

COMMONWEALTH OF PENNSYLVANIA



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October 17, 2014

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

Re: Pennsylvania Public Utility Commission, Bureau of
Investigation and Enforcement
Complainant
v.
Respond Power, LLC
Respondent
Docket No. C-2014-2438640

Secretary Chiavetta:

Enclosed please find the Office of Consumer Advocate's Answer to Preliminary Objections of Respond Power, LLC, in the above-referenced proceeding.

Copies have been served as indicated on the enclosed Certificate of Service.

Respectfully Submitted,

Candis A. Tunilo

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Assistant Consumer Advocate
PA Attorney I.D. #89891

Enclosures

cc: Honorable Elizabeth Barnes
Honorable Joel Cheskis
Certificate of Service

*190064

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PENNSYLVANIA PUBLIC UTILITY	:	
COMMISSION, BUREAU OF	:	
INVESTIGATION AND ENFORCEMENT,	:	
Complainant	:	
	:	
v.	:	Docket No. C-2014-2438640
	:	
RESPOND POWER, LLC,	:	
Respondent	:	

ANSWER OF THE OFFICE OF CONSUMER ADVOCATE TO PRELIMINARY OBJECTIONS
OF RESPOND POWER, LLC

Pursuant to Sections 5.61 and 5.101 of the Pennsylvania Public Utility Commission’s (Commission) regulations regarding Answers to Preliminary Objections, 52 Pa. Code §§ 5.61 and 5.101, the Office of Consumer Advocate (OCA) provides the following Answer to the Preliminary Objections of Respond Power, LLC (Answer), in the above-captioned proceeding.

I. INTRODUCTION

On August 21, 2014, the Commission’s Bureau of Investigation and Enforcement (I&E) filed a Formal Complaint against Respond Power, LLC (Respondent, Respond Power or Company) alleging various violations of the Public Utility Code, the Commission’s regulations and Unfair Trade Practices and Consumer Protection Law (Consumer Protection Law). See gen’ly I&E Complaint. Specifically, I&E alleged the following violations: (1) slamming; (2) misleading and deceptive claims of affiliation with Electric Distribution Companies (EDCs) or Government Programs; (3) misleading and deceptive promises of savings; (4) failure to disclose material pricing terms in Respond Power’s Disclosure Agreement/prices not conforming to Disclosure Agreement; (5) lack of good faith in handling customer complaints/cancellations; (6) inaccurate/incomplete/fraudulent sales agreements; and (7) incorrect billing. Id. I&E’s

allegations stem from a former employee of one of the Company's third party contractors and consumer complaints to the Commission's Bureau of Consumer Services (BCS). Id.

On September 2, 2014, the Office of Attorney General Bureau of Consumer Protection (BCP) filed a Notice of Intervention. On September 3, 2014, the OCA filed a Notice of Intervention and Public Statement. By letter dated September 3, 2014 to the Commission's Secretary, Respond Power sought a twenty-day extension to file responsive pleadings to the Formal Complaint. On September 30, 2014, Respond Power filed an Answer to the Formal Complaint and Preliminary Objections. On October 2, 2014, I&E requested a seven-day extension for the filing of an Answer to Preliminary Objections, which request was granted.

In Respondent's Preliminary Objections, Respond Power seeks the following: (1) dismissal of Counts 7-15 for lack of Commission jurisdiction and legal insufficiency; (2) dismissal of Counts 16-62 for lack of Commission jurisdiction; (3) dismissal of Counts 63-492 for lack of Commission jurisdiction and legal insufficiency; (4) dismissal of Counts 492-524 for legal insufficiency; (5) dismissal of Counts 524-568 for lack of Commission jurisdiction; and (6) dismissal of Paragraph 45 for lack of Commission jurisdiction. See gen'ly Respond Power POs. The OCA submits that Respond Power's Preliminary Objections are without merit, as the Commission possesses jurisdiction to rule on I&E's claims of violations, and I&E's averments of violations are legally sufficient. As such, Respond Power's Preliminary Objections should be overruled.

The OCA will not address all of Respond Power's Preliminary Objections, as the OCA anticipates that I&E will provide a comprehensive response. The OCA will address the jurisdictional issues raised in Respond Power's Preliminary Objections only.

II. ANSWER

A. The Commission Must Make Determinations Regarding Violations of the Consumer Protection Law in Order To Determine Whether its Regulations Incorporating the Law Have Been Violated.

In its Preliminary Objections, Respond Power seeks dismissal of Counts 7-15, 16-62 and 524-568 on the basis that the Commission lacks jurisdiction to enforce the Consumer Protection Law. See Respond Power POs at ¶¶ 22, 26 and 47-49. In its Complaint, I&E asserts that Respond Power violated Sections 54.43(f), 111.8, 111.9, 111.12(d), 54.4(a), 54.5(c)(2), and 54.7(a) of the Commission's regulations and various sections of the Consumer Protection Law, which is incorporated into the Commission's regulations in Sections 54.43(f) and 111.12(d)(1). See I&E Complaint at ¶¶ 37, 38, and 41. The OCA submits that these Preliminary Objections must be denied.¹ The Commission's regulations themselves incorporate the Consumer Protection Law, and therefore, the Commission can make determinations pursuant to the Consumer Protection Law in order to determine if the Respondent violated the Commission's regulations. See 52 Pa. Code §§ 54.43(f), 54.122(3) and 111.12(d)(1). See also 52 Pa. Code § 111.1 (Suppliers shall comply with the standards set forth in the regulations). I&E is seeking for the Commission to apply its own regulations requiring compliance with the Consumer Protection Law, which is fully within the Commission's jurisdiction.

¹ Respond Power raised the same Preliminary Objection to the OCA's and BCP's Joint Complaint at Docket No. C-2014-2427659. By Order entered August 20, 2014, Respond Power's Preliminary Objection was granted in part and denied in part. On September 8, 2014, the OCA and BCP filed a Joint Petition for Interlocutory Review and Answer to Material Questions with the Commission. One of the Material Questions was: Does the Commission have authority and jurisdiction to determine whether a violation of the Unfair Trade Practices and Consumer Protection Law (CPL) and the Telemarketer Registration Act (TRA) has occurred when considering whether the Commission's regulations—which require compliance with these laws—have been violated? Parties filed Briefs on the Material Questions on September 18, 2014. The Commission has not yet ruled on the Petition.

In determining whether Respondent violated these regulations, the Commission must determine whether the conduct alleged constitutes a violation of State or Federal law, including the Consumer Protection Law, or Commission regulation or order. 52 Pa. Code §§ 54.43(f) and 111.12(d)(1). See also Elkin v. Bell Telephone Co. of Pennsylvania, 491 Pa. 123, 133, 420 A.2d 371, 376 (1980). As a preliminary inquiry, the Commission must invoke the statute and case law under the Consumer Protection Law, interpret it, and apply it harmoniously where appropriate. See Duquesne Light Co. v. Borough of Monroeville, 449 Pa. 573, 298 A.2d 252 (1972); Pettko v. Pennsylvania American Water Co., 39 A.3d 473, 484 (Pa. Commw. Ct. 2012).

Although Respond Power relies on Pa. PUC v. The Bell Telephone Co. of Pa., 71 Pa. PUC 338, in 1989 and MAPSA v. PECO Energy Co., Docket No. P-00981615, the OCA submits that such reliance is misplaced. In 1999, after the adjudication of these cases, the Commission added the requirement that Electric Generation Suppliers (EGSs) must comply with the Consumer Protection Law to the Commission's regulations. In addition, in the MAPSA case, the Commission considered the consumer protection law in determining whether a referral to the Attorney General was necessary. Furthermore, the Commonwealth Court decided Harrisburg Taxicab & Baggage Co. v. Pa. PUC, wherein the Court held that the Commission's decision to incorporate another agency's regulations into the Commission's own regulations is in no way inappropriate and such overlap does not divest the Commission of its statutory authority or duty. Harrisburg Taxicab & Baggage Co. v. Pa. PUC, 786 A.2d 288, 292-93 (Pa. Commw. Ct. 2001) (Harrisburg Taxicab). See also City of Philadelphia v. Pa. PUC, 702 A.2d 1139 (Pa. Commw. Ct. 1997).

The Commission has previously recognized its authority to broadly consider such overlapping statutes. In its recent order on the Use of Fixed Price Labels for Products With a

Pass-Through Clause, Docket No. M-2013-2362961, Final Order (Nov. 14, 2013) (November 14 Order), the Commission stated as follows:

[T]his matter does not just concern the Commission or the Public Utility Code – it is a matter that also involves other laws such as the UTPCPL. The Commission cannot focus solely on our regulations and the Public Utility Code to the exclusion of other laws that may also be applicable to the matter at hand. . . . The guidance we provide is not a mandate; however, to the extent that an EGS fails to follow that guidance, *it takes the risk that a consumer or other agency may file a complaint asserting a violation of the Public Utility Code, Commission regulations or the UTPCPL.* Any such case would be decided based on the specific facts and circumstances presented.

November 14 Order at 23-24. (Emphasis added). Furthermore, the Commission has considered and reached conclusions regarding overlapping statutes in various other cases, including Barasch v. Bell Tel. Co., 529 Pa. 523, 605 A.2d 1198, 130 P.U.R. 4th 280 (1992) (The Commission considered whether a service violates the Wiretap Act); City of Philadelphia v. Pa. PUC, 702 A.2d 1139 (Pa. Commw. Ct. 1997) (The Commission must consider a county’s obligations under Act 78 in implementing telecommunication deregulation under the Public Utility Code and Telecom Act); Pa. PUC v. Columbia Gas of Pa., Docket No. R-2010-2215623, Order (Mar. 15, 2012), aff’d PCOC v. Pa. PUC, 635 C.D. 2012 (Pa. Commw. Ct. 2014) (The Commission found that the company’s customer assistance program did not violate the requirements of the federal Low-Income Home Energy Assistance Act).

In the present matter, by allowing the Commission to adjudicate these disputes in the first instance, all rights of the parties will be preserved. See e.g. County of Erie v. Verizon North, Inc., 879 A.2d 357 (Pa. Commw. Ct. 2005). As such, Respond Power’s Preliminary Objections to Counts 7-15, 16-62 and 524-568 on the basis that the Commission lacks jurisdiction should be overruled.

B. The Commission Possesses Jurisdiction To Determine if Respondent's Use of its Disclosure Statement Violates Commission Regulations.

In its Preliminary Objections, Respond Power seeks dismissal of Counts 63-492 for lack of Commission jurisdiction to regulate EGS rates. See Respond Power POs at ¶ 29-31. In its Complaint, I&E alleges that Respond Power's rates were inconsistent with the prices advertised, marketed or agreed upon. See I&E Complaint at ¶ 39. In support of its Preliminary Objection, Respond Power asserts that the Commission approved the Company's Disclosure Statement. See Respond Power POs at ¶ 36. Respond Power's Preliminary Objections lack merit.

I&E clearly alleges violations of the Commission's regulations related to Respondent's misuse of its Disclosure Statement. See I&E Complaint at ¶ 39. Specifically, I&E alleges that Respond Power charged prices that were inconsistent with the prices that Respondent advertised, marketed or agreed upon with its customers. Id. The Commission's regulations require that EGS prices charged comply with those marketed, advertised and agreed upon. See 52 Pa. Code §§ 54.4(a), 54.7(a) and 111.12(d)(4). Further, I&E alleges that Respondent failed to disclose material terms and conditions of service, which is required in Section 54.5(c)(2) of the Commission's regulations. See I&E Complaint at ¶ 39. I&E seeks for the Commission to enforce its regulations regarding EGS marketing and billing practices, not regulate Respond Power's rates.

The OCA submits that Respond Power's assertion that the Commission approved the Company's Disclosure Statement is also incorrect. The Commission did not approve Respondent's Disclosure Statement in the Order approving Respond Power's EGS license application. See 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 (Aug. 19, 2010) (Licensing Order). In fact, there is

no mention of Respond Power's Disclosure Statement in the Licensing Order. Additionally, it is not appropriate for Respond Power to use BCS's process for reviewing disclosure statements as a cloak to protect the Company from its alleged improper use of its Disclosure Statement when it charged customers prices that did not conform to the Disclosure Statement or the prices marketed or agreed to by the customers.

Further, Respond Power's reliance on Hoke v. Ambit NE, LLC, Docket No. C-2013-2357863 (Nov. 21, 2013), is misplaced. See Respond Power POs at ¶¶ 36, 38. In Hoke the ALJ found that it was the PaPowerSwitch website that led to the complainant's confusion regarding Ambit's price that would be charged after the first month but also referred Ambit's disclosure statement to BCS for additional review based on the complainant's confusion. See Hoke, Docket No. C-2013-2357863, I.D. at 6.

Finally, Respond Power's reliance on Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products, Docket No. M-2014-2406134, Order (adopted Feb. 20, 2014/entered March 4, 2014) (March 4 Order Seeking Comments) is also misplaced. The OCA submits that this was an Order seeking comments from interested parties and information from EGSs, not an Order entered to provide guidance on specific issues in the marketplace. On April 3, 2014, the OCA submitted Comments jointly with AARP, the Pennsylvania Utility Law Project and Community Legal Services, Inc. to the March 4 Order Seeking Comments. Of note, the Commission has not acted on the Comments submitted by interested parties to the March 4 Order Seeking Comments.

For the foregoing reasons, Respond Power's Preliminary Objections to Counts 63-492 of I&E's Complaint lack merit and should be overruled.

C. The Commission Possesses Jurisdiction To Order Refunds.

In its Preliminary Objections, Respond Power seeks dismissal of Paragraph 45 of the Complaint because the Commission lacks jurisdiction to issue refunds. See Respond Power POs at ¶ 51-55. In Paragraph 45 of its Complaint, I&E asks that Respondent be directed to provide refunds to each affected customer who has not already received a refund, which consists of the difference between the amount each customer was billed and the customer's respective price to compare. See I&E Complaint at ¶ 45. The OCA submits that Respond Power's Preliminary Objection lacks merit.²

The Commission has ordered equitable remedies, including refunds, in numerous cases. See e.g. Ely v. Pennsylvania Water, Docket No. C-20055616, Order at 1 (July 10, 2006) (The Commission determined this was a classic case for the application of equitable estoppel when Respondent damaged Complainants' asphalt driveway while replacing a water line on the neighboring property and made countless verbal assurances that the driveway would be restored); C.S. Warthman Funeral Home, et. al. v. GTE North, Inc., Docket No. C-00924416 (June 4, 1993) (Complainants were permitted to introduce into evidence the letter and promise of Respondent that it would provide toll free calling to support a claim of equitable estoppel); Electric Distribution Company Procedures for Processing Pilot Customer Supplier Selections, Docket No. M-00960890, 1998 Pa. PUC LEXIS 49 (Jan. 15, 1998) (discussing the Commission's broad authority under Ch. 28 of the Commission's regulations, including ordering restitution); Scheffer v. Columbia Gas of Pennsylvania, Inc., Docket No. C-2010-2153353, Order (Nov. 1, 2011) (illustrating the Commission's equitable authority under Ch. 56 of the

² This issue is pending before the Commission via the OCA's and BCP's Petitions for Interlocutory Review and Answer to Material Questions in OCA's and BCP's Joint Complaint against IDT Energy, Inc. at Docket No. C-2014-2427657 and Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric at Docket No. C-2014-2427656. Parties' briefs regarding the Petitions were submitted on September 18, 2014.

Commission's regulations where a complainant incurred gas supply costs during the time period in which Columbia failed to help the complainant switch); Pa. PUC v. Reed, 1972 Pa. PUC LEXIS 40; 46 Pa. PUC 19 (1972) (Commission directed Respondent, who was authorized to transport as a class D carrier, to refund overcharges to his customers); Grmusa v. Dominion Retail, Inc., Docket No. C-2009-2124359, Order (Apr. 16, 2010) (Commission asserted its jurisdiction over, and authority to, provide equitable remedies based on the misrepresentations of an EGS).

It is not clear and free from doubt that the Commission lacks jurisdiction to direct refunds in this matter. As such, Respond Power's Preliminary Objection should be overruled.

III. CONCLUSION

WHEREFORE, the Office of Consumer Advocate respectfully requests that Respond Power's Preliminary Objections be overruled.

Respectfully submitted,



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October 17, 2014
193359

CERTIFICATE OF SERVICE

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COMMISSION, BUREAU OF :
INVESTIGATION AND ENFORCEMENT, :
Complainant :
v. : Docket No. C-2014-2438640
RESPOND POWER, LLC, :
Respondent :

I hereby certify that I have this day served a true copy of the foregoing document, the Office of Consumer Advocate's Answer to Preliminary Objections of Respond Power, LLC, in the manner and upon the persons listed below:

Dated this 17th day of October 2014.

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