BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

GARY D. LINDNER,

Complainant, Docket No.: C-2012-2337274

v.

DUQUESNE LIGHT COMPANY,

Respondent.

REPLY TO EXCEPTIONS

Complainant's Reply to Duquesne Light's Exceptions will be brief. Duquesne Light's Exceptions demonstrate its continuing effort to manipulate the record to challenge facts conclusively established during a prior hearing and, therefore, no longer subject to the Commission's jurisdiction. Even worse, Duquesne Light exchanges advocacy for pure mischaracterization of the evidence developed during the hearing in this matter that ultimately permitted the suggested by Administrative Law Judge Dunderdale.

To that end, Complainant responds as follows so that the Commission may be privy to the complete facts surrounding this matter.

I. FACTS AND PROCEDURAL HISTORY

Sometime in 2011, Duquesne Light erroneously ensured that two delinquent residential accounts were to be assigned to Complainant. See, August 9, 2013 Initial Decision at p. 3. As a result of Duquesne Light's conduct, Complainant commenced an action against before the Pennsylvania Public Utility Commission (the "PUC") at Docket C-2011-2237595 in a matter styled *Gary D. Lindner v. Duquesne Light Company* (the "First PUC Action"). The PUC

conducted an evidentiary hearing on October 25, 2011 to determine if Duquesne Light's errors caused, *inter alia*, Complainant to lose a line of credit that he held with Citizens Bank. *Id*.

During the hearing in the First PUC Action, Duquesne Light misrepresented that it had resolved the issue with two delinquent accounts assigned to Complainant. *Id*. at p. 16. As explained in detail within, it had not. Upon conclusion of the hearing, Judge Dunderdale authored her Initial Decision, which became final when Duquesne Light failed to appeal.

The February 8, 2012 Initial Decision is of the utmost importance to Duquesne Light's exceptions. Specifically, Judge Dunderdale concluded that Duquesne Light acted "intentionally," and that Duquesne Light's conduct specifically caused Complainant to lose a line of credit with Citizens Bank. See, Initial Decision at Docket No.: C-2011-2237595 at pp. 7-8, 13.

When Complainant later attempted to locate new housing, he learned that Duquesne Light had not caused the delinquent account to be removed from his credit report. Due, in part, to Duquesne Light's own evidence (which Judge Dunderdale termed "disturbing"), Judge Dunderdale concluded, again, that Duquesne Light did not provide adequate service. See, Initial Decision at Docket No.: C-2012-2237274. Judge Dunderdale fined Duquesne Light $10,000.00 for its conduct. *Id*. at 19.

Based upon these undisputed facts, and for the reasons that follow below, Duquesne Light's Exceptions should be denied in their entirety.

II. ARGUMENT

EXCEPTION 1: Finding of Fact 8 should remain undisturbed

During the hearing in this matter, Judge Dunderdale took judicial notice of the hearing conducted at Docket No.: C-2011-2237595 and the Initial Decision for that matter. *Id*. at p. 3.

Neither party objected. In fact, in her discussion of the First PUC Action, Judge Dunderdale stated:

> Let me note for the parties that we are starting from the date of the final order...I don't want to hear about anything that predates March of 2012. Everything that was determined in the initial proceeding was not appealed by Duquesne Light, so there it is as it is...
>
> So we're taking that record, we can take judicial--in fact, I am taking judicial notice that record is there and whatever was in the initial decision, whatever was in the final order those are facts that we are starting with and we are moving forward from that point. So I don't want to hear about stuff going on before March 2012...

See, Hearing Tr. at p. 6:14-7:3.

Against this backdrop, Duquesne Light disingenuously attempts to collaterally attack a final, unappealed decision by now placing Judge Dunderdale's original finding concerning Citizens Bank before the Commission. Not only is this violative of well-established case law and precedent, Duquesne Light's desperate act in attempting to avoid owning its error demonstrates the reasoning underlying the $10,000.00 fine.

Duquesne Light did not file exceptions the Initial Decision at Docket No.: C-2011-2237595. As a result, on March 16, 2012, Secretary of the Public Utility Commission Rosemary Chiavetta entered a Final Order in the First PUC Action. See, March 16, 2012 Final Order. The Final Order provides that the Initial Decision was deemed to be final. Like the Initial Decision, the Final Order specifically concluded that Duquesne Light's actions caused Complainant to lose his line of credit with Citizens. *Id*. Duquesne Light did not appeal the Final Order, either.

Judge Dunderdale also concluded that Duquesne Light was responsible for improperly assigning two delinquent accounts to Complainant. See, Initial Decision at Docket No.: C-2011-2237595 at p. at 4. Again this decision was not appealed and became a final order.

Duquesne Light's position is clearly betrayed by the doctrine of collateral estoppel. Collateral estoppel, or issue preclusion, serves to preclude duplicative litigation of a matter previously litigated and essential to an earlier judgment. *Grant v. GAF Corp*., 608 A.2d 1047, 1053 (Pa.Super. 1992). Collateral estoppel is found when the issue decided in a prior action is identical to one presented in the later action; there is a final judgment on the merits in the prior action; the doctrine is being used against a party in the prior action; and the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the original action. *Grant*, 608 A.2d at 1053.

Essentially, collateral estoppel "forecloses litigation" in a subsequent action of an issue that was previously litigated and necessary to the original judgment. *Id*. Importantly, the doctrine of collateral estoppel is not available simply because the prior decision involved administrative procedures. *Id*. at 1056. Rather, so long as the agency is acting a judicial capacity, it resolves disputed facts, and the parties had the opportunity to litigate, "the courts will not hesitate to apply preclusion principles". *Id*.

Obviously, Duquesne Light cannot now challenge a finding of fact from the Initial PUC decision because Judge Dunderdale chose to take judicial notice of that fact in the present matter. Duquesne Light is attempting to relitigate, for the third time, an argument that failed during the First PUC action, an argument it wanted to raise in the instant action, and now on appeal despite the fact that it is foreclosed from doing so. As such, Exception 1 should be denied.

EXCEPTION 2: Findings of fact 6, 9 and 12 should remain undisturbed

Duquesne Light again attempts to relitigate matters conclusively decided during the Initial PUC Action. Specifically, Complainant learned, and Judge Dunderdale concluded, that

Duquesne Light erroneously assigned two adverse reports to Complainant that did not actually belong to him. See, Initial Decision at Docket No.: C-2011-2237595 at p. 4.

To rebut this finding, Duquesne Light does not refer to any testimony or facts presented at the hearing in the present matter. In fact, the entirety of Duquesne Light's Exception 2 references only the April 26, 2011 hearing in the First PUC Action. Despite not discussing the hearing conducted in this matter, there was relevant evidence presented on the topic. Patricia Moritz, a representative from Duquesne Light's collection agency, told Judge Dunderdale that she was aware there was a second report in error concerning Duquesne Light. April 16. 2013 Tr. at P. 72:13-15.

As explained above, Duquesne Light's argument is untenable due to collateral estoppel and, in fact, reaches so far beyond the boundaries of acceptable evidence for purposes of these exceptions that it should be denied in its entirety.

EXCEPTION 3: Finding of fact 15 should remain undisturbed

Finding of fact 15 states "Respondent's witness did not know when Respondent told its collection agency to remove [the credit information]." Ms. Pekarsky, the individual that oversees Duquesne Light's credit department, testified to this fact. Duquesne Light's counsel asked Ms. Pekarsky if she knew when, after learning that the erroneous information had not been removed, Duquesne Light contracted its collection agency. Ms. Pekarsky responded by stating, "I don't know when that was." See, April 16. 2013 Tr. at p. 27.

Duquesne Light argues that Judge Dunderdale's finding is contradicted by "ample and uncontroverted evidence." The evidence to which Duquesne Light speaks is an eleven (11) day window (that being the days between discovery and reporting) in which Duquesne Light must have taken some course of action with respect to its continuing error. Duquesne Light's own

argument demonstrates that Finding 15 is accurate: instead of pointing to a specific date and/or time that Duquesne Light made its request to its collection agency to remove the reporting error, it can only point to an eleven (11) day time frame.

Again, Duquesne Light's exception is without merit.

EXCEPTION 4: Finding of fact 26 should remain undisturbed

Duquesne Light's next wayward argument is an effort to convince the Commission that there is no evidence to support Judge Dunderdale's finding that on April 18, 2011, Duquesne Light's collection agency reported a delinquency for Complainant. Duquesne Light makes this argument despite the fact that on page 37 of Complainant's credit report, which is Exhibit D to the April 16, 2013 Transcript, there is a report that Duquesne Light's collection agency made a report in April 2011 that Complainant owed $183.00.

During Ms. Moritz's testimony, Duquesne Light offered Exhibit A, which is the collection agency's record of information reported to the credit bureau. April 16, 2013 Tr. at p. 59:1-3. Mr. Moritz believed that Exhibit A demonstrates that the collection agency attempted to delete Mr. Lindner's account on April 18, 2012. *Id*. at pp. 60:21-61:1. Unfortunately for Ms. Moritz and Duquesne Light, the Equifax credit report admitted into evidence demonstrates that the delinquency was again reported in April of 2011.

In fact, during cross examination, Ms. Moritz was unable to explain the discrepancy between the collection agency account, which allegedly demonstrates a request to remove the erroneous information, and the Equifax report, which clearly contradicts Ms. Moritz's testimony. *Id*. at p. 78:3-10. Ms. Moritz even agreed with Judge Dunderdale that by looking at the Equifax report, it demonstrated there was a reported unpaid balance for $183.00 with respect to Duquesne Light as of April of 2011. *Id*. at p. 80:5-13.

Additionally, Duquesne Light attempts to argue that Finding of Fact 26 cannot be true because it contradicts Finding of Fact 25, which states that the collection agency attempted to notify the reporting agencies to delete the delinquent accounts. What this argument fails to consider is that apparently Judge Dunderdale concluded that while Duquesne Light's collection agency may have attempted to remove notify the reporting agencies of the error, the collection agency also notified the reporting agencies of a continuing delinquency. Given the manner in which Duquesne Light and its collection agency have handled this matter thus far, this is not a far-fetched conclusion.

Accordingly, because Duquesne Light's exception is without merit, Finding of Fact 26 should remain undisturbed.

EXCEPTION 5: The fine issued should remain undisturbed

The factors cited by Judge Dunderdale given in support of her fine are well articulated and supported by the record. Complainant writes only to address some of the more glaring discrepancies between the record and Duquesne Light's position.

First, the evidence of record is sufficient for Judge Dunderdale to conclude that Complainant sustained prolonged damage to his property interest. It has already been conclusively established that Complainant lost his line of credit with Citizens Bank due to Duquesne Light's intentional actions. Yet, despite the decision from the First PUC hearing, and the representations made at that time by Duquesne Light, the erroneous credit information that was supposed to have been removed from Complainant's credit report remained with him until November of 2012.

Secondly, Duquesne Light attempts to downplay Judge Dunderdale's finding of its egregious conduct by describing it as "merely negligent." Instead, Judge Dunderdale used the

phrase "negligent at best but with an obvious and complete disregard for correcting and ameliorating the damage done to Complainant" to describe Duquesne Light's conduct. See, August 9, 2013 Initial Decision at p. 15. Judge Dunderdale continues later in her Initial Decision by holding that Duquesne Light's inaction was an intentional act that caused Complainant harm. *Id*. at p. 17.

The record, as it stands, is fully supported by the weight of the evidence. Judge Dunderdale, who was in a position to evaluate the witnesses' credibility first-hand, issued a well-reasoned and well-supported Initial Decision that should not be disturbed in light of Duquesne Light's Exceptions.

III. CONCLUSION

For the reasons stated above, Complaint respectfully request that this Commission deny Duquesne Light's Exceptions in there entirety.

Respectfully submitted,

/s/ A. Michael Gianantonio
A. Michael Gianantonio
Pa.ID No. 89120

310 Grant Street, Suite 2901
Pittsburgh, PA 15219
412-566-1090

Attorney for Complainant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon the following counsel of record by First Class Mail on the 9th day of September, 2013.

Christopher W. Cahillane, Esquire
Tucker Arensberg, P.C.
1500 One PPG Place
Pittsburgh, PA 15222

/s/ A. Michael Gianantonio
A. Michael Gianantonio