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June 28, 2019

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 Petition for Reconsideration 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.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Respond Power, LLC	:	C-2016-2576287
v.	:	
Pennsylvania Electric Company	:	
Respond Power, LLC	:	C-2016-2576292
v.	:	
West Penn Power Company	:	
Respond Power, LLC	:	C-2017-2631326
v.	:	
West Penn Power Company	:	
Respond Power, LLC	:	C-2017-2631331
v.	:	
Pennsylvania Electric Company	:	

PETITION FOR RECONSIDERATION

Pursuant to Section 703 of the Public Utility Code¹ and Section 5.572 of the regulations of the Pennsylvania Public Utility Commission (“Commission”),² Respond Power, LLC (“Respond Power”) files this Petition for Reconsideration of the Opinion and Order entered June 13, 2019 (“Order”) denying Respond Power’s Exceptions to the Initial Decision of the Office of Administrative Law Judge issued on April 10, 2018 and dismissing Respond Power’s above-captioned Complaints. By this Petition, Respond Power is seeking reconsideration only of the Commission’s disposition of the Complaints filed against Pennsylvania Electric Company (“Penelec”) and West Penn Power Company (“West Penn”) (collectively, the “Companies”) on

¹ 66 Pa.C.S. § 703.

² 52 Pa. Code § 5.572.

November 17, 2016 at Docket Nos. C-2016-2576287 and C-2016-2576292 (“2016 Complaints”). Although Respond Power disagrees with the Commission’s resolution of the Complaints filed against Penelec and West Penn in 2017, it has determined to focus on the 2016 Complaints for purposes of this Petition.

I. INTRODUCTION

It is undisputed that the Companies imposed charges on Respond Power in September 2016 based on tariff modifications that were not even on file with the Commission and in fact were not approved by the Commission until November 10, 2016. It is also undisputed that the 2016 tariff changes retroactively modified the terms and conditions of the Purchase of Receivables (“POR”) program in which Respond Power was participating for the June 1, 2015 to May 31, 2017 default service period (“DSP III”). These modifications occurred without adequate notice to Respond Power and without Respond Power’s consent. Reconsideration of the Order is warranted to rectify this situation in which the Companies changed the POR program rules after services had already been provided and then invoiced Respond Power nearly one-half million dollars based on the change in the rules.

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 and retroactive modifications to the terms and conditions of their POR programs without affording Respond Power advance notice. Rather than petitioning the Commission for approval to make changes to the existing Commission-approved POR program, the Companies buried a proposal for a significant tariff modification in their forward-looking default service plan for the next program period and then retroactively applied that change to assess charges against Respond Power during the default service program period that was then in effect.

Under the terms and conditions of Companies' POR program, as set forth in a Commission-approved tariff which was in effect for the DSP III period, the Companies were legally obligated to purchase accounts receivables from electric generation suppliers ("EGSs") at a zero-discount rate.³ This meant that the Companies would pay the face value of the receivables without recourse to the EGSs, regardless of the amounts they ultimately collected from the customers. The Companies bore the risk of customer accounts that are written off. Order at 11.

Through Respond Power's participation in the Companies' POR program starting June 1, 2015, it was doing so based on the terms and conditions that existed at that time under the Commission-approved non-recourse POR program. Midway through the DSP III period, the Companies modified the terms and conditions of the program so that they could recover from EGSs a portion of the amounts that they were not successful in collecting from customers. This change to the DSP III program occurred during the DSP IV proceeding, through a tariff modification, which was filed on October 28, 2016, with an effective date of August 1, 2016, and approved by the Commission on November 10, 2016. As a result of this mid-course revision to the terms and conditions of the Companies' non-recourse POR program that was in effect for the DSP III period, which retroactively converted it into a "with recourse" POR program, the Companies invoiced Respond Power in September 2016, based on the write-offs of billed amounts that they did not collect from Respond Power's customers from September 1, 2015 through August 31, 2016.

The POR program in which Respond Power was participating, as of June 1, 2015, required the Companies to fully purchase its account receivables, without recourse – meaning regardless of whether Respond Power's customers paid the Companies for their supply charges.

³ *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").

Because of the Companies' legal obligation under the tariff in effect at that time, Respond Power was not aware whether its supply customers were paying their bills and had no opportunity to engage in collection process or otherwise reduce the amount of uncollectible amounts that accrued. Until it received an invoice in September 2016, Respond Power had no knowledge that the Companies had received Commission approval to unilaterally and retroactively modify the terms and conditions of the DSP III POR program. Indeed, without a tariff even being on file, it had no way to determine the basis for the charges or to confirm they were accurate or lawful.

Allowing the Companies to invoice Respond Power in September 2016 for charges that were not part of the terms and conditions of the non-recourse program that was to continue until May 31, 2017 and did not yet even appear in the tariff violates fundamental principles of due process. Through dismissal of Respond Power's 2016 Complaints, the Commission has permitted the Companies to unilaterally and retroactively change the terms and conditions of the POR program without adequate notice to Respond Power and without Respond Power's consent. A unilateral and retroactive revision of the program rules is akin to a breach of contract. Effectively, the Commission's action endorses an approach where the rules of the game are changed halfway through the game; then, after the game is over, the final score is revised to reflect the changes in the rules.

In further support hereof, Respond Power avers as follows:

II. BACKGROUND

1. Respond Power is an electric generation supplier ("EGS") licensed by the Commission to supply electricity or electric generation services to the public within the Commonwealth of Pennsylvania.⁴ Under this EGS license, Respond Power has served a significant

⁴ *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).

number of residential and small business customers in various electric distribution company (“EDC”) service territories throughout the Commonwealth.⁵ Since 2013, Respond Power has participated in the Companies’ POR programs that have been implemented through their default service plans.⁶ Participation in the Companies’ POR programs is mandatory for EGSs serving mass market customers and using the Companies’ consolidated billing system, which is the only option for EGSs other than sending customers separate bills for their supply charges.⁷

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. They are subsidiaries of FirstEnergy Corp.⁸

3. In their role as EDCs, the Companies also provide default generation service to customers who do not purchase their supply from an EGS.⁹ This default service is provided by the Companies pursuant to Commission-approved default service programs.¹⁰

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.¹¹

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

⁵ Respond Power Statement No. 1 at 2.

⁶ Respond Power Statement No. 1 at 7.

⁷ Respond Power Statement No. 1 at 5.

⁸ Respond Power 2016 Formal Complaints and Companies’ Answers, ¶¶ 3.

⁹ 52 Pa. Code § 54.183(a).

¹⁰ 66 Pa.C.S. § 2807(e).

¹¹ 66 Pa.C.S. §§ 2807(e)(3.1), (3.4).

the currently effective default service program.¹² Under Section 54.185(e) of the Commission's regulations, the default service program must include a procurement plan, an implementation plan, a rate design plan and other documents that are necessary to provide default service to customers who do not choose an EGS.

6. While neither the Code nor the Commission regulations appear to contemplate the inclusion of supplier tariff provisions or POR programs in default service plans, Respond Power is aware that this has become the practice of many EDCs.¹³ To the extent that other issues, including those not related to procurement, are addressed as part of an EDC's default service program, they are implemented in accordance with the time period covered by that program.¹⁴

7. A 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. The EDCs have well-established, ratepayer funded systems in place to exercise this ability within the requirements of the law. EGSs are not able to terminate service to a customer for any reason.¹⁵

8. West Penn's first POR program, which purchased EGS receivables with full recourse for uncollectible accounts, was adopted in the settlement of its restructuring plan. It was

¹² 52 Pa. Code § 54.185.

¹³ See *Investigation of Pennsylvania's Retail Electric Market: Intermediate Work Plan*, Docket No. I-2011-2237952 (Final Order entered March 2, 2012), at 94-95.

¹⁴ Respond Power Statement No. 1 at 24 (the mechanism for addressing the remittance of refunds directly to the Companies went into effect on June 1, 2017, commensurate with the Companies' default service program period starting date); *Petition of PPL Electric Utilities Corp. for Approval of Default Service Program and Procurement Plan for the Period June 1, 2017 through May 31, 2021*, Docket No. P-2016-2526627 (Order entered October 27, 2016) (changes to the standard offer program were implemented on the start date of the default service program).

¹⁵ Respond Power Statement No. 1 at 4.

later revised to align it with those of its affiliates pursuant to the terms of the settlement of the proceeding for the merger of Allegheny Energy, Inc. and FirstEnergy Corp.¹⁶ Penelec first agreed to implement a POR program in 2009 in the context of its default service proceeding for the period to be effective January 1, 2011.¹⁷

9. 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 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.¹⁸ Otherwise stated, these POR programs were "non-recourse," which is a commercial 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.¹⁹

10. By participating in the Companies' non-recourse POR program since 2013, Respond Power has 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

¹⁶ Respond Power Statement No. 1 at 6; *See Petition of West Penn Power Company d/b/a Allegheny Power for Approval of its Retail Electric Default Service Program and Competitive Procurement Plan for Service at the Conclusion of the Restructuring Transition Period*, Docket No. P-00072342 (Order entered July 25, 2008, at 56-60). The details of the West Penn no-discount POR program were approved as part of a subsequent tariff filing made November 1, 2010 at Docket No. R-2010-2207938.

¹⁷ Respond Power Statement No. 1 at 6; *See Joint Petition of Metropolitan Edison Company and Pennsylvania Electric Company for Approval of Their Default Service Programs*, Docket Nos. P-2009-2093053 and P-2009-2093054 (Order entered at November 6, 2009, at 42) (Joint Petition for Settlement dated August 12, 2009), at 27-29.

¹⁸ Respond Power Statement No. 1 at 7-8.

¹⁹ Respond Power Statement No. 1 at 7.

customers are paying their bills to the Companies.²⁰ This non-recourse approach for the Companies' POR programs continued through the 2013-2015 default service program ("DSP II")²¹ and the 2015-2017 default service program ("DSP III").²²

11. In the 2017-2019 default service program filing ("DSP IV"), which was filed on November 3, 2015, the Companies proposed to modify the POR programs to include a tariff modification 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.²³ Unbeknownst to Respond Power at that time, the Companies' proposal was intended to modify the POR programs then in effect under DSP III.²⁴

12. The Companies' original proposal for a modification of the POR program was revised 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 on May 19, 2016.²⁵

13. 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" since the Companies have the future remedy of imposing charges on EGSs after fully purchasing the receivables if the customers do not pay their EGS charges. EGSs now bear

²⁰ Respond Power Statement No. 1 at 7-8.

²¹ *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).

²² *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").

²³ *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, 2019*, 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").

²⁴ Respond Power Statement No. 1 at 12.

²⁵ *DSP IV Order*.

the risk of uncollectibles. The tariff modifications have effectively transformed the Companies' "non-recourse" POR programs into "with recourse" POR programs.²⁶ While making such a change on a going forward basis may have been appropriate, the change in dispute was made in 2016 and impacted the existing POR program that had been in effect since June 1, 2015.

14. Importantly, for purposes of this Petition, the Companies did not file the tariff modifications leading to the imposition of the charges until October 28, 2016, with an effective date of August 1, 2016, to implement changes to the non-recourse POR program.²⁷

15. Before even filing tariff provisions with the Commission and prior to the Commission's approval of those tariff provisions on November 10, 2016, the Companies invoiced Respond Power in the amounts of \$305,890.63 and \$178,907.06 in September 2016. That invoice was based on pricing data and write-offs of unpaid amounts that accrued from September 1, 2015 through August 31, 2016. During that entire period, no tariffs were in place for the Companies to have recourse against Respond Power.

III. LEGAL STANDARDS FOR RECONSIDERATION

16. The Public Utility Code establishes a party's right to seek relief following the issuance of a decision.²⁸ Such requests for relief must be consistent with Section 5.572 of the Commission's regulations.²⁹

17. It is well settled that petitions made pursuant to Section 703(g) may properly raise any matters designed to convince the Commission that it should exercise its discretion under the

²⁶ Respond Power Statement No. 1 at 9-10.

²⁷ 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 docket. Secretarial Letter dated November 10, 2016, issued at the DSP IV docket.

²⁸ 66 Pa.C.S. § 703(f) relating to rehearings and § 703(g), relating to the rescission, clarification and amendment of orders.

²⁹ 52 Pa. Code § 5.572, relating to petitions for relief following the issuance of a final decision.

Public Utility Code to rescind or amend a prior order in whole or in part.³⁰ Parties are not permitted by a second motion to review and reconsider, to raise the same questions which were specifically decided against them. What the Commission expects in petitions for reconsideration are new and novel arguments, not previously heard or considerations which appear to have been overlooked by the Commission. Additionally, a petition for reconsideration is properly before the Commission where it pleads newly discovered evidence, alleges errors of law, or a change in circumstances.³¹

IV. RECONSIDERATION IS WARRANTED

18. Reconsideration is warranted because the Commission's Order overlooks the fact that Respond Power was participating in the Companies' non-recourse POR program established by a Commission-approved tariff, which started on June 1, 2015 and was to continue until May 31, 2017, which was unilaterally and retroactively modified. Despite the presumed certainty that Respond Power had of the terms and conditions set forth in a Commission-approved tariff for the Companies' non-recourse POR program, the Companies invoiced Respond Power nearly one-half million dollars in September 2016 as though it was participating in a "with recourse" POR program. The tariff modification that formed the basis for this invoice was not even proposed by the Companies until November 3, 2015 and was not approved by the Commission until May 19, 2016. Indeed, the tariff modification to support this invoice was not filed with the Commission until October 28, 2016 and was not approved by the Commission until November 10, 2016.

19. Tariffs include schedules of rates, and all rules, regulations, practices or contracts involving rates, and have the force of law and are binding on both the utility and its customer.³² Under the Commission-approved tariff on file as of June 1, 2015, the Companies had a legal obligation to purchase all of Respond Power's accounts receivables, without recourse, for the term

³⁰ *Duick v. Pennsylvania Gas and Water Co.*, Docket No. C-R0597001 et al., Order entered December 17, 1982; 56 Pa. P.U.C. 553 (1982).

³¹ *Id.*

³² *Behrend v. Bell Telephone Company*, 242 Pa. Super. Ct. 47, 363 A.2d 1152 (1976).

of the DSP III which was slated to end on May 31, 2017. “Non-recourse” is a commercial 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.³³

20. Despite the “non-recourse” terms and conditions set forth in the Commission-approved tariff, which is the equivalent of a contractual obligation, the Companies imposed charges on Respond Power in September 2016, effectively converting the non-recourse POR program, which went into effect on June 1, 2015, to a “with recourse” POR program on a retroactive basis. Through its tariff modifications made in 2016, the Companies gained recourse against EGSs if customers do not pay their bills in full and on time. Indeed, the Companies’ witness conceded that the charges assessed in 2016 modified the terms of the prior POR program and constituted a “new provision” to the then-existing program.³⁴ The Companies’ witness also agreed that the imposition of the charge is “recourse” that the Companies have against certain EGSs when they write off accounts that they are unable to collect from customers.³⁵

21. To meet the requisite due process requirement, it is imperative that utilities impose charges on a prospective basis only.³⁶ By subjecting Respond Power to the payment of charges that the Companies applied on a retroactive basis, to recoup monies they were unable to collect from customers, after POR services were provided and all data had been accumulated to form the basis of the charges, the Commission’s Order violated Respond Power’s due process rights.

22. Moreover, allowing the Companies to invoice Respond Power before a supplier tariff was on file violated Respond Power’s due process rights. Notably, nothing in the

³³ Respond Power Statement No. 1 at 7.

³⁴ Tr. at 82.

³⁵ Tr. at 76.

³⁶ See *Pa. PUC v. Philadelphia Electric Co.*, 56 Pa. PUC 191, 228, 1982 Pa. PUC LEXIS 81 (1982).

Commission's regulations permits a utility to file a tariff with a prior effective date so as to authorize the utility to justify a charge that it has already imposed.

23. In dismissing Respond Power's 2016 Complaints, the Commission's Order improperly focused on the notice that Respond Power received regarding the Companies' proposed changes to the POR program contained in its DSP IV Plan, which commenced on June 1, 2017. However, Respond Power did not dispute service of the DSP IV Plan or awareness of the Companies' proposal to make changes to the POR program.

24. Rather, Respond Power reasonably expected that any changes to the POR program, as were ultimately approved by the *DSP IV Order*, would be implemented for the DSP period beginning on June 1, 2017. The Companies' expressly stated purpose of filing the DSP IV plan 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, 2019.³⁷ Importantly, default service programs are by their very nature forward-looking. Their purpose 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.³⁸ 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.

25. Because the Commission's Order only addressed the adequacy of Respond Power's notice concerning the DSP IV Plan and corresponding proposed changes to the POR program, it is critical that the Commission grant reconsideration to address the lack of notice that Respond Power had about changes to the POR program that had been approved by the *DSP III Order*.

³⁷ DSP IV Petition at 1-2.

³⁸ Respond Power Statement. No. 1 at 14; 52 Pa. Code § 54.185 (EDCs are required to file a default service plan at least twelve months prior to the conclusion of the currently effective default service program and set forth their plan for providing default service in that future time period).

26. Rather than making a separate filing to propose mid-course modifications to the POR program that was part of DSP III, the Companies buried their proposed retroactive tariff changes in the forward-looking DSP IV filing. Because of this misleading maneuver by the Companies, Respond Power received no notice from that the Companies intended to retroactively change the terms and conditions of the DSP III Plan as part of the DSP IV Plan. Nor did the Commission reopen the *DSP III Order* to announce that it was proposing to make changes to POR program that was previously approved and to solicit comments from interested parties, as it is required to do by Code Section 703(g).

27. Importantly, the Commission has recognized that once an EDC plan is approved by Commission order, procedures for rescission and amendment of such order must be followed to assure due process for all affected parties.³⁹ 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 rationale for the relief requested and be served on affected parties.⁴⁰ Absent such a filing and Commission approval, mid-course corrections or modifications must be rejected.⁴¹

28. Additionally, the Pennsylvania Superior Court has enunciated the criteria that must be established to satisfy due process.⁴² 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

³⁹ *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).

⁴⁰ *Id.*; 52 Pa. Code §§ 5.41 (relating to petitions generally) and 5.572 (relating to petitions for relief).

⁴¹ *Id.*

⁴² *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).

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.

29. Because the Companies were proposing to modify the terms of an existing Commission-approved POR program, they should have served stand-alone proposed supplier tariffs on EGSs or provided specific notice of their proposed retroactive changes to their then existing POR programs.⁴³ Alternatively, as the Commission found in *PECO Act 129 Order*, the Companies should have filed a petition seeking to modify the Commission-approved program. Less formally, the Companies could have used their supplier support services to communicate with EGSs about the proposed changes.⁴⁴ Rather than take any of these steps that would have given EGSs notice of mid-course changes to the POR program, the Companies opted to bury significant tariff modifications 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.⁴⁵

30. Contrary to the requirements espoused by the Court in *Wilkes*, such notice was not reasonably calculated to apprise EGSs of the Companies' backward-looking proposal and afford them an opportunity to present their objections. Since the filing was made for the express purpose of establishing a default service program to cover the future period of June 1, 2017 through May 31, 2019, the notice did not contain an adequate description of the proceedings to inform a reasonable

⁴³ Respond Power Statement No. 1 at 14.

⁴⁴ Respond Power Statement No. 1 at 14.

⁴⁵ Respond Power Statement No. 1 at 13-14. The Commission's Order states that Respond Power was provided adequate notice of the Companies' proposal including when the tariff modifications would become effective. Order at 39. However, in reaching that conclusion, the Order fails to recognize that the listing of the proposed POR change as No. 12 in the DSP IV filing did not specify an effective date. DSP IV Plan, at 3. Nor did the supplier tariff provisions accompanying the DSP IV filing include a reference to an effective date. In addition, contrary to the Order's suggestion that all three witnesses addressed the POR changes, only one witness testified about this topic and the cover sheet of her testimony indicates that it deals with "Default Service Programs for the Period June 1, 2017 to May 31, 2019." Companies Statement No. 3.

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. Notably, 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, 2019.⁴⁶ Nothing about that notice suggests that the filing may result in the mid-course modification of an existing program previously approved by the Commission.

31. To the extent that the Commission believes that service of the DSP IV plan was sufficient to notify Respond Power of mid-course corrections to the DSP III plan, which Respond Power contends it was not, 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 charges.

32. Even if Respond Power had realized in November 2015 that the Companies, through their DSP IV Plan, were proposing changes to the POR Program that was in effect as part of their DSP III Plan, it would have been too late to avoid the September 2016 invoice. By the time the tariff modifications were approved by the Commission, most of the historical pricing and write-off data on which the charges were based had already accrued, as the time period for the data spanned from September 1, 2015 through August 31, 2016.

33. The only way that charges can be assessed in a manner that is consistent with fundamental principles of due process is for them to be implemented on a forward-looking basis, consistent with the timeframe for the commencement of the default service program period.⁴⁷ Indeed, that is precisely how Duquesne Light Company's similar mechanism was handled. It was approved during a default service plan proceeding but not implemented until the commencement of

⁴⁶ 45 Pa.B. 6654.

⁴⁷ Respond Power Statement No. 1 at 5-6, footnote 6.

that default service period.⁴⁸ As default service plans are inherently forward-looking, and all other features of the plans go into effect on the first date of the default service period that they cover, it makes no sense to expect an EGS to intervene in default service proceedings if they have no interest in future changes that will take effect when the program period commences.

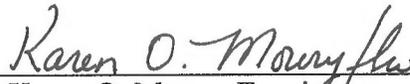
34. The Commission's Order also seems to overlook the chaos that could result from having all licensed EGSs participating in POR programs intervening in the EDCs' default service proceedings to guard against changes to the terms and conditions of previously approved default service plans. To avoid that chaos, the only adequate form of notification to Respond Power of the Companies' proposal to make midcourse modifications to the POR program approved by the *DSP III Order* would have been direct notice of a proposed revision.

⁴⁸ When Duquesne Light Company proposed to adjust the discount applied to an individual EGS under certain conditions, this mechanism was approved by the Commission on June 21, 2007 and did not go into effect until January 1, 2008. See *Petition of Duquesne Light Company for Approval of Default Service Plan for the Period January 1, 2008 Through December 31, 2010*, Docket No. P-00072247 (Recommended Decision served May 8, 2007, Appendix A, ¶5; Commission Order entered June 21, 2007).

V. CONCLUSION

WHEREFORE, on the basis of the foregoing, Respond Power, LLC respectfully requests that the Commission grant this Petition for Reconsideration, sustain the 2016 Complaints filed by Respond Power against West Penn Power Company and Pennsylvania Electric Company at Docket Nos. C-2016-2576287 and C-2016-2576292 and, grant any other relief in favor of Respond Power as may be just and proper under the circumstances.

Respectfully submitted,



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Date: June 28, 2019

Attorneys for Respond Power, LLC

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of Respond Power's Petition for Reconsideration upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54

Via Email and First Class Mail

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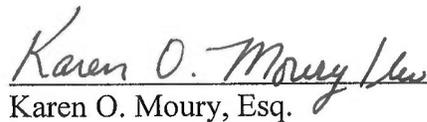
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