



November 22, 2013

VIA HAND DELIVERY

David P. Zambito

Direct Phone 717-703-5892

Direct Fax 215-989-4216

dzambito@cozen.com

SECRETARY'S BUREAU

2013 NOV 22 PM 4: 26

RECEIVED

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 et al. v. Duquesne Light Company;
Docket Nos. R-2013-2372129, C-2013-2390562, et al.**

**ANSWER OF NRG POWER MIDWEST LP, NRG ENERGY CENTER
PITTSBURGH LLC, AND RELIANT ENERGY NORTHEAST LLC TO
PRELIMINARY OBJECTIONS OF DUQUESNE LIGHT COMPANY TO
THE COMPLAINT OF NRG POWER MIDWEST LP**

Dear Secretary Chiavetta:

Enclosed for filing with the Commission please find the original Answer of NRG Power Midwest LP, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC to the Preliminary Objections of Duquesne Light Company to the Complaint of NRG Power Midwest LP in the above-referenced matter. All active parties to this proceeding have been served in accordance with the enclosed Certificate of Service.

Please do not hesitate to contact me should you have any questions regarding this filing or require additional information. Please date-stamp the extra enclosed copy of the filing and return it with our messenger. Thank you for your attention to this matter.

Sincerely,

COZEN O'CONNOR

By: David P. Zambito
Counsel for NRG Power Midwest LP, NRG Energy
Center Pittsburgh LLC, and Reliant Energy
Northeast LLC

DPZ:JLB
Enclosures

cc: Administrative Law Judge Conrad A. Johnson (via Electronic & First Class Mail)
Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	Docket Nos.	R-2013-2372129
Office of Consumer Advocate	:		C-2013-2379084
Office of Small Business Advocate	:		C-2013-2380474
Jacqueline 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	:		C-2013-2390562
Pittsburgh LLC, and Reliant Energy Northeast	:		
LLC	:		
	:		
	:		
v.	:		
	:		
Duquesne Light Company	:		

**ANSWER
OF NRG POWER MIDWEST LP, NRG ENERGY CENTER
PITTSBURGH LLC, AND RELIANT ENERGY NORTHEAST LLC
TO PRELIMINARY OBJECTIONS OF DUQUESNE LIGHT COMPANY
TO THE COMPLAINT OF NRG POWER MIDWEST LP**

AND NOW, come NRG Power Midwest LP (“NRG Midwest”), NRG Energy Center Pittsburgh LLC (“NRGP”), and Reliant Energy Northeast LLC (“REN”) (together, the “NRG Companies”), by and through counsel, Cozen O’Connor, and hereby file an answer to the Preliminary Objections of Duquesne Light Company to the Complaint of NRG Power Midwest LP (the “Preliminary Objections”) filed on November 12, 2013, by Duquesne Light Company (“Duquesne Light”). Simply put, the NRG Companies have raised an issue with a provision in a tariff approved by the Pennsylvania Public Utility Commission (“Commission”), which provision is prudently considered in the context of this proceeding. Whether the tariff provision to be considered may impact contractual relationships wholly outside the scope of the base rate

case does not supply grounds to deny due process to any of the NRG Companies. In further support of their answer, the NRG Companies state as follows:

I. BACKGROUND

On September 26, 2013, the Commission entered an order in the above-captioned proceeding. That order explained that initial investigation and analysis of the proposed Supplement No. 81 to Electric-PA. P.U.C. No. 24 (“Supplement No. 81”) indicated that the changes *proposed* by Duquesne Light “may be unlawful, unjust, unreasonable, and contrary to the public interest.” Order, Docket No. R-2013-2372129, at 2 (“Initial Order”). The Commission’s Initial Order further provided that “consideration should also be given to the reasonableness of [Duquesne Light’s] *existing* rates, rules, and regulations.” *Id.* (emphasis added); *see also* Prehearing Order Setting Litigation Schedule, Consolidating Complaints and Granting Petitions to Intervene, Docket No. R-2013-2372129, at 3 (Order entered Oct. 22, 2013) (“Prehearing Order”). As a result, the Commission ordered that an investigation be instituted to determine the lawfulness of Duquesne Light’s proposed rates, rules and regulations. In addition, the order specifically directed that the investigation “*shall* include consideration of the lawfulness, justness, and reasonableness of [Duquesne Light’s] *existing* rates, rules, and regulations.” Initial Order, at Ordering ¶ 4 (emphasis added). The present proceeding, therefore, is in no way limited to an examination of only those tariff changes proposed by Duquesne Light, but is intended to consider the entirety of Duquesne Light’s *existing* tariff Electric – PA. P.U.C. No. 24 (the “Tariff”).

On October 28, 2013, the NRG Companies filed their formal complaint at Docket No. C-2013-2390562 (the “Complaint”) in the Duquesne Light base rate proceeding. Among other things, the NRG Companies expressed concern regarding Duquesne Light’s Tariff Rider No. 18

– Rate for Purchase of Electric Energy from Customer-Owned Renewable Resources Generating Facilities (“Rider No. 18”), a provision contained within Duquesne Light’s existing rates, rules, and regulations. Rider No. 18 establishes the price that Duquesne Light will pay for electricity to certain small generators that are also Duquesne Light customers. The concern of both NRG Midwest and NRGP is that after having been instituted some 32 years ago in 1981, after the deregulation of the electric energy market in Pennsylvania, after the passage of the Electricity Generation Customer Choice and Competition Act in 1996 and the Alternative Energy Portfolio Standards Act in 2004, Rider No. 18 and the price for power provided therein has remained substantially unchanged. It appears that this may result in unreasonable discrimination benefitting certain customer-generators at the expense of Pennsylvania’s competitive generation market and to the competitive disadvantage of other customers with alternative energy projects. The NRG Companies have therefore requested that the Commission review the justification for maintaining this three decade-old tariff provision and determine whether it remains just, reasonable and non-discriminatory.

To be clear, the NRG Companies are *not* requesting that the Commission modify any power purchase agreements.¹ Despite Duquesne Light’s Preliminary Objections, there is no complex jurisdictional puzzle that must be solved here. The NRG Companies are simply requesting that the Commission investigate a previously Commission-approved tariff provision, which is unquestionably within the Commission’s jurisdiction. *See, e.g., Pa. Pub. Util. Comm’n v. Duquesne Light Co.*, Docket No. R-860556, 0087 WL 1378805 (Opinion & Order entered July

¹ In connection with its prepared direct testimony, NRG Midwest did submit two power purchase agreements and an agency agreement. These power purchase agreements set the price for electricity by indexing it to whatever the price may be in Duquesne Light’s Tariff (*i.e.*, Rider No. 18). The agreements were submitted to illustrate NRG Midwest’s direct interest as a purchaser of electricity at a price indexed to the Tariff. Importantly, both agreements grant Duquesne Light the ability to “unilaterally” apply to the Commission to terminate or modify the price for electricity contained in its Tariff. Duquesne Light’s unilateral right to change the price without Federal Energy Regulatory Commission approval is further evidence that Rider No. 18 falls squarely within the Commission’s jurisdiction.

20, 1987) (hereinafter, the “1987 Opinion & Order”) (rate proceeding specifically addressing changes to Rider No. 18) (attached hereto as **Appendix A**).

While some customer-generators selling power at prices indexed to the price contained in Tariff Rider No. 18 may be affected if the Commission deems modifications to Rider No. 18 to be necessary, they are no different in that respect than all the other customers of Duquesne Light who will be affected by the Tariff changes affirmatively proposed by Duquesne Light in its Supplement No. 81. The customers have been given notice of the proposed tariff changes and they may choose whether to participate in the proceeding.

II. LEGAL STANDARD OF REVIEW

In deciding preliminary objections, the Commission must determine whether, based on the well-pleaded factual averments of the non-moving party, recovery or relief is possible. *Dept. of Auditor General v. SERS*, 836 A.2d 1053, 1064 (Pa. Cmwlth. 2003); *P.J.S. v. Pa. State Ethics Comm'n*, 669 A.2d 1105 (Pa. Cmwlth. 1996). Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. *Boyd v. Ward*, 802 A.2d 705 (Pa. Cmwlth. 2002). All of the non-moving party’s averments in the complaint must be viewed as true for purposes of deciding the preliminary objections, and only those facts specifically admitted may be considered against the non-moving party. *Ridge v. State Employees’ Retirement Bd.*, 690 A.2d 1312 (Pa. Cmwlth. 1997). Preliminary objections may only be sustained where it appears, *with certainty*, that the law will not permit the relief requested. *Stilp v. Cmwlth.*, 910 A.2d 775, 781 (Pa. Cmwlth. 2006).

III. ANSWERS TO PRELIMINARY OBJECTIONS

As a necessary predicate to all three of its preliminary objections, Duquesne Light must convince the Commission that the NRG Companies, particularly NRG Midwest, are asking the Commission specifically to modify the terms of two power purchase agreements (the “PPAs”) executed in the early 1980s between Duquesne Light and two small hydroelectric power generators (the “Facilities”). (See Preliminary Objections, ¶¶ 19, 33, 40.) Duquesne Light attached these agreements to the Preliminary Objections as Appendix B (Highly Confidential) and Appendix C (Highly Confidential), as well as a copy of a certain Revised QF Agency Agreement (“Agency Agreement”) between Duquesne Light and a predecessor-in-interest to NRG Midwest under which NRG Midwest is the ultimate purchaser of energy produced by the Facilities. (Preliminary Objections, Appendix D (Highly Confidential).) NRG Midwest is not a party to the PPAs, and its relationship with Duquesne Light is governed under the Agency Agreement. These agreements were also provided by NRG Midwest in connection with its prepared direct testimony.

As a plain reading of the Complaint demonstrates, the NRG Companies have asked the Commission to review a provision contained in a Commission-approved tariff.² More specifically, the NRG Companies have asked the Commission to review Rider No. 18, a provision of Duquesne Light’s Tariff that the Commission has had occasion to review in the past. *See generally, e.g.*, 1987 Opinion & Order. NRG Midwest has *not* alleged a cause of action under any power purchase or other agreement, nor has NRG Midwest requested that the

² The NRG Companies emphasize that the standard of review on preliminary objections requires all well-pled averments of fact in the Complaint to be viewed as true. The appropriate inquiry is whether, with certainty, the law would *not* permit the relief sought. It is therefore inappropriate, as Duquesne Light has done, to look to the submitted direct testimony of the NRG Companies and to use it to mischaracterize the relief that the NRG Companies are seeking in the Complaint. Material issues of fact, including those raised in submitted testimony and responses to interrogatories, are more properly addressed at a later stage of the proceeding following discovery, and may be raised in a motion for summary judgment under 52 Pa. Code § 5.102. Nevertheless, the NRG Companies reserve the right to respond fully in the present answer to the various allegations in the Preliminary Objections.

Commission either construe or modify the terms of any power purchase or other agreement. The PPAs and the Agency Agreement were provided with the NRG Midwest testimony in order to demonstrate its relationship with Duquesne Light and the nature of its interest in Rider No. 18.

In any case, and as explained below, the PPAs do not set an express price for power, but merely reference the Tariff. Thus, while a modification to Rider No. 18 may affect the performance of the parties under the PPAs, as with any other agreement that incorporates the Tariff by reference, this does not mean that the actual terms of any such agreement would be directly or indirectly modified.³

A. Duquesne Light's Preliminary Objection No. 1: Misjoinder

Duquesne Light's preliminary objection alleging misjoinder of a cause of action is without factual support or legal merit and must be denied. The NRG Companies have asked the Commission to review a provision contained in a Commission-approved tariff. The specific provision is one that the Commission has reviewed in the past. NRG Midwest has *not* alleged a cause of action under any power purchase or other agreement, nor has NRG Midwest requested that the Commission either construe or modify the terms of any power purchase or other agreement.

Duquesne Light asserts that the Agency Agreement and the PPAs are subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC") and argues that, in any case, the jurisdictional and remedial issues implicated are simply too complex for the Commission to consider at this time. Because the NRG Companies are not bringing suit under these agreements and are not seeking to have their terms either construed or modified in this

³ While Duquesne Light repeatedly refers to the energy purchase price set forth in Rider No. 18 as a "rate," the NRG Companies do not believe that it is a "rate" as defined by Section 102 of the Pennsylvania Public Utility Code, 66 Pa. Code § 102, because it is not a charge by the public utility to a customer for service. Accordingly, in order to avoid confusion, the NRG Companies refer to a "price" in its filings.

proceeding, Duquesne Light's arguments are entirely beside the point. However, to the extent the Commission does credit Duquesne Light's concerns, there are at least two facts that lay bare Duquesne Light's assertion that a review of Rider No. 18 is beyond the scope of this proceeding.

First, it is a fact that the PPAs set forth a price for power that is indexed to Duquesne Light's Commission-approved Tariff and the PPAs remain in effect so long as Duquesne Light has a governing Tariff on file with the Commission. (Preliminary Objections, Appendices B (Highly Confidential), C (Highly Confidential), at Section 5.) Specifically, the PPAs provide, in pertinent part, as follows:

Duquesne agrees to purchase, under the terms and conditions of this Agreement and the terms and conditions of Duquesne's tariff, including all applicable rules and regulations thereto, on file with the Pennsylvania Public Utility Commission, or any other jurisdictional authority, as the same may be effective from time to time, [the net electric output from the facility].

(*Id.*) Importantly, this provision does *not* mention a six cents per kilowatt-hour price, does *not* reference Duquesne Light's "avoided costs," and even fails to cite to Rider No. 18. It simply establishes a price for power that may vary "from time to time" according to whatever is provided in Duquesne Light's Commission-approved Tariff. If the parties had wanted to fix the price at six cents per kilowatt-hour, they could have done so in the PPAs. As negotiated power purchase agreements, the parties have clearly anticipated and agreed that the Tariff might be modified in the future in a way that affects the price paid for power.

Second, it also is a fact that, under these PPAs, Duquesne Light retains the ability to "unilaterally" apply to the Commission to terminate or modify the Tariff. Specifically, the PPAs provide, in pertinent part, as follows:

Nothing contained in this Agreement shall be construed as affecting in any way the right of Duquesne to unilaterally make application to the Pennsylvania Public Utility Commission or any other jurisdictional authority either for termination of said tariff or for a change in said tariff, or the rules and regulations relating

thereto, at which Duquesne shall purchase power from [the facility].

(*Id.*) This further demonstrates that the parties expressly agreed that the Tariff can be modified in a way that affects the price paid for power. As explained below, this also has important implications for Duquesne Light's nonjoinder argument.

Duquesne Light seems to suggest that the NRG Companies could only challenge the price provided in Rider No. 18 through a proceeding before the FERC (or at least some other "appropriate forum"). (*See* Preliminary Objections ¶ 43.) This suggestion ignores the fact that the price at issue is contained within a Tariff on file with the Commission. Moreover, as a matter of law, the Commission has specifically considered changes to Rider No. 18 in the past and even has recognized that the price component of Rider No. 18 can be modified, subject to approval by the Commission. *See* 1987 Opinion & Order, p. 4 (stating that a project meeting the requirements of Rider No. 18 "would be entitled, as a matter of law, to the Rider No. 18 rate, *at least until the Commission approves the modification of [Duquesne Light's] tariff*") (emphasis added). Without question, the Commission has the authority to change the Tariff, including Rider No. 18.

In sum, the NRG Companies are simply asking the Commission to review a provision contained in a Commission-approved tariff. This is perfectly within the scope of this proceeding, as the Commission already has directed that all of Duquesne Light's existing rates, rules and regulations are to be considered. Moreover, the provision at issue is one that the Commission has reviewed in the past and has acknowledged can be changed. The NRG Companies are not asserting a cause of action under the PPAs or the Agency Agreement, nor are they requesting that the Commission construe or modify their terms. Nevertheless, it should be noted that these negotiated agreements expressly index the price of power to the Tariff and further provide that

Duquesne Light can apply to the Commission to terminate or change the Tariff. As such, Duquesne Light's preliminary objection alleging misjoinder of a cause of action must be denied.

B. Duquesne Light's Preliminary Objection No. 2: Nonjoinder

Duquesne Light's preliminary objection alleging nonjoinder of all necessary parties is without factual support or legal merit and must be denied. Again, NRG Midwest has *not* alleged *a cause of action under any power purchase or other agreement, nor has NRG Midwest requested that the Commission either construe or modify the terms of any power purchase or other agreement.* Rather, as interested parties, the NRG Companies have filed a valid complaint in this proceeding seeking review of certain Tariff provisions and, as discussed below, are not required to join all other customers or entities that might also have a similar interest in the proceeding.

Duquesne Light asserts that NRG Midwest is not a party to the PPAs and does not have contractual privity with the Facilities. (Preliminary Objections ¶ 34.) That being the case, NRG Midwest would be unable to assert an independent cause of action under the PPAs. By extension, NRG Midwest therefore has no special obligation to join the Facilities in the Complaint. In any case, the Facilities are similarly situated to all the other Duquesne Light customers; all may be impacted by changes to the Tariff. Duquesne Light would not assert that all 588,000 of its customers must be joined in its base rate case. The NRG Companies served the Facilities with the Complaint, thereby giving them notice of a potential change to Rider No. 18. To date, the Facilities have chosen not to participate.

The Commission's proceedings at Docket No. R-860556 are instructive on this point. In that docket, Duquesne Light had proposed a change to Rider No. 18 to phase out the six cent per kilowatt-hour price for future projects. In doing so, Duquesne Light did not join the Facilities, even though the PPAs had been executed at that time. Nor did Duquesne Light join any of 19 other facilities that either had an agreement with Duquesne Light or had been in contact and/or in

negotiations with the utility. 1987 Opinion & Order, pp. 2-3. The Commission did not require that these facilities be joined as indispensable parties. Rather, the Commission merely ordered that Duquesne Light serve those facilities with a copy of its order and its compliance tariff. *Id.* at 6.

In addition, and as previously explained, Duquesne Light retains the right under the PPAs to “unilaterally” apply to the Commission to terminate or modify the Tariff. Thus, by the very terms of the PPA to which they are party, the Facilities have voluntarily limited the scope of their rights with respect to Tariff modifications to the benefit of Duquesne Light. In fact, this provision would appear to allow Duquesne Light, a party that does have contractual privity to the Facilities, to apply to the Commission for a change to Rider No. 18 *without joining the Facilities as necessary parties* provided that proper notice of the tariff change is provided.⁴ There is simply no justification for holding the NRG Companies to a higher standard in this respect than Duquesne Light.

In sum, NRG Midwest and the other NRG Companies have brought a complaint in Duquesne Light’s base rate case requesting, among other things, that the Commission review a provision in Duquesne Light’s Tariff. As with the other complainants in this proceeding, the NRG Companies have direct interests in the Tariff. If the Commission reviews the Tariff and finds that certain provisions are unjust, unreasonable or discriminatory, it may order modifications to the Tariff. While other non-party Duquesne Light customers may be adversely impacted by such modifications, this does not require that complainants, including NRG Midwest and the other NRG Companies, join every such customer to this proceeding. As such,

⁴ To the extent that the Commission is concerned with adequate notice to the Facilities (which it should not be), the Commission could either *sua sponte* join the Facilities to the proceeding or provide relief to the NRG Companies that also would provide the Facilities with subsequent due process (such as the filing of written comments).

Duquesne Light's preliminary objection alleging nonjoinder of all necessary parties must be denied.

C. Duquesne Light's Preliminary Objection No. 3: Legal Insufficiency

Finally, Duquesne Light's preliminary objection alleging the legal insufficiency of the Complaint also is without factual support or legal merit and must be denied. The crux of this preliminary objection is that the Commission is prevented by the Public Utility Regulatory Policies Act ("PURPA") from modifying the price set forth in the PPAs. To reiterate, NRG Midwest has *not* alleged a cause of action under any power purchase or other agreement, nor has NRG Midwest requested that the Commission either construe or modify the terms of any power purchase or other agreement. Quite simply, the NRG Companies have requested that the Commission ensure Tariff Rider No. 18 remains just, reasonable and non-discriminatory.

The Agency Agreement and the PPAs were provided by NRG Midwest to show that it is a party to a certain framework of contracts, the price component of which ultimately is indexed to the Tariff. This establishes its relationship to Duquesne Light and to the Tariff—its direct interest in the proceeding. NRG Midwest has not requested that the Commission modify the terms of the PPAs.

Duquesne Light, by contrast, invites the Commission to look beyond the plain language of the Complaint and conclude that "in essence" NRG Midwest is requesting the PPAs be modified. (Preliminary Objections, ¶¶ 19, 33, 40.) Duquesne Light then argues that the opinion of the U.S. Court of Appeals for the Third Circuit in *Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners*, 44 F.3d 1178 (1995), prevents the Commission from granting such relief. Even if the Commission accepts this premise, Duquesne Light misconstrues the PPAs and misapplies the rule in *Freehold*.

Generally speaking, it is true that in *Freehold* the Third Circuit determined that once a state regulatory commission has approved the terms of a power purchase agreement between a qualifying facility and a utility, it cannot later reconsider that approval. But this rule is applied strictly on a contract-by-contract basis and recognizes that the parties to a power purchase agreement under PURPA are free to negotiate terms that differ from PURPA's requirements and that a qualifying facility may even agree to waive its statutory rights. *Freehold*, 44 F.3d at 1187 (citing 18 C.F.R. § 292.301(b)(1)).

As an initial matter, Duquesne Light has failed to allege that the PPAs were actually approved by the Commission. This would prevent the application of *Freehold* in this case. In addition, the Commission has previously stated that it is not required by federal or state law to approve the terms and conditions of power purchase agreements under PURPA, though it will do so on request or in order to resolve a dispute. *In re Collection of Amounts Paid, for Energy Purchases from Bethlehem Steel Corporation, from PP&L Ratepayers*, Docket No. P-850039 at p. 3 (Order entered June 25, 1985) (attached hereto as **Appendix B**). It would be therefore inappropriate to simply assume that the Commission has approved the PPAs.

In any case, the PPAs do not set a numeric price for power within the four corners of the respective documents. Rather, they simply index the price of power to the Tariff. The Tariff, including Rider No. 18, exists separate and apart from these agreements. Yet, Duquesne Light appears to argue that because the PPAs use the Tariff as an external reference point for the price of power, Rider No. 18 is placed beyond the reach of the Commission. It would be unreasonable to conclude that two power purchase agreements executed over three decades ago can divest the Commission of jurisdiction over a provision in a separate, Commission-approved tariff.

It is more reasonable to conclude, however, that the parties to the PPAs expressly anticipated that the price for power could change over time. The fact remains that the parties to

these agreements specifically and expressly acknowledge and agree that the Tariff may be modified from time to time, and that Duquesne Light may unilaterally request that the Commission approve such modifications. (Preliminary Objections, Appendices B (Highly Confidential), C (Highly Confidential), at Section 5.) A fixed price could have been included in the PPAs, but the parties chose not to do so. As Duquesne Light points out, consistent with *Freehold*, the FERC regulations expressly provide that qualifying facilities and utilities may negotiate rates and terms that differ from what is required under the regulations. 18 C.F.R § 292.301(b)(1).⁵

In sum, the Complaint of NRG Midwest and the other NRG Companies requests that the Commission ensure, among other things, that Rider No. 18 remains just, reasonable and non-discriminatory. While the PPAs may index the price for power to the Tariff, this does not divest the Commission of jurisdiction to consider a Tariff provision of otherwise general applicability to Duquesne Light customers. Duquesne Light's preliminary objection alleging legal insufficiency of the Complaint therefore must be denied.

IV. LIMITATION OF DUQUESNE LIGHT'S REQUESTED RELIEF; NRG MIDWEST AS DISTINGUISHED FROM NRGP

Duquesne Light's Preliminary Objections request that the Commission strike Paragraphs 13-15 and 20 of the Complaint and dismiss NRG Midwest as a complainant. Duquesne Light otherwise agrees that NRGP or REN may continue to participate as parties. (Preliminary

⁵ This provision provides as follows:

(b) *Negotiated rates or terms.* Nothing in this subpart:

(1) Limits the authority of any electric utility or any qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required by this subpart[.]

Objections at p. 6, n.6.) Essentially, Duquesne Light wishes to remove NRG Midwest and the issue of Rider No. 18 from this proceeding.

It is important to recognize, however, that in addition to NRG Midwest, NRGP, as a customer of Duquesne Light and potential developer of alternative energy projects, also has concerns regarding the potential impact to customer-generators of an outdated Rider No. 18. In any case, NRGP maintains an interest in Rider No. 18 distinguished from that of NRG Midwest, and Duquesne Light has not specifically requested that NRGP not be allowed to seek review of Rider No. 18. Should the Commission decide to dismiss NRG Midwest from this proceeding, this does not also require it to prohibit further consideration of Rider No. 18 at the request of the other parties.

V. AMENDMENT OF COMPLAINT

While Duquesne Light does not specifically request in its prayer for relief that the NRG Companies be prevented from amending their Complaint to join the Facilities should the Commission rule in Duquesne Light's favor, it does provide this suggestion in footnote 9 of its Preliminary Objections. In this footnote, Duquesne Light alleges that allowing amendment (1) would unduly prejudice the Facilities and the other parties because the deadline for presenting direct testimony has passed and (2) could not be completed within the nine-month suspension period. Both assertions are readily addressed.

With respect to undue prejudice, the NRG Companies note that the prehearing conference in this matter was held on October 4, 2013, before the window for filing complaints closed on October 31, 2013. As a result of that prehearing conference, the litigation schedule in this proceeding was established, including the deadline for submitting direct testimony. The NRG Companies, for their part, have met all applicable legal deadlines; they filed their Complaint on

October 28, 2013, and further complied with the deadline for submitting direct testimony. As for the Facilities, to the extent the Commission deems them to be indispensable, as well as the other parties to this proceeding, the Presiding Officer may permit the submission of supplemental direct testimony and otherwise modify any other provision of his Prehearing Order on motion and good cause shown by a party in interest. Prehearing Order, p. 11. This would cure any prejudice.

In addition, the Commission is not prevented from holding hearings beyond the suspension period, which only governs how long the effective date of a filed tariff may be postponed. If a final decision in this proceeding is not likely to be issued by May 1, 2014, Duquesne Light may choose either to (1) voluntarily suspend the effective date of Supplement No. 81, or (2) begin to charge the new rates beginning May 1, 2014, subject to any refunds the Commission may order in the event the rates are later found to be unjustified. *See* 66 Pa. C.S. § 1308(d).

While the NRG Companies continue to maintain that joinder of the Facilities is unnecessary, to the extent that they must be joined, no undue prejudice will result that cannot be remedied by the Presiding Officer. With respect to timing, the applicable statutory suspension period in no way operates to prevent a full and fair consideration of all issues raised in this proceeding. Indeed, the NRG Companies have a constitutional due process right to have a fair opportunity to be heard on the issues that they have raised. If deemed necessary, the NRG Companies should be allowed to join the Facilities to its Complaint or the Presiding Officer should do so *sua sponte* in the interest of time.

VI. SPECIFIC ANSWERS TO NUMBERED PARAGRAPHS

1. Admitted.

2. Admitted in part, denied in part. It is admitted that Duquesne Light filed its Supplement No. 81 on August 2, 2013. Supplement No. 81 is a document that speaks for itself. Any interpretation, characterization or quotation thereof is denied. After reasonable investigation, the NRG Companies are without knowledge or information sufficient to form a belief as to the truth of the averment that Duquesne Light's 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 and, therefore, deny the same.

3. Admitted.

4. Admitted. By way of further response, counsel for the NRG Companies (1) spoke to counsel for Duquesne Light on October 25, 2013, and advised that the NRG Companies intended to file a complaint, (2) filed the Complaint on October 28, 2013, and (3) provided counsel for Duquesne Light (and all other parties of record) with a courtesy copy of the Complaint via electronic mail on October 28, 2013.

5. Admitted. By way of further answer, the NRG Companies specifically averred in their prepared direct testimony that they oppose the continuation of Rider No. 18 in its current form.

6. Admitted.

7. Admitted in part, denied in part. It is admitted that Rider No. 18 establishes prices to be paid for electricity generated by certain customer-generators. Rider No. 18 is a document that speaks for itself. The regulations and case cited by Duquesne Light in footnotes 2 and 3 speak for themselves. Any interpretation, characterization or quotation of the foregoing is denied. Duquesne Light's interpretations of these regulations and case are conclusions of law to

which no response is required. To the extent a response is required, the accuracy of the interpretations is denied.⁶

8. Admitted.

9. Admitted in part, denied in part. After reasonable investigation, the NRG Companies are without knowledge or information sufficient to form a belief as to the truth of whether the Beaver Falls Municipal Authority is a “qualifying facility” under PURPA and Rider No. 18 and, therefore, deny the same.

10. Admitted in part, denied in part. It is admitted only that the price currently paid by NRG Midwest for energy from the Facilities is six cents per kilowatt-hour. By way of further response, the price at which net energy is to be purchased is not expressly set at six cents per kilowatt-hour in the PPAs. Rather, per Section 5 of each of the PPAs, purchases of net energy are to be made under the terms and conditions of Duquesne Light’s tariff on file with the Commission, “as the same may be effective from time to time.” In other words, the reference price for power is whatever price is in effect under the current Duquesne Light tariff. Critically, Duquesne Light reserves the right under Section 5 of the PPAs to “unilaterally make application” to the Commission to terminate or change its Tariff.

11. Admitted.

12. Admitted in part, denied in part. The Commission’s decisions and other documents on file at Docket No. R-00974104 speak for themselves. The Agency Agreement speaks for itself. Any interpretation, characterization or quotation of the foregoing is denied. The NRG Companies admit that the Agency Agreement was “accepted for filing” by FERC on

⁶ Duquesne Light’s “phase out” of the PURPA price to new customer-generators in 1987 raises yet another area of factual inquiry in this proceeding. The conditions that justified the continuation of the pre-1987 price may no longer exist. Specifically, the Commission should examine whether the Rider No. 18 price continues to be necessary for the customer-generators, such as the Facilities, to recover their investment costs, or whether Rider No. 18 now provides a windfall to the customer-generators in an unreasonably discriminatory manner. This is a legitimate factual inquiry and, accordingly, Duquesne Light’s preliminary objections should be denied.

March 8, 2001. However, the FERC order accepting the filing expressly states, in pertinent part, that “[t]his action *does not* constitute approval of any service, rate, charge, classification, or any rule, regulation, contract, or practice affecting such rate or service provided for in the filed documents.” Letter to Duquesne Light from Robert J. Cupina, Director, Division of Tariffs and Rates – Central, dated Mar. 8, 2001, FERC Docket No. ER01-1138-000 (emphasis added). As such, the acceptance for filing should not be read to imply the formal approval of FERC.

13. Admitted.

14. Admitted in part, denied in part. The Complaint speaks for itself. Any interpretation, characterization or quotation thereof is denied. By way of further response, the NRG Companies are requesting that the Commission ensure the price set forth in Rider No. 18 is just, reasonable and non-discriminatory. Whether a modification to the six cent per kilowatt-hour price is warranted is to be determined by the Commission.

15. The averments in Paragraph 15 are conclusions of law to which no response is required. To the extent a response is required, the averments are denied.

16. The averments in Paragraph 16 are conclusions of law to which no response is required. The regulations cited speak for themselves. Any interpretation, characterization or quotation thereof is denied.

17. The averments in Paragraph 17 are conclusions of law to which no response is required. The cases cited speak for themselves. Any interpretation, characterization or quotation thereof is denied.

18. Paragraph 18 merely incorporates prior paragraphs to which the NRG Companies already have responded; therefore, a response is not required.

19. Admitted in part, denied in part. The Complaint and testimony filed by the NRG Companies speak for themselves. Any interpretation, characterization or quotation thereof is

denied. Paragraph 19 contains conclusions of law to which no response is required. By way of further response, Duquesne Light mischaracterizes the relief requested. The NRG Companies have not asked the Commission to modify the PPAs. Rather, the NRG Companies are simply asking the Commission to ensure Rider No. 18 is just, reasonable and non-discriminatory. By way of further response, all aspects of Duquesne Light's Tariff may be considered in the course of this proceeding. *See Initial Order, at Ordering ¶ 4.*

20. Admitted in part, denied in part. Paragraph 20 contains conclusions of law to which no response is required. The Agency Agreement and PPAs speak for themselves. Any interpretation, characterization or quotation thereof is denied. As previously indicated, FERC *only accepted the Agency Agreement for filing.*

21. Admitted.

22. Denied. The Commission has directed that the instant proceeding "shall include consideration of the lawfulness, justness, and reasonableness of [Duquesne Light's] existing rates, rules, and regulations." Initial Order, at Ordering ¶ 4.

23. The averments in Paragraph 23 are conclusions of law to which no response is required. To the extent a response is required, the averments are denied.

24. The averments in Paragraph 24 are conclusions of law to which no response is required. To the extent a response is required, the averments are denied. The NRG Companies note Duquesne Light's assertion that there is "significant uncertainty as to the appropriate forum for NRG Midwest's request for relief and the novel and complex issues raised by NRG Midwest." This acknowledgement, in and of itself, suggests that there are disputed legal and factual issues and, accordingly, the standard for granting preliminary objections has not been met. The NRG Companies are entitled to an opportunity to be heard.

25. The averments in Paragraph 25 are conclusions of law to which no response is required. The case cited speaks for itself. To the extent a response is required, the averments are denied. By way of further response, Duquesne Light has not specifically averred that the PPAs have been approved by the Commission. Nevertheless, the NRG Companies are not requesting that the Commission modify the PPAs, but that the Commission ensure the price set forth in Rider No. 18 is just, reasonable and non-discriminatory. Duquesne Light appears to have admitted this at Paragraph 6 of the Preliminary Objections.

26. Denied. The Agency Agreement and the PPAs speak for themselves. Any interpretation, characterization or quotation thereof is denied. As previously indicated, FERC only accepted the Agency Agreement for filing. By way of further response, whether the Commission has jurisdiction over wholesale sales of power is not relevant. The Commission has jurisdiction to consider whether the price set forth in Rider No. 18 is just, reasonable and non-discriminatory.

27. The averments in Paragraph 27 are conclusions of law to which no response is required. To the extent a response is required, the averments are denied. By way of further response, uncertainty regarding the scope and applicability of the Commission's regulations is not a valid reason to grant preliminary objections. The "substantial uncertainty" resulting from the unanticipated emergence of a competitive electric market in Pennsylvania supports a re-examination of Rider No. 18 by the Commission. Duquesne Light has an obligation to ensure that all provisions of its Tariff are compliant with the current state of regulation. It has not done so with regard to Rider No. 18. Legal, factual, and policy issues need to be examined and, accordingly, Duquesne Light's Preliminary Objections should be denied.

28. The averments in Paragraph 28 are conclusions of law to which no response is required. To the extent a response is required, the averments are denied. The alleged uncertainty

surrounding Rider No. 18 in a post-restructuring, post-Act 129 regulatory environment suggests that the NRG Companies have raised legitimate legal, factual, and policy issues and, accordingly, Duquesne Light's Preliminary Objections should be denied. By way of further response, Duquesne Light is trying to cloud an otherwise straightforward question: whether Rider No. 18 is just, reasonable and non-discriminatory. Whether an issue is difficult or novel is not a valid reason to disregard the concerns of the NRG Companies regarding the potential impact of Rider No. 18 on Pennsylvania's competitive generation market. Likewise, it is not a basis to deny the NRG Companies' constitutional due process rights.⁷ Finally, there is no requirement that this proceeding be concluded within the nine-month suspension period. If necessary, Duquesne Light could voluntarily extend the suspension period or put rates into effect subject to refund. *See* 66 Pa. C.S. § 1308(d).

29. *The averments in Paragraph 29 are conclusions of law to which no response is required. To the extent a response is required, the averments are denied. The failure of Duquesne Light's management to re-examine and update Rider No. 18 is a valid consideration in setting an allowed return on equity in this base rate proceeding.*

30. *The averments in Paragraph 30 are conclusions of law to which no response is required. To the extent a response is required, the averments are denied. By way of further response, the NRG Companies are not bringing suit under the PPAs or seeking to modify their terms. The NRG Companies are asking the Commission, consistent with its jurisdiction over public utility tariffs, to ensure Rider No. 18 is just, reasonable and non-discriminatory. The*

⁷ Duquesne Light makes much of the fact that "formal" service of the Complaint was made one day prior to the deadline for submitting direct testimony. As noted at Paragraph 4 above, counsel for Duquesne Light was made aware of the NRG Companies' intent to file a complaint on October 25, 2013, and were served with an electronic copy of the Complaint on October 28, 2013. The NRG Companies filed their Complaint within the time allowed under the Commission's regulations, and their issues are no less deserving of due process. In any case, the NRG Companies did not participate in establishing the litigation schedule in this case. Nevertheless, they adhered to the established procedural schedule in serving prepared direct testimony so as to not adversely affect the timely consideration of the case.

Commission is, in fact, the appropriate forum to address a Commission-approved tariff, which, if left unchanged, will continue to have the force and effect of law.

31. The averments in Paragraph 31 are conclusions of law to which no response is required. To the extent a response is required, the averments are denied. As explained above, Rider No. 18 is properly considered in the context of this base rate proceeding and the failure of Duquesne Light's management to update it should be taken into consideration in setting an allowed return on equity.

32. Paragraph 32 merely incorporates prior paragraphs to which the NRG Companies already have responded; therefore, a response is not required.

33. Admitted in part, denied in part. The Complaint speaks for itself. Any interpretation, characterization or quotation thereof is denied. Paragraph 33 contains conclusions of law to which no response is required. By way of further response, Duquesne Light mischaracterizes the relief requested. The NRG Companies have not asked the Commission to modify the PPAs. Rather, the NRG Companies are simply asking the Commission to ensure Rider No. 18 is just, reasonable and non-discriminatory.

34. Admitted in part, denied in part. It is admitted only that the PPAs are not agreements by and between Duquesne Light and NRG Midwest. The Agency Agreement and the PPAs speak for themselves. Any interpretation, characterization or quotation thereof is denied. By way of further response, the NRG Companies are not bringing suit under the PPAs. They are challenging a Commission-approved tariff provision.⁸

⁸ Duquesne Light appears to be attempting to trap NRG Midwest in a "Catch-22." On the one hand, Duquesne Light argues that NRG Midwest lacks contractual privity with the Facilities. On the other hand, Duquesne Light argues that NRG Midwest cannot address Rider No. 18 with the Commission. Under Duquesne Light's theory, NRG Midwest would be stuck with the unfair price in perpetuity—a result that is clearly unjust. Duquesne Light chose to place the price in a tariff provision. It should now be bound by the legal processes allowed by the Pennsylvania Public Utility Code for challenges to tariff provisions.

35. The averments in Paragraph 35 are conclusions of law to which no response is required. The cases cited speak for themselves. To the extent a response is required, the averments are denied. By way of further response, the NRG Companies are asking the Commission to ensure Rider No. 18 is just, reasonable and non-discriminatory. Whether a modification is warranted is to be determined by the Commission. Duquesne Light argues that any modification of Rider No. 18 would directly affect the interests of the Facilities that are parties to the PPAs, reasoning that they are therefore indispensable parties. But this reasoning is flawed. The Facilities are no more “necessary” or “indispensable” than any other non-party that may have an interest in Rider No. 18. Moreover, the Commission has not previously required that all potentially affected facilities be joined as necessary parties to proceedings related to Rider No. 18. *See generally* 1987 Opinion & Order.

36. Admitted in part, denied in part. The averments in Paragraph 36 contain conclusions of law to which no response is required. It is admitted that the Facilities were not included as parties to the Complaint. By way of further response, the NRG Companies are not seeking modifications to the PPAs to which the Facilities are parties. This is not a narrow contract dispute between defined parties, but a regulatory proceeding regarding changes to a filed tariff of which the affected public has been provided notice. The requirements of due process depend in part on the nature of a case. *In re Upset Sale, Tax Claim Bureau of Berks County*, 505 Pa. 327, 333, 479 A.2d 940, 943 (1984). “In the administrative field the desiderata are notice and opportunity to be heard.” *See Fiore v. Bd. of Fin. & Revenue*, 534 Pa. 511, 517, 633 A.2d 1111, 1114 (1993) (citing *Conestoga Nat’l Bank v. Patterson*, 442 Pa. 289, 294-95, 275 A.2d 6, 8-9 (1971)). The NRG Companies put the Facilities on notice of the possible revision of Rider No. 18 when the Facilities were served with a copy of the NRG Companies’ Complaint. Such notice is adequate in the context of this proceeding, as it has been deemed adequate in past

proceedings related to Rider No. 18. *See generally* 1987 Opinion & Order. The Facilities could petition to intervene in this proceeding if they had any interest. To date, they have not done so.

37. The averments in Paragraph 37 are conclusions of law to which no response is required. The case cited speaks for itself. Any interpretation, characterization or quotation thereof is denied. By way of further response, the NRG Companies are not required to join the Facilities. In any case, it is within the discretion of the Commission to determine procedural questions regarding the addition or intervention of parties to an administrative proceeding, subject to the basic requirements of due process. *See Pittsburgh v. Pa. Pub. Util. Comm'n*, 153 Pa. Super. 83, 86, 87, 33 A.2d 641 (1943). By way of further response, the suggestion in footnote 9 to Duquesne Light's Preliminary Objections that the NRG Companies should not be allowed to amend the Complaint because it might prejudice the Facilities or the parties is without merit. As previously noted, the NRG Companies filed the Complaint within the time allowed under the Commission's rules. The Presiding Officer may allow the submission of supplemental direct testimony on motion and good cause shown by a party in interest. Prehearing Order, p. 11. Also, the Presiding Officer could join the Facilities *sua sponte* in order to avoid delay or the Commission could simply allow for additional process (such as written comments) following a formal order in this proceeding.⁹ These measures would cure any potential prejudice.

38. The averments in Paragraph 38 are conclusions of law to which no response is required. To the extent a response is required, the averments are denied.

39. Paragraph 39 merely incorporates prior paragraphs to which the NRG Companies already have responded; therefore, a response is not required.

40. Admitted in part, denied in part. The Complaint speaks for itself. Any interpretation, characterization or quotation thereof is denied. Paragraph 40 contains conclusions

⁹ Alternatively, the Commission could direct as relief in this dispute that Duquesne Light make a subsequent tariff supplement filing to eliminate or modify Rider No. 18, to which filing interested parties could respond.

of law to which no response is required. By way of further response, Duquesne Light mischaracterizes the relief requested. The NRG Companies have not asked the Commission to modify the PPAs. Rather, the NRG Companies are simply asking the Commission to ensure Rider No. 18 is just, reasonable and non-discriminatory—a matter clearly within the Commission’s jurisdiction.

41. The averments in Paragraph 41 are conclusions of law to which no response is required. The authorities cited speak for themselves. To the extent a response is required, the averments are denied.

42. The averments in Paragraph 42 are conclusions of law to which no response is required. The case cited speaks for itself. To the extent a response is required, the averments are denied. By way of further response, *Freehold Cogeneration Assocs., L.P. v. Bd. of Regulatory Comm’rs*, 44 F.3d 1178 (3d Cir. 1995), stands for the much narrower proposition that a state regulatory authority cannot unilaterally revisit specific PURPA power purchase agreements that it has approved. *Freehold* does nothing to change the fact that the FERC regulations expressly provide that qualifying facilities and utilities may negotiate rates and terms that differ from what is required under the regulations. 18 C.F.R § 292.301(b)(1). Nevertheless, the NRG Companies are not proposing that the PPAs be revisited. The actual terms of the PPAs would remain unchanged should the Commission revise Rider No. 18. Moreover, Duquesne Light has not alleged that the PPAs were actually approved by the Commission, so *Freehold* is inapplicable.

43. The averments in Paragraph 43 are conclusions of law to which no response is required. The case cited speaks for itself. To the extent a response is required, the averments are denied. By way of further response, the NRG Companies have not requested that the Commission modify the PPAs. Because it is a provision contained in a Commission-approved tariff, it is clear that the Commission is the appropriate forum to address Rider No. 18. In fact,

the Commission has considered proposed changes to Rider No. 18 in the past and recognized that the price component of Rider No. 18 can be modified. *See* 1987 Opinion & Order 4 (stating that a project meeting the requirements of Rider No. 18 “would be entitled, as a matter of law, to the Rider No. 18 rate, *at least until the Commission approves the modification of [Duquesne Light’s] tariff.*”) (emphasis added).

44. The averments in Paragraph 44 contain conclusions of law to which no response is required. The case cited speaks for itself. To the extent a response is required, the averments are denied. After reasonable investigation, the NRG Companies are without knowledge or information sufficient to form a belief as to the truth of the averments regarding the purpose of Rider No. 18. However, the averment that Rider No. 18 was adopted specifically to establish Duquesne Light’s “avoided cost rate” appears to conflict with the Commission’s comments in 1987 upon considering proposed changes to Rider No. 18: “[W]e have not examined Duquesne’s avoided cost filings for compliance with our regulations and can make no determination regarding the accuracy of rates set forth in those filings. Accordingly, it would not be acceptable to accord the avoided cost filings the force and effect of law by virtue of inclusion in the Company’s tariff.” 1987 Opinion & Order at 7. By way of further response, the PPAs do not expressly establish a numeric price for power, but generally reference to the Tariff as it may be in effect “from time to time.” Moreover, Duquesne Light retains the right under the PPAs to “unilaterally” apply to the Commission to terminate or modify the Tariff. In light of these provisions, the parties appear to have anticipated that the price for power as set in the Tariff may change, and that Duquesne Light may request such a change from the Commission. This makes sense when considering that the PPAs are “evergreen,” meaning that that they do not have an established termination date. Rather, they are set to terminate once Duquesne Light no longer

has an applicable tariff provision and/or is no longer compelled by law to purchase power from the Facilities.

45. The averments in Paragraph 45 are conclusions of law to which no response is required. To the extent a response is required, the averments are denied. By way of further response, *Duquesne Light does not appear to have changed or otherwise reconsidered the price for power under Rider No. 18 to its Tariff for over three decades. This failure is all the more acute in light of the emergence of a competitive generation market in Pennsylvania. The failure of Duquesne Light to update Rider No. 18 in the response to dramatic changes in the regulatory environment suggests that Rider No. 18 is unjust and unreasonable.*

46. Paragraph 46 merely incorporates prior paragraphs to which the NRG Companies already have responded; therefore, a response is not required.

47. The averments in Paragraph 47 are conclusions of law to which no response is required. To the extent a response is required, the averments are denied. By way of further response, the NRG Companies have simply requested that the Commission ensure that Rider No. 18 is just, reasonable and non-discriminatory. The Commission has the authority under the Pennsylvania Public Utility Code and the PPAs to do so. The NRG Companies are not requesting the termination or modification of the PPAs.

48. The averments in Paragraph 48 are conclusions of law to which no response is required. To the extent a response is required, the averments are denied.

49. The averments in Paragraph 49 are conclusions of law to which no response is required. To the extent a response is required, the averments are denied.

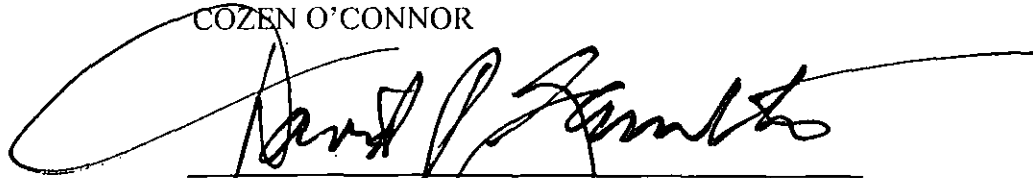
50. The averments in Paragraph 50 are conclusions of law to which no response is required. To the extent a response is required, the averments are denied.

51. Admitted in part, denied in part. It is admitted only that NRG Midwest is not a customer of Duquesne Light. The averments in Paragraph 51 contain conclusions of law to which no response is required. To the extent a response is required, the averments are denied.

WHEREFORE, for the foregoing reasons, and because Duquesne Light Company cannot establish with legal certainty that NRG Power Midwest LP and the other NRG Companies may not seek review of Rider No. 18 to the Tariff, the Preliminary Objections must be denied in their entirety.

Respectfully submitted,

COZEN O'CONNOR



David P. Zambito, Esquire (ID No. 80017)

Joshua L. Belcher (ID No. 313129)

Cozen O'Connor

305 North Front Street, Suite 400

Harrisburg, PA 17101

Tel: (717) 703-5892

Fax: (215) 989-4216

Email: dzambito@cozen.com

jbelcher@cozen.com

Counsel for NRG Power Midwest LP,

NRG Energy Center Pittsburgh LLC, and

Reliant Energy Northeast LLC

DATED: November 22, 2013

RECEIVED
2013 NOV 22 PM 4: 27
PA PSC
SECRETARY'S BUREAU

APPENDIX A

RECEIVED

2013 NOV 22 PM 4: 26

PA P
SECRETARY'S BUREAU

C

Pennsylvania Public Utility Commission, et al.
v.
Duquesne Light Company
R-860556, R-860556C001

Pennsylvania Public Utility Commission
July 16, 1987; entered July 20, 1987

ORDER rejecting proposed tariff supplement.

P.U.R. Headnote and Classification

1.

COGENERATION

s24 - Rates - Availability of current tariff - Reliance upon tariff for project development.

Pa.P.U.C. 1987

An electric utility's proposed tariff supplement, that would limit the availability of its current tariff rider for the purchase of electric energy from qualifying small power production facilities that use renewable resources, was rejected, because certain projects in the development stage had relied upon availability of the current tariff rider, and had expended substantial sums toward project development.

Pennsylvania Public Utility Commission, et al. v
Duquesne Light Company

P.U.R. Headnote and Classification

2.

COGENERATION

s24 - Rates - Determination of appropriate tariff - Negotiations - Grandfather clause.

Pa.P.U.C. 1987

In order to allow a developer of a qualifying small power production facility (QF) that has a contract for the sale of electric energy with an electric utility, but that has not yet commenced construction, a "window" during which it could determine whether

or not to proceed with a project, the commission allowed the utility the option to file a revised tariff supplement to limit the availability of the current tariff rider for the purchase of electric energy from a QF, that contained provisions for the grandfathering of facilities that: (1) are subject to a contract dated prior to the effective date of the revised tariff supplement and are supplying electric energy, or have commenced construction of facilities to supply electric energy within sixty days of the effective date of the revised tariff; (2) are currently supplying electric energy to the utility under the terms of the current rider, but that are not subject to an executed contract; and (3) are negotiating with the utility for a contract based upon the current rider.

Pennsylvania Public Utility Commission, et al. v
Duquesne Light Company

P.U.R. Headnote and Classification

3.

COGENERATION

s17 - Contracts - Grandfather clause - Serious negotiations.

Pa.P.U.C. 1987

Because the commission will only accept the grandfathering of projects that have been "seriously negotiating" with an electric utility for a contract based upon the current tariff rider for the purchase of electric energy from qualifying small power production facilities, it stated that some indicia of serious negotiations would include the following: (1) evidence of Federal Energy Regulatory Commission certification granting qualifying status to the facility; (2) a statement of project definition including preliminary project design; (3) letter of intent or similar evidence of host site control; (4) evidence of adequate fuel supply consistent with anticipated project life and energy production; (5) a plan for obtaining all necessary project licensing; and (6) preliminary evidence of financial feasibility of project and a preliminary financing plan. p. 391.

Appendix A

Commissioners Present:

Pennsylvania Public Utility Commission, et al. v
Duquesne Light Company

Bill Shane, Chairman
Linda C. Taliaferro
Frank Fischl
William H. Smith

By the COMMISSION:

OPINION AND ORDER

On December 12, 1986 Duquesne Light Company ("Duquesne") filed Supplement No. 34 to Duquesne Light Company Tariff Pa.P.U.C. No. 15 ("Supplement No. 34"). By this filing, Duquesne proposed to limit the availability of its current Rider No. 18, Rate for Purchase of Electric Energy from Customer-Owned Renewable Resources Generating Facilities, to those facilities that had a contract with Duquesne dated prior to February 10, 1987, the effective date of Supplement No. 34, and that were supplying energy or constructing facilities to supply energy to the Company. By Order adopted January 22, 1987, entered January 28, 1987, we suspended Duquesne's filing to August 10, 1987 or until further Order of the Commission pursuant to 66 Pa. C.S. §1308(b). On January 29, 1987 LTV Steel Company, Inc. ("LTV") filed a Complaint against Duquesne regarding Supplement No. 34. On February 9, 1987 the Office of Consumer Advocate ("OCA") filed a Notice of Intervention in the proceeding.

Rider No. 18, which has continued in effect during the suspension period, requires Duquesne to purchase electric energy from qualifying small power production facilities ^{FN1} at a rate of six cents (.06) per kwh ^{FN2} if the facility is located in Duquesne's service territory and uses "renewable resources such as small scale hydro facilities of 30 megawatts or less, biomass, waste, solar or wind." Supplement No. 17 to Electric Pa.P.U.C. No. 15, Third Revised Page No. 53. The original purpose of Rider No. 18

was to encourage the development of facilities utilizing renewable resources for generating electricity.

According to Duquesne's cover letter dated December 12, 1986 accompanying Supplement No. 34, since 1981 the Company has lost approximately 400 megawatts of its industrial load, and expects to have sufficient capacity through the year 2000 following the completion of the remaining nuclear capacity under construction. Duquesne avers that the six cent rate exceeds its current avoided costs and that by reducing this rate it hopes to save its customers "millions of dollars over the next five to ten years by avoiding excessive payments for unneeded power."

Duquesne acknowledges that "certain entities with qualifying facilities under construction might be affected by this change in rates if a purchase contract is not signed prior to the effective date of Supplement No. 34." Duquesne proposed to meet with these entities to discuss their current situation and the purchase of power. Due to our concern that developers that have relied upon the availability of Rider No. 18 be treated equitably, we suspended Supplement No. 34 for six (6) months to August 10, 1987 or until further Order of the Commission.

On February 19, 1987 the Commission's Law Bureau served a set of data requests upon Duquesne in an effort to determine what proposed projects, if any, should be grandfathered under Rider No. 18. Under cover of letter dated March 23, 1987 Duquesne submitted its responses to the Law Bureau's data requests. We will direct the Law Bureau to file the responses to the data requests with the Secretary so that the record on this proceeding will be more complete. Because portions of this information were photocopies of items that developers provided to Duquesne on a confidential basis, our Order of today's date will include standard ordering paragraphs designed to protect the confidentiality of this information.

Duquesne's responses identify four (4) small projects totaling approximately 1.8 MW that are

on-line and that qualify for Rider No. 18.^{FN3} One project of 5 MW qualifying under Rider No. 18 is the subject of an executed contract and is under construction.^{FN4} One other 10 MW project qualifying for Rider No. 18 is the subject of an executed power purchase agreement.^{FN5}

Duquesne further identified approximately sixteen (16) additional projects that have been the subject of contact and/or negotiations between Duquesne and the projects' developers. Of these projects, Duquesne considers four (4) to be active.^{FN6} Duquesne avers that the remaining projects "have been cancelled or do not qualify as small power producers, or the projects are considered to be inactive because we have received no contact during the last year." Data Response No. 6(a) and 6(b). There appear to be seven or eight projects classified as "inactive" that may qualify for Rider No. 18.

DISCUSSION

[1] The instant proceeding requires us to consider the interests of qualifying facilities that have relied upon the availability of Rider No. 18. In the absence of Rider No. 18, Duquesne would be obligated to pay rates to new projects based on energy-only credits in accordance with our regulations implementing PURPA at 52 Pa. Code §§57.31 et seq.^{FN7} With the drop in Duquesne's load and the recent and imminent addition of capacity from Perry I and Beaver Valley II, it appears that Duquesne would not be obligated to pay capacity credits to new qualifying facilities, and that \$.06 per kwh may be higher than the rate otherwise required by our regulations at 52 Pa. Code §§ 57.31 et seq. However, tariffs have the force and effect of law, *Brockway Glass Co., Inc. v. Pennsylvania Pub. Utility Commission*, 63 Pa.Cmwlth. 238, 437 A.2d 1067 (1982), *Stiteler v. Bell Teleph. Co. of Pennsylvania*, 32 Pa.Cmwlth. 319, 379 A.2d 339 (1977). Therefore, any project that met the requirements of Rider No. 18 would be entitled, as a matter of law, to the Rider No. 18 rate, at least until such time as the Commission approves the modifi-

ation of the Company's tariff. Because it appears that certain project(s) in the development stage reasonably may have relied upon the availability of Rider No. 18, and have expended substantial sums toward the project(s)' development, we conclude that Duquesne's Supplement No. 34 in its present form should be rejected. As stated above, Supplement No. 34 proposes to grandfather only those projects that are subject to a "contract dated prior to February 10, 1987, and are supplying energy, or constructing facilities to supply electric energy, to the Company..." Utilizing the information supplied by Duquesne in response to the Law Bureau's data requests it appears that only four (4) projects meet these dual requirements.^{FN8} These projects represent approximately 6.8 MW.

[2] Although we reject Duquesne's Supplement No. 34 in its present form, we are in basic agreement with the proposal to curtail the availability of the Rider No. 18 rate. Therefore, we will give Duquesne the option to file a revised tariff supplement, to be effective on five days' notice, which would grandfather the following classes of projects.

First, we would accept grandfathering of facilities that: a) are subject to a contract dated prior to the effective date of the revised tariff supplement, and b) are supplying electric energy, or have commenced construction of facilities to supply electric energy within 60 days of the effective date of the revised tariff. This is similar, though not identical, to Duquesne's original proposal. It would allow a developer of a facility that has a contract with Duquesne but that has not commenced construction a "window" during which it could determine whether or not to proceed with its project.^{FN9}

Secondly, we would accept grandfathering of facilities that currently are supplying electric energy to Duquesne under the terms of Rider No. 18, but that are not subject to an executed contract. We believe that the exclusion of this category of project by Supplement No. 34 may have been inadvertent.^{FN10}

[3] Finally, we would accept grandfathering of projects that have been negotiating with Duquesne for a contract based on Rider No. 18. By the term negotiating, we mean more than a casual inquiry by a developer and more than several intermittent contacts between Duquesne and a project developer. In short, we would require that a project must have been the subject of serious negotiations in order to be entitled to grandfathered status under any revised tariff supplement. Although "serious negotiations" is a term that cannot be defined with any degree of precision, some indicia of serious negotiations would include the following: 1) evidence of FERC certification granting qualifying status to the facility; 2) a statement of project definition including preliminary project design; 3) letter of intent or similar evidence of host site control; 4) evidence of adequate fuel supply consistent with anticipated project life and energy production; 5) a plan for obtaining all necessary project licensing; and 6) preliminary evidence of financial feasibility of project and a preliminary financing plan. This list is not meant to be strictly construed. Evidence of a project's making substantial progress toward meeting the enumerated criteria could be construed as evidence of "serious negotiations".

Based on the information provided by Duquesne, we are able to identify one project, the Mazzaro Landfill Project, which meets the definition of having been subject to "serious negotiations". We would therefore urge Duquesne to execute a contract with the developers of the Mazzaro Landfill Project based upon Rider No. 18 as soon as practicable, since the developers of this project have been prepared to commence construction for several months. With the exception of the Mazzaro Landfill Project, we are unable to determine what projects, if any, should be grandfathered. Certainly, we cannot adjudicate any potential projects' rights without providing notice and an opportunity to be heard. Therefore, if Duquesne exercises its option to file a revised tariff supplement in accordance with this order, we will require Duquesne to serve a copy of this Order and its revised tariff filing upon all de-

velopers identified in its responses to the Law Bureau's data requests that potentially would qualify under Rider No. 18, as well as any such projects that inadvertently were omitted in Duquesne's responses. In the event that any developer feels it has conducted serious negotiations with Duquesne and is unable to reach agreement with Duquesne on this issue, we would require such a developer to initiate a formal proceeding at the Commission within ninety (90) days of the effective date of the revised tariff supplement to preserve its right to grandfathered status, and would place the burden of proof in any such proceeding upon the project developer.

Our rejection of Duquesne's Supplement No. 34 in its present form renders the Complaint filed by LTV and the Notice of Intervention filed by OCA moot.^{FN11} However, if Duquesne exercises its option to file a revised tariff supplement in accordance with the provisions of this Order, OCA and/or LTV will have the opportunity to file a complaint at that time. We would require Duquesne to retain the burden of proof with respect to any complaints filed within sixty (60) days following the filing of its revised tariff supplement.

As a final matter, we would require any tariff supplement filed by Duquesne in accordance with this Order to revise the language at lines 5-9 of Supplement No. 34 as follows: "For facilities [with contracts dated after the effective date of Supplement No. 34] that do not qualify under the provisions of this Rider, the electric energy will be purchased at a rate based on the Company's avoided costs [as set forth in the Company's current filing pursuant to 52 Pa. Code Section 57.33] as calculated in accordance with the applicable Pa.P.U.C. regulations". As stated above, we have not examined Duquesne's avoided cost filings for compliance with our regulations and can make no determination regarding the accuracy of rates set forth in those filings. Accordingly, it would not be acceptable to accord the avoided cost filings the force and effect of law by virtue of inclusion in the Company's tariff; THEREFORE,

IT IS ORDERED:

1. That Duquesne Light Company's Supplement No. 34 to Tariff No. 15 is rejected as not in the public interest.
2. That Duquesne Light Company may file a revised tariff supplement in accordance with the provisions of this Order within thirty (30) days of the entry date of this Order.
3. That if Duquesne Light Company files a revised tariff supplement in accordance with Ordering Paragraph No. 2, such tariff supplement shall be allowed to become effective upon five (5) days' notice, the investigation shall be terminated, and the case marked closed.
4. That if Duquesne Light Company files a revised tariff supplement in accordance with Ordering Paragraph No. 2, it at that time shall serve a copy of this Order and a copy of the revised tariff supplement upon all project developers that have contacted it regarding the availability of Rider No. 18.
5. That if Duquesne Light Company files a revised tariff supplement in accordance with Ordering Paragraph No. 2, it shall retain the burden of proof with respect to any complaints filed regarding the revised tariff supplement within sixty (60) days following the date of filing.
6. That if Duquesne Light Company files a revised tariff supplement in accordance with Ordering Paragraph No. 2, a project developer unable to reach agreement with Duquesne on the issue of grandfathered status must file a formal complaint with the Commission within ninety (90) days of the effective date of the revised tariff supplement in order to preserve its right, if any, to grandfathered status. The project developer shall have the burden of proof in any such proceeding.
7. That the Law Bureau shall file the Data Responses of Duquesne Light Company submitted under cover of letter dated March 23, 1987 with the Secretary, subject to the following provisions:

a. A protective order is hereby issued with respect to all materials identified in subparagraph (b). All persons now and hereafter granted access to the information identified in subparagraph (b) shall use and disclose such information only in accordance with this Order. A copy of this Order shall be filed with the materials identified in subparagraph (b).

b. That the Confidential Information subject to this Order are the attachments pertaining the Mazzaro Landfill Project, the Econeco-Montgomery Dam Project, the Econeco-Emsworth Dam Project, and the Chambers Development Project.

c. That all Confidential Information shall be made available to the Commission and its staff and to the Office of Consumer Advocate for use in this and related proceedings and for all internal Commission analysis, studies, or investigations. For purposes of this proceeding, to the extent that Confidential Information is placed in the Commission's report folders, such information shall be handled in accordance with routine Commission procedures inasmuch as the report folders are not subject to public disclosure. To the extent that Confidential Information is placed in the Commission's testimony or document folders, such information shall be separately bound, conspicuously marked and accompanied by a copy of this order. Public inspection of the Confidential Information shall be permitted only in accordance with this Protective Order.

d. That Confidential Information shall be made available, upon request, to counsel for parties of record in this proceeding. Such counsel shall use or disclose the Confidential Information only for purposes for preparing or presenting evidence, cross-examination or argument in this proceeding. To the extent required for participation in this proceeding, a party's counsel may afford access to the Confidential Information to the party's expert(s). No other persons may have access to the Confidential Information except as authorized by further order of this Commission or the presiding Administrative Law Judge and after appropriate notice to Duquesne Light Company and the applicable de-

velopers giving them the opportunity to respond.

e. That prior to making Confidential Information available to an expert as provided by subparagraph (d), counsel for a party of record shall deliver a copy of this Order to such expert and shall receive a written acknowledgment from the expert in the form attached to this Order and designated as Appendix A. The party furnishing Confidential Information shall be notified promptly of the identity of all persons providing access to such Confidential Information pursuant to this subparagraph and subparagraph (d).

f. That any federal agency which has access to and/or receives copies of the Confidential Information will consider and treat the Confidential Information as within the exemption from disclosure provided in the Freedom of Information Act as set forth at 5 U.S.C. Section 552(b)(4) until such time as the information is found to be nonconfidential.

g. That any state agency which has access to and/or receives copies of the Confidential Information will consider and treat the Confidential Information as within the exemptions from disclosure provided in the Pennsylvania "Right-to-Know" Act as set forth at 65 P.S. Section 66.1(2) until such time as the information is found to be nonconfidential.

h. That any public reference to Confidential Information by the Commission or by counsel or persons afforded access thereto shall be to the title and exhibit reference in sufficient detail to permit persons with access to the Confidential Information to fully understand the reference and not more. The Confidential Information shall remain a part of the record to the extent admitted for all purposes of administrative or judicial review.

i. That part of any record of this proceeding containing Confidential Information, including but not limited to, all exhibits, writings, direct testimony, crossexamination, argument, responses to discovery requests, briefs and including reference thereto as mentioned in ordering subparagraph (h) above shall

be sealed for all purposes, including administrative and judicial review unless such Confidential Information is released from the restrictions of this Order either through the agreement of the parties or pursuant to an order of the Administrative Law Judge or the Commission.

j. That the parties affected by the terms of this Protective Order shall retain the right to (a) question or challenge the confidential nature of the Confidential Information, or the admissibility of Confidential Information into the record in this proceeding; (b) refuse or object to the production or admission of Confidential Information; and (c) seek additional measures of protection of the Confidential Information beyond those provided in this Order.

8. That a copy of this Order be served upon Duquesne Light Company, the Office of Consumer Advocate, LTV Steel Company, Inc., O'Brien Energy Systems and Manus Corporation.

Appendix A

ACKNOWLEDGMENT OF PROTECTIVE ORDER

TO WHOM IT MAY CONCERN:

The undersigned, an expert, witness, consultant or employee of the undersigned employer, has read and understands the Protective Order entered under date of July 20, 1987 in this proceeding docketed as above, which Order deals with the treatment of Confidential Information. The undersigned agrees to be bound by and to comply with the terms and conditions of said Order.

Dated:

Name

Address

Employer

FN1 Pursuant to the provisions of Sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. §796(17) through (22) and 16 U.S.C. 824a-3.

FN2 Or a rate based on avoided incremental operating and capacity costs when such rate exceeds six cents per kwh.

FN3 Beaver Valley Power Co. (Patterson Dam) and three windmills.

FN4 Beaver Falls Municipal Authority (Townsend Dam).

FN5 Wildwood Power Station. Duquesne avers that, to the best of its knowledge, this project has been abandoned.

FN6 O'Brien Energy Corp. (Mazzaro Landfill); Econeco (Emsworth Dam); Econeco (Montgomery Dam); and Chambers Development (Monroeville).

FN7 Pursuant to 52 Pa. Code §57.34(b), energy credits are to be equal to the utility's highest cost source of energy. When based upon the utility's own generation, the credits are to include costs of fuel, variable operations and maintenance expenses, and any other costs associated with that generation. At the option of the qualifying facility, energy credits are to be based on actual, projected, or levelized projected costs. Projections of avoided energy costs are not required beyond a ten (10) year period. Duquesne avers, in the cover letter accompanying Supplement No. 34, that its current avoided costs are "about two (2) cents per kilowatt-hour." We have not examined the accuracy of Duquesne's calculations

and express no opinion thereon.

FN8 Grieco Windmill, Holloway Windmill, Beaver Valley Power Co., and Beaver Falls Municipal Authority. See Data Response No. 5.

FN9 Duquesne has a contract with Wildwood Power Station, a 10 MW facility to be fueled by woodchips and coal, dated October 24, 1983. Duquesne avers that its last communication with Wildwood's developer took place on January 9, 1984, and that, to the best of its knowledge, the project has been abandoned. We have, of course, no information from Wildwood.

FN10 It appears that Duquesne has been purchasing the output of the .001 MW Beechwood Farms Windmill, which went into operation on January 6, 1983, independently of any contract.

FN11 By letters dated February 6 and April 15, 1987 counsel for Duquesne requested and received extensions of time to file Answers to LTV's Complaint stating, in part, that the parties "have agreed in principle to a Settlement of all litigation ... Upon consummation of the settlement arrangements..., LTV Steel anticipates withdrawing this Complaint".

END OF DOCUMENT

APPENDIX B

RECEIVED

2013 NOV 22 PM 4: 26

SECRETARY'S OFFICE
SECRETARY'S OFFICE

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120

Public Meeting held June 21, 1985

Commissioners Present:

Linda C. Taliaferro, Chairman
James H. Cavley
Frank Fischl
Bill Shane

Collection of Amounts Paid, for Energy
Purchases from Bethlehem Steel
Corporation, from PP&L Ratepayers

Docket No.
P-850039

ORDER GRANTING RATE RECOGNITION
OF PURCHASED POWER COSTS

BY THE COMMISSION:

Pennsylvania Power & Light Company (PP&L) and Bethlehem Steel Corporation (BSC) conducted negotiations concerning PP&L's purchase of cogeneration energy from BSC's Bethlehem plant. PP&L is required to purchase cogeneration energy and capacity by Section 210 of the federal Public Utility Regulatory Policies Act ("PURPA §210") (16 U.S.C. §824a-3) and Federal Energy Regulatory Commission (FERC) regulations adopted pursuant thereto. Absent an agreement between BSC and PP&L, PP&L could be required by law to pay its avoided costs for such energy and capacity. The Commission has adopted its own cogeneration regulations concerning the determination of the costs Pennsylvania utilities must pay cogenerators. (See 52 Pa. Code §57.31, et seq.).

Taken together, these authorities require that such purchases be made at a price equivalent to the "full avoided cost" or highest cost source of energy that the utility is buying or producing itself. These authorities also expressly allow the qualifying facility the benefit of arrangements which provide for levelized payments, even though payments at times (particularly during the early years of the arrangement) may exceed the full avoided cost at such times. However, qualifying facilities and utilities may agree on different arrangements, including those pertaining to price.

~~Additionally, PP&L has a duly approved tariff, filed with this Commission as Supplement No. 17 to Tariff-Electric Pa. P.U.C. No. 199 ("Pioneer Rate," Rule 6E), which provides prices to certain classes of alternative energy producers, which may serve as an alternative to application of the Commission's regulations.~~

DOCUMENT
FOLDER

JUL 2 1985

PP&L and BSC have entered into a proposed agreement setting forth terms, conditions and price provisions applicable to the purchase of electric energy by PP&L. The proposed agreement incorporates the price terms as set forth in PP&L's Pioneer Rate; but, also incorporates provisions similar to those set forth in our regulations. One of the conditions precedent to the effectiveness of the agreement is obtaining approval of this Commission where "deemed necessary" by the parties. Apparently, PP&L deems necessary our approval of the rate terms of the proposed agreement and approval of collection of amounts paid to BSC, for energy purchases, from PP&L's ratepayers, though the Energy Cost Rate (ECR), or its future equivalent. PP&L has filed a Petition expressly seeking this approval.

We think PP&L's request for this relief somewhat redundant, since we previously approved the Pioneer Rate Tariff which, as noted above, is the precise basis for the payments to be made to BSC. Having approved this tariff, it would be unconscionable for us to suggest that rates thus established could be unjust or unreasonable, and a fortiori we think implicit in our approval of the tariff our approval also of collection of such amounts from ratepayers. Nonetheless, we recognize we have not previously explicitly approved the collection of such amounts from ratepayers. We take this opportunity to do so and trust this Order will finally resolve any questions concerning such rate collections. The basis for both our approval of the Pioneer Rate and allowance of ECR recovery is that ratepayers will receive significant benefits from such transactions. If the price for such purchases is at the level of or below the cost for purchasing or generating energy a utility would otherwise incur, ratepayers can suffer no "cost disadvantages." This is true even if such prices are at times higher than utility costs, if over all the costs are no higher. Additionally, such alternative energy sources offer the advantages of greater system diversity, smaller capacity addition increments, better load management, closer match of capacity additions to load growth projections, less utility capital at risk, dual utilization of limited resources, renewable resources or waste products, and attaining other social and environmental goals (trash burning, etc.).

In the instant case, Bethlehem Steel Corporation (BSC) has an installed 30 megawatt cogeneration facility using coke oven gas and blast furnace gas as its primary fuel input. The facility has been certified by FERC as a qualifying facility. Since the primary fuel input is a waste product, PP&L's Pioneer Rate is applicable as an alternative to applying the Commission's regulations, and PP&L and BSC have agreed to its use.

In fact, applying the Pioneer Rate over an extended period of time will result in payments to BSC that are below full avoided costs. Since these prices are pursuant to the Pioneer Rate provisions and since BSC qualifies for those provisions, the rates are automatically just, reasonable and in the public interest. Any payments pursuant to this tariff are recoverable under the appropriate ECR or its future equivalent.

We will note one area of additional concern. The proposed agreement is on a year-to-year basis, albeit with a twelve-month notice of termination requirement. We direct PP&L's attention to 52 Pa. Code §57.32(a) which states "Long term contracts are encouraged," and to §57.34(c)(7)(1) which states "Wherever practical the term of the contract should be based on the useful life of the qualifying facility." While the latter section is among those provisions related to purchases of capacity, the intent of the regulations is that longer term contracts are preferable. Nothing in the Pioneer Rate can be construed to limit its application to contract periods of one year. Extremely short term contracts will deprive many potential qualifying facilities of the certainty necessary for financing or generally undertaking these projects. The provisions of the Pioneer Rate offer advantages to some qualifying facilities, which we endorse, but this tariff should be available over a longer term when the qualifying facility so desires.

Finally, we expressly note that neither federal law or regulations nor state law or regulations require our approval of the terms and conditions of an agreement between a utility and qualifying facility. We are specifically giving our approval to the rate terms of the proposed agreement in the instant case (although presumably unnecessary, due to prior approval of the Pioneer Rate) since we have been asked to do so. We are also expressly approving ECR collection of the rates. Beyond those issues, the other terms of the agreement are subject to negotiation between the parties, unless a party invokes our jurisdiction to settle a dispute. Our only additional requirement is that the executed agreement be filed with the Commission, as set forth at 52 Pa. Code §57.32(c)(2).

Consistent with our approval of the Pioneer Rate; consistent with our Orders in similar instances; and, consistent with statutory and regulatory authority, we will grant the relief requested in PP&L's Petition; THEREFORE,

IT IS ORDERED:

1. That the energy costs PP&L incurs by purchasing energy from Bethlehem Steel Corporation, pursuant to Supplement No. 17 to Tariff-Electric Pa. P.U.C. No. 199 and pursuant to the rate terms of the proposed agreement, attached as Exhibit "A" to PP&L's Petition, Docket No. P-850039, filed June 6, 1985, are approved as just, reasonable and in the public interest.

2. That PP&L is hereby authorized to fully collect all energy charges resulting from said agreement and from this and any application of its Supplement No. 17 to Tariff-Electric Pa. P.U.C. No. 199, by including such in its Energy Cost Rate or such other method

as may in the future replace or take the place of the Energy Cost Rate,
as a just and reasonable legal rate fixed by final Order of the Commission.

BY THE COMMISSION,



Jerry Rich
Secretary

(SEAL)

ORDER ADOPTED: June 21, 1985

ORDER ENTERED: JUN 25 1985

CERTIFICATE OF SERVICE
Docket Nos. R-2013-2372129 et al.

I hereby certify that I have this day served a true copy of the foregoing Answer of NRG Power Midwest LP, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC to the Preliminary Objections of Duquesne Light Company to the Complaint of NRG Power Midwest LP upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

VIA ELECTRONIC AND FIRST CLASS MAIL

Robert H. Hoaglund, II, Esq.
Tishekia E. Williams, Esq.
Duquesne Light Company
411 Seventh Avenue, 16th Floor
Pittsburgh, PA 15219
rhoaglund@duqlight.com
twilliams@duqlight.com

Michael W. Gang, Esq.
Anthony D. Kanagy, Esq.
David B. MacGregor, Esq.
Christopher T. Wright, Esq.
Post & Schell, P.C.
17 North Second Street, 12th Floor
Harrisburg, PA 17101-1601
mgang@postschell.com
akanagy@postschell.com
dmacgregor@postschell.com
cwright@postschell.com
Counsel for Duquesne Light Company

Candis A. Tunilo, Esq.
David T. Evrard, Esq.
Amy E. Hirakis, Esq.
Office of Consumer Advocate
555 Walnut Street
Forum Place, 5th Floor
Harrisburg, PA 17101-1923
ctunilo@paoca.org
devrard@paoca.org
ahirakis@paoca.org
(C-2013-2379084)

Sharon E. Webb, Esq.
Office of Small Business Advocate
300 North Second Street, Suite 1102
Harrisburg, PA 17101
swebb@pa.gov
(C-2013-2380474)

Charles Daniel Shields, Esq.
Scott B. Granger, Esq.
Bureau of Investigation & Enforcement
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265
chshields@pa.gov
sgranger@pa.gov

Theodore S. Robinson
Citizen Power
2121 Murray Avenue
Pittsburgh, PA 15217
robinson@citizenpower.com
Counsel for Citizen Power

Todd S. Stewart, Esq.
Hawke McKeon & Sniscak LLP
P.O. Box 1778
100 N. Tenth Street
Harrisburg, PA 17105-1778
tsstewart@hmslegal.com
Counsel for Interstate Gas Supply, Inc.

Derrick Price Williamson, Esq.
Barry A. Naum, Esq.
Spilman Thomas & Battle, PLLC
1100 Bent Creek Blvd., Ste. 101
Mechanicsburg, PA 17050
dwilliamson@spilmanlaw.com
bnaum@spilmanlaw.com
Counsel for U.S. Steel

Scott J. Rubin, Esq.
333 Oak Lane
Bloomsburg, PA 17815-2036
scott.j.rubin@gmail.com
Counsel for I.B.E.W., Local 29

Harry S. Geller, Esq.
Patrick M. Cicero, Esq.
Pennsylvania Utility Law Project
118 Locust Street
Harrisburg, PA 17101
pulp@palegalaid.net
Counsel for CAUSE-PA

Joseph L. Vullo, Esq.
1460 Wyoming Avenue
Forty Fort, PA 18704
jlvullo@aol.com
Counsel for CAAP

Pamela C. Polacek, Esq.
Teresa K. Schmittberger, Esq.
McNees Wallace & Nurick
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
ppolacek@mwn.com
tschmittberger@mwn.com
*Counsel for Duquesne Industrial Intervenors
(C-2013-2385292)*

RECEIVED

2013 NOV 22 PM 4: 27

SECRETARY'S BUREAU
PA PER

**CONSULTANTS
(VIA ELECTRONIC MAIL ONLY)**

Charlie King
Edward D. Christian
Snively King Majoros & Assoc., Inc.
4351 Garden City Drive, Suite 350
Landover, MD 20785
charlieking@snively-king.com
echristian@snively-king.com
Consultants for OCA

Roger D. Colton
Fisher, Sheehan & Colton
34 Warwick Road
Belmont, MA 02478
roger@fsconline.com
Consultants for OCA

David J. Efron
Berkshire Consulting Services
12 Pond Path
Northampton, NJ 03862
djeffron@aol.com
Consultants for OCA

Glenn A. Watkins
Technical Associates, Inc.
9030 Stony Point Parkway, Suite 580
Richmond, VA 23235
watkinsg@tai-econ.com
Consultants for OCA

Brian Kalcic, Consultant
Excel Consulting
225 S. Meramec Avenue, Suite 720-T
St. Louis, MO 63105
excel.consulting@sbcglobal.net
Consultants for OSBA

Jeffrey Pollock
J. Pollock, Inc.
12655 Olive Blvd, Suite 335
St. Louis, MO 63141
jpollock@jpollockinc.com
Consultants for DII

DATED: November 22, 2013



David P. Zambito, Esq.
*Counsel for NRG Power Midwest LP,
NRG Energy Center Pittsburgh LLC, and
Reliant Energy Northeast LLC*