COZEN O'CONNOR

December 1, 2014

VIA HAND DELIVERY

David P. Zambito
Direct Phone 717-703-5892
Direct Fax 215-989-4216
dzambito@cozen.com

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
P.O. Box 3265
Harrisburg, PA 17105-3265

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

PETITION OF THE NRG COMPANIES FOR RECONSIDERATION AND CLARIFICATION OF THE COMMISSION'S ORDER, ENTERED NOVEMBER 13, 2014 (NON-PROPRIETARY VERSION)

Dear Secretary Chiavetta:

Enclosed for filing with the Commission is NRG Power Midwest LP, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC's ("NRG Companies") Petition for Reconsideration and Clarification ("Petition') of the Commission's Order, entered November 13, 2014, in the above-referenced proceeding. Copies of this document have been served in accordance with the attached Certificate of Service. ***The NRG Companies are also filing a Highly Confidential version of the Petition with the Commission under separate cover.***

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

Sincerely,

COZEN O'CONNOR

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

RECEIVED
2014 DEC -1 PM 4:24
PA PUC
SECRETARY'S BUREAU

DPZ/kmg
Enclosure
cc: Honorable Robert F. Powelson, Chairman (via first class mail)

Honorable John F. Coleman, Vice Chairman (via first class mail)
Honorable James H. Cawley, Commissioner (via first class mail)
Honorable Pamela A. Witmer, Commissioner (via first class mail)
Honorable Gladys M. Brown, Commissioner (via first class mail)
Office of Special Assistants at ra-OSA@pa.gov (including MS Word version)
Per Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

NOTICE TO PLEAD

TO: Parties at Docket No. C-2013-2390562

Pursuant to 52 Pa. Code §§ 5.61 and 5.572, you are hereby notified that NRG Power Midwest LP, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC ("NRG Companies") have filed a Petition for Reconsideration and Clarification at the above-referenced docket to which you may file an answer within ten (10) days unless otherwise provided in Chapter 5 of Title 52 of the Pennsylvania Code or by the Commission. Your failure to answer will allow the Commission to rule on the Petition without a response from you, thereby requiring no other proof. All pleadings such as an Answer to this Petition must be filed with the Secretary of the Pennsylvania Public Utility Commission at P.O. Box 3265, Harrisburg, PA 17105-3265, with a copy served on the undersigned counsel for NRG Companies.

David P. Zambito, Esquire (Attorney I.D. No. 80017)
D. Troy Sellars, Esquire (Attorney I.D. No. 210302)
Cozen O'Connor
305 North Front Street, Suite 400
Harrisburg, PA 17101-1236
Telephone: 717-703-5892
Facsimile: 215-989-4216
E-mail: dzambito@cozen.com
tsellars@cozen.com

Date: December 1, 2014

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

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

***** NON-CONFIDENTIAL VERSION *****

PETITION OF THE NRG COMPANIES FOR RECONSIDERATION AND CLARIFICATION OF THE COMMISSION'S ORDER, ENTERED NOVEMBER 13, 2014

David P. Zambito, Esquire (PA ID No. 80017)
D. Troy Sellars, Esquire (PA ID No. 210302)
Cozen O'Connor
305 North Front Street, Suite 400
Harrisburg, PA 17101
Telephone: (717) 703-5892
Fax: (215) 989-4216
Email: dzambito@cozen.com
tsellars@cozen.com

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

Date: December 1, 2014

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

***** NON-CONFIDENTIAL VERSION *****

PETITION OF THE NRG COMPANIES FOR RECONSIDERATION AND CLARIFICATION OF THE COMMISSION'S ORDER, ENTERED NOVEMBER 13, 2014

David P. Zambito, Esquire (PA ID No. 80017)
D. Troy Sellars, Esquire (PA ID No. 210302)
Cozen O'Connor
305 North Front Street, Suite 400
Harrisburg, PA 17101
Telephone: (717) 703-5892
Fax: (215) 989-4216
Email: dzambito@cozen.com
tsellars@cozen.com

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

Date: December 1, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes

State Statutes

Regulations

Other Authorities

NOW COME NRG Power Midwest LP ("NRG Midwest"), NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC (together, the "NRG Companies"), by and through counsel, Cozen O'Connor, and file, pursuant to Section 5.572 of the Rules of Practice and Procedure of the Pennsylvania Public Utility Commission ("Commission"), 52 Pa. Code § 5.572 ("Petitions for relief"), and subsection (g) of Section 703 of the Pennsylvania Public Utility Code ("Code"), 66 Pa. C.S. § 703(g)("Rescission and amendment of orders"), this Petition for Reconsideration and Clarification ("Petition") of the Commission's Opinion and Order, entered November 13, 2014, ("November 13th Order") in the above-captioned matter. In support hereof, the NRG Companies argue as follows:

I. INTRODUCTION

1. As will be explained in greater detail in this Petition, the Commission committed a clear error of law in the November 13th Order by interpreting the language of private contracts and thereby exceeding its limited subject matter jurisdiction. Specifically, on page 63 of the November 13th Order, the Commission interprets the power purchase agreement between Duquesne Light Company ("Duquesne") and Beaver Falls Municipal Authority ("BFMA") and the power purchase agreement between Duquesne and Beaver Valley Power Company ("Beaver Valley") (collectively, the power purchase agreements are referred to herein as the "PPAs" and BFMA and Beaver Valley are referred to herein as the "QFs") as having legally-enforceable specified terms (*i.e.* contract durations). This error of law completely undercuts the rationale of the Commission's opinion, which concludes that the Commission lacks the authority to regulate the terms and conditions of Duquesne's Commission-approved tariff in order to ensure that such

tariff comports with the current regulatory scheme that has been mandated by the Pennsylvania Legislature.

2. The November 13th Order is erroneously premised an assumption that each of the PPAs has a legally-enforceable "specified term." November 13th Order, pp. 9-14, 63-64; *cf.* 18 C.F.R. § 292.304(d)(stating that certified qualifying facility purchases must be made at either the avoided cost at time of delivery or "pursuant to a legally enforceable obligation for the delivery of energy or capacity ***over a specified term***")(emphasis added). The substantial evidence of record in this proceeding supports only one of two conclusions in this regard. First, the terms of the PPAs are unspecified and, therefore, there is no restriction on the Commission's modification of Duquesne's Tariff Rider No. 18 – Rate for Purchase of Electric Energy from Customer-Owned Renewable Resources Generating Facilities ("Rider No. 18"). To the extent that there is a dispute regarding the term, only a court of competent jurisdiction or the Commission, using its powers under Section 508 of the Code, 66 Pa. C.S. § 508, can create a legally-enforceable obligation with a "specified term." Second, the substantial evidence of record supports a conclusion that the intent of the PPAs was to allow the term to be defined by the Commission through changes to Rider No. 18 of Duquesne's tariff after affording interested parties appropriate due process.

3. By not reaching one of these two conclusions regarding the term of the PPAs, the Commission has abused its discretion by not relying on substantial evidence of record and has effectively placed NRG Midwest in a "Catch 22" situation in which BFMA and Beaver Valley are free to decide how long they would like to be paid in excess of true "avoided cost." – an absurd result. Moreover, because NRG Midwest has assumed the obligations of the PPAs,

Duquesne has no incentive to advocate for a change to Rider No. 18.[1] Such a circumstance is patently unfair, unreasonable and inequitable. Further, the situation is harmful to the Commonwealth's wholesale and retail competitive markets.

4. As relief, the NRG Companies respectfully request that the November 13th Order be reversed and Duquesne be ordered to remove Rider No. 18 from its Commission-approved tariff consistent with the Recommended Decision of the Honorable Administrative Law Judge Conrad A. Johnson ("ALJ"). Alternatively, the Commission should defer its consideration of Rider No. 18 until such time as (a) a civil court of competent jurisdiction has had an opportunity to rule upon the terms of the PPAs or (b) the Commission has had the opportunity to consider whether the PPAs should be varied, reformed, or revised under Section 508 of the Code, 66 Pa. C.S. § 508, to reflect reasonable terms over which the QFs are able to earn a reasonable return on and of their investments as qualifying facilities under the federal Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 824 *et seq.* Further, the NRG Companies respectfully request clarification that the November 13th Order does not approve the PPAs, does not preclude NRG Midwest from seeking recourse from civil courts of competent jurisdiction on the terms of the PPAs, does not preclude NRG Midwest from seeking modification of the terms of the PPAs under Section 508 of the Code, 66 Pa. C.S. § 508, and does not conclude that Alternative Energy Credits are properly owned and sold by the QFs.

[1] In this regard, it is worth noting that the BFMA and Beaver Valley PPAs are the only two remaining power purchase agreements that are subject to Rider No. 18 and that NRG Midwest, not Duquesne, is responsible for the power purchases under an agency agreement with Duquesne. *See* Duquesne Main Brief, pp. 49-50; BFMA Main Brief, pp. 5-8; Duquesne St. No. 12-R, pp. 19-22; *see also* Recommended Decision, pp. 16-18, 34-35.

II. PROCEDURAL HISTORY

5. On August 2, 2013, Duquesne 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, the NRG Companies timely filed their formal complaint at Docket No. C-2013-2390562 in the Duquesne rate proceeding. The NRG Companies challenged Duquesne's Rider No. 18, which establishes the price at which Duquesne will purchase electricity from certain small generators that are also Duquesne customers. The NRG Companies served copies of their Complaint upon the QFs.[2]

6. Following extensive and, unfortunately, contentious litigation,[3] the ALJ, on June 3, 2014, 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 concluded 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." Recommended Decision, p. 40. It appropriately recommended 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. Recommended Decision, p. 42, Ordering ¶¶ 3, 4.

---

[2] The QFs are each a "qualifying facility" under PURPA. Through a series of agreements, NRG Midwest assumed responsibility to purchase power from the QFs pursuant to the power purchase price set forth in Rider No. 18. *See* Recommended Decision, pp. 16-18.

[3] In the interest of brevity of this Petition, the NRG Companies hereby incorporate by reference the "History of the Proceeding" on pages 2 through 7 of the November 13th Order as if set forth herein in its entirety.

7. By the November 13th Order, the Commission reversed the Presiding Officer's Recommended Decision and declined to require Duquesne to remove Rider No. 18 from its Tariff. The Commission concluded that it does "not have the jurisdictional authority to revise the six cent 'avoided cost' rate approved in Rider No. 18." November 13th Order, p. 84. Yet, the Commission, in order to achieve this result, improperly asserted jurisdictional authority to interpret private contracts – a power that clearly was not vested in it by the Pennsylvania Legislature.

III. STANDARD OF REVIEW

8. The Code provides that "[t]he commission may, at any time, after notice and after opportunity to be heard . . . , rescind or amend any order made by it." 66 Pa. C.S. § 703(g). Such a request must made by a petition which complies with 52 Pa. Code § 5.572. The Commission's established standard for determining whether to grant such a Petition for Reconsideration is set forth in *Duick v. Pennsylvania Gas and Water Co.*, 56 Pa. P.U.C. 553, 559, 1982 Pa. PUC LEXIS 4 (1982), and provides:

> A Petition for Reconsideration, under the provisions of 66 Pa. C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this Code to rescind or amend a prior order in whole or in part.
>
> In this regard we agree with the court in the Pennsylvania Railroad Company case, wherein it was stated that "[p]arties . . . , cannot be permitted a second motion to review and reconsider, to raise the same questions which were specifically decided against them . . . .' What we expect to see raised in petitions for reconsideration are new and novel arguments, not previously heard considerations which appear to have been overlooked by the Commission.

Additionally, a Petition for Reconsideration is properly before the Commission where it pleads newly discovered evidence, alleges errors of law, or a change in circumstances. *Id.* The same

standard applies to the Commission's consideration of petitions for clarification. *Application of PPL Electric Utilities Corporation*, Docket Nos. A-2009-2082652 *et al.*, (Order entered Apr. 23, 2010). Accordingly, showing that an order of the Commission was premised upon an error of law warrants the Commission's granting of a petition for reconsideration and clarification of the order in question.

9. Commission orders must be based upon substantial evidence of record. Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Nat'l Fuel Gas Distrib. Corp. v. Pa. Pub. Util. Comm'n*, 677 A.2d 861 (Pa. Cmwlth. 1996).

IV. ARGUMENT

10. The November 13th Order commits a clear error of law by interpreting the PPAs to contain legally-enforceable "specified terms" and must be reversed for two fundamental reasons. First, the Commission lacks subject matter jurisdiction to interpret disputed language in a private contract and, therefore, exceeded its authority by defining the terms of the PPAs. Second, even if the Commission asserts jurisdiction to interpret the PPAs (which it should not), its conclusions of law are not based upon substantial evidence of record. The record supports only two possible conclusions with regard to the terms of the PPAs – *i.e.*, the PPAs have unspecified terms or the terms were to be defined by the Commission's traditional process to change tariff provisions. If the Commission decides on reconsideration not to reverse the November 13th Order, the Commission, at a minimum, should make certain clarifications to ensure that NRG Midwest is not deprived opportunities to challenge the PPAs in other appropriate proceedings before the Commission or other forums.

A. Commission Committed a Clear Error of Law in Interpreting PPA Terms.

1. Commission Has Only Such Powers as Granted by Legislature.

11. It is black letter law that the Commission, as a creature of statute, has only the powers which are expressly conferred by the Pennsylvania Legislature and those powers which arise by necessary implication. *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977). The Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. Pa. Pub. Util. Comm'n*, 43 A.2d 348 (Pa. Super. 1945). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967). Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. *Hughes v. Pa. State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992), *allocatur denied*, 637 A.2d 293 (Pa. 1993).

2. Commission Lacks Authority to Interpret Contracts.

12. Pennsylvania appellate courts have long recognized that the Commission does not have authority to interpret the terms of, or settle disputes under, private contracts. *See Allport Water Auth. v. Winburne Water Co.*, 393 A.2d 673, 675 (Pa. 1978)(internal citations omitted)(explaining that it has long been recognized that "the PUC is not jurisdictionally empowered to decide private contractual disputes between a citizen and a utility"); *see also Behrend v. Bell Telephone*, 363 A.2d 1152, 1158 (Pa. Super. 1976), *vacated and remanded on other grounds*, 374 A.2d 536 (Pa. 1977)("The courts retain jurisdiction of a suit for damages based on negligence or breach of contract wherein a utility's performance of its legally imposed and contractually adopted obligations are examined and applied to a given set of facts.")(citation and footnote omitted); *Adams et al. v. Pa. Pub. Util. Comm'n*, 819 A.2d. 631 (Pa. Cmwlth.

2003); *Leveto v. Nat'l Fuel Gas Dist. Corp.*, 366 A.2d 270 (Pa. Super. 1976); *Litman v. Peoples Natural Gas Co.*, 449 A.2d 720 (Pa. 1982); *see generally ARIPPA v. Pa. Pub. Util. Comm'n*, 966 A.2d 1204 (Pa. Cmwlth. 2007)(upholding the Commission's finding that an electric distribution company, not a non-utility generator, owned Alternative Energy Credits where the power purchase agreement was silent as the resolution of the issue did not involve the Commission's interpretation of a contract).[4]

3. Commission Unlawfully Interpreted PPA Terms.

13. On page 63 of the November 13th Order, the Commission improperly engaged in contractual interpretation by attributing "legally enforceable" terms to the PPAs. The relevant passage is as follows:

> This notwithstanding, we also disagree with the ALJ's conclusion that the PPAs lack a term. The PPAs are limited by a term that is defined by either the continued availability of a price or the QFs continued desire to sell their output. While contracts may be more commonly defined by a term of years, nothing requires such a definition. Section 292.304(b)(5) of FERC's regulations, 18 C.F.R. § 292.304(b)(5), addresses QF rates for purchases "over the specific term of the contract or other legally enforceable obligation." Similarly, section 292.304(d), 18 C.F.R. § 292.304(d) addresses purchases "pursuant to a legally enforceable obligation." Nowhere does PURPA require a contract with a term defined by a set number of calendar years.

November 13th Order, p. 63. The Commission drew this dispositive conclusion of law in summary fashion in merely one paragraph of an 88-page Opinion and Order, and without citation to controlling legal authority. In doing so, the Commission clearly exceeded its subject matter jurisdiction as granted to it by the Pennsylvania Legislature and, as such, reconsideration should be granted and the November 13th Order should be reversed.

---

[4] Even BFMA acknowledges that the PUC lacks jurisdiction over private contracts. They argue 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.

4. Commission Opinion Is Dependent Upon Finding of Specified Terms.

14. The Commission's interpretation of the terms of the PPAs is fatal to the Commission's ultimate conclusion of law that it lacks authority, under PURPA, to revise Rider No. 18 to ensure that it is consistent with current Pennsylvania regulatory scheme. As the November 13th Order explains, Section 292.304 of FERC's regulations, 18 C.F.R. § 292.304, establishes the rules governing the utility's rates to be paid for the purchase of energy from qualifying facilities. *See generally* November 13th Order, pp. 10-13. Subsection (d) of Section 292.304 sets forth the requirements for purchases made pursuant to a "legally enforceable obligation" and states in relevant part:

> (d) Purchases "as available" or pursuant to a legally enforceable obligation. Each qualifying facility shall have the option either:
>
> > (1) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery; or
> >
> > (2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity ***over a specified term***, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:
> >
> > > (i) The avoided costs calculated at the time of delivery; or
> > >
> > > (ii) The avoided costs calculated at the time the obligation is incurred.

18 C.F.R. § 292.304(d)(1)-(2)(emphasis added). Thus, it is clear under FERC's regulations that, in order for a PURPA power purchase price to be binding, it must be pursuant to a "legally specified obligation" which includes a "specified term."

15. The Commission clearly exceeded its jurisdictional authority when it attempted to satisfy this criterion by interpreting the PPAs to have "legally enforceable" terms. *See* November 13th Order, p. 63. As explained below in the discussion on the substantial evidence of record, the terms of the PPAs, when read in the light most favorable to the QFs, are at most ambiguous; and, under such a circumstance, it is not within the authority of the Commission to make a determine as to whether a provision of a private contract between a utility and another entity is "legally enforceable." Such responsibility is properly reserved for civil courts of competent jurisdiction. Moreover, the Commission's improper determination of the legal enforceability of the terms of the PPAs would lead to an absurd result -- *i.e.* the power purchase price would continue in perpetuity unless and until the QFs unilaterally decide that they do not want to sell their power. As discussed in more detail below, this clearly was not the intent of the parties in entering into the contracts. Duquesne specifically reserved its right to seek modification of Rider No. 18 by the Commission. The intent was that the power purchase price could be adjusted through tariff changes following appropriate due process.

16. The instant compliant proceeding was about Rider No. 18, a Commission-approved tariff provision; it was not about interpretation of the language of the PPAs. The arguments raised by the NRG Companies throughout this proceeding focused on the Commission's authority to revise a tariff provision; not on the Commission's authority to revise or interpret a contract provision. By declaring that the PPAs in fact have "legally enforceable" terms, the Commission has usurped the authority of the civil courts and preemptively declared the QFs as the winners of contractual disputes that were not before the Commission.

17. The ALJ was correct in his Recommended Decision in finding that the PPAs do not have specified terms and, therefore, are not "locked-in." Recommended Decision, pp. 29-30.

Because the PPAs lack legally enforceable "specified terms" (at least until a court of competent jurisdiction finally interprets the PPAs), the Rider No. 18 price is not entitled to any "lock-in" -- as correctly concluded by the ALJ. Recommended Decision, p. 30 ("Accordingly, the Rider No. 18 rate is not 'locked-in.' Thus the Commission has jurisdiction over Rider No. 18."); *cf.* 18 C.F.R. § 292.304(d)(1)-(2)(explaining that qualifying facilities shall have the option to provide energy at utility's "avoided cost" at time of delivery or "pursuant to a legally enforceable obligation for the delivery of energy . . . ***over a specified term***")(emphasis added).

18. The Commission never specifically approved either of the PPAs, and neither Duquesne Light nor BFMA has submitted evidence to suggest otherwise.[5] 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.

19. If the Commission persists in interpreting private contracts, it should reverse the November 13th Order because, as discussed below, the Order is not based on substantial evidence of record. If however the Commission acknowledges the limitations on its jurisdiction, it should hold the NRG Companies' Complaint in abeyance pending a determination by a civil court of competent jurisdiction regarding the term of the PPAs or, at a minimum, dismiss the complaint without prejudice to refile upon entry of a court order interpreting the terms of the PPAs.

B. Evidence Does Not Support Commission Conclusion Regarding PPA Terms

20. Even if the Commission determines that it somehow may lawfully interpret the term language of the PPAs (which it should not), the November 13th Order should be reversed because the substantial evidence of record in the proceeding does not support the Commission's

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

conclusion that "[t]he PPAs are limited by a term that is defined by either the continued availability of a price or the QFs' continued desire to sell their output." November 13th Order, p. 63. The record evidence simply does not support this interpretation of the contracts. Indeed, such an interpretation would lead to an absurd result – *i.e.* the QFs are free to decide unilaterally when they no longer want to be paid more than what they could reasonably earn in the open market.[6]

21. The record in this proceeding supports only two possible interpretations of the terms of the PPAs. First, the terms of the PPAs are ambiguous and unspecified; in which case, the appropriate forum for a determination of the term is a court of competent jurisdiction with equity powers or the Commission exercising its Section 508 powers, 66 Pa. C.S. § 508 (regarding modification of public utility contracts). Second, the record supports a conclusion that the parties to the PPAs intended the terms to be defined by tariff supplement filings or tariff complaints through which all interested parties would have notice and opportunity to be heard as to whether Rider No. 18 should be modified.

22. **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]

[6] Indeed, the Commission's interpretation of the terms of the PPAs as being defined by "the continued availability of a price" is vague and without substantive meaning. A modified Rider No. 18 price would also ensure that there is price available.

[redacted]

[redacted][7] **[END HIGHLY CONFIDENTIAL]**

1. Substantial Record Evidence Supports Unspecified Terms.

23. The ALJ, to whom the Commission should grant deference as the person in the best position to assess the credibility of witnesses and closely examine evidence elicited through hearings, correctly determined that the PPAs lack specified terms. Recommended Decision, p. 29. At most, the terms of the PPAs could be considered to be disputed and, therefore by necessary implication, unspecified and not legally enforceable until a court of competent jurisdiction or the Commission, utilizing its Section 508 powers, rules upon them.

---

[7] In construing the terms of a contract, the governing rules of construction require that the doctrine of *pari materia*, (that all the terms of a contract dealing with the same subject be given effect and interpreted with reference to each other) be employed. *See, e.g., Miller Capital Ins. Co. v. Gambone Brothers Development Co., Inc.*, 941 A.2d 706, 715 (Pa. Super. 2007); *General Mills, Inc. v. Snavely*, 199 A.2d 540, 544 (Pa. Super. 1964). "Generally, courts must give plain meaning to a clear and unambiguous contract provision unless to do so would be contrary to a clearly expressed public policy." *Prudential Property and Casualty Ins. Co. v. Colbert*, 813 A.2d 747, 750 (Pa. 2002). See also *Tenos v. State Farm Ins. Co.*, 716 A.2d 626, 628-29 (Pa. Super. 1998)(explaining that, when interpreting a contract, words that are clear and unambiguous must be given their plain and ordinary meaning). See also *Mowry v. McWherther*, 74 A.2d 154, 157-58 (Pa. 1952)("The rule is familiar that where there is an ambiguity in a contract a proposed intersection which yields an inequitable, absurd or unusual result is, if possible, to be avoided. Where parties, *sui juris*, enter into an unambiguous agreement, with knowledge of the facts, the courts will not relieve them of their contractual obligations because of the questionable wisdom of the bargain; nor will the court reconstruct a contract for the parties. However, if the language of the contract if ambiguous we must examine the entire document to determine the intent of the parties. Though we do not relieve parties from the effect of an improvident contract, we also do not allow a rigid literalness to be used in creating an improvident contract for them against their intent.")(internal citations omitted). It is a court of competent jurisdiction, not the Commission, that is best-suited to apply these rules of contract interpretation in the instant situation.

24. Setting aside the Commission's lack of authority to interpret private contracts, there is simply no substantial credible evidence to support the November 13th Order's interpretation that "[t]he PPAs are limited by a term that is defined by either the continued availability of a price or the QFs continued desire to sell their output." November 13th Order, p. 63. Indeed, it is not even clear what this passage is intended to mean. It could be read to suggest that the Commission is granting the QFs *carte blanche* to continue to reap the windfalls of a more-than-three-decades-old power purchase price that no longer reflects market realities and true "avoided cost." The QFs would be permitted to decide unilaterally how long they want to benefit financially – regardless of whether they have already been afforded a reasonable period of time under the Rider No. 18 power purchase price to earn a reasonable return on and of their hydropower facility investments. This would be an absurd result which the Commission surely did not intend through its November 13th Order.

25. The lack of specified terms (either because they are not clearly defined in the PPAs or because they are disputed), by necessity, dictates that the Rider No. 18 power purchase price is not "locked-in" -- as correctly concluded by the ALJ. *See* Recommended Decision, pp. 29-30. The Commission is therefore free to exercise its traditional and ordinary tariff review powers to remove or modify Rider No. 18 as being inconsistent with the current Pennsylvania regulatory scheme.

2. Substantial Record Evidence Supports PPA Terms Defined by Tariff.

26. To the extent that the Commission concludes that it has the authority to interpret the terms of the PPAs (which it should not), the Commission should recognize that the substantial evidence of record supports a conclusion that the parties to the PPAs intended terms

that were defined by unilateral tariff supplement filings by Duquesne to revise Rider No. 18. The evidence simply does not support a conclusion, as made by the Commission, that the QFs are permitted to decide unilaterally how long they want the Rider No. 18 power purchase price to remain in effect.

27. Even if the Commission had approved the PPAs (which it did not), 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 Commission-approved tariff. As Duquesne's Senior Manager for Rates and Tariff Services testified, Duquesne retains the ability under the PPAs themselves to "unilaterally" apply to the Commission to terminate or modify the Tariff.[8] Hr'g Tr. 273-74, 278, 282. His position is consistent with the plain language of the PPAs and, if adopted, would avoid the situation created by the Commission's interpretation of the contracts in which the QFs can unilaterally decide how long they want to be paid the current six cents per kWh purchase price of Rider No. 18. Again, it is also worth noting that because responsibility for the power purchases has been assigned from Duquense to NRG Midwest, Duquesne now has no incentive to attempt to modify Rider No. 18.

28. As the ALJ properly noted on pages 28-29 of the Recommended Decision, 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).

[8] 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. This parol evidence that could be properly used in a civil proceeding involving disputed contract provisions.

Moreover, the terms of the PPAs, as noted in the Recommended Decision, clearly suggest that Duquesne 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* Recommended Decision, p. 17, Finding of Fact Nos. 31, 32.

29. The November 13th Order's interpretation that "[t]he PPAs are limited by a term that is defined by either the continued availability of a price or the QFs continued desire to sell their output" is simply without support in the record of this proceeding. *See* November 13th Order, p. 63. Even if the Commission had approved the PPAs (which it did not), the remedy to change the power purchase price, as contemplated by the parties, was a change to the tariff – *i.e.* the relief requested by the NRG Companies in the instant complaint proceeding. In other words, the intent of the parties was that the term would be defined by the Commission after affording interested parties the requisite due process associated with a tariff change. In the tariff proceeding, the parties would be free to present evidence on issues such as what a reasonable term would be in order to ensure that the QFs have had an opportunity to earn a reasonable return on and of their investment.

C. Commission's Opinion Creates Unreasonable "Catch 22" Situation for NRG.

30. By interpreting the terms of the PPAs as allowing the QFs to decide unilaterally when they would like to change the Rider No. 18 power purchase price, the Commission has placed NRG Midwest in an unfair, unreasonable and inequitable "Catch 22" situation. This is contrary to the promotion of vibrant wholesale and retail competitive markets in the Commonwealth. Because of the length of the November 13th Order and the breadth of topics covered therein, the Commission should -- if it elects not to reverse the Order on reconsideration

-- provide certain clarifications of its Order to avoid confusion with regard to NRG Midwest's legal rights to seek alternative relief.

1. Commission Has Not Approved the PPAs.

31. The only issue in this complaint proceeding is whether the power purchase price set forth in Rider No. 18 should be permitted to remain unchanged in Duquesne's Commission-approved Tariff. The NRG Companies' Complaint did not challenge the PPAs or any of the PPAs' specific provisions; nor did the parties litigate any of the provisions of the PPAs. As such, the parties have not been afforded the required due process in order for the Commission to approve the PPAs themselves.[9]

32. As acknowledged by the Commission in the November 13th Order, the Commission approves only the power purchase price. It does not necessarily approve the entire power purchase agreement. *See* November 13th Order, p. 59. Accordingly, the Commission should clarify that its refusal to modify Rider No. 18 does not constitute an approval of the PPAs or a binding interpretation of the terms of the PPAs (something that the Commission does not have authority to do under its limited powers). Such a clarification would eliminate confusion as to the authority of the civil courts to interpret the terms of the PPAs should the NRG Companies elect to seek such recourse.

[9] As an administrative body, the Commission is bound by the due process provisions of constitutional law and by fundamental fairness. *Popowsky v. Pa. Pub. Util. Comm'n*, 805 A.2d 637 (Pa. Cmwlth. 2002). Due process is required in administrative proceedings, particularly when the administrative action is adjudicative and involves substantial property rights. *See ARIPPA v. Pa. Pub. Util. Comm'n*, 792 A.2d 636 (Pa. Cmwlth. 2002)(citing *Randolph v. Pa. Blue Shield*, 717 A.2d 508 (Pa. 1998); *Conestoga Nat'l Bank v. Patterson*, 275 A.2d 6 (Pa. 1971). Due process requires notice and an opportunity to be heard. *See ARIPPA; Gross v. State Bd. of Psychology*, 825 A.2d 748 (Pa. Cmwlth. 2003); *Gruff v. Pa. Dep't of State*, 913 A.2d 1008 (Pa. Cmwlth. 2006).

2. The NRG Companies Still Have Recourse to Civil Courts.

33. The NRG Companies respectfully request an affirmative clarification by the Commission that the November 13th Order is not intended to preclude any recourse that they may have to civil courts of competent jurisdiction to challenge the PPA terms. As discussed herein, the Commission lacks subject matter jurisdiction to interpret disputed provisions of the PPAs. Moreover, the Commission, unlike civil courts, lacks equity powers to resolve contract disputes. The Commission should not leave any impression with the civil courts that it, as the state-level expert agency, has determined that the PPAs have specified terms under PURPA that cannot be modified by the civil courts. As previously discussed, the instant complaint proceeding was exclusively a challenge to a Commission-approved tariff provision. It was not a challenge to the PPAs in which the NRG Companies had a full and fair opportunity to levy contract law challenges to the terms of the PPAs.

3. Commission Retains Authority Under Section 508 to Modify PPAs.

34. Section 508 of the Code, 66 Pa. C.S. § 508, grants the Commission very broad powers in overseeing and even reforming public utility contracts in order to adequately protect the public interest. *See ARIPPA v. Pa. Pub. Util. Comm'n*, 966 A.2d 1204, 1211 n.13 (Pa. Cmwlth. 2009)(noting that, even if the Alternative Energy Portfolio Standards Act did not grant Commission authority to determine ownership of Alternative Energy Credits, the Commission has power to revise power purchase agreements under Section 508). In light of the Commission's acknowledgment that it approves only the power purchase price and not the underlying power purchase agreements (*see* November 13th Order, p. 59), the NRG Companies respectfully request clarification that nothing contained in the November 13th Order is intended

to limit the Commission's Section 508 power to vary, reform, or revise the PPAs – including, but not limited, to the terms of the PPAs.

4. Commission Has Not Determined Proper Ownership of AEC Credits.

35. 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).

36. The six cents price of Rider No. 18 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* Recommended Decision, 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. Hr'g Tr. 378, 395.

37. The record developed in this proceeding reveals that BFMA is selling and retaining the proceeds of the Alternative Energy Credits that it generates as a Tier I renewable resource. Hr'g Tr. 439:2-8, 22-25; Recommended Decision, p. 22, Finding of Fact No. 62. BFMA is doing so despite the fact that the Commission has previously determined that Alternative Energy Credits rightfully belong to the electric distribution company and not the non-utility generator where the power purchase agreement is silent because it pre-existed the AEPS Act. *See ARIPPA, supra.* Accordingly, the NRG Companies respectfully request that Commission clarify that nothing contained in the November 13th Order is intended to validate BFMA's sale of Alternative Energy Credits or to preempt any challenge by NRG Midwest to propriety of such sales.

V. CONCLUSION

38. The Commission committed a clear error of law in the November 13th Order by interpreting the language of private contracts and thereby exceeding its limited subject matter jurisdiction. Specifically, the Commission erred in interpreting the PPAs to have legally-enforceable specified terms.

39. The substantial evidence of record in this proceeding supports only one of two conclusions in this regard. First, the terms of the PPAs are not specified; in which case, there is a clear contractual dispute and only a court of competent jurisdiction with equity powers or the Commission, using its powers under Section 508 Code, 66 Pa. C.S. § 508, can create a legally-enforceable obligation with a "specified term." Under such an interpretation, the Commission cannot reasonably conclude that it is precluded by PURPA from modifying Rider No. 18 -- as the power purchase price does not have a "specified term" as required by FERC's regulations

implementing PURPA. Second, the intent of the PPAs was to allow the terms of the PPAs to be defined by the Commission through tariff changes following appropriate due process; in which case, the Commission erred in concluding that it could not remove Rider No. 18 from Duquesne' Commission-approved tariff. By not reaching one of these two conclusions, the Commission has effectively placed NRG Midwest in a "Catch 22" situation in which BFMA and Beaver Valley are free to decide unilaterally how long they would like to paid in excess of true "avoided cost." Moreover, because NRG Midwest has assumed the obligations of the PPAs, Duquesne has no incentive to advocate for a change to Rider No. 18. Such a circumstance is patently unfair, unjust and unreasonable, and is harmful to the Commonwealth's wholesale and retail competitive markets.

40. The Commission should clarify that it has not approved the terms of the PPAs, the NRG Companies are not precluded from seeking recourse with civil courts of competent jurisdiction, the NRG Companies are not precluded from seeking recourse with the Commission under Section 508 of the Code, and the Commission has made not a determination with regard to proper ownership of Alternative Energy Credits.

VI. 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:

A. The Petition for Reconsideration and Clarification of the NRG Companies be granted and (i) the November 13th Order be reversed and the Recommended Decision adopted in its entirety or (ii) in alternative, the Commission defer action on Rider No. 18 until relevant

contract interpretation issues are resolved by a civil court of competent jurisdiction or the Commission takes action under 66 Pa. C.S. § 508 to modify the terms of the PPAs; and,

B. The Commission clarify that (i) the Commission has never approved the PPAs, (ii) the NRG Companies are not precluded from seeking review of the PPAs by courts of competent jurisdiction; (iii) the NRG Companies are not precluded from seeking modification of the PPAs by the Commission under 66 Pa. C.S. § 508, and (iv) the Commission has made no determination with regard to the proper ownership of Alternative Energy Credits.

Respectfully submitted,

COZEN O'CONNOR

David P. Zambito, Esquire (PA ID No. 80017)
D. Troy Sellars, Esquire (PA ID No. 210302)
Cozen O'Connor
305 North Front Street, Suite 400
Harrisburg, PA 17101-1236
Tel: (717) 703-5892
Fax: (215) 989-4216
Email: dzambito@cozen.com
tsellars@cozen.com

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

DATED: December 1, 2014

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

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 Petition for Reconsideration and Clarification of the Commission's Order, Entered November 13, 2014, upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

VIA FIRST CLASS MAIL – HIGHLY CONFIDENTIAL VERSION

Honorable Conrad A. Johnson
Pennsylvania Public Utility Commission
Piatt Place
301 Fifth Avenue
Room 220
Pittsburgh, PA 15222

Robert H. Hoaglund, II, Esq.
Tishekia E. Williams, Esq.
Duquesne Light Company
411 Seventh Avenue, 16th Floor
Pittsburgh, PA 15219
rhoaglund@duqlight.com
twilliams@duqlight.com

Michael W. Gang, Esq.
Anthony D. Kanagy, Esq.
David B. MacGregor, Esq.
Christopher T. Wright, Esq.
Post & Schell, P.C.
17 North Second Street, 12th Floor
Harrisburg, PA 17101-1601
mgang@postschell.com
akanagy@postschell.com
dmacgregor@postschell.com
cwright@postschell.com
Counsel for Duquesne Light Company

John F. Povilaitis, Esq.
Alan M. Seltzer, Esq.
Buchanan Ingersoll & Rooney, PC
409 North Second Street, Suite 500
Harrisburg, PA 17101-1357
Counsel for Beaver Falls Municipal Authority

VIA ELECTRONIC & FIRST CLASS MAIL – NON-CONFIDENTIAL VERSION

Candis A. Tunilo, Esq.
David T. Evrard, Esq.
Amy E. Hirakis, Esq.
Office of Consumer Advocate
555 Walnut Street
Forum Place, 5th Floor
Harrisburg, PA 17101-1923
ctunilo@paoca.org
devrard@paoca.org
ahirakis@paoca.org
(C-2013-2379084)

Sharon E. Webb, Esq.
Office of Small Business Advocate
300 North Second Street, Suite 202
Harrisburg, PA 17101
swebb@pa.gov
(C-2013-2380474)

Scott B. Granger, Esq.
Bureau of Investigation & Enforcement
Pennsylvania Public Utility Commission
400 North Street, 2 West
P.O. Box 3265
Harrisburg, PA 17105-3265
chshields@pa.gov
sgranger@pa.gov

Theodore S. Robinson, Esq.
Citizen Power
2121 Murray Avenue
Pittsburgh, PA 15217
robinson@citizenpower.com
Counsel for Citizen Power

Todd S. Stewart, Esq.
Hawke McKeon & Sniscak LLP
P.O. Box 1778
100 N. Tenth Street
Harrisburg, PA 17105-1778
tsstewart@hmslegal.com
Counsel for Interstate Gas Supply, Inc.

Derrick Price Williamson, Esq.
Barry A. Naum, Esq.
Spilman Thomas & Battle, PLLC
1100 Bent Creek Blvd., Ste. 101
Mechanicsburg, PA 17050
dwilliamson@spilmanlaw.com
bnaum@spilmanlaw.com
Counsel for U.S. Steel

Scott J. Rubin, Esq.
333 Oak Lane
Bloomsburg, PA 17815-2036
scott.j.rubin@gmail.com
Counsel for I.B.E.W., Local 29

Harry S. Geller, Esq.
Patrick M. Cicero, Esq.
Pennsylvania Utility Law Project
118 Locust Street
Harrisburg, PA 17101
pulp@palegalaid.net
Counsel for CAUSE-PA

Pamela C. Polacek, Esq.
Teresa K. Schmittberger, Esq.
McNees Wallace & Nurick
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
ppolacek@mwn.com
tschmittberger@mwn.com
Counsel for Duquesne Industrial Intervenors
(C-2013-2385292)

Joseph L. Vullo, Esq.
1460 Wyoming Avenue
Forty Fort, PA 18704
jlvullo@aol.com
Counsel for CAAP

George Jugovic, Jr., Esq.
Heather Langeland, Esq.
200 First Avenue, Suite 200
Pittsburgh, PA 15222
Jugovic@pennfuture.org
Langeland@pennturue.org
Counsel for PennFuture

CONSULTANTS
(VIA ELECTRONIC MAIL ONLY)

Charlie King
Edward D. Christian
Snavely King Majoros & Assoc., Inc.
4351 Garden City Drive, Suite 350
Landover, MD 20785
charlieking@snavely-king.com
echristian@snavely-king.com
Consultants for OCA

Roger D. Colton
Fisher, Sheehan & Colton
34 Warwick Road
Belmont, MA 02478
roger@fsconline.com
Consultants for OCA

David J. Effron
Berkshire Consulting Services
12 Pond Path
Northampton, NJ 03862
djeffron@aol.com
Consultants for OCA

Glenn A. Watkins
Technical Associates, Inc.
9030 Stony Point Parkway, Suite 580
Richmond, VA 23235
watkinsg@tai-econ.com
Consultants for OCA

Brian Kalcic, Consultant
Excel Consulting
225 S. Meramec Avenue, Suite 720-T
St. Louis, MO 63105
excel.consulting@sbcglobal.net
Consultants for OSBA

Jeffry Pollock
J. Pollock, Inc.
12655 Olive Blvd, Suite 335
St. Louis, MO 63141
jpollock@jpollockinc.com
Consultants for DII

DATED: December 1, 2014

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