BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

LAURA ANDRACCHIO JOHNSON, and
CHARLES JOHNSON,

Complainants,

v.

DUQUESNE LIGHT COMPANY,

Respondent.

No: C-2022-3032695

COMPLAINANTS' REPLY TO DUQUESNE LIGHT COMPANY'S EXCEPTIONS TO INITIAL DECISION

Filed on behalf of Complainants
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I. INTRODUCTION

Complainants have sued to recover monetary damages from Duquesne Light Company ("Duquesne Light") for negligence and recklessness in failing to provide notice about two high voltage power line routes it privately mapped through property which Complainants unwittingly bought from its owners (the "sellers") in 2017. Ten days after Complainants bought the property, Duquesne Light notified the sellers of the routes as part of its pre-siting outreach regarding the West Deer Reliability Project. The routes had been mapped for at least two months, and probably longer, by that time. Duquesne Light has never filed a siting application for the routes.

Complainants do not allege that Duquesne Light violated any statute, rule or regulation of the Pennsylvania Public Utility Commission ("PUC" or "Commission") by not promptly notifying them or the sellers about the routes. Duquesne Light nevertheless moved to transfer this matter to the PUC, arguing that the Commission has primary jurisdiction because Duquesne Light's alleged dilatoriness "raises issues" about whether it furnished "reasonable service" under 66 Pa. C.S. §1501. Duquesne Light cites no authority that has ever interpreted §1501 or primary jurisdiction so broadly, while Complainants cite a long line of Pennsylvania Supreme, Superior and

Commonwealth authorities that firmly support Judge DeVoe's conclusion that the PUC lacks jurisdiction. *See* Initial Decision ("I.D.") and §V.A., *infra*.

That aside, however, Duquesne Light's efforts to transfer this matter to the PUC in order to litigate whether it complied with §1501 (if the statute even applied, which it does not) begs the question of what those efforts would accomplish in the context of this common law tort case. Even if the PUC would decide, as Duquesne Light insists it should decide, that the case "raises issues" under §1501, Complainants' four counts of common law tort will still have to be litigated and resolved in the Court of Common Pleas. Any efforts or resources spent on debating §1501 would be superfluous.

For the reasons set forth below, the Administrative Law Judge's June 22, 2023 Initial Decision correctly concluded that the Commission lacks primary jurisdiction to determine Duquesne Light's liability in this matter, and should be affirmed. Duquesne Light's Exceptions to the Initial Decision ("Exceptions" or "Exc.") should be overruled, and the case should be transferred back to the Court of Common Pleas in accordance with the Initial Decision.

II. SUMMARY OF COMPLAINANTS' ALLEGATIONS AND CAUSES OF ACTION

The relevant facts are summarized below.

A. The Complaint Allegations

Between January and April 5, 2017, Duquesne Light secretly plotted two high voltage power line routes through a 19-acre residential property in Indiana Township, Pennsylvania (the "property"), for purposes of a new transmission line project known as the West Deer Reliability Project. Formal Complaint ("FC") at 3; ¶¶1-2, 15-18, 20-22, 29.[1] The property was then owned

[1] All "¶" references, unless otherwise noted, are to Exhibit A to Complainants' Formal Complaint, which is Complainants' Second Amended Complaint in Civil Action ("SAC" or "complaint") filed in the Court of Common Pleas of Allegheny County at GD-19-007611.

by the sellers and publicly listed for sale on several internet sites, and with "For Sale" signs at the property, so that Duquesne Light privately plotted the routes while on notice that the property was being marketed for sale. FC at 3; ¶¶1-2, 1-22, 25, 28-32, 54-55, 66-96. For purposes of its anticipated outreach regarding the West Deer Project, Duquesne Light designated one route through the property as its "preferred" route and the other as an alternate route. FC at 3; ¶¶18, 20, 88-89. The property was the only parcel in the project transgressed by both routes, and therefore was more likely to be impacted than any other property in the project as of April 2017. ¶¶54-56, 75-76.

Duquesne Light was not yet filing a siting application at that time, but had decided, voluntarily, to notify property owners along the routes for outreach purposes. FC at 3; ¶¶84, 88-89. Duquesne Light therefore identified the sellers as the owners of the property in April 2017, while the property was still publicly listed for sale and before Complainants bought it. FC at 3; ¶¶24-35, 81-83.

But rather than promptly notifying the sellers, Duquesne Light held the information about the routes through their property for two months while the property continued to be listed for sale. During that time, on May 22, 2017, Complainants unwittingly bought the property for $1.3 million, not knowing about the privately plotted routes. FC at 3; ¶¶2, 29-42, 71-72, 75, 82-85, 91.

On June 2, 2017, over two months after mapping the routes, Duquesne Light mailed the outreach notice to the sellers' attention at the property address. FC at 3; ¶¶2, 41-42. The post office forwarded the notice to the sellers at their new address. ¶45. Also on June 2, 2017, Duquesne Light announced the West Deer project for the first time on its website, stating that construction would start in August 2018, and posting a map dated April 5, 2017 showing the alternative and preferred routes through the property. FC at 3; SAC ¶¶2, 42 and Ex. A thereto.

Complainants learned about the routes from their new neighbors as they were moving to the property on June 7, 2017. FC at 3; ¶¶3, 43. They were immediately distressed and wished to rescind their purchase, which they would not have consummated had they been informed of the routes—a material disclosure that the sellers would have been legally required to make had Duquesne Light promptly notified them. FC at 3; ¶¶3, 43, 46. Complainants then reviewed the announcement of the West Deer Project on Duquesne Light's website. Seeing the two-month-old map with routes through the property they had just bought two weeks earlier, they were traumatized and felt wholly deceived, as there had been no available information about the routes or the West Deer Project before their purchase. FC at 3; ¶¶43-44.

Duquesne Light's designs on the property, which existed months before Complainants bought it, posed an existing threat to its condition, aesthetics and value, and was material information of which potential buyers had the right to know, even though Duquesne Light was not yet filing a siting application. FC at 3; ¶¶3, 26-27. Duquesne Light's notice of the routes for outreach purposes also created uncertainty about the future of the property, and materially and negatively affected its desirability and perception to buyers. FC at 3; ¶¶36, 67-72.

About four months after Complainants bought the property, in September 2017, Duquesne Light sent a certified notice to Complainants that it would be contacting them "to discuss acquiring the right of way needed" to build a transmission line on one of the potential routes (September 2017 Eminent Domain Notice"). ¶¶50-51. Duquesne Light enclosed a "NOTICE OF EMINENT DOMAIN POWER" and requested access to the property, which was apparently preparatory to filing a siting application with the PUC, although to date no application has been filed. *Id.* At the same time, in September 2017, Duquesne Light posted a new route map for the West Deer Project

on its website, adding a third route along the Pennsylvania Turnpike, without designating any route as "preferred." [2]

Complainants never again heard from Duquesne Light about the right of way, but they lived with the threat posed by the routes and the September 2017 notice, and the consequent cloud placed on the property, ***for 3-1/2 years***. FC at 4. Complainants filed suit against Duquesne Light in Allegheny County Common Pleas Court in 2019, alleging claims for common law negligence and recklessness, as they were still encumbered by the cloud needlessly created by Duquesne Light. Complainants were in an unseemly predicament caused by the utility's unregulated conduct: they did not want to own the property with the threat of the power line destroying much of it, and were not able to sell it, at least not at full market value, because of the same threat. FC at 3-4; SAC. Most buyers would not wish to assume the risk of the power line at any price (as was proved out, as set forth below), and a few might be willing to do so but only at a steep discount. In other words, Complainants were saddled with an investment that tied up over $1.3 million of their capital for years because of Duquesne Light's tortious conduct, which now includes intentional conduct as set forth below.

B. Relevant Post-Complaint Events

Complainants asked Duquesne Light and its counsel many times in writing and in phone conversations from 2018-2020 whether Duquesne Light still intended to present a route through the property to the PUC and if so, when, and whether it still needed access for a right of way as

[2] An Indiana Township employee had drawn the Turnpike route on a map and attempted to show it to Duquesne Light's project manager during the initial outreach meeting in June 2017, but was rebuffed. Complainant Laura Johnson later obtained the map and presented it to a local committee of property owners who were opposing the original routes, and the committee presented it to Richard Riazzi, Duquesne Light's CEO at the time, in summer 2017. Mr. Riazzi apparently advocated the route, because it was then added to the utility's potential routes in September 2017.

stated in the September 2017 certified notice. They also told Duquesne Light in February 2020 that they wanted to sell the property and needed to know if Duquesne Light's intentions had changed since 2017, because they would be required to disclose the routes to potential buyers.[3] Throughout all those years and inquiries, Duquesne Light refused—in writing-- to answer Complainants' questions, and declined to provide any non-public information. And the only public information was on the utility's website, which continually posted the routes and stated its intent to complete the West Deer Project, and extended the date to begin construction first to August 2019, then indefinitely, then to 2025. ¶¶61-64. Complainants therefore refrained from listing the property for sale, anticipating that they could not sell it or would have to sell it at a steep discount.

Duquesne Light, however, has admitted for the first time in this proceeding that ***it knew in Spring 2019*** that the property was not going to be impacted and was no longer on a preferred route. New Matter, ¶22; see also Answer at ¶4, p. 5 ("In or around Spring 2019, the Company re-evaluated the feasibility of the proposed Project routes and determined the Ridgehaven Property would not be impacted."). In all the years that Complainants implored Duquesne Light for that material information, which they had a right to know as property owners, the utility withheld it.[4] Complainants believe that Duquesne Light withheld the information in retaliation for Complainants' lawsuit against it, and possibly because Complainant Laura Johnson sat on the local committee opposing the routes. See n. 2.

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[3] Complainants' SAC was filed on November 18, 2019, so that events after that date are not alleged in that pleading.

[4] See ¶22 of Complainants' Reply to New Matter and exhibits cited therein for details regarding Complainants' multiple written inquiries to Duquesne Light in 2020 about the September 2017 Notice and the status of the routes, and Duquesne Light's refusals to provide any information.

In September 2020, while Complainants still had no answer from Duquesne Light about the routes through their property, Duquesne Light removed the routes from its website and again restated the timeline for the project to commence in 2025. FC at 4. Complainants then contacted the number Duquesne Light provided for inquiries and asked about their property. *Id*. They were told, for the first time, that the property was not "impacted." *Id*. They then asked the project manager to confirm the absence of impact in writing because they wished to sell the property. *Id*. The project manager responded that their property was still on two "alternative" routes, but not on Duquesne Light's new "preferred" route. *Id*. Complainants then attempted to sell the property, but two buyers consecutively declined because of the alternative routes. *Id*.

After being told of the two buyers, Duquesne Light's former attorney, to whom Complainants had unavailingly addressed their earlier inquiries, provided Complainants with a letter in November 2020 stating that Duquesne Light did not anticipate that the property would be impacted by any route. *Id*. They were then able to sell the property.[5] FC at 4.

III. PROCEDURAL HISTORY LEADING TO THE TRANSFER OF THIS CASE TO THE COMMISSION

As noted earlier, Complainants commenced an action for money damages against Duquesne Light in the Allegheny County Court of Common Pleas in 2019, alleging four common law tort claims: Count I, Negligent Failure to Immediately or Promptly Disclose The Routes To Property Owners (¶¶66-73); Count II: Negligent Failure to Notify Plaintiffs Of The Routes

[5] While it is not relevant to the Commission's determination of jurisdiction, Duquesne Light incorrectly argues that Complainants profited on their sale. Exc. at 5. Complainants did not make a profit and can support that if ever necessary. As they plead in their Reply to New Matter at ¶17, they in fact paid over $1.3 million for the property, which included costs of real estate commissions. Complainants' maintenance and improvement costs were far greater than the difference between the purchase cost and sale price.

Through The Ridgehaven Property (¶¶74-86); Count III: Breach of Assumed Duty to Notify (¶¶87-93); and Count IV: Reckless Disregard for Plaintiffs' Rights as Purchasers of Property Along Its Routes (¶¶94-96). Complainants expressly allege in their complaint that Duquesne Light's "duties alleged herein are governed by common law, as DLC's misconduct alleged herein was not regulated by the PUC and DLC's actions were outside the PUC regulatory scheme." ¶9.

Duquesne Light filed Preliminary Objections in Common Pleas Court seeking dismissal of Complainants' action, and also moved to bifurcate and transfer the matter to the PUC for a determination of liability, arguing that the Commission had "primary jurisdiction" of liability under 66 Pa. C.S. §1501. *See Johnson v. DQE Holdings et al.*, GD 19-007611, Document No. 14 (Dec. 26, 2019).

On February 18, 2020, Common Pleas Judge Michael Della Vecchia overruled Duquesne Light's Preliminary Objections, ordering it to file an answer within 30 days, but also implicitly granted Duquesne Light's motion to transfer by adding the following handwritten ruling to the Order overruling the Preliminary Objections:

> [T]his matter is stayed pending a determination by the PUC as to the duty owed by defendants to plaintiffs regarding the location of the proposed transmission line and the appropriate time to give notice thereof.

FC, Ex. B ("Feb. 20, 2020 Order"). Notably absent from the Feb. 20, 2020 Order is any analysis or holding regarding the Commission's jurisdiction to make the determination transferred.[6]

Complainants appealed the Feb. 20, 2020 Order to the Superior Court by filing an Ancillary Petition for Review, seeking discretionary review of an interlocutory order, which the Superior

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[6] Duquesne Light patently misrepresents in its Exceptions that "[t]he Common Pleas Court has already ruled in the Civil Action that the Commission has jurisdiction to make a determination regarding [] the Complainants' allegations." Exc. at 8. Judge Della Vecchia made no such ruling and never even analyzed jurisdiction before transferring the matter to the Commission.

Court denied—in other words, the Superior Court declined to exercise its discretion to review the Feb. 20, 2020 Order. *See* Complainants' Reply to Duquesne Light Company's Memorandum Regarding Its Preliminary Objections in this matter ("P.O. Reply"), Ex. 1 (March 15, 2021 Order of the Superior Court at 44 WDM 2020). The Superior Court thus ***neither affirmed nor upheld*** the Feb. 20, 2020 Order, contrary to what Duquesne Light repeatedly represents (Exc. at 1, 10, 11), nor ruled on the PUC's jurisdiction. Complainants then filed a Petition for Allowance of Appeal in the Pennsylvania the Supreme Court, which was also denied—in other words, the Supreme Court did not permit Complainants to appeal the Superior Court's denial of discretionary review, which was likewise within the Supreme Court's discretion. P.O. Reply, Ex. 2 (December 21, 2021 Supreme Court Order denying Petition for Allowance of Appeal, No. 211 WAL 2021).

Consequently, no Pennsylvania appellate court has ruled that the Commission has jurisdiction to determine any duty owed by Duquesne Light to Complainants, or that the Feb. 20, 2020 Order transferring a liability determination to the Commission was even proper, contrary to Duquesne Light's repeated representations. Exc. at 1, 10, 11.

Having exhausted their appeals without the benefit of any tribunal's analysis regarding the Commission's jurisdiction, Complainants submitted their Formal Complaint "under protest," requesting the PUC to first determine whether it has jurisdiction to adjudicate the duties set forth in the Feb. 20, 2020 Order before making any liability determination. FC at 5.

IV. SUMMARY OF THE JURISDICTIONAL DISPUTE AND THE INITIAL DECISION

The Initial Decision sets forth in detail the procedural history before the Commission at 3-7, and therefore Complainants will not reiterate the details here. Judge DeVoe summarized the issue before the Commission as follows: "[T]he issue(s) here are whether the Complaint makes

allegations that DLC [‘]violated, any law which the commission has jurisdiction to administer, or any regulation or order of the commission,’ and if not, whether the Commission can reasonably infer such a claim from the allegations made in the Complaint.” I.D. at 18. Judge DeVoe correctly held that the Common Pleas court’s bifurcation and transfer of claims to the Commission “does not necessarily confer jurisdiction over the Complaint to the Commission. It is the Public Utility Code, not a common pleas court judge, that grants the Commission its authority and jurisdiction.” *Id*. at 18-19.

After a thorough discussion of the facts and Duquesne Light’s and Complainants’ opposing arguments and authorities (I.D. at 7-19), Judge DeVoe concluded that “[t]he Commission does not have jurisdiction to hear the Complaint filed in this matter,” and ordered that the Complaint be dismissed and the matter transferred back to the Allegheny County Court of Common Pleas. *Id*. at 20-21. For the reasons set forth below, Judge DeVoe’s conclusions were correct and should be upheld, Duquesne Light’s Exceptions should be overruled and the matter should be transferred back to Common Pleas.

V. REPLY TO EXCEPTIONS

A. Reply to Exception No. 1: The Initial Decision Correctly Determined That the PUC Does Not Have Primary Jurisdiction to Determine Liability

Duquesne Light’s Exception No. 1 challenges the Initial Decision’s plainly accurate Finding of Fact No. 14 (I.D. at 9): “Complainants do not allege DLC committed any violation of a statute which the Commission has jurisdiction to administer, or of a regulation or order of the Commission.” Indeed, Complainants expressly allege in their Formal Complaint:

> DLC was not required by PUC regulations to provide the [June 2017] notice because it was not yet submitting—and to date has not submitted—an application to the PUC for approval of any route through the property. Thus, DLC unnecessarily placed a cloud on the property, negatively impacting its salability and value. As such, DLC had a duty to act reasonably

> to remove the cloud from the property as quickly as practical and to not unreasonably prolong it. DLC, however, did not do so, and breached duties owed to Complainants.

FC at 3-4. See also FC Ex. A, ¶¶9 (alleging that Duquesne Light's "duties alleged herein are governed by common law, as DLC's misconduct alleged herein was not regulated by the PUC and DLC's actions were outside the PUC regulatory scheme."), 61-65, 88-89.

The Initial Decision correctly concluded that "[t]he Commission does not have jurisdiction to hear the Complaint filed in this matter" under 66 Pa. C.S. §1501, not only because Complainants do not allege any statutory or regulatory violations, but also because Complainants' claims, regardless of how they were pled, do not confer primary jurisdiction and do not fall within §1501, as set forth below.

1. The PUC Does Not Have Jurisdiction Under 66 Pa. C.S. §1501

Duquesne Light takes exception to the Initial Decision findings and Complainants' express allegations, arguing that Complainants "raise issues" as to whether the utility "provided reasonable service" under 66 Pa. C.S. §1501. Exc. at 6. While, to the contrary, Complainants raise no such issues as discussed *infra*, "raising issues" within the Commission's jurisdiction does not warrant transferring them to the Commission. A Pennsylvania court may transfer a matter to the PUC only if the PUC has "primary jurisdiction" over the matter. *Schriner v. Pennsylvania Power & Light Co.*, 384 Pa. Super. 177, 501 A.2d 1128, 1130 (1985). Primary jurisdiction may be found "where the subject matter is within an agency's jurisdiction *and* where it is a complex matter requiring special competence, with which the judge or jury would not or could not be familiar." *Id.* at 1130, citing *Elkin*, 123, 420 A.2d 371, 377 (emphasis original). Neither of these prerequisites exist here, which is why the transfer to the PUC was improper.

a. The PUC Lacks Subject Matter Jurisdiction

First, the Commission does not have subject matter jurisdiction of Complainants' claims under §1501 because they do not implicate "reasonable service," as Duquesne Light argues. Exc. at 7. Duquesne Light incorrectly claims that the Formal Complaint "raises issues" about "the reasonableness of Duquesne Light's planning and public communications in connection with a transmission line project," which are purportedly encompassed by "reasonable service" under §1501. Exc. at 7. But this case has nothing to do with "customers," Duquesne Light's "planning," or how Duquesne Light interacted with the public. Complainants allege that Duquesne Light breached common law duties of care by failing to promptly notify two private sellers that it had mapped two high voltage line routes through their publicly for sale-listed property—the only property of over 300 parcels transgressed by two routes, and therefore most likely of all properties to be impacted-- to the detriment of two private buyers, to-wit, the Complainants. FC at 3-4; FC Ex. A ¶¶2-7, 9, 15-31, 41-42, , 54-57, 66-96. At bottom, this case is about Duquesne Light's duties to two people who were buying publicly listed real property two months after Duquesne Light finished mapping routes through it.

Duquesne Light's alleged negligence in delaying an unregulated, voluntary outreach notice of proposed routes to sellers of one impacted for-sale property does not "draw into question" the reasonableness of electric services. *See, e.g. De Francesco v. Western Penn. Water Co.*, 499 Pa. 374, 453 A.2d 595, 597 (1982) (controversy alleging water company's negligence in failing to provide water pressure at fire hydrant was "not one in which the general reasonableness, adequacy or sufficiency of a public utility's service is drawn into question"). Pennsylvania appellate courts have held that where a utility's negligence uniquely harms one litigant, as in this case, the PUC does not have subject matter jurisdiction under §1501. *See, e.g. id.; Schriner*, 501 A.2d at 1130

(PUC did not have subject matter jurisdiction over dairy farmers' negligence claims against PP&L for injury to dairy cattle as a result of stray voltage from transmission lines, which raised "traditional concepts of negligence which only tangentially address the reasonableness, adequacy and sufficiency of the electric service being provided by PP&L."); *Ostrov v. I.F.T., Inc.*, 402 Pa. Super. 87, 586 A.2d 409, 415 (1991) (whether service was negligently provided to one litigant was for court to resolve).

Duquesne Light also implies that the definition of "service" under 66 Pa. C.S. §102 is broad enough to encompass its unregulated public outreach notice, but it cites no cases that even come close to interpreting §102 so broadly. Exc. at 7. In fact, Pennsylvania appeals courts have declined to apply §102 to events resembling utility services far more than the dilatory communications alleged here. *See, e.g*, *Schriner*, 501 A.2d at 1130 (claims alleging harm from stray voltage from transmission line were not within PUC's subject matter jurisdiction); *De Francesco*, 453 A.2d at 597 (claims alleging water company failed to provide water pressure at hydrant were not within PUC's jurisdiction).

DiSanto v. Dauphin Consol. Water Supply Co., 436 A.2d 197 (Pa. Super. 1981), cited by Duquesne Light, supports neither PUC jurisdiction of this matter nor Duquesne Light's argument that it was furnishing "service" to the public in notifying or failing to notify the sellers. Exc. at 7-8. In *DiSanto*, the issue transferred to the PUC was whether a water company could require a developer to use the water company's approved contractor to install a water main and forty-nine customer service lines, rather than a contractor chosen by the developer. 436 A.2d at 442, 446. The PUC had jurisdiction because the case involved the furnishing of water service and rates. *Id.* at 446-449. The utility's conduct in *DiSanto* is nothing like Duquense Light's conduct here, and the fact that the utility was furnishing service was unquestionable, unlike here.

Even if subject matter jurisdiction exists, primary jurisdiction may be found only "where it is a complex matter requiring special competence, with which the judge or jury would not or could not be familiar." *Schriner*, 501 A.2d at 1130, citing *Elkin v. Bell Telephone Co. of Pennsylvania*, 491 Pa. 123, 134, 420 A.2d 371, 377 (1980). This is not such a matter, as discussed below.

b. The PUC Lacks Primary Jurisdiction

First, primary jurisdiction cannot exist in the absence of a governing PUC regulation or policy. *De Francesco*, 453 A.2d at 597 (vesting primary jurisdiction in the PUC was improper where resolution of claims "depended on no rule or regulation predicated on the peculiar expertise of the PUC, no agency policy, no question of service or facilities owed to the general public, and no particular standard of safety or convenience articulated by the PUC."). *Accord Schriner*, 501 A.2d at 1130-1131, and *Hoch v. Philadelphia Electric Co.*, 341 Pa. Super. 598, 492 A.2d 27, 32 (1985). Duquesne Light initially objected to the Formal Complaint precisely on the ground that it does not allege PUC rules, regulations or orders. See Preliminary Objections ¶3. Indeed, Duquesne Light's delayed notice to the property sellers was not regulated by the PUC because Duquesne Light was not filing a siting application at the time, and has not filed one since. FC, Ex. B, ¶¶7, 9, 61, 88-89. The PUC does not regulate pre-siting application notices to property owners, but leaves them to the discretion of utilities. *Id.*, ¶¶61, 88-89.[7]

[7] *See, e.g.*, Final Order Establishing Interim Guidelines, M-2009-2141293, 2010 Pa. PUC LEXIS 2069, *16-22 (Nov. 5, 2010) (commenting as follows regarding utilities' pre-siting application communications: "public utility informational outreach is very company-specific to the service area," "the type and quality of the communication process will vary by public utility service area," and "informational public outreach and education about a proposed transmission project begins long before the formal application is made"; and then declining to issue a rule that would require PUC involvement in a utility's communications with owners and the public before siting applications are filed).

The absence of a PUC regulation alone negates the need for the "peculiar expertise" of the PUC. *De Francesco*, 453 A.2d at 597 (primary jurisdiction improper where resolution of claims "depended on no rule or regulation predicated on the peculiar expertise of the PUC, no agency policy, no question of service or facilities owed to the general public, and no particular standard of safety or convenience articulated by the PUC."); *accord Schriner*, 501 A.2d at 1130-1131, and *Hoch v. Philadelphia Electric Co.*,. 341 Pa. Super 598, 492 A.2d 27, 32 (1985). Duquesne Light's method of notifying property owners, including when to notify them, was of its own volition and entirely optional, as was Duquesne Light's decision to announce routes it was not yet presenting to the PUC.

Second, the liability question in this case raises common law negligence principles: what was reasonably foreseeable, what Duquesne Light reasonably should have known, and what would be reasonable conduct upon plotting two routes through a publicly listed property, identifying its sellers and knowing or being on constructive notice of the for-sale status. This is therefore not "a complex matter requiring special competence, with which the judge or jury would not or could not be familiar." *Schriner*, 501 A.2d at 1130. Resolving the question of whether Duquesne Light breached common law duties "falls within the scope of the ordinary business of courts." *De Francesco*, 453 A.2d at 597. *See also Schriner*, 501 A.2d at 1130-1131 (trial court properly asserted jurisdiction over negligence claims against electric utility for harm resulting from stray voltage); *Poorbaugh v. Pennsylvania PUC*, 666 A.2d 744, 749, 751 (Pa. Cmwlth. 1995) (PUC abused discretion in deciding claim that a utility was careless and negligent because the case was "not a complex matter requiring the special expertise of the PUC in order to resolve it," even though the subject matter was "encompassed by the Utility Code"); *Hausner*, 2017 Phila. Ct.

Com. Pl. LEXIS 155, *8-12 (asserting jurisdiction over tort claims against utility arising out of fire allegedly caused due to deterioration of high voltage electrical line).

Indeed, the Supreme Court cautioned in *Elkin* that "courts should not be too hasty in referring a matter to an agency, or to develop a 'dependence' on the agencies whenever a controversy remotely involves some issue falling arguably within the domain of the agency's 'expertise.'" 420 A.2d at 377. Pennsylvania courts have heeded that admonition and declined to vest primary jurisdiction in the PUC to adjudicate common law tort claims against utilities, because such claims require no agency expertise. *See, e.g.*, *De Francesco*, 453 A.2d at 597 (negligence claim against water utility for failing to provide water pressure at a hydrant "require[d] no recondite knowledge or experience and falls within the scope of the ordinary business of our courts" and "was within the [] authority of the courts"); *Drafto Corp. v. Nat'l Fuel Gas Distrib. Corp.*, 806 A.2d 9 (Pa. Super. July 25, 2002) (attempted termination of gas service did not raise a complex issue requiring deferment to the PUC); *Schriner*, 501 A.2d at 1130-1131 (upholding interlocutory order holding that the court of common pleas, not the PUC, had primary jurisdiction over negligence claims against an electric utility for injury to dairy cattle as a result of stray voltage from milking equipment electrified by power company, because the matter was not one peculiarly within the agency's area of expertise and the court was well-suited to determine the issue); *Poorbaugh*, 666 A.2d at 748-752 (vacating order of PUC and remanding to PUC for transfer back to Common Pleas court, which had transferred to PUC, to adjudicate negligence claims arising out of fire allegedly caused by power company's negligence because case was not a complex matter requiring PUC expertise).[8]

[8] See also *Feingold v. Bell of Pennsylvania* 477 Pa. 1, 383 A.2d 791, 796 n.7 (1977), which predates *Elkin* (question of whether damages were caused by breach of a legal duty owed to claimant by utility was "of the type traditionally disposed of by courts of law, and we do not see

Third and finally, Complainants' claim that Duquesne Light negligently delayed notifying sellers of one impacted property does not concern services to the general public or "an entire geographic area," and therefore would not require deferment to the PUC even if the agency had subject matter jurisdiction. *Draftco*, 806 A.2d 9, 15-16 (Pa. Super. 2002) (matters affecting a particular litigant, as opposed to the general public, are for courts to resolve), citing *Ostrov*, 586 A.2d at 415; *Poorbaugh*, 666 A.2d at 748, 751 (Supreme Court has distinguished questions affecting an entire geographic area rather than one claimant in determining whether the PUC has jurisdiction), citing *Feingold*, 383 A.2d 791, 796 n.7. This case therefore "does not involve the need for uniformity and consistency" of any policy. *Poorbaugh*, 666 A.2d at 751 (rejecting the utility's argument that "uniformity and consistency of agency policy" was needed because the plaintiff's "claim is that of one individual, not an entire geographic area.").

The liability determination in this case arises from facts that are specific to Complainants, uncannily unique and unlikely to occur again in the future:

- The property at issue was the only impacted parcel, out of about 300, on ***two*** of three potential routes, one of which was "Preferred";
- The property had been publicly listed on the internet and with physical signage for ten months by the time Duquesne Light finished mapping the two routes;
- Duquesne Light had plotted the routes and identified the property as impacted at least seven weeks before Complainants bought it;

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how the 'administrative expertise' of the PUC would contribute to the resolution of this issue"); *Sunrise Energy, LLC v. FirstEnergy Corp.*, 148 A.3d 894, *908-909 (Pa. Commw. Oct. 14, 2016) (Trial court properly overruled electric company's preliminary objections to claim which required construction of Alternative Energy Act because "[o]ur courts of common pleas construe statutes every day.").

- Duquesne Light had identified the sellers long before Complainants bought the property; and
- Duquesne Light did not send the notice until ten days after Complainants bought the property.

Such unusual facts fail to support the need- or even the potential-- for a uniform regulatory approach. Any future case raising such issues would be likewise highly unique, and would depend on multiple varying facts such as when the utility identifies a parcel and its owners, when it maps the routes, how many routes go through the property, when the utility provides notice to the owners, whether a property is publicly listed for sale and for how long, and if and when it sold. Issues arising under such unique and apparently rare facts cannot be resolved by a "uniform approach," and are more appropriately addressed by courts and juries on a case by case basis.

2. The PUC Does Not Have Jurisdiction Under Interim Guidelines

Nor does Duquesne Light's June 2017 announcement of the West Deer Project routes implicate the Interim Guidelines for The Filing of Electric Transmission Line Siting Applications, 52 Pa. Code §69.3101-3107, as Duquesne Light next argues. Exc. at 8. Rather, that announcement was pre-siting outreach, as Duquesne Light has admitted. Preliminary Objections at ¶24 (The June 2017 notice "was issued by Duquesne Light for the purpose of beginning public outreach and education for the West Deer Project."). Pre-siting outreach is not required or regulated by the PUC, including under the Interim Guidelines. The Guidelines set forth "information that should be provided ***with a transmission siting application*** by an electric utility under §57.71-57.76 (relating to Commission review of siting and construction of electric transmission lines)." 52 Pa. Code §69.3101, Scope. Section 69.3102 of the Interim Guidelines, "Public notice filing requirements," also contains no provision requiring pre-siting application outreach or notices. 52

Pa. Code §69.3102. That section requires utilities to provide with their siting applications notices sent under §57.91 relating to disclosure of eminent domain power. Therefore the June 2017 notice to the sellers, which was not a §57.91 eminent domain notice, was not governed by the Interim Guidelines, or any other PUC regulation or rule.

3. Complainants Do Not Allege That The September 2017 Eminent Domain Notice Was "Improper" Or Violated Any PUC Statute Or Regulation

Duquesne Light next incorrectly argues that Complainants allege that the utility "improperly" issued "a separate notice issued by Duquesne Light" regarding its eminent domain power, i.e., the September 2017 Eminent Domain Notice. Exc. at 9. Complainants do not allege that the Eminent Domain Notice was improper or violated any PUC statute or regulation. FC at 3. Rather, Complainants allege that the September 2017 Eminent Domain Notice, along with the June 2017 notice, "placed a cloud on the property that rendered it unsalable and/or devalued the property." FC at. 3. Duquesne Light's argument that it was complying with 52 Pa. Code §57.91 when it sent the September 2017 notice (Exc. at 9) is an irrelevant strawman argument and does not support PUC jurisdiction, because (1) Complainants do not allege the notice violated any statute, (2) the point of alleging the notice is that it placed a cloud on the property, (3) even if compliance with 52 Pa. Code §57.91 were at issue—which it is not—PUC expertise is not needed to make that determination, so that it would not confer primary jurisdiction on the Commission, and (4) at bottom, a PUC ruling that DLC was complying with 52 Pa. Code §57.91 would not resolve Complainants' common law tort claims, which would still have to be resolved in state court, and thus would serve only as a waste of time and resources.[9]

[9] Duquesne Light's argument that utilities have "duties" to provide reasonable service under 66 Pa. C.S. §1501 also does not confer jurisdiction of Complainants' claims on the PUC. Exc. at 9. Utilities are subject to common law negligence duties regardless of the presence or absence of an applicable regulation. *De Francesco*, 453 A.2d at 597 (negligence claim existed in absence of

B. Reply to Exception No. 2: The Initial Decision Does Not "Collaterally Attack" The Feb. 20, 2020 Order

Duquesne Light misrepresents that the Common Pleas Court "ruled" in its Feb. 20, 2020 Order that the Commission has jurisdiction and that the Superior and Supreme Courts "upheld" the Order. Exc. at 10-11. To the contrary, the Feb. 20, 2020 Order did not expressly rule that the PUC has jurisdiction and made no findings whatsoever to support the Commission's jurisdiction. Ex. B to Formal Complaint. In fact, the Order does not even use the word "jurisdiction," but merely stays the case pending a PUC determination, without any analysis of whether the PUC has jurisdiction to make the determination. *Id.* Further, neither the Superior Court nor the Supreme Court "upheld" the Common Pleas Court's Order. Exc. at 10. Rather, the Superior Court denied Complainants' Ancillary Petition for Review, which they were required to file due to the interlocutory nature of the Feb. 20, 2020 order. P.O. Reply, Ex. 1. And the Supreme Court did not give Complainants permission to appeal the Superior Court's denial of review, which was likewise discretionary. P.O. Reply, Ex. 2. Therefore, no Pennsylvania appellate court has ruled on the propriety of the Order bifurcating and transferring to the Commission nor has any held that the Commission has jurisdiction of this matter.

It was therefore incumbent upon the Judge DeVoe to resolve the question of jurisdiction, particularly because there is ample legal authority casting doubt on the Commission's jurisdiction here.[10] And trial courts are not immune from legal error in determining PUC jurisdiction. For

PUC rule, regulation or policy); *Schriner*, 501 A.2d at 1130-1131 (same; like here, "gravamen" of claim was that plaintiffs "sustained injury due solely to the negligence of" the utility).

[10] See §V.A.. *See also Draftco Corp. v. Nat'l Fuel Gas Distrib. Corp.*, 806 A.2d 9, 16 (Pa. Super. 2002) (Common Pleas court erred in deferring issues to the PUC and in finding that PUC had primary jurisdiction of an injunction claim that did not challenge any PUC rule or regulation).

example, in *Poorbaugh*, the Commonwealth court held that the Common Pleas court had erroneously transferred the case to the PUC, which held hearings and entered a ruling that was then vacated by the Commonwealth Court. 666 A.2d at 751. *Poorbaugh* is instructive here because the plaintiff claimed he incurred damages due to the utility's negligence in failing to prevent a power surge. *Id.* at 747-748, 750-751. The Commonwealth Court held that while the case was within the subject matter jurisdiction of the Utility Code, it did not require the special expertise of the PUC to resolve it, and therefore the PUC did not have primary jurisdiction and "there was no reason for the trial court to transfer jurisdiction over the matter to the PUC." *Id.* at 748, 750-751. Likewise here, even if subject matter jurisdiction did exist, which it does not, there was no reason for the trial court to transfer the matter to the Commission because it involves straightforward negligence and recklessness claims, removing it from the realm of primary jurisdiction. *See also Draftco*, 806 A.2d at 16 (Superior Court held that Common Pleas court erred in finding primary jurisdiction and deferring issues to the PUC).

Finally, subject matter jurisdiction "relates to the competency of the individual court ... to determine controversies of the general class to which a particular case belongs." *Green Acres Rehab. & Nursing Ctr. v. Sullivan*, 113 A.3d 1261, 1268 (Pa. Super. 2015) (citation omitted). The question of whether a tribunal has jurisdiction "is always open." *In re Navarra*, 2018 PA Super 84, 185 A.3d 342, 347–48 (2018). "The want of jurisdiction over the subject matter may be questioned at any time. It may be questioned either in the trial court, before or after judgment, or for the first time in an appellate court, and it is fatal at any stage of the proceedings, even when collaterally involved ...." *Id.*

The Initial Decision correctly declined to apply *Alderwoods (Pennsylvania), Inc. v. Duquesne Light Company*, Docket No. C-2016-2522634 (October 13, 2016 Order), relied on by

Duquesne Light (Exc. at 12-13), because *Alderwoods* provides no guidance here, as Duquesne Light's alleged misconduct in that case directly resulted from its provision of electrical service and therefore readily fell within 66 Pa. C.S. §§1501 and 102. In *Alderwoods*, a car accident caused an electrical outage for several customers in a service area, including the plaintiff business, a funeral home, which was consumed with fire after Duquesne Light restored power and sent a surge of high voltage current into the plaintiff's low voltage equipment. The ALJ ruled that the Commission had jurisdiction in that matter under 66 Pa. C.S. §§1501 and 102 because it is "empowered to determine whether a public utility is providing save, adequate and reasonable service," and because Duquesne may have faced "a civil penalty and/or an order to take remedial action" if Alderwoods established inadequate service. *Alderwoods* at 20. On the plaintiff's petition for interlocutory review, the Commission declined to answer the material question of whether it had primary jurisdiction to determine Duquesne Light's liability for "negligent restoration of electrical service." *Id*. at 32-33.

By stark contrast, Duquesne Light's misconduct here was its failure to notify sellers and buyers of one specific property about routes it had mapped for outreach purposes, and its then dilatory behavior in failing to remove the cloud it unnecessarily placed on the property for several years. None of this conduct is remotely related to providing electric service.

C. Reply to Exception No. 3: The Initial Decision Dismissed the Formal Complaint, Which Was Filed Under Protest, And Did Not Require a Public Interest Analysis

Duquesne Light relies on a July 20, 2022 Order entered in *Petition of DRIVE for a Declaratory Order Regarding the Expansion of its Community Broadband Network*, Docket No. P-2021-3025296, to support its argument that the Initial Decision improperly permits Complainants to withdraw their Formal Complaint without showing that it is in the public interest

to do so. Exc. at 13-15. The argument lacks merit for a few reasons. First, as the Initial Decision correctly held, *DRIVE* is entirely distinguishable because "DRIVE voluntarily filed its Petition with the Commission. Complainants filed their Complaint 'under duress' to keep their civil action alive." I.D. at 19. And, "DRIVE wanted to withdraw a complaint they, at least initially, agreed the Commission had jurisdiction to decide. Complainants here argue the Commission *does not* and *never had* jurisdiction over the claims in their Complaint." *Id*.

Second, public interest was clearly a concern in *DRIVE* because the Petitioner sought a Commission declaration that an expanded broadband network infrastructure in several counties was either not subject to, or had complied with, 66 Pa. C.S. § 3014(h), and that the project would not subject it to the Commission's jurisdiction as a public utility.[11] *DRIVE* Order at 2. By stark contrast, the Complainants are private citizens complaining of private damages, and their case raises no public interest issues for reasons set forth *infra*. As the Initial Decision correctly observed, "DRIVE's Petition implicated 'a number of important policy considerations and controversies' involving the interest of several telephone utilities who opposed the withdrawal request. Here, Complainants' Complaint is based on a very specific set of facts unique only to them." I.D. at 19.

Third, even if *DRIVE* had any relevance here, which it does not, the Commission is not compelled by "public interest" to find that it has jurisdiction simply because the Common Pleas Court transferred the matter to the PUC, as discussed *infra*. In fact, it would be contrary to the

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[11] The Petitioner, Driving Real Innovation for a Vibrant Economy or "DRIVE," was "a council of governments created under a formal agreement between the Commissioners of Montour and Columbia Counties under Article 9, Section 5 of the Pennsylvania Constitution and the Pennsylvania Intergovernmental Cooperation Act at 53 Pa. C.S. §§ 2301 et seq., which authorizes local governmental entities to cooperate under joint agreements in fulfilling their governmental functions, including economic development." *DRIVE* Order at 5.

public interest for the Commission to resolve the matter if it does not have jurisdiction. Indeed, it was not in the public interest for the Common Pleas court to issue an Order having such profound implications on a litigation, including causing additional years of delay, without supporting the Order with comprehensive factual findings and legal conclusions.

And finally, contrary to Duquesne Light's argument, denying transfer of the matter to Common Pleas would place an enormous, unnecessary added burden on the parties and the Commission. If Complainants are forced to litigate the contrived issue of whether Duquesne Light was providing reasonable service under 66 Pa. C.S. §§1501 and 102 when it failed to provide notice about the routes and then allowed an unnecessary cloud to linger over the property for years, ***that will not resolve Complainants' four causes of action for common law tort***, which will still be alive and in need of resolution in state court. In fact, it has been unclear from the moment Duquesne Light moved to bifurcate what purpose any determination from the PUC will serve, when the PUC cannot resolve the fundamental common law claims. Even if the Commission would determine that Duquesne Light was providing reasonable service under 66 Pa. C.S. §§1501 and 102, it will be a superfluous, straw man determination, needlessly costing resources and time, and will unnecessarily delay resolution of the gravamen of Complainants' claims.

VI. CONCLUSION

For the reasons set forth herein, Duquesne Light's Exceptions should be overruled, the Initial Decision should be upheld, and the case should be transferred back to Common Pleas.

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