Morgan Lewis

Anthony C. DeCusatis
Of Counsel
+1.215.963.5034
anthony.decusatis@morganlewis.com

September 11, 2017

VIA eFILING

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

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

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

Dear Secretary Chiavetta:

Enclosed for filing is the **Prehearing Memorandum of Pennsylvania Electric Company and West Penn Power Company** (the "Prehearing Memorandum") in the above-referenced proceedings.

As evidenced by the attached Certificate of Service, copies of the Prehearing Memorandum have been served upon Administrative Law Judge David A. Salapa and the parties of record.

Very truly yours,

Anthony C. DeCusatis

Anthony C. DeCusatis

Enclosures

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

Morgan, Lewis & Bockius LLP

1701 Market Street
Philadelphia, PA 19103-2921
United States

T +1.215.963.5000
F +1.215.963.5001

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	:	

CERTIFICATE OF SERVICE

I hereby certify and affirm that I have this day served a copy of **Prehearing Memorandum of Pennsylvania Electric Company and West Penn Power Company** 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

The Honorable David A. Salapa
Administrative Law Judge
Pennsylvania Public Utility Commission
400 North Street, 2nd Floor West
Commonwealth Keystone Building
Harrisburg, PA 17120
dsalapa@pa.gov

Karen O. Moury
Eckert Seamans Cherin & Mellot, LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101
kmoury@eckertseamans.com
Attorneys for Respond Power LLC

Daniel G. Asmus
Office of Small Business Advocate
Commerce Tower, Suite 202
300 North Second Street
Harrisburg, PA 17101
dasmus@pa.gov

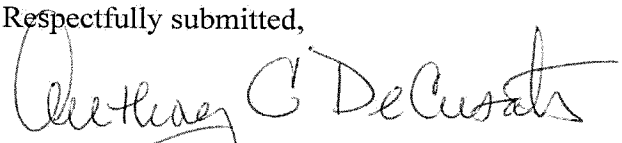
Aron J. Beatty
Kristine E. Marsilio
Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923
abeatty@paoca.org
kmarsilio@paoca.org

Patrick M. Cicero
Joline Price
Elizabeth R. Marx
Pennsylvania Utility Law Project
118 Locust Street
Harrisburg, PA 17101
pulp@palegalaid.net
Attorneys for Coalition for Affordable Utility Services and Efficiency in Pennsylvania

Susan E. Bruce
Charis Mincavage
Allesandra L. Hylander
Matthew L. Garber
McNees Wallace & Nurick, LLC
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
sbruce@mcneeslaw.com
cmincavage@mcneeslaw.com
ahylander@mcneeslaw.com
mgarber@mcneeslaw.com
Attorneys for the Met-Ed Industrial Users Group, the Penelec Industrial Customer Alliance and the West Penn Power Industrial Intervenors

Allison C. Kaster
Pennsylvania Public Utility Commission
Bureau of Investigation & Enforcement
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120
akaster@pa.gov

Respectfully submitted,



Anthony C. DeCusatis (Pa. No. 25700)
Brooke E. McGlinn (Pa. No. 204918)
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103-2921
215.963.5234 (bus)
215.963.5001 (fax)
anthony.decusatis@morganlewis.com
brooke.mcglinn@morganlewis.com

Attorneys for Pennsylvania Electric Company and West Penn Power Company

Dated: September 11, 2017

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	:	

PREHEARING CONFERENCE MEMORANDUM OF
PENNSYLVANIA ELECTRIC COMPANY AND WEST PENN POWER COMPANY

TO ADMINISTRATIVE LAW JUDGE DAVID A. SALAPA:

Pursuant to the August 11, 2017 Prehearing Conference Order issued by Administrative Law Judge David A. Salapa (the "ALJ") and the Pennsylvania Public Utility Commission's ("Commission") regulations at 52 Pa. Code § 5.222(d), Pennsylvania Electric Company ("Penelec") and West Penn Power Company ("West Penn") (each individually a "Company" and, collectively, the "Companies") hereby submit their Prehearing Conference Memorandum in the above-captioned proceedings.

I. HISTORY OF THE PROCEEDING

This proceeding relates to the voluntary purchase of receivables ("POR") programs previously established by the Companies and set forth in their respective Electric Generation Supplier Coordination Tariffs ("Supplier Coordination Tariffs"). Under the terms of their POR

programs, the Companies purchase the accounts receivable of participating electric generation suppliers ("EGSs") at face value (i.e., with no discount for uncollectible accounts) and without recourse for amounts not collected from EGSs' customers.

On November 3, 2015, the Companies, with their affiliates, Metropolitan Edison Company and Pennsylvania Power Company, filed a Joint Petition ("DSP IV Petition") requesting that the Commission approve, *inter alia*, the proposed fourth default service program ("DSP IV") of each petitioner, their proposed rates for default generation service, the continuation of their customer referral programs and a revision to their POR programs to add an administrative fee denominated a "clawback" charge. As initially proposed, the clawback charge could have been imposed if any EGS's average accounts receivable write-off percentage (write-offs expressed as a percent of revenue) for the preceding annual period exceeded 150% of the average write-off percentage for all POR-participating EGSs. If that threshold were crossed, an EGS that wished to remain in the POR program would, as a condition of doing so, have to pay a fee equal to the difference between its actual write-offs and what its write-offs would have been at 150% of the average write-off percentage for all participating EGSs.

The DSP IV Petition together with all of its accompanying direct testimony and exhibits was served upon, *inter alia*, all EGSs licensed to sell electric generation in the service areas of the Joint Petitioners, including Respond Power, LLC ("Respond Power" or "Complainant") and the Retail Energy Supply Association ("RESA"), a trade association of EGSs of which Respond Power, through its parent, is a member. Various parties intervened in the DSP IV proceeding, including RESA and two EGSs that market generation services in the Companies' service areas, and the testimony of various witnesses addressed the proposed clawback charge. Despite having been actually served with the legal pleading and all accompanying testimony and exhibits that

initiated the Companies' DSP IV proceeding, Respond Power chose not to intervene.

The parties to the Companies' DSP IV proceeding subsequently achieved a settlement of all issues related to the DSP IV Petition. One of the Settlement's terms narrowed the application of the proposed clawback fee in two ways: (1) the write-off threshold was raised from 150% to 200% of the average write-off percentage of all EGSs; and (2) another screening feature was added such that, even if an EGS crossed the 200% threshold, it would not incur a clawback fee unless, during the review period, the average price it charged for generation was more than 150% of the applicable Company's average Price-to-Compare ("PTC") for the same period. The parties also agreed that the clawback provision would be implemented for two years on a "pilot" basis, after which it would be subject to further review. In its final Order approving the DSP IV Petition, as modified by the Settlement, the Commission found the Settlement terms to be in the public interest, including implementation of a POR clawback charge on a pilot basis until May 31, 2019.[1] The Commission's Chairman issued a separate statement supporting the settlement. No party filed an appeal.[2]

Applying the Commission-approved settlement provisions, the Companies analyzed the accounts receivable write-offs and prices charged to customers for all POR-participating EGSs

---

[1] *See 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 and P-2015-2511356 (Recommended Decision issued April 15, 2016) ("Recommended Decision"), p. 31 ("I conclude that the provision of the joint petition for settlement establishing the POR clawback charge is in the public interest. As the parties recognize, any unpaid bills for service rendered are borne by all the utility's ratepayers. The POR clawback charge addresses FE's concerns about increasing amounts of unpaid bills and the resulting write-offs while balancing the concerns of the other parties as outlined above."). The Recommended Decision was adopted by the Commission without modification by Final Order entered May 19, 2016 ("DSP IV Final Order").

[2] Supplier Coordination Tariff supplements setting forth all of the revisions to the Companies' POR programs, including the clawback provision, were agreed to by the settling parties, attached to the Joint Petition for Settlement and approved by the Commission pursuant to the DSP IV Final Order. However, because the supplements filed with the Joint Petition did not bear supplement numbers, they were not included in the Companies' tariff books at the Secretary's Bureau. When this came to the Companies' attention, they filed the Supplements with the Secretary and, by Secretarial Letter dated November 10, 2016, the Supplements were accepted *nunc pro tunc* with an effective date of August 1, 2016.

for the twelve months ended August 31, 2016. Penelec and West Penn each identified Respond Power and other EGSs that were subject to clawback charges and calculated Respond Power's charges of $305,891 and $178,907, respectively. On September 30, 2016, the Companies issued Respond Power invoices for those amounts ("September 2016 Clawback Charge").

On October 21, 2016, Respond Power sent a letter to the Companies objecting to the clawback charges and requesting a waiver and extension of the due date. On October 26, 2016, Respond filed a Petition for Issuance of *Ex Parte* Emergency Order ("*Ex Parte* Petition") seeking an extension of the due date for payment of the clawback charge. On October 27, 2016, Commissioner Andrew Place granted the *Ex Parte* Petition and issued an Emergency Order. On November 1, 2016, the Companies filed an Answer to Respond Power's *Ex Parte* Petition explaining why Respond was not entitled to the relief it requested. The Commission nonetheless ratified the Emergency Order at its public meeting held on November 10, 2016 and directed that a hearing be held within ten days.

On November 17, 2016, Respond filed the Complaints challenging the validity of the clawback charge and seeking to retrospectively nullify the settlement's clawback provisions back to the date of the DSP IV Final Order.[3] On December 8, 2016, each of the Companies filed Answers and New Matter. They also filed Motions for Judgment on the Pleadings ("Motions") requesting dismissal on the principal grounds that the Complaints are unlawful collateral attacks on a Commission final order and, as such, are barred by Section 316 of the Public Utility Code ("Code").

[3] After the Complaints were filed, the Companies confirmed with Respond Power that the clawback charges billed to Respond Power were "disputed" and, pursuant to the terms of their Supplier Coordination Tariffs, collection efforts could not therefore be renewed until the Commission resolved the dispute. Accordingly, Respond Power withdrew its Petition for an Emergency Order, which had become moot. Judge Salapa cancelled the hearing scheduled for November 17, 2016 and approved the withdrawal. The clawback charges have not been paid, and the Companies have postponed any collection efforts until this case is adjudicated.

The Office of Consumer Advocate and the Office of Small Business Advocate filed a Notice of Intervention and Public Statement on December 8, 2017 and December 13, 2017, respectively, in response to the Complaint. The Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania and the Penelec Industrial Customer Alliance, the West Penn Power Industrial Intervenors and the Met-Ed Industrial Users Group (jointly) also filed Petitions to Intervene. On December 14, 2016, the Commission's Bureau of Investigation and Enforcement filed a Notice of Appearance.

On January 23, 2017, Judge Salapa issued his *Order Granting In Part, Motion For Judgment On The Pleadings* ("Order"). The "In Part" in the Order's title refers to the Companies' acknowledgment, which the Judge accepted, that their Motions did not extend to Respond Power's averments that the Companies allegedly made computational errors in calculating the charges that are the subject of the Complaints.

In response, on January 26, 2017, Respond Power filed a Petition for Interlocutory Review and Answer to Material Questions ("Petition") and posed the following two questions for the Commission's consideration:

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

B. Are Commission-approved tariffs subject to a just and reasonable standard?[4]

On July 13, 2017, the Commission entered an Opinion and Order granting interlocutory review, answered the foregoing questions in the affirmative and remanded the matter to the Office of Administrative Law Judge. The ALJ's Order and the Commission's Opinion and Order are discussed in more detail in Section III.E., *infra*.

Thereafter, the Complaints were assigned to the ALJ, and an initial Prehearing

[4] *See* Petition at 1-2.

Conference was scheduled for September 13, 2017.

II. BURDEN OF PROOF

This case involves Complaints against the existing Supplier Coordination Tariffs of Penelec and West Penn. As such, Respond Power has the burden of proof and also has the burden of going forward with the evidence. *See* 66 Pa.C.S. § 332(a).

III. RESPONSES TO PARAGRAPH NO. 3 OF THE PREHEARING ORDER

A. Service List (Prehearing Order, ¶ 3.a.)

Pursuant to 52 Pa. Code § 1.55, the Companies hereby designate the following individual for the service list in this proceeding:

Tori L. Giesler (Pa. No. 207742)
FirstEnergy Service Company
2800 Pottsville Pike
P.O. Box 16001
Reading, PA 19612-6001
Phone: 610.921.6658
Fax: 610.939.8655
tgiesler@firstenergycorp.com

Parties are requested to also serve documents on the following attorneys as a courtesy:

Anthony C. DeCusatis
Brooke E. McGlinn
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103-2921
215.963.5034 (bus)
215.963.5001 (fax)
anthony.decusatis@morganlewis.com
brooke.mcglinn@morganlewis.com

B. Possibility of Settlement (Prehearing Order, ¶ 3.b.)

Penelec and West Penn are willing to pursue with Respond Power the possible stipulation of individual issues and/or more far-ranging settlement discussions that might lead to a

comprehensive resolution of its Complaints.

C. Discovery (Prehearing Order, ¶¶ 3.c. and d.)

The Companies propose that a Protective Order be adopted in this case to protect sensitive information from public disclosure. Therefore, the Companies respectfully request that the ALJs approve the proposed Protective Order attached hereto as Appendix "A," which is similar to the Protective Order entered in the DSP IV proceeding. The Companies also propose modifications to the Commission's discovery regulations, as shown in Appendix "B." The proposed discovery modifications are identical to modifications approved in the Companies' DSP IV proceeding.

D. Proposed Schedule (¶ 3.e.)

The Companies will cooperate with the ALJ, Respond Power and other parties to facilitate the orderly conduct and disposition of this proceeding. To that end, the Companies consulted with Respond Power and agreed to the following proposed schedule:

Initial Prehearing Conference	September 13, 2017
Complainant's Direct Testimony Due	October 18, 2017
Companies' Direct Testimony Due	November 8, 2017
Complainant's Rebuttal Testimony Due	November 21, 2017
Companies' Surrebuttal Testimony Due	December 6, 2017
Oral Rejoinder and Evidentiary Hearings	December 13-14, 2017 (Anticipate only one day should be needed.)
Main Briefs Due	Three weeks from the date of receipt of the evidentiary hearing

	transcript.
Reply Briefs Due	Two weeks from the date of submission of Main Briefs.

All proposed dates for submission of testimony and briefs are for "in-hand" delivery, which may be satisfied by an e-mail or fax copy of the relevant documents.

E. Statement of Issues (Prehearing Order, ¶3.g.)

As previously explained, on January 23, 2017, the ALJ issues his Order, which granted in part the Companies' Motion for Judgment on the Pleadings. In that Order, the ALJ found and determined that:

(1) Respond Power had "notice and opportunity to be heard" as to the DSP IV proceeding and, in particular, the clawback provision; therefore, "its due process rights were adequately protected"[5];

(2) The clawback provision (although not strictly construed as a "rate"), when taken together with the other provisions that comprise the POR program, is properly included in the Companies' Supplier Coordination Tariffs[6];

(3) A tariff includes "rules, regulations and practices of a public utility" in addition to "rates"[7];

(4) The clawback provision is part of the "set of operating rules" that control the interaction between electric distribution companies ("EDCs") and EGSs; that "set of operating rules" is essential to EDCs' provision of "service" to retail distribution customers, as "service" is defined under the Public Utility Code[8];

(5) As a consequence of the direct relationship between the "operating rules" in the Supplier Coordination Tariff and the provision of service to an EDC's distribution customers, a Supplier Coordination Tariff is a "tariff" as defined by Section 102 and is subject to the jurisdiction and authority of the Commission under the Public Utility Code[9];

---

[5] *Id.* at 9. *See also id.* at 8 ("Respond first argues that it did not receive adequate notice from the captions in the DSP proceedings resulting in the Default Service Order that Penelec and West Penn were proposing the clawback charges. Therefore, Respond argues that imposition of the POR clawback charges on it violates principles of due process. This is incorrect.").

[6] *Id.* at 10.

[7] *Id.*

[8] Order, pp. 10-11.

[9] *Id.* at 11.

(6) Public utility tariffs "have the force and effect of law," are "binding on the public utility and its customers," are "prima facie reasonable" and "must be applied" in accordance with their terms[10];

(7) The Commission "approved Penelec's and West Penn's tariff filing implementing the clawback provisions," "no party appealed" the DSP IV Final Order, and the "clawback provision tariff therefore has the force and effect of law and is binding on Respond Power, Penelec and West Penn."[11] As a consequence, Respond Power is barred from raising any challenge that would seek to invalidate the clawback charge *retrospectively*, because that tariff provision has the "force and effect of law" and is "binding" on Respond Power and the Companies unless and until it is changed by the Commission; and

(8) To the extent Respond Power is challenging the clawback charge's *prospective* application (i.e., during the remainder of the second year of the two-year pilot), it has failed to allege any "facts and circumstances leading to the creation of the tariff provision" that have "changed so drastically as to render the application of the tariff provision unreasonable."[12]

As noted in the preceding summary, the ALJ drew a clear distinction between the retrospective and prospective aspects of Respond Power's Complaints. The retrospective aspect is Respond Power's attempt to challenge the clawback charge for the first year of its application, which had already expired by the time Respond Power filed its Complaints. The prospective aspect is Respond Power's challenge to the application of the clawback charge during the next subsequent twelve months.

The Order is clearly correct in finding that the retrospective and prospective distinction has legal significance because well-established precedent holds that the provisions of a tariff, once approved by the Commission, are protected from retroactive reversal. While this doctrine has most often been applied to "Commission-made rates,"[13] it is broadly applicable to rates, regulations, and terms of service that are part of a Commission-approved tariff, all of which have

---

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Cheltenham & Abington Sewerage Co. v. Pa. P.U.C.*, 344 Pa. 366, 369, 25 A.2d 334, 337 (1942); *Lancaster Ice Mfg. Co. v. Pa. P.U.C.*, 185 Pa. Super. 615, 626, 138 A.2d 262, 267 (1957); *West Penn Power Co. v. Pa. P.U.C.*, 174 Pa. Super. 123, 131, 100 A.2d 110, 114 (1953).

the force and effect of law.[14] Simply stated, whether the clawback charge is deemed to be a "rate" or not,[15] the Companies' Supplier Coordination Tariffs, including the clawback charge provisions set forth therein, were approved by the Commission and cannot be retrospectively reversed.[16]

In its Opinion and Order on interlocutory review, the Commission focused on the portion of the ALJ's Order that set forth the standard for determining whether a utility tariff provision that was approved by the Commission and, therefore, has the full force and effect of law,[17] may be changed prospectively. The ALJ correctly described the "changed circumstances" standard that must be satisfied for a complainant to prevail in challenging an existing, approved tariff provision, which was succinctly stated by the Commonwealth Court in a decision the Commission itself cited in its Opinion and Order (p. 17):

> Because Pennsylvania courts have repeatedly held that tariff provisions previously approved by the PUC are *prima facie* reasonable, *Zucker v. Pennsylvania Public Utility Commission*, 43 Pa. Commw. 207, 401 A.2d 1377 (Pa. Cmwlth. 1979), a complainant seeking to evade the effect of an existing tariff provision, such as Shenango, carries a very heavy burden to prove that the facts and circumstances have changed so drastically as to render the application of the tariff provision unreasonable. *Id.*; *see also Brockway Glass Co. v. Pennsylvania Public Utility Commission*, 63 Pa. Commw. 238, 437 A.2d 1067 (Pa. Cmwlth. 1981). The PUC held Shenango did not meet this burden, and

---

[14] *See Opinion and Order*, p. 19, *citing Brockway Glass Co. v. Pa. P.U.C.*, 437 A.2d 1067 (Pa. Cmwlth. 1981).

[15] The ALJ concluded that the clawback charge is not a "rate." Order, p. 9. The Commission did not specifically affirm or reverse that finding. The ALJ also determined that the Supplier Coordination Tariffs are "tariffs" and, as such, have the "force and effect of law." *Id.*, p. 11. The Commission did affirm that determination. Opinion and Order, p. 19. As a Commission-approved term of the Companies' Supplier Coordination Tariff, the clawback charge is entitled to protection from retroactive reversal for all the reasons discussed above whether or not it is specifically determined to be a "rate."

[16] *See Lancaster Ice Mfg. Co. v. Pa. P.U.C., supra. See also Cheltenham & Abington Sewerage Co., supra* ("[A] commission-made rate furnishes the applicable law for the utility and its customers until a change is made by the commission.")

[17] *See* Opinion and Order, p. 17: "All parties agree that a Commission-approved tariff is prima facie reasonable, has the full force of law and is binding on the utility and the customer."

following our review of the record, we must agree.[18]

Although the ALJ found and determined that Respond Power's Complaints failed to allege facts that, if proven, could sustain its "heavy burden" to show that there has been a "drastic" change in "facts and circumstances" since the terms of the Companies' Supplier Coordination Tariffs were approved, the Commission was of the opinion that the issue should not be decided on a dispositive motion and, instead, Respond Power should be afforded a hearing. The Commission's focus on the "changed circumstances" standard makes it clear that only the prospective aspect of Respond Power's Complaints is – or could be – at issue in the hearing it directed the ALJ to conduct. Moreover, under the well-established appellate court precedent previously cited, the Commission has no legal authority to grant Respond Power any retrospective relief even if it were to find that Respond Power could carry its "heavy burden" to override the Companies' existing approved tariffs.

For all the preceding reasons, at this point in the proceeding, it appears that the only issue that Respond Power may properly raise with regard to its challenge of the clawback provision is whether it can carry its "very heavy burden to prove that the facts and circumstances have changed so drastically as to render the application of" the Commission-approved terms of the Companies' Supplier Coordination Tariffs "unreasonable" for *prospective* application. With respect to the application of the clawback provision for the period that expired prior to Respond Power filing its Complaints, the only issue that properly is open for examination is whether the Companies made computational errors in calculating the September 2016 Clawback Charges in the invoices previously issued to Respond Power. The Companies will show that their computations are correct and conform to the terms of their Commission-approved Supplier

[18] *Shenango Twp. Bd. Of Supervisors v. Pa. P.U.C.*, 686 A.2d 910, 914 (Pa. Cmwlth. 1996).

Coordination Tariffs.

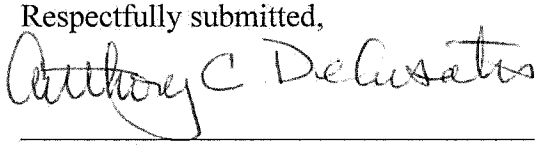
F. Witnesses and Evidence (Prehearing Order, ¶ 3.f. and h.)

The witness or witnesses the Companies would call will depend in large part upon the issue(s) Respond Power intends to pursue and the nature and scope of its case-in-chief. With that caveat, the Companies would expect to present testimony by Ms. Kimberlie L. Bortz: (1) to sponsor the relevant portions of the Companies' Supplier Coordination Tariffs and copies of relevant DSP IV filings; (2) to explain the POR clawback provision approved in the Companies' DSP IV proceeding and how it was implemented consistent with the settlement approved by the Commission in the DSP IV Final Order; and (3) to address the computational errors alleged in the Complaints. Ms. Bortz is employed by the FirstEnergy Service Company as a Rates Advisor – Rates and Regulatory Affairs-Pennsylvania. Her business address is 2800 Pottsville Pike, Reading, Pennsylvania 19605. While the Companies could foresee calling Ms. Bortz as the Companies' witness, their final list of witnesses cannot be determined until they obtain and review Respond Power's direct testimony. Accordingly, the Companies reserve the right to amend their list of witnesses as they determine necessary or appropriate to address issues as they develop over the course of this proceeding.

IV. CONCLUSION

WHEREFORE, Pennsylvania Electric Company and West Penn Power Company respectfully submit this Prehearing Conference Memorandum.

Respectfully submitted,



Tori L. Giesler (Pa. No. 207742)
FirstEnergy Service Company
2800 Pottsville Pike
P.O. Box 16001
Reading, PA 19612-6001
610.921.6658
tgiesler@firstenergycorp.com

Anthony C. DeCusatis (Pa. No. 25700)
Brooke E. McGlinn (Pa. No. 204918)
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103-2921
215.963.5034 (bus)
215.963.5001 (fax)
anthony.decusatis@morganlewis.com
brooke.mcglinn@morganlewis.com

Counsel for Pennsylvania Electric Company and West Penn Power Company

Dated: September 11, 2017

APPENDIX A

PROPOSED PROTECTIVE ORDER

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	:	

PROTECTIVE ORDER

IT IS ORDERED THAT:

1. This Protective Order is hereby GRANTED and shall establish procedures for the protection of all materials and information identified in Paragraphs 2 and 3 below, which are or will be filed with the Pennsylvania Public Utility Commission ("Commission"), produced in discovery, or otherwise presented during the above-captioned proceeding and all proceedings consolidated with it. All persons now or hereafter granted access to the materials and information identified in Paragraphs 2 and 3of this Protective Order shall use and disclose such information only in accordance with this Order.

2. The information subject to this Protective Order is all correspondence, documents, data, information, studies, methodologies and other materials, in whatever form produced, stored or contained, including computerized memory, magnetic, electronic or optical media, furnished in this proceeding that the producing party believes to be of a proprietary or confidential nature and are so designated by being stamped "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" protected material. Such materials are referred to in this Protective Order as "Proprietary

Information." When a statement or exhibit is identified for the record, the portions thereof that constitute Proprietary Information shall be designated as such for the record.

3. For purposes of this Protective Order, there are two categories of Proprietary Information: "CONFIDENTIAL" and "HIGHLY CONFIDENTIAL" protected material. A producing party may designate as "CONFIDENTIAL" those materials that are customarily treated by that party as sensitive or proprietary, that are not available to the public, and that, if generally disclosed, would subject that party to the risk of competitive disadvantage or other business injury. A producing party may designate as "HIGHLY CONFIDENTIAL" those materials that are of such a commercially sensitive nature, relative to the business interests of parties to this proceeding, or of such a private or personal nature, that the producing party is able to justify a heightened level of confidential protection with respect to those materials. The parties shall endeavor to limit the information designated as "HIGHLY CONFIDENTIAL" protected material.

4. Subject to the terms of this Protective Order, Proprietary Information shall be provided to counsel for a party who meets the criteria of a "Reviewing Representative" as set forth below. Such counsel shall use or disclose the Proprietary Information only for purposes of preparing or presenting evidence, testimony, cross-examination, argument, or settlement discussions in this proceeding. To the extent required for participation in this proceeding, such counsel may allow others to have access to Proprietary Information only in accordance with the conditions and limitations set forth in this Protective Order.

5. Nothing in this Protective Order precludes the use by the Commission and its Staff, consistent with this Protective Order, of Proprietary Information produced in this proceeding and made part of the record.

6. Information deemed "CONFIDENTIAL" shall be provided to a "Reviewing Representative." For purposes of "CONFIDENTIAL" Proprietary Information, a "Reviewing Representative" is a person who has signed a Non-Disclosure Certificate and is:

i. An attorney who has formally entered an appearance in this proceeding on behalf of a party;

ii. An attorney, paralegal, or other employee associated for purposes of this case with an attorney described in subparagraph (i) above;

iii. An expert or an employee of an expert retained by a party for the purpose of advising that party or testifying in this proceeding on behalf of that party; or

iv. Employees or other representatives of a party who have significant responsibility for developing or presenting that party's positions in this docket.

7. Information deemed "HIGHLY CONFIDENTIAL" protected material shall be provided to a Reviewing Representative, provided, however that a Reviewing Representative, for purposes of "HIGHLY CONFIDENTIAL" protected material, is limited to a person who has signed a Non-Disclosure Certificate and is:

i. An attorney who has formally entered an appearance in this proceeding on behalf of a party;

ii. An attorney, paralegal, or other employee associated for purposes of this case with an attorney described in subparagraph (i) above;

iii. An outside expert or an employee of an outside expert retained by a party for the purpose of advising that party or testifying in this proceeding on behalf of that party; or

iv. A person designated as a Reviewing Representative for purposes of HIGHLY CONFIDENTIAL protected material pursuant to Paragraph 12.

8. For purposes of this Protective Order, a Reviewing Representative may not be a "Restricted Person" absent agreement of the party producing the Proprietary Information pursuant to Paragraph 12. A "Restricted Person" shall mean: (a) an officer, director, stockholder, partner, or owner of any competitor of the parties or an employee of such an entity if the employee's duties involve marketing or pricing of the competitor's products or services or advising another person who has such duties: (b) an officer, director, stockholder, partner, or owner of any affiliate of a competitor of the parties (including any association of competitors of the parties) or an employee of such an entity if the employee's duties involve marketing or pricing of the competitor's products or services or advising another person who has such duties; (c) an officer, director, stock holder, owner, agent or employee of a competitor of a customer of or vendor to the parties if the Proprietary Information concerns a specific, identifiable customer of or vendor of the parties; and (d) an officer, director, stockholder, owner or employee of an affiliate of a competitor of a customer of the parties if the Proprietary Information concerns a specific, identifiable customer of the parties; provided, however, that no expert shall be disqualified on account of being a stockholder, partner, or owner unless that expert's interest in the business would provide a significant motive for violating the limitations of permissible use of the Proprietary Information. For purposes of this Protective Order, stocks, partnership or other ownership interests valued at more than $10,000 or constituting more than a 1% interest in a business establish a significant motive for violation. A "Restricted Person" shall not include an expert for the Office of Consumer Advocate ("OCA") or Office of Small Business Advocate ("OSBA").

9. If an expert for a party, another member of the expert's firm or the expert's firm generally also serves as an expert for, or as a consultant or advisor to, a Restricted Person (other than an expert or expert firm retained by the OCA or OSBA), that expert must: (1) identify for the parties each Restricted Person and all personnel in or associated with the expert's firm that work on behalf of the Restricted Person; (2) take all reasonable steps to segregate those personnel assisting in the expert's participation in this proceeding from those personnel working on behalf of a Restricted Person; and (3) if segregation of such personnel is impractical, the expert shall give to the producing party a written assurances that the lack of segregation will in no way adversely affect the interest of the parties or their customers. The parties retain the right to challenge the adequacy of the written assurances that the parties' or their customers' interests will not be adversely affected. No other persons may have access to the Proprietary Information except as authorized by order of the Commission or the presiding Administrative Law Judge(s).

10. Reviewing Representatives qualified to receive "HIGHLY CONFIDENTIAL" protected material may discuss HIGHLY CONFIDENTIAL protected material with their client or with the entity with which they are employed or associated, to the extent that the client or entity is not a "Restricted Person," but may not share with, or permit the client or entity to review or have access to, the HIGHLY CONFIDENTIAL protected material. Counsel for the OCA, OSBA and the Commission's Bureau of Investigation and Enforcement ("I&E") may share Proprietary Information with the Consumer Advocate, Small Business Advocate, or I&E Director, respectively, without obtaining a Non-Disclosure Certificate from the Consumer Advocate, Small Business Advocate, or I&E Director, provided however, that the Consumer Advocate, Small Business Advocate, or I&E Director otherwise abides by the terms of this Protective Order.

11. Proprietary Information shall be treated by the parties and by the Reviewing Representative in accordance with the terms of this Protective Order, which are hereby expressly incorporated into the certificate that must be executed pursuant to Paragraph 13(a). Proprietary Information shall be used as necessary, for the conduct of this proceeding and for no other purpose. Proprietary Information shall not be disclosed in any manner to any person except a Reviewing Representative who is engaged in the conduct of this proceeding and who needs to know the information in order to carry out that person's responsibilities in this proceeding.

12. Reviewing Representatives may not use anything contained in any Proprietary Information obtained through this proceeding to give any party or any competitor of any party a commercial advantage. In the event that a party wishes to designate as a Reviewing Representative a person not described in Paragraph 7(i) through (iii) above, as qualified by Paragraph 8 above, the party must first seek agreement to do so from the party providing the Proprietary Information. If an agreement is reached, the designated individual shall be a Reviewing Representative pursuant to Paragraph 7(iv) above with respect to those materials. If no agreement is reached, the party seeking to have a person designated a Reviewing Representative shall submit the disputed designation to the presiding Administrative Law Judge(s) for resolution.

13. (a) A Reviewing Representative shall not be permitted to inspect, participate in discussions regarding, or otherwise be permitted access to Proprietary Information pursuant to this Protective Order unless that Reviewing Representative has first executed a Non-Disclosure Certificate in the form provided in Appendix A, provided, however, that if an attorney or expert qualified as a Reviewing Representative has executed such a certificate, the paralegals, secretarial and clerical personnel under the attorney's instruction, supervision or control need not

do so. A copy of each executed Non-Disclosure Certificate shall be provided to counsel for the party asserting confidentiality prior to disclosure of any Proprietary Information to that Reviewing Representative.

(b) Attorneys and outside experts qualified as Reviewing Representatives are responsible for ensuring that persons under their supervision or control comply with this Protective Order.

14. The parties shall designate data or documents as constituting or containing Proprietary Information by stamping the documents "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" protected material. Where only part of data compilations or multi-page documents constitutes or contains Proprietary Information, the parties, insofar as reasonably practicable within discovery and other time constraints imposed in this proceeding, shall designate only the specific data or pages of documents which constitute or contain Proprietary Information.

15. The Commission and all parties, including the statutory advocates and any other agency or department of state government, will consider and treat the Proprietary Information as within the definition of "confidential proprietary information" in Section 102 of the Pennsylvania Right-to-Know Law of 2008, 65 P.S. § 67.102 and subject to the exemptions from disclosure provided in the Pennsylvania Right-to-Know Act (65 P.S. § 67.101 et seq.) until such information is found by a tribunal with jurisdiction to be not confidential or subject to one or more exemptions.

16. Any public reference to Proprietary Information by a party or its Reviewing Representative shall be to the title or exhibit reference in sufficient detail to permit persons with

access to the Proprietary Information to understand fully the reference and not more. The Proprietary Information shall remain a part of the record, to the extent admitted, for all purposes of administrative or judicial review.

17. The part(s) of any record of this proceeding containing Proprietary Information, including but not limited to all exhibits (including discovery responses made part of the record), writings, testimony, cross examination, and argument, and including reference thereto as mentioned in Paragraph 16 above, shall be sealed for all purposes, including administrative and judicial review, unless such Proprietary Information is released from the restrictions of this Protective Order, either through the agreement of the parties to this proceeding or pursuant to an order of the Commission.

18. The parties shall retain the right to question or challenge the confidential or proprietary nature of Proprietary Information and to question or challenge the admissibility of Proprietary Information. If a party challenges the designation of a document or information as proprietary, the producing party retains the burden of demonstrating that the designation is appropriate.

19. The parties shall retain the right to object to the production of Proprietary Information on any proper ground, to refuse to produce Proprietary Information pending the adjudication of the objection, and to seek additional measures of protection of Proprietary Information beyond those provided in this Protective Order.

20. Within 30 days after a Commission final order is entered in the above-captioned proceedings, or in the event of appeals, within thirty days after appeals are finally decided, the receiving party, upon request, shall either destroy or return to the producing party all copies of all

documents and other materials not entered into the record, including notes, which contain any Proprietary Information. This provision, however, shall not apply to I&E, the Office of Consumer Advocate, or the Office of Small Business Advocate, or any other party receiving the consent of the producing party; except, however, that HIGHLY CONFIDENTIAL protected material provided to any party shall be returned to the producing party or destroyed in all cases. In the event that a receiving party elects to destroy all copies of documents and other materials containing Proprietary Information instead of returning the copies of documents and other materials containing Proprietary Information to the producing party, upon request, the receiving party shall certify in writing to the producing party that the Proprietary Information has been destroyed.

Date:_____.

_____
David A. Salapa
Administrative Law Judge

APPENDIX A

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	:	

TO WHOM IT MAY CONCERN:

The undersigned is the _____of _____(the receiving party).

The undersigned has read and understands the Protective Order executed in the above-captioned proceedings that deals with the treatment of Proprietary Information. The undersigned agrees to be bound by, and comply with, the terms and conditions of said Protective Order, which are incorporated herein by reference.

_____
SIGNATURE

_____
PRINT NAME

_____
ADDRESS

_____
EMPLOYER

DATE: _____, 2017

APPENDIX B

PROPOSED DISCOVERY PROCEDURE MODIFICATIONS

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	:	

PENNSYLVANIA ELECTRIC COMPANY'S
AND WEST PENN POWER COMPANY'S
PROPOSED DISCOVERY PROCEDURE MODIFICATIONS

1. Answers to written interrogatories are to be served in-hand within ten (10) calendar days of service of the interrogatories.

2. Objections to interrogatories are to be communicated orally within three (3) days of service; unresolved objections are to be served on the Administrative Law Judge in writing within five (5) days of service of the interrogatories.

3. Motions to dismiss objections and/or direct the answering of interrogatories are to be filed within three (3) calendar days of service of written objections.

4. Answers to motions to dismiss objections and/or directing the answering of interrogatories shall be filed within three (3) calendar days of service of such motions.

5. Responses to requests for documents production, entry for inspection, or other purposes are to be served in-hand within ten (10) calendar days of service.

6. Requests for admission are deemed admitted unless answered within ten (10) calendar days or objected to within five (5) calendar days of service.

7. Discovery requests served after 4:30 p.m. Monday through Thursday or after 12:00 p.m. on a Friday or the day preceding a holiday shall be deemed to have been served on the next business day.