**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission : R-2018-3000124

Office of Consumer Advocate : C-2018-3001029

Jason Dolby : C-2018-3001074

Peoples Natural Gas Company LLC : C-2018-3001152

James Fedell : C-2018-3001473

Office of Small Business Advocate : C-2018-3001566

Duquesne Industrial Intervenors : C-2018-3001713

:

v. :

:

Duquesne Light Company :

1308(d) Proceeding :

# **INTERIM ORDER**

**Granting Respondent’s Motion for**

**Partial Judgment on the Pleadings**

Before

Katrina L. Dunderdale

Administrative Law Judge

INTRODUCTION

This Interim Order grants Duquesne Light Company’s Motion for Partial Judgment on the Pleadings and this Interim Order precludes Peoples Natural Gas Company LLC at Docket No. C-2018-3001152 from contesting Tariff Rider No. 16 in the base rate proceeding initiated by Duquesne Light Company at Docket No. R‑2018-3000124.

HISTORY OF THE PROCEEDING

On March 28, 2018, Duquesne Light Company (Duquesne Light), Utility Code 110150, filed Supplement No. 174 to Tariff Electric Pa. P.U.C. No. 24 to become effective May 29, 2018, containing a proposed general increase in electric distribution rates of approximately $133.8 million. In Supplement No. 174, Duquesne Light proposes, *inter alia*, to raise the rate for backup service for non-utility generating facilities from the current rate of $2.50 per kWh to $8.00 per kWh, (or 220%). Duquesne Light proposes to retain the existing tariff language that customers who exceed capability reservation will be charged two times the applicable charge per kilowatt but proposes to increase the charge from the current rate of $5.00 per kWh to $16.00 per kWh.

On April 10, 2018, the Peoples Natural Gas Company LLC (Peoples) filed a formal complaint against Duquesne Light at Docket No. C-2018-3001152. Peoples objected to provisions in Duquesne Light’s base rate proceeding concerning Tariff Rider 16. Peoples specifically objected to Duquesne Light’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 averred it had existing customers using distributed generation projects in Duquesne Light’s service territory, including some Combined Heat and Power (CHP) projects. Peoples contended these actions in the base rate proceeding would adversely affect reliability and public safety. Peoples also contended the increases in Tariff Rider 16 would have a significant adverse economic impact on Peoples because the higher rates would negatively impact the pursuit of distributed generation projects, contrary to the Commission’s *Final Policy Statement on Combined Heat and Power*, at Docket No. M-2016-2530484 (Opinion and Order entered April 5, 2018), p. 3.

On May 1, 2018, Duquesne Light filed a Motion for Partial Judgment on the Pleadings with Regard to Averments in the Complaint of Peoples Natural Gas Company LLC Regarding Tariff Rider No. 16 (Motion for Partial Judgment), with a Notice to Plead, at Docket No. C-2018-3001152. Duquesne Light indicated Peoples lacked standing to pursue a claim on behalf of Peoples’ customers. Duquesne Light cited to 52 Pa.Code § 5.102 and § 5.103 as authority for its Motion and averred there is no legal basis in Peoples’ formal complaint to justify the Commission requiring Duquesne Light to defend its actions

relative to Tariff Rider No. 16 as it relates to Peoples. Duquesne Light asked for a determination that Peoples did not have standing to address any issues related to Tariff Rider No. 16.

On May 11, 2018, Peoples filed its Answer to the Motion for Partial Judgment. Peoples argues the Motion for Partial Judgment should be treated as a preliminary objection. Citing to *Silvestri v. Verizon Pennsylvania, Inc.*, Docket No. C-2010-2174497 (Opinion and Order entered July 1, 2011), Peoples avers that, as a preliminary objection, dismissal is warranted only when the dismissal is free from doubt, and the movant prevails only based on Peoples’ assertions as a matter of law, assuming all factual allegations in Peoples’ formal complaint are true. Peoples asserts it is pursuing distributed generation projects, some of which Peoples anticipates will be owned by Peoples.

When Peoples owns a distributed generation project, Peoples will be a customer of Duquesne Light receiving service through Tariff Rider 16. Peoples contends its pursuit of further development of and ownership in distributed generation projects gives it a direct, immediate and substantial interest in Duquesne Light’s proposed increase in rates under Tariff Rider 16. Peoples argues that Duquesne Light’s proposed changes will directly affect the economic viability of the CHP and other distributed generation projects, and may render these projects uneconomically feasible, if the proposed rate changes are approved by the Commission.

This matter is now ripe for a disposition on Duquesne Light’s Motion for Partial Judgment.

FINDINGS OF FACT

1. Complainant is Peoples Natural Gas Company LLC, a certificated Natural Gas Distribution Company (NGDC) and is a customer of Respondent.
2. Respondent is Duquesne Light Company, a certificated Electric Distribution Company (EDC).
3. On April 10, 2018, Complainant filed a formal complaint at Docket No. C-2018-3001152 with the Commission against Duquesne Light’s base rate proceeding at Docket No. R-2018-3000124.
4. On May 1, 2018, Duquesne Light filed a Motion for Partial Judgment on the Pleadings, with a Notice to Plead, against Peoples at Docket No. C-2018-3001152.
5. On May 11, 2018, Peoples filed a response to Duquesne Light’s Motion for Partial Judgment on the Pleadings.

DISCUSSION

Respondent filed a Motion for Partial Judgment on the Pleadings (Motion) and avers Complainant lacks standing to file the formal complaint against Respondent in Duquesne Light’s base rate proceeding at Docket No. R-2018-3000124. Respondent requests the Commission dismiss Peoples’ formal complaint at Docket No. C-2018-3001152. In response, Peoples contends Duquesne Light should have filed preliminary objections instead of requesting a decision on the pleadings and, in response, Peoples treated the Motion as if it were preliminary objections.

Pursuant to Section 701 of the Code, 66 Pa.C.S.A. § 701, Peoples was allowed to file a formal complaint averring the existence of any act or thing which a public utility did or did not do in violation of any law over which the Commission has jurisdiction, provided Peoples has an interest in the subject matter.[[1]](#footnote-1)  Peoples’ formal complaint was consolidated with the base rate proceeding by the presiding officer after the prehearing conference in the base rate proceeding because Peoples’ averments stated Peoples is a customer, and objected to the base rate increase in general and specifically opposed a proposed tariff change in Duquesne Light’s initial base rate filing.

Under the Commission’s rules at 52 Pa.Code § 5.61(d), Duquesne Light was not required to file an answer to Peoples’ formal complaint because the formal complaint at Docket No. C-2018-3001152 was consolidated with and docketed in the Commission-instituted rate proceeding at Docket No. R-2018-3000124.

Pursuant to 52 Pa.Code § 5.103(b), written motions may be filed at any time in a proceeding, however, according to 52 Pa.Code § 5.102(a), a motion for judgment on the pleadings cannot be filed until after the pleadings close. Peoples filed its complaint on April 10, 2018. Duquesne Light had twenty (20) days from April 10, 2018 to file an answer. The pleadings closed twenty (20) days after April 10, 2018 or, in other words, on April 30, 2018.

Partial Judgment on the Pleadings

Instead of filing an answer, Duquesne Light filed the Motion on the day after the pleadings closed in Peoples’ formal complaint proceeding. Duquesne Light was not in error to file the Motion. Duquesne Light did not enunciate this position clearly in its Motion but Duquesne Light seeks to eliminate the ability of Peoples to contest or oppose Tariff Rider No. 16 without actually dismissing the formal complaint. For that reason, the appropriate motion to file was one entitled as “partial” because the Motion is intended to affect only one portion of the complaint which relates to Tariff Rider No. 16.

Under 52 Pa.Code § 5.102(d)(1), motions for judgment on the pleadings are to be granted if all the applicable pleadings, depositions, answers to interrogatories and admissions, together with affidavits, as applicable, “show that there is no genuine issue as to a material fact and the moving party [Duquesne Light] is entitled to a judgment as a matter of law.”

The Commission must view the record in the light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences.[[2]](#footnote-2) It must accept as true all well-pleaded statements of fact of the non-moving party and consider only those facts that the non-moving party specifically admits.[[3]](#footnote-3) All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.[[4]](#footnote-4) Only in a case where the moving party’s right to prevail is so clear that a trial would be a fruitless exercise should judgment on the pleadings be granted.[[5]](#footnote-5) Judgment on the pleadings should be entered only when the case is clear and free from doubt.[[6]](#footnote-6)

Standing

Here, Duquesne Light, *inter alia*, challenges the standing of Peoples to contest the proposed changes to Duquesne Light’s Tariff Rider 16, in the context of Duquesne Light’s base rate proceeding (at R-2018-3000124). Duquesne Light avers Peoples failed to demonstrate how it is a “party in interest” as required by the Public Utility Code, 66 Pa.C.S.A. § 701, and Commission regulations.[[7]](#footnote-7) The Commission traditionally requires a party to show how its interests will be directly impacted before allowing intervention. The term “standing” is not itself defined in either the Code or the Commission’s Rules of Administrative Practice and Procedure but reference to civil practice provides some insight.

To have standing in civil practice, a party must have: (1) a substantial interest in the subject matter of the litigation; (2) the interest must be direct; and (3) the interest must be immediate and not a remote consequence.[[8]](#footnote-8) The core concept of the question of “standing” is that a person or entity, who is not adversely affected in any way by the matter the person or entity seeks to challenge, is not “aggrieved” and, accordingly, has no standing to obtain a judicial resolution of the challenge.[[9]](#footnote-9)

The requirement of a “substantial” interest means the litigant must have some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law. The requirement that a litigant’s interest must be “direct” simply means the person claiming to be aggrieved must show causation of harm to his/her/its interest as a matter of which he/she/it complains. The interest sought to be protected must be “immediate” and “not a remote consequence of the judgment.”

Analysis of Standing

Applying these criteria to this proceeding, Peoples must show that some interest Peoples currently possesses will experience a discernible adverse effect. Peoples’ interest must be more than an abstract interest. Peoples must be able to show harm to Peoples will result as a cause-effect from Duquesne Light’s proposed actions. Lastly, Peoples’ interest, which Peoples seeks to protect, must be an immediate concern.

Applying these criteria, one can see more clearly that Peoples’ interest as an owner of a CHP enterprise is not at risk because Peoples does not currently own a CHP project. Peoples’ investment as an owner in a CHP enterprise is not an immediate risk. Peoples may have invested sums of money to investigate and prepare to own a CHP enterprise, but it does not currently have an ownership interest, according to its formal complaint. If Peoples were to own a CHP enterprise, then Peoples could experience an adverse impact as a direct result from the proposed action of Duquesne Light, but that factual scenario was not alleged by Peoples. When viewing all the facts as averred by Peoples in light of the requirements to prove standing, Peoples does not have standing to contest Tariff Rider No. 16.

Accepting as true all well-pleaded facts in Peoples’ complaint, I find Peoples did not allege sufficient facts that, if proven, would justify the issuance of an Initial Decision against Duquesne Light for failure to provide adequate and reasonable electric service and to comply with the Commission’s regulations concerning Tariff Rider No. 16. Therefore, there is insufficient basis to provide an opportunity to Peoples to proceed with its formal complaint as it relates to Tariff Rider No. 16. In all other regards, Peoples has standing as a customer to participate in the base rate proceeding and its formal complaint is included in the base rate proceeding because Duquesne Light did not request dismissal of the entire complaint. The Motion for Partial Judgment on the Pleadings is granted in the ordering paragraphs below.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties to this dispute and over the subject matter of this dispute to the extent the formal complaint involves allegations of a failure by Respondent to provide adequate, efficient, safe and reasonable electric service pursuant to 66 Pa.C.S.A. § 1501.

2. The Commission’s Rules of Administrative Practice and Procedure permit the filing of a Motion for Judgment on the Pleadings which questions the adequacy of the formal complaint, provided the filing is made after the pleadings are closed but within such time as to not delay a hearing. 52 Pa.Code § 5.102(a).

3. The core concept of the question of “standing” is that a person or entity, who is not adversely affected in any way by the matter the person or entity seeks to challenge, is not “aggrieved” and, accordingly, has no standing to obtain a judicial resolution of the challenge. *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975).

4. The formal complaint of Peoples Natural Gas Company LLC fails to raise a claim that, if proven, might show Peoples Natural Gas Company LLC has standing to contest Tariff Rider No. 16.

ORDER

THEREFORE,

IT IS ORDERED:

That the Motion for Partial Judgment on the Pleadings as filed by Duquesne Light Company is granted in that Peoples Natural Gas Company LLC at Docket No. C-2018-3001152 lacks standing as concerns Tariff Rider No. 16 and is precluded from opposing Tariff Rider No. 16.

Date: May 22, 2018

Katrina L. Dunderdale

Administrative Law Judge

**R-2018-3000124 – PENNSYLVANIA PUBLIC UTILITY COMMISSION V. DUQUESNE LIGHT COMPANY 1308(D)**

*(Revised 5/18/18)*

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1. *See also*, 52 Pa.Code § 5.21(a). [↑](#footnote-ref-1)
2. *First Mortgage Co. of Pennsylvania v. McCall*, 459 A.2d 406 (Pa.Super. 1983); *Mertz v. Lakatos*, 381 A.2d 497 (Pa.Cmwlth. 1978). [↑](#footnote-ref-2)
3. *Weik v. Estate of Brown*, 794 A.2d 907 (Pa.Super. 2002). [↑](#footnote-ref-3)
4. *Thomson Coal Company v. Pike Coal Company*, 412 A.2d 466 (Pa. 1979). [↑](#footnote-ref-4)
5. *Williams v. Lewis*, 466 A.2d 682 (Pa.Super. 1983); *Service Employees International Union, Local 69, AFL-CIO v. The Peoples Natural Gas Company, d/b/a Dominion Peoples*, Docket No. C-20028539 (Opinion and Order entered December 19, 2003). [↑](#footnote-ref-5)
6. *Reuben v. O’Brien*, 496 A.2d 913 (Pa.Super 1985). [↑](#footnote-ref-6)
7. *See,* 52 Pa.Code § 1.8. [↑](#footnote-ref-7)
8. *Franklin Twp. v. Pa. Dept. of Environmental Resources,* 499 Pa. 162, 452 A.2d 718 (1982). [↑](#footnote-ref-8)
9. *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh,* 464 Pa. 168, 346 A.2d 269 (1975). [↑](#footnote-ref-9)