

June 3, 2016

*Via Electronic Filing*

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

**RE: John Lee (UtiliSave, LLC) v. Duquesne Light Company**  
Docket No. C-2015-2507068

Dear Secretary Chiavetta:

Enclosed please find Duquesne Light Company's Post-Hearing Brief for filing. A copy of this document has been served upon opposing counsel in accordance with Commission regulations.

Please feel free to contact me if you have any questions.

Sincerely,



Jeremy V. Farrell  
JVF/kam  
Enclosure

c: John G. Harris, Esquire (w/enc.) (via e-mail and Federal Express)

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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

ONE TEN ASSOCIATES (DRAXXHALL )  
MANAGEMENT) )

Complainant, )

vs. )

DUQUESNE LIGHT COMPANY, )

Respondent. )

Docket No. C-2015-2507068

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**RESPONDENT'S POST-HEARING BRIEF**

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Jeremy V. Farrell, Esq. (PA ID # 316258)  
Tucker Arensberg, P.C.  
1500 One PPG Place  
Pittsburgh, PA 15222  
Phone: 412-594-3938  
Fax: 412-594-5619  
E-mail: [jfarrell@tuckerlaw.com](mailto:jfarrell@tuckerlaw.com)

Attorney for Respondent Duquesne Light  
Company

Date: June 3, 2016

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	)	
DUQUESNE LIGHT COMPANY,	)	
	)	
Respondent.	)	

**RESPONDENT DUQUESNE LIGHT COMPANY’S POST-HEARING BRIEF**

Respondent Duquesne Light Company (“Duquesne Light” or the “Company”), by and through its attorneys, Tucker Arensberg, P.C., files its Post-Hearing Brief and states as follows in support:

**I. OVERVIEW**

The Formal Complaint must be dismissed with prejudice because Duquesne Light calculates Complainant’s billing demand in strict adherence to the formula established in the Company’s Tariff, which has been filed with and approved by the Commission.

Duquesne Light’s Tariff establishes the following formula for the calculation of Complainant’s billing demand: “The Billing Demand will be the sum of the individual demands of each metered service. . . .” (emphasis added). Thus, to properly calculate Complainant’s billing demand, Duquesne Light must: (1) determine how many metered services exist at the service address; (2) determine the individual demand of each of those metered services; and (3) add those figures together.

With respect to the first prong of inquiry, Duquesne Light provides two metered services at the service address: (1) a 120/208V Lighting Service; and (2) a 277/480V Power Service. Those two services operate completely independently of one another. They require different

equipment, have different peak demand capacities, and are fed from different substations from different circuits of different voltages. Complainant's Lighting Service and Power Service operate as if they were located in different buildings. With respect to the second prong of inquiry, the Tariff defines "individual demand," in the same section that establishes the billing demand formula, as the "measurement of the average kilowatts during the fifteen-minute period of greatest kilowatt-hour use during the billing period." (emphasis added).

Therefore, to reach Complainant's billing demand, as illustrated by the chart below, Duquesne Light takes the greatest demand on the 120/208V Lighting Service and the greatest demand on the 277/480V Power Service and then adds those two numbers together:

	120/208V Meter (measured in kilowatts)	277/480V Meter (measured in kilowatts)	Sum
<i>Demand in Period 1</i>	500	0	500
<i>Demand in Period 2</i>	1000	200	1200
<i>Demand in Period 3</i>	1500	0	1500
<b><i>How Duquesne Light Calculates Billing Demand (Non-Coincidental Demand Calculation)</i></b>			
Per the formula established by its Tariff, Duquesne Light would calculate the billing demand in this example as the sum of the greatest demand on the 120/208V Lighting Service plus the greatest demand on the 277/480V Power Service, or: $1500 + 200 = 1700$ .			
<b><i>How Complainant Wants Duquesne Light to Calculate Billing Demand (Coincidental Demand Calculation)</i></b>			
Complainant believes that billing demand should be calculated by combining (or totalizing) the 120/208V Lighting Service and the 277/480V Power Service (so that they are treated as a single service even though they are not) and taking the highest simultaneous combined demand; here, 1500.			

As the example above illustrates, the core dispute between the Parties is whether Complainant's billing demand is to be calculated by: (1) taking the greatest demands on each

separate service and then adding those two figures together (non-coincidental billing); or (2) combining the two services and taking the highest combined simultaneous demand (coincidental billing). Since the Tariff explicitly provides that billing demand is the sum of the individual (*i.e.* greatest) demands of “each metered service,” it is clear that the Tariff requires non-coincidental billing. There is simply no support in the Tariff for combining Complainant’s two separate services for the purposes of determining billing demand. Since Duquesne Light’s method of calculating Complainant’s billing demand is reasonable and complies with the Tariff, this Formal Complaint must be dismissed with prejudice.

## II. HISTORY OF THE PROCEEDING

This action was initially commenced by John Lee and Utilisave, LLC (“Utilisave”), neither of whom are Duquesne Light’s customers, but rather are third party vendors retained to perform a utility audit for one of Duquesne Light’s customers – 110 Associates, L.P (“110 Associates” or “Complainant”). The Formal Complaint asked the Commission to order Duquesne Light to change its method of calculating Complainant’s billing demand and issue a refund for the difference to Utilisave. After two rounds of preliminary objections based on Utilisave’s lack of standing and other procedural issues, a Second Amended Complaint was filed, finally listing Duquesne Light’s customer as the complainant.

This matter proceeded to an initial telephonic hearing on April 11, 2016. Complainant, through counsel, presented the testimony of two witnesses, Michael Steifman (the CEO of Utilisave) and Adam Boese. Notably, neither are employed by 110 Associates or even claimed to have seen the equipment Duquesne Light utilizes to provide the Lighting Service and Power Service to Complainant. Moreover, Mr. Steifman admitted that Utilisave (his company) has a direct financial interest in the outcome of this matter because it will receive a portion of any award that the Commission might award to Complainant. Also of note is that Complainant did not offer the testimony of John Lee (who is also employed by Utilisave and was present for the

hearing) even though it was Mr. Lee who initiated this case, was chief liaison between Duquesne Light and the customer on this subject before the complaint was filed, and authored an important letter (Respondent's Exhibit L) that essentially acknowledged that Duquesne Light's Tariff envisions non-coincidental billing.

Duquesne Light offered the testimony of three witnesses and sponsored 13 exhibits into the record. Duquesne Light's witnesses were Chris Kovach, PE, Supervisor of Distribution and Planning, William Pfrommer, Duquesne Light's Senior Manager of Rates and Tariff Services whose job responsibility it is to ensure that customer's bills are in accordance with the Tariff, and Adam Goldbach, Duquesne Light's Major Account Representative for the service address.

### III. FACTS

This Formal Complaint relates to the electric service account at 435 Seventh Avenue, Pittsburgh, Pennsylvania 15219 (the "Gulf Tower"). Complainant has been the ratepayer of record for the Gulf Tower continuously since March 10, 1986. Tr. at 137-38;<sup>1</sup> RXK.<sup>2</sup>

Since Complainant challenges how Duquesne Light calculates its monthly billing demand in an effort to lower its bills, a brief overview of how Duquesne Light determines the bill amount for its industrial and commercial customers is necessary. Demand is one of the two main components<sup>3</sup> in calculating a commercial/industrial customer's bills. Tr. at 103. Demand, which is measured in kilowatts (kW), represents the average rate of energy consumption over a 15-minute period. Tr. at 103.<sup>4</sup> In other words, demand measures how fast energy is being consumed during a particular 15-minute period. Tr. at 103. Pursuant to its Tariff, Duquesne

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<sup>1</sup> Citations to the April 11, 2016 Hearing Transcript will be in the form "Tr. at 137," where 137 designates the page number of the subject testimony.

<sup>2</sup> Respondent's hearing exhibits will be identified in the form "RXK," where R stands for Respondent, X stands for Exhibit, and K identifies the subject exhibit.

<sup>3</sup> The other major component is the amount of energy consumption, which is measured in kilowatt-hours (kWh). The consumption component of a customer's bill is based on the total kWh consumed during a given period, regardless of how and when the electricity was used. Tr. at 103.

<sup>4</sup> Duquesne Light's meters measure the demand of a particular service in 15-minute intervals, meaning that the Company takes 2,880 readings per month. Tr. at 103-04.

Light bases its commercial/industrial customers' bill on the greatest 15-minute demand recorded during a particular billing cycle. Tr. at 103-04; RXB p. 2. This is sometimes referred to as "peak" or "maximum" demand. Tr. at 104.

The wrinkle in this case is that Duquesne Light provides Complainant with more than just one service at the Gulf Tower. See, e.g., RXG-J; Tr. at 63-64, 67, 68. There are two separate metered electric services to the Gulf Tower – a 120/208V Lighting Service and a 277/480V Power Service. See, e.g., Tr. at 63-64, 67, 68; RXC, F, G-J. The central question posed by the Formal Complaint is how Duquesne Light must calculate the billing demand for a commercial/industrial customer that has more than one metered service inside a single building.

Duquesne Light's Tariff answers that question. The Tariff states that "Billing Demand will be the sum of the individual demands of each metered service." RXB p. 2 (emphasis added).

Thus, the first step to reaching Complainant's billing demand is to determine how many "metered services" exist at the Gulf Tower. There are two: (1) the 120/208V Lighting Service; and (2) the 277/480V Power Service. Tr. at 63-64, 67, 68; RXC, F, G-J.<sup>5</sup> These two services utilize different equipment and operate completely independently of one another (just as if they were in different buildings) and cannot be tied together. Tr. at 63, 89, 132-133; RXC, F, G p. 3, 5, 6. The 120/208V Lighting Service is comprised of two 120/208V meters (though only one of them is currently in use)<sup>6</sup> and its own set equipment, including transformers, network protectors, and primary circuit feeds. Tr. at 61-63; RXF. The 277/480V power service is comprised of one

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<sup>5</sup> Chris Kovach, PE, explained that, 120/208 volt services typically feed lighting type loads, whereas 277/480 volt services feed larger motor type loads, such as commercial chillers and large commercial power equipment. Tr. at 56. Adam Goldbach, Duquesne Light's major account representative for the Gulf Tower, testified that William Bauldauff, the President of 110 Associates, informed him that the Gulf Tower's 277/480V Power Service was installed at the customer's request primarily to service a central HVAC system. Tr. at 130-132; RXH. Since Mr. Bauldauff's is Complainant's President, his statements count as opposing party statements that are admissible under Pa.R.E. 803(25). Moreover, Mr. Bauldauff's statements that the 277/480V Power Service was installed at the customer's request is corroborated by Duquesne Light's policy that the Company would not typically install a second service at a particular property absent a customer request. Tr. at 89, 151.

<sup>6</sup> Adam Goldbach explained that both meters were tied into the same service. Tr. at 141-42.

277/480V meter and its own set of transformers, network protectors, and primary circuit feeds. Tr. at 59-61; RXC. None of the equipment that Duquesne Light uses to provide the 120/208V Lighting Service is used to provide the 277/480V Power Service (and vice versa). Tr. at 62-63; RXC, F. The Gulf Tower’s Lighting Service and Power Service were installed at different times, are different voltages and could not be combined to feed one service, and are fed from different substations on different circuits of different voltages.<sup>7</sup> Tr. at 63-64, 130, 132-133; RXC, F. And, as established by the contract between 110 Associates and Duquesne Light, the Lighting Service and the Power Service have different peak demand requirements. RXH.<sup>8</sup>

Duquesne Light’s Tariff, which, again, states that “Billing Demand will be the sum of the individual demands of each metered service,” thus creates the following formula for calculating Complainant’s billing demand:

<b>Billing Demand</b>	=	Individual Demand of 120/208V Lighting Service	+	Individual Demand of 277/480V Power Service
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The next step in calculating Complainant’s billing demand is to determine what is the “individual demand” of each metered service during a particular billing cycle. Duquesne Light’s Tariff defines that term in same the section that sets forth the formula for calculating billing demand: “Individual demand, except in unusual cases, will be determined by measurement of the average kilowatts **during the fifteen-minute period of greatest kilowatt-hour use during the billing period.**” RXB p. 2 (emphasis added). By requiring that “individual demand” be based off the period of “greatest” kilowatt-hour use during a particular billing period, the Tariff defines “individual demand” as synonymous with “peak” or “maximum” demand. Tr. at 104.

<sup>7</sup> The two services also have different primary voltages, as the Lighting Service is fed from an 11kV circuit whereas the Power Service is fed by a 23kV circuit. Tr. at 63.

<sup>8</sup> Chris Kovach, Duquesne Light’s Supervisor of Distribution Planning, explained that the peak demand is relevant from an engineering and planning perspective because the Company has to ensure that the Company’s system maintains the capacity to meet that peak demand. In other words, Duquesne Light is required to make the peak demand on the 120/208V Lighting Service and the 277/480V Power Service available to Complainant whenever Complainant wants and whether the peak demands occur simultaneously or not. Duquesne Light has to plan and maintain its system so that it can do so. Tr. at 69.

Thus, under Duquesne Light's Tariff, Complainant's billing demand must be calculated as the sum of the Lighting Service's greatest demand and the Power Service's greatest demand. That is exactly how Duquesne Light calculates 110 Associates' billing demand, as illustrated by the following example:

	120/208V Meter	277/480V Meter	Sum
<i>Demand in Period 1</i>	500	0	500
<i>Demand in Period 2</i>	1000	200	1200
<i>Demand in Period 3</i>	1500	0	1500

RXP.<sup>9</sup>

In this example, the "individual [*i.e.* greatest] demand" recorded by the 120/208V meter was 1500. The "individual [*i.e.* greatest] demand" recorded by the 277/480V meter was 200. The sum of those two figures would be Complainant's billing demand. Tr. at 108-09; RXB p. 2. In other words,  $1500 + 200 = 1700$ , which is the figure that Duquesne Light would utilize (in this example) as Complainant's billing demand. Tr.at 108-09.

Not only does Duquesne Light's method of calculating Complainant's billing demand strictly adhere to the formula established by its Tariff, which has been filed with and approved by the Commission, but it also is a fair and equitable way to calculate Complainant's billing demand. Duquesne Light has an obligation to provide enough capacity to meet the peak demands for Complainant's Lighting Service and Power Service so that the capacity is available when Complainant needs it or chooses to use it; otherwise, Duquesne Light cannot guarantee reliable service. Tr. at 69, 110-11; RXH. When and how Complainant chooses to use the electricity provided by Duquesne Light is up to its discretion, but Duquesne Light is required to

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<sup>9</sup> The first column in the above chart illustrates three time periods of demand measurements in a given billing period. The second and third columns represent the service voltages that Duquesne Light provides. The numbers set forth in the second and third columns represent the demand read by the subject meter during the particular demand period. The fourth column represents the sum of columns two and three. Tr. at 108.

give Complainant the capacity to use its peak demand on each separate service whenever they choose to use it. Tr. at 111; RXH.

By utilizing two different services, Complainant is essentially using the equipment, and demanding the capacity, of two separate customers. Tr. at 111. Utilizing the example in Exhibit P, if these two services were in separate buildings next door to one another, the total amount of billing demand Duquesne Light would charge would be 1700. Tr. at 109. Merely placing two separate services under a single roof or bill does not in any way alter or minimize Duquesne Light's regulatory or electric delivery obligations. Tr. at 111. The Lighting Service and the Power Service are still two separate services that place their own distinct demand on Duquesne Light's system. Duquesne Light must provide the capacity to meet those demands.

Non-coincidental billing, thus, helps Duquesne Light to more accurately and fairly recover the costs it incurs in providing service to Complainant. Tr. at 111-12. Duquesne Light must have extra meters, transformers, and other equipment to operate each of the services. Tr. at 111; RXC, F. That means that there are extra maintenance, labor, and other costs Duquesne Light must incur to keep all that equipment operable.<sup>10</sup> Non-coincidental demand billing is also fair to Duquesne Light's other customers, because it is consistent with how Duquesne Light bills those customers when it comes to demand. Tr. at 111.

Furthermore, Duquesne Light's Tariff has contained this non-coincidental billing demand formula since at least 1969. Tr. at 112-113; RXA. Duquesne Light has, thus, calculated Complainant's billing demand on a non-coincidental basis since the inception of its account on 1986. Tr. at 141, 146-47; RXK. Even though this billing demand formula was set forth in Complainant's bills, the customer never questioned or challenged the calculation until Utilisave's involvement in 2015. Tr. at 140-41.

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<sup>10</sup> As explained above, Duquesne Light utilizes a customer's peak demand as their billing demand. Non-coincidental demand billing simply means that the customer's billing demand is determined by sum of the peak demands of each of its services.

#### IV. PROPOSED FINDINGS OF FACT

1. Complainant has been the ratepayer of record for the Gulf Tower since March 10, 1986. Tr. at 137-38; RXK.

2. Duquesne Light's Tariff has been filed with and approved by the Commission.

3. Duquesne Light's Tariff states that "[b]illing Demand will be the sum of the individual demands of each metered service." RXB p. 2.

4. Duquesne Light provides Complainant with two metered electric services at the Gulf Tower – a 120/208V Lighting Service and a 277/480V Power Service. See, e.g., Tr. at 63-64, 67, 68; RXC, F, G-J.

5. The 120/208V Lighting Service and the 277/480V Power Service are separate services. They require 1.) different equipment to function; 2.) operate completely independently of one another; 3.) have different voltages and peak demand requirements; 4.) were installed at different times; and 5.) are fed from different substations on different circuits of different voltages. Tr. at 59-64, 89, 130, 132-33; RXC, F, G, H.

6. Duquesne Light's Tariff also states that: "Individual demand, except in unusual cases, will be determined by measurement of the average kilowatts during the fifteen-minute period of greatest kilowatt-hour use during the billing period." RXB p. 2.

7. Duquesne Light calculates Complainant's billing on a non-coincidental demand basis.

8. Duquesne Light has, thus, calculated Complainant's billing demand on a non-coincidental basis since the inception of its account on 1986. Tr. at 141, 146-47; RXA,K.

9. Complainant never questioned or challenged Duquesne Light's Tariff, or its method of calculating Complainant's billing demand, until 2015. Tr. at 140-41.

## V. LAW AND ARGUMENT

### A. **Complainant bears the burden of proof, but failed to sustain it.**

It is well-established that, as the proponent of a rule or order, Complainant bears the burden of proof pursuant to 66 Pa. C.S. § 332(a). Snow v. Equitable Gas Co., LLC, Docket No. 2012-2315572, 2013 WL 3787541, \*4 (Pa. P.U.C. July 16, 2013). To satisfy the burden of proof, Complainant must show that Duquesne Light is responsible for the problem described in the Complaint. Id. Such a showing must be made by a preponderance of the evidence, which is evidence that is more convincing than the evidence presented by Duquesne Light. Id. Moreover, the Commission's decision must be supported by substantial evidence of record. Id. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Id.

As set forth more fully below, Complainant failed to carry its burden. Complainant's whole case rests on strained and unsupported interpretations of Duquesne Light's Tariff (RXB) and the Parties' Contract (RXH). Moreover, the testimony of Complainant's witnesses – one of whom has a direct financial interest in the case, and neither of whom are even employed by the customer or claim to have seen the equipment Duquesne Light must use to provide the Lighting Service and Power Service to Complainant – was unconvincing and, at times, confusing.<sup>11</sup> Duquesne Light respectfully submits that the Commission should strongly consider these factors when evaluating the credibility of Complainant's witnesses. See, e.g., Reffner v. Dominion Peoples Natural Gas Co., Docket No. C-20077841, 2008 WL 8014604, \*4 (Pa. P.U.C. June 5, 2008) (noting that “[i]t is the responsibility of the ALJ to consider the overall credibility of witnesses in responding to questioning . . . [including their] personal intent bias or lack of it, in determining what weight shall be given to their testimony.”).

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<sup>11</sup> For example, Mr. Steifman claimed that the Tariff's definition of “individual demand” was vague, which he suggested supported Complainant's position that the Tariff contemplated coincidental billing, but later stated that the definition of individual demand was “irrelevant” to the analysis of whether the Tariff envisioned coincidental or non-coincidental billing. Tr. at 22-23, 32.

**B. Duquesne Light's method of calculating Complainant's billing demand is reasonable and compliant with the Company's Tariff.**

Complainant failed to carry its burden of proving that it is entitled to a refund under the Public Utility Code because Duquesne Light's method of calculating Complainant's billing demand is reasonable and adheres to the formula established in the Company's Tariff, which has been filed with and approved by the Commission. RXB. Section 1312 of the Public Utility Code only allows the Commission to order a public utility to refund rates that were: (1) unlawful; (2) unjust or unreasonable; or (3) in excess of the rates contained in the public utility's tariff. 66 Pa. C.S. § 1312. See also, Springfield Twp. v. Pa. Public Utility Comm'n, 676 A.2d 304, 307 (Pa. Cmwlth. 1996). As the Commission is well aware, "[a] public utility's tariff . . . has the force of law and therefore is binding on both the public utility and its consumers." Springfield Twp., 676 A.2d at 308. See also, PPL Elec. Utilities Corp. v. City of Lancaster, 125 A.3d 837, 842 n. 7 (Pa. Cwmlth. 2015) ("A tariff has the force of law and is binding on the utility and its customers."). Indeed, "[t]ariff provisions that have been properly submitted to and approved by the Commission are *prima facie* reasonable." Leber v. PPL Electric Utilities Corp., Docket No. C-20055083,2006 WL 2788371, \*3 (Pa. P.U.C. Sept. 18, 2006). Since Duquesne Light's formula for calculating Complainant's billing demand is expressly mandated by its Tariff, Complainant has not carried its burden of proving it is entitled to a refund.

The Tariff provision that applies to the Gulf Tower contains a section titled "Determination of Demand for Distribution." RXB p. 2. It contains a clear and unambiguous formula for calculating billing demand. Specifically, it states: "The Billing Demand will be the sum of the individual demands of each metered service. . . ." *Id.* (emphasis added). Since "individual demand" is also defined in the same Tariff section, the only variable in this calculation is how many "metered service[s]" are utilized at the Gulf Tower.

**1. *There are two metered services at the Gulf Tower.***

As explained above, there are two metered services at the Gulf Tower: (1) the 120/208V Lighting Service; and (2) the 277/480V Power Service. See, e.g., Tr. at 63-64, 67, 68; RXC, F, G-J. These two services constitute separate and distinct services (just as if they were housed in completely different buildings) because they operate completely independently of one another. Tr. at 63, 89, 132-133; RXC, F, G p. 3, 5, 6. They are fed from different substations on different circuits of different voltages. Tr. at 63-64, 132-133; RXC, F. None of the equipment used to provide the Lighting Service is used to provide the Power Service. Tr. at 62-63; RXC, F.

Significantly, Complainant does not dispute any of those facts and did not offer any evidence suggesting that the 120/208V Lighting Service and the 277/480V Power Service are somehow tied together. That is not surprising given Complainant's failure to offer a witness with any firsthand knowledge of the electrical equipment at the Gulf Tower. Instead, Complainant offered the testimony of Adam Boese. But, critically, Mr. Boese did not proffer facts showing or suggesting that Duquesne Light offered only a single service at the Gulf Tower; instead, he merely testified that he was confused as to how there could be two services because there were three meters<sup>12</sup> at the Gulf Tower and because the Parties' contract uses the word "service" instead of "services" in its introductory paragraph. Tr. at 48. Certainly Mr. Boese's confusion is not evidence sufficient to sustain Complainant's burden of proof, so all that remains to Complainant's argument that there is only one metered service at the Gulf Tower is the mere fact that the Parties' contract says "service" (and not "services") in its introductory paragraph.

A cursory review of the Parties' contract reveals how weak Complainant's argument is because the word "service" upon which it relies is not written in a vacuum, but rather is part of a general, introductory clause that makes clear that the "service" Duquesne Light provides to Complainant is defined later in the contract. RXH. Specifically, the contract provides: "Subject

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<sup>12</sup> As explained above, the meter is merely one component of a service (along with the transformers, network protectors, or primary circuit feeds, etc.). While the meter records the consumption and the demand, the service is comprised of much more than the meter.

to the Rules, Regulations and Tariffs of the Company on file with the Pa. Public Utility Commission at present or hereafter in effect the Customer agrees to use at 435 7<sup>th</sup> Avenue, Pittsburgh, PA 15219, the Company's electric service described below . . . ." RXH. The contract then expressly defines that service as follows:

<u>277/480</u> volt base	<u>3</u> phase	<u>4</u> wire	Contract on peak demand <u>800</u> kw	Contract off peak demand <u>800</u> kw
<u>120/208</u> volt base	<u>3</u> phase	<u>4</u> wire	Contract on peak demand <u>700</u> kw	Contract off peak demand <u>700</u> kw

Thus, the mere use of the generic word "service" in the contract's introductory paragraph does not constitute evidence in Complainant's favor, nor does it create a conflict or ambiguity in the contract. The contract explicitly provides that there are two services at the Gulf Tower. RXH.

Moreover, Complainant's position fails under the basic rule of contract interpretation that specific language controls general language. As the Commonwealth Court has explained: "When interpreting contract language, specific provisions ordinarily will be regarded as qualifying the meaning of broad general terms in relation to a particular subject. Thus, where specific or exact terms seem to conflict with broader or more general terms, the former is more likely to express the meaning of the parties with respect to the situation than the general language." A.G. Cullen Construction, Inc. v. State System of Higher Education, 898A.2d 1145, 1168 (Pa. Cwmlth. 2006) (internal citations omitted). In other words, the contract's specific description of the two services that Duquesne Light provides to Complainant is controlling over the generic language in the contract's introductory paragraph. Thus, not only is Complainant's argument undermined by the contract itself, but it also violates a fundamental rule of contract interpretation.

In short, Complainant has presented no evidence, let alone substantial evidence, upon which the Commission could rule that the 120/208V Lighting Service and the 277/480V Power Service constitute a single service.

**2. *The Tariff requires that the individual demand on each metered service be determined separately and then added together to reach the billing demand.***

Under the formula established in the Tariff, the billing demand is reached by adding the “individual demands” of each metered service” together. RXB p. 2 (emphasis added). The same section of the Tariff that sets forth the formula for calculating billing demand also defines “individual demand” as the “measurement of the average kilowatts during the fifteen-minute period of greatest kilowatt-hour use during the billing period.” RXB p. 2 (emphasis added). Read together, as previously explained, these two provisions clearly require that Duquesne Light find the greatest demand on the 120/208V Lighting Service and the greatest demand on the 277/480V Power Service and add those two figures together to reach the billing demand. In other words, these two provisions of the Tariff mandate non-coincidental billing.

Complainant relied on the testimony of Mr. Steifman to support its position that this language is either ambiguous or contemplates coincidental billing, but his testimony unconvincing. Not only must Mr. Steifman’s testimony be viewed through the lens of his company’s financial interest in the outcome of this case, Tr. at 28-29, but, more importantly, his testimony was contradictory on this subject. Mr. Steifman testified on direct examination that the Tariff’s definition for “individual demand” was vague, which, he suggested, supported Utilisave’s position that the Tariff contemplated coincidental billing. Tr. at 23. During cross examination, however, Mr. Steifman stated that he believed the “individual demand” definition was “irrelevant” to the analysis of whether the Tariff contemplated coincidental or non-coincidental billing. Tr. at 32. Thus, it is unclear what level of significance even Mr. Steifman ascribes to his own perceived ambiguity in the Tariff’s definition of “individual demand.”

Nevertheless, Mr. Steifman's testimony about the supposed ambiguity in the Tariff's definition of "individual demand" is unconvincing and unreasonable. Language is "ambiguous" only when it conveys two or more reasonable meanings or where it is vague, uncertain, or indefinite. See Barasch v. Pa. Public Utility Comm'n, 532 A.2d 325, 332 (Pa. 1987), aff'd sub nom. Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989). Mr. Steifman believes that to clearly express an intent to bill on a non-coincidental basis, Duquesne Light should have added the phrase "per meter" to the definition of "individual demand." Tr. at 23. Like Utilisave's flawed interpretation of the Parties' contract discussed above, this position also fails to take into account the entirety of the relevant language in the subject document.

That is because the Tariff's formula for calculating billing demand incorporates the very qualifier that Mr. Steifman acknowledges would mandate non-coincidental billing. As noted above, billing demand is the "sum of the individual demands of each metered service. . . ." RXB p. 2 (emphasis added). Since the law requires that these two provisions in the same Tariff section to be read in harmony, it is apparent that Complainant's proposed ambiguity does not exist at all. See, e.g., Snizaski v. Workers' Comp. Appeal Bd. (Rox Coal Company), 8911 A.2d 1267, 1276 (Pa. 2006) ("Courts should not interpret the words of a statute in isolation from each other, but rather in light of the context in which they appear."); City of Phila v. F.A. Relaty Inv'rs Corp., 95A.3d377, 389 (Pa. Cmwlth. 2014) ("When statutes or parts of statutes relate to the same persons or things, or the same class of persons or things, they are *in pari materia* and are to be construed together."). The "per meter" qualifier Mr. Steifman described already exists as the "each metered service" qualifier in the billing demand formula.

**3. Utilisave effectively admitted, in writing, that Duquesne Light's Tariff mandates non-coincidental billing.**

On July 31, 2015, John Lee, the Utilisave employee who commenced this action, wrote a letter to Duquesne Light stating, in pertinent part, as follows:

Since the Interval Data Recorder system records information every 15 minutes, the account should be billed on the basis of coincident maximum demand based on our interpretation of Duquesne Light Company's Retail Tariff Rate GL-General Service Large page 48 which states:

*"The Billing Demand will be the sum of the individual demands of each metered service."*

If the intent was to bill on a non-coincident demand basis for each metered service, the tariff should have stated "The Billing Demand will be the sum of the **maximum** peak individual demands of **each metered service**. . . ."

RXL p. 1 (emphasis in original).

The only change Mr. Lee made to the language of Duquesne Light's Tariff, which he acknowledged would clearly demonstrate an intent to bill on a non-coincident demand basis for each metered service, was to add the words "maximum peak" to qualify the phrase "individual demand." *Id.* That concession is a critical and important one because the Tariff defines "individual demand" as "the measurement of the average kilowatts during the fifteen-minute period of **greatest** kilowatt-hour use during the billing period." RXB p. 2 (emphasis added). Since "greatest" and "maximum" mean the same thing, Utilisave has effectively admitted that Duquesne Light's Tariff mandates non-coincidental billing. RXL p. 1. Complainant should not be permitted to evade or disavow the significance of Utilisave's admission simply by not calling Mr. Lee as a witness.

**4. Rule 10 of Duquesne Light's Tariff does not require that Complainant's billing demand be calculated on a coincidental basis.**

Though Rule 10 is not mentioned in the Complaint, the Amended Complaint, or the Second Amended Complaint, and Complainant's counsel did not question any of its witnesses about Rule 10 or even submit that document as an exhibit, Complainant's cross examination of Duquesne Light's witnesses suggests that it intends to rely on Rule 10 in support of its case. Rule 10, however, does not support Complainant's case. It provides, in full:

**10. ONE SERVICE OF A KIND.** Only one service of each type as to voltage and phase will be provided to a customer under one contract; provided, however,

that when, in the judgment of the Company, compliance with Rule No. 17,<sup>13</sup> Fluctuations and Unbalances, may be most economically effected by establishing a separate service connection for a portion of the customer's load, such separate service connection may, at the option of the customer, be combined, notwithstanding similarity as to voltage and phase, with other service connections under a single contract the customer's entire electric delivery service requirements at the affected location. Electric service at different premises, regardless of voltage or phase, shall never be combined for billing under one account for the purpose of reducing Company charges.

RXQ.

The services that Duquesne Light provides to the Gulf Tower comply with Rule 10 because the Company does not provide more than one service of the same type of voltage and phase. It provides two services with different voltages (the Lighting Service is 120/208V and the Power Service is 277/480V). Tr. at 85-87, 113-114, 150; RXC, F, G-H.<sup>14</sup> Moreover, Complainant did not present any evidence suggesting that fluctuating or unbalanced loads (within the scope of Rule 17) played any role in setting up the 277/480V Power Service. Quite the contrary, Duquesne Light witness Adam Goldbach explained that there was no indication in the Company's records that fluctuating or unbalanced loads were ever a concern at the Gulf Tower. Tr. at 132. Therefore, Rule 10 (and Rule 17) is irrelevant to the issues involved in this case and does not support Complainant's position. Tr. 115-116.

The foregoing makes clear that Duquesne Light method of calculating Complainant's billing demand adheres to its Tariff, which, as noted above, is also a fair and equitable way to

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<sup>13</sup> Rule 17 ("Fluctuations and Unbalances") provides: "The customer's use of electric service shall not cause fluctuating loads or unbalanced loads of sufficient magnitude to impair the service to other customers or to interfere with the proper operation of the Company's facilities. The Company may require the customer to make such changes in his equipment or use thereof, or to install such corrective equipment, as may be necessary to eliminate fluctuating or unbalanced loads; or, where the disturbances caused thereby made be eliminated more economically by changes in or additions to the Company's facilities, the Company will, at the request of the customer, provide the necessary corrective facilities at a reasonable charge. Payment will be made in full in advance for supplying special equipment installed under this Rule."

<sup>14</sup> William Pfrommer, Duquesne Light's Senior Manager of Rates and Tariff Services, explained that Rule 10 is to prevent the Company from having multiple services of the *same* voltage service different parts of the same premise. Tr. at 114.

calculate Complainant's billing demand. Therefore, Complainant is not entitled to a refund under 66 Pa C.S. § 1312.

**C. Duquesne Light provided reasonable service to Complainant.**

While it does not appear that 110 Associates contends that Duquesne Light provided inadequate or unreasonable service under 66 Pa. C.S. § 1501, it is worth noting that the record evidence reveals that Duquesne Light has at all times provided reasonable service to Complainant. Not only did Duquesne Light calculate the customer's billing demand in adherence with its Tariff, but it also engaged in an on-going dialogue with Utilisave, the customer's third party vendor, in an effort to explain the Company's position. See, e.g., RXM, N. The tenor of those communications was at all times professional, cordial, and productive. RXM, N. The latter point is evidenced by the fact that the communications resulted in a new contract for 110 Associates that lowered their contract demand and will likely result in savings on their bill. See RXB, H, I. For those reasons, Duquesne Light has more than satisfied its duty to provide 110 Associates with reasonable service.

**D. Complainant's claim is barred by the doctrine of laches.**

This action is also barred by the doctrine of laches, which holds that "an action can be barred if one party can show delay arising from the other party's failure to exercise due diligence and prejudice from that delay." Dolman v. Pa. Power & Light Co., 72 Pa. P.U.C. 353 (Pa. P.U.C. 1990). Both requirements are met here.

Duquesne Light has calculated the billing demand of its commercial/industrial customers that have multiple services in a single premise on a non-coincidental basis since at least 1969. RXA. Complainant has been the ratepayer of record at the Gulf Tower for over 30 years, since March 10, 1986. RXK; Tr. at 137-138. Thus, during the entirety of this account, Complainant's billing demand has been calculated on a non-coincidental basis, yet Complainant never questioned or challenged that calculation until the involvement of Utilisave in 2015. Tr. at 140-

41. This is despite the fact that the bills that Duquesne Light notified or should have notified Complainant (a sophisticated customer that operates one of the largest skyscrapers in downtown Pittsburgh) how Duquesne Light calculated its billing demand.

That unreasonable delay has prejudiced Duquesne Light's ability to mount a defense in this case. That is perhaps best evidenced by Complainant's cross-examination questions about the reasons why the Power Service was installed at the Gulf Tower and whether Rule 17 played any part. Tr. at 123,150-51. The Power Service, however, was installed 30 to 40 years ago and Duquesne Light does not have records from the 1970s indicating exactly why that second service was involved. Tr. at 151. While it is unclear exactly what Complainant's theory of liability is with respect to these issues, to whatever extent it intends to use the absence of Duquesne Light's records on the subject in support of its claim, the doctrine of laches provides an additional reason preventing Complainant from doing so.<sup>15</sup>

The Commission has already recognized that the doctrine of laches is appropriate in cases such as this where "a delay in filing an action or failing to prosecute results in the unavailability of witnesses and no compelling reason has been shown for that delay or failure." Dolman, supra (citing Pa. P.U.C. v. West Penn Power Co., Docket No. C-21608, Order dated Feb. 19, 1998). In fact, the Commission has found as little as six years – far less than the 30 years involved here -- to raise a presumption of unreasonable delay. See Dolman, supra (citing sources).

In Dolman, the Commission found that the doctrine of laches barred a customer's complaint that requested that they be charged at a different rate that was not filed until eight years after the utility company changed their rates. In pertinent part, the Commission stated:

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<sup>15</sup> As noted above, Complainant marshaled no evidence in support of any argument that Rule 17 was the reason why the Power Service was installed. To ask the Commission to conclude that Rule 17 had any role in establishing the 277480V Power Service would be asking the Commission to make a decision based on speculation and conjecture. The preponderance of the evidence – including the statements of 110 Associates' President and Duquesne Light's policy – actually indicate that the Power Service was installed at the customer's request. See supra, p. 8 n. 5.

This eight year delay after the complainants knew or should have known that Rate RH was eliminated is clearly unreasonable. Even if complainants did not read the bill insert concerning elimination of Rate RH, they should have noticed a change in their bills in 1981 (or 1972 when they allege PP&L took them off Rate RH). Failure to file a claim within a reasonable time under these circumstances clearly constitutes unreasonable delay.

Id. The Commission also found that PP&L had been prejudiced by the delay because the utility's employee who negotiated the alleged oral contract that formed the basis for the complainant's claims was unavailable to testify and, even if he were, the Commission would not expect to "remember a conversation that allegedly took place twenty-one years ago." Id. The Commission concluded that "[t]his unavailability of witnesses and records several prejudices PP&L in defending against the complaint." Id. See also, Leber v. PPL Electric Utilities Corp., NO. C-200055083, 2006 WL 2788371 (Pa. P.U.C. Sept. 18, 2006) (ruling that laches barred a complaint requesting a rate change where the complainant "did not exercise due diligence in filing his Complaint and the lengthy delay in doing so prejudices PPL's ability to mount a defense. . ."). For the above reasons, the doctrine of laches provides an additional reason why this action must be dismissed with prejudice.

## **VI. PROPOSED CONCLUSIONS OF LAW (10)**

1. As the proponent of a rule or order, Complainant bears the burden of proof pursuant to 66 Pa. C.S. § 332(a). Snow v. Equitable Gas Co., LLC, Docket No. 2012-2315572, 2013 WL 3787541, \*4 (Pa. P.U.C. July 16, 2013).

2. Section 1312 of the Public Utility Code allows the Commission to order a public utility to refund rates that were: (1) unlawful; (2) unjust or unreasonable; or (3) in excess of the rates contained in the public utility's tariff. 66 Pa. C.S. § 1312. See also, Springfield Twp. v. Pa. Public Utility Comm'n, 676 A.2d 304, 307 (Pa. Cmwlth. 1996).

3. Duquesne Light's Tariff has the force of law and is binding on Duquesne Light and on Complainant. Springfield Twp., 676 A.2d at 308. See also, PPL Elec. Utilities Corp. v.

City of Lancaster, 125 A.3d 837, 842 n. 7 (Pa. Cwmlth. 2015) (“A tariff has the force of law and is binding on the utility and its customers.”).

4. “Tariff provisions that have been properly submitted to and approved by the Commission are *prima facie* reasonable.” Leber v. PPL Electric Utilities Corp., Docket No. C-20055083, 2006 WL 2788371, \*3 (Pa. P.U.C. Sept. 18, 2006).

5. The formula set forth in Duquesne Light’s Tariff for calculating billing demand mandates that Complainant’s billing demand be calculated on a non-coincidental basis. RXB p. 2.

6. Duquesne Light’s method for calculating Complainant’s billing demand complies with its Tariff. RXB p. 2.

7. Since Duquesne Light’s method for calculating Complainant’s billing demand is reasonable and required by the Company’s Tariff, Complainant is not entitled to the refund sought in the Second Amended Complaint under 66 Pa. C.S. § 1312.

8. Duquesne Light provided Complainant with reasonable service under 66 Pa. C.S. § 1501.

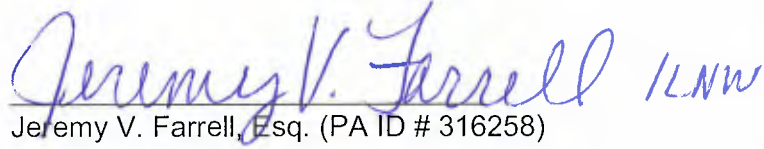
9. The Second Amended Complaint is also barred by the doctrine of laches. See, e.g., Dolman v. Pa. Power & Light Co., 72 Pa. P.U.C. 353 (Pa. P.U.C. 1990); Leber v. PPL Electric Utilities Corp., NO. C-200055083, 2006 WL 2788371 (Pa. P.U.C. Sept. 15, 2006).

10. The Second Amended Complaint must be dismissed with prejudice because Duquesne Light has not violated the Public Utility Code, any associated regulations, or the Company’s Tariff.

## VII. CONCLUSION

For the foregoing reasons, Respondent Duquesne Light Company respectfully requests the instant matter be dismissed with prejudice.

Respectfully submitted,

Handwritten signature of Jeremy V. Farrell in blue ink, including the initials "J.V.F." and "L.M.W." to the right.

Jeremy V. Farrell, Esq. (PA ID # 316258)

Tucker Arensberg, P.C.

1500 One PPG Place

Pittsburgh, PA 15222

Phone: 412-594-3938

Fax: 412-594-5619

E-mail: [jfarrell@tuckerlaw.com](mailto:jfarrell@tuckerlaw.com)

Attorney for Respondent Duquesne Light  
Company

LIT:606992-1 014657-158498

## CERTIFICATE OF SERVICE

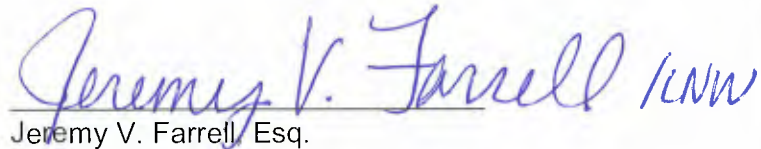
I certify that I have this day served a true copy of the foregoing document upon the participants listed below in accordance with the requirements of 52 PA. Code § 1.54 (relating to service by a participant) by email and by FedEx, as follows:

Administrative Law Judge Steven Haas  
Pennsylvania Public Utility Commission  
Keystone Building, 2<sup>nd</sup> Floor W  
400 N. Street  
Harrisburg, PA 17120  
[sthaas@pa.gov](mailto:sthaas@pa.gov)

John G. Harris, Esq.  
Berger | Harris  
1105 N. Market Street, Suite 1100  
Wilmington, DE 19801  
[jharris@bergerharris.com](mailto:jharris@bergerharris.com)

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Date: June 3, 2016

  
Jeremy V. Farrell, Esq.