



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

January 17, 2014

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

Re: Pennsylvania Public Utility Commission v. Duquesne Light Company

Docket No. R-2013-2372129

Dear Judge Johnson:

Enclosed please find an original copy of the **Reply Brief of the Bureau of Investigation and Enforcement Regarding the Burden of Proof** regarding the above-captioned proceeding.

Copies are being served on all active parties of record. If you have any questions, please contact me at (717) 783-6151.

Sincerely,

Charles Daniel Shields
Senior Prosecutor
Bureau of Investigation and Enforcement
PA Attorney I.D. No. 29363

CDS/sea
Enclosure

cc: Parties of Record
Hon. Conrad A. Johnson

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	R-2013-2372129
Office of Consumer Advocate	:	C-2013-2379084
Office of Small Business Advocate	:	C-2013-2380474
Jacquelyn and Robert Miller	:	C-2013-2383835
Gwendolyn L. LeVert	:	C-2013-2383980
Duquesne Industrial Intervenors	:	C-2013-2385292
Aimee-Marie Dorsten	:	C-2013-2386037
Connie Schiavo	:	C-2013-2386284
NRG Midwest, NRG Energy Center	:	C-2013-2390562
Pittsburgh LLC, and Reliant Energy	:	
Northeast, LLC	:	
	:	
	:	
v.	:	
	:	
	:	
Duquesne Light Company	:	

**REPLY BRIEF OF
THE BUREAU OF INVESTIGATION AND ENFORCEMENT
REGARDING BURDEN OF PROOF**

Charles Daniel Shields
Senior Prosecutor
PA Attorney I.D. No. 29363

Scott B. Granger
Prosecutor
PA Attorney I.D. No. 63641

Bureau of Investigation and Enforcement
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, Pennsylvania 17105-3265
(717) 787-1976

Dated: January 17, 2014

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<i>Johnstown v. Pa. P.U.C., 133 A.2d 246, 250 (Pa. Super. 1957)</i>	5
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I. INTRODUCTION

On January 6, 2014, the Commission's Bureau of Investigation and Enforcement ("I&E") and a number of other parties to this proceeding submitted briefs upon the direction of presiding Administrative Law Judge Conrad A. Johnson ("ALJ" or "ALJ Johnson") at the hearing on December 20, 2013. Tr., pp. 456-457. In compliance with the ALJ's directive to brief the burden of proof in regards to Duquesne Light Company's ("Company" or "Duquesne") existing Tariff Rider 18, I&E submitted an initial Brief specifically addressing that issue. I&E Brief, pp. 6-13.

As referenced in the I&E Brief, the Commission in its September 26, 2012, Order initiating this proceeding states that "[I]nvestigation and analysis of this proposed tariff filing and the supporting data indicate that the proposed changes in rates, rules, and regulations may be unlawful, unjust, unreasonable, and contrary to the public interest. It also appears that consideration should be given to the reasonableness of the Respondent's existing rates, rules, and regulations." I&E Brief, pp. 6-13. By this language, the Commission makes it abundantly clear that any and all aspects of the existing tariff can, and should be, scrutinized in this proceeding.

As such, this instant I&E Reply Brief is submitted to reaffirm the Company's burden of proof to demonstrate the validity of both proposed and existing tariff provisions and to respond to the arguments of certain other parties on the issue of the burden of proof as presented in their respective initial/main

briefs. The arguments and contentions provided in this I&E Reply Brief are consistent with and elaborate upon the I&E Brief's reference to the statutory and case law demonstrating that, in a formal investigation of a utility's rate hike request initiated by the Commission, that utility bears the burden of proof with respect to both its existing and proposed rates, rules and regulations and that burden does not shift to any other party to the proceeding contesting the legitimacy of an existing tariff provision simply because the utility proposed no changes to that provision.

II. ARGUMENT

A. Burden of Proof

The extensive burden of proof argument presented in the initial I&E Brief is hereby incorporated by reference. That I&E argument makes abundantly clear that it is incumbent upon a public utility to affirmatively prove the reasonableness of each and every element of its claim "in any proceeding upon motion of the Commission" 66 Pa. C.S.A. § 315(a). I&E MB, pp. 6-13. The I&E Brief submitted on January 6, 2014, addressed the two specific decisions that the ALJ directed be briefed, namely the *City of Johnstown v. Pennsylvania Public Utility Commission*, 184 Pa. Super 56, 133, A2d 246 (1957) and *Brockway Glass Company v. Pennsylvania Public Utility Commission*, 63 Pa. Cmwlth. 238, 437 A.2d 1067 (1981). In the review, discussion and analysis of both cases in the I&E Brief, I&E contends and repeats here that neither holding alters Duquesne's responsibility to bear the burden of proving that each element of its existing and

proposed tariff in this instant base rate proceeding upon Commission motion is just, reasonable, non-discriminatory and not contrary to the public interest. I&E MB, pp. 10-12.

The ALJ's directive for the parties to brief the issue of burden of proof was prompted by contentions raised in the Complaint of NRG Midwest, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC (collectively "NRG"); a complaint that the ALJ consolidated with this instant base rate proceeding. Specifically, the question is whether Complainant NRG bears the burden of proof regarding its proposed changes or elimination of Rider 18 in Duquesne's existing tariff, or whether, within the context of this base rate case, Duquesne retains the burden of demonstrating that Rider 18, like any and all other provisions of its rates, rules and regulations, is just, reasonable, non-discriminatory and not contrary to the public interest. I&E Brief, pp. 6-13.¹

This instant I&E Reply Brief responds to the positions on the issue of burden of proof as put forth by both Duquesne and intervenor Beaver Falls Municipal Authority ("Beaver Falls") in their respective initial/main briefs. Each of those briefs present argument and conclusions regarding the assignment of the burden of proof that fundamentally differ from the I&E position, as both Duquesne and Beaver Falls seek to improperly shift the burden of proof away

¹ The I&E Burden of Proof Brief does however provide its recognition that it is not enough for NRG to simply file a Complaint in response to the Company's base rate filing and they must then present some evidence or analysis on the record supporting the reasonableness of its proposed change to the existing Rider 18. I&E Brief, pp. 13-14. I&E also states there that, while the ultimate burden of proof does not shift from the public utility, a party proposing an adjustment to a ratemaking claim or a change to an existing tariff provision bears the burden of presenting some evidence or analysis tending to demonstrate the reasonableness of the adjustment or proposed change. I&E Brief, pp. 13-14.

from Duquesne and place it upon NRG as to any necessary and appropriate changes to Duquesne's existing Tariff Rider 18. DLC Initial Brief, pp. 8-10. Beaver Falls Main Brief, pp. 9-10. I&E Brief, pp. 6-13.

In contrast to the arguments put forth by Duquesne and Beaver Falls, a review of the briefs of the Office of Consumer Advocate, at pages 3-6, and NRG, at pages 3-5, discloses that they are consistent with the I&E position that Duquesne bears the burden of proof with respect to its existing tariff provisions in this base rate proceeding, regardless of whether or not Duquesne proposed a change to a particular provision.

Again, the I&E Brief distinguishes both the *Johnstown* and *Brockway Glass* cases from the situation here and demonstrates that neither holding affects the retention of the burden of proof by a filing public utility in a base rate proceeding to justify the validity of their existing rates, rules and regulations. I&E Brief, pp. 8-10. Like the I&E Brief, the OCA Main Brief also successfully demonstrates that neither case is applicable or controlling, noting in particular that the complaint in *Brockway Glass* was not filed in the context of a rate case but was a stand-alone filing against a utility's existing rate schedule previously approved by the Commission. OCA MB, pp. 3-6.

As to the NRG Main Brief, it similarly maintains that, "[W]here rate proceedings are initiated by the Commission, the public utility bears the burden of proof with respect to every element of "any proposed or existing rate." NRG Brief, p. 4. NRG also contends that there is no reason in a base rate proceeding to

alter the filing public utility's burden of proof on an existing tariff provision simply because the public utility was not proposing any change to that particular tariff provision. NRG, pp. 4-5. I&E agrees.

This is indeed the crux of the matter, as both the Duquesne and Beaver Falls initial/main briefs argue that since Duquesne has not sought any changes, amendments, or modifications to Rider No. 18 in this base rate proceeding, NRG bears the burden of proof. Duquesne, IP, pp. 9-10. In an attempt to advance this proposition, Duquesne cites to *Pa. P.U.C. v. Metropolitan Edison Company, et al.*, Docket Nos. R-00061366, et al., 2007 Pa. PUC LEXIS 5 (Jan. 11, 2007), where the Commission determined that a party to a base rate proceeding that proposed renewable energy initiatives that were not anywhere included within the utility's case-in-chief had the burden of proof as to those initiatives. However, the Commission's decision in that 2007 *Metropolitan Edison* proceeding is easily distinguishable from the present situation since NRG is contesting whether an existing tariff provision, namely Tariff Rider 18, is just, reasonable, non-discriminatory and not contrary to the public interest - and is not seeking to have the Commission direct Duquesne to produce a new and separate tariff provision that does not currently exist. As such, Duquesne's contention in its Initial Brief that, "[A] party that raises an issue that is not included in a public utility's general rate case filing bears the burden of proof" is unsupported and quite simply inapplicable here as Tariff Rider 18 most certainly is an existing Duquesne tariff provision. Duquesne IB, pp. 9-10. I&E Brief, pp. 6-13.

Also in its Initial Brief, Duquesne cites to the Pennsylvania Superior Court's decision in *Johnstown v. Pa. P.U.C.*, 133 A.2d 246, 250 (Pa. Super. 1957). As even interpreted by Duquesne, the case stands for the proposition that in a base rate proceeding where a municipal complainant challenges the requested rate increase (by alleging infirmities and limitations in the utility's original cost estimates, reproduction cost estimates, and accrued depreciation), the utility retains the burden to submit sufficient evidence of quantity and quality to enable the Commission to properly make its findings and reach its conclusions. Duquesne IP, p. 9. However, having cited the fact that *Johnstown* involved only a question of utility-proposed changes to its existing tariff provisions, Duquesne seeks to erroneously extend the application of that case to support its proposition that the utility bears the burden of proof in a base rate proceeding only for its own proposed changes to an existing tariff provision.

I&E submits that Duquesne's argument attempting to have the ALJ and the Commission reach such a conclusion is faulty and patently unsupportable. In point of fact, the Superior Court's holding in *Johnstown* provides no logical support for Duquesne's attempt to divert its burden of proof responsibilities to NRG regarding Tariff Rider 18. Simply put, no sound legal or rational reason exists to extend the Pennsylvania Superior Court's clear and unequivocal recognition of a public utility's burden of demonstrating the legitimacy of any proposed changes to its existing tariffs into an over-reaching proposition that proposed tariff changes by a utility are the only circumstance where such a burden

is retained by the utility in a base rate case proceeding. It cannot be accurately stated that a ruling that a utility retains the burden of proof for changes it proposes to its existing tariff in a base rate case supports, in any way, a further conclusion that the utility retains the burden of proof only when it proposes any changes to an existing tariff provision. Such reasoning is faulty and illogical and it is clear that the Superior Court made no such express conclusion in its holding in *Johnstown*.

For these reasons and those advanced in the initial I&E Brief, I&E submits that none of the arguments advanced in the Duquesne Initial Brief support its effort to have its burden of proof shifted to NRG on the issue of the justness, reasonableness and non-discriminatory nature of existing Tariff Rider 18.

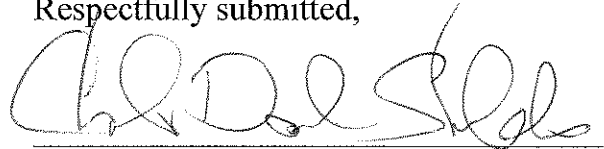
As to Beaver Fall's three-paragraph burden of proof argument in its Main Brief, the most that can be said for it is that it dutifully recites the holdings of the *Johnstown* and *Brockway Glass* cases as directed by the ALJ, but fails to even argue, let alone demonstrate, that either case supports Beaver Fall's contention that the burden of proof shifts to NRG on the Tariff Rider 18 issues. Beaver Falls MB, pp. 9-10. A review of the remaining portion of the Beaver Fall's Main Brief on the burden of proof issue discloses that it simply notes that Duquesne proposed no changes to Rider No. 18 and then concludes with a reference that elsewhere in their brief they advance their argument that "... Duquesne was without legal authority to propose any change to the Rider No. 18." Beaver Falls MB, pp. 9-10. As such, no part of the Beaver Falls Main Brief provides a rational or legal basis for either the ALJ or the Commission to relieve Duquesne of its longstanding and

appropriately comprehensive burden of proof responsibilities in this (or any other) base rate proceeding.

III. CONCLUSION

For the reasons set forth in this I&E Reply Brief, as well as those presented in the initial I&E Brief, the Bureau of Investigation and Enforcement respectfully requests that Administrative Law Judge Conrad A. Johnson and the Pennsylvania Public Utility Commission reconfirm that Duquesne Light Company retains the burden of proof in this instant base rate proceeding to demonstrate that any and all of its existing rates, rules, and regulations are lawful, just, reasonable, and not contrary to the public interest. As such, the traditional burden of proof assumed by a utility in a formal investigation proceeding of a base rate hike request should be reaffirmed as specifically applying to consideration of the instant question of whether the subject Tariff Rider 18, an existing rate, rule or regulation, is in any manner unlawful, unjust, unreasonable and contrary to the public interest in its current form.

Respectfully submitted,



Charles Daniel Shields
Senior Prosecutor
PA Attorney I.D. No. 29363

Scott B. Granger
Prosecutor
PA Attorney I.D. No. 63641

Bureau of Investigation and Enforcement
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, Pennsylvania 17105-3265
(717) 787-1976
Dated: January 17, 2014

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission :
 :
 v. : Docket No. R-2013-2372129
 :
 Duquesne Light Company :

CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing **Reply Brief** dated January 17, 2014, either personally, by first class mail, electronic mail, express mail and/or by fax upon the persons listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party):

Michael W. Gang, Esquire
Anthony D. Kanagy, Esquire
Christopher T. Wright, Esquire
Post & Schell, PC
17 North Second Street
12th Floor
Harrisburg, PA 17101-1601

Candis A. Tunilo, Esquire
Assistant Consumer Advocate
David T. Evrard
Assistant Consumer Advocate
Amy E. Hirakis
Assistant Consumer Advocate
Office of Consumer Advocate
555 Walnut Street
5th Floor Forum Place
Harrisburg, PA 17101-1923

Robert H. Hoaglund, II, Esquire
Sr. Counsel, Regulatory
Tishekia E. Williams, Esquire
Sr. Counsel, Regulatory

Sharon E. Webb, Esquire
Assistant Small Business Advocate
Office of Small Business Advocate
300 North Second Street
Suite 1102
Harrisburg, PA 17101

Pamela C. Polacek, Esquire
Teresa Schmittberger, Esquire
McNees, Wallace & Nurick
100 Pine Street
P. O. Box 1166
Harrisburg, PA 17108-1166
(Counsel for DII)

Theodore S. Robinson, Esquire
Citizen Power Inc.
2121 Murray Avenue
Pittsburgh, PA 15217
(Counsel for Citizen Power)

Christopher O'Hara
NRG Energy, Inc.
211 Carnegie Center Drive
Princeton, NJ 08540

Duquesne Light Company
411 Seventh Avenue, 16th Floor
Pittsburgh, PA 15219
Scott J. Rubin, Esquire
333 Oak Lane
Bloomsburg, PA 17815-2036
(Counsel for IBEW Local 29)

Harry S. Geller, Esquire
Patrick M. Cicero, Esquire
The Pennsylvania Utility Law Project
118 Locust Street
Harrisburg, PA 17101-1414
(Counsel for CAUSE-PA)

Todd S. Stewart, Esquire
Hawke McKeon & Sniscak LLP
P.O. Box 1778
100 N. Tenth Street
Harrisburg, PA 17105-1778
(Counsel for IGS)

David P. Zambito, Esquire
Joshua L. Belcher, Esquire
Cozen O'Connor
305 North Front Street, Suite 400
Harrisburg, PA 17101
(Counsel for NRG Companies)

John F. Povilaitis, Esquire
Buchanan Ingersoll & Rooney, PC
409 North Second Street, Suite 500
Harrisburg, PA 17101-1357

Derrick Price Williamson, Esquire
Barry A. Naum, Esquire
Spilman Thomas & Battle PLLC
1100 Bent Creek Boulevard, Suite 101
Mechanicsburg, PA 17050

Joseph L. Vullo, Esquire
Burke Vullo Reilly Roberts
1460 Wyoming Avenue
Forty Fort, PA 18704
(Counsel for CAAP)

David B. MacGregor, Esquire
Post & Schell, PC
Four Penn Center
1600 John F. Kennedy Boulevard
Philadelphia, PA 19103-2808

George Jugovic, Jr., Esquire
Heather M. Langeland, Esquire
Citizens for Pennsylvania's Future
200 First Avenue, Suite 200
Pittsburgh, PA 15222



Charles Daniel Shields
Senior Prosecutor
Bureau of Investigation and Enforcement
PA Attorney I.D. No. 29363