



An Exelon Company

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May 16, 2018

**VIA eFILING**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17105-3265

**Re: Pennsylvania Public Utility Commission v. PECO Energy Company**  
**Docket No. R-2018-3000164**

Dear Secretary Chiavetta:

Enclosed please find, in the above-referenced matter, **PECO Energy Company's Answer to the Petition to Intervene of NRG Energy, Inc.**

If you have any questions, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "Craig Williams", with a long horizontal line extending to the right.

W. Craig Williams

Enclosures

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**PENNSYLVANIA PUBLIC UTILITY  
COMMISSION**

**v.**

**PECO ENERGY COMPANY**

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:  
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:

**DOCKET NO. R-2018-3000164**

**CERTIFICATE OF SERVICE**

I hereby certify and affirm that I have this day served a copy of the **PECO Energy Company's Answer to the Petition to Intervene of NRG Energy, Inc.** on the following persons in the manner specified in accordance with the requirements of 52 Pa. Code § 1.54:

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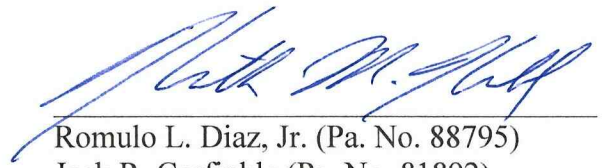
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Dated: May 16, 2018

*Counsel for PECO Energy Company*

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

<b>PENNSYLVANIA PUBLIC UTILITY COMMISSION</b>	:	
	:	
v.	:	<b>Docket No. R-2018-3000164</b>
	:	
<b>PECO ENERGY COMPANY</b>	:	

**ANSWER OF PECO ENERGY COMPANY TO  
THE PETITION TO INTERVENE OF NRG ENERGY, INC.**

Pursuant to 52 Pa. Code § 5.66, PECO Energy Company (“PECO” or the “Company”) submits this Answer to the Petition to Intervene filed by NRG Energy, Inc. (“NRG”) on May 4, 2018 in the above-referenced docket. As explained below, NRG is attempting to interject into this case, which is statutorily limited in subject matter and time,<sup>1</sup> alleged interests that should not be considered in this electric base rate proceeding. These interests include the “billing relationship” between electric distribution companies (“EDCs”) and their customers which NRG is already addressing in the Supplier Consolidated Billing (“SCB”) *en banc* proceeding initiated by the Pennsylvania Public Utility Commission (the “Commission”).<sup>2</sup> Furthermore, the specific issues NRG asserts it wants to examine in this proceeding are identical – indeed nearly word-for-word – to the issues presented in the Petition to Intervene of another party seeking intervention: the Retail Energy Supply Association (“RESA”), whose membership includes NRG.<sup>3</sup>

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<sup>1</sup> See 66 Pa.C.S. § 1308(d) (defining a “general rate increase” and setting a statutory timeline of seven months for the issuance of a final order).

<sup>2</sup> See Notice of *En Banc* Hearing on Supplier Consolidated Billing, Docket No. M-2018-2645254 (Notice issued March 27, 2018). NRG is a member of the Electric Generation Supplier Coalition for Supplier Consolidated Billing (“EGS Coalition for SCB”), which filed extensive comments in the SCB proceedings. See Comments on Behalf of the Electric Generation Supplier Coalition for Supplier Consolidated Billing, Docket No. M-2018-2645254 (filed May 4, 2018).

<sup>3</sup> A list of members of RESA (including NRG) is available at <https://www.resausa.org/members>.

The Commission’s regulations provide express authority to the Administrative Law Judges to consider whether the interests of an intervenor are adequately represented by existing participants and to limit the participation of an intervenor.<sup>4</sup> PECO therefore requests that the Administrative Law Judges exercise their authority to deny NRG’s Petition to Intervene in this proceeding in light of NRG’s membership in RESA and RESA’s investigation of the identical issues presented by NRG or, alternatively, to limit NRG’s discovery in this proceeding to requests that are non-duplicative of discovery by RESA.<sup>5</sup>

## **I. RELEVANT BACKGROUND**

On March 29, 2018, PECO filed with the Pennsylvania Public Utility Commission (“Commission”) Tariff Electric – Pa. P.U.C. No. 6 (“Tariff No. 6”). By Order issued April 19, 2018, the Commission instituted a formal investigation to determine the lawfulness, justness and reasonableness of PECO’s existing and proposed rates, rules and regulations. Accordingly, Tariff No. 6 was suspended by operation of law until December 28, 2018.<sup>6</sup>

On May 4, 2018, NRG filed its Petition to Intervene, asserting a substantial and direct interest in the proceeding on the ground that four NRG-affiliated companies operate as electric generation suppliers (“EGSs”).<sup>7</sup> NRG identified the following specific issues in its Petition to Intervene that it wished to pursue in discovery: “1) PECO’s proposed Electric Vehicle Direct Current Fast Charger Pilot Rider; 2) several initiatives that PECO has implemented to improve

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<sup>4</sup> See 52 Pa. Code § 5.72(2) (explaining that the right or interest of an intervenor may be “[a]n interest which may be directly affected *and which is not adequately represented by existing participants*, and as to which the petitioner may be bound by the action of the Commission in the proceeding”) (emphasis added); 52 Pa. Code § 5.75 (providing that the presiding officer “may, if found to be appropriate, authorize limited participation” by an intervenor).

<sup>5</sup> PECO does not oppose RESA’s intervention in this proceeding, but has proposed limitations on its participation. See PECO Energy Company’s Answer to the Petition to Intervene of Retail Energy Supply Association (filed May 16, 2018).

<sup>6</sup> Order, *Pa. P.U.C. v. PECO Energy Company*, Docket No. R-2018-3000164 (Order entered Apr. 19, 2018). In accordance with the Commission’s April 19 Order and Section 53.71 of the Commission’s regulations, 52 Pa. Code § 53.71, PECO filed a tariff supplement suspending Tariff No. 6. See Supplement No. 1 to Tariff Electric – Pa. PUC No. 6 Suspending Original Tariff No. 6 Until December 28, 2018, Docket No. R-2018-3000164 (filed Apr. 27, 2018).

<sup>7</sup> Petition to Intervene of NRG Energy, Inc., p. 1 (“NRG Petition to Intervene”) & ¶ 10.

the direct billing relationship it has with its distribution customers; 3) proposed modifications to net metering eligibility; 4) PECO's proposed allocation of costs to distribution functions that are related to the provision of default service and should be removed from distribution changes; and 5) proposals to streamline the interconnection process for distributed generation technologies.”<sup>8</sup>

On May 8, 2018, a Prehearing Conference was convened by Deputy Chief Administrative Law Judge Christopher P. Pell and Administrative Law Judge F. Joseph Brady (collectively, the “ALJs”). At the Prehearing Conference, the ALJs established a deadline of May 16, 2018 for responses to NRG's Petition to Intervene, among other filings.

## **II. ANSWER**

1. Admitted.

2. Admitted.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted.

7. Admitted.

8. Denied as stated. The language in 52 Pa. Code §§ 1.8, 5.72(a)(2) and 5.72(a)(3) speaks for itself.

9. The allegations of Paragraph 9 are conclusions of law, to which no response is required.

10. Denied in part. It is admitted that NRG's interest in PECO's proposed Electric Vehicle Direct Current Fast Charger Pilot Rider, the allocation of costs between PECO's distribution and default service functions, the Company's proposed changes to existing net

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<sup>8</sup> NRG Petition to Intervene, p. 3.



metering provisions, and the testimony of PECO witnesses discussing PECO's improvements in the distributed generation interconnection process might provide a basis for intervention by NRG, but RESA is intending to investigate the exact same issues on behalf of its membership (including NRG) and NRG has not articulated any distinction between its interests and those of RESA with respect to these issues. It is denied that NRG's remaining asserted interests provide a separate basis for NRG to intervene in this proceeding for the following reasons.

***“Direct Billing Relationship” and “Energy Company” Issues.*** The Commission has initiated an *en banc* proceeding to specifically consider SCB and its relationship to other billing options and new products for customers.<sup>9</sup> In its 85-page filing in the *en banc* proceeding, NRG, as a member of the EGS Coalition for SCB, provides extensive argument on the “direct billing relationship” between EDCs and their customers and offers critiques of specific EDC programs that it believes are inappropriate (notably listing only one PECO program, which offers free trees to help consumers save energy).<sup>10</sup> NRG also devotes extensive comments to its concerns that EDCs are perceived as “the energy company” by customers and offering products “unrelated to their functions as delivery companies.”<sup>11</sup>

As with RESA, NRG's SCB comments underscore exactly why NRG's allegations in its Petition to Intervene regarding PECO “initiatives to improve the direct billing relationship [PECO] has with its distribution customers” and PECO's “measures to strengthen its role as the customer's ‘energy company’” are impermissible justifications for intervention in this proceeding. NRG is already offering its views and arguments on these issues in the SCB proceeding. Even if the ALJs determine that RESA cannot fully address NRG's interests in this rate case proceeding, permitting NRG to pursue the same issues with a smaller group of

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<sup>9</sup> See March 27, 2018 Notice of *En Banc* Hearing on Implementation of Supplier Consolidated Billing, Docket No. M-2018-2645254.

<sup>10</sup> See EGS Coalition for SCB Comments, pp. 44-46.

<sup>11</sup> See *id.*

stakeholders and one EDC is likely to lead to results inconsistent with the *en banc* proceeding, especially in light of the time limitations of Section 1308(d).

Notably, the Commission has previously rejected efforts by NRG affiliates to introduce extraneous issues in a Section 1308(d) proceeding. In a recent Duquesne Light Company (“Duquesne”) electric base rate proceeding, several NRG companies filed a complaint asserting that a tariff provision (Rider No. 18) relating to the purchase of energy from qualifying facilities under the Public Utility Regulatory Policies Act of 1978 (“PURPA”) was discriminatory.<sup>12</sup> The NRG companies subsequently requested that the Commission either modify wholesale PURPA rates in Rider No. 18 or eliminate Rider No. 18.<sup>13</sup> After the NRG companies opposed a non-unanimous settlement of the base rate proceedings which did not address their issues, the Administrative Law Judge reopened the record in the proceeding and granted a motion by Duquesne to sever the issues presented by the NRG companies from the rate case proceeding.<sup>14</sup> The Commission subsequently agreed with the Administrative Law Judge, and explained:

We are in agreement with the ALJ that the Rider No. 18 issues were severable from our consideration of the base rate Settlement before us, and that they should be held in abeyance for disposition at a future time. We find that there simply was insufficient time to render a thorough and reasoned decision on these issues within the regulatory time constraints inherent in a Section 1308(d) base rate proceeding. In so doing, it is important to note that Duquesne itself did not propose any changes to its currently effective Rider No. 18 in conjunction with its base rate increase request. The issues arose solely due to a challenge of Duquesne’s existing Rider No. 18 by the NRG Companies and do not have any effect on the agreed upon revenue requirement contained within the Settlement. Therefore, we shall adopt the ALJ’s recommendation that the base rate investigation be closed; that the issues held in abeyance be resolved based upon the existing record; and that the NRG

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<sup>12</sup> See Opinion and Order, *Pa. P.U.C. v. Duquesne Light Company*, Docket No. R-2013-2372129 (Order entered April 23, 2014), p. 2. A copy of the Commission’s Opinion and Order is included as Attachment A to this Answer.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*, p. 6.

Companies have the burden of proof with regard to the deferred issues.<sup>15</sup>

***“Proposals to Streamline the Interconnection Process for Distributed Generation***

***Technologies.***” As described in the Direct Testimony of Mr. Schlesinger (PECO Statement No. 8), the Company is proposing certain clarifying changes to net metering provisions. Mr. Schlesinger also described PECO’s fulfillment of its commitment to revise terms and conditions for the interconnection of customer-sited distributed generation in accordance with the settlement of its 2015 electric base rate proceedings, and improvements PECO has already implemented to streamline the distributed generation interconnection process (which are also discussed by Mr. Innocenzo in PECO Statement No. 1).

PECO has not made any “proposals” to further streamline the interconnection process for distributed generation in this proceeding. To the extent that NRG is seeking to introduce new proposals, PECO does not believe that such interests provide a valid basis for intervention in this distribution base rate proceeding for the same reasons PECO has opposed RESA’s intervention on this issue. The challenges of creating a complete and well-developed evidentiary record on the issues that are properly within the scope of this base rate proceeding should not be heightened by interjecting entirely new (and as yet unidentified) proposals relating to distributed generation that will not receive proper consideration under a litigation schedule that was not designed or intended to accommodate them.

11. Denied. As noted *supra*, NRG is a member of RESA and NRG and RESA provide nearly identical lists of issues that they intend to address in this proceeding. In the event the ALJs nevertheless determine that NRG’s interests are not sufficiently represented by RESA,

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<sup>15</sup> *Id.*, p. 30 (footnote omitted). The Commission subsequently considered and rejected the NRG companies’ contentions regarding Rider No. 18. See Opinion and Order, *NRG Power Midwest LP, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC v. Duquesne Light Company*, Docket No. C-2013-2390562 (Order entered May 7, 2015).

the ALJs should limit NRG's participation to the same issues that PECO has proposed for RESA, specifically: (i) PECO's proposed Electric Vehicle Direct Current Fast Charger Pilot Rider; (ii) the allocation of costs between PECO's distribution and default service functions; (iii) PECO's proposed changes to net metering tariff provisions; and (iv) the Company's fulfillment of commitments made in the settlement of its 2015 electric base rate proceeding concerning the interconnection of distributed generation, and other existing interconnection improvements discussed in the direct testimony of Mr. Richard Schlesinger (PECO Statement No. 8) and Mr. Michael Innocenzo (PECO Statement No. 1). In addition, in light of the extensive discovery PECO has already produced in this proceeding,<sup>16</sup> NRG's membership in RESA, and the identical interests NRG and RESA in their Petitions to Intervene, the ALJs should limit NRG's discovery in this proceeding to discovery that does not duplicate discovery by RESA.

12. Denied in part. For the reasons set forth above, several of NRG's alleged interests are not within the scope of this proceeding in light of other Commission proceedings and therefore do not provide a basis for its request to intervene.

13. Denied in part. For the reasons set forth above, several of NRG's alleged interests are not within the scope of this proceeding in light of other Commission proceedings and therefore do not provide a basis for its request to intervene.

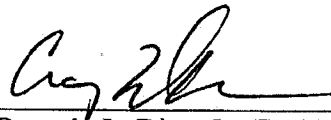
14. Denied in part. For the reasons set forth above, several of NRG's alleged interests are not within the scope of this proceeding in light of other Commission proceedings and therefore do not provide a basis for its request to intervene.

WHEREFORE, for the foregoing reasons, PECO Energy Company requests that the ALJs exercise their authority to deny NRG's Petition to Intervene in this proceeding in light of RESA's participation and investigation of the identical issues presented by NRG or,

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<sup>16</sup> As of May 16, 2018, PECO has responded to over 338 interrogatories, with an additional 28 interrogatories pending that will be answered by May 21, 2018.

alternatively, to limit NRG's discovery in this proceeding to requests that are non-duplicative of discovery by RESA and relate only to: (i) PECO's proposed Electric Vehicle Direct Current Fast Charger Pilot Rider; (ii) the allocation of costs between PECO's distribution and default service functions; (iii) PECO's proposed changes to net metering tariff provisions; and (iv) the Company's fulfilment of commitments made in the settlement of its 2015 electric base rate proceeding concerning the interconnection of distributed generation and other existing interconnection improvements discussed in the direct testimony of Mr. Richard Schlesinger (PECO Statement No. 8) and Mr. Michael Innocenzo (PECO Statement No. 1).



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Dated: May 16, 2018

*Counsel for PECO Energy Company*

# **Attachment A**

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

Public Meeting held April 23, 2014

Commissioners Present:

Robert F. Powelson, Chairman  
John F. Coleman, Jr., Vice Chairman  
James H. Cawley  
Pamela A. Witmer  
Gladys M. Brown

Pennsylvania Public Utility Commission	R-2013-2372129
Office of Consumer Advocate	C-2013-2379084
Office of Small Business Advocate	C-2013-2380474
Jacquelyn and Robert Miller	C-2013-2383835
Gwendolyn L. LeVert	C-2013-2383980
Duquesne Industrial Intervenors	C-2013-2385292
Aimee-Marie Dorsten	C-2013-2386037
Connie Schiavo	C-2013-2386284
NRG Power Midwest LP, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC	C-2013-2390562

v.

Duquesne Light Company

**OPINION AND ORDER**

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## **BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of NRG Power Midwest LP, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC (collectively, the NRG Companies) filed on April 4, 2014, to the Recommended Decision (R.D.) of Administrative Law Judge (ALJ) Conrad A. Johnson, issued on March 28, 2014, relative to the above-captioned general rate increase proceeding. Replies to Exceptions were filed by Duquesne Light Company (Duquesne or the Company) on April 11, 2014. Also, on April 11, 2014, the Beaver Falls Municipal Authority (BFMA) filed a letter concurring with the Replies to Exceptions of Duquesne.

### **I. History of the Proceeding**

On August 2, 2013, Duquesne filed Supplement No. 81 to Tariff Electric – Pa. P.U.C. No. 24 (Supplement No. 81) to become effective on October 1, 2013. Duquesne proposed a general increase in electric distribution rates to produce additional annual operating revenues of approximately \$76.3 million, or an overall increase of 17.6% in annual distribution revenues, based on data for a Fully Projected Future Test Year (FPFTY) ending April 30, 2015.

On August 9, 2013, the Commission's Bureau of Investigation and Enforcement (I&E) filed a Notice of Appearance. On August 16, 2013, the Office of Consumer Advocate (OCA) filed a Formal Complaint, Public Statement, and Notice of Appearance. On August 22, 2013, the Office of Small Business Advocate (OSBA) filed a Formal Complaint, Public Statement, and Notice of Appearance.

By Order entered September 26, 2013, the Commission noted the suspension of the effective date of Supplement No. 81 by operation of law, pursuant to

66 Pa. C.S. § 1308(d), for six months, or until May 1, 2014, and instituted an investigation into the lawfulness, justness and reasonableness of the Company's proposed and existing rates, rules and regulations.

On September 27, 2013, Duquesne Industrial Interveners (DII) filed a Formal Complaint.

On October 28, 2013, the NRG Companies jointly filed a Formal Complaint. In their Complaint, the NRG Companies alleged, *inter alia*, that Duquesne's Rider No. 18 – Rate for Purchase of Electric Energy from Customer-Owned Renewable Resources Generating Facilities (Rider No. 18), may be discriminatory and requested that the Commission investigate this particular tariff provision to ensure that the terms, conditions, and electric energy purchase price continue to be just, reasonable, and non-discriminatory. NRG Companies Complaint at ¶ 11. Later in the proceeding, the NRG Companies requested that the Commission either modify the wholesale PURPA rates in Rider No. 18 or eliminate Rider No. 18. NRG Midwest St. 1 at 6-7; St. 1-S at 6, 9, 12.

Petitions to Intervene, which were subsequently granted, were filed by the following entities: the International Brotherhood of Electrical Workers, Local 29 (IBEW); United States Steel Corporation (U.S. Steel); Citizen Power, Inc. (Citizen Power); Community Action Association of Pennsylvania (CAAP); the Coalition for Affordable Utility Service and Energy Efficiency in Pennsylvania (CAUSE-PA); Interstate Gas Supply, Inc. (IGS); Citizens for Pennsylvania's Future (PennFuture); and BFMA. Various individuals filed Formal Complaints and Oppositions to the rate increase.

On November 12, 2013, Duquesne filed an Answer to the NRG Companies' Complaint, as well as Preliminary Objections raising the following objections to the portions of the NRG Companies' Complaint pertaining to Rider No. 18:

(1) the Complaint is beyond the scope of the instant base rate proceeding; (2) the NRG Companies failed to join parties indispensable to the claims regarding the PURPA rates paid under Rider No. 18; and (3) the relief the NRG Companies requested is beyond the Commission's jurisdiction. On November 22, 2013, the NRG Companies filed an Answer to Duquesne's Preliminary Objections. ALJ Johnson denied the Company's Preliminary Objections by Interim Order dated December 12, 2013.

On December 13, 2013, Duquesne filed a Motion to Sever the Rider No. 18 portion of the NRG Companies' Complaint from this base rate proceeding. The ALJ denied the Motion to Sever on the second day of hearings, December 17, 2013.

Also, on December 13, 2013, Duquesne filed a Petition for Interlocutory Review and Answer to Material Questions (Petition) pertaining to issues associated with the NRG Companies' Complaint. In its Petition, Duquesne sought interlocutory Commission review and answer to the following Material Questions:

- (1) Whether [the] NRG [Companies'] Complaint must be dismissed for failure to join the affected QFs<sup>1</sup> as necessary and indispensable parties; and
- (2) Whether the PUC lacks authority to change the wholesale PURPA rate set forth in Rider No. 18?

Duquesne requested that the Commission answer the Material Questions in the affirmative. Petition at 2.

By Secretarial Letter issued January 9, 2014, the Commission waived the thirty-day consideration period set forth in Section 5.303 of its Regulations, 52 Pa. Code

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<sup>1</sup> QFs stands for qualifying facilities. Duquesne's Rider No. 18 establishes the rates to be paid for power produced by certain specified categories of QFs under the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. §§ 824, *et seq.* DLC St. 12-R at 19.

§ 5.303, in order to provide adequate time for a thorough review of the Material Questions. *See* 52 Pa. Code § 1.2(c); *see also* *C.S. Warthman Funeral Home, et al. v. GTE North, Incorporated*, Docket No. C-00924416 (Order entered June 4, 1993).

The Parties served direct, rebuttal and surrebuttal testimony, along with various exhibits. Evidentiary hearings were held before the ALJ on December 16, 17, and 20, 2013. At the hearings, the Parties advised the ALJ that all Parties, other than the NRG Companies, had reached a settlement on all base rate issues, and that the only issues remaining for decision were those issues raised by the NRG Companies. Tr. at 71. During the hearings, the Parties' respective testimony and exhibits were admitted into the record. Certain Parties were cross-examined on issues raised by the NRG Companies, and the NRG Companies cross-examined the I&E and the OCA witnesses.

On December 23, 2013, Duquesne filed a Brief in Support of the Petition, BFMA filed a Brief in Support of the Petition, and the NRG Companies filed a Brief in Opposition to the Petition.

On January 6, 2014, the following Parties filed Main Briefs: Duquesne, BFMA, the NRG Companies, I&E and the OCA.

On January 16, 2014, the following Parties filed a Joint Petition for Approval of Non-Unanimous Settlement (Settlement): Duquesne, I&E, the OCA, the OSBA, CAUSE-PA, DII, PennFuture, and U.S. Steel (Joint Petitioners). Other Parties, including the CAAP, Citizen Power, IGS, IBEW, and BFMA indicated they did not oppose the Settlement. The NRG Companies have reserved the right to oppose the Settlement. NRG Companies M.B. at 7-8. The Settlement provides for, *inter alia*, increases in rates designed to produce a net increase in annual distribution operating revenues of \$48 million, based on a FPFTY ending April 30, 2015, to become effective for service rendered on and after May 1, 2014.

On January 17, 2014, the following Parties filed Reply Briefs: Duquesne, I&E, the OCA, BFMA, and the NRG Companies.

On January 30, 2014, the NRG Companies filed Objections to the Settlement. In their Objections, the NRG Companies requested that the Commission not approve the Settlement as it does not address the concerns it raised about Rider No. 18.

On February 4, 2014, responses to the Objections filed by the NRG Companies were filed by the following Parties: Duquesne, U.S. Steel, BFMA and the OCA.

On February 6, 2014, the Commission entered an Order declining to answer the Material Questions raised in Duquesne's Petition and returning this matter to the Office of Administrative Law Judge.

By Interim Order issued February 7, 2014, the ALJ admitted the Settlement into the record and closed the record.<sup>2</sup>

On March 22, 2014, the ALJ, via e-mail, informed counsel for the active Parties that he would reconsider an earlier motion from the Company to sever the Rider No. 18 issues due to the complexity of the issues involved, if such motion was filed by March 25, 2014.

On March 25, 2014, Duquesne filed a Motion to Sever from this Base Rate Proceeding the Rider No. 18 Portion of the NRG Companies' Complaint (Motion to

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<sup>2</sup> The Settlement was served on the four individual Complainants who were non-signatories to the Settlement. None of these Parties filed a response or objection to the Settlement.

Sever). Duquesne requested that the Rider No. 18 portion of the Complaint be resolved in a separate recommended decision from the base rate increase Settlement.

On March 26, 2014, the NRG Companies filed an Answer to Duquesne's Motion opposing the severance of the Rider No. 18 issues. Also, on March 26, 2014, the BFMA filed an Answer to the Motion to Sever.

By Interim Order issued on March 27, 2014, the ALJ reopened the record to reconsider the Company's Motion to Sever and Answers thereto, and granted the Motion to Sever. The record was then re-closed on March 27, 2014.

The Commission issued ALJ Johnson's Recommended Decision on March 28, 2014. In his Recommended Decision, the ALJ found that the Settlement was in the public interest and should be approved. The ALJ further recommended that the Rider No. 18 portion of the NRG Companies' Complaint be held in abeyance by the Commission for resolution in a separate recommended decision. According to the ALJ, there is a sufficient record to resolve in a separate recommended decision the Rider No. 18 issues.

As noted, Exceptions were filed on April 4, 2014, by the NRG Companies. Replies to Exceptions were filed on April 11, 2014, by Duquesne and BFMA.

## **II. Discussion of the Non-Unanimous Settlement**

### **A. Terms and Conditions of the Non-Unanimous Settlement**

The Joint Petitioners agreed to the Settlement covering all issues, except for the Rider No. 18 issues, which were raised by the NRG Companies in this proceeding. The Settlement will result in an increase in distribution revenues of \$48 million, which is \$28.3 million less than the \$76.3 million originally proposed by Duquesne. The Joint Petitioners have agreed to a base rate increase, to an allocation of that revenue increase to the rate classes and to a rate design for each rate class.

The Settling Parties state that the Settlement was achieved after an extensive investigation of Duquesne's filing, including extensive informal and formal discovery and the filing of direct, rebuttal, surrebuttal and rejoinder testimony by a number of the Joint Petitioners. Settlement ¶¶ 52 at 15. They also state that the Settlement is in the public interest for the reasons set forth in their respective Statements in Support. Settlement ¶¶ 54 at 15.

The Settlement consists of the Joint Petition containing the terms and conditions of the Settlement, and ten appendices. Appendix A to the Settlement sets out the Settlement tariff supplements to be filed and to become effective in accordance with the Settlement. Appendix B to the Settlement sets out the proof of revenues at current and proposed Settlement rates. Appendices C through J to the Settlement are the Statements in Support of the Settlement submitted by Duquesne, I&E, the OCA, the OSBA, CAUSE, DII, PennFuture, and U.S. Steel, respectively.

The essential terms and conditions of the Settlement are set forth in Section II. Settlement ¶¶ 28-61 at 7-17. The Joint Petitioners agreed to the following terms and conditions:

## A. REVENUE REQUIREMENT

28. Duquesne Light will be permitted to increase rates by amounts designed to produce an increase in distribution revenues of \$48 million annually. These rates will become effective for service rendered on and after May 1, 2014. Rates will be designed based upon the billing usage determinants set forth in the Company's original filing and based upon the updated customer counts reflected in Exhibit JH 1-R as submitted on December 2, 2013, and reflected in the proof of revenues at Settlement rates attached as Appendix "B".

29. Commencing with calendar year 2014, Duquesne Light will deposit into its pension trusts an amount equal to \$37,200,000 per year; provided, however, that contribution(s) in any year in excess of the foregoing may be used on a cumulative basis to satisfy future contribution obligations under this Settlement. The Settlement provides for recovery of the expense component of \$18,600,000 (50% of the average cash contributions) of projected future pension contributions. Additionally, Duquesne Light will be permitted to include the other 50% of actual pension contributions from January 1, 2007, forward, net of related accumulated deferred income taxes, in rate base for rate making purposes. . . . Duquesne Light shall provide a report and affidavit attesting to the actual contributions to pension trusts during each calendar year. The report and affidavit shall be filed with the Commission, with copies provided to I&E, OCA and OSBA on or before January 31 of the following calendar year, with the first report and affidavit due on or before January 31, 2015.

30. The Company's distribution rate allowance for OPEBs [Other Post-Employment Benefits] is based upon the estimated ASC 715<sup>3</sup> cost for the Fully Projected Future Test Year [FPFTY] of approximately \$3,265,500, which reflects a two-year normalization of the Net Periodic Benefit Cost for historic and future test year distribution costs. The

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<sup>3</sup> Financial Accounting Standards Board: Accounting Standards Codification, Topic 715 *Compensation — Retirement Benefits*.



distribution expense component included in rates is approximately 50% of this estimated cost less the annual effect of the 3-year amortization of the regulatory liability of \$1.1 million (\$970,900 on a distribution basis) as explained in Duquesne Light St. No. 2, p. 27, for a net distribution expense of \$1,309,117 ( $\$1,632,750 - \$323,633 = \$1,309,117$ ). The remaining 50% of actual ASC 715 cost will be the amount to be capitalized on the Company's books. . . .

31. Duquesne Light's jurisdictional separation study of distribution and transmission costs and assets shall be approved for purposes of this case only and shall hold no precedential value in a future base rate proceeding. All parties reserve the right to challenge the jurisdictional separation study in future matters.

32. This Settlement reflects a compromise of the Parties' positions regarding rate base and rate of return. If Duquesne Light is authorized to implement a Distribution System Improvement Charge (DSIC), then following the effective date of rates in this proceeding, Duquesne Light will be eligible to include plant additions in the DSIC once eligible account balances exceed the levels projected by Duquesne Light at April 30, 2015. The foregoing provision is included solely for purposes of calculating the DSIC, and is not determinative for future ratemaking purposes of the projected additions to be included in rate base in a FPFTY filing.

33. In order to meet the Commission's smart meter surcharge requirements in *Petition of Duquesne Light Company for Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123948, and for that purpose only, Duquesne Light will use a 10% return on common equity and the capital structure proposed by the Company in this proceeding for establishing smart meter surcharge rates. The return on common equity and capital structure ratios are limited solely to establishing the Company's smart meter surcharge for a three-year period following the effective date of rates in this proceeding consistent with the Commission's Smart Meter Order at Docket No. M-2009-2123948 entered on May 11, 2010, or until the return on equity percentage and capital structure

ratios are reset in the Company's next base rate case, whichever is sooner. It is understood and agreed that this Settlement is the result of compromise and does not reflect any Party's position with respect to the current cost of common equity or capital structure for Duquesne Light. The Commission's approval of this Settlement shall not be construed to represent approval of any Party's position on these issues.

34. Duquesne Light commits to spend \$15 million on distribution system vegetation management on a twelve-month basis for three years commencing May 1, 2014; provided that any shortfall below that level of spending on a twelve-month basis shall be expended no later than April 30, 2017. Duquesne Light will report its distribution vegetation management spending for the three 12-month periods commencing May 1, 2014. These annual reports will be filed with the Commission, with copies provided to I&E, OCA and OSBA by October 31, 2015, October 31, 2016 and October 31, 2017.

35. Duquesne Light will file a Total Company and Pennsylvania jurisdictional report showing capital expenditures, plant additions and retirements, by month, for the FTY (April 2013 through March 2014), plus the gap month of April 2014 by October 31, 2014. A similar report for the FPFTY (May 1, 2014 through April 30, 2015) will be filed by October 31, 2015. In Duquesne Light's next base rate proceeding, the Company will prepare a comparison of its actual expenses and rate base additions for the twelve-months ended April 30, 2015 to its projections in this case. However, it is recognized by the Parties that this is a black box settlement that is a compromise of the Parties' positions on various issues.

36. The Parties agreed to support a request by Duquesne Light that its Petition filed at Docket No. M-2009-2123948 to amend, to the extent necessary, the Commission's May 6, 2013 Order approving the Company's Final Smart Meter Procurement and Installation Plan requesting that FOCUS project costs, exclusive of costs that have been previously recovered through the Company's Smart Meter Charge, be recovered in base rates, be consolidated with this

base-rate proceeding and be granted. . . . The Parties recognize that the Company's Petition was granted by Order entered on January 9, 2014.

Settlement ¶¶ 28-36 at 7-11. Paragraph 37 contains provisions relating to the treatment of IRS repair allowance.

## **B. UNIVERSAL SERVICE AND CUSTOMER SERVICE**

38. Duquesne Light agrees to an increase in the annual target of LIURP [Low Income Usage Reduction Income Program] from 2,555 in its currently filed Universal Service and Energy Conservation Plan (USECP) for 2014 to 2017 to 3,100 visits. Duquesne Light also agrees to increase the maximum CAP [Customer Assistance Program] credits for non-heat customers from \$560 per year to \$700 per year and for heating customers from \$1,400 per year to \$1,800 per year, effective January 1, 2015. Any increases in costs will be recovered in the Universal Service Charge. . . .

Settlement ¶ 38 at 12. Paragraphs 39 through 41 contain provisions relating to the initiation of a collaborative to discuss storm communication-related issues, the Company's retreat from requiring CAP applicants to provide Social Security numbers as a prerequisite to CAP participation and revitalizing its Red Flags Plan.

## **C. REVENUE ALLOCATION AND RATE DESIGN**

42. The Parties have agreed to allocate the \$48 million revenue allocation in the manner set forth in Appendix "B". The Parties agree that the revenue allocation is a reasonable compromise of the revenue allocation positions advanced by the Parties.

43. The rate design for each rate class to recover the revenue allocation to each class at the settlement increase of

\$48 million is set forth in Appendix “B”. The fixed monthly customer charge for Rates RS [Residential Service], RA [Residential Service Heating], and RH [Residential Service Add-On Heat Pump] will be increased from \$7.00 per month to \$10.00 per month. The Rate L [Large Power Service] redesign that provides a new rate only for service taken at transmission voltage (138 kV) is approved.

#### **D. DUQUESNE LIGHT LED STREET LIGHT PILOT PROGRAM**

44. Working in concert with interested municipalities, the Company agrees to install up to a total of 1,500 LED [light-emitting diode] lights per year at nominal lamp wattages of 43 or 106 watts, which are the 70 watt and 150 watt High Pressure Sodium Light (HPS) equivalents, respectively, under Rate SM [Street Lighting Municipal]. The distribution rates for these LED lights will be \$11.16 per month and \$12.82 per month, respectively.

Settlement ¶ 44 at 13. Paragraphs 45 through 49 contain additional provisions relating to the Company’s LED Pilot Program.

In addition to the specific terms to which the Joint Petitioners have agreed, the Settlement contains certain general, miscellaneous terms. The Settlement is conditioned upon Commission approval of the terms and conditions without modification. The Settlement establishes the procedure by which any of the Joint Petitioners may withdraw from the Settlement and proceed to litigate this case, if the Commission should act to modify the Settlement. Settlement ¶ 55 at 15. In addition, the Settlement states that the Settlement does not constitute an admission against, or prejudice to any position which any of the Joint Petitioners might adopt during subsequent litigation, or further litigation of this case, in the event the Settlement is rejected by the Commission. Settlement ¶ 56 at 16.

Further the Settlement provides that approval of the Settlement does not preclude the Joint Petitioners from filing Exceptions in response to issues raised by the NRG Companies. Settlement ¶ 61 at 17.

The Joint Petitioners respectfully request that the ALJ and the Commission approve the proposed Settlement, without modification, and deny the NRG Companies' opposition to the Settlement. The Joint Petitioners further request that the investigation into this matter be terminated and that the Commission issue an Order authorizing Duquesne to file the tariff attached as Appendix A to the Settlement to become effective for service on and after May 1, 2014. Settlement at 17.

## **B. Legal Standards**

The purpose of this investigation is to establish distribution rates for Duquesne's customers that are "just and reasonable" pursuant to Section 1301 of the Public Utility Code (Code), 66 Pa. C.S. § 1301. A public utility seeking a general rate increase is entitled to an opportunity to earn a fair rate of return on the value of the property dedicated to public service. *Bluefield Water Works and Improvement Co. v. Public Service Comm'n of West Virginia*, 262 U.S. 679 (1923).

In determining what constitutes a fair rate of return, the Commission is guided by the criteria set forth in *Bluefield, supra* and *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). In *Bluefield* the United States Supreme Court stated:

A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which

are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be too high or too low by changes affecting opportunities for investment, the money market and business conditions generally.

*Bluefield*, 262 U.S. at 692-3.

The policy of the Commission is to encourage settlements, and the Commission has stated that settlement rates are often preferable to those achieved at the conclusion of a fully litigated proceeding. 52 Pa. Code §§ 5.231, 69.401. A full settlement of all the issues in a proceeding eliminates the time, effort and expense that otherwise would have been used in litigating the proceeding, while a partial settlement may significantly reduce the time, effort and expense of litigating a case. A settlement, whether whole or partial, benefits not only the named parties directly, but, indirectly, all customers of the public utility involved in the case.

Rate cases are expensive to litigate, and the reasonable cost of such litigation is an operating expense recovered in the rates approved by the Commission. Partial or full settlements allow the parties to avoid the substantial costs of preparing and serving testimony and the cross-examination of witnesses in lengthy hearings, the preparation and service of briefs, reply briefs, exceptions and replies to exceptions, together with the briefs and reply briefs necessitated by any appeal of the Commission's decision, yielding significant expense savings for the company's customers. For this and other sound reasons, settlements are encouraged by long-standing Commission policy.

Despite the policy favoring settlements, the Commission does not simply rubber stamp settlements without further inquiry. In order to accept a rate case settlement such as that proposed here, the Commission must determine that the proposed terms and conditions are in the public interest. *Pa. PUC v. York Water Co.*, Docket No. R-00049165 (Order entered October 4, 2004); *Pa. PUC v. C. S. Water and Sewer Assoc.*, 74 Pa. P.U.C. 767 (1991).

With regard to the burden of proof in this matter, Section 315(a) of the Code provides:

**§ 315. Burden of proof**

**(a) Reasonableness of rates.**—In any proceeding upon the motion of the commission, involving any proposed or existing rate of any public utility, or in any proceedings upon complaint involving any proposed increase in rates, the burden of proof to show that the rate involved is just and reasonable shall be upon the public utility. The commission shall give to the hearing and decision of any such proceeding preference over all other proceedings, and decide the same as speedily as possible.

66 Pa. C.S. § 315(a). Consequently, in this proceeding, Duquesne has the burden to prove that the rate increase proposed by the Settlement is just and reasonable. The Joint Petitioners have reached an accord on many of the issues and claims that arose in this proceeding and submitted the Settlement. The Joint Petitioners have the burden to prove that the Settlement is in the public interest.

The ALJ found that the proposed Settlement is in the public interest and recommended that it be approved without modification. The proposed Settlement was opposed by only one party, the NRG Companies.

### **C. Disposition of the Non-Unanimous Settlement**

As noted above, a Settlement in principle of the majority of issues was reached prior to the hearing dates, thereby negating the need for the scheduled evidentiary hearings on the settled issues. However, during the evidentiary hearings, certain Parties were cross-examined only on the issues raised by the NRG Companies, and the NRG Companies cross-examined the I&E and the OCA witnesses. As such, during the hearings, the Parties' respective testimony and exhibits were admitted into the record. The Settlement was not signed by all the Parties, but it was also only opposed by the NRG Companies. The Settlement also was served on the four individual Complainants who were non-signatories to the Settlement, none of whom filed a response or objection to the Settlement.

As noted previously, it is in the public interest to provide a public utility with the financial ability to proffer safe, efficient, and adequate service to its customers. In terms of revenue requirement, as originally filed, Duquesne's Supplement No. 81 sought an increase in rates of \$76.3 million per year, or an approximate 17.6 percent increase over its present rates. Under the terms of the Settlement, the amount of the increase has been reduced to \$48 million per year, or approximately eleven percent, over present rates. This increase in revenues represents approximately sixty-three percent of the requested rate increase.

According to the ALJ, except for the NRG Companies' opposition to the omission of the Rider No. 18 issues from the Settlement, the Settlement of this proceeding is the result of compromise. The ALJ stated that although NRG filed an objection to the Settlement, it did not contest any specific Settlement provision concerning revenue requirement, rate design, allocation, universal service and customer service, the LED program or state tax adjustment surcharge. According to the ALJ, the crux of the NRG Companies' objection is the omission of any consideration of



Duquesne's Rider No. 18 from the Settlement terms. As such, the ALJ found that Duquesne's Rider No. 18 provision could be examined separately for compliance and recommended severance of that issue. The ALJ concluded that upon consideration of the terms and conditions of the Settlement, and the statements of the Settling Parties in support thereof, the Settlement constitutes a fair, just and reasonable resolution of the Commission's investigation, and recommended that the Commission approve the Settlement as being in the public interest. R.D. at 55-58.

Based on our review of the Settlement, we find that there are a number of settled issues within the Non-Unanimous Settlement that are beneficial to customers. Among these provisions are: (1) the reduced rate increase as compared to the originally proposed rates; (2) the inclusion of key provisions concerning the amount of Duquesne's ongoing pension contributions that will ensure that adequate funds are contributed to the Company's pension plans; (3) the inclusion of specific provisions for meeting the Company's OPEB requirements; (4) the Company's commitment to spending \$15 million on distribution system vegetation management on a twelve-month basis for three years commencing May 1, 2014, and to provide annual reports documenting these expenditures; (5) a clarification of the DSIC provision if Duquesne is authorized to implement a DSIC following the effective date of rates in this proceeding; (6) the agreement that the Company will use a ten percent return on equity and the capital structure proposed by the Company in this proceeding for establishing smart meter surcharge rates; (7) the agreement of the Company to file reports showing capital expenditures, plant additions and retirements, by month, for the period of April 2013 through April 2015; (8) the increase in the annual target of Low Income Usage Reduction Program visits from 2,555 to 3,100 visits, and the increase in the maximum CAP credits effective January 1, 2015; (9) the Company's agreement to initiate a collaborative with interested parties within six months of the conclusion of this proceeding to discuss storm communications related issues; (10) the decrease in the residential customer charge proposed by Duquesne from \$15 per month to \$10 per month; and (11) the agreement of

Duquesne to work with interested municipalities to install up to a total of 1,500 LED street lights per year as part of a LED Street Light Pilot Program.

We find that these many beneficial aspects within the Settlement all support a finding that the Joint Petition for Non-Unanimous Settlement is in the public interest. The Settlement resolves the majority of the issues impacting residential consumers, small business, large business customers and the public interest at large. The benefits of the Settlement are numerous and will result in significant savings of time and expenses for all Parties involved by avoiding the necessity of further administrative proceedings, as well as possible appellate court proceedings. For the reasons stated herein and in the Joint Petitioners' Statements in Support, we agree with the ALJ's conclusion that the Joint Petition for Non-Unanimous Settlement is in the public interest. Accordingly, we shall adopt the ALJ's recommendation to grant the Joint Petition for Non-Unanimous Settlement and approve the Settlement without modification.

### III. Discussion of Contested Rider No. 18 Issues

#### A. Burden of Proof

Typically in proceedings before the Commission, the public utility has the burden to establish the justness and reasonableness of every element of its rate increase in all proceedings conducted under Section 1308(d) of the Code, 66 Pa. C.S. § 1308(d). The standard of proof which a public utility must meet is set forth in Section 315(a) of the Code, 66 Pa. C.S. § 315(a), which specifies that, “[i]n any proceeding upon the motion of the Commission, involving any proposed or existing rate of any public utility, or in any proceeding upon complaint involving any proposed increase in rates, the burden of proof to show that the rate involved is just and reasonable shall be upon the public utility.” The Commonwealth Court has upheld this standard of proof<sup>4</sup> and has applied it in base rate proceedings.

In this proceeding, the burden of proof lies squarely with Duquesne. Duquesne is the public utility seeking permission from the Commission to increase its base rates and to implement and/or alter programs. The burden of proof does not shift to a statutory party or individual party (whether an entity or an individual) which challenged the requested rate increase. Instead, the utility’s burden, to establish the justness and reasonableness of every component of its rate request, is an affirmative one and remains with the public utility throughout the course of the rate proceeding.<sup>5</sup>

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<sup>4</sup> *Lower Frederick Twp. v. Pa. PUC*, 409 A.2d 505, 507 (Pa. Cmwlth. 1980). See also, *Brockway Glass v. Pa. PUC*, 437 A.2d 1067 (Pa. Cmwlth. 1981).

<sup>5</sup> There is no similar burden placed on parties which challenge a proposed rate component. See, *Berner v. Pa. PUC*, 382 Pa. 622, 631, 116 A.2d 738, 744 (1955).

Under the Code, rates charged by public utilities must be just and reasonable and cannot result in unreasonable rate discrimination. 66 Pa. C.S. §§ 1301 and 1304.

A public utility seeking a general rate increase has the burden of proof to establish the justness and reasonableness of every element of the rate increase request. 66 Pa. C.S. § 315(a); *Pa. PUC v. Aqua Pennsylvania*, Docket No. R-00038805, (Order entered August 5, 2004).

As the Commonwealth Court explained: “While it is axiomatic that a utility has the burden of proving the justness and reasonableness of its proposed rates, it cannot be called upon to account for every action absent prior notice that such action is to be challenged.”<sup>6</sup> Therefore, while the ultimate burden of proof does not shift from the utility, a party proposing an adjustment to a ratemaking claim bears the burden of presenting some evidence or analysis tending to demonstrate the reasonableness of the adjustment.<sup>7</sup>

However, a party that raises an issue that is not included in a public utility’s general rate case filing bears the burden of proof. As the proponent of a Commission order with respect to its proposals, the NRG Companies bear the burden of proof as to proposals that Duquesne did not include in its filing. Duquesne’s Rider No. 18 provisions are deemed just and reasonable because those tariff provisions previously were approved by the Commission. Therefore, the NRG Companies, as the party challenging a previously-approved tariff provision, bear the burden to demonstrate the

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<sup>6</sup> *Allegheny Center Assocs. v. Pa. PUC*, 570 A.2d 149, 153 (Pa. Cmwlth. 1990).

<sup>7</sup> *See, e.g., Pa. PUC v. PECO*, 1990 Pa. PUC Lexis 155; *Pa. PUC v. Breezewood Telephone Company*, 1991 Pa. PUC Lexis 45.

Commission's prior approval is no longer justified. *See Pa. PUC v. Columbia Gas of Pennsylvania, Inc.*, Docket No. R-2010-2215623, *et al.* (Order entered March 15, 2012).

As we proceed in our review of the various positions espoused in this proceeding, we are reminded that we are not required to consider expressly or at great length each and every contention raised by a party to our proceedings. *University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217, 1222 (Pa. Cmwlth. 1984). Moreover, any exception or argument that is not specifically addressed herein shall be deemed to have been duly considered and denied without further discussion.

**B. Duquesne's Rider No. 18**

**1. Positions of the Parties**

**a. NRG's Position**

As noted, the NRG Companies include NRG Power Midwest LP (NRG Midwest), NRG Energy Center Pittsburgh LLC (NRGP), and Reliant Energy Northwest LLC (REN). NRG Midwest is a wholesale power generation company operating generation facilities in Pennsylvania. NRG Companies Complaint ¶ 2. NRGP is a jurisdictional public utility providing steam, hot water and chilled water service to approximately thirty-five different buildings in the City of Pittsburgh. *Id.* ¶ 3. REN is an electric generation supplier (EGS) licensed by the Commission to provide electricity and related services to Pennsylvania customers, including Duquesne's service territory. *Id.* ¶ 4.

In their Complaint, the NRG Companies asserted as follows:

11. The NRG Companies collectively oppose Duquesne Light's proposed rate increase on the grounds that it may be unjust, unreasonable and in violation of the law and will or may produce an excessive return on investment in violation of the Public Utility Code, 66 Pa. C.S. §§ 1301, *et seq.* The NRG Companies are also concerned that the proposed allocation of the revenue increase and proposed rate design may be unlawfully discriminatory, in violation of the Public Utility Code, 66 Pa. C.S. §§ 1301 and 1304, and may otherwise be contrary to sound ratemaking principles and public policy. The NRG Companies also seek to ensure that the Tariff is not in violation of the Electricity Generation Choice and Competition Act, 66 Pa. C.S. § 2801, *et seq.* Finally, Rider No. 18 of Duquesne Light's Tariff should be examined to ensure that the terms, conditions and electric energy purchase price continue to be just, reasonable, and non-discriminatory.

*Id.* ¶ 11.

Duquesne's Rider No. 18, in pertinent part, provides that the Company will purchase electric energy from a qualifying facility (QF).<sup>8</sup> "The electric energy will be purchased, as available, from such facilities at the rate of six cents per kilowatt-hour, or at a rate based on the Company's avoided costs<sup>9</sup> when such costs exceed six cents per kilowatt-hour." Rider No. 18.

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<sup>8</sup> Section 57.31 of the Commission's Regulations defines "qualifying facility" as follows: "A cogeneration facility or a small power production facility which meets the criteria contained in 18 CFR Part 292 (relating to regulations under sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 with regard to small power producers and cogenerators)." 52 Pa. Code § 57.31.

<sup>9</sup> Section 57.31 of the Commission's Regulations defines "avoided cost" as follows: "The incremental costs to an electric utility of electric energy or capacity, or both, which, but for the purchase from the qualifying facility or qualifying facilities, the utility would generate itself or purchase from another source. 52 Pa. Code § 57.31.

During the course of this proceeding, NRG retreated from its concerns as to the proposed allocation of the revenue increase and proposed rate design. Instead, NRG reserved the right to challenge the Settling Parties' Settlement once it was filed and focused on Rider No. 18 issues. NRG stated that it decided not to contest the various Non-unanimous Settlement issues identified in the common brief outline circulated by Duquesne to the Parties, but specifically reserved the right to argue that terms regarding Rider No. 18 should be included in any approval by the Commission of a settlement. NRG Companies M.B. at 7-8.

Concerning Rider No. 18, NRG raised two questions:

Should the Commission permit Duquesne Light's Rider No. 18 to remain in its tariff, with the force and effect of law, where the provisions and intent of Rider No. 18 are no longer consistent with the Pennsylvania regulatory scheme following the enactment of the Electricity Generation Customer Choice and Competition Act and the Alternative Energy Portfolio Standards Act?

Does the energy purchase price contained in Duquesne Light's Rider No. 18 reflect a just and reasonable price such that it should continue to remain in Duquesne Light's tariff with the force and effect of law?

NRG Companies M.B. at 5-6. The NRG Companies submitted that both questions should be answered in the negative. As relief, the NRG Companies submitted that Rider No. 18 should be removed from Duquesne's Tariff, or, in the alternative, the six cents per kilowatt-hour price should be revised to a "price that approximates the average day-ahead locational marginal pricing in the Duquesne Zone." NRG Companies R.B. at 14.

**b. Duquesne's Position**

In its Answer to the NRG Companies' Complaint, Duquesne stated that the Rider No. 18 issues are beyond the scope of this base rate proceeding and would significantly complicate the issues to be decided. Further, Duquesne claimed that the NRG Companies failed to join an indispensable party, *i.e.*, the Beaver Valley Power Company. Additionally, Duquesne asserted that the Commission is without any authority to modify, either directly or indirectly, the rates under existing QF power purchase agreements. Answer at 1-2.

Duquesne stated that the NRG Companies' argument, that Rider No. 18 has been preempted by the Electricity Generation Customer Choice and Competition Act, 66 Pa. C.S. § 2801, *et seq.* (Competition Act), is a curious argument given that the rate in Rider No. 18 was established pursuant to federal law, *i.e.*, PURPA. According to Duquesne, a federal statute preempts any inconsistent state law and PURPA is still the law of the land as the Company continues to have an obligation to purchase power from QFs at avoided cost. Duquesne asserts that no Pennsylvania statute or regulation, including the Competition Act, can change that fact. Duquesne M.B. at 14.

With regard to the argument raised concerning the six cent rate, Duquesne notes that one of the primary purposes of PURPA was to establish long-term rates upon which QFs could rely to finance their power projects. According to Duquesne, the standard for judging the reasonableness of Rider No. 18 is whether it reflects Duquesne's long-term avoided costs. Duquesne opines that the NRG Companies never presented any credible evidence which demonstrated that Duquesne's long-term avoided costs was something other than six cents. Duquesne avers that one measure of its avoided cost is the price it pays to acquire power to serve its default service customers, as this is the cost that the Company would avoid if it purchased power from a QF. According to Duquesne, its default service rate has ranged from over seven cents per kWh to over five cents per



kWh over the last ten years. As such, Duquesne avers this indicates that the six cent rate in Rider No. 18 continues to be reasonable. Furthermore, Duquesne claims that the only alternative rate presented by the NRG Companies is a citation to current spot market prices, *i.e.*, the PJM Day Ahead Locational Marginal Price. Duquesne asserts it is not reasonable to judge the appropriateness of a long-term rate by comparing it to a spot market rate. *Id.* at 14-15.

**c. BFMA's Position**

BFMA provides water services to twenty-three municipalities and also generates electricity from hydroelectric facilities, which it sells to Duquesne pursuant to Rider No. 18. Pursuant to a license issued on August 17, 1984, by the Federal Energy Regulatory Commission, BFMA operates a hydroelectric power generation facility on the Beaver River in Beaver County, Pennsylvania. On February 28, 1985, BFMA entered into a negotiated power purchase agreement with Duquesne under which Duquesne agreed to purchase the output of BFMA generating facilities which were and remain a QF under and in accordance with PURPA. Under this agreement, Duquesne is obligated to purchase the net electric energy produced by BFMA in accordance with the terms and conditions of Rider No. 18. Therefore, BFMA asserts that Rider No. 18 is an integral component of, and inter-related with, the power purchase agreement it has with Duquesne. BFMA explains that pursuant to Duquesne's electric restructuring and other subsequent transactions, NRG Midwest assumed the obligations under the power purchase agreement. BFMA M.B. at 1-5.

BFMA submits that the Commission lacks jurisdiction to grant the relief sought by the NRG Companies because BFMA's hydroelectric facilities, as a matter of law, are entitled to the price set forth in Duquesne's Rider No. 18, in light of the fact that the Commission grandfathered its agreement with Duquesne and locked in the Rider No. 18 price. BFMA further asserts that Rider No. 18 deals with wholesale power

agreements under PURPA that are within FERC's exclusive jurisdiction. According to BFMA, once a state commission has established the price to be paid under a wholesale electric power arrangement, the state can no longer regulate the QF's rate and no state law can preempt this PURPA requirement. *Id.* at 10-11.

## **2. ALJ's Recommendation**

The ALJ recommended that the NRG Companies' Complaint should be held in abeyance to permit sufficient time to address the complex issues surrounding Duquesne's Rider No. 18 tariff provisions. The ALJ stated that Rider No. 18 may be examined separately for compliance with the Commission's regulatory scheme. Therefore, the ALJ severed the Rider No. 18 issue from the Settlement for resolution in a separate recommended decision. R.D. at 1, 58 and 60.

## **3. Exceptions and Replies to Exceptions**

In their Exceptions, the NRG Companies first aver that the ALJ failed to provide for the timely resolution of the Rider No. 18 issues. The NRG Companies note their appreciation of the ALJ's attention to the issues raised in their Complaint and state that they do not object to reserving consideration of the issues to a separate recommended decision. However, they request that the Commission modify the Recommended Decision in order to ensure that all outstanding issues properly raised and consolidated in this base rate proceeding can be resolved within a reasonable amount of time. The NRG Companies opine that as long as the Rider No. 18 issues remain unresolved, they continue to be subject to an unjust, unreasonable and unduly discriminatory power purchase price. Exc. at 2-3.

The NRG Companies assert that they have an interest in seeing their concerns addressed as expeditiously as possible, in accordance with the requirements of

due process. They aver that any delay caused by holding the Rider No. 18 issues in abeyance should result in a final decision rendered by the Commission on those issues no later than June 6, 2014, which was the date the ALJ originally requested a voluntary postponement of the effective date of the tariff supplement, but which was denied by Duquesne. Consistent with the ALJ's original contemplation of completing this case by June 6, 2014, the NRG Companies are requesting that the Commission direct the presiding ALJ to issue a recommended decision on the Rider No. 18 matters so as to provide reasonable time for the Parties to file exceptions and replies and so that the recommended decision could be considered at the June 5, 2014 Public Meeting. Exc. at 3-4.

Secondly, the NRG Companies aver that the Recommended Decision is ambiguous with respect to the procedural posture in which the Rider No. 18 issues are to be considered. The NRG Companies note that while the ALJ recommended that the Commission hold these issues in abeyance for resolution in a separate decision, he also recommended that the base rate investigation at this docket be closed upon the Commission's consideration of the recommendations in Ordering Paragraphs five, six and seven of his Recommended Decision. The NRG Companies assert that it is unclear whether the ALJ intends for the separate recommended decision to be issued in the context of an ongoing Commission investigation. Exc. at 4.

The NRG Companies request that the Commission clarify this portion of the recommendation to require the ALJ to issue a separate recommended decision in the context of the ongoing Commission investigation, which investigation will be closed only upon the Commission's final disposition of the Rider No. 18 issues. The NRG Companies aver that because its Complaint is related to and was properly consolidated with the base rate case investigation, the Commission's investigation must not be terminated unless and until the issues related to Rider No. 18 have been fully resolved. Exc. at 4.

The NRG Companies assert that premature closure of the Commission’s ongoing investigation inappropriately could shift the burden of proof from Duquesne to the NRG Companies on the Rider No. 18 issues. The NRG Companies argue that a proceeding initiated on motion of the Commission places the burden of proof with respect to both proposed and existing tariff provisions on the utility. Exc. at 5 (citing 66 Pa. C.S. § 315(a)). According to the NRG Companies, as the Commission ordered the present investigation and directed the examination of Duquesne’s existing tariff provisions, the burden of proof with respect to Rider No. 18 rests with Duquesne. The NRG Companies argue that it would be inappropriate if, by terminating the Commission’s existing investigation and addressing the Rider No. 18 issues in the context of a severed complaint docket, it could shift the burden of proof to the NRG Companies. As such, the NRG Companies request that the Commission hold open its ongoing investigation pending final resolution of the Rider No. 18 issues, ensuring that the burden of proof remains with Duquesne. Exc. at 5.

In reply, Duquesne first states that it supports the timely issuance of a Recommended Decision on the Rider No. 18 issues, but leaves such matters as to the actual dates to the Commission’s discretion. R. Exc. at 1.

Next, Duquesne states that it opposes the NRG Companies’ Exception with regard to the procedural process to be utilized in resolving the Rider No. 18 issues. Duquesne requests that the Commission close its investigation in this proceeding upon approval of the Settlement. Duquesne asserts that under the related contractual arrangements, NRG Midwest is obligated to pay the price set forth in Rider No. 18 to the qualifying facilities which has no effect on the rates or services to Duquesne’s customers. Further, Duquesne asserts that the NRG companies have not contended that the price in Rider No. 18 falls within the definition of the term “rates” as used in Section 1301 of the Code, 66 Pa. C.S. § 1301, and such price is clearly not a rate charged to customers.

Duquesne notes that it has consistently argued that the Rider No. 18 issues should be severed from the Commission's investigation. Duquesne requests that the Commission sever the Rider No. 18 issues from its Investigation docket by closing its Investigation and processing the NRG Companies' Complaint at a separate complaint proceeding. Duquesne refers to *Pa. PUC v. Columbia Gas of Pennsylvania, Inc.*, Docket No. R-2010-2215623 (Order entered October 14, 2011), at Ordering Paragraph No. 15, where the Commission closed its Investigation despite holding the determination of CAP issues in abeyance. Duquesne notes that it does not believe that the burden of proof as to the NRG Companies' allegations is to be placed on the Company simply because the NRG Companies chose to raise the issues in the rate case. According to Duquesne, the effect of such a determination would be to place the burden of proof on the Company for any claim that is raised in a rate case and encourage others to raise claims unrelated to a rate case in such proceedings. *Id.* at 1-2.

In its reply, the BFMA states that it concurs with the Reply Exceptions filed by Duquesne.

#### **4. Disposition**

Upon our consideration of the evidence of record, as well as the Exceptions of the NRG Companies and Replies thereto, we shall direct that the resolution of the Rider No. 18 issues, which have been held in abeyance, be accomplished on an expedited basis. The ALJ found, and we agree, that there exists a sufficient record to resolve, in a separate recommended decision, the Rider No. 18 issues raised by the NRG Companies. As such, further evidentiary hearings are not required. This conclusion should enable this Commission to resolve these issues in a reasonable amount of time. However, considering the complexity of the issues raised, and in the interest of due process, we will not designate a date certain for these issues to be placed upon the Commission's public

meeting agenda, as requested by the NRG Companies. Therefore, we shall deny the Exception filed by the NRG Companies on this particular issue.

With regard to the NRG Companies' Exception concerning the procedural recommendation of the ALJ, we are not persuaded by their arguments to alter the ALJ's recommendation. We are in agreement with the ALJ that the Rider No. 18 issues were severable from our consideration of the base rate Settlement before us, and that they should be held in abeyance for disposition at a future time. We find that there simply was insufficient time to render a thorough and reasoned decision on these issues within the regulatory time constraints inherent in a Section 1308(d) base rate proceeding. In so doing, it is important to note that Duquesne itself did not propose any changes to its currently effective Rider No. 18 in conjunction with its base rate increase request. The issues arose solely due to a challenge of Duquesne's existing Rider No. 18 by the NRG Companies and do not have any effect on the agreed upon revenue requirement contained within the Settlement. Therefore, we shall adopt the ALJ's recommendation that the base rate investigation be closed; that the issues held in abeyance be resolved based upon the existing record; and that the NRG Companies have the burden of proof with regard to the deferred issues.<sup>10</sup> Accordingly, we shall deny the Exception filed by the NRG Companies on this particular issue.

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<sup>10</sup> We note that the severance of the Rider No. 18 issues does not impact the burden of proof with respect to these issues. Consistent with our prior decisions, if the Rider No. 18 issues had been decided on the merits in this base rate proceeding, the NRG Companies would have had the burden of proof with respect to those issues. *See, Pa. PUC v. Columbia Gas of Pennsylvania, Inc.*, Docket No. R-2010-2215623 (Order entered March 15, 2012), at 16 (stating that a party that raises an issue that is not included in a public utility's general rate case filing bears the burden of proof with respect to that particular issue); *Pa. PUC v. Metropolitan Edison Company*, Docket No. R-00061366 (Order entered January 11, 2007), at 67 (stating that "the provisions of 66 Pa. C.S. § 315(a) cannot reasonably be read to place the burden of proof on the utility with respect to an issue the utility did not include in its general rate case filing and which, frequently, the utility would oppose.")

#### IV. Conclusion

Based on our review, evaluation and analysis of the record evidence, we shall deny the Exceptions filed by the NRG Companies hereto, consistent with the discussion contained in the body of this Opinion and Order, and adopt the ALJ's Recommended Decision to approve the Non-Unanimous Settlement and hold in abeyance the Rider No. 18 issues, consistent with our discussion *supra*. As such, our approval of the Settlement will reduce Duquesne's originally requested annual revenue increase of \$76.3 million (a 17.6 percent increase in total annual operating revenues) to \$48 million (an 11.0 percent increase in total annual operating revenues); **THEREFORE,**

#### **IT IS ORDERED:**

1. That the Exceptions filed by NRG Power Midwest LP, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC to the Recommended Decision of Administrative Law Judge Conrad A. Johnson are denied, consistent with this Opinion and Order.

2. That the Recommended Decision of Administrative Law Judge Conrad A. Johnson, issued on March 28, 2014, is adopted, consistent with this Opinion and Order.

3. That Duquesne Light Company shall not place into effect the rates, rules, and regulations contained in Supplement No. 81 to Tariff Electric – Pa. P.U.C. No. 24, the same having been found to be unjust, unreasonable, and, therefore, unlawful.

4. That the Joint Petition for Non-Unanimous Settlement submitted by Duquesne Light Company, the Bureau of Investigation and Enforcement, the Office of

Consumer Advocate, the Office of Small Business Advocate, the Coalition for Affordable Utility Service and Energy Efficiency in Pennsylvania, the Duquesne Industrial Intervenors, the Citizens for Pennsylvania's Future, and the United States Steel Corporation at Docket No. R-2013-2372129 be approved.

5. That Duquesne Light Company shall be permitted to file the tariff attached as Appendix A to the Joint Petition for Non-Unanimous Settlement, to become effective on one day's notice after entry of the Commission's Order approving the Joint Petition for Non-Unanimous Settlement for service rendered on or after May 1, 2014.

6. That Duquesne Light Company shall file detailed calculations with its tariff filing, which shall demonstrate to this Commission's satisfaction that the filed rates comply with the proof of revenue, in the form and manner customarily filed in support of tariffs.

7. That Duquesne Light Company shall comply with all directives, conclusions and recommendations contained in the Commission's Opinion and Order that are not the subject of individual ordering paragraphs as fully as if they were the subject of specific ordering paragraphs.

8. That the following Formal Complaints consolidated with the Commission's investigation at Docket No. R-2013-2372129 be deemed satisfied:

Office of Consumer Advocate at Docket No. C-2013-2379084;  
Office of Small Business Advocate at Docket No. C-2013-2380474; and  
Duquesne Industrial Intervenors at Docket No. C-2013-2385292.

9. That the following Formal Complaints consolidated with the Commission's investigation at Docket No. R-2013-2372129 be dismissed.




Jacquelyn and Robert Miller at No. C-2013-2383835;  
Gwendolyn L. LeVert at No. C-2013-2383980;  
Aimee-Marie Dorsten at No. C-2013-2386037; and  
Connie Schiavo at No. C-2013-2386284.

10. That the Rider No. 18 portion of the Complaint of NRG Power Midwest LP, NRG Energy Center Pittsburgh LLC and Reliant Energy Northeast LLC at Docket No. C-2013-2390562 be held in abeyance by the Commission for resolution in a separate recommended decision. Duquesne Light Company shall maintain its currently effective tariff Rider No. 18 until further action of the Commission.

11. That there is a sufficient record to resolve in a separate recommended decision the Rider No. 18 portion of the Complaint of NRG Power Midwest LP, NRG Energy Center Pittsburgh LLC and Reliant Energy Northeast LLC at Docket No. C-2013-2390562.

12. That the formal complaint of NRG Power Midwest LP, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC (collectively NRG or NRG Companies) at No. C-2013-2390562 be resolved in a separate recommended decision based upon the existing record.

13. That after acceptance and approval by the Commission of the tariff revisions filed by Duquesne Light Company, the investigation at Docket No. R-2013-2372129 be terminated and the record be marked closed.

**BY THE COMMISSION,**  
  
Rosemary Chiavetta  
Secretary

(SEAL)

ORDER ADOPTED: April 23, 2014

ORDER ENTERED: April 23, 2014