COZEN O'CONNOR

David P. Zambito
Direct Phone 717-703-5892
Direct Fax 215-989-4216
dzambito@cozen.com

December 23, 2013

VIA HAND DELIVERY

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.*; BRIEF OF THE NRG COMPANIES IN OPPOSITION TO DUQUESNE LIGHT COMPANY'S PETITION FOR INTERLOCUTORY REVIEW

Dear Secretary Chiavetta:

Enclosed for filing with the Commission is NRG Power Midwest LP, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC's Brief in Opposition to Duquesne Light Company's Petition for Interlocutory Review in the above-referenced proceeding. Copies have been served upon parties in accordance with the attached Certificate of Service.

If you have any questions regarding this filing, please direct them to me. Please date-stamp the extra copy and return it with our courier. 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/kmg
Enclosures

cc: Honorable Conrad A. Johnson
Per Certificate of Service

CERTIFICATE OF SERVICE
Docket Nos. R-2013-2372129, C-2013-2390562, *et al.*

I hereby certify that I have this day served a true copy of the foregoing Brief on behalf of NRG Power Midwest LP, NRG Energy Center Pittsburgh LLC and Reliant Energy Northeast LLC in Opposition to Duquesne Light Company's Petition for Interlocutory Review, upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

VIA ELECTRONIC & FIRST CLASS MAIL

Honorable Conrad A. Johnson
Pennsylvania Public Utility Commission
Piatt Place
301 Fifth Avenue
Room 220
Pittsburgh, PA 15222

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
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)

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

George Jugovic, Jr., Esq.
Heather Langeland, Esq.
200 First Avenue, Suite 200
Pittsburgh, PA 15222
Jugovic@pennfuture.org
Langeland@pennturue.org
Counsel for PennFuture

John F. Povilaitis, Esquire
Alan M. Seltzer, Esquire
Buchanan Ingersoll & Rooney, PC
409 North Second street, Suite 500
Harrisburg, PA 17101-1357
Counsel for Beaver Falls Municipal Authority

CONSULTANTS
(VIA ELECTRONIC MAIL ONLY)

Charlie King
Edward D. Christian
Snavely King Majoros & Assoc., Inc.
4351 Garden City Drive, Suite 350
Landover, MD 20785
charlieking@snavely-king.com
echristian@snavely-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. Effron
Berkshire Consulting Services
12 Pond Path
Northampton, NJ 03862
djeffron@aol.com
Consultants for OCA

DATED: December 23, 2013

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

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

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

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

BRIEF OF THE NRG COMPANIES IN OPPOSITION TO DUQUESNE LIGHT COMPANY'S PETITION FOR INTERLOCUTORY REVIEW

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

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, pursuant to 52 Pa. Code § 5.302(b), and hereby file this brief in opposition to the "Petition of Duquesne Light Company for Interlocutory Review and Answer to Material Questions" ("Petition"), filed on December 13, 2013, by Duquesne Light Company ("Duquesne Light") in the above-captioned proceeding. In opposition to Duquesne Light's Petition, the NRG Companies argue as follows:

I. STATEMENT OF THE CASE

On August 2, 2013, Duquesne Light filed with the Pennsylvania Public Utility Commission ("Commission") at Docket No. R-2013-2372129 Supplement No. 81 to the company's Tariff Electric – Pa. P.U.C. No. 24 ("Tariff"), representing a request for, among other things, a general increase in electric distribution rates. Duquesne Light advised the Commission of its election to use the alternative method of customer notification set forth at 52 Pa. Code § 53.45(b)(4) (allowing customer notification through bill inserts). Duquesne Light also agreed under that provision to extend from 60 to 90 days (*i.e.*, until October 31, 2013) the minimum period in which the filing of a complaint places the burden of proof upon Duquesne Light with respect to proposed rates.

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 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").

On October 28, 2013, the NRG Companies filed their formal complaint at Docket No. C-2013-2390562 (the "Complaint") in the Duquesne Light 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 at which Duquesne Light will purchase electricity from certain small generators that are also Duquesne Light customers. The NRG Companies served copies of their Complaint upon the Beaver Falls Municipal Authority ("Beaver Falls") and the Beaver Valley Power Company ("Beaver Valley").

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 or other related agreement. 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 (Opinion & Order entered July 20, 1987) (hereinafter, the "1987 Opinion & Order") (tariff proceeding specifically addressing changes to Rider No. 18).

In response to the NRG Companies' Complaint, Duquesne Light filed Preliminary Objections on November 12, 2013, challenging, among other things, (i) the alleged failure to join indispensable parties to the proceeding and (ii) questioning whether NRG Midwest's requested remedy was beyond the Commission's jurisdiction. On December 12, 2013, the presiding officer denied those preliminary objections.

On December 13, 2013, Duquesne Light filed the present Petition with the Commission. At the same time, Duquesne Light filed a Motion to Sever the portions of the Complaint that pertain to Rider No. 18 from the rate proceeding. The presiding officer denied the Motion to Sever on December 17, 2013, finding that the NRG Companies were challenging a provision of Duquesne Light's existing tariff in the context of a base rate proceeding – consistent with what the Commission directed should be done in its Initial Order suspending the filing for investigation.

On December 16, 17 and 20, 2013, evidentiary hearings were held in this matter, which included the cross-examination of several of the parties' witnesses. Notably, the intervention of Beaver Falls, one of only two qualifying facilities ("QF") to which Rider No. 18 applies, was granted on December 17, and Beaver Falls participated fully in the hearings including the submission of written rejoinder testimony.

II. COUNTER-STATEMENT OF MATERIAL QUESTIONS

A. Whether non-jurisdictional parties to private contracts referencing provisions of a Commission-approved tariff are necessary and indispensable parties to a rate proceeding in which those tariff provisions may be affected? *Suggested answer: No.*

B. Whether the Commission may terminate or modify the provisions of a Commission-approved tariff that set forth a voluntary price for power to be paid to customer–generators? *Suggested answer: Yes.*[1]

III. SUMMARY OF ARGUMENT

At the outset, it is important to note that the NRG Companies are not asking the Commission 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 (*i.e.*, the aforementioned QFs). The NRG Companies have asked the Commission to review a provision contained in a Commission-approved tariff. 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* 1987 Opinion & Order. The NRG Companies have not alleged a cause of action under any power purchase or other agreement, nor have the NRG Companies requested that the Commission either construe or modify the terms of any power purchase or other agreement.

In any case, and as explained below, the PPAs do not set an express price for power, but merely reference the Tariff. Thus, while the termination or modification of Rider No. 18 may affect the performance of the parties under the PPAs, as with any other agreement that might incorporate the Tariff by reference, this does not mean that the actual terms of any such agreement would be directly or indirectly modified. While the QFs may be interested parties, they are not necessary and indispensable. The Commission lacks jurisdiction to join unregulated

[1] Duquesne Light's formulation of the material question on this issue is as follows: "Whether the PUC lacks authority to change the wholesale PURPA rate set forth in Rider No. 18?" This formulation begs the question of whether the price of six cents per kilowatt-hour is a "wholesale PURPA rate." The NRG Companies contend, both factually and legally, that this price was the result of a voluntary filing and was never formally approved by the Commission as either Duquesne Light's "avoided cost" under PURPA or as the price to be paid for power under any specific contract.

entities and modification of Rider No. 18 requires only notice and opportunity to be heard (*i.e.* due process) – which has been provided in this proceeding. One of the QFs has voluntarily chosen to participate. The other has not.

In addition, the Commission has the authority to require the termination or modification of any provision contained in the Commission-approved tariff of a jurisdictional public utility. This is true even where the provision establishes a voluntary price to be paid to customer-generators who are considered qualifying facilities under the federal Public Utility Regulatory Policies Act ("PURPA"). While case law may provide that the Commission has limited jurisdiction to revisit PURPA contracts that it has specifically approved, the Commission has not been asked to revisit any such contracts. Nevertheless, the two PPAs between Duquesne Light and the QFs that may be impacted by the termination or modification of Rider No. 18 expressly allow such termination or modification, evidencing the consent of the parties to the Commission's continuing jurisdiction and authority over those PPAs.

Simply put, the NRG Companies are seeking review of a provision in a tariff approved by the Commission, which provision is properly considered in the context of this proceeding. Whether the tariff provision to be considered may impact contractual relationships wholly outside the scope of the rate case does not supply grounds to dismiss or sever the Complaint.

Through the instant Petition, Duquesne Light is seeking intervention by the full Commission in a matter that is appropriately working its way through the hearing process of the Office of Administrative Law Judge. The Commission should accordingly either deny the Petition or simply take no action on it.

IV. SCOPE AND STANDARD OF REVIEW

The Commission's standards for interlocutory review are found at 66 Pa. C.S. § 331(e), and 52 Pa. Code §§ 5.302-5.304. Interlocutory review, generally, is not granted except upon a showing by the petitioner of extraordinary circumstances or compelling reasons. Such showing may be accomplished by a petitioner proving that, without interlocutory review, some harm would result which would not be reparable through normal avenues, that the relief sought should be granted now rather than later, or that granting interlocutory review would prevent substantial prejudice or expedite the proceeding. *See Re: Structural Separation of Bell Atlantic-Pennsylvania, Inc. Retail and Wholesale Operations*, Docket No. M-00001353 (Order entered July 20, 2000). Duquesne Light has failed to demonstrate either extraordinary circumstances or compelling reasons that would result in irreparable harm or prejudice. Having failed to meet this burden, the Petition should be denied.

V. ARGUMENT

A. The QFs Are Not Necessary and Indispensable Parties to this Proceeding

With respect to the first material question posed, Duquesne Light has represented that currently only two QFs are subject to Rider No. 18—Beaver Falls and Beaver Valley.[2] (Hr'g Tr. 256, Dec. 17, 2013.) Importantly, both Beaver Falls and Beaver Valley (both entities that are not regulated by the Commission) were served by the NRG Companies with copies of the Complaint. Duquesne Light acknowledged that its attorneys have since been in communication with both Beaver Falls and Beaver Valley. (Hr'g Tr. 267-270.) Since the Petition was filed, one of the two QFs—Beaver Falls—intervened in this proceeding. Thus, Duquesne Light's

[2] A necessary and indispensable party is one whose rights are so directly connected with and affected by litigation that is must be a party of record to protect those rights. *Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 464 Pa. 377, 379 (1975).

argument regarding the failure to join a necessary and indispensable party pertains only to Beaver Valley. Despite being served with a copy of the Complaint and the contact with Duquesne Light attorneys, Beaver Valley willingly chose not to participate. The NRG Companies Complaint should not be dismissed or severed because of Beaver Valley's failure to participate.

In addition, Beaver Valley's interest in Rider No. 18 arises from its PPA with Duquesne Light.[3] Rather than set a firm price for power, the price provision of the PPA contains a generic reference to the Tariff. (Hr'g Tr. 255; Preliminary Objections, Appendix B (Highly Confidential), at Section 5.) Duquesne Light also retains the right under the PPA to "unilaterally" apply to the Commission to terminate or modify the Tariff. (Hr'g Tr. 273:14-22; Preliminary Objections, Appendix B (Highly Confidential), at Section 5.) By the very terms of the PPA, Duquesne Light may apply to the Commission for a change to Rider No. 18 without the participation of Beaver Valley as a necessary party (assuming that proper notice of the proposed tariff change is provided). There is simply no justification for holding the NRG Companies to a higher standard in this respect than Duquesne Light.

To be clear, however, this is a rate case and the NRG Companies are seeking review of a tariff provision—Rider No. 18. Although Beaver Valley may have contractual interests tied to Rider No. 18, this does not make it any more necessary or indispensable than any other Duquesne Light customer that may be impacted by the rate case. 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 QFs, even though the PPAs had been executed at that time. Nor did Duquesne Light join any of 19 other facilities that either had

[3] There is no privity of contract between the NRG Companies and Beaver Valley.

an agreement with Duquesne Light or had been in contact and/or in negotiations with the utility. 1987 Opinion & Order 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.

Duquesne Light has argued in both its Preliminary Objections and its Motion to Sever that the Commission's opinion and order in *J3 Energy Group, Inc. v. West Penn Power Co.*, Docket No. C-2011-2219920 (Oct. 31, 2013), compels the dismissal of the Complaint. That case pertained, however, to a disputed bidding process in which the complainant specifically challenged the validity of the final contract award and sought its revocation. The Commission determined that the holder of the challenged contract was an indispensable party to the Complaint. Here, the NRG Companies are not directly challenging any contract. They are seeking review of a tariff provision. Though parties to a private contract may choose voluntarily to reference a tariff in their agreement, this does not make them indispensable parties to subsequent proceedings brought by another person to alter that tariff.

B. Commission Has Exclusive Jurisdiction Over Commission-Approved Tariffs

The crux of Duquesne Light's second material question asks whether the Commission is prevented by PURPA from modifying Rider No. 18. In other words, Duquesne Light is suggesting that the Commission is without authority to review the justness, reasonableness, and discriminatory nature of a Commission-approved tariff.

Duquesne Light argues that "under PURPA the PUC cannot revisit or change QF rates once they are approved." (Petition at 7.) Duquesne Light attempts to support this statement with 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). Generally

speaking, 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)).

In contrast to *Freehold*, at issue in the present case is a Commission-approved tariff and not the terms of a power purchase agreement, a distinction that Duquesne Light has repeatedly failed to acknowledge in its pleadings. The NRG Companies have not alleged a cause of action under any power purchase agreement, nor has NRG asked the Commission to construe or modify the terms of a power purchase agreement. The NRG Companies have asked the Commission to review the justness, reasonableness, and discriminatory nature of a Commission-approved tariff which makes *Freehold* inapposite to this case.

Moreover, Duquesne Light has not alleged that the PPAs with Beaver Falls and Beaver Valley were actually approved by the Commission. (*See* Hr'g Tr. 256:17-21.) In fact, 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). This further suggests that *Freehold* should not be applied to this case.

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 the PPAs 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; Hr'g Tr. 273:14-22, 274:9-15, 278, 282:13-19.) 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*, federal 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).

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. In fact, during the December 17 hearing, Duquesne Light's Senior Manager, Rate and Tariff Services testified that in his opinion the Commission would have the authority to modify Rider No. 18. (Hr'g Tr. 241-242.)

The Commission should reject Duquesne Light's assertions that the Commission lacks the authority to terminate or revise provisions contained in the Tariff. Indeed, the Commission has exclusive jurisdiction over the rates, terms, and conditions contained in a tariff of a Pennsylvania public utility. The Commission has both the authority and duty to ensure that terms of the Tariff remain just, reasonable, non-discriminatory, and otherwise in the public interest. An appropriate inquiry into these issues requires the development of an evidentiary record (which has already occurred in this proceeding). As the Commission will see upon its ultimate review of this matter, the NRG Companies have presented substantial record evidence that Rider No. 18 is no longer in the public interest in light of the Pennsylvania Electricity

Generation Choice and Competition Act and the creation of electric generation wholesale markets. Duquesne Light's Petition, in essence, requests that the Commission deprive itself of this evidence in making its ultimate decision.

C. No Stay of Proceedings Is Warranted Because Evidentiary Hearings Have Been Held

No stay of proceedings is required to protect the substantial rights of any party. At this stage of the proceeding, three days of evidentiary hearings already have been held. The two issues raised in the Petition are nothing more than red-herrings and do not warrant delaying the proceeding for further consideration. With respect to the first material question posed, all relevant parties were notified of the proceeding and the one party not joining willingly chose not to participate. With respect to the second material question, Duquesne Light's own witness acknowledged that the Commission has the authority to review Rider No. 18. Although Duquesne Light requests that the Commission sever the Complaint from the rate case to more fully address the issues, this request is unnecessary and should be denied. Contrary to Duquesne Light's assertions, these are not "novel and complex issues" and the evaluation of Rider No. 18 should not be delayed. Once the final briefs are filed, the Rider No. 18 issue will ripe for the Presiding Officer's consideration and issuance of a recommended decision.

VI. CONCLUSION

In light of the foregoing, it would be inappropriate for the Commission to grant the relief requested by Duquesne Light. Beaver Valley, the one entity that Duquesne Light argues should be joined as a necessary and indispensable party to this proceeding, both received notice of the Complaint and spoke with counsel for Duquesne Light. The Commission should not find that Beaver Valley's conscious decision to watch from the sidelines results in a lack of subject matter

jurisdiction. Nor should the Commission dismiss or sever the proceeding to allow more extensive consideration. The Commission clearly has the authority to review the tariffs of jurisdictional public utilities. After discovery and three days of evidentiary hearings, it would be inefficient to send the case back to square one and require the parties to conduct briefing and hearings all over again. The Commission will benefit from having the opportunity to review this matter and the record in full following its receipt of the recommended decision of the Presiding Officer.

WHEREFORE, the NRG Companies respectfully request that the Commission deny the Petition of Duquesne Light Company for Interlocutory Review and Answer to Material Questions.

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: December 23, 2013