

STEVENS & LEE
LAWYERS & CONSULTANTS

17 North Second Street
16th Floor
Harrisburg, PA 17101
(717) 234-1090 Fax (717) 234-1099
www.stevenslee.com

Direct Dial: (717) 255-7365
Email: mag@stevenslee.com
Direct Fax: (610) 988-0852

May 7, 2019

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

RE: Pennsylvania Public Utility Commission v. Peoples Natural Gas Company, LLC
Docket No. R-2018-3006818
Correction to Duquesne Light Company Petition to Intervene

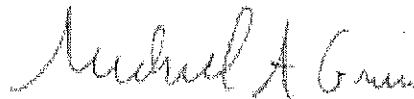
Dear Secretary Chiavetta:

Enclosed for filing please find Duquesne Light Company's Answer to the Motion for Protective Order filed in the above-referenced matter.

Copies of this filing have been served in accordance with the attached Certificate of Service. Should you have any questions, please feel free to contact me.

Best Regards,

STEVENS & LEE



Michael A. Gruin

Enclosure

cc: Administrative Law Judge Joel Cheskis
Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	
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	:	
v.	:	Docket No. R-2018-3006818
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	:	
Peoples Natural Gas Company, LLC	:	
	:	

**DUQUESNE LIGHT COMPANY’S ANSWER and COMMENTS TO PEOPLES’ MOTION
FOR PROTECTIVE ORDER**

Duquesne Light Company (“Duquesne Light”) hereby submits this Answer and Comments to the Motion for Protective Order filed by Peoples Natural Gas Company, LLC (“Peoples”) in the above-referenced matter. For the reasons set forth below, Duquesne Light respectfully requests that the proposed Protective Order be modified, and your Honors’ ruling adopting the Protective Order clarify that 1) Duquesne Light employees who have been identified as witnesses in the proceeding and 2) Duquesne Light internal legal counsel are permitted to view Confidential and Highly Confidential material, subject to the normal restrictions in the Protective Order.

I. Introduction and Overview of Issues

Peoples filed the instant Base Rate Case on January 28, 2019. Peoples has been marking discovery responses as “Confidential” or “Highly Confidential” since at least February 25, 2019. In accordance with 52 Pa. Code § 5.365(c)(4), Peoples should have filed a Motion for Protective Order within 14 days of receiving a request for proprietary information, but failed to do so. In its March 11, 2019 Prehearing Conference Memorandum, Peoples stated it would file a Motion for Protective Order. Peoples did not file a Motion for Protective Order until May 3, 2019.

As discussed further herein, the issue presently before the Commission is Peoples' ongoing failure – whether under the proposed Protective Order or under 52 Pa. Code § 5.365(c)(4) in the absence of a Protective Order – to provide timely and complete discovery responses to parties to this proceeding. As of the filing of this Answer, with the exception of five discovery responses, Peoples has refused to provide information marked “Confidential” or “Highly Confidential” to Duquesne Light's in-house counsel of record. In so doing, Peoples has failed to comply with the language of its own proposed Protective Order. In fact, except for those five responses, Peoples failed to provide information marked “Confidential” or “Highly Confidential” to any representative of Duquesne Light – including its outside counsel – until being instructed by ALJ Cheskis to do so on May 2, 2019.¹ Thus, Peoples has failed to comply with either its proposed Protective Order or 52 Pa. Code § 5.365(c)(4), even under Peoples' unreasonably restrictive interpretations thereof.

The proper scope of the Protective Order in this matter should permit Duquesne Light to fully and thoroughly evaluate Peoples' proposed rate increase. Duquesne Light is one of Peoples' customers for natural gas distribution service, and Peoples' effort to prevent Duquesne Light from viewing voluminous amounts of information is nothing more than an attempt by Peoples to curtail public scrutiny of certain of its ratemaking policies. In particular, Peoples has sought to prevent its customer, Duquesne Light, from viewing material related to advertising and sponsorship expenses that are being charged to ratepayers, and material related to special distribution rate deals that Peoples is offering to certain customers, to the detriment of other customers such as Duquesne Light. Peoples has raised spurious and phony “competitive” concerns to justify the withholding of information from Duquesne Light under the false pretense that Peoples would somehow be harmed if key Duquesne Light personnel were to view the information. Peoples' tactics would have the

¹ As a further consequence, Duquesne Light's outside counsel did not receive other parties' direct testimony containing information marked “Confidential” or “Highly Confidential” until May 3, 2019. Duquesne Light's employees and in-house counsel of record have still not been permitted to view such testimony.

effect of preventing Duquesne from fully examining Peoples' ratemaking practices. Duquesne Light respectfully submits that the and the Presiding ALJ should reject Peoples's overly broad restrictions for the viewing of confidential information, so as to not allow Peoples to avoid public scrutiny of its rate proposals.

In the Draft Protective Order submitted by Peoples, there are limitations on which individuals qualify as "Reviewing Representatives" for purposes of viewing Confidential and Highly Confidential Material (see paragraphs 7 and 10). In addition, the Protective Order lists categories of "Restricted Persons" in paragraphs 8 and 11, who would be prohibited from viewing Confidential and Highly Confidential Material even if they would otherwise qualify as "Reviewing Representatives".

In its Prehearing Conference Memorandum filed on March 11, 2019, Duquesne Light identified three potential witnesses for this proceeding, including C. James Davis, its Director of Rates and Energy Procurement and FERC/RTO Affairs. During discussions over the past several weeks, Peoples took the position that Mr. Davis is a "restricted person" and therefore precluded from viewing material marked as "Confidential" or "Highly Confidential." During the May 2, 2019 conference call with Judge Cheskis, Peoples expanded this position to claim that all employees of Duquesne Light, including its in-house counsel, qualify as "Restricted Persons" because Duquesne Light is allegedly a "competitor" of Peoples. Therefore, unless it is clarified that Duquesne is not a competitor, and the Protective Order is modified, Mr. Davis and other employees of Duquesne Light, including its in-house counsel, would be precluded from viewing material marked as "Confidential" or "Highly Confidential" by Peoples in this matter.

II. Peoples Has The Burden of Proving Entitlement To The Protective Order

The Commission's regulation at 52 Pa. Code § 5.365 governs the issuance of Protective Orders. This regulation states that:

A petition for protective order to limit the disclosure of a trade secret or other confidential information on the public record will be granted only when a party demonstrates that the potential harm to the party of providing the information would be substantial and that the harm to the party if the information is disclosed without restriction outweighs the public's interest in free and open access to the administrative hearing process. A protective order to protect trade secrets or other confidential information will apply the least restrictive means of limitation which will provide the necessary protections from disclosure

Under this regulation, Peoples has the burden of proving the need for the level of protective treatment sought, and the regulation makes it clear that the least restrictive means of limitation must be applied.

Duquesne Light is a party to this proceeding as a customer of Peoples. Duquesne Light receives natural gas distribution service from Peoples at multiple locations that are critical for Duquesne Light's operations in providing electric distribution service. As such, Duquesne Light has full rights as a party to this proceeding to evaluate Peoples' rates and tariff rules, and advocate on its behalf to the Commission. As a party, Duquesne Light has a right to receive all discovery and testimony served in the case, to allow it to evaluate the evidence and prepare its own testimony and argument.² Peoples has not made any showing that the material it is providing in discovery constitutes "trade secrets" or confidential information that it would cause it harm if released to Mr. Davis and Duquesne Light's attorneys, and its claims that Duquesne Light is a "competitor" are completely meritless and bordering on the absurd, as set forth below.

III. Duquesne Light Is Not A "Competitor" Of Peoples As A Matter Of Law

Peoples' claims of Duquesne Light's "competitor" status do not withstand scrutiny. Peoples is taking an unreasonably overbroad view of what constitutes a "competitor." Duquesne Light and Peoples are both monopolies providing different services – one

² As discussed *supra*, Peoples has already violated the Commission regulation at 52 Pa. Code § 5.365 by failing to provide Duquesne Light's counsel of record with copies of information marked as proprietary pending the issuance of a protective order. Peoples finally released this information to Duquesne Light's outside counsel on May 3 – after the due date for direct testimony – pursuant to an order from Judge Cheskis. The materials should have been provided weeks earlier.

provides natural gas distribution service, and one provides electric transmission and distribution service. Duquesne Light is an “electric distribution company,” (“EDC”) as that term is defined in Sections 2803 of the Public Utility Code (“Code”), 66 Pa. C.S. § 2803. Peoples is a “natural gas distribution company” (“NGDC”) as that term is defined in Section 2202 of the Code 66 Pa. C.S. § 2202. Peoples is not licensed by the Commission to provide electric distribution service, and Duquesne Light is not licensed by the Commission to provide natural gas distribution service. Therefore, at the outset, they cannot be competitors as matter of law. Peoples’ position that EDCs and NGDCs are competitors is unprecedented and has no foundation whatsoever in the Code or the Commission’s regulations or orders. From a public policy perspective, allowing an NGDC to define an EDC as a “competitor” would have widespread policy ramifications. Such a radical policy pronouncement should not be made in the context of a bilateral discovery dispute in one NGDC’s rate case.

IV. Peoples’ Claims of “Competition” are Red Herrings

At the May 2, 2019 conference call with Judge Cheskis, Peoples identified three topics that allegedly make Duquesne Light a “competitor” of Peoples: Peoples’ negotiated “flexed rates” for certain customers, Peoples’ costs related to attempts to acquire the Pittsburgh Water and Sewer Authority, and Peoples’ combined heat and power (“CHP”) initiatives. But the fact that Duquesne Light may have concerns related to Peoples’ handling of these issues does not convert Duquesne Light into a “competitor” of Peoples. Each of these topics bears directly on Duquesne Light’s interests as a Peoples customer, and none justifies a determination that Duquesne Light is a “competitor” such that Duquesne Light should be impeded from fully and fairly participating in this case.

First, Peoples apparently argues that Mr. Davis’ testimony regarding Peoples’ discounted “Flex” gas rates proves that the two companies are competitors. But this is simply untrue and a

gross mischaracterization of Mr. Davis's testimony. As Mr. Davis's testimony observes, Peoples' flexed gas rates shift Peoples' costs onto non-subsidized customers (such as Duquesne Light). It is entirely appropriate for Duquesne Light to explore the scope, applicability, and reasonableness of such customer rate subsidies in this proceeding. Furthermore, multiple parties, including OCA, BIE, and OSBA, raised the same or similar concerns with the Flex Rates. This argument by Peoples demonstrates the problem with its overreaching argument that Mr. Davis should be precluded from viewing highly confidential material. Mr. Davis – an employee of a customer of Peoples – was identified as a witness to submit testimony on an issue that directly affects the rates that Peoples customers pay, and which several other parties also addressed. But since Peoples labeled Duquesne Light a “competitor,” Peoples refuses to allow Mr. Davis to view discovery responses that are directly relevant to his analysis of this rate issue. In doing so, Peoples has effectively foreclosed Duquesne from providing its analysis and perspective on the impact of Peoples' Flex Rates on other customers.

Second, Peoples argues that Duquesne Light and Peoples are “competitors” because both are “interested” in acquiring the Pittsburgh Water and Sewer Authority (“PWSA”). Under Peoples' characterization of what constitutes a “competitor,” there could be dozens of companies in Pittsburgh and beyond that qualify as “competitors” because of rumored interest in partnering with or buying PWSA. But rumors and innuendo are not sufficient to tag a company as “competitor,” such that they are prohibited from fully examining the rates that Peoples seeks to charge. Furthermore, Peoples' argument on PWSA is factually groundless. There is currently no process underway by the City of Pittsburgh or PWSA for any type of public-private partnership or sale. On the contrary, PWSA has repeatedly expressed its desire to remain independent. Duquesne Light has no intent to pursue a public-private partnership or acquisition of PWSA. Peoples has publically announced that it has abandoned its efforts to acquire the PWSA. Mr. Davis's testimony

discusses Peoples' efforts to acquire the PWSA only to address whether Peoples is attempting to recover its costs of those efforts through base rates. This directly bears on Duquesne Light's legitimate interests in this proceeding.

Peoples' third justification for labeling Duquesne Light a "competitor" and for prohibiting Duquesne Light from fully examining Peoples rates is that both Peoples and Duquesne Light are (allegedly) interested in Combined Heat and Power ("CHP"). While both parties, like all companies in the electricity and natural gas industries, certainly have an interest in CHP, this does not justify tagging Duquesne Light as a competitor that is prohibited from fully evaluating the rates it must pay for natural gas distribution. Peoples' argument would make any entity a "competitor" of Peoples because they share a mutual interest in a topic or commodity. For example, Peoples and other companies may hire skilled workers from the same labor pool, or compete for office space leases. Under Peoples' argument, Peoples would deem those companies "competitors" for discovery purposes. Similarly, many companies sell products (such as propane, solar panels, or fiberglass insulation) that could conceivably reduce demand for natural gas. This does not make those other companies "competitors" ineligible to participate fully in this rate case. Peoples' overly broad interpretation of "competitor" is not the intent of the Commission's protective order regulations and would lead to an absurd result.

Furthermore, as with Peoples' prior arguments, the facts simply do not bear out Peoples' characterization of Duquesne Light's position. Duquesne Light is not a CHP developer, installer, or operator. The extent of Duquesne Light's presence in the CHP marketplace is that customers who install CHP may be eligible for rebates through Duquesne Light's Act 129 Energy Efficiency & Conservation Plan. (Customers may also receive rebates for LED lightbulbs, for example; but this does not make Duquesne Light a "competitor" of lightbulb retailers.) Mr. Davis's testimony discusses CHP to observe that Peoples' sales forecasts in this proceeding are inconsistent with its

CHP load-growth proposal presently pending before the Commission at Docket No. M-2017-2640306. This issue falls squarely within Duquesne Light's interests as a Peoples customer.

V. Harm to Duquesne Light From Peoples' Tactics

Duquesne Light has been, and will continue to be, severely prejudiced if its internal employees cannot view information that Peoples has marked as Confidential or Highly Confidential. Peoples has taken an overly broad approach to marking discovery responses as "Confidential" or "Highly Confidential," and has marked hundreds of pages of discovery responses as Confidential or Highly Confidential. Many of the materials marked Highly Confidential include information that are directly relevant to Peoples discounted Flex Gas rates, advertising expenses, and CHP – which happen to overlap to a large extent with Duquesne Light's areas of examination of Peoples' rates proposal.

It must be noted that Duquesne Light's outside counsel only received the previously withheld "Confidential" and "Highly Confidential" material on Friday, May 3, 2019, in most cases weeks after the responses were provided to the other parties. Currently, Mr. Davis and other personnel responsible for rate issues are not able to view this material. If Mr. Davis and other personnel responsible for rate issues cannot see this material, Duquesne Light – a customer of Peoples - will be precluded from fully evaluating critical issues related to gas curtailment, costs underlying rates, and Peoples' rate structure. This is inherently unfair and not justified by Peoples' hollow allegations that Duquesne Light is a "competitor." In addition, the impact of this tactic by Peoples will be to shield Peoples' rate making practices from full public scrutiny.

It also must be recognized that allowing Duquesne Light's outside counsel to see material is completely worthless if employees of Duquesne Light itself cannot view those materials. Outside counsel can only act with input and direction from their client. Outside counsel cannot testify, or decide which issues a client should or must pursue, or develop positions in the case. These actions

can only be done with input and participation by the client that is the party to the proceeding.

Therefore, Duquesne Light personnel and in-house attorneys must be permitted to view materials that have been marked as Confidential or Highly Confidential, subject to the mandatory restrictions on use and dissemination, in order for Duquesne Light to fully participate in this proceeding. If Peoples' position is upheld, a customer of Peoples that relies on Peoples' service for the provision of a critical public service would be excluded from meaningfully evaluating Peoples' proposed rates. This is clearly not just, reasonable, or in the public interest.

VI. Peoples Will Not Be Harmed by Allowing Duquesne Light Employees to See Confidential or Highly Confidential Materials

The Commission's regulation requires the least restrictive means possible to protect confidential information. Duquesne Light certainly believes a Protective Order is appropriate in this case, but not an overly broad or unduly restrictive Protective Order. To the extent Duquesne Light's recipients receive confidential information, those recipients will sign the acknowledgement that they will not disclose or disseminate the information except as permitted in the context of this proceeding. Those protections are sufficient to protect Peoples' interests. Peoples' overly broad approach to "competitor" status does not comport with the regulation's requirement to apply the least restrictive means possible to protect confidential information, and therefore should be rejected.

WHEREFORE, Duquesne Light Company respectfully requests a ruling that Duquesne Light is not a competitor of Peoples, and that the Protective Order issued in this case be modified such that Duquesne Light in-house counsel and employee witnesses are permitted to receive and view material that is marked Confidential or Highly Confidential in this proceeding.

Respectfully submitted,



Date: May 7, 2019

Linda R. Evers (PA ID No. 81428)
Michael A. Gruin (PA ID No. 78625)
Stevens & Lee
111 N. Sixth Street
Reading, PA 19601
Phone: (610) 478-2265
Fax: (610) 988-0855
email: lre@stevenslee.com
drw@stevenslee.com
mag@stevenslee.com

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission

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v.

Docket No. R-2018-3006818

Peoples Natural Gas Company, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of May, 2019, copies of the enclosed Answer to the Motion for Protective Order have been served upon the persons listed below via Electronic Mail and First Class U.S. Mail in accordance with the requirements of 52 Pa. Code Sections 1.54 and 1.55.

Anthony Kanagy, Esq.
Michael W. Gang, Esq.
Devin Ryan Esq.
Post & Schell
17 N. 2nd St., 12th Floor
Harrisburg, PA 17101
(Counsel for Peoples)

Erin K. Fure, Esq.
Office of Small Business Advocate
300 North Second Street, Suite 202
Harrisburg, PA 17101
(Counsel for OSBA)

William H. Roberts II, Esq.
Peoples Natural Gas Company LLC
375 North Shore Drive
Pittsburgh, PA 15212
(Counsel for Peoples)

Joseph L. Vullo, Esq.
Burke, Vullo Reilly Roberts
1460 Wyoming Ave.
Forty Fort, PA 18704
(Counsel for Community Action Association of Pennsylvania)

Christy M. Appleby, Esq.
Harrison Breitman, Esq.
J.D. Moore, Esq.
Darryl Lawrence, Esq.
Office of Consumer Advocate
555 Walnut Street 5th Floor
Forum Place
Harrisburg PA 17101
(Counsel for OCA)

Todd S. Stewart, Esq.
Hawke, McKeon & Sniscak, LLP
10 North Tenth St.
Harrisburg, PA 17101
(Counsel for RESA)

Erika L. McLain, Esq.
Carrie B. Wright, Esq.
Pennsylvania Public Utility Commission
Bureau of Investigation & Enforcement
400 North Street
Harrisburg, PA 17120
(Counsel for BIE)

Scott J. Rubin, Esq.
333 Oak Lane
Bloomsburg, PA 17815
(Counsel for Utility Works Union of America,
Local 612)

Pamela C. Polacek, Esq.
Vasiliki Karandrikas, Esq.
Errin T. McCaulley, Jr., Esq.
McNees Wallace & Nurick, LLC
100 Pine Street
PO Box 1166
Harrisburg, PA 17108
(Counsel for Synder Brothers)

Daniel Clearfield, Esq.
Carl Shultz, Esq.
Eckert Seamans Cherin & Mellott, LLC
213 Market St. 8th Fl.
Harrisburg, PA 17101
(Counsel for Direct Energy Business, LLC)

Charis Mincavage
Alessandra Hylander, Esq.
McNees Wallace & Nurick, LLC
100 Pine Street
PO Box 1166
Harrisburg, PA 17108
(Counsel for PII)

Patrick Cicero, Esq.
John Sweet, Esq.
Kadeem Morris, Esq.
The Pennsylvania Utility Law Project
118 Locust Street
Harrisburg, PA 17101
(Counsel for CAUSE-PA)

Kevin J. Moody, Esq.
Pennsylvania Independent Oil & Gas
Association
212 Locust St., Suite 300
Harrisburg, PA 17101-1510
(Counsel for PIOGA)

Tanya Leshko, Esq.
Alan Seizter, Esq.
Buchanan Ingersoll & Rooney PC
409 North 2nd St., Suite 500
Harrisburg, PA 17101-1357
(Counsel for Equitrans, L.P.)

David P. Zambito, Esq.
Jonathan Nase, Esq.
Cozen O'Connor
17 North Second St., Suite 1410
Harrisburg, PA 17101
(Counsel for Peoples)



Michael A. Gruin

DATE: May 7, 2019