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May 21, 2018

VIA eFILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17105-3265

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 on behalf of **Pennsylvania Electric Company and West Penn Power Company** is their **Reply to the Exceptions of Respond Power LLC to the Initial Decision of Administrative Law Judge David A. Salapa**, in the above-referenced proceedings ("Reply Exceptions").

As evidenced by the enclosed Certificate of Service, copies of the Reply Exceptions are being served on the Administrative Law Judge and all parties to this proceeding. Additionally, a courtesy copy of the Reply Exceptions is being sent via e-mail to the Commission's Office of Special Assistants as instructed in your April 20, 2018 transmittal letter.

Very truly yours,

Anthony C. DeCusatis

c: Per Certificate of Service (w/encls.)
Office of Special Assistants at *ra-OSA@pa.gov*

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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	:	
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	:	
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 **Pennsylvania Electric Company and West Penn Power Company's Reply to the Exceptions of Respond Power LLC to the Initial Decision of Administrative Law Judge David A. Salapa** 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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Dated: May 21, 2018

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	:		

REPLIES OF PENNSYLVANIA ELECTRIC COMPANY AND WEST PENN POWER COMPANY

To The Exceptions Of Respond Power, LLC To The Initial Decision Of Administrative Law Judge David A. Salapa

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May 21, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

COURT CASES

COMMISSION CASES

STATUTES

I. INTRODUCTION

Pennsylvania Electric Company ("Penelec") and West Penn Power Company ("West Penn") (individually, a "Company," and collectively, the "Companies") file these Reply Exceptions in response to the Exceptions filed by Respond Power, LLC ("Respond Power") to the Initial Decision of Administrative Law Judge David A. Salapa ("ALJ") issued on April 20, 2018 ("Initial Decision"). The ALJ found and determined that the Complaints filed by Respond Power against the Companies were meritless and recommended that they be denied. The ALJ's well-reasoned recommendation is supported by a thorough analysis of the record and of the controlling law and should be adopted by the Pennsylvania Public Utility Commission ("PUC" or the "Commission") without modification.

For the most part, Respond Power's Exceptions repackage arguments advanced in its Main and Reply Briefs to the ALJ to support its attempt to avoid an administrative charge (referred to as a clawback provision)[1] in the Companies' Electric Generation Supplier Coordination Tariffs ("Supplier Coordination Tariffs").[2] Those arguments have been fully addressed and refuted in the Companies' Initial Brief filed on March 16, 2018 and their Reply Brief filed on March 30, 2018. In view of the page limit on Reply Exceptions, the Commission is urged to review the Companies' Initial and Reply Briefs. These Reply Exceptions will address

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[1] The clawback provision is an administrative charge on electric generation suppliers ("EGSs") that elect to participate in the Companies' purchase of receivables ("POR") programs and that: (1) operate under a business model that generates accounts receivables with a write-off percentage that exceeds 200% of the average write-off percentage of all EGSs with customers in each Company's service territory; and (2) charged prices for generation service that, on average, exceeded 150% of the applicable Company's average Price-to-Compare ("PTC").

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

the key errors underlying Respond Power's efforts to collaterally attack the DSP IV Final Order and reopen the PUC's prior determination that administrative charges assessed in accordance with the Companies' Commission-approved clawback provisions are lawful and reasonable.

II. BACKGROUND: THE CHARGES RESPOND POWER IS TRYING TO AVOID PAYING

The Companies issued invoices to Respond Power on September 27, 2016 and September 29, 2017 pursuant to the Commission-approved clawback provision. Respond Power was one of three EGSs that passed both parts of the clawback provision's screening measures for each of two successive application years (2016 and 2017). As such, Respond Power was properly identified, based on available data and accepted cost-causation principles, as one of the EGSs whose mode of operation, product mix and pricing policies were generating uncollectible accounts expense well in excess (i.e., more than 200%) of the average uncollectible accounts percentage of *all* EGSs operating in each of the Companies' service areas and was doing so by charging prices that exceeded, on average over a full year, 150% of the applicable Company's PTC.

Significantly, Respond Power's write-off percentages are at least three times, and up to seven times, the threshold of 200% of the average write-offs experienced by over sixty-five other EGSs in the Companies' service areas, and Respond Power had the highest write-off percentage of any EGS in 2016.[3] Respond Power also has charged some of the highest prices for generation in the market, which, on average, were shown to be more than 250% of the applicable PTC.[4] Additionally, uncontroverted record evidence showed that the Respond Power customers whose

[3] PE/WP Exhibit KLB-1.

[4] PE/WP St. No. 1, pp. 18-19.

accounts were written-off: (1) were overwhelmingly low-income[5]; (2) were virtually all on month-to-month contracts subject to a variable rate that reflected volatile market prices plus a profit margin[6]; and (3) had unpaid balances that were owed to the Companies or to EGSs other than Respond Power at the time they became Respond Power customers.[7] Respond Power also affirmed[8] that it acquires customers through third-party solicitation firms that conduct telemarketing and door-to-door sales and are compensated only if customers sign contracts with Respond Power and do not revoke those contracts within three days.[9] Thus, the record evidence confirms that the clawback screening measures functioned exactly as they were designed by identifying EGSs whose mode of operation, product mix and pricing policies had exhibited a substantial correlation with extremely high uncollectible accounts expense.

Additionally, and contrary to Respond Power's contention, the prospectively-applied administrative charge for POR participation imposed on EGSs caught by both of the clawback screens is only a fraction of the increased uncollectible accounts expense that such EGSs impose on the Companies and their customers.[10] Consequently, Respond Power's exaggerated claims that the clawback provision made the Companies' purchases of EGSs' receivables "with recourse"[11] are simply incorrect.

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

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

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

[8] Tr. at 34-35.

[9] Respond Power's sales practices were also the subject of Complaints by the Pennsylvania Attorney General and Office of Consumer Advocate and the Bureau of Investigation and Enforcement. The settlement of both Complaints required Respond Power to pay substantial penalties and refunds. *See Cmwlth. of Pennsylvania et al. v. Respond Power, LLC*, Docket Nos. C-2014-2427659 and C-2014-2438640 (Initial Decision issued May 17, 2016).

[10] EGSs that pass both screening measures pay a charge for POR participation calculated by reference to the difference between their actual write-offs and what those write-offs would have been if they had not exceeded 200% of the average write-off percentage of all EGSs in each Company's service area.

[11] *See, e.g.,* Respond Power Exceptions, p. 9.

III. OVERVIEW: PRINCIPAL ISSUES AND SUMMARY OF ARGUMENT

In its Exceptions, Respond Power assails the Initial Decision on many fronts and, in so doing, mischaracterizes the ALJ's findings and rationale, ignores or misstates record evidence, and offers profoundly erroneous interpretations of the legal authority it attempts either to rely upon or to distinguish. For example, all three of those fundamental defects are exhibited by Respond Power's contentions that the ALJ allegedly applied the wrong legal standard and, therefore, purportedly erred in finding that Respond Power did not carry its burden of proof.[12]

However, the bulk of Respond Power's lengthy Exceptions can be distilled to one overriding issue: Should the Commission validate Respond Power's argument that, although it received actual service of the Joint Petition and accompanying testimony and exhibits initiating the Companies' DSP IV proceeding and deliberately abstained from participating in that case, it is not bound by the DSP IV Final Order and should be free to litigate issues it could have raised (and the parties did raise) in that proceeding? Well-settled Pennsylvania legal authority requires that the Commission answer that question with a resounding "no."[13]

Final orders of the Commission have legal significance. Once an order becomes final and non-appealable, it remains binding in accordance with its terms until the Commission, after notice and hearing, decides to change it – assuming that the change is lawful, based on substantial evidence and is not arbitrary or capricious. While this principle is both intuitive and axiomatic, it is also enshrined in Section 316 of the Public Utility Code.[14] Section 316 binds the Commission just as much as it does the parties to whom an order applies, and it forbids releasing

[12] Respond Power's unwarranted criticism is set forth at pages 28-36 of its Exceptions. The serious errors in Respond Power's legal analysis are explained in detail in the PE/WP Reply Brief (pp. 9-10 and 15-22), while the extensive record evidence demonstrating the emptiness of Respond Power's claims that the clawback provision is "unjust and unreasonable" as applied to Respond Power is discussed at pages 26-45 of the PE/WP Initial Brief.

[13] *See* PE/WP Initial Br., pp. 17-19; PE/WP Reply Br., pp. 2-4.

[14] 66 Pa.C.S. § 316. *See* PE/WP Initial Br., pp. 17-20.

a party retrospectively from the binding effect of a final order. If a party seeks a change in such an order, relief may be granted, but it may be granted *prospectively only*[15] – and then only if the complainant carries a "heavy burden" to overcome the presumption of reasonableness that attends a prior Commission determination.[16] As the Commonwealth Court has held: "[A] complainant seeking to evade the effect of an existing tariff provision . . . carries a heavy burden to prove that the fact and circumstances have changed so drastically as to render the application of the tariff provision unreasonable."[17]

The DSP IV Final Order must be given the legal effect required by Section 316. The DSP IV Final Order cannot apply to everyone *except* Respond Power simply because Respond Power decided – of its own volition – not to participate in the DSP IV proceeding and, therefore, did not raise its objections when it had a full and fair opportunity to do so. Yet, that is exactly the relief Respond Power seeks in this case. Indeed, it made the astonishing statement at page 36 of its Exceptions that "Respond Power did not participate in the [DSP IV] 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." Respond

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[15] This concept is also embodied in 66 Pa.C.S. § 1309. Under Section 1309, an aggrieved party is entitled to file a complaint challenging an existing rate of a public utility. However, any change can be made only after notice and hearing and a final determination by 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, that a final, un-appealed order of the Commission may be challenged by a subsequently-filed complaint, and the Commission may, after notice and hearing, change its prior decision. However, the change can have *prospective* effect only. *See Lehigh Valley Power Comm. v. Pa. P.U.C.*, 563 A.2d 557, 560 (Pa. Cmwlth. 1989) ("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.") (emphasis added)).

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

[17] *Shenango Twp. Bd. of Supervisors v. Pa. P.U.C.*, 686 A.2d 910, 914 (Pa. Cmwlth. 1996). *Accord Duquesne Light. Co. v. Pa. P.U.C.*, 715 A.2d 540 (Pa. Cmwlth. 1998) ("The burden falls upon the customer to prove the charge is no longer reasonable, by demonstrating 'recent significant changes in circumstances in the interim.' *Zucker*, 401 A.2d at 1379-80."). *See also* Initial Decision (pp. 25-26), which also discusses the PUC's application of this standard.

Power is asking for the proverbial "second bite at the apple." Section 316 and well-established Commission and appellate precedent hold that "second bites" are improper and prohibited.[18]

The Initial Decision, which the DSP IV Final Order affirmed, concluded that the clawback provision is lawful and found that the clawback provision is properly designed to impose reasonable charges on EGSs that pass its screening test.[19] Therefore, Section 316 mandates that the Commission's approvals, findings and determinations in that Order will remain valid until changed by the Commission, and any such change can be effective prospectively only. To hold otherwise would be fundamentally unfair and would infringe on the due process rights of the parties who did the right thing, followed the rules, and reasonably expected that the DSP IV Final Order would not be subject to an after-the-fact collateral attack by a non-party that hung back, awaited the outcome of the proceeding, delayed speaking up until it assessed the possible effect the order would have on it, and then asked for a "do-over" because it was dissatisfied with the outcome.

Even affording Respond Power the most generous interpretation of Section 316's mandate, Respond Power cannot lawfully challenge clawback charges assessed before it filed its first Complaints on November 17, 2016. And, as to charges the Companies assessed on September 29, 2017, the DSP IV Final Order's findings and conclusions impose a "heavy burden" on Respond Power to obtain even prospective relief, as the Companies explained in their Initial (pp. 12-17) and Reply (15-21) Briefs and as the Commission itself has already held in this

[18] *See* PE/WP Initial Br., pp. 17-19; PE/WP Reply Br., pp. 2-4.

[19] DSP Rec. Dec., p. 31 ("I conclude that the provision of the joint petition for settlement establishing the POR clawback charge is in the public interest. As the parties recognize, any unpaid bills for service rendered are borne by all the utility's ratepayers. The POR clawback charge addresses FE's concerns about increasing amounts of unpaid bills and the resulting write-offs while balancing the concerns of the other parties as outlined above.").

case.[20] Simply stated, there is a strong presumption of reasonableness that attaches to a tariff rule approved by the Commission even when its prospective effect is being challenged.

Respond Power, in an effort to evade the legal imperative created by Section 316, tried to claim its "due process" rights would somehow be abridged if it, like everyone else, was bound by the DSP IV Final Order. The best it could do was to offer the demonstrably counter-factual assertion that Respond Power was not provided adequate "notice" that the DSP IV proceeding would address proposed changes to the Companies' POR programs. The ALJ properly rejected that argument because Respond Power was served with the Joint Petition and accompanying testimony initiating the DSP IV proceeding; the Joint Petition and accompanying testimony explicitly stated that the Companies were proposing to alter their POR program by adding the clawback provision; and other EGSs as well the Retail Energy Supply Association ("RESA") (trade association of EGSs of which Respond's parent is a member) intervened in the DSP IV proceeding to address the clawback provision.[21] Even more telling, Respond Power's own witness, Mr. Adam Small, who is its General Counsel, acknowledged that he had read the DSP IV Joint Petition and he was "aware around the time the filings were made in November 2015 that the Companies were making proposals to modify the POR programs."[22] In short, Respond Power's "notice" arguments were gutted by its own witness's testimony.

Respond Power's contention that the clawback charge is improper because it operates "retroactively" is wrong in several counts. At the outset, the clawback change was approved by the Commission with full knowledge of how it would operate and, therefore, Respond Power is clearly trying to collaterally attack the DSP IV Final Order and give its proposed reversal of that

[20] Opinion and Order on Interlocutory Review (July 13, 2017), p. 17.

[21] *See* Initial Decision, pp. 21-22 and 31-32.

[22] Respond Power St. No. 1, p. 14. *See also* Tr. at 25 and PE/WP Reply Brief, pp. 23-24 and n.61 (citing other evidence that Mr. Small had actual notice that the Companies were proposing the clawback provision).

order retrospective effect. Respond Power's argument fails on that basis alone. Also, the clawback charge is an administrative fee for POR participation that is applied prospectively to all EGSs. The Company charged the fee *after* the clawback provision had already been approved by the Commission in the DSP IV Final Order.[23] And, as the ALJ found, based on prior Commission orders in analogous situations, the clawback screening measures, which analyze EGSs' track records to identify EGSs whose mode of operation, product type and pricing policies drive higher uncollectible accounts expense, do not make the charge "retroactive."[24]

In addition to the preclusive effect of Section 316 and the strong legal presumption it creates for the clawback provision's validity, the evidence shows that the clawback provision is reasonable, as the DSP IV Recommended Decision and Final Order determined. That conclusion is shared by the RESA, which signed the Joint Petition for Settlement of the DSP IV proceeding, and by other EGSs that intervened in that proceeding to address the clawback provision and did not object to the liberalized clawback provision adopted in the settlement. While Respond Power, at the very end of its Exceptions (p. 37), provides a sketchily-described list of alleged "structural" flaws, those claims are not valid.[25]

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[23] Respond Power also claims that the clawback was applied retroactively because, when the invoices for the 2016 clawback charges were issued in September 2016, the Companies' had not yet "filed" supplements to the Supplier Coordination Tariffs to memorialize the changes to their POR program approved in the DSP IV Order. *See* Respond Power Exceptions, pp. 3 and 21. The ALJ properly rejected this contention because the parties to DSP IV settlement agreed to those tariff provisions; the tariff supplements containing the clawback provision were attached to, and made part of, the Joint Petition for Settlement; and those tariff supplements were approved as part of the Commission's approval of the settlement. Because the supplements attached to the Joint Petition for Settlement did not contain tariff numbers, they were not lodged in the Companies' tariff books at the Commission when the settlement was approved. When that was discovered, the Companies filed the supplements with the Commission's Secretary, and they were approved by the Commission with an effective date of August 1, 2016. *See* Initial Decision, p. 30; PE/WP Initial Brief, p. 7.

[24] Initial Decision, pp. 33-36. *See also* PE/WE Initial Br., pp. 31-36 (which also explains the facts and holdings of the Commission decisions relied upon by the ALJ) and PE/WE Reply Br., pp. 10-12 (explaining why Respond Power's "retroactive ratemaking" assertions are based on an erroneous characterization of the clawback charge, which does not attempt to "retroactively" recover prior-period uncollectible accounts expense).

[25] *See* PE/WP Initial Br., pp. 36-45, where the extensive evidence adduced by the Companies of the clawback's reasonableness is summarized.

IV. REPLIES TO RESPOND POWER'S EXCEPTIONS

A. Respond Power's "Due Process" Rights Will Not Be Violated If The Commission Rejects Its Legally Impermissible Request To Collaterally Attack A Final Order (Respond Power Exception No. 1)

Respond Power Had Ample Notice Of The DSP IV Proceeding And A Full And Fair Opportunity To Be Heard In That Case. Respond Power's Exception No. 1 presents a series of convoluted, contrived and hyper-technical arguments designed to circumvent the preclusive effect of Section 316 by contending the DSP IV Final Order should not be binding upon it because "the DSP IV plan failed to put parties on notice of a proposal to modify the DSP III program." The daisy-chain of suppositions strung together by Respond Power appears to be: (1) POR programs exist only for the term of each DSP plan (i.e., POR programs exist only for the duration of, and are coterminous with, each DSP plan); (2) the clawback provision was proposed to become effective before the first day of the DSP IV plan; (3) therefore, the Company's proposal somehow constitutes a "mid-course modification" of its previously approved DSP III plan; and (4) although the DSP IV Joint Petition and accompanying testimony explained that the clawback charge would be "assessed, beginning September 2016" based on data for twelve-month periods ending August 31,[26] Respond Power believed that nothing in the Companies' POR programs would change until the DSP IV plan took effect – a belief *not* shared by RESA or other EGSs that intervened in the DSP IV proceeding and addressed the clawback charge.

There are many things wrong with Respond Power's argument, as will be explained below. Suffice it to say that Respond Power's notion of adequate "notice" is vastly different from what due process requires.[27] However, Respond Power's argument – indeed, the entirety of

[26] *See* PE/WP Initial Brief, pp. 24-25; PE/WP St. No. 1-SR, p. 3.

[27] *See* PE/WP Initial Br., pp. 23-29; PE/WP Reply Brief, pp. 21-26.

its Exception No. 1 – is simply an exercise in misdirection to deflect attention from Mr. Small's admission that, in November 2015, he had *actual* notice that the Companies' DSP IV Joint Petition proposed substantive modifications to their POR programs and that such changes were described in several areas of the DSP IV filing that was *actually served* on Respond Power.[28] And, when pressed on cross-examination,[29] Mr. Small stated that he may also have learned that the Companies were proposing POR program changes from reading *Energy Choice Matters* electronic newsletters. Notably, the November 4, 2015 issue of *Energy Choice Matters*, which was disseminated one day after the Companies filed their DSP IV Joint Petition, bore the bolded headline **"Pennsylvania Utilities Seeking to Add 'Clawback' to Purchase of Receivables, Cite 'Predatory Pricing' Practices by Suppliers."** Moreover, that newsletter reproduced the language from the Companies' DSP IV filing explaining that the clawback charge would be based on historical data and that the first charge would be assessed in September 2016. Therefore, even if *Energy Choice Matters* were the only source of information for Mr. Small – it was not – it alone was sufficient to apprise him of all the information Respond Power claims it needed to have adequate "notice" of the proposed operation of the clawback provision.[30]

While the record evidence shows that Respond Power knew, or certainly should have known, that clawback charges were proposed to be assessed beginning in September 2016 based on an analysis of data for the preceding twelve months, it is also clear that Respond Power's argument insists on a degree of specificity in the "notice" provided to interested parties that is not, and never has been, legally required. The correct standard was accurately explained in the Recommended Decision (subsequently affirmed by the Commission and the Commonwealth

[28] Respond Power St. No. 1, pp. 14-15; Tr. at 25.

[29] Tr. at 38-40.

[30] A copy of the November 4, 2015 *Energy Choice Matter* newsletter is available at http://www.energychoicematters.com/stories/20151104a.html.

Court) in *Petition of the Pennsylvania State Univ. for Declaratory Order Concerning the Generation Rate Cap of the West Penn Power Co. d/b/a Allegheny Power* ("*PSU/West Penn*"):

> The first flaw in Penn State's logic is its insistence that it should have been notified specifically that Tariff 37 rates would not be included in the rate cap extension. This Commission and the litigants who appear before it simply do not operate under that premise in the normal course of business.[31]

Actual service of the pleading that initiates a legal proceeding is the "gold standard" for "notice." Respond Power has not set forth any authority even suggesting an interested party is deprived of due process notice when it is served with all the documents that initiate a proceeding and set forth the claims made and relief requested. That is precisely what occurred in this case.

Contrary To Respond Power's Contentions, POR Programs Are *Not* Coextensive With Each DSP And, If They Were, Respond Power Would Have Had Even Greater Reasons And Incentives To Intervene In The DSP IV Proceeding. Respond Power's "notice" argument, as well as its contention that the clawback provision is unlawfully "retroactive" and constitutes a "mid-course modification" are grounded on Respond Power's claim that the Companies' POR programs are coextensive with each DSP.[32] As envisioned by Respond Power and its witness, Mr. Small, a POR program exists only for the duration of each DSP. Thus, a POR program would have to be approved at the same time a DSP is approved; would remain in effect (and could not be changed) for the duration of that DSP's term; would expire when the DSP ends; and would have to be renewed in order to begin again at the start of the next succeeding DSP.[33] This conceptual framework is central to Respond Power's argument.[34]

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[31] Docket Nos. P-2007-2001826 *et al.*, 103 Pa. P.U.C. 451, 472, 492-93 (Recommended Decision of Administrative Law Judge Louis Cocheres issued July 28, 2008) ("PSU/West Penn Rec. Dec."). *See* PE/WP Initial Brief, pp. 18-20, which discussed the PSU/West Penn Recommended Decision, the Commission's Final Order in that case, and the Commonwealth Court's decisions affirming the Commission.

[32] *See* Respond Power Exceptions, pp. 16-21.

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

Every element of Respond Power's argument is incorrect. While POR programs have been adopted in the context of DSP proceedings, and have been modified in those proceedings as well, POR programs are not necessarily coextensive with any particular DSP.[35] There is no authority for that proposition and Respond Power has not cited any. Consequently, the fundamental basis for Respond Power's "notice" and "retroactivity" arguments is invalid.

Furthermore, if Respond Power and Mr. Small really believed what they professed, Respond Power would have had an even greater reason, and an even stronger incentive, to intervene in the DSP IV proceeding – indeed, in every DSP proceeding – whether or not a clawback provision was proposed. If, as Mr. Small claimed to believe, the Companies' POR programs would run through the end of their DSP III and, then, would necessarily expire and have to be renewed to begin again with the start of DSP IV, Respond Power would have been facing not just a modification of the POR program, but its possible extinction, since, as Mr. Small conceded, in November of 2015, he had no way of knowing whether a "new" POR program would be approved to begin as of June 1, 2017.[36] At the same time, Mr. Small repeatedly testified that the POR programs of electric distribution companies ("EDCs") are "very important" to Respond Power's business.[37] Obviously, the glaring conflict between Mr. Small's professed beliefs and how a reasonable person in his position would have acted on those beliefs under the circumstances (i.e., by intervening in the DSP IV proceeding) demonstrate that

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[34] Paradoxically, Respond Power did not recognize that this argument is inconsistent with another position it advocated just as forcefully, namely, that DSP proceedings, by law, may only deal with the procurement of default generation supply and, therefore, any other issues, including proposals to establish or modify POR programs, are not within the scope of DSP proceedings. *See* Respond Power Exceptions, p. 17. However, there is extensive Commission precedent for addressing POR issues (as well as a host of other issues unrelated to default generation supply procurement, such as retail market enhancement measures) in DSP proceedings. *See* PE/WP Initial Br., pp. 27-28.

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

[36] Tr. at 44-45.

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

Respond Power's arguments are totally lacking in credibility. It is a conflict demonstrating, once again, that Respond Power is not making arguments, it is making excuses.

Respond Power's Claim That The DSP IV Final Order Unlawfully Approved A "Mid-Course Modification" Of The Companies' POR Programs Is Based On A Faulty Assumption And Seriously Misstates The Facts And Holding In The *PECO Act 129 Order*.

Respond Power's contention that the Commission-approved clawback provision constitutes a "mid-course modification" is based on Respond Power's erroneous assumption that each POR program must be co-terminus with a DSP plan. Since Respond Power's assumption is wrong (as previously explained), so is its conclusion. The clawback provision did not modify DSP III.

In addition, Respond Power's "mid-course modification" argument relies on a Commission decision related to a PECO Energy Company's ("PECO") Energy Efficiency and Conservation ("EE&C") Plan proceeding, which it refers to as the *PECO Act 129 Order*.[38] The facts in the *PECO Act 129 Order* bear no similarity to the the facts surrounding the Commission's approval of the clawback provision and, therefore, Respond Power's reliance on that Order is totally misplaced. The *PECO Act 129 Order* addressed PECO's attempt to transfer up to $20 million between different energy efficiency measures during the term of its first EE&C plan *without the Commission's prior approval.* Obviously, that is not the case here. To the contrary, the Companies specifically and expressly requested prior Commission approval of their proposed POR program changes as part of the DSP IV proceeding, did not try to impose any changes unilaterally, and provided notice to affected parties of their request.[39]

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[38] *Petition of PECO Energy Co. for Approval of its Act 129 Energy Efficiency and Conservation Plan and Expedited Approval of its Compact Fluorescent Lamp Program*, Docket No. M-2009-2093215 (Order entered Oct. 15, 2009), pp. 41-43.

[39] *See* PAWC Initial Br., pp. 27-28.

Respond Power's Claim (Exceptions, pp. 21-22) That The Clawback Provision Is Unlawful Because "Due Process Envisions Opportunity To Avoid Proposed Action" Is Based On An Erroneous Characterization Of The Clawback Provision. Respond Power contends that the clawback provision cannot lawfully be implemented unless all EGSs have the individual customer-level information Respond Power insists is necessary to monitor its customer base and deal with excessive write-offs. However, this argument is a function of Respond Power's persistent mischaracterization of the fundamental nature of the clawback provision and its screening measures.

Contrary to Respond Power's representation, the clawback provision does not recoup the difference between the face value of accounts receivable purchased by the Companies and the amounts actually recovered. Rather, it is an administrative charge for participation in the Companies' POR program that is assessed, based on cost-causation principles, on EGSs identified by objective screening measures as those EGSs whose mode of operation, product mix and pricing have a strong correlation with excessive accounts-receivable write-off percentages. And, the EGSs that exhibit those structural and systemic characteristics are the ones who garner a significant benefit – at the expense of the Companies and their customers – from selling their accounts receivable at face value and without recourse in the POR program. Hence, it is reasonable that EGSs exhibiting the characteristics the clawback provision's screening measures are designed to identify should pay a reasonable administrative fee to continue to participate in the POR program. The customer-level information Respond Power claims is needed would not diminish the overriding significance of the structural and systemic factors that ultimately determine if an EGS will pass the clawback screening measures.

Moreover, Respond Power's Exceptions provide a sanitized version of its witness' testimony on this point. As Mr. Small's testimony makes clear, Respond Power is not emphasizing the need for customer-level information because it actually intends to address the structural and systemic factors that drive its excessive write-off percentages. Instead, as Mr. Small candidly explained, Respond Power – without changing its mode of operation, product mix or pricing policy – would try to use the customer-level information to "game" the clawback provision by targeting payment-troubled customers and dumping them back onto the Companies' default service.[40] That is certainly no indication that Respond Power intends to make a good faith effort to address the major underlying issues responsible for its excessive write-off percentages.

Also unmentioned in Respond Power's Exceptions is the fact that Respond Power did not, in the past, ask for the information it now claims is vitally important. In fact, it did not make such a request even after receiving the first clawback charge invoice in September 2016. Respond Power's first request for customer-level payment information came after the evidentiary hearing in this case and, even then, only as an attempted "gotcha" because Respond Power assumed the Companies could not, or would not provide, the information it requested. The Companies did, however, provide that information, which was admitted into the post-hearing record by the ALJ.[41]

In simplest terms, Respond Power wants the Commission to believe that no EGS should be subject to the clawback provision unless it has the equivalent of continuous, nearly real-time electronic information on the payment status of the accounts of all its customers whose

[40] Respond Power St. No. 1, p. 19, lines 17-19 ("However, has Respond Power been aware that the customers were not paying their bills, it could have cancelled the contracts and returned the customers to default service so as to avoid the assessment of the clawback charge.").

[41] *See* Initial Decision, p. 12.

receivables are sold to an EDC.[42] While the Companies can provide a good deal of information on the payment status of accounts receivable – and actually did so when Respond Power finally got around to requesting it almost fifteen months after filing its first Complaint[43] – Respond Power wants to raise the bar to levels that are unachievable as well as unnecessary. In short, Respond Power wants to impose enough conditions to kill the clawback charge entirely. The Commission should not let that happen. In that regard, if Respond Power's prescription for the level and detail of customer payment status information were imposed, the POR discount adjustment Duquesne Light Company ("DLC") employs would have to be invalidated as well – even though the Commission has already approved that measure for use since 2008.[44]

B. The Clawback Provision Approved In The DSP IV Proceeding Does Not Operate Retroactively And Does Not Convert The Companies' POR Programs To "Recourse" (Respond Power Exception No. 2)

At the outset, two points should be underscored with regard to Respond Power's claim that the clawback charge violates the prohibition against "retroactive ratemaking." First, Respond Power is simply trying to raise an issue that is foreclosed by the preclusive effect Section 316 imparts to the DSP IV Order. Exception No. 2 should be rejected on that basis alone. Second, Respond Power assumes – and implicitly is asking the Commission to find – that administrative charges imposed in a Supplier Coordination Tariff should be held to the same strict cost-of-service criteria that the Commission imposes in establishing rates charged by a

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[42] Respond Power Exceptions, pp. 21-22.

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

[44] *Petition of Duquesne Light Co. for Approval of a Default Serv. Plan for the Period January 1, 2008 Through December 31, 2010*, Docket No. P-00072247, 2007 Pa. PUC LEXIS 36 (June 22, 2007). *See* PE/WP Initial Brief, p. 27 and n.44.

utility for retail utility service, including the prohibition against "retroactive ratemaking." As the ALJ's careful legal analysis shows,[45] Respond Power's assumption has no legal foundation.

In addition, Respond Power's "retroactive" and "recourse" arguments are based on its pervasive mischaracterization of what the clawback provision is and how it operates.[46] Specifically, Respond Power contends that the clawback provision "would permit Penelec and West Penn to invoice EGSs for a portion of the accounts receivable that had been previously fully purchased but which were not paid by customers."[47] However, as evident from the explanation of the clawback provision's operation discussed in Section III.A., Respond Power's characterization is simply wrong.

The clawback provision does not "invoice" any EGS for the purpose of recapturing the unpaid portion of accounts receivable that were previously purchased. Contrary to Respond Power's assertions, the clawback provision is not designed to make the Companies (or their customers) whole by reconciling the face value of purchased receivables with actual recoveries for historical periods. In fact, clawback charges are not traceable to (or reconciled with) any specific unpaid accounts receivable purchased by the Companies in the past from an EGS. Rather, as explained previously, the clawback provision allows the Companies to charge an administrative fee for participation in the POR program on certain EGSs that impose higher costs on the Companies and their distribution customers because those EGSs' modes of operation, products sold and pricing policies generate write-off percentages that are far higher than the average percentage of the Companies' entire EGS populations.

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[45] Initial Decision, pp. 33-34.

[46] It is also based on Respond Power's contention that POR programs are co-terminus with DSP plans. *See* Respond Power Exceptions, p. 24. The errors in that contention were pointed out in Section III.A., *supra*.

[47] *See* Respond Power Exceptions, p. 8. In its Exceptions, Respond Power repeats verbatim the same contention it made in its Main Brief at page 10.

Under the clawback provision, historical data are reviewed to identify EGSs exhibiting the structural and systemic factors that strongly correlate with generating excess costs – including, significantly, prices that far exceed the Companies' annual average PTC (and, in Respond Power's case, prices that far exceeded the average prices charged by other EGSs in the Companies' service areas[48]). Historical write-off data and historical prices are used because they are the best available source of objective, quantifiable data for identifying EGSs with the salient characteristics associated with the creation of higher costs, which those EGSs then pass on to the Companies and their distribution customers through the operation of the POR programs. The use of historical data in this fashion does not make the clawback provision "retroactive" nor does it convert the Companies' POR programs to "with recourse."[49] There is ample precedent for relying on analyses of historical data that preceded the approval of a rate or tariff rule to establish billing determinants for future charges,[50] as the ALJ correctly determined.[51] And, in the cases where such provisions were approved, the Commission did not find that the prohibition against retroactivity was violated. Moreover, the Commission has previously approved a provision for inclusion in DLC's POR program that imposes a "penalty" on EGSs whose uncollectible accounts expressed as a percentage of revenues exceeds 5% for a preceding twelve-month period.[52]

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

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

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

[51] Initial Decision, p. 34. Respond Power attempts to distinguish this precedent by contending that, in the cases cited, "the customers always knew they were going to be billed for their usage." Respond Power misses the point. In each of the cases cited, customers would not have been able to "avoid" the consequences of the new rate or charge as Respond Power insists is a necessary precondition to avoid "retroactive ratemaking." Moreover, in certain cases, the tariff change imposed a charge (i.e., a minimum bill driven by a demand ratchet determined by historical data) that the customer would pay prospectively without regard to its actual usage. *See* PE/WP Initial Brief, p. 33 (discussing Rate Schedules GS Small and GS Medium).

[52] *See* PE/WP Initial Br., pp. 32-33, where the DLC provision is discussed in more detail.

Additionally, and unmentioned by Respond Power, historical write-off data are neither the direct nor the only metric used to identify EGSs charged an administrative fee to participate in the Companies' POR programs. The write-off filter only identifies EGSs whose historical data exhibit a write-off percentage that is greater than 200% of the average write-off percentage of the entire EGS population, i.e., a substantial margin that provides significant flexibility to any individual EGS. Even then, before a clawback charge could be imposed, an EGS must pass a second filter; it must have followed a pricing policy that could be expected to drive higher uncollectible accounts expenses, i.e., charging an annual average price (across all of its customers) that was greater than 150% of the average annual PTC for the applicable Company. Only the EGSs identified by *both* filters would be charged an administrative fee. And, although that fee does not relate back to any accounts receivable previously purchased by the Companies, if the amount of the fee were to be compared to the uncollectible accounts expenses such EGSs impose, it is clear that the fee is equivalent to only a fraction of those expenses.

Respond Power also tries to support its claims that the clawback charges operate "retroactively" by seeking an analogy in a case about unemployment compensation.[53] Even if it were assumed that the case Respond Power relies upon is a valid legal reference point, its holding is entirely contrary to the proposition for which Respond Power cites it. Specifically, the Commonwealth Court, in a portion of its decision excised by Respond Power, summarized controlling precedent, stating:

> However, our Supreme Court has held that a statute does not operate retroactively merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment.[54]

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[53] *See* Respond Power Exceptions, pp. 26-27.

[54] *Dept. of Labor and Indus., Bureau of Emp't Sec. v. Pa. Eng'g Corp.*, 421 A.2d 521, 524 (Pa. Cmwlth. 1980).

Finally, Respond Power's assertion that the clawback provision converts the POR programs to "with recourse" is wrong for the reasons previously explained (the clawback is not designed, nor does it operate, to track and recoup uncollected prior period accounts receivable). Additionally, the terms of DLC's Commission-approved Supplier Coordination Tariff clearly states that it is purchasing accounts receivable "without recourse" notwithstanding the "penalty" provision in its POR program.[55]

C. Respond Power Seriously Misstates The Holdings Of Cases It Attempts To Distinguish, Which Fully Support The ALJ's Finding That Respond Power Did Not Carry Its Burden Of Proof In This Case (Respond Power Exception Nos. 3 and 4)

The legal standards defining the preclusive effect of the DSP IV Final Order, the prohibition on retrospective application of any changes in that Order, and the burden of proof Respond Power must carry to mount even a prospective challenge to the clawback provision were summarized above and discussed at length in the Companies' Initial Brief (pp. 16-20). In an effort to discredit the ALJ's accurate legal analysis,[56] Respond Power offers a convoluted argument to try to show that blackletter law repeatedly upheld by the Commonwealth Court[57] should not apply in this case.

Respond Power argues that, irrespective of the Commonwealth Court's holdings that a "heavy burden" must be carried by a party challenging an existing, Commission-approved tariff rule, what the Court really meant was that a complainant is always free to re-litigate *de novo* the "reasonableness" of previously-approved tariff provisions irrespective of the dictates of Section 316 and prior appellate precedent. In short, Respond Power contends that the Commonwealth

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[55] *See* PE/WP St. No. 1-SR, p. 8.

[56] Initial Decision, pp. 24-27.

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

Court, like Yogi Berra, "really didn't say everything [it] said."[58] As explained in the Companies' Reply Brief (pp. 15-21), Respond Power's attempt to distinguish *Shenango Twp.* and other authorities cited by the ALJ is based upon fundamentally flawed interpretations and, even more disturbing, leaves out critical elements of the Court's opinions.

At its core, the well-established concept articulated in *Shenango Twp.* simply puts in legal terms something that commonsense instructs. Once the Commission has determined that a tariff provision is just and reasonable, its decision has continuing validity unless (and until) a complainant has demonstrated that the fundamental "facts and circumstances" that formed the basis for the PUC's decision have "changed." Moreover, the necessary "change" must be so fundamental to the PUC's decision (i.e., "drastic," to mirror the Court's language) that it demands reexamining the previously-decided issues underlying the Commission's earlier approval to discern whether the tariff provision should continue to have a prospective binding effect. This rule embodies the concept that a valid administrative decision approving a tariff rule has very substantial precedential value and, therefore, a complaint challenging such a rule should *not* be treated as a case of first impression that entitles the complainant to *de novo* re-litigation of the issues that were already decided as the basis for the Commission's prior approval. Yet, that is what Respond Power is asking the Commission to do.

Respond Power has not identified any "facts and circumstances" that have changed so "drastically" (or, indeed, at all) since the entry of the DSP IV Final Order that those changes would legally justify the Commission's reversing its prior approval of the clawback provision or waive its application to Respond Power. Although Respond Power provides a laundry list of

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

alleged "structural" issues it claims should exempt it from the clawback provision,[59] none of those "structural" issues suddenly sprung to life *after* the DSP IV Final Order was entered, as the ALJ correctly determined.[60] To the contrary, they are what the ALJ said they are, namely, Respond Power's attempt to collaterally attack the DSP IV Final Order and litigate that proceeding *de novo*. In any event, and despite Respond Power's improper attempt to belatedly raise so-called "structural" issues in this case, the Companies presented extensive evidence showing that Respond Power's contentions have no validity.[61]

D. Section 316 Applies To The DSP IV Final Order (Respond Power Exception No. 5)

As discussed in Section II, *supra.*, Section 316, by its terms, applies to the DSP IV Final Order and, as such, prohibits retroactive revocation of approvals, findings and determinations made by the Commission in that Order. Respond Power tries to evade the application of Section 316 by claiming: (1) the Commission's Order on Interlocutory Review already decided that Section 316 does not apply in this case;[62] (2) Section 316 can apply only if there is perfect identity of parties and issues between an earlier and a subsequent proceeding;[63] and (3) the DSP IV Final Order is not "final" because it approved a settlement.[64] All three arguments are wrong.

First, the Order on Interlocutory Review did not negate the application of Section 316. All that Order did was offer Respond Power the opportunity for a hearing while, at the same

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[59] Respond Power Exceptions, pp. 37-38.

[60] Initial Decision, pp. 36-37.

[61] This evidence is discussed in the PE/WP Initial Brief (pp. 36-45) and in Section III.E., *infra.*

[62] Respond Power Exceptions, p. 34.

[63] *Id.*

[64] *Id.* at 35.

time, clearly stating that Respond Power has to meet the "heavy burden" test of *Shenango Twp.* to justify even a *prospective* alteration of the clawback tariff provision.

Second, identity of parties and issues is not a precondition to Section 316's mandate. Respond Power's error is apparent when its position 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. 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.

Third, orders approving settlements are "final" orders and must be afforded the same degree of finality as an order entered at the conclusion of a fully litigated case, as the Commission has previously held and well-established appellate precedent provides.[65]

E. The "Structure Flaws" Alleged By Respond Power Do Not Exist (Respond Power Exception No. 6)

Respond Power repeats in summary form alleged "structural flaws" that were set forth in its witness' written testimony and that it contends render the clawback provision's application to

[65] *Implementation of Act 11 of 2012,* Docket No. M-2012-2293611 (Final Implementation Order entered Aug. 2, 2012), p. 37 ("The rates that are approved in a Commission order relative to the settlement are rates with the same force and effect as if every element of the proceeding had been contested through the briefing and exceptions stage and are, therefore, just and reasonable.").

Respond Power "unjust and unreasonable." As previously noted, the alleged "structural flaws" are not a function of any change in "facts and circumstances" since the DSP IV Final Order was entered and, therefore, do not warrant consideration on that basis alone.[66] Moreover, Mr. Small's testimony was fully addressed in the Companies' Initial Brief (pp. 36-45), which explains the Companies' extensive evidence refuting his testimony point by point.

Respond Power's criticisms of the "structure" of the clawback provision principally pertain to alleged limitations on EGS access to information about the payment status of their customer accounts, the service periods to which the written-off amounts relate and the order of posting of partial payments. All of these criticisms are erroneous or irrelevant because they ignore the fact that the clawback provision's screening test is applied to all EGSs on a consistent basis and using comparable data.[67] Stated another way, the clawback provision's accounts-receivable write-off test measures each individual EGS's experience relative to the average of *all* EGSs participating in a Company's POR program,[68] and Respond Power cannot be treated unreasonably or inequitably given the clawback provision's fair "apples to apples" approach.[69]

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[66] *See* Initial Decision, pp. 36-37.

[67] *See* Initial Decision, pp. 22-23.

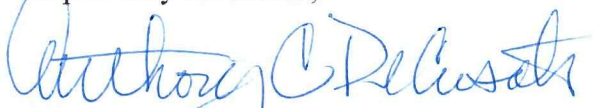
[68] Simply stated, no other EGSs are given preferential access to customer payment information, and both the relationship of service periods to the accounts receivable that are written-off and the Companies' post-write-off payment-posting procedures are consistent across the Companies' entire EGS populations.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

[69] *See* PE/WP Initial Br, pp. 37-39.

V. CONCLUSION

For the reasons set forth above and in the Companies' Initial and Reply Briefs, the Commission should deny Respond Power's Exceptions, adopt the ALJ's Initial Decision, and dismiss Respond Power's Complaints with prejudice.

Respectfully submitted,



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Dated: May 21, 2018

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