

Karen O. Moury

717 237 4820
karen.moury@bipc.com

409 North Second Street
Suite 500
Harrisburg, PA 17101-1357
T 717 237 4800
F 717 233 0852
www.buchananingersoll.com

August 24, 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 and Enforcement
v. Respond Power LLC; Docket No. C-2014-2438640

Dear Secretary Chiavetta:

On behalf of Respond Power, LLC, enclosed for electronic filing is the Answer of Respond Power LLC in Opposition to Joint Motion to Strike Portions of Testimonies, 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, 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 :

**ANSWER OF RESPOND POWER LLC IN OPPOSITION
TO JOINT MOTION TO STRIKE PORTIONS OF TESTIMONIES**

To Administrative Law Judges Barnes and Cheskis:

Pursuant to Section 5.103 of the Pennsylvania Public Utility Commission’s regulations, 52 Pa. Code § 5.103, Respond Power LLC (“Respond Power”) by and through its counsel, Karen O. Moury, and Buchanan Ingersoll & Rooney PC, files this Answer In Opposition to Joint Motion to Strike Portions of the Testimonies of Elliott Wolbrom, Adam Small and James L. Crist (“Motion to Strike”) filed by the Office of Attorney General and the Office of Consumer Advocate (“Joint Complainants”), and in connection therewith avers as follows:

I. INTRODUCTION

1. The Joint Complainants seek to strike specific portions of the testimony submitted by Mr. Wolbrom, Mr. Small and Mr. Crist on behalf of Respond Power, claiming that it is uncorroborated hearsay, irrelevant or inconsistent with discovery responses provided by Respond Power.

2. Very high stakes are involved in this proceeding for Respond Power, including a civil penalty, refunds to consumers and the possible loss of its license to operate as an electric generation supplier (“EGS”) in Pennsylvania.

3. On that basis alone, the Administrative Law Judges (“ALJs”) should permit the testimony identified by the Joint Complainants to be entered into the record in this proceeding so that the Commission has a comprehensive record that includes all of Respond Power’s proffered testimony in adjudicating this matter. While the ALJs and the Commission, as always, are free to ignore or afford little weight to certain testimony, Respond Power’s substantive rights would be adversely affected by the exclusion of this testimony.

4. Additionally, under the procedural schedule adopted for this proceeding, Respond Power had one opportunity to present testimony – Rebuttal Testimony, contrasted with the three opportunities granted to the Joint Complainants. Specifically, the Joint Complainants submitted Consumer Witness Testimony, Direct Expert Testimony and Surrebuttal Expert Testimony. While Respond Power recognizes that it agreed to this procedural schedule, the reality of this situation provides an additional reason for the ALJs to permit Respond Power to enter all of its proffered testimony into the record so that it may be considered by the Commission.

5. Moreover, the testimony described by the Joint Complainants as “uncorroborated hearsay” is admissible as it does not constitute specific out-of-court statements. Even if it is

hearsay, the lack of corroboration goes to the Commission's ability to rely on it, not to its admissibility. As such, it should be admitted under the more relaxed evidentiary standards followed by the Commission, particularly in this proceeding.

6. Further, testimony about the experiences and reactions of other EGSs during the Polar Vortex crisis is relevant to this proceeding. It is important for the Commission to review the allegations against Respond Power in the context of what was occurring throughout the industry, rather than looking at these matters in a vacuum.

7. Finally, as to testimony that was inconsistent with discovery responses, this objection is elevating form over substance since the Joint Complainants have been aware of the information that is in the testimony through settlement discussions. Excluding this testimony from the record would adversely affect Respond Power's substantive rights, and by contrast, no harm will flow to the Joint Complainants from having this testimony in the record.

8. For these reasons, and as more fully explained below, Respond Power respectfully requests that the ALJs deny the Motion to Strike.

II. ARGUMENT

A. The testimony of Mr. Wolbrom and Mr. Small containing feedback from vendors and customers should be admitted into the record.

9. Hearsay is defined as "an out-of-court statement offered to prove the truth of the matter asserted." Pa. R.E. 801. The testimony of Mr. Wolbrom that has been challenged by the Joint Complainants is merely describing feedback that he has received from potential or former vendors. Although he placed some of the phrases in quotations, he did not directly testify as to the exact statements made to him by the vendors. Mr. Small's testimony similarly referred to general feedback about Respond Power's marketing practices received from customers in the

context of requesting refunds as part of a different proceeding. He also did not share specific statements made by these customers.

10. Even if all or a portion of the testimony identified by the Joint Complainants is viewed as hearsay by the ALJs, it should be admitted. The Commission decision cited by the Joint Complainants regarding uncorroborated hearsay does not address the admissibility of hearsay. Rather, that decision stands for the proposition that hearsay that is not corroborated by other evidence may not ultimately be relied upon by the Commission to support findings of fact. *See Davis v. Equitable Gas Co., LLC*, Docket No. C-2011-2252493 (Initial Decision issued April 27, 2012). In fact, the hearsay evidence in that case that was later not relied upon was in fact admitted into the record. It is premature to determine now, before the record has been closed, whether there is evidence that corroborates this testimony and permitting it to support findings of fact.

11. Moreover, the presiding officers are not bound by technical rules of evidence at Commission hearings and may assign varying degrees of weight to hearsay evidence if admitted. 2 Pa. C.S. § 505. Therefore, the ALJs have the flexibility and discretion to permit this testimony to be admitted into the record even if it is viewed as hearsay evidence. These principles have been repeatedly followed in this proceeding in connection with evidence presented by the Joint Complainants, and Respond Power should be afforded consistent treatment. *See, e.g.*, Order Granting in Part and Denying in Part Motion to Strike dated March 6, 2015 (consumer testimony of what a family member was allegedly told by Respond Power sales agent was admitted into the record).

B. The testimony of Mr. Wolbrom and Mr. Crist regarding the experiences and reactions of other EGSs should be admitted into the record.

12. Although the ALJs have not compelled the Joint Complainants to provide discovery responses requested by Respond Power regarding details about the complaints lodged against other EGSs, the testimony of Mr. Wolbrom and Mr. Crist is relevant to this proceeding. Mr. Wolbrom's testimony merely notes that other EGSs took different approaches when prices rose and further provides some context to describe the environment that existed in early 2014. Mr. Crist's testimony points out the onslaught of incoming calls at that time and how other entities in the retail energy industry had similar experiences.

13. Having some evidence in the record about the experiences of other EGSs, as well as utilities, offers some insight to the difficulties that Respond Power had in handling the extraordinary call volume. Without this evidence, the Commission will be viewing these matters in a vacuum. To fairly adjudicate this proceeding, it is important for the Commission to consider the allegations against Respond Power in the context of what was occurring throughout the industry. As noted above, the Commission is free to disregard or afford little weight to this evidence, but excluding it deprives the Commission of an ability to consider it.

C. Mr. Small's testimony about the level of refunds and rerates should be admitted into the record.

14. The Joint Complainants seek to have Mr. Small's testimony about the level of refunds and rerates given to certain customers stricken and modified to exclude rerate amounts that were previously not provided through discovery responses. Citing to the provision in the Commission's regulations that requires parties to supplement responses, the Joint Complainants note that Respond Power's response provided on July 22, 2014 was not supplemented to include the rerate amounts that are now in Mr. Small's testimony.

15. The use of sanctions against Respond Power in this proceeding to preclude the company from presenting a full picture of refunds and rerates that were given to consumers who did not file informal or formal complaints (and to consumers who did not enroll on a fixed rate plan) is unwarranted. The purpose of a sanctions order is to move a case to prompt disposition, and in considering sanctions, courts seek to strike the appropriate balance between that need and the substantive rights of the parties. *See Marshall v. SEPTA*, 76 Pa.Cmwlth. 205, 463 A.2d 1215 (1983). The Joint Complainants have not cited to any harm that resulted from not having this information provided through discovery; nor have they referred to any need to move the case to prompt disposition.¹ By contrast, Respond Power's substantive rights would be adversely affected if it is not able to provide testimony showing the total amount of refunds and rerates given to customers who did not file complaints.

16. This is not a situation where Respond Power has refused to provide discovery responses. Rather, Respond Power simply neglected to supplement a response that was provided over a year ago to the Joint Complainants. Importantly, Respond Power has freely shared this information with the Joint Complainants as part of ongoing discussions, and in fact, the Joint Complainants have officially had this information since July 21, 2015 when Mr. Small's testimony was served on them. Striking or modifying Mr. Small's testimony would elevate form over substance.

17. In the interim order issued on March 6, 2015 in this proceeding (referenced above), the ALJs observed:

[T]he Commission's regulations also allow Presiding Officers the authority to "regulate the course of the proceeding." 52 Pa. Code § 5.483(a). Most significantly, however, the Commission's regulations allow for liberal

¹ Indeed, evidentiary hearings are scheduled to commence on August 26, 2015 and the Joint Complainants have not suggested that this Respond Power's failure to formally supplement the discovery responses prior to this time affected in any way the prompt disposition of this matter.

construction to “secure the just, speedy and inexpensive determination of every action or proceeding” and that the “presiding officer at any stage of an action or proceeding may disregard an error or defect of procedure which does not affect the substantive rights of the parties.

March 6, 2015 Interim Order at 4.

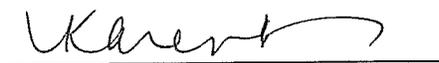
18. Therefore, although Respond Power should have supplemented the discovery response, the ALJs may overlook that error and allow the testimony to be admitted into the record since the substantive rights of the Joint Complainants have not been affected. In addition, Respond Power is curing its error by supplementing the response by August 25, 2015, prior to the commencement of evidentiary hearings in this proceeding.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, Respond Power LLC respectfully requests that the Commission deny the Joint Motion to Strike Portions of the Testimonies of Elliott Wolbrom, Adam Small and James L. Crist filed by the Office of Attorney General and the Office of Consumer Advocate.

Respectfully submitted,

Dated: August 24, 2015



Karen O. Moury
BUCHANAN INGERSOLL & ROONEY PC
409 North Second Street, Suite 500
Harrisburg, PA 17101-1357
(717) 237-4820

Counsel for Respond Power LLC

**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 documents upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

Via Email and First Class Mail

Elizabeth H. Barnes
Joel H. Cheskis
Administrative Law Judges
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

John M. Abel
Nicole R. DiTomo
Bureau of Consumer Protection
Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
jabel@attorneygeneral.gov
nditomo@attorneygeneral.gov

Sharon E. Webb
Office of Small Business Advocate
300 N. Second Street, Suite 202
Harrisburg, PA 17101
swebb@pa.gov

Candis A. Tunilo
Christy M. Appleby
Kristine E. Robinson
Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101
ctunilo@paoca.org
cappleby@paoca.org
krobinson@paoca.org

Adam D. Young
Michael L. Swindler
Pennsylvania Public Utility Commission
Bureau of Investigation & Enforcement
PO Box 3265
Harrisburg, PA 17105-3265
adyoung@pa.gov
mwindler@pa.gov
wascott@pa.gov

Steve Estomin
Exeter Associates, Inc.
10480 Little Patuxent Parkway
Suite 300
Columbia, Maryland 21044
sestomin@exeterassociates.com

Barbara R. Alexander
83 Wedgewood Drive
Winthrop, Maine 04364
barbalexand@gmail.com

Dated this 24th day of August, 2015.



Karen O. Moury, Esq.