

COMMONWEALTH OF PENNSYLVANIA



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January 26, 2015

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

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

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

Secretary Chiavetta:

Enclosed please find the Second Prehearing Memorandum of Joint Complainants Commonwealth of Pennsylvania and the Office of Consumer Advocate, in the above-referenced proceeding.

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

Respectfully Submitted,

A handwritten signature in cursive script that reads "Candis A. Tunilo".

Candis A. Tunilo
Assistant Consumer Advocate
PA Attorney I.D. #89891

Enclosures

cc: Honorable Elizabeth Barnes, ALJ
Honorable Joel Cheskis, ALJ
Certificate of Service

*196330

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Commonwealth of Pennsylvania, by Attorney :
General KATHLEEN G. KANE, Through the :
Bureau of Consumer Protection, :
: :
And : Docket No. C-2014-2427659
: :
TANYA J. McCLOSKEY, Acting Consumer :
Advocate, :
Complainants :
: :
v. :
: :
Respond Power, LLC, :
Respondent :

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

SECOND PREHEARING MEMORANDUM
OF JOINT COMPLAINANTS COMMONWEALTH
OF PENNSYLVANIA AND THE OFFICE OF CONSUMER ADVOCATE

Pursuant to Section 333 of the Public Utility Code, 66 Pa. C.S. § 333, the Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection (BCP) and the Acting Consumer Advocate Tanya J. McCloskey (OCA) (collectively referred to as Joint Complainants), provide the following information:

I. INTRODUCTION

On June 20, 2014, the Joint Complainants filed a Joint Complaint with the Public Utility Commission (Commission) pursuant to, *inter alia*, the Public Utility Code, 66 Pa. C.S. Ch. 28 and the Commission's regulations, 52 Pa. Code Ch. 54, 56 and 111. The Joint Complaint includes nine separate counts and alleges that Respond Power, LLC (Respond Power or Respondent) violated Pennsylvania law and Commission orders and regulations. Specifically, the nine counts in the Joint Complaint are: (1) misleading and deceptive claims of affiliation with electric distribution companies; (2) misleading and deceptive promises of savings; (3) failing to disclose material terms; (4) deceptive and misleading welcome letter and inserts; (5) slamming; (6) lack of good faith handling of complaints; (7) failing to provide accurate pricing information; (8) prices nonconforming to disclosure statement; and (9) failure to comply with the Telemarketing Registration Act (TRA). With respect to relief, the Joint Complainants request that the Commission find, *inter alia*, that Respondent violated the Public Utility Code and the Commission's regulations and Orders; provide restitution to Respondent's customers; impose a civil penalty; order Respondent to make various modifications to its practices and procedures; and revoke or suspend Respondent's Electric Generation Supplier (EGS) license, if warranted. The Bureau of Investigation and Enforcement (I&E) and the Office of Small Business Advocate intervened in the proceeding.

On July 10, 2014, Respond Power filed Preliminary Objections to the Joint Complaint and an Answer with New Matter to the Joint Complaint generally denying the alleged violations. On July 21, 2014, the Joint Complainants filed an Answer to Preliminary Objections. By Order dated August 20, 2014, Administrative Law Judges Joel H. Cheskis and Elizabeth Barnes (ALJs) granted in part and denied in part Respond Power's Preliminary Objections. Specifically, the

ALJs found: 1) that the Commission lacks jurisdiction to hear complaints under the Unfair Trade Practices and Consumer Protection Law (CPL) and the TRA even though compliance with these Acts is required by the Commission regulations, and 2) that the Commission lacks jurisdiction to determine if the prices charged to customers conformed to the disclosure statement provided to the customer.

On September 8, 2014, Joint Complaints filed a Petition for Interlocutory Review and Answer to Material Questions with the Commission. Specifically, Joint Complaints sought for the Commission to answer the following questions: (1) Does the Commission have authority and jurisdiction to determine whether a violation of the CPL and TRA has occurred when considering whether the Commission's regulations—which require compliance with these laws—have been violated and (2) Does the Commission have the authority and jurisdiction to determine whether the prices charged to customers by an EGS conform to the EGS disclosure statement regarding pricing. On September 18, 2014, the Joint Complainants filed a Brief in Support of their Material Questions, and Respond Power filed a Brief in Opposition. The Commission's Order is pending.¹

¹ On September 8, 2014, Joint Complainants also filed Petitions for Interlocutory Review and Answers to Material Questions in three other cases. See Commonwealth of Pennsylvania, by Attorney General KATHLEEN G. KANE, Through the Bureau of Consumer Protection, And TANYA J. McCLOSKEY, Acting Consumer Advocate v. Blue Pilot Energy, LLC, Docket No. C-2014-2427655 (Blue Pilot); Commonwealth of Pennsylvania, by Attorney General KATHLEEN G. KANE, Through the Bureau of Consumer Protection, And TANYA J. McCLOSKEY, Acting Consumer Advocate v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric, Docket No. C-2014-2427656; Commonwealth of Pennsylvania, by Attorney General KATHLEEN G. KANE, Through the Bureau of Consumer Protection, And TANYA J. McCLOSKEY, Acting Consumer Advocate v. IDT Energy, Inc., Docket No. C-2014-2427657 (IDT).

In the Blue Pilot Petition, Joint Complainants also asked whether the Commission has the authority and jurisdiction to determine whether a violation of the CPL and TRA has occurred when considering whether the Commission's regulations- which require compliance with these laws- have been violated and whether the Commission has the authority and jurisdiction to determine whether the prices charged to customers by an EGS conform to the EGS disclosure statement regarding pricing. The Commission entered an Order in the Blue Pilot proceeding (Blue Pilot Order) on December 11, 2014, in which it determined that while it does not have the authority and jurisdiction to determine whether a violation of the CPL and TRA has occurred, it does have jurisdiction over alleged violations of its own Regulations that require compliance with these laws. Blue Pilot Order at 20-21. This jurisdiction includes determining whether the Commission's Regulations prohibiting deceptive,

On July 30, 2014, Joint Complainants filed a Reply to Respond Power's New Matter. On August 25, 2014, a Prehearing Conference was convened in the BCP/OCA Docket and a litigation schedule was adopted for the submission of consumer testimony. Pursuant to the litigation schedule, on October 24, 2014, Joint Complainants served consumer direct testimony from approximately 200 consumer witnesses. Hearings for cross examination of the consumer witnesses were initially scheduled for November 10 and 12, 2014, and a Further Prehearing Conference was scheduled for November 25, 2014. On October 22, 2014, Respond Power filed a Motion for Continuance of evidentiary hearings, which was granted on October 28, 2014, and the evidentiary hearings were rescheduled for January 26-30, 2015. Respond Power filed a second Motion for Continuance on December 19, 2014. The ALJs granted Respond Power's second Motion for Continuance by Order dated December 29, 2014. In the December 29th Order, the ALJs further rescheduled evidentiary hearings for March 9-13, 2015. The Further Prehearing Conference was rescheduled for January 27, 2015.

On August 21, 2014, I&E filed a formal Complaint against Respond Power alleging various violations of the Public Utility Code, the Commission's regulations and CPL. 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)

and/or misleading conduct and/or the Commission's telemarketing regulations have been violated by an EGS. Blue Pilot Order at 17-18. Therefore, the Commission concluded that it can hear claims alleging fraudulent, deceptive, and/or misleading conduct brought against Blue Pilot under the Commission's Regulations and claims alleging improper verification of enrollment of residential customers brought against Blue Pilot under the Commission's telemarketing Regulations. Id. The Commission issued a consistent Order in the IDT proceeding on December 18, 2014.

Although the Commission's Order in the Respond Power proceeding is pending, the Commission has indicated that it intends for the Orders in the four proceedings to be consistent with each other. See Commonwealth of Pennsylvania, by Attorney General KATHLEEN G. KANE, Through the Bureau of Consumer Protection, And TANYA J. McCLOSKEY, Acting Consumer Advocate v. Blue Pilot Energy, LLC, Docket No. C-2014-2427655, Motion of Vice Chairman John F. Coleman, Jr. (Nov. 13, 2014).

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 September 2, 2014, BCP filed a Notice of Intervention. On September 3, 2014, OCA filed a Notice of Intervention and Public Statement.

On September 30, 2014, Respond Power filed an Answer to the I&E Formal Complaint and Preliminary Objections. In Respondent's Preliminary Objections, Respond Power sought the dismissal of various Counts for lack of Commission jurisdiction and legal insufficiency. On October 17, 2014, I&E and OCA filed Answers to Respond Power's Preliminary Objections. On November 17, 2014, ALJs Cheskis and Barnes issued an Order Granting in Part and Denying in Part the Preliminary Objections Filed Against the Formal Complaint of the Bureau of Investigation and Enforcement. Specifically, the ALJs found that the Commission has jurisdiction to determine whether prices charged by an EGS reflect marketed prices and prices agreed upon in the disclosure statement, as well as comply with other Commission regulations; the Commission has the authority to order EGSs to issue refunds in certain circumstances; and the Commission lacks jurisdiction to determine whether an EGS violated the CPL, but it has jurisdiction to determine whether an EGS violated the Commission's own consumer protection regulations.

Pursuant to the ALJs' direction, I&E served consumer direct testimony on November 14, 2014. The I&E Docket was consolidated with the BCP/OCA Docket by Order dated October 28, 2014

The Further Prehearing Conference was rescheduled for January 27, 2015. Accordingly, the Joint Complainants submit the following:

II. ISSUES

A. Misleading and Deceptive Claims of Affiliation, Promises of Savings and Welcome Letter and Inserts

Whether Respond Power engaged in misleading and deceptive conduct in violation of the Commission's regulations at 52 Pa. Code §§ 54.43(f), 111.4, 111.5, 111.8, 111.9 and 111.12(d)(1). See Joint Complaint at Counts I, II and IV and App. A.

B. Failing To Disclose Material Terms

Whether Respond Power failed to disclose to customers that they had a variable rate agreement with Respondent in violation of the Commission's regulations at 52 Pa. Code §§ 54.4(a), 54.5(b), 54.5(c)(2), 54.7(a), 111.4, 111.5, 111.11 and 111.12(d)(4). See Joint Complaint at Count III and App. A.

C. Slamming

Whether Respond Power engaged in slamming in violation of the Public Utility Code, 66 Pa. C.S. § 2807(d)(1), and the Commission's regulations, 52 Pa. Code § 54.42(a)(9). See Joint Complaint at Count V.

D. Handling of Customer Complaints

Whether Respondent failed to adequately handle customer complaints and use good faith, honesty and fair dealing with Respondent's residential customers with complaints in violation of the Commission's regulations at 52 Pa. Code Ch. 56 and Respond Power's Licensing Order, 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). See Joint Complaint at Count VI.

E. Pricing Information and Disclosure Statement

Whether Respondent's Disclosure Statement complies with the Commission's regulations at 52 Pa. Code §§ 54.5(c), 54.43(1), 54.43(f) and 111.12(d)(1). See Joint Complaint at Count VII and App. B. Whether Respondent's prices charged in early 2014 conformed to its variable rate pricing provision in its Disclosure Statement in violation of 66 Pa. C.S. § 2809 and 52 Pa. Code §§ 54.4 and 54.5. See Joint Complaint at Count VIII and App. B and C.

F. Failure to Comply with the Commission's Regulations at 52 Pa. Code §§ 53.43(f) and 111.10(a)

Whether Respondent violated and continues to violate the Commission's regulations at 52 Pa. Code §§ 54.43(f) and 111.10(a).

G. Remedies

By way of remedies for Respondent's violations of the Public Utility Code and the Commission's regulations and Orders, Joint Complainants seek refunds to customers, civil penalties and if warranted, suspension or revocation of Respondent's license. Further, Joint Complainants request that the Commission order Respond Power to discontinue the prohibited conduct and implement procedures to ensure compliance with all applicable laws and the Commission's regulations and Orders.

III. SERVICE ON JOINT COMPLAINANTS

As identified in Joint Complainants Prehearing Memorandum dated August 19, 2014, The OCA will be represented in this case by Candis A. Tunilo and Kristine E. Robinson, Assistant Consumer Advocates. Copies of all documents should be served on the OCA as follows:

Candis A. Tunilo
Kristine E. Robinson

Assistant Consumer Advocates
Office of Consumer Advocate
5th Floor, Forum Place
555 Walnut Street
Harrisburg, PA 17101-1923
Telephone: (717) 783-5048
Facsimile: (717) 783-7152
E-mail: ctunilo@paoca.org
krobinson@paoca.org

The BCP will be represented in this case by John M. Abel and Nicole R. (Beck) DiTomo, Deputy Attorneys General. Copies of all documents should be served on the BCP as follows:

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Senior Deputy Attorney General
Nicole R. (Beck) DiTomo
Deputy Attorney General
Office of Attorney General
Bureau of Consumer Protection
15th Floor, Strawberry Square
Harrisburg, PA 17120
Telephone: (717) 787-9707
Facsimile: (717) 787-1190
E-mail: jabel@attorneygeneral.gov
nditomo@attorneygeneral.gov².

IV. DISCOVERY MODIFICATIONS

Joint Complainants do not propose any modifications to the discovery rules at this time.

V. SETTLEMENT

The parties are engaged in ongoing settlement discussions. The Joint Complainants are willing to continue to engage in settlement discussions in this matter.

On December 20, 2014, Respond Power filed a Motion for Scheduling of a Settlement Conference and Assignment of Settlement Administrative Law Judge. The ALJs directed that Answers to the Motion be filed by January 9, 2015. By letter dated January 8, 2015, Respond Power requested that its Motion be held in abeyance and proposed to provide the ALJs with a

² Please note Ms. DiTomo's email address has changed.

status update on January 26, 2015, regarding whether the Motion should continue to be held in abeyance. The ALJs granted the request and directed the Answers to the Motion need not be filed by January 9th. Joint Complainants do not believe that the assignment of a settlement judge is appropriate at this time, as the parties have made good faith efforts to engage in settlement discussions and will continue to do so.

VI. PROPOSED SCHEDULE

Joint Complainants proposed the following schedule for the second half of the litigation schedule to Respond Power for consideration:

Direct Testimony- May 8, 2015

Rebuttal Testimony- July 1, 2015

Surrebuttal Testimony- July 31, 2015

Hearings- August 10-12, 2015

I&E has indicated agreement to this proposed schedule. Joint Complainants continue to discuss the schedule with Respond Power and hope to have a schedule that is acceptable to the parties to present to the ALJs at the Further Prehearing Conference. Joint Complainants will work with the ALJs and the parties to determine the dates for filing briefs in this proceeding.

VII. WITNESSES

On October 24, 2014, Joint Complainants served 200 pieces of testimony from consumer witnesses. Additionally, as identified in Joint Complainants' Prehearing Memorandum dated August 19, 2014, the Joint Complainants intend to present the direct, rebuttal, and surrebuttal testimonies, as may be necessary, of Dr. Steven L. Estomin and Ms. Barbara R. Alexander. These witnesses will present expert testimony in written form and may also attach various

exhibits, documents, and explanatory information which will assist in the presentation of the Joint Complainants' case.

Steven L. Estomin, Ph.D.
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Columbia, Maryland 21044
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Barbara R. Alexander
83 Wedgewood Drive
Winthrop, ME 04364
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In order to expedite the resolution of this proceeding, the Joint Complainants request that copies of all interrogatories, testimony, and answers to interrogatories be mailed directly to the witnesses identified above as well as mailing a copy to counsel for the Joint Complainants.

Also as identified in Joint Complainants' Prehearing Memorandum dated August 19, 2014, Joint Complainants also intend to call:

Gregory Strupp
Consumer Protection Agent
15th Floor, Strawberry Square
Harrisburg, PA 17120
E-mail: gstrupp@attorneygeneral.gov

Respectfully Submitted,



John M. Abel
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CERTIFICATE OF SERVICE

Commonwealth of Pennsylvania, by :
Attorney General KATHLEEN G. KANE, :
Through the Bureau of Consumer Protection, :

And :
:

TANYA J. McCLOSKEY, Acting Consumer :
Advocate, :

Complainants :

Docket No. C-2014-2427659

v. :

RESPOND POWER, LLC, :
Respondent :

PENNSYLVANIA PUBLIC UTILITY :
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
Second Prehearing Memorandum of Joint Complainants Commonwealth of Pennsylvania and the
Office of Consumer Advocate, in the manner and upon the persons listed below:

Dated this 26th day of January 2015.

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