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March 30, 2018

VIA eFILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

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

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

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

Dear Secretary Chiavetta:

Enclosed for filing in the above-referenced matter is the **Reply Brief on behalf of Pennsylvania Electric Company and West Penn Power Company**. Copies have been served upon presiding Administrative Law Judge David A. Salapa and all parties of record as indicated on the attached Certificate of Service.

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	:	
v.	:	**Docket No. C-2016-2576287**
PENNSYLVANIA ELECTRIC COMPANY	:	
	:	
	:	
RESPOND POWER LLC	:	
v.	:	**Docket No. C-2016-2576292**
WEST PENN POWER COMPANY	:	
	:	
	:	
RESPOND POWER LLC	:	
v.	:	**Docket No. C-2017-2631326**
PENNSYLVANIA ELECTRIC COMPANY	:	
	:	
	:	
RESPOND POWER LLC	:	
v.	:	**Docket No. C-2017-2631331**
WEST PENN POWER COMPANY	:	

CERTIFICATE OF SERVICE

I hereby certify and affirm that I have this day served a copy of the **Reply Brief on behalf of Pennsylvania Electric Company and West Penn Power Company** on the following persons, in the manner specified below, in accordance with the requirements of 52 Pa. Code § 1.54:

VIA ELECTRONIC MAIL AND FEDERAL EXPRESS

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Attorneys for Pennsylvania Electric Company and West Penn Power Company

Dated: March 30, 2018

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Respond Power LLC	:		
v.	:	**Docket No.**	**C-2016-2576287**
Pennsylvania Electric Company	:		
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West Penn Power Company	:		
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Pennsylvania Electric Company	:		
Respond Power LLC	:		
v.	:	**Docket No.**	**C-2017-2631331**
West Penn Power Company	:		

REPLY BRIEF OF RESPONDENTS PENNSYLVANIA ELECTRIC COMPANY AND WEST PENN POWER COMPANY

Before Administrative Law Judge
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March 30, 2018

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STATUTES & REGULATIONS

I. INTRODUCTION

Respondents, Pennsylvania Electric Company ("Penelec") and West Penn Power Company ("West Penn") (individually, a "Company" and collectively, the "Companies"), file this Reply brief in response to the Main Brief of Respond Power, LLC ("Respond Power"), an electric generation supplier ("EGS") in each Company's respective service territory and the Complainant in this case. To a very large extent, the arguments advanced in Respond Power's Main Brief in support of its attempt to avoid application of the clawback provision[1] in the Companies' Electric Generation Supplier Coordination Tariffs ("Supplier Coordination Tariffs") previously approved by the Pennsylvania Public Utility Commission ("Commission" or "PUC")[2] have been fully addressed and refuted in the Companies' Initial Brief filed on March 16, 2018. Therefore, an extensive reanalysis of each of Respond Power's contentions is not necessary.[3] However, as an aid to the Administrative Law Judge ("ALJ"), this Reply Brief will revisit certain of the key errors in Respond Power's attempt to collaterally attack the DSP IV Final Order and

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[1] As explained in the Companies' Initial Brief (pp. 1, 6-7), the clawback provision imposes an administrative charge on EGSs that elect to participate in the Companies' purchase of receivables ("POR") programs and that: (1) operate under a business model that results in their accounts receivables producing a write-off percentage (write-offs for nonpayment as a percentage of revenues) that exceeds 200% of each Company's average EGS write-off percentage; and (2) charged prices for generation service that, on average, exceeded 150% of the applicable Company's average Price-to-Compare ("PTC").

[2] The clawback provision was approved by the Commission in its Final Order approving the settlement of the Companies' fourth default service ("DSP IV") proceeding. *See Petition of Metropolitan Edison Co., Pennsylvania Elec. Co., Pennsylvania Power Co. and West Penn Power Co. for Approval of a Default Serv. Program for the Period Beginning June 1, 2017, through May 31, 2019*, Docket Nos. P-2015-2511333, P-2015-2511351, P-2015-2511355 and P-2015-2511356 (Recommended Decision issued Apr. 15, 2016) ("DSP IV Rec. Dec."), p. 31 ("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."). The DSP IV Rec. Dec. was adopted by the Commission without modification by Final Order entered May 19, 2016 ("DSP IV Final Order").

[3] The Companies will refrain from repeating the extensive discussion of the issues set forth in their Initial Brief. However, they note that the reasons and rationale for rejecting all of Respond Power's contentions and dismissing Respond Power's Complaints set forth in their Initial Brief are incorporated herein by reference. Consequently, the Companies should not be deemed to have waived any argument against, or conceded any point made by, Respond Power in its Main Brief simply because those matters are not also discussed at length herein.

reopen the ALJ's and the PUC's prior determination that administrative charges assessed in accordance with the Companies' Commission-approved clawback provisions are "just and reasonable."

As explained in the Companies' Initial Brief, Respond Power was issued invoices on September 27, 2016 and September 29, 2017 (collectively, the "Clawback Charges") pursuant to the clawback provision. Respond Power was one of three EGSs that passed both parts of the clawback provision's screening test for each of the 2016 and 2017 application years. As such, Respond Power was properly identified, based on available data and accepted cost-causation principles, as one of the EGSs whose mode of operation and pricing was imposing uncollectible accounts expense on the Companies and their customers well in excess (i.e., more than 200%) of the average uncollectible accounts percentage of *all* EGSs operating in each of the Companies' service areas. In short, the clawback provision functioned exactly as it was designed to do.

II. OVERVIEW AND SUMMARY

Respond Power's Complaints Are Barred By The Preclusive Effect Of The DSP IV Final Order.

Final orders of the Commission have legal significance. Once an order becomes final and non-appealable, it remains binding in accordance with its terms until the Commission, after notice and hearing, decides to change it – assuming that the change is lawful, based on substantial evidence and is not arbitrary or capricious. While this principle is both intuitive and axiomatic, it is also enshrined in Section 316 of the Public Utility Code.[4] Section 316 binds the Commission just as much as it does the parties to whom an order applies and precludes releasing a party retrospectively from the binding effect of a final order. If a party seeks a change in such

[4] 66 Pa.C.S. § 316. *See* PE/WP Initial Br., pp. 17-20.

an order, relief can be granted prospectively only – and then only if the complainant carries a "heavy burden" to overcome the presumption of reasonableness that attends a prior Commission determination.[5]

The DSP IV Final Order must be given preclusive effect as required by Section 316. The DSP IV Final Order cannot apply to everyone except Respond Power simply because Respond Power decided not to participate in the DSP IV proceeding and, therefore, did not raise its objections to the clawback provision in a timely fashion when it had the opportunity to do so. Respond Power wants the proverbial "second bite at the apple." Section 316 and well-established Commission and appellate precedent command that "second bites" are improper and, indeed, prohibited.[6]

The Recommended Decision, which the DSP IV Final Order affirmed, concluded that the clawback provision is lawful. The Recommended Decision also found and determined that the clawback provision is a just and reasonable mechanism that is properly designed to impose reasonable charges on EGSs that pass its screening test. Therefore, to reiterate, Section 316 mandates that the Commission's approval, findings and determinations remain valid until changed by the Commission and, furthermore, any such change can only be effective prospectively.

Even granting Respond Power the benefit of the most generous interpretation of Section 316's mandate, Respond Power cannot lawfully challenge clawback charges assessed before it filed its first Complaints on November 17, 2016. And, as to charges the Companies assessed on September 29, 2017, the DSP IV Final Order's findings and conclusions impose a "heavy burden" on Respond Power to obtain even prospective relief, as the Companies explained in their

[5] *See* PE/WP Initial Br., pp. 16-20.

[6] *Id.*

Initial Brief (pp. 12-17). Simply stated, there is a strong presumption of reasonableness that attaches to a tariff rule approved by the Commission even when its prospective effect is being challenged.

Moreover, in addition to the strong legal presumption to which the Companies are entitled, the evidence in this case shows the clawback provision is reasonable. That conclusion is shared by the Retail Energy Supply Association ("RESA"), the trade association for EGSs that included Respond Power's parent as a member,[7] which signed the Joint Petition for Settlement of the Companies DSP IV proceeding, and by other EGSs in the Companies' service territories that intervened in that proceeding and did not object to the liberalized clawback provision adopted in the settlement.

Respond Power Had Ample Notice And Opportunity To Be Heard.

Astonishingly, Section 316 does not appear in the Table of Authorities – indeed, is never even mentioned – in Respond Power's Main Brief. Respond Power appears, therefore, to concede – as Section 316's plain language clearly states – that Commission orders must be given binding effect and remain "conclusive on all parties affected thereby."[8] Without clearly stating its purpose, however, Respond Power makes an oblique attempt in its Main Brief to circumvent the preclusive effect of Section 316 by contending the DSP IV Final Order should not be binding upon it because "[service] of the DSP IV plan on Respond Power was insufficient to provide notice" of proposed changes in the POR programs.[9] Suffice it to say that Respond Power's notion of adequate "notice" is vastly different from what due process requires. Under no

[7] PE/WP Initial Br., p. 5.

[8] Under the Commission's regulations, Respond Power had an obligation to raise and discuss all issues and authorities relevant to its claims in its Main Brief. *See* 52 Pa. Code § 5.501(a)(3).

[9] Respond Power Main Br., p. 28.

reasonable application of due process principles could it be found that Respond Power lacked "notice" or was deprived of a full and fair opportunity to be heard.

At the outset, Respond Power concedes, as it must, that it was served with the DSP IV Joint Petition and its accompanying testimony and exhibits – the legal pleading that initiated the DSP IV proceeding.[10] Those documents clearly stated that the Companies proposed to modify their POR programs – programs that Respond Power witness Small testified were regarded by Respond Power as extremely important to its business model and profitability.[11] In fact, Mr. Small acknowledged that the DSP IV Joint Petition "delineated proposed POR program changes" and that "the testimony discussed the proposed clawback provision."[12]

Even more telling, Mr. Small also conceded that he read the DSP IV Joint Petition and that he was "aware around the time the filings were made in November 2015 that the Companies were making proposals to modify the POR programs."[13] Nonetheless, Mr. Small claimed – contentions repeated in Respond Power's Main Brief – that he did not have "notice" that the clawback charge was proposed to be assessed as early as September 2016 on the basis of historical data for the twelve months prior to that date.[14] But, if Mr. Small had, in fact, read the DSP IV Joint Petition or the accompanying testimony, which described the proposed clawback provision, he had to have known when the clawback charges were proposed to be assessed. As fully explained in the Companies' Initial Brief (pp. 24-25), the DSP IV Joint Petition and accompanying testimony spelled out in detail how the clawback provision would operate,

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[10] Respond Power St. No. 1-R, p. 12 ("Ms. Bortz is correct that the Companies served the DSP IV on Respond Power.").

[11] Tr. at 41 and 45.

[12] Respond Power St. No. 1-R, p. 12.

[13] *Id.* at 14; *see also* Tr. at 25.

[14] Respond Power St. No. 1-R, pp. 14-15.

including its use of historical data analysis, and explained that under the clause "an annual charge would be assessed *beginning September 2016*" based on data for the preceding twelve months "ending August 31st."[15] In short, the documents initiating the DSP IV proceeding made perfectly clear the very points Mr. Small claimed he could not discern. Thus, there is no factual basis for Respond Power's tenuous argument that it was not afforded adequate notice.

While the record evidence shows Respond Power knew, or should have known, that clawback charges were proposed to be assessed beginning in September 2016, it is also clear that Respond Power's argument insists on a degree of specificity in the "notice" provided to interested parties that is not, and never has been, legally required. The correct standard was accurately explained in the Recommended Decision (subsequently affirmed by the Commission and the Commonwealth Court) in *Petition of the Pennsylvania State Univ. for Declaratory Order Concerning the Generation Rate Cap of the West Penn Power Co. d/b/a Allegheny Power* ("*PSU/West Penn*"):

> The first flaw in Penn State's logic is its insistence that it should have been notified specifically that Tariff 37 rates would not be included in the rate cap extension. This Commission and the litigants who appear before it simply do not operate under that premise in the normal course of business. Instead, the Commission and the parties define those interests which will be impacted by the requested relief.[16]

Actual service of the pleading that initiates a legal proceeding is the "gold standard" for "notice." Respond Power has not set forth any authority – let alone controlling authority – that suggests an interested party is deprived of due process notice when it is served with all the documents that initiate a proceeding and that set forth the claims made and relief requested

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[15] PE/WP St. No. 1-SR, p. 3 (emphasis added). *See* PE/WP Initial Br., p. 25.

[16] Docket Nos. P-2007-2001826 *et al.*, 103 Pa. P.U.C. 451, 472, 492-93 (Recommended Decision of Administrative Law Judge Louis Cocheres issued July 28, 2008) ("PSU/West Penn Rec. Dec.").

therein. This is precisely what occurred in this case. What is more, Respond Power witness Small conceded he had actual notice in November 2015 that the Companies were proposing to revise their POR programs by implementing a clawback provision. Respond Power's argument that it lacked notice is nothing more than a web of excuses – excuses based on demonstrably counter-factual assertions – for neglecting to intervene in the DSP IV proceeding when it had a full and fair opportunity to do so and, by its own admission, ample incentive to do so, given the importance of POR programs to Respond Power.[17]

Contrary To Respond Power's Contentions, POR Programs Are Not Coextensive With Each Default Service Program ("DSP") And, If They Were, Respond Power Would Have Had Even Greater Reasons And Incentives To Intervene In The DSP IV Proceeding.

Respond Power's "notice" argument, as well as its contention that the clawback provision is unlawfully "retroactive," are grounded on Respond Power's claim that the Companies' POR programs are coextensive with each DSP. As envisioned by Respond Power and Respond Power witness Small, a POR program exists for the duration of each DSP. Thus, a POR program would have to be approved at the same time a DSP is approved; would remain in effect (and could not be changed) for the duration of that DSP's term; would expire when the DSP ends; and would have to be renewed in order to begin again at the start of the next succeeding DSP.[18] This conceptual framework is central to Respond Power's arguments.[19]

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[17] *See* Tr. at 41.

[18] Tr. at 41-45. *See* Respond Power St. No. 1-R, pp. 12-15; Respond Power Main Br., p. 10.

[19] Paradoxically, Respond Power did not recognize that this argument is inconsistent with another position it advocated just as forcefully, namely, that DSP proceedings, by law, may only deal with the procurement of default generation supply and, therefore, any other issues, including proposals to establish or modify POR programs, are not within the scope of DSP proceedings. Of course, Respond Power's contention that DSP proceedings cannot accommodate POR-related issues is also wrong. There is extensive prior Commission precedent for addressing POR issues (and a host of other issues unrelated to default generation supply procurement) in DSP proceedings. *See* PE/WP Initial Br., pp. 27-28.

The entire conceptual construct articulated by Respond Power and its witness Small is incorrect. While POR programs have been adopted in the context of DSP proceedings, and have been modified in those proceedings as well, POR programs are not necessarily coextensive with any particular DSP.[20] Indeed, there is no authority for that proposition, and Respond Power has not cited any. Consequently, the fundamental basis for Respond Power's "notice" and "retroactivity" arguments is invalid.

Furthermore, if Respond Power and Mr. Small really believed what they professed, Respond Power would have had an even greater reason, and an even stronger incentive, to intervene in the DSP IV proceeding – indeed, in every DSP proceeding – whether or not a clawback provision was proposed. If, as Mr. Small claimed to believe, the Companies' POR programs would run through the end of their DSP III and, then, would necessarily expire and have to be renewed to begin again with the start of DSP IV, Respond Power would have been facing not just a modification of the POR program, but its possible extinction, since, as Mr. Small conceded, in November of 2015, he had no way of knowing whether a "new" POR program would be approved to begin as of June 1, 2017.[21] At the same time, Mr. Small repeatedly testified that POR programs of electric distribution companies ("EDCs") are "very important" to Respond Power's business.[22] Obviously, the glaring conflict between Mr. Small's professed beliefs and how a reasonable person in his position would have acted on those beliefs under the circumstances (i.e., by intervening in the DSP IV proceeding) demonstrate that Respond Power's arguments are totally lacking in credibility. It is a conflict demonstrating, once again, that Respond Power is not making arguments, it is making excuses.

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[20] *See* PE/WP Initial Br., pp. 28-29.

[21] Tr. at 44-45.

[22] Tr. at 41 and 45; *see also* Respond Power St. Nos. 1, pp. 3-4, 1-Supp, p. 6 & 1-R, pp. 6-7.

Respond Power Seriously Misstates The Holdings Of Cases It Relies Upon Or Attempts To Distinguish.

The legal standards regarding the preclusive effect of the DSP IV Final Order, the prohibition on retrospective application of any changes in that Order, and the burden of proof Respond Power must carry to mount even a prospective challenge to the clawback provision were summarized above and discussed at length in the Companies' Initial Brief (pp. 16-20). As noted previously, Respond Power has not addressed Section 316 of the Public Utility Code and the preclusive effect of the DSP IV Final Order. It does, however, offer a convoluted argument to try to convince the ALJ and the Commission that blackletter law articulated repeatedly by the Commonwealth Court[23] should not apply in this case.[24]

Respond Power argues that, irrespective of the Commonwealth Court's holdings that a "heavy burden" must be carried by a party challenging an existing, Commission-approved tariff rule, what the Court really meant was that a complainant is always free to re-litigate *de novo* the "reasonableness" of previously-approved tariff provisions irrespective of the dictates of Section 316 and prior appellate precedent. In short, Respond Power contends that the Commonwealth Court, like Yogi Berra, "really didn't say everything [it] said."[25]

As explained in Section III.A., *infra*, Respond Power's attempt to distinguish *Shenango Twp.* and other authorities cited in its Main Brief reflects interpretations that are fundamentally flawed and, even more disturbing, leave out significant facts and elements of the Court's opinions that are critical to properly understanding the Court's holdings. The same is true for its citation of Commission precedent. As one of the most egregious examples, Respond Power cites

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[23] *See Shenango Twp. Bd. Of Supervisors v. Pa. P.U.C.*, 686 A.2d 910, 914 (Pa. Cmwlth. 1996) and cases cited therein.

[24] Respond Power Main Br., pp. 24-26.

[25] Berra, Yogi, *The Yogi Book: I Really Didn't Say Everything I Said*, 1999 Workman Publishing Co.

the Commission's recent Order on the implementation of Chapter 32 with regard to the effect of the Pittsburgh Water and Sewer Authority's ("PWSA's") "tariff." Yet, Respond Power never even mentions that the "tariff" at issue was the one adopted by PSWA *before* it became subject to PUC regulation – i.e., not a tariff previously approved by the Commission. Moreover, Respond Power also neglects to point out that the Commission, nonetheless, determined that "while the Prior Tariff is in effect, it will operate with the force and effect of law."[26]

The Clawback Provision Does Not Operate "Retroactively" And Does Not Convert The Companies' POR Programs To "Recourse."

Respond Power's "retroactive" and "recourse" arguments are based on its mischaracterization of what the clawback provision is and how it operates. Specifically, Respond Power contends that the clawback provision "would permit Penelec and West Penn to invoice EGSs for a portion of the accounts receivable that had been previously fully purchased but which were not paid by customers."[27] However, as evident from the explanation of the clawback provision's operation that the Companies previously provided, Respond Power's characterization is erroneous.

The clawback provision does not "invoice" any EGS for the purpose of recapturing the unpaid portion of accounts receivable that were previously purchased. Contrary to Respond Power's distorted characterization, the clawback provision is not designed to make the Companies (or their customers) whole by reconciling the face value of purchased receivables with actual recoveries for historical periods. In fact, clawback charges are not traceable to (or reconciled with) any specific unpaid accounts receivable purchased by the Companies in the past

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[26] *Implementation of Chap. 32 of the Public Util. Code Re Pittsburgh Water and Sewer Auth.*, Docket Nos. M-2018-2640802 (water) and M-2018-2640803 (sewer) (Final Implementation Order, Mar. 15, 2018), p. 11.

[27] Respond Power Main Br., p. 10.

from an EGS. Rather, the clawback provision allows the Companies to charge an administrative fee for participation in the POR program on certain EGSs that impose higher costs on the Companies and their distribution customers because those EGSs' modes of operation, products sold and pricing policies generate uncollectible accounts far higher than the uncollectible accounts percentage of the Companies' entire EGS populations.

Under the clawback provision, historical data are reviewed to identify EGSs exhibiting the key factors responsible for generating excess costs – including, significantly, prices that far exceed the Companies' annual average PTCs (and, in Respond Power's case, prices that exceeded the average prices charged by other EGSs in the Companies' service areas[28]). Historical write-off data and historical prices are used because they are the best available source of objective, quantifiable data for identifying EGSs with the salient characteristics associated with the creation of higher costs, which those EGSs then pass on to the Companies and their distribution customers through the operation of the POR programs. The use of historical data in this fashion does not make the clawback provision "retroactive" nor does it convert the Companies' POR programs to "with recourse."[29] There is ample precedent for reliance on historical data that preceded the approval of a rate or tariff rule to establish billing determinants for future charges.[30] And, in the case where such provisions were approved, the Commission did not find that any prohibition against retroactivity was violated.

Additionally, and unmentioned by Respond Power, historical write-off data are neither the direct nor the only metric used to identify EGSs charged an administrative fee to participate in the Companies' POR programs. The write-off filter only identifies EGSs whose historical

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[28] PE/WP Exhibit KLB-1; PE/WP Initial Br., p. 47.

[29] PE/WP Initial Br., pp. 31-36.

[30] *Id.* at 32-35.

data exhibit a write-off percentage that is greater than 200% of the average write-off percentage of the entire EGS population, i.e., a substantial margin that provides significant flexibility to any individual EGS. Even then, before a clawback charge could be imposed, an EGS must pass a second filter; it must have followed a pricing policy that could be expected to drive higher uncollectible accounts expenses, i.e., charging an annual average price (across all of its customers) that was greater than 150% of the average annual PTC for the applicable Company. Only the EGSs identified by both filters would be charged an administrative fee. And, although that fee does not relate back to any accounts receivable previously purchased by the Companies, if the amount of the fee were to be compared to the uncollectible accounts expenses such EGSs impose, it is clear that the fee is equivalent to only a part of those expenses.

Finally, as explained in the Companies' Initial Brief (pp. 32-33 and 35-36), Respond Power's assertions that the clawback provision is "retroactive" (because of its use of historical data) and that it converts the POR programs to "with recourse" are contradicted by the Commission's prior approval of a very similar provision for Duquesne Light Company ("DLC"). Notably, the terms of DLC's Commission-approved Supplier Coordination Tariff make clear that DLC is purchasing accounts receivable "without recourse" notwithstanding the "clawback" provision (which DLC calls a "penalty") in its POR program.[31]

"Facts And Circumstances" Have Not Changed Since The Clawback Provision Was Approved; The Clawback Provision Has Operated As It Was Designed To Perform.

Respond Power has not identified any "facts and circumstances" that have changed so "drastically" since the entry of the DSP IV Final Order as to provide a justification, under applicable legal standards, for the Commission to reverse its prior approval of the clawback

[31] PE/WP St. No. 1-SR, p. 8.

provision or to waive its application to Respond Power. In its Main Brief (pp. 40-54), Respond Power has thrown up a smoke screen of alleged "structural" issues it claims should exempt it from the clawback provision.[32] However, as explained in the Companies' Initial Brief (pp. 36-45), none of those alleged "structural" issues has any validity.

In addition, Respond Power persists in ignoring – or mischaracterizing – the fundamental nature of the clawback provision and its screening measures. As previously explained, the clawback provision does not recoup a portion of the face value of accounts receivable previously paid by the Companies to an EGS. Rather, it is an administrative charge for participation in the Companies' POR program that is assessed, based on cost-causation principles, on EGSs identified by objective screening measures as those whose modes of operation, product mix and pricing have demonstrated a tendency to drive excess accounts of receivable expenses.

Importantly, because of the discovery that the Companies and the Coalition for Affordable Utility Services and Energy Efficiency In Pennsylvania ("CAUSE-PA") were able to conduct in this case, the evidentiary record shows that the clawback provision, by identifying Respond Power as an EGS that should be subject to such an administrative charge, has operated as it was designed. Thus, not only did Respond Power pass both parts of the clawback provision's screening test, but uncontroverted evidence shows that the Respond Power customers whose accounts were written off: (1) were overwhelmingly low-income customers[33]; (2) were

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[32] At page 11 of its Main Brief, Respond Power claims that "the Commission acknowledged that their implementation may lead to unintended consequences in the form of unreasonable assessments on EGSs, but recognized that parties are free to raise such issues in future proceedings." Apparently even Respond Power realized that, despite its characterization, the DSP IV Final Order did not say anything remotely like the statement Respond Power attributed to the Commission because Respond Power cited *not* the Final Order, but the DSP IV Rec. Dec. at 29-31. Yet, even that characterization is wrong. At the referenced portion of the Recommended Decision, the ALJ simply summarized the position *RESA* espoused *in testimony* – a position RESA itself retreated from in signing the Joint Petition for Settlement, which incorporated the revised and liberalized terms of the clawback provision crafted in the settlement process, as the DSP IV Rec. Dec. makes clear.

[33] Confidential PE/WP Exhibit KLB-1SR; Confidential RP Exhibit AS-18.

virtually all on month-to-month contracts subject to a variable rate that reflected volatile market prices plus a profit margin[34]; and (3) had unpaid balances that were owed to the Companies or to EGSs other than Respond Power at the time they became Respond Power customers.[35] Additionally, evidence developed in this case shows that Respond Power acquires customers through third-party solicitation firms that conduct telemarketing and door-to-door sales and are compensated only if customers sign contracts with Respond Power and do not revoke those contracts within three days.[36]

While the Companies have not alleged that Respond Power's marketing practices targeted any particular customer demographic, the foregoing information is noteworthy because it confirms what the clawback screening measures showed. Respond Power clearly is an EGS whose customer mix, product type and pricing policy would be likely to drive higher uncollectible accounts expense. In sum, the record evidence confirms that the clawback provision performed in the manner it was designed.

Respond Power Believes That Measures Like The Companies' Clawback Provision And DLC's POR Discount "Penalty" Can Only Be Adopted If Accompanied By Continuous, Real-Time Reporting Of The Payment Status Of Every EGS's Customer List.

For the reasons set forth above, Respond Power fundamentally misunderstands, and mischaracterizes, the nature and purpose of the clawback provision. Largely for that reason, Respond Power argues that a clawback charge should not be imposed unless an EGS has the quantum of information Respond Power insists is necessary to monitor its customer base to deal with excessive write-offs. However, it is apparent that Respond Power's real objective is to set

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[34] PE/WP St. No. 1, p. 32; Confidential PE/WP Exhibit KLB-5; PE/WP Exhibit KLB-6.

[35] *See* PE/WP St. Nos. 1, pp. 32-33 & 1-SR, pp. 13-14.

[36] Tr. at 34-35.

the informational bar so high that there would be no practical means to provide all of the information it claims to require. In simplest terms, Respond Power argues that no EGS should be subject to the clawback provision unless it has the equivalent of continuous, nearly real-time electronic information on the payment status of the accounts of all its customers whose receivables are sold to an EDC.[37] While the Companies can provide a good deal of information on the payment status of accounts receivable – and actually did so when Respond Power finally got around to requesting it almost fifteen months after filing its first Complaint[38] – Respond Power continues to raise the bar to levels that are impractical as well as unnecessary. It is noteworthy that, if Respond Power's prescription for the level and detail of customer payment status were imposed, DLC's POR discount adjustment would have to be invalidated as well – even though the Commission has already approved that measure, and it has been in place since 2008.

III. ARGUMENT

A. Respond Power Has Completely Misconstrued The Burden Of Proof And Legal Standards Applicable To Its Complaints Challenging A Commission-Approved Tariff Provision

In *Shenango Twp., supra.*, the Commonwealth Court summarized long-standing appellate precedent on the legal standards that apply, and the burden of proof that must be carried, when a complainant challenges the reasonableness of an existing, Commission-approved tariff rule. The Court stated that, under such circumstances, a complainant has a "very heavy burden" to prove that "facts and circumstances have changed so drastically" as to render the previously-approved tariff provision unreasonable for further prospective application. The Court's opinion built on existing statutory law – namely, Section 316, as discussed previously – and a well-developed

[37] Respond Power Main Br., pp. 40-45.

[38] PE/WP Initial Br., pp. 41-42.

body of administrative jurisprudence holding that approved tariff provisions 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 terms.

At their core, however, the appellate authorities outlined above simply put in legal terms something that commonsense instructs. Once the Commission has determined that a tariff provision is just and reasonable, its decision has continuing validity unless (and until) a complainant has demonstrated the fundamental "facts and circumstances" that formed the basis for the PUC's decision have "changed." Moreover, the necessary "change" must be so fundamental to the PUC's decision (i.e., "drastic") that it necessarily demands reopening and reexamining the previously-decided issues underlying the Commission's earlier approval in order to discern whether the tariff provision should continue to have a prospective binding effect. At its most basic level, this rule embodies the concept that a valid administrative decision approving a tariff rule has very substantial precedential value and, therefore, a complaint challenging such a rule should *not* be treated as a case of first impression that entitles the complainant to *de novo* re-litigation of the issues that were already decided as the basis for the Commission's prior approval.

At pages 23-26 of its Main Brief, Respond Power engages in a great deal of rhetorical hairsplitting to try to support the startling proposition that, when a complaint challenges a tariff provision as "unreasonable," the Commission is somehow obligated to *ignore precedent*: "Case law should not be relied upon to limit that challenge . . ."[39] Respond Power then makes the even more startling contention that the *express* holding of the Commonwealth Court in *Shenango Twp.* – as well as all the similar holdings in that case's predecessors and progeny – should also be

[39] Respond Power, Main Br., p. 24.

ignored with impunity because allegedly "Courts have not held complaining parties to that burden."[40] In an attempt to support that proposition, Respond Power cherry-picks language from *Shenango Twp.* and *Kossman v. Pa. P.U.C.*[41] purporting to show that the Court, despite its recitation of blackletter law underscoring the "heavy burden" complainants must carry to show "facts and circumstances have changed . . . drastically," engaged in a *de novo* review of the "reasonableness" of the tariff provisions challenged in each case. Any meaningful review of the substance of the Commonwealth Court's decisions reveals that Respond Power's argument could not be farther from the truth.

Shenango Twp. involved a 1991 agreement between the Township and Pennsylvania-American Water Company ("PAWC") that had been filed and approved by the Commission under Section 507 of the Public Utility Code[42] as an agreement "between a public utility and a municipal corporation." Under the agreement, which substantially mirrored the terms of PAWC's tariff rule on main extensions then in effect, the Township agreed to build, at is sole cost, water distribution mains and a booster pump within its municipal limits and then lease those facilities to PAWC in consideration of PAWC's agreement to furnish water service to Township residents that applied for service. The facilities were built and leased as the parties had agreed.[43]

In 1992, the Commission issued a Policy Statement on main extensions providing, as interpreted by the Township, that a water utility could not seek contributions for the extension of its mains except on rare instances – essentially a near-blanket prohibition on requiring

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[40] *Id.*

[41] 694 A.2d 1147 (Pa. Cmwlth. 1997).

[42] 66 Pa.C.S. § 507.

[43] 686 A.2d at 912.

contributions to construct main extensions to serve so-called "bona fide applicants" for water service.[44]

In 1994, the Township filed an original and an amended complaint against PAWC in which it asked the Commission to exercise its authority under Section 508 of the Public Utility Code[45] to revise the 1991 agreement to require PAWC to fund the cost to construct the main extensions and booster pump in the Township and, therefore, order PAWC to reimburse the Township for those costs.[46] The Township argued that the agreement was substantially a requirement for it to contribute the cost of main extensions in violation of the 1992 Policy Statement. In short, the Township sought to have the PUC give the 1992 Policy Statement retroactive effect as the basis for revising the 1991 agreement.[47]

The Commission rejected the Township's argument and dismissed its complaint because it found that there was no valid basis for revisiting and reopening its order approving the 1991 agreement. On appeal, the Commonwealth Court affirmed.[48]

Contrary to Respond Power's characterization of *Shenango Twp.*, the Commonwealth Court did not engage in – nor did it authorize – a *de novo* re-litigation of the issues decided by the Commission in its order approving the 1991 agreement, which the Court treated as functionally equivalent to a tariff provision because it mirrored PAWC's tariff rule on main extensions in effect in 1991. The Court held that the 1992 Policy Statement was not a "material intervening event" (i.e., the Township failed to show any "drastic" change in "facts and

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[44] *Id.*

[45] 66 Pa.C.S. § 508.

[46] 686 A.2d at 913.

[47] *See id.* at 914 ("Shenango also asserts that the PUC erred in failing to apply the 1992 Policy Statement . . . retroactively . . .").

[48] *Id.*

circumstances") that could justify reopening the 1991 agreement or revisiting the underlying tariff rule, despite the Township's invocation of Section 508:

> The policy statement was not intended to affect a change in the PUC's approach to handling line extension disputes. As the ALJ emphasized, the PUC had previously approved the 1991 Agreement, as well as the tariff on which it was based, with full knowledge of the common law principles it later summarized in the 1992 Policy Statement. Under these circumstances, the issuance of the 1991 Policy Statement cannot be regarded as a material intervening event [justifying] . . . the PUC's reconsideration of the 1991 order approving the Agreement.[49]

The Court then noted that, even if the 1992 Policy Statement were applied, the Township would "not be a 'bona fide service applicant'" qualifying for a free main extension and, therefore, "the retroactive application of the 1992 Policy Statement could not affect it."[50] The latter statement, coming at the very end of the Court's opinion, is the fragile reed Respond Power tries to use to support the weight of its argument that the Court somehow backed away from its holding imposing a "heavy burden" to show a "drastic" change in "facts and circumstances." Obviously, that is demonstrably not the case.

Respond Power's tortured interpretation of *Kossman, supra*, is even more misguided. At issue in that case was a tariff rule under which DLC "reserved the right" to charge customers for the construction cost of a "service line" (i.e., the line from the utility's "supply line" to the customer's inside wiring) that was built on the customer's premises. DLC had built several "service lines" on properties owned by the complainant (a commercial developer) and required the developer to pay the full cost without the opportunity for any refunds in the future – an opportunity that did exist if a customer paid the cost to extend one of DLC's "supply lines."[51]

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[49] *Id.*

[50] *Id.* at 915.

[51] 694 A.2d at 1149.

The complainant accurately observed that DLC's tariff rule purported to leave to DLC's "discretion" whether or not to require an applicant for service to pay the entire, non-refundable cost of a "service line."[52] The complainant argued that "Duquesne does not exercise any discretion at all, as claimed in its Tariff" but, instead, "instituted a policy to automatically impose a non-refundable CIAC [contribution-in-aid-of-construction] charge for all service line extensions," which was "a practice that was not approved by the Commission."[53]

In response to the complainant's argument, the Court determined the complainant provided no valid basis to look behind DLC's tariff (or the Commission's order approving it) to permit Kossman to challenge the way DLC chose to exercise its "discretion":

> Contrary to Kossman's assertion, Duquesne's policy of not refunding CIAC payments for service line extensions is an exercise of discretion *within the terms of its Tariff.* This discretionary authority retained by Duquesne *was approved by the Commission as a Tariff provision and is binding on the customers and Duquesne.* Kossman has shown that the Tariff is unfavorable to him, but he has not shown that the Tariff is unreasonable.[54]

Contrary to Respond Power's contentions, the Commonwealth Court in *Kossman* adhered to its own prior holding in *Shenango Twp.* – a case that the *Kossman* Court cited and specifically relied upon to support is decision:

> The burden of showing that a tariff is either unreasonable or discriminatory is on Kossman. This burden is a very heavy burden because tariff provisions that have been properly submitted to and approved by the Commission are prima facie reasonable. *Shenango Township Board of Supervisors v. Public Utility Commission*, 686 A.2d 910, 914 (Pa. Cmwlth. 1996).[55]

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[52] *Id.* at 1151.

[53] *Id.*

[54] *Id.* at 1152 (emphasis added).

[55] *Id.*

For all the foregoing reasons, Respond Power's attempt to evade the clear, express holdings of *Shenango Twp.* and the cases cited therein regarding the "heavy burden" it must carry to prospectively challenge[56] the reasonableness of the clawback provision should be rejected.

B. Respond Power Had Ample Notice Of The POR Program Changes That The Companies Proposed As Part Of Their DSP IV Proceeding Culminating In The Commission's Approval Of The Clawback Provision But Failed To Intervene

As explained in Section II above and in the Companies' Initial Brief (pp. 24-26), Respond Power acknowledges that it received actual service of the DSP IV filing, which (in several places) described the terms of the clawback provision in detail, why it was being proposed and how it would be calculated. Indeed, Mr. Small, who is the person responsible for reviewing legal pleadings served on Respond Power, had to read no further than the second paragraph of the DSP IV Joint Petition (starting on page 2 and continuing to page 3 of that legal pleading) to see that the Companies and their affiliates were proposing changes to their POR programs. Notably, Section V ("**PURCHASE OF RECEIVABLES**"), Subsection A ("**EGS-Related Write-Offs**") of that legal pleading, as well as the direct testimony of Ms. Bortz in the DSP IV case, made it abundantly clear that a clawback charge would be assessed in September 2016 based on historical data for a preceding twelve-month period. Nonetheless, Respond Power chose not to intervene in the DSP IV proceeding. On the other hand, other POR-participating EGSs and RESA intervened and fully addressed the clawback provision on the

[56] As previously explained, Respond Power is barred from challenging the clawback provision's retrospective application to the period that preceded its first Complaints, which must, therefore, be dismissed on that basis alone. *See* Section II, *supra*; PE/WP Initial Br., pp. 12-30.

record and in settlement negotiations that led to a provision substantially more lenient than the Companies' original proposal.[57]

Respond Power reiterates its position that it should not be bound by the Final DSP IV Final Order because, despite receiving actual service of the Companies' DSP IV filing that Mr. Small conceded discusses the clawback provision in several places, Respond Power did not receive "notice" that a change in the Companies' existing POR programs was being proposed. Respond Power Main Br., pp. 1-3, 19, 28-34. However, as explained in the Companies' Initial Brief (pp. 26-27), Respond Power has simply characterized its own failure to read the Companies' DSP IV Petition as an alleged lack of "notice" and "due process." In short, Respond Power argues that anyone who is actually served with a utility's legal pleading can avoid the preclusive effect of a final order in the ensuing proceeding simply by choosing not to intervene. This argument is completely contrary to the holding in the *PSU/West Penn* case where due process was not violated when a party received "notice" that required it to make a separate investigation to obtain the information it needed to discern if its interests would be impacted by a utility's filing and, therefore, the party was precluded by Section 316 from thereafter challenging the final order entered in that case.[58]

Respond Power attempts to detract attention from the *PSU/West Penn* holding, which belies its position, by instead citing to inapposite cases, including one that addressed whether notice of a class action settlement sent to claimants whose injuries had not yet manifested at the time of the settlement was "misleading."[59] *See* Respond Power Main Br., p. 29. In that case, a

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[57] *See* PE/WP Initial Br., pp. 5-7, 23-29.

[58] PE/WP Initial Brief, pp. 17-20, 26; *see also* PSU/West Penn Rec. Dec., 103 Pa. P.U.C. at 485; *Petition of the Pennsylvania State Univ. for Declaratory Order Concerning the Generation Rate Cap of the West Penn Power Company d/b/a Allegheny Power,* 103 Pa. P.U.C. 451, 468 (Final Order entered Sept. 11, 2008); *The Pennsylvania State Univ. v. Pa. P.U.C.*, 988 A.2d 771, 783 (Pa. Cmwlth. 2010).

[59] *Wilkes v. Phoenix Home Life Mut. Ins. Co.*, 851 A.2d 204, 211 (Pa. Super. 2004).

life insurer admitted that its notice of a class action settlement did not provide information needed for the insureds and trustees to make an informed decision whether the settlement applied to future claims against the insurer concerning out-of-pocket premiums required under their "second-to-die" whole life policy.[60] Obviously, *Wilkes* bears little resemblance to the facts of this case where Respond failed to read, or chose to ignore, the DSP IV filing that, as previously explained, was certainly sufficient to put a reasonable POR-participating EGS on notice that historical data would be employed to assess the clawback provision as of September 2016.

At several points in its Main Brief, Respond Power also seriously mischaracterizes the record in this case. For example, Respond Power claims that the Companies "buried" the proposed changes to their existing POR programs, including the addition of a clawback provision, in their "massive" DSP IV filing. Respond Power Main Br., pp. 3, 19. As Respond Power is well aware, this is simply not true – Mr. Small admitted in his written rebuttal testimony (Respond Power St. No. 1, pp. 14-15) and oral rejoinder testimony (Tr. at 25) that he was aware that the Companies were proposing changes to their POR programs as part of DSP IV and that such changes were covered in several areas of the DSP IV filing that was actually served on Respond Power. When pressed on cross-examination at the evidentiary hearing (Tr. at 38-40), Mr. Small stated that he became aware that the Companies were proposing POR program changes in November 2015 either by reading the DSP IV Joint Petition or "Energy Choice Matters" newsletters.[61] In other words, Mr. Small had **actual notice** of the Companies' DSP IV

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[60] 851 A.2d at 211-213.

[61] The November 4, 2015 issue of *Energy Choice Matters*, which was issued one day after the DSP IV Joint Petition was filed, bore the bolded headline "Pennsylvania Utilities Seeking to Add 'Clawback' to Purchase of Receivables, Cite 'Predatory Pricing' Practices by Suppliers." Moreover, that newsletter reproduced the language from the Companies' DSP IV filing that explained the clawback charge would be based on historical data and that the first charge would be assessed *in September 2016*. Consequently, even if *Energy Choice Matters* were Mr. Small's only source of information, it was still sufficient to apprise him of all the information he now claims was critical for him to have adequate "notice" of the proposed operation of the clawback provision. A copy of the November 4, 2015 *Energy Choice Matter* newsletter is available at http://www.energychoicematters.com/stories/20151104a.html.

proceeding and, in particular, the POR program changes proposed by the Companies, and, as a result, Respond Power's due process rights were fully preserved.[62] For this reason, it is disconcerting that Respond Power's Main Brief simply repeats assertions from the Complaints and Mr. Small's direct testimony without even acknowledging the subsequent evidence – a good deal of it provided by its own witness in rebuttal and oral testimony – that contradicts those assertions and further supports Judge Salapa's finding in his January 23, 2017 Order (p. 9) that "[Respond Power's] due process rights were adequately protected."[63]

Respond Power also argues that actual service of the DSP IV filing on Respond Power was insufficient to provide notice that the Companies were proposing "mid-course" modifications to the POR programs in effect during DSP III and that the clawback provision could possibly apply prior to June 1, 2017.[64] Respond Power Main Br., pp. 28-34. According to Respond Power, "notice" could only have been afforded by either a stand-alone Supplier Coordination Tariff filing or by specifically delineating the Companies' request for approval of the clawback provision in the caption of the DSP IV case. *Id.*, p. 31. As discussed above and

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[62] *See, e.g., United Student Aid Funds Inc. v. Espinosa*, 559 U.S. 260, 265, 272 (2010) (holding that bankruptcy court's judgment confirming Chapter 13 plan was not void on the basis of any due process violation where student loan creditor received actual notice of the plan from the clerk of the court even though the debtor failed to serve creditor with the complaint and summons initiating the adversary proceeding); *F.E.R.C. v. Moreau*, 982 F.2d 556, 569 (D.C. Cir. 1993) (rejecting landowners argument that notices published in the *Federal Register* were inadequate to put them on notice that a pipeline could cut across their property where they engaged in negotiations with the gas utility about the route of the pipeline project before FERC granted the application for a certificate of public convenience); *In re: Consolidated Reports and Return by the Tax Claims Bureau of Northumberland Cty. of Properties*, 132 A.3d 637, 643, 647-48 (Pa. Cmwlth. 2016) (finding that owner's due process concerns were obviated by her admission of actual notice of tax sale even though she did not receive personal service).

[63] *See also* PE/WP Initial Br., pp. 12-13.

[64] Respond Power adopts the "mid-course" modifications terminology from a PECO Energy Company ("PECO") Energy Efficiency and Conservation ("EE&C") Plan proceeding where PECO sought to transfer up to $20 million in funds between different energy efficiency measures – *without prior Commission approval* – during the term of its first EE&C plan. *See Petition of PECO Energy Co. for Approval of its Act 129 Energy Efficiency and Conservation Plan and Expedited Approval of its Compact Fluorescent Lamp Program*, Docket No. M-2009-2093215 (Order entered Oct. 15, 2009), pp. 41-43. That case does not share any similarity to the facts in this case. To the contrary, the Companies specifically and expressly requested prior Commission approval of POR program changes as part of the DSP IV proceeding and did not try to impose them unilaterally. PAWC Initial Br., pp. 27-28.

explained in the Companies' Initial Brief (pp. 28-29), this argument rests entirely upon Respond Power's erroneous assumption that the duration, or effective date, of changes to POR programs is co-terminus with the term of a particular DSP. Furthermore, under Respond Power's own interpretation of the relationship of POR and default service programs, the Companies' POR programs would have expired at the end of the DSP III term, unless approved by the Commission for renewal on the same or different terms for DSP IV. Therefore, Respond Power would have had an even greater incentive to intervene in the DSP IV proceeding to ensure that it could continue to participate in the Companies' POR programs on a non-recourse, zero-discount basis, which Mr. Small repeatedly emphasized was critical to Respond Power's business of serving mass market customers in Pennsylvania. *See* PE/WP Initial Br., p. 25.

Finally, Respond Power claims it received inadequate "notice" of the clawback provision because, at the time it received the Companies' invoices for the 2016 clawback charges, the Companies had not yet filed, and the Commission had not yet approved, a supplement to their Supplier Coordination Tariffs that memorialized the clawback provisions approved in the DSP IV Final Order. *See* Respond Power Main Br., pp. 1, 27. Once again, Respond Power mischaracterizes record evidence. As explained in the Companies' Initial Brief (p. 7), even the purely technical issue Respond Power tries to raise became moot when the Commission accepted the Companies' Supplier Coordination Tariff supplements, which had already been filed with the Joint Petition for Settlement approved by the DSP IV Final Order, with an effective date of August 1, 2016.[65]

Respond Power's argument also fails because the Commission has held that a supplier coordination tariff is not the equivalent of a "services tariff" but, instead, sets forth the basic

[65] Thus, the Companies' Supplier Coordination Tariff supplements were "on file" well before the Companies invoiced the 2017 clawback charges – a fact that Respond Power omits from its Main Brief.

requirements, protocols and processes for EGS-EDC interactions that allow the Commission to monitor the development of retail competition.[66] As such, a supplier coordination tariff is not subject to all of the same statutory provisions and attendant Commission practices and precedent that accompany the filing of a "services tariff" setting forth a utility's "rates" for utility service.[67] Of course, Respond Power's claim about the alleged absence of a filed Supplier Coordination Tariff does not change the facts that Respond Power was actually served with the DSP IV filing and that its own witness was aware that the Companies were proposing POR changes in that proceeding. Stated simply, any alleged delay in performing the ministerial act of filing Supplier Coordination Tariff supplements cannot provide a basis for Respond Power's attempt to collaterally attack the Final DSP IV Order.

C. Imposition Of The Clawback Charges On Respond Power Does Not Constitute Retroactive Ratemaking

In its Main Brief, Respond Power reiterates Mr. Small's contention that the Companies are barred by the prohibition against retroactive ratemaking from collecting the Clawback Charges from Respond Power. Respond Power offers two principal arguments for its position: (1) the Companies use historical data that accrued for Respond Power prior to the effective date of the clawback provision to run the write-off screen (pp. 34-35, 37-40); and (2) the clawback provision "retroactively" converts the Companies' POR programs from "non-recourse" to "with recourse" (pp. 27-28, 35). Neither argument is correct. And, in fact, the Pennsylvania Commonwealth Court decision Respond Power relies upon for its first argument confirms that

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[66] *Application of Wellsboro Elec. Co. For Approval of Restructuring Plan Under Section 2806 of the Pub. Util. Code*, Docket No. R-00974046, 1998 Pa. PUC LEXIS 231, at **12-13 (Opinion and Order entered Dec. 17, 1998).

[67] The only legal authority cited by Respond Power in its Main Brief (p. 27) in support of its argument is a 1982 Commission decision disallowing retroactive adjustments to a utility's tax liability used to establish currently-effective base rates based on the prohibition against retroactive ratemaking. This ratemaking principle does not apply to administrative fees assessed under a voluntary POR program for the reasons discussed in Section III.C., *infra*.

the clawback provision does not operate retroactively merely because some of the facts or conditions upon which its application depends came into existence prior to its implementation – the exact opposite of what Respond Power cited it for.

As explained in the Companies' Initial Brief (pp. 32-35), the use of historical data, on a consistent basis, to run the screens to identify EGSs and who are most likely to be imposing higher costs on the Companies and their customers does not make any charges imposed under the clawback charge "retroactive." Contrary to Respond Power's argument, the Commission has previously approved a clawback mechanism for DLC and has found that relying on historical data predating rate approval to determine customers' bills for prospective periods was lawful, just and reasonable.[68]

At page 38 of its Main Brief, Respond Power states:

> Even beyond the realm of utility ratemaking, retroactive application of laws is not permissible. A retroactive law has been defined as one that "relates back to and gives a previous transaction a legal effect different from that which it had under the law in effect when it transpired." [*Department of Labor and Industry, Bureau of Employment Security v. Pa. Engineering Corp.*, Pa. Commw. Ct. 376, 380, 421 A.2d 521, 523 (1980).] That is exactly what has occurred through implementation of the clawback charge.

Notably, Respond Power left out the Commonwealth Court's analysis of whether imposition of liability on an employer who made deductions from a back wage award to claimants under Section 704 of the Unemployment Compensation Law ("Section 704") at issue in the decision Respond Power cited would indeed be retroactive. Specifically, the Commonwealth Court found that the fact of a back wage award, standing by itself, would create

[68] *See* Section II, *supra*.

no unemployment compensation funding liability under Section 704.[69] Therefore, the Court concluded that the sum of the employer's liability for a deduction made after the effective date of Section 704 was not created by any retroactive operation of the law even though the back wage award predated the statute:[70]

> However, our Supreme Court has held that a statute does not operate retroactively merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment.

The portions of the Commonwealth Court decision excised by Respond Power make clear that the clawback provision is not retroactive in nature. Here, the transaction that triggers charges under the clawback provision is an EGS satisfying **both** screening measures during the applicable test period – not the customer payment status of EGS accounts receivable purchased by the Companies before the effective date of the clawback provision, as Respond Power erroneously contends.[71]

As to the second contention, the Companies do not reconcile the face value of accounts receivable purchased from EGSs with the actual amounts collected from customers under the clawback provision. To the contrary, any charges assessed under the clawback provision are imposed on a prospective basis, consistent with the principle of cost causation, on some POR-participating EGSs that evidence indicates are responsible for creating excessive uncollectible accounts expense borne by the Companies and their customers – namely, those whose write-offs

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[69] *Pennsylvania Engineering Corp.*, *supra*, 421 A.2d at 523.

[70] *Id.* at 524.

[71] For this reason, the hypothetical posed by Respond Power's counsel to Ms. Bortz at the evidentiary hearing under which Respond Power would have incurred clawback charges in 2016 even if it reduced its prices after the PUC entered the DSP IV Final Order (*see* Respond Power Main Br., pp. 37-38) is also irrelevant. Moreover, Ms. Bortz was asked to assume Respond Power charged customers 151% of the applicable PTC until May 19, 2016 and then reduced its price below the PTC on that date. *See* Tr. at 79-81. In reality, Respond Power's prices exceeded the PTC by more than 250% and were also much higher than the prices charged by other EGSs in each Company's service area. *See* PE/WP St. No. 1, p. 19; PE/WP Exhibit KLB-1.

exceed the overall EGS average by more than 200% and are charging prices substantially above the PTC. As explained in the Companies' Initial Brief (pp. 35-36), the clawback charge does not compensate the Companies and their customers for all EGS write-offs after the underlying accounts receivable is purchased by a Company, as would be the case if the POR programs were "with recourse." Indeed, an EGS who does not charge a price above 150% of the PTC will not pay anything under the clawback provision, regardless of the level of the EGS's write-off percentage. *See* PE/WP Initial Br., pp. 7-8, 21, 44; *see also* Tr. at 74, 80. More importantly, even if the Companies now have "recourse" against individual EGSs under the clawback provision, as Respond Power erroneously claims, in light of Respond Power's fundamental misconception that POR programs are coextensive with default service programs, there is no legal basis for Respond Power's argument that the Companies made such a change "retroactively."

In addition, the cases cited by Respond Power on pages 35-36 of its Main Brief involved proceedings in which a utility proposed after-the-fact adjustments to base rates or surcharges to recover unanticipated expenses or simply mention the rule against retroactive ratemaking only to find that it was not implicated. Consequently, none of those decisions is relevant to this case, where the Companies are not reconciling purchased EGS accounts receivable with actual amounts collected. Moreover, POR programs are not a utility "service," nor are the administrative charges that may be imposed in connection with such programs "rates" as defined by the Public Utility Code.[72] In short, there is no valid legal basis to apply the prohibition

[72] *See* 66 Pa.C.S. § 102, defining "service" and "rates" by reference, respectively to "duties under this part" and "any service under this part." Part I of Title 66 is the Public Utility Code. *See* 66 Pa.C.S. § 101. *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, 2009 WL 4087051 (Pa. P.U.C. Nov. 19, 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.").

against retroactive ratemaking to the reasonable administrative fee imposed on solely individual EGSs electing to participate in the Companies' POR programs whose screening test results indicate are imposing costs well above the average for the entire EGS population.

D. The Design Of The Clawback Provision Is Reasonable And Imposes A Reasonable Administrative Charge Only Upon Those EGSs That Relevant Evidence Indicates Are Responsible For Creating Higher Uncollectible Accounts Expense

As summarized in Section II, *supra*, the Companies presented affirmative evidence – which has not been disputed – that Respond Power's results under the two-part screening test depart significantly from the rest of the Companies' EGS populations. Not only did Respond Power satisfy both criteria that trigger the clawback provision, but the evidence also shows that the vast majority of its customer accounts that were written-off and formed the basis of the Clawback Charges were low-income customers on month-to-month variable-priced contracts and had unpaid balances when they enrolled with Respond Power. PE/WP Initial Br., pp. 30-31. This evidence confirms that the clawback provision and its screening measures are operating exactly as they are designed – to assess an administrative fee for participation in the Companies' POR programs only on those EGSs who have demonstrated a tendency to create excess uncollectibles account expense borne by the Companies and their customers. In short, the clawback provision is reasonable.

Despite these facts, at pages 40-54 of its Main Brief, Respond Power repeats – virtually verbatim – the alleged "structural flaws" set forth in Mr. Small's written testimony that it contends render the clawback provision's application to Respond Power "unjust and unreasonable." These arguments were fully addressed, and refuted, in the Companies' Initial Brief (pp. 36-45), and only two points warrant additional discussion here.

Respond Power also levels criticisms of the "structure" of the clawback provision, which principally pertain to alleged limitations on EGS access to information about the payment status of their customer accounts, the service periods to which the written-off amounts relate and the order of posting of partial payments. All of these criticisms are erroneous or irrelevant because they ignore the fact that the clawback provision's screening test is applied to all EGSs on a consistent basis and using comparable data. Stated another way, the write-off test of the clawback provision measures each individual EGS's experience relative to the average of all EGSs participating in a Company's POR program.[73] Hence, Respond Power cannot be treated unreasonably or inequitably in light of the clawback provision's fair "apples to apples" approach. *See* PE/WP Initial Br, pp. 37-39.

As previously discussed, Respond Power also misconstrues the inherent nature of the clawback provision. Contrary to Respond Power's interpretation, the clawback provision does not recoup the uncollectible portion of the face value of Respond Power's accounts receivable previously purchased by the Companies. PE/WP Initial Br., pp. 30-31. A clawback charge is imposed, based on principles of cost causation, only on EGSs whose comparative data indicates they are responsible for excessive write-offs and, in turn, are imposing additional costs on the Companies and their customers.

[73] Simply stated, no other EGSs are given preferential access to customer payment information, and both the relationship of service periods to the accounts receivable that are written-off and the Companies' post-write-off payment posting procedures are consistent across the Companies' entire EGS populations. Since the clawback provision compares an individual EGS's performance to the average for the entire EGS population, consistent use of data means all EGSs experience a "level playing field" and EGSs that pass the two-part screening test do so because of inherent characteristics of their customer mix, products sold, and pricing policies.

E. Contrary To Respond Power's Contention, The Clawback Provision Screening Test Does Not Limit Or "Police" EGS Prices

As explained in the Companies' Initial Brief (pp. 45-46), nothing about the clawback provision limits or otherwise "polices" EGS pricing practices. To reiterate, it is simply a mechanism designed to track cost-causation and, as such, imposes the clawback charge on EGSs that create the greatest risk of excessive write-offs based on two independent and objective screening measures. In its Main Brief (pp. 54-57), Respond Power also reiterates the arguments advanced by Mr. Small for its objections to the use of 150% of the PTC as the benchmark for excessive EGS prices leading to higher than average write-offs. None of these arguments is valid for the reasons set forth at length and in detail in the Companies' Initial Brief (pp. 45-47).

IV. CONCLUSION

For the reasons set forth above and in the Companies' Initial Brief, the Commission should deny and dismiss, with prejudice, the Complaints of Respond Power. The Commission should further direct Respond Power to pay, in full, the amounts owed to the Companies under

the invoices issued on September 27, 2016 and September 29, 2017 to Respond Power within thirty (30) days of the date of this Order.

Respectfully submitted,

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