

COMMONWEALTH OF PENNSYLVANIA



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April 6, 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 Answer of the Commonwealth of Pennsylvania and the Office of Consumer Advocate to the Motion of Respond Power, LLC for Scheduling of Settlement Conference and Assignment of Settlement Administrative Law Judge, 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 "Kristine E. Robinson".

Kristine E. Robinson  
Assistant Consumer Advocate  
PA Attorney I.D. #316479

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 :  
INVESTIGATION AND ENFORCEMENT, :  
Complainant :  
: :  
v. : Docket No. C-2014-2438640  
: :  
Respond Power, LLC, :  
Respondent :

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ANSWER OF THE COMMONWEALTH OF PENNSYLVANIA  
AND THE OFFICE OF CONSUMER ADVOCATE  
TO THE MOTION OF RESPOND POWER, LLC  
FOR SCHEDULING OF SETTLEMENT CONFERENCE  
AND ASSIGNMENT OF SETTLEMENT ADMINISTRATIVE LAW JUDGE

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Pursuant to 52 Pa. Code Section 5.61 and the direction of Administrative Law Judges  
Elizabeth Barnes and Joel H. Cheskis (ALJs), the Commonwealth of Pennsylvania, by Attorney

General Kathleen G. Kane through the Bureau of Consumer Protection (OAG) and the Acting Consumer Advocate Tanya J. McCloskey (OCA) (collectively Joint Complainants) provide the following Answer to the Motion of Respond Power, LLC (Respond Power or the Company) for Scheduling of Settlement Conference and Assignment of Settlement Administrative Law Judge (Motion). For the reasons set forth below, the Company's Motion should be denied as unnecessary at this time.

## **I. INTRODUCTION**

On June 20, 2014, Joint Complainants brought a legal action against Respond Power for violations of Pennsylvania law and Pennsylvania Public Utility Commission (Commission) orders and regulations. The Joint Complaint includes nine separate counts, 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) deceptive and misleading welcome letter and inserts; V) slamming; VI) lack of good faith handling of complaints; VII) failing to provide accurate pricing information; VIII) prices nonconforming to disclosure statement; and IX) failure to comply with the Telemarketer Registration Act.

On July 10, 2014, Respond Power filed Preliminary Objections and an Answer with New Matter to the Joint Complaint generally denying the alleged violations. On July 21, 2014, the Joint Complainants filed an Answer to Preliminary Objections. On July 30, 2014, Joint Complainants filed a Reply to Respond Power's New Matter. By Order dated August 20, 2014, the ALJs granted in part and denied in part Respond Power's Preliminary Objections. Specifically, the ALJs found: 1) that the Commission lacks jurisdiction to hear complaints under the Consumer Protection Law (CPL) and the Telemarketer Registration Act (TRA) even though

compliance with these Acts is required by the Commission regulations, and 2) that the Commission lacks jurisdiction to determine if the prices charged to customers conformed to the disclosure statement provided to the customer.

On August 21, 2014, the Commission's Bureau of Investigation & Enforcement (I&E) filed a formal Complaint against Respond Power alleging various violations of the Public Utility Code and the Commission's Regulations and the CPL. Specifically, I&E alleged the following violations: (1) slamming; (2) misleading and deceptive claims of affiliation with Electric Distribution Companies (EDCs) or Government Programs; (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.

On August 25, 2014, a Prehearing Conference was convened and a litigation schedule was adopted for the submission of consumer testimony in the Joint Complainants' proceeding. On September 2, 2014, OAG filed a Notice of Intervention in the I&E proceeding. On September 3, 2014, OCA filed a Notice of Intervention and Public Statement in the I&E proceeding.

On September 8, 2014, Joint Complaints filed a Petition for Interlocutory Review and Answer to Material Questions with the Commission regarding the ALJs' August 20, 2014 Order on Preliminary Objections. Specifically, Joint Complaints sought for the Commission to answer the following questions: (1) Does the Commission have authority and jurisdiction to determine whether a violation of the CPL and TRA has occurred when considering whether the Commission's regulations—which require compliance with these laws—have been violated, and

(2) Does the Commission have the authority and jurisdiction to determine whether the prices charged to customers by an EGS conform to the EGS disclosure statement regarding pricing. On September 18, 2014, the Joint Complainants filed a Brief in Support of their Material Questions, and Respond Power filed a Brief in Opposition. The Commission's Order is pending.

On September 30, 2014, Respond Power filed an Answer to the I&E Formal Complaint and Preliminary Objections. In Respond Power's Preliminary Objections, Respond Power sought the dismissal of various Counts for lack of Commission jurisdiction and legal insufficiency. On October 17, 2014, I&E and OCA filed Answers to Respond Power's Preliminary Objections.

Pursuant to the litigation schedule, on October 24, 2014, Joint Complainants served consumer direct testimony from approximately 200 consumer witnesses. I&E served consumer direct testimony on November 14, 2014. The I&E Docket was consolidated with Joint Complainants' Docket by Order dated October 28, 2014.

On November 17, 2014, ALJs Cheskis and Barnes issued an Order Granting in Part and Denying in Part the Preliminary Objections Filed Against the Formal Complaint of I&E. Specifically, the ALJs found that the Commission has jurisdiction to determine whether prices charged by an EGS reflect advertised prices and prices agreed upon in the disclosure statement, as well as comply with other Commission regulations; the Commission has the authority to order EGSs to issue refunds in certain circumstances; and the Commission lacks jurisdiction to determine whether an EGS violated the CPL, but it has jurisdiction to determine whether an EGS violated the Commission's own consumer protection regulations. On January 27, 2015, the ALJs held a Further Prehearing Conference to determine the remainder of the litigation schedule.

Throughout the course of this proceeding, the parties have actively engaged in Settlement discussions. On September 10, 2014, the parties to this proceeding held an in-person settlement conference. On October 24, 2014, Respond Power provided a proposed term sheet to the parties. On November 12, 2014, the parties had a conference call to discuss Respond Power's proposed term sheet. On December 20, 2014, Respond Power filed this Motion. Joint Complainants and I&E provided Respond Power with a comprehensive, joint counterproposal on December 23, 2014. On January 7, 2015, Respond Power provided the parties with a counterproposal, and the parties had a third settlement discussion regarding that counterproposal. By letter dated January 8, 2015 (January 8 Letter), Respond Power requested that the ALJs hold the Motion in abeyance "[d]ue to the productive discussions engaged in by the parties during [the January 7, 2015 settlement conference] call." On February 2, 2015, Joint Complainants and I&E provided Respond Power with another counterproposal, in which Joint Complainants made a good faith effort to address concerns raised by the parties during the call on January 7, 2015. Hearings for cross-examination of the Joint Complainants' and I&E's consumer witnesses were held on March 9 through March 13, 2015.

The Joint Complainants have yet to receive a response from Respond Power to their February 9, 2015 counterproposal. Instead, by letter dated March 27, 2015, Respond Power renewed its Motion. The ALJs directed the parties to file Responses to the Motion no later than April 6, 2015. For the reasons set forth below, Joint Complainants respectfully request that the Company's Motion be denied as unnecessary at this time.

## II. ANSWER

In its Motion, Respond Power requests that a Settlement ALJ be assigned pursuant to 52 Pa. Code Section 5.231<sup>1</sup> and schedule a settlement conference.<sup>2</sup> In support of its Motion, Respond Power asserts that the designation of an ALJ to participate in settlement discussions would aid in the negotiations and offer a greater likelihood of success. Motion at ¶ 23. Respond Power states that it has a strong interest in avoiding the expenditure of significant resources for

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<sup>1</sup> Section 5.231 provides:

§ 5.231. Offers of settlement.

(a) It is the policy of the Commission to encourage settlements.

(b) Nothing contained in this chapter or Chapter 1 or 3 (relating to rules of administrative practice and procedure; and special provisions) preclude a party in a proceeding from submitting, at any time, offers of settlement or proposals of adjustment, or from requesting conferences for that purpose.

(c) Parties may request that the presiding officer participate in the settlement conferences or that an additional presiding officer or mediator be designated to participate in the settlement conferences.

(d) Offers of settlement, of adjustment, or of procedure to be followed, and proposed stipulations not agreed to by every party, including proposals intended to resolve discovery disputes, will not be admissible in evidence against a counsel or party claiming the privilege.

(e) Subsections (a)—(d) supersede 1 Pa. Code § 35.115 (relating to offers of settlement).

52 Pa. Code § 5.231.

Joint Complainants note that the plural use of the word “parties” in 52 Pa. Code § 5.231(c) is an indication that the request for a Settlement ALJ is to be unanimous.

<sup>2</sup> In its Motion, Respond Power requests that the ALJs schedule the settlement conference by mid-January 2015. Motion at ¶ 28. Joint Complainants note that in its letter renewing this Motion, dated March 27, 2015, Respond Power does not request a specific timeframe.

preparation of administrative proceedings when those resources could be better utilized to achieve a settlement. Motion at ¶ 26. Respond Power further notes that a Settlement ALJ is appropriate due to the unprecedented nature of the Joint Complaint and the complexity of the issues. Motion at ¶ 25.

Joint Complainants have engaged in settlement negotiations in good faith with the Company and will continue to do so. The Joint Complainants submit, however, that a Settlement ALJ is not necessary at this time to aid in settlement negotiations. The parties in this proceeding have actively exchanged settlement proposals. Based on the settlement discussions with Respond Power to date, it was Joint Complainants' understanding that the parties would continue to exchange information and negotiate. The Joint Complainants and I&E provided Respond Power with a second, good faith, comprehensive counterproposal on February 9, 2015. Joint Complainants have timely answered the Company's inquiries concerning the proposal. The Joint Complainants are amenable to further settlement discussions with Respond Power and are prepared to review any counterproposal that Respond Power provides to them.<sup>3</sup>

The Joint Complainants are committed to continuing settlement discussions as part of their duty to represent the public interest and consumers. As such, Joint Complainants respectfully submit that the intervention of a Settlement ALJ at this juncture is unnecessary as the Joint Complainants are guided by their legal duties to represent the public and consumers.

As for Respond Power's interest in "avoiding the expenditure of significant resources for preparation of administrative proceedings," Joint Complainants submit that this point has

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<sup>3</sup> Joint Complainants also note that they have reached a Settlement in a similar case against another EGS and have reached a Settlement in Principle in another similar proceeding without the appointment of a Settlement ALJ. Thus, Joint Complainants submit that a Settlement ALJ is not necessary for Joint Complainants to engage in meaningful settlement discussions.

become moot since Respond Power originally filed this Motion. Respond Power has acknowledged that when it initially filed the Motion, it was concerned with optimizing the likelihood of successful settlement negotiations to avoid the need for the hearings for the cross-examination of the consumer witnesses. See January 8 Letter at 1. These hearings have already occurred. Additionally, Joint Complainants note that the parties have more than a month to continue to engage in settlement discussions before Joint Complainants must serve the direct testimony of their experts or other non-consumer witnesses. Thus, Joint Complainants submit that the parties have time to direct their attention to settlement discussions should the Company provide Joint Complainants and I&E with a counterproposal to the February 9<sup>th</sup> proposal.

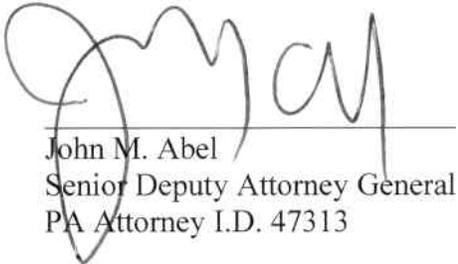
At this time, the settlement and litigation processes in this proceeding are well underway. The Joint Complainants are concerned that the assignment of a Settlement ALJ could unnecessarily delay this proceeding. In its Motion, Respond Power is seeking the assignment of an ALJ other than the presiding ALJs to participate in settlement conferences. See Motion at ¶ 1. As Respond Power notes in Paragraph 25 of its Motion, the Joint Complaint is of an unprecedented nature and raises complex and unique issues. It could take valuable time for a Settlement ALJ to familiarize himself or herself with the specific issues and testimony in this proceeding, potentially delaying settlement negotiations.

Thus, Joint Complainants submit that while they are agreeable to continuing settlement discussions in good faith with Respond Power, the appointment of a Settlement ALJ is not necessary at this time and could unnecessarily delay the proceeding.

III. CONCLUSION

WHEREFORE, for the reasons set forth above, Joint Complainants respectfully request that Respond Power's Motion for Scheduling of Settlement Conference and Assignment of Settlement Judge be denied as unnecessary at this time.

Respectfully submitted,



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Senior Deputy Attorney General  
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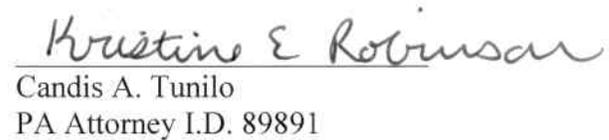
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CERTIFICATE OF SERVICE

Commonwealth of Pennsylvania, by :  
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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 Answer of the Commonwealth of Pennsylvania and the Office of Consumer Advocate to the Motion of Respond Power, LLC for Scheduling of Settlement Conference and Assignment of Settlement Administrative Law Judge, in the manner and upon the persons listed below:

Dated this 6th day of April 2015.

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