**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission : R-2021-3024750

Office of Consumer Advocate : C-2021-3025538

Office of Small Business Advocate : C-2021-3025462

 :

 v. :

 :

Duquesne Light Company :

**ORDER**

**DENYING PRELIMINARY OBJECTION**

**FILED BY DUQUESNE LIGHT COMPANY**

**AGAINST NATIONWIDE ENERGY PARTNERS, LLC**

**AND GRANTING MOTION TO CONSOLIDATE**

On April 16, 2021, Duquesne Light Company (Duquesne) filed Supplement No. 25 – PA P.U.C. No. 25 to become effective June 15, 2021 seeking an increase in total annual operating revenues for electric service by approximately $115 million, which includes rolling the Distribution System Improvement Charge (DSIC) Rider charges into base rates. If the Company’s entire request is approved, the proposed metered usage rates would increase from $100.12 to $107.85 per month, or by 7.72% for a residential customer using 600 kWh per month.

On April 23, 2021, the Office of Small Business Advocate (OSBA) filed a formal complaint and public statement against the tariff filing, docket number C-2021-3025462, averring, among other things, that upon review of the materials filed by Duquesne, those materials may be insufficient to justify the rate increase requested. On April 23, 2021, the Commission’s Bureau of Investigation and Enforcement (I&E) intervened into this case. On April 27, 2021, the Office of Consumer Advocate (OCA) filed a formal complaint and public statement against the tariff filing, docket number C-2021-3025538, averring, among other things, that a preliminary examination of Duquesne’s rate increase request indicates that the present rates, rules and regulations are not just and reasonable or otherwise proper under the Public Utility Code and applicable ratemaking principles. Petitions to intervene were filed by the Pennsylvania Weatherization Providers Task Force, Inc. (PWPTF), the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA), the Natural Resources Defense Council (NRDC), United States Steel Corporation (U.S. Steel), and Peoples Natural Gas Company LLC (Peoples).

On May 20, 2021, the Commission suspended the filing by operation of law until January 15, 2022 pursuant to Section 1308(d) of the Public Utility Code, unless permitted by the Commission to become effective at an earlier date. The Commission added that investigation and analysis of the proposed tariff filing and the supporting data indicate that the proposed changes in rates, rules and regulations may be unlawful, unjust, unreasonable and contrary to the public interest. The Commission determined that consideration should be given to the reasonableness of Duquesne’s existing rates, rules and regulations. The Commission assigned the case to the Office of Administrative Law Judge for the prompt scheduling of hearings as may be necessary culminating in the issuance of a Recommended Decision.

On May 25, 2021, Nationwide Energy Partners, LLC (Nationwide) filed a formal complaint against the tariff filing, docket number C-2021-3026057, averring, among other things, that based on the terms and interpretation of its tariff provisions relating to master metering for commercial buildings, specifically Tariff Rule 18 and Rule 41, Duquesne is depriving certain of its commercial customers of the opportunity to reduce their rates for service and, therefore, Duquesne’s current and proposed rates may be contrary to law. Nationwide averred in its complaint that it is a provider of submetering and conservation/efficiency services specializing in serving multi-tenant commercial buildings and that it has received requests from Duquesne customers to expand its services into Duquesne’s service territory. Nationwide further argued, among other things, that Duquesne’s current tariff contains a ban or severely limits the use of new master metering arrangements in tenant-occupied buildings that Nationwide needs to provide its service. Nationwide opposed Duquesne’s proposed rate increase because it is depriving certain of its commercial customers the opportunity to reduce their rates for service.

On May 27, 2021, a prehearing conference was convened amongst the parties wherein various procedural matters were addressed. A Scheduling Order was issued on May 28, 2021, which, among other things, consolidated the OCA and the OSBA complaints with the Commission’s investigation at docket number R-2021-3024750, granted the petitions to intervene of CAUSE-PA, U.S. Steel, PWPTF, and NRDC, and provided Duquesne until June 4, 2021 to file any answer or response to the complaint filed by Nationwide and the petition to intervene filed by Peoples.

On June 2, 2021, and in response to a request from the presiding officers, Nationwide filed a motion to consolidate its formal complaint with Duquesne’s general rate case, arguing that such consolidation is consistent with the Commission’s regulations and precedent and will promote judicial economy and administrative efficiency because there are common questions of law and fact.

On June 4, 2021, Duquesne filed an answer to Nationwide’s complaint. In its answer, Duquesne admitted in part and denied in part the various averments made by Nationwide in its complaint. Duquesne denied Nationwide’s characterization of the company’s current and proposed master metering tariff rules, namely Rule 18 and Rule 41, and attached copies of those tariffs to its answer. Duquesne also denied that its master metering tariff provisions deprive certain commercial customers the opportunity to reduce their rates but averred that those provisions are the result of expressed stakeholder interest and are intended to ensure residential tenant protections. Duquesne also asserted that Nationwide does not have standing to be granted party status in this proceeding and that Nationwide is not entitled to the relief it seeks.

Also on June 4, 2021, Duquesne filed a preliminary objection in response to Nationwide’s complaint. In its preliminary objection, which was accompanied by a notice to plead, Duquesne argued that Nationwide’s complaint should be dismissed in its entirety because Nationwide does not have a direct, immediate or substantial interest in the proceeding and therefore lacks standing to bring its complaint. Duquesne added that Nationwide’s interest is not direct because Nationwide is not a Duquesne customer, nor does it provide service in Duquesne’s service territory. Duquesne also argued that Nationwide’s interest is not immediate because there is no nexus between Nationwide’s ability to provide any future energy conservation services and the master metering proposal in the rate filing. Duquesne then argued that Nationwide’s interest is not substantial because Nationwide’s interest is no different than the general interest of a member of the public which is inadequate to confer standing. Duquesne concluded that Nationwide should be denied party status in this proceeding.

On June 9, 2021, Nationwide filed an answer to Duquesne’s preliminary objection. In its answer, Nationwide argued that, by attempting to obtain dismissal of Nationwide’s complaint in this proceeding, Duquesne is repeating the legal error it committed in its prior base rate increase case when it attempted to exclude the participation of Peoples. Nationwide noted that the Commission decisively rejected Duquesne’s arguments in the prior rate case and the arguments should be rejected here again. Nationwide also responded to Duquesne’s arguments that its interest is not direct, immediate and substantial. Nationwide argued that the lack of customer status is not relevant to standing when the complaint does not involve the quality of a utility’s service which Nationwide is not doing here. Nationwide argued that Duquesne’s argument that Nationwide’s interest is not immediate because Duquesne has only offered a proposed metering tariff is untenable because resolution of the relevant issues Nationwide requires will occur in this proceeding. Finally, Nationwide argued that Duquesne’s argument that Nationwide’s interest is no greater than that of a general member of the public is also without merit because Nationwide is advancing very specific interests that also impact commercial and residential customers in Duquesne’s service territory. Nationwide concluded that Duquesne’s preliminary objection should be denied.

On June 8, 2021, Sean Ferris filed a formal complaint against the rate increase at docket number C-2021-3026365 and on June 14, 2021 Jan Vroman filed a formal complaint against the rate increase at docket number C-2021-3026521. Also on June 14, 2021, IBEW Local 29 filed a petition to intervene.

Duquesne’s preliminary objection is ready for disposition. For the reasons discussed below, Duquesne’s preliminary objection will be denied, Nationwide’s complaint will be consolidated with this proceeding and Nationwide will be given full party status.

Section 5.101 of the Commission’s rules of administrative practice and procedure provides for the filing of preliminary objections. 52 Pa.Code § 5.101. Commission preliminary objection practice is comparable to Pennsylvania civil practice respecting the filing of preliminary objections. Equitable Small Transportation Intervenors v. Equitable Gas Company*,* 1994 Pa PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994) (Equitable). Section 5.101(a) provides:

(a) *Grounds.* Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections. Preliminary objections must be accompanied by a notice to plead, must state specifically the legal and factual grounds relied upon and be limited to the following:

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 a proceeding.

52 Pa.Code § 5.101(a)(1)-(7).

For purposes of disposing of preliminary objections, the Commission must accept as true all well pleaded, material facts of the nonmoving party, as well as every reasonable inference from those facts. County of Allegheny v. Commonwealth of Pennsylvania, 490 A.2d 402 (Pa. 1985); Commonwealth of Pennsylvania v. Bell Telephone Co. of Pa., 551 A.2d 602 (Pa. Cmwlth. 1988). The Commission must view the complaint in this case in the light most favorable to Nationwide and should dismiss the complaint only if it appears that Nationwide would not be entitled to relief under any circumstances as a matter of law. Equitable, *supra*; *see also*, Interstate Traveler Services, Inc. v. Commonwealth, Department of Environmental Resources, 406 A.2d 1020 (Pa. 1979).

In this case, Duquesne argued that Nationwide lacks standing to participate in the proceeding involving Duquesne’s request to increase its base rates. When viewing Nationwide’s complaint in the light most favorable to Nationwide and accepting as true all well pleaded averments in the complaint, as well as every reasonable inference from those averments, it is clear that Nationwide may be entitled to relief as a matter of law. As a result, Duquesne’s preliminary objection will be denied.

As an initial matter, in disposing of Duquesne’s preliminary objection, a review of the Commission’s decision in Duquesne’s last base rate proceeding involving Peoples that Nationwide referenced in its answer is necessary.

In Duquesne’s last base rate proceeding,[[1]](#footnote-1) the Commission answered in the affirmative a petition for interlocutory review and answer to material question filed by Peoples which sought a determination of whether the Administrative Law Judge (ALJ) erred in granting a motion for partial judgment on the pleadings that dismissed Peoples from that case. Peoples had filed a complaint in response to Duquesne’s base rate filing objecting to Duquesne’s proposal to more than double the backup service charges imposed on non-utility generating facilities and increase charges when distributed generation customers exceed the capacity reservation limits. Peoples had averred that it had existing customers using distributed generation projects in Duquesne’s service territory, including combined heat and power (CHP) projects. Peoples contended that Duquesne’s actions in the base rate case would adversely affect reliability and public safety and the increases would have an adverse economic impact on Peoples because higher rates would impact its pursuit of distributed generation projects. Duquesne argued that Peoples did not have standing to pursue claims on behalf of Peoples’ customers.

The ALJ agreed with Duquesne and issued an interim order granting the motion and precluding Peoples from pursuing those issues in that proceeding.

The Commission, however, treated the motion for partial judgment on the pleadings as a preliminary objection and answered the material question in the affirmative – that the ALJ erred in precluding Peoples’ participation in the base rate proceeding. The interim order was reversed and Peoples was allowed party status. In doing so, the Commission relied on the Pennsylvania Supreme Court decision in William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975), and determined that, when accepting as true the averments in Peoples’ complaint, Peoples has standing. The Commission held that “viewed in the light most favorable to Peoples, we find that Duquesne’s proposed changes in Rider 16 have a direct, immediate and substantial impact on Peoples because they impact the economic viability of CHP and other distributed generation projects being developed by [Peoples].” The Commission then referenced its final policy statement regarding CHP development.

The facts and circumstances in this case are analogous. In its complaint, Nationwide averred it is a provider of submetering and conservation/efficiency services specializing in multi-tenant commercial buildings and has received several requests from Duquesne customers to expand its services in Pennsylvania into Duquesne’s service territory. Nationwide noted that Duquesne’s current tariff contains a ban or severely limits the use of new master metering arrangements in tenant-occupied buildings. Nationwide then argued that Duquesne is depriving certain of its commercial customers of the opportunity to reduce their rates for service. Nationwide noted Tariff Rule 41 that Duquesne has specifically indicated it is changing as part of this proceeding that, along with Tariff Rule 18, should be examined and revised to ensure that their terms and conditions are interpreted and applied in a lawful, just, reasonable and non-discriminatory manner so as to provide enhanced value and services to customers.

These averments must be accepted as true when disposing of Duquesne’s preliminary objections. When doing so, and in light of the Commission’s ruling in Duquesne’s prior base rate proceeding regarding Peoples, it is clear that Nationwide’s interest is direct, immediate and substantial and, therefore, Nationwide has standing. In particular, Nationwide averred that Duquesne has specifically indicated that it is changing its Tariff Rule 41 as part of this proceeding. In addition, however, a review of Tariff Rule 18 would also be relevant in Duquesne’s general base rate proceeding.

With regard to Tariff Rule 41, Nationwide has averred that the proposed changes to Tariff Rule 41 may be unjust, unlawful, unreasonable and applied in a discriminatory manner. Such averment is sufficient to warrant denying Duquesne’s preliminary objection and allowing Nationwide to proceed with party status. Nationwide’s interest in the changes proposed by Duquesne to Tariff Rule 41 is direct, immediate and substantial. The interest is direct because the terms and conditions of Tariff Rule 41 impact Nationwide’s business model of providing benefits to customers that participate in the master metering services. This is true regardless of whether Nationwide currently has any customers in Duquesne’s service territory, so long as it impacts Nationwide’s ability to have customers in Duquesne’s service territory, especially as Nationwide indicated that customers in Duquesne’s service territory have expressed an interest in the services provided by Nationwide. Nationwide’s interest in this proceeding is immediate because Duquesne has proposed the use of master meters in multi-family property owner settings. Nationwide’s interest in this proceeding is also substantial because Nationwide’s ability to conduct business in Duquesne’s service territory is completely dependent on the resolution of the issues raised in this proceeding. It is possible that Nationwide would not be able to serve customers in Duquesne’s territory depending on the outcome of this proceeding. As a result, Nationwide has standing and Duquesne’s preliminary objection must be denied.

Finally, in addition, Nationwide’s motion to consolidate its complaint with the Duquesne base rate case is granted because there are common issues of law and fact. *See*, 52 Pa. Code § 5.81 (“the Commission or presiding officer, with or without motion, may order proceedings involving a common question of law or fact to be consolidated.”). Furthermore, the motion is unopposed.

In conclusion, the preliminary objection filed by Duquesne must be denied. When accepting as true all well pleaded averments of material fact in Nationwide’s complaint, as well as every reasonable inference from those averments, and viewing the complaint in the light most favorable to Nationwide, as is required when disposing of Duquesne’s preliminary objection, it is clear and free from doubt that the Commission has jurisdiction to hear matters alleging tariffs that are applied in a lawful, just, reasonable and non-discriminatory manner.

Nationwide is advised, however, that, at a hearing, it must support its complaint by a preponderance of the evidence in order to have its complaint sustained. This standard is higher than that which Duquesne’s preliminary objection was addressed. In addition, all decisions of the Commission must be supported by substantial evidence. In the interim, however, Duquesne’s preliminary objection must be denied consistent with the above discussion.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the preliminary objection filed by Duquesne Light Company against Nationwide Energy Partners, LLC on June 4, 2021 at Docket Numbers R-2021-3024750 and C-2021-3026057 is hereby denied.
2. That the motion to consolidate filed by Nationwide Energy Partners on June 2, 2021 at Docket Numbers R-2021-3024750 and C-2021-3026057 is hereby granted.

Date: June 21, 2021 /s/

 Joel H. Cheskis

 Deputy Chief Administrative Law Judge

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 John M. Coogan

 Administrative Law Judge

**R-2021-3024750 - PA PUBLIC UTILITY COMMISSION et al v. DUQUESNE LIGHT COMPANY**

*Updated 06/09/21*

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1. Docket No. R-2018-3000124 [↑](#footnote-ref-1)