

March 12, 2018

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
2nd Floor, Room-N201
Harrisburg, PA 17120

**Re: Gene Fenderson v. Duquesne Light Company
Docket No. F-2017-2640070**

Dear Secretary Chiavetta:

Enclosed please find Duquesne Light Company's Motion for Judgment on the Pleadings to the Amended Formal Complaint filed by Gene Fenderson.

A copy of this document has been 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

cc: Gene Fenderson (with enclosure)

LIT:635273-1 014657-158498

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

GENE FENDERSON,

Complainant,

vs.

DUQUESNE LIGHT COMPANY,

Respondent.

No: F-2017-2640070

**MOTION FOR JUDGMENT ON THE
PLEADINGS**

Filed on behalf of Respondent
Duquesne Light Company

Counsel of Record for this Party:

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Counsel for Respondent

NOTICE TO PLEAD

TO COMPLAINANT GENE FENDERSON:

YOU ARE NOTIFIED TO FILE A WRITTEN RESPONSE TO THIS MOTION FOR JUDGMENT ON THE PLEADINGS WITHIN 20 DAYS OF SERVICE OR A JUDGMENT MAY BE ENTERED AGAINST YOU.

TUCKER ARENSBERG, P.C.



Jeremy V. Farrell, Esquire
Attorney for Duquesne Light Company

\$59.00 payment to Complainant's account in April or May 2016; and (b) challenged a termination notice Duquesne Light issued to Complainant in October 2017. Original Complaint at ¶¶ 4-5. A copy of the Original Complaint is attached as Exhibit A.

4. According to the signature page, Complainant signed the Original Complaint on December 21, 2017. As noted above, it was served on Duquesne Light on or about December 27, 2017.

5. One day after Duquesne Light was served with the Original Complaint, on December 28, 2017, Complainant signed and submitted the Amended Complaint to the Commission. A copy of the Amended Complaint is attached as Exhibit B.

6. Though it uses slightly different language, the Amended Complaint raises the same concerns as the Original Complaint. For example, Complainant alleges that Duquesne Light treated "the untraced money order payment from [April] 2016 as delinquent" and that the 10 day shut off notice he received should have been issued "within the tax year 2016." Amended Complaint at ¶ 4. He also alleges that Duquesne Light's allegedly erroneous claims of non-payment are both criminal and negligent. *Id.*

7. Before it had been served with Complainant's Amended Complaint, on January 10, 2018, Duquesne Light filed a Certificate of Satisfaction relating to the Original Complaint. A copy of the certificate is attached as Exhibit C.

8. Duquesne Light was served with the Amended Complaint one week after filing its Certificate of Satisfaction on January 17, 2018.

9. Duquesne Light filed its Answer and New Matter to the Amended Complaint on or about February 5, 2018. A copy of Duquesne Light's Answer and New Matter is attached as Exhibit D. Duquesne Light noted in its Answer and New Matter that Complainant had not objected to its Certificate of Satisfaction and averred that Complainant was barred from re-litigating the issues that had already been satisfied. Since Complainant signed and submitted

his Amended Complaint well *before* Duquesne Light filed its Certificate of Satisfaction,¹ Duquesne Light noted that it was not even clear that Complainant intended his Amended Complaint to be an attempt to re-litigate those issues.

10. Duquesne Light's New Matter averred that it had already settled the issues raised in the Amended Complaint and raised the doctrine of settlement and 52 Pa. Code § 5.24 in defense of the claims in the Amended Complaint.

11. On or about February 14, 2018, Duquesne Light received Complainant's "Cross Motion to Dismiss Respondents' Certificate of Satisfaction pursuant to Rule 41(a), which is presumably a reference to Fed.R.Civ.P. 41(a), which provides that the plaintiff may dismiss an action without a court order by filing a notice of dismissal before the opposing party serves an answer or motion for summary judgment. As relief, Complainant requested that his "cross-motion to dismiss [] be granted." A copy of this document is attached as Exhibit E. Among other things, Complainant attached a page from Duquesne Light's Certificate of Satisfaction to this document.

Law and Argument

12. Pursuant to 52 Pa. Code § 5.102(a), a party may file a motion for judgment on the pleadings after the pleadings are closed, but within a time so that the hearing will not be delayed. A hearing has not yet been scheduled in this matter, so this Motion will not delay the hearing.

13. Duquesne Light files this Motion for Judgment on the Pleadings because: (1) it has already satisfied and settled the claims asserted in the Amended Complaint; and (2) some of the issues raised in the Amended Complaint fall outside this Commission's jurisdiction.

¹ As noted above, Duquesne Light had not yet been served with the Amended Complaint when it filed its Certificate of Satisfaction.

14. A comparison of the original Complaint and the Amended Complaint shows they are based on the same alleged conduct by Duquesne Light: a missing payment from April 2016 in the amount of \$59.00 and the issuance of a termination notice in October 2017. Compare Exhibit A with Exhibit B. Duquesne Light has already filed a Certificate of Satisfaction as to those allegations. See Exhibit C.

15. In relevant part, 52 Pa Code § 5.24 provides:

(b) In lieu of the certified statement required by subsection (a), the respondent may provide a certified writing to the Commission that it has addressed the complaint and at least one of the following:

(1) That the complainant has acknowledged satisfaction to the respondent.

(2) That the complainant has acknowledged to the respondent that the complainant no longer wishes to pursue the complaint.

(c) In the case of certification of satisfaction under subsection (b), the respondent shall simultaneously serve a copy of the respondent's certified writing, including a statement informing the complainant of the complainant's right to object in writing within 10 days, upon the complainant. **Unless the complainant objects, in writing, to the certification within 10 days of its filing, the complaint docket will be marked closed.**

16. Since Complainant did not object to the Certificate of Satisfaction within 10 days,² this docket must be marked closed under the plain language of 52 Pa. Code § 5.24(c).³

² Arguably, Complainant still has not objected to the Certificate. It is unclear to Duquesne Light whether Complainant intended Exhibit E to even constitute an objection, particularly since he cited F.R.C.P. 41(a), which is a vehicle for Plaintiffs in Federal Court to voluntarily dismiss their own complaints. Nonetheless, even assuming Exhibit E was an objection to the Certificate, Complainant did not file Exhibit E for nearly a month outside the time period he was required to do so under 52 Pa. Code §5.24(c). Therefore, Exhibit E cannot circumvent the closing of the docket in this matter.

³ Furthermore, prior to the filing of the Certificate of Satisfaction, Duquesne Light contends that it reached a private settlement agreement with Complainant and that, to the extent Complainant is seeking to re-litigate those issues (and, as noted above, based on the pleadings, it is not clear that he intends to do so), he is contractually prohibited from doing so. Duquesne Light New Matter at ¶ 16. Since the Commission lacks jurisdiction over private contractual arrangements, Duquesne Light is, to its prejudice, unable to raise that defense in this forum. Leslie P. Midla v. Equitable Gas Co., C-20066385, 2007 WL 7233729, at *3 (Mar. 1, 2007) (the Commission lacks jurisdiction over private contractual disputes).

17. Since Duquesne Light settled and satisfied the Original Complaint, the Amended Complaint should be barred.

18. Moreover, the Amended Complaint contends that Duquesne Light's conduct has been both criminal and tortious, neither of which are issues this Commission has jurisdiction to resolve. Pursuant to Section 501 of the Public Utility Code, 66 Pa.C.S.A. § 501, the Commission has the power to "enforce, execute and carry out, by its regulations, orders or otherwise" all provisions of the Code. Section 701, 66 Pa.C.S.A. § 701, allows any person, having an interest in the subject matter, to file a formal complaint in writing with the Commission setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the Commission has jurisdiction to administer. Here, Complainant improperly invokes federal criminal statutes that are clearly not part of the Pennsylvania Public Utility Code or associated regulations. Nor does it have the jurisdiction to resolve a negligence claim unless jurisdiction has been acquired through the primary jurisdiction doctrine, which is not the case. Elkin v. Bell Tel. Co. of Pa., 420 A.2d 371 (Pa. 1980).

19. "The Commission must act within, and cannot exceed, its jurisdiction." *City of Pittsburgh v. Pa. Public Utility Comm'n*, 43 A.2d 348 (Pa. Super. Ct. 1945).

20. Section 703(b) of the Public Utility Code allows the Commission to dismiss any complaint without a hearing if, in its opinion, a hearing is not necessarily in the public interest. 66 Pa. C.S. § 703(b). See also, Campisi v. PECO Energy Co., Docket No. 2014-2434501, 2014 WL 4644282 at *1 (Pa. P.U.C. Sept. 3, 2014) (Salapa, ALJ) ("The provision at 52 Pa. Code § 5.101(a)(4) serves judicial economy by avoiding a hearing where no factual dispute exists.").

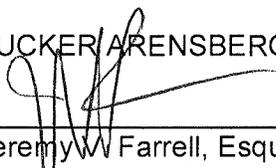
21. Duquesne Light respectfully submits that dismissal of the Amended Complaint is appropriate, without a formal hearing, for the reasons explained above. Duquesne Light should

not be compelled to litigate allegations it has already settled and satisfied in accordance with the Commission's regulations.

WHEREFORE, Respondent Duquesne Light Company respectfully requests that the Honorable Commission grant its Motion for Judgment on the Pleadings, dismiss the Amended Complaint, and mark this docket closed.

Respectfully submitted,

TUCKER/ARENSBERG, P.C.



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GENE FENDERSON,

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No: F-2017-2640070

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):

Gene Fenderson
4924 Brown Way
Pittsburgh, PA 15224

Dated this 12TH day of March, 2018



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