

September 22, 2020

*Via Electronic Filing*

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

**RE: Miranda Grace Edwards v. Duquesne Light Company**  
**Docket No. C-2018-3002741**

Dear Secretary Chiavetta:

Enclosed please find Duquesne Light Company's Motion To Strike Improper and Inadmissible Material in Complainant's Post-Hearing Brief and Reply Brief.

A copy of this document has been served upon Complainant and Administrative Law Judge Jeffrey Watson in accordance with Commission regulations.

Please feel free to contact me if you have any questions.

Sincerely,

*/s/ Paul Shane Miller*

Jeremy V. Farrell  
Attorney for Duquesne Light Company

Paul Shane Miller  
Attorney for Duquesne Light Company

Enclosure

cc: Miranda Grace Edwards (with enclosure)  
Administrative Law Judge Jeffrey Watson (with enclosures)

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

MIRANDA GRACE EDWARDS,

Complainant,

No: C-2018-3002741

vs.

DUQUESNE LIGHT COMPANY,

Respondent.

**MOTION TO STRIKE IMPROPER AND  
INADMISSIBLE MATERIAL IN  
COMPLAINANT'S POST-HEARING  
BRIEF AND REPLY BRIEF**

Filed on Behalf of:  
Duquesne Light Company

Counsel of Record for this Party:

Jeremy V. Farrell, Esquire  
PA I.D. No. 316258

Paul Shane Miller, Esquire  
PA I.D. No. 319174

Tucker Arensberg, P.C.  
1500 One PPG Place  
Pittsburgh, PA 15222  
(412) 566-1212

**NOTICE TO PLEAD**

**TO COMPLAINANT MIRANDA EDWARDS:**

**YOU ARE HEREBY NOTIFIED TO FILE A WRITTEN RESPONSE TO DUQUESNE LIGHT'S  
MOTION WITHIN 20 DAYS OR A JUDGMENT MAY BE ENTERED AGAINST YOU.**

TUCKER ARENSBERG, P.C.

/s/ Paul Shane Miller

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

MIRANDA GRACE EDWARDS,	:	
	:	
Complainant,	:	
	:	
v.	:	No: C-2018-3002741
	:	
DUQUESNE LIGHT COMPANY,	:	
	:	
Respondent.	:	

**MOTION TO STRIKE**

Respondent Duquesne Light Company (“Duquesne Light”) files this Motion to Strike Improper and Inadmissible Material in Complainant’s Post-Hearing Brief and Reply Brief pursuant to 52 Pa. Code § 5.103:

**I. Preliminary Statement**

1. The hearing in this matter took place before the Presiding ALJ on February 27, 2020. After the hearing, Complainant filed a Post-Hearing Brief and a Reply Brief, respectively. In these briefs, Complainant made a number of improper disclosures and repeatedly referred to evidence that is not in the record.

2. First, Complainant’s Post-Hearing Brief improperly disclosed confidential settlement discussions with Duquesne Light’s counsel. The Presiding ALJ should strike these disclosures because settlement discussions are inadmissible in administrative hearings.

3. Second, Complainant improperly attached seven exhibits to her Post-Hearing Brief that the Presiding ALJ already ruled were inadmissible. The Presiding ALJ

should strike these exhibits because Complainant cannot sidestep unfavorable evidentiary rulings by merely attaching excluded exhibits to her Post-Hearing Brief.

4. Finally, Complainant's Reply Brief discussed or referred to several documents and articles that she never offered into evidence. The Presiding ALJ should strike these references, documents, and articles because Complainant failed to explain why she should be allowed to introduce new evidence more than six months after the hearing. It would also be fundamentally unfair to Duquesne Light and deprive the Company of due process if new evidence is admitted into the record at this late date.

## **II. Relevant Facts**

5. On February 27, 2020, the parties participated in a telephonic hearing before the Presiding ALJ.

6. At the hearing, Complainant moved to admit nine exhibits marked as Complainant's Exhibits A, B, C, D, E, F, G, H, and I. Tr. at 124, 127, 128, 130-32, 135-43.

7. The Presiding ALJ admitted Complainant's Exhibits A and B without objection. Tr. at 124, 127.

8. Duquesne Light objected to Complainant's Exhibits C, D, E, F, G, H, and I, and the Presiding ALJ ruled that these seven exhibits were inadmissible. Tr. at 127-28, 133, 137, 139-40, 143.

9. On June 1, 2020, the Presiding ALJ issued an Interim Order Closing Evidentiary Hearing Record.

10. The next day, the Presiding ALJ reopened the hearing record "to provide the Parties an opportunity to file Main Briefs" after learning that the parties had not been

notified that he had previously set a post-hearing brief deadline. Interim Order Re-opening the Hearing Record and Establishing Briefing Schedule at 1 (issued on June 2, 2020). This Interim Order stated that post-hearing briefs were due on or before July 3, 2020. Id. at 2.

11. On July 2, 2020, Duquesne Light filed a timely Post-Hearing Brief and Proposed Findings of Fact, Conclusions of Law, and Order.

12. Complainant did not file a post-hearing brief or proposed findings of fact, conclusions or law, or order on or before July 3, 2020.

13. On July 8, 2020, at Complainant's request, the Presiding ALJ issued an Interim Order Extending Briefing Schedule, which extended Complainant's post-hearing brief deadline to August 6, 2020, and permitted both parties to file reply briefs on or before September 11, 2020.

14. On August 6, 2020, Complainant filed a Post-Hearing Brief and Proposed Findings of Fact, Conclusions of Law, and Order ("Complainant's Post-Hearing Brief").

15. Page 5 of Complainant's Post-Hearing Brief discloses confidential settlement discussions between herself and Duquesne Light's counsel, which begin as follows: "On February 22, 2020, Complainant and DLC counsel (Shane Paul Miller) [sic] spoke by phone. Mr. Miller stated . . ." <sup>1</sup> Id. at 5.<sup>2</sup>

16. Complainant also attached and relied upon the same nine exhibits to her Post-Hearing Brief that she offered at the hearing, seven of which the Presiding ALJ held to be inadmissible. See supra at ¶¶ 6-8.

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<sup>1</sup> Duquesne Light will not recite the rest of the communication to avoid disclosing confidential information.

<sup>2</sup> Complainant did not include page numbers in her Post-Hearing Brief, so Duquesne Light considers "page 1" of Complainant's Post-Hearing Brief to be the page that begins with the heading "INTRODUCTION."

17. On September 11, 2020, both parties submitted reply briefs.<sup>3</sup>

18. Complainant's Reply Brief improperly refers to several articles and documents that she never offered into evidence at the hearing and that she is not permitted to rely upon in these proceedings. See Complainant's Reply Brief at 7-8, 11-13, 15, 20-21.

### III. Argument

A. *The Presiding ALJ should strike Complainant's disclosure of confidential settlement discussions because settlement discussions are inadmissible in administrative proceedings.*

19. Under Rule 408 of the Pennsylvania Rules of Evidence, settlement offers generally are not admissible as evidence. Pa.R.E. 408 (evidence of conduct or a statement made during compromise negotiations about the claim is not admissible on behalf of any party to prove or disprove the validity or amount of a disputed claim).

20. Pennsylvania's General Rules of Administrative Practice and Procedure contain a similar rule: "Nothing contained in these rules shall be construed as precluding a participant in a proceeding from submitting at any time offers of settlement . . . [u]naccepted proposals of settlement . . . shall be privileged and are not admissible in evidence against a counsel or person claiming such privilege." 1 Pa. Code § 35.115.

21. Regulations governing hearings before the Commission also state that settlement offers are inadmissible: "Offers of settlement . . . not agreed to by every party . . . will not be admissible in evidence against a counsel or party claiming the privilege." 52 Pa. Code § 5.231(d).

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<sup>3</sup> Complainant's reply brief is titled "Response to Duquesne Light Company's Post-Hearing Brief and Proposed Findings of Fact, Conclusions of Law, and Order." For purposes of this Motion, Duquesne Light will refer to it as "Complainant's Reply Brief."

22. Finally, the Commonwealth Court and the Presiding ALJ have ruled that settlement negotiations are generally inadmissible in administrative proceedings. Shapiro v. State Bd. of Accountancy, 856 A.2d 864, 875 (Pa. Commw. Ct. 2004) (settlement offer was inadmissible in disciplinary proceeding before State Board of Accountancy); Liberty Manor Pers. Care Home v. Dep't of Pub. Welfare, No. 979 C.D. 2014, 2015 WL 5432471, at \*5 (Pa. Commw. Ct. Apr. 17, 2015) (non-precedential) (“We have applied Rule of Evidence 408 to administrative proceedings to hold that settlement offers are inadmissible.”); Sabatine v. West Penn Power Co., Docket No. C-2018-3002804, 2020 WL 2487393, at \*1 n.1 (Pa. P.U.C. Apr. 20, 2020) (Watson, ALJ) (“[C]omplainant also filed a document titled “Settlement Offer.” As settlement offers are generally not admissible as evidence . . . this document and its contents were not considered by the undersigned in drafting this Initial Decision.”).

23. Here, page 5 of Complainant’s Post-Hearing Brief revealed the substance of an alleged settlement discussion between Complainant and counsel for Duquesne Light on February 22, 2020. This alleged conversation directly relates to settlement discussions, which are inadmissible in administrative proceedings. The Presiding ALJ thus should strike this disclosure.

24. Complainant also attached Exhibit C to her Post-Hearing Brief, which is an email that contains settlement discussions with Duquesne Light’s counsel.

25. The Presiding ALJ should strike this exhibit for two reasons.

26. First, it reveals confidential settlement discussions, which are inadmissible in administrative proceedings. Second, the Presiding ALJ already ruled that Exhibit C

was inadmissible, and Complainant fails to explain why it should be admitted into the record at this late date.

*B. The Presiding ALJ should strike Exhibits D, E, F, G, H, and I because they were already excluded from evidence at the hearing.*

27. Under 52 Pa. Code § 5.431, the record at an administrative hearing will be closed at the conclusion of the hearing unless otherwise directed by the presiding officer or the Commission. 52 Pa. Code § 5.431(a).

28. After the hearing record is closed, additional matter may not be relied upon or accepted into the record unless allowed for good cause shown by the presiding officer or the Commission upon motion. 52 Pa. Code § 5.431(b).

29. The Commission must base its decisions on the evidence in the record and cannot look beyond the record to support a desired finding of fact or conclusion of law. Chailla v. Verizon Pa. LLC, Docket No. C-2019-3008691, 2020 WL 1906043 , at \*6 n.5 (Pa. P.U.C. Mar. 31, 2020).

30. The Commission prohibits parties from offering evidence into the record after the hearing because it violates the principle of “fundamental fairness” as well as “the due process rights of other parties . . .” Paul v. PECO Energy Co., Docket No. C-2015-2475355, 2019 WL 1315249, at \*13-14 (Pa. P.U.C. Mar. 14, 2019).

31. Here, the Presiding ALJ should strike Exhibits D, E, F, G, H, and I -- which are attached to Complainant’s Post-Hearing Brief -- because he already ruled that they are inadmissible. Complainant failed to show any “good cause” to admit them into evidence now. Complainant cannot sidestep the Presiding ALJ’s proper evidentiary rulings by merely attaching the excluded exhibits to her Post-Hearing Brief.

32. In addition, admitting these exhibits into evidence more than six months after the hearing would be fundamentally unfair to Duquesne Light and would deprive the Company of due process because Duquesne Light would have no opportunity to challenge or rebut the evidence.

C. *The Presiding ALJ should strike Complainant's references to documents and articles that she never offered into evidence at the hearing because admitting new evidence into the record now would be fundamentally unfair to Duquesne Light and would violate the Company's due process rights.*

33. As noted above, the Commission must base its decisions on the evidence in the record. Chailla, 2020 WL at \*6 n.5. The Commission prohibits parties from offering extra-record evidence because it violates the principle of "fundamental fairness" and the parties' due process rights. Paul, 2019 WL at \*13-14.

34. As shown in the list below, Complainant's Reply Brief discusses or refers to several documents and articles that Complainant never offered into evidence.

35. Allowing Complainant to submit new evidence now -- more than six months after the hearing -- would be fundamentally unfair to Duquesne Light and would violate the Company's due process rights because Duquesne Light would have no opportunity to respond to or rebut the evidence.

36. Moreover, the new evidence discussed or referenced by Complainant's Reply Brief would have been inadmissible if she offered it into evidence at the hearing for several reasons.

37. First, the articles and documents appear to be irrelevant to the subject matter of this case, which is whether Duquesne Light has a right to install a smart meter at Complainant's residence and attempted to do so in a reasonable manner.

38. In addition, the articles and documents are hearsay because the individuals who wrote them did not testify at the hearing, and Complainant is offering them for the truth of the matter asserted in the document or article. Pa.R.E. 801 (hearsay is an out of court statement offered for the truth of the matter asserted). These hearsay articles and documents thus could not support a finding of fact in this proceeding. See Hoffman-Lorah v. PPL Elec. Utilities Corp., Docket No. C-2018-2644957, 2019 WL 2325713, at \*10 n.6 (Pa. P.U.C. May 23, 2019) (a finding of fact based solely on hearsay will not stand).

39. The list below shows each instance where Complainant's Reply Brief discusses or refers to new evidence that should be stricken:

- Complainant's Reply Brief discusses "Polarization: A Key Difference between Man-made and Natural Electromagnetic Fields, in regard to Biological Activity" by Dimitris J. Panagopoulos, Olle Johansson & George L. Carlo. Complainant's Reply Brief at 7.
- Complainant's Reply Brief discusses testimony by Dr. De-Kun Li to the FCC, available here: <https://ecfsapi.fcc.gov/file/7022311506.pdf>. Id.
- Complainant's Reply Brief discusses "a growing body of evidence from independent researchers around the world," which is available here: <https://ecfsapi.fcc.gov/file/10607967426295/International-Policy-Precautionary-Actions-on-Wireless-Radiation.pdf>. Id. at 7, 13.
- Complainant's Reply Brief discusses the following articles relating to UL certification standards: <https://www.metlabs.com/meters/new-ul-2735-electric-utility-meter-standard-ensures-safety-and-performance/>; <https://standardscatalog.ul.com/ProductDetail.aspx?productId=UL2735>. Id. at 8, 15, 20.
- Complainant's Reply Brief discusses several articles purportedly relating to Itron: <https://blogs.itron.com/real-time-load-disaggregation/>; <https://www.itron.com//media/feature/products/documents/brochure/load-disaggregation.pdf>; <https://www.nasdaq.com/press->

release/itron-and-bidgely-bring-combined-distributed-intelligence-and-next-gen-enterprise. Id. at 11, 12, 15, 21.

- Complainant's Reply Brief cites the following article: [https://www.itron.com/-/media/resources/consumer-resource-center/itron\\_meters\\_and\\_ulcertification.pdf](https://www.itron.com/-/media/resources/consumer-resource-center/itron_meters_and_ulcertification.pdf). Id. at 15, 20.
- Complainant's Reply Brief states that the following website shows that smart meters have been associated with fires: <https://www.house.mi.gov/sessiondocs/2017-2018/testimony/Committee420-3-7-2017-5.pdf>. Id. at 20.

#### IV. CONCLUSION

40. Complainant's Post-Hearing Brief and her Reply Brief improperly disclose confidential settlement discussions, attempt to admit evidence that was already excluded, and seek to introduce new evidence. All of these actions are against the applicable rules, and so the subject statements should be stricken.

WHEREFORE, Duquesne Light Company respectfully requests that the Presiding ALJ grant its Motion to Strike Improper and Inadmissible Material in Complainant's Post-Hearing Brief and Reply Brief.

Respectfully submitted,

TUCKER ARENSBERG, P.C.

*/s/ Paul Shane Miller*

Jeremy V. Farrell, Esquire  
PA I.D. No. 316258  
(412) 594-3938

Paul Shane Miller, Esquire  
PA I.D. No. 319174  
(412) 594-5503

1500 One PPG Place  
Pittsburgh, PA 15222

Counsel for Respondent,  
Duquesne Light Company

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

MIRANDA EDWARDS,	:	
	:	
Complainant,	:	
	:	
vs.	:	No: C-2018-3002741
	:	
DUQUESNE LIGHT COMPANY,	:	
	:	
Respondent.	:	

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true copy of the foregoing Motion to Strike Improper and Inadmissible Material in Complainant's Post-Hearing Brief and Reply Brief upon the participants listed below in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant):

Miranda Edwards  
3835 Acorn Street  
Pittsburgh, PA 15207  
(via e-mail and U.S. First Class Mail)

Administrative Law Judge Jeffrey Watson  
Pennsylvania Public Utility Commission  
Piatt Place - 301 Fifth Avenue  
Suite 220  
Pittsburgh, PA 15222  
(via e-mail only)

Dated this 22<sup>nd</sup> day of September, 2020

/s/ Paul Shane Miller  
Jeremy V. Farrell, Esquire  
PA I.D. No. 316258  
(412) 594-3938  
[jfarrell@tuckerlaw.com](mailto:jfarrell@tuckerlaw.com)  
Paul Shane Miller, Esquire  
PA I.D. No. 319174  
(412) 594-5503  
[smiller@tuckerlaw.com](mailto:smiller@tuckerlaw.com)  
1500 One PPG Place  
Pittsburgh, PA 15222  
(412) 594-5619 (fax)

TADMS:5370570-1 014657-158498

Counsel for Respondent,  
Duquesne Light Company