BEFORE THE
PENNSYLVANIA PUBLIC UTILITIES COMMISSION

ONE TEN ASSOCIATES, (DRAXXHALL MANAGEMENT CORP.),	)	
Complainant,	)	
	)	No. C-2015-2507068
v.	)	
DUQUESNE LIGHT COMPANY,	)	
Respondent.	)	

COMPLAINANT'S
OPENING POST-HEARING BRIEF

Pursuant to Section 5.63 of the Pennsylvania Public Utility Commission's Regulations, 52 Pa. Code § 5.63, One Ten Associates, an affiliate of Draxxhall Management Corporation (collectively, "Complainant" or "OTA"), hereby files the following Opening Post-Hearing Brief with the Pennsylvania Public Utility Commission (the "Commission") in the above-captioned proceeding against Duquesne Light Company ("Respondent" or "Duquesne").

INTRODUCTION

As the Court accurately summed it up, "One Ten alleges that Duquesne misapplied its applicable tariff provisions in calculating the Complainant's bills, thereby resulting in incorrect bills." (*See* Order dated January 21, 2015, denying Preliminary Objections.)

At the April 11, 2016 initial telephonic hearing in this matter (the "Hearing"), Complainant demonstrated (i) that the meters in usage for the utility account at issue (the "Service Account"), located at 435 7th Avenue, Pittsburgh, PA 15219 (the "Service Address"), are capable of being billed on a coincident demand basis, (ii) Duquesne Light Company's Retail Tariff Rate GL-Generated Service Large (together with applicable Rules and Regulations, the "Tariff" or "Respondent's Tariff"), when read in light of Rule 10, authorizes Respondent to combine in a single contract as a single service meters of different voltages, thereby allowing for coincident billing, and (iii) Respondent failed to comply with its own Tariff by billing Complainant on a non-coincident basis.

In light of the above, Complainant respectfully requests an Order (i) declaring that Respondent overcharged Complainant for electric service based on Respondent's misapplication of the applicable provisions of the Tariff, namely by incorrectly billing Complainant on a non-coincident demand basis, (ii) requiring Respondent to recalculate the charges it incorrectly billed to Complainant for electric service covering the maximum period permitted by law, and (iii) requiring Respondent to remit a refund payment to Respondent in the amount sufficient to fully recompense Complainant for the overcharges to the maximum extent permissible.

PROPOSED FINDINGS OF FACT

A. Undisputed Facts

(1) The subject utility account is for electric service and is numbered 5932200000 (the "Service Account").

(2) The service address at issue is 435 7th Avenue, Pittsburgh, PA 15219 (the "Service Address" or the "Gulf Tower"). Ans. at 2.[1]

(3) Complainant has maintained the Service Account at the Service Address since March, 1986. Ans. at 2.

(4) The Service Address has three meters. Ans. at 2. Two are 120/208 voltage meters and third is a 277/480 voltage meter. Ans. at 2.

(5) One of the 120/280 voltage meters has not registered use since December 2014. Ans. at 2.

(6) Respondent has, at all times relevant to this matter, billed the Service Account at GL Rate (General Service Large). Ans. at 2.

(7) Respondent has, at all times relevant to this matter, billed the Service Account on a non-coincident demand basis for all meters at the Service Address. Ans. at 2.

(8) In billing the Service Account on a non-coincident demand basis, Respondent uses the following calculation methodology: "The

[1] "Ans. at __" refers to Respondent's Answer and New Matter submitted under cover letter dated January 11, 2016.

Company determines the peak demand for the 120/208V meter that is currently registering usage at the [Service Address] and then determines the peak demand for the [Service Address's] 277/480V meter and then adds the two figures together to reach the billing demand." Ans. at 5.

(9) All three meters at the Service Address are capable of 15-minute interval readings by an Interval Data Recorder ("IDR").

(10) The electric services contract, marked as Hearing Exhibit I, was not signed by any representative of Complainant.

B. Proposed (Disputed) Facts

(1) The fact that the two meters currently registering usage at the Service Address are of different voltages does not prevent Respondent from "totalizing" the demand for those meters.

(2) The fact that the two meters currently registering usage at the Service Address are of different voltages does not physically prevent Respondent from billing those meters on a coincident demand basis.

(3) The fact that the two meters currently registering usage at the Service Address are of different voltages does not mean there are two separate metered services at the Service Address.

PROPOSED CONCLUSIONS OF LAW

(1) Respondent failed to comply with its own Tariff by billing Complainant on a non-coincident basis.

(2) Respondent's Tariff, when read in light of Rule 10, authorizes Respondent to combine in a single contract as a single service meters of different voltages, thereby allowing for coincident billing, and (iii) Respondent failed to comply with its own Tariff by billing Complainant on a non-coincident basis.

(3) Complainant is entitled to a refund of the overcharges requiring Respondent to remit a refund payment to Respondent in the amount sufficient to fully recompense Complainant for the overcharges to maximum extent permissible

ARGUMENT

I. THE APPLICABLE STANDARD OF REVIEW.

A complainant has the burden of proof in a PUC proceeding. 66 Pa.C.S. § 332(a). The standard of proof is preponderance of evidence, which "requires proof by a greater weight of the evidence." *Agostino v. Twp. of Collier*, 968 A.2d 258, 269 (Pa. Commw. 2009).

As demonstrated below, Complainant has met its burden of proof.

II. RESPONDENT'S POSITION FINDS NO SUPPORT IN THE TARIFF.

A. Rule 10's meaning is unambiguous and shows that Respondent misinterpreted its own Tariff.

The Public Utility Code mandates a public utility's compliance with its own tariff. See 66 Pa.C.S. § 1303. *See also PPL Elec. Utilities Corp. v. Pennsylvania Pub. Util. Comm'n,* 912 A.2d 386, 402 (Pa. Comm. 2006) (noting that "[i]t is well settled that public utility tariffs must be applied consistently with their language."). "Public utility tariffs have the force and effect of law, and are binding on the customer as the utility." *Id.* "Deviation from an approved tariff is not permitted under any pretext." *Id.* at 405 (citations omitted).

"[A] tariff, like a statute, must be construed so as to give effect to all of its terms, and when the words are clear and free from ambiguity, they are not to be disregarded under the pretext of pursuing its spirit." *PPL Elec. Utilities Corp. v. Pennsylvania Pub. Util. Comm'n,* 912 A.2d 386, 403 (Pa. Comm. 2006). *See also Pennsylvania Elec. Co. v. Berwind Corp.*, 2015 WL 6144323, at *4 (Pa. Super. Apr. 28, 2015) (when construing agreements involving clear and unambiguous terms, a court will only "examine the writing itself to give effect to the parties' understanding"). Thus, when a tariff is plain on its face, one cannot look beyond the four corners of the tariff to ascertain its meaning. *See PPL Elec. Utilities Corp.,* 912 A.2d at 403.

Applying these rules of construction here dictates finding that Respondent failed its own Tariff, particularly Rule 10, which states:

> 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, 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 for 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.

(All caps in original; other emphasis added.)

Rule 10's use of the word "notwithstanding" is unambiguous. The Supreme Court of Pennsylvania "has defined 'notwithstanding' as 'regardless of.'" *Com. v. Miller*, 2014 WL 10936925, *2 (Pa. Super. May 20, 2014) (quoting *City of Phila. V. Clement & Muller, Inc.*, 552 Pa. 317, 321-22 (1998)). The Supreme Court's definition of the word "notwithstanding" is crucial to a proper, plain reading of Rule 10 of Respondent's Tariff. By employing the correct (and judicially adopted) meaning of the word "notwithstanding," Rule 10 provides that a "separate service connection may ... be combined, [***regardless of***] similarity as to voltage and phase, with other service connections under a single contract for the customer's entire

electric delivery service requirements at the effected location." (emphasis added). This reading makes clear that a separate service connection, whether it be a 120/208V connection or a 277/480V connection may be combined for the purposes of calculating a customer's bill.

Consequently, the electric service provided at the Service Address could—and should—have been billed on a coincidental basis. For these reasons, which are supported by the record evidence, Respondent has failed to comply with its own Tariff.

III. ANY AMBIGUITIES IN THE TARIFF MUST BE CONSTRUED AGAINST RESPONDENT.

Even if the Court were to find the meaning of Rule 10 ambiguous in this case, well established rules of statutory and contract construction weigh heavily in favor of Complainant.

The rules of tariff interpretation largely follow those of contract construction. *Great N. Ry. Co. v. Merchants' Elevator Co.*, 259 U.S. 285, 291, 42 S.Ct. 477 (1922) ("[W]hat construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute."). "A contract is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense." *Hutchison v. Sunbeam Coal Co.*, 519 A.2d 385, 390 (Pa. 2010). While unambiguous tariffs are enforced according to

their plain terms, any "tariff ambiguity is construed against the drafter, which is always the carrier." *Verizon Virginia, LLC v. XO Commc'ns, LLC*, 2015 WL 6759473, at *5 (E.D. Va. Nov. 5, 2015).[2]

In light of these teachings, to the extent the Court finds the text "notwithstanding similarity as to voltage and phase" ambiguous (or any other part of the Rule 10 or the Tariff ambiguous), such ambiguities must be resolved against Respondent.

IV. COMPLAINANT'S INTERPRETATION OF RULE 10 IS FURTHER SUPPORTED BY EXTRINSIC EVIDENCE.

The Commission may look to extrinsic evidence where the meaning of the tariff at issue is ambiguous. *See PPL Elec. Utilities Corp.*, 912 A.2d at 403. The record evidence counsels in favor of Complainant.

A. Respondent now admits that the Service Account can be billed on a coincident demand basis.

In its Answer, Respondent asserted that "[t]here are two separate metered services at the [Service Address] and the demand on those different meters cannot

[2] At least one Pennsylvania state court has likened the tariff of a power company to a contract of adhesion. *See State Farm Fire & Casualty Company v. PECO*, 54 A.3d 921, 935 (Pa. Super. 2012) (dissent) (finding PECO tariff at issue to be a contract of adhesion, "inasmuch as it fits the textbook definition perfectly"). The Tariff at issue here is no different given that it is a take it-or-leave it form that is not subject to the utility customer's negotiation. *See id.* (dissent). Accordingly, should the Court find that the meaning of "notwithstanding similarity as to voltage and phase" within Rule 10 is ambiguous, that ambiguity should be resolved against Respondent. *Id.* at 936 (dissent) ("The net result of my observations ... is that I would construe the ambiguous terms of the tariff, *qua* adhesion contract, in favor of the [customer].").

be 'totalized.'" Ans. at 3. Respondent attempted—but ultimately failed—to support this position at the Hearing. Mr. Kovach initially testified on direct examination that it is impossible, from an engineering perspective, to bill the Service Account on a coincident demand basis because the meters "are different service voltages" that "operate independently of another and they require separate equipment and separate installations[.]" Trans. at 64. But on cross-examination Mr. Kovach was forced to admit that, technically speaking, the Service Account could in fact be on a coincidental demand basis. Trans. at 76-77, 80. *See also* Trans. at 149 (Goldbach acknowledging that Rule 10 authorizes, under certain circumstances, two different voltages to exist under one metered service).

Mr. Kovach's grudging acknowledgment of this fact also was supported by Adam Boese, a mechanical engineer and energy efficiency expert with 30 years of experience in analyzing utility distribution systems and equipment. (Hr. Tran. at 44-45). Specifically, Mr. Boese testified that there is no technical reason that meters of different voltages cannot be coincidentally billed. Tran. at 47. *See also* id. at 47 (Boese testifying that "Voltage in and of itself doesn't designate a second service[.]").

B. The electric services contract also favors Complainant.

As established at the Hearing, the controlling electric services contract, marked as Hearing Exhibit H, is clearly a "SINGLE" service contract for the

multiple meters at the Service Address. This important fact, too, weighs in favor of sustaining Complainant's claims.

Additionally, the electric services contract—like the Tariff—is akin to a contract of adhesion. And for this reason, the Court should construe any ambiguities in the electric services contract against Respondent. *See State Farm Fire & Casualty Company v. PECO*, 54 A.3d 921, 935 (Pa. Super. 2012) (dissent).

CONCLUSION

Complainant has introduced both oral and documentary evidence to establish that Respondent failed to comply with its own Tariff, particularly with Rule 10. As established above, the "notwithstanding similarity as to voltage and phase" language of Rule 10 makes clear that meters of different voltages can be combined as a single service in a single contract thereby allowing for coincidental billing.

This interpretation is further supported by the controlling electric services contract (Hearing Exhibit H), which makes facially clear that it is a "single" service contract for the multiple meters at the Service Address.

The Hearing testimony also supports Complainant's position. Indeed, Respondent's own witness admitted at the Hearing that no technical impediment exists to billing the Service Account on the basis of coincident

demand. In particular, Respondent's witness, Mr. Kovach, gave conflicting testimony at the Hearing by initially asserting that different voltage does not mean different service but then claiming the opposite in a transparent effort to rehabilitate himself.

For these reasons, and the others detailed above, Complainant respectfully requests an Order (i) declaring that Respondent overcharged Complainant for electric service based on Respondent's misapplication of the applicable provisions of the Tariff, namely by incorrectly billing Complainant on a non-coincident demand basis, (ii) requiring Respondent to recalculate the charges it billed to Complainant for electric service, dating back four years (or 48 months) from September 29, 2015, the date on which Complainant filed its original complaint in the above-captioned proceeding, and (iii) requiring Respondent to remit a refund payment to Respondent in the amount sufficient to fully recompense Complainant for the overcharges to the maximum extent permissible plus a penalty of 50% of the amount of such refund, together with all court costs and reasonable attorneys' fees pursuant to 66 Pa.C.S. § 1312(B).

Respectfully submitted,

BERGER HARRIS LLP

By: _____

John G. Harris, Esq. (PA ID 85363)
1105 N. Market Street, Ste 1100
Wilmington, Delaware 19801
(302) 655-1140 telephone
(302) 655-1131 fax
jharris@bergerharris.com

Attorneys for Complainant,
One Ten Associates

Dated: June 7, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of June, 2016, I caused a true copy of Complainant's Opening Post-Hearing Brief to be served in accordance with the requirements set of 52 PA. Code § 1.54 (relating to service by a party) and in the manners set forth below.

Via First Class Mail

Jeremy V. Farrell, Esq.
1500 One PPG Place
Pittsburgh, PA 15222

Via Fax

Jeremy V. Farrell, Esq.
(412) 594-5619

Via E-Mail

Jeremy V. Farrell, Esq.
jfarrell@tuckerlaw.com

BERGER HARRIS LLP

By: _____
John G. Harris, Esq. (PA ID 85363)
1105 N. Market Street, Ste 1100
Wilmington, Delaware 19801
(302) 655-1140 telephone
(302) 655-1131 fax
jharris@bergerharris.com

Attorneys for Complainant,
One Ten Associates

Dated: June 7, 2016