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February 13, 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 Memorandum of Law of Respond Power LLC Regarding the Admission of Pattern of Practice Evidence 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	:	

MEMORANDUM OF LAW OF RESPOND POWER LLC REGARDING THE ADMISSION OF PATTERN OF PRACTICE EVIDENCE

Respond Power LLC ("Respond Power"), by and through its counsel, Karen O. Moury, and Buchanan Ingersoll & Rooney PC, files this Memorandum of Law in response to the Joint Memorandum of Law of the Commonwealth of Pennsylvania Bureau of Consumer Protection and the Office of Consumer Advocate ("Joint Complainants") regarding the admission of "pattern of practice" evidence into the record in this proceeding.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Joint Complainants seek to have written consumer statements admitted into the record as evidence without being authenticated or subjected to cross-examination. Referring to a practice used in federal courts involving "pattern of practice" claims, the Joint Complainants suggest that if a "representative sampling" of consumer witnesses testifies that they were misled or deceived by Respond Power during a sales transaction involving electric generation supply that any remaining verified consumer statements on the same subject should be admitted into the record and relied upon by the Commission to make factual findings and legal conclusions.

The written consumer statements that the Joint Complainants characterize as "testimony" are in many instances hand-written, incomplete and inaccurate. Several contain vague recollections and inconsistencies, as well as hearsay within hearsay. In some instances the handwriting is indecipherable, notes are made in margins and irrelevant comments are included. Unverified attachments, including letters to other entities such as the Better Business Bureau or government agencies, are often appended to the written statements.

Three fundamental flaws are inherent in the Joint Complainant's proposal to have these statements admitted into the record without being authenticated or subjected to cross-examination, warranting outright dismissal of the proposed approach. First, the Joint Complainants' proposal for the Commission to implement a "pattern of practice" concept exceeds the Commission's statutory authority and would require the Commission to depart from its obligation to base its decisions on substantial evidence. Second, the proposal calls for the admission of unauthenticated hearsay statements which may not lawfully be relied upon as evidence to support findings and conclusions. Third, particularly due to the nature of the statements as described above and the unique circumstances involved in each electricity supply sales transaction, due process principles mandate that Respond Power be given the opportunity to cross-examine each and every witness.

If the Joint Complainants' concern is with the time involved in authenticating over 200 written statements and subjecting those witnesses to cross-examination during evidentiary hearings, Respond Power suggests that the Joint Complainants were (and still are) free to select a reasonable subset of those consumer witnesses to support each specific allegation in the Joint Complaint and to present written testimony in a format required by the Commission's regulations. That approach would have presumably resulted in the introduction of testimony that

was free from many of the infirmities noted above (*i.e.*, inconsistencies, vague recollections, hearsay within hearsay) and would have been manageable by all involved. Instead, the approach that was followed, of sending out surveys or questionnaires to hundreds of potential consumer witnesses and then submitting all of them as "testimony," is what has created the situation now being faced by the parties and the Administrative Law Judges.

Given that the Joint Complainants chose their course of action in this proceeding, it is not up to Respond Power to determine how to streamline or manage the hearings. While Respond Power is committed to working with the parties and the ALJs to ensure that this process goes as smoothly as possible, it is certainly not willing to give up its rights to cross examine each and every witness if it elects to do so. Respond Power strenuously opposes the Joint Complainants' proposal to follow the "pattern or practice" approach for admitting evidence into the record of this proceeding and urges the ALJ to reject this proposal.

II. ARGUMENT

A. The Commission Lacks Jurisdiction To Hear Pattern Of Practice Cases And Needs Substantial Evidence Upon Which To Base Its Decisions.

The Joint Complainants' Memorandum of Law contains an extensive analysis of the use of customer affidavits in Federal Trade Commission ("FTC") "pattern of practice" consumer protection prosecutions in various federal district courts. In doing so, the Joint Complainants offer suggestions for acceptance of "pattern of practice" evidence into the record in this proceeding without authentication or cross-examination. Specifically, the Joint Complainants' suggest that if a representative sampling of customers testifies that they were misled or deceived by Respond Power, the remaining verified statements should simply be admitted into the record. Naturally, it would be the Joint Complainants who would select the sampling of consumer

witnesses who would be offered, and Respond Power would be deprived of the opportunity to test the claims of the remaining witnesses, many of whom raised different specific claims.

Notably, the Joint Complainants made no mention of a "pattern of practice" in the Joint Complaint and launched into this proposal without even citing any provision in the Public Utility Code, 66 Pa.C.S. §§ 101 *et seq.* ("Code"), that permits the Commission to entertain "pattern of practice" or class action types of proceedings. Likewise, the Joint Complainants fail to refer to any Commission precedent for implementing such an approach.

As a creation of the General Assembly, the Commission has only the powers and authority granted to it by the General Assembly and contained in the Public Utility Code, 66 Pa. C.S. §§ 101 *et seq* ("Code"). *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937 (Order entered May 28, 2008; *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977). The Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. Pa. Pub. Util. Comm'n,* 43 A.2d 348 (Pa. Super. 1945). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967) ("*Roberts*"). Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992), alloc. denied, 637 A.2d 293 (Pa. 1993).

Code Section 701 authorizes the Commission to hear complaints about acts done or omitted by a regulated entity in violation of any law which the Commission has jurisdiction to administer, or any regulation or order of the Commission. 66 Pa.C.S. § 701. Neither Code Section 701 nor any other provision of the Code authorizes the Commission to hear pattern of practice or class action types of proceedings.

Further, Code Section 332(a) places the burden of proof for an order on the proponent of the order. 66 Pa.C.S. § 332(a). To satisfy that burden, the proponent of the order must prove each element of its case by a preponderance of evidence. *Samuel J. Lansberry, Inc. v. Pennsylvania Public Utility Commission*, 578 A.2d 600 (Pa. Cmwlth. 1990). A preponderance of evidence is established by presenting evidence that is more convincing, by even the smallest amount, than that presented by the other parties to the case. *Se Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

Additionally, it well-settled that the Commission's decision must be supported by substantial evidence in the record. 2 Pa.C.S. § 704. Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and Western Railway Co. v. Pennsylvania Public Utility Commission*, 489 Pa. 109, 413 A.2d 1037 (1980).

In accordance with these well-established principles, Joint Complainants are obligated to present substantial evidence to support their factual allegations and claims of violations of the Code and the Commission's regulations and orders. The Joint Complainants have pointed to nothing in the Code or Pennsylvania case law that would permit the Commission to conclude that a regulated entity has committed a violation without proof that such a violation has occurred.

The Joint Complainants refer to Pennsylvania Rules of Civil Procedure as supporting the use of a representative sampling of customers to obtain relief for an entire class as part of a class action proceeding. Pa.C.R.P. 1702. However, the Commission has rejected prior attempts to be used as a forum for a class action lawsuit. See *Painter v. Aqua PA, Inc*, Docket No. C-2011-2239557 (Opinion and Order entered May 22, 2014); *Pettko v. Pennsylvania American Water*

Company, Docket No. C-2011-2226096 (Administrative Law Judge Order dated October 5, 2011 and adopted by Commission Order on February 18, 2013). Therefore, the civil rules allowing the use of a sampling of customers to support class action relief are irrelevant and inapplicable here.[1]

Moreover, a "pattern of practice" approach is not appropriate in this proceeding due to the unique facts and circumstances of each individual sales transaction. For instance, while some of the consumer statements contain vague and generalized allegations that they were promised savings, others are specific about a percentage of savings for a defined time period. Also, some statements describe a consumer's understanding, which may have been from any number of sources other than Respond Power, while others claim that sales representatives of Respond Power made specific promises to them. In short, each statement is a description of the customer's unique interaction with Respond Power and involves many nuances that warrant a more in-depth review. It is precisely for this reason that federal courts in Pennsylvania have found that claims involving deceptive business practices are not suitable for class action treatment. *See Kostur v. Goodman Global, Inc.*, 2014 WL 6388432 (E.D. Pa) (claims of deceptive business practices involve varying levels of reliance, causation and damages between each individual).

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[1] Respond Power also disputes the ability of the Joint Complainants to pursue what is effectively a class action lawsuit at the Commission. While the Attorney General's enabling statute (73 P.S. § 201-4) authorizes the initiation of civil actions to address violations of the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.*, the Commission has already determined that it is not the appropriate forum to hear those claims. *Commonwealth of Pennsylvania, et al. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655 (Order entered December 11, 2014). Further, Code Section 701 expressly provides that the Commonwealth through the Attorney General may be a complainant before the Commission only as an advocate for the Commonwealth as a consumer of public utility services. 66 Pa.C.S. § 701. The Consumer Advocate's enabling statute authorizes it to represent the general interests of consumers as a party. 71 P.S. § 309-4(a). *See Suprick v. Commonwealth Telephone Co.*, Docket No. C-00903161, 1995 LEXIS 15. While its enabling statute also references its ability to name a consumer or group of consumers in an action brought in the name of the Commonwealth, it does not specify any ability to initiate a class action lawsuit, and in any event, the Joint Complaint in this case did not name a consumer or group of consumers. 71 P.S. § 309-4(d).

To the extent the Joint Complainants intend to prove multiple violations by Respond Power, it is incumbent upon them to present substantial evidence of each and every specific violation alleged. The Joint Complainants cannot expect to prove a discrete number of violations and then ask the Commission to speculate that more violations must have occurred. Such a request would directly violate the bedrock principle that Commission findings cannot be based on a "mere trace of evidence or a suspicion of the existence of a fact sought to be established." *Norfolk, supra.*

The Commission has never found violations or assessed penalties based on assumptions about how customers might have been affected by a utility's actions, without any evidence of a violation against specific customers. Rather than employing a "pattern of practice" approach to situations involving multiple customers, the Commission has considered the number of customers affected by a violation in determining appropriate penalties. *See* 52 Pa. Code § 69.1201; s*ee also Rosi v. Bell Atlantic-Pa., Inc. and Sprint Communications Company*, Docket No. C-00992409 (Order entered February 10, 2000) ("*Rosi*"). Section 69.1201(c)(5) specifically provides for the Commission to consider the number of customers affected by a violation in making this determination. However, the Commission has expressly refrained from speculating about the number of possibly affected customers if there is no evidence in the record to demonstrate how many customers were in fact affected by a violation. *See, e.g., Eckroth v. Verizon Pa. Inc.,* Docket No. C-2011-2279168 (Order entered April 28, 2013). *See also, Pa. Public Utility Commission, Bureau of Investigation and Enforcement v. UGI*, Docket No. M-2013-2338981, 308 PUR 4th 301, 2013 Pa. PUC LEXIS 782 (2013) (for purposes of determining civil penalty, compliance history was indicative of a pattern of allegations regarding gas safety

violations, as well as a failure on the part of management to adequately focus on gas safety issues).

B. The Commission May Not Rely On Unauthenticated Hearsay Statements In Making Factual Findings and Legal Conclusions.

Pennsylvania Rule of Evidence 801 defines "hearsay" as a statement that the declarant makes outside a current trial or hearing and that a party offers in evidence to prove the truth of the matter asserted in the statement. P.R.E. 801. The statements made by the consumers in their "testimonies" were not made during a hearing and are offered to provide the truth of the matters asserted. As such, they constitute hearsay under Pennsylvania Rule of Evidence of 801.

Hearsay is not admissible as evidence under Pennsylvania Rule of Evidence 802, except as specifically provided by the rules, a statute or the Pennsylvania Supreme Court. P.R.E. 802. It has long been recognized in Pennsylvania that hearsay rules are not mere "technical rules of evidence" but instead are fundamental rules of law that should be followed by agencies when facts crucial to the issue are sought to be placed on the record. *See, e.g., Loudon v. Viridian Energy*, PA PUC Docket NO. C-2011-2244309 (Initial Decision dated February 2, 2012, Final Order entered March 29, 2012; *Gibson v. W.C.A.B.*, 861 A.2d 938 (Pa. 2004); and *Anthony v. PECO Energy Co.*, PA PUC No. C-2014-2408057 (Order entered July 30, 2014).

Further, Pennsylvania Rule of Evidence 901 requires the authentication of documentary evidence. P.R.E. 901. Under the Commission's regulations, written testimony is subject to the same rules of admissibility and cross-examination of the sponsoring witness as if it were presented orally in the usual manner. 52 Pa. Code § 5.412. In Commission hearings, the author of the prepared testimony is called to authenticate it as a witness pursuant to P.R.E. 901(b)(a).

Without such authentication, the witness statements such as the ones proffered by the Joint Complainants are inadmissible as hearsay.

It is also well-settled that a finding based wholly on hearsay cannot support a legal conclusion by an administrative agency. *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366 (Pa. Cmwlth. 1976). The Commission has held that "[a]lthough the Pennsylvania Rules of Evidence are relaxed in an administrative proceeding, crucial findings of fact may not be established solely by hearsay evidence." *Pa. P.U.C., Bureau of Investigation & Enforcement v. Yellow Cab Co. of Pittsburgh*, Docket No. 2012-2249031, 2013 WL 5912555 (Pa. P.U.C. Oct. 8, 2013). Even when hearsay is not excluded, the Commission has refused to make findings of fact without separate evidence corroborating it. *See, e.g., Jackson v. PECO Energy Co.*, Docket No. F-2013-2351046 (July 5, 2013); *Davis v. Equitable Gas., LLC*, Docket No. C-2011-2252493, 2012 WL 3838095 (April 27, 2012).

The Joint Complainants have pointed to no applicable exception that would permit the admission of this hearsay testimony. Their attempt to rely on the residual exception to the hearsay rule in Federal Rule of Evidence 807 is misplaced. While it may be appropriate at times to look beyond the Pennsylvania Rules of Evidence for guidance as to the admissibility of evidence, it is neither necessary nor proper to do so in this situation. Pennsylvania Rule of Evidence 802 expressly notes that exceptions to the hearsay rule are limited to those set forth in the Pennsylvania Rules of Evidence or prescribed by the Pennsylvania Supreme Court or a statute. P.R.E. 802. Since the residual exception to the hearsay rule has been expressly rejected by the Pennsylvania Supreme Court, it may not be relied upon here. *See Commonwealth v. Stallworth*, 566 Pa. 349, 781 A.2d 110, 128, n.2 (2001).

Even if the Commission would have relevant Pennsylvania legal precedent for applying the residual exception, federal courts have expressed significant skepticism about its use and have stressed that it be applied only in very limited circumstances. The courts' rationale for using it rarely is that there must be a "clear basis of trustworthiness" to support the out-of-court statement, and the burden is on the party seeking to invoke the residual exception to clearly demonstrate the existence of those requisite guarantees of trustworthiness. *See Reassure Am. Life Ins. Co. v. Warner*, 2010 WL 4782776, *2 (S.D. Fla. 2010). The Joint Complainants have made no effort to establish this clear basis of trustworthiness. To the contrary, particularly given the solicitation of the consumer statements by the Joint Complainants for purposes of litigation and the clear expectation on the part of many consumers for restitution, Respond Power submits that these guarantees could not be made.

In addition, the cases cited by the Joint Complainants in support of the residual exception to the hearsay rule are distinguishable from the present case. For instance, the Joint Complainants heavily rely on the decision in *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 608-609 (9th Cir. 1993) for use of the residual exception to the hearsay rule here. However, the circumstances are very different. In *Figgie*, the Ninth Circuit admitted letters that consumers provided at the time they purchased the product at issue – heat detectors. Notably, they were not admitted to prove liability or wrongdoing but only to establish the prices that customers paid for the heat detectors during the remedy phase of the case. Moreover, the letters were sent by the consumer without solicitation by the FTC. By contrast, the Joint Complainants in the present case actively solicited the customer statements using template questionnaires that were specifically framed to elicit responses that would advance the Joint Complainants' theory of the case. The use of leading questions to elicit specific details of transactions that occurred many

months or years before distinguishes the statements from those used in *Figgie*, and underscores the importance of having the "testimonies" in this case authenticated and subjected to cross examination.

The other FTC cases cited by the Joint Complainants are similarly distinguishable. Specifically, *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564 (7th Cir. 1989) involved the admission of consumer complaint letters to prove only that the defendant was on notice of potentially fraudulent activity. Again, they were not admitted to prove liability. Also, a key factor relied upon by the court in *Amy Travel* to admit the letters was that the customer-affiants were located throughout the country, unlike this case. Similarly, the other case relied upon by the Joint Complainants, *FTC v. Kitco of Nevada*, Inc., 612 F. Supp. 1282, 1294 (D. Minn. 1985), involved the admissibility of customer affidavits to establish the total amount of customer injury, not liability. In *Kitco*, the court also ruled it would be too expensive and time consuming to call witnesses from all parts of the country for that purpose

Not only are all of the consumer witnesses in the present case located in Pennsylvania, a process has been established to allow the witnesses to authenticate their testimony and be subjected to cross-examination by telephone. The ability of witnesses to testify telephonically should weigh heavily in favor of rejecting the notion advanced by the Joint Complainants to admit testimony that has not been authenticated and subjected to cross-examination. The circumstances are already less than ideal for Respond Power since consumers are not being required to travel and provide in-person testimony on cross examination from a witness stand in a crowded hearing room. It is very simple and far less intimidating for the consumers to provide telephonic testimony, which is likely to result in greater participation than if in-person testimony had been required.

Notably, several federal courts have rejected the FTC's attempts to admit customer letters under the residual exception in circumstances that are very similar to those present here. For instance, in *FTC v. Washington Data Resources*, 2011 WL 2669661 (M.D. Fla. July 7, 2011), the court did not permit the FTC to introduce letters that were obtained by way of outreach by the FTC to certain consumers to procure a declaration for the purpose of litigation. Because the FTC offered them as substantive evidence of alleged deceptive statements and misleading marketing material, the federal court in *Washington Data Resources* noted that the statements were not trustworthy.

State courts have likewise rejected attempts by an Attorney General to introduce affidavits under the residual exception in consumer protection proceedings that bear strikingly similar circumstances as are present here. For instance, in *People v. Shifrin*, 2014 WL 785220 (Feb. 27, 2014), the Colorado Court of Appeals rule that customer affidavits were not admissible because the: 1) affiants knew that litigation was pending; 2) the affiants stood to receive substantial restitution based on their affidavits; 3) the affidavits were not written spontaneously or independently, but were obtained by representatives of the Attorney General's office; and 4) the Attorney General's office procured the affidavits to further its position in the litigation.

All four of the above-referenced factors are present here. While Respond Power contends that the Commission may not award any relief to individual consumer witnesses as part of this proceeding, it is clear from reading the "testimonies" that the affiants believe otherwise. Clearly, reliance on the residual exception to the hearsay rule is not appropriate in this case due to the Pennsylvania Supreme Court's express rejection of this exception and the Joint Complainants' attempts to rely on these consumer statements as evidence of alleged deceptive statements and misleading marketing material.

C. Due Process Mandates That Respond Power Be Given Full Opportunity To Confront And Cross Examine Witnesses.

Respond Power's fundamental rights of due process require that it be given the full opportunity to confront and cross examine the witnesses who have offered "testimony" against it. The Joint Complainants have sought revocation of Respond Power's license on the basis of their unprecedented "pattern of practice" theory and based on unauthenticated hearsay evidence. In arguing that solid public policy support their proposed approach to short circuit these proceedings, the Joint Complainants completely lose sight of Respond Power's due process rights.

"[G]overnment licenses to engage in a business or occupation create an entitlement to partake of profitable activity, and therefore, are property rights." *Philadelphia Entertainment and Development Partners, L.P. v. Pennsylvania Gaming Control Bd.*, 34 A.3d 261 (Pa. Cmwlth. 2011). The principle that due process is fully applicable to adjudicative hearings involving substantial property rights is well established. *See Soja v. Pennsylvania State Police*, 45 A.2d 613, 500 Pa. 188 (1982). In *Soja*, the court observed that where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. *See also Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S.Ct. 1011, 1021, 25 L Ed. 2d 287 (1970). The court in *Sojo* also stressed the importance of cross examination when the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might not be truthful or might be motivated by inappropriate factors.

Since a format has been established to permit telephonic testimony that weighs in favor of the Joint Complainants, placing any limitations on Respond Power's ability to cross-examine those witnesses tramples its due process rights in defending against those allegations.

Particularly when the stakes are so high, in that the Joint Complainants are seeking significant refunds, civil penalties and license revocation or suspension, it is critical that Respond Power be given every opportunity to question the claims of each and every consumer witness.

III. CONCLUSION

WHEREFORE, on the basis of the foregoing, Respond Power LLC respectfully requests that the Commission reject the proposal advanced by the Joint Complainants in their Joint Memorandum of Law regarding the admission of "pattern of practice" evidence in the record of this proceeding.

Respectfully submitted,

Dated: February 13, 2015

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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	:	

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).

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Dated this 13th day of February, 2015.

Karen O. Moury, Esq.