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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
Harrisburg, PA 17120

Re: NRG Power Midwest LP, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC v. Duquesne Light Company; Docket Nos. C-2013-2390562

Dear Secretary Chiavetta:

On behalf of Beaver Falls Municipal Authority, I have enclosed for filing the following in the above-captioned consolidated matters:

1. A PUBLIC VERSION of the Exceptions of Beaver Falls Municipal Authority; and

2. A PROPRIETARY VERSION of the Exceptions of Beaver Falls Municipal Authority which is request to be filed under seal.

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

Very truly yours,

John F. Povilaitis / AMS

John F. Povilaitis

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

PUBLIC VERSION

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

NRG Power Midwest LP,	:	
NRG Energy Center Pittsburgh LLC,	:	
and Reliant Energy Northeast LLC	:	Docket Nos. C-2013-2390562
	:	
v.	:	
	:	
Duquesne Light Company	:	

EXCEPTIONS
ON BEHALF OF
BEAVER FALLS MUNICIPAL AUTHORITY

BUCHANAN INGERSOLL & ROONEY, P.C.

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Beaver Falls Municipal Authority

Dated: June 19, 2014

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I. INTRODUCTION

On June 4, 2014, the Pennsylvania Public Utility Commission ("Commission") served the Recommended Decision ("Recommended Decision" or "R.D.") of Administrative Law Conrad A. Johnson ("ALJ") in connection with the October 28, 2013 Formal Complaint ("Complaint") filed by NRG Power Midwest LP ("NRG Midwest"), NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC (collectively, the "NRG Companies") relating to the base rate proceeding initiated by Duquesne Light Company ("Duquesne") at Commission Docket No. R-2013-237219. Duquesne filed Supplement No. 81 to its Tariff Electric – Pa. P.U.C. No. 24 ("Tariff") to effect, among other things, a general increase in its electric distribution rates.

The NRG Companies' Complaint asserts that Duquesne's Tariff Rider No. 18 ("Rider No. 18") may present an indirect form of rate discrimination benefitting certain customer-generators and, therefore, requests that the Commission determine whether Rider No. 18 is just, reasonable and non-discriminatory.[1]

Despite being a party to a longstanding power purchase agreement with Duquesne, whose pricing was confirmed by Rider No. 18, the Beaver Falls Municipal Authority ("Authority") was neither named as a respondent nor as an indispensable party in the Complaint. Nor was Beaver Valley Power Company, another entity whose purchase power agreement price is confirmed by Rider No. 18, named as a respondent or indispensable party to the Complaint.[2]

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[1] Complaint, ¶¶ 13-15, 20. Duquesne's Tariff Rider No. 18 was attached to the Authority's Main Brief as "Appendix 2" and is attached to these Exceptions as Attachment 1.

[2] *See, Complaint.*

On November 12, 2013, Duquesne filed Preliminary Objections to the Complaint alleging that: (i) the NRG Companies failed to join all indispensable parties, including the Authority; (ii) the relief sought in the Complaint was beyond the scope of the present base rate proceeding; and (iii) the Complaint is legally insufficient since the Commission lacks the authority to adjust the avoided cost set forth in Rider No. 18. The NRG Companies filed a response to the Preliminary Objections on November 22, 2013 opposing the relief sought by Duquesne. The presiding ALJ denied the Preliminary Objections in an order dated December 12, 2013.[3]

On December 12, 2013 Duquesne filed with the ALJ a written motion to sever the Complaint for the remainder of Duquesne's rate proceeding at Commission Docket No. R-2013-2372129. The ALJ denied this motion orally on December 17, 2013.[4]

When the NRG Companies filed their testimony it became clear that references in the Complaint to Rider No. 18 and possible rate discrimination were intended to request that the rate for electricity being purchased by NRG Midwest from the Authority be reduced from the current $0.06/kWh. After the ALJ denied Duquesne's Preliminary Objections on December 12, 2013 and it was certain that issues relating to the requested modification to Rider No. 18 were going to be litigated in Duquesne's base rate proceeding, the Authority immediately filed a Petition to Intervene on December 16, 2013. The ALJ granted the Authority's Petition to Intervene on December 17, 2013.[5]

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[3] *See*, "Second Interim Order Denying Respondent Duquesne Light Company's Preliminary Objections to Complaint of NRG Power Midwest LP."
[4] N.T. 191.
[5] N.T. 180.

Evidentiary hearings in connection with the Complaint were held in Harrisburg on December 16, 17 and 20, 2013. Various witnesses were cross-examined during the hearings, including a witness on behalf of the Authority.

After the presiding ALJ noted in a March 22, 2014 email to all parties that he would consider a motion from Duquesne to reconsider his earlier denial of the motion to sever the Complaint from the rate proceeding, Duquesne filed such a motion on March 25, 2014. Over the NRG Companies' objection, the ALJ granted the motion to sever the Complaint from the balance of Duquesne's rate proceeding by his Fifth Interim Order entered on March 7, 2014.

After the filing of briefs and reply briefs by all interested parties in connection with the Complaint, the ALJ issued the Recommended Decision.

II. SUMMARY OF EXCEPTIONS

This case is complex and unusual. Contrary to the erroneous assumption made by the Recommended Decision, it does not present the issue of whether a longstanding retail rate charged by a public utility to its retail customers is currently just and reasonable under Pennsylvania law. Moreover, this is not a case the Commission typically adjudicates because, as noted throughout these Exceptions, the matters at issue arise under federal law and regulations leaving little, if any, room for the states. Although the Recommended Decision is riddled with numerous legal and factual errors (all of which are summarized below and addressed in greater detail in the specific Exceptions that follow), the largest single error is the failure of the ALJ to recognize and acknowledge that the traditional "just and reasonable rate" standard applicable to the retail rates of public utilities is completely inapplicable to prices "paid" by Duquesne as a public utility to the Authority (as a Qualifying Facility) as opposed to rates that are typically "charged" by public utilities to their customers. In this case, Duquesne is the "customer" and is *not* charging the Rider No. 18 rate to its retail customers. Indeed, Duquesne's retail customers

are not impacted in any way by the price specified in Rider No. 18. Thus, the Recommended Decision uses the fundamentally incorrect framework for analyzing all of the pertinent issues, thereby requiring its complete reversal.

The Recommended Decision must be reversed for numerous reasons, each of which is described further in the specific exceptions that follow:

- The Recommended Decision fails to properly define the actual issue in this proceeding, i.e., the lawfulness of the Commission modifying the sale price of a pre-existing and fully effective power purchase agreement with a federally recognized Qualifying Facility ("QF");

- The Recommended Decision fails to acknowledge that because the price reflected in Rider No. 18 is not charged to or collected from any of Duquesne's customers, any change in the existing price in the Tariff rider does *not* impact Duquesne's customers at all;

- The Recommended Decision fails to acknowledge and address the fact that Rider No. 18 has been restricted in application for years and only applies to two entities, one of which is the Authority;

- The Recommended Decision completely ignores the Authority's testimony regarding the devastating financial impact any change in the Rider No. 18 price would have on the Authority;

- The Recommended Decision has ignored or inappropriately distinguished controlling federal and state precedent that unequivocally prohibits the Commission from modifying any power purchase agreement ("PPA") (including the prices contained therein) between a QF (i.e., the Authority) and a public utility like Duquesne;

- Under the guise of ruling on the reasonableness of Rider No. 18 (which as noted above now applies to only two entities), the Recommended Decision has unlawfully modified the terms and conditions of a valid and fully effective PPA between the Authority and Duquesne in violation of federal law;

- The Recommended Decision unlawfully, and with no factual support, deems Duquesne's "avoided cost" to be the equivalent of the day-ahead locational marginal price for energy within PJM[6]; in reaching this conclusion, the ALJ incomprehensibly found the NRG Companies' sole witness to be credible and ignored her lack of knowledge on Commission ratemaking standards, the fact that

[6] PJM is the Regional Transmission Organization responsible for operations of the wholesale power market in the Mid-Atlantic area, among others.

on cross examination she recanted her testimony recommending the use of locational marginal pricing as the standard for pricing the Authority's electricity, her complete unfamiliarity with who calculates avoided cost and for what purpose, her unsubstantiated assertion that the Commission no longer enforces its QF regulations and her erroneous belief that Duquesne no longer has any mandatory obligation to purchase power from small QF facilities;[7]

- The Recommended Decision unlawfully, and with no factual support, compares point in time or "spot" energy prices in evaluating the Rider No. 18 price and ignores that "avoided cost" cannot be determined in such a manner under the PPA that was previously entered into between the Authority and Duquesne;

- The Recommended Decision unlawfully applies and misinterprets controlling federal regulations issued by the Federal Energy Regulatory Commission ("FERC") by removing the right possessed by QF's like the Authority to determine whether they will be paid at the time energy is delivered or over the term of any applicable contract or other legally enforceable obligation;

- The Recommended Decision ignores the preponderance of evidence showing Rider No. 18's price is reasonable relative to Duquesne's current default service purchases and improperly mischaracterizes Duquesne's testimony as claiming that the $0.06/kWh pricing in Rider No. 18 is excessive;

- The Recommended Decision erroneously grants the NRG Companies standing to litigate the Complaint even though (i) they are not direct parties to the existing PPA between the Authority and Duquesne, (ii) Rider No. 18 does not apply to them, and (iii) any change to the rate specified in Rider No. 18 would have no impact on the NRG Companies in their capacity as "customers" of Duquesne;

- The Recommended Decision erroneously uses the "just and reasonable rate" standard applicable to utility rates to evaluate the price contained in Rider No. 18 instead of the "avoided cost" standard mandated by federal law in evaluating sales by federal QFs like the Authority; and

- The Recommended Decision erroneously concludes that the NRG Companies satisfied their burden of proof to support the relief requested in the Complaint.

III. RELEVANT BACKGROUND

A. The Authority[8]

The Authority was established by an ordinance enacted by the City Council of Beaver Falls, Pennsylvania and was incorporated on July 3, 1940. The Authority now provides water

[7] For a full description of the multiple reasons Ms. Lagano's testimony was flawed and lacked credibility, such that the NRG Companies never established a prima facie evidentiary case, see the Authority's Main Brief, pp. 24-27.
[8] Beaver Falls Main Brief, pp. 3-5.

services to 23 municipalities. It also generates electricity from hydroelectric facilities, which it sells to Duquesne pursuant to Rider No. 18. The Authority's system serves approximately 60 square miles or over 10 percent of the land area of Beaver County, and approximately 50,000 people, or nearly 25-30 percent of Beaver County's population.[9]

On August 17, 1984, FERC issued a license under Part I of the Federal Power Act to the Authority to construct, operate, and maintain a hydroelectric power generation facility on the Beaver River in Beaver County, Pennsylvania.[10] The FERC order provided, among other things, that the license term would be 40 years, effective August 1, 1984.[11]

On February 28, 1985, the Authority entered into a negotiated PPA with Duquesne under which the Authority, among other things, agreed to sell and Duquesne agreed to purchase the output of two hydroelectric generating facilities of 2.5 megawatts each ("Facilities") and owned and operated by the Authority and subject to the FERC hydroelectric license issued in August 1984. The Facilities are a "qualifying facility" under and in accordance with PURPA.[12] Importantly, under the PPA, Duquesne is obligated to, among other things, purchase the net electric energy produced by the Facilities under and in accordance with the terms and conditions of Rider No. 18.[13] In other words, the price for electric power generated by the Authority's Facilities and purchased by Duquesne is specified in Rider No. 18 and not in the PPA itself.

[9] Beaver Falls Municipal Authority Statement No. 1-REJ, pp. 1-2.
[10] *See* 28 FERC 62,227, Beaver Falls Municipal Authority (Order Issued August 17, 1984); Beaver Falls Municipal Authority Statement No. 1-REJ, p. 4
[11] *Id.* at *9-10; Beaver Falls Municipal Authority Statement No. 1-REJ, p. 4, lines 11-16.
[12] Duquesne's purchase obligation arose pursuant to a 1978 Federal law, PURPA, under which public utilities are required to purchase all electricity produced by independent power producers that obtain status as QFs. 16 U.S.C. § 824a-3(b); 18 C.F.R. § 292.303(a). Under the FERC regulations 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 QF, such utility would generate itself or purchase from another source. 18 C.F.R. § 292.101(b)(6).
[13] Beaver Falls Municipal Authority Statement No. 1-REJ, p. 4, lines 19-22.

Thus, Rider No. 18 is an integral component of and inter-related with the PPA under which the Authority has sold electricity to Duquesne since the mid-1980s.

Since the price paid to the Authority under the PPA relates directly to Rider No. 18, any reduction of the price specified in Rider No. 18 or its elimination entirely, will have an obvious, substantial and materially adverse impact on the revenues the Authority receives for the electric generation produced by its Facilities and sold under the PPA.[14]

B. The NRG Companies[15]

Neither NRG Midwest nor the other NRG Companies has a direct contractual relationship with the Authority. However, in accordance with various Commission approvals relating to Duquesne's electric restructuring in the late 1990s, Duquesne auctioned to Orion Power Holdings, Inc. ("Orion") its generating assets in 2000 and, as part of that transaction, the PPA was assigned originally to Orion as the successful generation asset purchaser.

In order to effect the assignment of the PPA, Duquesne and Orion entered into a Revised QF Agency Agreement, which was approved by the FERC on March 8, 2001.[16] Through various subsequent transactions, NRG Midwest recently assumed the obligations under the Revised QF Agency Agreement including, among other things, the obligation to purchase the net electric output of the Facilities under the PPA from the Authority.[17]

NRG Midwest has been operating under the Revised QF Agency Agreement only since 2012[18], pursuant to which it has been paying a rate of six cents per kilowatt-hour for electric energy produced by the Facilities as specified in Rider No. 18.

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[14] Beaver Falls Main Brief, pp. 30-31.
[15] Beaver Falls Main Brief, p. 5.
[16] *See* FERC Docket No. ER01-1138-000.
[17] NRG Midwest St. No. 1, p. 3, lines 4-12.
[18] As testified by NRG Midwest witness Lagano, "NRG Midwest assumed the Revised QF Agency Agreement from GenOn Energy, Inc. ("GenOn") in connection with the merger in 2012 of NRG Energy, Inc. and GenOn." (NRG Midwest St. No. 1, p. 3, lines 8-9).

C. Rider No. 18[19]

In August 1981, Duquesne filed with the Commission Supplement No. 54 to its then current retail electric tariff which added Rider No. 18. This tariff sets the price at which Duquesne will pay QFs for the electricity they generate and which Duquesne is obligated to purchase under PURPA. Duquesne's August 5, 1981 letter to the Commission filing Rider No. 18 noted in part that "[t]he electricity from such [QF] facilities would be purchased at a rate of six (6) cents per kilowatt-hour or at a rate based on avoided incremental operating and capacity costs when those costs exceed six (6) cents per kilowatt-hour."[20] In that same letter, Duquesne calculated its "avoided cost" under PURPA as varying from 2.68 cents/kWh to 5.49 cents/kWh for the years 1982 through 1990. However, to encourage renewable energy resources on its system, Duquesne urged the Commission to allow Duquesne to pay QFs $0.06/kWh as specified in Rider No. 18.

Since its initial issuance in 1981, Rider No. 18 has consistently been structured with $0.06/kWh being the minimum or "floor" pricing for electric energy purchases from QFs.

In 1986, Duquesne became concerned that, with the anticipated reduction in its electric load and new capacity from its Perry I and Beaver Valley II generation units, it would no longer have the need to pay QFs a payment for capacity in addition to energy payments. In order to address these issues, Duquesne proposed in a filing with the Commission to limit the availability of Rider No. 18 to those QFs that had a contract with Duquesne prior to February 10, 1987 and were supplying energy or constructing facilities to supply energy to the company.[21] While the Commission rejected the specific form of limitation to Rider No. 18 proposed by Duquesne, it

[19] Beaver Falls Main Brief, p.5.
[20] NRG Midwest Exhibit No. 6.
[21] *Pennsylvania Public Utility Commission, et al. v. Duquesne Light Company* Docket, Nos. R-860556, R-860556C001 (Order entered July 20, 1987) ("1987 Order").

specifically held in an order entered on July 20, 1987 at Docket No. R-860556 that "... we are in basic agreement with the proposal to curtail the availability of the Rider No. 18 rate."[22]

Thus, since 1987, Rider No. 18 – including the $0.06/kWh price – has been closed and unavailable for new QFs. The Authority is one of only two QFs that are still today grandfathered under Rider No. 18 as it exists under Duquesne's retail electric tariff.[23] Indeed, in the 1986-1987 proceeding initiated by Duquesne to limit the availability of Rider No. 18, both the Commission and Duquesne specifically identified the Authority's Facilities as being then under construction and qualifying for the rate set forth in Rider No. 18.[24] And, the Commission's July 20, 1987 Order specifically found that the Authority's Facilities were entitled to the price set forth in Rider No. 18 because they were small hydroelectric facilities under construction and subject to a contract executed prior to July 25, 1987.[25]

IV. EXCEPTIONS

The Recommended Decision relies on a number of precedents, portions of regulations and analyses that were *never advanced* by the NRG Companies or any other parties in this proceeding. Accordingly, the Authority has not had a previous opportunity in its briefs to advise the ALJ of the erroneous elements of his analysis laid out in the Recommended Decision. Therefore, of necessity, the Authorities' Exceptions are lengthy and detailed. In accordance with Section 5.533 of Commission regulations, 52 Pa. Code § 5.533, the Authority submits the following Exceptions to the Recommended Decision.

[22] 1987 Order at 3.
[23] The other QF is the Beaver Valley Power Company. *See* 1987 Order at n. 4.
[24] 1987 Order at n. 4.
[25] 1987 Order at 3.

A. Exception No. 1: The R.D. erred in its definition of the "core issue" in this proceeding. (R.D. p. 8).

As noted in the Summary of Exceptions above, on page 8 of the R.D. the ALJ erroneously defines what he believes to be the "core" or "contested " issue in this case:

> *The core issue in this case is whether Duquesne Light's Tariff* Rider No. 18, which was established in 1981, remains compliant with statutory law and the current regulatory scheme in Pennsylvania in light of the restructuring that the electric industry has undergone in the Commonwealth.

This erroneous statement of the issue in this case ignores the true core issue in this matter, which is the controlling nature of a Federal statute, regulations and case law regarding the limits of state commission jurisdiction over prices paid to QFs by electric public utilities. Nowhere in this statement is there any acknowledgement or recognition of the PPA that governs the sale and purchase of electricity from the Authority's Facilities to Duquesne. Nor does this statement reflect that Rider No. 18 applies currently to only two entities, one of which is the Authority. Indeed, by framing the core issue in terms of whether Rider No. 18 is "compliant" with Pennsylvania law, the R.D. impliedly and incorrectly suggests that this tariff provision should be evaluated under the "just and reasonable" rate standard applicable to traditional utility retail rate setting.[26] This perspective is later confirmed in the R.D. by the ALJ's finding that the $0.06/kWh rate in Rider No. 18 is excessive and therefore inconsistent with current Pennsylvania law and "the current regulatory scheme in Pennsylvania".[27]

By framing the "core issue" solely in terms of the apparent rate impact of Rider No. 18 and whether the price reflected therein is consistent with Pennsylvania's regulatory scheme, the R.D. applies the wrong legal framework for evaluating both Rider No. 18 and the PPA. Unlike

[26] On page 32 of the R.D., the ALJ frames his core issue as follows: "The heart of the dispute in this proceeding is the justness and reasonableness of Duquesne Light's Rider No. 18."

[27] Conclusion of Law, No. 3: "Every rate made, demanded, or received by any public utility must be just, reasonable and in conformity with the regulations or order of the Commission. 66 Pa.C.S. § 1301". R.D. p. 41. Ordering Paragraph No. 3. R.D., p. 42.

more standard tariff provisions, Rider No. 18, by its own terms, does *not* contain a rate that is charged by Duquesne to its customers. Rather, Rider No. 18 contains a price, included in the PPA with a QF, that is *charged to* and *paid by* Duquesne. Based on these unassailable and uncontroverted facts, there is no legal or other justification for the R.D. to have evaluated the $0.06/kWh on a just and reasonable rate standard as if it were a regular retail rate charged to retail customers by Duquesne under Section 1301 of the Public Utility Code ("Code"), 66 Pa.C.S. § 1301, or otherwise.

The effect of misstating the core issue in this proceeding is monumental, and causes the R.D. to not only focus on Rider No. 18 as if it contained a rate charged to Duquesne's retail customers, but also to ignore or fail to consider a plethora of other legally relevant facts and information, such as the following:

- Rider No. 18 applies to only two entities and *no* retail customers of Duquesne[28];
- None of Duquesne's retail customers pay the $0.06/kWh price contained in Rider No. 18[29];
- A reduction or other any other change to the $0.06/kWh price in Rider No. 18 will have no impact on any of Duquesne's retail customers[30]; and
- A change in the $0.06/kWh price in Rider No. 18 would have a devastating financial impact on the Authority.[31]

Similarly, the consequences of failing to utilize the proper frame of analysis and consider certain unassailable facts resulted in a series of cascading errors, all of which are reflected in the R.D. These include:

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[28] See Rider No. 18, attached as "Appendix 2" to the Authority's Main Brief.

[29] While the R.D. does appear, in Finding of Fact No. 52, to recognize that Rider No. 18 has nothing to do with Duquesne's retail customers or their rates, it nevertheless analyzes the Rider as if $0.06/kWh price therein was a rate subject to the Commission's "just and reasonable' standard under Code Section 1301. In a nutshell, that is one of the significant legal errors that warrant reversal of the R.D.

[30] See Rider No. 18, attached as "Appendix 2" to the Authority's Main Brief.

[31] See Rider No. 18, attached as "Appendix 2" to the Authority's Main Brief.

- Modifying the terms and conditions of the valid and fully effective PPA between the Authority and Duquesne in violation of federal law;

- Deeming Duquesne's "avoided cost" to be the equivalent of the day-ahead *locational marginal price for energy within PJM*;

- Comparing the $0.06/kWh price under Rider No. 18 with point in time or "spot" energy prices;

- Ignoring substantial and probative evidence demonstrating that Rider No. 18's price is reasonable relative to Duquesne's current default service purchases; and

- Misapplying and misinterpreting controlling FERC regulations by removing the right possessed by QFs like the Authority to determine whether they will be paid at the time energy is delivered or over the term of any applicable contract or other legally enforceable obligation

The R.D. should be reversed if for no other reason than its failure to grasp the issues being litigated in this proceeding.

B. <u>Exception No. 2</u>: The R.D. erred in asserting jurisdiction over and finding that the price specified in Rider No. 18 (i.e., $0.06/kWh) is not in the public interest, and directing that either the rider be stricken from Duquesne's tariff or that Duquesne file a revised tariff (Conclusion of Law Nos. 1 and 3).

By ultimately finding that the $0.06/kWh in Rider No. 18 and in the PPA is not "compliant with the Commission's regulatory scheme[32] and directing that Rider No. 18 be stricken or revised, the R.D. has undeniably changed the price currently in the PPA and upon which the Authority has been paid for energy produced by the Facilities since 1985. This action was unlawful, and the R.D's efforts to distinguish controlling federal and state law to justify its unlawful result cannot be permitted to stand.

This Commission lacks the authority today to modify the price specified in Rider No. 18 and the PPA, neither of which were correctly addressed by the R.D. First, utility tariffs (like Rider No. 18) have the force and effect of law[33] and, as such, QFs like the Authority are entitled,

[32] R.D., Ordering Paragraph No. 2, p. 41.
[33] *Brockway Glass Co., Inc. v. Pennsylvania Public Utility Commission*, 437 A.2d 1067 (Pa. Cmwlth. 1982).

as a matter of law, to the Rider No. 18 price, as of the time in July 1987 when the Commission grandfathered the Authority's PPA with Duquesne and "locked-in" the Rider No. 18 price.[34]

Importantly, at no time since the Commission restricted the availability of Rider No. 18 in 1987 did it direct any change in the $0.06/kWh price specified in Rider No. 18. This is not surprising given that, once the PPA price was definitively set for the Authority through the grandfathering element of the 1987 Order, the paradigm for this PPA changed from a PPA with a price tied to a potentially changing tariff price, to a PPA with a price locked-in for this QF project. And, irrespective of whether the Commission could have changed the Rider No. 18 price (and thereby change the PPA pricing) earlier, it was clear that *after 1995* (i.e., after the federal appellate court decision in *Freehold,* discussed below) the Commission lacked the authority under PURPA to change a QF wholesale electric rate that had been previously approved by the Commission as was the Rider No. 18 price in 1987.

Second, Rider No. 18 was a voluntary Duquesne filing that created wholesale electric prices to be paid for electricity produced by QFs under PURPA. Rider No. 18 deals with wholesale power supply agreements under PURPA that are within FERC's exclusive jurisdiction.[35] States like Pennsylvania have no authority of any kind over wholesale power supply arrangements, except in limited circumstances. For example, PURPA is a limited exception to this rule, but that law does not give the Commission any broad authority over wholesale electric contracts like the PPA.

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[34] *See* 1987 Order, Appendix 1.

[35] *Nantahala Power & Light Co. v. Thornburg,* 476 U.S. 953, 965-66 (1986); *Utilimax.com v. PPL Energy Plus LLC,* 378 F.3d 303, 305 (3d Cir. 2004) (wholesale market for electric energy is regulated by FERC).

Under PURPA, state commissions are required to implement PURPA in accordance with regulations established by FERC.[36] A state commission has the authority to implement PURPA in connection with the approval of contracts between utilities and QFs.[37]

Once the state commission has established the "avoided cost" to be paid, the state can no longer regulate the QFs' price. The proposition that a state commission has no authority to modify a previously-approved power purchase agreement was announced in *Freehold Cogeneration Associates L.P. v. Board of Regulatory Commissioners, et al.* ("*Freehold*").[38] In *Freehold*, Freehold Cogeneration Associates ("FCA") negotiated a power purchase agreement with Jersey Central Power & Light Company ("JCP&L").[39] JCP&L later challenged the terms of the power purchase agreement and the New Jersey Board of Regulatory Commissioners ("BRC") directed the parties to renegotiate the purchase rate term in the agreement or negotiate an appropriate buyout of the contract.[40] The BRC's order also stated that in the event the parties did not reach an agreement within 30 days, the BRC would commence an evidentiary hearing to consider various courses of action.[41]

In response to the BRC's actions, FCA filed a federal district court action seeking a declaratory judgment that the BRC's order was preempted by PURPA.[42] FCA complained that the BRC had interfered with its federally-granted right to be exempt from certain state utility regulation.[43] On appeal of the district court's denial of FCA's petition, the Third Circuit, whose jurisdiction includes Pennsylvania, concluded that the district court had jurisdiction to hear

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[36] 16 U.S.C. § 824a-3(f).
[37] *Crossroads Cogeneration Corp. v. Orange & Rockland Utils. Inc.*, 159 F.3d 129, 135 (3d Cir. 1998).
[38] *Freehold Cogeneration Associates L.P. v. Board of Regulatory Commissioners, et al.*, 44 F.3d 1178 (3d. Cir. 1995).
[39] *Id.* at 1182.
[40] *Id.* at 1183.
[41] *Id.*
[42] *Id.*
[43] *Id.* at 1185.

FCA's claims brought under section 210(e) of the Federal Power Act and FERC regulations that exempt QFs from state utility regulation,[44] and that the BRC had no authority to order any modifications to the power purchase agreement:

> Based on the overall scheme of PURPA and its stated goal, and especially section 210(e) and the implementing rules promulgated by the FERC, we hold that Congress intended to exempt qualified cogenerators from state and federal utility rate regulations.[45]

The Pennsylvania courts have often echoed the holding in *Freehold.* In *West Penn Power Co. v. Pa. Pub. Util. Comm'n.*[46] the court stated:

> Section 210 of PURPA preempts the [Commission] from reconsidering its prior approval of the [power purchase agreements] between West Penn and the [qualifying facilities] or to change rates established for the avoided costs at the time of the agreements.[47]

The Commission has acted consistent with Freehold, even prior to the Third Circuit decision in 1995 when it considered so-called "regulatory out" clauses[48] in PURPA contracts: "federal law in the form of PURPA 210 and the regulations thereunder entitle a QF to a known stream of payments based upon the estimates of a utility's avoided costs as of the date the qualifying facility makes an offer of acceptance to the utility ... in our view federal law would act to prohibit us from reconsidering a prior approval of rate recovery."[49]

Rider No. 18 established wholesale PURPA prices for Duquesne going back to 1981. Those prices have continued unabated since 1981 and apply to existing QFs, like the Authority's

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[44] *Id.* at 1186, *citing* 16 U.S.C. § 824a-3(e)(1); 18 C.F.R. § 292.602(c).
[45] *Id.* at 1192.
[46] *West Penn Power Co. v. Pa. Pub. Util. Comm'n.,* 659 A.2d 1055, 1066 (Pa. Cmwlth, 1995), *affirmed by,* 535 Pa. 108, 634 A.2d 207 (1993).
[47] *Id.* at 1066.
[48] "Regulatory out" clauses were provisions inserted into PURPA contracts in the 1980's that allowed the electric utility to lower the price paid to the QF under a PURPA contract if the state public utility commission modified its prior approval for the utility and made a rate disallowance, effectively reducing the recovery in customer rates of the costs incurred by the utility under such PURPA contracts.
[49] *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 ("Scrubgrass"),* Docket No. P-870248, 1988 Pa. PUC LEXIS 101 at *11-12, 66 Pa. PUC 151 (Jan. 21, 1988).

PPA.[50] When the Commission in 1987 restricted the availability of Rider No. 18 to a class of QFs – including the Authority – and terminated it for new QFs, it effectively approved the very $0.06/kWh price the Authority was then receiving, i.e., such price was consistent with avoided cost, just, reasonably and prudently incurred. At that time and in accordance with the mandates of *Scrubgrass*, *Freehold* and their progeny,[51] the Commission had no further authority to make any change in the $0.06/kWh price that is now "locked-in" for the Authority and its PPA and for the R.D. to order such a result is unlawful.

It is of no consequence that the QF price to be changed is in Duquesne's *tariff* as opposed to a power purchase *agreement*.[52] The FERC's PURPA regulations make it clear that QF arrangements can lock-in prices for QF sales based on a "legally enforceable obligation" that is not necessarily derived from a contract.[53] Indeed, as noted above, the Commission's 1987 Order "locked in" the $0.06/kWh price in both Rider No. 18 and the PPA. This is clearly the "legally enforceable obligation" envisioned by FERC. The R.D. erroneously posits that the *Freehold* and *Scrubgrass* holdings can be circumvented by a state commission if it requires a tariff price embodying the agreed-to QF price to be filed by the utility in lieu of an agreement. Any reviewing federal court would quickly see through such subterfuge.

The R.D.'s efforts to distinguish the controlling decisions in *Scrubgrass* and *Freehold* are misplaced and should be rejected. The R.D. first dismisses the precedential effect of *Scrubgrass*

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[50] *See In re West Penn Power Company*, 71 F.E.R.C. ¶61,153 (order denying petition for declaratory order, May 8, 1995 (FERC has determined that PURPA permits "lock-ins", i.e., fixed rate long term QF contracts).

[51] *See, i.e., New York State Elec. & Gas Corp. v. Saranac Power*, 117 F. Supp.2d 211 (N.D.N.Y 2000). *See also Niagara Mohawk Power Corp. v. FERC*, 162 F. Supp. 2d 107 (N.D.N.Y 2001); *Kamine/Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp.*, 908 F. Supp. 1180 (W.D.N.Y. 1995); *Grays Ferry Cogeneration Partnership, et al. v. PECO Energy Co.*, 998 F. Supp. 542 (E.D. Pa. 1998).

[52] Beaver Falls Main Brief, pp. 15-16.

[53] *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."

because the power purchase agreement between the utility and QF in that case was approved by the Commission, unlike the PPA between Duquesne and the Authority.[54] This analysis is erroneous for two reasons. First, it is not the power purchase agreement that the Commission has historically approved in these types of proceedings, but the *rate recovery* of the prices contained in the power purchase agreement. Indeed, the very language in the Commission's *Scrubgrass* decision supports this view:

> By Order entered December 18, 1987 we addressed the first issue presented by the instant petition and related pleadings, *and approved the rates established by the agreement between Penelec and Scrubgrass as just reasonable and in the public interest.*[55]

The Commission's focus is and has always been on the power purchase agreement *rates/prices* and not the other contract provisions. To suggest, as the R.D. does, that *Scrubgrass* is not dispositive here because the PPA with the Authority was not "approved" ignores the factual and legal backdrop of the Commission's historical QF "approval" process.[56] Indeed, the Rider No. 18 price (i.e., $0.06/kWh) was "approved" by the Commission as part of the 1987 Order for Rider No. 18 every bit as much as the contract rates in *Scrubgrass*. The R.D. was wrong to suggest otherwise.

Second, the R.D. claims that the Commission's consideration of a later amendment to the original power purchase agreement in *Scrubgrass* confirms that the Commission does in fact have the jurisdiction to address QF rates that have been previously approved, thereby rebutting the argument that once QF rates have been approved by a state commission it lacks jurisdiction

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[54] R.D., p. 29.

[55] *Scrubgrass* at *9 (emphasis added).

[56] The Pennsylvania courts have recognized that Section 210 of PURPA preempts the Commission from reconsidering its prior approval of power purchase agreements between utilities and QFs or to change rates established for the avoided costs at the time of the agreements. *West Penn Power Co. v. Pa. Pub. Util. Comm'n.*, 659 A.2d 1055, 1066 (Pa. Cmwlth, 1995), *affirmed by*, 535 Pa. 108, 634 A.2d 207 (1993).

to modify them later.[57] Of course, the Commission's subsequent consideration of the rates in the amendment to the QF contract in *Scrubgrass* was predicated on a *voluntary* arrangement between the QF and utility, and reflected a "new deal" that required further Commission review and rate recovery approval. Neither of these facts applies here. There is neither a joint request by the Authority and Duquesne to change the PPA nor a mutually agreed upon amendment, which could justify another review of the "new' QF contract's prices for rate recovery purposes. The R.D.'s attempt to justify Commission jurisdiction in this proceeding based upon the Commission's subsequent consideration of a new, voluntarily negotiated power purchase agreement after *Scrubgrass* is clearly erroneous and in fact fictitious.

The R.D. summarily dismisses the applicability of *Freeehold* in a footnote.[58] The R.D. erroneously believes that the approval by the state utility commission of the actual power purchase agreement in *Freehold* was a material distinction, rendering *Freehold* inapplicable to this case. First, as noted above, the Pennsylvania courts have long held that Section 210 of PURPA preempts the Commission from reconsidering its prior approval of power purchase agreements between utilities and QFs or to change rates established for the avoided costs at the time of the agreements. Second, the R.D. cites no authority for the proposition that before the Commission can lose jurisdiction over QF rates it must have approved every element of the power purchase agreement. Third, the R.D.'s attempt to limit the reach of *Freehold* solely to approval of a power purchase agreement is inconsistent with the Court's actual holding:

> Finally, we hold that once the BRC approved the power purchase agreement between Freehold and JCP&L *on the ground that the rates were consistent with avoided cost, just, reasonably and prudently incurred,* any action or order by the BRC to reconsider its approval or to

[57] R.D., p. 29-30.
[58] R.D., p. 29, n. 12.

> deny the passage of those rates to JCP&L's consumers under purported state authority was preempted by federal law.[59]

It is clear that when properly read *Freehold* was focused on the just and reasonableness of the QF price and related rate recovery. References to referring to approval of the power purchase agreement must necessarily be evaluated in the context of what was being sought and addressed in the state proceeding, i.e., prices to be paid by the utility to the QF and the recovery of such payments in charges to customers. Here, it is abundantly clear that the $0.06/kWh price in Rider No. 18 contained in the PPA and later restricted as to applicability in the 1987 Order has been thoroughly reviewed by the Commission and approved in multiple orders and adjudications. To suggest that *Freehold* is inapplicable given (i) the nature and scope of the Commission's prior review and consideration of the Rider No. 18 pricing and (ii) the existing federal and Pennsylvania case law providing that Commission jurisdiction is preempted under PURPA if the power purchase agreement/rates have been previously approved, is inconsistent with both the facts and the law.

C. Exception No. 3: The R.D. erred in making any findings with respect to Duquesne's historic avoided costs/Rider No. 18 pricing, and comparing them to current market determined electric energy prices (Finding of Fact Nos. 39, 40, 41, 54, 55, 56, 63).

As a QF under PURPA, the Authority was entitled to receive a price the electricity produced by the Facilities and sold to Duquesne at "avoided cost." Indeed, as noted above and throughout this proceeding, Duquesne's purchase obligation with respect to the Authority arose pursuant to a 1978 Federal law, PURPA, under which public utilities are required to purchase all electricity produced by independent power producers that obtain status as QFs.[60] Under the FERC regulations implementing PURPA, the price a QF is to receive for the sale of its electricity

[59] *Freehold*, 44 F.3d at 1194 (emphasis added).
[60] 16 U.S.C. § 824a-3(b); 18 C.F.R. § 292.303(a).

is the "avoided cost" rate.[61] "Avoided costs" are the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the QF, such utility would generate itself or purchase from another source.[62]

In this case, the pricing at which Duquesne became obligated to purchase electric energy from the Authority and its Facilities was established via the PPA back in 1985 when that contracted was executed. Importantly, the pricing in the PPA, $0.06/kWh, was specified in Rider No. 18 and incorporated into the PPA.

By comparing the $0.06/kWh specified in Rider No. 18 and incorporated into the PPA to a current market price, the R.D. is effectively depriving the Authority of its federal right, under FERC's regulations, to select the option under which it will sell and be compensated for its QF energy. Under 18 C.F.R. § 292.304(d), as a QF the Authority has the *option* of providing energy based upon (i) the purchasing utility's avoided costs calculated at the time of delivery or (ii) pursuant to a legally enforceable obligation over a specified term, whose pricing can in turn be calculated at the time of delivery or at the time the obligation was incurred. It is undeniable that by entering into the PPA in 1985 the Authority elected a pricing structure that was set (at least initially) based upon when the obligation was incurred. The R.D., without legal basis and completely devoid of avoided cost prices, has effectively deprived the Authority of its federally mandated option by finding that the pricing in Rider No. 18 does not compare favorably to market energy prices set at the time of delivery.

Moreover, the RD's comparison of the Rider No. 18 price to Duquesne's prior representations of its "avoided cost" and/or subsequent iterations of the price of electricity in competitive energy markets (e.g., day-ahead locational marginal prices) is completely irrelevant

[61] *18 C.F.R. § 292.304(a)(2).*
[62] 18 C.F.R. § 292.101(b)(6).

to the propriety of the $0.06/kWh contained in the PPA via Rider No. 18. The various Findings of Fact based on this pricing comparison ignore FERC's regulations expressly acknowledging that rates for QF purchases based on estimates established by contract or other legally enforceable obligation do not violate FERC's PURPA regulations if those rates *differ from the avoided costs at the time of delivery.*

The R.D. is equally in error by comparing its perception of market energy prices to the $0.06/kWh in the PPA. The PPA pricing (which is derived from Rider No. 18) is a 1985 estimate of "avoided costs" which the Commission approved as part of the approval of Rider No. 18 and which was thereafter reflected in the PPA. The Authority accepted that estimated avoided cost pricing by entering into the PPA. The fact that over time the pricing applicable to energy from the Facilities is different now at the time of delivery than the original contracted for estimate is of no legal consequence. Indeed, this is precisely the situation FERC sought to address in its regulations at 18 C.F.R. § 292.304(b)(5). The fact that the R.D. finds as a matter of fact that Duquesne's historic avoided cost rates or market energy prices today (i.e., at the time of delivery) are lower/different than the $0.06/kWh estimated price in Rider No. 18 originating in 1985, is completely inconsistent with and in violation of the provisions of 18 C.F.R. § 292.304(b)(5).[63] Rates for QFs are set for extended periods of time that cover fluctuations in avoided costs ranging from periods of over supply to and through phenomenon such as a polar vortex.

[63] *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."

D. Exception No. 4: The R.D. erred in making any findings with respect to NRG Midwest's payments for energy over any time period. (Finding of Fact No. 53).

NRG Midwest is not a party to the PPA and not even a public utility. As such, neither its incremental energy costs nor what it pays currently or has paid in the past for energy are relevant to the propriety of the $0.06/kWh price in Rider No. 18 and included in the PPA. Indeed, Finding of Fact No. 53 is more egregiously wrong than those findings made with respect to Duquesne (and as discussed in Exception No. 3 above) because avoided cost is determined based on the purchasing *public utility's* (i.e., Duquesne's) cost. NRG Midwest is not a purchasing public utility under the PPA with the Authority. The Authority incorporates herein the analysis contained in Exception No. 3 above.

E. Exception No. 5: The R.D. inappropriately and without factual support benchmarks and equates Duquesne's avoided cost with day-ahead locational marginal prices. (Finding of Fact Nos. 54, 55 and 56).

The import of these Findings of Fact is that Duquesne's avoided cost today should, in the R.D.'s view, be benchmarked against and/or equated with the day-ahead locational marginal prices in the PJM competitive energy market. There are two primary errors with this approach. First, and as noted above, it is inappropriate and inconsistent with existing FERC regulations to compare the previously established *estimate* of avoided costs (that are reflected in the existing Rider No. 18 pricing and contained in the PPA) with a single point in time *actual* price at the time of energy delivery. The RD consistently and erroneously believes that because the $0.06/kWh price in Rider No. 18 is higher than some unrelated spot energy price the Rider is unlawful and/or inconsistent with "Pennsylvania's regulatory scheme." This is simply incorrect as a matter of law. Second, there is no evidence whatsoever in this proceeding suggesting that the day-ahead locational marginal prices in the PJM are Duquesne's avoided cost. Thus, it is

wholly inappropriate to imply that the $0.06/kWh price in Rider No. 18 is no longer an appropriate avoided cost rate.

While paying lip service to FERC's PURPA regulations, the R.D. has ignored and/or misapplied them. Under FERC's regulations, the rates by which public utilities must purchase energy from QFs like the Authority must be just and reasonable in consideration of the *utility's* avoided cost and in the public interest.[64] This standard is satisfied if the applicable rate equals avoided costs "determined after consideration of the factors set forth in paragraph (e) of this section."[65] To the extent practicable, the various factors specified in the FERC's regulations at 18 C.F.R. § 292.304(e) must be considered when determining avoided costs. This regulation underscores the judgment and subjectivity that is involved in setting avoided cost rates, because of the various factors to be considered under 18 C.F.R. § 292.304(e) (such as the availability of capacity and energy during the system daily and seasonal peak periods, coordination of outages, the terms of any contract or other legally enforceable obligation, etc.). More importantly, the R.D. did not address any of the considerations in 18 C.F.R. § 292.304(e) when evaluating the existing $0.06/kWh pricing in Rider No. 18 and in the PPA. This was patently erroneous.

F. Exception No. 6: The R.D. erred in finding that the pricing of $0.06/kWh in Rider No. 18 and the PPA could be modified because the PPA failed to have a specified term (R.D. p. 39)

The R.D. justifies its right to modify the $0.06/kWh in Rider No. 18 and the PPA in part because it does not have a "specified term."[66] The genesis of this argument is FERC's regulation at 18 C.F.R. § 292.304(d), which gives QFs like the Authority the *option* of providing energy based upon (i) the purchasing utility's avoided costs calculated at the time of delivery or (ii)

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[64] 18 C.F.R. § 292.304.
[65] 18 C.F.R. § 292.304(e).
[66] **|BEGIN PROPRIETARY:**

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pursuant to a legally enforceable obligation *over a specified term*, whose pricing can in turn be calculated at the time of delivery or at the time the obligation was incurred. In its zeal to turn the PPA from a contract based on an estimate of Duquesne's avoided costs at the time the contractual obligation was incurred (i.e., $0.06/kWh) to spot pricing at the time of delivery, the R.D. commits two errors. First, the R.D. fails to recognize or account for the fact that under the applicable FERC PURPA regulations at 18 C.F.R. § 292.304(d) it is the QF (i.e., the Authority) that has the *option* to choose the delivery and pricing method and no other entity, including the Commission. Second, the R.D. failed to comprehend the record evidence that demonstrates that the PPA does in fact have a specified term.

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G. <u>Exception No. 7</u>: The R. D. ignores the preponderance of evidence showing Rider No. 18's pricing is reasonable relative to Duquesne's current default service purchases and mischaracterizes Duquesne's testimony as claiming that the $0.06/kWh pricing in Rider No. 18 is excessive.

As explained above, the R.D. unlawfully and erroneously treats the utility's avoided cost rate standard for QF projects as the equivalent of current market prices. The R.D. attempts to overcome this critical flaw by citing to several 1980's vintage cases where the $0.06/kWh price was said to be above Duquesne's avoided costs, including the Commission's own reference to

[67] **[BEGIN PROPRIETARY: END PROPRIETARY]**

Duquesne's avoided costs in *City of Pittsburgh v. Duquesne Light Company*.[68] However the R.D. never attempts to understand or explain why after that acknowledgement the Commission would allow Rider No. 18's price to remain in effect for decades after the 1980's if it was unlawful for a QF rate to be above or below a utility's avoided costs at various points in time over an extended period. The explanation is that for decades the Commission has been well aware that once it has approved a price to be paid for a QF project and created a legally enforceable obligation, as the Commission did in approving Rider No. 18, it is without jurisdiction to revisit that determination as a matter of law. Nor would such a reconsideration of the QF rate be wise as a matter of policy, particularly where a project has been constructed and is still paying off its construction debt as is the case for the Authority.

In addition, to find that the price paid by Duquesne to the Authority was excessive, the R.D. had to ignore the cogent testimony of Duquesne's witness on Rider No. 18 issues, Mr. Pfrommer. Mr. Pfrommer is responsible for rates at Duquesne and he testified that not only is the $0.06t/kWh price is still reasonable, but over the last ten years, Duquesne's default service prices have been at or above $0.06/kWh.[69] With a grandfathered price established in 1987 for the Rider No. 18 QF projects, Duquesne has had no reason to waste its resources by attempting to calculate its avoided costs in any subsequent years.

Although Mr. Pfrommer indicated Duquesne "could" file a new Rider No. 18 supplement, it is clear from a complete review of his testimony that such a filing would occur only be in the context of an agreement accepted by all affected parties, and subject to a legal review of whether any tariff changes were consistent with the law affecting QF projects as it has

[68] R.D. at 33-35; *City of Pittsburgh*, Docket No. C-871584, 68 Pa. PUC 273 (1988).
[69] N.T. 237-238.

been clarified from 1987 to the present.[70] And, Mr. Pfrommer was clear that while Duquesne could file a tariff, any tariff change would not necessarily be approved by the Commission.[71] Under *Scrubgrass* and *Freehold*, the only way in which the Commission could "approve" a new price in Rider No. 18 would be if the QF *and* the utility mutually agreed to such change. No agreement with all affected parties to revise Rider No. 18 exists. Moreover, the R.D. cites no legal basis/authority upon which the Commission can revise a previously established QF rate.

The NRG Companies have recommended that Rider No. 18 be completely eliminated by the Commission without any consideration of the consequences of such an action. In fact, the NRG Companies have been indifferent to the consequences of eliminating Rider No. 18. Before filing the Complaint, the NRG Companies did not even determine where the Authority was located or what Pennsylvania river powered the hydroelectric facility.[72]

When they presented their recommendations, the NRG Companies did not calculate the impact eliminating Rider No. 18 would have on the Authority's revenues or whether any debt service remained on the Facilities.[73] It did not study whether the Facilities would be sustainable and capable of operating if Rider No. 18 were eliminated. Nor did it perform any study of what the market potential of the project's output would be if Rider No. 18 were eliminated.[74] In fact, none of the implications of eliminating Rider No. 18 or terminating the Authority's PPA with Duquesne were considered by the NRG Companies or the ALJ, with one exception.[75] Ms. Lagano testified that if the Commission eliminated Rider No. 18 altogether, "[a]ny ensuing legal battles should be of no concern to the Commission."[76] When asked to identify the parties in

[70] N.T. 242, 248, 278, 281, 287, 301.
[71] N.T. 278.
[72] N.T. 366.
[73] Beaver Falls Main Brief, pp. 30-31.
[74] N.T. 367-368
[75] N.T. 400.
[76] NRG Midwest St. No. 1-S, p. 9.

these legal battles that she anticipated, Ms. Lagano would only say they could involve NRG Power, NRG Midwest, Duquesne Light and the QF facilities.[77] Therefore, the Commission should keep in mind that its acceptance of the NRG Companies' recommendation to eliminate Rider No. 18, rather than having the effect of resolving an issue in a positive manner, could result in litigation (and the related expense) for parties, including the Authority, a non-profit entity, and Duquesne. The Authority's entire legal budget for 2013 was only $40,000.00.[78]

As demonstrated by Authority witness, James Riggio, had the NRG Companies discussed or explored the financial consequences of its recommendations with the Authority, they would have learned that the Facilities' debt costs have not been retired, and that Rider No. 18 and recent revenues from the sale of alternative energy credits only slightly exceed the Facilities' ongoing costs.[79] Should revenues be eliminated via cancellation of Rider No. 18 or even reduced to approximately $0.03/kWh, there would be dire financial consequences for the Authority, that would have extensive costs not covered by revenues, threatening its financial stability.[80]

By unlawfully modifying the Rider No. 18 pricing and setting up a possible structure that could substantially reduce, if not eliminate that rider completely, the R.D. has effectively accepted and indeed endorsed the NRG Companies' failure to fully assess its obligation to purchase Pennsylvania QF power through Duquesne before contractually committing to that purchase in 2012 as part of the GenOn merger. By shifting the risk and consequences of the NRG Companies' prior business decisions to the Authority, and doing it by relying upon non-credible and inadequately supported testimony, the R.D. acted both unreasonably and unlawfully.

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[77] N.T. 387.
[78] Authority St. No. 1-REJ, p. 7.
[79] Authority St. No. 1-REJ, pp. 4-6.
[80] Authority St. No. 1-REJ, pp. 4-6.

H. Exception No. 8: The R.D. erroneously grants the NRG Companies standing to litigate the Complaint (R.D. pp. 31-32).[81]

The doctrine of standing pertains to the propriety of the original plaintiff to bring the cause of action.[82] Although it occasionally treats standing and intervention as one and the same,[83] the Commission has recognized that the common law standard for standing from *William Penn Garage, Inc. v. City of Pittsburgh*[84] (requiring that a party have a substantial, direct, and immediate interest) is stricter that the standard for intervention under the Commission's regulations at 52 Pa. Code § 5.72.[85] Rather than analyzing each issue individually, the courts in most instances consider the three elements together and reach a blanket conclusion that a party's interest is (or is not) substantial, direct, and immediate.[86]

The R.D. summarily finds that the NRG Companies have standing to challenge Rider No. 18. There is little analysis and no lawful basis for this conclusion. Indeed, as the Authority argued before the ALJ, the NRG Companies do not have a substantial, direct and immediate interest that conveys them standing in this proceeding, and the Commission should be loath to accept the NRG Companies' invitation to intervene in a matter that is nothing more than an attempt to "fix a business deal gone bad."

A substantial interest for standing requires some discernible adverse effect to a party's interest other than the abstract interest of all citizens in having others comply with the law.[87]

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[81] Beaver Falls Main Brief, pp. 18-21.
[82] *Investigation into Equitable Gas Company's Revenue Allocation among Transportation Customer,* Docket No. I-900009, Order Entered January 16, 1992 (citing Sierra Club v. Morton, 405 U.S. 727 (1972)).
[83] *Investigation into Equitable Gas Company's Revenue Allocation among Transportation Customer,* Docket No. I-900009, Order Entered January 16, 1992 (intertwining the issues of standing and intervention in its resolution of whether representational standing status is available).
[84] 346 A.2d 269 (Pa. 1975).
[85] *Application of Metropolitan Edison Company for Approval to Construct an Electric Generating Unit Fueled by Natural Gas,* Docket No. A-110300, Order Entered February 25, 1994. See also *Petition of Morris-Rospond Associates for Declaratory Order*, Docket No. P-850088, Order Entered March 11, 1986.
[86] *Harrisburg Sch. Dist. v. Hickock*, 762 A. 2d 398 (Pa. Cmwlth. 2000).
[87] *DeFazio v. Civil Service Commission of Allegheny County,* 756 A.2d 1103 (Pa. 2000) (citing *Allegheny County v. Monzo,* 500 A.2d 1096, 1100 (Pa. 1985)).

While the NRG Companies allege in the Formal Complaint some interest in the pricing specified in Rider No 18 (albeit in a diffuse and ambiguous manner which led to its failure to join indispensable parties), as noted below, that interest is not sufficiently direct and immediate so as to covey standing to seek any modification to that rider in this proceeding.

To satisfy the second requirement for standing purposes, i.e., a direct interest, the aggrieved party must show causation of the harm to its interest by the matter of which it complains.[88] Here, none of the NRG Companies has any direct contractual or other privity with the Authority. The PPA and Rider No, 18 involve the relationship between Duquesne and the Authority as a QF under PURPA. While NRG Midwest is the assignee by merger of the Revised QF Agency Agreement, that agreement is solely between NRG Midwest and Duquesne, and not with the Authority.[89] None of the NRG Companies is a party to the PPA. The NRG Companies voluntarily entered into the merger with GenOn and assumed the normal risks of assets associated with such a transaction, including the then-existing Revised QF Agency Agreement and all duties and obligations thereunder. And, since the terms of Rider No. 18 are currently restricted and exist solely for the benefit of two QFs, one of which is the Authority, none of the NRG Companies can assert a direct relationship between the provisions of Rider No. 18 and the price they are required to pay for power under the Revised QF Agency Agreement they voluntarily assumed in 2012 in connection with the GenOn merger.

The fact that one of the NRG Companies is an existing Duquesne customer is of no consequence to any standing claim or showing of a "direct" interest because no Duquesne

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[88] *Id.*

[89] N.T. 369. As testified by NRG Midwest witness Lagano, "NRG Midwest assumed the Revised QF Agency Agreement from GenOn Energy, Inc. ("GenOn") in connection with the merger in 2012 of NRG Energy, Inc. and GenOn." (NRG Midwest St. No. 1, p. 3, lines 8-9.)

customer pays anything in rates for costs incurred by Duquesne under Rider No. 18.[90] Therefore, no customer has any interest, direct or otherwise, in the restricted pricing provisions of Rider No. 18.

The third requirement for standing, "immediacy" of the injury, is evaluated by the causal link between the government's action and the injury to the plaintiff.[91] Immediacy is shown where the particular interest is within the zone of interests sought to be protected by the statute or constitutional guarantee at issue.[92] One guideline relevant to this inquiry is whether the type of interest asserted is among the policies or interests protected by the legal or constitutional rule relied on by the person claiming standing.[93] In this case, it is clear that NRG Midwest seeks only one thing, a reduction in the price it pays to Duquesne under the Revised QF Agency Agreement, which price is tied to the now restricted provision of Rider No. 18. NRG witness Lagano could not have been more clear about the real motivation behind the Formal Complaint when she stated on cross-examination:

> Reviewing the settlements from PJM and reviewing the invoicing and the prior invoicing between Duquesne Light and the predecessor company of NRG over the past year, getting acclimated to the level of pricing being paid to Duquesne and what we were receiving in the wholesale market from PJM for all of the energy produced by the QF.[94]

The import of Ms. Lagano's testimony is clear. Despite having voluntarily entered into the merger transaction with GenOn and assumed the normal transactional risks of assets and agreements that were already in existence, NRG Midwest now seeks to substantially modify the pricing it is paying indirectly via the Revised QF Agency because it cannot resell the energy it is acquiring at a market price that is above the $0.06/kWh reflected in the restricted Rider No. 18.

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[90] *See* Duquesne's Tariff Rider No. 18, attached as "Appendix 2" to the Authority's Main Brief.
[91] *William Penn Parking Garage*, 346 A.2d at 282-83.
[92] *South Whitewall Township Police Service v. South Whitewall Township*, 555 A.2d 793, 795 (Pa. 1989).
[93] *William Penn Parking Garage*, 346 A.2d at 284.
[94] N.T. 370.

For standing purposes, the NRG Companies have not met the "immediacy" issue since the there is no legal or policy basis for the Commission to intervene in a matter that is purely market driven and the logical result of economic and other choices the NRG Companies voluntarily made when they decided to merge with GenOn in 2012. The NRG Companies should not be permitted to substantially undermine (if not completely vitiate) the price certainty of PURPA arrangements reflected in Rider No. 18 in violation of clear and longstanding federal mandates. Duquesne has no legal standing to change Rider No. 18 and the NRG Companies cannot and should not have an increased right to do so in this proceeding. The R.D. erred in granting the NRG Companies standing in this proceeding.

I. <u>Exception No. 9</u>: The R.D. erroneously concludes that the NRG Companies satisfied their burden of proof to support the relief requested in the Complaint. (R.D. p. 40).

The R.D. erroneously finds that the NRG Companies established a *prima facie* case and met their burden of proof in this complaint case by relying on the testimony of their witness, Ms. Lagano, and by finding that Rider No. 18 is no longer compliant with "the Commission's regulatory scheme", citing the Electricity Generation Customer Choice and Competition Act and the Alternative Energy Portfolio Standards Act.[95]

Counsel for the NRG Companies repeatedly characterized Rider No. 18 as a "tariff of general applicability".[96] This is not factually correct. As is clear from the face of Rider 18 and as noted above, its pricing was specifically restricted to very specific classes of QF's in 1987.[97] No post-August 25, 1987 QF project may access the Rider No. 18 minimum $0.06/kWh price and, as stated previously, the only two QF projects with access to that price are historically fixed,

[95] R.D. at 36-40.
[96] N.T. 134, 183, 392.
[97] Appendix 1, NRG Midwest Exhibit No. 3. Duquesne agrees that Rider No. 18 only applies to pre-August 25, 1987 QFs. N.T. 254.

i.e. grandfathered since 1987. Therefore, there is no prospective applicability of this tariff Rider whatsoever, much less "general" applicability.

The fact that Rider No. 18 affects no QF projects other than the Authority and the Beaver Valley Power Company highlights the NRG Companies' motivation with respect to the pricing in Rider No. 18. It is not concerned about the price set for a new QF project, or the basis on which the Commission would set an avoided cost for such projects. Rather, its objective in this case is to employ Pennsylvania regulation as a means to escape the commercial obligations it accepted under the Revised QF Agency Agreement as part of a merger, that it currently finds financially distasteful. In response to questioning regarding what steps the NRG Companies took to understand their obligations under the PPAs with the Authority and the Beaver Valley Power Company it voluntarily accepted as part of the merger with GenOn, Ms. Lagano stated that the NRG Companies reviewed the invoicing between GenOn and Duquesne to get "acclimated to the level of pricing being paid to Duquesne and *what we were receiving in the wholesale market from PJM for all the energy produced by the QF.*"[98] This explains the NRG Companies' strong interest in eliminating the current pricing associated with these QFs and substituting some fluctuating, market based price to reduce the chances it must "buy high" from Duquesne, and sell to the PJM market at a price that is lower when the market price is below 6 cents per kWh. The Commission should reject this attempt to unlawfully use the regulatory process to address the NRG Companies' private commercial interests.

Regardless of the NRG Companies' business motivations, if the Commission finds that it has the jurisdiction to review the substantive merits of the Complaint, the NRG Companies' recommendations should be rejected because there is no credible evidence in support of them,

[98] N.T 370 (emphasis added).

and the NRG Companies have failed to establish even a prima facie case for amendment or elimination of Rider No. 18.

In her Surrebuttal Testimony, Ms. Lagano opined that the electric utilities' obligation to purchase generation from QFs has been "preempted" and the Commission's QF regulations are no longer enforced.[99] She also expanded her recommendations to include a request that the Commission completely eliminate Rider No. 18.[100]

Cross-examination of Ms. Lagano revealed that with respect to Rider No. 18 her testimony was significantly flawed, lacked any credibility, and cannot support a *prima facie* case. Examples of these flaws are as follows:

- Ms. Lagano erroneously believes that the rate discrimination referenced in Section 1304 of the Public Utility Code ("Code") includes rates paid by the utility such as the price in Rider No. 18, when it is clear from the Code's Section 102 definition of "rate"[101] that Section 1304's non-discrimination mandate applies to charges demanded or received by a public utility, not paid by the utility.[102]

- Ms. Lagano has no comprehensible explanation for why she believes the Commission's ratemaking standard for the price in Rider No. 18 should be "just and reasonable rates".[103] In fact, "just and reasonable" is the Commission's standard for setting retail rates, which has nothing to do with wholesale rates for QFs under PURPA. Moreover, NRG Midwest's witness could think of no rate comporting with a just and reasonable ratemaking standard than "a market based rate."[104]

- In cross examination Ms. Lagano recanted her Direct Testimony recommendation that the price in Rider No. 18 should be based on locational marginal pricing ("LMP"), and asserted that LMP is merely some *benchmark* for consideration.[105] (ALJ Johnson – "She said it's a benchmark. She's not saying definitely that's

[99] NRG Midwest St. No. 1-S, pp. 6-7.
[100] NRG Midwest St. No. 1-S, p. 6 ("Rider No. 18 is simply inconsistent with the current regulatory scheme and should be removed from Duquesne Light's tariff.).
[101] 66 Pa.C.S. § 102 ("Rate." Every individual, or joint fare, toll, charge, rental, or other compensation whatsoever of any public utility....demanded or received for any service within this part, offered, rendered, or furnished by such public utility....".).
[102] N.T. 319.
[103] N.T. 321-324.
[104] N.T. 328.
[105] N.T. 328-330.

what it should be. She just says it's a guide.")[106] Neither Ms. Lagano nor her counsel challenged the ALJ's characterization of her cross examination testimony. This leaves the Commission without a basis in substantial evidence for what a new rate for Rider No. 18 "should be".

- As an owner/operator of generating units in PJM, NRG Midwest can influence its suggested benchmark for QF pricing, LMP, through its decisions on generating unit availability.[107] This makes LMP a self-serving, non-credible benchmark.

- After initially testifying that NRG Midwest was not permitted to have information that would allow it to evaluate the power purchase agreements it accepted assignment of as part of the merger with GenOn (an implausible assertion), Ms. Lagano conceded that "I don't know specifically what kind of assessment was made at the time of the assignment."[108]

- Although she is recommending changes in Rider No. 18 which references "avoided cost" as a pricing standard for QFs, Ms. Lagano could not answer the question "who calculates avoided cost and for what purpose", admitted that she has never been responsible for calculating avoided cost under PURPA and has not calculated a utility's avoided cost.[109]

- After incorrectly identifying the Pennsylvania's Electricity Generation Customer Choice and Competition Act ("Act") as the "Electricity Choice and Competition Act" in written testimony, Ms. Lagano asserted that "...the Competition Act created the wholesale electric market which allows generators to provide and sell certain products in the market...".[110] This opinion reflects a gross misunderstanding of the Act, which in fact established *retail* alternatives for electricity customers in Pennsylvania. A belief that a state law could have established wholesale electric markets displays a fundamental lack of expertise in energy regulation.

- After asserting in written testimony that the Commission no longer enforces its QF regulations, Ms. Lagano could provide no support for that action having been taken, could not distinguish between those QF regulations and Rider No. 18 and in fact could not recall if counsel had ever provided a citation to those QF regulations.[111]

- Ms. Lagano is under the belief that Duquesne currently has no mandatory obligation to purchase power from small QF facilities at or below 20

[106] N.T. 330.
[107] N.T. 335-340.
[108] N.T. 370-371.
[109] N.T. 375-376.
[110] N.T. 378.
[111] N.T. 379-383.

> megawatts.[112] This erroneous belief was contradicted as recently as October 2012, in an FERC Order confirming PPL's legal obligation to purchase power from a small QF facility in Pennsylvania.[113]

In her Surrebuttal Testimony, Ms. Lagano opined on the contract term of power purchase agreements and their design relative to the recovery of project investment costs.[114] In cross examination she could offer no specifics on the current relationship between QF contract lengths and financing requirements.[115] In her Surrebuttal Testimony she spoke about Pennsylvania electric utilities' responsibilities for default service generation supply "pursuant to a Commission-approved default service plan"[116], but in cross examination admitted she had not compared LMPs to Duquesne's current default service plan and apparently had not reviewed Duquesne's current 2013-2015 default service procurement plan in any respect.[117]

The foregoing inventory of the shortcomings in Ms. Lagano's testimony justifies giving it no weight. For the R.D. to have concluded that the NRG Companies established a prima facie case is erroneous and completely lacking in evidentiary support.

Duquesne continues to purchase electricity for its customers to supply its default service offering to customers who do not shop for their electricity. However, due to the NRG Companies' contractual acquisition of this supply from Duquesne, the purchases Duquesne makes from the Authority at the price set by Rider No. 18 are not used to provide this default service and instead are routed to NRG Midwest.[118] Therefore, it is impossible for Duquesne's implementation of its Commission-approved default service procurement plan to be frustrated or at odds with its purchases of QF energy under Rider No. 18 as claimed by the NRG

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[112] N.T. 384-385.
[113] *See* Appendix 2 to Beaver Falls Main Brief.
[114] NRG Midwest St. No. 1-S, p. 4.
[115] N.T. 333-334.
[116] NRG Midwest St. No. 1-S, p. 6.
[117] N.T. 316-317.
[118] NRG Midwest St. No. 1, p. 3.

Companies[119]. The NRG Companies attempted to show how Duquesne's purchases pursuant to Rider No. 18 might not pass muster under the Competition Act, but the reality is that the purchases are not part of Duquesne's default service procurement plan. The NRG Companies have made no showing that Duquesne cannot fulfill its obligations under PURPA and Rider No. 18, and also meet its obligations under the Competition Act and the AEPS Act. Neither the R.D. nor the NRG Companies explained how purchases from QFs governed by Federal law cannot co-exist with separate electric utility purchases made under the Competition Act. The R.D. cited the Competition Act's endorsement of retail customers having access to the competitive market.[120] However the R.D. it never explains how Rider No. 18 inhibits access to the retail market by retail customers in any way.

Not only are purchases from QFs consistent with state law, but explicit provision was made in Chapter 28 for continued electric utility purchases from nonutility generation projects, which includes the Authority's QF project, despite the Competition Act's introduction of default service through "commission-approved competitive procurement plan[s]".[121] Explicit provision was made in Section 2804(4)(iii)(B) of the Competition Act for continued electric utility payments for nonutility generation during the rate cap period of electric industry restructuring.[122] This provision clearly covers the Authority's QF project and there is no indication in the Competition Act that such authorized payments should be terminated during the rate cap period or afterwards.

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[119] NRG M.B., pp. 9-10.

[120] R.D. at 39.

[121] 66 Pa.C.S. § 2807(e)(3.1)("...the default service provider shall provide electric generation supply service to that customer pursuant to a commission-approved competitive procurement plan.").

[122] 66 Pa.C.S. § 2804(4)(iii)(B)(Electric utilities may seek an exception to the rate cap when "the electric distribution utility is required to begin payment under contracts with nonutility generation projects that have received commission orders...".) The relevant Commission order here is the 1987 decision approving Rider No. 18 and locking in the price for energy output from the Authority's QF project.

Before the ALJ, the NRG Companies' argument with respect to the AEPS Act was not really that it is in conflict with Rider No. 18, but that the Authority's potential sale of alternative energy credits to entities requiring such credits under the AEPS Act should make the elimination of Rider No. 18 more palatable to the Authority.[123] The Authority currently sells alternative energy credits associated with its QF project separate and apart from Rider No. 18.[124] However, those sales do not blunt the severe financial consequences the Authority would suffer if Rider No. 18 were eliminated.[125] Therefore, the NRG Companies never substantiated their allegation that the operation of Rider No. 18 somehow conflicts with the market forces it believes were intended to set the price for such renewable energy credits under the AEPS Act.

V. CONCLUSION

The R.D. has shoehorned the issue of QF pricing, for existing, longstanding QF projects no less, into a state retail ratemaking standard/tariff paradigm that simply will not fit. This is a wholesale rate issue, not a retail rate issue, governed by federal law rather than state law. It concerns a utility's obligation to *purchase* electricity, not its *sale* of electricity. To the extent a price setting standard is involved, it is the standard of avoided cost, not just and reasonable rates or market prices. The enormous irony in the R.D. is that it treats QF pricing as a retail rate issue addressed under state law, when PURPA's intent, as explained in *Scrubgrass* and *Freehold,* was to exempt QF's from traditional state laws and regulations regarding rates.[126]

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[123] NGR M.B., p. 12.
[124] N.T. 440.
[125] Authority St. No. 1-REJ, pp. 4-6; N.T. 448-449.
[126] "[S]ection 210(c) of PURPA requires the FERC to implement regulations exempting QFs from federal regulation to which traditional electric utilities are subject, including most provisions of the Federal Power Act and '[s]tate laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities.' 16 U.S.C. § 824a-3(a)(1)." *Freehold*, 44 F.3d at 1194 (quote).

The R.D. ignored the relevant legal issue of Duquesne's mandatory continuing purchase obligation under PURPA and instead focused on the incorrect and irrelevant issue of whether Rider No. 18 is inconsistent with the Competition Act and the AEPS Act. This issue of alleged inconsistency has no legal relevance due to the Federal PURPA mandate. In addition, factually there is no demonstrated inconsistency between these state laws and Rider No. 18.

For the reasons set forth above, the Recommended Decision must be reversed.

Respectfully submitted,

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Beaver Falls Municipal Authority

Dated: June 19, 2014

ATTACHMENT 1

STANDARD CONTRACT RIDERS - (Continued)

RIDER NO. 18 - RATE FOR PURCHASE OF ELECTRIC ENERGY FROM CUSTOMER-OWNED RENEWABLE RESOURCES GENERATING FACILITIES

The Company will purchase electric energy from customer-owned generating facilities that: (1) are "qualifying small power production facilities" as defined in Subpart B - Qualifying Cogeneration and Small Power Production Facilities, of Part 292 of Subchapter K of Chapter 1, Title 18, Code of Federal Regulations ("facility"); (2) are located in the Company's service area; (3) use as the energy source renewable resources such as small scale hydro facilities of 30 megawatts or less, biomass, waste, solar or wind; and (4) meet one of the following three criteria:

(a) are subject to a contract dated prior to August 25, 1987, and are supplying electric energy, or have commenced construction of facilities to supply electric energy within sixty (60) day of August 25, 1987.

(b) are supplying electric energy to the Company under the terms of this rider on or before August 25, 1987, but are not subject to an executed contract.

(c) have been negotiating with the Company for a contract and it is determined that the project has been the subject of serious negotiations prior to August 25, 1987.

The electric energy will be purchased, as available, from such facilities at the rate of six (6) cents per kilowatt-hour, or at a rate based on the Company's avoided costs when such costs exceed six (6) cents per kilowatt-hour. For facilities that do not qualify under the provisions of this rider, electric energy will be purchased at a rate based on the Company's avoided costs as calculated in accordance with the applicable PA. P.U.C. regulations. Payment will be made monthly for the electric energy received from the facility in the preceding month.

Each facility will be required to install at its expense, or to have the Company install at the customer's expense, interconnection equipment and facilities including metering, protection and controls. All such interconnection equipment and facilities must be reviewed and approved in writing by the Company prior to installation.

The owner of each facility will be solely responsible for the operation, maintenance and repair of such facility.

The Company shall not be liable for damage to the facility which may result from its interconnection with the Company's facilities.

(C)

Purchase of electric energy under this rider shall be subject to all applicable Rules and Regulations of the Company's Electric Service Tariff, such Rules and Regulations to be read and interpreted, generally, with the word "purchase" substituted for the word "supply" or the word "service" where appropriate to reflect the application of the Rules and Regulations to the purchase rather than the sale of electric energy.

The Company reserves the right to require a written contract covering the purchase of electric energy for each facility.

NRG Midwest Exhibit No. 3

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

NRG Power Midwest LP, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC	:	Docket Nos. C-2013-2390562
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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