COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
Office of Administrative Law Judge
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

August 4, 2006

In Re: C-20066233,
C-20066236

(See letter of 6-19-06)

C-20066233 Ohioview Infrastructure v. Duquesne Light Company
C-20066236 Groveton Housing v. Duquesne Light Company

Billing dispute.

Hearing Notice

This is to inform you that hearings on the above-captioned case will be held as follows:

Type: **Initial and Further Hearings**

Date: **Wednesday, November 15, 2006**
Thursday, November 16, 2006

Time: **10:00 a.m.**

Location: **11th floor hearing room**
Pittsburgh State Office Building
300 Liberty Avenue
Pittsburgh, PA 15222

Presiding: **Administrative Law Judge Michael A. Nemec**
1103 Pittsburgh State Office Building
300 Liberty Avenue
Pittsburgh, PA 15222
Telephone: 412.565.3550
Fax: 412.565.5692

DOCUMENT
FOLDER

BTL

#389988 rev 04/05

Attention: You may lose the case if you do not come to this hearing and present facts on the issues raised.

If you intend to file exhibits, 2 copies of all hearing exhibits to be presented into evidence **must** be submitted to the reporter. An additional copy **must** be furnished to the Presiding Officer. A copy **must** also be provided to each party of record.

Individuals representing themselves do not need to be represented by an attorney. All others (corporation, partnership, association, trust or governmental agency or subdivision) must be represented by an attorney. An attorney representing you should file a Notice of Appearance before the scheduled hearing date.

If you are a person with a disability, and you wish to attend the hearing, we may be able to make arrangements for your special needs. Please call the scheduling office at the Public Utility Commission at least (2) two business days prior to your hearing:

- Scheduling Office: 717.787.1399
- AT&T Relay Service number for persons who are deaf or hearing-impaired: 1.800.654.5988

pc: Judge Nemec
Susan Licon
Beth Plantz
Docket Section
Calendar File

OALJ Hearing Report

Please Check Those Blocks Which Apply

Docket No.:	C-20066233; C-20066236
	Ohioview Infrastructure v. Duquesne Light Co.
	And
	Groveton Housing v. Duquesne Light Company
Location:	Pittsburgh
Date:	January 9-10, 2007
ALJ:	Michael A. Nemec
Reporting Firm:	Commonwealth Reporting Company

	YES	NO
Prehearing Held:	☐	☑
Hearing Held:	☑	☐
Testimony Taken:	☑	☐
Transcript Due:	☑	☐
Hearing Concluded:	☑	☐
Further Hearing Needed:	☐	☑
Estimated Add'l Days:		
RECORD CLOSED:	☑	☐
DATE:	02/09/2007	
Briefs to be Filed:	☐	☑
DATE:	To be established by letter	
Bench Decision:	☐	☑

REMARKS: Reporter to be provided with appropriate copies.

DOCUMENT FOLDER

PLEASE PRINT CLEARLY - Incomplete Information may result in delay of processing.

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☐ Check this box if additional parties or attendees appear on back of form.

llp

Karen Cross
Reporter's Signature

Note: Completion of this form does not constitute an entry of appearance, see 52 Pa. Code §§1.24 and 1.25.

THORP REED & ARMSTRONG

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VIA FEDERAL EXPRESS

James McNulty, Secretary
Pennsylvania Public Utility Commission
2nd Floor, 400 North Street
Harrisburg, PA 17120

February 26, 2007

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

Dear Mr. McNulty:

Enclosed is the original and nine copies of the Brief in Support of Application of Ohioview Infrastructure and Groveton Housing regarding the above-referenced matter. Two copies of this brief have been served upon counsel for Duquesne Light as required by the Commission's Rules.

Very truly yours,

David J. Montgomery

DJM/vaj
Enclosures
cc: Administrative Law Judge Michael A. Nemec (w/encls.)
Regina M. Sestak, Esquire (w/encls.)
Clifford B. Levine, Esquire (w/o encls.)

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COMMONWEALTH OF PENNSYLVANIA

PUBLIC UTILITY COMMISSION

In re: APPLICATION OF OHIOVIEW INFRASTRUCTURE, INC. and GROVETON HOUSING PARTNERSHIP, LP FOR DECLARATORY RELIEF	)))	Application Docket No. 2006233 Application Docket No. 2006236

BRIEF IN SUPPORT OF APPLICATION OF OHIOVIEW INFRASTRUCTURE, INC. AND GROVETON HOUSING PARTNERSHIP, LP

February 26, 2007

Clifford B. Levine
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Attorneys for Applicants

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Before the
PENNSYLVANIA PUBLIC UTILITY COMMISSION

IN RE:	)	
	)	
Application of	)	Docket Nos. 2006233 and 2006236
OHIOVIEW INFRASTRUCTURE, INC.	)	
and GROVETON HOUSING PARTNERSHIP, LP	)	

BRIEF IN SUPPORT OF APPLICATIONS OF OHIOVIEW INFRASTRUCTURE, INC. AND GROVETON HOUSING PARTNERSHIP, LP

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 the requirements of 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 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, Duquesne Light wrongly concluded that the developers should be solely responsible for the costs of installation of the underground electrical facilities. To support this conclusion, Duquesne Light essentially seeks 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 development include underground electric lines.

II. STATEMENT OF THE CASE

A. Description of the Consolidated Complaints

Complainants Ohioview Infrastructure, Inc. (hereinafter "Ohioview Infrastructure") and Groveton Housing Village Partnership LP (the "Partnership") filed these consolidated Complaints on April 10, 2006. The Ohioview Infrastructure 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. On July 20, 2006, the Court conducted an Initial Prehearing Conference and, on July 21, 2006, issued a Prehearing Conference Order, consolidating the Complaints. On January 9, 2007, the Honorable Michael J. Nemec presided over an evidentiary hearing.

1. 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 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. Factual History

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

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[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 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.

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., Exhibit 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).

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 Groveton Village and Ohioview Acres prior to their demolition.

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 as sense of "ownership" to the residents and aiding in crime prevention. Tr. at 41.5. In addition, the developments had structural problems, 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. Constraints on the Authority's ability to fix the problems at Ohioview Acres and Groveton Village.

Prior to 1993, HUD regulations restricted the Authority's ability to address the problems noted above. 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, 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.

5. The "end of public housing as we know it" - - the creation of the HOPE VI affordable housing program

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:

> A. 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

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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.

98.12-17. Ms. Turbov identified three critical components to the changes in HUD policy made to implement this change.

a. 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:

> 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.

b. 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.

c. 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.

6. 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 the 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.

a. The highly competitive nature of the Hope VI funding process.

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.

7. 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.

8. 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, and transformers. Tr. at 122.9. After this demolition, the former Ohioview site was the equivalent of a "greenfield," ready for development.

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

Stowe Township treated Pleasant Ridge as a "new development," requiring that Ohioview Infrastructure enter into a developers agreement providing for maintenance and performance bonds for the construction of the infrastructure to be constructed. Tr. 64.2-10. In addition, the Township required the approval of a subdivision plan whereby the Pleasant Ridge site was subdivided into at least fifteen newly-created parcels. See October 26, 2004 Ohioview Acres Subdivision Plan (Exhibit 14). Because this subdivision plan was recorded, the development was treated as a "new" development under the local zoning ordinance. Tr. 63.18-

1– 64.10. Among other things, the development ordinance required the streets within Pleasant Ridge to have sidewalks and to have a 50' right of way. See Ohioview Subdivision Plan, Exh. 14. In addition, unlike Ohioview Acres, the owners of the newly created parcels at Pleasant Ridge pay real estate property taxes to Allegheny County. Tr. at 133.1.

Duquesne Light prepared a design drawing for the installation of the underground facilities and labeled the drawings as "**New Business** – Ohioview Acres." See Exhibit 13. In addition, after Pleasant Ridge was constructed, every unit was separately metered and Duquesne Light now bills the tenants and owners directly for electric service. By contrast, for Ohioview Acres, Duquesne Light maintained a single meter and billed the Authority for the electric service for the entire development). Tr. at 70.7-16; 130.13 – 131.6.

Distinct from the old Ohioview Acres, Pleasant Ridge is now owned 100% by a private limited partnership (with a long-term groundlease from the Authority) and the fifteen parcels sold in fee simple to private homeowners. Tr. at 48.21; 69.23. The complete eradication of Ohioview Acres and creation of Pleasant Ridge is shown by the photographs at Exhibit 6.

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

Patrick Gallagher, an engineer for GAI Consultants, served as the project manager for Pleasant Ridge. Mr. Gallagher testified that old Ohioview Acres had existing overhead electric facilities but that the facilities were fifty years old and had reached the end of their useful life. Tr. at 153.17-22. Moreover, Mr. Gallagher testified that because the former streets were vacated and a new street grid system and housing units were constructed, the old overhead lines could not have been retained. Tr. at 153.4-7.

Prior to beginning construction, Ohioview Infrastructure supplied Duquesne Light with a copy of the project subdivision plan, identifying boundaries and any necessary easements

or rights of way, as required under Duquesne Light Tariff subpart 13.2.C(1). Ohioview Infrastructure also advised Duquesne Light that it would comply with Rule 13.2.C(2)'s requirement that the applicant clear and grade the installation area. Mr. Gallagher and his subcontractor, Santangelo & Lindsay, provided Duquesne Light with a design for the installation of the underground facilities. Tr. at 148.1.

In response, Duquesne Light provided Mr. Gallagher with an initial estimated cost of installation in excess of $700,000. Tr. at 146.21. On July 7, 2004, Ohioview Infrastructure's attorneys sent a letter to Duquesne Light, requesting that Ohioview Acres be treated as a New Residential Development under Tariff No. 13.2. See Exhibit 1 (Attachment B). On August 14, 2004, Duquesne Light responded by refusing to designate the project as New Residential Development. See Exhibit 1 (Attachment C). In its letter, counsel for Duquesne Light erroneously concluded that Ohioview Acres was "an existing development under construction for modernization" rather than "new construction." See Exhibit 1 (Attachment C). Following this initial demand, Mr. Gallagher requested a detailed breakdown of how Duquesne Light arrived at the $700,000 figure.

Instead of providing the requested breakdown, Duquesne Light reduced its estimate of construction to $253,416.73. See July 14, 2005 letter from John E. Kahlil to Patrick Gallagher (Exhibit 4, Tab 5); Tr. at 148.15 – 149.12. In his July 14, 2005 letter, Mr. Kahlil observed that "[t]he former overhead facilities were removed this past winter under a prior job to allow for the rebuilding of Ohioview Acres." In order to keep the project on schedule, while reserving its right to challenge Duquesne Light's determination regarding the status of Ohioview Acres, Ohioview Infrastructure paid the $253,416.73 deposit to Duquesne Light. See Exhibit 4, ¶¶ 22.

Mistick Construction, the general contractor, excavated the trenches for the underground facilities, provided conduit for the lines, and backfilled the trenches. Tr. at 148.8 14.[5]

11. The construction of the "new" Groveton Village

While not funded as a HOPE VI project, Groveton Village's new design and architecture was also inspired by the concepts of new urbanism and low density. The Partnership initially submitted a Hope VI application for Groveton Village and, when that application did not receive funding from HUD, the Partnership turned to the PHFA to receive permission to use federal tax credits as a means of leveraging private funding to develop a new Groveton Village. See PHFA Application, Exhibit 26.[6] As Mr. MacFann explained, the PHFA used criteria similar to that HUD used in evaluating and approving the Groveton application. Tr. at 57.8-20. Like Ohioview Acres, the Authority had to obtain permission from HUD to demolish and dispose of the old Groveton Village site. See September 21, 2001 Demolition and Disposition Letter (Exh. 9). The HUD Disposition Letter stated that:

> The Mixed-Finance Finance Proposal for the Groveton Village site will blend the development into the surrounding community, reduce density, create a mixed income community, and provide residents with dwelling units that meet code requirements and modern marketability standards.

See Exh. 9, p.2. Through the issuance of this letter, HUD ensured that the proposed new community would embody the design concepts integral to the Hope VI program.

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[5] By providing the conduit and electric designs, the developer went above and beyond its obligations under Tariff Rule 13.2.

[6] The broad and comprehensive scope of the new developments can be seen from a review of the table of contents for the HOPE VI and PHFA Applications. See Exhibits 25 and 26.

After receiving this letter, the Partnership began construction of the "new" Groveton Village at a cost of ten to twelve million dollars. This project was accomplished in phases, due to litigation with some families on the " back end of the property." Tr. at 61.21. As phase one was completely razed to the equivalent of a greenfield, the remaining phase still had some overhead lines and residents until that portion of the site was also vacated. Tr. at 88.11-25. In addition, the Partnership obtained a subdivision approval from the Robinson Township Board of Supervisors and, on December 31, 2001, recorded the subdivision plan which divided the site into six new parcels. See Exh. 17; Tr. 77 at 20.21.

As with the Ohioview Acres, Duquesne Light billed the Authority for the electricity provided to the residents of the 100 units at the "old" Groveton Village. With regard to the "new" Groveton Village, Duquesne Light installed meters at each of the sixty-nine residences and billed its new customers directly. Tr. at 131.12-19. The "new" Groveton Village is owned by a limited partnership with a long-term groundlease from the Authority. Tr. at 113.1.

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

Mr. MacFann testified that, as a consequence of the subdivision, Robinson Township treated Groveton Village as a new development and required compliance with the Township's various subdivision, site plan, and land development ordinances:

> Q. Now, let's take, for example, with Groveton, when you proceeded with Groveton, how did Robinson Township treat that project? Did they treat it as existing units, that you could keep the same size streets and as basically an existing project improvement?
>
> A. No. They considered it a new development. They required us to, one, determine ownership of the streets; also then comply with current street regulations, meaning that if the streets were 35 or less, now we had to have a 50-foot right-of-way for the streets. The existing sewage lines, the municipal authority, new water lines, they were considering this a brand-new development. We had to subdivide the parcels to meet setback requirements, to meet

> the number of buildings on the lot, a variety of different zoning regulations and –
>
> Q. And that includes sidewalks as well?
>
> A. Yes. This Groveton Village was a strange site. For whatever reason, sidewalks were only on half the site on one side of the street, not on the other side. So they required sidewalks on both sides of the street.

Tr. at 59.22-60.17; Exh. 22. In addition, the streets within Groveton Village were vacated and excavated and replaced with a new pattern of streets. Tr. 127.9-22. In the course of this demolition, the Partnership paid Duquesne Light to remove the old overhead electric facilities. Tr. at 119.10. The complete eradication of the "old Groveton Village" and creation of the new development is shown by the photographs at Exhibit 8.

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

As with Pleasant Ridge, Mistick Construction excavated and backfilled the trenches for the underground electric facilities. In addition, Mistick provided conduit, free of charge, to Duquesne Light. Tr. at 120.7. On March 27, 2002, Duquesne Light submitted a cost estimate of $117,590.05 to Mistick and the Partnership paid Duquesne Light the $117,590.05.

III. RELIEF REQUESTED

The Complainants request a declaration that Pleasant Ridge and Groveton Village qualify as New Residential Developments under Duquesne Light Company's Tariff Rule 13.2 and seek a refund, pursuant to 66 Pa. C.S.A §1312, of money paid to Duquesne Light for the installation of underground electric facilities at Pleasant Ridge and Groveton Village, a total of $371,006.78, plus interest, costs and attorneys fees.

IV. SUMMARY OF ARGUMENT

Under its Tariff No. 13.2, Duquesne Light is required to pay for the costs of installing underground electric facilities for New Residential Developments, except for costs incurred by the developer in excavating and backfilling the utility trenches. The issue in this consolidated action is whether two affordable housing communities, Pleasant Ridge and Groveton Village, qualify as New Residential Developments under Tariff No. 13.2. Both developments are completely "new" in every meaningful respect and satisfy Tariff No. 13.2's requirements. Both communities were constructed on cleared, newly subdivided ground, utterly devoid of infrastructure, streets, or buildings. These communities are indistinguishable from 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 earlier public housing. However, the ownership of each development has changed – from a municipal authority to a private partnership. Individual customers are now responsible to pay their electric bills, and Pleasant Ridge includes fee simple ownership by individual home owners. Tr. at 69.3-24.

Duquesne Light concedes many of these facts, but disputes that the projects necessitated the extension of the Company's existing distribution lines. Its position ignores the fact that, when the projects were constructed, no distribution lines existed on the sites. The existing distribution lines were off-site and had to be extended throughout the new communities. Moreover, the overhead lines in the old communities could not be retained due to HUD design guidelines, market forces and the physical layout and reconfiguration of the new communities.

V. ARGUMENT

A. Burden of Proof

Section 332(a) of the Public Utility Code ("Code"), 66 Pa. C.S. § 332(a), provides that the party seeking affirmative relief from the Commission has the burden of proof. In Se-Ling Hosiery, Inc. v. Margulies, 364 Pa. 45, 70 A.2d 854 (1950), the Pennsylvania Supreme Court held that the term "burden of proof" means a duty to establish a fact by a preponderance of the evidence. The term "preponderance of the evidence" means that one party has presented evidence which is more convincing, by even the smallest degree, than the evidence presented by the other party. Samuel J. Lansberry, Inc. v. PA Public Utility Comm'n, 578 A.2d 600; 602 (1990), alloc. den., 602 A.2d 863 (1992). In these proceedings, the Complainants seek affirmative relief and, therefore, bear the burden of proof. Upon a complainant's submission of evidence sufficient to establish a *prima facie* case, the burden of going forward with the evidence, sometimes called the burden of persuasion, shifts to the utility. See Milkie v. Pennsylvania Public Utility Cmm'n, 768 A.2d 1217 (Pa. Cmmw. Ct. 2001). If a utility fails to rebut the evidence the Complainant presents, the Complainant must prevail.

Here, the utility offered no other evidence, other than to establish that overhead electric facilities, at one time, existed at the site. Because the utility offered no other evidence, the nature of the new residential development, the ownership change, and the need to remove (and the removal of) the overhead lines prior to the construction of the new residential developments is not in dispute.

B. Construction of Utility Tariff Provisions

1. Applicable principles of construction of Duquesne Light's tariff.

The provisions of a Commission-approved tariff have the force of law and are binding on both the utility and its customer. Stiteler v. Bell Telephone Co. of Pennsylvania, 32 Pa . Commw. 319, 379 A.2d 339 (1977), Brockway Glass Co. v. PA Public Utility Common, 63 Pa. Commw. 238, 437 A.2d 1067 (1981). Tariff provisions approved by the Commission are *prima facie* reasonable. Lynch v. PA Public Utility Comm'n, 140 Pa. Commw. 599, 594 A.2d 816 (1991), alloc. den. 529 Pa. 670, 605 A.2d 335 (1992). Notwithstanding the presumption of reasonableness, ambiguities in a tariff must be resolved against its author - - in this case, Duquesne Light. See, e.g., Kanowicz v. PPL Electric Utilities Corp., 2005 Pa. PUC Lexis 43 (April 20, 2005).

C. History of PUC Regulations Concerning Payment for the Installation of Underground Electric Facilities.

In its Investigative Docket No, 99 ("I.D. 99"), the Commission investigated the feasibility of installing electric distribution lines underground in New Residential Developments. By an Order dated July 8, 1970, the Commission ordered that underground electric service would be the standard for construction of New Residential Developments.[7] This 1970 rule allocated the

---

[7] I.D. No. 99 defined "Development" as follows:

> Five or more adjoining unoccupied lots in a recorded plan for the construction of single-family residences (detached or otherwise) intended for year-round occupancy, or one or more apartment houses containing an aggregate of five or more family units, if

costs for installation to the developer and required, among other things, that the developer pay a "per lot" fee for the installation. Id. at p. 578.

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.

> electric service to such residential or apartment house lots necessitates extending the utility's existing distribution lines.

See Pa. Bulletin, Vol. 7, No. 10, p.577 (Sat. March 5, 1977).

D. Pleasant Ridge and Groveton Village satisfy the definition of New Residential Development Under Duquesne Light Tariff 13.2A

Tariff No. 13.2 provides that Duquesne Light is required to pay the costs incurred during the construction and installation of facilities for New Residential Developments so long as the developer pays for the required excavation and backfilling of the trenches. See Duquesne Light Company Schedule of Rates, Tariff Nos. 13.2B and 13.2.C(6). Tariff No. 13.2.A defines a "Development" as follows:

> 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 services to such project necessitates extending the Company's existing distribution lines.

Tariff No. 13.2.A. Pleasant Ridge and Groveton Village meet this definition because: the projects were (1) "developed by a developer" (i.e. the Complainants), (2) were set out in "recorded plot plan[s] of five or more adjoining unoccupied lots;" (3) involve the "development of single family residences, detached or otherwise, or mobile homes;" and (4) involve "one or more five-unit apartment houses all of which are intended for year-round occupancy."

There is no dispute that the developments are "new." Pleasant Ridge involved the construction of 181 new rental townhouses and fifteen homes for sale to private owners, on vacant land that has been subdivided with new lot lines, streets and rights of way. Groveton involved the construction of 69 new homes and townhouses on vacant land that has been subdivided with new lot lines, streets and rights of way.

1. Pleasant Ridge and Groveton Village necessitated "extending Duquesne Light's existing distribution lines."

At the PUC's January 9, 2007 hearing before ALJ Nemec, Duquesne Light acknowledged that Groveton Village and Pleasant Ridge constituted new development but questioned whether such new development "necessitate[d] extending the Company's existing distribution lines." Tr. at 85.18. Despite Duquesne Light's position, the uncontradicted evidence shows that, when those projects were constructed, Duquesne Light had removed the former distribution lines, at the developers' cost. As 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 new underground distribution lines were installed. With respect to both developments, the sites were unused and unoccupied and saw a change of ownership from the Authority to the respective partnerships. When construction began on these new residential developments, Duquesne Light's existing distribution lines were off-site and, by necessity, had to be extended to serve the new communities.

Duquesne Light attempts to ignore its obligations under the tariff by suggesting that, despite the change in ownership, the razing of the prior buildings, the reconfiguration of the streets, and the construction of new homes, such a development should be treated as an exception (although not provided in the tariff) to the general rule. It essentially asserts that, once overhead distribution lines exist, for any purpose, and despite their removal, no new residential development at that site could ever qualify as "New Residential Development" under the tariff. This position requires the PUC to apply an arbitrary standard that is inconsistent with Pennsylvania law. Once the existing housing projects were demolished, and the overhead lines

removed, the site was as fallow as a greenfield site. Under Duquesne Light's theory, would it be treated like a greenfield property if it remained fallow for one year, three years, or ten years?

Further, 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, 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. In that event, 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 electric facilities underground pursuant to Rule 13.2.

In other contexts, Pennsylvania courts draw a bright line with respect to property rights where a property use has been dismantled. For example, under zoning law, once a non-conforming use has been abandoned, the new development must conform to the municipality's existing zoning and land development requirements. Thus, for example, the streets and sidewalks must meet the required dimensions set forth under the applicable subdivision ordinance. See, e.g., Tantlinger v. Zoning Hearing Board of South Union Township, 519 A.2d 1071, 1073-1074 (Pa. Commw. Ct. 1987). Tantlinger is instructive. In that case, the court rejected a property owner's efforts to immediately replace a mobile home with a modular home, despite the fact that the mobile home was a valid non-conforming use. The Honorable David W.

Craig, writing for the court, stated that "the complete removal of a non-conforming structure, and replacement of it with a different type of structure, is an abandonment of the nonconforming use thus eliminated, and is inconsistent with the concept of continuing it." Id.

Similarly, in the area of property law, Pennsylvania law provides that when a property owner ceases the use of an easement, the easement may be considered to be abandoned. See, e.g. Eagen v. Nagle, 378 Pa. 206, 106 A.2d 222 (1954) (owner of easement erects a barricade across it and discontinue all use thereof). Here, Duquesne Light was paid to remove its old infrastructure. A "gap" then followed when the sites had neither overhead lines nor residents to use the electricity.

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"**).

Duquesne Light's argument that it does not have a financial interest in encouraging the adaptive use of property, despite its status as new residential development where

previous overhead lines existed, ignores the standard under the tariff, but also ignores the fact that the overhead lines had reached the end of their useful life. Tr. at 152.7-23.

Furthermore, the retention of the lines simply was not an option. The uncontradicted testimony and evidence at the hearing showed that the overhead lines in the old communities could not be retained due to HUD design guidelines, market forces, and the physical layout and reconfiguration of the new communities. As Ms. Turbov explained, neither Groveton Village nor Pleasant Ridge could have received approval from HUD or attracted private funding if the proposals did not call for "new" construction, including the installation of new infrastructure. Tr. at 106.4-22. Because the projects could not have been built with the old infrastructure, "such project[s] necessitate[d] the extension of the Company's existing distribution lines."

2. The presence of overhead supply lines on the old Groveton and Ohioview sites does not justify an exemption from the undergrounding requirement under Tariff Rule 13.2.

Both 66 Pa. Code 57.83 and Tariff 13.2 require electric facilities within New Residential Developments to be installed underground. The logic of Duquesne Light's position is that an exception to this undergrounding requirement should be created where a site, at one time, had existing overhead facilities. By Duquesne Light's reasoning, even though both Groveton Village and Ohioview Acres were re-subdivided and razed to "greenfield" equivalents, the developers and Duquesne Light should have been permitted to ignore the undergrounding requirement and put up new overhead facilities. In Re Thomas A. Rue, 1977 Pa. PUC Lexis 157, 50 Pa. PUC 542 (March 1, 1977), the Commission rejected this position.

The Rue decision concerned a residential development in Monroe County known as Vista Estates. In 1975, when Vista Estates was being developed, the PUC required the

developer to pay for the installation of underground electric distribution facilities. See Investigation Docket No. 99.[8] To avoid the costs associated with the underground requirement, the developer filed a petition with the PUC and requested an exemption from the requirement on the basis that its application " . . . works an undue hardship, involves a physical impossibility, or is otherwise inappropriate . . ." Id. at *1 (quoting the exemption procedures of Investigation Docket No. 99).

The Rue developer based his request for an exemption, in part, on the fact that Vista Estates "is currently being served by an overhead line." Id. Rue testified that the 2000' long overhead line followed the road in the development and served an existing house on the property and, the developer argued, would be able to serve the proposed new development. The Commission rejected Rue's position, concluding that "the presence of a single overhead service line does not present a compelling reason to deviate from our undergrounding rule." Id. at *5.

Like the developer in Rue, Duquesne Light contends that the undergrounding rule should not apply. In Rue, however, the Commission concluded that the "public interest" would not be served by allowing the presence of an *existing* overhead line to justify a hardship waiver from the undergrounding requirement. Id. Here, the case for applying the undergrounding rule is even stronger because the overhead lines for Ohioview Acres and Groveton had been removed (at the developers' costs) well before the installation of the overhead lines, see Exhibit 4, Tab 5, and the sites were devoid of any infrastructure. Thus, even more so than in Rue, the "public interest" requires the application of the undergrounding requirement and the allocation of costs

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[8] As explained, *infra*, the Commission reallocated payment responsibilities in 1979 by requiring developers to pay for trenching and backfilling and requiring the electric utilities to pay for the remaining costs of installation.

set forth under Tariff No. 13.2 and the conclusion that Duquesne Light was required to bear its share of the costs for the installation of the underground electric facilities.

VI. CONCLUSION

For the foregoing reasons, the Complainants respectfully request that this Court grant the relief sought herein and direct Duquesne Light Company to issue a refund pursuant to 66 Pa. C.S.A §1312, of money paid to Respondent Duquesne Light for the installation of underground electric facilities at Pleasant Ridge and Groveton Village.

Dated: February 26, 2007

Respectfully submitted,

THORP REED & ARMSTRONG, LLP

By: _____

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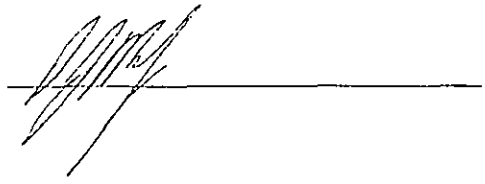
Attorneys for Applicant

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document, Brief in Support of Application of Ohioview Infrastructure, Inc. and Groveton Housing Partnership, LP, 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 26th day of February, 2007.



ORIGINAL

Duquesne Light
Our Energy...Your Power

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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 Brief are enclosed. Copies are being served upon Complainants and the Presiding Officer in accordance with Commission regulations. In addition, in accordance with Administrative Law Judge Michael A. Nemec's letter dated January 24, 2007, a copy in Word is being provided to him as an email attachment.

Sincerely,

Regina M. Sestak

Regina M. Sestak
Attorney for Duquesne Light Company

encs

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

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	)	

REPLY BRIEF OF RESPONDENT
DUQUESNE LIGHT COMPANY

Respondent Duquesne Light Company (hereinafter "Duquesne Light" or "DLC"), by and through its attorney Regina M. Sestak, files this Reply Brief in response to Complainants' Brief in Support of Application of Ohioview Infrastructure, Inc. and Groveton Housing Partnership, L.P. in accordance with Administrative Law Judge Michael A. Nemec's letter of January 24, 2007, and the extension of time granted orally to all parties on March 12, 2007:

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.

Complainants misstate Duquesne Light's position, and then proceed to knock down their misstated position. There is no competent evidence of record that Duquesne Light ever asserted that a development would be disqualified under Tariff Rule 13.2 "if, at one time, an overhead electric supply line, existed at the site." On the contrary, Duquesne Light's position was clearly set forth in the letter from Duquesne Light Attorney Jody Noble letter to Complainants' Attorney Clifford B. Levine dated August 17, 2004, and in Duquesne Light's Answers. Exhibit C to Complainant's Exhibit 2; Complainant's Exhibit 3; Complainant's Exhibit 4. To reiterate, it is Duquesne Light's position that Complainants' projects do not meet the definition of "development" set forth in its Tariff Rule 13.2 or in Commission Regulation 57.81, 52 Pa.Code §57.81, because providing electric service to the project sites did not necessitate Duquesne Light extending its existing distribution lines.

II. STATEMENT OF THE CASE

A. Description of the Consolidated Complaints

Complainants assert that the Ohioview Infrastructure Complaint concerned a housing development known as "Pleasant Ridge." No such name, however, appears in that Complaint. On the contrary, throughout said Complaint, the project is identified as "Ohioview Acres." The remainder of this section of Complainants' Main Brief accurately states the content of said Complaints and procedural history.

1. The Parties

The information contained in this section is in accord with testimony presented by Complainants at hearing and documents on file with the Commission.

B. Factual History

1. Pleasant Ridge

The information contained in this section is supported by evidence of record.

2. Groveton Village

The information contained in this section is supported by evidence of record.

3. Conditions at Groveton Village and Ohioview Acres prior to their demolition.

Complainants misstate the testimony of their witness Walter McFann (hereinfter "McFann"). 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. The fact that he linked these statements to actions taken by the federal government suggests 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. That citation, however, 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, 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 in their brief 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, 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, *this portion of McFann's testimony was about "these types of public housing* sites" generally and was sparked by Complainants' attorney's question at Lines 2-3 that used that phrase. 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 development, after which it would build back up. N.T., p. 42. 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 prior to redevelopment.

4. Constraints on the Authority's ability to fix the problems at Ohioview Acres and Groveton Village.

The information contained in this section is supported by evidence of record.

5. The "end of public housing as we know it" - - the creation of the HOPE VI affordable housing program.

The information contained in this section is supported by evidence of record.

a. <u>Private ownership and management</u>

The information contained in this section is supported by evidence of record.

b. **Adherence to "new urbanism" design principles**

The information contained in this section is supported by evidence of record.

c. **Mixed income residents**

The information contained in this section is supported by evidence of record.

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

The information contained in this section is supported by evidence of record.

a. **The highly competitive nature of the Hope VI funding process.**

The information contained in this section is supported by evidence of record.

7. 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 this section is supported by evidence of record.

8. 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.

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 by private parties as an investment. Testimony of Complainants' witness Ralph A. Falbo (hereinafter "Falbo"), N.T., pp. 111-112.

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

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. 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 development."

10. 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 Patrick Gallagher (hereinafter "Gallagher"). Those lines, however, contain a statement and a question by Complainants' counsel. 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's testimony concerned Duquesne Light's overhead facilities. In fact, said testimony occurred between testimony about sewers and before testimony about gas lines. Gallagher does not mention Duquesne Light's overhead facilities until the following page, noting only that

Duquesne Light's service came in in front of the elderly high-rise and that it was provided overhead. N.T., p. 153.

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 brief. Reading the final two paragraphs on Page 13 of Complainants' brief 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." 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, 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 itself 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.

Complainants' witness Gallagher testified that the Duquesne Light's existing overhead facilities could not remain in place in Ohioview because the site was redesigned. N.T., p. 145. He further 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. In other words, Complainants' projects required the relocation of Duquesne Light's existing facilities although, as Gallagher further testified, Ohioview could have been served through overhead facilities. N.T., p. 159.

Complainants assert that reconstruction led to separately-metered customers, rather than one billing responsible governmental entity, as if this were an advantage to Duquesne Light. No evidence of record, however, suggests that it is.

11. 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.

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

The information contained in this section is supported by evidence of record.

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

The information contained in this section is supported by evidence of record. However, it should be noted that Duquesne Light's Tariff Rule 13.1

requires contractors to install the necessary facility to receive electric supply lines at their own expense. *See* Exhibit 4 to Complainants' Exhibit 4.

III. RELIEF REQUESTED

As discussed more fully above and below, as well as in Duquesne Light's Main Brief, Complainants were properly charged for the relocation of facilities in their projects. It would therefore be inappropriate to require Duquesne Light to refund the moneys paid. Further, Complainants have offered no support for their request for interest, costs, or attorneys' fees.

IV. SUMMARY OF THE ARGUMENT

Complainants assert that, because ownership changed and Complainants cleared the sites prior to reconstruction, both Ohioview Acres and Groveton Village became indistinguishable from "communities built on former farmland." This is not the case. As noted above and below, and in Duquesne Light's Main Brief, Complainants' projects for both communities involved the demolition of housing units and removal of existing infrastructure, immediately followed by the building of housing units and the installation of infrastructure. Mere demolition or change in ownership is not sufficient to bring a project into the purview of Duquesne Light's Tariff Rule 13.2. It was not necessary for Duquesne Light to extend its distribution lines to serve the sites because it was already serving the sites. Complainants' position, if adopted by the Commission, would require utility ratepayers to bear the cost of any underground service installation for new owners who choose to demolish existing residential structures and replace them with other residential structures. This would place an unreasonable burden upon utility ratepayers,

and unreasonably shift the costs of underground installation from contractors who are in a position to profit from the change from overhead to underground.

V. ARGUMENT

A. Burden of Proof

Complainants correctly explain their burden of proof. However, they incorrectly interpret Duquesne Light's decision not to offer further evidence at the close of Complainants' case. As can be clearly seen by the foregoing section of this Reply Brief and by Duquesne Light's Main Brief, Complainants offered more than sufficient evidence to support Duquesne Light's position. To avoid wasting the time of the Administrative Law Judge and the parties by presenting redundant testimony and evidence, Duquesne Light chose not to offer additional evidence beyond establishing its base position. Duquesne Light's position has been clear throughout this proceeding: Complainants' projects do not fall within the definition of "development" under its Tariff Rule 13.2 because neither project necessitated Duquesne Light extending its existing distribution lines. Nothing presented at hearing established a *prima facie* case that either project required extension of Duquesne Light's facilities. In its attempt to build a case, Complainants chose instead to focus on public policy and perceived aesthetics issues, neither of which is controlling.

B. Construction of Tariff provisions.

Complainants begin this section by citing appropriate authority for the propositions that: (1) provisions of a Commission-approved tariff have the force of law and are binding on both the utility and its customers; and (2) tariff provisions approved by the Commission are *prima facie* reasonable.

Complainants then depart rationality by asserting a contract law presumption – that ambiguities in a tariff must be resolved against its author. Complainants apparently intend to mean that Duquesne Light's Tariff Rule 13.2 is ambiguous and should therefore be construed against Duquesne Light. Nothing in the record, however, suggests that Tariff Rule 13.2 is ambiguous. On the contrary, it is clear on its face. Further, as noted in Duquesne Light's Main Brief, Tariff Rule 13.2 was not drafted by Duquesne Light. It was drafted by the Commission itself. *See* Duquesne Light Main Brief, p. 7; Commission Regulation 57.81, 62 Pa. Code §57.81. A plain reading of this section of Complainants' Brief supports the absurd conclusion that the definition of "Development" must be construed against the Commission itself!

Complainants end this absurd assertion with a citation to *Kanowicz v. PPL Electric Utilities Corp.*, 2005 Pa. PUC Lexis 43 (April 20, 2005). That case, an Opinion and Order adopted at Public Meeting on October 27, 2005, and entered November 1, 2005, at PUC Docket No. C-20043915, concerns the applicability of PPL's residential rate to appurtenant detached buildings. There is no discussion in *Kanowicz* of construing an ambiguous tariff term against its maker. The Commission noted no ambiguous term in PPL's tariff provision. Instead, the Commission's determination turned on the plain meaning of the word "appurtenant."

Similarly, determination of the present case must turn upon the plain meaning of the word "extend," which will be discussed below.

C. History of PUC Regulations Concerning Payment for the Installation of Underground Electric Facilities.

As Complainants note, on July 8, 1970, the Commission adopted an Order at Investigative Docket No. 99 concerning the feasibility of installing

electric distribution lines underground. Said Order was subsequently published in the *Pennsylvania Bulletin*, Vol. 7, No. 10, March 5, 1977, pp. 577-580. That Order contained a definition of "Development" that ends with the phrase, "necessitates extending the utility's existing distribution lines."

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 accrued primarily to a particular customer. In the present case, the relocation of existing utility distribution facilities accrued to the benefit of Complainants.

D. Pleasant Ridge and Groveton Village do not satisfy the definition of New Residential Development Under Duquesne Light Tariff 13.2.A.

Complainants assert that Pleasant Ridge and Groveton Village are "new residential developments" within the meaning of Duquesne Light Tariff Rule 13.2. Yet no evidence of record indicates that either Complainant believed

itself required to install underground facilities because of that Rule. On the contrary, the decision to install underground facilities was apparently a business decision. Falbo speaks of "massaging" the site, asserting that, from an investment perspective, it would be almost impossible to accept the utilities that were there. N.T., p. 117. Gallagher opines that overhead facilities would have been "hideously ugly." N.T., p. 159. Neither assert that undergrounding was required by Duquesne Light's Tariff Rule 13.2.

As noted above, this case turns upon the definition of the word "extend." The American Heritage Dictionary, 3rd Edition, defines "extend" as follows:

> 1. To stretch, spread, or enlarge to greater length, area, or scope; expand. 2. To exert vigorously or to full capacity. 3. To offer; tender; *extend credit.*

Case law clearly utilizes the first definition of "extend." Thus, in *Lynch v. Pennsylvania Public Utility Commission*, 594 A.2d 816, 140 Pa. Cmwlth. 599 (1991), *appeal denied* 605 A.2d 335, 529 Pa. 670, the Commonwealth Court examined the extension of a water main which, in that case, involved the installation of facilities to provide water service to a previously unimproved lot.

In *Popowsky v. Pennsylvania Public Utility Commission*, 910 A.2d 38, __ Pa. __ (2006), the "extension" under consideration by the Pennsylvania Supreme Court involved the installation of approximately 19 miles of water main to provide service to the residents of Hickory in Mount Pleasant Township, Washington County, who lacked a public water supply.

The Commission listed possible line extension options to provide service to a residence that had not previously received electric service in *Dan Wert v. PPL Electric Utilities Corporation, Pennsylvania Electric Company, and Valley*

Rural Electric Cooperative, Inc., C-20054282, Opinion and Order adopted at Public Meeting held December 15, 2005 and entered December 19, 2005.

1. Pleasant Ridge and Groveton Village did not necessitate "extending Duquesne Light's existing distribution lines."

Complainants contend that, because they had caused existing overhead facilities to be removed before underground facilities were installed, Duquesne Light had to "extend" its facilities to provide service to Complainants' projects. At first blush, this contention would seem to be in keeping with the Commission's definition of "Line extension" in its Regulation 57.2, 52 Pa. Code §57.2:

> *Line extension*—An addition to the public utility electric supply line necessary to serve the premises of a customer which addition is so located that it cannot be supplied by means of a service line from the existing electric supply line.

However, as noted above, the only reason that there were no existing supply lines in place is because Complainants had required those existing supply lines to be removed. Falbo testified that Complainant Groveton paid to remove the existing overhead facilities through its development budget. (N.T., pp. 118). Similarly, Complainant Ohioview paid to remove the existing overhead facilities through its development budget. [N.T., p. 121] Complainants' position is therefore reminiscent of the story of the man who, while on trial for murdering his parents, demanded mercy because he was an orphan.

Rather than being necessary for Duquesne Light to extend its supply lines to provide service to the reconstructed Ohioview Acres or Groveton Village, Complainants' projects required Duquesne Light to relocate its supply

lines by removing the overhead lines and replacing them with underground lines at a different location. The same geographic area continued to be served.

Complainants' reliance upon cases decided under zoning law and easements is misplaced. None of the cases cited concern the extension of utility distribution lines.

Similarly, Complainants make a public policy argument in favor of affordable housing developments; they do not explain why Duquesne Light's customers should be forced to bear a part of the cost of building such projects rather than the contractors who stand to reap financial gain from the projects. This is particularly true because no evidence of record indicates that either Complainant was required to rebuild the existing residential communities. They chose to do so for financial reasons. *See* testimony of Falbo, N.T., p. 116. As noted by the Board of Commissioners of Robinson Township, Allegheny County, PA in its decision in *In re: The Matter of Groveton Village, Application for Subdivision, Site Plan and Land Development Approval*, Complainant's Exhibit 22:

> Groveton Housing Partnership, L.P. made a voluntary decision to propose demolition of the existing project. [*at* p. 2]

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 distribution 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. Complainants Exhibits 1, 2, 3, and 4.

E. The presence of overhead supply lines on the old Groveton and Ohioview sites justifies an exemption from the undergrounding requirement under Tariff Rule 13.2.

Complainants cite 66 Pa. Code §57.83 as requiring that electric facilities in new residential developments be installed underground. Complainants apparently intend to cite 52 Pa. Code §57.83, since the Pennsylvania Code has no Title 66. Complainants then go on to once again misstate Duquesne Light's position. As noted above, no evidence of record supports Complainants' assertion that Duquesne Light wants to create an exception to the undergrounding requirement if a site ever had existing overhead facilities. On the contrary, Duquesne Light is attempting to comply with both Commission Regulations and its own Tariff by following the plain meaning of their provisions.

Complainants' reliance upon *Re Thomas Rue*, Investigation Docket No. 99-76-Sub 2, 50 Pa. PUC 542 (1977), is similarly misplaced. In *Rue*, a developer sought exemption from the undergrounding requirement for his Vista Estates project on three bases:

> (1) Vista Estates is a vacation resort development, (2) a home in Vista Estates currently is being served by an overhead line, and (3) Mr. Rue does not have the funds necessary to pay the cost of installing electric distribution facilities underground.

Complainants focus on the fact that a single home in the development was being served by a 2000-foot long service line, noting that the Commission concluded that "the presence of a single overhead service line does not present a compelling reason to deviate from our undergrounding rule."

However *Rue*, in which there was a single service line, is clearly distinguishable from the present case, in which there were multiple

existing supply lines on the property. As noted above, the definition of "Line extension" in Commission Regulation 57.2, 52 Pa. Code §57.2, reads:

> *Line extension*—An addition to the public utility electric supply line necessary to serve the premises of a customer which addition is so located that it cannot be supplied by means of a service line from the existing electric supply line.

There is a clear distinction between service lines and supply lines, which the Commission also define in Regulation 57.2, 52 Pa. Code §57.2:

> *Electric supply line*—The wires or cables, with the *necessary supporting or containing structures and appurtenances*, used in connection with an overhead or underground system of a public utility, providing electric power, located on a public highway or utility right-of-way and used to transmit or distribute electric energy.
>
> *Service line*—the wires or cables and appurtenances which connect the electric supply line of the public utility with the customer's installation and which comply with either of the following:
>
> (i) If overhead-open-wire or cable-construction, the span, normally 100 feet, extending to a suitable support provided by the customer.
>
> (ii) If the electric supply line is of underground construction, the underground facilities extending to but not exceeding 18 inches inside the property line of the customer.

The Commonwealth Court offered simplified definitions in *Kossman Development Company v. PA. P.U.C.*, 694 A.2d 1147 (Pa. Cmwlth., 1997):

> A service line is that line extension that exists between a supply line and a customer's individual facilities which include all equipment and materials on the customer's individual premises that facilitate the receiving and consumption of electrical energy through the premises for all consumers of electrical energy on those premises. Therefore, a supply line, by definition, never connects to buildings, structures, or facilities that use or otherwise consume electrical energy; only service lines perform such a function. [*at* pp. 1150-1151]

A single 2000-foot long service line could not, by definition, serve Rue's entire 160-acre, 115-lot development. Provision of service to Vista Estates required the extension of the utility's supply lines. This case is clearly distinguishable from the situation at Ohioview and Groveton, where Duquesne Light had existing supply lines in place, but was instructed by Complainants to remove those existing facilities and replace them with other distribution facilities in order to provide service to the same geographic area.

Conclusion

For the reasons set forth above, Duquesne Light properly required Complainants to bear the cost of relocating its existing distribution facilities at Ohioview Acres and Groveton Village.

Respectfully submitted

Regina M. Sestak
Attorney for Respondent
Duquesne Light Company

Before the
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

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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Administrative Law Judge Michael A. Nemec
Pennsylvania Public Utility Commission
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Date: March 19, 2007

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VIA FEDERAL EXPRESS

James McNulty, Secretary
Pennsylvania Public Utility Commission
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Harrisburg, PA 17120

March 19, 2007

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

Dear Mr. McNulty:

Enclosed is the original and nine copies of the Reply Brief in Support of Application of Ohioview Infrastructure and Groveton Housing Partnership. Also enclosed are nine copies of the Findings of Fact and Conclusions of Law of Ohioview Infrastructure, Inc. and Groveton Housing Partnership regarding the above-referenced matter. Two copies of each of the above have been served upon counsel for Duquesne Light as required by the Commission's Rules.

DOCUMENT FOLDER

Very truly yours,

David J. Montgomery

DJM/kw
Enclosures

cc: Administrative Law Judge Michael A. Nemec (w/encls.)
Regina M. Sestak, Esquire (w/encls.)
Clifford B. Levine, Esquire (w/o encls.)

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ORIGINAL

Docket Nos. 2006233 and 2006236

COMMONWEALTH OF PENNSYLVANIA

PUBLIC UTILITY COMMISSION

In re: APPLICATION OF OHIOVIEW INFRASTRUCTURE, INC. and GROVETON HOUSING PARTNERSHIP, LP FOR DECLARATORY RELIEF	)))	Application Docket No. 2006233 Application Docket No. 2006236

REPLY BRIEF IN SUPPORT OF APPLICATION OF OHIOVIEW INFRASTRUCTURE, INC. AND GROVETON HOUSING PARTNERSHIP, LP

March 19, 2007

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Attorneys for Applicants

Before the
PENNSYLVANIA PUBLIC UTILITY COMMISSION

IN RE:	)	
	)	
Application of	)	Docket Nos. 2006233 and 2006236
OHIOVIEW INFRASTRUCTURE, INC.	)	
and GROVETON HOUSING PARTNERSHIP, LP	)	

REPLY BRIEF IN SUPPORT OF APPLICATIONS OF OHIOVIEW INFRASTRUCTURE, INC. AND GROVETON HOUSING PARTNERSHIP, LP

Complainants Ohioview Infrastructure, Inc. (hereinafter "Ohioview Infrastructure") and Groveton Housing Village Partnership LP (the "Partnership") hereby file this reply brief in response to the brief filed by respondent, Duquesne Light Company ("Duquesne"). 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.

Pleasant Ridge and Groveton Village did not involve the mere removal or relocation of facilities under Tariff Rule 9.B.

Everything about Pleasant Ridge and Groveton Village, including their streets, sidewalks, topography, utility infrastructure, buildings, trees and foliage, the residents, and the identity of the utility customers, was new.[1] As would be expected respecting the construction of new residential communities, these were substantial undertakings, costing $40,000,000 to

[1] At both Pleasant Ridge and Groveton Village, Duquesne metered and billed each residents directly instead of billing the Housing Authority for electric service. Tr. 130, 131.

$50,000,000 for Pleasant Ridge and approximately $12,000,000 for Groveton Village. Tr. at 61.21, 69.8.

Despite the magnitude and scope of these developments, Duquesne asserts that these communities do not qualify as New Residential Developments under its Tariff Rule 13.2. Instead, Duquesne asserts that Pleasant Ridge and Groveton Village involved a mere "relocation" of facilities under Tariff Rule 9.B.[2] Tariff Rule 9.B focuses narrowly on the removal or relocation of facilities and is apparently authorized by 52 Pa. Code §57.27, which permits a utility to recover for "pole removal or relocation." Cf., Matak v. PECO Energy Co., 1999 WL 33592665 (Pa. PUC Aug. 12, 1999) (applying 52 Pa. Code §57.27 and allocating costs to property owner for relocation of utility poles for the construction of swimming pool). The Complainants, however, do not dispute that Duquesne is allowed to recover its costs under Rule 9.B for the removal or relocation of its poles and associated facilities. Indeed, the Complainants have already paid Duquesne 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.

---

[2] Duquesne Light's Tariff Rule 9.B provides that:

> 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.

Here, however, none of Duquesne's facilities were relocated to a new location. Instead, the old facilities were removed, at the developers' expense. Tr. at 121.9 – 121.23. Further, 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. After the sites were reduced to a "greenfield" status and new infrastructure, including newly configured street and utility systems, were established, 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.

In contrast with a mere pole removal or relocation under Rule 9.B, Pleasant Ridge and Groveton Village involved the wholesale construction of new communities. This case does not involve the relocation of utility poles or facilities to suit the convenience of an existing property owner. Instead, the scale and comprehensive nature of these projects are commensurate with the broad policy objectives of Rule 13.2, i.e. the creation of a uniform aesthetic and technological standard for new residential developments across the Commonwealth of Pennsylvania. Accordingly, this Court should conclude that Rule 13.2 applies here, notwithstanding the removal of facilities some time earlier under Rule 9.B.

Pleasant Ridge and Groveton Village necessitated the extension of Duquesne Light Company's existing distribution lines.

Duquesne also contends that neither development fully satisfies Tariff Rule 13.2.A's definition of "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 services to such project necessitates extending the Company's existing distribution lines.

Tariff Rule 13.2.A. Duquesne does not dispute that Pleasant Ridge and Groveton Village satisfy the very high threshold required by the first four criteria under Rule 13.2.A because the projects were (1) "developed by a developer" (i.e. the Complainants), (2) were set out in "recorded plot plan[s] of five or more adjoining unoccupied lots;" (3) involve the "development of single family residences, detached or otherwise" and (4) "all of which are intended for year-round occupancy." Duquesne disputes only the fifth and final criterion:

> . . . if providing electric services to such project necessitates extending the Company's existing distribution lines.

Tariff Rule 13.2. The key to construing this final criterion lies in the phrase "such project," which assumes the existence of the other criteria, i.e. new development, with a recorded subdivision of five or more unoccupied lots, for single family housing, for year-round occupancy. These "projects" were brand new, as required under Hope VI and related programs. These "projects" required electricity service to enable these new residential developments to be constructed. Thus, the analysis here, of whether "such project(s)" necessitated the extension of existing distribution lines is fairly straight-forward: did the new residential communities of Pleasant Ridge and Groveton Village require electric service, and was that service existing at the time the streets were reconfigured and the new housing was constituted?

The undisputed evidence is that Pleasant Ridge and Groveton Village required the extension of Duquesne's distribution lines. The old above-ground facilities had been removed well before the construction of Pleasant Ridge and Groveton Village. Tr. at 88.14-25, 153-155, 163.24. Once those developments were constructed, Duquesne's existing distribution lines were located off-site and had to be extended. In addition, because the streets were vacated and

reconfigured and entirely new communities were created, neither development could have been served by the old facilities. Finally, Housing and Urban Development and Pennsylvania Housing Assistance Agency regulations precluded the use of the old facilities for the developments. Tr. at 106-20.

Duquesne fails to understand that the phrase "such project" requires consideration of the new developments as the starting point in the analysis of whether its distribution lines had to be extended. Instead, Duquesne focuses on the fact that both sites at one time had distribution lines. However, Rule 13.2.A's definition of "Development" does not include an exception for sites that were previously served by distribution lines. Instead, the only question is, given the construction of the new residential developments, quite substantial in nature and radically different in configuration and ownership, whether Duquesne had to extend its existing distribution lines to service those newly constituted houses? The uncontradicted evidence presented at the hearing requires that this question be answered in the affirmative.

Finally, Duquesne asserts that the complainants are "reminisce to the man who, while on trial for murdering his parents, demanded mercy because he was an orphan. Duquesne Reply at 14. In fact, the complainants seek only to be treated like any other developer of New Residential Developments in Pennsylvania and should not be penalized for redeveloping a brownfield site-behavior that this commonwealth favors rather than discourages. Moreover, Duquesne's analogy ignores the fact that Duquesne has been paid in full for the removal of its facilities.

Conclusion

For the foregoing reasons, and the reasons set forth in their main brief, the Complainants Ohioview Infrastructure, Inc. and Groveton Housing Village Partnership LP respectfully request that this Court issue an Order declaring that Pleasant Ridge and Groveton Village qualify as New Residential Developments under Duquesne Light Company's Tariff Rule 13.2 and order Duquesne Light Company to issue a refund, pursuant to 66 Pa. C.S.A §1312, of money paid to Duquesne Light for the installation of underground electric facilities at Pleasant Ridge and Groveton Village, plus interest, costs and attorneys fees.

Dated: March 19, 2007

Respectfully submitted,

THORP REED & ARMSTRONG, LLP

By: _____

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CERTIFICATE OF SERVICE

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

Regina M. Sestak, Esquire
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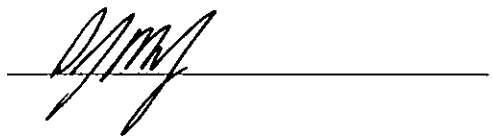
Dated this 19th day of March, 2007.



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March 19, 2007

Re: ***Ohioview Infrastructure v. Duquesne Light Company***
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(consolidated)

Dear Mr. McNulty:

Enclosed is the original and nine copies of the Reply Brief in Support of Application of Ohioview Infrastructure and Groveton Housing Partnership. Also enclosed are nine copies of the Findings of Fact and Conclusions of Law of Ohioview Infrastructure, Inc. and Groveton Housing Partnership regarding the above-referenced matter. Two copies of each of the above have been served upon counsel for Duquesne Light as required by the Commission's Rules.

DOCUMENT FOLDER

Very truly yours,

David J. Montgomery

DJM/kw
Enclosures

cc: Administrative Law Judge Michael A. Nemec (w/encls.)
Regina M. Sestak, Esquire (w/encls.)
Clifford B. Levine, Esquire (w/o encls.)

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

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COMMONWEALTH OF PENNSYLVANIA

PUBLIC UTILITY COMMISSION

In re: APPLICATION OF OHIOVIEW INFRASTRUCTURE, INC. and GROVETON HOUSING PARTNERSHIP, LP FOR DECLARATORY RELIEF	))))	Application Docket No. 2006233 Application Docket No. 2006236

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF OHIOVIEW INFRASTRUCTURE, INC. AND GROVETON HOUSING PARTNERSHIP, LP

March 19, 2007

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Attorneys for Applicants

Before the
PENNSYLVANIA PUBLIC UTILITY COMMISSION

IN RE:	)	
	)	
Application of	)	Docket Nos. 2006233 and 2006236
OHIOVIEW INFRASTRUCTURE, INC.	)	
and GROVETON HOUSING PARTNERSHIP, LP	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF OHIOVIEW INFRASTRUCTURE, INC. AND GROVETON HOUSING PARTNERSHIP, LP

I. FINDINGS OF FACT

A. Description of the Consolidated Complaints

1. Complainants Ohioview Infrastructure, Inc. (hereinafter "Ohioview Infrastructure") and Groveton Housing Village Partnership LP (the "Partnership") filed these consolidated Complaints on April 10, 2006.

2. Ohioview Infrastructure's Complaint concerns an affordable housing development known as Pleasant Ridge, constructed between 2003 and 2006, and Groveton's Complaint concerns an affordable housing development known as Groveton Village, constructed between 2002 and 2004.

3. 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 and seek a refund of money paid to Respondent Duquesne Light for the installation of underground electric facilities at Pleasant Ridge and Groveton Village.

4. Duquesne Light Company ("Duquesne") filed its answers to the Complaints on May 15, 2006 and joined in Complainants' request that these Complaints be joined.

5. On July 20, 2006, the Court conducted an Initial Prehearing Conference and, on July 21, 2006, issued a Prehearing Conference Order, consolidating the Complaints.

6. On January 9, 2007, the Honorable Michael J. Nemec presided over an evidentiary hearing.

B. The Parties

7. Ohioview Infrastructure, Inc., is a corporation located at 230 Wyoming Avenue, Kingston, Pennsylvania, 18704.

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

9. Like Ohioview Infrastructure, the Partnership is a land developer and was formed for the purpose of developing Groveton Village in Robinson Township, Pennsylvania.

10. The Respondent "Duquesne") 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.

C. Pleasant Ridge

11. Pleasant Ridge was constructed, on the site of 30.64 acres of land formerly occupied by a housing development known as Ohioview Acres. Tr. at 161.

12. Pleasant Ridge also included land acquired from an adjacent property to permit the vacation and relocation of Jefferson Drive. Tr. at 64.

13. The total cost of the project was between $45,000,000 and $50,000,000. Tr. at 69.8.

14. Ohioview Acres was constructed by the United States War Department during World War II to serve as temporary worker housing. Tr. at 55.1-56.1.

15. 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"). Tr.39-41.

16. Ohioview Acres consisted of 250 units of barracks-style housing, constructed on concrete slabs. See, e.g., Exhibit 5A-5H (pictures of Ohioview Acres).

17. These barracks were arrayed along two cul-de-sac streets known as Jefferson Drive and Potomac Drive. See Exhibit 11 (Existing Conditions Plan).

D. Groveton Village

18. Groveton Village, a 10.14 acre site, was also constructed by the United States War Department to serve as temporary worker housing during World War II. Tr. at 55.1.-56.1.

19. As with Ohioview Acres, the Authority acquired Groveton Village after the war for low income housing subject to HUD regulations. Tr. at 55, 56.

20. 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).

21. Before they were demolished, Groveton Village and Ohioview Acres were owned and managed entirely by the Authority. Tr. at 45.25-46.7.

E. Conditions at Groveton Village and Ohioview Acres prior to their demolition.

22. Walter MacFann, the Authority's Director of Real Estate, explained that, by the late 1990's, public housing such as Groveton Village and Ohioview Acres was plagued with severe social problems, including concentration of poverty, high unemployment, vandalism, periodic shootings, drug trafficking, and gang activity. Tr. at 42.4 – 42.7.

23. Ohioview Acres' distressed condition is also thoroughly discussed in Exhibit 25 (Executive Summary).

24. The crime problems were exacerbated by the developments' lack of "defensible space," i.e. space providing as sense of "ownership" to the residents and aiding in crime prevention. Tr. at 41.5.

25. In addition, the developments had structural problems, 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.

26. Moreover, the developments were not handicapped-accessible and lacked sidewalks compliant with the Americans With Disabilities Act.

27. 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.

28. As a result of the foregoing problems, the developments were declared to be obsolete in the 1990s. Tr. at 64.9-14.

F. Constraints on the Authority's ability to fix the problems at Ohioview Acres and Groveton Village.

29. Prior to 1993, the Authority's ability to address the problems noted above was restricted by HUD regulations.

30. 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.

31. Moreover, 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.

32. 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.

G. The creation of the HOPE VI Affordable Housing Program

33. 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."

34. Hope VI is an acronym for Housing Opportunities for People Everywhere.

35. The new regulations were adopted under a program known as Hope VI. Tr. at 43.8.

36. Mindy Turbov, an expert on Hope VI developments and affordable housing, testified that the Hope VI program was designed to "end public housing as we know it." Tr. at 98.12-17.

37. 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.

38. Ms. Turbov identified three critical components to the changes in HUD policy made to implement this change.

39. 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. Tr. at 99.10-100.1.

40. Second, Ms, Turbov explained, the Hope VI revolution in public housing also included requiring "new urbanism design" for proposed developments including the razing of existing buildings and streets and the complete rebuilding of the communities. Tr. at 102.13-25.

41. Third, Ms. Turbov explained that Hope VI developments would strive to include a mix of incomes among its residents. Tr. at 101.7-14.

42. Because such developments would include residents with choices about where to live, such developments had to be designed to the standards of the prevailing market. Tr. at 99.24.

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

43. By the late-1990s, Groveton Village and Ohioview Acres were failed communities and declared to the obsolete by the Authority. Tr. at 63.7; Exh. 25, 26.

44. 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.

45. 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.

I. The highly competitive nature of the Hope VI funding process.

46. Through the Hope VI Program, HUD allocates funds through a competitive application process. Tr. 48-55.

47. To achieve HUD approval, a HOPE VI application must achieve a high score on a prescribed set of criteria. Tr. at 107.12-25.

48. 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. Id.

49. 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.

50. 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.

51. 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.

52. HUD's scoring criteria also required that the new developments be constructed to a prevailing market standard for design. Tr. at 99.24.

53. 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.

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

54. In 2002, the Authority and its private sector partner, Pennrose Falbo, Inc., 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).

55. 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. See Exhibit 25.

56. As stated in the Application, the design for Pleasant Ridge fully embraced the concepts of new urbanism. See Exhibit 25.

57. 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.

58. 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.

59. 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. Id.

60. In addition, the Application contemplated that Pleasant Ridge would be designed to prevailing market standards, with new infrastructure replacing the obsolescent infrastructure dating from World War II. See Exhibit 25.

61. Among other things, this included removing the overhead electric facilities and installing underground electric lines in the development. Exh. 25, p. 112.

K. 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.

62. As part of its Hope VI approval, HUD approved the demolition of Ohioview Acres. See Exhibit 25, p.8.

63. Moreover, HUD approved the "disposition" of the site to a private developer, Complainant Ohioview Infrastructure, Inc. Tr. at 115.7.

64. Ralph Falbo, a partner in Pennrose-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.

65. 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.

66. Ohioview Infrastructure paid Duquesne Light for the removal of the existing overhead electric lines, poles, and transformers. Tr. at 122.9.

67. After this demolition, the former Ohioview site was the equivalent of a "greenfield," ready for development.

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

68. Stowe Township treated Pleasant Ridge as a "new development," requiring that Ohioview Infrastructure enter into a developers agreement providing for maintenance and performance bonds for the construction of the infrastructure to be constructed. Tr. 64.2-10.

69. In addition, the Township required the approval of a subdivision plan whereby the Pleasant Ridge site was subdivided into at least fifteen newly-created parcels. See October 26, 2004 Ohioview Acres Subdivision Plan (Exhibit 14).

70. Because this Subdivision Plan was recorded, the development was treated as a "new" development under the local zoning ordinance. Tr. 63.18-1– 64.10.

71. Among other things, the development ordinance required that the streets within Pleasant Ridge have sidewalks and have a 50' right of way. See Ohioview Subdivision Plan, Exh. 14.

72. In addition, unlike Ohioview Acres, the newly created parcels at Pleasant Ridge pay real estate property taxes to Allegheny County. Tr. at 133.1.

73. Finally, Duquesne Light prepared a design drawing for the installation of the underground facilities and labeled the drawings as "New Business – Ohioview Acres." See Exhibit 13.

74. In addition, after Pleasant Ridge was constructed, every unit was separately metered and Duquesne Light billed the tenants directly for electric service (in contrast to Ohioview Acres, where Duquesne Light maintained a single meter and billed the Authority for the electric service for the entire development). Tr. at 70.7-16; 130.13 – 131.6.

75. In contrast to the old Ohioview, Pleasant Ridge is now owned 100% by a private limited partnership (with a long-term groundlease from the Authority) and the fifteen parcels sold in fee simple to private homeowners. Tr. at 48.21; 69.23.

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

76. Patrick Gallagher, an engineer for GAI Consultants, served as the project manager for Pleasant Ridge and testified that old Ohioview Acres had existing overhead electric facilities but that the facilities were fifty years old and had reached the end of their useful life. Tr. at 153.17-22.

77. Moreover, Mr. Gallagher testified that the overhead facilities could not have been utilized for Pleasant Ridge. Tr. at 153.4-13.

78. He explained that, because the former streets were vacated and a new street grid system and housing units were constructed, the old overhead lines could not have been retained. Tr. at 153.4-7.

79. Prior to beginning construction, Ohioview Infrastructure supplied Duquesne Light with a copy of the project subdivision plan, identifying boundaries and any necessary easements or rights of way, as required under Duquesne Light Tariff subpart 13.2.C(1). See Dequesne Answers at ¶ 16 (Exh. 3).

80. Ohioview Infrastructure also advised Duquesne Light that it would comply with subpart 13.2.C(2)'s requirement that the applicant clear and grade the installation area. Id. at 917.

81. Also, Mr. Gallagher and his subcontractor, Santangelo & Lindsay, provided Duquesne Light with a design for the installation of the underground facilities. Tr. at 148.1.

82. In response, Duquesne Light provided Mr. Gallagher with an initial estimated cost of installation in excess of $700,000. Tr. at 146.21.

83. On July 7, 2004, Ohioview Infrastructure's attorneys sent a letter to Duquesne Light, requesting that Ohioview Acres be treated as a New Residential Development under Tariff No. 13.2. See Exhibit 1 (Attachment B).

84. On August 14, 2004, Duquesne Light responded with a letter setting forth its refusal to designate the project as New Residential Development. See Exhibit 1 (Attachment C).

85. In that letter, counsel for Duquesne Light erroneously concluded that Ohioview Acres was "an existing development under construction for modernization" rather than "new construction." See Exhibit 1 (Attachment C).

86. Following this initial demand, Mr. Gallagher requested a detailed breakdown of how Duquesne Light arrived at the $700,000 figure. Tr. at 146.21.

87. Instead of providing the requested breakdown, Duquesne Light reduced its estimate of construction to $253,416.73. Tr. at 148.15 – 149.12.

88. In order to keep the project on schedule, while reserving its right to challenge Duquesne Light's erroneous determination regarding the status of Ohioview Acres, Ohioview Infrastructure paid the $253,416.73 deposit to Duquesne Light. See Exhibit 4, ¶¶ 22.

89. Mistick Construction, the general contractor, excavated the trenches for the underground facilities, provided conduit for the lines, and backfilled the trenches. Tr. at 148.8-14.

90. By providing the conduit and electric designs, the developer went above and beyond its obligations under Tariff Section 13.2.

91. The Authority and Ohioview Acres Infrastructure completely eradicated the Ohioview Acres and created an entirely new community, Pleasant Ridge, in its place. See Exhibits 5 and 6.

N. The construction of the "new" Groveton Village

92. While not funded as a HOPE VI project, Groveton Village's new design and architecture was also inspired by the concepts of new urbanism and low density.

93. The Partnership initially submitted a Hope VI application for Groveton Village and, when that application did not receive funding from HUD, the Partnership turned to the PHFA to received permission to use federal tax credits as a means of leveraging private funding to develop a new Groveton Village. See PHFA Application, Exhibit 26.

94. As Mr. MacFann explained, the PHFA used criteria similar to that used by HUD in evaluating and approving the Groveton application. Tr. at 57.8-20.

95. Like Ohioview Acres, the Authority had to obtain permission from HUD to demolish and dispose of the old Groveton Village site. See September 21, 2001 Demolition and Disposition letter (Exh. 9).

96. The HUD Disposition Letter stated that,

> The Mixed-Finance Finance Proposal for the Groveton Village site will blend the development into the surrounding community, reduce density, create a mixed income community, and provide residents with dwelling units that meet code requirements and modern marketability standards.

See Exh. 9, p.2.

97. After receiving this letter, the Partnership began construction of the "new" Groveton Village at a cost of ten to twelve million dollars.

98. Like Ohioview Acres, the old Groveton Village was razed to the equivalent of a greenfield. Tr. at 88.11-25.

99. In addition, the Partnership recorded a subdivision plan on December 31, 2001, subdividing the site into six new parcels. See Exh. 17; Tr. 77 at 20.21.

100. As with Ohioview Acres, Duquesne Light had billed the Authority for the electricity provided to the residents of the 100 units at the "old" Groveton Village.

101. With regard to the new Groveton Village, Duquesne Light installed meters at each of the sixty-nine residences and billed its new customers directly. Tr. at 131.12-19.

102. The "new" Groveton Village is owned by a limited partnership with a long-term groundlease from the Authority. Tr. at 113.1.

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

103. As a consequence of the subdivision, Robinson Township treated Groveton Village as a new development and required compliance with the Township's various subdivision, site plan, and land development ordinances. Tr. at 59.22-60.17; Exh. 22.

104. In addition, the streets within Groveton Village were vacated and excavated and replaced with a new pattern of streets. Tr. 127.9-22.

105. In the course of this demolition, the Partnership paid Duquesne Light to remove the old overhead electric facilities. Tr. at 119.10.

106. The Partnership completely eradicated the "old Groveton Village" and created an entirely new community in its place. See Exhibits 7 and 8.

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

107. As with Pleasant Ridge, Mistick Construction excavated and backfilled the trenches for the underground electric facilities. Tr. at 120.7.

108. In addition, Mistick provided conduit, free of charge, to Duquesne Light. Tr. at 120.7.

109. On March 27, 2002, Duquesne Light submitted a cost estimate of $117,590.05 to Mistick and the Partnership paid Duquesne Light the $117,590.05. (Exh. 1, Tab A).

II. CONCLUSIONS OF LAW

A. Burden of Proof

1. Section 332(a) of the Public Utility Code ("Code"), 66 Pa. C.S. § 332(a), provides that the party seeking affirmative relief from the Commission has the burden of proof.

2. In Se-Ling Hosiery, Inc. v. Margulies, 364 Pa. 45, 70 A.2d 854 (1950), the Pennsylvania Supreme Court held that the term "burden of proof" means a duty to establish a fact by a preponderance of the evidence.

3. The term "preponderance of the evidence" means that one party has presented evidence which is more convincing, by even the smallest degree, than the evidence presented by the other party. Samuel J. Lansberry, Inc. v. PA Public Utility Comm'n, 578 A.2d 600; 602 (1990), alloc. den., 602 A.2d 863 (1992).

4. In these proceedings, the Complainants seek affirmative relief and, therefore, bear the burden of proof.

5. Upon a complainant's submission of evidence sufficient to establish a *prima facie* case, the burden of going forward with the evidence, sometimes called the burden of persuasion, shifts to the utility. See Milkie v. Pennsylvania Public Utility Cmm'n, 768 A.2d 1217 (Pa. Cmmw. Ct. 2001).

6. Here, with the exception of Complainants' Responses to Request for Admissions, the utility failed to present **any** evidence. The Requests for Admission asked whether Ohioview Acres and the old Groveton Village, had, at one time, overhead electric facilities, a fact the Complainants do not dispute.

7. The utility failed to rebut the evidence presented by the Complainants that supports these findings.

B. Principles of construction applicable to Duquesne Light's tariff.

8. The provisions of a Commission-approved tariff have the force of law and are binding on both the utility and its customer. Stiteler v. Bell Telephone Co. of Pennsylvania, 32 Pa . Commw. 319, 379 A.2d 339 (1977).

9. Tariff provisions approved by the Commission are *prima facie* reasonable. Lynch v. PA Public Utility Comm'n, 140 Pa. Commw. 599, 594 A.2d 816 (1991), alloc. den. 529 Pa. 670, 605 A.2d 335 (1992).

10. Notwithstanding the presumption of reasonableness, "ambiguities in a tariff must be resolved against its author." Kanowicz v. PPL Electric Utilities Corp., 2005 Pa. PUC Lexis 43, *8 (April 20, 2005).

C. Pleasant Ridge and Groveton Village satisfy the definition of New Residential Development Under Duquesne Light Tariff 13.2A

11. Under its Tariff, Duquesne Light is required to pay the costs incurred during the construction and installation of facilities for New Residential Developments. See Duquesne Light Company Schedule of Rates, Tariff Nos. 13.2B and 13.2.C(6).

12. Under the section of Duquesne Light's Tariff regarding New Residential Developments, a "Development" is defined as follows:

> 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 services to such project necessitates extending the Company's existing distribution lines.

See Tariff No. 13.2.A.

13. Pleasant Ridge and Groveton Village meet the foregoing definition because: (1) the projects were "developed by a developer," i.e. the Complainants, (2) the projects were set out in "recorded plot plan[s] of five or more adjoining unoccupied lots" for (3) the "development of single family residences, detached or otherwise, or mobile homes" and (4) "all of which are intended for year-round occupancy."

14. The fifth and final criterion of Tariff No. 13.2.A is satisfied because Pleasant Ridge and Groveton Village necessitated "extending Duquesne Light's existing distribution lines" because both developments included new homes, streets, and utility infrastructure, including Duquesne's lines that were extended from off-site.

15. Pleasant Ridge and Groveton Village qualify as New Residential Developments under Duquesne Light Tariff 13.2.A.

III. CONCLUSION

16. For the foregoing reasons, this Court grants the relief sought herein and directs Duquesne Light Company to issue a refund to the Complainants, Ohioview Infrastructure, Inc. and Groveton Housing Village Partnership LP, plus interest, pursuant to 66 Pa. C.S.A §1312, of money paid to Respondent Duquesne Light for the installation of underground electric facilities at Pleasant Ridge and Groveton Village.

Dated: March 19, 2007

Respectfully submitted,

THORP REED & ARMSTRONG, LLP

By: _____

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Attorneys for Applicant

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document, Findings of Fact and Conclusions of Law of Ohioview Infrastructure, Inc. and Groveton Housing Partnership, LP, 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 19th day of March, 2007.