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October 26, 2015

VIA E-MAIL (INCLUDING MICROSOFT WORD VERSION)

The Honorable Elizabeth H. Barnes
The Honorable Joel H. Cheskis
Office of Administrative Law Judge
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17120

Re: Commonwealth of Pennsylvania, et al. v. Respond Power, LLC;
Docket No. C-2014-2427659 and
Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement
v. Respond Power LLC; Docket No. C-2014-2438640;
PROPOSED COMMON BRIEFING OUTLINE OF RESPOND POWER, LLC

Dear Honorable Administrative Law Judges Barnes and Cheskis:

On behalf of Respond Power, LLC (“Respond Power”), enclosed is Respond Power’s proposed Common Briefing Outline for the above-captioned consolidated complaint proceeding. At the close of the hearing on October 15, 2015, the Honorable Administrative Law Judges Elizabeth H. Barnes and Joel H. Cheskis (“ALJs”) directed the parties to consult for the purpose of developing a Common Briefing Outline to be submitted by October 26, 2015. If those efforts were not successful, the ALJs indicated that each of the parties may submit their proposed Common Briefing Outlines for consideration by the ALJs.

To the regret of Respond Power, efforts to reach agreement with the Office of Consumer Advocate (“OCA”) and the Office of Attorney General of Pennsylvania (“OAG”) (collectively, referred to as the “Joint Complainants”) in regard to a Common Briefing Outline have not been successful. As explained below, Respond Power (with the support of the Commission Bureau of Investigation & Enforcement (“I&E”)) contends that -- as a matter of basic fairness -- it must be afforded a reasonable opportunity to be heard on certain fundamental issues that OCA and OAG wish to exclude from briefing. Namely, the Joint Complainants, through their proposed Common Briefing Outline, seek to preclude briefing on: (i) threshold issues related to the Commission’s limited statutory jurisdiction to adjudicate certain allegations, to rely upon

practice and pattern evidence, and to order particular remedies (absent Respond Power consent through a settlement); and, (ii) how the Commission should, if the settlement of all issues between Respond Power and I&E is adopted, reconcile the remedies of the settlement with remedies deemed appropriate for any remaining substantiated allegations of the Joint Complainants. Since these are issues that must be addressed in this proceeding, it makes sense, from a due process as well as an organizational perspective, that they be included in the Common Briefing Outline.

A. Procedural Background

This consolidated complaint proceeding is the result of (i) a Joint Complaint filed against Respond Power by OAG in the name of Attorney General Kathleen G. Kane and by OCA in the name of Acting Consumer Advocate Tanya J. McCloskey on June 20, 2014; and (ii) a Complaint filed by I&E on August 21, 2014. The Joint Complaint and the I&E Complaint were consolidated by the ALJs because of the similarity of facts and legal issues. The I&E Complaint has been fully satisfied by the filing of an Amended Petition for Approval of Settlement (“Settlement”) on September 18, 2015.

Hearings concluded on October 15, 2015. Pursuant to a briefing schedule established by the ALJs, Main Briefs are due on December 3, 2015 and Reply Briefs are due on December 24, 2015. Thereafter, the ALJs will issue an Initial Decision collectively adjudicating the Settlement and the Joint Complaint.

Respond Power has had this proceeding hanging over it for nearly a year and a half and wishes to bring this lengthy and costly process to conclusion, either through settlement or litigation, so that it may move forward with operating its business. Therefore, Respond Power does not propose any revision to the briefing schedule as established by the ALJs.

B. Proposed Common Briefing Outline

1. Respond Power’s Proposal

Consistent with the ALJs’ directive, Respond Power circulated a proposed Common Briefing Outline to the parties on October 22, 2015. The Joint Complainants rejected Respond Power’s proposed outline without any comment or acknowledgment of any common ground and returned to Respond Power a proposed Common Briefing Outline on October 23, 2015 with an entirely different approach (which Respond Power believes would be prejudicial to its due process rights). As the parties have been unable to reach a consensus on the components of a Common Briefing Outline, Respond Power is offering for the ALJs’ consideration the proposal attached hereto as **Appendix A**, which it believes to be a fair and comprehensive identification of the relevant issues in this proceeding.

Respond Power respectfully submits that its proposed Common Briefing Outline should be adopted for this consolidated proceeding because it (i) would ensure that Respond Power is given an opportunity to be heard on issues that are key to the company's defense, including the Commission's jurisdiction and the reconciliation of remedies under the Settlement and the Joint Complaint; (ii) would facilitate the ALJs' efforts to concurrently consider the issues raised by the Joint Complaint and the Settlement, rather than viewing them in a vacuum; and (iii) would provide a detailed and organized outline, including headings and subheadings, of the issues that will need to be addressed by the ALJs, which should assist the ALJs in drafting the Initial Decision. The parties would not be required to include arguments in each section, but would be expected to set forth any arguments on particular issues in the appropriate location in the Brief.

2. Joint Complainants' Proposal

By contrast, the Joint Complainants' proposed Common Briefing Outline seeks to deprive Respond Power of the opportunity to be heard on key issues such as the Commission's jurisdiction and the consistency of remedies. By way of example, the Joint Complainants' proposal includes "Establishment of Pattern & Practice" in Section IV.A., without any prior discussion of whether the Commission even has jurisdiction to entertain such evidence. This is also true of other issues where questions regarding the Commission's jurisdiction have been raised. Adopting the Joint Complainants' proposal would result in discussions of jurisdictional issues being scattered throughout the parties' Briefs, making it difficult for the ALJs to locate them and match them up.

Similarly, the Joint Complainants' proposed Common Briefing Outline contains no section recognizing the need to reconcile remedies that would be awarded under the Settlement with any remedies for allegations of the Joint Complaint for which the Joint Complainants are able to satisfy their burden of proof. The Joint Complainants' proposal ignores the fact that this is a consolidated proceeding because of the substantial commonality of facts and legal issues, and, if adopted, will deprive Respond Power of its substantive due process rights by denying it an opportunity to be heard on certain key issues. Respond Power must have the ability to argue that further remedies are unwarranted if the Settlement is approved.

3. Reconciliation of Remedies

Respond Power addresses this critical issue through its proposed Section IV.E., which is entitled "Relief for Substantiated Allegations." In this section of its Main Brief, Respond Power would address the remedies, if any, which should be awarded as a result of any allegations in the Joint Complaint that are found to have been substantiated by the Initial Decision. Respond Power's argument would specifically reconcile the remedies sought by the Joint Complainants with those that are contained in the Settlement, if it is approved by the ALJs as being in the public interest.

Respond Power contends that it is necessary and appropriate for the Briefs to address the reconciliation of remedies that are awarded as a result of approval of the Settlement with any allegations in the Joint Complaint that the ALJs find have been substantiated. Specifically, the ALJs should evaluate whether the Settlement is in the public interest and, if the Settlement is approved, the remedies set forth therein should be reviewed to determine whether they adequately address any substantiated allegations of the Joint Complaint.

Absent the use of Respond Power's proposed holistic approach for the Briefs and the Initial Decision, the ALJs would be in the unusual and somewhat contorted situation of viewing the Joint Complaint and the Settlement separately and in their own disparate vacuums. This would be unfair and inappropriate particularly since (i) this is a consolidated proceeding in which the parties and intervenors are the same; (ii) the factual allegations in the Joint Complaint and the I&E Complaint are nearly identical; (iii) the time period is the same; (iv) the factual, legal and regulatory issues are overlapping; and (v) the requests for relief are duplicative. Therefore, the Joint Complaint and the Settlement need to be considered together. Only in this manner can the ALJs and the Commission consider the impact on each matter and ensure that the rulings are consistent and in the public interest as a whole, as has been used in similar proceedings.

4. Consistency With Approach Used In Similar Proceedings

Holistically reconciling remedies sought by the Joint Complaint with those provided under the Settlement between Respond Power and I&E, would be consistent with the Initial Decisions issued by the ALJs in the matters of *Commonwealth of Pennsylvania, et al. v. HIKO Energy, LLC*, Docket No. C-2014-2427652 (Initial Decision issued August 21, 2015) ("*HIKO Settlement Initial Decision*") and *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. HIKO Energy, LLC*, Docket No. C-2014-2431410 (Initial Decision issued August 21, 2015) ("*HIKO Complaint Initial Decision*").

By way of background, the Joint Complainants filed a Joint Complaint on June 20, 2014 against HIKO Energy, LLC ("HIKO"), which resulted in the filing of a Joint Petition for Approval of Settlement ("HIKO Settlement") by the Joint Complainants, HIKO and the Office of Small Business Advocate ("OSBA") on May 1, 2015. The ALJs approved the HIKO Settlement without modification through the issuance of the *HIKO Settlement Initial Decision* on August 21, 2015. I&E filed a Complaint against HIKO on July 11, 2014, which was not settled and culminated in the issuance of the *HIKO Complaint Initial Decision* on August 21, 2015.

Although the two HIKO proceedings were never consolidated, the ALJs issued the Initial Decisions on the same date, repeatedly cross-referenced the concurrent Initial Decisions being issued *ad seriatim* and made numerous references throughout both Initial Decisions to the importance of considering the proceedings together. For instance, in the *HIKO Settlement Initial Decision*, the ALJs noted that although the two decisions were being issued separately, they were being viewed as a whole since they involve "similarly alleged conduct concerning similar

parties/intervenors, an overlapping customer base, the same regulation of 52 Pa. Code § 54.4(a), essentially the same time period in question, and both cases request refund relief.” *HIKO Settlement Initial Decision* at 36.

Likewise, in the *HIKO Complaint Initial Decision*, the ALJs considered the proposed OAG/OCA Settlement in adjudicating the I&E Complaint, noting as follows: “As these two decisions involve similar parties/intervenors, overlapping facts, allegations, and requests for relief, neither decision is being made in a vacuum without consideration for the impact each case has upon the other. Although the cases were never consolidated...we believe the rulings should be consistent and in the public interest as a whole.” *HIKO Complaint Initial Decision* at 56.

Numerous similar references appear in both Initial Decisions, examples of which are shown as follows:

- “...neither decision is being made in a vacuum without consideration for the impact each case has upon the other.” *HIKO Settlement Initial Decision* at 36.
- “...we believe the rulings should be issued concurrently, consistent with, and in the public interest as a whole.” *HIKO Settlement Initial Decision* at 36.
- I&E’s “request for refunds is denied as moot because the relief requested is essentially being granted under a concurrent, yet separate Initial Decision.” *HIKO Complaint Initial Decision* at 1.
- “...the refund relief requested in this proceeding is adequately addressed and satisfied in the concurrent Initial Decision.” *HIKO Complaint Initial Decision* at 2.
- The request for “a revocation of license is denied because this would be inconsistent with our approval of the of the proposed Settlement in the OAG/OCA case, which includes directing injunctive relief in the form of a moratorium of variable rate sales activities until June 2016 in Pennsylvania, and numerous sales and marketing corrective actions.” *HIKO Complaint Initial Decision* at 2. *See also HIKO Complaint Initial Decision* at 60; 62-63.
- The “company has agreed to modify certain internal procedures as part of its Settlement as outlined in the concurrent decision.” *HIKO Complaint Initial Decision* at 44.

Therefore, even in separate proceedings that were never consolidated, the ALJs recognized the importance of considering the issues concurrently and deciding them in a consistent manner aimed at achieving a result that is in the public interest. In this consolidated proceeding, this

approach is even more appropriate and necessary. By adjudicating the Settlement and the Joint Complaint together, the ALJs can properly determine whether the relief established by the Settlement adequately addresses any substantiated allegations of the Joint Complaint.

C. Conclusion

In this case, stemming from the extraordinary and politically-charged polar vortex events of 2014, three separate government entities are all advocating on behalf of the same constituency against a private business enterprise over which the Commission has limited jurisdiction. One government entity, the Commission's own prosecutory staff, has settled on terms and conditions that it believes to be in the interest of that constituency and is now defending its Settlement against the other two government entities. Moreover, the other two government entities, through their proposed Common Briefing Outline, are now attempting to deny the private business enterprise the mere opportunity to make arguments regarding the legislative limitations on the authority of the Commission and the necessity of reconciling remedies such that the private business enterprise is not penalized twice for the same alleged violations.

Respond Power respectfully requests that the ALJs adopt its proposed Common Briefing Outline to ensure that it has an opportunity to be heard on issues that are critical to its defense in a proceeding in which the stakes are so high. Addressing jurisdictional issues at the outset and including a section specifically focused on reconciling the remedies are critical and consistent with previous proceedings. Adoption of the proposed Common Briefing Outline attached as Appendix A would facilitate the drafting of an Initial Decision that appropriately addresses all issues raised in this consolidated proceeding and necessarily reconciles any remedies that may be awarded with the proposed Settlement.

Copies of this letter, together with Appendix A, have been served on the parties of record as shown in the certificate of service.

Very truly yours,



Karen O. Moury

KOM/bb
Enclosure

cc: Rosemary Chiavetta, Secretary
David P. Zambito, Cozen O'Connor
Certificate of Service

APPENDIX A

Respond Power LLC's Proposed Common Briefing Outline

- I. Introduction
- II. Statement of the Case
 - A. Procedural Background
 - B. Factual Background
 - C. Regulatory and Legal Background
- III. Summary of Argument
- IV. Argument
 - A. Preliminary Issues of Commission Jurisdiction
 - 1. Commission Jurisdiction over EGS Contracts and Prices
 - 2. Commission Jurisdiction over EGS Refunds
 - 3. Commission Jurisdiction under State Consumer Protection Laws
 - 4. Commission Jurisdiction over EGS Marketing Practices
 - 5. Commission Jurisdiction over EGS Billing Practices
 - 6. Commission Jurisdiction to Order Injunctive Relief
 - 7. Commission Jurisdiction to Use Pattern and Practice Evidence
 - B. OCA/OAG Complaint Allegations
 - 1. Burden of Proof and Standard of Review
 - 2. Clarification of Issues by Commission on Interlocutory Review
 - 3. Merits of OCA/OAG Allegations
 - a. Count I - Allegation of Claims of Affiliation with Electric Distribution Companies
 - b. Count II - Allegation of Claims of Customer Savings
 - c. Count III - Allegation Regarding Failure to Disclose Material Terms
 - d. Count IV - Allegation Regarding Welcome Letters
 - e. Count V - Allegation of Slamming
 - f. Count VI - Allegation of Lack of Good Faith Handling of Complaints
 - g. Count VII - Allegation of Failure to Provide Accurate Pricing Information
 - h. Count VIII - Allegation of Nonconformity of Prices to Disclosure Statement
 - i. Count IX - Allegations Regarding Telemarketing
 - C. Settlement of I&E Complaint Allegations
 - 1. Burden of Proof and Standard of Review
 - 2. Applicable Legal Standards
 - 3. Settlement Terms and Conditions
 - 4. Merits of Settlement
 - 5. Public Interest Nature of Settlement
 - D. Identification of Overlapping Allegations in OCA/OAG Complaint and I&E Complaint

- E. Relief for Substantiated Allegations
 - 1. Reconciliation of OCA/OAG Remedies with Settlement Remedies if Settlement Approved
 - 2. Specific Remedies
 - a. Refunds
 - i. Amount
 - ii. Credits Against Refunds
 - iii. Customer Classes
 - iv. Method of Distribution
 - v. Selection/Payment of Administrator
 - b. Civil Penalty
 - c. Contributions to EDC Hardship Funds
 - d. License Conditions
 - i. Product Offerings
 - ii. Marketing
 - iii. Third Party Verifications
 - iv. Disclosure Statement
 - v. Training
 - vi. Door-to-Door Marketing
 - vii. Compliance Monitoring
 - viii. Reporting
 - ix. Customer Service

V. Conclusion

VI. Appendices

- A. Proposed Findings of Fact
- B. Proposed Conclusions of Law
- C. Proposed Ordering Paragraphs

**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).

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Dated this 26th day of October, 2015.



Karen O. Moury, Esq.