

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

PR BEAVER VALLEY LIMITED PARTNERSHIP,

Complaint Docket

Complainant

No. C-2010-2192141

vs.

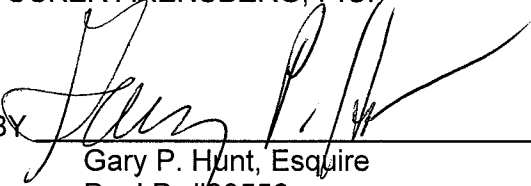
DUQUESNE LIGHT COMPANY,

Respondent

MOTION FOR LEAVE TO FILE AMENDED RESPONSE TO COMPLAINT

1. This matter was commenced by the filing of a Complaint on August 5, 2010.
2. Duquesne Light Company filed its response to the Complaint on September 14, 2010.
3. Since that date, in performing legal research on issues related to these proceedings, Duquesne Light Company found a line of cases that appears to hold that with respect to contractual relationships such as that at issue in this case, the tariff in effect at the time of the events that create a dispute governs the relationship of the parties, rather than the tariff in effect at the time of the formation of the contract.
4. To the extent those cases do hold as indicated above, they may have an impact on the issues before the Court.
5. Therefore, Respondent, Duquesne Light Company, wishes to file an Amended Response to the Complaint in order to raise these issues. A true and correct copy of the Amended Response to the Complaint is attached hereto as Appendix "A".

TUCKER ARENSBERG, P.C.

BY 

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APPENDIX A

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

PR BEAVER VALLEY LIMITED PARTNERSHIP,

Complainant

Complaint Docket

vs.

No. C-2010-2192141

DUQUESNE LIGHT COMPANY,

Respondent.

RESPONDENT'S AMENDED RESPONSE TO COMPLAINT

AND NOW COMES Respondent, Duquesne Light Company ("Duquesne Light"), by and through its attorneys, and files the within Response to Complaint, as follows:

1. Paragraph 1 of the Complaint consists of Complainant's interpretation of the 1969 Agreement, the application of Duquesne Light's tariff as it applies to that Agreement, and legal argument, and is therefore denied. Further, Complainant misstates the issue by positing the issue as ". . . whether an October 1, 1969 tariff . . . or the tariff then in effect as of the date of the Agreement applies to this dispute." Under recently discovered case law, it appears that tariffs in effect in 1969 do not govern a dispute arising in 2007. See, e.g., Bell Telephone Company of Pennsylvania v. Pennsylvania Public Utility Commission, 53 Pa. Commw. 241 (1980). Rather, the current tariffs should govern this matter. Rule 34 of Duquesne Light's current tariff provides "The Company may terminate electric service and remove its equipment from the premises in case the Company's property on the premises has been interfered with, or in case evidence is found that the service wires, meters, switch-box or other appurtenances on the premises have been tampered with." In ruling on this case, the Pennsylvania Superior Court concluded that "The interpretation of the tariff is relevant to the issue of whether Appellee can terminate the Agreement." It went on to state, "the issue regarding the tariff should be decided by the PUC, an issue over which it has primary jurisdiction." Under this ruling, and under the well-established doctrine of primary

jurisdiction, the PUC is to determine the effect of and proper application of the current and/or historical tariffs on the right of Duquesne Light to terminate the 1969 Agreement. Moreover the PUC is the proper entity to determine whether Duquesne Light's ownership of the secondary lines operates as an unreasonable preference given that current tariffs do not provide for Duquesne Light ownership and maintenance of secondary lines. Only after these determinations are made is the case to be remanded to the Court of Common Pleas for further proceedings consistent with the determination of the PUC. Finally, in Paragraph 1 of the Complaint, Complainant advances additional legal arguments regarding evidentiary issues regarding the tariff, which is a public document to which Complainant has the same access as Duquesne Light.

2. Duquesne Light admits that Complainant filed a Declaratory Judgment Action in the Court of Common Pleas of Beaver County. The pleadings in that case speak for themselves, and therefore any attempt to interpret or paraphrase the pleadings is denied.

3. Duquesne Light admits that Complainant filed a Declaratory Judgment Action in the Court of Common Pleas of Beaver County. The pleadings in that case speak for themselves, and therefore any attempt to interpret or paraphrase the pleadings is denied.

4. Duquesne Light admits that it filed Preliminary Objections in the proceedings before the Court of Common Pleas, asserting that under the Primary Jurisdiction Doctrine, the PUC should determine the effect of the application of the Duquesne Light tariff on the 1969 Agreement. By way of further response it is averred that whether the 1969 tariff or more recent tariffs apply, the PUC has primary jurisdiction to determine the effect of applying the tariffs to the 1969 Agreement.

5. It is admitted that Complainant opposed the Preliminary Objections of Duquesne Light. The pleadings in that case speak for themselves, and therefore any attempt to interpret or paraphrase the pleadings is denied.

6. It is admitted that on May 2, 2008, the Court of Common Pleas of Beaver County entered an Order sustaining the Preliminary Objections. The Order speaks for itself and therefore any attempt to interpret or paraphrase the pleadings is denied.

7. Admitted.

8. It is admitted that on May 17, 2010, the Pennsylvania Superior Court issued an Opinion and Order. The Opinion and Order speaks for itself and any attempt to interpret or paraphrase the Opinion and Order is denied.

9. It is admitted that on May 18, 2010, the Court of Common Pleas of Beaver County issued an Order referring this case to the PUC. The Order speaks for itself and any attempt to interpret or paraphrase the Order is denied.

10. Duquesne Light is without knowledge or information as to the truth of the averments set forth in Paragraph 10 of the Complaint and demands proof thereof.

11. Duquesne Light denies the averments of Paragraph 11 of the Complaint for the following reasons. The issue before the PUC is which tariff applies to this matter, and the effect of that tariff on the subject Agreement. Finally, Duquesne Light's tariffs have always been publicly filed documents, and in that regard, are as available to the Complainant as they are to Duquesne Light. The evidentiary issue raised by the Complainant is without merit.

12. Duquesne Light responds to Paragraph 12 and its sub-parts as follows:

(a) It is admitted that Exhibit C to the Complaint is a true and correct copy of the 1969 Agreement. The Agreement referred to in Paragraph 12(a) speaks for itself and therefore any attempt to interpret or paraphrase its contents is denied. By way of further response it is averred that the 1969 Agreement was entered into subject to the understanding that it would be economically viable to provide service to the Beaver Valley Mall, and that the Beaver Valley Mall would continue to be all electric. Since the 1969 Agreement was entered into, many changes have been made to the service at the Beaver Valley Mall and it is no longer all electric.

(b) Duquesne Light is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 12(b) of the Complaint and demands proof thereof, if relevant.

(c) The 1969 Agreement referred to in Paragraph 12(c) speaks for itself and therefore any attempt to interpret or paraphrase its contents is denied.

(d) Duquesne Light is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 12(d) regarding the transfer of the secondary wiring, equipment and other facilities and/or rights of way for the primary and secondary lines to Duquesne Light and therefore demands proof thereof, if relevant. By way of further response it is averred that the 1969 Agreement was entered into subject to the understanding that it would be economically viable to provide service to the Beaver Valley Mall, and that the Beaver Valley Mall

would continue to be all electric. Since the 1969 Agreement was entered into, many changes have been made to the service at the Beaver Valley Mall and it is no longer all electric.

(e) The averments of Paragraph 12(e) are legal arguments and are therefore denied.

(f) Admitted. By way of further response it is averred that the 1969 Agreement was entered into subject to the understanding that it would be economically viable to provide service to the Beaver Valley Mall, and that the Beaver Valley Mall would continue to be all electric. Since the 1969 Agreement was entered into, many changes have been made to the service at the Beaver Valley Mall and it is no longer all electric.

(g) Duquesne Light admits the averment of Paragraph 12(g) that it sent the letter dated September 26, 2007. The letter speaks for itself and therefore the averments that constitute an attempt to interpret or paraphrase the letter are denied.

(h) Duquesne Light admits that it has the right to terminate the Agreement and that the applicable tariff(s), which are a part of the Agreement, permit the termination. By way of further response it is averred that the currently effective tariff makes no provision for the ownership or maintenance of the secondary lines. Furthermore, Duquesne Light also has the right to terminate the 1969 Agreement for various contractual and common law reasons, including the fact that the 1969 Agreement was entered into subject to the understanding that it would be economically viable to provide service to the Beaver Valley Mall, and that the Beaver Valley Mall would continue to be all electric. Since the 1969 Agreement was entered into, many changes have been made to the service at the Beaver Valley Mall and it is no longer all electric. Such issues are for the Court of Common Pleas, assuming that it is necessary to reach such issues after these proceedings.

(i) The averments of Paragraph 12(i) are legal argument and are therefore denied.

(j) It is admitted that Paragraph 12(j) accurately recites a portion of the Duquesne Light tariff from 1969. The implication that the single phrase quoted by the Complainant in Paragraph 12(j) is the sole basis for Duquesne Light's termination of the 1969 Agreement is legal argument and is therefore denied.

(k) The allegations of Paragraph 12(k) are denied as stated. It is admitted that in 1969 Duquesne Light determined, for the purpose of encouraging development, that it would enter into the 1969 Agreement, subject to the terms of its tariff. The averments of Complainant in Paragraph 12(k) are legal argument, and are therefore denied. By way of further response it is averred that the 1969 Agreement was entered into subject to the understanding that it would be economically viable to provide service to the Beaver Valley Mall, and that the Beaver Valley Mall would continue to be all electric. Since the 1969 Agreement was entered into, many changes have been made to the service at the Beaver Valley Mall and it is no longer all electric.

(l) It is admitted that Paragraph 12(l) accurately recites a portion of the 1969 Agreement. That Agreement, being a writing, speaks for itself, and therefore any attempt to interpret, paraphrase or remove from context any portions of the Agreement are denied.

(m) The averments of Paragraph 12(m) are legal argument and are therefore denied.

(n) The averments of Paragraph 12(n) are legal argument and are therefore denied.

(o) The averments of Paragraph 12(o) are legal argument and are therefore denied. By way of further response it is averred that the 1969 Agreement was entered into subject to the understanding that it would be economically viable to provide service to the Beaver Valley Mall, and that the Beaver Valley Mall would continue to be all electric. Since the 1969 Agreement was entered into, many changes have been made to the service at the Beaver Valley Mall and it is no longer all electric.

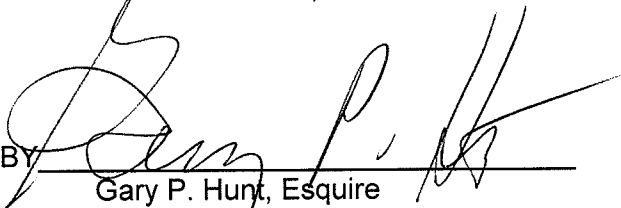
(p) The averments of Paragraph 12(p) are legal argument and are therefore denied. By way of further answer, the implication of this paragraph that the cost of maintenance of any electric system is not to be factored into the economic justification for providing service is without factual merit and is denied.

13. The averments of Paragraph 13 are legal arguments and are therefore denied. By way of further response it is averred that the tariffs are a part of the 1969 Agreement.

14. The averments of Paragraph 14 are legal arguments and are therefore denied. By way of further response, it is averred that the tariff was referred to in the 1969 Agreement and therefore is and was as available to Complainant as it was and is to Duquesne Light. Moreover, the current tariff, which is a part of the 1969 Agreement is a publicly filed document readily available to Complainant. Therefore, the evidentiary issue raised by Complainant is without merit. Furthermore, the tariffs have been provided to Complainant.

WHEREFORE, Duquesne Light respectfully requests that the PUC rule that the current tariffs give to Duquesne Light the right to terminate the 1969 Agreement.

TUCKER ARENSBERG, P.C.

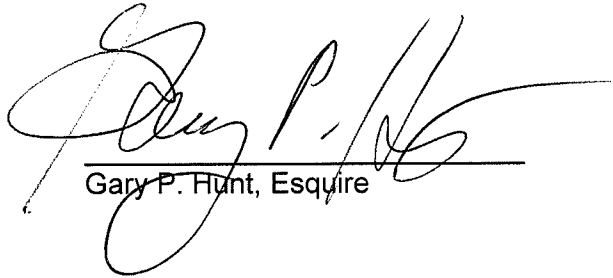
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Motion for Leave to File Amended Response to Complaint has been served upon counsel of record at the address set forth below via United States First Class Mail on the 12th day of November 2010:

Stephen S. Zubrow, Esquire
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Gary P. Hunt, Esquire

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ORDER

AND NOW, this _____ day of _____, 2010, upon consideration of the foregoing Motion for Leave to Amend Response to Complaint, it is hereby ORDERED, ADJUDGED AND DECREED that the same is GRANTED. Respondent shall have until the _____ day of _____, 201__ to file its Amended Response to the Complaint in the above-captioned case.

BY THE COURT:
