

COMMONWEALTH OF PENNSYLVANIA



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January 6, 2014

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

RE: Pennsylvania Public Utility Commission,  
*et al.* v. Duquesne Light Company  
Docket No. R-2013-2372129

Dear Secretary Chiavetta:

Enclosed please find the Office of Consumer Advocate's Main Brief in the above-referenced proceeding.

Copies have been served as indicated on the enclosed Certificate of Service.

Respectfully Submitted,

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Enclosures

cc: Honorable Conrad A. Johnson  
Certificate of Service

173469

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission

v.

Duquesne Light Company

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Docket No. R-2013-2372129

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MAIN BRIEF OF THE  
OFFICE OF CONSUMER ADVOCATE

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## **I. INTRODUCTION**

### **A. STATEMENT OF THE CASE**

On August 2, 2013, Duquesne Light Company (DLC or the Company) filed Supplement No. 81 to Tariff Electric - Pa. P.U.C. No. 24 (Supplement No. 81) proposing to increase rates to produce additional annual operating revenues of approximately \$76.3 million, or an overall increase of 17.6% in annual distribution revenues. DLC is engaged in the business of furnishing electric utility service to approximately 588,000 customers in the greater Pittsburgh region, specifically in Allegheny and Beaver Counties.

On August 9, 2013, the Bureau of Investigation & Enforcement (I&E) filed a Notice of Appearance. On August 16, 2013, the Office of Consumer Advocate (OCA) filed a Formal Complaint, Public Statement, and Notice of Appearance. On August 22, 2013, the Office of Small Business Advocate (OSBA) filed a Formal Complaint, Public Statement, and Notice of Appearance. Formal Complaints were also filed by the Duquesne Industrial Interveners (DII) and jointly filed by NRG Midwest, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC (collectively, NRG). Petitions to Intervene were filed by the International Brotherhood of Electrical Workers, Local 29 (IBEW 29); United States Steel Corporation (US Steel); Citizen Power, Inc.; Community Action Association of Pennsylvania (CAAP); CAUSE-PA; Interstate Gas Supply, Inc.; Citizen's for Pennsylvania's Future (PennFuture); and Beaver Falls Municipal Authority (BFMA). All petitions to intervene were subsequently granted. Formal Complaints and rate protests were filed by various individuals.

The proceeding was assigned to Administrative Law Judge (ALJ) Conrad A. Johnson. By Order entered September 26, 2013, the Public Utility Commission (Commission) suspended the implementation of Supplement No. 81 until May 1, 2014, and instituted an investigation into the lawfulness, justness, and reasonableness of the rates, rules, and regulations proposed in

Supplement No. 81 and DLC's existing rates, rules and regulations. A prehearing conference was held on October 4, 2013, and a litigation schedule was adopted.

On November 1, 2013, the OCA submitted the direct testimonies of David J. Effron, OCA Statement No. 1; Charles W. King, OCA Statement No. 2; Glenn A. Watkins, OCA Statement No. 3; and Roger D. Colton, OCA Statement No. 4. On November 26, 2013, the OCA submitted the rebuttal testimonies of Glenn A. Watkins, OCA Statement No. 3-R, and Roger D. Colton, OCA Statement No. 4-R. On December 9, 2013, the OCA submitted the surrebuttal testimonies of David J. Effron, OCA Statement No. 1-SR; Charles W. King, OCA Statement No. 2-SR; Glenn A. Watkins, OCA Statement No. 3-SR; and Roger D. Colton, OCA Statement No. 4-SR. Hearings were held on December 16, 17 and 20, 2013. The testimonies of OCA witnesses King, Watkins and Colton were entered into the record by stipulation of the parties at the hearing on December 16, 2013. OCA witness Effron's testimony was entered into the record at the hearing on December 17, 2013.

All of the parties to this matter except NRG have entered into a settlement (Settling Parties). BFMA does not oppose the settlement. As such, the only issue remaining for litigation is NRG's assertion that DLC's Tariff Rider 18 is discriminatory and must be removed from DLC's Tariff. On November 12, 2013, DLC filed Preliminary Objections against the Tariff Rider 18 issues in NRG's Formal Complaint seeking dismissal of the issues without prejudice on the basis that, *inter alia*, indispensable parties were not joined and the Commission lacked authority to grant the relief requested by NRG. On November 22, 2013, NRG filed an Answer to DLC's Preliminary Objections. The OCA submitted a letter in support of the Company's Preliminary Objections on November 25, 2013. The ALJ denied DLC's Preliminary Objections without opinion by Order entered December 12, 2013. On December 13, 2013, DLC filed a

Motion to Sever the Tariff Rider 18 issues from this base rate proceeding. NRG opposed DLC's Motion. The OCA and I&E indicated their support of DLC's Motion to Sever the Tariff Rider 18 issues at hearings on December 16, 2013. The ALJ denied DLC's Motion to Sever at hearings on December 17, 2013. Also on December 13, 2013, DLC filed an Interlocutory Appeal of the ALJ's denial of DLC's Preliminary Objections. The Interlocutory Appeal is pending with the Commission.

The OCA submits this Main Brief pursuant to the ALJ's Order entered on October 22, 2013, and the ALJ's direction at the hearing on December 20, 2013. The OCA will submit a Statement in Support of Settlement by January 17, 2014, pursuant to the ALJ's direction at the hearing on December 20, 2013.

## **B. LEGAL STANDARDS AND BURDEN OF PROOF**

### **1. Non-Rider No. 18 Issues**

As a Settling Party, the OCA supports the settlement of all non-Tariff Rider 18 issues and will detail its reasons in its Statement in Support of Settlement that will be submitted by January 17, 2014.

### **2. Rider No. 18 Burden of Proof Issue**

Pursuant to ALJ Johnson's direction at the hearing on December 20, 2013, the OCA provides a discussion of two specific cases as they relate to burden of proof in regards to Tariff Rider 18. See Tr. 456-57. See also Johnstown v. Pa. PUC, 184 Pa. Super. 56; 133 A.2d 246 (1957); and Brockway Glass v. Pa. PUC, 63 Pa. Commw. 238, 437 A.2d 1067 (1981). In this case, NRG filed a Formal Complaint against DLC's Tariff Rider 18 seeking a finding that Tariff Rider 18 is not just and reasonable. See NRG Complaint. Tariff Rider 18 establishes the price that is paid to certain small generators for electricity provided from their facilities pursuant to contracts entered into by DLC and subsequently sold as part of DLC's restructuring. In its rate

case filing, DLC did not propose changes to Tariff Rider 18, and Tariff Rider 18 does not impact the revenue requirement in this case.

In Johnstown v. Pa. PUC, the issue on appeal was whether the utility, Johnstown Water Company, provided sufficient evidence to the Commission for the Commission to find that the requested rate increase was just and reasonable. Id. at 248. In Johnstown, the City of Johnstown filed a complaint protesting the rate increase requested by the water company. The Commission dismissed the City's complaint and approved the rate increase. Id. On appeal, the City asserted that the Commission did not make specific findings of fair value and fair rate of return and that the water company had not presented substantial evidence supporting its requested rate increase. Id. at 249. The Superior Court affirmed the Commission's decision, finding that the Commission did in fact have substantial evidence on which to make a finding that the requested rate increase was just and reasonable, and that the Commission is not required to make a specific finding of fair value and fair rate of return. Id. at 252.

Regarding burden of proof, the Superior Court addressed which party has the burden of proof for a proposed rate as follows:

The purpose of a rate proceeding is to determine whether rates, proposed or existing, conform to the statutory mandate that they be just and reasonable. Where the rate proceeding is the result of a voluntary change in rates to which a complaint is filed or the result of an investigation ordered by the commission on its own motion, the utility is required to substantiate the proposed rates.

Id. at 250. (Citations omitted). Johnstown, however, does not address which party has the burden of proof when a party to a rate case complains about an existing tariff provision that is not a rate.<sup>1</sup> From the OCA's review, there are no cases that cite to Johnstown as authority on the issue of burden of proof.

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<sup>1</sup> NRG asserts that Tariff Rider 18 is not a rate. In NRG's Answer to DLC's Preliminary Objections, NRG stated:

Brockway Glass v. Pa. PUC has been cited in seven Commonwealth Court decisions on the issue of burden of proof. Brockway Glass v. Pa. PUC, 63 Pa. Commw. 238, 437 A.2d 1067 (1981). In Brockway, an industrial customer filed a complaint against West Penn Power Company regarding contract and billing issues in Rate Schedule 47. Id. at 1069. The complaint in Brockway was not filed in the context of a rate case but was filed against an existing rate schedule. The Commonwealth Court discussed this distinction as follows:

Public utility rates, of course, are required to be just and reasonable, 66 Pa. C.S. § 1301, and, where a customer is heard to complain concerning a *proposed* change in rate, the burden of proof is upon the public utility to show that the proposed rate is just and reasonable. Where the complaint involves an *existing* rate, however, the burden then falls upon the customer to prove that the charge is no longer reasonable.

Id. at 1070. (Emphasis in original).

The OCA submits, as well, that any discussion on burden of proof in a rate case must consider Section 315(a) of the Public Utility Code. Section 315(a) states:

Reasonableness of rates – In any proceeding upon the motion of the Commission, involving any proposed or existing rate of any public utility, or in any proceedings upon the complaint involving any proposed increase in rates, the burden of proof to show that the rate involved is just and reasonable shall be upon the public utility.

66 Pa. C.S. § 315(a).

Section 315(a) assigns the utility requesting the rate increase with the burden of proving its existing and proposed rates are just and reasonable. Sharon Steel Corporation v. Pa. PUC may provide the clearest discussion of burden of proof in a rate case proceeding. 78 Pa.

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While Duquesne Light repeatedly refers to the energy purchase price set forth in Rider No. 18 as a “rate,” the NRG Companies do not believe that it is a “rate” as defined by Section 102 of the Pennsylvania Public Utility Code, 66 Pa. Code § 102, because it is not a charge by the public utility to a customer for service. Accordingly, in order to avoid confusion, the NRG Companies refer to a “price” in its filing.

See NRG Answer to Preliminary Objections at 6 (fn 3).

Commw. 447; 468 A.2d 860 (1983). In Sharon Steel, Sharon Steel Corporation filed a complaint against a rate increase filed by NFG. Id. at 861. The Commission subsequently approved NFG's rate increase, and Sharon Steel appealed. On review, the Commonwealth Court explained that NFG had the burden of proving that its existing and proposed rates were just and reasonable. Id. at 862. The Commonwealth Court stated:

[...] the PUC's initiating order instituted an investigation upon commission motion into the propriety of NFG's existing rates as well as the proposed rates. Sharon maintains that, by virtue of the PUC's motion, NFG had the burden of proving that, not only its proposed rates, but also its existing rates, were just and reasonable under section 1301, because section 315 of the Code provides that '[i]n any proceeding upon the motion of the commission, involving any proposed or existing rate ... the burden of proof to show that the rate involved is just and reasonable shall be upon the utility.

Sharon Steel at 862. (Citations omitted.) Under Sharon Steel, once the Commission suspends a rate filing, the utility has the burden of proving that every rate in the tariff filing is just and reasonable. As noted in footnote 1 above, NRG asserted that Tariff Rider 18 is not a rate.

## **II. SUMMARY OF ARGUMENT**

The OCA entered into a settlement with the Company and other Settling Parties, which encompasses all of the OCA's issues raised in testimony. The OCA will submit a Statement in Support of Settlement with the Settling Parties' submission of the Joint Petition for Settlement.

## **III. ARGUMENT**

### **A. NON-UNANIMOUS SETTLEMENT ISSUES**

The OCA submits that it may not be appropriate to comment on specific elements of the settlement when the settlement has not yet been filed with the Commission. As such, in its Statement in Support of Settlement, the OCA intends to provide a detailed discussion of the reasons why the settlement meets the relevant legal standards and should be adopted. The ALJ directed the parties to file the Joint Petition for Settlement and Statements in Support by January

17, 2014. Tr. 458. At this time, the Settling Parties do not know if there will be formal opposition to the settlement.

**1. Standard of Review**

The OCA will provide a detailed discussion of the appropriate standard of review in its Statement in Support of Settlement.

**2. Revenue Requirement**

DLC witness Pfrommer testified that the Company and Settling Parties had reached a revenue requirement settlement, wherein DLC would be permitted an annual increase in distribution revenues of \$48 million. DLC St. 12-RJ at 4. As the OCA will discuss in more detail in its Statement in Support of Settlement, the OCA submits that the revenue requirement settlement is within the range of likely outcomes had this matter been fully litigated.

**3. Revenue Allocation and Rate Design**

The OCA will provide a detailed discussion of these settled issues in its Statement in Support of Settlement.

**4. Universal Service**

The OCA will provide a detailed discussion of these settled issues in its Statement in Support of Settlement.

**5. Customer Service**

The OCA will provide a detailed discussion of these settled issues in its Statement in Support of Settlement.

**6. LED Street Light Program**

The OCA takes no position on this settled issue.

**B. RIDER NO. 18 ISSUES**

The OCA has no comment on these issues at this time but reserves the right to reply to arguments raised by other parties in their Main Briefs.

**C. MISCELLANEOUS ISSUES**

The OCA has no additional issues to discuss at this time but reserves the right to reply to arguments raised by other parties in their Main Briefs.

#### IV. CONCLUSION

The Office of Consumer Advocate submits this Main Brief pursuant to the Order of Administrative Law Judge Conrad A. Johnson entered October 22, 2013, and pursuant to the directions provided by the ALJ at hearings of this matter.

Respectfully Submitted,



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Date: January 6, 2014

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CERTIFICATE OF SERVICE

Re: Pennsylvania Public Utility Commission, *et al.* v. Duquesne Light Company  
Docket No. R-2013-2372129

I hereby certify that I have this day served a true copy of the foregoing document, the Office of Consumer Advocate's Main Brief, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code Section 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 6th day of January 2014.

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