**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 :

**THIRD INTERIM ORDER**

Grant Motion to Compel of

Bureau of Investigation and Enforcement

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. The proposed base rate increase includes $52.2 million of revenues currently recovered under surcharges, therefore the increase to customers over current charges is $81.6 million.

On March 30, 2018, the Bureau of Investigation & Enforcement (BIE) filed a Notice of Appearance.

On April 11, 2018, BIE served Data Requests I&E-RE-1-D through I&E-RE-26-D (Data Requests) upon Duquesne Light. Pursuant to 52 Pa.Code § 5.331(c), Duquesne Light’s responses were due by April 26, 2018.

By Order entered April 19, 2018, the Commission suspended the implementation of Supplement No. 174 to Tariff Electric Pa. P.U.C. No. 24 by operation of law, pursuant to 66 Pa.C.S.A. § 1308(d), until December 29, 2018, unless permitted by Commission Order to become effective at an earlier date, and instituted an investigation into the lawfulness, justness, and reasonableness of the rates, rules, and regulations proposed in Supplement No. 174.

On April 26, 2018, the Office of Administrative Law Judge (OALJ) scheduled a prehearing conference to be conducted telephonically on May 3, 2018.

On May 2, 2018, BIE contacted Duquesne Light about the Data Requests which were six days overdue, including the responses to I&E-RE-21-D and 22-D.

On May 3, 2018, Administrative Law Judge Katrina L. Dunderdale conducted a call-in telephonic prehearing conference with the parties in which various procedural matters were discussed and a litigation schedule was established. Duquesne Light stated its intention that a draft of a proposed protective order would be provided to the parties by May 4, 2018 and Duquesne Light hoped to file the proposed protective order with the presiding officer by May 11, 2018.

Thereafter, on May 8, 2018, the presiding officer issued the Prehearing Order which memorialized the matters discussed at the prehearing conference. On the same date, BIE contacted Duquesne Light and repeated that some Data Requests were twelve days overdue, including the responses to I&E-RE-21-D and 22-D, and inquired about the status of the protective order.

On May 10, 2018, Duquesne Light notified the statutory parties that confidential information would be released to statutory parties pending finalization of a protective order, provided the statutory parties agreed to maintain the responses as confidential. On the same date, BIE notified Duquesne Light it would agree to keep material confidential.

Also on May 10, 2018, Duquesne Light provided the following responses to I&E-RE-21-D and 22-D, which responses had been due by April 26, 2018:

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.

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.

From May 10, 2018 through May 14, 2018, BIE and Duquesne Light engaged in conversations in an attempt to resolve the disagreement but was unsuccessful.

On May 15, 2018, BIE served a Notice to Plead and Expedited Motion to Compel (Expedited Motion to Compel) averring Duquesne Light was in possession of necessary and/or relevant documentation pertaining to the matter involved and requesting the presiding officer to enter an order compelling Duquesne Light to respond fully to the outstanding discovery requests.

First, BIE contends Duquesne Light’s insistence the material requested must be viewed in the offices of its lawyers and its refusal to copy or allow BIE to copy the material operates as untimely objections to BIE’s Data Requests. Second, BIE argues Duquesne Light has no viable basis to impose the restriction it seeks, namely, that the documents are so highly confidential that a separate confidentiality agreement must be signed first, and the materials would only be made available for viewing with an attorney representing Duquesne Light present in the room. Lastly, BIE argues Duquesne Light’s actions are intended to be burdensome, impractical and frustrating to BIE and the statutory parties. BIE contends Duquesne Light is intentionally impeding BIE’s ability to fully investigate the base rate filing and will render the requested materials as containing no evidentiary value.

On May 21, 2018, Duquesne Light served the Answer to the Expedited Motion to Compel. Duquesne Light avers BIE’s motion is moot as to I&E-RE-22 because the requested tax returns were produced. As concerns I&E-RE-21, Duquesne Light asserts it provided the federal return and consolidated taxable income schedule to BIE.

As for the other requested information, Duquesne Light contends it offered to allow BIE to view the entire consolidated tax return to see if BIE would like additional information from the return. Duquesne Light insists it is not objecting to the Data Requests, so the presiding officer does not need to consider whether Duquesne Light’s responses are timely or untimely because they are not objections. Duquesne Light argues its offers – to allow BIE to view the documents in the offices of Duquesne Light’s lawyers – are reasonable accommodations in light of the confidential nature of the information and should not be construed as objections. Duquesne Light insists that it is not objecting to the Data Request but it will not provide a hard copy of the consolidated tax return. Duquesne Light avers the consolidated tax return includes the income statement and balance sheet detail for all of its unregulated affiliates. Duquesne Light also does not understand why BIE would need to have a copy of this highly sensitive information. Lastly, Duquesne Light asserts any delay averred by BIE is the direct result of BIE’s refusal to inspect or view the documents outlined in Duquesne Light’s responses to the Data Request.

DISCUSSION

Section 5.321(c) of the Commission’s Rules of Administrative Practice and Procedure, 52 Pa.Code § 5.321(c), specifically provides that “a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.” Discovery is permitted regardless of whether the information sought “relates to the claim or defense of the party seeking discovery or to the claim or defense of another party or participant.” *Id*. Information may be discoverable, even if it would be inadmissible at a hearing. “It is not grounds for objection that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” *Id*. Consistently, the Commission has allowed participants wide latitude in discovery matters. Pa. Pub. Util. Comm’n v. The Peoples Natural Gas Company, 62 Pa. PUC 56 (August 26, 1986); and Pa. Pub. Util. Comm’n v. Equitable Gas Company, 61 Pa. PUC 468 (May 16, 1986).

When evaluating a base rate filing by a certificated utility, the Commission must determine if the proposed rate change is a just and reasonable rate to be charged or applied for the utility service. See 66 Pa.C.S.A. § 1308(c).

Expedited Motion to Compel of BIE

BIE asserts the information it seeks is relevant and necessary for it to properly investigate the claims in Duquesne Light’s base rate filing. BIE has the burden of specifying some justification for how the information sought to be discovered is relevant, beyond the simple averment.

There is nothing unusual about the information BIE seeks from Duquesne Light. BIE requests a copy of Duquesne Light’s federal and state tax returns. Such a request is commonplace, especially in a base rate proceeding where the impact of the Tax Cuts and Jobs Act of 2017 (TCJA) is at issue. TCJA will have an impact on Duquesne Light’s revenue requirement because, under TCJA, the federal income tax will be reduced. In light of the TCJA, BIE must have access to the federal and state income tax returns, especially given its role as a statutory party. BIE is clearly entitled to have Duquesne Light respond to the request for information in a timely manner in order to prepare for the upcoming hearings. It is disingenuous, at best, for Duquesne Light to insist that its two-week delay in responding to the Data Request in addition to its refusal to supply a copy of the documents requested are not “objections.” Duquesne Light is also in error to insist it has provided the requested documents to BIE when all it has done is “allow” BIE to view the documents while an attorney for Duquesne Light sits in the room.

The information requested by BIE is relevant and discoverable. Duquesne Light was in error to refuse to provide the requested information in BIE’s Data Request in a timely manner. In the Ordering Paragraphs below, Duquesne Light will be required to provide responsive documents to the Bureau of Investigation and Enforcement’s Data Requests Nos. I&E-RE-21-D and I&E-RE-22-D, which were dated April 11, 2018 and were due by April 26, 2018.

THEREFORE,

IT IS ORDERED:

1. That the Expedited Motion to Compel of the Bureau of Investigation and Enforcement, dated May 15, 2018, to respond and provide responsive documents to the Bureau of Investigation and Enforcement’s Data Requests Nos. I&E-RE-21-D and I&E-RE-22-D, dated April 11, 2018, is hereby granted.

2. That on or before 4:00 p.m. on Wednesday, May 30, 2018, Duquesne Light Company shall serve the following documentation noted in paragraph 4 below upon the Bureau of Investigation and Enforcement.

3. That failure of Duquesne Light Company to comply with paragraph 2 above may result in an order consistent with the provisions of 52 Pa.Code § 5.372(a).

4. That Duquesne Light Company shall fully answer the Bureau of Investigation and Enforcement’s Data Requests Nos. I&E-RE-21-D and I&E-RE-22-D, including providing a copy of the same, as applicable.

Date: May 24, 2018 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Katrina L. Dunderdale

Administrative Law Judge

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

*(Revised 5/22/18)*

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