**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Commonwealth of Pennsylvania, *et al.* :

:

v. : C-2014-2427659

:

Respond Power LLC :

Pennsylvania Public Utility Commission, :

Bureau of Investigation and Enforcement : C-2014-2438640

:

v. :

:

Respond Power LLC :

**ORDER**

**GRANTING IN PART AND DENYING IN PART**

**MOTION TO STRIKE**

**Introduction**

On June 20, 2014, the Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, through the Bureau of Consumer Protection (OAG), and Tanya J. McCloskey, Acting Consumer Advocate (OCA) (collectively referred to as “the Joint Complainants”) filed with the Pennsylvania Public Utility Commission (Commission) a formal Complaint against Respond Power LLC (Respond or “the Company”), at Docket Number C-2014-2427659. The Joint Complainants averred that they had received numerous contacts and complaints from consumers related to variable rates charged by Respond, including approximately twenty formal complaints filed by consumers at the Commission. As a result, the Joint Complainants averred nine separate counts against Respond, including, but not limited to, making misleading and deceptive claims, making misleading and deceptive promises of savings, slamming and failing to provide accurate pricing information. The Joint Complainants made several requests for relief, including providing restitution and prohibiting deceptive practices in the future.

On August 21, 2014, the Commission’s Bureau of Investigation and Enforcement (I&E) filed a formal Complaint against Respond containing 639 counts of 1) slamming, 2) misleading and deceptive claims of affiliation with electric distribution companies, 3) misleading and deceptive promises of savings, 4) failure to disclose material pricing terms in Respond Power’s Disclosure Agreement/Prices not conforming to Disclosure Agreement, 5) lack of good faith in handling customer complaints/cancellations, 6) inaccurate/incomplete/fraudulent sales agreements and 7) incorrect billing.

Subsequently, the procedural history of these complaints has been quite extensive. Various pleadings have been filed in these matters, including Answers with New Matter, Answers to the New Matter, Preliminary Objections and Answers to the Preliminary Objections. Orders granting in part and denying in part Preliminary Objections were issued. A Petition for Interlocutory Review of a Material Question was filed with the Commission. On October 28, 2014, an Order granting a Petition to Consolidate the formal Complaint filed by I&E against Respond with the formal Complaint filed against Respond by the Joint Complainants was granted.

On February 23, 2015, pursuant to the Order Granting Second Continuance dated December 29, 2014, Respond filed a Motion to Strike Pre-Served Consumer Direct Testimony. In its Motion, Respond sought to strike all or portions of certain pre-served testimony of consumer witness statements and attachments or exhibits served by the Joint Complainants on October 24, 2014 and I&E on November 14, 2014. Respond argued that portions of those statements 1) failed to comply with the Commission’s regulations governing written testimony, 2) included answers to leading questions regarding whether sales representatives guaranteed savings and 3) included inadmissible hearsay and double hearsay.

On March 2, 2015, I&E filed an Answer to Respond’s Motion. In its Answer, I&E admitted or denied the various arguments raised by Respond in each paragraph of its Motion. I&E argued that Respond’s argument regarding regulations governing written testimony elevates form over function and that Respond’s argument regarding leading questions is unfounded because only one of I&E’s witness answered the question in the affirmative who did not previously answer that they were guaranteed savings. With regard to Respond’s argument pertaining to hearsay, I&E argued, among other things, that the statements constitute a hearsay exception because they are admissions by a party opponent.

On March 3, 2015, the Joint Complainants filed an Answer to Respond’s Motion. In their Answer, the Joint Complainants argued that Respond’s Motion should be dismissed because any confusion caused by the form of the pre-served testimony could be addressed in cross-examination and was reasonable in light of the unique circumstances of this proceeding. The Joint Complainants also argued that Respond’s argument regarding leading questions is without merit because, among other things, the yes or no question is followed by an opportunity to explain the answer. With regard to Respond’s arguments regarding hearsay, the Joint Complainants argued that Presiding Officers are not bound by the technical rules of evidence in administrative hearings and, even if certain statements are hearsay, the statements identified fall within one of the established exceptions to the rule against admitting hearsay.

Respond’s Motion to Strike is ready for disposition. As discussed below, Respond’s Motion will be granted in part and denied in part.

**Failure To Comply With Written Testimony Requirements**

In its Motion, Respond argued that “the vast majority of the consumer statements fail to comply with the written testimony requirements of the Commission’s regulations.” Respond notes in particular that Commission regulations require that written testimony be prepared in question and answer format and have line numbers in the left-hand margin on each page. Respond added that, although the testimony is from consumer witnesses, the Joint Complainants and I&E are highly sophisticated government agencies and there are high stakes to this proceeding. Respond then identified eight specific pieces of testimony that also should be stricken because they include narratives that are not in question and answer format and do not indicate which question they respond to.

In response, I&E argued Respond’s arguments elevate form over function, noting that the testimony is bound with a table of contents and easily navigable. I&E added that the Company can cross-examine witnesses regarding testimony it may believe to be unclear. Similarly, the Joint Complainants argued that the Commission’s regulations can be liberally construed to secure the just, speedy and inexpensive determination of every action and that any error of procedure may be disregarded if substantive rights are not affected. Both I&E and the Joint Complainants responded to each of the individual consumer pre-served direct testimony Respond identified specific concerns with.

Respond’s argument will be rejected. To begin, the Commission’s regulations grant the presiding officer “all necessary authority to control the receipt of evidence.” 52 Pa.Code § 5.403(a). The Commission’s regulations also encourage the use of written testimony. 52 Pa.Code § 5.412(a). Although, as Respond correctly notes, the Commission’s regulations also require written testimony to be prepared in question and answer format and include line numbers in the left-hand margin on each page, 52 Pa.Code § 5.412(e), the Commission’s regulations also allow Presiding Officers the authority to “regulate the course of the proceeding.” 52 Pa.Code § 5.483(a). Most significantly, however, the Commission’s regulations allow for liberal construction to “secure the just, speedy and inexpensive determination of every action or proceeding” and that the “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.” 52 Pa.Code § 1.2(a); *see also*, 52 Pa.Code § 1.2(c) (“presiding officer at any stage of an action or proceeding may waive a requirement of this subpart when necessary or appropriate, if the waiver does not adversely affect a substantive right of a party.”).

The Joint Complainants and I&E have sought the admission of testimony from over 200 hundred witnesses. Initially, the Joint Complainants requested that public input hearings be held throughout the Commonwealth to facilitate receipt of such testimony. The logistics of such an endeavor, including allowing for a similar process in related cases, warranted the alternative process that has been established for this case that involves the admission of pre-served consumer testimony, subject to cross examination and timely motions. Although the number of consumers providing testimony has increased since the original request was made, the process established for this proceeding involving pre-served, written consumer testimony has greatly facilitated an efficient and effective development of the record. To the extent that the process may be hindered as a result of the omission of line numbering or the inclusion of narratives, among other things, that do not strictly conform to the Commission’s regulations, those hindrances are outweighed by the substantial due process benefits to all parties as a result of the process that is being followed in this proceeding. Respond has had the pre-served written consumer testimony for four months and the Company’s substantive rights have been preserved.

Furthermore, as noted by I&E, the consumer testimony is generally readable and comprehensible and any questions regarding decipherability could have been addressed through the Commission’s regulations regarding discovery or can be addressed on cross-examination.

With regard to the particular issues raised regarding eight individual consumers’ testimony, Respond argues that the attachments to these consumers’ testimony should be stricken because they are not provided in question and answer format and/or do not indicate the question numbers to which they pertain. These arguments will also be rejected because, in addition to the reasons cited above, the testimony from both the Joint Complainants’ witnesses and I&E’s witnesses respond to a final question asking “please provide any additional information.” These attachments are responsive to those questions and help further elaborate on the individual consumers’ testimony. This is reasonable and warrants not striking the attachments, as Respond seeks. In addition, the attachments generally are well-written and clear and provide additional information that should not be stricken on this basis.

As such, Respond’s argument that pre-served consumer testimony should be stricken because the consumer statements fail to comply with certain requirements for written testimony contained in the Commission’s regulations will be rejected. The Commission’s regulations allow Presiding Officers the authority, among other things, to regulate the course of the proceeding. The pre-served consumer testimony will not be stricken because they may fail to comply with certain Commission regulations regarding form as Respond’s substantive rights have been preserved and the circumstances of the case warrant such testimony be admitted. The pre-served consumer testimony is an efficient and effective way to admit the testimony of such a large number of consumers.

**Use of Leading Questions**

In its Motion, Respond argued that the question “Did the EGS salesperson guarantee savings? If yes, please explain” is a leading question and that any affirmative answers to that question and the follow up question are inadmissible and should be stricken. Respond added that “each consumer witness knows that the Joint Complainants and I&E are trying to recover money for them from Respond” and “that the question clearly suggests that an affirmative answer is both desired and the one most likely to produce a refund for the witness.” Respond added that the Joint Complainants and I&E could have easily elicited relevant testimony without signaling the desired answer and that Respond should be required to defend allegations only when they are offered by the consumer without being prompted by an impermissible leading question.

In response, I&E argued that four out of five of its witnesses that answered they were guaranteed savings had responded as such to prior questions and that, therefore, the question did not lead the witness in any way. Similarly, the Joint Complainants argued that the follow up “if yes, please explain” “cues the reader that the answer to the first question … may well be either affirmative or negative.” The Joint Complainants added that even if the question is leading, any objection during a hearing would require the question to be rephrased, not to have the answer stricken and that striking the answer now would be unduly harsh. The Joint Complainants agreed that leading questions should not be used during direct examination but that the Pennsylvania Rules of Evidence allow such questions when “necessary to develop the witness’s testimony” and that such is the case here given the circumstances of this case. Both I&E and the Joint Complainants noted that Respond could explore any concerns with answers to this question either through discovery or cross-examination.

Respond’s argument will be rejected. To begin, Respond is correct that a party may not lead its own witness with suggestive questions and that answers to such questions are not admissible. In this case, it is unclear whether the question “Did the EGS salesperson guarantee savings? If yes, please explain” is a leading question. Respond argues that the follow up question “If yes, please explain” “makes it clear to the consumer witness that he or she is expected to answer yes” but Respond provides no support for this argument. In fact, the use of “If” clearly conveys to consumers that it is possible that the salesperson may not have guaranteed savings. It is further noted that each of the pieces of pre-served written testimony is accompanied by a verification that requires the consumer to verify that the answers are true and correct. Any misinformation subjects the consumer to penalties in the Crimes Code relating to unsworn falsification to authorities. At a minimum, Respond could have inquired further regarding answers to this question in discovery and can still probe consumers’ answers during the hearing via cross-examination.

Furthermore, the unique circumstances surrounding this, and related cases, warrants the exercise of judicial discretion in order to “secure the just, speedy and inexpensive determination” of this proceeding, as noted above. The submission of pre-served consumer testimony in this proceeding, subject to cross-examination and timely motions, has greatly facilitated the efficient and effective development of the record. As with Respond’s concerns regarding the form of the testimony, Respond’s concerns about whether the question regarding guaranteed savings is leading is outweighed by the substantial due process benefits afforded all parties as a result of the process that is being followed in this proceeding, assuming the question is in fact misleading. This is particularly true given Respond’s ability to conduct discovery and cross examine any witnesses regarding their answers. This is also true in light of the Presiding Officer’s ability to regulate the course of the proceeding so long as the substantive rights of the parties are not adversely affected. In the alternative, it is unclear how this testimony could have been elicited from this large number of consumers in their testimony in an efficient and effective process without confounding the record. When developing the record with testimony from a large number of lay witnesses, unlike with expert witnesses, the question of whether a salesperson guaranteed savings is not unreasonable.

As such, Respond’s argument that any affirmative answers to the question “Did the EGS salesperson guarantee savings?” as well as any answers to the follow-up question should be stricken as leading, will be rejected. It is unclear whether consumers were led to answer the question a certain way when completing their testimony. As with Respond’s Motion regarding the form of the pre-served consumer testimony, the Commission’s regulations allow Presiding Officers the authority, among other things, to regulate the course of the proceeding and this question and its answers are admissible because Respond’s substantive rights have been preserved and the circumstances of the case warrant as such.

**Hearsay**

In its Motion, Respond argued that several of the consumer witness testimonies contain inadmissible hearsay which should be stricken. Respond identifies statements in the testimony regarding certain oral representations made by sales representatives and those out-of-court verbal statements being offered to prove matters asserted. Respond also notes other “more egregious situations” involving references by sales representatives made to other individuals including comments made by third parties such as representatives of public utilities and governmental entities offered to prove the truth of the matters asserted. Respond identified 14 particular pieces of consumer testimony that it averred contain double hearsay that should be stricken even if other statements are admissible as an exception to the prohibition on hearsay.

In response, I&E responded to Respond’s claims regarding statements made in its witnesses testimony, arguing that the statements are not offered for the truth of the matter asserted and are therefore not hearsay. Additionally, I&E argued that the declarants of the statements identified by Respond will be available for cross-examination and can verify at that time that the statements are true and correct. Similarly, the Joint Complainants argued that the third party statements in the consumer testimonies are not hearsay or are within an exception to the hearsay rule or, in the alternative, should be admitted into the record and assigned the appropriate weight by the Presiding Officers. The Joint Complainants further argued that the Presiding Officers are not bound by the rules of evidence and routinely admit hearsay if relevant to develop the evidentiary record, although hearsay evidence may not be given the same weight as non-hearsay evidence but may support a finding if corroborated by non-hearsay evidence. The Joint Complainants also note that statements made by Respond’s own employees are admissible as a hearsay exception. The Joint Complainants also addressed each aspect of the individual double hearsay arguments made by Respond.

Respond’s argument will be granted in part and rejected in part. To begin, hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Pa.R.E. 801(c). A finding based wholly on hearsay cannot support a legal conclusion by an administrative agency. Pa.R.E. 802. Yet, I&E and the Joint Complainants are also correct that a statement is not hearsay if it does not go to the truth of the matter asserted and that there are numerous exceptions to the hearsay rule. Most significantly, testimony from consumer witnesses regarding what they were told by agents or employees of Respond are considered exceptions to the hearsay rule because they are admissions by a party opponent. Pa.R.E. 803(25). Furthermore, the Joint Complainants are correct that Presiding Officers are not bound by the rules of evidence in Commission proceedings and may assign varying degrees of weight to hearsay evidence if admitted. Most of the statements identified by Respond as being inadmissible hearsay involve consumer testimony regarding what the consumer was told by a Respond agent or employee. Statements made by Respond’s sales representatives are properly excluded from the hearsay rule and admissible as an admission by a party opponent and will be admitted into the record of this proceeding during the hearing.

With regard to the individual consumer testimony Respond has characterized as double hearsay, 10 out of the 14 pieces of testimony pertain to what the consumer testified he or she was told by a family member (i.e., husband, wife, son, mother, fiancée or sister) by an agent or employee of Respond. This comprises testimony from Eric Weaver, Deborah Altman, Kathleen DiMaggio, Jeanne Mann, Danielle Groff, Lori Williams, Sylvia Bruinsma, Binh Tran, Paul Hassinger and Jenny Perez. I&E and the Joint Complainants have indicated that both the consumer who provided the testimony and the relative who spoke with the Respond agent or employee will be made available during the hearing for cross-examination. In addition, to the extent that the consumer who provided the testimony resides at the service address that is the subject of the testimony, and the consumer accepts responsibility for the utility usage at the service address, the consumer may adopt the testimony of a relative. As such, Respond’s argument that consumers who relate in their testimony what they were told by a relative should be stricken as hearsay, as noted above, will be rejected.

In contrast, however, three pieces of individual consumer testimony Respond has characterized as double hearsay include pieces of testimony regarding what the consumer testified he or she was told by a representative of the electric distribution company, the Commission, neighbors, coworkers and the Police Department. This comprises testimony from Andrew Ciocco, Victor Ogir and Kimberly Munn. The portions of those three pieces of testimony that refer to statements made by those third parties will not be admitted into the record. For example, Mr. Ogir states in an attachment to his testimony that he “spoke to at least five people including neighbors and coworkers who stated they were fortunate enough not to be contracted with Respond Power” and that they told him “that under their plans, their bill rates increased just a little bit, had not changed and in one case even decreased.” These are out-of-court statements offered for the truth of the matter asserted made by someone other than the declarant and are impermissible. There is no intent to bring Mr. Ogir’s neighbors and coworkers to the hearing to testify regarding their rate plans and the neighbors’ and coworkers’ statements do not fit into any of the exceptions to hearsay. As a result, the statements of Mr. Ciocco, Mr. Ogir and Ms. Munn will be redacted to exclude impermissible hearsay.

Finally, with regard to the pre-served testimony of Joint Complainant witness Emma Eckenroth, Respond argued that an account of someone other than Ms. Eckenroth about Ms. Ecknroth’s interactions with a Respond sales representatives that was attached to a complaint filed by Ms. Eckenroth with the Attorney General constitutes inadmissible hearsay and should be stricken in its entirety. The account is unsigned and does not identify the declarant. As it is unclear who is providing the account so that person can be questioned, or to see if the account falls within a hearsay exception, the account constitutes inadmissible hearsay and will be stricken.

As such, Respond’s argument that certain consumer testimony containing inadmissible hearsay should be stricken as hearsay will be granted in part and rejected in part. Those consumer testimonies that relate information told by a Respond sales agent or employee to the consumer or to a relative will admissible to the extent that the relative is available to adopt the testimony or the statements represent an exception to the hearsay rule. Those portions of consumer testimony, however, made by a representative of the electric distribution company, the Commission, neighbors, coworkers and the Police Department, or some unknown third party, are inadmissible hearsay and will be stricken.

**Conclusion**

Respond’s Motion to Strike will be granted in part and denied in part. Respond’s argument that the pre-served consumer testimony should be stricken because it fails to conform to the Commission regulations regarding written testimony that requires, for example, line numbers in the left-hand margin is without merit and will be rejected. I&E and the Joint Complainants should be commended for efficiently and effectively seeking the introduction of a vast amount of consumer testimony in this proceeding. Respond has had ample time to issue discovery on that pre-served testimony and can still conduct cross-examination on anything that may be undecipherable. Additionally, Respond’s argument that the pre-served consumer testimony includes a leading question will also be rejected because it is unclear that the consumers have been led in a certain way when completing the testimony and the question is otherwise acceptable under the circumstances of this proceeding. Respond’s Motion with regard to inadmissible hearsay, however, will be granted in part and denied in part. Statements made by Respond’s agents or employees to the consumer, or to a relative of the consumer providing testimony that is available to testify, or who are willing to adopt the testimony of the relative, or whose statements fall within a hearsay exception, will be admitted. However, portions of the testimony of third parties who are unavailable at the hearing, unknown and otherwise not included as an exception to hearsay, will be stricken.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Motion to Strike Pre-Served Consumer Direct Testimony filed by Respond Power, LLC at Docket Number C-2014-2438640 and dated February 23, 2015 is hereby granted in part and denied in part.
2. That portions of the testimony of consumer witnesses regarding third parties who are unavailable at the hearing, and otherwise not included as an exception to hearsay, contained in the pre-served testimony of witnesses Ciocco, Ogir, Munn and Eckenroth will be stricken.

Date: March 6, 2015

Elizabeth Barnes

Administrative Law Judge

Joel H. Cheskis

Administrative Law Judge

**C-2014-2427659 - ATTORNEY GENERAL PA & OFFICE OF CONSUMER ADVOCATE v. RESPOND POWER LLC**

***REVISED 2/17/15***

JOHN M ABEL ESQUIRENICOLE R BECK ESQUIRE

PA OFFICE OF ATTORNEY GENERALBUREAU OF CONSUMER PROTECTION15TH FL STRAWBERRY SQUAREHARRISBURG PA 17120CANDIS A TUNILO ESQUIRE\*\*CHRISTY APPLEBY ESQUIRE\*

KRISTINE E ROBINSON ESQUIRE

OFFICE OF CONSUMER ADVOCATE5TH FLOOR FORUM PLACE555 WALNUT STREETHARRISBURG PA 17101-1923\*\****Accepts eService***

SHARON WEBB ESQUIREOFFICE OF SMALL BUSINESS ADVOCATESUITE 202300 NORTH SECOND STREETHARRISBURG PA 17101***Accepts eService***

ADAM YOUNG ESQUIRE

MICHAEL L SWINDLER ESQUIRE

WAYNE T SCOTT ESQUIRE

PA PUC I&E

PO BOX 3265

HARRISBURG PA 17105-3265

***Accepts eService***

KAREN MOURY ESQUIRE

BUCHANAN INGERSOLL ROONEY PC409 NORTH SECOND STREETSUITE 500HARRISBURG PA 17101

***Accepts eService***