

Kirkpatrick & Lockhart LLP

Payne Shoemaker Building
240 North Third Street
Harrisburg, PA 17101-1507
717.231.4500
www.kl.com

ORIGINAL

James P. Melia
717.231.5842
Fax: 717.231.4501
jmelia@kl.com

April 4, 2002

VIA HAND DELIVERY

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building, 2nd Floor
400 North Street
Harrisburg, PA 17120

REP

Re: Office of Consumer Advocate v. Duquesne Light Company
Docket No. R-00016854

Dear Secretary McNulty:

Enclosed please find an original and three copies of the Answer of Duquesne Light Company to Motion for Clarification of the Office of Consumer Advocate in the above captioned matter.

Copies of this document are being served on the parties to this proceeding as indicated on the enclosed Certificate of Service.

Very truly yours,

James P. Melia
James P. Melia
Counsel for Duquesne Light Company

JPM/cem
Enclosures

cc: Hon. Wayne L. Weismandel, ALJ
Service List

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Office of Consumer Advocate

v.

Duquesne Light Company

Docket No. R-00016854

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served true and correct copies of foregoing document upon the individuals, listed below, in accordance with the requirements of Section 1.54 (relating to service by a participant).

Via Hand Delivery

Tanya J. McCloskey, Esquire
James A. Mullins, Esquire
Office of Consumer Advocate
Forum Place, 5th Floor
555 Walnut Street
Harrisburg, PA 17101-1923

Office of Small Business Advocate
Suite 1102, Commerce Building
300 N. Second Street
Harrisburg, PA 17101

Kenneth L. Mickens, Esquire
Office of Trial Staff
Pennsylvania Public Utility Commission
Commonwealth Keystone Bldg., 2nd Fl.
400 North Street
Harrisburg, PA 17120

David M. Kleppinger, Esquire
McNees Wallace & Nurick, LLC
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166

Michael Hassell, Esquire
Morgan Lewis & Bockius LLP
One Commerce Square
417 Walnut Street
Harrisburg, PA 17101

David Epple, Esquire
Energy Association of Pennsylvania
800 N. Third Street
Harrisburg, PA 17102

Hon. Wayne L. Weismandel
Administrative Law Judge
Pennsylvania Public Utility Commission
Commonwealth Keystone Bldg., 2nd Fl.
400 North Street
Harrisburg, PA 17120

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Via Federal Express

Kent D. Murphy, Esquire
Ward L. Smith, Esquire
Exelon Business Services Company
2301 Market Street, S23-1
Philadelphia, PA 19103

Michael Beiting, Esquire
FirstEnergy
76 E. Main Street
Akron, OH 44308

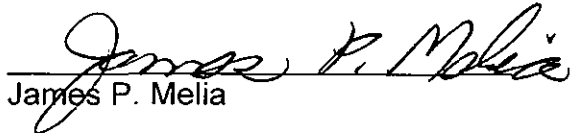
W. Edwin Ogden, Esquire
Ryan Russell Ogden & Seltzer, LLP
Suite 301
1100 Berkshire Boulevard
Reading, PA 19610

Mark R. Dingman, Esquire
UGI Utilities Inc.
Hanover Industrial Estates
400 Stewart Road
P.O. Box 3200
Wilkes Barre, PA 18773

Jack Munsch, Esquire
Allegheny Energy Company
800 Cabin Hill Drive
Greensburg, PA 15601

David B. MacGregor, Esquire
Morgan Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103

Kirkpatrick & Lockhart LLP
240 North Third Street
Harrisburg, PA 17101-1507
(717) 231-4500
(717) 231-4501 (Fax)
jmelia@kl.com


James P. Melia

Counsel for Duquesne Light Company

Dated: April 4, 2002

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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Office of Consumer Advocate

v.

Duquesne Light Company

Docket No. R-00016854

**ANSWER OF DUQUESNE LIGHT COMPANY TO
MOTION FOR CLARIFICATION OF THE
OFFICE OF CONSUMER ADVOCATE**

TO ADMINISTRATIVE LAW JUDGE WAYNE L. WEISMANDEL:

And now comes Duquesne Light Company ("Duquesne"), by its counsel, Kirkpatrick & Lockhart LLP, pursuant to 52 Pa. Code §5.103, and hereby files its Answer to the "Motion for Clarification of The Office of Consumer Advocate" ("Motion for Clarification") filed with the Pennsylvania Public Utility Commission ("Commission") in the above-captioned proceeding. As explained further in its Answer, Duquesne requests that Administrative Law Judge Wayne L. Weisman del ("ALJ") issue an Order which determines that: (1) this proceeding be considered a "single issue" rate proceeding under Section 2804(16)(ii) of the Public Utility Code, 66 Pa. C.S. §2804(16)(ii); (2) that the proper scope of this proceeding be limited to evidence concerning recovery of the Revenue-Neutral Reconciliation ("RNR") tax for 2002 under Section 2810 of the Public Utility Code, 66 Pa. C.S. §2810; and (3) that any matters beyond consideration of RNR tax matters, such as consideration of rate of return or

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other ratemaking issues, is irrelevant and will not be admitted into the record in this proceeding. In support of this Answer, Duquesne states as follows:

I. PROCEDURAL BACKGROUND

1. On September 29, 2001, pursuant to Section 2810(c) of the Public Utility Code, 66 Pa. C.S. §2810(c), the Secretary of Revenue of the Commonwealth of Pennsylvania published notice of the RNR tax for calendar year 2002 (31 Pa. Bulletin No. 39, p. 5507). The RNR tax calculation produced an increase to the RNR tax rate for Duquesne of 16 mills or 0.016. The RNR tax is recovered as a component of the gross receipts tax ("GRT"). 66 Pa. C.S. §2810(b). The increase in the RNR tax caused an increase in the GRT from 44 mills (.044) to 60 mills (.060). On November 30, 2001, the Department of Revenue published in the Pa. Bulletin a revised RNR rate of 59 mills (.059) for calendar year 2002.

2. Pursuant to Section 2804(16)(ii) of the Public Utility Code, 66 Pa. C.S. §2804(16)(ii), and the Pennsylvania Public Utility Commission's ("Commission's") regulations at 52 Pa. Code §§54.91-54.98, Duquesne made a single-issue rate filing with the Commission on October 29, 2001 under Section 1308(a) of the Public Utility Code, 66 Pa. C.S. §1308(a), for a proposed increase in rates for the sole purpose of recovering its RNR tax increase. Duquesne made this single-issue rate filing pursuant to the procedures identified in Section 2804(16)(ii) of the Public Utility Code and Section 54.95 of the Commission's regulations. Duquesne estimated that the increase in the RNR tax liability for the calendar year 2002 would create a tax liability of \$15,021,313. As a result of this increase, recovery of the 2002 RNR tax liability will produce rates above Duquesne's existing rate cap. Simultaneously, Duquesne filed a Petition for

Waiver of the implementation date of the RNR tax increase until March 20, 2002 to coincide with the expiration of its Competitive Transition Charge ("CTC").

3. Section 2804(16)(ii) permits an electric distribution company ("EDC") to file a "single-issue rate proceeding" under Section 1308(a) to recover its tax liability when RNR increases cause it to exceed its rate cap. The Commission, under this Section, is required to adjudicate the rate proceeding within 60 days of the filing. Duquesne filed its single issue rate proceeding consistent with Section 54.95, 52 Pa. Code §54.95, which identifies the procedure for an EDC to recover RNR tax liability which produces rates above the EDC's rate cap. Section 54.95 specifies the procedure to be followed and the information that must be filed in support of the rate increase. Duquesne's October 29, 2001 single-issue rate filing followed the procedure established in Section 54.95 and provided the information in support of the rate increase identified in that regulation. In support of the filing, Duquesne also provided information required by Sections 53.52(a) and 53.52(b) of the Commission's regulations. 52 Pa. Code §§53.52(a), 53.52(b).

4. On November 19, 2001, the Office of Consumer Advocate ("OCA") filed a Complaint against Duquesne's RNR tax recovery filing. In its Complaint, the OCA alleged that the Commission should consider rate of return and offsetting savings before approving RNR tax recovery despite the clear statutory mandate for a single-issue rate proceeding. Duquesne filed an Answer to the OCA's Complaint on December 10, 2001.

5. On December 10, 2001, Duquesne engaged in settlement discussions with Commission representatives, the OCA and other parties to attempt to settle this matter. As a result of this and later settlement conferences, Duquesne entered into a

Settlement Agreement on December 14, 2001 with the OCA and the other parties. The principal terms of the settlement would allow Duquesne to recover its RNR tax liability in its STAS calculation to be filed by December 31, 2001, and to be effective in March 2002 for all of its customers except its Rate RH and Rate RA customers, between March 2002 and December 31, 2002. Duquesne would be permitted to recover the portion of its RNR liability for Rate RH and Rate RA customers that did not exceed an existing statutory rate cap. Any RNR liability that is not recovered would be deferred.

6. On December 21, 2001, the Commission entered an Order rejecting the Settlement Agreement and approving Duquesne's filing to recover its full RNR tax increase on a current basis. The Commission determined that Duquesne's proposed rates accurately reflected known and measurable changes in state tax liability and, therefore, are just and reasonable within the meaning of Section 2804(16)(ii), 66 Pa. C.S. §2804(16)(ii). The Commission, however, permitted the OCA to pursue its *Complaint against Duquesne's proposed increase in rates*.

7. On January 8, 2002, the OCA filed with the Commonwealth Court a Petition for Review of the Commission's December 21, 2001 Order. In the Petition, the OCA alleged that the Commission erred in both approving Duquesne's RNR tax increase and in determining that the proposed rates complied with the requirements of Section 2804(16)(ii) because the Commission did not consider Duquesne's return or changes in other expenses, revenues, rate base, *etc.* before it permitted Duquesne to increase rates to recover the RNR tax increase. The OCA argued that issues such as rate of return and offsetting expenses must be considered in determining whether

Duquesne's rate increase met the statutory requirements for a "single issue" rate increase under Section 2804(16)(ii) in order to recover an increase in the RNR tax.

8. On February 22, 2002, the Commission filed with the Commonwealth Court a Motion to Quash or Dismiss the OCA's Petition for Review ("Motion to Quash"). In the Motion to Quash, the Commission argued that the OCA failed to exhaust its administrative remedies because it had failed to pursue its Complaint before the Commission.

9. On March 22, 2002, the Commonwealth Court entered an Order granting the Commission's Motion to Quash and remanded this proceeding to the Commission, holding that the December 21 Order was not final because there were still matters before the Commission to be resolved.

10. With the Commonwealth Court's disposition of the OCA's Petition for Review and its remand of the proceeding to the Commission, the OCA's Complaint against Duquesne's RNR increase in rates to recover the RNR tax increase can now be heard by the Commission. A Prehearing Conference is scheduled before the ALJ for Friday, April 5, 2002, at 10:00 a.m. in Harrisburg.

11. On April 1, 2002, the OCA filed its Motion for Clarification with the ALJ. Duquesne answers the OCA's Motion for Clarification as follows.

II. ARGUMENT

A. Neither the Commission's Motion To Quash Nor the Commonwealth Court's Order Granting the Motion Provide Support for the OCA's Motion.

12. In its Motion for Clarification, the OCA asserts that the Commission's Motion to Quash and the Commonwealth Court's Order should be interpreted to mean that the ALJ can receive evidence on all of the issues listed by the OCA in its

Prehearing Memorandum and that the ALJ should consider evidence on all of these issues including whether: (i) an RNR increase above the rate cap is just and reasonable; (ii) an RNR increase can be just and reasonable without evaluation of a company's rate of return and cost of capital; (iii) an RNR increase is just and reasonable based upon a finding that costs are known and measurable; and (iv) the Commission must consider offsetting expense decreases before granting an RNR rate increase *above the rate cap*.

13. OCA's contentions are without merit. Commonwealth Court's March 22nd Order quashing the OCA's Petition for Review does not constitute a "green light" to allow the OCA to pursue the multiple rate issues listed in its Prehearing Memorandum. Moreover, the portions of the Commission's Motion to Quash relied on by the OCA cannot be interpreted to mean that evidence on all issues introduced by the OCA must be considered by the Commission. The ALJ and the Commission must still exercise their discretion and determine whether the issues raised by the OCA, in its Prehearing Memorandum, are relevant to this proceeding. The issues raised by the OCA in its Complaint and Prehearing Memorandum are not supported by the language of Section 2804(16)(ii) and the ALJ should not consider evidence on these issues.

B. The OCA May Not Impose on Duquesne the Burden Of Filing a Full Rate Case Instead Of A Single Issue Rate Case as Contemplated by Section 2804(16)(ii).

14. Single-issue rate proceedings are permitted under Section 2804(16)(ii) of the Public Utility Code to provide for recovery of RNR tax increases that cause rates to exceed the rate cap. Section 2804(16)(ii), authorizing single-issue rate cases, was deemed necessary by the Legislature to permit recovery of increased taxes under the

Electric Generation Customer Choice and Competition Act ("Competition Act"), 66 Pa. C.S. §2801 et seq. Single-issue rate increases were generally not permitted under Section 1308 of the Public Utility Code prior to passage of the Electric Competition Act, 66 Pa. C.S. §1308, because single-issue rate proceedings do not consider the reasonableness of rates as a whole but only consider one particular item of revenue or expense.

15. In *Popowsky v. Pennsylvania Public Utility Commission*, 683 A.2d 958 (Pa. Commonwealth Ct. 1996), a case cited by the OCA in its initial Complaint, the Court affirmed a Commission Order adjudicating a \$1.7 million, non-general rate increase filed by the Equitable Gas Company to recover expense caused by changed accounting requirements for employee benefits. In response to the OCA arguments concerning the issues that must be examined by the Commission in a non-general base rate proceeding, the Court held that the Commission may issue a rate order in such a case based only on the general information required by Section 53.52(b) of the Commission's regulations and that the expense and rate of return information required by Section 53.52(c) were not required. In rejecting the OCA's argument that a non-general base rate case required the utility to file expense and rate of return information, the Court stated:

Although in its brief the OCA seems to argue that the same evidentiary burden should apply to Equitable in this contested, non-general rate case as in a general rate case, requiring it to provide specific information on each aspect of its capital and rate of return, it abandoned that argument at oral argument. In response to such an argument, we would agree with the PUC that the statutory and regulatory scheme does not make the same full-blown standards applicable. If such a high standard applied, there would be no significant difference between non-general rate filings under Section

1308(b) and general rate filings under Section 1308(d). To the contrary, because of the modest nature of non-general rate filings, as required by the statute, we believe the PUC may determine whether the public utility's rates are just and reasonable based upon the general information required under 52 Pa. Code §53.52(b). That the non-general rate filing may be contested does not increase Equitable's evidentiary burden or limit the PUC's discretion.

683 A.2d at 962 (emphasis added).

As recognized by the Commonwealth Court in *Popowsky*, the scope of non-general rate cases is not as broad as a general rate case proceeding and does not include the examination of rate of return and expense information required by the Commission's regulation at 52 Pa. Code 53.52(c). Likewise in the instant case, a proper reading of Section 2804(16)(ii) does not compel the conclusion that a "single-issue" proceeding addressing an increase in Duquesne's RNR tax liability necessitates an examination of its rate of return and offsetting expense adjustments.

16. The General Assembly enacted Section 2804(16)(ii) for the recovery of increased RNR liability as part of the Electricity Generation Customer Choice and Competition Act in 1996 subsequent to the Court's *Popowsky* decision. The Commission's regulation at 52 Pa. Code §54.95 was specifically promulgated to implement Section 2804(16)(ii). Duquesne submits that this subsequent legislative enactment and regulation conclusively establish the limited scope of a single-issue rate proceeding pursuant to Section 2804(16)(ii). Such a result is consistent with the relevant provisions of the Statutory Construction Act of 1972. Section 1933 of the Act, 1 Pa. C.S. §1933, provides that when a general provision in a statute is in conflict with a special provision, the special provision shall prevail and shall be construed as an exception to the general provision.

17. Section 1934 of that Act, 1 Pa. C.S. §1934, provides that, whenever, in the same statute, several clauses are irreconcilable, the clause last in order of date or position shall prevail. Duquesne submits that consistent with these provisions of the Statutory Construction Act, Section 2804(16)(ii), as a later enacted provision specifically addressing an EDC's recovery of increased RNR tax liability, should prevail over any general inconsistent prior provision of the Public Utility Code. To the extent that a broader examination of issues was possible in single-issue cases under prior interpretations of Section 1308(a), the later enactment of Section 2804(16)(ii) now controls the scope of these proceedings. Moreover, the Commission's specific regulation defining the filing requirements (Section 54.95) must prevail over any general filing requirement provision previously contained in the Commission's regulations.

18. Section 2804(16) established a statutory exception to the general rule against single issue rates cases and expressly permits a "single issue rate proceeding" for recovery of RNR tax increases. Section 2804(16)(ii) states that the EDC is to file a single-issue rate case under Section 1308(a). Duquesne submits that the section's reference to a "single issue" evidences the legislative intent that the Commission examine increases in RNR tax liability in proceedings which are limited to one issue. The OCA's attempts to introduce additional issues such as rate of return and operating expenses for purposes of determining whether there have been offsetting savings in other areas are outside the scope of Section 2804(16)(ii)'s very specific reference to Section 1308(a).

19. The issues identified by the OCA are to be examined in a general base rate case whose procedures are identified in Section 1308(d) of the Public Utility Code.

Duquesne submits that the section's specific reference to Section 1308(a) is designed to limit the issues that should be examined in cases initiated under that section. Moreover, the limited period in which such cases are to be decided by the Commission is additional evidence that the single-issue proceeding should involve only the issue of Duquesne's tax liability. Section 1308(d) provides that general base rate cases are subject to a seven-month suspension period instead of the two-month (60 day) period defined in Section 2804(16)(ii). The shorter suspension period is additional evidence of the legislative intent to limit proceedings under the section to the single issue of Duquesne's recovery of its RNR liability.

20. Conducting a "single issue rate proceeding", by definition, involves examining proposed rates to determine whether they recover in full the RNR tax increase. It does mean converting a proceeding from a "single issue rate proceeding" to a general rate case in which all components of revenue requirement (plant in service, income, depreciation, income taxes, etc.) would be considered to determine whether an EDC's return is adequate. In its Complaint, the OCA alleges that the Commission must consider multiple issues, including offsetting expenses and the overall level of a utility's rate of return before it can determine that 2002 RNR tax recovery is just and reasonable. (OCA Complaint, Paragraph G). Further, the OCA provides a more specific list of ratemaking issues in its Prehearing Memorandum. The OCA intends that all revenue requirement components be subject to investigation in this proceeding even though the proceeding was initiated to recover only the increase in the 2002 RNR tax rate. This position is in error and must be rejected.

C. The OCA's Proposal Is Inconsistent with Section 2804(16)(ii) and the Spirit of the Electric Competition Act.

21. The OCA's efforts to transform a single-issue proceeding into a general rate proceeding is in clear contravention of the dictates of Section 2804(16)(ii) and the intent of the Competition Act which permits the filing of a "single issue rate proceeding" for the purpose of recovering increases in RNR taxes. 66 Pa. C.S. §2804(16)(ii). The OCA's attempt to require a general rate case examination of ratemaking factors such as rate of return and offsetting expenses will render it impossible for the ALJ and the Commission to expeditiously adjudicate Duquesne's single-issue RNR tax liability case in the prescribed 60-day time period. Contrast this with Section 1308(d), applicable to general rate cases, in which the adequacy of "return" and other ratemaking components are determined and nine months are permitted for full Commission adjudication.

22. The OCA's position that the Commission must conduct a full rate of return analysis before allowing a rate increase to recover increases in the RNR tax is inconsistent with other provisions of the Competition Act. Section 2804 of the Competition Act, 66 Pa. C.S. §2804, contains several rate cap exceptions. These exceptions require the utility to establish that, absent a rate increase, it would be unable to earn a fair rate of return.¹ These rate cap exceptions permit an analysis of rate of return as part of a rate cap exception filing but contain no references to "single issue" rate proceedings.

23. The illegality and unworkable nature of the OCA's position is magnified by the nature of the RNR tax calculations of Section 2810 of the Public Utility Code. Increases in the RNR tax rate require EDC's to file simultaneously to increase rates to

¹ See Sections 2804(4)(iii)(C), 2804(4)(iii)(D), and 2804(4)(iii)(F) of the Public Utility Code, 66 Pa.C.S. §§ 2804(4)(iii)(C), 2804(4)(iii)(D), and 2804(4)(iii)(F).

recover the increased RNR tax liability. Under the OCA's flawed interpretation of Section 2804(16)(ii), the Commission would be faced with adjudicating nine general rate cases in 60 days. Such an absurd result could not have been intended by the Legislature when it passed the Competition Act. 1 Pa. C.S. §1922.

24. The OCA's argument that the Commission must examine rate of return and offsetting expenses in order to determine whether "resulting rates" are just and reasonable is incorrect. If this argument were valid, it would expand the scope of the proceeding to the point that the phrase "single issue" rate proceeding would be meaningless. Under the Rules of Statutory Construction, a statute cannot be interpreted to render particular provisions meaningless. 1 Pa. C.S. §1933.

25. Rates approved by the Commission must be just and reasonable but this requirement does not mean the Commission is prohibited from determining just and reasonable rates under a single-issue rate proceeding without reviewing earnings and fair rate of return. For example, under Section 1307(a), the Commission authorizes recovery of a single category or class of expenses and determines that resulting rates are just and reasonable without investigating the utility's rate of return for ratemaking purposes. Other provisions of the Public Utility Code, specifically Section 1307(f), permits recovery of a single category of expense, purchased gas costs, without requiring a broader examination of return or earnings levels.

26. The purpose of the RNR is not to increase or decrease tax revenues but to maintain revenue neutrality and tax stability and to maintain the level of tax revenues *from state taxes so that levels of tax revenues for the Commonwealth are not disrupted*. The purpose of the RNR tax was to maintain tax revenue neutrality, and the purpose of

Section 2804(16)(ii) was to permit electric distribution companies to recover increases in RNR tax liability in a timely fashion. The procedures enunciated under section 2804(16)(ii) were not intended to alter either the state's tax revenues or electric distribution companies' return or earnings.

27. For all the reasons stated, the OCA's attempt to transform the instant proceeding into a general rate case should be rejected.

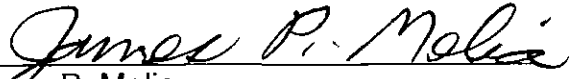
D. Scope of the Proceeding.

28. Duquesne contends that hearings are necessary to receive evidence on whether the 2002 RNR tax increase is known and measurable as well as whether the overall increase in the STAS is properly calculated to recover the 2002 RNR tax increase. The scope of the hearings should not be expanded to undertake a rate of return analysis or analysis of any other component of the ratemaking formula as it pertains to Duquesne's overall rates. Given the accelerated time-frame for adjudication of these cases, *it is critical that the ALJ provide guidance on the proper scope of this proceeding before Duquesne and other the parties expend resources in preparation of their evidentiary cases.*

III. CONCLUSION

WHEREFORE, Duquesne Light Company respectfully requests that Administrative Law Judge Wayne L. Weismandel deny the "Motion for Clarification of The Office of The Consumer Advocate" and issue an Order determining that this proceeding is a "single issue rate proceeding" under Section 2804(16)(ii) of the Public Utility Code and that evidence addressing issues other than recovery of the 2002 revenue-neutral reconciliation tax is irrelevant to this proceeding.

Respectfully submitted,


James P. Melia
Daniel P. Delaney

Kirkpatrick & Lockhart LLP
240 North Third Street
Harrisburg, PA 17101-1507
(717) 231-4500
(717) 231-4501 (Fax)
jmelia@kl.com
ddelaney@kl.com

Duquesne Light Company
411 Seventh Avenue, 9-1
Pittsburgh, PA 15219
(412) 393-3662
(412) 393-5602 (Fax)
rherskovitz@dqe.com

Richard S. Herskovitz

Counsel for Duquesne Light Company

Dated: April 4, 2002

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