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March 25, 2014

VIA E-MAIL & REGULAR MAIL

Honorable Conrad A. Johnson
Administrative Law Judge
PA Public Utility Commission
Suite 220, Piatt Place
301 Fifth Avenue
Pittsburgh, PA 15222

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

Dear Judge Johnson:

Enclosed please find the Motion of Duquesne Light Company to Sever from this Base Rate Proceeding the Rider No. 18 Portion of the Complaint Filed by NRG Power Midwest LP, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC in the above-referenced proceeding. Copies will be provided as indicated on the Certificate of Service.

Respectfully submitted,


Michael W. Gang

MWG/skr

cc: Certificate of Service
Rosemary Chiavetta, Secretary

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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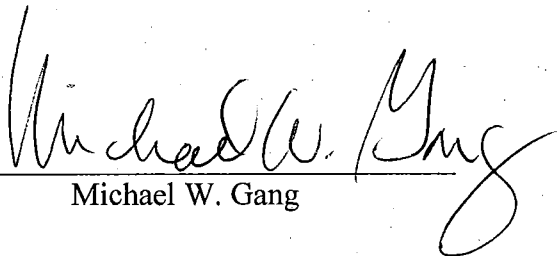
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Date: March 25, 2014



Michael W. Gang

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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

TO ADMINISTRATIVE LAW JUDGE CONRAD A. JOHNSON:

Duquesne Light Company (“Duquesne Light”) hereby files this Motion to Sever the Rider No. 18 portion of the Complaint filed by NRG Power Midwest LP (“NRG Midwest”), NRG Energy Center Pittsburgh LLC (“NRGP”), and Reliant Energy Northeast LLC (“REN”) (collectively the “NRG Companies”) from the above-captioned retail base rate proceeding pursuant 52 Pa. Code § 5.103. All parties to this proceeding, except the NRG Companies, fully settled all issues presented in this base rate proceeding, except those raised by the NRG Companies. During this proceeding, the NRG Companies’ Complaint challenged, among other things, Duquesne Light’s Tariff Rider No. 18 – Rate for Purchase of Electric Energy from Customer-Owned Renewable Resources Generating Facilities (hereinafter “Rider No. 18”). The Rider No. 18 issues raised in the NRG Companies’ Complaint are novel and complex, and the ALJ has indicated that it would be difficult to fully address and decide these issues within the nine-month suspension period for this retail base rate proceeding. In addition, these Rider No.

18 issues are not related to the base rate case and can be fully separated and independently decided without impacting the effective date of new base rates on May 1, 2014.

For the reasons explained below, Duquesne Light submits that it is appropriate, equitable, and an efficient use of resources to: (1) fully sever the Rider No. 18 portion of the NRG Companies' Complaint from the base rate case; (2) fully resolve the Rider No. 18 portion of the Complaint in a recommended decision that is separate and apart from the base rate case recommended decision; (3) decide the Rider No. 18 issues on the existing record; and (4) if necessary, hold a conference with the parties to address any questions and establish a separate procedural schedule for the Rider No. 18 issues raised in the NRG Companies' Complaint. In support thereof, Duquesne Light avers the following:

I. BACKGROUND

1. On August 2, 2013, Duquesne Light filed with the Pennsylvania Public Utility Commission ("Commission") Supplement No. 81 to Duquesne Light's Tariff – Electric Pa. P.U.C. No. 24 ("Supplement No. 81"). Supplement 81, issued to be effective October 1, 2013, proposes changes to Duquesne Light's base retail distribution rates designed to produce an increase in revenues of approximately \$76.3 million, based upon data for a fully projected future test year ending April 30, 2015. The filing was made in compliance with the Commission's regulations and contains all supporting data and testimony required to be submitted in conjunction with a tariff change seeking a general rate increase.

2. On September 26, 2013, the Commission opened an investigation of Duquesne Light's proposed rate increase and suspended the effective date of that increase by operation of law from October 1, 2013, until May 1, 2014, unless permitted by Commission Order to become effective at an earlier date.

3. A Prehearing Conference was held on October 4, 2013, before Administrative Law Judge Conrad A. Johnson (the "ALJ"). A procedural schedule was adopted and issued in a Prehearing Order issued October 22, 2013, with certain modifications to the Commission's procedures for formal discovery.

4. On October 31, 2013, Duquesne Light was served by the Commission with the Formal Complaint filed the NRG Companies at Docket No. C-2013-2390562, which challenged, among other things, Duquesne Light's Tariff Rider No. 18.

5. Duquesne Light's Tariff Rider No. 18 establishes the rates to be paid for power produced by certain specified categories of qualifying facilities ("QFs") pursuant to Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. §§ 824, *et seq.*

6. On November 12, 2013, Duquesne Light filed an Answer to the NRG Complaint. Also on November 12, 2013, Duquesne Light filed Preliminary Objections raising the following three objections to the portions of the NRG Complaint pertaining to Rider No. 18: (1) it is beyond the scope of this base rate proceeding; (2) it failed to join parties indispensable to its claims regarding the PURPA rates paid under Rider No. 18; and (3) the relief requested is beyond the scope of the Commission's jurisdiction. On December 12, 2013, the ALJ issued an Order denying Duquesne Light's Preliminary Objections to portions of the NRG Complaint.

7. On December 13, 2013, Duquesne Light filed a Petition for Interlocutory Review and Answer to Material Questions, pursuant to 52 Pa. Code § 5.302, requesting that the Commission direct that the NRG Companies' Complaint be: (1) dismissed for lack of jurisdiction to grant the relief requested; (2) alternatively, dismissed without prejudice to refile and joining all necessary/indispensable parties; or (3) alternatively, sever the Complaint from the base rate case so that these issues may be fully addressed by all necessary parties. On

February 6, 2014, the Commission issued an Opinion and Order declining to address Duquesne Light's Petition for Interlocutory Review and Answer to Material Questions.

8. On December 13, 2013, Duquesne Light also filed a "Motion to Sever from this Base Rate Proceeding the Rider No. 18 Portion of the NRG Complaint" requesting, among other relief, that the Rider No. 18 portion of the NRG Companies' Complaint be fully severed and resolved in a proceeding that is separate and apart from the base rate case. At the evidentiary hearing on December 17, 2014, the ALJ declined to sever the Rider No. 18 portion of the NRG Complaint. (TR. 191.) In his ruling, the ALJ did not have the opportunity to review the parties' arguments regarding Rider No. 18, which were fully developed and submitted in briefs filed after the evidentiary hearing. It is appropriate for the ALJ to now reconsider the request to sever the NRG Complaint given the novelty and complexity of the Rider No. 18 arguments presented by the parties in their briefs and the pending close of the suspension period.¹

9. All parties to this proceeding, except the NRG Companies, fully settled all issues presented in this base rate proceeding, except those raised by the NRG Companies. As a result, the NRG Companies' Rider No. 18 issues were fully litigated in this proceeding.

10. Evidentiary hearings were held before the ALJ on December 16, 17, and 20, 2013. At the hearings, the parties advised the ALJ that all parties other than the NRG Companies had achieved a settlement of all base rate issues, and that the only issues remaining to be decided are those raised by the NRG Companies. At the hearing, the parties' respective

¹ Duquesne Light's Motion to Sever is not barred by the doctrines of technical *res judicata* (claim preclusion) or collateral estoppel (issue preclusion) because there has not been a final adjudication of the facts or law regarding the Rider No. 18 issues. See *PMA Insurance Group v. Workmen's Compensation Appeal Board (Kelley)*, 665 A.2d 538 (Pa. Cmwlth. 1995) (technical *res judicata*, or claim preclusion, prevents a future suit between the same parties on the same cause of action after final judgment is entered on the merits of the action); see also *Fiore v. Commonwealth of Pennsylvania (Department of Environmental Resources)*, 508 A.2d 371, 374 (Pa. Cmwlth. 1986) (collateral estoppel, or issue preclusion, prevents re-litigation of an issue of fact or law between the same parties upon a different claim or demand).

testimony and exhibits were admitted into the evidentiary record. Certain parties' witnesses were cross-examined on the issues raised by the NRG Companies.

11. On January 16, 2014, a Joint Petition for Approval of Non-Unanimous Settlement was filed by Duquesne Light, the Bureau of Investigation and Enforcement ("I&E") of the Pennsylvania Public Utility Commission ("Commission"), the Office of Consumer Advocate ("OCA"), the Office of Small Business Advocate ("OSBA"), the Coalition for Affordable Utility Service and Energy Efficiency in Pennsylvania ("CAUSE-PA"), Duquesne Industrial Intervenors ("DII"),² Citizens for Pennsylvania's Future ("PennFuture") and United States Steel Corporation ("U. S. Steel"). Other parties in this proceeding, including the Community Action Association of Pennsylvania ("CAAP"), Citizen Power, Inc. ("Citizen Power"), Interstate Gas Supply, Inc. ("IGS"), International Brotherhood of Electrical Workers, Local 29 ("IBEW"), and Beaver Falls Municipal Authority ("Beaver Falls") all indicated that they do not oppose the Settlement.

12. The NRG Companies were the only active party to oppose the Settlement. The NRG Companies objected to the Settlement because it did not resolve the Rider No. 18 issues. (*See* NRG Objections to Settlement Petition, objecting to the Settlement on the basis that it did not resolve the Rider No. 18 issues; *see also* NRG Reply Brief at p. 3, stating that the NRG Companies do not address any non-Rider No. 18 issues.)

13. The Settlement fully resolves all of issues presented in this base rate proceeding, except those raised by the NRG Companies. The NRG Companies are the only active parties to oppose the Settlement.

14. The Settlement and the fully litigated Rider No. 18 issues currently are pending before the ALJ for adjudication.

² WHEMCO Inc./WHEMCO-Steel Castings, Inc. has participated in this proceeding as a member of DII, however, for purposes of the Joint Petition for Approval of Non-Unanimous Settlement, WHEMCO Inc./WHEMCO-Steel Castings, Inc. elected status as a non-objecting party.

15. In an electronic correspondence dated March 20, 2014, the ALJ advised the parties that the complex Rider No. 18 issues cannot be thoroughly addressed by the ALJ and the Commission, including sufficient time for exceptions and reply exceptions, within the nine-month suspension period for the base rate case. In a subsequent electronic communication dated March 22, 2013, the ALJ advised the parties that he would be willing to reconsider Duquesne Light's motion to sever the NRG Companies' Rider No. 18 issue from the base rate case proceeding.

16. The ALJ directed that any motion to sever must be filed by 12:00 p.m. on March 25, 2014, and that any response or objection thereto must be filed by 12:00 p.m. on March 26, 2014.

17. Duquesne Light herein files this Motion to Sever. For the reasons explained below, Duquesne Light respectfully requests that the NRG Companies' Complaint as to the Rider No. 18 issues be fully severed from the base rate case to allow a timely decision on the proposed base rate increase as set forth in the proposed Settlement, and that the Rider No. 18 issues be fully resolved in the severed Complaint proceeding based on the existing record.

II. ARGUMENT

18. Through this Motion, Duquesne Light is seeking to facilitate the entering of a final order concerning the Company's proposed base rate increase as set forth in the proposed Settlement within the suspension period under Section 1308(d) of the Public Utility Code, 66 Pa.C.S. § 1308(d). Duquesne Light is not seeking and does not support any delay in the final disposition of the base rate proceeding. This Motion to Sever is limited solely to the Rider No. 18 issues raised by the NRG Companies and has no impact on the base rate increase as set forth in the proposed Settlement pending for disposition. Further, this Motion is expressly contingent

on no extension of the suspension period for the base rate case proceeding and the timely decision of the base rate case proceeding.

19. The NRG Companies argue that Rider No. 18 is unjust and unreasonable because it is no longer consistent with Pennsylvania statutory law and the current regulatory scheme in Pennsylvania. (NRG MB, pp. 6, 9-10.) 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 day-ahead locational marginal price (“DALMP”) in the Duquesne Zone. (NRG MB, p. 15.)

20. Duquesne Light’s Tariff Rider No. 18 establishes the rates to be paid for power produced by certain specified categories of QFs pursuant to PURPA. Under PURPA, public utilities are required to purchase all electricity produced by independent power producers that obtain status as qualifying facilities. Electric utilities are required to purchase electricity from qualifying facilities at rates that are just and reasonable to the electric utility, in the public interest, and which do not discriminate against the qualifying facilities. 16 U.S.C. § 824a-3(b); 18 C.F.R. §§ 292.304(a)(1)(i), (ii).³

21. As explained in Duquesne Light’s Main Brief, the rates paid pursuant to Rider No. 18 have no impact on the base distribution rates paid by Duquesne Light’s retail customers, the distribution revenues received by Duquesne Light, or the distribution services provided to Duquesne Light’s customers because the NRG Companies have assumed Duquesne Light’s obligations under the QF agreements as part of Duquesne Light’s divestiture of its generation

³ Under the regulations of the Federal Energy Regulatory Commission (“FERC”) implementing PURPA, the rate a qualified facility is to receive for the sale of its electricity is the “avoided cost” rate. 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). Importantly, however, the FERC and Commission regulations expressly provide that qualifying facilities and electric utilities are permitted to enter negotiated agreements for rates and terms different from those called for in the regulations. 18 C.F.R. § 292.301(b)(1).

assets in 2000 pursuant to Electricity Generation Customer Choice and Competition Act (“Competition Act”), P.L. 802, No. 138, effective January 1, 1997, 66 Pa.C.S. §§ 2801-2812. (See Duquesne Light MB, pp. 51-52.) For this reason alone, the Rider No. 18 issues raised in the NRG Companies’ Complaint should be severed from the base rate proceeding for purposes of a decision.⁴

22. Moreover, the novel and complex issues related to Rider No. 18 cannot be fully addressed and decided within the nine-month suspension period for the base rate case proceeding.

23. On September 26, 2013, the Commission issued an order suspending Duquesne Light’s proposed base rate increase for a period of nine-months. Consequently, Duquesne Light’s proposed base rate increase will become effective on May 1, 2014.

24. Any delay in the timely issuance of a recommended decision in the base rate case proceeding clearly will jeopardize the Commission’s ability to fully review and rule upon the pending base rate increase as set forth in the proposed Settlement within the nine-month suspension period. If the Commission does not enter a final order on or before May 1, 2014, Duquesne Light’s “as-filed” base rate increase and rates would become effective on May 1, 2014, rather than the settled rates. 66 Pa.C.S. § 1308(d).

25. The ALJ has indicated that he requires additional time to decide the Rider No. 18 issues presented in this proceeding. Duquesne Light agrees that the issues presented in the NRG Complaint are novel and complex. Duquesne Light therefore does not oppose an additional period of time for a decision on the Rider No. 18 issues as long as it does not impact the timely determination of the issues settled in the base rate case.

⁴ See also Paragraph 12, *supra*.

26. Rather than trying to decide the NRG Companies' novel and complex non-base rate issues within the nine-month suspension period for the pending base rate case, the Rider No. 18 portion of the NRG Companies' Complaint should be severed from this base rate case for purposes of a decision. This will permit additional time to address the Rider No. 18 issues without jeopardizing the timely resolution of the base rate increase as set forth in the proposed Settlement.

27. It is anticipated that the NRG Companies will contend that they may be harmed if the Rider No. 18 issues are severed from the base rate proceeding and not decided within the nine-month suspension period. However, any so-called harm caused by any delay in reaching a decision on the merits of the Rider No. 18 issues is due solely to the actions of the NRG Companies. The above-captioned base rate case was initiated on August 2, 2013, when Duquesne Light filed and served Supplement No. 81. However, the NRG Companies elected to wait for three months before intervening in this proceeding on October 31, 2013. Further, the NRG Companies raised complex and novel issues that are not related to the proposed increase in distribution rates for retail customers, and should have been presented in a separate complaint proceeding.

28. The Rider No. 18 issues raised in the NRG Companies' Complaint can be fully severed and decided on the existing record.⁵

29. Severing the Rider No. 18 portion of the NRG Companies' Complaint is a reasonable, equitable, efficient, and appropriate remedy that will allow the base rate case issues to be fully considered by the Commission within the suspension period, while, at the same time, fully preserving the parties' Rider No. 18 issues.

⁵ The arguments fully developed and briefed by the parties on all issues in this proceeding can and should be preserved and fully decided in the severed Complaint proceeding without prejudice to any party.

III. CONCLUSION

WHEREFORE, Duquesne Light Company respectfully requests that Administrative Law Judge Conrad A. Johnson grant, in an expedited manner, this Motion to Sever and enter an appropriate order directing the following:

- (1) Sever the Rider No. 18 portion of the NRG Companies' Complaint at Docket No. C-2013-2390562 from the base rate case at Docket No. R-2013-2372129;
- (2) Resolve the Rider No. 18 portion of the Complaint in a recommended decision that is separate and apart from the base rate case recommended decision;
- (3) Decide the Rider No. 18 issues based on the existing record; and
- (4) If necessary, hold a conference with interested parties to address any questions and establish a separate procedural schedule for the Rider No. 18 issues raised in the NRG Companies' Complaint at Docket No. C-2013-2390562.

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Date: March 25, 2014

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