**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Commonwealth of Pennsylvania, *et al.* :

:

v. : C-2014-2427659

:

Respond Power LLC :

Pennsylvania Public Utility Commission, :

Bureau of Investigation and Enforcement : C-2014-2438640

:

v. :

:

Respond Power LLC :

**ORDER**

**GRANTING SECOND MOTION FOR CONTINUANCE**

On June 20, 2014, the Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, through the Bureau of Consumer Protection (OAG), and Tanya J. McCloskey, Acting Consumer Advocate (OCA) (collectively referred to as “the Joint Complainants”) filed with the Pennsylvania Public Utility Commission (Commission) a formal Complaint against Respond Power LLC (Respond or “the Company”), at Docket Number C-2014-2427659. The Joint Complainants averred that they had received numerous contacts and complaints from consumers related to variable rates charged by Respond, including approximately twenty formal complaints filed by consumers at the Commission. As a result, the Joint Complainants averred nine separate counts against Respond, including, but not limited to, making misleading and deceptive claims, making misleading and deceptive promises of savings, slamming and failing to provide accurate pricing information. The Joint Complainants made several requests for relief, including providing restitution and prohibiting deceptive practices in the future.

On July 10, 2014, Respond filed an Answer and New Matter in response to the Complaint. In its Answer, Respond admitted or denied the various averments made by the Joint Complainants. In particular, Respond specifically denied that multiple violations of Pennsylvania law have occurred and that consumers were misled or deceived as to the price they would pay for electricity. In its New Matter, Respond averred, among other things, that the Complaint ignores the market conditions that started in January 2014 that precipitated the variable price increases to which many consumers were exposed resulting in a spike in the volume of informal and formal complaints filed by consumers with the Commission.

Also on July 10, 2014, Respond filed Preliminary Objections in response to the Complaint. In its Preliminary Objections, Respond averred that five of the nine counts in the Complaint should be dismissed for lack of Commission jurisdiction, insufficient specificity of a pleading and/or legal insufficiency of a pleading. On July 21, 2014, the Joint Complainants filed an Answer to Respond’s Preliminary Objections. In their Answer, the Joint Complainants asserted that Respond’s Preliminary Objections are unsupported and should be overruled. On August 20, 2014, an Order Granting in Part and Denying in Part Preliminary Objections was issued striking one Count in its entirety and three counts in part.

On August 21, 2014, the Commission’s Bureau of Investigation and Enforcement (I&E) filed a formal Complaint against Respond containing 639 counts of 1) slamming, 2) misleading and deceptive claims of affiliation with electric distribution companies, 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.

On August 25, 2014, an Initial Prehearing Conference was convened in the case involving the OCA/OAG Complaint. Following the Initial Prehearing Conference, Procedural Order #2 was issued establishing 1) that the Joint Complainants would submit written direct testimony of consumer witnesses it intends to present in this proceeding by Friday, October 24, 2014; 2) that evidentiary hearings for purposes of admitting the written direct testimony of the consumer witnesses subject to cross examination and timely objections will be held on November 10 and 12, 2014; and, 3) a Further Prehearing Conference will be held in this matter on November 25, 2014.

On September 30, 2014, Respond filed an Answer to I&E’s formal Complaint admitting or denying the various averments made. In general, Respond requested that the Commission dismiss I&E’s Complaint.

On October 22, 2014, Respond filed a Motion for Continuance in the case involving the OCA/OAG Complaint seeking to have continued the evidentiary hearings scheduled for November 10 and 12, 2014. Respond argued that it needs sufficient time to retrieve and review enrollment documents and call recordings and to prepare for the cross-examination of approximately 200 consumer witnesses identified by the Joint Complainants. Respond also argued that ample time is needed for the parties to engage in meaningful settlement discussions and to ensure the efficient handling of logistics associated with the evidentiary hearings. Respond stated that the Joint Complainants have indicated that they do not oppose the request for a continuance provided that any additional time is used to engage in meaningful settlement discussions.

On October 24, 2014, pursuant to Procedural Order #2, the Joint Complainants submitted written direct testimony of approximately two hundred (200) consumers, comprising more than 1100 pages of testimony and exhibits.

Also on October 24, 2014, I&E filed a Petition to Consolidate the formal Complaint it filed against Respond on August 21, 2014 at Docket Number C-2014-2438640 with the formal Complaint filed against Respond by the Joint Complainants. The Petition to Consolidate was granted via Order dated October 28, 2014.

Also on October 24, 2014, an informal, off-the-record conference call was held amongst the parties and the Presiding Officers. During the conference call, a lengthy discussion was held regarding the various issues related to Respond’s Motion for Continuance, as well as other procedural issues. An Order Granting the Motion for Continuance was issued on October 28, 2014.

The October 28, 2014 Order noted that Section 1.15(b) of the Commission’s regulations allows for continuances of hearings for “good cause shown.” 52 Pa. Code § 1.15(b). The October 28, 2014 Order determined that good cause had been shown because the Joint Complainants originally indicated they would present the testimony of 93 consumer witnesses but then pre-served written testimony of approximately 200 witnesses. Therefore, the hearings were continued so that additional days for the hearing could be scheduled. The October 28, 2014 Order also noted that additional time will allow for further settlement discussions, the resolution of outstanding Petitions for Interlocutory Review filed with the Commission and for the parties to coordinate the most efficient means for admitting the pre-served testimony of the consumer witnesses subject to cross examination and timely motions. The Order established interim dates for the identification of witnesses to be crossed and the distribution of exhibits intended for use during the hearing and any Motions to Strike testimony. The parties were also reminded that Commission policy promotes settlement and were directed to advise the Presiding Officers of all future settlement activity. The evidentiary hearing scheduled for November 10 and 12, 2014 were rescheduled to January 26-30, 2015.

On December 19, 2014, Respond filed a second Motion for Continuance. In its Motion, Respond argued that “the sole purpose for seeking this [second] continuance is that Respond Power has made a concerted effort to avoid devoting resources to hearing preparations that could be more appropriately utilized to achieve a settlement of this matter, including the issuance of refunds…”. Respond articulated the efforts it has undertaken to pursue settlement included proposing a term sheet to the opposing parties, engaging in a conference call about the term sheet with the opposing parties and encouraging a response from the opposing parties to term sheet. Respond noted, however, that, despite its efforts, “no meaningful settlement discussions have yet been held.” Respond concludes that “it has not expended resources to prepare for the evidentiary hearings scheduled for January 26-30, 2015” and therefore a second continuance is required. Neither the Joint Complainants nor I&E opposed the request for continuance, although the Joint Complainants subsequently indicated they do not agree with the statements or reasons contained in Respond’s Motion. No other answer was received in response to Respond’s Motion for Continuance.

On December 22, 2014, pursuant to the October 28, 2014 Order Granting the Motion for Continuance, Respond filed a letter indicating that it intends to cross-examine all of the consumer witnesses that pre-served written direct testimony on October 24, 2014.

Respond’s second Motion for Continuance is now ready for disposition.

As noted above, Section 1.15(b) of the Commission’s regulations allows for continuances of hearings for “good cause shown.” 52 Pa.Code § 1.15(b). We are hard pressed to determine that “good cause” has been shown for a second continuance to be granted. Respond argued in its Motion that it has not expended efforts to prepare for hearings because it has been pursuing settlement. The Commission strongly encourages settlement. Yet, other than also preparing for the issuance of refunds to customers, Respond only identifies a conference call and several inquiries to the other parties as its efforts towards settlement since it provided the proposed term sheet on October 24, 2014. By Respond’s own admission, “no meaningful discussions have yet been held.” While it is undeniable that it is time consuming to repeatedly seek a response from an opposing party to a settlement term sheet, it is not reasonable to believe that Respond could not also have simultaneously been preparing for the evidentiary hearings it now seeks to have continued while seeking a response.

Nonetheless, we are granting the second continuance due to the large number of pre-served consumer written direct testimony submitted October 24, 2014 and, as Respond argued, the “high stakes of this proceeding.” This includes the significant relief sought, such as license revocation or suspension, substantial civil penalties and the issuance of refunds to customers. The October 28th Order granting the first continuance noted that a further continuance of the evidentiary hearing would not be granted absent exigent circumstances. No exigent circumstances are present here. As a result, a third continuance of these hearings will not be granted.

The evidentiary hearings for purposes of admitting the pre-served consumer testimony subject to cross-examination and timely motions will be rescheduled for March 9-13, 2015. To help expedite the evidentiary hearings, Respond will indicate to the Presiding Officers and the parties no later than February 2, 2015 which customers it intends to cross-examine. All other consumer witness testimony pre-served on October 24, 2014 will be admitted without cross-examination. Additionally, Respond will circulate to the Presiding Officers and the parties no later than February 17, 2015 the exhibits it intends to use during the evidentiary hearings. Any Motions to Strike testimony will be filed no later than February 23, 2015. All other aspects of the first Order granting the continuance remain effective, including, in particular, that the parties are directed to coordinate the most efficient means for admitting the pre-served consumer testimony into the record, including entering into any Stipulations or waiving the need to cross-examine any witnesses and to engage in any other activity that will help expedite the evidentiary hearings now scheduled for March 9-13, 2015.

In addition, a Further Prehearing Conference will be held in this matter on January 27, 2015 at 10:00 a.m. in the Commonwealth Keystone Building in Harrisburg. During this Further Prehearing Conference, the remaining schedule for this proceeding will be established, including dates for the submission of pre-served written expert testimony, hearings for the admission of that pre-served expert testimony, subject to cross-examination and any timely motions, and the submission of Main and Reply Briefs. The parties were queried by email regarding the remaining schedule for this proceeding on December 1, 2014 and the Presiding Officers have not received a definitive response. The parties are advised that the schedule will be established on January 27, 2015.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Motion for Continuance filed by Respond Power LLC on December 19, 2014 in the above-captioned proceeding is hereby granted.
2. That the evidentiary hearings scheduled for January 26-30, 2015 are cancelled and rescheduled for March 9-13, 2015.
3. That the Further Prehearing Conference scheduled for February 20, 2015 is cancelled and rescheduled for January 27, 2015.
4. That the parties are directed to coordinate the most efficient means for admitting the pre-served consumer testimony into the record, subject to cross-examination and timely objections, including entering into any Stipulations or waiving the need for cross examination.
5. That Respond Power LLC will indicate to the Presiding Officers and other parties no later than February 2, 2015 which customers it intends to cross-examine.
6. That Respond Power LLC will circulate to the Presiding Officers and the other parties no later than February 17, 2015 the exhibits it intends to use during the evidentiary hearings.
7. That Respond Power LLC will file no later than February 23, 2015 any Motions to Strike pre-served consumer testimony.
8. That the parties are advised that no further continuance of these evidentiary hearings will be granted.
9. That the parties are encouraged to continue settlement discussions and are directed to advise the Presiding Officers of all future settlement activity.

Date: December 29, 2014

Elizabeth H. Barnes

Administrative Law Judge

Joel H. Cheskis

Administrative Law Judge

**C-2014-2427659 - ATTORNEY GENERAL PA & OFFICE OF CONSUMER ADVOCATE v. RESPOND POWER LLC**

***REVISED 11/18/14***

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