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January 26, 2017

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

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

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Respond Power LLC's Petition for Interlocutory Review and Answer to Material Question with regard to the above-referenced matters. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,



Karen O. Moury
KOM/lww

Enclosure

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

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of Respond Power's Petition for Interlocutory Review and Answer to Material Questions 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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Dated: January 26, 2017



Karen O. Moury, Esq.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**PETITION OF RESPOND POWER, LLC FOR INTERLOCUTORY REVIEW
AND ANSWER TO MATERIAL QUESTIONS**

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January 26, 2017

Counsel for Respond Power LLC

Pursuant to 52 Pa. Code § 5.302, Respond Power, LLC (“Respond Power”) hereby files this Petition for Interlocutory Review and Answer to Material Questions (“Petition”) relating to the Interim Order issued by Administrative Law Judge (“ALJ”) David A. Salapa on January 23, 2017 granting, in part, the Motions for Judgment on the Pleadings filed by Pennsylvania Electric Company and West Penn Power Company (“Companies”), and in support thereof avers as follows.

1. On November 18, 2016, Respond Power filed complaints with the Pennsylvania Public Utility Commission (“Commission”) against the Companies, challenging the application of supplier tariff provisions to Respond Power. Through these tariff provisions, the Companies assessed a clawback charge in the amount of \$484,797.69 against Respond Power as part of the purchase of receivables (“POR”) program for their 2015-2017 default service plan, stemming from changes made to that program by the most recent default service proceeding.¹

2. On December 8, 2016, the Companies filed Answers and New Matter and Motions for Judgment on the Pleadings (“Motions”). On December 28, 2016, Respond Power filed Replies to the New Matter and Answers to the Motions. By Interim Order dated January 23, 2017, the ALJ granted the Motions, in part, thereby limiting Respond Power to presenting evidence only on the issue of whether the clawback charge was properly calculated pursuant to the tariffs. Respond Power seeks interlocutory review of the Interim Order.

3. From the Interim Order, the following two material questions arise, which Respond Power suggests should be answered in the affirmative based on long-standing case law:

- (A) May an entity to whom a utility tariff provision is applied file a complaint with the Commission challenging the application of the tariff?

¹ *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 (Order entered May 19, 2016).

- (B) Are Commission-approved tariff provisions subject to a just and reasonable standard?

4. Interlocutory review of these questions is needed to expedite the conduct of the proceeding and prevent substantial prejudice to Respond Power. If Respond Power is limited during the evidentiary hearing to only addressing the proper calculation of the clawback charge, it will be denied basic due process. Absent reversal of the Interim Order, Respond Power will be deprived of the opportunity to develop a record in support of its challenge against the Companies' application of the clawback charge. A later remand for a hearing on these issues would unduly delay the conduct of the proceeding. Also, since a hearing will be held on the complaint to address computational issues, judicial economy would be served by conserving resources and permitting Respond Power to also present evidence at the same hearing regarding the unreasonable features provisions, including their retroactive application and their inclusion of customers' unpaid supply charges dating back to 2014 or earlier.

5. The Interim Order concludes that Respond Power's only means of challenging the clawback charge was to participate in the default service proceeding in which it was established. To the contrary, well-established case law holds that an affected entity may file a complaint against an existing tariff provision at any time.² Moreover, it is not reasonable to expect Respond Power to have participated in a proceeding where the express purpose was to establish a default service plan for the period from June 1, 2017 through May 31, 2019 in order to protect the features of the POR program that were in effect for the current period from June 1, 2015 through May 31, 2017


² See *Brockway Glass Co. v. Pa. PUC*, 437 A.2d 1067 (1981). Also, the Secretarial Letter approving the supplier tariff provisions in question specifically noted the ability of interested parties to file complaints. Further, the settlement agreement approved in the default service proceeding provides that signatories did not even waive their ability to challenge such provisions in future proceedings. (¶ M.)

6. The Interim Order also finds that the clawback charge is not a rate and is therefore not subject to the just and reasonable standard of Section 1301 of the Public Utility Code.³ Particularly since the Commission has broadly defined both “rate” and “compensation,” the clawback charge that was assessed to Respond Power as part of its participation in the Companies’ POR program falls within those definitions. Notably, the charge appears under the billing and payment sections of the respective supplier tariffs and was imposed via an invoice sent to Respond Power. Further, it is well-settled that all tariff provisions are required to be reasonable.

7. These Commission-approved tariff provisions establish payment obligations by EGSs, who have a right to dispute such charges. If Respond Power does not have the ability to challenge the application and reasonableness of the clawback charge in a proceeding before the Commission, it will be forced to pursue these issues in the courts.

WHEREFORE, Respond Power, LLC respectfully requests that this Honorable Commission undertake interlocutory review of the Interim Order and answer the material questions in the affirmative.

Respectfully submitted,



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³ 66 Pa.C.S. § 1301.