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December 20, 2016

*Via Electronic Filing*

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

**RE: Andrew Tomko v. Duquesne Light Company**
Docket No. C-2016-2577571

Dear Secretary Chiavetta:

Enclosed please find Duquesne Light Company's re-filed Preliminary Objections to the Formal Complaint. Please be advised that the Preliminary Objections were originally filed on the due date and on time, but apparently two of the numbers in the docket number were accidently transposed and therefore the filing was rejected. I have included a copy of our e-filing confirmation for your reference. Please accept these re-filed Preliminary Objections as still being timely. A copy of this document is again being served upon Complainant in accordance with Commission regulations.

Sincerely,

Jeremy V. Farrell
Attorney for Duquesne Light Company

Lauren N. Rulli
Attorney for Duquesne Light Company

Enclosure

c: Andrew Tomko (with enclosure)

LIT:616113-1 014657-158498

**BEFORE THE**
**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

| | | |
|---|---|---|
| ANDREW TOMKO, | : | |
| | : | |
| Complainant, | : | |
| | : | |
| vs. | : | No: C-2016-2577571 |
| DUQUESNE LIGHT COMPANY, | : | |
| | : | |
| Respondent. | : | |

**PRELIMINARY OBJECTIONS**

Filed on behalf of Respondent
Duquesne Light Company

Counsel of Record for this Party:
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**NOTICE TO PLEAD**

TO: **COMPLAINANT ANDREW TOMKO:**

**YOU ARE HEREBY NOTIFIED TO FILE A WRITTEN RESPONSE TO THE PRELIMINARY OBJECTIONS OF RESPONDENT DUQUESNE LIGHT COMPANY WITHIN TEN (10) DAYS OF SERVICE OR A JUDGMENT MAY BE ENTERED AGAINST YOU.**

TUCKER ARENSBERG, P.C.

Jeremy V. Farrell, Esquire
Counsel for Duquesne Light Company

**BEFORE THE**
**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

| | | |
|---|---|---|
| ANDREW TOMKO, | : | |
| Complainant, | : | |
| vs. | : | No: C-2016-2577571 |
| DUQUESNE LIGHT COMPANY, | : | |
| Respondent. | : | |

## PRELIMINARY OBJECTIONS

Pursuant to 52 Pa. Code. § 5.101, Duquesne Light files its Preliminary Objections to the Formal Complaint filed by Complainant Andrew Tomko:

### Overview

1. Duquesne Light files these Preliminary Objections seeking to dismiss the Formal Complaint in its entirety. As set forth more fully below, the Formal Complaint fails as a matter of law for several reasons.

2. First, Complainant has failed to join a necessary and indispensable party to this action; namely, the entity who will be responsible for paying for the service consumed by the street light requested in the Complaint (Plum Borough). Since the failure to join an indispensable party deprives the Commission of jurisdiction, dismissal of the Complaint is required by 52 Pa. Code § 5.101(a)(1), (5).

3. Second, the fact that Complainant may live somewhere nearby or travel through the intersection where he requests that a street light be installed is not enough to confer standing to bring this legal proceeding in either an individual or representative capacity. The Formal Complaint is, therefore, also separately and independently barred by 52 Pa. Code § 5.101(a)(7).

4. Third, Complainant is a non-lawyer and the Commission regulations do not allow him to represent Plum Borough (to whatever extent he may seek to do so) or the unidentified individuals that he claims to represent in the Complaint. Therefore, dismissal is also mandated under 52 Pa. Code § 51.01(a)(2).

**The Relevant Allegations in the Formal Complaint[1]**

5. Complainant filed this Formal Complaint in an attempt to force Duquesne Light to install a street light at an intersection of two public streets in Plum Borough. Complaint, ¶¶ 4-5.

6. The Complaint alleges that Plum Borough -- and not Complainant -- was the entity that determined that the absence of a street light in that particular location constituted a safety hazard and the entity that requested that Duquesne Light install a new street light at the intersection. Complaint, ¶ 4.

7. Complainant does not contend that he is a duly authorized, appointed, or elected official of Plum Borough or that he has the authority to bind the Borough and its constituents in this matter.[2] Nor does Complainant allege that he is an attorney retained to act on behalf of Plum Borough. Complainant did not join Plum Borough in this action. Complainant nevertheless tries to bind Plum Borough to reimburse Duquesne Light for the expenses of installing the street light that he requests. Complaint, ¶ 4.

8. Complainant alleges that he -- a non-attorney -- represents "35 residents of the Willow Village Place in filing this Formal Complaint," though he does not identify those individuals, state whether they have authorized them to act on their behalf, or allege that they even believe that a street light is necessary at the intersection in question. See Complaint, ¶ 4,

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[1] Duquesne Light accepts Complainant's allegations as true only for the purposes of filing these Preliminary Objections.

[2] In fact, Complainant implicitly acknowledges that he is not a representative of the Borough in paragraph 7(c) of the Complaint when he alleged that Duquesne Light would not meet with "the Boro [sic] and myself."

verification. Complainant provides no additional details regarding these unidentified individuals he purports to represent.

9. Despite seeking the installation of a street light (which will obviously consume power for which Duquesne Light must be paid), Complainant does not and could not allege that *he* (or, for that matter, any of the other residents he purports to represent) is responsible for paying for that service. The only connection that can be gleaned from the Complaint between Complainant and the location where he requests the street light to be installed is that Complainant lives somewhere nearby (though at an unspecified distance) -- or sometimes travels through -- the intersection in question. Complaint, ¶ 4.

## Law and Argument

**Preliminary Objection No. 1: Complainant has failed to join Plum Borough, which is a necessary and indispensable party, to this action; therefore, the Complaint must be dismissed.**

10. Duquesne Light makes this preliminary objection pursuant to 52 Pa. Code §§ 5.101(a)(1) and (5) because Complainant has failed to join a necessary and indispensable party to this action (Plum Borough), which deprives this Commission of jurisdiction.

11. A party is considered indispensable to a legal proceeding "when its rights are so connected with the claims of the litigants that no decree can be made without impairing its rights, and it must be made a party to protect such rights." Grimme Combustion, Inc. v. Mergentine Corporation, 595 A.2d 77, 81 (Pa. Super. 1991). A necessary party is one "whose presence, while not indispensable, is essential if the court is to resolve completely a controversy and to render complete relief." Pennsylvania Human Relations Comm'n v. School Dist. of Phila., 651 A.2d 177, 184 (Pa. Cmwlth. 1993). Inquiry into whether a party is indispensable is made from the perspective of protecting the rights of the absent party, not from the view of whether the joinder or nonjoinder of a party would make the matter more difficult to litigate. Grimme, 595 A.2d at 81.

12. It is readily apparent that Plum Borough qualifies as both a necessary and indispensable party under those definitions. If the Commission were to grant the relief that the Complaint seeks, the rights of Plum Borough would be affected because the Borough would be required to pay for the service consumed by the street light requested in the Complaint or, as Complainant requests, to pay Duquesne Light for the equipment and labor to install the street light without having the opportunity to be involved in the proceeding that established those obligations. The Borough must be made a party to protect its rights.

13. The failure to join an indispensable party is crucial because it goes to subject matter jurisdiction. Polydyne, Inc. v. City of Philadelphia, 795 A.2d 495 (Pa. Commw. 2002); Bridgeport Garage, Inc. v. Pennsylvania-American Water Co., F-2008-2037352, 2009 WL 1515009, at *2 (Pa. P.U.C. May 20, 2009). Lack of jurisdiction is an appropriate ground for preliminary objections under 52 Pa. Code § 5.101(a)(1).

14. In sum, since Complainant has failed to join to this action a necessary and indispensable party, this Formal Complaint must be dismissed pursuant to 52 Pa. Code §§ 5.101(a)(1) and (5).

**Preliminary Objection No. 2: Complainant lacks standing to pursue this action.**

15. Duquesne Light makes it second preliminary objection pursuant to 52 Pa. Code. § 5.101(a)(7), which permits a party to file preliminary objections to dismiss a pleading for lack of standing.

16. "Generally, the Commission has held that a person or entity has standing when the person or entity has a direct, immediate and substantial interest in the subject matter of a proceeding." Pamela Giacomel Luke v. Columbia Gas of Pennsylvania, Docket No. C-2014-2425948, 2014 WL 3824555, *5 (Pa. P.U.C., July 18, 2014).

17. "The Complainant's interest in the subject matter of the proceeding is direct if her interest is adversely affected by the actions challenged in the complaint, is immediate if there is a causal nexus between her asserted injury and the actions challenged in the complaint and is substantial if she has a discernible interest other than the general interest of all citizens in seeking compliance with the law." Luke, 2014 WLC 3824555 at *5 (citing Ken R. ex rel. C.R. v. Arthur Z., 682 A.2d 1267 (Pa. 1996)).[3] An entity that asserts standing "in a representational capacity would still be required to demonstrate an interest on the part of its members that is direct, immediate and substantial." Pennsylvania Pub. Utility Comm'n v. Pennsylvania Gas & Water Company, et al., R-922169, 1992 WL 687130, at *3 (Oct. 29, 1992).

18. As relevant to this action, a complainant lacks standing when he is not a customer of the utility company or a resident at the service address at the time the alleged incidents occurred. See, e.g., Luke, 2014 WL 3824555 at *1; Coggins v. PPL Electric Utilities Corp., Docket No. C-2012-2312785, 2013 WL 1856491 at *6 (Pa. P.U.C. April 22, 2013) (noting that a "complainant which is not a customer of a utility generally does not have the requisite substantial, direct, and immediate interest necessary to confer standing to bring the complaint about the service of that utility.").

19. Complainant cannot establish all elements of the standing tests because he lacks a direct, immediate, and substantial interest in this matter. Complainant's interest is neither direct nor immediate because, while he is a customer of Duquesne Light with respect to a different address, Complainant is not a customer of Duquesne Light who resides at or would be responsible for paying the bills associated with the service consumed by the street light requested in the Complaint. Complainant at most lives or travels to somewhere near the

[3] Standing is an important concept. As one Administrative Law Judge aptly noted: "Requiring a person or entity to have a direct, immediate and substantial interest in the subject matter of a proceeding helps avoid frivolous, harassing lawsuits whose costs are ultimately borne, at least in part, by utility ratepayers." Luke, supra at *5.

intersection referenced in the Complaint. This makes Complainant no different from a person who, while perhaps a customer at one service address, files a complaint to dispute some service-related condition at another address that does not affect the complainant's home. There is no standing in such cases and there can be none here. The dispute expressed in the Complaint -- to the extent it even exists -- is between Duquesne Light and Plum Borough. Complainant's recourse is to petition his local representatives to seek the relief he desires, not to personally commence legal proceedings against Duquesne Light. Complainant is simply acting in this matter (even if altruistically) as a citizen who is trying to procure compliance with the law, which is insufficient to confer standing. Luke, 2014 WLC 3824555 at *5.

20. For example, in Coggins v. PPL Electric Utilities Corp., Docket No. C-2012-2312785, 2013 WL 1856491 at *1 (Pa. P.U.C. April 22, 2013), the complainant filed a formal complaint against PPL alleging that the campground where he rented space as a permanent resident was overcharging him for electric service it received from PPL. The complainant, however, paid the campgrounds for his electric service through a private contract and, therefore was not a PPL customer. Relying on the rule that "a complainant must be respondent's customer to have standing to file a complaint about its utility service," the presiding ALJ dismissed the formal complaint with prejudice in advance of hearing. Id. at *6. Even though the complainant in Coggins lived *at* the campground where service was delivered, he still lacked standing as he was not the utility's customer.

21. The decision in Luke similarly stated:

> Since the Complainant was not the customer of record or a resident at the service address, the Complainant cannot maintain this action as a customer. Her interest is not direct because she is not adversely affected by the actions challenged in the complaint. Her interest is not immediate because she has suffered no injury as a result of the actions challenged in the complaint. Her interest is not substantial because she has no discernible interest other than the general interest of all citizens in seeking compliance with the law. The Complainant lacks standing to maintain the action as a customer or resident.

Id. at *6.

22. Nor does Complainant have standing to assert the alleged claims of the unidentified individuals he purports to be representing in this action. Coggins, 2013 WL 1856491 at *6 (noting that the complainant "does not have standing to assert the rights of other tenants, as he has endeavored to do in his Complaint.")

23. For the foregoing reasons, Complainant lacks standing to pursue the claims asserted in the Formal Complaint and, therefore, the Complaint must be dismissed pursuant to 52 Pa. Code § 5.101(a)(7).

**Preliminary Objection No. 3: The Complaint fails to conform to several Commission regulations.**

24. Duquesne Light makes its third preliminary objection pursuant to 52 Pa. Code § 5.101(a)(2).

25. Under 52 Pa. Code §§ 1.8, 1.21, and 1.22, municipalities, municipal corporations, and other political subdivisions must have an attorney licensed to practice law represent them in this proceeding. To whatever extent Complainant, a non-attorney, seeks to indirectly or directly represent Plum Borough in this action, his attempt to do so violates the Commission's regulations.

26. For similar reasons, and in addition to the fact that Complainant lacks standing to actually assert their claims, Complainant is also precluded by the Commission's regulations from representing the other unidentified individuals he claims to represent in his Complaint. Complaint, ¶ 4, verification. Individuals who are not attorneys may only represent themselves in adversarial proceedings before the Commission.[4] 52 Pa. Code §§ 1.8,[5] 1.21(a), (b), 1.22(a).

[4] While individuals may represent themselves, 52 Pa. Code § 1.21(a), Complainant lacks standing to bring this Complaint in his individual capacity for the reasons set forth above.

See also, Luke, 2014 WL 3834555 at *6 ("The Commission's regulation at 52 Pa.Code § 1.21(b) provides that in adversarial proceedings, a person shall be represented by an attorney except where an individual represents himself or herself. The Complainant is not an attorney and may not represent the customer in this proceeding."

27. Since Complainant cannot represent Plum Borough or the unidentified individuals referenced in the Complaint, the Complaint must also be dismissed for its failure to comply with the Commission's regulations. 52 Pa. Code § 5.101(a)(2).

WHEREFORE, Duquesne Light Company respectfully requests that the Commission sustain its Preliminary Objections and dismiss the Formal Complaint in its entirety and with prejudice.

TUCKER ARENSBERG, P.C.

Jeremy V. Farrell, Esquire
Counsel for Duquesne Light Company

Lauren N. Rulli, Esquire
Counsel for Duquesne Light Company

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[5] Section 1.8 defines "person" to include "individuals, corporations, partnerships, associations, joint ventures, other business organizations, trusts, trustees, legal representatives, receivers, agencies, governmental entities, municipalities, municipal corporations or other political subdivisions."

**BEFORE THE**
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|---|---|---|
| ANDREW TOMKO, | : | |
| Complainant, | : | |
| vs. | : | No: C-2016-2577571 |
| DUQUESNE LIGHT COMPANY, | : | |
| Respondent. | : | |

## CERTIFICATE OF SERVICE

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

Mr. Andrew Tomko
110 Willow Village Drive
Pittsburgh, PA 15239

Dated this 20th day of December, 2016

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