

COMMONWEALTH OF PENNSYLVANIA



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August 21, 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 Joint Motion of the Commonwealth of Pennsylvania, Office of Attorney General Bureau of Consumer Protection, and the Office of Consumer Advocate to Strike Portions of the Testimonies of Elliott Wolbrom, Adam Small, and James L. Crist filed on Behalf of Respond Power, LLC, 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 : Docket No. C-2014-2438640
INVESTIGATION AND ENFORCEMENT, :
Complainant, :

v. :

RESPOND POWER, LLC, :
Respondent :

JOINT MOTION OF THE COMMONWEALTH OF PENNSYLVANIA, OFFICE OF
ATTORNEY GENERAL BUREAU OF CONSUMER PROTECTION,
AND THE OFFICE OF CONSUMER ADVOCATE
TO STRIKE PORTIONS OF THE TESTIMONIES OF ELIOTT WOLBROM, ADAM SMALL,
AND JAMES L. CRIST FILED ON BEHALF OF RESPOND POWER, LLC

Pursuant to Section 5.103 of the Pennsylvania Public Utility Commission’s regulations,
52 Pa. Code § 5.103, the Commonwealth of Pennsylvania, by Attorney General Kathleen G.
Kane, through the Bureau of Consumer Protection (BCP or OAG) and Tanya J. McCloskey,
Acting Consumer Advocate (OCA), (together, Joint Complainants) hereby file this Motion to

Strike (Motion) certain portions of the Rebuttal Testimonies of Respond Power, LLC (Respond Power) witnesses Elliott Wolbrom, Respond Power Statement No. 1, Adam Small, Respond Power Statement No. 3, and James L. Crist, Respond Power Statement No. 4- Revised, in the above-captioned proceeding. Those portions of the testimony which are subject to this Motion are Respond Power Statement No. 1, page 6, lines 15-19; page 13, lines 17-18; and page 15, lines 2-9; Respond Power Statement No. 3, page 9, lines 4-6 and 12-13; and page 10, lines 5-7; and Respond Power Statement No. 4- Revised, pages 5-6, lines 30-1. In support of their Motion, Joint Complainants submit as follows:

I. INTRODUCTION

On June 20, 2014, the Joint Complainants filed a Joint Complaint with the Public Utility Commission (Commission) pursuant to the Public Utility Code, 66 Pa. C.S. Ch. 28, the Commission's regulations, 52 Pa. Code Ch. 54, 56 and 111, the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.* (CPL), and the Telemarketer Registration Act, 73 P.S. § 2241, *et seq.* (TRA). The Joint Complaint includes nine separate counts and alleges that Respond Power violated Pennsylvania law and Commission orders and regulations. Specifically, the nine counts in the Joint Complaint are: (1) misleading and deceptive claims of affiliation with electric distribution companies; (2) misleading and deceptive promises of savings; (3) failing to disclose material terms; (4) deceptive and misleading welcome letter and inserts; (5) slamming; (6) lack of good faith handling of complaints; (7) failing to provide accurate pricing information; (8) prices nonconforming to disclosure statement; and (9) failure to comply with the TRA. With respect to relief, the Joint Complainants request that the Commission find, *inter alia*, that Respondent violated the Public Utility Code and the Commission's regulations and Orders; provide restitution to Respondent's customers; impose a

civil penalty; order Respondent to make various modifications to its practices and procedures; and revoke or suspend Respondent's Electric Generation Supplier (EGS) license, if warranted. The Bureau of Investigation and Enforcement (I&E) and the Office of Small Business Advocate intervened in the proceeding.

On July 10, 2014, Respond Power filed Preliminary Objections to the Joint Complaint and an Answer with New Matter generally denying the alleged violations. On July 30, 2014, Joint Complainants filed a Reply to Respond Power's New Matter. On July 21, 2014, the Joint Complainants filed an Answer to Preliminary Objections. By Order dated August 20, 2014, Administrative Law Judges Joel H. Cheskis and Elizabeth Barnes (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 CPL and the 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 September 8, 2014, Joint Complaints filed a Petition for Interlocutory Review and Answer to Material Questions with the Commission. 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 issued an Order on Joint Complainants' Petition for Interlocutory Review and Answer to Material Questions on April 9, 2015, in which it determined that while it does not have the authority and jurisdiction to determine whether a violation of the CPL and TRA has occurred, it does have jurisdiction over alleged violations of its own regulations that require compliance with these laws. This jurisdiction includes determining whether the Commission's regulations prohibiting deceptive and/or misleading conduct and/or the Commission's telemarketing regulations have been violated by an EGS. Therefore, the Commission concluded that it can hear claims alleging fraudulent, deceptive, and/or misleading conduct brought against Respond Power under the Commission's regulations and claims alleging improper verification of enrollment of residential customers brought against Respond Power, improper association of Respond Power with an electric distribution company, and other allegations raised against Respond Power under the Commission's telemarketing Regulations. The Commission also determined that it does 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 August 25, 2014, a Prehearing Conference was convened in the BCP/OCA Docket and a litigation schedule was adopted for the submission of consumer testimony. Pursuant to the litigation schedule, on October 24, 2014, Joint Complainants served consumer direct testimony from approximately 200 consumer witnesses.

On August 21, 2014, I&E filed a formal Complaint against Respond Power alleging various violations of the Public Utility Code, the Commission's regulations and 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 September 2, 2014, BCP filed a Notice of Intervention. On September 3, 2014, OCA filed a Notice of Intervention and Public Statement.

On September 30, 2014, Respond Power filed an Answer to the I&E Formal Complaint and Preliminary Objections. In Respondent'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. 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 the Bureau of Investigation and Enforcement. Specifically, the ALJs found that the Commission has jurisdiction to determine whether prices charged by an EGS reflect marketed 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 October 24, 2014, Joint Complainants served consumer direct testimony from approximately 200 consumer witnesses. The I&E Docket was consolidated with the BCP/OCA Docket by Order dated October 28, 2014. I&E served consumer direct testimony on November

14, 2014. Hearings for cross-examination of the consumer witnesses occurred on March 9 through 13, 2015. Joint Complainants served non-consumer Direct Testimony on May 18, 2015.

On July 21, 2015, Respond Power served Rebuttal Testimony. Joint Complainants submit that Respond Power Statement No. 1, page 6, lines 15-19; Respond Power Statement No. 3, page 10, lines 5-7; and Respond Power Statement No. 4- Revised, page 6, lines 10-17; and Exh. JC-1 constitute uncorroborated hearsay. Further, Joint Complainants submit that Respond Power Statement No. 1, page 13, lines 17-18 and page 15, lines 2-9; and Respond Power Statement No. 4- Revised, page 5, lines 30-1 are not relevant to the issues in this proceeding. Additionally, Respond Power Statement No. 3, page 9, lines 4-6 and 12-13 contain information that Joint Complainants requested in discovery, but Respond Power did not provide. Accordingly, Joint Complainants respectfully request that the ALJs strike Respond Power Statement No. 1, page 6, lines 15-19; page 13, lines 17-18; and page 15, lines 2-9 and Respond Power Statement No. 3, page 9, lines 12-13, and page 10, lines 5-7; Respond Power Statement No. 4- Revised, pages 5-6, lines 30-1; and modify Respond Power Statement No. 3, page 9, lines 4-6 as requested in this Motion.

II. MOTION TO STRIKE

A. Respond Power Statement No. 1, page 6, lines 15-19; and Respond Power Statement No. 3, page 10, lines 5-7 constitute uncorroborated hearsay and therefore, should be stricken.

Pennsylvania Rule of Evidence 801 defines “hearsay” as an out-of-court statement offered to prove the truth of the matter asserted. Pa. R.E. 801. It is well established at the Commission that uncorroborated hearsay may not support a finding of fact. See e.g. Davis v. Equitable Gas Co., LLC, Docket No. C-2011-2252493, Initial Decision at **21-22 (April 27, 2012).

In Mr. Elliott Wolbrom's Rebuttal Testimony submitted on behalf of Respond Power, Mr. Wolbrom testified, in pertinent part, as follows:

We have often heard feedback from potential or former vendors that we "won't sit back and just let them do their job." That is feedback we take as a compliment and serves as testament to the "too hands-on" and "annoying" oversight we employ with our vendors. Those are terms that have been used by vendors when describing Respond Power.

Respond Power Statement No. 1 at 6, lines 15-19.

Additionally, in Mr. Adam Small's Rebuttal Testimony submitted on behalf of Respond Power, Mr. Small testified, in pertinent part, as follows:

A substantial number of customers have called and let us know that they received our letter and had no problems or concerns with our marketing, but were inquiring about any refund they could still receive.

Respond Power Statement No. 3 at 10, lines 5-7.

Both of these statements are hearsay, as they are out-of-court statements being offered to prove the truth of the matters asserted. For example, Respond Power Statement No. 1, page 6, lines 15-19 is being offered to prove that Respond Power does not just "sit back" and let the vendors do their job, but rather is "hands-on." Joint Complainants submit that any other purpose for offering this statement is not relevant to this proceeding. Furthermore, Respond Power Statement No. 3, page 10, lines 5-7 is being offered to prove that Respond Power's customers do not have problems or concerns with Respond Power's marketing. Again, any other purpose for offering this statement is not relevant to this proceeding. Moreover, neither of these statements are corroborated with, for example, exhibits displaying written vendor feedback, vendor testimony, or recorded customer calls or testimony. Therefore, these statements cannot support findings in this proceeding.

Accordingly, Joint Complainants respectfully request the ALJs strike Respond Power Statement No. 1, page 6, lines 15-19 and Respond Power Statement No. 3, page 10, lines 5-7.

B. Respond Power Statement No. 1, page 13, lines 17-18 and page 15, lines 2-9; and Respond Power Statement No. 4- Revised, page 5, lines 30-1 are not relevant to the issues in this proceeding and therefore, should be stricken.

Evidence must be relevant and material in order to be admissible. See 52 Pa. Code § 5.401. In Mr. Elliott Wolbrom's Rebuttal Testimony submitted on behalf of Respond Power, Mr. Wolbrom makes several statements that the ALJs have already determined are not relevant to this proceeding. Specifically, Mr. Wolbrom testified, in pertinent part, as follows:

Many other suppliers took the tact of "rates are so high, we may as well make them higher," ...

...
[Ms. Barbara Alexander] fails to provide any context relative to other Pennsylvania electric generation suppliers (EGSs) during [the first quarter of 2014] or acknowledge the volume of calls that were received. My understanding is that numerous EGSs, including Respond Power, experienced high call volume and longer call duration during the first quarter of 2014. Respond Power, like many other EGSs, took steps to respond to these circumstances. Ms. Alexander, however, focuses solely on Respond Power and deliberately ignores the surrounding environment, which was unexpected and impacted perhaps many, if not all, market participants.

Respond Power Statement No. 1 at 13, lines 17-18 and at 15, lines 2-9.

Furthermore, Mr. Crist testified as follows:

Unfortunately that was very typical of the retail energy industry at the time [experiencing difficulty handling the onslaught of incoming calls during December 2013 through March 2014 and producing dissatisfaction with customers]. Energy marketers were struggling to manage the huge increase of calls from customers, as were utilities themselves.

Respond Power Statement No. 4- Revised page 5-6, lines 30-1.

Information regarding the practices or experiences of other EGSs is not relevant to the allegations against Respond Power in the Joint Complaint or defenses that Respond Power has asserted. The allegations of violations in the Joint Complaint are specific to Respond Power's

billing and marketing practices in Pennsylvania. By Order dated May 28, 2015 (May 28 Order), the ALJs held that information regarding the billing and marketing practices of other EGSs is not relevant in this proceeding. May 28 Order at 5-7; 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. 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

Specifically, in the May 28 Order, the ALJs held:

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).

May 28 Order at 5.

Additionally, in the IDT Order, the ALJs held:

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

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.

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. ...

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 HIKO Order at 4.

Thus, Joint Complainants submit that Mr. Wolbrom's and Mr. Crist's statements about the experiences or practices of other EGSs are not relevant to any of the allegations in the Joint Complaint or to any defense that Respond Power could raise. Accordingly, Joint Complainants request the ALJs strike Respond Power Statement No. 1, page 13, lines 17-18 and page 15, lines 2-9; and Respond Power Statement No. 4- Revised page 5-6, lines 30-1.

C. Respond Power Statement No. 3, page 9, lines 4-6 and 12-13 contain information that Joint Complainants requested from Respond Power in discovery, but Respond Power did not provide to Joint Complainants and, therefore, the ALJs should modify Respond Power Statement No. 3, lines 4-6 and strike Respond Power Statement No. 3, page 9, lines 12-13.

Answers to interrogatories must be verified, full and complete unless an objection is made. 52 Pa. Code § 5.342(a)(4), (a)(6). Additionally, the Commission's regulations require a party or expert witness to supplement discovery responses, as follows:

A party or expert witness who has responded to a request for discovery with a response that was complete when made is under a duty to supplement a response to include information thereafter acquired, as follows:

...

A party or an expert witness is under a duty to amend a prior response upon discovering that the response is incorrect or incomplete.

52 Pa. Code § 5.332(2).

Under the Commission's regulations, if a party fails to provide sufficient answers to discovery, it is appropriate for the presiding officer to issue an order prohibiting the disobedient

party from introducing into evidence designated testimony. See 52 Pa. Code §§ 5.371(a)(1), 5.372(a)(2).

In Mr. Adam Small's Rebuttal Testimony submitted on behalf of Respond Power, Mr. Small makes several statements that are inconsistent with discovery responses served by Respond Power. Accordingly, Joint Complainants submit that it is proper to strike or limit those portions of Mr. Small's testimony.

Specifically, on July 2, 2014, Joint Complainants served their first set of interrogatories on Respond Power (Joint Complainants' IR Set I). Joint Complainants' Set I, Interrogatory No. 21 provides as follows:

Please provide the total amount of refunds, rebates, or other relief provided for each month from January 1, 2014, to present.

On July 22, 2014, Respond Power served the following **CONFIDENTIAL** response to Joint Complainants' IR Set I-21: **[Begin Confidential]**

[End Confidential]. A copy of Respond Power's Responses to Joint Complainants' IR Set I-21 is attached hereto as Exhibit A. Respond Power did not serve any supplemental responses to Joint Complainants' IR Set I-21.

Mr. Small, however, testified that "Respond Power has voluntarily given refunds and re-rates to customers in the amount of approximately \$1,154,490.69 absent the filing of any informal or formal complaint with the Commission." Respond Power Statement No. 3 at 9, lines 4-6. Additionally, when asked how much money Respond Power has given in refunds and re-rates to customers on variable rate plans who did not re-enroll in a fixed rate plan and did not file an informal complaint, Mr. Small testified, in pertinent part, "... we voluntary gave around

\$971,279 to 4,960 customers in re-rates on their bills.” Respond Power Statement No. 3 at 9, lines 12-13.

These statements are inconsistent with the information that Respond Power provided to Joint Complainants in discovery. In Joint Complainants’ Interrogatories Set I-21, Joint Complainants specifically inquired about any refunds, rebates, or other relief that Respond Power provided customers from January 1, 2014 to present. Respond Power’s Response to Joint Complainants’ Interrogatories Set I-21 indicated that **[Begin Confidential] [End Confidential]**. Respond Power had a duty to supplement its responses to include information thereafter acquired. See 52 Pa. Code § 5.332. As Respond Power did not mention any relief provided in the form of re-rates in its discovery responses, although such information was specifically requested and did not supplement its responses, Mr. Small’s testimony relating to the amount of re-rates provided to customers in Respond Power Statement No. 3, page 9, lines 12-13 should be stricken.

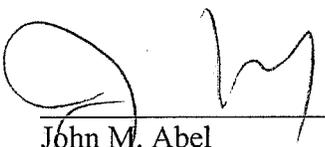
Furthermore, Mr. Small’s testimony in Respond Power Statement No. 3, page 9, lines 4-6 regarding the \$1,154,490.69 in refunds and re-rates provided by Respond Power should be modified to exclude the \$971,279 re-rate amount, for the reasons explained above, and to limit the refund amount to the **[Begin Confidential] [End Confidential]** that Respond Power disclosed to Joint Complainants in discovery. Therefore, Joint Complainants propose that Respond Power Statement No. 3, page 9, lines 4-6 be modified to provide as follows, “Respond Power has voluntarily given refunds/credit to customers in the amount of approximately **[Begin Confidential] [End Confidential]**.” This modification would be consistent with Respond Power’s discovery responses provided to Joint Complainants.

Accordingly, Joint Complainants request the ALJs strike Respond Power Statement No. 3, page 9, lines 12-13 and modify Respond Power Statement No. 3, lines 4-6 as requested above.

III. CONCLUSION

On the basis of the foregoing, Joint Complainants respectfully request that the Administrative Law Judges strike Respond Power Statement No. 1, page 6, lines 15-19; page 13, lines 17-18; and page 15, lines 2-9 and Respond Power Statement No. 3, page 9, lines 12-13, and page 10, lines 5-7; Respond Power Statement No. 4- Revised, pages 5-6, lines 30-1; and modify Respond Power Statement No. 3, page 9, lines 4-6 as requested in this Motion.

Respectfully submitted,



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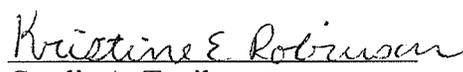
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PROPRIETARY
EXHIBIT A

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

v.

RESPOND POWER, LLC,
Respondent

PENNSYLVANIA PUBLIC UTILITY
COMMISSION, BUREAU OF
INVESTIGATION AND ENFORCEMENT,
Complainant

v.

RESPOND POWER, LLC,
Respondent

Docket No. C-2014-2427659

Docket No. C-2014-2438640

I hereby certify that I have this day served a true copy of the foregoing document, the Joint Motion of the Commonwealth of Pennsylvania, Office of Attorney General Bureau of Consumer Protection, and the Office of Consumer Advocate to Strike Portions of the Testimonies of Elliott Wolbrom, Adam Small, and James L. Crist Filed on Behalf of Respond Power, LLC, in the manner and upon the persons listed below:

Dated this 21st day of August 2015.

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*Receiving Proprietary Information