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December 11, 2014

VIA E-FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

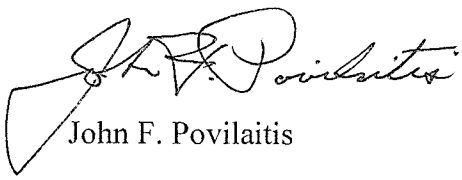
Re: NRG Power Midwest LP, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC v. Duquesne Light Company; Docket No. C-2013-2390562

Dear Secretary Chiavetta:

On behalf of Beaver Falls Municipal Authority, please find the Answer Of Beaver Falls Municipal Authority To The Petition For Reconsideration And Clarification of NRG Power Midwest LP, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC in the above-captioned matter.

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

Very truly yours,



John F. Povilaitis

JFP/bb
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
Per Certificate of Service

PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

ANSWER OF BEAVER FALLS MUNICIPAL AUTHORITY TO PETITION FOR RECONSIDERATION AND CLARIFICATION

The Beaver Falls Municipal Authority ("Authority"), by and through its attorneys, John F. Povilaitis, Alan M. Seltzer and Buchanan Ingersoll & Rooney PC, hereby files this Answer to the Petition of the NRG Companies[1] for Reconsideration and Clarification of the Commission's Order, entered November 13, 2014 ("Petition") in the above-captioned matter pursuant to 52 Pa. Code § 5.572(e), and in connection therewith represent as follows:

I. INTRODUCTION

1. On November 13, 2014, the Commission entered an 88-page final Opinion and Order ("Final Order") in this proceeding reversing the Recommended Decision of Administrative Law Judge Conrad Johnson ("R.D.") and dismissing the Formal Complaint filed by the NRG Companies challenging the justness and reasonableness of Rider No. 18 to Duquesne Light Company's ("Duquesne Light") retail electric tariff. Rider No. 18 was introduced by Duquesne in 1981 and intended to establish a flat $0.06 per kilowatt-hour ("kWh")

[1]The "NRG Companies" are collectively referred to herein as NRG Power Midwest LP, NRG Energy Center Pittsburgh LLC, and Reliant Energy Northeast LLC.

rate by which Duquesne would purchase and pay for electricity from special non-utility electric power generators known as qualifying facilities ("QF's")[2].

2. In February 1985, the Authority entered into a power purchase agreement ("PPA") with Duquesne Light under which the Authority agreed to sell to Duquesne the electric output of two hydroelectric generating facilities of 2.5 megawatts each ("Facilities") owned and operated by the Authority. The Facilities were QF's and were therefore eligible for the $0.06/kWh pricing specified in Duquesne Light's Rider No. 18.

3. The PPA required Duquesne Light to purchase the net electric energy produced by the Facilities under and in accordance with the terms and conditions of Rider No. 18, including the $0.06/kWh pricing. The price for the electricity sold by the Authority to Duquesne Light under the PPA was *not* specified in the PPA itself but by Rider No. 18. That rider thus became an integral component of and inter-related with the PPA.

4. The PPA operated in accordance with its terms without incident from 1985 until the NRG Companies filed the formal complaint in October 2013 challenging Rider No. 18 and indirectly seeking to terminate the PPA and/or reduce the $0.06/kWh pricing in Rider No. 18 that was incorporated into the PPA.

5. In 1987 the Commission approved a tariff supplement filed by Duquesne Light that grandfathered the applicability of the $0.06/kWh pricing in Rider No. 18 to the Facilities. *Pa. Pub. Util. Comm'n v. Duquesne Light Co.*, 64 Pa. PUC 388 (July 20, 1987). The Authority has continued to be paid for the net electricity produced by its Facilities from 1985 to the present.

[22] Under the Public Utility Regulatory Policies Act of 1978 ("PURPA"), public utilities are required to purchase all electricity produced by independent power producers that obtain status as QF's. 16 U.S.C. § 824a-3(b); 18 C.F.R. § 292.303(a). Under the Federal Energy Regulatory Commission's regulations implementing PURPA, the rate a qualified facility is to receive for the sale of its electricity is the "avoided cost" rate. 18 C.F.R. § 292.304(a)(2). "Avoided costs" are the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the QF, such utility would generate itself or purchase from another source. 18 C.F.R. § 292.101(b)(6).

Through a "Revised QF Agency Agreement" approved by the Federal Energy Regulatory Commission ("FERC") on March 8, 2001, one or more of the NRG Companies currently pay Duquesne Light for the output of the Facilities at the Rider No. 18 rate of $0.06/kWh, and those payments are in turn passed through to the Authority by Duquesne Light.

6. The NRG Companies sought to void or materially modify the PPA only a short period of time after they assumed the obligations under the Revised QF Agency Agreement in 2012, which obligated them to pay for the net electric energy produced by the Facilities under the PPA.

7. Despite the Authority's reliance on Rider No. 18 and the PPA, including still outstanding indebtedness associated with the construction of the Facilities, the NRG Companies have been on a focused – albeit unlawful – mission to terminate the PPA and/or materially reduce the prevailing and previously Commission-approved $0.06/kWh pricing contained in Rider No. 18 and expressly incorporated into the PPA. The prejudice and harm to the Authority of granting the relief requested by the NRG Companies would be devastating.

8. Fortunately, the Final Order, in a well-reasoned, thorough and dispassionate manner, examined the complex jurisprudence surrounding PURPA, and properly found that the NRG Companies' attempt to have the Commission exercise its jurisdiction to void the PPA or substantially reduce the Rider No. 18 pricing being paid to the Authority that had been approved previously by the Commission is unlawful, since any such Commission action is preempted by federal legislation – PURPA.

9. Now, in an ironic twist not lost on the Authority, the NRG Companies in the Petition are requesting that the Commission offer an interpretation of and specific guidance on

the terms of the PPA, after the NRG Companies repeatedly asserted during the proceeding that they only sought to modify Duquesne's tariff, Rider No. 18 and not the PPA.

10. The NRG Companies have argued repeatedly in this proceeding that they were not seeking an amendment of the PPA, but only a change in Duquesne Light's Rider No. 18. (e.g., NRG Main Brief, p. 18; NRG Reply Brief, p. 14). Now, in the Petition the NRG Companies argue that substantial evidence of record supports a Commission finding that the intent of the PPA was to allow issues such as the contract term to be defined through Commission-approved changes to Rider No. 18. (Petition, p. 2).[3]

11. During the litigation phase of this proceeding, the NRG Companies asserted, as a factual matter, that the PPA had no specific end date, i.e., it was an "evergreen" contract. (NRG Companies' Main Brief, p. 13). Those assertions were in support of the NRG Companies' claim that "fairness" requires the Commission to eliminate Rider No. 18 or, in the alternative, modify the $0.06/kWh pricing for QF electric energy required to be paid by Duquesne Light. (NRG Companies' Main Brief, p. 12). The R.D. erroneously agreed with NRG on this factual matter. However, in the Final Order, the Commission disagreed with the R.D.'s factual reading of the PPA and also found as a legal matter a term in years was not a necessary prerequisite to creating a "legally enforceable obligation" under federal law and further observed that the PPA did in fact have a "term", albeit not one expressed in years.[4] Thus, there are both factual and legal aspects to the "term" issue. In addition to making an erroneous factual conclusion regarding the "term" issue, the R.D. also used this conclusion to buttress its erroneous legal conclusion that the

[3]This new request for relief is not only unlawful for the Commission to grant at this stage of the proceeding as a matter of due process, it is inconsistent with the NRG Companies' position that it is unlawful for the Commission to engage in an interpretation of the PPA. (Petition, p. 8).

[4] The Authority submits that this is not an "interpretation" of the PPA, but a factual correction of the R.D.'s reading of the PPA.

absence of an end date in the PPA meant that there was no "legally enforceable obligation" supporting the $0.06/kWh price in Rider No. 18 and the Commission could therefore eliminate that rider or modify its pricing irrespective of PURPA and clear precedent to the contrary.

12. In the remainder of this Answer, the Authority will address the legal errors in the Petition and demonstrate why there is no basis for the Commission to interpret the PPA, modify its description of the PPA in the Final Order or provide the NRG Companies and their counsel a legal advisory opinion on speculative matters and future legal action that might be taken in reaction to the Final Order. In short, the Petition should be denied in its entirety.

II. ARGUMENT

A. The Petition fails to Meet the Legal Standards for Petitions for Reconsideration

13. As the NRG Companies properly point out, the Commission's standards relating to granting petitions for reconsideration and/or clarification are set forth in *Duick v. Pennsylvania Gas and Water Co.,* 56 Pa. P.U.C. 553, 559, 1982 Pa. PUC LEXIS 4 (1982). However, the Authority's agreement with the NRG Companies ends there. While it is relatively simple for party to file a petition for reconsideration and/or clarification, the bar to obtaining relief is quite high. As the Commission has long since noted, "[s]uch petitions are likely to succeed only when they raise 'new and novel arguments' not previously heard or considerations that appear to have been overlooked or not addressed by the Commission." *Duick* at 559. The courts have also held that, "because a grant of relief on such petitions [reconsideration and/or clarification] may result in the disturbance of final orders, it should be granted judiciously and only under appropriate circumstances. *West Penn Power v. Pa. P.U.C.*., 659 A.2d 1055 (Pa. Cmwlth. 1995), *petition for allowance of appeal denied,* No. 576 W.D., Allocatur Docket (April 9, 1996); *City of Pittsburgh v. PennDOT*, 490 Pa. 264, 416 A.2d 461 (1980).

14. The Petition completely fails to satisfy the *Duick* standards. NRG has not raised new or novel arguments or considerations that were overlooked by the Commission. As noted above, the Final Order, some 88 pages in length, evaluated in a comprehensive (indeed exhaustive) manner the facts and law applicable to PUPRA and QF contracts. That order literally evaluated over 25 years of statutory, regulatory and common law principles – both at the federal and state level – relating to the preemptive effect of PURPA after a state utility commission has approved a contractual rate to be paid to a QF like the Authority. It is abundantly clear that reconsideration is not appropriate here because the Commission in the Final Order neither committed an error of law nor overlooked any factual or legal argument pertinent to its finding that the NRG Companies are not entitled to relief.

15. The Commission's conclusions regarding the term of the PPA were necessary determinations due to the R.D.'s erroneous conclusions that the failure of the PPA to set a specific term of years meant there was no term for the agreement and therefore no "legally enforceable obligation" under applicable FERC regulations that the purchaser of the Authority's energy was required to fulfill. (R.D. pp. 29, 39). The R.D. used this erroneous conclusion to justify ignoring prior controlling Commission and federal court decisions (identified as "*Scrubgrass I*" and "*Freehold*" in the Final Order), and it was necessary for the Commission to refute this erroneous conclusion. Moreover, because the R.D. described the PPA as having no term, it was appropriate for the Commission to refute this conclusion by 1) observing that the PPA did have a term, albeit not one in specific years, defined as either the continued availability of a price or an end to the Authority's desire to sell the output of the Facilities, and 2) a legally enforceable obligation could be established *without* a specified period of years. If the R.D.'s erroneous finding (R.D. at 29, 39) that the lack of an "end date" in the PPA meant there was no

legally enforceable obligation had been the final word on this issue, the NRG Companies certainly would have been satisfied with this conclusion and ceased paying $0.06/kWh for the output of the Facilities. However, the R.D. is not final. After the Commission's reversal of the R.D. on this point, the NRG Companies cannot credibly argue now that the issue of the PPA term and its legal import were not properly before the Commission. This is particularly true since the NRG Companies' attempted to use the alleged absence of a specific end date in the PPA as an equitable consideration (i.e., "fairness") the Commission should adopt in adjudicating the NRG Companies' primary claim that the Commission had the lawful authority to eliminate and/or modify Rider No. 18. (NRG Companies Main Brief, p. 12).

B. The Final Order is Not Premised on any Particular Finding on the Duration of the PPA

16. It is clear that the NRG Companies are concerned that the PPA lacks a specific duration expressed in years. They signal throughout the Petition that further litigation may be in the offing to resume a direct challenge to the PPA. Any such grand plan is of no consequence to the Commission – particularly in the context of this proceeding. As such, the Commission should be loath to accept the NRG Companies' entreaties to modify the Final Order in ways that better position the NRG Companies to assert some speculative and uncertain challenge in another forum.

17. In paragraph 2 of the Petition, the NRG Companies assert that the Final Order "is erroneously premised [on] an **assumption** that each of the PPAs has a legally enforceable 'specified term.'" (emphasis added). This assertion misinterprets the Final Order, which held that the PPA did in fact have a "specific term", albeit not one expressed in years. The Commission

therefore properly found that a legally enforceable obligation under FERC's PURPA regulations existed between Duquesne Light and the Authority *with a specific term.*

18. Pages 63-64 of the Final Order confirm clearly that the Commission addressed the PPA duration issue in the context of the R.D.'s erroneous conclusion that PURPA's preemption of state proceedings (including the $0.06/kWh pricing in Rider No. 18) was legally voided because the PPA did not have a specific term. The R.D. specifically cited the lack of an "end date" in the PPA as justifying the Commission ignoring the *Scrubgrass I* and *Freehold* precedents that preempt the Commission's authority to change the rate in Rider No. 18. (R.D. pp. 29, 39). Due to the R.D.'s analysis of the legal import of the "end date" of the PPA, it was therefore necessary for the Commission to address the legal significance of a QF contract's "end date" relative to a "legally enforceable obligation" under applicable FERC regulations in order to rule on the NRG Companies' assertion that the Commission was free to change the Rider No. 18 rate. The Commission properly and appropriately decided that question and neither the NRG Companies nor the Authority could have said it more clearly: ". . . nothing in PURPA requires a contract or, more specifically, a contract with a term defined by a set of years, in order to effectuate PURPA's preemption of state utility-type regulations under Section 210(e)." (Final Order, p. 63).

19. Having now seen the Commission's disposition of the "end date" argument in the R.D., the NRG Companies may regret that it was even raised. However, the NRG Companies did not take exception to the R.D.'s "end date" analysis and argue to the Commission that it addressed an "interpretation" of the PPA outside the Commission's jurisdiction. The Commission's correction of the R.D.'s erroneous analysis was neither an error of law nor a conclusion on an issue outside the Commission's authority and jurisdiction. The Commission

should not accept the NRG Companies' opportunistic approach to litigating this case – i.e., remaining silent on a PURPA contract issue when it is decided in their favor, but claiming foul when the properly decided issue turns against them.

20. It is wholly improper for the NRG Companies to claim that the Commission's correct treatment of an erroneous conclusion or finding in the R.D. (e.g., relating to contract duration and PURPA preemption) rises to the level of a "premise" or "assumption" in the Final Order or constitutes an unlawful interpretation of the PPA. (Petition, ¶ 13)..

21. The NRG Companies' tactic in their Petition is clear – i.e., give the erroneous impression that the "end date" analysis reflected in the R.D. has always been the cornerstone of their position. The record belies such a conclusion. As noted above, the NRG Companies did reference the alleged absence of a specific end-date in the PPA in connection with their effort to persuade the Commission to eliminate Rider No. 18 on general fairness principles (NRG Companies Main Brief, p. 12). However, any implication that NRG litigated "a dispute regarding the term" of the PPA (Petition, ¶¶ 2 and 16) is completely erroneous.

22. After having clearly premised their Formal Complaint solely on Rider No. 18, the NRG Companies' thinly veiled effort to shift the inquiry at this stage of the proceeding to the PPA should be summarily rejected. Indeed, it is impossible to reconcile the NRG Companies' continued efforts to force a Commission determination of details of the PPA with their own assertion that the "Commission Lacks Authority to Interpret Contracts" (Petition, ¶ 12). Second, there is absolutely no record evidence cited by the NRG Companies in the Petition regarding any dispute about the duration of the PPA. Given the theory of this case asserted by the NRG Companies from the outset, it should not be surprising that the terms and conditions of the PPA –

in contrast to the rate set by Rider No. 18 – were simply not the primary focus of the NRG Companies in this proceeding. Now is not the time to make it the focus.[5]

23. The Commission should also reject the NRG Companies' efforts to characterize what the record "supports" in this proceeding. (Petition, ¶ 2). They go to great pains to state that the record supports only one of two conclusions regarding the duration of the PPA. Again, not surprisingly, no record evidence is cited at all. That's because this case simply was not primarily focusing on the specific terms of the PPA and the Commission should not accept the NRG Companies' invitation to do so now.

24. While the NRG Companies now assert that the absence of a specific "end date" in the PPA violates the "legally enforceable obligation" required under FERC's PURPA regulations (thereby voiding any payment obligation under the PPA based on Rider No. 18 pricing) (Petition, p. 9), they fail to acknowledge FERC's recent action on this very issue. In a filing made on June 26, 2014, the Authority requested that FERC grant it a waiver of FERC's regulations under Order No. 671, issued in 2006, requiring QF's to file written self-certifications of their QF status. The Authority first self-certified on November 22, 2013, but had neglected to self-certify back to April 16, 2006 when the self-certification requirement under FERC Order No. 671 first became effective. The FERC granted the Authority's requested waiver over the protest of the NRG Companies. *Beaver Falls Municipal Authority*, Docket Nos. EL 14-78-000, QF 14-91-001 (November 7, 2014). *See* Appendix A. In two places in that Order, FERC noted that the 1985 Agreement [the PPA] has no expiration date. FERC observed that "[t]he 1985 Agreement has no expiration date but becomes void if Beaver Falls loses its QF status and cannot be re-executed"

[5] Without unduly addressing the merits, the Final Order does acknowledge that the duration or specific term of a QF agreement need not be defined by a term of years. (Final Order, p. 63). The NRG Companies conveniently gloss over this discussion in the Final Order.

and that "NRG points out that the 1985 Agreement has no expiration date....". (Order pp. 2, 5). Fully aware of the PPA's lack of a term of years, FERC nevertheless partially granted the Authority's request for a waiver stating that "...the Commission will grant Beaver Falls partial waiver so that the Beaver Falls' generating facility will be treated as a QF for the period that Beaver Falls' generating facility operated out of compliance with the Commission's requirement that an owner of a small power production facility make a filing in order to certify as a QF...". (Order at 9).

25. It is clear that FERC had no trouble granting the Authority's requested relief *with full knowledge* of the lack of a specific end date in the PPA.

C. *There is no legal or other basis on which the Commission should defer its consideration of Rider 18.*

26. In paragraph 4 of the Petition, the NRG Companies inexplicably depart from the relief sought in their formal complaint and are now asking the Commission, for the first time, to *defer* any decision with respect to Rider No. 18 until a civil court rules upon the PPA or the Commission considers the PPA under Section 508 of the Public Utility Code ("Code"), 66 Pa. C.S. § 508. The Commission should reject this new requested relief. First, the Commission is being asked to take some action (i.e., defer ruling on Rider No. 18) based on the unsupported, speculative, and implied action that the NRG Companies *may* plan to take with respect to challenges to the PPA. The NRG Companies provide absolutely no legal support for this unprecedented relief. Indeed, the record, hearing, briefing and decision on this case are fully complete, and there is no reason why action on the NRG Companies' originally requested relief should not be decided. Fundamental due process principles mandate completion of this litigation, not defer it at the eleventh hour on the basis of speculation and unsupported future conduct.

27. And, to the extent the NRG Companies are actually contemplating asking the Commission to modify the PPA under Code Section 508, the NRG Companies have not even remotely explained in the Petition (or cited any legal authority) supporting how such Commission action can be accomplished given the preemptive effect of PURPA and the various cases cited in the Final Order.

D. *The Commission should reject the NRG Companies' request for Advisory Opinions*

28. In paragraph 4 of the Petition, the NRG Companies seek what amounts to an advisory opinion by asking the Commission to opine that the Final Order "does not approve the PPAs, does not preclude NRG Midwest from seeking course from civil courts or 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 by the QFs." The Commission does not grant requests for advisory opinions like that being sought by the NRG Companies in the Petition[6].

[6]The Commission consistently refuses to provide "advisory opinions" regarding future acts or hypothetical fact situations. *See, i.e., Application of Kane & Kane Railroad*, Docket No. A-2010-2168780 (Final Order entered October 18, 2010 denying applicant's request that the Commission agree to approve applications that have not yet been filed, because to do so equates to an advisory opinion and the Commission will not provide an advisory opinion); *Application of Excelon Corporation et al.*, Docket No. A-2009-2093057, A-2009-2093058, A-2009-2093059 (Final Opinion and Order entered June 25, 2009 declining to approve a merger where no such merger agreement exists because to do so would constitute an advisory opinion); *Petition for a Joint Default Service Plan for Citizens' Electric Company of Lewisburg, Pennsylvania and Wellsboro Electric Company*, Docket Nos. P-0072306, P00072307 (Final Opinion and Order entered November 9, 2007 denying OSBA's request to rule on future remedies because that request is "one seeking an advisory opinion with regard to a purely hypothetical event"); *Re Campo's Express and Leasing, Inc. t/d/b/a Campo's Express, Inc.*, Docket No. A-00105619 (Final Order entered July 11, 1989 denying exceptions as moot and refusing to issue advisory opinions on the merits of the exceptions); *see also Pennsylvania PUC v. T.W. Phillips Gas and Oil Co.*, Docket No. R-2008-2013026 (Final Opinion and Order entered April 16, 2010 affirming that "advisory opinions on the issues addressed" in Commission orders "are disfavored").

29. The NRG Companies provide no legal basis supporting the advisory opinions they now seek. Their questions appear to arise in part from unspecified and speculative action that is implied but certainly not assured. These requests are essentially calling on the Commission – under the guise of reconsideration/clarification – to give legal opinions about the possible effect and interpretation of the Final Order under factual situations that do not – and may never -- exist. There is no case or controversy raising any justiciable issue presently based on the items for which the NRG Companies are now seeking reconsideration and clarification. Because there is no present case or controversy, the Commission cannot and should not entertain these unsupported and speculative requests. Rather than looking outward to the Commission, the NRG Companies should look inward – to their very capable in-house and outside attorneys – to answer the speculative questions posed under the guise of reconsideration and clarification.

E. The Petition Misstates the Current Treatment of Alternative Energy Credits ("AEC's)

30. Aside from their attempt to obtain an advisory opinion from the Commission on the sale of the AEC's under the Alternative Energy Portfolio Standards Act, 73 P.S. 1648.1 *et seq.*, the NRG Companies erroneously suggest there is some question about the ownership and right to sell the AEC's in connection with the Facilities. (Petition, ¶ 33). Relying on *ARIPPA* v. *Pa. Pub. Util. Comm'n*, 966 A.2d 1204 (Pa. Cmwlth. 2009), they claim there is some doubt about the Authority's voluntary sales of AEC's from the Facilities to Duquesne Light. What the NRG Companies ignore is that *ARIPPA* addressed a situation where both the underlying contract was silent on the ownership of the AEC's *and* the parties had not otherwise agreed on the seller of the AEC's. Here, the Authority and Duquesne had previously agreed voluntarily on the buyer and seller of the AEC's associated with the Facilities, so ARIPPA is inapposite. It is curious – if

argue that the Authority has no such right to make AEC sales despite the uncontradicted record evidence that such sales have been made in the past with Duquesne Light. (Tr. 439, lines 2-8).

WHEREFORE, for the reasons specified above, the Beaver Falls Municipal Authority respectfully requests that the Petition of the NRG Companies for Reconsideration and Clarification of the Commission's Order entered November 13, 2014 be dismissed with prejudice and the Commission grant the Beaver Falls Municipal Authority such other relief as is just and reasonable under the circumstances.

Respectfully submitted,

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Attorneys for
Beaver Falls Municipal Authority

Dated: December 11, 2014

APPENDIX A

149 FERC P 61108, 2014 WL 5819538 (F.E.R.C.)

FEDERAL ENERGY REGULATORY COMMISSION

*1 Commission Opinions, Orders and Notices

Before Commissioners: Cheryl A. LaFleur, Chairman; Philip D. Moeller, Tony Clark, and Norman C. Bay.

Beaver Falls Municipal Authority

Docket Nos.
EL14-78-000, QF14-91-001

ORDER GRANTING IN PART AND DENYING IN PART REQUEST FOR LIMITED WAIVER

(Issued November 7, 2014)

1. On June 26, 2014, as amended on August 11, 2014, Beaver Falls Municipal Authority (Beaver Falls) filed a petition for declaratory order (Petition) requesting a limited waiver of the small power production qualifying facility (QF) filing requirements set forth in section 292.203(a)(3) of the Commission's regulations [FN1] during a period of non-compliance from March 17, 2006 to November 22, 2013 with respect to Beaver Fall's Townsend Dam Facility, a 4.995 MW net capacity municipality-owned "run of the river" hydroelectric generating plant located in New Brighton, Pennsylvania (Facility). As discussed below, we will grant in part and deny in part Beaver Falls' waiver request.

I. Background

2. Beaver Falls is a municipal water authority created by the City of Beaver Falls, Pennsylvania, to supply water to 25,000 customers in Beaver County, Pennsylvania. Beaver Falls has sold electric energy produced by the Facility to Duquesne Light Company (Duquesne Light) or its assignee since 1987 pursuant to a 1985 power purchase agreement (1985 Agreement) and Rider No. 18 of Duquesne Light's Pennsylvania Public Utility Commission (Pennsylvania Commission) approved retail tariff.

3. In September 1999, Orion Power Midwest, LP, which, through various mergers and acquisitions, is now NRG Power Midwest LP (NRG), entered into a QF Agency Agreement with Duquesne Light under which NRG assumed the obligations of Duquesne Light in the 1985 Agreement. [FN2]

4. On October 28, 2013, NRG sent a letter to Duquesne Light requesting a copy of Beaver Falls' QF self-certification, and announced its intention to cease purchases from Beaver Falls under the 1985 Agreement, effective December 1, 2013, unless NRG received a copy of the self-certification from Beaver Falls by November 29, 2013.

5. On November 22, 2013, Beaver Falls filed a notice of self-certification of QF status with the Commission in Docket No. QF 14-91-000, which became effective on the date of filing.

II. Instant Petition

6. On June 26, 2014, as amended on August 11, 2014, Beaver Falls filed its Petition, seeking a limited waiver of the filing requirements for its QF under section 292.203 of the Commission's regulations for the period from March 17, 2006 to November 22, 2013. [FN3] Beaver Falls also claims an exemption from the filing fee otherwise required in Part 381 of the Commission's regulations with respect to its request for declaratory relief.

7. Aside from temporary outages, Beaver Falls states that the Facility has been operating and producing renewable electric energy without interruption since the commencement of commercial operation on October 12, 1987 [FN4] and has sold the electrical output to Duquesne Light pursuant to the 1985 Agreement at an agreed upon avoided cost rate at $.06 per kWh. The 1985 Agreement has no expiration date but becomes void if Beaver Falls loses its QF status and cannot be re-executed; Duquesne Light's Rider No. 18 has been closed and unavailable to new QFs since 1987. [FN5]

*2 8. Beaver Falls argues that, at the time of the Facility's initial operation, no filing for QF status certification was required for a facility to claim QF status, and that it was not until the Commission issued Order No. 671, [FN6] where the Commission implemented provisions of the Energy Policy Act of 2005 relating to QFs, [FN7] that the Commission established a filing requirement for QF status, which was codified in section 292.203(a)(3) of the Commission's regulations [FN8] for small power production facilities and in section 291.203(b)(2) of the Commission's regulations [FN9] for cogeneration facilities. Sections 292.203(a)(3) and 292.203(b)(2), which became effective on April 16, 2006, require a generating facility seeking QF status (in addition to meeting the other requirements for QF status)to file either a notice of self-certification, or an application for Commission certification, that has been granted, to establish QF status.

9. Beaver Falls argues that, outside of operating the Facility, Beaver Falls has no experience in the energy production market and as a municipality/municipal authority it is exempt from the Federal Power Act (FPA) pursuant to section 201(f) of the FPA. [FN10] Beaver Falls states that it does not routinely have the need to employ counsel practicing before the Commission. [FN11]

10. Beaver Falls states that it was only made aware of the need to file for self-certification of QF status for the Facility during the course of its participation in a base rate proceeding initiated by Duquesne Light before the Pennsylvania Commission, and when NRG challenged the continuation of Rider No. 18's minimum floor pricing applicable to the 1985 Agreement. Beaver Falls claims that it has otherwise satisfied all of the requirements for QF status under section 201 of the Public Utility Regulatory Policies Act of 1978 (PURPA); [FN12] it has been in substantive compliance with the QF requirements from the date the Facility commenced operation until its recent certification but it could not find records indicating that the Facility had ever previously been certified as a QF. [FN13] Beaver Falls states that it did, however, file for and receive hydroelectric licensing authority from the Commission in connection with the Facility, and that those filings provided notice to the Commission that Beaver Falls was operating as a hydroelectric generating plant under 80 MW that would qualify as a QF under PURPA. [FN14]

11. Beaver Falls states that the waiver that it is requesting is substantially similar to those granted in *WM Renewable Energy, L.L.C* and *Ashland Windfarm, LLC*[FN15] where the owners of small power production facilities failed to submit QF certification filings until some period of time after their facilities were constructed and placed into operation.

*3 12. Beaver Falls states that, under the 1985 Agreement, Duquesne Light agreed to buy all of the net electric energy generated at the Facility as long as it would maintain its QF status under PURPA at a minimum or

"floor" pricing of $0.06 per kWh for electric energy purchases.

III. Notice of Filing, Interventions, and Protests

13. Notice of Beaver Falls' amended filing was published in the *Federal Register*, 79 Fed. Reg. 49,304 (2014), with interventions and protests due on or before September 2, 2014. A timely motion to intervene was filed by Duquesne Light. A timely intervention and protest was filed by NRG.

A. NRG's Protest

14. NRG argues that Beaver Falls: (1) should not be able to claim the significant benefits of QF status when it failed to take action to obtain or maintain QF status;(2) has not justified its seven and a half-year delay in complying with the Commission's filing requirements; and (3)has not identified any Commission precedent or policies supporting its Petition. NRG asks that the Commission deny Beaver Falls' request for waiver of the filing requirement and thus deny QF status for the period after April 16, 2006 and prior to November 22, 2013 when Beaver Falls first self-certified its QF status.

15. NRG argues the Commission should deny Beaver Falls' requested waiver because: (1) Beaver Falls, as an active participant in Commission proceedings in which it filed several hundred documents in the hydroelectric licensing context since 1984, cannot claim ignorance of Commission law and procedures, and should have been aware of Order No. 671 which was not an obscure decision on case-specific facts; [FN16] (2) the precedent that Beaver Falls cites — *Ashland Windfarm* and *WM Renewable* — does not support a waiver in these circumstances; and (3) granting Beaver Falls a waiver would not lead to equitable results that are consistent with current policy. NRG adds that, if the Commission denies waiver, Beaver Falls will still be a QF from the date of its self-certification.

16. NRG points out that the 1985 Agreement has no expiration date but becomes void if Beaver Falls loses its QF status certification and cannot be re-executed, and that Rider No. 18 has been closed and unavailable to new QFs since 1987. [FN17] NRG also points out that, in contrast to the minimum floor pricing of $0.06 per kWh, the average annual marginal price between 2009 and 2013 in PJM Interconnection, L.L.C. (PJM) ranged from $0.03153 per kWh to $0.03889 per kWh. [FN18]

17. NRG asks that the Commission, if it decides to grant Beaver Falls waiver of the filing requirement, grant any such waiver conditioned upon Beaver Falls' accepting the obligation to refund the revenues received under the 1985 Agreement, plus interest, for power sold between March 17, 2006 and November 22, 2013.

B. Beaver Falls' Answer

*4 18. On August 11, 2014, Beaver Falls filed an answer to its request for waiver which, among other things, opposed NRG's intervention. Beaver Falls argued that NRG, as an indirect purchaser of the output of the facilities (NRG purchases from Duquesne Light), does not meet the standard for intervention in Rule 214 of the Commission's Rules of Practice and Procedure, [FN19] and that NRG's motion to intervene is not in the public interest. Beaver Falls also argues that NRG seeks to intervene in the Petition to not only urge denial of the Petition, but to obtain an order from the Commission directing refunds from the Beaver Falls going back to 2006, six years before it had any connection with Duquesne Light, which connection only first existed in 2012. [FN20]

C. NRG's Answer to Beaver Falls' Answer

19. On August 25, 2014, NRG filed an answer to Beaver Falls' answer. NRG argues that its request to intervene should be granted because its pass-through relationship with Duquesne Light with respect to the Beaver Falls 1985 Agreement creates an interest in the outcome of this proceeding, which will determine whether Beaver

Falls maintained its QF status, and which will directly affect whether the 1985 Agreement and the accompanying Rider No. 18 rates remain in effect.

IV. Discussion

A. Procedural Matters

20. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), Duquesne Light's timely, unopposed motion to intervene serves to make it a party to this proceeding. Notwithstanding Beaver Falls' opposition to NRG's intervention, we find that NRG has demonstrated an interest in this proceeding that warrants our granting its intervention. [FN21]

21. Section 381.108 of the Commission's regulations [FN22] provides that municipalities are exempt from the filing fees required in Part 381. Beaver Falls explains that it is a municipality. Beaver Falls is therefore exempt from the filing fee otherwise required for a petition for declaratory order.

B. Commission Determination

22. For many years, there was no express requirement in section 292.203 that a facility make a filing in order to establish QF status. However, in Order No. 671, the Commission changed its regulations by adding the filing requirements for QF status contained in sections 292.203(a)(3) (for small power production facilities) and 292.203(b)(2) (for cogeneration facilities) of the Commission's regulations. [FN23] The Commission explained that it did not believe "that a facility should be able to claim QF status without having made any filing with this Commission."[FN24] Our regulations thus have required that an owner or operator of a facility, whether existing or new, must, in addition to meeting other specified requirements, file either a notice of self-certification, or an application for Commission certification that has been granted, in order to establish QF status for a generating facility larger than 1 MW. [FN25] For facilities that were operating at the time Order No. 671 was issued, the filing requirement became effective on April 16, 2006.

*5 23. As noted above, Beaver Falls self-certified its facility on November 22, 2013. Accordingly, absent our granting the requested waiver, Beaver Falls would not be considered a QF from April 16, 2006, the date the filing requirement became effective for already-operating QFs, until November 22, 2013, when Beaver Falls filed its notice of self-certification. The issue in this case is thus the intervening period and whether Beaver Falls' excuse for its failure to timely certify its facility warrants waiver of the filing requirement for that period. We find that it does not, and we will deny Beaver Falls' requested waiver. Beaver Falls has not justified its failure to comply with a filing requirement that has been present in the Commission's regulations for seven and a half years. Beaver Falls acknowledges that it was operating in 2006 when the change in the Commission's regulations and the resulting filing requirement became effective, and that it did not file a notice of self-certification until November 22, 2013 — seven and a half years late.

24. Beaver Falls nonetheless argues that it deserves a waiver of the filing requirement. Among other things, Beaver Falls argues that it has complied with all "substantive" requirements for small power production QF status since the date the Facility went into service. Beaver Falls also claims that it promptly remedied the failure to file for QF status, once discovered.

25. The factors that Beaver Falls cites for failing to timely file are not persuasive. As the Commission recently stated, "[t]he filing requirement is a substantive and important criterion for QF status, which was expressly adopted in Order No. 671 and must be followed."[FN26] Although Beaver Falls argues that its failure to make the filing was inadvertent, the fact remains that for seven and a half years it was out of compliance with the express

requirements for QF status. In similar situations, the Commission has not been persuaded by claims that the Facility met all other requirements for QF status because that argument improperly minimizes the importance of the filing requirement. [FN27]

26. Beavers Falls cites two cases — *WM Renewable* and *Ashland Windfarm* — in support of its requested waiver. [FN28] Neither *WM Renewable* nor *Ashland Windfarm*, however, supports a grant of waiver in this instance.

27. *Ashland Windfarm* involved atypical ownership of the petitioners' wind project companies that included charities. [FN29] This case does not present a similar situation.

28. To the extent that Beaver Falls argues that it was inexperienced in the power industry, the Commission finds that not to be the case; since 1984, Beaver Falls' QF has filed several hundred documents in hydroelectric licensing proceedings before the Commission. And, as pointed out by Beaver Falls, it learned of its failure to comply with the Commission regulations through its participation in a state regulatory proceeding. As an entity experienced in electric utility matters both at the Federal and state levels, Beaver Falls should have reasonably known of the requirements of the Commission's regulations, including the requirement that, in order to be a QF, a generator larger than 1 MW must file either a notice of self-certification or of an application for Commission certification that has been granted. [FN30] In this regard, as noted earlier, the change in the Commission's regulations was published in the *Federal Register*. And the regulation as revised, with the filing requirement, has been published in each year's Code of Federal Regulations since that time. [FN31] It is not unreasonable to expect a regulated entity such as Beaver Falls that claims benefits because it meets criteria laid out in the Code of Federal Regulations, i.e., what Beaver Falls views as the "substantive" requirements necessary to meet QF status, to read those regulations from time to time to see how they may have changed and to ensure its continued compliance. Indeed, Beaver Falls' argument that it is unsophisticated and that its error was inadvertent, if accepted, would equally justify granting waiver of even what it views as the "substantive" requirements of QF status had those requirements changed in the intervening years. Seven and a half years' failure to comply with the filing requirement for QF status is simply too long.

*6 29. Finally, Beaver Falls' reliance on *WM Renewable* is misplaced. In *OREG 1*, the Commission stated that " *WM Renewable* was not consistent with the Commission's previously announced policy on dealing with late-filed QFs," and that the Commission has chosen "not to follow a decision inconsistent with its policy."[FN32]

30. In sum, we are not persuaded that we should grant Beaver Falls waiver of the filing requirement for QF status. Nonetheless, the Commission will grant Beaver Falls partial waiver so that the Beaver Falls' generating facility will be treated as a QF for the period that Beaver Falls' generating facility operated out of compliance with the Commission's requirement that an owner of a small power production facility make a filing in order to certify as a QF, i.e., from April 16, 2006, when the Facility became subject to the filing requirement, until November 22, 2103, when the Facility self-certified as a QF, and will qualify for most exemptions contained in sections 292.601 and 292.602 of the Commission's regulations. [FN33] Treating Beaver Falls as a QF for the period it was out of compliance and granting Beaver Falls most of the exemptions from the FPA, the Public Utility Holding Company Act of 2005 and state laws, as provided in sections 292.601 and 292.602 of the regulations, which go to lightening the regulatory burden on QFs, is consistent with the Commission's action in other cases. [FN34]

31. Typically, when the Commission denies a QF waiver of the filing requirement for QF status, it nevertheless

otherwise grants partial waiver of the exemptions provided to QFs so that the QF is granted all of the exemptions contained in sections 292.601 and 292.602 of the Commission's regulations, except the exemptions from sections 205 and 206 of the FPA. [FN35] Here, consistent with that precedent, we are not granting an exemption from sections 205 and 206 of the FPA. However, as NRG has recognized, because Beaver Falls is a municipal utility, it is largely exempt from the FPA, and accordingly any refunds which the Commission might otherwise order pursuant to section 205 of the FPA, in a situation where a generating plant makes sales without the exemption from section 205 of the FPA that is available to some QFs, are beyond the Commission's authority. As to NRG's request that we condition any waiver granted to Beaver Falls on its agreeing to make refunds pursuant to section 205 of the FPA as if section 205 of the FPA were applicable, we deny; we do not believe that Beaver Falls' failure to timely self-certify its Facility as a QF warrants compelling Beaver Falls to submit to Commission jurisdiction under the FPA when it is otherwise exempt (even assuming that we had the authority to do so [FN36]).

The Commission orders:

***7** Beaver Falls' Petition requesting waiver of the filing requirement in section 292.203(a)(3), is hereby granted in part, and denied in part, as discussed in the body of this order.

By the Commission.

(SEAL)

Nathaniel J. Davis, Sr.
Deputy Secretary

FN1. 18 C.F.R. § 292.203(a)(3) (2014).

FN2. Beaver Falls August 11, 2014 Answer at 5.

FN3. Beaver Falls amended its Petition to request waiver until November 22, 2013, instead of until November 15, 2013 as initially proposed in its June 26, 2014 Petition.

FN4. Beaver Falls' Form 556, Box 11 states that the Facility was expected to be installed and begin operation on October 12, 1987, but Beaver Falls confusingly also states on page 19 of its Form 556 that the Facility began operations on January 1, 1987.

FN5. Beaver Falls August 11, 2014 Answer at 4. Currently the only other facility selling pursuant to the 1985 Agreement is Beaver Valley Power Company, which received its QF certification in Docket No. QF01-23-000.

FN6. *Revised Regulations Governing Small Power Production and Cogeneration Facilities*, Order No. 671, FERC Stats. & Regs. ¶ 31,203, *clarified*, 114 FERC ¶ 61,128 (2006), *order on reh'g*, Order No. 671-A, FERC Stats. & Regs.¶ 31,219 (2006).

FN7. Pub.L. No. 109-58, 119 Stat. 594, 967-70 (2005).

FN8. 18 C.F.R. § 292.203(a)(3) (2014).

FN9. 18 C.F.R. § 292.203(b)(2) (2014).

FN10. 16 U.S.C. § 824(f) (2012).

FN11. June 26, 2014 Petition at 3.

FN12. Section 201 of PURPA amended section 3 of the FPA by adding new paragraphs (17)-(22).16 U.S.C §§ 796(3)(17)-(22) (2012).

FN13. June 26, 2014 Petition at 4- 5.

FN14. *See Beaver Falls Municipal Authority*, 28 FERC ¶ 62,227 (1984).

FN15. *WM Renewable Energy, L.L.C.*, 130 FERC ¶ 61,268 (2010)(*WM Renewable*); *Ashland Windfarm, LLC*, 124 FERC ¶ 61,068 (2008)(*Ashland Windfarm*).

FN16. NRG cites to Docket No. P-3451, where, during February 2006, nearly thirty documents were filed on behalf of Beaver Falls.

FN17. NRG's July 28, 2014 Protest at 2 (citing to Section 7 of the 1985 Agreement, which states "Beaver Falls must obtain and maintain a "qualified facility" status under PURPA Section 210 from the Federal Energy Regulatory Commission for this Agreement to be in force. Beaver Falls will notify Duquesne Light in writing if the facilities should lose its 'qualified facility' status. Beaver Falls will provide Duquesne Light a copy of its application to FERC on or before the entered date of this Agreement.").

FN18. *Pennsylvania Public Utility Comm'n v. Duquesne Light Co.*, Prepared Direct Testimony of Judith A. Lagano, at 5 (filed Jan. 24, 2014, Pa. PUC Docket No. R-2013-2372129, *et al.*).

FN19. 18 C.F.R. § 385.214(b) (2014).

FN20. Beaver Falls August 11, 2014 Answer at 5.

FN21. *See*18 C.F.R. § 385.214(b)(2) (2014).

FN22. 18 C.F.R. § 381.108 (2014).

FN23. 18 C.F.R. §§ 292.203(a)(3), 292.203(b)(2) (2014). As with other changes in Commission regulations, this change was published in the *Federal Register*. 71 Fed. Reg. 7852 (2006).

FN24. Order No. 671, FERC Stats. & Regs. ¶ 31,203 at P 81.

FN25. 18 C.F.R. §§ 292.203(a)(3), 292.203(b)(2) (2014). While the revised regulations were published in the Federal Register on February 15, 2006, and were made effective generally 30 days thereafter (i.e., on March 17, 2006), the requirement to file for existing QFs that had never filed was made effective 60 days after the date of publication (i.e., on April 16, 2006). Order No. 671, FERC Stats. & Regs. ¶ 31,203 at P 82.

FN26. *OREG 1, Inc.*, 135 FERC ¶ 61,150, at P 8 (2011), *reh'g denied*, 138 FERC ¶ 61,110 (2012) (*OREG 1*).

FN27. *OREG 1*, 135 FERC ¶ 61, 150, at PP 8, 12 & n.16.

FN28. Citing *WM Renewable*, 130 FERC ¶ 61,268 at P 5; *Ashland Windfarm*, 124 FERC ¶ 61,068 at P 6.

FN29. *Ashland Windfarm*, 124 FERC ¶ 61,068 at P 3.

FN30. *See supra* note 23.

FN31. *See, e.g.*, 18 C.F.R. § 292.203(a)(3) (2007).

FN32. *OREG 1*, 135 FERC ¶ 61,150 at P 12 (citing *Lg & E-Westmoreland Southampton (Southampton)*, 76 FERC ¶ 61,116, at 61,603-05 (1996), *order granting clarification and denying reh'g*, 83 FERC ¶ 61,182, at 61,752-53 (1998)).

FN33. 18 C.F.R. §§ 292.601, 292.602 (2014).

FN34. *See Iowa Hydro, LLC*, 146 FERC ¶ 61,207 (2014); *accord CII Methane Management IV, LLC*, 148 FERC ¶ 61,229 (2014); *OREG 1, Inc.*, 135 FERC ¶ 61,150 (2011), *reh'g denied*, 138 FERC ¶ 61,110, at P 16 (2012); *LG&E-Westmoreland Southampton* (*Southampton*), 76 FERC ¶ 61,116, at 61,603-05 (1996), *order granting clarification and denying reh'g*, 83 FERC ¶ 61,182, at 61,752-53 (1998).

FN35. Id.

FN36. *Cf., e.g., Pacer Power LLC*, 104 FERC ¶ 61,131, at P 37 n.5 (2003) ("an entity that is not subject to regulation as a public utility under Part II of the FPA cannot voluntarily submit to regulation as a public utility under the Commission's jurisdiction").

149 FERC P 61108, 2014 WL 5819538 (F.E.R.C.)

END OF DOCUMENT

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document in accordance with the requirements of 52 Pa. Code § 1.54 et seq. (relating to service by a participant).

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Date: December 11, 2014

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