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December 23, 2013

VIA E-FILING

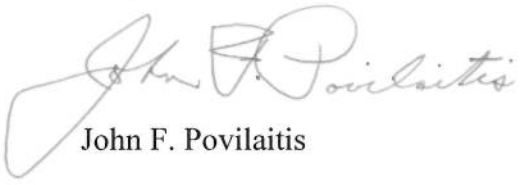
Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Pennsylvania Public Utility Commission; Office of Consumer Advocate; Office of Small Business Advocate; Jacquelyn and Robert Miller; Gwendolyn L. LeVert; Duquesne Industrial Interveners; Aimee M. Dorsten; Connie Schiavo; NRG Power MidWest LP, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC v. Duquesne Light Company; Docket Nos. R-2013-2372129; C-2013-2379084; C-2013-2380474; C-2013-2383835; C-2013-2383980; C-2013-2385292; C-2013-2386037; C-2013-2386284

Dear Secretary Chiavetta:

On behalf of Beaver Falls Municipal Authority, I have enclosed for electronic filing the Brief in Support of Duquesne Light Company's Petition for Interlocutory Review in the above-captioned consolidated matters. Copies have been served on all parties as indicated in the attached certificate of service.

Very truly yours,



John F. Povilaitis

JFP/kra
Enclosure
cc: Administrative Law Judge Conrad A. Johnson (via email and first class mail)

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission	:	
Office of Consumer Advocate	:	
Office of Small Business Advocate	:	**Docket Nos. R-2013-2372129**
Jacquelyn and Robert Miller	:	**C-2013-2379084**
Gwendolyn L. LeVert	:	**C-2013-2380474**
Duquesne Industrial Interveners	:	**C-2013-2383835**
Aimee M. Dorsten	:	**C-2013-2383980**
Connie Schiavo	:	**C-2013-2385292**
NRG Power Midwest LP,	:	**C-2013-2386037**
NRG Energy Center Pittsburgh LLC,	:	**C-2013-2386284**
and Reliant Energy Northeast LLC	:	
	:	
v.	:	
	:	
Duquesne Light Company	:	

BRIEF IN SUPPORT OF DUQUESNE LIGHT COMPANY'S PETITION FOR INTERLOCUTORY REVIEW

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Dated: December 23, 2013

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I. MATERIAL QUESTIONS AND SUGGESTED ANSWERS

This Brief, filed pursuant to 52 Pa. Code § 5.302(b) and in support of the Petition for Interlocutory Review and Answers to Material Questions ("Petition") filed by Duquesne Light Company ("Duquesne") on December 13, 2013, arises from Duquesne's presently pending retail base increase proceeding before the Pennsylvania Public Utility Commission ("Commission") at Docket No. R-2013-2372129 *et al.* ("Base Rate Proceeding"). The Base Rate Proceeding was filed by Duquesne on August 2, 2013. Close to the end of the ninety-day period for filing complaints against the proposed rate increase, NRG Power Midwest, LP[1] filed on October 31, 2013 a complaint at Docket No. C-2013- 2390562 ("Complaint") which urged that Duquesne's Tariff Rider No. 18 – Rate for Purchase of Electric Energy from Customer-Owned Renewable Resources Generating Facilities ("Rider No. 18"), be "examined to ensure that the terms, conditions and electric energy purchase price continue to be just, reasonable, and non-discriminatory."[2] The Complaint also asserted that Rider No. 18 "may represent an indirect form of rate discrimination benefiting certain customer-generators." In the Complaint's "Relief Sought," NRG Midwest asked that the Commission "ensure that Tariff Rider No. 18 is just, reasonable and non-discriminatory." The Complaint neither identified the customer-generators allegedly benefiting from rate discrimination nor referenced any specific relief sought with respect to Rider No. 18. In Direct Testimony served one day after the filing of the Formal Complaint, NRG Midwest's witness, Ms. Judith Lagano, asserted that the price in Rider No. 18, six cents per kilowatt-hour, was "double" a "just and reasonable energy price" and recommended that the price be based "on the locational marginal price in the Duquesne Zone."[3] It was not until

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[1] NRG Power Midwest LP ("NRG Midwest"), NRG Energy Center Pittsburgh ("NRG Pittsburgh"), and Reliant Energy Northeast LLC ("Reliant") are the three NRG Energy, Inc. entities that filed the formal complaint against Duquesne on October 31, 2013. NRG Midwest is a wholesale power generation company owning and operating 1154 megawatts ("MW") of capacity in Pennsylvania. NRG Pittsburgh is a certificated public utility providing steam, hot water and chilled water service in a portion of the City of Pittsburgh. Reliant is a Pennsylvania EGS offering service to residential, commercial industrial and governmental customers throughout Pennsylvania and in the service territory of Duquesne. (Complaint, pp. 1-2). The testimony offered on the issue of Tariff Rider No. 18 in support of the Complaint was submitted by Ms. Judith Lagano on behalf of NRG Midwest.

[2] Rider 18 establishes the rates to be paid for electricity produced by certain specified types of qualifying facilities ("QFs") under the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 824 *et seq.*

[3] NRG Midwest St. No. 1, pp. 6-7.

NRG Midwest submitted its Surrebuttal Testimony on December 19, 2013 that it recommended to the Commission that Rider No. 18 be eliminated altogether.[4] Duquesne filed timely Preliminary Objections ("POs") to the Complaint raising three objections: (1) the Complaint was beyond the scope of the Base Rate Proceeding; (2) the Complaint failed to join parties indispensable to the claims regarding the PURPA rates paid under Rider No. 18, thereby depriving the Commission of jurisdiction over the Complaint; and (3) the relief requested in the Complaint is beyond the scope of the Commission's jurisdiction.

The presiding Administrative Law Judge ("ALJ") issued an order on December 12, 2013 denying the POs. This order did not indicate any specific basis for the denial of the POs.

The day following the order denying its POs, i.e., December 13, 2013, Duquesne filed the Petition raising the following material questions:

1. Whether NRG's Complaint must be dismissed for failure to join the affected QFs[5] as necessary and indispensable parties?
2. Whether the Commission lacks authority to change the wholesale PURPA rate set forth in Rider No. 18?

Duquesne suggested each question must be answered in the affirmative. The Beaver Falls Municipal Authority ("Authority") requests that the Commission answer Duquesne's second material question first in the interest of judicial economy. A conclusion that the Commission lacks the authority to change the price in Rider No. 18 not only moots the issue of whether there are indispensable parties missing in this case, it terminates continued litigation of the Rider No. 18 issue by the Authority, which is a non-profit entity significantly smaller than NRG Midwest.

[4] NRG Midwest St. No. 1-S, pp. 6, 9, 10.

[5] "QFs" are a discrete set of electric generation facilities established by PURPA that were given a number of special rights, including the right to sell and require electric utilities to purchase the output of their facilities at a specific price referred to as "avoided cost." The two types of QFs are small power production facilities under 18 C.F.R. §§ 292.203(a) and 292.203(c) and cogeneration facilities under 18 C.F.R. § 292.203(b).

II. BEAVER FALLS MUNICIPAL AUTHORITY

When the ALJ issued his order denying the POs on December 12, 2013, which had the practical effect requiring the status of Rider No. 18 to be litigated in the Base Rate Proceeding, the Authority took immediate steps to protect its interests.

The Authority was established by an ordinance enacted by the City Council of Beaver Falls, Pennsylvania and was incorporated on July 3, 1940. The Authority now provides water services to 23 municipalities. It also generates electricity from hydroelectric facilities, which it sells to Duquesne pursuant to Rider No. 18. The Authority's system serves approximately 60 square miles or over 10 percent of the land area of Beaver County, and approximately 50,000 people, or nearly 25-30 percent of Beaver County's population.[6]

By way of background, on August 17, 1984, the Federal Energy Regulatory Commission ("FERC") issued a license under Part I of the Federal Power Act to the Authority to construct, operate, and maintain a hydroelectric power generation facility on the Beaver River in Beaver County, Pennsylvania.[7] The FERC order provided, among other things, that the license term would be 40 years, effective August 1, 1984.[8]

On February 28, 1985, the Authority entered into a negotiated power purchase agreement ("PPA") with Duquesne under which the Authority, among other things, agreed to sell and Duquesne agreed to purchase the output of two hydroelectric generating facilities of 2.5 megawatts each ("Facilities") and owned and operated by the Authority and subject to the FERC hydroelectric license issued in August 1984. The Facilities were and remain a "qualifying facility" under and in accordance with PURPA.[9] Importantly, under the PPA, Duquesne is obligated to, among other things, purchase the net electric energy produced by the Facilities

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[6] Petition to Intervene, pp. 1-2.

[7] *See* 28 FERC 62,227, Beaver Falls Municipal Authority (Order Issued August 17, 1984).

[8] *Id.* at *9-10.

[9] Under PURPA, public utilities are required to purchase all electricity produced by independent power producers that obtain status as QFs. 16 U.S.C. § 824a-3(b); 18 C.F.R. § 292.303(a). Under the FERC regulations 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 QF, such utility would generate itself or purchase from another source. 18 C.F.R. § 292.101(b)(6).

under and in accordance with the terms and conditions of Rider No. 18. In other words, the *price* for electric power generated by the Authority's Facilities and purchased by Duquesne is specified in Rider No. 18 and not in the PPA itself. Thus, Rider No. 18 is an integral component of and inter-related with the PPA under which the Authority and Duquesne have been engaged since the mid-1980s.

Since the price paid to the Authority under the PPA relates directly to Rider No. 18, any reduction of the rate specified in Rider No. 18 or its elimination entirely, as demanded by NRG Midwest, will have an obvious, substantial and materially adverse impact on the revenues the Authority receives for the electric generation produced by its Facilities and sold under the PPA. Under these circumstances, the Authority filed a Petition to Intervene in the Base Rate Proceeding on December 16, 2013, which was granted by the presiding ALJ on December 17, 2013.[10] To the extent the Petition addresses the Complaint, the Authority's economic interests under the PPA are potentially at risk. Hence, the Authority is filing this Brief in Support of the Petition to protect its rights under the PPA and Rider No. 18, and urges the Commission to answer the material questions in the affirmative as requested by Duquesne.

III. NRG MIDWEST

While NRG Midwest has no direct contractual relationship with the Authority, its actions in general with respect to Rider No. 18 and the Complaint in particular have a direct and material impact on the Authority and its PPA with Duquesne. Specifically, in accordance with various Commission approvals relating to Duquesne's electric restructuring in the late 1990s, Duquesne auctioned to Orion Power Holdings, Inc. ("Orion") its generating assets in 2000 and, as part of that transaction, the PPA was assigned originally to Orion as the successful generation asset purchaser.

In order to effect the assignment of the PPA, Duquesne and Orion entered into a Revised QF Agency Agreement, which was approved by the FERC on March 8, 2001.[11] Through various

[10] N.T. 180.

[11] *See* FERC Docket No. ER01-1138-000.

subsequent transactions, NRG Midwest assumed the obligations under the Revised QF Agency Agreement including, among other things, the obligation to purchase the net electric output of the Facilities under the PPA from the Authority.

NRG Midwest has been operating under the Revised QF Agency Agreement only since 2012[12], pursuant to which it has been paying a rate of six cents per kilowatt-hour for electric energy produced by the Facility as specified in Rider No. 18.

IV. RIDER NO. 18

The dispute before the ALJ in the Base Rate Proceeding and now in this Petition centers on Rider No. 18. In August 1981, Duquesne filed with the Commission Supplement No. 54 to its then current retail electric tariff which added Rider No. 18. Duquesne's August 5, 1981 letter to the Commission filing Rider No. 18 noted in part that "[t]he electricity from such [QF] facilities would be purchased at a rate of six (6) cents per kilowatt-hour or at a rate based on avoided incremental operating and capacity costs when those costs exceed six (6) cents per kilowatt-hour." In that same letter, Duquesne calculated its "avoided cost" under PURPA as varying from 2.68 cents/kWh to 5.49 cents/kWh for the years 1982 through 1990. However, to encourage renewable energy resources on its system, Duquesne urged the Commission to allow Duquesne to pay QFs $0.06/kWh as specified in Rider No. 18.

Since the original 1981 filing, the language of Rider No. 18 has been changed from time to time, not always with respect to QF pricing. The relevant *pricing* language in Rider No. 18 at the time of each such change is as follows:

- Supplement No. 17 to Tariff Electric-PA. P.U.C. No. 15, Third Revised Page No. 53, effective January 26, 1985: *"The electric energy will be purchased, as available, from the facility [QF] at the rate of six (6) cents per kilowatt-hour or at rate based on avoided incremental operating capacity cost when such rate exceeds six (6) cents per kilowatt-hour."*
- Supplement No. 43 to Tariff Electric-PA. P.U.C. No. 15, Fifth Revised Page No. 53, effective August 25, 1987: *"The electric energy will be purchased, as available, from such facilities [QFs] at the rate of six (6) cents per Kilowatt-hour*

[12] NRG Midwest witness Lagano in the Base Rate Proceeding noted in part: "NRG Midwest assumed the Revised QF Agency Agreement from GenOn Energy, Inc. ("GenOn") in connection with the merger in 2012 of NRG Energy, Inc. and GenOn." (NRG Midwest St. No. 1, p. 3, lines 8-9.)

or at rate based on the Company's avoid costs when such costs exceed six (6) cents per Kilowatt-hour."

- Supplement No. 2 to Tariff Electric-PA. P.U.C. No. 24, First Revised Page No. 105, effective January 6, 2007: *"The electric energy will be purchased, as available, from the facility [QF] at the rate of six (6) cents per kilowatt-hour or at rate based on the Company's avoid costs when such costs exceed six (6) cents per kilowatt-hour."*[13]

Importantly, since its initial issuance in 1981, Rider No. 18 has consistently been structured with $0.06/kWh being the minimum or "floor" pricing for electric energy purchases from QFs.

In 1986, Duquesne became concerned that, with the anticipated reduction in its electric load and new capacity from the Perry I and Beaver Valley II generation units, it would no longer have the need to pay QFs a payment for capacity in addition to energy payments. In order to address these issues, Duquesne proposed in a filing with the Commission to limit the availability of Rider No. 18 to those QFs that had a contract with Duquesne prior to February 10, 1987 and were supplying energy or constructing facilities to supply energy to the company.[14] While the Commission rejected the specific form of limitation to Rider No. 18 proposed by Duquesne, it specifically held in an order entered on July 20, 1987 at Docket No. R-860556 that "... we are in basic agreement with the proposal to curtail the availability of the Rider No. 18 rate."[15]

Thus, since 1987, Rider No. 18 – including the $0.06/kWh rate – has been closed and unavailable for new QFs. Indeed, Rider No. 18 on its face has been restricted since 1987 to the following QFs:

- QFs subject to a contract dated prior to August 25, 1987 and are supplying electric energy, or have commenced construction of facilities to supply electric energy within sixty (60) days of August 25, 1987;
- QFs that are supplying electric energy to Duquesne under the terms of Rider No. 18 on or before August 25, 1987, but are not subject to an executed contract; or

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[13] The only change to Rider No. 18 in 2007, was striking the reference to Duquesne's energy cost rate recovery, which was superfluous given its sale and assignment of its generation resources.

[14] *Pennsylvania Public Utility Commission, et al. v. Duquesne Light Company* Docket Nos. R-860556, R-860556C001 (Order entered July 20, 1987) ("1987 Order" attached as Appendix 1).

[15] 1987 Order at 3, Appendix 1.

- QFs that had been negotiating with Duquesne for a contract and it is determined that the project has been the subject of "serious negotiations" prior to August 25, 1987.

The Authority is one of only two QFs that are still today grandfathered under Rider No. 18 as it exists under Duquesne's retail electric tariff.[16] Indeed, in the 1986-1987 proceeding initiated by Duquesne to limit the availability of Rider No. 18, both the Commission and Duquesne specifically identified the Authority's Facilities as being then under construction and qualifying for the rate set forth in Rider No. 18.[17] And, the Commission's July 20, 1987 Order specifically found that the Authority's Facilities were entitled to the rate set under Rider No. 18 because they were small hydroelectric facilities under construction and subject to a contract executed prior to July 25, 1987.[18]

Having voluntarily assumed the Revised QF Agency Agreement in its recent 2012 merger, NRG Midwest essentially seeks in the Complaint to void and vitiate the Authority's PPA – which is expressly tied to $0.06/kWh pricing in Rider No. 18. However, the price in Rider No. 18 has been fixed and locked since 1987 when the Commission expressly restricted it as noted above. Thus, NRG Midwest is powerless to change this restricted Rider No. 18. The only way to put an end to NRG Midwest's unlawful attempt to undermine Rider No. 18 – and in so doing protect the integrity of the QF and renewable energy paradigm envisioned and established by Congress when it passed PURPA in 1978 – is to grant the Petition and answer Duquesne's material questions in the affirmative.

V. ARGUMENT

A. The Commission Should Answer the Material Questions Presented

The Authority understands that the Commission's regulations at 52 Pa. Code § 5.303(a) give it four discrete options in addressing the Petition. However, the Authority urges the Commission to answer the two material questions for a few important reasons. First, as the Commission can imagine, NRG Midwest's action in filing the Complaint in the Base Rate

[16] The other QF is the Beaver Valley Power Company. *See* 1987 Order at n. 4, Appendix 1.
[17] 1987 Order at n. 4, Appendix 1.
[18] 1987 Order at 3, Appendix 1.

Proceeding when Duquesne has not proposed any change whatsoever to Rider No. 18, has taken the Authority and others by surprise.[19] While the Authority has no desire to impede any party from exercising its lawful rights, NRG Midwest's actions are a direct threat to the PPA and the economic value the Authority has come to rely on for years. It is particularly disconcerting that as a relatively recent (i.e., 2012) assignee of the Revised QF Agency Agreement, NRG Midwest, would be seeking to undo an arrangement that has been successfully in place since the mid-1980s. NRG Midwest knew or should have known the terms and risks of the PPA when conducting the due diligence in connection the GenOn merger, but failed to avail itself of such traditional due diligence opportunities.[20] The Authority should not be the scapegoat for NRG Midwest's prior decisions and apparent inaction.

Second, the Authority's overall resources, including its legal budget, are no match for NRG Midwest's substantial resources that could be brought to bear in litigation over Rider No. 18. A clear statement that the Commission lacks jurisdiction to hear the Complaint and that NRG Midwest is prohibited from challenging the restricted Rider No. 18 tariff provision – including the $0.06/kWh rate therein – would avoid needless and costly litigation by all parties, including the Authority.

Third, the Commission should answer the material questions since the answers are clear and compelling. As will be discussed further below, the PPA is a wholesale power supply agreement over which the Commission currently has no jurisdiction. It is well-settled that the Commission cannot revisit or change QF rates once they have been approved.

Finally, the Commission's regulations permit interlocutory review and answer to a material question to prevent substantial prejudice or to expedite the conduct of the proceeding.[21] Absent the Commission's proactive action in answering the material questions, it is possible that

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[19] The Commission's standard, general language in its order opening the Base Rate Proceeding makes all of Duquesne's tariff provisions subject to review. However, Rider No. 18 is an atypical tariff provision, quite different from the rest of Duquesne's tariff in two respects: (i) it deals with a rate Duquesne pays, and not one it charges or can charge and (ii) it is a grandfathered provision, the hallmark of which is that it "locks in" specific terms to specific entities.

[20] *See* Transcript of December 20, 2013; cross-examination of Ms. Lagano.

[21] 52 Pa. Code § 5.302(a).

litigation on Rider No. 18 would continue until completion, only to be subject to a later challenge by other indispensable parties (e.g., Beaver Valley Power Company) and possible reversal via a successful challenge to the Commission's jurisdiction in light of its prior approval (and locked-in nature) of the Rider No. 18 rate.

In order to avoid needless, costly and prolonged litigation on issues that are not within the Commission's jurisdiction, and to avoid the substantial prejudice to the Authority and all the parties to the Base Rate Proceeding, the Authority urges the Commission to substantively first answer the material question regarding Commission jurisdiction to change the Rider No. 18 price. Should the Commission answer this question by finding it lacks jurisdiction, there is no need to address the issue of an indispensable party because such a conclusion is not adverse to the missing party, the Beaver Valley Power Company. It is only necessary for the Commission to reach the second issue of whether an indispensable party is missing if it finds it has jurisdiction to change the price in Rider No. 18.

B. Modification of the Six Cent/kwh Price in Rider No. 18 is Beyond the Commission's Authority

Two separate theories support the view that the Commission lacks the authority to modify the price specified in Rider No. 18 as requested by NRG Midwest in the Complaint. First, utility tariffs have the force and effect of law[22] and, as such, QFs like the Authority's Facilities are entitled, as a matter of law, to the Rider No. 18 price, as of the time in July 1987 when the Commission grandfathered the Authority's agreement with Duquesne and "locked-in" the Rider No. 18 price.[23] Importantly, at no time since the Commission restricted the availability of Rider No. 18 in 1987 did it direct any change in the $0.06/kWh rate specified in Rider No. 18. This is not surprising given that, once the PPA price was definitively set for the Authority through the grandfathering element of the 1987 Order, the paradigm for this PPA changed from a PPA with a price tied to a potentially changing tariff price, to a PPA with a price locked-in for this QF project. This is a completely typical scenario for a QF facility. And, as will be discussed

[22] *Brockway Glass Co., Inc. v. Pennsylvania Public Utility Commission*, 437 A.2d 1067 (1982).
[23] *See* 1987 Order, Appendix 1.

further below, after 1995, it was clear that the Commission lacked the authority under PURPA to change a QF wholesale electric rate that had been previously approved as was the Rider No. 18 rate in 1987.

Second, Rider No. 18 was a voluntary Duquesne filing that created wholesale electric rates to be paid for electricity produced by QFs under PURPA. Rider No. 18 deals with wholesale power supply agreements under PURPA that are within FERC's exclusive jurisdiction.[24] States like Pennsylvania have no authority of any kind over wholesale power supply arrangements, except in limited circumstances. For example, PURPA is a limited exception to this rule, but does not give the Commission any broad authority over wholesale electric contracts like the PPA.

Under PURPA, state commissions are required to implement PURPA in accordance with regulations established by FERC.[25] A state commission has the authority to implement PURPA in connection with the approval of contracts between utilities and QFs.[26]

Once the state commission has established the "avoided cost" to be paid, the state can no longer regulate the QFs' rate. The proposition that a state commission has no authority to modify a previously-approved power purchase agreement was announced in *Freehold Cogeneration Associates L.P. v. Board of Regulatory Commissioners, et al.* ("*Freehold*").[27] In that case, Freehold Cogeneration Associates ("FCA") negotiated a power purchase agreement with Jersey Central Power & Light Company ("JCP&L").[28] JCP&L later challenged the terms of the power purchase agreement and the New Jersey Board of Regulatory Commissioners ("BRC") directed the parties to renegotiate the purchase rate term in the agreement or negotiate an appropriate buyout of the contract. [29] BRC's order also stated that in the event the parties did not

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[24] *Nanthahala Power&Light Co. v. Thornburg,* 476 U.S. 953, 965-66 (1986); *Utilimax.com v. PPL Energy Plus LLC*, 378 F.3d 303, 305 (3d Cir. 2004) (wholesale market for electric energy is regulated by FERC).
[25] 16 U.S.C. § 824a-3(f).
[26] *Crossroads Cogeneration Corp. v. Orange & Rockland Utils, Inc.*, 159 F.3d 129, 135 (3d Cir. 1998).
[27] *Freehold Cogeneration Associates L.P. v. Board of Regulatory Commissioners, et al.*, 44 F.3d 1178 (3d. Cir. 1995).
[28] *Id.* at 1182.
[29] *Id.* at 1183.

reach an agreement within 30 days, the BRC would commence an evidentiary hearing to consider various courses of action.[30]

In response, FCA filed a federal district court action seeking a declaratory judgment that the BRC's order was preempted by PURPA.[31] FCA complained that the BRC had interfered with its federally-granted right to be exempt from certain state utility regulation.[32] On appeal of the district court's denial of FCA's petition, the Third Circuit, whose jurisdiction includes Pennsylvania, concluded that the district court had jurisdiction to hear FCA's claims brought under section 210(e) of the Federal Power Act and FERC regulations that exempt QFs from state utility regulation,[33] and that the BRC had no authority to order any modifications to the power purchase agreement:

> Based on the overall scheme of PURPA and its stated goal, and especially section 210(e) and the implementing rules promulgated by the FERC, we hold that Congress intended to exempt qualified cogenerators from state and federal utility rate regulations.[34]

The Pennsylvania courts have often echoed the holding in *Freehold.* In *West Penn Power Co. v. Pa. Pub. Util. Comm'n.*[35] the court stated:

> 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 rates established for the avoided costs at the time of the agreements.[36]

Rider No. 18 established wholesale PURPA rates for Duquesne Light going back to 1981. Those rates have continued unabated since 1981 and apply to existing QFs, like the Authority's PPA.[37] When the Commission in 1987 restricted the availability of Rider No. 18 to a class of QFs – including the Authority – and terminated it for new QFs, it effectively approved

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[30] *Id.*
[31] *Id.*
[32] *Id.* at 1185.
[33] *Id.* at 1186, *citing* 16 U.S.C. § 824a-3(e)(1); 18 C.F.R. § 292.602(c).
[34] *Id.* at 1192.
[35] *West 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).
[36] *Id.* at 1066.
[37] *See In re West Penn Power Company*, 71 F.E.R.C. ¶61,153 (order denying petition for declaratory order, May 8, 1995 (FERC has determined that PURPA permits "lock-ins", i.e., fixed rate long term QF contracts).

the very $0.06/kWh rate the Authority was then receiving, i.e., such rate was consistent with avoided cost, just, reasonably and prudently incurred. At that time and in accordance with the mandates of *Freehold* and its progeny,[38] the Commission had no further authority – on its own or at the behest of NRG Midwest in the Complaint – to make any change in the $0.06/kWh rate that is now "locked-in" for the Authority and its PPA.

It is of no consequence that the QF rate sought to be changed by NRG Midwest is contained in a Duquesne's retail tariff as opposed to a power purchase agreement. The FERC's PURPA regulations make it clear that QF arrangements can lock in rates for QF sales based on a "legally enforceable obligation" that is not necessarily derived from a contract.[39] Indeed, as noted above, the Commission's 1987 Order "locked in" the $0.06/kWh price in both Rider No. 18 and the PPA. This is clearly the "legally enforceable obligation" envisioned by FERC.

While the essence of NRG Midwest's argument is that it is paying an excessive amount *today* for energy provided by the Facilities, it ignores that the same FERC regulation expressly acknowledges that rates for QF purchases based on estimates established by contract or other legally enforceable obligation do not violate FERC's PURPA regulations if those rates differ from the avoided costs at the time of delivery. The fact that NRG Midwest believes that Duquesne's avoided cost rates today (at the time of delivery) are lower than the $0.06/kWh estimated price in Rider No. 18 originating in 1985, is completely inconsistent with the provisions of 18 C.FR. §292.304(b)(5) and does not entitle NRG Midwest to any relief.

C. The Complaint Fails to Join Necessary and Indispensable Parties

In Pennsylvania, "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

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[38] *See, i.e., New York State Elec. & Gas Corp. v. Saranac Power*, 117 F. Supp.2d 211 (N.D.N.Y 2000). *See also Niagara Mohawk Power Corp. v. FERC*, 162 F. Supp. 2d 107 (N.D.N.Y 2001); *Kamine/Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp.*, 908 F. Supp. 1180 (W.D.N.Y. 1995); *Grays Ferry Cogeneration Partnership, et al. v. PECO Energy Co.*, 998 F. Supp. 542 (E.D. Pa. 1998).

[39] *See,* 18 C.F.R. §292.304(b)(5), which provides as follows: "In the case in which the rates for purchases are based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation, the rates for such purchases do not violate this subpart if the rates for such purchases differ from avoided costs at the time of delivery."

absence renders any order or decree of court null and void for want of jurisdiction."[40] Failure to join an indispensable party goes absolutely to the court's jurisdiction and, if not raised by the parties, should be raised *sua sponte*.[41]

The Pennsylvania Supreme Court has established that "the basic inquiry in determining whether a party is indispensable concerns whether justice can be done in the absence of a third party…In order to make the analysis, however, one must refer to the nature of the claim and the relief sought."[42] The Pennsylvania Supreme Court's test for determining indispensability involves evaluating "at least" the following considerations:

1. Do absent parties have a right or interest related to the claim?
2. If so, what is the nature of that right or interest?
3. Is that right or interest essential to the merits of the issue?
4. Can justice be afforded without violating the due process rights of absent parties?[43]

It is indisputable that the Authority and, critically, the Beaver Valley Power Company (i.e., the other QF currently grandfathered under Rider No. 18) satisfy each of the criteria for indispensability. As QFs that stand to lose all or a substantial portion of the rate (and related revenues) under which they have been paid for their facility generation, they each have a right or interest to the claim. In addition, their interests are essential to the merits of the case because the Complaint centers exclusively on the price set under Rider No. 18, despite NRG Midwest's suggestions to the contrary. And, the failure to join the Authority and the Beaver Valley Power Company as parties, where their existing contract rights could be unilaterally modified by the Commission without being afforded the right to participate, violates their constitutional right to procedural due process.[44]

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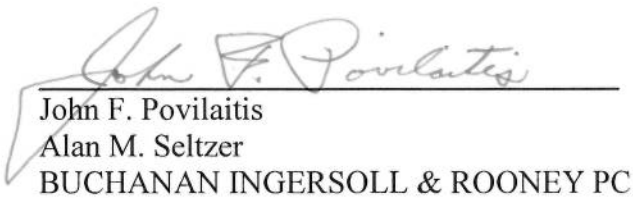
[40] *Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 464 Pa. 377, 379 (Pa. 1975); *City of Philadelphia, et al. v. Commonwealth of Pennsylvania, et al.*, 575 Pa. 542 (Pa. 2003); *Barren v. Dubas*, 441 A.2d 1315, 1316 (Pa. Super Ct. 1982).
[41] *Posel v. Redevelopment Authority of Philadelphia*, 465 A.2d 243, 246 (Pa. Cmwlth. 1983).
[42] *Cry, Inc. v. Mill Service, Inc.*, 536 Pa. 462, 486-69 (Pa. 1994).
[43] *Mechanicsburg Area School District v. Kline*, 494 Pa. 476, 481 (Pa. 1981).
[44] *Id.*

NRG Midwest's failure to name all QFs utilizing Rider No. 18 (i.e., the Authority and the Beaver Valley Power Company) as indispensable parties deprives the Commission of its jurisdiction to adjudicate the Complaint and is fatal to NRG Midwest. Although the Authority has intervened in this proceeding, the Beaver Valley Power Company was not named as a respondent to the Complaint and has not participated in this proceeding.[45]

VI. CONCLUSION

For the reasons set forth herein, the Beaver Falls Municipal Authority respectfully requests that the Commission grant interlocutory review, answer the material questions in the affirmative and dismiss the Complaint with prejudice.

Respectfully submitted,



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Attorneys for
Beaver Falls Municipal Authority

Dated: December 23, 2013

[45] Although the Authority, as of December 17, 2013, is a Party to this proceeding, NRG Midwest's failure to name it as a respondent to its Complaint and identify its true objectives in this case in that Complaint, essentially denied the Authority the opportunity to Answer the Complaint, file Preliminary Objections, conduct discovery or prepare Direct, Rebuttal or Surrebuttal Testimony. The ALJ provided the Authority an opportunity to present Rejoinder Testimony, which was served in writing on December 19, 2013 and admitted into evidence on December 20, 2013. The Authority's Rejoinder Testimony describes the economic impact NRG Midwest's recommendations would have on it if those recommendations were granted.

APPENDIX 1

C

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

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

ORDER rejecting proposed tariff supplement.

P.U.R. Headnote and Classification

1.
COGENERATION

s24 - Rates - Availability of current tariff - Reliance upon tariff for project development.
Pa.P.U.C. 1987
An electric utility's proposed tariff supplement, that would limit the availability of its current tariff rider for the purchase of electric energy from qualifying small power production facilities that use renewable resources, was rejected, because certain projects in the development stage had relied upon availability of the current tariff rider, and had expended substantial sums toward project development.

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

P.U.R. Headnote and Classification

2.
COGENERATION

s24 - Rates - Determination of appropriate tariff - Negotiations - Grandfather clause.
Pa.P.U.C. 1987
In order to allow a developer of a qualifying small power production facility (QF) that has a contract for the sale of electric energy with an electric utility, but that has not yet commenced construction, a "window" during which it could determine whether or not to proceed with a project, the commission allowed the utility the option to file a revised tariff supplement to limit the availability of the current tariff rider for the purchase of electric energy from a QF, that contained provisions for the grandfathering of facilities that: (1) are subject to a contract dated prior to the effective date of the revised tariff supplement and are supplying electric energy, or have commenced construction of facilities to supply electric energy within sixty days of the effective date of the revised tariff; (2) are currently supplying electric energy to the utility under the terms of the current rider, but that are not subject to an executed contract; and (3) are negotiating with the utility for a contract based upon the current rider.

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

P.U.R. Headnote and Classification

3.
COGENERATION

s17 - Contracts - Grandfather clause - Serious negotiations.
Pa.P.U.C. 1987
Because the commission will only accept the grandfathering of projects that have been "seriously negotiating" with an electric utility for a contract based upon the current tariff rider for the purchase of electric energy from qualifying small power production facilities, it stated that some indicia of serious negotiations would include the following: (1) evidence of Federal Energy Regulatory Commission certification granting qualifying status to the facility; (2) a statement of project definition including preliminary project design; (3) letter of intent or similar evidence of host site control; (4) evidence of adequate fuel supply consistent with anticipated project life and energy production; (5) a plan for obtaining all necessary project licensing; and (6) preliminary evidence of financial feasibility of project and a preliminary financing plan. p. 391.

Commissioners Present:

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

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

By the COMMISSION:

OPINION AND ORDER

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

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

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

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

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

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

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

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

DISCUSSION

[1] The instant proceeding requires us to consider the interests of qualifying facilities that have relied upon the availability of Rider No. 18. In the absence of Rider No. 18, Duquesne would be obligated to pay rates to new projects based on energy-only credits in accordance with our regulations implementing PURPA at 52 Pa. Code §§57.31 et seq. [FN7] With the drop in Duquesne's load and the recent and imminent addition of capacity from Perry I and Beaver Valley II, it appears that Duquesne would not be obligated to pay capacity credits to new qualifying facilities, and that $.06 per kwh may be higher than the rate otherwise required by our regulations at 52 Pa. Code §§ 57.31 et seq. However, tariffs have the force and effect of law, Brockway Glass Co., Inc. v. Pennsylvania Pub. Utility Commission, 63 Pa.Cmwlth. 238, 437 A.2d 1067 (1982), Stiteler v. Bell Teleph. Co. of Pennsylvania, 32 Pa.Cmwlth. 319, 379 A.2d 339 (1977). Therefore, any project that met the requirements of Rider No. 18 would be entitled, as a matter of law, to the Rider No. 18 rate, at least until such time as the Commission approves the modification of the Company's tariff. Because it appears that certain project(s) in the development stage reasonably may have relied upon the availability of Rider No. 18, and have expended substantial sums toward the project(s)' development, we conclude that Duquesne's Supplement No. 34 in its present form should be rejected. As stated above, Supplement No. 34 proposes to grandfather only those projects that are subject to a "contract dated prior to February 10, 1987, and are supplying energy, or constructing facilities to supply electric energy, to the Company..."Utilizing the information supplied by Duquesne in response to the Law Bureau's data requests it appears that only four (4) projects meet these dual requirements. [FN8] These projects represent approximately 6.8 MW.

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

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

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

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

Based on the information provided by Duquesne, we are able to identify one project, the Mazzaro Landfill Project, which meets the definition of having been subject to "serious negotiations". We would therefore urge Duquesne to execute a contract with the developers of the Mazzaro Landfill Project based upon Rider No. 18 as soon as practicable, since the developers of this project have been prepared to commence construction for several months. With the exception of the Mazzaro Landfill Project, we are unable to determine what projects, if any, should be grandfathered. Certainly, we cannot adjudicate any potential projects' rights without providing notice and an opportunity to be heard. Therefore, if Duquesne exercises its option to file a revised tariff supplement in accordance with this order, we will require Duquesne to serve a copy of this Order and its revised tariff filing upon all developers identified in its responses to the Law Bureau's data requests that potentially would qualify under Rider No. 18, as well as any such projects that inadvertently were omitted in Duquesne's responses. In the event that any developer feels it has conducted serious negotiations with Duquesne and is unable to reach agreement with Duquesne on this issue, we would require such a developer to initiate a formal proceeding at the Commission within ninety (90) days of the effective date of the revised tariff supplement to preserve its right to grandfathered status, and would place the burden of proof in any such proceeding upon the project developer.

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

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

IT IS ORDERED:

1. That Duquesne Light Company's Supplement No. 34 to Tariff No. 15 is rejected as not in the public interest.

2. That Duquesne Light Company may file a revised tariff supplement in accordance with the provisions of this Order within thirty (30) days of the entry date of this Order.

3. That if Duquesne Light Company files a revised tariff supplement in accordance with Ordering Paragraph No. 2, such tariff supplement shall be allowed to become effective upon five (5) days' notice, the investigation shall be terminated, and the case marked closed.

4. That if Duquesne Light Company files a revised tariff supplement in accordance with Ordering Paragraph No. 2, it at that time shall serve a copy of this Order and a copy of the revised tariff supplement upon all project developers that have contacted it regarding the availability of Rider No. 18.

5. That if Duquesne Light Company files a revised tariff supplement in accordance with Ordering Paragraph No. 2, it shall retain the burden of proof with respect to any complaints filed regarding the revised tariff supplement within sixty (60) days following the date of filing.

6. That if Duquesne Light Company files a revised tariff supplement in accordance with Ordering Paragraph No. 2, a project developer unable to reach agreement with Duquesne on the issue of grandfathered status must file a formal complaint with the Commission within ninety (90) days of the effective date of the revised tariff supplement in order to preserve its right, if any, to grandfathered status. The project developer shall have the burden of proof in any such proceeding.

7. That the Law Bureau shall file the Data Responses of Duquesne Light Company submitted under cover of letter dated March 23, 1987 with the Secretary, subject to the following provisions:

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

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

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

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

velopers giving them the opportunity to respond.

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

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

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

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

i. That part of any record of this proceeding containing Confidential Information, including but not limited to, all exhibits, writings, direct testimony, crossexamination, argument, responses to discovery requests, briefs and including reference thereto as mentioned in ordering subparagraph (h) above shall be sealed for all purposes, including administrative and judicial review unless such Confidential Information is released from the restrictions of this Order either through the agreement of the parties or pursuant to an order of the Administrative Law Judge or the Commission.

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

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

Appendix A

ACKNOWLEDGMENT OF PROTECTIVE ORDER

TO WHOM IT MAY CONCERN:

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

Dated:

Name

Address

Employer

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

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

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

FN4 Beaver Falls Municipal Authority (Townsend Dam).

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

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

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

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

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

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

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

END OF DOCUMENT

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission	:	
Office of Consumer Advocate	:	
Office of Small Business Advocate	:	Docket Nos. R-2013-2372129
Jacquelyn and Robert Miller	:	C-2013-2379084
Gwendolyn L. LeVert	:	C-2013-2380474
Duquesne Industrial Interveners	:	C-2013-2383835
Aimee M. Dorsten	:	C-2013-2383980
Connie Schiavo	:	C-2013-2385292
NRG Power Midwest LP,	:	C-2013-2386037
NRG Energy Center Pittsburgh LLC, and	:	C-2013-2386284
Reliant Energy Northeast LLC	:	
	:	
v.	:	
	:	
Duquesne Light Company	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document in accordance with the requirements of 52 Pa. Code § 1.54 et seq. (relating to service by a participant).

VIA FIRST CLASS AND ELECTRONIC MAIL

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