

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Respond Power, LLC	:	
	:	
v.	:	C-2016-2576287
	:	
Pennsylvania Electric Company	:	
	:	
Respond Power, LLC	:	
	:	
v.	:	C-2016-2576292
	:	
West Penn Power Company	:	

**ORDER GRANTING, IN PART, MOTION FOR JUDGMENT
ON THE PLEADINGS**

On November 18, 2016, Respond Power, LLC (Respond) filed complaints with the Pennsylvania Public Utility Commission (Commission) against Pennsylvania Electric Company (Penelec) and West Penn Power Company (West Penn). The Commission docketed these complaints at C-2016-2576287 and C-2016-2576292 respectively. The complaints contain similar allegations.

The complaints allege that Penelec and West Penn are threatening to withhold purchase of receivable (POR) payments totaling \$484,797.69 from Respond. The complaints allege that the amount is an offset assessed on September 30, 2016 by Penelec and West Penn under Penelec's and West Penn's clawback charge pilot program previously approved by Commission order approving their default service plans (DSPs) at 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 entered May 19, 2016) (Default Service Order).

Respond's complaints explain that the POR payments Penelec and West Penn are threatening to withhold on or after October 27, 2016 are due and payable to Respond for electric generation services already provided to retail customers. According to the complaints, allowing Penelec and West Penn to withhold the POR payments less than one month after being invoiced for the POR clawback charge would impact Respond's cash flow and jeopardize its ability to continue providing electric generation services to retail customers in Pennsylvania. The complaints also argue that allowing Penelec and West Penn to withhold POR payments from Respond would discourage other Electric Generation Suppliers (EGSs) from offering competitive retail service to mass market customers.

The complaints allege that on September 30, 2016, Penelec and West Penn invoiced Respond for \$484,797.69, pursuant to the POR clawback charge approved by the Commission in the Default Service Order. The invoices are based on revenues, write offs and prices for the period from August 31, 2015 through August 31, 2016.

According to the complaints, Penelec and West Penn failed to notify Respond that its retail customers were not paying their electric supply charges or that a POR clawback charge would be imposed. The complaints argue that Respond had no opportunity to address these concerns and minimize write-offs.

The complaints also assert that the captions in the DSP petitions resulting in the Default Service Order did not place Respond on notice that Penelec and West Penn were proposing retroactive charges. Therefore, imposition of the POR clawback charges violate fundamental principles of due process and amount to impermissible retroactive rate making.

The complaints further contend that the Default Service Order did not authorize Penelec and West Penn to impose arbitrary due dates for payment of the clawback charges or permit Penelec and West Penn to use self-help remedies to address payment disputes with EGSs concerning the clawback charges. The complaints argue that if the Commission permits Penelec and West Penn to unilaterally withhold POR payments from Respond, without any dispute

resolution process, the Commission would be sanctioning the unrestricted imposition of charges and remedies by EDCs on EGSs.

In addition, the complaints allege that Respond has not received a breakdown of the charges from Penelec and West Penn. Because it has not received this information, Respond has been unable to verify the accuracy of the amounts requested by Penelec and West Penn. Since it has not been able to verify the accuracy of the amounts requested by Penelec and West Penn, Respond asserts that Penelec and West Penn have made computational errors and included charges that violate the tariff provisions.

The complaints request that the Commission prohibit Penelec and West Penn from withholding \$484,797.69 in POR payments and refer the complaints to the mediation unit of the Office of Administrative Law Judge (OALJ).

On December 7, 2016, West Penn Power Industrial Intervenors (WPPII), the Penelec Industrial Customer Alliance (PICA), and the Met-Ed Industrial Users Group (MEIUG), (collectively, the Industrials), filed joint petitions to intervene in both proceedings. The Industrials' petitions allege that WPPII, PICA and MEIUG all participated in the proceedings resulting in the Default Service Order and signed the settlement agreement that the Commission adopted in the Default Service Order. The joint petitions request that the Commission grant the Industrials intervenor status in both proceedings.

On December 8, 2016, the Office of Consumer Advocate (OCA) filed its notices of intervention and public statements. The public statements allege that OCA was a signatory to the settlement that resulted in the Default Service Order. The public statements state that OCA has determined to intervene in these proceedings to ensure that the provisions in the settlement are appropriately implemented, including the clawback provisions.

On December 8, 2016, Penelec and West Penn filed answers with new matter to Respond's complaints. The answers assert that Respond's complaints are unlawful collateral attacks on the Default Service Order. The answers state that the Default Service Order approved

a settlement among the parties to the proceeding. The answers point out that Respond did not participate in the proceeding that lead to the Default Service Order. According to the answers, Respond's complaints are attempts to overturn the settlement because it has become dissatisfied with a single term of the settlement.

The answers contend that the parties to the settlement have an interest in the implementation and enforcement of the settlement agreement, including the clawback provision. Allowing Respond to challenge the clawback provision violates principles of finality and undermines the integrity of the settlement process.

In addition, the answers state that Penelec and West Penn served copies of the DSP petitions and supporting testimony that resulted in the Default Service Order on Respond. The petitions included proposed clawback provisions that would implement charges as of September 1, 2016, based on a one year look back at write off experience. The answers point out that other EGSs intervened in the proceeding and participated actively in the litigation and settlement.

The answers further assert that there is no basis for Respond's claim that the clawback provisions violate the prohibition against retroactive ratemaking. The prohibition only applies to rates for utility service. The POR program is not a utility service and the clawback charge is not a rate. The POR program is a voluntary program, not part of Penelec's and West Penn's obligation to serve. Therefore, the purchase of EGS receivables is not a service and the clawback provision is not a rate for utility service.

In addition, the answers point out that by approving the settlement agreement in the Default Service Order, the Commission has determined that the clawback provision is lawful. No party appealed the Default Service Order alleging that the clawback provision is unlawful. The answers argue that Respond had notice and opportunity to participate in the DSP proceeding that resulted in the Default Service Order but chose not to intervene.

The answers state that Penelec and West Penn filed tariff provisions that include the clawback provision on October 28, 2016. On November 10, 2016, the Commission approved the tariff provisions.

The new matters largely reiterate the statements in the answers concerning the Default Service Order. The answers with new matter request that the Commission dismiss Respond's complaints with prejudice.

Also on December 8, 2016, Penelec and West Penn filed motions for judgment on the pleadings. The motions reiterate the allegations in their answers with new matter.

The motions contend that Respond's complaints are collateral attacks on the Default Service Order barred by 66 Pa.C.S. § 316. The motions argue that the Default Service Order precludes affected parties from challenging that order if those parties were provided due process prior to the entry of the order. A party is provided due process if it is afforded notice of the proceeding and given the opportunity to appear and be heard.

Here, Penelec and West Penn argue that Respond was served with the DSP petitions initiating the proceedings resulting in the Default Service Order plus the notice of the prehearing conference and prehearing conference order. Therefore, Respond's complaints are barred by 66 Pa.C.S. § 316.

In addition, Penelec and West Penn assert that Respond's complaints fail to assert that they have violated any statute, regulation or order of the Commission. They point out that Respond's participation in their POR programs are voluntary. Therefore, the clawback charges are not rates for a utility service.

Penelec and West Penn conclude that Respond is seeking relief that requires the Commission to change the clawback charge which is outside the Commission's jurisdiction. Penelec and West Penn request that the Commission grant judgment on the pleadings except for

the averments in Respond's complaints challenging the accuracy of the computation of the clawback charges billed to Respond.

On December 13, 2016, the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA) filed a petition to intervene. The petition asserts that CAUSE-PA intervened in the DSP proceedings and was a signatory to the settlement agreement that resulted in the Default Service Order. The petition to intervene alleges that members of CAUSE-PA are customers of Penelec and West Penn who would be directly affected by the outcome of this proceeding. The petition requests that CAUSE-PA be granted status as an intervener in this proceeding.

On December 13, 2016, the Office of Small Business Advocate (OSBA) filed its notices of intervention and public statements. The public statements allege that OSBA was a signatory to the settlement that resulted in the Default Service Order. The public statements state that OSBA has determined to intervene in these proceedings to ensure that the provisions in the settlement are appropriately implemented, including the clawback provisions.

On December 14, 2016, the Commission's Bureau of Investigation and Enforcement (I&E) filed a notice of appearance.

On December 28, 2016, Respond filed replies to the new matters of Penelec and West Penn. The replies assert that Respond's complaints do not constitute a collateral attack on the Default Service Order. Rather, the replies argue that because the clawback charges are contained in Penelec's and West Penn's tariff, they constitute rates that are subject to 66 Pa.C.S § 1301 and must be just and reasonable. Respond argues that the clawback charges are not just and reasonable. The replies to new matter request that the Commission dismiss the new matters of Penelec and West Penn and sustain Respond's complaints.

Also on December 28, 2016, Respond filed answers to Penelec's and West Penn's motions for judgment on the pleadings. The answers reassert that the clawback charges are rates and must be just and reasonable. The answers deny that Respond's complaints are collateral

attacks on the Default Service Order. The answers also argue that Penelec and West Penn failed to provide adequate notice to Respond that they included the proposed clawback provision in their DSP filings. In addition, Respond argues that it may file a complaint against an existing tariff at any time. The answers request that the Commission deny Penelec's and West Penn's motions for judgment on the pleadings.

By notice dated January 19, 2017, the Commission notified the parties that it had assigned the case to me as motion judge. The motions for judgment on the pleadings are ready for decision. For the reasons set forth below, I will grant the motions for judgment on the pleadings in part.

The Commission's Rules of Practice and Procedure at 52 Pa.Code § 5.102 govern motions for judgment on the pleadings. 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. 52 Pa.Code § 5.102(d)(1). Only in a case where the moving party's right to prevail is so clear that a trial would be a fruitless exercise should judgment on the pleadings be granted. Williams v. Lewis, 466 A.2d 682 (Pa.Super. 1983); Service Employees International Union, Local 69, AFL-CIO v. The Peoples Natural Gas Company, d/b/a Dominion Peoples, Docket No. C-20028539 (Opinion and Order entered December 19, 2003).

In ruling on a motion for judgment on the pleadings, the tribunal must consider as true all well-pleaded averments of the party against whom the motion is directed and consider against it only those facts it specifically admits. Judgment on the pleadings should be entered only when the case is clear and free from doubt. Reuben v. O'Brien, 496 A.2d 913 (Pa.Super 1985).

I will view the factual averments in the complaints in this case as true for purposes of disposing of the motion for judgment on the pleadings. Those facts are that Penelec and West Penn are threatening to withhold POR payments totaling \$484,797.69 from Respond. The amount is an offset assessed on September 30, 2016 by Penelec and West Penn under

Penelec's and West Penn's clawback charge pilot program previously approved by Commission order in the Default Service Order. The POR payments Penelec and West Penn are threatening to withhold on or after October 27, 2016 are due and payable to Respond for electric generation services already provided to retail customers.

On September 30, 2016, Penelec and West Penn invoiced Respond for \$484,797.69, pursuant to the POR clawback charges approved by the Commission in the Default Service Order. The invoices are based on revenues, write offs and prices for the period from August 31, 2015 through August 31, 2016. Taking the factual averments in the complaints, there is no genuine issue as to a material fact concerning Penelec's and West Penn's attempts to collect the clawback charge from Respond.

Respond first argues that it did not receive adequate notice from the captions in the DSP proceedings resulting in the Default Service Order that Penelec and West Penn were proposing the clawback charges. Therefore, Respond argues that imposition of the POR clawback charges on it violates fundamental principles of due process. This is incorrect.

Penelec and West Penn filed their joint petition with the Commission requesting approval of their clawback charges as part of their DSPs at P-2015-2511351 and P-2015-2511356. At pages 17-18, paragraphs 50-53, the joint petition proposes a clawback provision as part of Penelec's and West Penn's DSPs. In support of the clawback provision, Penelec and West Penn provided Statement No. 3 which, at pages 17-18, outlined the proposed clawback provision.

Penelec and West Penn served copies of the joint petition and supporting statement on numerous EGSs, including Respond. In addition, notice of the DSP petitions were published in the November 14, 2015 Pennsylvania Bulletin at 45 Pa.B. 6654-6655, specifying a deadline of November 30, 2015 for filing protests, petitions and answers to the joint petition.

Administrative agencies, such as the Commission, are required to provide due process to the parties appearing before them. Schneider v. Pa. Pub. Util. Comm'n., 479 A.2d 10

(Pa.Cmwlth. 1984). This due process requirement is satisfied, however, when the administrative agency provides parties notice and the opportunity to be heard.

In this case, because Respond was served with a copy of the joint DSP petition, it had notice of the DSP and its clawback provision and opportunity to be heard but did not intervene in the proceeding. Several EGSs who were served with a copy of the joint DSP petition did intervene in the proceeding and objected to the proposed clawback provision. As a result the parties reached a settlement that modified the proposed clawback provision. Because Respond had notice and opportunity to be heard, its due process rights were adequately protected.

Respond also argues that the clawback provision is a rate that is not just and reasonable and therefore violates 66 Pa.C.S. § 1301 which requires that rates be just and reasonable. This argument is incorrect because the clawback charge is not a rate.

The Public Utility Code at 66 Pa.C.S. § 102 defines rate as follows:

"Rate." 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.

A rate embraces any and all compensation received by a public utility for service it renders to a customer. Penn-Harris Hotel Co. v. Pa. Pub. Util. Comm'n, 71 A.2d 853 (Pa.Super. 1950) (Penn Harris). In Penn Harris, the Superior Court held that the definition of "rate" contained in the Public Utility Law, Act of May 28, 1937, did not cover services rendered to the public utility for which the public utility expends money.

In 1978, the General Assembly repealed the Act of May 28, 1937 and enacted the Act of July 1, 1978, P.L. 598, No. 116, the existing Public Utility Code. The current Public Utility Code at 66 Pa.C.S. § 102, defining "rate", contains almost identical language as that

found in the prior Public Utility Law at 66 P.S. § 1102. Since the provision at 66 Pa.C.S. § 102 is a reenactment of the provisions of the prior Public Utility Law, decisions interpreting the provisions that existed prior to 1978 continue to be applicable. Pittsburgh & Shawmut R. Co. v. Pa. Pub. Util. Comm'n, 14 A.2d 903 (Pa. Super. 1940); County of Chester v. Pa. Pub. Util. Comm'n, 408 A. 2d 552 (Pa. Cmwlth. 1979).

Here, the clawback charge is not compensation received by Penelec and West Penn for service it renders to Respond. Therefore, the clawback charge is not a rate and therefore not subject to 66 Pa.C.S. § 1301.

As pointed out in their answers, Penelec and West Penn filed tariff provisions in the DSP proceeding that include the clawback provision on October 28, 2016. On November 10, 2016, the Commission approved the tariff provisions. The clawback provision is part of Penelec's and West Penn's tariff but is not a rate.

In contrast to the narrow definition of rate, the Public Utility Code at 66 Pa.C.S. § 102 defines tariff more broadly as follows:

"Tariff." All schedules of rates, all rules, regulations, practices, or contracts involving any rate or rates, including contracts for interchange of service, and, in the case of a common carrier, schedules showing the method of distribution of the facilities of such common carrier.

A tariff therefore includes schedules of rates but also includes the rules, regulations and practices of a public utility. Brockway Glass Co. v. Pa. Pub. Util. Comm'n, 437 A.2d 1067 (Pa.Cmwlth. 1981). Tariff provisions, for example, govern the terms and conditions under which a public utility will extend service to potential customers. Kossman v. Pa. Pub. Util. Comm'n, 694 A.2d 1147 (Pa.Cmwlth. 1997).

As a tariff, the clawback provision is part of a set of operating rules imposed by the Commission that each public utility must follow in order to provide service to its customers. PPL Electric Utilities Corp. v. Pa. Pub. Util. Comm'n, 912 A.2d 386 (Pa. Cmwlth. 2006). Each public utility must file a copy of its tariff with the Commission setting forth its rates, services,

rules, regulations and practices so that the public may inspect its contents. 66 Pa.C.S. §1302; 52 Pa.Code §53.25; Philadelphia Suburban Water Co. v. Pa. Pub. Util. Comm'n, 808 A.2d 1044 (Pa.Cmwlth. 2002). Public utility tariffs must be applied consistent with their language. Public utility tariffs have the force and effect of law and are binding on the public utility and its customers. Pennsylvania Electric Co. v. Pa. Pub. Util. Comm'n, 663 A.2d 281 (Pa.Cmwlth. 1995). The Commission has no authority to allow a public utility to deviate from its tariff even where the Commission concludes it is in the public interest. Philadelphia Suburban Water Co. v. Pa. Pub. Util. Comm'n, 808 A.2d 1044 (Pa.Cmwlth. 2002).

Tariff provisions previously approved by the Commission are prima facie reasonable. Zucker v. Pa. Pub. Util. Comm'n, 437 A.2d 1067 (Pa.Cmwlth. 1981). A complainant seeking to evade the effect of an existing tariff provision carries a very heavy burden of proving that the facts and circumstances leading to the creation of the tariff provision have changed so drastically as to render the application of the tariff provision unreasonable. Shenango Twp. v. Pa. Pub. Util. Comm'n, 686 A.2d 910 (Pa.Cmwlth. 1996).

In this case, the Commission approved the clawback provision as part of Penelec's and West Penn's DSPs. The Commission approved Penelec's and West Penn's tariff filing implementing the clawback provision. No party to Penelec's and West Penn's DSP proceedings appealed the Commission's approval of the tariff. Penelec's and West Penn's clawback provision tariff therefore has the force and effect of law and is binding on Respond, Penelec and West Penn.

Since the Commission has approved the clawback tariff, it is prima facie reasonable. In order to overcome this presumption of reasonableness, Respond must allege in its complaint that the facts and circumstances leading to the creation of the tariff provision have changed so drastically as to render the application of the tariff provision unreasonable. Respond has not done this.

Rather than allege facts or circumstances that have changed since the creation of the clawback tariff approved by the Commission, Respond in its complaint asserts that Penelec's

and West Penn's application of the tariff conflicts with the Public Utility Code and Commission regulations. Respond should have intervened in the DSP proceedings and raised these arguments.

Respond has not alleged any change of circumstances since the Commission's approval of the clawback tariff that render it unreasonable. As stated above, the Commission cannot direct Penelec and West Penn to deviate from the provisions of the clawback tariff in order to provide relief to Respond even if the Commission were to conclude it is in the public interest to do so. The tariff must be applied in a non-discriminatory manner.

Respond fails to allege any facts or circumstances in its complaint that have changed since the Commission's approval of the clawback tariff that now render the provision unreasonable. Since the complaint fails to allege any change in circumstances in its complaint, a hearing is not necessary to allow Respond the opportunity to present evidence that application of the tariff provision in this case is unreasonable. In these circumstances, giving Respond the opportunity to explain its position on this issue at a hearing would be a fruitless exercise.

However, Respond's complaints allege that Respond has not received a breakdown of the charges from Penelec and West Penn and has been unable to verify the accuracy of the amounts requested by Penelec and West Penn. Since it has not been able to verify the accuracy of the amounts requested by Penelec and West Penn, Respond asserts that Penelec and West Penn have made computational errors and imposed charges that violate the tariff provisions. This issue raised in the complaint will be scheduled for hearing.

Since there are no material facts in dispute and Penelec and West Penn are entitled to judgment as a matter of law concerning Respond's assertions that the clawback provision is invalid or unreasonable. I will grant their motion for judgment on the pleadings on those issues and refer the issue concerning computational errors and charges that violate the tariff provisions for hearing.

ORDER

THEREFORE,

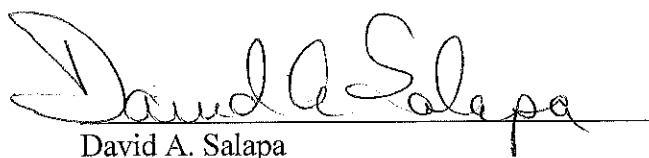
IT IS ORDERED:

1. That the motions for judgment on the pleadings filed by Pennsylvania Electric Company at Docket No. C-2016-2576287 and West Penn Power Company at Docket No. C-2016-2576292 are granted in part.

2. That the issues concerning the validity and reasonableness of the clawback provisions set forth in in the complaints of Respond Power, LLC at Docket No. C-2016-2576287 and C-2016-2576292 are denied.

3. That the remaining issue concerning computational errors and charges that violate the tariff provisions set forth in the complaints of Respond Power, LLC at Docket No. C-2016-2576287 and C-2016-2576292 shall be scheduled for hearing before an administrative law judge.

Date: January 23, 2017

A handwritten signature in cursive script that reads "David A. Salapa". The signature is written in black ink and is positioned above a horizontal line.

David A. Salapa
Administrative Law Judge

C-2016-2576287 - RESPOND POWER LLC v. PENNSYLVANIA ELECTRIC CO
C-2016-2576292 - RESPOND POWER LLC v WEST PENN POWER COMPANY

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