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April 18, 2018

VIA eFILING AND FEDERAL EXPRESS

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 **Motion of Pennsylvania Electric Company and West Penn Power Company for Leave to File a Supplemental Reply Brief**. 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

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	:		

NOTICE TO PLEAD

To: Karen O. Moury
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Attorney for Respond Power LLC

You are hereby notified pursuant to 52 Pa. Code § 5.103(b) that a responsive pleading must be filed within twenty (20) days of the date of service of the following Motion, or such shorter period as may be established, as specifically requested in the Motion. All pleadings, such as an Answer to the enclosed Motion, must be filed with the Secretary of the Pennsylvania

Public Utility Commission, with copies served on the undersigned counsel and all parties of record in the above-captioned proceedings.

Respectfully submitted,

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Counsel for Pennsylvania Electric Company and West Penn Power Company

Dated: April 18, 2018

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

MOTION OF PENNSYLVANIA ELECTRIC COMPANY AND WEST PENN POWER COMPANY FOR LEAVE TO FILE A SUPPLEMENTAL REPLY BRIEF TO AVOID UNDUE PREJUDICE FROM RESPOND POWER LLC'S VIOLATION OF 52 PA. CODE § 5.501(A)(3) AND REQUEST FOR EXPEDITED CONSIDERATION AND RULING ON THIS MOTION

I. INTRODUCTION

Pursuant to 52 Pa. Code §§ 5.103 and 5.501(a)(3), Pennsylvania Electric Company ("Penelec") and West Penn Power Company ("West Penn") (individually, a "Company" and, collectively, the "Companies") move for: (1) leave to file the Supplemental Reply Brief attached hereto as Appendix A; and (2) for expedited review and ruling on this Motion – specifically, to provide Respond Power LLC ("Respond Power") no more than

five calendar days to file an Answer (if any) to this Motion and for a prompt ruling by the presiding Administrative Law Judge ("ALJ") thereafter.

The relief requested herein is essential to avoiding the undue prejudice to the Companies from Respond Power's violation of 52 Pa. Code § 5.501(a)(3), which provides in relevant part: "The party with the burden of proof shall, in its main or initial brief, completely address, to the extent possible, every issue raised by the relief sought and the evidence adduced at hearing."

The application of Section 316 of the Public Utility Code[1] and the preclusive effect it affords to the Pennsylvania Public Utility Commission's ("PUC" or the "Commission") Final Order in the Companies' fourth default service plan ("DSP IV") proceeding[2] that approved their respective clawback provisions has been a principal issue in this case since the Companies filed their Motions for Judgment on the Pleadings and Dismissal of Respond Power's Complaints on December 8, 2016. Issues surrounding the application of Section 316 and the preclusive effect of the DSP IV Final Order were also identified, and discussed, in the Companies' Prehearing Conference Memorandum filed on September 11, 2017. Nonetheless, Respond Power's Main Brief was devoid of *any* discussion of Section 316 or its application to this case, as the Companies specifically noted in their Reply Brief (p. 4). Indeed, the Companies' Reply Brief presaged the current problem by noting that 52 Pa. Code § 5.501(a)(3) prohibited Respond Power from "sandbagging" the Companies by staying silent on issues related to the application of Section 316 in its Main Brief and then making its arguments in a Reply Brief to which, absent corrective action by

[1] 66 Pa.C.S. § 316.

[2] *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 (Final Order entered May 19, 2016) ("DSP IV Final Order").

the ALJ, the Companies could not respond. The Companies' fears were well justified because Respond Power has employed the gambit the Companies warned of in their Reply Brief. Having remained mum about Section 316 and the preclusive effect of the DSP IV Final Order in its Main Brief, Respond Power devoted nearly half of its 40-page Reply Brief to those issues. The unfairness this works on the Companies is manifest and must be corrected by allowing the Companies to file the limited-scope Supplemental Reply Brief[3] attached hereto as Appendix A.

II. MOTION FOR LEAVE TO FILE THE COMPANIES' SUPPLEMENTAL REPLY BRIEF ATTACHED AS APPENDIX A

1. The Companies request leave to file their Supplemental Reply Brief attached hereto as Appendix A to address arguments presented in Respond Power's Reply Brief – arguments that Respond Power, as the party with the burden of proof, was obligated to present in its Main Brief, as required by 52 Pa. Code § 5.501(a)(3).

2. This case was initiated by Complaints filed by Respond Power on November 17, 2016.[4] On December 8, 2016, the Companies filed Answers and New Matter to Respond Power's Complaints. They also filed Motions for Judgment on the Pleadings and Dismissal of Respond Power's Complaints. In their Answers and New Matter and in their Motions, the Companies set forth their argument that Respond Power's Complaints and, in particular, its requests for retrospective relief from the terms of the Commission-approved clawback provision, were barred by the preclusive effect afforded the DSP IV Final Order by Section 316 of the Public Utility Code.

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[3] The three limited issues the Companies seek to address are set forth in Paragraph 10, *infra*.

[4] A detailed procedural history of this case was presented in the Companies' Initial Brief filed on March 16, 2018, and, therefore, it will not be repeated here. Only the procedural events relevant to this Motion are set forth herein.

3. On January 23, 2017, the ALJ issued his Order Granting In Part, Motion For Judgment On The Pleadings ("January 2017 Order"). In summary, the ALJ agreed with the Companies that Section 316 afforded preclusive effect to the DSP IV Final Order. He also found and determined that Respond Power had not stated any facts that, even if proved, would support its requested relief given the binding effect that must be accorded the Companies' Supplier Coordination Tariffs and the principle of finality embodied in both Section 316 and long-standing appellate authority. A summary of the findings and conclusions made in the January 2017 Order was provided in both the Companies' Prehearing Conference Memorandum filed on September 11, 2017 and in their Initial Brief (pp. 12-13) filed on March 16, 2018.

4. On January 26, 2017, Respond Power filed a Petition for Interlocutory Review and Answer to Material Questions, which posed two broadly-stated, generic questions for the Commission's consideration.[5] *See* PE/WP Initial Brief, p. 10. Almost six months later, on July 13, 2017, the Commission entered an Opinion and Order ("Opinion and Order on Interlocutory Review") granting interlocutory review, answered the questions in the affirmative and remanded the matter to the Office of Administrative Law Judge.

5. A Prehearing Conference was scheduled, and the parties were asked to file Prehearing Conference Memoranda. As previously noted, the Companies filed their Prehearing Conference Memorandum on September 11, 2107. In their Prehearing Conference Memorandum, the Companies set forth their interpretation of the Opinion and Order on Interlocutory Review in light of the ALJ's January 2017 Order. In particular, the

[5] The questions were: "(A) May an entity to whom a utility tariff provision is applied file a complaint with the Commission challenging the application of the tariff?" and "(B) Are Commission-approved tariffs subject to a just and reasonable standard?"

Companies explained why those two Orders, when read together, as they should be, made clear that only a potential prospective change in the clawback provisions could lawfully be addressed given the finality of the DSP IV Final Order and the preclusive effect afforded it by Section 316 (PE/WP Prehearing Conference Memorandum, pp. 8-11). Consequently, the Companies, once again, set forth their legal argument based on the application of Section 316 and made clear that they would continue to advance that argument throughout the balance of the proceeding. In particular, the Companies stated:

> For all the preceding reasons, at this point in the proceeding, it appears that the only issue that Respond Power may properly raise with regard to its challenge of the clawback provision is whether it can carry its "very heavy burden to prove that the facts and circumstances have changed so drastically as to render the application of" the Commission-approved terms of the Companies' Supplier Coordination Tariffs "unreasonable" for prospective application. With respect to the application of the clawback provision for the period that expired prior to Respond Power filing its Complaints, the only issue that properly is open for examination is whether the Companies made computational errors in calculating the September 2016 Clawback Charges in the invoices previously issued to Respond Power. The Companies will show that their computations are correct and conform to the terms of their Commission-approved Supplier Coordination Tariffs.[6]

6. Pursuant to the approved procedural schedule, written direct, rebuttal and surrebuttal testimony was submitted, and an evidentiary hearing was held on February 1, 2018. As also provided in the procedural schedule, Respond Power filed its Main Brief and the Companies filed their Initial Brief on March 16, 2018, and the parties filed Reply Briefs on March 30, 2018.

7. In their Initial Brief, the Companies set forth at length the legal and factual basis for the ALJ and the Commission to find and determine that the DSP IV Final Order

[6] PE/WP Prehearing Conference Memorandum, pp. 11-12.

should be afforded preclusive effect under Section 316 and, therefore, the clawback provision set forth in their respective Supplier Coordination Tariffs was not subject to the retrospective revision or revocation Respond Power sought. The Companies' argument was consistent with, and tracked, the legal argument they had presented in their Motions for Judgment on the Pleadings, their Brief in opposition to the Petition for Interlocutory Review filed on February 6, 2017, and their discussion of the relevant issues in their Prehearing Conference Memorandum.

8. Respond Power's Main Brief said nothing about one of the principal legal issues in this case, namely, the application of Section 316 granting preclusive effect to the DSP IV Final Order to bar retrospective revocation of the Commission-approved clawback charges. The Companies called out this glaring omission in their Reply Brief (p. 4), stating:

> 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."

9. After remaining silent in its Main Brief on all issues pertaining the application of Section 316 in this case, Respond Power devoted nearly half of its 40-page Reply Brief to attempting to rebut the Companies' arguments that, as previously explained, it had known since the filing of the Companies' Motions for Judgment on the Pleadings in December 2016 – arguments that the Companies outlined again in their theory of the case set forth in their Prehearing Conference Memorandum filed on September 11, 2017.

10. While virtually all of the portions of Respond Power's Reply Brief belatedly addressing the application of Section 316 in this case represent a *prima facie* violation of 52 Pa. Code § 5.501(a)(3), the Companies are limiting the scope of this Motion and their Supplemental Reply Brief to three arguments that Respond Power presented in its Reply Brief:

> (1) That Section 316 is identical to the principle of *res judicata* and, therefore, Section 316 cannot apply unless all of the preconditions for the application of *res judicata* are satisfied.
>
> (2) That none of the authorities relied upon by the Companies applied Section 316 "to preclude a challenge to the application of a tariff" – a new averment that ignores the fact the Companies relied upon the same authorities in their Initial Brief that they cited and relied upon in their Motions for Judgment on the Pleadings, Answers and New Matter, and Brief in Opposition to Interlocutory Review.
>
> (3) That the clawback charge should be subject to retroactive review and revocation because it is allegedly a "formula" rate and because the principle of finality allegedly can never apply to "formula" rates.

11. Respond Power clearly "sandbagged" the Companies on an important issue that the Companies had raised and addressed as early as December 8, 2016. In its Reply Brief, Respond Power made arguments that it could have, and should have, presented in its Main Brief. Unless appropriate corrective action is taken by allowing the Companies to file their Supplemental Reply Brief attached as Appendix A, Respond Power will get away with a significant violation of 52 Pa. Code § 5.501(a)(3); the Companies will have been unfairly prejudiced by being denied an opportunity to address Respond Power's

arguments; and the ALJ will be denied the full and complete development of the legal issues to which he is entitled.[7]

12. Granting this Motion will leave the parties in the same position they would have been if Respond Power had complied with the Commission's regulations on briefing, in that the Companies will be afforded the opportunity to respond, through their Supplemental Reply Brief, to arguments Respond Power should have made in its Main Brief.

III. REQUEST FOR EXPEDITED PROCESS, REVIEW AND RULING

13. Given the current stage of this proceeding, which warrants an official and timely submission to the ALJ of an appropriate response to the new material in Respond Power's Reply Brief, the Companies also request expedited processing of this Motion. Specifically, Respond Power should be given no more than five calendar days to file an Answer (if any) to this Motion, and the ALJ is requested, thereafter, to promptly rule upon this Motion. An expedited process is entirely justified in this instance. The facts relevant to a determination of this Motion are all "of record" – indeed, they consist of the Briefs and other written submissions that were already filed with the Commission. In addition, the Companies' request is limited in scope, is responsive to a clear violation of an applicable regulation, and is narrowly tailored to redress the kind of unfairness of which the Commission was acutely aware in promulgating its regulation at 52 Pa. Code § 5.501(a)(3).

[7] Although the Companies believe they would be justified in doing so, they have refrained from seeking to strike the offending portions of Respond Power's Reply Brief. The Companies believe a more appropriate course at this point in the proceeding is to allow the Companies to remediate the unfairness Respond Power has worked on them by allowing them to file the Supplemental Reply Brief attached hereto as Appendix A to address three limited issues. The Companies' proposed approach will also assure that the ALJ has access to all of the legal authorities, and accurate explications of those authorities, that may prove helpful in deciding this case.

IV. CONCLUSION

WHEREFORE, for the reasons stated above, the Companies respectfully request that the Administrative Law Judge: (1) establish an expedited process for considering and ruling upon this Motion by allowing Respond Power no more than five days to file an Answer (if any) to this Motion; and (2) thereafter, promptly grant this Motion and authorize the Companies to file the Supplemental Reply Brief attached hereto as Appendix A.

Respectfully submitted,

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Dated: April 18, 2018

APPENDIX A

SUPPLEMENTAL RELY BRIEF OF RESPONDENTS, PENNSYLVANIA ELECTRIC COMPANY AND WEST PENN POWER COMPANY

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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v.	:	**Docket No.**	**C-2017-2631326**
Pennsylvania Electric Company	:		
Respond Power LLC	:		
v.	:	**Docket No.**	**C-2017-2631331**
West Penn Power Company	:		

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

Before Administrative Law Judge
David A. Salapa

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April 18, 2018

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I. INTRODUCTION

Pennsylvania Electric Company ("Penelec") and West Penn Power Company ("West Penn") (individually, a "Company" and, collectively, the "Companies") have requested leave to file this Supplemental Reply Brief to address certain arguments and authorities that were presented for the first time in Respond Power LLC's ("Respond Power") Reply Brief and that, pursuant to 52 Pa. Code § 5.501(a)(3), Respond Power should have presented (if at all) in its Main Brief. Specifically, the Companies will address the fundamental errors and mischaracterizations of authorities underlying Respond Power's argument that Section 316 of the Public Utility Code[1] does not confer preclusive effect on the Pennsylvania Public Utility Commission's ("PUC" or the "Commission") Final Order in the Companies' fourth default service plan ("DSP IV") proceeding,[2] which Respond Power wants to be free to collaterally attack in this case.

II. ARGUMENT

A. Respond Power Has Conflated Section 316 With The Principle Of *Res Judicata* And, Therefore, Erroneously Claims That The Conditions Precedent To *Res Judicata's* Absolute Bar On Re-Litigating Decisions Made In The Commission's Judicial Capacity Must Also Be Satisfied Before Section 316 May Be Invoked To Prohibit Only The Retrospective Revocation Or Revision Of Final Commission Action Taken In Its Legislative Capacity.

The Companies have invoked Section 316 – a *statutory* provision – that grants preclusive effect to final decisions the Commission makes in its "legislative" capacity and, therefore, prevents those legislative actions from being revoked or revised *retrospectively*. Section 316

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[1] 66 Pa.C.S. § 316.

[2] *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 (Final Order entered May 19, 2016) ("DSP IV Final Order").

does not prohibit challenges to Commission action that, if successful, would result in *prospective* changes to, for example, rates, charges, tariff rules or terms of service, and the Companies have acknowledged as much in their Initial and Reply Briefs. Contrary to the mischaracterization of the Companies' position in Respond Power's Reply Brief, the Companies relied solely on Section 316 and did not invoke *res judicata.*

Res judicata is a common law concept that has been imported to administrative proceedings where an administrative agency acts in its "judicial" capacity to adjudicate rights and obligations that are specific to the litigants and involve the application of the law to a particular set of historical facts.[3] For that reason, in the circumstances where *res judicata* could apply, it functions as a *total* bar to re-litigating issues that, once finally decided, cannot be revisited by the same parties whether the relief requested in the second proceeding is either retrospective or prospective in nature. Because of the much broader prohibition created by *res judicata*, the conditions that must be satisfied before it applies are strict,[4] but they are not – and never have been – preconditions to the application of Section 316. Indeed, Section 316 is fundamentally different from *res judicata* and, therefore, the conditions that restrict the application of *res judicata* – in particular the need for identity of the parties in both the prior and subsequent litigation – simply do not apply to Section 316.

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[3] *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908) ("A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist."). *See also McCrary v. PECO Energy Co.*, Docket No. C-2015-2503724, 2015 WL 787824 (Recommended Decision of David A. Salapa issued Nov. 9, 2015) (Noting that res judicata applies to "[d]ecisions of Commonwealth administrative agencies . . . where the agency is acting in a *judicial capacity* and resolves disputed issues of fact . . ." (emphasis added)). The Recommended Decision was adopted and approved by the Commission's Final Order entered May 19, 2016.

[4] These conditions were summarized in the Recommended Decision in *McCrary, supra*, at *5: "For the doctrine of res judicata to apply, four conditions must be met: (1) identity of issues; (2) identity of causes of action; (3) identity of persons and parties to the action, and (4) identity of the quality and capacity of the parties suing or sued (citation omitted)."

Administrative agencies can act either in a "legislative" or "judicial" capacity, as explained by the United State Supreme Court:

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.[5]

The distinction between legislative and judicial actions directly bears upon the principle of *res judicata* because both that principle and the closely allied doctrine of collateral estoppel only apply to decisions of administrative agencies acting in their judicial capacity.[6] When an agency enters a final order in its judicial capacity (i.e., where it "investigates, declares and enforces liabilities" between specific parties based on "present or past facts" and under existing laws), the same cause of action cannot be re-litigated between the same parties (or persons in privity with those parties). *Res judicata* is, therefore, an absolute bar on re-litigation between the parties with respect to the matter adjudicated without regard to the nature of the relief (i.e., retrospective or prospective) requested in a subsequent case.

However, the Commission acts in a *legislative* capacity when it establishes rules, tariff provisions, rates, charges or terms of service that apply to everyone affected thereby (i.e., all customers, an entire class of customers or, as in DSP IV, all electric generation suppliers ("EGSs") participating in the Companies' purchase of receivables ("POR") programs). In those instances, the Commission establishes legal norms, having binding effect, for "the future" and

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[5] *Prentis*, 211 U.S. at 226.

[6] *Id.* ("The establishment of a rate is the making of a rule for the future and therefore is an act legislative, not judicial. . . . The decision upon [rates] cannot be *res judicata.*"]; *see also McCrary, supra* (explaining that *res judicata* only applied where the Commission is acting in its "judicial capacity.").

"changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."[7]

Res judicata does not apply to legislative acts of administrative agencies. However, that does not mean that the Commission's decisions made in a legislative capacity lack finality. Far from it. Section 316 exists to impart the degree of finality to Commission legislative actions that is essential for a coherent system of regulation to exist.[8] Section 316 assures that legislative decisions of an administrative agency – just like enactments of a legislative body – remain binding and have full force and effect *until changed.* Thus, unlike causes of action to which *res judicata* properly applies, decisions of the Commission in its legislative capacity are subject to re-litigation. However, any change made by the Commission applies *prospectively* only: "Legislation on the other hand *looks to the future* and changes existing conditions by making a new rule *to be applied thereafter* . . ." Accordingly, when the Commission entered the DSP IV Final Order, it acted in its legislative capacity. *Res judicata* would not apply to that decision and, therefore, it could be challenged upon complaint. However, the DSP IV Final Order (and the clawback provision it approved) remained in full force and effect – insulated from retrospective revision – until changed by the Commission.[9] Respond Power can file a complaint and challenge the clawback charge – as it has done – but any relief granted can have prospective effect only. Section 316 – not *res judicata* – requires that outcome. And, as previously explained, the

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[7] *Prentis*, 211 U.S. at 226.

[8] Respond Power's claim at page 6 of its Reply Brief that the concept of "commission-made rates" and comparable principles of finality that attach to final legislative acts of the Commission are "not grounded in statute" is directly contradicted not only by Section 316 but by Section 1309 of the Public Utility Code, 66 Pa.C.S. § 1309. Under Section 1309, a party is entitled to file a complaint challenging an existing rate of a public utility. However, any change in that rate can be made only after notice and hearing and a final determination of the Commission of "the just and reasonable rates . . . *to be thereafter observed and in force* . . ." (emphasis added). Section 1309 embodies the same concept articulated in Section 316, namely, legislative decisions of the Commission can be challenged by a party, and the Commission can change those decisions. However, the change can have *prospective* effect only.

[9] Contrary to Respond Power's contentions, this principle has, in fact, been established and affirmed by the Commonwealth Court, as explained in Section II.B., *infra.*

conditions for applying *res judicata* are, therefore, irrelevant to the application of Section 316 and to the enforcement of the preclusive effect that section commands for actions taken in the Commission's legislative capacity.

The manifest error in Respond Power's position is apparent when it is considered in light of a Commission proceeding establishing rates or tariff rules to apply to all customers from and after the entry of a Commission final (and non-appealed) order – *i.e.*, a classic example of an administrative agency acting in a "legislative" capacity.[10] Applying Respond Power's misguided approach, if a customer simply chose not to intervene in that proceeding (and, therefore, was not a "party"), the Commission's final order would not apply to him or her. That customer would be free to contest the application of a rate or rule retrospectively and seek to avoid paying the rate or obeying the rule even during a period that preceded the adjudication of its complaint, despite the PUC's previously-issued final order approving the rate or rule. In short, if any credence were given to Respond Power's theory, it would banish from the law of this Commonwealth both the "filed-tariff" and "Commission-made rate" doctrines and eviscerate the concept of finality expressly embodied in Sections 316 and 1309 of the Public Utility Code. Obviously, Respond Power's argument is contravened by the terms of Sections 316 and 1309 and long-standing appellate court authority that is cited and discussed in Section III of the Companies' Initial Brief. Respond Power's argument is, therefore, fatally flawed and should be rejected.

[10] *Prentis*, 211 U.S. at 226; *Duquesne Light Co. v. Pa. P.U.C.*, 107 A.2d 745, 755 (1954) ("Rate making is an exercise of the legislative power, delegated to the Commission . . . .").

B. Respond Power's Claim That There Are No Cases That Applied Section 316 "To Preclude A Challenge To The Application Of A Tariff" Is Directly Contradicted By Appellate Authority Specifically Identified By The Companies In Pleadings At The Inception Of This Case.

At page 13 of its Reply Brief, Respond Power asserts that "none of the cases cited by the Companies involved the use of the Code Section 316 doctrine to preclude a challenge to the application of a tariff." That contention is directly contravened by the Commonwealth Court's decision in *Lehigh Valley Power Comm. v. Pa. P.U.C.*,[11] which the Companies cited and relied upon in their Motions for Judgment on the Pleadings filed on December 8, 2016 as well as in their Initial Brief (p. 17).

In *Lehigh Valley Power Comm.*, Pennsylvania Power & Light Company ("PPL") petitioned the Commission for an order finding that it could recover, through its Energy Cost Rate, its payments to purchase electric power from American REF-FUEL Company ("REF-FUEL"), a "qualifying facility" ("QF") under the Public Utility Regulatory Policies Act. PPL's power purchase contract with REF-FUEL provided that it would pay a base price of $0.6 per kWh, which was set forth in PPL's tariff as its so-called "Pioneer Rate" for purchases of power from QFs. The Pioneer Rate had previously been approved by the Commission in a formal proceeding where the rate was judged to be reasonable and lawful.[12]

The Lehigh Valley Power Committee ("LVPC"), an *ad hoc* group of industrial customers, intervened to protest the PPL Petition for rate recovery on the grounds that the rate stated in the PPL/REF-FUEL power purchase agreement was unjust and unreasonable. PPL and REF-FUEL opposed LVPC's position on the grounds, *inter alia*, that "LVPC had no right to force the utility to prove the justness and reasonableness of a contract rate agreed upon pursuant

[11] 563 A.2d 557 (Pa. Cmwlth. 1989).
[12] *Id.* at 558.

to an existing previously approved tariff."[13] The Commission agreed with PPL and REF-FUEL, rejected LVPC's protest, and approved PPL's rate recovery. In so doing, the Commission stated as follows (language quoted with approval in the Commonwealth Court's decision):

> It is well established that tariffs have the force and effect of law. *See, e.g., Brockway Glass v. Pa. P.U.C.*, 63 Pa. Commonwealth Ct. 238, 437 A.2d 1067 (1982); *Stiteler v. Bell Telephone*, 32 Pa. Commonwealth Ct. 319, 379 A.2d 339 (1977). Therefore, if LVPC is concerned that the Pioneer Rate of six cents per kwh set forth in PP&L's Tariff Rule 6E is excessive, its remedy would be to file an independent complaint or a petition with the Commission *seeking a prospective change* to PP&L's tariff pursuant to 66 Pa.C.S. § 1309. Absent a change in Tariff Rule 6E, the justness reasonableness and lawfulness of amounts paid pursuant thereto is conclusive, and the evidentiary hearing requested by LVPC in the instant proceeding would not serve any legitimate purpose.[14]

LVPC appealed to the Commonwealth Court, which affirmed the Commission's Order. In so doing, the Court – like the Commission – held that PPL's Pioneer Rate was not subject to collateral attack in the proceeding for approval of the REF-FUEL contract:

> The commission was entirely correct in pointing out in its order that the justness and reasonableness of the contract rate, *incorporating as it does the Pioneer Rate previously approved for inclusion in PP & L's tariff* (with per se reasonable percentages of FAC [future avoided costs] as alternatives), is not now subject to challenge in this proceeding.[15]
>
> * * *
>
> . . . LVPC's attempt in this case to force PP & L to prove at a hearing the justness and reasonableness of PP & L's recovery of levelized payments to a QF pursuant to a contract *incorporating a rate previously approved by the commission* must fail.[16]

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[13] *Id.* at 559.
[14] *Id.* at 560 (emphasis added).
[15] *Id.* at 563 (emphasis added).
[16] *Id.* at 564 (emphasis added).

Additionally, the Court explained that it was specifically relying upon Section 316 as the basis for its decision:

> LVPC also contends that the commission's order is not supported by the evidence of record. . . . The factual basis for the commission's action comes from the order initially approving the Pioneer Rate as being just and reasonable:
>
> > Whenever the commission shall make any rule, regulation, finding, determination or order, the same shall be conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review.[17]
>
> Section 316 of the Public Utility Code, 66 Pa.C.S. § 316.

Both the Commonwealth Court's decision in *Lehigh Valley Power Comm.* and the PUC order the Court affirmed directly support the arguments advanced by the Companies for applying Section 316 to afford preclusive effect to the DSP IV Final Order. Moreover, as noted above, the Companies explicitly cited and relied upon the Court's opinion in their Motions for Judgment on the Pleadings filed on December 8, 2016. Accordingly, there was no valid reason for Respond Power to delay until its Reply Brief to suggest – for the first time – that *Lehigh Valley Power Comm.* does not support the Companies' position in this case.

C. Contrary To Respond Power's Representations: (1) The Companies Did Not "Rely On The 'Commission-Made Rates Doctrine;'" (2) Respond Power's Attempt To Distinguish "Formula" Rates Fails Because Respond Power Mischaracterizes Both The Cases On Which It Relies And The Nature Of Its Challenge To The Clawback Provision; And (3) In Making Its Argument, Respond Power Does Not Recognize That, If Accepted, Its Own Argument Would Totally Undercut All Of Its "Retroactive" Ratemaking Claims.

At page 5 of its Reply Brief, Respond Power states: "In support of this argument [Section 316 prohibits retrospective invalidation of the DSP IV Final Order's approval of the

[17] 563 A.2d at 565.

clawback provision], the Companies rely on the 'Commission-made rates doctrine'." Not surprisingly, Respond Power did not cite any portion of the Companies' Initial Brief allegedly advancing that position. The Companies did not say what Respond Power attributes to them. Here is what they actually said:

> The January 2017 Order correctly found and determined that the retrospective and prospective distinction has legal significance because well-established precedent holds that the provisions of a tariff, once approved by the Commission, are protected from retroactive reversal. While this doctrine has most often been applied to "Commission-made rates," it is broadly applicable to rates, regulations, and terms of service that are part of a Commission-approved tariff, all of which have the force and effect of law. Simply stated, whether the clawback charge is deemed to be a "rate" or not, the Companies' Supplier Coordination Tariffs, including the clawback charge provisions set forth therein, were approved by the Commission and cannot be retrospectively reversed.
>
> * * *
>
> The ALJ concluded that the clawback charge is not a "rate." January 2017 Order, p. 9. The Commission did not specifically affirm or reverse that finding. The ALJ also determined that the Supplier Coordination Tariffs are "tariffs" and, as such, have the "force and effect of law." *Id.*, p. 11. The Commission did affirm that determination. Opinion and Order, p. 19. As a Commission-approved term of the Companies' Supplier Coordination Tariffs, the clawback charge is entitled to protection from retroactive reversal for all the reasons discussed above whether or not it is specifically determined to be a "rate."[18]

The principle of finality incorporated in Section 316 (and Section 1309 as well) is generic. The doctrine of "commission-made rates" derives from, and is based upon, that generic principle, but that does not mean they are coextensive or that all of the conditions and qualifications that might attach to the application of the "commission-made rate" doctrine must

[18] PE/WP Initial Br., p. 14 and n. 21.

be satisfied before the generic principle of finality may be applied to other final Commission orders. For precisely that reason, the Commission acknowledged blackletter law when it stated in its Opinion and Order on Interlocutory Review: "All parties agree that a Commission-approved tariff is *prima facie* reasonable, has the full force of law and is binding on the utility and the customer."

Having fabricated the strawman that the Companies' position assumes the clawback provision is a "commission-made rate," Respond Power tries to knock it down with the argument that the clawback provision is a "formula" rate and that the doctrine of commission-made rates does not apply to "formula" rates.[19] In so doing, Respond Power misconstrues the two Commonwealth Court decisions it cites,[20] mischaracterizes the clawback provision, and fundamentally misrepresents the nature of its own objections to that provision.

To start with, Respond Power uses the contrived term "formula" rate to avoid saying what *Metropolitan Edison* and *Duquesne Light* were really about, namely, surcharges derived from automatic adjustment clauses (a Fuel Adjustment Clause and a New Energy Clause, respectively) that were established under Section 1307 of the Public Utility Code.[21] In each case, the Court determined that the costs recovered through those surcharges were not immune from retrospective review of their "prudence" because the surcharges were not "commission-made rates." Respond Power did not, however, cite another important – and more recent – Commonwealth Court decision addressing this issue – *Pa. Indus. Energy Coalition v. Pa. P.U.C.* ("*PIEC*").[22] Whether or not that omission was deliberate, the fact remains that *PIEC* makes it

[19] Respond Power Reply Br., pp. 3 and 5-6.
[20] *Duquesne Light Co. v. Pa. P.U.C.*, 507 A.2d 433 (Pa. Cmwlth. 1983); *Metropolitan Edison Co. v. Pa. P.U.C.*, 437 A.2d 76 (Pa. Cmwlth. 1980).
[21] 66 Pa.C.S. § 1307. *See Duquesne Light*, 507 A.2d at 434 n.2.
[22] 653 A.2d 1336 (Pa. Cmwlth. 1994).

perfectly clear the holdings of *Metropolitan Edison* and *Duquesne Light* on which Respond Power relies apply only to the surcharges produced by automatic adjustment clauses established under Section 1307, not to the Commission-approved terms of the clauses themselves.

Specifically, the *PIEC* Court explained[23] that the prohibition against retroactive and single-issue ratemaking (which it viewed as two halves of the same coin) does not apply to charges produced by a Section 1307 automatic adjustment clause because (unlike "commission-made rates") such charges are, by design, permitted to go into effect subject to an after-the-fact reconciliation to actual costs, and only at that time can the prudence and reasonableness of the actual (not projected) costs occur:

> In *Allegheny Ludlum Steel Corporation v. Pennsylvania Public Utility Commission*, 501 Pa. 71, 459 A.2d 1218 (1983), the Supreme Court held that the automatic adjustment of electric rates pursuant to Section 1307 of the Code to reflect fuel cost increase did not violate due process because, although implemented without opportunity for opponents of an increase to be heard, the PUC must approve increases through a subsequent, year-end proceeding for a final determination and adjustment of rate increases, allowing full participation by interested parties and requiring refunds if increases were excessive.[24]

While obvious, it is worth underscoring that the clawback provision is not a Section 1307 automatic adjustment clause and, therefore, it does not impose a charge based on a projection of future costs that are subject to after-the-fact reconciliation and review. More importantly, Respond Power objects to the nature and design of the clawback provision itself, as evidenced by its repeated claims that the clawback suffers from alleged "*structural*" defects in its fundamental design.[25] Respond Power has already conceded that the actual clawback "charges" themselves were accurately calculated – i.e., those charges conform to the terms of the clawback provision

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[23] *Id.* at 1348-1350.
[24] *Id.* at 1348.
[25] *See* Respond Power Main Br., pp. 40 *et seq.*

and employ the data the clawback provision specifically prescribes. This is an important distinction because the Commission has recognized that a "clause" is itself a rate – separate and apart from the "charges" it produces.

In *Metropolitan Edison* and *Duquesne Light*, the companies' Section 1307 adjustment clauses (the Fuel Adjustment Charge and Net Energy Clause, respectively) prescribed the categories of costs (fuel and purchased power) that were eligible for recovery and set the rules for their recovery (e.g., the use of projections subject to after-the-fact reconciliation). However, in those cases, the costs claimed for recovery – and the resulting "charges" or "surcharges" – were challenged after-the-fact on the grounds that those costs had not been prudently incurred (in Met-Ed's case because it paid too much for coal and in Duquesne's case because it was accused of unduly prolonging an outage of a nuclear power plant). However, in neither case was there any challenge to the previously-approved Fuel Adjustment Clause or Net Energy Clause set forth in the companies' tariffs. Nor could any such challenges have been sustainable, because, as this Commission has held, Section 1307 *clauses* are themselves a form of "rate" – as distinguished from the "charges" or "surcharges" they produce.[26] And, as such, the relevant tariff provisions (i.e., the adjustment clauses) are entitled to protection from retrospective revision or invalidation. As applied to this case, this means that even if the clawback provision were regarded as the equivalent of a Section 1307 automatic adjustment clause (which it is not), it is not denied the protection afforded by Section 316.

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[26] *See Petition of Columbia Gas of Pennsylvania, Inc. for Approval of a Distribution Sys. Improvement Charge*, Docket No. P-2012-2338282 (R.D. issued Mar. 6, 2014), p. 45, which held that "in Pennsylvania a rate is defined as more than just the individual components of the mechanism, but rather the entire mechanism and all rules and regulations associated with it." In that case, the Commission agreed with the Administrative Law Judges that the entire Distribution System Improvement Charge ("DSIC") Rider constituted a "rate," not just the surcharges that are produced by running specific data through the terms of the DSIC Rider. *See* Final Order entered May 22, 2014, p. 58, approving and adopting the Recommended Decision. Ultimately, the Commonwealth Court affirmed the Commission's Final Order on similar grounds in *McCloskey v. Pa. P.U.C.*, 127 A.3d 860 (Pa. Cmwlth. 2015).

Simply stated, *Metropolitan Edison* and *Duquesne Light* stand for the proposition that the charges or surcharges produced by an automatic adjustment clause are not exempt from retrospective review because, until a final, after-the-fact reconciliation and approval has occurred, those charges are not "commission-made rates." However, the same is not true for the *clauses themselves*, which are "rates" under the Public Utility Code and, as such, when approved by the Commission, deserve the protection from after-the-fact revision or invalidation afforded by Sections 316 and 1309. Significantly, Respond Power has repeatedly stated that its objections lie with the alleged "structural" flaws in the terms of the clawback provision itself, i.e., the very thing the Commission approved in the DSP IV Final Order. Indeed, as previously noted, Respond Power admitted there were no errors in the "calculation" of the clawback charges themselves – that is, those charges were calculated in conformity with the terms of the Commission-approved clawback provision.

Finally, Respond Power apparently fails to recognize that, if its argument were given any credence, it would undercut all of its "retroactivity" claims (which, in any event, are meritless for other reasons previously explained in the Companies' Initial and Reply Briefs). The clawback provision is itself an element of the Companies' POR programs. And the broadly-defined concept of a "formula" rate Respond Power tries to apply to the clawback charge would be equally applicable to the POR programs themselves, which do not state a specific "rate" and rely upon specified terms to describe how to calculate the amounts paid to a participating EGS. Thus, if – as argued by Respond Power – the clawback charge is not immune from retrospective revision, neither is the POR program, and, therefore, all of Respond Power's "retroactivity" claims would have to be invalidated as a direct and immediate consequence of the acceptance of Respond Power's own argument. This glaring internal inconsistency highlights the fallacies of

law and logic underlying Respond Power's arguments in this case and provides further support for rejecting all of those arguments.

III. CONCLUSION

For the reasons set forth above, and in the Companies' Initial and Reply Briefs, the Commission should deny and dismiss, with prejudice, the Complaints of Respond Power and direct Respond Power to pay the amounts owed to the Companies pursuant to invoices previously issued to Respond Power.

Respectfully submitted,

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Dated: April 18, 2018

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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 **Motion of Pennsylvania Electric Company and West Penn Power Company for Leave to File a Supplemental Reply Brief** on the following persons, in the manner specified below, in accordance with the requirements of 52 Pa. Code § 1.54:

VIA ELECTRONIC MAIL AND FEDERAL EXPRESS

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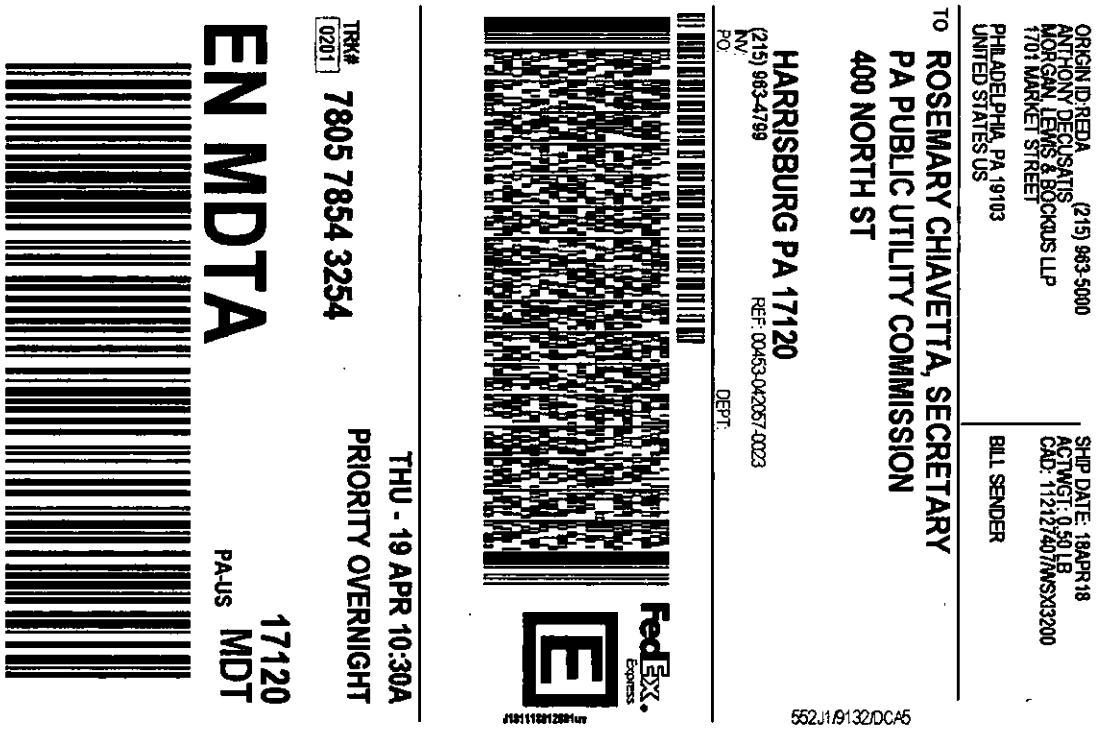

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