

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

Public Meeting held June 16, 2022

Commissioners Present:

Gladys Brown Dutrieuille, Chairman
John F. Coleman, Jr., Vice Chairman
Ralph V. Yanora

Kim Wilkes

C-2021-3027702

v.

Duquesne Light Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Katarina L. Dunderdale, issued on March 29, 2022, in the above-captioned proceeding. No Exceptions have been filed. However, we have exercised our right to review the Initial Decision pursuant to Section 332(h) of the Public Utility Code (Code), 66 Pa. C.S. § 332(h). For the reasons stated below, we shall adopt the Initial Decision, as modified, consistent with this Opinion and Order.

History of the Proceeding

On July 28, 2021, Kim Wilkes (Ms. Wilkes or Complainant) filed a Formal Complaint (Complaint) with the Pennsylvania Public Utility Commission (Commission) against Duquesne Light Company (Duquesne or Respondent) (collectively, the Parties). The Complainant alleged there were incorrect charges on her bills from January 2021 through July 2021,¹ and the rates listed were too high in comparison to her usage. Complaint at 1-11.

On August 24, 2021, Duquesne filed its Answer and New Matter. The Respondent acknowledged the Complainant is a residential customer but denied there were incorrect charges on the billing statements. Duquesne averred the monthly billing statements were based on actual meter reads taken from an electric meter which met the Commission's standards of accuracy. Answer at 1-3.

In New Matter, the Respondent alleged Ms. Wilkes has filed nine formal and informal complaints with the Commission against Duquesne within the last two years. *Id.* at 3. Duquesne asserted the Complainant filed a prior complaint in October 2020, at Docket No. F-20203022227, in which the Complainant alleged incorrect charges appeared on her electric bills. *Id.* The Respondent contended the prior formal complaint resulted in an evidentiary hearing on November 24, 2020, and an Initial Decision was issued on February 3, 2021. *Id.* Duquesne asserted the administrative law judge in the prior formal complaint dismissed the Complainant's allegations about incorrect measurement of consumption and incorrect charges based on consumption.²

¹ At the initial hearing, Ms. Wilkes was permitted to argue the incorrect charges continued through September 2021.

² Ms. Wilkes did not file exceptions to the Initial Decision dated February 3, 2021, and the Initial Decision became final on March 9, 2021, when the Commission entered a Final Order.

Duquesne argued the Complainant has a pattern of filing complaints with the Commission alleging incorrect charges and that she has been abusing the Commission's processes by complaining about the same or materially similar issues.

By Call-In Telephone Hearing Notice dated September 14, 2021, the Office of Administrative Law Judge (OALJ) notified the Parties an initial telephonic hearing was scheduled for October 20, 2021, at 10:00 a.m. On September 15, 2021, the presiding officer issued a Prehearing Order which, *inter alia*, advised the Parties that continuances would only be granted if requested and only in rare situations where sufficient cause was shown to exist.

On October 20, 2021, the presiding officer convened the initial telephonic hearing as scheduled. The Complainant represented herself and Duquesne was represented by Emily Farah, Esquire, who appeared with Duquesne's witness, Lisa Bloomfield. The Complainant orally requested a continuance because she was ill and had spent the previous evening in the emergency room. Duquesne consented to the continuance but requested a continuance of short duration. After discussion, the Parties agreed to reschedule the initial hearing to October 29, 2021. The Parties briefly discussed the issues that would be handled at the initial hearing. The presiding officer noted the issues would be limited to the allegations in the Complaint filed on July 28, 2021, in addition to discussing the allegations in Duquesne's Answer and New Matter alleging the Complainant is filing an excessive number of complaints on the same issue.

Thereafter, on October 20, 2021, the presiding officer issued the First Interim Order which continued the initial hearing from October 20, 2021 to October 29, 2021. Also, the OALJ notified the Parties on October 20, 2021, by Telephonic Hearing Reschedule/Cancellation Notice, that the initial telephonic hearing was rescheduled to October 29, 2021, at 10:00 a.m.

On October 29, 2021, the presiding officer convened the initial telephonic hearing as scheduled. The Complainant appeared pro se and testified on her own behalf. Duquesne was represented by Emily Farah, Esquire, who appeared with Respondent's witness, Lisa Bloomfield. Attorney Farah offered seven exhibits, marked Duquesne Exhibits Redacted A, Redacted B, E, F, G, K and Redacted N, which were admitted into evidence.

On November 17, 2021, the presiding officer issued the Interim Order Closing the Hearing Record. The hearing record was closed inadvertently after receipt of the transcript from the Parties' conversation on October 20, 2021. Accordingly, on December 15, 2021, the presiding officer issued the First Post-Hearing Order to reopen the hearing record for the purpose of receiving the transcript from the telephonic hearing on October 29, 2021. The transcript from October 29, 2021 was received in the Secretary's Bureau on December 16, 2021. The presiding officer closed the hearing record by Interim Order on December 29, 2021.

The transcripts from October 20, 2021 and October 29, 2021 contain a total of 135 pages. The Complainant and Duquesne issued final statements on the hearing record in lieu of filing briefs. As noted, the hearing record closed on December 29, 2021.

Discussion

Legal Standards

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). To establish a sufficient case and satisfy the burden of proof, the Complainant must show that the Respondent is responsible or accountable for the problem described in the Complaint. *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). Such a showing must be by a preponderance of the

evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992). That is, the Complainant's evidence must be more convincing, by even the smallest amount, than that presented by the Respondent. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, this Commission's decision must be supported by substantial evidence in the record. *Mill v. Pa. PUC*, 447 A.2d 1100 (Pa. Cmwlth. 1982). More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980).

Upon the presentation by the Complainant of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence, also referred to as the burden of persuasion, to rebut the evidence of the customer shifts to the Respondent. If the evidence presented by the Respondent is of co-equal value or "weight," the burden of proof has not been satisfied. The Complainant now has to provide some additional evidence to rebut that of the Respondent. *Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983). While the burden of going forward with the evidence may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001).

A Commission approved tariff has the force of law and is binding on both the utility and customer. *Brockway Glass Co. v. PA PUC*, 437 A.2d 1067 (Pa. Cmwlth. 1981). Section 1303 of the Code provides that:

No public utility shall, directly or indirectly, by any device whatsoever, or in any wise, demand or receive from any person, corporation, or municipal corporation a greater or less rate for any service rendered or to be rendered by such public utility than that specified in the tariffs of such public

utility applicable thereto. The rates specified in such tariffs shall be the lawful rates of such public utility until changed, as provided in this part. Any public utility, having more than one rate applicable to service rendered to a patron, shall, after notice of service conditions, compute bills under the rate most advantageous to the patron.

66 Pa. C.S. § 1303.

ALJ's Initial Decision

ALJ Dunderdale made thirty-one Findings of Fact and reached six Conclusions of Law. I.D. at 4-8, 16. We shall adopt and incorporate herein by reference the ALJ's Findings of Fact and Conclusions of Law except as reversed or modified by this Opinion and Order, either expressly or by necessary implication.

The ALJ denied, in part, and granted, in part, the Complainant's Complaint. Specifically, the ALJ denied the Complaint in part due to the Complainant's failure to meet the burden of proving the utility billed her incorrectly and that the rate charged for electric service was too high in comparison to her consumption level. The ALJ granted, in part, the Complaint because the Complainant met her burden of proving that Duquesne failed to provide reasonable customer service when it did not transfer her service from its residential electric heating rate to its regular residential rate. I.D. at 1, 17.

New Matter

Regarding the disposition of the New Matter raised by Duquesne, the ALJ noted that it argued in New Matter that the Complainant has intentionally abused the Commission's complaint procedures. I.D. at 12. Duquesne contended the Complainant has filed six (6) informal complaints and three (3) formal complaints against the Respondent since August 14, 2019. *Id.* Duquesne argued most of these complaints

allege the same issues: the meter is incorrectly recording consumption and the bills are incorrect. The Respondent noted that many times the Complainant filed informal complaints while disposition was pending on a previous complaint. In addition, Duquesne points out that the issue of recorded consumption and the correctness of the bills was decided in March 2021 after a full evidentiary hearing in which the Complainant participated. I.D. at 13,

In that proceeding, the presiding officer dismissed the formal complaint against Ms. Wilkes with prejudice. *Id.* Duquesne argued the Complainant has had her opportunity to prove that the meter was inaccurately recording consumption and failed to meet her burden of proof. *Id.* Duquesne asked that the formal complaint herein be dismissed because the issue was decided against the Complainant previously and asked the Commission to find Ms. Wilkes is abusing the judicial process. *Id.*

Duquesne made an extraordinary request of the Commission: to ban the Complainant from filing any future complaints against Duquesne alleging incorrect charges and incorrect recording of consumption, even though Ms. Wilkes typically does not carry an unpaid balance and tends to pay her monthly bills in full and on time. *Id.* The ALJ noted that these utility requests, while not typically raised, will not appear usually in cases when a ratepayer is a customer in good standing, that is, when a customer is current on monthly bill payments and makes payments in full. *Id.*

While prohibiting a complainant from filing further complaints appears to be a harsh result, the Commission must consider if undue prejudice results to the utility because each informal and formal complaint which Ms. Wilkes files requires Duquesne to spend its resources preparing for litigation, retaining an attorney and securing the services of at least one employee as a witness at each hearing. Further, the ALJ noted that with nine complaint proceedings within the past two years, Ms. Wilkes' actions have required Duquesne to expend money to defend against her allegations. *Id.*

According to the ALJ, abuse of the Commission's administrative process can occur in various forms. The Commission considers the number and the nature of complaints filed by a complainant, the number of payments on which a complainant defaulted, a complainant's use of tactics to avoid payments and service terminations, and a complainant's history of payments when determining whether a complainant abused the Commission's process. I.D. at 13-14, citing *DiFilippo v. PECO Energy Company*, Docket No. C-20027116 (Final Order dated October 3, 2002); *Manu v. Bell Telephone Co. of Pa.*, Docket No. F-09029141 (Opinion and Order entered May 4, 1994) *Potora v. UGI Penn Natural Gas, Inc.*, Docket No. C-2018-3003485 (Opinion and Order entered August 8, 2019).

The ALJ noted that Ms. Wilkes' six informal complaint filings and three formal complaint filings concern similar but not the same allegations and centered around her claims that: Duquesne's meter does not correctly record consumption; the bills are incorrectly rendered; threat of termination; request for a payment arrangement; repeated service outage and LIHEAP discrepancies. I.D. at 15. The presiding officer would have sufficient reasons to find Ms. Wilkes should be restricted from filing further complaints against Duquesne, if Duquesne met the burden to prove the Complainant intentionally used the informal and formal complaint processes to delay termination, delay payment on undisputed amounts and/or for the purpose of annoying the Respondent. *Id.*

From the ALJ's perspective, what Duquesne proved was that the Complainant has a habit of filing complaints, especially informal complaints, before a previous complaint is resolved. *Id.* The ALJ stated that the Complainant credibly testified at the hearing about her frustration that Duquesne and the Commission have failed to consider the real nature of her complaint: Duquesne consistently has charged her the residential service heating rate or RH rate when she requested the residential service rate or RS rate, and this behavior which troubles Ms. Wilkes has continued unabated and unaddressed for a couple of years. *Id.* In addition, the Complainant's instant Complaint

concerns the billing statements issued from January 2021 through September 2021, which are dates that were not at issue previously. *Id.* It is true that the dates at issue follow quickly after the dates at issue in the previous proceeding (at Docket No. F-2020-3022227), but the Complainant's concern here was distinctly different. *Id.*

The ALJ noted that the Complainant should be cautioned, however, that she may be precluded from filing any future informal or formal complaints within six months from the date of the Initial Decision in this proceeding if the allegations in a subsequent complaint (whether formal or informal) concern the residential rate charged and/or the level of consumption recorded. Furthermore, the ALJ denied Duquesne's request in its New Matter because it did not meet its burden to show Ms. Wilkes is attempting to delay termination, delay payment or annoy her utility company.

66 Pa. C.S. § 332(a). *Id.*

Formal Complaint

Regarding the instant Complaint, the ALJ noted that Ms. Wilkes had done a commendable job in reducing her consumption levels and economizing on her use of electricity at her residence. Her efforts resulted in monthly bills in significantly lower amounts than before she began her efforts in 2019. Her average bill from October 2020 to September 2021 was \$70.17, while her average bill from October 2018 to September 2019 was \$219.28. She obviously reduced her usage from the time she testified she used her electric furnace to the time when she began using oil heat. However, none of the evidence shows that she suffered from a significant decrease in income during that time period. I.D. at 12.

The ALJ noted that Ms. Wilkes wants to be charged for the electric service she uses each month, and she does not want to be billed based on an average (such as used in the Customer Assistance Program or CAP program) and she does not need a

payment arrangement. The ALJ further noted that Ms. Wilkes does not like that in some months her distribution charge is greater than her supply charge. According to the ALJ, while Ms. Wilkes' frustration is understandable, Duquesne is charging her the rate determined by the Commission after the Commission last reviewed Duquesne's charges and rates in the last base rate proceeding. *Id.*

Accordingly, the ALJ found that the rates and charges on her billing statements were just and reasonable, she did not provide any evidence to rebut the presumption that the rates themselves were reasonable after the Commission approved the tariffs, and her formal complaint must be denied as it relates to her allegation of unreasonable and unjust charges. Consequently, the ALJ granted the Complaint as it relates to the Complainant's allegation that Duquesne did not process her requests to be charged under the RS rate rather than the RH rate. *Id.*

Positions of Parties

Complainant's Position

The Complainant contends the distribution rate and supply rate are too high. (I.D. at 8 citing Tr. 32). She argues that, as an electric service consumer, she "cannot win" because her monthly bills continue to rise despite her reduced consumption. The Complainant asserts she installed EnergyStar appliances, reduced her consumption, stopped heating her home with the electric furnace and now uses the low wattage light bulbs provided by Duquesne. The Complainant contends she is not complaining about the meter because she does not know if the meter correctly or incorrectly records her consumption. (I.D. at 9 citing Tr. 33, 34). She asserts her complaint is with Duquesne's Billing Department which refuses to comply with her requests to remove her from the CAP program and budget billing program, and she decries Duquesne's insistence on charging her under the RH rate instead of the RS rate. The Complainant contends she

does not want a rate that charges her more in the summer and would rather be on the RS rate which does not change over the seasons. As for the multiple informal and formal complaints, the Complainant argues she only filed those complaints because the problems she has pointed to for the last two years continue to be persistent problems that Duquesne has not resolved. (I.D. at 9 citing Tr. 74).

Respondent's Position

Duquesne contends it bills the Complainant appropriately based upon the consumption recorded by her meter and appropriately charges the RH rate because she has an electric furnace. Duquesne also argues the Complainant would have lower payments if she applied for CAP benefits and used budget billing because those two programs would reduce the amount she must pay and spread her monthly payments over the year, thus reducing the spikes in usage caused by seasonal changes. I.D. at 9.

Disposition

As a preliminary matter, any argument that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. We are not required to consider expressly or at length each contention or argument raised by parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *also see, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984). On exercise of our independent review of the Parties' positions in their pleadings in this case, we shall adopt the Initial Decision, as modified, consistent with the following discussion.

The Complaint was sustained to the extent that the presiding ALJ determined that the Complainant should be served under Duquesne's Rate RS, as opposed to its Rate RH. Rate RH is available to customers who use electricity as the

sole, primary method of space heating their homes. Rate RS is available to those customers who use other sources of energy to heat their homes, such as natural gas or heating oil.

The Complainant testified that she had an oil furnace installed in her home in 2019 and stopped using her electric furnace.³ This testimony was supported by a significant reduction in the Complainant's billed electric usage starting in 2019.⁴ Duquesne does not dispute that an oil furnace was installed or that the Complainant's consumption of electricity subsequently declined. Duquesne's attorney summarized its witnesses' position on why the Complainant was not transferred to Rate RS in 2019:

The Complainant is being billed in accordance with the RH, or residential heating rate, which is the correct rate for this customer who has hard-wired electrical furnaces installed at her property, as indicated in the hearing today. But it's also the most beneficial rate for the customer. As Ms. Bloomfield testified, the RH rate, they discount the customers between the months of November and April.

Hearing Transcript, pgs. 131-132.

The ALJ held that Duquesne should have honored the customer's request to switch her service given her use of the oil furnace. However, the ALJ concluded that Duquesne complied with its tariff, and that no civil penalty should be imposed due to tariff compliance, and because the Complainant suffered no financial harm.⁵ The ALJ also held that if the Complainant changes her mind and expresses a preference for returning to Rate RH that Duquesne should honor such request.

³ Initial Decision, pg. 6, Hearing Transcript pg. 43.

⁴ Initial Decision, pg. 5.

⁵ Initial Decision, pg. 10.

A Commission approved tariff has the force of law and is binding on both the utility customer.⁶ Section 1303 of the Code provides that:

No public utility shall, directly or indirectly, by any device whatsoever, or in any wise, demand or receive from any person, corporation, or municipal corporation a greater or less rate for any service rendered or to be rendered by such public utility than that specified in the tariffs of such public utility applicable thereto. The rates specified in such tariffs shall be the lawful rates of such public utility until changed, as provided in this part. Any public utility, having more than one rate applicable to service rendered to a patron, shall, after notice of service conditions, compute bills under the rate most advantageous to the patron.

66 Pa. C.S. § 1303. Accordingly, Section 1303 does not permit a utility to deviate from the tariffed rate, even when such action might appear to benefit the customer. However, Section 1303 also imposes an obligation on a public utility to compute bills under the most advantageous rate when more than one rate is available to the customer, provided the utility has actual knowledge of service conditions.⁷ Based on the testimony in the record, it appears that Duquesne believed that the Complainant's service was eligible for both Rate RH and RS, and chose to compute bills under Rate RH as using this rate was "most advantageous" to her.

However, a review of the tariff language does not support Duquesne's actions or its interpretation of its tariff. Duquesne's tariff states that Rate RH is

Available to residential or combined residential and farm customers using the Company's standard low voltage service for lighting, appliance operation, general household purposes and for commercial or professional activity where associated consumption represents less than 25% of the total monthly usage at the premise, and as the sole primary method of

⁶ *Brockway Glass Co. v. Pa. PUC*, 437 A.2d 1067 (Pa. Cmwlth. 1981).

⁷ *Springfield Twp. v. Pa. PUC*, 676 A.2d 304 (Pa. Cmwlth. 1996).

space heating except that the space heating system may be supplemented with renewable energy sources such as solar, wind, wood, or hydro.

Duquesne's Rate RH (emphasis added). The un rebutted testimony before the Commission is that electricity was not the "sole primary method of space heating" as of sometime in 2019. Nor did the Complainant supplement the electric furnace with "renewable energy sources." Instead, the Complainant testified that she installed an oil furnace in 2019 and stopped using the electric furnace. The Complainant's bills support the claim that she has relied primarily, if not entirely, on oil heat since 2019.

Duquesne's failure to reassign the customer to Rate RS in 2019 was therefore a violation of both its tariff and Section 1303 of the Code. The Complainant's circumstance was not that of a customer with more than "one rate applicable to service rendered." The Complainant was no longer eligible for Rate RH, and Duquesne should have reassigned her to Rate RS when it received notice of her actual service conditions, in this case the installation of an oil furnace to heat her home. The reassignment should have been made not because, as determined in the Initial Decision, of the Complainant's *preference* for Rate RS, but because she was no longer *eligible* for service under Rate RH. The fact that a functional electric furnace remained at the service address is not identified in Duquesne's tariff as the determining factor for Rate RH eligibility. If the Complainant should return to using her electric furnace as the "sole primary method" of space heating and gives notice to Duquesne of this change in service conditions, it would then be appropriate to return her to Rate RH.

Given that Duquesne was in violation of its tariff, and therefore Section 1303 as well, it is necessary to consider whether a civil penalty is appropriate. After reviewing the record in this proceeding and the applicable law we find that no civil penalty should be imposed for the following reasons, including but not limited to: (1) Duquesne believed it was following the tariff; (2) that the error was limited to one

customer; and (3) that the Complainant experienced no financial harm from this mistake.⁸ The record indicates a pattern of zealous, if mistaken, behavior by Duquesne staff to assist this customer achieve a lower bill, including the encouraged use of budget billing and customer assistance programs. We encourage Duquesne to review with its staff the eligibility of customers for Rate RH under its existing tariff and the requirements of Section 1303 of the Code. Accordingly, we will adopt the Initial Decision, as modified, consistent with this Opinion and Order.

Conclusion

Based on the foregoing, we shall adopt the Initial Decision of ALJ Dunderdale, as modified, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Initial Decision of Administrative Law Judge Katarina L. Dunderdale issued on March 29, 2022, is adopted as modified, consistent with this Opinion and Order.
2. That the Formal Complaint filed by Kim Wilkes against Duquesne Light Company on July 28, 2021, is granted, in part, and denied in part.
3. That the Formal Complaint filed by Kim Wilkes against Duquesne Light Company, is granted, in that Duquesne Light Company did not switch from using the Residential Heating rate to the Residential Service rate at Kim Wilkes' request as she

⁸ *Rosi v. Bell Atl.-Pa., Inc. & Sprint Commc'ns Co.*, Docket No. C-00992409 (Final order entered February 10, 2000), 52 Pa. Code § 69.1201.

was no longer eligible for service under the Residential Heating rate due to the installation of an oil furnace to heat her home.

4. That the Formal Complaint filed by Kim Wilkes against Duquesne Light Company, is denied, in that Duquesne Light Company correctly recorded consumption and appropriately billed Kim Wilkes consistent with its tariff.

5. That commencing with the next billing period after the Commission's Final Order in this proceeding, Duquesne Light Company shall charge Kim Wilkes under the Residential Service rate for the electric service it provides to the service address until such time as Kim Wilkes informs Duquesne Light Company in writing that she wants to use the Residential Heating rate and has resumed using her electric furnace to heat the service address.

6. That the request of Duquesne Light Company to preclude and/or bar Kim Wilkes from filing any further complaints, informal or formal, against Duquesne Light Company is denied.

7. That this docket shall be marked closed.

BY THE COMMISSION,

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is written in a cursive style with a large initial "R".

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: June 16, 2022

ORDER ENTERED: July 25, 2022