

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

Public Meeting held August 4, 2022

Commissioners Present:

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

Erika and Brendan Kelley

F-2021-3029920

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) Emily I. DeVoe, issued on June 22, 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, 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 November 17, 2021, Erika and Brendan Kelley (Complainants) filed a Formal Complaint (Complaint) with the Commission against Duquesne Light Company (Duquesne or Company) alleging that Duquesne had not properly or accurately calculated, credited, and reimbursed them for their electric generation from their solar panel output.<sup>1</sup> The Complainants claimed they had generated more than they consumed and were due monetary compensation for a “substantial surplus.” They further requested that Duquesne provide them information on how to transfer their electric account to another company. Complaint at 2-3.

On December 27, 2021, Duquesne filed an Answer denying the material allegations set forth in the Complaint (Answer). Duquesne also requested this matter be assigned to the Office of Administrative Law Judge’s Mediation Unit. Answer at 2-4.

On December 29, 2021, Chief Administrative Law Judge Charles E. Rainey, Jr. issued an Interim Order Setting Resolution Conference. Mediation was not successful, and this matter was assigned to ALJ DeVoe for an evidentiary hearing and issuance of an Initial Decision.

On January 13, 2022, a Hearing Notice was issued, scheduling an evidentiary hearing for February 17, 2022.

---

<sup>1</sup> This Complaint is a timely appeal from a determination by the Commission’s Bureau of Consumer Services at Case No. 3805393, in response to the Complainants’ informal complaint. Review of the informal complaint determinations are heard de novo. 52 Pa. Code § 56.403(a). I.D. at 1.

On January 18, 2022, a Corrected Hearing Notice was issued, correcting the Toll-free Bridge Number and PIN number for the conference bridge.<sup>2</sup>

On January 21, 2022, a Prehearing Order was issued.

On February 17, 2022, the presiding officer convened the initial telephonic hearing as scheduled. Brendan Kelley (Mr. Kelley) was present and represented himself. Erika Kelley (Ms. Kelley) was not present. Counsel for Duquesne was present on behalf of the Company. Three witnesses were present on behalf of Duquesne: Roxanne Morris, Regulatory Consumer Relations Supervisor; Gregory Murphy, Billing Analyst; and Charles Stoltenberg, Senior Meter Engineer.

Mr. Kelley began, but did not finish, his direct testimony. During his direct testimony, Complainants' Exhibit A was conditionally admitted into the record. Two other exhibits (Complainants' Exhibits B and C) were offered by Mr. Kelley but were not admitted. During his direct testimony and prior to any cross-examination by the Company, Mr. Kelley requested a continuance to give him an opportunity to obtain a witness from his solar panel company to authenticate and lay an appropriate foundation for his proposed exhibits. Tr. at 26. Counsel for Duquesne agreed to a sixty (60) day continuance. *Id.*

The presiding officer advised the Parties she was willing to reconsider her rulings on Complainants Exhibits B and C at the second day of hearing if Mr. Kelley was able to offer an appropriate witness. Tr. at 7. Both Mr. Kelley and Duquesne agreed to a second day of hearing on April 19, 2022, at 10:00 a.m., and the Parties received oral notice on the record of this date and time. Tr. at 29-33.

---

<sup>2</sup> Shortly after the initial Notice was issued, the presiding officer discovered her original conference bridge number had expired. After a new bridge account was created, a new Notice was issued with the new call-in information. I.D. at 2.

On February 18, 2022, a Further Hearing Notice was issued, memorializing the agreed upon further hearing and scheduling the second day of hearing for April 19, 2022, at 10:00 a.m. The Notice provided instructions on how to call into the hearing and provided the Parties with the bridge number and PIN number. The Notice warned the Parties that they may lose their case if they failed to take part in the hearing and present evidence on the issues raised. The Notice was electronically served upon the Complainants, similar to the Notices for the first day of hearing.

On April 4, 2022, Mr. Kelley emailed the presiding officer, copying counsel for Duquesne, advising he was unable to secure a representative from his solar panel company to speak to a Duquesne representative. He advised he had made multiple attempts to coordinate communication between his solar panel company and Duquesne, but he had been unsuccessful. He requested an additional continuance until he secured “a way to verify the solar output values that would substantiate [his] dispute.” Tr. at 40-41.

On April 5, 2022, counsel for Duquesne emailed the presiding officer, copying Mr. Kelley, advising that Duquesne did not consent to a second continuance. Tr. at 41. Later on that day, Mr. Kelley emailed the presiding officer, copying counsel for Duquesne, requesting that the presiding officer order Duquesne to contact his solar panel company and offering to provide the presiding officer proof of his correspondence with his solar panel company to verify his efforts. *Id.*

On April 7, 2022, the presiding officer emailed both Mr. Kelley and counsel for Duquesne, advising that Mr. Kelley’s request for the presiding officer to

order Duquesne to contact the solar panel company was denied and Mr. Kelley's request for a second continuance was denied.<sup>3</sup> *Id.*

On April 11, 2022, Mr. Kelley emailed the presiding officer, copying counsel for Duquesne, advising he wanted to withdraw the Complaint. The presiding officer responded to his email, directing his attention to 52 Pa. Code § 5.94, the rule governing withdrawals of pleadings.<sup>4</sup> *I.D.* at 4.

The second day of hearing convened on April 19, 2022, as scheduled. The presiding officer, court reporter, and counsel for Duquesne were present on the conference bridge at 10:00 a.m. Neither of the Complainants were present. The presiding officer contacted her legal assistant and directed him to contact the Complainants to remind them of the hearing and provide them the call-in information. The presiding officer's legal assistant did so and advised there was no answer at the Complainants' number, and he left a voicemail message.

The presiding officer went on the record at 10:11 a.m. Duquesne offered no evidence but made a motion to dismiss the proceeding due to the Complainants' failure to appear and prosecute their Complaint. The presiding officer took said motion under advisement. *Tr.* at 42.

---

<sup>3</sup> The presiding officer incorrectly advised the Parties the second day of hearing would convene on April 14, 2022. However, the presiding officer did not receive any indication Mr. Kelley called into the conference bridge on April 14, 2022. *I.D.* at 4.

<sup>4</sup> Section 5.94(a) of the Commission's Regulations provides that a party desiring to withdraw a pleading in a contested proceeding may file a petition for leave to withdraw the appropriate document with the Commission and serve it upon other parties. 52 Pa. Code § 5.94(a). Section 5.94 further provides that the petition must set forth the reasons for the withdrawal and that a party may object to the petition to withdraw within 10 days. *Id.*

The transcript for the first day of hearing was filed on March 2, 2022, and the transcript for the second day of hearing was filed May 4, 2022. An Interim Order was entered on May 5, 2022, closing the hearing record. Mr. Kelley did not file a petition for leave to withdraw prior to the closure of the record on May 5, 2022.

As noted, on June 22, 2022, ALJ DeVoe issued her Initial Decision dismissing the Complaint with prejudice for the Complainants' failure to appear and prosecute their case. I.D. at 1, 11.

### **Discussion**

The Commission's Rules of Practice and Procedure at 52 Pa. Code § 5.94 permit parties to withdraw pleadings in a contested proceeding. The provision at 52 Pa. Code § 5.94(a) allows for the withdrawal of pleadings through a petition for leave to withdraw the pleading. The petition is granted only by permission of the presiding officer or the Commission. The presiding officer or Commission must consider the petition, any objections thereto and the public interest in determining whether to permit withdrawal of the pleading. *See Pa. PUC, Bureau of Investigation and Enforcement v. Nasser Limousine, LLC*, Docket No. C-2017-2610579, (Final Order entered November 29, 2018). We note that we are mindful of the *pro se* participation of the Complainants in this matter.

### **ALJ's Initial Decision**

ALJ DeVoe made twenty-five Findings of Fact and reached seven Conclusions of Law. I.D. at 5-7, 9-10. 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.

As noted, the ALJ dismissed the Complaint for failure of the Complainants to appear and prosecute this matter. According to the ALJ, as the party seeking affirmative relief from the Commission, the Complainants bear the burden of proof. I.D. at 7, citing 66 Pa. C.S. § 332(a). The ALJ stated that to uphold this burden, the Complainants must show that Duquesne is responsible or accountable for the problem described in the Complaint and that the Complainants must meet their burden of proof by a preponderance of the evidence. That is, the Complainants must present evidence more convincing, by even the smallest amount, than that presented by Duquesne. I.D. at 7, citing *Patterson v. Bell Tel. Co. of Pa.*, 72 Pa. PUC 196 (1990); *Feinstein v. Phila. Suburban Water Co.*, 50 Pa. PUC 300 (1976); *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 602 A.2d 863 (Pa. 1992); *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

The ALJ stated that on February 18, 2022, the hearing notice for the second day of hearing was e-served upon the Complainants at the email address listed on their Complaint form. The ALJ noted that the Complainants registered for e-service at the time they filed their Complaint and that the Notice for the first day of hearing was e-served upon the Complainants in the same fashion, and Mr. Kelley appeared for that hearing. The ALJ stated that once notice of a hearing and the opportunity to be heard has been provided, it is the responsibility of the parties to appear and participate in the hearing. I.D. at 8, citing *Sentner v. Bell Tel. Co. of Pa.*, Docket No. F-00161106 (Opinion and Order entered October 24, 1993).

The ALJ stated that Mr. Kelley appeared at the first day of hearing, began his testimony but did not complete it. According to the ALJ, Mr. Kelley was never subject to cross-examination by the Company and per the Commission's rules, a party shall move the admission of evidence into the record upon presentation of the sponsoring witness, and after the opportunity of other parties to examine the witness. I.D. at 8, citing

52 Pa. Code § 5.403(a). As such, the admission of Complainants' Exhibit A was conditional upon the Complainant being subject to cross-examination. I.D. at 8.

The ALJ also stated that although Mr. Kelley emailed the presiding officer expressing his intent to withdraw, it is appropriate in this matter to dismiss the Complaint with prejudice rather than to simply allow the Complaint to be withdrawn without prejudice. According to the ALJ, in a recent decision, the Commission held that an email to a presiding officer prior to a hearing, but after a prehearing conference, requesting that a complaint be withdrawn was akin to a petition for leave to withdraw a complaint filed under the Commission's rules. I.D. at 9, citing *Stephen and Nancy J. Ulishney v. West Penn Power*, Docket No. C-2021-3024487 (Opinion and Order entered May 19, 2022) (*Ulishney v. West Penn Power*). The ALJ explained that, in that matter, the Commission held that the complaint filed be dismissed without prejudice. The ALJ stated that in the instant case, however, the request to withdraw was not received until after the first day of hearing and after the Company had expended significant resources preparing for and participating in the first day of hearing. Therefore, it is not appropriate to dismiss the instant Complaint without prejudice. I.D. at 9. Accordingly, the ALJ granted Duquesne's motion to dismiss the Complaint for failure to prosecute on the basis that since Duquesne was present and ready to proceed at both days of hearing, it is unfair to require it to prepare again for the same set of facts. Therefore, the ALJ dismissed the Complaint with prejudice. *Id.*

## **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.

As noted, the provision at 52 Pa. Code § 5.94(a) provides that a party desiring to withdraw a pleading in a contested proceeding may file a petition for leave to withdraw the appropriate document with the Commission and serve it upon other parties. 52 Pa. Code § 5.94(a). Section 5.94 further provides that the petition must set forth the reasons for the withdrawal and that a party may object to the petition to withdraw within 10 days. *Id.* Here, Mr. Kelley's April 11, 2022 correspondence clearly communicated his wish to withdraw the Complaint. Mr. Kelley's April 4, 2022 email, explained his unsuccessful attempts to secure a solar panel company representative to substantiate his Complaint. Recognizing Mr. Kelley's *pro se* status, we believe that his emailed correspondence should have been deemed a Petition to Withdraw the Complaint (Petition).<sup>5</sup> Having considered the Petition, we find there is no harm to the public interest in granting the request to withdraw the Complaint.<sup>6</sup> Since the Commission must also consider any objections to the Petition, it is appropriate to establish a 10-day objection period as set forth in Section 5.94. 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 DeVoe, as modified, consistent with this Opinion and Order; **THEREFORE,**

---

<sup>5</sup> The Commission or presiding officer at any stage of an action or proceeding may waive a requirement of this subpart when necessary or appropriate if the waiver does not adversely affect a substantive right of a party. 52 Pa. Code § 1.2(c).

<sup>6</sup> *See Ulishney v. West Penn Power Company.*

**IT IS ORDERED:**

1. That the Initial Decision of Administrative Law Judge Emily I. DeVoe issued on June 22, 2022, is adopted as modified, consistent with this Opinion and Order.
2. That Erika and Brendan Kelley's April 11, 2022 communication shall be deemed a Petition to Withdraw, consistent with 52 Pa. Code § 5.94.
3. That if no objection to the Petition to Withdraw is received within ten (10) days of the entry date of this Opinion and Order, the Petition to Withdraw shall be deemed granted and this docket shall be marked closed.

**BY THE COMMISSION,**



Rosemary Chiavetta  
Secretary

(SEAL)

ORDER ADOPTED: August 4, 2022

ORDER ENTERED: August 15, 2022