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March 30, 2018

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 No. C-2016-2576287

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

Respond Power LLC v. Pennsylvania Electric Company
Docket No. C-2017-2631326

Respond Power LLC v. West Penn Power Company
Docket No. C-2017-2631331

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Respond Power LLC's Reply Brief with regard to the above-referenced matters. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,

Karen O. Moury
KOM/jls

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, LLC's Reply Brief on the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

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Dated: March 30, 2018

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Respond Power, LLC	:	
	:	
v.	:	C-2016-2576287
	:	
Pennsylvania Electric Company	:	
Respond Power, LLC	:	
	:	
v.	:	C-2016-2576292
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West Penn Power Company	:	
Respond Power, LLC	:	
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West Penn Power Company	:	
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Respond Power, LLC	:	
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v.	:	C-2017-2631331
	:	
Pennsylvania Electric Company		

REPLY BRIEF OF RESPOND POWER LLC

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Date: March 30, 2018

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Respond Power LLC ("Respond Power") respectfully requests that the Pennsylvania Public Utility Commission ("Commission") sustain its Complaints and find that it would be unjust and unreasonable for Pennsylvania Electric Company ("Penelec") and West Penn Power Company ("West Penn") (or collectively "the Companies") to apply supplier tariff provisions to Respond Power that would result in the payment of over $700,000 in clawback charges in connection with the Companies' formerly non-recourse purchase of receivables ("POR") programs. The Complaints should be sustained because as part of the June 1, 2017 through May 31, 2021 default service program ("DSP IV"), the Companies retroactively modified, without advance notice, the terms and conditions of the Commission-approved POR programs that were then in effect as part of the June 1, 2015 through May 31, 2017 default service program period ("DSP III").

Specifically, while Respond Power was participating in the Companies' Commission-approved DSP III POR programs, no clawback mechanism existed. In fact, no clawback mechanism was even proposed until the Companies filed their forward-looking DSP IV plan on November 3, 2015 (during the DSP III program period), to go into effect on June 1, 2017. Further, the clawback mechanism was not approved by the Commission until May 19, 2016. Moreover, supplier tariffs containing the clawback mechanism were not filed by the Companies until October 28, 2016 and were not approved by the Commission until November 10, 2016.

Yet, on September 27, 2016, the Companies imposed clawback charges on Respond Power based on the write-offs of customers' unpaid supply charges and Respond Power's pricing data for the period of September 1, 2015 through August 31, 2016. The unpaid supply charges that were written off by the Companies during that period dated back to 2013. While those unpaid supply charges were accruing and being written off, Respond Power was unaware that its customers were not paying their bills and had no reason to inquire since they were participating in non-recourse

POR programs, meaning that the Companies were fully purchasing their receivables without regard to whether customers paid their bills. As the clawback mechanism was non-existent in 2013, 2014, 2015 and for most of 2016, Respond Power participated in the non-recourse POR programs without any knowledge of or concern about their customers' payment patterns. And, during that entire time, unbeknownst to Respond Power, the Companies were failing to collect supply charges from Respond Power's customers, which would later be written-off and form the basis for then non-existent clawback charges.

Moreover, at no time did the Companies notify Respond Power that it was proposing to change the terms and conditions of the POR programs that were in effect for the DSP III program period of June 1, 2015 to May 31, 2017. Rather, the Companies buried a proposal to make a significant mid-course modification to the terms of that POR program in their massive filing that was made on November 3, 2015 for the purpose of establishing their forward looking DSP IV default service program for the period of June 1, 2017 through May 31, 2021.

The Companies' efforts to bar Respond Power from challenging the application of the clawback charge on the basis of Section 316 of the Public Utility Code ("Code")[1] should be rejected. The Code Section 316 doctrine only precludes the relitigation of the same issues by the same parties. Here, Respond Power was not a party to the proceeding that resulted in the order approving the clawback mechanism that it is now challenging on several grounds, including inadequate due process, impermissible retroactive ratemaking and numerous structural flaws that render its application unjust and unreasonable. Respond Power's decision not to intervene in the default service proceeding was reasonable, considering the significant costs of doing so, its lack of interest in the way default service supply is procured and its valid expectation that a proceeding

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[1] 66 Pa.C.S. § 316.

filed to establish a default service program to begin on June 1, 2017 would not alter the terms of the default service program that was then in effect.

Further, improperly relying on the Commission-made rates doctrine, the Companies wrongfully argue in their Main Brief that even if the Commission finds that application of the tariff provision is unjust and unreasonable, it is powerless to grant relief to Respond Power for the first year of the clawback mechanism's application. The Companies' reasoning is grounded in the fact that Respond Power's Complaints were filed after the clawback mechanism was in effect. What the Companies' argument overlooks is that by retroactively assessing clawback charges in September 2016 for the period cover September 1, 2015 through August 31, 2016, the Companies created the situation that resulted in the Complaints being filed after the initial year's application of the clawback mechanism. Moreover, the Commission-made rates doctrine is inapplicable to formula-based charges approved by the Commission. Because the Commission did not find that specific clawback charges were just and reasonable, the Companies are not entitled to any protections that might otherwise be afforded by the Commission-made rates doctrine.

Throughout this proceeding, Respond Power has not opposed the concept of a clawback mechanism. Rather, Respond Power challenges the lawfulness of imposing a clawback charge that did not exist while the data on which it would be based were accruing and while Respond Power was serving customers under the Companies' non-recourse POR programs without any knowledge or reason to be concerned that its customers were not paying their bills. These features of the Companies' clawback mechanism render it unlawful, unjust and unreasonable. In addition, the mechanism is structurally flawed in that it is triggered by the failure of customers to pay their bills; the inability of the Companies to collect unpaid supply charges; the Companies' write-off practices; and the lack of control that Respond Power has over any of these factors. Therefore, Respond Power respectfully requests that its Complaints be sustained.

II. ARGUMENT

A. Burden of Proof

As the party carrying the burden of proof in this proceeding, Respond Power is required to demonstrate that the application of the Companies' clawback mechanism contained in its supplier tariffs, resulting in over $700,000 in clawback charges being assessed to Respond Power, is unjust and unreasonable. Previously-approved tariff provisions are *prima facie* reasonable, and parties challenging them bear the burden of demonstrating otherwise.[2] As the Commonwealth Court in *Brockway Glass* observed, the Commission is empowered to evaluate the reasonableness of tariffs filed with it to determine whether the provisions are consistent with the Code, Commission policies and its regulatory scheme.[3] Also, reviewing a challenge to a tariff relating to service line extensions, the Commonwealth Court in *Kossman v. Pa. Public Utility Commission*,[4] examined the tariff provisions to determine whether they were just and reasonable.[5]

1. The Commission-Made Rate Doctrine Does Not Bar Respond Power's Challenge to the 2016 Clawback Charges.

In their Main Brief, the Companies contend that Respond Power is barred from raising any challenge that would seek to invalidate the clawback charge "retrospectively" because the tariff provision has the force and effect of law and is binding on Respond Power and the Companies unless and until it is changed by the Commission.[6] The Companies describe Respond Power's 2016 Complaints as an "attempt to challenge the clawback charge for the first year of its

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2 *Brockway Glass v. PUC*, 437 A.2d 1067 (Pa. Cmwlth. 1981); *Respond Power, LLC v. Pennsylvania Electric Company, et al.*, Docket Nos. C-2016-2576287, *et al.* (Order on Interlocutory Review entered July 13, 2017) ("*Interlocutory Review Order*").

3 *Brockway Glass*, 437 A.2d at 1070.

4 694 A.2d 1147 (1997).

5 *See also Interlocutory Review Order* at 17-21; *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 August 15, 2012 and December 5, 2012 (the burden to show that a charge imposed on another provider under an existing tariff is unreasonable is on the complaining party).

6 Companies' Main Brief at 13-14.

application, which had already expired by the time Respond Power filed its Complaints."[7] In their Main Brief, the Companies argue that "the Commission has no legal authority to grant Respond Power any retrospective relief even if it were to find that Respond Power could carry its 'heavy burden' to override the Companies' existing approved tariffs."[8]

In support of this argument, the Companies rely on the "Commission-made rates doctrine" discussed in *Cheltenham & Abington Sewerage Co. v. Pa. P.U.C.*,[9] *Lancaster Ice Mfg. Co. v. Pa. P.U.C.*,[10] and *West Penn Power Co. v. Pa. P.U.C.*[11] This doctrine, with certain exceptions, prevents the Commission from ordering refunds of monies collected by a utility under authority of a prior Commission-approved tariff. The rationale that has been relied upon in preventing refunds on the basis of this doctrine is that utilities should be able to rely on the Commission's findings that their rates are just and reasonable until declared otherwise on a prospective basis.[12]

The rulings in *Cheltenham*, *Lancaster Ice* and *West Penn* are not applicable to Respond Power's request for relief as a result of its challenges to the application of the clawback mechanism after the charges were assessed in September 2016. Indeed, if the Commission were to accept the Companies' argument, it would have to conclude that even if it finds that the retroactive imposition of the clawback charges was unjust and unreasonable, it is powerless to take any action to rectify that outcome. Similarly, in any complaint proceeding where the complaining party proves that the application of an existing tariff provision is unjust and unreasonable, the Commission's hands would be tied. That is an unacceptable result, given the Commission's indisputable duty to ensure the reasonableness of rates and tariff provisions. This outcome would also be inconsistent with Code Section 1312, which empowers the Commission, in any proceeding involving rates of public

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7 Companies' Main Brief at 13.
8 Companies' Main Brief at 15.
9 25 A.2d 334, 337, 344 Pa. 366, 369 (Pa. 1942).
10 185 Pa. Super. 615, 626, 138 A.2d 262, 267 (1957).
11 174 Pa. Super. 123, 131, 100 A.2d 110, 114 (1953).
12 *Cheltenham*.

utilities, to direct refunds if it determines that "any rate received by a public utility was unjust or unreasonable."[13] The Commission's statutory authority could not be any clearer.

a. The Commission-Made Rates Doctrine Is Inapplicable to Formula-Based Charges.

Moreover, not every rate or tariff provision enjoys the protection that has been afforded by the Commission-made rates doctrine, which is not grounded in the statute but rather has arisen from case law. Importantly, the Courts have found that when a rate is established through a formula, and no specific rate has been given the Commission's stamp of approval, the Commission-made rate doctrine is inapplicable. Specifically, in *Metropolitan Edison Company v. Pa. P.U.C.*,[14] the Commonwealth Court rejected the notion that a formula-driven charge in the utility's tariff was a Commission-made rate. In finding that this doctrine did not apply to the utility's fuel cost adjustment provision, the Court explained that the Supreme Court in *Cheltenham* spoke of rates that were Commission-made or rates stamped with antecedent Commission approval. Since the Commission had approved a formula but not given antecedent approval of specific surcharges collected by the utility pursuant to its adjustment clause, the Court in *Metropolitan Edison* found that the concept of a "Commission-made rate" had no application and that the utility "could not validly expect that the surcharges in issue were insulated from retroactive modification by the Commission."[15]

The situation here mirrors the circumstances that existed in *Duquesne Light* and *Metropolitan Edison*. As in those cases, the clawback mechanism that was approved by the Commission's order in the DSP IV proceeding did not establish a Commission-made rate.[16]

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13 66 Pa.C.S. § 1312 (emphasis added).

14 62 Pa. Cmwlth. 460, 465, 437 A.2d 76 (1981).

15 *Id. See also Duquesne Light Company v. Pa. P.U.C,* 96 Pa. Cmwlth. 168, 179, 507 A.2d 433 (1986) (since the net energy clause was based on a formula, a refund would not violate the Commission-made rates doctrine) ("*Duquesne Light*").

16 *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 July*

Rather, the Commission permitted the Companies to use the formula contained in the tariff provisions to impose clawback charges on EGSs. In fact, at the time the clawback mechanism was approved, data on which it would be based were still accumulating, meaning that neither the Companies nor the Commission knew the amount of charges that would be assessed or if any charges would be assessed against EGSs. Therefore, the Companies could not validly expect that any charges later imposed were insulated from retroactive modification by the Commission.

The inapplicability of the Commission-made rate doctrine is particularly true given the retroactive nature of the Companies' assessment. Indeed, the whole reason Respond Power's 2016 Formal Complaints were filed after the first year of the application of the clawback mechanism is that despite charges being assessed on September 27, 2016, the mechanism did not even exist until either August 1, 2016, the effective date of the tariff, or November 10, 2016, the date on which the Commission approved the tariff provisions.

b. The Rationale Underlying the Commission-Made Rate Doctrine Is Not Applicable Here.

Moreover, the cases cited by the Companies address different scenarios from the circumstances that are involved here, rendering the rationale upon which they were based inapplicable. In *Cheltenham*, a customer sought refunds from the utility in a situation where the Commission had found that specific rates, based on allowable expenses and a fair rate of return, were just and reasonable. The Commonwealth Court explained that the utility was entitled to rely upon the declaration of the Commission as to what was a lawful and reasonable rate until a change was made by the Commission. Here, no such analysis occurred and no lawful and reasonable rate

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1, 2017 through May 31, 2021, Docket Nos. P-2015-2511333; P-2015-2511351; P-2015-2511355; and P-2015-2511356 (Recommended Decision served April 29, 2016; Final Order entered May 19, 2016) ("*DSP IV Order*").

was established by the Commission's *DSP IV Order*. Therefore, the Companies had no declaration from the Commission as to what was a lawful and reasonable charge to impose.[17]

Similarly, in *Lancaster Ice*, the Superior Court explained that a group of large customers lacked standing to assert the Commission-rate doctrine because it is intended to protect the utility from unfair reparations. Clearly, a utility that imposes a clawback charge less than two months after the effective date of tariff provision containing the formula on which it was based is not in a position of needing protection from unfair reparations. The Companies were not at risk of being directed to later issue refunds of rates that had been declared just and reasonable by the Commission. To the contrary, it was Respond Power that was subject to unfair consequences by the Companies' changes to the rules of the POR program on a retroactive basis. Notably, the Companies also need no "protection from unfair reparations" since they are not getting any additional revenues from the clawback charges but rather are seeking to collect those amounts from EGSs rather than through their uncollectible mechanism.[18]

The Superior Court's decision in *West Penn* likewise provides no support for applying the Commission-made rates doctrine here. As *Cheltenham*, it involved the setting of specific rates, but in *West Penn*, the questions concerned whether the Commission had taken final action to do so. Finding that the Commission had issued a final order approving the rates, the Court concluded that the Commission could not then order the utility to issue refunds. Absent the existence of a specific Commission order establishing the actual rates, the Court in *West Penn* would not have

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17 Also, the Court in *Cheltenham* noted that no finding had even been made by the Commission that the rates were unreasonable in the past, so that the question of refunds could not be properly determined. The Court's recognition of the possibility of retroactive refund based upon a finding of unreasonable rates in the past is consistent with the language in Code Section 1312 that authorizes the Commission to order refunds <u>any</u> time it finds that a rate charged by a utility is unjust and unreasonable. For instance, under the plain language of Code Section 1312, the Commission could direct a utility to issue refunds for past rates imposed after determining it has been earning an excessive rate of return for several years, provided of course that the statute of limitation provisions of that section are fulfilled.

18 Companies' Main Brief at 4-5; Penelec/West Penn Statement No. 1 at 7, 10-11.

applied the doctrine.[19] Because the Commission did not declare that in the *DSP IV Order* that a specified rate is just and reasonable, it is inappropriate to rely on the Commission-made rate doctrine to deny Respond Power's relief related to the first year's retroactive application of the clawback charge.

2. The Applicable Standard is Just and Reasonable.

In the *Interlocutory Review Order* issued in this proceeding, the Commission stated that when a complaint involves an existing, Commission-approved tariff, the burden falls on the complainant "to prove that the charge or rule is no longer reasonable."[20] However, the Companies seek to hold Respond Power to a higher burden than showing that such application is unreasonable. Specifically, the Companies argue that Respond Power carries the burden to prove that the facts and circumstances have changed so drastically as to render the application of the tariff provision unreasonable. On this basis, the Companies maintain that Respond Power has not carried the burden required to evade the effect of an existing tariff provision. The Companies' argument relies on language in *Shenango Township Twp. v. Pa. Pub. Util. Comm'n.*[21]

Contrary to the Companies' claim that the Commission focused on the "changed circumstances" standard in its *Interlocutory Review Order*,[22] a review of that order demonstrates otherwise. Clearly, the Commission framed the discussion only as to whether application of the tariff provision is just and reasonable. Specifically, recognizing that the existing, Commission-approved tariff provision is *prima facie* reasonable, the Commission stated that it was necessary for Respond Power to show that it should no longer be viewed as reasonable or "to show that the

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19 174 Pa. Super at 131 (a failure to suspend would not amount to Commission approval of the rates in the tariff).

20 *Id.* at 17.

21 686 A.2d 910 (Pa. Commw. Ct. 1996). Companies' Main Brief at 16-17. Respond Power's Main Brief explains the inapplicability of the *Shenango Township* language in this proceeding, at pages 23-26.

22 Companies' Main Brief at 14-15.

application of the existing tariff at issue is applied unreasonably."[23] Further, the Commission described Respond Power's burden of showing "that the tariff, as applied, was not just and reasonable."[24] The Commission also observed that the tariff resulting from a settlement did not insulate it "from a colorable challenge concerning the justness and reasonableness of its application under a fact-specific complaint."[25]

As the Commission recognized in the *Interlocutory Review Order*, Respond Power is statutorily entitled to challenge the reasonableness of the clawback charges.[26] Therefore, imposing an additional burden to show a drastic change in facts and circumstances, which is not in the Code and appears only to have occurred in *Shenango Township*, would unduly limit the ability of a complaining party to exercise its statutory right to challenge a tariff provision on the basis that it is unreasonable. Especially since other Courts have held complaining parties only to the "just and reasonable standard," *Shenango Township* should not be relied upon to require Respond Power to show a drastic change in facts and circumstances. For instance, despite citing *Shenango Township*, the Court in *Kossman* discussed only whether the tariff provision was unreasonable. Importantly, the Court in *Kossman* did not impose the higher burden on the complaining party that was established by the Court in *Shenango Township*.

In *Shenango Township*, the situation may have justified the imposition of a different standard on the complaining party beyond proving that a tariff provision is unreasonable. Under an agreement between the utility and the township, the township would construct and lease water facilities to the utility for a term of up to twenty years, and in exchange, the utility would perform various services including the supply of total water requirements to the customers. The

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23 *Id.*
24 *Interlocutory Review Order* at 19.
25 *Id.* at 20.
26 *Interlocutory Review Order* at 19.

Commission approved the agreement and the water facilities were completed and placed in service in 1993. Then, in 1994, the township filed a complaint seeking immediate payment from the utility for the cost of constructing the water facilities. Since the township had previously been subject to and accepted the outcome of the tariff provision resulting in the agreement, the Court expected the township to explain what had so drastically changed to now render the tariff provision unreasonable.

Even in *Brockway Glass*, where the complainant had opted for a certain rate schedule without complaint from 1974 to 1980, the Court did not hold the complainant to a higher burden of showing a drastic change in facts and circumstances. Rather, in dismissing the complaint, the Court in *Brockway Glass* found that the complainant submitted virtually no evidence at the hearing as to the unreasonableness of the provision about which it was complaining.

By contrast, here, Respond Power clearly wasted no time in challenging the reasonableness of the clawback mechanism and has submitted substantial evidence showing that its application is unreasonable.[27] Indeed, Respond Power sought to informally dispute the charges in October 2016, which efforts were rejected by the Companies. Respond Power then promptly sought the Commission's intervention to avoid the withholding of POR payments on October 27, 2016, resulting in the issuance of an Emergency Order on that date. Thereafter, on November 17, 2016, Respond Power filed the 2016 Complaints. Since Respond Power immediately challenged the application of the tariff provisions, it is sufficient for Respond Power to show that application of the clawback charges is unreasonable.

Even if the Commission imposes a higher burden similar to that required of the complaining party in *Shenango Township*, Respond Power points to the evidence in this

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[27] Respond Power's Main Brief.at 21-56; Respond Power Statement Nos. 1, 1-Supp and 1-R; Respond Power Exhibits AS-1 through AS-22.

proceeding showing that the clawback charges assessed by the Companies in September 2016 and October 2017 were based on the write-off of unpaid supply charges dating back to 2013.[28] The Commission's *DSP IV Orde*r contains no indication that the Commission was aware of this fact, which is neither explained in the Joint Settlement Petition nor mentioned by the Commission.

Moreover, the clawback charges fundamentally altered the terms and conditions of a POR program in which Respond Power was participating as part of the DSP III plan without advance notice – a fact that the Commission also appears not to have considered in the *DSP IV Order*. To the contrary, the Recommended Decision, which was adopted by the *DSP IV Order* ("*DSP IV RD*") notes that in the context of a four-year default service program, the Companies agreed to conduct a mid-course check in October 2017, with one of the issues for discussion being the POR clawback charge, which was being implemented as a two-year pilot.[29] The settlement further entailed a commitment that the Companies would not propose any changes to the first prong of the test prior to 2021.[30] All of these timeframes suggest that the clawback mechanism was being implemented, as it should have been, in tandem with the default service programs.

The reference to a September 2016 assessment only appears in the *DSP IV RD* as part of the recitation of the settlement language,[31] without any discussion. Clearly, the mechanism was packaged by the Companies in a way that was not transparent and appeared to be aligned with the default service program period. Notably, the tariff provision containing the clawback mechanism was not even filed until October 28, 2016, about a month after the charges were invoiced to Respond Power, calling into question the validity of the assessment from the outset and showing

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28 Respond Power's Main Brief at 43-49.
29 *DSP IV RD* at 8, 16.
30 *DSP IV RD* at 17.
31 *Id.*

a change in drastic facts and circumstances from the situation that existed prior to those provisions being included in the tariff.

Therefore, to the extent that Respond Power was required to show a drastic change in the facts or circumstances, it has met this burden through presenting substantial evidence of these unreasonable elements of the clawback mechanism. Regardless of the burden that is placed on Respond Power, the evidence and the law establish that the clawback mechanism – as applied to Respond Power in 2016 and 2017 – is unreasonable and should be declared null and void.

B. Respond Power's Complaints Are Not Precluded by Code Section 316

The Commission confirmed in its *Interlocutory Review Order* that Respond Power is statutorily entitled to challenge the clawback mechanism in the Companies' tariff provisions that were approved by the Secretarial Letter dated November 10, 2016.[32] Reaching this conclusion, the Commission was clearly aware of its prior approval of the mechanism through the *DSP IV Order*. Specifically, the Commission noted that the tariff resulting from a settlement "cannot serve to insulate it from a colorable challenge concerning the justness and reasonableness of its application."[33] Through that language, the Commission fully endorsed the legal entitlement of Respond Power to challenge the application of Commission-approved tariff provisions.

1. Code Section 316, Which Seeks to Avoid Relitigation of an Issue, Does Not Preclude a Challenge to Application of Tariff Provision.

In their Main Brief, the Companies contend that Respond Power's Complaints are a collateral attack on a prior Commission order that is precluded by Code Section 316.[34] However, none of the cases cited by the Companies involved the use of the Code Section 316 doctrine to preclude a challenge to the application of a tariff – a challenge to which the Commission has

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32 *Interlocutory Review Order* at 19.
33 *Id.* at 20.
34 Companies' Main Brief at 17-18, 23-29; 66 Pa.C.S. § 316.

confirmed that Respond Power has a statutory entitlement. Notably, Code Section 701 gives any person having an interest in the subject matter to complain in writing about "any act or thing done" by a public utility.[35] The Code 316 doctrine is only intended to preclude such person from relitigating the same issues against the same party. As the Commission has not previously resolved the pending dispute between Respond Power and the Companies regarding the application of the clawback mechanism, Respond Power's Complaints challenging the charges as unjust and unreasonable are not precluded by this doctrine.[36]

Code Section 316 provides, in pertinent part, as follows:

> Whenever the commission shall make any rule, regulation, finding, determination or order, the same shall be prima facie evidence of the facts found and small remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review.[37]

In *Tillman*, the Commission dismissed a complaint on the basis of Code Section 316, explaining that it must be shown that: (i) the issue decided by a prior final judgment is identical to 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 privy with a party to the prior litigation; and (iv) the determination of the issue was essential to the prior final judgment.[38] Notably, the Commission in *Tillman* initially declined to dismiss the complaint on the basis of Section 316 and remanded the matter to the ALJ because it was unable to conclude that all of the issues presented in the complaint were litigated in the prior complaint.[39]

Here, the Companies' analysis does not even address the criteria that the Commission has relied upon in making Code Section 316 determinations. When such an analysis is performed, it

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35 66 Pa.C.S. § 701.

36 *Tillman v. Philadelphia Gas Works,* Docket No. C-2014-2445229, (Initial Decision served November 19, 2015; Order entered March 8, 2016; (Initial Decision on Remand served January 26, 2017; Final Order entered March 16, 2017).

37 66 Pa.C.S. § 316.

38 *Tillman* Initial Decision served November 19, 2015, at 4-7.

39 *Tillman* Order entered March 8, 2016 at 6-8.

is clear that contrary to the Companies' characterization, Respond Power's Complaints are not a collateral attack on the *DSP IV Order*. Indeed, none of the factors for applying the Code 316 doctrine is present, as follows:

- *Different Issues*. The issues decided by the *DSP IV Order* are not identical to those presented in this proceeding. While the *DSP IV Order* established the Companies' default service program that would commence on June 1, 2017, Respond Power is challenging the retroactive application of a tariff provision that would modify the terms and conditions of the POR program that was in effect for DSP III that ended on May 31, 2017.

- *Issues Not Litigated.* The issues that Respond Power has raised during this proceeding were not litigated during the DSP IV proceeding. Rather, the Recommended Decision ("*DSP IV RD*") that was adopted by the *DSP IV Order* approved the settlement of the parties and did not adjudicate any contested issues relating to the clawback mechanism. Notably, the RD contains no findings of fact and no discussion of these issues. Also, Chairman Brown's statement addresses only the procurement methods for the June 1, 2017 to May 31, 2021 default service program period.

- *Respond Power Not a Party*. Respond Power was not a party or in privy with a party to the prior litigation. While the Companies have sought to link Respond Power to the Retail Energy Supply Association ("RESA") through an affiliate, Spark Energy, LLC ("Spark"),[40] it is undisputed that Respond Power and Spark did not become subsidiaries of a common parent until after execution of the DSP IV settlement and further that RESA does not represent the interests of individual suppliers.[41]

- *Not Essential to Prior Judgment*. Approval of the POR clawback mechanism was not essential to the prior judgment. As the purpose of the DSP IV proceeding was to establish the future-looking default service program to commence on June 1, 2017, modifying the POR program that was in effect for the DSP III program period was entirely beyond the scope of that proceeding and not at all germane to the issues that needed to be resolved for the DSP IV program period.

Further, in approving the implementation of the clawback mechanism on a two-year pilot basis, the Commission acknowledged that it may lead to unintended consequences in the form of unreasonable assessments on EGSs. Indeed, the Commission recognized that the settlement was not intended to apply to other proceedings or to waive any parties' rights regarding those issues in

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40 Companies' Main Brief at 26.

41 Respond Power Statement No. 1-R at 16.

future proceedings.[42] Clearly, the Commission did not anticipate relying on Code Section 316 to preclude later challenges to the Companies' application of the clawback mechanism. In short, Respond Power has not waived its rights to challenge the application of the clawback charge.[43]

2. Service of the DSP IV Filing on Respond Power Does Not Invoke the Code Section 316 Doctrine.

The Companies argue that because Respond Power was served with the DSP IV filing and did not intervene in the proceeding, it is precluded by Code Section 316 from challenging the Commission's *DSP IV Order*.[44] In support of their contention that a party who received notice of a proceeding and did not intervene is precluded by Code Section 316 from thereafter challenging the final order in that case, the Companies cite to a case involving a petition of the Pennsylvania State University ("PSU") for a declaratory order. The issue in that case was whether PSU's generation rate caps for its Tariff 37 account should be extended for two years, as were its rate caps for accounts under Tariff 39, under which PSU was served as a large commercial customer.[45]

For numerous reasons, the PSU rulings relied upon by the Companies do not support dismissal of Respond Power's Complaints. Notably, PSU did not file a complaint against the utility for an act that was done or omitted to be done.[46] Nor did PSU file a complaint against the utility challenging the application of a tariff. Rather, PSU sought declaratory relief from the Commission, which is discretionary.[47] Ultimately, the Court and the Commission found that PSU

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42 *DSP IV RD* at 31.

43 *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).

44 Companies' Main Brief at 17-20, 23-29.

45 Companies' Main Brief at 17-20. *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-2007-2001828 *et al*, 103 Pa. P.U.C. 472 (Recommended Decision served July 28, 2008) ("*Penn State Recommended Decision*"); *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-2007-2001828 *et al*, 103 Pa. P.U.C. 451 (Final Order entered September 11, 2008) ("*PUC Penn State Order*"); *The Pennsylvania State University v. Pa. P.U.C.*, 988 A.2d 771, 783 (Pa. Cmwlth. 2010) ("*Penn State*").

46 66 Pa.C.S. § 701.

47 66 Pa.C.S. § 331(f).

was bound by the provisions of a prior settlement agreement to which it was a signatory and was not entitled to an extension of generation rate caps that occurred through a separate settlement agreement, of which it had notice through bill inserts and publication in the *Pennsylvania Bulletin*. Importantly, the decision in *Penn State* did not limit in any way a party's statutory right to challenge the application of a Commission-approved tariff provision on the basis that it is unjust and unreasonable.

Although the Companies rely on the Court's decision in *Penn State* to support its Code Section 316 argument, the Court made no reference to Code Section 316.[48] Similarly, the Commission's order in that proceeding did not discuss the Code Section 316 doctrine.[49] The only reference to Code Section 316 during that case was a single reference by the ALJ, who undertook no analysis as to whether the necessary criteria were present in applying the doctrine to PSU.[50] Therefore, nothing about the *Penn State* decision supports dismissal of the Complaints here.

Penn State had its genesis in a Petition filed by West Penn Power d/b/a Allegheny Power ("Allegheny Power") in 2003 to extend its stranded cost recovery period beyond December 31, 2008, which was the planned end point of Allegheny Power's stranded cost recovery period and generation rate caps as set forth in the 1998 Restructuring Settlement. The underlying rationale for Allegheny Power's 2003 Petition was that it expected a shortfall of more than $157 million in recovery of its stranded costs by the end of 2008, absent an extension. The 2003 Petition did not propose a corresponding extension of the generation rate caps.[51]

To resolve the 2003 Petition, Allegheny Power and the intervening parties filed a Joint Petition for Settlement and Modification of the 1998 Restructuring Settlement ("2004 Petition").

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48 *Penn State.*
49 *PUC Penn State Order.*
50 *Penn State Recommended Decision* at 25.
51 *Penn State*, 988 A.2d at 774.

The 2004 Petition proposed an extension of Allegheny Power's generation rate cap for various rate schedules, including those on Tariff 39. Since it was modifying a prior settlement, the 2004 Petition provided for notice to the parties in the prior proceeding and to Allegheny Power customers. As a result, Allegheny Power included bill inserts that summarized the 2004 Petition, and the full text of the 2004 Petition was published in the *Pennsylvania Bulletin*. The Commission approved the 2004 Petition on May 11, 2005.[52]

On December 3, 2007, PSU filed a Petition for Declaratory Order with the Commission seeking a declaration that a two-year extension of Allegheny Power's generation rate applied to electric generation service provided to PSU under the Tariff 37 account as well as to Tariff 39 accounts. PSU's Petition was later consolidated with Allegheny Power's Petition for Approval of a Default Service Procurement Plan which would establish the terms and conditions of default service for PSU under Tariff 37 if it did not obtain service from an EGS.[53]

In *Penn State*, the Commonwealth Court extensively discussed the fact that Penn State was not entitled to the rate cap extensions that were afforded to other rate schedules by the Commission's order approving the 2004 Petition. The Court further found that PSU should have known that the generation rate caps under Tariff 37 would not be extended, since PSU had already bought out its Tariff 37 stranded cost obligation before the 2003 Petition was filed. Therefore, the 2003 Petition was logically oriented only to the Tariff 39 customers. It would have made no sense to include the rate schedules on Tariff 37 since the 2003 Petition was not seeking to extend the time period for recovering stranded cost in connection with them.[54] Emphasizing that PSU had entered into a private buyout agreement with the knowledge that the Tariff 37 rate cap would expire at the end of 2008, the Court noted that each party got the benefit of the bargain -- PSU got

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52 *Id.* at 774-775.
53 *Id.*
54 *Id.* at 777.

a lower interest rate and the utility got its stranded costs payments faster. As Allegheny Power experienced no under-recovery of Tariff 37 stranded costs, the Court agreed that no reason existed for the Commission to act gratuitously in favor of PSU particularly when PSU had failed to intervene in the proceeding initiated by the 2003 Petition to modify the 1998 Restructuring Agreement.[55]

Against this backdrop showing extensive involvement by PSU in the restructuring process, particularly in buying out Allegheny Power's stranded costs through a private agreement and thereby forfeiting any opportunity to have generation rate caps extended, the Court addressed PSU's arguments concerning the adequacy of the notice. In doing so, the Court found that abundant evidence established that PSU was adequately notified of the 2004 Petition that ultimately modified the 1998 Restructuring Agreement. Notably, PSU had received approximately 100 bill inserts specifically referencing the extension of rate caps for the under the Tariff 39 rate schedules under which PSU was served.

Also, the Court and the Commission found that the *Pennsylvania Bulletin* notice was reasonably calculated to inform PSU of the pending action and provided PSU with an opportunity to present an objection.[56] As the Commission noted, the notice was captioned "West Penn Power Company Joint Petition for Settlement and for Modification of the 1998 Restructuring Settlement." The Commission added that the entire Joint Petition was published in the *Pennsylvania Bulletin* which referred to generation rate cap extensions, as set forth in Appendix A. As a large commercial customer and a signatory to the 1998 Restructuring Settlement, PSU thereby had notice that its rights might be affected. According to the Commission, "[t]his statement put PSU

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55 *Id.*

56 34 Pa.B. 5326 (2004). https://www.pabulletin.com/secure/data/vol34/34-39/1807.html

on notice that it needed to read Appendix A. If it had done so, it would have realized that the rate cap extension did not apply to Tariff 37."[57]

Rather than being precluded from filing a complaint against the application of a tariff provision because it did not participate in a proceeding of which it had notice, Penn State was bound by the terms of the original settlement to which it was a signatory and the private buy-out agreement it reached with Allegheny Power. In other words, the Commission and the Court maintained the status quo to which Penn State had agreed. To the extent that *Penn State* was based on PSU's lack of intervention in the proceeding, the same rationale cannot be used here. As the Code makes clear, and the Commission has recognized, a party is free at any time to complain to the Commission about any act or thing done by a public utility and to lodge a challenge to the application of an existing tariff provision. If Respond Power's lack of intervention in the DSP IV proceeding results in its Complaints being barred, the Commission would be endorsing a change in the status quo and allowing the Companies to retroactively modify the terms and conditions of a program in which Respond Power was participating.

3. Respond Power Did Not Receive Notice of Proposed Mid-Course Changes to the POR program.

The Companies did not provide notice that it was proposing to make mid-course changes to the terms and conditions of a POR program in which Respond Power was then actively participating. Receiving service of the forward-looking DSP IV filing did not provide that notice since Respond Power had a reasonable expectation that such a filing would only establish terms and conditions commencing on June 1, 2017.

In their Main Brief, the Companies contend that Respond Power had to read no further than the second paragraph of the DSP IV filing to see that the Companies were proposing revisions to

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57 *PUC Penn State Order* at 468-469.

their POR programs.[58] Respond Power has indicated its awareness that the DSP IV filings addressed the POR program. However, as Respond Power's witness explained, default service programs are by their very nature forward-looking. Their purpose is to establish the parameters of providing default service in a future program period, meaning that any changes approved by the Commission would not be effective until the start date of the plan. Therefore, no reason existed for Respond Power to consider the possibility that a filing to establish the Companies' DSP IV plans would contain a retroactive change to a previously-approved POR program that was then in effect.[59] The second paragraph of the DSP IV filing also provided no information to indicate that the charge would be based on historical pricing and write-off data for unpaid supply charges that had accrued prior to Commission approval of the proposed clawback mechanism and even before the Companies' filing of the proposal to implement such a mechanism.

Service of the DSP IV filing was not reasonably calculated to apprise Respond Power of a backward-looking proposal affecting the DSP III program period and afford Respond Power an opportunity to present objections. Since the filing was made for the express purpose of establishing a default service program to cover the <u>future</u> period of June 1, 2017 through May 31, 2021, the notice did not contain an adequate description of the proceedings to inform a reasonable person of the need to participate to protect the terms of an existing program in effect until May 31, 2017 or risk being bound by the final judgment.

Further, the *Pennsylvania Bulletin* notice indicated only that a default service plan had been filed to cover the DSP IV period from June 1, 2017 through May 31, 2021.[60] Nothing about that notice provided any indication that the Companies were proposing mid-course modifications to

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58 Companies' Main Brief at 24.

59 Respond Power Statement. No. 1 at 14; 52 Pa. Code § 54.185 (EDCs are required to file a default service plan at least twelve months prior to the conclusion of the currently effective default service program and set forth their plan for providing default service in that future time period).

60 45 Pa.B. 6654.

the terms and conditions of an existing program previously approved by the Commission. Also, no additional details were provided in the notice about the content of the filing, as had occurred in *Penn State.* For further arguments to refute the Companies' claims of adequate notice, Respond Power incorporates by reference portions of its Main Brief.[61]

Notably, in *West Penn*, the Court emphasized that "under rudimentary principles of due process and fair play the Commission cannot subsequently reverse a previous order without giving notice...and an opportunity to be heard."[62] The Court also said that there must be a point in at which an administrative ruling becomes fixed and definite.[63] For Respond Power, it believed that the point when the parameters of the POR program as part of DSP III were fixed and definite was upon the issuance of the order in the DSP III proceeding.[64] In the same way that the Court in *West Penn* would not permit the Commission to summarily reverse its order approving the utility's rates and apply such reversal retroactively for a prior period, the Commission is not permitted to summarily reverse its *DSP III Order* approving the POR program and apply such reversal retroactively for the prior period.

4. *It Was Reasonable for Respond Power Not to Intervene in the DSP IV Proceeding.*

a. Scope and Complexity of Default Service Programs

The Companies argue that the only opportunity for Respond Power to challenge the clawback mechanism was to intervene in the DSP IV proceeding.[65] However, Respond Power's witness adequately explained why Respond Power did not intervene in the DSP IV proceeding:

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61 Respond Power's Main Brief at 27-34.

62 *Id.*

63 174 Pa.Super. at 128.

64 *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company for Approval of Their Default Service Programs for June 1, 2015 through May 31, 2017,* Docket Nos. P-2013-2391368, P-2013-2391372, P-2013-2391375, P-2013-2391378, Opinion and Order entered July 24, 2014 ("*DSP III Order*").

65 Companies' Main Brief at 18, 22-23.

> Respond Power did not intervene in the proceedings that were held to review the Companies' 2017-2019 Default Service Plans for several reasons. Initially, Respond Power's resources are limited and any additional costs incurred beyond conducting its primary business of supplying electricity will limit the products and services it can offer to consumers. Moreover, as an EDC's default service proceeding is intended to approve the procurement process that will be utilized by the EDCs to procure power for default service, these proceedings can involve substantial litigation and become very complex. For example, the Companies' default plan proceeding to be effective June 1, 2013 included a binding poll, a 162-page Opinion and Order and three subsequent orders addressing petitions for reconsideration and appeal of staff action. Because intervention in default service proceedings can be very costly, especially for an EGS like Respond Power who has little or no interest in the procurement of default service supply by the Companies, it is not reasonable to intervene.[66]

Also, neither the Code nor the Commission's regulations contemplate that issues beyond the procurement of default service supply will be addressed as part of EDC's default service programs.[67] Indeed, the *DSP IV RD* describes the purpose of a default service proceeding, explaining that it is intended to: (i) establish how EDCs will provide default service; (ii) review the procurement plan to consider whether it contains a prudent mix of spot purchases, short-term contracts and long-term contracts; and (iii) ensure that the prudent mix of contracts is designed to produce adequate and reliable service as well as the least cost to customers over time.[68]

Notwithstanding the primary purpose of DSP filings, Respond Power acknowledged that it has become the practice of EDCs to address POR programs in their default service plans.[69] That does not mean, however, that is appropriate for EDCs to use their default service plans to include proposals that do not align with the timeframe for the default service program period. While the Companies characterize Mr. Small's testimony as contending that it is improper to consider POR issues in a default service proceeding, a review of his testimony shows otherwise.[70] Rather, he

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66 Respond Power Statement No. 1 at 13-14 (footnotes omitted).
67 *See* 66 Pa. C.S. § 2807(e); 52 Pa. Code §§ 54.181-54.189; 52 Pa. Code §§ 69.1802-69.1817.
68 *DSP IV RD* at 5-7.
69 Respond Power's Main Brief at 5-6.
70 Companies' Main Brief at 27.

testified that it is improper to modify existing POR programs that are in effect as part of previously approved default service programs in the context of a default service plan that is proposed for a future program period.[71]

b. Timing of Implementation of Other Programs

In an effort to justify mid-course modifications to its POR program, the Companies argue that the POR programs are not tied to the DSP term or any other specific elements of the Companies' default service program. Specifically, the Companies contend that neither the duration nor the effective date of revisions to POR programs is "co-terminus" with the terms of any particular default service program.[72] As Respond Power pointed out, however, when EDCs address issues in their default service programs that are not related to procurement, the additional programs are implemented in accordance with the same time period covered by that program.[73]

The Companies' efforts to de-link the POR program from the default service program only for purposes of the effective date and applicable time period for the clawback mechanism make no sense and have caused the problem resulting in a lack of adequate notice regarding changes to POR programs. While contending that POR programs are appropriately addressed in default service plans, the Companies cannot also claim that the POR programs are not linked to the timing of the default service program period.[74]

Simply stated, the Companies cannot have it both ways. If they want to include their POR programs in their default service plans, it is essential that they be required to implement all aspects of the default service plan on the first date of the default service program period. If they wish to

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71 Respond Power Statement No. 1 at 13-14.

72 Companies' Main Brief at 28-29.

73 Respond Power's Main Brief at 6; *See, e.g., Petition of PPL Electric Utilities Corp. for Approval of Default Service Program and Procurement Plan for the Period June 1, 2017 through May 31, 2021*, Docket No. P-2016-2526627 (Order entered October 27, 2016) (changes to the standard offer program were implemented on the start date of the default service program).

74 Respond Power Statement No. 1-R at 13-14.

have time periods for their POR programs that are not co-terminus with the terms of any particular default service program, they should be required to do as Mr. Small suggested – file stand-alone supplier tariff provisions that are served on all suppliers, with proposed effective dates, giving them the requisite notice and an opportunity to be heard. Alternatively, to the extent that the Companies desire to use different durations or time periods for their POR programs that do not align with their default service programs, they should be required to make stand-alone POR program filings. At a minimum, the Companies had the obligation to file a petition proposing to modify the POR program that was approved by the *DSP III Order*. Regardless of the approach that ideally should have been used, the practice followed by the Companies on November 3, 2015 of proposing modifications in the DSP IV filing to the POR program that was in effect for the DSP III program period, and making those modifications go into effect during the DSP III program period, based on data that had already accrued before the proposal was made, denied Respond Power notice and an opportunity to be heard.

Notably, aside from the timing of the POR program changes, everything else in the DSP IV filing was geared toward the June 1, 2017 through May 31, 2021 default service program period. For instance, in the Companies' DSP IV filing, they proposed that a provision be added to the supplier tariffs to include a process whereby EGSs are able to remit any courtesy customer credits or refunds directly to the Companies to be used to pay outstanding bills. This provision did not go into effect until June 1, 2017. So while the clawback mechanism was retroactively implemented, this credit/refund tool was prospectively implemented. The different effective dates not only created confusion but failed to allow both tools to work together in the same time period to minimize any impact on the EGS's uncollectible rate which would then be used to determine whether to impose the POR clawback charge.[75]

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[75] Respond Power Statement No. 1 at 24.

In support of their inclusion of changes to their POR program in the DSP IV proceeding, the Companies refer to a POR program change for Duquesne Light Company ("Duquesne") that was adopted in a default service proceeding.[76] That example, however, actually supports Respond Power's position regarding the timing of such changes. Through that proceeding, Duquesne proposed and received approval for a provision in its supplier tariff allowing it to discount individual EGS POR purchase prices due to increases in the uncollectible amounts.[77] Duquesne's proposal was contained in its default service filing for the January 1, 2008 through December 31, 2010 program period, to go into effect on January 1, 2008 – the first date of the program period.[78] The proposal was filed on January 25, 2007, a settlement was reached on April 24, 2007, the Commission approved the discount program on June 22, 2007, and the discount program went into effect on January 1, 2008. Respond Power has not been assessed with a discounted purchase price and the record contains no evidence that Duquesne actually ever implemented the discount.[79] Importantly, the program went into effect for the future default service program period that was the subject of the filing.

C. Imposition of the Clawback Charges Is Impermissible Retroactive Ratemaking

As Respond Power argued in its Main Brief, retroactively changing the rules for the DSP III POR program while the program was in effect constitutes impermissible retroactive ratemaking.[80] While Respond Power was participating in the Companies' DSP III Commission-approved POR program in 2015, it had no knowledge that a clawback charge would be proposed and approved in the DSP IV proceeding that would modify the terms of the DSP III-approved

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76 Companies' Main Brief at 27.

77 Respond Power Statement No. 1 at 25.

78 *Petition of Duquesne Light Company for Approval of a Default Service Plan for the Period January 1, 2008 through December 31, 2010*, Docket No. P-00072247, 2007 Pa. PUC LEXIS 36 (June 22, 2007), adopting the Recommended Decision issued May 8, 2007.

79 Respond Power Statement No. 1-R at 20.

80 Respond Power's Main Brief at 34-40.

program during the DSP III plan period. The DSP IV-approved rule change that went into effect on August 1, 2016 (during the DSP III plan period), which was based on write-offs that occurred from September 1, 2015 through August 31, 2016 and pricing data from the same time period, resulted in an assessment of clawback charges on September 30, 2016. All of this occurred prior to the June 1, 2017 effective date of the DSP IV plan. No other aspect of the DSP III plan was similarly, retroactively modified in this manner. Such an outcome is exactly what the rules against retroactive ratemaking are designed to prevent.

The Companies argue that "the clawback charge is a fee that is applied prospectively to EGSs who, based on reasonable criteria, are shown to impose additional costs on the Companies and their customers."[81] Additionally, they maintain that the clawback mechanism does not modify the terms of the sale and purchase of EGS accounts receivables under the Companies' POR programs prior to entry of the *DSP IV Order*.[82] Yet, the Companies also acknowledge that Respond Power's 2016 Complaints dispute charges for the "first year" the clawback provision was in effect.[83] Given the fact that the clawback charges were assessed in September 2016 for the period of September 1, 2015 through August 31, 2016 (the Companies' reference to "the first year"), this concession demonstrates the retroactive nature of the charges that went into effect on August 1, 2016.

Clearly, the clawback mechanism allowed the Companies to retroactively impose fees that recoup "additional costs" they have incurred due to unanticipated higher uncollectible expenses, which is precisely what retroactive ratemaking prevents utilities from doing. The clawback mechanism also permitted the Companies to modify the terms and conditions of the sale and purchase of accounts receivables for transactions that were finalized prior to the entry of the *DSP*

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81 Companies' Main Brief at 32.
82 Companies' Main Brief at 32.
83 Companies' Main Brief at 10, footnote 10.

IV Order. At the time Respond Power was participating in the Commission-approved DSP III POR program for the period of June 1, 2015 through May 31, 2017, it was indifferent to whether its customers paid their supply charges because it was being made whole through the Companies' "non-recourse" POR program. No Commission-approved clawback mechanism even existed; rather, it only surfaced following entry of the Commission's *DSP IV Order*.

Even if Respond Power is deemed to have known on May 19, 2016 that the terms of its participation in the DSP III POR program for the period of June 1, 2015 through May 31, 2017 were being modified as a result of the *DSP IV Order* and that the Companies now would have recourse to impose fees to recover some of those unpaid supply charges, it was too late at that point to take actions to avoid imposition of the clawback charge. By then, nearly nine months of write-offs on which the charge would be based and the pricing of supply had already occurred. More importantly, the write-offs were based on unpaid supply charges dating back to 2013, of which Respond Power had no knowledge or ability to control. In addition, the mechanism through which the clawback charges would be assessed was not included in the Companies' Supplier Tariffs on file with the Commission until October 28, 2016 with a retroactive date of August 1, 2016. When the first clawback charges were invoiced to Respond Power in September 2016, all of the data on which they were based had already accrued, and their imposition could not be avoided or moderated in any way.[84] That outcome is the epitome of impermissible retroactive ratemaking.

The Companies disagree with Respond Power's characterization of the clawback mechanism converting the POR programs from "non-recourse" to "with recourse."[85] They explain that because they do not reconcile the face value of accounts receivable purchased from EGSs with the actual amounts collected from customers under the clawback provision, EGSs participating in

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84 Respond Power Statement No. 1 at 16.

85 Companies' Main Brief at 35-36.

the Companies' POR programs continue to avoid the costs and risks associated with collecting any delinquent amounts owed by customers.[86]

Undisputed evidence in the record shows that "non-recourse" is "a commercial term meaning that once a receivable is sold, the purchaser of the receivable has no recourse with the seller to collect on any amounts the purchaser is unable to successfully recover through customer collection efforts."[87] Under the clawback mechanism, the Companies now have recourse against EGSs – through the assessment of a clawback charge – if customers do not pay their bills in full and on time. Indeed, Ms. Bortz conceded during cross-examination that the clawback charges assessed in 2016 modified the terms of the prior POR program and constituted a "new provision" to the then-existing program.[88] She also agreed during cross-examination that the imposition of the clawback charge is "recourse" that the Companies have against certain EGSs when they write off accounts that they are unable to collect from customers.[89] It is noteworthy that Penelec's tariff provision containing the clawback mechanism explicitly states that the POR, which is mandatory for any EGS using the EDC consolidated billing option, "will be 'non-recourse,' except as provided for under Section 12.9(g)," which is the clawback mechanism.[90]

Clearly, the new provision to the POR program introduced in the DSP IV proceeding provides a vehicle through which the Companies have recourse. When they are unable to collect money from customers, they impose a clawback charge on the EGSs who were serving those customers. Regardless of how the Companies may have previously viewed the term "non-recourse," they have transformed their prior "non-recourse" POR programs to "with recourse" POR programs without affording EGSs notice of their proposal to do so.

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86 Companies' Main Brief at 35-36.
87 Respond Power Statement No. 1 at 7.
88 N.T. at 82.
89 N.T. at 76.
90 Electric Pa. P.U.C. No. S-1 (Supp. 7), Third Revised Page No. 38, Section 12.9.

The Companies further contend that it is not unreasonable or retroactive to base the clawback mechanism on historical data. In support of this feature of the mechanism, the Companies refer to examples of other rates and charges they impose on the basis of historical data.[91]

As Respond Power's witness explained, however, these examples involved historical demand patterns of customers that are used to determine future rates. The customers always knew that they were going to be billed for their usage; all that may have changed were the specific billing determinants that would be used. Here, Respond Power expected to be fully compensated for its receivables without recourse from the Companies only to learn years later that this would not be the case. Moreover, Mr. Small testified that "the rates that are paid by customers on a prospective basis using historical data are based on the customers' own demand patterns that they could and did control."[92] By contrast, here, the Companies have sought to impose charges on Respond Power related to billed amounts that were not paid by the customers and were not collected by the Companies – neither activity over which Respond Power had any control.

D. The Structural Flaws of the Clawback Mechanism Render its Application to Respond Power Unjust and Unreasonable

In addition to the legal issues concerning due process and the retroactive application of the clawback charge to Respond Power, numerous structural flaws of the Companies' clawback mechanism render its application to Respond Power unjust and unreasonable. The specific items discussed by Respond Power's Main Brief include the lack of any notification from the Companies that customers are not paying their supply bills; no ability to control collections; no credit screening; no control over Companies' write-off practices; and the Companies' partial payment allocation practices. Therefore, Respond Power incorporates by reference that portion of its Main

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91 Companies' Main Brief at 32-35.

92 Respond Power Statement No. 1 at 21.

Brief discussing the structural flaws of the Companies' clawback mechanism[93] to refute the Companies' arguments in its Main Brief regarding the same.[94] Responses to specific issues raised by the Companies' Main Brief are set forth below.

With respect to the flaws identified by Respond Power, the Companies seek to justify the structure of the clawback mechanism on the basis that the features are applied uniformly to all EGSs.[95] However, as Mr. Small explained, that rationale does not support a finding that application of the clawback mechanism is just and reasonable. Respond Power has not contended that the Companies have discriminated against it in relation to other EGSs. Indeed, Mr. Small noted that the concerns he has raised about the clawback mechanism could be equally applied to other EGSs, but that he is only authorized to speak on behalf of Respond Power. He specifically discussed several features of the clawback charge he as rendering the application of the mechanism unjust and unreasonable. As Mr. Small testified, "[i]t does not matter that the Companies treat all EGSs the same with respect to these practices. Applying unfair practices to all EGSs does not make them just and reasonable."[96]

A particular feature of the clawback mechanism that single-handedly renders its application unjust and unreasonable is the failure of the Companies to provide notice to Respond Power that its customers were not paying their supply charges. While the clawback charges were accruing, Respond Power had no knowledge that its customers were not paying the Companies and had no ability to address the situation directly with its customers. Respond Power also had no control over the Companies' collection efforts. Had Respond Power been aware that its customers were not paying their supply charges, it could have taken steps designed to avoid the imposition of the

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93 Respond Power's Main Brief at 40-54.
94 Companies' Main Brief at 31-45.
95 Companies' Main Brief at 37-45.
96 Respond Power Statement No. 1-R at 21-22.

clawback charges.[97] Although Respond Power could not have threatened to terminate service as a way of encouraging payment, it could have negotiated different contract terms or cancelled the contracts and returned the customers to default service.[98]

The Companies have claimed that Respond Power could have requested information as to whether their customers were paying their bills.[99] While that may have been true after imposition of the clawback charges in September 2016, Respond Power was unaware during the September 1, 2015 through August 31, 2016 write-off period that a clawback mechanism even existed. In fact, as discussed above, the mechanism did not exist for most of that time. The earliest date it existed is its effective date of August 1, 2016, eleven months into the write-off period. Moreover, the supplier tariff provisions were not filed until October 28, 2016 or approved on November 10, 2016 – both of which occurred after the conclusion of the write-off period and after issuance of the 2016 invoices. As a result, Respond Power would have had no reason to inquire with the Companies prior to the September 2016 invoices about unpaid supply charges, especially since it was participating in a non-recourse POR program.

Even after September 2016, when Respond Power became aware of the clawback mechanism upon receipt of the invoices, contacting the Companies to learn the payment status of their customers involved a cumbersome manual process for an EGS serving the volume of customers served by Respond Power.[100] While the Companies' opacity during this proceeding concerning the manner in which any information could be obtained was fully addressed by Respond Power's Main Brief,[101] it is necessary to respond to a few points raised by the Companies' Main Brief.

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97 Respond Power Statement No. 1 at 18.
98 Respond Power Statement No. 1 at 18-19.
99 Penelec/West Penn Statement. No. 1 at 28.
100 Respond Power's Main Brief at 41-42.
101 Respond Power's Main Brief at 41-44.

Regardless of the availability – as of February 7, 2018 – of the "most valuable" method for Respond Power to obtain information about its non-paying customers, the point remains that this method was not revealed by the Companies until February 1, 2018 and was not readily available on February 2, 2018.[102] Given that the Companies were desirous of minimizing write-offs, it would seem that they would have made this method freely known so that EGSs do not have to wonder what their situation is relative to the imposition of clawback charges.[103] In any case, due to the significant gap between customers' unpaid balances and the write-off of those accounts, it was critical for the Companies to be sharing information about unpaid charges as early as 2013 in order for Respond Power to avoid the imposition of clawback charges in 2017. Yet, in 2013, 2014, 2015 and over half of 2016, no clawback mechanism existed, no information sharing was occurring and Respond Power would have had no reason to inquire due to being made whole through the POR program.

The Companies also refer to Respond Power's failure to request information regarding its non-paying customers for over a year after being invoiced on September 27, 2016. Based on the information that the Companies provided throughout this proceeding (up through February 1, 2018), Mr. Small testified that it would be impossibly burdensome to make individual inquiries on an ongoing basis about the payment patterns of each customer. In an industry that relies on EDI to exchange customer information between EDCs and EGSs, Mr. Small recommended that that the Companies "be directed to modify the system so that electronic transactions are automatically transmitted to Respond Power when its customers do not pay their supply bills in full or on time.[104] Without this information, Respond Power could not undertake any other actions with regard to the

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102 Respond Power's Main Brief at 42.
103 Respond Power's Main Brief at 44-45.
104 Respond Power Statement No. 1-R at 22.

customer's lack of payment to avoid or minimize the clawback charges that are assessed.[105] While the Companies note that Respond Power did not offer new contracts the customers whose charges were written off,[106] Mr. Small explained that the customers whose accounts were written off by the Companies are no longer being served by Respond Power. Therefore, no reason existed for Respond Power to reach out to negotiate more affordable terms. Having the information about accumulating unpaid balances prior to the write-offs occurring would have given Respond Power this opportunity, which did not exist following the write-offs.[107]

While the Companies contend that the clawback mechanism is not intended to incentivize certain conduct, it is imperative for the potential recipient of clawback charges to be aware of the conduct that is occurring that will trigger the imposition of the charges. As the charges were accruing, Respond Power had no knowledge that certain customers were not paying the Companies and no ability to attempt to address the situation directly with its customers.[108]

The failure of the Companies to automatically provide notifications to EGSs when their customers do not pay their supply bills is a departure from the manner in which clawback tools are typically used in the industry. As Mr. Small testified, the knowledge of their existence and an ability to control whether they are imposed are critical features of such a mechanism. Specifically, he noted that clawback charges are used in the energy industry to incentivize certain behavior and explained that Respond Power uses clawback charges with its vendors to promote compliance with the regulatory requirements. For instance, if Respond Power discovers that a vendor secured an improper enrollment of a customer, Respond Power may "clawback" the fee earned by the vendor for the enrollment. However, in the case of the Companies' clawback mechanism, Respond Power

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105 Respond Power Statement No. 1 at 10.
106 Companies' Main Brief at 41.
107 Respond Power Statement No. 1-R at 24.
108 Respond Power Statement No. 1-R at 22-23.

was not even aware that clawback charges existed during the first year when the data was accruing and had no opportunity to take steps to avoid the assessment of charges in either year since the write-offs related to supply charges from prior years.[109] As such, the application of the mechanism was unreasonable.

The Companies further contend that Respond Power was aware that customers were not paying their bills due to the Polar Vortex litigation initiated by the Office of Attorney General and the Office of Consumer Advocate.[110] However, as Mr. Small testified, that litigation occurred several years ago and was a general complaint that did not identify specific customers.[111] As to the Companies' characterization of Respond Power making a business decision not to track whether their customers were paying their bills or offering new contracts with lower rates,[112] Respond Power reiterates that at the time the unpaid supply charges were accruing in 2013-2016 that ultimately formed the basis for the 2016 and 2017 invoices, no clawback mechanism existed and therefore Respond Power had no reason whatsoever to question whether their customers were paying their bills.[113]

In their Main Brief, the Companies acknowledge that the write-off periods leading to the clawback charges include unpaid supply bills during the Polar Vortex timeframe. They claim, however, that these unpaid charges are not unique drivers of Respond Power's higher than average write-off percentage.[114] To the contrary, Mr. Small explained that while many EGSs encountered unprecedented and record-breaking wholesale price spikes during the Polar Vortex, EGSs serving customers on month-to-month contracts had the ability to pass along some of those costs to

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109 Respond Power Statement No. 1 at 17.
110 Companies' Main Brief at 42.
111 N.T. 26.
112 Companies' Main Brief at 42.
113 Respond Power's Main Brief at 27-40.
114 Companies' Main Brief at 38.

customers, which may very well have resulted in higher write-offs.[115] In fact, the Commission expressly recognized both the unprecedented and record-breaking costs faced by many EGSs at that time, and the differences among EGS contract provisions affecting whether they could increase retail prices.[116] Therefore, those unpaid charges did in fact drive Respond Power's write-off percentages and the imposition of the clawback charges, despite Respond Power issuing refunds to customers for that time period as part of a settlement of the Polar Vortex litigation.[117]

E. Clawback Mechanism Unlawfully Imposes Limits on EGS Prices

The prong of the clawback mechanism that considers EGS pricing over a twelve-month period operates to unlawfully limit EGS prices. The Commission and the Commonwealth Court have concluded that the Commission may not regulate or impose limits on EGS pricing.[118] Yet, if the Commission requires Respond Power to pay the invoices that are the subject of this proceeding, it is effectively imposing limits on EGS pricing.[119]

As an EGS, Respond Power has no control over the Companies' write-off practices or consumers' payment patterns. Therefore, the only prong of the clawback charge that Respond Power can control is the price. Since it does not know which customers are not paying their bills, to avoid the imposition of a clawback charge Respond Power would need to continually (or on average) keep its prices below 150% of the Companies' respective PTCs for all customers. Therefore, the clawback mechanism is operating to unlawfully limit its prices.

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115 Respond Power Statement No. 1-R at 28.

116 *See Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products,* Docket No. M-2014-2406134 (Order entered March 4, 2014), at 1-2.

117 Respond Power Exhibit AS-21. In response to the Companies' statement that not all refund checks were cashed (Companies' Main Brief at 43), Respond Power notes that under the clear terms of the settlement of the Polar Vortex litigation, unclaimed refunds are not returned to Respond Power. Also, Respond Power had no power to determine the manner in which refunds were calculated or issued to customers.

118 *Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania v. Pa. P.U.C.*, 120 A.3d 1087, 1094 (Pa. Commw. Ct. 2015), *appeals denied*, 136 A.3d 982 and 136 A.3d 983 (Pa. 2016), at 1102; *see also HIKO Energy, LLC v. Pa. P.U.C.*, 163 A.3d 1079, 1082, n.1 (Pa. Commw. Ct. 2017).

119 Respond Power's Main Brief at 54-56.

The Companies argue that the clawback provision does not limit EGS pricing practices.[120] They suggest that to avoid triggering the clawback provision, Respond Power would "only need to monitor the quarterly changes in the PTC, ascertain the average price it is charging in a Company's service area and then maintain an average price...of less than 150% of the average PTC."[121] The result of requiring such an exercise is the same as unlawfully placing a cap on the prices that EGSs may charge.

Moreover, Mr. Small explained that this suggestion is not feasible or appropriate. As he explained, it would be unreasonable to expect EGSs to constantly monitor the EDCs' PTC when they are ideally not competing with the EDCs but rather are competing with their peers, other EGSs. Also, EDC prices are not established in the same way as EGS prices are developed.[122] As EDCs' PTCs are set in a regulated environment, they do not reflect current market conditions and other realities that EGSs must consider. When unanticipated events occur in the wholesale energy market or new regulatory burdens increase costs, EGSs cannot turn to the Commission for cost recovery from a captive base of monopoly distribution customers. Rather, EGSs must forego or minimize profits, or try to collect these costs from their supply customers in a competitive arena where customers have choices.[123]

The facts that the PTCs change quarterly, include reconciliation factors, and reflect different market conditions than EGS prices due to the lag between EDC procurements and charging the PTC further demonstrate the irrelevance of EDC PTCs to EGS pricing in the competitive market.[124] Also, some of the expenses that EGSs must include in their prices are

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120 Companies' Main Brief at 45.
121 Companies' Main Brief at 42-43.
122 Respond Power Statement No. 1-R at 30.
123 Respond Power Statement No. 1-R at 10.
124 Respond Power Statement No. 1-R at 11, 30; *RMI End State Order* at 12 (EDC's PTCs are often not correlated to wholesale energy markets and may move in directions opposite that of the wholesale energy markets trends).

recovered by the Companies through distribution rates, rather than through the PTC, for default generation service. For example, the Companies' tariffs describe the PTC as representing the costs of providing energy, capacity, transmission and ancillary services for customers who take default service. However, EGSs incur numerous other costs to serve customers, beyond those costs of providing generation supply services, such as billing, customer service, marketing and customer acquisition.[125] Mr. Small also provided perspective on a 150% difference in prices when he compared the Companies' PTCs over the course of five years. Notably, the Companies' PTCs have fluctuated by more than 150%, with Penelec's lowest PTC of 5.960 cents per kWh and its highest PTC of 9.284 cents per kWh. Also, West Penn's PTC fluctuated by more than 150% from one quarter to the next in 2014.[126]

When one considers all of the differences between what goes into EDC and EGS pricing, it is clear that a comparison between them is not meaningful and that a variation of 150% or more is not significant. Further, EGSs offer a variety of time periods, from one-month to three-year terms, and numerous other options in between. An EGS that negotiates a three-year contact with a price that is lower than the EDC's PTC at the start of the contract may very well be charging a price far above the EDC's PTC at any time during the three-year term. That is a risk that the customer chose to take in exchange for price certainty that he or she could not get from the EDC. It does not mean that the EGS's prices are excessive. In any case, it is not the role of the EDC to set price limits or determine excessive prices.[127]

F. The Companies Have No Basis for Requesting Interest

Without any discussion in their Main Brief or any reference to the testimony of their witness, the Companies include a proposed ordering paragraph under which Respond Power would

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125 Respond Power Statement No. 1-R at 10.
126 Respond Power Statement No. 1-R at 11; Respond Power Exhibit AS-16.
127 Respond Power Statement No. 1-R at 11-12.

be directed, in the event that its Complaints are dismissed, to pay the amounts set forth in the invoices previously issued by the Companies to Respond Power, together with applicable interest.[128] To the extent that the Commission dismisses the Complaints and determines that Respond Power is obligated to pay the invoices, which Respond Power contends should not occur, the Companies have offered no basis for seeking the imposition of interest.

The Companies' Supplier Tariffs contain no provisions requiring an EGS to pay interest on disputed amounts.[129] They have also not pointed to any Code section or Commission regulation entitling them to interest. In the absence of any statutory provision, regulation or tariff language authorizing the collection of interest, the Companies may not obtain interest from Respond Power. Notably, Respond Power has raised a colorable claim, as recognized by the Commission's *Interlocutory Review Order*. Accordingly, no basis exists for awarding interest on the amounts in dispute.

III. CONCLUSION

WHEREFORE, Respond Power LLC respectfully requests that the Commission sustain the formal complaints filed against Pennsylvania Electric Company and West Penn Power Company.

Respectfully submitted,

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[128] Companies' Main Brief, Appendix A at 32, ¶ 4.

[129] *See* Penelec Electric Pa. P.U.C. No. S-1 (Supp. 5), Section 18; West Penn Electric-Pa. P.U.C. No. 2S, Section 18.