

COMMONWEALTH OF PENNSYLVANIA



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William R. Lloyd, Jr.  
Small Business Advocate

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December 22, 2010

**HAND DELIVERY**

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

**Re: Joint Application for All of the Authority and the Necessary Certificate(s) of Public Convenience to Transfer the Interests and Shares in DQE Holdings LLC, currently owned by DUET Investment Holdings Limited, to Epsom Investment Pte Ltd, a subsidiary of GIC Infra Holdings Pte Ltd, and to Approve the Resulting Change in Control of Duquesne Light Company Docket No. A-2010-2213369**

Dear Secretary Chiavetta:

I am delivering for filing today the original plus three copies of the Notice of Intervention and Protest, Verification, Public Statement, and Notice of Appearance, on behalf of the Office of Small Business Advocate, in the above-captioned proceeding.

Two copies have been served today on all known parties in this proceeding. A Certificate of Service to that effect is enclosed.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Sharon E. Webb  
Assistant Small Business Advocate  
Attorney ID No. 73995

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Enclosures  
cc: Parties of Record

Brian Kalcic

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Joint Application for All of the Authority :  
and the Necessary Certificate(s) of Public :  
Convenience to Transfer the Interests :  
and Shares in DQE Holdings LLC, :  
currently owned by DUET Investment : Docket No. A-2010-2213369  
Holdings Limited, to Epsom Investment :  
Pte Ltd, a subsidiary of GIC Infra :  
Holdings Pte Ltd, and to Approve the :  
Resulting Change in Control of :  
Duquesne Light Company :**

**OFFICE OF  
SMALL BUSINESS ADVOCATE  
NOTICE OF INTERVENTION AND PROTEST**

The Office of Small Business Advocate (“OSBA”) files this Notice of Intervention and Protest with respect to the above-captioned proceeding pursuant to Sections 5.51(a) and 5.71(a)(1) of the Rules of Practice and Procedure of the Pennsylvania Public Utility Commission (“Commission”), 52 Pa. Code §§5.51(a) and 5.71(a)(1), and pursuant to 40 Pa.B. 7319. In support of this Notice of Intervention and Protest, the OSBA avers as follows:

**I. Filing Background**

1. The OSBA is an agency of the Commonwealth authorized by the Small Business Advocate Act (Act 181 of 1988, 73 P.S. §§ 399.41 – 399.50) to represent the interest of small business customers as a party in proceedings before the Commission.

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2. Representing the OSBA in this proceeding is:

Sharon E. Webb  
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3. On December 2, 2010, a Joint Application was filed in the above captioned proceeding, seeking approval to transfer certain interests and shares in DQE Holdings LLC, thereby causing a change of control of the Duquesne Light Company (“Joint Application”). Joint Application, at ¶1.

4. Filing the Joint Application were Duquesne Light Company (“Duquesne Light”), Epsom Investment Pte Ltd (“Epsom”), and DUET Investment Holdings Limited (“DUET”) and Diversified Utility and Energy Trust No. 3 (“DUET3”) (collectively, the “Joint Applicants”). Joint Application, at ¶1.

5. Duquesne Light is a certificated electric distribution company (“EDC”) and a default service provider (“DSP”) in western Pennsylvania. Duquesne Light is wholly-owned by Duquesne Light Holdings, Inc. (“DLH”). Joint Application, at ¶¶7-8.

6. DQE Holdings, LLC (“DQE”) is the owner of DLH. Joint Application, at ¶9. DQE was formed by a group of six investment entities (“Investor Consortium”) to acquire DLH. Joint Application, at ¶10.

7. DUET is an Australian corporation and a member of the Investor Consortium. DUET is the largest individual shareholder in DQE, with a 28.95% Class A ownership interest. In addition, its affiliate, DUET3, owns rights as a lender to DQE under a \$201,227,372 promissory note. Joint Application, at ¶¶ 10 and 12.

8. The Macquarie Group (“Macquarie”) directly or indirectly manages the majority of investment funds of the Investor Consortium, including DUET. Collectively, the investment funds managed by Macquarie own 64.3% of the equity interest in DQE. Joint Application, at ¶11.

9. The Government of Singapore Investment Corporation Pte Ltd (“GIC”) is wholly-owned by the Government of Singapore and manages funds on behalf of the Government of Singapore. Joint Application, at ¶13.

10. GIC Special Investments Pte Ltd (“GIC SI”) is the infrastructure and private equity investment arm of GIC. Joint Application, at ¶15. GIC SI invests in private equity and infrastructure assets through GIC Ventures, which is an investment holding company owned by Minister of Finance (Incorporated) (“MOF”). MOF was created by statute to own and administer assets of the Government of Singapore. Joint Application, at ¶¶15-16. In turn, GIC Ventures owns GIC Infra Holdings Pte Ltd (“GIC Infra”), which is a holding company for infrastructure investments. GIC Infra owns Epsom Investment Pte Ltd (“Epsom”), which is one of the Joint Applicants. Joint Application, at ¶16.

11. Epsom would acquire DUET’s 28.95% equity interest in DQE. In addition, DUET<sup>3</sup> would transfer the aforementioned \$201,227,372 promissory note to Epsom. Joint Application, at ¶¶19-20. As a result, the Government of Singapore would become the indirect owner of the largest individual equity interest in Duquesne Light.

12. Because of the transfer of DUET’s equity interest to Epsom, the Macquarie Group would no longer manage investment funds owning a majority of the equity interest in DQE and, indirectly, in Duquesne Light. Specifically, the Macquarie

Group would manage investment funds owning only 35.39% of the equity interest in DQE and, indirectly, in Duquesne Light. Joint Application, at ¶11.

## II. Legal Requirements

### A. General Standard

13. Section 1102(a) of the Public Utility Code, 66 Pa. C.S. § 1102(a), requires that the Commission issue a certificate of public convenience as a legal prerequisite for the transfer or acquisition of certain property. The statute provides, in pertinent part, as follows:

(a) Upon the application of any public utility and the approval of such application by the commission, evidenced by its certificate of public convenience first had and obtained, and upon compliance with existing laws, it shall be lawful:

\* \* \*

(3) For any public utility or an affiliated interest of a public utility as defined in section 2101 ... to acquire from, or to transfer to, any person or corporation, including a municipal corporation, by any method or device whatsoever, including the sale or transfer of stock and including a consolidation, merger, sale or lease, the title to, or the possession or use of, any tangible or intangible property used or useful in the public service....

14. Section 1103(a) of the Public Utility Code, 66 Pa. C.S. § 1103(a), provides the statutory standard for granting a certificate of public convenience, as follows:

A certificate of public convenience shall be granted by order of the commission, only if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public.

15. In *City of York*, the Pennsylvania Supreme Court provided the legal standard for granting a certificate of public convenience under Section 1103(a) in public utility merger and acquisition cases. Specifically, the Supreme Court stated:

[A] certificate of public convenience approving a merger is not to be granted unless the Commission is able to find affirmatively that public benefit will result from the merger .... [T]hose seeking approval of a utility merger [are required to] demonstrate more than the mere absence of any adverse effect upon the public .... [T]he proponents of a merger [are required to] demonstrate that the merger will affirmatively promote the ‘service, accommodation, convenience, or safety of the public’ in some substantial way.

*City of York v. Pennsylvania Public Utility Commission*, 449 Pa. 136, 141, 295 A.2d 825, 828 (Pa. 1972).<sup>1</sup>

16. Under Section 1103(a), “[t]he commission, in granting such certificate [of public convenience], may impose such conditions as it may deem to be just and reasonable.” Consistent with Section 1103(a), the Commission has held that “[i]n order to ensure that a proposed merger is in the ‘public interest,’ the Commission may impose conditions on its granting of the certificate of public convenience.” *Joint Application for Approval of the Merger of GPU, Inc. with FirstEnergy Corp.*, Docket No. A-110300F0095, 2001 Pa. PUC Lexis 23 (Order entered June 20, 2001). Consequently, by imposing conditions pursuant to Section 1103(a), the Commission may approve a transaction which would not meet the *City of York* standard without those conditions.

17. The Pennsylvania Supreme Court applied Section 1103(a) in deciding the appeal of the Commission’s decision regarding the Verizon/MCI merger. *Popowsky v.*

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<sup>1</sup> Although *City of York* involved a merger, its holding is also applicable to an acquisition or other form in which control is transferred. Section 1102(a)(3), which imposes the certificate of public convenience requirement, makes no distinction based on whether property is acquired by the “sale or transfer of stock,” a “consolidation,” a “merger,” a “sale,” or a “lease.”

*Pennsylvania Public Utility Commission*, 594 Pa. 583, 937 A.2d 1040 (Pa. 2007). The Supreme Court ruled that “while in some circumstances conditions may be necessary to satisfy the Commission that public benefit sufficient to meet the requirement of Section 1103(a) will ensue, even where the PUC finds benefit in the first instance, Section 1103(a) also confers discretion upon the agency to impose conditions which it deems to be just and reasonable.”<sup>2</sup>

18. Through its ruling in *Popowsky*, the Court provided further guidance on the evidentiary findings the Commission is required to make before approving a merger or acquisition. Specifically, the Court opined that:

the appropriate legal framework requires a reviewing court to determine whether substantial evidence supports the Commission’s finding that a merger will affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way. In conducting the underlying inquiry, the Commission is not required to secure legally binding commitments or to quantify benefits where this may be impractical, burdensome, or impossible; rather, the PUC properly applies a preponderance of the evidence standard to make factually-based determinations (including predictive ones informed by expert judgment) concerning certification matters.<sup>3</sup>

In other words, the applicants are required to prove the likelihood of “substantial” affirmative public benefits and to do so by a preponderance of the evidence.

19. In both *City of York* and *Popowsky*, the Supreme Court simply concluded that there was substantial evidence to support the Commission’s finding that the proposed transaction would provide affirmative public benefits. The Supreme Court did not hold that it would have been error if the Commission had found that the benefits were proven

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<sup>2</sup> *Popowsky*, 937 A.2d at 1057.

<sup>3</sup> *Popowsky*, 937 A.2d at 1057.

by a preponderance of the evidence but that the transaction should be denied because those benefits were not “substantial.” In other words, even if the Commission finds (by a preponderance of the evidence) that a transaction would yield affirmative public benefits, the Commission is not permitted to approve that transaction unless it finds that the benefits would be *substantial*.

20. Moreover, the Supreme Court emphasized in *Popowsky* that the Commission is required to weigh the detriments of a transaction against the transaction’s affirmative benefits, in order to determine if the merger would produce *net* public benefits. Specifically, the Supreme Court stated as follows:

We also differ with the OCA’s suggestion that the PUC’s analysis of the effect of the Verizon /MCI merger on competition is immaterial to its assessment of public benefit. In line with the DOJ and FCC assessments, competitive impact is a substantial component of a rational net public benefits evaluation in the merger context. That the ultimate determination may be that the impact is modest, minimal, or non-existent does not negate the necessity of undertaking the examination in the first instance or remove the factor from the weighing and balancing process. Significantly, in terms of the net public benefits arising out of corporate consolidation, anticompetitive effects may offset or negate advantages and result in a denial of regulatory approval. Indeed, it is for this very reason that large merger transactions are so highly regulated.<sup>4</sup>

21. Consistent with the “net” benefits test, the Commission has recognized that a change of control has both benefits and detriments which must be balanced as part of the process for determining whether the transaction should be approved. For example, in a recent merger proceeding, the Commission specifically stated:

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<sup>4</sup> *Popowsky v. Pennsylvania Public Utility Commission*, 594 Pa. at 610-611, 937 A.2d at 1056-1057 (Pa. 2007).

The proposed transaction, like all transactions that are presented for our approval, has advantages and disadvantages. On balance, we find the advantages outweigh the disadvantages.<sup>5</sup>

**B. Special Standard**

22. In addition to the standards governing the review of all proposed changes of control, there are special statutory requirements applicable to reviewing such a transaction in the electric industry.

23. Specifically, Section 2811(e)(1) of the Public Utility Code, 66 Pa. C.S. §2811(e)(1), imposes a duty on the Commission regarding “anticompetitive” conduct and “the unlawful exercise of market power,” as follows:

In the exercise of authority the commission otherwise may have to approve the mergers or consolidations by electric utilities or electricity suppliers, or the acquisition or disposition of assets or securities of other public utilities or electricity suppliers, the commission shall consider whether the proposed merger, consolidation, acquisition or disposition is likely to result in anticompetitive or discriminatory conduct, including the unlawful exercise of market power, which will prevent retail electricity customers in this Commonwealth from obtaining the benefits of a properly functioning and workable competitive retail electricity market.

24. In addition, Section 2811(e)(2) provides in pertinent part, as follows:

... If the commission finds, after hearing, that a proposed merger, consolidation, acquisition or disposition is likely to result in anticompetitive or discriminatory conduct, including the unlawful exercise of market power, which will prevent retail electricity customers in this Commonwealth from obtaining the benefits of a properly functioning and workable competitive retail electricity market, the commission shall not approve such proposed merger, consolidation, acquisition or disposition, except upon such terms and conditions as it finds necessary to

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<sup>5</sup> *Joint Application of The United Telephone Company of Pennsylvania LLC d/b/a Embarq Pennsylvania and Embarq Communications, Inc. for Approval of the Indirect Transfer of Control to CenturyTel, Inc.*, Docket No. A-2008-2076038 (Order entered May 2, 2010) at 22.

preserve the benefits of a properly functioning and workable competitive retail electricity market.

### **III. Issues of Concern**

25. Although the OSBA may ultimately pursue additional issues, a preliminary review has identified two issues of substantial concern which would justify rejection of the Joint Application unless appropriate conditions were added to the certificate of public convenience. First, approval and implementation of the proposed transaction would make a foreign government the *de facto* owner of the largest equity interest in DQE, thereby effectively making that foreign government the largest individual equity owner of Duquesne Light. Second, Macquarie would no longer be managing the investments of the owners of a majority of the equity in DQE, which could lead to changes in the philosophy under which Duquesne Light has been operating.

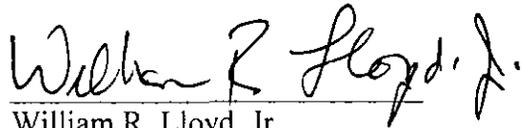
26. In view of the highly-publicized financial crises facing numerous foreign governments, the Commission should not approve the Joint Application without a thorough review of the impact on ratepayers of effectively making the Government of Singapore the largest single equity investor in Duquesne Light. First, it is possible that any financial crisis confronting the Government of Singapore could expose Epsom's ownership interest in DQE to creditors of the Government of Singapore. Second, it is possible that Epsom's response to such a financial crisis would be to seek larger dividends from Duquesne Light or to encumber the assets of Duquesne Light, thereby indirectly providing revenues to the Government of Singapore or its creditors that would otherwise be available to maintain quality distribution service. Third, Macquarie's ability to restrain any effort by Epsom to obtain higher dividends or encumber the assets of

Duquesne Light would be significantly undercut by the fact that Macquarie would manage the investments of the owners of less than 40% of the equity in DQE.

**WHEREFORE**, for the reasons set forth above, the OSBA respectfully requests that the Commission conduct a full investigation, including evidentiary hearings, regarding the Joint Application. Upon completion of that investigation, the OSBA further requests that the Commission:

1. Reject the Joint Application and deny the issuance of a certificate of public convenience; or, in the alternative,
2. Approve the Joint Application and issue a certificate of public convenience with conditions that resolve the concerns raised by the OSBA in this Notice of Intervention and Protest and any additional concerns raised by the OSBA during the Commission's investigation.

Respectfully submitted,



William R. Lloyd, Jr.  
Small Business Advocate  
PA Attorney I.D. No. 16452

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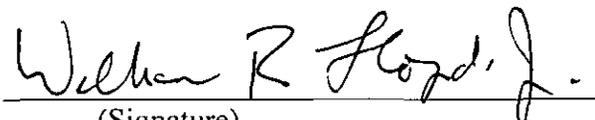
Dated: December 22, 2010

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**VERIFICATION**

I, William R. Lloyd, Jr., hereby state that the facts set forth herein above are true and correct to the best of my knowledge, information and belief and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. §4904 (relating to unsworn falsification to authorities).

Date: December 22, 2010

  
(Signature)

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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Joint Application for All of the Authority :  
and the Necessary Certificate(s) of Public :  
Convenience to Transfer the Interests :  
and Shares in DQE Holdings LLC, :  
currently owned by DUET Investment : Docket No. A-2010-2213369  
Holdings Limited, to Epsom Investment :  
Pte Ltd, a subsidiary of GIC Infra :  
Holdings Pte Ltd, and to Approve the :  
Resulting Change in Control of :  
Duquesne Light Company :**

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**PUBLIC STATEMENT  
OF THE OFFICE OF  
SMALL BUSINESS ADVOCATE**

The Small Business Advocate is authorized and directed to represent the interest of small business consumers of utility services in Pennsylvania under the provisions of the Small Business Advocate Act, Act 181 of 1988, 73 P.S. §§ 399.41 - 399.50 (the "Act"). The Act further provides that the Small Business Advocate is to issue publicly a written statement stating concisely the specific interest of small business consumers to be protected by his initiation of or intervention in any proceeding involving those interests before the Pennsylvania Public Utility Commission ("Commission") or any other agency or court.

This public statement relates to the filing today by the Small Business Advocate of a Notice of Intervention and Protest in the above-captioned proceeding that was initiated by Duquesne Light Company ("Duquesne Light"), Epsom Investment Pte Ltd ("Epsom"), and DUET Investment Holdings Limited ("DUET") and Diversified Utility and Energy Trust No. 3 ("DUET3") (collectively, the "Joint Applicants"). The Joint

Applicants are seeking approval to transfer certain interests and shares in DQE Holdings LLC, thereby causing a change of control of the Duquesne Light Company.

The Small Business Advocate is filing a Notice of Intervention and Protest in order to assure that the proposed sales does not unreasonably impact the rates paid, or the service received, by the Company's small commercial and industrial customers.

Dated: December 22, 2010

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Joint Application for All of the Authority  
and the Necessary Certificates of Public  
Convenience to Transfer the Interests and  
Shares in DQE Holdings LLC, currently  
owned by DUET Investment Holdings  
Limited, to Epsom Investment Pte Ltd,  
a subsidiary of GIC Infra Holdings Pte Ltd,  
and to Approve the Resulting Change in  
Control of Duquesne Light Company** :

Docket No. A-2010-2213369

**CERTIFICATE OF SERVICE**

I certify that I am serving two copies of the Notice of Intervention and Protest, Verification, Public Statement, and Notice of Appearance, on behalf of the Office of Small Business Advocate, by e-mail and first class mail (unless otherwise noted) upon the persons addressed below:

Hon. Charles E. Rainey, Jr.  
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*Sharon E. Webb*  
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Sharon E. Webb  
Assistant Small Business Advocate  
Attorney ID No. 73995

Date: December 22, 2010