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May 14, 2015

VIA E-FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

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

Dear Secretary Chiavetta:

On behalf of Respond Power, LLC, I have enclosed for electronic filing the Motion of Respond Power LLC to Compel Joint Complainants Responses to Interrogatories – Sets II-4, 5 and 6, in the above-captioned matter.

Copies have been served on all parties as indicated in the attached Certificate of Service.

Very truly yours,



Karen O. Moury

KOM/bb
Enclosure
cc: Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**MOTION OF RESPOND POWER LLC TO COMPEL
JOINT COMPLAINANT RESPONSES
TO INTERROGATORIES - SETS II-4, 5 AND 6**

Pursuant to 52 Pa. Code § 5.342(g), Respond Power LLC (“Respond Power”), by and through its counsel, Karen O. Moury and Buchanan Ingersoll & Rooney PC, files this Motion to Compel, requesting the dismissal of the Objections filed by the Office of Consumer Advocate and the Office of Attorney General (“Joint Complainants”) to Respond Power’s Interrogatories - Sets II-4, 5 and 6, and compelling the Office of Consumer Advocate and the Office of Attorney General to provide responses to the Interrogatories, and in support hereof, avers as follows:

I. INTRODUCTION AND BACKGROUND

1. On June 20, 2014, the Joint Complainants filed a Joint Complaint against Respond Power.
2. Count VIII of the Joint Complaint, which is titled “Prices Nonconforming to Disclosure Statement,” alleges that the variable prices charged by Respond Power in early 2014

were not reflective of the cost to serve residential customers and did not conform to the variable rate pricing provision of Respond Power's Disclosure Statement. Joint Complaint ¶¶ 88, 90.

3. Respond Power's Disclosure Statement is attached to the Joint Complaint as Appendix B. The variable rate pricing provision of the Disclosure Statement provides in pertinent part:

Your price may vary from month to month. This rate is set by Respond Power and reflects their Generation Charge as reflected by the PJM Day-Ahead Market, installed capacity (the cost of reserve or standby power), electricity lost on the transmission system ("losses"), estimated state taxes and any other costs Respond Power incurs to deliver your electricity to your electric Utility's Transmission System (where they receive the electricity). For their services, Respond Power adds a profit margin to the electricity...

4. By Order dated August 20, 2014, the Administrative Law Judges ("ALJs") granted in part and denied in part preliminary objections filed by Respond Power, resulting in dismissal of Count VIII of the Joint Complaint.

5. In disposing of the Joint Petition for Interlocutory Review and Answer to Material Questions filed by the Joint Complainants on September 8, 2014, the Commission adopted an Opinion and Order on April 9, 2015, finding that it has the authority and jurisdiction to determine whether the prices charged by Respond Power conformed to the disclosure statement. This was the same conclusion reached by the Commission in *Commonwealth of Pennsylvania, et al. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655 (Order entered December 11, 2014) ("*Blue Pilot Energy Order*"). See also *Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Order entered December 18, 2014) ("*IDT Energy Order*").

6. On January 8, 2015, following entry of the *Blue Pilot Energy Order* and the *IDT Energy Order*, the Joint Complainants filed a Motion to Compel seeking dismissal of Respond

Power's objections to several pending discovery requests seeking pricing data and other cost of service type of information.

7. By Order dated January 23, 2015, the ALJs granted the Joint Complainants' Motion to Compel, reasoning that the information sought by the discovery was relevant to the determination of whether Respond Power's prices conformed to its Disclosure Statement. The ALJs indicated that key components of that analysis are PJM market conditions and Respond Power's profit margin.

8. In the Interrogatories served on the Office of Consumer Advocate ("OCA"), Set II-4, 5 and 6, Respond Power requested the following information:

4. Please identify the number of electric generation suppliers who were the subject of the approximately 2,434 consumer contacts identified in Paragraph 16 of the Joint Complaint.
5. Please identify the number of electric generation suppliers who were the subject of the approximately 2,434 consumer contacts identified in Paragraph 16 of the Joint Complaint and were alleged to have charged consumers: (a) more than \$.2499 per kwh at any point during the period from January 1, 2014 through April 30, 2014; (b) more than \$.3499 per kwh at any point during the period from January 1, 2014 through April 30, 2014; (c) more than \$.3999 per kwh at any point during the period from January 1, 2014 through April 30, 2014; and (d) more than \$.4499 per kwh at any point during the period from January 1, 2014 through April 30, 2014.
6. Please identify the number of customers making the allegations in each of the categories listed in Set II-5.

9. In the Interrogatories served on the Office of Attorney General ("OAG"), Set II-4, 5 and 6, Respond Power requested the following information:

4. Please identify the number of electric generation suppliers who were the subject of the 7,503 consumer complaints identified in Paragraph 18 of the Joint Complaint.
5. Please identify the number of electric generation suppliers who were the subject of the 7,503 consumer complaints identified in Paragraph 18 of the Joint Complaint and were alleged to have charged consumers: (a) more than

\$.2499 per kwh at any point during the period from January 1, 2014 through April 30, 2014; (b) more than \$.3499 per kwh at any point during the period from January 1, 2014 through April 30, 2014; (c) more than \$.3999 per kwh at any point during the period from January 1, 2014 through April 30, 2014; and (d) more than \$.4499 per kwh at any point during the period from January 1, 2014 through April 30, 2014.

6. Please identify the number of customers making the allegations in each of the categories listed in Set II-5.

10. The OCA's Objections are attached as Exhibit A and the OAG's Objections are attached as Exhibit B. Since the Joint Complainants' Objections raise the same three issues and are substantially similar, Respond Power is filing one Motion to Compel seeking dismissal of those Objections.

II. ARGUMENT

A. Respond Power's Interrogatories Are Calculated To Lead To The Discovery Of Admissible Evidence.

11. Under the Commission's regulations, the scope of permissible discovery is broad. Section 5.321(c) generally provides that a party may obtain discovery regarding any matter which is relevant to the subject matter involved in the pending action, if it appears to be reasonably calculated to lead to the discovery of admissible evidence.

12. Because Respond Power's Disclosure Statement relies on PJM market conditions and a profit margin as establishing variable prices, information received by the Joint Complainants from consumers of the variable prices being charged by other electric generation suppliers ("EGSs") in early 2014 is directly related to Respond Power's defense against allegations about its prices being non-conforming to its Disclosure Statement.

13. To the extent that consumers were alleging that other EGSs were charging variable prices at, near or in excess of levels charged by Respond Power, that information would tend to support Respond Power's position that its prices generally reflected the costs to serve

residential customers at that time and otherwise conformed to its Disclosure Statement by reflecting PJM market conditions and EGS profit margins.

14. Respond Power's Interrogatories seeking information about allegations involving other EGSs are clearly distinguishable from prior Motions to Compel that were denied by the ALJs in similar proceedings. In the Order denying Hiko Energy LLC's ("Hiko Energy") Motion to Compel, the ALJs found that the identification of other EGSs' third party marketers was not relevant to the allegations about Hiko Energy's billing and marketing practices, particularly given the responsibility of the EGS for the marketing acts of its employees, agents and representatives. *Commonwealth of Pennsylvania, et al. v. Hiko Energy, LLC*, Docket No. C-2014-2427652 (Order dated September 2, 2014). In the Order denying IDT Energy, Inc.'s ("IDT Energy") Motion to Compel, the ALJs found that other EGSs' disclosure statements and marketing materials were not relevant to the question of whether IDT Energy's disclosure statement and marketing materials complied with the Commission's regulations.

15. By contrast, Respond Power's Interrogatories seek information about variable prices being charged by other EGSs who were facing the same wholesale market conditions during the same time period, which is directly related to the costs incurred by Respond Power to serve residential customers and whether Respond Power's variable prices properly reflected market conditions and EGS profit margins factors in conformance with its Disclosure Statement. Both the number of EGSs about whom variable price complaints were lodged and the number of customers making allegations of certain pricing levels may lead to the discovery of admissible evidence directly related to Respond Power's defense of its variable prices in early 2014.

B. Factual Information About Consumer Allegations Does Not Constitute Attorney Work Product.

16. Section 5.323(a) of the Commission's regulations do not allow discovery of attorney work product, which includes "the mental impressions of a party's attorney or his conclusions, opinions, memoranda, notes, summaries, legal research or legal theories." 52 Pa. Code § 5.323(a).

17. In requesting factual information about allegations made by consumers regarding variable prices charged by EGSs in early 2014, Respond Power's Interrogatories do not seek attorney work product. Nothing in Respond Power's Interrogatories seek mental impressions, legal research or legal theories of the Joint Complainants' attorneys.

18. In support of their objections, the Joint Complainants cite *Sedat, Inc. v. Dept. of Env'tl. Res.*, 163 Pa. Commw. 29, 33, 641 A.2d 1243, 1244 (1994), citing *Okum v. Unemployment Compensation Board of Review*, 77 Pa. Commw. 386, 465 A.2d 1324 (1983). In *Sedat*, the party sought disclosure of an interoffice legal memorandum prepared by an attorney for the Department of Environmental Resources, which was described as a summary of a Superior Court decision and whether it was legally correct or binding upon the department. The issue in that case centered on the protection of attorney work product connected to prior litigation. In protecting the memorandum from disclosure, the court in *Sedat* sought to avoid giving the party the benefit of the agency's legal and factual research and reasoning or to gain insight into the agency's general strategic and tactical approach in deciding when suits are brought, how they are conducted, and on what terms they may be settled.

19. Respond Power's Interrogatories do not seek legal memoranda or any other information connected to prior litigation. Moreover, they do not seek to benefit from the Joint Complainants' legal and factual research and reasoning or gain insight into their general strategic

and tactical approach. Rather, Respond Power's Interrogatories merely request factual information regarding the variable price allegations made by consumers about EGSs. Nothing in the *Sedat* decision supports the protection of this information as attorney work product.

C. Factual Information About Consumer Allegations Is Not Protected By The Investigative Privilege.

20. Although the Joint Complainants correctly note that Pennsylvania recognizes an investigative privilege in protecting certain information from disclosure, the factual information about consumer allegations concerning variable prices charged by EGSs does not qualify for such protection.

21. Under the cases cited by the Joint Complainants, the investigative privilege is invoked only when the release of information would substantially hinder an ongoing criminal investigation and the government makes a specific showing that the release of the information would have a substantial negative impact on its investigation. *See In Re Buchanan*, 880 A.2d 568 (Pa. 2005); *Commonwealth v. Kauffman*, 431 Pa. Super. 527, 605 A.2d 1243 (1992) and *Frankenhauser v. Rizzo*, 59 F.R.D. 339 (E.D. Pa. 1973)

22. Further, the courts have emphasized that that the investigative privilege is not absolute but qualified. When it is asserted, courts are required "to balance the government's interest in ensuring the secrecy of documents whose discovery is sought against the need of the private litigant to obtain discovery of relevant materials in possession of the government." *Frankenhauser* at 343-344.

23. The Joint Complainants have offered no details to explain how the disclosure of factual information about consumer allegations concerning variable prices charged by EGSs, which they have publicly acknowledged receiving, would hinder any ongoing criminal investigation. They have similarly failed to demonstrate any need to ensure the secrecy of this

information, which is directly relevant to the defense of allegations made against Respond Power about its variable prices not reflecting wholesale market conditions and EGS profit margins.

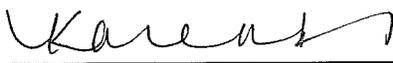
24. To the extent that the information is considered privileged, Respond Power is willing to accept a “confidential” or “highly confidential” designation for the information in question so that Respond Power would be prohibited from revealing the information or utilizing it in a way that is not authorized by the terms of the existing Protective Order covering this proceeding or a new Protective Order that would be issued specifically to safeguard this information.

III. CONCLUSION

For the reasons set forth above, Respond Power LLC respectfully requests that the Objections of the Office of Consumer Advocate and the Office of Attorney General be dismissed and that the OCA and OAG be compelled to provide responses to Respond Power’s Interrogatories Sets II-4, 5 and 6, subject to any appropriate confidentiality protections.

BUCHANAN INGERSOLL & ROONEY PC

May 14, 2015

By: 
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Telephone: (717) 237-4820
Facsimile: (717) 233-0852

Attorneys for Respond Power LLC

EXHIBIT A

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

555 Walnut Street, 5th Floor, Forum Place
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(717) 783-5048
800-684-6560

FAX (717) 783-7152
consumer@paoca.org

May 4, 2015

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Buchanan Ingersoll & Rooney PC
409 N. Second Street
Harrisburg, PA 17101-1357

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

Dear Ms. Moury:

Enclosed please find the Objections of the Office of Consumer Advocate to Interrogatories and Requests for Production of Documents of Respond Power LLC Directed to the Office of Consumer Advocate, Set II.

Also enclosed is a copy of the Certificate of Service for these Objections, which has been filed with Secretary Chiavetta of the Pennsylvania Public Utility Commission.

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: Rosemary Chiavetta, Secretary (Certificate of Service)
Certificate of Service

*206220

**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 :

**OBJECTIONS OF THE OFFICE OF CONSUMER ADVOCATE
TO INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS
OF RESPOND POWER LLC DIRECTED
TO THE OFFICE OF CONSUMER ADVOCATE- SET II**

Pursuant to 52 Pa. Code §§ 5.342(e) and 5.349(d), the Office of Consumer Advocate (OCA) hereby files these Objections to Respond Power, LLC's (Respond Power or the

Company) Interrogatories and Requests for Production of Documents Set II to the OCA (Respond Power's Set II), questions 4, 5 and 6.

I. INTRODUCTION

On April 22, 2015, Respond Power served Respond Power's Set II on the OCA. Respond Power's Set II consists of seven questions directed to the OCA. The OCA communicated its objections to questions 4 through 6 to Respond Power on April 27, 2015 and requested that Respond Power withdrawal the objectionable discovery requests. Thereafter, the Company rejected the OCA's request to withdrawal Respond Power's Set II-4 through Set II-6. As such, the OCA submits the following objections pursuant to 52 Pa. Code §§ 5.342(e) and 5.349(d):

II. OBJECTIONS

The Pennsylvania Public Utility Commission's (Commission) regulations allow a participant to obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party or participant. 52 Pa. Code § 5.321(c). It is not ground for objection that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Id.

Section 5.361 of the Pennsylvania Code, however, specifically limits the scope of discovery in proceedings before the Commission. In particular, Section 5.361 provides the following:

- (a) No discovery or deposition is permitted which:
 - (1) Is sought in bad faith.

- (2) Would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent, a person or participant.
- (3) Relates to a matter which is privileged.
- (4) Would require the making of an unreasonable investigation by the deponent, a participant or witness.

52 Pa. Code § 5.361(a).

The OCA objects to Respond Power's Set II-4, 5 and 6, because the requests seek information that is not relevant and will not lead to admissible evidence in this proceeding, constitute attorney work product, and is protected by the investigative privilege. Respond Power's Set II-4 provides:

4. Please identify the number of electric generation suppliers who were the subject of the approximately 2,434 consumer contacts identified in Paragraph 16 of the Joint Complaint.

Respond Power's Set II-5 provides:

5. Please identify the number of electric generation suppliers who were the subject of the approximately 2,434 consumer contacts identified in Paragraph 16 of the Joint Complaint and were alleged to have charged consumers: (a) more than \$.2499 per kwh at any point during the period from January 1, 2014 through April 30, 2014; (b) more than \$.3499 per kwh at any point during the period from January 1, 2014 through April 30, 2014; (c) more than \$.3999 per kwh at any point during the period from January 1, 2014 through April 30, 2014; and (d) more than \$.4499 per kwh at any point during the period from January 1, 2014 through April 30, 2014.

Respond Power's Set II-6 provides:

6. Please identify the number of customers making the allegations in each of the categories listed in Set II-5.

A. Respond Power's Set II-4, 5, and 6 seek information that is not permitted, because they will not lead to relevant information or admissible evidence in this proceeding.

The Company's discovery requests seek additional details regarding the contacts received by the OCA about variable rates of other electric generation suppliers (EGSs). The OCA submits that these discovery requests seek information that is not permitted because they will not lead to relevant information or admissible evidence regarding the allegations against Respond Power. Specifically, information regarding the practices of other EGSs will not lead to relevant information or admissible evidence regarding the allegations against Respond Power in the Joint Complaint or defenses that Respond Power has asserted. Discovery that is not relevant or not reasonably calculated to lead to admissible evidence is not permitted under the Commission's Regulations. 52 Pa. Code § 5.321(c). The allegations of violations in the Joint Complaint are specific to Respond Power's billing and marketing practices in Pennsylvania. The ALJs have held that information regarding the billing and marketing practices of other EGSs is not relevant in this type of proceeding. See Commonwealth of Pennsylvania, by Attorney General KATHLEEN G. KANE, Through the Bureau of Consumer Protection And TANYA J. McCLOSKEY, Acting Consumer Advocate v. IDT Energy, Inc., Docket No. C-2014-2427657, (Order entered Sept. 8, 2014) (IDT Order); See also Commonwealth of Pennsylvania, by Attorney General KATHLEEN G. KANE, Through the Bureau of Consumer Protection And TANYA J. McCLOSKEY, Acting Consumer Advocate v. HIKO Energy, LLC, Docket No. C-2014-2427652, (Order entered Sept. 2, 2014) (HIKO Order); See also Pennsylvania Public Utility Commission Bureau of Investigation and Enforcement v. HIKO Energy LLC, Docket No. C-2014-2431410, (Order entered December 30, 2014) (I&E Order).¹ In the IDT proceeding, IDT filed a Motion seeking an Order compelling the Joint Complainants to respond to the following interrogatories:

¹ Additionally, during the hearings in the I&E proceeding on April 20, 2015, the ALJs granted HIKO's Motion to Strike statements by I&E witness Dan Mumford in his Surrebuttal testimony that related to the actions of other EGSs.

IDT II-1 – Referencing paragraph 15 of the Complaint, please provide a breakout of the approximately 3000 contacts from customers regarding variable rates, listing the names of all EGSs that were identified by customers by name, and the number of customers that referenced each EGS.

IDT II-4 – Referencing paragraph 18 of the Complaint, please provide a breakout of the approximately 7,503 consumer complaints related to variable rates charged by EGSs, listing the names of all EGSs that were identified by customers by name, and the number of complaints against each EGS.

See IDT Order at 3. In the IDT Order, the ALJs held:

The names of other EGSs and the number of contacts and complaints filed against EGSs other than IDT is not relevant to whether IDT's Disclosure Statement is misleading or deceptive in anyway and, therefore, in violation of a Commission Order or regulation prohibiting such activities. As the Joint Complainants averred in the Complaint, Section 54.43(f) of the Commission's regulations, for example, states that a licensed EGS is responsible for any fraudulent, deceptive or other unlawful marketing acts by *its employees, agents and representatives*. 52 Pa.Code § 54.43(f) (emphasis added). Similarly, the Joint Complainants also cite to Section 111.10 which requires *a supplier and its agents* to comply with regulations that govern marketing, consumer protection and telemarketing sales. 52 Pa.Code § 111.10(a) (emphasis added). None of the violations averred in the Complaint pertain to activities of other EGSs or IDT's activities in relation to other EGSs. Information about the operation of other suppliers will not prove or disprove whether IDT has violated Section 54.43 or 111.10 of the Commission's regulations, or any other Commission regulation. IDT interrogatories II-1 and II-4 are, therefore, irrelevant and beyond the scope of discovery ...

Materials and practices of other EGSs have no relevance to whether IDT's materials and practices violate the Public Utility Code. Even if it was determined that IDT's materials and practices are similar to those of other EGSs, that would not be a reasonable defense to the averments in the Complaint.

IDT Order at 5, 7 (Emphasis in original); See also I&E Order at 4-6 (“[T]he number of customer complaints filed against other EGSs in comparison to HIKO is irrelevant and not likely to lead to admissible evidence in the instant case.”). Thus, the OCA submits that the number of contacts

about and prices charged by EGSs other than Respond Power, as requested by the Company in Set II-4, 5 and 6, is not relevant to any of the allegations in the Joint Complaint or to any defense that Respond Power could raise.

Similarly, in the HIKO Order, the ALJs addressed the issue of whether it was permissible for HIKO to seek information regarding the use of any of HIKO's third party marketers by any of the other four EGSs that Joint Complainants had filed Complaints against with the Commission. The ALJs, again, held that the requested information about other EGS third party sales or marketing services appears to be outside the scope of discovery and not relevant to the issues in that proceeding. See HIKO Order at 4. The ALJs also stated:

While discovery is broad in Pennsylvania, parties are not entitled to engage in "fishing expeditions." Land v. State Farm Mut. Ins. Co., 410 Pa. Super. 579, 585, 600 A.2d 605, 608 (1991). Whether or not the third party sales marketing company used by HIKO was used by any other EGS appears to be irrelevant to the issues posed in this case.

Id.

Here, Respond Power is seeking information regarding the practices of other EGSs. Specifically, in Respond Power's Set II-4 and Set II-5, Respond Power is seeking the number of EGSs who were the subject of consumer contacts to the OCA and prices other EGSs charged consumers. As the ALJs have held, information regarding consumer contacts to the OCA about other EGSs is not relevant and will not lead to admissible evidence regarding the allegations against Respond Power in the Joint Complaint. Similarly, Respond Power's Set II-6 seeks information regarding the number of customers that made certain allegations against other EGSs. The OCA submits that such information is not relevant and will not lead to admissible evidence in this proceeding. Accordingly, the OCA's objections to Respond Power's Set II-4, 5 and 6 should be sustained.

B. Respond Power's Set II-4, 5, and 6 are beyond the permissible scope of discovery, because they seek attorney work product.

The information that Respond Power seeks in Set II-4, 5, and 6 is attorney work product, which is beyond the permissible scope of discovery. Section 5.323(a) of the Pennsylvania Code is consistent with Pa. R.C.P. 4003.3 which codifies the attorney work product privilege and states the following:

The discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

Pa. R.C.P. 4003.3. Respond Power is asking the OCA to disclose information that was collected by OCA attorneys or representative employees regarding consumer contacts to the OCA. In the Commonwealth of Pennsylvania, the existence of the attorney work product privilege when attorneys act in their professional capacity for governmental agencies is well established. Sedat, Inc. v. Dep't of Env'tl. Res., 163 Pa. Commw. 29, 33, 614 A.2d 1243, 1244 (1994), citing Okum v. Unemployment Compensation Board of Review, 77 Pa. Commw. 386, 465 A.2d 1324 (1983). To allow the defendant access to such privileged information, would allow him to “. . . get the benefit of the agency's legal and factual research and reasoning, enabling him to litigate ‘on wits borrowed from the adversary.’ Worse yet, he could gain insight into the agency's general strategic and tactical approach to deciding when suits are brought, how they are conducted, and on what terms they may be settled.” Sedat, 163 Pa. Commw. At 34, 641 A.2d at 1245, quoting F.T.C. v. Grolier, 462 U.S. 19, 30-31, 103 S.Ct. 2209, 2216, 76 L.Ed.2d 387, 397-98 (1983)(J. Brennan, concurring). Moreover, when a representative employee of the attorney who is acting as the agent of the attorney and is directed by the attorney to do the desired preparatory work in

the investigation of a case and its preparation for trial, the product of that work becomes a part of the hiring attorney's work product, just as if the work had been done by the attorney in person or by an employee of his office. 35 ALR 3d 412, 429; See also Brant v. Turnamian, 9 Pa. D. & C. 4th 216, 219 (Com. Pl. 1991).

In Respond Power's Set II-4, 5 and 6, Respond Power is requesting the OCA to disclose the number of other EGSs who were the subject of the complaints received by the OCA, the number of EGSs who charged consumers various prices during the specified time periods, and the number of customers who made certain allegations against other EGSs. This information, collected by the OCA, is legal research that the OCA used in determining whether or not to initiate legal proceedings against EGSs. As such, Respond Power's Set II-4, 5 and 6 constitute attorney work product.

C. Respond Power's Set II-4, 5 and 6 seek information that is protected by the investigative privilege.

Additionally, Respond Power's Set II-4, 5 and 6 seek information that is not permitted because it is protected by the investigative privilege. The Pennsylvania Supreme Court has recognized an investigative privilege to protect information from being discovered during ongoing government investigations. See In re Buchanan, 583 Pa. 620, 880 A.2d 568 (2005); See also Commonwealth V. Kauffman, 413 Pa. Super. 527, 605 A.2d 1243, 1247 (1992) (holds that this privilege "requires the court to balance the government's interest in ensuring the secrecy of the documents whose discovery is sought against the need of the private litigant to obtain discovery of relevant materials in possession of the government"). The investigative privilege has been defined as "the government's privilege to prevent disclosure of certain information whose disclosure would be contrary to the public interest." Frankenhauser v. Rizzo, 59 F.R.D. 339, 342 (E.D. Pa. 1993); See also U.S. v. Lang, 766 F.Supp. 389 (D.Md.1991) (Court found that

one party is seeking notes integral to the continuing investigation of another party and of a possible civil enforcement action; moreover, such selective note-taking can provide clues as to the focus of the on-going investigation and thus are not discoverable).

Respond Power's Set II-4, 5 and 6 are protected by the investigative privilege. The OCA statute states: "it shall be [the Consumer Advocate's] duty, in carrying out the responsibilities under this act, to ... initiat[e] proceedings if in his judgment such may be necessary" 71 P.S. Sec. 309-4(a). Further, subpart (b) states that "[t]he Consumer Advocate may exercise discretion in determining the interests of consumers which will be advocated in any particular proceeding and in determining whether or not ... to initiate any particular proceeding and, in so determining, shall consider the public interest, the resources available and the substantiality of the effect of the proceedings on the interest of consumers."

The customer contacts that the OCA received about other EGSs is protected information gathered solely for the purpose of allowing the Acting Consumer Advocate to exercise her statutory authority to determine whether or not to initiate proceedings in the interest of consumers. Disclosure of such information would be contrary to the public interest, because it would prevent the free flow of information to the OCA, inhibiting the OCA's ability to gain the necessary information that is required in order to determine whether to initiate proceedings in the interest of the public.

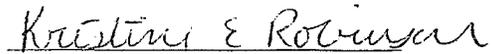
The number of EGSs who were the subject of consumer contacts received by the OCA and the number of customers making certain allegations is not solely factual data. Respond Power is essentially seeking an evaluative summary because this is information that would have been included in the overall strategic and tactical approach in the determination of whether to file

suit against Respond Power; thus, this information as it relates to other EGSs the OCA may be investigating is protected from discovery under the investigative privilege.

III. CONCLUSION

WHEREFORE, the OCA respectfully requests that these Objections be sustained, because Respond Power's Set II-4, 5 and 6 seek information that is not relevant and will not lead to admissible evidence in this proceeding, constitute attorney work product, and is protected by the investigative privilege.

Respectfully submitted,



Candis A. Tunilo
PA Attorney I.D. 89891

Kristine E. Robinson
PA Attorney I.D. 316479
Assistant Consumer Advocates

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ctunilo@paoca.org
krobinson@paoca.org

Counsel for:

Tanya J. McCloskey
Acting Consumer Advocate

Date: May 4, 2015
206112

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
 Objections of the Office of Consumer Advocate to Interrogatories and Requests for Production of
 Documents of Respond Power LLC Directed to the Office of Consumer Advocate, Set II, in the
 manner and upon the persons listed below:

Dated this 4th day of May 2015.

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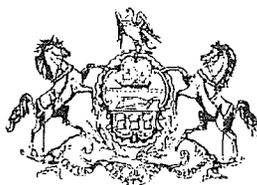
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EXHIBIT B



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

KATHLEEN G. KANE
ATTORNEY GENERAL

May 4, 2015

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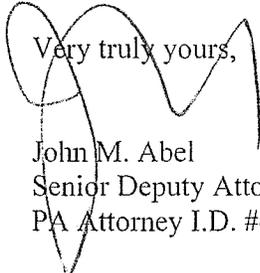
Re: Office of Attorney General's Objections to Respond Power, LLC's
Set II Discovery Requests
Docket Nos. C-2014-2427659 and C-2014-2438640

Dear Secretary Chiavetta:

Enclosed, please find the Office of Attorney General, Bureau of Consumer Protection's Objections to Respond Power, LLC's Set II Discovery Requests in the above-captioned proceedings.

Copies have been served as indicated on the enclosed Certificate of Service.

Very truly yours,


John M. Abel
Senior Deputy Attorney General
PA Attorney I.D. #47313

Enclosures

cc: Honorable Elizabeth Barnes, ALJ
Honorable Joel Cheskis, ALJ
Certificate of Service

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, :
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Complainants :
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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 :

**OBJECTIONS OF THE COMMONWEALTH OF PENNSYLVANIA TO RESPOND
POWER, LLC'S INTERROGATORIES AND REQUESTS FOR
PRODUCTION OF DOCUMENTS – SET II**

Pursuant to 52 Pa. Code § 5.342(c), the Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, through the Bureau of Consumer Protection (Attorney General) submits these Objections to Respond Power, LLC's (Respond Power or the Company)

Interrogatories and Requests for Production of Documents Set II (Requests) directed to the Attorney General.

I. INTRODUCTION

On April 22, 2015 Respond Power served Interrogatories and Requests for Production of Documents Set II on the Attorney General. Respond Power's Interrogatories Set II consists of eight Requests. The Attorney General communicated its objections to Respond Power on April 27, 2015. Counsel for Respond Power was not willing to withdraw its Requests Set II-4 through II-6. As such, the Attorney General submits this written objection to Respond Power's Requests Set II-4 through II-6 because the Requests seek information that is beyond the permissible scope of discovery and the information sought is protected by privilege.

II. OBJECTIONS

In proceedings before the Public Utility Commission (Commission), a participant may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party or participant. 52 Pa. Code § 5.321(c). Section 5.321 outlines the scope of discovery as follows:

- (c) Scope. Subject to this subchapter, a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, content, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

52 Pa. Code § 5.321(c).

Further, Section 5.361 of the Pennsylvania Code specifically limits the scope of discovery in proceedings before the Commission. In particular, Section 5.361 provides the following:

- (a) No discovery or deposition is permitted which:
 - (1) Is sought in bad faith.
 - (2) Would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent, a person or participant.
 - (3) Relates to a matter which is privileged.
 - (4) Would require the making of an unreasonable investigation by the deponent, a participant or witness.

52 Pa. Code § 5.361(a).

The Attorney General asserts that Respond Power's Requests Set II-4 through II-6 seek information that is not permitted because (1) it will not lead to relevant information or admissible evidence regarding the allegations against Respond Power; (2) it is beyond the scope of permissible discovery because it seeks attorney work product; and (3) it is protected by the investigative privilege. As such, Respond Power's Requests Set II-4 through II-6 should be stricken.

A. Requests Will Not Lead To Relevant or Admissible Evidence

The Attorney General asserts that Respond Power's Requests Set II-4 through II-6 seek information that is not permitted because they will not lead to relevant information or admissible evidence regarding the allegations against Respond Power.

Respond Power's Requests state:

Set II-4 – Please identify the number of electric generation suppliers who were the subject of the 7,503 consumer complaints identified in Paragraph 18 of the Joint Complaint.

Set II-5 – Please identify the number of electric generation suppliers who were the subject of the 7,503 consumer complaints identified in Paragraph 18 of the Joint Complaint and were alleged to have charged consumers: (a) more than \$.2499 per kwh at

any point during the period from January 1, 2014 through April 30, 2014; (b) more than \$.3499 per kwh at any point during the period from January 1, 2014 through April 30, 2014; (c) more than \$.3999 per kwh at any point during the period from January 1, 2014 through April 30, 2014; and (d) more than \$.4499 per kwh at any point during the period from January 1, 2014 through April 30, 2014.

Set II-6 – Please identify the number of customers making the allegations in each of the categories listed in Set II-5.

The Attorney General objects to these Requests insofar as they require the Attorney General to provide the number of electric generation suppliers (EGSs) who were named in the complaints filed by consumers, the number of electric generation suppliers who were alleged to charge various amounts per kWh during the time period from January 1, 2014 through April 30, 2014, and the number of customers making those allegations. Such information will not lead to relevant information or admissible evidence regarding the allegations against Respond Power in the Joint Complaint. The information regarding the total number of consumer complaints received by the Attorney General in the Joint Complaint was provided to show the percentage of total consumer complaints specific to Respond Power in relationship to the consumer complaints received. The allegations in the Joint Complaint are specific to Respond Power's billing and marketing practices in Pennsylvania. The Public Utility Code and the Commission's regulations require compliance thereto by each EGS licensed to conduct business in Pennsylvania. See e.g. 66 Pa. C.S. Ch. 28; 52 Pa. Code Ch. 54 and 111. The Commission's regulations further require compliance with the Consumer Protection Law, 73 P.S. § 201-1, et seq. and hold each EGS liable for improper conduct of its employees, agents and representatives. See e.g. 52 Pa. Code §§ 54.43(f) and 111.12(d)(1).

As such, the disclosure of the number of other EGSs who were the subject of the complaints received by the Attorney General, the number of EGSs who charged consumers various amounts per kWh during the specified time periods, and the number of customers

making those allegations against EGSs other than Respond Power cannot lead to relevant information or admissible evidence regarding the allegations in the Joint Complaint against Respond Power.¹ The Company seeks to obtain information that is outside the scope of discovery and the Requests II-4 through II-6 should be stricken. See 52 Pa. Code § 5.321(c).

B. Requests Seek Attorney Work Product

Additionally, the Attorney General objects to these Requests because the information that Respond Power seeks is protected from disclosure by the attorney work product privilege.² Section 5.323(a) of the Pennsylvania Code is consistent with Pa. R.C.P. 4003.3, which codifies the attorney work product privilege and states the following:

The discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

Pa. R.C.P. 4003.3.

¹ Similar discovery requests were made by Defendants in another electronic generation supply case and Administrative Law Judge Elizabeth Barnes has already addressed similar concerns listed in this Objection. See Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, Through the Bureau of Consumer Protection, And Tanya J. McCloskey, Acting Consumer Advocate v. IDT Energy, Inc., Docket No. C-2014-2427657 (Order Denying IDT Energy, Inc. Motion to Compel) (September 8, 2014) (IDT Order). IDT Energy, Inc. (IDT) requested “a breakout of the approximately 7,503 consumer complaints related to variable rates charged by EGSs, listing the names of all EGSs that were identified by customers by name, and the number of complaints against each EGS.” See IDT Order at 3. Judge Barnes articulated that information sought by the Defendant about other EGSs will not lead to relevant information or admissible evidence regarding the allegations against IDT in the Complaint. Id. at 4.

² In the IDT Order, Judge Barnes reflected that it was not necessary to consider the issues regarding whether the interrogatories are beyond the scope of permissible discovery because they seek attorney work product or the information requested is protect by the “investigative privilege” because it was sufficient to deny the interrogatories since the questions will not lead to relevant information or admissible evidence. Id. at 7. Nonetheless, the Attorney General will incorporate these concerns within this Objection in case the ALJs need to address these matters in the future.

Respond Power is requesting the Attorney General to disclose the number of other EGSs who were the subject of the complaints received by the Attorney General, the number of EGSs who charged consumers various amounts per kWh during the specified time periods, and the number of customers making those allegations against EGSs other than Respond Power. Work done by an attorney at the Attorney General's office, or done at that attorney's direction as it related to other EGSs by way of summary or otherwise, clearly falls within the scope of attorney work product privilege.

In the Commonwealth of Pennsylvania, the existence of the attorney work product privilege when attorneys act in their professional capacity for governmental agencies is well established. See e.g. Sedat, Inc. v. Dep't of Env'tl. Res., 163 Pa. Commw. 29, 33, 614 A.2d 1243, 1244 (1994), citing Okum v. Unemployment Compensation Board of Review, 77 Pa. Commw. 386, 465 A.2d 1324 (1983). To allow a defendant access to such privileged information, would allow him to "gain insight into the agency's legal and factual research and reasoning, enabling [him] to litigate 'on wits borrowed from the adversary.'" Worse yet, [he] could gain insight into the agency's general strategic and tactical approach to deciding when suits are brought, how they are conducted, and on what terms they may be settled." Sedat, 163 Pa. Commw. At 34, 641 A.2d at 1245, quoting F.T.C. v. Grolier, 462 U.S. 19, 30-31, 103 S.Ct. 2209, 2216, 76 L.Ed.2d 387, 397-98 (1983)(J. Brennan concurring). Moreover, when a representative employee of the attorney who is acting as the agent of the attorney and is directed by the attorney to do the desired preparatory work in the investigation of a case and its preparation for trial, the product of that work becomes a part of the hiring attorney's work product, just as if the work had been done by the attorney in person or by an employee of his

office.” 35 ALR 3d 412, 429. See also Brant v. Turnamian, 9 Pa. D. & C. 4th 216, 219 (Com. Pl. 1991).

As was previously stated, the disclosure of the information sought in Respond Power’s Requests seek information that would be protected by the attorney work product privilege and the Requests II-4 through II-6 should be stricken.

C. Information Protected By Investigative Privilege

Finally the Attorney General objects to these Requests because the information that Respond Power seeks is protected from disclosure by the investigative privilege. The Pennsylvania Supreme Court has recognized an investigative privilege to protect information from being discovered during ongoing government investigations. See e.g. In re Buchanan, 583 Pa. 620, 880 A.2d 568 (2005). See also Commonwealth v. Kauffman, 413 Pa. Super. 527, 605 A.2d 1243, 1247 (1992) (Held that this privilege “requires the court to balance the government’s interest in ensuring the secrecy of the documents whose discovery is sought against the need of the private litigant to obtain discovery of relevant materials in possession of the government”). The investigative privilege has been defined as “the government’s privilege to prevent disclosure of certain information whose disclosure would be contrary to the public interest.” Frankenhauser v. Rizzo, 59 F.R.D. 339, 342 (E.D. Pa. 1993).

The disclosure of the information requested by Respond Power in Requests Set II-4 through II-6 is contrary to public policy and implicates the investigative privilege. Respond Power’s request is not solely factual data related to the Company’s case. Respond Power’s Requests seek a protected evaluative summary because this is information that would have been included in the overall strategic and tactical approach in the preparation of filing suit against

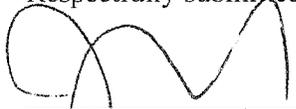
Respond Power. The Attorney General's evaluation in bringing this case will be chilled by disclosing the information Respond Power seeks in these Requests.

Thus, the requested information is protected from discovery under the investigative privilege, and therefore, not discoverable.

III. CONCLUSION

WHEREFORE, based on the foregoing, the information sought by Respond Power in its Requests Set II-4 through II-6 is discovery that is not permitted pursuant to 52 Pa. Code §§5.323(c) and 5.361(a)(3). The Attorney General's objection thereto should be sustained, and Respond Power's Requests Set II-4 through II-6 should be stricken. The Attorney General respectfully requests that these Objections be sustained.

Respectfully submitted,



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PA Attorney I.D. 47313

Nicole R. DiTomo
Deputy Attorney General
PA Attorney I.D. 315325

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**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 :

CERTIFICATE OF SERVICE

I hereby certify that I have, on this day served a true copy of the foregoing Objections to Respond Power, LLC's Set II directed to the Attorney General Kathleen G. Kane, in the manner and upon the persons listed below:

Dated this 4 day of May 2015.

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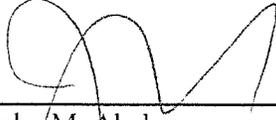
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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

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Dated this 14th day of May, 2015.



Karen O. Moury, Esq.