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December 13, 2013

VIA E-MAIL & REGULAR MAIL

Honorable Conrad A. Johnson
Administrative Law Judge
PA Public Utility Commission
Suite 220, Piatt Place
301 Fifth Avenue
Pittsburgh, PA 15222

**Re: Pennsylvania Public Utility Commission, et al. v. Duquesne Light Company
Docket No. R-2013-2372129, et al.**

Dear Judge Johnson:

Enclosed please find the Motion of Duquesne Light Company to Sever from this base Rate Proceeding the Rider No. 18 Portion of the Complaint Filed by NRG Power Midwest LP, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC in the above-referenced proceeding.

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

Respectfully submitted,

David B. MacGregor

DBM/skr
Enclosure

cc: Certificate of Service
Rosemary Chiavetta, Secretary (*via electronic filing*)

CERTIFICATE OF SERVICE

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

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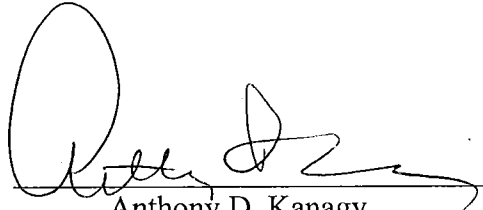
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Date: December 13, 2013



Anthony D. Kanagy

necessary and indispensable parties be joined as parties to the severed Complaint proceeding, and that all interested parties be permitted to fully participate in the severed Complaint proceeding; (3) deny all pending discovery requests, objections to discovery, and motions to compel without prejudice and permit the parties to issue new discovery requests in the severed Complaint proceeding; and (4) order that the severed Complaint proceeding be set for prehearing conference to establish a litigation and discovery schedule that fully permits all interested and necessary parties to fully examine and address the complex and novel Rider No. 18 issues raised in the NRG Companies' Complaint. Finally, Duquesne Light requests expedited treatment of this Motion to avoid wasting the resources of the parties and the Pennsylvania Public Utility Commission ("Commission"), and to avoid unduly interfering with and delaying the pending base rate case. In support thereof, Duquesne Light avers the following:

I. BACKGROUND

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

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

3. A Prehearing Conference was held on October 4, 2013, before Administrative Law Judge Conrad A. Johnson (the “ALJ”). A procedural schedule was adopted and issued in a Prehearing Order issued October 22, 2013, with certain modifications to the Commission’s procedures for formal discovery.

4. On October 31, 2013, *i.e.*, one day before the due date for direct testimony, Duquesne Light was served by the Commission with the Formal Complaint jointly filed by NRG Midwest, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC (together, the “NRG Companies”) at Docket No. C-2013-2390562, which challenged, among other things, DLC’s Tariff Rider No. 18 – Rate for Purchase of Electric Energy from Customer-Owned Renewable Resources Generating Facilities (hereinafter “Rider No. 18”).¹

5. As confirmed by NRG Midwest’s direct and surrebuttal testimony, the NRG Companies request that the Commission either modify the wholesale PURPA rates set forth in Rider No. 18 or eliminate Rider No. 18 entirely. (NRG Midwest St. 1, pp. 6-7; NRG Midwest St. 1-S, pp. 6, 9, 12)

6. On November 1, 2013, the parties other than Duquesne Light, including the NRG Companies, served direct testimony.

7. On November 6, 2013, the NRG Companies served interrogatories and data requests to Duquesne Light (“NRG Set I”). Duquesne Light timely responded to the specific

¹ Duquesne Light’s Tariff Rider No. 18 establishes the rates to be paid for power produced by certain specified categories of qualifying facilities (“QFs”) pursuant to the Public Utility Regulatory Policies Act of 1978 (“PURPA”), 16 U.S.C. §§ 824, *et seq.* Under PURPA, public utilities are required to purchase all electricity produced by independent power producers that obtain status as qualifying facilities. Electric utilities are required to purchase electricity from qualifying facilities at rates that are just and reasonable to the electric utility, in the public interest, and which do not discriminate against the qualifying facilities. 16 U.S.C. § 824a-3(b); 18 C.F.R. §§ 292.304(a)(1)(i), (ii). Under the regulations of the Federal Energy Regulatory Commission (“FERC”) implementing PURPA, the rate a qualified facility is to receive for the sale of its electricity is the “avoided cost” rate. 18 C.F.R. § 292.304(a)(2). “Avoided costs” are the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility, such utility would generate itself or purchase from another source. 18 C.F.R. § 292.101(b)(6). Importantly, however, the FERC and Commission regulations expressly provide that qualifying facilities and electric utilities are permitted to enter negotiated agreements for rates and terms different from those called for in the regulations. 18 C.F.R. § 292.301(b)(1).

interrogatories set forth in NRG Set I in accordance with the modified discovery schedule adopted by the October 22, 2013 Prehearing Order.

8. On November 12, 2013, Duquesne Light filed an Answer to the NRG Companies' Complaint.

9. On November 12, 2013, DLC filed Preliminary Objections raising the following three objections to the portions of the Complaint pertaining to Rider No. 18: (1) it is beyond the scope of this base rate proceeding; (2) it failed to join parties indispensable to its claims regarding the PURPA rates paid under Rider No. 18; and (3) the relief requested is beyond the scope of the PUC's jurisdiction.

10. On November 22, 2013, the NRG Companies filed an Answer to the Duquesne Light Preliminary Objections. On November 25, 2013, the Office of Consumer Advocate filed a letter in support of the Duquesne Light Preliminary Objections.

11. On November 26, 2013, Duquesne Light and other parties served rebuttal testimony. The NRG Companies did not serve rebuttal testimony.

12. On November 26, 2013, the NRG Companies served interrogatories and data requests to Duquesne Light ("NRG Set II"). As entitled by the Commission's regulations and in full compliance with the discovery schedule modified by the Prehearing Order issued October 22, 2013, Duquesne Light served formal objections to NRG Set II in its entirety on December 2, 2013. On December 5, 2013, the NRG Companies filed a Motion to Compel responses to NRG Set II and a Motion for Leave to File Supplemental Surrebuttal Testimony. Therein, the NRG Companies represent that they are prejudiced in their ability to serve meaningful surrebuttal testimony. On December 9, 2013, Duquesne Light filed an answer to the NRG Companies' Motion. The NRG Companies' Motion is still pending for disposition.

13. On December 3, 2013, Duquesne Light served its Interrogatories and Requests for Production of Documents on the NRG Companies (“Duquesne Light Set II”). On December 6, 2013, the NRG Companies served Objections to Duquesne Light Set II, Question Numbers 2, 4, 7, 13 and 14. On December 9, 2013, Duquesne Light served a Motion to Compel responses to Duquesne Light Set II. On December 11, 2013, the NRG Companies filed an answer to Duquesne Light’s Motion. Duquesne Light’s Motion is still pending for disposition.

14. On December 9, 2013, the parties other than Duquesne Light, including the NRG Companies, served surrebuttal testimony. In NRG Statement No. 1-S, NRG Midwest represents that the on-going, unresolved discovery disputes have impaired NRG Midwest’s ability to participate in the hearings in the base rate proceeding set for December 16, 2013, and that NRG Midwest may request that the hearings be postponed.

15. On December 12, 2013, Administrative Law Judge Conrad A. Johnson issued an Order denying Duquesne Light’s Preliminary Objections, stating as follows:

[The NRG Companies] filed answers to the preliminary objections, arguing, in part, that NRG Companies, in conformity with the Commission’s investigative order were seeking review of certain portions of Respondent’s existing rates, rules and regulations and whether the same remained reasonable and non-discriminatory.

Upon due consideration of the objections and answers thereto, Respondent’s preliminary objections are denied. This matter shall proceed to hearing as scheduled on December 16, 2013, at 10:00 a.m. in the Commission’s Harrisburg Hearing Room 1.

16. On December 13, 2013, Duquesne Light served rejoinder testimony, including testimony that responded to the surrebuttal testimony submitted by NRG Midwest.

17. On December 13, 2013, Duquesne Light filed Petition for Interlocutory Review and Answer to Material Questions, pursuant to 52 Pa. Code § 5.302, raising the following

material questions that were not addressed and resolved in the order denying the Preliminary Objections:

Whether NRG's Complaint must be dismissed for failure to join the affected QFs as necessary and indispensable parties?

Whether the PUC lacks authority to change the wholesale PURPA rate set forth in Rider No. 18?

Duquesne Light's Petition for Interlocutory Review requested that the Commission answer these material questions in the affirmative and direct that the NRG Companies' Complaint be: (1) dismissed for lack of jurisdiction to grant the relief requested, (2) alternatively, dismissed without prejudice to refile and joining all necessary/indispensable parties, or (3) alternatively, sever the Complaint from the base rate case to that these issues may be fully addressed by all necessary parties.

18. Currently, there is an agreement in principle between Duquesne Light, the Commission's Bureau of Investigation and Enforcement, the Office of Consumer Advocate, the Office of Small Business Advocate, and PA-CAUSE on revenue requirement, universal service and other issues, and a revenue allocation settlement among all parties other than Citizens for Pennsylvania's Future and the NRG Companies.

19. Hearings for the above-captioned base rate case are set to begin December 16, 2013, at 10:00 a.m.

20. Given the outstanding procedural issues, Duquesne Light submits that it is appropriate, equitable, and an efficient use of resources to sever the Rider No. 18 portion of the NRG Companies' Complaint for the reasons explained below.

II. ARGUMENT

21. In its Complaint, and as confirmed by NRG Midwest's direct and surrebuttal testimony, the NRG Companies request that the Commission either modify the wholesale

PURPA rates set forth in Rider No. 18 or eliminate Rider No. 18 entirely. (NRG Midwest St. 1, pp. 6-7; NRG Midwest St. 1-S, pp. 6, 9, 12)

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

23. The Commission regulations provide that the “Commission or presiding officer, with or without motion, may order proceedings involving a common question of law or fact to be consolidated.” 52 Pa. Code § 5.81 (emphasis added). To date, there has been no order from the Commission or the ALJ consolidating the NRG Companies’ Complaint with the above-captioned base rate proceeding.

24. On September 26, 2013, the Commission issued an order suspending Duquesne Light’s proposed rate increase for a period of nine-months. Therefore, Duquesne Light’s proposed rate increase will become effective on May 1, 2014, unless permitted by Commission Order to become effective at an earlier date.

25. The issue of PURPA rates has never been addressed post-restructuring and post-Act 129. As clearly demonstrated by procedural status of this matter and the outstanding discovery disputes, these novel and complex issues cannot be adequately and fully examined and addressed within the nine-month suspension period for this proceeding, especially given the fact that the Complaint was formally served one day before the due date for direct testimony.

26. Indeed, the NRG Companies concede the difficulty in addressing the Rider No. 18 issues raised in their Complaint within the accelerated time frame for a base rate proceeding. (See NRG Companies’ Motion to Compel; NRG Midwest Statement No. 1-S, p. 13)

27. It is anticipated that the NRG Companies will contend that any difficulty experienced by the NRG Companies in examining and developing the issues was caused by

Duquesne Light. However, any so-called prejudice is due solely to the action, or in this case the in-action, of the NRG Companies. As explained above, it was the NRG Companies that elected to wait for three months before intervening in this proceeding. Duquesne Light has the right to file Preliminary Objections to a complaint, and did so in full compliance with the Commission's regulations and the litigation schedule established in the Prehearing Order issued October 22, 2013. Further, it was the NRG Companies that elected to wait until November 26, 2013, to serve NRG Set II. Duquesne Light has the right to object to discovery, and Duquesne Light's Objections fully complied with the discovery schedule established in the Prehearing Order issued October 22, 2013. Clearly, to the extent that the NRG Companies are prejudiced, any such prejudice is due to the NRG Companies' failure to intervene and serve discovery in a timely manner.

28. In any event, the fact remains that there continues to be an outstanding discovery dispute between the NRG Companies and Duquesne Light, with both parties seeking information in support of their respective cases over the objection of the other party. Clearly, these pending discovery disputes must be resolved prior to an evidentiary hearing on the NRG Companies' Complaint. Indeed, if one or both of the Motions to Compel are granted, the parties will still need to prepare and serve responses. Further, the parties would also need sufficient time to evaluate the responses, prepare responsive testimony, and possibly engage in further discovery based on the responses that may or may not be the subject of further discovery disputes. Clearly, there is not sufficient time in this base rate proceeding for the parties to fully and adequately examine and address the Rider No. 18 issues raised in the NRG Companies' Complaint.

29. The NRG Companies have represented that they intend to request a postponement of the hearing schedule. Further, in electronic correspondence dated December 12, 2013,

counsel for the NRG Companies advised the parties that “that NRG intends to object to the cross-examination of its witnesses and to request a delay in the cross-examination of Mr. Pfrommer because of the outstanding discovery disputes. We believe that the denial of relevant information creates a due process problem if the hearing proceeds.” Therefore, NRG Companies’ own arguments demonstrate that there is insufficient time in this base rate proceeding for the parties to fully and adequately examine and address the Rider No. 18 issues raised in the NRG Companies’ Complaint.

30. More importantly, any delay in the procedural schedule clearly will jeopardize the parties’ and the Commission’s ability to fully review and rule upon the pending base rate case within the nine-month suspension period.

31. It also should be noted that, contemporaneously herewith, Duquesne Light has filed a Petition for Interlocutory Review and Answer to Material Questions with the Commission. The Commission’s disposition of the pending Petition for Interlocutory Review will fully and finally resolve issues that must be decided in the first instance before the merits of the Rider No. 18 portion of the NRG Companies’ Complaint can be reached. It would be a waste of the Commission’s and parties’ resources to litigate the NRG Companies’ Complaint unless and until the issues raised in the Petition for Interlocutory Review, including the fundamental question of the Commission’s authority, are fully resolved. Thus, the Rider No. 18 portion of the NRG Companies’ Complaint should be severed and held in abeyance until the final disposition of the pending Petition for Interlocutory Review.

32. It also would be a waste of the Commission’s and parties’ resources to litigate the NRG Companies’ Complaint, either at the hearing scheduled for December 16, 2013, or at a postponement of that hearing, without first joining all necessary and indispensable parties to the

Rider No. 18 issues. Indeed, it appears from recent Commission precedent that if the NRG Companies' Complaint proceeds to be litigated as part of this base rate proceeding without first joining all necessary and indispensable parties, the parties would, at a minimum, be required to re-litigate these issues again with all necessary and indispensable parties. In *J3 Energy Group, Inc. v. West Penn Power Company*, Docket No. C-2011-2219920 (Oct. 31, 2013), an unsuccessful bidder to a competitive procurement by West Penn Power Company ("West Penn") filed a complaint challenging the evaluation of the bids. The complaint was not served on the successful bidder, nor was the successful bidder named as a party to the complaint. The unsuccessful bidder and West Penn litigated the complaint for over two and one-half years, after which an Initial Decision was issued dismissing the complaint. Over one year after the Initial Decision was issued, the Commission issued an Opinion and Order ("Order") that declined to address the merits of the complaint and, *sua sponte*, concluded that:

As the current contractor for West Penn, with a significant interest in the continued performance under the contract, [successful bidder] must be joined as an indispensable party, even at this stage of the proceeding. Otherwise, without [successful bidder] as a party, the Commission does not have subject matter jurisdiction to proceed.

(Order p. 10) The Commission therefore ordered that the Initial Decision be vacated, the successful bidder be joined as an indispensable party, and that the proceeding be remanded to the Office of Administrative Law Judge for such further proceedings as may be warranted. (Order pp. 11-12)

33. In this case, there are two qualifying facilities that have existing power purchase agreements that are subject to the wholesale PURPA rate set forth in Rider No. 18. If the Commission were to grant the relief requested by the NRG Companies and either eliminate Rider No. 18 or modify the rate in Rider No. 18, such action clearly would directly and materially

affect the two remaining qualifying facilities. Clearly, these qualifying facilities are necessary and indispensable parties to the claims and relief sought by NRG Midwest. *See, Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 464 Pa. 377, 379 (1975) (“an indispensable party is one whose rights are so directly connected with and affected by litigation that he must be a party of record to protect such rights, and his absence renders any order or decree of court null and void for want of jurisdiction”)

34. Based on the Commission’s recent precedent, if the Rider No. 18 portion of the NRG Companies’ Complaint is not severed from this base rate proceeding and the qualifying facilities are not joined as indispensable parties, the parties to the base rate proceeding will be required to re-litigate these issues again with all necessary and indispensable parties. *J3 Energy Group, Inc. v. West Penn Power Company*, *supra*; *see also Bucks County Servs. v. Phila. Parking Auth.*, 71 A.3d 379 (Pa. Cmwlth. 2013) (the failure to join an indispensable party deprives a court of subject matter jurisdiction and is fatal to a cause of action).

35. Rather than trying to inject into this base rate case the NRG Companies’ novel and complex non-base rate issues, the Rider No. 18 portion of the NRG Companies’ Complaint should be severed and fully resolved in a proceeding that is separate and apart from this base rate case.

36. By severing the Rider No. 18 portion of the NRG Companies’ Complaint, all interested and necessary parties will be able to avoid the time constraints of a base rate case and, as a result, have the opportunity to fully and adequately examine the issues and develop their respective positions. Setting the Rider No. 18 portion of the NRG Companies’ Complaint to proceed as a separate proceeding will allow the parties to fully engage and complete discovery in a timely manner, fully develop their issues and prepare meaningful testimony, and allow the

matter to be resolved at a hearing to be set in the future. Importantly, severing and resolving the Rider No. 18 portion of the NRG Companies' Complaint in a proceeding that is separate and apart from this base rate case will fully resolve any alleged "due process" concerns raised by the NRG Companies.

37. Given the NRG Companies' concern regarding their ability to develop its position and testimony in this base rate case, the NRG Companies cannot credibly argue against the severance of the Rider No. 18 portion of the Complaint as the overall most reasonable, equitable, and efficient procedure to fully address their concerns.

38. Severing the Rider No. 18 portion of the NRG Companies' Complaint is a reasonable, equitable, efficient, and appropriate remedy that will allow the base rate case issues to be fully considered by the Commission within the suspension period, while, at the same time, allowing the NRG Companies to fully pursue and develop their issues without the potential of being required to re-litigate the issues due to lack of jurisdiction or failure to join an indispensable party.

39. Duquesne Light has been authorized by the counsel for the Commission's Bureau of Investigation and Enforcement to represent that they support the granting of this Motion.

III. REQUEST FOR EXPEDITED CONSIDERATION

40. The above-captioned base rate case currently is set for evidentiary hearings on December 16, 2013, at 10:00 a.m.

41. The parties, other than the NRG Companies, have provided their witness availability and anticipated cross-examination.

42. The NRG Companies, however, have advised the parties that they intend to object to the cross-examination of its witnesses and to request a delay in the cross-examination of Duquesne Light's witnesses.

43. Given the fact that the hearings are only one day away from this request, and given the significant uncertainty in the witness schedule and witness availability caused by the NRG Companies' forthcoming objection, the parties and their witnesses will be hindered in their ability to fully prepare for the evidentiary hearings scheduled to being on December 16, 2013, if a ruling on this Motion is delayed.

44. For these reasons, it is imperative that this Motion be considered and granted in an expeditious manner. Given the timing of the recent developments in this case, including the denial of the Preliminary Objections and the NRG Companies' advisement of its planned objection to cross-examination, Duquesne Light submits that it would be appropriate to address and resolve this Motion on the record as a preliminary matter at the hearing on December 16, 2013.

IV. CONCLUSION

WHEREFORE, Duquesne Light Company respectfully requests that Administrative Law Judge Conrad A. Johnson grant, in an expedited manner, this Motion to Sever and enter an appropriate order directing the following:

(1) Sever the Rider No. 18 portion of the NRG Companies' Complaint at Docket No. at Docket No. C-2013-2390562 and to have the severed portion of the Complaint fully resolved in a proceeding that is separate and apart from the base rate case at Docket No. R-2013-2372129;

(2) Join all necessary and indispensable parties to the severed Complaint proceeding;

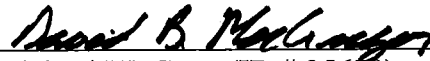
(3) Permit all interested and necessary parties to fully participate in the severed Complaint proceeding;

(4) Deny all pending discovery requests, objections to discovery, and motions to compel without prejudice;

(5) Permit the parties to issue new discovery requests in the severed Complaint proceeding; and

(6) Order that the severed Complaint proceeding be set for prehearing conference to establish a litigation and discovery schedule that fully permits all interested and necessary parties to fully examine and address the complex and novel issues raised in the NRG Companies' Complaint.

Respectfully submitted,



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Date: December 13, 2013

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