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June 9, 2021

**VIA EFILING**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2nd Floor  
Harrisburg, PA 17120

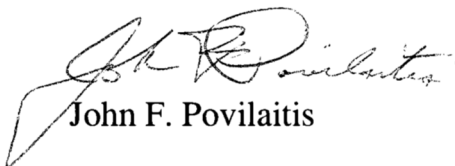
Re: Pennsylvania Public Utility Commission, Office of Consumer Advocate, Office of  
Small Business Advocate v. Duquesne Light Company;  
Docket No. R-2021-3024750, C-2021-3025538, C-2021-3025462, C-2021-  
3026057

Dear Secretary Chiavetta:

On behalf of Nationwide Energy Partners, LLC, enclosed please find the Answer  
of Nationwide Energy Partners, LLC to the Preliminary Objection of Duquesne Light Company  
in the above-referenced proceeding.

This document is being served as indicated in the Certificate of Service.

Very truly yours,

  
John F. Povilaitis

JFP/tlg  
Enclosure  
cc: Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,	:	
Office of Consumer Advocate, Office of Small	:	Docket No. R-2021-3024750
Business Advocate	:	C-2021-3025538
	:	C-2021-3025462
v.	:	C-2021-3026057
	:	
Duquesne Light Company	:	

**ANSWER OF NATIONWIDE ENERGY PARTNERS, LLC TO THE  
PRELIMINARY OBJECTION OF DUQUESNE LIGHT COMPANY**

AND NOW, Nationwide Energy Partners, LLC (“NEP”) hereby responds to the Preliminary Objection (“PO”) of Duquesne Light Company (“DLC” or “Company”), pursuant to Section 5.101(a)(7) of the Pennsylvania Public Utility Commission’s (“PaPUC” or “Commission”) regulations, 52 Pa. Code § 5.101(a)(7), as follows:

**I. INTRODUCTION**

1. On April 16, 2021, DLC filed with the Commission at Docket No. R-2021-3024750 Tariff Supplement No. 25 to the Company’s Tariff Electric-Pa.P.U.C. No. 25 (“Tariff”), in connection with a request for a general increase in its electric distribution rates of approximately \$115 million, with an effective date of June 15, 2021, and proposing various other changes to its existing tariff.

2. DLC Tariff Rule 18 bans the redistribution of electricity by a customer except where DLC decides that “special circumstances exist,” provided it gives written consent and the tenant is not required to make a specific payment for the energy. Customer installations in place prior to June 1, 1965 are exempted, which is an indication of how long DLC has maintained this policy against redistribution of electricity. Among the other things, DLC has proposed a change in its Tariff Rule 41, which addresses and currently prohibits the use of master meters in multi-

tenant buildings. The proposed change to Tariff Rule 41 would allow master metering by property owners of multi-tenant buildings on a very limited basis. Tariff Rule 41.1, as proposed, would only allow the use of master meters for a very limited class of residential customers and deny their use in other situations that NEP believes would be beneficial and in the public interest. The Company has supported its proposed changes in Tariff Rule 41 through Statement No. 6, the Direct Testimony of Yvonne Phillips. The main subject of Ms. Phillips' Direct Testimony is the Company's proposed master metering proposal.

3. On May 26, 2021, NEP filed a complaint against DLC and its proposed rate increase ("Complaint") alleging, among other things, DLC's Tariff Rule 41, as it existed and as proposed in DLC's Tariff, in conjunction with Rule 18 unreasonably, unlawfully and discriminatorily limits the use of master meters by multifamily property owner customers. *See* Complaint, paragraph 10.

4. In its Complaint, NEP averred that its services, which require the installation of a customer master meter and are provided in other PaPUC-jurisdictional electric utility service areas, have been requested by DLC customers.

5. On June 4, 2021, DLC filed a Preliminary Objection to the Complaint claiming that NEP lacks standing to bring the Complaint in this proceeding.

6. For the reasons specified herein, there is no basis for dismissing the Complaint and NEP should be permitted to litigate in this proceeding all of the issues raised in the Complaint.

## **II. LEGAL STANDARDS OF REVIEW**

7. The Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary objections. 52 Pa. Code § 5.101; *see also Equitable Small Transportation*

*Intervenors v. Equitable Gas Company*, Docket No. C-00935435 (Final Order entered July 18, 1994).

8. The grounds for preliminary objections are set forth in 52 Pa Code § 5.101(a):

(1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.

(2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.

(3) Insufficient specificity of a pleading.

(4) Legal insufficiency of a pleading.

(5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.

(6) Pendency of a prior proceeding or agreement for alternative dispute resolution.

(7) Standing of a party to participate in the proceeding.

9. The Commission's procedure regarding the disposition of preliminary objections is similar to that utilized in Pennsylvania civil practice. *Equitable Small Transportation Intervenors*, Docket No. C-00935435 (July 18, 1994).

10. A preliminary objection in civil practice seeking dismissal of a pleading will be granted only where relief is clearly warranted and free from doubt. *Interstate Traveller Services, Inc. v. Pa. Dept. of Environmental Resources*, 406 A.2d 1020 (Pa. 1979); *Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc.*, 595 A.2d 172 (Pa. Super. 1991). The Commission has adopted this standard. *Montague v. Philadelphia Electric Company*, 66 Pa. PUC 24 (1988).

11. The moving party (DLC) cannot rely on their own factual assertions, but must accept for purposes of disposition of the preliminary objection all well-pleaded, material facts of

the other party (NEP), as well as every inference fairly deductible from those facts. *County of Allegheny v. Commonwealth of Pa.*, 507 Pa. 360, 490 A.2d 402 (1984). Any doubt must be resolved in favor of the non-moving party (NEP) by refusing to sustain the preliminary objections. *Dep't of Auditor General, et al. v. State Employees' Retirement System, et al.*, 836 A.2d 1053, 1064 (Pa. Cmwith Ct. 2003) citing *Boyd v. Ward*, 802 A.2d 705 (Pa. Cmwlth Ct. 2002).

12. DLC has objected to NEP's standing to pursue its Complaint issues in the rate proceeding. PO ¶ 6. The seminal Pennsylvania case on standing is *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975) ("William Penn"). Under *William Penn*, to have standing in a proceeding (1) a party must have 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. See *Franklin Twp. v. Pa. Dept of Environmental Resources*, 499 Pa. 162, 452 A.2d 718 (1982).

13. Thus, in resolving a preliminary objection, the Commission must assume that:

[a]ll material facts set forth in the complaint as well as all inferences reasonably deducible therefrom are admitted as true. The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it.

*McMahon v. Shea*, 688 A.2d 1179, 1181 (Pa. 1997).

14. DLC has a heavy burden to demonstrate any entitlement to relief under its PO, which as noted further below it has completely failed to satisfy.

### **III. ARGUMENT**

15. By attempting to obtain dismissal of NEP's Complaint, DLC is repeating the legal error it committed in its previous base rate increase case at Docket No. R-2018-3000124 when it attempted to exclude the participation of Peoples Natural Gas Company LLC ("Peoples"). DLC

objected to Peoples standing to pursue a formal complaint against proposed tariff provisions involving backup service that would impair its interest in developing combined heat and power projects for DLC customers. See *Attachment 1, PaPUC et al. v. Duquesne Light Company*, Docket No. R-2018-3000124 (Order Entered June 14, 2018)(“*Order On Standing*”). The Commission decisively rejected DLC’s arguments in the prior rate case, and the ALJs should similarly reject those arguments again in this proceeding.

16. DLC argues that NEP has no direct interest in this proceeding because it is not a DLC customer, nor does it currently provide its services in DLC’s service territory. PO ¶18. However, the lack of customer status is not relevant to standing when the complaint does not involve the quality of a utility’s service. In *Home Oxygen and Medical Equipment v. Verizon Pennsylvania, Inc.* 2011 Pa. PUC LEXIS 576 Docket No. C-2011-2267086 (December 15, 2011).

17. NEP is not challenging the quality of DLC’s service, but the application and interpretation of two tariff provisions, one of which DLC is proposing to modify in this proceeding. Ironically, NEP’s lack of current customers in DLC’s service territory is the direct result of the language in and application of DLC’s Tariff Rules 18 and 41, which as they presently exist and as proposed in this proceeding directly impair NEP’s business model of providing significant financial and energy efficiency benefits to customers that participate in its master metering services. Absent NEP’s participation in this proceeding and its advocacy opposing the existing language in and proposed modifications of Tariff Rules 18 and 41, NEP’s legitimate business interests in providing service in DLC’s territory are and will continue to be directly and substantially impaired , an impairment that will *not be remedied* by the Company’s proposed changes to Rule 41. As the Commission’s *Order On Standing* in DLC’s prior rate case made clear, “Peoples’ customers that are developing CHP and other distributed generation projects may decide

not to pursue some or all of their planned CHP projects resulting in economic harm to Peoples.” *Order On Standing* at 24. That same logic equally applies to NEP in this case and fully supports NEP’s standing to litigate its Complaint in this proceeding.

18. DLC argues that NEP’s interest in this proceeding is not “immediate” because there is allegedly no nexus between NEP’s ability to provide services within the Company’s service territory and its specific master metering proposal in the April 16, 2021 rate case filing. PO ¶ 19. This argument ignores the fact that after a long period of virtually banning the use of master meters in multi-family property owner settings, DLC has proposed the use of master meters, but on a very narrow basis that is too limited and discriminatory to permit interested customers to use NEP’s services in DLC’s service territory. Under DLC’s logic, NEP cannot participate in this DLC proceeding where master meter issues are being considered unless the Company has master meter policies already in effect that allow NEP’s services to be provided. This is an untenable proposition. NEP’s interests in these tariff rules are direct, substantial and immediate. Proper resolution of NEP’s master metering issues in this proceeding, where the relevant tariff rules will be considered and evaluated, will allow NEP to provide the services it already provides elsewhere in Pennsylvania. There is no better basis for standing than the actual facts presented by NEP’s complaint and the issues already established by DLC itself in this proceeding.

19. DLC’s argument that NEP does not have a substantial interest in the issues of this proceeding, but merely the general interest of a member of the public is completely unworkable. PO ¶¶ 20-21. NEP is unable to provide its services in the DLC service territory directly because of Tariff Rules 18 and 41. NEP is nothing like a member of the public with a general interest in an issue. On the contrary, it has a direct and substantial interest in the resolution of its issues with

Tariff Rules 18 and 41. Indeed, its ability to conduct business in DLC's service territory is completely dependent on the successful resolution of its Complaint.

20. The Company's suggested analogy that NEP and its unnamed potential customers are similar to a legislator trying to establish standing because of its constituents' interests is equally unsupportable. PO ¶ 22. As the Company well knows, NEP has discussed with DLC service opportunities in its service territory and was informed its Tariff rules do not permit those services to be extended. NEP is advancing its own very specific interests that also impact commercial and residential customers in DLC's service territory. NEP's interests in master metering rules is clearly substantial.

21. In addressing DLC's PO, the ALJs must resolve the material facts in favor of NEP. Those facts critical to the PO that must be accepted are: (i) that Tariff Rules 18 and 41, as they currently read and as Rule 41 is proposed to be changed, prevent NEP from offering services in DLC's service territory that are available elsewhere in Pennsylvania; and (ii) customers in DLC's service territory are interested in obtaining NEP's services and, but for the Company's Tariff rules, such services could be offered. Complaint, ¶¶ 1, 9-10. NEP's interests in the rate case proceeding are substantial, immediate and direct.

22. NEP notes that DLC has not taken the position that a party must be a DLC customer with respect to other Intervenors in this proceeding. For example ChargePoint, Inc. ("ChargePoint"), an entity seeking to sell products and services in the Company's service territory and protect its business model, *has not pleaded that it is a DLC customer*. ChargePoint Petition to Intervene ¶¶ 5-6. ChargePoint's interests are similar to NEP's but on different DLC proposals. However, DLC has not filed preliminary objections to ChargePoint based on its alleged non-customer status. DLC's inconsistent legal position is palpable and only serves to unjustifiably



delay the participation of parties in its rate proceedings and add to their costs, such as Peoples in 2018 and now NEP.

23. For all the reasons specified above, NEP respectfully requests the immediate issuance of an order by the Presiding Officers denying the Company's completely unsupported PO.<sup>1</sup>

#### **IV. CONCLUSION AND REQUESTED RELIEF**

Wherefore, NEP respectfully requests that the Presiding Officers immediately deny DLC's PO, confirm NEP's standing to fully participate in the Company's rate case proceeding, and grant NEP such other relief as may be just and reasonable under the circumstances.

Respectfully submitted,

BUCHANAN INGERSOLL & ROONEY PC

Dated: June 9, 2021

By: /s/ John F. Povilaitis

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*Counsel for Nationwide Energy Partners, LLC*

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<sup>1</sup> DLC has indicated that if its PO is denied, it will not contest consolidation of NEP's Complaint with the rate case docket.

# Attachment 1

**PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17105-3265**

Public Meeting held June 14, 2018

Commissioners Present:

Gladys M. Brown, Chairman  
Andrew G. Place, Vice Chairman  
Norman J. Kennard  
David W. Sweet,  
John F. Coleman, Jr.

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

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is a Petition for Interlocutory Review and Answer to Material Question on an Expedited Basis (Petition) filed pursuant to Section 5.302(a) of the Commission's Regulations, 52 Pa. Code § 5.302(a), by Peoples Natural Gas

Company LLC (Peoples or Petitioner) on May 22, 2018, in the above-captioned proceeding. On May 29, 2018, the Duquesne Industrial Intervenors (DII) filed a brief in support of the Petition. On May 31, 2018, Peoples filed a brief in support of its Petition and Duquesne Light Company (DLC or Company) filed a brief in opposition to the Petition.

In its Petition, Peoples seeks Commission review of and answer to the following material question:

Does the Interim Order, dated May 22, 2018, err in granting the Motion for Partial Judgment on the Pleadings filed by Duquesne Light Company (“Duquesne”) on May 1, 2018[,] and precluding Peoples – as developer of Combined Heat and Power (“CHP”) projects – from contesting, in Duquesne’s base rate proceeding, a proposed 220% increase in the Back Up Rate for CHP projects?

The Petitioner proposes that the question be answered in the affirmative. Petition at 3.

For the reasons more fully discussed below, we shall Answer the material question in the affirmative and return this matter to the Office of Administrative Law Judge (OALJ) for such proceedings as may be necessary.

### **History of the Proceeding**

On March 28, 2018, Duquesne Light Company (DLC or Company), filed Supplement No. 174 to Tariff Electric Pa. P.U.C. No. 24 (Supplement No. 174) 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 (I&E) filed a Notice of Appearance. On April 6, 2018, the Office of Consumer Advocate (OCA) filed a public statement and Formal Complaint at Docket No. C-2018-3001029. Thereafter, Formal Complaints have been filed by Jason Dolby at Docket No. C-2018-3001074, by Peoples at Docket No. C-2018-3001152, by James Fedell at Docket No. C-2018-3001473, by the Office of Small Business Advocate at Docket No. C-2018-3001566, and by DII at Docket No. C-2018-3001713.<sup>1</sup> By Prehearing Order dated May 8, 2018, Administrative Law Judge (ALJ) Katrina L. Dunderdale consolidated the Formal Complaints into the proceeding docketed at No. R-2018-3000124.

In Peoples' Formal Complaint (Complaint), served by Secretarial Letter dated April 13, 2018, the Petitioner objected to DLC's proposed changes to its Tariff Rider 16 in Docket No. R-2018-3000124 (Rider 16). Peoples specifically objected to the Company'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. The Petitioner averred that it had existing customers using distributed generation projects in DLC's service territory, including some Combined Heat and Power (CHP) projects. According to Peoples, the Company's actions in the base rate proceeding would adversely affect reliability and public safety. Peoples also contended that the increases in Rider 16 would have a significant adverse economic impact on Peoples because the higher rates would negatively impact its pursuit of distributed generation projects, contrary to the Commission's *Final Policy Statement on Combined Heat and Power*, Docket No. M-2016-2530484 (Order entered April 5, 2018) (*Final Policy Statement*) at 3.

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<sup>1</sup> In her Fifth Interim Order, dated June 1, 2018, the ALJ stated that the Complaint of *James Fedell v. Duquesne Light Company* at Docket No. C-2018-3001473 had been satisfied and directed the Secretary's Bureau to mark it as closed.

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

On May 1, 2018, DLC 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). DLC indicated that the Petitioner lacked standing to pursue a claim on behalf of Peoples' customers. The Company cited to 52 Pa. Code §§ 5.102 and 5.103 as authority for its Motion and averred there is no legal basis in Peoples' Complaint to justify a requirement that DLC defend its actions relative to Rider 16 as it relates to Peoples. DLC requested a determination that the Petitioner did not have standing to address any issues related to Rider 16.

On May 11, 2018, Peoples filed an Answer to the DLC Motion, arguing in part that it should be treated as a preliminary objection. Peoples averred 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' Complaint are true. Peoples asserted it is pursuing distributed generation projects, some of which the Petitioner anticipates will be owned by Peoples.

On May 22, 2018, ALJ Dunderdale issued the Interim Order which granted the Motion. In the Interim Order, Peoples was precluded from opposing Rider 16. As noted above, Peoples filed its Petition on May 22, 2018. On May 25, 2018, Peoples filed an Amended Formal Complaint to DLC's proposed general rate increase (Amended Complaint). Thereafter, DII, the Petitioner and DLC filed their respective briefs in response to the Petition.

On May 31, 2018, DLC filed a Motion for Simultaneous Consideration of: (1) The Petition for Interlocutory Review of Duquesne Light Company Filed April 29, 2018 at Docket No. M-2017-2640306 (DLC Interlocutory Review Petition); and (2) The Petition for Interlocutory Review Filed May 22, 2018 by the Peoples Natural Gas Company LLC at Docket Nos. R-2018-3000124, *et al.*<sup>2</sup>

## **Discussion**

### **Preliminary Objections**

As an initial matter, we shall address DLC's Motion which it filed pursuant to 52 Pa. Code § 5.102, pertaining to motions for summary judgment and judgment on the pleadings. Here, we disagree with the ALJ's treatment of the Motion as a partial judgment on the pleadings rather than as preliminary objections.

In the Interim Order, the ALJ explained the procedural anomalies of this matter. Peoples, she noted, filed its Complaint pursuant to 66 Pa. C.S. § 701; thereafter, the Complaint was consolidated with the base rate proceeding. Consolidation was permissible, the ALJ explained, because the Petitioner had averred that it was a customer of DLC which had objected to the base rate increase, in general, and the proposed tariff change, in particular. Under 52 Pa. Code § 5.61(d), the ALJ noted, DLC was not required to file an Answer to the Complaint because of its consolidation with the rate proceeding. Interim Order at 4-5.

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<sup>2</sup> We are concurrently addressing the DLC Interlocutory Review Petition by a separate Opinion and Order within the proceeding at Docket No. M-2017-2140306 and, thus, deem DLC's Motion for Simultaneous Consideration to be moot.

Motions for judgment on the pleadings, the ALJ continued, cannot be filed until after the pleadings are closed. The ALJ stated that Peoples filed its Complaint on April 10, 2018, and DLC had twenty days from that date to file an Answer. Believing that the pleadings closed on April 30, 2018, twenty days after April 10, 2018, the ALJ indicated that the Company appropriately filed the Motion on the day after the pleadings closed in Peoples' Complaint proceeding. Interim Order at 5. Upon review, however, the Complaint was served by Secretarial Letter dated April 13, 2018, and, thus, the pleadings did not close until May 3, 2018. As noted above, DLC filed its Motion on May 1, 2018, two days before the close of the pleadings.

Section 5.101 of our Regulations, 52 Pa. Code § 5.101, sets forth the grounds for granting preliminary objections. That section provides an opportunity for objecting to a pleading on the basis of a party's lack of standing as follows:

**§ 5.101. Preliminary objections.**

(a) *Grounds.* Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections. Preliminary objections must be accompanied by a notice to plead, must state specifically the legal and factual grounds relied upon and be limited to the following:

- (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
- (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
- (3) Insufficient specificity of a pleading.
- (4) Legal insufficiency of a pleading.
- (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.



(6) Pendency of a prior proceeding or agreement for alternative dispute resolution.

(7) *Standing of a party to participate in the proceeding.*

52 Pa. Code § 5.101(a) (emphasis added). Preliminary objections must be filed within twenty days of the pleading. 52 Pa. Code § 5.101(d). Here, DLC filed its Motion within twenty days of service of the Complaint.

We agree with Peoples that, under the circumstances of this proceeding, the Motion should have been evaluated as preliminary objections. As the Commission treats pleadings by what are reflected in their content rather than what they are labeled, we will address the legal standards applicable to preliminary objections.

Commission procedure regarding the disposition of preliminary objections is similar to the procedure utilized in Pennsylvania civil practice. A preliminary objection in civil practice seeking dismissal of a pleading will be granted only where relief is clearly warranted and free from doubt. *Interstate Traveller Services, Inc. v. Pa. Dep't of Environmental Resources*, 486 Pa. 536, 406 A.2d 1020 (1979). The moving party may not rely on its own factual assertions but must accept for the purposes of disposition of the preliminary objection all well-pleaded, material facts of the other party, as well as every inference fairly deducible from those facts. *County of Allegheny v. Commonwealth of Pa.*, 507 Pa. 360, 490 A.2d 402 (1985). The preliminary objection may be granted only if the moving party prevails as a matter of law. *Rok v. Flaherty*, 527 A.2d 211 (Pa. Cmwlth. 1987). Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. *Dep't of Auditor General, et al. v. State Employees' Retirement System, et al.*, 836 A.2d 1053, 1064 (Pa. Cmwlth. 2003) (citing *Boyd v. Ward*, 802 A.2d 705 (Pa. Cmwlth. 2002)).

If a preliminary objection is granted, the party who submitted the stricken pleading has the right to file an amended pleading within ten days of service of the order. 52 Pa. C.S. § 5.101(h). Here, Peoples filed an Amended Complaint on May 25, 2018, within ten days of service of the Interim Order.

## **Legal Standards**

Peoples filed its Petition pursuant to Section 5.302 of the Commission's Regulations, 52 Pa. Code § 5.302. During the course of a proceeding and pursuant to the provisions of 52 Pa. Code § 5.302, a party may seek interlocutory review and answer to a material question which has arisen or is likely to arise.

The standards for interlocutory review are well established. *See* 52 Pa. Code § 5.302(a). Section 5.302(a) of the Commission's Regulations requires that the petitioning party "state . . . the compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding." The pertinent consideration is whether interlocutory review is necessary in order to prevent substantial prejudice – that is, the error and any prejudice flowing therefrom could not be satisfactorily cured during the normal Commission review process. *Joint Application of Bell Atlantic Corp. and GTE Corp.*, Docket No. A-310200F0002, *et al.* (Order entered June 10, 1999); *Pa. PUC v. Frontier Communications of Pa. Inc.*, Docket No. R-00984411 (Order entered February 11, 1999); *In re: Knights Limousine Service, Inc.*, 59 Pa. P.U.C. 538 (1985).

Pursuant to 52 Pa. Code § 5.303, the Commission may take one of the following courses of action on requests for interlocutory review and answer to a material question:

- (1) Continue, revoke or grant a stay of proceedings if necessary to protect the substantial rights of the parties.
- (2) Determine that the petition was improper and return the matter to the presiding officer.
- (3) Decline to answer the question.
- (4) Answer the question.

We note that any issue we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the 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).

### **Interim Order**

In the Interim Order, the ALJ explained the legal principles of standing in civil practice and the requirements that: (1) a party must have 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. *Id.* at 6-7 (citing *Franklin Twp. v. Pa. Dept. of Environmental Resources*, 499 Pa. 162, 452 A.2d 718 (1982)). The ALJ emphasized that the core concept of standing is that a person or entity who is not adversely affected in any way by a matter the person or entity seeks to challenge is not aggrieved and, thus, has no standing to obtain a judicial resolution of the challenge. Interim Order at 7 (citing *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975) (*William Penn*)).

Applying the principles of standing to this proceeding, the ALJ determined that Peoples' interest as an owner of a CHP enterprise is not at risk because the Petitioner does not currently own a CHP project. The ALJ found that Peoples' investment as an owner in a CHP – which involved investing sums of money to investigate and prepare to own a CHP enterprise, according to the Complaint – is not an immediate risk. If Peoples were to own a CHP enterprise, the ALJ acknowledged, then the Petitioner could experience an adverse impact as a direct result of DLC's action. However, Peoples did not allege this factual scenario, the ALJ stated. Accepting as true all the well-pleaded facts of the Complaint, the ALJ concluded that Peoples did not allege sufficient facts that, if proven, would justify the issuance of an Initial Decision against DLC for failure to provide reasonable adequate and reasonable electric service and to comply with the Commission's Regulations concerning Rider 16. Interim Order at 7-8.

Although the ALJ found that Peoples could not proceed with its Complaint as it relates to Rider 16, the ALJ ruled that Peoples has standing as a customer to participate in the base rate proceeding and that in all other regards its Complaint will remain in the consolidated proceeding. *Id.* at 8.

## **Position of Peoples and DII**

In its brief, the Petitioner argues two main reasons in support of granting interlocutory review and answering its Material Question. First, Peoples contends that the ALJ erred by issuing an Interim Order rather than an Initial or Recommended Decision, which would have provided an immediate statutory right to file Exceptions. Peoples asserts that it had argued that a party's standing is to be challenged by way of Preliminary Objections and urged the ALJ to treat the Motion as Preliminary Objections. According to the Petitioner, the ALJ's granting of the Motion by way of the Interim Order was clear error in contravention of 52 Pa. Code § 5.102(d)(3). Peoples submits

that the Commission should correct this error by considering its Petition. Peoples Brief at 5.

Second, Peoples argues that interlocutory review is necessary to prevent substantial prejudice to the Petitioner, which Peoples contends cannot be satisfactorily cured during the normal Commission review process. According to Peoples, in the absence of interlocutory review, the Petitioner will be precluded from challenging Rider 16 until this case comes to the Commission for review. Such a delay, Peoples submits, would prevent the conduct of discovery and the submission of testimony into the record. Even if the Commission were to later find the Interim Order to be erroneous, Peoples continues, the Commission could not correct the error at a later point due to the statutory timeframe for rendering a decision in a rate proceeding. Additionally, the Petitioner notes the litigation schedule requiring non-company direct testimony by June 25, 2018, and written rebuttal testimony by due July 23, 2018. Peoples argues that unless the Commission expeditiously reverses the Interim Order, the Petitioner will suffer prejudice that cannot be reversed during the normal Commission review process because it will be precluded from pursuing issues related to Rider 16. As such, the Petitioner requests that the Commission grant interlocutory review and answer the material question. Peoples Brief at 5.

Peoples submits that it has standing as a customer of DLC to pursue cost of service, revenue allocation, rate design, and return on equity issues – even with respect to Rider 16. As an example, the Petitioner asserts that it should not be precluded from pursuing return on equity issues because such issues directly impact Peoples’ rates as a customer of DLC. Peoples argues that it was clear error for the Interim Order, in a blanket and over-generalized fashion, to preclude Peoples from addressing Rider 16 issues. As such, the Petitioner contends it has standing to pursue discovery and introduce testimony concerning Rider 16 in order to pursue its legitimate claims relating to general ratemaking issues such as cost of service, revenue allocation, rate design, and return on

equity. In order to pursue its legitimate ratemaking claims, Peoples must have the ability to examine Duquesne's entire proposed tariff, not just portions of it. Peoples Brief at 8.

Further, Peoples proffers that cost of service, revenue allocation, rate design, and return on equity issues cannot be segregated in the context of a base rate proceeding. According to the Petitioner, such issues are all inter-related and, as a matter of fairness and as a constitutional due process right, Peoples should have the opportunity to be heard regarding Rider 16. Peoples argues that the Interim Order must be overturned because it has proscriptively precluded the Petitioner from addressing an issue that is clearly intertwined with general rate case issues. Moreover, Peoples criticizes the Interim Order because it essentially prevents a challenge to a rate proposal unless and until a party is receiving service pursuant to that specific tariffed rate. Peoples acknowledges that it is not currently receiving service from DLC pursuant to Rider 16. However, the Petitioner submits that it has pleaded sufficient facts to establish that it has a direct, immediate, and substantial interest in that tariff. *Id.* at 8-9.

Assuming as true the averments of its Complaint, Peoples argues that it has standing for the following six reasons: (1) Peoples is in the process of developing CHP projects that it will own; (2) Peoples may lose sales from existing customers; (3) Peoples is actively partnering with customers to develop additional CHP projects; (4) the Interim Order's restrictive view of standing is inconsistent with the Commission's *Final Policy Statement*; (5) Peoples seeks to protect its own and not to vindicate the rights of its customers; and (6) appellate precedent supports a Commission finding that Peoples has standing. Peoples Brief at 9-14.

In support of the Petition, DII argues that given Peoples' current work with customers that are considering or pursuing CHP in DLC's territory, it is in the public interest for the Commission to hear the Petitioner's concerns regarding the proposed rates, terms, and conditions (including interconnection requirements) for Rider 16.

Additionally, DII contends that, viewed in the light most favorable to the non-moving party, Peoples has standing under Pennsylvania Supreme Court precedent to participate in all aspects of this proceeding. DII further submits that, as a participant in DLC's rate case, Peoples should be permitted to provide testimony and briefing in all matters of the rate case. DII Brief at 2-4.

### **Position of DLC**

DLC objects to the filing of the Amended Complaint, which it characterizes as Peoples' belated attempt to correct the flaws in its case. According to DLC, Peoples averred in its Amended Complaint, zero days before the due date of the briefs on the Petition, that Peoples is in the midst of a major construction project to install a 35-kW reciprocating engine CHP project. DLC contends that the averments do not satisfy the criterion for service under Rider 16, which only applies to non-utility generating facilities, and that it would be improper for the Commission to rely on the Amended Complaint because DLC has not had an opportunity to file an Answer or other responsive pleading. DLC Brief at 7-8.

DLC also argues that the Interim Order properly applied controlling Commission and appellate court precedent to the statements of fact plead in Peoples original Complaint. The Company contends that Peoples' claims of standing are based on an attenuated chain of alleged causal links to Rider 16. DLC asserts that Peoples is improperly seeking standing in this case to promote and advance its gas marketing and revenue-enhancement plan which is being asserted in Peoples' EE&C proceeding. DLC Brief at 11-12.

The Company proffers that Peoples' situation is similar to that of a vendor to a manufacturing facility which seeks to intervene in a utility rate case to contest electric rates charged to the manufacturer. DLC states that intervention by the vendor, on

the grounds that lower electric rates could cause the manufacturer to increase its capacity and thus increase the use of what the vendor sells, is an indirect and non-immediate interest which does not grant standing. DLC Brief at 12-13 (citing *Municipal Authority of the Borough of West View v. Pa. PUC*, 41 A.3d 929 (Pa. Cmwlth. 2012) (standing cannot be conferred to vindicate the rights of third parties) (*Borough of West View*)).

DLC contends that the granting of standing in this proceeding to challenge Rider 16 would mark a major deviation from prior Commission precedent and practice. According to the Company, it would likely require the Commission to adjudicate a cascade of controversies with attenuated and legally insufficient interests in proceedings. DLC Brief at 14.

## **Disposition**

Under the unique circumstances of this litigated rate proceeding, we find it necessary to address the Petition and to answer the Material Question. Pursuant to 66 Pa. C.S. § 1308(d), the rate filing is suspended until December 29, 2018. In order to permit a Commission decision by the expiration of the suspension date, a tight litigation schedule has been developed which includes the submission of direct testimony by June 25, 2018, written rebuttal testimony by July 23, 2018, and written surrebuttal testimony by August 6, 2018. Evidentiary hearings have been scheduled for August 15-17, 2018. Failing to address the Material Question and permitting the issue to be resolved during the Commission's normal review process, could result in significant prejudice to Peoples. If the Commission were to later reverse the finding of the Interim Order, there would be insufficient time for a remedy because of the statutory timeframe for rendering a decision. By that time, the Petitioner would have missed the opportunity to conduct discovery and submit evidence into the record. Thus, the resolution of the Material Question is necessary to address the Interim Order and, if necessary, to allow sufficient time for the OALJ to adjust the remaining litigation schedule in this proceeding.



Upon review, we conclude that Peoples has standing to address Rider 16. Thus, we shall answer the Material Question in the affirmative.

Section 701 of the Code provides, in pertinent part:

[A]ny person, corporation, or municipal corporation having an interest in the subject matter, or any public utility concerned, may complain in writing, setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission.

66 Pa. C.S. § 701. In order to have standing to pursue a formal complaint before the Commission under Section 701, the complainant must have a direct, immediate, and substantial interest in the subject matter of the controversy. *Borough of West View, supra*.

The seminal case for standing is the Pennsylvania Supreme Court's decision in *William Penn*. "The requirement that an interest be 'direct' simply means that the person claiming to be aggrieved must show causation of the harm to *his* interest by the matter of which he complains." *William Penn*, 464 Pa. at 195, 346 A.2d at 282 (emphasis added). The requirement that an interest be "immediate" and not a remote consequence of the matter concerns "the nature of the causal connection between the action complained of and the injury to the person challenging it." *Id.* at 197, 346 A.2d at 283. The requirement of a "substantial" interest means that the interest must have substance – "there must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law." *Id.* at 195, 346 A.2d at 282.

Under the posture of this proceeding, we are required to assume that the averments in Peoples' Complaint are true. In doing so, we conclude that the Petitioner has standing. Here, Peoples stands in a unique position because it is pursuing distributed generation projects that use natural gas to generate electricity, requiring back-up service from DLC pursuant to Rider 16. Peoples may increase its gas throughput if more CHP projects are pursued by DLC's customers. As a certificated provider of natural gas service in DLC's region, Peoples' interest in the costs associated with Rider 16 are not abstract. If there were a spike in back-up prices for CHP projects, Peoples' customers that are developing CHP and other distributed generation projects may decide not to pursue some or all of their planned CHP projects resulting in economic harm to Peoples.

Viewed in the light most favorable to Peoples, we find that DLC's proposed changes in Rider 16 have a direct, immediate and substantial impact on Peoples because they impact the economic viability of CHP and other distributed generation projects being developed by the Petitioner.

As we explained in our *Final Policy Statement*, the costs of purchasing back-up power during planned plant maintenance and unplanned downtime can be a barrier to CHP development. *Final Policy Statement* at 3. Additionally, interconnection procedures and fees can be a barrier to CHP development. *Id.* Thus, as noted by Peoples, the participation of CHP developers in rate proceedings such as this one may be beneficial to the public interest:

Where – as here – a fully projected future test year (“FPFTY”) is used, the parties, the Presiding Officer, and the Commission should all want to know what revenues and expenses are likely to be realized during the FPFTY. These projections should include revenues and expenses of CHP projects that come on-line during the FPFTY. The only meaningful way of developing such an evidentiary record is to allow participation by CHP developers; as CHP projects

are often treated as proprietary endeavors and not publicly-disclosed. CHP developer participation in rate cases should be encouraged; not discouraged.

Peoples Brief at 9-10. Upon review, we agree that full participation of Peoples would appear to help facilitate a complete evidentiary record in this proceeding.

With this decision, we shall reverse the Interim Order and return this matter to the OALJ for further proceedings as may be necessary, including an opportunity for the Company to file an Answer to the Amended Complaint or other responsive pleading pursuant to 52 Pa. Code § 5.65.

### **Conclusion**

Based on our review of the instant Petition, as well as the Briefs in Support and Opposition thereto, we shall answer the Material Question in the affirmative and return this matter to the OALJ for further proceedings as may be necessary, consistent with this Opinion and Order; **THEREFORE,**

### **IT IS ORDERED:**

1. That the Interim Order of Administrative Law Judge Katrina L. Dunderdale, issued on May 22, 2018, is reversed, consistent with this Opinion and Order.

2. That with regard to the Petition for Interlocutory Review and Answer to Material Question filed by Peoples Natural Gas Company LLC, on May 22, 2018, we shall answer the following material question in the affirmative:

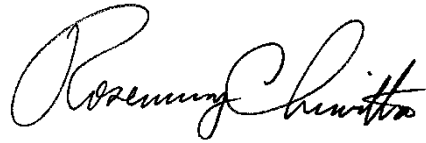
Does the Interim Order, dated May 22, 2018, err in granting the Motion for Partial Judgment on the Pleadings filed by

Duquesne Light Company (“Duquesne”) on May 1, 2018[,] and precluding Peoples – as developer of Combined Heat and Power (“CHP”) projects – from contesting, in Duquesne’s base rate proceeding, a proposed 220% increase in the Back Up Rate for CHP projects?

3. That this matter is returned to the Office of Administrative Law

Judge.

**BY THE COMMISSION**

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is written in a cursive, flowing style.

Rosemary Chiavetta  
Secretary

(SEAL)

ORDER ADOPTED: June 14, 2018

ORDER ENTERED: June 14, 2018

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,	:	
Office of Consumer Advocate, Office of Small	:	Docket No. R-2021-3024750
Business Advocate	:	C-2021-3025538
	:	C-2021-3025462
v.	:	C-2021-3026057
	:	
Duquesne Light Company	:	

**CERTIFICATE OF SERVICE**

I hereby certify that this day I served a copy of the foregoing document upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code § 1.54.

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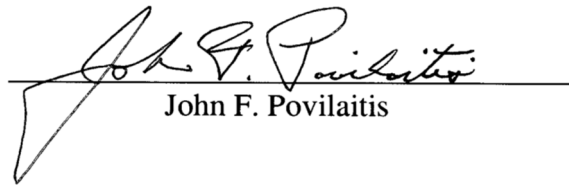
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