

June 21, 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 Reply 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/sls  
Enclosure

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

LIT:607794-1 014657-158498

**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 REPLY POST-HEARING BRIEF**

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Attorney for Respondent Duquesne Light  
Company

Date: June 21, 2016

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

**RESPONDENT'S REPLY POST-HEARING BRIEF**

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

Complainant's Opening Post-Hearing Brief ("Complainant's Brief") relies primarily on a Tariff provision (Rule 10) that does not apply to this case and ignores the Tariff provision establishing the billing demand formula that governs this case. The language in Rule 10 upon which Complainant relies would apply *only if* one of the Gulf Tower's two services was established to comply with Rule 17 of Duquesne Light's Tariff (which is aimed at preventing fluctuating and unbalanced loads). Complainant's Brief ignores that explicit prerequisite, most likely because there is no evidence demonstrating that Rule 17 played any part in the decision to establish either of the Gulf Tower's separate services.

The inapplicability of Rule 10 means that the dispositive issue in this case is whether the Tariff's "Determination of Demand" provision contemplates non-coincidental or coincidental billing. Surprisingly, Complainant did not address that issue in its Brief. The Tariff's billing demand methodology is not mentioned at all in Complainant's Brief. Since the Tariff's

“Determination of Demand” provision mandates non-coincidental billing as explained at length in Duquesne Light’s Post-Hearing Brief,<sup>1</sup> the Complaint must be dismissed with prejudice.

I. **Neither Rule 10 nor Rule 17 applies to this case.**

Complainant’s Brief is premised almost exclusively on a provision of Duquesne Light’s Tariff -- Rule 10 -- that does not apply to this case. The Tariff expressly limits the applicability of the portion of Rule 10 upon which Complainant relies to situations involving Rule 17 (which deals with preventing fluctuating and/or unbalanced loads). RXQ. See also, Tr. at 115-16, 117-18, 119, 148-49.

Specifically, Rule 10 provides:

**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;<sup>2</sup> *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. . . .***

RXQ (emphasis added). The italicized language represents the entirety of the Rule 10 provision upon which Complainant relies; the underlined portion is what Complainant’s Brief attempts to isolate and emphasize. Complainant’s Brief, pp. 7-8. The bold language is what Complainant ignores. The critical and fatal flaw in Complainant’s Brief is that it disregards, without any explanation whatsoever, the Rule 17 qualifier that immediately precedes and controls the language upon which Complainant bases its argument.

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<sup>1</sup> Not only is non-coincidental billing specifically required by the Tariff under the facts of this case, but, for the reasons set forth at pages 7 - 8 of Duquesne Light’s Post-Hearing Brief, it is also a fair and equitable way to calculate Complainant’s billing demand.

<sup>2</sup> Complainant did not contend in its Brief that Duquesne Light violated the portion of Rule 10 that precedes the semicolon. That is not surprising as the evidence produced at the hearing showed that Duquesne Light complied with this portion of the Tariff. Duquesne Light does not provide two services of the same voltage and phase to the Gulf Tower; it provides two services of two different voltages. See Respondent’s Post-Hearing Brief, pp. 16-17.

The plain language of Rule 10 specifically states that when a separate service connection is established for “**compliance with Rule No. 17, Fluctuations and Unbalances**,”<sup>3</sup> then “**such** separate service connection” may be combined with another service under a single contract. RXQ (emphasis added). In other words, the only time that the underlined language comes into play is when the separate service is installed to comply with Rule 17.

Here, there is no evidence, let alone substantial evidence, that suggests that the 277/480V Power Service (which was the second service installed at the Gulf Tower) was established to comply with Rule 17 or out of concern for fluctuating or unbalanced loads at the Gulf Tower. See Respondent’s Post-Hearing Brief p. 17; Tr. at 116, 132.<sup>4</sup> To the contrary, Adam Goldbach, Duquesne Light’s major account representative for the Gulf Tower, explained that there is no record indicating that Rule 17 was the reason why the 277/480V Power Service was installed:

Q. Based on your review of the files associated with the account for the Gulf Tower, is there any information in that file that indicates that fluctuation or unbalances were a concern in establishing [the 277/480V Power Service]?

A. I did not find any indication of that in the historical file.

Q. Is there any indication in the file that [R]ule 17 was of concern when configuring the services at the Gulf Tower as they presently are?

A. Again, there is no mention of that in the file.

Tr. at 132. Complainant mustered no evidence to the contrary. In fact, Complainant’s President, William Baldauff, informed Mr. Goldbach that the Gulf Tower’s Power Service was

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<sup>3</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>4</sup> Duquesne Light incorporates its Post-Hearing Brief as if fully restated.

installed at the customer's request to service an HVAC system. Tr. at 130, 132. See Respondent's Post-Hearing Brief, pp. 8 n. 5, 19 n. 15.

In sum, there is no evidence suggesting that Rule 17 or fluctuating/unbalanced loads played any part in establishing the 277/480V Power Service; any argument to the contrary is based on speculation, which cannot form the basis for a decision by the Commission. See Travillion v. Bell Telephone Co. of Pa., Docket No. F-09244775, 1992 WL 684902, \*10 (Pa. P.U.C. Oct. 8, 1992) (Corbett, ALJ) ("Mere speculation alone does not supply the substantial evidence required to support, a well-reasoned decision.") Since the Tariff provision upon which Complainant relies clearly and unambiguously<sup>5</sup> applies only where a separate service is established to comply with Rule 17 and there is no evidence that Rule 17 had anything to do with establishing the Gulf Tower's 277/480V Power Service, Complainant's argument fails.

Since Rule 10 does not apply to the instant action, the dispositive issue remains whether the billing demand formula in Duquesne Light's Tariff (RXB) mandates non-coincidental or coincidental billing -- a subject that Complainant did not even mention in its Brief.

## **II. Complainant ignored the Tariff's billing demand formula.**

Despite the fact that this Formal Complaint challenges Duquesne Light's method of calculating Complainant's billing demand, Complainant's Brief completely ignored the formula for calculating billing demand that is established by Duquesne Light's Tariff. RXB. Complainant's disregard of the Tariff's billing demand formula is as curious as it is significant because, by doing so, Complainant essentially disavowed the position that: (a) Utilisave took in its pre-complaint discussions with Duquesne Light (RXL, N); (b) Complainant took in all three versions of the Formal Complaint; and (c) Complainant's witnesses took at the hearing.<sup>6</sup>

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<sup>5</sup> Since Rule 10 is unambiguous, Complainant's arguments about contra proferentum do not apply. Furthermore, Complainant's contention that the Tariff is a contract of adhesion ignores that the Commission reviews and approves of the Tariff provisions before they become final and are applied to customers.

<sup>6</sup> Complainant's witnesses did not contend at the hearing that Rule 10 supported their testimony.

Complainant's refusal to address this obviously critical Tariff provision in its Brief, especially when coupled with Utilisave's acknowledgment that the billing demand formula set forth in Respondent's Exhibit B mandates non-coincidental billing,<sup>7</sup> is a telling indication that the billing demand formula does not support Complainant's request for coincidental billing.

**III. Complainant did not establish that there is only a single service at the Gulf Tower; to the contrary, there are two.**

Duquesne Light's Post-Hearing Brief thoroughly explained why the 120/208V Lighting Service and 277/480V Power Service are completely independent and separate services.<sup>8</sup> Notably, Complainant still does not challenge any of those facts, but instead argued that Duquesne Light provided only a single service to the Gulf Tower because the Parties' contract, in Complainant's words, is a "SINGLE" service contract. Complainant's Brief, p. 10 (caps in original). While Complainant twice set-off the word "single" in quotation marks when describing the contract -- once even going so far as to put it in all caps -- it is critical to note that the word "single" *does not appear in the contract*.<sup>9</sup> Complainant's Brief, pp. 10, 11. Complainant's argument is nothing more than a blatant misquotation of the Parties' contract. RXH. As noted at pages 12 - 14 of Duquesne Light's Post-Hearing Brief, the Parties' contract clearly delineates that there are two separate services at the Gulf Tower. RXH.

Complainant also argues that the fact that "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." Complainant's Brief, p. 4. This statement is not evidence that there is only a single service at the Gulf Tower. It also does not rebut the evidence presented by Duquesne Light that demonstrated the complete independence of the 120/208V

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<sup>7</sup> See Respondent's Post-Hearing Brief, p. 15-16; RXL p. 1.

<sup>8</sup> See Respondent's Post-Hearing Brief pp. 5-6, 12-14.

<sup>9</sup> See also, pages 12-13 of Duquesne Light's Post-Hearing Brief (explaining that Complainant's argument that the word "service" in the contract's introductory paragraph meant that there was only a single service at the Gulf Tower was refuted by both the plain language of the contract and by basic rules of contract interpretation).

Lighting Service and the 277/480V Power Service. As noted above, there is no factual basis -- let alone substantial evidence -- upon which the Commission could conclude that there is only one service at the Gulf Tower.

**IV. The mere ability to mathematically manipulate demand readings to determine coincidental demand does not mean that the Tariff envisions coincidental billing under the facts of this case.**

Complainant's Brief tries to make much of the fact that it is possible from an arithmetic standpoint to calculate the coincident demand of the Gulf Tower's 120/208V Lighting Service and the 277/480V Power Service. *Id.* at pp. 2, 4, 9-10. But that does not mean that the Tariff requires that Complainant be billed on a coincidental basis. Duquesne Light's Post-Hearing Brief explained that the Tariff mandates non-coincidental billing and, as Complainant's Brief acknowledges, the Tariff is binding on utility and customer alike. See Complainant's Brief, p. 6. The mere fact that Duquesne Light can, *ex post facto*, mathematically manipulate demand readings to calculate a coincidental demand does not mean that the Tariff actually entitles Complainant to coincidental billing.<sup>10</sup>

**V. Objections to Complainant's Proposed Findings of Fact.**

Complainant proposed two alleged "undisputed" findings of fact that are both disputed and inaccurate. Complainant's Brief, pp. 3-4. First, Complainant's Proposed Undisputed Fact No. 7 incorrectly states that Duquesne Light has billed Complainant on a non-coincidental basis for "all meters" at the Gulf Tower. Complainant's Brief, p. 3. That is not true. When both 120/208V meters were registering consumption, they were billed on a coincidental basis because they were both tied into the same Lighting Service. *Tr.* at 141-42.

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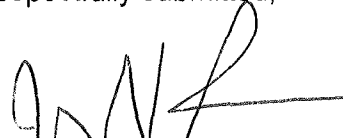
<sup>10</sup> Complainant also mischaracterized the testimony of Chris Kovach on this subject. Complainant's Brief, p. 10. Specifically, citing page 64 of the Hearing Transcript, Complainant contends that "Mr. Kovach testified on direct examination that it is impossible, from an engineering perspective to bill the Service Account on a coincident demand basis. . . ." But the testimony cited by Complainant was Mr. Kovach's explanation of why the 120/208V Lighting Service and 277/480V Power Service are considered separate services. *Tr.* at 64.

Second, Complainant's Proposed Undisputed Fact No. 10 contends that the prior contract between the Parties (reflected in Respondent's Exhibit I) was not signed by a representative of Complainant. Complainant's Brief, p. 4. Not only is that statement wholly irrelevant to the issues in dispute (as evidenced by the fact that Complainant did not even reference Exhibit I throughout the remainder of its Brief), but, more importantly, it is not supported by the evidence. As Adam Goldbach explained, while the copy of the contract that Duquesne Light has on file has not been signed, that does not necessarily mean that the contract was never signed as it could be simply a filing mishap. Tr. at 152, 153. Complainant offered no representative of 110 Associates at the hearing to offer any contradictory facts.

**VII. Conclusion**

For the reasons set forth above, and those expressed in Duquesne Light's Post-Hearing Brief, Respondent Duquesne Light Company respectfully requests that this Formal Complaint be dismissed with prejudice.<sup>11</sup>

Respectfully submitted,



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<sup>11</sup> Even assuming Complainant was entitled to a refund, which it is not, Complainant is not entitled to attorney's fees and penalties under 66 Pa. C.S. § 1312(b). That section applies only to situations where the utility has failed to make a refund awarded by the Commission or by a court.

**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  
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This document was also filed on the Commission's electronic filing system.

Date: June 21, 2016

  
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Jeremy W. Farrell, Esq.