

August 27, 2024

Via Electronic Filing

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

RE: Geoff Day v. Duquesne Light Company
Docket No. C-2018-3003960

Dear Secretary Chiavetta:

Enclosed please find Duquesne Light Company's Answer to Complainant's Petition For Rescission.

A copy of this document has been served upon Complainant in accordance with Commission regulations.

Sincerely,



Jeremy V. Farrell
Attorney for Duquesne Light Company

Enclosure

c: Geoff Day (w/enc.) (via regular mail)
Pennsylvania Public Utility Commission (w/enc.) (via email)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

GEOFF DAY,

:

:

Complainant,

:

:

vs.

:

No: C-2018-3003960

:

DUQUESNE LIGHT COMPANY,

:

:

Respondent.

:

**ANSWER TO COMPLAINANT'S
PETITION FOR RESCISSION**

Filed on behalf of Respondent:
Duquesne Light Company

Counsel of Record for this Party:

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**BEFORE THE
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Complainant,	:	
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vs.	:	No: C-2018-3003960
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DUQUESNE LIGHT COMPANY,	:	
	:	
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ANSWER TO COMPLAINANT’S PETITION FOR RESCISSION

Respondent Duquesne Light Company (“Duquesne Light” or the “Company”) files its Answer to Complainant’s Petition For Rescission.

I. INTRODUCTION

Duquesne Light Company (“Company”), pursuant to 52 Pa. Code § 5.61, respectfully submits this Answer to the Petition for Rescission filed by Geoff Day (“Complainant”) on June 20, 2024, and was served on the Company by Secretarial Letter on August 7, 2024 (“Petition”). In his Petition, Complainant requests that the Pennsylvania Public Utility Commission (“Commission”) vacate its April 4, 2024 Order denying his Exceptions and his Formal and Amended Complaint (“April 4, 2024 Order” or “Order”).

A petition for rescission, if granted, disturbs a final order. Althea Poe-Henderson v. Philadelphia Gas Works, Docket No. F-2019-3010206, 2020 LEXIS 249, at *5 (Pa. P.U.C. Aug. 6, 2020). Thus, a petition for rescission may only “be granted judiciously and under

appropriate circumstances.” Id. (citing City of Pittsburgh v. Pennsylvania Dep’t of Transportation, 416 A.2d 461, 465 (Pa. 1980)). The Commission can only rescind a prior order where there is “newly discovered evidence, a substantial change in circumstances, or an error of fact or law.” Althea Poe-Henderson v. Philadelphia Gas Works, Docket No. F-2019-3010206, 2020 LEXIS 249, at *5-6 (Pa. P.U.C. Aug. 6, 2020). None of those circumstances are present here.

Complainant’s Petition does not raise any new evidence; it merely reiterates all the same contentions properly rejected by ALJ Watson and the Commission. Complainant also fails to assert a substantial change in circumstances or an error of fact or law that would entitle him to the extreme remedy of rescission. For these reasons, Complainant’s Petition should be denied.

II. BACKGROUND

Complainant is a Duquesne Light customer at a two-family property located at 1699 Suburban Avenue, Pittsburgh, Pennsylvania 15207 (the “Service Location”). Duquesne Light has installed a smart meter on one unit (“Unit 1”) and has attempted to install one on the other unit (“Unit 2”) but has been prevented from doing so by Complainant. On August 13, 2018, Complainant filed a Formal Complaint against Duquesne Light to prevent it from installing a smart meter at Unit 2 and to have the already installed smart meter at Unit 1 removed. The Company filed its Answer and New Matter denying the material allegations within the Formal Complaint, as well as submitting Preliminary Objections on September 4, 2018. On October 18, 2018, a Motion

Judge Assignment Notice was issued assigning Administrative Law Judge (“ALJ”) Jeffrey A. Watson as the Presiding Officer in this proceeding.

On December 14, 2018, ALJ Watson issued an Interim Order denying the Company’s Preliminary Objections, as well as Establishing an Initial Litigation Schedule. Complainant filed an Amended Formal Complaint against Duquesne Light on February 21, 2019. Duquesne Light filed its Answer and New Matter to the Amended Formal Complaint on March 14, 2019. On June 13, 2019, ALJ Watson scheduled a telephonic hearing to take place on August 21–22, 2019. About two months later, ALJ Watson converted the telephonic hearing to an in-person hearing after Complainant requested an in-person hearing. On August 14, 2019, one week before the scheduled hearing, Complainant filed a document titled “Withdraw of Formal Complaint” in which he asserted, “[t]he level of corruption within the Public Utility Commission makes any good faith attempt for relief absolutely pointless, and a gross waste of time.” See Withdraw of Formal Complaint.¹

On August 16, 2019, ALJ Watson issued an order requiring the parties to attend the in-person hearing scheduled for August 21, 2019. The parties appeared for the in-person hearing before ALJ Watson on August 21, 2019. At the hearing, Complainant intended to testify on his own behalf as his only witness. Duquesne Light planned to call eight witnesses to testify regarding the smart meter. After the parties arrived at the hearing—but before the hearing began—Complainant stated that he was withdrawing

¹ All documents being referenced throughout this Answer are publicly available on the Commission’s electronic docket.

all allegations and concerns raised in his Complaint and Amended Complaint, except for one legal issue. Duquesne Light and Complainant subsequently entered into a stipulation in which they agreed to brief “the question of law of whether Duquesne Light has the lawful right to install a smart meter at 1699 and 1699 ½ Suburban Avenue by Act 129 of 2008 and the Pennsylvania Public Utility Commission’s Implementation Order, even though Mr. Day does not consent to the installation of the smart meter.” See Stipulation at ¶¶ 7,8. After the parties entered into the stipulation, ALJ Watson canceled the hearing and set a briefing schedule requiring the parties to submit any briefs in this matter on or before December 2, 2019.

On December 2, 2019, Complainant and Duquesne Light submitted respective briefs to ALJ Watson. By Secretarial Letter dated April 14, 2020, the Commission served ALJ Watson’s Initial Decision dismissing Complainant’s Formal and Amended Complaint with prejudice. Complainant filed Exceptions to the Initial Decision of ALJ Watson on May 1, 2020. On May 12, 2020, Duquesne Light filed a Reply to Complainant’s Exceptions. On November 4, 2020, the Commission issued an Order at Docket No. M-2009-2092655 staying all smart meter complaint proceedings that were then pending before the Commission. The Commission lifted the stay imposed by the November 4, 2020 Order on November 14, 2023. On April 4, 2024, the Commission entered its Final Order denying Complainant’s Exceptions, adopting the Initial Decision, and denying the Formal and Amended Complaint. Complainant then filed his Petition for Rescission on June 20, 2024; however, he failed to include a Certificate of Service or serve the Company with the filing. On August 7, 2024, by Secretarial Letter, the Commission served the

Company with the Petition and stated that the Company had twenty (20) days from the date of the Secretarial Letter to respond, *i.e.*, until August 27, 2024. For the reasons explained below, the Complainant's Petition lacks merit and should be denied.

III. LEGAL STANDARD

The Commission's standard for reviewing petitions for rescission following final orders is as follows:

A petition for reconsideration, under the provisions of 66 Pa. C.S. §703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part. In this regard [the Commission] agree[s] with the Court in the Pennsylvania Railroad Company case, wherein it was said that "[p]arties . . ., cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them . . ." *What [the Commission] expect[s] to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission.* Absent such matters being presented, [the Commission] consider[s] it unlikely that a party will succeed in persuading [it] that [the Commission's] initial decision on a matter or issue was either unwise or in error.

Philip Duick et al. v. Pennsylvania Gas and Water Company, 56 Pa. PUC 553, 558 (Pa. P.U.C. Dec. 17, 1982) (emphasis added).

In reviewing a petition for rescission, the Commission must use a "totality of the circumstances" approach to determine whether it should exercise its discretion to rescind. Feleccia v. PPL Electric Utilities Corp., Docket No. C-2016-20016210 (Order entered March 7, 2003). The Supreme Court of Pennsylvania has held that "[b]ecause such relief [of rescission] may result in disturbance of final orders, it must be granted

judiciously and only under appropriate circumstances.” Pittsburgh v. Pa. Dep’t of Transp., 416 A.2d 461, 465 (Pa. 1980). The petitioner seeking rescission bears the burden of establishing “the existence of newly discovered evidence, a substantial change in circumstances, or an error of fact or law.” Althea Poe-Henderson v. Philadelphia Gas Works, Docket No. F-2019-3010206, 2020 LEXIS 249, at *5–6 (Pa. P.U.C. Aug. 6, 2020). As explained below, the Commission should deny Complainant’s Petition for Rescission because none of Complainant’s arguments meet the high legal standard for rescission of a Commission’s final order.

IV. ARGUMENT

A. THE COMPLAINANT’S REQUEST FOR RESCISSION OF THE COMMISSION’S ORDER SHOULD BE DENIED BECAUSE COMPLAINANT’S PETITION RE-RAISES THE SAME ARGUMENT REGARDING THE MANDATORY INSTALLATION OF SMART METERS UNDER ACT 129 WHICH WAS ALREADY CONSIDERED AND PROPERLY REJECTED BY ALJ WATSON AND THE COMMISSION.

The Commission should deny Complainant’s Petition because Complainant has failed to meet the strict standard for rescission. Specifically, Complainant has failed to establish any “newly discovered evidence, a substantial change in circumstances, or an error of fact or law.” Althea Poe-Henderson v. Philadelphia Gas Works, Docket No. F-2019-3010206, 2020 LEXIS 249, at *5–6 (Pa. P.U.C. Aug. 6, 2020). In his Petition, Complainant merely regurgitates the same constitutional arguments previously raised during the hearing and in his post-hearing brief in support of his core assertion that Duquesne Light is not permitted to install a smart meter at the Service Location. See Petition for Rescission at 2–4; Complainant’s Post-Hearing Brief at 1; Complainant’s

Exceptions at 1. However, in both the Initial Decision and Final Order, ALJ Watson and the Commission considered and rejected Complainant’s argument that he is entitled to “opt-out” of smart meter installation. See I.D. at 20; Final Order at 18–19. Specifically, the Commission held:

Here, we agree with the ALJ that there is no specific provision in the Code or the Commission’s Regulations or Orders that provides for customers to opt-out of smart meter installation.

. . . .

Therefore, we find no error in the ALJ’s determination that the installation of the smart meter was mandatory, as set forth in the Initial Decision. We agree with the Company that the Complainant’s request for an opt out of smart meter installation must be rejected.

See I.D. at 20; Final Order at 27–28, 30.

Furthermore, the Pennsylvania Supreme Court has now affirmatively established that there is no “opt-out” provision for smart meter installation. See Povacz, et al. v. Pa. PUC, 280 A.3d 975, 983–84 (Pa. 2022) (“Povacz II”). Thus, the law is well-settled on this issue and the Commission, by addressing Povacz II in its Final Order, has already properly rejected Complainant’s argument that he is entitled to an “opt-out.” See Final Order at 14, 27. Complainant improperly disregards well-settled law established in Povacz II, which mandates the installation of smart meters for all electric customers within an electric distribution service area and does not provide customers the opportunity to refuse such installation. Povacz, 280 A.3d at 983.

B. THE COMPLAINANT’S REQUEST FOR RESCISSION OF THE COMMISSION’S ORDER SHOULD BE DENIED BECAUSE COMPLAINANT’S PETITION RE-RAISES THE SAME ARGUMENT REGARDING AN ALLEGED VIOLATION OF HIS FOURTH AMENDMENT RIGHTS WHICH WAS ALREADY CONSIDERED AND PROPERLY REJECTED BY ALJ WATSON AND THE COMMISSION.

Additionally, both ALJ Watson and the Commission specifically addressed and properly denied Complainant’s argument that the Company’s attempt to install a smart meter at his service address is a violation of his Fourth Amendment rights under the United States Constitution. See I.D. at 16-17; Final Order at 30. Relevant to the Complainant’s Petition, the Complainant’s argument included the claim that “[e]ven though Duquesne Light Company is a private company, it is subject to the Pennsylvania Public Utility Commission, and is for the purpose of this matter a public entity since they exercise the privilege of using Public Right of ways throughout the Commonwealth . . .” Petition for Rescission at 3.

Complainant attempts to re-raise arguments that were already addressed and properly rejected by both ALJ Watson and the Commission. Specifically, the Commission adopted ALJ Watson’s ruling that “although Duquesne is regulated by the Commission, it is not a “state actor,” and therefore, the U.S. Constitution does not apply to the conduct by a private company.” I.D. at 17; Final Order at 30. Furthermore, it is well-settled that the United States Constitution only applies to “state action;” it does not apply to conduct by a private company like Duquesne Light, even if the company is regulated by the state. See Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349-350 (1974); Schutz v. PPL Elec. Utilities Corp., No. C-2018-3005659, 2019 WL 2744430, at *12 (Pa. P.U.C. June 11, 2019)). In Jackson, a customer sued a privately owned and operated utility company, alleging

that it violated her due process rights under the Fourteenth Amendment to the United States Constitution by terminating her electric service. 419 U.S. at 348–49. The U.S. District Court for the Middle District of Pennsylvania dismissed her complaint. *Id.* at 349. The United States Court of Appeals for the Third Circuit affirmed. *Id.* The Supreme Court of the United States ruled that although the utility company was heavily regulated by the Commonwealth of Pennsylvania, state regulation did not convert the utility’s decision to terminate the complainant’s electric service into “state action.” *Id.* at 358–59.

Accordingly, the Complainant’s Petition merely reiterates the same constitutional arguments that were previously raised and rejected by ALJ Watson in his Initial Decision and, by extension, the Commission in its Final Order. Therefore, the Commission should deny Complainant’s Petition for Rescission because Complainant failed to meet the strict standard for overturning a final order by establishing the existence of newly discovered evidence, a substantial change in circumstances, or an error of fact or law.

V. CONCLUSION

WHEREFORE, for all the foregoing reasons, Duquesne Light Company respectfully requests that the Pennsylvania Public Utility Commission deny the Petition for Rescission filed by Geoff Day in its entirety.

Respectfully submitted,

TUCKER ARENSBERG, P.C.



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PA I.D. No. 316258

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Pittsburgh, PA 15222
Counsel for Respondent,
Duquesne Light Company

Date: August 27, 2024

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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 Duquesne Light Company's Answer to Complainant's Petition for Rescission upon the participants listed below in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant):

Geoff Day
1699 Suburban Avenue
Pittsburgh, PA 15216
Via Regular Mail

Pennsylvania Public Utility Commission
Office of Special Assistants
ra-OSA@pa.gov
Via Email

Dated this 27th day of August, 2024



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Counsel for Respondent,
Duquesne Light Company