ECKERT SEAMANS
ATTORNEYS AT LAW

Eckert Seamans Cherin & Mellott, LLC
213 Market Street
8th Floor
Harrisburg, PA 17101

TEL 717 237 6000
FAX 717 237 6019
www.eckertseamans.com

Karen O. Moury
717.237.6036
kmoury@eckertseamans.com

May 10, 2018

Via Electronic Filing
Rosemary Chiavetta, Secretary
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

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

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

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

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

Dear Secretary Chiavetta:

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

Sincerely,

Karen O. Moury
KOM/lww

Enclosure
cc: Hon. David A. Salapa w/enc.
Certificate of Service w/enc.

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of Respond Power, LLC's Exceptions on the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

Via Email and/or First Class Mail

Thomas P. Gadsden, Esq.
Anthony C. DeCusatis, Esq.
Brooke E. McGlinn, Esq.
Morgan Lewis & Bockius, LLP
1701 Market St.
Philadelphia, PA 19103-2921
tgadsden@morganlewis.com
adecusatis@morganlewis.com
bmcglinn@morganlewis.com

Tori Giesler, Esq.
FirstEnergy Service Company
2800 Pottsville Pike
PO Box 16001
Reading, PA 19612-6001
tgiesler@firstenergycorp.com

Aron J. Beatty, Esq.
Haylee E. Dunn, Esq.
Office of Consumer Advocate
555 Walnut St., 5th Floor, Forum Place
Harrisburg, PA 17101-1923
ABeatty@paoca.org

Daniel Asmus, Esq.
Office of Small Business Advocate
1102 Commerce Building
300 N. Second St.
Harrisburg, PA 17101
dasmus@pa.gov

Patrick Cicero, Esq.
Elizabeth R. Marx, Esq.
Kadeem Morris, Esq.
Pennsylvania Utility Law Project
118 Locust St.
Harrisburg, PA 17101
pulp@palegalaid.net

Susan E. Bruce, Esq.
Charis Mincavage, Esq.
Alessandra L. Hylander, Esq.
Matthew L. Garber, Esq.
McNees Wallace & Nurick LLC
1 00 Pine Street
P.O. Box 1166
Harrisburg, P A 17108
sbruce@mcneeslaw.com
cmincavage@mcneeslaw.com
ahylander@mcneeslaw.com
mgarber@mcneeslaw.com

Allison C. Kaster, Esq.
PA Public Utility Commission
Bureau of Investigation & Enforcement
PO Box 3265
Harrisburg, PA 17101-3265
akaster@pa.gov

Mr. Robert D. Knecht
Industrial Economics Incorporated
2067 Massachusetts Avenue
Cambridge, MA 02140
rdk@indecon.com

Dated: May 10, 2018

Karen O. Moury, Esq.

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

EXCEPTIONS OF RESPOND POWER LLC

Karen O. Moury
I.D. No. 36879
Eckert Seamans Cherin & Mellott, LLC
213 Market St., 8th Floor
Harrisburg, PA 17101
717.237.6036
kmoury@eckertseamans.com

May 10, 2018

Counsel for Respond Power LLC

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I. INTRODUCTION

Respond Power LLC ("Respond Power") respectfully requests that the Pennsylvania Public Utility Commission ("Commission") reverse the Initial Decision ("ID") of the Administrative Law Judge served on April 20, 2018 and sustain Respond Power's Formal Complaints ("complaints") filed against Pennsylvania Electric Company ("Penelec") and West Penn Power Company ("West Penn") (or collectively "the Companies"). Relying on long-standing legal requirements for tariffs to be just and reasonable, the complaints challenged the application of the Companies' supplier tariff provisions to Respond Power that would result in the payment of over $700,000 in clawback charges in connection with the Companies' purchase of receivables ("POR") programs. Through the Companies' June 1, 2017 through May 31, 2021 default service program ("DSP IV"), they retroactively modified, without prior notice, the terms and conditions of the previously Commission-approved POR programs that were then in effect as part of the June 1, 2015 through May 31, 2017 default service program period ("DSP III").

The findings of fact and discussion of the issues in the ID portray an incomplete picture of this case. Notably, the ID does not even mention the Companies' use of the DSP IV proceeding to make significant mid-course modifications to the POR program that was in effect as part of the DSP III plan. The ID also does not acknowledge Respond Power's assertions regarding the forward-looking nature of default service plans and the importance of making changes to existing programs so that their effective dates are aligned with the commencement of the default service program. Similarly, the ID wholly disregards Respond Power's evidence concerning the fact that Respond Power was not aware that its customers were not paying their bills and had no ability to control the collection efforts and write-off practices of the Companies. While these factors are relevant to Respond Power's claims regarding the unreasonable and unjust application of the

supplier tariff provisions, the ID fails to address them. Therefore, it is imperative that the Commission review Respond Power's Main and Reply Briefs filed in this proceeding, along with Respond Power's proposed findings of fact, to obtain a more comprehensive understanding of the facts that were introduced and the issues that have been raised in this proceeding

Rather than reviewing all of the evidence, the ID relies on the Commission's prior approval of the clawback mechanism in a separate proceeding, of which Respond Power had notice, to conclude that it is now too late for Respond Power to challenge the application of the tariff provisions by the Companies. The ID reaches this conclusion despite statutory language and long-standing case law that permits challenges to a tariff provision at any time. The ID repeatedly indicates that if Respond Power wanted to challenge the tariff provisions, it should have intervened in the Companies' default service proceeding – completely overlooking the costs involved in such an intervention, as well as the effect that such interventions would have on other parties in those proceedings and the ability of EGSs to compete in the retail market. Particularly since Respond Power had a reasonable expectation that the Companies' default service proceeding would only modify programs on a going-forward basis, service of the default service plan on Respond Power and its failure to intervene in the proceeding do not preclude the pending challenges.

Further, the ID improperly places a burden on Respond Power to show more than that the application of the clawback mechanism was unjust and unreasonable. The ID would require Respond Power to establish a drastic change in circumstances since the tariff provisions were approved, even though Respond Power immediately challenged those provisions upon their application. Under the ID, even if the Commission would agree with Respond Power that application of the tariff provisions is unjust and unreasonable, the Commission would be powerless to rectify the situation. That result must be overturned, and in doing so, the Commission should

find that Respond Power has indeed carried its burden of proof to show that application of the supplier tariff provisions is unjust and unreasonable.

Regardless of the burden of proof that is imposed, Respond Power has established that application of the clawback mechanism is unjust and unreasonable. The most compelling reason for reaching this conclusion is that the clawback charges assessed in 2016 and 2017 were already accumulating before the mechanism for imposing them even existed. While Respond Power was participating in the Companies' Commission-approved DSP III POR programs that commenced on June 1, 2015, no clawback mechanism existed. In fact, no clawback mechanism was even proposed until the Companies filed their forward-looking DSP IV plan on November 3, 2015 (during the DSP III program period), to go into effect on June 1, 2017. Further, the mechanism was not approved by the Commission until May 19, 2016 as part of the DSP IV plan. Moreover, supplier tariffs containing the clawback mechanism were not filed by the Companies until October 28, 2016 and were not approved by the Commission until November 10, 2016.

Yet, on September 27, 2016, the Companies assessed clawback charges on Respond Power of nearly one-half million dollars based on the write-offs of customers' unpaid supply charges and Respond Power's pricing data for the period of September 1, 2015 through August 31, 2016. The unpaid supply charges that were written off by the Companies during that period dated back to 2013 and included the Polar Vortex of 2014 – a significant event in which the wholesale market experienced record-breaking prices. While those unpaid supply charges were accruing and being written off, Respond Power was unaware that its customers were not paying their bills and had no reason to inquire since they were participating in non-recourse POR programs, meaning that the Companies were fully purchasing their receivables without regard to whether customers paid their bills. As the clawback mechanism was non-existent in 2013, 2014, 2015 and for most of 2016,

Respond Power participated in the non-recourse POR programs that entire time without any knowledge of or concern about their customers' payment patterns. And, during that entire time, unbeknownst to Respond Power, the Companies were failing to collect supply charges from Respond Power's customers, which would later be written-off and form the basis for then non-existent (but later to be devised) clawback charges.

By the time Respond Power became aware of the clawback mechanism when charges were first assessed in September 2016 (before it even appeared in a tariff provision), it was too late to avoid their imposition because the unpaid supply charges and pricing data upon which they were based had already accrued. Even if Respond Power had been aware of the clawback mechanism when it was first proposed to modify the POR program in effect for the DSP III or even when it was approved by the Commission, the fact that it was based on unpaid supply charges dating back to 2013 means that Respond Power would have still been subject to the fee in September 2016.

As accrued unpaid supply charges continued to be written off by the Companies from September 1, 2016 through August 31, 2017, again based on unpaid supply charges dating back to 2013, Respond Power became subject to another round of clawback invoices in October 2017 in the amount of over $200,000. Again, the Companies failed to provide any information to Respond Power during that time period to indicate that their customers were not paying their bills. Indeed, Respond Power was unable to obtain such information in any kind of meaningful format until February 7, 2018, following the evidentiary hearings in this proceeding.

Throughout this proceeding, Respond Power has not opposed the concept of a clawback mechanism. Rather, Respond Power has challenged the lawfulness of imposing a clawback charge that did not exist while the data on which it would be based were accruing and while Respond Power was serving customers under the Companies' non-recourse POR programs without any

knowledge or reason to be concerned that its customers were not paying their bills. These features of the Companies' clawback mechanism render it unlawful because Respond Power's fundamental rights of due process have been violated and imposition of the clawback charges would violate the rules against retroactive ratemaking.

For these reasons, as well as others that are articulated throughout Respond Power's Main and Reply Briefs concerning the flawed structure of the mechanism, its application to Respond Power should be found to be unjust and unreasonable. In recommending that the complaints be denied, the ID errs as follows:

1) By failing to conclude that Respond Power's fundamental rights of due process were violated when the Companies retroactively made mid-course modifications to the terms of their existing POR programs in the context of a forward-looking default service plan proceeding;

2) By failing to find that application of the clawback mechanism violates the rules against retroactive ratemaking when it expressly modifies the terms of the transactions after they have already occurred;

3) By applying a burden of proof on Respond Power that would require it to demonstrate more than that the application of the tariff provisions would be unjust and unreasonable;

4) By finding that Respond Power did not carry the heavy burden of proof imposed by the ID despite evidence in the record showing that the clawback charges assessed against Respond Power were based on unpaid supply charges that accrued during a time when no clawback mechanism even existed;

5) By concluding that Respond Power's complaints challenging the application of tariff provisions are barred because of the Commission's prior approval of the tariff provisions; and

6) By failing to address the numerous structural flaws of the clawback mechanism that render it unjust and unreasonable in its application to Respond Power.

Respond Power urges the Commission to reverse the ID and sustain its complaints against the Companies, declare that the clawback mechanism is null and void and direct the Companies to cease and desist from imposing that clawback charges on Respond Power that were invoiced in September 2016 and October 2017.

II. BACKGROUND

Respond Power is an EGS licensed by the Commission to supply electricity or electric generation services to the public within the Commonwealth of Pennsylvania.[1] Under this EGS license, Respond Power has served a significant number of residential and small business customers in various electric distribution company ("EDC") service territories throughout the Commonwealth. Since 2013, Respond Power has participated in the Companies' POR programs that have been implemented through their default service plans.[2]

Penelec and West Penn are EDCs providing distribution services to customers within the service territories authorized by the certificates of public convenience issued by the Commission. In their role as EDCs, the Companies provide default generation service to customers who do not select an EGS.[3] This default service is provided by the Companies pursuant to Commission-approved default service programs.[4] Section 2807(e) of the Public Utility Code ("Code") requires EDCs in the default service provider role to acquire electric energy through a prudent mix of resources that are designed to: (i) provide adequate and reliable service; (ii) provide the least cost to customers over time; and (iii) achieve these results through competitive processes that include auctions, requests for proposals and/or bilateral agreements.[5] Pursuant to the Commission's regulations, the Companies are required to file forward-looking default service programs no later than twelve months prior to the conclusion of the currently effective default service program.[6]

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1 *License Application of Respond Power LLC for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as a Supplier of Retail Electric Power*, Docket No. A-2010-2163898 (Order entered August 19, 2010).

2 Respond Power Statement No. 1 at 2, 7.

3 52 Pa. Code § 54.183(a).

4 66 Pa.C.S. § 2807(c).

5 66 Pa.C.S. §§ 2807(e)(3.1), (3.4).

6 52 Pa. Code § 54.185.

Section 54.185(e) of the Commission's regulations establishes the required components of the default service program, which all relate to the procurement of electric generation supply for default service customers.[7]

A "purchase of receivables" or "POR" program sets forth the parameters under which the EDC bills and collects the charges (accounts receivables) due to a participating EGS that is providing the end-user customer with generation service and where the customer has opted to receive a single consolidated bill from the EDC for both energy and wires services. The reason it is appropriate to place the risk of collection on the EDCs is that because in Pennsylvania today, only the EDCs can terminate a customer for non-payment. EDCs recover the costs of uncollectible accounts through other ratepayers in their distribution rates. When the amount of such recovery is not sufficient, EDCs have the ability to recover the costs of uncollectible expense through the structure of the POR program. Participation by EGSs in the Companies' POR programs is mandatory for any EGS that uses the EDC consolidated billing option, which is the only consolidated billing option that is currently available.[8]

Since 2011 and until 2016, Penelec and West Penn have fully purchased the accounts receivables, without any discount or other future remedies, of EGSs serving residential and small commercial customers in the Companies' service territories. The Companies have explained the terms of the these POR programs as meaning that they pay the face value of the account receivables regardless of what they are actually able to collect from customers, which eliminates the risk to EGSs of uncollectible expense associated with serving residential and small commercial customers. Otherwise stated, these POR programs were "non-recourse," which is a commercial

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7 52 Pa. Code § 54.185(e).

8 Respond Power Main Brief ("M.B.") at 6-9.

term meaning that once a receivable is sold, the purchaser of the receivable has no recourse with the seller to collect on any amounts the purchaser is unable to successfully recover through customer collection efforts.[9]

By participating in the Companies' non-recourse POR program since 2013, Respond Power collected its entire accounts receivables from the Companies without regard to whether the customers paid the supply charges that were billed. As a result, Respond Power has undertaken no collection efforts and, in fact, has not even been aware whether or not customers are paying their bills to the Companies.[10] This non-recourse approach for the Companies' POR programs continued through the 2013-2015 default service program ("DSP II")[11] and the 2015-2017 default service program ("DSP III").[12]

In the 2017-2021 default service program ("DSP IV"), which was filed on November 3, 2015, the Companies proposed to modify the POR programs (that were currently in effect and would remain in effect until May 31, 2017 pursuant to the *DSP III Order*) to include a clawback mechanism that would permit Penelec and West Penn to invoice EGSs for a portion of the accounts receivables that had been previously fully purchased but which were not paid by customers.[13] According to the Companies, the proposal was intended to address increased uncollectible costs

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9 Respond Power M.B. at 9-12.

10 Respond Power Statement No. 1 at 7-8.

11 *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company for Approval of Their Default Service Programs*, Docket Nos. P-2011-2273650, P-2011-2273668, P-2011-2273669, P-2011-2273670 (Order entered August 16, 2012).

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

13 *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company for Approval of a Default Service Program for the Period Beginning July 1, 2017 through May 31, 2021*, Docket Nos. P-2015-2511333; P-2015-2511351; P-2015-2511355; and P-2015-2511356 (Recommended Decision served April 29, 2016; Final Order entered May 19, 2016) ("*DSP IV Order*").

associated with EGS receivables which were not being recovered through the uncollectible accounts expense approved in the Companies' rate case.[14]

The Companies' original proposal to add a clawback mechanism to the POR program was modified by a Joint Petition for Settlement filed by the parties in the DSP IV proceeding on April 1, 2016 and approved by the Commission as a two-year pilot.[15] In approving the POR clawback charges on a pilot basis, the Commission acknowledged comments of the parties that their implementation may lead to unintended consequences in the form of unreasonable assessments on EGSs and that parties are free to raise such issues in future proceedings.[16]

The practical effect of this change is that although the Companies are continuing to fully purchase the EGSs' accounts receivables, the Companies' POR programs are no longer "non-recourse." Rather, the Companies now have the future remedy of imposing clawback charges on EGSs after fully purchasing the receivables if the customers do not pay their EGS charges. Essentially, the clawback charges have transformed the Companies' "non-recourse" POR programs into "with recourse" POR programs.[17]

III. PROCEDURAL HISTORY

The genesis of this proceeding was the imposition of clawback charges by Penelec and West Penn against Respond Power on September 30, 2016. Via electronic mail ("email") on that date, Penelec and West Penn invoiced Respond Power in the amounts of $305,890.63 and $178,907.06, respectively. Referencing the *DSP IV Order* as providing additional information

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14 Respond Power. Statement No. 1 at 8.
15 *DSP IV Order*.
16 *DSP IV Order* (Recommended Decision at 29-31).
17 Respond Power Statement No. 1 at 9-10.

about the clawback charges, the emails indicated that failure to remit payment by the due date of October 27, 2016 would result in the Companies withholding POR payments.[18]

On October 28, 2016, the Companies filed supplier tariffs containing the clawback charge, with an effective date of August 1, 2016.[19] By Secretarial Letter dated November 10, 2016, the Commission approved the supplier tariffs, noting they were filed in compliance with the DSP IV settlement.[20] The Secretarial Letter also provided that the approval was without prejudice to any formal complaints timely filed against such tariff revisions.

On November 17, 2016, Respond Power filed complaints against Penelec and West Penn, challenging the application of the clawback provisions in the supplier tariffs. On December 8, 2016, the Companies filed separate Answers and New Matter. On the same date, the Companies filed Motions for Judgment on the Pleadings at both dockets. On December 28, 2016, Respond Power filed Replies to the New Matter and Answers to the Motions for Judgment on the Pleadings.

By Order dated January 23, 2017, ALJ Salapa granted, in part, the Companies' Motions for Judgment on the Pleadings. Under the January 23, 2017 Order, Respond Power would have been precluded from challenging the justness and reasonableness of the tariff provisions and would have been limited to pursuing its allegations regarding computational errors that resulted in the imposition of charges that violated the tariff provisions.

On January 26, 2017, Respond Power filed a Petition for Interlocutory Review and Answer to Material Questions ("Interlocutory Review Petition"). By the Interlocutory Review Petition,

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18 Respond Power Statement No. 1 at 11; Respond Power Exhibit AS-1.

19 Penelec Supplement No. 7 Electric-Pa. P.U.C. No. S-1, Section 12.9(g); West Penn Supplement No. 9 to Electric-Pa. P.U.C. No. 2S, Section 12.4.2, filed at *DSP IV Order* docket.

20 Secretarial Letter dated November 10, 2016, issued at the *DSP IV Order* docket.

Respond Power urged the Commission to permit it to challenge the tariff provisions, on the basis that their application is unjust and unreasonable.

By Opinion and Order entered July 13, 2017 in this proceeding, the Commission granted Respond Power's Interlocutory Review Petition and answered the material questions in the affirmative. Confirming that (i) an entity to whom a tariff provision is applied may file a complaint challenging the application of the provision; and (ii) that tariff provisions are subject to a just and reasonable standard, the Commission found that Respond Power is statutorily entitled to challenge the reasonableness of the application of a Commission-approved tariff.[21]

On October 2, 2017, while the proceeding on the 2016 complaints was pending, Penelec assessed clawback charges against Respond Power in the amount of $142,973.13 and West Penn assessed clawback charges against Respond Power in the amount of $68,039.41. The invoices contained a due date of October 29, 2017 and the e-mail transmitting the invoices indicated that a failure to remit payment by the due date would result in the Companies withholding POR in the amount of $211,012.54.[22]

Respond Power filed complaints against Penelec and West Penn on October 27, 2017 The Companies filed an Answer and New Matter to each Formal Complaint on November 20, 2017. Respond Power filed Replies to the New Matter on December 8, 2017. On November 8, 2017, ALJ Salapa issued Prehearing Order #3, consolidating the 2016 and 2017 Formal Complaints for hearing and decision.

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21 *Respond Power, LLC v. Pennsylvania Electric Company and Respond Power, LLC v. West Penn Power Company*, Docket Nos. C-2016-2576287 and C-2016-2576292 (Order entered July 13, 2017), at 19 ("*Interlocutory Review Order*").

22 Respond Power Exhibit AS-9; Respond Power Statement No. 1-Supp at 7.

Respond Power and the Companies filed Main Briefs on March 16, 2018 and Reply Briefs on March 30, 2018. The ID was served by the Commission on April 20, 2018. Under the Secretarial Letter serving the ID, Exceptions are due by May 10, 2018. These Exceptions are timely filed in accordance therewith and fully incorporate by reference the Main and Reply Briefs filed by Respond Power.[23]

IV. EXCEPTIONS

A. Introduction

Section 335 of the Public Utility Code ("Code") provides that "[o]n review of the initial decision, the commission has all the powers which it would have in making the initial decision."[24] Under well-established Pennsylvania case law, observing that a "broader grant of power to the Commission...can scarcely be imagined," the Commission is always free to wholly disregard and supersede an initial decision.[25]

In this proceeding, the ID must be wholly disregarded and superseded by the Commission through adoption of an order that recognizes the inequities of permitting the Companies to change the rules of the game while the game was being played. It is also imperative that the Commission acknowledge and act upon its ability to rectify a situation that has occurred as a result of the unjust and unreasonable application of previously-approved tariff provisions. Absent Commission action to sustain Respond Power's complaints, the outcome will be one in which a participant in a non-recourse POR program which was having its receivables fully purchased by the Companies is later assessed charges that retroactively, and without prior notice, alter the terms of that program.

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23 A complete Procedural History is set forth in Respond Power's Main Brief at 12-19.

24 66 Pa.C.S. § 335(a).

25 *See, e.g., City of Philadelphia v. Pa. P.U.C.*, 73 Pa. Cmwlth. 355, 361, 458 A.2d 1026 (1983).

In the simplest terms, in 2013, 2014, 2015 and most of 2016, Respond Power was participating in the Companies' non-recourse POR programs without any knowledge of or concern about their customers' payment patterns since the Companies were fully purchasing their receivables without regard to whether customers paid their bills. And, during that entire time, unbeknownst to Respond Power, the Companies were failing to collect supply charges from Respond Power's customers, which would later be written-off and form the basis for then non-existent clawback charges. The ID ignores these inequities and instead goes to great lengths to protect the clawback mechanism from Respond Power's challenge on the basis that it was approved by the Commission in a default service proceeding of which Respond Power had notice.

If the ID is adopted, it will mean that even if the Commission finds that the application of the clawback mechanism to Respond Power is unjust and unreasonable, the Commission is powerless to rectify the situation. That is an absurd result that cannot be upheld by the Commission. Further, if the Commission does not step in to set aside the ID in its entirety, it will be endorsing the view that EGSs must participate in default service proceedings, which are forward-looking by nature, in order to preserve the terms and conditions of previously-approved programs in which they are currently participating. Even aside from due process concerns that result from changing prior POR program terms as part of a forward-looking plan, the notion that EGSs having no interest in default service procurement must intervene in default service proceedings runs counter to the Commission's expressly stated goals of promoting the development of a competitive retail market.[26] Particularly with the Commission's express recognition of the fact that EGSs are already operating in a challenging environment where EDC default service prices do not reflect the current

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26 *See generally Investigation of Pennsylvania's Retail Electricity Market*, Docket No. I-2011-2237952 (Order entered February 15, 2013) ("*End State Final Order*").

wholesale market conditions,[27] it is unreasonable to expect EGSs to use any profits they are earning in the retail market to intervene in default service proceedings as a way of safeguarding existing terms and conditions of participating in this market. Given the cost of such litigation, it seems that the Commission would prefer that EGSs use available resources to offer competitive pricing.

Deferring to the Commission's prior approval of the clawback mechanism, the ID also fails to even consider the many structural flaws identified by Respond Power in this proceeding that render its application unjust and unreasonable even beyond the legal issues that Respond Power has raised concerning the lack of due process and retroactive ratemaking. These flaws include:

1) the lack of notice provided by the Companies informing Respond Power that its customers were not paying their bills, thereby preventing Respond Power from taking steps to avoid the imposition of the clawback charge;

2) the inability of Respond Power to control the Companies' collection efforts, including attempts at telephone contact with the customer that were largely unsuccessful;

3) the prohibition on Respond Power performing credit screening measures and denying service to residential customers for credit-related reasons, which would enable Respond Power to insulate itself from non-paying or poor-paying customers in the first place;

4) the lack of control by Respond Power over the Companies' write-off practices, under which write-offs automatically occur for unpaid amounts approximately 182 days after the final billed date, following collection activities that span months or years;

5) the failure of the Companies to give Respond Power credit when customers make payments after their accounts are written off;

6) the inability of Respond Power to show that the clawback charges should not be imposed due to a particular incident or set of circumstances, such as the Polar Vortex of 2014, which caused write-off amounts to be higher than average;

7) the Companies' allocation of partial payments first to unpaid distribution charges before applying them to unpaid supply charges, thereby inflating the level of unpaid supply charges and increasing Respond Power's exposure to the clawback mechanism; and

8) the effect of the clawback mechanism unlawfully limiting an EGSs' prices and improperly placing the Companies in a gatekeeper role of restricting EGSs' prices relative to their

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27 *End State Final Order* at 11-15.

prices to compare, regardless of the products consumers are choosing in the competitive retail market.

Respond Power's specific Exceptions are detailed below.

B. Exception No. 1: The ID Errs By Failing To Conclude That Respond Power's Due Process Rights Were Violated When The Companies Retroactively Changed The Terms Of Their Existing POR Programs

Fundamental principles of due process require that parties be given notice and an opportunity to be heard before programs approved by prior Commission orders are modified. However, in this proceeding, Respond Power has shown that the Companies made mid-course modifications to the terms and conditions of their DSP III POR programs without affording advance notice to affected parties. Rather than petitioning the Commission for approval to make changes to the existing Commission-approved DSP III POR program, the Companies buried a proposal for a clawback charge mechanism in their forward-looking DSP IV plan and then retroactively applied it to assess clawback charges against Respond Power during the DSP III program period. Through these clawback charges, the Companies modified the terms and conditions of the DSP III POR program after services had already been provided. Indeed, the charges were imposed on Respond Power before supplier tariff provisions were even on file.[28]

The ID concludes that because the Companies served copies of the DSP IV petitions and supporting statements, and notice of the DSP IV petitions were published in the November 14, 2015 *Pennsylvania Bulletin*, Respond Power's due process rights were adequately protected.[29] This conclusion wholly disregards Respond Power's arguments regarding the Companies' mid-course modifications of it DSP III POR program without any notice to Respond Power. Receiving

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28 Respond Power M.B. at 27-34.

29 ID at 31.

service of the forward-looking DSP IV filing did not provide that notice since Respond Power had a reasonable expectation that such a filing would only establish terms and conditions commencing on June 1, 2017.

1. DSP Filings Are Forward-Looking

The Companies' expressly stated purpose of filing the DSP IV plan filed on November 3, 2015 was to establish the terms and conditions for the default service program for the forward-looking period from June 1, 2017 through May 31, 2021.[30] In response to Respond Power's claims that the DSP IV plan failed to put parties on notice of a proposal to modify the DSP III program, the ID suggests that Respond Power should have filed preliminary objections to the DSP IV plan if it believed the Companies provided insufficient information.[31] This suggestion of the ID overlooks the fact that Respond Power did not intervene in the proceeding due to its forward-looking nature and otherwise did not become aware of the insufficiency of the notice until it received clawback charge invoices in September 2016.[32]

As its witness explained, Respond Power did not intervene in the proceedings that were held to review the Companies' DSP IV plans for several reasons:

> Initially, Respond Power's resources are limited and any additional costs incurred beyond conducting its primary business of supplying electricity will limit the products and services it can offer to consumers. Moreover, as an EDC's default service proceeding is intended to approve the procurement process that will be utilized by the EDCs to procure power for default service, these proceedings can involve substantial litigation and become very complex. For example, the Companies' default plan proceeding to be effective June 1, 2013 included a binding poll, a 162-page Opinion and Order and three subsequent orders addressing petitions for reconsideration and appeal of staff action. Because intervention in default service proceedings can be very costly, especially for an EGS like Respond

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30 DSP IV Petition at 1-2.
31 ID at 32.
32 Respond Power M.B. at 12, 27; Respond Power R.B. at 21-22.

Power who has little or no interest in the procurement of default service supply by the Companies, it is not reasonable to intervene.[33]

The whole purpose of default service plans is to establish the parameters of providing default service in a future program period, meaning that any changes approved would not be effective until the start date of the plan. Neither the Code nor the Commission's regulations contemplate that issues beyond the procurement of default service supply will be addressed as part of EDC's default service programs.[34] Therefore, no reason existed for Respond Power to consider the possibility that a filing to establish the Companies' DSP IV plans would contain a retroactive change to a previously-approved POR program that was then in effect or that such change would be based on historical pricing and write-off data that had accrued prior to Commission approval of the proposed clawback mechanism and even before the filing of the proposal to implement clawback charges.

While the Companies have contended that neither the duration nor the effective date of revisions to POR programs is "co-terminus" with the terms of any particular default service program,[35] that assertion does not justify making mid-course changes to POR programs through the next DSP filing. If the Companies want to include their POR programs in their default service plans, it is essential that they be required to implement all aspects of the default service plan on the first date of the default service program period. If they wish to have time periods for their POR programs that are not co-terminus with the terms of any particular default service program, they should be required to do as Respond Power suggests – file stand-alone supplier tariff provisions

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33 Respond Power Statement No. 1 at 13-14 (footnotes omitted).

34 *See* 66 Pa. C.S. § 2807(e); 52 Pa. Code §§ 54.181-54.189; 52 Pa. Code §§ 69.1802-69.1817.

35 Companies' M.B. at 28-29.

that are served on suppliers, with proposed effective dates, giving them the requisite notice and an opportunity to be heard.[36]

2. Service of the DSP IV Plan Was Insufficient to Provide Notice of Proposed Retroactive Modifications

The Companies' retroactive conversion of the POR program from "non-recourse" to "with recourse" occurred without advance notice to Respond Power. By the Commission's *DSP III Order*, the Commission approved a default service program to cover the period through May 31, 2017, including continuation of previously Commission-approved non-recourse POR programs. Service of the DSP IV Plan on Respond Power did not provide notice that the Companies were proposing to change the terms of the POR program approved by the *DSP III Order*.

The Pennsylvania Superior Court has enunciated the criteria that must be established to satisfy due process.[37] Specifically, notice must be reasonably calculated to apprise interested parties of the proposal and afford them an opportunity to present their objection. Although notice need not be entirely comprehensive, it must not be misleading or materially incomplete. It is further required that the notice contain an adequate description of the proceedings and include information that a reasonable person would consider material in making an informed, intelligent decision of whether to participate or risk being bound by the final judgment.

Service of the DSP IV filing was not reasonably calculated to apprise Respond Power of a backward-looking proposal affecting the DSP III program period and to afford Respond Power an opportunity to present objections. Since the filing was made for the express purpose of establishing a default service program to cover the <u>future</u> period of June 1, 2017 through May 31, 2021, the

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36 Respond Power R.B. at 24-25.

37 *Wilkes v. Phoenix Home Life Mutual Insurance Company*, 851 A.2d 204, 211 (2004), *rev'd on other grounds*, 587 Pa. 590, 902 A.2d 366 (2006).

notice did not contain an adequate description of the proceedings to inform a reasonable person of the need to participate to protect the terms of an existing program in effect until May 31, 2017 or risk being bound by the final judgment. As a result, Respond Power was unaware that the Companies were proposing a modification to a Commission-approved program mid-course through the 2015-2017 default service program.[38]

Additionally, the notice published in the *Pennsylvania Bulletin* described the DSP IV petition as seeking approval of a default service program for the period beginning June 1, 2017 through May 31, 2021. Nothing about that notice suggests that the filing may result in the mid-course modification of an existing program previously approved by the Commission. Rather, the notice indicated only that a default service plan had been filed to cover a future program period[39] Therefore, Respond Power was deprived of notice and an opportunity to be heard on the proposed modifications to a POR program in which it was participating, which is a violation of fundamental principles of due process.[40]

3. Mid-Course Program Modifications Require Due Process

The Commission has previously found that once an EDC plan is approved by Commission order, specific procedures for rescission and amendment of such order must be followed to assure due process for all affected parties.[41] If an EDC believes it is necessary to modify a Commission-approved plan, it is incumbent upon the EDC to file a petition requesting that the Commission rescind and amend its prior order approving the plan. Further, such a petition must set forth the

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38 Respond Power Statement No. 1 at 13.

39 45 Pa.B. 6654; Respond Power MB at 27-34.

40 *See Schneider v. Pennsylvania Pub. Util. Comm'n*, 479 A.2d 10 (Pa. Cmwlth. 1984).

41 *Petition of PECO Energy Company for Approval of its Act 129 Energy Efficiency and Conservation Plan*, Docket No. M-2009-2093215 (Order entered October 23, 2009) ("*PECO Act 129 Order*"), at 43; 66 Pa.C.S. § 703(g).

rationale for the relief requested and be served on affected parties.[42] Absent such a filing and Commission approval, mid-course corrections or modifications must be rejected.[43]

As the Commission found in *PECO Act 129 Order*, the Companies should have filed a petition seeking to modify the Commission-approved program. Instead, the Companies opted to bury a brand new proposed clawback charge that it intended to implement retroactively against EGS within a massive filing to establish their forward-looking 2017-2019 default service program, which included direct testimony from three different witnesses, hundreds of pages of supporting exhibits and proposals regarding all four of the FirstEnergy companies.[44]

Quite simply, despite the fact that Respond Power was participating in the "non-recourse" POR program that was currently in effect for the DSP III program period of June 1, 2015 through May 31, 2017, it was not notified of the Companies' proposal to change to the terms and conditions of that POR program to make it "with recourse." After giving no notice of proposed mid-course modifications to a Commission-approved program, the Companies assessed the clawback charges against Respond Power for unpaid supply charges that had accumulated prior to the existence of the clawback mechanism and that were written off prior to approval of the clawback mechanism.

Additionally, the Commission has an obligation to give notice and an opportunity to be heard to interested parties. Code Section 703 authorizes the Commission to rescind or amend any order made by it at any time, after notice and opportunity to be heard by affected parties.[45] Here, however, the Commission's *DSP IV Order* modified its prior orders approving the Companies' POR program without providing affected parties any notice and opportunity to be heard. Prior to

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42 *Id.*; 52 Pa. Code §§ 5.41 (relating to petitions generally) and 5.572 (relating to petitions for relief).
43 *Id.*
44 Respond Power Statement No. 1 at 13-14.
45 66 Pa.C.S. § 703(g).

approving such modifications to the POR, the Commission had a legal obligation to provide notice to affected parties and given them an opportunity to be heard. As this step was not taken, Respond Power's due process rights were violated and the clawback charges approved by the *DSP IV Order* should be rendered null and void.

It is also a violation of due process that supplier tariff provisions were applied to Respond Power before they were even on file with the Commission. Although the *DSP IV Order* approved a settlement that contained tariff pages,[46] the fact remains that the Companies did not file the supplier tariffs containing the clawback mechanism until October 28, 2016, despite imposing the initial charges on Respond Power in September 2016.[47] As the ID notes, tariffs must be filed with the Commission setting forth the utility's rates, services, rules, regulations and practices so that the public may inspect its contents.[48] Until such time as the supplier tariff provisions were filed on October 28, 2016, they were not available for an inspection of their contents. Although the Commission approved the provisions with an effective date of August 1, 2016, it did so without prejudice to the filing of complaints. Making the provisions retroactively effective did not cure the fact that the tariffs were not on file when the Companies first assessed clawback charges and could not have been inspected by the public.

4. Due Process Envisions Opportunity to Avoid Proposed Action

Even though Respond Power was aware of the existence of the clawback charges before they were assessed in 2017, Respond Power's due process rights would also be violated if those charges are required to be paid. Knowing about the clawback mechanism since approximately

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46 ID at 30.

47 *See Respond Power LLC for Issuance of Ex Parte Emergency Order*, Docket No. P-2016-2572934 (Emergency Order entered October 27, 2016).

48 ID at 28. See 66 Pa.C.S. § 1302; 52 Pa. Code § 53.25.

September 27, 2016 does not cure the lack of notice and the lack of opportunity that Respond Power had to oppose retroactive changes to the DSP III POR programs that were included in the Companies' DSP IV filing. Had the Companies provided specific notice of their proposed retroactive changes to their then existing POR programs, Respond Power would have had an opportunity to raise the structural flaws in the clawback charges that it is now exposing. Moreover, the vast majority of the write-offs from September 1, 2016 through August 31, 2017 involved unpaid supply charges dating back to 2013, 2014, 2015 and the first eight months of 2016 before the clawback charge even went into effect.[49]

The very essence of due process requires that Respond Power be given notice and an opportunity to be heard before the events occurred that would trigger the imposition of the clawback charges. Yet, here the supply charges on which the write-offs would be based had been accruing for several years. Also, due to the use of historical pricing data for the twelve-month period preceding the invoice, Respond Power had no ability to avoid the 2016 assessment even by limiting its prices – a practice that the clawback mechanism unlawfully condones. Since such notice and opportunity to be heard was not provided, permitting the Companies to recover the clawback charges from Respond Power would violate fundamental principles of due process.

C. Exception No. 2: The ID Errs By Failing to Find That Application Of The Clawback Mechanism Violates the Rules Against Retroactive Ratemaking

Retroactively changing the rules for the DSP III POR program while the program was in effect is impermissible retroactive ratemaking. While Respond Power was participating in the Companies' DSP III Commission-approved POR program in 2015, it had no knowledge that a clawback charge would later be implemented that would modify the terms of the DSP III-approved

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49 Respond Power M.B. at 33.

program during the DSP III plan period. The DSP IV-approved rule change that went into effect on August 1, 2016 (during the DSP III plan period), which was based on write-offs that occurred from September 1, 2015 through August 31, 2016 and pricing data from the same time period, resulted in an assessment of clawback charges on September 30, 2016. All of this occurred prior to the June 1, 2017 effective date of the DSP IV plan. No other aspect of the DSP III plan was similarly, retroactively modified in this manner. Such an outcome is exactly what the rules against retroactive ratemaking are designed to prevent.[50]

The ID rejects Respond Power's argument by improperly finding that clawback charges are not rates.[51] This conclusion, however, is not consistent with the Commission findings that the term "rate" is broadly defined to include all charges imposed by a utility. As the Commission has observed:

> It is well-settled that Section 1301 of the Code, 66 Pa. C.S. § 1301, requires that, "[e]very rate made, demanded, or received by any public utility...shall be just and reasonable, and in conformity with regulations or orders of the commission. *See Barasch v. Pa. PUC*, 507 Pa. 496, 491 A.2d 94 (1985), citing *Pa. PUC v. Pa. Gas and Water Co.*, 492 Pa. 326, 424 A.2d 1213 (1980), *cert. denied* 454 U.S. 824, 102 S.Ct. 112, 70 L.Ed.2d 97 (1981). Under the predecessor, Public Utility Law, and under the current, Public Utility Code, the term "rate" is broadly defined as encompassing every individual, or joint fare, toll, charge, rental, or other compensation whatsoever of any public utility made, demanded, or received for any service within this act [Code], offered, rendered, or furnished by such public utility and includes any rules, regulations, practices, classifications or contracts affecting any such compensation, *charge*, fare, toll, or rental.[52]

The Commission has also noted that when there is a question concerning the justness and reasonableness of rates of any entity subject to the Code, the Commission cannot be indifferent.[53]

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50 Respond Power MB at 34-40.

51 ID at 33-35.

52 *SBG Management Services, Inc./Colonial Garden Realty Co., L.P. v. Philadelphia Gas Works*, Docket No. C-2012-2304183 (Order entered December 8, 2016), at 82 (emphasis added) (footnote omitted).

53 *See Di Santo v. Dauphin Consol. Water Supply*, 436 A.2d 197 (Pa. Super. 1981); *Painter v. Pa. PUC*, 116 A.3d 749 (Pa. Cmwlth. 2015).

The rule against retroactive ratemaking prohibits the Commission from allowing utilities to impose rates to recoup past losses. Retroactive ratemaking occurs when persons are retroactively assessed rates based on a different rate methodology than it previously imposed. The rule against retroactive ratemaking has been described as preventing a utility from raising rates on service that was already sold.[54] A major underlying purpose of the filed-rate doctrine, which prevents retroactive ratemaking, is predictability. Avoiding retroactive ratemaking permits entities to know the consequences of their actions. The rationale for the rule against retroactive ratemaking is to avoid unpredictable, arbitrary or unilateral choices as to what the charges for utility service should be. Its equity lies in its steady application and the avoidance of potential significant impact on the party being assessed fees by the utility.[55]

Everything that the rule against retroactive ratemaking seeks to avoid happened when the Companies assessed clawback charges against Respond Power, as follows:

- The Companies made after-the-fact corrections to their DSP III POR program, converting it from "non-recourse" to "with recourse," resulting in Respond Power being assessed a charge that was not part of the DSP III POR program in which it was participating;
- The Companies retroactively implemented a charge due to growing uncollectible expenses that it had not previously anticipated;
- The Companies imposed a retroactive fee to recoup higher levels of uncollectible expenses;
- The Companies devised a different method for recovering uncollectible expenses by establishing a clawback charge to be retroactively imposed on certain EGSs;
- The Companies raised the cost, after the fact, for EGSs participating in the POR program;

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54 Respond Power M.B. at 35.
55 Respond Power M.B. at 35-36.

- The Companies provided no notice to EGSs during the program period that their participation would be subject to the later imposition of an additional fee;
- The Companies afforded no opportunity to EGSs to know or avoid the consequences of their continued participation in the POR program;
- The Companies made mid-course unilateral choices about the terms and conditions about the DSP III POR program; and
- The Companies removed all certainty and predictability from the POR program by implementing clawback charges on a retroactive basis.

Notably, when the first clawback charges were invoiced to Respond Power in September 2016, all of the data on which they were based had already accrued, and their imposition could not be avoided or moderated in any way.[56] Even to the extent that the Commission does does not view the clawback charge as amounting to impermissible retroactive ratemaking, the underlying principles for the rule against retroactive ratemaking demonstrate the unreasonable nature of the clawback charges.[57]

The retroactive argument equally applies to the 2017 clawback charges since they were based on write-off data that were accumulating prior the date on which the clawback charge was approved by the Commission. Although the DSP IV 2017-2019 Default Service Plans did not go into effect until June 1, 2017, the POR clawback charges that were assessed in September 2017 were based on historical data from the prior twelve-month period of September 1, 2016 through August 31, 2017, which included amounts that customers failed to pay to the Companies dating back to 2013. In fact, the unpaid amounts contained in the write-off data that forms the basis of the 2017 clawback charges began accruing prior to the filing of the Companies' proposal in the

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56 Respond Power M.B. at 36-38.
57 Respond Power M.B. at 39.

DSP IV proceeding to implement clawback charges.[58] It is not reasonable for clawback charges to be assessed on the basis of data that accrued months or years before the charges are proposed, approved and included in a tariff.[59]

As to the use of historical data, the ID refers to other situations where the Commission has approved rates and charges based on such data.[60] However, Respond Power's witness explained that those examples involved historical demand patterns of customers that are used to determine future rates. The customers always knew that they were going to be billed for their usage; all that may have changed were the specific billing determinants that would be used. Here, Respond Power expected to be fully compensated for its receivables without recourse from the Companies only to learn years later that this would not be the case. Moreover, Respond Power's witness testified that "the rates that are paid by customers on a prospective basis using historical data are based on the customers' own demand patterns that they could and did control."[61] By contrast, here, the Companies have sought to impose charges on Respond Power related to billed amounts that were not paid by the customers and were not collected by the Companies – neither activity over which Respond Power had any control. The ID completely overlooks these points.

Even beyond the realm of utility ratemaking, retroactive application of laws is not permissible. A retroactive law has been defined as one that "relates back to and gives a previous transaction a legal effect different from that which it had under the law in effect when it transpired."[62] That is exactly what has occurred through implementation of the clawback charge.

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58 Respond Power Exhibit AS-12.
59 Respond Power Statement No. 1-Supp at 11.
60 ID at 34.
61 Respond Power Statement No. 1 at 21.
62 *Department of Labor and Industry, Bureau of Employment Security v. Pennsylvania Engineering Corp.*, 54 Pa. Commw. Ct. 376, 380, 421 A.2d 521, 523 (1980).

At the time Respond Power was participating in the Commission-approved DSP III POR program for the period of June 1, 2015 through May 31, 2017, it was indifferent to whether its customers paid their supply charges because it was being made whole through the Companies' "non-recourse" POR program. Even if Respond Power is deemed to have known on May 19, 2016 that the terms of its participation in the DSP III POR program for the period of June 1, 2015 through May 31, 2017 were being modified as a result of the *DSP IV Order* and that the Companies now would have recourse to impose fees to recover some of those unpaid supply charges, it was too late at that point to take actions to avoid imposition of the clawback charge. By then, nearly nine months of write-offs on which the charge would be based and its pricing of supply had already occurred. More importantly, the write-offs were based on unpaid supply charges dating back to 2013, of which Respond Power had no knowledge or ability to control.[63]

The ID rejects Respond Power's argument concerning the improper retroactive application of laws because the clawback charges are not statutes. The ID also notes that "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. The ID further indicates that substantive rights are those affected when the application of the statute imposes new legal burdens on past transactions or occurrences.[64]

Regardless of whether the clawback charges are viewed as "rates," no doubt exists that the clawback mechanism is a tariff provision. As noted by the ID, a tariff is a schedule of the rates, rules, regulations, practices or contracts.[65] Further, the ID refers to tariffs provisions as "part of a set of operating rules imposed by the Commission" and explains that they "have the force and

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63 Respond Power M.B. at 31-33.

64 ID at 35.

65 ID at 34.

effect of law."[66] As such, the tariff is a "law" or "legal obligation," and changing it to give a previous transaction a different legal effect than it had when the transaction transpired or to impose a new legal burden on past occurrences is not permissible.

Here, the clawback mechanism clearly gives a previous transaction a legal effect different from that which it had under the law in effect when it transpired. When the Companies purchased Respond Power's receivables from 2013 through August 1, 2016, they did so without recourse. The accounts of Respond Power's customers who did not pay their bills were written off during that timeframe, and Respond Power was oblivious to that fact. Respond Power was not responsible for those write-offs under the terms and conditions of the POR program in which it was participating. It was not until August 1, 2016 when a new tariff provision went into effect that Respond Power became subjected to a new legal burden as a result of those prior transactions. When the first clawback charges were invoiced to Respond Power in September 2016, all of the data on which they were based had already accrued, and their imposition could not be avoided or moderated in any way.[67] That outcome is the epitome of impermissible retroactive ratemaking.

D. Exception No. 3: The ID Errs In Applying A Burden On Respond Power That Would Require It Show More Than That Application Of The Tariff Is Unjust and Unreasonable

Code Section 701 entitles any person having an interest in the subject matter or any public utility to complain about any act or thing done or omitted to be done by any public utility.[68] Under Code Section 332(a), Respond Power – as the complainant – has the burden of proof.[69] Code Section 1309(a) empowers the Commission to find that any rate of a public utility for any service

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66 ID at 28. *See PPL Electric Utilities Corp. v. Pa. P.U.C.*, 912 A.2d 386 (Pa. Cmwlth. 2006).
67 Respond Power Statement No. 1 at 16.
68 66 Pa.C.S. § 701.
69 66 Pa.C.S. § 332(a).

is unjust or unreasonable.[70] As the POR is clearly a service provided by the Companies (purchasing the receivables of EGSs) and the clawback charge is a fee that is imposed on EGSs with write-offs and prices above certain levels, no doubt exists that it is a rate, as that term has been broadly defined by the Commission. In any event, Pennsylvania case law requires that tariff provisions, which include rates, likewise be just and reasonable.[71]

As the party carrying the burden of proof in this proceeding, Respond Power is required to demonstrate that the application of the Companies' clawback mechanism contained in its supplier tariffs, resulting in over $700,000 in clawback charges being assessed to Respond Power, is unjust and unreasonable.[72] As the Commonwealth Court in *Brockway Glass* observed, the Commission is empowered to evaluate the reasonableness of tariffs filed with it to determine whether the provisions are consistent with the Code, Commission policies and its regulatory scheme.[73] Also, reviewing a challenge to a tariff relating to service line extensions, the Commonwealth Court in *Kossman v. Pa. Public Utility Commission*,[74] examined the tariff provisions to determine whether they were just and reasonable.[75]

Here, the ID does not consider whether the tariff provisions at issue, or their application to Respond Power, are just and reasonable. Rather than holding Respond Power to this standard, the ID states that Respond Power must prove that the facts and circumstances have changed so

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70 66 Pa.C.S. § 1309(a).

71 *See Brockway Glass v. PUC*, 437 A.2d 1067 (Pa. Cmwlth. 1981)

72 *Respond Power, LLC v. Pennsylvania Electric Company, et al.*, Docket Nos. C-2016-2576287, *et al.* (Order on Interlocutory Review entered July 13, 2017) ("*Interlocutory Review Order*").

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

74 694 A.2d 1147 (1997).

75 *See also Interlocutory Review Order* at 17-21; *Core Communications, Inc. v. AT&T Communications of Pennsylvania, LLC*, Docket No. C 2009 2108186 (Recommended Decision served May 24, 2011, at 25. Orders entered August 15, 2012 and December 5, 2012) (the burden to show that a charge imposed on another provider under an existing tariff is unreasonable is on the complaining party).

drastically so as to render application of the tariff provision unreasonable.[76] In reaching this conclusion, the ID relies on language in *Shenango Township Twp. v. Pa. Pub. Util. Comm'n.*[77] Under the ID, even if the Commission concludes that a tariff is unjust and unreasonable, it is powerless to rectify the situation.

In the *Interlocutory Review Order*, the Commission cited to *Shenango Township* for the proposition that Respond Power has a heavy burden to overcome the presumption that a Commission-approved tariff provision is just and reasonable but did not discuss or reference the "changed circumstances" standard of review on which the ID relies. Clearly, the Commission framed the discussion only as to whether application of the tariff provision is just and reasonable. Specifically, recognizing that the existing, Commission-approved tariff provision is *prima facie* reasonable, the Commission stated that it was necessary for Respond Power to show that it should no longer be viewed as reasonable or "to show that the application of the existing tariff at issue is applied unreasonably."[78] Further, the Commission described Respond Power's burden of showing "that the tariff, as applied, was not just and reasonable."[79] The Commission also observed that the tariff resulting from a Commission-approved settlement did not insulate it "from a colorable challenge concerning the justness and reasonableness of its application under a fact-specific complaint."[80]

As the Commission recognized in the *Interlocutory Review Order*, Respond Power is statutorily entitled to challenge the reasonableness of the clawback charges.[81] Therefore, imposing

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76 ID at 25; Conclusion of Law ¶ 5.

77 686 A.2d 910 (Pa. Commw. Ct. 1996). Respond Power's Main Brief explains the inapplicability of the *Shenango Township* language in this proceeding, at pages 23-26.

78 *Interlocutory Review Order* at 19.

79 *Id.*

80 *Id.* at 20.

81 *Interlocutory Review Order* at 19.

an additional burden to show a drastic change in facts and circumstances, which is not in the Code and appears only evolved through case law, would unduly limit the ability of a complaining party to exercise its statutory right to challenge a tariff provision on the basis that it is unreasonable. Especially since other Courts have held complaining parties only to the "just and reasonable standard," *Shenango Township* should not be relied upon to require Respond Power to show a drastic change in facts and circumstances. For instance, despite citing *Shenango Township*, the Court in *Kossman* discussed only whether the tariff provision was unreasonable. Importantly, the Court in *Kossman* did not impose the higher burden on the complaining party that was established by the Court in *Shenango Township*.

Moreover, the *Shenango Township* ruling is based on a specific factual situation that does not exist here. In that case, the utility and the township had entered into a twenty-year agreement consistent with the utility's tariff. Following the Commission's approval of the agreement, the township filed a complaint challenging the tariff. Naturally, given the township's earlier acceptance of the tariff provision, it made sense that the Court expected the township to explain what had changed to now render the tariff provision unreasonable.[82] Here, Respond Power Respond Power clearly wasted no time in challenging the reasonableness of the clawback mechanism.[83] Since Respond Power immediately challenged the application of the tariff provisions, it is sufficient for Respond Power to show that application of the clawback charges is unreasonable.

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82 The Commission decisions cited by the ID similarly involve factual scenarios under the complaining entities had received service under the applicable tariff provision for some period of time before challenging it. ID at 25.

83 Respond Power M.B. at 12-15.

E. Exception No. 4: The RD Errs By Finding That Respond Power Did Not Carry Its Burden Of Proof

As argued in its Main and Reply Briefs, Respond Power carried its burden of proof to show that the application of the Companies' clawback mechanism is unjust and unreasonable.[84] Even to the extent that the Commission holds Respond Power to a higher standard, Respond Power pointed to evidence in this proceeding showing a change in circumstances that has occurred since the Commission's approval.

The ID finds that Respond Power did not present evidence concerning changes in facts and circumstances since the Commission approved the clawback charges.[85] However, Respond Power presented evidence showing that the clawback charges assessed by the Companies in September 2016 and October 2017 were based on the write-off of unpaid supply charges dating back to 2013. The Commission's *DSP IV Order* contains no indication that the Commission was aware of this fact, which is neither explained in the Joint Settlement Petition nor mentioned by the Commission.

Moreover, the clawback charges fundamentally altered the terms and conditions of a POR program in which Respond Power was participating as part of the DSP III plan without advance notice – a fact that the Commission also appears not to have considered in the *DSP IV Order*. To the contrary, the Recommended Decision, which was adopted by the *DSP IV Order* ("*DSP IV RD*") notes that in the context of a four-year default service program, the Companies agreed to conduct a mid-course check in October 2017, with one of the issues for discussion being the POR clawback charge, which was being implemented as a two-year pilot.[86] The settlement further entailed a commitment that the Companies would not propose any changes to the first prong of the

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84 Respond Power M.B. at 21-56.; Respond Power R.B. at 13-37.
85 ID at 27.
86 *DSP IV RD* at 8, 16.

test prior to 2021.[87] All of these timeframes suggest that the clawback mechanism was being implemented, as it should have been, in tandem with the default service programs.

The reference to a September 2016 assessment only appears in the *DSP IV RD* as part of the recitation of the settlement language,[88] without any discussion. Clearly, the mechanism was packaged by the Companies in a way that was not transparent and appeared to be aligned with the default service program period. Notably, the tariff provision containing the clawback mechanism was not even filed until October 28, 2016, about a month after the charges were invoiced to Respond Power, calling into question the validity of the assessment from the outset and showing a change in drastic facts and circumstances from the situation that existed prior to those provisions being included in the tariff.

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

F. Exception No. 5: The ID Errs In Concluding That Respond Power's Complaints Are Barred By Section 316 Of The Public Utility Code

The ID improperly concludes that Respond Power's complaints are barred by Code Section 316 and that Respond Power's complaints represent a collateral attack on the *DSP IV Order*. In doing so, the ID fails to address the substantive issues raised in this proceeding challenging the unjust and unreasonable application of the tariff provision.

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87 *DSP IV RD* at 17.

88 *Id.*

The Commission has already rejected the notion that Respond Power is barred from challenging the application of the clawback charge on the basis of Code Section 316.[89] The entire basis for the Companies' Motion for Judgment on the Pleadings and their opposition to Respond Power's Petition for Interlocutory Review was their argument that Respond Power was precluded from filing the complaints on the grounds that they represented a collateral attack on the *DSP IV Order*. However, in granting Respond Power's Petition for Interlocutory Review, the Commission appropriately found that a party may file a complaint against the application of a tariff at any time and gave no credence to the Companies' claim, and now the ID's conclusion, that Respond Power is somehow barred from challenging the application of the clawback tariff provisions because it was served with the DSP IV plan and the Commission already approved the clawback mechanism.

Notably, Code Section 701 gives any person having an interest in the subject matter to complain in writing about "any act or thing done" by a public utility.[90] The Code 316 doctrine is only intended to preclude such person from relitigating the same issues against the same party. As the Commission has not previously resolved the pending dispute between Respond Power and the Companies regarding the application of the clawback mechanism, Respond Power's Complaints challenging the charges as unjust and unreasonable are not precluded by this doctrine.[91]

Code Section 316 provides, in pertinent part, as follows: "Whenever the commission shall make any rule, regulation, finding, determination or order, the same shall be prima facie evidence of the facts found and small remain conclusive upon all parties affected thereby, unless set aside,

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89 66 Pa.C.S. § 316.

90 66 Pa.C.S. § 701.

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

annulled or modified on judicial review."[92] In *Tillman*, the Commission dismissed a complaint on the basis of Code Section 316, explaining that it must be shown that: (i) the issue decided by a prior final judgment is identical to the one presented in the later action; (ii) the issue was actually litigated; (iii) the party against whom issue preclusion was asserted was a party or in privy with a party to the prior litigation; and (iv) the determination of the issue was essential to the prior final judgment.[93]

The ID does not even address the criteria that the Commission has relied upon in making Code Section 316 determinations. When such an analysis is performed, it is clear that Respond Power's complaints are not a collateral attack on the *DSP IV Order*.[94] Indeed, none of the factors for applying the Code 316 doctrine is present. The issues decided by the *DSP IV Order* are not identical to the challenged presented by Respond Power in this proceeding. Notably, the Commission did not resolve issues in the *DSP IV Order* concerning inadequate due process, impermissible retroactive ratemaking and numerous structural flaws that render the application of the tariff provisions unjust and unreasonable. Moreover, the issues surrounding the clawback mechanism were not litigated at all since the *DSP IV Order* approved a settlement of the proceeding. In addition, Respond Power was not a party to the proceeding that resulted the issuance of the *DSP IV Order*, and its decision not to intervene in that proceeding was reasonable, considering the significant costs of doing so, its lack of interest in the way default service supply is procured and its valid expectation that a proceeding filed to establish a default service program

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92 66 Pa.C.S. § 316.

93 *Tillman* Initial Decision served November 19, 2015, at 4-7 (discussion of preclusion was altered by remand).

94 Although the ID does not rely on a series of cases involving Pennsylvania State University, which were cited by the Companies in their briefs regarding the effect of Code Section 316 on the ability of Respond Power to pursue the complaints, Respond Power fully addressed the inapplicability of those rulings to this proceeding in its Reply Brief at pages 15-19.

to begin on June 1, 2017 would not alter the terms of the default service program that was then in effect. Finally, no issues were determined by the *DSP IV Order* regarding the clawback mechanism that were essential to the final judgment.[95] In short, Respond Power has not waived its rights to challenge the application of the clawback charge.[96]

G. Exception No. 6: The ID Errs By Failing To Address The Numerous Structural Flaws Of The Clawback Mechanism In The Companies' Application To Respond Power

During this proceeding, Respond Power raised numerous structural flaws of the clawback mechanism, which the ID declines to address, finding that Respond Power should have pursued those arguments in the DSP IV proceeding.[97] As discussed above, it would be unreasonable for the Commission to expect all EGSs to participate in default service proceedings, particularly those EGSs like Respond Power who has no interest in the way that the Companies procure default service supply. The more important point is that Respond Power did not participate in the proceeding or agree to the settlement and therefore is not precluded from raising issues regarding the unjust and unreasonable application of a tariff provision that was adopted in that proceeding. While Respond Power has a heavy burden to establish that the application of the tariff provision is unjust and unreasonable, due to the Commission-approved clawback mechanism being considered *prima facie* reasonable, its decision not to participate in a default service proceeding that was initiated by the Companies to establish a forward-looking default service plan certainly

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95 Respond Power R.B. at 13-15.

96 *See Borough of Lansdale v. PP&L, Inc.*, 426 F. Supp. 2d 264 (2006) (an entity that was not a party to a proceeding is not barred from raising an issue of fact or law in a subsequent proceeding). In the case cited by the ID for the principle of *res judicata* or claim preclusion, the federal court rejected the utility's arguments based on that principle because three of the four prongs of the test were not satisfied. The federal court quoted *Purter v. Heckler*, 771 F.2d 682, 689-90 (3rd Cir. 1985), which explained that this principle "is a court-created rule that is designed to draw a line between a meritorious claim on the one hand and the vexatious, repetitious and needless claim in the other." ID at 26-27.

97 ID at 35-37.

does not preclude Respond Power from challenging the application of the tariff now. Through Respond Power's challenge, it has exposed a number of flaws in the mechanism that should result in a finding by the Commission of its unjust and unreasonable application to Respond Power.

The flaws identified by Respond Power are fully explained in its Main and Reply Briefs. In summary fashion, those flaws rendering application of the clawback mechanism unjust and unreasonable include:

1) the lack of notice provided by the Companies informing Respond Power that its customers were not paying their bills, thereby preventing Respond Power from taking steps to avoid the imposition of the clawback charge;[98]

2) the inability of Respond Power to control the Companies' collection efforts, including attempts at telephone contact with the customer that were largely unsuccessful;[99]

3) the prohibition on Respond Power performing credit screening measures and denying service to residential customers for credit-related reasons, which would enable Respond Power to insulate itself from non-paying or poor-paying customers in the first place;[100]

4) the lack of control by Respond Power over the Companies' write-off practices, under which write-offs automatically occur for unpaid amounts approximately 182 days after the final billed date, following collection activities that span months or years;[101]

5) the failure of the Companies to give Respond Power credit when customers make payments after their accounts are written off;[102]

6) the inability of Respond Power to show that the clawback charges should not be imposed due to a particular incident or set of circumstances, such as the Polar Vortex of 2014, which caused write-off amounts to be higher than average;[103]

7) the Companies' allocation of partial payments first to unpaid distribution charges before applying them to unpaid supply charges, thereby inflating the level of unpaid supply charges and increasing Respond Power's exposure to the clawback mechanism;[104] and

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98 Respond Power M.B. at 40-45; Respond Power R.B. at 30-34.
99 Respond Power M.B. at 45-46; Respond Power R.B. at 30.
100 Respond Power M.B. at 46-47.
101 Respond Power M.B. at 47-51; Respond Power R.B.at 30-34.
102 Respond Power M.B. at 51-52.
103 Respond Power M.B. at 52-53; Respond Power R.B. at 34-45.
104 Respond Power M.B. at 53-54.

8) the effect of the clawback mechanism unlawfully limiting an EGSs' prices and improperly placing the Companies in a gatekeeper role of restricting EGSs' prices relative to their prices to compare, regardless of the products consumers are choosing in the competitive retail market.[105]

While the Companies have sought to justify the structure of the clawback mechanism on the basis that the features are applied to all EGSs,[106] that rationale does not support a finding that the application of the mechanism is just and reasonable. As Respond Power's witness testified, "[i]t does not matter that the Companies treat all EGSs the same with respect to these practices. Applying unfair practices to all EGSs does not make them just and reasonable."[107]

The particular feature of the clawback mechanism that single-handedly renders its application unjust and unreasonable is the failure of the Companies to provide notice to Respond Power that its customers were not paying their supply charges. The failure of the Companies to automatically provide notifications to EGSs when their customers do not pay their supply bills is a departure from the manner in which clawback tools are typically used in the industry. As Respond Power's witness testified, the knowledge of their existence and an ability to control whether they are imposed are critical features of such a mechanism. Specifically, he noted that clawback charges are used in the energy industry to incentivize certain behavior. For instance, if Respond Power discovers that a vendor secured an improper enrollment of a customer, Respond Power may "clawback" the fee earned by the vendor for the enrollment. However, in the case of the Companies' clawback mechanism, Respond Power was not even aware that clawback charges existed during the first year when the data was accruing and had no opportunity to take steps to

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105 Respond Power M.B. at 54-57; Respond Power R.B. at 35-37. On this point regarding pricing, the ID seems to condone the use of the clawback mechanism to control EGS prices. Finding of Fact ¶ 10. Although the Companies and the ID blame EGS practices for driving higher write-offs, the fact remains that is the failure of customers to pay their bills and the failure of the Companies to collect those unpaid amounts that triggers the imposition of the clawback charge. Respond Power M.B. at 45-49.

106 Companies' M.B. at 37-45.

107 Respond Power Statement No. 1-R at 21-22.

avoid the assessment of charges in either year since the write-offs related to supply charges from prior years.[108] As such, the application of the mechanism was unreasonable.

In addition to the legal issues identified above concerning due process and the retroactive application of the clawback charge to Respond Power, these structural flaws render its application unjust and unreasonable. Therefore, the Commission should sustain the complaints and direct the Companies to cease and desist from collecting the clawback charges imposed on Respond Power in 2016 and 2017.

V. CONCLUSION

For the reasons set forth above, Respond Power LLC respectfully requests that the Commission grant these Exceptions, reverse the Initial Decision of the Administrative Law Judge and sustain the Complaints filed by Respond Power against Pennsylvania Electric Company and West Penn Power Company.

Respectfully submitted,

Karen O. Moury, Esquire
Attorney ID #36879
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101
(717) 237-6000 (phone)
(717) 237-6019 (fax)

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108 Respond Power Statement No. 1 at 17.