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August 19, 2014

VIA E-FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Commonwealth of Pennsylvania, et al. v. Respond Power LLC
Docket No. C-2014-2427659

Dear Secretary Chiavetta:

On behalf of Respond Power LLC, I have enclosed for electronic filing the Prehearing Conference Memorandum of Respond Power LLC in the above-captioned matter.

Copies have been served on all parties as indicated in the attached certificate of service.

Very truly yours,



Karen O. Moury

KOM/tlg
Enclosure
cc: Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Commonwealth of Pennsylvania, et al.	:	
	:	
v.	:	Docket No. C-2014-2427659
	:	
Respond Power LLC	:	

**PREHEARING CONFERENCE MEMORANDUM OF
RESPOND POWER LLC**

TO ADMINISTRATIVE LAW JUDGES BARNES AND CHESKIS:

Respond Power LLC (“Respond Power”) hereby submits this Prehearing Conference Memorandum in accordance with 52 Pa. Code § 5.222 and the Prehearing Conference Order dated August 8, 2014.

I. INTRODUCTION AND BACKGROUND

Respond Power is an electric generation supplier (“EGS”) licensed by the Commission since August 19, 2010 to supply electricity or electric generation services to the public within the Commonwealth of Pennsylvania. Since receiving its EGS license in 2010, Respond Power has supplied electric generation services under variable rate plans to tens of thousands of residential, small commercial and large commercial customers throughout Pennsylvania.

Respond Power’s Disclosure Statement, which was submitted with its license application and subjected to review and approval by the Bureau of Consumer Services during the licensing process, provides that: (i) the price may vary from month to month, (ii) the rate is set by Respond Power, (iii) the rate reflects Respond Power’s generation charge based on various market

conditions plus a profit margin; (iv) the consumer may contact Respond Power for its current variable rate; and (v) Respond Power's goal is to charge a price that is less than what the customer would have paid to the local utility, but that it cannot guarantee savings due to market fluctuations and conditions. Prior to January 2014, no customers filed formal complaints with the Commission against Respond Power concerning its variable rate contracts.

During January 2014, wholesale prices for hourly energy supply in the day ahead and particularly the real time markets increased exponentially in response to a combination of sustained cold weather ("Polar Vortex"). New records were set for winter electricity use in Pennsylvania and throughout the service area of PJM Interconnection, LLC ("PJM"). High demand combined with high forced outage rates for a number of generators to produce record high costs in the PJM-administered energy markets. *See Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, Docket No. M-2014-2406134 (February 20, 2014).

To serve its retail customers in Pennsylvania, Respond Power incurred increases, at various times during the winter months, in excess of ten times its typical costs. As a result of those abnormally high wholesale costs, Respond Power exercised its discretion under its variable price contracts and made a business decision to increase customers' rates to recover at least a portion of those costs.

On June 20, 2014, the Joint Complainants filed the Joint Complaint, asserting nine causes of action against Respond Power, as follows: Count I – Misleading and Deceptive Claims of Affiliation with Electric Distribution Companies; Count II – Misleading and Deceptive Promises of Savings; Count III – Failing to Disclose Material Terms; Count IV – Deceptive and Misleading Welcome Letters and Inserts; Count V – Slamming; Count VI – Lack of Good Faith

Handling of Complaints; Count VII – Failing to Provide Accurate Pricing Information; Count VIII – Prices Nonconforming to Disclosure Statement; and Count IX – Failure to Comply with the Telemarketer Registration Act.

On July 10, 2014, Respond Power filed an Answer and New Matter, and Preliminary Objections. The Joint Complainants filed an Answer to the Preliminary Objections on July 21, 2014 and a Joint Reply to New Matter on July 30, 2014. The Preliminary Objections, which are currently pending resolution by the ALJs, seek dismissal of Counts III, IV, VII, VIII and IX of the Joint Complaint with prejudice due to lack of Commission jurisdiction, insufficient specificity of pleading and/or legal insufficiency of a pleading.

On July 10, 2014, the Office of Small Business Advocate filed a Notice of Intervention and a Public Statement. On August 1, 2014, the Commission's Bureau of Investigation and Enforcement filed a Notice of Intervention.

On July 30, 2014, a Notice was issued scheduling a Prehearing Conference before the Honorable Administrative Law Judges Elizabeth H. Barnes and Joel H. Cheskis on August 25, 2014 at 10:00 a.m. in Harrisburg.

II. SERVICE OF DOCUMENTS

The Applicants request that all documents be served on:

Counsel for Respond Power

Karen O. Moury
Buchanan Ingersoll & Rooney PC
409 North Second Street
Suite 500
Harrisburg, PA 17101-1357
Phone: 717.237.4820
Fax: 717.233.0852

Respond Power agrees to receive service of documents electronically in this proceeding.

Further, to the extent that materials are disseminated electronically, it is requested that copies be served upon Karen O. Moury at karen.moury@bipc.com and Adam Small, General Counsel, Respond Power LLC, at asmall@majorenergy.com.

III. DISCOVERY

Respond Power proposes no modifications to the discovery rules that are set forth in the Commission's regulations.

IV. PROPOSED SCHEDULE

Respond Power will work with the parties to develop a mutually acceptable litigation schedule that may be presented to the ALJs at the prehearing conference. Respond Power anticipates the submission of written direct testimony by the Joint Complainants and the submission of written rebuttal testimony by Respond Power, with hearings commencing no earlier than the first quarter of 2015.

V. CONSOLIDATION

As to consolidation of the proceeding with other similar complaints for purposes of an evidentiary hearing, Respond Power is opposed to consolidation of this proceeding with the similar Joint Complaints filed against four other electric generation suppliers ("EGSs"). While there are common legal issues in those Joint Complaints, Respond Power's reasons for opposing consolidation include different factual scenarios, confidentiality issues, the lack of any resulting administrative efficiencies, and the potential for the actions of one EGS to affect the timeframe for adjudicating other complaints.

With respect to consolidation of this proceeding with pending formal complaints filed by individual consumers, Respond Power acknowledges that some administrative efficiencies may be gained through limited consolidation and is amenable to that approach in particular situations.

Respond Power would appreciate the opportunity to hold discussions with the Joint Complainants about that possibility on case-by-case basis. Respond Power would not, however, want to interfere with the timely disposition of pending formal complaints, either from its perspective or that of the consumer.

VI. WITNESSES

At this time, Respond Power intends to call the following witness:

Adam Small, General Counsel
Respond Power LLC
100 Dutch Hill Road, Suite 310
Orangeburg, New York 10962

Respond Power reserves the right to call additional witnesses to address any issues that have been or are later raised during the course of the proceeding, and will identify such additional witnesses within a reasonable period of time prior to the commencement of hearings.

VII. ISSUES

The primary issues in this complaint proceeding are whether Respond Power has violated any laws over which the Commission exercises jurisdiction, and if so, what the appropriate resolution should be. Respond Power's position is that underlying many of the allegations raised in the Joint Complaint is an overall frustration with the functioning of the electric wholesale market during the Polar Vortex and its effects on variable retail electric rates paid by consumers. Also at the heart of many of the allegations is the view that Respond Power's Disclosure Statement was somehow inadequate in preparing consumers for the possibility of significant increases in variable rates. However, it is Respond Power's position that its Disclosure Statement was reviewed and approved by the Commission during the licensing approval process, and that it has been in place for nearly four years without any formal complaints having been

filed alleging inadequacies. It is further Respond Power's position that its Disclosure Statement complies with the Commission's regulations, and to the extent that consumers did not understand the degree to which their variable prices might vary, that is not a failure of Respond Power.

Citing four customers who provided written correspondence to the Office of Consumer Advocate ("OCA") and four formal complaints filed with the Commission,¹ Count I of the Joint Complaint alleges that some of Respond Power's salespeople represented that they were from the electric distribution company ("EDC"). Respond Power has denied these allegations and intends to establish at the hearing that its salespeople are clearly instructed during training to not represent that they are from the EDC and that further they are told to affirmatively explain that they are not from the EDC. It is Respond Power's position that the allegations in Count 1 are the result of consumer confusion due to complexities associated with electric choice, including the need for its salespeople to explain the continuing role of the EDC (i.e. for billing and outages) if the customer switches to an EGS.

Citing five customers who provided written correspondence to the OCA and five formal complaints filed with the Commission, Count II of the Joint Complaint alleges that Respond Power's salespeople promised savings over the price to compare ("PTC") as an inducement to switch and then the consumers received bills for generation supply that were at least two or three times more than the PTC. Respond Power has denied these allegations and intends to establish at hearing that it trains its salespeople to explain that savings cannot be guaranteed. Moreover,

¹ Respond Power does not yet know if there is any overlap in these customers but has requested and expects to this information through discovery. Respond Power also acknowledges that customers contacted the Attorney General about the issues in the Joint Complaint, but for purposes of this summary of the allegations and Respond Power's positions, Respond Power is only reciting the number of customers who filed formal complaints with the Commission or submitted written correspondence to OCA.

its Disclosure Statement expressly states that Respond Power cannot guarantee savings due to market fluctuations and conditions.

Citing five formal complaints filed with the Commission, Count III of the Joint Complaint alleges that Respond Power's salespeople did not inform customers that they had signed up for a variable rate. Respond Power has denied these allegations and intends to establish at hearing that the documents provided to customers, including a sales agreement and Disclosure Statement, clearly showed that they were signing a variable rate contract.

Count IV of the Joint Complaint alleges that Respond Power uses welcome letters containing misleading and unlawful assertions. Respond Power denied the continued use of the referenced welcome letters, but admitted that for a few-month period more than two years ago, a vendor for Respond Power used them. Respond Power has further averred that upon learning of the welcome letters, it immediately retracted them and prohibited their continued distribution.

Citing three customers who provided written correspondence to the OCA and two formal complaints filed with the Commission, Count V of the Joint Complaint alleges that Respond Power switched customers to its service without authorization. Respond Power denied these allegations, explaining that it only enroll customers who consent to switch and that it confirms the enrollment through the use of a third party verification recording. It is Respond Power's position that these allegations likely resulted from another member of the household authorizing the switch.

Citing sixteen customers who provided written correspondence to the OCA and eleven formal complaints filed with the Commission, Count VI of the Joint Complaint alleges a lack of good faith handling of complaints due to the inability of the consumers to reach Respond Power and some limited instances of customers allegedly being informed that they would receive a

refund only if they agreed to enter into a one-year fixed price agreement with Respond Power. Respond Power denied these allegations, noting the unprecedented volume of calls that were received during and after the Polar Vortex and the lack of Commission's standards establishing timelines for EGSs answering customers' calls. Moreover, it is Respond Power's position that its pricing and refund strategies are outside the Commission's jurisdiction, and it was free to work with its customers in a way that enabled it to recoup some of its costs over a longer period of time while avoiding significant short-term price spikes for consumers.

Count VII of the Joint Complaint alleges that Respond Power's Disclosure Statement fails to provide accurate pricing information and that as a result customers cannot determine the price they would or could be charged by Respond Power or how the price would be calculated by Respond Power. It is Respond Power's position that its Disclosure Statement was approved by the Commission and contains all elements required by the Commission's regulations, which do not mandate the inclusion of a ceiling price or a reference to a specific pricing formula. It is further Respond Power's position that by the very nature of a variable rate plan that contains no market index or ceiling, consumers are not able to determine the price they might be charged. Use of a Disclosure Statement that lacks certain elements that the Joint Complainants would have wanted to have included is not a failure on the part of Respond Power.

Count VIII of the Joint Complaint alleges that Respond Power's prices charged to customers in early 2014 were not reflective of the cost to serve residential customers and therefore did not conform to the variable rate pricing provision of its Disclosure Statement. Respond Power's position is that its prices fully conformed to its Disclosure Statement, which explained that rates would fluctuate on the basis of market conditions and other factors, including profit margins. It is further Respond Power's position that its prices are not required to

reflect cost of service, which is a principle relied upon in and reserved for traditional utility ratemaking.

Count IX of the Joint Complaint alleges that Respond Power failed to provide consumers who made purchases during a telemarketing call with a written contract that contains specific information required by the Telemarketer Registration Act, 73 P.S. § 2241, *et seq.* (“TRA”). It is Respond Power’s position that the Commission does not have jurisdiction to enforce the TRA. It is further Respond Power’s position that in any event, the provisions of the TRA cited by the Joint Complaint are inapplicable due Section 2245(d) of the TRA, which expressly exempts contractual sales regulated by other laws of the Commonwealth.

As a general matter, and particularly with respect to the relief that is sought by the Joint Complaint, Respond Power’s position is that the Commission does not have jurisdiction over the prices charged by EGSs or the private contracts entered into between EGSs and their customers and may not direct the issuance of a refund to a consumer by an EGS. Further, it is Respond Power’s position that the Commission does not have jurisdiction to enforce the provisions of the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.* Finally, it is Respond Power’s position that as to any formal complaints that have been settled with individual consumers, it is relieved of any responsibility for the specific matters complained of, as provided in Section 703(a) of the Public Utility Code, 66 Pa. C. S. § 703(a), and they may not be relitigated or considered as part of this Joint Complaint proceeding.

In summary, Respond Power’s position in this proceeding is that with the exception of welcome letters that were used for a brief period more than two years ago, and immediately retracted upon Respond Power’s discovery of their use, the allegations in the Joint Complaint are without basis. They are essentially a collection of complaints received and solicited from

customers who were dissatisfied with their variable rate plans when prices increased to reflect wholesale market conditions in January 2014 in a manner that was consistent with Respond Power's Disclosure Statement, which was reviewed and approved by the Commission during the licensing process and is consistent with the Commission's regulations governing such documents.

VIII. PUBLIC INPUT HEARINGS

Respond Power does not believe that public input hearings are necessary and suggests that it would be inappropriate to hold such hearings in the context of a complaint proceeding. Any consumer witnesses that the Joint Complainants wish to call to substantiate the allegations contained in the Joint Complaint should be required to participate in an evidentiary hearing.

IX. PROTECTION OF CONFIDENTIAL INFORMATION

Confidential and proprietary information has been provided to the parties by Respond Power pursuant to an agreement reached via electronic mail to handle that information in a manner that is consistent with a draft Motion for Protective Order that Respond Power has shared with the parties. Respond Power is prepared to file the Motion for Protective Order with the presiding ALJs, seeking issuance of a Protective Order at the appropriate time.

X. SETTLEMENT

Respond Power has reached out to the Joint Complainants for the purpose of initiating settlement discussions and the parties are working to finding a mutually convenience date to hold those discussions. Respond Power does not see any need to include specific dates for settlement conferences in the procedural schedule.

Dated: August 19, 2014

Respectfully submitted,



Karen O. Moury
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409 North Second Street
Suite 500
Harrisburg, PA 17101-1357
(717) 237-4820

Attorneys for Respond Power LLC

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

Via E-Mail and First-Class Mail

Elizabeth H. Barnes
Joel H. Cheskis
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Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265
Telephone: (717) 787-1399

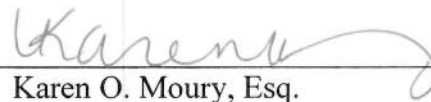
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Office of Attorney General
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Harrisburg, PA 17120

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Bureau of Investigation & Enforcement
PO Box 3265
Harrisburg, PA 17105-3265

Dated this 19th day of August, 2014.


Karen O. Moury, Esq.