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June 19, 2014

VIA HAND DELIVERY

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 Proprietary and Non-Proprietary Exceptions of Duquesne Light Company to the Recommended Decisions issued on June 4, 2014 in the above-referenced proceeding. Only parties who have signed the Stipulated Protective Agreement and/or the Non-Disclosure Certificate will receive a copy of the Proprietary version. Copies of the Non-Proprietary version will be provided to all parties as indicated on the Certificate of Service.

Respectfully submitted,

Michael W. Gang

MWG/skr
Enclosure

cc: Certificate of Service
Honorable Conrad A. Johnson

NON-PROPRIETARY VERSION

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission	:	R-2013-2372129
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	:	

EXCEPTIONS OF DUQUESNE LIGHT COMPANY

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Date: June 19, 2014

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I. INTRODUCTION

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, proposed 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.

On October 31, 2013, Duquesne Light was served by the Commission with the Formal Complaint jointly filed by the NRG Power Midwest, LP ("NRG Midwest"), NRG Energy Center Pittsburgh LLC ("NRGP"), and Reliant Energy Northeast LLC ("REN") (collectively the "NRG Companies") at Docket No. C-2013-2390562 ("NRG Complaint"). The NRG Companies 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").[1]

All active parties to this base rate case, other than the NRG Companies, achieved a settlement or agreed not to oppose the settlement on all issues raised in this base rate proceeding, except those raised by the NRG Companies (the "Settlement"). On April 23, 2014, the Commission issued an Opinion and Order that adopted the Recommended Decision of Administrative Law Judge Conrad A. Johnson ("ALJ"), approved the Settlement without modification, held the Rider No. 18 issues in abeyance for resolution in a separate

[1] Duquesne Light's Rider No. 18 establishes the rates to be paid for 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.* (Duquesne Light St. No. 12-R, p. 19.) 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)

Recommended Decision, and held as a matter of law that the NRG Companies, as the party challenging a previously-approved tariff provision, bear the burden to demonstrate the Commission's prior approval with respect to Rider 18 is no longer justified.

By Secretarial letter dated June 4, 2014, the ALJ issued a Recommended Decision on the NRG Companies' Rider No. 18 issues ("RD"). Therein, the RD concluded that the Commission has jurisdiction to modify or eliminate the wholesale PURPA rates set forth in Rider No. 18, and that the two qualifying facilities ("QFs") subject to Rider No. 18 are not necessary and indispensable parties to the claims and relief sought by NRG.[2] (RD, pp. 30-31.) The RD found that the NRG Companies met their burden to demonstrate that the six cents per kilowatt-hour PURPA rate is no longer compliant with the Commission's regulatory scheme. (RD, p. 40.) The RD therefore recommended that Rider No. 18 be eliminated in its entirety from Duquesne Light's tariff or, alternatively, that Duquesne Light file a tariff supplement with a revised PURPA rate for the Commission's consideration. (RD, p. 40.)

Pursuant to 52 Pa. Code § 5.533 and the Secretarial Letter dated June 4, 2014, Duquesne Light hereby files these Exceptions to the RD on the Rider No. 18 issues. As explained below, the RD erred in finding that the NRG Companies met their burden to prove that the Rider No. 18 rate is unreasonable and that Rider 18 should be eliminated or replaced. The RD largely disregarded the substantial, credible evidence in this case demonstrating that the six cent rate in Rider No. 18 continues to be just, reasonable, and in the public interest and improperly concludes that NRG Companies have met their burden of proof. The RD also erred in concluding that the Commission has authority to modify or eliminate the previously-approved wholesale PURPA rate set forth in Rider No. 18. The RD further erred in finding that the QFs that will be directly

[2] One QF, Beaver Falls Municipal Authority ("Beaver Falls") filed a Petition to Intervene on December 16, 2013. *Beaver Valley Power Company ("Beaver Valley"), the other QF subject to Rider No. 18, has not filed a* Petition to Intervene, been joined, or otherwise participated in this proceeding.

impacted by the modification or elimination of the PURPA rates set forth in Rider No. 18 are not necessary and indispensable parties. Finally, the remedies recommended in the RD fail to provide a complete remedy and disregard Duquesne Light's continuing obligations under PURPA which remain in full force and effect.

For these reasons, as more fully explained below and in Duquesne Light's Main Brief ("MB")[3] and Reply Brief ("RB"), which are incorporated herein, the findings and recommendations in the RD should be rejected and the NRG Complaint should be dismissed.[4]

II. EXCEPTIONS

A. EXCEPTION No. 1 - The NRG Companies failed to meet their burden of proving that Rider No. 18 should be eliminated or that its six cent rate is an unreasonable long-term avoided cost rate.

The RD concluded that the NRG Companies met their burden to demonstrate that the six cents per kilowatt-hour PURPA rate is no longer just and reasonable. Specifically, the RD found that the six cents per kilowatt-hour PURPA rate set forth in Rider No. 18 is almost double what is available in the open market. (RD, pp. 36-37) The RD also found that the six cents per kilowatt-hour PURPA rate is no longer compliant with the Commission's regulatory scheme. (RD, pp. 38-39.) Finally, the RD found that the six cents per kilowatt-hour PURPA rate set forth in Rider No. 18 is no longer reasonable because the power purchase agreements ("PPAs") with the QFs **[BEGIN CONFIDENTIAL]** **[END**

[3] Duquesne Light notes that it inadvertently identified its Main Brief as an "Initial Brief" contrary to 52 Pa. Code § 5.502(d), which provides that "Main Briefs" are filed in rate cases. For the sake of clarity, Duquesne Light's reference to its "Main Brief in these Exceptions refers to the mislabeled "Initial Brief" filed in this matter.

[4] Consistent with 52 Pa. Code § 5.33(c), the statements of reasons supporting Duquesne Light's Exceptions will avoid repeating portions of the record and arguments previously addressed in its Main and Reply Briefs and, instead, will incorporate and cross-reference the relevant portions of its Briefs.

CONFIDENTIAL]. (RD, p. 39.) The findings in support of the RD's conclusion that NRG met its burden of proof are not supported by substantial, credible evidence.[5]

To meet their burden to demonstrate that the six cents per kilowatt-hour PURPA rate is no longer reasonable, the NRG Companies relied solely on a comparison of the long-term levelized six cent rate to current hourly spot market prices, *i.e.*, the PJM Interconnection, LLC Day Ahead Locational Marginal Price ("DALMP"). However, the NRG Companies offered no support for the proposal that the DALMP is as an appropriate proxy for Duquesne Light's long-term avoided cost under PURPA. In fact, the NRG Companies' own witness specifically and repeatedly declined to state on cross examination that the DALMP equates to avoided costs under PURPA.[6] (Tr. 322-328.)

The DALMP rate is a very short term price, *i.e.*, a daily, spot market price. The avoided cost rate under PURPA by contrast is a long-term rate. 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 at the time Rider 18 was adopted was specifically and intentionally selected and approved by the Commission to help achieve this policy under PURPA. FERC regulations specifically provide that a PURPA rate in a long-term contract is not unjust or unreasonable because it is higher than "avoided costs" at the time the power is delivered. *See* 18 C.F.R. § 292.303(d). The fact that DALMP, a current spot price,

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[5] It is well-established that any finding in this case must be supported by and based upon substantial evidence of record. *Met-Ed Indus. Users Group v. Pa. PUC*, 960 A.2d 189, 193 n.2 (Pa. Cmwlth. 2008) (citing 2 Pa.C.S. § 704).

[6] The RD found that the NRG Companies' witness credibly testified that six cent per kilowatt hour rate in Rider No. 18 is no longer reasonable in today's market because she had more than 25 years of experience in the power industry. (RD, p. 36.) However, the NRG Companies' witness was unable or refused to answer many questions regarding the purchase and sale of power, avoided costs, PURPA, and the regulatory scheme in Pennsylvania. (*See, e.g.*, Tr. 322-328, 380-381, 399-400, 402-04.) Further, the NRG Companies' own witness admitted on cross-examination that they own a large number of generating facilities in addition to the qualifying facility contracts. (Tr. 395-96.) The NRG Companies own substantial generation in PJM. Nevertheless, the NRG Companies presented no evidence of the avoided cost of generation.

averaged three cents over the last three years prior to this case provides no credible evidence that the six cent long-term rate in Rider No. 18 is unreasonable or does not reflect Duquesne Light's long-term avoided cost. (*See* Duquesne Light MB, Section III.B.2.a.iii.) The NRG Companies therefore clearly did not meet their burden of proof, and their Complaint should be rejected.[7]

The RD also found 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, the RD largely disregards the fact that PURPA and the obligation to purchase power from qualifying facilities are federal statutory requirements that remain in effect. Unless Duquesne Light receives 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 remains obligated to purchase power from the two qualifying facilities under PURPA. Although the RD is correct that the Commission's policy in the Competition Act and the AEPS Act is to promote competition in the wholesale and retail markets, the Commission's policy cannot preempt federal law under PURPA, or its underlying policy to encourage the development and maintenance of alternative energy sources. Indeed, to the extent that there was a "conflict" between the federal policy in PURPA and state policy in the Competition Act or the AEPS Act, PURPA would control under the Supremacy Clause of the United States Constitution. U.S. Const, art. VI, cl. 2. (*See* Duquesne Light MB, Sections III.B.2.a.i and III.B.2.a.ii; Duquesne Light RB, Section IV.B.1.)

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[7] The RD cites *City of Pittsburgh v. Duquesne Light Co.*, Docket No. C-871584, 68 Pa.PUC 273 (1988), noting that Duquesne Light contended that the City of Pittsburgh facilities should not be eligible for Rider 18 in 1987, as acknowledgment that the Rider 18 rate was excessive. However, the Commission, in this case, granted the City access to the rate on a grandfathered basis concluding that the Commission's prior approval of the rate was conclusive as to the justness and reasonableness of the rate. 68 Pa. PUC at 277.

The RD also erred in finding that the NRG Companies met their burden to demonstrate that the six cents per kilowatt-hour PURPA rate set forth in Rider No. 18 is no longer reasonable because the PPAs with the two remaining QFs **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]**. According to the RD, because **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]**, the PURPA purchase rates must be "as available" purchase rates rather than PURPA purchase rates pursuant to a "legally enforceable obligation." (RD, p. 39.) As explained below, the RD's finding is without evidentiary support.

As a preliminary matter, the RD's finding should be rejected because it adopts a position that was not advocated by the NRG Companies, or any other party, in support of their contention that the six cents per kilowatt-hour PURPA rate set forth in Rider No. 18 is no longer reasonable. Indeed, nowhere in any of the NRG Companies' briefs or testimony do they state that the six cents per kilowatt-hour PURPA rate set forth in Rider No. 18 is no longer reasonable because the PPAs with the two remaining QFs **[BEGIN CONFIDENTIAL]**

[END CONFIDENTIAL], nor do they contend that the purchase rates in the PPAs should be construed to be "as available" purchase rates.

Further, the ALJ's finding completely disregards that the PPAs are, in fact, negotiated contracts for the wholesale purchase of power, *i.e.*, "legally enforceable obligations." The negotiated PPAs clearly provide that the specific price to be paid for the net power produced by these QFs is subject to the terms and conditions of Duquesne Light's Commission-approved Rider No. 18. (*See* Duquesne Light MB, Section III.B.1.) The fact that the PPAs **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** does not somehow

convert the specific price term negotiated in the PPAs (*i.e.*, the rate set forth in Rider No. 18) from a "legally enforceable obligation" to an "as available" purchase rate.[8]

Based on the foregoing, the RD erred in finding that the NRG Companies met their burden to demonstrate that the six cents per kilowatt-hour PURPA rate is no longer just and reasonable because the NRG Companies presented no competent evidence as to avoided cost.

B. EXCEPTION No. 2 - The RD largely ignored the substantial, credible evidence in this case demonstrating that the six cent rate in Rider No. 18 continues to be just, reasonable, and in the public interest.

In support of its conclusion that the NRG Companies met their burden of proof, the RD found that "Duquesne Light did not present any credible evidence to rebut, in essence, NRG's prima facie case." (RD, p. 40.) This finding in the RD, however, is directly contrary to the actual evidence admitted to the record in this case. Indeed, the RD largely disregarded the substantial, credible evidence in this case demonstrating that the six cent rate in Rider No. 18 continues to be just, reasonable, and in the public interest.

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. 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 MB, Section III.B.2.b.) Specifically, the Company noted the Default Service rates were within the range of 5 to 7 cents per kWh over the past decade. (Tr. 237-38.) Further, the Default Service rates reflect the costs of Duquesne Light's purchases of power and is evidence of avoided cost.

[8] FERC has determined that PURPA permits "lock-ins," that is, long-term, fixed-rate contracts with qualifying facilities. *See In re West Penn Power Company*, 71 F.E.R.C. P61,153 (order denying petition for declaratory order, May 8, 1995). Further, FERC's regulations provided that where the power purchase rates are based upon estimates of avoided costs over the specific term of a contract or other legally enforceable obligation, the rates for such purchases do not violate PURPA if they differ from the avoided costs at the time of delivery. 18 C.F.R. § 292.304(b)(5). *See also New York State Elec. & Gas Corp.*, 71 FERC 61,027 (1995) (declining to find a contract in violation of PURPA where the rates based on avoided cots at the time the contract obligation was incurred exceed the current avoided cost rate).

Notably, the evidence introduced by Duquesne Light was not refuted or otherwise contested by the NRG Companies in responsive testimony.

The RD failed to acknowledge or give any credence to the unrefuted evidence introduced by Duquesne Light. Further, there is no basis or explanation in the RD as to why Duquesne Light's unrefuted evidence was not credible evidence of long term avoided cost, nor did the RD provide any explanation as to why it should not be considered. Similarly, there is nothing in the RD to suggest that Duquesne Light's unrefuted evidence was outweighed by the evidence submitted by the NRG Companies.[9]

Based on the foregoing, the RD erred by failing to consider and weigh the unrefuted evidence introduced by Duquesne Light that the six cent per kilowatt-hour rate in Rider No. 18 continues to be just, reasonable, and in the public interest. Accordingly, the Commission should not adopt the RD's analysis and findings and, instead, should fully consider all the evidence of record and make appropriate findings and conclusion based on the credible and substantial evidence of record.[10]

C. EXCEPTION No. 3 – The RD erred in concluding that the Commission has authority to modify or eliminate the previously-approved wholesale PURPA rate set forth in Rider No. 18.

In this case, there was substantial dispute over whether the Commission has the authority to modify or eliminate the previously-approved wholesale PURPA rate set forth in Rider No. 18

[9] 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). Accordingly, in order to meet their burden and in order for relief to be granted, the NRG Companies had to introduce substantial evidence of record as to long term avoided cost and that evidence had to be more convincing than the evidence presented by Duquesne Light. *Samuel J. Lansberry, Inc. v Pa. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990); *Brown v. Commonwealth of Pa.*, 940 A.2d 610, 614 n.14 (Pa. Cmwlth. 2008). As explained previously, the NRG Companies submitted only evidence concerning recent spot prices.

[10] The Commission, not the administrative law judge, is the ultimate finder of fact and arbiter of credibility. 66 Pa.C.S. §§ 335(a), 703(e).

as requested by the NRG Companies. The RD found that the Commission has the authority to modify or eliminate the previously-approved wholesale PURPA rate set forth in Rider No. 18 because: (i) the Commission did not approve the PPAs between Duquesne Light and the QFs, and the PURPA rate is not set forth in the PPAs (RD, p. 29); (ii) the PPAs at issue **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** (RD, p. 29); (iii) the Commission has previously approved changes to avoided costs (RD, pp. 29-30); (iv) Duquesne Light "admitted" on cross-examination that it could amend the PURPA rate in Rider No. 18 by submitting a supplemental tariff filing (RD, p. 31); and (v) it is the Commission's policy to promote competition in the wholesale and retail markets (RD, p. 39). For the reasons explained below, the RD erred in concluding that the Commission has authority to modify or eliminate the previously-approved wholesale PURPA rate set forth in Rider No. 18.

As a preliminary matter, Duquesne Light notes that the Commission need not reach the issue of its authority and jurisdiction to modify or eliminate the previously-approved wholesale PURPA rates in this proceeding, a decision that clearly would have state-wide impact and which would require the interpretation and application of federal law. As explained above, the NRG Companies failed to meet their burden to demonstrate by a preponderance of the evidence that the wholesale PURPA rate set forth in Rider No. 18 is no longer just and reasonable. Therefore, the Commission can and should dismiss the NRG Companies' complaint without reaching the merits of the Commission's authority and jurisdiction under PURPA. In the event that the Commission finds that the NRG Companies met their burden of proof, which Duquesne Light denies for the reasons explained above, the Commission should find that the RD erred in concluding that the Commission has authority to modify or eliminate the previously-approved wholesale PURPA rate set forth in Rider No. 18.

Under PURPA, state regulatory authorities were granted a very important but very limited role with respect to certain wholesale power purchase agreements -- to set the "avoided costs" rate to be paid to qualifying facilities pursuant to PURPA. However, once a state regulatory commission establishes the "avoided cost" to be paid, the state no longer has authority to regulate the qualifying facilities' rate. *See Freehold Cogeneration Assocs., L.P. v. Board of Regulatory Comm'rs*, 44 F.3d 1178, 1194 (3d Cir. 1995) (holding that any action by the state to reconsider its approval or to deny PURPA rates set forth in a power purchase agreement between qualifying facility and the electric utility was preempted by federal law).[11] (*See* Duquesne Light MB, Section III.B.3; Duquesne Light RB, Section IV.B.1.)

The RD found that the Third Circuit's holding in *Freehold* and the federal preemption under PURPA do not apply in this case because the Commission did not approve the PPAs between Duquesne Light and the QFs, and the PURPA rate is not set forth in the PPAs. (RD, p. 29.) However, the RD overlooks that Rider No. 18 was adopted to establish the rates to be paid for the wholesale power produced by qualifying facilities pursuant to PURPA, and that the Commission approved Rider No. 18, including the wholesale PURPA rate, in 1981. The PPAs at issue expressly incorporate the PURPA rate established by Duquesne Light's Commission-approved tariff. Thus, although the Commission did not technically approve the PPAs in this case, the Commission did in fact approve the avoided cost PURPA rate used in the PPAs. Further, in 1987, the Commission fully approved the continuation of the six cent PURPA rate for

[11] *See also West Penn Power Co. v. Pa. PUC*, 659 A.2d 1055, 1066 (Pa. Cmwlth. 1995) (explaining that "Section 210 of PURPA preempts the [Commission] from reconsidering its prior approval of the [power purchase agreements] between West Penn and the QFs or to change the rates established for the avoided costs at the time of the agreements"); *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 *11-15, 66 Pa. PUC 151 (Jan. 21, 1988) ("*Scrubgrass I*") ("If this Commission would, in the future, attempt to deprive a QF of the revenue stream to which it was entitled, or would attempt to deprive the utility of its corresponding entitlement to rate recovery of this stream of revenues under color of state law, in our opinion this attempt would be subject to a substantial federal preemption challenge").

existing qualifying facilities. *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). Consequently, pursuant to the Third Circuit's holding in *Freehold*, the Commission is without authority to alter, revise, or continually monitor the wholesale PURPA rates set forth in Rider No. 18.

The RD also found that the Third Circuit's holding in *Freehold* and the federal preemption under PURPA do not apply in this case **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** and because the Commission has the right to determine that the rate under Rider 18 is no longer just and reasonable. (RD, p. 29.) However, the RD fails to provide any factual or legal support for the conclusion that a PPA **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** is exempt from the principles of federal preemption. The issue of whether a wholesale power supply agreement **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** is valid and subject to federal preemption under PURPA is a matter of law that is beyond the Commission's jurisdiction. *See Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 965-66 (1986) (it is well-settled that wholesale power supply agreements are within the jurisdiction of the FERC). Indeed, as the Third Circuit explained in *Freehold*:

> Where, as here, the PPA has a long-term, fixed price, tension may arise between this consumer protective provision of PURPA and the FERC regulation permitting the parties to hold incremental avoidable cost at the level it has on the date the PPA is effective. Whatever problem this may create is, however, a matter for FERC, not the [Board of Regulatory Commissioners].

Id. at 1191, n. 11.

In further support of the RD's conclusion that the Commission has authority to modify or eliminate the previously-approved wholesale PURPA rate set forth in Rider No. 18, the RD noted that the Commission has previously approved changes to avoided costs, citing to *Petition*

of Pennsylvania Electric Company Re Third Supplement Agreement with Scrubgrass Power Corporation, Docket Nos. P-900469, P-900470, 1990 Pa. PUC LEXIS 152; 126 P.U.R.4th 111 (November 21, 1990) ("*Scrubgrass II*"). (RD, pp. 29-30.) In *Scrubgrass II*, the electric distribution company ("EDC") and QF renegotiated a previously-approved PPA and voluntarily entered into amendments that, among other things, provided for a new avoided cost rate to be paid to the QF. Importantly, the rates paid to the QF were recovered by the EDC from ratepayers through the Energy Cost Rate, a Commission-approved automatic adjustment clause. Thus, in order for the EDC to recover the voluntarily renegotiated new avoided cost rate from ratepayers, the EDC first had to obtain Commission approval of the collection of the costs through the Energy Cost Rate.

The Commission's authority in *Scrubgrass II* to approve the recovery, via the Energy Cost Rate, of the costs for a new avoided cost rate that was voluntarily renegotiated by both the EDC and the QF is distinctly different than the Commission's authority to unilaterally modify or eliminate a previously-approved wholesale PURPA rate as requested by the NRG Companies and opposed by the QF in this case. Unlike the EDC in *Scrubgrass II*, the rates paid under Rider No. 18 have no impact on the rates paid by Duquesne Light's retail customers, the revenues received by Duquesne Light, or the services provided to Duquesne Light's customers because the rates are paid entirely by the NRG Companies as a result of their voluntarily assumed obligation to purchase the net power produced from Beaver Valley and Beaver Falls. (*See* Duquesne Light MB, Section III.B.1.) Further, unlike *Scrubgrass II* where the EDC and the affected QF voluntarily re-negotiated a new PURPA rate, Duquesne Light and the QFs at issue have not proposed a change to the wholesale PURPA rate set forth in Rider No. 18. Duquesne Light

respectfully submits that the RD's reliance on *Scrubgrass II* is misplaced and factually inapplicable to this case.

The RD also concludes that the Commission has authority to modify the wholesale PURPA rate set forth in Rider No. 18, because Duquesne Light "admitted" on cross-examination that it could amend the PURPA rate in Rider No. 18 by submitting a supplemental tariff filing. (RD, p. 31.) This is not an accurate characterization of the record evidence in this proceeding. The RD cites to the cross-examination testimony elicited from Duquesne Light's witness over the objection of Duquesne Light's counsel. Notably, 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 from a non-lawyer witness should be given no weight. It is role of the Commission to determine the law, not non-lawyer witnesses.

In any event, 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. 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, the power purchase agreements do not provide that Duquesne Light may modify the wholesale PURPA rate through a tariff filing with the Commission. **[BEGIN CONFIDENTIAL]**

[**END CONFIDENTIAL**] (Duquesne Light Exs. WVP 3-R [**HIGHLY CONFIDENTIAL**] and WVP 4-R [**HIGHLY CONFIDENTIAL**] (emphasis added).)

Finally, the RD concludes that the Commission has authority to modify the wholesale PURPA rate set forth in Rider No. 18 under the Competition Act and notes that it is the Commission's policy to promote competition in the wholesale and retail markets. (RD, p. 39). However, as explained above, the Commission's policy cannot preempt federal law under PURPA, or its underlying policy to encourage the development and maintenance of alternative energy sources. Furthermore, PURPA is perfectly consistent with and complimentary to Pennsylvania Alternative Energy Portfolio Standards. (*See* Duquesne Light MB, Sections III.B.2.a.i and III.B.2.a.ii; Duquesne Light RB, Section IV.B.1.)

For these reasons, as well as those more fully explained in Duquesne Light's Main and Reply Briefs, the RD erred in concluding that the Commission has authority to modify or eliminate the previously-approved wholesale PURPA rate set forth in Rider No. 18.

D. EXCEPTION No. 4 – The RD erred in finding that the QFs are not necessary and indispensable parties.

The RD found that "[w]hile the outcome of this proceeding may ultimately impact both [QFs], neither QF is an indispensable party to the resolution of NRG's formal complaint. (RD, p. 30.) For the reasons below, the RD erred in finding that the QFs are not necessary and indispensable parties.

As a preliminary matter, Duquesne Light notes that the Commission need not reach the issue of whether the QFs are necessary and indispensable parties. As explained above, the NRG Companies failed to meet their burden to demonstrate by a preponderance of the evidence that the wholesale PURPA rate set forth in Rider No. 18 is no longer just and reasonable. Further, as

explained above, the Commission is without authority to modify or eliminate the previously-approved wholesale PURPA rate set forth in Rider No. 18. Therefore, the Commission can and should dismiss the NRG Companies' complaint without reaching the issue of whether the QFs are indispensable parties to the relief requested by the NRG Companies. In the event that the Commission finds that the NRG Companies met their burden of proof and the Commission has the authority to modify or eliminate the previously-approved wholesale PURPA rate set forth in Rider No. 18, which Duquesne Light denies for the reasons explained above, the Commission should find that the RD erred in concluding that both the QFs subject to the rates set forth in Rider No. 18 are not necessary and indispensable parties to this proceeding.

Duquesne Light submits that the RD did not apply the correct standard for determining whether there is an indispensable party in this case. An "indispensable party is one whose rights are so directly connected with and affected by 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." *Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 464 Pa. 377, 379 (1975); *see also J3 Energy Group, Inc. v. West Penn Power Company*, Docket No. C-2011-2219920, p. 10 (Oct. 31, 2013) (holding, *sua sponte*, that a party whose continued performance under a contract may be impacted by the outcome of the case is an indispensable party.) (Duquesne Light MB, Section, III.B.4.)

In this case, the unrefuted, substantial evidence clearly demonstrates that both QFs are necessary and indispensable parties to the claims and relief sought by the NRG Companies, and that one of the QFs is not party to this proceeding. To date, both qualifying facilities have not been joined as parties. The failure to join an indispensable party deprives a court of subject matter jurisdiction and is fatal to a cause of action. *Bucks County Servs. v. Phila. Parking Auth.*,

71 A.3d 379 (Pa. Cmwlth. 2013). (*See* Duquesne Light MB, Section, III.B.4.) Accordingly, the RD erred in finding that the QFs, which will be directly impacted by the modification or elimination of the PURPA rates set forth in Rider No. 18, are not necessary and indispensable parties.

E. EXCEPTION No. 5 – The remedies recommended in the RD are not justified by the record.

In their request for relief, the NRG Companies generally requested that the Commission "ensure that Tariff Rider No. 18 is just, reasonable and nondiscriminatory." (NRG Complaint ¶ 20.) The NRG Companies subsequently clarified their position in direct testimony and requested that the rate set forth in Rider No. 18 be modified, *i.e.*, to the DALMP. (NRG Midwest St. No. 1, pp. 6-7.) In surrebuttal, however, the NRG Companies changed their theory and, for the first time, requested that Rider No. 18 be eliminated in its entirety. (NRG Midwest St. 1-S, pp. 6, 9.) The RD recommended that that Rider No. 18 be eliminated in its entirety from Duquesne Light's tariff or, alternatively, that Duquesne Light file a tariff supplement for Rider No. 18 with a revised PURPA rate for the Commission's consideration. (RD, p. 40.) The RD's recommended alternative remedies are flawed for several reasons.

First, as explained above, the NRG Companies failed to meet their burden to demonstrate that the six cents per kilowatt-hour PURPA rate is no longer just and reasonable. The unrefuted, credible evidence of record clearly demonstrates that he six cent per kilowatt-hour rate in Rider No. 18 continues to be just, reasonable, and in the public interest. Because the NRG Companies failed to meet their burden of proof, the RD erred in recommending that the Commission grant any relief to the NRG Companies.

Second, the Commission is without authority to grant either of the remedies recommended by the RD. As explained above, the Commission is without authority to alter,

revise, or continually monitor the wholesale PURPA rates set forth in Rider No. 18 pursuant to the Third Circuit's holding in *Freehold* and the principles of federal preemption under PURPA. Further, as explained above, the Commission currently lacks subject matter jurisdiction over the relief requested by the NRG Companies because one of the QFs that is a necessary and indispensable party has not been joined as a party to this proceeding. For these reasons, the Commission lacks authority to modify or eliminate the previously-approved wholesale PURPA rate set forth in Rider No. 18 as recommended by the RD.

Third, the RD's recommendation that Rider No. 18 be eliminated from Duquesne Light's tariff would lead to a result that is contrary to federal law. As explained in Duquesne Light's Main and Reply Briefs, PURPA and the obligation to purchase power from QFs clearly remain in effect. Unless 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 QFs under PURPA. (*See* Duquesne Light MB, Section III.B.1 and III.B.2; Duquesne Light RB, Section IV.B.1.) Thus, Duquesne Light is required by PURPA to have an avoided cost rate for the existing QFs, which currently is set forth in Rider No. 18.

If Rider No. 18 were simply removed from Duquesne Light's tariff, as recommended by the RD, Duquesne Light would have no avoided cost rate in its tariff to meet its federally mandated obligation under PURPA to purchase power from the existing QFs and no rate is contained in the QF agreements. The recommendation to simply eliminate Rider No. 18, without more, would put Duquesne Light in jeopardy of violating a federal statute. Indeed, absent an amendment to PURPA, it is FERC, not the Commission, that is authorized to relieve Duquesne

Light of its obligations under PURPA. For these reasons, the RD erred in recommending that Rider No. 18 simply be eliminated from Duquesne Light's tariff.

In the alternative, the RD recommended that Duquesne Light file a tariff supplement proposing a revised PURPA rate under Rider 18 for the Commission's consideration. This remedy is only appropriate if the Commission determines that the NRG Companies met their burden of proof and the Commission has jurisdiction to change a rate implicit in a wholesale power contract. If the NRG Companies believe that **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** justify revisions to the agreements and modification to the price – something they did not contend in this proceeding – the appropriate forum for such a claim is the FERC, which has exclusive jurisdiction over wholesale power agreements. The fact that the current rate is in Duquesne's tariff **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** is not a basis to interfere with FERC's jurisdiction over wholesale power agreements, particularly where the agreements have no effect on Duquesne Light's retail customers.

Finally, the Commission should not adopt the recommendation that Rider No. 18 be eliminated even if it concludes that it has jurisdiction to do so and concludes that the NRG Companies have met their burden of proof. Currently, the Rider 18 rate in Duquesne Light's tariff is paid by the NRG Companies and passed directly by the Company through to the QFs and, therefore, the rates paid pursuant to Rider No. 18 have no impact on the 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.) Eliminating Rider 18 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 eliminate Rider No. 18 entirely. (*See* Duquesne Light MB, Section III.B.2.c.)

Nevertheless, if the Commission rejects Duquesne Light's arguments that the NRG Companies have failed to meet their burden of proof and that any reconsideration of avoided cost under the QF agreements should be addressed before FERC, the Commission should adopt the alternative remedy recommended by the ALJ to permit Duquesne Light to file to reset avoided cost under Rider 18.

For these reasons, as well as those more fully explained in Duquesne Light's Main and Reply Briefs, the NRG Companies' Complaint should be dismissed.

III. CONCLUSION

WHEREFORE, for all the foregoing reasons, as well as those more fully explained in its Main and Reply Briefs, Duquesne Light respectfully takes exception to the Recommended Decision of Administrative Law Judge Conrad A. Johnson and respectfully requests that the Pennsylvania Public Utility Commission reject the findings of fact and recommendations of the Recommended Decision and deny the relief requested in the Formal Complaint filed by the NRG Companies.

Respectfully submitted,

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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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