



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

December 8, 2008

C-20066233

C-20066236

CLIFFORD B LEVINE ESQUIRE
DAVID J MONTGOMERY ESQUIRE
THORP REED & ARMSTRONG
ONE OXFORD CENTRE
301 GRANT STREET 14TH FLOOR
PITTSBURGH PA 15219-1425

Ohioview Infrastructure, Inc
v.
Duquesne Light Company

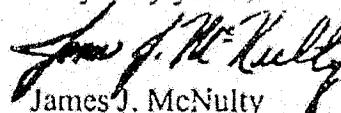
Groveton Housing Partnership, LP
v.
Duquesne Light Company

To Whom It May Concern:

This is to advise you that the Commission in Public Meeting on December 4, 2008 adopted an Order in the above entitled proceeding.

An Order has been enclosed for your records.

Very truly yours,


James J. McNulty
Secretary

Encls
Cert Mail
JF

REGINA M SESTAK ESQUIRE
DUQUESNE LIGHT COMPANY
411 SEVENTH AVENUE 8-2
PITTSBURGH PA 15219

DOCUMENT
FOLDER

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA. 17105-3265

Public Meeting held December 4, 2008

Commissioners Present:

James H. Cawley, Chairman
Tyrone J. Christy, Vice Chairman
Robert F. Powelson
Kim Pizzingrilli
Wayne E. Gardner

Ohioview Infrastructure, Inc.

C-20066233

v.

Duquesne Light Company

Groveton Housing Partnership, L.P.

C-20066236

v.

Duquesne Light Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of Ohioview Infrastructure, Inc. ("Ohioview") and Groveton Housing Partnership ("Groveton") (jointly referred to as "Complainants") filed May 24, 2007, to the Initial Decision (I.D.) of Administrative Law

Judge (ALJ) Michael A. Nemeec, which was issued on April 27, 2007. Duquesne Light Company ("Duquesne Light") filed Reply Exceptions on June 5, 2007.¹

History of the Proceeding

Ohioview and Groveton filed consolidated formal complaints (Complaints) on April 10, 2006. The Ohioview Complaint concerns an affordable housing development known as "Pleasant Ridge," which was constructed between 2003 and 2006. The Groveton Complaint concerns an affordable housing development known as "Groveton Village," which was constructed between 2002 and 2004. The Complainants request a declaration from the Commission that Pleasant Ridge and Groveton Village qualify as New Residential Developments under Duquesne Light's Tariff Rule 13.2. Each Complainant seeks the refund of the money that was spent by the Complainants to install the underground facilities at Pleasant Ridge and Groveton Village. I.D. at 1.

On May 15, 2006, Duquesne Light filed Answers to the Complaints. On July 20, 2006, a Prehearing Conference was held in Pittsburgh. A hearing was held on January 9, 2007, which was attended by the parties. The record contained twenty-six Complainant exhibits and four Respondent exhibits. On February 9, 2007, the record was closed. The ALJ recommended that the Complaints be dismissed for failure to carry the burden of proof. I.D. at 2.

The Complainants are seeking that the Commission direct Duquesne Light to refund monies paid to Duquesne Light for design, equipment and installation of electrical distribution systems for the Ohioview and Groveton housing projects. The total

¹ The Housing Alliance of Pennsylvania and 10,000 Friends of Pennsylvania also filed Exceptions, however, since these Exceptions were filed on June 30, 2008, and July 17, 2008, respectively, they will not be considered in our decision as they were untimely filed.

requested is \$371,006.78, plus interest, costs and attorney fees. Complainants cited Section 1312 of the Public Utility Code (Code), 66 Pa. C.S. § 1312, as authority for their request. The ALJ pointed out that Section 1312 does provide for the payment of interest as part of a refund; however, attorney fees and costs are imposed by the Commission only if the Commission orders a refund that is not made within a year of the order. Section 1312(a)(b) of the Code, 66 Pa. C.S. § 1312(a)(b). I.D. at 4.

Duquesne Light argued that its Tariff Rule 13.2 does not apply and stated that it only applies if the provided service necessitates extending Duquesne Light's existing distribution lines. Duquesne Light submitted that both projects were built on sites that had existing overhead distribution infrastructure servicing residential dwellings and the existing infrastructure was relocated at Complainants' request and replaced with underground infrastructure. Duquesne argued that Complainants were properly required to bear the costs in accordance with Tariff Rule 9.B, which is now Rule 13.1A.B. Duquesne Light M.B. at 5-6; I.D. at 5. Duquesne Light relied on the following language found in Rule 13.2 titled, "Underground Electric Service in New Residential Developments":

(3) Development – A planned project which is developed by a developer/applicant for electric service set out in a recorded plot plan of five or more adjoining unoccupied lots for the construction of single-family residences, detached or otherwise, or mobile homes and one or more five-apartment house, all of which are intended for year-round occupancy, *if providing electric service to such project necessitates extending the Company's existing distribution lines.* (emphasis supplied) (The language is similar with that found in 52 Pa. Code § 57.81, "Definitions".)

Duquesne Light Exhibit R-3; Complainants Exhibit 1(A); I.D. at 6.

Duquesne also contended that the Ohioview and Groveton projects are governed by its tariff provision found at Rule 13.1, Underground Distribution which reads as follows:

13.1 Underground Distribution

(A) When the Company is required by government order or enters into agreements with redevelopment authorities, a private real estate developer or a group of customers to change its distribution supply lines from overhead to underground, customers receiving or to receive electric service at voltage of 600 volts or less from these supply lines shall provide at their own expense the necessary facilities for receiving such underground service.

Duquesne Light Exhibit R-3; I.D. at 6.

Discussion

As a preliminary matter, we note that any issue or Exception that we do not specifically address has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider, expressly or at length, each contention or argument raised by the parties. *Consolidated Rail Corporation v. Pennsylvania Public Utility Commission*, 625 A.2d 741 (Pa. Cmwlth. 1993).

As the proponent of a rule or order, the Complainant in this proceeding bears the burden of proof pursuant to Section 332(a) of the Code, 66 Pa. C.S. § 332(a), which provides that the party seeking a rule or order from the Commission has the burden of proof in that proceeding. It is axiomatic that “[a] litigant’s burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible.” *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990).

The ALJ made fourteen Findings of Fact and reached three Conclusions of Law. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

The Complainants argue that the ALJ erred in concluding that Tariff Rule 13.2 does not apply to the Pleasant Ridge and Groveton Village developments. The Complainants aver that the Pleasant Ridge and Groveton Village meet the definition of development in Duquesne Light's Tariff Rule 13.2 because the projects were: (1) developed by a developer; (2) set out in "recorded plot plans of five or more adjoining unoccupied lots;" (3) involve the development of single family residences, detached or otherwise, or mobile homes; (4) involve "one or more five-unit apartment houses all of which are intended for year-round occupancy;" and (5) required the extension of distribution lines to serve the new developments, which consisted of a radical transformation of the sites, with new streets, newly installed infrastructure, brand new homes, and new homeowners. Complainants. Exc. No. 1 at 17-18. The Complainants submit that there is no basis for the ALJ's assertion that the "record is clear that both sites could have been redeveloped and served from above-ground facilities." Exc. No. 1 at 19.

The Complainants contend that the ALJ erred in considering Rule 13.1(A). The Complainants argue that Rule 13.1(A) governs the payment for lateral service lines and associated facilities rather than the wholesale installation of distribution lines and associated facilities that are at issue. Exc. No. 2 at 24-25.

The Complainants submit that the ALJ erred in concluding that the developers chose to install underground electric lines, thereby improperly rejecting the application of Rule 13.2. The Complainants argue that they had no choice and that they

had to be reconfigured in order to attract private investors and obtain HUD approval. Exc. No. 3 at 26.

The Complainants submit that the ALJ erred in his interpretation of Rule 13.2 in a manner that is unduly restrictive and discriminatory. The Complainants claim that the ALJ ignored: (1) Executive Order No. 2004-9; (2) Commission rules requiring underground electric lines in new residential developments; and (3) the discriminatory effect of treating suburban greenfield developments differently than urban in-fill affordable housing developments of the same size. Exc. No. 4 at 28.

In its Reply Exceptions, Duquesne Light argues that the ALJ properly determined that both of Complainants' projects were built on sites that had existing overhead distribution infrastructure serving residential dwellings, which infrastructure was relocated at Complainant's request and replaced with underground infrastructure. Duquesne Light contends that since it was not necessary to extend its existing distribution lines to provide service, Tariff Rule 13.2 does not apply. R.Exc. at 13.

Duquesne Light avers that Pleasant Ridge and Groveton Village were not mere relocations of facilities under Tariff Rule 9.B. It disagrees with the Complainants' assertion that since the buildings were leveled and the land lay vacant for an extended period of time that the property was transformed into a greenfield site. Duquesne Light contends that there is no clear evidence that the Groveton site was vacant for an extended period of time. R.Exc. at 14.

Duquesne Light submits that its right to charge Complainants for installation of underground service is supported not only by its Tariff Rule 13.1, but by its Tariff Rules 7 and 9B, as well. It contends that the issue in this case is whether or not the Complainants' projects meet the definition of "development" in Duquesne Light's Tariff Rule 13.2 or the Commission's Regulation 57.81. R.Exc. at 17.

Duquesne Light asserts that by defining "development" in the Commission Regulation Section 57.81, 52 Pa. Code § 57.81 to include the phrase "if electric service to the lots necessitates extending the utility's existing distribution lines," the Commission limited the circumstances under which a public utility would have to bear the cost of installing underground service to those instances in which the utility's revenue would increase due to the extension of service to a previously unserved area. Duquesne Light argues that there is no reason to believe that the Commission ever intended its Investigative Order 99 or its Regulations at Section 57.81-57.88 to require utility customers to bear the cost of installing underground service whenever a developer chooses to demolish existing buildings and relocate existing overhead service to underground. R.Exc. at 21.

We agree with the ALJ and Duquesne Light that that this case does not involve an extension of Duquesne Light's facilities and, therefore, Duquesne Light's Tariff Rule 13.2 does not apply in this case. We note that Duquesne Light's Tariff Rule 13.2 applies only if providing service necessitates extending Duquesne Light's existing distribution lines. Both of the Complainants' developments, Pleasant Ridge and Groveton Village, were built on sites that had existing overhead distribution infrastructure serving residential dwellings. Clearly, the record indicates that both sites could have been redeveloped and served from above ground facilities. Instead, the developers chose to build developments with underground facilities. The Complainants argument that they should not be responsible financially because they had no choice and had to install underground infrastructure in order to get HUD approval and to secure financing is a weak argument at best. As pointed out by Duquesne Light, the developers were not forced to build these developments, these projects were undertaken for financial gain.

We also concur with the ALJ's conclusion that the Complainants were not required to install underground facilities by the Commission Regulation at 52 Pa. Code §

57.81. Like Duquesne Light's Tariff Rule 13.2, Commission Regulation 57.81 relies on the definition of "development" and since neither of the Complainant's projects met the definition of "development" as it is defined in the Commission's Regulation at Section 57.81, 52 Pa. Code § 57.81, Duquesne Light is not financially responsible for the Complainants' decision to install underground facilities in its Pleasant Ridge and Groveton Village projects.

Nothing in the Complainant's Exceptions compels us to revise the ALJ's Initial Decision. We agree with the ALJ's recommendation that the Complainants failed to carry their burden of showing that Duquesne Light violated the provisions of the Public Utility Code, the Commission's Regulations or any other order or law the Commission is authorized to enforce. Accordingly, we will deny the Complainant's Exceptions.

Conclusion

Based upon the foregoing discussion, we shall deny the Complainants' Exceptions. As such, we shall adopt the ALJ's Initial Decision, which dismisses the Complaints; **THEREFORE,**

IT IS ORDERED:

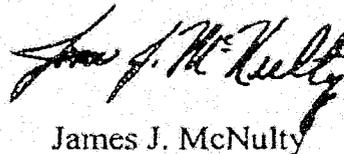
1. That the Exceptions of Ohioview Infrastructure, Inc. and Groveton Housing Village Partnership to the Initial Decision of Administrative Law Judge Michael A. Nemeck are denied.

2. That the Initial Decision of Administrative Law Judge Michael A. Nemec is adopted.

3. That the Complaints of Ohioview Infrastructure, Inc. and Groveton Housing Village Partnership are dismissed for the failure to satisfy their burden of proof.

4. That this proceeding be marked closed.

BY THE COMMISSION,



James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: December 4, 2008

ORDER ENTERED: DEC 08 2008



David J. Montgomery
Direct Dia 412 394 7763
Email dmontgomery@thorpreed.com

ATTORNEYS AT LAW SINCE 1895

Chief Clerk
Commonwealth Court of Pennsylvania
Room 624
Iris Office Building
Harrisburg, PA 17120

January 7, 2009

Re: Ohioview Infrastructure Inc. v. Duquesne Light Company, C20066233
Groveton Housing Partnership, LP v. Duquesne Light Company, C20066236
Petition for Review of December 8, 2008 Order entered by the Pennsylvania
Public Utility Commission

Dear Chief Clerk

I have enclosed for filing an original and one copy of a Petition for Review regarding the above-referenced matter, along with our check in the amount of \$60.00 for the filing fee. Also enclosed is a completed Certificate of Mailing, PS Form 3817.

I have also enclosed an extra copy of the Petition which I would request be time-date stamped and returned to me in the enclosed, addressed, postage-paid envelope.

Thank you for your assistance.

Very truly yours,

**DOCUMENT
FOLDER**

David J. Montgomery

DJM/vj
Enclosures

cc: (w/enci.)
Pennsylvania Office of Attorney General
Duquesne Light Company
Pennsylvania Public Utility Commission
Clifford B. Levine, Esquire (w/o encl.)

Pittsburgh
Philadelphia
Ponca City
Wheeler

Thorpe Reed & Armstrong, LLP
One Oxford Centre
301 Grant Street, 14th Floor
Pittsburgh, PA 15219-1420
412 394 7711
412 394 2550 Fax

RECEIVED
2009 JAN -9 AM 10:29
P. PUBLIC
SECRETARY'S BUREAU

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

OHIOVIEW INFRASTRUCTURE, INC.,

Petitioner,

v.

DUQUESNE LIGHT COMPANY

Respondent.

GROVETON HOUSING
PARTNERSHIP, LP,

Petitioner,

v.

DUQUESNE LIGHT COMPANY

Respondent

PETITION FOR REVIEW OF OPINION AND ORDER ENTERED ON
DECEMBER 8, 2008 BY THE PUBLIC UTILITY COMMISSION

Clifford B. Levine
Pa. I.D. #33507
David J. Montgomery
Pa. I.D. #78874

THORP REED & ARMSTRONG, LLP
301 Grant Street, 14th Floor
Pittsburgh, PA 15129-1425
412-394-2396

Attorneys for Petitioners

RECEIVED
P.U.C.
SECRETARY'S BUREAU

2009 JAN -9 4:10:29

RECEIVED

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

OHIOVIEW INFRASTRUCTURE, INC.,

Petitioner,

v.

DUQUESNE LIGHT COMPANY

Respondent.

GROVETON HOUSING
PARTNERSHIP, LP,

Petitioner,

v.

DUQUESNE LIGHT COMPANY

Respondent.

**PETITION FOR REVIEW OF OPINION AND ORDER ENTERED ON
DECEMBER 8, 2008 BY THE PUBLIC UTILITY COMMISSION**

Petitioners Ohioview Infrastructure, Inc. and Groveton Housing Partnership, LP, hereby request that this Honorable Court review the December 8, 2008 Order entered by the Commonwealth of Pennsylvania Public Utility Commission (the "Commission"). See Attachment A.

STATEMENT OF JURISDICTION

1 This Honorable Court has jurisdiction over this appeal pursuant to 42 Pa. C.S. §763 and Pennsylvania Rules of Appellate Procedure 1511, et seq.

PARTIES

2 Petitioner Ohioview Infrastructure, Inc. ("Ohioview Infrastructure") is a corporation located at 230 Wyoming Avenue, Kingston, Pennsylvania, 18704.

3. In 2003, Ohioview Infrastructure was formed for the purpose of constructing Pleasant Ridge in Stowe Township, Pennsylvania.

4. Groveton Housing Partnership, LP, ("Groveton Partnership") is a partnership located at 230 Wyoming Avenue, Kingston, Pennsylvania, 18704

5. Like Ohioview Infrastructure, Groveton Partnership is a land developer and was formed for the purpose of developing Groveton Village in Robinson Township, Pennsylvania.

6. The Respondent Duquesne Light Company ("Duquesne Light") is a public utility located at 411 Seventh Avenue, Pittsburgh, Pennsylvania 15219 and is the electric utility with the exclusive right to provide electric service to Pleasant Ridge and Groveton Village

7. In accordance with Pa. R. App. Pro. Rule 1513(a), the Commission is considered to be a disinterested party for the purposes of this Petition for Review.

DETERMINATION OF GOVERNMENT UNIT SOUGHT TO BE REVIEWED

The Consolidated Complaints

8. Ohioview Infrastructure and Groveton Partnership filed consolidated Complaints on April 10, 2006 with the Commission requesting a declaration that Pleasant Ridge and Groveton Village qualify as New Residential Developments under Duquesne Light Company's Tariff Rule 13.2.

9. Pleasant Ridge and Groveton Village met the definition of New Residential Development in Duquesne Light's Tariff Rule 13.2 because the projects were: (1) developed by a developer; (2) set out in "recorded plot plans of five or more adjoining unoccupied lots;" (3) involve the development of single family residences, detached or otherwise, or mobile homes; (4) involve "one or more five-unit apartment houses all of which are intended for year-round occupancy;" and (5) required the extension of distribution lines to serve the new developments.

which consisted of a radical transformation of the sites, with new streets, newly installed infrastructure, brand new homes, and new homeowners

10. Pursuant to Section 1312 of the Public Utility Code (Code), 66 Pa. C.S. § 1312, each Complaint sought a refund of money, totaling \$371,006.78, plus interest, paid to Duquesne Light for the installation of underground electric facilities at Pleasant Ridge and Groveton Village.

11. Rule 13.2 provides that Duquesne is responsible for the costs of installing underground electrical facilities in New Residential Developments.

12. Duquesne Light filed its answers to the Complaints on May 15, 2006 and joined Complainants' request to consolidate these Complaints.

The ALJ's Initial Decision and the Commission's December 8, 2008 Opinion and Order

13. On May 4, 2007, the ALJ issued his Initial Decision with regard to this matter, dismissing these Complaints on the basis that the Complainants allegedly failed to carry their burden of proof.

14. On May 24, 2007, the Petitioner filed Exceptions to the ALJ's May 4, 2007 Initial Decision.

15. On December 8, 2008, the Commission entered an Order and Opinion adopting the ALJ's May 4, 2007 Initial Decision.

GENERAL STATEMENT OF THE OBJECTIONS

16. The Commission lacked a substantial basis for its findings of fact and conclusions of law in its December 8, 2008 Opinion and Order.

17. The Commission erred in concluding that Pleasant Ridge and Groveton Village did not qualify as New Residential Developments under Rule 13.2.

18. The Commission erred in concluding that Pleasant Ridge and Groveton Village could have been redeveloped and served from the previously existing above-ground distribution lines.

19. The Commission erred in failing to consider that the Pleasant Ridge and Groveton Village developments involved separate and distinct ownership from the ownership of the previously existing developments on those sites and had been subdivided, with new utility easements and street patterns.

20. The Commission erred in considering the federal criteria associated with redevelopment projects that required underground distribution facilities and reorganization of roads.

21. The Commission erred in concluding that simply because some financial motivation existed on the part of the developers to undertake the Pleasant Ridge and Groveton Village projects, such motivation operated as a bar from qualifying as New Residential Developments under Rule 13.2.

22. The Commission erred in concluding that the Pleasant Ridge and Groveton Village residential developments did not meet the definition of "development" under either Rule 13.2 or Commission Regulation § 57.81, 52 Pa. Code § 57.81.

23. The Commission erred in interpreting Rule 13.2 in a manner that is unduly restrictive and discriminatory and ignored: (1) Executive Order No. 2004-9, (2) Commission rules requiring underground electric lines in new residential developments, and (3) the discriminatory effect of treating suburban greenfield developments differently than urban in-fill affordable housing developments of the same size.

24. The Commission erred in concluding that Pleasant Ridge and Groveton Village were mere relocations of facilities under Tariff Rule 9 B.

25. The Commission erred in concluding that the Pleasant Ridge and Groveton Developments did not involve an extension of Duquesne Light's facilities.

26. The Commission erred in concluding that Tariff Rule 13.2 does not apply to the Pleasant Ridge and Groveton Village developments.

27. The Commission lacked substantial evidence in concluding that the "record is clear that both sites could have been redeveloped and served from above-ground facilities."

28. The Commission erred in considering Rule 13.1(A) because Rule 13.1(A) governs the payment for lateral service lines and associated facilities rather than the wholesale installation of distribution lines and associated facilities that are at issue.

29. The Commission lacked substantial evidence in concluding that the developers chose to install underground electric lines, thereby improperly rejecting the application of Rule 13.2.

STATEMENT OF THE RELIEF SOUGHT

WHEREFORE, Petitioners, Ohioview Infrastructure, Inc. and Groveton Housing Partnership, L.P., respectfully request that this Court reverse the December 8, 2008 Order and Opinion and direct Respondent, Duquesne Light Company, to refund the \$371,006.78, plus interest, paid for the installation of underground electric utilities, and order any other relief that the Court deems appropriate.

Dated: January 7, 2009

Respectfully submitted,

THORP REED & ARMSTRONG, LLP

By: Clifford B. Levine
Clifford B. Levine
Pa. I.D. #33507
David J. Montgomery
Pa. I.D. #78874

THORP REED & ARMSTRONG, LLP
301 Grant Street, 14th Floor
Pittsburgh, PA 15120-1425
412-394 2396

Attorneys for Petitioners

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA. 17105-3265

Public Meeting held December 4, 2008

Commissioners Present:

James H. Cawley, Chairman
Tyrone J. Christy, Vice Chairman
Robert F. Powelson
Kim Pizzingrilli
Wayne E. Gardner

Ohioview Infrastructure, Inc.

C-20066233

v.

Duquesne Light Company

Groveton Housing Partnership, L.P.

C-20066236

v.

Duquesne Light Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of Ohioview Infrastructure, Inc. ("Ohioview") and Groveton Housing Partnership ("Groveton") (jointly referred to as "Complainants") filed May 24, 2007, to the Initial Decision (I.D.) of Administrative Law

A

Judge (ALJ) Michael A. Nemec, which was issued on April 27, 2007. Duquesne Light Company ("Duquesne Light") filed Reply Exceptions on June 5, 2007.¹

History of the Proceeding

Ohioview and Groveton filed consolidated formal complaints (Complaints) on April 10, 2006. The Ohioview Complaint concerns an affordable housing development known as "Pleasant Ridge," which was constructed between 2003 and 2006. The Groveton Complaint concerns an affordable housing development known as "Groveton Village," which was constructed between 2002 and 2004. The Complainants request a declaration from the Commission that Pleasant Ridge and Groveton Village qualify as New Residential Developments under Duquesne Light's Tariff Rule 13.2. Each Complainant seeks the refund of the money that was spent by the Complainants to install the underground facilities at Pleasant Ridge and Groveton Village. I.D. at 1.

On May 15, 2006, Duquesne Light filed Answers to the Complaints. On July 20, 2006, a Prehearing Conference was held in Pittsburgh. A hearing was held on January 9, 2007, which was attended by the parties. The record contained twenty-six Complainant exhibits and four Respondent exhibits. On February 9, 2007, the record was closed. The ALJ recommended that the Complaints be dismissed for failure to carry the burden of proof. I.D. at 2.

The Complainants are seeking that the Commission direct Duquesne Light to refund monies paid to Duquesne Light for design, equipment and installation of electrical distribution systems for the Ohioview and Groveton housing projects. The total

¹ The Housing Alliance of Pennsylvania and 10,000 Friends of Pennsylvania also filed Exceptions, however, since these Exceptions were filed on June 30, 2008, and July 17, 2008, respectively, they will not be considered in our decision as they were untimely filed.

requested is \$371,006.78, plus interest, costs and attorney fees. Complainants cited Section 1312 of the Public Utility Code (Code), 66 Pa. C.S. § 1312, as authority for their request. The ALJ pointed out that Section 1312 does provide for the payment of interest as part of a refund; however, attorney fees and costs are imposed by the Commission only if the Commission orders a refund that is not made within a year of the order. Section 1312(a)(b) of the Code, 66 Pa. C.S. § 1312(a)(b). I.D. at 4.

Duquesne Light argued that its Tariff Rule 13.2 does not apply and stated that it only applies if the provided service necessitates extending Duquesne Light's existing distribution lines. Duquesne Light submitted that both projects were built on sites that had existing overhead distribution infrastructure servicing residential dwellings and the existing infrastructure was relocated at Complainants' request and replaced with underground infrastructure. Duquesne argued that Complainants were properly required to bear the costs in accordance with Tariff Rule 9.B, which is now Rule 13.1A.B. Duquesne Light M.B. at 5-6; I.D. at 5. Duquesne Light relied on the following language found in Rule 13.2 titled, "Underground Electric Service in New Residential Developments":

(3) Development – A planned project which is developed by a developer/applicant for electric service set out in a recorded plot plan of five or more adjoining unoccupied lots for the construction of single-family residences, detached or otherwise, or mobile homes and one or more five-apartment house, all of which are intended for year-round occupancy, *if providing electric service to such project necessitates extending the Company's existing distribution lines.* (emphasis supplied) (The language is similar with that found in 52 Pa. Code § 57.81, "Definitions".)

Duquesne Light Exhibit R-3; Complainants Exhibit I(A); I.D. at 6.

Duquesne also contended that the Ohioview and Groveton projects are governed by its tariff provision found at Rule 13.1, Underground Distribution which reads as follows:

13.1 Underground Distribution

(A) When the Company is required by government order or enters into agreements with redevelopment authorities, a private real estate developer or a group of customers to change its distribution supply lines from overhead to underground, customers receiving or to receive electric service at voltage of 600 volts or less from these supply lines shall provide at their own expense the necessary facilities for receiving such underground service.

Duquesne Light Exhibit R-3; I.D. at 6.

Discussion

As a preliminary matter, we note that any issue or Exception that we do not specifically address has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider, expressly or at length, each contention or argument raised by the parties. *Consolidated Rail Corporation v. Pennsylvania Public Utility Commission*, 625 A.2d 741 (Pa. Cmwlth. 1993).

As the proponent of a rule or order, the Complainant in this proceeding bears the burden of proof pursuant to Section 332(a) of the Code. 66 Pa. C.S. § 332(a), which provides that the party seeking a rule or order from the Commission has the burden of proof in that proceeding. It is axiomatic that “[a] litigant’s burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible.” *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A 2d 600 (Pa. Cmwlth. 1990).

The ALJ made fourteen Findings of Fact and reached three Conclusions of Law. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

The Complainants argue that the ALJ erred in concluding that Tariff Rule 13.2 does not apply to the Pleasant Ridge and Groveton Village developments. The Complainants aver that the Pleasant Ridge and Groveton Village meet the definition of development in Duquesne Light's Tariff Rule 13.2 because the projects were: (1) developed by a developer; (2) set out in "recorded plot plans of five or more adjoining unoccupied lots;" (3) involve the development of single family residences, detached or otherwise, or mobile homes; (4) involve "one or more five-unit apartment houses all of which are intended for year-round occupancy;" and (5) required the extension of distribution lines to serve the new developments, which consisted of a radical transformation of the sites, with new streets, newly installed infrastructure, brand new homes, and new homeowners. Complainants. Exc. No. 1 at 17-18. The Complainants submit that there is no basis for the ALJ's assertion that the "record is clear that both sites could have been redeveloped and served from above-ground facilities." Exc. No. 1 at 19.

The Complainants contend that the ALJ erred in considering Rule 13.1(A). The Complainants argue that Rule 13.1(A) governs the payment for lateral service lines and associated facilities rather than the wholesale installation of distribution lines and associated facilities that are at issue. Exc. No. 2 at 24-25.

The Complainants submit that the ALJ erred in concluding that the developers chose to install underground electric lines, thereby improperly rejecting the application of Rule 13.2. The Complainants argue that they had no choice and that they

had to be reconfigured in order to attract private investors and obtain HUD approval. Exc. No. 3 at 26.

The Complainants submit that the ALJ erred in his interpretation of Rule 13.2 in a manner that is unduly restrictive and discriminatory. The Complainants claim that the ALJ ignored: (1) Executive Order No. 2004-9; (2) Commission rules requiring underground electric lines in new residential developments; and (3) the discriminatory effect of treating suburban greenfield developments differently than urban in-fill affordable housing developments of the same size. Exc. No. 4 at 28.

In its Reply Exceptions, Duquesne Light argues that the ALJ properly determined that both of Complainants' projects were built on sites that had existing overhead distribution infrastructure serving residential dwellings, which infrastructure was relocated at Complainant's request and replaced with underground infrastructure. Duquesne Light contends that since it was not necessary to extend its existing distribution lines to provide service, Tariff Rule 13.2 does not apply. R.Exc. at 13.

Duquesne Light avers that Pleasant Ridge and Groveton Village were not mere relocations of facilities under Tariff Rule 9.B. It disagrees with the Complainants' assertion that since the buildings were leveled and the land lay vacant for an extended period of time that the property was transformed into a greenfield site. Duquesne Light contends that there is no clear evidence that the Groveton site was vacant for an extended period of time. R.Exc. at 14.

Duquesne Light submits that its right to charge Complainants for installation of underground service is supported not only by its Tariff Rule 13.1, but by its Tariff Rules 7 and 9B, as well. It contends that the issue in this case is whether or not the Complainants' projects meet the definition of "development" in Duquesne Light's Tariff Rule 13.2 or the Commission's Regulation 57.81. R.Exc. at 17.

Duquesne Light asserts that by defining "development" in the Commission Regulation Section 57.81, 52 Pa. Code § 57.81 to include the phrase "if electric service to the lots necessitates extending the utility's existing distribution lines," the Commission limited the circumstances under which a public utility would have to bear the cost of installing underground service to those instances in which the utility's revenue would increase due to the extension of service to a previously unserved area. Duquesne Light argues that there is no reason to believe that the Commission ever intended its Investigative Order 99 or its Regulations at Section 57.81-57.88 to require utility customers to bear the cost of installing underground service whenever a developer chooses to demolish existing buildings and relocate existing overhead service to underground. R.Exc. at 21.

We agree with the ALJ and Duquesne Light that that this case does not involve an extension of Duquesne Light's facilities and, therefore, Duquesne Light's Tariff Rule 13.2 does not apply in this case. We note that Duquesne Light's Tariff Rule 13.2 applies only if providing service necessitates extending Duquesne Light's existing distribution lines. Both of the Complainants' developments, Pleasant Ridge and Groveton Village, were built on sites that had existing overhead distribution infrastructure serving residential dwellings. Clearly, the record indicates that both sites could have been redeveloped and served from above ground facilities. Instead, the developers chose to build developments with underground facilities. The Complainants argument that they should not be responsible financially because they had no choice and had to install underground infrastructure in order to get HUD approval and to secure financing is a weak argument at best. As pointed out by Duquesne Light, the developers were not forced to build these developments, these projects were undertaken for financial gain.

We also concur with the ALJ's conclusion that the Complainants were not required to install underground facilities by the Commission Regulation at 52 Pa. Code §

57.81. Like Duquesne Light's Tariff Rule 13.2, Commission Regulation 57.81 relies on the definition of "development" and since neither of the Complainant's projects met the definition of "development" as it is defined in the Commission's Regulation at Section 57.81, 52 Pa. Code § 57.81, Duquesne Light is not financially responsible for the Complainants' decision to install underground facilities in its Pleasant Ridge and Groveton Village projects.

Nothing in the Complainant's Exceptions compels us to revise the ALJ's Initial Decision. We agree with the ALJ's recommendation that the Complainants failed to carry their burden of showing that Duquesne Light violated the provisions of the Public Utility Code, the Commission's Regulations or any other order or law the Commission is authorized to enforce. Accordingly, we will deny the Complainant's Exceptions.

Conclusion

Based upon the foregoing discussion, we shall deny the Complainants' Exceptions. As such, we shall adopt the ALJ's Initial Decision, which dismisses the Complaints; **THEREFORE,**

IT IS ORDERED:

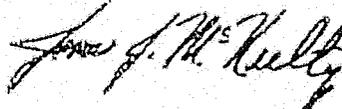
1. That the Exceptions of Ohioview Infrastructure, Inc. and Groveton Housing Village Partnership to the Initial Decision of Administrative Law Judge Michael A. Nemeck are denied.

2. That the Initial Decision of Administrative Law Judge Michael A. Nemeec is adopted.

3. That the Complaints of Ohioview Infrastructure, Inc. and Groveton Housing Village Partnership are dismissed for the failure to satisfy their burden of proof.

4. That this proceeding be marked closed.

BY THE COMMISSION,



James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: December 4, 2008

ORDER ENTERED: DEC 08 2008

CERTIFICATE OF SERVICE

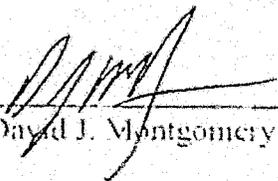
I hereby certify that I have this day served a true copy of the foregoing document,
PETITION FOR REVIEW OF OPINION AND ORDER ENTERED ON
DECEMBER 8, 2008 BY THE PUBLIC UTILITY COMMISSION, upon the participants
listed below, in accordance with the requirements of § 1.54 (relating to service by a participant).

Jodi Noble, Esquire
Duquesne Light Company
411 Seventh Ave., 9th Fl.
Pittsburgh, PA 15219

James J. McNulty
Commonwealth of Pennsylvania
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Pennsylvania Office of Attorney General
16th Floor, Strawberry Square
Harrisburg, PA 17120

Dated this 7th day of January, 2009.



David J. Montgomery



**UNITED STATES
POSTAL SERVICE**

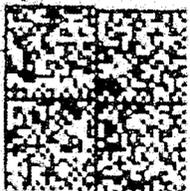
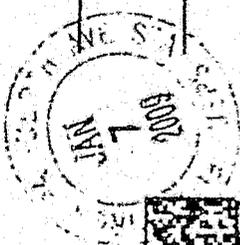
**Certificate Of
Mailing**

To pay fee, affix stamps or
meter postage here.

This Certificate of Mailing provides evidence that mail has been presented to USPS® for mailing.
This form may be used for domestic and international mail.

From:

David J. Montgomery, Esquire
Thorp, Reed & Armstrong LLP
One Oxford Centre
301 Grant Street, 14th Floor
Pittsburgh, PA 15219-1425



049JB2040030
\$01.100
01/07/2009
Mailed From 15219
US POSTAGE

To:

Michael F. Kimmel
Deputy Prothonotary/Chief Clerk
Commonwealth Court of Pennsylvania
Room 624
Iris Office Building
Harrisburg, PA 17120

Postmark Here

RECEIVED
2009 JAN -9 AM 10:29
SECRETARY'S BUREAU

PS Form 3817, April 2007 PSN 7530-02-000-9065