BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of Duquesne Light Company for a Certificate of Public Convenience under Section 1102(a)(3) of the Public Utility Code Approving the Acquisition of Duquesne Light Holdings, Inc. by Merger	:	**Docket No. A-110150F0035**
Application of DQE Communications Network Services LLC for a Certificate of Public Convenience under Section 1102(a)(3) of the Public Utility Code Approving the Acquisition of Duquesne Light Holdings, Inc. by Merger	:	**Docket No. A-311233F0002**

SUPPLEMENTAL STATEMENT OF
THE OFFICE OF SMALL BUSINESS ADVOCATE
IN SUPPORT OF THE JOINT PETITION FOR SETTLEMENT

The Small Business Advocate is authorized and directed to represent the interests of the small business consumers of utility services in the Commonwealth of Pennsylvania under the provisions of the Small Business Advocate Act, Act 181 of 1988, 73 P.S. §§ 399.41 - 399.50. Pursuant to that statutory authority, the Office of Small Business Advocate ("OSBA") filed a Notice of Intervention and Protest at Docket No. A-311233F0002, against the September 6, 2006, Application of Duquesne Light Company ("DLC") and DQE Communications Network Services LLC ("DQE Communications") (collectively, the "Joint Applicants"), seeking approval under Chapters 11 and 28 of the Public Utility Code, 66 Pa. C.S. Ch. 11 and 28, of the acquisition of their parent company—Duquesne Light Holdings, Inc. ("DLH")—by the Macquarie Consortium ("Macquarie"). The OSBA filed testimony; actively participated in the negotiations that

led to the Joint Petition for Settlement of the issues in this case ("Settlement"); and is a signatory to the Settlement which was filed on February 9, 2007.

On February 27, 2007, ALJ Robert P. Meehan issued Interim Order #2 in this matter, noting the fact that on February 20, 2007, the Commonwealth Court of Pennsylvania issued a decision in *Irwin A. Popowsky, Consumer Advocate v. Pennsylvania Public Utility* Commission, No. 255 C.D. 2006, 2007 Pa. Commw. LEXIS 63 ("Verizon/MCI Decision"), which reversed the Commission's approval of a merger between Verizon Communications, Inc. ("Verizon") and MCI, Inc. ("MCI"), and remanded the proceeding to the Commission. In ALJ Meehan's opinion, the Joint Petitioners should be given the opportunity to provide either a Joint Statement in Support or Supplemental Statements in Support of the Settlement in light of the Verizon/MCI Decision prior to his issuance of an Initial Decision and the entry of an Order in the instant case. Consequently, ALJ Meehan has reopened the record at this docket number to permit the filing of an additional Joint Statement in Support or Supplemental Statements in Support, to be filed with the Commission and served upon the ALJ, the parties, and Citizen Power on or before Friday, March 9, 2007.

Pursuant to the Interim Order #2 issued on February 27, 2007, the OSBA is filing this Supplemental Statement in Support, addressing the Joint Petition for Settlement in light of the Verizon/MCI Decision.

The Verizon/MCI Decision

In the Verizon/MCI Decision, the Commission adopted the decision of the ALJ approving the merger between Verizon and MCI, finding that the two companies had established that the merger was in the public interest. While acknowledging that there must be an affirmative showing that the merger was in the public interest under the standard established in *City of York v. Pennsylvania Public Utility Commission*, 449 Pa. 136, 295 A.2d 825 (Pa. 1972) (proponents of the merger must "demonstrate that the merger will affirmatively promote the 'service, accommodation, convenience, or safety of the public' in some substantial way." *Id.* at 828), the Commission gave its own interpretation of that standard. The Commission stated that "[t]he public interest standard is a broad standard that encompasses examining whether, for example, the 'merger will have an anti-competitive effect or will impair the technical, managerial or financial fitness' of the jurisdictional utilities affected to continue to provide adequate . . . services to Pennsylvania customers at just and reasonable rates." Verizon/MCI Decision at 15. (citations omitted).

The Commission went on to find that the Verizon/MCI merger was in the public interest because there had been approvals of the merger at the federal level, stating that "a comprehensive and Pennsylvania-specific analysis of the competitive effects of the merger was not appropriate in light of the [Department of Justice] Consent Decree . . . " where "the United States Department of Justice Antitrust Division (DOJ) and the Federal Communications [sic] (FCC) have also thoroughly investigated the merger and have

imposed conditions to ameliorate the anticompetitive effects of the merger." Verizon/MCI Decision at 16.

The Commonwealth Court disagreed with the Commission, stating that "even if the conditions imposed by those federal agencies ameliorated all of the anti-competitive effects in Pennsylvania, it would only establish that the merger was not detrimental to the public, not that needed substantial benefits were present to justify the merger." Verizon/MCI Decision at 25. The Court reviewed the Commission's determination that there were three positive benefits that would accrue to the public from the merger, finding that (1) the claimed access by Verizon to MCI's Internet system resulting from the merger, which would purportedly support a broad array of services and applications, in effect promised nothing new; (2) continuing Verizon's presence in Pennsylvania was going to occur regardless of the merger; and (3) the ostensibly enhanced deployment of broadband services was not quantified in such a way as to demonstrate that the merger provided a benefit to the public. Verizon/MCI Decision at 27-28.

In the Verizon/MCI Decision, the Commonwealth Court has upheld the standard set forth in *City of York*, with the additional proviso that any purported affirmative benefits which would justify approval of a merger must be demonstrably quantified, not just stated in an illusory fashion. (*See* Verizon/MCI Decision at 28, FN 28). Given this precedent, the OSBA, in the analysis below, will attempt to show which of the purported benefits of the DLC/Macquarie merger meet the standard set forth in *City of York* as interpreted in the Verizon/MCI Decision, thereby justifying approval of the merger by the Commission.

Settlement

The Settlement sets forth a list of issues that were resolved through the negotiation process, including the resolution of issues which were of particular significance to the OSBA when it concluded that the Settlement was in the best interests of DLC's small business customers. Those issues are addressed in the OSBA's initial Statement in Support of the Joint Petition for Settlement and will be incorporated herein by reference.

As implied by the Verizon/MCI Decision, conditions in a merger settlement do not qualify as affirmative benefits if they simply attempt to avoid or mitigate problems, or potential problems, that would be unlikely to arise in the absence of the merger. Therefore, conditions may be essential to concluding that a merger settlement is in the public interest but may not constitute affirmative benefits. Conditions qualify as affirmative benefits only if they provide something to the public that is positive, that is not illusory, and that would not have been provided without the merger. The following specific issues and the resolution thereof demonstrate affirmative benefits that the OSBA believes will accrue to the public as a result of the DLC/Macquarie merger, if approved:

a. DLC has agreed that there will be no general increase in distribution rates prior to January 1, 2010. In effect, this stayout will be financed, at least in part, by the predicted reduction in the cost of capital. That predicted reduction in the cost of capital would also benefit ratepayers when distribution rates are set in subsequent cases;

b. With respect to universal service, DLC has agreed to convene a collaborative ("Universal Service Collaborative") of local representatives

of low income groups, community based organizations ("CBOs") and the Office of Consumer Advocate ("OCA") to consider universal service programs so as to enhance DLC's programs within current funding levels. The collaborative will meet no less than once a year and will include representatives from CAAP and Pennsylvania weatherization network providers.

c. DLC has committed to increase the number of customers served under its Smart Comfort program from 2, 250 to 3,000 customers per year from 2007 through 2009, except for 2008, where DLC will commit to serving 4,000 customers.

d. DLC will establish a competitively neutral Economic Development Program to attract and support expanding Pennsylvania industrial employers by offering a flat 50MW block of energy consumed at a new or expanded facility at a discount of up to $3 per MWh below market for three years for commercial/ industrial customers who meet specific criteria for creating new or expanding load and create two new full time employment positions per MW of new load. DLC will also consider applications from customers that do not meet the specific criteria, if the applicant can demonstrate that the new or expanded load has significant benefits, such as increasing off-peak power that could be utilized to a greater extent than on-peak power, or providing attractive or improved load factor or power factor, or offers significant new employment. The program will be funded solely from shareholder funds, and will not be conditioned upon receiving generation supply from DLC or its affiliates.

e. DLH will pay for the cost of an independent consultant to identify and quantify the cost of services and business functions provided to Duquesne Light Energy ("DLE") and to provide for the remittance of compensation for the cost of these services and business functions rendered to DLE or any other affiliated electric generation supplier ("EGS") by any affiliated Duquesne companies (including DLC) except for power procurement services. DLE will remit the appropriate compensation for such services and business functions to the companies providing these services and business functions.

Conclusion

For the reasons set forth in the Settlement, as well as the additional factors that are enumerated in this statement, the OSBA believes that the Settlement is in the public interest and that the proposed merger provides affirmative benefits which satisfy the standard under *City of York* as interpreted by the Commonwealth Court in the Verizon/MCI Decision. Therefore, the OSBA reiterates its support for the proposed Joint Petition for Settlement and respectfully requests that the ALJ and the Commission approve the Settlement in its entirety.

Respectfully submitted,

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