



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

May 15, 2018

Via E-Filing

Secretary Rosemary Chiavetta
Pennsylvania Public Utility Commission
Commonwealth Keystone Building, Second Floor
400 North Street
Harrisburg, PA 17120

Re: Pennsylvania Public Utility Commission v.
Duquesne Light Company – Base Rates
Docket No. R-2018-3000124

Dear Secretary Chiavetta:

Enclosed please find the Bureau of Investigation and Enforcement's (I&E) **Notice to Plead and Expedited Motion to Compel** in the above-captioned proceeding.

Copies are being served on parties as identified in the attached certificate of service. If you have any questions, please contact me at (717) 787-8754.

Sincerely,

Gina L. Miller

Prosecutor

Bureau of Investigation and Enforcement
PA Attorney I.D. #313863

John M. Coogan

Prosecutor

Bureau of Investigation and Enforcement
PA Attorney I.D. #313920

GLM/JMC/sea

Enclosure

cc: Certificate of Service
ALJ Katrina L. Dunderdale

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission	:	
	:	
v.	:	Docket No. R-2018-3000124
	:	
Duquesne Light Company - Base Rates	:	

CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing **Notice to Plead and Expedited Motion to Compel** dated May 15, 2018, in the manner and upon the persons listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party):

Served via First Class and Electronic Mail

Michael W. Gang, Esquire
Anthony D. Kanagy, Esquire
Post & Schell, P.C.
12th Floor
17 North Second Street
Harrisburg, PA 17101

Sharon Webb, Esquire
Office of Small Business Advocate
300 North Second Street
Suite 202, Commerce Building
Harrisburg, PA 17101

Scott Rubin, Esquire
333 Oak Lane
Bloomsburg, PA 17815-2036
Counsel for International Brotherhood of
Electric Workers

David P. Zambito, Esquire
Jonathan P. Nase, Esquire
Cozen O'Connor
17 North Second Street, Suite 1410
Harrisburg, PA 17101

Phillip D. Demanchick, Esquire
David T. Evrard, Esquire
Aron J. Beatty, Esquire
Office of Consumer Advocate
555 Walnut Street
Forum Place, 5th Floor
Harrisburg, PA 17101-1923

David T. Fisfis, Esquire
Tishekia E. Williams, Esquire
Michael Zimmerman, Esquire
Emily Farah, Esquire
Duquesne Light Company
411 Seventh Avenue, 16th Floor
Pittsburgh, PA 15219

Patrick M. Cicero, Esquire
Kadeem G. Morris, Esquire
Elizabeth R. Marx
Pennsylvania Utility Law Project
118 Locust Street
Harrisburg, PA 17101

Joseph L. Vullo, Esquire
1460 Wyoming Avenue
Forty Fort, PA 18704
*Counsel for Community Action
Association of Pennsylvania*

William H. Roberts, Esquire
PNG Companies LLC
375 North Shore Drive
Pittsburgh, PA 15212

James Fedell
2009 Forge Drive
Aliquippa, PA 15001

Jason Dolby
409 Anawanda Avenue
Pittsburg, PA 15228

Mark C. Szybist, Esquire
Natural Resources Defense Council
1152 15th Street NW Suite 300
Washington, DC 20005

Anthony C. DeCusatis, Esquire
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103-2921

Pamela C. Polacek, Esquire
Matthew L. Garber, Esquire
McNees Wallace & Nurick, LLC
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166

Served via Electronic Mail only

Joseph Otis Minott, Esquire
Logan Welde, Esquire
Clean Air Council
135 South 19th Street
Suite 300
Philadelphia, PA 19103
lwelde@cleanair.org
joe_minott@cleanair.org



Gina L. Miller
Prosecutor
Bureau of Investigation and Enforcement
PA Attorney I.D. #313863

John M. Coogan
Prosecutor
Bureau of Investigation and Enforcement
PA Attorney I.D. #313920

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission, et al.

v.

Duquesne Light Company
1308(d) Proceeding

Docket No. R-2018-3000124 et al.

NOTICE TO PLEAD

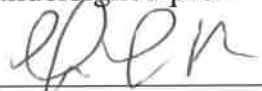
To: Michael W. Gang, Esq., Anthony D. Kanagy, Esq., Anthony De Cusatis, Esq., Tishekia Williams, Esq., Michael Zimmerman, Esq., Counsel for Duquesne Light Company

You are hereby notified to file a written response to the attached Expedited Motion to Compel of the Bureau of Investigation and Enforcement (I&E) within five (5) days from the date of service of this notice. If you do not file a written response denying the enclosed Expedited Motion to Compel within five (5) days of service, the presiding officers may rule in favor of I&E on the attached Motion without a hearing. Failure to response to this Motion could result in an order directing the production of documents to I&E.

All pleadings, such as answers to motions, must be filed with the Secretary of the Pennsylvania Public Utility Commission:

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
400 North Street
Harrisburg, PA 17120

You must also serve a copy of your response on the undersigned prosecutors.


Gina L. Miller, Prosecutor
PA Attorney ID No. 313863

John M. Coogan, Prosecutor
PA Attorney ID No. 313920

Bureau of Investigation & Enforcement
Pennsylvania Public Utility Commission
400 North Street, 2nd Floor West
Harrisburg, PA 17120
May 15, 2018

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission, et al.	:	
	:	
v.	:	Docket No. R-2018-3000124 et al.
	:	
Duquesne Light Company	:	
1308(d) Proceeding	:	

**EXPEDITED MOTION TO COMPEL THE RESPONSE OF DUQUESNE LIGHT
COMPANY TO THE BUREAU OF INVESTIGATION AND ENFORCEMENT’S
ON THE RECORD DATA REQUESTS**

Pursuant to 52 Pa. Code §§ 5.331(c) and 5.342(g), the Bureau of Investigation and Enforcement (“I&E”) of the Pennsylvania Public Utility Commission (“Commission”) moves that Administrative Law Judge (“ALJ”) Katrina L. Dunderdale direct Duquesne Light Company (“Duquesne” or “DLC”) to provide responsive documents I&E’s data requests numbered as I&E-RE-21-D and I&E-RE-22-D. Additionally, I&E respectfully requests expedited consideration of its Motion. In support of this Motion, I&E avers the following:

I. Introduction

1. On March 28, 2018, Duquesne Light Company filed Supplement No. 174 to Tariff – Electric Pa. P.U.C. No. 24 to become effective May 29, 2018. Supplement No. 174, which was docketed at No. R-2018-3000124 contained proposed tariff changes calculated to increase DLC’s total annual distribution rates by approximately \$133.8 million.

2. Pursuant to 66 Pa. C.S. § 1308(d), Supplement No. 174 was suspended by operation of law until April 19, 2018, unless permitted by Commission Order to become effective at an earlier date.

3. I&E entered its appearance in this matter on March 30, 2018.

4. On April 4, 2018, the Commission assigned DLC's Supplement No. 174 to the Office of Administrative Law Judge ("OALJ") for the development of an evidentiary record, including a Recommended Decision. The OALJ assigned the proceeding to ALJ Katrina L. Dunderdale.

5. On April 11, 2018, pursuant to 52 Pa. Code § 5.342(d), I&E served upon Duquesne its Data Requests – I&E-RE-1-D through I&E-RE-26-D. I&E's data requests operated as "staff data requests" within the scope of 52 Pa. Code §5.331(c), meaning that Duquesne had an affirmative obligation to fully and completely answer I&E-RE-1-D through I&E-RE-26-D within 15 days of service,¹ or on or by April 26, 2018.

6. Although Duquesne's counsel never contacted I&E's counsel to request an extension of time for answering I&E-RE-1-D through I&E-RE-26-D, and never raised any objection to answering I&E-RE-1-D through I&E-RE-26-D, Duquesne Light failed to provide timely responses for most of the data requests, including I&E-RE-21-D and 22-D.

7. On May 2, 2018, I&E's counsel notified Duquesne's Counsel by electronic mail that certain responses to Data Requests were overdue by approximately six (6) days, including the responses to I&E-RE-21-D and 22-D. Duquesne Light's counsel agreed to check on the status of the overdue responses and to provide an update.

¹ 52. Pa. Code §5.342(d).

8. A Prehearing Conference in this matter took place on May 3, 2018, and ALJ Dunderdale presided. Counsel for the following entities (collectively the “Parties”) participated in the Prehearing Conference: Duquesne, I&E, the Office of the Consumer Advocate (“OCA”), the Coalition for Affordable Utility Service and Energy (“CAUSE-PA”), the Office of Small Business Advocate (“OSBA”), Community Action Association of Pennsylvania (“CAAP”), International Brotherhood of Electrical Workers-Local 29 (“IBEW”), Peoples Natural Gas Company LLC (“PNG”), Clean Air Council (“CAC”), and Natural Resources Defense Council (“NRDC”).

9. During the Prehearing Conference, ALJ Dunderdale modified certain discovery provisions, including that motions to dismiss objections and/or direct the answering of interrogatories shall be filed within five (5) days of service of written objections.²

10. At the Prehearing Conference, counsel for Duquesne represented an intention to provide parties with a draft of a proposed protective order by the next day and to file the proposed protective order by the end of the following week.³

11. On May 8, 2018, counsel for I&E left a telephone message with Duquesne’s counsel indicating that that certain responses to I&E’s Data Requests were twelve (12) days overdue, including the responses to I&E-RE-21-D and 22-D. During the telephone message, counsel for I&E noted that Duquesne Light had also failed to circulate its proposed protective order. Counsel for I&E also followed-up to this message in writing via electronic mail to Duquesne Light’s counsel on the same date.

² R-2018-300124 et al., Tr. at 31.

³ Id. at 33.

12. After receiving I&E's message on May 8, 2018, on the same date, counsel for Duquesne Light replied via electronic mail indicating that he was checking with the Duquesne and that he would respond as soon as he could.

13. On May 10, 2018, Duquesne, through counsel, notified statutory parties⁴ that it would release confidential information to statutory parties pending a protective order if the statutory parties agreed to keep responses confidential. I&E agreed and notified counsel of same via electronic mail on May 10.

14. On May 10, 2018, fourteen (14) days after the responses were due, Duquesne provided the following responses to I&E-RE-21-D and I&E-RE-22-D:

I&E-RE-21-D

21. Provide a copy of the Company's most recent federal income tax return and supporting calculations for all federal tax allocations from the parent company.

Response:

The most recent federal income tax return filed by the consolidated group is tax year 2016. This document is Highly Confidential. It will be made available for review by statutory parties at the offices of Post & Schell P.C., subject to the execution of a separate confidentiality agreement.

⁴ Pursuant to 52 Pa. Code 1.8(a), I&E is a statutory party. I&E notes that this section does not explicitly name I&E, it nonetheless includes I&E because it refers to the Office of Trial Staff, as I&E was formerly known.

I&E-RE-22-D

22. Provide copies of the Company's most recent Pennsylvania Corporate Tax Report, Official Settlement Notice and Assessment Notice along with related worksheet(s).

Response:

The most recent Pennsylvania income tax return filed by the Duquesne Light is tax year 2016. This document is Highly Confidential. It will be made available for review by statutory parties at the offices of Post & Schell P.C., subject to the execution of a separate confidentiality agreement. The Company has not received an Official Settlement and Assessment Notice from the Pennsylvania Department of Revenue as the Department no longer issues Official Settlement Notices.

15. On May 11, I&E contacted Duquesne's counsel by telephone, objecting to its conditions for release of the responses to I&E-RE-21-D and 21-D. During the call, Duquesne's counsel indicated that Duquesne did not intend to physically provide I&E with either the state or federal tax information requested in the responses at issue. Instead, I&E would only have access to the documents at his office for the purposes of taking notes only.

16. Counsel for I&E informed Duquesne's counsel that its proposal was unacceptable, would compromise I&E's investigation into Duquesne's filing, and would impose a myriad of evidentiary issues if the information at issue needed to be used as evidence in this proceeding. I&E also advised that unless a resolution could be reached, I&E would file a motion to compel the production of materials responsive to I&E-RE-21-D and 22-D by no later than Tuesday, May 15. I&E memorialized this phone call in writing via electronic mail to Duquesne's counsel on the same date.

17. I&E notes that Duquesne's counsel contacted counsel for I&E in the afternoon of May 14, 2018 in order to discuss the possibility of an agreement to turnover materials responsive to I&E-RE-21-D and to negotiate a possible resolution to I&E-RE-

22-D. Shortly thereafter, another member Duquesne's counsel came to I&E's office with the offer to allow several I&E witnesses to view the documents in his presence.

Unfortunately, due to the voluminous nature of the documents, which were over 250 pages in total, and the fact that I&E witnesses were only permitted to access them in the presence of Duquesne's counsel, and therefore without the ability to refer to other relevant data at their workstations, this limited review was not a viable substitute for the production of the documents. Nor would it cure I&E's evidentiary concerns.

Accordingly, to date, no resolution has been reached. Although I&E is hopeful that an agreement may be reached while this Motion is pending, I&E must nonetheless protect its interest at this time and therefore now offers the following in support of this Motion.

II. Discussion

A. Duquesne's Refusal to Provide I&E with the Requested Documents Operates as an Untimely Objection

18. I&E avers that Duquesne's responses to I&E-RE-21-D and I&E-RE-22-D serve as *de facto* objections to those data requests. This is true because although Duquesne has agreed to allow I&E to view the documents that are responsive to these requests, Duquesne will not physically provide the documents to I&E or allow I&E to reproduce them. Instead, Duquesne will limit I&E to viewing the documents at its attorneys' office and to taking notes about the documents.

19. The onerous limitations imposed by Duquesne's unwarranted viewing-only restriction operate to effectively deprive I&E of the requested materials. These materials include Duquesne's most recent federal income tax return and supporting calculations for all federal tax allocations from its parent company, as well as its most recent

Pennsylvania Corporate Tax Report. These documents, which are over 250 pages in length, are complex and voluminous in nature and could not reasonably be reproduced or encapsulated through “note taking.”

20. Accordingly, I&E avers that Duquesne’s unreasonable condition operates as refusal to provide I&E with the requested materials and should therefore be considered a de facto objection.

21. I&E served Duquesne with I&E-RE-21-D and I&E-RE-22-D on April 11, 2018. Pursuant to the regulations that govern the Commission’s discovery process, Duquesne Light had an obligation to serve I&E with any objections to these data requests within 10 days of service,⁵ or by no later than April 23, 2018. Duquesne failed to object to I&E-RE-21-D and I&E-RE-22-D by April 23, 2018, or to respond in any fashion until several weeks later.

22. Accordingly, Duquesne’s conditional response to I&E I&E-RE-21-D and I&E-RE-22-D serves as an untimely and unwarranted de facto objection; therefore, Duquesne should be immediately compelled to provide I&E with any and all materials in its possession that are responsive I&E I&E-RE-21-D and I&E-RE-22-D.

B. Duquesne Has No Viable Basis for the Restrictions it Seeks to Impose

23. As indicated in Paragraph 14 above, Duquesne’s basis for refusing to provide I&E with materials that are responsive to I&E I&E-RE-21-D and I&E-RE-22-D is that the documents are highly confidential, they will be subject to execution of a separate confidentiality agreement, and therefore they will only be made available for review by statutory parties at the offices of Post & Schell.

⁵ 52 Pa. Code § 5.342(e).

24. I&E is left to assume that the confidentiality agreement that Duquesne references is a petition for protective order to limit availability of proprietary information under the Commission's regulations.⁶ Yet, despite Duquesne's designation of the materials at issue as "Highly Confidential," Duquesne just circulated its proposal for a protective order to parties for review after 4 p.m. on Friday, May 11, 2018. Thus, when Duquesne finally elected to conditionally respond to I&E-RE-21-D and I&E-RE-22-D on May 10, I&E had no ability to execute a confidentiality agreement.

25. Notwithstanding the timing, the Commission's regulation regarding orders to limit availability of proprietary information provides as follows:

A petition for protective order to limit the disclosure of a trade secret or other confidential information on the public record will be granted only when a party demonstrates that the potential harm to the party of providing the information would be substantial and that the harm to the party if the information is disclosed without restriction outweighs the public's interest in free and open access to the administrative hearing process. A protective order to protect trade secrets or other confidential information will apply the least restrictive means of limitation which will provide the necessary protections from disclosure. In considering whether a protective order to limit the availability of proprietary information should be issued, the Commission or the presiding officer should consider, along with other relevant factors, the following: (1) The extent to which the disclosure would cause unfair economic or competitive damage; (2) The extent to which the information is known by others and used in similar activities; (3) The worth or value of the information to the party and to the party's competitors; (4) The degree of difficulty and cost of developing the information; (5) Other statutes or regulations dealing specifically with disclosure of the information.⁷

⁶ 52 Pa. Code § 5.365.

⁷ 52 Pa. Code § 5.365(a).

26. In this case, Duquesne has failed to provide for the basis of its restriction of the information sought in I&E-RE-21-D and I&E-RE-22-D; therefore, no assessment of harm and the necessity of protection from disclosure can be conducted. Accordingly, Duquesne has not demonstrated that it would be substantially harmed by providing the information contained in I&E-RE-21-D and I&E-RE-22-D.

27. Although the Commission's regulation regarding limitation of availability of proprietary information account for restriction of disclosure of proprietary information to the extent only necessary for the purposes of preparing and presenting evidence, cross-examination and argument,⁸ nothing in the regulation contemplates a parties' conditional provision of information of a form so limiting that it would deprive the requesting party of any evidentiary use of the information, as Duquesne's restrictions would.

28. In summary, Duquesne failed to provide any authority or basis for its failure to provide I&E with the materials requested in I&E-RE-21-D and I&E-RE-22-D; therefore, Duquesne should be immediately compelled to provide I&E with any and all materials in its possession that are responsive I&E I&E-RE-21-D and I&E-RE-22-D.

C. Duquesne's Conduct Has Frustrated I&E's Investigation

29. It is burdensome and impractical for statutory parties, including I&E, to review responses to I&E-RE-21-D and I&E-RE-22-D at the offices of Duquesne's counsel.

30. The burden to I&E is further compounded by the fact that responses to I&E-RE-21-D and I&E-RE-22-D are already over two weeks late, thereby impeding I&E witnesses' ability to fully investigate Duquesne's filing and to develop further discovery

⁸ 52 Pa. Code § 5.365(c)(1).

and written testimony. Now, compounding this substantial delay, Duquesne seeks to restrict I&E's access to the materials by refusing to turn them over and limiting I&E's access to them to the extent that their value is either diminished or extinguished.

31. Duquesne effectively seeks to deprive I&E of materials responsive to I&E-RE-21-D and I&E-RE-22-D, because Duquesne's unwarranted condition ensures that any viewed materials will have no evidentiary value. The materials will lack evidentiary value because any notes that I&E produces after viewing the materials will surely be ripe for numerous evidentiary challenge, including on the basis of authenticity, rendering the information practically useless to I&E.

32. Duquesne's untimely and conditional responses to RE-21-D and I&E-RE-22-D have imposed considerable delay and hardship on I&E's ability to carry out its rate investigation in this case. Accordingly, Duquesne should be immediately compelled to provide I&E with any and all materials in its possession that are responsive I&E-RE-21-D and I&E-RE-22-D.

WHEREFORE, for the reasons set forth above, I&E respectfully requests that Duquesne Light Company be compelled to immediately provide in-hand responses to I&E-RE-21-D and I&E-RE-22-D. As previously indicated, I&E will voluntarily agree to treat these materials as highly confidential while a Protective Order is pending.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "G. Miller", written over a horizontal line.

Gina L. Miller
Prosecutor
PA Attorney ID No. 313863

John M. Coogan
Prosecutor
PA Attorney ID No. 313920

Bureau of Investigation & Enforcement
Pennsylvania Public Utility Commission
400 North Street, 2nd Floor North
Harrisburg, PA 17120

May 15, 2018