



100 Pine Street • PO Box 1166 • Harrisburg, PA 17108-1166  
Tel: 717.232.8000 • Fax: 717.237.5300

Teresa K. Schmittberger  
Direct Dial: 717.237.5270  
Direct Fax: 717.260.1688  
tschmittberger@mwn.com

February 7, 2013

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

**VIA ELECTRONIC FILING**

**RE: Petition of Duquesne Light Company for Approval of its Act 129 Phase II Energy Efficiency and Conservation Plan; Docket No. M-2012-2334399**

Dear Secretary Chiavetta:

Please find enclosed for filing with the Pennsylvania Public Utility Commission ("PUC" or "Commission") the Reply Brief of the Duquesne Industrial Intervenors ("DII") in the above-referenced proceeding.

As evidenced by the attached Certificate of Service, all parties to this proceeding are being duly served with a copy of this document.

Sincerely,

McNEES WALLACE & NURICK LLC

By   
Teresa K. Schmittberger

Counsel to the Duquesne Industrial Intervenors

TKS/sar  
Enclosure

c: Administrative Law Judge Dennis J. Buckley (via First Class Mail and E-Mail)  
Certificate of Service

**www.mwn.com**

HARRISBURG, PA • LANCASTER, PA • STATE COLLEGE, PA • COLUMBUS, OH • WASHINGTON, DC

## CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a true copy of the foregoing document upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (relating to service by a participant).

### VIA E-MAIL AND FIRST-CLASS MAIL

David T. Evrard  
Brandon J. Pierce  
Office of Consumer Advocate  
555 Walnut Street  
5<sup>th</sup> Floor, Forum Place  
Harrisburg, PA 17101  
[devrard@paoca.org](mailto:devrard@paoca.org)  
[bpierce@paoca.org](mailto:bpierce@paoca.org)

Sharon E. Webb  
Office of Small Business Advocate  
Commerce Building  
300 North Second Street, Suite 1102  
Harrisburg, PA 17101  
[swebb@pa.gov](mailto:swebb@pa.gov)

Tishekia E. Williams  
Sr. Counsel, Regulatory  
Duquesne Light Company  
411 Seventh Avenue, 16<sup>th</sup> Floor  
Pittsburgh, PA 15219  
[twilliams@duqlight.com](mailto:twilliams@duqlight.com)

Andrew S. Tubbs  
Post & Schell, P.C.  
17 North Second Street  
12<sup>th</sup> Floor  
Harrisburg, PA 17101  
[atubbs@postschell.com](mailto:atubbs@postschell.com)  
*Counsel for Duquesne Light Company*

Patrick M. Cicero  
Pennsylvania Utility Law Project  
118 Locust Street  
Harrisburg, PA 17101  
[pulp@palegalaid.net](mailto:pulp@palegalaid.net)  
*Counsel for CAUSE-PA*

Joseph L. Vullo  
1460 Wyoming Avenue  
Forty Fort, PA 18704  
[jlvullo@aol.com](mailto:jlvullo@aol.com)  
*Counsel for CAAP*

Theodore S. Robinson  
Citizen Power, Inc.  
2121 Murray Avenue  
Pittsburgh, PA 15217  
[robinson@citizenpower.com](mailto:robinson@citizenpower.com)

Jeffrey L. Norton  
Carl R. Schultz  
Eckert Seamans Cherin & Mellott, LLC  
213 Market Street, 8<sup>th</sup> Floor  
Harrisburg, PA 17101  
[jnorton@eckertseamans.com](mailto:jnorton@eckertseamans.com)  
[cschultz@eckertseamans.com](mailto:cschultz@eckertseamans.com)  
*Counsel for Comverge, Inc.*



Teresa K. Schmittberger  
Counsel to the Duquesne Industrial Intervenors

Dated this 7<sup>th</sup> day of February, 2013, at Harrisburg, Pennsylvania

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Petition of Duquesne Light Company for** :  
**Approval of its Act 129 Phase II Energy** : **Docket No. M-2012-2334399**  
**Efficiency and Conservation Plan** :

---

**REPLY BRIEF OF THE  
DUQUESNE INDUSTRIAL INTERVENORS**

---

ATI Allegheny Ludlum  
United States Steel Corporation

Pamela C. Polacek (Pa. I.D. 78276)  
Teresa Schmittberger (Pa. I.D. 311082)  
McNees Wallace & Nurick LLC  
100 Pine Street  
P.O. Box 1166  
Harrisburg, PA 17108-1166  
Phone: (717) 232-8000  
Fax: (717) 237-5300  
ppolacek@mwn.com  
tschmittberger@mwn.com

Counsel to the Duquesne Industrial  
Intervenors

Dated: February 7, 2013

**TABLE OF CONTENTS**

	<u>Page</u>
I. INTRODUCTION .....	1
A. Procedural History .....	1
B. Summary of Argument .....	2
II. ARGUMENT .....	3
A. Duquesne Fails To Provide a Preponderance of Evidence That Its Proposed Phase II EE&C Plan Includes a Reasonable and Prudent Allocation of Costs to Each Customer Class. ....	3
B. Duquesne's Proposed Acquisition Costs Are Directly Inconsistent with Commission Precedent And Must Be Readjusted To Promote an Equitable Allocation of Phase II Measures and Costs. ....	6
III. CONCLUSION.....	8

## **I. INTRODUCTION**

### **A. Procedural History**

The Pennsylvania Public Utility Commission ("PUC" or "Commission") outlined the requirements for Phase II EE&C Plans in an Implementation Order issued August 3, 2012. *Energy Efficiency and Conservation Program*; Docket Nos. M-2012-2289411, *et al.*, Order (Aug. 3, 2012) (hereinafter, "Implementation Order"). Consistent with this Implementation Order, on November 15, 2012, Duquesne Light Company ("Duquesne" or "Company") filed with the PUC a Petition for Approval of the Company's Act 129 Phase II Energy Efficiency and Conservation Plan ("Phase II EE&C Plan"). *Petition of Duquesne Light Company for Approval of its Act 129 Phase II Energy Efficiency and Conservation Plan*; Docket No. M-2012-2334399 (hereinafter, "Petition"). DII also received the Company's Direct Testimony on November 15, 2012. On December 7, 2012, the Duquesne Industrial Intervenors ("DII") filed a Petition to Intervene in response to the Company's Petition.<sup>1</sup> A Prehearing Conference was held on December 10, 2012, before Administrative Law Judge ("ALJ") Dennis J. Buckley.

On December 21, 2012, DII submitted Comments regarding the Company's proposed Phase II Plan. Subsequently, on January 3, 2013, DII received Direct Testimony from the following parties: Community Action Association of Pennsylvania ("CAAP"), the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania ("CAUSE-PA"), and the Office of Consumer Advocate ("OCA"). On January 15, 2013, DII received Rebuttal Testimony from the Company.

An evidentiary hearing was held in this proceeding on January 18, 2013, for the purposes of presenting testimony and performing cross-examination. During this hearing, the parties confirmed the process for submitting Briefs. Duquesne and DII submitted Main Briefs on

---

<sup>1</sup> DII's compilation for purposes of the instant proceeding is listed on the cover page of this Reply Brief.

January 28, 2013. In addition, Duquesne filed a Joint Petition for Settlement of all issues in the proceeding, other than those issues DII reserved for briefing.<sup>2</sup> Also pursuant to the procedural schedule of this proceeding, DII submits this Reply Brief in response to issues raised in Duquesne's Main Brief.<sup>3</sup>

**B. Summary of Argument**

DII submits this Reply Brief to address two remaining issues discussed in Duquesne's Main Brief, namely, Large Commercial and Industrial ("C&I") cost allocation and acquisition cost levels. As set forth below, there is a significant disparity within Duquesne's proposed Phase II Plan between the Phase II costs allocated among customer classes versus the total revenues provided by the respective customer classes:

**Table I: Duquesne Phase II EE&C Plan – Total Cost Allocation by Customer Class**

<b>Customer Class</b>	<b>% Total Phase II EE&amp;C Plan Budget</b>	<b>% of Total Customer Revenue</b>	<b>Difference</b>
Residential	45.4%	59.0%	-13.6%
Small C&I	8.5%	16.7%	-8.2%
Large C&I	36.2%	14.4%	21.8%
Government/ Nonprofit	9.6%	10.0%	-0.4%

DII M.B., pp. 4-5; *see also* Phase II EE&C Plan, p. 154. As explained in more detail herein, as well as in DII's Main Brief, this budget-revenue disparity is inconsistent with Act 129 and

<sup>2</sup> The arguments raised in DII's Main Brief were previously identified or documented on the record of the instant proceeding. DII's Main Brief addressed the allocation of Duquesne's Phase II EE&C costs between customer classes, acquisition cost levels, the proportion of Duquesne's Phase II EE&C incentive and non-incentive costs, and Large C&I bidding into PJM markets. *See generally* DII M.B. DII propounded discovery requesting detailed information regarding the Phase I and Phase II EE&C program cost allocations and acquisition cost levels for all customer classes and further introduced Duquesne's responses on the record. DII Cross-Examination Ex. No. 1. Moreover, at the January 18, 2013, DII conducted cross-examination of Duquesne witness David Defide on cost allocation, acquisition cost levels, incentive/non-incentive costs, and PJM bidding. Transcript of January 18, 2013, Evidentiary Hearing at 30-40. As a result, Duquesne's contention that "it is difficult for Duquesne Light to address issues that have not been articulated on the record" is largely moot. Duquesne Main Brief (hereinafter, "M.B."), p. 9. To the extent that the Commission elects to address Duquesne's claim, however, DII further submits that the Commission's Rules of Practice and Procedure fully authorize the presentation of new arguments in a Main or Initial Brief, subject to the Rules of Evidence.

<sup>3</sup> DII continues to support all positions within its Main Brief, whether or not addressed herein.

Commission precedent and must be rejected. In order to remedy this disparity, Duquesne should be required to increase its acquisition cost levels to align with the Commission's Implementation Order and reduce the disproportionate cost impact of the Phase II Plan on Large C&I customers.

## II. ARGUMENT

### A. **Duquesne Fails To Provide a Preponderance of Evidence That Its Proposed Phase II EE&C Plan Includes a Reasonable and Prudent Allocation of Costs to Each Customer Class.**

As the party presenting the proposed Phase II EE&C Plan, Duquesne bears the burden of proof in this proceeding. As set forth herein, Duquesne fails to provide that a preponderance of evidence would support a cost allocation proposal that would violate Act 129. Rather, the Company erroneously relies on the lack of evidence provided by DII, a party without the burden of proof, to support the otherwise unjust and unreasonable proposal to allocate 36% of Phase II costs to Large C&I customers. Accordingly, because insufficient evidence has been provided by Duquesne to support this cost allocation, Duquesne's proposed cost allocation must be rejected.

Section 315(a) of the Public Utility Code provides that "[i]n any proceeding...involving any proposed or existing rate of any public utility...the burden of proof to show that the rate involved is just and reasonable shall be upon the utility." *Id.* § 315(a). In carrying this burden, a litigant must establish a case before an administrative tribunal using a preponderance of evidence as the requisite degree of proof. *See Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600, 602 (Pa. Commw. Ct. 1990). To establish a preponderance of evidence, there must be substantial, "relevant evidence that a reasonable mind may accept as adequate to support a conclusion: more is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established." *Duquesne M.B.*, p. 11 (quoting *Murphy v. Pa. Dep't of Pub. Welfare, White Haven Center*, 480 A.2d 382 (Pa. Commw. Ct. 1984)). In addition, if a respondent provides evidence to rebut the petitioner public utility's substantial evidence, then the

burden shifts back to the public utility to rebut the respondent's evidence. *See, e.g., Lolly v. Duquesne Light Co.*, 2011 WL 2113407 (Pa.P.U.C. 2011). Ultimately, it falls to the PUC to determine "whether the Code section meaning embraces the utility's conduct here, and the factual question ... whether substantial evidence supports the PUC's finding." *W. Penn Power Co. v. Pa. Pub. Util. Comm'n*, 578 A.2d 75, n. 1 (Pa. Commw. Ct. 1990).

In the instant proceeding, Duquesne fails to establish a preponderance of evidence to justify such an inequitable allocation of Phase II EE&C costs to Large C&I customers. As stated in DII's Main Brief, Large C&I customers remit only 14.4% of Duquesne's total customer revenues, but are assigned 36.2% of EE&C costs under Duquesne's proposed Phase II Plan. DII M.B., p. 5. Such a significant budget-revenue disparity appears unjust and unreasonable on its face.

Despite this large disparity between percentage of Large C&I budget and revenue, Duquesne has not supported this particular cost allocation in testimony or briefing. Instead, Duquesne maintains only a defensive position with respect to the proposal, stating that "there is no requirement that Duquesne Light provide a proportionate distribution of programs based on customer revenue, or any other single factor." Duquesne M.B., p. 12. Rather than establish a prima facie case in support of the proposed cost allocation, Duquesne chooses to leave the budget-revenue disparity (reflected in Table 5 of the Company's EE&C Plan) unaddressed and unsupported.

Moreover, contrary to Duquesne's contentions that proportional plans are not mandated, Act 129 explicitly states that EE&C measures be provided "equitably to all classes of customers," while the Commission requires that EE&C benefits not be "skewed toward or away from any particular class." 66 Pa. C.S. § 2806.1(a)(5); *see also* Implementation Order, p. 87. In

the case of Duquesne's proposed Plan, Residential and Small C&I customers will remit 45.4% and 8.5% of the Phase II budget, which represent 13.6% and 8.2% less than their respective percentages of Duquesne's revenues. DII M.B., p. 4. Thus, it is up to the Commission to determine whether the "equitable" requirement of Act 129 could allow for such disparity when Large C&I customers will be remitting 21.8% more Phase II costs than their Duquesne revenues.

Rather than address the issue at hand, *i.e.*, the disparity between customer budgets and revenues, Duquesne attempts to justify the significant Phase II costs for Large C&I customers by citing to Large C&I consumption levels of 44.8%. Duquesne M.B., p. 14. Referring to Large C&I customers' consumption levels, however, is a red herring. Level of consumption may have little relation to generation costs based on significant shopping levels among Large C&I customers. Pursuant to cost causation principles, Large C&I consumption levels may be entirely irrelevant for determining a reasonable Large C&I cost allocation.

Accordingly, Duquesne fails to provide substantial evidence to justify its cost allocation proposal. Duquesne implies that the lack of rebuttal evidence provided by DII precludes DII from challenging the Phase II cost allocation. *See, e.g.*, Duquesne M.B., p. 11. Contrary to this implication, DII has submitted evidence in this proceeding, *i.e.*, cross-examination and discovery exhibit references, to support its arguments herein and in its Main Brief. In actuality, Duquesne fails to rebut any of DII's contentions or sufficiently lend support to its own proposal.

As the proponent of the proposed allocation, it is Duquesne's responsibility to provide evidence to support this proposal before DII would have any obligation to rebut it. Yet, Duquesne has failed to provide any evidence to justify such a widespread disparity between EE&C budget and overall revenue. Simply put, a reasonable mind cannot accept the conclusion that this proposal is just and reasonable. *See Murphy*, 480 A.2d 382. Accordingly, the

Commission should reject Duquesne's proposed cost allocation and require that Duquesne adopt an equitable cost allocation among customer classes, in parity with their contributions to Duquesne's revenue, consistent with Act 129 and Commission precedent.

**B. Duquesne's Proposed Acquisition Costs Are Directly Inconsistent with Commission Precedent And Must Be Readjusted To Promote an Equitable Allocation of Phase II Measures and Costs.**

The Commission's Implementation Order required all Pennsylvania electric distribution companies ("EDCs") to adopt certain acquisition cost levels developed by the Statewide Evaluator. Implementation Order, p. 24. As part of its Phase II Plan, Duquesne is proposing a significantly lower acquisition cost level than the Implementation Order. DII M.B., p. 10. Duquesne's over-compliance with the Implementation Order is inappropriate, however, when one customer class, *i.e.*, the Large C&I class, would carry a disproportionate level of Phase II costs. Accordingly, to remain consistent with the Implementation Order, Duquesne's Phase II Plan should be rebalanced to include a more equitable distribution of measures and costs among customer classes.

Despite the Implementation Order's holding that Duquesne's Phase II acquisition costs should equal \$211.90, Duquesne is proposing a range of Phase II measures with an average acquisition cost of \$176.10. Implementation Order, p. 24; *see also* DII Cross-Examination Exhibit No. 1, Response to DII-I-7. To support this low acquisition cost level, Duquesne contends that "[i]t would not be prudent to design a plan with the goal of achieving its savings at \$211.90 when more cost effective savings are available." Duquesne M.B., p. 15. Along these lines, Duquesne not only proposes low acquisition cost levels, but also assumes that its Phase II EE&C Plan will only realize approximately 80% of potential savings. *Id.* In other words, if Duquesne's proposed measures reach 100% of anticipated savings, Duquesne would significantly exceed its Phase II reduction targets.

Crucially, the Commission has not required Duquesne to either adopt measures with lower acquisition costs or over-comply with savings targets by 20% from the figures included in the Implementation Order. The Commission's Implementation Order provides Duquesne with far more flexibility with respect to measures and savings than Duquesne has chosen to acknowledge. Instead, Duquesne is going above and beyond the requirements of the Commission's Implementation Order at the expense of Large C&I customers.

Although Duquesne is correct that the intent of Act 129 is to achieve consumption reductions in a cost-effective manner, the plain language of Act 129 cannot be ignored. *See* Duquesne M.B., p. 15. As established in Section II.A., *supra*, Duquesne's proposed Plan provides for an inequitable allocation of measures among customer classes in contravention of the Act. *See* 66 Pa. C.S. § 2806.1(a)(5). Per the terms of Act 129, because the Large C&I class would receive an inequitable share of costs under the Plan, it is Duquesne's responsibility to evaluate measures with higher acquisition cost levels and/or consider decreasing its 20% over-compliance target to alleviate this burden on Large C&I customers.

Duquesne has the freedom to design a Plan that it believes will allow it to meet, and even exceed, all Commission-imposed targets, but not to the detriment of certain customers in violation of Act 129. As currently drafted, Duquesne's Phase II EE&C Plan shoulders Large C&I customers with an unreasonable level of measures and costs as compared to the other customer classes. Accordingly, the Commission should order Duquesne to revise its Plan in a manner that allocates costs evenly throughout its customer base.

### III. CONCLUSION

WHEREFORE, the Duquesne Industrial Intervenors respectfully request that the Pennsylvania Public Utility Commission:

- (1) direct Duquesne to modify its proposed Phase II EE&C Plan to reflect a more equitable cost allocation among customer classes in parity with their contributions to Duquesne's revenues;
- (2) direct Duquesne to modify its Phase II EE&C Plan to reflect a more equitable measure allocation among customer classes to reduce the overreliance on Large Commercial and Industrial customers;
- (3) provide all additional relief requested in the Main Brief of the Duquesne Industrial Intervenors; and
- (4) provide any other relief deemed necessary and reasonable.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

By 

Pamela C. Polacek (Pa. I.D. 78276)  
Teresa Schmittberger (Pa. I.D. 311082)  
McNees Wallace & Nurick LLC  
100 Pine Street  
P.O. Box 1166  
Harrisburg, PA 17108-1166  
Phone: (717) 232-8000  
Fax: (717) 237-5300  
ppolacek@mwn.com  
tschmittberger@mwn.com

Counsel to the Duquesne Industrial Intervenors

Dated: February 7, 2013