**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 MOTION TO COMPEL**

**RESPONSES TO JOINT COMPLAINANTS SET V-4 THROUGH V-13**

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 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.

Subsequently, the procedural history of these complaints has been quite extensive. Various pleadings have been filed in these matters, including Answers with New Matter, Answers to the New Matter, Preliminary Objections and Answers to the Preliminary Objections. Orders granting in part and denying in part Preliminary Objections were issued. A Petition for Interlocutory Review of a Material Question was filed with the Commission. On October 28, 2014, an Order granting a Petition to Consolidate the formal Complaint filed by I&E against Respond with the formal Complaint filed against Respond by the Joint Complainants was issued.

On January 8, 2015, the Joint Complainants filed a Motion to Compel Responses to Set V-4 through V-13. On January 13, 2015, Respond filed an Answer to the Joint Complainants’ Motion to Compel. The Joint Complainants’ Motion is now ready for disposition. For the reasons discussed below, the Motion will be granted and Respond will be directed to provide answers to Joint Complainant interrogatories V-4 through V-13.

The standard for permissible discovery is set forth in Section 5.321 of the Commission’s regulations:

**§ 5.321. Scope.**

(c)  *Scope*. Subject to this subchapter, a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, content, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

52 Pa. Code § 5.321(c). Section 5.361 of the Commission’s regulations, however, provides various limitations on the scope of discovery:

**§ 5.361. Limitation of scope of discovery and deposition.**

 (a)  Discovery or deposition is not permitted which:

  (1)  Is sought in bad faith.

   (2)  Would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent, a person or party.

   (3)  Relates to matter which is privileged.

   (4)  Would require the making of an unreasonable investigation by the deponent, a party or witness.

52 Pa. Code § 5.361(a).

In this case, the Joint Complainants seek an Order compelling Respond to answer interrogatories 4 through 13 of Set V. These interrogatories provide:

1. Please state all generation prices charged to Respondent’s customers in December 2013, January 2014, February 2014, and March 2014.

1. If not included in your response to the question in paragraph 4 above, identify the billing cycles applicable to all prices stated.
2. Please state whether you receive notification of Respondent’s running charges with PJM weekly or monthly and whether Respondent settles its running charges with PJM weekly or monthly.
3. Please produce any and all documents setting forth methods used to reflect electric power market information into the establishment of the price for Respondent’s residential consumers for December 2013, January 2014, February 2014 and March 2014. Please include the following information:
   1. Any and all formula(s) used to calculate the price;
   2. The load profile(s) used for Respondent’s residential consumers. If different load profiles are used for different months or seasons, different EDC service areas, or residential consumers of different size, provide all such load profiles used for the months of December 2013, January 2014 and February 2014;
   3. The specific type of market price information (*e.g*., reported four-week forward contract prices for on-peak and off-peak at the PJM West hub) used to develop the residential generation price and the source(s) of that information;
   4. Any and all electronic spreadsheets used to develop the residential generation price applicable to Respondent’s residential consumers;
   5. All on-peak and off-peak energy prices relied upon to develop the prices charged to Respondent’s residential consumers for billing cycles that include at least seven (7) days in January 2014 and for all billing cycles in February 2014. This information should be disaggregated by billing cycle used for Respondent’s residential consumers; and
   6. Respondent’s total residential kWh sales for December 2013, January 2014, February 2014, and March 2014.
4. Please produce any and all documents indicating whether you develop different generation prices for each of the billing cycles within the month or whether the same price is applicable to multiple billing cycles. If the same price is applicable to multiple billing cycles, please indicate the frequency with which the generation price is changed.
5. Please produce any and all documents indicating all cost components used to develop the generation price (*e.g*., AEPS credits, ancillary services) and Respondent’s average cost of acquiring those components for December 2013, January 2014, February 2014, and March 2014.
6. Please provide a sample calculation of one of the prices charged to Respondent’s residential consumers that reflects a time period that includes the last three (3) weeks in January 2014.
7. Please provide a sample calculation at monthly usage of 750 kWh of a price charged to Respondent’s residential consumers that reflect a time period that includes at least 21 days in February 2014.
8. Please produce any and all documents setting forth all such notifications of Respondent’s running charges with PJM for December 2013, January 2014, February 2014, and March 2014.
9. Please provide Respondent’s Pennsylvania prices and revenues, by month, from January 1, 2013 to present, broken down by EDC service territory and customer class.

In its Objections, Respond argued that the Commission does not have jurisdiction to regulate or establish prices charged by electric generation suppliers (EGSs) and that these interrogatories seek information that would not be admissible at hearing or that is reasonably calculated to the discovery of admissible evidence. Respond argued that the Commission does not have jurisdiction to determine the price an EGS should have charged in the context of a variable price contract that was based on a variety of factors. Respond concluded its objection by stating that: “Simply stated, under the statute and case law, the Commission may not place itself in the shoes of Respond Power and establish a price that ‘should’ have been charged to customers on variable price contracts.”

In its Motion, the Joint Complainants argued that Respond should be compelled to answer interrogatories they claim are “directly relevant to the issue of whether Respond Power charged prices that conform to the Company’s Disclosure Statement.” The Joint Complainants further averred that information relating to the prices that Respond charged its customers on variable rate plans and information relating to the factors identified in Respond’s Disclosure Statement that the Company would use to calculate customers’ variable prices are relevant to allegations raised in the Complaint and likely to lead to admissible evidence in this matter. The Joint Complainants requested that Respond’s objections be overruled and that Respond be directed to provide full and complete answers.

In its Answer to the Joint Complainant’s Motion, Respond argued that the Commission does not have traditional ratemaking authority over competitive EGSs and does not regulate competitive supply rates. Respond further argued that “jurisdiction to consider whether an EGS has billed its customers in accordance with its disclosure statement does not include authority to review the expenses incurred by the EGS in purchasing electricity, consider the reasonableness of the EGSs profit margin or determine a ‘just and reasonable’ price on the basis of those factors.” Respond concluded that it is inappropriate for Respond to be compelled to provide this ‘cost of service’ type information to the Joint Complainants.

As discussed below, the Joint Complainants Motion will be granted.

To begin, Section 54.5 of the Commission’s regulations governs disclosure statements for residential and small business customers. This Section specifically provides, among other things, that “the agreed upon prices in the disclosure statement must reflect the marketed prices and the billed prices.” 52 Pa.Code § 54.5(a). This Section also articulates various terms of service that must be disclosed including, for variable pricing statements “(i) the conditions of variability (state on what basis prices will vary) and (ii) limits on price variability.” 52 Pa.Code § 54.5(c).

The Commission recently addressed Section 54.5 in Commonwealth of Pennsylvania, *et al.* v. IDT Energy, Inc., Docket No. C-2014-2427657, Opinion and Order (entered Dec. 18, 2014) (IDT Order). In the IDT Order, the Commission stated that “EGSs are required under Section 2809 of the Public Utility Code to abide by Commission regulations, including Chapter 54 regulations on bill format, disclosure statements, marketing and sales activity and contract expiration notices.” Id. at 24. The Commission added: “We concluded that the Commission has jurisdiction and authority over this use under Section 54.4(a) and 54.5(a) of our regulations which require that an EGS’s billed price reflect its disclosure statement.” Id. at 25 (citations omitted); *see also*, Commonwealth of Pennsylvania, *et al.* v. Blue Pilot Energy, LLC, Docket No. C-2014-2427655, Opinion and Order (entered Dec. 11, 2014).

In this case, the Joint Complainants articulated in their Motion the text in Respond’s Disclosure Statement regarding the terms by which Respond’s variable electric rate is determined. The Joint Complainants provided that Respond’s Disclosure Statement is as follows:

**Electric**

***Variable Rate.*** Your price may vary from month to month. This rate is set by Respond Power and reflects their Generation Charge as reflected by the PJM Day-Ahead Market, Installed capacity (the cost of reserve or standby power), electricity lost on the transmission system (“losses”), estimated state taxes, and any other costs that Respond Power incurs to deliver your electricity to your electric Utility’s Transmission System (where they receive the electricity). For their services, Respond Power adds a profit margin to the electricity and Respond Power’s goal each and every month is to deliver your power at a price that is less than what you would have paid had your [sic] purchased your power from your local utility company, however, due to market fluctuations and conditions, Respond Power cannot always guarantee that every month you will see savings. Commodity charges exclude Pennsylvania sales tax, if applicable. You may contact Respond Power for our current Variable Rate.

Respond did not contest in its Answer to the Joint Complainants’ Motion that this is an accurate recitation of their Disclosure Statement. A review of interrogatories V-4 through V-13 that are the subject of this Motion reveals that the information sought in those interrogatories is relevant, or is reasonably calculated to lead to the discovery of admissible evidence, to various elements that Respond indicates in its Disclosure Statement is used to set the rate charged.

For example, the Disclosure Statement indicates that the rate charged to consumers is determined in part by “the PJM Day-ahead market.” Interrogatory V-6 asks whether Respond receives notification of running charges with PJM weekly or monthly and whether Respond settles its running charges with PJM weekly or monthly. Similarly, Respond’s Disclosure Statement states that the rate charged to consumers is determined in part by “any other costs that Respond Power incurs to deliver your electricity to your electric Utility’s Transmission System.” Interrogatory V-9 seeks “any and all documents indicating all cost components used to develop the generation price.” Finally, Respond’s Disclosure Statement states that “for their services, Respond Power adds a profit margin to the electricity.” Interrogatory V-13 seeks “prices and revenues, by month, from January 1, 2013 to present, broken down by EDC service territory and customer class.” Each of these interrogatories, as well as the other interrogatories included in this Motion, appear to seek information that is relevant to the subject matter involved in the pending action or reasonably calculated to lead to the discovery of admissible evidence – i.e., whether Respond’s billed prices are consistent with their disclosure statement.

Respond argues that the Joint Complainants’ Motion should be denied because “the Commission has made it clear that it does not have traditional ratemaking authority over EGSs and that it does not regulate competitive supply rates.” Respond also argued that the General Assembly has made it clear that the price of generation supply is exempt from regulation, noting that “competitive market forces are more effective than economic regulation in controlling the cost of generating electricity.” Respond concluded, among other things, that “it is inappropriate for Respond Power to be compelled to provide this ‘cost of service’ type of information to the Joint Complainants.” Respond’s arguments will be dismissed.

In their Complaint, the Joint Complainants aver that Respond is charging prices that do not conform to its disclosure statement. The Joint Complainants do not argue what specific price Respond should have charged or that its formula for determining prices should be changed. Nor are they seeking to impose traditional ratemaking authority over the rates charged by Respond. The Joint Complainants seek information in interrogatories V-4 to V-13 that ensures Respond charged prices that conform to the disclosure statement. Pursuant to the IDT Order, *supra*, and other recent Commission precedent, the Commission has authority to ensure that the prices charged by Respond conform to the Disclosure Statement and that is precisely what the Joint Complainants seek to do through interrogatories V-4 through V-13. The Joint Complainants do not seek to thwart the finding of the General Assembly that competitive market forces are more effective than economic regulation in controlling the cost of generating electricity. The Joint Complainants merely seek to “check the math” by knowing the inputs articulated in the Disclosure Statement and the rates that were created by those inputs to make sure that the rates charged conform with Respond’s Disclosure Statement.

As such, the Joint Complainants’ Motion to Compel Response to Interrogatories Set V-4 through V-13 is granted. Respond’s Objections are dismissed and Respond is directed to provide answers to Joint Complainant interrogatories Set V-4 through V-13 within ten (10) days of the date of this Order.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Motion of Joint Complainants Commonwealth of Pennsylvania and Office of Consumer Advocate to Compel Responses to Set V-4 through V-13 in the above referenced proceeding dated January 8, 2015 is hereby granted.
2. That Respond Power, LLC is hereby directed to file answers to Joint Complainants interrogatories V-4 through V-13 within ten (10) days of the date of this Order.

Date: January 23, 2015 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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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