

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

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February 3, 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 Joint Memorandum of Law of the Commonwealth of Pennsylvania Bureau of Consumer Protection and the Office of Consumer Advocate Regarding the Admission of Pattern of Practice Evidence, 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 : Docket No. C-2014-2438640  
INVESTIGATION AND ENFORCEMENT, :  
Complainant :  
v. :  
RESPOND POWER, LLC, :  
Respondent :

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JOINT MEMORANDUM OF LAW OF THE COMMONWEALTH OF PENNSYLVANIA  
BUREAU OF CONSUMER PROTECTION AND  
THE OFFICE OF CONSUMER ADVOCATE  
REGARDING THE ADMISSION OF PATTERN OF PRACTICE EVIDENCE

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**I. INTRODUCTION**

The Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, through the Bureau of Consumer Protection (Attorney General or BCP) and the Acting Consumer Advocate Tanya J. McCloskey (Consumer Advocate or OCA) (collectively referred to as the Joint Complainants) submit this Memorandum of Law pursuant to the direction of

Administrative Law Judges Elizabeth Barnes and Joel H. Cheskis (ALJs) to set forth the legal framework for the acceptance of evidence from a large group of customers to establish a misleading or deceptive pattern of practice into the record.

On June 20, 2014, Joint Complainants filed a Joint Complaint before the Pennsylvania Public Utility Commission (Commission) against Respond Power, LLC (Respond Power or Respondent), a licensed Electric Generation Supplier (EGS), pursuant to the Public Utility Code, 66 Pa. C.S. Ch. 28, the Commission's regulations, 52 Pa. Code Ch. 54, 56 and 111, and other Pennsylvania laws. The Joint Complaint includes nine counts<sup>1</sup> and alleges that Respond Power violated Pennsylvania law and Commission regulations and Orders. With respect to relief, 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 EGS license, if warranted.

Pursuant to the litigation schedule adopted at the August 25, 2014, Prehearing Conference in this matter, Joint Complainants served written consumer direct testimony on the ALJs and parties on October 24, 2014. The consumer direct testimony includes the direct testimony and exhibits of 200 consumer witnesses and encompasses four volumes, totaling 1140 pages. The consumer testimony relates to each consumer's experience with Respond Power's marketing and billing practices. Hearings for the cross-examination of the consumer witnesses are scheduled for March 9-13, 2015. A Second Prehearing Conference was held on January 27,

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<sup>1</sup> Specifically, the nine counts in the Joint Complaint are: (I) misleading and deceptive claims of affiliation with electric distribution companies; (II) misleading and deceptive promises of savings; (III) failing to disclose material terms; (IV) deceptive and misleading welcome letter and inserts; (V) slamming; (VI) lack of good faith handling of complaints; (VII) failing to provide accurate pricing information; (VIII) prices nonconforming to disclosure statement; and (IX) failing to comply with the Telemarketer Registration Act.

2015, at which time the ALJs adopted a further litigation schedule for the submission of, *inter alia*, Joint Complainants' expert testimony regarding Respond Power's marketing and billing practices and directed Joint Complainants to submit a memorandum of law prior to hearings in this matter discussing the submission and acceptance into the record of "pattern of practice" evidence. Joint Complainants submit this Memorandum of Law pursuant to the ALJs' directive.

## **II. DISCUSSION**

The present matter stems from Respond Power's marketing and billing practices used with consumers across the Commonwealth for a sustained period of time, which Joint Complainants allege violate, *inter alia*, the Public Utility Code and the Commission's regulations and Orders. See gen'ly Joint Complaint. This type of case involving pattern of, *inter alia*, deceptive and misleading conduct and large volumes of consumer complaints and testimonies is of first impression to this Commission. It is well established that Commonwealth agencies are not bound by the technical rules of evidence and may receive all relevant evidence of reasonably probative value. See 2 Pa. C.S. § 505. See also C.S. Warthman Funeral Home, et al. v. GTE North, Inc., 1993 Pa. PUC LEXIS 214, \*16, Docket No. C-00924416 (June 4, 1993) (Warthman). It is reasonable, therefore, to look to the procedures generally used in other forums for the receipt of such evidence to determine how best to conduct orderly and efficient proceedings in this matter.

The Commission's Rules for Formal Proceedings vest the ALJs with all necessary authority to control the receipt of evidence, including, *inter alia*, ruling on the admissibility of evidence, limiting the number of witnesses to be heard, limiting the time and scope of direct- and cross-examinations, and any other necessary limitations. See 52 Pa. Code § 5.403. Further, this Commission has specifically held that if evidence is relevant to the issues before the agency and

of reasonable probative value, the agency may receive it. Warthman at \*15. Evidence is deemed relevant when it tends to establish facts in issue. Id.

It goes without saying that in other forums, litigants seeking to establish the existence of a pattern of deceptive and misleading conduct in sales to the public generally present consumer testimony. Consumer testimony is appropriate in this matter in order to, *inter alia*, have evidence of what consumers believed Respond Power's offer was, based on Respondent's sales solicitations and new customer documents, and how consumers interpreted these items. Consumer testimony is also appropriate to show impact. Joint Complainants acknowledge that the ALJs have wide discretion in determining how much consumer testimony is necessary to establish the necessary facts for consideration. The Joint Complainants would also note that the consumer testimony will be followed by testimony of Joint Complainants' expert witnesses.

The Federal Trade Commission (FTC) frequently initiates cases involving large volumes of consumers, similar to this matter. Courts have determined that in such cases, it is sufficient for the FTC to present a sample of consumer witnesses and permit the remaining consumers to submit sworn affidavits in lieu of testifying. See e.g. FTC v. Kitco of Nevada, Inc., 612 F.Supp. 1282, 1294 (D. Minn. 1985) (Kitco). In Kitco, the FTC brought suit seeking to enjoin defendants from misrepresenting facts concerning business opportunities, rescission of contracts and consumer restitution. 612 F.Supp. at 1286. By way of evidence in the matter, the FTC presented, *inter alia*, eight consumers who testified about their dealings with Kitco. Id. at 1287-90, 1294, 1295. The FTC sought to offer the affidavits of 20 additional Kitco purchasers that did not appear as witnesses as further proof of consumer purchase, subsequent injury, and entitlement to restitution. Id. at 1294. The court in Kitco permitted the admission of the affidavits into evidence because the consumer testimony and other evidence presented at the trial

established the trustworthiness of the affidavits. Id. Further, the court found that the cumulative consumer testimony and other evidence presented at trial demonstrated that defendants engaged in a widespread pattern and practice of deception, and the consumer affidavits set forth facts relating to defendants' misrepresentations that were consistent with the testimony and other evidence presented at trial. Id. Additionally, the court stated that it would be too expensive and time consuming to call witnesses from all parts of the country merely to establish total consumer injury for purposes of rescission and restitution relief. Id. at 1295.

The court cited to the residual exception to the hearsay rule in Federal Rules of Evidence 803(24) as authority for its admission of the 20 consumer affidavits into evidence. Kitco, 612 F.Supp at 1294. FRE 803(24)<sup>2</sup> permits the admission of hearsay when the proffered evidence has circumstantial guarantees of trustworthiness. Id.; see also F.R.E. 803(24). In order to properly invoke the residual exception, the proponent must show the following: (1) the statement is offered as evidence of a material fact; (2) the statement is more probative on the point than any other evidence which the proponent can procure through reasonable efforts; and (3) the general purpose of the rules and the interests of justice are best served by admission of the statement into evidence.<sup>3</sup> Id. See also FTC v. Figgie Int'l, Inc., 994 F.2d 595, 608-609 (9th Cir. 1993) (Figgie) (trial court did not err in permitting into the record evidence derived from 127 letters of complaint from unrelated members of the public received by the FTC because the underlying letters would have been admissible under F.R.E. 803(24)); FTC v. Amy Travel Service, Inc., 875 F.2d 564, 576 (7th Cir. 1989) (consumer affidavits were admissible by discretion of trial court when requirements of F.R.E. 803(24) were met, and defendants had proper notice of the

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<sup>2</sup> F.R.E. 803(24) is now F.R.E. 807.

<sup>3</sup> Joint Complainants submit that while it is well-established that Commonwealth agencies are not bound by the technical rules of evidence, such agencies are further not limited to the Pa. R.E. for guidance on the admission of evidence.

affidavits; even if the requirements of F.R.E. 803(24) had not been met, admission of such evidence was not prejudicial to defendants).

Additionally, the FTC need not show individual consumer reliance on misleading and deceptive statements in order for all the affected consumers to be entitled to redress. See e.g. Figgie, 994 F.2d at 605.<sup>4</sup> In Figgie, the FTC issued a cease and desist order that the company stop its unfair and deceptive practices of marketing the company's heat detectors as more effective than smoke detectors, the accuracy of which was refuted in a series of tests by fire-prevention experts and recommendations by the National Fire Prevention Association. 994 F.2d at 598-600, 603. The FTC then brought suit for consumer redress. Id. at 601. Summary judgment on the issue of liability was granted in favor of the FTC based on the record established in the cease and desist case, and the court directed that Figgie pay \$7.59 million, which amount represented the company's gross revenues from the sale of the heat detectors, into a fund to provide refunds to customers. Id. Further, the court required Figgie to add to the fund, if customers' claims totaled more than \$7.59 million, up to a ceiling of \$49.95 million, which amount represented the total amount consumers paid for the heat detectors. Id.

Figgie argued on appeal that only those consumers that proved reliance on the company's sales statements should be entitled to redress. 994 F.2d at 605. The court rejected Figgie's argument, holding that a presumption of actual reliance arises once the FTC proved that the company made material misrepresentations, that they were widely disseminated, and that consumers purchased the company's product. Id. at 605-606. At this point, according to the

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<sup>4</sup> Joint Complainants note that under the Pennsylvania Rules of Civil Procedure, plaintiffs in a class action may present evidence from a representative sample of consumers in order to obtain relief for the entire class. See Pa. R.C.P. 1702. Further, much like the ALJs in actions before the Commission, judges presiding over class action lawsuits in Pennsylvania are provided vast discretion in determining the course of proceedings. See e.g. Pa. R.C.P. 1713(a)(1). As such, Joint Complainants submit that it is commonplace in Pennsylvania jurisprudence, as well as in Federal jurisprudence, that evidence received from a representative sample of consumers is adequate for the factfinder to reach a determination of liability.

court, it would be up to Figgie to present evidence of absence of reliance. Id. at 606. Figgie presented no evidence to rebut the presumption of reliance by consumers, and therefore, the court found that injury to consumers had been established. Id. See also FTC v. Security Rare Coin & Bullion Corp., 931 F.2d 1312, 1316 (8th Cir. 1991) (FTC met the burden of showing consumer reliance by showing that defendant's misrepresentations concerning low coin prices, high profit potential, and low risk were the type of representations that consumers in the market would generally rely upon in deciding whether to make a purchase; showing of reliance by each consumer to be reimbursed was not necessary).

There is solid public policy behind the Kitco and Figgie line of cases. As the courts have recognized, the FTC (similar to the OAG and the OCA in this case) does not file private actions on behalf of individuals, but instead seeks to deter unfair and deceptive trade practices and obtain relief on behalf of large classes of injured consumers. It would be inconsistent with this public purpose to require each consumer to testify about his/her individual reliance or other aspects of his/her individual case; rather proof of a defendant's common deceptive and misleading practices from a representative sample of consumers is sufficient. Requiring individual proof from every consumer subjected to the misleading and deceptive behavior would thwart effective prosecution of large consumer redress actions. See Kitco at 1239; Security Rare Coin & Bullion Corp., 931 F.2d at 1316.

Joint Complainants submit that the ALJs in this matter could permit cross examination of Respondent's selection of a certain number of witnesses or permit the cross examination of all the consumer witnesses that Respondent can complete in a certain timeframe, such as five hearing days, and then admit the remaining verified consumer testimonies into the record without cross examination of the consumer witnesses. Joint Complainants submit that the guidance



provided by F.R.E. 807, which the courts in the FTC cases rely upon, is important in this case as it provides an efficient and reasonable way to accept evidence in this administrative proceeding.<sup>5</sup>

As Pennsylvania courts have held, agencies may receive evidence and rely upon it in their decisions, even if technically objectionable, so long as there is corroborating evidence in the record. The Pennsylvania Superior Court, looking to a United States Supreme Court decision on the topic, explained as follows:

The rule of construction applicable to administrative bodies when the statute provides in effect, that the rules of evidence prevailing in courts of law shall not be controlling, has been thus stated in Consolidated Edison Co. v. National Labor Relations Bd., 305 U.S. 197, 59 S. Ct. 206, 83 L. Ed. 126: "The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. [Citing cases.] But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence." In deciding the question "we must, therefore, determine whether the evidence depended upon to support the order is substantial and legally competent, keeping in mind the definition of 'substantial evidence' as set forth in N. L. R. B. v. Columbian, etc., Co., 306 U.S. 292, 299, 300, 83 L. Ed. 660, 59 S. Ct. 501, that substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established." It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," .... and it must be enough [both in quantity and quality] to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.'" Union Trust Co. of Pbg'h's Petition, 342 Pa. 456, 20 A.2d 779.

Phillips v. Unemployment Comp. Bd. of Review, 152 Pa. Super. 75, 81, 30 A.2d 718, 722-23 (1943).

By way of example, Commission ALJs employ such flexibility in procedure regarding voluminous consumer testimony on a regular basis at public input hearings, when ALJs direct

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<sup>5</sup> By this statement, Joint Complainants do not intend to imply that the consumer testimonies are hearsay. The consumer testimonies are first-party accounts in the written question/answer testimony format that the ALJs directed be used. Joint Complainants submit that the consumers would provide the same answers if the questions were asked of them in the hearing room. As such, the consumer testimonies at issue here are not hearsay.

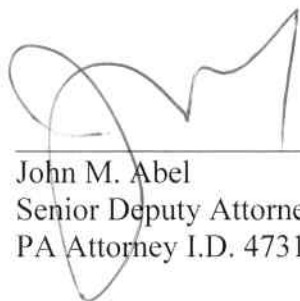
consumer witnesses to merely state “me too,” under oath, if their testimony would substantially match that of a consumer that has already testified at length. The ALJs may consider such testimony as if it had been provided at length even though the consumers that testify “me too” were not subjected to cross examination.

In the present matter, even if the verified testimonies of the uncross-examined consumers were deemed objectionable, which Joint Complainants do not concede, the verified testimonies could be received into evidence and properly relied upon by the ALJs in making determinations in this proceeding because they would be corroborated by the verified testimonies of the consumers that were cross-examined, in addition to other evidence and expert testimony that will be presented pursuant to the subsequent litigation schedule.

### III. CONCLUSION

Joint Complainants present this Memorandum of Law pursuant to the direction of the Administrative Law Judges and submit that the Administrative Law Judges have wide discretion to determine how much consumer testimony is necessary to establish a misleading or deceptive pattern of practice by the Respondent and to more efficiently determine consumer redress.

Respectfully submitted,



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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	:	

I hereby certify that I have this day served a true copy of the foregoing document, the Joint Memorandum of Law of the Commonwealth of Pennsylvania Bureau of Consumer Protection and the Office of Consumer Advocate Regarding the Admission of Pattern of Practice Evidence, in the manner and upon the persons listed below:

Dated this 3rd day of February 2015.

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