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July 19, 2010

Via E-Filing and First Class Mail

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

Re: Chet and Michele Duffy
v.
Pennsylvania Power Company, Docket No. C-2008-2063047

Dear Secretary Chiavetta:

Attached are the Replies to Exceptions of Pennsylvania Power Company to the Complaint of Chet and Michele Duffy in the above-captioned proceeding. Copies have been served in accordance with the attached Certificate of Service.

Very truly yours,



Matthew A. Totino

Enclosures

MAT:ck

c: Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

CHET AND MICHELE DUFFY	:	
	:	
v.	:	Docket No. C-2008-2063047
	:	
PENNSYLVANIA POWER COMPANY	:	

**REPLIES OF PENNSYLVANIA POWER COMPANY
TO THE EXCEPTIONS OF CHET AND MICHELE DUFFY**

I. Introduction

Administrative Law Judge (“ALJ”) Katrina L. Dunderdale issued an Initial Decision (“ID”) in this proceeding on June 17, 2010 dismissing the Formal Complaint of Chet and Michele Duffy filed at the above-captioned docket against Pennsylvania Power Company (“Penn Power” or “Company”). Exceptions to the ID were filed by Complainants. Pursuant to Section 5.533 of the Commission's regulations, Penn Power submits these Replies to the Exceptions filed by Complainants.

In sum, the crux of the above Complaint is that Penn Power has over charged Complainants for electric service rendered to them since the installation of a new transformer in August 2007. The ALJ properly dismissed the Complaint, based on substantial and credible record evidence that Complainant's usage was, in fact, justified. The Commission should not be duped by Complainants' attempt via their lengthy exceptions to distort the evidentiary record in this proceeding through a series of mischaracterizations of the evidence and/or criticisms of the ID that are not substantiated by the record. Complainants have resorted to these tactics because they cannot escape the reality that there is no credible evidence whatsoever to support that their electric bills are incorrect. Therefore, Complainants' Exceptions should be denied.

II. Replies to Exceptions

A. Complainants were afforded full and complete due process rights in the prosecution of their Complaint.

Complainants imply in their Exceptions that their due process rights were denied because the hearing in this matter was telephonic and because they were unable to admit into the record certain documentary evidence. Complainants raise the telephonic hearing issue for the first time in this case as part of their Exceptions. Nevertheless, the record clearly shows that Complainants were afforded a meaningful opportunity to be heard on their Complaint, which is what due process requires.¹ Penn Power notes that upon receiving notice that each of the two hearings was telephonic, nothing precluded Complainants from requesting an in-person hearing each time. On the evidentiary issue, ignorance of the law regarding the admissibility of evidence is no excuse,² and a party's ability to admit evidence into the record is not unlimited.³ Moreover, the ALJ has the authority to regulate the course of the proceeding and has the authority over the control and receipt of the evidence.⁴ Such authority includes the ability to exclude irrelevant, immaterial, or otherwise inadmissible evidence.⁵

¹ Due process requires that Complainants have a meaningful opportunity to be heard. *Cmwlth. v Thompson*, 444 Pa. 312, 316, 281 A.2d 856, 858 (1971). Pennsylvania courts have recognized that with regard to the opportunity to be heard, the "fundamental requirement of due process is the *opportunity* to be heard at a *meaningful* time and in a *meaningful* manner." *Cresco, Inc. v. Pa. Pub. Util. Comm'n*, 622 A.2d 997 (Pa. Cmwlth. 1993). Here, Complainants were given the opportunity to be heard at a meaningful time (during normal Commission business hours with advanced notice) and a meaningful manner (telephonic hearing with the same rights as existing at an in-person hearing).

² Penn Power's comment is in response to Complainants' allegation that no one ever told them that certain documents submitted to the Commission were not admissible.

³ *See, e.g.* Section 5.401 of the Commission's regulations, which calls for the exclusion of irrelevant and cumulative evidence.

⁴ 66 Pa. C.S. § 331(d); 52 Pa. Code §§ 5.403, 5.483.

⁵ Penn Power notes that throughout their Exceptions, Complainants reference documents, which they allege were either improperly excluded from the record or not given the proper evidentiary weight. Because Complainants do not specifically identify these documents, it is difficult for Penn Power to provide a meaningful response. Nevertheless, Penn Power submits that any documentation submitted by Complainants that was deemed inadmissible was properly excluded, while, the ALJ made the proper credibility determinations regarding the record evidence, including documentary evidence.

Complainants imply that the ALJ's decision was biased in that ordering Penn Power via an interim order to submit additional evidence regarding a consumption analysis, etc. was akin to helping the Company defend its case. However, Pennsylvania law is clear that Complainants have the burden of proof in this matter,⁶ and the record is clear that prior to the issuance of the ALJ's Third Interim Order directing the submission of the additional evidence, Penn Power was on record that Complainants had not met their burden of proof, based on the state of the record at that time.⁷ Thus, Penn Power was not requesting any "help" from the ALJ regarding any record issues. Rather, the ALJ was acting within her prescribed powers⁸ to address what she perceived was a shortcoming of the record that she attributed to both parties. As stated in the Third Interim Order, the ALJ directed the submission of the additional evidence related to consumption, etc. not to assist Penn Power in the defense of its case, but rather, to permit a complete record and a full and true disclosure of the facts.

In their Exceptions, Complainants allege that the ID was riddled with "bias" and "personal opinion," yet Complainants have failed to cite to any specific examples of bias or personal opinion in the substance of the decision. This is because they cannot, as no such bias or personal opinion exists. Rather, the ALJ conducted her functions in any impartial manner, as required by Section 331(c) of the Public Utility Code. Moreover, all findings of fact were supported by substantial record evidence,⁹ and no errors of law were committed with the application of the law to the facts.¹⁰

⁶ 66 Pa. C.S. § 332(a).

⁷ See, e.g., Penn Power Main Brief, pp. 4-14, which was filed in August 2009.

⁸ See 66 Pa. C.S. § 331(d); 52 Pa. Code §§ 5.403, 5.483, 5.571(d).

⁹ See F.F. Nos. 1-32.

¹⁰ See ID, pp. 9-14; C.L. Nos. 1-3.

B. Complainants' exception to the finding that they did not meet their burden of proof is contrary to the record evidence and should be denied.

1. Over billing

Complainants argue in their Complaint that Penn Power has been over billing them, beginning in 2007. In an attempt to support their allegation, Complainants cite to a 7% increase in electric usage, post-2007, as compared to their usage from 1992 to 2007. Complainants contend in their exceptions to several findings of fact that this increased usage, post-2007, was never explained. Complainants also disagree that they did not meet their burden of proof. However, the record is replete with substantial and credible evidence explaining the increased usage and that Complainant's electric usage, post-2007, was justified. This includes record evidence that the increased usage, post-2007, was due to Complainants' increased use of their barn and its water-heated concrete floor¹¹ and their use of a large residence with numerous electronically operated apparatus.¹² The record evidence also showed that Complainant's electric meter accurately recorded the electricity consumed by Complainant,¹³ while a Consumption Audit Report showed that Complainants had the potential for the usage that was registering on the meter.¹⁴ Evidence was also provided that the transformer serving Complainants serves only Complainants and that there were no ground problems with the transformer. Thus, the Company confirmed that there was no foreign load on or ground problems with the transformer.¹⁵

¹¹ ID, pp. 5-6, 11, citing Tr. 64, 65, 92, 94, 97, 98, 99, 102-103, 163, 164-166..

¹² ID, pp. 5-6, 7, citing Tr.. 25, 64, 65, 69, 70, 90, 91, 92, 95, 97, 163, 231, 234, 238-247; Complainants' Exhibit 18; Penn Power Exhibit 11.

¹³ ID, pp. 6, 13, citing Tr. 147, 148; Penn Power Exhibit 1.

¹⁴ ID, pp. 8, 12, citing Tr. 223; Penn Power Exhibit 11.

¹⁵ ID, pp. 8, 12, citing Tr. 213, 214, 222; Penn Power Exhibits 10 and 11. Incidentally, Complainants raise the issue of the allegedly broken ground wire for the first time in this case as part of their Exceptions. As extra-record evidence, it should not be considered. *Application of Apollo Gas Company*, 1994 Pa. PUC LEXIS 45. In any event, upon being contacted by Complainants about the ground wire, Penn Power deployed personnel immediately to investigate and if need be, correct any problem. Upon investigation, Penn Power found and repaired a broken ground wire. However, the condition of the ground wire in no way affected Complainants power quality or consumption.

Specifically, Complainants except to numerous findings of fact related to their barn, including the findings regarding the usage of the barn and the barn heat. According to Complainants, the barn heat is utilized on an as-needed basis only, and they have been using the barn consistently since being built in 2001. However, as a fact-finder, the ALJ weighed the credibility of the evidence and properly concluded, based on other, more credible evidence, that Complainants' testimony about the frequency with which they use the barn, post-2007, and their barn heat was not credible. That other, more credible evidence included Penn Power testimony that concrete floor heating works best if allowed to remain on for extended periods of time¹⁶ and Complainants own testimony that they spent considerable time and money to install a heating system and insulate a 3,600 square foot barn, which was completed in 2007.¹⁷ The ALJ properly reasoned that one would not reasonably under take such measures if one intended to utilize the barn and the barn heat on an infrequent basis. In sum, the record is clear that the increase in Complainants' usage in December 2007 coincided with the winter months when Complainants used their barn and barn heat with more frequency.

Complainants also except to the ID for failing to accept a cause and effect between the installation of a new transformer serving them and the increase in Complainants' electric bills, post-2007. However, the ALJ properly concluded that any such cause and effect is not supported by the record evidence. For example, if Complainants' "cause and effect" theory were correct, then their electric bills should have begun to increase following the installation of the new transformer in August 2007.¹⁸ However, as the record evidence shows, the increase did not begin to occur until December 2007, which, as the ALJ properly acknowledged, coincides with

¹⁶ Tr. 163-164.

¹⁷ Tr. 65, 94.

¹⁸ Tr. 25, 26, 141-143, 237.

the winter months when Complainants used their barn, including the heat, with greater frequency.

In their Exceptions, Complainants also allege that the ID omits certain facts related to their heating and cooling systems, like the fact that it was Penn Power that sized the heating and cooling systems. As a result, Complainants contend that any billing inefficiencies caused by any under sizing of these systems are Penn Power's responsibility. However, as stated at pages 5-6 of Penn Power's reply brief, there is absolutely no evidence in the record to support that Penn Power was involved in any way with the sizing of the heating and cooling systems. In an attempt to support their erroneous conclusion, Complainants cite to what they characterize as a consumption audit report from 1992/1993 that was not admitted into the record. As extra-record evidence, it should be disregarded.¹⁹ In any event, this document was not a consumption audit and does not support that Penn Power played any role in the selection of Complainants' heating and cooling systems. Rather, the document in question represents the Company's estimates of the consumption level and costs of the proposed heating and cooling systems, based upon certain assumptions made at the time.

Complainants in their Exceptions also take issue with Penn Power's Exhibit 11, which is the Consumption Audit Report, characterizing it as "self-serving" and hence, biased. Thus, Complainants implicitly question the credibility of the report, which was directed to be submitted by the ALJ. But, Complainants conveniently omit from the discussion that the Company in preparing the report followed the guidelines of the Electric Power Research Institute, an independent, non-profit institute. Complainants also omit from the discussion that the estimated usage in the Consumption Audit Report is in line with the Federal Energy Guide usage estimates provided by Complainants themselves. As a report that was prepared in accordance with

¹⁹ *Application of Apollo Gas Company*, 1994 Pa. PUC LEXIS 45.

industry guidelines and that contains conclusions about usage estimates in line with other, 3rd-party sources, the report is clearly credible.

2. Inadequate Power Supply

Complainants argue in their Exceptions that their power supply is inadequate. To support this erroneous conclusion, they cite to what they characterize as "hundreds" of sag events reported by Penn Power. This characterization is inaccurate. The clear and uncontroverted record evidence shows that in June 2008 and February 2009, Penn Power installed socket recorders at the Service Location to monitor voltage, amperage power quality, and consumption for 1-week periods each time.²⁰ During each test period, two sag events resulting in a momentary dip in voltage were recorded, not hundreds as claimed by Complainant.²¹ Even more significant are the overall tests results, which, on both occasions, verified that good voltage was entering the home.

III. Conclusion

THEREFORE, in accordance with these Replies, Pennsylvania Power Company recommends that the Commission deny the Exceptions of Chet and Michele Duffy to the Initial Decision issued at the above-captioned docket.

Respectfully submitted,



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Date: July 19, 2010

Attorneys for Pennsylvania Power Company

²⁰ Tr. 136, 137, 143, 147.

²¹ Tr. 184-186, 201; Penn Power Exhibit 2.

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

CHET AND MICHELE DUFFY

v.

PENNSYLVANIA POWER COMPANY

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Docket No. C-2008-2063047

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document(s) of Pennsylvania Power Company upon the individuals listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

Service by First Class Mail, postage prepaid, addressed as follows:

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135 Liberty Road
Harmony, Pennsylvania 16037

Bradley A. Bingaman, Esquire
Pennsylvania Electric Company
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P.O. Box 16001
Reading, Pennsylvania 19612-6001

Dated: July 19, 2010



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