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June 15, 2021

**Via Electronic Filing**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Keystone Bldg. 2nd Floor W  
400 N. Street  
Harrisburg, PA 17120

**RE: Todd Koger v. Duquesne Light Company**  
**Docket No. C-2021-3026214**

Dear Secretary Chiavetta:

Enclosed please find Duquesne Light Company's Preliminary Objections to the Formal Complaint filed by Todd Koger at the above mentioned docket. A copy of this document and the enclosed filing were served upon Complainant, as indicated on the Certificate of Service.

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

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "Emily M. Farah", is written over a faint, larger version of the signature.

Emily M. Farah  
Counsel, Regulatory

cc: Todd Koger (w/encl.)

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

TODD KOGER, SR.	:	
	:	
Complainant,	:	
	:	
v.	:	No: C-2021-3026214
	:	
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 TODD KOGER, SR.:**

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

DUQUESNE LIGHT COMPANY



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Emily M. Farah  
Counsel for Duquesne Light Company

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

TODD KOGER, SR.	:	
	:	
Complainant,	:	
	:	
v.	:	No: C-2021-3026214
	:	
DUQUESNE LIGHT COMPANY,	:	
	:	
Respondent.	:	

**PRELIMINARY OBJECTIONS**

Pursuant to 52 Pa. Code § 5.101(a)(1) and 52 Pa. Code § 5.101(a)(6), Duquesne Light files its preliminary objections to Complainant Todd Koger Sr.’s formal complaint, and states as follows:

**I. INTRODUCTION**

1. Duquesne Light seeks to dismiss the above-captioned formal complaint (“2021 Complaint”) in its entirety for three reasons. First, the Pennsylvania Public Utility Commission (“Commission”) lacks jurisdiction to rule on the portions of the 2021 Complaint rooted in the United States Code, 42 USC 1981, 1983, and 1985. 2021 Complaint ¶ 4. Second, the Commission lacks jurisdiction to grant Complainant the requested relief, namely, civil monetary damages. 2021 Complaint ¶ 5. Third, the allegations in the 2021 Complaint are subject to a consolidated proceeding awaiting an Initial Decision, identified by Docket Nos. C-2019-3013238 (“2019 Complaint”) and Docket No. C-2020-3020394 (“2020 Complaint”) (the 2019 Complaint and the 2020 Complaint will be collectively referred to as the “Consolidated Complaints”). See 2021 Complaint ¶¶ 4, 7(b)-(c).

2. Because the Commission lacks jurisdiction over the Complainant's allegations in the Complaint, and because the Complainant has a pending proceeding regarding the same causes of action, the 2021 Complaint must be dismissed in its entirety.

3. Should the Commission conclude that the 2021 Complaint should not be dismissed, Duquesne Light respectfully requests that the Commission either: (a) consolidate the 2021 Complaint with the Consolidated Complaints, or (b) stay the 2021 Complaint proceeding until final adjudication of the Consolidated Complaints.

4. Duquesne Light further requests the Commission enter an Order precluding the Complainant from filing any additional complaints until the Consolidated Complaints are fully adjudicated.

## **II. BASIS FOR PRELIMINARY OBJECTIONS**

5. The Commission's Rules of Practice and Procedure permit parties to file preliminary objections. The grounds for preliminary objections are limited to those set forth in 52 Pa. Code § 5.101(a) as follows:

- (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
- (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
- (3) Insufficient specificity of a pleading.
- (4) Legal insufficiency of a pleading.
- (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
- (6) Pendency of a prior proceeding or agreement for alternative dispute resolution.
- (7) Standing of a party to participate in the proceeding.

6. The Commission's procedural regulations allow a party to file a preliminary objection to pleadings that fail to comply with the rules of administrative practice or where the Commission lacks jurisdiction over the proceeding. See 52 Pa. Code § 5.101(a)(1).

7. The Commission's procedural regulations also allow a party to file a preliminary objection to pleadings on the basis that there is a pending prior proceeding or agreement for alternative dispute resolution. See 52 Pa. Code § 5.101(a)(6).

8. On June 2, 2021, the Company was electronically served with Complainant's Formal Complaint at the above-captioned docket.

9. Duquesne Light is timely filing its Answer contemporaneously with these Preliminary Objections.

10. As more fully set forth below, these Preliminary Objections request the Commission dismiss the above-captioned Formal Complaint in its entirety due to the lack of Commission jurisdiction over federal law, lack of Commission jurisdiction to grant monetary damages, and the pendency of prior proceedings related to the same issues.

11. In the event the Commission does not dismiss the 2021 Complaint, Duquesne Light respectfully requests that the Commission either: (a) consolidate the 2021 Complaint with the Consolidated Complaints, or (b) stay the 2021 Complaint proceeding until final adjudication of the Consolidated Complaints.

12. Additionally, Duquesne Light respectfully requests the Commission enter an Order forbidding the Complainant from filing any additional complaints until all of the aforementioned active proceedings are finally adjudicated.

### **III. ARGUMENT**

A. The portions of the 2021 Complaint alleging violations of federal law must be dismissed because the Commission lacks jurisdiction to adjudicate claims arising from the United States Code.

13. Commission regulations allow parties to file preliminary objections on the basis that the Commission lacks jurisdiction over the proceeding. 52 Pa. Code § 5.101(a)(1).

14. The Commission lacks subject matter jurisdiction to decide the Complainant's allegations regarding violation of the United States Code, Equal Rights Under the Law, 42 USC § 1981, Civil Action for Deprivation of Rights 42 USC § 1983, and Conspiracy to Interfere with Civil Rights, 42 USC § 1985.

15. The Commission may only exercise powers that are expressly conferred upon it by the legislature. See Feingold v. Bell of Pa., 383 A.2d 791, 794 (Pa. 1978).

16. The Commission must act within its jurisdiction, and may only hear complaints regarding the Pennsylvania Code, Commission Regulations, or Commission Order. 66 Pa. C.S. § 701; Haleema B. Alkhatib v. PECO Energy Co., Docket No. C-2011-2242125, 2012 WL 641672, at \*5 (Jan. 12, 2012); City of Pittsburgh v. Pa. Pub. Util. Comm'n., 43 A.2d 348, 348 (Pa. Super. 1945).

17. The Commission does not have jurisdiction over claims arising under the United States Code. White v. PPL Elec. Utilities Corp., Docket No. C-2018-3003468, 2019 WL 2250756 (May 6, 2019) (stating the Commission has no jurisdiction to determine if an issue violates a complainant's constitutional rights).

18. The Commission has held that claims relating to violations of the United States Constitution were beyond the Commission's subject matter jurisdiction. See James Coppedge v. PECO Energy Co., Docket No. F-2009-2135893, 2010 WL 3183815, at \*1 (July 29, 2010).

19. Here, the 2021 Complaint alleges that the Company violated Complainant's constitutional rights by allegedly violating the federal laws, 42 USC §§ 1981, 1983, and 1985. See 2021 Complaint ¶ 4.

20. Application and interpretation of the constitution and federal law are outside of the Commission's express jurisdiction of Pennsylvania Code, Commission Regulations, or Commission Order. Complaint, ¶ 4; 66 Pa. C.S. § 701; Haleema B. Alkhatib v. PECO Energy Co., Docket No. C-2011-2242125, 2012 WL 641672, at \*5 (Jan. 12, 2012).

21. Therefore, the Commission lacks jurisdiction over the Complainant's allegations that are rooted in alleged constitutional violations and alleged violations of federal law.

22. Consequently, because the Commission lacks jurisdiction, the portions of the 2021 Complaint that allege violations of federal law must be dismissed pursuant to 52 Pa. Code § 5.101(a)(1).

B. The 2021 Complaint must be dismissed in its entirety because the Commission does not have jurisdiction to grant the Complainant the requested relief in the form of civil damages.

23. The above paragraphs are incorporated as if fully restated herein.

24. The Complaint is requesting to be "made 'whole'" by way of "compensatory relief and 'punitive damages.'" 2021 Complaint ¶ 5.

25. Clearly, the relief sought in the 2021 Complaint is an award of monetary damages from the Company.

26. It is well established that the Commission does not have jurisdiction over actions for damages. Horowitz v. PECO, Docket No. C-2013-2382740, 2013 WL 7019109, at \*3 (Dec. 30, 2013).

27. In Elkin v. Bell Telephone Co., 420 A.2d 371 (Pa. 1980), the Superior Court of Pennsylvania stated: "The courts retain jurisdiction of a suit for damages based on negligence or breach of contract wherein a utility's performance of its legally imposed and contractually

adopted obligations are examined and applied to a given set of facts.” Elkin, 420 A.2d at 379 (citations omitted).

28. Further, “[t]here is no question that the Commission lacks authority to award damages.” Horowitz at \*3, citing Terminato v. Pa. National Insurance Co., 645 A.2d 1287 (Pa. 1994); Elkin v. Bell Telephone Co., 420 A.2d 371 (Pa. 1980); Feingold v. Bell Telephone Co. of Pa., 383 A.2d 791 (Pa. 1977); Ostrov v. I.F.T., Inc., 586 A.2d 409 (Pa. Super. 1991); Poorbaugh v. Pa. Pub. Util. Comm’n, 666 A.2d 744 (Pa. Cmwlth. 1995).

29. The Commission’s jurisdiction is limited only to “regulatory matters essential to utility service.” Horowitz at \*3.

30. Because Complainant’s requested relief is a request for monetary compensation, and granting of such relief is outside the Commission’s jurisdiction, the 2021 Complaint must be dismissed in its entirety.

C. The Complaint must be dismissed because the issues raised in the 2021 Complaint are subject to a proceeding that is currently pending before an Administrative Law Judge.

31. The above paragraphs are incorporated as if fully restated herein.

32. Commission regulations allow preliminary objections to be filed because of the pendency of a prior proceeding. 52 Pa. Code § 5.101(a) (6).

33. On September 30, 2019, the Complainant filed the 2019 Complaint alleging, among other things, that the Company threatened to shut off his service or had already terminated his service. See Answer **Exhibit A**; 2021 Complaint ¶¶ 4, 7(b)-(c).

34. On January 9, 2020, and February 25, 2020, the parties participated in telephonic hearings before an Administrative Law Judge.

35. At the hearings, the parties litigated a number of issues, including whether there was any wrongdoing associated with Complainant's participation in customer assistance programs, including the Low Income Home Energy Assistance Program ("LIHEAP"), whether the Company improperly threatened to terminate his residential electric service, and whether there was any wrongdoing related to the enrollment with an Electric Generation Supplier ("EGS").

36. An Initial Decision has not yet been issued for the Consolidated Complaints.

37. On June 16, 2020, the Complainant filed another formal complaint ("2020 Complaint") raising various allegations, including whether the Company improperly threatened to terminate electric service to 515 Kelly Avenue, Pittsburgh, PA 15221. See Answer **Exhibit B**; 2021 Complaint ¶¶ 4, 7(b)-(c).

38. By Order dated October 14, 2020, the 2019 Complaint and the 2020 Complaint (collectively, "Consolidated Complaints") were consolidated. See Answer **Exhibit C**; 2021 Complaint ¶¶ 4, 7(b)-(c).

39. An Initial Decision has not yet been issued for the Consolidated Complaints.

40. On June 2, 2021, the Company was served with a third formal complaint, docketed at C-2021-3026214 ("2021 Complaint"), raising similar allegations addressed in the Consolidated Complaints, including claim(s) that Duquesne Light improperly threatened to terminate Complainant's electric service; claim(s) that Duquesne Light violated federal law; and claim(s) alleging improper handling of LIHEAP grant(s).

41. To successfully plead the defense of pendency of a prior proceeding or *lis pendens*, "it must be shown that the prior case is the same, the parties are the same and the relief requested is the same." Crutchfield v. Eaton Corp., 806 A.2d 1259, 1263 (Pa. Super

2002); Penox Technologies, Inc. v. Foster Medical Corp., 546 A. 2d 114, 115 (Pa. Super. 1988).

42. The *lis pendens* defense protects “a defendant from the harassment of having to defend several suits on the same cause of action at the same time. Crutchfield v. Eaton Corp., 806 A.2d 1259, 1263 (Pa. Super 2002); Penox Technologies, Inc. v. Foster Medical Corp., 546 A. 2d 114, 115 (Pa. Super. 1988).

43. When “the *lis pendens* defense is raised, a court may dismiss or stay the subsequent proceeding.” Crutchfield v. Eaton Corp., 806 A.2d 1259, 1263 (Pa. Super 2002); Penox Technologies, Inc. v. Foster Medical Corp., 546 A. 2d 114, 115 (Pa. Super. 1988).

44. Here, the participating parties and the issues litigated under the Consolidated Complaints and the 2021 Complaint are identical.

45. Because the Consolidated Complaints are pending and awaiting an initial decision from an Administrative Law Judge, the 2021 Complaint must be dismissed or stayed.

46. Specifically, the issues raised by the Complainant in the Present Complaint and the issues raised during litigation for the Consolidated Complaints are related to Duquesne Light’s attempts to terminate Complainant’s electric service, the application of LIHEAP funds to Complainant’s electric account, and alleged violations of federal law.

47. In conclusion, the Commission should dismiss the 2021 Complaint, to protect Duquesne Light from the harassment of having to defend several suits on the same cause of action at the same time.

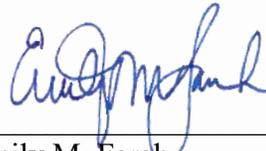
48. In the event the Commission does not dismiss the 2021 Complaint, Duquesne Light respectfully requests that the Commission either: (a) consolidate the 2021 Complaint

with the 2019 Complaint and the 2020 Complaint, or (b) stay the 2021 Complaint proceeding until final adjudication of the Consolidated Complaints.

49. Additionally, Duquesne Light respectfully requests the Commission enter an Order forbidding the Complainant from filing any additional complaints until all of the aforementioned active proceedings are finally adjudicated.

**WHEREFORE**, Duquesne Light Company respectfully requests that the Commission sustain its Preliminary Objections and dismiss the above-captioned formal complaint with prejudice.

DUQUESNE LIGHT COMPANY



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Emily M. Farah  
Counsel for Duquesne Light Company

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

TODD KOGER, SR.	:	
	:	
Complainant,	:	
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v.	:	No: C-2021-3026214
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DUQUESNE LIGHT COMPANY,	:	
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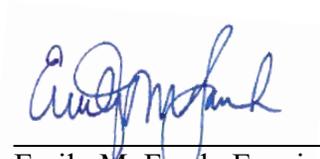
**CERTIFICATE OF SERVICE**

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

**VIA FIRST-CLASS MAILING ONLY**

Todd Koger, Sr.  
515 Kelly Avenue  
Pittsburgh, PA 15221

Dated this 15th day of June 2021.



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Emily M. Farah, Esquire  
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Counsel for Respondent, Duquesne Light  
Company