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February 4, 2014

**VIA E-FILING**

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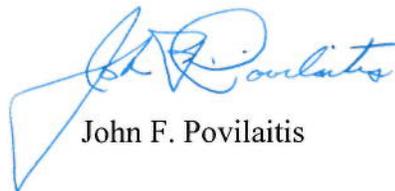
Re: Pennsylvania Public Utility Commission; Office of Consumer Advocate; Office of Small Business Advocate; Jacquelyn and Robert Miller; Gwendolyn L. LeVert; Duquesne Industrial Interveners; Aimee M. Dorsten; Connie Schiavo; NRG Power Midwest LP, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast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

Dear Secretary Chiavetta:

On behalf of Beaver Falls Municipal Authority, I have enclosed for electronic filing the Reply of Beaver Falls Municipal Authority to Objections of the NRG Companies to the Joint Petition for Non-Unanimous Settlement in the above-captioned consolidated matters.

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

Very truly yours,



John F. Povilaitis

JFP/kra  
Enclosure

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

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**REPLY OF BEAVER FALLS MUNICIPAL AUTHORITY TO OBJECTIONS OF THE  
NRG COMPANIES TO THE JOINT PETITION FOR  
NON-UNANIMOUS SETTLEMENT**

The Beaver Falls Municipal Authority (“Authority”), by and through its attorneys, John F. Povilaitis, Alan M. Seltzer and Buchanan Ingersoll & Rooney, submits this Reply to the Objections of the NRG Companies to the Joint Petition for Non-Unanimous Settlement (“Objections”), in accordance with Administrative Law Judge Conrad A. Johnson’s third Interim Order and in connection therewith represents as follows:

**I. Introduction**

1. On January 16, 2014, Duquesne Light Company (“Duquesne”) filed a Joint Petition for Approval of a Non-Unanimous Settlement (“Joint Petition”) that resolves all issues in the general rate proceeding at Pennsylvania Public Utility Commission (“Commission”) Docket No. R-2013-2372129 (“Rate Proceeding”), except for certain allegations relating to

Duquesne Rider No. 18 contained in a formal complaint filed by the NRG Companies on October 28, 2013 at Commission Docket No. C-2013-2390652 (“Formal Complaint”).

2. The Joint Petition was filed on behalf of the Commission’s Bureau of Investigation & Enforcement, the Office of Consumer Advocate, the Office of Small Business Advocate, the Coalition of Affordable Utility Service and Energy Efficiency in Pennsylvania, the Duquesne Industrial Intervenors, Citizens for Pennsylvania’s Future and United States Steel Corporation (collectively, “Joint Petitioners”).

3. The Authority, as an intervenor in the Rate proceeding, has actively participated in the litigation of the Formal Complaint.<sup>1</sup> The Authority is neither a party to the Joint Petition nor the Settlement, but authorized Duquesne to represent in the Joint Petition that it does not oppose the Settlement.

4. Although neither the Settlement nor Joint Petition address any aspect of the Formal Complaint, which is presently being litigated separate and apart from the balance of the Rate Proceeding, the NRG Companies’ Objections challenge the Joint Petition for failing to address the issues being litigated currently in the Formal Complaint.<sup>2</sup> The Objections of the NRG Companies should be disregarded. When contested issues have been procedurally separated between those set for litigation (Rider No. 18) and those addressed by Settlement (the Joint Petition), it is fundamentally unfair and inappropriate for the NRG Companies to criticize the Settlement for failing to address Rider No. 18.

5. By filing their Objections, the NRG Companies are not only seeking to derail (or at the very least, delay consideration of) the Settlement and Joint Petition, but to essentially re-argue the merits of their substantive arguments regarding Rider No. 18 in connection with the

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<sup>1</sup> All briefing in connection with the Formal Complaint has been completed and that matter is awaiting the Initial Decision of the presiding Administrative Law Judge.

<sup>2</sup> Objections, p. 3.

Formal Complaint. While the Authority takes no specific substantive position with respect to any aspect of the Settlement or the Joint Petition, it opposes the NRG Companies' attempt to reargue the merits of the Rider No. 18 issues raised in the Formal Complaint. Since merits of the Rider No. 18 issues in the Formal Complaint are being actively litigated and all of the NRG Companies' due process rights are and continue to be fully protected, there is no reason or justification to interject these issues into the consideration of the Settlement and Joint Petition. And, more importantly, on the merits of Rider No. 18, the NRG Companies are incorrect and their arguments should be fully rejected.

## **II. Legal Standards and Burden of Proof**

6. In their Objections, the NRG Companies argue in general that non-unanimous settlements must be within the public interest and the petitioning parties bear the burden of proof that the settlement is in the public interest.<sup>3</sup> No one disputes these principles, but they only tell half the story. In this case, the Formal Complaint specifically challenges the provisions and continued applicability of Duquesne's Rider No. 18, for which the NRG Companies – not Duquesne and the Joint Petitioners – have the ultimate burden of proof.

7. As noted by the Authority in its Reply Brief,<sup>4</sup> the NRG Companies' legal error in its burden of proof analysis lies in assuming that for Public Utility Code ("Code"), 66 Pa. C. S. § 315 purposes, the \$0.06/kWh price in Rider No. 18 constitutes a "rate." The fact is the Formal Complaint does not relate to a "rate", but a *price* that NRG must pay to purchase electricity from the Authority, thereby making Code Section 315 irrelevant and inapposite to this proceeding. The Commission and the courts of the Commonwealth have long held that the broad and expansive definition of "rate" in the Code and its predecessors embraces substantially any and all

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<sup>3</sup> Objections, p.3.

<sup>4</sup> The Authority's Main and Reply Briefs in connection with the Formal Complaint are expressly incorporated herein.

compensation *received* by a public utility for service rendered to a consumer.<sup>5</sup> In *Penn-Harris Hotel Company v. Pennsylvania Public Utility Commission* (“*Penn-Harris*”),<sup>6</sup> the Superior Court considered the Commission’s dismissal of a joint complaint filed by the Pennsylvania Hotel Association and the Penn-Harris Hotel Company alleging that the Bell Telephone Company of Pennsylvania (“Bell”) omitted from its tariffs certain commissions paid by Bell to the hotels for services rendered by the hotels in connection with the semi-public branch exchange service to which they subscribed. Just like the commissions at issue in *Penn-Harris*, the \$0.06/kWh price in Rider No. 18 is *not* received by Duquesne for any *services* it is providing to customers. It is a price that Duquesne is *paying* for services (i.e., electricity) that are being provided to it by the Authority. Duquesne’s customers have no direct or other interest in Rider No. 18, since none of the amounts paid by Duquesne under the PPA with the Authority are included in customer rates, and the rider’s terms and conditions have been restricted with no opportunity for expansion to customers or Qualifying Facilities since 1987. The Commission’s typical and customary reference in its September 26, 2013 investigation order to exploring the lawfulness, justness and reasonableness of Duquesne’s existing “rates, rules and regulations” should not be read to include Rider No. 18 because it is not a Duquesne “rate”. Rather, Rider No. 18 is an atypical tariff provision governing grandfathered PURPA projects and agreements. It is abundantly clear that under *Penn-Harris* the \$0.06/kWh pricing in Rider No. 18 that the NRG Companies seek to eliminate or drastically reduce is not a “rate” justifying any application of Code Section 315(a) for burden of proof purposes.

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<sup>5</sup> *Penn-Harris Hotel Company v. Pennsylvania Public Utility Commission*, 166 Pa. Super. 394, 71 A.2d 853 (Pa. Super. 1950).

<sup>6</sup> *Id.*

**III. Rider No. 18 is a valid tariff provision that must remain in full force and effect.**

8. In their Objections, the NRG Companies make the following unsupported and unsupportable allegations with respect to Rider No. 18, each of which will be addressed briefly below:

- *Rider No. 18 is in direct conflict with the Electricity Generation Customer Choice Act and the Alternative Energy Portfolio Standards Act and no longer serves a legitimate purpose.*<sup>7</sup>

Response: Neither of the cited statutes expressly or impliedly mention let alone vitiate Rider No. 18. Indeed, neither of these state statutes can preempt the Public Regulatory Policies Act of 1978 (“PURPA”), which is federal legislation mandating the public utilities purchase electricity from Qualifying Facilities (“QFs”) like the Authority.<sup>8</sup> As noted in the Authority’s Main and Reply briefs in connection with the Formal Complaint, the PURPA purchase obligation remains fully viable today and has been recognized as such by the Federal Energy Regulatory Commission (“FERC”), the federal entity responsible to administering the wholesale electric market.

- *Rider No. 18 is an outdated tariff provision, no longer applies in Pennsylvania and has never been revised to account for the restructuring of the electric industry, competitive markets and the default service obligations of electric distribution companies.*<sup>9</sup>

Response: These allegations do not acknowledge or appear to understand the legal and factual background of Rider No. 18 as it exists today. First, the term and rates in Rider No. 18 have been grandfathered and closed by express prior Commission order to new QFs since 1987. Thus, any suggestion or implication by the NRG Companies that the tariff provision is problematic, inconsistent with Pennsylvania’s electric deregulated electric markets, etc. prospectively is patently incorrect. Importantly, federal case law decided *after* the application of and rates in Rider No. 18 were frozen in 1987 expressly prohibits the Commission from

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<sup>7</sup> Objections, pp. 3-4.

<sup>8</sup> Electric utilities like Duquesne are required to purchase electricity from qualifying facilities (“QFs”) at rates that are just and reasonable to the electric utility, in the public interest, and which do not discriminate against the QFs. 16 U.S.C. § 824a-3(b); 18 C.F.R. §§ 292.304(a)(1)(i), (ii).

<sup>9</sup> Objections, p. 4.

changing the rates in Rider No. 18.<sup>10</sup> The NRG Companies have repeatedly failed to acknowledge that the relief they seek in the Formal Complaint – the elimination or at least drastic reduction of the \$0.06/kWh price in Rider No. 18 – cannot be effected by the Commission without violating federal law. And, as also previously noted by the Authority, the fact that the price being paid for electricity from a QF at the time of “delivery” is different than the prevailing price at the time the contract or “other legally enforceable obligation” was entered into is *not* a valid or lawful basis for voiding or changing the rate previously approved by the Commission to be paid to the QF.<sup>11</sup>

#### **IV. Conclusion**

9. Contrary to the NRG Companies’ assertion, Rider No. 18 is not unjust, unreasonable, contrary to existing law or inconsistent with the public interest. Rather, it represents a limited and grandfathered tariff provision that validly applies to a very small subset of federal QF projects, like the owned and operated by the Authority, and contains a price for electricity to be purchased by Duquesne or its assignee that cannot be lawfully changed without violating federal law.

10. It is the NRG Companies, and not the Joint Petitioners, Duquesne or the Authority, that bears the burden of proof with respect to all the allegations and relief requested in the Formal Complaint. As Duquesne and the Authority have amply demonstrated in their Main and Reply Briefs in connection with the Formal Complaint, the NRG Companies have completely failed to prove any entitlement to the relief requested.

Wherefore, the Beaver Falls Municipal Authority hereby requests that the Objections of the NRG Companies to the Joint Petition for Non-Unanimous Settlement be dismissed in their entirety in recognition of the fact that they are meritless and that Rider No. 18 issues have been

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<sup>10</sup> Under PURPA, once the state commission has established the avoided costs to be paid, the state can no longer regulate the QFs rate. This proposition was established in *Freehold Cogeneration Associates L.P. v. Board of Regulatory Commissioners, et al.* 44 F.3d 1178 (3d. Cir. 1995).

<sup>11</sup> See, 18 C.F.R. § 292.304(b)(5), which provides as follows: “In the case in which the rates for purchases are based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation, the rates for such purchases do not violate this subpart if the rates for such purchases differ from avoided costs at the time of delivery.”

litigated separate and apart from the issues addressed by the Settlement, and the Commission grant the Beaver Falls Municipal Authority such other relief as is just and reasonable under the circumstances.

Respectfully submitted,



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Dated: February 4, 2014

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	
Office of Consumer Advocate	:	
Office of Small Business Advocate	:	Docket Nos. R-2013-2372129
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Aimee M. Dorsten	:	C-2013-2383980
Connie Schiavo	:	C-2013-2385292
NRG Power Midwest LP,	:	C-2013-2386037
NRG Energy Center Pittsburgh LLC, and	:	C-2013-2386284
Reliant Energy Northeast LLC	:	
	:	
	:	
v.	:	
	:	
Duquesne Light Company	:	

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the foregoing document in accordance with the requirements of 52 Pa. Code § 1.54 et seq. (relating to service by a participant).

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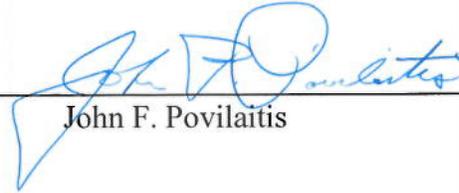
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