**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**

**DENYING MOTION TO COMPEL**

**RESPONSES TO RESPOND INTERROGATORIES SET II- 4, 5 and 6**

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. 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. Of note, hearings were held March 9-13, 2015 wherein the pre-served, written testimony of over 100 consumers was admitted into the record subject to cross-examination and timely objections or via stipulation.

On May 14, 2015, Respond filed a Motion to Compel Joint Complainants’ Responses to Interrogatories Set II-4, 5 and 6. On May 19, 2015, the OAG and OCA filed a Joint Answer to Respond’s Motion. Respond’s Motion is now ready for disposition. For the reasons discussed below, Respond’s Motion will be denied.

**Standard And Evidence**

The standard for permissible discovery is set forth in Section 5.321 of the Commission’s regulations:

**§ 5.321. Scope.**

(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). Section 5.361 of the Commission’s regulations, however, provides various limitations on the scope of discovery:

**§ 5.361. Limitation of scope of discovery and deposition.**

 (a)  Discovery or deposition is not permitted which:

  (1)  Is sought in bad faith.

   (2)  Would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent, a person or party.

   (3)  Relates to matter which is privileged.

   (4)  Would require the making of an unreasonable investigation by the deponent, a party or witness.

52 Pa. Code § 5.361(a).

In this case, Respond seeks an Order compelling the OCA to Answer the following interrogatories:

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

Respond served virtually identical interrogatories on the OAG regarding complaints it received about other EGSs.

Both the OAG and the OCA filed separate Objections to the discovery making generally the same three arguments. In their Objections, the Joint Complaints argued that these interrogatories seek information that is not permitted because they will not lead to relevant information or admissible evidence in this proceeding. Second, the Joint Complainants argued that these interrogatories are beyond the permissible scope of discovery because they seek attorney work product. Finally, the Joint Complainants objected because the interrogatories seek information that is protected by the investigative privilege.

In response to the Objections, Respond argued that the interrogatories are calculated to lead to the discovery of admissible evidence because they relate to the costs incurred by the Company to serve residential customers and whether Respond’s variable prices properly reflected market conditions and EGS profit margins in conformance with its Disclosure Statement. Respond also argued that the information sought is not attorney work product because they do not seek legal memoranda or any information connected to prior litigation. Nor do they seek to benefit from Joint Complainants’ legal and factual research and reasoning or gain insight into their general strategic and tactical approach. Respond also argued that factual information about consumer allegations is not protected by the investigative privilege because the investigative privilege is invoked only when the release of information would substantially hinder an ongoing criminal investigation and the government agency makes a specific showing of negative impact on its investigation.

As discussed below, Respond’s Motion will be denied because the interrogatories are not likely to lead to relevant or admissible evidence.

To begin, we reiterate that the Commission’s regulations provide that 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. 52 Pa.Code § 5.321(c), *supra*. We have held in other related proceedings that information regarding other electric generation suppliers (EGSs) is not relevant to whether another EGS – in this case, Respond – has violated Commission regulations. We noted, for example, that the issue of whether one EGS has engaged in “fraudulent, deceptive or other unlawful marketing or billing acts performed by the licensee, its employees, agents or representatives,” is not relevant to whether another EGS has engaged in such activities. *See*, 52 Pa.Code § 54.43(f). Similar reasoning applies to the interrogatories at issue in Respond’s Motion here.

Respond argued that interrogatories II-4, 5 and 6 relate to the provision in its Disclosure Statement that relies on PJM market conditions and a profit margin in establishing variable rates. Respond, therefore, argued that “information received by the Joint Complainants from consumers of the variable prices being charged by other EGSs in early 2014 is directly related to Respond’s defense against allegations about its prices being non-conforming to its Disclosure Statement.” Respond also argued that “to the extent that consumers were alleging that other EGSs were charging variable prices at, near or in excess of levels charged by Respond, that information would tend to support Respond’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.” Respond, therefore, argued that the interrogatories seeking information about complaints made by other EGSs is relevant to this proceeding.

“Market conditions” is a factor identified in Respond’s Disclosure Statement as a basis for setting Respond’s variable rates. However, the number of EGSs who were the subject of the consumer contacts identified in the Complaint, as well as the number of customers making allegations at specific rates charged by other EGSs, is not relevant to, or likely to lead to admissible evidence, regarding whether Respond’s prices charged conformed to its Disclosure Statement. Nor are the specific levels at which those consumers were charged by other EGSs relevant to whether the prices Respond charged conform to its Disclosure Statement. The specific information sought in these interrogatories does not comprise “market conditions.” Rather, the specific information sought in these interrogatories ***arises as a result of*** the “market conditions.” That is, market conditions include issues such as supply restraint, increased demand, weather conditions, among other things. Those conditions impact the market for electric generation supply. The number of customers who filed complaints against other EGSs and the level of the rates they were charged is ***the result of*** those market conditions – when the supply goes down and the demand goes up (market conditions), rates change (result) – not the market conditions themselves.

“Market fluctuations and conditions,” as stated in Respond’s Disclosure Statement, is a basis upon which Respond’s variable rates are set and, therefore, information regarding market fluctuations and conditions is likely to lead to the discovery of admissible evidence and discoverable. Yet, the information sought in Respond’s interrogatories Set II-4, 5 and 6 is ***the result of*** the market conditions, not the market conditions themselves. As such, information about the prices charged by other EGSs and the number of complaints or contacts received by the Joint Complainants at various levels will not lead to the relevant information or admissible evidence regarding the violations specifically alleged against Respond.

Respond has failed to raise any other argument that supports its Motion. For example, it is not a defense to allegations that Respond failed to charge rates that conform to its Disclosure Statement that other EGSs also did not charge rates that conformed to their Disclosure Statements. Nor do the prices other EGSs charge reflect on Respond’s costs to serve residential customers at that time, as Respond argued.

Because we find that Respond interrogatories Set II-4, 5 and 6 are not relevant, and therefore beyond the scope of discovery, the other arguments raised in Respond’s Motion – namely, whether the interrogatories seek attorney work product or are protected by the investigative privilege – are moot. Respond’s Motion to Compel will be denied because the information sought is not likely to lead to relevant or admissible evidence.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Motion to Compel Joint Complainants Responses to Interrogatories Set II-4, 5 and 6 filed by Respond Power LLC in the above-captioned matter on May 14, 2015 is hereby denied.

Date: May 28, 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***

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