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December 11, 2014

VIA ELECTRONIC FILING

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

Dear Secretary Chiavetta:

Enclosed please find the Non-Proprietary Version of the Answer of Duquesne Light Company to the Petition of NRG Companies for Reconsideration of the Commission's Order, Entered November 13, 2014 ("Answer of Duquesne Light"), for the above-referenced proceeding. The Proprietary Version of the Answer of Duquesne Light will be provided by hand delivery. Copies will be provided as indicated on the Certificate of Service.

Respectfully submitted,

Michael W. Gang

MWG/skr
Enclosure

cc: Honorable Conrad A. Johnson
Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing have been served upon the following persons, in the manner indicated, in accordance with the requirements of § 1.54 (relating to service by a participant).

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Date: December 11, 2014

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

ANSWER OF DUQUESNE LIGHT COMPANY TO THE PETITION OF NRG COMPANIES FOR RECONSIDERATION OF THE COMMISSION'S ORDER, ENTERED NOVEMBER 13, 2014

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Date: December 11, 2014

Attorneys for Duquesne Light Company

Duquesne Light Company ("Duquesne Light"), pursuant to 52 Pa. Code § 5.572, hereby respectfully submits this Answer to the Petition for Reconsideration and Clarification filed by NRG Power Midwest, LP ("NRG Midwest"), NRG Energy Center Pittsburgh LLC ("NRGP"), and Reliant Energy Northeast LLC ("REN") (collectively the "NRG Companies") on December 1, 2014. In their Petition, the NRG Companies seek reconsideration and clarification of the Opinion and Order of the Pennsylvania Public Utility Commission ("Commission") entered November 31, 2014 ("Opinion and Order"). For the reasons explained below, the NRG Companies' Petition should be denied.

I. INTRODUCTION

On August 2, 2013, Duquesne Light filed with the Pennsylvania Public Utility Commission ("Commission") Supplement No. 81 to Duquesne Light's Tariff – Electric Pa. P.U.C. No. 24 ("Supplement No. 81"). Supplement 81, issued to be effective October 1, 2013, proposed changes to Duquesne Light's base retail distribution rates designed to produce an increase in revenues based upon data for a fully projected future test year ending April 30, 2015.

On October 31, 2013, Duquesne Light was served by the Commission with the Formal Complaint jointly filed by the NRG Companies at Docket No. C-2013-2390562. The NRG Companies challenged, among other things, Duquesne Light's Tariff Rider No. 18 – Rate for Purchase of Electric Energy from Customer-Owned Renewable Resources Generating Facilities (hereinafter "Rider No. 18").[1]

[1] Duquesne Light's Rider No. 18 establishes the rates to be paid for power produced by certain specified categories of electric generating facilities pursuant to federal law, the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. §§ 824, *et seq.* (Duquesne Light St. No. 12-R, p. 19.) Under the regulations of the Federal Energy Regulatory Commission ("FERC") implementing PURPA, the electric utility is required to purchase electricity generated by a qualifying facility at the utility's "avoided cost." 18 C.F.R. § 292.304(a)(2). "Avoided costs" are the incremental costs to an electric utility of electric energy or capacity or both which, but for the

All active parties to Duquesne Light's base rate case, other than the NRG Companies, achieved a settlement or agreed not to oppose the settlement on all issues raised in this base rate proceeding, except those raised by the NRG Companies (the "Settlement"). On April 23, 2014, the Commission issued an Opinion and Order that adopted the Recommended Decision of Administrative Law Judge Conrad A. Johnson ("ALJ"), approved the Settlement without modification, held the Rider No. 18 issues in abeyance for resolution in a separate Recommended Decision, and held as a matter of law that the NRG Companies, as the party challenging a previously-approved tariff provision, bear the burden to demonstrate the Commission's prior approval with respect to Rider 18 is no longer justified.

By Secretarial letter dated June 4, 2014, the ALJ issued a Recommended Decision on the NRG Companies' Rider No. 18 issues ("RD"). Therein, the RD concluded, among other things, that the Commission has jurisdiction to modify or eliminate the wholesale PURPA rates set forth in Rider No. 18. Pertinent to the pending Petition for Reconsideration, the RD made a finding of fact that the power purchase agreements ("PPAs") between Duquesne Light and the two qualifying facilities ("QFs") lacked a definitive contract term and, therefore, the Commission was not preempted under PURPA from modifying the wholesale rates set forth in Rider No. 18. (*See* RD, p. 17, Finding of Fact No. 31; *see also* RD, p. 29.) The RD found that the NRG Companies met their burden to prove that the Rider No. 18 rate is unreasonable and, therefore, the RD recommended that Rider No. 18 be eliminated in its entirety from Duquesne Light's tariff or, alternatively, that Duquesne Light file a tariff supplement with a revised PURPA rate for the Commission's consideration. (RD, p. 40.)

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purchase from the qualifying facility, such utility would generate itself or purchase from another source. 18 C.F.R. § 292.101(b)(6)

On June 19, 2014, Duquesne Light and Beaver Falls Municipal Authority ("BFMA"), a QF that intervened in the proceeding, filed Exceptions to the RD. Replies to Exceptions were filed by the NRG Companies on June 26, 2014. On November 13, 2014, the Commission entered an Opinion and Order that granted the Exceptions filed by Duquesne Light and BFMA, and reversed the RD.

In a well-reasoned and thorough decision, the Commission concluded that Section 210(e) of PURPA preempted the Commission from directly or indirectly revising or terminating the pricing terms of the PPAs and, therefore, the Commission lacked authority to modify or eliminate the previously-approved wholesale PURPA rate set forth in Rider No. 18. Pertinent to the pending Petition for Reconsideration, the Commission also concluded that the RD erred in finding that the PPAs lacked a definitive contract term. Finally, the Commission found that the NRG Companies failed to meet their burden to prove that the Rider No. 18 rate is unreasonable and that Rider 18 should be eliminated or replaced.

In their Petition for Reconsideration, the NRG Companies seek reconsideration and clarification of the Commission's conclusion that the RD erred in finding that the PPA's lacked a term. Specifically, the NRG Companies contend that the Commission erred as a matter of law because it lacks jurisdiction to interpret the language in the PPAs. The NRG Companies further assert that, even if the Commission had jurisdiction to interpret the PPAs, the Commission's conclusion that the PPAs did not lack a definitive term is not supported by substantial evidence. Finally, the NRG Companies request that, if the Commission does not reverse the November 13, 2014 Opinion and Order, the Commission should grant additional, newly requested remedies to ensure that the NRG Companies can challenge the PPAs in a separate proceeding and/or different forum.

For the reasons explained below, as well as those more fully explained in the Commission's Opinion and Order, the NRG Companies' Petition for Reconsideration should be denied.

II. LEGAL STANDARD

The Commission's standards for granting reconsideration following final orders are set forth in *Duick v. Pennsylvania Gas and Water Co.*, 56 Pa. P.U.C. 553, 559 (1982) (emphasis added):

> 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 section 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 said that "[p]arties ..., cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them...." What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission.

Thus, in order for a petition to warrant reconsideration by the Commission, it must demonstrate new and novel arguments that were raised below by the petitioner, but not previously considered by the Commission. The Commission has cautioned that the last portion of the operative language of the *Duick* standard -- "by the Commission" -- focuses on the deliberations of the Commission, not the arguments of the parties. *See Pa. PUC v. PPL Electric Utilities Corporation*, Docket No. R-2012-2290597, p. 3 (May 22, 2014). Therefore, a petition for reconsideration cannot be used to raise new arguments or issues that should have been but were not previously raised.

A petition seeking relief under the *Duick* standard may properly raise any matter designed to convince the Commission that it should exercise its discretion to rescind or amend a prior order in whole or part. However, the *Duick* standard does not permit a petitioner to raise questions considered and decided below such that the petitioner obtains a second opportunity to argue properly resolved matters. *Id.* As explained by the Pennsylvania Supreme Court, petitions that request modification or rescission of a final agency order may only be granted judiciously and under appropriate circumstances because such action results in the disturbance of final agency orders. *City of Pittsburgh v. Pa. Department of Transportation*, 490 Pa. 264, 416 A.2d 461 (1980).

For the reasons explained below, the NRG Companies' Petition fails to satisfy the standards for granting reconsideration.

III. ARGUMENT

A. The NRG Companies Raised the Issue of Whether the PPAs had a Term

The NRG Companies argue that the Commission lacks jurisdiction to interpret the language in the PPAs and, therefore, the NRG Companies request that the Commission reverse its finding that the PPAs contain a definitive term. (*See* NRG Petition ¶ 10.) Not only did the NRG Companies raise the issue of whether the PPAs had a definitive term, the ALJ relied on this issue to conclude that Commission has jurisdiction to modify or eliminate the wholesale PURPA rates set forth in Rider No. 18. For these reasons, as further explained below, the NRG Companies' Petition for Reconsideration is without merit and should be rejected.

While the NRG Companies repeatedly asserted that they were challenging the tariff rate in Rider No. 18 and not the PPAs, they conveniently ignore that Rider No. 18 and the PPAs are

inextricably interrelated. Indeed, the Commission conclusively recognized this, stating as follows:

> NRG also acknowledges that elimination or revision of the tariff will impact the PPAs, leaving them with a mandatory purchase obligation at a reduced price or no price at all. This, however, NRG contends may be left to the Parties to resolve on their own.
>
> While our jurisdiction over state tariffs is generally unquestioned, we believe it injudiciously narrows our analysis of the unique issue raised in NRG's Complaint to circumscribe our review in terms of traditional state review of a traditional state tariff. To decide this proceeding solely on the basis of our traditional state rate regulatory jurisdiction, in the face of a fundamental challenge to our jurisdiction, would have us ignore the implications of our actions, both past and present, based on the form our action takes rather than the substance invoked. When the singular reason for the tariff's existence is to memorialize the pricing term for contracts entered into under federal law, done at a time when the state implications and even our own regulations under this law were novel and unfolding, we are wise to engage in a more thorough analysis of the impact our actions will have on these contracts. These PPAs do not exist in a vacuum. They have a long and rich statutory, administrative, and judicial history, the significance of which is critical to any analysis of a claim invoking state jurisdiction that will directly impact the rights and obligations under them.
>
> * * *
>
> Based upon our analysis of those decisions, we believe that in determining the preemptive effect under PURPA, the proper analysis should look to substance and not form. In this respect, we must look to not only the substance of both parties' obligations under the PPAs but also the impact our state action will have on those obligations. We should not be constrained by form, either of the price (in a tariff) or of our actions (over that tariff rather than the PPA itself).

(Opinion and Order, pp. 43-44, 58-59 (footnotes omitted).) Thus, the Commission clearly determined that it had to review the PPAs in order to resolve the Rider No. 18 issues raised by the NRG Companies.

Further, it was the NRG Companies that raised the issue of whether the PPAs had a definitive term. In support of their contention that Rider No. 18 is unjust and unreasonable, the NRG Companies "raise[d] the issue of these two PPAs to illustrate the inequity of NRG Midwest's present position." (*See* NRG MB, p. 13). The NRG Companies expressly argued that the "PPAs are 'evergreen,' meaning that they do not have an established termination date." (*See* NRG MB, p. 13.) Further, counsel for the NRG Companies cross-examined the witnesses for both Duquesne Light and BFMA on whether the PPAs had a definitive term. (Tr. 286:3-15, 436:7-10.)

The record in this case clearly demonstrate that, but for the NRG Companies' attempt to raise the issue in support of their argument that Rider No. 18 is no longer just and reasonable, the meaning of the PPAs and whether they have a definitive term would not have been addressed in this proceeding. Thus, it was the NRG Companies that asked the Commission to review the PPAs by arguing, among other things, that they lacked a definitive term.[2] The NRG Companies' litigation position clearly suggests that the NRG Companies believed the Commission had jurisdiction to review the PPAs.

In this case, the ALJ addressed the issue presented by the NRG Companies. Indeed, not only did the NRG Companies raise the issue of whether the PPAs had a definitive term, the ALJ relied on this issue to make both a finding of fact and conclusion of law. The issue of whether the PPAs had a definitive term was a central part of the RD's conclusion that the Commission has jurisdiction to modify or eliminate the wholesale PURPA rates set forth in Rider No. 18. (*See* RD, p. 17, Finding of Fact No. 31; *see also* RD, p. 29.) Content with this finding of fact and

[2] The NRG Companies further invited the Commission to review the PPAs by also asserting that the PPAs have an express provision that allows Duquesne Light to request that the Commission modify the price under Rider No. 18 (*see* NRG MB, p. 14; NRG RB, p. 10), and that the PPAs do not serve to lock-in the price in Rider No. 18 (*see* NRG RB, p. 8-9).

conclusion of law, the NRG Companies did not take any exception to the RD or otherwise contend that the ALJ and/or Commission lacked jurisdiction to determine the meaning of the PPAs.

Duquesne Light, on the other hand, took exception to the RD's finding that the NRG Companies met their burden to demonstrate that the PURPA rate set forth in Rider No. 18 is no longer reasonable because the PPAs with the two remaining QFs do not have a specified term of year. (Duquesne Light Exceptions, pp. 5-6, 11.) Clearly, the Commission had to review and apply the PPAs to review the findings and conclusions made in the RD and to address Duquesne Light's exception.

The Commission reviewed the findings and conclusions made in the RD and addressed Duquesne Light's exception, stating as follows:

> Finally, in his analysis, the ALJ dismissed PURPA's exemption of state utility-type regulation over Duquesne's PPAs because the ALJ found the PPAs lacked a definitive contract term. R.D. at 29. In providing for the state's approval of avoided cost rates for QF purchases, however, nothing in PURPA requires a contract or, more specifically, a contract with a term defined by a set number of years, in order to effectuate PURPA's preemption of state utility-type regulations under Section 210(e). Conversely, nothing in PURPA allows for subsequent state utility-type regulation of a QF's rates absent a contract or, more specifically, a contract with a term defined by a set number of years.
>
> 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.

(Opinion and Order, p. 63 (emphasis added).) Thus, the Commission disagreed with the RD's finding that the PPAs lacked a definitive contract term.

It is clear that the NRG Companies raised the issue of whether the PPAs had a definitive term in support of their litigation position before the Commission. Now, apparently unhappy with the Commission's conclusion, the NRG Companies argue that the Commission did not have jurisdiction to do precisely what the NRG Companies requested -- to review the meaning of the PPAs and determine whether they had a definitive term. The Commission's jurisdiction is not and cannot be contingent on the outcome of the determination, as suggested by the NRG Companies' inconsistent positions.

Finally, it also should be noted that, similar to their litigation position, the NRG Companies' Petition for Reconsideration is internally inconsistent. Indeed, the NRG Companies' Petition first argues that the Commission did not have jurisdiction to review the meaning of the PPA (*see* NRG Companies' Petition ¶ 10), and then argues that the Commission should exercise its authority under Section 508 of the Public Utility Code, 66 Pa.C.S. § 508, to interpret, vary, reform, or revise the PPAs (*see* NRG Petition ¶¶ 21, 23, 34). The NRG Companies simply cannot have it both ways -- either the Commission and ALJ have jurisdiction to make findings of fact regarding the meaning of the PPAs or they do not.

It is well-established that, under the doctrine of judicial estoppel, a party is precluded from switching positions or asserting contrary positions in the same or related actions. *Sunbeam Corporation v. Liberty Mutual Insurance Company*, 566 Pa. 494, 781 A.2d 1189, 1192 (Pa. 2001); *Gross v. City of Pittsburgh*, 686 A.2d 864, 867 (Pa. Cmwlth. 1996); *Ligon v. Middletown Area Sch. Dist.*, 584 A.2d 376, 380 (Pa.Cmwlth. 1990). It is clear that the NRG Companies' Petition for Reconsideration is advocating for a position that is contrary the position taken and

arguments made by the NRG Companies during the litigation. The NRG Companies therefore should be prohibited from switching legal positions to whatever suits their own ends at the moment.

Based on the foregoing, not only did the NRG Companies raise the issue of whether the PPAs had a definitive term, it was a central part of their argument that Commission has jurisdiction to modify or eliminate the wholesale PURPA rates set forth in Rider No. 18. Thus, it was the NRG Companies that asked the Commission to review and apply the PPAs. Although the NRG Companies are apparently unhappy with the result reached by the Commission, they should not now be permitted to advocate that the Commission lacks jurisdiction where they have relied on such jurisdiction in advancing their position and arguments during the litigation. Therefore, the Commission should deny the NRG Companies' Petition for Reconsideration and affirm the well-reasoned findings and conclusions set forth in the November 13, 2014 Opinion and Order.

B. The Commission did not Interpret, Modify, or Revise the PPAs as Suggested by the NRG Companies

The NRG Companies argue that the Commission erred in finding that the PPAs had a definitive term because, according to the NRG Companies, the Commission lacks jurisdiction to interpret private contracts between public utilities and third-parties. (NRG Petition ¶¶ 11-12.) The NRG Companies' argument is without merit for several reasons.

First, the NRG Companies' argument that the Commission lacked subject matter jurisdiction is not a new or novel argument that was overlooked by the Commission. Indeed, the Commission thoroughly considered the scope of its jurisdiction to revisit PPAs under PURPA. (*See* Opinion and Order, pp. 22-73.) A review of the November 13, 2014 Opinion and Order clearly reveals that the Commission carefully considered the scope of its jurisdiction in this

proceeding. For this reason alone, the NRG Companies' Petition fails to satisfy the *Duick* standards for granting reconsideration.

Second, the NRG Companies argument is based upon a misreading of the November 13, 2014 Opinion and Order (or an overstatement of the conclusion reached by the Commission regarding its jurisdiction). In this case, the Commission concluded that it did not have jurisdiction to revisit the power purchase prices in preexisting long-term PPAs. (Opinion and Order, pp. 56-57.) The Commission did not, as suggested by the NRG Companies, conclude that the federal scheme applicable to wholesale generation contracts with QFs precluded state agencies from looking to the PPAs to determine the meaning of non-pricing terms when raised by parties. *See, e.g., Competitive Bidding Regulations*, Docket No. I-860025, 52 Pa. PUC 4091, 1994 Pa. PUC LEXIS 54 at *14 (Aug. 12, 1994) ("If the utility contends that a qualifying facility is in material breach of relevant portions of a power purchase agreement, the Commission of course will have jurisdiction to resolve the dispute between the utility and qualifying facility, which is something that we have occasionally been called on to consider.").

Third, although PURPA prohibits the Commission from revising the rates paid by an agreement between a QF and utility, this does not mean that the Commission is precluded from reviewing the non-pricing terms of the agreement in the context of deciding a proceeding brought by the NRG Companies before the Commission. Indeed, the "Commonwealth Court has confirmed the Commission's authority to grant modifications to [PPAs]." *Petition of West Penn Power Company for Approval of Electric Energy Purchase Agreement; Order on Petition of Mon Valley Energy Corporation for Modification of Electric Energy Purchase*, Docket No. P-880286, 1992 Pa. PUC LEXIS 23 (Jan. 14, 1992) (citing *Armco Advanced Materials Corporation v. Pa. PUC*, 579 A.2d 1337 (Pa. Cmwlth. 1990)); *see also West Penn Power*

Company v. Pa. PUC, 659 A.2d 1055, 1060 (Pa. Cmwlth. 1995) (noting that in the unpublished decision in *Armco Advanced Materials Corporation v. Pa. PUC*, Nos. 2090 and 2097 CD 1989 (Sept. 7, 1990), the Commonwealth Court affirmed the Commission's authority to modify the PPAs reflecting milestone extensions).[3]

Fourth, and importantly, the Commission did not "interpret" or modify the meaning of the PPAs as suggested by the NRG Companies. The PPAs at issue in this case provide, in pertinent part, as follows:

[BEGIN CONFIDENTIAL]

[END CONFIDENTIAL].

(Duquesne Light Exs. WVP 3-R [**HIGHLY CONFIDENTIAL**] and WVP 4-R [**HIGHLY CONFIDENTIAL**].) In this case, the Commission found that 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." (Opinion and Order, p. 63.) It is clear that the Commission did not "interpret," modify, or revise the meaning of the PPAs; rather, the Commission merely applied the plain language of the PPAs to conclude that the ALJ erred in finding that the PPAs lack a term.

Based on the foregoing, it is clear that the Commission did not "interpret" or modify the PPAs as suggested by the NRG Companies. Rather, the Commission merely applied the plain language of the PPAs to conclude that the RD erred in finding that the PPAs lacked a definitive term. Further, the Commission's application of the non-pricing term of the PPAs is consistent

[3] It should be noted that the issue of the Commission's authority under Section 508 of the Public Utility Code, 66 Pa.C.S. § 508, to modify, reform, or revise wholesale power purchase agreements was not raised by any of the parties to this proceeding, is not before the Commission, and should not now be decided on a request for reconsideration.

with the Commission's conclusion in the November 13, 2014 Opinion and Order regarding jurisdiction, as well as the case law regarding the Commission's authority to look to PPAs. Accordingly, the Commission should deny the NRG Companies' Petition for Reconsideration and affirm the well-reasoned findings and conclusions set forth in the November 13, 2014 Opinion and Order.

C. The Commission's Finding that the PPAs had a Term is Supported by Substantial Evidence of Record

The NRG Companies contend that, even if the Commission had jurisdiction to interpret the PPAs, the Commission's conclusion was not supported by substantial evidence of record. (*See* NRG Petition ¶ 10.) The NRG Companies' substantial evidence argument is without merit and should be rejected by the Commission.

It is well established that any finding of fact necessary to support an adjudication of the Commission must be based upon substantial evidence. *Met-Ed Industrial Users Group v. Pa. PUC*, 960 A.2d 189, 193 n.2 (Pa. Cmwlth. 2008) (citing 2 Pa.C.S. § 704). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Borough of E. McKeesport v. Special/Temporary Civil Service Commission*, 942 A.2d 274, 281 (Pa. Cmwlth. 2008). Although substantial evidence must be "more than a scintilla and must do more than create a suspicion of the existence of the fact to be established," *Kyu Son Yi v. State Board of Veterinary Medicine*, 960 A.2d 864, 874 (Pa. Cmwlth. 2008) (citation omitted), the "presence of conflicting evidence in the record does not mean that substantial evidence is lacking." *Allied Mechanical and Electric, Inc. v. Pennsylvania Prevailing Wage Appeals Board*, 923 A.2d 1220, 1228 (Pa. Cmwlth. 2007) (citation omitted).

As explained above, the Commission looked to the plain language of the PPAs and found that 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." (Opinion and Order, p. 63.) The Commission's application of the PPAs clearly is supported by evidence that was admitted to the record, including testimony and the PPAs themselves. (*See* Duquesne Light Exs. WVP 3-R [**HIGHLY CONFIDENTIAL**] and WVP 4-R [**HIGHLY CONFIDENTIAL**]; Tr. 286:3-15, 436:7-10.) The fact that the NRG Companies disagree with the conclusion reached by the Commission does not mean that substantial evidence is lacking. *See Allied Mechanical and Electric, supra.*

In an effort to demonstrate that the Commission's application of the PPAs is not supported by substantial evidence, the NRG Companies argue that the terms of the PPAs could be considered to be ambiguous or disputed. (NRG Petition ¶¶ 21, 23) It should be noted, however, that the NRG Companies' argument that the above-quoted language of the PPAs is ambiguous and disputed is entirely inconsistent with their litigation position. In their Main Brief, the NRG Companies argued that the "[PPAs] terminate only when Duquesne Light no longer has an applicable tariff provisions and/or is no longer compelled to by law to purchase power from the QFs." (NRG Main Brief, p. 13.) Thus, it appears that the NRG Companies initially advocated a position that is consistent with the Commission's application of the PPAs. The NRG Companies cannot now credibly claim that the language in the PPAs is ambiguous and disputed.

The NRG Companies next argue that 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 Light to revise Rider No. 18. (NRG Petition ¶ 15.) The NRG Companies, however, overlook that the Commission did in fact consider and reject this argument:

> The ALJ also held out Duquesne's reservation of the unilateral right to file a new tariffed rate as proof that the PPA rate may be revised. We disagree. While the Company may at any time choose to file a new tariff, nothing guarantees that the Commission would approve such a tariff, particularly if the other party to the contractual obligation objected. Filing to change a tariff is no more than an opening move on one party's part to renegotiate the contract, a right that both parties to the contract already enjoy. Any discussion of Duquesne's reservation in 1981 of the right to file to modify a tariff ignores the subsequent decisions like *Freehold* that clarified that no matter Duquesne's intention in including the PPA pricing term in a state tariff, the state cannot mandate a price change to an existing QF contract. We simply cannot force parties to renegotiate.

(Opinion and Order, p. 67.) The fact that the NRG Companies disagree with the conclusion reached by the Commission does not mean that substantial evidence is lacking. *See Allied Mechanical and Electric, supra.* Further, the Commission clearly considered and rejected the NRG Companies' argument and, therefore, the NRG Companies failed to satisfy the standards for reconsideration in *Duick.*

Based on the foregoing, the Commission should deny the NRG Companies' Petition for Reconsideration and affirm the well-reasoned findings and conclusions set forth in the November 13, 2014 Opinion and Order.

D. The NRG Companies' Alternative Remedies being Advanced for the First Time on Reconsideration Should be Rejected.

The NRG Companies request that, if the Commission does not reverse its finding that the PPAs contain a definitive term, the Commission should make clarifications to the November 13, 2014 Opinion and Order to ensure that NRG Midwest is not deprived of the opportunity to again challenge the PPAs in a separate proceeding and/or different forum. (*See* NRG Petition ¶ 10.) Specifically, the NRG Companies request that the Commission enter an order finding that: (i) the November 13, 2014 Opinion and Order does not constitute approval of the PPAs or a binding interpretation of the terms of the PPAs (*see* NRG Petition ¶ 32); (ii) the November 13, 2014

Opinion and Order does not preclude the NRG Companies from any recourse that they may have to civil courts to challenge the PPAs (*see* NRG Petition ¶ 33); (iii) the November 13, 2014 Opinion and Order does not limit the Commission's authority under Section 508, 66 Pa.C.S. § 508, to vary, reform, or revise the PPAs (*see* NRG Petition ¶ 34);[4] and (iv) the November 13, 2014 Opinion and Order does not determine the ownership of alternative energy credits ("AECs") (*see* NRG Petition ¶ 37). For the reasons explained below, the NRG Companies' alternative remedies should be denied.

In their complaint, the NRG Companies generally requested that the Commission "ensure that Tariff Rider No. 18 is just, reasonable and nondiscriminatory." (NRG Complaint ¶ 20.) The NRG Companies subsequently clarified their position in direct testimony and requested that the rate set forth in Rider No. 18 be modified. (NRG Midwest St. No. 1, pp. 6-7.) In surrebuttal, the NRG Companies changed their theory and requested that Rider No. 18 be eliminated in its entirety. (NRG Midwest St. 1-S, pp. 6, 9.) The Commission found that the NRG Companies failed to meet their burden to prove that the Rider No. 18 rate is unreasonable and that Rider 18 should be eliminated or replaced. Consequently, the Commission denied the relief requested by the NRG Companies.

Apparently unhappy with the Commission's conclusion, the NRG Companies now seek to again modify their request for relief so that they may challenge the PPAs in a separate proceeding and/or different forum. These remedies, however, were raised for the first time in the NRG Companies' Petition for Reconsideration. Clearly, the NRG Companies have waived these newly requested remedies by failing to raise them during the course of the litigated proceeding. Moreover, the NRG Companies overlook that the Commission dismissed their complaint

[4] See Footnote 3, *supra.*

because they failed to meet their burden of proof and, therefore, the NRG Companies are not entitled to any relief regardless of when it was requested

Further, to permit the NRG Companies to now request these new alternative remedies -- after the close of the record and the issuance of the Commission's final order -- could have serious due process implications. Indeed, to now grant the post-final order remedies requested by the NRG Companies would deny the other parties to the proceeding any meaningful opportunity to evaluate these remedies and present evidence on whether these remedies are just, reasonable, and in the public interest. While the Commission has the power to rescind or amend any order, exercise of such function cannot violate fundamental principles of fairness or constitutional guarantees. *Popowsky v. Pa. PUC*, 805 A.2d 637 (Pa. Cmwlth. 2002); *Lang v. Pa. PUC*, 217 A.2d 750 (Pa. Super 1966); *Department of Highways v. Pa. PUC*, 138 A.2d 143 (Pa. Super 1958).

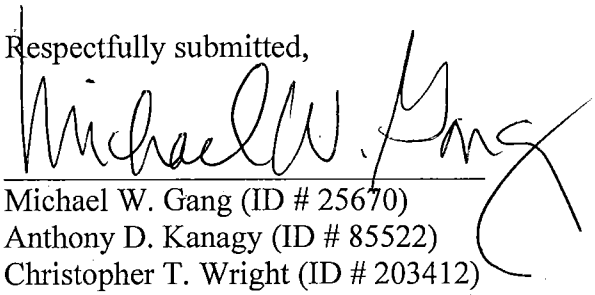
It plainly appears that purpose of the NRG Companies newly requested relief is to ensure that the NRG Companies may have a second bite at the proverbial apple by seeking relief in a different proceeding or forum. It must be remembered that it was the NRG Companies that sought to bring these Rider No. 18 issues before the Commission during Duquesne Light's base rate case. The fact that the NRG Companies apparently now regret their decision to bring and fully litigate these issues before the Commission simply is not sufficient reason to grant reconsideration under the *Duick* standards. Indeed, other than the apparent dissatisfaction with their own initial remedies, the NRG Companies have failed to articulate any new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission in support of their newly requested alternative remedies.

Based on the foregoing, the Commission should deny the NRG Companies' Petition for Reconsideration and affirm the well-reasoned findings and conclusions set forth in the November 13, 2014 Opinion and Order.

IV. CONCLUSION

WHEREFORE, for all the foregoing reasons, as well as those more fully explained in November 13, 2014 Opinion and Order, Duquesne Light respectfully requests that the Pennsylvania Public Utility Commission deny the Petition for Reconsideration and Clarification filed by NRG Power Midwest, LP, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC in its entirety.

Respectfully submitted,



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