

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF SMALL BUSINESS ADVOCATE
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Bernard A. Ryan, Jr
Small Business Advocate

(717) 783-2525
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January 7, 2002

Fax and First Class Mail

Hon. Wayne L. Weismandel
Administrative Law Judge
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

DOCUMENT
FOLDER

Re: Progress Light Company Rate Change to
State Tax Adjustment Surcharge to Implement
2002 Revenue Neutral Reconciliation
Docket No. R-00016854

Dear Judge Weismandel:

In accordance with your Initial Prehearing Conference Order dated December 21, 2001, enclosed please find the Prehearing Memorandum on behalf of the Office of Small Business Advocate. As evidenced by the enclosed certificate of service, all parties have been served as indicated.

Sincerely,

Angela T. Jones

Angela T. Jones
Assistant Small Business Advocate

Enclosures

cc: James J. McNulty, Secretary
(W/two copies)

Parties of Record

Brian Kalcic

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

DUQUESNE LIGHT COMPANY :
RATE CHANGE TO STATE TAX ADJUSTMENT :
SURCHARGE TO IMPLEMENT 2002 REVENUE : Docket No. R-00016854
NEUTRAL RECONCILIATION :

OFFICE OF SMALL BUSINESS ADVOCATE
PREHEARING MEMORANDUM

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I. INTRODUCTION

The Office of Small Business Advocate ("OSBA") is authorized to represent the interests of small business consumers of utility services before the Pennsylvania Public Utility Commission pursuant to the provisions of the Small Business Advocate Act, Act 181 of 1988, 73 P.S. §§399.41 - 399.50 ("the Act"). In order to discharge this statutory duty, the Small Business Advocate deems it necessary to participate as a party to this proceeding. Representing the OSBA in this matter is Assistant Small Business Advocate Angela T. Jones. Please address all correspondence as follows:

Angela T. Jones
Assistant Small Business Advocate
Office of Small Business Advocate
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Harrisburg, Pennsylvania 17101
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E-mail: anjones@state.pa.us

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II. FILING BACKGROUND

On October 29, 2001, Duquesne Light Company filed a single issue rate proceeding to recover the Revenue Neutral Reconciliation tax liability that produced rates above Duquesne's rate cap. The OSBA filed a Notice of Intervention and Public Statement on November 28, 2001.

III. IDENTIFICATION OF ISSUES AND WITNESSES

Assisting in the development and presentation of the OSBA's case in this proceeding will be:

Mr. Brian Kalcic
Excel Consulting
Suite 720-T
225 S. Meramec Avenue
St. Louis, MO 63105
(314) 725-2511
(314) 725-2022 - Fax
E-mail: bkalccic@mindspring.com

The OSBA requests that all parties serve copies of all documents, including discovery, testimony and briefs, upon Mr. Kalcic, simultaneously with service upon the OSBA. The OSBA does not now expect to present testimony by Mr. Kalcic in this proceeding.

The OSBA will participate in the case to assure that the interests of small business customers of Duquesne are adequately represented and protected. As appropriate and necessary, the OSBA will investigate and analyze the claims and proposals of the Company and other parties, primarily through the cross-examination of witnesses appearing for those parties and through briefing. The OSBA will particularly focus on any issue where the impact on the interests of Duquesne's small business consumers would be unjustifiably different than or disproportionate to the impact on another class of customers, or otherwise

lacking in reasonableness or basic fairness. The OSBA reserves the right to pursue additional issues as they arise throughout the proceeding.

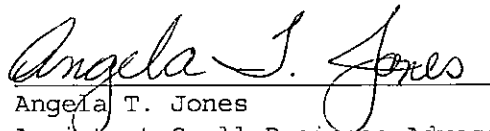
IV. SETTLEMENT

The OSBA is willing to enter into settlement discussions at any phase of this proceeding.

V. PROCEDURAL SCHEDULE

The OSBA has been served with the Procedural Schedule issued by Judge Weismandel for this proceeding. The OSBA agrees to cooperate with the parties and the ALJ in establishing a reasonable schedule within the timeframe presented.

Respectfully submitted,



Angela T. Jones
Assistant Small Business Advocate

Office of Small Business Advocate
Suite 1102, Commerce Building
300 North Second Street
Harrisburg, PA 17101
(717) 783-2525

Dated: January 7, 2002

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

DUQUESNE LIGHT COMPANY :
RATE CHANGE TO STATE TAX ADJUSTMENT :
SURCHARGE TO IMPLEMENT 2002 REVENUE : Docket No. R-00016854
NEUTRAL RECONCILIATION :

CERTIFICATE OF SERVICE

I certify that I am serving a copy of the Prehearing Memorandum on behalf of the Office of Small Business Advocate by FAX and first class mail upon the persons addressed below:

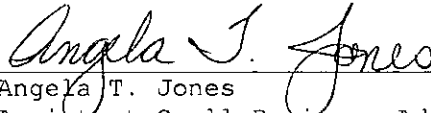
Hon. Wayne L. Weismandel
Administrative Law Judge
Pa. Public Utility Commission
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Angela T. Jones
Assistant Small Business Advocate

Date: January 7, 2002

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MWN

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January 7, 2002

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VIA HAND DELIVERY

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
The Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Duquesne Light Company – Docket No. R-00016854; Metropolitan Edison
Company – Docket No. R-00016852; Pennsylvania Electric Company –
Docket No. R-00016853; PECO Energy Company – Docket No. R-00016856;
PPL Electric Utilities Corporation – Docket No. R-00016850; West Penn
Power Company – Docket No. R-00016857

Dear Secretary McNulty:

Please find enclosed the original and three (3) copies of the Prehearing Memorandum of Duquesne Industrial Intervenors, Met-Ed Industrial Users Group, Penelec Industrial Customer Alliance, Philadelphia Area Industrial Energy Users Group, PP&L Industrial Customer Alliance, and West Penn Power Industrial Intervenors in the above-referenced proceedings.

As evidenced by the attached Certificate of Service, all parties to the proceedings are being served with a copy of this document. Please date stamp the extra copy of this transmittal letter and kindly return it to our messenger for our filing purposes. Thank you.

Very truly yours,

MCNEES WALLACE & NURICK LLC

By *Karen S. Miller Orner*
Karen S. Miller Orner

Counsel to Duquesne Industrial Intervenors,
Met-Ed Industrial Users Group, Penelec
Industrial Customer Alliance, Philadelphia Area
Industrial Energy Users Group, PP&L Industrial
Customer Alliance, and West Penn Power
Industrial Intervenors

KSMO

Enclosures

c: Administrative Law Judge Wayne L. Weismandel (via hand delivery)
Certificate of Service

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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 Section 1.54 (relating to service by a participant):

VIA HAND DELIVERY

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Certificate of Service

Docket Nos. R-00016854, R-00016852, R-00016853, R-00016856, R-00016850, R-00016857

Page 2

Michael R. Beiting, Esq.
FirstEnergy Corp.
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Akron, OH 44308

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Karen S. Miller Ormer
Karen S. Miller Ormer

Dated this 7th day of January, 2002, in Harrisburg, Pennsylvania.

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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Duquesne Light Company	:	Docket No. R-00016854
	:	SECRETARY'S OFFICE
Metropolitan Edison Company	:	Docket No. R-00016852
	:	
Pennsylvania Electric Company	:	Docket No. R-00016853
	:	
PECO Energy Company	:	Docket No. R-00016856
	:	
PPL Electric Utilities Corporation	:	Docket No. R-00016850
	:	
West Penn Power Company	:	Docket No. R-00016857

**PREHEARING MEMORANDUM OF
DUQUESNE INDUSTRIAL INTERVENORS,
MET-ED INDUSTRIAL USERS GROUP,
PENELEC INDUSTRIAL CUSTOMER ALLIANCE,
PHILADELPHIA AREA INDUSTRIAL ENERGY USERS GROUP,
PP&L INDUSTRIAL CUSTOMER ALLIANCE, AND
WEST PENN POWER INDUSTRIAL INTERVENORS**

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As requested by Administrative Law Judge ("ALJ") Wayne L. Weismandel in his Prehearing Conference Order of December 21, 2001, Duquesne Industrial Intervenor ("DII"),¹ Met-Ed Industrial Users Group, Penelec Industrial Customer Alliance, Philadelphia Area Industrial Energy Users Group, PP&L Industrial Customer Alliance, and West Penn Power

¹ DII does not intend to pursue active litigation in these proceedings; however, for reasons explained below, DII disagrees with the legal standard applied by the Pennsylvania Public Utility Commission ("Commission") in these proceedings and is contemplating filing a Petition for Review with the Commonwealth Court of Pennsylvania ("Commonwealth Court") with respect to this issue.

Industrial Intervenors ("WPPII") (collectively, "Industrial Intervenors"), collectively, hereby submit this Prehearing Memorandum.²

I. HISTORY OF THE PROCEEDING

On September 29, 2001, the Pennsylvania Department of Revenue ("DOR") published in the Pennsylvania Bulletin notice of an increase in the Revenue Neutral Reconciliation ("RNR") tax rate for the 2002 calendar year. This increase to the RNR tax rate increased the electric utility gross receipts tax from 44 mills to 60 mills. See 31 Pa.B. 5507 (September 29, 2001). On November 30, 2001, DOR published in the Pennsylvania Bulletin a revised RNR rate of 59 mills.

Pursuant to Sections 2804(16) and 2810 of the Electricity Generation Customer Choice and Competition Act ("Competition Act"), which permit an Electric Distribution Company ("EDC") to collect its RNR tax liability from its customers, Duquesne Light Company, Metropolitan Edison Company, Pennsylvania Electric Company, PECO Energy Company ("PECO"), PPL Electric Utilities Corporation, and West Penn Power Company ("West Penn") (collectively, "EDCs") filed individual Petitions with the Commission seeking to increase their State Tax Adjustment Surcharges in order to recover RNR tax liability which would cause the EDCs to exceed their rate caps. See 66 Pa.C.S. §§ 2804(16) & 2810. The Office of Consumer Advocate ("OCA") filed Complaints against each of these Petitions,³ and the EDCs filed Answers to the appropriate Complaints. In addition, Petitions to Intervene in these proceedings

² Membership in each separate industrial group was reflected in the groups' respective Petitions to Intervene.

³ The OCA's Complaints asserted that in order for the Commission to determine that each EDC's proposed rates are just and reasonable, as required by Section 2804(16)(ii) of the Competition Act, the Commission must review each EDC's rate of return and consider whether any expense or tax savings offset the EDC's increased tax liability. See 66 Pa.C.S. § 2804(16)(ii).

were filed by PECO, the Office of Small Business Advocate ("OSBA"), the Mid-Atlantic Power Suppliers Association ("MAPSA"), and the Industrial Intervenors.⁴

Following a collaborative process, the EDCs, the OCA, the OSBA, MAPSA, and the Industrial Intervenors reached settlements resolving the issues raised by the EDC's Petitions. The EDCs individually filed the Settlements with the Commission on December 14, 2001. At a Public Meeting on December 19, 2001, however, the Commission voted to reject the Settlements. By Order entered December 21, 2001, the Commission formally rejected the Settlements and approved the Petitions, reasoning that the EDCs' proposed rates accurately reflect known and measurable changes in their RNR tax liability and, thus, are just and reasonable. The Commission also referred the OCA's Complaints to the Office of Administrative Law Judge for adjudication within 60 days, however, and granted the Petitions to Intervene filed by PECO, the OSBA, MAPSA, and the Industrial Intervenors.

II. ANTICIPATED ISSUES AND SUB-ISSUES

The Industrial Intervenors wish to ensure that, prior to permitting the EDCs to recover their increased RNR tax liability resulting in rates that exceed their applicable rate caps, the Commission determine that the EDCs' resulting rates are "just and reasonable," as required by Sections 1308(a) and 2804 of the Competition Act. See 66 Pa.C.S. §§ 1308(a) & 2804. The Industrial Intervenors assert that while the Competition Act permits an EDC to seek recovery of increased tax liability attributable to the RNR process, the Competition Act does not automatically entitle an EDC to such recovery as an exception to the rate cap. Rather, inherent in the Competition Act's "just and reasonable" standard is the requirement that an EDC seeking

⁴ In addition to filing a Petition to Intervene in the Commission's proceeding regarding West Penn's Petition (Docket No. R-00016857), WPPII also submitted an Answer in Opposition.

to increase its rates beyond its rate cap show that an exception to the rate cap is necessary for the EDC to have the opportunity to earn a fair rate of return. See 66 Pa.C.S. § 2804(4)(iii)(c). An EDC may have an opportunity to earn a fair rate of return and recover increased tax liability without exceeding the rate cap by an amount equivalent to the increased tax liability. Thus, an EDC must prove that the rates resulting from its proposed exception to its rate cap are just and reasonable. The Commission's determination that the EDCs accurately calculated the effect of the RNR tax increase on their proposed rates is wholly insufficient. Instead, Section 2804(16)(ii) of the Competition Act clearly provides, "The commission shall adjudicate . . . whether the *resulting rates* are just and reasonable." 66 Pa. C.S. § 2804(16)(ii) (emphasis added). Because the Industrial Intervenors disagree with the standard applied by the Commission in these proceedings, the Industrial Intervenors are planning to file Petitions for Review with the Commonwealth Court with respect to this issue.

III. PROPOSED WITNESSES

The Industrial Intervenors are in the process of evaluating whether they will sponsor testimony in this proceeding. In the event that the Industrial Intervenors decide to sponsor testimony, they will inform the parties and the ALJ as soon as possible of the intended witnesses and topics of testimony. The Industrial Intervenors also intend to participate in this proceeding through possible submission of discovery, cross-examination of other parties' witnesses, and submission of briefs, exceptions, and reply exceptions, as necessary.

IV. PROPOSED SCHEDULE AND DISCOVERY RULES

The Industrial Intervenors will cooperate with the ALJ and the parties at the Prehearing Conference to develop an appropriate procedural schedule and discovery rules in accordance with the Commission's regulations and any ALJ directives. If the Industrial Intervenors or other

parties file Petitions for Review concerning the appropriate legal standard to be applied in these proceedings, however, the OCA's Complaints should be held in abeyance pending resolution of such Petitions for Review due to the inefficiencies of litigating the OCA's Complaints under the legal standard set forth in the Commission's Orders while also contesting that legal standard at the appellate level.

V. POSSIBILITY OF SETTLEMENT

The Industrial Intervenors participated in collaborative discussions with the other parties in an attempt to amicably resolve the issues raised by the EDCs' Petitions and are willing to continue doing so.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

By Karen S. Miller Orner

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Counsel to Duquesne Industrial Intervenors,
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Industrial Customer Alliance, Philadelphia
Area Industrial Energy Users Group, PP&L
Industrial Customer Alliance, and West Penn
Power Industrial Intervenors

Dated: January 7, 2002

Irwin A. Popowsky, Consumer Advocate v. Pennsylvania
Public Utility Commission.

R-00016854

NOTICE OF PETITION by Irwin A. Popowsky, Consumer
Advocate v. Pennsylvania Public Utility Commission. at No.
54 C.D. 2002, in the Commonwealth Court of Pennsylvania
from the order of the Commission entered December 21,
2001 in the above-captioned appeal.

B-00023892

Filed: January 8, 2002

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