

COMMONWEALTH OF PENNSYLVANIA



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September 28, 2015

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

RE: Commonwealth of Pennsylvania, *et al.* v. Respond Power LLC
Docket No. C-2014-2427659

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

Secretary Chiavetta:

Enclosed please find the Joint Initial Objections of the Commonwealth of Pennsylvania, Office of Attorney General Bureau of Consumer Protection, and the Office of Consumer Advocate to the Amended Petition of Approval of Settlement of the Bureau of Investigation and Enforcement and Respond Power, LLC, in the above-referenced proceeding.

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

Respectfully Submitted,

A handwritten signature in cursive script that reads "Candis A. Tunilo".

Candis A. Tunilo
Assistant Consumer Advocate
PA Attorney I.D. #89891

Enclosures

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

*196330

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SECRETARY'S BUREAU

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Commonwealth of Pennsylvania, by Attorney
General KATHLEEN G. KANE, Through the
Bureau of Consumer Protection,

And

TANYA J. McCLOSKEY, Acting Consumer
Advocate,

Complainants,

v.

RESPOND POWER, LLC,
Respondent

Docket No. C-2014-2427659

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

v.

RESPOND POWER, LLC,
Respondent

Docket No. C-2014-2438640

JOINT INITIAL OBJECTIONS OF THE COMMONWEALTH OF PENNSYLVANIA,
OFFICE OF ATTORNEY GENERAL BUREAU OF CONSUMER PROTECTION,
AND THE OFFICE OF CONSUMER ADVOCATE
TO THE AMENDED PETITION OF APPROVAL OF SETTLEMENT OF THE BUREAU OF
INVESTIGATION AND ENFORCEMENT AND RESPOND POWER, LLC

Pursuant to the directive of Administrative Law Judges Elizabeth Barnes and Joel H. Cheskis (ALJs) at the August 27, 2015 hearing in the above matter, the Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, through the Bureau of Consumer Protection (BCP or OAG) and Tanya J. McCloskey, Acting Consumer Advocate (OCA),

(together, Joint Complainants) hereby file these Initial Objections to the Amended Petition for Approval of Settlement (Settlement) filed by the Bureau of Investigation and Enforcement (I&E) and Respond Power, LLC with the Pennsylvania Public Utility Commission (Commission) on September 18, 2015. Joint Complainants respectfully request that the ALJs convene a hearing (currently scheduled for October 15, 2015) and permit Joint Complainants the opportunity to question witnesses regarding the Settlement and present evidence if necessary regarding objections to the Settlement. Joint Complainants respectfully request that the ALJs direct I&E and Respond Power to produce witnesses knowledgeable of the Settlement and able to answer questions about the Settlement at the hearing. Further, Joint Complainants respectfully request the opportunity to present their full legal analysis in written Objections to the Settlement at least 30 days after the close of the record in this matter.

Additionally, as discussed at the August 26, 2015 hearing, Joint Complainants intend to serve written supplemental testimony of Barbara R. Alexander regarding re-billing/re-rating prior to the hearing on October 15, 2015. See Tr. 1240-43. Joint Complainants respectfully request that Ms. Alexander be permitted to appear for cross-examination regarding her supplemental testimony by telephone at the hearing on October 15, 2015.

Finally, Joint Complainants and Respond Power have reached a stipulation regarding the authenticity of Wolbrom Cross Exhibits 1 and 2 in that they were marketing materials used by Respond Power sales representatives in Pennsylvania. Joint Complainants respectfully request that these exhibits be admitted into the record by stipulation at the hearing on October 15, 2015.

I. INTRODUCTION

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

On August 21, 2014, I&E filed a formal Complaint against Respond Power alleging various violations of the Public Utility Code, the Commission's regulations and CPL. Specifically, I&E alleged the following violations: (1) slamming; (2) misleading and deceptive claims of affiliation with Electric Distribution Companies (EDCs) or Government Programs; (3) misleading and deceptive promises of savings; (4) failure to disclose material pricing terms in

Respond Power's Disclosure Agreement/prices not conforming to Disclosure Agreement; (5) lack of good faith in handling customer complaints/cancellations; (6) inaccurate/incomplete/fraudulent sales agreements; and (7) incorrect billing. On September 2, 2014, BCP filed a Notice of Intervention. On September 3, 2014, OCA filed a Notice of Intervention and Public Statement.

I&E filed a Motion to Consolidate the Joint Complainants' Docket with the I&E Docket, which Motion was granted by Order dated October 28, 2014. Pursuant to the partial litigation schedule, on October 24, 2014, Joint Complainants served consumer direct testimony from approximately 200 consumer witnesses. Thereafter, on November 14, 2014, I&E served consumer direct testimony from approximately 21 consumer witnesses. Hearings for cross-examination of the Joint Complainants' and I&E's consumer witnesses occurred on March 9 through 13, 2015.

Pursuant to the remaining litigation schedule, as amended, on May 18, 2015, Joint Complainants served the direct testimony of OAG investigator Gregory Strupp and the direct testimonies of their experts Barbara R. Alexander, Steven L. Estomin and Ashley E. Everette. Also on May 18, 2015, I&E served the direct testimony of Daniel J. Mumford. Respond Power served the rebuttal testimonies of: (1) Elliott Wolbrom on July 21, 2015; (2) Adam Small, as revised on August 24, 2015; (3) Saul Horowitz, as revised on July 22, 2015; and (4) James L. Crist, as revised on July 23, 2015. On August 19, 2015, Joint Complainants served the surrebuttal testimonies of their aforementioned witnesses. On August 27, 2015, Joint Complainants served the revised surrebuttal and supplemental surrebuttal testimonies of Ashley E. Everette. Hearings for cross-examination of these witnesses occurred on August 26 and 27, 2015.

Joint Complainants and I&E had been engaging in joint settlement negotiations with the Company throughout this consolidated proceeding and had provided a joint counterproposal to Respond Power on July 21, 2015. On July 23, 2015, I&E advised Joint Complainants and OSBA that I&E had reached a settlement in principle with Respond Power that fully satisfied the I&E Complaint and that I&E and Respond Power had “earlier that week” had a brief conference call with the ALJs to advise them of the settlement. Until that time, Joint Complainants were unaware that I&E and Respond Power had been engaging in separate negotiations regarding settlement in this consolidated matter. Late on August 25, 2015, I&E and Respond Power filed a Petition for Approval of Settlement. Thereafter, additional emails were received from counsel for Respond Power providing changes to the Petition and the terms of settlement within the Petition. Joint Complainants advised the parties and ALJs on August 26, 2015, that they would oppose the settlement, and on August 27, 2015, Joint Complainants reserved the opportunity to call witnesses and present evidence supporting their objections to the settlement. The ALJs set a hearing for October 15, 2015.

On September 18, 2015, I&E and Respond Power filed an Amended Petition for Approval of Settlement (Settlement) that further modified the terms of the settlement presented on August 25, 2015 along with a Stipulation of Facts and Statements in Support of Settlement. The ALJs directed Joint Complainants and OSBA to provide initial objections in writing¹

Joint Complainants provide these Initial Objections pursuant to the directive of the ALJs.

¹ Specifically, ALJ Cheskis directed that Joint Complainants and OSBA provide:

... something in writing. It doesn't have to be the complete objection or the complete response the settlement, but we would like something in writing by September 21st, including a suggestion as to how to proceed at that point.

II. INITIAL OBJECTIONS

A. The Settlement is legally defective.

The Joint Complainants learned on July 23, 2015 that Respond Power had entered into a settlement in principle with I&E. Under normal circumstances this would not be a concern because, typically, when a case is litigated before the Commission, the ALJs will allow multiple complainants to consolidate their individual claims to effectuate a more efficient process. These complainants may include a state agency, an individual consumer who had filed a formal complaint, or other third party entities interested in the proceeding. As ALJ Cheskis pointed out at the August 26, 2015 hearing in this proceeding, it is not uncommon for individual plaintiffs to settle or resolve their concerns with a defendant even after the separate matters had been consolidated. Tr. 1171. I&E and Respond Power, however, purport to settle the Joint Complainants' claims as well as I&E's claims in their Settlement.

This case is a consolidated proceeding adjudicating complaints brought by three state agencies – OAG, OCA and I&E— serving in their statutory roles. The Joint Complaint filed by the OAG and OCA against Respond Power and the Formal Complaint filed by I&E contain substantially similar causes of action² and substantially similar allegations of fact and seek similar remedies. In its Formal Complaint, I&E did not seek that the Commission order Respond Power to, *inter alia*, prohibit violations by the Company's salespeople (i.e., injunctive relief). In response to the Joint Complaint and Formal Complaint, Respond Power filed Answers and New Matter asserting the same defenses to the claims. I&E filed a Petition to Consolidate the Complaints, and the Complaints were consolidated, and thereafter the consolidated case proceeded as a single action. In this consolidated proceeding, the parties acted accordingly. The

² Although very similar, the Joint Complainants' Joint Complaint contains a count relating to alleged violations of the Commission's regulations requiring compliance with the Telemarketer Registration Act, which allegations are not in I&E's Complaint.

Joint Complainants treated the action in such a fashion in serving joint settlement proposals, and in pursuing testimony and conducting cross-examination of witnesses.

I&E and Respond Power, however, are now attempting to unilaterally settle all the issues in this consolidated matter, including Joint Complainants' TRA claim, which was not raised by I&E in its Complaint and including relief in the Settlement that I&E did not seek in its Complaint. The Joint Complainants were not included in the negotiations between I&E and Respond Power that led up to this Settlement. Further, I&E and Respond Power describe in great detail the consumer contacts and complaints received by the OCA and OAG and heavily rely on the facts found in the Joint Complainants' consumer witness, non-consumer witness and expert testimonies in attempting to show that this Settlement is in the public interest to approve. See Settlement at Exh. A at 2, 9-12 and 13.

It appears that I&E and Respond Power consider the actions to have become inseparable and are attempting to circumvent the rights of two named complainants with the claim that the "Commission will conserve valuable resources that would otherwise be invested in briefing and adjudicating the Joint Complaint." See Settlement at App. A at 7 and App. B at 8. And "[i]f 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." See Settlement at App. B at 8. Additionally, the "Release of Claims" discussed in the Settlement requires a customer to agree "to release, acquit, and forever discharge the Company ... from any and all claims arising from or related to the conduct alleged in the Formal Complaint." See Settlement ¶ 22. The Joint Complainants submit that the proposed Settlement would be unenforceable as to

law and not within the consumers' and public's interests to bar two state agencies from complying with their statutory authority to protect these interests.³

The Joint Complainants submit that this Settlement is legally defective in that it seeks to settle claims of other statutory parties without their consent or input. It is not appropriate for Joint Complainants, who have diligently moved forward with their burden of proof in this matter, to be denied their statutory right to move forward because another state agency, with a different statutory responsibility has determined to settle Joint Complainants' claims in a manner that agency deems adequate over the objections of Joint Complainants. I&E has no authority to negotiate or speak on behalf of the Joint Complainants and the groups that the OCA and OAG are statutorily authorized to represent. Further, while Joint Complainants do not disagree that a release of claims could be appropriate in a proper and complete settlement of this type of action, it is not appropriate to approve the Release of Claims in this Settlement because it seeks to bar the Joint Complainants, who have a statutory right to bring a proceeding against Respond Power and have been diligently pursuing the litigation as well as joint settlement, from pursuing their own claims at the Commission.

B. Refunds.

Joint Complainants submit that there are several concerns with the refund provisions in the Settlement. First, there are two Refund Pools established, and the customers eligible for refunds are divided into two groups. See Settlement at ¶¶ 20-21. The only difference between the two groups of consumers eligible for refunds, however, is that one group filed an informal complaint with the Commission from February 1, 2014 to June 30, 2014 and the other group did

³ See e.g. Azinger v. Pennsylvania R. Co., 262 Pa. 242, 105 A. 87 (1918); reaffirmed by Kincy v. Petro, 606 Pa. 524, 2 A.3d 490 (2010).

not file an informal complaint with the PUC in that time period.⁴ Settlement at ¶ 20. There is no allegation or statement that one group's injuries are different or more substantial than the injuries in the other group of consumers or that Respond Power's alleged violations of Commission regulations, policies and the Public Utility Code were more egregious to one group over the other. As such, Joint Complainants submit that the refund provisions in the Settlement do not provide for a fair disbursement of refunds to Respond Power's customers.⁵ Additionally, there are many issues regarding the selection and number of consumers in the Refund Group in Paragraph 20 of the Settlement and the calculations and disbursements of refunds, which are not addressed in the Settlement or the Statements in Support.

Second, Joint Complainants submit that the amount of refunds overall and as designated to what the Settlement and Statements in Support call the "silent" group of consumers is wholly inadequate. Although I&E claims that the amount of refunds in the Settlement is "where it should be" in comparison to the Joint Petitions for Settlement filed in other Joint Complaint cases against EGSs,⁶ Joint Complainants submit that an adequate amount of refunds for settlement purposes must be determined on a case-by-case basis based on a company's number and type of customers, usage and prices charged, types of violations alleged and the resulting

⁴ In its Statement in Support, however, I&E states that the difference between the groups is that one group filed formal or informal complaints with the Commission against Respond Power between February 1, 2014 and June 30, 2014 and/or provided testimony in this consolidated proceeding. See Settlement at App. A at 8. Joint Complainants submit that this inconsistency affects the number of customers eligible for refunds under this provision.

⁵ I&E and Respond Power, in their Stipulation of Facts, cite the denial of class certification by the U.S. District Court for the Eastern District of Pennsylvania in a class action suit against Respond Power. See Settlement at Exh. A at ¶ 42. By doing so, I&E and Respond Power seem to suggest that this order supports the dual treatment of consumers for purposes of refunds in this matter. Joint Complainants submit that the class action is different than this proceeding, as this proceeding is about extensive alleged violations of the Public Utility Code and Commission regulations and orders, including the requirements that advertised prices to *every* customer match prices billed to *every* customer and that *every* customer receive fair and adequate disclosures from their suppliers. See e.g. 52 Pa. Code § 54.4(a); 66 Pa. C.S. § 2807(d)(2). As such, Joint Complainants submit that the order regarding class certification is irrelevant to this proceeding.

⁶ See Settlement at App. A at 24.

harm as well as the actions taken to address the harm. It is not appropriate to determine a level of refunds by comparing the level of complaints or contacts reported in the Joint Complaint about Respond Power *vis a vis* those reported in the Joint Complaints about other companies. Such comparison does not reflect the full investigation and record developed or the individual circumstances of each company. The Joint Complainants would also note that I&E and Respond Power made simple assumptions from this complaint information about company size and prices that are not contained in the record of this case or in any way shown to be valid. As such, the comparison to other EGS settlements is not meaningful or supported by the record. Joint Complainants submit that it is appropriate to use Respond Power's number of customers, usage and pricing information in determining the suitable level of refunds in this matter. Joint Complainants further submit that when Respond Power's own data is used in evaluating the level of refunds, the level is not sufficient.

Third, Joint Complainants submit that the refund process involves several steps by the customer to obtain a refund pursuant to the Settlement for the group designated as the "silent" consumers. The refund process for informal complainants is not specified in the Settlement, but it appears that the consumers in this group will receive a refund without further action. Such disparity is not fair treatment of the refund groups. Those in the "silent" customer refund group must first receive and then mail back a completed form to the Settlement Administrator within 60 days of receipt of a letter advising of the minimum refund amount before a refund will be disbursed. See Settlement at ¶ 21(c). There is no information as to what will be on this form or whether the customer will be required to answer questions in a certain way to obtain the refund. It is not possible from the Settlement or Statements in Support to determine the impact of this process. But, such a process requiring this extra step will automatically reduce the number of

Respond Power customers that will receive a refund because not every customer that receives the form will complete it and return it and not every customer may receive the initial letter if they have relocated. Limiting the number of customers that are likely to receive a refund is problematic, particularly with the reverter provision of the Settlement as discussed below in Section II.F.

Fourth, Joint Complainants submit that there is an inconsistency in the Settlement and the Statements in Support regarding the disbursement of the refunds to consumers that filed informal complaints with the Commission during the relevant time period. In the Settlement, it is stated that the refunds to these customers will be “based on the individual customer’s usage, price charged and refund amounts already received directly from Respond Power.” See Settlement at ¶ 20. In I&E’s Statement in Support, however, I&E states that it “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.” See Settlement at App. A at 8. (Emphasis added). According to the Settlement, it appears all customers who filed informal complaints (although see FN 4 *supra*), will be eligible for a refund, but I&E appears to explain that it will first make a determination regarding whether a customer that filed an informal complaint against Respond Power was affected by the conduct alleged in I&E’s Complaint before offering a refund. Joint Complainants submit that the process described by I&E appears to place I&E in the role of adjudicating the merits of informal complaints, which is outside the authority of I&E pursuant to 66 Pa. C.S. § 308.2. It also suggests that not all consumers who filed informal complaints will receive a refund.

C. Alternate Refund Method.

Joint Complainants submit that in the amended Settlement filed on September 18th, an alternate refund method is provided in Paragraph 22 of the Settlement. This method, though, is inadequate and unlikely to result in a different level of investigation into customer complaints and offers of refunds by Respond Power than that to date. Of note, to date Respond Power has paid \$248,873.58 in cash refunds directly to customers.⁷ Many consumer witnesses testified that Respond Power outright refused to consider a refund when they called the Company to complain about their bills. See e.g. Consumer Testimony of Maghen Wines at 588 (When asked to describe the relief, if any, Respond Power offered, Ms. Wines testified, “Nothing[.] [Respond Power] told me I had to pay it. My problem.”); see also Consumer Testimony of Michael Sumerano at 595 (“[Respond Power] offered no relief. Just excuses ...”); see also Consumer Testimony of Eric Rodabaugh at 823 (“Mr. Rodabaugh testified that Respond Power offered “[n]o relief at all, just sent me in circles telling me the same thing.”). Further, the Settlement does not contain any reporting requirement regarding this provision or any detailed process that Respond Power is required to follow. As such, Joint Complainants submit that this provision of the Settlement lacks elements necessary to ensure compliance with the spirit of the agreement and compliance with Chapter 54 of the Commission’s regulations.

D. EGS License Retention.

In the Settlement, I&E affirmatively commits, in consideration for the Settlement, to actively promote license retention by Respond Power in Joint Complainants’ action. See

⁷ As Joint Complainants’ expert Ashley E. Everette testified, amounts claimed by Respond Power to be “re-rates” provided to customers in February 2014 were already accounted for in Ms. Everette’s calculations of overcharges by the Company. See OAG/OCA St. 3-SR (Rev) at 12-13. As such, Joint Complainants submit that crediting Respond Power in the Settlement for these “re-rates” amounting to a purported \$971,279.45, or nearly one-third of the Refund Pool, is not appropriate because doing so results in a credit to Respond Power for amounts never actually collected from customers.

Settlement at ¶ 24. This Settlement term is directly contrary to the position of the Joint Complainants that Respond Power's license should be revoked or suspended as a penalty for its extensive regulatory violations. The Joint Complainants expert testimony, the consumer witness testimony and I&E's own testimony provide extensive evidence regarding this issue and highlights the severity of the alleged conduct to both consumers and the retail market. I&E has committed to actively promote the position of the Company that it should be able to retain its license and actively oppose the Joint Complainants' request for this as a penalty, which the Joint Complainants and I&E have developed on the record through consumer and expert testimonies. The I&E commitment does not appear designed to ensure compliance with the Public Utility Code, Commission regulations or orders. The Joint Complainants submit that the Settlement falls far short of ensuring compliance with the Public Utility Code, Commission regulations and orders or providing appropriate protections and remedies for consumers now or in the future. See 66 Pa. C.S. § 308.2(a)(11).

E. Third-Party Administrator and Distribution of Refunds.

Joint Complainants have several concerns with the process for the distribution of refunds as outlined in the Settlement, including the third-party administrator provisions of the Settlement. Joint Complainants first note that under the terms of the Settlement, it appears that the distribution of refunds to customers who filed informal complaints with the Commission will be effectuated differently than the distribution of refunds to the "silent" customers. Specifically, the use of a third-party administrator seems to be limited to the distribution of refunds to customers who did not file an informal complaint at the Commission. Settlement at ¶ 21. As for the distribution of refunds to customers who filed an informal complaint (although see FN 4 *supra*) at the Commission, the Settlement simply provides that refunds to these customers "shall be distributed using a distribution method provided by I&E, which will be based on the individual

customer's usage, price charged and refund amounts already received directly from Respond Power." Settlement at ¶ 20. Joint Complainants submit that the Settlement is unclear as to who will be distributing these refunds or who will bear that expense. Joint Complainants also submit that the use of a third-party administrator for the distribution of refunds to one class of customers and not for the distribution of refunds to the other makes the process of refunding customers unnecessarily complex.

Second, Joint Complainants submit that \$50,000 is an inadequate amount for Respond Power to pay towards the costs and expenses of the Administrator, in light of the fact that the Settlement provides for a two-step process for the distribution of refunds to customers who did not file an informal complaint at the Commission. Under the terms of the Settlement, the Administrator will first send letters to all eligible "silent" customers and then will make a second mailing containing the refund. Settlement at ¶ 21(c). As noted above, it is unclear who will receive refunds – all consumers that return the first letter or only those that return the letter and pass a screening process. If all eligible "silent" customers respond to the first mailing and I&E determines that refunds be made to them all, this two-step process could potentially be twice as expensive as a process that does not require an administrator to send an initial round of letters. Therefore, Joint Complainants submit that the costs and expenses of the Administrator are likely to exceed \$50,000, at which point the costs and expenses will be deducted from the Refund Pool. This will further limit the refund pool which the Joint Complainants submit is already too limited to provide meaningful refunds from the resulting harm.

Third, the Settlement authorizes Respond Power to retain the third-party administrator. See Settlement at ¶ 21(a). The Settlement does not require Respond Power to obtain an Administrator in a cost-effective manner or to retain an independent third-party administrator.

As stated above, given the two-step process, costs are likely to significantly exceed \$50,000, the excess of which will be deducted from the Refund Pool, thereby reducing the amounts available for refunds to customers.

F. Reverter Provision.

The Settlement provides that funds that remain in the Refund Pool will be returned to Respond Power twelve months after the date of the letter sent by the Administrator, except that if customers 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, 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. See Settlement at ¶ 21(d). Given this provision, there is no incentive for Respond Power to assist or cooperate in ensuring that the Refund Pool will be fully utilized. This concern is especially pertinent in light of the fact that Respond Power will retain the third-party administrator under the terms of the Settlement, and the process for obtaining a refund from the Refund Pool is unnecessarily complex for customers to navigate. Further, because the Refund Pool applicable to this provision is approximately \$1,466,495, under the Reverter provision, Respond Power has the opportunity to return nearly one million dollars to its coffers. As the full value of the refunds in the Settlement is \$3 million, Respond Power could regain nearly one-third of this value pursuant to the Reverter provision in Paragraph 21(d).

G. Door-to-Door Marketing.

Joint Complainants have alleged in their Joint Complaint, *inter alia*, that Respond Power's door-to-door sales representatives made misleading and deceptive claims of affiliation with electric distribution companies in order to induce customers to switch to Respond Power;

that Respond Power's sales representatives made misleading and deceptive promises of savings; and that Respond Power's sales representatives failed to disclose material terms of the contract. See Joint Complaint at Counts I-III. Joint Complainants consumer witnesses testified about serious door-to-door marketing abuses by Respond Power's marketers. See e.g. Consumer Testimony of Justin Herp at 607-609 (Mr. Herp testified as follows regarding his interactions with Respond Power's door-to-door sales agents: "There were five of them that had come out of the van and they all came toward me and were nearly surrounding me ... I felt threatened, and I told them at that point that they would have to leave or else I would call the police. One of the Respond Power marketers, a woman, became belligerent and yelled in my face: "Go ahead and call the police" and continued yelling obscenities to me. Two of the other marketers stepped forward, grabbed her and pulled her back away from me. I stepped back to my yard, and I called 911 on my phone. The girl was still yelling while I was on the phone with 911 ..."); see also Consumer Testimony of Eileen Bowers at 636-638 (Ms. Bowers testified that Respond Power's door-to-door sales agents spoke with her boyfriend, who was not authorized to switch her account. "My boyfriend came in with a paper. I chased [the] guys from [the] EGS and made them give me all copies back [that] he signed and made them call their Company and tell them I didn't want it and he was not authorized to sign for me." Ms. Bowers further testified that "[t]hey changed it anyway."); see also Consumer Testimony of Leona Johnson at 1124 (Ms. Johnson testified that the Respond Power salesperson said he was from West Penn Power."); see also Consumer Testimony of Walter Stelma at 67 (I&E witness, Walter Stelma, testified that a Respond Power "sales agent stop[ped] by the house. I told him no changing companies. [I] had to tell him to leave my property or I will be forced to call the police[.]"); see also Consumer Testimony of Deborah Altman at 100, Exh. DA-1 and Tr. at 1108-1111 (I&E witness Deborah

Altman provided testimony that she received a sales agreement from Respond Power which did not indicate whether her rate was fixed or variable. I&E provided further evidence that the Respond Power sales agent subsequently checked the box marked “variable” *after* the sales contact with Ms. Altman.). The OCA’s expert witness also documented serious failings regarding the door-to-door marketing activities of Respond Power and its contractors. See e.g. OAG/OCA Statement No. 1 at 42-66; see also OAG/OCA Statement No. 1-SR at 21-22. Joint Complainants submit that the Settlement does not adequately address the allegations in the Joint Complaint or the evidence in the record in this matter relating to Respond Power’s door-to-door marketing. Specifically, Joint Complainants are concerned that the Settlement does not require extensive modifications to Respond Power’s door-to-door marketing practices, training and compliance monitoring nor does it require Respond Power to temporarily or permanently cease door-to-door marketing.

H. Oversight and Injunctive Relief.

As discussed above in Section II.A, I&E and Respond Power assert that their Settlement renders the Joint Complaint moot, as the Settlement resolves all issues in this matter on behalf of all Plaintiffs. As also noted above in Section II.A, I&E did not seek injunctive relief in its Formal Complaint, whereas the Joint Complainants did seek a remedy that would prohibit violations by the Company’s salespeople. While the Settlement contains modifications to the Company’s business practices, which Joint Complainants assert are not sufficient in Section II.G. above, the Joint Complainants submit that none of the reporting requirements in the Settlement direct Respond Power to provide the reports to Joint Complainants. See e.g. Settlement at ¶¶ 25(G)(i) and 25(H)(v). Furthermore, Joint Complainants are not included in the review of documents created pursuant to the Settlement. See e.g. Settlement at ¶¶ 25(D)(i), (ii) (disclosure

statement); 25(E)(ii), (iii) (training materials); 25(F)(ii), (iii) (door-to-door marketing training) or any on-going compliance monitoring to assure that the settlement provisions are implemented consistent with all applicable laws.⁸

I. Hardship Fund.

The Settlement provides for a minimum contribution to the Hardship Funds of \$25,000. While the Settlement provides that there may be a greater contribution based on the “silent” customer response to the refund letter, only a minimum guarantee is provided. The Joint Complainants submit that a minimum contribution of \$25,000 is inadequate given the significant impact that the prices charged by Respond Power had on its customers. As the consumer witnesses testified, many of them experienced hardships as a result of the prices charged by Respond Power. See e.g. Consumer Testimony of Mary Malloy at 259 (Ms. Malloy testified, “This was a terrible hardship for me and I had to borrow hundreds of dollars from relatives to pay these bills. I am disabled and live on a fixed income.”); see also Consumer Testimony of Matthew Colicigno at 570 (“I had to work out a payment plan [with] my electric [and] gas [company] in order to avoid shut offs. ... I live paycheck to paycheck.”).

⁸ As found by the Commission, some of the applicable laws in this proceeding, such as the Consumer Protection Law and the TRA, are not within the Commission’s jurisdiction to enforce. See e.g. Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. Respond Power, LLC, Docket No. C-2014-2427659, Order on Petition for Interlocutory Review and Answer to Material Questions (April 9, 2015). The OAG, however, has the statutory responsibility and experience with these laws.

III. CONCLUSION

WHEREFORE based on the foregoing, Joint Complainants respectfully request that the ALJs convene a hearing (currently scheduled for October 15, 2015) and permit Joint Complainants the opportunity to question witnesses regarding the Settlement and present evidence regarding objections to the Settlement. Joint Complainants respectfully request that the ALJs direct I&E and Respond Power to produce witnesses knowledgeable of the Settlement and able to answer questions about the Settlement at the hearing. Further, Joint Complainants respectfully request the opportunity to present their full legal analysis in written Objections to the Settlement at least 30 days after the close of the record in this matter.

Additionally, as discussed at the August 26, 2015 hearing, Joint Complainants intend to serve written supplemental testimony of Barbara R. Alexander regarding re-billing/re-rating prior to the hearing on October 15, 2015. See Tr. 1240-43. Joint Complainants respectfully request that Ms. Alexander be permitted to appear for cross-examination regarding her supplemental testimony by telephone at the hearing on October 15, 2015.

Finally, Joint Complainants and Respond Power have reached a stipulation regarding the authenticity of Wolbrom Cross Exhibits 1 and 2 in that they were marketing materials used by Respond Power sales representatives in Pennsylvania. Joint Complainants respectfully request that these exhibits be admitted into the record by stipulation at the hearing on October 15, 2015.

Respectfully submitted,



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CERTIFICATE OF SERVICE

Commonwealth of Pennsylvania, by
Attorney General KATHLEEN G. KANE,
Through the Bureau of Consumer Protection,

And

TANYA J. McCLOSKEY, Acting Consumer
Advocate,

Complainants

Docket No. C-2014-2427659

v.

RESPOND POWER, LLC,

Respondent

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

Docket No. C-2014-2438640

v.

RESPOND POWER, LLC,

Respondent

I hereby certify that I have this day served a true copy of the foregoing document, the Joint Initial Objections of the Commonwealth of Pennsylvania, Office of Attorney General Bureau of Consumer Protection, and the Office of Consumer Advocate to the Amended Petition of Approval of Settlement of the Bureau of Investigation and Enforcement and Respond Power, LLC, in the manner and upon the persons listed below:

Dated this 28th day of September 2015.

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