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December 23, 2013

VIA ELECTRONIC FILING

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

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

Dear Secretary Chiavetta:

Enclosed please find Duquesne Light Company's Brief in Support of Petition for Interlocutory Review and Answer to Material Questions in the above-referenced proceeding.

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

Respectfully submitted,

Anthony D. Kanagy

MWG/skr
Enclosure

cc: Certificate of Service
Honorable Conrad A. Johnson

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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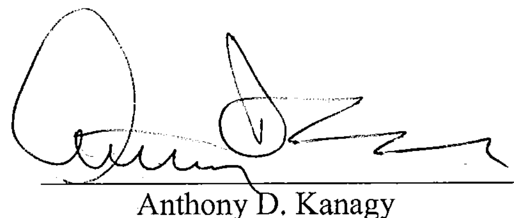

Anthony D. Kanagy

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission	:	
	:	
v.	:	Docket No. R-2013-2372129
	:	
Duquesne Light Company	:	

DUQUESNE LIGHT COMPANY BRIEF IN SUPPORT OF PETITION FOR INTERLOCUTORY REVIEW AND ANSWER TO MATERIAL QUESTIONS

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. BACKGROUND 2

III. ARGUMENT 5

A. NRG'S COMPLAINT MUST BE DISMISSED FOR FAILURE TO JOIN ALL AFFECTED QUALIFYING FACILITIES AS NECESSARY AND INDISPENSABLE PARTIES 5

B. THE COMMISSION LACKS AUTHORITY TO GRANT THE RELIEF REQUESTED BY NRG 10

V. CONCLUSION 15

11467076v1

TABLE OF AUTHORITIES

Page

United States Court Decisions

Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986) 10, 12

Pennsylvania Court Decisions

Bucks County Servs. v. Phila. Parking Auth., 71 A.3d 379 (Pa. Cmwlth. 2013) 8, 9

Columbia Gas Transmission Corp. v. Diamond Fuel Co., 464 Pa. 377 (1975) 5, 7

Freehold Cogeneration Assocs., L.P. v. Board of Regulatory Comm'rs, 44 F.3d 1178 (3d Cir. 1995) 10, 11

W. Penn Power Co. v. Pa. Pub. Util. Comm'n, 659 A.2d 1055 (Pa. Cmwlth. 1995), *affirmed by*, 535 Pa. 108, 634 A.2d 207 (1993) 11

Administrative Agency Decisions

In re West Penn Power Company, 71 F.E.R.C. P61,153 (order denying petition for declaratory order, May 8, 1995) 12

Investigation of Pennsylvania's Retail Electricity Market: End State of Default Service, Docket No. I-2011-2237952, 2013 Pa. PUC LEXIS 306, 303 P.U.R.4th 28 (February 15, 2013) 12

J3 Energy Group, Inc. v. West Penn Power Company, Docket No. C-2011-2219920 (Oct. 31, 2013) 9

Joint Application of PECO Energy Company And Public Service Electric and Gas Company for Approval of the Merger of Public Service Enterprise Group, Inc. with and into Exelon Corporation, Docket No. A-110550F0160, 2006 Pa. PUC LEXIS 33 at *193 (February 1, 2006) 12

Pa. PUC v. Columbia Gas of Pennsylvania, Docket Nos. R-2010-2215623 et al., 2011 Pa. PUC LEXIS 185 at *89-90, 293 P.U.R.4th 235 (Oct. 14, 2011)..14

Pa. P.U.C. et al. v. Duquesne Light Co., Docket No. R-860556, 1987 Pa. PUC LEXIS 235, 64 Pa. PUC 388 (July 20, 1987) 6, 11

Petition of Pennsylvania Electric Company Requesting Approval of Rate Recovery, Under the Energy Cost Rate, for the Costs Proposed to be Paid Under an Agreement with Scrubgrass Power Corporation, Docket No. P-870248, 1988 Pa. PUC LEXIS 101 at *11-12, 66 Pa. PUC 151 (Jan. 21, 1988) 11, 12

Utilimax.com v. PPL Energy Plus LLC, 378 F.3d 303, 305 (3d Cir. 2004) 12

Federal Statutes

16 U.S.C. §§ 824, *et seq* 1

16 U.S.C. § 824a-3(b) 3

16 U.S.C. § 824a-3(f) 13

Regulations

52 Pa. Code § 5.302 ....1, 4

52 Pa. Code § 5.75(c) 8

52 Pa. Code § 57.31 et seq. 13

52 Pa. Code § 57.32(c) 3

18 C.F.R. § 292.101(b)(6) 3

18 C.F.R. § 292.301(b)(1) 3

18 C.F.R. §§ 292.304(a)(1)(i), (ii) 3

18 C.F.R. § 292.304(a)(2) 3

I. INTRODUCTION

Duquesne Light Company ("Duquesne Light") filed a Petition for Interlocutory Review and Answer to Material Questions, pursuant to 52 Pa. Code § 5.302. In its Petition, Duquesne Light raises two discrete issues that require the Pennsylvania Public Utility Commission's ("Commission") immediate consideration and disposition. Specifically, Duquesne Light seeks a determination of: (1) whether certain issues raised in the complaint filed by NRG Power Midwest LP ("NRG Midwest"), NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC (collectively "NRG") must be dismissed for failure to join all necessary and indispensable parties;[1] and (2) whether the Commission has authority to change the wholesale rate set forth in Duquesne Light's Rider No. 18 paid to qualifying facilities ("QFs") pursuant to the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. §§ 824, *et seq.*

These issues were raised by NRG in the context of Duquesne Light's retail base rate proceeding. As explained below, Duquesne Light submits that if the Commission were to grant the relief requested by NRG, the QFs still subject to the wholesale PURPA rate set forth in Rider No. 18 would be directly and materially affected. However, NRG did not join the QFs as parties.[2] Duquesne Light further submits that the Commission lacks authority to modify the wholesale PURPA rates set forth in Rider No. 18 as requested by NRG. Importantly, the Order denying Duquesne Light's Preliminary Objections summarily rejected the Preliminary Objections without specifically addressing and resolving these fundamental questions of

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[1] Portions of NRG's Complaint address issues that are appropriately raised in the base rate proceeding and are not subject to this Petition for Interlocutory Review.

[2] One of the QFs filed a petition to intervene on the first day set for the evidentiary hearings, and was granted intervenor status on the second day for the evidentiary hearings by ALJ Johnson in an attempt to provide the QF with an opportunity to participate. The QF submitted testimony explaining that if NRG was granted the relief requested, the QF would suffer dire financial consequences. The other affected QF has not intervened or otherwise been joined as a party to the NRG Complaint. Nevertheless, even the QF that has intervened has been denied a fair opportunity to fully participate in the development of the record as a result of NRG's failure to join indispensable parties.

jurisdiction in the decision.

As explained below, Duquesne Light submits that these important issues must be resolved in the first instance or the parties will be forced to proceed without a materially affected party and to litigate issues that are beyond the Commission's authority, or the parties, at a minimum, would be required to re-litigate these issues again with all necessary and indispensable parties. Duquesne Light also submits that these novel and complex issues have not and cannot be adequately and fully examined and addressed within the context of this base rate proceeding. These issues are ripe for the Commission's disposition.

II. BACKGROUND

On August 2, 2013, Duquesne Light filed with the 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 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.

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. 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.

On October 31, 2013, one day before the due date for direct testimony, Duquesne Light was served by the Commission with the Formal Complaint filed by NRG at Docket No. C-2013-2390562. NRG challenged, among other things, Duquesne Light's Tariff Rider No. 18 – Rate for Purchase of Electric Energy from Customer-Owned Renewable Resources Generating Facilities (hereinafter "Rider No. 18").[3] Relevant to the pending Petition for Interlocutory Review, NRG requests, as confirmed by NRG Midwest's direct and surrebuttal testimony, 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)

On November 12, 2013, Duquesne Light filed an Answer to the NRG Complaint. On November 12, 2013, Duquesne Light 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 Commission's jurisdiction. On November 22, 2013, NRG 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.

[3] Duquesne Light's Tariff Rider No. 18 establishes the rates to be paid for power produced by certain customer owned generating facilities or QFs pursuant to PURPA. 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, both 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. *See* 18 C.F.R. § 292.301(b)(1); 52 Pa. Code § 57.32(c).

On December 12, 2013, the ALJ issued an Order denying Duquesne Light's Preliminary Objections, stating as follows:

> [NRG] filed answers to the preliminary objections, arguing, in part, that NRG, 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.

On December 13, 2013, Duquesne Light filed the pending Petition for Interlocutory Review and Answer to Material Questions, pursuant to 52 Pa. Code § 5.302, raising the following material questions that were raised in the Preliminary Objections but were not addressed and resolved in the order denying the Preliminary Objections:

> (1) Whether NRG's Complaint must be dismissed for failure to join the affected QFs as necessary and indispensable parties?
>
> (2) Whether the Commission lacks authority to change the wholesale PURPA rate set forth in Rider No. 18?

Duquesne Light's pending Petition for Interlocutory Review requests that the Commission answer these material questions in the affirmative and direct that the NRG Complaint be: (1) dismissed for lack of jurisdiction to grant the relief requested, (2) alternatively, dismissed without prejudice to refile and join all necessary/indispensable parties, or (3) alternatively, severe the Rider No. 18 issues from the base rate case so that these issues may be fully addressed by all necessary parties.[4]

[4] Also on December 13, 2013, Duquesne Light filed a Motion to Sever the Rider No. 18 portion of the Complaint filed by the NRG, requesting, among other things, that the Rider No. 18 portion of the NRG' Complaint at Docket No. at Docket No. C-2013-2390562 be severed and 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' Complaint. The Commission's Bureau

Currently, there is a Settlement in the base rate proceeding among Duquesne Light and all other parties with the exception of NRG. The Settlement resolves all issues raised by the other parties in the base rate proceeding, except those raised by NRG. NRG has advised the parties and the ALJ that it intends to oppose the Settlement.

Hearings for the above-captioned base rate case were held on December 16, 17, and 20 2013. Because all the base rate issues had been settled by the parties other than NRG, the sole purpose of the hearings was to address the issues raised by NRG.

For the reasons explained below, it would be a waste of both the Commission's and the parties' resources to litigate the Rider No. 18 issues without joining all indispensable parties and deciding the scope of the Commission's jurisdiction in the first instance. Further, the complex issues raised by NRG regarding Rider No. 18 have not been and cannot be adequately and fully examined and addressed within this base rate proceeding. These important and material issues are ripe for the Commission's immediate disposition.

III. ARGUMENT

A. NRG'S COMPLAINT MUST BE DISMISSED FOR FAILURE TO JOIN ALL AFFECTED QUALIFYING FACILITIES AS NECESSARY AND INDISPENSABLE PARTIES

The QFs are necessary and indispensable parties to the Complaint filed by NRG. NRG's failure to join them is a fatal flaw which deprives the Commission of jurisdiction. An indispensable party is one whose rights are so directly connected with and affected by the litigation that he must be a party of record to protect such rights, and his absence renders any order or decree of court null and void for want of jurisdiction. *See, Columbia Gas Transmission Corp. v. Diamond fuel Co.*, 464 Pa. 377, 379 (1975).

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of Investigation and Enforcement ("I&E") supported the Motion to Sever. The ALJ denied the Motion to Sever on the second day of hearings, December 17, 2013.

The NRG Complaint was served shortly before the due date for other parties' direct testimony and little more than six weeks before the commencement of hearings on December 16, 2013. NRG generally averred in the Complaint that "Rider No. 18 of Duquesne Light's Tariff should be examined to ensure that the terms, conditions and electric energy purchase price continue to be just, reasonable, and non-discriminatory." (NRG Complaint ¶ 11) However, in its direct testimony NRG requested that the Commission modify the wholesale PURPA rates set forth in Rider No. 18 and then, when it filed its surrebuttal on December 9,2013, NRG requested that the Commission eliminate Rider No. 18 entirely. (NRG Midwest St. 1, pp. 6-7; NRG Midwest St. 1-S, pp. 6, 9, 12) For the reasons explained below, NRG's Complaint and request for relief must be dismissed because NRG failed to join indispensable parties and provide those parties with due process and a fair opportunity to participate.

Duquesne Light's Rider No. 18 was approved by the Commission in 1981 at Docket No. R-811713. As acknowledged by NRG, Rider No. 18 establishes the rates to be paid for the wholesale power produced by QFs pursuant to PURPA. (NRG Midwest St. 1-S, p. 6) Rider No. 18 provides that the power produced by QFs will be purchased at the "rate of six (6) cents per kilowatt-hour, or at a rate based on the Company's avoided costs when such costs exceed six (6) cents per kilowatt-hour."

There are two QFs that have existing power purchase agreements that are subject to the wholesale PURPA rate set forth in Rider No. 18: the negotiated purchase power agreement with Beaver Valley Power Company entered on August 18, 1982; and the negotiated purchase power agreement with Beaver Falls Municipal Authority entered on February 28, 1985.[5] Both of these

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[5] In 1987, the Commission approved, with modifications, Duquesne Light's request to phase out the PURPA rate to new customer-generators. *Pa. P.U.C. et al. v. Duquesne Light Co.*, Docket No. R-860556 (July 20, 1987). Consequently, the existing power purchase agreements with Beaver Valley Power Company and Beaver Falls

agreements provide that the price to be paid for the net power produced by the QFs is subject to the terms and conditions of Duquesne Light's tariff on file with the Commission or any other jurisdictional authority. As the successor to the entities that bought Duquesne Light's generation facilities and QF obligations, NRG must pay this price to the QFs. Consequently, as recognized by NRG, the wholesale rate paid under both of these negotiated power purchase agreements is set forth in Rider No. 18.[6] (NRG Midwest St. 1-S, pp. 3, 9)

If the Commission were to grant the relief requested by NRG and either eliminate Rider No. 18 or modify the rate in Rider No. 18, such action clearly would directly and materially affect both the QFs. Indeed, if the Commission were to reduce the wholesale PURPA rate in Rider No. 18, this would directly, and adversely, affect the rate paid by NRG to both of the QFs because there is no separately stated rate under the existing power purchase agreements. Further, if the Commission were to eliminate Rider No. 18, there would be no wholesale PURPA rate in Duquesne Light's tariff as required by the existing power purchase agreements and the existing agreements would be materially modified. Clearly, the two QFs 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").

Although it appears from the Certificate of Service attached to the Complaint that NRG served the owners of the qualifying facilities, NRG failed to name the QFs as parties to the

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Municipal Authority are the only two remaining power purchase agreements subject to Rider No. 18. The Commission has not at any time modified or terminated the Rider No. 18 PURPA rate.

[6] As averred by NRG, through various transactions, in 2012 NRG Midwest has assumed the obligation under a Revised QF Agency Agreement to purchase the net power output from the QFs described above. (Complaint ¶¶ 13, 14)

Complaint. Indeed, the QFs were omitted from the caption of the Complaint. Similarly, the QFs were omitted from the description of the parties to the Complaint. Moreover, given the vague and cryptic averments in the Complaint -- "Rider No. 18 of Duquesne Light's Tariff should be examined to ensure that the terms, conditions and electric energy purchase price continue to be just, reasonable, and non-discriminatory" -- there was nothing in the Complaint to suggest that the QFs' *existing* wholesale power purchase agreements could be materially and adversely modified or altogether terminated as a result of the Complaint. Simply stated, the Complaint was not sufficient to put the QFs on notice that they could be affected by the relief sought by NRG.[7]

To date, neither QF has been joined by NRG as parties to the base rate proceeding.[8] NRG's failure to join the qualifying facilities as parties to the Complaint is fatal to the cause of action. *See Bucks County Servs. v. Phila. Parking Auth.*, 71 A.3d 379 (Pa. Cmwlth. 2013) (the failure to join an indispensable party deprives a court of subject matter jurisdiction and is fatal to a cause of action). Indeed, it appears from recent Commission precedent that if the NRG 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.

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[7] Indeed, it was not until NRG served their direct and surrebuttal testimonies on November 1, 2013 and December 9, 2013, respectively, that NRG requested that the Commission either modify the wholesale PURPA rates set forth in Rider No. 18 or eliminate Rider No. 18 entirely. Notably, the QFs were not parties to the proceeding and, therefore, as evidenced by the certificates of service, were not served with NRG direct and surrebuttal testimonies. Clearly, the QFs were without any notice of NRG's request for relief in this proceeding.

[8] Following the ALJ's December 12, 2013 denial of Duquesne Light's Preliminary Objections, which requested, among other things, that the Complaint be dismissed for failure to join indispensable parties, the Beaver Falls Municipal Authority filed a Petition to Intervene. Beaver Falls Municipal Authority's Petition to Intervene was granted on December 17, 2013, *i.e.*, the second day of hearings in the base rate case proceeding. Although Beaver Falls Municipal Authority was granted intervention status, this does not resolve the indispensable party issue. First, the fact remains that Beaver Falls Municipal Authority has not had an adequate opportunity to file dispositive motions, participate in discovery, develop a position, or prepare comprehensive testimony in support of its position. Second, it is well-settled that an intervenor does not have the same rights as party. *See* 52 Pa. Code § 5.75(c). Finally, the second QF, Beaver Valley Power Company has not intervened or otherwise been joined as a party to the base rate proceeding.

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) The Commission's disposition in *J3* is directly on point and controlling in this case. While NRG concedes that the QF's interest may be affected, they claim the QFs are similarly situated with other Duquesne Light customers and are not indispensable parties. The QFs are not similarly situated with other customers. Other customers pay Duquesne Light's tariffed rates to receive electric service. The QFs are paid the rate under Rider No. 18, and Rider No. 18 is not a retail tariff provision. Rider No. 18 sets rates to the QFs under wholesale power contracts, and any changes to Rider No. 18 will directly and materially affect the QFs.

NRG's failure to join all necessary and indispensable parties is fatal to its cause of action. *See Bucks County Servs., supra.* Based on the Commission's recent precedent, if litigation of the

NRG' Complaint is continued and both the QFs are not joined as indispensable parties and given a full opportunity to participate, the parties will be required to re-litigate these issues again with all necessary and indispensable parties. Clearly, it would be a waste of the Commission's and parties' resources to litigate the NRG Complaint, either as part of the base rate case proceeding, or at a postponement of any hearing on NRG's Rider No. 18 issues, without first joining all necessary and indispensable parties.

Based on the foregoing, Duquesne Light respectfully requests that Commission answer the first material question presented in the Petition for Interlocutory Review in the affirmative and dismiss the NRG' Complaint as to Rider No. 18 issues without prejudice to refile and join all necessary and indispensable parties.

B. THE COMMISSION LACKS AUTHORITY TO GRANT THE RELIEF REQUESTED BY NRG

As confirmed by the direct and surrebuttal testimony submitted on behalf of NRG Midwest, NRG requests 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) However, the Commission lacks the authority to grant the relief requested by NRG.

Wholesale power supply agreements under PURPA are within the exclusive jurisdiction of the FERC. *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 965-66 (1986). State regulatory authorities are granted a very important but very limited role under PURPA – to initially set the "avoided costs" rate to be paid pursuant to PURPA. Once a state regulatory commission establishes the "avoided cost" to be paid, the state no longer has authority to regulate the QFs' rate. *See Freehold Cogeneration Assocs., L.P. v. Board of Regulatory Comm'rs*, 44 F.3d 1178, 1190 (3d Cir. 1995).

Here, as acknowledged by NRG, Rider No. 18 was adopted to establish the rates to be paid for the wholesale power produced by QFs pursuant to PURPA. (NRG Midwest St. 1-S, p. 6) The Commission approved Rider No. 18, including the wholesale PURPA rate, in 1981.[9] Therefore, pursuant to the Third Circuit's holding in *Freehold*, the Commission is without authority to alter, revise, or continually monitor the wholesale PURPA rates set forth in previously approved Rider No. 18. Indeed, the Commonwealth Court has explained that "Section 210 of PURPA preempts the [Commission] from reconsidering its prior approval of the [power purchase agreements] between West Penn and the [qualifying facilities] or to change the rates established for the avoided costs at the time of the agreements." *W. Penn Power Co. v. Pa. Pub. Util. Comm'n*, 659 A.2d 1055, 1066 (Pa. Cmwlth. 1995), *affirmed by*, 535 Pa. 108, 634 A.2d 207 (1993). Similarly, the Commission has held that "federal law in the form of PURPA 210 and the regulations thereunder entitle a QF to a known stream of payments based upon estimates of a utility's avoided costs as of the date the qualifying facility makes an offer of acceptance to the utility...in our view federal law would act to prohibit us from reconsidering a prior approval of rate recovery." *Petition of Pennsylvania Electric Company Requesting Approval of Rate Recovery, Under the Energy Cost Rate, for the Costs Proposed to be Paid Under an Agreement with Scrubgrass Power Corporation*, Docket No. P-870248, 1988 Pa. PUC LEXIS 101 at *11-12, 66 Pa. PUC 151 (Jan. 21, 1988). Accordingly, it would appear that the Commission is without authority to modify the previously-approved wholesale PURPA rate set forth in Rider No. 18 as to existing power purchase agreements as requested by NRG.

[9] It is anticipated that the NRG will argue that the Commission has previously modified Rider No. 18 and, therefore, it has the authority to grant the relief requested here. It should be noted, however, that these prior modifications by the Commission were related only to the implementation of Rider No. 18 and, importantly, had no effect on the previously-approved wholesale PURPA rate set forth in Rider No. 18. *See, e.g., Pa. P.U.C. et al. v. Duquesne Light Co.*, Docket No. R-860556, 1987 Pa. PUC LEXIS 235, 64 Pa. PUC 388 (July 20, 1987).

Further, as explained above, granting the relief requested by NRG would have a direct and material effect on the existing wholesale power purchase agreements. In essence, if the Commission were to grant the requested relief, the Commission's action would amount to a *de facto* modification of the existing wholesale power purchase agreements. However, it is well-settled that the Commission has no jurisdiction over wholesale power purchase agreements, which are within the exclusive jurisdiction of FERC. *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 965-66 (1986).[10] Further, the Commission has explained that it is the Commission's policy to not revisit the rates paid under power purchase agreements with qualifying facilities for the term of the agreement.[11] *Petition of Pennsylvania Electric Company, supra.* Accordingly, there are significant issues as to the Commission's authority to modify or terminate the existing wholesale power purchase agreements by either modifying the wholesale PURPA rates set forth in Rider No. 18 or eliminating Rider No. 18 entirely as requested by NRG.

PURPA remains in full force and effect and has not been repealed.[12] Therefore, even assuming, *arguendo*, that the Commission had authority to either modify the wholesale PURPA rates set forth in Rider No. 18 or eliminate Rider No. 18 entirely, the Commission would still need to determine the appropriate "avoided costs" to be paid to the QFs in today's electric

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[10] *See also Utilimax.com v. PPL Energy Plus LLC*, 378 F.3d 303, 305 (3d Cir. 2004) (wholesale market for electrical energy is regulated by FERC"); *Joint Application of PECO Energy Company And Public Service Electric and Gas Company for Approval of the Merger of Public Service Enterprise Group, Inc. with and into Exelon Corporation*, Docket No. A-110550F0160, 2006 Pa. PUC LEXIS 33 at *193 (February 1, 2006) (it is FERC, not the Commission, which has exclusive jurisdiction over the wholesale electric and natural gas markets).

[11] Here, the existing power purchase agreements remain in effect as long as Duquesne Light has a tariff regarding the purchase of power from small generators. *See In re West Penn Power Company*, 71 F.E.R.C. P61,153 (order denying petition for declaratory order, May 8, 1995) (FERC has determined that PURPA permits "lock-ins," that is, fixed-rate long-term QF contracts).

[12] *See, e.g., Investigation of Pennsylvania's Retail Electricity Market: End State of Default Service*, Docket No. I-2011-2237952, 2013 Pa. PUC LEXIS 306, 303 P.U.R.4th 28 (February 15, 2013) (acknowledging the continued existence of PURPA and PURPA contracts post-Competition Act).

market.[13] The issue of PURPA rates has never been addressed post-restructuring and post-Act 129, and it is entirely unclear what Pennsylvania electric distribution companies' "avoided costs" would be today in light of de-regulation, the general lack of utility-owned generating units, or electric distribution companies' default service obligations.[14]

For these reasons, Duquesne Light submits that the Commission lacks authority to either modify the wholesale PURPA rates set forth in Rider No. 18 or eliminate Rider No. 18 entirely as requested by NRG. Therefore, Duquesne Light respectfully requests that Commission answer the second material question presented in the Petition for Interlocutory review in the affirmative and dismiss the NRG Complaint for lack of jurisdiction to grant the relief requested.

Alternatively, in the event that the Commission concludes that it has the authority to grant the relief requested by NRG or desires to have jurisdiction considered on a preliminary basis, Duquesne Light respectfully requests that the Rider No. 18 portion of the NRG Complaint be severed from the base rate case and held in abeyance. Duquesne Light notes that the Commission previously has reviewed and approved a partial settlement in a base rate case and held in abeyance for disposition at a future date litigated issues that could not be resolved in the context of the base rate:

> Based upon our review and analysis of the record evidence presented with regard to the challenge of PCOC to Columbia's existing CAP-Plus program, we do not believe that this matter can be resolved in the context of this proceeding. Therefore, we will defer consideration of this issue and hold it in abeyance for disposition at a future date. We take this unusual approach based on our concern that resolution of this issue in this proceeding will have significant impact on all other similar, currently effective

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[13] State regulatory authorities are required to implement PURPA pursuant to the rules and regulations promulgated by FERC. *See* 16 U.S.C. § 824a-3(f).

[14] There also is substantial uncertainty as to the extent that the Commission's regulations regarding the purchase and sale of energy and capacity from qualifying facilities, 52 Pa. Code § 57.31 et seq., would apply to determine "avoided costs." A review of these regulations suggests that they were enacted prior to and without anticipating the competitive electric market that exists in Pennsylvania today.

> programs of our other jurisdictional utilities. There is simply insufficient time to render a thorough and reasoned decision on this matter within the regulatory time constraints inherent in a 1308(d) base rate proceeding. In so doing, it is important to note that Columbia itself did not propose any changes to its currently effective CAP-Plus program in conjunction with its rate increase request. The issue rises solely due to a challenge of Columbia's existing CAP-Plus program by PCOC and does not have any effect on the agreed upon revenue requirement contained within the Settlement. Therefore, we find that this issue is severable from the resolution of the other issues within this proceeding, and we will hold the CAP-Plus issue in abeyance until further action by the Commission.

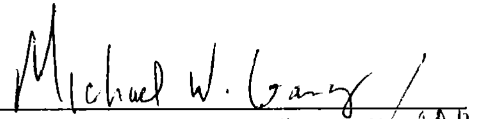
Pa. PUC v. Columbia Gas of Pennsylvania, Docket Nos. R-2010-2215623 et al., 2011 Pa. PUC LEXIS 185 at *89-90, 293 P.U.R.4th 235 (Oct. 14, 2011).

The Commission's treatment of the non-settled issue in the Columbia base rate case is directly on point. Here, there simply is not sufficient time in this base rate proceeding for the parties to fully and adequately examine and address the novel and complex issue of the appropriate "avoided costs" to be paid to the QFs in today's electric market. Duquesne Light itself did not propose any changes Rider No. 18 in conjunction with its requested rate increase. Rather, the issues related to Rider No. 18 rise solely due to NRG's challenge of the wholesale PURPA rate set forth in Rider No. 18, and does not have any effect on the agreed upon revenue requirement contained within the Settlement reached among all parties except NRG. Finally, given the potential statewide impact, all potentially affected parties should be given the opportunity to fully participate in the determination of such issues.

V. CONCLUSION

WHEREFORE, Duquesne Light Company respectfully requests that the Pennsylvania Public Utility Commission answer the material questions in the affirmative and direct that the Rider No. 18 portion of NRG's Complaint be (1) dismissed for lack of jurisdiction to grant the relief requested, (2) alternatively, dismissed without prejudice to refile and join all necessary/indispensable parties, or (3) alternatively, severe the Complaint from the base rate case or hold the Rider No. 18 issues in abeyance until further action by the Commission.

Respectfully submitted,



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