

**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	:	

SUPPLEMENTAL DIRECT TESTIMONY

OF

ADAM SMALL

On Behalf of

RESPOND POWER, LLC

PUBLIC VERSION

November 29, 2017

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TABLE OF EXHIBITS

Exhibit No.	Description
RP Ex. AS-9	2017 Clawback Charge Invoices
RP Ex. AS-10	Companies' Response to Respond Power Set III, Nos. 1 and 4, Attachment A
RP Ex. AS-11	Companies' Confidential Response to Respond Power Set IV, No. 1, Confidential Attachment A
RP Ex. AS-12	Companies' Response to Respond Power Set III, Nos. 2 and 3, Confidential Attachment A, and Respond Power Set III, Nos. 5 and 6, Confidential Attachment A
RP Ex. AS-13	Companies' Responses to Respond Power Set IV, No. 3

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 proprietary and public versions of Direct
8 Testimony pre-marked as Respond Power St. 1. My Direct Testimony was accompanied
9 by eight exhibits pre-marked as RP Ex. AS-1 through RP Ex. AS-8.

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

11 A. My testimony is submitted on behalf of Respond Power.

12 **Q. PLEASE DESCRIBE RESPOND POWER.**

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

18 **Q. WHAT IS THE PURPOSE OF YOUR SUPPLEMENTAL DIRECT TESTIMONY?**

19 A. The purpose of my Supplemental Direct Testimony is to support the complaints filed by
20 Respond Power against Pennsylvania Electric Company (“Penelec”) and West Penn Power

¹ *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 Company (“West Penn”) (collectively referred to as “the Companies”) on October 27,
2 2017.² The complaints filed on October 27, 2017 relate to Purchase of Receivables
3 (“POR”) clawback charges in the amount of \$211,012.54 that were assessed on Respond
4 Power by the Companies through invoices dated October 2, 2017. At the request of the
5 parties, Administrative Law Judge (“ALJ”) David A. Salapa issued an Order dated
6 November 8, 2017, consolidating these complaints with the complaints filed by Respond
7 Power on November 17, 2016 relating to the 2016 POR clawback charges that were
8 assessed by the Companies, and establishing a revised procedural schedule. This
9 Supplemental Direct Testimony is provided in accordance with the schedule established
10 by the ALJ’s Order.

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

13 Respond Power is seeking to have the Commission conclude that it would be unjust,
14 unreasonable and unlawful for the Companies to collect the POR clawback charges from
15 Respond Power that were assessed on October 2, 2017 pursuant to the Companies’ Supplier
16 Tariffs.

17 **II. BACKGROUND**

18 **Q. WHAT IS A PURCHASE OF RECEIVABLES (“POR”) PROGRAM?**

19 A. Through my Direct Testimony, I provided an extensive discussion concerning the
20 development of POR programs in Pennsylvania and specifically by the Companies.
21 Therefore, I will not reiterate all of that discussion in my Supplemental Direct Testimony,
22 which is focused specifically on the Companies’ imposition of the 2017 clawback charges.

² *Respond Power LLC v. Pennsylvania Electric Company*, Docket No. C-2017-2631331; *Respond Power LLC v. West Penn Power Company*, Docket No. C-2017-263126.

1 Briefly, however, a “purchase of receivables” or “POR” program sets forth the parameters
2 under which the EDC bills and collects the charges (receivables) due to a participating EGS
3 that is providing the end-user customer with generation service and where the customer
4 has opted to receive a single consolidated bill from the EDC for both energy and wires
5 services. Typically, POR programs involve residential and small commercial customers
6 (aka “mass market customers”).³

7 **Q. CAN A POR PROGRAM INCLUDE A MECHANISM TO ADDRESS**
8 **UNCOLLECTIBLE EXPENSE?**

9 A. Yes. Because the EGS is paid for the charges assessed to its customers and the risk of
10 uncollectible expense for these customers is taken over by the EDC, POR programs may
11 include a “discount” to the payment that is made by the EDC to the EGS. The purpose of
12 this discount is to reflect any incremental uncollectible expense that the EDC experiences
13 over and above the amount for which it is already being compensated in its regulated
14 distribution rates.

15 **Q. WHEN DID THE COMPANIES FIRST IMPLEMENT THEIR POR PROGRAMS?**

16 A. West Penn has explained that its first POR program, which purchased EGS receivables
17 with full recourse for uncollectible accounts, was adopted in the settlement of its
18 restructuring program. West Penn further noted that it revised its POR program to align it
19 with those of its affiliates pursuant to the terms of the settlement of the proceeding for
20 merger of Allegheny Energy, Inc. and FirstEnergy Corp.⁴ Penelec first agreed to

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

⁴ West Penn New Matter (filed November 20, 2017) ¶ 47. See also *Petition of West Penn Power Company d/b/a Allegheny Power for Approval of its Retail Electric Default Service Program and Competitive Procurement Plan for Service at the Conclusion of the Restructuring Transition Period*, Docket No. P-00072342 (Order entered

1 implement a POR program in 2009 in the context of its default service proceeding for the
2 period to be effective January 1, 2011.⁵

3 **Q. PLEASE DESCRIBE THE HISTORICAL POR PROGRAMS OF THE**
4 **COMPANIES.**

5 A. Penelec and West Penn have fully purchased the accounts receivables since 2011, without
6 any discount or other future remedies, of EGSs serving residential and small commercial
7 customers in the Companies' service territories. Otherwise stated, these POR programs
8 were "non-recourse," which is a commercial term meaning that once a receivable is sold,
9 the purchaser of the receivable has no recourse with the seller to collect on any amounts
10 the purchaser is unable to successfully recover through customer collection efforts.

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

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

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

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

July 25, 2008, at 56-60). The details of the West Penn no-discount POR program were approved as part of a subsequent tariff filing made November 1, 2010 at Docket No. R-2010-2207938.

⁵ Penelec New Matter (filed November 20, 2017) ¶ 47. See also *Joint Petition of Metropolitan Edison Company and Pennsylvania Electric Company for Approval of Their Default Service Programs*, Docket Nos. P-2009-2093053 and P-2009-2093054 (Order entered at November 6, 2009, at 42) (Joint Petition for Settlement dated August 12, 2009 at 27-29).

1 **Q. AT WHAT POINT DID THE COMPANIES PROPOSE TO CHANGE THE POR**
2 **PROGRAMS?**

3 A. As part of their 2017-2019 Default Service Plans, which were filed on November 3, 2015,
4 the Companies proposed to modify the POR programs (that were currently in effect and
5 would remain in effect until May 31, 2017) to include clawback charges that would permit
6 Penelec and West Penn to invoice EGSs for a portion of the accounts receivables that had
7 been previously fully purchased but which were not paid by customers.

8 **Q. DID THE COMPANIES RECEIVE APPROVAL TO IMPLEMENT CLAWBACK**
9 **CHARGES FROM THE COMMISSION?**

10 A. Yes. The original proposal was modified by a Joint Petition for Settlement filed on April
11 1, 2016 and approved by the Commission as a two-year pilot.⁶ In approving the POR
12 clawback charges, the Commission acknowledged that their implementation may lead to
13 unintended consequences in the form of unreasonable assessments on EGSs, but
14 recognized that parties are free to raise such issues in future proceedings.⁷

15 **Q. PLEASE EXPLAIN THE POR CLAWBACK CHARGES IMPLEMENTED BY**
16 **THE COMPANIES.**

17 A. The Companies apply a two-pronged test to determine whether to assess the clawback
18 charges. This test identifies those EGSs participating in the POR whose average
19 percentage of write-offs, as a percentage of revenues over the twelve-month period ending
20 August 31 each year, exceeds 200% of the average percentage of total EGS write-offs as a
21 percentage of revenues per Penelec and West Penn. The second prong of the test identifies
22 EGSs, among those identified in the first prong, whose average price charged over the same

⁶ 2017-2019 Default Service Plans (Joint Petition for Settlement filed April 1, 2016; Initial Decision served April 29, 2016; Order entered May 19, 2016).

⁷ 2017-2019 Default Service Plans (Initial Decision at 29-31).

1 twelve-month period exceeds 150% of the average price-to-compare for the prior twelve-
2 month period. For EGSs who meet both prongs of the test, the annual clawback charge is
3 the difference between the EGS's actual write-offs and 200% of the average EGS
4 percentage of write-offs per operating company.⁸

5 **Q. WHAT IS THE PRACTICAL EFFECT OF THIS CHANGE?**

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

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

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

16 **Q. GIVEN THAT PARTICIPATION IS MANDATORY, IS THERE ANY WAY TO**
17 **AVOID BEING ASSESSED A POR CLAWBACK CHARGE?**

18 A. The only way Respond Power can avoid being assessed a POR clawback charge is to limit
19 its prices for all customers because Respond Power is not given any information about its
20 customers who are not paying their bills. Without this information, Respond Power cannot
21 offer these customers a new contract that may be more manageable for them or undertake

⁸ 2017-2019 Default Service Plans (Joint Petition for Settlement at 18-20).

1 any other actions with regard to the customer's lack of payment to avoid or minimize the
2 clawback charges that are assessed.

3 **Q. WHEN DID THE COMPANIES FIRST ASSESS THE CLAWBACK CHARGES**
4 **ON RESPOND POWER?**

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

9 **Q. WHEN WERE THE MORE RECENT CLAWBACK CHARGES ASSESSED ON**
10 **RESPOND POWER?**

11 A. On October 2, 2017, the Companies assessed the clawback charges on Respond Power that
12 are the subject of the 2017 complaints filed by Respond Power. The invoice from Penelec
13 is in the amount of \$142,973.13 and the invoice from West Penn is in the amount of
14 \$68,039.41.⁹ The invoices contain a due date of October 29, 2017 and the email
15 transmitting the invoice indicated that a failure to remit payment by the due date would
16 result in the Companies withholding POR amounts by \$211,012.54.

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

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

⁹ The 2017 invoices that Respond Power received from the Companies are attached as RP Ex. AS-9. The supporting calculations are included in RP Ex. AS-10 (Companies' Response to Respond Power Set III, Nos. 1 and 4, Attachment A).

1 **III. SUMMARY OF CONCERNS**

2 **Q. PLEASE SUMMARIZE YOUR PRIMARY CONCERNS WITH THE CLAWBACK**
3 **CHARGES ASSESSED BY THE COMPANIES.**

4 A. Although the primary concerns identified in my Direct Testimony continue to apply to the
5 2017 clawback charges, I am reiterating them here but providing less discussion to explain
6 them, except where necessary due to the differing time periods. My primary concerns with
7 the clawback charges assessed by the Companies may be summarized as follows:

8 (a) No notice was given to Respond Power by the Companies that they were proposing to
9 change the terms of their POR programs contained in the 2015-2017 Default Service Plans
10 by way of their forward-looking 2017-2019 Default Service Plans;

11
12 (b) No notice and opportunity to be heard was provided by the Commission prior to
13 approval of the 2017-2019 Default Service Plans that modified the then-existing POR
14 programs contained in the 2015-2017 Default Service Plans;

15
16 (c) The clawback charges assessed in October 2017 were based on write-off data that were
17 accumulating prior to the date when the clawback charges were approved or even initially
18 proposed;

19
20 (d) When write-offs began occurring on September 1, 2016, Respond Power was unaware
21 of the existence of clawback charges modifying the POR programs that were then in effect
22 for the 2015-2017 default service plan period;

23
24 (e) While the clawback charges were accruing, Respond Power had: (i) no knowledge that
25 its customers were not paying the Companies; (ii) no ability to terminate non-paying
26 customers; (iii) no opportunity to pursue collection activities; and (iv) no control over the
27 Companies' collection efforts;

28
29 (f) The write-offs by the Companies include supply charges that were billed to customers
30 several months or years earlier and do not match the time period for the pricing information
31 upon which the clawback charges are based; and

32
33 (g) The clawback charges effectively impose a limit on EGS prices, which the Commission
34 lacks the statutory authority to do.
35

1 **Q. WHAT DO YOU CONCLUDE FROM THESE CONCERNS?**

2 A. Based on these numerous concerns with the application of the 2017 clawback charges to
3 Respond Power, I conclude that the Companies' application of the 2017 clawback charges
4 to Respond Power is unjust, unreasonable and unlawful. Further, I recommend that the
5 Commission direct the Companies to cease and desist from collecting any clawback
6 charges from Respond Power until such time as they modify the clawback charges so that
7 their application to Respond Power is just, reasonable and lawful.

8 **IV. DUE PROCESS ISSUES**

9 **Q. PLEASE DESCRIBE YOUR DUE PROCESS CONCERNS WITH THE**
10 **CLAWBACK CHARGES ASSESSED BY THE COMPANIES.**

11 A. As an initial matter, Respond Power was not aware that the Companies' forward-looking
12 2017-2019 Default Service Plans filed on November 3, 2015 contained a proposal to
13 retroactively modify the POR programs that had been largely unchanged since January 1,
14 2011 and were in effect as part of their 2015-2017 Default Service Plans. Because Respond
15 Power was not aware of the Companies' proposal to modify the POR programs contained
16 in the 2015-2017 Default Service Plans, it was deprived of fundamental due process –
17 notice and an opportunity to be heard.

18 **Q. WHEN DID RESPOND POWER BECOME AWARE OF THE MODIFICATION**
19 **TO THE COMPANIES' POR PROGRAMS?**

20 A. Respond Power became aware of the modification to the POR programs on or about
21 September 27, 2016 when the 2016 invoices were received.

22 **Q. SINCE RESPOND POWER WAS AWARE OF THE EXISTENCE OF THE**
23 **CLAWBACK CHARGES FOR ELEVEN MONTHS OF THE TWELVE-MONTH**

1 **PERIOD ON WHICH THE 2017 CLAWBACK CHARGES WERE BASED, WHY**
2 **DOES RESPOND POWER CONTINUE TO RAISE A DUE PROCESS ISSUE?**

3 A. Even though Respond Power was aware of the existence of the clawback charges for
4 eleven months of the twelve-month period on which the 2017 clawback charges were
5 based, Respond Power continues to raise a due process issue because it is being subjected
6 to clawback charges that were proposed and approved in a proceeding in which Respond
7 Power was not a party. Knowing about the charges since approximately September 27,
8 2016 does not cure the lack of notice and the lack of opportunity that Respond Power had
9 to oppose proposed retroactive changes to the 2015-2017 Default Service Plans that were
10 included in the Companies' 2017-2019 Default Service Plans. Had the Companies
11 provided specific notice of their proposed retroactive changes to their then existing POR
12 programs, Respond Power would have had an opportunity to raise the structural flaws in
13 the clawback charges that it is now exposing.

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

17 A. Yes. Although I am an attorney licensed in New York and not in Pennsylvania,
18 Pennsylvania counsel for Respond Power in this proceeding advises that Section 703(g) of
19 the Public Utility Code permits the Commission to rescind or amend any order made by it
20 only "after notice and opportunity to be heard" to interested parties.¹⁰ Because the POR
21 programs have been non-recourse since their January 1, 2011 effective date and the 2017-
22 2019 Default Service Plans modified the POR programs that were in effect from June 1,

¹⁰ 66 Pa. C.S. § 703(g).

1 2015 through May 31, 2017, I believe that the Commission was obligated to provide notice
2 to affected parties before issuing the May 19, 2016 Order.

3 **V. RETROACTIVE NATURE OF CLAWBACK CHARGES**

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

5 A. Although the 2017-2019 Default Service Plans did not go into effect until June 1, 2017,
6 the POR clawback charges that were assessed in September 2017 were based on
7 historical data from the prior twelve-month period of September 1, 2016 through August
8 31, 2017, which included amounts that customers failed to pay to the Companies dating
9 back to 2013. On this basis, I view the changes to the POR program as being retroactive.

10 **Q. PLEASE FURTHER DESCRIBE YOUR CONCERNS ABOUT THE**
11 **RETROACTIVE NATURE OF THE CLAWBACK CHARGES.**

12 A. The clawback charges assessed on Respond Power by the Companies in October 2017
13 were based on write-off data that were accumulating prior to the date when the clawback
14 charge was approved by the Commission. In fact, the unpaid amounts contained in the
15 write-off data that forms the basis of the clawback charges began accruing prior to the
16 filing of the Companies' proposal to implement clawback charges.

17 **Q. WHAT DO YOU CONCLUDE FROM THIS ACCUMULATION OF DATA**
18 **BEFORE THE CHARGES WERE PROPOSED OR APPROVED?**

19 A. I conclude that it is unjust and unreasonable for clawback charges to be assessed on the
20 basis of data that accrues months before the charges are proposed, approved and included
21 in a tariff.

1 VI. **STRUCTURE OF CLAWBACK CHARGES**

2 **Q. DOES RESPOND POWER ALSO HAVE CONCERNS ABOUT THE STRUCTURE**
3 **OF THE 2017 CLAWBACK CHARGES?**

4 A. Yes. For a clawback charge to have the intended effect of incentivizing certain results, it
5 is imperative for the potential recipient of the charges to be aware of the conduct that is
6 occurring that will trigger the imposition of the charges. While the charges were accruing,
7 Respond Power had no knowledge that its customers were not paying the Companies and
8 had no ability to attempt to address the situation directly with its customers. Had Respond
9 Power known that its customers were not paying their EGS charges, it could have contacted
10 the customers and determined whether different terms of service would enable the
11 customers to pay the bills.

12 **Q. DID RESPOND POWER HAVE ANY ABILITY TO ASSIST OR INFLUENCE THE**
13 **COLLECTION PRACTICES OF THE COMPANIES?**

14 A. No. Respond Power was completely at the discretion of the Companies' collection efforts.
15 It had no control over the Companies' collection efforts or any ability to assist or influence
16 the collection practices of the Companies.

17 **Q. DO YOU HAVE ANY OBSERVATIONS ABOUT THE COMPANIES'**
18 **COLLECTION EFFORTS?**

19 A. In response to discovery, the Companies described the collection steps that are taken for
20 residential (winter and non-winter) and non-residential customers.¹¹ As I observed in my
21 Direct Testimony, it appears that the Companies' collection efforts generally track the
22 requirements in the Commission's regulations relating to notices that must be given prior

¹¹ See RP Ex. AS-3 (Companies' Response to Respond Power Set I, No. 8), which is attached to my Direct Testimony.

1 to terminations of service.¹² Specifically, I note that telephone attempts are made but are
2 not necessarily successful. In fact, the Companies provided information in response to
3 discovery to describe the attempts that were made with twenty-seven specific customers
4 identified by Respond Power, whose accounts were written off during the time period from
5 September 1, 2016 to August 31, 2017. A review of that information shows that the results
6 of the Companies' efforts to contact the customers were largely unsuccessful, including
7 numerous notations indicating that "party hung up," "no answer," "invalid phone #," "no
8 result" or "left message."¹³ While the Companies may not be required to do anything
9 further under the Commission's regulations, Respond Power would have had the option of
10 including additional outreach to non-paying customers if it was aware that the Companies'
11 collection efforts were not successful and may have been able to negotiate a contract that
12 was more affordable for the customer.

13 **Q. DID RESPOND POWER HAVE ANY ABILITY TO TERMINATE CUSTOMERS'**
14 **SERVICE FOR NON-PAYMENT?**

15 A. No. Only the Companies can terminate customers' service for non-payment. Therefore,
16 even if Respond Power had known that the customers were not paying, it lacked the ability
17 to utilize this effective tool to encourage payment by its customers. However, had Respond
18 Power been aware that the customers were not paying their bills, it could have cancelled
19 the contracts and returned the customers to default service so as to avoid the assessment of
20 the 2017 clawback charges.

¹² 52 Pa. Code §§ 56.91-56.100.

¹³ RP Ex. AS-11 (Companies' Response to Respond Power Set IV, No. 1, Confidential Attachment A).

1 **Q. COULD RESPOND POWER HAVE TAKEN STEPS TO INSULATE ITSELF**
2 **FROM NON-PAYING CUSTOMERS IN THE FIRST PLACE?**

3 A. No. As a condition of participating in the POR program, Respond Power cannot deny
4 service to residential customers for credit-related reasons.¹⁴

5 **Q. DO YOU HAVE ANY COMMENTS ABOUT THE MANNER IN WHICH THE**
6 **COMPANIES APPLY PARTIAL PAYMENTS MADE BY CUSTOMERS?**

7 A. Yes. In response to discovery, the Companies explained how they post partial payments
8 by residential and small commercial customers that are insufficient to pay outstanding
9 charges for distribution and generation service. To the extent that a payment is insufficient
10 to cover both distribution consumption charges and generation consumption charges, the
11 Companies indicated that they post the payments first to distribution line items and then to
12 supplier line items.¹⁵ Therefore, if Respond Power's customers are making partial
13 payments that are not sufficient to cover both the Companies' charges and Respond
14 Power's charges, a higher write-off amount is being attributed to Respond Power.

15 **Q. DOES RESPOND POWER HAVE ANY OTHER CONCERNS ABOUT THE**
16 **STRUCTURE OF THE CLAWBACK CHARGES?**

17 A. Yes. The Companies' write-offs include supply charges that were billed to customers
18 several months or years earlier. In response to discovery, the Companies explained the
19 write-off-process, noting that with some exceptions write-offs automatically occur for

¹⁴ 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.

¹⁵ See RP Ex. No. 5 (Companies' Responses to Set I, No. 7 and Set II, No. 1), which is attached to my Direct Testimony.

1 unpaid amounts approximately 182 days after the final bill due date.¹⁶ That 182-day period
2 follows the collection steps, which span several months or even more than one year.¹⁷

3 **Q. PLEASE REFER TO SPECIFIC INFORMATION SHOWING THAT THE**
4 **WRITE-OFFS DURING THE PERIOD FROM SEPTEMBER 1, 2016 THROUGH**
5 **AUGUST 31, 2017 INCLUDE UNPAID CHARGES DATING BACK TO 2013.**

6 A. In response to discovery, the Companies provided confidential information for each
7 account that was written-off during that time period, including the operating company; the
8 customer account number; the total amount of the write-off; the date on which the account
9 was written off; and the date on which the customer first failed to make a payment that
10 covered the balance due.¹⁸ A sampling of these accounts is included below, showing that
11 the write-offs during the period from September 1, 2016 through August 31, 2017 included
12 unpaid charges dating back to 2013 and even 2012, as well as very large write-offs with
13 unpaid charges beginning in early 2014.

14 **BEGIN CONFIDENTIAL INFORMATION**

OP CO	CUSTOMER NUMBER	WRITE-OFF AMOUNT	WRITE- OFF DATE	FIRST MONTH OF DELINQUENCY

15

¹⁶ See RP Ex. AS-6 (Companies' Response to Respond Power Set II, No. 2), which is attached to my Direct Testimony.

¹⁷ See, e.g., RP Ex. AS-4, which is attached to my Direct Testimony.

¹⁸ RP Ex. AS-12 (Companies' Responses to Respond Power Set III, Nos. 2 and 3, **Confidential Attachment A**, and Respond Power Set III, Nos. 5 and 6, **Confidential Attachment A**).

1 twelve-month period and were written off by the Companies during that twelve-month
2 period. This structure appears to mix apples and oranges since it is not consistently using
3 historical data. In assessing clawback charges, it is not just and reasonable to use
4 uncollectible amounts for one time period and the EGS's prices for a different time period.

5 **Q. DO YOU HAVE OTHER CONCERNS ABOUT THE STRUCTURE OF THE**
6 **CLAWBACK CHARGES?**

7 A. Yes. The way the clawback charges are structured, no credit is given for payments
8 subsequently made by customers on amounts that were previously written-off. If Respond
9 Power is required to pay the clawback charges, the result is that it will be reimbursing the
10 Companies for charges that were later paid by the customers. Therefore, the Companies
11 are receiving payment twice for those charges – once from Respond Power and once from
12 the individual customers. On a similar note, it appears that the Companies have the
13 potential to recover these amounts through the clawback charges and through uncollectible
14 expenses that are included in base rates.

15 **Q. PLEASE CONTINUE.**

16 A. Another concern that I have about the structure of the clawback charges relates to refunds
17 that are issued by Respond Power to customers as a result of inquiries or the filing of
18 informal or formal complaints. For example, as part of the Polar Vortex litigation that I
19 identified earlier, Respond Power voluntarily refunded approximately \$5 million to
20 customers who were served in January through June of 2014. It appears that assessing
21 clawback charges against Respond Power for any of these customers who received refunds
22 would result in Respond Power essentially being penalized twice – first with the payment
23 to the customer and then with the payment to the Companies.

1 **Q. PLEASE IDENTIFY ANY OTHER ISSUES YOU HAVE WITH THE STRUCTURE**
2 **OF THE CLAWBACK CHARGES.**

3 A. I also believe the structure of the clawback charges is flawed because the EGSs have no
4 opportunity to demonstrate that the write-off amounts were higher than average due to a
5 particular incident or set of circumstances. For instance, an EGS may experience a large
6 commercial customer default or have a residential versus non-residential customer mix that
7 differs from the average.

8 **Q. DO THE COMPANIES HAVE ANY PROVISION IN THE CLAWBACK**
9 **CHARGES TO IDENTIFY WHETHER THE AMOUNTS WRITTEN OFF FOR**
10 **RESPOND POWER CUSTOMERS WERE ACTUALLY BILLED BY RESPOND**
11 **POWER?**

12 A. No. As a result, in my Direct Testimony, I suggested that it is entirely possible that these
13 customers received service from many different EGSs (or returned to default service for
14 some periods of time) during the time they were not paying their bills. Since that time,
15 Respond Power has done another round of discovery in an attempt to determine the answer
16 to this question. In responding to this question, the Companies indicated that the write-
17 off amounts only contain Respond Power supply charges.¹⁹ However, the Companies'
18 response that it assigns a unique document number including a supplier code does not
19 explain how the Companies confirmed that Respond Power served these customers during
20 all of the months when the customer failed to pay its supply charges. Therefore, I am
21 continuing to review Respond Power's records in an effort to confirm this conclusion.

¹⁹ RP Ex. AS-13 (Companies' Response to Respond Power Set IV, No. 3).

VII. EGS PRICING LIMITS

2 **Q. WHAT IS RESPOND POWER’S VIEW RELATING TO THE PRONG OF THE**
3 **CLAWBACK CHARGES THAT CONSIDERS EGS PRICING OVER A TWELVE-**
4 **MONTH PERIOD?**

5 A. Initially, Respond Power’s view concerning the prong of the clawback charges that
6 considers EGS pricing over a twelve-month period is that it operates to unlawfully limit
7 EGS prices. Again, while I am not an attorney licensed in Pennsylvania, counsel advises
8 that the Commission and the Commonwealth Court in Pennsylvania have concluded that
9 the Commission may not regulate or impose limits on EGS pricing.²⁰ Yet, by approving
10 the clawback charges, the Commission is effectively imposing limits on EGS pricing.

11 **Q. ARE THERE ANY OTHER PROBLEMS WITH IMPOSING LIMITS ON EGS**
12 **PRICES?**

13 A. Yes. In addition to the concerns about the Commission’s lack of statutory authority to
14 impose limits on EGS prices, such a practice appears to facilitate policing of EGS prices
15 by the Companies. The Commission has indicated that EDCs are not gatekeepers and are
16 not responsible for enforcing the Commission’s regulations against EGSs.²¹ Indeed, the
17 Commission has protections in place to monitor marketing practices of EGSs and has
18 utilized them to ensure that EGSs’ prices are consistent with the disclosure statements and
19 marketing materials that are provided to customers.²²

²⁰ *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).

²¹ *EDC Customer Account Number Access Mechanism for EGS*, Docket No. M-2013-2355751 (Order entered July 17, 2013, at 38 (Commission declined to put EDCs in gatekeeper role of “policing” EGS actions).

²² *See, e.g., Pa. P.U.C. v. HIKO Energy, LLC*, Docket No. C-2014-2431410 (Order entered December 3, 2015); and *Commonwealth of PA, et al. v. HIKO Energy, LLC*, Docket No. C-2014-2427652 (Order entered December 3, 2015).

1 The imposition of price limits also fails to consider the various factors that may
2 result in EGS prices being 150% higher, on average over the course of a particular year,
3 than the Companies' prices to compare. One important factor that this practice overlooks
4 is that the Companies' prices to compare are established through a regulated process which
5 is not based on current wholesale market prices.²³ As a result, using the Companies price
6 to compare as a benchmark for what is a competitive price in the market is flawed.
7 Additionally, limiting EGS prices to a percentage of the prices to compare fails to recognize
8 that consumers select higher EGS prices for a variety of reasons, including a preference to
9 support a renewable product, a desire to obtain a gift card or reward points or an interest in
10 locking in a fixed rate for a long period of time when the Companies prices are constantly
11 fluctuating. For example, an EGS may have offered an attractive 3-year fixed price in
12 2014 that is no longer competitive with other offers in the market (and is now more than
13 150% higher than the Companies' price to compare) but is valued by the customer for its
14 long-term stability.

IVIII. CONCLUSION

16 **Q. DOES THIS COMPLETE YOUR SUPPLEMENTAL DIRECT TESTIMONY?**

17 **A. Yes.**

²³ See *Investigation of Pennsylvania's Retail Electricity Market: End State of Default Service*, Docket No. I-2011-2237952 (Order entered February 15, 2013, at 24).

RP Ex. AS-9
2017 Clawback Charge Invoices



09/29/2017

Cost / Acct Number 801743096 / 120014866467

Invoice No.

90544706

Bill for:

RESPOND POWER LLC
100 DUTCH HILL RD., SUITE 230
ORANGEBURG NY 10962

Total due by 10/29/2017

To avoid a possible Late Payment Charge being added to your bill, please pay by the due date.

General Description			
Do not mail invoice - return to Bret Young - A-GO-10 330-374-6677			
Item	Description	Qty	Total
1	Customer Referral - Residential Clawback Charge for the period of September 1, 2016 # August 31, 2017	1.000	142,973.13
Subtotal			142,973.13
Total Amount Due			142,973.13
General Information			
	Written correspondence may be mailed to:	Questions regarding this invoice may be directed to	
	Business Services Penelec 6404 Evans Road Erie PA 16509	Accounts Receivable: 1-814-868-8763	



Return this part with a check or money order payable to:

PENELEC

Write name, phone, or address changes on back and check here.

Invoice No.	Customer PO No.	Your Check Number/Date	Contract No.
90544706			120014866467

Amount Paid	
Please Pay	142,973.13
Due By	10/29/2017

RESPOND POWER LLC
100 DUTCH HILL RD., SUITE 230
ORANGEBURG NY 10962

PENELEC
PO BOX 3612
AKRON OH 44309-3612

0112001486646700000000905447066000142973130142973139



09/29/2017

Cust./Acct. Number 801743096 / 120014866525

Bill for:

RESPOND POWER LLC
100 DUTCH HILL RD., SUITE 230
ORANGEBURG NY 10962

Invoice No.

90544781

Total due by 10/29/2017

To avoid a possible Late Payment Charge being added to your bill, please pay by the due date.

General Description			
Do not mail invoice - return to Bret Young - A-GO-10 330-374-6677			
Item	Description	Qty	Total
1	Customer Referral - Residential Clawback Charge for the period of September 1, 2016 # August 31, 2017	1.000	68,039.41
Subtotal			68,039.41
Total Amount Due			68,039.41
General Information			
	Written correspondence may be mailed to:		Questions regarding this
	Attn: Accounts Receivable, 6th Floor FirstEnergy Corp. 78 S Main St Akron OH 44308		invoice may be directed to Accounts Receivable: 1-724-830-5725



Return this part with a check or money order payable to:

WEST PENN POWER

Write name, phone, or address changes on back and check here.

Invoice No.	Customer PO No.	Your Check Number/Date	Contract No.
90544781			120014866525

Amount Paid	
-------------	--

Please Pay	68,039.41
Due By	10/29/2017

RESPOND POWER LLC
100 DUTCH HILL RD., SUITE 230
ORANGEBURG NY 10962

WEST PENN POWER
P.O. BOX 3615
AKRON OH 44309-3615

111200148665250000000905447819000068039410068039415

RP Ex. AS-10
Companies' Responses to
Respond Power Set III, Nos. 1 and 4
and
Attachment A

**RESPOND POWER LLC V. PENNSYLVANIA ELECTRIC COMPANY
RESPOND POWER LLC V. WEST PENN POWER COMPANY
Docket Nos. C-2016-2576287, C-2016-2576292**

Respond Power LLC, Set III, No. 1

“With reference to Invoice No. 90544706 dated September 29, 2017 and issued by Penelec to Respond Power in the amount of \$142,973.13, please provide the supporting calculations.”

RESPONSE:

See PN/WPP Response to Respond Power LLC Set III, No. 1, Attachment A.

DSP IV POR Clawback Charge
 Twelve Months Ended August 31, 2017

Co	EGS	First Prong					Second Prong					Charge		Invoice No.
		Respond Power Revenues (1)	Respond Power Write-Offs (2)	Respond Power Write-Offs as a % of Revenues (3) = (2)/(1)	EGS Average Write-Off % (4)	200% of EGS Average Write-Off % (5) = (4)x2	Respond Power kWh (6)	Respond Power Average Rate c/kWh (7) = ((1)/(6))x100	Weighted Average PTC c/kWh (8)	150% of Weighted Average PTC c/kWh (9) = (8) x 1.5	Respond Power Write-Offs Calculated at 200% of EGS Average Write-Off % (10) = (1)x(5)	Clawback Charge (11) = (2)-(10)		
PN	Respond Power, LLC	\$ 2,259,090.88	\$ 200,414.28	8.87%	1.27%	2.54%	20,526,495	11.01	6.76	10.13	\$ 57,441.15	\$ 142,973.13	90544706	
WP	Respond Power, LLC	\$ 926,876.54	\$ 88,192.11	9.51%	1.09%	2.17%	8,109,852	11.43	7.10	10.65	\$ 20,152.70	\$ 68,039.41	90544781	
Total Clawback Charge											\$ 211,012.54			

Supporting Calculation (a)

	EGS Revenues (1)	EGS Write-Offs (2)	EGS Average Write-Off % (3) = (2)/(1)
PN	\$ 250,590,023.25	\$ 3,185,834.47	1.27%
WP	\$ 276,823,115.34	\$ 3,009,426.84	1.09%

Supporting Calculation (b)

	Quarterly PTC Rates per kWh	EGS Average Write-Off %				Sum of Quarterly Weighted Average	Weighted Average PTC
		9/1/2015	12/1/2015	3/1/2016	6/1/2016		
PN	Residential	0.07724	0.07121	0.06047	0.06192	0.06771	0.06755
	Commercial	0.06899	0.07238	0.07018	0.05795		
WP	Residential	0.06061	0.06574	0.05975	0.06602	0.06303	0.07100
	Commercial	0.07986	0.08014	0.07670	0.07917		
Months		3	3	3	3		
Weight		0.25	0.25	0.25	0.25		
	Quarterly Weighted Average PTC Rates per kWh						
PN	Residential	0.01931	0.01780	0.01512	0.01548	0.06771	0.06755
	Commercial	0.01725	0.01810	0.01755	0.01449	0.06738	
WP	Residential	0.01515	0.01644	0.01494	0.01651	0.06303	0.07100
	Commercial	0.01997	0.02004	0.01918	0.01979	0.07897	

**RESPOND POWER LLC V. PENNSYLVANIA ELECTRIC COMPANY
RESPOND POWER LLC V. WEST PENN POWER COMPANY
Docket Nos. C-2016-2576287, C-2016-2576292**

Respond Power LLC, Set III, No. 4

“With reference to Invoice No. 90544781 dated September 29, 2017 and issued by West Penn to Respond Power in the amount of \$68,039.41, please provide the supporting calculations.

RESPONSE:

See PN/WPP Response to Respond Power LLC Interrogatory Set III, No. 1.

RP Ex. AS-11
Companies' **Confidential** Response to
Respond Power Set IV, No. 1
and
Confidential Attachment A

RP Ex. AS-12

Companies' Responses to
Respond Power Set III, Nos. 2 and 3
and
CONFIDENTIAL Attachment A
and
Companies Responses to
Respond Power Set III, Nos. 5 and 6
and
CONFIDENTIAL Attachment A

**RESPOND POWER LLC V. PENNSYLVANIA ELECTRIC COMPANY
RESPOND POWER LLC V. WEST PENN POWER COMPANY
Docket Nos. C-2016-2576287, C-2016-2576292**

Respond Power LLC, Set III, No. 2

“Also with reference to Invoice No. 90544706, please provide the monthly write-offs for the months of September 2016 through August 2017, including the account numbers and the write-off amounts.”

RESPONSE:

See PN/WPP Response to Respond Power LLC Set III, No. 2, CONFIDENTIAL Attachment A.

**RESPOND POWER LLC V. PENNSYLVANIA ELECTRIC COMPANY
RESPOND POWER LLC V. WEST PENN POWER COMPANY
Docket Nos. C-2016-2576287, C-2016-2576292**

Respond Power LLC, Set III, No. 3

“For the monthly write-off information provided in response to Set III-2 above, please provide the following information for each account number:

- (a) The month and year when the customer first either failed to make a payment or failed to make a payment that was sufficient to cover the balance due.
- (b) The number of months during which the account had an unpaid amount.
- (c) The period of time over which this written-off amount accrued.
- (d) An indication of whether the customer subsequently paid the written-off amount or agreed to pay it through a payment agreement.
- (e) An indication of whether service has been restored.”

RESPONSE:

See PN/WPP Response to Respond Power LLC Interrogatory Set III, No. 2.

**RESPOND POWER LLC V. PENNSYLVANIA ELECTRIC COMPANY
RESPOND POWER LLC V. WEST PENN POWER COMPANY
Docket Nos. C-2016-2576287, C-2016-2576292**

Respond Power LLC, Set III, No. 5

“Also, with reference to Invoice No. 90544781, please provide the monthly write-offs for the months of September 2016 through August 2017, including the account numbers and the write-off amounts.”

RESPONSE:

See PN/WPP Response to Respond Power LLC Set III, No. 5, CONFIDENTIAL Attachment A.

**RESPOND POWER LLC V. PENNSYLVANIA ELECTRIC COMPANY
RESPOND POWER LLC V. WEST PENN POWER COMPANY
Docket Nos. C-2016-2576287, C-2016-2576292**

Respond Power LLC, Set III, No. 6

“For the monthly write-off information provided in response to Set 111-5 above, please provide the following information for each account number.

- (a) The month and year when the customer first either failed to make a payment or failed to make a payment that was sufficient to cover the balance due.
- (b) The number of months during which the account had an unpaid amount.
- (c) The period of time over which this written-off amount accrued.
- (d) An indication of whether the customer subsequently paid the written-off amount or agreed to pay it through a payment agreement.
- (e) An indication of whether service has been restored.”

RESPONSE:

See PN/WPP Response to Respond Power LLC Interrogatory Set III, No. 5.

RP Ex. AS-13
Companies' Response to
Respond Power Set IV, No. 3

**RESPOND POWER LLC V. PENNSYLVANIA ELECTRIC COMPANY
RESPOND POWER LLC V. WEST PENN POWER COMPANY
Docket Nos. C-2016-2576287, C-2016-2576292**

Respond Power LLC, Set IV, No. 3

“Reference PN/WPP Responses to III-2, CONFIDENTIAL Attachment A, and III-5, CONFIDENTIAL Attachment A.

- (a) Please indicate whether the write-off amounts contain only Respond Power supply charges.
- (b) Please describe the process the Companies follow to determine whether the customers listed in this response were served by Respond Power at all times when these unpaid amounts accrued.”

RESPONSE:

- (a) The write-off amounts provided in the response contain only Respond Power supply charges.
- (b) The Companies' SAP enterprise system assigns a unique document number to each transaction. This document number provides the transaction details including the supplier code that enables the Companies to determine the customers served by Respond Power.