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December 8, 2009

BY ELECTRONIC FILING

James J. McNulty
Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

**Re: Petition of Duquesne Light Company for Approval of Default Service
Plan for the Period January 1, 2011 through May 31, 2013
Docket No. P-20092135500**

Dear Secretary McNulty:

Attached for electronic filing with the Commission in the above-captioned matter please find the Retail Energy Supply Association's Motion to Dismiss Objections of Duquesne Light Company and to Compel Discovery Responses.

Copies of this filing are being served per the attached certificate of service.

If you have any questions, please contact me.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Brian Greene', enclosed in a light blue rectangular box.

Brian R. Greene

BRG/ps
Enclosure

c: The Hon. John H. Corbett, Jr. (by e-mail and overnight delivery)
Victor P. Stabile, Esq. (by e-mail only)
Certificate of Service

sg

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CERTIFICATE OF SERVICE

I certify that on December 8, 2009, true copies of the Retail Energy Supply Association's Motion to Dismiss Objections of Duquesne Light Company and to Compel Discovery Responses were served upon the following people, in the manner indicated, in accordance with requirements of 52 Pa. Code § 1.54 (relating to service by a participant), by e-mail and first class mail:

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Letter to James J. McNulty
December 8, 2009
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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of Duquesne Light Company :
For Approval of Default Service Plan : Docket No. P-2009-2135500
for the Period January 1, 2011 through :
May 31, 2013 :

**RETAIL ENERGY SUPPLY ASSOCIATION’S
MOTION TO DISMISS OBJECTIONS OF DUQUESNE LIGHT COMPANY
AND TO COMPEL DISCOVERY RESPONSES**

On November 24, 2009, the Retail Energy Supply Association (“RESA”)¹ served its First Set of Interrogatories and Requests for Production of Documents on Duquesne Light Company (“Duquesne Light”), the petitioner in this proceeding. On December 3, 2009, after attempting to resolve informally Duquesne Light’s objections to the discovery, Duquesne Light formally objected to Interrogatory Nos. 4, 8, 9, 10 and 12, as well as to the definition of “You,” “your,” “Company,” or “Duquesne” as defined by RESA in the “Definitions” section of the discovery. Pursuant to the procedure set forth in the Prehearing Order entered on November 12, 2009, as well as 52 Pa. Code §§ 5.103, 5.321 and 5.342(g), RESA, by counsel, requests that the Commission deny Duquesne Light’s objections and compel Duquesne Light to respond fully to Interrogatory Nos. 4, 8, 9, and 12, and to a modified Interrogatory Nos. 10.

Virtually all of Duquesne Light’s objections state that the requested information is not relevant to this proceeding because the information pertains to Duquesne Light’s

¹ RESA’s members include ConEd Solutions; Direct Energy Services, LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Gexa Energy; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; RRI Energy; Sempra Energy Solutions LLC. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

relationship with its affiliate, Duquesne Power. Furthermore, Duquesne Light contends in many instances that it cannot produce documents because Duquesne Power, and not Duquesne Light, possesses them. As explained below, Duquesne Light's objections are not well-taken and should be denied.

Legal Standard for Discovery

Section 5.321(c) of the Commission's Rules of Administrative Practice and Procedure provides that "a participant may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Discovery is permitted regardless of whether the information sought "relates to the claim or defense of the party seeking discovery or to the claim or defense of another party or participant." Information may be discoverable, even if it would be inadmissible at a hearing. "It is not ground for objection that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

Importantly, the Commission "has issued a number of decisions interpreting the scope of its discovery rules. Consistently, the Commission has allowed participants wide latitude in discovery matters"² and, in adjudicating discovery disputes, the Commission has held that, "[w]e believe that the relevancy test should be liberally applied when considering discovery requests."³

² *John Lee v. Verizon Pennsylvania Inc.*, Docket No. C-20054564, 2006 Pa. PUC LEXIS 28 (Pa. PUC 2006) (Feb. 28, 2006)(citing *Pa. PUC v. The Peoples Natural Gas Company*, 62 Pa. PUC 56 (Aug. 26, 1986); *Pa. PUC v. Equitable Gas Company*, 61 Pa. PUC 468 (May 16, 1986)).

³ *Pa. PUC v. Equitable Gas Company*, 61 Pa. PUC 468 (May 16, 1986).

RESA's Responses to Duquesne Light's Objections

Interrogatory No. 4: Has the PA PUC, FERC or any other regulatory agency conducted any review of Duquesne's affiliate relationships in the past 3 years? If so, provide a copy of any agency notices, decisions, or orders, pertaining to the agency's review. Please also provide a copy of any data responses, internal reports or analyses, or other information provided by Duquesne to the agency.

In its objection, Duquesne Light contends that it is proposing, in this proceeding, to procure the power to serve default service customers, and that its affiliates will no longer be performing this procurement function. As a result, Duquesne Light concludes that the information requested is not relevant and, because the information involves documents submitted to agencies as well as internal reports, analyses, etc., it would be burdensome to produce.

Currently, Duquesne Power, on behalf of Duquesne Light, procures the power to allow Duquesne Light to serve its default service customers. This procurement structure was and is a unique relationship between affiliates in which an unregulated affiliate (Duquesne Power) procures power and manages load on behalf of a regulated affiliate (Duquesne Light) and also on behalf of an unregulated affiliate that serves retail customers (Duquesne Energy). As Duquesne Light admits in its testimony, there is a history of controversy relating to cost allocation and cross subsidization issues between Duquesne Light on the one hand and its affiliates, including Duquesne Power, on the other hand.⁴ In its application in this proceeding, Duquesne Light proposes to procure power for default service residential customers by utilizing bilateral contracts, not through the use of full-requirements contracts procured through the use of RFPs.

⁴ See Testimony of James E. Wilson at p. 4, lines 18-21.

In RESA's view, shifting the procurement function from Duquesne Power to Duquesne Light is a distinction without a real difference. First, in the POLR IV proceeding, Duquesne Light proposed to utilize an actively managed portfolio approach with Duquesne Power managing the portfolio. In POLR V, Duquesne Light would be responsible for managing the portfolio and for procurements, but it is possible that the same people would be performing the same tasks as they do today.

Second, shifting the procurement function "in-house" could actually serve to exacerbate the present controversy over cost allocation and cross subsidization. If and when the procurement function is moved to Duquesne Light, costs incurred by Duquesne Light could become even less transparent than they are today.⁵ Duquesne Light may be able to derive cost advantages by relying on the assets and resources which are funded by distribution rates. This would place Duquesne Light's default service at a competitive advantage compared to EGSs, which would not have similar cost advantages.

RESA is aware of at least two regulatory proceedings where Duquesne Light's affiliate relationships have come into question. Additional information on these regulatory audits is relevant to the proceeding at hand because if Duquesne Light has had a history of controversy over its affiliate relationships under its current procurement arrangement (whereby a separate legal entity, Duquesne Power, manages the procurement functions) then this information is informative on the issue of whether costs would be properly accounted for and allocated if Duquesne Light brings the procurement functions in house.

⁵ Duquesne Light confirmed RESA's concern about the transparency of costs under the new proposal when, in response to a discovery question, Duquesne Light stated that it will not utilize an independent evaluator/consultant to oversee the negotiation of bilateral contracts to serve residential customers. See Duquesne Light Response to RESA Set 1, No. 3, attached as Ex. 1.

Without this information, it would also be difficult to assess whether Duquesne Light's proposal satisfies Act 129's obligation that default service be provided at "the least cost to customers over time" if the costs are not transparent. Thus, Duquesne Power's relationship with Duquesne Light is relevant because if Duquesne Power is making (or losing) money on default service, then there is a question about whether simply bringing the procurement function in-house will result in the "least cost to customers over time."

The factual reality is that Duquesne Light's withholding of this information precludes the parties and the Commission from assessing relevant information regarding Duquesne Light's current operations as well as costs that presumably will be incurred by default service customers, and how that information would compare to the operational changes that Duquesne Light has proposed in this proceeding. Interrogatory No. 4 indeed seeks information that "appear[s] reasonably calculated to lead to the discovery of admissible evidence," and Duquesne Light's objection should be overruled.

The Commission should also overrule Duquesne Light's objection that the requested information is too burdensome to produce. Duquesne Light's bald assertion is insufficient, as Duquesne Light does not contend that producing the information would in any way interfere with its preparation or presentation of its case.⁶

Interrogatory No. 8: Please identify the amount of any profit or loss incurred by the family of Duquesne companies related to its provision of POLR service to customers from 1/1/2008 through the most recent month for which information is available.

Duquesne Light's primary objection to this request is based on relevancy. Duquesne Light contends that its affiliates are not parties in this proceeding and that

⁶ See, e.g., *Pa. PUC v. Equitable Gas Company*, 61 Pa. PUC 468 (May 16, 1986).

profit/loss information during the POLR IV period “is irrelevant to determine whether the Duquesne’s pending default service plan in this proceeding comports with applicable statutes and regulations.”⁷ As explained above and reiterated below, the information requested is relevant and, when viewed liberally in favor of RESA, satisfies the test that the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

As explained above, Duquesne Light’s procurements under POLR IV remain within the Duquesne family. It is critical to understand the profits and losses of the companies involved in that relationship in order to understand the potential pitfalls that could occur under the proposed POLR V plan, especially as POLR V applies to residential customers. During POLR IV, capacity prices exceeded Duquesne Light’s forecasts, and Duquesne Light reserved the right to seek recovery of the shortfall from ratepayers. RESA favors full-requirements RFPs in which the wholesale bidders assume the risk of capacity prices. It is unclear in this proceeding whether Duquesne Light will require the default service wholesale supplier for residential default service load – which would not be selected based on full requirements RFPs – to assume various risks, including capacity prices. The parties and the Commission must be able to quantify the risk that Duquesne Light apparently seeks to pass onto customers (or anyone else) and which would not be assumed by the wholesale provider. While past performance and pricing are not necessarily indicators of what will happen in the future, the information is recent and can serve as a guide for the parties and the Commission as they determine the reasonableness of Duquesne Light’s proposal and whether it complies with Act 129.

⁷ Duquesne Objections at p. 3.

Finally, Duquesne Light objects on the grounds that it does not possess this information of its unregulated affiliates. The Commission has rejected a similar argument before, when it held that, “Here, although Kepco may be two levels removed from the Company, to say that the documents, records, and information sought are not within the control, either factually or legally, of Equitable, is to insult our intelligence.”⁸ The Commission should not be swayed by Duquesne Light’s object that it does not possess the requested information.⁹

Interrogatory No. 9: Provide copies of any reports or analyses prepared by or on behalf of the Duquesne companies regarding the following:

- a. The financial results related to Duquesne’s provision of provider of last resort service under the Duquesne POLR IV plan;**
- b. Future projections of financial results related to Duquesne’s provision of default service for the proposed POLR V period (1/1/11 to 5/31/13);**
- c. Projected POLR/default service load and/or market share projections; and**
- d. Discussion and/or analyses of various default service procurement and pricing methods for the POLR V period.**

Duquesne Light objects to Question 9(a) on the grounds that the information sought is not relevant and not in its possession. Question 9(a) seeks reports or analyses concerning the financial results related to the provision of POLR service under POLR IV. The reports are relevant for the reasons stated above and should be produced.

⁸ *Pa. PUC v. Equitable Gas Company*, 61 Pa. PUC 468 (May 16, 1986) (internal footnote omitted).

⁹ Duquesne Light states on page 4 of its Objections that RESA is seeking “highly confidential, competitive information for its members...” RESA has advised Duquesne Light that it will execute a protective order that reasonably limits RESA’s use of information deemed proprietary or confidential.

Question 9(b) requests reports or analyses regarding financial projections under POLR V. In its objections, Duquesne Light states that the requested reports or analyses are not relevant because (1) the POLR V rates will be set based on market rates, and (2) any projected profit or loss is speculative. The issue, however, is whether these reports or analyses exist and, if so, whether their contents or conclusions compelled Duquesne Light to favor one procurement strategy over another. If Duquesne projects a financial benefit under its fixed price plan for residential customers and its proposal to manage the default service procurement function in house, then the requested information is relevant and informative on the issue of whether Duquesne Light will properly fulfill its obligations to facilitate access to the competitive retail market. Put simply, if Duquesne Light's proposal results in Duquesne Light making a lot of money on the provision of default service, then Duquesne Light necessarily has a significant financial interest in keeping customers on default service. That is antithetical to the Commonwealth's goal of promoting direct access to a competitive retail market.

Moreover, under Act 129, "[c]osts incurred through an approved competitive procurement plan shall be deemed to be the least cost over time." To the extent that Duquesne Light is seeking to ensure cost recovery now for tasks to be performed under POLR V, the requested reports or analyses would be relevant because they would reveal facts, including costs, pertaining the provision of default service.

Question 9(c) requests reports or analyses regarding projected POLR/default service load and/or market share projections. First, it bears mentioning that this information was public before the recent merger that essentially privatized Duquesne Light. Prior to the acquisition of Duquesne Light by the Macquarie Consortium,

Duquesne included various financial and load information in its public SEC filings. Second, as discussed above, the reports or analyses are relevant in that Duquesne Light might have an incentive to serve default load to earn money for its shareholders, which could influence the procurement strategy or proposal.

Question 9(d) is clearly relevant. RESA seeks reports or analyses regarding various default service procurement and pricing methods for the POLR V period. In other words, if a report was prepared for or by Duquesne Light that assessed the “pros and cons” of alternative procurement models, or a comparison of seasonal, time-of-use, on-peak, off-peak or some other form of pricing, it is fair game. Any such reports shed light on the factors that Duquesne Light considered in selecting the procurement and pricing methods included in its POLR V proposal and are absolutely relevant to this proceeding.

Finally with respect to 9(d), the requested reports or analyses are not subject to the attorney-client privilege. Under Pennsylvania law, the attorney-client privilege “protects those disclosures that are necessary to obtain informed legal advice which might not have been made absent the privilege. This privilege *only* applies where the . . . ultimate goal is legal advice.”¹⁰ Undoubtedly, any reports or analyses that address alternatives to the procurement or pricing methods proposed in POLR V were not prepared to obtain legal advice, and they would have been prepared regardless of the attorney-client privilege. They were prepared for business reasons, and the privilege does not apply.

¹⁰ *Commonwealth v. Baumhammers*, 599 Pa. 1, 37-38, 960 A.2d 59, 82 (2008)(emphasis in original) (citations omitted).

Interrogatory No. 10: Please provide the average bid results from Duquesne’s recent solicitations for POLR supply for Medium C&I customers the most recent month for which information is available.

Duquesne Light contends that confidentially agreements with wholesale suppliers preclude it from responding to Question 10. RESA proposes to modify Question 10 as follows:

Please confirm that Duquesne Light’s current retail default service/POLR rates for Medium C&I customers are the result of wholesale RFP solicitations approved as part of the prior POLR IV proceeding and subsequent modifications to the POLR IV plan.

Interrogatory No. 12: Reference Duquesne Statement No. 2 p. 5. Mr. Wilson states that Duquesne currently outsources its power procurement functions under the current POLR IV arrangement. Please provide a copy of the service agreement for this outsourcing arrangement. Please also identify the compensation structure used by Duquesne to pay the third party for power procurement functions.

Duquesne Light currently outsources its scheduling functions to a third party. On page 5 of his testimony, Mr. Wilson contends that “these functions will continue to be performed by the current third party providers in a manner independent from Duquesne Power.” Since the arrangement will continue, someone will ultimately bear the burden of paying for the third party services. Presumably, Duquesne Light will seek to recover its costs for this contract through its default service rates. In addition, RESA understands that the third party currently performs scheduling on behalf of Duquesne Light Energy, the utility’s unregulated retail affiliate. If that is so, then the agreement between Duquesne Light and the third-party entity would need to be examined to determine whether it gives Duquesne Light Energy an unfair competitive advantage in the retail marketplace.

WHEREFORE, for the foregoing reasons, RESA requests that the Commission deny Duquesne Light's objections to RESA's first set of discovery and compel Duquesne Light to respond fully to Questions 4, 8, 9, and 12, and to the modified Question 10. When the relevancy test is liberally applied, as it must be, it is evident that the interrogatories relate directly either to Duquesne Light's proposal or to "information appearing reasonably calculated to lead to the discovery of admissible evidence" as required by 52 Pa. Code § 5.321(c). Under either instance, the interrogatories are appropriate and the relevancy objections should be denied. So, too, should the other objections.¹¹

Respectfully submitted,

RETAIL ENERGY SUPPLY ASSOCIATION

By Counsel



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Dated: December 8, 2009

¹¹ Duquesne Light has also objected to the definition of "You," "Your," "Company," or "Duquesne" as it includes affiliates. For the reasons explained in this motion, the definition is appropriate and should be allowed to stand.

CERTIFICATION OF COUNSEL

I certify that I have, on behalf of RESA, in good faith conferred with counsel for Duquesne Light in an effort to resolve the above-mentioned discovery disputes informally.

A handwritten signature in blue ink, appearing to read "Brian R. Greene", is centered on the page. The signature is written in a cursive style.

Brian R. Greene

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Petition of Duquesne Light Company for
Approval of Default Service Plan for the Period
January 1, 2011 through May 31, 2013

Docket No. P-2009-2135500

**Retail Energy Supply Association
Interrogatories Set I**

Response By: Fred Eichenmiller

3. Will Duquesne utilize an independent evaluator/consultant to oversee the negotiation of the bilateral contracts to serve residential customers? If so, explain the process for selecting an evaluator/consultant, the criteria for evaluating the bilateral contracts, and how Duquesne intends to seek cost recovery for the evaluator/consultant's services.

Response:

No.