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December 8, 2016

RECEIVED

VIA FEDERAL EXPRESS (Overnight Delivery)

DEC 08 2016

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17105-3265

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Re: Respond Power LLC v. Pennsylvania Electric Company
Docket No. ~~C-2016-2576887~~ C-2016-2576287

Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company for Approval of a Default Service Program for the Period Beginning June 1, 2017, through May 31, 2019

Docket Nos. P-2015-2511333, P-2015-2511351, P-2015-2511355 and P-2015-2511356

Petition of Respond Power LLC for Issuance of *Ex Parte* Emergency Order
Docket Nos. P-2016-2572934

Dear Secretary Chiavetta:

Enclosed for filing are signed originals of: **(1) the Answer and New Matter ("Answer"); and (2) Motion for Judgment on the Pleadings ("Motion"), filed on behalf of Pennsylvania Electric Company** with respect to the Complaint of Respond Power LLC that was filed on November 18, 2016 in the above captioned matter. Pursuant to 52 Pa. Code § 1.11(a)(2), the date of filing shall be December 8, 2016, as shown on the Federal Express delivery receipt attached to the envelope containing the enclosed pleadings and this letter.

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Rosemary Chiavetta, Secretary
December 8, 2016
Page 2

As evidenced by the attached Certificate of Service, copies of the Answer and Motion have been served upon Administrative Law Judge David A. Salapa and the parties of record.

Very truly yours,

A handwritten signature in black ink, appearing to read "Anthony C. DeCusatis". The signature is written in a cursive style with a large initial "A" and a long horizontal stroke at the end.

Anthony C. DeCusatis

c: Per Certificate of Service (w/encls.)

1

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

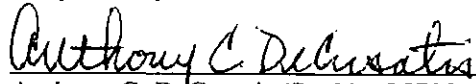
Respond Power LLC	:	
	:	
v.	:	Docket No. C-2016-2576887
	:	C-2016-2576287
Pennsylvania Electric Company	:	
Petition of Metropolitan Edison Company,	:	Docket Nos. P-2015-2511333
Pennsylvania Electric Company,	:	P-2015-2511351
Pennsylvania Power Company and West	:	P-2015-2511355
Penn Power Company for Approval of a	:	P-2015-2511356
Default Service Program for the Period	:	
Beginning June 1, 2017, through May 31,	:	
2019	:	
Petition of Respond Power LLC for	:	Docket No. P-2016-2572934
Issuance of Ex Parte Emergency Order	:	

NOTICE TO PLEAD

To: Karen O. Moury
Sarah C. Stoner
Eckert Seamans Cherin & Mellot, LLC
213 Market Street, Eighth Floor
Harrisburg, PA 17101
kmoury@eckertseamans.com
Attorneys for Respond Power LLC

You are hereby notified pursuant to 52 Pa. Code §§ 5.102(a) and 5.103(b) that a responsive pleading must be filed within twenty (20) days of the date of service of the following Motion for Judgment on the Pleadings

Respectfully submitted,


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Counsel for Pennsylvania Electric Company

Dated: December 8, 2016

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Respond Power LLC	:	
	:	
v.	:	Docket No. C-2016-2576887
	:	C-2016-2574287
Pennsylvania Electric Company	:	
Petition of Metropolitan Edison Company,	:	Docket Nos. P-2015-2511333
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Default Service Program for the Period	:	
Beginning June 1, 2017, through May 31,	:	
2019	:	
Petition of Respond Power LLC for	:	Docket No. P-2016-2572934
Issuance of Ex Parte Emergency Order	:	

**MOTION OF PENNSYLVANIA ELECTRIC COMPANY
FOR JUDGMENT ON THE PLEADINGS AND DISMISSAL OF
THE COMPLAINT OF RESPOND POWER, LLC**

Pursuant to 52 Pa. Code § 5.102(a), Pennsylvania Electric Company (“Penelec”) moves for judgment on the pleadings and dismissal of the above-captioned Complaint of Respond Power, LLC (“Respond Power”), which was served on November 18, 2016.¹ As explained below, Penelec is entitled to judgment in its favor as a matter of law because Respond’s Complaint is an unlawful collateral attack on a Final Order of the Pennsylvania Public Utility Commission (“PUC” or the “Commission”) and erroneously seeks to treat a term of a voluntary purchase of receivables program (“POR”) as the equivalent of a “rate” charged for utility “service,” which it clearly is not.

¹ Respond filed a similar Complaint against Penelec’s affiliate, West Penn Power Company (“West Penn”). West Penn is also filing a Motion for Judgment on the Pleadings against Respond’s Complaint. Penelec and West Penn are also filing Answers and New Matter to the respective Respond Complaints.

I. INTRODUCTION AND OVERVIEW

Respond's Complaint is an assault on the finality of a Commission Final Order approving a settlement. If given any credence, Respond's Complaint would expose to collateral attack many orders that parties and the Commission reasonably concluded were final. It would also undermine the integrity of Commission-approved settlements and contravene long-standing Commission policy on settlements.²

Respond claims it should be absolved from complying with one of the many inter-related and inter-dependent terms of the settlement of Penelec's Default Service Program IV ("DSP IV") proceeding. As alleged support for its claim, Respond contends it is not bound by the Commission's Final Order approving the settlement³ because it did not enter an appearance in Penelec's DSP IV case even though it was served with the Joint Petition⁴ initiating that proceeding.⁵ In short, Respond argues that anyone who receives notice of, or (as in Respond's case) is actually served with, a utility's legal pleading can avoid the preclusive effect of a final order in the ensuing proceeding simply by choosing not to intervene.

² See 52 Pa. Code § 5.231 and *Policy Statement on Settlements* at 52 Pa. Code § 69.401, which encourage settlements of disputed proceedings. It would be pointless for parties to settle cases if individual terms of Commission-approved settlements could be nullified after the fact at the behest of non-participants, as Respond is seeking to do in this case.

³ *Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company for Approval of a Default Service Program for the Period Beginning June 1, 2017, through May 31, 2019*, Docket Nos. P-2015-2511333, P-2015-2511351, P-2015-2511355 and P-2015-2511356 (Order adopting April 15, 2016 Recommended Decision entered May 19, 2016) ("DSP IV Final Order").

⁴ Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company for Approval of a Default Service Program for the Period Beginning June 1, 2017, filed Nov. 3, 2015 (hereafter, the "Joint Petition").

⁵ Respond concedes that it received service of the entire Joint Petition but nonetheless contends it did not have "notice" of the Joint Petition's contents because its personnel – presumably, including its legal counsel – read no further than the case caption. See Complaint, ¶¶ 41-42.

If Respond's position were validated, then, for example, any one of the customers served with notice of a utility's filing of a rate request, a default service program or an energy efficiency and conservation plan could decline to participate in the case, wait until the proceeding was concluded, attack specific conclusions it does not like, and seek to overturn the Commission's action *all the way back to the effective date of the Commission's decision*.⁶ If this kind of "sand bagging" were permitted, chaos would ensue. However, it clearly is *not* permitted. Respond's position is contrary to settled law upholding the finality of Commission orders and rejecting attempts, like Respond's, to collaterally attack such orders.⁷ Therefore, Penelec is entitled to judgment in its favor because the fundamental premise of Respond's Complaint, i.e., that the Commission's Final Order is not final as to it, is wrong as a matter of law.

The object of Respond's Complaint is an administrative charge imposed on electric generation suppliers ("EGSs") that choose to participate in Penelec's EGS POR program.⁸ The fee, denominated a "clawback" charge, is imposed on participating EGSs whose track records indicate their average percentage of accounts receivable write offs (for non-payment) expressed a percentage of revenue exceeds 200% of the average percentage for all EGSs, due, in part, to charging prices more than 50% higher than the Company's average price to compare ("PTC").⁹

The fundamental proposition underlying Respond's Complaint is that the administrative charge to which it objects is exactly the same as a "rate" for utility "service" and, therefore, is subject to the Commission's ratemaking jurisdiction, including all of the principles and processes that apply in establishing an electric distribution company's ("EDC") rates for electric

⁶ See Complaint, p. 18, ¶ 1

⁷ See 66 Pa.C.S. § 316 and Section II.D., *infra*.

⁸ Penelec's POR program was established in 2009 pursuant to the Commission Final Order approving Penelec's first default service program, as explained more fully in Section II.A., *infra*.

⁹ See Joint Petition for Settlement filed April 1, 2016, pp. 18-20 and Exhibits E-H.

distribution service. The purported legal foundation for Respond's Complaint is incorrect and, therefore, all of the succeeding elements of its Complaint are meritless. POR programs are not a utility "service," nor are the administrative charges that may be imposed in connection with such programs "rates" as defined by the Public Utility Code.¹⁰ To the contrary, as the Commission has previously held¹¹:

No provision of the Code either expressly or by 'strong and necessary implication' provides the Commission with the authority to require EDCs to purchase accounts receivable from EGSs. On the contrary, the Code specifically provides that *the Commission cannot require EDCs to purchase EGS' accounts receivable.*

The Commission's interest in the terms of POR programs is derived from the collateral impact those programs may have on retail customers where, as in Penelec's case, the portion of EGSs' accounts receivable written off is claimed for recovery in rates charged to distribution customers. Simply stated, the Commission's principal interest is to assure that charges to EGSs are *not set too low* (thus, unreasonably burdening distribution customers).¹² Contrary to Respond's assumption, the Commission does not have jurisdiction to extend its ratemaking authority to the establishment of administrative fees that are charged for EGS participation in an EDC's POR program. Respond is attempting to impose the body of ratemaking jurisprudence upon what is fundamentally the framework for an agreement for EDCs to purchase, and EGSs to sell, EGS accounts receivable. As such, the purported basis for Respond's Complaint is contrary

¹⁰ See 66 Pa.C.S. § 102, defining "service" and "rates" by reference, respectively to "duties under this part" and "any service under this part." Part I of Title 66 is the Public Utility Code. See 66 Pa.C.S. § 101.

¹¹ *Petition of PPL Elec. Util. Corp. Requesting Approval Of A Voluntary Purchase Of Receivables Program And Merchant Function Charge*, Docket No. P-2009-21290502, 2009 WL 4087051 (Pa. P.U.C., Nov. 19, 2009) (emphasis added).

¹² Indeed, if such charges were too low, the Commission could deny recovery of a proportionate part of the write-offs an EDC seeks to recover. In that event, the EDC could reasonably conclude that it would not absorb the loss and either revise the terms of its POR program or simply cease to offer the program at all.

to law and should be rejected. Respond is asking the Commission to act outside its authority. Accordingly, there is no lawful basis for the relief Respond requests, and Penelec is entitled to judgment on the pleadings in its favor on this basis as well.

II. MOTION FOR JUDGMENT ON THE PLEADINGS

A. Background

(1) Penelec's POR Program As Adopted In Penelec's First DSP Proceeding

1. Penelec's POR program was proposed in the context of its first default service program as part of the settlement that was approved by the Commission's Final Order entered November 9, 2009.¹³ The establishment of Penelec's POR program as part of a default service program is consistent with the practice of its Pennsylvania affiliates, which adopted or revised their POR programs in default service proceedings,¹⁴ and with the practices of other EDCs in Pennsylvania. In fact, the Commission has expressly stated that, "in the electric industry . . . PORs are usually the subject of default service plan filings."¹⁵

2. Under the terms of Penelec's POR program, EGSs' accounts receivable are purchased at face value (i.e., with no discount for uncollectible accounts) and without recourse to

¹³ *Joint Petition of Metropolitan Edison Co. and Pennsylvania Elec. Co. for Approval of Their Default Service Programs*, Docket Nos. P-2009-2093053 and P-2009-2093054 (Opinion and Order approving settlement entered Nov. 6, 2009).

¹⁴ Metropolitan Edison Company ("Met-Ed") adopted its POR program in the context of its first default service proceeding, which was consolidated with Penelec's default service program for hearings and decision. *Id.* Pennsylvania Power Company's ("Penn Power") POR program was also adopted in connection with a default service program proceeding. *Petition of Pennsylvania Power Co. for Approval of its Default Service Program*, Docket No. P-2010-2157862 (Opinion and Order approving settlement entered Nov. 17, 2010). Prior to the merger of Allegheny Energy, Inc. and FirstEnergy Corp. in 2011, West Penn purchased EGS account receivables with full recourse for uncollectible accounts. Following the merger, West Penn revised its POR program to purchase EGS accounts receivable at a zero discount and without recourse. Thereafter, further revisions to West Penn's POR program and recovery of uncollectible accounts expense related to purchased receivables were addressed in the settlement of its 2013 default service program filing. *Joint Petition of Metropolitan Edison Co. Pennsylvania Elec. Co., Pennsylvania Power Co., and West Penn Power Co. for Approval of Their Default Service Programs*, Docket Nos. P-2013-2391368, *et al* (Opinion and Order approving settlement entered July 24, 2014).

¹⁵ *Investigation of Pennsylvania's Retail Nat. Gas Supply Mkt.*, Docket No. I-2013-2381742, 2014 Pa. P.U.C. LEXIS, at * 74 (Order entered Aug. 21, 2014).

the seller for amounts not collected from the EGS's customers. Penelec recovers uncollectible accounts expenses associated with purchased receivables through its Default Service Support Rider ("DSSR"). The DSSR and DSSR recovery of POR-related uncollectible accounts expense were approved in Penelec's first default service proceeding.

(2) Filing Of The Joint Petition, Service Upon Respond, Publication In the *Pennsylvania Bulletin*

3. On November 3, 2015, Penelec and its affiliated EDCs in Pennsylvania filed the Joint Petition requesting the relief set forth therein, including revisions to their POR programs. On the same day, the Joint Petition was served upon, *inter alia*, all EGSs licensed to sell electric generation in the service areas of the Joint Petitioners, including Respond, and the Retail Energy Supply Association ("RESA"), a trade association of EGSs that participates actively in proceedings before the Commission.

4. The Joint Petition was accompanied by a transmittal letter, which was also served upon all the same parties as the Joint Petition, including Respond. The transmittal letter stated: "The Companies respectfully request that notice of this filing and a deadline for intervention be published in the November 14, 2015 issue of the *Pennsylvania Bulletin*."

5. A Notice was published in the November 14, 2015 edition of the *Pennsylvania Bulletin* explaining how any interested party could intervene in the proceeding initiated by the Joint Petition. The Notice also stated that a Prehearing Conference was scheduled for December 1, 2015, commencing at 10:00 A.M., before Administrative Law Judge David A. Salapa, to be held in Hearing Room 4 of the Commonwealth Keystone Building in Harrisburg. Contact information for Judge Salapa was also provided.

**(3) The Joint Petition Set Forth All Of The Relief Requested, Including
A Detailed Description Of The Proposed Clawback Charge**

6. The second paragraph of the Joint Petition, which begins on page 2 of that pleading, sets forth in twelve separately numbered items each of the specific approvals that the Companies were requesting the Commission to grant, including “approving the Companies’ proposed revisions to their respective supplier tariffs related to their purchase of receivables (‘POR’) programs.”¹⁶

7. Paragraph No. 8, at page 5 of the Joint Petition, sets forth a summary of the subject matter addressed in the direct testimony of each of the three witnesses whose statements were submitted with, and attached to, the Joint Petition. The summary of Met-Ed/Penelec/Penn Power/West Penn Statement No. 3 (the Direct Testimony of Kimberlie L. Bortz) states that Ms. Bortz was testifying about the Joint Petitioners’ “Purchase of Receivables Program” and “Related Tariff Matters.”

8. Section V of the Joint Petition has the title (bolded and in all capital letters) **“PURCHASE OF RECEIVABLES.”** Subsection A., titled **“EGS-Related Write-Offs”**, contains four separately numbered paragraphs explaining the Companies’ proposal to impose an administrative clawback charge. As initially proposed, the charge could have been imposed if an EGS’s average accounts receivable write-off percentage (expressed as a percentage of revenues) for the annual review period exceeded 150% of the average write-off percentage (expressed as a percentage of revenues) for all POR-participating EGSs. The initial proposal was much less lenient on EGSs than the clawback provision actually adopted in the settlement of the Companies’ DSP IV.

¹⁶ Joint Petition, p. 3.

9. As previously explained, the Companies filed with the Joint Petition the testimony of three witnesses. In Statement No. 3, Ms. Bortz explained the terms of the proposed clawback charge and the reasons why the Companies were proposing it. The Table of Contents (the first page after the title page) of Statement No. 3 identifies seven sections (numbered by roman numerals) of Ms. Bortz' testimony. Section V is titled (bolded and in capital letters) **"PURCHASE OF RECEIVABLES PROGRAM."** In that section, there are eight pages (pp. 12-20), in question and answer form, explaining the proposed administrative charge, why it was being proposed, how it would be calculated, and how its proceeds would be applied.

10. Ms. Bortz also sponsored, and provided with her Direct Testimony, Met-Ed/Penelec/Penn Power/West Penn Exhibits KLB-4 through KLB-7, consisting of proposed supplements to each of the Companies' Supplier Coordination Tariffs. The exhibits included the terms of the proposed clawback charge.

(4) Other Notices Regarding The DSP IV Proceeding, Which Explained How Interested Parties Could Participate, Were Served On Respond

11. On November 6, 2015, the Commission issued a Notice of the Initial Prehearing Conference, setting forth its date, time and location, and providing the contact information for Judge Salapa. The Notice of Initial Prehearing Conference was served on all the same parties that received the Joint Petition, including Respond, as evidenced by the service list that accompanied the Notice.

12. Also on November 6, 2015, Judge Salapa issued his Prehearing Conference Order, which was served on all the same parties that received the Joint Petition, including Respond. (*See* Certificate of Service (p. 18) accompanying the Prehearing Conference Order.) The Prehearing Order provided the date, time and location of the Prehearing Conference and directed parties to submit Prehearing Conference Memoranda setting forth, *inter alia*, "[a] list of

the issues and sub-issues of this proceeding which the party intends to address and a statement of the party's position on each of the issues and sub-issues listed."

(5) Interventions By Other Parties, Including Other EGSs And The Trade Association For EGSs, And The Subsequent Procedural History¹⁷

13. The Bureau of Investigation and Enforcement ("I&E") filed a Notice of Appearance, the Office of Consumer Advocate ("OCA") and the Office of Small Business Advocate ("OSBA") filed Notices of Intervention and Answers to the Joint Petition. In addition, Petitions to Intervene were filed by the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania ("CAUSE-PA"), four groups of industrial customers,¹⁸ the Pennsylvania State University ("PSU"), Exelon Generation Company, LLC ("ExGen"), TransCanada Power Marketing, Ltd. ("TransCanada"),¹⁹ NextEra Energy Power Marketing, LLC ("NextEra"), RESA²⁰, and two EGSs that market generation services in the Companies' service areas: Direct Energy Services, LLC ("Direct Energy") and Noble Americas Energy Solutions, LLC ("Nobel Americas").

14. A Prehearing Conference was held on December 1, 2015, at which a schedule was established for the submission of testimony and the conduct of evidentiary hearings. Pursuant to the schedule established at the Prehearing Conference, on January 14, 2016, I&E, CAUSE-PA,

¹⁷ The information set forth in this subsection is from the Commission-approved Joint Petition for Settlement and Judge Salapa's Recommended Decision in the DSP IV proceeding.

¹⁸ Met-Ed Industrial Users Group ("MEIUG"), Penelec Industrial Customer Alliance ("PICA"), Penn Power Users Group ("PPUG") and West Penn Power Industrial Intervenors ("WPPII") (collectively, "Industrial Intervenors").

¹⁹ While ExGen and TransCanada represented that they participate in retail electric markets (not necessarily in Pennsylvania), their interventions in the Companies' DPS IV proceedings were for the stated purpose of representing their interests as wholesale market participants.

²⁰ Respond is not itself a member of RESA. However, its affiliate, Spark Energy, LLC, is a member of RESA. See RESA's website at <https://www.resausa.org/members>. Respond and Spark Energy are subsidiaries of a common parent. See Respond Power LLC License Update at Docket Nos. A-2010-2163898, C-2014-2427659 and C-2014-2438640 (May 4, 2016).

OCA, OSBA, RESA, TransCanada and ExGen submitted a total of nine written statements and accompanying exhibits. On February 9, 2016, the Companies, CAUSE-PA, the Industrial Intervenors, OCA, OSBA and RESA submitted eleven statements constituting their rebuttal testimony. On February 19, 2016, the Companies, OCA, OSBA, CAUSE, I&E, RESA, ExGen and PSU submitted eleven surrebuttal statements. The testimony of various witnesses addressed the proposed clawback charge.

15. An evidentiary hearing was held on February 25, 2016, at which the Companies submitted a written rejoinder statement and the Industrial Intervenors submitted three stipulations. Oral rejoinder was provided by the Companies' witnesses, Ms. Bortz and Charles V. Fullem. Ms. Bortz and Mr. Fullem were cross-examined and their testimony and exhibits were admitted into the record. The testimony and exhibits of all other witnesses were admitted by stipulation.

(6) The Joint Petition For Settlement Of The DSP IV Proceeding

16. Following the evidentiary hearing, the settling parties reached a settlement in principle. A Joint Petition for Settlement was filed on April 1, 2016. All of the parties to the proceeding either executed the Joint Petition for Settlement or affirmatively indicated that they did not oppose the settlement.²¹

17. The clawback provision to which the settling parties agreed differed from the Companies' initial proposal. Two changes significantly reduced the number of EGSs that potentially could be subject to the charge. First, the write-off threshold was raised from 150% to 200% of the average write-off percentage of all EGSs. Second, another screening feature was added. Specifically, even if an EGS had an average write-off percentage more than 200% of the

²¹ See Joint Petition for Settlement, pp. 1-2.

average for all EGSs, it would not incur a clawback fee unless, during the review period, the average price it charged customers for generation was more than 150% of the applicable Company's average PTC for the same period.²²

18. Under the settlement, the clawback charge itself was reduced by basing it only upon the amount by which an EGS's average write-off percentage exceeded 200% (not 150% as in the initial proposal) of what its write-offs would be if its write-off percentage were the same as the average for all EGSs.²³ In addition, the settling parties agreed that the clawback provision would be implemented for a period of two years on a "pilot" basis, after which the pilot would be subject to further review.²⁴ Thus, the clawback charge as adopted in the settlement would be in effect for two annual periods, concluding on August 31, 2016 and 2017, and would expose EGSs to clawback charges in 2016 and 2017.

19. The Joint Petition for Settlement was accompanied by Statements in Support and various exhibits, including Exhibits E-H, which set forth the supplements to the Companies' Supplier Coordination Tariffs to which all the settling parties had agreed and which the settling parties requested the Commission to approve.

20. As in virtually all settlements filed with the Commission, the Joint Petition for Settlement in the Companies' DSP IV case includes the following condition²⁵:

This Settlement is conditioned upon the Commission's approval of the terms and conditions contained herein without modification. If the Commission should disapprove the Settlement or modify the terms and conditions herein, this Settlement may be withdrawn

²² Joint Petition for Settlement, ¶ 11.1.1.a.(2)

²³ Joint Petition for Settlement, ¶ 11.1.2.

²⁴ Joint Petition for Settlement, ¶ 11.1.a.

²⁵ Joint Petition for Settlement, ¶ 18.

upon written notice to the Commission and all active parties within five business days following entry of the Commission's Order by any of the Joint Petitioners and, in such event, shall be of no force and effect. In the event that the Commission disapproves the Settlement or the Company or any other Joint Petitioner elects to withdraw as provided above, the Joint Petitioners reserve their respective rights to fully litigate this case, including but not limited to presentation of witnesses, cross-examination and legal argument through submission of Briefs, Exceptions and Replies to Exceptions.

(7) The Recommended Decision And DSP IV Final Order Approved The Settlement And Found That It Is In The Public Interest

21. On April 29, 2016, Judge Salapa issued his Recommended Decision approving the settlement. The Recommended Decision set forth the standard that must be met in order for a proposed settlement to be approved by the Commission, as follows:

In order to accept a settlement, the Commission must first determine that the proposed terms and conditions are in the public interest. *Pennsylvania Pub. Util. Comm'n v. York Water Co.*, Docket No. R-00049165, (Final Order entered October 4, 2004); *Pa. Pub. Util. Comm'n v. C S Water and Sewer Assoc.*, 74 Pa. P.U.C. 767 (1991).²⁶

22. As to the proposed clawback provision, Judge Salapa found and determined as follows:

I conclude that the provision of the joint petition for settlement establishing the POR clawback charge is in the public interest. As the parties recognize, any unpaid bills for service rendered are borne by all the utility's ratepayers. The POR clawback charge addresses FE's concerns about increasing amounts of unpaid bills and the resulting write-offs while balancing the concerns of the

²⁶ *Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company for Approval of a Default Service Program for the Period Beginning June 1, 2017, through May 31, 2019*, Docket Nos. P-2015-2511333, P-2015-2511351, P-2015-2511355 and P-2015-2511356 (Recommended Decision issued May 19, 2016) ("DSP IV Rec. Dec"), p. 7.

other parties as outlined above.

23. Consistent with the foregoing finding and the applicable legal standard, Judge Salapa concluded that the settlement as a whole was in the public interest and, therefore, should be approved, and that the Companies should be authorized to file the agreed-upon supplements to their Supplier Coordination Tariffs that accompanied the Joint Petition for Settlement. As previously explained, the supplements accompanying the Joint Petition included, among other things, the proposed clawback provision.²⁷

24. No Exceptions were filed to the Recommended Decision. At the public meeting held on May 19, 2016, the Commission voted unanimously to adopt the Recommended Decision as its decision in the case. The Final Order was entered the same day. The Commission's Chairman issued a separate statement explaining why she determined that the settlement was in the public interest and should be approved.²⁸

(8) Penelec's Invoice To Respond, Respond's Opposition, The Entry Of An Emergency Order And The Filing Of Respond's Complaint

25. Consistent with the terms of the Commission-approved clawback provision, Penelec conducted analyses of the accounts receivable write-offs and prices charged to customers for all the EGSs that participated in its POR during the twelve months ended August 31, 2016. Based on those analyses, Penelec identified Respond and one other EGS as EGSs subject to clawback charges, in the amounts of \$305,891 and \$5,458, respectively. On September 30, 2016, Penelec issued an invoice to Respond for the amount Respond owed.

²⁷ DSP IV Rec. Dec., pp. 35-37.

²⁸ Statement of Chairman Gladys M. Brown issued May 19, 2016 at Docket Nos. P-2015-2511333, P-2015-2511351, P-2015-2511355 and P-2015-2511356.

26. On October 21, 2016, Respond sent a letter to Penelec objecting to the clawback charge and requesting a waiver and extension of the due date. On October 26, 2016, Respond filed a Petition for Issuance of *Ex Parte* Emergency Order seeking an extension of the due date for payment of the clawback charge. On October 27, 2016, Commissioner Andrew Place granted the *ex parte* petition and issued an Emergency Order. On November 1, 2016, Penelec joined with West Penn in filing an Answer to Respond's Petition in which it explained why Respond was not entitled to the relief it requested. The Commission ratified the Emergency Order at its public meeting held on November 10, 2016.

27. The Commission's ratification order directed that a hearing be held on the Emergency Order within ten days. A hearing was, therefore, scheduled for November 17, 2016. On November 16, 2016, Respond filed a single Complaint against Penelec and West Penn challenging the validity of the clawback charge and, in particular, seeking to nullify the clawback provisions back to the date of the Commission's Final Order. At the request of the Commission's Secretary, Respond filed separate Complaints against Penelec and West Penn on November 17, 2016.

28. After Respond filed its first Complaint, Penelec confirmed with Respond that the clawback charge billed to Respond was considered formally "disputed" and, pursuant to the terms of its Supplier Coordination Tariff, Penelec's efforts to collect the charge could not be renewed until the Commission resolved the disputed issue. Accordingly, Respond withdrew its Petition for an Emergency Order, and the November 17, 2016 hearing was cancelled.

B. Legal Standard For Granting A Motion For Judgment On The Pleadings

29. The Commission's regulations at 52 Pa. Code § 5.102 permit a party to file a Motion for Judgment on the Pleadings and provide that such a Motion should be granted where

the pleadings show that “there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law.”

30. While the criteria used by civil courts for granting a Motion for Judgment on the Pleadings are not binding on the Commission, those criteria have been used as a guide in applying the Commission’s regulations, as evidenced by the Initial Decision in *McCarey v. PECO Energy Co.*²⁹:

The Commission must view the record in the light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences. *First Mortgage Co. of Pennsylvania v. McCall*, 459 A.2d 406 (Pa.Super. 1983); *Mertz v. Lakatos*, 381 A.2d 497 (Pa.Cmwlth. 1978). It must accept as true all well pleaded statements of fact of the non-moving party and consider only those facts that the non-moving party specifically admits. *Weik v. Estate of Brown*, 794 A.2d 907 (Pa.Super. 2002). All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Thomson Coal Company v. Pike Coal Company*, 412 A.2d 466 (Pa. 1979).

The Commission will grant a motion for judgment on the pleadings only if the pleadings show there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law.

31. Pursuant to the Commission’s regulations at 52 Pa. Code § 5.102 and prior Commission precedent, Penelec is entitled to entry of judgment on the pleadings in its favor and against Respond on the grounds, and with respect to the issues, set forth in more detail below.

C. Respond’s Complaint

32. Respond seeks to invalidate one of the inter-related and inter-dependent terms of the DSP IV settlement, namely, the two-year pilot program implementing the clawback provision under Penelec’s pre-existing POR program. In so doing, Respond is asking the Commission not

²⁹ Docket No. C-2015-2503724 (Initial Decision of Administrative Law Judge David A. Salapa issued Nov. 9, 2015), 2015 WL 78973824 (Pa. P.U.C.). Affirmed by the Commission’s Final Order entered May 19, 2016.

only to block the application of the clawback provision in its current form for the period ending August 31, 2017, but also to retrospectively nullify the clawback charge that was billed, pursuant to the DSP IV Final Order, before Respond filed its Complaint.³⁰

33. Respond asserts that the clawback charge billed in September 2016 is “unjust and unreasonable” because it allegedly has “retroactive application.”³¹ Respond claims the charge is “retroactive” simply because an EGS may be exposed to the clawback charge based on two screening measures used to identify EGSs that have demonstrated a propensity to significantly exceed the average write-off percentage of all EGSs based in large measure on charging prices that far exceed the incumbent EDC’s PTC. The clawback charge itself was not – indeed, could not – be imposed prior to the Commission’s approval of the clawback provision. Respond’s argument assumes, erroneously, that if there is any kind of historical referent for an administrative charge, the charge itself is “retroactive” and, therefore, allegedly, unlawful.

34. Respond also asserts that imposing the clawback charge violates “fundamental fairness and equity” because Respond was not provided, in real time, “information upon which the Clawback Charge is based”³² so that Respond would have the “opportunity to avoid or minimize the Clawback Charge prior to the assessment”³³ by dumping non-paying customers back onto default service.³⁴ Respond claims that unless such real-time information is provided, the 2017 clawback charge should be invalidated as well, despite the fact that the clawback

³⁰ Complaint, p. 18.

³¹ Complaint, pp. 12-13.

³² Respond does not explain what such “information” would entail.

³³ Complaint, p. 14.

³⁴ See Complaint, p. 2 (“[I]t is critical that Respond Power receive this information from the Company before any Clawback Charge is applied so that it can make business decisions to manage the impact of the charge, including whether to return non-paying customer to default service.”).

provision was agreed to in settlement and approved by the Commission without conditions such as those Respond belatedly seeks to impose on the settling parties. Notably, Respond does not mention that, under the second prong of the clawback provision's screening test (average EGS prices for the year exceed 150% of the applicable PTC), Respond has *total* control over whether it would be exposed to a clawback charge by simply ceasing to charge prices far in excess of Penelec's PTC.

35. Respond also claims that the clawback charge could not be billed on September 30, 2016 because Penelec had not filed, and the Commission had not yet approved, a supplement to Penelec's Supplier Coordination Tariff memorializing the provisions approved in the DSP IV Final Order. Even that purely formalistic issue was eliminated when Penelec, on October 28, 2016, filed with the Commission's Secretary the supplement that had been attached to the Joint Petition for Settlement and had already been approved as part of the DSP IV Final Order's approval of the DSP IV settlement. On November 10, 2016, the Commission accepted Penelec's supplement *nunc pro tunc* with an effective date of August 1, 2016. Respond's argument also fails because the Commission has held that a supplier coordination tariff is not a "services tariff" but, instead, simply sets forth the basic requirements, protocols and processes for EGS-EDC interactions that allow the Commission to monitor the development of retail competition.³⁵ As such, a supplier coordination tariff is not subject to the requirements or restrictions of Section 1302 or any other statutory provisions with respect to a "rate" for utility "service."³⁶

³⁵ *Application of Wellsboro Elec. Co., for Approval of Restructuring Plan Under Section 2806 of the Pub. Util. Code*, Docket No. R-00974046, 1998 Pa. PUC LEXIS 231, at ** 12-13 (Opinion and Order entered Dec. 17, 1998). See also 52 Pa. Code § 69.1816, which is a Policy Statement (not a regulation) that promotes, but does require, the filing of supplier coordination tariffs.

³⁶ 66 Pa.C.S. § 1302. Section 1302 pertains only to the statement of a utility's "rates." The clawback charge is not a "rate" because it is not imposed with regard to "any service under this part," as required to fit the definition of a "rate" under Section 102. As previously explained, a POR program is not a utility "service," as the Commission has previously determined.

36. The forgoing paragraphs summarize the arguments Respond is prepared to make *if its Complaint is permitted to proceed*.³⁷ However, even Respond recognizes that its Complaint is a collateral attack on the DSP IV Final Order and, therefore, is unlawful, and cannot be considered, unless Respond establishes a valid reason for the Commission to find that the DSP IV Final Order should be “final” as to everyone *except* Respond. To that end, Respond contends that it was denied “due process” because it was not given “notice and opportunity to be heard.”³⁸ Specifically, despite having been served with the Joint Petition and all of its accompanying testimony and exhibits (and having received the Commission’s Notice of the Initial Prehearing Conference and Judge Salapa’s Prehearing Conference Order), Respond contends it should be deemed *not* to have received “notice” of the relief requested in that legal pleading. There is no valid basis for that contention, and the DSP IV Final Order must be given preclusive effect.

37. The Complaint also alleges computational errors in the calculation of the clawback charge billed to Respond.³⁹ In its Answer, Penelec denies those averments. Penelec does not seek judgment on the pleadings as to those averments because they relate to fact-specific matters pertaining to the calculation of the clawback charge and not its overall validity, which was determined conclusively by the DSP IV Final Order’s approval of the settlement of Penelec’s DSP IV proceeding.

³⁷ As explained in Section II.E., *infra*, not only is Respond’s Complaint barred by principles of finality embodied in Section 316 of the Public Utility Code, there is no basis to grant the relief Respond requests because, contrary to the fundamental assumption underlying Respond’s position, administrative charges implemented in connection with a voluntary POR program are *not* the same as utility “rates” and, therefore, are *not* subject to the same ratemaking jurisdiction the Commission exercises in setting an EDC’s rates for retail distribution service.

³⁸ Complaint, p. 12.

³⁹ Complaint, p. 15.

D. Respond's Complaint Is A Collateral Attack On the DSP IV Final Order That Is Barred By Section 316 Of The Public Utility Code

38. Section 316 of the Public Utility Code⁴⁰ provides in relevant part as follows:

§ 316. Effect of commission action.

Whenever the commission shall make any rule, regulation, finding, determination or order, the same shall be prima facie evidence of the facts found and shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review. . . .

39. It is well-established that Section 316 precludes a collateral attack upon a Commission order that has not been reversed upon appeal.⁴¹

40. Pursuant to Section 316, a prior order of the Commission has preclusive effect on all affected parties if they were provided due process prior to the entry of that order.⁴² However, due process is fully satisfied when parties are afforded notice and the opportunity to appear and be heard.⁴³ In short, the party against whom Section 316 is invoked need not have been a participant in the proceeding that resulted in the final order being given preclusive effect so long as that party had notice and an opportunity to appear and be heard. For precisely that reason, Administrative Law Judge Louis G. Cocheres, in a 2008 Recommended Decision,⁴⁴ held that a

⁴⁰ 66 Pa.C.S. § 316.

⁴¹ *E.g., Tillman v. Phila. Gas Works*, Docket No. C-2014-2445229, 2015 Pa. PUC LEXIS 532 (Rec. Dec. of Adm. Law Judge Dennis Buckley issued Nov. 4, 2016) at *10. Adopted and approved by the Commission's Final Order at 77 Pa. P.U.C. 98 (1992). *See also Lehigh Valley Power Comm. v. Pa. P.U.C.*, 563 A. 2d 557, 565 (Pa. Cmwlt. 1989).

⁴² *Schneider v. Pa. P.U.C.*, 479 A.2d 10, 12 (Pa. Cmwlt. 1984). *See Tillman v. Phila. Gas Works, supra*.

⁴³ *Id.*

⁴⁴ *Petition of the Pennsylvania State University for Declaratory Order Concerning the Generation Rate Cap of the West Penn Power Company d/b/a Allegheny Power*, Docket Nos. P-2007-20018 et al, 103 Pa. P.U.C. 472, 485 (Rec. Dec. of Administrative Law Judge Louis Cocheres issued July 28, 2008) ("PSU/West Penn Rec. Dec."). A copy of the PSU/West Penn Rec. Dec. is attached as Appendix A.

party that received notice of a proceeding and did not intervene was precluded by Section 316 from thereafter challenging the final order entered in that case:

Section 316 of the Public Utility Code (66 Pa. C.S. § 316) specifies that whenever the Commission promulgates an order, it is prima facie evidence of the facts found and remains binding on all the parties affected by it. In other words even though the University was not a party (but should have been), all of Penn State's arguments about the failure to mention Tariffs 37 or 39 or the failure to specifically say Tariff 37 was excluded from the new [rate] caps extension are invalid.

41. Judge Cocheres' Recommended Decision was adopted and approved by the Commission, which held, in relevant part, that the Pennsylvania State University ("PSU") was provided reasonable notice of the prior proceeding by a notice published in the *Pennsylvania Bulletin* and, therefore, it had the opportunity to appear and be heard, which is all that due process requires for a final order to have preclusive effect under Section 316:

PSU could have filed comments to the Joint Petition within twenty days after publication of the notice in the *Pennsylvania Bulletin*. Additionally, several parties intervened in the 2003 Proceedings following publication of the notice. Consequently, we conclude that the *Pennsylvania Bulletin* notice was reasonably calculated to put PSU on notice that the Joint Petition could impact its rights and provided PSU with a meaningful opportunity to object to the proposal.⁴⁵

42. PSU appealed to Commonwealth Court. The Court affirmed the holdings of the PSU/West Penn Rec. Dec. and Final Order granting preclusive effect to an earlier order, as

⁴⁵ *Petition of the Pennsylvania State University for Declaratory Order Concerning the Generation Rate Cap of the West Penn Power Company d/b/a Allegheny Power*, Docket Nos. P-2007-20018 et al, 103 Pa. P.U.C. 451, 468 (Final Order entered Sept. 11, 2008) ("PSU/West Penn Final Order"). A copy of the PSU/West Penn Final Order is attached as Appendix B.

required by Section 316. In so doing, the Court held that PSU had been given due process in the earlier proceeding:

Therefore, the PUC properly concluded that pursuant to the customer bill inserts and the *Pennsylvania Bulletin* PSU “had reasonable notice of the scope of the 2003 Petition case and that its Tariff 37 rights could be impacted . . . [and] all of its due process rights were properly protected, and it failed to use its opportunity to participate in that case due to its own inactions . . .” PUC Opinion adopting ALJ Recommended Decision at 36m 40; R.R. at 1068a, 1072a. Consequently, PSU was not denied due process.⁴⁶

43. The PSU/West Penn Rec. Dec. and PSU/West Penn Final Order also demonstrate the error in Respond’s claims that it did not receive adequate “notice” despite actually being served with the entire Joint Petition and all of its accompanying testimony and exhibits. In the PSU case, Judge Cocheres, the Commission and the Commonwealth Court all concluded that PSU’s due process rights had been fully protected where it received notice that was far less robust than the *actual service of the Joint Petition on Respond* that occurred here.

44. The PSU case had its genesis in West Penn’s restructuring proceeding initiated to comply with the Electricity Generation Customer Choice and Competition Act.⁴⁷ That case was concluded in 1998 by a Commission-approved restructuring settlement that permitted West Penn to recover its generation stranded costs through the end of 2008 and extended the statutory cap on West Penn’s generation rates for the same period.⁴⁸ The timeline of subsequent relevant events is summarized below. Important to the understanding of those events is the fact that PSU’s University Park campus was served on a separate tariff (Tariff 37) that applied only to

⁴⁶ *The Pennsylvania State University v. Pa. P.U.C.*, 988 A.2d 771, 783 (Pa. Cmwlth. 2010).

⁴⁷ 66 Pa.C.S. §§ 2801-2812. See PSU/West Penn Final Order at 456.

⁴⁸ PSU/West Penn Rec. Dec. at 477; PSU/West Penn Final Order at 456.

that location. Tariff 39 applied to all other customers, including PSU accounts other than the University Park campus.⁴⁹

- 1999 PSU and West Penn entered into a stranded cost buyout agreement under which PSU prepaid its share of West Penn's stranded costs by August 2003 in exchange for a lower interest rate on the unpaid balance.⁵⁰
- November 25, 2003 West Penn filed a petition at a docket number different from its restructuring case in which it requested that the Commission allow it to continue to impose competitive transition charges ("CTCs") through the end of 2010 because it was under-recovering its stranded costs.⁵¹ West Penn served a copy of the petition on the legal counsel that represented PSU in West Penn's 1998 restructuring case. However, PSU argued, and the Commission found, that service on PSU's former law firm did not constitute service on West Penn as required under the Commission's regulations at 52 Pa. Code §§ 1.54 and 1.55.⁵² In short, PSU was not served with the 2003 petition, and it had not received a copy of the petition from its former law firm.
- September 7, 2004 A Joint Petition for Settlement was signed by the parties that allowed West Penn to continue to charge CTCs through 2010 but required that generation rate caps remain in place for the same period for the rate schedules set forth in Appendix A to the Joint Petition. Appendix A contained rate schedules that appeared *only* in Tariff 39.⁵³ West Penn served the Joint Petition for Settlement on PSU's former counsel, but it was not forwarded to PSU, and, as noted above, the Commission held that service on former counsel in another proceeding was not service on PSU
- September 25, 2004 The text of the Joint Petition for Settlement, which did not distinguish between Tariff 37 and Tariff 39 and stated that all customers would be subject to the rate cap extensions, was published in the *Pennsylvania Bulletin*, but *did not include*

⁴⁹ PSU/West Penn Rec. Dec. at 472.

⁵⁰ PSU/West Penn Rec. Dec. at 477; PSU/West Penn Final Order at 457.

⁵¹ PSU/West Penn Final Order at 457.

⁵² PSU/West Penn Rec. Dec. at 493; PSU/West Penn Final Order at 467.

⁵³ PSU/West Penn Rec. Dec. at 477.

*Appendix A.*⁵⁴

- September 2004 All of West Penn's customers were notified of the "scope of the settlement" via bill inserts which said that "the caps would be extended for all customers."⁵⁵
- Post-September 2004 Publication in the *Pennsylvania Bulletin* and the mailing of customer bill inserts caused additional parties to intervene in the proceeding to contest certain aspects of the settlement. Further negotiations with the former and new intervenors produced an Amended Joint Petition for Settlement and a Revised Appendix A.⁵⁶ The Amended Joint Petition and Revised Appendix A were not served on the parties to West Penn's restructuring case, were not published in the *Pennsylvania Bulletin*, and were not noticed to customers via bill insert.⁵⁷
- April 21, 2005 The Commission approved the Amended Joint Petition at its public meeting. Thereafter, West Penn issued a press release stating that "there was a rate cap extension for its customers through the end of 2010."⁵⁸ The Commission entered its Final Order approving the Amended Joint Petition for Settlement on May 11, 2005.
- December 3, 2007 PSU, after learning that generation rate caps would expire for Tariff 37 at the end of 2008, filed its Petition for Declaratory Order for a determination that generation rates charged under Tariff 37 should be subject to caps through the end of 2010.

45. As previously explained, Judge Cocheres, the Commission and the Commonwealth Court found and determined that PSU's due process rights had been protected by reason of the publication of the Joint Petition for Settlement in the *Pennsylvania Bulletin* and

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* It appears that the Amended Joint Petition and Revised Appendix A enlarged the number of Tariff 39 rate schedules that would have extended rate caps but continued to exclude Tariff 37.

⁵⁸ *Id.*

issuance of bill inserts to customers, including PSU, providing notice of “the scope of the settlement.” Accordingly, Judge Cocheres concluded as follows:

. . . I find that Penn State had notice of the full scope of the 2003 proceedings and failed to act to protect its rights. As a result, it forfeited its opportunity to participate in the 2003 case and is not entitled to an extension of the rate caps for any electric service rendered pursuant to Tariff 37 in 2009 and 2010. My conclusion is based on the content of the notice in the bill inserts, the publication of the Joint Petition in the *Pa. Bull.* and Mr. Cooper's testimony.⁵⁹

46. The Commission affirmed the Recommended Decision, stating:

Consequently, we conclude that the *Pennsylvania Bulletin* notice was reasonably calculated to put PSU on notice that the Joint Petition could impact its rights and provided PSU with a meaningful opportunity to object to the proposal.⁶⁰

47. Likewise, the Commonwealth Court found that “abundant evidence established that PSU was adequately notified of the 2003 Petition”⁶¹ through West Penn’s bill insert customer notices and publication in the *Pennsylvania Bulletin*.⁶²

48. Notably, PSU argued at every stage of its case that the forms of notice West Penn provided were inadequate to inform it that the promised rate cap extension would not apply to Tariff 37. Specifically, PSU contended that neither the bill insert nor the publication in the *Pennsylvania Bulletin* could have alerted PSU that Tariff 37 was excluded from the rate cap extension because: (1) the bill insert notice stated that rate caps were extended for all customers,

⁵⁹ PSU/West Penn Rec. Dec. at 492. Robert E. Cooper was the key point of contact for PSU with regard to its University Park account. Mr. Cooper testified that he had not reviewed the bill insert customer notices and had not read the published version of the Joint Petition for Settlement until June 2007. *Id.*

⁶⁰ PSU/West Penn Final Order at 468.

⁶¹ *The Pennsylvania State University v. Pa. P.U.C.*, 988 A.2d at 771.

⁶² *Id.* at 781-782.

while failing to distinguish between service provided under Tariffs 37 and Tariff 39; and (2) the text of the Joint Petition for Settlement published in the *Pennsylvania Bulletin* similarly did not distinguish between Tariff 37 and Tariff 39 and did not include Appendix A, which was the only part of the puzzle showing that the rate cap extension would not encompass Tariff 37 rates.⁶³

49. Judge Cocheres rejected PSU's arguments because he concluded that PSU was insisting on a level of specificity for "notice" that neither Commission policy and practice nor principles of due process required. As to the adequacy of the bill insert notices, Judge Cocheres found and determined as follows:

The first flaw in Penn State's logic is its insistence that it should have been notified specifically that Tariff 37 rates would not be included in the rate cap extension. This Commission and the litigants who appear before it simply do not operate under that premise in the normal course of business. Instead, the Commission and the parties define those interests which will be impacted by the requested relief.

* * *

The second flaw in Penn State's argument is its attempt to say that the language of the notices specified that the rate caps were extended for all customers somehow lulled the University into believing that the extensions applied to Tariff 37, as well. . . .

Having reviewed the bill insert, I find that it was sufficient to give notice to Penn State: 1) that the Restructuring Settlement was being amended; 2) that generation and distribution rate caps were going to be extended; 3) that the period for recovery of stranded costs was going to be extended; and 4) that the generation rate cap would increase in 2006, 2007, 2009 and 2010. (The bill insert was provided as Exh. 1 to WPP Co. St. 1-B at 6 in AP Exh. GBB-5. It was also provided in a larger, more legible format as PS Cross-Exam. Exh. 1.) Had Penn State representatives read the notice, they would have realized the importance of the proposed amendment to the restructuring settlement (a very important document to which Penn State was a signatory), the extension of the stranded cost recovery period and the extension of the rate caps

⁶³ See PSU/West Penn Rec. Dec. at 488 and 491.

which would produce a concurrent rise in the generation cap (almost annually). At this point (had the notice been read) the University would have known it could be impacted by the case.⁶⁴

50. As to the adequacy of the *Pennsylvania Bulletin* publication, the Judge emphasized that due process is not abridged if a potentially affected party, having been provided a form of notice, chooses not to read it or, reading it, fails to take reasonable steps to understand the possible impact of the proceeding on its interests:

The Joint Petition as published in the *Pa. Bull.* provided an even clearer message. (A copy of the Joint Petition was provided as AP Exh. GBB-3.) Had Penn State representatives read the *Pa. Bull.*, the title of the document and the addition of the restructuring docket number would have alerted the University that the restructuring settlement was being amended to change the rates and rate caps and that Appendix A contained a list of the proposed increases to the generation rate schedules for 2008, 2009 and 2010. Joint Petition at PP 11a-11d. At this point, the University should have known that its rights were at risk. *Even though none of the Appendices (A, B, C and D) noted in the text of the Joint Petition were included in the Pa. Bull., Penn State was on notice to find a copy of Appendix A to learn more.* If it had done so, it would have learned that the proposed changes to the rate schedules only impacted its Tariff 39 accounts and would have known that it had the opportunity to be heard on the subject of Tariff 37.⁶⁵

51. The Commission underscored Judge Cocheres' conclusions and, in so doing, made it clear that "notice" is adequate for due process purposes even if it requires the party receiving it to go beyond its surface to understand the possible impact of a proceeding on its interests:

We further agree with the ALJ that the failure to publish Appendix A in the *Pennsylvania Bulletin* notice does not mean that the notice

⁶⁴ PSU/West Penn Rec. Dec. at 492-493.

⁶⁵ PSU/West Penn Rec. Dec. at 493 (emphasis added).

to PSU was inadequate. Based on the information published in the *Pennsylvania Bulletin*, PSU should have obtained and reviewed a copy of Appendix A.

Having concluded that the notice published in the *Pennsylvania Bulletin* gave PSU adequate notice, we need not address the question of whether the bill inserts provided PSU with adequate notice. We note, however, that we agree with the ALJ that the inserts were not misleading so as to lull PSU into believing that the extensions applied to Tariff 37. PSU knew that the generation rate cap for Tariff 37 was set in the 1998 Restructuring Settlement. If the bill inserts led PSU to believe that the rate cap for Tariff 37 was being extended, then PSU should have known that a proceeding in which it was not a party was impacting a settlement agreement to which it was a signatory. *Under these circumstances, PSU should have reviewed the Amended Joint Petition. If it had done so, it would have realized that the rate cap for Tariff 37 was, in fact, not being extended.*⁶⁶

52. The Commonwealth Court, relying upon, and quoting extensively from, the PSU/West Penn Rec. Dec. and Final Order, affirmed, holding as follows:

Therefore, the PUC properly concluded that pursuant to the customer bill inserts and the *Pennsylvania Bulletin* PSU “had reasonable notice of the scope of the 2003 Petition case and that its Tariff 37 rights could be impacted . . . [and] all of its due process rights were properly protected, and it failed to use its opportunity to participate in that case due to its own inactions” PUC Opinion adopting ALJ Recommended Decision at 36, 40; R.R. at 1068a, 1072a. Consequently, PSU was not denied due process.⁶⁷

53. Applying the law as set forth in the PSU/West Penn Rec. Dec. and Final Order and in the Commonwealth Court’s Opinion and Order affirming those decisions, Respond’s claims that it did not receive “notice” sufficient to satisfy due process standards must be rejected.

⁶⁶ PSU/West Penn Final Order at 468-469.

⁶⁷ *The Pennsylvania State University v. Pa. P.U.C.*, 988 A.2d at 773.

54. Respond does not deny it was served with the Joint Petition and all of its accompanying testimony and exhibits. (It was also served with the Notice of Initial Prehearing Conference and Judge Salapa's Prehearing Conference Order.)

55. Respond's contention that the proposed clawback charge was "buried within the massive filing" of DSP IV is totally fallacious. The Joint Petition was, after all, *a legal pleading*, and Respond had to read no further than the second paragraph (starting on page 2 and continuing to page 3 of the Joint Petition) to see that Penelec and its affiliates were proposing revisions to their POR programs. The nature of those changes, including a detailed explanation of the clawback charge and how it would operate, was provided in *three pages of text*, under a separate, bolded, all capitalized major heading, within the Joint Petition (pp. 18-20). And, at page five of the Joint Petition, the reader was specifically directed to the testimony of Ms. Bortz, which discussed at length all the changes being proposed to Penelec's POR program.

56. At pages 4-5 of its Complaint, Respond makes a series of averments purporting to show that because the caption of the Joint Petition did not include specific reference to changes to the POR program, Respond was not put on "notice" that the Joint Petition addressed anything other than the bare minimum specifications for default service plans set forth in the Public Utility Code and the Commission's default service regulations.⁶⁸ Respond's position is wrong as a matter of law in three important respects.

57. First, Respond contends, in effect, that the Commission should find that it was reasonable for Respond to read no further than the case caption to determine that the ensuing default service proceeding would not affect any of its interests as an EGS and, therefore, the

⁶⁸ It would be entirely unwieldy to try to capture all of the relief requested in a legal pleading in that pleading's caption, which is why the approach Respond demands is contrary to established practice before the Commission and not required. Respond is demanding the same hyper-technical specificity that Judge Cocheres rejected out of hand as both unrealistic and unnecessary: "This Commission and the litigants who appear before it simply do not operate under that premise in the normal course of business." PSU/West Penn Rec. Dec., at 492.

minimal effort required to file a Petition to Intervene was not necessary.⁶⁹ That averment is directly contradicted by the PSU/West Penn Rec. Dec. and Final Order. Due process was not violated when PSU received “notice” (by publication in the *Pennsylvania Bulletin*) that required a separate investigation to obtain the information PSU needed (the unpublished and unserved “Appendix A”) to learn that its largest account was excluded from the promised rate cap extension. Here, all Respond had to do was read the second paragraph of the Joint Petition – and/or flip through that legal pleading and review the bolded, all capitalized roman numeral headings – which made it perfectly clear that changes to the POR program were being proposed.

58. Second, Respond’s contention that it is somehow improper to consider POR issues in a default service proceeding is contrary to the Commission’s policy, practice and precedent. Indeed, as previously noted, the Commission itself has stated that “in the electric industry . . . PORs are usually the subject of default service plan filings.”⁷⁰ Moreover, as explained in Section II.A., the POR programs of Penelec and all of its Pennsylvania affiliates *were adopted or revised in the context of default service proceedings*. The same is true for other major EDCs in Pennsylvania that adopted or amended their POR programs as part of their default service filings. For example, Duquesne Light Company’s POR program was adopted in a default service proceeding.⁷¹ In short, there is a long history of POR programs being proposed,

⁶⁹ While this averment is unreasonable on its face, it is even more disconcerting when offered as an excuse by a subsidiary of a New York Stock Exchange listed parent that is represented by experienced in-house and outside counsel. (Spark Energy, Inc., the ultimate of Respond, trades on the NYSE under the ticker symbol SPKE.)

⁷⁰ *Investigation of Pennsylvania’s Retail Nat. Gas Supply Mkt.*, *supra*, at * 74.

⁷¹ *E.g. Petition of Duquesne Light Company for Approval of a Default Service Plan for the Period January 1, 2008 Through December 31, 2010*, Docket No. P-00072247, 2007 Pa. PUC LEXIS 36 (June 22, 2007) adopting the Recommended Decision issued May 8, 2007, approving a settlement and various stipulations. *See* Rec. Dec., p. 10 (“The default service plan, *as amended by the Settlement*, also advances retail competition by offering rates at prevailing market prices, *adopting a POR program for Residential and Small C&I customers*, providing for an MST collaborative, and eliminating, over time, energy demand charges and declining block energy rates.” (Emphasis added.)) The adoption of a POR program in Duquesne’s default service case was called out for special recognition in a separate statement issued by Vice-Chairman Cawley in that case on June 21, 2007.

and POR related issues being raised and addressed, in EDCs' default service proceedings, and Respond's averments to the contrary are simply wrong. Indeed, under Respond's approach, the existing POR program of Penelec was not validly adopted and, presumably, should cease to be implemented.

59. Third, as alleged support for not reading beyond the case caption of the Joint Petition, Respond broadly asserts that it is impermissible, in a default service case, to address anything beyond the bare minimum statutory and regulatory requirements for the contents of a default service plan. This assertion is also contradicted by prior Commission precedent, including the Commission's decisions to require EDCs to include extensive retail market enhancements in their default service programs. To cite only two significant examples, in *Investigation of Pennsylvania's Retail Electricity Market: Recommendations Regarding Upcoming Default Service Plans*,⁷² the Commission directed EDCs to include in their then-upcoming default service plans retail opt-in auctions⁷³ and standard offer customer referral programs.⁷⁴ These directives were repeated in the Commission's March 2, 2012 Order in *Investigation of Pennsylvania's Retail Electricity Market: Intermediate Work Plan*.⁷⁵ Significantly, the Commission made it clear that the costs of implementing those programs

⁷² *Investigation of Pennsylvania's Retail Electricity Market: Recommendations Regarding Upcoming Default Service Plans*, Docket No. I-2011-2237952 (Final Order entered Dec. 16, 2011).

⁷³ *Id.* at 21-33 ("Therefore, the Commission maintains its recommendations within the October 14 Order to have EDCs include an opt-in auction program in their upcoming default service plans.")

⁷⁴ *Id.* at 33-44 ("[T]he Commission will retain its recommendation [from its October 14 Order] that EDCs include a customer referral program in their upcoming default service plans.")

⁷⁵ *Investigation of Pennsylvania's Retail Electricity Market: Intermediate Work Plan*, Docket No. I-2237952 (Final Order entered Mar. 2, 2012). Standard offer customer referral programs are delineated at pages 20-32. Retail opt-in auction programs are discussed at pages 33-71. The Commission directed that both programs be developed in the context of EDCs' then-upcoming default service plans. See pp. 30-31 and 36-37.

would be recovered from participating EGSs,⁷⁶ including through a “discount on the POR.”⁷⁷ In fact, EGSs themselves have repeatedly interjected issues unrelated to EDCs’ default service plans in default service proceedings, including proposals for retail market enhancements. If adopted, Respond’s position would bar EGSs from making such proposals in any EDC’s default service proceeding. In summary, there is a long history of the Commission itself interjecting issues that go well beyond the bare legal requirements for the contents of default service plans. Additionally, the Commission has directed parties to address in their default service plans cost recovery methods that involved “discounts” from payments made by EDCs to EGSs under their POR programs. Therefore, it is entirely incorrect for Respond to contend that the Commission’s regulations, orders and prior practices could, in any way, justify its conclusion – reached without even reading Penelec’s Joint Petition – that there could not possibly be an issue raised in that legal pleading or *that could be raised by other parties in the course of the proceeding*, that might affect its interests as an EGS serving customers in the Penelec (and Met-Ed, Penn Power and West Penn) service areas.

60. Penelec is entitled to judgment on the pleadings in its favor and dismissal of Respond’s Complaint because the Respond Complaint is an unlawful collateral attack on the DSP IV Final Order, which is barred by Section 316 of the Public Utility Code. Respond was provided notice of the DSP IV proceeding and given an opportunity to appear and be heard, which is all that due process requires. Other factors that clearly establish Section 316 as a bar to the Respond Complaint, which are present on the face of the pleadings in this case or represent official Commission action, are discussed in detail above and are summarized below:

⁷⁶ *Id.* at 32 and 84.

⁷⁷ *Id.* at 32.

a. Respond was served with the entire Joint Petition, which set forth Penelec's request to establish a clawback charge as well as detailed explanations of how the clawback charge would operate and why it was being proposed.

b. Respond was served with the Commission's Notice of Initial Prehearing Conference and Judge Salapa's Prehearing Conference Order.⁷⁸

c. Respond did not intervene in the DSP IV proceeding.

d. The DSP IV case was litigated up to an evidentiary hearing, but was settled before briefing.

e. A Joint Petition for Settlement was filed on April 1, 2016.

f. Paragraph 18 of the Joint Petition for Settlement conditions the settlement upon approval by the Commission without modification and provides that modification would allow parties to withdraw from the settlement and continue to pursue full litigation.

g. All parties to the DSP IV case either signed the Joint Petition for Settlement or stated that they did not oppose it.

h. Judge Salapa's Recommended Decision issued on April 29, 2016 recommended approval of the settlement without modification. The Recommended Decision discussed the clawback provision and found that it is "in the public interest."⁷⁹

i. The Commission adopted Judge Salapa's Recommended Decision and approved the settlement without modification in the DSP IV Final Order. Chairman Brown issued a separate statement expressing her approval of the settlement.

⁷⁸ It should be noted that all of the Notices and Petitions to Intervene, Answers thereto, and Prehearing Memoranda of the parties that participated in the DSP IV proceeding were available for review on the Commission's website. Those documents included, in many instances, summaries of the issues parties intended to address, including the proposed clawback charge.

⁷⁹ DSP IV Rec. Dec. at 31.

j. The DSP IV Final Order was not appealed.

61. It is clear that Respond's Complaint should be dismissed on the pleadings and, in any event, has no merit. However, it should be noted that Commission action nullifying, conditioning or modifying the clawback provision as Respond requests could be viewed as triggering the condition set forth in Paragraph 18 of the Joint Petition for Settlement allowing any party to withdraw from the settlement and pursue full litigation. If the relief requested by Respond were granted, parties that negotiated in good faith will have been denied an important part of the "benefit of the bargain" represented by the mutual compromises on many issues resolved by the settlement. Those parties, which may include, in addition to Penelec, the OCA, I&E and CAUSE-PA, could, at a minimum, seek to invoke Paragraph 18 to litigate the issue of the extent to which all EGSs should be responsible for some portion of the uncollectible accounts expense generated by the accounts receivable they sell to Penelec and its other affiliates in Pennsylvania. Simply stated, the Commission cannot reopen the DSP IV case as Respond is requesting and selectively change one term of a carefully crafted settlement without reopening all other aspects of the settlement thereby affected. To do otherwise would violate the due process rights of all the settling parties. Additionally, if the relief Respond seeks were granted, parties to all future settlements would face the threat of losing benefits for which they bargained in good faith and for which they made compromises on other issues of importance to them. Under those circumstances, the value of settlements would be substantially diminished if not eliminated.

E. There Is No Valid Legal Basis To Invoke The Commission's Ratemaking Authority To Alter An Administrative Charge Under Penelec's POR Program Because Such A Charge Is Not A "Rate," A POR Program Is Not A Utility "Service," And The Relief Respond Requests Is, Therefore, Outside The Commission's Jurisdiction To Establish "Rates"

62. Respond filed its Complaint "[p]ursuant to 66 Pa.C.S. § 701."⁸⁰ Section 701 provides, in relevant part, as follows:

The commission, or any person, corporation, or municipal corporation having an interest in the subject matter, or any public utility concerned, may complain in writing, *setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission.* Any public utility, or other person, or corporation likewise may complain of any regulation or order of the commission, *which the complainant is or has been required by the commission to observe or carry into effect.* (Emphasis added.)

63. In its Complaint, Respond did not identify "any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of *any law which the commission has jurisdiction to administer, or of any regulation or order of the commission.*" Indeed, that condition for a valid complaint does not exist in this case because the Commission has expressly stated that POR programs are "voluntary" and it does not have authority to require any EDC to establish or maintain such a program:

No provision of the Code either expressly or by 'strong and necessary implication' provides the Commission with the authority to require EDCs to purchase accounts receivable from EGSs. On the contrary, the Code specifically provides that *the Commission cannot require EDCs to purchase EGS' accounts receivable.*⁸¹

⁸⁰ Complaint, p. 1.

⁸¹ *Petition of PPL Elec. Util. Corp. Requesting Approval Of A Voluntary Purchase Of Receivables Program And Merchant Function Charge*, Docket No. P-2009-21290502, 2009 WL 4087051 (Pa. P.U.C., Nov. 19, 2009).

64. Similarly, the second sentence of Section 701 does not authorize the Complaint because Respond does not identify “any regulation or order of the commission, which the complainant is or has been required by the commission to observe or carry into effect.” Respond’s participation in Penelec’s POR program is also voluntary – Respond could choose to participate or not. However, it cannot remain in the POR program if it refuses to abide by the program’s terms, including paying administrative charges imposed for participating in the program.

65. In Paragraph 33, Respond expressly states that the purported legal foundation for its Complaint is its assumption that the clawback charge is a “rate” as defined in Section 102 of the Public Utility Code and, therefore, the charge is subject to the Commission’s jurisdiction to establish rates under Sections 1301, 1301 and 1303.⁸² Respond is wrong. There is no valid legal foundation for Respond’s Complaint or for the relief requested therein (i.e., nullifying, amending, or conditioning the clawback provision that is set forth in the DSP IV settlement).

66. Section 102⁸³ defines a “rate” as follows:

Every individual, or joint fare, toll, charge, rental, or other compensation whatsoever of any public utility, or contract carrier by motor vehicle, made, demanded, or received *for any service within this part*, offered, rendered, or furnished by such public utility, or contract carrier by motor vehicle, whether in currency, legal tender, or evidence thereof, in kind, in services or in any other medium or manner whatsoever, and whether received directly or indirectly, and any rules, regulations, practices, classifications or contracts affecting any such compensation, charge, fare, toll, or rental.

(emphasis added). *See also Pa. P.U.C. v. PECO Energy Co.*, Docket No. R-2010-2161592 (Order entered Dec. 29, 2010), p. 13 (adopting settlement that included a term providing that PECO could terminate its POR program upon three months’ notice.).

⁸² 66 Pa.C.S. §§ 102, 1301-1303.

⁸³ 66 Pa.C.S. § 102.

(The term “part” in Section 102 refers to the Public Utility Code.⁸⁴)

67. Section 102 defines “service” in relevant part as follows:

Used in its broadest and most inclusive sense, includes any and all acts done, rendered, or performed, and any and all things furnished or supplied, and any and all facilities used, furnished, or supplied by public utilities, or contract carriers by motor vehicle, *in the performance of their duties under this part* to their patrons, employees, other public utilities, and the public . . .

68. A voluntary POR program does not implicate a public utility’s “performance of [its] duties under this part” because, as the Commission has clearly held, voluntary POR programs do not constitute an “[act] done, rendered, or performed” under the authority of the Public Utility Code nor is the purchase of EGS accounts receivable something “furnished or supplied” pursuant to any service obligation imposed by the Public Utility Code. Therefore, administrative charges under voluntary POR programs, including the clawback provision at issue here, are not “rates” and are not within the jurisdiction of the Commission to establish or alter utility “rates.” For this reason, Respond cannot rely upon Sections 1301, 1302 or 1303 as the purported legal basis for the relief requested in its Complaint because each of those section applies only to a “rate” or “rates” as defined by the Public Utility Code.⁸⁵

69. Respond’s requested relief is based entirely on an invocation of the Commission’s *ratemaking* authority. As a consequence, the alleged legal foundation for Respond’s Complaint rests on its attempt to appropriate for its purposes ratemaking principles that the Public Utility Code applies to utility “rates” (e.g., assertions that the clawback charge is “unjust and

⁸⁴ See 66 Pa.C.S. § 101.

⁸⁵ 66 Pa.C.S. § 1301 (“Every rate made, demanded, or received by any public utility . . .”); 66 Pa.C.S. § 1302 (“Under such regulations as the commission may prescribe, every public utility shall file with the commission . . . tariffs showing all rates established by it . . .”); 66 Pa.C.S. § 1303 (“No public utility shall . . . demand or receive from any person, corporation or municipal corporation a greater or less rate for any service rendered or to be rendered by such public utility than that specified in the tariffs of such public utility applicable thereto.”)

unreasonable” and that its application is barred by a general proscription against “retroactive application”⁸⁶). However, the authority on which Respond purports to rely does not extend to charges that are not utility “rates,” and it is abundantly clear that the clawback charge is not a utility “rate.” Accordingly, Respond’s Complaint requests the Commission to act outside its jurisdiction and to exercise authority it does not have. Consequently, there is no legal basis for the Commission to grant Respond the relief it requests.

70. In the same vein, Respond claims that, at the time it received its invoice for the clawback charge, Penelec did not have “a valid tariff on file and approved by the Commission.”⁸⁷ However, this assertion has no validity because it is based entirely on Sections 1302 and 1303 of the Public Utility Code, which, as previously explained, apply only to the publication of “rates” that are “within the jurisdiction of the commission” (Section 1302) for “service rendered or to be rendered by such public utility” (Section 1303). Administrative charges imposed in connection with voluntary POR programs are not within the terms of either section. For this reason, the Commission has held that a supplier coordination tariff (the “tariff” Respond is referring to throughout its Complaint) is not a “services tariff” (i.e., a “tariff” as the term is used in Section 1302 and 1303) but, instead, simply sets forth the basic requirements, protocols and processes for EGS-EDC interactions so that the Commission may monitor the development of retail competition.”⁸⁸ Of course, as previously explained in Section II.C., *supra*, Penelec has filed, and the Commission has accepted, Penelec’s supplier coordination tariff supplement that includes the previously-approved clawback provisions with an effective date of August 1, 2016.

⁸⁶ See, e.g., Complaint, p. 2 (“(ii) the retroactive application of a tariff that would result in imposition of unjust and unreasonable charges . . .”)

⁸⁷ See Complaint, p. 2 and ¶¶ 61-63.

⁸⁸ *Application of Wellsboro Elec. Co., for Approval of Restructuring Plan Under Section 2806 of the Pub. Util. Code, supra*, at ** 12-13.

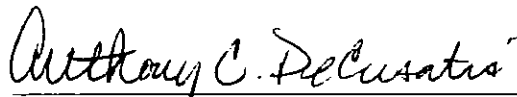
Consequently, Respond's claims about the alleged absence of a "valid tariff" as the basis for invoicing the clawback charge in September 2016 is not only wrong as a matter of law, it is now moot.

71. In summary, Respond's Complaint seeks relief that is premised on the exercise of the Commission's ratemaking authority to change an administrative charge under a voluntary POR program. The relief Respond requests is outside the Commission's jurisdiction. The administrative charge at issue is not a "rate" and the sections of the Public Utility Code on which Respond relies do not apply and cannot be used as a valid legal basis for the Commission to act in the manner Respond requests. Accordingly, Penelec is entitled to judgment on the pleadings in its favor on this basis as well.

IV. CONCLUSION

WHEREFORE, for the reasons stated above, Penelec respectfully requests that the Administrative Law Judge and the Commission grant judgment on the pleadings in favor of Penelec with respect to all the relief requested in Respond's Complaint except for those averments pertaining to the accuracy of the computation of the charge that has already been billed to Respond. Although Penelec denies that the charge invoiced to Respond was calculated incorrectly, Penelec is not seeking judgment on the pleadings as to that issue, which is factual in nature and not properly a subject for a dispositive motion at this time.

Respectfully submitted,



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Counsel for Pennsylvania Electric Company

Dated: December 8, 2016

APPENDIX A

*Petition of Pennsylvania State University for Declaratory Order
Concerning the Generation Rate Cap of the West Penn Power Company
d/b/a Allegheny Power*

Docket No. P-2007-20018 *et al*

103 Pa. P.U.C. 472

**RECOMMENDED DECISION OF LOUIS G. COCHERES
Issued July 28, 2008**

Penn Power Company d/b/a Allegheny Power at Docket No. P-2007-2001828 is denied.

6. That the Joint Stipulation between The Pennsylvania State University and West Penn Power Company d/b/a Allegheny Power, filed June 30, 2008, is approved.

7. That the Petition of the West Penn Power Company d/b/a Allegheny Power for Approval of its Retail Electric Default Service Program and Competitive Procurement Plan for Service at the Conclusion of the Restructuring Transition Period for Tariff 37, as modified by the Joint Stipulation filed on June 30, 2008, at Docket No. P-2008-2021608 is approved in part and denied in part, consistent with this Opinion and Order.

8. That the West Penn Power Company d/b/a Allegheny Power shall implement an Electric Default Service Program and Competitive Procurement Plan, starting on January 1, 2009, and ending December 31, 2010, as more fully described in the Joint Stipulation and this Opinion and Order.

9. That the West Penn Power Company d/b/a Allegheny Power shall file a tariff supplement not later than thirty (30) days after entry of this Order, which supplement shall incorporate all of the changes needed to implement the Commission-approved Electric Default Service Program and Competitive Procurement Plan for Tariff 37 and other related conditions of service.

10. That the parties meet to come to agreement on the issues of emergency power planning and elimination of self-generation restrictions and the encouragement of more dialogue on the issue of increased University generation capacity. If the parties cannot agree, they may seek mediation or request that the Commission facilitate discussions.

11. That paragraphs 5-7 of Tariff 37, Original Page No. 6-3 are unjust and unreasonable and violative of Section 2804(2) of the Public Utility Code, and shall be cancelled effective on January 1, 2009.

12. That upon acceptance and approval by the Commission of the tariff supplement filed by West Penn Power Company d/b/a Allegheny Power consistent with the Commission's Order, this proceeding shall be marked closed.

BY THE COMMISSION,

James J. McNulty
Secretary

ORDER ADOPTED: September 11, 2008
ORDER ENTERED: September 11, 2008

RECOMMENDED DECISION

Before
Louis G. Cocheres
Administrative Law Judge

I. HISTORY OF THE PROCEEDING

On December 3, 2007, the Pennsylvania State University (Penn State or University) filed with the Pennsylvania Public Utility Commission (Commission) a Petition for Declaratory Order at Docket No. P-2007-2001828 requesting a declaration that Penn State is entitled to a continued generation rate cap under Tariff 37 for 2009 and 2010.¹ Tariff 37 is the tariff under which Penn State's University Park main campus receives retail electric service from Allegheny Power. Penn State is the lone customer served under Tariff 37. All other retail customers, including additional Penn State service locations that are not part of Penn State's University Park main campus, receive retail electric service from Allegheny Power under Tariff 39.

On December 26, 2007, Allegheny Power (Allegheny or Company) filed an Answer and New Matter requesting that the Commission dismiss the Petition. In its New Matter, Allegheny Power explained why Penn State's Tariff 37 is not entitled to a continuation of the generation rate cap. Essentially, Allegheny Power argued that the Commission's Order, entered on May 11, 2005 at Docket Nos. R-00039022 and R-00973981 (May 11 Order),² which approved a settlement extending the generation rate caps to the end of 2010 for specific Tariff 39 rate schedules, did not apply to Tariff 37. Therefore, Penn State's Tariff 37 generation rate cap for 2009 and 2010 was not extended

under the Order. On January 15, 2008, Penn State filed a Reply to the Company's New Matter.

Allegheny Power subsequently filed a Petition with the Commission at Docket No. P-2008-2021608 requesting approval of a default service plan for Penn State under Tariff 37 for 2009 and 2010. The default service plan proposed by Allegheny was to apply only if Penn State did not obtain generation service from a Commission-licensed competitive electric generation supplier (EGS). The default service plan included at the customer's option either generation procured directly from the spot market or a fixed-price service option. Either option included an energy cost adjustment applicable to Tariff 37. The parties have since reached a stipulation regarding Penn State's default service plan.

Petitions to Intervene in the Allegheny Power/Penn State default service proceeding were filed and granted for Penn State and Constellation NewEnergy Inc. and Constellation Energy Commodities Group, Inc. (Constellation). The Office of Consumer Advocate (OCA) and the Office of Small Business Advocate (OSBA) also intervened and were parties to the proceeding. By Notice dated February 28, 2008, the Commission advised that an Initial Prehearing Conference would be held on March 18, 2008 and that Judge Cocheres was assigned to preside over the proceeding. The Prehearing Conference was convened as scheduled, at which time a schedule for the litigation of the proceeding was established. Judge Cocheres issued a Prehearing Order, dated March 19, 2008, confirming and supplementing the litigation schedule and certain other rulings made during the Prehearing Conference and denying the Petition to Intervene of West Penn Power Industrial Intervenors. By Order entered on April 22, 2008, at the Declaratory Order docket, the Commission requested additional information before rendering a determination on Penn State's Petition and consolidated the case at Docket No. P-2007-2001828 with Allegheny's default service filing at Docket No. P-2008-2021608 pending before the OALJ. By Consolidated Hearing Notice dated May 9, 2008, evi-

dentiary hearings in the consolidated proceedings were scheduled for June 18 and 19, 2008.

On May 6, 2008, Penn State distributed the prepared written direct testimony of James L. Crist, P.E., Penn State Statement No. 1, and the prepared written direct testimony of Robert E. Cooper, P.E., Penn State Statement No. 2. On May 30, 2008, Allegheny distributed the prepared rebuttal testimony of Mr. Keeping, West Penn Power Statement No. 1-R, Mr. Valdes, West Penn Power Statement No. 2-R, and George B. Blankenship, West Penn Power Statement No. 3-R. On June 3, 2008, Penn State distributed the surrebuttal testimony of Mr. Crist, Penn State Statement No. 1-SR, and Mr. Cooper, Penn State Statement No. 2-SR. Thereafter, Allegheny distributed the surrebuttal testimony of Messrs. Reeping, Valdes and Blankenship, West Penn Power Statements Nos. 1-SR, 2-SR and 3-SR, respectively, on June 13, 2008.

On October 25, 2007, Allegheny Power filed with the Commission a Petition at Docket No. P-0072342 for approval of a general default service plan for all Allegheny Power Tariff 37 and Tariff 39 customers in Pennsylvania, for a defined period beginning January 1, 2011.³ On May 23, 2008, the presiding Administrative Law Judge (ALJ) issued an Initial Decision (ID) regarding Allegheny's proposed default service plan. In the ID, the ALJ proposed a method of default service for Penn State under Tariff 37, beginning January 1, 2011. The plan as proposed by Allegheny and as adopted by the ALJ is as follows:

Allegheny Power agrees to place Penn State University in the ST 40 procurement group and provide that group with a twelve-month fixed price option with quarterly reconciliations. The solicitation for fixed price service would occur close to the beginning of the delivery period and the details of the service would be based on the large customer fixed price plan previously approved by the Commission for PPL as part of its Competitive Bridge Plan⁴ such as: (1) customers indicating their interest in the fixed price option 30 days in advance of the solicitation; and (2) customers would affirmatively select the

fixed price option within 30 days after the retail price is known. The Company also maintains its proposal to offer ST 40 customers hourly service. Should this approach be approved by the Commission, the Company envisions its compliance tariff establishing terms such as customers served by an electric generation supplier as of January 1, 2011 or during the 12-month fixed price term returning to default service (or new customers) may only take the hourly priced default service option; customers may not switch between the fixed price and hourly priced option during the twelve-month availability of fixed price service; and at the end of the twelve-month period, all nonshopping ST 40 customers on default service would be switched to hourly service.⁵

On June 18, 2008, at the hearing of the consolidated proceedings, Allegheny Power and Penn State agreed to develop a Joint Stipulation on the method of default service under Tariff 37 for the years 2009 and 2010. The Joint Stipulation was to be based on the method of default service described in the ID for Tariff 37. The Joint Stipulation was to be conditioned on the following presumptions: (i) that Penn State's Petition for Declaratory Order may not be granted, and (ii) that the Joint Stipulation would not become effective in the event that Penn State's Petition for Declaratory Order is granted. As previously mentioned, the parties were able to reach a Joint Stipulation regarding procurement issues, which is attached to this Recommended Decision (RD).

Evidentiary hearings were held before Judge Cocheres on June 18 and 19, 2008, as scheduled. All witnesses appeared and were cross-examined. The transcript of the hearings is substantial and numbers 415 pages. The evidentiary record also includes the statements of testimony and exhibits offered and accepted into the record. I incorporated the entire record from Allegheny's general default service case into these cases at the June 18 hearing.⁶

On June 30, 2008, Allegheny and Penn State filed a Joint Stipulation regarding procurement issues. Main Briefs were filed on July 3,

2008 by Allegheny and Penn State. Reply Briefs were filed on July 11, 2008 by Allegheny, Penn State and the OSBA.

By letter dated July 15, 2008, Allegheny requested that the Commission make certain corrections to its April 22, 2008 Order at Docket No. P-2007-2001608. By letter dated July 18, 2008, Penn State responded to Allegheny letter and opposed the request.

II. DISCUSSION

A. LEGAL STANDARDS

At my direction the parties agreed to prepare a uniform outline for the presentation of their arguments in their briefs. Generally, I will follow the outline they provided.

1. *Burden of Proof*

The parties and I agree that, pursuant to Section 332(a) of the Public Utility Code (66 Pa. C.S. §332(a)), Allegheny had the burden of proving that its default service plan for Tariff 37 for the years 2009 and 2010 complied with the applicable portions of the Public Utility Code and other statutes, Commission regulations, Commission orders and, to some extent, published Commission policy statements. Similarly, Penn State had the burden of proving it was entitled to an order under Section 331(f) of the Public Utility Code (66 Pa. C.S. §331(f)) that resolved a controversy regarding Tariff 37.

Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Public Utility Comm'n*, 134 Pa. Commw. 218, 221-222, 578 A.2d 600, 602 (1990); *alloc. den.* 602 A.2d 863 (1992). That is, a complainant must present evidence more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosier v. Marquies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. *Mill v. Commw., PA Public Utility Comm'n*, 67 Pa. Commw. 597, 447 A.2d 1100 (1982); *Edan Transportation Corp. v. PA Public Utility*

Comm'n, 154 Pa. Commw. 21, 623 A.2d 6 (1993). 2 Pa. C.S. §704. More information is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and Western Ry. v. Pa. Public Utility Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Review*, 194 Pa. Super. 278, 166 A.2d 96 (1960); *Murphy v. Commonwealth, Dep't. of Public Welfare, White Haven Center*, 85 Pa. Commw. 23, 480 A.2d 382 (1984).

2. Declaratory Order Standard

Penn State provided a succinct description of the declaratory order with which I agree and adopt as my own. It is set forth below:

Section 331(f) of the Public Utility Code, 66 Pa. C.S. §331(f) grants the Commission the discretion to issue a declaratory order to terminate a controversy or remove uncertainty. A declaratory order should be issued only when there is no outstanding issue or fact. Consolidation Order at 7. The issuance of a declaratory judgment is within the discretion of the Commission and is not a matter of right. *Petition of Philadelphia Gas Works for Establishment of Interim Rate Procedures and for a Declaratory Order*, Docket No. P-00001831, 94 Pa. PUC 411 (2000); *Sustainable Energy Fund of Central Eastern Pennsylvania, Inc.*, Docket No. M-00031715 F0003, 101 Pa. PUC 794 (2006).

A petition for declaratory judgment must concern an actual case or controversy. *Silo v. Tom Ridge, et al.*, 728 A.2d 394, 398 (Pa. Commw. 1999) ("Declaratory relief is not available unless an actual controversy exists, is imminent or inevitable."). See also *Independence Blue Cross v. Pennsylvania Insurance Dep't*, 802 A.2d 715 (Pa. Commw. 2002) ("A declaratory judgment is the appropriate remedy where a case presents antagonistic claims, indicating imminent and inevitable litigation. However, it is an inappropriate remedy to determine rights in anticipation of events which may never occur.").

That is, it must be a case or controversy which "(1) is real and not hypothetical; (2) affects an individual in a concrete manner [and] provides a factual predicate for reasoned adjudication; and (3) sharpens the issues for judicial resolution." *IMS Health, Inc. v. Vality Tech., Inc.* 59 F. Supp. 2d 454, 459 (E.D. Pa. 1999). A party without an actual imminent or inevitable controversy lacks standing to maintain a declaratory action. *Silo*, 728 A.2d at 398.

PS M.B. at 8-9.

3. Default Service Regulatory Requirements

Section 2807(e)(3) is the operative portion of the Public Utility Code which sets forth the Company's obligation, as follows:

(e) *Obligation to serve.* — An electric distribution company's obligation to provide electric service following implementation of restructuring and the choice of alternative generation by a customer is revised as follows:

* * *

(3) If a customer contracts for electric energy and it is not delivered or if a customer does not choose an alternative electric generation supplier, the electric distribution company or commission-approved alternative supplier shall acquire electric energy at prevailing market prices to serve that customer and shall recover fully all reasonable costs.

66 Pa. C.S. §2807(e). (Emphasis in the original.) I note that Subsection (3): 1) is the foundation for Allegheny's obligation to serve, 2) identifies the customers who must be served, 3) sets the standard for the price of procuring electric energy, and 4) mandates full recovery of reasonable costs from the customers.

The University and the Company both provided brief summaries of the relevant regulations and policy statements which provide addi-

tional requirements and guidance for default service. They generally agree with each other. I have set forth the Penn State version below because it was somewhat more succinct.

In addition to statutory directives, the Commission has promulgated regulations ("Default Service Regulations") and adopted a policy statement ("Policy Statement") related thereto in order to provide the necessary framework to manage the default service obligation. *See Rulemaking Re Electric Distribution Companies' Obligation to Serve Retail Customers at the Conclusion of the Transition Period Pursuant to 66 Pa. C.S. §2807(e)(2) (Final Rulemaking Order)*, Docket No. L-00040169 (Order entered May 10, 2007); *Default Service and Retail Electric Market (Final Policy Statement)*, Docket No. M-00072009 (Order entered May 10, 2007).

The Commission's Default Service Regulations at 52 Pa. Code §§54.181-54.189 define the obligation of EDCs to serve retail customers at the conclusion of their respective transition periods. To comply with this obligation, the regulations provide for a two-phase procedure whereby a default service provider first must submit a default service program for the Commission to review, which includes, *inter alia*, a proposed competitive procurement plan, an implementation plan identifying the schedules and technical requirements of competitive bid solicitations and spot market energy purchases, and a rate design plan for recovery of all reasonable costs of default service. 52 Pa. Code §41.185. *See also id.* §§54.186 and 54.187. Upon approval of that program, the providers then execute the procurement and implementation process. A default service provider must acquire electric generation supply at "prevailing market prices" for default customers to meet the providers's [sic] anticipated default service obligation at reasonable costs. 52 Pa. Code §54.186.⁷ The regulations also identify the mechanisms by which the default service provider recovers its costs, set forth the rules governing customer migration

to and from default service, and provide competitive safeguards to ensure the reliable provision of default service.

Realizing the practical limits in connection with the regulation of large, wholesale electric markets, the Commission adopted its Policy Statement on default service and retail electric markets, 52 Pa. Code §§69.1801-1817, to provide flexibility for, and to respond more effectively to, individual default service plans and regulatory and market challenges. Accordingly, the Policy Statement offers guidelines, rather than strict rules, for default service providers in the areas of procurement, bid solicitation, rate design, and cost recovery.

PS M.B. at 10-11. (Emphasis in the original and footnote renumbered.)

With this guidance in mind, I will review the evidence presented by the parties below. I note that any argument not addressed below should be deemed denied.

B. DECLARATORY ORDER

1. Parties' Positions

a. Penn State

In its Main Brief, Penn State began its presentation with the following description of its status as an Allegheny customer:

Penn State is a major generation, transmission and distribution service customer of Allegheny at its University Park campus receiving service through Allegheny PA Retail Tariff 37. University Park is an 8,500 acre campus containing 932 buildings. The University owns five substations around the campus and receives service from the Company at 12,500 volts. In 2006, the University received 301,392,585 kWh of electric energy from Allegheny at the University Park campus and paid Allegheny \$12,329,113.57 for generation, transmission and distribution service. Penn State St. No. 1 at 5.⁸

PS M.B. at 12. (Footnote renumbered.)

The University continued by explaining that in Allegheny's restructuring settlement, the Company was permitted to recover its stranded costs to the end of 2008. In addition, the generation rates were capped to the end of the same period. PS M.B. at 12.

Penn State stated that, after the restructuring settlement, it had agreed with the Company to accelerate its payments for its competitive transition charge (CTC) obligations for Tariff 37 (pursuant to the Public Utility Code, 66 Pa. C.S. §2808(b)) at a reduced interest rate. In accordance with the CTC Buyout Agreement, Penn State made its last payment in August 2003. (As directed by this Commission in its Order, entered April 22, 2008, at Docket No P-2007-2001828, a copy of the CTC Buyout Agreement, *marked Confidential and Proprietary*, was entered into the record as Attachment A to PS State. 1.) PS M.B. at 12-13.

The University argued that prepayment of its CTC obligation did not cause it to lose any right to continued generation service at a capped rate. It pointed out that, even though the last payment was in August 2003, it continued to receive generation service at a capped rate similar to any other customer. Penn State asserted that the Competition Act did not require customers to make stranded cost payments to continue service under rate caps. PS M.B. at 13.

Then the University provided a history of the 2003 Petition case at Docket No. R-00039022 which was filed in November 2003. In the 2003 Petition, Allegheny requested that the Commission extend the Company's stranded cost recovery period. All parties to the restructuring case were sent copies of the 2003 Petition. The 2003 Petition did not specify that it was only applicable to Tariff 39. AP Exh. GBB-2. As a result of negotiations in September 2004, the parties signed the 2004 Joint Petition to settle the case. AP Exh. GBB-4. The parties agreed to allow the Company to extend its stranded cost recovery period for two years to the end of 2010 and to extend the rate caps concurrently. Allegheny customers were notified of the scope of the settlement by bill inserts which said the caps would be extended for all cus-

tomers. PS Cross-Exam. Exh. 1. All parties to the restructuring case were sent copies of the 2004 Joint Petition. The 2004 Joint Petition was published in the *Pennsylvania Bulletin* on September 25, 2004 (34 Pa. Bull. 5326) without Appendix A. The 2004 Joint Petition made no reference to Tariffs 37 or 39, but did state that all customers were subject to the cap extensions. The Joint Petition also referred to Appendix A which listed the rate schedules impacted by the cap extensions. (Appendix A listed only Tariff 39 rate schedules.) After publication of the Joint Petition in the *Pa. Bull.* and a full customer cycle of bill inserts, additional parties intervened in the 2003 Petition case; and new negotiations produced an Amended Joint Petition to settle the case in March 2005: AP Exh. GBB-5. The parties to the restructuring case were not sent copies of the 2005 Amended Joint Petition; no bill inserts were sent to the customers; and the Amended Joint Petition was not published in the *Pa. Bull.* Penn State asserted that the Amended Joint Petition did not specify that the cap extensions were only limited to Tariff 39 rate schedules. The University noted that this Commission approved the Amended Joint Petition at a Public Meeting on April 21, 2005 which prompted a Company press release which said there was a rate cap extension for its customers through the end of 2010. PS Cross-Exam. Exh 2. By Commission Order, entered May 11, 2005 (May 11 Order), the Amended Joint Petition was approved and specified that the generation rate caps were extended from the end of 2008 to the end of 2010. PS M.B. at 14-18.

The University submitted that in the May 11 Order, the Commission did not intend to exclude Tariff 37 from the rate cap extension because the rate cap extension was the *quid pro quo* for extending the stranded cost recovery period. Penn State claimed that the May 11 Order did not specifically limit the extension to certain customers and did not exclude any customers. The University quoted portions of the May 11 Order including a generation rate cap cross-reference to Amended Appendix A. It continued by noting that the plain language of the Order and the customer and public notices

specified that all customers would be subject to the extension. The University argued that none of the documents referred to any distinction between Tariff 37 and Tariff 39 customers. Penn State insisted that the cross-reference to Appendix A was insufficient notice of the limitation to Tariff 39 customers and violative of due process and fundamental fairness. As evidence of the Commission's failure to grasp the distinction, the University pointed to the Commission's Web page which identified the end of 2010 as the end of the rate cap period. PS M.B. at 18-21.

Penn State maintained that, if the Commission had intended to exclude it from the rate cap extension, the Commission would have clearly stated the exclusion in the May 11 Order. Without that stated exclusion, the University concluded that the Commission intended to include Tariff 37 in the rate cap extension. PS M.B. at 21-22.

Penn State argued that one result of the May 11 Order was a financial windfall for Allegheny's generation affiliate because it would be permitted to sell generation on the power market which was previously designated for Penn State's use under a capped rate. Without express recognition of that windfall in the Order, the University concluded that the Commission did not intend to permit its occurrence. PS M.B. at 22-23.

Penn State asserted that its prepayment of its CTC obligations did not exclude it from eligibility from the extended rate caps. It noted that, after the final payment in August 2003, the University continued to receive electric service under capped rates. PS M.B. at 23.

Penn State next focused on the language of Section 2804(4)(ii) of the Public Utility Code to define the application of rate caps to Allegheny's customers. Section 2804(4)(ii) states, as follows:

(ii) In addition to the rate cap set forth in subparagraph (i), for a period of nine years from the effective date of this chapter or until an electric distribution utility is no longer recovering its transition or stranded costs through a competitive transition charge or

intangible transition charge and all customers of an electric distribution utility can choose an alternative provider of electric generation, whichever is shorter, the generation component of a utility's charges to customers who purchase generation from the utility, including the competitive transition charge and intangible transition charge, shall not exceed the generation component charged to the customers that has been approved by the commission for such service as of the effective date of this chapter.

66 Pa. C.S. §2804(4)(ii). The University emphasized that the above language held open the rate caps for all customers until Allegheny was "no longer recovering" its stranded costs and until all customers could "choose an alternative provider of electric generation" Penn State asserted that, because there were no current alternative suppliers in the Allegheny service territory, the second requirement could not be met until a market formed after the rate caps expired at the end of 2010. PS M.B. at 24-25.

The University dismissed the informal poll taken by Allegheny witness Reeping of alternate suppliers in Allegheny's Maryland service territory. The bottom line for Penn State was that of 22 possible suppliers, only four appeared to have any interest, and none of them made any offers. PS M.B. at 25-26.

Penn State contended that it was difficult to conclude there was a market or a valid market price when the University was the only customer looking for a supplier. Penn State contended that the result of making it the only customer without a capped rate was a form of unreasonable discrimination and violative of the Public Utility Code. 66 Pa. C.S. §1304. The University claimed that removing its capped rates would put it at a competitive disadvantage. PS M.B. at 26.

Penn State believed that equitable considerations favored the grant of the rate cap extension to Tariff 37. It argued that it was inequitable to be denied rate cap protection after paying its CTC obligations in advance while customers who had not finished paying their CTC obligations would continue to receive

the rate cap protection. The University thought it was unfair of the Company to provide notices of the scope of the extensions which did not detail the exclusion of the Tariff 37 customer. PS M.B. at 27.

Penn State noted that on May 31, 2005, the Company issued a Request for Proposal (RFP) for a Full Requirements Wholesale Electric Power Supply for the years 2009 and 2010. AP Exh. RBR-3. Even though the RFP introduction referred to supplying all customers, later Allegheny testimony clarified that Penn State's load was not included in the description of power needs. AP State 1-R at 9-10. The University observed that the Company's generation affiliate, Allegheny Energy Supply Company, LLC, (Allegheny Energy) was the winning bidder, as well as the current supplier through the end of 2008. Penn State repeated its position that Allegheny Energy would be free of supplying the Penn State load in 2009 and 2010 and able to sell that power on the open market. The University explained that there was no evidence to show that the other signatories to the Amended Joint Petition or the Commission were aware of the creation of this opportunity for Allegheny Energy; nor was there any clear explanation of this opportunity to Penn State prior to the award of the bid. The University reproached the Company for failing to disclose its intentions. Because Penn State could not assume that the Commission was fully apprised of this undisclosed benefit when it approved the Amended Joint Petition, the University requested the Commission to declare that the cap extension was applicable to Tariff 37 and order the Company to procure default service power for Penn State at the capped rates without regard to the costs incurred by Allegheny's provision of the service. PS M.B. at 27-30.

In its Reply Brief, Penn State began by repeating its position that the Joint Petition, Amended Joint Petition and their attachments and the bill inserts and the *Pa. Bull.* notices, the Commission Web site and May 11 Order all said the cap extension would be applied to all customers. The University repeated its arguments that, because it had prepaid its stranded cost obligations and because the Company

already notified its customers that the caps were extended for all customers, 1) the omission of any reference to the Tariff 37 rate schedule was not surprising; 2) that Appendix A and Revised Appendix A did not mention Tariffs 37 or 39; 3) that it was not necessary for the May 11 Order to include the Tariff 37 load in the list of customer groups which had not paid their stranded costs; and 4) that, in order to exclude Tariff 37 from the rate cap extension, there would need to be a specific statement to that effect in the May 11 Order. PS R.B. at 4-5.

Penn State rejected the Allegheny position that the savings clauses in the Amended Joint Petition and the May 11 Order exempted the University from proposed rate cap extensions. Penn State pointed out that the language of the savings clauses exempted "rate cap exceptions" in the Restructuring Settlement and that Penn State's rate cap was not an "exception." PS R.B. at 6.

The University claimed that it was inconsistent for the Company to send bill inserts to all customers which said all customers would be subject to the cap extension and then deny the extension to Penn State. PS R.B. at 6-7.

The University repeated its contention that Section 2804(4)(ii) held open the rate caps for all customers until Allegheny was "no longer recovering" its stranded costs and until all customers could "choose an alternative provider of electric generation" PS R.B. at 7-8.

Penn State argued that Section 2808(b) did not allow the Commission to extend the rate caps to some customers who were not signatories to the Amended Joint Petition and not to Penn State. 66 Pa. C.S. §2808(b). The University, as the only customer excluded from the cap extension, believed its exclusion was discriminatory. It interpreted Section 2808(b) as only applicable to alternative payment arrangements and not rate cap extensions. Penn State asserted that there was no legal requirement which linked stranded cost payments to rate caps. It claimed that this premise was shown by the original 2003 Petition which only requested an extended stranded cost recovery period with no mention of a cap extension. Conversely, the University explained there was no requirement

to currently make stranded cost payments to be entitled to a rate cap, as demonstrated by the fact that Penn State completed payment of its cost obligation in August 2003 and continued to be subject to a rate cap until 2008. As the only customer not subject to the cap extension, the University thought it was being penalized for paying its stranded cost obligation early in violation of Sections 1304 and 2804(7). 66 Pa. C.S. §§1304 and 2804(7). PS R.B. at 9-12.

Penn State rejected the Allegheny position that the cap extension should be upheld because it was bargained for and because the University did not participate in the process. It noted that the University's Tariff 39 accounts were within the scope of the extension without participating in the process. Penn State repeated its position that the prepayment should not have disqualified it from the application of the cap extension. It emphasized that Allegheny also benefited from the CTC Buyout Agreement. Penn State acknowledged that it had not been assessed the resulting rate increases resulting from approval of the Amended Joint Petition and indicated its willingness to make up its share from the prior years. PS R.B. at 12-14.

Penn State agreed with the Company that projecting the outcome of the 2003 Petition case with the University's participation would only be speculation. PS R.B. at 14-15.

Penn State disputed Allegheny's assertion that a competitive market will exist for Tariff 37 service in 2009 and 2010. It disputed the Company's description of Mr. Reeping as possessing "vast experience," because there were no customers shopping in Allegheny's service territory. The University characterized Mr. Reeping's Maryland experience with wholesale and retail as of little value to Penn State in 2009 and 2010 and criticized the value of the Maryland supplier poll as not useful to the University as a single customer without a rate cap. Penn State claimed that Mr. Crist's description of Penn State as a customer in 2011 in a market without rate caps was not applicable to a situation in 2009 and 2010 where the University was the only customer in a market where all other customers had rate caps. PS R.B. at 15-17.

Penn State denied that it had access to the Pennsylvania State University Facilities Engineering Institute (FEI) to assist with the University's energy procurement issues. It explained that FEI was created at the request of the Commonwealth to provide advice to Commonwealth agencies on energy use, procurement and facilities management and was not available for Penn State Tariff 37 issues. PS R.B. at 17-18.

The University explained that Allegheny misunderstood the reference to Penn State's competitive disadvantage. The University was concerned about competing schools within the Company service territory which continued to be served subject to the rate caps in 2009 and 2010. PS R.B. at 18.

Penn State repeated its argument that financial motives were the basis for denying cap extensions to Tariff 37 because Allegheny Energy would be able to sell power in 2009 and 2010 at market rates which would have gone to the University under capped rates. PS R.B. at 19-20.

b. *Allegheny*

Allegheny argued that there was no legal or policy basis for continuing caps on Tariff 37 rates. Allegheny M.B. at 11. The Company summarized its position, as follows:

In sum, the extension of the generation rate caps for specific Tariff 39 rate schedules does not apply to Penn State's Tariff 37 because: (i) under the terms of Allegheny's Restructuring Settlement, the generation rate cap for Tariff 37 expires on December 31, 2008; (ii) the generation rate cap extension approved in the Commission's May 11, 2005 Order for specific Tariff 39 rate schedules does not cover Tariff 37 rates and thus, does not apply to Penn State's service at University Park; (iii) Penn State did not participate in the proceedings that produced the extension approved in the Commission's May 11, 2005 Order; and (iv) Penn State has already paid its Tariff 37 stranded costs, which means that Penn State has not provided any consideration in exchange for a negotiated exten-

sion of the Tariff 37 generation rate cap to 2009 and 2010.

Allegheny M.B. at 12. (Footnote omitted.) Allegheny explained that the Company and the University entered into an agreement in 1999 in which Penn State prepaid its stranded cost obligations for Tariff 37 by August 2003. (The CTC Buyout Agreement, *marked Confidential and Proprietary*, was entered into the record as Attachment A to PS State. 1.) The Company noted that the CTC Buyout Agreement did not modify the Restructuring Settlement generation rate cap. Allegheny M.B. at 12-13.

Allegheny further explained that the May 11 Order did not extend the rate caps to the end of 2010 for Tariff 37 because the 2003 Petition case only dealt with Tariff 39 rates. The Company quoted the May 11 Order to show that it cross-referenced the designation of the extension of the rate caps to affected rate schedules set forth in Revised Appendix A in the Amended Joint Petition which was attached to the Order. Allegheny continued that the rate schedules in Revised Appendix A were only Tariff 39 rates. None of the listed schedules came from Tariff 37. The Order also listed the rate schedules for which Allegheny would procure default service power in 2009 and 2010 pursuant to the Amended Joint Settlement. Again, only Tariff 39 schedules were identified. Both the Amended Joint Settlement and the May 11 Order included a savings clause which specified that, with the exception of the rates subject to the Petition and Order, there were no changes to the Restructuring Settlement and prior related orders. Allegheny M.B. at 13-14.

The Company acknowledged that because initially the 2003 Petition case only concerned a request to extend the recovery period for stranded costs and because Penn State had already completed paying for its Tariff 37 stranded cost obligation in August 2003, the University probably would not have had any interest in the case. Allegheny asserted that without Penn State's participation, there was no request or reason to apply the rate cap extension to Tariff 37. Consistent with the May 11 Order, the Company RFP and resulting bids for 2009

and 2010 default service did not include loads related to Tariff 37. In addition, Allegheny dismissed the Penn State assertion that there should have been specific notice that Tariff 37 was not subject to the cap extension. The Company posited that regulatory filings typically only listed customer groups impacted by the filing and that Rate Schedules 59, 85 and 90 from Tariff 39 were also not listed in the Amended Joint Petition, May 11 Order or Revised Appendix A because as wholesale customers, they were not impacted by the rate cap extension either. Allegheny M.B. at 14-16.

Allegheny argued that Penn State failed to cite any portion of Chapter 28 of the Public Utility Code to support the University's position that there was no authority to establish different rate cap periods for different customer groups. The Company countered that there was no provision in Chapter 28 that required stranded cost payments and generation rate caps to coincide for all customer groups. Citing Section 2808(b), Allegheny contended that the statute granted the flexibility to the Company to enter into agreements regarding the payment of stranded cost obligations and rate cap extensions with different customers which resulted in different stranded cost recovery periods and different rate cap expirations. 66 Pa. C.S. §2808(b). Allegheny M.B. at 16-18.

Allegheny claimed Penn State's argument that it was inequitable to exclude Tariff 37 from the cap extension after it prepaid its stranded cost obligation was flawed because the University failed to note the prepayments included a substantial reduction in interest rate (11% for all customers reduced to 6.5% for Penn State) in exchange for the reduced payment period. The Company did not believe it was unfair to allow a bargained-for rate cap extension for Tariff 39 customers as well as modifications to the Restructuring Settlement to be approved by the May 11 Order while concurrently complying with a prior private agreement to prepay stranded cost obligations at a reduced interest rate where the CTC Buyout Agreement did not extend the rate cap beyond the end of 2008 or modify the Restructuring Settlement. To the Company, there was nothing inequitable or dis-

criminatory about simultaneously complying with a Commission order and with the CTC Buyout Agreement. Allegheny M.B. at 18-19.

Allegheny disputed the Penn State assertion that the Company should not be allowed to benefit from an extended stranded cost recovery period while charging market-based rates to the University. Allegheny maintained that, because it was no longer collecting stranded costs from Penn State and because the CTC Buyout Agreement did not call for a cap extension, there was no benefit it was receiving from Penn State and no reason to extend its capped rate beyond the end of 2008. The Company criticized Penn State's failure to mention that the May 11 Order also approved increasing the generation rates in 2007, 2008, 2009 and 2010 as per the Amended Joint Petition which the University had not committed to pay. Allegheny M.B. at 18-20.

Allegheny characterized forecasting the outcome of the 2003 Petition case with Penn State's participation as speculative. It posited that the University, having prepaid its stranded cost obligation, would have had a different bargaining position than those customers who had not finished paying their stranded costs. The Company noted that the May 11 Order approved rate increases which varied from schedule to schedule; therefore, Allegheny could not agree that Penn State's participation would necessarily have resulted in a cap extension. Allegheny M.B. at 20-21.

Based on Mr. Reeping's testimony, the Company asserted that a competitive generation market would develop to serve Penn State in 2009 and 2010. Mr. Reeping based his conclusion on his personal experience with wholesale and retail electric supply procurement, Allegheny's experience with the generation procurement in the Maryland market and a poll of 22 Maryland suppliers which resulted in nine suppliers which showed some interest in serving Penn State's load profile. The Company reviewed Mr. Crist's (a Penn State witness) testimony in Allegheny's prior general default service plan proceeding at Docket No. P-00072342 in which Mr. Crist presented the University as a very attractive generation customer in terms of size, load shape, stability, growth potential and

credit risk. Allegheny pointed out that Penn State had a substantial amount of expertise on energy procurement within its staff. The Company claimed that Penn State failed to refute the evidence of the poll results. Allegheny M.B. at 21-23.

Allegheny disputed the University's claim that failing to grant the cap extension to Tariff 37 would put it at a competitive disadvantage. The Company noted that any Penn State competitor in Maryland and in the Duquesne Light service territory was already operating without rate caps. Allegheny M.B. at 24.

Allegheny disputed the Penn State assertion that Allegheny had a profit motive for not extending the rate caps to Tariff 37 in 2009 and 2010. The Company noted that it did not own generation assets so that it did not have power to sell at market rates. It argued that Allegheny Energy was an affiliated EGS and was not subject to this Commission's jurisdiction; and its profitability was not relevant to the Commission's consideration in setting rates. Because Mr. Crist was not able to identify what supply costs would be, the Company contended that his calculations were speculative. Allegheny denied any alleged collusion between it and Allegheny Energy as violative of the Federal Energy Regulatory Commission (FERC) Standard of Conduct and the Pennsylvania Code of Conduct. The Company asserted that the University failed to produce evidence to support its allegation. Allegheny maintained that Mr. Crist's request that Allegheny Energy provide the University with default service without regard to cost violated the requirement that a default service provider (DSP) fully recover all reasonable costs incurred in providing service. Allegheny M.B. at 24-26.

In its Reply Brief, Allegheny repeated its position that Penn State's prepayment of its stranded cost obligation meant that the University did not have anything left to exchange for a new cap extension. The Company claimed that Penn State's plain language analysis of the "all customers" references in the May 11 Order was contradicted by paragraphs 11b and 11d of the same Order which limit the cap extension to the affected Tariff 39 rate schedules listed in

Revised Appendix A and by reference to Appendix A to the Joint Petition which contained a similar list. Allegheny repeated its argument that there was no reason to explicitly exclude the Tariff 37 rate schedule because the normal Commission format was only to list the affected rate schedules. The Company repeated its argument that there was no reason to expressly exclude Tariff 37 because Penn State had already paid its stranded cost obligation and did not intervene in the 2003 Petition case. Allegheny pointed out that examination of the list of affected rate schedules showed that not all Tariff 39 rates were included and was another example of a format which only addressed affected rate schedules, not unaffected ones. The Company indicated that the University criticism of the bill inserts and notice in the *Pa. Bull* for failure to include an express exclusion of the Tariff 37 schedule was ineffective for the same reasons. Allegheny continued that the bill insert was a summary, not a detailed report of the settlement conditions. Similarly, the cross-reference to Appendix A in the Joint Petition as published in the *Pa. Bull.* should have alerted Penn State to check the Appendix and discover only Tariff 39 rate schedules. Allegheny R.B. at 6-9.

The Company repeated its argument that the University failed to prove that Allegheny was motivated to give its affiliate, Allegheny Energy, a financial windfall by excluding Tariff 37 from the cap extension. Allegheny repeated its report that Penn State witness Crist admitted that he did not know what supply costs were. As a result, the Company posited that the University could not calculate any credible profit projection. Allegheny argued that just because its affiliate was the successful bidder in 2005 for providing default energy in 2009 and 2010 did not mean that its bid was below market price. The Company repeated its position that Penn State's contention was illogical because, according to the University, Allegheny Energy would be more profitable if it discontinued bidding to serve Company customers since it could make more profit by selling on the market. Allegheny R.B. at 9-10.

The Company repeated its argument that Penn State failed to identify any legal authority for the proposition that it had a continued right to cap extensions beyond 2008. It repeated its position that the CTC Buyout Agreement did not amend the Restructuring Settlement which set the expiration of the rate caps at the end of 2008. Allegheny R.B. at 10-11.

Allegheny noted that the Penn State Main Brief raised arguments based on Sections 2802 and 2804(4)(ii) for the first time. 66 Pa. C.S. §§2802 and 2804(4)(ii). The Company viewed these arguments as violative of the Commission's regulations which require pleading with specificity in petitions for relief. 52 Pa. Code §§5.41 and 5.42. Allegheny asserted that there was not a reference to these sections of the statute in the Petition for Declaratory Relief and that these arguments should not be considered. The Company regarded these arguments as a Penn State attempt to amend its Petition without using a pleading. 52 Pa. Code §5.91. Allegheny R.B. at 11-13.

In the alternative, Allegheny responded to the Chapter 28 arguments and asserted that the arguments were invalid because they were mistakenly based on the premise that there would be no access to a competitive generation market. The Company based its position on Mr. Reeping's testimony about polling 22 suppliers in Maryland which resulted in a positive response from nine of the suppliers and his vast experience in wholesale and retail supply procurement. Allegheny repeated its summary of Penn State's witness Crist who testified that the University would be an attractive customer. Allegheny R.B. at 13-15.

Allegheny repeated its argument that Penn State misinterpreted Section 2804(4)(ii). The Company first disputed the University's factual premise that it would not have access to an alternative supplier in 2009 and 2010. Allegheny noted that Section 2804(4)(ii) specified that the maximum length for a rate cap was nine years which expired on December 31, 2005. The Company asserted that Section 2804(4)(ii) was no longer applicable because the current and proposed rate caps were already beyond the statutory time limit. Allegheny dis-

puted the Penn State contention that the statute required rate caps to stay in place until the customers could effectively choose an alternative supplier. In the alternative, the Company maintained that, because Allegheny was no longer collecting stranded costs from Penn State and because Penn State will be able to choose an alternative supplier in 2009 and 2010, with respect to Tariff 37 both conditions have been met. Allegheny R.B. at 15-17.

The Company disputed Penn State's claim that the failure to include Tariff 37 in the cap extension was discriminatory. Allegheny countered that there was no statutory prohibition against having different rate cap periods for different customer classes. The Company repeated its argument that each rate cap period was validly set by different mechanisms. The Tariff 37 period was set in the Restructuring Settlement at the end of 2008 and was not modified by the CTC Buyout Agreement. The Tariff 39 period for selected rate schedules was bargained for in exchange for an extended stranded cost recovery period as part of a settlement which did modify the Restructuring Settlement. Allegheny R.B. at 18.

Allegheny opposed Penn State's claim that it was unfair to exclude the University (which prepaid its stranded cost obligation) from the cap extension while granting the extension to the Tariff 39 customers that had not completed paying their stranded costs. The Company repeated its position that the selected Tariff 39 rate schedules received the benefit of the cap extension as part of a valid bargained-for exchange in a case settlement which the Commission approved in the May 11 Order. In contrast, the Tariff 37 period was set in the Restructuring Settlement at the end of 2008 and was not modified by the CTC Buyout Agreement. The Company found nothing unfair about complying with the Commission Order and adhering to the Buyout Agreement. Allegheny disputed the University position that it failed to receive clear notice of the Tariff 37 exclusion. The Company claimed that Penn State had full and fair notice of the cap extension for selected Tariff 39 rate schedules which should have alerted the University that Tariff 37 was not in-

cluded. Allegheny believed that Penn State received notice of the filing of the 2003 Petition case and notice in the *Pa. Bull.* of the 2003 Joint Petition and an explanation of the Joint Petition settlement terms at a November 2004 meeting and that Penn State failed to intervene in the 2003 Petition case to protect its interests. Allegheny R.B. at 19-20.

The Company repeated its argument that it did not own generation assets and could not have benefited by selling energy in the market which would have been used to serve the University in 2009 and 2010. Allegheny dismissed as speculative Penn State's attempt to quantify possible profits its affiliate, Allegheny Energy, could receive from the sale of energy in 2009 and 2010 which could have been used to serve Penn State in the same period. The Company emphasized that the May 11 Order dealt with selected Tariff 39 rate schedules which did not list Tariff 37 as part of the bidding process. Allegheny asserted that the Commission and all parties to the 2003 Petition case were aware that Tariff 37 was not part of the bidding process for generation procurement in 2009 and 2010. The Company repeated its position that there was no evidence of any collusion between it and Allegheny Energy to benefit the affiliate and that kind of conduct would violate the FERC Standard of Conduct and the Pennsylvania Code of Conduct. Allegheny explained that its affiliate was legally authorized to bid on the Company's wholesale procurements for default service loads. The Company repeated its position that Penn State's request for default service at capped rates in 2009 and 2010 from Allegheny Energy or another source without regard to cost violated the statutory and regulatory requirements that a DSP recover all of its reasonable costs of providing service. Allegheny R.B. at 20-23.

2. Recommendation

Having reviewed the briefs, the pertinent portions of the record, the relevant portions of the Public Utility Code and the Commission regulations and the Commission Orders, I find that Penn State is not entitled to the grant of a

declaratory order which would extend the Tariff 37 rate caps from the end of 2008 to the end of 2010. While Penn State made some arguments which I believe were correct, my review of the law and the record led me to the conclusion that it failed to carry its burden of proving its entitlement to the declaratory order.

In its simplest terms, my conclusion is based on the fact that, pursuant to Section 2808(b), Allegheny and Penn State agreed to an alternative payment methodology whereby Penn State accelerated its Tariff 37 payments for stranded costs or CTC obligations. The benefit for the University was a lowered carrying charge. All customers were to pay 11% interest. However, that rate was lowered to 6.5% in the CTC Buyout Agreement which required the University to complete its prepayments by or during August 2003. Penn State paid timely in accordance with the Buyout Agreement. The benefit for the Company was that it recovered all of its stranded costs attributable to Tariff 37 by August 2003, as opposed to December 2008. The Buyout Agreement did not alter the end of 2008 as expiration date of the Tariff 37 capped generation rate period as set forth in the Company's Restructuring Settlement. Penn State's ineligibility to qualify for the new cap extension is not related to the execution and completion of its responsibilities under the Buyout Agreement, but rather its failure to participate in the 2003 Petition case, thereby missing its opportunity to try to be included in the new cap extension.

I began my analysis with those subjects where Penn State and I agree. Initially, I agree that prepayment of Penn State's CTC obligation did not cause it to lose any right to continued generation service at a capped rate. The University demonstrated the validity of this premise by noting that, after the final payment in August 2003, the University continued to receive electric service under capped rates. I also note that I agree with Penn State and Allegheny in their conclusion that the Competition Act does not require customers to make stranded cost payments to continue service under rate caps. I hasten to add that the converse is true as well, the Competition Act does not require the imposi-

tion of rate caps when the customers continue to pay for stranded costs.

Penn State set forth a lengthy description of major procedural events which occurred in the 2003 Petition case at Docket No. R-00039022. My analysis of the significance of those events is set forth in detail in the "Notice of the 2003 Proceeding" chapter below. In summary, I found that the various documents which spoke in terms of "all customers" gave appropriate notice to Penn State that its rights could be impacted because, in addition to being a Tariff 37 customer for the main campus, the University has about 100 Tariff 39 accounts for other satellite campuses served by Allegheny. The University's position was substantially undermined with the admission that, although about 100 bill insert notices arrived at the main campus, none were forwarded to Mr. Cooper who is the Penn State witness charged with responsibility for authorizing payment of those energy bills. Penn State's position was collapsed by the admission that Mr. Cooper did not begin reading the *Pa. Bull.* until 2007. In short, Penn State missed the opportunity to participate in the 2003 Petition case because of its own administrative failures.

The University argued vociferously that the Commission did not intend the May 11 Order to exclude Tariff 37 from the new cap extension. In addition to the well worn phrase that the Order speaks for itself, the Penn State position is legally incorrect. Section 316 of the Public Utility Code (66 Pa. C.S. §316) specifies that whenever the Commission promulgates an order, it is prima facie evidence of the facts found and remains binding on all the parties affected by it. In other words even though the University was not a party (but should have been), all of Penn State's arguments about the failure to mention Tariffs 37 or 39 or the failure to specifically say Tariff 37 was excluded from the new caps extension are invalid. Instead, the rate schedules affected by the proposed extension were listed in both the May 11 Order and Revised Appendix A. Only selected Tariff 39 schedules were listed. The listing of only the affected rate schedules is the normal regulatory format for addressing this kind of issue. By

clearly listing only selected Tariff 39 schedules, the Commission gave notice that Tariff 37 was not included. I hasten to add that all of Penn State's approximately 100 Tariff 39 accounts were included in the new cap extension.

I agree with the Company that the University failed to prove that the main reason for excluding Tariff 37 from the new cap extension was to create a financial windfall for Allegheny or its generation affiliate, Allegheny Energy, and failed to prove there was any collusion between the two affiliates. Penn State produced no evidence to show that Allegheny Energy could sell energy in 2009 and 2010 on the market which would have been designated for default service to the University. Mr. Crist's testimony that he did not know what the relevant energy prices were demonstrated that his estimates of the size of the windfall were speculative.

Penn State misread Section 2804(4)(ii) which states as follows:

(ii) In addition to the rate cap set forth in subparagraph (i), for a period of nine years from the effective date of this chapter or until an electric distribution utility is no longer recovering its transition or stranded costs through a competitive transition charge or intangible transition charge and all customers of an electric distribution utility can choose an alternative provider of electric generation, whichever is shorter, the generation component of a utility's charges to customers who purchase generation from the utility, including the competitive transition charge and intangible transition charge, shall not exceed the generation component charged to the customers that has been approved by the commission for such service as of the effective date of this chapter.

66 Pa. C.S. §2804(4)(ii). The University emphasized that the above language held open the rate caps for all customers until Allegheny was "no longer recovering" its stranded costs and until all customers could "choose an alternative provider of electric generation" Penn State asserted that, because there were no current alternative suppliers in the Allegheny service

territory, the second requirement could not be met until a market formed after the rate caps expired at the end of 2010. PS M.B. at 24-25. I view the University's presentation which gives attention to the position of the disjunctive "or" and the conjunctive "and" to produce the following "intended" meaning:

In addition to the rate cap set forth in subparagraph (i), for a period of nine years from the effective date of this chapter [**AND until all customers of an electric distribution utility can choose an alternative provider of electric generation**] OR until an electric distribution utility is no longer recovering its transition or stranded costs through a competitive transition charge or intangible transition charge **AND** all customers of an electric distribution utility can choose an alternative provider of electric generation, *whichever is shorter*,

The bolding was added to demonstrate the addition of the clause which Penn State would like to link to both sides of the phrases separated by "OR." The problem with the Penn State interpretation is that by adding the bolded clause to both phrases, it makes the time periods equal on both sides of the "OR" because both sides are now dependent on all customers being able to choose an alternative supplier. That equality contradicts the italic phrase, "whichever is shorter." I find that the language of the statute is more properly construed as authorizing rate caps for the *shorter* of two time measurements: The first measure was nine years. The second was until an electric distribution utility was no longer recovering its transition or stranded costs through a competitive transition charge or intangible transition charge **AND** all customers of an electric distribution utility could choose an alternative provider of electric generation. Given that the nine years ended in December 2005, I find that this section of the statute is not applicable to the current fact pattern and not supportive of the Penn State argument.

I disagree with the University's contention that there would not be a market in 2009 and 2010 when Penn State will be the only cus-

tomer. My conclusion is primarily based on Mr. Crist's testimony in the most recent Allegheny DSPP case at Docket No. P-0072342 which Allegheny summarized succinctly in its Main Brief, as follows:

In his testimony in Allegheny's general default service plan proceeding at Docket No. P-00072342, Mr. Crist presents Penn State as a very attractive generation customer in terms of size, load shape, stability, growth potential, and credit risk:

The Penn State load factor is attractive due to a number of circumstances resulting from the combination of academic, office and residential loads. Many loads created by the research activities exist around the clock. Additionally, the on-campus residential loads peak in the evening offsetting the loss of academic/office loads during that time period.

The overall loads are predictable on a daily basis. This results partly from a repeating class schedule along with the amount of routinely occurring business function.

The campus load is not as weather/temperature dependant as other similarly sized customer loads due to the University's own coal-fired district steam heating system. When operating normally, Penn State's electrical generators provide peak shaving and therefore contribute to an improved load factor. The generator output increases due to greater steam demand matching campus heating load. The new and expanding central chilled water system will continue to improve the load profile due to the ability to take advantage of system diversity.⁹

Allegheny M.B. at 22. (Footnote renumbered.) I also accept the Maryland poll results presented by Allegheny's witness, Mr. Reeping, as an indicia of supplier interest in providing generation service to customers with Penn State's load profile. Obviously, there can be no market until there is a customer willing to buy. In this instance Penn State is precisely the kind of cus-

tomer which is likely to lure bids from willing suppliers.

I disagree with the University's arguments that equity and fairness favor the grant of the cap extension to Tariff 37. Penn State entered into the CTC Buyout Agreement with the knowledge that the Tariff 37 rate cap would expire at the end of 2008. At the risk of some repetition, both sides got what they bargained for in a private agreement: Penn State got a lower interest rate, and Allegheny got its stranded cost payments faster. In this instance, the main campus will not get the cap extension, but the other 100 accounts will. Penn State got the benefit for those other 100 accounts without any action on its part. I find that it was treated as fairly as all of the other Tariff 39 customers who got the cap extension without appearing in the 2003 Petition case. Chapter 28 of the Public Utility Code does not require all customers to have the same rate cap expiration date. As will be set forth in the next chapter in more detail, the University should have intervened in the 2003 Petition case, but was prevented from doing so by its own internal procedural failures.

Penn State misread the savings clause in the Amended Joint Petition and the May 11 Order. The savings clause reads, as follows:

14. The provisions of the 1998 Restructuring Settlement and Commission Orders relating thereto shall remain applicable except as specifically amended in this proceeding pursuant to this Amended Joint Petition. In particular, the rate cap exceptions provided in the 1998 Restructuring Settlement, which expressly incorporate the rate cap exceptions of Section 2804 of the Public Utility Code, shall remain applicable, during the rate cap extensions provided in this Amended Joint Petition.

May 11 Order. AP Exh. GBB-6 at 19-20. I agree with the Company that the first sentence preserves all of the terms of the 1998 Restructuring Settlement and related Commission Orders unless the Amended Joint Petition makes a specific modification. The first sen-

tence preserves the end of 2008 as the expiration of the Tariff 37 rate caps. The second sentence emphasizes that the previously approved rate cap exceptions will continue. The authority for a rate cap exception is found in Section 2804(4)(iii) (66 Pa. C.S. §2804(4)(iii)) which allows an electric utility to establish higher rates and rate caps under certain limited circumstances. The second sentence does not narrow the scope of the first sentence. It emphasized that existing rate cap exceptions will continue for the duration of the new rate cap extensions. It does not enlarge Penn State's Tariff 37 rights.

The University's argument that the exclusion of Tariff 37 from the cap extension was illegally discriminatory lacked merit. Section 2808(b) authorized the Commission to extend the CTC recovery period for good cause. Good cause existed in the 2003 Petition case when the Company demonstrated that it was underrecovering its stranded costs from selected Tariff 39 customers. 66 Pa. C.S. §2808(b). Section 2808(b) is silent on the issue of extending rate caps. However, the May 11 Order approved the settlement offered by the parties in the Amended Joint Petition because the settlement offered extended rate caps to the affected customers and was judged to be in the public interest. At the risk of continued repetition, there was no underrecovery of Tariff 37 stranded costs and no reason for the Commission to act gratuitously in favor of Penn State, particularly when Penn State failed to intervene. Any alleged discrimination suffered by the University was attributable to its own inaction.

Penn State failed to prove that it would be at a competitive disadvantage against other colleges subject to the protective cap extension in Tariff 39. It introduced no evidence of record to support the contention which first appeared in its Main Brief.

In conclusion, I find that the University failed to carry its burden of proof and failed to show its legal entitlement to a declaratory order in its favor.

C. NOTICE OF THE 2003 PROCEEDINGS

1. Parties' Positions

a. Penn State

In its Main Brief, Penn State explained that the fundamental elements of due process were the rights to adequate notice and the opportunity to be heard. PS M.B. at 30. It argued that the notices provided by Allegheny specified that the extension of the generation rate caps applied to all customers. The University continued that any ambiguity in the notice should be construed against the party (Allegheny) which drafted the document. Penn State stated that the November 2003 Petition gave no notice of a possible extension of the generation rate caps. It continued that, while the September 2004 Joint Settlement Petition was published in the *Pennsylvania Bulletin*, the Joint Petition was incomplete because Appendix A (the schedule of rates) was not included. The University attributed the failure to publish Appendix A as due to the Commission's inability to grasp the document's importance which in turn was caused by the Company's failure to explain the exclusion of Tariff 37 from the scope of the Joint Petition. Penn State continued that the Company had not given notice of the 2005 Amended Joint Petition because Allegheny specified there were no additional changes to the 1998 Restructuring Settlement. The University added that the Amended Joint Petition made no mention of the exclusion of Tariff 37 from the proposed extended rate caps. Penn State dismissed the bill inserts because the inserts specified that the proposed settlement applied to all customers. The University claimed that, even though the extension of rate caps through 2010 was discussed, Allegheny said nothing about the exclusion of Tariff 37 from the caps at the November 2004 meeting between Penn State and Company representatives. PS M.B. at 30-34.

The University claimed that Allegheny did not notify Penn State personnel of the exclusion of Tariff 37 until a July 20, 2005 phone call. Given that the Commission Order was entered on May 11, 2005 and that the Company had

already conducted its Request for Proposals (RFP) for default service power sources for 2009 and 2010, the University was concerned about projected increases and wanted more clarification from Allegheny. At a September 28, 2005 meeting, Mr. Reeping (a Company witness) clearly informed Penn State representatives that Tariff 37 was excluded from the extended rate caps. The University accused Allegheny of intentionally hiding the exclusion of Tariff 37 from the proposed rate caps until after the May 11 Order. Penn State asserted that it was entitled to the extended rate caps because the Commission's Customer Education Web page specified that Allegheny's rate caps expired on December 31, 2010. PS M.B. at 34-36.

In its Reply Brief, Penn State responded to the Allegheny arguments about having served the attorneys who represented the University in the 1998 restructuring proceeding with the 2003 Petition and the 2004 Joint Petition. Quoting AP Cross-Exam. Exh. 5, Penn State countered that the Company knew that Mr. Cooper, not the University's former attorneys, was the official contact person. It pointed out that service on its former attorneys, who had not entered their appearance on behalf of the University, was not effective. Penn State continued that Mr. Cooper, aware the client relationship was ended years before, testified he would not have expected the former attorneys to contact him, even if they had received the documents in question. PS R.B. at 21-23. The University repeated its position that the actual wording of the various notices was misleading because they said all customers were included within the rate cap extensions without specifying that Tariff 37 was excluded. Penn State discounted the fact that the notices prompted Citizens Power, Inc., Reliant Energy, Inc. and Constellation to participate because none of them were customers. It emphasized that the 2005 Amended Joint Petition was only sent to parties and that the May 11 Order did not confirm that Tariff 37 would not be covered by the rate cap extension. PS R.B. at 23-26.

With respect to the meeting between representatives of the University and Allegheny,

Penn State disputed the idea that the transcribed notes of a University employee, who attended the meeting, should be more credible than Mr. Cooper's testimony about the meeting he also attended. Penn State repeated its position that the Company did not clearly inform the University of its exclusion from the rate cap extension until the September 28, 2005 meeting. After more meetings with Allegheny, Penn State concluded that it would be unable to find agreement with Allegheny and, as a result, filed its Petition for Declaratory Order. PS R.B. at 26-27. Quoting Mr. Cooper's testimony, the University contested the proper interpretation of an e-mail written by Mr. Cooper to Company personnel. Penn State claimed that the author was far more credible at discussing his intent than the Company witness. PS R.B. at 27-28.

b. *Allegheny*

In its Main Brief, Allegheny argued that Penn State knew or should have known of the events leading to the exclusion of Tariff 37 from the terms of the 2005 Amended Joint Petition and the Commission's approval of the same in the May 11 Order. Allegheny did note that Penn State was represented by counsel (Thomas, Thomas, Armstrong and Niesen) and participated in Allegheny's restructuring case and its settlement. As part of that settlement, the University would have been on notice that the rate caps expired at the end of 2008. Allegheny explained that the 2003 Petition was served on the same attorneys who participated in the restructuring case on behalf of Penn State. Allegheny argued that, even though the attorneys denied receipt of the documents, that denial was not sufficient to rebut the mailbox rule presumption, *i.e.* mail sent to the correct address is presumed received. The Company acknowledged that the 2003 Petition to extend the time for recovering stranded costs probably would not have been of any interest to the University. Allegheny M.B. at 26-27.

Allegheny explained that the agreement to extend the rate caps until the end of 2010 for the Tariff 39 customers led to the preparation of

the September 2004 Joint Settlement Petition which, because it amended the restructuring settlement, now carried the original Petition Docket No. R-00039022 and the original restructuring Docket No. R-00973981. Again, the Joint Settlement was served on the same attorneys whose denial could not rebut the mailbox rule presumption. The Company contended that the attorneys had a duty to serve the new documents on their former client. In addition, notice of the Joint Petition was placed in the *Pennsylvania Bulletin* on September 25, 2004 (34 *Pa. Bull.* 5326) and notice of the Joint Petition was sent to the customers as a bill insert during the September 30 to October 28, 2004 billing cycle. The full text of the Joint Petition was printed in the *Pa. Bull.* and referred to the specific proposed rates in Appendix A which were included in the rate cap extension. The Company noted the evidence which showed that Penn State did not review the *Pa. Bull.* during that time period. Because Penn State has over 100 accounts with Allegheny, it would have received an insert in each bill. The testimony of Mr. Cooper (the Penn State witness who had responsibility for reviewing the bills and approving them for payment) established that it is and was not the administrative practice at the University to forward bill inserts to him. The Company contended that the bill insert reference to all customers was correct because Penn State was a Tariff 39 customer, as well as a Tariff 37 customer. Allegheny specified that, while the rate cap extension applied to all customers, it did not apply to all customer accounts. The Company emphasized that these notices prompted Citizens Power, Inc., Reliant Energy, Inc. and Constellation Energy Commodities Group, Inc. and Constellation New Energy, Inc., to intervene and participate in the case. Allegheny asserted that Penn State, like those new intervenors, had the same opportunity. Allegheny M.B. at 27-31.

As a result of the previous notices and the participation of the new intervenors, the Joint Petition was amended and became the 2005 Amended Joint Petition (including a Revised Appendix A) which was filed on March 8, 2005. Administrative Law Judge (ALJ) Wayne

L. Weisman issued a Recommended Decision on April 6, 2005, and recommended approval of the Amended Joint Petition. As noted earlier, the 2005 Amended Joint Petition was approved by the Commission's May 11 Order. Allegheny M.B. at 31.

Allegheny asserted that the Penn State notes about a November 2004 meeting between representatives of the Company and the University indicated that Penn State was aware that Allegheny was not extending the rate caps for Tariff 37. The Company also emphasized that Penn State notes from a similar meeting on September 28, 2005, clearly show Penn State understood that the rate caps for Tariff 37 would expire at the end of 2008. Allegheny asserted that Penn State timed the filing of its Petition for a Declaratory Order to avoid rate increases specified for Tariff 39 customers in the Amended Joint Petition as approved by the May 11 Order. The Company maintained that its interpretation of the November 2004 notes was confirmed by Mr. Cooper's e-mail, dated July 20, 2005. Allegheny disputed Mr. Cooper's denial in his testimony. The Company denied it tried to hide its 2005 RFP for default generation supply in 2009 and 2010 so that the University would not know power for Tariff 37 was not included in the bids. Allegheny believed that Penn State had notice that its rate caps had not been extended beyond 2008 and no additional contact was needed. Allegheny M.B. at 31-34.

In its Reply Brief, Allegheny started by asserting that Penn State was a sophisticated customer with substantial expertise in energy procurement. The Company believed that the University's testimony about failing to forward the bill inserts and failing to read the *Pa. Bull.* and failing to receive notice of the 2003 Petition and 2004 Joint Petition from its former attorneys reflected either a serious lapse in judgment or evidence which was difficult to believe. Allegheny repeated its positions that Penn State knew or should have known: 1) the restructuring proceeding specified rate caps would expire at the end of 2008; 2) the Joint Petition would not extend the rate caps for Tariff 37; and 3) Penn State had ample notice about the scope of the 2003 Petition and 2004 Joint Petition and

the opportunity to be heard. Allegheny R.B. at 23-25.

The Company reviewed the purpose of the 2003 Petition to extend the recovery period for stranded costs. It disputed the relevance of the University comments that the 2003 Petition was assigned a new docket number because Allegheny used the restructuring case service list to notify the parties to the restructuring case about the new petition. The Company again acknowledged that Penn State's interest in the initial pleading would probably be limited because the University had already paid its stranded cost obligations. Allegheny repeated the fact that the Joint Petition contained the agreement to extend the rate caps through 2010 for Tariff 39 customers only. The Company repeated the forms of notice (bill inserts, *Pa. Bull.* and service on former attorneys) provided to the University. Allegheny emphasized that the Joint Petition's reference to rate schedules in Appendix A should have prompted Penn State to find a copy of Appendix A and examine it. The Company stressed that the title of the Joint Petition, "West Penn Power Company Joint Petition for Settlement and for Modification of the 1998 Restructuring Settlement," should have been sufficient to give the University notice that its rights could be impacted. The University should also have noticed that the Joint Petition was revised to carry both docket numbers, *i.e.* the 2003 Petition and the Restructuring case. The Company conceded that the Amended Joint Petition was not published in the *Pa. Bull.* or served on the restructuring parties. However, it disputed the need for further notice because there were few changes from the Joint Petition to the Amended Joint Petition and no new issues were included which would have further revised the restructuring settlement. Allegheny maintained that, given Penn State's failure to receive and/or read any of the notices, the University could not credibly argue that the notices were confusing or misleading. Allegheny R.B. at 25-30.

Allegheny dismissed Penn State assertions that the information Penn State received at the November 2004 meeting was insufficient. The Company noted that the subjects of the meeting

covered the main elements of the 2004 Joint Petition, including expected rises in generation costs, undercollection of stranded costs and generation rate cap increases and extensions in 2009 and 2010. Allegheny repeated its arguments that by July 2005, Penn State fully understood the impact of the May 11 Order and the exclusion of Tariff 37 rate schedules from the rate cap extensions. The Company again stressed the failure of Penn State to act on its knowledge of the limited scope of the extensions until it avoided the 2007 and 2008 rate increases for the Tariff 39 customers which were also included in the May 11 Order. Allegheny R.B. at 30-31.

c. OSBA

The OSBA filed a Reply Brief for the limited purpose of confirming an assertion made by Penn State that the OSBA's silence in this case should not be construed to be supportive of the Company. The OSBA then clearly added that its silence should also not be construed to be supportive of the Penn State position either. OSBA R.B. at 3-4.

2. Recommendation

Having reviewed the briefs, the pertinent portions of the record, the relevant portions of the Commission regulations and the Commission Orders, I find that Penn State had notice of the full scope of the 2003 proceedings and failed to act to protect its rights. As a result, it forfeited its opportunity to participate in the 2003 case and is not entitled to an extension of the rate caps for any electric service rendered pursuant to Tariff 37 in 2009 and 2010. My conclusion is based on the content of the notice in the bill inserts, the publication of the Joint Petition in the *Pa. Bull.* and Mr. Cooper's testimony.

Mr. Cooper's testimony was the critical key in understanding how the University failed to act. He testified that, after the electric bills were received, the actual bills were passed to him. He reviewed the bills and authorized pay-

ment. He specified that billing inserts were not sent to him and that he did not see the inserts at issue in this case. Tr. 115-116, 133. Mr. Cooper continued by explaining that at the time the Joint Petition was published in the *Pa. Bull.*, the University did not review the *Pa. Bull.* In fact, he added that he did not see the published version of the Joint Petition in September 2004 and did not begin to review the *Pa. Bull.* until June 2007. Tr. 113-114.

Even though Mr. Cooper did not see the bill inserts or the Joint Petition in the *Pa. Bull.*, my review of those documents led me to the conclusion that both formats were adequate to provide informed notice to Penn State. The University argued vociferously that the wording was inaccurate and inadequate to properly inform Penn State that Tariff 37 would not be subject to the rate cap extensions in 2009 and 2010. The University particularly focused on the fact that the notices specified that the rate caps would be extended for *all* customers which it believed was proof that Tariff 37 rates would be within the proposed extension. I disagree.

The first flaw in Penn State's logic is its insistence that it should have been notified specifically that Tariff 37 rates would *not* be included in the rate cap extension. This Commission and the litigants who appear before it simply do not operate under that premise in the normal course of business. Instead, the Commission and the parties define those interests which will be impacted by the requested relief. In the 2003 Petition case, the Company, initially, only requested to extend the time period for recovering stranded costs to the end of 2010. Because Penn State had already paid its Tariff 37 stranded cost obligation before the 2003 Petition was filed, the 2003 Petition was logically oriented only to the Tariff 39 customers. Those were the customers who would be subject to continued stranded cost payments. The settlement process added the extension of the rate caps. Given that the original Petition only concerned Tariff 39 customers, it was entirely logical that the extension was limited to those customers as well. When the parties agreed and signed the 2004 Joint Petition, they included Appendix A which listed the rate schedules

which would be subject to the cap extension. Not surprisingly, the vast majority of the Tariff 39 rates were listed with no reference to Tariff 37. Indeed, because Penn State has some satellite campuses within the Allegheny service territory, it has about 100 Tariff 39 accounts with the Company. Those accounts were included in Appendix A. Accordingly, I find nothing unusual or sinister (as argued by the University) in the omission of any reference to Tariff 37.

The second flaw in Penn State's argument is its attempt to say that the language of the notices specified that the rate caps were extended for *all* customers somehow lulled the University into believing that the extensions applied to Tariff 37, as well. My first problem with this argument is trying to conclude Penn State was misled by language it never read. Mr. Cooper testified that he did not read the bill inserts or the Joint Petition in the *Pa. Bull.* If Penn State did not know about the 2003 Petition, the 2004 Joint Petition and the contents of the bill inserts, then it could not have been confused the use of the words, "all customers." I hasten to add that, due to the University's dual status as both Tariff 39 customers and a Tariff 37 customer, the words, "all customers," were technically correct. Penn State was properly included within the scope of "all customers."

Having reviewed the bill insert, I find that it was sufficient to give notice to Penn State: 1) that the Restructuring Settlement was being amended; 2) that generation and distribution rate caps were going to be extended; 3) that the period for recovery of stranded costs was going to be extended; and 4) that the generation rate cap would increase in 2006, 2007, 2009 and 2010. (The bill insert was provided as Exh. 1 to WPP Co. St. 1-B at 6 in AP Exh. GBB-5. It was also provided in a larger, more legible format as PS Cross-Exam. Exh. 1.) Had Penn State representatives read the notice, they would have realized the importance of the proposed amendment to the restructuring settlement (a very important document to which Penn State was a signatory), the extension of the stranded cost recovery period and the extension of the rate caps which would produce a concurrent rise in the generation cap (almost annually). At this point (had

the notice been read), the University would have known it could be impacted by the case.

The Joint Petition as published in the *Pa. Bull.* provided an even clearer message. (A copy of the Joint Petition was provided as AP Exh. GBB-3.) Had Penn State representatives read the *Pa. Bull.*, the title of the document and the addition of the restructuring docket number would have alerted the University that the restructuring settlement was being amended to change the rates and rate caps and that Appendix A contained a list of the proposed increases to the generation rate schedules for 2008, 2009 and 2010. Joint Petition at ¶¶ 11a-11d. At this point, the University should have known that its rights were at risk. Even though none of the Appendices (A, B, C and D) noted in the text of the Joint Petition were included in the *Pa. Bull.*, Penn State was on notice to find a copy of Appendix A to learn more. If it had done so, it would have learned that the proposed changes to the rate schedules only impacted its Tariff 39 accounts and would have known that it had the opportunity to be heard on the subject of Tariff 37.

While I agree with the Company that Penn State should have known about the events leading to the exclusion of Tariff 37 from the terms of the 2005 Amended Joint Petition and the Commission's approval of the same in the May 11 Order, I did not find all of Allegheny's arguments persuasive. More specifically, I cannot agree that service of any of the 2003 Petition documents on the former attorneys for Penn State in the restructuring case was valid service and notice to the University. Indeed, Allegheny submitted the evidence which helped undermine this argument. AP Cross-Exam. Exh. 5 demonstrated that the Company knew that Mr. Cooper, not the University's former attorneys, was the official contact person. Allegheny simply could not use the former attorneys as a contact point when it knew that Mr. Cooper was the official contact. Penn State correctly pointed out that according to this Commission's regulations, service on its former attorneys, who had not entered their appearance on behalf of the University in the 2003 Petition case, was not effective. 52 Pa. Code §1.55. The University added

that Mr. Cooper, aware the client relationship was ended years before, testified he would not have expected the former attorneys to contact him, even if they had received the documents in question. Tr. 125. Under these circumstances, I find that service of any 2003 Petition case documents on the Thomas, Thomas, Armstrong and Niesen firm was not valid service of effective notice on Penn State.

Allegheny asserted that the Penn State notes about a November 2004 meeting between representatives of the Company and the University indicated that Penn State was aware that Allegheny was not extending the rate caps for Tariff 37. AP Cross-Exam. Exh. 4. The Company noted that the subjects of the meeting covered the main elements of the 2004 Joint Petition, including expected rises in generation costs, undercollection of stranded costs and generation rate cap increases and extensions in 2009 and 2010. Allegheny maintained that its interpretation of the November 2004 notes was confirmed by Mr. Cooper's e-mail, dated July 20, 2005. AP Cross-Exam. Exh. 3. The Company criticized the Penn State representatives for failing to understand the subject of the meeting and/or failing to ask the right questions. I only agree with Allegheny's interpretation of the minutes of the November meeting and the July e-mail to a very limited extent.

Given that Penn State personnel did not read the bill inserts or the Joint Petition as published in the September 2004 *Pa. Bull.*, I do not find it surprising that the University representatives at the November 2004 meeting did not ask questions about the 2003 Petition case nor would I expect them to relate the subjects of the meeting to the case. As a result, I cannot attribute their notes from the meeting as somehow cross-referenced to the Petition case.

My review of Mr. Cooper's July 20 e-mail did not lead me to the conclusion that it confirmed much about the November meeting. Mr. Cooper's portion of the e-mail contained the following words: "fyi, as we spoke." AP Cross-Exam. Exh. 3. Obviously, he was forwarding a message from Mr. Burns (another Penn State employee) to Ms. Miller and Messrs. Harris, Prinkey and Smith (other Penn State em-

ployees). Mr. Cooper gave no insight about his agreement or disagreement with Mr. Burns' message. Mr. Cooper was acting as a conduit to the other employees, no more, no less. Mr. Burns' message summarized the information presented to him by Mr. J.P. Tambourine (an Allegheny employee) from a recent meeting or conversation between the two men. After the summary; which included references, 1) that he was told the current Tariff 37 rates would extend through 2008, 2) that the rate cap extension would not apply, 3) that Penn State would be buying service at market rates, and 4) that the Company was unsure what "market rates" meant; Mr. Burns added the following question: "Who do you want to take the lead in scheduling meetings with Allegheny to discuss the new market rates?" *Id.* While I agree that Mr. Burns' notes show that some similar subjects were discussed at the November meeting, I cannot conclude that he endorsed Mr. Tambourine's information on behalf of the University.

In conclusion, I find that Penn State had reasonable notice of the scope of the 2003 Petition case and that its Tariff 37 rights could be impacted. Accordingly, all of its due process rights were properly protected, and it failed to use its opportunity to participate in that case due to its own inactions and insufficient administrative procedures.

D. *PROCUREMENT*

1. *Stipulated Matters*

With my encouragement Allegheny and Penn State agreed on the record of the June 18, 2008 hearing to adopt a procurement system by stipulation in the event that Penn State's Declaratory Order Petition was denied by the Commission and determined that the generation rate cap extension was not applicable to Tariff 37 services to University Park. At that hearing, the record of the prior Allegheny Petition for Approval of a Default Service Program at Docket No. P-00072342 was incorporated into the record of this proceeding for the purpose of providing an evidentiary record to support the

Commission's findings required to approve the Joint Stipulation. The Joint Stipulation was filed on June 30, 2008. (A copy of the Joint Stipulation is attached to this Recommended Decision.) The terms of the Joint Stipulation are generally self-explanatory and will not be reviewed in detail. Penn State provided the following succinct summary of its contents.

The Joint Stipulation provides for two 12-month fixed price procurement options and a 24-month fixed price procurement option with quarterly reconciliations. It is based on the method of default service proposed by Judge Cocheres in his Initial Decision, issued May 23, 2008, in Allegheny's post-2010 DSPP proceeding at Docket No. P-00072342 and is consistent with and patterned after the fixed price option approved by the Commission in the PPL Electric Utilities Corporation Competitive Bridge Plan proceeding at Docket No. P-00062227.

PS M.B. at 38. I note that at this Commission's Public Meeting held on July 17, 2008, the Commission completed a binding poll on the issues related to Allegheny Petition at Docket No. P-00072342. At that time, the Commission voted to approve the procurement plan for Service Type 40 customers which included Penn State and an almost identical plan to the one in the Joint Stipulation. Given that I have recommended the denial of the Penn State Petition for a Declaratory Order, I now recommend the approval of the Joint Stipulation so that a procurement plan can be put in place to be effective on January 1, 2009.

E. *MISCELLANEOUS TARIFF ISSUES*

1. *System Loss Factors*

Allegheny and Penn State agreed in the Allegheny Petition case at Docket No. P-00072342 and in this case that the system loss factors in Tariff 37 should be corrected to show 1.07447 for on-peak usage and 1.04325 for off-peak usage. I agree and recommend the adoption of these revisions.

2. Self-Generation

Penn State has chosen to revisit this issue which was discussed in the prior Allegheny Petition case at Docket No. P-00072342. The record reflects some limited agreement on the issue of Penn State's plan to provide emergency power during a campus outage. There is also a valid inquiry from the Company on the issue of University plans to increase its generation capacity. There also appears to be some willingness by the Company to investigate these issues informally. And finally, Allegheny has created some confusion about whether it is even talking about the language challenged by the University. Given that I have recommended that rate caps for Penn State be permitted to expire at the end of 2008, I recommend that this Commission encourage more customer flexibility to meet the challenges of open market energy procurement. Some of the language in the tariff appears to be outdated, particularly the limitations on self-generation. By virtue of the terms of the Joint Stipulation, the parties will need to work together to implement a viable procurement policy. I recommend that the parties meet to come to agreement on the issues of emergency power planning and elimination of self-generation restrictions and the encouragement of more dialogue on the issue of increased University generation capacity. If the parties cannot agree, they may seek mediation or request that the Commission facilitate discussions. I also recommend that the Commission declare paragraph 5 of Tariff 37, Original Page No. 6-3 to be unjust and unreasonable and violative of Section 2804(2) of the Public Utility Code and to order its cancellation effective on January 1, 2009, the date Penn State must start to procure power in the marketplace. Penn State has carried its burden of proving the tariff language is outdated and violative of the Public Utility Code. 66 Pa. C.S. §2804(2).

F. APRIL 22 CONSOLIDATION ORDER

By letter dated July 15, 2008, Allegheny requested that the Commission correct an inaccurate reference to the Company's Answer to

Penn State's Petition for a Declaratory Order in the April 22 Consolidation Order. It raised this issue because it believed that the Penn State Reply Brief had used that reference in the Consolidation Order to argue that Allegheny had presented inconsistent positions to the Commission.

By letter dated July 18, 2008, the University responded to the Company's letter and argued that Allegheny's positions continued to be inconsistent throughout the litigation process.

The portion of the Consolidation Order which concerned Allegheny stated, as follows:

Allegheny opines that Penn State *could* have participated in the 2003-2005 proceeding on Allegheny's *Second Supplement Petition*, and *if* it had, it *could* have obtained the result it desires now. Also, *if* Penn State had intervened and signed the *Joint Petition*, Allegheny would have included Penn State's load in its procurement program for 2009 and 2010.

Id. at 6. (*italic added.*) The Company provided the following excerpt from its Answer for comparison purposes.

15c. The statements in Paragraph 15c constitute legal argument which need not be admitted or denied. Had Penn State intervened in the 2003-2005 proceeding, Penn State may or may not have obtained the result it desires now. Had Penn State intervened in the 2005 Settlement, and had Penn State obtained the results it wants now, both conjectural events, Allegheny Power could have included Penn State's load in its procurement program for 2009 and 2010.

Id. at 4. My comparison of the language in the Answer to the language in the Consolidation Order led me to the conclusion that the Order's summary was accurate and does not require correction. More specifically, I interpret the skillful use of the words "could" and "if" to mean that there was a possibility (not a certainty) that intervention might have led to inclusion of

Tariff 37 in the cap extension; and "if that had happened, the Company would have included that load in the procurement program for 2009 and 2010. The Consolidation Order summary retained the meaning set forth in paragraph 15c. There is no need to grant the Company's request.

III. ORDER

THEREFORE,
IT IS RECOMMENDED:

1. That the Petition of The Pennsylvania State University for Declaratory Order Concerning the Generation Rate Cap of the West Penn Power Company d/b/a Allegheny Power at Docket No. P-2007-2001828 is denied.

2. That the Joint Stipulation, filed June 30, 2008, and attached to the Recommended Decision and signed by The Pennsylvania State University and West Penn Power Company d/b/a Allegheny Power is approved.

3. That the Petition of the West Penn Power Company d/b/a Allegheny Power for Approval of its Retail Electric Default Service Program and Competitive Procurement Plan for Service at the Conclusion of the Restructuring Transition Period for Tariff 37, as modified by the Joint Stipulation filed on June 30, 2008, at Docket No. P-2008-2021608, is hereby granted in part and denied in part in accordance with the Recommended Decision.

4. That the West Penn Power Company d/b/a Allegheny Power shall implement an Electric Default Service Program and Competitive Procurement Plan, starting on January 1, 2009 and ending December 31, 2010, as more fully described in the Joint Stipulation and Recommended Decision.

5. That the West Penn Power Company d/b/a Allegheny Power shall file a tariff supplement not later than 30 days after the Commission's Order, which supplement shall incorporate all of the changes needed to implement the Commission-approved Electric Default Service Program and Competitive Procurement Plan for Tariff 37 and other related conditions of service.

6. That the parties meet to come to agreement on the issues of emergency power plan-

ning and elimination of self-generation restrictions and the encouragement of more dialogue on the issue of increased University generation capacity. If the parties cannot agree, they may seek mediation or request that the Commission facilitate discussions.

7. That paragraph 5 of Tariff 37, Original Page No. 6-3, is unjust and unreasonable and violative of Section 2804(2) of the Public Utility Code and shall be cancelled effective on January 1, 2009.

8. That upon acceptance and approval by the Commission of the tariff supplement filed by West Penn Power Company d/b/a Allegheny Power consistent with the Commission's Order, this proceeding shall be marked closed.

DATED: July 28, 2008

/s/ Louis G. Cocheres
Louis G. Cocheres
Administrative Law Judge

JOINT STIPULATION

West Penn Power Company d/b/a Allegheny Power ("Allegheny Power") and The Pennsylvania State University ("Penn State") (collectively "the Parties") enter into a Joint Stipulation to resolve the potential provision of electric generation default service to Penn State under Allegheny Power's Tariff 37 for the years 2009 and 2010. The Parties Stipulate and Agree as follows:

BACKGROUND

1. On December 3, 2007, Penn State filed with the Pennsylvania Public Utility Commission ("Commission") a Petition for Declaratory Order at Docket No. P-2007-2001828 requesting a declaration from the Commission that Penn State is entitled to a continued generation rate cap under Allegheny Power's Tariff 37 for the years 2009 and 2010.

2. On January 21, 2008, Allegheny Power filed a Petition with the Commission at Docket No. P-2008-2021608 requesting approval of a

default service plan for Penn State under Tariff 37 for the years 2009 and 2010. The proceedings at Docket No. P-2007-2001828 and at Docket No. P-2008-2021608 were consolidated by the Commission by Order entered April 22, 2008.

3. On October 25, 2007, Allegheny Power filed with the Commission a Petition at Docket No. P-00072342 for approval of a general default service plan for all Allegheny Power Tariff 37 and Tariff 39 retail customers in Pennsylvania for a defined period beginning January 1, 2011.¹⁰ On May 23, 2008, the presiding Administrative Law Judge ("ALJ") issued an Initial Decision ("ID") regarding Allegheny's proposed default service plan. In the ID, the ALJ proposed a method of default service for Tariff 37 beginning January 1, 2011.

4. At the hearing of the consolidated proceedings on June 18, 2008, Allegheny Power and Penn State agreed to develop a Joint Stipulation on the method of default service for Tariff 37 for the years 2009 and 2010, based on the ALJ's ID and the method of default service described in the ID for Tariff 37. The Joint Stipulation was to be conditioned on the following presumptions: (i) that Penn State's Petition for Declaratory Order may not be granted, and (ii) that the Joint Stipulation would not become effective in the event that Penn State's Petition for Declaratory Order is granted.

STIPULATION TERMS

5. Allegheny Power agrees to provide Tariff 37 service to University Park with two 12-month fixed price procurement options and a 24-month fixed price procurement option. Allegheny Power's solicitations for fixed price service will occur close to the beginning of the applicable delivery periods as more fully discussed in paragraph 6. Allegheny Power's solicitations will use the Request for Proposal ("RFP") documents and procedures as submitted by Allegheny Power in its Petition at Docket No. P-2008-2021608.

6. Allegheny Power and Penn State University will cooperatively determine a final schedule for bids to be conducted as follows: (i)

during the fall of 2008 for the contract term beginning on January 1, 2009, and, if necessary (ii) during the fall of 2009 for the contract term January 1, 2010 - December 31, 2010.

7. In lieu of an independent monitor for oversight of the procurement and bid selection process as proposed by Allegheny Power in its Petition at Docket No. P-00072342, the Parties agree that Penn State representatives will participate in bid day activities at Allegheny Power's Greensburg Corporate Center in Greensburg, Pennsylvania.

8. Once bids are received in accordance with the RFP criteria, Penn State will have 24 hours from the closing of the bid receipt period (4:30 pm Eastern Prevailing Time) to execute its acceptance or rejection of the lowest priced bid for fixed price service for the applicable contract term.

9. If Penn State accepts the low price bid, Penn State agrees to take Tariff 37 default service for the entire term of the agreement for fixed price service. If Penn State rejects the low price bid, Penn State will then take Tariff 37 default service under Allegheny Power's hourly priced default service option or, in the alternative, Penn State will take generation service from a Commission-licensed competitive electric generation supplier of Penn State's choice. If Penn State elects to take generation service from a Commission-licensed competitive electric generation supplier, or the hourly priced default service option, in lieu of fixed price service during the first 12-month term option, Penn State is not eligible to return to fixed price service until the second 12-month term option.

10. The fixed price procurement options will have quarterly reconciliations via an Energy Cost Adjustment ("ECA") surcharge, which is an automatic adjustment clause for any overrecovery or underrecovery of the actual costs for the provision of default generation supply from Allegheny Power. The ECA will be applicable to Tariff 37, even in the event that Penn State takes generation service from a Commission-licensed competitive electric generation supplier during 2009 and 2010. Any ECA balance remaining as of December 31, 2010 will be paid by Penn State to Allegheny

Power if the ECA balance is an undercollection, or will be paid by Allegheny Power to Penn State if the ECA balance is an overcollection, by no later than March 31, 2011.

11. Allegheny Power withdraws its request for waiver of 52 Pa. Code §54.187(f) governing interest on over- and undercollection of default service revenues.

12. The Parties submit this Stipulation as evidence of their agreement with regard to these issues in the above-captioned matter.

Respectfully Submitted,

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FOOTNOTES

Opinion and Order

¹See, *Petition of PPL Electric Utilities Corporation for Approval of a Competitive Bridge Plan*,

Docket No. P-00062227 (Order Entered May 10, 2007).

²I.D. at 110. This Commission subsequently adopted the Initial Decision, with certain modifications not pertinent here. *Petition of the West Penn Power Company d/b/a Allegheny Power for Approval of its Retail Electric Default Service Program and Competitive Procurement Plan for Service at the Conclusion of the Restructuring Transition Period*, Docket No. P-00072342 (Order entered July 25, 2008).

Recommended Decision

¹The following description was taken largely from the Procedural History in the Allegheny Main Brief and in part from the Procedural History of Penn State Main Brief with additional editing from the undersigned.

²In 2003, Allegheny filed a petition with the Commission to address the underrecovery of stranded costs (2003 Petition), which culminated in the Commission's May 11, 2005 final and unappealed Order. The May 11 Order approved a settlement providing a 2-year extension of Allegheny Power's generation rate cap to the end of 2010 at increasing default service rates for specific Tariff 39 rate schedules, during which the Company would recover its deferred stranded costs.

³*Petition of West Penn Power Company d/b/a Allegheny Power for Approval of its Retail Electric Default Service Program and Competitive Procurement Plan for Service at the Conclusion of the Restructuring Transition Period*, Docket No. P-00072342.

⁴*Petition of PPL Electric Utilities Corporation for Approval of a Competitive Bridge Plan*, Docket No. P-00062227 (Order Entered May 10, 2007). Mr. Baron, witness for the West Penn Power Industrial Intervenors, reviewed and endorsed the PPL Bridge Plan in this case. Tr. 499-502.

⁵I.D., p. 110.

⁶Tr. 44.

⁷To meet the "prevailing market price" standard, the default service provider must procure all generation supply through a Commission-approved competitive bidding process. 52 Pa. Code §54.186.

⁸The University also receives generation, transmission and distribution service from Allegheny under rate schedules other than Tariff 37 for approximately 100 additional accounts at the University Park campus and campuses at New Kensington, Fayette

and Mont Alto. In 2006, the University received 37,935,513 kWh of electric energy from Allegheny and paid Allegheny \$2,110,749 for generation, transmission and distribution service through these other accounts. Penn State St. No. 1 at 5.

⁹AP St. 1-R, p. 6, quoting PSU St. 1 at Docket No. P-00072342, p. 5.

¹⁰*Petition of West Penn Power Company d/b/a Allegheny Power for Approval of its Retail Electric Default Service Program and Competitive Procurement Plan for Service at the Conclusion of the Restructuring Transition Period*, Docket No. P-00072342.

Additionally, the commission holds that the carrier had violated commission regulations in not breaking out its package price into separate charges for basic local service versus long-distance service.

Commission instructs the carrier to (1) reinstate the subscriber's toll services; (2) relieve her of all existing arrearage liabilities; (3) clarify its terms and file a formal tariff revision governing conference calls and bridges; and (4) amend its billing format so as to comply with rules requiring basic service rates to be listed as a separate charge, even on bills for bundled services.

Veronica A. Hannevig

v.

Trinsic Communications, Inc.

F-02146362

Pennsylvania Public Utility Commission
September 25, 2008;
entered September 29, 2008

ORDER finding that a competitive local exchange telephone carrier had wrongfully terminated the interLATA and interstate toll services of a residential telecommunications customer who had subscribed to a bundled service plan. Moreover, the carrier is admonished for continuing to charge the customer the full package price even though she was no longer able to use the long-distance portion of the bundled service plan.

Commission rejects the carrier's claims that its actions were proper because the customer had used the service for accessing a "conference bridge," which was prohibited under the carrier's stated policies. Commission explains that the carrier had not incorporated its policy terms into tariff form nor had such provisions ever received commission approval. Commission says that, absent such approval, the carrier did not have authority to enforce those policy terms. Further, the commission rules that the policy was confusing with respect to the difference between prohibited "conference bridging" and permitted "conference calling."

1. EVIDENCE, §11

[PA.] Burden of proof — In complaint proceeding — As resting with complainant — Ultimate commission decision to be based on substantial evidence.
p. 502.

2. SERVICE, §451

[PA.] Telecommunications — Misuse of service — Usage as triggering a fraud search — Subscriber dialing a "conference bridge" rather than a simple "conference call" — But no actual allegation of fraud.
p. 503.

3. SERVICE, §464

[PA.] Telecommunications — Restrictions on use — As to conference calling — Policy terms proscribing "conference bridging" but permitting simple "conference calls" — But terms ambiguous and not incorporated into tariffs — Impropriety of carrier's reliance on such terms to suspend customer's toll service for engaging in prohibited conference bridging.
p. 505.

4. SERVICE, §470

[PA.] Telecommunications — Toll service — Restrictions on use — As to conference calling — Policy terms proscribing "conference bridging" but permitting simple "conference

APPENDIX B

*Petition of Pennsylvania State University for Declaratory Order
Concerning the Generation Rate Cap of the West Penn Power Company
d/b/a Allegheny Power*

Docket No. P-2007-20018 *et al*

103 Pa. P.U.C. 451

FINAL ORDER ENTERED SEPTEMBER 11, 2008

¹⁶This subject is fully discussed in the *SEARCH Report* in Section G (Standardization of NGDC System Operations) at pp. 11-14.

¹⁷This subject is fully discussed in the *SEARCH Report* in Section J (Nomination and Delivery Requirements) at pp. 21-25.

¹⁸For a more thorough explanation of how nomination rules and delivery requirements relate to tolerance bands and cash out/penalties, see *SEARCH Report* at pp. 21-23.

¹⁹This subject is fully discussed in the *SEARCH Report* in Section K (Tolerance Bands) at pp. 25-28.

²⁰This subject is fully discussed in the *SEARCH Report* in Section L (Cash Out/Penalties) at pp. 28-29.

²¹This subject is fully discussed in the *SEARCH Report* in Section M (Electronic Bulletin Boards) at pp. 29-31.

²²Data related to imbalance penalties, cash out penalties and system gaming that were filed by PGW and Hess at this investigation docket in compliance with the Commission's order in *PA PUC, et al. v. Philadelphia Gas Works*, order entered September 28, 2007 at Docket No. R-00061931, pp. 126-127, shall be considered in this rulemaking.

the school is not entitled to the benefits the signatories would receive. Moreover, the commission determines that the school had been given sufficient notice that such a proceeding could have a bearing on its own previously arranged rate schedules, yet had chosen not to participate.

Commission points out that the utility's recommendation to extend the rate caps had been specific to those areas in which competitive market maturity had not yet been achieved. It likewise had been targeted at those customers that had not yet completed payment of their proportionate share of the utility's restructuring-related stranded cost liabilities, whereas the university, pursuant to a special agreement with the utility, had already paid off its competitive transition charge obligations. Accordingly, the commission concludes there is no reason that the university needs continued protection via rate caps.

Re The Pennsylvania State University

P-2007-2001828

Re West Penn Power Company dba Allegheny Power
P-2008-2021608

Pennsylvania Public Utility Commission
September 11, 2008

PETITION by a university for a declaratory ruling that an extension of an electric utility's generation rate cap should apply to the rate tariff under which the university's main campus is served; denied. Commission finds numerous grounds for rejecting the school's request. It explains, first, that the order authorizing the rate cap extension had been premised on an underlying settlement in a proceeding in which the university had failed to participate. Commission says that, by not being a party to the agreement,

1. EVIDENCE, §11

[PA.] Presumptions and burden of proof — As resting with the proponent of a rule, order, plan, or other action — Preponderance of the evidence standard.
p. 457.

2. JUDGMENT, §3

[PA.] Declaratory rulings — Propriety of only when no true issue of fact is involved — Declaratory orders as a matter of commission discretion rather than a matter of right.
p. 458.

3. PROCEDURE, §7

[PA.] Determination of preliminary questions — Declaratory rulings — Propriety of only when no true issue of fact is involved — Declaratory orders as a matter of commission discretion rather than a matter of right.
p. 458.

4. RATES, §332

[PA.] Electric rate design — Special charges — Pursuant to restructuring — Com-

petitive transition charge (CTC) — For the recovery of stranded costs — Nexus between stranded cost payments and generation rate caps — No need to make CTC payments to continue service under rate caps — Conversely, no need for ongoing rate caps when customers continue to make CTC payments — *Dicta* only.
p. 462.

5. RATES, §321

[PA.] Electric rate design — Pursuant to restructuring — Enactment of generation rate caps in conjunction with special cost recovery charges — Competitive transition charge (CTC) — For recouping stranded costs — Nexus between stranded cost payments and rate caps — No need to make CTC payments to continue service under rate caps — Conversely, no need for ongoing rate caps when customers continue to make CTC payments — *Dicta* only.
p. 462.

6. RATES, §321

[PA.] Electric rate design — Restructuring-related institution of generation rate caps — Pending transition to more competitive market — Extension of rate cap expiration date — As based on settlement negotiations — Extension as not applicable to nonparticipants — As premised in part on customer nonfulfillment of competitive transition charge (CTC) obligations — No extension of generation rate cap to university customer — Factors — Failure of school to participate in underlying proceedings — Prior fulfillment of CTC payments.
p. 464.

7. RATES, §234

[PA.] Schedules and procedure — Extension of expiration date for special rate — Electric restructuring-related generation rate caps — Extension as based on settlement negotiations — Extension as not applicable to nonparticipants — As premised in part on customer nonfulfillment of competitive transition charge (CTC) obligations — No extension of generation rate cap to university customer — Factors — Failure of school to participate in underlying

proceedings — Prior fulfillment of CTC payments.
p. 464.

8. RATES, §234

[PA.] Schedules and procedure — Amendment of existing tariffs — Commission orders so authorizing — As usually rendered on a tariff-specific basis — Inapplicability of amendment to any tariff not explicitly listed — Extension of generation rate cap expiration date — Extension as not available to university's unmentioned Tariff 37.
p. 464.

9. ELECTRICITY, §1

[PA.] Industry restructuring — Transition to more competitive market — Generation rate caps as one element thereof — Extension of rate cap expiration date — As based on settlement negotiations — Extension as not applicable to nonparticipants — As premised in part on customer nonfulfillment of competitive transition charge (CTC) obligations — No extension of generation rate cap to university customer — Factors — Failure of school to participate in underlying proceedings — Prior fulfillment of CTC payments.
p. 464.

10. MONOPOLY AND COMPETITION, §54

[PA.] Electric restructuring — Transition to more competitive market — Generation rate caps as one element thereof — Extension of rate cap expiration date — As based on settlement negotiations — Extension as not applicable to nonparticipants — As premised in part on customer nonfulfillment of competitive transition charge (CTC) obligations — No extension of generation rate cap to university customer — Factors — Failure of school to participate in underlying proceedings — Prior fulfillment of CTC payments.
p. 464.

11. PROCEDURE, §23

[PA.] Notice requirements — Parties notified — Designated contact person in one proceeding as not necessarily the same as in other

proceedings — Reasonableness of service of notice — Electric proceeding.
p. 466.

12. PROCEDURE, §43

[PA.] Service of papers — Notice of proposed tariff and schedule changes — Parties notified — Designated contact person in one proceeding as not necessarily the same as in other proceedings — Reasonableness of service of notice — Electric proceeding.
p. 466.

13. RATES, §649

[PA.] Procedural matters — Notice requirements — Parties notified — Designated contact person in one proceeding as not necessarily the same as in other proceedings — Reasonableness of service of notice — Electric proceeding.
p. 466.

14. PROCEDURE, §23

[PA.] Notice requirements — Parties notified — Service on a law firm rather than actual party — But counsel of record in one proceeding as not necessarily the same as in other proceedings — Notice as not perfected unless served on lawyer that has entered an appearance on that party's behalf in the new proceeding — Electric proceeding.
p. 467.

15. PROCEDURE, §43

[PA.] Service of papers — Service on a law firm rather than actual party — But counsel of record in one proceeding as not necessarily the same as in other proceedings — Notice as not perfected unless served on lawyer that has entered an appearance on that party's behalf in the new proceeding — Electric proceeding.
p. 467.

16. RATES, §649

[PA.] Procedural matters — Notice requirements — Parties notified — Service on a law firm rather than actual party — But counsel of record in one proceeding as not necessarily the same as in other proceedings — Notice as

not perfected unless served on lawyer that has entered an appearance on that party's behalf in the new proceeding — Electric proceeding.
p. 467.

17. ATTORNEYS AT LAW

[PA.] Entering of appearance — As factor in determining compliance with notice requirements — Service on a law firm rather than actual party — But counsel of record in one proceeding as not necessarily the same as in other proceedings — Notice as not perfected unless served on lawyer that has entered an appearance on that party's behalf in the new proceeding — Electric proceeding.
p. 467.

18. PROCEDURE, §23

[PA.] Notice requirements — Sufficiency of notice — Use of multiple formats — Via bill inserts — Via publication in the *Pennsylvania Bulletin* — Captioning as a factor — Reasonableness — Electric proceeding.
p. 468.

19. RATES, §243

[PA.] Schedules and procedure — Notice requirements — Sufficiency of notice — Use of multiple formats — Via bill inserts — Via publication in the *Pennsylvania Bulletin* — Captioning as a factor — Reasonableness — Electric proceeding.
p. 468.

20. RATES, §649

[PA.] Procedural matters — Notice requirements — Sufficiency of notice — Use of multiple formats — Via bill inserts — Via publication in the *Pennsylvania Bulletin* — Captioning as a factor — Reasonableness — Electric proceeding.
p. 468.

21. RATES, §345

[PA.] Electric rate design — Large power customers — University campus — Post-restructuring tariff terms — Upon the expiration of generation rate caps — Necessity for new procurement plan — Stipulation calling for

joint 12-month and 24-month fixed price options, with quarterly reconciliation — Reasonableness.
p. 469.

22. RATES, §339

[PA.] Electric rate design — Types of service — Default service — On a post-restructuring basis — Effect of expiration of generation rate caps — Necessity for new procurement plan — Stipulation calling for joint 12-month and 24-month fixed price options, with quarterly reconciliation — University campus customer — Reasonableness.
p. 469.

23. MONOPOLY AND COMPETITION, §54

[PA.] Electric restructuring — Default service — On a post-restructuring basis — Effect of expiration of generation rate caps — Necessity for new procurement plan — Stipulation calling for joint 12-month and 24-month fixed price options, with quarterly reconciliation — University campus customer — Reasonableness.
p. 469.

24. ELECTRICITY, §1

[PA.] Industry restructuring — Default service — On a post-restructuring basis — Effect of expiration of generation rate caps — Necessity for new procurement plan — Stipulation calling for joint 12-month and 24-month fixed price options, with quarterly reconciliation — University campus customer — Reasonableness.
p. 469.

25. SERVICE, §320

[PA.] Electric — Amendment of 30-year-old tariff language — Addressing availability of customer-generated capacity as standby power — Lifting of restrictions on self-generating customers — Incorporation of customer's self-generated capacity into utility's emergency power planning policies.
p. 470.

26. RATES, §342

[PA.] Electric rate design — Standby power — Availability of customer-generated capacity as standby power — Amendment of 30-year-old tariff language thereto — To lift restrictions on self-generating customers — Incorporation of customer's self-generated capacity into utility's emergency power planning policies.
p. 470.

27. ELECTRICITY, §4

[PA.] Generating plant and interconnected systems — Operating practices — Availability of customer-generated capacity as standby power — Amendment of 30-year-old tariff language thereto — To lift restrictions on self-generating customers — Incorporation of customer's self-generated capacity into utility's emergency power planning policies.
p. 470.

28. COGENERATION, §10

[PA.] Operating practices — Availability of customer-generated capacity as standby power — Amendment of 30-year-old tariff language thereto — To lift restrictions on self-generating customers — Incorporation of customer's self-generated capacity into utility's emergency power planning policies.
p. 470.

Commissioners Present:

James H. Cawley, Chairman
Tyrone J. Christy, Vice Chairman
Robert F. Powelson
Kim Pizzingrilli
Wayne E. Gardner

BY THE COMMISSION:

OPINION AND ORDER

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of The Penn-

sylvania State University (PSU), West Penn Power Company d/b/a Allegheny Power (Allegheny Power) and the Office of Small Business Advocate (OSBA), all filed on August 11, 2008, to the Recommended Decision (R.D.) of Administrative Law Judge (ALJ) Louis G. Cocheres, which was issued on July 30, 2008. On August 15, 2008, Replies to Exceptions were filed by PSU, Allegheny Power, and the OSBA.

History of the Proceeding

The Recommended Decision describes the history of this proceeding in detail. R.D. at 1-4. The following summary is based on that description.

On December 3, 2007, PSU filed a Petition for Declaratory Order (PSU's Petition), which was docketed at P-2007-2001828. PSU's Petition alleged that the generation rate cap for power to all customers of Allegheny Power had been extended for two additional years by our May 11, 2005 Order in *Petition of West Penn Power Company for Issuance of a Second Supplement to its Previous Qualified Rate Orders Under Sections 2808 and 2812 of the Public Utility Code*, Docket No. R-00039022 *et al.* (the *May 11, 2005 Order*). Despite this Order, PSU alleged, Allegheny Power had advised PSU that the generation rate cap extension did not apply to power supplied to PSU's University Park main campus. PSU asked this Commission to declare that

The extension of [Allegheny Power's] generation rate cap from the end of 2008 through the end of 2010 pursuant to the Order of the Commission entered May 11, 2005 at Docket Nos. R-00973981 and R-00039022 applies for service rendered by Allegheny [Power] to the University Park campus pursuant to Allegheny Retail PA Tariff 37.

PSU's Petition at 1.

On December 26, 2007, Allegheny Power filed an Answer and New Matter requesting that the Commission dismiss PSU's Petition. In its New Matter, Allegheny Power explained that

PSU's main campus receives service pursuant to Allegheny Power's Tariff 37. It argued that the *May 11, 2005 Order* approved a settlement extending the generation rate caps to the end of 2010 for specific Tariff 39 rate schedules. Therefore, according to Allegheny Power, PSU's Tariff 37 generation rate cap was not extended under the *May 11, 2005 Order*. On January 15, 2008, PSU filed a Reply to Allegheny Power's New Matter.

Allegheny Power subsequently filed a Petition (Allegheny Power's Petition) requesting Commission approval of a default service plan for PSU under Tariff 37 during 2009 and 2010, which was docketed at P-2008-2021608. The default service plan proposed by Allegheny Power was to apply only if PSU did not obtain generation service from a Commission-licensed competitive electric generation supplier.

Petitions to Intervene in the proceedings on Allegheny Power's Petition were filed and granted for PSU, Constellation NewEnergy Inc. and Constellation Energy Commodities Group, Inc., The Office of Consumer Advocate (OCA) and OSBA also intervened. Following a Prehearing Conference held on March 18, 2008, ALJ Cocheres issued a Prehearing Order confirming and supplementing the litigation schedule and certain other rulings made during the Prehearing Conference. This Prehearing Order also denied the Petition to Intervene of West Penn Power Industrial Intervenors.

On April 22, 2008, this Commission entered an Order in the proceedings on PSU's Petition (*April 22, 2008 Order*). Our *April 22, 2008 Order*, at 8, requested additional information before rendering a determination on PSU's Petition. It also consolidated the proceedings on PSU's Petition with the proceedings on Allegheny Power's Petition. *April 22, 2008 Order*, at 9.

On October 25, 2007, Allegheny Power filed a Petition requesting Commission approval of a general default service plan for all Allegheny Power Tariff 37 and Tariff 39 customers for a specified period beginning January 1, 2011, which was docketed at P-00072342. On May 23, 2008, ALJ Cocheres issued an Initial Decision in that proceeding

(the Initial Decision), proposing a method of default service for PSU under Tariff 37 beginning January 1, 2011. The plan as proposed by Allegheny Power and as adopted by the ALJ is as follows:

Allegheny Power agrees to place Penn State University in the ST 40 procurement group and provide that group with a twelve-month fixed price option with quarterly reconciliations. The solicitation for fixed price service would occur close to the beginning of the delivery period and the details of the service would be based on the large customer fixed price plan previously approved by the Commission for PPL as part of its Competitive Bridge Plan¹ such as: (1) customers indicating their interest in the fixed price option 30 days in advance of the solicitation; and (2) customers would affirmatively select the fixed price option within 30 days after the retail price is known. The Company also maintains its proposal to offer ST 40 customers hourly service. Should this approach be approved by the Commission, the Company envisions its compliance tariff establishing terms such as customers served by an electric generation supplier as of January 1, 2011 or during the 12-month fixed price term returning to default service (or new customers) may only take the hourly priced default service option; customers may not switch between the fixed price and hourly priced option during the twelve-month availability of fixed price service; and at the end of the twelve-month period, all nonshopping ST 40 customers on default service would be switched to hourly service.²

Evidentiary hearings were held on June 18 and 19, 2008. At the hearing on June 18, 2008, the ALJ incorporated the entire record from Allegheny's general default service case into these cases. Also at the hearing on June 18, 2008, Allegheny Power and PSU agreed to develop a Joint Stipulation on the method of default service under Tariff 37 for 2009 and 2010. The Joint Stipulation was to be based on the method of default service described in the Initial Decision, described above. The Joint

Stipulation was to be conditioned on the following presumptions: (i) PSU's Petition may not be granted, and (ii) the Joint Stipulation would not become effective if PSU's Petition is granted. On June 30, 2008 Allegheny Power and PSU filed a Joint Stipulation regarding procurement issues.

Main Briefs were filed on July 3, 2008, by Allegheny Power and PSU. Reply Briefs were filed on July 11, 2008, by Allegheny Power, PSU and the OSBA.

By correspondence dated July 15, 2008, Allegheny Power requested that the Commission make certain modifications to its *April 22, 2008 Order*. By correspondence dated July 18, 2008, PSU opposed Allegheny Power's request.

As stated previously, the ALJ issued his Recommended Decision on July 30, 2008. He recommended that PSU's Petition be denied, that the Joint Stipulation of PSU and Allegheny Power be approved, and that Allegheny Power's Petition be approved in part and denied in part. R.D. at 44. He also found part of Tariff 37 is unjust and unreasonable and violative of Section 2804(2) of the Public Utility Code (Code), 66 Pa. C.S. §2804(2). *Id.*, at 45.

As stated previously, PSU, Allegheny Power and the OSBA filed Exceptions on August 11, 2008, and Replies to Exceptions on August 15, 2008.

Background

Pursuant to the Electric Generation Competition and Customer Choice Act (Competition Act), 66 Pa. C.S. §§2801-2812, Allegheny Power filed with the Commission a restructuring proceeding at Docket No. R-00973981. PSU intervened in this proceeding. The parties to that proceeding negotiated a settlement, which was approved by the Commission by Order entered November 19, 1998, 91 Pa. PUC 700 (the *1998 Restructuring Settlement*). This settlement extended Allegheny Power's generation rate caps for three additional years, from January 1, 2006 through December 31, 2008. This settlement also established the stranded cost obligations for all Allegheny Power customers.

The *1998 Restructuring Settlement* applied to both Allegheny Power's Tariff 37 and Tariff 39. Tariff 37, which is the only tariff involved in the instant case, is the tariff by which PSU receives electric service to the University Park main campus. PSU is the only customer served on Tariff 37. "All other retail customers, including additional Penn State service locations that are not part of Penn State's University Park main campus, receive retail electric service from Allegheny Power under Tariff 39." R.D. at 1.

In 1999, PSU and Allegheny Power negotiated an agreement by which PSU would prepay its stranded cost obligations (the CTC Buyout Agreement). PSU made its final payment in accordance with the CTC Buyout Agreement in August 2003.

On November 25, 2003, Allegheny Power filed a petition with the Commission (the November 2003 Petition), which was docketed at a new docket number, R-00039022 (the *2003 Proceedings*). This petition sought:

[A] supplemental qualified rate order (QRO) to securitize [Allegheny Power's] remaining unsecuritized, unrecovered stranded costs allowed in its 1998 Restructuring Settlement, carrying costs, company savings, transaction fees and expenses, and to recover the supplemental intangible transition charge beyond December 31, 2008, which was to be the end point of [Allegheny Power's] stranded cost recovery period and generation rate cap as set forth in the 1998 Restructuring Settlement.

May 11, 2005 Order, at 4-5.

On September 7, 2004, the parties to the *2003 Proceedings* filed a Joint Petition for Settlement and for Modification of the 1998 Restructuring Agreement (Joint Petition). The Joint Petition, unlike the November 2003 Petition, proposed an extension of Allegheny Power's generation rate cap. Public notice of the Joint Petition was published in the *Pennsylvania Bulletin*, 34 Pa.B. 5326 (September 25, 2004), with a twenty-day intervention period. PSU did not intervene in the *2003 Proceedings*.

The parties to the *2003 Proceedings* subsequently amended the proposed settlement and submitted an Amended Joint Petition for Settlement and Modification of the 1998 Restructuring Agreement (the Amended Joint Petition). The Amended Joint Petition was approved by the Commission in the *May 11, 2005 Order*.

Discussion

We note that any issue that we do not specifically address herein has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corporation v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); also see, generally, *University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

A. Legal Standards

1. Burden of Proof

[1] Section 332(a) of the Code, 66 Pa. C.S. §332(a), provides that the proponent of a rule or order has the burden of proof. As a result, Allegheny Power has the burden of proof with regard to its default service plan for Tariff 37 for 2009 and 2010, and PSU has the burden of proof with regard to its request for a declaratory order.

Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990). That is, the evidence presented by the party with the burden of proof must be more convincing, by even the smallest amount, than that presented by the opposing party. *Se-Ling Hosiery v. Marquies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, this Commission's decision must be supported by substantial evidence in the record. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980).

2. Declaratory Order Standard

[2, 3] The Commission may issue a declaratory order in order to terminate a controversy or remove uncertainty. 66 Pa. C.S. §331(f). A declaratory order should be issued only when there is no outstanding issue of fact. The issuance of a declaratory judgment is within the Commission's discretion and is not a matter of right. *Petition of Philadelphia Gas Works for Establishment of Interim Rate Procedures and for a Declaratory Order*, Docket No. P-00001831, 94 Pa. PUC 411 (2000). Declaratory orders of the Commission are adjudications and are final orders that can be appealed. *Pa. Industrial Energy Coalition v. Pa. PUC*, 653 A.2d 1336 (Pa. Cmwlth. 1995, citing *Professional Paramedical Services, Inc. v. Pa. PUC*, 525 A.2d 1274 (Pa. Cmwlth. 1987), *appeal denied*, 538 A.2d 879 (Pa. Cmwlth. 1988).

B. PSU's Petition

There is no question that the instant matter involves a case or controversy, and that the uncertainty should be removed before December 31, 2008 (which Allegheny Power contends is the expiration date of the generation rate cap for Tariff 37). Although this case involves some factual disputes (e.g., whether Mr. Robert Cooper was designated as the contact person for communications from Allegheny Power to PSU related to the *1998 Restructuring Settlement*, R.D. at 38), the Commission finds that the public interest will be served by issuing a declaratory order on the PSU Petition at this time.

1. Positions of the Parties

The Parties agreed to a uniform outline for the presentation of arguments in their briefs. According to this outline, PSU set forth four distinct lines of argument for its contention that the generation rate cap for Tariff 37 was or should be extended: Commission decisions, statutes, equitable considerations, and corporate/affiliate impacts. Allegheny Power disputes each line of argument.

a. Relevant Commission Dockets

PSU argued that the *May 11, 2005 Order* extended the generation rate cap for Tariff 37. PSU noted that the *May 11, 2005 Order* did not explicitly exclude Tariff 37 from its extension of Allegheny Power's rate caps. Moreover, PSU argued that the *May 11, 2005 Order* did not implicitly exclude Tariff 37 from its extension of Allegheny Power's rate caps. PSU contended that none of the pertinent documents leading up to the *May 11, 2005 Order* referred to any distinction between Tariff 37 and Tariff 39 customers. To the contrary, PSU asserted, the plain language of the *May 11, 2005 Order* and the customer and public notices specified that "all customers" would be subject to the rate cap extension. PSU maintained that the Commission did not intend to draw a distinction between Tariff 37 and Tariff 39 customers, as evidenced by the Commission's Web page, which identified the end of 2010 as the end of the rate cap period for Allegheny Power. PSU M.B. at 18-21.

PSU noted that it entered into the CTC Buyout Agreement with Allegheny Power. PSU made the last payment, pursuant to this agreement, in August 2003. PSU contends that there is nothing in the *May 11, 2005 Order* to indicate that the Commission believed that the payment of stranded cost obligations resulted in the forfeiture of rate cap protection. PSU M.B. at 23-24.

Allegheny Power responded that the *May 11, 2005 Order* did not explicitly extend the generation rate cap for Tariff 37. Moreover, Allegheny Power argued that the Order did not implicitly extend that rate cap. Allegheny Power noted that the practice of this Commission is to reference only those tariffs that are modified by Orders. Therefore, the lack of any explicit reference to Tariff 37 means that Tariff 37 was not affected by the *May 11, 2005 Order*. In addition, Allegheny Power argued, there was no reason to include Tariff 37 customers in the rate cap extension, because PSU had already paid its stranded cost obligation and PSU did not intervene in the *2003 Proceedings*. A.P. M.B. at 11-16.

Allegheny Power contended that the CTC Buyout Agreement did not extend the rate cap protections set forth in the *1998 Restructuring Settlement*. A.P. M.B. at 13. In addition, Allegheny Power argued that the pertinent documents leading up to the *May 11, 2005 Order* clearly referenced certain rate schedules from Tariff 39, and only those rate schedules. A.P. R.B. at 8. Allegheny Power further noted that the *May 11, 2005 Order*, at page 20, included the following savings clause:

14. The provisions of the 1998 Restructuring Settlement and Commission Orders relating thereto shall remain applicable except as specifically amended in this proceeding pursuant to this Amended Joint Petition. In particular, the rate cap exceptions provided in the *1998 Restructuring Settlement*, which expressly incorporate the rate cap exceptions of Section 2804 of the Public Utility Code, shall remain applicable during the rate cap extensions provided in this Amended Joint Petition.

In its Reply Brief, PSU contended that the above savings clause saved the rate cap exceptions provided in the *1998 Restructuring Settlement*, but PSU's rate cap is not such an exception. Additionally, PSU contended that the only provisions that were saved were those not specifically amended by the *May 11, 2005 Order*. That Order specifically extended the rate cap for all Allegheny customers, including PSU. PSU R.B. at 6.

b. Statutory and Legal Principles — Chapter 28

Section 2804(4)(ii) of the Code, 66 Pa. C.S. §2804(4)(ii), provides:

(4) The following caps on electric utility rates shall apply:

* * *

(ii) In addition to the rate cap set forth in subparagraph (i), for a period of nine years

from the effective date of this chapter or until an electric distribution utility is no longer recovering its transition or stranded costs through a competitive transition charge or intangible transition charge and all customers of an electric distribution utility can choose an alternative provider of electric generation, whichever is shorter, the generation component of a utility's charges to customers who purchase generation from the utility, including the competitive transition charge and intangible transition charge, shall not exceed the generation component charged to the customers that has been approved by the commission for such service as of the effective date of this chapter.

PSU argued that this language holds rate caps in place for all customers until Allegheny Power no longer recovers its stranded costs and all customers can choose an alternative provider of electric generation. PSU further contended that there are no current alternative providers in the Allegheny Power service territory. Therefore, the second requirement cannot be met until a market forms after the rate caps expire at the end of 2010. PSU M.B. at 24-26.

PSU further contended that there will be no market, and no valid market price, so long as it is the only customer looking for a supplier. If PSU is the only customer without a capped rate, PSU contended, it is being subjected to unreasonable discrimination in violation of the Code. Pa. C.S. §1304.

Allegheny Power noted that PSU raised its statutory arguments for the first time in its Main Brief. Since these arguments were not included in PSU's Petition, Allegheny Power contended that PSU was attempting to amend its Petition without using a pleading. It argued that these arguments should not be considered. A.P. R.B. at 12.

In the alternative, Allegheny Power contended that PSU failed to cite any provision in the Competition Act that prohibits the creation of different rate cap periods for different customer groups. Each rate cap period was validly set by a different mechanism. The Tariff 37 rate cap period was set in the *1998 Restructuring*

Settlement and was not modified by the CTC Buyout Agreement. The Tariff 39 rate cap period, in contrast, was set by the *May 11, 2005 Order*. The Tariff 39 rate cap period was bargained for as part of a settlement that modified the *1998 Restructuring Settlement*. A.P. R.B. at 18.

In addition, Allegheny Power contended that Section 2808(b) of the Code, 66 Pa. C.S. §2808(b), gives it the flexibility to enter into agreements resulting in different stranded cost recovery periods and different rate cap expirations for different customers. Allegheny Power M.B. at 16-18. That section provides:

(b) Period for collecting competitive transition charge. — The competitive transition charge shall be included on bills to customers for a period not to exceed nine years from the effective date of this chapter unless an alternative payment methodology is mutually agreed upon by the customer and the utility or unless the commission in its discretion and for good cause shown orders an alternative payment period. In establishing the length of the period for collection of the competitive transition charge, the commission shall consider the effect on the ability of the Commonwealth to compete in attracting industry and jobs, on the financial health of electric utilities and other relevant factors.

Allegheny Power also argued that PSU misinterprets Section 2804(4)(ii) (quoted above). According to Allegheny Power, the maximum length for a statutory rate cap is nine years, which expired on December 31, 2005. Consequently, that section is no longer applicable. Even if the section continues to apply, Allegheny Power contends that the two-pronged test for the expiration of rate caps has been met, because PSU will be able to choose an alternative supplier and Allegheny Power is no longer collecting stranded costs from PSU. A.P. M.B. at 16-18.

Finally, Allegheny Power contended that PSU's Chapter 28 arguments were based on incorrect factual premises. Allegheny Power argued that a competitive market will develop to

serve PSU after the expiration of its rate caps. Allegheny Power further contended that failing to grant the rate cap extension for Tariff 37 will not put PSU at a competitive disadvantage. A.P. R.B. at 13.

c. Equitable Concerns

PSU contended that it would be inequitable to deny PSU an extension of its rate cap because the notices provided to it stated that all Allegheny Power customers would receive a rate cap extension. In addition, PSU argued that it would be inequitable to deny it rate cap protection after it paid its CTC obligations in advance, while customers who have not finished paying their CTC obligations would continue to receive rate cap protection. PSU M.B. at 27.

Allegheny Power, in contrast, contended that the notices gave PSU full and fair notice that the rate cap extension applied to certain Tariff 39 rate schedules and only those rate schedules. Allegheny Power further contended that PSU received the benefit of its bargain in the CTC Buyout Agreement (PSU received a substantial reduction in its interest rate in exchange for the shortened payment period). Allegheny Power further noted that the CTC Buyout Agreement did not modify the *1998 Restructuring Settlement*. Allegheny Power saw nothing inequitable about enforcing both that settlement agreement and the Commission-approved Amended Joint Petition, which extended the rate cap period for Tariff 39 customers. According to Allegheny Power, PSU's prepayment of its stranded cost obligation meant that PSU had nothing left to exchange for an extension of its rate cap. A.P. R.B. at 19.

d. Corporate and Affiliate Impact

PSU contended that the *May 11, 2005 Order* resulted in a financial windfall for Allegheny Power's generation affiliate because that entity would be permitted to sell generation on the power market that was previously designated for PSU's use under a capped rate. Without an express recognition of this windfall in the *May 11, 2005 Order*, PSU contended that

the Commission did not intend such a result. PSU MB at 22-23 and 27-30.

Allegheny Power contended that it does not have generation assets. It purchases power from Allegheny Energy, an affiliated electric generation supplier that is not subject to this Commission's jurisdiction. Allegheny Power argued that PSU's arguments regarding the potential windfall to Allegheny Energy are speculative. In addition, Allegheny Power maintained that the profitability of Allegheny Energy is not relevant to this Commission in setting rates. A.P. M.B. at 24-26.

2. ALJ's Recommendation

The ALJ concluded that PSU failed to carry its burden of proving its entitlement to the declaratory order. The ALJ noted that the *1998 Restructuring Settlement* capped the generation rate for Tariff 37 through 2008. He found no basis for finding that the cap had been, or should be, extended. R.D. at 24.

According to the ALJ, the *May 11, 2005 Order* did not explicitly extend the cap for Tariff 37. Moreover, the ALJ found that the normal procedure in Commission proceedings is to reference only those tariffs affected by an Order. The lack of any explicit reference to Tariff 37 means that the *May 11, 2005 Order* did not affect Tariff 37. R.D. at 25.

The ALJ agreed with Allegheny Power that the savings clause in the *May 11, 2005 Order* preserved all terms of the *1998 Restructuring Settlement* unless the Order specifically modified those terms. The *May 11, 2005 Order* did not explicitly modify the expiration date for the rate cap applicable to Tariff 37 in the *1998 Restructuring Settlement*. As a result, December 31, 2008, remains the expiration date of the rate cap applicable to Tariff 37. R.D. at 29.

The ALJ further found that PSU misread Section 2804(4)(ii) of the Code, 66 Pa. C.S. §2804(4)(ii). He found that this section requires rate caps to be in place until the shorter of: (a) nine years, or (b) "until an electric distribution utility was no longer recovering transition or stranded costs through a competitive transition charge or intangible transition charge AND

all customers of an electric distribution utility could choose an alternative provider of electric generation" R.D. at 27 (emphasis in original). Since the nine-year period expired in December 2005, the ALJ found this section does not support PSU's position in this case. *Id.*

The ALJ found that the CTC Buyout Agreement did not extend the expiration date of the generation rate for Tariff 37. The *May 11, 2005 Order* extended the expiration date of the generation rate cap for certain Tariff 39 rate schedules, but PSU did not participate in that proceeding. As a result, PSU missed the opportunity to try to be included in the cap extension. R.D. at 24.

The ALJ rejected the argument that the exclusion of Tariff 37 from the rate cap extension was illegally discriminatory. The ALJ determined that Section 2802(b) authorized the Commission to extend the CTC recovery period for good cause. The Commission concluded that good cause existed for the *May 11, 2005 Order* because Allegheny Power proved it was underrecovering its stranded costs from Tariff 39 customers. There was, however, no similar underrecovery of Tariff 37 stranded costs. Furthermore, since PSU did not participate in the *2003 Proceedings*, there was no reason for the Commission to extend the rate cap for Tariff 37. Additionally, the ALJ found no evidence of record to support the argument that PSU would be at a competitive disadvantage against other colleges subject to the rate cap extension in Tariff 39. I.D. at 29-30.

The ALJ disagreed with PSU that equity favors extending the rate cap for Tariff 37. The ALJ noted that PSU's University Park main campus will not get the cap extension, but PSU's other 100 accounts will. PSU "got the benefit for those 100 other accounts without any action on its part. I find that it was treated as fairly as all of the other Tariff 39 customers who got the cap extension without appearing" in the *2003 Proceedings*. R.D. at 28. The ALJ further found that

[T]he various documents which spoke in terms of "all customer[s]" gave appropriate notice to Penn State that its rights could be

impacted because, in addition to being a Tariff 37 customer for the main campus, the University has about 100 Tariff 39 accounts for other satellite campuses served by Allegheny.

R.D. at 25. PSU admitted that the bill insert notices were not forwarded to Mr. Cooper, who is the person charged with the responsibility of authorizing payment of those energy bills. Tr. 115-116, 133. PSU further admitted that this person did not begin reading the *Pennsylvania Bulletin* until 2007. Tr. 113-114.

3. Exceptions, Replies and Dispositions

a. OSBA Exception 2: The ALJ erred when he opined that the Competition Act does not require the imposition of rate caps when the customers continue to pay for stranded costs.

(1) Positions of the Parties

[4, 5] The ALJ noted that he agreed with PSU and Allegheny Power in their conclusion that the Competition Act does not require customers to make stranded cost payments to continue service under rate caps. He added "I hasten to add that the converse is true as well, the Competition Act does not require the imposition of rate caps when the customers continue to pay for stranded costs." R.D. at 24-25.

The OSBA excepted to the latter statement on the grounds that it addresses a question not before the ALJ. If the statement is adopted in this proceeding, the OSBA argues, it could prejudice the outcome of future proceedings. OSBA Exc. at 8.

Allegheny Power stated that it does not disagree with OSBA's Exception to the extent the OSBA argues that the Commission need not address the question. A.P. R.Exc. at 23. PSU stated it believes the ALJ's statement is legally correct, but added "we, however, do not think that such a conclusion is necessarily required if the Commission were to address and explain what it meant and intended in regard to its Order entered May 11, 2005." PSU R. Exc. at 11.

(2) Disposition

We will grant this Exception because we agree with the OSBA that the statement in question is *dicta*.

b. PSU Exceptions 1-9: The ALJ erred in concluding that the generation rate cap for Tariff 37 has not been, and should not be, extended.

(1) Positions of the Parties

The positions of the Parties will generally be discussed here using the same outline used above to describe the arguments offered to the ALJ. The Parties' Exceptions, however, did not contain any arguments based on corporate and affiliate impacts. Therefore, the following discussion will only discuss Commission precedent, statutes, and equitable considerations.

(a) Relevant Commission Dockets

PSU excepts to the ALJ's finding that PSU failed to prove its entitlement to the requested declaratory order. PSU Exc. No. 2. According to PSU, "The purpose of the Declaratory Order proceeding was to determine what the Commission intended with respect to the extension of the generation rate cap." PSU Exc. No. 1. PSU argues that the Commission's consumer education Web site, which states that the generation rate cap expires for Allegheny Power on December 31, 2010, is dispositive proof that the Commission intended the *May 11, 2005 Order* to extend the rate cap for all Allegheny Power customers, including those receiving service under Tariff 37. PSU Exc. at 3.

PSU further argues that the savings clause in the *May 11, 2005 Order* supports its position that the Commission intended the *May 11, 2005 Order* to extend the rate cap for all Allegheny Power customers. According to PSU, the savings clause provides that the provisions of the *1998 Restructuring Settlement* remain in effect, except as specifically amended by the *May 11, 2005 Order*. The generation rate cap applicable

to PSU was specifically amended by the *May 11, 2005 Order*, PSU contends, because that Order extended the rate cap for all Allegheny Power customers through December 31, 2010. PSU Exc. at 16.

PSU excepts to the ALJ's conclusion that PSU does not qualify for the rate cap extension set forth in the *May 11, 2005 Order* because it was not a participant in the *2003 Proceedings*. PSU Exc. No. 3. PSU argues that the extended rate cap applies to all Allegheny Power customers, whether or not they participated in those proceedings. PSU Exc. at 5. PSU also excepts to the ALJ's finding that PSU failed to participate in the *2003 Proceedings* because of its own administrative failures. PSU Exc. No. 4. PSU continues to argue that the bill inserts, the *Pennsylvania Bulletin* notice, and other notices relating to that proceeding were inadequate and misleading. PSU Exc. at 7.

Allegheny Power responds by arguing that the ALJ's Recommended Decision was legally correct and supported by substantial credible evidence. A.P. R.Exc. at 4. Allegheny Power argues that the ALJ correctly determined that: (a) the *May 11, 2005 Order* did not affect the generation rate cap for Tariff 37, *id.*; (b) the savings clause in the *May 11, 2005 Order* maintained the pre-existing rate cap period for Tariff 37, *id.* at 17; (c) PSU did not qualify for the extended generation rate cap because it failed to participate in the *2003 Proceedings*, *id.* at 5; and (d) PSU failed to participate in the *2003 Proceedings* due to its own administrative failures, *id.* at 7.

Allegheny Power notes that the caption of the 2004 Petition was "Joint Petition for Settlement and for *Modification of the 1998 Restructuring Settlement*" (emphasis added). PSU was a signatory to the *1998 Restructuring Settlement*. Thus, Allegheny Power argues, PSU should have read the entire Petition and all of its Appendices. If it had done so, PSU would have realized that Tariff 37 was not modified by the petition. A.P. R.Exc. at 8.

Finally, with regard to the information on the Commission's consumer education Web site, Allegheny Power argues that such information is an unofficial statement, not binding on

the Commission pursuant to Section 1.96 of the Commission's Regulations. 52 Pa. Code §1.96.

(b) *Statutory and Legal Principles — Chapter 28*

PSU takes exception to the ALJ's determination that Section 2804(4)(ii) of the Code, 66 Pa. C.S. §2804(4)(ii), does not apply more than nine years after the effective date of the Competition Act. PSU Exc. at 9. PSU argues that the ALJ erred by construing this section exclusively considering the current fact pattern, rather than considering other factors, such as the Commission's intention when adopting the *May 11, 2005 Order*.

PSU also excepts to the ALJ's determination that there will be a competitive market for electric generation when PSU will be the only customer in Allegheny Power's service territory that is not subject to a rate cap. PSU Exc. No. 6. PSU argues that the testimony of Allegheny Power's witness is not credible. PSU Exc. at 10.

In addition, PSU excepts to the ALJ's failure to find that the exclusion of Tariff 37 from the extension of the rate cap was discriminatory. PSU Exc. No. 9. PSU argues that the Code does not permit the extension of the rate cap for all customers of Allegheny Power except for the one receiving power pursuant to Tariff 37. PSU Exc. at 18.

In response, Allegheny Power argues that Section 2804(4)(ii) does not require extending the rate cap for Tariff 37. Allegheny Power first argues that the ALJ correctly determined that the statute does not apply because more than nine years have passed since the statute was effective. Allegheny Power next argues that, even if the statute did apply, a rate cap extension is not required because the ALJ correctly determined that PSU will have a choice of an electric supplier in 2009. A.P. R.Exc. at 9-10. Allegheny Power argues that the ALJ properly gave weight to its witness rather than PSU's witness. Allegheny Power therefore contends that the ALJ's decision is legally correct and is supported by substantial credible evidence. A.P. R.Exc. at 12.

Allegheny Power also argues that the ALJ correctly concluded that PSU is not being subjected to illegal discrimination. Allegheny Power maintains that the rate cap exceptions specified in Section 2804(4)(ii) do not relate to the extension of the rate cap period. Rather, they address circumstances under which a party may exceed the rate cap amount during the rate cap period. A.P. R.Exc. at 18.

(c) *Equitable Concerns*

PSU continues to argue that equity favors the extension of the generation rate cap for Tariff 37. PSU Exc. No. 7. PSU stresses that its Exceptions are interrelated. For example, PSU argues that, in addressing equity, the Commission should consider (1) the statutory prohibitions against discrimination, and (2) the lack of a market where only one customer in a service territory is not subject to the generation rate cap. PSU Exc. at 14-15.

In response, Allegheny Power submits that the Code provisions prohibiting discrimination, 66 Pa. C.S. §§1304, 2804(7), prohibit unreasonable discrimination. Allegheny Power contends that the different treatment of Tariff 37 and Tariff 39 customers is based on a reasonable distinction. The extended rate caps in the *May 11, 2005 Order* apply to Tariff 39 customers, who had continuing stranded cost payment obligations. The stranded costs associated with Tariff 37's customers, in contrast, had already been paid pursuant to the CTC Buyout Agreement. Thus, there was no reason for the *May 11, 2005 Order* to extend the rate cap applicable to Tariff 37.

Finally, Allegheny Power contends that PSU's position is itself inequitable. Allegheny Power argues:

It should be noted that while [PSU] is seeking "equity" from the Commission in the form of extended generation rate caps, it is selectively seeking that one benefit from the Amended Joint Petition approved in the May 11, 2005 Order, and has avoided the 2007 and 2008 increases in generation rates that were also adopted as part of the amendments

to the 1998 settlement. There is nothing equitable or fair in that stance by Penn State.

A.P. R.Exc. at 16.

(2) *Disposition*

[6-10] We have carefully reviewed the record in these proceedings, including the Recommended Decision, the Exceptions of the Parties, and the Replies thereto. For the reasons set forth below, we shall grant PSU's Exception 6 and deny PSU's Exceptions 1-5 and 7-9. Consequently, we shall adopt the ALJ's recommendations, except for the ALJ's recommendation pertaining to the competitiveness of the market following the expiration of the rate cap applicable to Tariff 37.

The ALJ disposes of the issues raised by the Parties in a well-reasoned manner, and his decision is supported by substantial credible evidence. The period of the generation rate cap applicable to Tariff 37 was set in the *1998 Restructuring Settlement*. PSU failed to demonstrate that this rate cap has been, or should be, extended. We concur in the ALJ's reading of the *May 11, 2005 Order* and his interpretation of the disputed Code provisions. PSU's Exceptions generally reiterate the arguments offered in PSU's Main Brief and Reply Brief, and we are not persuaded that the ALJ's conclusions were erroneous.

In particular, we are not persuaded that the equitable concerns articulated by PSU support the remedy that PSU seeks: a declaratory order extending the generation rate cap applicable to Tariff 37 that was set in the *1998 Restructuring Settlement*. We agree with Allegheny Power that it is impossible to conclude now that PSU's intervention in the *2003 Proceedings* would have resulted in an extension of its Tariff 37 generation cap rate. A.P. M.B. at 20-21. We further agree with Allegheny Power that PSU's proposed remedy for its alleged unfair treatment would, in itself, be inequitable. A.P. R.Exc. at 16.

In addition, we note that the Commission and its staff make every effort to ensure that information on the Commission's Web site is

correct. If, however, the information on the Web site is inconsistent with a Commission Order, the Commission Order controls. We therefore reject PSU's assertion that the ALJ should have relied on the information on the consumer education portion of our Web site.

Finally, we specifically note our concurrence with the ALJ's determination that Section 2804(4)(ii) of the Code, 66 Pa. C.S. §2804(4)(ii), is not applicable to this case because more than nine years have passed following the effective date of the Competition Act. R.D. at 27. Based on this conclusion, there is no need for us to address the question of whether or not the market will be competitive following the expiration of the rate cap that applies to Tariff 37. That determination is only necessary if Section 2804(4)(ii) applies. Therefore, we grant PSU's Exception 6 and we will not adopt the ALJ's findings that the market will in fact be competitive following the expiration of the rate cap that applies to Tariff 37. R.D. at 27-28. In all other respects, we deny PSU's Exceptions 1-9 and adopt the recommendations of the ALJ.

C. Notice of the 2003 Proceedings

1. Positions of the Parties

PSU argued below that the fundamental elements of due process are adequate notice of governmental action and a meaningful opportunity to be heard. PSU further notes that notice is adequate when it is reasonably calculated to inform a party of the pending action and provides the party with an opportunity to present objections to the action. PSU M.B. at 30. PSU submits that it did not receive adequate notice of the *2003 Proceedings* for the following reasons:

- Allegheny Power mailed copies of the November 2003 Petition and the Joint Petition to PSU's former law firm, not to PSU. There is no record evidence indicating that PSU's former law firm received these documents.

- The Joint Petition was published in the *Pennsylvania Bulletin*, but Appendix A (which included the schedule of affected rates) was not included.

- Neither the Joint Petition nor the Amended Joint Petition stated that Tariff 37 was to be excluded from the rate cap extension.

- The bill insert sent to Allegheny Power customers, including PSU, stated that the generation rate cap would be extended for all customers.

- The news release issued by Allegheny Power following the Commission's *May 11, 2005 Order* stated that the generation rate cap would be extended for all customers.

- During meetings with PSU personnel in 2003-2005, Allegheny's representatives did not reveal that the extension of the rate cap period would not apply to Tariff 37.

PSU M.B. at 31-36, PSU R.B. at 21-23.

Allegheny Power, in contrast, argued that PSU received adequate notice of the *2003 Proceedings*. The rate cap period for Tariff 37 was established in the *1998 Restructuring Settlement*, to which PSU was a party. When Allegheny Power filed its November 2003 Petition, it served a copy on the law firm that represented PSU in the *1998 Restructuring Settlement* proceedings. When Allegheny Power filed the Joint Petition with the Commission, it again served a copy on the law firm that represented PSU in the *1998 Restructuring Settlement* proceedings. Allegheny Power notes that Section 33 of the Restatement of the Law, Third, The Law Governing Lawyers, requires a lawyer, following the termination of representation, to take reasonable steps to convey to the former client any material communication the lawyer receives relating to the matter involved in the representation. Allegheny Power also argued that PSU received notice of the filing of the Joint Petition via publication in the *Pennsylvania Bulletin* and customer bill inserts. A.P. M.B. at 26-31.

Allegheny Power contended that the notices accurately stated that the generation rate cap would be extended for all customers, be-

cause PSU is a customer receiving service pursuant to Tariff 39 at numerous locations in Allegheny Power's service territory. The fact that PSU also receives service pursuant to Tariff 37, which did not receive a rate cap extension, does not make the notice inaccurate or misleading, according to Allegheny Power. A.P. M.B. at 30.

Allegheny Power contends "Since [PSU] did not read the bill inserts, the *Pennsylvania Bulletin* notice, or the filings themselves, it is difficult to understand how PSU was confused. Being unaware of a filing is not the same as being confused by it." A.P. R.B. at 29. Allegheny Power concludes that PSU received adequate notice and opportunity to be heard regarding the *2003 Proceedings*. A.P. R.B. at 24.

2. ALJ's Recommendation

The ALJ concluded that PSU had reasonable notice of the *2003 Petition*. "Accordingly, all of its due process rights were properly protected." R.D. at 40. The ALJ concluded that PSU failed to take the opportunity to participate in the *2003 Proceedings* due to its own inactions and insufficient administrative procedures. *Id.* As a result, PSU is not entitled to an extension of the rate caps for electric service rendered pursuant to Tariff 37. R.D. at 36.

The ALJ found that the format of the bill inserts, and the notice in the *Pennsylvania Bulletin*, were adequate to provide notice to PSU. R.D. at 36. The ALJ rejected PSU's argument that the bill inserts and the *Pennsylvania Bulletin* notice needed to say that Tariff 37 rates were unaffected by the filing. The ALJ also rejected PSU's argument that PSU was misled by the statement that the rate cap extension applied to all customers of Allegheny Power. The ALJ reached this conclusion not only because the notices were correct (PSU received an extension of its rate cap as a customer subject to Tariff 39), but also because the evidence showed that PSU did not read the notices at the time. R.D. at 37.

The ALJ found that Allegheny Power's service of documents in the *2003 Proceedings*

on the law firm that represented PSU in the *1998 Restructuring Settlement* was ineffective, in part, because Commission regulations state that service on an attorney who has not entered an appearance in a matter is ineffective. 52 Pa. Code §1.55. The ALJ further found that Allegheny Power knew that Mr. Cooper, rather than PSU's former law firm, was the official contact person to receive such communications. *Id.*

3. Exceptions, Replies and Dispositions

a. *Allegheny Power Exception No. 1: The ALJ erred in finding that Allegheny Power knew that Robert Cooper had been designated as the official contact person for communications with PSU regarding energy-related and Commission matters.*

(1) Positions of the Parties

[11-13] Allegheny Power argues that the ALJ's conclusion was not supported by any record evidence. Allegheny Power argues that the CTC Buyout Agreement designated Mr. Cooper as PSU's contact person for the limited purpose of receiving notices required or permitted by that Agreement. The *2003 Proceedings*, however, did not pertain to the CTC Buyout Agreement. A.P. Exc. at 4. Allegheny Power contends that PSU could not point to any document designating Mr. Cooper as its contact person for the broad purposes stated in the Recommended Decision. *Id.*

PSU argues that the CTC Buyout Agreement modified the *1998 Restructuring Settlement*. Consequently, the CTC Buyout Agreement made Mr. Cooper the official contact person for PSU for all contacts regarding the *1998 Restructuring Settlement*. PSU R.Exc. at 5.

(2) Disposition

We will grant this Exception. We concur with Allegheny Power that the CTC Buyout Agreement designated Mr. Cooper as the contact person for PSU for the limited purpose of receiving notices required or permitted by the

CTC Buyout Agreement. We do not believe that provision made Mr. Cooper the designated contact person for all purposes under the *1998 Restructuring Settlement*.

b. Allegheny Power Exception No. 2: The ALJ erred in concluding that service of the November 2003 Petition, the Joint Petition, and the Amended Petition on PSU's former law firm was not valid and effective service on PSU.

(1) Positions of the Parties

Allegheny Power asserts that during the *2003 Proceeding*, it mailed pertinent documents to PSU's former law firm, which, under the mailbox rule, must be presumed to have been received. Allegheny Power then argues that Section 33 of the Restatement of the Law, Third, The Law Governing Lawyers is persuasive authority for the proposition that a lawyer, following the conclusion of his representation of a client, must take reasonable steps to convey to the former client any material communication the lawyer receives relating to the matter involved in the representation. As a result, Allegheny Power concludes that its service of the law firm that represented PSU during the *1998 Restructuring Settlement* constituted valid and effective service upon PSU in the *2003 Proceedings*. A.P. Exc. at 7.

Allegheny Power further argues that Section 1.55 of the Commission's Regulations, 52 Pa. Code §1.55, does not address the question of whether service upon a client's former counsel, who remains the client's counsel of record for a concluded proceeding, constitutes service on the party. Allegheny Power thus concludes that "Section 1.55 of the Commission's regulations does not preclude the possibility that service upon former counsel may constitute effective service upon the party." A.P. Exc. at 6.

[14-17] PSU argues that 52 Pa. Code §1.55 does, in fact, address the fact situation presented in this case. The *2003 Proceedings* were a different matter, with a different docket number, than the proceeding that resulted in the *1998 Restructuring Settlement*. The new proceeding commenced more than five years after

the conclusion of the earlier proceeding. No appearance for PSU was entered in the new proceeding. Section 1.55 states that service on a law firm that has not entered an appearance is not service on the client. Thus, any service on PSU's former law firm is not service on PSU, according to PSU. PSU R.Exc. at 9.

PSU contends that Section 33 of the Restatement of the Law, Third, The Law Governing Lawyers, is irrelevant. The conduct of Pennsylvania attorneys is governed by the Rules of Professional Conduct (Rules) promulgated by the Supreme Court of Pennsylvania. PSU argues that nothing in those Rules "requires a lawyer to convey an allegedly material communication involving a new filing at a different docket to a former client years after the lawyer's work at another docket has been completed and representation terminated." PSU R.Exc. at 10. PSU further argues that, even if the attorneys at PSU's former law firm violated a rule applicable to them, by failing to convey a communication to PSU, there is no justification for concluding that PSU received a notice that it did not. *Id.*

(2) Disposition

We will deny this Exception. Our Regulations at 52 Pa. Code §§1.54 and 1.55 clearly require service upon a party, except that when a party is represented by an attorney, service upon a party's attorney is deemed service upon the party. The November 2003 Petition commenced a new proceeding, separate and distinct from the *1998 Restructuring Settlement*. Allegheny Power was required to serve PSU rather than its former attorneys.

c. PSU's Exceptions 10-13: The ALJ erred in concluding that PSU had adequate notice of the 2003 Proceedings.

(1) Positions of the Parties

PSU excepts to the ALJ's finding that it had adequate notice of the full scope of the *2003 Proceedings* and failed to take action to protect its rights. PSU Exception No. 10.

According to PSU, the bill inserts and the publication of the Joint Petition in the *Pennsylvania Bulletin* were not adequate to provide notice to PSU. PSU Exception No. 11. The bill inserts notified PSU that the generation rate cap would be extended for all customers of Allegheny Power. PSU specifically excepts to the ALJ's finding that the bill insert was correct in so stating. PSU Exception No. 12. PSU argues that the ALJ's reading of this notice violates the plain language requirements of 52 Pa. Code §69.251 for written materials to customers. PSU Exc. at 21. PSU also specifically excepts to the ALJ's finding that the notice published in the *Pennsylvania Bulletin* provided it with notice. PSU Exception No. 13. According to PSU, the *Pennsylvania Bulletin* notice did not give notice that the rate cap for Tariff 37 would not be extended.

Allegheny Power responds by arguing that the ALJ's decision is legally correct and supported by substantial credible evidence. Allegheny Power contends that it provided several forms of notice to PSU, any one of which was adequate to provide notice to PSU. Allegheny Power reiterates its argument that the bill inserts were correct in saying that "all customers" would receive a rate cap extension because "all customers" means every customer, not every customer account. PSU is a customer and would receive an extension of its rate caps because it has over 100 accounts receiving service under Tariff 39. The fact that PSU also has one account receiving service under Tariff 37, which would not receive a rate cap extension, does not make the bill insert misleading or inaccurate. Allegheny Power also argued that the notice published in the *Pennsylvania Bulletin* included several references to Appendix A, which PSU should have obtained. If it had done so, PSU would have realized that its rights were impacted by the *2003 Proceedings*. A.P. R.Exc. at 20.

(2) *Disposition*

[18-20] We will deny PSU's Exceptions 10-13 and adopt the recommendation of the ALJ. We agree that PSU received adequate notice of the *2003 Proceedings*.

Allegheny Power alleged that it gave PSU several notices of the *2003 Proceedings*. If any one of these notices was reasonably calculated to inform PSU of the pending action, and provided PSU with an opportunity to present objections, PSU received adequate notice. The *Pennsylvania Bulletin* notice was reasonably calculated to inform PSU of the pending action and provided PSU with an opportunity to present objections.

The *Pennsylvania Bulletin* notice was captioned "West Penn Power Company Joint Petition for Settlement and for Modification of the 1998 Restructuring Settlement." PSU was a signatory to the *1998 Restructuring Settlement*, hence, it had notice that its rights might be affected. In addition, Paragraph 11d.) of the Joint Petition, published in the *Pennsylvania Bulletin*, stated as follows (emphasis added):

The period of the generation rate cap shall be extended from the end of 2008 through 2009 and 2010, provided however, that the level of the system average generation rate cap shall increase to 5.587 cents/KWh in 2009 and to 6.061 cents/KWh in 2010, as set forth in Appendix A.

This statement put PSU on notice that it needed to read Appendix A. If it had done so, it would have realized that the rate cap extension did not apply to Tariff 37.

PSU could have filed comments to the Joint Petition within twenty days after publication of the notice in the *Pennsylvania Bulletin*. Additionally, several parties intervened in the *2003 Proceedings* following publication of the notice. Consequently, we conclude that the *Pennsylvania Bulletin* notice was reasonably calculated to put PSU on notice that the Joint Petition could impact its rights and provided PSU with a meaningful opportunity to object to the proposal.

We further agree with the ALJ that the failure to publish Appendix A in the *Pennsylvania Bulletin* notice does not mean that the notice to PSU was inadequate. Based on the information published in the *Pennsylvania Bulletin*, PSU

should have obtained and reviewed a copy of Appendix A.

Having concluded that the notice published in the *Pennsylvania Bulletin* gave PSU adequate notice, we need not address the question of whether the bill inserts provided PSU with adequate notice. We note, however, that we agree with the ALJ that the inserts were not misleading so as to lull PSU into believing that the extensions applied to Tariff 37. PSU knew that the generation rate cap for Tariff 37 was set in the *1998 Restructuring Settlement*. If the bill inserts led PSU to believe that the rate cap for Tariff 37 was being extended, then PSU should have known that a proceeding in which it was not a party was impacting a settlement agreement to which it was a signatory. Under these circumstances, PSU should have reviewed the Amended Joint Petition. If it had done so, it would have realized that the rate cap for Tariff 37 was, in fact, not being extended.

Finally, we note — as we did in the context of PSU's equitable concerns, above — that we are not persuaded that PSU's allegations (the violation of its due process rights in the *2003 Proceeding*) support its requested remedy (a two-year extension of the rate cap for Tariff 37). Therefore, we find that PSU has not proven that it is entitled to the requested declaratory order.

D. Procurement

1. Stipulated Matters

[21-24] The ALJ encouraged PSU and Allegheny Power to stipulate to a procurement system in the event that PSU's Petition is denied and the Commission determines that the generation rate cap extension does not apply to Tariff 37. The Parties submitted a Joint Stipulation on June 30, 2008. PSU summarized its contents as follows:

The Joint Stipulation provides for two 12-month fixed price procurement options and a 24-month fixed price procurement option with quarterly reconciliations. It is based on the method of default service pro-

posed by Judge Cocheres in his Initial Decision, issued May 23, 2008, in Allegheny's post-2010 DSPP proceeding at Docket No. P-00072342 and is consistent with and patterned after the fixed price option approved by the Commission in the PPL Electric Utilities Corporation Competitive Bridge Plan proceeding at Docket No. P-00062227.

PSU M.B. at 38.

2. ALJ's Recommendation

Considering that he recommended denying PSU's Petition, the ALJ concluded that a procurement plan was necessary effective January 1, 2009. The ALJ noted that the Commission approved the procurement plan for Service Type 40 customers, which included PSU, and an almost identical plan to the one in the Joint Stipulation. *Petition of the West Penn Power Company d/b/a Allegheny Power for Approval of its Retail Electric Default Service Program and Competitive Procurement Plan for Service at the Conclusion of the Restructuring Transition Period*, P-00072342 (Order entered July 25, 2008) (the *July 25, 2008 Order*). Consequently, the ALJ recommended approval of the Joint Stipulation.

3. Disposition

No Party excepted to the ALJ's recommendation on this issue. As noted by the ALJ, the *July 25, 2008 Order* approved an almost identical plan. We will approve the Joint Stipulation.

E. Miscellaneous Tariff Issues

1. System Loss Factors

a. Positions of the Parties

In both Docket No. P-00072342 and this case, Allegheny Power and PSU agreed that the system loss factors in Tariff 37 should be corrected to show 1.07447 for on-peak usage and 1.04325 for off-peak usage.

b. ALJ's Recommendation

The ALJ recommended adoption of the Parties' agreement.

c. Disposition

No Party excepted to the ALJ's recommendation on this issue. Finding the ALJ's recommendation to be reasonable, appropriate and otherwise in accord with the record evidence, it is adopted.

2. Self-Generation

a. Positions of the Parties

PSU sought to have the following paragraphs deleted from Tariff 37:

5. The University agrees that it will normally generate electric energy only as a by-

product of heating steam. Upon notification by [Allegheny Power] that an emergency exists, The University agrees to make available to [Allegheny Power] any excess energy from The University central power plant. When such excess energy is generated at the request of [Allegheny Power], it will be defined as emergency generation and the energy produced and delivered to [Allegheny Power] will be billed at the rate specified in Paragraph No. 7.

6. The University agrees to deliver to [Allegheny Power] and [Allegheny Power] agrees to receive and pay, at the rate specified in Paragraph No. 7, for all by-product energy from The University central power plant in excess of The University's requirements.

7. The monthly rate for sales to [Allegheny Power] by The University shall be as follows:

ENERGY CHARGE

By-product generation	15.77 mills net per kilowatt-hour
Emergency generation	30.00 mills net per kilowatt hour

These provisions have been in Tariff 37 since 1978. PSU argued that the limitations on self-generation are inconsistent with the Competition Act, which provides in pertinent part "Customers should be able to choose among alternatives such as firm and interruptible service, flexible pricing, and alternate generation sources, including reasonable and fair opportunities to self-generate and interconnect." 66 Pa. C.S. §2804(2). PSU further argued that the emergency generation provisions have not been used in over thirty years. PSU M.B. at 43.

Allegheny Power contended that the existing provisions of Tariff 37 are *prima facie* reasonable. Allegheny Power M.B. at 40. Nevertheless, Allegheny Power appeared agreeable to removing the emergency generation condition from Tariff 37. Allegheny Power M.B. at 39. With regard to the self-generation language, Allegheny Power maintained that PSU failed to prove that this provision is unreasonable. To the

contrary, according to Allegheny Power, this provision is reasonable because it helps Allegheny Power provide safe, adequate and reliable electric service in accordance with Section 1501 of the Code, 66 Pa. C.S. §1501. Allegheny Power maintained that the elimination of the self-generation restriction could have a significant adverse impact on distribution capacity due to the lack of standby power rates in Tariff 37. Allegheny Power further argued that the elimination of the self-generation restriction could not occur until after the existing generation contract expires on December 31, 2008. *Id.*, at 40.

b. ALJ's Recommendation

[25-28] The ALJ recommended that the Parties meet to come to an agreement on the issues of emergency power planning and elimination of self-generation restrictions, as well as

to encourage dialogue on the issue of increased PSU generation capacity. R.D. at 42. He concluded that PSU sustained its burden of proving the tariff language is outdated and violative of the Code. He therefore recommended that the Commission (1) declare Paragraph 5 above to be unjust and unreasonable and a violation of Section 2804(2) of the Code; and (2) order Paragraph 5 cancelled effective January 1, 2009. *Id.*

c. Exceptions and Replies

PSU's Exception No. 14 argues that the ALJ erred by not recommending the cancellation of Paragraphs 6 and 7, in addition to the cancellation of Paragraph 5. PSU contends that Paragraphs 6 and 7 pertain to a commercial transaction (PSU's emergency sale of electricity to Allegheny Power) that no longer exists, due to the cancellation of Paragraph 5. PSU Exc. at 27.

Allegheny Power did not contest this Exception. A.P. R.Exc. at 2, note 1.

d. Disposition

We will grant this Exception. We agree with the ALJ that Paragraph 5 conflicts with 66 Pa. C.S. §2804(2). In addition, we agree with PSU that Paragraphs 6 and 7 are unnecessary, given the cancellation of Paragraph 5. We will therefore order the cancellation of Paragraphs 5, 6 and 7 effective January 1, 2009.

F. April 22, 2008 Order

1. Positions of the Parties

In pertinent part, the *April 22, 2008 Order* described Allegheny Power's Answer to PSU's Petition. By correspondence dated July 15, 2008, Allegheny Power asked that this description be modified, because it believed PSU was relying on that description to argue that Allegheny Power presented inconsistent positions to the Commission. By correspondence dated July 18, 2008, PSU opposed this request.

2. ALJ's Recommendation

The ALJ compared the pertinent part of the *April 22, 2008 Order* with the pertinent part of Allegheny Power's Answer to PSU's Petition, and concluded that the summary was accurate. He therefore recommended that Allegheny Power's request be denied.

3. Disposition

No Party excepted to the ALJ's recommendation on this issue. We concur with the ALJ and adopt his recommendation.

Conclusion

Based on the foregoing, we will (1) grant in part and deny in part the Exceptions filed by The Pennsylvania State University; (2) grant in part and deny in part the Exceptions filed by West Penn Power Company d/b/a Allegheny Power; (3) grant in part and deny in part the Exceptions filed by the Office of Small Business Advocate; and (4) adopt the Recommended Decision of the Administrative Law Judge, as modified by this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions filed by The Pennsylvania State University on August 11, 2008 are granted in part and denied in part, consistent with this Opinion and Order.

2. That the Exceptions filed by West Penn Power Company d/b/a Allegheny Power on August 11, 2008 are granted in part and denied in part, consistent with this Opinion and Order.

3. That the Exceptions filed by the Office of Small Business Advocate on August 11, 2008 are granted in part and denied in part, consistent with this Opinion and Order.

4. That the Initial Decision of Administrative Law Judge Louis G. Cocheres, issued on July 30, 2008, is adopted, as modified by this Opinion and Order.

5. That the Petition of The Pennsylvania State University for Declaratory Order Concerning the Generation Rate Cap of the West

Penn Power Company d/b/a Allegheny Power at Docket No. P-2007-2001828 is denied.

6. That the Joint Stipulation between The Pennsylvania State University and West Penn Power Company d/b/a Allegheny Power, filed June 30, 2008, is approved.

7. That the Petition of the West Penn Power Company d/b/a Allegheny Power for Approval of its Retail Electric Default Service Program and Competitive Procurement Plan for Service at the Conclusion of the Restructuring Transition Period for Tariff 37, as modified by the Joint Stipulation filed on June 30, 2008, at Docket No. P-2008-2021608 is approved in part and denied in part, consistent with this Opinion and Order.

8. That the West Penn Power Company d/b/a Allegheny Power shall implement an Electric Default Service Program and Competitive Procurement Plan, starting on January 1, 2009, and ending December 31, 2010, as more fully described in the Joint Stipulation and this Opinion and Order.

9. That the West Penn Power Company d/b/a Allegheny Power shall file a tariff supplement not later than thirty (30) days after entry of this Order, which supplement shall incorporate all of the changes needed to implement the Commission-approved Electric Default Service Program and Competitive Procurement Plan for Tariff 37 and other related conditions of service.

10. That the parties meet to come to agreement on the issues of emergency power planning and elimination of self-generation restrictions and the encouragement of more dialogue on the issue of increased University generation capacity. If the parties cannot agree, they may seek mediation or request that the Commission facilitate discussions.

11. That paragraphs 5-7 of Tariff 37, Original Page No. 6-3 are unjust and unreasonable and violative of Section 2804(2) of the Public Utility Code, and shall be cancelled effective on January 1, 2009.

12. That upon acceptance and approval by the Commission of the tariff supplement filed by West Penn Power Company d/b/a Allegheny Power consistent with the Commission's Order, this proceeding shall be marked closed.

BY THE COMMISSION,

James J. McNulty
Secretary

ORDER ADOPTED: September 11, 2008

ORDER ENTERED: September 11, 2008

RECOMMENDED DECISION

Before
Louis G. Cocheres
Administrative Law Judge

I. HISTORY OF THE PROCEEDING

On December 3, 2007, the Pennsylvania State University (Penn State or University) filed with the Pennsylvania Public Utility Commission (Commission) a Petition for Declaratory Order at Docket No. P-2007-2001828 requesting a declaration that Penn State is entitled to a continued generation rate cap under Tariff 37 for 2009 and 2010.¹ Tariff 37 is the tariff under which Penn State's University Park main campus receives retail electric service from Allegheny Power. Penn State is the lone customer served under Tariff 37. All other retail customers, including additional Penn State service locations that are not part of Penn State's University Park main campus, receive retail electric service from Allegheny Power under Tariff 39.

On December 26, 2007, Allegheny Power (Allegheny or Company) filed an Answer and New Matter requesting that the Commission dismiss the Petition. In its New Matter, Allegheny Power explained why Penn State's Tariff 37 is not entitled to a continuation of the generation rate cap. Essentially, Allegheny Power argued that the Commission's Order, entered on May 11, 2005 at Docket Nos. R-00039022 and R-00973981 (May 11 Order),² which approved a settlement extending the generation rate caps to the end of 2010 for specific Tariff 39 rate schedules, did not apply to Tariff 37. Therefore, Penn State's Tariff 37 generation rate cap for 2009 and 2010 was not extended

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Respond Power LLC	:	
	:	
v.	:	Docket No. C-2016-2576887
	:	C-2016-2576287
Pennsylvania Electric Company	:	
Petition of Metropolitan Edison Company,	:	Docket Nos. P-2015-2511333
Pennsylvania Electric Company,	:	P-2015-2511351
Pennsylvania Power Company and West	:	P-2015-2511355
Penn Power Company for Approval of a	:	P-2015-2511356
Default Service Program for the Period	:	
Beginning June 1, 2017, through May 31,	:	
2019	:	
Petition of Respond Power LLC for	:	Docket No. P-2016-2572934
Issuance of Ex Parte Emergency Order	:	

CERTIFICATE OF SERVICE

I hereby certify and affirm that I have this day served copies of: **(1) the Answer and New Matter; and (2) Motion for Judgment on the Pleadings, filed on behalf of Pennsylvania Electric Company** on the following persons, in the manner specified below, in accordance with the requirements of 52 Pa. Code § 1.54:

VIA ELECTRONIC MAIL AND FEDERAL EXPRESS

The Honorable David A. Salapa
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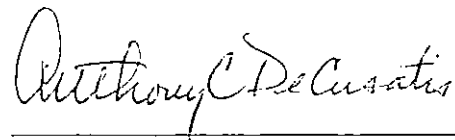
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