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November 12, 2013

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Pennsylvania Public Utility Commission v. Duquesne Light Company
Docket No. R-2013-2372129, C-2013-2390562, etc.

Dear Secretary Chiavetta:

Enclosed for filing is the Preliminary Objections of Duquesne Light Company to the Complaint of NRG Power Midwest LP in the above-referenced proceeding. Appendices B, C, D and E to the Preliminary Objections are **HIGHLY CONFIDENTIAL** and will be filed under seal.

Copies will be provided as indicated on the Certificate of Service.

Respectfully submitted,

Anthony D. Kanagy

ADK/skr
Enclosure

cc: Honorable Conrad A. Johnson
Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing have been served upon the following persons, in the manner indicated, in accordance with the requirements of § 1.54 (relating to service by a participant).

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Date: November 12, 2013

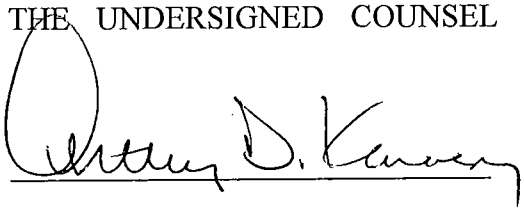
Anthony D. Kanagy

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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 Midwest, NRG Energy Center Pittsburgh LLC,	:	C-2013-2390562
and Reliant Energy Northeast LLC	:	
v.	:	
Duquesne Light Company	:	

NOTICE TO PLEAD

YOU ARE HEREBY ADVISED THAT, PURSUANT TO 52 PA. CODE § 5.101, YOU MAY ANSWER THE ENCLOSED PRELIMINARY OBJECTIONS WITHIN TEN (10) DAYS OF THE DATE OF SERVICE HEREOF. YOUR ANSWER TO THE PRELIMINARY OBJECTIONS MUST BE FILED WITH THE SECRETARY OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION, P.O. BOX 3265, HARRISBURG, PA 17105-3265. A COPY SHOULD ALSO BE SERVED ON THE UNDERSIGNED COUNSEL FOR DUQUESNE LIGHT COMPANY.



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Date: November 12, 2013

Attorneys for Duquesne Light Company

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission	:	R-2013-2372129
Office of Consumer Advocate	:	C-2013-2379084
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NRG Midwest, NRG Energy Center Pittsburgh LLC,	:	C-2013-2390562
and Reliant Energy Northeast LLC	:	
v.	:	
Duquesne Light Company	:	

PRELIMINARY OBJECTIONS OF
DUQUESNE LIGHT COMPANY
TO THE COMPLAINT OF NRG POWER MIDWEST LP

TO ADMINISTRATIVE LAW JUDGE
CONRAD A. JOHNSON:

AND NOW, comes Duquesne Light Company ("Duquesne Light") and hereby files Preliminary Objections, pursuant to the regulations of the Pennsylvania Public Utility Commission ("Commission") at 52 Pa. Code § 5.101, and respectfully requests that the Honorable Administrative Law Judge Conrad A. Johnson (the "ALJ") dismiss certain portions of the Complaint filed by NRG Power Midwest LP ("NRG Midwest") and related companies, docketed at Docket No. C-2013-2390562 ("Complaint"), and dismiss NRG Midwest as a party. In support thereof, Duquesne Light states as follows:

I. BACKGROUND

1. Duquesne Light furnishes electric service to approximately 588,000 customers throughout its certificated service territory, which includes portions of Allegheny and Beaver Counties and encompasses approximately 817 square miles in western Pennsylvania. Duquesne Light is a "public utility" and an "electric distribution company" as defined in Sections 102 and 2803 of the Pennsylvania Public Utility Code, 66 Pa.C.S. §§ 102, 2803.

2. On August 2, 2013, Duquesne Light filed with the Pennsylvania Public Utility Commission ("Commission") Supplement No. 81 to Duquesne Light's Tariff – Electric Pa. P.U.C. No. 24 ("Supplement No. 81"). Supplement 81, issued to be effective October 1, 2013, proposes changes to Duquesne Light's base retail distribution rates designed to produce an increase in revenues of approximately $76.3 million, based upon data for a fully projected future test year ending April 30, 2015. The filing was made in compliance with the Commission's regulations and contains all supporting data and testimony required to be submitted in conjunction with a tariff change seeking a general rate increase.

3. On September 26, 2013, the Commission opened an investigation of Duquesne Light's proposed rate increase and suspended the effective date of that increase by operation of law from October 1, 2013, until May 1, 2014, unless permitted by Commission Order to become effective at an earlier date.

4. On October 31, 2013, Duquesne Light was served by the Commission with the Formal Complaint jointly filed by NRG Midwest, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC (together, the "NRG Companies").

5. In their Complaint, the NRG Companies generally averred that they collectively oppose Duquesne Light's proposed rate increase. (Complaint ¶ 11)

6. Pertinent to these Preliminary Objections, NRG Midwest avers that Duquesne Light's Tariff Rider No. 18 – Rate for Purchase of Electric Energy from Customer-Owned Renewable Resources Generating Facilities (hereinafter "Rider No. 18") may present an indirect form of rate discrimination benefitting certain customer-generators. (Complaint ¶ 13-15) In the prayer for the relief, as confirmed by their direct testimony filed by November 1, 2013, NRG Midwest requests that the Commission ensure that Tariff Rider No. 18 is just, reasonable, and non-discriminatory.[1] (Complaint ¶ 20)

7. Duquesne Light's Tariff Rider No. 18 establishes the rates to be paid for power produced by certain specified categories of qualifying facilities pursuant to the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. §§ 824, *et seq.*[2] A true and correct copy of Tariff Rider No. 18 is attached hereto as "**Appendix A.**" Specifically, Rider No. 18 provides that "electric energy will be purchased, as available, from such facilities at the rate of six (6) cents per kilowatt-hour, or at a rate based on the Company's avoided costs when such costs exceed six (6) cents per kilowatt-hour."[3] (Appendix A)

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[1] A copy of Rider No. 18 is attached to the Complaint. The attachment is taken from Duquesne Light's currently effective Tariff; it was not taken from the *pro forma* tariff filed with Duquesne Light's base rate case filing. Although the copy of Rider No. 18 attached to the Complaint reflects a change, that change was previously approved by the Commission and is not at issue in this proceeding. Indeed, Duquesne Light has not proposed nor is it seeking any changes, amendments, or modifications to Rider No. 18 in this base rate proceeding.

[2] Under PURPA, public utilities are required to purchase all electricity produced by independent power producers that obtain status as qualifying facilities. Electric utilities are required to purchase electricity from qualifying facilities at rates that are just and reasonable to the electric utility, in the public interest, and which do not discriminate against the qualifying facilities. 16 U.S.C. § 824a-3(b); 18 C.F.R. §§ 292.304(a)(1)(i), (ii). Under the regulations of the Federal Energy Regulatory Commission ("FERC") implementing PURPA, the rate a qualified facility is to receive for the sale of its electricity is the "avoided cost" rate. 18 C.F.R. § 292.304(a)(2). "Avoided costs" are the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility, such utility would generate itself or purchase from another source. 18 C.F.R. § 292.101(b)(6). Importantly, however, the FERC regulations expressly provide that there is nothing that limits the ability of qualifying facilities and electric utilities from entering negotiated agreements for rates and terms different from those called for in the regulations. 18 C.F.R. § 292.301(b)(1).

[3] In July 1987, the Commission approved, with modifications, Duquesne Light's proposal to phase out the PURPA rate to new customer-generators. *Pa. P.U.C. et al. v. Duquesne Light Co.*, Docket No. R-860556 (July 20, 1987). Consequently, Rider No. 18 by its own terms is limited to projects (1) that were subject to a contract with Duquesne dated prior to August 25, 1987; (2) that were supplying energy to Duquesne under Rider No. 18 prior to August 25,

8. On August 18, 1982, Duquesne Light entered into a negotiated purchase power agreement with Beaver Valley Power Company, a qualifying facility pursuant to PURPA and Rider No. 18. A true and correct copy of the agreement with Beaver Valley Power Company is attached hereto as "**Appendix B**" [**HIGHLY CONFIDENTIAL**]. Pursuant to this negotiated agreement, Duquesne Light and Beaver Valley Power Company agreed, in pertinent part, that Duquesne Light will purchase the net energy produced from Beaver Valley Power Company's facilities under the terms and conditions of Duquesne Light's tariff on file with the Commission. (Appendix B, pp. 3, 7)

9. On February 28, 1985, Duquesne Light entered into a negotiated purchase power agreement with Beaver Falls Municipal Authority, a qualifying facility pursuant to PURPA and Rider No. 18. A true and correct copy of the agreement with Beaver Falls Municipal Authority is attached hereto as "**Appendix C**" [**HIGHLY CONFIDENTIAL**]. Pursuant to this negotiated agreement, Duquesne Light and Beaver Falls Municipal Authority agreed, in pertinent part, that Duquesne Light will purchase the net energy produced from Beaver Falls Municipal Authority's facilities under the terms and conditions of Duquesne Light's tariff on file with the Commission. (Appendix C, pp. 3, 8)

10. The rate for both of the above-described, negotiated power purchase agreements ("Power Purchase Agreements" or "PPAs") is six cents per kilowatt-hour as set forth in Rider No. 18.

11. On December 3, 1996, Governor Tom Ridge signed the Electricity Generation Consumer Choice and Competition Act, P.L. 802, No. 138, effective January 1, 1997, 66 Pa. C.S. §§ 2801-2812. The Act restructured Pennsylvania law relating to retail electric service in

---

1987 without the benefit of a contract; or (3) that were the subject of serious negotiations with Duquesne prior to August 25, 1987.

the Commonwealth. In accordance with the Electricity Generation Consumer Choice and Competition Act, all Pennsylvania electric distribution companies, such as Duquesne Light, were required to file restructuring plans for review and approval by this Commission. 66 Pa.C.S. § 2806(d). These restructuring plans were required to provide for the transition from the monopolistic provision of all electric service to the competitive market for generation.

12. Duquesne Light's restructuring plan was approved by the Commission in 1998. *Application of Duquesne Light Company for Approval of Its Restructuring Plan Under Section 2806 of the Public Utility Code*, Docket Nos. R-00974104, et al., 1998 Pa. PUC LEXIS 163 (May 29, 1998). In the order approving Duquesne Light's restructuring plan, the Commission accepted the rejoinder offer of Duquesne Light to divest itself of generation and directed Duquesne Light to, *inter alia*, file a plan for divestiture of its generation assets. *Id.* at *113-18. As a result, in 2000, Duquesne Light auctioned its generation assets to Orion Power Holdings, Inc. ("Orion"). As part of the agreement to acquire Duquesne Light's generation assets, Duquesne Light and Orion entered into an agreement whereby Duquesne Light assigned and Orion accepted the obligation to purchase the net power output from the PPAs discussed above.[4] A true and correct copy of a Revised QF Agency Agreement by and between Duquesne Light and Orion is attached hereto as "**Appendix D**" [**HIGHLY CONFIDENTIAL**]. The Revised QF Agency Agreement was approved by FERC on March 8, 2001. *See* FERC Docket No. ER01-1138-000.

[4] The Revised QF Agency Agreement attached as Appendix D references three negotiated PPAs: the PPAs with Beaver Falls Municipal Authority and Beaver Valley Power Company described above, and a PPA with O'Brien Energy Systems. However, the negotiated PPA between O'Brien Energy Systems and Duquesne Light was terminated.

13. As averred by NRG Midwest, through various transactions, NRG Midwest has assumed the obligations under the Revised QF Agency Agreement, including the obligation to purchase the net power output from the PPAs described above. (Complaint ¶¶ 13, 14)

14. In the Complaint, NRG Midwest avers that Rider No. 18 may present an indirect form of rate discrimination benefitting certain customer-generators and, therefore, requests that the Commission ensure that Rider No. 18 is just, reasonable, and non-discriminatory. (Complaint ¶ 13-15, 20) In essence, NRG Midwest is requesting that the Commission modify the six cents per kilowatt-hour PURPA rate set forth in Rider No. 18.[5]

15. Duquesne Light herein files these Preliminary Objections to NRG Midwest's allegations regarding Tariff Rider No. 18. For the reasons explained below, Duquesne Light respectfully requests that, pursuant to Section 5.101(a) of the Commission's regulations, 52 Pa. Code § 5.101(a), Paragraphs 13-15 and 20 of the Complaint regarding Rider No. 18 be dismissed in their entirety for: (1) misjoinder of a non-base rate case issue in a base rate proceeding; (2) nonjoinder of all necessary parties, and (3) lack of Commission authority to grant the relief requested. For these same reasons, Duquesne Light also requests that NRG Midwest be dismissed as a party.[6]

II. STANDARD OF REVIEW

16. Pursuant to the Commission's regulations, preliminary objections in response to a pleading may be filed on several grounds, including:

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

[5] This specific request for relief is confirmed by the direct testimony served by NRG Midwest on November 1, 2013.

[6] In these Preliminary Objections, Duquesne Light is seeking to dismiss only those portions of the Complaint related to Rider No. 18 and NRG Midwest (Complaint ¶ 13-15, 20). Duquesne Light is not seeking to dismiss any other portion of the Compliant, nor is Duquesne Light requesting that NRG Energy Center Pittsburgh LLC or Reliant Energy Northeast LLC be dismissed as parties.

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

(3) Insufficient specificity of a pleading.

(4) Legal insufficiency of a pleading.

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

52 Pa. Code § 5.101(a).

17. In ruling on preliminary objections, the Presiding Officer must accept as true all well-pled allegations of material facts as well as all inferences reasonably deducible therefrom. *Stilp v. Cmwlth.*, 910 A.2d 775, 781 (Pa. Cmwlth. 2006) (citing *Dep't of Gen. Serv. v. Bd. of Claims*, 881 A.2d 14 (Pa. Cmwlth. 2005); *accord Complaint of Nat'l Fuel Gas Distrib. Corp. and Petition for an Order to Show Cause*, Docket No. P-00072343 (December 26, 2007). However, the Presiding Officer need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion. *Stanton-Negley Drug Co. v. Dep't of Pub. Welfare*, 927 A.2d 671, 673 (Pa. Cmwlth. 2007). For preliminary objections to be sustained, it must appear with certainty that the law will permit no recovery, and any doubt must be resolved in favor of the non-moving party. *Stilp*, at 781.

III. PRELIMINARY OBJECTIONS

A. PRELIMINARY OBJECTION NO. 1: MISJOINDER OF A CAUSE OF ACTION

18. Duquesne Light incorporates by reference Paragraphs 1 through 17 as if fully set forth herein.

19. In the Complaint, NRG Midwest avers that Rider No. 18 may present an indirect form of rate discrimination benefitting certain customer-generators and, therefore, requests that the Commission ensure that Rider No. 18 is just, reasonable, and non-discriminatory.

(Complaint ¶ 13-15, 20) In essence, and as confirmed by the direct testimony filed on November 1, 2013, NRG Midwest is requesting that the Commission modify the exiting PPAs by reducing the price paid to the qualifying facilities through an adjustment of the "avoided cost" rate provided in Rider No. 18. (NRG Midwest Statement No. 1, pp. 6-7) NRG Midwest's allegations and request for relief are beyond the proper and prudent scope of this base rate proceeding and, therefore, should be summarily rejected.

20. As a result of the FERC-approved Revised QF Agency Agreement assumed by NRG Midwest, NRG Midwest is obligated to purchase the net power produced by the qualifying facilities under the PPAs. (Complaint ¶¶ 13, 14) Consequently, the rates paid pursuant to Rider No. 18 have no impact to the base rates paid by Duquesne Light's retail customers, the revenues received by Duquesne Light, or the services provided to Duquesne Light's customers.

21. In addition, Duquesne Light has not proposed nor is it seeking any changes, amendments, or modifications to Rider No. 18 in this base rate proceeding.

22. Other than noting that Rider No. 18 is contained in Duquesne Light's Tariff, NRG Midwest has failed to identify any legitimate reason that the non-base rates paid under Rider No. 18 and the Revised QF Agency Agreement should be investigated in this base rate proceeding.

23. For the reasons set forth in Paragraphs 19 through 23, *supra*, NRG Midwest's allegations and request for relief related to Rider No. 18 are beyond the scope of this base rate proceeding and, therefore, should be dismissed and stricken from the Complaint.

24. In addition, as explained below, it would not be appropriate to address these non-base rate issues and NRG Midwest's request for relief in this base rate case because of the significant uncertainty as to the appropriate forum for NRG Midwest's request for relief and the novel and complex issues raised by NRG Midwest.

25. Initially, it is uncertain whether the Commission is the appropriate forum to address the issues raised and relief requested by NRG Midwest. As further explained below in Preliminary Objection No. 3, the Commission does not have the authority to grant the relief requested by NRG Midwest -- to adjust the purchase price under an existing approved PPA with a qualifying facility. *See Freehold Cogeneration Assocs., L.P. v. Board of Regulatory Comm'rs*, 44 F.3d 1178, 1190 (3d Cir. 1995).

26. In addition, the obligations and commitments by and between NRG Midwest and Duquesne Light, including NRG Midwest's assumed obligation to purchase the net output from the PPAs, are governed by the Revised QF Agency Agreement, which is a FERC-approved agreement that provides that the parties' performance under the Revised QF Agency Agreement is subject to Duquesne Light's FERC-approved tariff. (Appendix D, pp. 8-9) The Revised QF Agency Agreement is a contract for the sale of wholesale power that is subject to FERC jurisdiction. The Commission does not regulate wholesale sales of power.

27. There also is substantial uncertainty as to the extent that the Commission's regulations regarding the purchase and sale of energy and capacity from qualifying facilities, 52 Pa. Code § 57.31 *et seq.*, would apply to NRG Midwest's request for relief. A review of these regulations suggests that they were enacted prior to and without anticipating the competitive electric market that exists in Pennsylvania today. Indeed, the regulations do not appear to account for de-regulation, the lack of utility-owned generating units, or electric distribution companies' default service obligations.

28. The issue of PURPA rates has never been addressed post-restructuring and post-Act 129. Addressing such issues would, as a preliminary matter, require a determination of the Commission's jurisdiction and of the remedies available. It would be very difficult for the

parties to adequately and fully examine and address these novel, non-base rate issues within the nine-month suspension period for this proceeding, especially given the fact that the Complaint was formally served one day before the due date for direct testimony.[7]

29. Due to the lack of connection of NRG Midwest's issue to base rates and the significant uncertainty as to the appropriate forum for NRG Midwest's request for relief, Duquesne Light submits that it would not be appropriate to address these non-base rate issues and NRG Midwest's request for relief in this base rate case.

30. To the extent that NRG Midwest seeks to challenge the PURPA rates paid pursuant to the existing PPAs with the qualifying facilities, NRG Midwest should raise such issues in an appropriate and lawful forum so that all necessary and interested parties have sufficient and proper notice, time, and resources to fully investigate and resolve the matter.

31. Based on the foregoing, NRG Midwest's allegations and request for relief related to Rider No. 18 are beyond the scope of this base rate proceeding. Therefore, the allegations in Paragraphs 13-15 and 20 of the Complaint regarding NRG Midwest and Rider No. 18 should be dismissed and stricken from the Complaint pursuant 52 Pa. Code § 5.101(a)(5).

B. PRELIMINARY OBJECTION NO. 2: NONJOINDER OF ALL NECESSARY PARTIES

32. Duquesne Light incorporates by reference Paragraphs 1 through 31 as if fully set forth herein.

33. In the Complaint, NRG Midwest avers that Rider No. 18 may present an indirect form of rate discrimination benefitting certain customer-generators and, therefore, requests that the Commission ensure that Rider No. 18 is just, reasonable, and non-discriminatory. (Complaint ¶ 13-15, 20) In essence, and as confirmed by the direct testimony filed on November

[7] The Complaint was formally served via a Secretarial Letter dated October 31, 2013, and the other parties' direct testimony was served on November 1, 2013.

1, 2013, NRG Midwest is requesting that the Commission modify the exiting PPAs by reducing the price paid to the qualifying facilities through an adjustment of the "avoided cost" rate provided in Rider No. 18. (NRG Midwest Statement No. 1, pp. 6-7) NRG Midwest's allegations and request for relief failed to join all necessary parties and, therefore, should be summarily rejected.

34. The PPAs are not agreements by and between Duquesne Light and NRG Midwest. Indeed, in an amendment to the Revised QF Agency Agreement, which is attached hereto as "**Appendix E**" [**HIGHLY CONFIDENTIAL**], the parties expressly acknowledge that Duquesne Light has contractual privity with the owners of the qualifying facilities, and that NRG Midwest does not have contractual privity with the PPAs. (Appendix E, p. 5)

35. If the Commission were to grant relief to NRG Midwest and modify either the PPAs or the PURPA rates set forth in Rider No. 18, such action would directly and adversely affect the interests and rights of the qualifying facilities that are parties to the PPAs. Clearly, the qualifying facilities are necessary and indispensable parties to the claims and relief sought by NRG Midwest. *See, Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 464 Pa. 377, 379 (1975) ("an indispensable party is one whose rights are so directly connected with and affected by litigation that he must be a party of record to protect such rights, and his absence renders any order or decree of court null and void for want of jurisdiction"); *see also J3 Energy Group, Inc. v. West Penn Power Company*, Docket No. C-2011-2219920 (Oct. 31, 2013) (holding that successful bidder to a contract was an indispensable party to a complaint filed by an unsuccessful bidder challenging the outcome of the bidding process).

36. Although it appears from the Certificate of Service attached to the Complaint that NRG Midwest served the owners of the qualifying facilities, NRG Midwest failed to name the

qualifying facilities as parties to the Complaint. Indeed, the qualifying facilities were omitted from the caption of the Complaint. Similarly, the qualifying facilities were omitted from the description of the parties to the Complaint. There simply is nothing in the Complaint to suggest that the qualifying facilities should be put on notice that they are parties to the Complaint, or that the qualifying facilities should file an answer or otherwise respond to the Complaint as parties. Under these circumstances, NRG Midwest's service of the Complaint on the qualifying facilities clearly is not sufficient to put the qualifying facilities on notice that they are parties to the allegations and relief sought in the Complaint and, as such, have a right and obligation to respond to the allegations.[8]

37. NRG Midwest's failure to join the qualifying facilities as parties to the Complaint is fatal to the cause of action. *See Bucks County Servs. v. Phila. Parking Auth.*, 71 A.3d 379 (Pa. Cmwlth. 2013) (the failure to join an indispensable party deprives a court of subject matter jurisdiction and is fatal to a cause of action).[9]

38. Based on the foregoing, NRG Midwest has failed to join all necessary, indispensable parties to its claims. Therefore, the allegations in Paragraphs 13-15 and 20 of the Complaint regarding NRG Midwest and Rider No. 18 should be dismissed and stricken from the Complaint pursuant 52 Pa. Code § 5.101(a)(5).

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[8] Properly naming the qualifying facilities will provide the owners of the qualifying facilities with the required due process and the opportunity to address the scope of the Commission's jurisdiction over these contentions.

[9] At this stage of the proceeding, NRG Midwest should not be allowed to amend its Complaint or file a motion to join the qualifying facilities as parties. Allowing NRG Midwest to amend its complaint or to file a motion to join would unduly prejudice the qualifying facilities, as well as the other parties, because the time to file direct testimony has passed. Further, allowing NRG Midwest to amend its Complaint or file a motion to join the qualifying facilities cannot be accommodated within the nine-month suspension period in this proceeding.

C. PRELIMINARY OBJECTION NO. 3: LEGAL INSUFFICIENCY OF A PLEADING

39. Duquesne Light incorporates by reference Paragraphs 1 through 38 as if fully set forth herein.

40. In the Complaint, NRG Midwest avers that Rider No. 18 may present an indirect form of rate discrimination benefitting certain customer-generators and, therefore, requests that the Commission ensure that Rider No. 18 is just, reasonable, and non-discriminatory. (Complaint ¶ 13-15, 20) In essence, and as confirmed by the direct testimony filed on November 1, 2013, NRG Midwest is requesting that the Commission modify the exiting PPAs by reducing the price paid to the qualifying facilities through an adjustment of the "avoided cost" rate provided in Rider No. 18. (NRG Midwest Statement No. 1, pp. 6-7) However, as explained below, the Commission cannot grant the relief requested by NRG Midwest.

41. State regulatory authorities are required to implement PURPA pursuant to the rules and regulations promulgated by FERC. *See* 16 U.S.C. § 824a-3(f). A state has broad authority to implement PURPA with respect to the approval of purchase contracts between utilities and qualifying facilities. *See Crossroads Cogeneration Corp. v. Orange & Rockland Utils., Inc.*, 159 F.3d 129, 135 (3d Cir. 1998).

42. While states do play a substantial role in implementing PURPA and approving contracts between utilities and qualifying facilities, once a state regulatory commission establishes the "avoided cost" to be paid, the state no longer has authority to regulate the qualifying facilities' rate. *See Freehold Cogeneration Assocs., L.P. v. Board of Regulatory Comm'rs*, 44 F.3d 1178, 1190 (3d Cir. 1995).

43. The Third Circuit's conclusion in *Freehold* removed any doubt concerning the power of state public utility commissions to alter, revise, or continually monitor PURPA

contracts once they have been approved and signed. *See also, W. Penn Power Co. v. Pa. Pub. Util. Comm'n*, 659 A.2d 1055, 1066 (Pa. Cmwlth. 1995), *affirmed by*, 535 Pa. 108, 634 A.2d 207 (1993) ("Section 210 of PURPA preempts the [Commission] from reconsidering its prior approval of the [power purchase agreements] between West Penn and the [qualifying facilities]s or to change the rates established for the avoided costs at the time of the agreements. Unless or until PURPA is amended or repealed, reestablishing regulatory power over the area, it appears that the [Commission] cannot reexamine contracts for PURPA power.") To the extent NRG Midwest seeks to challenge or modify the exiting PPAs by reducing the price paid to the qualifying facilities through an adjustment of the rate provided in Rider No. 18, NRG Midwest should initiate a separate proceeding in an appropriate forum with the jurisdiction to grant the relief requested by NRG Midwest, so that all necessary and interested parties have sufficient and proper notice, time, and resources to fully investigate and resolve the matter.

44. In this case, Rider No. 18 was specifically adopted to establish the avoided cost rate for Duquesne Light under PURPA. This PURPA rate continues to apply to the existing PPAs. *See In re West Penn Power Company*, 71 F.E.R.C. P61,153 (order denying petition for declaratory order, May 8, 1995) (FERC has determined that PURPA permits "lock-ins," that is, fixed-rate long-term QF contracts).

45. Based on the foregoing, the Commission is without authority to grant the relief requested by NRG Midwest -- to modify the existing PPAs, either directly or indirectly, by adjusting the "avoided cost" set forth in Rider No. 18 of Duquesne Light's tariff. Accordingly, NRG Midwest has failed to state a cause of action upon which relief may be granted and, therefore, NRG Midwest's request should be dismissed and stricken from the Complaint pursuant 52 Pa. Code § 5.101(a)(4).

IV. CONCLUSION

46. Duquesne Light incorporates by reference Paragraphs 1 through 45 as if fully set forth herein.

47. NRG Midwest's allegations and request for relief related to Rider No. 18 are beyond the scope of this base rate proceeding. NRG Midwest's attempt to raise such issues and claims will complicate the issues to be decided in this base rate proceeding and cannot be addressed within the nine-month suspension period in this proceeding.

48. NRG Midwest has failed to join all the parties necessary to its claims regarding the PURPA rates paid under Rider No. 18 and the PPAs.

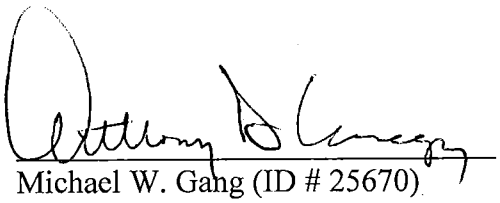
49. NRG Midwest has failed to state a cause of action upon which relief may be granted because the Commission is without authority to modify the existing PPAs, either directly or indirectly, by adjusting the "avoided cost" set forth in Rider No. 18.

50. Based on the foregoing, Paragraphs 13-15 and 20 of the Complaint regarding NRG Midwest and Rider No. 18 should be dismissed and stricken from the Complaint.

51. Further, because NRG Midwest has not raised any additional issues or claims that are relevant to this proceeding and because NRG Midwest is not a customer of Duquesne Light, NRG Midwest should be dismissed as a party to this proceeding.

WHEREFORE, Duquesne Light Company respectfully requests that Paragraphs 13-15 and 20 of the Complaint regarding Rider No. 18 be dismissed in their entirety, and that NRG Midwest LP be dismissed as a party.

Respectfully submitted,



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Date: November 12, 2013

Attorneys for Duquesne Light Company

VERIFICATION

I, David B. Bordo, being the Vice President- Strategy & External Affairs for Duquesne Light Company, hereby state that the facts above set forth are true and correct to the best of my knowledge, information and belief and that I expect Duquesne Light Company to be able to prove the same at a hearing held in the matter. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 (relating to falsification to authorities).

David B. Bordo

Dated: November 12, 2013

Appendix A

STANDARD CONTRACT RIDERS - (Continued)

RIDER NO. 18 - RATE FOR PURCHASE OF ELECTRIC ENERGY FROM CUSTOMER-OWNED RENEWABLE RESOURCES GENERATING FACILITIES

The Company will purchase electric energy from customer-owned generating facilities that: (1) are "qualifying small power production facilities" as defined in Subpart B - Qualifying Cogeneration and Small Power Production Facilities, of Part 292 of Subchapter K of Chapter 1, Title 18, Code of Federal Regulations ("facility"); (2) are located in the Company's service area; (3) use as the energy source renewable resources such as small scale hydro facilities of 30 megawatts or less, biomass, waste, solar or wind; and (4) meet one of the following three criteria:

(a) are subject to a contract dated prior to August 25, 1987, and are supplying electric energy, or have commenced construction of facilities to supply electric energy within sixty (60) day of August 25, 1987.

(b) are supplying electric energy to the Company under the terms of this rider on or before August 25, 1987, but are not subject to an executed contract.

(c) have been negotiating with the Company for a contract and it is determined that the project has been the subject of serious negotiations prior to August 25, 1987.

The electric energy will be purchased, as available, from such facilities at the rate of six (6) cents per kilowatt-hour, or at a rate based on the Company's avoided costs when such costs exceed six (6) cents per kilowatt-hour. For facilities that do not qualify under the provisions of this rider, electric energy will be purchased at a rate based on the Company's avoided costs as calculated in accordance with the applicable PA. P.U.C. regulations. Payment will be made monthly for the electric energy received from the facility in the preceding month.

Each facility will be required to install at its expense, or to have the Company install at the customer's expense, interconnection equipment and facilities including metering, protection and controls. All such interconnection equipment and facilities must be reviewed and approved in writing by the Company prior to installation.

The owner of each facility will be solely responsible for the operation, maintenance and repair of such facility.

The Company shall not be liable for damage to the facility which may result from its interconnection with the Company's facilities.

(C)

Purchase of electric energy under this rider shall be subject to all applicable Rules and Regulations of the Company's Electric Service Tariff, such Rules and Regulations to be read and interpreted, generally, with the word "purchase" substituted for the word "supply" or the word "service" where appropriate to reflect the application of the Rules and Regulations to the purchase rather than the sale of electric energy.

The Company reserves the right to require a written contract covering the purchase of electric energy for each facility.

HIGHLY CONFIDENTIAL

Appendix B

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HIGHLY CONFIDENTIAL

Appendix C

FILED UNDER SEAL

HIGHLY CONFIDENTIAL

Appendix D

FILED UNDER SEAL

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Appendix E

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