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February 6, 2017

VIA eFILING

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

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

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

Dear Secretary Chiavetta:

Enclosed for filing is the **Brief in Opposition to Respond Power LLC's Petition for Interlocutory Review and Answer to Material Questions** (the "Brief") in the above-referenced proceedings.

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

Very truly yours,



Anthony C. DeCusatis

Enclosures

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

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

RESPOND POWER LLC : **Docket No. C-2016-2576287**
v. :
PENNSYLVANIA ELECTRIC :
COMPANY :

RESPOND POWER LLC : **Docket No. C-2016-2576292**
v. :
WEST PENN POWER COMPANY :

CERTIFICATE OF SERVICE

I hereby certify and affirm that I have this day served a copy of the **Brief in Opposition to Respond Power LLC's Petition for Interlocutory Review and Answer to Material Questions** 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

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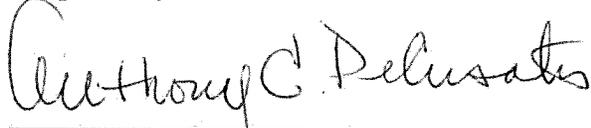
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Dated: February 6, 2017

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Respond Power LLC	:	
	:	
v.	:	Docket No. C-2016-2576287
	:	
Pennsylvania Electric Company	:	
	:	
Respond Power LLC	:	Docket No. C-2016-2576292
	:	
v.	:	
	:	
West Penn Power Company	:	

**BRIEF IN OPPOSITION TO RESPOND POWER LLC'S
PETITION FOR INTERLOCUTORY REVIEW AND
ANSWER TO MATERIAL QUESTIONS**

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February 6, 2017

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I. INTRODUCTION AND OVERVIEW – RESPOND’S PETITION FOR INTERLOCUTORY REVIEW REQUESTS EXTRAORDINARY RELIEF TO WHICH IT IS NOT ENTITLED AND WOULD FURTHER DELAY THE FINAL RESOLUTION OF THIS CASE

On November 17, 2016, Respond Power LLC (“Respond”), an electric generation supplier (“EGS”), filed the above-captioned Complaints against Pennsylvania Electric Company (“Penelec”) and West Penn Power Company (“West Penn”) (each a “Company” and collectively, the “Companies”) seeking to be absolved from complying with tariff provisions that had been approved by a final order of the Pennsylvania Public Utility Commission (“PUC” or the “Commission”). Each of the Companies filed Answers and New Matter. They also filed Motions for Judgment on the Pleadings (“Motions”) requesting dismissal on the principal grounds that the Complaints are unlawful collateral attacks on a Commission final order and, as such, are barred by Section 316 of the Public Utility Code.¹

On January 23, 2017, Administrative Law Judge David A. Salapa issued his *Order Granting In Part, Motion For Judgment On The Pleadings* (“Order”). The “In Part” in the Order’s title refers to the Companies’ acknowledgment, which the Judge accepted, that their Motions did not extend to Respond’s averments that the Companies allegedly made computational errors in calculating the charges that are the subject of the Complaints. The Companies did, however, specifically deny those averments in their Answers.

Although the Companies have now provided Respond all the information it could reasonably need about the calculation of the charges it seeks to evade, Respond has yet to identify any alleged computational “errors.” In any event, this case is ripe for a brief evidentiary

¹ 66 Pa.C.S. § 316 (“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 . . .”). Hereafter, all references to a “Section” are to the Public Utility Code, 66 Pa.C.S. §§ 101 *et seq.*, unless expressly stated or the context indicates otherwise.

hearing – nothing more would be needed, if that – to allow the Judge and the Commission to address the remaining computational issues, *if any*, and to decide this case in its entirety.

Nonetheless, Respond, seeking yet again to forestall payment of what it owes, has taken the unorthodox step of seeking interlocutory review² of an Order that applied black-letter law to a straight-forward and undisputed factual scenario. In short, nothing about Judge Salapa’s Order suggests that Respond is entitled to the extraordinary relief it seeks – or, in fact, to *any* relief.

The Commission would set a bad precedent if it departed from standard procedures to grant interlocutory review of an Order that did not break any new legal ground – nor did it need to – in reaching a sound, lawful conclusion that is compelled by the terms of Section 316. In sum, there is no valid legal basis for Respond’s contention that, despite having been actually served with the legal pleading and all accompanying testimony and exhibits that initiated the Companies’ Default Service Program IV (“DSP IV”) proceeding, it should be allowed to avoid the preclusive effect of the Commission’s DSP IV Final Order³ and re-litigate a decided issue simply because it chose not to intervene in the proceeding where that issue was previously adjudicated.⁴ Indeed, the total lack of substance in Respond’s Petition is underscored by the “questions” it poses for Commission review, which are so generic they offer nothing remotely

² Petition of Respond Power LLC for Interlocutory Review and Answer to Material Questions (“Petition”). The Companies are filing this Brief in Opposition to Respond’s Petition and Answer to the Material Questions pursuant to the authorization provided by 52 Pa. Code § 5.302(b).

³ *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, through May 31, 2019*, Docket Nos. P-2015-2511333, P-2015-2511351, P-2015-2511355 and P-2015-2511356 (Final Order entered May 19, 2016 (“DSP IV Final Order”) adopting the Recommended Decision issued April 15, 2016 (“DSP IV Rec. Dec.”)).

⁴ The solid legal authority that is stacked against Respond’s position is discussed in the Companies’ Motions at Paragraphs 38-61.

“material” to the well-defined and thoughtfully-analyzed issues decided by the Order. Most significantly, the “questions” do not even touch on the Order’s holding and rationale.⁵

Under Section 5.302 of the Commission’s regulations, a request for interlocutory review must demonstrate “compelling reasons” why interrupting the normal progress of litigation will “prevent substantial prejudice” or “expedite the conduct of the proceeding.” Respond has not provided any valid reason, let alone “compelling reasons,” to grant its request.

The essence of Respond’s alleged justification for interlocutory review is that “[a]bsent reversal of the Interim Order, Respond Power will be deprived of the opportunity to develop a record in support of its challenge against the Companies’ application of the clawback charge.” However, Respond already was given an “opportunity to develop a record” – an opportunity that was used by other EGSs and the trade association for EGSs to challenge the clawback provision. What Respond wants is a second opportunity – the proverbial “second bite at the apple” – now that it has reconsidered its earlier decision to waive its right to participate in the DSP IV proceeding. In short, Respond’s “reason” for interlocutory review is simply a restatement of its disagreement with the sound decision by Judge Salapa that, having been provided one “opportunity to develop a record,” Respond is not entitled to another. Thus, Respond is seeking interlocutory review of an issue that can be, and will be, properly considered on direct review. Respond’s actions would severely prejudice the parties to the DSP IV case who did the right thing, followed the rules and reasonably expected that a Commission-approved settlement could not be undone by a belated challenge from an entity that sat on its hands while the case was being litigated and now wants a “do-over” because it found something in the settlement not to its liking.

⁵ See Order, pp. 11-12.

While the Companies are confident that Judge Salapa's Order is correct and will be affirmed by the Commission, interrupting the normal course of this case – given the minimal effort needed to close out all issues – would introduce delay and inefficiencies that Respond claims it wants to avoid. Simply stated, Respond's diversionary tactic is designed to postpone the day it finally has to pay what it owes. Accordingly, the Companies respectfully request that Respond's Petition be denied and these cases be scheduled promptly for an evidentiary hearing to be conducted on an expedited basis so that this matter can be closed without additional delay.⁶

II. RELEVANT BACKGROUND – RESPOND HAD NOTICE OF THE CLAWBACK PROPOSAL AND HAD A FULL AND FAIR OPPORTUNITY TO PARTICIPATE IN THE DSP IV PROCEEDING

This proceeding relates to the voluntary purchase of receivables (“POR”) programs previously established by the Companies and set forth in their respective Supplier Coordination Tariffs. Under the terms of their POR programs, the Companies purchase participating EGSs' accounts receivable at face value (i.e., with no discount for uncollectible accounts) and without recourse against the sellers for amounts not collected from EGSs' customers.

On November 3, 2015, the Companies, with their affiliates, Metropolitan Edison Company and Pennsylvania Power Company, filed a Joint Petition (“DSP IV Petition”) requesting that the Commission approve, *inter alia*, the proposed DSP IV of each petitioner, their proposed rates for default generation service, the continuation of their Customer Referral Programs and a revision to their POR programs to add an administrative fee denominated a “clawback” charge. As initially proposed, the clawback charge could have been imposed if any EGS's average accounts receivable write-off percentage (write-offs expressed as a percent of

⁶ Moving forward with the hearing in this case is particularly important now that the Commission has waived the thirty-day requirement for ruling on the Petition. See Secretarial Letter issued Feb. 2, 2017 at the above-referenced dockets.

revenue) for the preceding annual period exceeded 150% of the average write-off percentage for all POR-participating EGSs. If that threshold were crossed, an EGS that wished to remain in the POR program would, as a condition of doing so, have to pay a fee equal to the difference between its actual write-offs and what its write-offs would have been if they did not exceed 150% of the average write-off percentage for all participating EGSs.

The DSP IV Petition together with all of its accompanying direct testimony and exhibits 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 of which Respond, through its parent, is a member. In addition, notice of the filing of the DSP IV Petition was published in the *Pennsylvania Bulletin* on November 14, 2015. The Notice also stated the date, time and location of the Prehearing Conference. On November 6, 2015, the Commission issued a Notice of Initial Prehearing Conference and Judge Salapa issued a Prehearing Conference Order, both of which were served on Respond.

Various parties intervened in the DSP IV proceeding, including RESA and two EGSs that market generation services in the Companies’ service areas. Litigation of the DSP IV proceeding ensued, in which parties submitted written direct, rebuttal, surrebuttal and rejoinder testimony addressing, among other things, the clawback provision. An evidentiary hearing was held on February 25, 2016. Thereafter, a settlement was achieved. A Joint Petition for Settlement, filed on April 1, 2016, was executed by fifteen parties, while the remaining four parties affirmatively indicated they did not oppose the settlement.

The Joint Petition for Settlement included a number of inter-related provisions reflecting compromises by all parties.⁷ One of the Settlement’s terms narrowed the application of the

⁷ Paragraph No. 18 of the Joint Petition conditioned the settlement upon the Commission’s approval “without modification.” It also provided that a modification would entitle a Joint Petitioner to require the withdrawal of the

proposed clawback fee in two ways: (1) the write-off threshold was raised from 150% to 200% of the average write-off percentage of all EGSs; and (2) another screening feature was added such that, even if an EGS crossed the 200% threshold, it would not incur a clawback fee unless, during the review period, the average price it charged for generation was more than 150% of the applicable Company's average PTC for the same period. The parties also agreed that the clawback provision would be implemented for two years on a "pilot" basis, after which it would be subject to further review. Thus, the clawback provision's screening tests would apply to two annual periods, concluding on August 31, 2016 and August 31, 2017, respectively, and could expose EGSs to possible clawback charges subsequent to those dates.

On April 29, 2016, Judge Salapa issued his Recommended Decision approving the Joint Petition for Settlement, finding, as to the clawback provision, 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 other parties as outlined above.⁸

No exceptions were filed. At the public meeting of May 19, 2016, the Commission voted unanimously to adopt the Recommended Decision as its own decision, and the DSP IV Final

settlement. This provision reflects the fact that a modification of material settlement terms could deny parties the benefit of the bargain they struck, for which various compromises were made on all sides. That is certainly the case here, where several parties – not just the Companies – had a keen interest in the implementation of the clawback provisions to protect customers from high uncollectible accounts expense driven by EGSs that charge prices far in excess of the applicable Company's Price-to-Compare ("PTC"). As explained in Paragraph No. 61 of the Motion, granting Respond the relief requested in the Complaints would undermine the integrity of the settlement process; it would also violate due process rights of all the settling parties.

⁸ DSP IV Rec. Dec., p. 31.

Order issued the same day.⁹ The Commission's Chairman issued a separate statement supporting the settlement. No party filed an appeal.

Applying the Commission-approved settlement provisions, the Companies analyzed the accounts receivable write-offs and prices charged to customers for all POR-participating EGSs for the twelve months ended August 31, 2016. Penelec and West Penn each identified Respond and other EGSs that were subject to clawback charges and calculated Respond's charges of \$305,891 and \$178,907, respectively. On September 30, 2016, the Companies issued Respond invoices for those amounts, and heard nothing for three weeks.

On October 21, 2016, Respond sent a letter to the Companies objecting to the clawback charges 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 ("*Ex Parte* Petition") 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, the Companies filed an Answer to Respond's *Ex Parte* Petition explaining why Respond was not entitled to the relief it requested. The Commission nonetheless ratified the Emergency Order at its public meeting held on November 10, 2016 and directed that a hearing be held within ten days.

On November 17, 2016, Respond filed the Complaints challenging the validity of the clawback charge and seeking to retrospectively nullify the settlement's clawback provisions back to the date of the DSP IV Final Order. After the Complaints were filed, the Companies

⁹ Supplier Coordination Tariff supplements setting forth all of the revisions to the Companies' POR programs, including the clawback provision, were agreed to by the settling parties, attached to the Joint Petition for Settlement and approved by the Commission pursuant to the DSP IV Final Order. However, because the supplements filed with the Joint Petition did not bear supplement numbers, they were not included in the Companies' tariff books at the Secretary's Bureau. When this came to the Companies' attention, they filed the Supplements with the Secretary and, by Secretarial Letter dated November 10, 2016, the Supplements were accepted *nunc pro tunc* with an effective date of August 1, 2016.

confirmed with Respond that the clawback charges billed to Respond were “disputed” and, pursuant to the terms of their Supplier Coordination Tariffs, collection efforts could not therefore be renewed until the Commission resolved the dispute. Accordingly, Respond withdrew its Petition for an Emergency Order, which had become moot. Judge Salapa cancelled the hearing scheduled for November 17, 2016 and approved the withdrawal. The clawback charges have not been paid, and the Companies have postponed any collection efforts until this case is adjudicated.

III. THERE IS NO VALID LEGAL BASIS FOR GRANTING THE RELIEF REQUESTED IN THE COMPLAINTS

The Complaints seek to invalidate the two-year pilot clawback provision, which was one of the numerous inter-related terms of the DSP IV settlement. In so doing, the Complaints ask the Commission not only to block the clawback provision for the *current* application period (which began on September 1, 2016 and extends through August 31, 2017), but also to retrospectively nullify the clawback charge that was billed, pursuant to the DSP IV Final Order, *before Respond even filed its Complaint.*

Respond analogizes the clawback provision to a “rate” for utility service and, thereby, attempts to subject it to the principles and restrictions that apply to utility ratemaking. Based on that premise, Respond contends that the Commission, despite having approved the clawback charge, should prohibit the Companies from collecting it because it is allegedly “unjust and unreasonable.”¹⁰ Respond’s “unjust and unreasonable” claim derives principally from its theory that the clawback has “retroactive application.”¹¹ While the charge itself clearly was not imposed before the Commission approved it in the DSP IV Final Order, Respond nonetheless

¹⁰ See Complaint, p. 2.

¹¹ *Id.* at 12-13.

claims there is a retroactive aspect to the clawback provision's two screening measures, because they employed data for the twelve months ended August 31, 2016 – a period that, in part, preceded entry of the DSP IV Final Order. Of course, this argument carries no weight as to the second year of the pilot program, where the screening measures apply to the twelve months ending August 31, 2017, which entirely follow the entry of the DSP IV Final Order. However, Respond's argument is entirely meritless. It assumes, erroneously, that if there is any historical referent for an administrative charge, then the charge itself is "retroactive" and unlawful. There is no legal support for this position, and Respond has not attempted to offer any.

Respond also contends that the clawback charge violates "fundamental fairness and equity" because Respond is not receiving information about the write-offs of its transferred accounts contemporaneously with those write-offs occurring. Respond asserts that, with such real-time information, it could "avoid or minimize the Clawback Charge" by dumping non-paying customers back onto default service.¹² Respond further claims that unless such real-time information is provided, the 2017 clawback charge (to which, as previously explained, Respond's "retroactivity" allegation does not apply) should also be invalidated, even though it was agreed to in settlement and approved by the Commission without conditions like those Respond belatedly is trying 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 must 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 that are far in excess of the Companies' PTCs.

¹² *Id.* at 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.").

While both of Respond's "unjust and unreasonable" contentions are demonstrably incorrect and should be rejected on their merits, they represent arguments that should not be considered at all because Respond's Complaints are unlawful collateral attacks on the DSP IV Final Order and are barred by Section 316. Indeed, Respond itself recognized as much and tried unsuccessfully to preempt the application of Section 316 by alleging that it was denied "due process" because it was not given "notice and an opportunity to be heard."¹³ As alleged support for this contention, Respond offered a series of contrived arguments that boil down to one unalterable fact: Respond received, but chose to ignore, the DSP IV Petition and its accompanying testimony and exhibits. Trying to avoid the consequences of its own dereliction, Respond now wants the Commission to find that it acted reasonably because, having read *only the case caption*, Respond assumed there was nothing in DSP IV that might affect its interests as an EGS, despite the fact that other EGSs and RESA intervened and participated actively on several issues, including the proposed clawback charge. These contentions should be summarily rejected.

Each of Respond's tenuous contentions is refuted in detail in the Companies' Motions,¹⁴ which the Commission is urged to review. Consequently, only the key points are summarized below:

- Respond does not deny it was served with the DSP IV Petition and all of its accompanying testimony and exhibits. It was also served with the Notice of the Prehearing Conference and the Judge's Prehearing Order (Motions, ¶¶ 3-5).
- The request for approval of the proposed clawback charge and all of its terms were clearly set forth in the DSP IV Petition, including in the second paragraph thereof beginning at page 2 and in the entire bolded and capitalized Section V.A. titled: **PURCHASE OF RECEIVABLES – EGS-Related Write Offs**. The clawback provision was discussed at length in the testimony accompanying the Petition, which was

¹³ *Id.* at 12.

¹⁴ Motions, ¶¶ 54-59.

also summarized at page 5 of the DSP IV Petition (Motions, ¶¶ 6-10).

- The “notice” (in this case, actual service) Respond received satisfies all of the due process “notice” requirements articulated by the Commission in *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*¹⁵ and affirmed by the Commonwealth Court in its decision on appeal of that case¹⁶ (Motions, ¶¶ 38-53).
- It was not reasonable for Respond to read only the case caption to ascertain if the DSP IV proceeding might affect its interest as an EGS and POR participant. Respond’s belief that its action was reasonable is self-evidently wrong; it is also directly contradicted by the PSU/West Penn Final Order. There, the Commission found that due process was not violated when PSU received “notice” (by publication in the *Pennsylvania Bulletin*) that required a separate investigation to obtain the information it needed to discern if its rates would be affected by a filing. Here, all Respond had to do was read the second paragraph or the bold headings of the DSP IV Petition (Motions, ¶¶ 56-57).
- Contrary the Complaints, there is nothing wrong with raising or considering POR issues in a default service program proceeding. The Commission itself stated that “in the electric industry . . . PORs are usually the subject of default service plan filings.”¹⁷ The POR programs of Penelec and West Penn – as well as their Pennsylvania affiliates – were adopted or revised in the context of default service proceedings. There is a long history of POR programs being proposed, and POR-related issues being raised and addressed, in default service proceedings (Motions, ¶¶ 1 and 58).
- Contrary to the Complaints, default service proceedings are not limited to addressing only the bare minimum requirements specified by statute for the contents of a default service program. Indeed, Respond’s assertions are contradicted by Commission precedent, including decisions requiring EDCs to present retail market enhancements in their default service programs,¹⁸ such as retail opt-in auctions and standard offer customer referral programs.¹⁹ There is also a long history of the Commission interjecting issues that go well beyond the bare legal requirements for the contents of default service plans (Motions, ¶ 59).

¹⁵ 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 to the Motions. A copy of the Recommended Decision is attached to the Motions as Appendix A.

¹⁶ *The Pennsylvania State University v. Pa. P.U.C.*, 988 A.2d 771, 783 (Pa. Cmwlth. 2010).

¹⁷ *Investigation of Pennsylvania’s Retail Nat. Gas Supply Mkt.*, Docket No. I-2013-2381742, 2014 Pa. P.U.C. LEXIS 404, at * 74 (Order entered Aug. 21, 2014).

¹⁸ *See Investigation of Pennsylvania’s Retail Elec. Mkt: Recommendations Regarding Upcoming Default Serv. Plans*, Docket No. I-2011-2237952 (Final Order entered Dec. 16, 2011).

¹⁹ *Investigation of Pennsylvania’s Retail Elec. Mkt: Intermediate Work Plan*, Docket No. I-2011-2237952 (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 id.*, pp. 30-31 and 36-37.

In summary, as Judge Salapa determined, Respond received ample “notice” of the DSP IV proceeding and of the contents of the DSP IV Petition and its accompanying testimony. Respond had a full and fair opportunity to appear and be heard, which is all that due process requires. Therefore, Respond is bound by the DSP IV Final Order, which must be afforded finality under Section 316.

IV. JUDGE SALAPA’S ORDER IS CORRECT IN ITS ENTIRETY AND SHOULD NOT BE OVERTURNED OR REVISED EITHER ON DIRECT OR INTERLOCUTORY REVIEW

Judge Salapa granted judgment on the pleadings in favor of the Companies because he found and determined that:

- (1) There is “no genuine issue as to a material fact” and the Companies are “entitled to judgment as a matter of law”²⁰;
- (2) Respond had “notice and opportunity to be heard” as to the DSP IV proceeding and, in particular, the clawback provision; therefore, “its due process rights were adequately protected”²¹;
- (3) The clawback provision is not subject to the full panoply of ratemaking principles and restrictions (such as, for example, the prohibition against retroactive ratemaking that Respond tries to invoke) because it is not a “rate” in the same sense as “rates” an EDC charges customers for utility service²²;
- (4) The clawback provision (although not strictly construed as a “rate”), when taken together with the other provisions that comprise the POR program, is nonetheless properly included in the Companies’ Supplier Coordination Tariffs²³;

²⁰ Order, pp. 8 and 12.

²¹ *Id.* at 9. *See also id.* at 8 (“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 principles of due process. This is incorrect.”)

²² *Id.* at 9-10. *See also* *Petition of PPL Elec. Util. Corp. Requesting Approval Of A Voluntary Purchase Of Receivables Program And Merchant Function Charge*, Docket No. P-2009-21290502, 279. PUR4th 539 (2009) (“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.”)

²³ *Id.* at 10.

- (5) A tariff includes “rules, regulations and practices of a public utility” in addition to “rates”²⁴;
- (6) The clawback provision is part of the “set of operating rules” that control the interaction between EDCs and EGSs; that “set of operating rules” is essential to EDCs’ provision of “service” to retail distribution customers, as “service” is defined under the Public Utility Code²⁵;
- (7) As a consequence of the direct relationship between the “operating rules” in the Supplier Coordination Tariff and the provision of service to an EDC’s distribution customers, a Supplier Coordination Tariff is a “tariff” as defined by Section 102 and is subject to the jurisdiction and authority of the Commission under the Public Utility Code²⁶;
- (8) Public utility tariffs “have the force and effect of law,” are “binding on the public utility and its customers,” are “prima facie reasonable” and “must be applied” in accordance with their terms²⁷;
- (9) The Commission “approved Penelec’s and West Penn’s tariff filing implementing the clawback provisions,” “no party appealed” the DSP IV Final Order, and the “clawback provision tariff therefore has the force and effect of law and is binding on Respond, Penelec and West Penn.”²⁸ As a consequence, Respond is barred from raising any challenge that would seek to invalidate the clawback charge *retrospectively*, because that tariff provision has the “force and effect of law” and is “binding” on Respond and the Companies unless and until it is changed by the Commission; and
- (10) To the extent Respond is challenging the clawback charge’s *prospective* application (i.e., during the remainder of the second year of the two-year pilot), it has failed to allege any “facts and circumstances leading to the creation of the tariff provision” that have “changed so drastically as to render the application of the tariff provision unreasonable.”²⁹ The Judge noted: “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.*”³⁰ Respond is simply trying to get a second bite at the apple, which is totally improper and barred by Section 316.

²⁴ *Id.*

²⁵ Order, pp. 10-11.

²⁶ *Id.* at 11.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Order, pp. 11-12 (emphasis added).

Every step in Judge Salapa's reasoning is solidly grounded on black-letter law. His holding and rationale are based on undisputed facts and rely on well-established Commission and appellate court precedent. If the Commission were to grant interlocutory review, the only lawful and reasonable decision in this case is to affirm Judge Salapa's Order in its entirety.

V. CONCLUSION

For the reasons set forth above, the Commission should deny the Petition of Respond Power, LLC for Interlocutory Review and Answer to Material Questions. However, the Commission should not permit the time it reasonably requires to rule on Respond's Petition to further delay this proceeding and, thereby, prejudice the Companies, who are still awaiting payment of what they are lawfully owed. Accordingly, an expedited hearing should promptly be scheduled in this case to address the computational issues, if any, that Respond alleges but, to

date, has failed to identify. If the Commission decides to grant interlocutory review of Judge Salapa's Order, then, for the reasons set forth above, his Order should be affirmed in its entirety and without modification.

Respectfully submitted,



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