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January 17, 2014

VIA E-FILING

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

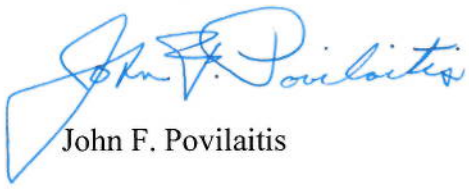
Re: Pennsylvania Public Utility Commission; Office of Consumer Advocate; Office of Small Business Advocate; Jacquelyn and Robert Miller; Gwendolyn L. LeVert; Duquesne Industrial Interveners; Aimee M. Dorsten; Connie Schiavo; NRG Power Midwest LP, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast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

Dear Secretary Chiavetta:

On behalf of Beaver Falls Municipal Authority ("Authority"), I have enclosed for electronic filing the Reply Brief of the Authority in the above-captioned consolidated matters.

Copies have been served on all parties as indicated in the attached certificate of service.

Very truly yours,



John F. Povilaitis

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

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

REPLY BRIEF ON BEHALF OF BEAVER FALLS MUNICIPAL AUTHORITY

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Dated: January 17, 2014

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I. INTRODUCTION

Consistent with the Administrative Law Judge's First Prehearing Order, on January 6, 2014, Main Briefs were submitted in this proceeding to the Honorable Conrad A. Johnson and filed with the Pennsylvania Public Utility Commission ("Commission"). The Beaver Falls Municipal Authority ("Authority")[1] submits the following Reply Brief to the Main Brief of the NRG Companies.

A. STATEMENT OF THE CASE[2]

B. LEGAL STANDARDS AND BURDEN OF PROOF

1. Non-Rider No. 18 Issues[3]

2. Rider No. 18 Issues

a) Burden of Proof

In an unusual move, the NRG Companies[4] completely reverse course in their Main Brief and now assert they no longer have the burden of proof to substantiate their Formal Complaint allegations and requested relief with respect to Rider No. 18. Instead, they now claim that Duquesne Light Company ("Duquesne"), as the public utility seeking a proposed rate increase, bears the burden of showing that "Rider No. 18 is just, reasonable and non-discriminatory."[5] It appears that the NRG Companies have either forgotten or simply ignored their counsel's clear and unequivocal acknowledgement at the evidentiary hearings that they had the burden of proof

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[1] Any capitalized terms not otherwise defined in this Reply Brief shall have the definitions set forth in Beaver Valley's Main Brief.
[2] The Authority has addressed this issue in its Main Brief and it is not necessary to address it in the Reply Brief.
[3] 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.
[4] The Authority will refer to the NRG Energy Inc. subsidiaries in this case collectively as the "NRG Companies", however, because Rider No. 18 issues have been advanced by NRG Midwest, that subsidiary alone is referred to where Rider No. 18 issues are addressed.
[5] NRG Companies M.B., p. 5.

in this rate proceeding: "[w]e agree that NRG has the burden of proof, even though it's a base rate proceeding."[6]

Irrespective of the recent reversal of position, the substantive outcome on who has the burden of proof regarding the Formal Complaint is unchanged, i.e., the NRG Companies bear the burden of proof on all the allegations made and relief requested in their Formal Complaint.

The NRG Companies' new position is based on their interpretation of Section 315(a) of the Public Utility Code ("Code"), 66 Pa. C. S. § 315(a), which provides as follows:

§ 315. Burden of proof

> (a) Reasonableness of rates. – In any proceeding upon the motion of the commission, involving any proposed or existing rate of any public utility, or in any proceedings upon complaint involving any proposed increase in rates, the burden of proof to show that the rate involved is just and reasonable shall be upon the public utility. The commission shall give to the hearing and decision of any such proceeding preference over all other proceedings, and decide the same as speedily as possible.[7]

According to the NRG Companies, Duquesne "bears the burden of proof with respect to *both* existing and proposed rates where proceedings are initiated by the Commission."[8]

It is undisputed that the Formal Complaint seeks a drastic modification or outright elimination of the $0.06/kWh price that Duquesne has been paying the Authority for its QF electricity provided by the Facilities since 1987. The NRG Companies' legal error in its burden of proof analysis lies in assuming that for Code Section 315 purposes, the $0.06/kWh price in Rider No. 18 constitutes a "rate." The fact is the Formal Complaint does not relate to a "rate", but a *price* that NRG must pay to purchase electricity from the Authority, thereby making Code Section 315 irrelevant and inapposite to this proceeding.

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[6] N.T. 147.
[7] 66 Pa. C. S. § 315(a).
[8] NRG Companies M.B., p. 5.

Code Section defines a "rate" as follows:

> "Rate." Every individual, or joint fare, toll, charge, rental, or other compensation whatsoever of any public utility, or contract carrier by motor vehicle, made, demanded, or received for any service within this part, offered, rendered, or furnished by such public utility, or contract carrier by motor vehicle, whether in currency, legal tender, or evidence thereof, in kind, in services or in any other medium or manner whatsoever, and whether received directly or indirectly, and any rules, regulations, practices, classifications or contracts affecting any such compensation, charge, fare, toll, or rental.[9]

The Commission and the courts of the Commonwealth have long held that the broad and expansive definition of "rate" in the Code and its predecessors embraces substantially any and all compensation *received* by a public utility for service rendered to a consumer.[10] In *Penn-Harris Hotel Company v. Pennsylvania Public Utility Commission ("Penn-Harris")*,[11] the Superior Court considered the Commission's dismissal of a joint complaint filed by the Pennsylvania Hotel Association and the Penn-Harris Hotel Company alleging that the Bell Telephone Company of Pennsylvania ("Bell") omitted from its tariffs certain commissions paid by Bell to the hotels for services rendered by the hotels in connection with the semi-public branch exchange service to which they subscribed. The Superior Court specifically defined the issue before it as "whether or not the rules and regulations including the commissions allowed hotels as subscribers of semi-public branch service are 'rates' within the meaning of that term as defined in the Public Utility Law, § 2(19), 66 PS § 1102, and as a 'rate' should be plainly specified in respondent's tariff."[12] In upholding the Commission's determination that such commissions need not be included in Bell's tariff, the Superior Court adeptly addressed the contours of the

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[9] 66 Pa. C. S. § 102.
[10] *Penn-Harris Hotel Company v. Pennsylvania Public Utility Commission*, 166 Pa. Super. 394, 71 A.2d 853 (Pa. Super. 1950).
[11] *Id.*
[12] *Id.* at 166 Pa. Super at 398, 71 A.2d at 855.

definition of "rate" contained in the Public Utility Law, which analysis remains valid today in connection with the definition of "rate" in Code Section 102:

> It [the definition of "rate"] emphasizes and applies only to the compensation *received* by a public utility for services rendered by the utility in return for *services rendered by it*. Clearly the definition does not cover contracts, such as here involved, which relate to *services rendered to the utility* and for which the utility expends money. ... The commissions are not, within the statutory meaning of a 'rate', but are merely part of Bell's operating expenses. 'The rate is the consideration that the company receives for the service. *Swarthmore Borough v. P.S.C.,* 277 Pa. 472, 483, 121 A. 488.[13]

(emphasis in original).

Just like the commissions at issue in *Penn-Harris*, the $0.06/kWh price in Rider No. 18 is *not* received by Duquesne for any *services* it is providing to customers. It is a price that Duquesne is *paying* for services (i.e., electricity) that are being provided to it by the Authority. And, as noted previously, Duquesne's customers have no direct or other interest in Rider No. 18 since none of the amounts paid by Duquesne under the PPA with the Authority are included in customer rates, and the rider's terms and conditions have been restricted with no opportunity for expansion to customers or QFs since 1987. It is abundantly clear that under *Penn-Harris* the $0.06/kWh pricing in Rider No. 18 that the NRG Companies seek to eliminate or drastically reduce is not a "rate" justifying any application of Code Section 315(a) for burden of proof purposes.

Indeed, this conclusion is reinforced by other language in the Code Section 102 definition of "rate." The $0.06/kWh pricing in Rider No. 18 is not "made, demanded, or received for any service within this part....by such public utility." As stated above, the $0.06/kWh price is not

[13] *Id.* at 166 Pa. Super at 399, 71 A.2d at 856.

demanded or received by Duquesne, but is actually *paid* by Duquesne. Nor is this pricing "made" by customers to the utility (i.e., Duquesne).

Rider No. 18 does not involve a "service" as that term is used in the Code Section 102 definition of "rate". Even the broad definition of the term "service" in Code Section 102[14] cannot encompass Duquesne's only obligation under Rider No. 18, which is to pay a QF (i.e., the Authority) based on the $0.06/kWh pricing. Importantly, Duquesne's payment obligation does not arise from the performance of Duquesne's "duties under this part" (i.e., Code), which is a critical requirement for an act to constitute a "service" under the Code.[15] Rather, the obligation to purchase and pay for power from QF's arises under PURPA (i.e., federal legislation)[16] and not under the Code or other Pennsylvania law.

Since it is clear that the burden of proof with respect to the Formal Complaint is not controlled by Code Section 315(a), the standard burden proof provision in Code Section 332(a) applies here:

> (a) **Burden of Proof**. – Except as may be other otherwise provided in section 315 (relating to burden of proof) or other provisions of this part or other relevant statue, the proponent of a rule or order has the burden of proof.[17]

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[14] "Service." Used in its broadest and most inclusive sense, includes any and all acts done, rendered, or performed, and any and all things furnished or supplied, and any and all facilities used, furnished, or supplied by public utilities, or contract carriers by motor vehicle, *in the performance of their duties under this part* to their patrons, employees, other public utilities, and the public, as well as the interchange of facilities between two or more of them, but shall not include any acts done, rendered or performed, or anything furnished or supplied, or any facility used, furnished or supplied by public utilities or contract carriers by motor vehicle in the transportation of voting machines to and from polling places for or on behalf of any political subdivision of this Commonwealth for use in any primary, general or special election, or in the transportation of any injured, ill or dead person, or in the transportation by towing of wrecked or disabled motor vehicles, or in the transportation of pulpwood or chemical wood from woodlots. Code Section 102, 66 Pa. C. S. § 102. (emphasis added).

[15] *See* Note No. 10 above.

[16] Electric utilities like Duquesne are required to purchase electricity from qualifying facilities ("QFs") at rates that are just and reasonable to the electric utility, in the public interest, and which do not discriminate against the QFs. 16 U.S.C. § 824a-3(b); 18 C.F.R. §§ 292.304(a)(1)(i), (ii).

[17] 66 Pa. C. S. § 332(a).

As the party proposing specific relief in the Formal Complaint (i.e., a rule or order), the NRG Companies, to the extent this matter is not otherwise dismissed on jurisdictional grounds (including PURPA preemption and the failure to join indispensable parties), bears the burden of proof on all allegations and relief requested in the Formal Complaint.

II. SUMMARY OF ARGUMENT

NRG Midwest has argued in its Main Brief that Rider No. 18 in Duquesne's tariff should be eliminated altogether or its price should be modified relative to a locational marginal price ("LMP") benchmark. NRG Midwest contends that state law is inconsistent with the present form of Rider No. 18. It also argues that the price in Rider No. 18, $0.06/kWh, is discriminatory with respect to customer-generators, and that fairness and the Commission's ability to review the justness and reasonableness of a tariff justify granting its requested relief. In addition, NRG Midwest has reversed its prior stance and now argues that Duquesne bears the burden of proof to show that Rider No. 18 is reasonable and lawful.

In reply, the Authority submits that NRG Midwest has failed to establish the fundamental proposition that it is lawful under PURPA for the Commission to even modify the price Duquesne has paid the Authority since the 1980s under Rider No. 18, much less eliminate the rider altogether. Nor has NRG Midwest effectively countered Duquesne's and the Authority's argument that the Commission lacks jurisdiction over the Rider No. 18 issues due to the absence of indispensable parties, i.e. Beaver Valley Power Company, the other QF that is impacted by the rider. Furthermore, not only is Duquesne's continued adherence to Rider No. 18 consistent with Federal law, it is consistent with Pennsylvania's Electricity Generation Customer Choice and Competition Act ("Competition Act") and the Alternative Energy Portfolio Standards Act ("AEPS Act"). NRG Midwest has made no showing that Duquesne is conflicted in simultaneously complying with these Federal and state law mandates. Indeed, such a claim turns

the legal realities on its head since it is PURPA, and not any state law or regulation, that has preemptive effect with respect to the price paid to QFs like the Authority.

While Rider No. 18 provides an assured price to the two qualified facilities ("QFs") governed by that provision, it in no way bars other QFs from obtaining the same price, if they substantiate that such a price meets the legal standard for QF pricing, which is Duquesne's avoided cost. Both Duquesne and the Authority have established in their Main Briefs that regardless of Duquesne's avoided costs at any single point in time, the price in Rider No. 18 is lawful and cannot be modified by the Commission.

NRG Midwest has failed to support with adequate evidence elimination or modification of Rider No. 18's price. In fact, it is not clear exactly what price NRG Midwest is recommending the Commission adopt if it decides to adjust the price in Rider No. 18. Certainly, NRG Midwest has not submitted evidence that LMP is Duquesne's avoided cost, an oversight fatal to its position. Moreover, it has not been proven that the Authority has any access to revenues from the sale of capacity that would allow it to weather the loss of revenues from Duquesne. In fact, NRG Midwest completely ignored the Authority's substantial evidence demonstrating the material adverse economic impact on the Authority of reducing or eliminating the Rider No. 18 pricing as proposed in this proceeding.

Finally, NRG Midwest has failed to explore what the effects its recommendations would have on the future availability of QF projects, Duquesne or its customers. This oversight leaves the Commission in the position of not knowing what impact sustaining NRG Midwest's position would have on the public interest.

III. ARGUMENT

A. NON-UNANIMOUS SETTLEMENT ISSUES[18]

B. RIDER NO. 18 ISSUES[19]

1. NRG Midwest has Failed to Demonstrate that Duquesne's Obligation to Continue to Purchase Power From QFs Under Federal law has Ceased.

NRG Midwest has not addressed a fundamental issue in this case which is why PURPA, the Federal law pursuant to which Duquesne commenced purchases of hydroelectric energy from the Authority in the 1980s, no longer requires those purchases to be made at the avoided cost approved by the Commission in Rider No. 18. PURPA has not been repealed. Neither FERC nor the Commission has replaced or abolished the regulations under which utility purchases of power from QFs are governed. Neither FERC nor the Commission has entered any orders acknowledging an end to the mandatory obligation to purchase power from QFs under PURPA. And, contrary to NRG Midwest's assertions, there is no indication that the Commission has ceased to enforce its QF regulations.

To the contrary, in a case arising from Pennsylvania, FERC has recently confirmed that utilities continue to have the obligation to purchase power from small QF projects such as those owned and operated by the Authority.[20] NRG Midwest's proposal that the Commission terminate Rider No. 18 has no basis in law and should be rejected.

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[18] 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.

[19] While the balance of this Reply Brief addresses NRG Midwest's claims associated with Rider No. 18 on their merits, Beaver Valley does so without prejudice to its prior position that the Commission has no jurisdiction to entertain these matters because of the NRG Companies' failure to join indispensable parties and that PURPA preempts any attempt by the Commission to modify QF pricing or payments to QFs like the Authority pursuant to a legally enforceable obligation.

[20] Authority M.B., Appendix 3.

2. NRG Midwest has not Shown that Duquesne's Mandatory Purchase Obligation Under PURPA is Inconsistent with Either the Competition Act or the AEPS Act.

NRG Midwest has ignored the relevant legal issue of Duquesne's mandatory continuing purchase obligation under PURPA and instead argued the incorrect and irrelevant issue of whether Rider No. 18 is inconsistent with the Competition Act and the AEPS Act. This issue of alleged inconsistency has no legal relevance due to the Federal PURPA mandate. In addition, factually there is no demonstrated inconsistency between these state laws and Rider No. 18.

Duquesne continues to purchase electricity for its customers to supply its default service offering to customers who do not shop for their electricity. However, due to NRG Midwest's contractual acquisition of this supply from Duquesne, the purchases Duquesne makes from the Authority at the price set by Rider No. 18 are not used to provide this default service and instead are routed to NRG Midwest.[21] Therefore, it is impossible for Duquesne's implementation of its Commission-approved default service procurement plan to be frustrated or at odds with its purchases of QF energy under Rider No. 18 as claimed by NRG Midwest.[22] NRG Midwest attempts to show how Duquesne's purchases pursuant to Rider No. 18 might not pass muster under the Competition Act, but the reality is that the purchases are not part of Duquesne's default service procurement plan. NRG Midwest has made no showing that Duquesne cannot fulfill its obligations under PURPA and Rider No. 18, and also meet its obligations under the Competition Act and the AEPS Act. Nor has NRG Midwest explained how purchases from QFs governed by Federal law cannot co-exist with separate electric utility purchases made under the Competition Act.

[21] NRG Midwest St. No. 1, p. 3.
[22] NRG M.B., pp. 9-10.

Not only are purchases from QFs consistent with state law, but explicit provision was made in Chapter 28 for continued electric utility purchases from nonutility generation projects, which includes the Authority's QF project, despite the Competition Act's introduction of default service through "commission-approved competitive procurement plan[s]".[23] Explicit provision was made in Section 2804(4)(iii)(B) of the Competition Act for continued electric utility payments for nonutility generation during the rate cap period of electric industry restructuring.[24] This provision clearly covers the Authority's QF project and there is no indication in the Competition Act that such authorized payments should be terminated during the rate cap period or afterwards.

NRG Midwest's argument with respect to the AEPS Act is not really that it is in conflict with Rider No. 18, but that the Authority's potential sale of alternative energy credits to entities requiring such credits under the AEPS Act should make the elimination of Rider No. 18 more palatable to the Authority.[25] The Authority currently sells alternative energy credits associated with its QF project separate and apart from Rider No. 18.[26] However, those sales do not blunt the severe financial consequences the Authority would suffer if Rider No. 18 were eliminated.[27] Therefore, NRG Midwest has not substantiated its allegation that the operation of Rider No. 18 somehow conflicts with the market forces it believes were intended to set the price for such renewable energy credits under the AEPS Act.

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[23] 66 Pa.C.S. §2807(e)(3.1)("...the default service provider shall provide electric generation supply service to that customer pursuant to a commission-approved competitive procurement plan.").
[24] 66 Pa.C.S. §2804(4)(iii)(B)(Electric utilities may seek an exception to the rate cap when "the electric distribution utility is required to begin payment under contracts with nonutility generation projects that have received commission orders...".) The relevant Commission order here is the 1987 decision approving Rider No. 18 and locking in the price for energy output from the Authority's QF project.
[25] NGR M.B., p. 12.
[26] Tr. 440.
[27] Authority St. No. 1-REJ, pp. 4-6; Tr. 448-449.

Under PURPA, once the state commission has established the avoided costs to be paid, the state can no longer regulate the QFs rate. This proposition was established in *Freehold Cogeneration Associates L.P. v. Board of Regulatory Commissioners, et al.* ("*Freehold*").[28] The Commission has acted consistent with *Freehold.* 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.[29] When the Commission in 1987 restricted the availability of Rider No. 18 to a class of QFs – including the Authority, 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*,[30] *Freehold* and their progeny,[31] 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.

This preemptive effect of PURPA on the traditional rate setting authority of the Commission makes NRG Midwest's argument that Rider No. 18 is inconsistent with the Competition Act and the AEPS Act immaterial. Furthermore, such inconsistency has not been shown to exist by NRG Midwest.

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[28] *Freehold Cogeneration Associates L.P. v. Board of Regulatory Commissioners, et al.*, 44 F.3d 1178 (3d. Cir. 1995). Authority M.B., pp. 13-16.

[29] *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).

[30] *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).

[31] *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).

3. Rider No. 18 Does Not Discriminate Against Customer-Generators.

NRG Midwest has argued that the limited availability of Rider No. 18 to two QF projects constitutes unreasonable generation benefiting certain customer-generators.[32] It is true that only two QFs, Beaver Valley Power Company and Beaver Falls Municipal Authority receive the $0.06/kWh price set forth in Rider No. 18 and the Rider does not apply to new, contemporary projects. Rider No. 18 is nonetheless not discriminatory relative to new QFs, however, because nothing in this Rider prohibits a new QF from receiving the same price, or a higher price, upon proof that the requested price is Duquesne's avoided cost. In short, the continued operation of Rider No. 18 does not have the legal effect of denying this price to a new project, if evidence of Duquesne's avoided costs justifies that price.

There is no evidence in this case that Duquesne has rebuffed the request of any customer-generator for the Rider No. 18 price. This highlights the fact that there is no participant in this case with the standing to claim that Rider No. 18's limited applicability harms it as a customer-generator.

4. NRG Midwest has Failed to Support with Credible Evidence any Alternative to the Rider No. 18 Price.

NRG Midwest proposed a reduction in the Rider No. 18 price in its Direct Testimony. In its Surrebuttal Testimony, it switched its primary recommendation to complete elimination of Rider No. 18. In cross examination, its witness declined to recommend any particular price for Rider No. 18 and would only say that the "benchmark" of LMP should be considered by the Commission when it examines Rider No. 18 as part of this investigation. In its Main Brief, NRG Midwest now asserts that the price under Rider No. 18 should "approximate" LMP.[33] Nowhere

[32] NRG M.B. p. 7.
[33] NRG M.B., p. 11.

does NRG Midwest make it clear exactly how Rider No. 18 should read if the Commission chose to adopt its LMP "benchmark".

NRG Midwest's depiction of LMP consisted of NRG Midwest Exhibit No. 4, which shows five average annual PJM Day-Ahead LMPs in dollars per Megawatt hour for the Duquesne Zone from 2009-2013. NRG Midwest has not made it clear whether the average of these prices is its "benchmark", the most recent LMP price is its "benchmark", a rolling average LMP price is its "benchmark" or some other variation of LMP should be the price element of Rider No. 18. No adequate record has been provided by NRG Midwest upon which the Commission could base a new price for Rider No. 18. Further confusion as to what the Commission is being requested to do relative to Rider No. 18 is created by NRG Midwest's assertion that Rider No. 18's limited availability chills new alternative energy development, while simultaneously arguing that the price in Rider No. 18 should be reduced.[34]

NRG Midwest suggests that Rider No. 18 can be eliminated or its price reduced because the Authority has not availed itself of revenues it can acquire from the capacity market.[35] However, NRG Midwest has not demonstrated that a capacity product is actually available to the Authority to sell given the characteristics of the hydro facility, and a study of the potential for the Authority to sell capacity has not been performed.[36] Speculative capacity market revenues are not a basis for eliminating Rider No. 18.

Duquesne and the Authority agree that the standard for electric utility purchases from QFs under PURPA is "avoided cost".[37] NRG Midwest has not presented evidence showing that its LMP "benchmark" actually constitutes Duquesne's avoided cost. Moreover, NRG Midwest's

[34] NRG M.B., p. 12.
[35] NRG M.B., pp. 12, 14.
[36] Tr. 441-442.
[37] Authority M.B., p. 15; Duquesne M.B., pp. 58-59.

witness, Ms. Lagano, could not identify who calculates avoided cost and for what purpose, has not calculated Duquesne's or any other utility's avoided cost, and admitted that she has never been responsible for calculating avoided cost under PURPA.[38] Consequently, there is a complete lack of evidence supporting the proposition that NRG Midwest's LMP benchmark meets the standard of being the equal of Duquesne's avoided costs.

Finally, NRG Midwest has not examined the impact eliminating Rider No. 18 or replacing its price with an LMP benchmark would have on the interests of Duquesne, its customers or the Authority. These failures to examine the consequences of its recommendations are fatal, because the Commission must consider the impact of its adjudications on the public interest. NRG Midwest has utterly failed to address all the important questions such as (i) what would be effect on new renewable energy projects on declaring and using some form of LMP as avoided cost , (ii) what would be the effect on customers and the renewable credit market if existing projects such as the Authority's hydro project were lost due to financial distress, , and (iii) what will Duquesne have to pay for QF energy in the future.

NRG Midwest has not substantiated any sound credible alternative to Rider No. 18 and, therefore, its recommendation to eliminate Rider No. 18 or base its price on some unspecified LMP benchmark must be rejected.

C. MISCELLANEOUS ISSUES[39]

IV. CONCLUSION

There is no reason to reach the "merits" of the issues raised by the NRG Companies in the Formal Complaint. As described in Beaver Falls' Main Brief and again in this Reply Brief, the Commission lacks jurisdiction to adjudicate any aspect of the Formal Complaint because the

[38] N.T. 375-376.

[39] 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.

NRG Companies have failed to join certain indispensable parties and further lacks jurisdiction under PURPA to take any action to eliminate or modify the $0.06/kWh price contained in Rider No. 18.

Even if the Commission were to consider the merits of its claims, NRG Midwest has failed to meet its burden of proof and burden of persuasion in support of its Formal Complaint allegations. Even if one attributes the burden of proof to Duquesne, NRG Midwest still does not succeed because it failed to establish a prima facie case in support of its allegations, failed to support its proposed facts with a preponderance of the evidence, and failed to meet the burden of production in response to Duquesne's and the Authority's rebuttal evidence. For all of these reasons, NRG Midwest's requests for relief should be denied.

Respectfully submitted,

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Attorneys for Beaver Falls Municipal Authority

Dated: January 17, 2014.

BEFORE THE
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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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