

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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

Respond Power, LLC	:	
	:	
v.	:	C-2017-2631326
	:	
West Penn Power Company	:	

Respond Power, LLC	:	
	:	
v.	:	C-2017-2631331
	:	
Pennsylvania Electric Company	:	

INITIAL DECISION

Before
David A. Salapa
Administrative Law Judge

INTRODUCTION

An electric generation supplier (EGS) filed a complaint against two electric utilities alleging that a clawback charge imposed on the EGS and previously approved by the Pennsylvania Public Utility Commission (Commission) is unreasonable. This decision denies the complaint because the EGS failed to demonstrate that facts and circumstances have changed so drastically since the Commission approved the charge, so as to render application of the clawback provision unreasonable. The EGS also failed to demonstrate that the electric utilities miscalculated the clawback charge.

HISTORY OF THE PROCEEDING

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

The complaints allege that Penelec and West Penn are threatening to withhold purchase of receivable (POR) payments totaling \$484,797.69 from Respond (2016 clawback charges). The complaints allege that the amount is an offset assessed on September 30, 2016 by Penelec and West Penn under Penelec's and West Penn's clawback charge pilot program previously approved by Commission order approving their fourth default service plans (DSP IV) at Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company for Approval of a Default Service Program for the Period Beginning June 1, 2017 through May 31, 2019, Docket Nos. P-2015-2511333, P-2015-2511351, P-2015-2511355 and P-2015-2511356 (Order entered May 19, 2016) (Default Service Order).

Respond's complaints explain that the POR payments Penelec and West Penn are threatening to withhold on or after October 27, 2016 are due and payable to Respond for electric

generation services already provided to retail customers. According to the complaints, allowing Penelec and West Penn to withhold the POR payments less than one month after being invoiced for the POR clawback charge would impact Respond's cash flow and jeopardize its ability to continue providing electric generation services to retail customers in Pennsylvania. The complaints also argue that allowing Penelec and West Penn to withhold POR payments from Respond would discourage other EGSs from offering competitive retail service to mass market customers.

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

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

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

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

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

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

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

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

On December 8, 2016, Penelec and West Penn filed answers with new matter to Respond's complaints. The answers assert that Respond's complaints are unlawful collateral attacks on the Default Service Order. The answers state that the Default Service Order approved a settlement among the parties to the proceeding. The answers point out that Respond did not participate in the DSP IV proceedings that lead to the Default Service Order. According to the

answers, Respond's complaints are attempts to overturn the DSP IV settlement because it has become dissatisfied with a single term of the settlement.

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

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

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

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

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

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

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

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

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

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

Penelec and West Penn concluded that Respond is seeking relief that requires the Commission to change the clawback charges, which is outside the Commission's jurisdiction. Penelec and West Penn requested that the Commission grant judgment on the pleadings except for the averments in Respond's complaints challenging the accuracy of the computation of the clawback charges billed to Respond.

On December 13, 2016, the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA) filed a petition to intervene. The petition asserts that

CAUSE-PA intervened in the DSP IV proceedings and was a signatory to the settlement agreement that resulted in the Default Service Order. The petition to intervene alleges that members of CAUSE-PA are customers of Penelec and West Penn who would be directly affected by the outcome of this proceeding. The petition requests that CAUSE-PA be granted status as an intervener in this proceeding.

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

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

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

Also, on December 28, 2016, Respond filed answers to Penelec's and West Penn's motions for judgment on the pleadings. The answers reasserted that the clawback charges are rates and must be just and reasonable. The answers denied that Respond's complaints are collateral attacks on the Default Service Order. The answers also argued that Penelec and West Penn failed to provide adequate notice to Respond that they included the proposed clawback provision in their DSP IV filings. In addition, Respond argued that it may

file a complaint against an existing tariff at any time. The answers requested that the Commission deny Penelec's and West Penn's motions for judgment on the pleadings.

By notice dated January 19, 2017, the Commission notified the parties that it had assigned the case to me as motion judge. By order dated January 23, 2017, I granted the motions for judgment on the pleadings in part. I ordered that the issues concerning the validity and reasonableness of the clawback provisions in Respond's complaints be denied. I ordered that the remaining issue concerning computational errors and charges that violate the tariff provisions in Respond's complaints be scheduled for a hearing before an administrative law judge.

On January 26, 2017 Respond filed a petition for interlocutory review. The petition for interlocutory review requested that the Commission review my January 23, 2017 order and allow it to challenge the reasonableness and application of the clawback tariff provisions.

On February 6, 2017 Respond filed its brief in support of its petition for interlocutory appeal. The brief argued that complaints against a tariff may be filed at any time and that it should not be precluded by my January 23, 2017 order from pursuing its complaints against Penelec's and West Penn's clawback tariff provisions. In addition, the brief contended that a tariff provision must be just and reasonable and that Respond should be able to challenge the reasonableness of the clawback tariff provisions.

Also, on February 6, 2017, Penelec and West Penn filed a brief opposing Respond's petition for interlocutory appeal. The brief argued that Respond had notice of the clawback provisions and opportunity to intervene in the DSP IV proceedings but failed to do so. The brief contended that there was no valid legal basis for nullifying the clawback charges.

By Opinion and Order dated July 13, 2017, the Commission granted Respond's petition for interlocutory review. The Commission held that Respond had the burden of proof to show that the clawback tariff provision is being applied to it unreasonably. The Commission stated that the burden is heavy because tariff provisions that have been properly submitted to and

approved by the Commission are prima facie reasonable. The Commission concluded that Respond was entitled to an opportunity to meet its burden of proof.

By notice dated August 9, 2017, the Commission scheduled a prehearing conference for this matter on September 13, 2017 at 10:00 a.m. in Hearing Room 2, Commonwealth Keystone Building in Harrisburg and assigned the matter to me. I issued a prehearing order, dated August 11, 2017, addressing, inter alia, requests for continuance, subpoena procedures, attorney representation and the Commission's policy encouraging settlements.

I conducted a prehearing conference in the cases at C-2016-2576287 and C-2016-2576292 on September 13, 2017. Present were counsel for Penelec and West Penn, (collectively the Companies), Respond, OCA, OSBA, I&E, CAUSE-PA and the Industrials. As a result of the prehearing conference, I issued Prehearing Order #2, dated September 13, 2017, which consolidated the two complaints for purposes of hearing and decision, pursuant to 52 Pa. Code § 5.81, granted petitions to intervene and established a litigation and briefing schedule.

By order dated September 14, 2017, I issued an order granting Penelec's and West Penn's request for a protective order.

By notice dated September 20, 2017, the Commission scheduled a hearing for this matter on December 13 and 14, 2017 at 10:00 a.m. in Hearing Room 2, Commonwealth Keystone Building in Harrisburg.

On October 27, 2017, Respond filed complaints (2017 complaints) against West Penn and Penelec, which the Commission docketed at C-2017-2631326 and C-2017-2631331, respectively. The complaints allege that Penelec and West Penn are threatening to withhold POR payments totaling \$211,012.54 from Respond (2017 clawback charges). The complaints allege that the amount is an offset assessed on October 2, 2017 by Penelec and West Penn under Penelec's and West Penn's clawback charge pilot program previously approved by

Commission's Default Service Order. The 2017 complaints contain allegations similar to the allegations in the 2016 complaints.

On October 31, 2017, the parties contacted me to request that I consolidate the four complaints and modify the existing litigation schedule. On November 3, 2017, the parties provided me with a proposed revised litigation schedule.

As a result, I issued Prehearing Order #3, dated November 8, 2017, which consolidated the four complaints for purposes of hearing and decision, pursuant to 52 Pa. Code § 5.81, and established a revised litigation and briefing schedule.

By notice dated November 14, 2017, the Commission cancelled the hearings scheduled for December 13 and 14, 2017 and rescheduled the hearings for January 31, 2018 and February 1 and 2, 2018 at 10:00 a.m. in Hearing Room 4, Commonwealth Keystone Building in Harrisburg. The Commission sent a corrected hearing notice dated November 14, 2017 which included all four docket numbers for the complaints.

On November 20, 2017, Penelec and West Penn filed answers with new matter to Respond's 2017 complaints. These answers with new matter contain allegations similar to the answers with new matter filed in response to the 2016 complaints.

On December 8, 2017, Respond filed replies to the new matters of Penelec and West Penn. These responses to new matter contain allegations similar to the responses to new matter filed in the 2016 complaints proceedings.

On January 23, 2018, the parties contacted me and advised me that they would only need one day of hearings for these proceedings. I agreed to cancel two days of the hearings and by notice dated January 24, 2018, the Commission cancelled the hearings scheduled for January 31 and February 2.

I conducted the initial hearing as scheduled on February 1, 2018. Brooke McGlenn, Esquire, Tori Giesler, Esquire and Anthony C. DeCusatis, Esquire appeared on behalf of Penelec and West Penn. Karen O. Moury, Esquire appeared on behalf of Respond. Daniel G. Asmus, Esquire appeared on behalf of OSBA. Aron J. Beatty, Esquire and Hayley E. Dunn, Esquire appeared on behalf of OCA. Allison C. Kaster, Esquire appeared on behalf of I&E. Patrick M. Cicero, Esquire and Kadeem Morris, Esquire appeared on behalf of CAUSE-PA. Alessandra L. Hylander, Esquire appeared on behalf of WPPII, PICA, and MEIUG.

On February 5, 2018, Respond filed a petition to reopen the record. The petition alleges that Kimberlie Bortz testified that Penelec and West Penn would, upon request, provide an EGS with a list of its customers showing their outstanding unpaid balances. On February 2, 2018, Respond submitted email requests to Penelec and West Penn for a list of Respond's customers showing outstanding unpaid balances on their accounts. According to the petition, Penelec's and West Penn's employee informed Respond via email that no such list was available.

The petition requested that the Commission reopen the record so that Respond could offer testimony and exhibits in response to Ms. Bortz's testimony. Alternatively, the petition requested admission of email communications between Penelec, West Penn and Respond, attached to the petition and marked as Attachment A.

On February 15, 2018, Penelec and West Penn filed an answer to Respond's petition to reopen. The answer stated that on February 6, 2018, the same Penelec and West Penn employee who responded to Respond's February 2, 2018 request sent an email to Respond indicating that after his initial response, he learned that Penelec and West Penn had the capability to provide the requested information to Respond and indicated that the information would be provided on February 7, 2018.

According to the answer, on February 7, 2018, that same employee provided two emails to Respond with the requested information. Copies of the above referenced emails were attached to the answer and marked as Appendices A, B and C.

The answer indicated that Penelec and West Penn did not oppose Respond's petition to reopen to admit its Attachment A on the condition that the record remain open for the admission of their Appendices A, B and C. The answer requested that the Commission deny Respond's petition to reopen or alternatively, that Respond's request to admit Attachment A be granted on condition that Penelec's and West Penn's Appendices A, B and C be admitted as well.

On February 20, 2018, Respond, Penelec and West Penn indicated that they did not wish to present additional testimony at a further hearing. Rather, they indicated that they wished to move the documents attached to the petition and answer into the record as exhibits. None of the parties requested the opportunity to cross examine on the proposed exhibits.

By order dated February 21, 2018, I admitted the above-referenced documents into the record of this proceeding.

On March 6, 2018, OSBA filed a letter requesting clarification on a document it had received. From OSBA's letter, it appeared that the February 21, 2018 order admitting the exhibits was uploaded to Infomap on February 23, 2018 but was not posted to the Commission's website or e-served to the parties. A hard copy of the February 21, 2018 order was served on OSBA.

Instead of the February 21, 2018 order admitting exhibits being posted to the website and e-served on the parties, Prehearing Order #3, dated November 8, 2017, which had been previously posted to the Commission's website and e-served to the parties, was mistakenly posted to the Commission's website and e-served on the parties a second time on February 23, 2018. I caused the February 21, 2018 order admitting the exhibits to be posted on the Commission's website and e-served on the parties.

On March 15, 2018, OSBA filed a letter stating that it would not be filing a main brief.

On March 16, 2018, OCA filed a letter stating that it would not be filing a main brief.

On March 16, 2018, the Industrials filed a letter stating that they would not be filing a main brief.

On March 16, 2018, Respond, Penelec and West Penn filed main briefs (M.B.).

On March 29, 2018, OSBA filed a letter stating that it would not be filing a reply brief.

On March 30, 2018, OCA filed a letter stating that it would not be filing a reply brief.

On March 30, 2018, the Industrials filed a letter stating that they would not be filing a reply brief.

On March 30, 2018, Respond, Penelec and West Penn filed reply briefs (R.B.). The evidentiary record in this proceeding closed on March 30, 2018, the date Respond, Penelec and West Penn filed their reply briefs. The matter is now ready for decision.

FINDINGS OF FACT

1. Penelec and West Penn provide Commission-approved POR programs for residential and small business customers. Penelec/West Penn St. 1, p. 9.

2. Penelec's and West Penn's POR programs provide that they will purchase accounts receivables from EGSs at a zero-discount rate. Penelec/West Penn St. 1, p. 9.

3. Penelec and West Penn pay the face value of the receivables without recourse to the EGSs, regardless of the amounts Penelec and West Penn can collect from the customers. Penelec/West Penn St. 1, p. 9.

4. The Commission approved allowances for uncollectible accounts expenses in Penelec's and West Penn's 2014 and 2016 base rate cases. Penelec/West Penn St. 1, p. 10.

5. A portion of those allowances is attributable to distribution rates and the balance is attributable to the provision of default service and the POR program. Penelec/West Penn St. 1, p. 10.

6. The default service and POR-related portion of uncollectible accounts expense for both Penelec and West Penn is recovered through their respective Default Service Support ("DSS") Riders on a non-bypassable basis. Penelec/West Penn St. 1, p. 10.

7. Penelec and West Penn proposed the addition of a clawback provision to their POR programs in the DSP IV proceedings to reduce their and their customers' exposure to increased uncollectible expense due to excessive EGS write-offs. Penelec/West Penn St. 1, p. 10.

8. Penelec and West Penn identified an approximate \$7 million increase in POR-related net write-offs since 2012, when they began tracking discrete categories of write-offs. Penelec/West Penn St. 1, p. 10.

9. Penelec and West Penn identified a wide variance in percentages for EGS write-offs as a percentage of generation revenues billed over a twelve-month period. Penelec/West Penn St. 1, p. 10.

10. Penelec and West Penn proposed to collect a portion of growing uncollectible accounts expense from EGSs whose practices are driving higher write-offs as a result of the types of offers they make to customers. Penelec/West Penn St. 1, p. 11.

11. Penelec and West Penn believed that they and their customers were unfairly burdened by certain EGSs with higher percentages of write-offs whose business models involve charging exorbitant prices. Penelec/West Penn St. 1, p. 11.

12. On November 3, 2015, Penelec and West Penn and their affiliated electric distribution companies (EDCs) in Pennsylvania filed the DSP IV petitions which included revisions to their POR programs. Penelec/West Penn St. 1, p. 13.

13. On November 3, 2015, the DSP IV petitions were served upon, inter alia, all EGSs licensed to sell electric generation in the service areas of Penelec and West Penn. Penelec/West Penn St. 1, p. 13.

14. Respond Power was included on the certificate of service. Penelec/West Penn St. 1, p. 13.

15. The Commission caused a notice of the DSP IV proceedings to be published in the November 14, 2015 edition of the Pennsylvania Bulletin explaining how any interested party could intervene in the proceeding initiated by the DSP IV petitions. Penelec/West Penn St. 1, p. 14.

16. The notice also stated that a prehearing conference was scheduled for December 1, 2015, commencing at 10:00 A.M. to be held in Hearing Room 4 of the Commonwealth Keystone Building in Harrisburg. Penelec/West Penn St. 1, p. 14.

17. The second paragraph of the DSP IV petitions, which begins on page 2 and carries over to page 3, sets forth in twelve separately numbered items each of the specific approvals that Penelec and West Penn was requesting the Commission to grant, including approving their proposed revisions to their respective supplier tariffs related to their POR programs. Penelec/West Penn St. 1, p. 14.

18. Paragraph No.8, at page 5 of the DSP IV petitions, sets forth a summary of the subject matter addressed in the direct testimony of each of the three witnesses whose statements were submitted with, and attached to, the DSP IV petitions. Penelec/West Penn St. 1, p. 14-15.

19. The summary of Met-Ed/Penelec/Penn Power/West Penn Statement No.3 submitted in the DSP IV proceedings states that the witness, Ms. Bortz, was testifying about the "Purchase of Receivables Program" and "Related Tariff Matters." Penelec/West Penn St. 1, p. 15.

20. In Statement No.3, submitted in the DSP IV proceedings, Ms. Bortz explained the terms of the proposed clawback provisions, why they were being proposed, how they would be calculated, and how their proceeds would be applied. Penelec/West Penn St. 1, p. 15.

21. In the DSP IV proceeding, Ms. Bortz also sponsored Met-Ed/Penelec/Penn Power/West Penn Exhibits KLB-4 through KLB- 7, consisting of proposed supplements to each of the companies' supplier coordination tariffs. Penelec/West Penn St. 1, p. 15.

22. The exhibits in the DSP IV proceedings included the terms of the proposed clawback provisions. Penelec/West Penn St. 1, p. 15.

23. The Retail Energy Supply Association (RESA) and several EGSs, intervened in the DSP IV proceeding. Penelec/West Penn St. 1, p. 16-17.

24. RESA and the EGSs addressed the clawback provisions in the DSP IV proceeding. Penelec/West Penn St. 1, p. 17.

25. In the DSP IV proceedings, the proposed clawback provisions were modified to reduce the number of EGSs that potentially could be subject to the charge. Penelec/West Penn St. 1, p. 17.

26. In the DSP IV proceedings, the write-off threshold was raised from a proposed 150% to 200% of the average write-off percentage of the average of all EGSs. Penelec/West Penn St. 1, p. 17.

27. The settlement in the DSP IV proceeding provided that if an EGS had an average write-off percentage of more than 200% of the average for all EGSs, it would not be subject to the clawback charges unless during the review period, the average price it charged customers for generation was more than 150% of the applicable company's price to compare (PTC) for the same period. Penelec/West Penn St. 1, p. 17.

28. Penelec and West Penn applied the screening test under the clawback provisions in the same manner to all EGSs serving residential and small commercial customers in their service territories. Penelec/West Penn St. 1, p. 17-18.

29. Penelec and West Penn first analyzed revenues and write-offs during the applicable test period ending August 31 for each EGS participating in the applicable POR program to calculate individual write-off percentages and an average EGS write-off percentage. Penelec/West Penn St. 1, p. 18.

30. Write-offs are customer accounts receivable balances that become delinquent due to non-payment and are written off Penelec's and West Penn's books approximately 182 days after a customer's account is final billed. Penelec/West Penn St. 1, p. 18.

31. Penelec and West Penn calculated an average rate for each EGS based on their revenues and kilowatt hours (kWhs) sold over the applicable twelve-month test period and

compared that rate to 150% of the weighted average quarterly PTC for residential and small commercial customers over the same period. Penelec/West Penn St. 1, p. 18.

32. For those EGSs identified by both prongs of the test, the annual clawback charge assessed is the difference between the EGS's actual write-offs and its actual write-off amount calculated at 200% of the average EGS percentage of write-offs. Penelec/West Penn St. 1, p. 18.

33. Respond's write-off percentage was 14.79% and 14.42% for Penelec and West Penn, respectively, in 2016 and 8.87% and 9.51% for Penelec and West Penn, respectively, in 2017. Penelec/West Penn St. 1, p. 18, Exhibit KLB-1,

34. These write-off percentages are three to seven times 200% of the average write-offs of sixty-five other EGSs. Penelec/West Penn St. 1, p. 17-18.

35. In 2016, Respond had the highest write-off percentage of any EGS serving residential and small commercial customers in West Penn's service territory and the second highest in Penelec's. Penelec/West Penn St. 1, p. 18-19.

36. Respond was charging some of the highest prices for generation in the market, which are, on average, more than 250% of the applicable PTC. Penelec/West Penn St. 1, p. 18-19, Exhibit KLB-1.

37. Based on the results of the screening test, two other EGSs participating in Penelec's and West Penn's POR programs were subject to a clawback charge in 2016 and 2017. Penelec/West Penn St. 1, p. 19.

38. After determining that Respond satisfied both prongs of the screening test, Penelec and West Penn first applied 200% of the EGS average write-off percentage for each company to Respond Power's revenues in the applicable service territory. Penelec/West Penn St. 1, p. 19.

39. The charge assessed by Penelec and West Penn recovers the amount of Respond's write-offs over this amount for 2016 and 2017, respectively. Penelec/West Penn St. 1, p. 19, RP Exhibit AS-2 and RP Exhibit AS-I0.

40. Based on these computations, Penelec and West Penn sent invoices dated September 27, 2016 in the amounts of \$305,890.63 and \$178,907.06 respectively and invoices dated September 29, 2017 in the amounts of \$142,973.13 and \$68,039.41 respectively to Respond. RP Exhibit AS-1, RP Exhibit AS-9.

41. Respond has not identified any computational errors in the calculation of the 2016 and 2017 clawback charge invoices. Penelec/West Penn St. 1, p. 19, Exhibit KLB-3.

DISCUSSION

The Clawback Charges

Before addressing Respond's arguments in support of its complaint, I will provide a brief description of the clawback charges, their origins, their calculation and their application to Respond. I will first briefly describe the clawback charges. The clawback charges impose a charge on EGSs that participate in Penelec's and West Penn's POR program. Penelec/West Penn St. 1, p.2. If the operations of the EGS result in 1) their accounts receivable producing a write-off percentage (write-offs for non-payment as a percentage of revenues) that exceeds 200% of either Penelec's or West Penn's average EGS write-off percentage and 2) their charged price for generation service, on average exceeding 150% of either Penelec or West Penn's PTC, Penelec or West Penn will impose the clawback charge. Penelec/West Penn St. 1, p.2.

Having briefly described the clawback charges, I will now describe how the clawback charges originated. Since the clawback charges are tied to Penelec's and West Penn's POR programs, I will first provide a brief description of the POR programs.

Pursuant to the Commission's policy statement at 52 Pa.Code § 69.1814, Penelec and West Penn provide Commission-approved POR programs for residential and small business customers. Penelec/West Penn St. 1, p. 9. Penelec's and West Penn's POR programs provide that they will purchase accounts receivables from EGSs at a zero-discount rate. Penelec/West Penn St. 1, p. 9. Penelec and West Penn pay the face value of the receivables without recourse to the EGSs regardless of the amounts Penelec and West Penn collect from the customers. Penelec/West Penn St. 1, p. 9. Penelec and West Penn bear the risk of customer accounts that are written off. Penelec/West Penn St. 1, p. 9.

The Commission approved allowances for uncollectible accounts expenses in Penelec's and West Penn's 2014 and 2016 base rate cases. Penelec/West Penn St. 1, p. 10. A portion of those allowances is attributable to distribution rates and the balance is attributable to the provision of default service and the POR program. The default service and POR-related portion of uncollectible accounts expense for both Penelec and West Penn is recovered through their respective DSS Riders on a non-bypassable basis. Penelec/West Penn St. 1, p. 10.

Having briefly described the POR program, I will now discuss how the clawback charges originated. Penelec and West Penn proposed the addition of a clawback provision to their POR programs in the DSP IV proceedings to reduce their and their customers' exposure to increased uncollectible expense due to excessive EGS write-offs. Penelec/West Penn St. 1, p. 10. In analyzing growth in uncollectibles since their 2014 base rate proceeding, Penelec and West Penn identified an approximate \$7 million increase in POR-related net write-offs since 2012, when they began tracking discrete categories of write-offs. Penelec/West Penn St. 1, p. 10. Penelec and West Penn further identified a wide variance in percentages for EGS write-offs as a percentage of generation revenues billed over a twelve-month period. Penelec/West Penn St. 1, p. 10.

To address this disparity in EGS-related write-off percentages, Penelec and West Penn proposed to collect a portion of growing uncollectible accounts expense from EGSs whose practices are driving higher write-offs as a product of the types of offers they make to customers. Penelec/West Penn St. 1, p. 11. Because collection is not an issue EGSs must concern

themselves with, Penelec and West Penn believed that they and their customers were unfairly burdened with higher percentages of write-offs by certain EGSs whose business models involve charging exorbitant prices. Penelec/West Penn St. 1, p. 11.

On November 3, 2015, Penelec and West Penn and their affiliated EDCs in Pennsylvania filed the DSP IV petitions which included revisions to their POR programs. Penelec/West Penn St. 1, p. 13. On the same day, in accordance with the default service regulations at 52 Pa. Code §§ 54.185 and 54.188, the DSP IV petitions were served upon, inter alia, all EGSs licensed to sell electric generation in the service areas of Penelec and West Penn. Penelec/West Penn St. 1, p. 13. As shown on the transmittal letter and certificate of service accompanying the DSP IV filing at Docket Nos. P-2015-2511351, P-2015-2511333, P-2015-2511355 and P-2015-2511356, Respond Power was included on the certificate of service. Penelec/West Penn St. 1, p. 13.

The Commission caused a notice to be published in the November 14, 2015 edition of the Pennsylvania Bulletin explaining how any interested party could intervene in the proceeding initiated by the DSP IV proceedings. Penelec/West Penn St. 1, p. 14. The notice also stated that a prehearing conference was scheduled for December 1, 2015, commencing at 10:00 A.M., before Administrative Law Judge David A. Salapa, to be held in Hearing Room 4 of the Commonwealth Keystone Building in Harrisburg. Penelec/West Penn St. 1, p. 14.

The second paragraph of the DSP IV petitions, which begins on page 2 and carries over to page 3, sets forth in twelve separately numbered items each of the specific approvals that Penelec and West Penn were requesting the Commission to grant, including approving their proposed revisions to their respective supplier tariffs related to their POR programs. Penelec/West Penn St. 1, p. 14.

Paragraph No. 8, at page 5 of the DSP IV petitions, sets forth a summary of the subject matter addressed in the direct testimony of each of the three witnesses whose statements were submitted with, and attached to, the DSP IV petitions. Penelec/West Penn St. 1, p. 14-15. The summary of Met-Ed/Penelec/Penn Power/West Penn Statement No.3 states that the witness,

Ms. Bortz, was testifying about the "Purchase of Receivables Program" and "Related Tariff Matters." Penelec/West Penn St. 1, p. 15.

In Statement No. 3, submitted in the DSP IV proceeding, over eight pages in question and answer form, Ms. Bortz explained the terms of the proposed clawback provisions, why they were being proposed, how they would be calculated, and how their proceeds would be applied. Penelec/West Penn St. 1, p. 15. Ms. Bortz also sponsored Met-Ed/Penelec/Penn Power/West Penn Exhibits KLB-4 through KLB- 7, consisting of proposed supplements to the supplier coordination tariffs. The exhibits included the terms of the proposed clawback provisions. Penelec/West Penn St. 1, p. 15.

RESA and several EGSs intervened in the DSP IV proceeding. Penelec/West Penn St. 1, p. 16-17. RESA and the EGSs addressed the clawback provision in the DSP IV proceeding. Penelec/West Penn St. 1, p. 17. As a result, the proposed clawback provision was modified to reduce the number of EGSs that potentially could be subject to the charge. Penelec/West Penn St. 1, p. 17.

In the DSP IV proceeding, the write-off threshold was raised from a proposed 150% to 200% of the average write-off percentage of the average of all EGSs. Penelec/West Penn St. 1, p. 17. In addition, another screening feature was added. If an EGS had an average write-off percentage of more than 200% of the average for all EGSs, it would not be subject to the clawback charge unless during the review period, the average price it charged customers for generation was more than 150% of the applicable company's PTC for the same period. Penelec/West Penn St. 1, p. 17.

Having discussed how the clawback charge originated, I will now describe how the clawback charges were applied to Respond. Penelec and West Penn applied the screening test under the clawback provisions in the same manner to all EGSs serving residential and small commercial customers in their service territories. Penelec/West Penn St. 1, p. 17-18. Penelec and West Penn first analyzed revenues and write-offs during the applicable test period ending August 31 for each EGS participating in the applicable POR program to calculate individual

write-off percentages and an average EGS write-off percentage. Penelec/West Penn St. 1, p. 18. Write-offs are customer accounts receivable balances that become delinquent due to non-payment and are written off Penelec's and West Penn's books approximately 182 days after a customer's account is final billed. Penelec/West Penn St. 1, p. 18.

Penelec and West Penn next calculated an average generation rate for each EGS, based on their revenues and kWh sold over the applicable twelve-month test period and compared that rate to 150% of the weighted average quarterly PTC for residential and small commercial customers over the same period. Penelec/West Penn St. 1, p. 18. For those EGSs identified by both prongs of the test, the annual clawback charge assessed is the difference between the EGS's actual write-offs and its actual write-off amount calculated at 200% of the average EGS percentage of write-offs. Penelec/West Penn St. 1, p. 18.

Respond Power's write-off percentage was 14.79% and 14.42% for Penelec and West Penn, respectively, in 2016 and 8.87% and 9.51% for Penelec and West Penn, respectively, in 2017. Penelec/West Penn St. 1, p. 18, Exhibit KLB-1. These write-off percentages are a three times to seven times 200% of the average write-offs of over sixty-five other EGSs. Penelec/West Penn St. 1, p. 17-18. In 2016, Respond Power had the highest write-off percentage of any EGS serving residential and small commercial customers in West Penn's service territory and the second highest in Penelec's. Penelec/West Penn St. 1, p. 18-19. Respond Power is charging some of the highest prices for generation in the market, which are, on average, more than 250% of the applicable PTC. Penelec/West Penn St. 1, p. 18-19, Exhibit KLB-1. Based on the results of the screening test, two other EGSs participating in Penelec's and West Penn's POR programs were also subject to a clawback charge in 2016 and 2017. Penelec/West Penn St. 1, p. 19.

After determining that Respond satisfied both prongs of the screening test, Penelec and West Penn first applied 200% of the EGS average write-off percentage for each company to Respond Power's revenues in the applicable service territory. Penelec/West Penn St. 1, p. 19. The charge assessed by Penelec and West Penn recovers the amount of Respond's write-offs over this amount for 2016 and 2017, respectively. Penelec/West Penn St. 1, p. 19, RP

Exhibit AS-2 and RP Exhibit AS-I0. Based on these computations, Penelec and West Penn sent invoices dated September 27, 2016 in the amounts of \$305,890.63 and \$178,907.06 respectively and invoices dated September 29, 2017 in the amounts of \$142,973.13 and \$68,039.41 respectively to Respond. RP Exhibit AS- and RP Exhibit AS-9. Respond Power has not identified any computational errors in the calculation of the 2016 and 2017 clawback charge invoices. Penelec/West Penn St. 1, p. 19, Exhibit KLB-3.

Burden of Proof

Having provided a brief description of the clawback charge, its origins, its calculation and its application to Respond, I will now address Respond's arguments in support of its complaint. I will start with the burden of proof.

Respond, as the Complainant in these proceedings, has the burden of proof to show that Penelec and West Penn are responsible or accountable for the problem described in the complaints. Patterson v. Bell Telephone Co. of Pa., 72 Pa. PUC 196 (1990); Feinstein v. Philadelphia Suburban Water Co., 50 Pa. PUC 300 (1976). Respond must establish its case by a preponderance of the evidence. Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n, 578 A.2d 600 (Pa.Cmwlth. 1990), alloc. den., 602 A.2d 863 (Pa. 1992). To meet its burden of proof, Respond must present evidence more convincing, by even the smallest amount, than that presented by Penelec and West Penn. Se-Ling Hosiery v. Margulies, 70 A.2d 854 (Pa. 1950).

Here, the Commission's Opinion and Order dated July 13, 2017, ruled that the Commission-approved clawback charge tariff provisions were presumed to be reasonable, had the full force of law and were binding on the utilities and their customers citing State Farm Fire & Cas. Co. v. PECO Energy Co., 54 A.3d 921 (Pa. Super. 2012); Stiteler v. Bell Telephone Co. of Pa., 379 A.2d 339 (Pa.Cmwlth. 1977); Brockway Glass Co. v. Pa. Pub. Util. Comm'n, 437 A.2d 1067 (Pa.Cmwlth. 1981) and Pennsylvania Electric Co. v. Pa. Pub. Util. Comm'n, 663 A.2d 281 (Pa.Cmwlth. 1995).

The Order and Opinion stated that Respond could file a complaint against the existing tariff, pursuant to 66 Pa. C.S. § 701, and present evidence that the clawback provisions were no longer reasonable. The Opinion and Order held that Respond's burden would be heavy because tariff provisions submitted to and approved by the Commission are prima facie reasonable citing Shenango Township Board of Supervisors v. Pa. Pub. Util. Comm'n, 686 A.2d 910, 914 (Pa.Cmwlth. 1996) (Shenango).

Respond states that the heavy burden of proof described in Shenango requires that a complainant prove that facts and circumstances have changed so drastically so as to render application of the tariff provision unreasonable. Respond argues that this standard should not be applied to this proceeding, because it restricts Respond from exercising its statutory right to challenge a tariff provision on the basis that it is unreasonable. Respond M.B. 23-24, Respond R.B. 9-13. Respond cites no authority to support this argument and my research has not revealed any. I agree with Penelec and West Penn that Respond has misstated the burden of proof. Penelec/West Penn R.B. 15-20. Respond's argument is without merit for two reasons.

First, the Commission has consistently applied the standard described in Shenango to cases where a complainant has challenged the applicability of a tariff provision to that complainant. St. Andrew's Church v. Pennsylvania-American Water Co., Docket No. C-2009-2139206 (Final Order entered December 2, 2010) (monthly meter charge); Rollock Company v. Pennsylvania Electric Co., Docket No. C-2014-2425842 (Final Order entered May 20, 2015) (hourly pricing service charge). While an administrative agency is not bound by the rule of stare decisis, it must render consistent opinions and should either follow, distinguish or overrule its own precedent. Bell Atl. Tel. Co. v. Pa. Pub. Util. Comm'n, 672 A.2d 352 (Pa.Cmwlth. 1995); Pennsylvania Trout v. Pa. Dep't of Env'tl. Prot., 863 A.2d 93 (Pa.Cmwlth 2004); Crawford v. National Fuel Gas Distribution Co., Docket No. C-20066348 (Opinion and Order entered December 6, 2007). In order to be consistent with prior Commission decisions, I will apply the standard enunciated in Shenango.

Second, Respond's complaints are requesting that the Commission modify or vacate its prior ruling approving the clawback charges. Respond's complaints are similar to a

petition for relief following the issuance of a final decision, filed pursuant to 52 Pa.Code § 5.572. The Commission has held that such petitions should raise new and novel arguments not previously heard or considerations which appear to have been overlooked or not addressed by the Commission. Salahuddin v. Metropolitan Edison Co., Docket Nos. P-2015-2504703 and F-2015-2463441 (Opinion and Order entered March 17, 2016). This requirement is similar to the burden of proof described in Shenango requiring that a complainant prove that facts and circumstances have changed so drastically so as to render application of the tariff provision unreasonable. In either case, the burden of proof is heavier because the party is seeking to modify or vacate a final Commission order which, pursuant to 66 Pa.C.S. § 316, is conclusive upon the parties affected by the order. The statute at 66 Pa.C.S. § 316 states, in 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 shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review.

To adopt Respond's argument that it should be able to challenge the clawback provisions on the basis that they are unreasonable, without demonstrating that a change in facts or circumstances has occurred since the Commission approved the provisions, would be to permit Respond to relitigate issues already litigated by the parties in the DSP IV proceedings and considered by the Commission. As Penelec and West Penn point out, to allow Respond to relitigate these issues would be to permit a collateral attack on the Default Service Order. Penelec/West Penn M.B. 23-29.

Respond argues that its complaints are not subject to 66 Pa.C.S. § 316. Respond R.B. 13-26. Respond argues that since the Commission has not previously resolved the dispute between Respond and Penelec and West Penn, 66 Pa.C.S. § 316 does not apply to its complaints challenging the reasonableness of the clawback charge. Respond R.B. 14. Respond is incorrect.

Decisions of Commonwealth administrative agencies, such as the Commission, are entitled to res judicata and collateral estoppel effect where the agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which parties had an opportunity

to litigate. Kentucky-West Virginia Gas v. Pa. Pub. Util. Comm'n., 721 F.Supp. 710 (M.D. Pa. 1989), aff'd, 899 F.2d 1217 (3d Cir. 1990). In the Default Service Order, the Commission acted in a judicial capacity and resolved the issues that Respond had the opportunity to litigate concerning the reasonableness of the clawback provisions.

Respond did not avail itself of the opportunity to litigate the reasonableness of the clawback provisions in spite of being given notice of the DSP IV proceedings. Since it had the opportunity to litigate these issues, 66 Pa.C.S. § 316 applies to its complaints and bars it from litigating issues it had the opportunity to litigate in the DSP IV proceeding. It may only litigate issues that have arisen since the Commission approved the clawback charges since the Commission would not have had the opportunity to consider issues that have arisen since it served the Default Service Order.

Reasonableness of the Clawback Charges

Respond argues that even applying the heavy burden described in Shenango, it presented evidence to meet this burden. Respond M.B. 26. According to Respond, it presented evidence that the clawback charges assessed to it in 2016 and 2017 are based on write-offs that occurred as far back as 2013. Respond M.B. 26. It argues that there is no evidence that the Commission was aware of this fact when it approved the clawback charge in the Default Service Order. Respond M.B. 26.

In addition, it contends that the clawback charges fundamentally changed Penelec's and West Penn's PORs. Respond M.B. 26. Respond states that the Commission appears not to have considered this in the Default Service Order. Respond's arguments are without merit.

Respond has not proven any change of circumstances since the Commission's approval of the clawback tariffs that render them unreasonable. Rather than presenting evidence concerning changes in facts and circumstances since the Commission approved the clawback charges that would render application of the clawback provisions to it unreasonable, Respond

presented evidence and arguments alleging that the clawback provisions conflict with the Public Utility Code and Commission regulations and were unreasonable when the Commission approved them.

Respond's arguments that the clawback provisions were unreasonable when the Commission approved them are contrary to how tariff provisions are interpreted and applied. Tariff provisions previously approved by the Commission are prima facie reasonable. Zucker v. Pa. Pub. Util. Comm'n, 437 A.2d 1067 (Pa.Cmwlth. 1981). As tariffs, the clawback provisions are part of a set of operating rules imposed by the Commission that each public utility must follow in order to provide service to its customers. PPL Electric Utilities Corp. v. Pa. Pub. Util. Comm'n, 912 A.2d 386 (Pa.Cmwlth. 2006). Each public utility must file a copy of its tariff with the Commission setting forth its rates, services, rules, regulations and practices so that the public may inspect its contents. 66 Pa.C.S. § 1302; 52 Pa.Code § 53.25; Philadelphia Suburban Water Co. v. Pa. Pub. Util. Comm'n, 808 A.2d 1044 (Pa.Cmwlth. 2002). Public utility tariffs must be applied consistent with their language. Public utility tariffs have the force and effect of law and are binding on the public utility and its customers. Pennsylvania Electric Co. v. Pa. Pub. Util. Comm'n, 663 A.2d 281 (Pa.Cmwlth. 1995). The Commission has no authority to allow a public utility to deviate from its tariff even where the Commission concludes it is in the public interest. Philadelphia Suburban Water Co. v. Pa. Pub. Util. Comm'n, 808 A.2d 1044 (Pa.Cmwlth. 2002).

In this case, the Commission approved the clawback provisions as part of the DSP IV proceedings. The Commission approved Penelec's and West Penn's tariff filings implementing the clawback provision. No party to the DSP IV proceedings appealed the Commission's approval of the tariff. Penelec's and West Penn's clawback provision tariffs therefore have the force and effect of law and are binding on Respond, Penelec and West Penn.

Since the Commission has approved the clawback tariffs, they are prima facie reasonable. To overcome this presumption of reasonableness, Respond must present evidence that the facts and circumstances leading to the creation of the tariff provision have changed so drastically as to render the application of the tariff provision unreasonable. I agree with Penelec and West Penn that Respond has not done this. Penelec/West Penn M.B. 29-31.

The evidence presented by Respond does not address changes in facts or circumstances that occurred since the Commission served the Default Service Order. Rather, Respond alleged facts and circumstances that existed prior to the Commission serving the Default Service Order. Respond therefore has failed to prove by a preponderance of the evidence that the facts and circumstances leading to the creation of the clawback provision have changed so drastically as to render the application of the tariff provision to it unreasonable.

Furthermore, Respond has failed to present any evidence that the clawback charges are unreasonable because Penelec or West Penn miscalculated the amounts of the 2016 and 2017 clawback charges. To the contrary, Penelec and West Penn presented evidence that they applied the two prongs of the clawback provisions to all EGSs serving residential and small business customers in their service territories. They calculated individual write-off percentages and average EGS write-off percentages. Penelec and West Penn then calculated an average generation rate for each EGS and compared that to the PTC. Penelec and West Penn provided Respond with this information to explain how they calculated the 2016 and 2017 clawback charges.

Respond failed to present any evidence that Penelec's and West Penn's calculations were contrary to their Commission-approved clawback provisions. Since the calculations are consistent with the clawback provisions approved by the Commission, they are reasonable. Respond also failed to present any evidence that there were mathematical errors in the calculations provided by Penelec and West Penn. I agree with Penelec and West Penn that Respond has failed to prove by a preponderance of the evidence that either Penelec or West Penn miscalculated the clawback charges. Penelec/West Penn M.B. 49. Since there were no mathematical errors in the calculation of the clawback charges and the calculation of the clawback charges complied with the tariff provisions governing the clawback charges, the clawback charges are reasonable.

Due Process

Respond also argues that the imposition of the clawback charge on it would violate fundamental due process principles. Respond M.B. 27-34, Respond R.B. 16-26. In support of this argument, Respond first contends that Penelec and West Penn failed to file a tariff implementing the clawback provision prior to invoicing Respond in 2016. Respond M.B. 27. According to Respond, Penelec and West Penn did not file the clawback tariff until October 28, 2016, approximately one month after they sent the invoice to Respond. Respond M.B. 27. Respond concedes that the Commission approved the tariff on November 10, 2016 with an effective date of August 1, 2016. Respond M.B. 27.

Respond argues that absent the supplier tariff to review, Respond had no notice of the clawback charge. Respond M.B. 27. Respond concludes that invoicing it before filing and approval of the clawback tariff violated its due process rights. Respond M.B. 27. Therefore, Penelec and West Penn are prohibited from collecting the clawback charges. Respond M.B. 27. Respond cites no case law supporting this argument other than a case stating that the Commission's policy is that proper rate making principles permit rates to be accounted for only on a prospective basis.

Respond's argument overlooks the fact that the Commission approved the clawback charge when it entered the Default Service Order on May 19, 2016. As Penelec and West Penn point out, the joint petition for settlement filed in the DSP IV proceedings contained the clawback provisions as part of the supplier coordination tariffs. Penelec/West Penn M.B. 7, Penelec/West Penn R.B. 25. The parties to the DSP IV settlement agreed to those tariff provisions. Penelec/West Penn M.B. 7. Apparently, the tariff supplements attached to the DSP IV joint settlement petition did not have supplement numbers and were not included in the Commission's tariff books. Penelec/West Penn M.B. 7. When this was discovered, Penelec and West Penn filed supplements which the Commission accepted with an effective date of August 1, 2016. Penelec/West Penn M.B. 7.

Therefore, the Commission approved the tariff provisions, including the clawback charges, in the Default Service Order. Penelec and West Penn had the authority to assess the clawback charges on Respond as of the effective date of the Default Service Order.

Respond next argues that the conversion of Penelec's and West Penn's POR program from non-recourse to with recourse occurred without adequate notice to Respond. Respond M.B. 27-28, Respond R.B. 16-26. Respond also argues that service of the DSP IV petitions was insufficient to provide notice that Penelec and West Penn were proposing to retroactively modify the non-recourse POR program. Respond M.B. 28-34, Respond R.B. 16-22. Respond's arguments are without merit.

Administrative agencies, such as the Commission, are required to provide due process to the parties appearing before them. Schneider v. Pa. Pub. Util. Comm'n., 479 A.2d 10 (Pa.Cmwlth. 1984). This due process requirement is satisfied, however, when the administrative agency provides parties notice and the opportunity to be heard.

Penelec and West Penn served copies of the DSP IV petitions and supporting statements on numerous EGSs, including Respond. In addition, notice of the DSP IV petitions was published in the November 14, 2015 Pennsylvania Bulletin at 45 Pa.B. 6654-6655, specifying a deadline of November 30, 2015 for filing protests, petitions and answers to the DSP IV petitions. Respond failed to present any evidence that it did not receive the DSP IV petitions.

Because Respond was served with a copy of the DSP IV petitions, it had notice of the DSP IV proceedings and their clawback provisions and opportunity to be heard. Respond did not intervene in the proceeding. Several EGSs who were served with a copy of the DSP IV petitions did intervene in the proceeding and objected to the proposed clawback provisions. As a result, the parties reached a settlement that modified the proposed clawback provisions. Because Respond had notice and opportunity to be heard, its due process rights were adequately protected.

Furthermore, the DSP IV petitions provided adequate information to allow Respond to answer and prepare a defense. Penelec and West Penn filed their petitions with the Commission requesting approval of their clawback charges as part of the DSP IV proceedings. At pages 17-18, paragraphs 50-53, their DSP IV petitions propose a clawback provision. In support of the clawback provisions, the DSP IV petitions provided Statement No. 3 which, at pages 17-18, outlined the proposed clawback provisions. The DSP IV petitions provided sufficient information to Respond.

If, upon receiving the DSP IV petitions, Respond believed that the petitions provided insufficient information, it could have filed preliminary objections, pursuant to 52 Pa.Code § 5.101(a)(3), asserting that the petitions were insufficiently specific. Respond could have argued in preliminary objections that its right and ability to answer and defend had been impaired by vagueness in the DSP IV petitions in stating the subject matter of the petitions and the relief sought. Local No. 163, International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America v. Watkins, 207 A.2d 776 (Pa. 1965); Foster v. Peat Marwick Main & Co., 587 A.2d 382 (Pa.Cmwlt. 1991); Paz v. Dep't. of Corrections, 580 A.2d 452 (Pa.Cmwlt. 1990); Green Cab Company v. Hajducho, 50 Pa. PUC 745 (1977).

Respond could have argued that the DSP IV petitions failed to disclose the material facts sufficient to enable it to prepare its case. Respond could have contended that the allegations in the DSP IV petitions did not contain averments of all the facts Penelec and West Penn would need to prove to prevail. In that event, the Commission could have determined whether the allegations in the DSP IV petitions were sufficiently specific to enable Respond to prepare its defense. If the Commission concluded that they were, the allegations in the DSP IV petitions would withstand Respond's preliminary objection challenging their specificity. Baker v. Rangos, 324 A.2d 498 (Pa.Super. 1974); Landau v. Western Pennsylvania National Bank, 282 A.2d 335 (Pa. 1971); Smith v. Wagner, 588 A.2d 1308 (Case 3) (Pa.Super. 1991). If the Commission concluded that the allegations in the DSP IV petitions were not sufficiently specific, the Commission would have sustained Respond's preliminary objections and ordered the filing of a more specific DSP IV petition, pursuant to 52 Pa.Code § 5.101(e).

Respond failed to file preliminary objections challenging the specificity of the DSP IV petition within the twenty day time period set forth in 52 Pa.Code § 5.101(d). Since it failed to file timely preliminary objections, it cannot raise objections challenging the specificity of the DSP IV petitions now.

I agree with Penelec and West Penn that the DSP IV petitions adequately informed Respond that Penelec and West Penn would be seeking to implement clawback charges so as to allow it to prepare an answer and present a defense. Penelec/West Penn R.B. 21-26. Given these circumstances, the DSP IV petitions were sufficient to enable Respond to prepare its case.

Retroactive Ratemaking

Respond next argues that the clawback charges constitute impermissible retroactive rate making. Respond M.B. 34-38, Respond R.B. 26-30. This argument is incorrect because the clawback charges are not rates.

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

"Rate." Every individual, or joint fare, toll, charge, rental, or other compensation whatsoever of any public utility, or contract carrier by motor vehicle, made, demanded, or received for any service within this part, offered, rendered, or furnished by such public utility, or contract carrier by motor vehicle, whether in currency, legal tender, or evidence thereof, in kind, in services or in any other medium or manner whatsoever, and whether received directly or indirectly, and any rules, regulations, practices, classifications or contracts affecting any such compensation, charge, fare, toll, or rental.

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

In 1978, the General Assembly repealed the Act of May 28, 1937 and enacted the Act of July 1, 1978, P.L. 598, No. 116, the existing Public Utility Code. The current Public Utility Code at 66 Pa.C.S. § 102, defining “rate”, contains almost identical language as that found in the prior Public Utility Law at 66 P.S. § 1102. Since the provision at 66 Pa.C.S. § 102 is a reenactment of the provisions of the prior Public Utility Law, decisions interpreting the provisions that existed prior to 1978 continue to be applicable. Pittsburgh & Shawmut R. Co. v. Pa. Pub. Util. Comm’n, 14 A.2d 903 (Pa.Super. 1940); County of Chester v. Pa. Pub. Util. Comm’n, 408 A. 2d 552 (Pa.Cmwlth. 1979).

Here, the clawback charges are not compensation received by Penelec and West Penn for service they render to Respond. Therefore, the clawback charges are not rates. The clawback provisions are part of Penelec’s and West Penn’s tariffs but are not rates.

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

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

Since the clawback provisions are not rates, any prohibition concerning retroactive ratemaking is not applicable to the clawback provisions.

Furthermore, as Penelec and West Penn point out, the clawback charges are being applied prospectively on Respond using historic write-off data. Penelec/West Penn M.B. 31, Penelec/West Penn R.B. 26-30. Using historic data to identify EGSs which are most likely to be imposing higher costs does not make the clawback charges retroactive. Penelec and West Penn point out that the Commission has approved numerous rates and charges based on historic data. Penelec/West Penn M.B. 32-36, Penelec/West Penn R.B. 27-30.

Respond also argues that retroactive application of a statute is not permissible. Respond M.B. 38-40. The statement that retroactive application of a statute is impermissible is not entirely accurate.

While there is a presumption against the retroactive application of statutes affecting substantive rights, a law is only retroactive in its application when it relates back and gives a previous transaction a legal effect different from that which it had under the law in effect when it transpired, citing R & P Services v. Dept. of Revenue, 541 A.2d 432 (Pa.Cmwlth. 1988). Substantive rights are those affected when the application of the statute imposes new legal burdens on past transactions or occurrences. DeMatteis v. DeMatteis, 582 A.2d 666 (Pa.Super. 1990); Dept. of Labor and Industry, Bureau of Employment Security v. Pa. Engineering Corp., 421 A.2d 521 (Pa.Cmwlth. 1980). However, where no substantive right or contractual obligation is involved, an act is not retroactively construed when applied to a condition existing on its effective date even though the condition results from events which occurred prior to that date. Creighan v. Pittsburgh, 132 A.2d 867 (Pa. 1957); Cole v. Czegan, 722 A.2d 686 (Pa.Super. 1998) (citing McMahon v. McMahon, 417 Pa. Super. 592, 600-01, 612 A.2d 1360, 1364 (1992)); Brangs v. Brangs, 407 Pa. Super. 43, 595 A.2d 115 (1991).

Respond fails to explain how the retroactive application of statutes is relevant to the clawback charges since they are not statutes.

If Respond believed that the clawback provisions constituted impermissible retroactive ratemaking or the retroactive application of a statute, it should have intervened in the DSP IV proceedings and raised these arguments. To allow Respond to now raise arguments that it should have raised in the DSP IV is barred by 66 Pa.C.S. § 316. I agree with Penelec and West Penn that these arguments constitute a collateral attack on the Default Service Order. Penelec/West Penn M.B. 23-29.

Structural Flaws in the Clawback Provisions

Respond contends that numerous structural flaws in the clawback provisions render its application to Respond unreasonable. Respond M.B. 40-54, Respond R.B. 30-36. The evidence presented by Respond does not address changes in facts or circumstances that occurred since the Commission served the Default Service Order. Rather, Respond alleged facts and circumstances that existed prior to the Commission serving the Default Service Order.

If Respond believed that the clawback provisions contained structural flaws that rendered them unreasonable, it should have intervened in the DSP IV proceedings and raised these arguments. To allow Respond to now raise arguments that it should have raised in the DSP IV proceedings is barred by 66 Pa.C.S. § 316. I agree with Penelec and West Penn that these arguments constitute a collateral attack on the DSP IV order. Penelec/West Penn M.B. 36-45.

Clawback Provisions limiting EGS Prices

Respond contends that the prong of the clawback charges that considers EGS pricing over a twelve-month period operates to limit EGS prices. Respond M.B. 54-57, Respond R.B. 36-38. As Penelec and West Penn point out, the EGS's price is only one of two screens used in the clawback provision. Penelec/West Penn M.B. 46. Some EGSs charged prices that exceeded 150% of the PTC but were not subject to the clawback charges. Penelec/West Penn M.B. 46 Penelec/West Penn R.B. 32.

The evidence presented by Respond does not address changes in facts or circumstances that occurred since the Commission served the Default Service Order. Rather, Respond alleged facts and circumstances that existed prior to the Commission serving the Default Service Order. If Respond believed that the clawback provisions limited EGS prices, it should have intervened in the DSP IV proceedings and raised these arguments. To allow Respond to now raise arguments that it should have raised in the DSP IV proceedings is barred

by 66 Pa.C.S. § 316. I agree with Penelec and West Penn that these arguments constitute a collateral attack on the DSP IV order. Penelec/West Penn M.B. 45-48.

In conclusion, Respond has failed to establish by a preponderance of the evidence that facts and circumstances have changed so drastically since the Commission served the Default Service Order so as to render application of the clawback provisions to Respond unreasonable. Respond has also failed to prove by a preponderance of the evidence that either Penelec or West Penn miscalculated the clawback charges. Since Respond has failed to establish the allegations set forth in its complaints, I will deny the complaints and enter the following order.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and parties to this proceeding. 66 Pa.C.S. § 701.
2. The burden of proof in this proceeding is on Respond. 66 Pa.C.S. § 332(a).
3. Respond must establish its case by a preponderance of the evidence. Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n, 578 A.2d 600 (Pa.Cmwlth. 1990), alloc. den., 602 A.2d 863 (Pa. 1992).
4. A Commission-approved tariff provision is presumed to be reasonable, has the full force of law and is binding on the utility and its customers. State Farm Fire & Cas. Co. v. PECO Energy Co., 54 A.3d 921 (Pa.Super. 2012); Stiteler v. Bell Telephone Co. of Pa., 379 A.2d 339 (Pa.Cmwlth. 1977); Brockway Glass Co. v. Pa. Pub. Util. Comm'n, 437 A.2d 1067 (Pa.Cmwlth. 1981) and Pennsylvania Electric Co. v. Pa. Pub. Util. Comm'n, 663 A.2d 281 (Pa.Cmwlth. 1995).

5. A complainant filing a complaint against an existing tariff must prove that facts and circumstances have changed so drastically as to render application of the tariff provision unreasonable. Shenango Township Board of Supervisors v. Pa. Pub. Util. Comm'n, 686 A.2d 910, 914 (Pa.Cmwlth. 1996).

6. While an administrative agency is not bound by the rule of stare decisis, it must render consistent opinions and should either follow, distinguish or overrule its own precedent. Bell Atl. Tel. Co. v Pa. Pub. Util. Comm'n, 672 A.2d 352 (Pa.Cmwlth. 1995); Pennsylvania Trout v. Pa. Dep't of Env'tl. Prot., 863 A.2d 93 (Pa.Cmwlth. 2004); Crawford v National Fuel Gas Distribution Co., Docket No. C-20066348 (Opinion and Order entered December 6, 2007).

7. Administrative agencies, such as the Commission, are required to provide due process to the parties appearing before them. Schneider v. Pa. Pub. Util. Comm'n, 479 A.2d 10 (Pa.Cmwlth. 1984).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the complaints filed by Respond Power, LLC against Pennsylvania Electric Company and West Penn Power Company at Docket Nos. C-2016-2576287, C-2016-2576292, C-2017-2631326 and C-2017-2631331 are denied.

2. That the dockets at C-2016-2576287, C-2016-2576292, C-2017-2631326 and C-2017-2631331 are marked closed.

Date: April 5, 2018

/s/
David A. Salapa
Administrative Law Judge