



Citizens for Pennsylvania's Future
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November 30, 2017

Richard Riazzi, CEO
Duquesne Light Company
411 Seventh Avenue
Pittsburgh, PA 15219

Re: 138 kV Transmission Line Project, Indiana and West Deer Townships

Mr. Riazzi:

I represent a group of individual property and business owners in Indiana Township. My clients reside and do business along two possible western routes for the 138 kV transmission line that Duquesne Light Company (DLC) proposes to construct in Indiana and West Deer Townships.

My clients urge you to select the eastern route that follows the existing Pennsylvania Turnpike corridor for the transmission line. This route will avoid serious and permanent impacts to prime agricultural lands and environmental amenities that provide vital economic services to Indiana Township.

The primary purpose of this letter is to emphasize the Public Utility Commission's responsibilities under Article I, Section 27, and how those responsibilities should affect DLC's route selection decision for this project. At a meeting on October 4, 2017, DLC employees indicated that they did not view the company as being affected by recent Supreme Court decisions strengthening Article I, Section 27. We write, in particular, to take issue with that opinion.

On June 20, 2017, the Pennsylvania Supreme Court issued a landmark decision in *PEDF v. Commonwealth*. The decision struck down the Pennsylvania legislature's attempt to use royalties from the sale of oil and gas rights beneath state forest lands to balance the state budget as a violation of the state's public trust duties under Article I, Section 27. At first blush, the decision would seem to have little application to a private company's selection of a corridor through which to construct a high power transmission line. However, as explained below, anyone holding that opinion fails to fully understand the significance of the decision.

The Supreme Court made the following holdings that directly apply to DLC's transmission line selection process:

1. **Article I, Section 27 applies to decisions made by the PUC.** *PEDF* involved legislation enacted by the General Assembly and not a Commonwealth agency such as the PUC. However, the Supreme Court made clear that Article I, Section 27's reference to "the Commonwealth" included all branches and levels of state government. **As a result, any decision made by the PUC to issue a permit for the construction of a high voltage transmission line must comply with Article I, Section 27.**
2. **Article I, Section 27 guarantees fundamental constitutional rights to Pennsylvania citizens that may not be abridged by the state.** Article I, Section 27 guarantees citizens the right to clean air and pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment. In its opinion, the Court emphasized that these rights are fundamental, on par with other fundamental rights in Article I such as the right of free speech, religious freedom, and to bear arms. Article I rights limit the powers otherwise vested in government by the remaining Articles of the Constitution. **As such, any decision by the PUC to approve a transmission line route for DLC must be viewed through this lens to ensure that the public's fundamental constitutional rights are not violated.**
3. **The legality of the PUC's decision must be measured against the language of the Constitution.** Prior to *PEDF*, Pennsylvania courts measured compliance with Article I, Section 27 using a deferential balancing test that only inquired whether the state agency considered the environmental impact of its decisions and otherwise complied with the law. This test was very similar to existing PUC regulations for selecting transmission line routes, which provide only that DLC assess and attempt to mitigate environmental harm. However, the Supreme Court in *PEDF* held that the analysis previously employed by courts to measure compliance with Article I, Section 27 did not adequately ensure protection of citizens' environmental rights. Instead, the Court substituted a test that relies on the language of the Constitution, which guarantees citizens the right to a clean environment. The Court characterized this shift as a "sea change" in how courts would protect citizens' rights under Article I, Section 27. In short, the Court held that compliance with existing regulations and "reasonable efforts" to reduce environmental harm did not sufficient to guarantee that citizens' rights would be adequately protected. Similarly, when reviewing DLC's application, the PUC must do more than ensure that the company reviewed alternatives and attempted to minimize environmental harm. **Given reasonable alternatives, the Constitution requires that the PUC approve the only that route that does the least harm to the citizens' rights under Article I, Section 27.**

- 4. The ERA imposes a duty on government to conserve and protect public natural resources.** Under Article I, Section 27, the Commonwealth holds Pennsylvania's public natural resources in trust for the benefit of current and future generations. The Court said that the Commonwealth may not manage those resources as if it was an owner, but instead must conserve and maintain them as would a trustee that owes a fiduciary duty to the owners of the trust corpus, namely, the public. **As such, when deciding upon a route for the transmission line, the PUC must measure its decision against the duties it owes Pennsylvania citizens as trustee of our natural resources, that is, its duty to conserve and protect the public's natural resources.**

The PUC's regulations for transmission lines require that an application evaluate the transmission line "as proposed" and evaluate efforts to minimize the impact of the transmission line upon the environment. 52 Pa. Code § 57.72(a)(7). The application must also contain a "general description" of reasonable alternatives and a comparison of the "merits and detriments" of each route. 52 Pa. Code § 57.72(a)(10). These regulations were adopted long before the Supreme Court's decision in *PEDF*, at a time when the Courts required nothing more under Article I, Section 27 than for government to consider and minimize impacts to the public's natural resources. The *PEDF* decision changed that equation in a significant way. It is, as a result, imminently unreasonable for DLC to take the position that, since the Supreme Court's decision in *PEDF*, it is "business as usual" when it comes to deciding on a route for its high power transmission line through Indiana Township.

We urge you to take seriously the PUC's duties and obligations under Article I, Section 27, and to submit an application that reflects the heightened protection afforded citizens' rights under Article I, Section 27. Such an application should ensure that DLC applies for approval to construct its transmission line along the route that has the least impact on the rights of citizens under Article I, Section 27.

Thank you for your kind consideration of these issues.

Sincerely,

George Jugovic Jr.

George Jugovic, Jr.

Vice President of Legal Affairs

Counsel for RespectAgZone

cc: Zach Merritt, Project Manager