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February 13, 2012

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Secretary's Bureau
P.O. Box 3265
Harrisburg, PA 17105-3265

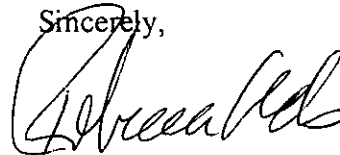
RE: Robert Wagner v. Duquesne Light
Docket No. C-2011-2247887

Dear Secretary Chiavetta:

Enclosed for filing please find Robert Wagner's Response to Respondent's Motion to Compel Discovery in the above-referenced matter. A copy of this document has been served upon Respondent's counsel in accordance with Commission regulations.

Thank you for your attention to this matter.

Sincerely,



Rebecca A. Olds

RAO/
Enclosures
cc: Krysia Kubiak, Esquire
Administrative Law Judge Mark Hoyer
Robert Wagner

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Before the
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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SECRETARY'S BUREAU

ROBERT WAGNER,)
)
 Complainant,)
)
 v.)
)
 DUQUESNE LIGHT COMPANY,)
)
 Respondent.)

Docket No. C-2011-2247887

**COMPLAINANT ROBERT WAGNER'S RESPONSE
TO RESPONDENT'S MOTION TO COMPEL DISCOVERY**

Complainant, Robert Wagner, by and through his attorneys, Rebecca A. Olds, and Edward A Olds makes the following response to Respondent, Duquesne Light's Motion to Compel Discovery:


1. The Respondent has requested the names of the tenants currently residing at 1706 Marmaduke St. in its Motion to Compel Discovery. After the Respondent's Motion was filed, Mr. Wagner provided the name and a copy of the lease of the tenant living in one of the apartments at the property.
2. The identity of the current tenants is irrelevant to the issue before this tribunal, which is the reasonableness of Duquesne Light not billing for service for over four and one half years. Mr. Wagner has resisted providing the names of the current tenants residing in the two remaining apartments because there is no written lease agreement between Mr. Wagner and those tenants and they have no information relevant to this proceeding. Mr. Wagner fears that if he provides the names of those tenants, and the

Respondent contacts them they might choose to move or discontinue making rental payments because of the current dispute.

3. There is not a written lease agreement between the two remaining tenants and Mr. Wagner. The month-to-month payment arrangement which governs the relationship does not require them to pay for electric service, and Mr. Wagner is currently paying such services.
4. Disclosure of their identity would impose an unreasonable burden and expense pursuant to 52 Pa. Code §5.361 on Mr. Wagner. Knowledge of the dispute might jeopardize the relationship between Mr. Wagner and his tenants.
5. These tenants would also have no knowledge or information about the reasonableness of notice as it relates to the quality of service provided by Duquesne Light to Mr. Wagner, which is the sole subject of this proceeding.
(See Order Granting in Part and Denying in Part Preliminary Objections)

WHEREFORE, Mr. Wagner requests this Commission deny the Respondent's Motion to Compel Discovery regarding the identity of the two remaining tenants.

Respectfully Submitted,


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Counsel for the Claimant

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Robert Wagner

v.

Duquesne Light Company

:
:
:
:
:

C-2011-2247887

ORDER GRANTING IN PART AND
DENYING IN PART PRELIMINARY OBJECTIONS

Before
Administrative Law Judge
Dennis J. Buckley

This Order grants in part and denies in part Preliminary Objections that Duquesne Light Company (Duquesne or Respondent) filed with the Pennsylvania Public Utility Commission (Commission) on July 12, 2011 in response to the formal Complaint of Robert Wagner (Complainant).¹ The Preliminary Objections object to Commission consideration of the Complaint on the basis of lack of capacity to sue and the application of the doctrine of *res judicata* and the principles of collateral estoppel (the latter being a doctrine of issue preclusion). However, and as explained below, this Order does not dispose of the remaining quality of service issue raised in the formal Complaint, and that issue will be set for hearing.

HISTORY OF THE PROCEEDING

This case had its origin in a formal Complaint filed by the Complainant on June 6, 2011. In that Complaint, Mr. Wagner alleged that from 2008 through 2011, Duquesne failed to

¹ The Complaint is an appeal of a determination in Bureau of Consumer Services (BCS) Case No. 2823621. That informal Complaint was closed by the BCS under the provision of 66 Pa. C.S. § 1410.1, failure by the Complainant to first contact the utility with respect to his complaint.

provide him with any notice of overdue bills being accrued at 1706 Marmaduke Street, Pittsburgh, Pennsylvania. Complainant asserts that the property at 1706 Marmaduke Street, Pittsburgh, Pennsylvania is a rental property, and that he was unaware that his tenants were not paying their electric bills until Duquesne contacted him in January, 2011, with a demand for over \$20,000 in delinquent payments. On the basis of this claimed lack of notice, the Complainant also challenges the appropriateness and legality of Duquesne taking him to court for the appointment of a receiver, about which more will be explained, below. Complainant asks to be relieved of responsibility for paying the delinquent payments.²

On July 12, 2011, Duquesne filed an Answer and Preliminary Objections to the Complaint, properly endorsed with a Notice to Plead.

On August 10, 2011, the Complainant filed an Answer to the Preliminary Objections reiterating, in more detail, the arguments set forth in his original Complaint.³

This case was assigned to me as a Motion Judge on July 27, 2011, and is ready for decision.

² The Complainant has called the Office of Administrative Law Judge several times about the status of his Complaint. On one occasion, when his call was put through to me, I declined to discuss the merits of the Complaint with the Complainant.

³ The Answer to the Respondent's Preliminary Objections was not timely filed in compliance with 52 Pa. Code § 5.61(a)(2), but as the Complainant is a *pro se* litigant I will apply the Commission's procedural rule at 52 Pa. Code § 1.2(a) which allows a presiding officer to disregard an error or defect of procedure which does not affect the substantive rights of the parties.

FINDINGS OF FACT

1. The Complainant in this case is Robert Wagner who is the owner of the rental property at 1706 Marmaduke Street, Pittsburgh, Pennsylvania.⁴
2. The Respondent in this case is Duquesne Light Company which provides electric service to 1706 Marmaduke Street, Pittsburgh, Pennsylvania.
3. The monthly bills for the provision of electric service at 1706 Marmaduke Street, Pittsburgh, Pennsylvania, were sent to that address.
4. The fact that payment is owed to the Respondent for the provision of electric service at 1706 Marmaduke Street, Pittsburgh, Pennsylvania, is not in dispute in this proceeding.
5. Duquesne Light Company brought suit against the Complainant in the Court of Common Pleas of Allegheny County and, on June 9, 2011, obtained a Court Order pursuant to 66 Pa.C.S. § 1533, which Order appointed a receiver to recover utility costs related to the provision of electric utility service to 1706 Marmaduke Street, Pittsburgh, Pennsylvania. Preliminary Objections, Exhibit 2.

DISCUSSION

In this somewhat atypical case, a utility has employed 66 Pa. C.S. § 1533 to have a receiver appointed by a Court of Common Pleas to collect money owed for electric service provided at a rental property. The utility's right to use this provision of the Pennsylvania Public Utility Code (Code) is not at issue in this case, and the Complainant unquestionably received proper notice of that civil proceeding. In his Complaint, filed with the Commission at a time near the end of that civil litigation, the Complainant claimed that he is aggrieved because he was never informed by Duquesne that he owed Duquesne over \$20,000 in unpaid utility bills accumulated for a period of at

⁴ I note that while Mr. Wagner is the owner of the property in question, he resides at 1490 Wood Avenue, Glenshaw, Pennsylvania.

least four (and perhaps as long as six) years for electricity service provided by Duquesne to the rental property owned by the Complainant. The Complainant admits that the bills were sent to the rental property at 1706 Marmaduke Street, Pittsburgh, Pennsylvania, but claims that he thought that the tenants were paying the bills. The Complainant further asserts that the Respondent never informed him that the bills were not being paid until the Respondent contacted him for the first time in January 2011, when Respondent instituted proceedings in the Allegheny County Court of Common Pleas to have the property placed in receivership.⁵ Complainant also contends that the property at 1706 Marmaduke Street, Pittsburgh, Pennsylvania, has two separate meters, one for each apartment.⁶

In its Answer to the Complaint, Duquesne denies that it failed to contact the Complainant about the overdue account, stating that monthly utility bills were mailed to the Complainant at the 1706 Marmaduke Street, Pittsburgh, Pennsylvania, address for the past four years, which is the address that Duquesne claims that the Complainant provided. Answer at 4A.

In its Preliminary Objections and in its Petition to Appoint Receiver, Duquesne contends that electric service at the 1706 Marmaduke Street, Pittsburgh, Pennsylvania, address was established in Complainant's name in October, 1972, and is not individually metered. Duquesne further contends in its Preliminary Objections that the Complainant never called to terminate service at the address, which would have allowed Duquesne to offer the tenants an opportunity to receive uninterrupted service in their names pursuant to 66 Pa. C.S. § 1521 *et seq.* Preliminary Objections at 2; ¶¶ 3, 5-6. Therefore, Duquesne continued service to the tenants. Preliminary Objections at 2; ¶ 8. Duquesne goes on to assert that the Complainant lacks the capacity to bring suit because the property at 1706 Marmaduke Street, Pittsburgh, Pennsylvania, has already been the subject of the adjudicated Petition to Appoint Receiver filed on January 21, 2011, in the Court of Common Pleas

⁵ With the property in receivership, the Complainant is enjoined from collecting any rents from his tenants while the receivership remains in place.

⁶ The Allegheny County Court of Common Pleas appears to have accepted Duquesne's assertion that the property has only one meter, which is a prerequisite for the appointment of a receiver under 66 Pa. C.S. § 1533.

of Allegheny County.⁷ Also, because Judge Christine Ward of the Allegheny County Court appointed a receiver by Order dated June 9, 2011, Duquesne contends that consideration of this case is barred by *res judicata* because a “final order” has been issued by a court of competent jurisdiction. Preliminary Objections at 3; ¶¶ 17-19. Similarly, Duquesne argues that because of the adjudication in the Allegheny County Court of Common Pleas and the Order issued by Judge Ward, the Commission is collaterally estopped from considering the Complaint. Preliminary Objections at 5; ¶¶ 20-22.

Other than the BCS informal Complaint, it is unclear whether this controversy was ever brought to the notice of the Commission. While there may well be more to this case, factually, than meets the eye on the face of the pleadings, Duquesne states that because the Complainant never called to terminate service at the service address, which would have allowed Duquesne to offer the tenants an opportunity to receive uninterrupted service in their names, Duquesne continued service to the tenants *for at least four years while over \$20,000 in unpaid electric bills accrued*. It is also unclear what steps, if any, were taken by Duquesne to resolve this matter with the Complainant before Duquesne availed itself of its right to petition the Court of Common Pleas of Allegheny County for the appointment of a receiver as is permitted by 66 Pa. C.S. § 1533. That section states:

Notwithstanding the foregoing sections of this chapter, when a landlord ratepayer is *two or more months* in arrears in his utility payments, the affected utility shall have the right to petition the court of common pleas of the county wherein the leased premises are located to appoint a receiver to collect rent payments otherwise due the landlord ratepayer directly from the tenants to pay all overdue and subsequent utility bills therefrom. The provisions of this section shall not be construed to supersede any tenant rights or defenses under the law regarding the payment of rent. This right may be exercised only in those situations that involve units that are not individually metered by the utility

66 Pa. C.S. § 1533(a) (emphasis added).

⁷ *Duquesne Light Company v. Robert J. Wagner*, CD No. GD 11-001410 (CP Allegheny County 2011). This is the court proceeding that the Complainant refers to in his Complaint and in his Answer to the Preliminary Objections.

Now that this controversy has reached the Commission, jurisdiction has been effectively precluded for most of the issues in this case, as Respondent correctly argues in its Preliminary Objections.⁸

The Commission's Rules of Practice and Procedure permit parties to file preliminary objections. The grounds for preliminary objections are limited to those set forth in 52 Pa Code § 5.101(a) as follows:

- (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
- (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
- (3) Insufficient specificity of a pleading.
- (4) Legal insufficiency of a pleading.
- (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
- (6) Pendency of a prior proceeding or agreement for alternative dispute resolution.

The Respondent's Preliminary Objection asserts, in part, lack of Commission jurisdiction pursuant to 52 Pa. Code §§ 5.101(a)(1) and lack of capacity to sue pursuant to 52 Pa. Code §§ 5.101(a)(5). Commission preliminary objection practice is analogous to Pennsylvania civil

⁸ Complainant, who appeared *pro se* in the Allegheny County Court of Common Pleas proceeding, asked for and obtained a stay of the Court's June 9, 2011 Order, though for what purpose the stay was granted is unclear. If the Complainant's theory was to attempt to bring this case before the Commission during that time, that theory was fatally flawed because: (1) Judge Ward did not relinquish jurisdiction in granting the stay, which was only for thirty days or until August 25, 2011; and (2) the Commission's jurisdiction had already been precluded by the Order of June 9, 2011 at the time the stay was granted. The Complainant, who is not an attorney, did not think to or did not know enough to file a formal Complaint with the Commission in January, 2011, when he claims to have first learned that Duquesne was taking action against him for the unpaid bills. In fact, the Complainant did not file a formal Complaint with the Commission until three days before the entry of judgment against him by the Allegheny Court of Common Pleas.

practice regarding preliminary objections. *Equitable Small Transportation Intervenors v. Equitable Gas Company*, 1994 Pa PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994). A preliminary objection asserting lack of Commission jurisdiction pursuant to the Commission's Rules of Practice and Procedure is therefore analogous to preliminary objections allowed by Rule 1028 of the Pennsylvania Rules of Civil Procedure.

Preliminary objections in civil practice requesting dismissal of a pleading will be granted only where the right to relief is clearly warranted and free from doubt. *Interstate Traveller Services, Inc. v. Pa. Dept. of Environment Resources*, 406 A.2d 1020 (Pa. 1979); *Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc.*, 595 A.2d 172 (Pa. Super. 1991). The Commission follows this standard. *Montague v. Philadelphia Electric Company*, 66 Pa. PUC 24 (1988).

The Commission may not rely upon the factual assertions of the moving party but must accept as true for purposes of disposing of the motion all well pleaded, material facts of the nonmoving party, as well as every inference from those facts. *County of Allegheny v. Commonwealth of Pennsylvania*, 490 A. 2d 402 (Pa. 1985); *Commonwealth of Pennsylvania v. Bell Telephone Co. of Pa.*, 551 A.2d 602 (Pa. Cmwlth. 1988). The Commission must view the Complaint in this case in the light most favorable to the Complainants and should dismiss the Complaint only if it appears that the Complainants would not be entitled to relief under any circumstances as a matter of law. *Equitable Small Transportation Intervenors v. Equitable Gas Company*, 1994 Pa PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994)

I must agree with the Respondent that under the doctrine of *res judicata*, the Commission may not permit the Complainant to re-litigate the Petition for the Appointment of a Receiver as that matter has already been heard and adjudicated by the Court of Common Pleas of Allegheny County. That receivership is already in place pursuant to an Order by that Court. However, there remains the issue of notice to the Complainant with respect to the accrual of the unpaid bills for electric service at 1706 Marmaduke Street, Pittsburgh, Pennsylvania.

The General Assembly has mandated the character of service and facilities a public utility must provide in Section 1501 of the Public Utility Code, 66 Pa. C.S. § 1501, which reads in pertinent part:

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission.

The Commission has exclusive jurisdiction to determine the reasonableness, adequacy and sufficiency of a public utility's services and facilities. *Elkin v. Bell of Pa.*, 491 Pa. 123, 420 A.2d 371 (1980). Section 102 of the Code, 66 Pa. C.S. § 102, defines the word "service" as:

Used in its broadest and most inclusive sense, includes any and all acts done, rendered, or performed, and any and all things furnished or supplied, and any and all facilities used, furnished, or supplied by public utilities . . . in the performance of their duties under [the Code].

A utility's "service" is not merely confined to the distribution of electrical energy, but also includes "any and all acts" related to that function. *West Penn Power Co. v. Pa. P.U.C.*, 578 A.2d 75 (Pa. Cmwlth. 1990).

The quality of service issue that the Complainant has placed before the Commission is whether it was reasonable for Duquesne to allow over \$20,000 in unpaid bills to accumulate at the Complainant's rental property over a period of from four to six years without *reasonable* notice to or demands upon the Complainant to pay the arrearage until the property was about to be placed in receivership.

In setting this matter for hearing on the limited issue of quality of service, I note that as the party bringing this Complaint to the Commission, the Complainant bears the burden of proving that the Respondent violated a duty mandated by the Public Utility Code. 66 Pa. C.S. § 332(a).

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter of this proceeding as related to quality of service issues. 66 Pa. C.S. § 701; 66 Pa. C.S. § 1501.

2. Commission regulations permit the filing of preliminary objections. 52 Pa. Code § 5.101(a).

3. Preliminary objection practice before the Commission is similar to Pennsylvania civil practice respecting preliminary objections.

4. In deciding the preliminary objections, the Commission must determine whether, based on well-pleaded factual averments of the complainant, recovery or relief is possible. *Dep't of Auditor General, et al v. SERS, et al.*, 836 A.2d 1053, 1064 (Pa.Cmwlth. 2003); *P.J.S. v. Pa. State Ethics Comm'n*, 669 A.2d 1105 (Pa.Cmwlth. 1996).

5. Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. *Boyd v. Ward*, 802 A.2d 705 (Pa.Cmwlth. 2002).

6. All of the non-moving party's averments in the complaint must be viewed as true for purposes of deciding the preliminary objections, and only those facts specifically admitted may be considered against the non-moving party. *Ridge v. State Employees' Retirement Bd.*, 690 A.2d 1312 (Pa.Cmwlth. 1997).

7. The Commission does not have jurisdiction with respect to the adjudicated Petition to Appoint Receiver filed on January 21, 2011, in the Court of Common Pleas of Allegheny

County, *Duquesne Light Company v. Robert J. Wagner*, CD No. GD 11-001410 (CP Allegheny County 2011).

8. The Commission has exclusive jurisdiction to determine the reasonableness, adequacy and sufficiency of a public utility's services and facilities. *Elkin v. Bell of Pa.*, 491 Pa. 123, 420 A.2d 371 (1980).

ORDER

THEREFORE,

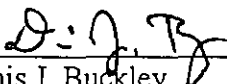
IT IS ORDERED:

1. That the Preliminary Objections filed on July 12, 2011, by Duquesne Light Company at Docket No. C-2011-2247887 are granted in part and denied in part, consistent with this Order.

2. That the Complaint of Robert Wagner filed on June 6, 2011, at Docket No. C-2011-2247887 against Duquesne Light Company is dismissed, in part, for lack of jurisdiction with respect to the June 9, 2011, Order of the Allegheny Court of Common Pleas in *Duquesne Light Company v. Robert J. Wagner*, CD No. GD 11-001410 (CP Allegheny County 2011), consistent with this Order.

3. That the Complaint of Robert Wagner filed on June 6, 2011, at Docket No. C-2011-2247887 against Duquesne Light Company with respect to quality of service issues is to be scheduled for hearing.

Date: September 14, 2011



Dennis J. Buckley
Administrative Law Judge

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Before the
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ROBERT WAGNER,)
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 Complainant,)
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 v.)
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 DUQUESNE LIGHT COMPANY,)
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 Respondent.)

Docket No. C-2011-2247887

CERTIFICATE OF SERVICE

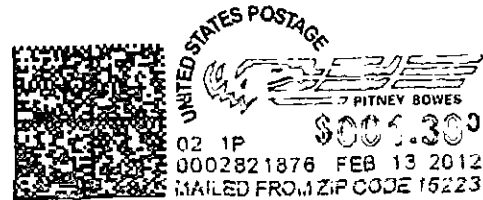
The undersigned hereby certifies that on February 13, 2012, she served a true and correct copy of the foregoing document on the following in accordance with the requirements of 52 Pa. Code § 1.54 by First Class United States Mail, postage prepaid.

Krysiá Kubiak, Esquire
Duquesne Light Company
411 Seventh Avenue 16-1
Pittsburgh, PA 15219

Date: 2-13-12


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