**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission : R-2021-3024750

Office of Consumer Advocate : C-2021-3025538

Office of Small Business Advocate : C-2021-3025462

:

v. :

:

Duquesne Light Company :

**ORDER**

**GRANTING MOTION FOR A PROTECTIVE ORDER**

On April 16, 2021, Duquesne Light Company (Duquesne Light or Company) filed Supplement No. 25 – PA P.U.C. No. 25 to become effective June 15, 2021 seeking an increase in total annual operating revenues for electric service by approximately $115 million, which includes rolling the Distribution System Improvement Charge (DSIC) Rider charges into base rates.

On April 23, 2021, the Office of Small Business Advocate (OSBA) filed a formal complaint and public statement against the tariff filing, docket number C-2021-3025462, averring, among other things, that upon review of the materials filed by Duquesne Light, those materials may be insufficient to justify the rate increase requested and that Duquesne Light’s present and proposed rates, rules and conditions of service may be unjust, unreasonable, unduly discriminatory and otherwise contrary to law, particularly as they pertain to small business customers. The OSBA further averred that the proposed rates, rate design and cost and revenue allocation are or may be unjust, unreasonable and unlawfully discriminatory in violation of the Public Utility Code, and contrary to appropriate public policy and sound ratemaking considerations. The OSBA also requested that the filing be suspended and investigated and that the proposed new rates and other tariff changes be rejected to the extent they are found to be unlawful, unjust, unreasonable and unduly discriminatory.

On April 23, 2021, the Commission’s Bureau of Investigation and Enforcement (I&E) intervened into this case.

On April 27, 2021, the Office of Consumer Advocate (OCA) filed a formal complaint and public statement against the tariff filing, docket number C-2021-3025538, averring, among other things, that a preliminary examination of Duquesne Light’s rate increase request indicates that the present rates, rules and regulations are not just and reasonable or otherwise proper under the Public Utility Code and applicable ratemaking principles. OCA also avers that Duquesne Light’s proposed charges, increases and changes in rates, rules and programs are or may be unjust, unreasonable and in violation of law, will allow Duquesne Light an opportunity to recover an excessive rate of return on its utility property investment in violation of the Public Utility Code, and otherwise may be contrary to sound ratemaking principles and public policy. The OCA asked that the Commission suspend and investigate the operation of the proposed tariff supplement pursuant to Section 1308(d) of the Public Utility Code, consolidate all complaints filed against the proposed tariff supplement, hold full evidentiary hearings to examine the reasonableness of Duquesne Light’s current rates and its proposed increases in rates, and deny or modify any unjustified proposals. The OCA also asked that public input hearings be held in the affected service territory.

On April 26, 2021, Duquesne Light Company (Duquesne Light) filed a motion for a protective order in this proceeding pursuant to 52 Pa. Code § 5.365(a). Duquesne Light’s motion indicated that the statutory advocates either agreed with or did not oppose the motion.

On May 20, 2021, the Commission suspended the filing by operation of law until January 15, 2022 pursuant to Section 1308(d) of the Public Utility Code, unless permitted by the Commission to become effective at an earlier date. The Commission added that investigation and analysis of the proposed tariff filing and the supporting data indicate that the proposed changes in rates, rules and regulations may be unlawful, unjust, unreasonable and contrary to the public interest. The Commission determined that consideration should be given to the reasonableness of Duquesne Light’s existing rates, rules and regulations. The Commission assigned the case to the Office of Administrative Law Judge for the prompt scheduling of hearings as may be necessary culminating in the issuance of a Recommended Decision.

As a result, on May 20, 2021, a hearing notice was issued establishing a telephonic prehearing conference for this matter for Thursday, May 27, 2021 at 10:00 a.m. and assigning us as the presiding officers. A prehearing conference order was also issued on May 20, 2021, setting forth various rules that would govern the prehearing conference.

On May 26, 2021, Nationwide Energy Partners, LLC (Nationwide) filed a formal complaint against the tariff filing, docket number C-2021-3026057, averring, among other things, that based on the terms and interpretation of its tariff provisions relating to master metering for commercial buildings, specifically Tariff Rule 18 and Rule 41, Duquesne Light is depriving certain of its commercial customers of the opportunity to reduce their rates for service and, therefore, Duquesne Light’s current and proposed rates may be contrary to law.

Petitions to intervene have been filed by the Pennsylvania Weatherization Providers Task Force, Inc. (PWPTF), the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA), the Natural Resources Defense Counsel (NRDC), United States Steel Corporation (U.S. Steel), and Peoples Natural Gas Company LLC (Peoples Natural Gas).

The prehearing conference convened on May 27, 2021 as scheduled. The following parties were present and represented by counsel: Duquesne Light, I&E. OCA, OSBA, CAUSE-PA, U.S. Steel, PWPTF, NRDC, and Peoples Natural Gas. At the prehearing conference, the parties considered issues raised by the filing, discussed prehearing matters and established a litigation schedule. Additionally, a discussion was held regarding Duquesne Light’s motion for protective order filed on April 26, 2021. No party indicated opposition to the motion for protective order.

The presiding officers issued a Scheduling Order on May 28, 2021, which, among other things, consolidated the OCA and the OSBA complaints with the Commission’s investigation at docket number R-2021-3024750, granted the petitions to intervene of CAUSE-PA, U.S. Steel, PWPTF, and NRDC, and provided Duquesne Light until June 4, 2021 to file any answer or response to the complaint filed by Nationwide and the petition to intervene filed by Peoples Natural Gas.

Duquesne Light’s motion for a protective order is ready for disposition. For the reasons discussed below, Duquesne Light’s motion will be granted.

As an initial matter, the Commission’s Rules of Practice and Procedure permit the Commission to issue protective orders limiting the availability of certain proprietary or confidential information. 52 Pa. Code §§ 5.362 and 5.365. The party seeking the protective order has the burden to establish that the potential harm to the party of providing the information would be substantial and 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. Petition for Protective order of GTE North Inc., 1996 Pa PUC LEXIS 95, Docket No. G-00940402, Order (entered August 8, 1996); ITT Communications Services’ Petition for a Protective Order, 1991 Pa PUC LEXIS 193, Docket No. R-912017, Order (entered November 5, 1991). If that burden is satisfied, the least restrictive means of limitation which will provide the necessary protection from disclosure will be applied. 52 Pa. Code § 5.365(a).

In considering whether to issue a protective order, the Commission, pursuant to Section 5.365(a), should consider the following factors:

(1)  The extent to which the disclosure would cause unfair economic or competitive damage.

(2)  The extent to which the information is known by others and used in similar activities.

(3)  The worth or value of the information to the party and to the party’s competitors.

(4)  The degree of difficulty and cost of developing the information.

(5)  Other statutes or regulations dealing specifically with disclosure of the information.

52 Pa. Code § 5.365(a). The Commission’s regulations further provide detail regarding restrictions placed on the proprietary material, access to proprietary material by representatives of parties, special restrictions and the return of proprietary information at the conclusion of the proceeding. 52 Pa. Code §§ 5.365(c)-(g).

Section 5.365, however, must be balanced against Commission regulations that also provide that the Commission’s records, including the record of this proceeding, may be accessed by the public pursuant to 52 Pa. Code §§ 1.71-1.77. In particular, Section 1.71 of the Commission’s regulations provides: “The Commission’s record maintenance system is intended to provide for the greatest degree of public access to Commission documents that is consistent with the exercise of the functions of the Commission under the act and other applicable laws.” 52 Pa. Code § 1.71. In addition, the interests of keeping material proprietary or confidential must be viewed in light of the Pennsylvania Right to Know Law. 65 P.S. § 67.102.

In this case, Duquesne Light’s motion for protective order states proprietary information within the definition of 52 Pa. Code § 5.365 has been or may be requested during the course of this proceeding, and therefore the issuance of a protective order is justified. Attached to Duquesne Light’s motion is a proposed protective order, which defines two categories of protected information: confidential and highly confidential.

Although there are no specific materials identified by the motion for protective order, the need for a protective order to govern the treatment of information alleged to be proprietary in this proceeding is clear. There is an extensive range of issues to be examined in a base rate proceeding, and therefore a party may produce materials that are properly marked proprietary and/or confidential. Due to the voluminous amount of information exchanged during a base rate proceeding, it is expedient to issue a protective order now. Although the proposed protective order allows a producing party to assert a claim of confidentiality, it allows parties to question or challenge the confidential nature or proprietary nature of particular material and to question the admissibility of such material. The party designating a document or information as proprietary retains the burden of demonstrating that the designation is appropriate. This is an essential element of the protective order that ensures that the appropriate protections are being provided while still maintaining the necessary public access to the Commission’s records. Finally, as discussed above, no party expressed any objection to the proposed protective order.

As a result, the protective order proposed by Duquesne Light will be adopted for this proceeding. The proposed protective order is consistent with the Commission’s regulations regarding protective orders. This proceeding involves information that warrants protection and the proposed protective order provides the least restrictive means of limitation which will provide the necessary protection from disclosure. The parties are advised, however, to minimize the amount of information alleged to be proprietary that is admitted into the record to increase the likelihood that the ultimate decision of the Commission in this matter provides the greatest degree of public access, consistent with the Commission’s regulations. This is especially true with regard to confidential security information which is governed by the Public Utility Confidential Security Information Disclosure Protection Act at 35 P.S. §§ 2141.1-2141.6 and the Commission's regulations at 52 Pa. Code §§ 104.1-104.4 and provide additional layers of protection for such materials.

ORDER

THEREFORE,

IT IS ORDERED THAT:

1. The Protective Order is hereby granted with respect to all materials and information identified in Paragraphs 2 and 3 below, which have been or will be filed with the Commission, produced in discovery, or otherwise presented during the above-captioned proceeding and all proceedings consolidated therewith. All persons previously or hereafter granted access to the materials and information identified in Ordering Paragraphs 2 and 3 of this Protective Order shall use and disclose such information only in accordance with this Protective Order.
2. The materials or information subject to this Protective Order are all correspondence, documents, data, information, studies, methodologies and other materials which are believed by the producing Party to be of a proprietary or confidential nature, and which are so designated by being stamped “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” (hereinafter collectively referred to as “Proprietary Information”). When a statement or exhibit is identified for the record, the portions thereof that constitute Proprietary Information shall be appropriately designated as such for the record.
3. This Protective Order applies to the following materials:

(a) The producing Party may designate as “CONFIDENTIAL” those materials which customarily are treated by that Party as sensitive or proprietary, which are not available to the public, and which, if disclosed freely, would subject that Party or its clients to risk of competitive disadvantage or other business injury;

(b) The producing Party may designate as “HIGHLY CONFIDENTIAL” those materials that are of such a commercially sensitive nature or of such a private, personal nature that the producing Party is able to justify a heightened level of confidential protection with respect to those materials. Each of the Parties shall endeavor to limit its designation of information as HIGHLY CONFIDENTIAL.

1. Proprietary Information shall be made available to counsel for the nonproducing Party, subject to the terms of this Protective Order. Such counsel shall use or disclose the Proprietary Information only for purposes of preparing or presenting evidence, cross examination or argument in this proceeding and not in any other proceedings or matters. To the extent required for participation in this proceeding, counsel for a Party may afford access to Proprietary Information subject to the conditions set forth in this Protective Order.
2. Proprietary Information produced in this proceeding shall be made available to the Commission and its Staff. For purposes of filing, to the extent that Proprietary Information is placed in the Commission’s report folders, such information shall be handled in accordance with routine Commission procedures inasmuch as the report folders are not subject to public disclosure. To the extent that Proprietary Information is placed in the Commission’s testimony or document folders, such information shall be separately bound, conspicuously marked, and accompanied by a copy of this Protective Order. Public inspection of Protected Information shall be permitted only in accordance with this Protective Order.
3. Proprietary Information shall be made available to a Reviewing Representative in this proceeding pursuant to the following procedures:
4. Information deemed as “CONFIDENTIAL”, shall be made available to a “Reviewing Representative” who is a person who has signed a Non-Disclosure Certificate and who is:

(i) an attorney who has made an appearance in this proceeding for a Party;

(ii) attorneys, paralegals, and other employees associated for purposes of this case with an attorney described in Paragraph (i);

(iii) an expert or an employee of an expert retained by a Party for the purpose of advising, preparing for or testifying in this proceeding;

(iv) employees or other representatives of a Party appearing in this proceeding with significant responsibility for the docket.

1. Information deemed as “HIGHLY CONFIDENTIAL,” may be provided to a “Reviewing Representative” who has signed a Non-Disclosure Certificate and who is:

(i) an attorney for a statutory advocate pursuant to 52 Pa. Code §1.8 or an outside counsel who has made an appearance in this proceeding for a Party;

(ii) an attorney, paralegal, or other employee associated for purposes of this case with an attorney described in Paragraph (i);

(iii) an outside expert or an employee of an outside expert retained by a Party for the purposes of advising, preparing for or testifying in this proceeding;

(iv) a person designated as a Reviewing Representative for purposes of Highly Confidential Information pursuant to Paragraph 11.

Provided, further, that in accordance with the provisions of Sections 5.362 and 5.365(e) of the Commission’s rules of Practice and Procedure, 52 Pa. Code §§ 5.362, 5.365(e), the producing Party may, by subsequent motion or objection, seek further protection with respect to HIGHLY CONFIDENTIAL material, including but not limited to, total prohibition of disclosure or limitation of disclosure only to particular Parties.

1. Proprietary Information shall not be made available to a “Restricted Person.” For the purpose of this Protective Order, “Restricted Person” shall mean: (a) an officer, director, stockholder, partner, owner or employee of any competitor of a Party or an employee of such an entity if the employee’s primary duties involve the development, marketing or pricing of the competitor’s products or services; (b) an officer, director, stockholder, partner, or owner of any affiliate of a competitor of a Party (including any association of competitors of a Party) or an employee of such an entity if the employee’s primary duties involve the development, marketing or pricing of the competitor’s products or services; (c) an officer, director, stockholder, owner or employee of a competitor of a Party’s customer if the Proprietary Information concerns a specific, identifiable customer of a Party; and (d) an officer, director, stockholder, owner or employee of an affiliate of a competitor of a Party’s customer if the Proprietary Information concerns a specific, identifiable customer of a Party; provided, however, that no expert shall be disqualified on account of being a stockholder, partner, or owner unless that expert’s interest in the business would provide a significant motive for violation of the limitations of permissible use of the Proprietary Information. For purposes of this Protective Order, stocks, partnership or other ownership interests valued at more than $10,000 or constituting more than 1% interest in a business establishes a significant motive for violation.
2. If an expert for a Party, another member of the expert’s firm or the expert’s firm generally also serves as an expert for, or as a consultant or advisor to, a Restricted Person, said expert must: (1) identify for the Parties each Restricted Person and each expert or consultant; (2) make reasonable attempts to segregate those personnel assisting in the expert’s participation in this proceeding from those personnel working on behalf of a Restricted Person; and (3) if segregation of such personnel is impractical, the expert shall give to the producing Party written assurances that the lack of segregation will in no way jeopardize the interests of the Parties or their customers. The producing Party retains the right to challenge the adequacy of the written assurances that the nonproducing Party or its customers’ interests will not be jeopardized. No other persons may have access to the Proprietary Information except as authorized by order of the Commission.
3. A qualified “Reviewing Representative” for “HIGHLY CONFIDENTIAL” material may review and discuss “HIGHLY CONFIDENTIAL” material with his or her client or with the entity with which he or she is employed or associated, to the extent that the client or entity is not a “Restricted Person,” but may not share with or permit the client or entity to review the “HIGHLY CONFIDENTIAL” material, provided, however, that counsel for the Bureau of Investigation and Enforcement (“I&E”), Office of Consumer Advocate and Office of Small Business Advocate (“OSBA”) may share Proprietary Information with the I&E Director, Consumer Advocate and Small Business Advocate, respectively, without obtaining a Non-Disclosure certificate from these individuals, provided, however, that these individuals otherwise abide by the terms of the Protective Order.
4. Proprietary Information shall be treated by the nonproducing Party and by the Reviewing Representative in accordance with the certificate executed pursuant to Paragraph 12(a). Information deemed Proprietary Information shall not be used except as necessary for the conduct of this proceeding, nor shall it be disclosed in any manner to any person except a Reviewing Representative who is engaged in the conduct of this proceeding and who needs to know the information in order to carry out that person’s responsibilities in this proceeding. For I&E, the I&E Prosecutor may afford access to Proprietary Information made available by Duquesne Light only to I&E’s assigned and identified internal expert(s) who are full-time I&E employees and therefore subject to the terms of this Protective Order by virtue of the signature of the I&E Prosecutor affixed to his executed Non-Disclosure Certificate. Prior to making the provided Proprietary Information available to its full-time employed expert as provided above, the I&E Prosecutor shall notify said internal expert of the existence of the Protective Order and shall provide a copy of it to that expert with an admonition that he or she is bound by its provisions for the duration of the proceeding. Said I&E Prosecutor and each full-time employed expert is personally responsible for ensuring that the I&E Prosecutor each and every full-time employed expert provided with Proprietary Information complies with all terms and conditions of the Protective Order. In addition, OSBA’s consultant, Mr. Robert D. Knecht, will not be considered to be a Restricted Person, and Paragraphs 7, 8 and 9 will not apply to Mr. Knecht provided that Mr. Knecht does not share or discuss the Proprietary Information with any person except authorized OSBA representatives.
5. Reviewing Representatives may not use information contained in any Proprietary Information obtained through this proceeding to give any Party or any competitor of any Party a commercial advantage. In the event that the nonproducing Party wishes to designate as a Reviewing Representative a person not described in Paragraph 6 above, that Party shall seek agreement from the Party producing the Proprietary Information. If an agreement is reached, that person shall be a Reviewing Representative pursuant to Paragraph 6 above with respect to those materials. If no agreement is reached, the nonproducing Party shall submit the disputed designation to the presiding Administrative Law Judge for resolution.
6. (a) A Reviewing Representative shall not be permitted to inspect, participate in discussions regarding, or otherwise be permitted access to Proprietary Information pursuant to this Protective Order unless that Reviewing Representative has first executed a Non-Disclosure Certificate set forth in Appendix A hereto, provided that if an attorney qualified as a Reviewing Representative has executed such a certificate, the paralegals, secretarial and clerical personnel under the attorney’s instruction, supervision or control need not do so. A copy of each Non-Disclosure Certificate shall be provided to counsel for the Party asserting confidentiality prior to disclosure of any Proprietary Information to that Reviewing Representative.

(b) Attorneys and outside experts qualified as Reviewing Representatives are responsible for ensuring that persons under their supervision or control comply with this Protective Order.

1. A producing Party shall designate data or documents as constituting or containing Proprietary Information by stamping the documents “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL.” Where only part of data compilations or multi-page documents constitutes or contains Proprietary Information, the producing Party, insofar as reasonably practicable within discovery and other time constraints imposed in this proceeding, shall designate only the specific data or pages of documents which constitute or contain Proprietary Information. The Proprietary Information shall be served upon the nonproducing Party hereto only in an envelope separate from the nonproprietary materials, and the envelope shall be conspicuously marked “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL.”
2. The nonproducing Party will consider and treat the Proprietary Information as within the exemptions from disclosure provided in Section 335(d) of the Public Utility Code, 66 Pa. C.S. § 335(d), and is within the definition of “confidential proprietary information” in the Pennsylvania Right to Know Law, Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-67.3104, effective January 1, 2009, until such time as the information is found to be non-proprietary. In the event that any person or entity seeks to compel the disclosure of Proprietary Information, the nonproducing Party shall promptly notify the producing Party in order to provide the producing Party an opportunity to oppose or limit such disclosure.
3. Any public reference to Proprietary Information by a Party or its Reviewing Representative shall be to the title or exhibit reference in sufficient detail to permit persons with access to the Proprietary Information to fully understand the reference and not more. The Proprietary Information shall remain a part of the record, to the extent admitted, for all purposes of administrative or judicial review.
4. Part of any record of this proceeding containing Proprietary Information, including but not limited to all exhibits, writings, testimony, cross examination, argument and responses to discovery, and including references thereto as mentioned in Paragraph 15 above, shall be sealed for all purposes, including administrative and judicial review, unless such Proprietary Information is released from the restrictions of this Protective Order, either through the agreement of the Parties or pursuant to order of the Administrative Law Judge, the Commission or appellate court.
5. The nonproducing Party shall retain the right to question or challenge the confidential or proprietary nature of Proprietary Information. If a nonproducing Party challenges the designation of a document or information as proprietary, the Party providing the information retains the burden of demonstrating that the designation is appropriate.
6. Each Party shall retain the right to question or challenge the admissibility of Proprietary Information; to object to the production of Proprietary Information on any proper ground; to refuse to produce Proprietary Information pending the adjudication of the objection; and to seek additional measures of protection of Proprietary Information beyond those provided in this Protective Order.
7. Within thirty (30) days after a Commission final order is entered in the above-captioned proceeding, or in the event of appeals, within thirty (30) days after appeals are finally decided, the nonproducing Party, upon request, shall either destroy or return to the producing Party all copies of all documents and other materials not entered into the record, including notes, which contain any Proprietary Information. In the event that the nonproducing Party elects to destroy all copies of documents and other materials containing Proprietary Information instead of returning the copies of documents and other materials containing Proprietary Information to the producing Party, the nonproducing Party shall certify in writing to the producing Party that the Proprietary Information has been destroyed.

Dated: June 2, 2021 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_/s/\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Joel H. Cheskis

Deputy Chief Administrative Law Judge

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_/s/\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

John M. Coogan

Administrative Law Judge

**APPENDIX A**

**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

|  |  |  |
| --- | --- | --- |
| Pennsylvania Public Utility Commission  v.  Duquesne Light Company | **: : : :**  **:**  **:**  **:**  **:** | Docket No. R-2021-3024750 |

NON-DISCLOSURE CERTIFICATE

TO WHOM IT MAY CONCERN:

The undersigned is a Reviewing Representative of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ a Party to this proceeding (“Party”), and is not, or has no knowledge or basis for believing that he/she is a “Restricted Person” as that term is defined in Paragraph 7, page 4 of the Protective Order executed on behalf of the Party with regard to the above-referenced proceeding. The undersigned has read and understands the Protective Order in the above-referenced proceeding, which Protective Order deals with the treatment of Proprietary Information. The undersigned agrees to be bound by, and comply with, the terms and conditions of said Protective Order.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

SIGNATURE

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EMPLOYER

DATE: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**R-2021-3024750 - PA PUBLIC UTILITY COMMISSION et al v. DUQUESNE LIGHT COMPANY**

*Updated 05/27/21*

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