

# Buchanan Ingersoll & Rooney PC

**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

October 14, 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 Respond Power LLC's Motion to Strike Portions of Testimony of Gregory M. Strupp and Exhibits A, B, C, D, E and F Filed on Behalf of the Commonwealth of Pennsylvania, by Attorney General Kathleen Kane Through the Bureau of Consumer Protection, and Tanya J. McCloskey, Acting Pennsylvania Consumer Advocate, in the above-captioned matter.

Copies have been served on all parties as indicated in the attached Certificate of Service.

Very truly yours,



Karen O. Moury

KOM/bb  
Enclosure  
cc: Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

---

Administrative Law Judges  
Elizabeth H. Barnes and Joel H. Cheskis

---

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

---

**RESPOND POWER LLC’S MOTION TO STRIKE PORTIONS OF TESTMONY OF  
GREGORY M. STRUPP AND EXHIBITS A, B, C, D, E AND F FILED ON BEHALF OF  
THE COMMONWEALTH OF PENNSYLVANIA, BY ATTORNEY GENERAL  
KATHLEEN KANE THROUGH THE BUREAU OF CONSUMER PROTECTION, AND  
TANYA J. MCCLOSKEY, ACTING PENNSYLVANIA CONSUMER ADVOCATE**

---

Pursuant to Section 5.103 of the Pennsylvania Public Utility Commission’s regulations, 52 Pa. Code § 5.103, Respond Power LLC (“Respond Power” or “Company”), by and through its counsel, Karen O. Moury and John F. Povilaitis of Buchanan Ingersoll & Rooney PC and David P. Zambito and D. Troy Sellars of Cozen O’Connor, files this Motion to Strike (“Motion”) certain portions of the Testimony of Gregory M. Strupp, OAG/OCA Statement No. 4-Objection (“Strupp Testimony”), and Exhibits A, B, C, D, E and F (“Exhibits”) accompanying the Strupp Testimony, which were served in the above-captioned matter by the Commonwealth of

Pennsylvania, by Attorney General Kathleen Kane through the Bureau of Consumer Protection, and Tanya J. McCloskey, Acting Pennsylvania Consumer Advocate, (“Joint Complainants”). In support hereof, Respond Power states as follows.

**I. INTRODUCTION**

1. By this Motion, Respond Power seeks to strike portions of the Strupp Testimony, as well as the Exhibits attached to the Strupp Testimony, on the following four grounds: (i) no foundation has been laid for the Exhibits, in that they have been neither identified nor authenticated; (ii) the Exhibits contain extraneous information that is irrelevant to the Amended Settlement and are being inappropriately offered by the Joint Complainants to supplement the record in support of their Joint Complaint; (iii) both the Strupp Testimony and the Exhibits contain uncorroborated hearsay; and (iv) any probative value of the Strupp Testimony and the Exhibits is outweighed by the danger of unfair prejudice and confusion of the issues.

2. This consolidated proceeding involves a Joint Complaint filed by the Joint Complainants on June 20, 2014 and a Formal Complaint filed by the Bureau of Investigation and Enforcement (“I&E”) on August 21, 2014 against Respond Power. In view of the stage of this proceeding and the numerous prior filings and interim orders that have set forth the procedural history, Respond Power will, in the interest of brevity, recite only relevant recent procedural steps in this Motion.

3. On September 18, 2015, Respond Power and I&E filed an Amended Petition for Approval of Settlement (“Settlement”), along with a Stipulation of Facts in Support of Amended Settlement marked as Exhibit A, and accompanied by I&E’s Statement in Support of Amended

Settlement and Respond Power's Statement in Support of Amended Settlement, labeled as Appendices A and B, respectively.

4. On September 28, 2015, the Joint Complainants filed Joint Initial Objections, requesting that the Honorable Administrative Law Judges Elizabeth H. Barnes and Joel H. Cheskis ("ALJs"): (i) further keep the evidentiary record open in this matter; (ii) direct Respond Power and "I&E" to produce additional witnesses; (iii) convene a further on-the-record evidentiary hearing, (iv) afford the Joint Complainants the opportunity to cross-examine Respond Power's and I&E's witnesses regarding the Settlement; (v) allow the Joint Complainants to present additional evidence regarding the Joint Complainants' Objections to the Settlement; and, (vi) permit the Joint Complainants to present additional written objections to the Settlement at least 30 days after the close of the record.

5. On October 5, 2015, Respond Power and I&E each filed a Response to the Joint Initial Objections ("Objections"), opposing these requests. Respond Power contended that the requests are unprecedented in Commission practice and convoluted, and would exceed any process that is legally due to the Joint Complainants. Respond Power further noted that the Joint Complainants' proposal, if adopted, would discourage parties in future Commission proceedings from entering into non-unanimous settlements since the value of entering into a settlement would be greatly diminished and the settling parties would be required to make statements, on the record, in evidentiary hearings why they were willing to compromise, which could be used against them at a later time. Moreover, Respond Power maintained that the Commission's standard applicable to settlements is whether they are in the public interest, which does not require an evidentiary hearing, particularly when the Joint Complainants' objections did not raise any issues of fact, and a full record has been developed in this proceeding. Finally, Respond

Power argued that a written process, which the Joint Complainants have been afforded, fully satisfies due process principles, while holding an evidentiary hearing on the Settlement has the potential of allowing the Joint Complainants to supplement the record in support of their Joint Complaint, which would violate Respond Power's due process rights. Notwithstanding these arguments, Respond Power agreed to make a witness available, if necessary, to respond to any questions that the ALJs might have about the Settlement.

6. The ALJs issued Procedural Order #6 on October 7, 2015 directing that: (i) the Joint Complainants will be given an opportunity to submit written supplemental testimony setting forth their formal objections to the Settlement no later than 4:30 p.m. on October 13, 2015; (ii) any testimony submitted by the Joint Complainants will be admitted into the record subject to cross-examination and any timely motions during the hearing scheduled for October 15, 2015; (iii) Respond Power and I&E will have an opportunity during that hearing to present oral responsive testimony in response to any supplemental testimony filed by the Joint Complainants; (iv) Respond Power and I&E will have witnesses available for that hearing who are knowledgeable about the Settlement and able to answer questions about the Settlement; and (v) at the conclusion of the hearing on October 15, 2015, a schedule will be set for the submission of main and reply briefs regarding all issues, including those regarding the Settlement and those that remain unsettled regarding the Complaint filed by the Joint Complainants.

7. In accordance with Procedural Order #6, the Joint Complainants served the Strupp Testimony and the accompanying Exhibits on October 13, 2015, along with testimony marked as OAG/OCA Statement No. 1-Objection and OAG/OCA Statement No. 1-SR (supplemental) of Barbara R. Alexander.

8. For the reasons set forth below, portions of the Strupp Testimony and the entirety of the accompanying Exhibits should be stricken.

## II. ARGUMENT

### A. Applicable Legal Standards

9. While the Commission, as an administrative agency having quasi-judicial functions, is not limited by the strict rules relating to the admissibility of evidence, essential principles must be observed. *Pittsburgh and Lake Erie Railroad Company, v. Pennsylvania Public Utility Commission*, 85 A.2d 646, 653 (Pa. Super Ct. 1952); *Bleilevens v. State Civil Service Commission*, 312 A.2d 109, 111 (Pa. Commw. 1973).

10. Section 5.403(a)(1) of the Commission's regulations authorizes the presiding officer to control the receipt of evidence, including ruling on the admissibility of evidence. 52 Pa. Code § 5.403(a)(1).

11. Section 5.403(b) of the Commission's regulations requires the presiding officers to "actively employ these powers to direct and focus the proceedings consistent with due process." 52 Pa. Code § 5.403(b).

12. Under Section 5.401(a) of the Commission's regulations, relevant and material evidence is admissible in Commission proceedings subject to objections on other grounds. 52 Pa. Code § 5.401(a). 52 Pa. Code § 5.401. *See also* Pa.R.E. 402; *See also American Future Systems, Inc. v. Better Business Bureau of Eastern Pennsylvania*, 872 A.2d 1202 (Pa. Super. Ct. 2005).

13. Under Section 5.401(b) of the Commission's regulations, evidence will be excluded if it is repetitious or cumulative, or if its probative value is outweighed by danger of

unfair prejudice, confusion of the issues, or considerations of undue delay or waste of time. 52 Pa. Code § 5.401(b).

14. Pennsylvania Rule of Evidence 801 defines “hearsay” as an out-of-court statement offered to prove the truth of the matter asserted. Pa.R.E. 801. It has long been recognized in Pennsylvania that hearsay rules are not mere “technical rules of evidence” but instead are fundamental rules of law that should be followed by agencies when facts crucial to the issue are sought to be placed on the record. *See, e.g., Loudon v. Viridian Energy*, PA PUC Docket No. C-2011-2244309 (Initial Decision dated February 2, 2012, Final Order entered March 29, 2012); *Gibson v. W.C.A.B.*, 861 A.2d 938 (Pa. 2004); and *Anthony v. PECO Energy Co.*, PA PUC No. C-2014-2408057 (Order entered July 30, 2014).

15. Even when hearsay is admissible pursuant to an exception, it is well-settled that a finding based wholly on hearsay cannot support a legal conclusion by an administrative agency. *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366 (Pa. Cmwlth. 1976). The Commission has held that “[a]lthough the Pennsylvania Rules of Evidence are relaxed in an administrative proceeding, crucial findings of fact may not be established solely by hearsay evidence.” *Pa. P.U.C., Bureau of Investigation & Enforcement v. Yellow Cab Co. of Pittsburgh*, Docket No. 2012-2249031, 2013 WL 5912555 (Pa. P.U.C. Oct. 8, 2013). The Commission has expressly refused to make findings of fact on the basis of hearsay without separate evidence corroborating it. *See, e.g., Jackson v. PECO Energy Co.*, Docket No. F-2013-2351046 (July 5, 2013); *Davis v. Equitable Gas, LLC*, Docket No. C-2011-2252493, 2012 WL 3838095 (April 27, 2012).

16. Pennsylvania Rule of Evidence 901 requires documents to be identified and authenticated before being admitted into evidence. Pa.R.E. 901. In laying a foundation for a

document, a sponsoring witness with personal knowledge of the circumstances must provide evidence sufficient to support a finding that the proffered evidence is what it is claimed to be. *See Lexington Insurance Company v. Western Pennsylvania Hospital*, 423 F.3d 318 (2005).

B. Motion to Strike Exhibits A, B, C, D, E and F of Strupp Testimony

17. Exhibits A, B, C, D, E and F attached to the Strupp Testimony should be stricken in their entirety because: (i) no foundation has been laid for them, in that they have been neither identified nor authenticated; (ii) they contain extraneous information that is irrelevant to the Amended Settlement and are being inappropriately offered by the Joint Complainants to supplement the record in support of their Joint Complaint; (iii) they contain uncorroborated hearsay that may not be relied upon by the Commission in making findings of fact; and (iv) their probative value is outweighed by the danger of unfair prejudice and confusion of the issues.

18. The Strupp Testimony contains no information identifying the documents that are included in the Exhibits. Referring generically to the “OAG complaint”<sup>1</sup> or “OAG complaint form,”<sup>2</sup> the Strupp Testimony does not describe the actual documents that are attached as Exhibits. Moreover, the Exhibits contain various differing documents, making it difficult to determine what may be an Office of Attorney General (“OAG”) complaint, an OAG complaint form, an electronic form, an electronic mail or something else entirely.

19. Further, the Strupp Testimony fails to offer any foundation to authenticate these documents contained in the Exhibits. The Strupp Testimony makes no representations as to whether they are original documents, true copies of original documents and whether they have been altered in any way.

---

<sup>1</sup> OAG/OCA Statement No. 4-Objection at page 2, line 12.

<sup>2</sup> OAG/OCA Statement No. 4-Objection at page 2, line 17.

20. Moreover, the Exhibits contain a significant amount of extraneous information that has no bearing on whether the Amended Settlement is in the public interest. The Joint Complainants were limited by the Procedural Order to submitting testimony on October 13, 2015 “setting forth their formal objections to the settlement submitted on September 18, 2015 by Respond and I&E.” Procedural Order #6 at 3. However, the Joint Complainants simply ignored the ALJs’ directive and used this unique opportunity that was afforded to them to litigate the terms of a settlement to attempt to supplement the record in support of their Joint Complaint, without any opportunity for Respond Power to cross-examine the identified customers or challenge the supplemental information, as follows:

- a. Exhibit A contains allegations about representations that were made by Respond Power’s sales representatives, which are not relevant to the Settlement or even remotely related to the Strupp Testimony;
- b. Exhibit B is cumulative evidence in that the testimony of Ms. Noren has already been admitted into the record; moreover, it is inappropriate to supplement that testimony by including additional irrelevant information that has not been subjected to cross-examination;
- c. Exhibit C alleges that the consumer could not reach Respond Power’s call center, which is not relevant to the Settlement or even remotely related to the Strupp Testimony;
- d. Exhibit D contains allegations suggesting that the consumer may have thought that the Respond Power representative was from West Penn Power Company, which is not relevant to the Settlement or even remotely related to the Strupp Testimony; and,

- e. Exhibit E sets forth allegations about high prices and appears to be from a consumer who submitted testimony in this proceeding, but did not appear for cross-examination during the evidentiary hearings and the testimony was not admitted; in addition, Exhibit E is not relevant to the Settlement or even remotely related to the Strupp Testimony.

21. These Exhibits also suffer from a double hearsay problem. The customer statements themselves are hearsay in that they are out-of-court statements offered to prove the truth of the matter asserted. Additionally, the extraneous comments made by the consumers within the statements likewise constitute uncorroborated hearsay, including alleged representations by Respond Power sales representatives.

22. The inclusion of these other materials in the record would create unfair prejudice and confusion such that any probative value of them is outweighed. According to Procedural Order #6, the Joint Complainants' opportunity to submit testimony was limited to addressing the Joint Complainants' Objections to the Settlement. These Exhibits far exceed the scope of the permissible testimony at this stage of the proceeding, and Respond Power has no opportunity to cross-examine the identified consumers or challenge their allegations. In addition, they create confusion by referencing allegations and materials that are unrelated to the Settlement.

C. Motion to Strike Portions of Strupp Testimony

23. Portions of the Strupp Testimony, which are set forth on page 2, line 3, through page 3, line 16, should also be stricken because they contain uncorroborated hearsay. As Mr. Strupp has no personal knowledge of what consumers who complained to the Commission's Bureau of Consumer Services ("BCS") about Respond Power in January, February and March

2014, he relies on information he gleaned from communications with customers to prove that some consumers were referred to other agencies. Specifically, Mr. Strupp testified: “I fielded multiple telephone calls and read in multiple consumer complaints that consumers were referred by BCS to other agencies.”<sup>3</sup> OAG/OCA Statement No. 4-Objection at page 2, lines 8-9.

24. Mr. Strupp’s testimony also includes excerpts from complaint forms submitted by consumers to the OAG, which are offered to prove that BCS referred the consumer to OAG or told the consumer that that the Commission could not help. OAG/OCA Statement No. 4-Objection at page 2, line 12 through page 3, line 16.

25. As these excerpts from OAG complaint forms are out-of-court statements that are being offered to prove the truth of the matter asserted – *i.e.* that the Commission referred consumers to the OAG or told them they could not help them – they constitute uncorroborated hearsay and may not be relied upon to support a finding of fact.

26. If Mr. Strupp’s testimony is admitted into the record, Respond Power will have been denied its right to cross-examine these witnesses to determine, for instance, if they did in fact file an informal complaint with BCS or if they had any desire to file an informal complaint with BCS, which was denied to them through any referral.

### **III. CONCLUSION AND REQUEST FOR RELIEF**

WHEREFORE, Respond Power LLC respectfully requests that the Honorable Administrative Law Judges Elizabeth H. Barnes and Joel H. Cheskis grant this Motion to Strike the identified portions of the Strupp Testimony marked as OAG/OCA Statement No. 4-Objection and the entirety of Exhibits A, B, C, D, E and F accompanying the Strupp Testimony.

---

<sup>3</sup> Despite this nebulous reference to multiple calls and complaints, Mr. Strupp only includes a handful of situations where Respond Power customers may have been referred to the OAG.

Respectfully submitted,

Dated: October 14, 2015



---

Karen O. Moury (PA ID #36879)  
John F. Povilaitis (PA ID #28944)  
BUCHANAN INGERSOLL & ROONEY PC  
409 North Second Street, Suite 500  
Harrisburg, PA 17101-1357  
Telephone: (717) 237-4820  
Facsimile: (717) 233-0852  
Email: karen.moury@bipc.com  
john.povilaitis@bipc.com

David P. Zambito (PA ID #80017)  
D. Troy Sellars (PA ID #210302)  
COZEN O'CONNOR  
17 North Second St., Suite 1410  
Harrisburg, PA 17101  
Telephone: (717) 703-5892  
Facsimile: (215) 989-4216  
E-mail: dzambito@cozen.com  
tsellars@cozen.com

*Counsel for Respond Power LLC*

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

CERTIFICATE OF SERVICE

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

**Via E-FILING and U.S. Mail:**

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

John M. Abel  
Nicole R. DiTomo  
Bureau of Consumer Protection  
Office of Attorney General  
15<sup>th</sup> Floor, Strawberry Square  
Harrisburg, PA 17120  
[jabel@attorneygeneral.gov](mailto:jabel@attorneygeneral.gov)  
[nditomo@attorneygeneral.gov](mailto:nditomo@attorneygeneral.gov)

Sharon E. Webb  
Office of Small Business Advocate  
300 N. Second Street, Suite 202  
Harrisburg, PA 17101  
[swebb@pa.gov](mailto:swebb@pa.gov)

Candis A. Tunilo  
Christy M. Appleby  
Kristine E. Robinson  
Ashley E. Everette  
Office of Consumer Advocate  
555 Walnut Street  
5<sup>th</sup> Floor, Forum Place  
Harrisburg, PA 17101  
[ctunilo@paoca.org](mailto:ctunilo@paoca.org)  
[cappleby@paoca.org](mailto:cappleby@paoca.org)  
[krobinson@paoca.org](mailto:krobinson@paoca.org)  
[aeverette@paoca.org](mailto:aeverette@paoca.org)

Steve Estomin  
Exeter Associates, Inc.  
10480 Little Patuxent Parkway  
Suite 300  
Columbia, Maryland 21044  
[sestomin@exeterassociates.com](mailto:sestomin@exeterassociates.com)

Barbara R. Alexander  
83 Wedgewood Drive  
Winthrop, Maine 04364  
[barbalexand@gmail.com](mailto:barbalexand@gmail.com)

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

Dated this 14<sup>th</sup> day of October, 2015.

  
\_\_\_\_\_  
Karen O. Moury, Esq.