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NRG Power Midwest LP, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC v. Duquesne Light Company; Docket No. C-2013-2390562

Attached are NRG Companies Replies to Exceptions of Duquesne Light Company and Beaver Falls Municipal Authority.

Please stamp our file copy and return it via first class mail or call the office and someone will pick up the stamped copy.

If you have any questions, please call either David P. Zambito at 717-703-5892 or Keeley M. Grant, his assistant, at 717-703-5894.

Thank you.

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June 26, 2014

**VIA OVERNIGHT**

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Rosemary Chiavetta, Secretary  
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**Re: NRG Power Midwest LP, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC v. Duquesne Light Company; Docket No. C-2013-2390562**

**REPLIES OF NRG POWER MIDWEST LP, NRG ENERGY CENTER PITTSBURGH LLC, AND RELIANT ENERGY NORTHEAST LLC TO THE EXCEPTIONS OF DUQUESNE LIGHT COMPANY AND BEAVER FALLS MUNICIPAL AUTHORITY**

Dear Secretary Chiavetta:

Enclosed for eFiling with the Commission are the Replies of NRG Power Midwest LP, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC in the above-referenced proceeding. Copies of this document has been served in accordance with the attached Certificate of Service.

If you have any questions regarding this filing, please direct them to me. Thank you for your attention to this matter.

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JUN 26 2014

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

Sincerely,

COZEN O'CONNOR

By: David P. Zambito  
Counsel for NRG Power Midwest LP, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC

DPZ/kmg  
Enclosure

cc: Per Certificate of Service  
Honorable Robert F. Powelson, Chairman  
Honorable John F. Coleman, Vice Chairman  
Honorable James H. Cawley  
Honorable Pamela A. Witmer  
Honorable Gladys M. Brown

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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NRG Power Midwest LP, NRG Energy Center  
Pittsburgh LLC, and Reliant Energy Northeast  
LLC,

Complainants

v.

Duquesne Light Company,

Respondent

JUN 26 2014

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

Docket No. C-2013-2390562

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REPLIES OF THE NRG COMPANIES TO  
THE EXCEPTIONS OF DUQUESNE LIGHT COMPANY  
AND BEAVER FALLS MUNICIPAL AUTHORITY

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Date: June 26, 2014

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**I. INTRODUCTION**PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

This case is fundamentally about the authority of the Pennsylvania Public Utility Commission (“Commission”) to regulate the terms and conditions of a regulated public utility’s Commission-approved tariff in order to ensure that such tariff comports with the regulatory scheme that has been mandated by the Pennsylvania Legislature. The Honorable Administrative Law Judge Conrad A. Johnson (“Presiding Officer”) correctly concludes in his Recommended Decision in the above-captioned proceeding, dated June 3, 2014 and issued June 4, 2014, (“Recommended Decision” or “R.D.”) that the Commission possesses such authority and should exercise it in this case.

On August 2, 2013, Duquesne Light Company (“Duquesne Light”) filed with the Commission at Docket No. R-2013-2372129 Supplement No. 81 to the company’s Tariff Electric – Pa. P.U.C. No. 24 (“Tariff”), representing a request for, among other things, a general increase in electric distribution rates. On October 28, 2013, NRG Power Midwest LP (“NRG Midwest”), NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC (together, the “NRG Companies”) timely filed their formal complaint at Docket No. C-2013-2390562 in the Duquesne Light rate proceeding. The NRG Companies challenged Duquesne Light’s Tariff Rider No. 18 – Rate for Purchase of Electric Energy from Customer-Owned Renewable Resources Generating Facilities (“Rider No. 18”). Rider No. 18 establishes the price at which Duquesne Light will purchase electricity from certain small generators that are also Duquesne Light customers. The NRG Companies served copies of their Complaint upon the Beaver Falls Municipal Authority (“BFMA”) and the Beaver Valley Power Company (“Beaver Valley”) (collectively, the “Qualifying Facilities” or “QFs”).<sup>1</sup>

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<sup>1</sup> The QFs are each a “qualifying facility” under the federal Public Utility Regulatory Policies Act of 1978 (“PURPA”), 16 U.S.C. § 824 *et seq.* Through a series of agreements, NRG Midwest assumed responsibility to

Following extensive and, unfortunately, contentious litigation,<sup>2</sup> the Presiding Officer issued the very-detailed and well-reasoned Recommended Decision finding that the NRG Companies had sustained their burden of proof with regard to their challenge to Rider No. 18. The Recommended Decision correctly concludes that, “[u]pon due consideration of the evidence and legal argument present in this matter, NRG established that Duquesne Light’s Tariff Rider No. 18 is no longer compliant with the Commission’s regulatory scheme” and, as a matter of law, is “unjust and unreasonable and not in the public interest.” R.D. at p. 40. It appropriately recommends as relief that Rider No. 18 be stricken from Duquesne Light’s Tariff as not being in the public interest and that Duquesne Light be given the choice of either removing Rider No. 18 from its Tariff within 90 days or filing a revised Rider No. 18 within 90 days that is just, reasonable, non-discriminatory and in the public interest. R.D. at p. 42, Ordering ¶¶ 3, 4. The Commission should defer to the judgment of the Presiding Officer, who had the ability to assess witness credibility and the opportunity to closely examine the evidence, and adopt the Recommended Decision without modification.<sup>3</sup>

## II. REPLIES TO EXCEPTIONS

The Exceptions set forth by Duquesne Light and BFMA are simply restatements of the arguments presented in their Main Briefs, Reply Briefs, and pleadings throughout this proceeding (including Preliminary Objections, Answer to Motion to Compel Discovery, and

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purchase power from the QFs pursuant to the power purchase price set forth in Rider No. 18. *See* R.D. at pp. 16-18. Despite the repeated efforts of Duquesne Light and BFMA to paint this proceeding as a challenge to the agreements, the Commission should recognize that the NRG Companies are not challenging the agreements. The challenge is solely to Rider No. 18, a provision within Duquesne Light’s Commission-approved tariff.

<sup>2</sup> In the interest of brevity of their Replies to Exceptions, the NRG Companies hereby incorporate by reference the “History of the Proceeding” on pages 1 through 8 of the Recommended Decision as if set forth herein in its entirety.

<sup>3</sup> The Commission rightly affords deference to the factual determinations of presiding officers. *See Re: Mohamed Mansaray v. PECO Energy Co.*, Docket No. C-2013-2352692 (Statement of Chairman R. Powelson dated Jun. 19, 2014)(“Judging the credibility of witnesses is squarely within the realm of the ALJ, as fact finder. As such, we believe it is appropriate to defer to the ALJ’s factual determination on this issue.”).

Petition for Interlocutory Review). While Duquesne Light and BFMA may attempt to reframe or rehash these arguments in an attempt to avoid the Commission's bringing of Rider No. 18 into compliance with the current Pennsylvania regulatory scheme for competitive generation markets, all of their arguments were duly and thoroughly considered by the Presiding Officer and soundly rejected in the Recommended Decision. In support of the Commission's adoption of the Recommended Decision without modification, the NRG Companies hereby reply to the disparate and incongruous Exceptions of Duquesne Light and BFMA by grouping them into the fundamental issues presented in this case.<sup>4</sup>

**A. The Commission Clearly Has the Authority to Direct the Removal or Revision of Rider No. 18, a Commission-Approved Tariff (Reply to Duquesne Light Exception No. 3 and BFMA Exception Nos. 2 & 6).**

Duquesne Light and BFMA continue to forward, as they did in their Main Briefs, Reply Briefs and other pleadings, arguments that the Commission is without authority or jurisdiction to terminate or revise a provision of a Commission-approved tariff (*i.e.*, Rider No. 18). These arguments were first made by Duquesne Light in its Preliminary Objections, which ultimately were rejected by the Presiding Officer. These arguments were again included in the Duquesne Light and BFMA briefs in support of Duquesne Light's Petition for Interlocutory Review and Answer to Material Questions.<sup>5</sup> The arguments have all been thoroughly examined by the Presiding Officer and rejected. The Commission should simply affirm the Recommended Decision.

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<sup>4</sup> The Commission is not required to consider expressly or at great length each and every contention raised by a party to its proceedings. *See Univ. of Pa. v. Pa. Pub. Util. Comm'n*, 485 A.2d 1217, 1222 (Pa. Cmwlth. 1984).

<sup>5</sup> Duquesne Light's request for interlocutory review was denied in its entirety by Commission order entered February 6, 2014. The Commission declined to "preempt the normal review process prior to the ALJ rendering his decision in this proceeding." Feb. 6, 2014 Order at p. 15.

As an initial matter, it is critical to recognize that the six cents per kilowatt-hour price contained in Rider No. 18 is not Duquesne Light's actual "avoided cost." This fundamental point is undisputed. Rider No. 18 specifically provides that the price to be paid for energy from qualifying customer-generators is "six (6) cents per kilowatt-hour, or at a rate based on [Duquesne Light's] avoided costs when such costs exceed six (6) cents per kilowatt-hour." Duquesne Light Exhibit WVP 2-R. When Duquesne Light first established Rider No. 18 in 1981, it acknowledged that the six cents price was above its avoided costs.<sup>6</sup> In connection with its 1987 amendment to Rider No. 18, Duquesne Light stated that its avoided costs were actually about two (2) cents per kilowatt-hour. In short, the six cent price in Rider No. 18 is not and has never represented Duquesne Light's "avoided cost" under PURPA or the Commission's regulations.<sup>7</sup> Accordingly, there is nothing to prevent the elimination or modification of Rider No 18.

Duquesne Light and BFMA have contended, *ad nauseam*, throughout this proceeding that Rider No. 18 represents the public utility's "PURPA rate," and argue that the tariff provision is therefore beyond the Commission's jurisdiction. *See* Duquesne Light Main Brief at pp. 54-57; BFMA Main Brief at pp. 12-16; Duquesne Light Exception No. 3; BFMA Exception No. 1. They further suggest that the tariff provision is actually a contractual term that has been "locked-in" by virtue of prior Commission approval or the execution of power purchase agreements of

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<sup>6</sup> Although Duquesne Light asserts that the price of six cents is in line with prices adopted by another utility and a few other state commissions at the time, Duquesne Light Main Brief at p. 49, this has no bearing on Duquesne Light's actual "avoided costs," which are to be determined based on a public utility's specific circumstances, 18 C.F.R. § 292.304(e) (regarding "Factors affecting rates for purchases"). In any case, as argued below, the six cents price was never formally approved by the Commission as Duquesne Light's "avoided cost."

<sup>7</sup> As pointed out by the Recommended Decision, Duquesne Light in fact on at least three separate occasions (1981, 1986 and 1988) acknowledged in public proceedings that the six cents price was in excess of its actual avoided costs. *See* R.D. at pp. 33-35 ("Thus for a third time Duquesne Light acknowledged that the six cents rate was excessive."); NRG Exhibit No. 6 (Duquesne Light Letter in Support of Implementation of Rider No. 18, dated Aug. 5, 1981); *Pa. Pub. Util. Comm'n v. Duquesne Light Co.*, Docket No. 860556 (Opinion and Order entered Jul. 20, 1987); *City of Pittsburgh v. Duquesne Light Co.*, Docket No. C-871584 (Opinion and Order entered Oct. 6, 1988).

the QFs (the “PPAs”) that reference the Tariff. Duquesne Light Main Brief at p. 49; BFMA Main Brief at p. 12; Duquesne Light Exception No. 3; BFMA Exception No. 1. As discussed below, these positions are without merit and their rejection in the Recommended Decision should be affirmed.

To be clear, Rider No. 18 is a tariff provision. It is a tariff provision that was *voluntarily* adopted by Duquesne Light. Hr’g Tr. 251-52; *accord* BFMA Main Brief at p. 13. The addition of Rider No. 18 to Duquesne Light’s tariff was *not* directly compelled by PURPA or by order of the Commission. Rider No. 18 is not entitled to any special exception or exemption from the Commission’s *exclusive jurisdiction over tariff provisions simply because it voluntarily reaffirms* Duquesne Light’s existing obligations under state and federal law.

Rider No. 18 does not represent the “avoided cost” price at which Duquesne Light is compelled to purchase electricity from qualifying facilities under PURPA.<sup>8</sup> Rather, the six cents per kilowatt-hour price set forth in Rider No. 18 was set *above* Duquesne Light’s avoided cost. NRG Midwest Exhibit No. 6; *see* R.D. at pp. 33-34 (“As emphasized above, Duquesne Light acknowledged that Rider No. 18, when first established, provided for a six (6) cents per kilowatt-hour purchase rate that exceeded the Company’s avoided costs. According to the Company’s filing, the six cents rate was set in excess of the avoided cost in order to encourage the development of generating facilities.”). Indeed, Rider No. 18 treats “avoided cost” as an open term; it is an *alternative* to the six cents per kilowatt-hour price (whichever is higher), left to be determined on a case-by-case basis. Duquesne Light Exhibit WVP 2-R; Duquesne Light St. No. 12-R, at p. 20. Specifically, Rider No. 18 provides that qualifying customer-generators will be

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<sup>8</sup> Duquesne Light readily concedes that it remains compelled to purchase power from qualifying facilities under PURPA, even if Rider No. 18 were to be eliminated as the NRG Companies have requested (Hr’g Tr. 244; Duquesne Light Main Brief at pp. 14, 57), stating “PURPA is still the law of the land, and Duquesne Light continues to have an obligation to purchase power from qualifying facilities at avoided cost” (Duquesne Light Main Brief at p. 14). Thus, regardless of the Commission’s action with regard to Rider No. 18, the mandates of PURPA will continue to be satisfied.

paid “six (6) cents per kilowatt-hour, or at a rate based on [Duquesne Light’s] avoided costs when such costs exceed six (6) cents per kilowatt-hour.” Duquesne Light Exhibit WVP 2-R.

Importantly, Rider No. 18 has never been specifically approved by the Commission as Duquesne Light’s avoided cost. *See Pa. Pub. Util. Comm’n v. Duquesne Light Co.*, Docket No. 860556, 87 WL 1378805, at \*4 (Opinion and Order entered Jul. 20, 1987). BFMA suggests that the six cents per kilowatt-hour price was implicitly approved as consistent with Duquesne Light’s avoided cost when that price was phased out in 1987, but this conclusion is expressly contradicted by the Commission’s own opinion in the 1987 proceeding, when it stated: “[W]e have not examined Duquesne’s avoided cost filings for compliance with our regulations and can make no determination regarding the accuracy of rates set forth in those filings.” *Id.* In fact, the Commission further noted in 1987 that Duquesne Light believed its avoided costs at that time were approximately two (2) cents per kilowatt-hour. *Id.* at \*7 n.7. Six cents simply is not and has never been Duquesne Light’s avoided cost.

Because the six cents per kilowatt-hour price contained in Rider No. 18 has never been specifically approved by the Commission as Duquesne Light’s “avoided cost” under PURPA or the Commission’s regulations, it is not entitled to any “lock-in” by virtue of the same -- as correctly concluded by the Recommended Decision. R.D. at p. 30 (“Accordingly, the Rider No. 18 rate is not ‘locked-in.’ Thus the Commission has jurisdiction over Rider No. 18.”) The Commission never specifically approved either of the PPAs, and neither Duquesne Light nor BFMA has submitted evidence to suggest otherwise.<sup>9</sup> As a result, the reliance placed by Duquesne Light and BFMA on *Freehold Cogeneration Assocs., L.P. v. Board of Regulatory Comm’rs*, 44 F.3d 1178 (3d Cir. 1995), and its progeny is misplaced.

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<sup>9</sup> Indeed, neither Duquesne Light nor BFMA presented proof that the PPAs were approved under Section 507 of the Public Utility Code. 66 Pa. C.S. § 507 (requiring Commission approval of contracts between public utilities and municipalities).

In *Freehold*, the Third Circuit determined that the Board of Regulatory Commissioners of the State of New Jersey had approved a certain power purchase agreement between a qualifying facility and an electric utility and was therefore prevented by federal law from later reopening the previously approved terms of that agreement. Here, the Commission has not been asked to reopen a term in a power purchase agreement, let alone any agreement that the Commission has actually approved.<sup>10</sup> Instead, it has been asked to consider the continued legality of a 32 year-old tariff provision that no longer comports with the law in Pennsylvania. As a result, *Freehold* is inapposite.

Likewise, the Recommended Decision correctly finds that the *Scrubgrass* cases are inapplicable to the current situation. See R.D. at pp. 29-30; *Petition of Pa. Elec. Co. (Penelec) Requesting Approval of Rate Recovery, Under the Energy Cost Rate, for the costs Proposed to be Paid under an Agreement with Scrubgrass Power Corp.*, Docket No. P-870248, 66 Pa. P.U.C. 151 (Order entered Jan. 21, 1988)(“*Scrubgrass I*”); *Petition of Pa. Elec. Co. Re Third Supplement Agreement with Scrubgrass Power Corp.*, Docket No. P-00469 *et al.*, 126 Pa. P.U.R.4<sup>th</sup> 111 (Ordered entered Nov. 21, 1990)(“*Scrubgrass II*”). The Presiding Officer succinctly explains: “Based upon the arguments of Duquesne Light and BFMA that the avoided costs purchase rate are within the exclusive jurisdiction of FERC once the state regulatory body has approved the rate, the Commission would have lacked the jurisdiction to change the purchase rates in the PPAs. Obviously the arguments are flawed because in *Scrubgrass II* the Commission approved the amendment which modified the purchase rate.” R.D. at p. 30. Here, the PPAs were never approved by the Commission.

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<sup>10</sup> Duquesne Light has suggested that *Freehold* can be extended beyond the four corners of a Commission-approved power purchase agreement, arguing that the determination of avoided cost is “once and done” and cannot be changed, even where provided in a tariff. As the NRG Companies have shown, Rider No. 18 does not and never has represented a Commission-approved avoided cost for Duquesne Light. As a result, *Freehold* should be applied only to terms contained within a specific Commission-approved contract.

Even if the Commission had approved the PPAs, its approval would have been based, at least in part, on the understanding that the price provision was subject to modification because it was set forth in a tariff. As Duquesne Light's Senior Manager for Rates and Tariff Services testified, Duquesne Light retains the ability under the PPAs themselves to "unilaterally" apply to the Commission to terminate or modify the Tariff.<sup>11</sup> Hr'g Tr. 273-74, 278, 282. The Commission further understood that it retained the authority to make future modifications to the price component of Rider No. 18 when considering the phase out of the six cents price in 1987. *Pa. Pub. Util. Comm'n v. Duquesne Light Co.*, Docket No. R-860556, 87 WL 1378805, at \*3 (noting that certain projects would be entitled to the Rider No. 18 price "*at least until the Commission approves the modification of [Duquesne Light's] tariff*") (emphasis added). Moreover, the terms of the PPAs, as noted in the Recommended Decision, clearly suggest that Duquesne Light intended to preserve its ability to seek redress from the Commission if the price set forth in Rider No. 18 at some point in the future became unjust or unreasonable. *See* R.D. at p. 17, Finding of Fact Nos. 31, 32.

The suggestion of Duquesne Light and BFMA that the Commission is now without the power to change the Tariff is baseless. Even if the Commission had approved the PPAs (which it did not), the remedy to change the power purchase price is a revision of the Tariff. To the extent that the *Freehold* decision deprived the Commission of the power to modify the stated price (which it did not), *Freehold* cannot divest the Commission of the powers expressly granted to it by the Pennsylvania Legislature. Among these powers is the power to say what can and cannot

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<sup>11</sup> While Duquesne Light in essence attacks the credibility of its own witness on the grounds that he is not a lawyer, he is clearly a senior management employee of the company and his testimony reveals the position of Duquesne Light that it may at any time seek to modify a provision of its Tariff in furtherance of the public interest. *See* Duquesne Light Exception No. 3, p. 13.

properly be contained within a Pennsylvania-regulated public utility's tariff. *See* 66 Pa. C.S. §§ 501 (regarding "General powers"), 1302 (regarding "Tariff; filing and inspection").

**B. Rider No. 18 is Inconsistent with the Law in Pennsylvania and Must Be Removed from the Tariff as *Per Se* Unjust and Unreasonable (Reply to Duquesne Light Exception Nos. 1, 3 & 5 and BFMA Exception Nos. 1 & 9).**

Duquesne Light and BFMA make a variety of arguments in an attempt to convince the Commission that the power purchase price contained in Rider No. 18 should remain unchanged. They argue unconvincingly that the "core issue" of the proceeding is not whether Rider No. 18 is compliant with the Pennsylvania regulatory scheme but, instead, what impact a revision of Rider No. 18 may have on private contracts over which the Commission lacks jurisdiction. *See* BFMA Exception Nos. 1, 9. They would have the Commission, under questionable theories of federal preemption for which they can offer no concrete case law in support, conclude that it is powerless to remove or otherwise modify a tariff provision that the Commission itself approved. *See* Duquesne Light Exception Nos. 1, 3, 5. Duquesne Light and BFMA's advocacy for the *status quo* is unsupported by both the facts of the case and the law.

As concluded by the Recommended Decision, Rider No. 18 is an outdated relic of a prior Pennsylvania regulatory scheme. R.D. at p. 40. Duquesne Light first established Rider No. 18 in 1981. NRG Midwest Exhibit No. 6, at p. 1. At that time, there were no markets in Pennsylvania for capacity or alternative energy credits, as the electric utility industry remained vertically integrated. Hr'g Tr. 378:10-25, 379:1-6. In over thirty-two years, Duquesne Light has only changed Rider No. 18 three times. Hr'g Tr. 254:1-3. However, it has never revised the six cent per kilowatt-hour price under Rider No. 18, except in 1987 to phase it out for prospective applicants. *See Pa. Pub. Util. Comm'n v. Duquesne Light Co.*, Docket No. 860556 (Opinion and

Order entered Jul. 20, 1987); Duquesne Light Company St. No. 12-R, at 27:9-19; Hr'g Tr. 254:4-20, 290:12-16. Prospective applicants under Rider No. 18 may sell power at Duquesne Light's "avoided cost." The Tariff however does not provide how Duquesne Light's "avoided cost" is to be determined. Hr'g Tr. 250:24-25, 251:1-19. Duquesne Light has not performed an "avoided cost" study in at least 10 years. *See* Hr'g Tr. 245:10-11. Currently, only two facilities (BFMA and Beaver Valley) have executed power purchase agreements with Duquesne Light that are subject to the price of six cents per kilowatt-hour pursuant to Rider No. 18. Duquesne Light Company St. No. 12-R, at 21:19-30; 22:1-25. The price in Rider No. 18 has not been analyzed by Duquesne Light in at least 10 years. Hr'g Tr. 237:12-20, 238:3-12. *See* R.D. at pp. 15-16 (Findings of Fact Nos. 18-24).

In 1996, the Electricity Generation Customer Choice and Competition Act (the "Competition Act"), 66 Pa. C.S. § 2801 *et seq.*, was signed into law in Pennsylvania. In support of the Competition Act, the General Assembly found that providing retail customers access to a competitive generation market was in the public interest, and that competitive market forces are more effective than economic regulation in controlling the cost of generating electricity. 66 Pa. C.S. § 2802.

The Competition Act amended the Public Utility Code by adding Chapter 28 and required electric utilities to unbundle their rates and services and to provide open access over their transmission and distribution systems to allow competitive suppliers to generate and sell electricity directly to consumers. *Id.* Electric utilities were relieved of their duty to supply generation service to retail customers, except as providers of last resort to those choosing not to participate in the competitive markets. 66 Pa. C.S. § 2807. In providing such default service, electric utilities must procure power through certain specified competitive processes. Bilateral

power purchase agreements are permissible, so long as the price for power is no greater than the cost of obtaining power in the wholesale market. 66 Pa. C.S. § 2807(e)(3.1)(iii). Long-term power purchase agreements may not have a term in excess of 20 years. *Id.* § 2807(e)(3.2)(iii).

The Alternative Energy Portfolio Standards Act (“AEPS Act”), 73 P.S. § 1648.1 *et seq.*, was signed into law in 2004. The AEPS Act requires that electric distribution companies and electric generation suppliers procure a certain percentage of their electricity supply from alternative energy sources. 73 P.S. § 1648.3. The AEPS Act also required the Commission to establish an alternative energy credits program as a means of tracking compliance with the portfolio standards. 73 P.S. § 1648.3(e). An “alternative energy credit” is a tradable instrument “used to establish, verify and monitor compliance with the act.” 73 P.S. § 1648.2. Not only does the AEPS Act provide an incentive to develop alternative energy sources by requiring electric utilities and generation suppliers to purchase power from such sources, it also provides an additional revenue stream to these sources by monetizing the environmental attributes of the power itself (*i.e.*, through tradable alternative energy credits).

In light of the Competition Act and the AEPS Act, Rider No. 18 is in direct conflict with statutory law and no longer serves a legitimate purpose. The Competition Act directly governs the purchase of power by Duquesne Light and further specifies the terms and conditions under which power may be competitively procured. By establishing a price for power through bilateral contracts, Rider No. 18 is incompatible with the Competition Act’s competitive procurement processes at 66 Pa. C.S. § 2807(e)(3.1), which specifically address bilateral contract pricing requirements. Moreover, there is no need to establish a Tariff-based price as an incentive for the development of alternative energy. The AEPS Act establishes a firm incentive for electric distribution companies and electric generation suppliers to purchase power from alternative

energy sources and at a price that accounts for the additional “green” attributes of that power, representing a market-based premium over wholesale prices for traditional power. By predetermining as a matter of law the price at which Duquesne Light must purchase alternative energy from select customer-generators, Rider No. 18 is in direct conflict with the express policy decision of the Commonwealth to allow market forces to establish the price of power and the value of any associated alternative energy credits.

Charged with the implementation of both the Competition Act, 66 Pa. C.S. §2806, and the AEPS Act, 73 P.S. § 1648.7, the Commission must not allow Rider No. 18 to continue with the force and effect of law.<sup>12</sup> Because it is in direct conflict with Pennsylvania law (as concluded by the Recommended Decision), Rider No. 18 is *per se* unjust and unreasonable and must be removed from Duquesne Light’s Tariff or, alternatively, Duquesne must be required to file a revised Rider No. 18 that is just, reasonable, non-discriminatory and otherwise in the public interest. R.D. at p. 40.

Exception Nos. 1, 3 and 5 of Duquesne Light and Exception Nos. 1 and 9 of BFMA suggest that the Commission should simply ignore its statutory obligation to ensure that Rider No. 18 is compliant with the current regulatory scheme. The Exceptions should accordingly be denied. Again, this case is about a Commission-approved tariff provision; it is not about power purchase agreements and agency agreements over which the Commission lacks subject matter jurisdiction.

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<sup>12</sup> It is within the Commission’s authority to evaluate the reasonableness of filed tariffs and to determine whether tariff provisions are compatible with both the Public Utility Code and the Commission’s policies, and consistent with its regulatory scheme. *See Behrend v. Bell Tele. Co.*, 363 A.2d 1152, 1166 (Pa. Super. 1976).

**C. The Recommended Decision's Finding that the Current Rider No. 18 Power Purchase Price is Excessive is Supported by Substantial, Credible Evidence of Record (Reply to Duquesne Light Exception Nos. 1, 2 and 5 and BFMA Exception Nos. 2, 3, 4, 5, 7 & 9).**

The contention of Duquesne Light and BFMA that the NRG Companies failed to meet their burden of proof and present substantial and credible evidence of record must be rejected. See Duquesne Light Exception Nos. 1, 2, 5; BFMA Exception Nos. 2, 3, 4, 5, 7, 9. The Recommended Decision correctly finds such an argument to be “unpersuasive.” R.D. at pp. 36-40 (“All of the above reasoning requires finding that the NRG Companies established their burden of proving that Rider No. 18 is no longer compliant with the Commission’s regulatory scheme. Further Duquesne Light did not present any credible evidence to rebut, in essence, NRG’s prima facie case. In other words, both Duquesne Light’s and BFMA’s positions rested upon legal arguments, which are unavailing.”). In the end, the NRG Companies satisfied their burden of proof while Duquesne Light and BFMA failed to satisfy their burden of production.<sup>13</sup>

Among the substantial evidence presented by the NRG Companies in the proceeding was the fact that, in today’s environment, Rider No. 18’s six cents price is almost double as to what is available in the open market. Hr’g Tr. 320-24. NRG Witness Judith Lagano, whom the Presiding Officer found to have credibly testified, explained that “NRG Midwest and its predecessors have paid the \$60 per megawatt hour price (\$0.06 per kilowatt-hour) for the past

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<sup>13</sup> The burden of proof is composed of two distinct burdens: the burden of production and the burden of persuasion. *Hurley v. Hurley*, 754 A.2d 1283 (Pa. Super. 2000); see *Joint Petition of Metropolitan Edison and Pennsylvania Power Co. for Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. R-2009-2123950 (Initial Decision of ALJ Colwell, issued Jan. 28, 2010). The burden of production, also called the burden of producing evidence or the burden of coming forward with evidence, determines which party must come forward with evidence to support a particular proposition. This burden may shift between the parties during the course of a hearing. If the party with the burden of production (initially, the NRG Companies in this case) fails to introduce sufficient evidence, the opposing party is entitled to receive a favorable ruling. Once the party with the initial burden of production introduces sufficient evidence to make out a prima facie case, the burden of production shifts to the opposing party. If the opposing party introduces evidence sufficient to balance the evidence introduced by the party having the initial burden of production, the burden then shifts back to the party who had the initial burden to introduce more evidence favorable to its position. The burden of production goes to the legal sufficiency of a party’s case. *Id.*

twelve years.” NRG Midwest St. No. 1, p. 6; Hr’g Tr. 320; R.D. at p. 36. By contrast, in the Duquesne Light service area, the PJM Interconnection, LLC day-ahead locational marginal prices (“DALMP”) for energy, over the period of 2009 to the present, range from \$31.53 MWh to \$38.89 MWh. NRG Midwest St. No. 1, p. 5; NRG Midwest Exhibit No. 4. Accordingly, the Rider No. 18 price no longer reasonably reflects Duquesne Light’s “avoided cost.”<sup>14</sup>

Even if Rider No. 18 is allowed to remain in effect in a revised form, the six cents per kilowatt-hour price contained therein is not just and reasonable. The six cents price is over 30 years old, and it exceeds by a considerable margin the average price at which power may be purchased on the market. The six cents per kilowatt-hour price is for electric energy only. It does not include compensation for capacity or ancillary services. Nor does the six cents price provide compensation for alternative energy credits generated by eligible facilities. See R.D. at p. 22, Finding of Fact No. 61 (finding that “green” attributes of power are a market-based premium over wholesale prices for traditional power). This is because Rider No. 18 was developed prior to the existence of capacity and alternative energy credit markets.<sup>15</sup> Hr’g Tr. 378, 395. As a result, the six cents price must be evaluated in light of current market prices for electric energy only.<sup>16</sup>

Duquesne Light argues that it has experienced *full requirements* default service rates in the range of five to seven cents per kilowatt-hour and that the six cents price contained in Rider No. 18 is therefore reasonable. Duquesne Light Exception No. 2. However, it is improper to compare the *energy-only* six cents per kilowatt-hour price to the *full requirements* default service

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<sup>14</sup> The Recommended Decision correctly notes that states cannot impose purchase rates in excess of long-term avoided costs. R.D. at p. 36 (citing *State of N.C. ex rel. Utilities Comm’n v. N.C. Power*, 450 S.E.2d 896, 900 (N.C. 1994)).

<sup>15</sup> Indeed, BFMA has been benefitting from this change in law and regulatory scheme. In addition to the revenue being received at the Rider No. 18 price, BFMA is now also selling the alternative energy credits it generates as a Tier I renewable resource. Hr’g Tr. 439:2-8, 22-25; R.D. at p. 22, Finding of Fact No. 62.

<sup>16</sup> This is not to say that the price for power in Rider No. 18 must be continually updated, but periodic adjustments at reasonably regular intervals, at a minimum, would be appropriate.

rates experienced by Duquesne Light over the past decade. As explained by the witness for Duquesne Light, the bids received by the public utility are in fact for “full requirements” contracts. Hr’g Tr. 239:17-24. A full requirements contract with Duquesne Light requires a supplier to provide not only electric energy, but capacity, ancillary services, congestion and congestion management charges, alternative energy requirements, and PJM grid management charges. Duquesne Statement No. 4, at 6, Petition of Duquesne Light Company for Approval of the Default Service Program, Docket No. P-2012-2301664. The five to seven cents pricing cited by Duquesne Light is therefore inclusive of more than just a price for electric energy. With respect to the generation-only component of those rates, the witness for Duquesne Light could not testify. Hr’g Tr. 239:25 to 240:1-4. Duquesne Light has therefore failed to provide any credible evidence that the six cents per kilowatt-hour price is just and reasonable. As noted above and in the Recommended Decision, Duquesne Light has acknowledged on at least three separate occasions that six cents per kilowatt-hour is in excess of its avoided cost. *See* R.D. at pp. 33-35.

The NRG Companies submit that the DALMP in the Duquesne Zone represents a just and reasonable price for power under Rider No. 18, provided the tariff provision is allowed to remain in force, because it reflects the price for energy in Pennsylvania’s competitive markets, consistent with current policy. While there may be other pricing mechanisms that could be just and reasonable, Duquesne Light has offered no alternatives. This is not surprising, since the public utility admitted that it had not studied the six cents price or its avoided cost in at least the last decade. Hr’g Tr. 237:12-20, 238:3-12, 245:10-11.

In any event, the NRG Companies respect the Recommended Decision’s recommendation that the Commission order Duquesne Light to remove Rider No. 18 or, in the

alternative, that the Commission require Duquesne Light to revise Rider No. 18 to reflect a just and reasonable rate. The NRG Companies encourage the Commission to adopt the Recommended Decision without modification. See R.D. at p. 42, Ordering ¶¶ 3, 4.

If the Commission requires Duquesne Light to revise Rider No. 18 to reflect a price that it considers to be “just, reasonable, non-discriminatory and in the public interest,” interested parties -- including the NRG Companies -- will have the opportunity to participate actively in the tariff supplement proceeding in order to ensure that the proposed price complies with this standard and reflects a true “energy only” cost.

**D. The NRG Companies Clearly Have Standing to Challenge Rider No. 18 (Reply to BFMA Exception No. 8).**

Despite clear evidence to the contrary, BFMA continues to assert that the NRG Companies lack standing to challenge Rider No. 18. BFMA Exception No. 8. The position is completely without merit. Again, BFMA fails to recognize that the instant dispute is about a provision in Duquesne Light’s Tariff and whether it comports with the Pennsylvania regulatory scheme. It is not an attempt to litigate power purchase agreements before the Commission. See R.D. at p. 32 (“Additionally there is no evidence in the record to establish that the NRG Companies are challenging the PPAs between DLC and the QFs.”) Litigation regarding private contractual arrangements is properly reserved for the civil courts. As entities that participate in the Pennsylvania competitive market, the NRG Companies clearly have an interest in Rider No. 18 that is substantial, direct and immediate. See *William Penn Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975).

In particular, NRG Midwest clearly has standing. As noted in the Recommended Decision, “NRG Midwest has a substantial, direct and immediate interest in challenging the

lawfulness of Rider No. 18. Because the pass through construct of its Agency Agreement with DLC, NRG Midwest is the entity that actually pays the six cents purchase price set forth in Rider No. 18.” R.D. at pp. 31-32. For this reason alone, BFMA’s Exception No. 8 should be summarily denied.

**E. The QFs are not Indispensable Parties to a Tariff Challenge but Were Nonetheless Provided Adequate Notice of the Challenge to Rider No. 18 (Reply to Duquesne Light Exception No. 4).**

In its Exception No. 4, Duquesne once again raises its argument that the NRG Companies failed to join an indispensable party. This argument was previously raised in Duquesne Light’s Preliminary Objections and was rejected by the Presiding Officer. See “Second Interim Order Denying Respondent Duquesne Light Company’s Preliminary Objections to Complaint of NRG Power Midwest LP,” dated Dec. 12, 2013. Duquesne then raised it in its Petition for Interlocutory Order and the Commission appropriately declined to take action. Order entered Feb. 6, 2014.

As explained above, the current dispute involves a challenge to a provision of a Commission-approved tariff. It is not a challenge to any specific agreement to which BFMA or Beaver Valley may be a party. As such, the Recommended Decision correctly finds that “[w]hile the outcome of this proceeding may ultimately impact both BFMA and Beaver Falls [*sic*], neither QF is an indispensable party to the resolution of NRG’s formal complaint. The earlier history of Rider No. 18 demonstrates that BFMA and Beaver Falls [*sic*] Power Company were not parties to the proceeding when Duquesne Light sought to restrict the availability of the six cents rate to other QFs.” R.D. at p. 30 (citing *Pa. Pub. Util. Comm’n v. Duquesne Light Co.*, Docket No. 860556 (Opinion and Order entered Jul. 20, 1987)).

Even if the Commission were to deem that notice of the NRG Companies' challenge to Rider No. 18 was required, notice was in fact given. Both BFMA and Beaver Valley were served with the NRG Companies' Complaint and, by admission of a Duquesne witness, subsequently spoke with counsel for Duquesne Light about the proceeding. Hr'g Tr. 267-70. BFMA chose to intervene; Beaver Valley did not. The Commission's ability to rectify Rider No. 18 should not be delayed by Beaver Valley's voluntary decision not to participate.

For the foregoing reasons, Duquesne Light's Exception No. 4 should be denied. The due process rights of the QFs have been fully protected. They were provided with notice of the NRG Companies' Complaint and had, and will again have through Duquesne Light's filing of a tariff supplement to remove or revise Rider No. 18, an opportunity to be heard.

### **III. CONCLUSION**

The Recommended Decision correctly concludes that both the Competition Act and the AEPS Act, in conjunction with the market for competitive generation in Pennsylvania, have rendered Rider No. 18 obsolete as a relic of an outdated regulatory scheme. The Commission should no longer sanction Rider No. 18 and give it the "force and effect" of law. Rider No. 18 as a matter of law is unjust, unreasonable and otherwise contrary to the public interest. For the reasons set forth above, in the NRG Companies' Main Brief and Reply Brief and in the Recommended Decision, the Commission should order Duquesne Light to either remove Rider No. 18 from its Tariff or file a revised Rider No. 18 consistent with the findings and direction of the Recommended Decision.

To the extent that Rider No. 18 is eliminated, there will undoubtedly be contractual implications for NRG Midwest, Duquesne Light, and the QFs. These issues, however, should be

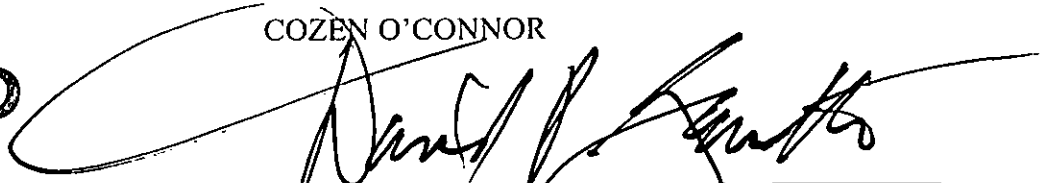
resolved between the parties and require no further action by the Commission. The Commission's responsibility is simply to ensure that Duquesne Light's tariff is consistent with the law and the intention of the Pennsylvania Legislature to promote a competitive generation market.

#### IV. REQUEST FOR RELIEF

WHEREFORE, for the foregoing reasons, NRG Power Midwest LP, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC respectfully request that the Exceptions of Duquesne Light Company and Beaver Falls Municipal Authority be denied in their entirety and that the Pennsylvania Public Utility Commission adopt the Recommended Decision of the Honorable Administrative Law Judge Conrad A. Johnson, dated June 3, 2014 and issued June 4, 2014, without modification.

Respectfully submitted,

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DATED: June 26, 2014

**RECEIVED**  
JUN 26 2014  
PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

**CERTIFICATE OF SERVICE**  
**NRG Power Midwest LP, NRG Energy Center Pittsburgh LLC,**  
**and Reliant Energy Northeast LLC, Complainants**  
**vs.**  
**Duquesne Light Company, Respondent**  
**Docket No. C-2013-2390562**

**RECEIVED**

JUN 26 2014

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

I hereby certify that I have this day served a true copy of NRG Power Midwest LP, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC's Replies to Exceptions to the Recommended Decision of Administrative Law Judge Conrad A. Johnson issued June 4, 2014, upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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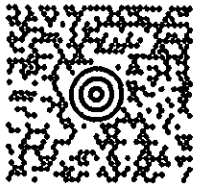

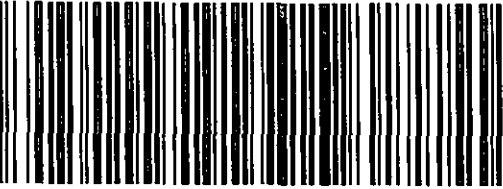

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