

RECEIVED



January 6, 2014

JAN 06 2014

VIA OVERNIGHT MAIL

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

David P. Zambito

Direct Phone 717-703-5892

Direct Fax 215-989-4216

dzambito@cozen.com

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

**Re: Pennsylvania Public Utility Commission, et al. v. Duquesne Light Company;
Docket Nos. R-2013-2372129, C-2013-2390562 et al.; MAIN BRIEF OF THE NRG
COMPANIES**

Dear Secretary Chiavetta:

Enclosed for filing with the Commission is the Main Brief of NRG Power Midwest LP, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC in the above-referenced matter. Copies have been served upon parties in accordance with the attached Certificate of Service.

If you have any questions regarding this filing, please direct them to me. Please date-stamp the extra copy and return it with our courier. Thank you for your attention to this matter.

Sincerely,

COZEN O'CONNOR

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

DPZ/kmg
Enclosures

cc: Honorable Conrad A. Johnson (via Electronic Mail (including Word version) and First
Class Mail)
Per Certificate of Service

LEGAL\17986000\1 16112.0003.000/326600.000

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Administrative Law Judge
Conrad A. Johnson

Pennsylvania Public Utility Commission	:	Docket Nos.	R-2013-2372129
Office of Consumer Advocate	:		C-2013-2379084
Office of Small Business Advocate	:		C-2013-2380474
Jacqueline and Robert Miller	:		C-2013-2383835
Gwendolyn L. LeVert	:		C-2013-2383980
Duquesne Industrial Intervenors	:		C-2013-2385292
Aimee-Marie Dorsten	:		C-2013-2386037
Connie Schiavo	:		C-2013-2386284
NRG Power Midwest LP, NRG Energy Center	:		C-2013-2390562
Pittsburgh LLC, and Reliant Energy Northeast	:		
LLC	:		

v.

Duquesne Light Company

RECEIVED

JAN 06 2014

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

MAIN BRIEF OF THE NRG COMPANIES

David P. Zambito, Esquire (ID No. 80017)
Joshua L. Belcher (ID No. 313129)
Cozen O'Connor
305 North Front Street, Suite 400
Harrisburg, PA 17101-1236
Telephone: 717-703-5892
Facsimile: 215-989-4216
E-mail: dzambito@cozen.com
E-mail: jbelcher@cozen.com

DATED: January 6, 2014

TABLE OF CONTENTS

I. INTRODUCTION1

A. STATEMENT OF THE CASE.....1

B. LEGAL STANDARDS AND BURDEN OF PROOF.....3

 1. Legal Standard.....3

 2. Burden of Proof on Non-Rider No. 18 Issues4

 3. Burden of Proof on Rider No. 18 Issues4

II. STATEMENT OF THE ISSUES5

III. SUMMARY OF ARGUMENT.....6

IV: ARGUMENT.....7

A. NON-UNANIMOUS SETTLEMENT ISSUES.....7

B. RIDER NO. 18 ISSUES.....8

 1. Rider No. 18 Is Inconsistent with the Law in Pennsylvania and Must Be Removed from the Tariff as *Per Se* Unjust and Unreasonable8

 2. Alternatively, the Price for Power under Rider No. 18 Should Approximate Locational Marginal Pricing 11

 3. Fairness Requires that the Commission Address Rider No. 18.....12

 4. The Specific Remedy Sought by the NRG Companies Is the Elimination of Rider No. 1815

 5. If Rider No. 18 is modified or eliminated, will that have any impact on Duquesne’s revenue requirement?16

V. PROPOSED FINDINGS OF FACT.....16

VI. PROPOSED CONCLUSIONS OF LAW19

VII. CONCLUSION22

TABLE OF AUTHORITIES

Regulations

52 Pa. Code § 53.45(b)(4).....	1
--------------------------------	---

Cases

<i>Behrend v. Bell Telephone Co.</i> , 242 Pa. Super. 47, 363 A.2d 1152 (1976)	3, 7, 11
<i>Brockway Glass Co v. Pa. Pub. Util. Comm'n</i> , 63 Pa. Cmwlth. 238, 437 A.2d 1067 (1981).....	5
<i>Di Santo v. Dauphin Consol. Water Supply Co.</i> , 291 Pa. Super. 440, 436 A.2d 197 (1981)	3
<i>Johnstown v. Pa. Pub. Util. Comm'n</i> , 184 Pa. Super. 56, 133 A.2d 246 (1957)	5
<i>Lower Frederick Twp. v. Pa. Pub. Util. Comm'n</i> , 48 Pa. Cmwlth. 222, 409 A.2d 505 (1980).....	4
<i>Lynch v. Pa. Pub. Util. Comm'n</i> , 140 Pa. Cmwlth. 599, 594 A.2d 816 (1991).....	5
<i>Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n</i> , 489 Pa. 109, 413 A.2d 1037 (1980).....	4
<i>Pa. Pub. Util. Comm'n v. Duquesne Light Co.</i> , Docket No. R-2013-2372129 (Order entered Sept. 26, 2013).....	1
<i>Pa. Pub. Util. Comm'n v. Duquesne Light Co.</i> , Docket No. 860556 (Opinion and Order entered July 20, 1987)	8, 16-17
<i>Pa. Pub. Util. Comm'n v. Philadelphia Gas Works</i> , Docket No. R-00061931 (Opinion and Order entered Sept. 28, 2007)	4
<i>Pa. Pub. Util. Comm'n v. Duquesne Light Co.</i> , Prehearing Order Setting Litigation Schedule, Consolidating Complaints and Granting Petitions to Intervene, Docket No. R-2013-2372129 (Order entered Oct. 22, 2013).....	1
<i>Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n</i> , 134 Pa. Cmwlth. Ct. 218, 578 A.2d 600 (1990), <i>alloc. denied</i> , 529 Pa. 654, 602 A.2d 863 (1992).....	3

<i>Se-Ling Hosiery, Inc. v. Margulies</i> , 364 Pa. 45, 70 A.2d 854 (1950).....	3
------------------------------------------------------------------------------------	---

Statutes

66 Pa. C.S. § 315(a).....	4, 5
66 Pa. C.S. § 316	5
66 Pa. C.S. § 501	21
66 Pa. C.S. § 1301	3
66 Pa C.S. § 1302	21
66 Pa. C.S. § 1303	7
66 Pa. C.S. § 1304	21
66 Pa. C.S. § 1304	3
66 Pa. C.S. § 2802	9, 19
66 Pa. C.S. § 2806	11
66 Pa. C.S. §§ 2807	9, 19
66 Pa. C.S. § 2807(e)(3.1)	10, 20
66 Pa. C.S. § 2807(e)(3.1)(iii)	9, 11, 19
66 Pa.C.S. § 2807(e)(3.2)(iii)	9, 19
73 P.S. § 1648.2.....	10, 20
73 P.S. § 1648.3.....	10, 20
73 P.S. § 1648.3(e)	10
73 P.S. § 1648.7.....	11
Alternative Energy Portfolio Standards Act, 73 P.S. § 1648.1 <i>et seq.</i>	9, 18
Electricity Generation Customer Choice and Competition Act, 66 Pa. C.S. § 2801 <i>et seq.</i>	9, 18
Public Utility Regulatory Policies Act (“PURPA”), Pub. L. No. 95-617, 92 Stat. 3117	7, 21

RECEIVED

JAN 06 2014

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

I. INTRODUCTION

A. STATEMENT OF THE CASE

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

On September 26, 2013, the Commission entered an order in the above-captioned proceeding. That order explained that initial investigation and analysis of the proposed Supplement No. 81 indicated that the changes proposed by Duquesne Light “may be unlawful, unjust, unreasonable, and contrary to the public interest.” Order, Docket No. R-2013-2372129, at 2 (“Initial Order”). The Commission’s Initial Order further provided that “consideration should also be given to the reasonableness of [Duquesne Light’s] *existing* rates, rules, and regulations.” *Id.* (emphasis added); *see also* Prehearing Order Setting Litigation Schedule, Consolidating Complaints and Granting Petitions to Intervene, Docket No. R-2013-2372129, at 3 (Order entered Oct. 22, 2013) (“Prehearing Order”).

On October 28, 2013, NRG Power Midwest LP (“NRG Midwest”), NRG Energy Center Pittsburgh LLC (“NRGP”), and Reliant Energy Northeast LLC (“REN”) (together, the “NRG Companies”) timely filed their formal complaint at Docket No. C- 2013-2390562 (the

“Complaint”) in the Duquesne Light rate proceeding. Among other things, the NRG Companies expressed concern regarding Duquesne Light’s Tariff Rider No. 18 – Rate for Purchase of Electric Energy from Customer-Owned Renewable Resources Generating Facilities (“Rider No. 18”), a provision contained within Duquesne Light’s *existing* rates, rules, and regulations. Rider No. 18 establishes the price at which Duquesne Light will purchase electricity from certain small generators that are also Duquesne Light customers. The NRG Companies served copies of their Complaint upon the Beaver Falls Municipal Authority (“Beaver Falls”) and the Beaver Valley Power Company (“Beaver Valley”).

In response to the NRG Companies’ Complaint, Duquesne Light filed Preliminary Objections on November 12, 2013, challenging, among other things, (i) the alleged failure to join indispensable parties to the proceeding and (ii) questioning whether NRG Midwest’s requested remedy was beyond the Commission’s jurisdiction. On December 12, 2013, Administrative Law Conrad A. Johnson (the “Presiding Officer”) denied the Preliminary Objections.

On December 13, 2013, Duquesne Light filed its Petition of Duquesne Light Company for Interlocutory Review and Answer to Material Questions with the Commission. At the same time, Duquesne Light filed a Motion to Sever, seeking to sever the portions of the Complaint that pertain to Rider No. 18 from the rate proceeding. The Presiding Officer denied the Motion to Sever on December 17, 2013, finding that the NRG Companies were challenging a provision of Duquesne Light’s existing tariff in the context of a base rate proceeding – consistent with what the Commission directed should be done in its Initial Order suspending the filing for investigation.

On December 16, 17 and 20, 2013, evidentiary hearings were held in this matter, which included the cross-examination of several of the parties’ witnesses. At the hearing on December

17, 2013, the Presiding Officer consolidated the Complaint of the NRG Companies with the rate case at Docket No. R-2013-2372129. The Presiding Officer also granted the petition for intervention of Beaver Falls, one of only two qualifying facilities (“QF”) to which Rider No. 18 currently applies.¹ Additionally, at the conclusion of the hearings, the Presiding Officer posed three questions to the parties, which are addressed herein.²

B. LEGAL STANDARDS AND BURDEN OF PROOF

1. Legal Standard

In a rate case, the applicable legal standard asks whether the public utility’s rates are just, reasonable and nondiscriminatory. 66 Pa. C.S. §§ 1301, 1304. All other provisions of a public utility’s tariffs must be reasonable as well. *Di Santo v. Dauphin Consol. Water Supply Co.*, 291 Pa. Super. 440, 449, 436 A.2d 197, 201 (1981). Tariffs filed with the Commission have the force and effect of law and are subject to review by the Public Utility Commission to ensure their reasonableness, fairness and consistency with the Public Utility Code, the Commission’s established policies and its regulatory scheme. *Behrend v. Bell Telephone Co.*, 242 Pa. Super. 47, 70, 74-75, 363 A.2d 1152, 1165-66 (1976).

To prevail before the Commission, a party bearing the burden of proof must establish his or her case by a preponderance of evidence that is substantial and legally credible. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm’n*, 134 Pa. Cmwlth. Ct. 218, 578 A.2d 600 (1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992). The evidence produced in support must be more convincing, by even the smallest amount, than that presented by the other parties. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). The Commission’s decision also

¹ The other QF is the Beaver Valley Power Company, which also was served with a copy of the Complaint, but apparently has decided not to seek intervention or otherwise participate in this proceeding.

² See Sections I.B.3, IV.B.4, and IV.B.5.

must be supported by substantial evidence, which is more than a “mere trace” of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm’n*, 489 Pa. 109, 413 A.2d 1037 (1980). Once the party with the burden of proof establishes a *prima facie* case, however, the burden of persuasion shifts to the opposing party. It becomes incumbent upon the opposing party to provide evidence in rebuttal of the *prima facie* showing. *Pa. Pub. Util. Comm’n v. Philadelphia Gas Works*, Docket No. R-00061931 (Opinion and Order entered Sept. 28, 2007) at 12.

2. Burden of Proof on Non-Rider No. 18 Issues

As a matter of black letter law, it is the public utility, in this case Duquesne Light, which generally bears the burden to prove that its rates are just and reasonable in the context of a rate case. 66 Pa. C.S. § 315(a). Where rate proceedings are initiated by the Commission, the public utility bears the burden of proof with respect to every element of “any proposed or existing rate.” *Id.* Where initiated by complaint, the public utility bears the burden of proof only with respect to *proposed* rates. *Id.*; *Lower Frederick Twp. v. Pa. Pub. Util. Comm’n*, 48 Pa. Cmwlth. 222, 409 A.2d 505 (1980). Here, the Commission itself specifically ordered the investigation of the entirety of Duquesne Light’s Tariff, including both proposed changes and existing provisions. Initial Order at 2; Prehearing Order at 3. As a result, it is without question that Duquesne Light bears the burden of proof with respect to Tariff changes proposed in Supplement No. 81.

3. Burden of Proof on Rider No. 18 Issues

Although it did not propose to change Rider No. 18 in Supplement No. 81, Duquesne also bears the burden of proof with respect to Rider No. 18. It is true that where proceedings are initiated on complaint, the public utility bears the burden of proof only on the changes proposed

to its tariff. See 66 Pa. C.S. § 315(a); accord *Brockway Glass Co. v. Pa. Pub. Util. Comm'n*, 63 Pa. Cmwlth. 238, 437 A.2d 1067 (1981) (regarding challenge to reasonableness of rate outside context of rate case proceeding) and *Johnstown v. Pa. Pub. Util. Comm'n*, 184 Pa. Super. 56, 133 A.2d 246 (1957) (regarding “just and reasonable” rates outside and inside base rate case). This result is consistent with 66 Pa. C.S. § 316, which provides that a tariff provision previously approved by the Commission is considered reasonable. *Lynch v. Pa. Pub. Util. Comm'n*, 140 Pa. Cmwlth. 599, 605, 594 A.2d 816, 819 (1991). However, as explained at Section I.B.1 above, the Commission itself ordered an investigation of the entirety of Duquesne Light’s Tariff, not just those issues raised by Supplement No. 81. Under Section 315 of the Pennsylvania Public Utility Code, the public utility bears the burden of proof with respect to *both* existing and proposed rates where proceedings are initiated by the Commission. 66 Pa. C.S. § 315(a). As such, Duquesne Light bears the burden of proof with respect to both proposed changes *and* existing provisions, including Rider No. 18. Thus, Duquesne Light has the burden of proof to show that Rider No. 18 is just, reasonable and non-discriminatory.

II. STATEMENT OF THE ISSUES

A. Should the Commission permit Duquesne Light’s Rider No. 18 to remain in its Tariff, with the force and effect of law, where the provisions and intent of Rider No. 18 are no longer consistent with the Pennsylvania regulatory scheme following the enactment of the Electricity Generation Customer Choice and Competition Act and the Alternative Energy Portfolio Standards Act?

Suggested Answer: No. Rider No. 18 should be eliminated from Duquesne Light's Commission-approved Tariff as unjust, unreasonable, unduly discriminatory, and otherwise contrary to the public interest.

B. Does the energy purchase price contained in Duquesne Light's Rider No. 18 reflect a just and reasonable price such that it should continue to remain in Duquesne Light's tariff with the force and effect of law?

Suggested Answer: No. To the extent that the Commission permits Rider No. 18 to remain in Duquesne Light's tariff (which it should not), Duquesne Light should be required to modify the energy purchase price contained therein to reflect the locational marginal pricing for the PJM Duquesne Zone.

III. SUMMARY OF ARGUMENT

In the context of this rate proceeding, as ordered by the Commission, the NRG Companies have asked the Commission to consider Rider No. 18, a provision contained in Duquesne Light's Commission-approved Tariff. In light of discovery, the evidentiary hearings and the filings in this matter to date, the NRG Companies have concluded that, after having been instituted some 32 years ago in 1981, after the restructuring of the electric utility industry in Pennsylvania, and after the passage of both the Electricity Generation Customer Choice and Competition Act in 1996 and the Alternative Energy Portfolio Standards Act in 2004, Rider No. 18 is inconsistent with statutory law and the current regulatory scheme in Pennsylvania. As a result, Rider No. 18 is *per se* unjust and unreasonable and should be removed from Duquesne

Light's Tariff. The Commission should no longer continue to give the "force and effect" of law³ to a tariff provision that is inconsistent with the regulatory scheme directed by the Pennsylvania Legislature and implemented by the Commission.

To the extent that the Commission determines that Rider No. 18 remains "good law," the NRG Companies note that the price of six cents per kilowatt-hour has not been changed in over 30 years, except that its application has been phased out so that it now only applies to two facilities. This results in unreasonable discrimination benefitting certain "customer-generators." Prospective "customer-generator" applicants under Rider No. 18 may sell power at Duquesne Light's "avoided cost." (*Duquesne Light Exhibit WVP 2-R.*) If the federal Public Utility Regulatory Policies Act ("PURPA"), Pub. L. No. 95-617, 92 Stat. 3117, requires the purchase of output from these facilities, it does so at Duquesne Light's "avoided cost" – the cost Duquesne Light would have likely incurred to purchase electricity but for the purchase from the QF projects. Duquesne Light has noted that it has not examined its avoided costs in over ten years and, at a minimum, it appears that the six-cent price should be revised to reflect the realities of the current competitive market for electricity and Duquesne Light's costs of purchasing the power in the market.

IV. ARGUMENT

A. NON-UNANIMOUS SETTLEMENT ISSUES

Upon consideration of the evidence elicited at the hearings in this proceeding, the NRG Companies have decided not to contest the various non-unanimous settlement issues identified in the common brief outline circulated by Duquesne Light to the parties. The NRG Companies

³ 66 Pa. C.S. § 1303. Tariffs "filed under authority of law, have the force of law and their reasonableness is to be determined by the Public Utility Commission." *Behrend v. Bell Telephone Co.*, 242 Pa. Super. at 70, 363 A.2d at 1165. "Therefore, the Commission is the appropriate body to evaluate the tariffs filed with it and determine their reasonableness, fairness and consistency with established policies." *Id.*

emphasize, however, that a petition for approval of settlement has not yet been finalized by the settling parties and filed with the Commission. The NRG Companies therefore reserve their right to challenge whether the terms and conditions of any such petition, once it is made available, are in the public interest and respectfully request an opportunity to comment on the petition that is eventually filed. Specifically, the NRG Companies reserve the right to argue that terms regarding Rider No. 18 should be included in any approval by the Commission of a settlement.

B. RIDER NO. 18 ISSUES

1. Rider No. 18 Is Inconsistent with the Law in Pennsylvania and Must Be Removed from the Tariff as *Per Se* Unjust and Unreasonable

Duquesne Light first established Rider No. 18 in 1981. (NRG Midwest Exhibit No. 6, at 1.) Rider No. 18 establishes the price at which Duquesne Light will purchase electricity from certain small generators that are also Duquesne Light customers. (*Id.*) The stated purpose of Rider No. 18 was to encourage the development of alternative generation. (*Id.*) Duquesne Light set the price to be paid for electricity at the higher of six cents per kilowatt-hour or Duquesne Light's avoided cost. (*Id.*)

In over thirty-two years, Duquesne Light has only changed Rider No. 18 three times. (Hr'g Tr. 254:1-3.) It has never revised the six cent per kilowatt-hour price under Rider No. 18, except in 1987 to phase it out for prospective applicants. *See Pa. Pub. Util. Comm'n v. Duquesne Light Co.*, Docket No. 860556 (Opinion and Order entered July 20, 1987); (Duquesne Light Company St. No. 12-R, at 27:9-19; Hr'g Tr. 254:4-20, 290:12-16.) Prospective applicants under Rider No. 18 may sell power at Duquesne Light's "avoided cost." The Tariff does not provide how Duquesne Light's "avoided cost" is to be determined. (Hr'g Tr. 250:24-25, 251:1-19.) Duquesne Light has not performed an "avoided cost" study in at least 10 years. (*See* Hr'g

Tr. 245:10-11.) Currently, only two facilities have executed power purchase agreements with Duquesne Light that are subject to the price of six cents per kilowatt-hour pursuant to Rider No. 18. (Duquesne Light Company St. No. 12-R, at 21:19-30; 22:1-25.) The price in Rider No. 18 has not been analyzed by Duquesne Light in at least 10 years. (Hr'g Tr. 237:12-20, 238:3-12.)

In 1996, the Electricity Generation Customer Choice and Competition Act (the "Competition Act"), 66 Pa. C.S. § 2801 *et seq.*, was signed into law in Pennsylvania. In support of the Competition Act, the General Assembly found that providing retail customers access to a competitive generation market was in the public interest, and that competitive market forces are more effective than economic regulation in controlling the cost of generating electricity. 66 Pa. C.S. § 2802.

The Competition Act amended the Public Utility Code by adding Chapter 28 and required electric utilities to unbundle their rates and services and to provide open access over their transmission and distribution systems to allow competitive suppliers to generate and sell electricity directly to consumers. *Id.* Electric utilities were relieved of their duty to supply generation service to retail customers, except as providers of last resort to those choosing not to participate in the competitive markets. 66 Pa. C.S. § 2807. In providing such default service, electric utilities must procure power through certain specified competitive processes. Bilateral power purchase agreements are permissible, so long as the price for power is no greater than the cost of obtaining power in the wholesale market. 66 Pa. C.S. § 2807(e)(3.1)(iii). Long-term power purchase agreements may not have a term in excess of 20 years. *Id.* § 2807(e)(3.2)(iii).

The Alternative Energy Portfolio Standards Act ("AEPS Act"), 73 P.S. § 1648.1 *et seq.*, was signed into law in 2004. The AEPS Act requires that electric distribution companies and electric generation suppliers procure a certain percentage of their electricity supply from

alternative energy sources. 73 P.S. § 1648.3. The AEPS Act also required the Commission to establish an alternative energy credits program as a means of tracking compliance with the portfolio standards. 73 P.S. § 1648.3(e). An “alternative energy credit” is a tradable instrument “used to establish, verify and monitor compliance with the act.” 73 P.S. § 1648.2. Not only does the AEPS Act provide an incentive to develop alternative energy sources by requiring electric utilities and generation suppliers to purchase power from such sources, it also provides an additional revenue stream to these sources by monetizing the environmental attributes of the power itself (i.e., through tradable alternative energy credits).

In light of the Competition Act and the AEPS Act, Rider No. 18 is in direct conflict with statutory law and no longer serves a legitimate purpose. The Competition Act directly governs the purchase of power by Duquesne Light and further specifies the terms and conditions under which power may be competitively procured. By establishing a price for power through bilateral contracts, Rider No. 18 is incompatible with the Competition Act’s competitive procurement processes at 66 Pa. C.S. § 2807(e)(3.1), which specifically address bilateral contract pricing requirements. Moreover, there is no need to establish a Tariff-based price as an incentive for the development of alternative energy. The AEPS Act establishes a firm incentive for electric distribution companies and electric generation suppliers to purchase power from alternative energy sources and at a price that accounts for the additional “green” attributes of that power, representing a market-based premium over wholesale prices for traditional power. By predetermining as a matter of law the price at which Duquesne Light must purchase alternative energy from select customer-generators, Rider No. 18 is in direct conflict with the express policy decision of the Commonwealth to allow market forces to establish the price of power and the value of any associated alternative energy credits. It is within the Commission’s authority to

evaluate the reasonableness of filed tariffs and to determine whether tariff provisions are compatible with both the Public Utility Code and the Commission's policies, and consistent with its regulatory scheme. *Behrend*, 242 Pa. Super. at 74-75, 363 A.2d at 1166. Charged with the implementation of both the Competition Act, 66 Pa. C.S. § 2806, and the AEPS Act, 73 P.S. § 1648.7, the Commission must not allow Rider No. 18 to continue with the force and effect of law. Because it is in direct conflict with Pennsylvania law, Rider No. 18 is *per se* unjust and unreasonable and must be removed from Duquesne Light's Tariff.

2. **Alternatively, the Price for Power under Rider No. 18 Should Approximate Locational Marginal Pricing**

In the alternative, and only to the extent that the Commission determines that Rider No. 18 does not conflict with the Competition Act and/or the AEPS Act, the NRG Companies contend that Duquesne Light must revise the price for power under Rider No. 18 to reflect market realities. This approach would be more consistent with the competitive procurement processes specified under the Competition Act, which require the price for power under bilateral power purchase agreements to be either (1) no greater than the wholesale cost of power or (2) consistent with a Commission-approved competition procurement process. 66 Pa. C.S. § 2807(e)(3.1)(iii). Additionally, PURPA requires that the electricity be purchased at utilities' "avoided cost." Duquesne Light has made clear that it has not calculated its avoided cost in a number of years (Hr'g Tr. 237:12-20, 238:3-12), but on its face avoided cost is the price Duquesne Light would pay to purchase the power if it were not purchasing from the QFs. The NRG Companies submitted evidence of the PJM Interconnection's average day-ahead locational marginal pricing ("LMP") for the Duquesne Zone over the past five years, NRG Midwest Exhibit No. 4, which pricing appropriately reflects the present cost of power in the competitive wholesale markets.

Although the original intent of Rider No. 18 was to encourage the development of alternative energy sources, the six cent per kilowatt-hour price has not served as an incentive for new alternative energy development since it was phased out in 1987. (Hr'g Tr. 290:12-23.) Because it is not available to new qualifying facilities, it provides no incentive for new investment. Rather, it only serves to provide a discriminatory benefit to two customer-generators.

In any case, setting a price for energy in Rider No. 18 that is higher than LMP is not necessary to create this incentive. The price under Rider No. 18 is for the purchase of "electric energy" only. (Duquesne Light Exhibit WVP 2-R.) When it was first established in 1981, there were no markets in Pennsylvania for capacity or alternative energy credits, as the electric utility industry remained vertically integrated. At that time, an above-market price for power may have been appropriate to encourage alternative energy development. Three decades later, alternative energy sources can now sell the power that they generate into the competitive wholesale market as well as capacity (i.e., the difference between what the facility can produce and what it actually produces). They may also sell the alternative energy credits that are associated with the power that they produce, as Beaver Falls in fact does. (Hr'g Tr. 439:2-8.) These are additional revenue streams that have been made available as a result of the Competition Act and the AEPS Act and which ensure that adequate incentives exist for the development of alternative energy. As such, there is no need for Rider No. 18 to contain an above-market price for electricity.

3. Fairness Requires that the Commission Address Rider No. 18

While the NRG Companies are not requesting that the Commission modify the terms of any power purchase agreements or other related agreement, the termination or modification of Rider No. 18 will impact two power purchase agreements (the "PPAs") executed in the early

1980s between Duquesne Light and two small hydroelectric power generators (*i.e.*, the aforementioned QFs). (Duquesne Light Exhibit WVP 3-R (Highly Confidential); Duquesne Light Exhibit WVP 4-R (Highly Confidential).) These PPAs are the only two agreements in effect to which the six-cent price under Rider No. 18 applies. (Duquesne Light Company St. No. 12-R, at 21:19-30; 22:1-25.) Duquesne Light is also party to a third contract with NRG Midwest (the “Agency Agreement”), under which NRG Midwest is the ultimate purchaser of the energy produced by the QFs. (Duquesne Light Exhibit WVP 6-R.)

The NRG Companies raise the issue of these two PPAs to illustrate the inequity of NRG Midwest’s present position. NRG Midwest is economically harmed by the requirement to purchase power under the PPAs, on behalf of Duquesne Light, at a substantially above-market price. (NRG Midwest St. No. 1, at 6:6-15; NRG Midwest Exhibit No. 4; Hr’g Tr.) The PPAs are “evergreen,” meaning that they do not have an established termination date. (Duquesne Light Exhibit WVP 3-R (Highly Confidential), at Section 14; Duquesne Light Exhibit WVP 4-R (Highly Confidential), at Section 16; Hr’g Tr. 286:3-15, 436:7-10.) Rather, they terminate only when Duquesne Light no longer has an applicable tariff provision and/or is no longer compelled by law to purchase power from the QFs.

Duquesne Light, on the other hand, would not be economically harmed by the relief sought by the NRG Companies. Yet, Duquesne Light has vigorously opposed the NRG Companies and made a number of arguments why termination or modification of Rider No. 18 is not possible. Among others, it has argued that case law regarding the reformation of power purchase agreements subject to PURPA prevents the Commission from considering Rider No. 18.⁴ (*See Preliminary Objections.*) While PURPA may require Duquesne Light to purchase the

⁴ Notably, however, during the December 17 hearing, Duquesne Light’s Senior Manager, Rate and Tariff Services testified that in his opinion the Commission would have the authority to modify Rider No. 18. (Hr’g Tr. 241-242.)

output of certain small QFs, it requires this purchase to be made at Duquesne Light's avoided costs and in no way preempts the Commission's ability to review the justness and reasonableness of a Commission approved tariff. In fact, if the Commission were to terminate Rider No. 18, Duquesne Light may still be required to purchase the output from the QFs at its avoided cost; it is merely the six cent per kilowatt-hour price set forth in Rider No. 18 that the NRG Companies contend is no longer just and reasonable. Alternatively, it has argued that the Commission lacks jurisdiction to provide relief because the NRG Companies did not join all the parties to the PPAs (notwithstanding the fact that the NRG Companies (1) are not parties to the PPAs, (2) have not alleged a cause of action under any power purchase agreement, and (3) have not asked the Commission to construe or modify the terms of any power purchase agreement). *Id.* By contrast, the PPAs contain express provisions that allow Duquesne Light, which is a party to the PPAs, to unilaterally request (without the participation or consent of the QFs) that the Commission modify the price for power under Rider No. 18 or terminate it altogether. (Hr'g Tr. 273:14-22, 274:9-15, 278, 282:13-19.)

Under the current regulatory scheme, additional revenue streams have become available to QFs. Even the witness for Beaver Falls (a municipal authority whose revenues are primarily derived from the provision of water service), recognized that Beaver Falls is currently receiving payment for the sale of renewable energy credits, which did not exist in 1981. (Hr'g Tr. 439:2-8.) Additionally, the witness was not aware of whether Beaver Falls could participate in PJM's capacity market—another source of revenue not available in 1981. (Hr'g Tr. 441:19-21.)

As it stands, Duquesne Light has failed to meet its burden of proof in demonstrating that Rider No. 18 remains just, reasonable, and nondiscriminatory. The NRG Companies however have presented substantial record evidence that, in light of the Competition Act and the AEPS

Act, Rider No. 18 is unjust, unreasonable, unduly discriminatory in favor of certain “customer-generators,” and no longer in the public interest. The Commission must not allow a tariff provision that conflicts with law and the prevailing regulatory scheme to remain in effect with the force and effect of law.

4. The Specific Remedy Sought by the NRG Companies Is the Elimination of Rider No. 18

The Presiding Officer requested that the NRG Companies specifically address the remedy or remedies it is seeking by elimination of Rider No. 18. As discussed at Section III.B.1 above, the NRG Companies are seeking the elimination of Rider No. 18 as a tariff provision that is unjust, unreasonable and unduly discriminatory. As a matter of law, the Commission should no longer countenance a tariff provision (allowing it to maintain the force and effect of law) that is based upon an outdated regulatory scheme and is at odds with the interests of the competitive generation markets in Pennsylvania. To the extent that Rider No. 18 is eliminated, this will have *contractual implications for NRG Midwest, Duquesne Light, and the QFs*. These issues, however, should be resolved between the parties and require no further action by the Commission. In the alternative, if Rider No. 18 is not eliminated, the NRG Companies ask that the price under Rider No. 18 reflect a just and reasonable price. The NRG Companies submit that a just and reasonable price would be Duquesne Light’s “avoided cost”—the cost Duquesne Light would incur from purchasing the power from the market. The NRG Companies believe that a reasonable proxy or benchmark for Duquesne Light’s avoided cost is the PJM locational marginal pricing for the Duquesne Zone.

5. **If Rider No. 18 is modified or eliminated, will that have any impact on Duquesne's revenue requirement?**

The Presiding Officer also requested that Duquesne Light address whether the elimination or modification of Rider No. 18 will impact its revenue requirement in this base rate proceeding. Because the procurement of electricity is addressed through default service rates, which are not being addressed in this proceeding, the elimination or modification of Rider No. 18 should have no impact on the revenue requirement upon which base distribution rates are set.

V. **PROPOSED FINDINGS OF FACT**

The NRG Companies propose the following Findings of Fact:

Rider No. 18

1. Duquesne Light first established Rider No. 18 in 1981. (NRG Midwest Exhibit No. 6, at 1.)
2. Rider No. 18 establishes the price at which Duquesne Light will purchase electricity from certain small generators that are also Duquesne Light customers. (*Id.*)
3. The original price to be paid for electricity under Rider No. 18 was established at the higher of six cents per kilowatt-hour or Duquesne Light's avoided cost. (*Id.*)
4. In over thirty-two years, Duquesne Light has only changed Rider No. 18 three times. (Hr'g Tr. 254:1-3.)
5. Duquesne Light has never revised the six cent per kilowatt-hour price under Rider No. 18, except in 1987 to phase it out for prospective applicants. *See Pa. Pub. Util. Comm'n v. Duquesne Light Co.*, Docket No. 860556 (Opinion and Order

entered July 20, 1987); (Duquesne Light Company St. No. 12-R, at 27:9-19; Hr'g Tr. 254:4-20, 290:12-16.)

6. Prospective applicants under Rider No. 18 may sell power to Duquesne Light at Duquesne Light's "avoided cost." (Duquesne Light Exhibit WVP 2-R.)
7. The Tariff does not provide how Duquesne Light's "avoided cost" is to be determined. (Hr'g Tr. 250:24-25, 251:1-19.)
8. Duquesne Light has not performed an "avoided cost" study in at least 10 years. (See Hr'g Tr. 245:10-11.)
9. Since it was established, only three facilities ever executed power purchase agreements with Duquesne Light at the price of six cents per kilowatt-hour pursuant to Rider No. 18. (Duquesne Light Company St. No. 12-R, at 21:19-30; 22:1-25; Hr'g Tr. 255:19-22.)
10. Only two facilities are subject to the six cent per kilowatt-hour price under Rider No. 18. (Duquesne Light Company St. No. 12-R, at 21:19-30; 22:1-25.)
11. The six cents per kWh price in Rider No. 18 has not been analyzed by Duquesne Light in at least 10 years. (Hr'g Tr. 237:12-20, 238:3-12.)
12. The six cent per kilowatt-hour price under Rider No. 18 has not served as an incentive for new alternative energy development since it was phased out in 1987. (Hr'g Tr. 290:12-23.)
13. The price under Rider No. 18 is for the purchase of "electric energy" only. (Duquesne Light Exhibit WVP 2-R.)

14. When Rider No. 18 was first established in 1981, there were no markets in Pennsylvania for capacity or alternative energy credits, as the electric utility industry remained vertically integrated. (Hr’g Tr. 378:10-25, 379:1-6.)
15. The PJM Interconnection’s average day-ahead locational marginal pricing (“LMP”) for the Duquesne Zone appropriately reflects the present cost of power in the competitive wholesale markets. (NRG Midwest Statement No. 1-S, at 10.)

Electricity Generation Customer Choice and Competition Act

16. In 1996, the Electricity Generation Customer Choice and Competition Act (the “Competition Act”), 66 Pa. C.S. § 2801 *et seq.*, was signed into law in Pennsylvania.
17. In support of the Competition Act, the General Assembly found that providing retail customers access to a competitive generation market was in the public interest, and that competitive market forces are more effective than economic regulation in controlling the cost of generating electricity. 66 Pa. C.S. § 2802.

Alternative Energy Portfolio Standards Act

18. The Alternative Energy Portfolio Standards Act (“AEPS Act”), 73 P.S. § 1648.1 *et seq.*, was signed into law in 2004.
19. The AEPS Act establishes a firm incentive for electric distribution companies and electric generation suppliers to purchase power from alternative energy sources and at a price that accounts for the additional “green” attributes of that power, representing a market-based premium over wholesale prices for traditional power.
20. Beaver Falls sells the alternative energy credits it generates as a Tier I renewable resource. (Hr’g Tr. 439:2-8, 22-25.)

VI. PROPOSED CONCLUSIONS OF LAW

The NRG Companies propose the following Conclusions of Law:

Electricity Generation Customer Choice and Competition Act

1. The Competition Act required electric utilities to unbundle their rates and services and to provide open access over their transmission and distribution systems to allow competitive suppliers to generate and sell electricity directly to consumers. 66 Pa. C.S. § 2802.
2. The Competition Act relieved electric utilities of their duty to supply generation service to retail customers, except as providers of last resort to those choosing not to participate in the competitive markets. 66 Pa. C.S. § 2807.
3. In providing such default service, electric utilities must procure power through certain specified competitive processes. Bilateral power purchase agreements are permissible, so long as the price for power is no greater than the cost of obtaining power in the wholesale market or otherwise consistent with a Commission-approved competition procurement process. 66 Pa. C.S. § 2807(e)(3.1)(iii). Long-term power purchase agreements may not have a term in excess of 20 years. *Id.* § 2807(e)(3.2)(iii).
4. The Competition Act directly governs purchases of power by Duquesne Light and further specifies the terms and conditions under which power may be competitively procured.

Alternative Energy Portfolio Standards Act

5. The AEPS Act requires that electric distribution companies and electric generation suppliers procure a certain percentage of their electricity supply from alternative energy sources. 73 P.S. § 1648.3.
6. The AEPS Act also required the Commission to establish an alternative energy credits program as a means of tracking compliance with the portfolio standards. 73 P.S. § 1648.3(e).
7. An “alternative energy credit” is a tradable instrument “used to establish, verify and monitor compliance with the act.” 73 P.S. § 1648.2.
8. The Competition Act directly governs the purchase of power by Duquesne Light and further specifies the terms and conditions under which power may be *competitively procured*.

Rider No. 18 Is Unjust, Unreasonable and Discriminatory

9. By establishing a price for power through bilateral contracts, Rider No. 18 is incompatible with the Competition Act’s competitive procurement processes at 66 Pa. C.S. § 2807(e)(3.1) which specifically address bilateral contract pricing requirements.
10. By predetermining as a matter of law the price at which Duquesne Light must purchase alternative energy from select customer-generators, Rider No. 18 is in direct conflict with the express policy decision of the Commonwealth to allow

market forces to establish the price of power and the value of any associated alternative energy credits.

11. No provision of the Public Utility Regulatory Policies Act ("PURPA"), Pub. L. No. 95-617, 92 Stat. 3117, requires the Commission to allow energy purchase prices to be paid to qualifying facilities to be set by tariff.
12. The Commission has exclusive jurisdiction over Commission-approved tariffs filed by its regulated public utilities. 66 Pa. C.S. §§ 501 (regarding "General powers"), 1302 (regarding "Tariffs; filing and inspection").
13. Because it is in direct conflict with Pennsylvania law, Rider No. 18 is *per se* unjust and unreasonable and must be removed from Duquesne Light's Tariff.
14. Because the six cent per kilowatt-hour price under Rider No. 18 applies only to two facilities and further fails to reflect the market price for power that other similarly situated facilities could receive, Rider No. 18 is unduly discriminatory in violation of 66 Pa. C.S. § 1304.
15. The PJM locational marginal pricing for the Duquesne Zone is a reasonable proxy for Duquesne Light's avoided cost.

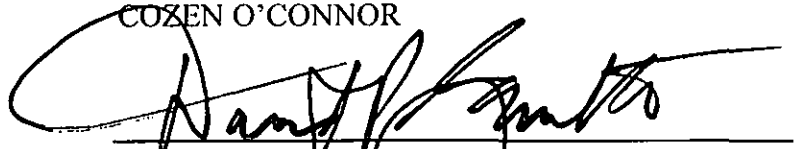
VII. CONCLUSION

In sum, the NRG Companies assert that both the Competition Act and the AEPS Act, in conjunction with the market for competitive generation in Pennsylvania, have rendered Rider No. 18 obsolete. Rider No. 18 is a relic of an outdated regulatory scheme and directly conflicts with current law. As such, Rider No. 18 as a matter of law is unjust, unreasonable, unduly discriminatory and otherwise contrary to the public interest. It must therefore be removed from Duquesne Light's existing Tariff.

WHEREFORE, the NRG Companies respectfully request that the Commission order Duquesne Light to remove Rider No. 18 from its Tariff. In the alternative, the Commission should set Rider No. 18 at a price that approximates the day ahead locational marginal pricing for the Duquesne Zone.

Respectfully submitted,

COZEN O'CONNOR



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

Joshua L. Belcher (ID No. 313129)

Cozen O'Connor

305 North Front Street, Suite 400

Harrisburg, PA 17101

Tel: (717) 703-5892

Fax: (215) 989-4216

Email: dzambito@cozen.com

jbelcher@cozen.com

Counsel for NRG Power Midwest LP,

NRG Energy Center Pittsburgh LLC, and

Reliant Energy Northeast LLC

DATED: January 6, 2014

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

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

VIA ELECTRONIC & FIRST CLASS MAIL

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

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

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

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

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

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

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

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

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

RECEIVED

JAN 06 2014

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

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

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

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

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

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

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

**CONSULTANTS
(VIA ELECTRONIC MAIL ONLY)**

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

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

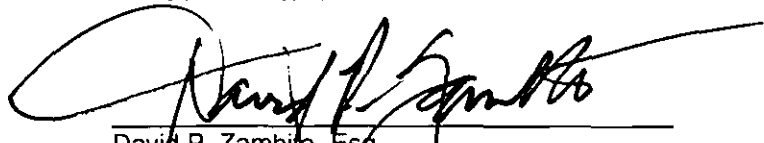
Roger D. Colton
Fisher, Sheehan & Colton
34 Warwick Road
Belmont, MA 02478
roger@fsconline.com
Consultants for OCA

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

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

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

DATED: January 6, 2014



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

DAVID ZAMBITO 2156653713 COZEN O'CONNOR 305 NORTH FRONT STREET HARRISBURG PA 17101		2 LBS	PAK	1 OF 1
SHIP TO: ROSEMARY CHIAVETTA, SECRETARY 7177727777 PA PUBLIC UTILITY COMMISSION 2ND FLOOR - FILING ROOM 400 NORTH STREET HARRISBURG PA 17120-0079				
		PA 171 9-20 		
UPS NEXT DAY AIR				1
TRACKING #: 1Z 16Y 18Y 01 9818 6901				
				
BILLING: P/P				
Reference No.1: 326600.000-5278 Reference No.2: 5278 Zambito, David				
<small>XOL 14.01.23</small>			<small>NV45 45.0A 10/2013</small>	

FOLD on this line and place in shipping pouch with bar code and delivery address visible

1. Fold the first printed page in half and use as the shipping label.
2. Place the label in a waybill pouch and affix it to your shipment so that the barcode portion of the label can be read and scanned.
3. Keep the second page as a receipt for your records. The receipt contains information useful for tracking your package.