

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITIES COMMISSION**

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

**COMPLAINANT’S
POST-HEARING REPLY BRIEF**

INTRODUCTION

On June 7, 2016, One Ten Associates, an affiliate of Draxxhall Management Corporation (collectively, “Complainant”), filed its Opening Post-Hearing Brief with the Pennsylvania Public Utility Commission (the “Commission”) in the above-captioned proceeding against Duquesne Light Company (“Respondent” or “Duquesne”). Duquesne’s submission either fails to persuasively rebut or concedes the key factors that heavily favor finding in favor of Complainant.

Duquesne admits that no technical barrier exists that prevents meters of different voltage from being billed on coincident demand basis. Duquesne has pointed to no textual mandate or support in its tariff or the Commission rules that warrant treating meters of different voltage as separate services. Nor has Duquesne identified any business or practical justification for billing meters of different voltage on a non-coincident demand basis.

More specifically, Duquesne *first* urges the Commission to hold that Complainant receives two electric services. This argument has no bearing on the proper resolution of this matter because Rule 10 renders the number of services Complainant receives irrelevant. *Second*, Duquesne contends that, pursuant to its tariff, Duquesne must bill Complainant on a non-coincident basis. This argument also must fail because, for the reasons set forth in Complainant's opening brief and below, Rule 10 of Duquesne's tariff explicitly provides for Duquesne to bill Complainant on a coincidental basis.

Third, Duquesne invites the Commission to find that Rule 10 is not at issue in this case. Duquesne has not demonstrated that Complainant failed to meet its burden of proof relating to the relevance and applicability of Rules 10 and 17 of Duquesne's tariff. Complainant's burden of proof is a preponderance of the evidence. It is an established principle that a party bearing the burden of proof may do so by reliable circumstantial evidence. Complainant has done so and Duquesne's assertions to the contrary are unavailing. *Fourth*, Duquesne contends that Complainant's claim is barred by the doctrine of laches. Again, Duquesne's argument is without merit because Complainant had neither actual nor constructive knowledge of Duquesne's billing practices until 2015.

ARGUMENT

I. DUQUESNE'S METHOD OF CALCULATING BILLING DEMAND IS COMPLIANT WITH ITS TARIFF.

A. There Are Two Metered Services at Gulf Tower.

Duquesne is adamant that Complainant receives two metered electric services and that, as a result of its tariff, the total maximum demand of each one of those service

meters should be added together to determine Complainant's total bill. While Complainant does not agree with Duquesne on this point, even when assuming that two metered services do exist at Gulf Tower, Duquesne's argument fails. As will be discussed in greater detail below, in light of Rules 10 and 17 of Duquesne's tariff, the two services provided to Complainant can, and should, be totaled and billed coincidentally.

B. Duquesne's Tariff Requires That the Individual Demand of Each Metered Service Be Separately Determined and Added Together to Reach Billing Demand.

Duquesne contends that its tariff "mandate[s] coincidental billing." Resp.'s Br. 14. Complainant cannot agree with Duquesne's overly-broad statement to that effect. To support its position, Duquesne again points to its tariff provision entitled "Determination of Demand for Distribution," (Hearing Tr. Ex. B.) and emphasizes the language that "billing demand will be the sum of the individual demands of each metered service[".]” Resp.'s Br. 11 (emphasis in original). Here, again, Duquesne's argument is irrelevant because Duquesne refuses to confront the fact that Rule 10 of its tariff envisions (at least in certain circumstances) that its customers may be billed coincidentally.

To be sure, before the telephonic hearing Duquesne contended that coincidental billing was not possible for the two services provided to Complainant. At the hearing, however Duquesne admitted that no technical barrier exists that prevents meters of different voltage from being billed on coincident demand basis. Hearing Tr. 76 ¶¶ 17-19, 23-24; 77 ¶¶ 6-10. Duquesne has not pointed to any textual mandate or support in its tariff or the Commission rules that warrants treating meters of different voltage as

separate services. Nor has Duquesne identified any business or practical justification for billing meters of different voltage on a non-coincident demand basis.

Consequently, Duquesne's proffered billing determination—that is, that non-coincidental billing is required—fails not only because provisions of Duquesne's tariff explicitly permit coincidental billing, but also because Duquesne admitted that coincidental billing is technically feasible.

C. Rule 10 of Duquesne's Tariff Does Not Require That Complainant's Billing Demand Be Calculated on a Coincidental Demand Basis.

Duquesne's argument that Complainant has failed to meet its burden of proof regarding Rules 10 and 17 of Duquesne's tariff is also without merit. The Complainant must only prove, by a preponderance of the evidence, that tariff Rules 10 and 17 are implicated here. Resp.'s Br. 10; *Snow v. Equitable Gas Co., LLC*, Docket No. 2012-2315572, 2013 WL 3787541, at *4 (Pa. P.U.C Jul. 16, 2013). In other words, "Complainant's evidence must be more convincing, *by even the smallest amount*, than that presented by the Respondent." *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950) (emphasis added).

Consistent with the systematic overstatement of its case, Duquesne contends that Complainant "did not present *any* evidence suggesting unbalanced loads (within the scope of Rule 17) played any role in setting up the 277/480V Power Service." Resp.'s Br 17 (emphasis added). In an attempt to discredit Complainant's position Duquesne simultaneously misapprehends the facts and overlooks the legal significance of circumstantial evidence.

While Complainant does not have direct evidence that Rule 17 fluctuations and unbalances were a factor providing the 277/480V capability at Gulf Tower in the 1980s, Duquesne has not provided any direct evidence establishing that Rule 17 was not a factor. Instead, Complainant relies on circumstantial evidence to meet its burden of a preponderance of the evidence. Pennsylvania courts have repeatedly recognized:

when a party who has the burden of proof relies upon circumstantial evidence and inferences reasonably deducible therefrom, such evidence, in order to prevail, must be adequate to establish the conclusion sought and must so preponderate in favor of that conclusion as to outweigh in the mind of the fact-finder any other evidence and reasonable inferences therefrom which are inconsistent therewith.

Van Zandt v. Holy Redeemer Hosp., 806 A.2d 879, 886 (Pa Super. 2002) (citing *Smith v. Bell Tel. Co.*, 153 A.2d 477, 480 (Pa. 1959)).

In pertinent part, Rule 17 provides:

[t]he customer's use of electric service shall not cause fluctuating or unbalanced loads . . . to interfere with the proper operation of [Duquesne's] facilities. . . . [W]here the disturbances caused thereby may 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."

As a preliminary matter, the 277/480V capability was added at the request of the customer in this case. Duquesne's own witness testified that the 277/480V capability was added to Gulf Tower because "the customer wanted that installed." Hearing Tr. 132 ¶¶ 2-4. This fact alone proves by a preponderance of the evidence that Complainant requested 277/480V capability because Complainant envisioned needing increased electric capacity

to power its HVAC system such that Complainant's increased requirements would interfere with proper operation of Duquesne's facilities.

Duquesne's contention that "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" also misses the mark. Resp.'s Br. 17. First, when asked "based on company records and your prior conversations with Mr. Baldauff, why was the 277/480 volt meter installed?" Goldbach responded, "*based on conversations with Mr. Baldauff I think it was mainly to install it as a part of a central HVAC system being installed in the building.*" Hearing. Tr. 131 ¶ 24-132 ¶ 6. Goldbach *never* intimated that his knowledge as to why the 277/480V meter was installed was founded upon his inspection on any records, historical or otherwise, relating to Complainant's account. Instead, Goldbach's knowledge stems only from conversations with one of Complainant's agents. Consequently, Duquesne's declaration that Goldbach's testimony on this point proves Rule 17 was never at issue rings hollow. In addition, Duquesne distorts the extent to which its company records were searched. To be sure, Goldbach's review of historical records relating to Complainant's account "in the ordinary course of [his] job responsibilities" does not demonstrate that documentation relating to the reasons underlying the request for the 277/480V meter was thoroughly reviewed, if at all. Hearing Tr. 129 ¶ 21-130 ¶ 3.

Nevertheless, another Duquesne witness, Chris Kovach, testified that 277/480V electric capability is primarily utilized to power "larger motor type loads," "large chillers" and "large power equipment." Hearing Tr. 57 ¶¶ 18-20. That Complainant

installed a new HVAC system in a large building bespeaks the necessity for additional electric energy. It is apparent that once Complainant's HVAC system was installed, additional electrical demand would be required to power that system. Simply because one of Duquesne's witnesses testified that one of Complainant's agents requested 277/480V capability be provided at Gulf Tower—an event that occurred roughly thirty years ago—hardly suggests that fluctuations or unbalances would have been a concern in the determination of whether or not to provide 277/480V capability at Gulf Tower. Pfrommer's testimony lends credence to this conclusion. Pfrommer explained that Duquesne has “an obligation to provide enough capacity to meet the peak demand of [its] customers.” Hearing Tr. 110 ¶¶ 23-24. If the new HVAC system at Gulf Tower was going to require additional capacity to power the large motors associated with an industrial HVAC system, an inference “reasonably deducible therefrom” is that Duquesne's electric facilities were necessarily going to be impacted pursuant to Rule 17. *See Van Zandt*, 806 A.2d at 886.

Through the use of the foregoing circumstantial evidence, Complainant has successfully proved, that its inferences are adequate and demonstrate that Complainant's inferences preponderate in its favor and establish this its conclusions outweigh any reasonable inferences proffered by Duquesne. *See id.*

II. DUQUESNE PROVIDED REASONABLE SERVICE TO COMPLAINANT.

Duquesne's contention that it has provided Complainant with reasonable service contradicts the fact that Duquesne has violated its own tariff. Violation of its own tariff by an electric utility is *per se* unreasonable service.

III. COMPLAINANT'S CLAIM IS BARRED BY THE DOCTRINE OF LACHES.

Duquesne's attempt to assert the affirmative defense of laches is wholly unsupported by any record evidence and must fail. Duquesne simply contends that because it has billed Complainant on a non-coincident basis for more than thirty years, and because Complainant never before complained about the way in which it was billed, Complainant's claims are barred by laches. Duquesne, in conclusory fashion, states that Complainant's bill notified or should have notified Complainant of the fact that it was billed non-coincidentally.

As the party asserting the affirmative defense of laches, Duquesne bears the burden of proof. *See Bullock v. Bullock*, 639 A.2d 826, 829 (Pa. Super. 1994). Duquesne has failed to satisfy that burden.

Complainant did not unreasonably delay in bringing this suit. Complainant did not have actual knowledge of the method Duquesne used to calculate Complainant's bills. Not surprisingly, Duquesne has failed to point to any record evidence indicating that Complainant was aware of how its bills were calculated prior to Complainant's hiring of UtiliSave, LLC. Neither was Complainant on constructive notice of how Duquesne calculated its bills. The words "coincident" and "non-coincident" appear nowhere on the face of the bills. Duquesne simply asserts that Complainant should have known how it was being billed solely on the basis of its status as a "sophisticated customer that operates one of the largest skyscrapers in downtown Pittsburgh[.]" Resp.'s Br. 19. Duquesne has cited to no authority for such a principle, and its unsupported

assertion does not make it so. As a result, Duquesne cannot demonstrate that Complainant unreasonably delayed bringing this action.

Furthermore, Duquesne has not pointed to any demonstrable record evidence establishing that Complainant's action has prejudiced Duquesne. Again, Duquesne's allegation is unsupported. Complainant has paid its electric bills for thirty years without question, new information became known to Complainant, and Complainant promptly brought a claim based upon this new information. Such a sequence of events did not prejudice Duquesne's ability to "mount a defense in this case." Resp.'s Br. 19.

CONCLUSION

For the foregoing reasons, Complainant respectfully requests the Commission grant the relief set forth in its opening submission.

Respectfully submitted,

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Dated: June 17, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June, 2016, I caused a true copy of Complainant's Post-Hearing Reply 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.

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