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July 8, 2019

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**

**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 filing on behalf of **Pennsylvania Electric Company** and **West Penn Power Company** is their **Answer Opposing Respond Power LLC's Petition for Reconsideration of the Commission's Opinion and Order entered June 13, 2019** in the above-referenced proceedings ("Answer").

As evidenced by the enclosed Certificate of Service, copies of the Answer are being served on the Chief Administrative Law Judge (because of the retirement of the former presiding Administrative Law Judge) and upon counsel for all parties to this proceeding.

Very truly yours,


Anthony C. DeCusatis

c: Per Certificate of Service (w/encls.)

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

RESPOND POWER LLC	:	
v.	:	Docket No. C-2016-2576287
PENNSYLVANIA ELECTRIC	:	
COMPANY	:	
	:	
	:	
RESPOND POWER LLC	:	
v.	:	Docket No. C-2016-2576292
WEST PENN POWER COMPANY	:	
	:	
	:	
RESPOND POWER LLC	:	
v.	:	Docket No. C-2017-2631326
PENNSYLVANIA ELECTRIC	:	
COMPANY	:	
	:	
	:	
RESPOND POWER LLC	:	
v.	:	Docket No. C-2017-2631331
WEST PENN POWER COMPANY	:	

CERTIFICATE OF SERVICE

I hereby certify and affirm that I have this day served a copy of the **Answer of Pennsylvania Electric Company and West Penn Power Company Opposing Respond Power LLC's Petition for Reconsideration of the Commission's Opinion and Order entered June 13, 2019** on the following persons, in the manner specified below, in accordance with the requirements of 52 Pa. Code § 1.54:

VIA ELECTRONIC MAIL AND FEDERAL EXPRESS

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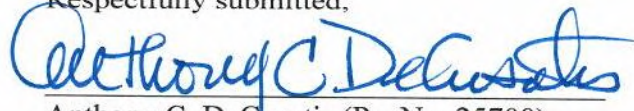
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Dated: July 8, 2019

*Counsel for Pennsylvania Electric Company
and West Penn Power Company*

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**ANSWER OF
PENNSYLVANIA ELECTRIC COMPANY AND WEST PENN POWER COMPANY
OPPOSING RESPOND POWER LLC’S PETITION FOR RECONSIDERATION OF
THE COMMISSION’S OPINION AND ORDER ENTERED JUNE 13, 2019**

I. INTRODUCTION AND OVERVIEW

Attempting to extend its nearly three-year-long campaign to delay for as long as possible paying what it owes to Pennsylvania Electric Company (“Penelec”) and West Penn Power Company (“West Penn”) (collectively, the “Companies”), Respond Power, LLC (“Respond Power”) has filed a Petition for Reconsideration (“Petition”) of the unanimous Opinion and Order (“Order”) entered on June 13, 2019 that decisively dismissed Respond Power’s Complaints against the Companies.

The Pennsylvania Public Utility Commission's ("PUC" or the "Commission") 63-page Order, like the 39-page Initial Decision of Administrative Law Judge David A. Salapa ("ALJ") ("Initial Decision") that it adopted, meticulously reviewed all of the arguments advanced by Respond Power and rejected every one of them as unsupported by evidence, contrary to controlling law and devoid of merit. Nonetheless, Respond Power has filed a Petition that transparently seeks only "to raise the same questions which were specifically considered and decided against [it]."¹ As this Commission mandated in *Duick*, Respond Power's ploy "cannot be permitted."² As even a cursory review reveals, Respond Power's Petition does not present anything remotely resembling "new and novel arguments, not previously heard" or "considerations" that were "overlooked or not addressed by the Commission."³

This case was initiated by Respond Power's unlawful collateral attack on a prior Commission final order⁴ and was unduly extended by Respond Power's obstructive tactics – e.g., petition for emergency order, petition for interlocutory review, and motion to reopen the record following a full evidentiary hearing.⁵ This proceeding has dragged on long enough. Justice for the Companies should not be delayed further by a Petition consisting of nothing more than a virtually verbatim repetition of the arguments Respond Power presented in its Main Brief, Reply Brief and Exceptions – all of which were specifically considered and rejected first by the ALJ, in his Initial Decision, and again by a unanimous Commission, in the Order. To maintain the integrity of the administrative process and send a clear message that it will not tolerate facially

¹ *Duick v. Pennsylvania Gas and Water Co.*, 56 Pa. P.U.C. 553, 559 (1985) (internal quotations omitted).

² *Id.*

³ *Id.*

⁴ See Initial Decision, p. 26 ("As Penelec and West Penn point out, to allow Respond to relitigate these issues would be to permit a collateral attack on the *Default Service Order*."); Order, p. 56 ("We also agree with the Companies that a substantial portion of the issues litigated in this matter are, essentially, a collateral attack on findings and determinations reached in prior Commission orders.").

⁵ See Order, pp. 7 and 9-10; *Petition of Respond Power LLC for Issuance of an Ex Parte Emergency Order*, Docket No. P-2016-2572934 (filed Oct. 26, 2016)

inadequate pleadings that waste its (and other parties') time and resources, the Commission should remind Respond Power that it meant what it said in *Duick* by summarily rejecting the Petition.

II. THE PETITION DISTORTS THE RECORD, TOTALLY IGNORES THE EXPLICIT FINDINGS AND CONCLUSIONS MADE BY THE ALJ AND THE COMMISSION, AND FAILS TO SATISFY THE MINIMUM REQUIREMENTS OF THE *DUICK* STANDARD FOR RECONSIDERATION

Respond Power's Petition repackages arguments it already advanced in its Briefs and Exceptions to avoid paying an administrative charge for participating in the Companies' purchase-of-receivables ("POR") programs ("POR Administrative Charge"). The Commission found the POR Administrative Charge to be just and reasonable more than three years ago in its May 19, 2016 Final Order approving the settlement of the Companies' fourth default service proceeding ("DSP IV").⁶ Notably, the ALJ and the Commission concluded it was very significant – particularly with respect to Respond Power's "notice" and "due process" arguments – that both the Retail Energy Supply Association ("RESA")⁷ and individual electric generation suppliers ("EGSs") had intervened in DSP IV to address the POR Administrative Charge and either joined in, or did not oppose, the settlement.⁸

The POR Administrative Charge is billed prospectively only to those POR-participating EGSs that: (1) generate excessive accounts receivables as exhibited by a write-off percentage that exceeds 200% of the average write-off percentage of all EGSs in each Company's service territory; and (2) charged prices that, on average, exceeded 150% of the applicable Company's

⁶ *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), p. 31. The DSP IV Recommended Decision was adopted and approved by the Commission without modification in its Final Order entered May 19, 2016 ("DSP IV Final Order").

⁷ RESA is the trade association for electric generation suppliers.

⁸ Order, p. 41; Initial Decision, p. 22.

average Price-to-Compare (“PTC”).⁹ Respond Power was one of three EGSs that passed both parts of the provision’s screening measures for each of two successive application years (2016 and 2017) and, therefore, was issued invoices for the POR Administrative Charge on September 27, 2016 and September 29, 2017.¹⁰

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 likely to continue to generate uncollectible accounts expense 200% above the average uncollectible accounts percentage of all EGSs operating in each Companies’ service areas. As both the ALJ and the Commission found, the two screening measures use historical data to identify EGSs likely to continue to impose excessive costs on the Companies and their customers.¹¹ Accordingly, as both the ALJ and the Commission also expressly found, there is nothing about the prospectively-applied POR Administrative Charge that is “retroactive” and, therefore, the charge plainly did not modify the Companies’ prior POR programs to make them “with recourse.”¹²

Using historical data to identify EGSs which are most likely to be imposing higher costs does not make the clawback charges retroactive.¹³

* * *

⁹ See Order, pp. 13-14.

¹⁰ As noted in the Petition (p. 2), Respond Power has abandoned its opposition to the September 29, 2017 invoices.

¹¹ Initial Decision, p. 34; Order, p. 47.

¹² Respond Power’s “recourse” contention was inextricably tied to its counter-factual argument that the POR Administrative Charge effected a “retroactive” reconciliation designed to recover uncollectible-accounts expense for receivables the Companies purchased from Respond Power in the past. Because the Commission totally rejected Respond Power’s “retroactive” arguments, Respond Power’s derivative claim that the POR programs were somehow converted to “with recourse” also collapses of its own weight. Moreover, and also contrary to Respond Power’s contentions, the POR Administrative Charge is only a fraction of the increased uncollectible accounts expense imposed by EGSs that pass both screening measures. Indeed, the POR Administrative Charge actually gives EGSs like Respond Power a pass on their excessive accounts receivables until they exceed 200% of the average for *all* EGSs. See Companies’ Replies to Exceptions, pp. 3 and 17-20.

¹³ Initial Decision, p. 34.

We agree with the Companies that the clawback charges did not modify the terms of the prior POR programs but is an authorized revision to the program that was approved in the *Default Service Order*. See Tr. at 80-82. The use of billing determinants from a prior, historic period does not render the operation of the clawback improperly retroactive. Therefore, we find no merit in Respond's claim that the Commission was not aware of the use of the historic data to assess the charge.

The Companies further aver that contrary to Respond's claim, the clawback charge is an administrative fee for participation in the Companies' POR program that is applied prospectively to all EGSs and was charged only after the clawback provision was approved in the *Default Service Order*. Moreover, the Companies argue that the charge is not retroactive just because the clawback screening process analyzes the track records of the EGSs to identify their mode of operation, product type and pricing policies and how these factors drive higher uncollectible account expense. Furthermore, the record clearly shows that the Companies' calculation and assessment of the clawback charges for 2016 and 2017 were in accordance with the terms and conditions of the clawback provisions approved by the Default Service Order. Therefore, we find no merit in Respond's retroactive ratemaking argument.¹⁴

The now-discredited "retroactive" and "with recourse" arguments in the Petition have simply been lifted with minimal or no modification from Respond Power's briefs and Exceptions.¹⁵ As explained above, the Commission has already considered at length and properly rejected those arguments, and it provided a detailed and well-reasoned rationale for doing so.

Respond Power also claims that a tariff supplement setting forth the POR Administrative Charge had not been "filed" before the Companies issued their first invoices and that this fact was somehow overlooked by the ALJ and the Commission.¹⁶ In leveling that charge, Respond Power couples repetition (in flagrant non-compliance with the *Duick* standard) with a gross

¹⁴ Order, p. 47.

¹⁵ See Petition, pp. 2-3 and ¶¶ 18-21 and 32-33.

¹⁶ Petition, p. 2 and ¶ 18.

distortion of the record, as evidenced by the ALJ's detailed findings¹⁷ adopted by the Commission¹⁸:

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

In short, the point Respond Power rehears in its Petition was considered by the Commission *twice* before. First, after the DSP IV Final Order approved the tariff supplements filed with the DSP IV settlement, the Commission, on November 2, 2016, formally accepted the re-filed tariff supplements with their original, previously-approved effective date of August 1, 2016. Then, the Commission affirmed its November 2, 2016 decision by its adoption of the Initial Decision, as explained above. Significantly, when the Companies re-filed their tariff supplements bearing an August 1, 2016 effective date, they served those tariff supplements and accompanying transmittal letter on Respond Power, which did not offer any objection at that time.

¹⁷ Initial Decision, p. 30 (emphasis added).

¹⁸ The Commission specifically acknowledged Respond Power's argument (Order, p. 27), which belies the suggestion that the Commission somehow overlooked it. Moreover, the Commission expressly adopted the ALJ's Initial Decision (Order, p. 62) while also explaining, consistent with its own prior pronouncements and well-established appellate precedent, that it is not required to consider expressly or at length each contention or argument raised by the parties (Order, p. 27). *See also UGI Corp. v. Pa. P.U.C.*, 410 A.2d 923, 935 (Pa. Cmwlth. 1980). Because the Commission had already accepted the re-filed tariff supplements effective as of August 1, 2016 without objection from Respond Power (as explained above), there was no need for the Commission to revisit that decision in the Order or to do anything more than it actually did, namely, to adopt the ALJ's express findings on this issue.

Respond Power also persists in trying to sell the fiction that the POR Administrative Charge proposal was somehow “buried” in the Companies’ DSP IV filing.¹⁹ The facts – which the ALJ and the Commission reviewed at length, but Respond Power did not even mention – tell a dramatically different story, as detailed by the ALJ²⁰ and as the Commission itself expressly found:

The record shows that the Companies, in accordance with the Commission’s Default Service Regulations at 52 Pa. Code §§ 54.185 and 54.188, served the DSP IV Joint Petition upon, *inter alia*, all EGSs licensed to sell electric generation in their service territories, including Respond and RESA. Companies St. 1 at 13. The record also indicates that the DSP IV Joint Petition and associated documents explicitly stated that the Companies were proposing to alter their POR program by adding the clawback provision. The record evidence shows that several sections of the DSP IV Joint Petition highlighted the proposed POR program changes, including the clawback provision.

For instance, the proposed POR change was listed as No. 12 of the twelve separately numbered items the Companies were requesting Commission approval in the DSP IV Joint Petition. Companies St. 1 at 4 and 14, citing DSP IV Joint Petition at 3. The proposed POR changes were also highlighted in the summary of the subject matter addressed in the Direct Testimony of the Companies’ three witnesses whose statements were submitted with and attached to the DSP IV Joint Petition. Companies St. 1 at 4-5, citing DSP IV Petitions at 5.

Specifically, the proposed changes to the Companies’ POR programs were highlighted in Section V (“PURCHASE OF RECEIVABLES”) Subsection A (EGS-Related Write-Offs”) of the DSP IV Joint Petition. Companies St. 1 at 4-5 and 14-15, citing DSP IV Joint Petition at 17-18. Finally, our review of the record evidence shows that changes to the POR programs, including the clawback provision, were discussed in detail in Statement No. 3 accompanying the DSP IV Joint Petition and set forth in the

¹⁹ See Petition, p. 2 and ¶ 26.

²⁰ Initial Decision, pp. 15-16 (Findings of Fact Nos. 12 – 24).

proposed Supplier Coordination Tariffs also accompanying the petition. Companies St. 1 at 5 and 15.²¹

Astonishingly, Respond Power also tries to suggest that it did not have “notice” that the Companies were proposing the POR Administrative Charge on the terms that were actually set forth in their DSP IV filing.²² That claim cannot be squared with the admission under oath by Respond Power’s General Counsel 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.²³

The DSP IV Joint Petition, with its accompanying tariff supplements and direct testimony, was served on Respond Power – a fact Respond Power concedes in Paragraph No. 23 of the Petition. That undisputed fact, in itself, totally discredits Respond Power’s claims that it did not have “notice” of the POR Administrative Charge, the data the Companies would use to apply the applicable screening measures, and the timeline for billing the charge. Indeed, all of that information was provided at multiple places in the filing that Respond Power received. For

²¹ Order, pp. 39-40.

²² See Petition ¶¶ 23-24. Respond Power’s argument is particularly puzzling since, in Paragraph 23 of the Petition, it concedes that it does not “dispute service of the DSP IV Plan or awareness of the Companies’ proposal to make changes to the POR program.” Instead, it makes a convoluted but ultimately incoherent argument that, notwithstanding the terms the Companies spelled out in their DSP IV Petition and its accompanying tariffs and testimony (see Order, pp. 39-40), Respond Power had no reason to expect that the POR Administrative Charge would be billed until sometime after May 31, 2017. No one who actually read the DSP IV Petition – as Respond Power’s General Counsel had every opportunity to do – could harbor that belief. Indeed, as the Commission found, both RESA and two other EGSs that received the DSP IV filing had no difficulty discerning when the POR Administrative Charge would be billed or that historic-period data that would be used to identify EGSs to whom the charge might apply. See Order, p. 40.

²³ Respond Power St. No. 1, pp. 14-15; Tr. at 25. Additionally, when pressed on cross-examination (Tr. 38-40), Respond Power’s General Counsel testified he may also have learned that the Companies were proposing POR program changes from reading *Energy Choice Matters* electronic newsletters – which spelled out the terms of the proposed POR Administrative Charge (see Order, pp. 35-36; Companies’ Reply Exceptions, p. 10). Whether or not Respond Power’s General Counsel read the *Energy Choice Matters* article, it cannot be disputed that a writer for a trade journal reviewed the DSP IV filing and was able to understand fully how the POR Administrative Charge would be calculated and applied. Consequently, Respond Power’s claim that no one at Respond Power could have done the same illuminates the total lack of credibility in Respond Power’s argument.

that reason, the Commission rejected Respond Power's "notice" and "due process" arguments as entirely devoid of merit.²⁴ Respond Power's argument is also invalidated by the fact that both RESA and other EGSs reviewed the same material provided to Respond Power's General Counsel and "unlike Respond . . . participated in the DSP IV proceeding and fully addressed the clawback provision and the settlement negotiations that led to the modification of the Companies' original proposal."²⁵

In the final analysis, Respond Power is complaining because the POR Administrative Charge provision functioned exactly as the parties to the DSP IV proceeding and the Commission expected, and intended, it to operate. The Commission-approved provision identified three EGSs in the 2016 application year and four EGSs in 2017 application year, whose mode of operation, product mix and pricing policies exhibited a substantial correlation with extremely high uncollectible accounts expense and who, therefore, should properly be charged an administrative fee reflecting the added risks they impose on the Companies and their customers. There is no question that Respond Power was properly identified as one of those EGSs.

Respond Power's write-off percentages were 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.²⁶ In fact, in 2016, Respond Power had the highest write-off percentage of any EGS in the Companies' service areas.²⁷ Respond Power also had charged some of the highest prices for generation in the market, which, on average, were more than 250% of the

²⁴ Order, pp. 39-41.

²⁵ Order, p. 40.

²⁶ PE/WP Exhibit KLB-1.

²⁷ *Id.*

applicable PTC.²⁸ Additionally, uncontroverted record evidence showed that the Respond Power customers whose accounts were written-off: (1) were overwhelmingly low-income²⁹; (2) were virtually all on month-to-month contracts subject to a variable rate that reflected volatile market prices plus a profit margin³⁰; 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.³¹ Respond Power also affirmed³² 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.³³

Additionally, and unmentioned by Respond Power, EGSs can always choose to operate in a responsible fashion and avoid the POR Administrative Charge on a going-forward basis. The opportunity for such relief exists because the two screening measures incorporated in the POR Administrative Charge are re-applied each year based on new annual data. Therefore, any EGS can, by making reasonable reforms in its marketing practices, product mix and pricing policies, avoid the imposition of the charge for the future. Contrary to Respond Power's erroneous assertions, no EGS is stuck paying the POR Administrative Charge due to circumstances outside its control.

For all the reasons set forth above, Respond Power's Petition should be denied, and the Commission should decline to reconsider its well-reasoned and carefully-crafted Order.

²⁸ PE/WP St. No. 1, pp. 18-19.

²⁹ Confidential PE/WP Exhibit KLB-1SR; Confidential RP Exhibit AS-18.

³⁰ PE/WP St. No. 1, p. 32; Confidential PE/WP Exhibit KLB-5; PE/WP Exhibit KLB-6.

³¹ PE/WP St. Nos. 1, pp. 32-33 & 1-SR, pp. 13-14.

³² Tr. at 34-35.

³³ Respond Power's sales practices were 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).

III. RESPONSES TO INDIVIDUALLY-NUMBERED PARAGRAPHS

(The “Background” section of the Petition comprises Paragraph Nos. 1-15)

1. At the outset, an overall response to the entire “Background” section of the Petition is necessary. Paragraph Nos. 1-15 of the Petition purport to set forth the history and background of this proceeding. However, a complete, objective and non-argumentative description of the procedural history and the relevant factual background has already been set forth by the Commission in the Order (pp. 1-15). And, reviewing the comparable portions of the Petition and the Order reveals that Respond Power has taken enormous liberties in setting forth what it represents as “background.” In reality, that section contains substantial argumentation disguised as a recitation of facts. Indeed, large swaths of the “background” portion of the Petition reflect Respond Power’s attempt to characterize self-serving averments as if they were propositions that had been established without dispute, which is entirely incorrect. In fact, Respond Power’s argumentative averments have been discredited by directly contradictory findings and conclusions made by the ALJ and the Commission.³⁴ The Companies will respond to specific arguments improperly recast as facts in the numbered paragraphs of the Petition. However, the Company generally denies as stated all of the material averments of the “Background” section of the Petition and, as its overall response to Paragraph Nos. 1-15 thereof, incorporates herein by reference the recitation of the history and background of this case set forth in the Order (pp. 1-15).

³⁴ See, e.g., Petition ¶ 11 (Claiming that the DSP IV filing proposed to “modify” the Companies’ POR programs to recover uncollectible accounts expense related to prior purchases of accounts receivable, even though the Commission expressly found to the contrary (Order, p. 47); Petition ¶ 11 (Asserting that the Companies’ proposal was made “unbeknownst” to Respond Power, even though the Commission found otherwise (Order, pp. 39-40 and 47); Petition ¶ 13 (Claiming that, because the POR Administrative Charge’s screening measures use historical data to identify high-risk EGSs to whom the charge should apply, it converts the Companies’ POR programs to “with recourse,” even though the Commission found otherwise (*Id.*); Petition ¶ 14 (Claiming that the Companies did not “file” tariff supplements containing the POR Administrative Charge until after invoices were issued, even though

2.-3. Admitted.

4. The averments of Paragraph No. 4 are a statement of law to which no response is required.

5. Denied. Section 54.185 of the Commission's regulations cited by Respond Power speaks for itself and, therefore, Respond Power's characterization of the same is denied.

6. Admitted in part, denied in part. It is admitted only that nothing in the Commission's regulations prohibits an electric distribution company ("EDC") from proposing, or the Commission from accepting, revisions to supplier tariffs or POR programs in the context of a default service program ("DSP") filing. For the reasons set forth in their Reply to Exceptions (pp. 11-13), the Companies deny Respond Power's contentions that a POR program exists only for the duration of a co-extensive DSP and, therefore: (1) EDC POR programs must be reauthorized at the same time each new DSP is approved; and (2) an EDC, *even with prior Commission approval*, is powerless to revise a POR program except in lock-step with the time intervals covered by its DSP. Those contentions are central to the argument, which Respond Power simply lifted from its Exceptions, that the POR Administrative Charge is unlawfully "retroactive" and constitutes an unauthorized "mid-course" modification of the Companies' POR programs.

As Respond Power concedes, POR programs have routinely been reviewed and approved in DSP proceedings. However, that fact does not validate Respond Power's unsupported and illogical contention that POR programs are tied to a particular DSP term and, therefore, revisions to POR programs cannot become effective except at precisely the same time a new DSP also goes into effect. Respond Power did not cite any authority for that proposition and, in fact, none

the ALJ and the Commission found this contention to be contrary to the facts and meritless as a matter of law (Initial Decision, p. 14; Order, pp. 27 and 62).

exists. Respond Power's unsupported contention is merely an after-the-fact attempt to collaterally attack the DSP IV Final Order by claiming that no reasonable EGS could have known (i.e., Respond Power did not have "notice") that the POR Administrative Charge would become effective prior to May 31, 2017. Obviously, the actions and decisions of RESA and other EGSs to intervene in the DSP IV specifically to address the POR Administrative Charge are, in themselves, a full refutation of Respond Power's argument.

Furthermore, if Respond Power truly believed what it professes, Respond Power (and virtually every other EGS) would have a strong incentive to intervene in *every* DSP proceeding of *every* EDC that has a POR program regardless of whether a POR Administrative Charge were proposed. The reason is obvious. Under Respond Power's conception of how DSP and POR programs relate to each other, every EDC POR program would expire with the EDC's DSP and have to be reauthorized to begin anew with the start of the EDC's next DSP. Since every DSP filing could potentially mark the complete termination – not just the modification – of an EDC's POR program, EGSs that depend on POR programs³⁵ would undoubtedly have compelling reasons to intervene in every DSP proceeding to assure that termination without renewal did not occur. In short, Respond Power's argument, even if accepted, would prove the opposite of the proposition Respond Power hoped to establish.

Once again, Respond Power is looking for excuses to justify collaterally attacking the DSP IV Final Order based on frivolous claims that it did not have adequate "notice" of the proceeding in which that prior order was entered. In direct contradiction of the contentions in the Petition, the Commission found and determined that Respond Power had adequate notice of the proposed POR Administrative Charge and the addition of that charge to the Companies'

³⁵ Respond Power's General Counsel repeatedly testified that participation in EDC POR programs on a non-recourse, zero-discount basis is critical to Respond Power's business of serving mass-market customers in Pennsylvania. Tr. at 41 and 45; *see also* Respond Power St. Nos. 1, pp. 3-4, 1-Supp. p. 6 & 1-R, pp. 6-7.

Supplier Coordination Tariffs with the prior express approval of the Commission “did not modify the terms of the prior POR programs” with retrospective effect.³⁶

7. Denied as stated for the reasons set forth in Paragraph No. 1, *supra*, which are incorporated herein by reference as if set forth at length. To the extent the averments of Paragraph No. 7 assert that the POR Administrative Charge converts the Companies’ POR program to “with recourse,” those averments are specifically denied for the reasons set forth Section II, *supra*.

8.-10. Denied as stated for the reasons set forth in the Companies’ answer to Paragraph No. 1, *supra*, which are incorporated herein by reference as if set forth at length.

11. Denied. For the reasons set forth in Section II, *supra*, and the Companies’ answer to Paragraph No. 6, *supra*, it is denied that the POR Administrative Charge approved in the DSP IV Final Order “was intended to modify the POR programs then in effect under DSP III.” In fact, that averment is directly contradicted by the Commission’s findings.³⁷

12. Denied as stated for the reasons set forth in the Companies’ answer to Paragraph No. 11, *supra*, which are incorporated herein by reference as if set forth at length.

13. Denied. For the reasons set forth in Section II, *supra*, and the Companies’ answer to Paragraph Nos. 6 and 11, *supra*, it is denied that the POR Administrative Charge approved in the DSP IV Final Order “transformed” the Companies’ zero-discount, non-recourse POR programs to “with recourse” programs.

14.-15. Denied. For the reasons set forth in Section II, *supra*, it is denied that the POR Administrative Charge was applied retroactively because the Companies did not “file” the

³⁶ Order, pp. 47 and 56.

³⁷ Order, p. 47 (“We agree with the Companies that the clawback charges did not modify the terms of the prior POR programs but is an authorized revision to the program that was approved in the Default Service Order. See Tr. at 80-82. The use of billing determinants from a prior, historic period, does not render the operation of the clawback improperly retroactive.”)

tariff supplements setting forth the POR Administrative Charge before they issued the first invoices to Respond Power and the other EGSs that passed the applicable two-part screening test.

(The “Legal Standards” section of the Petition comprises Paragraph Nos. 16-17)

16-17. The Petition provides a watered-down paraphrase of the requirements that must be satisfied before the Commission will grant a Petition for Reconsideration, as set forth in *Duick, supra*. Accordingly, the averments of Paragraph Nos. 16-17 are denied as stated. The Commission’s order in *Duick* speaks for itself and states as follows:

A petition for reconsideration, under the provisions of 66 Pa C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part. In this regard we agree with the Court in the *Pennsylvania Railroad Company* case, wherein it was said that “[p]arties . . ., cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them. . . .” What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission. Absent such matters being presented, we consider it unlikely that a party will succeed in persuading us that our initial decision on a matter or issue was either unwise or in error.

(The “Basis for Petition” section of the Petition comprises Paragraph Nos. 18-34)

18. Denied. As previously explained in Section II, *supra*, the Commission carefully considered and properly rejected the “notice” and “retroactive” arguments Respond Power advanced in its Briefs and Exceptions and repeated in Paragraph No. 18 of the Petition. Therefore, contrary to Respond Power’s assertions, Paragraph No. 18 does not present “new and novel arguments, not previously heard” or “considerations” that were “overlooked or not

addressed by the Commission,” as required under the Commission’s well-established standard for reconsideration articulated in *Duick*.

19-21. Denied. For the reasons set forth in Section II, *supra*, it is denied that the prospectively-applied POR Administrative Charge is “retroactive” and therefore converts the Companies’ POR program to “with recourse.”

22. Denied. For the reasons set forth in Section II, *supra*, it is denied that the Companies invoiced Respond Power for the 2016 POR Administrative Charge prior to the Commission’s approval of the related tariff provisions.

23.-25. Denied. For the reasons set forth in Section II, *supra*, it is denied that Respond Power did not have “notice” that the Companies were proposing the POR Administrative Charge on the terms that were set forth in the DSP IV filing. The ALJ and the Commission found and determined that Respond Power’s averment has no basis in fact, Respond Power had adequate notice, and its due process rights were properly observed.³⁸

26. Denied. For the reasons set forth in Section II, *supra*, it is denied that the Companies “buried” the proposed changes to their existing POR programs, including the addition of the POR Administrative Charge, in their “massive” DSP IV filing. The ALJ and the Commission found exactly the opposite to be the case.³⁹

27. Denied. For the reasons set forth in Section II, *supra*, and the Companies’ answer to Paragraph No. 6, *supra*, it is denied that POR Administrative Charge approved in the DSP IV Final Order modifies a prior PUC Order approving an “EDC plan.” In fact, the Commission expressly rejected this assertion.⁴⁰ Sections 5.41 and 5.572 of the Commission’s

³⁸ Initial Decision, pp. 15-16; Order, pp. 39-42.

³⁹ *Id.*

⁴⁰ Order, p. 47.

regulations cited by Respond Power speak for themselves and, therefore, Respond Power's characterization of the those regulations is denied.

28. The averments of Paragraph No. 28 are a statement of law to which no response is required. By way of further answer, Respond Power cites to an inapposite case that addressed whether notice of a class action settlement sent to claimants whose injuries had not yet manifested at the time of the settlement was "misleading."⁴¹ In that case, a life insurer admitted that its notice of a class action settlement did not provide information needed for the insureds and trustees to make an informed decision whether the settlement applied to future claims against the insurer concerning out-of-pocket premiums required under their "second-to-die" whole life policy.⁴² Obviously, *Wilkes* bears little resemblance to the facts of this case where Respond failed to read, or chose to ignore, the DSP IV filing that, as the Commission found, was certainly sufficient to put a reasonable POR-participating EGS on notice that historical data would be employed to assess the POR Administrative Charge as of September 2016.⁴³

29. Denied. For the reasons set forth in Section II, *supra*, it is denied that "notice" of proposed changes to the Companies' POR programs adding a POR Administrative Charge provision could only be accomplished by the Companies making a "stand-alone" Supplier Coordination Tariff filing. By way of further answer, Respond Power fails in its attempt to analogize the Companies' DSP IV filings to the "mid-course" modifications PECO Energy Company ("PECO") made to its Energy Efficiency and Conservation ("EE&C") Plan, which the Commission found to be unauthorized. In that proceeding, PECO was called upon to justify the transfer up to \$20 million in funds between different energy efficiency measures that occurred during the term of its first EE&C plan *without the required prior Commission approval of the*

⁴¹ *Wilkes v. Phoenix Home Life Mut. Ins. Co.*, 851 A.2d 204, 211 (Pa. Super. 2004).

⁴² *Id.* at 211-213.

⁴³ Order, pp. 39-41.

change.⁴⁴ That case does not share any similarity to the facts of this case. In fact, it does not even stand for the proposition for which Respond Power cited it. In stark contrast to the facts and the issue at the heart of PECO's EE&C proceeding, the Companies specifically and expressly requested prior Commission approval of POR program changes as part of their DSP IV proceeding and did not try to impose those changes either "unilaterally" or "retroactively."⁴⁵

30.-31. Denied. For the reasons set forth in Section II, *supra*, and the Companies' answer to Paragraph No. 28, *supra*, it is denied that Respond Power did not have "notice" that the Companies were proposing the POR Administrative Charge on the terms that were set forth in the DSP IV filing. In fact, the ALJ and the Commission found otherwise.⁴⁶

32. Denied. For the reasons set forth in Section II, *supra*, it is denied that the use of historical data to identify EGSs whose mode of operation, product mix and pricing policies correlate with high uncollectible accounts renders the POR Administrative Charge "retroactive." In fact, the ALJ and the Commission found otherwise.⁴⁷

33. Denied. For the reasons set forth in Section II, *supra*, it is denied that assessing the POR Administrative Charge prior to the June 1, 2017 start of DSP IV constitutes "retroactive" application contrary to "due process." In fact, the ALJ and the Commission found otherwise.⁴⁸

34. Denied. The Commission correctly disregarded Respond Power's exaggerated and factually unsupported assertion that, unless Respond Power is permitted to collaterally attack the DSP IV Final Order, "chaos" would ensue from a proliferation of EGS

⁴⁴ See *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.

⁴⁵ Order, pp. 47 and 56.

⁴⁶ Initial Decision, pp. 15-16; Order, pp. 39-42.

⁴⁷ Initial Decision, p. 34; Order, p. 47.

⁴⁸ *Id.*

interventions in future DSP proceedings to “guard against” alleged “retroactive” or “mid-course” modifications to the terms on which accounts receivable had been purchased in prior periods. First, Respond Power’s argument is predicated on a claim (i.e., that the POR Administrative Charge effects a retrospective modification of prior-period purchases of accounts receivable) that the ALJ and the Commission explicitly rejected, as explained in Section II, *supra*. Second, actual experience refutes Respond Power’s speculation. In fact, the Companies’ DSP V proceedings at Docket Nos. P-2017-2637855 and P-2017-2637857 were litigated and resolved in an orderly fashion without generating the “chaos” Respond Power hypothesized, even though the POR Administrative Charge was, once again, an issue in those cases.⁴⁹ Respond Power is certainly aware of that fact because it was a party to the Companies’ DSP V proceedings.

IV. CONCLUSION

Respond Power’s Petition fails to satisfy even the minimum requirements for reconsideration expressed in *Duick*. Given the duration of this case thus far and the careful consideration and detailed analysis underlying the ALJ’s Initial Decision and the Commission’s Order, further delay in bringing this proceeding to a close is not justified.

Notably, Respond Power has chosen simply to ignore this Commission’s directives in *Duick*. Respond Power’s Petition does not even purport to raise anything “new” or “novel,” nor does it identify any argument the Commission “overlooked” or failed to address. To the contrary, the Petition, from beginning to end, consists of a tiresome repetition of arguments that both the ALJ and the Commission carefully considered and properly rejected. Under these circumstances, giving any credence to Respond Power’s Petition would needlessly delay the proper outcome in this case and encourage litigants in future cases to mirror Respond Power’s

⁴⁹ See Order, pp. 60-62.

attempt to “game” the administrative process and forestall the day when it is forced to pay what it owes to the Companies. In order to achieve justice for the Companies in this case and to promote the broader institutional and public interest in maintaining the integrity of the administrative process for future cases, the Commission should summarily deny Respond Power’s Petition for Reconsideration of its June 13, 2019 Opinion and Order.

Respectfully Submitted



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