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VIA FEDERAL EXPRESS

May 24, 2007

Secretary of the Commission
Pennsylvania Public Utility Commission
2nd Floor, Keystone Building
400 North Street
Harrisburg, PA 17120

Re: ***Ohioview Infrastructure v. Duquesne Light Company***
C-20066233
Groveton Housing v. Duquesne Light Company
C-20066236
(consolidated)

Dear Secretary:

Enclosed for filing as of today, May 24, 2007, are an original and nine (9) copies of the Exceptions of Ohioview Infrastructure, Inc. and Groveton Housing Partnership, LP - Complainants in the above-referenced matter. Pursuant to 52 Pa. Code 1.11(a)(2), (b), the enclosed is deemed filed on the date deposited with an overnight express package delivery service. Copies have been served on the parties as per the attached Certificate of Service.

Please return a time-stamped copy of the extra cover page in the enclosed self-addressed envelope for our file.

Thank you for your assistance.

Very truly yours,

David J. Montgomery

DOCUMENT FOLDER

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COMMONWEALTH OF PENNSYLVANIA

PUBLIC UTILITY COMMISSION

OHIOVIEW INFRASTRUCTURE, INC.,

Complainant,

v.

DUQUESNE LIGHT COMPANY

Respondent.

Docket No. C-20066233
C-20066236

GROVETON HOUSING PARTNERSHIP, LP,

Complainant,

v.

DUQUESNE LIGHT COMPANY

Respondent.

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MAY 24 2007

PA PUBLIC UTILITY COMMISSION
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EXCEPTIONS OF OHIOVIEW INFRASTRUCTURE, INC. AND GROVETON HOUSING PARTNERSHIP, LP - COMPLAINANTS

May 24, 2007

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**EXCEPTIONS OF OHIOVIEW INFRASTRUCTURE, INC.
AND GROVETON HOUSING PARTNERSHIP, LP – COMPLAINANTS**

Complainants Ohioview Infrastructure, Inc. (hereinafter "Ohioview Infrastructure") and Groveton Housing Village Partnership LP (the "Partnership") hereby file the following exceptions to the April 27, 2007 Initial Decision and Order issued by the Administrative Law Judge (the "ALJ"), Hon. Michael A. Nemec. See Exhibit A (the "Initial Decision").

I. INTRODUCTION

Rule 13.2 of its Tariff requires Respondent Duquesne Light Company ("Duquesne Light") to pay for the costs of installing underground electric facilities for "New Residential Developments." The issue in this consolidated action is whether two newly constructed affordable housing communities, Pleasant Ridge and Groveton Village, qualify as

New Residential Developments under Rule 13.2. Because the developments are completely "new" in every substantive respect, they satisfy Rule 13.2's requirements. Both communities were constructed on cleared, newly subdivided ground, utterly devoid of infrastructure, streets, or buildings. These communities are thus indistinguishable from new residential communities built on former farmland. The only difference is that these communities were built on reclaimed land -- property that had previously been occupied by public housing.

Despite the different ownership and the unquestionably new residential quality of the developments, the ALJ wrongly concluded that the developers should be solely responsible for the costs of installation of the underground electrical facilities. To support this conclusion, the ALJ has adopted a limitation of the term "New Residential Development" that would disqualify any such development if, at one time, an overhead electric supply line, existed at the site. This position ignores Pennsylvania land use law and, significantly, the PUC's own requirement that new residential developments include underground electric lines. See 52 Pa.Code § 57.81.

II. BACKGROUND

A. The Parties

Ohioview Infrastructure, Inc., is a corporation located at 230 Wyoming Avenue, Kingston, Pennsylvania, 18704. In 2003, Ohioview Infrastructure was formed for the purpose of constructing Pleasant Ridge in Stowe Township, Pennsylvania.[1] Groveton Partnership is a

[1] Ralph A. Falbo, the Chairman and CEO of Ralph A. Falbo, Inc. ("Falbo, Inc.") testified regarding the partnership structures of Ohioview Infrastructure and Groveton Village partnerships. Tr. at 110.17. As he explained, Falbo, Inc. is a partner in Penrose Falbo, Inc. and Penrose Falbo and the Allegheny County Housing Authority are co-general partners in both Ohioview Infrastructure, Inc. and Groveton Village Partnership. Tr. at 134.3. Although the

partnership located at 230 Wyoming Avenue, Kingston, Pennsylvania, 18704. Like Ohioview Infrastructure, the Partnership is a land developer and was formed in 2000 for the purpose of developing Groveton Village in Robinson Township, Pennsylvania. Duquesne Light is a public utility located at 411 Seventh Avenue, Pittsburgh, Pennsylvania 15219 and is the electric utility with the exclusive right to provide electric service to Pleasant Ridge and Groveton Village.

B. The Subject Properties

1. Pleasant Ridge

Pleasant Ridge was constructed on the site of 30.64 acres of land formerly occupied by a housing development known as Ohioview Acres.[2] The United States War Department constructed Ohioview Acres during World War II to serve as temporary worker housing. Tr. at 55.1.-56.1. After the war, the Allegheny County Housing Authority (the "Authority") acquired Ohioview Acres from the federal government and used it for low income housing, subject to the supervision and regulations of the United States Department of Housing and Urban Development ("HUD"). Ohioview Acres consisted of 250 units of barracks-style housing, constructed on concrete slabs. See, e.g., Exhibits 5A-5H (pictures of Ohioview Acres). These barracks were arrayed along two cul-de-sac streets known as Jefferson Drive and Potomac Drive. See Exhibit 11 (Existing Conditions Plan).

Authority is a general partner, its ownership interest is nominal, comprising only 1% of the partnerships. Tr. at 112.20-113.1.

[2] As explained below, Pleasant Ridge also included land acquired from an adjacent property to permit the vacation and relocation of Jefferson Drive. The total cost of the project was $45,000,000 – $50,000,000. Tr. at 69.8.

2. Groveton Village

The United States War Department also constructed Groveton Village on an eleven-acre site to serve as temporary worker housing during World War II. Tr. at 55.1.-56.1. As with Ohioview Acres, the Authority acquired Groveton Village after the war for low income housing subject to HUD regulations. Groveton Village consisted of cinder-block, barrack-style housing constructed along streets known as Village Drive, School Street, and Court Place. See Exhibit 7 (pictures of old Groveton Village) and Exhibit 19 (Groveton Village Survey of Property). Before they were demolished, the Authority entirely owned and managed both Groveton Village and Ohioview Acres. Tr. at 45.25-46.7.

3. Conditions at Ohioview Acres and Groveton Village

Walter MacFann, the Authority's Director of Real Estate, explained that by the late 1990's, both Groveton Village and Ohioview Acres were plagued with severe social problems, including concentration of poverty, high unemployment, vandalism, periodic shootings, drug trafficking, and gang activity. The crime problems were exacerbated by the developments' lack of "defensible space," i.e. space providing a sense of "ownership" to the residents and aiding in crime prevention. Tr. at 41.5. In addition, the developments had structural problems, and lacked public transportation and other amenities, such as air conditioning, and social services to address problems within the community. Tr. at 40.21-41.4. Moreover, the developments were not handicapped-accessible and lacked sidewalks that complied with the Americans With Disabilities Act. Accordingly, the developments suffered from "huge vacancy" rates, below 50% of capacity, because even the "poorest of the poor" chose to live elsewhere. Tr. 42.15-42.25. As a result of these foregoing problems, the developments were declared to be obsolete in the 1990s. Tr. at 64.9-14.

4. Regulations restricting the Authority's ability to address the problems with Ohioview Acres and Groveton Village

Prior to 1993, the United States Department of Housing and Urban Development ("HUD") regulations restricted the Authority's ability to address the problems associated with Ohioview Acres and Groveton Village. Under HUD's pre-1993 regulations, the Authority could engage in piecemeal rehabilitation of public housing, but could not undertake the wholesale structural changes necessary to address the deep-seated social problems endemic to developments such as Groveton Village and Ohioview Acres. Tr. at 44.11. As Mr. MacFann testified:

> Prior to that the authority was not allowed to do anything different than basically fix what was there, meaning you couldn't change the unit size, couldn't make a bedroom, couldn't add more bedrooms to a unit, you couldn't take bedrooms away.
>
> Q. This was by virtue of HUD regulations?
>
> A. By HUD regulations. Tearing down a unit was practically impossible because of one for one replacement, meaning that you had to build the unit first prior to tearing down. That was part of the regulations. So that was really what we were able to do. We weren't able to change a lot of the density problems. We weren't able to improve services to the community, meaning bus transportation, and stop the isolation.

Tr. 44.11-24. Moreover, Mr. MacFann explained that HUD regulations restricted the Authority's ability to simply abandon the developments and start over in a new location. Tr. at 58.9-16; 107.6-19. Thus, prior to 1993, although Ohioview Acres and Groveton Village were obsolete and riddled with social, physical, and structural problems, HUD regulations restricted the Authority's ability to provide a comprehensive solution.

a. The creation of Hope VI and related state programs.

In 1993, faced with the nationwide failure of housing developments such as Ohioview Acres and Groveton Village, Congress and HUD implemented regulations designed to "change the face of public housing." The new regulations were adopted under a program known as Hope VI. As Mr. MacFann explained:

> Congress appointed a commission to study the problems in public housing and to identify an opportunity to change the face of public housing. Through that a program was developed called the Hope VI Program, and Hope VI in some cases morphed into a mixed financing development, as is the case of the Groveton Village. But through this we established partnerships with both other forms of government, meaning local government, county government, state government, and also brought in public or private enterprises into the mix.

Tr. at 43.8.[3] Mindy Turbov, an expert on Hope VI developments and affordable housing,[4] testified that the Hope VI program was designed to "end public housing as we know it." Tr. at 98.12-17. Ms. Turbov identified three critical components to the changes in HUD policy made to implement this change.

(1) Private ownership and management

First, Ms. Turbov explained, private sector development, ownership, and management of Hope VI developments was critical to obtaining funding and restoring accountability to public housing:

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[3] Hope VI is an acronym for Housing Opportunities for People Everywhere.

[4] Ms. Turbov was the official at HUD responsible for creating the Hope VI program and is currently a consultant to housing agencies and developers throughout the country. Tr. at 91.8-92.17; 98.5-17.

> In 1994 the general counsel of HUD gave an opinion that private entities could own public housing, and the point behind that was that a public housing authority, which is basically a surrogate of HUD, I mean, housing authorities have no other sources of funds, that a housing authority couldn't use any kind of modern housing financing techniques; in particular, low income housing tax credits. You had to have a private entity involved and a private entity own and manage the properties.

Tr. at 99.10-100.1. Ms. Turbov explained that private sector involvement ensures the vigorous oversight and accountability demanded by private sector investors:

> By changing the ownership pattern, what happened was you would allow for leveraging to others, which meant increasing the number of dollars you would have for the property, but also bringing in a new set of investors and a new set of oversight, which HUD has never been good at overseeing housing authorities, and demand market standards. They basically had Wall Street watching and owning, frankly, and Wall Street owning public housing.

Tr. at 99.19-25. Ms. Turbov also stated that private sector ownership ensured that public housing would be responsive to the market:

> And there would be consequences unlike when it's owned by a housing authority. It's a hundred percent public housing, there are no consequences, and people with choices don't make choices to live there.

Tr. at 101.15-18.

(2) Adherence to "new urbanism" design principles

Ms. Turbov also explained that the Hope VI revolution in public housing included requiring "new urbanism design" for proposed developments. On a broad level, "new urbanism" required the razing of existing buildings and streets and the complete rebuilding of the communities:

> So at that time it was realizing that the super blocks and the isolation were the wrong way to go in terms of design. And at the

> same time this new urbanist movement was coming to the fore it was pretty much really, if you want to know what new urbanism is, it's building neighborhoods just like they used to be instead of these massive super blocks or barrack style housing.

Tr. at 102.13-25.

(3) Mixed-income residents

Finally, Ms. Turbov explained that Hope VI developments would strive to include a mix of incomes among its residents:

> Well, HUD preferenced having a mix of incomes, and the reason for that was really very simple. Aside from getting benefits of the low income housing tax credits, if you had a market rate renter and a market rate rental component in there, the project, the economics of the projects made them work in such a way to be very simple that if it wasn't managed in standards of people like you and I who have housing choices the economics would fall apart.

Tr. at 101.7-14. Because these developments would include residents who have choices about where to live, the developments had to be designed to the standards of the prevailing market. Tr. at 99.24.

5. The Applications for Hope VI funding to create new communities to replace Ohioview Acres and the old Groveton Village.

By the late-1990s, Groveton Village and Ohioview Acres were failed communities, which the Authority had declared to be obsolete. Tr. at 63.7; Exh. 25, 26. Moreover, the problems with the developments were structural and could not be addressed through the rehabilitation of the existing infrastructure. Tr. at 65.11-25. Accordingly, the Authority formed a partnership with Pennrose Falbo, and submitted applications to HUD (and later the Pennsylvania Housing Finance Agency (the "PHFA")) for approval to use federal tax credits to develop Groveton Village, to secure Hope VI funding and permission to use federal tax

credits as a means of leveraging private funding for the creation of the new communities. See Exhibits 25 and 26.

Through the Hope VI Program, HUD allocates funds through a competitive application process. See Tr. 48.7-25. To achieve HUD approval, a Hope VI application must achieve a high score on a prescribed set of criteria. Tr. at 107.12-25. Broadly speaking, the criteria required the successful applicant to show that the proposed development would "change the face of public housing." Tr. at 45.10-16. To achieve this, HUD ranked the applications taking into consideration the factors discussed above: private ownership and management, "new urbanism," and mixed income.

As applied to the old Ohioview Acres and Groveton Village sites, Mr. MacFann and Ms. Turbov explained that the Hope VI scoring criteria dictated certain design choices. In each development, the streets had to be reconfigured to permit public transportation, eradicate the "superblocks" and create "defensible space." Tr. at 106.4-25. Without a sweeping redesign of the streets, neither Ohioview nor Groveton Village would have received HUD approval for demolition and disposition to a private developer or approval from the PHFA for the use of federal tax credits. Id. HUD's scoring criteria also required that the new developments be constructed to a prevailing market standard for design. Market forces, driven by private investors and prospective homeowners, demanded that the developments be built to the design standard prevailing at other new residential developments in Western Pennsylvania. Tr. at 99.24.

6. Ohioview Acres is demolished and a Hope VI Community known as Pleasant Ridge is created on the site of the former property.

In 2002, the Authority filed an Application with HUD to obtain permission to demolish Ohioview Acres and to construct the Pleasant Ridge community. See Exhibit 25 (Ohioview Acres 2002 Hope VI Application). In the Application, the Authority explained that

Pleasant Ridge would consist of 181 for-rent townhouse and duplex units, fifteen for-sale detached homes, a First-Tee golfing center, a community center, and a municipal building.

As set forth in the Application, the design for Pleasant Ridge fully embraced the concepts of new urbanism. First and foremost, Pleasant Ridge completely redesigned the site's street layout, eliminating the "superblocks" and barrack-style housing. See Exhibit 25, Tabs 33, 34. The plan contemplated vacating and removing the existing streets, Jefferson Street and Potomac Street, and creating an entirely new street grid of streets and alleys. Id. Second, the Pleasant Ridge design included defensible space, including front porches, back yards, gardens and, with regard to the townhouses, "urban" setbacks adjacent to the new streets. In addition, the Application contemplated that Pleasant Ridge would be designed to prevailing market standards, with new infrastructure replacing the obsolescent infrastructure that dated from World War II. This included removing the overhead electric facilities and installing underground electric lines in the development. See Exh. 25.

7. The former Ohioview Acres site was transformed into a "greenfield" following the receipt of HUD approval for the demolition of Ohioview Acres and disposition of the site to a private developer.

As part of its Hope VI approval, HUD approved the demolition of Ohioview Acres. See Exhibit 25, p.8. Moreover, HUD approved the "disposition" of the site to a private developer, Ohioview Infrastructure. Tr. at 115.7. On behalf of Ohioview Infrastructure, Inc., Mr. Falbo testified that the "disposition" was a critical step for enabling the private developer to take control of the site to begin the new development. Tr. at 115.7-12.

Pursuant to HUD's demolition approval, the Authority removed all of the existing tenants from Ohioview Acres, razed every building on the site, removed the roads and all of the infrastructure, including the overhead electric lines. Tr. at 163.23. Ohioview Infrastructure paid Duquesne Light for the removal of the existing overhead electric lines, poles,

Complainants, however, have never disputed that Duquesne is allowed to recover its costs under Rule 9.B for the *removal* of its overhead facilities. Indeed, the Complainants paid Duquesne separately for its costs in removing the overhead facilities at the old Ohioview Acres and Groveton Village sites and do not seek recovery of those charges. Tr. 118.10, 121.1a.

None of Duquesne's facilities were relocated. Instead, the old facilities were removed, at the developers' expense. Tr. at 121.9 – 121.23. Such removal was not only a critical component of obtaining funding approval, it was a practical necessity associated with demolishing the old barracks, reconfiguring the roads, and building new homes consistent with the federal and state requirements that such developments reflect contemporary market standards. Contrary to the claim in its Brief, Duquesne did not "simultaneously" remove its poles and replace them with underground facilities. D.L. Br. at 8. The removal of the facilities (and payment for the removal) occurred first, followed by significant periods where the sites were barren and without electric customers, while awaiting the new developments. As Duquesne Light's representative, John Kahlil, explained in his July 14, 2005 letter regarding Pleasant Ridge, the "[t]he former overhead facilities were removed this past winter under a prior job to allow for the rebuilding of Ohioview Acres." Exhibit 4, Tab 5. Moreover, no customers remained at the sites because all of the residents had been removed from the locations before the

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> When requested or required by the action of a customer or a third party, relocation of Company facilities, except those covered by Section A of this Rule, will be performed by the Company upon receipt, in advance, of the Company's estimated total direct and indirect costs including the related income tax of such relocations from the customer or such third party. The Company may waive charges under this rule if, in the Company's judgment, the location of the Company's existing supply line and/or service line on the customer's property restricts the growth of the customer's operations and the potential increase in the Company's revenues.

The ALJ discussed Tariff Rule 9.B, but did not explicitly conclude that Rule 9.B applied here.

new underground distribution lines were installed. Tr. at 70.24. With respect to both developments, the sites were unused and unoccupied and saw a change of ownership from the Authority to the respective partnerships. After the sites were reduced to a "greenfield-equivalent" status and new infrastructure, including newly configured street and utility systems, was constructed, Duquesne installed its underground lines. Tr. at 88.14-25, 153-155; 163.24. Those lines serviced brand-new housing, with different owners and customers. Clearly, given the site demolition, removal of overhead lines and change in ownership, the projects here necessitated the extension of Duquesne Light's existing distribution lines.

Duquesne Light's position ignores the fact that, once the old facilities were razed and removed, there was no guarantee when or if the new developments would proceed. Mr. Falbo and Mr. Gallagher testified that both developments had to complete significant development hurdles imposed by the local communities. For example, Robinson Township, the host community of Groveton Village, attempted to have the development stopped, and relented only after court intervention. Tr. 60.17-25; Exhibit 22. Thus, even though the Partnership had razed the former sites, there was no guarantee that the Township would permit the completion of the development. Without such approvals, the former Groveton Village site would have remained empty, with no overhead facilities, for an indefinite length of time, until a developer in the future could propose a new project. In the event such a developer would seek to construct a residential community, there could be no question that Duquesne Light would be required to pay for the installation of the underground electric facilities pursuant to Rule 13.2.

This case does not involve the mere relocation of utility poles or facilities to suit the convenience of an existing property owner. Instead, the scale and comprehensive nature of these projects is commensurate with the clear objective of Rule 13.2, to create a uniform

aesthetic and technological standard for new residential developments across the Commonwealth of Pennsylvania. Accordingly, the ALJ erred in failing to conclude that Rule 13.2 applies here, notwithstanding the removal of facilities some time earlier under Rule 9.B.

B. Exception No. 2: The ALJ erred in considering Rule 13.1(A).

The Complainants take exception to the ALJ's conclusion that Tariff Rule 13.1(A) applies to Pleasant Ridge and Groveton Village. *See* Initial Decision, page 6. The ALJ wrongly claimed that "Duquesne Light contends that the situation presented by Ohioview and Groveton projects is governed by its tariff provision found at Rule 13.1." *Id.* In fact, Duquesne did not discuss the applicability of Rule 13.1(A) in its Main and Reply Briefs or in its pretrial memorandum. Nor did Duquesne Light's counsel discuss Rule 13.1(A) during the January 9, 2007 hearing. At the January 9, 2007 Hearing, the ALJ instructed the parties that "failure" to brief any legal arguments would constitute a waiver of such arguments. Tr. at 172. Accordingly, the ALJ should have concluded that any consideration of Rule 13.1(A) had been waived by Duquesne.

Further, the ALJ is incorrect regarding the applicability of Tariff Rule 13.1(A).[8] Rule 13.1(A) provides that, where distribution lines have been changed from overhead to underground, "customers receiving or to receive electric service at voltages of 600 volts or less from these supply lines shall provide at their own expense the necessary facilities for receiving

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[8] 13.1 UNDERGROUND DISTRIBUTION

> (A) When the Company is required by government order or enters into agreements with redevelopment authorities, a private real estate developer or a group of customers to change its distribution supply lines from overhead to underground, customers receiving or to receive electric service at voltages of 600 volts or less from these supply lines shall provide at their own expense the necessary facilities for receiving such underground service.

such underground service." Clearly, Rule 13.1(A) governs the payment for lateral service lines and associated facilities rather that the wholesale installation of distribution lines and associated facilities that are at issue here. Moreover, even if Rule 13.1(A) had some applicability, its terms would conflict with the cost-allocation provisions set forth under Rule 13.2.A, which requires Duquesne Light to pay for the installation of underground facilities and the developer to grade, trench, and backfill the sites for installation). Under the Pennsylvania Rules of Statutory Construction, 1 Pa. C.S. §1933, the more particular Rule 13.2.A, with its specific application, would prevail.

C. Exception No. 3: The ALJ erred in concluding, without substantial evidence, that the developers of the new residential development simply "chose" to install underground electric lines, thereby improperly rejecting the application of Rule 13.2.

Clearly, the Ohioview and Grovetown projects constituted "new residential developments" as that phrase is commonly used. As noted in Exception 1, these developments involved more than mere utility relocations and thus fit within the definition of "development" under Rule 13.2.

As noted under the discussion to Exception 1, the projects simply could not have been constructed without the demolition of the existing infrastructure, including roads and the complete and radical site transformation that took place. Therefore, to make the newly constructed homes inhabitable, Duquesne's existing distribution lines had to be extended to provide these projects with electric services. These projects would not have been approved, the developers would not have been interested, and the new homes would not have been constructed or sold if the overhead electric lines remained; they had to be removed as part of the radical transformation of these sites. Once the construction started from scratch, including the need to install new streets and infrastructure, electric service had to be extended to serve these new

residents. Rule 13.2 does not mandate a lengthy waiting period where urban lands must remain fallow before new residential development can be considered "New Residential Development" under Rule 13.2.

The ALJ, however, has misapplied two factual circumstances to support the erroneous conclusion that the retention of overhead electric lines **within the Projects** was a simple matter of choice of the developers.

These two erroneous statements were as follows:

1. "[T]he electric system design for Ohioview was modified to retain some of the above ground system that resulted in a reduced cost estimate. See Initial Decision, page 8; and
2. "[D]esign changes made with input from Duquesne Light resulted in the $700,000+ estimate being reduced to $253,416.73." See Initial Decision, page 8.

The first finding is apparently meant to support the ALJ's conclusion that the above-ground facilities could have been maintained throughout the new communities. It is based, however, on a misunderstanding of the record. The only above-ground facilities that survived at Ohioview were those located **outside** of the new Pleasant Ridge development. These facilities were located on land adjacent to the elderly high-rise, a parcel of land that was not included in the Pleasant Ridge Subdivision and remained in the Authority's ownership. Tr. at 145.9-19 (Testimony of Patrick Gallagher, comparing Exhibits 11 and 13). This parcel is not at issue in this proceeding.

Further, the undisputed evidence was that all of the electric infrastructure located within the former Ohioview Acres site was removed and, for an extended period of time, the

thirty-acre site was entirely vacant. Tr. at 163.21-164.1. After this period, once the developer prepared utility-ready lots, installed a new street pattern, and granted utility easements to Duquesne Light, the underground distribution system at Pleasant Ridge was installed.

The second finding relates to Duquesne Light's original, wildly inflated, $700,000 estimate for the installation of underground facilities at Ohioview. Tr. at 146.22. When the developers asked for a breakdown of that cost estimate, Duquesne Light simply lowered its estimate, with no explanation. The ALJ had no basis to attribute Duquesne Light's reduction of this $700,000 estimate to $253,416.73 to "design changes." In support of this finding, the ALJ cites testimony appearing at Transcript pages 88-89. These pages, however, have nothing to do with the reasons for the reduction of the original $700,000 quote. The ALJ also cited Transcript pages 154-57 (and Exhibit 5 to Hearing Exhibit 4). These record citations indicate that the only design change made after this initial estimate was the decision to leave the electric facilities above-ground in the vicinity of the elderly high-rise (as noted above, this parcel was not within the Pleasant Ridge subdivision). There is no basis for concluding that this *de minimus* design change was responsible for Duquesne's $446,583.27 (70%) reduction in its estimate to $253,416.73. If anything, the fact that only the facilities *outside* of the Hope VI development remained above-ground supports the Complainants' position that within the Hope VI property, the retention of above-ground facilities within the projects was not possible.

The record clearly and unambiguously establishes that the over-head electric lines had to be removed or these projects would not have been approved. Under federal and state funding requirements, and marketplace demands, retaining the over-head electric facilities simply was not an option, just as retaining the old street configuration was not an option. Thus, underground lines were required to service these projects and it was error to conclude otherwise.

D. Exception No. 4: The ALJ erred in applying a restrictive and discriminatory interpretation of Rule 13.2 inconsistent with: (1) Executive Order No. 2004-9; (2) the public policy objectives of the Commission's rules encouraging underground electric lines in new residential developments; and (3) the fair and equal treatment of new residential developments whether they are located on a suburban greenfield site or an urban in-fill site.

The ALJ has interpreted Rule 13.2 in a manner that is unduly restrictive and discriminatory. To do so, he ignores: (1) Executive Order No. 2004-9; (2) Commission rules requiring underground electric lines in new residential developments; and (3) the discriminatory effect of treating suburban greenfield developments differently than urban in-fill affordable housing developments of the same size.

As explained in the Complainants' Main Brief, the Commonwealth of Pennsylvania favors the adaptive reuse of land:

> Duquesne's position really is an affront to any urban project that involves the adaptive reuse of land. Its interpretation clearly would discriminate against affordable housing developments (which, given the layers of HUD regulation regarding their disposition are unique) in favor of suburban private residential developments. Such a policy would be inconsistent with the clear public policy of the Commonwealth of Pennsylvania to avoid urban sprawl and encourage brownfield revitalization. See, e.g., Exhibit 21 Commonwealth of Pennsylvania Governors Office issued Executive Order No. 2004-9 ("Commonwealth of Pennsylvania Keystone Principles for Growth, Investment, & Resource Conservation") (stating that the "Commonwealth's economic development goals include . . . **"implementing a preference for development that uses and improves existing infrastructure over development in undeveloped agricultural, forested, or watershed lands"**).

Complainants' Main Brief at 24 (citing Exhibit 21 Commonwealth of Pennsylvania Governors Office issued Executive Order No. 2004-9 ("Commonwealth of Pennsylvania Keystone Principles for Growth, Investment, & Resource Conservation")).

The ALJ responded, not by an analysis of the language of Executive Order 2004-9, or with the cost-sharing aspects of the Duquesne Light tariff at issue, but instead with a reference to a different type of utility, by stating that:

> Complainants' policy argument avoids the question of who will pay for the cost of the construction. The end result of adoption of Complainants' position would be that ultimately the cost would be placed on Duquesne's current customers. Such a policy would seem to conflict with this Commission's regulations on extension of services by water utilities. 52 Pa Code §§ 65.21, 65.22. The regulations on water service distribution extensions provide for a balancing of the costs of the extension against the anticipated revenue. I am not aware of any similar provision applicable to electric utilities.

See Initial Decision, page 8. This analysis ignores the fact that, after nearly fifteen years of rule-making, the Commission resolved the issue of "who will pay for the cost of construction" by striking a balance between the burden imposed on the developer and the burden placed on the utility.[9] Rule 13.2.C reflects this balance by requiring an Applicant for underground electric service to (1) provide "at its own cost" the recorded development plot plan and easements and (2) clear and grade the ground and provide backfilling and excavating services. The "Company's part of the installation shall consist only of laying the lines and installing other

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[9] By an Order dated November 1, 1976, the Commission considered: (1) whether continued application of the undergrounding requirement was needed, and (2) if so, whether the existing requirements should be amended. See Pa. Bulletin, Vol. 9, No. 13, p. 1142 (Sat. March 31, 1979). After an inquiry into these issues, and feedback from the public and the utilities, the Commission issued its December 28, 1979 Order, reaffirming its position that underground electric service must be the standard for development in Pennsylvania. With this ruling, the Commission also deleted the requirement that developers pay a "per lot fee" for the installation of underground facilities. See Pa. Bulletin, Vol. 9, No. 13, p. 1141 (Sat. March 31, 1980). In deleting the "per lot" fee, the Commission reasoned that cost-shifting to the utilities was justified because, over the long term, the operation and maintenance costs of underground facilities were lower than for overhead facilities. See Pa. Bulletin, Vol. 14, No. 26, p. 2251 (Sat. June 30, 1984). Thus, the Commission retained the undergrounding rule "as a means of spurring technological advances and providing a more attractive form of service." Id. Finally, the Commission concluded that the aesthetic benefits of undergrounding outweighed the utilities' countervailing arguments. Id.

service related facilities." *See* Respondents' Exhibit 4. The Company is required to bear the remaining costs. *See* Tariff Rule 13.2.C (6). Given the Commission's rulemaking and the balance struck by Tariff Rule 13.2.C, the ALJ's reference to the Commission's water regulations was misplaced and unwarranted.

Moreover, the ALJ's Initial Decision is contrary to the public policy underlying Tariff Rule 13.2.A. In its rule-making process, the Commission explained that its goal was to make the use of underground electric facilities the standard for new residential developments in Pennsylvania. See Pa. Bulletin, Vol. 14, No. 26, p. 2251 (Sat. June 30, 1984) at footnote 9, infra. The Commission further explained that its cost allocation provisions would serve "as a means of spurring technological advances and providing a more attractive form of service." Id. The ALJ's Initial Decision would undermine this goal by creating a lower aesthetic and design standard for affordable housing (or any other residential developments constructed in urban areas), and would only serve to subsidize and encourage suburban and ex-urban sprawl.

IV. CONCLUSION

For the reasons set forth above, the Complainants respectfully file these Exceptions in response to certain aspects of Administrative Law Judge Michael A. Nemec's Initial Decision. The Initial Decision should be modified in consideration of these Exceptions.

Dated: May 24, 2007

Respectfully submitted,

THORP REED & ARMSTRONG, LLP

By: Clifford B Levine

Clifford B. Levine
Pa. I.D. #33507
David J. Montgomery
Pa. I.D. #78874

THORP REED & ARMSTRONG, LLP
301 Grant Street, 14th Floor
Pittsburgh, PA 15129-1425
412-394-2396

Attorneys for Complainants

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document, Exceptions of Ohioview Infrastructure, Inc. and Groveton Housing Partnership, LP - Complainants, upon the participants listed below, in accordance with the requirements of § 1.54 (relating to service by a participant).

Regina M. Sestak, Esquire
Duquesne Light Company
411 Seventh Ave., 9th Fl.
Pittsburgh, PA 15219

Dated this 24th day of May, 2007.

Clifford B. Levine

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

IN REPLY PLEASE
REFER TO OUR FILE

ISSUED: May 4, 2007

C-20066233
C-20066236

CLIFFORD B LEVINE ESQUIRE
DAVID J MONTGOMERY ESQUIRE
THORP REED & ARMSTRONG
ONE OXFORD CENTRE
301 GRANT STREET 14TH FLOOR
PITTSBURGH PA 15219-1425

COPY

Ohioview Infrastructure, Inc.
v.
Duquesne Light Company

Groveton Housing Partnership, LP
v.
Duquesne Light Company

TO WHOM IT MAY CONCERN:

Enclosed is a copy of the Initial Decision of Administrative Law Judge Michael A. Nemec. This decision is being issued and mailed to all parties on the above specified date.

If you do not agree with any part of this decision, you may send written comments (called Exceptions) to the Commission. Specifically, an original and nine (9) copies of your signed exceptions MUST BE FILED WITH THE SECRETARY OF THE COMMISSION 2ND FLOOR, KEYSTONE BUILDING, 400 NORTH STREET, HARRISBURG, PA OR MAILED TO P.O. BOX 3265, HARRISBURG, PA 17105-3265, within **twenty (20) days** of the issuance date of this letter. The signed exceptions will be deemed filed on the date actually received by the Secretary of the Commission or on the date deposited in the mail as shown on U.S. Postal Service Form 3817 certificate of mailing attached to the cover of the original document (52 Pa. Code §1.11(a)) or on the date deposited with an overnight express package delivery service (52 Pa. Code 1.11(a)(2), (b)). If your exceptions are sent by mail, please use the address shown at the top of this letter. A copy of your exceptions must also be served on each party of record. 52 Pa. Code §1.56(b) cannot be used to extend the prescribed period for the filing of exceptions/reply exceptions. A certificate of service shall be attached to the filed exceptions.

If you receive exceptions from other parties, you may submit written replies to those exceptions in the manner described above within **ten (10) days** of the date that the exceptions are due.

Exceptions and reply exceptions shall obey 52 Pa. Code 5.533 and 5.535 particularly the 40-page limit for exceptions and the 25-page limit for replies to exceptions. Exceptions should clearly be labeled as "EXCEPTIONS OF (name of party) - (protestant, complainant, staff, etc.)".

If no exceptions are received within **twenty (20) days**, the decision of the Administrative Law Judge may become final without further Commission action. You will receive written notification if this occurs.

Very truly yours,

James J. McNulty
Secretary

Encls.
Certified Mail
Receipt Requested
JF

EXHIBIT
A

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Ohioview Infrastructure, Inc.	:	
	:	
v.	:	C-20066233
	:	
Duquesne Light Company	:	
Groveton Housing Partnership, LP.	:	
	:	
v.	:	C-20066236
	:	
Duquesne Light Company	:	

INITIAL DECISION

Before
Michael A. Nemec
Administrative Law Judge

HISTORY OF THE PROCEEDING

Complainants' Ohioview Infrastructure, Inc. ("Ohioview" or "Complainant") and Groveton Housing Village Partnership LP ("Groveton" or "Complainant") filed these consolidated Complaints on April 10, 2006. The Ohioview Complaint concerns an affordable housing development known as "Pleasant Ridge," which was constructed between 2003 and 2006. The Groveton Complaint concerns an affordable housing development known as "Groveton Village," which was constructed between 2002 and 2004. The Complaints request a declaration that Pleasant Ridge and Groveton Village qualify as New Residential Developments under Duquesne Light Company's Tariff Rule 13.2. Each Complaint also seeks a refund of money paid to Duquesne Light for the installation of underground electric facilities at Pleasant Ridge and Groveton Village.

Duquesne Light filed its answers to the Complaints on May 15, 2006 and joined Complainants' request to join these Complaints. A Prehearing Conference Order was issued on June 21, 2006. On July 20, 2006 an Initial Prehearing Conference was held in Pittsburgh, and on July 21, 2006, a Further Prehearing Order was issued that established the ground rules for discovery and consolidated the two Complaints. The initial hearing was held on January 9, 2007 in Pittsburgh. All parties were and are represented by counsel. The record closed on February 9, 2007 in accordance with the notation on the OALJ Hearing Report.

The resulting record consists of a transcript of 174 pages of the testimony and discussion, 26 Complainant exhibits and 4 Respondent exhibits. Main and reply briefs were filed by Complainants and Respondent, along with proposed findings of fact and conclusions of law. The record is summarized in the findings of fact that follow and reviewed in the discussion section. The two Complaints are dismissed in the order at the end for failure to carry the burden of proof.

FINDINGS OF FACT

1. Ohioview is a corporation formed under and pursuant to the laws of the Commonwealth of Pennsylvania located at 230 Wyoming Avenue, Kingston, PA, 18704. Complainants' Exhibit No. 2.

2. Groveton is a partnership formed under and pursuant to the laws of the Commonwealth of Pennsylvania also located at 230 Wyoming Avenue, Kingston, PA 18704. Complainants' Exhibit No. 1.

3. Duquesne Light Company is a regulated Pennsylvania public utility located at 411 Seventh Avenue, Pittsburgh, PA 15219.

4. At the time Ohioview or its agent initially contacted Duquesne Light to discuss the provision of electric power to the planned Ohioview Acres development, there were already existing Duquesne Light electrical facilities including, but not limited to, poles, wires,

transformers, meters, and other structures and devices used in the distribution of electric power on the property. Tr. 79-80, 141-142, 144-145, 152-153; Complainants' Exhibits 10, 11, 16; Complainants' Response to Duquesne Light Company's Request for Admissions, No. 1; see Tr. 29-30.

5. Mr. Patrick Gallagher of GAI Consultants, Inc. served as project manager on the Ohioview Acres project. Tr. 140, 146.

6. Existing buildings on the Ohioview Acres site were demolished. Tr. 154-155.

7. Existing utilities on the Ohioview Acres site were removed at the expense of Ohioview as part of the development budget. Tr. 121.

8. Prior to demolition of the existing residential dwellings at the Ohioview Acres site, Mr. Gallagher contacted Duquesne Light concerning the planned relocation and installation, and was told by Duquesne Light that the cost for design and construction would be in excess of $700,000. Tr. 146-149.

9. Design changes made with input from Duquesne Light resulted in the $700,000+ estimate being reduced to $253,416.73. Apparently, that amount was paid to Duquesne by Ohioview. Tr. 88-89, 154-157; Complainants' Exhibit 4 (See Exhibit 5 attached thereto).

10. As part of the Ohioview Acres project, existing electric facilities were relocated and installed underground. Tr. 140-145; Complainants' Exhibits 10, 11, 13.

11. At the time Groveton or its agent initially contacted Duquesne Light to discuss the provision of electric power to the planned Groveton Village development, there were already existing Duquesne Light electrical facilities including, but not limited to poles, wires, transformers, meters, and other structures and devices used in the distribution of electric power,

on the property. Complainants' Response to Duquesne Light Company's Request for Admissions, No. 2, see Tr. 29-30; Tr. 117-118; Tr. 149-151; Complainants' Exhibits 16, 19.

12. Existing utilities on the Groveton Village site were removed at the expense of Groveton as part of the development budget. Tr. 118.

13. As part of the Groveton Village project, existing electric facilities were relocated and installed underground. Tr. 126-127; Complainants' Exhibits 17, 19.

14. Groveton paid $117,000 to Duquesne Light for installation of underground service at Groveton Village. Tr. 118.

DISCUSSSION

Complainants seek an order from this Commission directing Duquesne to pay back monies paid to Duquesne for design, equipment and installation of electrical distribution systems for the Ohioview and Groveton housing projects. The total requested is $371,006.78, plus interest, costs and attorney fees. Complainants cite Section 1312 of the Public Utility Code as authority for their request. Section 1312 does indeed provide for the payment of interest as part of a refund, but attorney fees and costs are imposed only if the Commission orders a refund that is not made within a year of the order. Section 1312(a)(b) of the Public Utility Code, 66 Pa. C.S. §1312(a)(b); Complainants' Main Brief, p. 16.

Complainants properly recognize that they have the burden of proof in this proceeding. Complainants' Main Brief, p. 18; Section 332(a) of the Public Utility Code, 66 Pa. C.S. §332(a).

Complainants contend that Duquesne is obligated under the terms of its Tariff provision No. 13.2 to pay for the costs of installing underground facilities for new residential developments, except for the costs of excavating and backfilling the utility trenches. While Complainants address the issue of interpretation and application of tariff provisions, that

discussion is largely irrelevant as Duquesne's provision 13.2 is nearly identical to this Commission's regulations at 52 Pa. Code §§57.81 – 57.88. Complainants' Main Brief, pp. 17, 19.

While Complainants expended a great deal of effort in establishing that both developments were new, with the removal of all of the preexisting structures, roads and infrastructure, Duquesne does not, and could not contest that contention. Complainants also expended a great deal of effort in explaining the rationale for replacing the old structures, and the change in philosophy that resulted in the design of the new developments. The decision to replace the old dwelling units and the design of the new ones was a matter of public policy arrived at by political entities at the local and national levels. Duquesne was involved in the process because both developments are in Duquesne's service territory, and the Complainants desired to have electrical distribution systems installed at both locations.

Duquesne's position is that 13.2 does not apply. As stated in its Main Brief, Duquesne Light's Tariff Rule 13.2 applies only if providing service necessitates extending Duquesne Light's existing distribution lines. Both projects at Ohioview Acres, now known as Pleasant Ridge, and Groveton Village were built on sites that had existing overhead distribution infrastructure serving residential dwellings, which infrastructure was relocated at Complainants request and replaced with underground infrastructure. Since it was not necessary for Duquesne Light to extend its existing distribution lines to provide service, Tariff Rule 13.2 does not apply. Complainants were properly required to bear the costs in accordance with Tariff Rule 9.B, which is now Rule 13.1.A.B. Duquesne's Main Brief, pp. 5-6; Duquesne Exhibits R-3, R-4.

The language that Complainants rely on is found in Duquesne Rule 13.2 that includes the title, "Underground Electric Service in New Residential Developments." Duquesne Rule 13.2 (A)(3) contains the definition of development, and reads as follows:

> (3) Development – A planned project which is developed by a developer/applicant for electric service set out in a recorded plot plan of five or more adjoining unoccupied lots for the construction of single-family residences, detached or otherwise, or mobile homes and one or more five-unit apartment

houses, all of which are intended for year-round occupancy, *if providing electric service to such project necessitates extending the Company's existing distribution lines*. (emphasis supplied) (The language is similar with that found in 52 Pa. Code §57.81, "Definitions".)

Duquesne Exhibit R-3; Complainants' Exhibit 1(A).

As noted above, Complainants have gone to great lengths to demonstrate that Ohioview and Groveton involved the construction of new residential developments. Also as noted above, Duquesne does not contest that the developments are new, only that it was the choice of the developers to change the distribution system within the development to an underground system as opposed to using the existing overhead system. Complainants place great emphasis on the title to Duquesne's Rule 13.2, and 52 Pa. Code § 57.81, "Underground Electric Service in New Residential Developments." Pennsylvania's rules of statutory construction can be helpful in a situation such as the one presented here. Section 1924 states that a title of a statute may be considered in the construction of the statute. 1 Pa.C.S. § 1924. However, Section 1933 states that the particular controls the general. Wherever possible, where a general provision conflicts with a special provision, if possible, effect should be given to both. However, if the difference is irreconcilable, the special provision shall prevail. 1 Pa. C.S. § 1933. Here we are not dealing with a general provision, but a title. The proviso in question here imposes an additional requirement before a project can qualify as a "development" under either Duquesne's tariff or the Commission's regulation.

Duquesne contends that the situation presented by the Ohioview and Groveton projects is governed by its tariff provision found at Rule 13.1, Underground Distribution:

13.1 UNDERGROUND DISTRIBUTION

(A) When the Company is required by government order or enters into agreements with redevelopment authorities, a private real estate developer or a group of customers to change its distribution supply lines from overhead to underground, customers receiving or to receive electric service at voltages of 600 volts or less from these supply lines shall provide at their own expense the necessary facilities for receiving such underground service.

Duquesne Exhibit R-3

Complainants place reliance on a 1977 decision of this Commission recorded under its Investigation Docket No. 99. Mr. Thomas Rue petitioned the Commission for an exemption from the requirement to underground the electrical distribution system for a new subdivision. His petition included three points, one of which is pertinent here. He contended that because one house on the property was already served by an overhead line, his development should be exempt. In response to his contention, this Commission stated:

> The line serving the house is approximately 2,000 feet long and generally follows the road in the development. We believe that the existence of a single overhead *service* line in a 160-acre, 115 –lot housing development does not present a compelling reason to permit deviation from our undergrounding rule. (emphasis supplied)

Re. Thomas A. Rue, 1977 Pa. PUC LEXIS 157, 50 Pa. PUC 542, 543 (1977)

This Commission's regulations on underground electrical service distinguishes between a service line and a distribution line. A distribution line is an electric supply line of untransformed voltage which delivers energy to one or more service lines: A service line is defined as an electric supply line that delivers transformed, or lower, voltage service to a residence or building. 52 Pa. Code § 57.81. The language in Duquesne's tariff Rule 13.2 (4) (5) is substantially the same. Duquesne Exhibit R-3; Complainants' Exhibit 1(A).

Complainants also frame the issue in terms of policy. In their main brief at page 24 they state the following:

> Duquesne's position really is an affront to any urban project that involves the adaptive reuse of land. Its interpretation clearly would discriminate against affordable housing developments (which, given the layers of HUD regulations regarding their disposition are unique) in favor of suburban private residential developments. Such a policy would be inconsistent with the clear policy of the Commonwealth of Pennsylvania to avoid urban sprawl and encourage brownfield revitalization. (citation omitted)

Complainants' Main Brief, p. 24.

Complainants' policy argument avoids the question of who will pay for the cost of the construction. The end result of adoption of Complainants' position would be that ultimately the cost would be placed on Duquesne's current customers. Such a policy would seem to conflict with this Commission's regulations on extension of service by water utilities. 52 Pa Code §§ 65.21, 65.22. The regulations on water service distribution extensions provide for a balancing of the costs of the extension against the anticipated revenue. I am not aware of any similar provision applicable to electric utilities.

The present case does not involve an extension of Duquesne's facilities. Its distribution system existed and was present at each site. The record here is clear that both sites could have been redeveloped and served from above ground facilities. The developers chose to build developments with underground facilities. That decision was not imposed on the developers by either Duquesne or this Commission. In response to Duquesne's initial cost estimate, the electric system design for Ohioview was modified to retain some of the above ground system that resulted in a reduced cost estimate. Tr. 145-148, 155, 165.

I conclude that Complainants have failed to carry their burden of showing that Duquesne has in some fashion violated the provisions of the Public Utility Code, this Commission's regulations or any other order or law this Commission is authorized to enforce. As a result the two complaints here should be dismissed.

CONCLUSIONS OF LAW

1. This Commission has jurisdiction over the parties and subject matter of this proceeding.

2. Neither Complainant has carried its burden of proof of showing that Duquesne has in some fashion violated the provisions of the Public Utility Code, this Commission's regulations or any other order or law this Commission is authorized to enforce.

3. Specifically, neither Complainant has sustained its burden of proving that Duquesne's Tariff Rule 13.2 applies to either the new development at the former Ohioview Acres or Groveton Village.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Complaint of Ohioview Infrastructure, Inc., against the Duquesne Light Company at Docket No. C-20066233 is dismissed for failure to carry the burden of proof.

2. That the Complaint of Groveton Housing Partnership, LP, against the Duquesne Light Company at Docket No. C-20066236 is dismissed for failure to carry the burden of proof.

Date: April 27, 2007

Michael A. Nemec
Administrative Law Judge

Duquesne Light
Our Energy...Your Power
Regina M. Sestak
Assistant General Counsel

Legal Department
411 Seventh Avenue, 8-2
Pittsburgh, PA 15219

Tel 412-393-1546
Fax 412-393-1418
rsestak@duqlight.com

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May 31, 2007

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James J. McNulty, Secretary
Pennsylvania Public Utility Commission
New Filing Section
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Harrisburg, PA 17105-3265

RE: Ohioview Infrastructure, Inc. v. Duquesne Light Company
PUC Docket No. C-20066233
Groveton Housing Partnership, LP v. Duquesne Light Company
PUC Docket No. C-20066236

Dear Secretary McNulty:

An original and nine copies of Respondent Duquesne Light Company's Reply to the Exceptions of Ohioview Infrastructure, Inc. and Groveton Housing Partnership, LP – Complainants are enclosed. Copies are being served upon Complainants and the Presiding Officer in accordance with Commission regulations.

Sincerely,

Regina M. Sestak

Regina M. Sestak
Attorney for Duquesne Light Company

encs

cc: Clifford B. Levine and David J. Montgomery, Attorneys for Complainants
(with enclosures)
Administrative Law Judge Michael A. Nemec (with enclosure)

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MAY 31 2007
PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Before the
PENNSYLVANIA PUBLIC UTILITY COMMISSION

OHIOVIEW INFRASTRUCTURE, INC.,	)	
	)	
Complainant,	)	
	)	
v.	)	No. C-20066233
	)	
DUQUESNE LIGHT COMPANY,	)	
	)	
Respondent	)	
GROVETON HOUSING PARTNERSHIP, LP,	)	
	)	
Complainant,	)	
	)	
v.	)	No. C-20066236
	)	
DUQUESNE LIGHT COMPANY,	)	
	)	
Respondent	)	

DOCUMENT FOLDER

DOCKETED
JUN 05 2007

RESPONDENT DUQUESNE LIGHT COMPANY'S REPLY TO THE EXCEPTIONS OF OHIOVIEW INFRASTRUCTURE, INC. AND GROVETON HOUSING PARNERSHIP, LP - COMPLAINANTS

Respondent Duquesne Light Company (hereinafter "Duquesne Light" or "DLC"), by and through its attorney Regina M. Sestak, files this Reply to the Exceptions of Ohioview Infrastructure, Inc. and Groveton Housing Partnership, LP in accordance with Commission Regulation 5.535, 52 Pa. Code §5.535:

I. INTRODUCTION

Complainants assert that their projects meet the definition of "New Residential Development" under Duquesne Light's Tariff Rule 13.2 because they were constructed on cleared, newly subdivided ground, utterly devoid of infrastructure, streets or buildings. Complainants' projects, however, do not meet the definition of "development" in Duquesne Light's Tariff Rule 13.2 because neither project necessitated Duquesne Light extending its existing distribution lines. Evidence of record clearly demonstrates that both projects were built on land that was already being served by Duquesne Light's distribution system. Complainants themselves

caused Duquesne Light's overhead facilities to be removed as part of projects that also required installation of underground facilities. Because removing facilities and replacing them with facilities in another location is a relocation, Duquesne Light properly charged Complainants under its Tariff Rule 9B.

Any cost imposed upon an electric distribution company such as Duquesne Light is ultimately borne by its customers. As will be discussed in greater detail below, no evidence of record supports a finding that Duquesne Light's customers should be forced to subsidize the installation of underground service in Complainants' projects, when both projects occupy sites that were being served by Duquesne Light's distribution system prior to demolition and reconstruction.

Complainants misstate the reasoning of Administrative Law Judge Michael A. Nemec (hereinafter "ALJ Nemec") as set forth in the Initial Decision, and then assert that this misstated reasoning ignores Pennsylvania land use law and Public Utility Commission (hereinafter "PUC" or "Commission") requirements. Nowhere in the Initial Decision is the term "New Residential Development" limited to disqualify any development if, at one time, an overhead supply line existed at the site. On the contrary, the Initial Decision turns upon the meaning of the word "development" as it is defined in DLC Tariff Rule 13.2 and Commission Regulation 57.81, 52 Pa. Code §57.81. As will be discussed in greater detail below, ALJ Nemec properly concluded that neither of the Complainants' projects met this definition of "development" because providing electric service to the project sites did not necessitate Duquesne Light extending its existing distribution lines.

II. BACKGROUND

A. The Parties

B. The Subject Properties

1. Pleasant Ridge 2. Groveton Village

The information contained in these sections is generally in accord with testimony and exhibits presented at hearing.

3. Conditions at Ohioview Acres and Groveton Village

Complainants misstate the testimony of their witness Walter McFann (hereinafter "McFann"). As noted in Duquesne Light's Reply Brief, pp. 3-4, at no time during his voluminous testimony (N.T., pp. 36-89) did McFann state that either Groveton Village or Ohioview Acres had been plagued by severe social problems, including concentration of poverty, high unemployment, vandalism, periodic shootings, drug trafficking, and gang activity. Rather, McFann made these statements about pre-1993 era public housing in general. *See* N.T., pp. 40-43. His linkage of these statements to actions taken by the federal government underscores the fact that he was speaking globally about problems with public housing across the United States rather than about problems in two specific public housing communities in Western Pennsylvania.

Complainants assert that McFann testified Groveton Village and Ohioview Acres lacked defensible space, citing Page 41, Line 5 of the transcript. However, as noted in Duquesne Light's Reply Brief, p. 4, that citation leads to a portion of a question asked by Complainants' counsel: "What do you mean by that term, defensible --" The question continues onto the next line, where we find the word, "--space?"

Complainants go on to cite a portion of the transcript, Page 40, Line 21 through Page 41, Line 4, as if this section of the transcript contained specific testimony about short-comings of Ohioview Acres and Groveton Village, i.e., structural problems, and lack of public transportation and other amenities, such as air conditioning and social services. In fact, as noted in Duquesne Light's Reply Brief, p. 4, this testimony also concerned pre-1993 public housing in general and was not specific to Ohioview Acres or Groveton Village. It should be noted that window air conditioners are clearly visible in pre-demolition photos of Ohioview Acres. Complainants' Exhibits 5A, 5F.

Complainants assert that "the developments," again apparently referring to Ohioview Acres and Groveton Village, were not handicapped-accessible and lacked sidewalks that complied with the Americans With Disabilities Act. No citation to the record is provided to support this statement. However, as noted in Duquesne Light's Reply Brief, pp. 4-5, pre-demolition photos of Ohioview Acres and Groveton Village appear to contradict Complainants' assertion by showing curb cuts of the sort typically associated with wheelchair access, a designated handicapped parking area, and what appear to be wheelchair access ramps to dwelling units. Complainants' Exhibits 5A, 5C, 7B, 7D.

Complainants assert that "the developments" suffered from vacancy rates below 50% of capacity, citing transcript Pages 42, Lines 15 through 25. Again, as noted in Duquesne Light's Reply Brief, p. 5, this portion of McFann's testimony was about "these types of public housing sites" generally. Further, rather than asserting that occupancy was below 50% in "these types of public housing sites," McFann testified that occupancy was typically "in the high 80s," but would fall below 50% after several shootings in a public housing community, after which it would build back up. N.T., p. 42, Lines 22-25. Nothing in McFann's testimony indicates that there had been even one shooting or less than 50% occupancy at either Ohioview Acres or Groveton Village.

4. **Regulations restricting the Authority's ability to address the problems at Ohioview Acres and Groveton Village**

5. **The Applications for Hope VI funding to create new communities to replace Ohioview Acres and the old Groveton Village.**

6. **Ohioview Acres is demolished and a Hope VI Community known as Pleasant Ridge is created on the site of the former property.**

The information contained in these sections is generally in accord with testimony and exhibits presented at hearing.

7. **The former Ohioview Acres site was transformed into a "greenfield" following the receipt of HUD approval for the**

demolition of Ohioview Acres and disposition of the site to a private developer.

Although Complainants assert that the Ohioview Acres site was equivalent to a "greenfield" site, there is no evidence of record to support this. Complainants' reference to Page 163, Line 23, of the transcript leads only to a portion of a question asked by Complainants' counsel of their witness Patrick Gallagher (hereinafter "Gallagher") which reads, "completely razed and vacant." Duquesne Light is aware of no generally accepted definition of "greenfield" that holds that term to mean land that is vacant because the structures on it had been razed. Such a definition would require that every construction site be considered a "greenfield" site, which would *grossly dilute the meaning of the word.*

Black's Law Dictionary (8th ed. 2004) defines "greenfield site" as:

> 1. Land that has never been developed. Such land is presumably uncontaminated. Cf. BROWNFIELD SITE. 2. Property acquired as an investment, esp. for establishing a new business.

Complainants appear to be using the term "greenfield" in accordance with the first definition. If so, no evidence of record suggests that the condition of Ohioview Acres after demolition of the existing housing was equivalent to that of land that had never been developed. There is ample evidence, however, that the site meets the second definition, in that it was acquired as an investment. Testimony of Complainants' witness Ralph A. Falbo (hereinafter "Falbo"), N.T., pp. 111-112; *see also*, Complainant's Exceptions, pp. 8-10.

8. Stowe Township, Allegheny County, and Duquesne Light treated Pleasant Ridge as a new development.

Complainants assert that requirements imposed by Stowe Township mean that the project at Ohioview Acres was a "new development." The Commission, however, is not bound by such a municipal determination, which was apparently driven by considerations other than the Public Utility Code. In determining whether or not this project was a new residential development within the meaning of Duquesne Light's Tariff Rule 13.2 and Commission Regulations 57.81-57.88, the Commission must

rather look to Duquesne Light's Tariff itself, as well as its own Regulations. Neither support Complainants' position, as will be discussed in greater detail below.

Complainants make much of the fact that the words "New Business" appear on Duquesne Light's design drawing for installation of underground facilities at Ohioview Acres. Complainants' Exhibit 13. As noted in Duquesne Light's Reply Brief, p. 7, Complainants did not establish the meaning of the phrase "New Business" on the record. If they had attempted to, they would have discovered that it is the name of a Duquesne Light department, rather than a determination that the project was or was not a "new residential development."

Complainants assert that reconstruction led to separately metered customers, rather than one billing responsible governmental entity, as if this were proof that the Ohioview project was a new residential development within the meaning of Tariff Rule 13.2. Nothing in the record supports this inference. Further, Complainants present this change in metering as if it were an advantage to Duquesne Light. No evidence of record suggests that it is.

Complainants assert that their Exhibit 6 shows the complete eradication of Ohioview Acres and creation of Pleasant Ridge. In fact, these photographs show various streets with buildings that appear to be houses and a playground area. No eradication or creation is depicted.

9. After the demolition of Ohioview Acres, Pleasant Ridge was constructed with underground electric facilities.

Complainants cite Lines 17-22 of Transcript Page 153 in support of certain testimony by Gallagher. As noted in Duquesne Light's Reply Brief, p. 7, those lines contain a statement and a question by Complainants' counsel. Also as noted in Duquesne Light's Reply Brief, pp. 7-8, Gallagher's testimony that the utilities were 50 years old and that their useful life was nearing its end appears on Page 152. Complainants' wording of this section implies that Gallagher intended "utilities" to refer to Duquesne Light's electrical facilities. In fact, said testimony speaks only of "utilities" and follows testimony about problems with sanitary and storm sewers; it

precedes testimony about gas lines, leading to an inference that Gallagher was speaking of sewers or gas lines rather than electrical facilities. Gallagher does not mention Duquesne Light's facilities until the following page, noting only that Duquesne Light's service came into Ohioview Acres in front of the elderly high-rise and that it was provided overhead. N.T., p. 153, Lines 1-3.

Complainants cite Lines 4-7 on Page 153 of the transcript for Gallagher's testimony that, because the former streets were vacated and a new street grid system and housing units were constructed, the old overhead lines could not be retained. The cited testimony, however, reads: "But with the current layout, the condition of the existing utilities, and the magnitude of the money being spent here, along with the horizontal and vertical changes to the site, we couldn't reuse the utilities." Gallagher did testify that Duquesne Light's existing overhead facilities could not remain in place in Ohioview because the site was redesigned. N.T., p. 144, line 19, through p. 145, line 8. In other words, the Ohioview Acres project required the relocation of Duquesne Light's existing facilities to accommodate changes made by Complainant Ohioview. Gallagher further testified that the new Ohioview Acres project could have been served through overhead facilities. N.T., p. 159, Line 17.

Complainants cite Gallagher's testimony at Line 1, Page 148 in support of their assertion that, "Mr. Gallagher and his subcontractor, Santangelo & Lindsay, provided Duquesne Light with a design for the installation of the underground facilities." The actual testimony that appears at the cited location, however, reads: "Yes. We prepared the utility plans for all the --" The rest of the sentence, found at Lines 2 and 3, reads: "-- utilities, including the Duquesne Light, Verizon and Comcast."

Complainants assert that, in a letter dated August 14, 2004, Duquesne Light's attorney erroneously concluded that Ohioview Acres was not a new residential development because it was "an existing development under construction for modernization" rather than "new construction." The letter, Attachment C to

Complainants' Exhibit 1, speaks for itself. In pertinent part it reads: "In addition, DLC had distribution lines in place serving Ohioview Acres. As such, Section 9(B), Relocation of Facilities, is the operable provision of DLC's Tariff . . ."

Complainants' discussion of Duquesne Light's charges for relocation of facilities at Ohioview Acres is just one more example of the way Complainants have misstated the evidence throughout their Exceptions, as well as in their previously filed Briefs. Reading the rest of this section of their Exceptions leads to an inference that Duquesne Light initially provided an inflated estimate, then cut it by more than half rather than provide a breakdown of the costs involved. No evidence of record supports this inference. Gallagher testified that the initial estimate was over $700,000 and that he requested a breakdown. When asked if he ever received a breakdown, he testified, "Not a detailed breakdown from an engineering standpoint that we could substantiate and review with our client, no." N.T., p. 149, lines 5-8. The inescapable conclusion is that he did receive a less detailed breakdown. When asked about the cost being lowered, Gallagher testified that the design team met with Duquesne Light employee John Khalil (hereinafter "Khalil"), who was very helpful in trying to lower the costs, apparently through design changes. For example, Gallagher testified that keeping overhead facilities in the portion of Ohioview Acres near the high-rise led to a revised cost estimate. N.T., pp. 148-149, 155, 165. It should be noted that the original plan shows underground facilities in front of the high-rise. Testimony of Gallagher, N.T., p. 143. This is significant because, if Complainant Ohioview had actually believed that it was required to install underground facilities by Duquesne Light Tariff Rule 13.2, it would not have altered the plan to save money by keeping some overhead facilities.

As noted in the letter dated July 14, 2004, from Khalil to Gallagher, Exhibit 5 to Complainant's Exhibit 4, Duquesne Light was able to reduce its original estimate by allowing some of the existing overhead conductors to remain and by removing the materials costs for URD transformers.

Complainants assert that the developer excavated and backfilled trenches. Even if Duquesne Light's Tariff Rule 13.2 applied, the developer would have been responsible for excavation and backfilling. *See* Exhibit 1 to Complainants' Exhibit 4, Tariff Rule 13.2.C., which requires:

> The applicant for electric service to a development shall conform to the following: . . .
>
> (2) At its own cost, clear the ground in which the lines and related facilities are to be laid of trees, stumps and other obstructions, provide the excavating and backfilling subject to the inspection and approval of the Company, and rough grade it to within six inches of final grade, so that the Company's part of the installation shall consist only of laying of the lines and installing other service-related facilities. . . ..

Complainants assert in Footnote 5 on Page 13 that the developer went above and beyond its obligations under Tariff Rule 13.2 by providing conduit and electric designs. However, since Duquesne Light's Tariff Rule 13.2 did not apply, any item provided by the developer operated to avoid Duquesne Light charges. Gallagher testified that Duquesne Light's original $700,000 estimate had been for both design and construction. N.T., p. 147, lines 2-5. It should be further noted that Duquesne Light's Tariff Rule 13.1 requires that the necessary facilities to receive electric supply and service lines be installed at the customer's own expense. *See* Exhibit 4 to Complainants' Exhibit 4.

10. The construction of the "new" Groveton Village

Complainants assert that Duquesne Light had previously billed the Allegheny County Housing Authority for service to 100 housing units. It is not clear why Complainants present the fact that Duquesne Light must now individually bill 69 end-user housing units instead, as if this were an advantage to Duquesne Light. No evidence of record indicates that it is.

As was the case with the Ohioview project, no evidence of record establishes that the Groveton project was a development within the meaning of Duquesne Light's Tariff Rule 13.2 because it was not necessary for Duquesne Light to extend its distribution lines to provide service. Distribution facilities were already in place at

the site prior to demolition. Gallagher testified that some of the existing poles in Groveton Village could not have remained in place because the streets were widened. N.T., p. 151, lines 20-25. In other words, the project required the relocation of Duquesne Light's existing facilities to accommodate changes made by the Complainant Groveton.

11. Robinson Township treated Groveton Village as a "new" development.

Complainants assert that Robinson Township considered the project at Groveton Village a "new development." The Commission, however, is not bound by such a municipal determination, which was apparently driven by considerations other than the Public Utility Code. *See* Complainants' Exhibit 22. In determining whether or not this project was a new residential development within the meaning of Duquesne Light's Tariff Rule 13.2 and Commission Regulations 57.81-57.88, the Commission must rather look to the Tariff itself, as well as its own Regulations. Neither support Complainants' position, as will be discussed more fully below.

12. The developer excavated and backfilled the trenches for the underground lines and provided conduit to Duquesne Light.

Complainants assert that the developer excavated and backfilled trenches and provided conduit. It should be noted that Duquesne Light's Tariff Rule 13.1 requires that the necessary facilities to receive electric supply and service lines be installed at the customer's own expense. *See* Exhibit 4 to Complainants' Exhibit 4. Further, as noted above, even if Duquesne Light's Tariff Rule 13.2 had applied, Rule 13.2.C. requires that the applicant for service excavate and backfill.

C. Procedural Background

The procedural history contained in this section is accurate.

III. EXCEPTIONS

For reasons discussed in greater detail above and below, as well as in Duquesne Light's Main Brief and Reply Brief, Complainants' Exceptions are without merit.

Any finding of fact made by an administrative agency such as the Commission, that is necessary to support its adjudication, must be supported by substantial evidence. 2 Pa. C.S.A §704.

As the parties seeking affirmative relief from the Commission, Complainants had the burden of proving the complaint allegations by presenting evidence at hearing to establish the material facts by a preponderance of the evidence. Darling v. Philadelphia Electric Co., F-00161139 (Order entered November 16, 1993); 66 Pa. C.S. 332(a). 'Burden of proof' imports the duty of finally establishing the existence of a certain fact or set of facts by evidence which preponderates to a legally required extent. Se-Ling Hosiery v. Margulies 364 Pa. 45, 70 A.2d 854 (1950). To establish a sufficient case against a utility and satisfy the burden of proof, one must show that the utility is responsible or accountable for the problem described in the complaint. Feinstein v. Philadelphia Suburban Water Company, 50 Pa. P.U.C. 300 (1976), reversed on other grounds, 34 Pa. Commonwealth 516, 383 A.2d 997 (1978). Without a showing that a utility is in violation of its duty under the Public Utility Code or the orders or regulations of the Commission, the Commission has no power to sustain a complaint brought against the utility; in such a case, the Commission does not have the authority, when acting on a customer's complaint, to require any action by the utility. West Penn Power Company v. Pennsylvania Public Utility Com., 84 Pa. Commonwealth Ct. 157, 162, 478 A.2d 947 (1984).

The Initial Decision properly dismisses Complainants' Complaints due to their failure to prove that Duquesne Light had violated the provisions of its Tariff, the Public Utility Code, the Commission's Regulations, or any other order or law the Commission is authorized to enforce.

A. Exception No. 1: The ALJ erred in concluding that Tariff Rule 13.2 does not apply to the Pleasant Ridge and Groveton Village developments.

It is well established that tariffs filed with the Commission have the force of law and are binding upon the utility and the customer. Stiteler v. Bell Telephone Co.,

32 Pa.Cmwlth. 319, 379 A.2d 339 (1977). The tariff rule here in issue, Duquesne Light's Tariff Rule 13.2 [*Exhibit 1 to Complainants' Exhibit 4*] concerns the installation of underground electric service and, in pertinent part, limits the installation costs that must be paid by an applicant for electric service. These provisions are substantially identical to Commission Regulations 57.81-57.88.

Tariff Rule 13.2.A presents a series of definitions that limit the applicability of Tariff Rule 13.2:

> **A. Definitions**
>
> The following words and terms, when used in this rule shall have the following meanings, unless the text clearly indicates otherwise.
>
> (1) **Applicant for Electric Service** – The developer of a recorded plot plan consisting of five or more lots, or of one or more five-unit apartment houses.
> (2) **Developer** – The party responsible for constructing and providing improvements in a development, that is, streets, sidewalks, and utility-ready lots.
> (3) **Development** – A planned project which is developed by a developer/applicant for electric service set out in a recorded plot plan of five or more adjoining unoccupied lots for the construction of single-family residences, detached or otherwise, or mobile homes and one or more five-unit apartment houses, all of which are intended for year-round occupancy, ***if providing electric service to such project necessitates extending the Company's existing distribution lines.*** (emphasis added)

These definitions are substantially identical to those contained in Commission Regulation 57.81.

Prior to construction of Pleasant Ridge and the present Groveton Village, their sites were occupied by residential dwellings that received service though Duquesne Light's existing distribution system. This can be clearly seen in photographs contained in Complainants' Exhibits 5 and 7.[1] *See* also Complainants' Response to Duquesne Light Company's Request for Admissions, which was made part of the record at N.T. p. 30, lines 3-5; Testimony of Falbo, N.T. pp. 117-118; Testimony of

[1] Gallagher opined that overhead lines in Ohioview Acres would have "probably been hideously ugly." N.T. p. 159. However, as can be seen in Complainants' Exhibits 5 and 7, Duquesne Light's overhead facilities are sometimes strikingly beautiful.

Complainants' witness Walter MacFann (hereinafter "MacFann"), N.T. pp. 79-80; Testimony of Patrick Gallagher (hereinafter "Gallagher"), N.T. pp. 141-142, 144-145, 150-153; Complainants' Exhibits 16 and 19.

ALJ Nemec therefore properly determined that both of Complainants' projects were built on sites that had existing overhead distribution infrastructure serving residential dwellings, which infrastructure was relocated at Complainants' request and replaced with underground infrastructure. Since it was not necessary for Duquesne Light to extend its existing distribution lines to provide service, Tariff Rule 13.2 does not apply. Initial Decision, p. 5.

Complainants fault ALJ Nemec's conclusion that the "record is clear that both sites could have been redeveloped and served from above-ground facilities," asserting that, to attract private investors and obtain HUD approval, it was necessary for Complainants to reconfigure the sites. This assertion misses the point. No evidence of record indicates that anyone forced Complainants to participate in these projects that are, after all, investment opportunities. *See* testimony of Falbo, N.T., pp. 111-112. As discussed in greater detail on pages 20-21 of Complainants' Exceptions, it is clear that Complainants chose to undertake these projects for financial gain and that they chose to reconfigure the project sites and install underground service in order to obtain HUD approval, public funds, private investment, and federal tax credits. They were not required to install underground service by Duquesne Light's Tariff Rule 13.2 or Commission Regulations 57.81-57.88, neither of which applied because, as discussed in greater detail elsewhere in this Reply, as well as in the Initial Decision and in Duquesne Light's Main and Reply Briefs, Complainants' projects do not meet the definition of "development."

Complainants conclude with an assertion that, because they had caused Duquesne Light's overhead infrastructure to be removed, installation of underground infrastructure required the extension of Duquesne Light's distribution system. Complainants' position is disingenuous, at best. At worst, it is reminiscent of the

story of the man who, while on trial for murdering his parents, demanded mercy because he was an orphan.

a. Pleasant Ridge and Groveton Village were not mere relocations of facilities under Tariff Rule 9.B

Complainants assert that, because old facilities were removed before new facilities were installed, no relocation of facilities took place. They reiterate that, for a period, both locations became "greenfield" sites. However, as discussed in greater detail above, mere razing of buildings does not transform property into a greenfield site.

Complainants imply that the land lay vacant for an extended period of time. In fact, a portion of the Groveton site continued to be occupied. Testimony of MacFann, N.T. pp. 87-88. In its Formal Complaint, Complainant Groveton avers at ¶5 that Groveton was constructed in 2001 and 2002. [Complainants' Exhibit 1] Khalil's letter to Complainant Groveton's agent Mistick Construction is dated March 27, 20021 *(sic), which is apparently March 27, 2002 since it is stamped received on* March 28, 2002. [Attachment B to Complainants' Exhibit 1] Said letter in pertinent part describes work to be performed as: "Remove the existing overhead facilities and install an underground plan according to your request." There is no clear evidence of record concerning how long any portion of the Groveton site may have been vacant. However, logic dictates that an estimate for removal and installation to be performed sometime after the late March, 2002, date of the estimate, which work was apparently completed sometime before the end of 2002, does not allow much time for the property to sit vacant.

Complainants assert that it was never certain that the new Groveton project would be built after the old community was razed because of opposition by Robinson Township that required court intervention to overcome. The decision of the Robinson Board of Commissioners, however, is dated September 11, 2000. [Complainants Exhibit 22] Complainants did not establish when court intervention was successful but, since Khalil's letter was dated more than 18 months later, and both demolition

and construction were apparently completed within nine months of the date of the letter, it is likely that Complainants knew that the project would be built prior to having Duquesne Light remove its existing overhead facilities.

There is no clear evidence of record concerning the amount of time that elapsed between the demolition of Ohioview Acres and the construction of Pleasant Ridge. However, the first Utility Coordination Meeting took place on October 27, 2003, at which time (according to the minutes, page 2), the proposed demolition of Ohioview Acres was still in the planning stage. [DLC Exhibit 2] In fact, Gallagher testified that, on October 17, 2003, when he wrote the letter setting the first Utility Coordination Meeting, *there may have still been a few residents in Ohioview Acres.* N.T., p. 163, lines 16-18. Duquesne Light's revised cost estimate for installation of underground service, dated July 14, 2004 (less that eight months after that first meeting took place), indicates that Complainant Ohioview's agent Gallagher "will be *requiring work soon.*" *[Exhibit 5 to Complainants' Exhibit 4] It does not appear* likely, therefore, that the Ohioview site remained vacant for an extended period of time.

Complainants speculate on page 23 of their Exceptions that, if they had been unable to complete construction at the Groveton site after it was razed:

> [I]t would have remained empty for an indefinite length of time, until a developer in the future could propose a new project. In the event such a developer would seek to construct a residential community, there could be no question that Duquesne Light would be required to pay for the installation of underground electric facilities pursuant to Rule 13.2.

No evidence of record supports this speculation. Further, the concluding sentence is directly contrary to page 2 of the Exceptions, where Complainants opine that the Initial Decision would disqualify any development under Tariff Rule 13.2 "if, at any one time, an overhead electric supply line, existed at the site." Duquesne Light respectfully requests that the Commission base its determination of this matter upon facts of record and the controlling law, rather than upon Complainants' unsupported speculations.

B. Exception No. 2: The ALJ erred in considering Rule 13.1(A)

Complainants fault ALJ Nemec for considering Duquesne Light's Tariff Rule 13.1(A). It is significant that the only time Tariff Rule 13.1(A) is mentioned in the Initial Decision is on page 6:

> Duquesne contends that the situation presented by the Ohioview and Groveton projects is governed by its tariff provision found at Rule 13.1, . . .

Further, it was Complainants themselves who placed Duquesne Light's contention concerning Tariff Rule 13.1 and that Tariff provision itself into evidence. [*See* Complainants' Exhibit 4, pages 7-8, and Exhibit 4 to Complainants' Exhibit 4] Clearly, it is appropriate for the presiding officer to consider any evidence of record.

Complainants assert that Duquesne Light's counsel did not discuss Tariff Rule 13.1(A) during the January 9, 2007, hearing. Duquesne Light respectfully responds that hearings are designed to provide the presiding officer with testimony and other evidence upon which to base a decision. They are not designed to facilitate discussions by counsel. Nevertheless, Duquesne Light's counsel referred to Duquesne Light's Tariff Rule 13, which encompasses both Rule 13.1 and 13.2, in her opening statement. N.T., p. 34. She later noted that the case turned on the interpretation of Duquesne Light's Tariff Rule 13, and offered a complete copy of Tariff Rule 13 into evidence as DLC Exhibit 3. N.T., pp. 170-171.

Complainants further contend that Duquesne Light did not discuss Tariff Rule 13.1(A) in its Main or Reply Briefs. This is clearly contrary to fact, since Duquesne Light's Reply Brief discusses Tariff Rule 13.1 at pages 9-10.

Complainants assert that the ALJ 'instructed the parties that "failure" to brief any legal arguments would constitute a waiver of said arguments.' This is an inaccurate summary of ALJ Nemec's statement:

> Yeah, any legal argument that you feel that would be important for me to consider, please put it in your brief. Failure to do so ***may*** result in bad consequences as in if not raised, waived. N.T., p. 172, lines 8-11. (emphasis added)

Complainants assert that, under the Pennsylvania Rules of Statutory Construction, 1 Pa.C.S. §1933, the "more particular Rule 13.2.A, with its specific application, would prevail." This argument makes no sense. Tariff Rules 13.1 and 13.2 may be read disjunctively. Tariff Rule 13.1 could not require payment for the installation of underground service if Complainants' projects fell under Tariff Rule 13.2, which would exempt them from such payment.

It is significant that Duquesne Light's right to charge Complainants for installation of underground service is supported not only by its Tariff Rule 13.1, but by its Tariff Rules 7 and 9B, as well. [*See* Attachment C to Complainants' Exhibit 2; Complainants' Exhibit 4, page 7; Exhibit 2 and 3 to Complainant's Exhibit 4].

C. Exception No. 3: The ALJ erred in concluding, without substantial evidence, that the developers of the new residential development simply "chose" to install underground electric lines, thereby improperly rejecting the application of Rule 13.2

This exception erroneously implies that the ALJ based his determination that Duquesne Light's Tariff Rule 13.2 did not apply to Complainants' projects upon a finding that Complainants "chose" to install underground service. On the contrary, the ALJ's reasoning is clearly premised upon the fact that said installation of underground service did not meet the definition of "development" because it did not require the extension of Duquesne Light's distribution lines:

> The present case does not involve an extension of Duquesne's facilities. Its distribution system existed and was present at each site. *Initial Decision*, p. 8.

If Duquesne Light's Tariff Rule 13.2 and Commission Regulations 57.81-57.88 had applied, Complainants would not have had a choice. They would have been required to install underground service.

On Page 26 of their Exceptions, Complainants assert that the ALJ relied upon "two erroneous statements." In fact, both statements are supported by uncontroverted evidence of record, all of which was provided by Complainants themselves:

1. The retention of some overhead facilities contributed to the reduction in cost from Duquesne Light's original estimate. As noted above, the original plan

shows underground facilities in front of the high-rise. Testimony of Gallagher, N.T., p. 143. *Gallagher testified that keeping overhead facilities in the portion of* Ohioview Acres near the high-rise led to a revised cost estimate. N.T., p. 155, lines 1-5; *see also* Khalil's letter to Gallagher, Exhibit 5 to Complainants' Exhibit 4.

2. Design changes made with input from Duquesne Light resulted in reduction of the cost estimate. When asked about the cost being lowered, Gallagher testified that the design team met with Khalil, who was very helpful in trying to lower the costs, apparently through design changes. N.T., pp. 149, lines 10-12. Gallagher further testified that Khalil "worked with us" to get the costs down. N.T., p. 165, lines 5-11.

Complainants seem to have the impression that if they repeat the same misstatements of evidence, unsupported innuendoes, and outright lies often enough, the Commission will fall for them. Duquesne Light respectfully submits that the Commission is not as gullible as Complainants appear to think it is.

Contrary to Complainants assertion on page 27 of their Exceptions, there is absolutely no evidence that Duquesne Light's initial estimate was "wildly inflated." Similarly, there is absolutely no evidence that Duquesne Light reduced the estimate rather than provide a breakdown. As discussed repeatedly and in detail above and in Duquesne Light's Main and Reply Briefs, Complainants' own evidence shows that Duquesne Light's original cost estimate for the Ohioview Acres project was lowered because of design changes undertaken with input from Khalil.

D. Exception No. 4: The ALJ erred in applying a restrictive and discriminatory interpretation of Rule 13.2 inconsistent with: (1) Executive Order No. 2004-9; (2) the public policy objectives of the Commission's rules encouraging underground electric lines in new residential developments; and (3) the fair and equal treatment of new residential developments whether they are located on a suburban greenfield site or an urban in-fill site.

Complainants use this Exception to raise a series of red herrings. The issue before this Commission is not whether or not Pennsylvania's economic development goals favor building on previously developed land rather than undeveloped

agricultural, forest or watershed land. The issue is not whether or not it is good public policy to replace public housing communities with affordable housing communities, nor whether underground service is "better" than overhead service in terms of attracting investors or obtaining public money and tax breaks. The issue is whether or not Complainants' projects meet the definition of "development" in Duquesne Light's Tariff Rule 13.2 or Commission Regulation 57.81.

Complainants assert that Duquesne Light's position is "an affront to any urban project that involves the adaptive use of land." It is important to note, however, that Duquesne Light did not prevent Complainants from installing underground service in their projects. Duquesne Light simply required them to bear the cost of said installation. It is clear that Complainants put a great deal of thought and effort into the finances involved in both projects. *See* Complainants' Exhibits 25 and 26. They had ample opportunity to provide for the cost of relocating Duquesne Light's facilities. No evidence of record indicates that they failed to obtain sufficient public and private funding to meet these reasonable costs which have, in fact, been paid.

Further, Duquesne Light's position is in accordance with the plain meaning of its Tariff Rule 13.2. 57.81-57.88. As a regulated public utility, Duquesne Light is required to adhere to its tariff. 66 Pa. C.S. §1303.

The Public Utility Code empowers the Commission to regulate all public utilities doing business in Pennsylvania and to make such regulations, not inconsistent with law, as may be necessary or proper in the exercise of its power or performance of its duties. 66 Pa. C.S. §501(b). Every public utility is required to observe, obey and comply with Commission Regulations and orders. 66 Pa. C.S. §501(c). The definition of "development" in Commission Regulation 57.81 excludes Complainants' projects on its face. Duquesne Light's position is in accord with this Regulation.

As noted in Duquesne Light's Reply Brief, pp. 12-13, and at N.T., p. 171, Duquesne Light's Tariff Rule 13.2 was adopted in compliance with the Commission's

July 8, 1970, Order at Investigative Docket No. 99. Said Order was subsequently published in the *Pennsylvania Bulletin*, Vol. 7, No. 10, March 5, 1977, pp. 577-580.

Complainants seek to impose the cost of underground service installation in their developments upon Duquesne Light. However, as the Commission noted in *Santo Calantoni v. Pennsylvania Power and Light Company, Additional Complainants: Franklin Towne Realty, Inc. et al., Additional Respondents: Bell Telephone Company of Pennsylvania and Duquesne Light Company*, Opinion and Order adopted at Public Meeting held August 21, 1986 and entered August 27, 1986, Docket Nos. C-78100568 and C-78060381:

> No parties deny that one of the primary purposes of promulgating electric and telephone undergrounding regulations was to place the cost responsibilities for the undergrounding differential upon the developer or homeowners, not the utility customers.

Calantoni is specific to trenching costs. However, as the Superior Court determined in *Colonial Products Company v. Pennsylvania Public Utility Commission*, 188 Pa. Superior Court 163, 146 A.2d 657 (1958), a utility may require contribution when the benefits of a proposed improvement accrue primarily to a particular customer. In the present case, the relocation of existing utility distribution facilities accrued to the benefit of Complainants.

Whether or not Complainants believe that they were compelled by HUD requirements, the need to attract investors, or other considerations to install underground service, the fact remains that they were not compelled to do so by Commission Regulations 57.81-57.88 nor by Duquesne Light's Tariff Rule 13.2 because neither the Regulations nor the Tariff Rule applied. There is simply no basis for requiring Duquesne Light to subsidize the installation of underground service in Complainants' projects. As the ALJ rightly noted at page 8 of the Initial Decision:

> Complainants' policy argument avoids the question of who will pay for the cost of construction. The end result of adoption of Complainants' position would be that ultimately the cost would be placed on Duquesne's current customers.

By defining "development" in Commission Regulation 57.81 to include the phrase "if electric service to the lots necessitates extending the utility's existing distribution lines," the Commission limited the circumstances under which a public utility would have to bear the cost of installing underground service to those *instances in which the utility's revenue would increase due to the extension of service* to a previously unserved area. There is no reason to believe that the Commission ever intended its Investigative Order No. 99 or its Regulations 57.81-57.88 to require utility customers to bear the cost of installing underground service whenever a developer chooses to demolish existing buildings and relocate existing overhead service to underground.

IV. CONCLUSION

For the reasons set forth above, Complainants Exceptions are clearly without merit. The Initial Decision properly determined that Complainants had failed to meet their burden of proof and that their complaints must therefore be dismissed.

Respectfully submitted,

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Before the
PENNSYLVANIA PUBLIC UTILITY COMMISSION

OHIOVIEW INFRASTRUCTURE, INC.,	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. C-2006233
	)	
DUQUESNE LIGHT COMPANY,	)	
	)	
Respondent	)	
GROVETON HOUSING PARTNERSHIP, L.P.,	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. C-2006236
	)	
DUQUESNE LIGHT COMPANY,	)	
	)	
Respondent	)	

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document in accordance with the requirements of 52 Pa. Code §1.54 upon:

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Date: May 31, 2007

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DATE: June 7, 2007

SUBJECT: C-20066233
C-20066236

TO: Cheryl W. Davis, Director
Office of Special Assistants

FROM: James J. McNulty
Secretary
nvl

DOCUMENT
FOLDER

OHIOVIEW INFRASTRUCTURE, INC.
V.
UWCHLAN TOWNSHIP

GROVETON HOUSING PARTNERSHIP LP
V.
DUQUESNE LIGHT COMPANY

DOCKETED
JUN 11 2007

Copies of the Initial Decision have been served upon all parties of interest.

Exceptions have been filed by:

COMPLAINANT

Reply Exceptions have been received from:

DUQUESNE LIGHT COMPANY

cc: Susan Hoffner

BA