

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**REBUTTAL TESTIMONY**

**OF**

**ADAM SMALL**

**On Behalf of**

**RESPOND POWER, LLC**

**PUBLIC VERSION**

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 C-2016-2576287, et al.  
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1 **I. INTRODUCTION AND BACKGROUND**

2 **Q. PLEASE STATE YOUR NAME, BUSINESS ADDRESS AND TITLE.**

3 A. My name is Adam Small and my business address is 100 Dutch Hill Road – Suite 310,  
4 Orangeburg, New York 10962. I am General Counsel for Respond Power, LLC (“Respond  
5 Power”).

6 **Q. HAVE YOU PREVIOUSLY PROVIDED TESTIMONY IN THIS PROCEEDING?**

7 A. Yes. On October 18, 2017, I submitted Direct Testimony (public and proprietary) pre-  
8 marked as Respond Power Statement No 1. My Direct Testimony was accompanied by  
9 eight exhibits pre-marked as Respond Power Exhibits AS-1 through AS-8. On November  
10 29, 2017, I submitted Supplemental Direct Testimony (public and proprietary), which was  
11 pre-marked as Respond Power St. 1-Supp and accompanied by five exhibits pre-marked as  
12 Respond Power Exhibits AS-9 through AS-13.

13 **Q. ON WHOSE BEHALF ARE YOU TESTIFYING IN THIS PROCEEDING?**

14 A. My Rebuttal Testimony is submitted on behalf of Respond Power.

15 **Q. PLEASE DESCRIBE RESPOND POWER.**

16 A. Respond Power is an electric generation supplier (“EGS”) licensed by the Commission to  
17 supply electricity or electric generation services to the public within the Commonwealth of  
18 Pennsylvania.<sup>1</sup> Since receiving its EGS license, Respond Power has served a significant  
19 number of residential and small commercial customers in various electric distribution  
20 company (“EDC”) service territories throughout Pennsylvania.

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<sup>1</sup> *License Application of Respond Power LLC for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as a Supplier of Retail Electric Power, Docket No. A-2010-2163898 (Order entered August 19, 2010).*

1 **Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?**

2 A. The purpose of my Rebuttal Testimony is to respond to the Direct Testimony of Kimberlie  
3 L. Bortz that was submitted on behalf of Pennsylvania Electric Company (“Penelec”) and  
4 West Penn Power Company (“West Penn”) (collectively referred to as “the Companies”)  
5 on December 21, 2017.<sup>2</sup>

6 **Q. PLEASE SUMMARIZE WHAT RESPOND POWER IS SEEKING FROM THE**  
7 **COMMISSION IN THIS PROCEEDING.**

8 Respond Power is seeking to have the Commission conclude that it would be unjust,  
9 unreasonable and unlawful for the Companies to collect the clawback charges from  
10 Respond Power that were assessed on September 27, 2016 and October 2, 2017 pursuant  
11 to the Companies’ Supplier Tariffs as part of their Purchase of Receivables (“POR”)  
12 programs.

13 **Q. WHAT IS A POR PROGRAM?**

14 A. A POR program sets forth the parameters under which the EDC bills and collects the  
15 charges (receivables) due to a participating EGS that is providing the end-user customer  
16 with generation service and where the customer has opted to receive a single consolidated  
17 bill from the EDC for both energy and wires services. Typically, POR programs involve  
18 residential and small commercial customers (aka “mass market customers”).<sup>3</sup>

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<sup>2</sup> Penelec/West Penn Statement No. 1.

<sup>3</sup> See generally *PPL Electric Utilities Corporation Retail Markets*, Docket No. M-2009-2104271 (Order entered August 11, 2009 at 27-30).

1 **Q. IS PARTICIPATION IN THE POR PROGRAM MANDATORY?**

2 A. Yes. Participation by EGSs in the Companies' POR programs is mandatory for any EGS  
3 that uses the EDC consolidated billing option, which is the only consolidated billing option  
4 that is currently available.

5 **Q. WHEN DID THE COMPANIES FIRST ASSESS THE CLAWBACK CHARGES**  
6 **ON RESPOND POWER?**

7 A. The Companies first assessed the clawback charges on Respond Power by sending invoices  
8 on September 27, 2016 in the amount of \$178,907.06 due to West Penn and in the amount  
9 of \$305,890.63 due to Penelec. Those are the clawback charges that are the subject of the  
10 2016 complaints filed by Respond Power.

11 **Q. WHEN WERE THE MORE RECENT CLAWBACK CHARGES ASSESSED ON**  
12 **RESPOND POWER?**

13 A. On October 2, 2017, the Companies assessed the clawback charges on Respond Power that  
14 are the subject of the 2017 complaints filed by Respond Power. The invoice from Penelec  
15 is in the amount of \$142,973.13 and the invoice from West Penn is in the amount of  
16 \$68,039.41. The invoices contain a due date of October 29, 2017 and the email transmitting  
17 the invoice indicated that a failure to remit payment by the due date would result in the  
18 Companies withholding POR amounts by \$211,012.54.

19 **Q. HAVE THE 2017 CLAWBACK CHARGES BEEN PAID?**

20 A. No. The Companies have treated the complaints filed on October 27, 2017 as formal  
21 disputes of the charges. Therefore, Respond Power has not paid the invoices and the  
22 Companies have not withheld POR payments from Respond Power pending the outcome  
23 of this proceeding.

1 **II. SUMMARY OF REBUTTAL TESTIMONY**

2 **Q. PLEASE SUMMARIZE YOUR REBUTTAL TESTIMONY.**

3 A. Through this Rebuttal Testimony, I am addressing comments made by Ms. Bortz in her  
4 Direct Testimony regarding: (i) the Companies' conversion of their POR programs from  
5 "non-recourse" as approved during the 2015-2017 Default Service Plan ("DSP III")  
6 proceedings<sup>4</sup> to "with recourse" during the 2017-2019 Default Service Plan ("DSP IV")  
7 proceedings;<sup>5</sup> (ii) Respond Power's business model; (iii) due process issues; (iv) the  
8 retroactive nature of the clawback charge; (v) the structure of the clawback charge; (vi) the  
9 impermissible attempts to limit EGS pricing; and (vii) the adverse impact on retail  
10 competition.

11 **Q. WHAT WERE THE PRIMARY CONCERNS YOU IDENTIFIED IN YOUR**  
12 **DIRECT TESTIMONY AND SUPPLEMENTAL DIRECT TESTIMONY ABOUT**  
13 **THE CLAWBACK CHARGES?**

14 A. My primary concerns with the clawback charges assessed by the Companies may be  
15 summarized as follows:<sup>6</sup>

16 (a) No notice was given to Respond Power by the Companies that they were proposing to  
17 change the terms of their POR programs contained in the DSP III by way of their forward-  
18 looking DSP IV;

19  
20 (b) No notice and opportunity to be heard was provided by the Commission prior to  
21 approval of the DSP IV that modified the then-existing POR programs contained in the  
22 DSP III;

23

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<sup>4</sup> *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company for Approval of their Default Service Programs*, Docket No. P-2015-2511333, P-2015-2511351, P-2015-2511355 and P-2015-2511356 (Order entered May 19, 2016) ("DSP IV Order").

<sup>5</sup> *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company for Approval of Their Default Service Programs*, Docket Nos. P-2013-2391368, P-2013-2391372, P-2013-2391375, P-2013-2391378, Opinion and Order entered July 24, 2014 ("DSP III Order").

<sup>6</sup> Respond Power Statement No. 1; Respond Power Statement No. 1-Supp.

1 (c) The clawback charges were based on write-off data that were accumulating prior to the  
2 date when the clawback charges were approved or even initially proposed;  
3

4 (d) When write-offs began occurring, Respond Power was unaware of the existence of  
5 clawback charges modifying the POR programs that were then in effect for the 2015-2017  
6 default service plan period;  
7

8 (e) While the clawback charges were accruing, Respond Power had: (i) no knowledge that  
9 its customers were not paying the Companies; (ii) no ability to terminate non-paying  
10 customers; (iii) no opportunity to pursue collection activities; and (iv) no control over the  
11 Companies' collection efforts;  
12

13 (f) The write-offs by the Companies include supply charges that were billed to customers  
14 several months or years earlier and do not match the time period for the pricing information  
15 upon which the clawback charges are based; and  
16

17 (g) The clawback charges effectively impose a limit on EGS prices, which the Commission  
18 lacks the statutory authority to do.  
19

20 **Q. BASED UPON YOUR REVIEW OF MS. BORTZ' DIRECT TESTIMONY, DO**  
21 **YOU CONSIDER ANY OF THESE CONCERNS AS HAVING BEEN**  
22 **ADEQUATELY ADDRESSED?**

23 **A.** No. I continue to believe that the Companies' application of the 2016 and 2017 clawback  
24 charges to Respond Power is unjust, unreasonable and unlawful. Further, I recommend  
25 that the Commission direct the Companies to cease and desist from collecting any clawback  
26 charges from Respond Power until such time as they modify the clawback charges so that  
27 their application to Respond Power is just, reasonable and lawful.

28 **III. CONVERSION OF POR PROGRAM FROM "NON-RECOURSE" TO "WITH**  
29 **RECOURSE"**

30 **Q. DOES MS. BORTZ DISPUTE YOUR CLAIM THAT THE CLAWBACK CHARGE**  
31 **CONVERTED THE COMPANIES' POR PROGRAMS FROM "NON-**  
32 **RECOURSE" TO "WITH RECOURSE"?**

33 **A.** Yes. Ms. Bortz testifies that "an EGS subject to a clawback charge would not be  
34 responsible for the uncollectible accounts expense generated by its customers" and "an  
35 EGS participating in the Companies' POR programs continues to avoid the costs and risks

1 associated with collecting any delinquent amounts owed by its customers.”<sup>7</sup> Rather than  
2 acknowledging that the Companies’ POR programs are now “with recourse,” Ms. Bortz  
3 characterizes the clawback charge as administrative fee that is linked to higher  
4 uncollectible expenses caused by excessive write-offs.<sup>8</sup>

5 **Q. DO YOU AGREE WITH MS. BORTZ THAT THE COMPANIES’ POR**  
6 **PROGRAMS CONTINUE TO BE NON-RECOURSE?**

7 A. No. The implementation of the clawback charge has converted the Companies’ POR  
8 programs from “non-recourse” to “with recourse.” Simply, the Companies now have  
9 recourse against EGSs – through the assessment of a clawback charge – if customers do  
10 not pay their bills in full and on time. Recognition that the POR programs are now “with  
11 recourse” is significant since the Companies retroactively modified the programs that were  
12 approved as part of the DSP III proceeding.

13 **Q. PLEASE DESCRIBE THE HISTORICAL POR PROGRAMS OF THE**  
14 **COMPANIES.**

15 A. Penelec and West Penn have fully purchased the accounts receivables since 2011, without  
16 any discount or other future remedies, of EGSs serving residential and small commercial  
17 customers in the Companies’ service territories. Otherwise stated, these POR programs  
18 were “non-recourse,” which is a commercial term meaning that once a receivable is sold,  
19 the purchaser of the receivable has no recourse with the seller to collect on any amounts  
20 the purchaser is unable to successfully recover through customer collection efforts.

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<sup>7</sup> Penelec/West Penn Statement No. 1 at 12.

<sup>8</sup> Penelec/West Penn Statement No. 1 at 12-13.

1 **Q. HOW LONG HAS RESPOND POWER BEEN PARTICIPATING IN THE**  
2 **COMPANIES' POR PROGRAMS?**

3 A. Respond Power has been participating in the Companies' POR programs since 2013.

4 **Q. PRACTICALLY SPEAKING, WHAT DID IT MEAN FOR RESPOND POWER TO**  
5 **PARTICIPATE IN THE COMPANIES' PRIOR POR PROGRAMS?**

6 A. By participating in the Companies' non-recourse POR programs, Respond Power collected  
7 its entire accounts receivables from the Companies without regard to whether the  
8 customers paid the charges that were billed. As a result, Respond Power has undertaken  
9 no collection efforts and, in fact, has not even been aware whether or not customers are  
10 paying their bills to the Companies.

11 **Q. AT WHAT POINT DID THE COMPANIES PROPOSE TO CHANGE THE POR**  
12 **PROGRAMS?**

13 A. As part of their DSP IV, filed on November 3, 2015, the Companies proposed to modify  
14 the POR programs (that were currently in effect and would remain in effect until May 31,  
15 2017) to include clawback charges that would permit Penelec and West Penn to invoice  
16 EGSs for a portion of the accounts receivables that had been previously fully purchased  
17 but which were not paid by customers.

18 **Q. DID THE COMPANIES RECEIVE APPROVAL TO IMPLEMENT CLAWBACK**  
19 **CHARGES FROM THE COMMISSION?**

20 A. Yes. The original proposal was modified by a Joint Petition for Settlement filed on April  
21 1, 2016 and approved by the Commission as a two-year pilot. In approving the POR  
22 clawback charges, the Commission acknowledged that their implementation may lead to  
23 unintended consequences in the form of unreasonable assessments on EGSs, but  
24 recognized that parties are free to raise such issues in future proceedings.

1 **Q. WHAT IS THE PRACTICAL EFFECT OF IMPLEMENTING THE CLAWBACK**  
2 **CHARGES?**

3 A. Although the Companies are continuing to fully purchase the EGSs' accounts receivables,  
4 the practical effect of this change is that the Companies' POR programs are no longer "non-  
5 recourse" since the Companies have the future remedy of imposing clawback charges on  
6 EGSs after fully purchasing the receivables if the customers do not pay their EGS charges.  
7 Essentially, the clawback charges have transformed the Companies' POR programs into  
8 "with recourse" programs.

9 **Q. WHAT DOES MS. BORTZ CLAIM WITH RESPECT TO WHO BEARS THE RISK**  
10 **OF CUSTOMER ACCOUNTS THAT WRITE-OFF UNDER THE COMPANIES'**  
11 **POR PROGRAMS?**

12 A. Ms. Bortz states that under the Companies' POR programs, the risk of customer accounts  
13 that write-off is borne by the Companies and their customers.<sup>9</sup>

14 **Q. DO YOU AGREE?**

15 A. No. While it was true under the Companies' original POR programs that the risk was borne  
16 by the Companies and their customers, the clawback charge shifts that risk to EGSs.  
17 Therefore, it is no longer accurate to state that the Companies and their customers bear the  
18 risk of customer accounts that write-off. With the implementation of the clawback charge,  
19 EGSs now need to be concerned with the creditworthiness of customers and their ability to  
20 pay the charges that are being offered in the competitive market. Yet, the Companies'  
21 supplier tariffs preclude EGSs participating in the POR program to deny service to  
22 residential customers for credit-related reasons.<sup>10</sup>

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<sup>9</sup> Penelec/West Penn Statement No. 1 at 9.

<sup>10</sup> Penelec Electric Pa. P.U.C. No. S-1, Section 12.9; West Penn Electric Pa. P.U.C. No. 2S, Section 12.4.2.

1 **Q. IS MS. BORTZ CORRECT WHEN SHE CLAIMS THAT COLLECTION IS NOT**  
2 **AN ISSUE WITH WHICH EGSS MUST CONCERN THEMSELVES?<sup>11</sup>**

3 A. No. That would have been a correct statement if the Companies had not modified the POR  
4 programs. Under the POR program that was approved in the DSP III proceeding, it was  
5 true that EGSSs did not need to concern themselves with the Companies' collection efforts.  
6 If the Companies implemented inadequate collection efforts, the Companies would  
7 experience higher uncollectible expenses. Now, with the clawback charges in place, if the  
8 Companies implement inadequate collection efforts, they can simply invoice EGSSs for a  
9 significant portion of their uncollectible amounts.

10 **IV. RESPOND POWER'S BUSINESS MODEL**

11 **Q. THROUGHOUT HER DIRECT TESTIMONY, MS. BORTZ CHARACTERIZES**  
12 **RESPOND POWER AS HAVING PRACTICES OR A BUSINESS MODEL THAT**  
13 **DRIVES HIGHER WRITE-OFFS.<sup>12</sup> PLEASE RESPOND.**

14 A. Ms. Bortz seems to be suggesting that Respond Power has deployed a particular strategy  
15 aimed at producing higher write-off levels. Indeed, in response to discovery, Ms. Bortz  
16 states that Respond Power's higher write-off levels may reflect the consumer demographics  
17 targeted by Respond Power's marketing efforts.<sup>13</sup> Contrary to Ms. Bortz' baseless and  
18 unsubstantiated assertions, Respond Power's marketing strategies are not in any way  
19 designed to target certain consumer demographics, including non-paying customers or  
20 low-income customers, or to charge prices that customers cannot afford to pay. As an EGSS,  
21 Respond Power simply uses the marketing tools that are available to reach consumers who  
22 are willing to shop for generation supply and charges prices that reflect current market

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<sup>11</sup> Penelec/West Penn Statement No. 1 at 11.

<sup>12</sup> Penelec/West Penn Statement No. 1 at 11, 12-13, 26, 33.

<sup>13</sup> Respond Power Ex. AS-14 (Companies' Response to Respond Power, Set V, No. 3).

1 conditions, while allowing Respond Power to earn a profit. In my experience, that is a  
2 customary approach for a business to follow. Respond Power ultimately does not benefit  
3 if the customers are unable to pay their bills and lose their electric service.

4 **Q. MS. BORTZ ALSO MAKES REPEATED REFERENCES TO PRICES CHARGED**  
5 **BY CERTAIN EGSS, PRESUMABLY INCLUDING RESPOND POWER, AS**  
6 **BEING EXCESSIVE OR EXORBITANT.<sup>14</sup> DO YOU HAVE ANY COMMENT?**

7 A. Yes. Ms. Bortz is accustomed to operating in a fully regulated environment where the  
8 Companies recover reasonable costs that they incur. This description does not reflect the  
9 environment in which EGSSs like Respond Power operate. When unanticipated events  
10 occur in the wholesale market or new regulatory burdens increase costs, EGSSs cannot turn  
11 to the Commission for cost recovery from a captive base of monopoly distribution service  
12 customers. Rather, EGSSs must forego or minimize profits, or try to collect these costs from  
13 their supply customers in a competitive arena where customers have choices. Ms. Bortz'  
14 references to excessive or exorbitant prices also overlook the possibility, or probability,  
15 that some of the expenses that EGSSs must include in their supply prices are recovered by  
16 the Companies through distribution rates, rather than through the price to compare ("PTC")  
17 for default generation service. For instance, the Companies' tariffs describe the PTC as  
18 representing the costs of providing energy, capacity, transmission and ancillary services  
19 for customers who take default service.<sup>15</sup> However, EGSSs incur numerous other costs to  
20 serve customers, beyond those costs of providing generation supply services, such as  
21 billing, customer service, marketing and customer acquisition.

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<sup>14</sup> Penelec/West Penn Statement No. 1 at 11, 12-13, 26, 33.

<sup>15</sup> Penelec Electric Pa. P.U.C. 81, First Revised Page 24; West Penn Electric Pa. P.U.C. No. 40, Original Page 23.

1           In discovery responses included as Respond Power Exhibit AS-15, Ms. Bortz  
2 indicated that EGS prices are exorbitant or significantly exceed the PTC if they if they  
3 exceed the PTC by more than 150%.<sup>16</sup> Notably, as shown in Respond Power Exhibit AS-  
4 16, over the last five years, the Companies' PTCs have fluctuated by more than 150%.<sup>17</sup>  
5 Specifically, Penelec's highest PTC of 9.284 cents per kWh, effective June 1, 2014,  
6 exceeds its lowest PTC of 5.960 cents per kWh, effective September 1, 2012, by more than  
7 150%. Similarly, West Penn's highest PTC of 7.514 cents per kWh, effective June 1, 2014,  
8 exceeds its lowest PTC of 4.961 cents per kWh, effective March 1, 2014, by more than  
9 150%. By Ms. Bortz' definition of an exorbitant price or a price that significantly exceeds  
10 the PTC, the Companies themselves have charged prices that fall into that category.  
11 Therefore, the 150% standard for defining exorbitant prices does not appear to be an  
12 appropriate measure.

13           Also, when one considers all of the differences between what goes into EDC and  
14 EGS pricing, it is clear that a comparison between them is not meaningful and that a  
15 variation of 150% or more is not as significant as portrayed by Ms. Bortz. These  
16 differences include the fact that they are not established in the same manner, with EDC  
17 prices being set in a regulated environment and EGS prices being developed in a  
18 competitive market. In addition, different market conditions drive the pricing due to the  
19 lag between EDC procurements and charging the PTC.<sup>18</sup> Further, while the Companies'

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<sup>16</sup> Companies' Responses to Respond Power, Set V, Nos. 5 and 9.

<sup>17</sup> Companies' Response to Respond Power Set V, No. 6 and Attachment A.

<sup>18</sup> *Investigation of Pennsylvania's Retail Electricity Market: End State of Default Service*, Docket No. I-2011-2237952 (Order entered February 15, 2013), at 12 (the EDCs' PTC is often not correlated to wholesale energy markets and may move in directions opposite that of the wholesale energy markets trends).

1 prices change quarterly, sometimes fluctuating by more than 150% from one quarter to  
2 another, EGSs offer a variety of time periods, from one-month to three-year terms, and  
3 numerous other options in between.<sup>19</sup> An EGS that negotiates a three-year contract with a  
4 price that is lower than the EDC's PTC at the start of the contract may very well be charging  
5 a price far above the EDC's PTC at any time during the three-year term. That is a risk that  
6 the customer chose to take in exchange for price certainty. It does not mean that the EGS's  
7 prices are exorbitant. Also, as noted above, the EGS prices include components that are  
8 not contained in the EDC's PTC. In short, it is not up to the Companies to determine what  
9 is an excessive or exorbitant price charged by an EGS.

10 **V. DUE PROCESS ISSUES**

11 **Q. DOES MS. BORTZ ATTEMPT TO ADDRESS THE DUE PROCESS CONCERNS**  
12 **YOU IDENTIFIED IN YOUR DIRECT TESTIMONY AND SUPPLEMENTAL**  
13 **DIRECT TESTIMONY?**

14 **A.** Yes. In an effort to address the due process concerns I raised in my Direct Testimony and  
15 Supplemental Direct Testimony, Ms. Bortz refers to service of the DSP IV as being served  
16 on Respond Power, the delineation of proposed POR program changes in several places in  
17 the DSP IV and discussion of the proposed clawback provision in testimony.<sup>20</sup>

18 **Q. ARE THESE STATEMENTS CORRECT?**

19 **A.** Yes. Ms. Bortz is correct that the Companies served the DSP IV on Respond Power. I  
20 also recognize that the DSP IV delineated proposed POR program changes and that the  
21 testimony discussed the proposed clawback provision. However, these points do not  
22 change the fact that Respond Power was not aware that the Companies' forward-looking

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<sup>19</sup> [www.papowerswitch.com](http://www.papowerswitch.com)

<sup>20</sup> Penelec/West Penn Statement No. 1 at 4-5, 13-15.

1 DSP IV filed on November 3, 2015 contained a proposal to retroactively modify the POR  
2 programs that had been largely unchanged since January 1, 2011 and were in effect as part  
3 of their DSP III. Because Respond Power was not aware of the Companies' proposal in  
4 the DSP IV to modify the POR programs contained in the DSP III, it was deprived of  
5 fundamental due process – notice and an opportunity to be heard.

6 **Q. HAVE THE COMPANIES SUGGESTED THAT THEY DID NOT MODIFY THEIR**  
7 **DSP III AS PART OF THEIR DSP IV?**

8 A. Yes. In responding to discovery, the Companies took issue with Respond Power's  
9 characterization of the DSP IV as having modified the DSP III. The response, which is  
10 included as Respond Power Exhibit AS-17, states that the revisions to the POR programs  
11 approved in May 2016 did not modify their "default service programs" that were in effect  
12 from June 1, 2015 through May 31, 2017. Their rationale is that although the POR  
13 programs are addressed in conjunction with the default service program cases, they are  
14 separate and distinct.<sup>21</sup>

15 **Q. HOW DO YOU RESPOND?**

16 A. The Companies' position makes no sense to me. The POR programs were addressed in  
17 conjunction with DSP III and their terms were approved by the Commission's DSP III  
18 Order. Upon approval of the POR programs in the DSP III Order, the Companies were  
19 obligated to follow the conditions established therein for the term of the default service  
20 period. To change those conditions during the default service period, I believe it was  
21 incumbent upon the Companies to make a filing expressly requesting a change to the POR  
22 programs that were currently in effect rather than simply including proposed modifications

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<sup>21</sup> Companies' Response to Respond Power, Set V, No. 10.

1 to those POR programs in the context of the DSP IV that was scheduled to go into effect  
2 on June 1, 2017 upon the expiration of the DSP III. Indeed, the DSP IV Order approved  
3 the modified POR programs for a two-year period, consistent with the term of the plan, and  
4 it is my understanding that the Companies have now filed their DSP V seeking to continue  
5 the POR programs for another four-year period.<sup>22</sup> Therefore, it strikes me as disingenuous  
6 that the Companies now seek to separate the POR programs from the default service plans  
7 for the limited purpose of rejecting the two-year time period for the POR program that was  
8 approved by the DSP III Order.

9 **Q. MS. BORTZ CLAIMS THAT YOU DID NOT READ BEYOND THE CAPTION OF**  
10 **THE DSP IV.<sup>23</sup> IS THAT CORRECT?**

11 A. No. I never said that I did not read beyond the caption of the DSP IV. In general, I recall  
12 being aware around the time the filings were made in November 2015 that the Companies  
13 were making proposals to modify the POR programs. However, I did not realize that the  
14 Companies were proposing to modify the POR programs approved during the DSP III  
15 proceedings. As I do not believe it is appropriate for an EDC to retroactively modify POR  
16 programs previously approved by the Commission, without re-opening the prior  
17 proceeding or affording specific notice to EGSs, I had no reason to consider that the  
18 Companies were trying to do just that. It was not until Respond Power received the invoice  
19 in September 2016 that I had any inkling of the possibility for the POR programs in effect  
20 for the DSP III to be revised by the DSP IV. Even upon receiving the invoice, I was sure

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<sup>22</sup> *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company for Approval of Their Default Service Programs*, Docket Nos. P-2017-2637855, P-2017-2637857; P-2017-2637858; P-2017-2637866.

<sup>23</sup> Penelec/West Penn Statement No. 1 at 13-14.

1 that it was in error, especially since I had received no communications from the Companies  
2 and nothing yet appeared in the Companies' Supplier Tariffs.<sup>24</sup> In fact, I continue to  
3 believe that the invoice was in error since it is unjust and unreasonable to impose a charge  
4 that did not even exist at the time the basis for it was accumulating.

5 **Q. WHAT ABOUT THE OTHER NOTICES DISCUSSED BY MS. BORTZ,**  
6 **INCLUDING THE PENNSYLVANIA BULLETIN AND THE PREHEARING**  
7 **CONFERENCE?<sup>25</sup>**

8 A. Neither the Notice published in the *Pennsylvania Bulletin* nor the Notice of Prehearing  
9 Conference contained any information about the proposal to modify the 2015-2017 POR  
10 Programs as part of the DSP IV proceeding.

11 **Q. MS. BORTZ ALSO REFERS TO A DISCUSSION OF THE CLAWBACK CHARGE**  
12 **PROPOSAL IN THE PETITION AND IN TESTIMONY.<sup>26</sup> DID THIS**  
13 **DISCUSSION ADDRESS THE RETROACTIVE NATURE OF THE CHANGE?**

14 A. The references in the Petition for the DSP IV to the POR changes to implement a clawback  
15 charge do not explain that the proposal was intended to modify the 2015-2017 POR  
16 Programs as part of the DSP IV proceeding. As to the testimony identified by Ms. Bortz,  
17 it is also not clear that the Companies were proposing to retroactively modify the POR  
18 Programs. In any event, the DSP IV and supporting testimony/exhibits consisted of  
19 testimony from three different witnesses, hundreds of pages of supporting exhibits and  
20 proposals regarding all four of the FirstEnergy companies. It is not reasonable to have  
21 expected Respond Power to read and comprehend the entire filing, especially given its

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<sup>24</sup> Commission's Emergency Order dated October 27, 2016 in this proceeding; Secretarial Letter dated November 10, 2016 in DSP IV proceeding.

<sup>25</sup> Penelec/West Penn Statement No. 1 at 14.

<sup>26</sup> Penelec/West Penn Statement No. 1 at 14-15.

1 understanding that the Companies may not retroactively modify the 2015-2017 POR  
2 programs as part of the DSP IV proceeding.

3 **Q. HOW DOES MS. BORTZ ADDRESS YOUR CONTENTION THAT THE**  
4 **COMPANIES WERE REQUIRED TO SEEK COMMISSION APPROVAL OF**  
5 **POR PROGRAM CHANGES THROUGH A STAND-ALONE SUPPLIER TARIFF**  
6 **FILING?**

7 A. Ms. Bortz claims that it is customary to address POR programs and other supplier charges  
8 in default service plan proceedings.<sup>27</sup> While I do not dispute the fact that POR programs  
9 and other supplier charges have been addressed in default service plan proceedings, I  
10 continue to believe that it was incumbent upon the Companies to seek separate Commission  
11 approval of changes to the POR programs that were in effect.

12 **Q. MS. BORTZ NOTES THAT THE RETAIL ENERGY SUPPLY ASSOCIATION**  
13 **(“RESA”) SIGNED THE JOINT PETITION FOR SETTLEMENT CONTAINING**  
14 **THE CLAWBACK CHARGE.<sup>28</sup> IS THAT RELEVANT?**

15 A. No. It is not relevant that RESA signed the Joint Petition for Settlement containing the  
16 clawback charge. As Ms. Bortz indicated, Respond Power was not a member of RESA.  
17 While its affiliate, Spark Energy, LLC, is a member of RESA, the Joint Petition for  
18 Settlement was executed and approved prior to Spark and Respond Power becoming  
19 subsidiaries of a common parent.<sup>29</sup> In any event, RESA does not speak on behalf of  
20 individual EGSs, who are free to raise challenges the later application of tariff provisions  
21 agreed upon in settlements.<sup>30</sup>

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<sup>27</sup> Penelec/West Penn Statement No. 1 at 15-16.

<sup>28</sup> Penelec/West Penn Statement No. 1 at 17.

<sup>29</sup> See Respond Power LLC License Update at Docket No. A-2010-2163898 (May 4, 2016 and September 15, 2016).

<sup>30</sup> See RESA Petition to Intervene in DSP IV proceeding filed on November 30, 2015, at 1.

1 **Q. MS. BORTZ TESTIFIES THAT YOU SUGGEST THAT DEFAULT SERVICE**  
2 **PROCEEDINGS SHOULD BE LIMITED TO GENERATION SUPPLY**  
3 **PROCUREMENT ISSUES.<sup>31</sup> IS THAT AN ACCURATE CHARACTERIZATION**  
4 **OF YOUR TESTIMONY?**

5 A. No. I understand that the Commission has used the default service proceedings to address  
6 issues other than generation supply procurement issues. My point was that default service  
7 proceedings are forward-looking in nature. When issues are addressed as part of such  
8 proceedings, EGSs should have a reasonable expectation that the terms and conditions of  
9 any programs implemented in that context will not be altered in a retroactive manner.

10 **Q. DO YOU BELIEVE THAT THE COMMISSION ALSO HAD A LEGAL**  
11 **OBLIGATION TO PROVIDE NOTICE TO AFFECTED PARTIES BEFORE**  
12 **APPROVING THE 2017-2019 DEFAULT SERVICE PLANS?**

13 A. Yes. Although I am an attorney licensed in New York and not in Pennsylvania,  
14 Pennsylvania counsel for Respond Power in this proceeding advises that Section 703(g) of  
15 the Public Utility Code permits the Commission to rescind or amend any order made by it  
16 only “after notice and opportunity to be heard” to interested parties.<sup>32</sup> Because the POR  
17 programs have been non-recourse since their January 1, 2011 effective date and the DSP  
18 IV Order modified the POR programs that were in effect from June 1, 2015 through May  
19 31, 2017 under the DSP III Order, I believe that the Commission was obligated to provide  
20 notice to affected parties before issuing the DSP IV Order on May 19, 2016.

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<sup>31</sup> Penelec/West Penn Statement No. 1 at 5.

<sup>32</sup> 66 Pa. C.S. § 703(g).

1 **VI. RETROACTIVE NATURE OF CLAWBACK CHARGES**

2 **Q. MS. BORTZ CLAIMS THAT THE CLAWBACK PROVISION IS NOT**  
3 **RETROACTIVE IN NATURE.<sup>33</sup> DO YOU AGREE?**

4 A. No. Ms. Bortz' claim is based on the fact that the 2016 and 2017 clawback charges were  
5 not imposed until after entry of the DSP IV Order. She also states that the only retroactive  
6 aspect of the charges is that the Companies use historical data to identify EGSs that should  
7 pay them. However, her testimony overlooks the fact that the clawback charge was not  
8 even in existence for eleven months of the twelve-month period on which the 2016 invoice  
9 was based. Also, she ignores the fact that the non-recourse POR programs approved as  
10 part of the DSP III Order were retroactively modified by the DSP IV Order.

11 **Q. PLEASE EXPLAIN WHY YOU VIEW THE POR CHANGES AS RETROACTIVE?**

12 A. Although DSP IV did not go into effect until June 1, 2017, the POR clawback charges that  
13 were assessed in September 2016 were based on historical data from the prior twelve-  
14 month period of September 1, 2015 through August 31, 2016, and the charges that were  
15 assessed in September 2017 were based on historical data from the prior twelve-month  
16 period of September 1, 2016 through August 31, 2017. Both invoices included amounts  
17 that customers failed to pay to the Companies dating back to 2013. On this basis, I view  
18 the changes to the 2015-2017 POR program as being impermissibly retroactive.

19 **Q. MS. BORTZ TESTIFIES THAT THE USE OF HISTORICAL DATA DOES NOT**  
20 **MAKE APPLICATION OF THE CLAWBACK CHARGE TO RESPOND POWER**  
21 **UNJUST AND UNREASONABLE.<sup>34</sup> DO YOU AGREE?**

22 A. No. It is not only the use of historical data in the screening process that makes application  
23 of the clawback charge unjust and unreasonable. The clawback charges assessed on

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<sup>33</sup> Penelec/West Penn Statement No. 1 at 6.

<sup>34</sup> Penelec/West Penn Statement No. 1 at 20.

1 Respond Power by the Companies in both years were based on write-off data that were  
2 accumulating prior to the date when the clawback charge was approved by the  
3 Commission. In fact, the unpaid amounts contained in the write-off data that forms the  
4 basis of the clawback charges began accruing prior to the filing of the Companies' proposal  
5 to implement clawback charges. What makes application of the clawback charges unjust  
6 and unreasonable is that they are based on data that accrued months or years before the  
7 charges were proposed, approved and included in its tariff.

8 **Q. DO YOU HAVE OTHER CONCERNS ABOUT THE UNPAID CHARGES THAT**  
9 **WERE WRITTEN-OFF, RESULTING IN ASSESSMENT OF THE CLAWBACK**  
10 **CHARGES?**

11 A. Yes. In response to discovery, the Companies produced information showing the balance  
12 that a customer owed at the time Respond Power began serving the customer. This  
13 information is shown in Respond Power Exhibit AS-18.<sup>35</sup> Even a cursory review of that  
14 document shows that the vast majority of the customers had a balance due at the time  
15 Respond Power began serving them. Several of these balances were over \$2,000. One that  
16 stands out is a pre-existing balance of \$11,071.89 for a customer who was served by  
17 Respond Power from only July 22, 2014 through November 18, 2014. This information  
18 shows that it is unjust and unreasonable to apply the clawback charges to Respond Power  
19 based upon write-offs by the Companies when customers had unpaid balances before they  
20 even started being served by Respond Power.

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<sup>35</sup> Companies' Response to Respond Power, Set V, No. 20, and *Confidential* Attachment A.

1 **Q. DOES MS. BORTZ REFER TO ANOTHER EDC CLAWBACK PROVISION**  
2 **THAT IS BASED ON HISTORICAL DATA?**

3 A. Yes. Ms. Bortz refers to a clawback provision employed by Duquesne Light Company  
4 (“DLC”) that considers historic data.<sup>36</sup> Importantly, however, DLC’s clawback provision  
5 was approved by the Commission before it went into effect. The materials attached to the  
6 Companies’ Answers (as Appendix A) in this proceeding show that DLC proposed a  
7 change in the discount rate for an EGS based on historical uncollectible amounts in its  
8 January 1, 2008 through December 31, 2010 default service proceeding to go into effect in  
9 on January 1, 2008, with signatories to the settlement of that proceeding being dated in  
10 December 2006. Clearly, Duquesne did not change the rules of an existing default service  
11 program but rather implemented its tool in a prospective manner as part of its future default  
12 service program. Also, DLC has not assessed a clawback charge against Respond Power.  
13 *Therefore, to the extent that it contains features that would render its application unjust and*  
14 *unreasonable, it has not been tested or reviewed to date.*

15 **Q. DOES MS. BORTZ ALSO DISCUSS OTHER SITUATIONS WHERE UTILITIES**  
16 **RELY ON HISTORICAL DATA IN IMPOSING RATES AND CHARGES?**

17 A. Yes. Ms. Bortz discusses a tariff provision that went into effect on May 3, 2015 for medium  
18 and large commercial customers that contains a minimum billing demand provision based  
19 on historical data. Similarly, she refers to a rate that recovers costs from large commercial  
20 customers using historical peak load contributions and a rate that recovers certain non-  
21 market based transmission service charges from customers based on coincident peak  
22 determined for a historic period.<sup>37</sup>

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<sup>36</sup> Penelec/West Penn Statement No. 1 at 20-21

<sup>37</sup> Penelec/West Penn Statement No. 1 at 21-26.

1 **Q. DO ANY OF THESE PROVISIONS JUSTIFY THE USE OF HISTORICAL DATA**  
2 **IN DETERMINING THE ELIGIBILITY OF AN EGS TO HAVE A CLAWBACK**  
3 **CHARGE IMPOSED?**

4 A. No. The examples referenced by Ms. Bortz involve historical demand patterns of  
5 customers that are used to determine future rates. As described by Ms. Bortz, these rates  
6 do not modify the customers' terms of service on a retroactive basis. Moreover, the rates  
7 that are paid by customers on a prospective basis using historical data are based on the  
8 customers' own demand patterns that they could and did control. Here, the Companies are  
9 seeking to impose charges on Respond Power related to billed amounts that were not paid  
10 by the customers and were not collected by the Companies – neither activity over which  
11 Respond Power has any control.

12 **VII. STRUCTURE OF CLAWBACK CHARGES**

13 **Q. WHAT EXPLANATION DOES MS. BORTZ OFFER TO ADDRESS MANY OF**  
14 **THE OTHER CONCERNS YOU RAISED IN YOUR DIRECT TESTIMONY?**

15 A. Throughout her Direct Testimony, Ms. Bortz attempts to justify various features of the  
16 clawback charges by noting that the Companies apply the same standards consistently to  
17 all EGSs.<sup>38</sup> That explanation, however, does not supporting a finding that the application  
18 of the clawback charge is just and reasonable. Respond Power has not claimed that the  
19 Companies have discriminated against it in relation to other EGSs. Indeed, the concerns I  
20 have raised about the clawback charges could be applied equally to other EGSs. Since I  
21 am not authorized to speak on their behalf, I have presented my testimony only from the  
22 perspective of Respond Power. The features of the clawback charge that I highlighted,  
23 such as the order of posting partial payments, the service periods to which the written-off

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<sup>38</sup> Penelec/West Penn Statement No. 1 at 7-8, 26-33.

1 amounts relate and the crediting of post-write-off payment, render the application of the  
2 charge unjust and unreasonable. It does not matter that the Companies treat all EGSs the  
3 same with respect to these practices. Applying unfair practices to all EGSs does not make  
4 them just and reasonable.

5 **Q. HOW DOES MS. BORTZ SEEK TO REFUTE YOUR CLAIM ABOUT RESPOND**  
6 **POWER NOT HAVING ACCESS TO INFORMATION REGARDING**  
7 **CUSTOMERS' PAYMENT STATUS OR CONTROL OVER THE COMPANIES'**  
8 **COLLECTION EFFORTS?**

9 A. Initially, she notes that Respond Power is in the same position as other EGSs regarding  
10 management of write-off amounts.<sup>39</sup> As I noted above, treating all EGSs the same way  
11 does not make the structure of the clawback charges just and reasonable. She also states  
12 that an EGS is free to request information regarding its non-paying customers through the  
13 Companies' Supplier Services website.<sup>40</sup> In a discovery response, which is attached as  
14 Respond Power Exhibit AS-19, the Companies explained that these inquiries would need  
15 to be submitted manually by specific customer.<sup>41</sup> For an EGS serving the volume of  
16 customers that Respond Power is serving, it would be impossibly burdensome to make  
17 individual inquiries on an ongoing basis about the payment patterns of each customer. If  
18 the Companies wish to impose a clawback charge on Respond Power in the future, they  
19 should be directed to modify the system so that electronic transactions are automatically  
20 transmitted to Respond Power when its customers do not pay their bills in full or on time.

21 For a clawback charge to have the intended effect of incentivizing certain results,  
22 it is *imperative for the potential recipient of the charges to be aware of the conduct that is*

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<sup>39</sup> Penelec and West Penn Statement No. 1 at 28.

<sup>40</sup> Penelec and West Penn Statement No. 1 at 28.

<sup>41</sup> Companies' Response to Respond Power, Set V, No. 16.

1 occurring that will trigger the imposition of the charges. While the charges were accruing,  
2 Respond Power had no knowledge that certain customers were not paying the Companies  
3 and had no ability to attempt to address the situation directly with its customers. Had  
4 Respond Power known that particular customers were not paying their EGS charges, it  
5 could have contacted the customers and determined whether different terms of service  
6 would enable the customers to pay the bills.

7 **Q. HAD RESPOND POWER QUERIED THE COMPANIES THROUGH THE**  
8 **SUPPLIER WEBSITE AND DETERMINED THAT CERTAIN CUSTOMERS**  
9 **WERE NOT PAYING THEIR BILLS, DID RESPOND POWER HAVE ANY**  
10 **ABILITY TO ASSIST OR INFLUENCE THE COLLECTION PRACTICES OF**  
11 **THE COMPANIES?**

12 A. No. Respond Power was completely at the discretion of the Companies' collection efforts.  
13 It had no control over the Companies' collection efforts or any ability to assist or influence  
14 the collection practices of the Companies. As I observed in my Direct Testimony, the  
15 Companies' efforts to contact the customers were largely unsuccessful, including  
16 numerous notations indicating that "party hung up," "no answer," "invalid phone #," "no  
17 result" or "left message."<sup>42</sup> While the Companies may not be required to do anything  
18 further under the Commission's regulations, Respond Power would have had the option of  
19 including additional outreach to non-paying customers if it was aware that the Companies'  
20 collection efforts were not successful and may have been able to negotiate a contract that  
21 was more affordable for the customer.

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<sup>42</sup> Respond Power Statement No. 1 at 18-19.

1 **Q. DOES MS. BORTZ CRITICIZE RESPOND POWER FOR NOT REACHING OUT**  
2 **TO CUSTOMERS?**

3 A. Yes. Ms. Bortz testifies that even though the Companies provided detailed customer  
4 account information for Respond Power's write-off amounts more than a year ago,  
5 Respond Power has not offered any new contracts to those customers.<sup>43</sup>

6 **Q. HOW DO YOU RESPOND?**

7 A. It is my understanding that many customers identified by the Companies whose accounts  
8 were written-off are no longer being served by Respond Power. As a result of the amounts  
9 being written-off, I assume their electric service was terminated. While some customers  
10 have since had service restored, in general, these customers are no longer under service  
11 contracts with Respond Power, and no reason existed for Respond Power to reach out to  
12 them to negotiate more affordable terms. Having the information about accumulating  
13 unpaid balances prior to the write-offs occurring would have given Respond Power this  
14 opportunity, which did not exist following the write-offs.

15 **Q. HOW DOES MS. BORTZ ADDRESS YOUR CONCERN WITH THE MANNER IN**  
16 **WHICH THE COMPANIES POST PARTIAL PAYMENTS?**

17 A. In my Direct Testimony, I pointed out that the Companies' posting practices when  
18 customers make partial payments unfairly disadvantages Respond Power because the  
19 Companies post them first to distribution charges, leaving supply charges unpaid and  
20 subject to write-off.<sup>44</sup> Therefore, if Respond Power's customers are making partial  
21 payments that are not sufficient to cover both the Companies' charges and Respond  
22 Power's charges, a higher write-off amount is being attributed to Respond Power. Ms.

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<sup>43</sup> Penelec and West Penn Statement No. 1 at 29.

<sup>44</sup> Respond Power Statement No. 1 at 20-21.

1 Bortz simply indicates that partial payments go to unpaid distribution charges first for all  
2 EGSs. Again, as I noted above, just because the Companies are treating all EGSs in the  
3 same way does not make their practices just and reasonable. Certainly in a true non-  
4 recourse POR program, EGSs are indifferent to the manner in which partial payments are  
5 posted. However, when the amount of write-offs can trigger the implementation of a  
6 clawback charge, rendering the POR program with recourse, it does matter that the  
7 Companies are getting their charges paid first, leaving the supply charges unpaid and  
8 subject to write-off. These practices result in higher write-offs for EGSs, exposing them  
9 to greater risk of clawback charges being imposed.

10 **Q. HOW DOES MS. BORTZ ADDRESS YOUR COMMENTS ABOUT THE WRITE-**  
11 **OFFS DATING BACK TO 2013 AND NOT MATCHING THE TIME PERIOD FOR**  
12 **THE PRICING INFORMATION FOR THE CLAWBACK CHARGE?**

13 A. In my Direct Testimony, I raised concerns about how the write-offs date back to 2013 and  
14 do not match the time period for the pricing information for the clawback charge. As  
15 structured, the clawback charges use pricing information for the twelve-month period that  
16 immediately precedes the assessment of the charges. However, the uncollectible amounts  
17 accrued during months or years prior that twelve-month period and were simply written  
18 off by the Companies during that twelve-month period.<sup>45</sup> In response, Ms. Bortz responds  
19 only that the same gap exists for all EGSs that are subject to the clawback provision.<sup>46</sup> As  
20 I testified earlier, treating all EGSs in the same manner does not make the practice or the  
21 application of the tariff just and reasonable. To the contrary, this structure mixes apples  
22 and oranges because it is not consistently using historical data. In assessing clawback

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<sup>45</sup> Respond Power Statement No. 1 at 22.

<sup>46</sup> Penelec/West Penn Statement No. 1 at 30.

1 charges, it is not just and reasonable to use uncollectible amounts for one time period and  
2 the EGS's prices for a different time period.

3 **Q. HOW DOES MS. BORTZ RESPOND TO YOUR CONCERNS ABOUT NO**  
4 **CREDIT BEING GIVEN UNDER THE SCREENING TEST FOR POST-WRITE-**  
5 **OFF PAYMENTS MADE BY CUSTOMERS?**

6 A. In my Direct Testimony, I noted that the Companies give no credit under the screening test  
7 for post-write-off-payments made by customers.<sup>47</sup> In response, Ms. Bortz relies on the fact  
8 that the Companies employ the same methodology of excluding post-write-off-customer  
9 payments for all EGSs.<sup>48</sup> However, her response does not explain why it is fair and  
10 appropriate for the Companies to impose the clawback charge on an EGS that is based on  
11 the customers' write-off amounts and then ignore the post-write-off-payments made by  
12 customers. If Respond Power is required to pay the clawback charges, the result is that it  
13 will be reimbursing the Companies for charges that were later paid by the customers.  
14 Therefore, the Companies are receiving payment twice for those charges – once from  
15 Respond Power and once from the individual customers.

16 **Q. HOW DOES MS. BORTZ ADDRESS YOUR TESTIMONY REGARDING POLAR**  
17 **VORTEX REFUNDS?**

18 A. In my Direct Testimony, I noted that assessing clawback charges against Respond Power  
19 for customers who were issued refunds through the Polar Vortex litigation produces an  
20 unjust and unreasonable result.<sup>49</sup> In response, Ms. Bortz testifies that not all of the refund  
21 checks have been cashed.<sup>50</sup> Whether customers cashed the checks or not has no relevance

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<sup>47</sup> Respond Power Statement No. 1 at 23.

<sup>48</sup> Penelec/West Penn Statement No. 1 at 30.

<sup>49</sup> Respond Power Statement No. 1 at 23.

<sup>50</sup> Penelec/West Penn Statement No. 1 at 31.

1 since the refunds are not being returned to Respond Power. Ms. Bortz further contends  
2 that Respond Power should have checked with the Companies to see if any of its customers  
3 to whom it owed a refund had an unpaid balance with the Companies.<sup>51</sup> However, in  
4 response to discovery, the Companies conceded that no such provision existed in their  
5 Supplier Tariffs at the time of the Polar Vortex refunds.<sup>52</sup> In any event, Respond Power  
6 did not control the amount of the refunds or the administration of the refunds, which was  
7 handled exclusively by the Bureau of Investigation and Enforcement, the Office of  
8 Attorney General, the Office of Consumer Advocate and the third-party administrator.<sup>53</sup>  
9 As Respond Power had no obligation to “check with the Companies” before refunds were  
10 issued to their former customers, Ms. Bortz’ testimony should be disregarded.

11 **Q. HOW DOES MS. BORTZ ADDRESS YOUR CONCERNS ABOUT HAVING NO**  
12 **OPPORTUNITY TO EXPLAIN THE HIGHER WRITE-OFFS?**

13 A. In responding to my concerns about having no opportunity to explain higher write-off  
14 amounts, Ms. Bortz concedes that EGSs encounter many scenarios in the marketplace that  
15 may result in prices that are substantially above the EDC’s PTC. She claims, however, that  
16 these scenarios were not drivers for Respond Power’s significant write-offs. In support of  
17 this assertion, Ms. Bortz refers to Confidential Exhibit KLB-5, which shows that the vast  
18 majority of Respond Power customers whose write-off amounts were on month-to-month  
19 contracts, which reflect market prices.<sup>54</sup>

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<sup>51</sup> *Id.*

<sup>52</sup> Respond Power Exhibit AS-20 (Companies’ Response to Respond Power, Set V, No. 19).

<sup>53</sup> *Commonwealth of Pennsylvania, et al. v. Respond Power, LLC*, Docket No. C-2014-2427659 and *Pa. P.U.C. v. Respond Power, LLC*, Docket No. C-2014-2438640 (Order entered August 11, 2016).

<sup>54</sup> Penelec/West Penn Statement No. 1 at 31-32.

1 **Q. DO YOU AGREE WITH MS. BORTZ' ASSERTION?**

2 A. No. The very scenario faced by Respond Power during the Polar Vortex of 2014 mirrored  
3 the circumstances of many other EGSs, who encountered unprecedented and record-  
4 breaking wholesale price spikes. EGSs serving customers on month-to-month contracts  
5 had the ability to pass along some of those costs to customers, which may very well have  
6 resulted in higher write-offs. The Commission explained as follows:<sup>55</sup>

7           During the month of January 2014, wholesale prices for hourly  
8 energy supply in the day ahead and particularly the real time markets  
9 increased exponentially in response to a combination of sustained  
10 cold weather. New records were set for winter electricity use in  
11 Pennsylvania and throughout the service area of PJM  
12 Interconnection, LLC (PJM). During this period, PJM recorded 8  
13 of the top 10 highest hourly usage periods ever observed. This high  
14 demand, in combination with particularly high forced outage rates  
15 for a number of generators, produced record high costs in the PJM-  
16 administered energy markets.  
17

18           The Commission continued to note that as a result of these high PJM energy market prices,  
19 many EGSs serving Pennsylvania customers with variable-priced retail supply contracts  
20 needed to increase their retail prices to customers in order to recover the higher wholesale  
21 electric energy costs they incurred in January 2014.<sup>56</sup>

22           The Polar Vortex is exactly the type of market scenario that EGSs could point to in  
23 explaining why write-offs were higher than normal. Indeed, a review of Respond Power  
24 Exhibit AS-7 (attached to my Direct Testimony) shows that most of the customers whose  
25 accounts were subsequently written-off were being served by Respond Power during that  
26 volatile time. Yet, it is now when the Companies are writing off the account – now that

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<sup>55</sup> See *Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, Docket No. M-2014-2406134 (Order entered March 4, 2014), at 1-2.

<sup>56</sup> *Id.* at 2.

1 they have a clawback charge they can implement that retroactively assesses fees on  
2 Respond Power for write-offs that occurred during the Mid-Atlantic region's most volatile  
3 wholesale pricing period ever.

4 **Q. HOW DOES MS. BORTZ ADDRESS YOUR CONTENTION THAT WRITE-OFF**  
5 **AMOUNTS MAY RELATE TO UNPAID CHARGES OF A DIFFERENT EGS?**

6 A. In response to my contention that write-off amounts used to calculate the write-off  
7 percentage under the first prong of the screening test may relate to unpaid charges of a  
8 different EGS, Ms. Bortz testifies that the "write-off amounts included in the clawback  
9 calculation assessed to Respond Power are only for Respond Power accounts receivable."  
10 She further explained that all customers whose write-offs were used in the clawback  
11 calculation were in fact served by Respond Power.<sup>57</sup>

12 **Q. DOES MS. BORTZ' EXPLANATION SATISFY YOUR CONCERN?**

13 A. No. I do not dispute her claim that at some point all customers whose write-offs were used  
14 in the clawback calculation were in fact served by Respond Power. Her explanation,  
15 however, does not confirm that those customers were served by Respond Power during the  
16 entire time their write-offs were accruing. Indeed, in response to discovery, the Companies  
17 produced a document showing that many of those customers had unpaid balances when  
18 they started being served by Respond Power.<sup>58</sup> Those unpaid balances may have been due  
19 and payable to the Companies or to another EGS, but they could not have been due and  
20 payable to Respond Power. Also, I do not believe that the Companies' system for tracking

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<sup>57</sup> Penelec/West Penn Statement No. 1 at 32-33.

<sup>58</sup> Respond Power Exhibit AS-18.

1 write-off amounts is capable of confirming that those customers were served only by  
2 Respond Power from the start date to the end date shown on the document.

**VIII. EGS PRICING LIMITS**

4 **Q. HOW DOES MS. BORTZ SUGGEST THAT RESPOND POWER AVOID THE**  
5 **ASSESSMENT OF CLAWBACK CHARGES?**

6 A. Ms. Bortz' suggestion for an EGS to avoid clawback charges is to monitor their prices  
7 relative to the applicable PTC.<sup>59</sup>

8 **Q. IS MS. BORTZ' SUGGESTION FEASIBLE?**

9 A. No. EDC rates are set in a regulated environment and do not reflect current market  
10 conditions and other realities that EGSs must consider. As such, they are not established  
11 in the same way as EGS prices are developed. Moreover, it is unreasonable to expect EGSs  
12 to constantly monitor the EDCs' PTC when they are ideally not competing with the EDCs  
13 but rather are competing with their peers, other EGSs. The fact that the PTCs change  
14 quarterly and include reconciliation factors further demonstrates the irrelevance of EDC  
15 PTCs to EGS pricing in the competitive market.

16 **Q. MS. BORTZ CLAIMS THAT NOTHING ABOUT THE CLAWBACK PROVISION**  
17 **LIMITS THE PRICES AN EGS CAN CHARGE.<sup>60</sup> PLEASE RESPOND.**

18 A. As an EGS, Respond Power has no control over the Companies' write-off practices or  
19 consumers' payment patterns. Therefore, the only prong of the clawback charge that  
20 Respond Power can control is the price. The only way Respond Power can avoid the  
21 imposition of a clawback charge is to continually keep its prices below 150% of the  
22 Companies' respective PTCs for all customers since it does not know which customers are

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<sup>59</sup> Penelec/West Penn Statement No. 1 at 28.

<sup>60</sup> Penelec/West Penn Statement No. 1 at 8.

1 not paying their bills. While the Companies view any prices above that amount as being  
2 “excessive,” it is not up to the Companies or the Commission to decide what prices or limit  
3 the prices that may be charged in the competitive market. Again, while I am not an attorney  
4 licensed in Pennsylvania, counsel advises that the Commission and the Commonwealth  
5 Court in Pennsylvania have concluded that the Commission may not regulate or impose  
6 limits on EGS pricing.<sup>61</sup> Yet, by approving the clawback charges, the Commission is  
7 effectively imposing limits on EGS pricing.

8 **IX. IMPACT ON RETAIL COMPETITION**

9 **Q. MS. BORTZ TAKES ISSUE WITH YOUR ASSERTION THAT THE CLAWBACK**  
10 **PROVISION WILL HAVE AN ADVERSE IMPACT ON RESPOND POWER.<sup>62</sup>**  
11 **HOW DO YOU RESPOND?**

12 **A.** In responding to my assertion that the clawback provision will have an adverse impact on  
13 Respond Power, Ms. Bortz refers to Respond Power’s net income in 2016 and 2017.<sup>63</sup>  
14 However, net income does not paint the entire picture of an EGS’s ability to effectively  
15 compete in the retail market. Margins are very small given the regulated nature of the  
16 EDC’s PTC and the many competitive EGSs making offers in the market. Any unexpected  
17 charges of this magnitude adversely affect Respond Power.

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<sup>61</sup> *Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania v. Pa. P.U.C.*, 120 A.3d 1087, 1094 (Pa. Commw. Ct. 2015), appeals denied, 136 A.3d 982 and 136 A.3d 983 (Pa. 2016), at 1102; *see also HIKO Energy, LLC v. Pa. P.U.C.*, 163 A.3d 1079, 1082, n.1 (Pa. Commw. Ct. 2017).

<sup>62</sup> Penelec/West Penn Statement No. 1 at 13.

<sup>63</sup> Penelec/West Penn Statement No. 1 at 33-34.

1 **Q. HOW DOES MS. BORTZ ADDRESS YOUR CONCERNS ABOUT THE IMPACT**  
2 **OF THE CLAWBACK PROVISION ON EGS PARTICIPATION IN THE MASS**  
3 **MARKET?**

4 A. In addressing my concerns about the potential for the clawback provision to discourage  
5 EGSs from serving mass market customers in the Companies' service territories, Ms. Bortz  
6 testifies that no EGSs subject to the clawback charges have left the market since it was  
7 implemented.<sup>64</sup> Certainly, the potential for that to occur in the future is very real, especially  
8 due to *unanticipated wholesale market price spikes or other factors*. While I am not  
9 advocating for the elimination of the clawback charges from the Companies' portfolio, I  
10 am urging the Commission to ensure they are assessed in a just and reasonable manner.

11 **X. CONCLUSION**

12 **Q. DOES THIS COMPLETE YOUR REBUTTAL TESTIMONY?**

13 A. Yes.

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<sup>64</sup> Penelec/West Penn Statement No. 1 at 34.

RP Ex. AS-14  
Companies' Response to Respond Power,  
Set V, No. 3

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**Respond Power LLC, Set V, No. 3**

“Reference Penelec/West Penn St. No. 1, page 7, where you refer to Respond Power’s business model as generating very high write-off percentages. Also, reference Penelec/West Penn St. No. 1, page 8, where you note that a number of EGSs charges prices that exceed 150% of the PTC but were not subject to the clawback charge in 2017. Based upon these two statements, do you agree that the clawback charge appears to be driven more by customer behavior than EGS prices? If you do not agree, please explain.”

**RESPONSE:**

No. The fact that some EGSs charged prices greater than 150% of the PTC but nonetheless experienced write-offs that did not exceed 200% of the average write-off percentage for all EGS may reflect the difference between the consumer populations being targeted by those EGSs as compared to the consumer demographics Respond Power has chosen as the focus of its marketing efforts. High prices coupled with the choices made by Respond Power with regard to the consumer demographic targeted by its marketing efforts can be directly responsible for the higher write-offs Respond Power experienced relative to other EGSs that charged prices above the PTC but did not experience write-offs that exceeded 200% of the average for all EGSs.

RP Ex. AS-15  
Companies' Responses to  
Respond Power Set V, Nos. 5 and 9

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**Respond Power LLC, Set V, No. 5**

“Reference Penelec/West Penn St. No. 1, page 11. You refer to EGSs with business models that “involve charging exorbitant prices.” Please define what you mean by “exorbitant prices.”

**RESPONSE:**

The modifier “exorbitant” was used to be synonymous with average EGS prices higher than 150% of the average PTC. The Companies believe their characterization of such prices is consistent with the consensus reached by the diverse group of parties in the Companies’ DSP IV proceeding that executed, or did not oppose, the Joint Petition for Settlement of that case, which included the clawback charge.

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Respond Power LLC, Set V, No. 9

“Reference Penelec/West Penn St. No. 1, page 13. Please indicate what you mean by prices that “significantly” exceed the applicable Company’s PTC.”

**RESPONSE:**

EGS prices higher than 150% of the applicable Company’s average PTC may reasonably be characterized as “significant.”

RP Ex. AS-16  
Companies' Response to  
Respond Power Set V, No. 6  
and  
Attachment A

**RESPOND POWER LLC V. PENNSYLVANIA ELECTRIC COMPANY  
RESPOND POWER LLC V. WEST PENN POWER COMPANY  
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**Respond Power LLC, Set V, No. 6**

“Please provide the prices to compare for the residential class of Penelec and West Penn for 2012-2017.”

**RESPONSE:**

*See Respond Power LLC Interrogatory Set V, No. 6, Attachment A.*

Penelec and West Penn Power Residential PTC  
2012-2017

	Penelec PTC	West Penn PTC
12/1/2011	\$ 0.08207	\$ 0.07177
3/1/2012	\$ 0.07474	\$ 0.07002
6/1/2012	\$ 0.06321	\$ 0.05349
9/1/2012	\$ 0.05960	\$ 0.05384
12/1/2012	\$ 0.07071	\$ 0.05126
3/1/2013	\$ 0.06975	\$ 0.05411
6/1/2013	\$ 0.08729	\$ 0.06262
9/1/2013	\$ 0.08081	\$ 0.06070
12/1/2013	\$ 0.07195	\$ 0.05643
3/1/2014	\$ 0.07734	\$ 0.04961
6/1/2014	\$ 0.09284	\$ 0.07514
9/1/2014	\$ 0.07053	\$ 0.06254
12/1/2014	\$ 0.06370	\$ 0.06313
3/1/2015	\$ 0.06943	\$ 0.05331
6/1/2015	\$ 0.07343	\$ 0.07311
9/1/2015	\$ 0.07341	\$ 0.06917
12/1/2015	\$ 0.07554	\$ 0.07011
3/1/2016	\$ 0.06516	\$ 0.06983
6/1/2016	\$ 0.06020	\$ 0.06410
9/1/2016	\$ 0.07724	\$ 0.06061
12/1/2016	\$ 0.07121	\$ 0.06574
3/1/2017	\$ 0.06047	\$ 0.05975
6/1/2017	\$ 0.06158	\$ 0.06597
9/1/2017	\$ 0.05383	\$ 0.06289
12/1/2017	\$ 0.06742	\$ 0.06149

RP Ex. AS-17  
Companies' Response to  
Respond Power Set V, No. 10

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**Respond Power LLC, Set V, No. 10**

“Reference Penelec/West Penn St. No. 1, pages 13-17. Please identify any instance in any of the documents referenced in that testimony when the Companies or the Commission referred to the clawback charge as modifying the default service program for the period from June 1, 2015 through May 31, 2017.”

**RESPONSE:**

Such references properly were not made by the Companies or the Commission because the assumption underlying Respond Power’s Interrogatory is erroneous. As explained in the Companies’ answer to Respond Power Interrogatory Set V, No. 2, the revisions to the Companies’ POR program approved by the Commission did not modify their “default service programs.” POR programs are separate and distinct from default service programs, although, as the Commission has previously stated, it is entirely appropriate that electric POR programs should be addressed in conjunction with electric distribution companies’ default service program cases (*see* Penelec/West Penn St. No. 1, p. 5).

RP Ex. AS-18  
Companies' Response to  
Respond Power Set V, No. 20  
and  
**Confidential Attachment A**

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**Respond Power LLC, Set V, No. 20**

“Reference Penelec/West Penn St. 1, pages 32-33. You describe a document number assigned by the Companies’ SAP enterprise accounting software, which enabled the Companies to determine that all customers whose write-offs were used in the clawback calculation were in fact served by Respond Power.

- (a) Please explain how this system enabled the Companies to determine that the customers were served by Respond Power during the entire time during which the unpaid amounts were accruing.
- (b) For all accounts that were written off, resulting in the assessment of 2016 and 2017 clawback charges, please provide the balance that was due at the time Respond Power began serving the customer.”

**RESPONSE:**

- (a) An 814 EDI enrollment is sent to the Companies by Respond Power when a customer selects Respond Power as its generation supplier. This transaction marks the beginning of the customer’s service period with Respond Power, which continues until an 814 EDI drop notice, a supplier switch or a customer-initiated drop is received by the Companies. The Companies’ SAP enterprise system assigns a unique billing document number to each supplier billing transaction. This document number provides the transaction details, including the supplier code that enables the Companies to determine the billing periods that a customer was served by Respond Power. The payment posting priority determines how customer payments are applied to open balances.
- (b) See Respond Power LLC Interrogatory Set V, No. 20, CONFIDENTIAL Attachment A. The balance due at the time Respond Power began serving the customer is provided for each time slice the customer was served.

RP Ex. AS-19  
Companies' Response to Respond Power,  
Set V, No. 16

**RESPOND POWER LLC V. PENNSYLVANIA ELECTRIC COMPANY**  
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**Respond Power LLC, Set V, No. 16**

*“Reference Penelec/West Penn St. 1, page 28. You indicate that an EGS is free to request information regarding its non-paying customers through the Companies’ Supplier Services website. Please indicate how an EGS would initially know their customers are not paying the bills and describe the process for using this feature on the Companies’ Supplier Services website.”*

**RESPONSE:**

An EGS may submit inquiries to the Companies at any time and in fact several EGS actively involved in the DSP IV proceeding inquired as to whether or not they would be assessed a clawback charge. To utilize the FirstEnergy Supplier Services website, an EGS may email questions utilizing the “Contact Supplier Services” form which is located at the following link:

<https://www.firstenergycorp.com/supplierservices/contact-us-supplier.html>

RP Ex. AS-20  
Companies' Response to Respond Power,  
Set V, No. 19

**RESPOND POWER LLC V. PENNSYLVANIA ELECTRIC COMPANY  
RESPOND POWER LLC V. WEST PENN POWER COMPANY  
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**Respond Power LLC, Set V, No. 19**

“Reference Penelec/West Penn St. 1, page 31. You indicate that Respond Power kept the accounts receivables without checking with the Companies to see if any of its customers to whom it owed a refund had an unpaid balance with the Companies. Please identify any such requirement that existed at the time the refunds were paid. If no such requirement existed, please explain why Respond Power would have checked with the Companies.”

**RESPONSE:**

The requirement to check the payment status of a customer’s account before an EGS issues a refund or bill credit was a procedure that, while it should be a best practice for EGSSs, was not memorialized in the Companies’ Supplier Coordination Tariffs until it was included in those tariffs pursuant to the Commission’s approval of the Joint Petition for Settlement of the Companies’ DSP IV case. Consequently, in the absence of a specific Commission mandate for Respond Power to adhere to what should be a best practice, Respond Power decided it was at liberty to simply issue refund checks to customers in settlement of the extensive Polar Vortex litigation initiated by the Pennsylvania Attorney General and the Commission’s Bureau of Investigation and Enforcement without regard to the payment status of the accounts to which refunds were being made. While Respond Power’s decision not to follow a best practice might be understandable for normal levels of refunds paid in the ordinary course of business, its failure to check the payment status of accounts being paid refunds under the circumstances of a comprehensive settlement of major consumer protection litigation requiring a magnitude of refunds that Respond Power itself claims were significant was not reasonable.