



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

March 2, 2015

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Pennsylvania Public Utility Commission, Bureau of Investigation
and Enforcement v. Respond Power LLC
Docket No. C-2014-2438640; C-2014-2427659

Dear Secretary Chiavetta:

Enclosed for electronic filing is the Answer to the Motion to Strike Pre-Served Consumer Direct Testimony on behalf of the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission in the above referenced matter. Copies have been served on the parties of record in accordance with the Certificate of Service.

Sincerely,

A handwritten signature in blue ink, appearing to read "Adam D. Young", is written over the typed name.

Adam D. Young
Prosecutor
PA Attorney ID No. 91822

Counsel for the Bureau of
Investigation and Enforcement

Enclosures

cc: As per Certificate of Service
ALJ Cheskis
ALJ Barnes

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	
Bureau of Investigation and Enforcement	:	
	:	
v.	:	Docket No. C-2014-2438640
	:	
Respond Power, LLC	:	
	:	
Commonwealth of Pennsylvania, et al.	:	
	:	
v.	:	Docket No. C-2014-2427659
	:	
Respond Power, LLC	:	

**BUREAU OF INVESTIGATION AND ENFORCEMENT ANSWER TO THE
MOTION TO STRIKE PRE-SERVED CONSUMER DIRECT TESTIMONY**

AND NOW comes the Pennsylvania Public Utility Commission’s (“Commission”) Bureau of Investigation and Enforcement (“I&E”) and files this Answer to the Motion to Strike Pre-Served Consumer Direct Testimony, filed by Respond Power, LLC (“Respondent”), on February 23, 2015. In support thereof, I&E avers as follows:

1. Admitted.
2. Admitted in part and Denied in part. It is Admitted that Respondent seeks to strike all or portions of the pre-served consumer testimony. It is Denied that the grounds upon which Respondent seeks to strike the pre-served consumer testimony are viable.
3. Denied. While the pre-filed consumer testimony may not strictly comply with 52 Pa. Code § 5.412, it is not necessary to elevate form over function and strike the testimony because it is not typed or is missing line numbers. All the questions are numbered. Both I&E’s and Joint Complainants’ testimony is bound with a table of

contents and easily navigable. I&E submits that Respondent is more than capable of reading and comprehending the testimony, and any questions pertaining to issues with decipherability can be addressed on cross-examination. Moreover, to the extent that any testimony contains “vague recollections, incomplete responses and general meanderings” I&E avers that that is common when asking open-ended questions of layperson consumers. For this reason, Respondent will have the opportunity to cross-examine any witness it so chooses and may ask the consumer to clarify any answers. Additionally, with regard to any testimony containing attachments, many consumers had previously written letters to various state agencies complaining of Respondent’s actions, and those consumers appended such letters to their testimony rather than reinvent the wheel, or otherwise attached a narrative due to space considerations on the original questionnaire.

4. Denied. I&E’s question 11(a) and (b) “Did Respond Power’s salesperson guarantee savings?” would barely qualify as a leading question, and if it is, its impact is *de minimis*. The suggestive, not mandatory, Pa. R. Evid. 611(c) states, “Leading questions *should* not be used on direct or redirect examination except as necessary to develop the witness’s testimony.” (emphasis added). The consumer testimony initially elicits responses from the consumers generally regarding their interaction with Respondent’s salesperson and follows up with a more detailed question. The consumer can answer “yes” or “no” to Question 11(a), and in fact Question 11(b) asks the consumers to explain *if* the answer is “yes.” I&E asserts that this question does not “put the desired answer in the mouth of the witness,” as evidenced by the fact that many of I&E’s witnesses (Fred Jones, Jeanne McCloe, Rachael Butterworth, Brian Herneisey, Tracy Frazier, Evelyn Somerville, Andrew Ciocco, Eric Weaver, Marsha Lewis, and Sadie Skrzat) either did not answer the question, did not recall, or their answer was unresponsive to the question. Four of I&E’s witnesses answered in the affirmative that they were promised savings (Deborah Altman, Ronald Caldwell, Kathleen DiMaggio, and Robert Cowan) and *all four had previously indicated* a promise of savings in Questions 7, 8, and/or 9. *In fact, only one* of I&E’s witnesses (Nicole/Joseph Zayac) answered “yes” to Question 11(a) who did not state in a prior answer that they were

guaranteed savings. Therefore, Respondent's assertion that the question is leading and "literally puts the desired answer in the mouth of the witness" is absurd and *clearly* is not the case.

5. Denied. Any statements made by Respondent, its employees, representatives, and/or agents is deemed a party opponent admission, and is obviously not excluded by the rule against hearsay. *See* Pa. R. Evid. 803(25)(A), (C), and (D).

6. Denied.

7. Denied as a conclusion of law to which no response is required.

8. Denied as a conclusion of law to which no response is required.

9. Denied as a conclusion of law to which no response is required.

10. Denied as a conclusion of law to which no response is required.

11. Denied as a conclusion of law to which no response is required. By way of further response refer to the response in Paragraph 3 herein.

12. Denied. By way of further response refer to the response in Paragraph 3 herein.

13. Denied. By way of further response refer to the response in Paragraph 3 herein. Moreover, the stakes of the case have no bearing on the admissibility of the pre-filed consumer direct testimony. Respondent acts as though it is incapable of "deciphering" hand-written testimony, yet Respondent spent the last four (4) months doing not only that, but also determining which witnesses it intended to cross-examine, and what exhibits would be used for each witness on cross-examination. Additionally, the lack of line numbers on each consumer's testimony in no way hinders Respondent's understanding of the testimony, nor its ability to find the desired responses. All testimony comes with a table of contents, page numbers, and each question is numbered.

14. Denied.

15. Denied

a. Denied. By way of further answer, Question 20 asks the consumer to provide additional important information about the consumer's experience with Respond Power. Mr. Ciocco provided a copy of a letter

that he sent to the Commission as well as to Widener Law. These letters, while not strictly in Q&A format with numbered lines, are attached as exhibits, written by Mr. Ciocco, and tell a far more comprehensive story than would fit in the space provided on the direct testimony questionnaire. Moreover, Mr. Ciocco is available for cross-examination regarding the authenticity of the attachment letters, and the veracity of any statements made therein.

- b. Denied. By way of further answer, Question 20 asks the consumer to provide additional important information about the consumer's experience with Respond Power. Ms. DiMaggio stated in her response to Question 20, "See Attachment," and provided a narrative with a detailed timeline of events. This timeline, while not strictly in Q&A format with numbered lines, is attached as an exhibit, written by Ms. DiMaggio, and tells a far more comprehensive story than would fit in the space provided on the direct testimony questionnaire. Moreover, Ms. Dimaggio is available for cross-examination regarding the authenticity of the attachment, and the veracity of any statements made therein.
- c. Denied. This paragraph applies to a Joint Complainant witness, therefore no response is required. By way of further response I&E submits that, for the reasons set forth in Paragraphs 15 (a) and (b) above, this testimony should not be stricken.
- d. Denied. This paragraph applies to a Joint Complainant witness, therefore no response is required. By way of further response I&E submits that, for the reasons set forth in Paragraphs 15 (a) and (b) above, this testimony should not be stricken.
- e. Denied. This paragraph applies to a Joint Complainant witness, therefore no response is required. By way of further response I&E

submits that, for the reasons set forth in Paragraphs 15 (a) and (b) above, this testimony should not be stricken.

- f. Denied. This paragraph applies to a Joint Complainant witness, therefore no response is required. By way of further response I&E submits that, for the reasons set forth in Paragraphs 15 (a) and (b) above, this testimony should not be stricken.
- g. Denied. This paragraph applies to a Joint Complainant witness, therefore no response is required. By way of further response I&E submits that, for the reasons set forth in Paragraphs 15 (a) and (b) above, this testimony should not be stricken.
- h. Denied. This paragraph applies to a Joint Complainant witness, therefore no response is required. By way of further response I&E submits that, for the reasons set forth in Paragraphs 15 (a) and (b) above, this testimony should not be stricken.

16. Denied. By way of further response, refer to the reasons set forth in Paragraph 4 herein.

17. Denied as a conclusion of law to which no response is required. By way of further answer, refer to Paragraph 4 herein.

18. Denied as a conclusion of law to which no response is required. By way of further answer, refer to Paragraph 4 herein.

19. Denied. By way of further answer, refer to Paragraph 4 herein.

20. Denied. It is Denied that it was even necessary to rephrase the “guaranteed savings question” to elicit the desired response, as evidenced by the fact that four (4) of the five (5) that answered in the affirmative to the “guaranteed savings question” previously did so in Questions 7, 8, 9, or 10. Only one consumer did not previously discuss promised savings in Questions 7, 8, 9, or 10. Refer to Paragraph 4 herein.

21. Admitted. It is Admitted that I&E witnesses had several opportunities prior to the “guaranteed savings question” to raise allegations of promised savings, and, in fact, as alleged in Paragraph 4 herein, four (4) of the five (5) that answered in the affirmative

to the “guaranteed savings question” did so. Only one consumer did not previously discuss promised savings in Questions 7, 8, 9, or 10.

- a. Admitted.
- b. Admitted.
- c. Admitted.
- d. Admitted.

22. Denied. This allegation pertains to the Joint Complainants, and therefore, no response is required by I&E. To the extent a response is necessary, I&E refers to the responses in Paragraphs 4, 20, and 21 herein.

23. Denied. 80% of the I&E consumers answering Question 11 in the affirmative did so after previously, of their own accord, stating that promises or guarantees of savings were made by a Respond Power representative in their responses to Questions 7, 8, 9, and/or 10. They merely affirmed facts already in evidence. The remaining ten (10) witnesses subject to cross-examination by Respondent either did not answer Question 11, did not recall, or wrote an answer unresponsive to the question. Again, clearly, this question neither “puts the desired response in the mouth of the witness,” nor in any way leads the witness.

24. Denied as a conclusion of law to which no response is required. The remainder of this allegation pertaining to non-conclusions of law are likewise Denied.

25. Denied as a conclusion of law to which no response is required.

26. Denied as a conclusion of law to which no response is required.

27. Denied.

- a. Admitted in part and Denied in part. It is Admitted that Exh. AC-1 and Exh. AC-2 contain statements made to the witness by a representative of PECO Energy Company. It is Denied that any of these statements go to the truth of any matter asserted. It is further Denied that any statement made by an employee of the Commission goes to the truth of any matter asserted. Therefore these statements are not hearsay. The letters attached by Mr. Ciocco as Exhibits AC-1 and 2 are narratives that

explain Mr. Ciocco's entire interaction with Respond Power, PECO, and the Commission, and the frustration experienced with receiving an extraordinarily high electric bill and his attempts to remedy this. These statements go to the state of mind of Mr. Ciocco. None of these statements should be stricken, rather, they should be given whatever weight the court deems appropriate.

- b. Admitted in part and Denied in part. It is admitted that Mr. Weaver's testimony contains hearsay statements providing an account of his wife's interactions with Respond Power's representatives. It is Denied that this testimony should be stricken. The declarant of the statements, Mrs. Weaver, will be available vis telephone for cross-examination, and can verify that the statements contained in Mr. Weaver's testimony are true and correct.
- c. Admitted in part and Denied in part. It is admitted that Ms. Altman's testimony contains hearsay statements providing an account of her husband's interactions with Respond Power's representatives. It is Denied that this testimony should be stricken. The declarant of the statements, Mr. Altman, will be available via telephone for cross-examination, and can verify that the statements contained in Mrs. Altman's testimony are true and correct.
- d. Admitted in part and Denied in part. It is admitted that Ms. DiMaggio's testimony contains hearsay statements providing an account of her son's interactions with Respond Power's representatives. It is Denied that this testimony should be stricken. The declarant of the statements, Michael DiMaggio, will be available via telephone for cross-examination and can verify that the statements contained in Ms. DiMaggio's testimony are true and correct.
- e. Denied. This paragraph applies to a Joint Complainant witness, therefore no response is required. By way of further response I&E

- submits that this testimony should not be stricken, and should be given whatever weight the court deems appropriate.
- f. Denied. This paragraph applies to a Joint Complainant witness, therefore no response is required. By way of further response I&E submits that this testimony should not be stricken, and should be given whatever weight the court deems appropriate.
 - g. Denied. This paragraph applies to a Joint Complainant witness, therefore no response is required. By way of further response I&E submits that this testimony should not be stricken, and should be given whatever weight the court deems appropriate.
 - h. Denied. This paragraph applies to a Joint Complainant witness, therefore no response is required. By way of further response I&E submits that this testimony should not be stricken, and should be given whatever weight the court deems appropriate.
 - i. Denied. This paragraph applies to a Joint Complainant witness, therefore no response is required. By way of further response I&E submits that this testimony should not be stricken, and should be given whatever weight the court deems appropriate.
 - j. Denied. This paragraph applies to a Joint Complainant witness, therefore no response is required. By way of further response I&E submits that this testimony should not be stricken, and should be given whatever weight the court deems appropriate.
 - k. Denied. This paragraph applies to a Joint Complainant witness, therefore no response is required. By way of further response I&E submits that this testimony should not be stricken, and should be given whatever weight the court deems appropriate.
 - l. Denied. This paragraph applies to a Joint Complainant witness, therefore no response is required. By way of further response I&E

submits that this testimony should not be stricken, and should be given whatever weight the court deems appropriate.

- m. Denied. This paragraph applies to a Joint Complainant witness, therefore no response is required. By way of further response I&E submits that this testimony should not be stricken, and should be given whatever weight the court deems appropriate.
- n. Denied. This paragraph applies to a Joint Complainant witness, therefore no response is required. By way of further response I&E submits that this testimony should not be stricken, and should be given whatever weight the court deems appropriate.

WHEREFORE, on the basis of the foregoing, I&E respectfully requests that the Administrative Law Judges DENY the Motion to Strike Pre-Served Consumer Direct Testimony.

Respectfully submitted,



Adam D. Young
Prosecutor
Bureau of Investigation & Enforcement
Pennsylvania Public Utility Commission

P.O. Box 3265
Harrisburg, PA 17105-3265

Date: March 2, 2015

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 52 Pa. Code § 1.54 (relating to service by a party).

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Date: March 3, 2015