COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

October 5, 2015

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

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

Dear Secretary Chiavetta:

Enclosed for filing please find the original copy of the Response to the Joint Initial Objections of Joint Complainants in the above referenced case, on behalf of the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission.

Copies have been served on the parties of record in accordance with the Certificate of Service.

Sincerely,

Adam D. Young
Prosecutor
PA Attorney ID No. 91822
Counsel for the Bureau of
Investigation and Enforcement

Enclosures

cc: As per Certificate of Service
ALJ Cheskis
ALJ Barnes

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 RESPONSE TO THE JOINT INITIAL OBJECTIONS OF JOINT COMPLAINANTS

NOW COMES The Public Utility Commission's ("Commission") Bureau of Investigation and Enforcement ("I&E") and submits this Response to the Joint Initial Objections of Joint Complainants. I&E submits that conducting a further hearing in this matter on the terms of the Settlement Agreement is not only unnecessary, but contrary to the Commission's regulations regarding review of a Settlement by the presiding officer at 52 Pa. Code § 5.232(d). Further litigation contradicts the Commission's stated goal of encouraging mutually agreeable outcomes via settlement agreement, namely by thwarting efforts to lessen the time and expense that the parties must expend litigating a case, and thwarting efforts to conserve precious administrative resources. In support thereof, I&E submits as follows:

BACKGROUND:

On September 18, 2015, Respond Power and I&E submitted an Amended Petition for Approval of Settlement ("Settlement") with attached Stipulation of Facts and Statements in Support intended to resolve I&E's Formal complaint at Docket No. C-2014-2438640. On September 28, 2015, Pennsylvania Office of Attorney General ("OAG") and Office of Consumer Advocate ("OCA") (hereafter collectively "Joint Complainants") filed Initial Objections to the partial Settlement. Joint Complainants seek a further hearing to "permit Joint Complainants the opportunity to question witnesses regarding the Settlement and present evidence, if necessary, regarding objections to the Settlement."

ARGUMENT:

I&E submits that this case has been fully and adequately litigated through five days of hearings in March 2015, wherein 153 consumers testified, followed by two more days of testimony by expert witnesses in late August 2015. Moreover, a 40-page Settlement Agreement (the terms of which speak for themselves) has been filed with nearly 60 pages of Statements in Support of the Settlement, a comprehensive Stipulation of Facts, and now 20 pages of written objections by Joint Complainants. There is more than ample record evidence, testimony, and filings upon which the presiding officers can determine if the Settlement is in the public interest and approve the Settlement without modification, approve the Settlement with modification, or reject the Settlement. *See* 2 Pa.C.S. § 704 (decisions of the Commission must be supported by substantial evidence); *See also* Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n, 413 A.2d 1037 (Pa. 1980); (holding that "substantial evidence" is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion); *See* Erie Resistor Corp. v. Unemployment Comp. Bd. of Review, 166 A.2d 96 (Pa. Super. 1960) (substantial evidence requires more than a mere scintilla of evidence or suspicion of the existence of a fact to be established).

The applicable Commission regulations regarding petitions for settlement can be found at 52 Pa. Code § 5.231, et seq. Sections 52 Pa. Code § 5.231 and 5.232 speak directly to petitions for settlement and supporting statements, and the procedure to be followed thereafter. Specifically Section 5.232(c) requires service upon each party to the proceeding and allows for an opportunity to comment on the proposed settlement.[1] Section 5.232(d) directs that the settlement is then to be reviewed by the presiding officer and any ruling made being in the form of an Initial Decision or Recommended Decision. Section 5.232(f) directs that any exceptions to the settlement will be disposed of in the same ruling. ***Nothing*** in the Commission regulations allows for or even contemplates a hearing be held on a settlement petition.

OBJECTIONS:

I&E will now address the merits of each objection raised by Joint Complainants to the Settlement, and illustrate that none of these objections raise or even suggest additional material facts necessary to warrant a further hearing, but rather, raise only legal questions and judgment calls to be exercised by the ALJs and the Commission.

1. The Settlement is Legally Defective

Joint Complainants allege that the Settlement is "legally defective" because I&E and Respond Power are attempting to unilaterally settle all issues in the consolidated matter and seeking to settle claims of other statutory parties without their consent or input. This claim is without merit.

Whether the Settlement is "legally defective" is, quite obviously, a legal issue and no material facts are alleged warranting further testimony. This is for

[1] I&E presumes that the "Joint Initial Objections" are deemed Joint Complainants' objections on the proposed partial Settlement.

the presiding ALJs in this case to decide. The record, as it stands now, is more than adequate for such a determination to be made.

Interestingly, Joint Complainants cite little case law in support of their argument that the Settlement is "legally defective," and that which they do cite is not on point and easily distinguishable from the present case. Joint Complainants cite to two cases at footnote 2, page 8 that discuss general principles of consolidation in matters involving personal injury. Ironically, *Kincy v. Petro*, 2 A. 3d 490 (Pa. 2010) does not support the Joint Complainants' argument that the instant settlement is legally unenforceable and bars "two state agencies from complying with their statutory authority to protect these interests." *Kincy*, citing *Azinger v. Pennsylvania R. Co.*, 105 A. 87 (Pa. 1918), actually ***supports*** the Settlement in this matter by holding that even if two separate actions are consolidated for trial each produces its own verdict and judgment. *See also*, *Roznowski v. Pa. Nat'l Mut. Cas. Ins. Co.*, 493 A.2d 775 (Pa. Super. 1985), the Superior Court recognized that Rule 213 authorizes consolidation of actions for trial, and, citing *Azinger*, noted "[w]hen separate actions are consolidated for trial, each action retains its separate character. **Each has its own docket entries, and each produces its own verdict and judgment.**" 493 A.2d at 777–78 (emphasis added). While the complaints of I&E and Joint Complainants are consolidated, each has retained its own docket and its own separate character. The partial Settlement **does not preclude** the Joint Complainants from moving their case forward.

Additionally, Joint Complainants allege that they "were not included in the negotiations between I&E and Respond Power that led up to the Settlement." (Objections at Page 7). On the contrary, global settlement negotiations were ongoing between all parties until about July 2015. Only when it became apparent that Joint Complainants and I&E had very disparate views of what constitutes a reasonable outcome to this case, and that no global settlement likely would be reached, I&E decided to stop taking a back seat role and proceed with settlement negotiations

unilaterally regarding its Formal Complaint. Moreover, the Joint Complainants acted precisely in the same manner in *Commonwealth of Pa. et al. v. HIKO Energy LLC*, C-2014-2427652, when it excluded I&E from settlement talks. Regardless, this Settlement **does not preclude** Joint Complainants from proceeding forward with their own case.

2. Refunds

Joint Complainants raise several concerns including: 1) disparate treatment of customers who filed informal complaints and customers who did not, without any allegation about different injuries; 2) many issues regarding selection of customers, calculations and disbursement of refunds, which are not addressed by the settlement; 3) the sufficiency of the amount of refunds; and 4) the requirement for customers in the additional refund pool to send a form back, as the Joint Complainants argue that this mandate will reduce the number of customers who will get refunds.

A. Disparate treatment of customers who filed informal complaints and customers who did not:

Initially, these concerns **raise only legal issues and judgment calls for the ALJs and Commission to decide**, and no further hearing is necessary. Moreover, I&E made clear in its Statement in Support of Settlement that providing refunds to those customers affected is not only in the public interest, but also more jurisdictionally appropriate for the Commission. I&E questions the Commission's 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.[2] 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 customers that are formal/informal complainants at the Commission is certainly legally sound and in the public interest.

B. Issues regarding selection of customers, calculations and disbursement of refunds:

Again, Joint Complainants' concern **raises only legal issues and judgment calls for ALJs and the Commission to decide**, and no further hearing is necessary. I&E notes that the settlement agreements that the Joint Complainants filed in other EGS matters[3] use substantially the same language as the instant Settlement, and allow similar discretion to Joint Complainants in choosing customer refund amounts, irrespective of I&E. This Settlement resolves all issues with respect to all informal complainants that came to the Commission. As the Settlement clearly states, the distribution of refunds will be based on the individual customer's usage, price charged and refund amounts already received directly from Respond Power. Joint Complainants are not precluded from engaging in litigation seeking refunds above and beyond that amicably reached by the settling parties in this Settlement.

[2] 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.

[3] *See Commonwealth of Pa. et al. v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric*, Docket No. C-2014-2427656, *Commonwealth of Pa. et al. v. IDT Energy Inc.*, Docket No. C-2014-2427657 and *Commonwealth of Pa. et al. v. HIKO Energy, LLC*, Docket No. C-2014-2427652.

C. Amount of refunds is insufficient:

This concern **raises only legal issues and judgment calls for ALJs and the Commission to decide.** There are no material facts in dispute that cannot be adequately addressed by the existing abundant evidence of record, and thus, no hearing is warranted.

D. Requiring customers in additional refund pool to send a form back will reduce the number of customers who will get refunds:

This concern **raises only legal issues and judgment calls for ALJs and the Commission to decide.** There are no material facts in dispute that cannot be adequately addressed by the existing abundant evidence of record, and thus, no hearing is warranted. Moreover, if some customers are disinclined to fill out a form and return it to file a claim, then those customers evidently do not feel as though they were harmed by the actions of Respondent.

E. Inconsistency between the Settlement and Statement in Support:

It appears as though there may be some inconsistency between Paragraph 20 of the Settlement and the corresponding Statement in Support, wherein refunds to the customers that provided testimony in the joint proceedings were inadvertently deleted from Paragraph 20 of the Settlement. This was a technical error in the drafting and editing process. The intent of Paragraph 20 was that all customers that filed an informal complaint at the Commission between February 1, 2014 and June 30, 2014 will be eligible for a refund. In addition, all customers providing written testimony in the consolidated proceeding will be eligible for a refund. While there is considerable overlap with these two groups, some consumers providing testimony did not also file an informal complaint at the Commission, but the settling parties agreed that they should be included, because their written testimony could be deemed "complain[ing]

in writing" to the Commission for the purposes of 66 Pa.C.S. §701. The Settlement agreement can be modified to reflect this, however, a hearing on a technical issue such as this is not warranted.

3. Alternate Refund Method

Joint Complainants allege that since there is no reporting requirement or detailed process that Respond Power is required to follow, the settlement lacks elements necessary to ensure compliance. Once again, this concern **raises only legal issues and judgment calls for ALJs and the Commission to decide.** There are no material facts in dispute that cannot be adequately addressed by the existing abundant evidence of record, and thus, no hearing is warranted.

The presiding ALJs or the Commission have the discretion to modify the settlement to include such language if the Settlement provision is deemed not in the public interest as stated.

4. EGS License Retention

Joint Complainants allege that I&E's commitment to promote license retention does not appear designed to ensure compliance with the Commission's regulations. This claim is unfounded. The Settlement specifically notes that this commitment is made due to the many concessions given by Respond Power, including extensive modifications to business practices. The remedial measures are designed to ensure future compliance, thus rendering license revocation unnecessary. *See Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. HIKO Energy LLC*, Docket No. C-2014-2431410 (Initial Decision issued August 21, 2015) at p. 2, wherein the ALJs determined that license revocation was not appropriate in I&E's proceeding because in the Joint Complaints' case docketed at C-2014-2427652, extensive modifications to business practices were agreed-upon in the settlement.

Moreover, the remedial measures in this Settlement are by and large identical to the remedial measures recently approved in other EGS cases.

Again, this concern **raises only legal issues and judgment calls for ALJs and the Commission to decide.** There are no material facts in dispute that cannot be adequately addressed by the existing abundant evidence of record, and thus, no hearing is warranted.

5. Third-Party Administrator and Distribution of Refunds

Joint Complainants allege that distribution of funds for one group directly from Respond Power, while through a third-party administrator for refunds to the "silent victims," makes refunds unnecessarily complex. This claim is without merit. Contrary to Joint Complainants' assertion, the procedure set forth in the Settlement expedites the refund process to all informal complainants and those providing testimony in the joint proceedings, as Respond Power can more expeditiously access customer names and addresses, account numbers, and usage data to promptly mail refunds. The third-party administrator will be used for the more involved process of distributing refunds to the remaining "silent victims."

Joint Complainants also allege that $50,000 in administrator fees is not enough money, based on speculation about the refund process, including a "what if" scenario wherein all 50,000 customers mail back the claim form. Based on the 20% response rate for written testimony in these proceedings by both I&E and Joint Complainants, such an eventuality is highly unlikely. However, in the unlikely event that it does, Respond Power will have saved some administrator fees by refunding directly to the first group of customers, and I&E submits that $50,000 will be sufficient for administrator fees for the remaining customers. In other recent EGS settlements, the standard has been $50k - $75k for administrator costs.

Regardless, once again, this concern **raises only legal issues and judgment calls for ALJs and the Commission to decide.** There are no material facts in dispute

that cannot be adequately addressed by the existing abundant evidence of record, and thus, no hearing is warranted.

6. Reverter Provision

Joint Complainants allege that, due to the fact that the applicable refund pool is $1,466,495, Respond Power has the opportunity to return nearly one-million dollars to its coffers. This allegation must suppose the opposite "what if" scenario as the previous objection; one wherein no customers at all make a claim against the refund pool. Once again, I&E submits that this scenario, too, is highly unlikely, but in the event that it does happen, I&E submits that the alleged "harm" to the 50,000 Respond Power customers that did not file an informal complaint or testify in this proceeding must not exist, and therefore, Respond Power *should* get the money back. If no claims are made against the refund pool, then that means nobody felt aggrieved. It seems only fair that Respondent not pay out a million additional dollars to unharmed customers.

The intent of the settling parties is to establish a formula, based on the number of potential refund customers in the "silent victims" pool, as well as total kWh usage, which establishes a re-rate utilizing the entire refund pool. So in the event that all customers respond, every customer gets a refund based upon his/her usage; if no customers respond, the money reverts in 12 months. In the almost guaranteed event that something in between happens, those customers that respond get the same formula applied to their usage to determine a refund.

Regardless, once again, this concern **raises only legal issues and judgment calls for ALJs and the Commission to decide.** There are no material facts in dispute that cannot be adequately addressed by the existing abundant evidence of record, and thus, no hearing is warranted.

7. Door-to-Door Marketing

The substantial modifications to marketing, door-to-door sales, call center staffing, training, etc. outlined in the Settlement are thorough and comprehensive, and I&E submits that they adequately address the concerns raised in this joint proceeding. Specifically regarding door-to-door marketing, the modifications thereto are found at pages 24-29 of the Settlement, and require sufficient changes to ensure regulatory compliance in the future.

Once again, this concern **raises only legal issues and judgment calls for ALJs and the Commission to decide.** There are no material facts in dispute that cannot be adequately addressed by the existing abundant evidence of record, and thus, no hearing is warranted.

8. Oversight and Injunctive Relief

This concern **raises only legal issues and judgment calls for ALJs and the Commission to decide.** There are no material facts in dispute that cannot be adequately addressed by the existing abundant evidence of record, and thus, no hearing is warranted.

Moreover, this Settlement nearly mirrors those approved in *Commonwealth of Pa. et al. v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric*, Docket No. C-2014-2427656 (Initial Decision issued June 30, 2015) and *Commonwealth of Pa. et al. v. HIKO Energy, LLC*, Docket No. C-2014-2427652 (Initial Decision issued August 21, 2015), and proposed in *Commonwealth of Pa. et al. v. IDT Energy Inc.*, Docket No. C-2014-2427657. If the presiding ALJs feel further injunctive relief is warranted, they have the discretion to modify the Settlement accordingly. I&E sought revocation in its complaint and may accept injunctive relief as an alternative. If the ALJs or the Commission would like to include Joint Complainants in review and compliance monitoring, I&E does not object.

9. Hardship Fund

This concern **raises only legal issues and judgment calls for ALJs and the Commission to decide.** There are no material facts in dispute that cannot be adequately addressed by the existing abundant evidence of record, and thus, no hearing is warranted. I&E submits that a minimum of $25,000 to the EDC hardship fund, with a maximum of $525,000 is an adequate amount. The ALJs approved the settlement in *Commonwealth of Pa. et al. v. HIKO Energy, LLC*, Docket No. C-2014-2427652 (Initial Decision issued August 21, 2015), wherein Joint Complainants felt that $25,000 was adequate. At least in this case, there is a possibility for a greater contribution.

DUE PROCESS CONCERNS

It is clear that the objections raised by Joint Complainants raise no material facts warranting a further hearing on the merits of the Settlement. But equally as important are the due process issues that the holding of such a hearing would create. The reasons why a further hearing on the merits of the Settlement would be legally unsound are numerous above and beyond the lack of regulatory authority. First ***and most importantly***, it confuses the issues in the underlying litigated matter by changing the focus of the proceeding to one wherein the settling parties (one prosecutorial and one defendant) must now join, and submit testimony, in defense of the settlement. Should the settlement be rejected by the Commission, or modified to such an extent that one party withdraws, these parties must now revert back to their adversarial roles. At this point, however, there will be on the record testimony that may compromise the litigation positions of either or both parties.

Second, a further hearing in this matter to determine whether the Settlement is in the public interest raises some serious due process concerns. As allowed by Commission regulations, Joint Complainants filed 20 pages of written "objections" to

the Settlement raising all of their legal concerns using the four corners of the Settlement, the Statements in Support, and in some instances, the record presented at the hearings. Thus, through the filing of the Joint Initial Objections, Joint Complainants have been afforded adequate due process, the elements of which are notice and an opportunity to be heard to challenge an action. *See* Barasch v. Pa. Pub. Util. Comm'n, 546 A.2d 12996 (Pa. Cmwlth. 1988). To open this proceeding to further oral testimony regarding this Settlement is akin to giving Joint Complainants a second bite at the apple to introduce, potentially, additional testimony against Respondent. It logically follows that any further evidence illustrating why the Settlement is inadequate necessarily requires additional testimony about Respond Power's alleged acts. Joint Complainants cannot attack the adequacy of the refunds, the EDC contributions, the remedial measures, or any other provision without offering additional testimony as to why Respondent's actions were so egregious that the Settlement remedy is inadequate. Essentially, this is giving Joint Complainants a second chance to supplement the testimony already presented, and that is a major due process concern.

Thus, further testimony on the Settlement is not only legally unsound, but it would compromise the integrity of the litigated proceedings. Joint Complainants have offered **NO** reason why the voluminous record in this matter is insufficient to support a ruling on whether the Settlement is on the public interest. Moreover, Joint Complainants have offered **NO** additional facts they wish to elicit that they believe would be necessary for such a ruling, but rather, have remained vague as to the witnesses they desire to question and the scope of such questioning.

Third, an additional hearing is considered further litigation, which is time consuming and costly for all parties, which settlement is intended to avoid. The Commission encourages settlements because settlements save the time and resources of the Commission and other stakeholders in litigating a matter with an uncertain outcome. *Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. West*

Penn Power Company, Docket No. C-2014-2417325, 2014 Pa. PUC LEXIS 371 at *12 (Order entered August 1, 2014); 52 Pa. Code § 5.231(a).

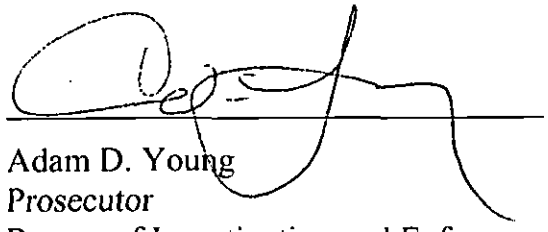
And finally, this Settlement was negotiated by counsel for Respond Power and I&E. No other persons have first-hand knowledge of the settlement negotiations. Due regard should be given to the recommendations of the experienced counsel in this case, who have negotiated this Settlement at arms-length and in good faith, while evaluating and considering the interests of the objecting parties, which were expressed in 20 pages of written objections. In other words, the only evidence needed to support or oppose the settlement petition are the respective statements in support, testimony and exhibits (if any) of record, and written objections to the petition.

Again, there is more than enough record testimony, exhibits, statements, and filings in this matter to determine whether the Settlement is in the best interests of the public, and therefore, an additional hearing is unnecessary in addition to being legally unsound.

CONCLUSION:

Wherefore, I&E submits that no further evidentiary hearings are warranted, and moreover, could potentially result in substantial due process violations for the settling parties. Respectfully, if the Administrative Law Judges presiding over this matter feel that evidence or testimony is lacking regarding certain facts necessary to base a decision as to whether the Settlement is in the public interest, then I&E will certainly make every effort to remedy this through further stipulations of fact or having counsel entertain questions from the judges, as needed. I&E, however, is vehemently opposed to allowing Joint Complainants to embark on a fishing expedition, purportedly to answer questions about a partial Settlement that they have elected to oppose.

Respectfully submitted,



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

Dated: October 5, 2015

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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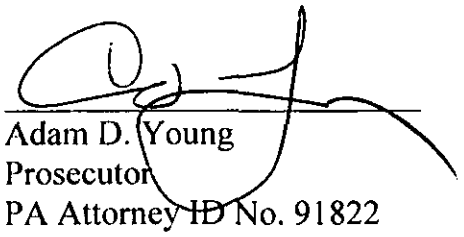

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Date: October 5, 2015