

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITIES COMMISSION**

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

**EXCEPTIONS OF COMPLAINANT ONE TEN ASSOCIATES, LLC  
TO THE INITIAL DECISION AND ORDER DATED SEPTEMBER 12, 2016**

Complainant One Ten Associates, LLC (“Complainant” or “Customer”), by and through its undersigned counsel, hereby submits the exceptions detailed below (collectively, the “Exceptions”) to the Initial Decision and Order of Administrative Law Judge, Steven K. Haas (the “ALJ”) dated September 16, 2016 (referenced as the “Initial Decision” or cited as “I.D. at \_\_\_”), in the above-captioned action, pursuant to 52 Pa. Code §§ 5.333 and 5.535, and in support thereof, Complainant states as follows.

**PRELIMINARY STATEMENT**

This matter involves Complainant’s formal complaint (as amended, the “Complaint”) filed with the Pennsylvania Public Utility Commission (the “Commission”) against its electric distribution company, Duquesne Light Company (“Respondent”), which generally alleges that Respondent has been incorrectly calculating Complainant’s electric bills in violation of Respondent’s tariff and related regulations, and which seeks an order requiring that Respondent recalculate Complainant’s bills and compelling Respondent to

refund the overpayments, with applicable interest, to Complainant, through its duly authorized representative, UtiliSave, LLC.

Following a telephonic hearing and post-hearing briefing, the ALJ issued an Initial Decision, concluding that Complainant failed to satisfy its burden of proving, by a preponderance of the evidence, that Respondent “violated any applicable statutes, regulations, orders or tariff provisions over which the Commission has jurisdiction.” I.D. at 18. Accordingly, through the Initial Decision, the ALJ dismissed the Complaint in its entirety. I.D. at 18.

Complainant respectfully submits that the Initial Decision is predicated on erroneous conclusions of law and findings of fact unsupported by substantial evidence. *First*, the Initial Decision contains an erroneous interpretation of the word “service” as it applies to meters of different voltages. I.D. at 14. This error, which repeated throughout the Initial Decision, materially contributed to the ALJ’s dismissal of the Complaint. In particular, the Initial Decision concludes that Complainant’s service contract lists meters of two different voltages and finds that two services are being provided at the subject property even though a third-party expert witness testified that different voltages do not constitute separate services. *Second*, the Initial Decision rejects Complainant’s well-founded position that the applicable tariff provision, Rate GL – General Service Large, for determining demand – contains a material ambiguity. I.D. at 16. *Third*, the ALJ concludes that Complainant’s position is not supported by substantial evidence in the record and “failed to prove that either Respondent violated any applicable statutes, regulations, orders or tariff provisions over which the Commission has

jurisdiction.” I.D. at 18. For these reasons, which are set out in more detail below, the Commission should not adopt the ALJ’s conclusions of law and findings of fact that are the subject of Complainant’s Exceptions and, accordingly, the Commission should reject the ALJ’s recommended dismissal of the Complaint.

## ARGUMENT

### **I. THE APPLICABLE LEGAL STANDARD.**

The party seeking affirmative relief from the Commission bears the burden of proof 66 Pa.C.S. § 332(a). As a matter of law, a Complainant must show that the named utility is responsible or accountable for the problem described in the Complaint in order to prevail. *Patterson v. Bell Tel. Co. of PA*, 72 Pa. PUC 196 (1990); *Feinstein v. Phila. Suburban Water Co.*, 50 Pa. PUC 300 (1976). This must be shown by a preponderance of the evidence. *Samuel I Lansberry, Inc. v. Pa. Pub. Util. Comm’n*, 578 A.2d 600 (1990), *alloc, denied*, 602 A.2d 863 (1992). A preponderance of evidence is that which is more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854, 1950 Pa. LEXIS 316 (1950).

Additionally, any finding of fact necessary to support the Commission’s adjudication must be based upon substantial evidence. *Mill v. Pa. Pub. Util. Comm’n*, 447 A.2d 1100 (Pa.Cmwlt. 1982); *Edan Transportation Corp. v. Pa. Pub. Util. Comm’n*, 623 A.2d 6 (Pa.Cmwlt. 1993); 2 Pa.C.S. § 704. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and Western Ry. v. Pa. Pub. Util. Comm’n*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment*

*Compensation Bd. Of Review*, 166 A.2d 96 (Pa.Super. 1960); *Murphy v. Dep't. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa.Cmwlth. 1984).

The offense must be a violation of the Public Utility Code, the Commission's regulations, or an outstanding order of the Commission. 66 Pa.C.S. § 701. The Commission may order a public utility to refund rates collected by it that are found to have been unlawful, unjust or unreasonable, or in excess of the rates authorized in the utility's tariff. 66 Pa. Code § 1312.

## II. COMPLAINANT'S EXCEPTIONS TO THE INITIAL DECISION.

### A. Exception No. 1: The ALJ Erroneously Interpreted the Meaning of "Service" As That Term Applies To Meters Of Different Voltages.

The recommended dismissal of the Complaint rests heavily on the ALJ's interpretation of the applicable service contract. Specifically, the ALJ misreads the meaning of the word "service" in the service contract. The Initial Decision states:

I am more convinced by the fact that the *two services* are listed separately in the contract, which shows the two having different voltages and on peak and off peak demand estimates. (Duquesne Ex. H). I agree with Duquesne (Main Brief, p. 13) that the specific language *identifying the two services* is controlling over the general language contained in the introductory passages of the contract.

I.D. at 14 (emphasis added). The word "service" is used in the introductory paragraph, it is not used in the specific language below the introductory paragraph which itemizes meter types by voltage. As Complainant's expert witness testified at the telephonic hearing, different voltages do not constitute different services. Similarly, Respondent's interpretation of "service" by voltage, and practice of using separate voltages as a basis for

billing non-coincident demand, finds no textual support in Respondent's tariff or in the Commission's regulations. That the meters are fed by separate and independent equipment is irrelevant since meters served by separate equipment under the same voltage would still be considered one service by Respondent's interpretation of the tariff. Furthermore, demand on a 120/208 volt meter is identical to the demand on a 277/480 volt meter, represents the same stress on the utilities system, and should not be treated or billed differently than demands recorded on meters of the same voltage.

**B. Exception No. 2: The Initial Decision Erroneously Concludes That The Controlling Tariff, Rate GL – General Service Large, For Determining Demand, Is Unambiguous.**

The ALJ committed legal error in finding that the applicable provision for determining demand – Rate GL – General Service Large – is unambiguous for purposes of the instant case. I.D. at 16. This finding was in error because the pertinent language of the tariff does not explicitly distinguish between an individual meter or building total. The relevant provision in Rate GL – General Service Large, states:

DETERMINATION OF DEMAND FOR DISTRIBUTION

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....

\*\*\*

The Billing Demand will be the sum of the individual demand of each metered service...

\*\*\*

The determination of individual demand is based on the "fifteen-minute period of greatest kilowatt-hour use during the billing period.

This language does not identify whether the greatest kilowatt-hour use occurs per meter, per service, or per building, nor does it explicitly define the word service. Yet, the ALJ improperly concludes that the provision above is unambiguous.

**C. Exception No. 3: The Initial Decision Is Premised On Key Findings Of Fact That Are Not Supported By Substantial Record Evidence.**

The ALJ ultimately concludes that the Complainant did not meet its burden of proving, by a preponderance of the evidence, that Respondent has violated, and continues to violate, its tariff. I.D. at 18. A thorough review of the evidence of record cannot sustain this conclusion. The Complainant's proofs consist of expert testimony regarding the definition of service as it relates to voltage, supported by a statement that the customer's meters are capable of being billed on a coincident demand basis. Conversely, Respondent provided conflicting testimony that separate equipment feeding the Complainant's meters supports the definition of separate service, which contradicts Respondent's own definition of the word "service" insofar as separate equipment serving meters of the same voltage would constitute same service.

The ALJ also concluded that the applicable provision in Respondent's tariff is unambiguous (I.D. at 14); however, the controlling language in the tariff is silent on whether individual demand occurs per meter, per service, or per building. The applicable provision of the tariff also provides no definition of "service." Therefore, the language in the tariff is ambiguous, and open to reasonable interpretation, and this ambiguity should be resolved in favor of the Customer.

## CONCLUSION

The Commission should not adopt the ALJ's recommended dismissal of the Complaint because (i) Complainant has sustained its burden of proving, by a preponderance of the evidence, that the voltage in and of itself does not designate a separate service, meaning the service contract lists one service, not two; (ii) Respondent's applicable tariff provision for demand is ambiguous; (iii) the ALJ's interpretation of the word "service" is flawed, because, contrary to the ALJ's conclusion that two voltages on the Customer's contract constitute two services, Respondent has improperly billed the customer on a non-coincident demand basis; and (iv) Complainant has met its burden by demonstrating by a preponderance of the evidence that Duquesne violated the applicable tariff provisions over which the Commission has jurisdiction.

For the foregoing reasons, Complainant, One Ten Associates, LLC, respectfully requests that the Commission reject the ALJ's findings of fact and conclusions of law that support the ALJ's recommended dismissal of the Complaint.

Respectfully submitted,

**BERGER HARRIS LLP**

By: /s/ John G. Harris  
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

*Attorney for Complainant,  
One Ten Associates*

Dated: October 14, 2016

**CERTIFICATE OF SERVICE**

I hereby certify that on this 14<sup>th</sup> day of October, 2016, I caused a true copy of EXCEPTIONS OF COMPLAINANT ONE TEN ASSOCIATES, LLC TO THE INITIAL DECISION AND ORDER DATED SEPTEMBER 12, 2016 to be served in accordance with the requirements set of 52 PA. Code § 1.58 (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](mailto:jfarrell@tuckerlaw.com)

**BERGER HARRIS LLP**

By: /s/ John G. Harris  
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](mailto:jharris@bergerharris.com)

*Attorneys for Complainant,  
One Ten Associates*

Dated: October 14, 2016