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January 6, 2014

VIA HAND DELIVERY

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

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SECRETARY OF BUREAU

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

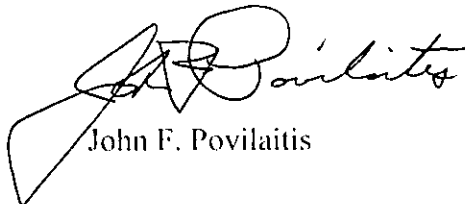
Dear Secretary Chiavetta:

On behalf of Beaver Falls Municipal Authority ("Authority"), I have enclosed for filing the following in the above-captioned consolidated matters:

1. A Highly Confidential Version of the Main Brief of the Authority that we hereby request be maintained under seal as confidential; and
2. A Public Version of the Main Brief of the Authority.

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	:	

MAIN BRIEF
ON BEHALF OF
BEAVER FALLS MUNICIPAL AUTHORITY

BUCHANAN INGERSOLL & ROONEY, P.C.

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Dated: January 6, 2014

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I. INTRODUCTION

This Brief filed by the Beaver Falls Municipal Authority (“Authority”) opposes the relief being sought by NRG Power Midwest LP (“NRG Midwest”), NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC (collectively, the “NRG Companies”) in this rate proceeding in a formal complaint they filed with the Commission on October 28, 2013 that has been docketed to this base rate proceeding (“Formal Complaint”).

A. STATEMENT OF THE CASE

On August 2, 2013, Duquesne Light Company (“Duquesne”) filed with the Pennsylvania Public Utility Commission (“Commission”) Supplement No. 81 to the company’s Tariff Electric – Pa. P.U.C. No. 24 (“Tariff”) at Docket No. R-2013-237219, requesting, among other things, a general increase in its electric distribution rates.

On September 26, 2013, the Commission entered an order in this proceeding opening an investigation into Duquesne’s proposed rate increase. Among other things, this order noted that the initial investigation of proposed Supplement No. 81 to the Tariff “may be unlawful, unjust, unreasonable, and contrary to the public interest.”¹

On October 28, 2013, the NRG Companies filed the Formal Complaint and a copy thereof was served on the Authority on October 31, 2013. Among other things, the Formal Complaint asserts that Duquesne’s tariff Rider No. 18 may present an indirect form of rate discrimination benefitting certain customer-generators and, therefore, requests that the Commission ensure that Rider No. 18 is just, reasonable and non-discriminatory.²

Despite being a party to a certain power purchase agreement with Duquesne, whose pricing is established by Rider No. 18, the Authority was neither named as a respondent nor an

¹ Commission order dated September 26, 2013 at Docket No. 2013-2372129, p. 2.

² Formal Complaint, ¶¶ 13-15, 20.

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indispensable party in the Formal Complaint. Nor was Beaver Valley Power Company, another entity impacted by Rider No. 18, named as a respondent or indispensable party to the Formal Complaint.³

On November 12, 2013, Duquesne filed Preliminary Objections to the Formal Complaint alleging that (i) the NRG Companies failed to join all indispensable parties, including the Authority; (ii) the relief sought in the Formal Complaint was beyond the scope of the present base rate proceeding; and (iii) the Formal Complaint is legally insufficient since the Commission lacks the authority to adjust the avoided cost set forth in Rider No. 18. The NRG Companies filed a response to the Preliminary Objections on November 22, 2013 opposing the relief sought by Duquesne. The presiding Administrative Law Judge (“ALJ”) denied the Preliminary Objections in an order dated December 12, 2013.⁴

On December 13, 2013, Duquesne filed with the Commission a Petition for Interlocutory Review of Material Questions under 52 Pa. Code § 5.302. Duquesne, the Authority and the NRG Companies each timely filed separate briefs before the Commission in connection with this Petition, which is still pending before the Commission.

On December 12, 2013 Duquesne also filed with the ALJ a written motion to sever the Formal Complaint for the remainder of the rate proceeding at Commission Docket No. R-2013-2372129. The ALJ denied this motion orally on December 17, 2013.⁵

It was not until the NRG Companies filed their testimony in this case that it became clear that the Rider No. 18 references in the Formal Complaint relating to possible rate discrimination were intended to request that the rate for power purchased by NRG Midwest from the Authority

³ See, Formal Complaint.

⁴ See, “Second Interim Order Denying Respondent Duquesne Light Company’s Preliminary Objections to Complaint of NRG Power Midwest LP.”

⁵ N.T. 191.

be reduced from the current \$0.06/kWh. After the ALJ denied Duquesne's Preliminary Objections on December 12, 2013 and it was certain that issues relating to the requested modification to Rider No. 18 were going to be litigated in this base rate proceeding, the Authority immediately filed a Petition to Intervene on December 16, 2013. The ALJ granted the Authority's Petition to Intervene on December 17, 2013.⁶

Evidentiary hearings in connection with the Formal Complaint were held in Harrisburg on December 16, 17 and 20, 2013. Various witnesses were cross-examined during the hearings, including the Authority's witness, James A. Riggio, who had previously presented written rejoinder testimony responding specifically to the surrebuttal testimony of Judith Lagano on behalf of NRG Midwest.⁷

1. The Beaver Falls Municipal Authority and Its Qualifying Facilities

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.⁸

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.⁹

⁶ N.T. 180.

⁷ See generally, Beaver Falls Municipal Authority Statement No. 1-REJ.

⁸ Beaver Falls Municipal Authority Statement No. 1-REJ, pp. 1-2.

⁹ See 28 FERC 62,227, Beaver Falls Municipal Authority Project # 3451-001 (Order Issued August 17, 1984); Beaver Falls Municipal Authority Statement No. 1-REJ. p. 4

The FERC order provided, among other things, that the license term would be 40 years, effective August 1, 1984.¹⁰

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.¹¹ Importantly, under the PPA, Duquesne is obligated to, among other things, purchase the net electric energy produced by the Facilities under and in accordance with the terms and conditions of Rider No. 18.¹² 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.

¹⁰ *Id.* at *9-10; Beaver Falls Municipal Authority Statement No. 1-REJ, p. 4, lines 11-16. NRG Midwest St. No. 1, p. 3.

¹¹ 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).

¹² Beaver Falls Municipal Authority Statement No. 1-REJ, p. 4, lines 19-22.

Under these circumstances, the Authority is filing this brief to protect its rights under the PPA and Rider No. 18.

2. 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 Formal 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, 2001.¹³ Through various 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.¹⁴

NRG Midwest has been operating under the Revised QF Agency Agreement only since 2012¹⁵, 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.

3. Rider No. 18

The dispute in the Formal Complaint centers on Rider No. 18. In August 1981, Duquesne filed with the Commission Supplement No. 54 to its then current retail electric tariff

¹³ See FERC Docket No. ER01-1138-000.

¹⁴ NRG Midwest St. No. 1, p. 3, lines 4-12.

¹⁵ As testified by NRG Midwest witness Lagano. "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).

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."¹⁶ 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 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*

¹⁶ NRG Midwest Exhibit No. 6.

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."¹⁷

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.¹⁸ 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."¹⁹

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;

¹⁷ 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.

¹⁸ *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).

¹⁹ 1987 Order at 3, Appendix I.

- 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
- 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.²⁰ 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. 18.²¹ 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, 1987.²²

Having voluntarily assumed the Revised QF Agency Agreement in its recent 2012 merger, NRG Midwest essentially seeks in the Formal 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.

B. LEGAL STANDARDS AND BURDEN OF PROOF

- 1. Non-Rider No. 18 Issues²³**
- 2. Rider No. 18 Issues**

²⁰ The other QF is the Beaver Valley Power Company. See 1987 Order at n. 4, Appendix 1.

²¹ 1987 Order at n. 4, Appendix 1.

²² 1987 Order at 3, Appendix 1.

²³ The Authority does not object to the Settlement of these issues, but is not joining in the Settlement. Therefore, the Authority will not address the issues in II.B.1.

While there was considerable discussion during the evidentiary hearings regarding the burden of proof with respect to Rider No. 18, the NRG Companies' counsel appropriately recognized that they have the burden of proof with respect to the issues raised and relief sought in the Formal Complaint.²⁴ Such a conclusion is fully consistent with the two cases cited by the ALJ which he asked the parties to address in briefing. In *Brockway Glass Company v. Pennsylvania Public Utility Commission*²⁵, the Commonwealth Court considered the Commission's order addressing an industrial customer's claim – in a non-base rate case – that a one-year notice of cancellation of a particular rate schedule was unjust, unreasonable and unlawful. The presiding ALJ and ultimately the Commission held that the customer had failed to meet its burden of proof and dismissed the complaint. In upholding the Commission's decision, the Commonwealth Court, in reviewing the applicable provisions of the Public Utility Code, noted that:

...[w]here a customer is heard to complain concerning a *proposed* change in rate, the burden of proof is upon the public utility to show that the proposed rate is just and reasonable. Where the complaint involves an *existing* rate, however, the burden then falls upon the customer to prove that the charge is no longer reasonable.²⁶

(emphasis in original).

In contrast to Brockway, the Superior Court in *Johnstown v. Pennsylvania Public Utility Commission*²⁷ addressed burden of proof issues in a base rate proceeding. Johnstown involved the Commission's approval of proposed rate increase for a water utility without making a specific determination of the fair value of the utility's property and without making a specific finding of a fair rate of return.²⁸ In upholding the Commission's right to approve the rate

²⁴ N.T. 147: "We agree that NRG has the burden of proof, even though it's a base rate proceeding."

²⁵ 437 A.2d 1067 (Pa. Cmwlth. 1981).

²⁶ Id. at 1070.

²⁷ 133 A.2d 246 (Pa. Super. 1957).

²⁸ Id. at 248.

increase without making these specific findings, the Superior Court found, in reliance upon the then-existing Public Utility Law, 66 P.S. § 1148 (i.e., the predecessor to the existing Public Utility Code at 66 Pa. C.S. §§ 101 *et seq*) that “[w]here the rate proceeding is the result of a voluntary change in rates (Public Utility Law, § 308, 66 P.S. § 1148) to which a complaint is filed or the result of an investigation ordered by the commission on its own motion, the utility is required to substantiate the proposed changes.”²⁹

In this case, it is undisputed that Duquesne’s proposed voluntary base rate increase filing did not involve or propose any change to any aspect of Rider No. 18. Indeed, as stated elsewhere in this brief, Duquesne was without legal authority to propose any change to the Rider No. 18. Thus, the NRG Companies clearly have the burden of proof on all issues raised and relief requested in the Formal Complaint, which relate to an existing rate in Duquesne’s retail tariff.

II. SUMMARY OF ARGUMENT

The Commission lacks jurisdiction to grant the relief sought by NRG Midwest in this proceeding for two reasons. First, QFs such as the Authority’s hydroelectric facilities are entitled as a matter of law to the price set forth in Duquesne’s Tariff Rider No. 18, as of the time in 1987 when the Commission grandfathered the Authority’s agreement with Duquesne and “locked-in” the Rider No. 18 price. Second, Rider No. 18 deals with wholesale power agreements under PURPA that are within FERC’s exclusive jurisdiction. A hallmark of this regulatory construct is that the Commission does not have the type of broad jurisdiction over wholesale electric power arrangements and the price of such arrangements suggested by NRG Midwest. Once a state commission has established the price to be paid, the state can no longer regulate the QFs’ rate. No state law can preempt this PURPA requirement. An additional jurisdictional impediment to the Commission reaching the merits of NRG Midwest’s

²⁹ *Id.* at 250.

recommendations is that it has failed to name all QFs utilizing Rider No. 18 as indispensable parties to its complaint.

NRG Midwest is neither the buyer nor seller under Rider No. 18. It lacks standing to advocate elimination of the Rider or its modification. Its interest in Rider No. 18 is not sufficiently direct and immediate, and none of the NRG Companies can assert a direct relationship between the provisions of Rider No. 18 and the price they are required to pay for power under the Revised QF Agency Agreement they voluntarily assumed in 2012 in connection with the GenOn merger. Nor is the “immediacy” test required for standing met by the NRG Companies, because there is no legal or policy basis for the Commission to intervene in a matter that is purely market driven and the logical result of economic choices the NRG Companies made when they merged with GenOn in 2012.

NRG Midwest’s evidence in support of its recommendations to eliminate Rider No. 18 or dramatically reduce the price in that tariff provision, lacks credibility with the result that it has failed to establish a *prima facie* case for its position. Contrary to NRG Midwest’s assertions, PURPA has not been preempted by the Electricity Generation Customer Choice and Competition Act and the Commission has not ceased enforcing its QF regulations. The obligation of Pennsylvania electric utilities to purchase power from small QF facilities continues and was recently confirmed by the FERC.

Substitution of a fluctuating, market based price for the price in Rider No. 18 is both unlawful and impractical. Such an “avoided cost” would provide no basis whatsoever for development of QF projects.

Finally, Duquesne has shown that the price in Rider No. 18 is not only lawful, but it continues to be a reasonable and sensible price for purchased energy given its default service

prices. NRG Midwest made no study or investigation of the impact its recommendations would have on the Authority. As explained by its witness, those recommendations would impose dire financial consequences on the Authority.

For these and all the reasons specified in its Main Brief, the NRG Companies requested relief with respect to Rider No. 18 should be dismissed with prejudice.

III. ARGUMENT

A. **NON-UNANIMOUS SETTLEMENT ISSUES³⁰**

B. **RIDER NO. 18 ISSUES**

1. **The Commission lacks jurisdiction to grant the relief sought by NRG Midwest**

The Commission lacks the authority to modify the price specified in Rider No. 18 as requested by NRG Midwest in the Formal Complaint two different reasons. First, utility tariffs have the force and effect of law³¹ 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.³² 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 further below, after 1995, it was clear that the Commission lacked the authority under *PURPA* to change

³⁰ The Authority does not object to the Settlement of these issues, but is not joining in the Settlement. Therefore, the Authority will not address the issues in III.A.

³¹ *Brockway Glass*, 437 A.2d at 1070.

³² *See* 1987 Order, Appendix 1.

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.³³ 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.³⁴ A state commission has the authority to implement PURPA in connection with the approval of contracts between utilities and QFs.³⁵

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").³⁶ In that case, Freehold Cogeneration Associates ("FCA") negotiated a power purchase agreement with Jersey Central Power & Light Company ("JCP&L").³⁷ 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

³³ *Nantahala 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).

³⁴ 16 U.S.C. § 824a-3(f).

³⁵ *Crossroads Cogeneration Corp. v. Orange & Rockland Utils, Inc.*, 159 F.3d 129, 135 (3d Cir. 1998).

³⁶ *Freehold Cogeneration Associates L.P. v. Board of Regulatory Commissioners, et al.*, 44 F.3d 1178 (3d Cir. 1995).

³⁷ *Id.* at 1182.

appropriate buyout of the contract.³⁸ BRC's order also stated that in the event the parties did not reach an agreement within 30 days, the BRC would commence an evidentiary hearing to consider various courses of action.³⁹

In response to the BRC's actions, FCA filed a federal district court action seeking a declaratory judgment that the BRC's order was preempted by PURPA.⁴⁰ FCA complained that the BRC had interfered with its federally-granted right to be exempt from certain state utility regulation.⁴¹ 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,⁴² 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.⁴³

The Pennsylvania courts have often echoed the holding in *Freehold*. In *West Penn Power Co. v. Pa. Pub. Util. Comm'n.*⁴⁴ 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.⁴⁵

³⁸ *Id.* at 1183.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 1185.

⁴² *Id.* at 1186, citing 16 U.S.C. § 824a-3(e)(1); 18 C.F.R. § 292.602(c).

⁴³ *Id.* at 1192.

⁴⁴ *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).

⁴⁵ *Id.* at 1066.

The Commission has acted consistent with *Freehold*, even prior to the Third Circuit decision in 1995 when it considered so-called “regulatory out” clauses⁴⁶ in PURPA contracts: “federal law in the form of PURPA 210 and the regulations thereunder entitle a QF to a known stream of payments based upon the estimates of a utility’s avoided costs as of the date the qualifying facility makes an offer of acceptance to the utility ... in our view federal law would act to prohibit us from reconsidering a prior approval of rate recovery.”⁴⁷

Rider No. 18 established wholesale PURPA rates for Duquesne going back to 1981. Those rates have continued unabated since 1981 and apply to existing QFs, like the Authority’s PPA.⁴⁸ 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 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 *Scrubgrass*, *Freehold* and their progeny,⁴⁹ the Commission had no further authority – on its own or at the behest of NRG Midwest in the Formal 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

⁴⁶ “Regulatory out” clauses were provisions inserted into PURPA contracts in the 1980’s that allowed the electric utility to lower the price paid to the QF under a PURPA contract if the state public utility commission modified its prior approval for the utility and made a rate disallowance, effectively reducing the recovery in customer rates of the costs incurred by the utility under such PURPA contracts.

⁴⁷ *Petition of Pennsylvania Electric Company Requesting Approval of Rate Recovery, Under the Energy Cost Rate, for the Costs Proposed to be Paid Under an Agreement with Scrubgrass Power Corporation (“Scrubgrass”)*, Docket No. P-870248, 66 Pa. PUC 151 (Jan. 21, 1988) (Order entered January 21, 1988).

⁴⁸ *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).

⁴⁹ *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).

“legally enforceable obligation” that is not necessarily derived from a contract.⁵⁰ 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 (i.e., 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.F.R. § 292.304(b)(5) and does not entitle NRG Midwest to any relief.

2. Due to the absence of an indispensable party the Commission cannot consider substantive changes to Rider No. 18

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 absence renders any order or decree of court null and void for want of jurisdiction.”⁵¹ 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*.⁵²

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

⁵⁰ 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.”

⁵¹ *Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 464 Pa. 377, 379, 346 A.2d 788, 789 (1975); *City of Philadelphia, et al. v. Commonwealth of Pennsylvania, et al.*, 575 Pa. 542, 838 A.2d 566 (2003); *Barren v. Dubas*, 441 A.2d 1315, 1316 (Pa. Super Ct. 1982).

⁵² *Posel v. Redevelopment Authority of Philadelphia*, 465 A.2d 243, 246 (Pa. Cmwlth. 1983).

party...In order to make the analysis, however, one must refer to the nature of the claim and the relief sought.”⁵³ 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?⁵⁴

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.⁵⁵

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 Formal Complaint and is fatal to NRG Midwest. Although the Authority has intervened in this proceeding, the Beaver Valley Power Company was not named

⁵³ *Cry, Inc. v. Mill Service, Inc.*, 536 Pa. 462, 468-69, 640 A.2d 372, 375 (1994).

⁵⁴ *Mechanicsburg Area School District v. Kline*, 494 Pa. 476, 481, 431 A.2d 953, 956 (1981).

⁵⁵ *Id.*

as a respondent to the Formal Complaint and has not participated in this proceeding.⁵⁶ Under the circumstances the Formal Complaint must be dismissed for failure to join all indispensable parties.

3. NRG Midwest lacks standing to challenge Rider No. 18

The doctrine of standing pertains to the propriety of the original plaintiff to bring the cause of action.⁵⁷ Although it occasionally treats standing and intervention as one and the same,⁵⁸ the Commission has recognized that the common law standard for standing from *William Penn Garage, Inc. v. City of Pittsburgh*⁵⁹ (requiring that a party have a substantial, direct, and immediate interest) is stricter than the standard for intervention under the Commission's regulations at 52 Pa. Code § 5.72.⁶⁰ Rather than analyzing each issue individually, the courts in most instances consider the three elements together and reach a blanket conclusion that a party's interest is (or is not) substantial, direct, and immediate.⁶¹ As demonstrated below, the NRG Companies do not have a substantial, direct and immediate interest that conveys them standing in this proceeding, and the Commission should be loath to accept the NRG Companies' invitation to intervene in a matter that is nothing more than an attempt to "fix a business deal gone bad."

⁵⁶ 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 Formal Complaint, file Preliminary Objections, conduct discovery or prepare Direct, Rebuttal or Surrebuttal Testimony. However, 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. Importantly, the NRG Companies cannot cure their failure to actually join the Authority and the Beaver Valley Power Company as parties by asserting that the Formal Complaint was "served" on them. Absent some direct statement that their interests were at stake and that the NRG Companies were taking a position adverse to them, there is no reasonable way that either the Authority or the Beaver Valley Power Company could have known to actually intervene based on the Formal Complaint that was filed in this proceeding.

⁵⁷ *Investigation into Equitable Gas Company's Revenue Allocation among Transportation Customer*, Docket No. I-900009 (January 16, 1992) (citing *Sierra Club v. Morton*, 405 U.S. 727 (1972)).

⁵⁸ *Investigation into Equitable Gas Company's Revenue Allocation among Transportation Customer*, Docket No. I-900009 (January 16, 1992) (intertwining the issues of standing and intervention in its resolution of whether representational standing status is available).

⁵⁹ 346 A.2d 269 464 Pa. 168 (1975).

⁶⁰ *Application of Metropolitan Edison Company for Approval to Construct an Electric Generating Unit Fueled by Natural Gas*, Docket No. A-110300 (February 25, 1994). See also *Petition of Morris-Rospond Associates for Declaratory Order*, Docket No. P-850088 (March 11, 1986).

⁶¹ *Harrisburg Sch. Dist. v. Hickock*, 762 A.2d 398 (Pa. Comwlth. 2000).

A substantial interest for standing requires some discernible adverse effect to a party's interest other than the abstract interest of all citizens in having others comply with the law.⁶² While the NRG Companies allege in the Formal Complaint some interest in the pricing specified in Rider No 18 (albeit in a diffuse and ambiguous manner which led to its failure to join indispensable parties), as noted below, that interest is not sufficiently direct and immediate so as to convey standing to seek any modification to that rider in this proceeding.

To satisfy the second requirement for standing purposes, i.e., a direct interest, the aggrieved party must show causation of the harm to its interest by the matter of which it complains.⁶³ Here, none of the NRG Companies has any direct contractual or other privity with the Authority. The PPA and Rider No. 18 involve the relationship between Duquesne and the Authority as a QF under PURPA. While NRG Midwest is the assignee by merger of the Revised QF Agency Agreement, that agreement is solely between NRG Midwest and Duquesne, and not with the Authority.⁶⁴ None of the NRG Companies is a party to the PPA. The NRG Companies voluntarily entered into the merger with GenOn and assumed the normal risks of assets associated with such a transaction, including the then-existing Revised QF Agency Agreement and all duties and obligations thereunder. And, since the terms of Rider No. 18 are currently restricted and exist solely for the benefit of two QFs, one of which is the Authority, none of the NRG Companies can assert a direct relationship between the provisions of Rider No. 18 and the price they are required to pay for power under the Revised QF Agency Agreement they voluntarily assumed in 2012 in connection with the GenOn merger.

The fact that one of the NRG Companies is an existing Duquesne customer is of no

⁶² *DeFazio v. Civil Service Commission of Allegheny County*, 562 Pa. 531, 756 A.2d 1103 (2000) (citing *Allegheny County v. Monzo*, 509 Pa. 26, 33-34, 500 A.2d 1096, 1100 (1985)).

⁶³ *DeFazio v. Civil Service Commission of Allegheny County*, 562 Pa. 531, 756 A.2d 1103 (2000).

⁶⁴ N.T. 369. As testified by NRG Midwest witness Lagano, "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.)

consequence to any standing claim or showing of a “direct” interest because no Duquesne customer pays anything in rates for costs incurred by Duquesne under Rider No. 18.⁶⁵ Indeed, as noted elsewhere in this brief, the structure of Rider No. 18 is so unique that it has no counterpart in Duquesne’s tariff. Unlike other rate schedules in the Tariff, which contain the charges *to be paid by customers*, Rider No. 18 contains not what customers pay but what *Duquesne pays* to certain selected QFs, including the Authority. Therefore, no customer has any interest, direct or otherwise in the restricted pricing provisions of Rider No. 18.

The third requirement for standing, “immediacy” of the injury, is evaluated by the causal link between the government’s action and the injury to the plaintiff.⁶⁶ Immediacy is shown where the particular interest is within the zone of interests sought to be protected by the statute or constitutional guarantee at issue.⁶⁷ One guideline relevant to this inquiry is whether the type of interest asserted is among the policies or interests protected by the legal or constitutional rule relied on by the person claiming standing.⁶⁸ In this case, it is clear that NRG Midwest seeks only one thing, a reduction in the rate it pays to Duquesne under the Revised QF Agency Agreement, which rate is tied to the now restricted provision of Rider No. 18. NRG witness Lagano could not have been more clear about the real motivation behind the Formal Complaint when she stated on cross-examination:

Reviewing the settlements from PJM and reviewing the invoicing and the prior invoicing between Duquesne Light and the predecessor company of NRG over the past year, getting acclimated to the level of pricing being paid to Duquesne and what we were receiving in the wholesale market from PJM for all of the energy produced by the QF.⁶⁹

⁶⁵ NRG Midwest St. No. 1-S, p. 11.

⁶⁶ *William Penn Parking Garage*, 464 Pa. at 196, 346 A.2d at 282-83.

⁶⁷ *South Whitewall Township Police Service v. South Whitewall Township*, 521 Pa. 82, 86, 555 A.2d 793, 795 (1989).

⁶⁸ *William Penn Parking Garage*, 464 Pa. at 189-199, 346 A.2d at 284.

⁶⁹ N.T. 370.

The import of Ms. Lagano’s testimony is clear. Despite having voluntarily entered into the merger transaction with GenOn and assumed the normal transactional risks of assets and agreements that were already in existence, NRG Midwest now seeks, after slightly more than a year post-closing, to substantially modify the pricing it is paying indirectly via the Revised QF Agency because it cannot resell the energy it is acquiring at a market price that is above the \$0.06/kWh reflected in the restricted Rider No. 18. For standing purposes, the NRG Companies have not met the “immediacy” issue since there is no legal or policy basis for the Commission to intervene in a matter that is purely market driven and the logical result of economic and other choices the NRG Companies voluntarily made when they decided to merge with GenOn in 2012. The NRG Companies should not be permitted to substantially undermine (if not completely vitiate) the price certainty of PURPA arrangements reflected in Rider No. 18 in violation of clear and longstanding federal mandates. Duquesne has no legal standing to change Rider No. 18 and the NRG Companies cannot and should not have an increased right to do so in this proceeding.

4. NRG Midwest has failed to show by a preponderance of the evidence that the price established in Rider No. 18 for Duquesne’s grandfathered purchases of QF power should be modified

NRG Midwest is dissatisfied with the price it is obligated to pay Duquesne for the output of two small QF hydroelectric power generators located in Pennsylvania, one of which is owned and operated by the Authority. As noted above, this obligation is relatively new for NRG Midwest, arising from the Revised QF Agency Agreement it voluntarily assumed in the 2012 merger of NRG Energy, Inc. and GenOn. NRG Midwest pays Duquesne \$0.06 per kWh for this QF output and Duquesne in turn pays the same amount per kWh to the Authority⁷⁰. Rider No. 18

⁷⁰ NRG Midwest St. No. 1, pp. 3-4.

notes that the price is six (6) cents per kWh, or a higher rate based on Duquesne's avoided costs "when such costs exceed six (6) cents per kilowatt-hour."⁷¹

Counsel for NRG Midwest has repeatedly characterized Rider No. 18 as a "tariff of general applicability".⁷² This is not factually correct. As is clear from the face of Rider No. 18 and as noted above, its pricing was specifically restricted to very specific classes of QF's in 1987.⁷³ No post-August 25, 1987 QF project may access the Rider No. 18 minimum 6 cent/kWh price and, as stated previously, the only two QF projects with access to that price are historically fixed, i.e. grandfathered since 1987. Therefore, there is no prospective applicability of this Tariff provision whatsoever, much less "general" applicability.

The fact that Rider No. 18 affects no QF projects other than the Authority and the Beaver Valley Power Company highlights NRG Midwest's motivation with respect to the pricing in Rider No. 18. It is not concerned about the price set for a new QF project, or the basis on which the Commission would set an avoided cost for such projects. Rather, its objective in this case is to employ Pennsylvania state regulation as a means to escape the commercial obligations it accepted under the Revised QF Agency Agreement as part of a merger, that it currently finds financially problematic. In response to questioning regarding what steps NRG Midwest took to understand its obligations under the PPAs with the Authority and the Beaver Valley Power Company it voluntarily accepted as part of the merger with GenOn, Ms. Lagano stated that NRG Midwest reviewed the invoicing between GenOn and Duquesne to get "acclimated to the level of pricing being paid to Duquesne and *what we were receiving in the wholesale market from PJM*

⁷¹ Appendix 2, NRG Midwest Exhibit No. 3.

⁷² N.T. 134, 183, 392.

⁷³ Appendix 2, NRG Midwest Exhibit No. 3. Duquesne agrees that Rider No. 18 only applies to pre-August 25, 1987 QFs. N.T. 254.

*for all the energy produced by the QF.*⁷⁴ This explains NRG Midwest's strong interest in eliminating the current pricing associated with these QFs and substituting some fluctuating, market based price to reduce the chances it must "buy high" from Duquesne, and sell into the PJM market at a price that is lower when the market price is below 6 cents per kWh. The Commission should reject this attempt to unlawfully use the regulatory process to address NRG Midwest's private commercial interests.

Regardless of NRG Midwest's business motivations, if the Commission finds, over the Authority's objection, that it has the jurisdiction to review the substantive merits of the Formal Complaint, NRG Midwest's recommendations should be rejected because there is no credible evidence in support of them, and NRG Midwest failed to establish even a prima facie case for amendment or elimination of Rider No. 18.

In its Direct Testimony, NRG Midwest asserted that the Rider No. 18 price was "no longer just and reasonable", the price is twice what it should be, that the regulatory scheme reflected in Rider No. 18 "has been largely displaced by the Electricity Customer Choice and Competition Act in 1996 and the Alternative Energy Portfolio Standards Act in 2004", represents "an indirect form of rate discrimination benefitting certain customer-generators at the expense of electric generation market participants such as NRG Midwest", and therefore Rider No. 18 should be revised to reflect a just, reasonable and non-discriminatory purchase price "based on the locational marginal price in the Duquesne Zone."⁷⁵ In her Surrebuttal Testimony, Ms. Lagano opined that the electric utilities' obligation to purchase generation from QFs has been "preempted" and the Commission's QF regulations are no longer enforced.⁷⁶ She also expanded

⁷⁴ N.T 370 (emphasis added).

⁷⁵ NRG Midwest St. No. 1, pp. 5-7.

⁷⁶ NRG Midwest St. No. 1-S, pp. 6-7.

her recommendations to include a request that the Commission completely eliminate Rider No. 18.⁷⁷

Cross-examination of NRG Midwest's witness revealed that its position with respect to Rider No. 18 is significantly flawed, lacks any credibility, and cannot support a prima facie case.

Examples of these flaws are as follows:

- Ms. Lagano erroneously believes that the rate discrimination referenced in Section 1304 of the Public Utility Code includes rates paid by the utility such as the price in Rider No. 18, when it is clear from the Code's Section 102 definition of "rate"⁷⁸ that Section 1304's non-discrimination mandate applies to charges demanded or received by a public utility, not paid by the utility.⁷⁹
- Ms. Lagano has no comprehensible explanation for why she believes the Commission's ratemaking standard for the price in Rider No. 18 should be "just and reasonable rates".⁸⁰ In fact, "just and reasonable" is the Commission's standard for setting retail rates, which has nothing to do with wholesale rates for QFs under PURPA. Moreover, NRG Midwest's witness could think of no rate comporting with a just and reasonable ratemaking standard than "a market based rate."⁸¹
- In cross examination Ms. Lagano recanted her Direct Testimony recommendation that the price in Rider No. 18 should be based on locational marginal pricing

⁷⁷ NRG Midwest St. No. 1-S, p. 6 ("Rider No. 18 is simply inconsistent with the current regulatory scheme and should be removed from Duquesne Light's tariff.).

⁷⁸ 66 Pa. C.S. § 102 ("Rate." Every individual, or joint fare, toll, charge, rental, or other compensation whatsoever of any public utility....demanded or received for any service within this part, offered, rendered, or furnished by such public utility....").

⁷⁹ N.T. 319.

⁸⁰ N.T. 321-324.

⁸¹ N.T. 328.

(“LMP”), and asserted that LMP is merely some *benchmark* for consideration.⁸² (ALJ Johnson – “She said it’s a benchmark. She’s not saying definitely that’s what it should be. She just says it’s a guide.”)⁸³ Neither Ms. Lagano or her counsel challenged the ALJ’s characterization of her cross examination testimony. This leaves the Commission without a basis in substantial evidence for what a new rate for Rider No. 18 “should be”.

- As an owner/operator of generating units in PJM, NRG Midwest can influence its suggested benchmark for QF pricing, LMP, through its decisions on generating unit availability.⁸⁴ This makes LMP a self-serving, non-credible benchmark.
- After initially testifying that NRG Midwest was not permitted to have information that would allow it to evaluate the PPAs it accepted as an assignment as part of the merger with GenOn (an implausible assertion), Ms. Lagano conceded that “I don’t know specifically what kind of assessment was made at the time of the assignment.”⁸⁵
- Although she is recommending changes in Rider No. 18 which references “avoided cost” as a pricing standard for QFs, Ms. Lagano (i) could not answer the question “who calculates avoided cost and for what purpose”, (ii) admitted that she has never been responsible for calculating avoided cost under PURPA and (iii) has not calculated a utility’s avoided cost.⁸⁶
- After incorrectly identifying the Pennsylvania’s Electricity Generation Customer Choice and Competition Act (“Act”) as the “Electricity Choice and Competition

⁸² N.T. 328-330.

⁸³ N.T. 330.

⁸⁴ N.T. 335-340.

⁸⁵ N.T. 370-371.

⁸⁶ N.T. 375-376.

Act” in written testimony, Ms. Lagano asserted that “...the Competition Act created the wholesale electric market which allows generators to provide and sell certain products in the market...”.⁸⁷ This opinion reflects a gross misunderstanding of the Act, which in fact established *retail* alternatives for electricity customers in Pennsylvania. A belief that a state law could have established wholesale electric markets displays a fundamental lack of expertise in energy regulation.

- After asserting in written testimony that the Commission no longer enforces its QF regulations, Ms. Lagano could provide no support for that action having been taken, could not distinguish between those QF regulations and Rider No. 18 and in fact could not recall if counsel had ever provided a citation to those QF regulations.⁸⁸
- Ms. Lagano is under the belief that Duquesne currently has no mandatory obligation to purchase power from small QF facilities at or below 20 megawatts.⁸⁹ This erroneous belief was contradicted as recently as October 2012, in a FERC Order confirming PPL’s legal obligation to purchase power from a small QF facility in Pennsylvania.⁹⁰

Ms. Lagano’s expertise is apparently much like a light bulb that flickers on and off. In her Surrebuttal Testimony she opined on the contract term of PPAs and the agreement’s design relative to the recovery of project investment costs.⁹¹ In cross examination she could offer no

⁸⁷ N.T. 378.

⁸⁸ N.T. 379-383.

⁸⁹ N.T. 384-385.

⁹⁰ See Appendix 3, attached hereto.

⁹¹ NRG Midwest St. No. 1-S, p. 4.

specifics on the current relationship between QF contract lengths and financing requirements.⁹² In her Surrebuttal Testimony she spoke to Pennsylvania electric utilities' responsibilities for default service generation supply "pursuant to a Commission-approved default service plan"⁹³ but in cross examination admitted she had not compared LMPs to Duquesne's current default service plan and apparently has not reviewed Duquesne's current 2013-2015 default service procurement plan in any respect.⁹⁴

Because the foregoing inventory of the shortcomings in Ms. Lagano's testimony justifies giving it no weight, NRG Midwest has failed to establish even a prima facie case in support of its requested relief.

If one does consider the merits of NRG Midwest's recommendations, it is clear that adopting its policy approach to QF projects would be disastrous. Although Ms. Lagano recognized in her testimony that the PPAs with Beaver Valley Power Company and the Authority were designed to match the useful life of each facility with a contract term that permits the facility owner to recover investment costs, she recommends that "market pricing could provide a good benchmark for a just and reasonable rate for the energy from those two facilities."⁹⁵ Rather than the fixed, minimum rate of 6 cents per kWh provided by Rider No. 18, NRG Midwest suggests that a fluctuating market price⁹⁶, (a price it can influence through its operation of generating units), with no minimum or maximum, will serve as a superior new approach to pricing for the two QF projects covered by Rider No. 18. NRG Midwest provides no explanation for how the use of market prices will ensure recovery of QF investment costs, or how they comport with PURPA's avoided cost standard and the Commission's QF regulations.

⁹² N.T. 333-334.

⁹³ NRG Midwest St. No. 1-S, p. 6.

⁹⁴ N.T. 316-317.

⁹⁵ N.T. 327.

⁹⁶ Ms. Lagano admitted that a market price would vary over time as supply and demand changes. N.T. 396.

NRG Midwest appears not to have considered how such a pricing standard would impact new QF projects because it mistakenly believes the Commission has stopped enforcing its QF regulations and that Pennsylvania state law has somehow preempted federal law.

NRG Midwest is attempting in this proceeding to shoehorn the issue of QF pricing, for existing, longstanding QF projects no less, into a state retail ratemaking standard/tariff paradigm that simply will not fit. This is a wholesale rate issue, not a retail rate issue, governed by federal law rather than state law. It concerns a utility's obligation to *purchase* electricity, not its *sale* of electricity. To the extent a price setting standard is involved, it is the standard of avoided cost, not just and reasonable rates or market prices. The enormous irony in NRG Midwest's advocacy is that it is attempting to treat QF pricing as a retail rate issue addressed under state law, when PURPA's intent, as explained in *Scrubgrass* and *Freehold*, was to exempt QF's from traditional state laws and regulations regarding rates.⁹⁷

NRG Midwest may argue that Duquesne shares its view that Rider No. 18's price can simply be changed by a new tariff filing, but that is not the case. Despite any language in Rider No. 18 or the PPA to the contrary, Duquesne cannot lawfully change the wholesale 6 cent/kWh rate in Rider No. 18. Not only was that rate restricted as of 1987, both *Scrubgrass* and *Freehold* make it clear that states are powerless to change QF wholesale rates established via contract or other legally enforceable obligation.

Furthermore, Duquesne's witness on Rider No. 18 issues, Mr. Pfrommer, testified that not only is the 6 cent/kWh price is still reasonable, but over the last ten years, Duquesne's

⁹⁷ As stated in *Freehold*: "[S]ection 210(e) of PURPA requires the FERC to implement regulations exempting QFs from federal regulation to which traditional electric utilities are subject, including most provisions of the Federal Power Act and '[s]tate laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities.' 16 U.S.C. § 824a-3(a)(1)."

default service prices have been at or above 6 cents per kWh.⁹⁸ With a grandfathered price established in 1987 for the Rider No. 18 QF projects, Duquesne has had no reason to waste its resources by attempting to calculate its avoided costs in any subsequent years.

[BEGIN HIGHLY CONFIDENTIAL]

[END

HIGHLY CONFIDENTIAL]

Although Mr. Pfrommer indicated Duquesne “could” file a new Rider No. 18 supplement, it is clear from a complete review of his testimony that such a filing would occur only be in the context of an agreement accepted by all affected parties, and subject to a legal review of whether any tariff changes were consistent with the law affecting QF projects as it has been clarified from 1987 to the present.¹⁰¹ And, Mr. Pfrommer was clear that while Duquesne may file a tariff, any tariff change will not necessarily be approved by the Commission.¹⁰² Under *Scrubgrass* and *Freehold*, the only way in which the Commission could “approve” a new rate in

⁹⁸ N.T. 237-238.

⁹⁹ NRG Midwest Exhibit No. 2 (Highly Confidential).

¹⁰⁰ See *PPL v. Pa.P.U.C.*, 912 A.2d 386 (2006) (“As the Commission pointed out, while it may be true that parties may mutually agree to terminate a contract, parties may not agree to violate or disregard a filed tariff. Deviation from an approved tariff is not permitted under any pretext. *Philadelphia Suburban Water Company*, 808 A.2d at 1054-1055; *West Penn Power Company v. Pennsylvania Public Utility Commission*, 147 Pa. Commw. 6, 607 A.2d 1132 (Pa. Cmwlth. 1992).”)

¹⁰¹ N.T. 242, 248, 278, 281, 287, 301.

¹⁰² N.T. 278.

Rider No. 18 would be if the QF *and* the utility mutually agreed to such change. No agreement with all affected parties to revise Rider No. 18 exists. Moreover, no legal basis for the Commission having the authority to revise a previously established QF rate has been presented.

NRG Midwest has also recommended that Rider No. 18 be completely eliminated by the Commission without any clear specification of the consequences of such an action. In fact, NRG Midwest has been indifferent to the consequences of eliminating Rider No. 18. With respect to the Authority's project, NRG Midwest did not even determine where the Authority was located or what Pennsylvania river powered the hydroelectric facility.¹⁰³

When it presented its recommendations, NRG Midwest did not calculate the impact eliminating Rider No. 18 would have on the Authority's revenues or whether any debt service remained on the Facilities. It did not study whether the Facilities would be sustainable and capable of operating if Rider No. 18 were eliminated. Nor did it perform any study of what the market potential of the project's output would be if Rider No. 18 were eliminated.¹⁰⁴ In fact, none of the implications of the elimination of Rider No. 18 or the termination of the Authority's agreement with Duquesne were considered by NRG Midwest with one exception.¹⁰⁵ Ms. Lagano testified that if the Commission eliminated Rider No. 18 altogether, "[a]ny ensuing legal battles should be of no concern to the Commission."¹⁰⁶ When asked to identify the parties in these legal battles that she anticipated, Ms. Lagano would only say they could involve NRG Power, NRG Midwest, Duquesne Light and the QF facilities.¹⁰⁷ Therefore the Commission should keep in mind that its acceptance of NRG Midwest's recommendation to eliminate Rider No. 18, rather than having the effect of resolving an issue in a positive manner, could result in litigation (and

¹⁰³ N.T. 366.

¹⁰⁴ N.T. 367-368

¹⁰⁵ N.T. 400.

¹⁰⁶ NRG Midwest St. No. 1-S, p. 9.

¹⁰⁷ N.T. 387.

the related expense) for parties, including the Authority, a non-profit entity, and Duquesne. The Authority's entire legal budget for 2013 was only \$40,000.00.¹⁰⁸

As demonstrated by Authority witness, Mr. Riggio, had NRG Midwest discussed or explored the financial consequences of its recommendations with the Authority, it would have learned that the Facilities' debt costs have not been retired, and that Rider No. 18 and recent revenues from the sale of alternative energy credits only slightly exceed the Facilities' ongoing costs.¹⁰⁹ Should revenues be eliminated via cancellation of Rider No. 18 or even reduced to approximately 3 cent per kWh, there would be dire financial consequences for the Authority, that would have extensive costs not covered by revenues, threatening its financial stability.¹¹⁰

NRG Midwest's failure to fully assess its obligation to purchase Pennsylvania QF power through Duquesne before contractually committing to that purchase in 2012 as part of the GenOn merger should not be remedied by adoption of the non-credible, inadequately supported, unlawful and non-jurisdictional proposal on Rider No. 18 that it has put before the Commission. If not otherwise disposed of on jurisdictional grounds or for failure to join indispensable parties and considered on the merits, NRG's proposal regarding Rider No. 18 should be summarily rejected.

C. MISCELLANEOUS ISSUES¹¹¹

¹⁰⁸ Authority St. No. 1-REJ, p. 7.

¹⁰⁹ Authority St. No. 1-REJ, pp. 4-6.

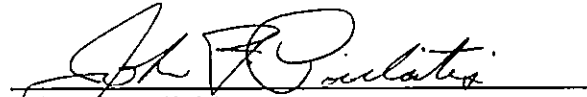
¹¹⁰ Authority St. No. 1-REJ, pp. 4-6.

¹¹¹ The Authority does not object to the Settlement of these issues, but is not joining in the Settlement. Therefore, the Authority will not address the issues in III.C.

IV. CONCLUSION

For the reasons specified in this brief, the Beaver Fall Municipal Authority requests that the Formal Complaint be dismissed with prejudice.

Respectfully submitted,



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Attorneys for Beaver Falls Municipal Authority

Dated: January 6, 2014.

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APPENDIX 1

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PA No. 2
SECRETARIAT BUREAU

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.

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, *Brookway 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 modifi-

ation 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 revised 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}

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

[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 de-

velopers 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.

c. 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 Order 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".

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APPENDIX 2

STANDARD CONTRACT RIDERS - (Continued)

**RIDER NO. 18 - RATE FOR PURCHASE OF ELECTRIC ENERGY FROM
CUSTOMER-OWNED RENEWABLE RESOURCES GENERATING FACILITIES**

The Company will purchase electric energy from customer-owned generating facilities that: (1) are "qualifying small power production facilities" as defined in Subpart B - Qualifying Cogeneration and Small Power Production Facilities, of Part 292 of Subchapter K of Chapter 1, Title 18, Code of Federal Regulations ("facility"); (2) are located in the Company's service area; (3) use as the energy source renewable resources such as small scale hydro facilities of 30 megawatts or less, biomass, waste, solar or wind; and (4) meet one of the following three criteria:

- (a) are 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) day of August 25, 1987.
- (b) are supplying electric energy to the Company under the terms of this rider on or before August 25, 1987, but are not subject to an executed contract.
- (c) have been negotiating with the Company for a contract and it is determined that the project has been the subject of serious negotiations prior to August 25, 1987.

The electric energy will be purchased, as available, from such facilities at the rate of six (6) cents per kilowatt-hour, or at a rate based on the Company's avoided costs when such costs exceed six (6) cents per kilowatt-hour. For facilities that do not qualify under the provisions of this rider, electric energy will be purchased at a rate based on the Company's avoided costs as calculated in accordance with the applicable PA. P.U.C. regulations. Payment will be made monthly for the electric energy received from the facility in the preceding month.

Each facility will be required to install at its expense, or to have the Company install at the customer's expense, interconnection equipment and facilities including metering, protection and controls. All such interconnection equipment and facilities must be reviewed and approved in writing by the Company prior to installation.

The owner of each facility will be solely responsible for the operation, maintenance and repair of such facility.

The Company shall not be liable for damage to the facility which may result from its interconnection with the Company's facilities.

Purchase of electric energy under this rider shall be subject to all applicable Rules and Regulations of the Company's Electric Service Tariff, such Rules and Regulations to be read and interpreted, generally, with the word "purchase" substituted for the word "supply" or the word "service" where appropriate to reflect the application of the Rules and Regulations to the purchase rather than the sale of electric energy.

The Company reserves the right to require a written contract covering the purchase of electric energy for each facility.

(C)

NRG Midwest Exhibit No. 3

(C) - Indicates Change

ISSUED: DECEMBER 22, 2006

EFFECTIVE: JANUARY 6, 2007

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JAN - 6 2014

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

APPENDIX 3

145 FERC ¶ 61,053
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

PPL Electric Utilities Corporation

Docket Nos. QM13-2-000
QM13-2-001

ORDER DENYING APPLICATION TO TERMINATE
MANDATORY PURCHASE OBLIGATION

(Issued October 17, 2013)

1. On May 17, 2013,¹ PPL Electric Utilities Corporation's (PPL Electric) filed an application pursuant to section 210(m) of the Public Utility Regulatory Policies Act of 1978 (PURPA)² and section 292.309(a) and of the Commission's regulations.³ PPL Electric is requesting to be relieved of its requirement to enter into a new contract or obligation to purchase electric energy from IPS Power Engineering Inc.'s (IPS Power) Souderton LLC cogeneration qualifying facility (Souderton QF), which is expected to have a net capacity of 18.1 MW.⁴ In this order, we deny PPL Electric's request to terminate its mandatory purchase obligation for the Souderton QF, as discussed below.

I. Background

2. In 2009, the Commission terminated PPL Electric's mandatory purchase obligation to purchase capacity and energy from QFs larger than 20 MW in its service territory within PJM Interconnection, LLC (PJM).⁵ The termination of PPL Electric's

¹ The application was supplemented on May 24, 2013, and amended on July 19, 2013.

² 16 U.S.C. § 824a-3(m) (2006).

³ 18 C.F.R. § 292.309(a) (2013).

⁴ The Souderton QF was self-certified as a topping-cycle cogeneration qualifying facility (QF) in Docket No. QF13-325-000 and self-recertified in QF13-325-001, and is slated to begin operations and sales on April 1, 2014.

⁵ *PPL Elec. Utils. Corp.*, Docket Nos. QM09-6-000 and QM09-6-001 (Oct. 14, 2009, *errata* Oct. 15, 2009) (delegated letter orders).

mandatory purchase obligation was based on the finding, reflected in 18 C.F.R. § 292.309(e) (2013), that the PJM markets qualify as markets that warrant termination of the mandatory purchase obligation and on the rebuttable presumption, also reflected in 18 C.F.R. § 292.309(e) (2013), that QFs larger than 20 MW have nondiscriminatory access to the PJM markets.

3. However, the Commission created another rebuttable presumption; QFs with a net capacity of 20 MW or below do not have nondiscriminatory access to markets sufficient to warrant termination of the mandatory purchase obligation.⁶ In creating this rebuttable presumption the Commission found persuasive arguments that some QF's may, in practice, not have nondiscriminatory access to markets in light of their small size; the Commission noted that there was agreement among commenters representing both QFs and utilities that small size could affect a QF's ability to access markets.⁷ The Commission explained that it adopted this rebuttable presumption for small QFs to reflect that smaller QFs are often interconnected at a distribution level and that QFs interconnected at the distribution level may, in practice, lack the same level of access to markets as those connected to transmission lines.⁸ The Commission also explained that smaller QFs were more likely to have to overcome obstacles that larger QFs would not have to overcome, such as jurisdictional differences, pancaked delivery rates, and administrative burdens to obtaining access to distant buyers. The Commission found that such difficulties supported a rebuttable presumption that smaller QFs have "substantially less ability to access wholesale markets than do larger QFs."⁹ The Commission further explained that it set this rebuttable presumption at 20 MW, rather than at a much smaller size of one or two MW, to reflect its understanding of "the general nature of QFs' interconnection practices and the relative capabilities of small entities" to participate in markets.¹⁰

⁶ 18 C.F.R. §292.309(d)(1) (2013); *see also New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, FERC Stats. & Regs. ¶ 31,233, at P 72 *et seq.* (2006), *order on reh'g*, Order No. 688-A, FERC Stats. & Regs. ¶ 31,250, at P 94 *et seq.* (2007), *appeal denied sub nom. American Forest and Paper Assoc. v. FERC*, 550 F.3d 1179 (D.C. Cir. 2008).

⁷ *E.g.*, Order No. 688, FERC Stats. & Regs. ¶ 31,233 at PP 72-73; Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 103.

⁸ Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at PP 94-103.

⁹ *Id.* P 96; *accord id.* P 103.

¹⁰ *Id.* P 101.

4. The Commission has explained that, to overcome this rebuttable presumption that smaller QFs lack nondiscriminatory access to markets, the electric utility must make additional showings to demonstrate, on a QF by QF basis, that each small QF, in fact, has nondiscriminatory access to the relevant wholesale markets.¹¹ Order No. 688 placed the burden of proof on the electric utility to demonstrate that a small QF has nondiscriminatory access to the markets of which the electric utility is a member (i.e., in this case, PJM). The Commission also stated that an application for relief must be fully supported by documentation upon which it can make the required finding.¹² To date, the Commission has not granted any utility relief from the mandatory purchase obligation for a QF that is 20 MW or smaller.

II. PPL Electric's Applications

5. PPL Electric argues that it should be relieved from the obligation to purchase power from the Souderton QF because it believes the Souderton QF will have nondiscriminatory access to PJM, an independently administered, auction-based day ahead and real time wholesale market for energy and long-term sales of capacity. Accordingly, PPL Electric states that it can overcome the rebuttable presumption set forth in section 292.309(d)(1) of the Commission's regulations for the below 20 MW Souderton QF.

6. PPL Electric states that the Souderton QF will have no operational constraints that will prevent the Souderton QF from participating in the PJM energy and capacity markets.¹³ PPL Electric argues that it appears that the Souderton QF will be available to run 24 hours a day, 7 days a week and will be fully dispatchable with 98 percent expected availability.¹⁴ Therefore, PPL Electric argues that the Souderton QF will not have highly variable thermal and electrical demand from the QF host that would make it difficult for the Souderton QF to participate in PJM's market. PPL Electric also argues that it appears that the Souderton QF was designed to sell its full electrical output and capacity into the market. PPL Electric argues that the Souderton QF can meet the Commission's fundamental use test while planning to sell the electrical output to a third party and will provide no electrical output to its host, and these facts demonstrate that the counterbalancing thermal output of the facility will be significant, sustained and non-

¹¹ Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 9(B)-(C) & n.9.

¹² *Id.* P 28.

¹³ PPL Electric Application at 8.

¹⁴ *Id.* at 9 (referring to a letter from IPS Power and attached to the Application as Exhibit 1).

fluctuating such that it can engage in regular, steady and predictable wholesales sales into the PJM market.¹⁵

7. PPL Electric maintains that, since PJM directs the operations of PPL Electric's transmission facilities and provides service over those same transmission facilities, the Souderton QF should face no barriers to scheduling transmission service. PPL Electric asserts that it is unaware of any transmission constraints that would prevent the Souderton QF from selling its energy or capacity into the PJM market. PPL Electric further asserts that, since PJM markets rely on locational marginal pricing and financial transmission rights, the Souderton QF will be able to sell into the PJM market regardless of transmission constraints.

8. PPL Electric also states that its long-term transmission planning is contained in PJM's Regional Transmission Expansion Plan, which identifies transmission system upgrades and enhancements, includes generation and load response projects to meet its regional needs, and addresses transmission constraints and congestion. PPL Electric further states that PJM currently considers planning and reliability over a fifteen-year period.

9. PPL Electric states that the Souderton QF must follow PJM's procedures for obtaining transmission service over PPL Electric's transmission system and provides a link to PJM's website for a complete description of the procedures.¹⁶ PPL Electric also states that, in order to interconnect to PPL Electric's transmission system, the Souderton QF will need to follow the interconnection procedures contained in the Small Generation Interconnection Procedures of PJM's tariff. PPL Electric states that currently there are over 150 small, under 20 MW generation projects in the PJM queue -- demonstrating that size is not a barrier to interconnecting through PJM.

10. On July 19, 2013, PPL Electric amended its application, arguing that the Souderton QF will be too big to interconnect with PPL Electric directly and must connect via PJM's interconnection procedures instead. PPL Electric also reiterates its contention that the Souderton QF's operational characteristics will allow it to engage in regular, steady and predictable wholesale sales in PJM markets, and that it has the necessary nondiscriminatory access to PJM markets.¹⁷

¹⁵ *Id.* at 8 (referencing Souderton QF's Form 556 self-certification filings).

¹⁶ PPL Electric Application at 14.

¹⁷ PPL Electric Amended Application at 4-5, 7 and 9-10.

III. Notices of Filings and Responsive Pleadings

11. Notice of PPL Electric's application was published in the *Federal Register*, 78 Fed. Reg. 32,244 (2013); notice of PPL Electric's supplement was published in the *Federal Register*, 78 Fed. Reg. 34,364 (2013); and notice of PPL Electric's amended application was published in the *Federal Register*, 78 Fed. Reg. 45,520 (2013), with interventions and protests due on or before August 16, 2013. Notices of PPL Electric's application were mailed by the Commission to each of the potentially-affected QF's identified by PPL Electric in its supplemental filing on May 24, 2013.

12. The Pennsylvania Public Utility Commission (Pennsylvania PUC) filed a notice of intervention. IPS Power filed a timely motion to intervene and a protest styled as an answer with attached comments from JBS USA LLC's (JBS). IPS Power also filed a protest styled as an answer to PPL Electric's amended application.

IPS Power Answer

13. IPS Power argues that PPL Electric has not demonstrated that the Souderton QF will have nondiscriminatory access to PJM's wholesale markets, and has failed to carry its burden of proof.¹⁸

14. IPS Power argues the Souderton QF will not have access to wholesale markets for long-term sales of capacity and electric energy, also referred to as "Day 2" markets as defined in the section 292.309(a) of the Commission's regulations.¹⁹ Additionally, IPS Power argues that, although PJM is attempting to develop a voluntary long-term capacity auction to support future investment, that market does not currently exist. Instead, IPS Power contends that PJM's capacity market construct, the Reliability Pricing Model, has been unsuccessful in attracting appreciable new generation since its inception in 2007.²⁰ IPS Power further argues that Pennsylvania currently also does not have long-term markets for capacity and energy.

¹⁸ IPS Power Protest at 2, 4 and 5.

¹⁹ *Id.* at 3, 9 (citing 16 U.S.C. § 824a-3(m) (2006); 18 C.F.R. § 292.309(a) (2013)).

²⁰ *Id.* at 10 (citing *PJM Interconnection LLC*, Docket No. ER12-513-000 Cover Letter at 30-31, for proposed revisions to its Open Access Transmission Tariff under Federal Power Act (FPA) section 205 as a result of triennial review and performance assessment of the Reliability Pricing Model).

15. Finally, IPS Power contends that PPL Electric has not responded to its request for information, has denied interconnection of the Souderton QF to its grid, and has also failed to publish an avoided cost rate as requested.

16. In response to PPL Electric's amended application, IPS Power disputes PPL Electric's contention that the Souderton QF must interconnect with PJM.²¹ IPS Power also reiterates its contention that the Commission requires the electric utility to bear the "full burden of proof" and "make additional showings" (i.e., beyond what it showed in its request to be relieved of the mandatory purchase obligation for QFs larger than 20 MW) in order to effectively rebut the presumption that 20 MW or smaller QFs do not have nondiscriminatory access to its region's Day 2 markets. IPS Power argues that PPL Electric has failed to do so.

JBS Comments (Attachment A to IPS Power's Answer)

17. JBS is the steam host and states that the Souderton QF will be critical in providing electric energy and steam to support JBS' Souderton beef processing operation. According to JBS, the Souderton QF will allow servicing of all of JBS's Souderton load from onsite generation that also meets most of the thermal needs of JBS's Souderton beef processing operation. JBS emphasizes that energy reliability is critical in animal processing operations and that such businesses typically operate on extraordinarily tight profit margins, as evidenced by a large number of bankruptcy and distressed operations in the United States over the past decade. JBS claims that good management of energy resources is, therefore, extremely important in these operations. JBS further emphasizes that JBS's Souderton beef processing operation has experienced power interruptions especially during hot summer months, a particularly bad time to experience power supply interruptions in the animal processing industry. According to JBS, each power outage results in significant additional costs to feed livestock, lost production opportunity costs, and potential loss of work in process if refrigeration temperatures rise above acceptable USDA cold storage levels.

18. JBS states that the Souderton QF will permanently resolve the energy reliability issues it faces as well as greatly improving efficiency, lowering carbon emissions and significantly improving long-term sustainability from an energy standpoint. However, JBS states its understanding that the Souderton QF will not be feasible without a long-term market power purchase agreement (PPA) of at least 10 years for electric energy and capacity. JBS therefore urges the Commission to deny PPL Electric's application.²²

²¹ IPS Power Protest to PPL Electric's July 19 Amended Application at 5.

²² IPS Power Protest, Attachment A.

IV. Discussion

A. Procedural Matters

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the notice of intervention and timely, unopposed motion to intervene serves to make the Pennsylvania PUC and IPS Power parties to this proceeding.

B. Determination

20. The Commission denies PPL Electric's application for termination of its mandatory purchase obligation to purchase from the Souderton QF, for the reasons explained below.

21. PPL Electric relies heavily on the Commission's findings when it previously granted PPL Electric's request for termination of its mandatory purchase obligation for QFs over 20 MW, and has not made the showings necessary to rebut the presumption in section 292.309(d)(1) of the Commission's regulations for those QFs that are 20 MW or smaller. While PPL Electric argues that it is not aware of any problematic operational characteristics, transmission constraints or congestion, it does not appear, based on the record before us, that there have been any QF-specific studies, e.g., an interconnection study, that would demonstrate the absence of any specific transmission constraints that may be facing the Souderton QF. Additionally, while PPL Electric contends that the design of the Souderton QF, as detailed in the Souderton QF's self-certification, should allow for IPS Power to readily sell net capacity into the PJM markets, it is too early to determine whether the QF will, in fact, be built according to its anticipated plan, and it is similarly too early to know whether, in practice, the Souderton QF will be able to sell net capacity into the PJM markets at that time.

22. In *Public Service Company of New Hampshire*, 131 FERC ¶ 61,027 (2010), *reh'g denied*, 134 FERC ¶ 61,041 (2013) (*PSNH*), the Commission addressed a similar attempt to rebut the presumption that QFs with a net capacity of 20 MW or less lack nondiscriminatory access to markets. The Commission there explained that a utility may not simply show that market rules permit small QF participation in the markets, that there are no constraints or other barriers to a QF's output reaching the markets, or that other small QFs have participated in the markets. Rather, the electric utility seeking to rebut the presumption that a small QF lacks nondiscriminatory access must make a QF-specific affirmative showing that the individual QF has access to the markets.²³ While PPL Electric seeks relief from the mandatory purchase obligation with respect to only the Souderton QF, PPL Electric has attempted to make many of the same generalized

²³ *PSNH*, 131 FERC ¶ 61,027 at PP 21-22.

showings made by Public Service Company of New Hampshire; specifically, PPL Electric alleges that the Souderton QF has nondiscriminatory access to PJM's markets because PJM's market rules provide such access, and that the Souderton QF will neither have operational characteristics nor face constraints that would definitionally prevent access to PJM's markets. As explained above, the Commission, in *PSNH*, specifically rejected just such arguments.

23. While the Commission chose not to prejudge what evidence would be sufficient to demonstrate whether a small QF has nondiscriminatory access to the market, Order No. 688 did note that such evidence could include whether the QF has, in fact, been participating in the market or is owned by, or is an affiliate of, an entity that has been participating in the market.²⁴ Here, the Souderton QF is a new QF not yet in operation, and as such has not been participating in PJM's markets, and there is no evidence that the Souderton QF will be owned by, or is an affiliate of, an entity participating in PJM's markets.²⁵

24. In sum, PPL Electric has not demonstrated that the Souderton QF has overcome the greater practical difficulty faced by small QFs in participating in power markets – which is what justified the rebuttable presumption adopted in Order No. 688 in the first place.²⁶ PPL Electric has failed to overcome the Commission's rebuttable presumption that the Souderton QF, as a 20 MW or smaller QF, lacks nondiscriminatory access to the PJM markets. We, therefore, deny PPL Electric's request for relief from its mandatory purchase obligation with respect to the Souderton QF.

²⁴ Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 78.

²⁵ In saying this, we do not intend to suggest that these two facts alone would necessarily be a basis for granting relief from the mandatory purchase obligation.

²⁶ See Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 103; *cf. id.* PP 96, 98, 99, 101 (referencing a small QF's ability or capability to access markets).

The Commission orders:

PPL Electric's application to terminate its PURPA mandatory purchase obligation to purchase energy or capacity from the Souderton QF is hereby denied, as discussed in the body of this order.

By the Commission. Commissioners Clark and Moeller are concurring with a joint statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PPL Electric Utilities Corporation

Docket Nos. QM13-2-000
QM13-2-001

(Issued October 17, 2013)

CLARK, Commissioner, and MOELLER, Commissioner, *concurring*:

Insofar as this decision generally comports with Commission precedent we support it, but we would encourage the Commission to consider how it can provide more guidance to applicants such as PPL Electric regarding how they can be relieved of PURPA obligations for 20 MW and below facilities.

The Commission's regulations provide for a rebuttable presumption that a qualifying facility (QF) at or below 20 megawatts does not have nondiscriminatory access to the market.¹ To overcome that presumption, the electric utility must provide QF-specific information demonstrating nondiscriminatory access. Here, PPL Electric uses unit-specific information to support its application, as provided by the developer, IPS Power Engineering, in its self-certification of the Souderton QF.² The question, then, should be whether PPL Electric provided the Commission with enough evidence to determine that the Souderton QF indeed has nondiscriminatory access to the PJM market.

While we concur with the overall finding in this order and agree that PPL's application lacked certain QF-specific information required under the Commission's regulations, such as a system impact study for the interconnection,³ we do not agree that the PJM market rules and planning process are irrelevant for purposes of determining QF-specific market access.⁴ These provisions are

¹ 18 C.F.R. §292.309(d)(1) (2013).

² *IPS Power Engineering*, Form 556, Certification of Qualifying Facility Status for a Small Power Production or Cogeneration Facility, Docket No. QF13-325-000 (filed Mar. 7, 2013).

³ See 18 C.F.R. §292.310(d)(3) (2013).

⁴ Section 292.310(d)(2) of the Commission's regulations states, in pertinent part, that "[t]o the extent applicant seeks relief from the purchase obligation with respect to a qualifying facility 20 megawatts or smaller, and thus seeks to rebut the presumption in § 292.309(d), applicant must also set forth, and submit evidence

fundamental to our evaluation of whether the Souderton QF will have nondiscriminatory access to the markets, as they provide the playbook for the interconnection process, transmission system operations, and revenues earned by a resource in the region where the Souderton QF will be located.

It's important that the Commission's standard for rebutting the presumption not be so high as to preclude a utility from successfully making a showing before the QF is fully operational and the utility is obligated to purchase. Such a circular result would not be a reasonable interpretation of the statute or our own regulations. By considering unit-specific information submitted by an applicant, alongside the opportunities available to suppliers through open markets in an RTO, we can prevent this outcome and avoid rendering meaningless the opportunity to rebut the presumption and obtain PURPA relief.

For these reasons, we respectfully concur with this order.

Tony Clark
Commissioner

Philip D. Moeller
Commissioner

of, the factual basis supporting its contention that the qualifying facility has nondiscriminatory access *to the wholesale markets which are the basis for the applicant's filing.*" (emphasis added) 18 C.F.R. §292.310(d)(2) (2013).

Document Content(s)

QM13-2-000.DOCX.....1-11

**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).

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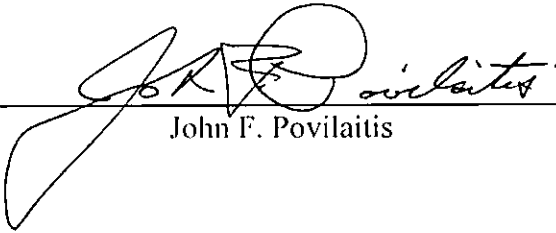
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Date: January 6, 2014



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