

COMMONWEALTH OF PENNSYLVANIA



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March 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 Answer of the Commonwealth of Pennsylvania, Bureau of Consumer Protection, and the Office of Consumer Advocate to Respond Power, LLC, Motion to Strike Consumer Direct Testimony, 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 ANSWER OF THE COMMONWEALTH OF PENNSYLVANIA, BUREAU OF  
CONSUMER PROTECTION, AND THE OFFICE OF CONSUMER ADVOCATE  
TO RESPOND POWER, LLC, MOTION TO STRIKE CONSUMER DIRECT TESTIMONY

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TO ADMINISTRATIVE LAW JUDGES BARNES AND CHESKIS:

Pursuant to Sections 5.61 of the Pennsylvania Public Utility Commission (Commission) regulations regarding answers to motions, 52 Pa. Code Section 5.61, 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 Answer to the Respond Power LLC Motion to Strike Pre-Served Customer Testimony (Motion) in the above-captioned proceeding.

**I. INTRODUCTION.**

On June 20, 2014, the Joint Complainants filed a Joint Complaint with the Commission, pursuant to the Public Utility Code, 66 Pa. C.S. Ch. 28, the Commission's regulations, 52 Pa. Code Ch. 54, 56 and 111, the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.* (Consumer Protection Law), and the Telemarketer Registration Act, 73 P.S. § 2241, *et seq.* (TRA). The Joint Complaint includes nine separate counts and alleges that Respond Power, LLC (Respondent or Respond Power) violated Pennsylvania law and Commission Orders and regulations.<sup>1</sup> With respect to relief, the Joint Complainants request that the Commission find that Respondent violated the Public Utility Code, the Consumer Protection Law, and the TRA, 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.<sup>2</sup>

Pursuant to the litigation schedule adopted at the August 25, 2014, Prehearing Conference in this matter, Joint Complainants timely served the ALJs and the parties on October 24, 2014, with consumer direct testimony, consisting of questions and answers and exhibits of

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<sup>1</sup> Specifically, the nine separate counts in the Joint Complaint are as follows: 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) misleading and deceptive welcome letter and inserts; V) slamming; VI) lack of good faith in the handling of complaints; VII) failing to provide accurate pricing information; VIII) prices nonconforming to disclosure statement; and IX) failure to comply with the Telemarketer Registration Act.

<sup>2</sup> For the sake of brevity, Joint Complainants have not included the lengthy and complicated procedural history in its entirety.

200 consumer witnesses and encompassing four volumes, totaling 1140 pages. The testimony relates to each consumer's firsthand experience with Respond Power's marketing, billing and customer service practices. Hearings for the cross-examination of the consumer witnesses are scheduled for March 9 through 13, 2015. A second Prehearing Conference was convened on January 27, 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.

On February 23, 2015, Respondent filed its Motion, seeking to strike and to have ruled inadmissible certain portions of the customer witness testimony and exhibits pre-served by the Joint Complainants on October 24, 2014. In light of the fact that the hearings in this matter are to begin on March 9, 2015, the ALJs directed that Joint Complainants submit their Answer to Respondent's Motion by March 3, 2015. Joint Complainants therefore submit this Answer in compliance with that directive.

Respond Power moves to strike parts of Joint Complainants' customer witness testimony and exhibits on several different grounds, all of which lack merit. First, Respondent asserts that the statements do not comply with the Commission's regulations governing written testimony. Motion at 2. Joint Complainants would first point out that, pursuant to the rule cited by Respond Power, 52 Pa. Code § 5.412, written testimony must be served at least twenty (20) days prior to the hearings scheduled for cross-examination of the testimony. In the instant case, Respond Power had the written testimonies *one hundred and twenty-two* days prior to filing its Motion to Strike, allowing for ample time to raise any issues of form, such as the lack of line-numbering; it did not do so. Joint Complainants would also note that, while written testimony is required of experts in rate cases, it is not required of lay witnesses such as the consumers and former

consumers of Respond Power; the Commission routinely waives strict application of the procedural rules for consumer witnesses. Also, at the prehearing conference where the idea of written direct testimony was first discussed by the ALJs and the parties, the ALJs stated only that the consumer testimony was to be prepared in question-and-answer form and counsel for Respond indicated agreement to that suggestion. Tr. 18-20. No other requirements were discussed or imposed with regard to the consumer statements.

In addition to the issues of form, Respond Power complains of “vague recollections, incomplete responses and general meanderings” by the consumers. Motion at 2. Joint Complainants would acknowledge that the consumer statements are imperfect in certain respects; however, they engaged in an intensive good faith effort to obtain the information from affected consumers in the short time allowed for this purpose and in the format directed by the ALJs. In the sixty days following the prehearing conference, Joint Complainants were required to prepare questions, first-class mail them to consumers who had contacted their offices concerning Respond Power, receive the answers back via U.S. mail, review, organize, reproduce and serve the statements, which were received in numbers far exceeding Joint Complainants’ expectations. All of this was done to avoid the inordinate expenses to the Commission and all of the parties, including Respond Power, of scheduling and attending hearings in various parts of the state or expending a great amount of telephonic hearing time to receive the testimony orally, which would have otherwise been required. Tr. 16-17.

Second, Respondent asserts that Joint Complainants’ Question 12.a., *i.e.* “Did the EGS salesperson guarantee savings?” is “leading” and, therefore, every affirmative answer to that question and to the follow-up Question 12.b., *i.e.*, “If yes, please explain” should be stricken and ruled inadmissible. Motion at 2-3. As discussed in Paragraphs 16 through 23 in Section III.C.,

below, this part of the Motion should be denied. First, as a matter of procedure, if opposing counsel objects to a leading question in the course of a hearing, the remedy is not to strike the witnesses' answers; rather, a Presiding Officer would allow counsel to rephrase the question and allow the witness to answer. Striking the testimony in this context would be an inappropriately harsh result, especially given the time constraints imposed upon Joint Complainants, as noted above, to procure, to organize, to reproduce and to serve the written testimonies of the hundreds of witnesses who called to complain about Respond Power.

Second, the question is not unduly leading because it is immediately followed by the phrase "If yes, explain" -- clearly cuing the consumer that either a "yes" or a "no" answer is possible. Third, a review of the specific answers offered by the Respond Power customers whose testimonies were served demonstrates that they were not answering in a rote manner that "yes, the EGS guaranteed savings." *See, e.g.*, Vol. 1, at 32 ("They stated we were missing out on savings..."); Vol. 1, at 72 ("The monthly newsletters did."); Vol. 1, at 80 ("Yes, he said West Penn Power rate was increasing & I would be crazy to stay with them."); Vol. 1 at 84 ("I didn't know anything about anything from them."); Vol. 1 at 88 ("They explained how much I would save compared to PPL Electric Utilities."). The variety within the answers to Question 12 underscores that these consumer witnesses were not led by the question to answer "Yes."

Fourth, Respondent moves to strike *only* the affirmative answers to Question 12.a.-b., a transparent attempt to shape the evidentiary record in a way that works in the Company's favor, which the Presiding Officers should not allow. Additionally, the civil cases that Respondent cites do not support its argument that the consumer testimony should be stricken and ruled inadmissible in the context of this Commission administrative hearing.

Finally, Respond Power moves that certain third-party statements “offered for the truth of the matter asserted” contained in certain statements and exhibits should be stricken and ruled inadmissible pursuant to the rule against hearsay. Motion at 3. As discussed in Paragraphs 24 through 27 in Section III.D., below, the ALJs should deny this part of the Motion as well. It is common knowledge within Commission practice that Presiding Officers are not bound by the technical rules of evidence in administrative hearings under the Pennsylvania Administrative Procedure Act. 2 Pa. Code § 505. Second, even if they were so bound, some of the examples Respondent has offered of third-party statements “offered for the truth of the matter asserted” do not actually meet the definition of “hearsay” that Respondent cites – or they fall within one of the established exceptions to the rule against admitting hearsay. Third, it is also common knowledge that Commission ALJs generally accept even statements that meet the definition of hearsay and are not within any of the exceptions to the hearsay rule into the record and accord such evidence appropriate weight. Hearsay so admitted may not, standing alone, support a finding of fact, however; admitted hearsay statements may support findings of fact in conjunction with other corroborative non-hearsay evidence. London v. Viridian Energy PA, LLC, Docket No. C-2011-2244309, I.D. (Feb. 2, 2012) (Final Order entered March 29, 2012); Davis v. Equitable Gas Co., LLC, 2012 PaPUC LEXIS 2068 (April 27, 2012), at \*21-22. For all of these reasons as more fully set forth below, the ALJs should deny this Motion.

## **II. ANSWER**

1. Admitted.
2. Admitted that the Respondent has moved to strike consumer testimony on the bases that Paragraph 3 describes; however, Joint Complainants deny that the reasons stated in support of the Motion are in any way valid.

3. Admitted in part and denied in part. Joint Complainants made a good faith effort to procure statements from affected consumers in question-and-answer form as required by the ALJs and as agreed to by the Respondent at the August 25, 2014 prehearing conference. While some of the statements may be vague or incomplete, Joint Complainants engaged in best efforts to procure the information in the time allowed, which precluded working with each affected consumer individually. Moreover, Respondent has had ample time to since October 24, 2014 to review the statements and engage in discovery to obtain more information from the consumers if it believed the omissions to be material to its defense of the allegations, but the Company did not do so.

4. Admitted in part and denied in part. It is admitted only that Question No. 12.a. reads as quoted in Paragraph 4. It is denied that the question is impermissibly leading and that the answers should be stricken.

5. Admitted in part and denied in part. It is denied that the hearsay statements referred to are inadmissible; it is also denied that some of the statements identified by Respondent as hearsay fall within the definition of "hearsay" set forth in Rule of Evidence 803. It is admitted that some of the statements fall within the definition of "hearsay"; however, many of those are also within one of the exceptions that render hearsay admissible even in civil courts, as opposed to administrative agency hearings, under Rule of Evidence 803.

6. Admitted only that Respond Power moves to strike the testimony for the reasons asserted; it is denied that any of the stated reasons are valid.

### **III. ARGUMENT**

#### **A. Applicable Legal Standards.**

7. Admitted.

8. Admitted.

9. Admitted.

10. Admitted in part and denied in part. It is admitted that the Commission, as an administrative entity with quasi-judicial functions, is not limited by the strict rules relating to the admissibility of evidence. It is denied that any of the “essential principles” that must be observed, as noted by the courts in Pittsburgh and Lake Erie Railroad Company v. Pa. Public Utility Commission, 85 A.2d 646, 653, (Pa. Super. 1952) and Bleilevens v. State Civil Service Commission, 312 A.2d 109, 111 ( Pa. Commw. 1973) support granting the Respond Power motion to strike.

B. Respond Power’s Objections as to the Form of the Consumer Testimony Do Not Justify Striking the Statements in Whole or in Part.

11. Admitted in part and denied in part. It is admitted that the Commission’s Rules state that written statements must “normally” be prepared in question-and-answer form and “include a statement of the qualifications” of the witness. 52 Pa. Code § 5.412. It is admitted that the rule requires the insertion of line numbers and that the majority of the statements do not meet this requirement. The questions, however, are numbered in all of the statements, which allows for virtually the same ease of reference as line numbers, therefore, this factor should be disregarded.

Joint Petitioners would note that the Rules of Administrative Practice and Procedure “shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which it is applicable.” 52 Pa. Code § 1.2. That subpart continues: “The Commission or presiding officer at any stage of an action or proceeding may disregard an error or defect of procedure which does not affect the substantive rights of the parties.” Id. Joint Complainants submit that Respond Power has not asserted any effect on its substantive rights

and that this is precisely the type of error or defect that Presiding Officers may disregard. The same applies to the requirement in 52 Pa. Code § 1.32(a) that documents be typewritten, particularly in light of the fact that most consumers would have no reason to own a typewriter in current times; thus, submitting a typewritten version would have been infeasible without a great deal of time and inconvenience.

12. Admitted in part and denied in part. It is admitted that consumer witnesses are not necessarily aware of the requirements set forth in the Commission's rules. The Joint Complainants submit that the consumer witnesses are, in fact, individually unrepresented, as Complainants Attorney General and the Office of Consumer Advocate represent the public interest and the interest of ratepayers, respectively. It is admitted that the Joint Complainants are highly sophisticated government entities that are accustomed to engaging in litigation before the Commission and other tribunals.

13. Admitted in part and denied in part. Joint Complainants engaged in an intensive effort within the time allowed to ensure that the written testimony submitted in support of the Joint Complaint substantially complied with Commission and the ALJs' requirements, with the objective to conserve the Commission's and the parties' resources that would have otherwise been expended in scheduling hearings in various parts of the state or receiving oral direct questions and answers telephonically. Tr. 16-17. It is admitted that the Joint Complainants are seeking license revocation and suspension, civil penalties and the issuance of refunds. Joint Complainants submit further that had Respond Power had an issue with the form or legibility of the consumer statements, as it now asserts, it could have engaged in informal or formal discovery -- or at least could have raised the issue sooner than fourteen days prior to the hearings in this

proceeding, in light of the fact that they were served with the testimonies one hundred and twenty-two days prior to filing the Motion.

14. Denied. None of the issues as to form raised by the Respondent justify striking the consumer statements in their entirety. 52 Pa. Code § 1.2.

15. None of the specific OAG/OCA statements listed by the Respondent in Paragraph 15 should be stricken.

a. No response required by Joint Complainants, as this subparagraph refers to an I&E witness statement.

b. No response required by Joint Complainants, as this subparagraph refers to an I&E witness statement.

c. Joint Complainants' Witness James O'Reilly, Vol. 1, Page 15. Respond Power asserts that Mr. O'Reilly's unmarked attachment is not in question-and-answer format and "gives no indication as to the question(s) to which it pertains." Motion at 6. Joint Complainant OCA has served hundreds of written testimonies in Commission proceedings and has not encountered an objection or motion to strike because the attachments are not in question-and-answer format, so the Presiding Officers should reject this argument. More important, Mr. O'Reilly's attachment is well-written, clear and offers important details that add substantial material information to the question-and-answer document concerning the door-to-door encounter with Respond's agent and the consumer's interaction with Respond's customer service representatives. The evidentiary record would be enhanced with this highly relevant and probative information included and, as with all testimony, Respond will have an opportunity to cross-examine this witness once the statement is admitted.

d. Joint Complainants' Witness Victoria Werkmeister, Vol. 1, Page 23. For all of the same reasons asserted in Paragraph 15.c. above, Respondent's motion to strike and declare Ms. Werkmeister's attachment inadmissible should be denied.

e. Joint Complainants' Witness Linda Newton, Vol. 1, Page 35. For all of the same reasons asserted in Paragraph 15.c. above, Respondent's motion to strike and declare Ms. Newton's attachment inadmissible should be denied.

f. Joint Complainants' Witness Eileen Bowers, Vol. 3, Page 636. For all of the same reasons asserted in Paragraph 15.c. above, Respondent's motion to strike and declare Ms. Bower's attachment inadmissible should be denied.

g. Joint Complainants' Witness Paul Hassinger, Vol. 4, Page 901. For all of the same reasons asserted in Paragraph 15.c. above, Respondent's motion to strike and declare Mr. Hassinger's attachment inadmissible should be denied.

h. Joint Complainants' Witness Barbara Grosz. Vol. 4, Page 984. Joint Complainants disagree with Respondent's description of Ms. Grosz's statement. On Page 984, the answers are responsive to the specific questions on the questionnaire. Also, for all of the same reasons asserted in Paragraph 15.c. above, Respondent's Motion to Strike and declare Ms. Grosz's attachment inadmissible should be denied.

C. Question 12.a. Is Not Impermissibly Leading.

16. It is admitted that the Joint Complainants' question reads as stated in the first sentence of Paragraph 16. Joint Complainants deny that the question is improperly leading and that any affirmative answers to that question and any answers to the follow-up question are inadmissible and should be stricken. This question should be looked at in context, as the following question, 12.b. states: "If yes, please explain." This second part cues the reader that

the answer to the first question, *i.e.*, “Did the EGS salesperson guarantee savings?” may well be either affirmative or negative.

Moreover, if Joint Complainants direct-examined these consumers orally in the hearing room, a leading question might be objected to and, if the objection were sustained, counsel would generally be offered an opportunity to rephrase. Joint Complainants endeavored, within the extreme time constraints imposed to obtain, organize, reproduce and serve the testimonies in support of their Complaint in the interest of conserving the time and resources of the Commission and all parties. To strike testimony now because a question may be interpreted as leading, when no opportunity to rephrase exists, would be an unduly harsh penalty. Moreover, as the rule states, Respondent has the same opportunity to cross-examine the witnesses as if the statement had been offered orally in the hearing room.

17. Admitted in part and denied in part. Joint Complainants admit that, generally speaking, leading questions should not be used on direct examination in administrative proceedings. Joint Complainants would also point out, however, that Pennsylvania Rule of Evidence 611(c) cited by Respondent (Motion at 8) specifically states, “leading questions should not be used on direct or redirect examination, except as necessary to develop the witness’s testimony.” Considering the unusual nature of this case and the stringent time constraints, Joint Complainants submit that presenting consumers with a standard set of questions, including Question 12, to assist in developing their testimony was necessary in this matter. Joint Complainants deny that the Presiding Officers in this case are bound by the cases Respondent cites (Motion at 8), most of which are appellate cases arising from civil trials.

18. Admitted in part and denied in part. Joint Complainants admit that “[a] leading question has been defined as one which puts the desired answer in the mouth of the witness” in

the case of Commonwealth v. Dreibilbis, *supra*, as quoted by the Respondent. The remainder of Paragraph is denied. It is impossible for Respondent to know what was in the minds of the consumers answering the questions received from the Joint Complainants. More important, a review of the series of the many different answers to Question 12 demonstrates that consumers were not rotely answering “Yes” to that question. *See, e.g.*, Vol. 1, at 32 (“They stated we were missing out on savings...”); Vol. 1, at 72 (“The monthly newsletters did.”); Vol. 1, at 80 (“Yes, he said West Penn Power rate was increasing & I would be crazy to stay with them.”); Vol. 1 at 84 (“I didn’t know anything about anything from them.”); Vol. 1 at 88 (“They explained how much I would save compared to PPL Electric Utilities.”). Counsel for Respondent is entitled to explore the consumers’ perception and recollection of the interaction with the EGS salesperson on cross-examination. Further, counsel for Respond Power could have explored consumers’ perception and recollection through timely discovery, as the Company has had this testimony since October 24, 2014, but it did not do so.

19. Denied. It is impossible for Respondent to know what is in the mind of the consumer witnesses concerning what the Joint Complainants are trying to do through this complaint case. The responses to Question 12 are admissible and should be admitted into the evidentiary record.

20. Denied. Respondent is merely speculating about what Joint Complainants could have done or asked in lieu of Question 12, and these statements should be given no weight. The purpose of cross-examination is to probe the accuracy of a witness’s perception, recollection and description of the material facts, so if the Presiding Officers see any problem with Question 12 at all, the remedy is to permit Respondent to cross-examine these witnesses about the nature and extent of their recollection about the interaction with the Respond Power sales agents.

21. Admitted.

22. Admitted.

23. Denied. Respond Power has no first-hand knowledge of what the consumers responding to the questions believed about the statements of the sales representative, nor at what exact juncture or in response to which question they would have first made such an assertion.

D. The Third Party Statements in the Customer Testimonies Are Not Hearsay In the First Instance, or Are within an Exception to the Hearsay Rule or, In The Alternative, Should be Admitted into The Record and Assigned Appropriate Weight By The ALJs.

24. Admitted in part and denied in part. Joint Complainants admit that Pennsylvania Rule of Evidence 801 defines “hearsay” as an out-of-court statement offered to prove the truth of the matter asserted. Joint Complainants deny that the third party oral out-of-court statements contained in the consumer statements, including statements made by Respond Power’s sales representatives to other individuals, fall within the definition of hearsay, as many are not offered “to prove the truth of the matter asserted.” Joint Complainants admit only that the statements were not made while testifying at a hearing in this matter. Joint Complainants further deny that Pennsylvania Rule of Evidence 801(c) applies to Commission proceedings, as argued above, 2 Pa.C.S. § 505, and deny that all of these statements are inadmissible and must be stricken from the testimonies pursuant to Pennsylvania Rule of Evidence 802, as Respondent asserts. Id.

25. Denied. Joint Complainants deny that hearsay is not admissible as evidence in Public Utility Commission proceedings. Presiding Officers are not bound by the rules of evidence and routinely admit hearsay if relevant to develop the evidentiary record; however, it may not be given the same weight as non-hearsay evidence and, if properly objected to, may only support a finding if corroborated by other non-hearsay evidence. These principles govern decisions on hearsay objections at proceedings of the Commission and are explained in the

London v. Viridian Energy PA, LLC, Docket No. C-2011-2244309, I.D. (Feb. 2, 2012) (Final Order entered March 29, 2012), referenced by the Respondent. Joint Complainants would also point out that the decision also expresses another principle applicable to the instant Motion, *i.e.*, that “agent acts or declarations ...when made in the course of one’s business and within the scope of one’s authority, either express or implied, are admissible against one even if they are hearsay.” *Id.* at 7. Thus, to the extent that the testimonies and exhibits the Respondent moves to strike contain statements of Respond Power’s own agents and employees, such statements are clearly admissible.

26. Admitted, except with regard to footnote 10. Respondent asserts, without analysis, that “while various exceptions set forth in the Pennsylvania Rule of Evidence 803 permit hearsay to be admitted into a legal proceeding, Respond Power submits that none of those exceptions is applicable here.” Joint Complainants deny that statement, and submit that any hearsay statement that may be contained within a consumer witness statement falls within one of the exceptions to the hearsay rule, rendering it admissible.

27. Joint Complainants deny that it is essential that statements containing double hearsay be stricken in whole or in part, for the following reasons:

a.-d. No response is required by Joint Complainants as these subparagraphs refer to I&E witness statements.

e. Joint Complainants’ Consumer Witness Jeanne Mann, Vol. 1, page 128. Respondent asserts that the statements made by Ms. Mann incorporate statements made to her by her husband who interacted with the Respond Power sales representative when she was not present; this is correct. This same situation has arisen in other similar cases, which have already gone to hearings. To the extent possible, Joint Complainants have made available both the

consumer witness and the spouse or other member of the household for cross-examination where statements by such others are included in the consumer statement.

The Respondent also objects to the inclusion of the Better Business Bureau records, which are largely iterative of the statements made in the consumer statement, but include additional detail. They are offered not for the truth of the statements included therein, but rather to demonstrate the actions Ms. Mann took to attempt to get relief elsewhere when she got no satisfaction from Respond Power and therefore are not hearsay, *per se*. The documents are also arguably documents created in the normal course of business and, as such, would fall within the business record exception to hearsay. Pa. Rule 803(6). Joint Complainants assert that the documents would benefit the evidentiary record and should not be stricken.

f. Joint Complainants' Consumer Witness Danielle Groff, Vol. 1, Page 152. Respondent's motion to strike this witness's statement must be denied. The statements are not offered for the truth of the matters asserted therein and thus are not inadmissible hearsay; rather, the statements are offered to demonstrate that the sales representative switched the account solely on the basis of contact with the accountholder's mother, who was not authorized to make changes on the account. These statements are highly relevant to the allegations in the Joint Complaint and should not be stricken.

g. Joint Complainants' Consumer Witness Emma Eckenroth, Vol. 2, Page 359. Respondent moves to strike Exhibit EE-1 as inadmissible hearsay. Again, the Presiding Officers are not bound to strictly apply the Pennsylvania Rules in this administrative proceeding. Joint Complainants submit, however, that with the exception of page 367<sup>3</sup>, all of Exhibit EE-1 consists of governmental documents, public records and business records of West Penn Power

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<sup>3</sup> The complaint letter that is attached to the consumer's complaint form on page 367 was typed by Debra Shook, daughter of Ms. Emma Eckenroth, at Ms. Eckenroth's direction.

and Respond Power and, as such, fall within multiple exceptions to the hearsay rule and would be admissible nonetheless. See Pa. Rules 803(6)(Records of a Regularly Conducted Activity), 803(25)(An Opposing Party's Statement).

h. Joint Complainants' Consumer Witness Lori Williams, Vol. 2, Page 378. Respondent asserts that the consumer who submitted the statement relates her husband's experience with the Respond Power sales representative. This same situation has arisen in other similar cases, which have already gone to hearings. To the extent possible, Joint Complainants have made available both the consumer witness and the spouse or other member of the household for cross-examination where statements by such others are included in the consumer statement. The statements should therefore not be stricken.

i. Joint Complainants' Consumer Witness Victor Ogir, Vol. 2, Page 543. Respond Power complains that Mr. Ogir's Exhibit VO-1 contains an account of conversations that he has held with neighbors and coworkers and constitute inadmissible hearsay. Joint Complainants submit that the statement is not offered for the truth of the matter asserted therein, rather it is offered to explain Mr. Ogir's motivation for challenging his Respond Power bills and, as such, is not hearsay *per se*. The statements should not be stricken.

j. Joint Complainants' Consumer Witness Sylvia Bruinsma, Vol. 3, Page 610. Respondent asserts that the consumer who submitted the statement relates her fiance's experience with the Respond Power sales representative. This same situation has arisen in other similar cases, which have already gone to hearings. To the extent possible, Joint Complainants have made available both the consumer witness and the spouse or other member of the household for cross-examination where statements by such others are included in the consumer statement. The statements should therefore not be stricken.

k. Joint Complainants' Consumer Witness Binh Tran, Vol. 3, Page 806.

Respondent asserts that the consumer who submitted the statement relates his sister's experience with the Respond Power sales representative. This same situation has arisen in other similar cases, which have already gone to hearings. To the extent possible, Joint Complainants have made available both the consumer witness and the other member of the household for cross-examination where statements by such others are included in the consumer statement. The statements should therefore not be stricken.

l. Joint Complainants' Consumer Witness Paul Hassinger, Vol. 3, Page 901.

Respondent asserts that the consumer who submitted the statement relates his wife's experience with the Respond Power sales representative. This same situation has arisen in other similar cases, which have already gone to hearings. To the extent possible, Joint Complainants have made available both the consumer witness and the other member of the household for cross-examination where statements by such others are included in the consumer statement. The statements should therefore not be stricken.

m. Joint Complainants' Consumer Witness Kimberly Munn, Vol. 4, Page

914. Respondent complains that within an "unmarked" attachment to Ms. Munn's statement is a reference to her communications with the Spring City Police Department. The attachment is marked "attachment for complaint explanation & settlement." Merely referencing that a communication occurred is not the same as repeating an "out-of-court statement" and the paragraph should not be stricken. The letter that Ms. Munn references, as being attached is not, in fact, attached and therefore cannot be stricken.

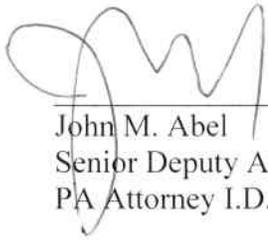
n. Joint Complainants' Consumer Witness Jenny Perez, Vol. 4, Page 947.

Respondent asserts that the consumer who submitted the statement relates her husband's

experience with the Respond Power sales representative. This same situation has arisen in other similar cases, which have already gone to hearings. To the extent possible, Joint Complainants have made available both the consumer witness and the other member of the household for cross-examination where statements by such others are included in the consumer statement. The statements should therefore not be stricken.

### III. CONCLUSION

On the basis of the foregoing, Joint Complainants respectfully request that the Administrative Law Judges deny the Respond Power Motion to Strike Pre-Served Consumer Direct Testimony.



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Nicole R. (Beck) DiTomo  
Deputy Attorney General  
PA Attorney I.D. 315325

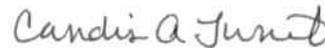
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CERTIFICATE OF SERVICE

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 Joint Answer of the Commonwealth of Pennsylvania, Bureau of Consumer Protection, and the Office of Consumer Advocate to Respond Power, LLC, Motion to Strike Consumer Direct Testimony, in the manner and upon the persons listed below:

Dated this 3rd day of March 2015.

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