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January 17, 2014

VIA ELECTRONIC FILING

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

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

Dear Secretary Chiavetta:

Enclosed please find the Reply Brief of Duquesne Light Company in the above-referenced proceeding. Copies will be provided as indicated on the Certificate of Service.

Respectfully submitted,

Michael W. Gang

MWG/skr
Enclosure

cc: Certificate of Service
Honorable Conrad A. Johnson

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing have been served upon the following persons, in the manner indicated, in accordance with the requirements of § 1.54 (relating to service by a participant).

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Date: January 17, 2014

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PENNSYLVANIA PUBLIC UTILITY COMMISSION

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Office of Consumer Advocate	:	C-2013-2379084
Office of Small Business Advocate	:	C-2013-2380474
Jacquelyn and Robert Miller	:	C-2013-2383835
Gwendolyn L. LeVert	:	C-2013-2383980
Duquesne Industrial Intervenors	:	C-2013-2385292
Aimee-Marie Dorsten	:	C-2013-2386037
Connie Schiavo	:	C-2013-2386284
NRG Midwest, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC	:	C-2013-2390562
v.	:	
Duquesne Light Company	:	

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Date: January 17, 2014

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I. INTRODUCTION

On January 6, 2014, Duquesne Light Company ("Duquesne Light" or the "Company") filed its Initial Brief ("Initial Brief" or "IB") in accordance with the Scheduling Order issued by Administrative Law Judge Conrad A. Johnson (the "ALJ") on October 22, 2013. Therein, Duquesne Light explained its positions on the various issues pending before the Pennsylvania Public Utility Commission ("Commission") in this base rate proceeding. In so doing, Duquesne Light anticipated and, as a practical matter, responded to many of the arguments presented in the Main Briefs ("MB") filed by other parties.[1] Nevertheless, it is appropriate for Duquesne Light to respond to certain contentions advanced by these parties in their Main Briefs.

In this base rate proceeding, Duquesne Light proposes changes to Duquesne Light's base retail distribution rates designed to produce an increase in revenues based upon data for a fully projected future test year ("FPFTY") ending April 30, 2015. The distribution rate increase reflects Duquesne Light's status as a distribution electric utility and is based on financial and operating data for that single business line. The requested rate increase reflects the business environment the Company currently faces, particularly its need to make significant capital investments to continue to provide safe and reliable service to its customers. Duquesne Light, I&E, OSBA, CAUSE-PA, DII, PennFuture, CAAP, Citizens Power, IGS, IBEW, and Beaver, all of the parties to this proceeding except the "NRG Companies have achieved settlement or agreed

[1] Main Briefs were filed by the Commission's Bureau of Investigation and Enforcement ("I&E"), the Office of Consumer Advocate ("OCA"), Beaver Falls Municipal Authority ("Beaver Falls"), and NRG Power Midwest, LP ("NRG Midwest"), NRG Energy Center Pittsburgh LLC ("NRGP"), and Reliant Energy Northeast LLC ("REN") (collectively the "NRG Companies"). The following parties indicated that they were not serving Main Briefs: the Office of Small Business Advocate ("OSBA"), the Coalition for Affordable Utility Service and Energy Efficiency in Pennsylvania ("CAUSE-PA"), Duquesne Industrial Intervenors ("DII"), United States Steel Corporation ("U.S. Steel"), Citizens for Pennsylvania's Future ("PennFuture"), Community Action Association of Pennsylvania ("CAAP"), Citizen Power, Inc. ("Citizen Power"), Interstate Gas Supply, Inc. ("IGS"), and International Brotherhood of Electrical Workers, Local 129 ("IBEW").

not to oppose the Settlement on all issues raised in this base rate proceeding except those raised by the NRG Companies (the "Settlement").

This Reply Brief primarily responds to the Main Brief submitted by the NRG Companies. During the hearings, the NRG Companies contested the revenue requirement under the Settlement. However, the NRG Companies decided not to brief this issue.

The NRG Companies' remaining challenge is to Duquesne Light's Tariff Rider No. 18 – Rate for Purchase of Electric Energy from Customer-Owned Renewable Resources Generating Facilities (hereinafter "Rider No. 18"). Duquesne Light's Rider No. 18 establishes the rates to be paid for wholesale power produced by certain specified categories of electric generating facilities pursuant to federal law, the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. §§ 824, *et seq.* In their Main Brief, the NRG Companies assert that Duquesne Light failed to meet *its* burden to demonstrate that Rider No. 18 continues to be just and reasonable. The NRG Companies therefore request that Rider No. 18 be eliminated in its entirety or, alternatively, that the wholesale PURPA rate set forth in Rider No. 18 be revised to the average day-ahead locational marginal price ("DALMP") in the Duquesne Zone.

In responding to the arguments raised by the NRG Companies, Duquesne Light will rely on and cross-reference those portions of its Initial Brief that have already addressed the issues and arguments raised in the NRG Companies' Main Brief rather than repeat the same arguments herein. For the reasons explained below, as well as those more fully explained in Duquesne Light's Initial Brief, the NRG Companies' arguments are without merit, contradictory, and should be rejected.

II. BURDEN OF PROOF

In this proceeding, the NRG Companies contend that Rider No. 18 is no longer just and reasonable. The NRG Companies propose that Rider No. 18 be eliminated in its entirety.

Alternatively, the NRG Companies propose that the wholesale rate set forth in Rider No. 18 be modified to the DALMP. At the hearing, the ALJ directed the parties to address which party has the burden of proof with respect to the NRG Companies' issues. (Tr. 457.)

The NRG Companies, I&E, OCA, and Beaver Falls all briefed the burden of proof with respect to the Rider No. 18 issues raised by the NRG Companies in this proceeding. Beaver Falls agreed with Duquesne Light that the NRG Companies bear the burden of proof. OCA concluded that Rider No. 18 is not a distribution rate and, therefore, argued that the NRG Companies bear the burden of proof. The NRG Companies and I&E, however, argue that Duquesne Light has the burden of proof with respect to the Rider No. 18 issues. Duquesne Light fully addressed the burden of proof on Rider No. 18 issues in its Initial Brief, and will not repeat those arguments here. (Duquesne Light IB, Section I.B.2) However, it is appropriate for Duquesne Light to respond to certain contentions made with respect to the burden of proof on Rider No. 18 issues.

The NRG Companies contend that Duquesne Light has the burden of proof with respect to the Rider No. 18 issues. The NRG Companies note that the Commission ordered an investigation of the justness and reasonableness of both Duquesne Light's existing and proposed rates. The NRG Companies therefore contend that, pursuant to 66 Pa.C.S. § 315(a), Duquesne Light has the burden of proof to show that Rider No. 18 is just, reasonable, and non-discriminatory. The NRG Companies' burden of proof argument must be rejected as contrary to recent Commission precedent and because it would lead to illogical results.

As a general rule, the public utility has the burden to establish the justness and reasonableness of every element of its rate increase in all proceedings conducted under Section 1308(d) of the Code, 66 Pa.C.S. § 1308(d). The standard of proof that a public utility must meet

is set forth in Section 315(a) of the Code, 66 Pa.C.S. § 315(a), which provides that "[i]n any proceeding upon the motion of the Commission, involving any proposed or existing rate of any public utility, or in any proceeding 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." Under the Code, rates charged by public utilities must be just and reasonable and cannot result in unreasonable rate discrimination. 66 Pa.C.S. § 1304. Therefore, a public utility seeking a general rate increase has the burden of proof to establish the justness and reasonableness of every element of the rate increase request. 66 Pa.C.S. § 315(a); *Pa. P.U.C. v. Aqua Pennsylvania*, Docket No. R-00038805, 236 PUR4th 218, 2004 Pa. P.U.C. LEXIS 39 (Aug. 5, 2004).

As explained in Duquesne Light's Initial Brief, a party that raises an issue that is not included in a public utility's general rate case filing bears the burden of proof. *See Pa. P.U.C. v. Metropolitan Edison Company, et al.*, Docket Nos. R-00061366, et al., 2007 Pa. PUC LEXIS 5 at *184-87 (Jan. 11, 2007) (adopting the ALJ's conclusion that Section 315(a) of the Public Utility Code, 66 Pa.C.S. § 315(a), *cannot* reasonably be read to place the burden of proof on the utility with respect to an issue the utility did not include in its general rate case filing and which, frequently, the utility would oppose). Indeed, the Commission recently confirmed the burden of proof standard for proposals not included in a utility's rate case filing, stating:

> [A]a party that raises an issue that is not included in a public utility's general rate case filing bears the burden of proof. As the proponent of a Commission order with respect to its proposals, PCOC bears the burden of proof as to proposals that Columbia did not include in its filing. Columbia's CAP-Plus provisions are deemed just and reasonable because those tariff provisions previously were approved by the Commission. Therefore, PCOC, as the party challenging a previously-approved tariff provision, bears the burden to demonstrate the Commission's prior approval is no longer justified.

Pa. PUC v. Columbia Gas of Pennsylvania, Inc., Docket Nos. R-2010-2215623, et. al, 2012 Pa. PUC LEXIS 420 at *28 (Mar. 15, 2012). Notably, much like it did here, the Commission also opened an investigation into both the existing and proposed rates in both the *Metropolitan Edison* and *Columbia* case. The NRG Companies' argument that a public utility bears the initial burden to demonstrate that an existing and unchanged tariff provision continues to be just and reasonable ignores and is plainly inconsistent with recent Commission precedent and should be rejected.

Duquesne Light's Rider No. 18 was approved by the Commission in 1981 at Docket No. R-811713. (Duquesne Light St. No. 12-R, p. 19.) Tariff provisions previously approved by the Commission are deemed just and reasonable. *Columbia, supra; see, also Pa. P.U.C. v. Philadelphia Gas Works*, Docket Nos. R-00061931, *et al.*, 2007 Pa. PUC LEXIS 45 at *165-68 (September 28, 2007) (adopting the ALJ's discussion on burden of proof in a general base rate case proceeding and holding that a party challenging a previously-approved tariff provision bears the burden to demonstrate that the Commission's prior approval is no longer justified). Accordingly, Duquesne Light's Rider No. 18 is deemed just and reasonable and, therefore, NRG bears the burden to demonstrate that the Commission's prior approval is no longer justified. For the reasons explained below, as well as those more fully explained in Section III.B.2 of Duquesne Light's Initial Brief, the NRG Companies have failed to demonstrate that Rider No. 18 is no longer just and reasonable.

Further, even if Duquesne Light had the burden to demonstrate that Rider No. 18 continues to be just and reasonable, Duquesne Light clearly does not bear the burden of proof with respect to the *NRG Companies proposal* to change the existing PURPA rate by either modifying the wholesale PURPA rates set forth in Rider No. 18 or eliminating Rider No. 18

entirely. Indeed, the Commission has unequivocally stated that a public utility does not bear the burden of proof with respect to an issue the utility did not include in its general rate case filing and which the utility would oppose. *See Metropolitan Edison, supra; Columbia, supra.* For the reasons explained below, as well as those more fully explained in Section III.B.2 of Duquesne Light's Initial Brief, the NRG Companies have failed to demonstrate that its proposal to either modify the wholesale PURPA rates set forth in Rider No. 18 or eliminate Rider No. 18 entirely is just and reasonable.

Even assuming, *arguendo*, that the NRG Companies' theory was correct and that Duquesne Light had the burden of proof with respect to both proposed and existing distribution rates, the NRG Companies theory is not applicable to Rider No. 18. Duquesne Light's Rider No. 18 is not a distribution rate or distribution rule, nor is it a service provided to distribution customers. Rather, Rider No. 18 establishes the wholesale rate to be paid for the wholesale power produced by qualifying facilities pursuant to federal law under PURPA. (NRG Midwest St. 1-S, p. 6; *see also* Duquesne Light St. No. 12-R, p. 19.) Simply stated, Rider No. 18 is a wholesale rate, not a distribution rate or service. Therefore, as argued by the OCA, Duquesne Light does not bear the burden of proof on non-distribution Rider No. 18 issues in this distribution base rate proceeding. (*See* OCA MB, p. 6.)

Further, because the rates currently are paid by the NRG Companies and passed directly through to the qualifying facilities under the existing contractual arrangements, the rates paid pursuant to Rider No. 18 have no impact on the base rates paid by Duquesne Light's retail distribution customers, the revenues received by Duquesne Light, or the services provided to Duquesne Light's customers. (Duquesne Light St. No. 12-R, p. 25, lines 14-17.) In addition, Duquesne Light has neither proposed nor is it seeking any changes, amendments, or

modifications to Rider No. 18 in this base rate proceeding. Finally, the requested base rate increase will have no impact on Rider No. 18 as it presently exists today. Clearly, Rider No. 18 currently has absolutely nothing to do with either the proposed or existing distribution rates or services.

Finally, even if Duquesne Light bears the burden to demonstrate that Rider No. 18 continues to be just and reasonable, Duquesne Light introduced credible evidence that the six cent per kilowatt-hour rate in Rider No. 18 continues to be just, reasonable, and in the public interest. Indeed, Duquesne Light explained that, based upon its recent history, the six cent rate is within range of reasonable rates paid by the Company to purchase power to provide default service. (*See* Duquesne Light IB, Section III.B.2.b.) Accordingly, even if Duquesne Light had the burden of proof as suggested by the NRG Companies, the Company clearly met that burden.

III. SUMMARY OF ARGUMENT

During the hearings, the NRG Companies contested the Settlement. In their Main Brief, however, the NRG Companies elected not to challenge the revenue requirement under the Settlement. Therefore, the NRG Companies have waived any right to contend that revenue requirement adjustments proposed by other parties are appropriate. Furthermore, Duquesne Light demonstrated in its Initial Brief that the Settlement revenue increase is supported by substantial evidence of record and would produce a return on equity consistent with the most recent Commission determination after considering all of the evidence submitted by Duquesne Light, I&E and OCA on revenue requirement issues. The combined evidence of the Company, I&E and OCA clearly demonstrates that the revenue increase under the Settlement is supported by substantial evidence and in the public interest.

The NRG Companies' remaining challenge is to Duquesne Light's Rider No. 18. The NRG Companies contend that Rider No. 18 is no longer just and reasonable. The NRG

Companies propose that Rider No. 18 be eliminated in its entirety. Alternatively, the NRG Companies propose that the wholesale rate set forth in Rider No. 18 be modified to the DALMP. The NRG Companies arguments and proposals are without merit and must be rejected.

The NRG Companies argue that Rider No. 18 is unjust and unreasonable and should be eliminated because it is inconsistent with the Electricity Generation Customer Choice and Competition Act ("Competition Act"), P.L. 802, No. 138, effective January 1, 1997, 66 Pa.C.S. §§ 2801-2812, and the Pennsylvania Alternative Energy Portfolio Standards Act ("AEPS Act"), 73 P.S. § 1648.1 *et seq.* However, PURPA and the obligation to purchase power from qualifying facilities continue today. The Competition Act and the AEPS Act have not and cannot preempt federal law under PURPA and its underlying policy to encourage the development and maintenance of alternative energy sources. To the extent that there were a "conflict" between PURPA and the Competition Act or the AEPS Act as asserted by the NRG Companies, which there is not, PURPA would control under the Supremacy Clause of the United States Constitution. U.S. Const, art. VI, cl. 2.

In an effort to further support their argument that Rider No. 18 is unjust and unreasonable, the NRG Companies argue that Rider No. 18 is unfair because NRG Midwest is economically harmed by the requirement to pay the six cent rate set forth in Rider No. 18. Any harm allegedly incurred by the NRG Companies is clearly part of the business risk voluntarily assumed by the NRG Companies. Further, the NRG Companies' allegation of financial harm is based on a simplistic comparison of the six cent rate it pays with the three cent recent average DALMP. They have not provided any evidence to demonstrate financial harm. It is unrefuted that there are other opportunities and markets to sell the output from the qualifying facilities other than at the spot market. A sophisticated energy company like NRG Midwest could take

advantage of these other opportunities and markets to mitigate any so-called harm caused by the voluntarily incurred obligation to purchase the net output from the qualifying facilities.

The NRG Companies also argue that if their request to eliminate Rider No. 18 is rejected, the wholesale PURPA rate set forth in Rider No. 18 should be modified to the DALMP in the Duquesne Zone. However, the NRG Companies have failed to demonstrate that their proposal to set the wholesale PURPA rate at the DALMP is just, reasonable, and in the public interest. Indeed, the NRG Companies witness repeatedly failed to state that the DALMP met the definition of avoided costs under PURPA. The evidence of record clearly demonstrates that the DALMP is not Duquesne Light's "avoided cost" as defined by FERC's regulations and, therefore, is not an appropriate proxy for "avoided costs" under PURPA. Further, it is unrefuted that that the six cent per kilowatt-hour rate in Rider No. 18 continues to be just, reasonable, and in the public interest.

The NRG Companies also failed to present a specific and complete proposal for this Commission to consider. At the hearing, the ALJ directed the parties to brief the issue of what is the remedy if Rider No. 18 is eliminated or modified as requested by the NRG Companies. (Tr. 457.) The NRG Companies, however, failed to explain what the next step is for the Commission and the parties to take should the Commission grant the relief requested by the NRG Companies. At minimum, the Commission would still need to determine the appropriate "avoided costs" to be paid to qualifying facilities in today's electric market and how those costs would be recovered if Rider 18 is eliminated as requested by the NRG Companies. The NRG Companies have failed to even attempt to explain how the Commission and the parties would accomplish these necessary steps if this relief is granted to the NRG Companies.

For these reasons as explained below, as well as those more fully explained in Duquesne Light's Initial Brief, the NRG Companies' arguments and proposals to either modify the wholesale PURPA rates set forth in Rider No. 18 or eliminate Rider No. 18 entirely are without merit, contradictory, and not supported by a preponderance of the evidence. Accordingly, the ALJ and the Commission should reject the NRG Companies' arguments and proposals.

IV. REPLY ARGUMENT

A. NON-UNANIMOUS SETTLEMENT ISSUES

1. Revenue Requirement

In its Main Brief, the NRG Companies state as follows:

> [T]he NRG Companies have decided not to contest the various non-unanimous settlement issues identified in the common brief outline circulated by Duquesne light to the parties.

(NRG MB, p. 7.)

During the hearings, the NRG Companies contested the Settlement. Counsel for the NRG Companies cross-examined the principal revenue requirement witnesses for I&E and OCA, over those parties' objections, to attempt to solicit the implicit return on equity under the $48 million Settlement increase if all I&E and OCA revenue requirement adjustments were accepted. (Tr. 206-213; 218-228.) During this cross-examination, the ALJ observed that the NRG Companies may be attempting to rely on the testimony of settling parties to challenge the revenue increase under the Settlement. (Tr. 225.)

In its Initial Brief, Duquesne Light addressed the major adjustments proposed by I&E and OCA on revenue requirement in anticipation that the NRG Companies would attempt to argue in their main brief that those adjustments should be accepted. The Commission's regulations require that parties address issues that are disputed in the initial brief.

Section 5.501(a)(3) of the Commission's regulations provides as follows:

> The party with the burden of proof shall, in its main or initial brief, completely address, to the extent possible, every issue raised by the relief sought and the evidence adduced at hearing.

52 Pa. Code § 5.501(a)(3).

The NRG Companies did not make these arguments in their Main Brief and, therefore, have waived any right to contend that such adjustments are appropriate. It is well settled that when parties have been ordered to file briefs and fail to include all the issues they wish to have reviewed, the issues not briefed have been waived. *Pa. PUC v. Metropolitan Edison Company*, Docket Nos. R-00061366 et al., 2006 Pa. PUC LEXIS 116 (Recommended Decision Oct. 31, 2006) (citing *Jackson v. Kassab*, 812 A.2d 1233 (2002), appeal denied, 573 Pa. 698, 825 A.2d 1261 (Pa. Super. 2003); see also *Pa. PUC v. Columbia Gas of Pennsylvania*, Docket Nos. R-00049783, 2005 Pa. PUC LEXIS 14 at *165-66; 245 P.U.R.4th 1 (Nov. 4, 2005) (concluding as reasonable the ALJ's recommendation that when parties have been directed to file briefs and fail to include an issue in their briefs, the un-briefed issues may properly be viewed as having been waived) (citing *Jackson v. Kassab*). Further, it is inappropriate for a party to withhold arguments until its reply brief because it fails to provide other parties with a meaningful opportunity to respond. See *Petition of PPL Electric Utilities Corporation For Approval of a Competitive Bridge Plan*, Docket No. P-00062227, 2007 Pa. PUC LEXIS 38 at *110-11 (May 17, 2007) (holding that the ALJ acted properly in granting a motion to strike where the party's position was raised for the first time in its reply brief). This is particularly problematic where a party, such as Duquesne Light on the base rate increase issues, has the burden of proof and the ultimate burden of persuasion but would be without any meaningful opportunity to respond to arguments raised for the first time in reply briefs. Accordingly, the NRG Companies have waived any right to use the testimony of OCA and I&E witnesses to contend that revenue increase under the Settlement is unreasonable.

Under these circumstances, it is not necessary or appropriate for the ALJ to specifically decide each individual adjustment proposed by I&E and OCA, including those referenced in Duquesne Light's Initial Brief. Further, it is also not necessary or appropriate to make the specific findings of fact that were proposed in the Company's Initial Brief, Attachment A, related to these individual adjustments. For this reason, the Company notified the ALJ and the Parties on January 15, 2014 that it was withdrawing proposed findings of fact paragraphs 3-6 and 16-56 in Attachment A of its Initial Brief.

As noted by the Commission in rejecting a challenge to a black box settlement by a customer complainant, the Commission is not required to decide specific rate base revenue and expense amounts in order to judge the reasonableness of a contested settlement.

> We have historically permitted the use of "black box" settlements as a means of promoting settlement among the parties in contentious base rate proceedings. *See*, *Pa. PUC v. Wellsboro Electric Co.*, Docket No. R-2010-2172662 (Final Order entered January 13, 2011); *Pa. PUC v. Citizens' Electric Co. of Lewisburg, PA*, Docket No. R-2010-2172665 (Final Order entered January 13, 2011). Settlement of rate cases saves a significant amount of time and expense for customers, companies, and the Commission and often results in alternatives that may not have been realized during the litigation process. Determining a company's revenue requirement is a calculation involving many complex and interrelated adjustments that affect expenses, depreciation, rate base, taxes and the company's cost of capital. Reaching an agreement between various parties on each component of a rate increase can be difficult and impractical in many cases. For these reasons, we support the use of a "black box" settlement in this proceeding and, accordingly, deny this Exception.

Pa. P.U.C. v. Peoples TWP LLC, Docket No. R-2013-2355886, Order entered December 19, 2013, p. 28.

Duquesne Light has demonstrated in its Initial Brief that the Settlement revenue increase is supported by substantial evidence of record and would produce a return on equity consistent with the most recent Commission determination after considering all of the evidence submitted

by Duquesne Light, I&E and OCA on revenue requirement issues. (Duquesne Light IB, pp. 23-24, 37-43.) Duquesne Light's Initial Brief supports a black box settlement in this case, and does not suggest that the proposed revenue increase under the Settlement resulted in any specific return on equity or that any specific rate base, revenue or expense adjustments proposed by the parties have been accepted or rejected, as such determinations are unnecessary. (*See* Duquesne Light IB, p. 24.) The combined evidence of the Company, I&E and OCA demonstrates that the revenue increase under the Settlement is supported by substantial evidence and in the public interest.

2. Customer Service Issues

The NRG Companies also raised certain customer service issues in direct testimony, including communications and net metering. (NRGP St. No. 1, pp. 4-5.) However, as with revenue requirement, the NRG Companies have failed to address these contentions in their main brief. Therefore, any contention based on such testimony also must be deemed to be waived as explained above.

B. RIDER NO. 18 ISSUES

1. Rider No. 18 Continues to be Just and Reasonable

The NRG Companies contend that Rider No. 18 is unjust and unreasonable and, therefore, request that Rider No. 18 be eliminated from Duquesne Light's tariff. The NRG Companies sole argument in support of its position is that Rider No. 18 is no longer consistent with Pennsylvania statutory law and the current regulatory scheme in Pennsylvania.[2] (NRG MB, p. 6.) For the reasons that follow, as well as those more fully explained in Duquesne Light's

[2] In their Main Brief, the NRG Companies note that Duquesne Light has not changed the six cent per kilowatt-hour wholesale PURPA rate since Rider No. 18 was adopted in 1981. (NRG MB, p. 8.) Duquesne Light fully addressed the NRG Companies' argument that Rider No. 18 is "outdated,", and will not repeat the same arguments here. (*See* Duquesne Light IB, Section III.B.2.a.ii.)

Initial Brief, the NRG Companies' argument is contrary to law, contradictory, without merit, and should be rejected.

The NRG Companies contend that Rider No. 18 conflicts with the Competition Act and no longer serves a legitimate purpose due to the passage of the AEPS Act. (NRG MB, p. 10) The NRG Companies assert that the Competition Act and AEPS Act have somehow preempted or "relieved" Duquesne Light of its obligation to purchase wholesale power from qualifying facilities in today's electric market in Pennsylvania. (NRG MB, pp. 9-10.) In other words, the NRG Companies contend that state laws, i.e., the Competition Act and AEPA Act, can preempt a federal law, i.e., PURPA. This is a fundamentally flawed argument, and even the NRG Companies elsewhere concede that their reverse preemption argument is simply not true and that Duquesne Light is in fact still obligated to purchase power from the two qualifying facilities under PURPA:

> While PURPA may require Duquesne Light to purchase output of certain small QFs, it requires this purchase to be made at Duquesne Light's avoided costs.... In fact, if the Commission were to terminate Rider No. 18, Duquesne Light may still be required to purchase the output from the QFs at its avoided cost.

(NRG MB, pp. 13-14.) As acknowledged by the NRG Companies, PURPA and the obligation to purchase power from qualifying facilities clearly remain in effect unless and until either Duquesne Light receives an exemption from the Federal Energy Regulatory Commission or the United States Congress amends PURPA to remove the federally mandated obligation in PURPA to purchase power from small qualifying facilities.

As explained in Duquesne Light's Initial Brief, a state law, such as the Competition Act or the AEPS Act, cannot preempt a federal law unless the federal act itself sanctions the application of state standards. (Duquesne Light IB, Section V.B.2.a.i.) Except for the limited

purpose of establishing and approving the *initial* PURPA rate,[3] there is nothing in PURPA that sanctions the application of state standards regarding the obligation in PURPA to purchase power from small qualifying facilities. Further, the NRG Companies cite to nothing in the Competition Act or the AEPS Act that suggests these acts were intended to replace, as opposed to supplement, PURPA or otherwise abolished or invalidated contracts with qualifying facilities. Therefore, to the extent that there were a "conflict" between PURPA and the Competition Act or the AEPS Act as asserted by the NRG Companies, which there is not, PURPA would control under the Supremacy Clause of the United States Constitution. U.S. Const, art. VI, cl.2.

Ignoring the basic fundamentals of constitutional law, the NRG Companies contend that the Competition Act relieved electric utilities of their duty to supply generation service, except as for default service. (NRG MB, p. 9.) However, as NRG concedes, the Competition Act did not "relieve" electric utilities of the obligation in PURPA to purchase power from small qualifying facilities. (NRG MB, pp. 13-14.)

The NRG Companies also argue that the Competition Act governs the purchase of power by Duquesne Light. According to the NRG Companies, as a result of the Competition Act, any purchase of power by Duquesne Light, including from qualifying facilities, must be part of a default service plan. (NRG MB, p. 10.) The NRG Companies also contend that any contract for the purchase of energy, including from qualifying facilities, is governed by the same terms and conditions for the competitive procurement of default service supply under the Competition Act. (NRG MB, pp. 9-10.) The NRG Companies' attempt to force the default service supply

[3] *See Freehold Cogeneration Assocs., L.P. v. Board of Regulatory Comm'rs*, 44 F.3d 1178 (3d Cir. 1995) (holding that concluded that once the state agency approved the power purchase agreement between qualifying facility and the electric utility, any action or order by the state agency to reconsider its approval or to deny those rates to qualifying facility under purported state authority was preempted by federal law).

standards of the Competition Act on to wholesale power purchases from qualifying facilities under PURPA is misplaced.

The Competition Act governs the competitive procurement of default service supply. It does not address wholesale power purchased pursuant to PURPA. Further, the Competition Act does not expressly provide that purchases from qualifying facilities under PURPA must be included in and governed by an electric utility's default service plan. In this regard, the NRG Companies voluntarily assumed Duquesne Light's PURPA contract obligations and it is incorrect to apply the Competition Act to the purchase of the output of these qualifying facilities since the output is not purchased to provide default service. Indeed, although the Commission has jurisdiction over the procurement of default service supply, it is without jurisdiction over wholesale power supply agreements. (Duquesne Light IB, p. 38.) Thus, the Competition Act cannot and does not grant the Commission the authority to revise the existing PURPA agreements to meet the default service supply standards of the Competition Act.[4]

The NRG Companies also argue that there is no longer a need for PURPA to provide incentives for the development of alternative energy sources because, according to the NRG Companies, the AEPS Act now provides such incentives. (NRG MB, p. 10) The central purpose of PURPA was to provide long-term contracts with qualifying facilities to incentivize renewable sources of generation. PURPA and its federal policy remain in effect today. The fact that the AEPS Act was adopted by Pennsylvania post-PURPA to create an alternative energy credit market to *further* stimulate alternative energy sources only reinforces the need to continue to develop and maintain renewable sources of generation. (Duquesne Light IB, Section V.B.2.a.iii.B.) Further, the purpose of the AEPS Act is to promote the sale of electric energy that

[4] Duquesne Light does not concede that the Competition Act, which provides for purchases under long term contracts, 66 Pa.C.S. § 2807(e)(3.2)(iii), would prohibit purchases from small PURPA facilities.

is generated from renewable and environmentally beneficial services.. 73 P.S. § 1648.1. Therefore, PURPA is consistent with the purpose and policy of the AEPS Act, not contradictory as suggested by the NRG Companies.

Based on the foregoing, the NRG Companies' failed to meet their burden to demonstrate that Rider No. 18 is no longer just and reasonable. As explained in Duquesne Light's Initial Brief, Rider No. 18 was adopted to establish the rates to be paid to qualifying facilities pursuant to PURPA. (Duquesne Light IB, pp. 46-48.) PURPA and the obligation to purchase power from qualifying facilities continue today. The Competition Act and the AEPS Act have not and cannot preempt PURPA and its underlying policy to encourage the development and maintenance of alternative energy sources. Unless and until Duquesne Light received an exemption from FERC or the United States Congress amends PURPA to remove the federally mandated obligation in PURPA to purchase power from small qualifying facilities, Duquesne Light is still obligated to purchase power from the two qualifying facilities under PURPA. The NRG Companies have assumed the obligation to purchase the output from these qualifying facilities. Because the NRG Companies failed to demonstrate that Rider No. 18 is no longer just and reasonable, the ALJ and Commission must reject the NRG Companies request that Rider No. 18 be eliminated in its entirety.

2. The Preponderance of the Evidence Does Not Support Adjustment of the Rider No. 18 Rate

If the NRG Companies' request to eliminate Rider No. 18 is rejected, the NRG Companies request in the alternative that the wholesale PURPA rate set forth in Rider No. 18 should be revised to reflect market realities. Specifically, the NRG Companies propose in their Main Brief that the wholesale rate set forth in Rider No. 18 be modified to the DALMP in the Duquesne Zone. (NRG MB, p. 11). In an effort to support their request that the DALMP be

used for the wholesale PURPA rate in Rider No. 18, the NRG Companies argued that the six cent per kilowatt-hour wholesale rate set forth in Rider No. 18 is discriminatory to any new qualifying facilities. (NRG MB, p. 12) The NRG Companies also contend that, although the original intent of Rider No. 18 was to encourage the development of alternative energy sources, a rate that is higher than the DALMP is no longer necessary to create this incentive. (NRG MB, p. 12.) The NRG Companies' arguments are without merit. Further, the preponderance of the evidence demonstrates that the six cent per kilowatt-hour rate in Rider No. 18 continues to be just, reasonable, and in the public interest.[5] Therefore, the NRG Companies' alternative request must be rejected.

Under the regulations of the Federal Energy Regulatory Commission ("FERC") implementing PURPA, the electric utility is required to purchase electricity generated by a qualifying facility at the utility's "avoided cost." 18 C.F.R. § 292.304(a)(2). "Avoided costs" are the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility, such utility would generate itself or purchase from another source. 18 C.F.R. § 292.101(b)(6). Stated otherwise, the "avoided cost" is the cost the utility would have incurred had it generated the power itself or, alternatively, obtained it from another source. The NRG Companies simply have offered no support for the proposal that the DALMP be used as an appropriate proxy for Duquesne's avoided cost. In fact, the NRG Companies' witness specifically declined on multiple occasions to state on cross examination that the DALMP equates to avoided cost. (Tr. 322-328.) The NRG Companies' assertion in

[5] It is well-established that "[a] litigants burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible." *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990). The preponderance of the evidence standard requires proof by a greater weight of the evidence. *Commonwealth of Pa. v. Williams*, 557 Pa. 207, 732 A.2d 1167 (1999). This standard is satisfied by presenting evidence more convincing, by even the smallest amount, than that presented by another party. *Brown v. Commonwealth of Pa.*, 940 A.2d 610, 614 n.14 (Pa. Cmwlth. 2008).

their Main Brief that the DALMP should be the "avoided costs" is contrary to the testimony of their own witness.

In an effort to support their request that the DALMP be used for the wholesale PURPA rate in Rider No. 18, the NRG Companies argue in their Main Brief that the six cent per kilowatt-hour wholesale rate set forth in Rider No. 18 is discriminatory because the rate is closed, and it is not available to any new qualifying facilities, only the two existing qualifying facilities. (NRG MB, p. 12) Until the NRG Companies filed their Complaint in this base rate proceeding (*i.e.*, more than thirty-two years after Rider No. 18 was approved by the Commission), no party has requested a PURPA rate and, moreover, no party has at any time complained or otherwise objected to the rate set forth in Rider No. 18, including the two remaining qualifying facilities subject to Rider No. 18. (Duquesne Light IB, Section V.B.2.a.ii.) Indeed, the NRG Companies have failed to identify a single new qualifying facility that has complained about or otherwise objected to the six cent rate in Rider No. 18. The NRG Companies theoretical discrimination claim must fail for the lack of a party actually being discriminated against.

Further, the NRG Companies entirely overlook that the Commission fully blessed the continuation of the six cent rate for existing qualifying facilities. In 1987, the Commission approved the phase out of the six cent PURPA rate to new customer-generators. *Pa. P.U.C. et al. v. Duquesne Light Co.*, Docket No. R-860556 1987 Pa. PUC LEXIS 235, 64 Pa. PUC 388 (July 20, 1987). Importantly, although the Commission phased out Rider No. 18 to new customers, the Commission expressly permitted the existing power purchase agreements with Beaver Valley and Beaver Falls to remain in effect and subject to the six cents per kilowatt hour wholesale rate set forth in Rider No. 18. Thus, to the extent that the NRG Companies' argue that Rider No. 18 would be "discriminatory" to any potential new customer generators, this result has

specifically been approved by the Commission in closing Rider No. 18 to new customer generators.

In a further effort to support their request that the DALMP be used for the wholesale PURPA rate in Rider No. 18, the NRG Companies contend in their Main Brief that, although the original intent of Rider No. 18 was to encourage the development of alternative energy sources, a rate that is higher than the DALMP is no longer necessary to create this incentive. Specifically, the NRG Companies contend that qualifying facilities have additional revenue streams available today that were not available when Rider No. 18 was initially adopted. (NRG MB, p. 12.)

The six cent per kilowatt hour rate in Rider No. 18 was established to encourage and incent the development of renewable energy resources, and a price above projected avoided cost was specifically and intentionally selected and approved by the Commission to help achieve this policy goal. The NRG Companies seem to assume that this policy goal is no longer valid in Pennsylvania, but this is clearly not the case. (Duquesne Light IB, Section V.B.2.a.ii.B.) Any redetermination of the rate to be paid to these qualifying facilities, as requested by the NRG Companies, also should reflect the Commonwealth's current policy regarding the development and maintenance of renewable energy resources. The results of that process might or might not result in a rate that is less than or above six cents per kilowatt hour.

The record in this proceeding clearly demonstrates that a reduction in the wholesale PURPA rate set forth in Rider No. 18 could have devastating financial impacts to the qualifying facilities. Indeed, it was unrefuted that any reduction in the wholesale PURPA rate set forth in Rider No. 18 would have dire economic impacts on the qualifying facilities that are dependent on

and have relied upon the long-term fixed price provided in Rider No. 18. (Duquesne Light IB, Section V.B.2.a.iii.A; Beaver Falls MB, pp. 27-31.)[6]

The NRG Companies appear to suggest that the wholesale PURPA rate can be reduced and that the qualifying facilities can make up the difference through additional revenue streams. (NRG MB, pp. 12, 14.) The NRG Companies, however, conveniently overlook that on cross-examination their witness conceded that they too could take advantage of these other opportunities and markets to sell the output from the qualifying facilities other than the spot market. (Tr. 398-99.) Indeed, the NRG Companies admitted that there are many options for reselling this power, including, but not limited to, selling the power on a long-term basis, participating as a supplier in a utility's default service plan, and selling the power to marketers that participate in the retail competition market. (*Id.*) Thus, the NRG Companies also have the ability to sell the power acquired from the qualifying facilities at long-term prices higher than the DALMP, that is consistent with the long-term commitments made by the qualifying facilities, without causing seriously financial consequences or removing the PURPA incentives for the existing qualifying facilities.

Further, Duquesne Light fully explained that the DALMP is not the incremental cost incurred by Duquesne Light for the energy or capacity that, but for purchases from a qualifying facility, Duquesne Light would purchase from another source, *i.e.*, it is not the "avoided cost" as

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[6] In their Main Brief, the NRG Companies assert that they are not required to join the qualifying facilities as indispensable parties because the NRG Companies "have not alleged a cause of action under any power purchase agreement, and . . . have not asked the Commission to construe or modify the terms of any power purchase agreement." (NRG MB, p. 14.) It must be noted, however, that this assertion by the NRG Companies is directly contrary to their earlier statement that "the termination or modification of Rider No. 18 *will impact two power purchase agreements* (the "PPAs") executed in the early 1980s between Duquesne Light and two small hydroelectric power generators." (NRG MB, pp. 12-13 (emphasis added).) Not only are the NRG Companies' statements internally contradictory, they arguably constitute an admission that the qualifying facilities are in fact indispensable parties to the relief requested by the NRG Companies. *See, Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 464 Pa. 377, 379 (1975) ("an indispensable party is one whose rights are so directly connected with and affected by the litigation that he must be a party of record to protect such rights, and his absence renders any order or decree of court null and void for want of jurisdiction").

defined by FERC's regulations. (Duquesne Light IB, Section V.B.2.a.iii.A.) The use of the highly variable, short-term day ahead locational marginal price and spot market price clearly is inconsistent the avoided cost of the utility associated with the long-term contracts for power purchased under PURPA. (Duquesne Light IB, Section V.B.2.a.iii.B.) Thus, the evidence of record clearly demonstrates that the DALMP is not an appropriate proxy for "avoided costs" under PURPA.

Finally, Duquesne Light introduced credible evidence that the six cent per kilowatt-hour rate in Rider No. 18 continues to be just, reasonable, and in the public interest. Indeed, Duquesne Light explained that, based upon its recent history, the six cent rate is within range of reasonable rates paid by the Company to purchase power to provide default service. (*See* Duquesne Light IB, Section III.B.2.b.) Notably, the evidence introduced by Duquesne Light was no refuted or otherwise contested by the NRG Companies.

Based on the foregoing, the NRG Companies have failed to demonstrate that the six cent per kilowatt-hour wholesale rate set forth in Rider No. 18 is no longer just and reasonable. The NRG Companies also have failed to demonstrate that their proposal to set the wholesale PURPA rate at the DALMP is just, reasonable, and in the public interest. The preponderance of the evidence demonstrates that the six cent per kilowatt-hour rate in Rider No. 18 continues to be just, reasonable, and in the public interest. Accordingly, NRG Companies' proposal to modify the wholesale PURPA rate set forth in Rider No. 18 must be rejected.

3. The NRG Companies' Fairness Argument is Without Merit

The NRG Companies argue that Rider No. 18 is unfair because NRG Midwest is economically harmed by the requirement to pay the six cent rate set forth in Rider No. 18. (NRG MB, p. 13.) The NRG Companies' allegations of harm are misstated, unsupported, and not relevant to this proceeding for several reasons.

The NRG Companies' obligation to purchase the net output from the qualifying facilities is the result of Duquesne Light's restructuring in which the power purchase agreements with the qualifying facilities were sold, together with Duquesne Light's other generation assets, and subsequently voluntarily acquired by the NRG Companies. To now abandon Rider No. 18 as suggested by the NRG Companies would re-open Duquesne Light's restructuring plan that was approved by this Commission in 1998, over 15 years ago. *Application of Duquesne Light Company for Approval of Its Restructuring Plan Under Section 2806 of the Public Utility Code*, Docket Nos. R-00974104, et al., 1998 Pa. PUC LEXIS 163 (May 29, 1998). The NRG Companies cannot now, after over 15 years, seek to modify Duquesne Light's Commission-approved restructuring plan.

The NRG Companies' obligation to pay six cents for the qualifying facility power results from a voluntary contractual obligation accepted by the NRG Companies as part of a very large merger in 2012 of NRG Energy, Inc. and GenOn Energy, Inc. (NRG Midwest St. No. 1, p. 3.) NRG Midwest is a very large, sophisticated commercial entity with significant experience in energy transactions, including the acquisition/merger of generation assets and the sale and purchase of power in the retail market. (NRG Midwest St. No. 1, pp. 1, 3.) Any harm allegedly incurred by the NRG Companies is clearly part of the business risk voluntarily assumed by the NRG Companies when they acquired GenOn and their obligations. Now, apparently unhappy with their business decision, the NRG Companies are asking this Commission to do something the NRG Companies cannot legally do themselves -- relieve the NRG Companies out of a very small portion of a very large transaction to reduce the price of power purchased under their voluntarily assumed contractual obligations.

Further, the NRG Companies' obligation to purchase the net output from these qualifying facilities arises solely from the voluntarily assumed Revised QF Agency Agreement, which is a FERC-approved agreement. The NRG Companies ask this Commission to relieve it of the obligations set forth in the FERC-approved Revised QF Agency Agreement by eliminating Rider No. 18. It is entirely unclear how this Commission has the authority to second guess and grant relief from a FERC-approved agreement. If the NRG Companies are unhappy with their obligations contained in a FERC-approved agreement or believes that FERC's approval of the agreement is no longer just and reasonable, the NRG Companies' remedy is to seek appropriate relief from FERC.

Further, the NRG Companies' allegation of financial harm is based on a simplistic comparison of the six cent rate it pays with the recent average three cent DALMP discussed above. They have not provided any evidence to demonstrate financial harm. Moreover, their entire argument is premised on the assumption that the NRG Companies must sell this power into the day ahead spot market. As explained above, this is simply not true. The NRG Companies conceded in their Main Brief and on cross-examination that there are many options for reselling this power. (Tr. 398-99; NRG MB, p. 14.) Reducing the Rider No. 18 rate is instead likely to produce profit for the NRG Companies as they sell the power purchases in long-term power contracts. Clearly, a sophisticated energy company like NRG Midwest could take advantage of these same opportunities and markets to sell the output from the qualifying facilities to mitigate any so-called harm caused by the voluntarily incurred obligation to purchase the net output from the qualifying facilities.

The NRG Companies assert that Duquesne Light would not be financially harmed if the Commission granted the relief requested and either modified the wholesale PURPA rate set forth

in Rider No. 18 or eliminated Rider No. 18 in its entirety. (NRG MB, p. 13.) There is simply no evidence of record to support this contention. Indeed, as Duquesne Light explained in its Initial Brief, the NRG Companies have failed to demonstrate what impact the elimination of Rider No. 18 would have on Duquesne Light's retail ratepayers. (Duquesne Light IB, Section V.B.2.c.) Currently, the rates are paid by the NRG Companies and passed directly through to the qualifying facilities and, therefore, the rates paid pursuant to Rider No. 18 have no impact on the base rates paid by Duquesne Light's retail distribution customers, the revenues received by Duquesne Light, or the services provided to Duquesne Light's customers. (Duquesne Light St. No. 12-R, p. 25, lines 14-17.) However, granting the relief requested by the NRG Companies ultimately may cause harm to retail customers. Indeed, it is entirely unknown on this record whether the rates paid to the qualifying facilities would continue to be paid by NRG Midwest under the Revised QF Agency Agreement or whether Duquesne Light and/or its customers would become responsible to pay the rates if the Commission were to either modify the wholesale PURPA rates set forth in Rider No. 18 or eliminate Rider No. 18 entirely.

The NRG Companies also argue that Rider No. 18 is unfair because, according to the NRG Companies, Duquesne Light can unilaterally modify the wholesale PURPA rate set forth in Rider No. 18 without any notification, coordination, participation, or consent from the qualifying facilities. (NRG MB, p. 14.)[7] As explained in Duquesne Light's Initial Brief, both of these

[7] In support of this contention, the NRG Companies cite to the cross-examination testimony elicited from Duquesne Light's witness over the objection of Duquesne Light's counsel. The cross-examination question and response call for a conclusion of law. (Tr. 241-42.) However, Duquesne Light's witness was not an attorney and did not have the expertise to provide legal conclusions. Simply stated, Duquesne Light's witness was not qualified to render an expert legal opinion on what is legally permissible under the terms of the power purchase agreements. Any legal interpretations or legal conclusions solicited by counsel for the NRG Companies from a non-lawyer witness should be given no weight. It is role of the ALJ and the Commission to determine the law, not non-lawyer witnesses.

Notwithstanding, and without waiver of any objection, Duquesne Light clearly explained that it *would not* unilaterally modify the wholesale PURPA rate set forth in Rider No. 18 as suggested by the NRG Companies. Rather, Duquesne Light stated that "[e]ven assuming that Duquesne Light desired to change or eliminate Rider No.

agreements pre-date the Third Circuit's holding in *Freehold Cogeneration Assocs., L.P. v. Board of Regulatory Comm'rs*, 44 F.3d 1178 (3d Cir. 1995), as well as the Commonwealth Court's holding in *West Penn Power Co. v. Pa. Pub. Util. Comm'n*, 659 A.2d 10556 (Pa. Cmwlth. 1995), *affirmed by*, 535 Pa. 108, 634 A.2d 207 (1993). Duquesne Light's authority to unilaterally ask this Commission to modify the wholesale PURPA rate set forth in Rider No. 18 and demand that this be done over the qualifying facilities' objections is seriously in doubt in light of these decisions. Moreover, in addressing a regulatory out provision in *Petition of Pennsylvania Electric Company Requesting Approval of Rate Recovery, Under the Energy Cost Rate, for the Costs Proposed to be Paid Under an Agreement with Scrubgrass Power Corporation*, Docket No. P-870248, 1988 Pa. PUC LEXIS 101 at *11-12, 66 Pa. PUC 151 (Jan. 21, 1988), the Commission clearly suggested that it would not enforce any unilateral attempt by a utility to modify a wholesale PURPA rate. (Duquesne Light IB, Section V.B.3.)

Finally, the NRG Companies argue that Rider No. 18 is unfair because Duquesne Light failed to demonstrate that Rider No. 18 continues to be just and reasonable. (NRG MB, p. 14). As explained above, however, it is the NRG Companies that have the burden of proof and, moreover, have failed to meet that burden. Notwithstanding, even assuming, *arguendo*, that Duquesne Light had the burden of proof as suggested by the NRG Companies, Duquesne Light introduced credible evidence that the six cent per kilowatt-hour rate in Rider No. 18 continues to be just, reasonable, and in the public interest. Indeed, Duquesne Light explained that, based upon its recent history, the six cent rate is within range of reasonable rates paid by the Company

18, Duquesne Light certainly would have first attempted to re-negotiate the power purchase agreements with all the affected parties in interest, including the qualifying facilities." (Duquesne Light St. No. 12-RJ, pp. 10-11.) Furthermore, despite the NRG Companies assertion to the contrary, the power purchase agreements do not provide that Duquesne Light may modify the wholesale PURPA rate through a tariff filing with the Commission. Rather, the power purchase agreements expressly provide that Duquesne Light may make "application to the Pennsylvania Public Utility Commission or *any other jurisdictional authority* either for termination of said tariff or for a change in said tariff." (Duquesne Light Exs. WVP 3-R [HIGHLY CONFIDENTIAL] and WVP 4-R [HIGHLY CONFIDENTIAL] (emphasis added).)

to purchase power to provide default service. (*See* Duquesne Light IB, Section III.B.2.b.) Notably, the evidence introduced by Duquesne Light was not refuted or otherwise contested by the NRG Companies. Accordingly, even if Duquesne Light had the burden of proof as suggested by the NRG Companies, the Company clearly met its burden of proof.

Based on the foregoing, the NRG Companies' argument that Rider No. 18 is unfair is not supported by the record. The NRG Companies have failed to introduce credible evidence demonstrating that NRG Midwest is economically harmed by the requirement to pay the six cent rate set forth in Rider No. 18. Moreover, it is entirely unknown whether the rates paid to the qualifying facilities would continue to be paid by NRG Midwest under the Revised QF Agency Agreement or whether Duquesne Light and/or its customers would become responsible to pay the rates if the Commission were to either modify the wholesale PURPA rates set forth in Rider No. 18 or eliminate Rider No. 18 entirely.

4. The NRG Companies have Failed to Present a Specific and Complete Proposal for this Commission to Consider

At the evidentiary hearing, the ALJ the directed the parties to brief the issue of what is the remedy if Rider No. 18 is eliminated or modified as requested by the NRG Companies. (Tr. 457.) In their Main Brief, the NRG Companies simply state that the remedy they are seeking is to eliminate Rider No. 18 in its entirety or, alternatively, to modify the wholesale PURPA rate set forth in Rider No. 18. (NRG MB, p. 15.) The NRG Companies clearly missed the point of the ALJ's question because they failed to even attempt to explain what must be done next if the Commission were to grant the NRG Companies relief and eliminate or modify Rider No. 18.

As Duquesne Light explained in its Initial Brief, the NRG Companies have failed to explain what the next step is for the Commission and the parties to take should the Commission grant the relief requested by the NRG Companies. (Duquesne Light IB, Sections V.B.2.c and

V.B.2.d.) The NRG Companies completely skirt the issue and, instead, contend that the "contractual issues" will be resolved by Duquesne Light, NRG Midwest, and the qualifying facilities without any further action by the Commission. (NRG MB, p. 15.) However, PURPA remains in full force and effect and has not been repealed. Therefore, even assuming, *arguendo*, that the Commission had authority to either modify the wholesale PURPA rates set forth in Rider No. 18 or eliminate Rider No. 18 entirely, the Commission would, at a minimum, still need to determine the appropriate "avoided costs" to be paid to qualifying facilities in today's electric market.

Under PURPA, Duquesne Light, as a matter of law, is entitled to fully recover from its customers the costs incurred to purchase power from qualifying facilities. However, the NRG Companies have failed to even attempt to explain on this record how such costs would be recovered if the Commission were to grant relief to the NRG Companies. The ALJ and Commission should not, and indeed, cannot, grant the relief requested by the NRG Companies without fully considering and understanding how "avoided costs" are to be recovered in light of EDCs' default service obligations, which could have significant rate impacts to Pennsylvania ratepayers.

Based on the foregoing, the NRG Companies have failed to meet their burden, and moreover failed to respond to the ALJ's request, to present a specific and complete proposal for this Commission to consider. Clearly, further consideration by the Commission is required if it were to grant the relief requested by the NRG Companies. Accordingly, the NRG Companies proposals should be denied.

5. Impact on the Revenue Requirement if Rider No. 18 is Modified or Eliminated

At the hearing, the ALJ directed that the parties to address whether the modification of the wholesale PURPA rate set forth in Rider No. 18 or the elimination of Rider No. 18 will have an impact on Duquesne Light's revenue requirement. (Tr. 457.) In their Main Brief, the NRG Companies assert that there will be no impact on Duquesne Light's revenue requirement if Rider No. 18 is either modified or eliminated because the procurement of energy is addressed through default service rates. (NRG MB, p. 16.)

This case is about Duquesne Light's distribution revenues. Rider No. 18 involves the wholesale purchase of energy from the QFs. Energy costs and revenues are not considered in this proceeding. (Duquesne Light IB, Section V.B.5.) Further, the rates currently are paid by the NRG Companies and passed directly through to the qualifying facilities and, therefore, the rates paid pursuant to Rider No. 18 currently have no impact on the base rates paid by Duquesne Light's retail distribution customers, the revenues received by Duquesne Light, or the services provided to Duquesne Light's customers. (Duquesne Light St. No. 12-R, p. 25, lines 14-17.)

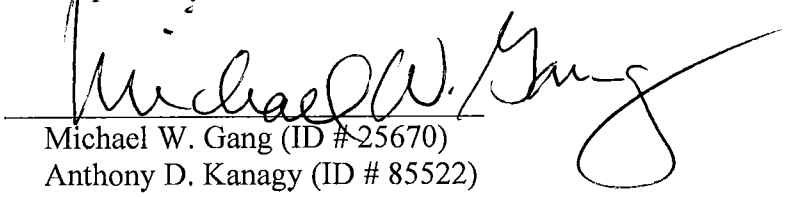
Although Rider No. 18 currently has no impact on Duquesne Light's revenue requirement, it is entirely unknown on this record whether the rates paid to the qualifying facilities would continue to be paid by NRG Midwest under the Revised QF Agency Agreement or whether Duquesne Light and/or its customers would become responsible to pay the rates if the Commission were to either modify the wholesale PURPA rates set forth in Rider No. 18 or eliminate Rider No. 18 entirely. If Rider No. 18 was modified or eliminated and these modifications relieved the NRG Companies of this obligation to purchase power from the QFs, Duquesne Light may be required to pay for this power. In this situation, Duquesne Light would

be entitled to recover the costs of this power from its customers to the extent its costs could not otherwise be recovered in the market.

V. CONCLUSION

For all the foregoing reasons, as well as those more fully explained in its Initial Brief, Duquesne Light Company respectfully requests that Administrative Law Judge Conrad A. Johnson and the Pennsylvania Public Utility Commission approve the Joint Petition for Approval of Non-Unanimous Settlement that will be filed on or before January 17, 2014 without modification and deny the relief requested in the Formal Complaint filed by the NRG Companies.

Respectfully submitted,



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