



March 26, 2014

VIA E-FILE

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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 Nos. R-2013-2372129, C-2013-2390562, et al.**

**ANSWER OF NRG POWER MIDWEST LP, NRG ENERGY CENTER PITTSBURGH
LLC, AND RELIANT ENERGY NORTHEAST LLC TO THE "MOTION OF DUQUESNE
LIGHT COMPANY TO SEVER FROM THIS BASE RATE PROCEEDING THE RIDER
NO. 18 PORTION OF THE COMPLAINT FILED BY [THE NRG COMPANIES]"**

Dear Secretary Chiavetta:

In accordance with Administrative Law Judge Conrad A. Johnson's March 22 and 25, 2014 e-mails in the above-referenced matter, enclosed for filing with the Commission please find the Answer of NRG Power Midwest LP, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC (the "NRG Companies") to the "Motion of Duquesne Light Company to Sever from this Base Rate Proceeding the Rider No. 18 Portion of the Complaint filed by [the NRG Companies]." All active parties to this proceeding have been served in accordance with the enclosed Certificate of Service.

Please do not hesitate to contact me should you have any questions regarding this filing or require additional information. Thank you for your attention to this matter.

Sincerely,

COZEN O'CONNOR

By: Joshua L. Belcher
Counsel for NRG Power Midwest LP, NRG Energy
Center Pittsburgh LLC, and Reliant Energy Northeast
LLC

JLB:kmg
Enclosure
cc: 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 Answer of NRG Power Midwest LP, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC to Duquesne Light Company's Motion to Sever the Rider No. 18 Portion of the Complaint filed by the NRG Companies, upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

VIA ELECTRONIC & FIRST CLASS MAIL

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separate complaint proceeding as proposed by Duquesne Light. As previously determined by the Honorable Administrative Law Judge Conrad A. Johnson (“Presiding Officer”) in resolving Duquesne Light’s earlier motion to sever, the NRG Companies have lawfully and appropriately raised their issues in the context of the instant base rate investigation proceeding. Indeed, the Pennsylvania Public Utility Commission (“Commission”), in its suspension order, explicitly stated that the entirety of Duquesne Light’s tariff should be examined. That directive has not changed since Duquesne Light’s initial motion to sever was denied.

The severance of the Rider No. 18 issues would cause undue prejudice to the NRG Companies. They have acted entirely within their legal rights and have expended substantial time and resources to defend the numerous procedural attacks by Duquesne Light against their Complaint throughout the course of this base rate investigation (including preliminary objections, a motion to sever, omnibus discovery objections, and a petition for interlocutory review). Now, rather than granting a reasonable extension of the effective date of their rate increase as initially requested by the Presiding Officer, Duquesne Light asks that its interests be chosen over those of the NRG Companies. The NRG Companies respectfully object.

A severance could shift the burden of proof from Duquesne Light to the NRG Companies and would likely lead to substantial delays in relief being granted to NRG. For instance, even if the Presiding Officer issues a timely initial decision in a severed complaint proceeding, there would be no deadline for the Commission to act upon exceptions filed in response to the initial decision. The consideration of the exceptions could linger with the Commission for months or even longer. Such a result would be patently unfair to the NRG Companies.

The NRG Companies nevertheless understand and appreciate the timing dilemma currently being faced by the Presiding Officer, as well as the other parties, and are not entirely unsympathetic. Like other parties, the NRG Companies also want a prompt resolution of their

issues – as the NRG Companies continue to be subject to an unjust, unreasonable, and unduly discriminatory power purchase price under Rider No. 18.

Rather than granting Duquesne Light's Motion to Sever and creating unnecessary due process and delay issues, the NRG Companies respectfully submit that a more appropriate resolution of the current timing dilemma is for the Presiding Officer simply to recommend to the Commission that the Joint Petition for Non-Unanimous Settlement, filed January 16, 2014, ("Non-Unanimous Settlement") be denied insofar as it proposes that the pending investigation be terminated, the matter marked closed, and an order issued terminating the proceeding. *See* Non-Unanimous Settlement, p. 17; *see also* NRG Companies Objections to Non-Unanimous Settlement, dated Jan. 30, 2014. He should further recommend that the investigation be held open (even if other aspects of the Non-Unanimous Settlement are recommended for approval) in order for a subsequent recommended decision to be issued on the Rider No. 18 issues by a date certain and that the Commission itself take action by a date certain. The NRG Companies suggest a date of June 6, 2014, *i.e.* the date to which the Presiding Officer had requested Duquesne Light to suspend its tariff supplement, as an appropriate date by which the Commission should take final action. The NRG Companies would not except to such a recommendation and would hope that Duquesne Light and the other parties likewise would not.

Rather than placing the onus on the Presiding Officer to reject the Non-Unanimous Settlement in part, the NRG Companies suggest that Duquesne Light and the signatories to the Non-Unanimous Settlement, all of whom have a stake in the prompt and fair resolution of this proceeding, could facilitate the timely resolution of this proceeding by filing a revised settlement petition which does not attempt to terminate the investigation proceeding without consideration of the Rider No. 18 issues. The extreme measure of severance of the NRG Companies' Complaint, with all of its potential unintended consequences, is not necessary so long as the

parties cooperate in good faith to find a workable solution through some type of procedural settlement.

The NRG Companies would not oppose a settlement if the Rider No. 18 issues were properly reserved for a subsequent recommended decision by the Presiding Officer and timely action by the Commission. In fact, the NRG Companies would be willing to waive their right to file exceptions if the parties are able to craft a revised settlement that provides for the timely resolution of the Rider No. 18 issues; thereby allowing the recommended decision on the non-Rider No. 18 issues to be considered by the end of the statutory suspension period.

In support of this Answer, the NRG Companies state as follows:

I. BACKGROUND

On Thursday, March 20, 2014, the Presiding Officer requested that Duquesne Light voluntarily postpone the effective date of the company's proposed base rate tariff supplement to June 6, 2014. He explained that postponement would allow additional time in which to render a thorough recommended decision while preserving the time periods for exceptions and replies to exceptions; thereby ensuring that all parties are afforded adequate due process.

On Friday, March 21, 2014, counsel for Duquesne Light responded that the company is unwilling to postpone voluntarily the effective date of its proposed tariff supplement. In the alternative, Duquesne Light proposed that the Presiding Officer either sever issues raised by the NRG Companies or hold them in abeyance, allowing for expedited treatment of the non-contested issues in this case. Duquesne Light also suggested that the period for exceptions and replies to exceptions could be shortened.

On Saturday, March 22, 2014, the Presiding Officer replied that he would entertain a motion to reconsider severing the issues raised by the NRG Companies. The Presiding Officer

stated that any such motion should be filed by 12:00 p.m. on Tuesday, March 25, 2014, and that responses would be due by 12:00 p.m. on Wednesday, March 26, 2014.

On Tuesday, March 25, 2014, Duquesne Light filed its Motion to Sever, requesting that issues raised by the NRG Companies with respect to Duquesne Light's tariff Rider No. 18 – Rate for Purchase of Electric Energy from Customer-Owned Renewable Resources Generating Facilities be (1) fully severed from the base rate investigation proceeding, (2) fully resolved in a separate recommended decision, and (3) decided on the existing record, and that a conference be held with the parties, if necessary, to address procedural issues associated with the severance and to “establish a separate procedure for the Rider No. 18 issues raised in the NRG Companies’ Complaint at Docket No. C-2013-2390562.” Motion to Server, p. 10.

II. ARGUMENT

The NRG Companies recognize that a number of the issues raised in this proceeding involve a certain level of complexity requiring thorough review. Nevertheless, severance of the NRG Companies’ Complaint is not the proper remedy for the current timing dilemma. If the Motion to Sever is granted, the burden of proof could improperly be shifted from Duquesne Light to the NRG Companies and the resolution of the Rider No. 18 issues could be substantially delayed. As indicated in the requested relief of the Motion to Sever, Duquesne Light is already contemplating “a separate procedural schedule for the Rider No. 18 issues.” Motion to Sever, p. 10. However, no “separate procedural schedule” is warranted here. The Rider No. 18 issues have already been extensively litigated and the time has come for a decision.

In resolving Duquesne Light's Motion to Sever, three fundamental principles should be kept in mind. First, the existing investigation proceeding should remain open. Second, there

should be no undue delay in the Commission's resolution of the Rider No. 18 issues. Third, there should be no shifting of the burden of proof from Duquesne Light to the NRG Companies.

No Termination of Investigation

Any approval of the Joint Petition for Non-Unanimous Settlement ("Non-Unanimous Settlement") must not preclude further consideration of the Rider No. 18 issues. Specifically, the Non-Unanimous Settlement requests that the Commission terminate its investigation into this matter, mark the matter closed, and issue an order terminating the proceeding. Non-Unanimous Settlement, p. 17. The Complaint of the NRG Companies, including the Rider No. 18 issues, were properly consolidated with the base rate case, and on December 17, 2013, the Presiding Officer denied the previous motion by Duquesne Light to sever these issues. The correctness of the Presiding Officer's decision is supported by the Commission's decision not to answer Duquesne Light's Petition for Interlocutory Review and Answer to Material Questions, which essentially restated the substantive arguments contained in the company's prior motion to sever. As the Presiding Officer recognized, the Commission saw no reason to preempt the normal review process. Because the Complaint of the NRG Companies is related to and was properly consolidated with the base rate case investigation, and the Commission directed the examination of Duquesne Light's existing tariff provisions, which include Rider No. 18, the Commission's investigation must not be terminated unless and until the issues related to Rider No. 18 have been fully resolved.

The NRG Companies respectfully suggest that the best approach may be for Duquesne Light and the other settling parties to file an amended Non-Unanimous Settlement. Currently, the Non-Unanimous Settlement requests that the existing investigation be terminated, that the matter be marked closed, and the proceeding terminated. Non-Unanimous Settlement, p. 17. An

amended settlement, if approved, could allow the Commission's existing investigation to be held open, while allowing the other provisions of the settlement to go into effect upon the entry of a final order of the Commission. The NRG Companies would not oppose such a settlement and would waive their right to file exceptions should the settlement be recommended for approval by the Presiding Officer; thus preserving precious time for consideration of the recommended decision by the Commission.

To the extent that Duquesne Light and the other settling parties decline to revise the Non-Unanimous Settlement, the Presiding Officer should recommend that the investigation remain open for final Commission action on the Rider No. 18 issues by June 6, 2014. Again, the NRG Companies would be willing to waive exceptions to such a recommended decision.

No Undue Delay

Ultimate resolution of the Rider No. 18 issues by the Commission must not be unduly delayed. While Duquesne Light and the other parties to this proceeding have an interest in a prompt resolution of the issues presented in the Non-Unanimous Settlement, the NRG Companies also have an interest in seeing the Rider No. 18 issues resolved as expeditiously as possible. Each day a final decision on these issues is delayed is another day that an unjust, unreasonable, and unduly discriminatory tariff provision is allowed to continue with the force and effect of law, further subjecting NRG Midwest to an unjust, unreasonable, and unduly discriminatory price for power. As Duquesne Light concedes in its March 21 response to the Presiding Officer's request and in its present Motion to Sever, the Rider No. 18 issues have been fully briefed. Yet, Duquesne Light is still contemplating the establishment of a "separate procedural schedule" in its Motion to Sever. No further hearings or other proceedings are required in order to support a decision on the matter. As such, any delay in resolution of the

Rider No. 18 issues should not result in a final decision being rendered by the Commission on those issues any later than originally anticipated by the Presiding Officer when he made his request to Duquesne Light to extend voluntarily the effective date of its tariff supplement, *i.e.* June 6, 2014. The Presiding Officer should recommend to the Commission that they take final action by that date in order to avoid undue prejudice to the NRG Companies.

No Shifting of Burden of Proof

The severance of the NRG Companies' Complaint could inappropriately shift the burden of proof from Duquesne Light to the NRG Companies on the Rider No. 18 issues. As argued by the NRG Companies, the Commission's Bureau of Investigation & Enforcement and the Office of Consumer Advocate in their respective briefs, a proceeding initiated on motion of the Commission places the burden of proof with respect to both proposed and existing tariff provisions on the utility. 66 Pa. C.S. § 315(a). Because the Commission ordered the present investigation and directed the examination of Duquesne Light's existing tariff provisions, which include Rider No. 18, the burden of proof with respect to Rider No. 18 presently rests with Duquesne Light. At this late stage in the proceedings, if a procedural accommodation to address timing considerations were to shift the burden of proof from one party to another, this would impair the parties' due process. Severance of the Rider No. 18 issues would be wholly inappropriate if, by terminating the Commission's existing investigation, it could shift the burden of proof to the NRG Companies.¹

¹ The burden of proof in a complaint proceeding against a tariff is upon the complainant. See 66 Pa. C.S. § 332(a) ("Burden of Proof").

III. SPECIFIC RESPONSES TO NUMBERED PARAGRAPHS

1. Admitted in part, denied in part. It is admitted that Duquesne Light filed its Supplement No. 81 on August 2, 2013. Supplement No. 81 is a document that speaks for itself. Any interpretation, characterization or quotation thereof is denied. The statement that Duquesne Light's filing was made in compliance with the Commission's regulations is a conclusion of law to which a response is not required. To the extent a response is a required, the statement is denied.

2. Admitted.

3. Admitted.

4. Admitted.

5. It is admitted only that Rider No. 18 establishes the price to be paid for electric power produced by certain Duquesne Light customer generators. The remainder of this paragraph states arguments and conclusions of law to which a response is not required. To the extent a response is a required, the same are denied.

6. Admitted.

7. Admitted.

8. The first two sentences are admitted. The remainder of the paragraph is denied. By way of further response, the NRG Companies agree that severance may be reconsidered, provided that the parties are not denied due process.

9. Admitted.

10. Admitted.

11. Admitted.

12. The NRG Objections to Settlement Petition is a document that speaks for itself. Any interpretation, characterization or quotation thereof is denied.

13. Admitted.

14. Admitted.

15. Admitted.

16. Admitted.

17. The averments in Paragraph 17 consist of argument and conclusions of law to which no response is required. To the extent a response is required, the averments are denied.

18. The averments in Paragraph 18 consist of argument and conclusions of law to which no response is required. To the extent a response is required, the averments are denied.

19. Admitted.

20. The averments in Paragraph 20 consist of argument and conclusions of law to which no response is required. To the extent a response is required, the averments are denied.

21. The averments in Paragraph 21 consist of argument and conclusions of law to which no response is required. To the extent a response is required, the averments are denied.

22. The averments in Paragraph 22 consist of argument and conclusions of law to which no response is required. To the extent a response is required, the averments are denied.

23. Admitted.

24. The averments in Paragraph 24 consist of argument and conclusions of law to which no response is required. To the extent a response is required, the averments are denied.

25. It is admitted that the Presiding Officer requested additional time to issue a recommended decision in this matter. The remaining averments in Paragraph 20 consist of argument and conclusions of law to which no response is required. To the extent a response is required, the averments are denied. The NRG Companies agree that all issues, including the Rider No. 18 issues, should be timely determined.

26. The averments in Paragraph 26 consist of argument and conclusions of law to which no response is required. To the extent a response is required, the averments are denied.

27. The averments in Paragraph 27 consist of argument and conclusions of law to which no response is required. To the extent a response is required, the averments are denied. By way of further response, the NRG Companies reiterate that all of their filings have adhered to the procedural schedule established for this matter. To be clear, it is Duquesne Light that has made every effort to prevent or otherwise stall the resolution of the Rider No. 18 issues. On November 12, 2013, Duquesne Light filed its preliminary objections to the Complaint of the NRG Companies. On December 2, 2013, Duquesne Light objected to the entirety of the NRG Companies' second set of interrogatories and requests for production, forcing the NRG Companies to file a motion to compel. On December 13, 2013, Duquesne Light filed its original motion to sever the Rider No. 18 issues. Also on December 13, 2013, Duquesne Light filed its petition for interlocutory review with the Commission. In every instance, it is Duquesne Light that has attempted to delay proceedings and deny the NRG Companies due process; in every instance, Duquesne Light's attempt has been rejected.

28. The averments in Paragraph 28 consist of argument and conclusions of law to which no response is required. The NRG Companies agree that this Rider No. 18 issues can and should be resolved on the existing record and without further hearings or proceedings.

Severance should be denied. Instead, the investigation should be held open and the parties should be afforded due process upon the subsequent issuance of a recommended decision on the Rider No. 18 issues.

29. The averments in Paragraph 29 consist of argument and conclusions of law to which no response is required. Again, the NRG Companies are entitled to the due process that has been promised to them as a result of their participation in this base rate investigation.

IV. CONCLUSION

In light of the foregoing, the NRG Companies oppose a severance of its Complaint from the instant investigation as requested by Duquesne Light. The Presiding Officer should recommend, or the parties could agree, that any approval of the Non-Unanimous Settlement should not terminate the Commission's existing base rate case investigation into Duquesne Light's tariff or otherwise preclude consideration of the Rider No. 18 issues in the context of a *continuing* investigation. The burden of proof should not be shifted from Duquesne Light to the NRG Companies. The Rider No. 18 issues should be promptly decided based upon the existing record without further hearings or other proceedings and in sufficient time for the Commission to issue a final order by June 6, 2014.

WHEREFORE, for the foregoing reasons, the NRG Companies respectfully request that the Presiding Officer:

- (a) Deny Duquesne Light's Motion to Sever;
- (b) Recommend in his recommended decision that the Non-Unanimous Settlement be disapproved insofar as it recommends termination of the base rate case investigation without resolution of the NRG Companies' Rider No. 18 issues;

(c) Recommend in his recommended decision that the Rider No. 18 issues be addressed through a subsequent recommended decision in the instant base rate investigation (as opposed to consideration in a separate complaint proceeding) based on the existing record; and,

(d) Recommend in his recommended decision that the Commission take action on the subsequent recommended decision regarding Rider No. 18 issues by no later than June 6, 2014.

Respectfully submitted,

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DATED: March 26, 2014