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January 17, 2014

VIA E-FILE

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Rosemary Chiavetta, Secretary
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Harrisburg, PA 17105-3265

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

Dear Secretary Chiavetta:

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

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

Sincerely,

COZEN O'CONNOR

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

DPZ/kmg
Enclosures

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

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

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

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DATED: January 17, 2014

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Administrative Law Judge
Conrad A. Johnson

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

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DATED: January 17, 2014

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I. INTRODUCTION

NRG Power Midwest LP ("NRG Midwest"), NRG Energy Center Pittsburgh LLC ("NRGP"), and Reliant Energy Northeast LLC ("REN") (together, the "NRG Companies") hereby file this Reply Brief with the Pennsylvania Public Utility Commission ("Commission") in the above-captioned matter to address issues raised by Duquesne Light Company ("Duquesne Light") and Beaver Falls Municipal Authority ("Beaver Falls") in their respective Main Briefs with respect to Rider No. 18 – Rate of Purchase of Electric Energy from Customer-Owned Renewable Resources Generating Facilities ("Rider No. 18") to Duquesne Light's Tariff Electric – Pa. P.U.C. No. 2 ("Tariff").

II. BURDEN OF PROOF

In their respective Main Briefs, Duquesne Light and Beaver Falls have argued that the burden of proof with respect to Rider No. 18 issues falls on the NRG Companies. (Duquesne Light Main Brief 8; Beaver Falls Main Brief 10.) In short, they assert that a complainant must bear the burden of proving issues not raised by a public utility in its proposed base rate filing. In support, they point to the fact that Duquesne Light did not propose to change Rider No. 18 in its proposed Supplement No. 81.

This position is in contrast with that of the NRG Companies,[1] the Commission's Bureau of Investigation and Enforcement ("I&E"), and the Office of Consumer Advocate ("OCA"),[2] who all assert that the burden of proof falls on Duquesne Light. (NRG Companies Main Brief 5;

[1] As noted in the Main Brief of the NRG Companies, it is generally correct that a complainant bears the burden of proof with respect to tariff revisions not proposed by the public utility. (NRG Companies Main Brief 4-5.) This is the principle to which counsel for the NRG Companies referred when the issue was raised for the first time at the January 17 hearing. (*See* Hr'g Tr. 147-48.) However, upon review of the Public Utility Code, it is clear that as a Commission-initiated proceeding, Duquesne Light bears the burden with respect to both proposed and existing provisions of its Tariff.

[2] While OCA argues that in a rate case the public utility bears the burden of proving that every rate, proposed and existing, is just and reasonable, (OCA Main Brief 6), OCA's conclusion with respect to Rider No. 18 is less clear. As OCA correctly notes, the NRG Companies do not believe that Rider No. 18 is a "rate" *per se*. However, the NRG Companies assert that the burden of proof nevertheless lies with Duquesne Light.

I&E Brief Regarding Burden of Proof 12; OCA Main Brief 6.) Pursuant to Section 315(a) of the Public Utility Code (the "Code"), a public utility bears the burden of proof "[i]n any proceeding upon the motion of the commission, involving any proposed or *existing* rate." 66 Pa. C.S. § 315(a) (emphasis added). Although Duquesne Light did not propose to change Rider No. 18, the present proceedings were initiated pursuant to the Commission's September 26, 2013 Order in this matter, which expressly directed a review of Duquesne Light's Tariff, in its entirety. Order, Docket No. R-2013-2372129 at 2, Ordering Paragraph 4 ("[T]his investigation shall include consideration of the lawfulness, justness, and reasonableness of [Duquesne Light's] existing rates, rules, and regulations."). Neither the Duquesne Light Main Brief or Beaver Falls Main Brief addresses this fact or the applicable provision of Section 315 of the Code. As a proceeding initiated by order of the Commission on its own motion, Duquesne Light thus bears the burden of proof in this matter with respect to the Tariff in its entirety, not just proposed modifications. 66 Pa. C.S. § 315(a); *see also Johnstown v. Pa. Pub. Util. Comm'n*, 184 Pa. Super. 56, 63, 133 A.2d 246, 250 (1957)

As the party bearing the burden of proof, it is Duquesne Light that must demonstrate that its rates, as well as its rules, regulations and other Tariff provisions, are just, reasonable and nondiscriminatory. 66 Pa. C.S. §§ 1301, 1304; *see also Di Santo v. Dauphin Consol. Water Supply Co.*, 291 Pa. Super. 440, 449, 436 A.2d 197, 201 (1981) (explaining that other tariff provisions must be reasonable). Specifically, Duquesne Light must prove that Rider No. 18 is reasonable, fair and consistent with the Public Utility Code, the Commission's established policies and its regulatory scheme. *Behrend v. Bell Telephone Co.*, 242 Pa. Super. 47, 70, 74-75, 363 A.2d 1152, 1165-66 (1976). It has not done so.

III. SUMMARY OF ARGUMENT

As the NRG Companies have argued in their Main Brief, Rider No. 18 is inconsistent with the Electricity Generation Customer Choice and Competition Act ("Competition Act"), 66 Pa. C.S. § 2801 *et seq.*, the Alternative Energy Portfolio Standards Act ("AEPS Act"), 73 P.S. § 1648.1 *et seq.*, the regulatory schemes established thereunder, and the Commission's established policies with respect to fostering Pennsylvania's competitive electric generation market and alternative energy market. Duquesne Light has not demonstrated how Rider No. 18 can be reconciled with the current regulatory scheme in Pennsylvania and, as explained below, none of the arguments presented by Duquesne Light or Beaver Falls in their Main Briefs justifies allowing Rider No. 18 to maintain the force and effect of law. Even if the burden of proof would rest with the NRG Companies, Duquesne Light has failed to carry its burden of persuasion by failing to rebut the *prima facie* showing of the NRG Companies. For the reasons more-fully explained in the NRG Companies' Main Brief, Rider No. 18 is *per se* unjust, unreasonable, and no longer in the public interest and must be removed from the Tariff.

IV. ARGUMENT

A. NON-RIDER NO. 18 ISSUES

The NRG Companies do not address any non-Rider No. 18 issues in this Reply Brief.

B. RIDER NO. 18 ISSUES

1. The NRG Companies Have Demonstrated that the Six Cents per Kilowatt-Hour Price Is Unjust and Unreasonable

Even if Rider No. 18 is allowed to remain in effect, the six cents per kilowatt-hour price contained therein is not just and reasonable. The six cents price is over 30 years old, and it exceeds by a considerable margin the average price at which power may be purchased on the

market. The six cents per kilowatt-hour price is for electric energy only. It does not include compensation for capacity or ancillary services. Nor does the six cents price provide compensation for alternative energy credits generated by eligible facilities. This is because Rider No. 18 was developed prior to the existence of capacity and alternative energy credit markets. (Hr'g Tr. 378, 395.) As a result, the six cents price must be evaluated in light of current market prices for electric energy only.[3]

As demonstrated by NRG Midwest Exhibit No. 4, the average day-ahead locational marginal price for power in the Duquesne Zone has been between three to three-and-a-half cents per kilowatt-hour over the last five years. (NRG Midwest Exhibit No. 4.) The six cents price under Rider No. 18 therefore provides double what the average price for energy has been in the Duquesne Zone over the last five years and double what Duquesne Light would have paid for energy had it purchased power in the open market.

Duquesne Light has argued that it has experienced *full requirements* default service rates in the range of five to seven cents per kilowatt-hour and that the six cents price contained in Rider No. 18 is therefore reasonable. (Duquesne Light Main Brief 64.) However, it is improper to compare the *energy-only* six cents per kilowatt-hour price to the *full requirements* default service rates experienced by Duquesne Light over the past decade. As explained by the witness for Duquesne Light, the bids received by the public utility are for "full requirements" contracts. (Hr'g Tr. 239:17-24.) A full requirements contract with Duquesne Light requires a supplier to provide not only electric energy, but capacity, ancillary services, congestion and congestion management charges, alternative energy requirements, and PJM grid management charges. Duquesne Statement No. 4, at 6, Petition of Duquesne Light Company for Approval of the

[3] This is not to say that the price for power in Rider No. 18 must be continually updated, but periodic adjustments at reasonably regular intervals, at a minimum, would be appropriate.

Default Service Program, Docket No. P-2012-2301664. The five to seven cents pricing cited by Duquesne Light is therefore inclusive of more than just a price for electric energy. With respect to the generation-only component of those rates, the witness for Duquesne Light could not testify. (Hr'g Tr. 239:25 to 240:1-4.) Duquesne Light has therefore failed to provide any credible evidence that the six cents per kilowatt-hour price is just and reasonable.

The NRG Companies submit that the locational marginal pricing in the Duquesne Zone represents a just and reasonable price for power under Rider No. 18, provided the tariff provision is allowed to remain in force, because it reflects the price for energy in Pennsylvania's competitive markets, consistent with current policy. While there may be other pricing mechanisms that could be just and reasonable, Duquesne Light has offered no alternatives. This is not surprising, since the public utility admitted that it had not studied the six cents price or its avoided cost in at least the last decade. (Hr'g Tr. 237:12-20, 238:3-12, 245:10-11.)

Duquesne certainly cannot credibly argue that it has satisfied its burden of proof (or even burden of persuasion) in this proceeding where it has not examined the price in over a decade and has not presented a reasonable alternative price. The NRG Companies have presented the only substantial credible evidence in this proceeding as to what a reasonable tariffed price should be if Rider No. 18 is permitted to remain in effect.

2. Arguments that the Commission Is Without Authority to Terminate or Revise Rider No. 18 Misconstrue PURPA

The Main Briefs of Duquesne Light and Beaver Falls forward a number of arguments that the Commission is without authority or jurisdiction to terminate or revise a provision of a Commission-approved tariff (*i.e.*, Rider No. 18). These arguments were first made by Duquesne Light in its Preliminary Objections, which ultimately were rejected by the Presiding Officer. These arguments were again included in the Duquesne Light and Beaver Falls briefs in support

of Duquesne Light's pending Petition for Interlocutory Review and Answer to Material Questions. The NRG Companies restate and incorporate herein by reference the arguments made in their November 22, 2013 Answer to Duquesne Light's Preliminary Objections, and the December 23, 2013 Brief in Opposition to Duquesne Light's Petition for Interlocutory Review. Below, the NRG Companies provide additional arguments and clarifications in response to certain issues raised in the Main Briefs of Duquesne Light and Beaver Falls.

It is critical to recognize that the six cents per kilowatt-hour price contained in Rider No. 18 is not Duquesne Light's actual "avoided cost." This fundamental point is undisputed. Rider No. 18 specifically provides that the price to be paid for energy from qualifying customer-generators is "six (6) cents per kilowatt-hour, or at a rate based on [Duquesne Light's] avoided costs when such costs exceed six (6) cents per kilowatt-hour." (Duquesne Light Exhibit WVP 2-R.) When Duquesne Light first established Rider No. 18 in 1981, it acknowledged that the six cents price was above its avoided costs.[4] In connection with its 1987 amendment to Rider No. 18, Duquesne Light stated that its avoided costs were actually about two (2) cents per kilowatt-hour. In short, the six cent price in Rider No. 18 is not and has never represented Duquesne Light's "avoided cost" under PURPA or the Commission's regulations. Accordingly, there is nothing to prevent the elimination or modification of Rider No 18.

a) Rider No. 18 Is Not a Commission-Approved "Avoided Cost" Price

Duquesne Light and Beaver Falls stress repeatedly that Rider No. 18 represents the public utility's "PURPA rate," and argue that the tariff provision is therefore beyond the Commission's

[4] Although Duquesne Light asserts that the price of six cents is in line with prices adopted by another utility and a few other state commissions at the time (Duquesne Light Main Brief 49), this has no bearing on Duquesne Light's actual "avoided costs," which are to be determined based on a public utility's specific circumstances, 18 C.F.R. § 292.304(e) (regarding "Factors affecting rates for purchases"). In any case, as argued below, the six cents price was never formally approved by the Commission as Duquesne Light's "avoided cost."

jurisdiction. (*See* Duquesne Light Main Brief 54-57; Beaver Falls Main Brief 12-16.) They further suggest that the tariff provision is actually a contractual term that has been "locked-in" by virtue of prior Commission approval and/or the execution of power purchase agreements that reference the Tariff. (Duquesne Light Main Brief 49; Beaver Falls Main Brief 12.) As discussed below, these positions are without merit and must be rejected.

To be clear, Rider No. 18 is a tariff provision. It is a tariff provision that was *voluntarily* adopted by Duquesne Light. (Hr'g Tr. 251-52; *accord* Beaver Falls Main Brief 13.) The addition of Rider No. 18 to Duquesne Light's tariff was *not* directly compelled by the federal Public Utility Regulatory Policies Act ("PURPA"), Pub. L. No. 95-617, 92 Stat. 3117, or by order of the Commission. Rider No. 18 is not entitled to any special exception or exemption from the Commission's exclusive jurisdiction over tariff provisions simply because it voluntarily reaffirms Duquesne Light's existing obligations under state and federal law.

(1) Rider No. 18 Is Not, and Has Never Been, Duquesne Light's Avoided Cost

Rider No. 18 does not represent the "avoided cost" price at which Duquesne Light is compelled to purchase electricity from qualifying facilities under PURPA. Rather, the six cents per kilowatt-hour price set forth in Rider No. 18 was set *above* Duquesne Light's avoided cost. (NRG Midwest Exhibit No. 6.) Indeed, Rider No. 18 treats "avoided cost" as an open term; it is an *alternative* to the six cents per kilowatt-hour price (whichever is higher), left to be determined on a case-by-case basis. (Duquesne Light Exhibit WVP 2-R; Duquesne Light St. No. 12-R, at 20.) Specifically, Rider No. 18 provides that qualifying customer-generators will be paid "six (6) cents per kilowatt-hour, or at a rate based on [Duquesne Light's] avoided costs when such costs exceed six (6) cents per kilowatt-hour." (Duquesne Light Exhibit WVP 2-R.)

Importantly, Rider No. 18 has never been specifically approved by the Commission as Duquesne Light's avoided cost. *See Pa. Pub. Util. Comm'n v. Duquesne Light Co.*, Docket No. 860556, 87 WL 1378805, at *4 (Opinion and Order entered July 20, 1987). Beaver Falls suggests that the six cents per kilowatt-hour price was implicitly approved as consistent with Duquesne Light's avoided cost when that price was phased out in 1987, but this conclusion is expressly contradicted by the Commission's own opinion in the 1987 proceeding, when it stated: "[W]e have not examined Duquesne's avoided cost filings for compliance with our regulations and can make no determination regarding the accuracy of rates set forth in those filings." *Id.* In fact, the Commission further noted in 1987 that Duquesne Light believed its avoided costs at that time were approximately two (2) cents per kilowatt-hour. *Id.* at *7 n.7. Six cents simply is not and has never been Duquesne Light's avoided cost. Because the six cents per kilowatt-hour price contained in Rider No. 18 has never been specifically approved by the Commission as Duquesne Light's "avoided cost" under PURPA or the Commission's regulations, it is not entitled to any "lock-in" by virtue of the same.

(2) Rider No. 18 Is Not a Contractual Term in Any Commission-Approved Wholesale Power Purchase Agreement

Duquesne Light's power purchase agreements with Beaver Falls and the Beaver Valley Power Company (the "PPAs") do not serve to "lock-in" the price of six cents per kilowatt-hour under Rider No. 18 as a Commission-approved avoided cost price. Importantly, neither of the PPAs mentions a six cents per kilowatt-hour price, neither references Duquesne Light's "avoided costs," and neither cites to "Rider No. 18."[5] Instead, each of the PPAs contains only a generic reference to the Tariff, stating that the purchase of power is subject to "the terms and conditions

[5] Further, as noted above, the six cents price was never independently approved by the Commission as Duquesne Light's "avoided cost" for electric energy.

of Duquesne's tariff, including all applicable rules and regulations thereto, on file with the Pennsylvania Public Utility Commission, or any other jurisdictional authority, as the same may be effective from time to time." (Duquesne Light St. No. 12-R, at 22.) There is nothing on the face of the PPAs to suggest a fixed price.[6] Had the parties intended to actually "lock-in" a price for power, they could have included a fixed price in their contracts. They did not.

In addition, the Commission never specifically approved either of the PPAs, and neither Duquesne Light nor Beaver Falls has submitted evidence to suggest otherwise.[7] As a result, the reliance placed by Duquesne Light and Beaver Falls on *Freehold Cogeneration Assocs., L.P. v. Board of Regulatory Comm'rs*, 44 F.3d 1178 (3d Cir. 1995), and its progeny is inappropriate. In *Freehold,* the Third Circuit determined that the Board of Regulatory Commissioners of the State of New Jersey had approved a certain power purchase agreement between a qualifying facility and an electric utility and was therefore prevented by federal law from later reopening the previously approved terms of that agreement. Here, the Commission has not been asked to reopen a term in a power purchase agreement, let alone any agreement that the Commission has actually approved.[8] Instead, it has been asked to consider the continued legality of a 32 year-old tariff provision that no longer comports with the law in Pennsylvania. As a result, *Freehold* is inapposite.

Even if the Commission had approved the PPAs, its approval would have been based, at least in part, on the understanding that the price provision was subject to modification. As

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[6] Beaver Falls itself submits that, at least prior to 1987, the Rider No. 18 price could be modified. (Beaver Falls Main Brief 12.)

[7] Indeed, neither Duquesne Light or Beaver Falls presented proof that the PPA was approved under Section 507 of the Public Utility Code. 66 Pa. C.S. § 507 (requiring Commission approval of contracts between public utilities and municipalities).

[8] Duquesne Light has suggested that *Freehold* can be extended beyond the four corners of a Commission-approved power purchase agreement, arguing that the determination of avoided cost is "once and done" and cannot be changed, even where provided in a tariff. As the NRG Companies have shown, Rider No. 18 does not and never has represented a Commission-approved avoided cost for Duquesne Light. As a result, *Freehold* should be applied only to terms contained within a specific Commission-approved contract.

Duquesne Light's Senior Manager for Rates and Tariff Services has testified, Duquesne Light retains the ability under the PPAs themselves to "unilaterally" apply to the Commission to terminate or modify the Tariff. (Hr'g Tr. 273-74, 278, 282.) The Commission further understood that it retained the authority to make future modifications to the price component of Rider No. 18 when considering the phase out of the six cents price in 1987. *Pa. Pub. Util. Comm'n v. Duquesne Light Co.*, Docket No. R-860556, 87 WL 1378805, at *3 (noting that certain projects would be entitled to the Rider No. 18 price "*at least until the Commission approves the modification of [Duquesne Light's] tariff*") (emphasis added).

The suggestion of Duquesne Light and Beaver Falls that the Commission is now without the power to change the tariff is little more than an attempt to deprive NRG Midwest of a remedy and to saddle it with an unreasonable price for an indefinite term. Even if the Commission had approved the PPAs (which it did not), the PPAs envisioned a contractual remedy to change the price – *i.e.,* the filing of a tariff supplement with the Commission. To the extent that the *Freehold* decision deprived the Commission of the power to modify the stated price (which it did not), *Freehold* cannot divest the Commission of the powers expressly granted to it by the Pennsylvania Legislature. Among these powers is the power to say what can and cannot properly be contained within a Pennsylvania-regulated public utility's tariff. *See* 66 Pa. C.S. §§ 501 (regarding "General powers"), 1302 (regarding "Tariff; filing and inspection").

Rider No. 18 should no longer be in Duquesne Light's tariff because it not only reflects an outdated regulatory scheme but it also reflects (under the misguided arguments of Duquesne Light and Beaver Falls) an outdated contractual scheme that envisioned a unilateral remedy with the Commission. The Commission should, at this point, simply extract itself from the

controversy by requiring Duquesne Light to remove Rider No. 18 from its Tariff and allowing the parties to pursue private contractual remedies and negotiations.

b) The Elimination of Rider No. 18 Will Not Conflict with PURPA

Although Duquesne Light and Beaver Falls have made much of PURPA and the public utility's obligation to purchase power from qualifying facilities, the elimination or modification of Rider No. 18 would be in no way inconsistent with PURPA. As argued at Section IV.B.2.a above, Rider No. 18 was not directly compelled by either PURPA or state law. In fact, Duquesne Light readily concedes that it remains compelled to purchase power from qualifying facilities under PURPA, even if Rider No. 18 were to be eliminated as the NRG Companies have requested (Hr'g Tr. 244; Duquesne Light Main Brief 14, 57), stating "PURPA is still the law of the land, and Duquesne Light continues to have an obligation to purchase power from qualifying facilities at avoided cost" (Duquesne Light Main Brief 14). Not only does Rider No. 18 conflict with the current regulatory scheme in Pennsylvania, but it appears that it is simply unnecessary.

According to Duquesne Light, the NRG Companies have argued that the public utility's obligation under PURPA to purchase power from qualifying facilities was preempted by state law. (Duquesne Light Main Brief 54.) This is a straw argument that should be rejected out of hand. The NRG Companies agree that PURPA may continue to compel Duquesne Light to purchase power from qualifying facilities, although not at a six cents per kilowatt-hour price. The regulatory scheme in Pennsylvania that was "largely displaced" by the Competition Act and the AEPS Act is one that applied to vertically integrated electric utilities providing generation, transmission and distribution services to their customers on a bundled basis. (NRG Midwest St. No. 1, at 5-6.) There was no dynamic competitive market for generation to which qualified

facilities had access at that time. This was the context in which Rider No. 18 was first introduced; it is no longer relevant or necessary in today's regulatory environment.

c) The Commission Can Grant the NRG Companies Relief Without Further Consideration of Rate Recovery of Avoided Cost Contracts

Duquesne Light also argues that the Commission cannot grant the NRG Companies relief without fully understanding how "avoided costs" are to be recovered in light of the current regulatory paradigm. (Duquesne Light Main Brief 66.) This is not a novel issue, nor is it one created by the NRG Companies' requested relief. If a new qualifying facility were to be developed in Duquesne Light's service territory today, Duquesne Light believes it is obligated under PURPA and the Commission's regulations to purchase the power generated at the public utility's "avoided cost." As discussed above, this would not be the six cents price in Rider No. 18. Reconciling this scenario to its default service obligations, including any impact on Pennsylvania ratepayers, is a responsibility that belongs with Duquesne Light (and every other electric utility in the Commonwealth). The NRG Companies' requested relief has merely brought this issue to the surface.

As all parties admit, the calculation of an electric utility's "avoided cost" in today's post restructuring environment presents some very complex issues—issues that the Commission at some point must deal with directly. Fortunately, these issues need not be addressed in this proceeding. By simply eliminating Rider No. 18, the Commission can instantly rid Duquesne Light's tariff of a provision that no longer complies with Pennsylvania law. The issues of calculating avoided cost and rate recovery are more appropriately resolved by the Commission in a separate proceeding in which a qualifying facility under PURPA has requested that Duquesne Light execute a power purchase agreement at Duquesne Light's avoided cost.

3. The Non-Joinder of Beaver Falls or Beaver Valley Power Company as Parties Is Not Fatal to the Commission's Jurisdiction

Duquesne Light and Beaver Falls assert that the NRG Companies failed to join indispensable parties and that the Commission is therefore without jurisdiction to grant the relief requested. The parties in question, Beaver Falls and Beaver Valley Power Company ("Beaver Valley") are party to two power purchase agreements with Duquesne Light. The NRG Companies restate and incorporate herein by reference the arguments made in their November 22, 2013 Answer to Duquesne Light's Preliminary Objections, and the December 23, 2013 Brief in Opposition to Duquesne Light's Petition for Interlocutory Review. In short, the NRG Companies have not brought suit under any power purchase agreement, nor have they requested that the Commission modify or construe the terms of any power purchase agreement. Nor do the NRG Companies have contractual privity with Beaver Falls or Beaver Valley. Both Beaver Falls and Beaver Valley were served with the Complaint and subsequently spoke with counsel for Duquesne Light, (Hr'g Tr. 267-70). Beaver Falls chose to intervene; Beaver Valley, to date, has not.

4. The NRG Companies Have Standing to Challenge Rider No. 18

Beaver Falls argues that NRG Midwest lacks standing to challenge Rider No. 18. (Beaver Falls Main Brief 18.) This argument is entirely without merit. As explained in its Complaint and as demonstrated in its prepared direct testimony, NRG Midwest has an interest in Rider No. 18 that is substantial, direct and immediate. In any case, lack of standing is an affirmative defense that is properly raised only in a new matter. *Jackson v. Garland*, 622 A.2d 969 (Pa. Super. 1993); *Wroblewski v. Pa. Electric Co.*, Docket No. C-2008-2058385 (Order entered May 15, 2009). It is further well established law in Pennsylvania that an intervenor takes the litigation as he finds it. *Sell v. Douglas Tp. Zoning Hearing Bd.*, 613 A. 2d 162 (Pa. Cmwlth.

1992). At this late stage in the proceedings, the Commission must decline to further consider the argument.

V. CONCLUSION

The NRG Companies assert that both the Competition Act and the AEPS Act, in conjunction with the market for competitive generation in Pennsylvania, have rendered Rider No. 18 obsolete as a relic of an outdated regulatory scheme. As such, Rider No. 18 as a matter of law is unjust, unreasonable and otherwise contrary to the public interest and must be removed from Duquesne Light's existing Tariff. Duquesne Light has not met is burden to prove otherwise. For the reasons set forth above and in the NRG Companies' Main Brief, the Commission should order Duquesne Light to remove Rider No. 18 from its Tariff. In the alternative, the six cents per kilowatt-hour price in Rider No. 18 should be revised to reflect a price that approximates the average day-ahead locational marginal pricing in the Duquesne Zone.

Respectfully submitted,

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