

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

September 18, 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, enclosed for electronic filing is the Amended Petition for Approval of Settlement along with Exhibit A, Stipulation of Facts in Support of Settlement, and Appendices A and B, the Statements in Support of the Bureau of Investigation and Enforcement and Respond Power LLC, respectively, in the above-captioned matter.

By this Amended Petition for Approval of Settlement, the Bureau of Investigation and Enforcement and Respond Power LLC have revised several paragraphs of the Petition for Approval of Settlement previously filed on August 26, 2015. The affected paragraphs and key revisions are as follows:

- Paragraph 1 has been revised to note that it is an Amended Petition and to reference the inclusion of Exhibit A, Stipulation of Facts, as well as Appendices A and B, the Statements in Support
- Paragraph 20 has been revised to explain that the distribution method for refunds will be based on the individual customer's usage and price charged and to note that refund determinations will be designed so as to fully utilize the refund pool established by this paragraph

September 18, 2015

Page - 2 -

- Paragraph 21c has been revised to explain that the distribution method for refunds will be based on the individual customer's usage and price charged and to note that refund determinations will be designed so as to fully utilize the refund pool established by this paragraph
- Paragraph 21d has been revised to include a commitment of a \$25,000 minimum contribution to the electric distribution companies' hardship funds
- Paragraph 22 has been revised to indicate that any customer who does not receive or accept an offer of funds from the Settlement may contact the Company directly with complaints and request a refund
- Paragraph 23 has been revised to note that the Company will not claim a tax deduction for the \$125,000 civil penalty

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**

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

AMENDED PETITION FOR APPROVAL OF SETTLEMENT

I. INTRODUCTION

1. The Pennsylvania Public Utility Commission’s Bureau of Investigation and Enforcement (“I&E”), and Respond Power LLC (collectively, “Petitioners”) hereby join in this Amended Petition for Approval of Settlement (“Settlement”), which resolves all issues among the Petitioners in Docket No. C-2014-2438640.¹ Attached to this Settlement are Exhibit A, Stipulation of Facts; Appendix A, the Bureau of Investigation and Enforcement’s Statement in Support of Amended Settlement; and Appendix B, Respond Power LLC’s Statement in Support of Amended Settlement.

¹ This Settlement amends a Petition for Approval of Settlement filed on August 26, 2015. The paragraphs affected by the amendments are: 1, 20, 21c, 21d, 22 and 23. The cover letter accompanying the Settlement identifies the specific revisions.

2. The Petitioners respectfully request that Administrative Law Judges Elizabeth Barnes and Joel H. Cheskis (“ALJs”) recommend and the Pennsylvania Public Utility Commission (“Commission”) approve all terms and conditions of the Settlement without modification on an expedited basis. The Settlement provides for customer refunds, a civil penalty, and injunctive relief in full satisfaction of the Formal Complaint filed with the Commission by I&E against Respond Power LLC (“Respond Power” or “Company”) on June 20, 2014 at Docket No. C-2014-2438640 (“Formal Complaint”).

In support of this Settlement, the Petitioners state the following:

3. The parties to this Settlement are the Pennsylvania Public Utility Commission’s Bureau of Investigation and Enforcement, P.O. Box 3265, Harrisburg, PA 17105-3265, and Respond Power LLC, which maintains a principal place of business at 100 Dutch Mill Road, Suite 310, Orangeburg, New York 10962.

4. The Pennsylvania Public Utility Commission is a duly constituted agency of the Commonwealth of Pennsylvania empowered to regulate utilities within this Commonwealth pursuant to the Public Utility Code (“Code”), 66 Pa.C.S. §§ 101, *et seq.*

5. Respond Power is a New York limited liability company licensed to supply electric generation supplier services to residential, small commercial (25Kw and under)

and large commercial (over 25Kw) customers in the Allegheny Power, Duquesne Light Company, Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, PECO Energy Company, PPL Electric Utilities Corporation, and UGI Utilities Inc. service territories in Pennsylvania.

6. Respond Power was licensed by the Commission by Order dated August 19, 2010 at Docket No. A-2010-2163898. License Application of Respond Power LLC for Approval to Offer, Render, Furnish or Supply Electricity or Electrical Generation Services as a Supplier of Retail Electric Power, Docket No. A-2010-2163898 (“Licensing Order”).

7. Section 501(a) of the Code, 66 Pa.C.S. § 501(a), authorizes and obligates the Commission to execute and enforce the provisions of the Code.

8. The Commission has delegated its authority to initiate proceedings that are prosecutory in nature to I&E and other bureaus with enforcement responsibilities. *Delegation of Prosecutory Authority to Bureaus with Enforcement Responsibilities*, Docket No. M-00940593 (Order entered September 2, 1994), as amended by Act 129 of 2008, 66 Pa.C.S. § 308.2(a)(11).

9. The Commission is responsible for regulating the service of electric generation suppliers (“EGSs”), as related to their activities in the marketing and sale of electricity and electric services. 66 Pa.C.S. § 2809(e); 52 Pa. Code Ch. 54, 56, and 111.

10. Respond Power, as an EGS in Pennsylvania, is a public utility as defined by Section 102 of the Public Utility Code, 66 Pa.C.S. § 102, only for the limited purposes as described in Sections 2809 and 2810 of the Competition Act, 66 Pa.C.S. §§ 2809-10.

11. Respond Power, as a provider of electric generation service for compensation, is subject to the power and authority of the Commission and must observe, obey and comply with the Commission’s regulations and orders pursuant to Section 501(c) of the Public Utility Code, 66 Pa.C.S. § 501(c).

12. Respond Power provides EGS services to residential customers, and as such, must comply with the applicable residential service regulations in Chapters 54 and 56 of the Commission’s regulations. *See* 52 Pa. Code Ch. 54 and 56. *See also* Licensing Order at 3 (August 19, 2010). Respond Power must also comply with Chapter 111 of the Commission’s regulations. 52 Pa. Code § 111.1 *et seq.*

13. Section 3301 of the Code, 66 Pa.C.S. § 3301, authorizes the Commission to impose civil penalties on any public utility or on any other person or corporation subject to the Commission’s authority for violations of the Code or Commission regulations or

both. Section 3301 further allows for the imposition of a separate fine for each violation and each day's continuance of such violation(s). Specifically with regard to standards for changing a customer's electric generation supplier, the Commission is empowered to assess fines under the aforementioned Section 3301, pursuant to 52 Pa. Code §§ 57.177(e) and 111.3(c)(2).

14. As a result of negotiations between Respond Power and I&E (hereinafter referred to collectively as "Parties"), the Parties have agreed to resolve their differences as encouraged by the Commission's policy to promote settlements. *See* 52 Pa. Code § 5.231. The duly authorized Parties executing this Agreement agree to the settlement terms set forth herein and urge the Commission to approve the Agreement as submitted as being in the public interest. Statements in Support of the Settlement Agreement and Stipulations of Fact will be filed by I&E and Respond Power within thirty (30) days of entering this Settlement into the record.

II. BACKGROUND

15. By letter dated November 8, 2013, I&E initiated an informal investigation of Respond Power, consistent with Sections 331(a) and 506 of the Public Utility Code, 66 Pa.C.S. §§ 331(a) and 506 and 52 Pa. Code § 3.113. This investigation centered on allegations of "slamming" (enrolling customers to receive electric generation supply service without proper customer authorization) and related unauthorized marketing

practices as alleged in a telephone call to the Commission's Bureau of Consumer Services ("BCS") on October 24, 2013.

16. From February 1, 2014 to June 30, 2014, BCS received approximately 1,206 informal complaints against Respond Power. Many of these informal complaints can be summarized as alleging one or more of the following acts/omissions by Respond Power's employees, agents or representatives:

- A. Slamming (unauthorized transfer of a customer account)
- B. Misleading and Deceptive claims of Affiliation with Electric Distribution Companies
- C. Misleading and Deceptive Promises of Savings
- D. Failure to Disclose Material Pricing Terms in Respond Power's Disclosure Agreement/Prices not Conforming to Disclosure Agreement
- E. Lack of Good Faith in Handling Customer Complaints/Cancellations
- F. Inaccurate/Incomplete/Fraudulent Sales Agreements
- G. Incorrect Billing

17. As a result of its findings, I&E filed a Formal Complaint with the Commission against Respond Power on August 21, 2014 at Docket No. C-2014-2438640.

III. SETTLEMENT TERMS AND CONDITIONS

18. It is understood that this Settlement is the compromise of the allegations in the Formal Complaint, which I&E intended to prove and that Respond Power disputes.

Although I&E and Respond Power may disagree with the allegations as to the Company's conduct, both acknowledge the importance to consumers and the retail market of full and accurate information and disclosures to consumers, as well as the assurance of fair and transparent marketing and billing practices. I&E and Respond Power recognize that this is a disputed claim, and given the inherent unpredictability of the outcome of a contested proceeding, there are benefits to amicably resolving the disputed issues through settlement. The refunds, penalties and injunctive measures described herein are not and should not be considered to be or construed as admissions of liability or wrongdoing on the part of the Company.

It is further understood that the Company specifically denies any wrongdoing or liability in this proceeding. It is the parties' intent that the terms and conditions of this Settlement are not to be used in any further proceeding, including but not limited to, the Commission, the Pennsylvania court system or the federal court system, relating to this or any other matter, as evidence of unlawful behavior, or as an admission of unlawful behavior by the Company.

A. REFUNDS

19. Respond Power agrees to issue refunds in the total amount of \$3,000,000.00 to customers served by Respond Power during January, February and March 2014. This total amount of refunds includes \$971,279.45 in voluntary reductions of charges through rebillings performed by Respond Power in February 2014. It also

includes voluntary refunds that were previously provided by Respond to customers in the amount of \$248,873.58.

20. Of the \$1,779,846.97 remaining in the Refund Pool for additional refunds, after subtraction of the voluntary rebillings and refunds described in Paragraph 19, \$313,351.33 will be refunded to former or existing Respond Power customers who filed an informal complaint with the Commission against Respond Power from February 1, 2014 to June 30, 2014. Refunds to these customers shall be issued no later than thirty (30) days from the date of the Order approving this Settlement Agreement, using a distribution method provided by I&E to Respond Power, which will be based on the individual customer's usage, price charged and refund amounts already received directly from Respond Power. The refund determinations will be designed so as to fully utilize the Refund Pool established by this Paragraph.

21. Of the \$1,466,495.64 remaining in the Refund Pool, after the subtraction of the refunds to customers who filed informal complaints with the Commission as described in Paragraph 20, Respond Power agrees to make this amount available for refunds to all other customers served by Respond Power during January, February and March 2014.

a. Respond Power shall retain, in consultation with I&E, a third-party Administrator to administer the distribution of refunds referenced in this Paragraph. The first \$50,000 of costs and expenses of the Administrator shall be

paid by Respond Power. If the costs and expenses of the Administrator exceed \$50,000, any such costs and expenses shall be deducted from the Refund Pool.

b. Respond Power shall deposit the net Refund Pool amount noted in this Paragraph within five business days after the Administrator is retained.

c. The Administrator will be responsible for sending a letter to each of the customers identified in this Paragraph within 30 days of approval of this Petition by the Commission, which offers a minimum amount of refund that may be claimed by any customers of Respond Power during the period in question. I&E will provide the distribution method to the Administrator, which will be based on the individual customer's usage, price charged and refund amounts already received directly from Respond Power. The refund determinations will be designed so as to fully utilize the Refund Pool established by this Paragraph. In order to claim a refund, the customer must mail back the response within 60 days. Refunds will be issued within 90 days of the claim being made by the customer.

d. Funds that remain in the Refund Pool established by this Paragraph will be returned to Respond Power twelve months after the date of the letter sent by the Administrator, except that if customers have claimed less than \$500,000, Respond Power will contribute the difference between total refunds claimed and \$500,000 to the electric distribution companies' ("EDCs") hardship funds and allocated by the ratio of the Company's customers in the EDC's territory to the total amount of Company customers in Pennsylvania as of January 1, 2014. Respond Power commits to contribute a minimum of \$25,000 to the EDCs'

hardship refunds, regardless of the total refunds claimed under this Paragraph, which will be allocated in the manner explained in the preceding sentence.

e. I&E shall have the ability to monitor and audit the Refund Pool and processes and agreed upon actions of Respond Power to confirm compliance with the terms hereof.

22. No customer shall be paid any funds from the Refund Pool without executing a "Release of Claims" pursuant to which the customer agrees, in exchange for payment of the funds, to release, acquit, and forever discharge the Company and all of its current and former officers, shareholders, and employees from any and all claims arising from or related to the conduct alleged in the Formal Complaint. Further, as part of this settlement agreement, I&E releases the Company and all of its current and former officers, shareholders, and employees from any and all claims arising from or related to the conduct alleged in I&E's Formal Complaint. Any customer of the Company who does not receive or accept an offer of funds from the Refund Pool pursuant to Paragraphs 20 or 21 may contact the Company directly with complaints and request a refund; the Company shall use its best efforts to investigate the customer's complaint and to negotiate an agreement under which the customer will accept a refund in exchange for the release of any claims or causes of action that the customer has or may have against the Company.

B. CIVIL PENALTY

23. Respond Power shall pay a civil penalty in the amount of one hundred twenty five thousand dollars (\$125,000.00) to the General Fund to resolve all allegations in I&E's Formal Complaint. Said payment shall be made by check payable to the "Commonwealth of Pennsylvania" and presented to the Commission within thirty (30) days after the Commission has entered a final Order approving the Settlement Agreement. No portion of this payment shall be recovered from the Pennsylvania generation customers of Respond Power. In addition, Respond Power shall not claim a tax deduction for the \$125,000 civil penalty.

C. LICENSE REVOCATION AND SUSPENSION

24. In consideration for the concessions made in this Settlement, I&E withdraws any relief seeking to suspend or revoke Respond Power's license to operate as an EGS in Pennsylvania. In addition, I&E will actively promote full license retention in the corresponding proceeding initiated by the Office of Attorney General and the Office of Consumer Advocate at Docket No. C-2014-2427659.

IV. INJUNCTIVE RELIEF

25. **Modifications to Business Practices:** In addition to complying with all Commission regulations, Orders and policies, Respond Power shall implement the following modifications to its business practices:

A. Product Offering:

i. Respond Power will offer only fixed price contracts for a period of two years beginning September 1, 2015. This restriction will not apply to Respond Power's contracts with existing customers. After the expiration of that two-year period, Respond Power will be free to offer variable price contracts in a manner that is consistent with the Commission's regulations which are in effect at that time. The Company specifically commits to complying with the Commission's regulations at 52 Pa. Code § 54.10 if the Company moves customers whose fixed-rate contracts have expired and have not responded to the options notice to a month-to-month contract. Respond Power acknowledges that this would require 30 days' advanced notice before the monthly price can be charged.

ii. Respond Power agrees that it will not charge Pennsylvania customers cancellation or termination fees for the Company's variable rate products.

B. Marketing:

i. Respond Power shall comply with all Pennsylvania laws, including the Public Utility Code, 66 Pa. C.S. § 101 *et seq.*, the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.* (hereinafter "Consumer Protection Law") and the Telemarketer Registration Act, 73 P.S. § 2241, *et seq.* (hereinafter "TRA"), and other applicable laws, as well as Commission regulations, Orders and policies.

ii. Respond Power commits that the Company, its agents, employees and representatives shall not make misrepresentations to consumers.

iii. Respond Power, its agents, employees and representatives shall not make representations, either directly or by implication, about savings that consumers may realize by switching to Respond Power except when referencing an explicit, affirmative guaranteed savings program. An example of an explicit, affirmative guaranteed savings program is 10% off the applicable Price to Compare (“PTC”) each month for 12 months.

iv. Respond Power, its agents, employees and representatives shall refrain from using terms in their marketing campaigns, whether for fixed or variable products (should the Company offer variable rates pursuant to Paragraph IV(A)(i) above), such as “risk free,” “competitive,” “guaranteed,” or any other terminology that represents, explicitly or by implication, that the price offered will be lower than the electric distribution company’s (EDC’s) PTC except when referencing an explicit, affirmative guaranteed savings program. An example of an explicit, affirmative guaranteed savings program is 10% off the applicable PTC each month for 12 months.

v. Respond Power its agents, employees and representatives shall refrain from using terms in their variable rate marketing campaigns, such as “trial period” or “introductory rate,” without a clear and conspicuous disclosure of the material terms and conditions thereof, including and without limitation to, a full description of the price that will be charged after the expiration of that introductory or trial period, the

circumstances under which the consumer can cancel, and the consequences of cancellation.

vi. Respond Power, its agents, employees and representatives shall not make representations, either directly or by implication, about “special programs” for which a Pennsylvania consumer qualifies, unless Respond Power provides documentation to the consumer explaining in detail the “special program,” including but not limited to the parameters of the program, term of the program and eligibility requirements for acceptance into the program.

vii. Respond Power, its agents, employees and representatives shall not make representations, either directly or by implication, about PTC increasing or the PTC being a variable rate. Further, Respond Power, its agents, employees and representatives shall not make any representations whatsoever about how a consumer’s utility purchases electricity. However, nothing herein shall prohibit Respond Power, its agents, employees and representatives from making truthful statements about the current level of the electric distribution company’s PTC or future PTC if that information is publicly available, and how frequently it changes or when it will next change.

viii. Respond Power specifically commits to complying with 52 Pa. Code § 57.175 and shall not enter into a sales agreement or change the commodity provider for any consumer that is not personally accepted by the EDC Customer of Record or by a person purporting to be authorized to act on behalf of the Customer of Record. Respond Power Third Party Verifications (“TPVs”) shall require affirmative representation by the person consenting to the change that the person is either the EDC

Customer of Record or has been authorized by the Customer of Record to act on behalf of the Customer of Record; otherwise, Respond Power shall not proceed with the switch.

ix. Every communication by a Respond Power representative with a potential customer shall begin with the sales representative stating:

My name is [Sales Representative's Name]. I am calling on behalf of Respond Power, LLC. Respond Power can provide you with your electricity. I do not work for or represent your electric utility.

x. Further, the Respond Power salesperson shall explain that if the consumer switches to Respond Power, his or her electric bill will contain Respond Power's charges for generation as well as delivery charges from his or her electric utility.

xi. If Respond Power offers variable rate products to consumers in the Commonwealth after the time period set forth in Paragraph IV(A)(i), above, Respond Power salespeople must state the following during all variable rate sales contacts:

After ___ month(s) [if Introductory Price period is applicable], the price you pay under this variable rate contract can change every month. This is not a fixed rate contract. Variable means the price can go up or down. There is no limit on how high the price can go.

xii. During any sales contact or on any advertising, if Respond Power makes a representation to the consumer that they may cancel their contract at any time, Respond Power must also state that cancellations will be handled promptly, but it may take several days to switch suppliers pursuant to Commission regulations.

xiii. Regarding all telephone sales, Respond Power shall deposit with the United States Postal Service (or such other mail delivery service the Company

may employ) the Disclosure Statement and Welcome documents the same day as the sales contact. These documents shall contain a detailed description of the product, which shall match the oral description given in the telemarketing solicitation. This description may be satisfied with the appropriate use of the Schumer box.

xiv. Respond Power shall retain records in accordance with the Commission's requirements, including but not limited to confirmations of mailing, which shall include the date that the contract, Disclosure Statement and Welcome documents were deposited with U.S.P.S. (or other delivery service the Company may employ) and the customer name and address stated on the envelope containing the documents.

xv. Regarding online enrollments, within 180 days after approval of the settlement, Respond Power shall revise its website to clearly and conspicuously display its Disclosure Statement and all contract terms and conditions as one or multiple unavoidable separate screens, which require the consumer to scroll to the end of the document and click a button indicating he or she has reviewed the documents and agrees to the terms and conditions, during the electronic customer enrollment process. Respond Power shall require new customers to click a screen button acknowledging that they have reviewed the terms and conditions, and Respond Power shall also make a live chat feature available for customers to ask questions about the terms and conditions. Respond Power shall offer a screen prompt enabling the consumer to print the terms and conditions.

xvi. In all advertising to consumers, Respond Power shall include a clear and conspicuous display of Respond Power's brand identification information and

clear and conspicuous notice that Respond Power is independent of the consumer's electric utility, but not formally name the electric utility. Further, Respond Power shall include clear and conspicuous language that the consumer is not required to switch to an alternate EGS, but if the consumer chooses to switch, he or she will continue to receive one bill from his or her electric utility and the bill will reflect Respond Power's generation charges.

xvii. If the Company offers variable rate products pursuant to Paragraph IV(A)(i) above, in all advertising of variable rate products to consumers and in all Welcome documents to consumers that have enrolled in variable rate products with Respond Power, the Company shall provide a statement of the average price per kWh, as required by 52 Pa. Code § 54.7(b)(2). The Company shall use 24 months of price data to calculate the average price per kWh. The Company shall also provide a statement of the total impact of the Company's average price under the program for the levels of monthly usage of 500 kWh, 1,000 kWh and 2,000 kWh. The information would be organized as follows:

Monthly usage	500 kWh	1,000 kWh	2,000 kWh
Respond Power Average rate over the prior 24 months is ____ cents per kWh	\$	\$	\$

This information shall also be conveyed to the consumer during the sales contact.

C. Third Party Verifications:

i. For TPVs, whether live or through an Interactive Voice Response (“IVR”) process, the Company representative shall provide the following explanation, in a slow and audible manner, to consumers prior to beginning the TPV process:

You are going to hear a series of questions to confirm your understanding of the agreement. If the representative speaks too quickly, please interrupt and tell the representative to speak more slowly (when using a live verifier). If you do not understand a question, please say that you do not understand the question or press _____. If you have a question of your own, please ask your question or press _____.

ii. Respond Power shall add the following questions to all TPVs whether live or through an IVR system:

- What is your name? (when using a live agent only)
- What is your address? (when using a live agent only)
- Do you understand that Respond Power is not your electric utility?
- Do you understand that you are not required to switch to Respond Power in order to continue receiving electric service?
- Does your name appear on the electric bill?

iii. If the consumer answers that his or her name does not appear on the electric bill, Respond Power shall request that the consumer produce the person whose name appears on the electric bill to verify authorization to switch. If the customer of record is not available, Respond Power shall request that the consumer verify that he

or she is authorized by the person whose name is on the bill to consent to changes in electric generation service for the account. If the consumer cannot verify such authorization, the sales solicitation and TPV must immediately end.

iv. If the consumer is the customer of record or authorized by the customer of record to consent to changes in electric generation service and the sales solicitation is for a variable rate product pursuant to Paragraph IV(A)(i) above, Respond Power shall also add the following questions to the TPV:

- Do you understand that you are agreeing to a variable rate that changes on a monthly basis?
- Do you understand that there is no limit on how high the price can go?
- Do you feel comfortable with your selection to switch to a Respond Power variable rate product?

v. Respond Power agrees that all TPVs will be performed outside the presence of the Respond Power sales representative.

vi. Respond Power sales representatives shall not prompt consumers' responses to TPV questions, instruct the consumers as to the manner in which to respond to TPV questions or otherwise participate in the TPV of any sale. If the sales representative interrupts the TPV in this manner, the TPV shall be immediately terminated and the sale shall not be consummated unless a new TPV is initiated and successfully completed.

D. Disclosure Statement:

i. No later than 60 days after the Commission's final order in this proceeding, Respond Power shall provide to I&E and the Commission's BCS its current Disclosure Statement and Schumer Box, drafted pursuant to the Commission's regulations at 52 Pa. Code § 54.5.

ii. Respond Power shall provide to I&E and BCS any subsequently amended Disclosure Statements for use in the Commonwealth for the period of five years.

iii. In addition to adhering to the Commission's regulations, Orders and policies regarding the requirements for disclosure statements, terms and conditions, and marketing materials, Respond Power shall:

a. If it offers variable rate products to consumers in the Commonwealth after the time period set forth in Paragraph IV(A)(i), above state the following in its Disclosure Statement provided to customers:

After ___ month(s) [if Introductory Price period is applicable], the price you pay under this variable rate contract can change every month. This is not a fixed rate contract. Variable means the price can go up or down. There is no limit on how high the price can go.

b. provide to all current customers on variable rate products an updated disclosure statement as provided in the above paragraph.

iv. Under the heading “Cancellation/Early Termination Fees” of the Disclosure Statement, Respond Power shall state the following in at least 12-point bold font:

You may cancel this contract at any time without an early termination fee. All cancellations will be handled promptly, but it may take several days to switch suppliers pursuant to the Commission’s regulations.

v. Should the Company offer variable rate products pursuant to Paragraph IV(A)(i) above, in its variable pricing Disclosure Statement, Respond Power shall describe the basis of the Company’s charges and set forth the attributes that comprise the product and the percentage of each attribute that makes up the price. For example, Respond Power could state, if demonstrably true for a program with such attributes, that XX% of the price in a given month is based on projected wholesale costs and adjustments to “true up” the prior month’s projected wholesale costs and X% of the price is based on overhead such as the cost of sales, uncollectables, and the Company’s profit. Respond Power shall not state or represent to customers in the Company’s variable rate programs that the price Respond Power will charge will be “market-based” or set on “market conditions” unless the Company also includes either:

a. the calculation that will be used to set monthly rates under the contract, where each element of that calculation shall be based on a fixed constant, a cost to Respond Power, or a value ascertainable from publicly available information such that the

customer can calculate the price and any applicable charges in terms of dollars and cents or cents per kWh; or

b. information to the customer that he or she may view upcoming variable rates on the Respond Power website at least 30 days in advance of when the rates will take effect or call the Respond Power customer service telephone number to obtain the information.

E. Training:

i. Respond Power shall implement a new training program specifically tailored to the requirements of the Public Utility Code, the Consumer Protection Law, the TRA, and Commission regulations, Orders and policies.

ii. No later than 60 days after the Commission's final order in this proceeding, Respond Power shall provide to BCS and I&E a detailed description of the training the company will implement.

iii. After a 30-day review period, the Company will meet with BCS and I&E to review and discuss the training Respond Power plans to implement.

iv. The Company's training materials for its sales representatives and customer service representatives will accurately and comprehensively cover the following:

a. The requirements of the Public Utility Code and the Commission's regulations, Orders and policies regarding marketing and billing practices for EGSs;

b. The requirements of the Consumer Protection Law and the TRA, including both prohibited practices and affirmative requirements;

c. An express warning that deceptive sales practices will not be tolerated by Respond Power's management;

d. An express warning and material description of the remedial steps that will be taken against any sales representatives and customer service representatives that violate any term of this Settlement or otherwise engages in improper sales practices; and

e. A description of the quality assurance, monitoring, auditing and reporting practices Respond Power maintains to identify and prevent improper sales practices.

v. The training, at a minimum, shall include the following:

a. Initial training and subsequent refresher training on at least a quarterly basis for all Respond Power employees, agents and third-party contractors in the modifications listed in this Settlement Agreement and the implementation thereof;

b. Initial training and subsequent refresher training on at least a quarterly basis for all Respond Power employees, agents and

third-party contractors in Pennsylvania laws applicable to the company, including but not limited to the Public Utility Code, the Consumer Protection Law and the TRA; and

c. Initial training and subsequent refresher training on at least a quarterly basis for all Respond Power employees, agents and third-party contractors in current Pennsylvania Public Utility Commission regulations, policies and Orders.

vi. Respond Power, itself, shall implement and conduct the training and ensure that its sales agents comply with the Public Utility Code, the Consumer Protection Law, the TRA, and Commission regulations, Orders and policies.

vii. Individual marketers retained by Respond Power shall be required to successfully complete Respond Power's training program before marketing to and enrolling customers on behalf of Respond Power. Each trainee shall be required to sign a form acknowledging that he or she has received and understands the information provided in Respond Power's training materials.

viii. Respond Power shall not engage in any telemarketer sales solicitations of Pennsylvania consumers until Respond Power has fully implemented the training program and initial training and testing described in this Settlement.

F. Door-to-Door Marketing:

i. In the event that Respond Power engages in door-to-door marketing, Respond Power shall implement a new door-to-door sales training program

specifically tailored to the requirements of the Public Utility Code, the Consumer Protection Law, the TRA, and Commission regulations, Orders and policies and other applicable state and federal law.

ii. No later than 90 days after the Commission's final order in this proceeding, Respond Power shall provide to I&E and BCS a detailed description of the door-to-door sales training the Company will implement.

iii. After a 30-day review period, the Company will meet with I&E and BCS to review and discuss the door-to-door sales training Respond Power plans to implement.

iv. The Company's door-to-door training materials for its sales representatives and customer service representatives will accurately and comprehensively cover the following:

a. The requirements of the Public Utility Code and the Commission's regulations, Orders and policies and other applicable state and federal law regarding door-to-door sales practice requirements for EGSs;

b. The requirements of the Consumer Protection Law and the TRA, including both prohibited practices and affirmative requirements with particular emphasis on the following:

1. As soon as possible and prior to describing any products or services offered for sale by Respond Power, an in-person sales representative shall:

i. Produce identification, to be visible at all times thereafter, which prominently displays in the full name of the marketing representative, displays a photograph of the marketing representative and depicts the legitimate trade name and logo of Respond Power; and provides Respond Power's telephone number for inquires, verification and complaints.

ii. Identify the reason for the visit and state that Respond Power is an independent energy marketer, and identify himself or herself as a representative of Respond Power; explain that he or she does not represent the distribution utility; and explain the purpose of the solicitation.

iii. Offer a business card or other material that lists the agent's name, identification number and title, and the Respond Power's name and contact information, including telephone number.

2. During the sales presentation, the marketing representative must also state that if Customer purchases electricity from Respond Power, that the Customer's utility will continue to deliver their energy and will respond to any leaks or emergencies.

3. The representative will provide the Customer with written information regarding Respond Power's products and services immediately upon request, which shall include Respond Power's name and telephone number for inquiries, verification and complaints. Any written materials, including contracts, sales agreements, and marketing materials, must be provided to the Customer in the same language utilized to solicit the customer.

4. Where it is apparent that the Customer's language skills are insufficient to allow the Customer to understand and respond to the information conveyed by the marketing representative or where the Customer or another third party informs the marketing representative of this circumstance, the marketing representative shall terminate contact with the Customer in accordance with 52 Pa. Code § 111.9(e). The marketing representative shall leave the premises of a Customer when requested to do so by the Customer or the owner or occupant of the premises.

c. An express warning that deceptive or intimidating sales practices will not be tolerated by Respond Power's management;

d. An express warning and material description of the remedial steps that will be taken against any sales representatives and customer service representatives that violate any term of this Settlement or otherwise engages in improper sales practices; and

e. A detailed description of the quality assurance, monitoring, auditing and reporting practices Respond Power maintains to identify and prevent improper door-to-door sales practices.

f. The training, at a minimum, shall include the following:

1. Initial training and subsequent refresher training on at least a quarterly basis for all Respond Power door-to-door salespeople in the modifications listed in this Settlement Agreement and the implementation thereof;

2. Initial training and subsequent refresher training on at least a quarterly basis for all Respond Power door-to-door salespeople in Pennsylvania and federal door-to-door marketing laws applicable to the Company, including but not limited to the Public Utility Code, the Consumer Protection Law and the TRA; and

3. Initial training and subsequent refresher training on at least a quarterly basis for all Respond Power door-to-

door salespeople in current Pennsylvania Public Utility Commission regulations, policies and Orders.

g. Respond Power, itself, shall implement and conduct the training and ensure that its door-to-door sales agents comply with the Public Utility Code, the Consumer Protection Law, the TRA, and Commission regulations, Orders and policies.

h. Individual door-to-door salespeople retained by Respond Power shall be required to successfully complete Respond Power's training programs before marketing to and enrolling customers on behalf of Respond Power. Each trainee shall be required to sign a form acknowledging that he or she has received and understands the information provided in Respond Power's training materials.

i. Respond Power shall not engage in any door-to-door sales solicitations of Pennsylvania consumers until Respond Power has fully implemented the training program and initial training and testing described in this Settlement.

F. Compliance Monitoring:

i. Respond Power shall increase internal quality control efforts to include at least the following:

a. Respond Power shall record all communications between customers and Respond Power's customer service representatives.

b. Respond Power shall require its telemarketers to record all communications with consumers that result in a sale.

c. Respond Power shall maintain such recordings in accordance with the Commission's requirements.

d. Respond Power shall implement a provision in its contracts with telemarketers that no commissions shall be paid for any enrollment unless a recording of the entire sales presentation to that consumer is supplied to Respond Power within three days of the sale.

e. Respond Power shall, on a weekly basis, review a statistically valid sample of calls recorded pursuant the prior paragraph from each of Respond Power's agents and third-party contractors in order to evaluate the sales practices employed and ensure that the sales practices comply with this Settlement Agreement, the Public Utility Code, the Consumer Protection Law, the TRA, and Commission regulations, Orders and policies.

f. The sample in subsection (e) above shall include no fewer than three sales for each sales representative conducting sales solicitations for Respond Power.

g. Whenever such sample in subsection (e) above reveals one or more non-compliant sales calls by an agent, third-party contractor or sales representative, Respond Power shall investigate whether any of the consumers enrolled by the agent, third-party contractor or sales representative were subjected to sales practices that violated this Settlement, the Public Utility Code, the Consumer Protection Law, the TRA, or Commission regulations, Orders and policies.

h. Such investigation in subsection (g) above, at a minimum, shall include a review of the sales calls and call notes for the ten consumers enrolled before the call in question and the ten consumers enrolled after the call in question. If Respond Power identifies additional non-compliant sales calls, Respond Power shall implement remedial steps as described in Paragraphs IV(F) (ii) and(iii) below.

i. Additionally, Respond Power shall offer to any consumer subjected to the non-compliant sales practices a refund equal to the difference between the price charged by Respond Power and the consumer's applicable Price to Compare for the period in which the consumer was a customer as a result of the non-compliant sales practice. Such refund shall be paid to the consumer within ten days.

ii. Any substantiated consumer complaint about a Respond Power sales representative or other information indicating that a Respond Power sales representative has violated any term of this Settlement or otherwise engaged in improper sales practices shall trigger an investigation by Respond Power into whether any of the other Respond Power customers enrolled by that sales representative were subjected to sales practices that violated the terms of this Settlement or were otherwise improper. Such investigation shall, at a minimum, include examination of customer enrollment records, sales service call notes for the ten consumers enrolled by the sales representative immediate prior to and subsequent to the enrollment that triggered the investigation.

iii. In the event Respond Power determines that a sales representative has violated any terms of this Settlement, the Public Utility Code, the Consumer Protection Law, the TRA, or Commission regulations, Orders and policies or otherwise engaged in improper sales practices, Respond Power shall take prompt remedial actions, which at a minimum shall include:

- a. For the first violation, provide additional training and re-training;
- b. For two violations in a twelve-month period, suspend the sales representative for a period of no fewer than 30 days; and
- c. For any violations in excess of two within a twelve-month period, permanently disqualify the sales representative from marketing Respond Power's services to Pennsylvania consumers.

d. The Respond Power marketing contractor which employs the sales representative shall forfeit an amount equal to twice the total marketing contractor's sales commissions applicable to the non-compliant sales. All sales commissions claimed by the marketing contractor shall be subject to forfeiture for a period of six months in the event violations are found by Respond Power.

iv. Respond Power shall not engage in any telemarketer sales solicitations of Pennsylvania consumers until Respond Power has fully implemented the compliance monitoring program described in this Settlement, including any changes to contracts with marketers necessary to carry out the compliance monitoring program provisions.

G. Reporting:

i. Within 30 days of implementation of the training and compliance monitoring described above and quarterly thereafter for a period of five years, Respond Power shall provide to BCS and I&E:

a. An explanation of all internal audits and investigations performed during the reporting period, including a detailed description of the amount of calls reviewed pursuant to Paragraph IV(F) (i) (e) and (f) of this Settlement and a description of the audit(s) or investigation(s) performed as well as the results thereof and

b. A report of all customer complaints and disputes received by Respond Power during the reporting period.

H. Customer Service:

i. Respond Power shall employ regulatory personnel whose duties include, at a minimum:

a. Compliance with the Chapter 56 of the Commission's regulations, including but not limited to, prompt investigation of all customer complaints, providing the customer with information necessary to make an informed judgment and issue a report to the customer within 30 days;

b. Resolution of customer complaints fairly and expeditiously; and

c. Training customer service representatives in accurately recording the reason for a customer's call in a customer contact log and ensuring compliance with the training described in this Settlement.

ii. Respond Power shall at all times maintain a staff of customer service representatives necessary to at least:

a. Within normal business hours, provide consumers with reasonably timely access to a "live" customer service representative, whether the consumer seeks such access via telephone and/or e-mail.

Reasonably timely access shall mean that hold times for consumers calling the Company shall be no more than 10 minutes, and consumer emails shall be answered within 24 hours unless sent on weekends or holidays in which case shall be responded to within 24 hours of the first business day following the weekend or holiday;

b. Provide a timely response to any voice mail messages left on its customer service toll-free number outside of normal business hours, but in no event, later than 24 after the message was left, unless the message is left on a weekend or holiday in which case shall be responded to within 24 hours of the first business day following the weekend of holiday;

c. Provide for the check of its voice mail message system at the beginning of each day's normal business hours.

d. Use reasonable measures to prevent its voice mail customer service message system from becoming "full" such that consumers cannot leave a voice mail message.

e. Respond to all inquiries made by letter within five business days of receipt of said letter.

iv. Respond Power shall develop and implement an action plan for handling periods of high call volumes. Such action plan will, at a minimum:

a. Provide for the answering of overflow calls to Respond Power's system by additional customer service staff or temp services;

b. Provide a detailed description for use by all such staff or temp services answering calls regarding inputting of the nature of customer calls;

c. Provide clear and consistent information to all such staff or temp services answering calls to convey to customers with the same or similar issues; and

d. Provide clear and consistent information to all such staff or temp services answering calls regarding relief that will be provided by Respond Power to convey to customers.

v. If Respond Power experiences a period of high call volumes in which it could not and did not comply with the provisions of this Settlement, Respond Power shall within 30 days provide to BCS and I&E a report of the occurrence, an explanation of underlying reasons for the occurrence and a description of all remedial measures implemented by Respond Power.

V. THIS SETTLEMENT IS IN THE PUBLIC INTEREST

26. This Settlement was achieved by the Petitioners after extensive investigation into Respond Power's marketing and billing practices, including formal and

informal discovery and service on the ALJs and parties of the direct testimony of consumers.

27. The agreed-upon provisions regarding refunds and comprehensive injunctive relief in the Settlement will provide reasonable relief for Respond Power's current and former customers affected by the Company's conduct as alleged in the Formal Complaint.

28. Additional support for this Settlement will be set forth in the Supporting Statements and Stipulation of Facts, which will be filed within 30 days of this Settlement being entered into the record.

VI. ADDITIONAL TERMS AND CONDITIONS

29. This Settlement is conditioned upon the Commission's approval of the terms and conditions contained herein without modification. If the Commission modifies the Settlement, then either Petitioner may elect to withdraw from this Settlement and may proceed with litigation and, in such event, this entire Settlement shall be void and of no effect. Such election to withdraw must be made in writing, filed with the Secretary of the Commission and served upon all parties and the ALJs within five business days after the entry of an Order modifying the Settlement.

30. This Settlement is proposed by the Petitioners to settle all issues among them in the instant proceeding. If the Commission does not approve the Settlement, the Petitioners reserve their respective rights to conduct further hearings, including further cross-examination, submit additional direct, rebuttal and surrebuttal testimony, as contemplated by the litigation schedules adopted in this proceeding, and briefing regarding contested issues. This Settlement is made without any admission against, or prejudice to, any position which any Petitioner may adopt in the event of any subsequent litigation of this proceeding or in any other proceeding.

31. If Respond Power reaches a settlement at Docket No. C-2014-2427659, I&E will not oppose it, provided that it does not adversely change the material terms of this Settlement.

32. This Settlement is being presented only in the context of this proceeding in an effort to resolve the proceeding in a manner that is fair and reasonable. The Settlement is presented without prejudice to any position which any of the parties may have advanced and without prejudice to the position any of the parties may advance in the future on the merits of the issues in future proceedings except to the extent necessary to effectuate the terms and conditions of the Settlement. This Settlement does not preclude the parties from taking other positions in other proceedings involving the marketing and billing practices of Electric Generation Suppliers or Natural Gas Suppliers or other aspects of the competitive market.

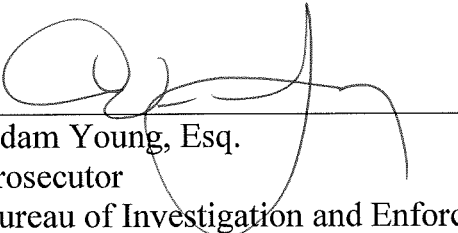
33. If the ALJs adopt this Settlement without modification in their Initial Decision, the Petitioners waive their rights to file exceptions to the issues addressed by the Settlement.

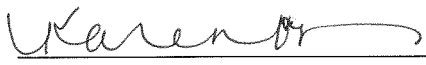
VII. CONCLUSION.

WHEREFORE, the Petitioners, by their respective counsel, respectfully request:

1. That the ALJs, on an expedited basis, recommend that the Commission approve this Settlement, including all the terms and conditions thereof, without modification;
2. That the Commission approve, on an expedited basis, the Settlement without modification; and
3. That the Formal Complaint of I&E be marked satisfied.

Respectfully submitted,


Adam Young, Esq.
Prosecutor
Bureau of Investigation and Enforcement
Pa. Public Utility Commission
400 North St.
Harrisburg, PA 17120


Karen O. Moury, Esq.
Buchanan, Ingersoll & Rooney
409 North Second St.
Harrisburg, PA 17102

Counsel for Respond Power LLC

Dated: September 18, 2015

EXHIBIT A

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

STIPULATION OF FACTS IN SUPPORT OF AMENDED SETTLEMENT

Pursuant to 52 Pa. Code § 5.232(a), the Bureau of Investigation and Enforcement (“Complainant” or “I&E”), and Respond Power, LLC (“Respond Power” or “Company”), by their undersigned attorneys, agree and stipulate to the following facts for the sole purpose of supporting the approval of the parties’ proposed settlement of the matter docketed at C-2014-2438640:

PROCEDURAL HISTORY

1. 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 Joint Complaint against Respond Power LLC (“Respond Power” or “the Company”), at Docket Number C-2014-2427659.

2. The Joint Complainants averred that on or about February 10, 2014, the OCA began receiving “a high volume of calls and written correspondence from residential consumers on variable rate plans with [electric generation suppliers] EGSs regarding the level of electric generation charges on the consumers’ electric bills. The OCA has received approximately 3,000 contacts from consumers regarding variable rates.”¹
3. Joint Complainants averred that as of May 5, 2014, the OCA had collected information from 2,434 of its consumer contacts, 189, or 8%, were from customers of Respond Power. Of the referenced 189 total contacts, approximately 162 were telephone calls and approximately 27 were written correspondence.
4. Joint Complainants averred that from February 27, 2014 through June 4, 2014, the Attorney General received 39,607 telephone calls and 7,503 consumer complaints related to variable rates charged by EGSs. Of these 7,503 consumer complaints, 520, or 7% were regarding Respond Power.
5. Joint Complainants averred that from January 1, 2014 to April 21, 2014, approximately 500 Formal Complaints were filed at the Commission by customers regarding variable rates charged by EGSs and that of the 203 Formal Complaints reviewed by the OCA, approximately 20 or 10% were filed against Respond Power.
6. Joint Complainants’ allegations against Respond Power relate to claims of affiliation with electric distribution companies (“EDCs”); promises of savings; non-disclosure of material terms; welcome letter and inserts; slamming; complaint handling; inaccurate pricing information; prices nonconforming to

¹ Joint Complaint at ¶ 15.

disclosure statement; and failing to provide a written contract following telemarketer sales.

7. The Joint Complainants made several requests or relief including providing restitution to customers, requesting a civil penalty, prohibiting deceptive practices in the future, and revocation or suspension of Respond Power's EGS license.
8. On July 10, 2014, Respond Power filed an Answer to the Joint Complaint, in which it admitted or denied the various averments made by the Joint Complainants and specifically denied the violations of law and other wrongdoing alleged by the Joint Complainants. In particular, Respond Power denied that any of its actions violated Pennsylvania law or the orders or regulations of the Commission. Further, Respond Power averred that consumers knowingly entered into agreements to purchase electric generation service through variable rate plans under which prices would vary monthly on the basis of wholesale market conditions.
9. In New Matter, Respond Power alleged that the Joint Complaint had completely ignored the market conditions starting in January 2014 that precipitated the variable price increases to which many customers were exposed, resulting in a spike in the volume of informal and informal complaints filed by consumers with the Commission.
10. Also on July 10, 2014, Respond Power filed Preliminary Objections to the Joint Complaint, seeking dismissal of the counts relating to non-disclosure of material terms, welcome letter and inserts, the provision of accurate pricing information, prices nonconforming to the disclosure statement and failing to provide a written contract following a telemarketing sale. In the Preliminary Objections, Respond Power contended that the Commission had approved its

disclosure statement and that the Commission does not have jurisdiction over prices charged by electric generation suppliers (“EGSs”) or to enforce the Unfair Trade Practices and Consumer Protection Law (“Consumer Protection Law”), 73 P.S. § 201-1 *et seq.* or the Telemarketer Registration Act (“TRA”), 73 P.S. §§ 2242 *et seq.*

11. On August 20, 2014, the Administrative Law Judges (“ALJs”) issued an Interim Order granting in part and denying in part Respond Power’s Preliminary Objections. The Interim Order was later modified on interlocutory review by the Commission through an Order entered on April 9, 2015, which found that the Commission does not have jurisdiction to enforce the Consumer Protection Law or the TRA. Additionally, by the April 9, 2015 Order, the Commission found that although it does not regulate EGS rates, it may determine whether the prices charged to consumers conform to the EGS’s disclosure statement.
12. On August 21, 2014, the Commission’s Bureau of Investigation and Enforcement (I&E) filed a Formal Complaint against Respond Power 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.
13. The allegations in I&E’s Formal Complaint were based upon eighty-six (86) informal complaints received by the Commission’s Bureau of consumer Services.

14. In its Formal Complaint, I&E averred six counts alleging that the Company, its employees, agents or representatives, engaged in unfair, fraudulent or deceptive marketing acts by slamming six (6) customer accounts in violation of 66 Pa.C.S. § 2807(d)(1).
15. I&E further averred fifteen counts alleging that the Company, its employees, agents or representatives, engaged in unfair, fraudulent, deceptive or otherwise unlawful marketing acts in that the Company's employees, agents or representatives through its door-to-door sales people misrepresented to three (3) customers an affiliation with a local EDC or a government program, in violation of 52 Pa. Code § 54.43(f); 52 Pa. Code § 111.8 and 111.9 (misrepresentation); Pennsylvania's Unfair trade Practices and Consumer Protection Law, 73 P.S. § 201-1 *et seq.*, as incorporated through 52 Pa. Code §§ 54.43(f) and 111.12(d)(1).
16. I&E further averred forty-seven counts alleging that the Company, its employees, agents or representatives, engaged in unfair, fraudulent, deceptive or otherwise unlawful marketing acts in that the Company's employees, agents or representatives misrepresented to forty-seven (47) customers that the Company's rates would be competitive or always be lower than or equal to the price to compare ("PTC"), or otherwise employed other unethical and/or fraudulent tactics for the purposes of inducing a customer to switch to respondent such as guaranteeing savings over the PTC, or guaranteeing a savings of up to 10%, in violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-2(4)(ix), (xi), and (xxi), as incorporated through 52 Pa. Code §§ 54.43(f) and 111.12(d)(1).
17. I&E further averred four hundred thirty counts alleging that the Company, its employees, agents or representatives, engaged in unfair, fraudulent, deceptive or otherwise unlawful marketing acts in that the Company, its employees,

agents or representatives, failed to disclose material terms and conditions of service including the material terms and conditions of price variability, the limits on variability, and billing amounts inconsistent with advertised prices, marketed prices, or the agreed upon prices in the disclosure statement for eighty-six (86) customers, in violation of 52 Pa. Code § 54.4(a); 52 Pa. Code § 54.5(c)(2); 52 Pa. Code § 54.7(a); 52 Pa. Code § 111.12(d)(4); Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-2(4)(xxi), as incorporated through 52 Pa. Code §§ 54.43(f) and 111.12(d)(1).

18. I&E further averred thirty-three counts alleging that the Company, its employees, agents or representatives, did not utilize good faith, honesty and fair dealing with eleven (11) residential customers in that the Company, its employees, agents or representatives, failed to adequately staff its call centers, provide reasonable access to company representatives for the purposes of submitting complaints, failed to properly investigate customer disputes, failed to timely cancel accounts, and failed to notify customers of the results of the Company's investigation into a dispute, in violation of 52 Pa. Code §§ 56.141(a), 56.151 and 56.152 (incorporated through 66 Pa. C.S. § 2809(e)).
19. I&E further averred forty-five counts alleging that the Company, its employees, agents or representatives, engaged in unfair, fraudulent, deceptive or otherwise unlawful marketing acts in that the Company, its employees, agents or representatives, marketed the electric generation supplier services of the Company to nine (9) Pennsylvania consumers, including circumventing the Commission's sales verification procedures, by falsely pretending to be the customer on verification calls, forging customer signatures on sales contracts and/or other enrollment materials, not disclosing to the customer whether the rate was fixed or variable and/or checking the "variable" box on the sales agreement after the customer has signed, in violation of 52 Pa. Code § 54.4(a);

52 Pa. Code § 54.5(c)(2); 52 Pa. Code § 54.7(a), 52 Pa. Code § 111.12(d)(4); Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-2(4)(xxi), as incorporated through 52 Pa. Code §§ 54.43(f) and 111.12(d)(1).

20. I&E further averred fourteen counts alleging that the Company, its employees, agents or representatives, failed to comply with the Electricity Generation Customer Choice and Competition Act, 52 Pa. Code §§ 54.1 *et seq*, in that the Company or agent(s) or representative(s) of the Company billed a generation rate on fourteen (14) customer invoices that did not reflect the price agreed upon in the written enrollment materials in violation of 52 Pa. Code § 54.4(a).
21. I&E further averred fifty-nine counts alleging that the Company failed to properly train and monitor its employees, agents or representatives on responsible and ethical sales practices, in that the Company's employees, agents or representatives by committing the alleged violations in Paragraphs 7, 8, and 11 above, in violation of 52 Pa. Code § 111.5(a) and (e).
22. I&E made several requests for relief, including providing refunds to customers, paying a civil penalty, and revocation of Respond Power's EGS license.
23. A Prehearing Conference was held on Monday, August 25, 2014, at which the following matters were addressed: (1) the need for preliminary evidentiary hearing(s) regarding testimony of OCA and OAG witnesses (other than expert witnesses); (2) procedural schedule; (3) settlement conference; (4) service requirements and parties list; (5) discovery modifications; and (6) a protective order.
24. On September 30, 2014, Respond Power filed an Answer to I&E's Formal Complaint in which it admitted or denied the various averments made by I&E

and specifically denied the violations of law and other wrongdoing alleged by I&E. In particular, Respond Power denied that any of its actions violated Pennsylvania law or the orders or regulations of the Commission.

25. Also, on September 30, 2014, Respond Power filed Preliminary Objections to I&E's Formal Complaint. In its Preliminary Objections, Respond Power sought dismissal of several counts due to the Commission's lack of jurisdiction to enforce the Consumer Protection Law and to regulate EGS prices.
26. On October 17, 2014, I&E filed a response to the Preliminary Objections denying the lack of Commission jurisdiction and/or legal insufficiency of the pleadings in the Formal Complaint.
27. On October 23, 2014, I&E filed a Motion to Consolidate its Formal Complaint with the Joint Complaint filed by the Joint Complainants.
28. On October 28, 2014, an Order was issued by the ALJs granting the Petition to Consolidate the Formal Complaint filed by I&E against Respond Power with the Joint Complaint filed against Respond Power by the Joint Complainants.
29. On November 17, 2014, Administrative Law Judges Joel Cheskis and Elizabeth Barnes issued an Order granting in part and denying in part the Preliminary Objections filed by Respond Power to the I&E Formal Complaint.

STIPULATION OF FACTS BASED ON ADMITTED TESTIMONY

30. On October 24, 2014, Joint Complainants served written direct testimony with exhibits of two hundred (200) consumer witnesses.
31. On November 14, 2014, I&E served written direct testimony with exhibits of twenty-one (21) consumer witnesses.

32. At the initial hearings held on March 9-13, 2015, the testimony of one hundred fifty three (153) consumer witnesses of the Joint Complainants and I&E was admitted into the record, either via stipulation by the parties or following cross-examination by Respond Power.
33. The written testimony of the consumer witnesses, which has been admitted into the record, includes testimony regarding Respond Power's sales representatives making promises of savings or claiming to be affiliated with EDCs or a government program. Some consumer witnesses also testified that: (1) they did not authorize switches to Respond Power and did not know they were being served by Respond Power until their variable prices increased in early 2014; (2) they did not sign up for a variable price contract or know that they were on a variable price contract; (3) they were not aware that there was no ceiling on the variable price they could be charged; (4) they believed that the variable prices charged by Respond Power were excessive; (5) they did not know there was no ceiling on the price they could be charged; (6) they were unable to reach Respond Power to complain about their charges; (7) they were confused or misled by marketing materials, including Respond Power's welcome letter; (8) they did not receive copies of their disclosure statements or did not understand the terms and conditions set forth in them; and (9) they suffered financial difficulties after receiving Respond Power's charges. Each consumer witness' testimony related to his or her own personal and unique experience with Respond Power.
34. In written testimony and during cross examination at the hearings on March 9-13, 2015, some consumer witnesses testified that: (1) they understood that Respond Power was an EGS and not affiliated with their EDC; (2) they now realize they did authorize the switch to Respond Power, based upon a review of a third party verification ("TPV") recording or written documentation; (3) they

knew they were on variable price contracts; (4) they knew there was no ceiling on the variable price that could be charged; (5) they were able to reach Respond Power to complain about their charges and were offered refunds or credits; (6) they received but did not review their disclosure statements; (7) they do not review or remember all of their mail and may have missed the disclosure statement; (8) they received contacts from multiple EGSs with messages about possible price savings; (9) they received letters from their EDCs encouraging them to choose an EGS; and (10) they reviewed PaPowerSwitch.com before switching to Respond Power. Respond Power introduced several cross-examination exhibits, including TPV recordings, sales agreements and its disclosure statement, during these hearings.

35. At the hearings on August 26-27, 2015, pre-served expert testimony and exhibits were admitted into the record, including the following:
 - A. Direct Testimony of Barbara R. Alexander, OAG/OCA Statement No. 1; Surrebuttal Testimony of Barbara R. Alexander, OAG/OCA Statement No. 1-SR; and Exhibits BRA-1, BRA-2, BRA-3, BRA-4, BRA-5, and BRA 1-SR. Ms. Alexander's testimony addresses Respond Power's marketing practices, training program, disclosure statement, telemarketing sales, and complaint handling.
 - B. Direct Testimony of Steven L. Estomin, OAG/OCA Statement No. 2; Surrebuttal Testimony of Steven L. Estomin, OAG/OCA Statement No. 2-SR; and Exhibits SLE-1, SLE-2 and SLE-3. Dr. Estomin's testimony addresses the variable prices charged by Respond Power and wholesale market conditions.
 - C. Direct Testimony of Ashley E. Everette, OAG/OCA Statement No. 3; Surrebuttal Testimony of Ashley E. Everette, OAG/OCA Statement No. 3-SR; and Supplemental Surrebuttal Testimony of Ashley E. Everette,

OAG/OCA Statement No. 3-SR (Supplemental). Ms. Everette's testimony compares the prices charged residential customers by Respond Power from December 2013 through March 2014 to the prices these customers would have been charged by their EDCs.

- D. Direct Testimony of Gregory M. Strupp, OAG/OCA Statement No. 4; and Surrebuttal Testimony of Gregory M. Strupp, OAG/OCA Statement No. 4-SR. Mr. Strupp's testimony addresses the number of complaints that OAG received from consumers about Respond Power's marketing and pricing practices.
- E. Direct Testimony of Daniel Mumford, I&E Statement No. 1, and I&E Exhibits 1-8. Mr. Mumford's testimony addresses Respond Power's sales and marketing practices, marketing materials, unauthorized switches, billing errors, prices nonconforming to disclosure statements, inaccurate sales agreements; and complaint handling.
- F. Rebuttal Testimony of Elliott Wolbrom, Respond Power Statement No. 1, and Exhibit EW-1. Mr. Wolbrom's testimony responds to the testimony of Ms. Alexander and Mr. Mumford and addresses Respond Power's marketing activities, its selection and oversight of third party vendors, the enrollment processes, the training and termination of sales representatives, the references to historical savings in marketing materials and the operation of Respond Power's call center.
- G. Rebuttal Testimony of Saul Horowitz, Respond Power Statement No. 2-Revised. Mr. Horowitz testimony responds to the testimony of Dr. Estomin and focuses on Respond Power's variable pricing activities in Pennsylvania.
- H. Rebuttal Testimony of Adam Small, Respond Power Statement No. 3-Revised, and Exhibits AS-1, AS-2, AS-3 and AS-4 (Revised). Mr. Small's testimony responds to the testimony of Ms. Alexander and Mr. Mumford and to the testimony of some consumer witnesses. He

addresses Respond Power's complaint volumes, complaint handling process, quality control measures, and disclosure statement. Mr. Small's testimony also addresses customer claims that they were not aware they were being served by Respond Power or that they were on a variable rate plan.

- I. Rebuttal Testimony of James L. Crist, Respond Power Statement No. 4-Revised, and Exhibits JC-1, JC-2, JC-3 and JC-4. Mr. Crist's testimony responds to testimony of Ms. Alexander, Dr. Estomin, Ms. Everette and Mr. Strupp. Mr. Crist's testimony describes the Polar Vortex and its effect on energy prices and the economy, Respond Power's operations since 2010 and Respond Power's enrollment and verification processes. Mr. Crist also addresses issues raised about Respond Power's sales agreement and disclosure statement.

OTHER STIPULATION OF FACTS

36. Between February 1, 2014 and June 30, 2014, BCS received 8,673 informal complaints against EGSs, 1,206 (13.9%) of which were regarding Respond Power. During 2014, BCS received a total of 1,282 informal complaints against Respond Power.
37. During calendar year 2013, BCS received a total of 2,125 informal complaints from consumers regarding EGSs, compared to a total of 10,506 informal complaints received from consumers regarding EGSs in 2014. Whereas 735 of the informal complaints filed in 2013 related to bills, rates or prices charged by EGSs, 4,538 of the informal complaints filed in 2014 related to bills, rates or prices charged by EGSs. BCS' monthly informal complaint data for the calendar years 2013 and 2014 shows the following:

- In January 2013 and January 2014, the number of informal complaints received by BCS regarding EGSs was similar (208 and 231, respectively)
- In February 2014, 2,442 informal complaints were filed with BCS regarding EGSs, compared to 171 in February 2013
- In March 2014, 3,506 informal complaints were filed with BCS regarding EGSs, compared to 302 in March 2013
- In April 2014, 1,342 informal complaints were filed with BCS regarding EGSs, compared to 231 in April 2013
- In May 2014, 813 informal complaints were filed with BCS regarding EGSs, compared to 173 in May 2013
- In June 2014, 570 informal complaints were filed with BCS regarding EGSs, compared to 134 in June 2013

38. Of the 2,434 consumer contacts received by OCA regarding EGS variable prices in early 2014, which are referenced in the Joint Complaint, 189 involved Respond Power, while 826 were against Energy Services Providers, Inc., d/b/a Pennsylvania Gas and Electric (“PG&E”); 538 related to IDT Energy, Inc. (“IDT”); 109 concerned Hiko Energy, LLC (“Hiko”); 83 were against Blue Pilot Energy, LLC (“BPE”); and 689 of those contacts involved other EGSs.

39. Of the 7,503 complaints received by the OAG regarding EGS variable prices in early 2014, which are referenced in the Joint Complaint, 520 involved Respond Power, while 1,762 were against PG&E; 1,917 related to IDT; 254 concerned Hiko; 232 were against BPE; and 2,818 of those complaints involved other EGSs.

40. PaPowerSwitch.com, which is the website developed under the Commission's control and supervision to promote electric choice and provide educational materials, has continuously included references to possible price savings.
41. During the license application process, BCS reviews draft disclosure statements submitted by EGSs. As the Commission office with primary responsibility for EGS license applications, the Bureau of Technical Utility Services ("TUS") forwards the draft disclosure statement to BCS for review. A BCS analyst reviews the draft disclosure statement to ensure that it includes the elements required by the Commission's regulations at 52 Pa. Code § 54.5. The analyst may also look for any use of terminology, jargon or acronyms that is contrary to plain language guidance, as referenced in 52 Pa. Code § 54.43(1) and 52 Pa. Code § 69.251. The BCS analyst then interacts with the EGS applicant informally via telephone or email until the analyst is satisfied that the disclosure statement is substantially in compliance with the regulations. This informal finding is then communicated to TUS and the EGS applicant. Disclaimers are provided to EGS applicants noting that the informal opinion is not binding on the Commission, pursuant to 52 Pa. Code § 1.96.
42. In a putative class action lawsuit involving matters similar to those alleged in the Joint Complaint and the I&E Complaint regarding Respond Power's marketing and sales activities for variable rate contracts, the United States District Court for the Eastern District of Pennsylvania denied the Plaintiff's motion for class certification by Order dated August 31, 2015. *Barbara A. Gillis, Thomas Gillis, Scott R. McClelland and Kimberly A. McClelland, individually and on behalf of all others similarly situated v. Respond Power, LLC*, Docket No. 14-3856. In so ruling, the Court reviewed Respond Power's disclosure statement and found that Respond Power's variable rate customers could not be expected to share the same understanding of their contractual

rights and that therefore the commonality requirement of class certification was not fulfilled.

43. In February 2014, Respond Power implemented voluntary reductions of charges through re-rating and re-billing customers in the amount of \$971,279.45.
44. From January 1, 2014 through August 25, 2015, Respond Power voluntarily refunded \$248,873.58 to customers.
45. The key provisions of the settlement between the Joint Complainants and Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric filed on March 24, 2015 and approved by Initial Decision issued on June 30, 2015 include: a) net refund pool of \$2,325,000; b) payment up to \$100,000 to cover the costs and expenses of the third-party administrator; c) contribution of \$100,000 to the EDCs' hardship funds; d) a civil penalty of \$25,000; e) 18-month moratorium on selling variable rate products to new customers; and (f) other injunctive relief, in the form of additional marketing restrictions and obligations associated third party verifications, disclosure statement, training , compliance monitoring, and customer service.²
46. The key provisions of the settlement between the Joint Complainants and Hiko Energy, LLC filed on May 1, 2015 and approved by Initial Decision issued on August 21, 2015 include: a) net refund pool of \$1,866,063.70; b) payment up to \$50,000 to cover the costs and expenses of the third-party administrator; c) contribution of \$25,000 to the EDCs' hardship funds; d) 15-month moratorium on selling variable rate products to new customers; and (e) other injunctive

² See *Commonwealth of Pennsylvania, et al. v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric*, Docket No. C-2014-2427656 (Settlement Agreement filed March 24, 2015) (Initial Decision issued June 30, 2015).

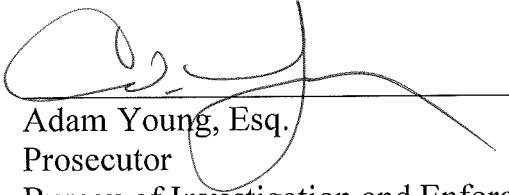
relief, in the form of additional marketing restrictions and obligations associated third party verifications, disclosure statement, training , compliance monitoring, and customer service.³

47. The key provisions of the settlement between the Joint Complainants and IDT Energy, Inc. filed on August 4, 2015 and pending review by the ALJs include: a) net refund pool of \$2,400,000; b) payment up to \$75,000 to cover the costs and expenses of the third-party administrator; c) contribution of \$75,000 to the EDCs' hardship funds; d) civil penalty of \$25,000; e) 21-month moratorium on selling variable rate products to new customers; and (f) other injunctive relief, in the form of additional marketing restrictions and obligations associated third party verifications, disclosure statement, training , compliance monitoring, and customer service.⁴
48. The key provisions of the settlement between the I&E and Respond Power filed on September 18, 2015 and pending review by the ALJs include: a) net refund pool of \$1,779,846.97; b) payment up to \$50,000 to cover the costs and expenses of the third-party administrator; c) minimum contribution of \$25,000 to the EDCs' hardship funds; d) civil penalty of \$25,000; e) 24-month moratorium on selling variable rate products to new customers; and (f) other injunctive relief, in the form of additional marketing restrictions and obligations associated third party verifications, disclosure statement, training , compliance monitoring, and customer service.

³ See *Commonwealth of Pennsylvania, et al. v. Hiko Energy, LLC*, Docket No. C-2014-2427652 (Settlement Agreement filed May 1, 2015) (Initial Decision issued August 21, 2015).

⁴ See *Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Settlement Agreement filed on May 1, 2015) (Settlement Agreement filed August 4, 2015).

Respectfully submitted,



Adam Young, Esq.
Prosecutor
Bureau of Investigation and Enforcement
Pa. Public Utility Commission
400 North St.
Harrisburg, PA 17120



Karen O. Moury, Esq.
Buchanan, Ingersoll & Rooney
409 North Second St.
Harrisburg, PA 17102

Counsel for Respond Power LLC

Dated: September 18, 2015

APPENDIX A

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**THE BUREAU OF INVESTIGATION AND ENFORCEMENT’S
STATEMENT IN SUPPORT OF AMENDED SETTLEMENT**

The Public Utility Commission’s (“Commission”) Bureau of Investigation and Enforcement (“I&E”), a signatory party to the Amended Petition for Approval of Settlement filed in the matter docketed above at C-2014-2438640, submits that the terms and conditions in the Settlement are reasonable and in the public interest for the following reasons:

I. BACKGROUND

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 Commission a Formal Complaint alleging 10 counts against Respond Power LLC (“Respond Power” or “the Company”), at Docket Number C-2014-2427659.

The Joint Complainants averred that on or about February 10, 2014, the OCA began receiving “a high volume of calls and written correspondence from residential consumers on variable rate plans with electric generation suppliers (“EGS”) regarding the level of electric generation charges on the consumers’ electric bills.”¹

On July 10, 2014, Respond Power filed an Answer to the Joint Formal Complaint, which admitted or denied the various averments made by OCA/OAG and specifically denied the violations of law and other wrongdoing alleged by OCA/OAG. In particular, Respond Power denied that any of its actions violated Pennsylvania law or the orders or regulations of the Commission.

On August 21, 2014, I&E filed a Formal Complaint against Respond Power 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. The specific details of the allegations are more fully set forth in the Joint Stipulation of Facts filed commensurate with the Statement in Support.

I&E made several requests for relief, including providing refunds to customers, paying a civil penalty, and revocation of Respond Power’s EGS license.

¹ Joint Complainants averred that as of May 4, 2014, the OCA had collected information from 2,434 of its consumer contacts, 189 (8%) of which were regarding Respond Power. Joint Complainants alleged that from February 27, 2014 through June 4, 2014, the Attorney General received 7,503 consumer complaints related to variable rates charged by EGSs. Of these 7,503 consumer complaints, 520 (7%) were regarding Respond Power.

On September 30, 2014, Respond Power filed an Answer to the Formal Complaint and admitted or denied the various averments made by I&E and specifically denied the violations of law and other wrongdoing alleged by I&E. In particular, Respond Power denied that any of its actions violated Pennsylvania law or the orders or regulations of the Commission.

A Prehearing Conference was held on Monday, August 25, 2014, at which the following matters were addressed: (1) the need for preliminary evidentiary hearing(s) regarding testimony of OCA and OAG witnesses (other than expert witnesses); (2) procedural schedule; (3) settlement conference; (4) service requirements and parties list; (5) discovery modifications; and (6) a protective order.²

On September 30, 2014, Respond Power also filed Preliminary Objections to the Formal Complaint, alleging lack of Commission jurisdiction and/or legal insufficiency of various pleadings as they relate to Pennsylvania's Consumer Protection Law, 52 Pa. Code § 56.141, and/or as they purport to regulate the prices Respond Power charged.

On October 17, 2014, I&E filed a response to the Preliminary Objections denying the lack of Commission jurisdiction and/or legal insufficiency of the pleadings in the Formal Complaint. On November 17, 2014, Administrative Law Judges Joel Cheskis and Elizabeth Barnes issued an Order granting in part and denying in part the Preliminary Objections.

On October 24, 2014, Joint Complainants filed written direct testimony with exhibits of two hundred (200) consumer witnesses. On November 14, 2014, I&E filed written direct testimony with exhibits of twenty-one (21) consumer witnesses. At the initial hearing held March 9-13, 2015, one hundred fifty three (153) of the 221 consumers provided telephonic/live testimony.

On August 25, 2015, a Petition for Approval of Settlement ("Settlement Agreement") was filed resolving all issues between I&E and Respond Power. An

² On October 23, 2014, I&E filed a Motion to Consolidate the two Formal Complaints referenced in Paragraphs 1 and 2 above, which was approved by Order on October 28, 2014.

Amended Petition for Approval of Settlement was filed on September 18, 2015. Additional hearings were held on August 26-27, 2015 for the admission of expert testimony in the joined actions. This Statement in Support of Settlement follows.

II. LEGAL STANDARD

52 Pa. Code § 69.1201. Factors and standards for evaluating litigated and settled proceedings involving violations of the Public Utility Code and Commission regulations -- statement of policy:

- (a) The Commission will consider specific factors and standards in evaluating litigated and settled cases involving violations of 66 Pa.C.S. (relating to Public Utility Code) and this title. These factors and standards will be utilized by the Commission in determining if a fine for violating a Commission order, regulation or statute is appropriate, as well as if a proposed settlement for a violation is reasonable and approval of the settlement agreement is in the public interest.
- (b) Many of the same factors and standards may be considered in the evaluation of both litigated and settled cases. When applied in settled cases, these factors and standards will not be applied in as strict a fashion as in a litigated proceeding. The parties in settled cases will be afforded flexibility in reaching amicable resolutions to complaints and other matters so long as the settlement is in the public interest. The parties to a settlement should include in the settlement agreement a statement in support of settlement explaining how and why the settlement is in the public interest. The statement may be filed jointly by the parties or separately by each individual party.
- (c) The factors and standards that will be considered by the Commission include the following:
 - (1) Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.
 - (2) Whether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.
 - (3) Whether the conduct at issue was deemed intentional or negligent. This Factor may only be considered in evaluating litigated cases.

When conduct has been deemed intentional, the conduct may result in a higher penalty.

- (4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.
- (5) The number of customers affected and the duration of the violation.
- (6) The compliance history of the regulated entity which committed the violation. An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.
- (7) Whether the regulated entity cooperated with the Commission's investigation. Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty.
- (8) The amount of the civil penalty or fine necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount.
- (9) Past Commission decisions in similar situations.
- (10) Other relevant factors.

52 Pa. Code § 69.1201.

Commission policy promotes settlements. 52 Pa. Code § 5.231. Settlements lessen the time and expense the parties must expend litigating a case and at the same time conserve administrative resources. The Commission has indicated that settlement results are often preferable to those achieved at the conclusion of a fully litigated proceeding. 52 Pa. Code § 69.401. The focus of inquiry for determining whether a proposed settlement should be recommended for approval is not a “burden of proof” standard, as is utilized for contested matters. *Pa. Pub. Util. Comm’n, et al. v. City of Lancaster – Bureau of Water*, Docket Nos. R-2010-2179103, et al.

(Opinion and Order entered July 14, 2011) (Lancaster). Instead, the benchmark for determining the acceptability of a settlement or partial settlement is whether the proposed terms and conditions are in the public interest. *Pa. Pub. Util. Comm'n LBPS v. PPL Utilities Corporation*, M-2009-2058182 (Opinion and Order November 23, 2009); *Pa. Pub. Util. Comm'n v. Philadelphia Gas Works*, M-00031768 (Opinion and Order January 7, 2004); 52 Pa. Code § 69.1201; *Warner v. GTE North, Inc.*, Docket No. C-00902815 (Opinion and Order entered April 1, 1996); *Pa. Pub. Util. Comm'n v. CS Water and Sewer Associates*, 74 Pa. PUC 767 (1991).

III. PUBLIC INTEREST

I&E contends that the Settlement Agreement is in the public interest because the terms and conditions of the Settlement satisfactorily address the broad range of issues raised in the Formal Complaint and that the Settlement, taken as a whole, constitutes a reasonable compromise of the complex issues presented.

The total settlement package allocates significant refunds to customers affected by Respond Power's conduct based upon the customer's usage, price charged, and refunds already given. The Settlement also allocates nearly \$1.5M of additional funds to be distributed to any potential "silent victims." The refunds, \$125,000 civil penalty, and minimum of \$25,000 economic hardship fund contributions are significant enough to deter future violations of the Public Utility Code. The remedial actions mandated by the Settlement will ensure in the future full and accurate information and disclosures to consumers, proper and adequate training to employees and third-party contractors, adequate call-center staffing, as well as fair and transparent marketing and billing practices. All of these are of paramount importance both to consumer protections and the continued development of a retail choice market.

As the Settlement offers every customer served by Respond Power in early 2014 the opportunity to receive a refund; includes a substantial civil penalty; provides

for contributions to EDCs' hardship funds; and contains extensive modifications to Respond Power's marketing, sales and business practices; it should be approved without modification. Moreover, it is arguable that the relief provided by the Settlement effectively resolves all factual and legal allegations of the Joint Complaint that are within the Commission's jurisdiction to address. In so doing, the Commission will conserve valuable resources that would otherwise be invested in briefing and adjudicating the Joint Complaint. As such, I&E submits that no additional relief or remedies are warranted or appropriate.

IV. SETTLEMENT TERMS

The Settlement Agreement is comprised of nearly forty (40) pages, many of which are remedial actions to be undertaken by Respond Power. For the sake of brevity, I&E will not discuss each and every remedial action herein. I&E will, however, touch upon some of the most important aspects of the Settlement terms.

A. TOTAL SETTLEMENT PACKAGE:

Most notable is the total value of the Settlement Agreement, which is potentially \$3,200,000 if all money is claimed by customers. Three million dollars of this settlement package will be for refunds to Respond Power customers, a minimum of \$25,000 electric distribution company ("EDC") hardship fund contributions, \$50,000 for third-party administrator fees, and \$125,000 will be paid as a civil penalty to the General Fund. Each will be discussed in greater detail in the sections to follow.

B. REFUNDS TO FORMAL/INFORMAL COMPLAINANTS:

Respond Power has agreed to issue refunds in the total amount of \$3,000,000.00 to customers served by Respond Power during January, February and March 2014. This total amount of refunds includes \$971,279.45 in voluntary

reductions of charges through re-billings performed by Respond Power in February 2014. It also includes voluntary refunds that were previously provided by Respond to customers in the amount of \$248,873.58.

Of the net \$1,779,846.97 remaining in the Refund Pool for additional refunds (after subtraction of the voluntary re-billings and refunds), \$313,351.33 will be refunded to former or existing Respond Power customers who filed formal/informal complaints with the Commission against Respond Power between February 1, 2014 to June 30, 2014, and/or provided consumer testimony in this joint proceeding. I&E will determine which customers were affected by the conduct of Respond Power alleged in the Formal Complaint and shall determine how much restitution to offer to any individual customer. I&E will allocate refunds according to the customer's usage, the price charged, and refunds already administered. The refunds will be determined so as to maximize the refunds to individual customers to ensure fair treatment to affected customers.

I&E submits that providing refunds to those customers affected is not only in the public interest, but also more jurisdictionally appropriate for the Commission. It is questionable whether the Commission has jurisdiction to order refunds to *all* Respond Power customers that *may* be similarly situated to those that filed formal/informal complaints at the Commission. To order refunds to customers who did not file a formal/informal complaint with the Commission is akin to a class action suit, the entertainment of which exceeds the Commission's authority.³ The Commission is, however, authorized to direct refunds to complainants who are customers of EGSs, and who complained in writing to the Commission regarding the acts or omissions of a public utility. *See* 66 Pa.C.S. §501; 66 Pa. C.S. § 701. Thus, refunding money to

³ Section 701 of the Public Utility Code provides that any person may complain in writing to the Commission regarding the acts or omissions of a public utility. 66 Pa.C.S. § 701. Nothing in Section 701 or any other section of the Public Utility Code, however, allows for the filing of class action complaints. In the absence of statutory authority, the Commission cannot entertain class action complaints.

customers that are formal/informal complainants at the Commission is certainly legally sound and in the public interest.

Moreover, this refund distribution method is the most fair, as it provides a substantial refund to those customers *actually* harmed (complained to the Commission in writing) while, as discussed in the next section, providing an avenue for a monetary refund to those customers who did not file a formal/informal complaint with the Commission (silent victims).

C. REFUNDS TO ADDITIONAL CUSTOMERS:

Respond Power, through this Settlement Agreement, has agreed to distribute the \$1,466,495.64 remaining in the Refund Pool (after the subtraction of the refunds to customers who filed formal/informal complaints) to *all other customers served by Respond Power during January, February and March 2014*. Respond Power shall retain, in consultation with I&E, a third-party Administrator to administer the distribution of refunds to the remaining customers. I&E will provide the distribution method to the Administrator, which will be based on the individual customer's usage, price charged and refund amounts already received directly from Respond Power. The refund determinations will be designed so as to fully utilize the Refund Pool.

The Administrator will be responsible for sending a letter to each of these customers within 30 days of approval of this Petition by the Commission, which offers a minimum amount of refund that may be claimed by any customers of Respond Power during the period in question. In order to claim a refund, the customer must mail back the response within 60 days. Refunds will be issued within 90 days of the claim being made by the customer.

I&E and Respond Power, through this Settlement, agreed upon the informal complaint receipt dates for receiving a refund (Feb. 1 – June 30) after a careful review of the number of informal complaints received against Respond Power in each month starting in January 2014. Customers in February 2014 began receiving their bills for

usage in January 2014 (the first month of the polar vortex). It is in February that the number of informal complaints received by BCS began to increase dramatically from 19 in January to 105 in February. Likewise, given the end of the polar vortex around March/April 2014 (April/May 2014 bills) the number of informal complaints began to dwindle in May and June of 2014. Thus, the dates for receiving informal complaints of February 1, 2014 through June 30, 2014 are based on a sound conclusion after review of all relevant data.

D. ECONOMIC HARDSHIP FUND CONTRIBUTION:

Respond Power will make a minimum contribution to electric distribution hardship funds of \$25,000. In addition to the \$25,000, if customers claim less than \$500,000 of the Refund Pool, Respond Power will make contributions to electric distribution company hardship funds in an amount representing the difference between \$500,000 and the total claims made. For example, if customers claim only \$495,000, Respond Power will make EDC hardship fund contributions of \$30,000 (\$25,000 + \$5,000). Thus, \$525,000 is guaranteed either to silent victims, or to EDC hardship funds. Hardship funds will be allocated by the ratio of the Company's customers in the EDC's territory to the total amount of Company customers in Pennsylvania as of January 1, 2014. I&E has the ability to monitor and audit the Refund Pool and processes and agreed upon actions of Respond Power to confirm compliance with the terms of the Settlement.

In the event that customers claim \$500,000 or more of the Refund Pool, Respond Power will contribute \$25,000 to the EDCs' hardship funds, which will be allocated in the manner explained above, and any funds remaining in the Refund Pool will be returned to Respond Power twelve months after the date of the letter sent by the Administrator.

No customer shall be paid any funds from the Refund Pool without executing a "Release of Claims" pursuant to which the customer agrees, in exchange for payment

of the funds, to release, acquit, and forever discharge the Company and all of its current and former officers, shareholders, and employees from any and all claims arising from or related to the conduct alleged in the Formal Complaint. Further, as part of this Settlement Agreement, I&E releases the Company and all of its current and former officers, shareholders, and employees from any and all claims arising from or related to the conduct alleged in I&E's Formal Complaint.

Such a "release of claims" is not against the public interest because if a customer is an active plaintiff in a separate proceeding (*i.e.* averring breach of contract) against Respond Power, he or she has the choice of 1) receiving the refund amount offered to him/her as determined by the third party Administrator of the Refund pool in the instant case and releasing Respond Power from further claims against the company, or 2) refusing the offered refund amount and pursuing a separate claim in another jurisdiction, *i.e.*, federal or state trial court. That decision is at the discretion of the consumer. Some consumers might want the more expedient resolution by accepting a refund amount from the Administrator of the Refund Pool. Others may hold out for a resolution in a separate lawsuit. If a consumer elects to pursue the remedy created in this Settlement or somewhere else, he or she is free to do so.

E. REMEDIAL MEASURES:

In addition to the monetary restitution, civil penalty, and EDC Hardship Fund contribution, Respond Power has agreed to significantly modify its business practices as outlined in the Settlement. These modifications are nearly identical to the modifications that HIKO, PaG&E, and IDT⁴ will be making pursuant to their

⁴ See *Commonwealth of Pennsylvania, et al. v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric*, Docket No. C-2014-2427656 (Settlement Agreement filed March 24, 2015) (Initial Decision issued June 30, 2015); *Commonwealth of Pennsylvania, et al. v. Hiko Energy, LLC*, Docket No. C-2014-2427652 (Settlement Agreement filed May 1, 2015) (Initial Decision issued August 21, 2015); *Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Settlement Agreement filed on May 1, 2015) (Settlement Agreement filed August 4, 2015).

respective settlement agreements (if approved by the Commission). As compared to HIKO, PaG&E and IDT, Respond Power will be subject to the most restrictive stay-out period for variable rate offerings, namely, Respond Power will offer only fixed price contracts for a period of two years beginning September 1, 2015. After the expiration of that two-year period, Respond Power will be free to offer variable price contracts in a manner that is consistent with the Commission's regulations which are in effect at that time.

Respond Power commits that the Company, its agents, employees and representatives shall not make misrepresentations to consumers including: making representations, either directly or by implication, about savings that consumers may realize by switching to Respond Power except when referencing an explicit, affirmative guaranteed savings program; using terms in its marketing campaigns, whether for fixed or variable products such as "risk free," "competitive," "guaranteed," or any other terminology that represents that the price offered will be lower than the electric distribution company's (EDC's) price to compare ("PTC"); using terms in their variable rate marketing campaigns, such as "trial period" or "introductory rate," without a clear and conspicuous disclosure of the material terms and conditions thereof; making representations, either directly or by implication, about "special programs" for which a Pennsylvania consumer qualifies, unless Respond Power provides documentation to the consumer explaining in detail the "special program;" making representations, either directly or by implication, about PTC increasing or the PTC being a variable rate; and making any representations whatsoever about how a consumer's utility purchases electricity.

Additionally, Respond Power will make significant modifications to its third-party verification process and its disclosure statements, as well as implement a new training program for employees and third-party contractors and follow new protocols for door-to-door marketing. Of concern to I&E in this proceeding was the conduct of Respond Power's third-party vendors during door-to-door sales. I&E

asserts that the modifications to the third-party verifications, new training of employees and third-party contractors, as well as the door-to-door marketing restrictions, and call center staffing/training modifications will prevent similar occurrences in the future. These modifications warrant adopting the Settlement in its entirety without modification as being in the public interest.

V. DISCUSSION

THE PETITION FOR APPROVAL OF SETTLEMENT SHOULD BE APPROVED AS BEING IN THE PUBLIC INTEREST.

To determine whether a proposed settlement is in the public interest, the Commission must evaluate the proposed settlement subjecting it to the following factors and standards:

- (1) Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.
- (2) Whether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.
- (3) Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated cases. When conduct has been deemed intentional, the conduct may result in a higher penalty.
- (4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.
- (5) The number of customers affected and the duration of the violation.
- (6) The compliance history of the regulated entity which committed the violation. An isolated incident from an otherwise compliant utility may result

in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.

(7) Whether the regulated entity cooperated with the Commission's investigation. Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty.

(8) The amount of the civil penalty or fine necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount.

(9) Past Commission decisions in similar situations.

(10) Other relevant factors.

52 Pa. Code § 69.1201. I&E will now address each of these factors.

- (1) Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty... When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.**

With regard to the first factor, whether the conduct was of a serious nature, I&E submits that the violations alleged in the Complaint were of a serious nature. It has long been the policy of the Commonwealth to promote the competitive provision of electric generation service and various parties, including the General Assembly, the Commission, the public advocates, EDCs, EGSs and others, have expended a substantial amount of resources in making the marketplace successful. Such success requires that no misleading and deceptive promises of savings, among other things, be made that may undermine competition. The actions averred in the Formal Complaint would reverse the years of efforts to promote competition and are quite serious. The conduct alleged in the instant case warrants the remedial relief outlined in the Settlement Agreement. A moratorium on variable rate sales in

Pennsylvania for 24 months will give the company time to implement the numerous corrective actions outlined in the settlement to bring their marketing and sales techniques into regulatory compliance. Further, the refund pool amount will reimburse the customers who were charged rates inconsistent with the expected savings the customers were told they would receive, relieving some of the financial burden sustained by many of the consumers that were affected by the conduct alleged in the Formal Complaint. Certainly, the allegations made in the Formal Complaint do not amount to less egregious conduct, such as an administrative filing or technical errors, which would warrant less severe treatment. Rather, the conduct at issue was of a serious nature and warrants adopting the Settlement in its entirety without modification, along with the civil penalty included therein, as being in the public interest.

- (2) Whether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.**

With regard to the second factor, whether the resulting consequences of the conduct at issue were of a serious nature, although there was no personal injury or property damage that occurred as a result of the alleged actions, I&E believes that the resulting consequences of the conduct averred in the Formal Complaint are of a serious nature. Many of the consumers experienced increases in their monthly bills of three to five times the normal amount. Some consumers had their service terminated, while other consumers were placed on payment agreements to pay off the outstanding balance. Such consequences strained family budgets and low - income customer assistance programs - both of which are serious consequences.

In addition, the violations averred in the Formal Complaint should be deemed serious because the alleged conduct could adversely impact the integrity of electric competition and potentially deter participation in the retail electric market. As noted above, the effective development of the competitive provision of electric generation service requires eliminating misleading and deceptive promises, among other things. As such, I&E asserts that the resulting consequences of the conduct at issue were of a serious nature and warrant adopting the Settlement in its entirety without modification, along with the civil penalty and EDC hardship contribution included therein, as being in the public interest.

- (3) Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated cases. When conduct has been deemed intentional, the conduct may result in a higher penalty.**

As this action is apparently set for settlement, the third factor would not apply at this point. As such, the same will not be discussed.

- (4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.**

With regard to the fourth factor, whether the regulated entity has made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future, Respond Power has agreed as part of the Settlement to make substantial modifications to its business practices. These modifications encompass changes to Respond Power's product offering, marketing practices, third party verifications, Disclosure Statement, training of internal and external sales representatives, compliance monitoring, reporting, and customer service. The Settlement provides significant detail regarding each of these issues. These

modifications, as noted above, along with the refund pool, seek to ensure that the conduct alleged in the Complaint is remedied and that such conduct is prevented from occurring in the future.

Respond Power has also agreed not to offer variable rate plans for a period of 24 months, beginning September 1, 2015. This is the most restrictive stay-out period of the 4 major EGS cases litigated or settled in the past year.⁵ In part, this time period allows for the implementation of the modifications to the business practices so that a variable rate plan may be a viable competitive option for some customers in the future. When viewed in conjunction with the entire Settlement, including the numerous other injunctive provisions, prohibiting Respond Power from offering a variable rate plan for 24 months is reasonable. In general, the Settlement provides several modifications to Respond Power's internal practices and procedures that supports adopting the Settlement in its entirety without modification, along with the civil penalty included therein, as being in the public interest.

(5) The number of customers affected and the duration of the violation.

With regard to the fifth factor, the number of customers affected and the duration of the violation, I&E avers that between February 1, 2014 and June 30, 2014 the Commission's Bureau of Consumer Services (BCS) received 1206 informal complaints regarding Respond Power. Joint Complainants averred that they received approximately 709 contacts from Respond Power customers from early February 2014

⁵ I&E notes that the PG&E Settlement Agreement at Page 12, Paragraph 44, contains a "Most Favored Nation" clause, wherein if OCA and/or the Bureau of Consumer Protection (BCP) settle another matter with "product offering" terms materially less restrictive than the terms in the PG&E Settlement, PGE may apply to have the Settlement modified to include equally less restrictive product offering terms. Settlement between I&E and Respond Power does not trigger this provision for the simple reason that I&E is neither OCA nor the BCP. Thus, settlement between an EGS and I&E is not covered by this clause. Moreover, the product offering terms in the instant Settlement are *more* restrictive than those in the PG&E Settlement. *See Commonwealth of Pennsylvania, et al. v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric*, Docket No. C-2014-2427656 (Settlement Agreement filed March 24, 2015) (Initial Decision issued June 30, 2015).

through early June 2014. While some of these contacts are undoubtedly duplicates, it is fair to say that the number of customers who were likely impacted by the Company's conduct as alleged in the Formal Complaint is significant, but not as significant as the number of customers affected in other approved EGS settlements of a similar nature. For example, in PaG&E, the number of customer contacts with Joint Complainants was approximately 2588, in IDT it was 2456, whereas in HIKO the number of customer contacts with Joint Complainants was 363.⁶ Thus, Respond Power's conduct may have affected more customers than affected by HIKO's conduct, but far less than those affected by PaG&E's and IDT's conduct.

The refund pool, however, is substantial and large enough to remunerate those customers who have not yet received a refund from the Company. This issue must also be considered in light of the fact that the Settlement is the result of a compromise and carries with it other benefits in addition to refunds. When viewed in total, it is clear that the Settlement is reasonable and should be adopted in its entirety without modification, along with the civil penalty and EDC hardship contribution included therein, as being in the public interest.

- (6) The compliance history of the regulated entity which committed the violation. An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.**

The sixth Rosi Factor is the compliance history of the regulated entity. 52 Pa. Code § 69.1201(c)(6). “An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.” *Id.* Respond Power has no prior history of non-compliance.

⁶ See *Commonwealth of Pennsylvania, et al. v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric*, Docket No. C-2014-2427656 (Settlement Agreement filed March 24, 2015) (Initial Decision issued June 30, 2015); *Commonwealth of Pennsylvania, et al. v. Hiko Energy, LLC*, Docket No. C-2014-2427652 (Settlement Agreement filed May 1, 2015) (Initial Decision issued August 21, 2015); *Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Settlement Agreement filed on May 1, 2015) (Settlement Agreement filed August 4, 2015).

Although some formal complaints are currently pending before the Commission, an adjudication of them while this Settlement is being considered would not constitute a prior “compliance history” since those cases involve the same allegations and time period at issue here. Moreover, the injunctive terms of the Settlement will help to ensure compliance with regulatory standards going forward. That is, the significant monetary and injunctive provisions of this Settlement will ensure that Respond Power becomes a compliant utility. As such, this factor supports adopting the Settlement in its entirety without modification, along with the civil penalty and EDC hardship contribution included therein, as being in the public interest because, in particular, because of the extensive modifications to the Company’s business practices that are required in the Settlement.

(7) Whether the regulated entity cooperated with the Commission's investigation, Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty.

The seventh Rosi Factor is whether the regulated entity cooperated with the Commission’s investigation. 52 Pa. Code § 69.1201(c)(7). I&E submits that Respond Power cooperated in the investigation in this matter, including cooperating in formal and informal discovery and settlement negotiations.

(8) The amount of the civil penalty or fine necessary to deter future violations, The size of the utility may be considered to determine an appropriate penalty amount.

With regard to the eighth factor, the amount of the civil penalty or fine necessary to deter future actions, I&E asserts that the total settlement package of \$3,200,000 consisting of a refund pool of \$3,000,000, including what Respond Power previously disbursed to consumers (\$971,279.45 in voluntary reductions of charges through re-billings performed by Respond Power in February 2014, and voluntary

refunds that were previously provided by Respond to customers in the amount of \$248,873.58), and the additional refund amount agreed to as part of the Settlement (\$313,351.33), along with the additional monies comprising the \$125,000 civil penalty, \$50,000 towards administrator fees, and \$1,466,495.64 made available for refunds to all other customers served by Respond Power during January, February and March 2014, of which \$525,000 is guaranteed either to customers or an EDC hardship fund, is significant and appropriate enough to deter future misconduct.⁷ This civil penalty is significantly higher than the \$25,000 civil penalty agreed to by PG&E and IDT as part of their settlements with the Joint Complainants, even though both EGSs have previously had penalties imposed upon them by the Commission, as a result of an I&E investigation.

Moreover, the total number of customers that provided testimony in this consolidated case is 221, of which 153 are part of the record. A mathematically precise breakdown of a specific dollar amount per violation is unnecessary, but would illustrate that given the number of affected customers providing written testimony of record upon which to find substantial evidence to warrant a civil penalty, the \$125,000 civil penalty is appropriate. Even accounting for the 1206 BCS contacts and 709 Joint Complainant contacts (of which some are duplicates) the civil penalty is sufficient, adequate, and in the public interest. Furthermore, the \$125,000 civil penalty, \$3,000,000 in restitution, minimum of \$25,000 EDC hardship contribution, and \$50,000 administrator fees, accompanied by the numerous changes to Respond Power's business practices detailed in the Settlement, are sufficient to deter future violations, and warrant approval of this Settlement.

⁷ If customers claim less than \$500,000 of the Refund Pool, in addition to a \$25,000 contribution to EDC hardship funds, Respond Power will make contributions to EDC hardship funds of the remaining amount up to \$500,000. If customers claim more than \$500,000 of the Refund Pool, Respond Power will make a \$25,000 EDC hardship fund contribution. Any remaining unclaimed amounts in the Refund Pool after twelve months from the date of the letter sent by Respond Power may be moved out of the segregated account and retained by Respond Power.

Looking at the Settlement package as a whole, the Settlement is comprehensive and substantial and should be adopted in its entirety without modification. When doing so, this factor supports adopting the Settlement in its entirety without modification as being in the public interest.

(9) Past Commission decisions in similar situations.

The ninth Rosi Factor is past Commission decisions in similar situations. 52 Pa. Code § 69.1201(c)(9). The Commission has approved settlements involving EGSs that involve refunds, civil penalties and injunctive relief. *See e.g. Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Energy Services Provider, Inc. d/b/a Pennsylvania Gas & Electric And U.S. Gas & Electric, Inc. d/b/a Pennsylvania Gas & Electric*, Docket No. M-2013-2325122, Order (Oct. 2, 2014) (The Commission approved a Settlement that required PaG&E to pay a civil \$150,200 penalty, refunds to its customers affected by the conduct complained of, and implement revisions to its operating procedures); *see also Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. IDT Energy, Inc.*, Docket No. 2013-2314312, (Opinion and Order entered October 17, 2013) (The Commission approved a Settlement that required IDT to pay a \$39,000 civil penalty, and make modifications to its practices relating to its training and supervision of its sales agents and handling of customer complaints).

I&E submits that this Settlement is consistent with prior Commission decisions in similar situations. This case presents its own set of facts, involving a number of affected customers unique to this case, wherein violations attributable to each customer are based on the unique facts of each customer's interaction with Respond Power and/or its third-party sales agent. The above-cited cases, however, are illustrative of the fact that the terms of the Settlement reached in the instant case are just, reasonable, and in the public interest. In PaG&E, above, the Commission approved a civil penalty of \$150,200 for slamming or attempting to slam 319

customer accounts. Docket No. 2013-2314312, (Opinion and Order entered October 17, 2013). The Commission also ordered refunds to those customers slammed and approved the settlement terms for PaG&E to modify its business practices to avoid future misleading, unlawful or fraudulent business practices. In IDT, above, the Commission approved a settlement for a \$39,000 civil penalty for 21 affected customers, 3 of which were actually slammed. The remaining violations alleged consisted of fraudulent, deceptive, and unlawful business practices, and violating the Telemarketer Registration Act (73 P.S. §§ 2241, *et seq.*). Docket No. 2013-2314312, (Opinion and Order entered October 17, 2013).

While not considered past Commission decisions, I&E believes that the recent Initial Decisions issued by the Office of Administrative Law Judge in *Commonwealth of Pennsylvania, et al. v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric*, Docket No. C-2014-2427656 (Initial Decision issued June 30, 2015); *Commonwealth of Pennsylvania, et al. v. Hiko Energy, LLC*, Docket No. C-2014-2427652 (Initial Decision issued August 21, 2015) illustrate that the terms of the instant Settlement are just, reasonable, and in the public interest.

In this second PaG&E case, the ALJs issued an Initial Decision approving without modification the settlement agreement between PaG&E and Joint Complainants requiring (in addition to extensive business practice modifications similar to those imposed by the instant Settlement) PaG&E to pay a \$25,000 civil penalty, a \$100,000 EDC Hardship Fund contribution, a net refund pool of \$2,325,000, and an 18-month stay-out from offering variable rate plans. This PaG&E case involved violations nearly identical to those alleged in I&E's Formal Complaint against Respond Power, yet related to 2588 customer contacts with Joint Complainants. Joint Complainants received only 709 customer contacts relating to Respond Power during the same timeframe, for the same alleged violations. This is approximately 27% of the customer contacts received for PaG&E.

Likewise, in HIKO, the ALJs issued an Initial Decision approving without modification the settlement agreement between HIKO and Joint Complainants requiring (in addition to extensive business practice modifications similar to those imposed by the instant Settlement) HIKO to pay no civil penalty,⁸ a \$25,000 EDC Hardship Fund contribution, a net refund pool of \$2,025,383.85, and an 15-month stay-out from offering variable rate plans. This HIKO case involved violations nearly identical to those alleged in I&E's Formal Complaint against Respond Power, yet related to 363 customer contacts with Joint Complainants. Joint Complainants received only 709 customer contacts relating to Respond Power during the same timeframe, for the same alleged violations.

Finally, while no Initial Decision has issued in *Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc*, Docket No. C-2014-2427657 (Settlement Agreement filed on May 1, 2015) (Settlement Agreement filed August 4, 2015), Joint Complainants did file a comprehensive settlement agreement requiring (in addition to extensive business practice modifications similar to those imposed by the instant Settlement) IDT to pay a \$25,000 civil penalty, a \$75,000 EDC Hardship Fund contribution, a net refund pool of \$2,400,000, and 21 month stay-out from offering variable rate plans. This IDT case involved violations nearly identical to those alleged in I&E's Formal Complaint against Respond Power, yet related to 2456 customer contacts with Joint Complainants. Again, Joint Complainants received only 709 customer contacts relating to Respond Power during the same timeframe, for virtually the same alleged violations. This is approximately 28% of the customer contacts received for IDT.

⁸ In a separate but related litigated matter, *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Hiko Energy, LLC*, Docket No. C-2014-2431410 (Initial Decision issued August 21, 2015), the ALJs issued an Initial Decision imposing a civil penalty against HIKO in the amount of \$1,836,125 for alleged violations different than those alleged by Joint Complainants. I&E alleged that HIKO's actions in 2014 constituted deliberate and egregious misconduct in that HIKO expressly, unambiguously, and clearly guaranteed a 12-month introductory period discount of 1-7% over the PTC. After which HIKO's CEO and management decided not to honor its contractual promises for as many as four consecutive billing cycles from January through and including April, 2014. HIKO's action resulted in 14,689 deliberate overcharges of over 5,700 customers.

To briefly summarize for comparison purposes, I&E's Settlement Agreement with Respond Power has a potential total value of \$3,200,000, consisting of a \$125,000 civil penalty, a minimum EDC Hardship Fund contribution of \$25,000, \$50,000 in administrator fees, a net refund pool of \$1,779,846.97, a 24-month stay-out from offering variable rate plans, and extensive modifications to business practices nearly identical to the settlement agreements approved by Initial Decision in PaG&E and HIKO, and proposed in the pending IDT matter. The proposed Settlement amounts (civil penalty and restitution) fall squarely between HIKO and PaG&E, which by Joint Complainant's own pleadings, is where it should be. PaG&E had 2588 customer contacts, IDT had 2456 customer contacts and HIKO had 363 customer contacts. Respond Power had 709 customer contacts with Joint Complainants and 1206 with BCS (some of which were duplicates). All of these complaints involved the same types of violations. Moreover, Respond Power has no prior compliance history with the commission, whereas, as discussed above, PaG&E and IDT do. All of this supports a finding that this comprehensive Settlement is just, reasonable, and in the public interest.

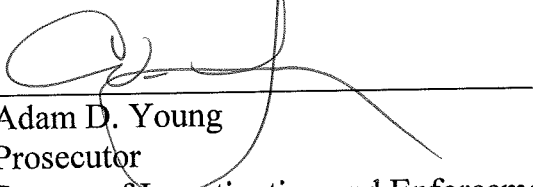
(10) Other relevant factors.

There are no other relevant factors to discuss.

VI. CONCLUSION:

I&E respectfully submits that the Settlement of the above-captioned matter is in the public interest and should be approved, and therefore respectfully requests that the Commission approve the Settlement without modification.

Respectfully submitted,



Adam D. Young
Prosecutor
Bureau of Investigation and Enforcement
Pennsylvania Public Utility Commission

Dated: September 18, 2015

APPENDIX B

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**RESPOND POWER LLC'S STATEMENT
IN SUPPORT OF AMENDED SETTLEMENT AGREEMENT**

Pursuant to 52 Pa. Code §§ 5.231, 5.232 and 69.1201, Respond Power LLC (“Respond Power” or “Company”), by and through its counsel, Karen O. Moury, and Buchanan Ingersoll & Rooney PC, files this Statement in Support of Amended Settlement Agreement (“Settlement”) filed in the above-captioned matter on September 18, 2015, which fully satisfies the Complaint filed by the Bureau of Investigation and Enforcement (“I&E”) at Docket No. C-2014-2438640 on August 21, 2014 and comprehensively addresses and resolves all allegations raised in this consolidated proceeding. For the reasons set forth below, the Settlement is reasonable and in the public interest, and should be approved by the Pennsylvania Public Utility Commission (“Commission”).

I. INTRODUCTION

This Settlement demonstrates Respond Power's commitment to work with the Commission and fully address the concerns raised about Respond Power's variable price increases as result of the Polar Vortex of 2014 and the Company's associated sales, marketing and business practices. Respond Power's total financial responsibility for the Settlement is \$3.2 million, and the Company specifically agrees to: 1) provide significant financial relief in the form of refunds to the consumers who complained to the Commission's Bureau of Consumer Services ("BCS") from February 1, 2014 through June 30, 2014 about Respond Power; 2) establish an additional refund pool that will be administered by a third party administrator to give current and former Respond Power customers who previously did not file complaints the opportunity to now make claims for refunds; 3) forego offering variable price products to new customers for two years; 4) modify its marketing practices and materials to enhance the quality and content of the information that is provided to consumers about its products; 5) design and implement improved training programs for its sales representatives and third-party contractors; 6) increase internal quality control and compliance monitoring efforts; 7) staff its call center to answer calls within specified timeframes and develop an action plan for handling periods of high call volumes; and 8) provide quarterly reports to the Commission regarding complaints and disputes. In addition, Respond Power agrees to pay a civil penalty in the amount of \$125,000 and contribute up to \$50,000 toward the costs and expenses of the third party administrator for the additional refund pool as part of the Settlement. The Company will also contribute \$25,000 to the electric distribution companies' ("EDCs") hardship funds, with the potential for a greater contribution if consumers do not claim money that is set aside for the additional refund pool described above.

Although the Office of Attorney General (“OAG”) and Office of Consumer Advocate (“OCA”) (collectively referred to as “Joint Complainants”) have not entered into a settlement agreement with Respond Power to satisfy the Joint Complaint they filed on June 20, 2014 at Docket No. C-2014-2427659, the vast majority of the allegations in the Joint Complaint are duplicated in the I&E Complaint and relate to the same marketing, sales and business practices that are described in the I&E Complaint. If this were not true, the complaints would not have been appropriate for consolidation. Further, the injunctive relief agreed to by Respond Power in this Settlement is nearly identical to the language contained in settlement agreements among the Joint Complainants and other electric generation suppliers (“EGSs”), two of which have been approved by Initial Decisions issued by Administrative Law Judges (“ALJs”) Barnes and Cheskis. Most importantly, Respond Power’s financial commitments under the Settlement are consistent with, if not more compensatory, than those previous settlements. Therefore, this comprehensive Settlement is in the public interest, and approval of this Settlement should fully resolve and appropriately address all issues raised in this consolidated proceeding. See *Commonwealth of Pennsylvania, et al. v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric*, Docket No. C-2014-2427656 (Initial Decision issued June 30, 2015) (“*PG&E Initial Decision*”); *Commonwealth of Pennsylvania, et al. v. Hiko Energy, LLC*, Docket No. C-2014-2427652 (Initial Decision issued August 21, 2015) (“*Hiko Initial Decision*”); *Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Joint Petition for Approval of Settlement filed August 4, 2015) (“*IDT Settlement*”).

Therefore, Respond Power respectfully requests expeditious approval of the Settlement without modification so that the benefits may be quickly delivered to consumers without the need for continued litigation.

II. BACKGROUND

Respond Power is an EGS licensed by the Commission to supply electricity or electric generation services to the public within the Commonwealth of Pennsylvania. *License Application of Respond Power LLC for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as a Supplier of Retail Electric Power*, Docket No. A-2010-2163898 (August 19, 2010). Since receiving its EGS license in 2010, Respond Power has supplied electric generation services under variable price plans to tens of thousands of residential, small commercial and large commercial customers throughout Pennsylvania.¹ In mid-February 2014, after customers began making inquiries about variable price increases, Respond Power voluntarily re-rated customers in the service territories of PECO Energy Company and PPL Electric Utilities, Inc. Specifically, Respond Power cancelled the bills for these customers and re-billed the customers at approximately one-half of the prior amount per kilowatt hour (“kWh”) for a total reduction of nearly \$1 million.² Additionally, Respond Power has issued voluntary refunds to customers in the amount of almost \$250,000.³ It should also be noted that Respond Power’s average prices during this period were likely not as high as many other EGSs offering similar variable price plans.

Under its variable rate plan, Respond Power provided a Disclosure Statement to consumers explaining as follows: (i) the price may vary from month to month; (ii) the rate is set by Respond Power; (iii) the rate reflects Respond Power’s generation charge based on the PJM Day-Ahead Market, installed capacity, transmission system losses, estimated state taxes, other costs and a profit margin; and (iv) the consumer may contact Respond Power for its current variable rate. The Disclosure Statement further provided that Respond Power’s goal was to

¹ Respond Power’s Answer and New Matter to Joint Complainants’ Complaint, ¶ 106.

² Stipulation of Facts ¶ 43.

³ Stipulation of Facts ¶ 44.

charge a price that is less than what the customer would have paid to the local utility company, but that it could not guarantee savings due to wholesale market fluctuations and conditions.⁴ The variable pricing language in the Disclosure Statement mirrors the language that was included in its draft Disclosure Statement, which was submitted by Respond Power with its application filed with the Commission on February 2, 2010. This language was approved by the Commission's BCS as part of the licensing process.⁵

Prior to January 2014, no customers had filed formal complaints with the Commission against Respond Power concerning its variable rate contracts. From the time Respond Power received its license in 2010 until January 2014, only two customers had filed formal complaints and both were quickly resolved through settlement agreements.⁶

During the month of January 2014, wholesale prices for hourly energy supply in the day ahead and particularly the real time markets increased exponentially in response to sustained cold weather ("Polar Vortex"). New records were set for winter electricity use in Pennsylvania and throughout the service area of PJM Interconnection, LLC ("PJM"). High demand combined with particularly high forced outage rates for a number of generators to produce record high costs in the PJM-administered energy markets. For instance, average wholesale day-ahead LMP prices for Pennsylvania in January 2014 were estimated at \$148/MWh compared to \$44/MWh in December 2013. Similarly, estimated energy uplift charges, which are energy charges billed to EGSs in addition to LMP costs, were estimated at \$631 million in the month of January 2014, which is equivalent to a full year of uplift charges for the period 2010-2012. *See Review of*

⁴ Joint Complaint, Appendix B.

⁵ Small Rebuttal Testimony, Page 12, lines 4-8; Exhibit AS-3; Stipulation of Facts ¶41.

⁶ Small Rebuttal Testimony, Page 2, lines 26-30. The complaints are docketed at Docket No. F-2012-2291997 (unauthorized switching) and Docket No. F-2014-2399569 (incorrect charges on the bill and misrepresentation as an electric distribution company).; Mumford Direct Testimony, p. 32, lines 7-11. The lack of other formal complaints may also be verified by a review of public documents searchable through the Commission's website. This press release explains the process available for searching the Commission's website for complaints against regulated entities: http://www.puc.pa.gov/about_puc/press_releases.aspx?ShowPR=3579.

Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products, Docket No. M-2014-2406134 (February 20, 2014) (“*Variable Price Order*”).

To serve its retail customers in Pennsylvania, Respond Power incurred costs, at various times during the winter months, which were in excess of ten times its typical costs.⁷ As a result of those abnormally high wholesale costs, Respond Power made a business decision to increase customers’ prices to recover a portion of those costs. The variable price contracts under which those customers were being served allowed Respond Power to adjust their prices to reflect those costs, as well as a profit margin. If Respond Power had added a profit margin of \$.02/kWh to all of its costs, it would have charged Pennsylvania customers more than it did.⁸

III. COMPREHENSIVENESS OF SETTLEMENT

As the independent prosecutory bureau of the Commission, which is charged with enforcing the Public Utility Code, Commission regulations and Commission orders, I&E has negotiated this comprehensive Settlement with Respond Power. The Settlement fully resolves all issues arising from the variable price increases that were charged to retail customers during the 2014 Polar Vortex as a result of the record-breaking wholesale price increases that were paid by Respond Power, including associated concerns with Respond Power’s marketing, sales and business practices. It addresses these issues by providing for significant refunds to consumers and the payment of a substantial civil penalty by Respond Power, as well as contributions to EDCs’ hardship funds, and by imposing extensive injunctive relief on Respond Power, including major modifications to its marketing, sales and business practices.

Through this Settlement, Respond Power is assuming total liability in the amount of \$3.2 million. In addition to rerates and refunds that have already been voluntarily issued to former

⁷ Respond Power’s Answer and New Matter to Joint Complainants’ Complaint, ¶ 108.

⁸ Horowitz Rebuttal Testimony, page 4, lines 18-21.

and current Respond Power customers in the amount of over \$1.2 million, Respond Power will make an additional amount of nearly \$1.8 million available for more refunds. Over \$300,000 of that amount will be set aside for refunds to customers who complained to the Commission about Respond Power from February 1, 2014 through June 30, 2014. The remaining amount of almost \$1.5 million will be made available to every other customer served by Respond Power during January, February and March 2014. Through the establishment of this additional refund pool, which will be administered by a third party administrator, the Settlement ensures that any and all customers who may have been affected by Respond Power's variable price increases in that time period have an opportunity to receive a refund. In addition to this money that Respond Power is providing for refunds to customers, it will also pay a \$125,000 civil penalty under the Settlement; pay up to \$50,000 to cover the costs and expenses of the third party administrator for the refund pool; and contribute a minimum of \$25,000 to the EDCs' hardship funds, with the potential for up to a \$500,000 contribution if customers do not submit claims from the additional refund pool.

Additionally, by this comprehensive Settlement, Respond Power will forego offering variable price contracts to new customers in Pennsylvania for a period of two years, commencing on September 1, 2015.⁹ It will also implement significant changes to its marketing and sales practices, compliance monitoring efforts, training programs, and complaint handling procedures. Specific injunctive relief in this Settlement includes a series of obligations to which Respond Power will adhere in marketing electric generation services in Pennsylvania related to sales scripts; third party verification scripts; the use of terminology such as "savings," "competitive," and "guaranteed;" and its disclosure statement. Respond Power will also be subjected to greater

⁹ While this Settlement is pending review, Respond Power is voluntarily foregoing the marketing of variable prices to new customers.

oversight by the Commission and to additional reporting requirements than would otherwise be applicable to Respond Power as a licensed EGS.

The ALJs should expeditiously approve this Settlement without modification as it: (i) offers every customer served by Respond Power in early 2014 the opportunity to receive a refund; (ii) includes a substantial civil penalty; (iii) provides for contributions to EDCs' hardship funds; and (iv) contains extensive modifications to Respond Power's marketing, sales and business practices. Moreover, the ALJs should conclude that the relief provided by the Settlement effectively resolves all factual and legal allegations of the Joint Complaint that are within the Commission's jurisdiction to address. This result would most effectively be reached by holding the litigation procedural schedule on the Joint Complaint in abeyance pending a review of the Settlement. If the ALJs and the Commission agree that the Settlement adequately addresses all issues raised in the consolidated proceeding, the Joint Complaint should be dismissed as moot. In that manner, valuable resources would be conserved by the parties and the Commission that would otherwise be spent briefing and adjudicating the Joint Complaint. Therefore, by essentially merging the Joint Complaint with the Settlement, the ALJs can globally address all allegations raised by both the Joint Complainants and I&E through approval of the Settlement. The Settlement has been intentionally structured in a manner that no additional relief or remedies are warranted or appropriate.

IV. SETTLEMENT PROVIDES CONSUMERS WITH REFUNDS NOT LIKELY AVAILABLE UNDER THE LAW

If this matter is fully litigated at the Commission (either as a result of the ALJs not approving the Settlement, approving it with modification, or ordering additional refunds or other relief as may be requested by the Joint Complainants), Respond Power will be forced to make arguments under existing law that would likely deny refunds for aggrieved customers. Even if

the Commission disagrees and directs Respond Power to issue refunds to some or all customers, it is likely that the order would be appealed and that any distribution of refunds may not be approved or would be significantly delayed, possibly for many years.

In continued litigation without the Settlement, Respond Power's position would be that the Commission does not have statutory authority to direct the issuance of a refund by an EGS to any customer. It is well-settled that as a creation of the General Assembly, the Commission has only the powers and authority granted to it by the General Assembly and contained in the Public Utility Code, 66 Pa.C.S. §§ 101 et seq. ("Code"). *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937 (Order entered May 28, 2008); *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977). The Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. Pa. Pub. Util. Comm'n*, 43 A.2d 348 (Pa. Super. 1945). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967). Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992), *alloc. denied*, 637 A.2d 293 (Pa. 1993).

Code Section 1312 is the only statutory provision authorizing the Commission to direct the issuance of refunds and it applies only to public utilities who charge rates that are "unjust or unreasonable." 66 Pa.C.S. § 1312. While Respond Power is aware of the Commission's orders relying on plenary authority under Code Section 501 to direct EGSs to issue a refunds under certain circumstances,¹⁰ Respond Power would contend that in making those decisions, the Commission has disregarded the Statutory Construction Act of 1972, 1 Pa. C.S. §§ 1501 et seq., as well as long-standing case law. Respond Power would further argue that the limited circumstances under which the Commission has directed EGSs to issue refunds do not apply to

¹⁰ See *Kiback v. IDT Energy, Inc.*, Docket No. C-2014-2409676 (Order entered August 20, 2015).

many of the consumers who testified in this proceeding. For instance, some witnesses claimed to have been switched without authorization and it was later shown during the evidentiary hearings on March 9-13, 2015 that they were not slammed; therefore, they would have no entitlement to a refund even under the Commission's recent decisions. *See, e.g., Tran v. Respond Power, LLC*, Docket No. C-2014-2417540 (Order entered July 30, 2015).

Moreover, Respond Power would maintain that only consumers who filed complaints with the Commission have any recourse or ability to request a refund under Code Section 701. 66 Pa.C.S. § 701. Neither I&E nor either of the Joint Complainants has standing to represent individual consumers before the Commission and seek refunds on their behalf. Code Section 701 expressly provides that the Commonwealth through the Attorney General may be a complainant before the Commission in any matter solely as an advocate for the Commonwealth as a consumer of public utility services. *Id.* Similarly, the Office of Consumer Advocate's enabling statute does not authorize it to represent the interests of individual utility consumers before the Commission. *See* 71 P.S. § 309-1, *et seq.; Suprick v. Commonwealth Telephone Co.*, Docket No. C-00903161, 1995 LEXIS 15. As to I&E, it is not authorized by statute, but rather by a Commission Order, which likewise does not delegate any powers enabling it to represent consumers in Commission proceedings. *See Implementation of Act 129 of 2008, Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Order adopted August 11, 2011).

Further, Respond Power would contend that the Commission does not have jurisdiction over class action lawsuits or to hear "pattern of practice" claims. As the ALJs have observed, "[n]othing in Section 701 or any other section of the Public Utility Code...allows for the filing of class action complaints. In the absence of such statutory authority, the Commission cannot entertain class action complaints." *Commonwealth of Pennsylvania, et al. v. Energy Services*

Providers, Inc. d/b/a Pennsylvania Gas & Electric, Docket No. C-2014-2427656 (Order Granting Petition to Intervene dated April 23, 2015). See also *Painter v. Aqua PA, Inc.*, Docket No. C-2011-2239557 (Opinion and Order entered May 22, 2014); *Pettko v. Pennsylvania American Water Company*, Docket No. C-2011-2226096 (Administrative Law Judge Order dated October 5, 2011 and adopted by Commission Order on February 18, 2013).

Finally, a “pattern of practice” approach is not appropriate in this proceeding due to the unique facts and circumstances of each individual sales transaction. For instance, while some of the consumer statements contain vague and generalized allegations that they were promised savings, others are specific about a percentage of savings for a defined time period. Also, some statements describe a consumer’s understanding, which may have been from any number of sources other than Respond Power, while others claim that sales representatives of Respond Power made specific promises to them. In short, each statement is a description of the customer’s unique interaction with Respond Power and involves many nuances that warrant a more in-depth review. It is precisely for this reason that federal courts in Pennsylvania have found that claims involving deceptive business practices are not suitable for class action treatment. See *Kostur v. Goodman Global, Inc.*, 2014 WL 6388432 (E.D. Pa) (claims of deceptive business practices involve varying levels of reliance, causation and damages between each individual).

In fact, the United States District Court for the Eastern District recently denied the Plaintiff’s motion for class certification in a putative class action lawsuit filed against Respond Power regarding marketing and sales activities for variable rate contracts, for the very reasons explained above. Since the variable rate customers could not be expected to share the same understanding of their contractual rights, the Court found that the commonality requirement of

class certification was not fulfilled. *Barbara A. Gillis, Thomas Gillis, Scott R. McClelland, and Kimberly A. McClelland, individually and on behalf of all others similarly situated v. Respond Power, LLC*, Docket No. 14-3856 (Order dated August 31, 2015).

Therefore, the opportunity for all customers served by Respond Power to claim a refund as a result of the Settlement weighs heavily in support of its expeditious approval without modification and would result in more favorable treatment for consumers than the likely result under existing law.

V. SPECIFIC SETTLEMENT TERMS

Under the Settlement, Respond Power is agreeing to issue refunds in the total amount of \$3,000,000 to customers served by Respond Power during January, February and March 2014, which includes the amount of \$971,279.45 in voluntary reductions of charges through rebillings already performed by Respond Power in February 2014 and voluntary refunds previously provided by Respond Power to customers in the amount of \$248,873.58.¹¹ Of the \$1,779,846.97 that remains in the refund pool, the amount of \$313,351.33 in additional refunds will be issued to about 1200 customers who informally complained to the Commission from February 1, 2014 through June 30, 2014.¹²

The remaining amount in the refund pool, of \$1,466,495.64, referred to previously as the “additional refund pool,” may be claimed by all other customers served by Respond Power during the time period noted above. A third party administrator will communicate with those customers and offer a minimum amount of refund that may be claimed. Customized refunds will

¹¹ Stipulation of Facts ¶¶ 43 and 44.

¹² This time period is appropriate in view of complaint trends. Stipulation of Facts ¶¶ 36 and 37; Joint Complaint ¶¶ 15 and 18. Also, by June 30, 2014, customers would have received multiple bills containing higher variable prices and should have known whether they were affected and felt aggrieved. *See* 52 Pa. Code § 57.177 (Commission’s slamming regulations afford customers two months’ of bills to notice a change in EGS and register a dispute).

be calculated on the basis of an individual customer's usage and prices that were charged, offset by any refunds already issued to those customers. To qualify for a refund, the customers will simply need to mail a response back to the administrator within 60 days.

Besides the issuance of additional refunds and the creation of this refund pool to allow non-complaining customers to now submit claims, Respond Power is agreeing to contribute up to \$50,000 to cover the costs and expenses of the third party administrator. Further, Respond Power agrees to pay a civil penalty in the amount of \$125,000 and contribute a minimum of \$25,000 to the EDCs' hardship funds, with the potential for up to \$500,000 if customers do not make claims for refunds.

By way of injunctive relief and modifications to its current practices relating to marketing and sales, compliance monitoring and training, Respond Power has agreed that it will not offer variable price contracts to new customers for a period of two years commencing September 1, 2015. The Company has further agreed to avoid making representations about potential savings or using terms such as "competitive" in describing its prices. In addition, Respond Power has agreed that if it resumes marketing variable price contracts after the 2-year stay-out, it will provide specific information in all sales contacts explaining that the price can change every month; that it is not a fixed price contract; that the price can go up or down; and that there is no limit on how high the price can go. Further, Respond Power has agreed to make changes to its website to more conspicuously display its terms and conditions and provide greater assurances that consumers will review them. For third party verifications, Respond Power has agreed to follow a specific script set forth in the Settlement that is designed to ensure that a customer understands that they are agreeing to a variable rate that changes monthly and has no ceiling. Respond Power has also agreed to submit a copy of its current disclosure statement to the

Commission following approval of this Settlement and to continue to provide amended disclosure statements to the Commission for five years.

As to training, Respond Power has agreed to implement a program that is specifically tailored to Pennsylvania requirements and to provide to the Commission a detailed description of the program that will be implemented. Under the Settlement, the training program will include initial training and subsequent refresher training on a quarterly basis for all Respond Power employees, agents and third-party contractors. A portion of the new training program will be specifically geared toward door-to-door marketing and designed to ensure that all sales representatives produce photo identification depicting Respond Power's trade name and logo, identify the reason for the visit and describe Respond Power as an independent energy marketer. The enhanced training program will also highlight the fact that deceptive or intimidating sales practices will not be tolerated by Respond Power.

In addition, Respond Power has agreed to increase its internal quality control efforts, which will include the recording of all communications between customers and Respond Power's customer service representatives and requiring its telemarketers to record and maintain all communications with consumers that result in a sale. The enhanced compliance monitoring will also entail the weekly review of a statistically valid sample of recorded calls and follow-up investigations of additional calls if any non-compliant calls are identified. Respond Power further has agreed to promptly take specific remedial actions against sales representatives and third-party contractors in the event of violations. Respond Power has also committed to provide quarterly reports to the Commission for a period of five years, explaining all internal audits and investigations performed during the reporting period. This report will list all customer complaints and disputes received by Respond Power.

With respect to customer service, Respond Power has agreed to maintain a staff of customer service representatives necessary to handle calls within timeframes specified in the Settlement and to develop and implement an action plan for handling periods of high call volumes. If Respond Power experiences a period of high call volumes during which it does not comply with the timeframes set forth in the Settlement, it has committed to provide a report to the Commission of the occurrence, which contains an explanation of the reasons and a description of remedial measures implemented by the Company.

VI. THE SETTLEMENT IS IN THE PUBLIC INTEREST

A. Introduction

“It is the policy of the Commission to encourage settlements.” 52 Pa. Code § 5.231. Settlements, whether partial or full, conserve valuable resources of the Commission and the parties. Importantly, the focus of inquiry for determining whether a proposed settlement should be recommended for approval is not a “burden of proof” standard, as is utilized for contested matters. *Pa. Public Utility Commission, et al. v. City of Lancaster – Bureau of Water*, Docket No. R-2010-2179103 (Order entered July 14, 2011). Rather, the Commission reviews settlements to determine whether the terms are in the public interest. *See, e.g., Pa. Public Utility Commission, Law Bureau Prosecutory Staff v. PPL Electric Utilities Corporation*, Docket No. M-2009-2058182 (Order entered November 23, 2009).

The Commission’s Policy Statement at 52 Pa. Code § 69.1201, which sets forth specific factors and standards that are used in evaluating settled cases, is a codification of the Commission’s decision in *Rosi v. Bell Atlantic-Pa., Inc. and Sprint Communications Company*, Docket No. C-00092409 (Order entered February 10, 2000). These factors and standards are utilized by the Commission in determining if a fine is appropriate, as well as if a proposed

settlement is reasonable and approval of the settlement agreement is in the public interest. 52 Pa. Code § 69.1201(a). Although the same criteria are used in the evaluation of both litigated and settled cases, they are not applied in as strict a fashion to settled cases, and the parties in settled cases are afforded flexibility in reaching amicable resolutions to complaints as long as the settlement is in the public interest. 52 Pa. Code § 69.1201(b).

B. Approval Of The Settlement Would Eliminate Uncertainties Of Litigation

As discussed above, absent a full approval of the Settlement, Respond Power's litigation position would be that the Commission lacks statutory authority to direct the issuance of refunds by EGSs in any situation, and that any authority the Commission may have does not extend to directing Respond Power to issue refunds to consumers who are not complainants in matters pending before the Commission. Yet, under the Settlement, Respond Power is agreeing to make available a significant refund pool to both complaining and non-complaining customers.

Similarly, in litigation, Respond Power would contend that the Commission does not have jurisdiction to enforce the Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 P.S. §§ 201-1, *et seq.* ("Consumer Protection Law") or Telemarketer Registration Act ("TRA"), 73 P.S. §§ 2241 *et seq.* However, in the Settlement, Respond Power voluntarily agrees to comply with the provisions of those state laws.

Likewise, if this matter is litigated, Respond Power would maintain that the Commission's customer information disclosure regulations and plain language guidelines were vague and unenforceable, particularly given the review and approval process that Respond Power's disclosure statement was subjected during the licensing proceeding. Nonetheless, as part of the Settlement, Respond Power agrees to have its disclosure statement subjected to

further review and approval by the Commission, as well as future amendments for a period of five years.

These are just examples of the certainties created by the Settlement that would not be possible through litigation. By delivering these certainties rather than having the Commission's jurisdiction and legality of its regulations challenged and resolved by appellate courts, the Settlement is in the public interest.

C. The Settlement Fully Resolves All Issues Raised In This Consolidated Proceeding

The Settlement is in the public interest because it fully resolves all issues raised in this proceeding by developing a fair and workable mechanism for issuing refunds to all customers of Respond Power in January, February and March 2014; establishing a significant civil penalty for the allegations set forth in both the Joint Complaint and the I&E Complaint; providing for a contribution to EDCS' hardship funds; and creating a framework for modifying Respond Power's marketing, sales, training, and compliance monitoring practices to address these allegations. Many of the allegations in the Joint Complaint are mirrored in the I&E Complaint and relate to the same marketing, sales and business practices that are described in the I&E Complaint. Specifically, both the Joint Complaint and the I&E Complaint allege misleading and deceptive claims of affiliation with EDCs; misleading and deceptive promises of savings; failure to disclose material terms; prices nonconforming to the disclosure statement; slamming; and lack of good faith in handling complaints.

The Joint Complaint contains only three allegations that do not appear in the I&E Complaint. One concerns compliance with the TRA, which the Commission has found that it does not have the jurisdiction to enforce.¹³ *Commonwealth of Pennsylvania, et al. v. Respond Power*, Docket No. C-2014-2427659 (Order on Interlocutory Review entered April 9, 2015)

¹³ Joint Complaint at Count IX.

(“April 9, 2015 Interlocutory Order”). In any event, the allegation made in that count of the Joint Complaint is that Respond Power did not provide consumers with a contract following a telemarketer sale, which is not required by the TRA when a transaction is regulated by other laws of the Commonwealth. 73 P.S. § 2245(d).

Another count in the Joint Complaint that does not appear in the I&E Complaint relates to an alleged failure to provide accurate pricing information.¹⁴ In this count, the Joint Complainants allege that Respond Power’s Disclosure Statement does not contain sufficient information about the conditions and limits of price variability. As the Commission approved the variable pricing language as part of the licensing process, this allegation has no merit. *See Hoke v. Ambit Northeast, LLC d/b/a Ambit Energy*, Docket No. C-2013-2357863 (Initial Decision dated November 21, 2013) (Final Order entered January 16, 2014). Also, these allegations are based on an inaccurate interpretation of the Commission’s regulations, which do not require EGSs to use a specific pricing methodology or to place limits on prices that may be charged. Even when the Commission revised its regulations in response to the Polar Vortex, it did not include this language in the requirements. *See* 52 Pa. Code § 54.5. In any event, the Settlement provides for Respond Power to submit a new draft Disclosure Statement to BCS and to submit any changes for five years; therefore, any ongoing concerns about Respond Power’s Disclosure Statement have been fully addressed.

The third count in the Joint Complaint that is not in the I&E Complaint relates to welcome letters and inserts, which the Joint Complaint contends violate the Consumer Protection Law. As the Commission has concluded that it does not have jurisdiction to enforce the Consumer Protection Law, this count does not contain any allegations upon which the Commission may award any relief. *See April 9, 2015 Interlocutory Order*. In any case, Respond

¹⁴ Joint Complaint at Count VII.

Power noted in its Answer to the Joint Complaint that the welcome letter and inserts appended to the Joint Complaint were used by a vendor over a few-month period more than two years prior to July 10, 2014.¹⁵ Therefore, no further relief is warranted by this count.

The I&E Complaint also contains two allegations that do not appear in the Joint Complaint. Specifically, I&E alleged billing errors¹⁶ and inaccurate or incomplete sales agreements.¹⁷

Despite these minor differences in the allegations, the Settlement produces results and fashions specific remedies that adequately and effectively address all of the allegations contained in both the Joint Complaint and the I&E Complaint. The injunctive relief agreed to by Respond Power in this Settlement is nearly identical to the language contained in settlement agreements among the Joint Complainants other EGSs concerning similar allegations, two of which have been approved by Initial Decisions issued by ALJs Barnes and Cheskis. Additionally, the financial commitments made by Respond Power in this Settlement are consistent with or exceed amounts that have been previously agreed to by the Joint Complainants and approved by the ALJs. *See generally PG&E Initial Decision; Hiko Initial Decision; and IDT Settlement.* Approval of this Settlement would fully address all of the issues raised in this consolidated proceeding.

D. The Refund Pool Established By The Settlement Is In The Public Interest

The Settlement establishes a total refund pool in the amount of \$3 million to provide financial relief to customers served by Respond Power during January, February and March 2014 who complained to the Commission and to others who feel aggrieved. This refund pool includes \$971,279.45 in voluntary bill reductions made by Respond Power in February 2014 and

¹⁵ Respond Power Answer and New Matter, ¶ 55.

¹⁶ I&E Complaint, ¶ 35.

¹⁷ I&E Complaint ¶ 34.

\$248,873.58 in voluntary refunds previously provided by Respond Power. The Settlement provides that \$313,351.33 of the refund pool will be refunded to customers who filed informal complaints from February 1, 2014 through June 30, 2014 with the Commission. The remaining amount of the refund pool in the total of \$1,466,495.64 will be offered to all other customers served by Respond Power during the first quarter of 2014. This sum will be administered and distributed by a third-party administrator, with Respond Power paying up to \$50,000 of the costs and expenses of the administration of the pool. If consumers do not claim at least \$500,000 of this amount, Respond Power will contribute the difference between \$500,000 and the amount of refunds claimed to the EDCs' hardship funds, in addition to a \$25,000 minimum contribution to which Respond Power has committed as part of this Settlement.

A key difference between this Settlement and the settlement agreements with other EGSs is that the Commission's prosecutory bureau, I&E, has the discretion, rather than the Joint Complainants, to determine how the refunds will be distributed to customers. Also, rather than simply issuing refunds to all customers who were served by Respond Power in early 2014, the vast majority of whom have not complained, the Settlement provides for substantial refunds to consumers who felt aggrieved and took steps to complain and seek a remedy. This approach is consistent with the practice that occurs every day when consumers file informal complaints and formal complaints with the Commission and companies resolve them through settlements. Those settlements benefit only the complaining customers. However, in this Settlement, Respond Power has also addressed concerns about customers who may not have realized they were affected or who opted not to complain by establishing an additional refund pool from which all customers served by Respond Power may make claims for refunds now. Further, nothing in this Settlement precludes a customer from continuing to seek relief from the Commission or

other appropriate forum if he or she is not satisfied with the amount of refund that is being offered here. In fact, the Settlement specifically acknowledges that consumers may contact the Company directly to request refunds if they are not satisfied by offers made through this process.

The ALJs should conclude that this refund pool is in the public interest. As the ALJs have already observed, a refund pool that gives numerous affected consumers financial relief, “provides a level of assurance to the marketplace that the EGSs’ actions will be watched,” and aids in the development of the retail competitive market. See *PG&E Initial Decision* at 39 and 43; *Hiko Initial Decision* at 31. It also establishes a mechanism, as the ALJs have recognized, to expedite refunds to customers in Pennsylvania and provides some form of financial relief to customers who complained to the Commission and the Joint Complainants. See *PG&E Initial Decision* at 38-39; *Hiko Initial Decision* at 31. Further, the issuance of voluntary refunds by an EGS is consistent with past Commission precedent, and nothing precludes a party from agreeing to perform under a settlement that which the party may not necessarily be legally obliged to do under law. *PG&E Initial Decision* at 39 and 42; *Hiko Initial Decision* at 32, 34-45. Therefore, Respond Power submits that the same rationale that was employed in the prior initial decisions approving settlements among the Joint Complainants and other EGSs supports a finding that the refund pool established by the Settlement is in the public interest.

E. The Civil Penalty And Contribution To EDC Hardship Funds Is In the Public Interest.

The Settlement includes a civil penalty in the amount of \$125,000 and provides for a \$25,000 minimum contribution to the EDCs’ hardship funds. In addition, if customers claim less than \$500,000 from the nearly \$1.5 million refund pool that is being administered by a third party administrator, additional contributions will be made to the EDCs’ hardship funds, allocated

on the basis of the number of customers Respond Power served in each EDC territory as of January 1, 2014.

The ALJs should find that these provisions are in the public interest. In reviewing a settlement with another EGS, the ALJs concluded that a \$25,000 civil penalty and a \$100,000 contribution to the EDCs' hardship funds, viewed together, were reasonable, appropriate and in the public interest. *PG&E Initial Decision* at 45-46. The ALJs observed that these remedies are "consistent with Commission precedent and will aid in the development of a competitive market for the provision of electric generation service while aiding low income customers." *Id.* at 46. Here, Respond Power is agreeing to pay a civil penalty five times that approved in the PG&E Initial Decision, while also committing to substantial contributions to the EDCs' hardship funds. Therefore, the same rationale employed in the *PG&E Initial Decision* supports a finding that these provisions are in the public interest.

F. The Injunctive Relief Is In The Public Interest

The Settlement provides extensive injunctive relief provisions requiring numerous modifications to Respond Power's business practices, which are almost identical to those that were found to be in the public interest in the *PG&E Initial Decision* (pages 46-50) and the *Hiko Initial Decision* (pages 37-45). These provisions include a two-year moratorium on offering variable price contracts to new customers, and significant changes to Respond Power's marketing and sales practices, compliance monitoring efforts, training programs and complaint handling procedures. They also include a series of obligations to which Respond Power will adhere in marketing electric generation services in Pennsylvania related to sales scripts; third party verification scripts; the use of terminology such as "savings," "competitive," and "guaranteed;" and its Disclosure Statement. Respond Power will also be subjected to greater

oversight by the Commission. As the ALJs have observed, these injunctive relief provisions are appropriate and in the public interest because they address the various issues raised in the Joint Complaint and the I&E Complaint. *PG&E Initial Decision* at 49. Moreover, these substantial actions “further the policy of the Commonwealth to ‘permit retail customers to obtain direct access to a competitive generation market,’ 66 Pa.C.S. §§ 2802(3), and should be adopted without modification.” *Hiko Initial Decision* at 44.

While Respond Power does not admit to any wrongdoing in connection with the Settlement or in making these significant modifications to its marketing, sales and business practices, it does acknowledge having learned valuable lessons as a result of the customer complaints that were filed following the variable price increases in early 2014 and from the consumer witnesses who testified in this proceeding. Clearly, many consumers did not have a sufficient understanding of the workings of the retail competitive market, particularly as to variable pricing. This lack of awareness was acknowledged by the Commission in the *Variable Price Order* when it observed that existing regulatory requirements may need to be changed to ensure that consumers understand how the prices can change. As a result, the Commission took several steps to increase consumer education efforts, including the posting of a consumer alert on PaPowerSwitch.com, developing a separate page on Pa.PowerSwitch.com and the addition of a Q&A for inclusion under “Frequently Asked Questions” on PaPowerSwitch.com to help ensure that consumers are better educated about variable rates. *See Variable Price Order* at 5. In addition, the Commission adopted an Order on April 3, 2014 revising its customer information disclosure regulations to enhance the information that is provided to consumers about variable prices, including a requirement to provide warning that there is no ceiling. *See Rulemaking to Amend Provisions of 52 Pa. Code § 54.5 Regulations Regarding Disclosure Statement for*

Residential and Small Business Customers, Docket No. L-2014-2409385 (Order adopted April 3, 2014). With perfect hindsight, it is clear that this additional information will benefit consumers and the competitive market.

G. The Settlement Is Consistent With The Factors and Standards In The Policy Statement

The Settlement provides immediate, concrete benefits to current and former customers of Respond Power. In addition, it requires Respond Power to make numerous enhancements to its marketing and sales practices, training program, compliance monitoring efforts, customer service and reporting requirements, which are all designed to improve the quality and content of information that is provided to consumers. Importantly, the Settlement is consistent with the factors and standards set forth in the Policy Statement and approval of the Settlement is in the public interest.

The first factor that is considered under the Policy Statement is whether the allegations were of a serious nature, such as willful fraud or misrepresentation, as opposed to administrative or technical errors. 52 Pa. Code § 69.1201(c)(1). Allegations in the Joint Complaint and the I&E Complaint concerning misleading representations by Respond Power sales representatives and the use of misleading marketing materials are of a serious nature. However, no allegations have been made to suggest that Respond Power directed or trained its sales representatives to promise savings or make any other guarantees. To the contrary, Respond Power has offered testimony to demonstrate that its training and oversight of sales representatives was designed to avoid any guarantees of savings.¹⁸ Indeed, the scripts that have been included in the record show that Respond Power's sales representatives were trained to use qualifying language such as

¹⁸ Wolbrom Rebuttal Testimony, p. 5, line 22 – p. 7, line 21.

possible or potential when discussing savings with customers.¹⁹ Moreover, marketing materials contained the same qualifying language.²⁰ The record also includes evidence showing that phrases such as “historical savings” were true at various times prior to the Polar Vortex.²¹ Importantly, Respond Power’s Disclosure Statement expressly stated that the Company could not guarantee savings.²² This is not a situation where an executive level decision was made to increase prices despite a written guarantee to the contrary. *See Pa. Public Utility Commission, Bureau of Investigation and Enforcement v. Hiko Energy, LLC*, Docket No. C-2014-2431410 (Initial Decision issued August 21, 2015). As the ALJs noted in the *Hiko Initial Decision* (page 46), the remedies of a moratorium on variable rate sales and refunds to consumers address the seriousness of the allegations. In the *PG&E Initial Decision* (page 50), the ALJs similarly found that the nature of the allegations warranted approval of the Settlement without modification, including the civil penalty.

The second factor that is evaluated under the Policy Statement is whether the resulting consequences of the actions were of a serious nature, such as whether personal injury or property damage were involved. 52 Pa. Code § 69.1201(c)(2). Here, no allegations have been raised about personal injury or property damage. Rather, the allegations relate to financial harm to customers and to an adverse impact on the competitive retail market. While some customers testified to having difficulty paying their bills when variable prices were increased, Respond Power submits that those increases were consistent with contracts into which they entered. Further, Respond Power made voluntary reductions in the charges for many of those customers

¹⁹ BRA-2, p. 93; I&E Exhibit 5. In fact, the Commission itself has focused on the possible savings from switching to an EGS in promoting electric choice through PaPowerSwitch.com. Stipulation of Facts ¶ 40.

²⁰ Wolbrom Rebuttal Testimony at p. 9, lines 6-9; Joint Complainants’ Consumer Witness Testimony, Volume I, page 28 (Exh. VW-1).

²¹ Wolbrom Rebuttal Testimony at p. 11, lines 24-30; Exhibit EW-1.

²² Joint Complainants’ Complaint, Appendix B; Small Rebuttal Testimony at p. 6, lines 24-25.

in the amount of nearly \$1 million and has already issued refunds in the amount of almost \$250,000. The Settlement affords additional substantial financial relief to customers who complained to the Commission and offers a generous \$1.5 million pool from which other customers may claim refunds. It also provides for contributions to EDCs' hardship funds. In the *PG&E Initial Decision* (page 51), the ALJs concluded that the financial difficulties experienced by consumers and the potential effect of the alleged conduct on the retail market warranted approval of the these provisions and the overall settlement without modification. In the *Hiko Initial Decision* (pages 46-47), the ALJs observed that the disbursement of refunds and a contribution to the EDCs' hardship funds are appropriate remedies to address the consequences of the alleged conduct.

The third factor identified by the Policy Statement is whether the conduct at issue was deemed intentional or negligent. 52 Pa. Code § 69.1201(c)(3). "This factor may only be considered in evaluating litigated cases." *Id.* Therefore, this factor is not relevant here. See *PG&E Initial Decision* at 51; *Hiko Initial Decision* at 47, footnote 10.

The fourth factor that is considered under the Policy Statement is whether Respond Power has made efforts to modify internal practices and procedures to address the allegations at issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision. 52 Pa. Code § 69.1201(c)(4). In addition to the measures noted above to help customers who were financially affected by the variable price increases, Respond Power has agreed as part of this Settlement to implement numerous modifications in its marketing practices, including a stay-out from offering variable price contracts to new customers for two years. The Settlement also includes specific provisions regarding sales scripts, third party verification scripts, disclosure statements, marketing

materials, training, compliance monitoring and reporting. Noting that PG&E had agreed not to offer variable rate plans for 18 months, which is a shorter moratorium than agreed to by Respond Power, and that the PG&E settlement agreement provided for several modifications to its internal practices and procedures, which are identical to the injunctive relief contained in the Respond Power Settlement, the ALJs concluded that approval of the settlement without modification was in the public interest. *PG&E Initial Decision* at 51-52. In the *Hiko Initial Decision* (page 47), the ALJs found that refunds, contributions to the EDCs' hardship funds and modifications to business practices supported approval of the settlement.

The fifth factor that is evaluated under the Policy Statement is the number of customers who were affected and the duration of the alleged violations. 52 Pa. Code § 69.1201(c)(5). The Joint Complaint identifies 709 customers of Respond Power who contacted the Office of Attorney General and the Office of Consumer Advocate. The I&E Complaint notes that 1,206 customers filed informal complaints with the Commission from February 1, 2014 through June 30, 2014. Even if there was no overlap between those two groups of customers, and there is some overlap, the total number of customers who were affected would be less than 2,000. Only about 10% of those customers submitted written testimony as part of this proceeding, and the written testimony of approximately 153 consumers were admitted in the record either by stipulation or following cross-examination. The remaining pieces of consumer testimony that were served by the Joint Complainants and I&E are not in the record. The Settlement will result in refunds for the approximately 1,200 customers who filed informal complaints and establishes a mechanism for the other customers served by Respond Power in early 2014, including those who complained to the Joint Complainants, to receive a refund. If customers do not claim the amount that is set aside for the non-complaining customers, up to \$500,000 will be contributed to

the EDCs' hardship funds, including the \$25,000 minimum contribution to which Respond Power has committed. In the *Hiko Initial Decision* (page 47) and in the *PG&E Initial Decision* (page 52-53), the ALJs found that refunds and contributions to the EDCs' hardship funds were reasonable and in the public interest, especially considering the injunctive relief outlined in the settlement agreements.

The sixth factor is the compliance history of Respond Power. 52 Pa. Code § 69.1201(c)(6). Respond Power has no prior compliance history with the Commission.²³ Prior to January 2014, two formal complaints had been filed with the Commission and both were quickly resolved through settlements.²⁴ Although some formal complaints are currently pending before the Commission, an adjudication of them while this Settlement is being considered would not constitute a prior "compliance history" since those cases involve the same allegations and time period at issue here. In fact, several formal complaints filed with the Commission involving the same allegations and time period at issue here have been dismissed during the pendency of this proceeding.²⁵ The fact that formal complaints were fully litigated and adjudicated in Respond Power's favor demonstrates that there is no "pattern and practice" of unlawful activity. In the *PG&E Initial Decision* (pages 53-54), the ALJs concluded that the settlement, including a \$25,000 civil penalty, was in the public interest, despite PG&E having a prior settlement agreement with I&E involving the slamming of 300 customers that resulted in a \$150,200 civil penalty and various corrective measures.

²³ Mumford Direct Testimony, p. 32, lines 7-11.

²⁴ Small Rebuttal Testimony, p. 2, lines 23-30.

²⁵ See, e.g., *Werle v. Respond Power LLC*, Docket No. C-2014-2429158 (Initial Decision issued November 18, 2014; Final Order entered February 23, 2015); *Nadav v. Respond Power LLC*, Docket No. C-2014-2429159 (Order entered December 19, 2014); *Tran v. Respond Power LLC*, Docket No. C-2014-2417540 (Order entered July 30, 2015); *Friz v. Respond Power LLC*, Docket No. F-2014-2453884 (Initial Decision issued February 11, 2015; Final Order entered March 19, 2015).

The seventh factor that is considered under the Policy Statement is whether Respond Power cooperated with the Commission's investigation. 52 Pa. Code § 69.1201(c)(7). I&E has indicated that Respond Power was cooperative during the informal investigation that led to the filing of the I&E Complaint. Before and since the filing of the Joint Complaint and the I&E Complaint, the Company has worked to resolve issues with individual consumers. Numerous cases have been closed due to settlements resulting in the filing of certificates of satisfaction.²⁶ In the *Hiko Initial Decision* (page 48), the ALJs relied on the Joint Complainants' assertion that the company had cooperated in the investigation, including discovery and settlement negotiations, and concluded that the ability of the parties to comprehensively resolve this matter demonstrates cooperation. Similarly, in the *PG&E Initial Decision* (page 54), the ALJs commended the parties for their cooperation in reaching a comprehensive settlement of these various complex issues.

The eighth factor that is evaluated under the Policy Statement is the amount of civil penalty that is necessary to deter future violations. 52 Pa. Code § 69.1201(c)(8). It is also appropriate to consider the totality of the payments that Respond Power has made or will make pursuant to the Settlement. The total costs of the Settlement to Respond Power exceed \$3 million, including a civil penalty of \$125,000. This civil penalty is significantly higher than the amounts of \$25,000 agreed to by each PG&E and IDT as part of their settlements with the Joint Complainants, even though both EGSs have previously had penalties imposed upon them by the Commission, as a result of an I&E investigation. See *PG&E Initial Decision* at 53-54; *Pa. Public Utility Commission, Bureau of Investigation and Enforcement v. Energy Services*

²⁶ See, e.g., *Tustin v Respond Power LLC*, Docket No C-2014-2417552 (Certificate of Satisfaction filed December 5, 2014); *Russell v. Respond Power LLC*, Docket No. C-2014-2417551 (Certificate of Satisfaction filed September 29, 2014); *Slocum v. Respond Power LLC*, Docket No. C-2014-2429154 (Certificate of Satisfaction filed November 13, 2014); *Lewis v. Respond Power LLC*, Docket No. C-2014-2411127 (Certificate of Satisfaction filed November 19, 2014).

Providers, Inc. d/b/a Pennsylvania Gas and Electric, Docket No. M-2013-2325122 (Order entered October 2, 2014). See also *Pa. Public Utility Commission, Bureau of Investigation and Enforcement v. IDT Energy, Inc.*, Docket No. M-2013-2314312 (Order entered October 17, 2013). In the *PG&E Initial Decision* (pages 54-55), the ALJs recognized the total refund pool as well as the additional amounts agreed to as part of the settlement agreement, including the civil penalty, costs for administering the refund pool and a contribution to the EDCs' hardship funds were substantial and should deter future violations. The same package of settlement terms exists here.

Respond Power recognizes that the total amounts of the settlement packages for PG&E and IDT are higher than the amount produced by this Settlement. For example, PG&E agreed to a total refund pool of over \$6.8 million and IDT agreed to a total refund pool of over \$6.5 million. However, it is likely that those EGSs each had significantly higher average customer prices and larger customer bases that would, by pure math, result in a larger refund pool. Moreover, those EGSs issued more refunds to customers on their own terms prior to execution of their settlements, for their own business reasons such as for media purposes or to keep customers. Therefore, for comparison purposes, and to assist in a determination of whether the Settlement is in the public interest, it is more appropriate to consider the net refund pools. PG&E agreed to refund an additional \$2.3 million to customers, while IDT agreed to refund an additional \$2.4 million to customers as part of their settlement agreements with the Joint Complainants.²⁷ These refund pools compare favorably to Respond Power's nearly \$1.5 million in additional refunds provided for by the Settlement, particularly given the number of customers who contacted the Joint Complainants about PG&E and IDT, as compared to Respond Power. Specifically, 2,588 customers contacted the Joint Complainants about PG&E and 2,456

²⁷ Stipulation of Facts ¶¶ 45 and 47.

customers contacted the Joint Complainants about IDT, compared to the 709 customers who contacted the Joint Complainants about Respond Power.²⁸ PG&E and IDT had over 300 percent more complaints about their prices.

The ninth factor that is considered under the Policy Statement relates to past Commission decisions in similar situations. 52 Pa. Code § 69.1201(c)(9). While the Commission has not issued a final order involving similar allegations against an EGS, the ALJs found in the *PG&E Initial Decision* (page 55) that the settlement was consistent with prior settlements approved by the Commission that involved EGSs and provided for refunds, civil penalties, contributions to EDCs' hardship funds and injunctive relief. As discussed above, the financial payment and modifications to business practices are very similar between the settlement agreement involving PG&E and the Settlement in this proceeding. In the *Hiko Initial Decision* (pages 48-49), the ALJs likewise found the settlement to be consistent with prior Commission-approved settlements and to constitute a comprehensive resolution of the issues.

The tenth factor to consider is "other relevant factors." 52 Pa. Code § 69.1201(c)(10). Because the Settlement provides for significant financial relief to current and former Respond Power customers; precludes Respond Power from offering a variable price for two years; modifies the Company's marketing and sales practices to improve the quality of the information that is provided to prospective customers; requires the implementation of a new training program for employees, agents and contractors that designed to reinforce Pennsylvania's requirements; and enhances Respond Power's compliance monitoring efforts, it is in the public interest and should be approved. In the *Hiko Initial Decision* (page 49), the ALJs also noted that a comprehensive settlement avoids litigation, conserves resources and provides for expedited relief to affected customers. In the *PG&E Initial Decision* (pages 55-56), the ALJs added that a

²⁸ Stipulation of Facts ¶¶ 38 and 39.

settlement is in the public interest because it alleviates the uncertainty associated with fully litigating a case.

In summary, Respond Power respectfully submits that an evaluation of the Settlement under the factors and standards set forth in the Commission's Policy Statement warrants expeditious approval of the Settlement without modification. Through the issuance of refunds to customers who complained to the Commission, the establishment of a refund pool to permit every other customer served by Respond Power in early 2014, the payment of a substantial civil penalty and the imposition of injunctive relief requiring Respond Power to forego offering variable rate contracts to new customers for two years and modifying many of Respond Power's business practices, the Settlement comprehensively addresses all of the allegations raised by the Joint Complaint and the I&E Complaint.

VII. CONCLUSION

Respond Power respectfully submits that the Settlement of the above-captioned matter is in the public interest and should be approved, and therefore respectfully requests that the Commission expeditiously approve the Settlement without modification.

Respectfully submitted,

Dated: September 18, 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.

Respond Power LLC

Pennsylvania Public Utility
Commission, Bureau of Investigation
and Enforcement

v.

Respond Power LLC

Docket No. C-2014-2427659

Docket No. C-2014-2438640

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 E-FILING

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

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

Ashley E. Everette
Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101
aeverette@paoca.org

Dated this 18th day of September, 2015.

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



Karen O. Moury, Esq.