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January 26, 2015

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

Dear Secretary Chiavetta:

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

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

Very truly yours,



Karen O. Moury

KOM/bb
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	:	

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

**SECOND 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.

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 Office of Attorney General and the Office of Consumer Advocate (“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. By Order dated August 20, 2014, Administrative Law Judges (“ALJs”) Joel H. Cheskis and Elizabeth Barnes, granted in part and denied in part Respond Power’s Preliminary Objections. Specifically, the ALJs found that: 1) the Commission lacks jurisdiction to enforce the Unfair Trade Practices and Consumer Protection Law and the Telemarketer Registration Act; and 2) the Commission lacks jurisdiction to determine if the prices charged to customers conformed to the disclosure statement. On September 8, 2014, the Joint Complainants filed a Petition for Interlocutory Review and Answer to Material Questions, which is pending before the Commission.

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 (“I&E”) filed a Notice of Intervention.

I&E filed a formal Complaint against Respond Power on August 21, 2014, alleging: 1) slamming; 2) misleading and deceptive claims of affiliation with electric distribution companies; 3) promises of savings; 4) failure to disclose material pricing terms in the disclosure statement; 5) lack of good faith in handling customer complaints; 5) inaccurate or incomplete sales agreements; and 6) billing errors. The Joint Complainants separately filed Notices of Intervention on September 2, 2014 and September 3, 2014.

On September 30, 2014, Respond Power filed an Answer and Preliminary Objections to the I&E Complaint. On November 17, 2014, ALJs Cheskis and Barnes issued an Order Granting in Part and Denying in Part the Preliminary Objections. The proceedings initiated by the Joint Complainants and I&E were consolidated by Order of ALJs Cheskis and Barnes dated October 28, 2014.

The Joint Complainants served direct testimony of approximately 200 consumer witnesses on October 24, 2014. I&E served direct testimony of 21 consumer witnesses on November 14, 2014.

Evidentiary hearings are currently scheduled for March 9-13, 2015. A Further Prehearing Hearing Conference is scheduled for January 27, 2015.

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

The schedule proposed by the Joint Complainants is acceptable to Respond Power, subject to the availability of Respond Power's witness, which we are seeking to confirm in advance of the prehearing conference.

V. 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 service of testimony.

VI. ISSUES

A. Substantive Issues

The primary issues in this consolidated complaint proceeding are whether Respond Power, through the marketing to and enrolling of customers and the pricing of retail electric supply, has violated any laws over which the Commission exercises jurisdiction, and if so, what

the appropriate resolution should be. Respond Power's fundamental position is that underlying many of the allegations raised in the Joint Complaint and the I&E 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. Regarding the more detailed allegations of the Joint Complainants and I&E, as well as Respond Power's responses, Respond Power incorporates herein by reference the Prehearing Memorandum it filed on August 18, 2014.

Specifically regarding Count VIII of the Joint Complaint, Respond Power's position is that because the Commission does not have traditional ratemaking authority over competitive electric generation suppliers ("EGSs") and does not regulate competitive supply prices, it does not have jurisdiction to determine a price that it believes would have been "just and reasonable" and therefore appropriate for Respond Power to charge in a competitive environment. The Commission's interlocutory order in the matter of *Commonwealth of Pennsylvania, et al. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655 (Order adopted November 13, 2014) ("*Blue Pilot Energy Order*") merely concluded that the Commission may determine whether an EGS's prices conformed to the disclosure statement. Importantly, however, the Commission in the *Blue*

Pilot Energy Order stopped short of finding that it could engage in a traditional ratemaking analysis of an EGS's prices through a review of wholesale market conditions and expenses incurred by the EGS to purchase electricity. Moreover, the Commission did not suggest that it could determine an acceptable profit for an EGS to recover. Such a conclusion would have been beyond the Commission's statutory authority and at odds with its own past pronouncements regarding its lack of jurisdiction to establish or limit EGS prices. Therefore, despite the apparent interpretation of the *Blue Pilot Energy Order* by the Joint Complainants, Respond Power submits that the ALJ's rationale for dismissing Count VIII continues to be valid since the "cost to serve residential customers" in early 2014 is beyond the pale of the Commission to review in the context of EGS pricing.

B. Procedural Issues

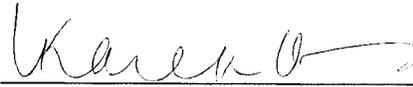
Respond Power is working to identify consumer witnesses for whom it will waive cross-examination, subject to the admission of certain cross-examination exhibits related to those witnesses, and is exploring the possibility of entering into factual stipulations to avoid the need for some consumer witnesses to appear for cross-examination. To preserve confidential customer information, such as account numbers, telephone numbers and consumption history, Respond Power will seek to preclude individuals from attending the consumer witness hearings unless they are counsel of record or consultants/experts who are covered by the Protective Order issued in this proceeding. As to the use of third-party verification call recordings or sales recordings, Respond Power plans to provide a transcription of the recording to allow the parties, the ALJs and the Court Reporter to better follow the recorded conversation. However, the official record of the recording will be captured by the Court Reporter.

VII. SETTLEMENT

The parties are actively engaged in settlement discussions. At this time, Respond Power requests that its Motion for Settlement Judge continue to be held in abeyance with a further report due to the ALJs by February 9, 2015.

January 26, 2015

Respectfully submitted,



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Harrisburg, PA 17101-1357
(717) 237-4820

Attorneys for Respond Power LLC

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and Enforcement	:	
	:	
v.	:	Docket No. C-2014-2438640
	:	
Respond Power LLC	:	

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 Email and First Class Mail

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Dated this 26th day of January, 2015.

A handwritten signature in cursive script, appearing to read "Karen O. Moury", written above a horizontal line.

Karen O. Moury, Esq.