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December 28, 2016

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 Nos. C-2016-2576287

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 June 1, 2017 through May 31, 2019, Docket Nos. P-2015-2511333; P-2015-2511351; P-2015-2511355; P-2015-2511356

Petition of Respond Power LLC for Issuance of Ex Parte Emergency Order,
Docket No. P-2016-2572934

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Respond Power LLC's Answer to Motion for Judgment on the Pleadings of Pennsylvania Electric Company with regard to the above-referenced matters. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,

Karen Moury/lww

Karen O. Moury
KOM/lww

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

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of Respond Power's Answer to Penelec's Motion for Judgment on the Pleadings upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Respond Power LLC	:		
	:		
v.	:	Docket No.:	C-2016-2576287
	:		
Pennsylvania Electric Company	:		
Petition of Metropolitan Edison Company,	:		
Pennsylvania Electric Company, Pennsylvania	:	Docket Nos.:	P-2015-2511333
Power Company and West Penn Power Company	:		P-2015-2511351
for Approval of a Default Service Program for the	:		P-2015-2511355
Period Beginning June 1, 2017 through May 31,	:		P-2015-2511356
2019	:		
Petition of Respond Power LLC for Issuance	:	Docket No.	P-2016-2572934
of Ex Parte Emergency Order	:		

ANSWER OF RESPOND POWER LLC TO MOTION FOR JUDGMENT ON THE PLEADINGS OF PENNSYLVANIA ELECTRIC COMPANY

Pursuant to 52 Pa. Code § 5.102(b), Respond Power LLC ("Respond Power") submits this Answer in opposition to the Motion for Judgment on the Pleadings ("Motion") filed by Pennsylvania Electric Company ("Penelec" or "Company") on December 8, 2016. By its Motion, the Company seeks dismissal of Respond Power's Complaint filed on November 17, 2016 against Tariff Electric Pa. P.U.C. No. S-1 filed on October 28, 2016 with an effective date of August 1, 2016 (the "Supplier Tariff"). Respond Power's Complaint relates to the computation and application of a clawback charge contained in Section 12.9(g) of the Supplier Tariff in connection with the Company's Purchase of Receivables ("POR") program. For the reasons set forth below, Respond Power submits that the Company has not demonstrated that it is entitled to judgment as a matter of law, particularly when the Complaint raises issues about the proper computation of the charge, which the Company acknowledges may not be resolved through its Motion.

I. INTRODUCTION

By its Complaint, Respond Power challenges the computation of the clawback charge and the application of an existing tariff. This challenge to an existing tariff does not constitute a collateral attack on the underlying Commission Order that approved the implementation of a clawback charge. Rather, Respond Power's challenge directly attacks the Company's calculation of the charge and its application to Respond Power. Although Respond Power had notice of the Company's default service proceeding, it was not aware of the Company's proposal to make changes to its existing default service program as part of a forward-looking proceeding that was required to establish a future default service program.

Moreover, as the charge is contained in a Commission-approved tariff, it constitutes a rate for utility service and is subject to the just and reasonable standard set forth in Section 1301 of the Public Utility Code ("Code"), 66 Pa.C.S. § 1301. Yet, due to its retroactive components including its lack of existence during the period it was accruing and its basis on historical write-off data, the charge does not meet the requisite just and reasonable standard. Notably, the Company acknowledges that the Complaint cannot be dismissed in its entirety due to the material issues of fact that are raised regarding the accurate computation of the charge.

In approving the Settlement, the Commission acknowledged that the implementation of the clawback charge on a two-year pilot basis may lead to unintended consequences in the form of unreasonable assessments on EGSs. However, the Commission found that the terms of the Settlement adequately addressed those concerns by reserving the rights of all parties to propose modifications to or termination of the clawback charge and by recognizing that the Settlement is not intended to apply to other proceedings or to waive any parties' rights regarding those issues in future proceedings.

For the reasons more fully explained below, the Company has not demonstrated that this matter may be adjudicated on the basis of the pleadings. To the contrary, it is imperative that the Commission fully consider the legal and factual issues raised by Respond Power' Complaint before a determination is made as to whether the clawback charge may lawfully be applied to Respond Power.

II. APPLICABLE LEGAL STANDARD

Section 5.102 of the Commission's regulations provides the standard of review for a request for judgment on the pleadings:

> (1) Standard for grant or denial on all counts. The presiding officer will grant or deny a motion for judgment on the pleadings or a motion for summary judgment, as appropriate. The judgment sought will be rendered if the applicable pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, shown that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law.
>
> (2) Standard for grant or denial in part. The presiding officer may grant a partial summary judgment if the pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitles to a judgment as a matter of law on one or more but not all outstanding issues.

52 Pa. Code § 5.102(d)(1), (2).

In ruling on a Motion for Judgment on the Pleadings, the Commission must accept as true all well-pleaded facts that appear in the pleadings of the non-moving party and must examine all asserted facts in a light most favorable to the non-moving party. *McCauley v. Pennsylvania Electric Company*, Docket No. C-2010-2195962, 2011 Pa. PUC LEXIS 305, at [7] (October 17, 2011), *citing Reuben v. O'Brien*, 496 A.2d 913 (Pa. Cmwlth. 1985) and *Monzo v. Commonwealth of PA, Dept. of Transportation*, 556 A.2d 493, 495 (Pa. Cmwlth. 1989). Judgment on the pleadings may not be granted if there are genuine issues of material fact, or if the moving party has not demonstrated it is entitled to judgment as a matter of law. 52 Pa. Code § 5.102(d); *Office of*

Consumer Advocate, Pennsylvania Utility Law Project, AARP Pennsylvania v. Verizon North, Inc., Docket No. C-20077916, 2008 Pa. PUC LEXIS 37, at [10] (May 19, 2008); *MCI WorldCom, Inc. as successor in interest to MFS Intelenet of Pennsylvania, Inc. v. Bell Atlantic-Pennsylvania, Inc.*, 2000 Pa. PUC Lexis 68, at [12] (August 1, 2000).

As explained below, the Company has not met its burden to prove that it is entitled to judgment as a matter of law. Furthermore, the Company has failed to show that there are not genuine issues as to material facts relevant to Respond Power's Complaint. Therefore, the Company's Motion for Judgment on the Pleadings must be denied.

III. ARGUMENT

A. Summary of Argument.

The Company's Motion is based on two flawed recurring themes. The first is the Company's incorrect characterization of Respond Power's Complaint as an impermissible collateral attack on the Commission's Final Order approving a Joint Petition for Settlement ("Settlement") in *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) ("*2017-2019 Default Service Program Order*"). The second erroneous argument advanced by the Company is that the clawback charge in the Supplier Tariff does not constitute a rate for utility service and that the Commission lacks statutory authority to address whether it is just and reasonable under Code Section 1301, 66 Pa. C.S. § 1301.

Neither of these arguments establishes that the Company is entitled to judgment as a matter of law. Contrary to the Company's characterization, Respond Power's Complaint is not a

collateral attack on the *2017-2019 Default Service Program Order.* Respond Power was not a party to the default service proceeding and is not attempting to relitigate issues of fact or law that were addressed in that proceeding. Rather, the Complaint constitutes a challenge to the application of an existing tariff to Respond Power and contests the calculation of the clawback charge, which the Company acknowledges may not be resolved through the pleadings.[1] As to the clawback charge not being a rate that is subject to the just and reasonable standard of Code Section 1301, the Commission has broadly defined "rate" to include any charge or compensation whatsoever that is demanded or received by a public utility for any service that is provided. A charge that constitutes a change in the rules after the game has been played cannot meet the requisite just and reasonable standard. Therefore, both of the Company's arguments fail to support an entry of judgment dismissing Respond Power's Complaint.

B. Respond Power's Complaint is not a collateral attack on the Commission's Order.

1. The issue preclusion doctrine is inapplicable.

The Company's Motion argues that Code Section 316 precludes a collateral attack upon a Commission order that has not been reversed upon appeal and cites the Initial Decision of Administrative Law Judge Buckley in *Tillman v. Philadelphia Gas Works*, Docket No. C-2014-2445229, 2015 Pa. PUC LEXIS 532 (Initial Decision served November 19, 2015) as an example of when this rule is applied.[2] Although Respond Power does not dispute that Code Section 316 precludes the relitigation of issues before the Commission, even in *Tillman*, the Commission reversed the ALJ's finding and remanded the matter for further hearings because some issues had not been previously raised and it was premature to apply the Code Section 316 doctrine of issue

1 Motion ¶ 37.
2 Motion ¶ 39.

preclusion. *Tillman v. Philadelphia Gas Works*, Docket No. C-2014-2445229 (Order entered March 8, 2016), at [7-8].

Portions of the *Tillman* Initial Decision that were not disturbed during review by the Commission thoroughly explain the rule against a collateral attack. A review of that discussion shows that Respond Power's Complaint is not an impermissible attack on the Commission's May 19, 2016 Order. ALJ Buckley explained that the doctrine of *res judicata*, also known as claim preclusion, holds that a final judgment on the merits by a court of competent jurisdiction will bar any future action on the same cause of action between the parties and their privies." *Hopewell Estates, Inc. v. Kent*, 435 Pa. Super. Ct. 471, 476, 646 A.2d 1192 (1994). *Tillman* Initial Decision at 4. He further noted that issue preclusion, formerly referred to as collateral estoppel, prevents the relitigation of an issue of fact or law which was actually litigated in a prior proceeding and was necessary to the original judgment. For issue preclusion to apply, it must be shown that: (i) the issue decided by a prior final judgment is identical with the one presented in the later action; (ii) the issue was actually litigated; (iii) the party against whom issue preclusion was asserted was a party or in privy with a party to the prior litigation; and (iv) the determination of the issue was essential to the prior final judgment. *Tillman* Initial Decision at 4.

Here, none of the criteria for applying the doctrine of issue preclusion are present. The prior final judgment related to the Company's 2017-2019 Default Service Plan, whereas this proceeding challenges the application and computation of a charge to Respond Power that modifies the existing default service program. The issues being raised here about the clawback charge were not litigated during the default service proceeding. Respond Power was not a party to the default service proceeding and a determination on the clawback provision in the Settlement that modified the 2015-2017 default service program was not a critical component of the Company's default service plan covering the period beginning on June 1, 2017. In short, Respond Power has not

waived its rights to challenge the application of the clawback charge. *See Borough of Lansdale v. PP&L, Inc.*, 426 F. Supp. 2d 264 (2006) (an entity that was not a party to a proceeding is not barred from raising an issue of fact or law in a subsequent proceeding).

The Company's Motion further maintains that "[p]ursuant to Section 316, a prior order of the Commission has preclusive effect on all affected parties if they were provided due process prior to entry of that order,"[3] and cites to *Schneider v. Pa. P.U.C.*, 479 A.2d 10, 12 (Pa. Cmwlth. 1984) in support of that contention. A review of *Schneider*, however, reveals that it did not even involve an issue concerning the applicability of Code Section 316. Rather, *Schneider* addressed due process issues raised by property owners who opposed a condemnation of an electric transmission line right-of-way. The Commonwealth Court agreed that the property owners' due process rights had not been violated because the Commission had afforded them ample opportunities to appear at the Commission's hearings and have their concerns heard.

The Motion also cites to a series of cases involving a petition of the Pennsylvania State University ("PSU") for a declaratory order concerning the extension of generation rate caps for Tariff 37, which was one of the tariffs under which PSU was served.[4] The *PSU rulings* are offered by the Companies in support of their contention that a party who received notice of a proceeding and did not intervene is precluded by Code Section 316 from thereafter challenging the final order in that case. Again, a review of the *PSU rulings* shows that they do not support the proposition set forth by the Companies.

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3 Motion ¶ 40.

4 Motion ¶¶ 38-61. Petition of the Pennsylvania State University for Declaratory Order Concerning the Generation Rate Cap of the West Penn Power Company d/b/a Allegheny Power, Docket Nos. P-2007-20018 *et al*, 103 Pa. P.U.C. 472 (Recommended Decision served July 28, 2008); *Petition of the Pennsylvania State University for Declaratory Order Concerning the Generation Rate Cap of the West Penn Power Company d/b/a Allegheny Power*, Docket Nos. P-2007-20018 *et al*, 103 Pa. P.U.C. 451 (Final Order entered September 11, 2008); *The Pennsylvania State University v. Pa. P.U.C.*, 988 A.2d 771, 783 (Pa. Cmwlth. 2010) (collectively referred to as "the *PSU rulings*").

To the contrary, the Recommended Decision, the Commission Order and the Commonwealth Court Opinion focused not on whether PSU had notice of the proceeding but rather whether PSU had notice of the company's proposal to exclude Tariff 37 from the extension of generation rate caps that was applicable to other tariffs, including Tariff 39, under which PSU was also served. Finding that PSU was not denied due process, the Commission and the Commonwealth Court relied upon abundant evidence of adequate notice, including: (i) bill inserts specifically referencing the extension of rate caps for another rate schedule under which the customer was served; (ii) notice of proposed changes to a restructuring settlement of which the customer was a signatory; and (iii) a publication in the *Pennsylvania Bulletin* specifying which tariffs were being affected by the rate cap extensions.

Because of the many different ways that PSU had been notified of the company's proposal to extend the generation rate cap for Tariff 39 but not to extend it for Tariff 37, the Commission and the Commonwealth Court found that PSU should have been in the proceeding that resulted in the generation rate cap for Tariff 37 not being extended. Essentially, the Commission and the Commonwealth Court relied on the abundant evidence of adequate notice to apply the issue preclusion doctrine of Code Section 316 even though PSU was not a party to the proceeding.

2. Respond Power did not have notice of proposed changes to the Companies' 2015-2017 default service program.

By contrast, in this proceeding, nothing pointed to by the Company in its Motion placed Respond Power on notice that changes were being proposed to the 2015-2017 Default Service Program through the forward-looking 2017-2019 Default Service Program filing that was intended to establish a default service program for the period commencing on June 1, 2017. Respond Power has not disputed that it had notice of the default service proceeding. However, Respond Power did not have notice that the Company was proposing, in a filing designed to establish its 2017-

2019 Default Service Program, to modify the current POR program 2015-2017 Default Service Program. Respond Power was also not on notice that the changes would use historical write-off data that had already begun to accrue and would include unpaid supply charges billed by Respond Power dating back months or years (covering the Polar Vortex timeframe of early 2014).[5] Section 54.185 of the Commission's regulations requires default service providers to file a default service program no later than twelve months prior to the conclusion of the currently effective default service program or Commission-approved generation rate cap for that particular service territory, unless the Commission authorizes another filing date. 52 Pa. Code § 54.185. Clearly, the expectation is that the default service program that is filed will go into effect following the conclusion of the currently effective default service program.

The Pennsylvania Superior Court has annunciated the criteria that must be established to satisfy due process. *Wilkes v. Phoenix Home Life Mutual Insurance Company*, 851 A.2d 2014, 211 (2004), *rev'd on other grounds*, 587 Pa. 590, 902 A.2d 366 (2006). Specifically, notice must be reasonably calculated to apprise interested parties of the proposal and afford them an opportunity to present their objections. Although notice need not be entirely comprehensive, it must not be misleading or materially incomplete. It is further required that the notice contain an adequate description of the proceedings and include information that a reasonable person would consider material in making an informed, intelligent decision of whether to participate or risk being bound by the final judgment.

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[5] Respond Power's Complaint does not contain this allegation about the inclusion of unpaid supply charges billed by Respond Power dating back months or years. It is included here based upon a review of information provided by the Company supporting the calculations of the clawback charge that was invoiced in September 2016. Respond Power is currently engaged in informal discovery with the Company and will file an Amended Complaint as appropriate upon the completion of the discovery process.

It was reasonable for Respond Power to decline to participate in the proceeding initiated by the filing of the Company's 2017-2019 Default Service Program since the purpose of the proceeding was to establish a default service program for a future time period and no notice was given that the filing sought to modify the 2015-2017 Default Service Program. Even with notice that the default service filing would address the POR program, Respond Power would have reasonably been expected to participate in the proceeding only if it had concerns about **future changes** to the POR program or other aspects of the Company's default service program. It is not reasonable to expect electric generation suppliers ("EGSs") to participate in electric distribution companies' ("EDCs") default service proceedings if they are willing to accept the resulting design of the future default service program or cease operating in the affected service territory.

For proposed retroactive changes to the existing POR program that is part of the current default service program, it was incumbent upon the Company to separately file such proposals so that all affected parties would be on notice of a modification to the current program. Indeed, before the Commission approved the Settlement containing the clawback charge and thereby modifying the 2015-2017 Default Service Program, it was obligated to adopt the proposal as a tentative order, affording affected parties notice and an opportunity to be heard. *See* 66 Pa. C.S. § 703(g). Therefore, it was reasonable for Respond Power to expect that any changes to the POR program ultimately approved by the Commission would not go into effect until June 1, 2017.

3. Complaints may be filed against existing tariffs.

In addition to the notice issues that vary widely between the *PSU rulings* and the present case, it is also noteworthy that these matters involve wholly different circumstances. In the *PSU rulings*, the customer was seeking to resurrect a generation rate cap extension after an entire proceeding had been devoted to the extension of generate rate caps for certain rate schedules. By

contrast, Respond Power in this proceeding is challenging the application and computation of an existing tariff charge.

It is well-settled that a complaint may be filed against an existing, Commission-approved tariff and that the reasonableness of the charge may be challenged. *See Brockway Glass Co. v. Pa. PUC*, 437 A.2d 1067, 63 Pa. Cmwlth. 238 (1981). *See also In Core Communications, Inc. v. AT&T Communications of Pennsylvania, LLC*, Docket No. C-2009-2108186 (Recommended Decision served May 24, 2011) at [25].[6] Indeed, the Commission's Secretarial Letter approving the Supplier Tariff acknowledged that it was filed pursuant to the Settlement in the default service proceeding and specifically noted "this is without prejudice to any formal complaints timely filed against said tariff revisions."[7] Also, the Initial Decision adopted by the Commission in the default service proceeding acknowledged that the Settlement reserved the rights of all parties to propose modifications to or termination of the clawback charge, and that this provision is not intended to apply to other proceedings nor to waive any parties' rights regarding those issues in future proceedings.[8]

Further, the Complaint raises issues regarding the proper computation of the clawback charge, which the Company acknowledges may not be resolved through the pleadings. Clearly, complaints against the application and calculation of a tariff charge are not barred by Code Section 316.

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6 This issue was not challenged in exceptions or other pleadings and therefore was adopted by the Commission without discussion in the Order entered on December 5, 2012 and not disturbed by the Order entered on August 15, 2013.

7 Secretarial Letter dated November 10, 2016.

8 Initial Decision at 29-31.

C. The clawback charge is a rate that must be just and reasonable, which it is not due to the various retroactive components of the charge.

POR is a service that the Company provides to EGSs and the clawback charge is a fee that is imposed in connection with POR pursuant to the Supplier Tariff. As noted in the *Core* Recommended Decision, "[t]he Commission-approved tariff has the force of law" and an entity challenging it bears the burden "to show that the charge for the services that apply under the tariff is not reasonable." *Id.* at 25.

The Commission has found that the term "rate" is broadly defined to include all charges imposed by a utility. In *SBG Management Services, Inc./Colonial Garden Realty Co., L.P. v. Philadelphia Gas Works*, Docket No. C-2012-2304183 (Order entered December 8, 2016), the Commission observed that:

> It is well-settled that Section 1301 of the Code, 66 Pa. C.S. § 1301, requires that, "[e]very rate made, demanded, or received by any public utility...shall be just and reasonable, and in conformity with regulations or orders of the commission. *See Barasch v. Pa. PUC*, 507 Pa. 496, 491 A.2d 94 (1985), citing *Pa. PUC v. Pa. Gas and Water Co.*, 492 Pa. 326, 424 A.2d 1213 (1980), *cert. denied 454 U.S. 824, 102 S.Ct. 112, 70 L.Ed.2d 97 (1981).* Under the predecessor, Public Utility Law,[9] and under the current, Public Utility Code, the term "rate" is broadly defined as encompassing every individual, or joint fare, toll, charge, rental, or other compensation whatsoever of any public utility made, demanded, or received for any service within this act [Code], offered, rendered, or furnished by such public utility and includes any rules, regulations, practices, classifications or contracts affecting any such compensation, charge, fare, toll, or rental.

Order at 82. The Commission also noted that when there is a question concerning the justness and reasonableness of rates of any entity subject to the Code, the Commission, as an agency, delegated by the General Assembly, cannot be indifferent to a practice that results in a violation of the Code. *See Di Santo v. Dauphin Consol. Water Supply*, 436 A. 2d 197 (Pa. Super. 1981); *Painter v. Pa. PUC*, 116 A. 3d 749 (Pa. Cmwlth. 2015).

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9 Public Utility Law, Act of May 28, 1937, P.L. 1053.

Nothing in the Commission's decision cited by the Company's Motion supports its position that a charge in a supplier tariff is not a rate. Specifically, in *Application of Wellsboro Electric Company for Approval of Restructuring Plan Under Section 2806 of the Public Utility Code*, Docket No. R-00974046 (Order entered December 17, 1998), 1998 Pa. PUC LEXIS 231, the Commission did not address the question of whether charges contained in supplier tariffs fall under the definition of "rate." Rather, the Commission merely required the EDC in that case to file a supplier services tariff and noted some of the purposes of such a tariff filing, including establishing the basic requirements for EGS/EDC interactions in a standard format through a standardized process. Clearly, a review of the Company's current Supplier Tariff shows that it has evolved to a point that it addresses significantly more details governing the relationship between the Company and EGSs serving customers in its service territory.

Respond Power's Complaint describes the aspects of the clawback charge that render it unjust and unreasonable. The most compelling problem with the clawback charge is that it represents a change in the rules after the game has been played, which the Commission has observed violates a fundamental rule of due process. *Phone Talk, Inc. v. Bell Telephone Company of Pennsylvania, et al.*, Docket No. C-882009 et al., 126 P.U.R. 4th 179 (Order entered September 12, 1991) at [16]. In *Phone Talk*, the Commission explained that due process is fully applicable to situations involving substantial property rights and prohibits the retroactive establishment of rates. To meet the requisite due process requirement, it is imperative that utilities be permitted to impose charges on a prospective basis only. S*ee Pa. PUC v. Philadelphia Electric Co.*, 56 Pa. PUC 191, 228 (1982).

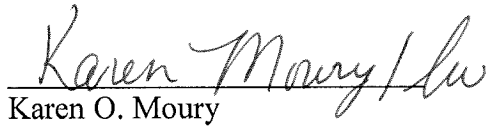
Yet, here, the clawback charge that the Company seeks to apply to Respond Power was not even approved until May 19, 2016 and would be based on historical write-off data that had already begun to accrue before the 2017-2019 Default Service Program filing was even made. Indeed,

while the clawback charge was accruing, Respond Power had no knowledge of its existence[10] and no access to information that would enable it to minimize or avoid these charges.[11] Further, based on Respond Power's review of supporting calculations provided by the Company, the historical write-off data on which the clawback charge is based includes unpaid supply charges dating back to the Polar Vortex in early 2014 and possibly beyond. Moreover, it does not appear that the write-off amounts have been adjusted by the Company to reflect amounts that have since been paid by customers to have service restored. These factors raise serious concerns about the just and reasonable nature of the clawback charge.

IV. CONCLUSION

Based upon the foregoing, Respond Power LLC respectfully requests that the Commission deny the Motion for Judgment on the Pleadings filed by Pennsylvania Electric Company.

Respectfully submitted,



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December 28, 2016

Counsel for Respond Power LLC

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[10] Even if Respond Power was presumed to know of its existence as of May 19, 2016, the date of the Commission's Final Order, nearly 9 months of write-offs had accrued by that time.

[11] The Company claims that Respond Power has control over the pricing component of two-prong test that is performed to identify EGSs who are subject to the clawback charge. While that may be true currently, that does not change the fact that while the clawback charge was accruing, Respond Power was not aware that its prices (dating back to early 2014) would later be used to subject it to a clawback provision of the POR. It is also not appropriate to require an EGS to cap its price at a certain percentage of the EDC's price to compare, since EGS prices are not regulated by the Commission and the EDC and EGS prices for generation are established in completely different manners. *See Final Order on End-State of Default Service*, Docket No. I-2011-2237952 (Order entered February 15, 2013).

VERIFICATION

I, Adam Small, hereby state that: (1) I am General Counsel for Respond Power LLC; (2) I am authorized to verify the facts in this document on behalf of Respond Power, LLC; and, (3) the facts set forth in this document are true and correct to the best of my knowledge, information and belief. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

Adam Small

Date: December 28, 2016

Adam Small
General Counsel
Respond Power LLC