

**IN THE COURT OF COMMON PLEAS
COUNTY OF PHILADELPHIA
CIVIL TRIAL DIVISION**

Delaware Station, LLC <i>Plaintiff</i>	:	March Term, 2019
	:	No. 2922
	:	
v.	:	Commerce Program
	:	
Exelon Generation Co., LLC <i>Defendant</i>	:	1262 EDA 2019
	:	

OPINION

Djerassi, J.

September 3, 2019

Plaintiff Delaware Station, LLC (“Delaware Station”) appeals an order granting preliminary injunction to Defendant Exelon Generation Co., LLC (“Exelon”). Exelon has easily met required elements for preliminary injunction in a case where Exelon must have access through Delaware Station’s land to install a new transformer that this court finds necessary to provide back-up power to Philadelphia and the surrounding region in the event of a blackout.¹

PROCEDURAL HISTORY AND FACTS

On March 22, 2019, Delaware Station filed a complaint.² Delaware Station then moved for emergency preliminary injunction on March 25, 2019. That same day, Exelon filed its answer and asserted counterclaims.³ Exelon moved for its own emergency preliminary injunction on March 25, 2019.

Exelon is the former owner of 1325 Beach St, Philadelphia (“Subject Property”) along the Delaware River. Four CTU power generators are situated there. CTU power generators are used in the process of generating electric power during a blackout or grid failure.

¹ Delaware Station filed a cross emergency preliminary injunction. Delaware Station asserted it would suffer immediate and irreparable harm if Exelon is not enjoined from trespassing on land covered by an easement to build the new transformer. We denied Delaware Station’s motion and as explained here, we granted preliminary injunction in favor of Exelon.

² In its Complaint, Delaware Station avers four causes of action: Count I Declaratory Action, Count II Trespass, Count III Fraud in the Inducement, and Count IV Private and Public Nuisance.

³ Exelon raised four counterclaims: Counterclaim I Declaratory Judgment, Counterclaim II Quiet Title, Counterclaim III Trespass, and Count IV Permanent Injunction.

There is a PECO power station across the street from the Subject Property and it is located at 1419 Delaware Avenue, Philadelphia (“Beach Street Station”).⁴ An electric transformer located at the Beach Street Station converts power generated by CTU power generators into a suitable electric form for transmission into the regional power grid. Without a transformer, energy that is available to the electric company cannot be converted to power that can safely fit into the region’s power grid. In the case of Beach Street Station, an underground easement connects Exelon’s CTU power generators on the Subject Property to the transformer at the Beach Street Station.

After finding that the power generated by the CTU power generators and transformer is supplied to the Philadelphia region in the event of a blackout, we also find that PECO’s generators are used to “black start” the creation of electric power. In the event of a black-out black start transformer generators are capable of providing back up energy within fifteen minutes of being turned on. We also found that Exelon needed to replace its existing black start generator at the Broad Street Station site. Failure to do so could affect up to 100,000 homes and businesses. We found that the risk of a blackout escalates during the summer because of hot temperatures inducing extended use of air conditioning.

In May 2015, Exelon sold the Subject Property to Plaintiff Delaware Station. Among terms of sale, Exelon was granted an easement by Delaware Station (“Retained Easement”). This easement permits Exelon to retain access through land now belonging to Delaware Station in order to “operate, repair, add to, replace, and upgrade” its CTU power generators. The Retained Easement also permits Exelon to go through the easement land for the purpose of maintaining, replacing, repairing, or upgrading “all related equipment, including equipment necessary to generate, transmit, and distribute electricity.”

After the 2015 sale and its grant of easement rights to Exelon, the transformer that was then located at the Beach Street Station site was degraded and needed to be replaced, according to testimony which we accepted. We found that that the Beach Street Station site does not have enough land space for a new transformer because size requirements have changed due to new environmental regulations. In other words, the Beach Street Property is unable to meet Exelon’s need for a new environmentally compliant transformer. We found Exelon had no choice but to install the new transformer within the Retained Easement.

⁴ PECO is a subsidiary company owned by Exelon.

From late 2018 through early 2019, Exelon began preparations to install the new transformer within the Retained Easement. By March 2019, Exelon was ready and Exelon began lining up equipment for installation.⁵ Instead, Delaware Station refused to grant Exelon access to the Retained Easement. Without access, Exelon is unable to install the new transformer and test it under emergency conditions. The company was planning a simulated power outage for evaluation on April 1, 2019.⁶ As this injunction hearing specifically related to access in time for emergency simulation testing, as well as access thereafter, we found considered emergency injunctive relief. Based on testimony at the hearing, we found Delaware Station's failure to honor the Retained Agreement before April 1, 2019 put its customers at immediate risk. This is because without participation in the April 1, 2019 simulated black-out, the reliability of the energy connections linking the CTU generators, the new transformer and the regional power grid cannot be tested until the next simulation in the fall.

On March 28, 2019, we therefore found the situation to be an emergency and granted injunction relief in favor of Exelon.

LEGAL ANALYSIS

Preliminary injunction was granted because Exelon met its burden to prove each of six elements.⁷

First, Exelon proved harm that was immediate and irreparable.⁸ As a public utility, Exelon was responsible to provide back- up power for the summer of 2019. The only way to assure this was to replace the degraded transformer and install a new one. Testing of the connections between the CTU power generator, the new transformer and the electrical grid itself was also necessary to assure system reliability. To meet these challenges, the April 1, 2019 deadline needed to be met; otherwise the next system wide simulated back-up power testing would not take place for more than six months, and the summer would go by without back-up

⁵ As referenced above, Exelon's final preparations for installation triggered Delaware Station's Petition for Preliminary Injunction.

⁶ The next outage is not planned until December, 2019.

⁷ Preliminary injunction requires the moving party show: (1) an immediate and irreparable harm that cannot be compensated by monetary damages, (2) a greater injury will result from refusing the injunction than from granting it, (3) an injunction would return the moving party to the status quo that existed before the alleged wrongful conduct, (4) a likelihood that the petitioner will prevail on the merits at trial, (5) that the injunction is a reasonable means to abate the alleged offending activity, and (6) granting the injunction will not adversely affect public interest. *Summit Town Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003).

⁸ See *DiLucente Corp. v. Penn. Roofing Co.*, 655 A.2d 1035 (Pa. Super. Ct. 1995).

power proven to be reliable.⁹ Delaware Station refused access to land that Exelon needed to cross in order to transport parts for the installation of its new transformer.

In doing so, Delaware Station was causing irreparable harm by risking the health, safety and welfare of thousands of people throughout the Philadelphia region. The only way to avoid this harm was to permit Exelon to use its Retained Easement immediately. Testimony was persuasive that there was no source of alternative back up power would reliably mesh with the region's power grid and do so on a quick start basis. We found money damages were incalculable in the event of a black out catastrophe.

Second, Exelon easily met its burden to show that it would suffer far greater injury than Delaware Station if injunctive relief were denied—compared to the reverse.

Third, the injunction returns Exelon to the status quo because Exelon should have been permitted to enter the Retained Easement and install the new transformer without interference from Delaware Station. The appropriate status quo is Exelon's ability to provide necessary back up power in the event of the black out.

Fourth, Exelon showed it will likely prevail on the merits. It is clear from the Retained Easement language that Exelon is allowed to install a new transformer within the Retained Easement. When determining whether certain activity is permitted under an express easement, courts look to its language.¹⁰ When an easement is unambiguous, the easement's plain meaning will be used to measure the rights conferred by it.¹¹

Here, the language of the Retained Easement is unambiguous. The Retained Easement allows Exelon to add to, maintain, replace, repair, and upgrade the existing CTU power generators within the Retained Easement. The Retained Easement also permits Exelon to add to, maintain, replace, repair, and upgrade "all related equipment, including equipment necessary to generate, transmit, and distribute electricity." A new transformer is within this category. Exelon has a property right to enter the Retained Easement area for construction of the new transformer on adjacent property the company owns, and is virtually certain to prevail on the merits.

Fifth, granting injunctive relief to Exelon is a reasonable means of abating the offending activity of refusing access to the Retained Easement. This is easy because the cost to Delaware

⁹ These system tests involve multiple producers, transmitters and government agencies who are coordinated to simulate an actual power outage triggering the need for back-up electricity.

¹⁰ See *Steen v. Pa. Tpk. Comm'n.*, 3 A.3d 747 (Pa. Commw. Ct. 2010).

¹¹ See *Kanefsky v. Dratch Constr. Co.*, 101 A.2d 923 (Pa. 1954).

Station of Exelon's access is low. Projected access use is of short duration with minimal disruption to Delaware Station's use of its land. In contrast, denying the injunction poses a huge risk to Exelon because there is no alternative quick start transformer to take its place.

Finally, the injunction does not adversely impact the public's interest. Just the opposite. We found that grant of preliminary injunction protects the public's interest by ensuring a reliable backup power supply for summer and thereafter. The new transformer whose installation depends on access through the Retained Easement allows back-up electric power to reach the regional grid within fifteen minutes.

CONCLUSION

The elements of preliminary injunction are satisfied. Accordingly, this court respectfully requests the Court to affirm.

BY THE COURT

RAMY I. DJERASSI, J.