

**ECKERT  
SEAMANS**  
ATTORNEYS AT LAW

Eckert Seamans Cherin & Mellott, LLC  
213 Market Street  
8<sup>th</sup> Floor  
Harrisburg, PA 17101

TEL 717 237 6000  
FAX 717 237 6019  
www.eckertseamans.com

Karen O. Moury  
717.237.6036  
kmoury@eckertseamans.com

February 6, 2017

**Via Electronic Filing**

Rosemary Chiavetta, Secretary  
PA Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

Re: Respond Power LLC v. Pennsylvania Electric Company  
Docket Nos. C-2016-2576287

Respond Power LLC v. West Penn Power Company  
Docket No. C-2016-2576292

---

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Respond Power LLC's Brief in Support of Interlocutory Review and Answer to Material Question with regard to the above-referenced matters. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,



Karen O. Moury  
KOM/lww

Enclosure

cc: Hon. David A. Salapa w/enc.  
Certificate of Service w/enc.

**CERTIFICATE OF SERVICE**

I hereby certify that this day I served a copy of Respond Power's Brief in Support of Interlocutory Review and Answer to Material Questions upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54

**Via Email and First Class Mail**

Thomas P. Gadsden, Esq.  
Anthony C. DeCusatis, Esq.  
Brooke E. McGlinn, Esq.  
Morgan Lewis & Bockius, LLP  
1701 Market St.  
Philadelphia, PA 19103-2921  
[tgadsden@morganlewis.com](mailto:tgadsden@morganlewis.com)  
[adecusatis@morganlewis.com](mailto:adecusatis@morganlewis.com)  
[bmcglinn@morganlewis.com](mailto:bmcglinn@morganlewis.com)

Tori Giesler, Esq.  
FirstEnergy Service Company  
2800 Pottsville Pike  
PO Box 16001  
Reading, PA 19612-6001  
[tgiesler@firstenergycorp.com](mailto:tgiesler@firstenergycorp.com)

Aron J. Beatty, Esq.  
Kristine E. Marsilio, Esq.  
Office of Consumer Advocate  
555 Walnut St., 5th Floor, Forum Place  
Harrisburg, PA 17101-1923  
[ABeatty@paoca.org](mailto:ABeatty@paoca.org)  
[kmarsilio@paoca.org](mailto:kmarsilio@paoca.org)

Daniel Asmus, Esq.  
Office of Small Business Advocate  
1102 Commerce Building  
300 N. Second St.  
Harrisburg, PA 17101  
[dasmus@pa.gov](mailto:dasmus@pa.gov)

Patrick Cicero, Esq.  
Joline Price, Esq.  
Elizabeth R. Marx, Esq.  
Pennsylvania Utility Law Project  
118 Locust St.  
Harrisburg, PA 17101  
[pulp@palegalaid.net](mailto:pulp@palegalaid.net)

Allison C. Kaster, Esq.  
PA Public Utility Commission  
Bureau of Investigation & Enforcement  
PO Box 3265  
Harrisburg, PA 17101-3265  
[akaster@pa.gov](mailto:akaster@pa.gov)

Susan E. Bruce  
Charis Mincavage  
Vasiliki Karandrikas  
Teresa K. Schmittberger  
McNees Wallace & Nurick LLC  
1 00 Pine Street  
P.O. Box 1166  
Harrisburg, P A 17108  
[sbruce@mwn.com](mailto:sbruce@mwn.com)  
[emincavage@mwn.com](mailto:emincavage@mwn.com)  
[vkandrikas@mwn.com](mailto:vkandrikas@mwn.com)  
[tschmittberger@mwn.com](mailto:tschmittberger@mwn.com)

Dated: February 6, 2017



Karen O. Moury, Esq.

**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	:	

---

**BRIEF OF RESPOND POWER, LLC IN SUPPORT OF  
INTERLOCUTORY REVIEW  
AND ANSWER TO MATERIAL QUESTIONS**

---

Karen O. Moury  
Attorney I.D. No. 36879  
Eckert Seamans Cherin & Mellott, LLC  
213 Market Street, Eighth Floor  
Harrisburg, PA 17101  
717.237.6036  
kmoury@eckertseamans.com

February 6, 2017

Counsel for Respond Power LLC

## I. INTRODUCTION

On January 26, 2017, pursuant to 52 Pa. Code § 5.302, Respond Power, LLC (“Respond Power”) filed a Petition for Interlocutory Review and Answer to Material Questions (“Petition”) relating to the Interim Order issued by Administrative Law Judge (“ALJ”) David A. Salapa on January 23, 2017 (“*Interim Order*”) granting, in part, the Motions for Judgment on the Pleadings (“Motions”) filed by Pennsylvania Electric Company (“Penelec”) and West Penn Power Company (“West Penn”) ( collectively referred to as the “Companies”).

This proceeding involves Complaints filed by Respond Power against the Companies’ application of supplier tariff provisions, which resulted in the imposition of clawback charges on Respond Power in connection with the Companies’ purchase of receivables (“POR”) program. Respond Power’s specific challenges to the tariff provisions are that: 1) the Companies retroactively changed the terms of the 2015-2017 Default Service Plan as part of their 2017-2019 Default Service Plan; and 2) the charges are based on historical write-off data that includes uncollectible amounts that accrued over a period of several months or even years before September 1, 2015. In support of its challenges, Respond Power has cited due process principles and standards relating to the need for Commission-approved tariff provisions to be just and reasonable.

By its Petition, Respond Power requests that the Commission answer the following two material questions in the affirmative:

- (1) May an entity to whom a utility tariff provision is applied file a complaint with the Commission challenging the application of the tariff?
- (2) Are Commission-approved tariff provisions subject to a just and reasonable standard?

In asking the Commission to review these material questions on an interlocutory basis and requesting that the Commission answer them in the affirmative, Respond Power seeks to avoid

substantial prejudice and expedite the conduct of this proceeding. Specifically, if Respond Power's Petition is denied, it will be prohibited from presenting evidence in support of the bulk of the allegations set forth in its Complaints. By precluding Respond Power from supporting its challenges to the retroactive application of the tariffs and the historical write-off data supporting the Companies' charges, the *Interim Order* essentially puts Respond Power out of court.

Under the *Interim Order*, the only evidence that Respond Power would be permitted to present at the hearing relates to alleged computational errors. Although Respond Power has been unable to verify the Companies' calculations based on the data that has been made available to date, the gist of the Complaints is the unjust and unreasonable application of the tariff provisions. Therefore, if the hearing proceeds on the extremely limited basis outlined in the *Interim Order*, significant resources of Respond Power (including witness travel time and costs) will be expended to develop a record on a very small portion of the Complaints' allegations. Rather than moving forward with a limited hearing on narrow issues, and later remanding the matter to correct legal errors, judicial economy would be served by permitting Respond Power to challenge the application of existing tariff provisions and present evidence in support of its claims that they are unjust and unreasonable. This approach would also allow Respond Power to pursue issues regarding the Companies' retroactive application of the tariff provisions in a manner that was not contemplated by the Commission in approving them.

The fundamental errors of the *Interim Order* warrant interlocutory review. To avoid substantial prejudice to Respond Power and to expedite the conduct of the proceeding, Respond Power should be permitted to pursue during the hearing in this proceeding whether its due process rights were violated when clawback charges were imposed that retroactively changed the terms of an existing POR program. Respond Power should also be afforded the opportunity to challenge

the reasonableness of a tariff provisions that are based on historical write-offs that were being accrued months or years before the clawback charges were even proposed by the Companies.

## II. BACKGROUND AND PROCEDURAL HISTORY

On September 30, 2016, the Companies assessed clawback charges on Respond Power in the amount of \$484,797.69 based on write-offs for the period of September 1, 2015 through August 31, 2016. As a basis for the charges, the Companies pointed to their 2017-2019 Default Service Plan.<sup>1</sup> However, the charges were assessed in connection with the Companies' 2015-2017 Default Service Plan.<sup>2</sup> Establishing a due date of October 27, 2016, the Companies threatened to withhold POR payments if the invoices were not timely paid. Despite efforts by Respond Power to obtain additional information and to discuss an amicable resolution of the matter, the Companies were unresponsive. As a result, Respond Power filed a Petition for Issuance of *Ex Parte* Emergency Order on October 26, 2016, asking the Commission to direct the Companies to cease and desist from unilaterally withholding payments on or after October 27, 2016.

On October 27, 2016, the Commission issued an Emergency Order, directing the Companies to cease and desist from implementing the clawback charges until they had filed the appropriate tariffs and obtained the Commission's approval thereof, or November 27, 2016, whichever occurred later. On October 28, 2016, the Companies filed supplier tariffs containing the clawback charges with an effective date of August 1, 2016. The Commission ratified the Emergency Order on November 9, 2016 and a hearing was scheduled on November 17, 2016. In

---

<sup>1</sup> *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, P-2015-2511356 (Order entered May 19, 2016) ("May 19, 2016 Order").

<sup>2</sup> *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company for Approval of their Default Service Programs*, Docket No. P-2013-2391368, P-2013-2391372, P-2013-2391375 and P-2013-2391378 (Order entered July 24, 2014) ("July 24, 2014 Order").

approving the supplier tariffs on November 10, 2016, the Commission expressly noted that its approval was “without prejudice to any formal complaints timely filed against tariff revisions.”<sup>3</sup>

On November 16, 2016, Respond Power filed a Complaint, challenging the application of supplier tariff provisions.<sup>4</sup> The specific tariff provisions are Section 12.9(g) of Penelec’s Supplier Tariff and Section 12.4.2(1) of West Penn’s Supplier Tariff. The Companies then agreed that the charges were disputed and further agreed not to withhold POR payments during the pendency of the proceeding. The hearing on the Emergency Order was cancelled.

On December 8, 2016, the Companies filed Answers and New Matter and Motions for Judgment on the Pleadings (“Motions”). On December 28, 2016, Respond Power filed Replies to the New Matter and Answers to the Motions. By *Interim Order* dated January 23, 2017, the ALJ granted the Motions, in part, thereby limiting Respond Power to presenting evidence only on the issue of whether the clawback charges were properly calculated pursuant to the tariffs. Through its Petition filed on January 26, 2017, Respond Power seeks interlocutory review of the Interim Order. This Brief is submitted pursuant to Section 5.302(b) of the Commission’s regulations.<sup>5</sup>

### **III. APPLICABLE LEGAL STANDARDS**

Under Section 5.302(b) of the Commission’s regulations, a Petition must present “compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding.”<sup>6</sup> The Commission has construed “substantial prejudice” to mean that the error and any prejudice following therefrom could not be satisfactorily cured during the normal

---

<sup>3</sup> Secretarial Letter dated November 10, 2016.

<sup>4</sup> At the Commission’s request, Respond Power filed separate Complaints against Penelec and West Penn on November 17, 2016. They were served on the Companies on November 18, 2016.

<sup>5</sup> 52 Pa. Code § 5.302(b).

<sup>6</sup> *Id.*; *Pa. PUC v. Philadelphia Gas Works*, Docket Nos. P-2009-2097639, et al. (Order entered April 15, 2010).

Commission review process.<sup>7</sup> The Commission has further determined that a showing supportive of interlocutory review may be accomplished by a petitioner by demonstrating that, without such review, “some harm would result which would not be reparable through normal avenues, that the relief sought should be granted now, rather than later, and that granting interlocutory review would prevent substantial prejudice of expedite the proceeding.”<sup>8</sup>

In granting interlocutory review by the *IDT Interlocutory Order*, the Commission did so for the purpose of “clarifying the scope of the Commission’s subject matter jurisdiction and authority in this case and by ensuring the development of a full and complete record here that is consistent with the Commission’s jurisdiction and authority.”<sup>9</sup> Had the Commission not granted interlocutory review, the Office of Consumer Advocate and the Office of Attorney General would have been precluded from presenting evidence in the same manner that the *Interim Order* would accomplish here.<sup>10</sup> Notably, in ruling on petitions requesting interlocutory review, the Commission has found that “the preferred approach is to permit proceedings to move forward in the normal course in order to provide all parties, the presiding officer, and the Commission, *with a full opportunity to develop the record, brief issues and present arguments at each stage.*”<sup>11</sup>

Motions for judgment on the pleadings are granted only if the pleadings show that there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter

---

<sup>7</sup> *Joint Application of Bell Atlantic Corp. and GTE Corp.*, Docket No. A-310200F0002, *et al.* (Order entered June 14, 1999); *Pa. PUC v. Frontier Communications of Pa. Inc.*, Docket No. R-00984411 (Order entered February 11, 1999); *In re: Knights Limousine Service, Inc.*, 59 Pa. P.U.C. 538 (1985).

<sup>8</sup> *Commonwealth of PA, et al., v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Order entered December 18, 2014), at 10 (“*IDT Interlocutory Order*”).

<sup>9</sup> *Id.* at 16.

<sup>10</sup> *See also Commonwealth et al. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655 (Order entered December 11, 2014).

<sup>11</sup> *CRH Catering Company, Inc. v. Blue Pilot Energy, LLC*, Docket No. P-2014-2451865 (Order entered February 24, 2015), at 8 (emphasis added).

of law.<sup>12</sup> Only where the moving party's right to prevail is so clear that a trial would be fruitless should judgment on the pleadings be granted.<sup>13</sup>

#### IV. ARGUMENT

##### A. Respond Power Meets the Interlocutory Review Standard.

In order to avoid substantial prejudice to Respond Power and expedite the conduct of the proceeding, it is necessary for the Commission to grant interlocutory review and answer the following material questions in the affirmative:

- (1) May an entity to whom a utility tariff provision is applied file a complaint with the Commission challenging the application of the tariff?
- (2) Are Commission-approved tariff provisions subject to a just and reasonable standard?

Additionally, the *Interim Order* makes such fundamental errors as to warrant interlocutory review by the Commission. Well-established law permits parties to file a complaint at any time challenging the application of a utility tariff. Further, it is beyond dispute that Commission-approved tariff provisions are subject to a just and reasonable standard.

Denying Respond Power the opportunity to pursue these challenges during the hearing that will be scheduled on the Complaints would harm Respond Power and would delay the orderly disposition of this proceeding. To avoid substantial prejudice to Respond Power and to expedite the conduct of the proceeding, Respond Power should be permitted to pursue its claim that its due process rights were violated when clawback charges were imposed in a way that retroactively changed the terms of an existing POR program. Respond Power should also be afforded the opportunity to challenge the reasonableness of tariff provisions that are based on historical write-

---

<sup>12</sup> 52 Pa. Code § 5.102(d)(1).

<sup>13</sup> *Williams v. Lewis*, 466 A.2d 682 (Pa. Super. 1983).

offs of uncollectible amounts that were being accrued months or years before the clawback charges were even proposed by the Companies or approved by the Commission.

Absent intervention by the Commission, Respond Power will be prohibited from presenting evidence in support of the bulk of the allegations set forth in its Complaints. By precluding Respond Power from supporting its challenges to the retroactive application of the tariff provisions and the historical write-off data that form the basis for the Companies' charges, the *Interim Order* essentially puts Respond Power out of court. Under the *Interim Order*, the only evidence that Respond Power would be permitted to present at the hearing relates to the allegations in the Complaints regarding computational errors. Although Respond Power has been unable to verify the Companies' calculations based on the data that has been made available to date, the gist of the Complaints concerns the unjust and reasonable application of the tariff provisions.

If the hearing proceeds on the extremely limited basis established by the *Interim Order* and the Commission later determines that Respond Power should have been permitted to develop a record on the reasonableness of the underlying tariff provision, it would be harmed by needing to expend additional resources (including travel expenses and time) to attend a further hearing. Particularly since the *Interim Order* contains such fundamental errors, Respond Power would be substantially prejudiced by this result. This outcome would also unduly delay the disposition of the proceeding, while judicial economy would be served by permitting Respond Power to fully develop a record in support of its challenges. Further, allowing Respond Power to fully exercise its rights to contest the reasonableness of these provisions would permit it to demonstrate that the Commission's approval of the tariff provisions did not contemplate their retroactive application in the manner that the Companies have implemented them.

B. Complaints Against Tariffs May Be Filed At Any Time.

The *Interim Order* finds that Respond Power is precluded from filing the Complaints because it was served with the Companies' 2017-2019 Default Service Plans. Rather than recognizing Respond Power's ability to challenge the application of an existing tariff, the *Interim Order* concludes that because Respond Power was served with a copy of the Companies' 2017-2019 Default Service Plan, its due process rights were adequately protected. Under the *Interim Order*, Respond Power's only recourse for challenging the tariff provisions was to participate in the Companies' 2017-2019 Default Service Plans proceeding. This result is directly contrary to Code Section 1309, which provides that the Commission may find that *existing* rates for any public utility for any service are unjust, unreasonable or in violation of any law.<sup>14</sup>

Well-settled case law also confirms that the reasonableness of Commission-approved tariffs may be challenged.<sup>15</sup> Indeed, the Secretarial Letter approving the disputed tariff provisions acknowledged that approval was "without prejudice to any formal complaints timely filed against said tariff revisions."<sup>16</sup> Also, the settlement approved by the Commission's May 19, 2016 Order expressly reserved the rights of all parties to propose modifications to or termination of the clawback charge, and noted that this provision is not intended to apply to other proceedings nor to waive any parties' rights regarding those issues in future proceedings.<sup>17</sup> Further, as noted in the *Core Recommended Decision*, "[t]he Commission-approved tariff has the force of law" and an entity challenging it bears the burden "to show that the charge for the services that apply under the

---

<sup>14</sup> 66 Pa. C.S. § 1309(a).

<sup>15</sup> See *Brockway Glass Co. v. Pa. PUC*, 437 A.2d 1067, 63 Pa. Cmwlth. 238 (1981). See also *In Core Communications, Inc. v. AT&T Communications of Pennsylvania, LLC*, Docket No. C-2009-2108186 (Recommended Decision served May 24, 2011, at 25; Orders entered on December 5, 2012 and August 15, 2012) ("*Core Recommended Decision*").

<sup>16</sup> Secretarial Letter dated November 10, 2016.

<sup>17</sup> Initial Decision at 29-31.

tariff is not reasonable.”<sup>18</sup> Therefore, parties are not precluded from challenging approved tariff provisions. Rather, they have the burden of establishing that they are not just and reasonable.

Respond Power’s Complaints do not constitute an impermissible collateral attack on the Commission’s May 19, 2016 Order. As more fully explained by Respond Power’s Answers to the Motions, Code Section 316 and the doctrine of issue preclusion are inapplicable.<sup>19</sup> For issue preclusion to apply, it must be shown that: (i) the issue decided by a prior final judgment is identical with the one presented in the later action; (ii) the issue was actually litigated; (iii) the party against whom issue preclusion was asserted was a party or in privity with a party to the prior litigation; and (iv) the determination of the issue was essential to the prior final judgment.<sup>20</sup>

Here, none of the criteria for applying the doctrine of issue preclusion are present. The May 19, 2016 Order related to the Company’s 2017-2019 Default Service Plan, whereas this proceeding challenges the application and computation of a charge to Respond Power that modifies the existing 2015-2017 Default Service Plan. Further, issues relating to the clawback charges were not litigated during the default service proceeding, which was resolved by settlement. In addition, Respond Power was not a party to the default service proceeding and the clawback provisions that modified the 2015-2017 Default Service Plan were not a critical component of the Company’s 2017-2019. In short, Respond Power has not waived its rights to challenge these charges.<sup>21</sup>

The Companies have cited to a series of cases involving a petition of the Pennsylvania State University for a declaratory order (concerning the extension of generation rate caps for a particular tariff) to support their contention that a party who received notice of a proceeding and

---

<sup>18</sup> *Core Recommended Decision* at 25.

<sup>19</sup> Respond Power’s Answers at 5-7.

<sup>20</sup> *Tillman v. Philadelphia Gas Works*, Docket No. C-2014-2445229, 2015 Pa. PUC LEXIS 532 (Initial Decision served November 19, 2015 and Final Order entered March 8, 2016).

<sup>21</sup> *See Borough of Lansdale v. PP&L, Inc.*, 426 F. Supp. 2d 264 (2006) (an entity that was not a party to a proceeding is not barred from raising an issue of fact or law in a subsequent proceeding).

did not intervene is precluded by Code 316 from thereafter challenging the final order.<sup>22</sup> As explained in Respond Power's Answers to the Motions, the *PSU rulings* are not applicable.<sup>23</sup> Notably, the *PSU rulings* focused on adequate notice of the company's specific proposal (not the filing of the proceeding). In finding that due process requirements were satisfied, the Commission and the Commonwealth Court relied upon abundant evidence of adequate notice of the specific proposal, including: (i) bill inserts with detailed information; (ii) notice of proposed changes to a restructuring settlement to which the customer was a signatory; and (iii) a publication in the *Pennsylvania Bulletin* specifying which tariffs were being affected by the rate cap extensions.<sup>24</sup>

By contrast, in this proceeding, Respond Power did not receive notice from the Companies or the Commission that modifications were being proposed to the no-recourse POR program in which it was/is participating under the 2015-2017 Default Service Plan. The Pennsylvania Superior Court has enunciated the criteria that must be established to satisfy due process.<sup>25</sup> Specifically, notice must be reasonably calculated to apprise interested parties of the proposal and afford them an opportunity to present their objections. Although notice need not be entirely comprehensive, it must not be misleading or materially incomplete. It is further required that the notice contain an adequate description of the proceedings and include information that a reasonable person would consider material in making an informed, intelligent decision of whether to

---

<sup>22</sup> Motion ¶¶ 38-61. 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 (Recommended Decision served July 28, 2008); *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 (Final Order entered September 11, 2008); *The Pennsylvania State University v. Pa. P.U.C.*, 988 A.2d 771, 783 (Pa. Cmwlth. 2010) (collectively referred to as "the *PSU rulings*").

<sup>23</sup> Respond Power's Answers at 7-8.

<sup>24</sup> In addition to the notice issues that vary widely between the *PSU rulings* and the present case, it is also noteworthy that these matters involve wholly different circumstances. In the *PSU rulings*, the customer was seeking to resurrect a generation rate cap extension after an entire proceeding had been devoted to the extension of generate rate caps for certain rate schedules. By contrast, Respond Power in this proceeding is challenging the application of an existing tariff charge.

<sup>25</sup> *Wilkes v. Phoenix Home Life Mutual Insurance Company*, 851 A.2d 2014, 211 (2004), *rev'd on other grounds*, 587 Pa. 590, 902 A.2d 366 (2006).

participate or risk being bound by the final judgment. Additionally, to meet the requisite due process requirement, it is imperative that utilities impose charges on a prospective basis only.<sup>26</sup>

A review of the relevant timeline and filings supports Respond Power's claim that it was denied due process by receiving an inadequate and incomplete description of the proceedings such that it would be aware of the effects of the proposed 2017-2019 Default Service Plan on the previously approved 2015-2017 Default Service Plan. By its July 24, 2014 Order, the Commission approved the Companies' 2015-2017 Default Service Plan containing a POR program without recourse, meaning that the Companies fully purchased the accounts of receivables of electric generation suppliers ("EGSs") without discount or other future remedies. On November 3, 2015, the Companies filed their forward-looking 2017-2019 Default Service Plan to propose how it would in the future acquire electric generation supply for its default supply customers.<sup>27</sup> Buried within that filing was a proposal to revise the POR in their 2015-2017 Default Service Plan, which had just been implemented less than six months earlier. Service of the 2017-2019 Default Service Plan on Respond Power did not provide notice of proposed changes to the 2015-2017 Default Service Plan. Further, in approving the disputed tariff provisions by its May 19, 2016 Order, the Commission modified its July 24, 2014 Order without providing affected parties notice and opportunity to be heard as required by Section 703(g) of the Public Utility Code ("Code").<sup>28</sup>

It is not reasonable to conclude that Respond Power needed to participate in the Companies' 2017-2019 Default Service Plan proceeding in order to preserve POR program features that were already approved by the Commission and in effect as part of the 2015-2017 Default Service Plan. Clearly, the expectation of Section 54.185 of the Commission's regulations

---

<sup>26</sup> See *Pa. PUC v. Philadelphia Electric Co.*, 56 Pa. PUC 191, 228 (1982).

<sup>27</sup> 52 Pa. Code §§ 54.186, 54.188.

<sup>28</sup> 66 Pa.C.S. § 703(g).

is that the default service program that is filed will go into effect following the conclusion of the currently effective default service program.<sup>29</sup> Since the purpose of the Companies' 2017-2019 Default Service Plan was to establish a default service program for a future time period and no notice was given that the filing sought to modify the 2015-2017 Default Service Plan, Respond Power would have reasonably been expected to participate in the proceeding only if it had concerns about **future changes** to the POR program or other aspects of the Company's default service program. It is not reasonable to expect EGSs to expend the resources to participate in electric distribution company ("EDC") default service proceedings if they are willing to accept the resulting design of the future default service program. For proposed changes to the existing POR program, it was incumbent upon the Company to separately file such proposals so that all affected parties would be on notice of a possible modification to the current program. Absent such notice, it was reasonable for Respond Power to expect that any proposed changes to the POR program would not go into effect until June 1, 2017.<sup>30</sup>

When the Companies filed their 2017-2019 Default Service Plan in November 2015, proposing to modify the no-recourse POR program for the 2015-2017 period, two months of write-offs had already accrued (September and October 2015) that would be used in September 2016 to assess the clawback charge. By the time the Commission approved the modification to the Companies' 2015-2017 Default Service Plan by the May 19, 2016 Order, nearly nine months of write-offs had already accrued. Further aggravating that situation, those write-offs include amounts billed to customers for months or even years prior to September 1, 2015. Additionally,

---

<sup>29</sup> See 52 Pa. Code § 54.185.

<sup>30</sup> Notably, another EDC implemented a clawback charge on a forward-looking basis so that EGSs were aware of its existence before it went into effect. See *Petition of Duquesne Light Company for Approval of Default Service Plan for the Period January 1, 2008 Through December 31, 2010*, Docket No. P-00072247 (Order entered June 21, 2007).

no information is available as to the collection activities undertaken by the Companies or whether the write-off amounts are inflated due to delays in writing them off or as a result of subsequent payments by customers in order to have service restored.

In short, Respond Power was participating in a no-recourse POR program with no idea that at a later point in time, the rules applicable to that program would change and that uncollectible amounts written off by the Companies would subject Respond Power to clawback charges.<sup>31</sup> Indeed, while the clawback charges were accruing, Respond Power had no knowledge of their existence because they did not yet in fact exist.<sup>32</sup> The Commission has previously observed that changing the rules after the game has been played violates a fundamental rule of due process.<sup>33</sup>

C. Utility Tariff Provisions Must Be Just and Reasonable.

The *Interim Order* finds that the clawback charges are not rates and are therefore not required to be just and reasonable. The Commission has found that the term “rate” is broadly defined to include all charges imposed by a utility. Recently, the Commission observed that:

It is well-settled that Section 1301 of the Code, 66 Pa. C.S. § 1301, requires that, “[e]very rate made, demanded, or received by any public utility... shall be just and reasonable, and in conformity with regulations or orders of the commission. See *Barasch v. Pa. PUC*, 507 Pa. 496, 491 A.2d 94 (1985), citing *Pa. PUC v. Pa. Gas and Water Co.*, 492 Pa. 326, 424 A.2d 1213 (1980), cert. denied 454 U.S. 824, 102 S.Ct. 112, 70 L.Ed.2d 97 (1981). Under the predecessor, Public Utility Law,<sup>34</sup> and under the current, Public Utility Code, the term “rate” is broadly defined as encompassing every individual, or joint fare, toll, charge, rental, or other

---

<sup>31</sup> While the Companies have pointed to the two-prong analysis that is used in assessing the clawback charges, noting that Respond Power was eligible due to its prices and write-off levels, those factors are irrelevant to whether it is appropriate for the Companies to assess charges of which Respond Power had no notice while they were accruing and no ability to minimize or avoid. Additionally, issues concerning Respond Power’s prices during the Polar Vortex have been fully addressed by the Commission, with over \$5 million being refunded to customers, along with several other measures to which Respond Power agreed. *Commonwealth et al. v. Respond Power LLC*, Docket No. C-2014-2427659 (Order entered August 11, 2016). The clawback charges that the Companies seek to impose would inappropriately further penalize Respond Power.

<sup>32</sup> Even if Respond Power was presumed to know of its existence as of May 19, 2016, the date of the Commission’s Final Order, nearly 9 months of write-offs had accrued by that time.

<sup>33</sup> *Phone Talk, Inc. v. Bell Telephone Company of Pennsylvania, et al.*, Docket No. C-882009 et al., 126 P.U.R. 4<sup>th</sup> 179 (Order entered September 12, 1991) at 16 (“*Phone Talk*”).

<sup>34</sup> Public Utility Law, Act of May 28, 1937, P.L. 1053.

compensation whatsoever of any public utility made, demanded, or received for any service within this act [Code], offered, rendered, or furnished by such public utility and includes any rules, regulations, practices, classifications or contracts affecting any such compensation, *charge*, fare, toll, or rental.<sup>35</sup>

The Commission has also noted that when there is a question concerning the justness and reasonableness of rates of any entity subject to the Code, the Commission cannot be indifferent.<sup>36</sup>

As they contain charges that are imposed as part of a POR program offered by the Companies to EGSs, the disputed tariff provisions constitute rates and are required to be just and reasonable.

Even if the Commission does not view the clawback charges as rates, they are undoubtedly tariff provisions, as acknowledged by the *Interim Order*. The case law addressing the just and reasonable standard does not distinguish between rates and other tariff provisions.<sup>37</sup> Indeed, the orders cited by the *Interim Order* make it clear that tariff provisions must be just and reasonable.<sup>38</sup> In *Zucker*, the Commonwealth Court explained that a complainant challenging a Commission-approved tariff must establish that it is “unjust or unreasonable.” Since the *Shenango Twp.* decision cited by the *Interim Order* involved a water utility’s line extension policy rather than the imposition of a charge, the additional burden placed by that decision for parties challenging existing tariffs to show drastic changes in circumstances is not applicable. Notably, the courts have not typically imposed this additional burden on parties challenging the justness and reasonableness of existing tariff provisions.<sup>39</sup> In any event, Respond Power has raised issues relating to the retroactive changes to the POR program and the use of historical write-off data that

---

<sup>35</sup> *SBG Management Services, Inc./Colonial Garden Realty Co., L.P. v. Philadelphia Gas Works*, Docket No. C-2012-2304183 (Order entered December 8, 2016), at 82 (emphasis added).

<sup>36</sup> *See Di Santo v. Dauphin Consol. Water Supply*, 436 A.2d 197 (Pa. Super. 1981); *Painter v. Pa. PUC*, 116 A.3d 749 (Pa. Cmwlth. 2015).

<sup>37</sup> *See, e.g., Behrend v. Bell Tel. Co.*, 242 Pa. Super. 47 (1976) (Commission is empowered to evaluate the reasonableness of tariffs).

<sup>38</sup> *Shenango Twp. v. Pa. PUC*, 686 A.2d 910 (Pa. Cmwlth. 1996) (“*Shenango Twp.*”); *Zucker v. Pa. PUC*, 437 A.2d 1067 (Pa. Cmwlth. 1981), 1979 Pa. Commw. LEXIS 1651,\*210 (“*Zucker*”).

<sup>39</sup> *See, e.g., Zucker*.

includes unpaid supply charges dating back beyond the twelve-month historical period, which represent a drastic change in the circumstances that were presented to the Commission at the time these provisions were evaluated and approved.

The *Interim Order* also cites a series of cases regarding the binding nature of public utility tariffs and states that “[t]he 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.”<sup>40</sup> However, the Commonwealth Court’s decision in *Philadelphia Suburban Water Co. v. Pa. PUC*<sup>41</sup> relied upon by the *Interim Order* does not restrict the ability of the Commission to strike down an unreasonable tariff provision. Rather, the Commonwealth Court held in that case that the Commission could not permit a water company to provide free service to city in deviation of its tariff.

Respond Power has raised serious concerns about the just and reasonable nature of the clawback charges that it should be permitted to explore. Notably, Respond Power would be denied due process if these charges are applied to a no-recourse POR program established by the Companies’ 2015-2017 Default Service Plan. Further, the historical write-off data includes unpaid supply charges dating back to early 2014 and possibly beyond and have not been adjusted to reflect amounts that have since been paid by customers to have service restored. If the Commission will not hear its dispute regarding the lawfulness of charges imposed pursuant to Commission-approved tariffs, Respond Power will be forced to seek review by the courts.

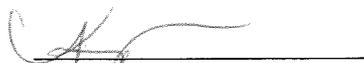
WHEREFORE, Respond Power, LLC respectfully requests that this Honorable Commission undertake interlocutory review of the *Interim Order*, answer the material questions in the affirmative and permit Respond Power to fully develop the record in this proceeding.

---

<sup>40</sup> *Interim Order* at 11.

<sup>41</sup> 808 A.2d 1044 (Pa. Cmwlth. 2002).

Respectfully submitted,



Karen O. Moury  
Attorney I.D. No. 36879  
Eckert Seamans Cherin & Mellott, LLC  
213 Market Street, Eighth Floor  
Harrisburg, PA 17101  
717.237.6036  
kmoury@eckertseamans.com

February 6, 2017

Counsel for Respond Power LLC