**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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| Commonwealth of Pennsylvania, by Attorney General KATHLEEN G. KANE, Through the Bureau of Consumer Protection,  And  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 : | :  :  :  :  :  :  :  :  :  :  :  :  :  :  :  :  :  :  :  :  :  :  :  : | C-2014-2427659  C-2014-2438640 |

**INTERIM ORDER**

**ON MOTION FOR SCHEDULING OF A SETTLEMENT**

**CONFERENCE AND ASSIGNMENT OF SETTLEMENT JUDGE**

On June 20, 2014, 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) filed a formal complaint containing nine counts against Respond Power, LLC (Respond Power).

On August 21, 2014, the Commission’s Bureau of Investigation and Enforcement (BIE) filed a complaint against Respond Power alleging various violations of the Public Utility Code and the Commission’s Regulations and the Consumer Protection Law.

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. These two dockets were consolidated by Order dated October 28, 2014.

On December 30, 2014, Respond Power filed a Motion for Scheduling of Settlement Conference. As articulated in the Motion, throughout the course of this proceeding, the parties have actively engaged in the following 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. Hearings for cross-examination of the Joint Complainants’ and I&E’s consumer witnesses were held on March 9 through March 13, 2015, and consumer direct testimony was entered into the record.

The Joint Complainants claim that they 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 for a Settlement Judge and Conference. Responses to the Motion were filed on or about April 6, 2015. Although I&E has no opposition to the request, OCA and OAG request Respond Power’s Motion be denied as unnecessary at this time.

**Parties Positions**

**Respond Power**

In its Motion, Respond Power requests that a Settlement ALJ be assigned pursuant to 52 Pa. Code Section 5.231and a settlement conference be scheduled.[[1]](#footnote-1) 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. Respond Power states that it has a strong interest in avoiding the expenditure of significant resources for preparation of administrative proceedings when those resources could be better utilized to achieve a settlement. Respond Power further requests a Settlement ALJ due to the unprecedented nature of the Joint Complaint and the complexity of the issues.

**Joint Complainants**

Joint Complainants object to the assignment of a settlement judge and conference. Joint Complainants claim they have engaged in settlement negotiations in good faith with the Company and will continue to do so. The Joint Complainants contend 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, Joint Complainants believe that the parties will continue to exchange information and negotiate. The Joint Complainants and I&E provided Respond Power with a second 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.[[2]](#footnote-2) Joint Complainants assert 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 claim that this point has become moot since the consumer testimony 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 9th proposal.

The Joint Complainants are concerned that the assignment of a new Settlement ALJ could unnecessarily delay this proceeding. It could take time for a Settlement ALJ to become familiar with the specific issues and testimony in this proceeding, potentially delaying settlement negotiations.

**I&E**

I&E does not oppose the motion.

**Disposition**

Section 5.223(c) provides:

(c ) The presiding officer may participate in settlement discussions upon agreement of all parties. A different presiding officer or a mediator, if appropriate, will be assigned by the Chief Administrative Law Judge to participate in settlement discussions upon the request of a party.

52 Pa. Code § 5.223.

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.

52 Pa. Code § 5.231.

In the instant case, there is no agreement between Respond Power and the Joint Complainants to have a presiding officer participate in settlement negotiations within the meaning of Section 5.223(c). Further, Section 5.231 provides for the assignment of a settlement judge when the “parties” request it, not just a “party.” Here, Joint Complainants oppose the designation of a settlement judge for the reasons articulated in their joint answer to the motion. The regulation is not meant to enable one party to force another party to engage in the formalized settlement process permitted by the rule. That is, opposing parties must be willing to submit to the settlement or mediation process. Although I&E is unopposed to the request, the cases have been consolidated for litigation, and we find this case is similar to *Pa. Pub. Util. Comm’n, Bureau of Investigation and Enforcement v. Uber Technologies, Inc.* at Docket No. C-2014-2422723, *Interim Order on Motion For Scheduling of a Settlement Conference and Assignment of Settlement Judge,* dated January 23, 2015. In the *Uber* case, the ALJs denied Uber’s request for the assignment of a settlement judge because I&E opposed the use of a Settlement Judge process. Similarly, in the instant case, Joint Complainants oppose the designation of a settlement judge. Accordingly, at this time, the request is denied as it is opposed. In the event that all parties should agree in the future that they have reached impasse which could benefit from the scheduling of a settlement conference and assignment of a settlement judge, the parties may make such a request.

THEREFORE,

IT IS ORDERED:

1. That Respond Power, LLC’s Motion for Scheduling of Settlement Conference and Assignment of Settlement Judge dated December 30, 2014, and renewed by letter request dated March 27, 2015, is denied without prejudice.
2. That the parties are not precluded from requesting a Settlement Conference and Appointment of Settlement Judge at a future date if they are all in agreement with the request.

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Date: April 14, 2015 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Joel H. Cheskis Administrative Law Judge

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

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

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1. In its letter renewing this Motion, dated March 27, 2015, Respond Power does not request a specific timeframe. [↑](#footnote-ref-1)
2. Joint Complainants also contend 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. [↑](#footnote-ref-2)