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Manager, State Regulatory Affairs and Senior Legal Counsel

March 7, 2016

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

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Re: Duquesne Light Company's Comments to Proposed Electric Safety Regulations
Docket No. L-2015-2500632

Dear Secretary Chiavetta:

Enclosed please find Duquesne Light Company's comments regarding the proposed rules regarding the Proposed Electric Safety Regulations at the above-referenced docket.

If you have any questions regarding the information contained in the comments, please contact me.

Sincerely,

Shelby Linton-Keddie
Manager, State Regulatory Affairs
And Senior Legal Counsel

Enclosure

c: Robert Young, Deputy Chief Counsel, Law Bureau (rfyoung@pa.gov)

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Rulemaking Re Electric Safety Regulations, :
52 Pa. Code Chapter 57 : **Docket No. L-2015-2500632**

**COMMENTS OF
DUQUESNE LIGHT COMPANY**

On February 6, 2016, the Pennsylvania Utility Commission (“Commission”) issued a *Proposed Rulemaking Order* to amend its regulations in Chapter 57, Subchapters A and B of the Pennsylvania Code. The *Proposed Rulemaking Order* was published in the Pennsylvania Bulletin on February 6, 2016. See 46 Pa.B. 654. Pursuant to the *Proposed Rulemaking Order*, interested parties had thirty days from the date of publication in the Pennsylvania Bulletin to file comments, i.e., on or before March 7, 2016. Consistent with the *Proposed Rulemaking Order*, Duquesne Light Company (“Duquesne Light” or “Company”) hereby files comments for the Commission’s consideration.¹

As articulated by the Commission in the *Proposed Rulemaking Order*, these amendments are intended to clarify two definitions in current Section 57.1 of the Commission’s regulations, as well as to codify new electric safety standards in order to specify those standards that the Electric Safety Division, as part of the Bureau of Investigation and Enforcement (“I&E”), are able to **enforce** (emphasis added). Duquesne Light supports the overall Commission objective in undertaking this rulemaking in order to remove the uncertainty of expectations and enforcement powers of the Electric Safety Division and appreciates the opportunity to offer its comments in response to the *Proposed Rulemaking Order*. With that said, however, in addition to seeking clarifications and some revisions, Duquesne Light has concerns that the proposed regulations

¹ Duquesne Light is a member of the Energy Association of Pennsylvania, who is also submitting Comments at this Docket. In addition to the positions stated herein, Duquesne Light supports the positions articulated in EAP’s comments.

inappropriately attempt to incorporate directives that are overreaching and unrelated to enforcement powers (the stated goal of this rulemaking), as well as unnecessary in light of existing regulations.

Accordingly, Duquesne Light offers the following limited comments for the Commission's consideration. Notably, Duquesne Light is not responding to all of the revisions proposed by the Commission; where the Company has comments, it has organized its comments to follow the order of the proposed regulations.

Revisions to Existing Section 57.1

Service Point/Point of Delivery Location

In order to modernize the definition of "service terminal" as well as illustrate, consistent with the National Electrical Safety Code ("NESC"), that an electric utility determines the demarcation of responsibility by designating the service point, the Commission proposes to remove the definition of "service terminal" and add a definition for "service point/point of delivery." Besides noting that "point of delivery" is duplicative and unnecessary since NESC uses the term "service point," the Company would like clarify one point below.

Overhead services generally terminate on the building, not on the rooftop

In the *Proposed Rulemaking Order*, the Commission, upon citing the NESC, states in part that "the exact physical location of the service point ... is often located on the rooftop of a customer's premise or even underground." As a point of clarification, many times, Duquesne Light's overhead services do not terminate on the rooftop of the building. Overhead services generally terminate on the building, in some instances near the rooftop, but not on the actual rooftop of the building.

Comments to Proposed Section 57.28, Electric Safety Standards

As articulated in the *Proposed Rulemaking Order*, the creation of clear safety standards “will assist the Electric Safety Division **in enforcing those standards.**” *Proposed Rulemaking Order* at 2-3 (emphasis added). In an attempt to achieve this objective, the Commission, similar to what it has done and found successful to date with I&E’s Gas Safety Division, proposes minimum safety standards such as incorporating unnamed current regulatory and statutory requirements, NESC standards, compliance with company internal procedures and adherence to the Underground Utility Line Protection Act (a/k/a PA One Call). In response to this proposal, Duquesne Light proposes the recommendations noted below and seeks clarification on the applicability of these standards, as proposed.

Only the NESC Standards Should be Included as the Minimum Safety Standards for Purposes of This Rulemaking.

This rulemaking notes that “the Commission desires to reference the national electric safety standards in order to remove doubt and minimize legal challenges as to the applicability of the NESC to jurisdictional Pennsylvania electric distribution companies.” *Proposed Rulemaking Order* at 3. This contention is curious, considering the fact that the Energy Generation Customer Choice and Competition Act (“Competition Act”) as well as the Commission’s regulations already reference the use of NESC standards as minimum safety standards. Specifically, the Competition Act provides that “[e]ach electric distribution company shall maintain the integrity of the distribution system at least in conformity with the National Electric Safety Code and such other standards practiced by the industry in a matter sufficient to provide safe and reliable service to all customers connected to the system consistent with this title and the commission’s regulations.” 66 Pa C.S. §2807(a). Moreover, the Competition Act directs that the Commission ensure that the installation and maintenance of transmission and distribution facilities be

consistent with industry standards and practices, including those set forth in the NESC. 66 Pa C.S. § 2804(1)(ii). Finally, Commission Regulations, since 1977, have included a reference to NESC standards for underground installations. See Pa Code §57.82. In addition, NESC standards have been incorporated into regulations codified after the Competition Act's effective date. See 52 Pa. Code §§ 57.193(a), 57.194(b) and 57.198(b). Despite this clear direction from the General Assembly and incorporation of the same standards by the Commission to date, the Commission's Electric Safety Standards proposal attempts to include additional requirements as minimum electric safety standards which are neither included nor addressed in the Competition Act.

As stated above, Duquesne Light supports the Commission's overall goal to set uniform, minimum electric safety standards for all EDCs, similar to that required of Natural Gas Distribution Companies ("NGDCs") and hazardous liquid public utilities in Section 59.33 of the Pennsylvania Code. Specifically, Section 59.33(b) includes the following minimum safety standards for NGDCs and hazardous liquid public utilities: 49 U.S.C.A. §§ 60101-60503, as well as implemented 49 CFR Parts 191-193, 195 and 199, inclusive of any future amendments, unless the Commission, via a published notice in the Pennsylvania Bulletin, states that the amendment or modification may not take effect. See 52 Pa. Code § 59.33(b). These minimum requirements, based on Federal standards, have been in effect since 1986, are consistently applied among utilities, uniform, and widely understood.

Of concern with this proposed rulemaking, however, is that the Commission, in crafting proposed electric safety standards, mainly reiterates existing obligations, such as the need to comply with Chapter 57 of the Regulations and comply with the standards articulated in the PA

One Call Law which is notably not under the Commission's jurisdiction, at this time.² Moreover, in addition, the Commission has sought to include unnamed, generic, "other applicable and governing state and federal laws and regulations," as well as "procedures established by the electric utility and set forth in the EDC's internal company procedures." Duquesne Light similarly suggests that both of these requirements be removed as they are unnecessary and duplicative.

First, the requirement that EDCs follow all state and federal laws and obligations is so broad and ambiguous that there is no clear understanding of what is required for compliance. Second, internal company procedures established by EDCs are not minimum standards in any respect. They are processes and procedures beyond that required by minimum standards and are created at a Company's discretion in order to govern how tasks should be completed by Company personnel. These procedures generally exceed regulatory requirements and are not meant nor anticipated to be used as enforceable by regulators. Additionally, these internal procedures are not necessarily entirely consistent across all EDCs, as the service territories of each EDC have specific needs.

More troubling is that the Commission suggests that the purpose of *Proposed Rulemaking* is to bring clarity to the electric safety regulations in a similar manner to that applied to the natural gas safety regulations. However, the proposed requirement to include internal company procedures as a minimum electric safety standard is not a requirement in the gas industry via Section 59.33, was not explained by the Commission as to why it should be included here and likely lacks uniformity and consistency among EDCs. The encroachment upon and attempted enforcement of these standards inappropriately attempts to regulate the management of a utility –

² Currently, the responsibility for enforcement of PA One Call rests with the Department of Labor and Industry, not the Commission. Duquesne Light acknowledges that proposed legislation has been introduced that would transfer enforcement responsibility of PA One Call to the Commission, but has yet to be passed.

something that the Commission has specifically avoided numerous times in recognition of the fact that it is not the customary role of the regulator to manage a company. *See, e.g. U.S. Indus. Fabricators, Inc. v. Bell telephone Co. of Pennsylvania*, 65 Pa.P.U.C. 365, 365 (Nov. 25, 1987).

Moreover, and in support of Duquesne Light's contention that the only electric safety standard that should be included in these regulations are the ones that have been articulated by the General Assembly (compliance with NESC) – the Commission specifically states that the purpose of proposed Section 57.28(d) is to require “an electric utility to keep ‘adequate records’ as required under the Commission’s regulations **and the National Electric Safety Code.**” (emphasis added). Noticeably absent in this section are any references to PA One Call, internal company procedures or any other additional requirement that is proposed to be included in the “Safety Code.” If the Commission itself only desires the information tied to compliance with the NESC, it follows that the NESC should be the only minimum standard articulated in these regulations.

The NESC Standards in Place at the Time of Installation are the Appropriate Standards to Apply to Inspections by the Electric Safety Division.

Assuming the application of the NESC is maintained as a minimum electric safety standard, Duquesne Light requests that a clarification be made. As the Commission may be aware, the NESC is updated approximately every three to five years, with revisions related to technology and techniques that conform to the most up to date safety standards. In light of the proposed regulations, Duquesne Light would like the Commission to clarify that, consistent with the applicability of the NESC itself, the NESC standards in place at the time of a unit or facility's installation will be the standards that apply to that particular unit or facility.³

³ For a more detailed discussion of this issue, please refer to the EAP's Comments at pages 3-5.

The Addition of the Word Investigation is Inappropriate, Beyond the Stated Scope of This Rulemaking and Should be Removed.

The proposed Section 57.28(c) – titled, “Enforcement,” does not mimic the language in existing Section 59.33, which is clearly stated, limited to inspections and has worked well since the mid-1980s. Instead, the Commission seeks to impermissibly add a requirement that EDCs, in the course of investigations, allow the Commission (namely I&E) access to specific data, including raw data. This deviation from the gas safety standards in Section 59.33 is unnecessary, not well supported and should be removed.

In the *Proposed Rulemaking Order*, the stated purpose for the Rulemaking is that “the clear outlay of electric safety standards in one Section of Chapter 57 of the Commission’s regulations will clarify minimum industry standards and will assist the Electric Safety Division in enforcing those standards.” *Proposed Rulemaking Order* at 3. Despite this stated goal, in discussing proposed Section 57.28(c), the Commission argues that “on occasion” prior to the establishment of the Electric Safety Division, I&E has had difficulty getting certain information from electric utilities.” *Proposed Rulemaking Order* at 8. Next, the Commission notes that even with the Electric Safety Division established, “I&E still needs to be able to readily and easily acquire information from electric utilities.” *Id.* Accordingly, the Commission proposes that EDCs make available “books, facilities and records available to **staff of I&E** and the Electric Safety Division during inspections **and investigations.**” *Id.* (emphasis added). This addition goes beyond the scope of clarifying standards for the Electric Safety Division and is unnecessary in light of existing regulations.

When I&E is conducting an investigation and needs information as part of that process, there is no indication that I&E has not been able to gather sufficient information to carry out its work. A passing comment that, “on occasion,” I&E has had difficulty obtaining information is

not, in itself, sufficient justification to necessitate a regulatory change. It has been well cited that, with respect to the factors and standards used for evaluating the size of a civil penalty in litigated and settled proceedings involving violations of the Public Utility Code and Commission regulations, a specific factor to be considered is:

Whether the regulated entity cooperated with the Commission's investigation. Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty.

52 Pa. Code § 69.1201.

This acknowledgement, combined with the ability of I&E to file a Motion to Compel should it not receive a response to an interrogatory in the course of a litigated proceeding (See 52 Pa. Code §5.342) has not proven to be ineffective enough to require additional regulatory requirements, especially in a Section and a rulemaking purportedly limited to clarifying enforcement powers of the Electric Safety Division.

If Retaining the Word "Inspection" in Section 57.28(c), Duquesne Light Seeks Confirmation That Any Information Gathered as Part of an Inspection Will Be Exempt From the Right To Know Law.

Act 3 of 2008, effective January 1, 2009, Pennsylvania's Right to Know (RTK) Law, was enacted in order to allow access to public information from each Pennsylvania Agency. 65 P.S. §§ 67.101-67.3104. While the RTK Law allows general access to information to the public, there are specific exemptions from disclosure. Two of those exemptions include disclosure of a record that creates a reasonable likelihood of endangering the safety or physical security of a public utility, as well as agency records relating to noncriminal investigations (notably NOT inspections). 65 P.S. §§ 67.708(b)(3), (b)(17). Should the Commission remove the reference to "investigations" as suggested *supra* in order to parallel existing Section 59.33, Duquesne Light seeks clarification that information gathered by the Commission as part of an inspection by the

Electric Safety Division (including any accessible materials, notes, correspondence and reports) be exempt from a RTK request.

This clarification is consistent with Commonwealth Court case law, which has found that gas safety inspection materials are exempt from disclosure under Section 708(b)(17), the noncriminal investigation exemption under the RTK law. *Pennsylvania Pub. Util. Comm'n v. Gilbert*, 40 A.3d 755, 762 (Pa. Commw. Ct. 2012). In reaching this decision, the Court, in part, recognized that potential public disclosure of inspection materials could cause utilities to be less likely to cooperate with requests and therefore make it more difficult for the Commission to carry out its enforcement duties. *Id.* at 761. The same reasoning should apply here. In order to avoid any confusion over the applicability of RTK law Section 708(b)(17), Duquesne Light suggests that the Commission consider defining the term “inspection” as part of this rulemaking by indicating that it is akin to a noncriminal investigation by the Commission.

Duquesne Light Objects to Providing “Raw Data” to the Commission as Part of an Inspection.

In addition to requiring “facilities, books and records” as part of an inspection, citing “confusion and hesitance” from EDCs, the Commission, via regulation, is attempting to require that raw data be given to an Electric Safety Inspector when on site – specifically that “collected at the time of the initial incident investigation.” *Proposed Rulemaking Order* at 8. This information is simply that – raw – collected at the time of internal investigation – not vetted, not reviewed nor verified. The data, before review and verification is an internal business work product, not collected in the ordinary course of business, and as such, may not necessarily demonstrate whether a company is complying with safety standards. The term “raw data” also is not sufficiently defined. As it stands, “raw data” could cover essentially all internal records,

which are not necessarily related to safety. Notably, there is no parallel requirement that “raw data” in any form be given to the Gas Safety Section, nor has there been adequate justification as to why it is needed here. There is no indication or allegation that the information provided by EDCs to date via normal company business records or reports has been inadequate to allow the Electric Safety Division to do its job. For these reasons, the proposal to require utilities to provide “raw data” should be removed from the Final Regulations.

Duquesne Light Seeks Clarification on the Scope of the Facilities, Books and Records That Must Be Provided to Electric Safety During an Inspection.

Proposed Section 57.28(c) would require EDCs to make their “facilities, books, and records accessible” to the Electric Safety Division during inspections. This broad grant of authority does not limit the type of access and the use of such access. As indicated above, Duquesne Light intends to cooperate and assist the Commission in any inspection and investigation (as it has in the past); however this cooperation should be limited to providing access to only those facilities, books, and records necessary for that particular inspection and provided in a way that does not compromise the confidentiality or security of Duquesne Light’s information.

Duquesne Light is concerned with the broad verbiage of this proposed section because authorizing the Commission to have unrestricted access to EDC files could subject the Commission to an increase in hacking attempts. In the context of a series of inspections, without guidance on what is meant by “accessible,” the Commission could, in theory, obtain copies of EDC grid information, which is a primary target for hackers. EDCs themselves are already a target for domestic and international terrorist hacking efforts; therefore, storing grid information for multiple EDCs in one location would create an unnecessary risk for EDCs and their customers. Accordingly, for the protection and security of Duquesne Light’s information,

Duquesne Light seeks clarification that accessible can mean made available at a utilities' property for Commission review, when circumstances warrant.

The Commission Should Clarify the Term “Adequate Records” in Proposed Section 57.28(d).

In an attempt to mimic the current requirements at Section 59.33 of the Commission's regulations for NGDCs, the Commission proposes that EDCs “shall keep adequate records as required for the safety code.” The proposal then also states that an electric utility “shall submit reports for each reportable accident under Section 57.11 (relating to accidents).” In order to streamline this proposal, rid this section of duplicative and unnecessary directives (since 52 Pa Code Section 57.11 clearly requires that utilities “shall submit a report of each reportable accident ... to the Secretary of the Commission”), Duquesne Light suggests that this Section be revised to simply state:

(d) *Records.* An EDC shall keep adequate records as required for compliance with the safety code set forth in subsection (b).

This revision is adequate, since the fact that the records “shall be accessible” to the Commission is already encompassed in proposed Section 57.28(c). In addition, this revision would bring proposed Section 57.28(d) more in line with existing Section 59.33(d).

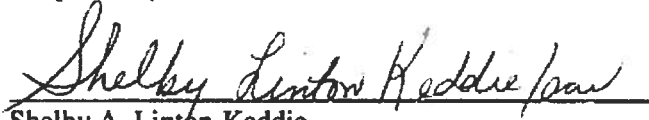
Regardless of whether this language change is made, Duquesne Light seeks clarification as to what the Commission considers as “adequate records” for purposes of this Section. While in the *Proposed Rulemaking Order* the Commission cites to 52 Pa. Code § 59.33, that language provides no additional guidance as to what records are considered necessary to satisfy this requirement. Further, to the best of Duquesne Light's knowledge, the NESC does not have a record retention requirement, nor does it provide any clarification as to what records are necessary to adequately record such installations. To that end, Duquesne Light requests

additional clarification as to what the Commission is requiring, possibly including the scope and time limit of information to be kept, so as to eliminate further "confusion and hesitance" from EDCs.

Conclusion

Duquesne Light supports the goal of the Commission to clarify the rules and expectations regarding enforcement abilities and powers of the newly created Electric Safety Division via regulation, but urges that the Commission articulate those abilities in a clear, appropriate manner. To that end, Duquesne Light requests that the Commission adopt its revisions and suggestions.

Respectfully submitted,



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