



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

December 3, 2015

Via-E-filing

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

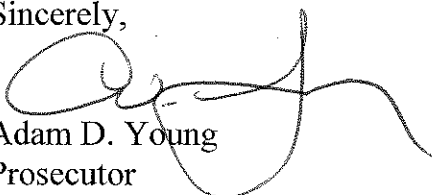
Re: Pennsylvania Public Utility Commission, Bureau of Investigation
and Enforcement v. Respond Power LLC
Docket Nos. C-2014-2438640; C-2014-2427659

Dear Secretary Chiavetta:

Enclosed for electronic filing is the Main Brief 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,



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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	:	
	:	
And	:	
	:	
Commonwealth of Pennsylvania, by	:	
Attorney General Kathleen G. Kane,	:	
through the Bureau of Consumer	:	
Protection, and Tanya J. McCloskey,	:	Docket No. C-2014-2427659
Acting Consumer Advocate	:	
	:	
v.	:	
	:	
Respond Power, LLC	:	

**MAIN BRIEF OF THE
BUREAU OF INVESTIGATION AND ENFORCEMENT**

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Dated: December 3, 2015

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STATEMENT OF THE CASE

On June 20, 2014, the Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, through the Bureau of Consumer Protection (OAG), and Tanya J. McCloskey, Acting Consumer Advocate (OCA) (collectively referred to as “the Joint Complainants”) filed with the Pennsylvania Public Utility Commission (Commission) a Formal Complaint against Respond Power LLC (Respond or “the Company”), at Docket Number C-2014-2427659. The Joint Complainants averred that they had received numerous contacts and complaints from consumers related to variable rates charged by Respond, including approximately twenty formal complaints filed by consumers at the Commission. As a result, the Joint Complainants averred nine separate counts against Respond, including, but not limited to, making misleading and deceptive claims, making misleading and deceptive promises of savings, slamming and failing to provide accurate pricing information. The Joint Complainants made several requests for relief, including providing restitution and prohibiting deceptive practices in the future.

On August 21, 2014, the Commission’s Bureau of Investigation and Enforcement (I&E) filed a Formal Complaint against Respond containing 639 counts of 1) slamming, 2) misleading and deceptive claims of affiliation with electric distribution companies (EDC), 3) misleading and deceptive promises of savings, 4) failure to disclose material pricing terms in Respond’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. These

matters were ultimately consolidated before the presiding ALJs for disposition.

The procedural history of these complaints has been quite extensive, and for the sake of brevity will not be fully recited herein. Various pleadings have been filed in these matters, including Answers with New Matter, Replies to the New Matter, Preliminary Objections and Answers to the Preliminary Objections. Orders granting in part and denying in part Preliminary Objections were issued. A Petition for Interlocutory Review of a Material Question was filed with the Commission. On October 28, 2014, an Order granting a Petition to Consolidate the Formal Complaint filed by I&E against Respond with the Joint Complaint filed against Respond by the Joint Complainants was granted.

Hearings were held March 9-13, 2015 wherein the pre-served, written testimony of approximately 150 consumers was admitted into the record subject to cross-examination and timely objections or via stipulation. On August 25, 2015, I&E and Respond entered into a Settlement Agreement resolving all issues in I&E's Formal Complaint. Additional hearings were held August 26-27, 2015, at which the various parties entered into the record pre-filed testimony of expert witnesses subject to cross-examination and timely objections. At the August 26-27 hearings, Joint Complainants voiced concern over the Settlement and expressed an interest in formally responding to the Settlement in writing.

On September 18, 2015, I&E and Respond filed an amended Settlement Agreement, respective Statements in Support of Settlement, and a Joint Stipulation of Facts. On September 28, 2015, Joint Complainants filed written objections to the Settlement Agreement. A hearing was then held on October 15, 2015 at which the

Settling Parties presented witnesses in support of the Settlement, subject to cross-examination by the Joint Complainants. Joint Complainants were also afforded an opportunity to present witnesses in opposition to the Settlement.

I&E submits this Main Brief in accordance with the briefing schedule established by Interim Order dated October 28, 2015.

SUMMARY OF THE ARGUMENT

The Commission is empowered to act within the scope of authority granted to it by the legislature. That authority grants the Commission quasi-judicial authority to make determinations regarding violations of the Public Utility Code, Commission regulations, and/or Commission Orders. Likewise, that authority grants the Commission the authority to impose civil penalties for any such violations found to have occurred. Nowhere in the Public Utility Code is the Commission granted the power to speculate on the number of customers affected by a particular violation, or the scope of a particular violation beyond the substantial evidence presented at hearing. In other words, class-action suits cannot properly be adjudicated by the Commission, nor can “pattern and practice” evidence be used to establish harm or wrongdoing to an entire class of people based on the record testimony of only a few. There are too many factors at play in this particular case to reach a conclusion that 50,000 customers were harmed based only upon the record testimony of 153 consumers. One of the more important examples being that each customer’s interaction with Respond’s salespeople or telemarketers was unique, as was each customer’s understanding of the terms and conditions of the agreement and the potential for savings.

I&E entered into a Settlement Agreement with Respond to substantially remunerate those customers that came to the Commission with issues regarding their time as a customer of Respond, the amounts charged, and their interactions with salespeople. The Settlement Agreement, nearly forty pages in length, contains substantial remedial

actions for the company to undertake in order to operate as a compliant EGS, including restrictions on variable rate offers and significant overhauling of its door-to-door marketing practices. As such, the Settlement Agreement is in the public interest and should be approved as filed.

In approving the Settlement agreement, the Administrative Law Judges (ALJs) and the Commission should look not only to the extent to which the Settlement Agreement between I&E and Respond addresses the allegations in the I&E Formal Complaint, but also how it may address the issues raised in the Joint Complainant. With the exception of a few customers who testified, but who did not file either an informal or formal complaint at the Commission (outside the scope of the Settlement), the Settlement Agreement, along with its lengthy remedial actions, likely addresses the all allegations in this joint proceeding. I&E submits that, while the ALJs have the discretion to modify the Settlement Accordingly, the Settlement Agreement should be construed as resolving the allegations raised in this consolidated proceeding.

Notwithstanding the positions of I&E set forth herein, which necessarily impact the disposition of the OCA/OAG proceeding against Respond, I&E avers that its Settlement with Respond regarding I&E's Formal Complaint should be approved in its entirety.

Moreover, the Settlement Agreement was designed to provide financial relief to those customers actually harmed, provide for a civil penalty, provide for an EDC hardship fund contribution, and equally as important, bring Respond into compliance with

Commission regulations going forward so as to significantly reduce the chances that future violations occur. I&E submits that such an approach is appropriate for a company with no prior history of non-compliance, and in this particular case, is preferable to license revocation. Thus, Respond should be given the opportunity to continue to operate under these new terms.

ARGUMENT

I. THE COMMISSION HAS NO AUTHORITY TO ENTERTAIN “PATTERN AND PRACTICE” EVIDENCE, NOR DOES JURISDICTION LIE WITH THE COMMISSION TO ENTERTAIN A CLASS-ACTION SUIT.

Just to be very clear at the outset of this discussion, a “pattern and practice” or “class action” type suit has never been successfully litigated before the Commission, or any other Commonwealth agency for that matter. Even a cursory review of the Rules of Civil Procedure governing class action suits¹ illustrates that such an action is only appropriate before a proper judicial authority, rather than a quasi-judicial administrative agency. For instance, Rule 1703 requires that a class action shall be commenced by the filing of a complaint with the prothonotary. Moreover, Rule 1704 requires the complaint to have a caption designating “class action” with a separate heading in the body of the complaint averring facts in support of the prerequisites of Rules 1702, 1708, and 1709. Clearly, none of these rules were followed in either complaint filed in this proceeding, and rightfully so, considering that a “class-action” suit pursuant to the Rules of Civil Procedure would not properly be before the Commission. This is not to suggest, however, that the Rules of Civil Procedure have *any* applicability to Commission proceedings,² but rather to illustrate that, lack of jurisdiction notwithstanding, a “pattern and practice” or “class action” cause of action is not properly before the Commission, even by the civil rules that govern such actions.

¹ Pa. R.C.P. 1701-1717.

² See 52 Pa. Code § 1.1. Subpart A, consisting of Chapters 1, 3, and 5 of the Commission’s regulations governs practice and procedure before the Commission, and even supersedes the rules of administrative practice and procedure at 1 Pa. Code Part II.

The Commission has only the powers and authority granted to it by the General Assembly and contained in the Public Utility Code. 66 Pa.C.S. § 101 *et seq.* *Feingold v. Bell Telephone Co. of Pa.*, 383 A. 2d 791 (Pa. 1977). The Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. Pa. Pub. Util. Comm'n*, 43 A. 2d 348 (Pa. Super. 1945). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967). Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. *Hughes v. Pa. State Police*, 619 A. 2d 390 (Pa. Cmwlth. 1992).

Section 701 of the Public Utility Code authorizes the Commission to hear complaints about acts done or omitted by a regulated entity in violation of any law which the Commission has jurisdiction to administer, or any regulation or order of the Commission. 66 Pa.C.S. § 701. Neither Section 701 nor any other provision of the Code authorizes the Commission to rely on “pattern and practice” evidence or entertain “class action” types of proceedings in determining whether a violation of the Code, Commission regulations or Commission orders has occurred and, if so, what penalty or relief may be awarded.

As the ALJs have previously observed, “[n]othing in Section 701 or any other section of the Public Utility Code...allows for the filing of class action complaints. In the absence of such statutory authority, the Commission cannot entertain class action complaints.” *Commonwealth of Pennsylvania, et al. v Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric*, Docket No. C-2014-2427656 (Order Granting

Petition to Intervene dated April 23, 2015). The Commission has also rejected other attempts at class action suits. *See Painter v. Aqua PA, Inc.*, Docket No. C-2011-2239556 (Initial Decision entered January 7, 2014, adopted by Commission Opinion and Order entered May 22, 2014); *Pettko v. Pennsylvania American Water Company*, Docket No. C-2011-2226096 (Recommended Decision dated October 5, 2011, adopted by Commission Opinion and Order entered February 18, 2013). As a result, only consumers who have filed complaints with the Commission or have participated in an enforcement action instituted by a prosecutory body have any recourse or ability to seek the imposition of a penalty, refund or other relief.

Once such a complaint is filed, Section 332(a) of the Public Utility Code places the burden of proof for an order on the proponent of the order. 66 Pa.C.S. § 332(a). To satisfy that burden, the proponent of the order must prove each element of its case by a preponderance of evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990). A preponderance of evidence is established by **presenting evidence** that is more convincing, by even the smallest amount, than that presented by the other parties to the case. *Se Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950) (emphasis added). It is for this very reason that the Formal Complaint filed by I&E contained 639 specific counts of alleged wrongdoing. Each count must be supported by substantial evidence of record to support the factual allegations and claims of violations of the Code and the Commission's regulations and orders. *See* 66 Pa. C.S. § 3301

(allowing for the imposition of a civil penalty not to exceed \$1000 for each violation of the Code, Commission regulations, or Orders).

Additionally, it well-settled that the Commission's decision must be supported by substantial evidence in the record. 2 Pa.C.S. § 704. Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and Western Railway Co. v. Pa. Pub.Util. Comm'n*, 413 A.2d 1037 (Pa. 1980).

In accordance with these well-established principles, substantial evidence is necessary to support each factual allegation and/or claim of violations of the Public Utility Code and the Commission's regulations and orders. To the extent multiple violations are alleged, it is, once again, necessary to present substantial evidence of each and every specific violation alleged. A complainant cannot prove a discrete number of violations and then ask the Commission to speculate that more violations must have occurred. Such a request would directly violate the bedrock principle that Commission findings cannot be based on a "mere trace of evidence or a suspicion of the existence of a fact sought to be established." *Norfolk, supra*. Quite simply, it is not proper to infer wrongdoing or harm to 50,000 customers based on the record testimony of 153 customers, as substantial evidence does not exist proving a violation occurred with respect to the vast majority of these customers.

Furthermore, a pattern and practice approach is not appropriate in this joint proceeding due to the unique facts and circumstances of each individual sales transaction. For instance, while some of the consumer statements contain allegations that they were promised savings, others are specific about a percentage of savings for a defined time period, and yet others do not recall being promised savings. In short, each consumer's statement is a description of the customer's unique interaction with Respond or its third-party vendors and involves many nuances that warrant a more in-depth review. It is precisely for this reason that federal courts in Pennsylvania have found that claims involving deceptive business practices are not suitable for class action treatment. *See Kostur v. Goodman Global, Inc.*, 2014 WL 6388432 (E.D. Pa. 2014) (claims of deceptive business practices involve varying levels of reliance, causation and damages between each individual).

Directly to this point, the United States District Court for the Eastern District recently denied the plaintiffs' motion for class certification in a putative class action lawsuit filed against Respond regarding marketing and sales activities related to variable price contracts for the very reasons explained above. Since the variable rate customers could not be expected to share the same understanding of their contractual rights, the Court found that the commonality requirement of class certification was not fulfilled. *Barbara A. Gillis, Thomas Gillis, Scott R. McClelland, and Kimberly A. McClelland, individually and on behalf of all others similarly situated v. Respond Power, LLC*, Civil Action No. 14-38576, 2015 U.S. Dist. LEXIS 115935 (Order dated August 31, 2015).

Rather than employing a “pattern and practice” approach to situations involving multiple customers, 52 Pa. Code § 69.1201(c)(5) specifically provides for the Commission to consider the actual number of customers affected by a violation. However, the Commission has expressly refrained from speculating about the number of possibly affected customers if there is no evidence in the record to demonstrate how many customers were, in fact, affected by a violation. *See, e.g., Eckroth v. Verizon Pa. Inc.*, Docket No. C-2011-2279168 (Order entered April 28, 2013).

While the Commission has plenary authority under Section 501 of the Public Utility Code, 66 Pa. C.S. § 501, to direct an EGS to issue a credit or refund for an overbilling, such authority is premised upon a showing that a billing adjustment is necessary, such as when an EGS fails to bill a customer in accordance with its disclosure statement pursuant to 52 Pa. Code § 54.4(a). *See Commonwealth of Pennsylvania, et al., v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Order Concerning Interlocutory Review and Answer to a Material Question entered December 18, 2014). To the contrary, there is no authority for the Commission, in a litigated proceeding, to order refunds to an EGS’ entire class of customers absent substantial evidence to support billing violations.

Furthermore, the Commission does not regulate the rates of EGSs. EGSs are only public utilities for the limited purposes of Sections 2809 and 2810 of the Public Utility Code. *See* Pa. C.S. §§ 102, 2809, 2810. Although Section 501(b) of the Code, 66 Pa.C.S. § 501(b), provides the PUC with the “general administrative power and authority to supervise and regulate all public utilities doing business within this Commonwealth” and

Section 1301 of the Code authorizes the PUC to regulate the rates of public utilities, electricity generation is no longer regulated as a public utility service or function in the Commonwealth. *See* 66 Pa.C.S. § 102 (defining “public utility” as excluding EGSs except for specific limited purposes); *id.* § 2806(a). *See Delmarva Power & Light Co. v. Commonwealth*, 870 A.2d 901 (Pa. 2005), wherein the Supreme Court opined that the General Assembly, through the Choice Act, intended that EGSs be excluded from the definition of “public utility” for most purposes, subject to limited express exemptions. *Delmarva Power & Light Co.*, 870 A.2d at 910. While authority certainly exists for the Commission to order refunds **to a public utility’s customers** as a class under 66 Pa. C.S. § 1312 in cases where a utility charges in excess of its Commission approved tariff rate, the Commission cannot do so to an entire class of EGS customers, as the Commission does not regulate the rates of EGSs.

In the instant case, Respondent offered a variable rate contract where the rate is determined by Respond and reflects their generation charge as set by the PJM day-ahead market, and other costs, as well as adding a profit margin. In requesting refunds to the customer base as a whole, Joint Complainants are essentially asking the Commission to determine a “just and reasonable” rate that it believes the EGS **should have** charged, and subtract that from the amount actually charged, which is essentially regulating rates. Such an action is improper.

It is not the Commission's duty to ensure that the rates of EGSs are just and reasonable, rather, only that an EGS is billing customers the rate marked and agreed upon in the disclosure statement.

II. THE SETTLEMENT AGREEMENT BETWEEN I&E AND RESPOND POWER IS IN THE PUBLIC INTEREST.

Commission policy promotes settlements. 52 Pa. Code § 5.231. Settlements lessen the time and expense the parties must expend litigating a case and at the same time conserve administrative resources. The Commission has indicated that settlement results are often preferable to those achieved at the conclusion of a fully litigated proceeding. 52 Pa. Code § 69.401. The focus of inquiry for determining whether a proposed settlement should be recommended for approval is not a "burden of proof" standard, as is utilized for contested matters. *Pa. Pub. Util. Comm'n, et al. v. City of Lancaster – Bureau of Water*, Docket Nos. R-2010-2179103, *et al.* (Opinion and Order entered July 14, 2011) (Lancaster). Instead, the benchmark for determining the acceptability of a settlement or partial settlement is whether the proposed terms and conditions are in the public interest. *Pa. Pub. Util. Comm'n LBPS v. PPL Utilities Corporation*, M-2009-2058182 (Opinion and Order November 23, 2009); *Pa. Pub. Util. Comm'n v. Philadelphia Gas Works*, M-00031768 (Opinion and Order January 7, 2004); 52 Pa. Code § 69.1201; *Warner v. GTE North, Inc.*, Docket No. C-00902815 (Opinion and Order entered April 1, 1996); *Pa. Pub. Util. Comm'n v. CS Water and Sewer Associates*, 74 Pa. PUC 767 (1991).

The Commission's regulations at 52 Pa. Code § 69.1201 set forth factors and standards for evaluating litigated and settled proceedings involving violations of the Public Utility Code and Commission regulations, to wit:

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

as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.

- (5) The number of customers affected and the duration of the violation.
- (6) The compliance history of the regulated entity which committed the violation. An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.
- (7) Whether the regulated entity cooperated with the Commission's investigation. Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty.
- (8) The amount of the civil penalty or fine necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount.
- (9) Past Commission decisions in similar situations.
- (10) Other relevant factors.

52 Pa. Code § 69.1201. (Emphasis added).

To determine whether a proposed settlement is in the public interest, the Commission must evaluate the proposed Settlement subjecting it to the standards above. With regard to the first factor, whether the conduct was of a serious nature, I&E submits that the violations alleged in I&E's Formal Complaint were of a serious nature. And while the actions averred in the Formal Complaint could thwart years of efforts to promote competition, the remedial relief outlined in the Settlement Agreement is designed to specifically meet these concerns. A moratorium on variable rate sales in Pennsylvania for 24 months will give Respond time to implement the numerous corrective actions outlined in the Settlement to bring its marketing and sales techniques

into regulatory compliance. Furthermore, the refund pool amount will reimburse the customers who were charged rates inconsistent with the expected savings the customers believed they would receive, relieving some of the financial burden sustained by many of the consumers that were affected by the conduct alleged in the Formal Complaint.

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

With regard to the fourth factor,³ whether the regulated entity has made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future, Respond has agreed as part of the Settlement to make substantial modifications to its business practices. These modifications encompass changes to Respond's product offering, marketing practices, third party verifications, Disclosure Statement, training of internal and external sales representatives, compliance monitoring, reporting, and customer

³ The third factor is only relevant to litigated proceedings, and therefore, does not apply to the proposed Settlement of C-2014-2438640.

service. In fact, Respond is already implementing these changes prior to the approval of the Settlement. The Settlement provides significant detail regarding each of these issues. These modifications, along with the refund pool, seek to ensure that the conduct alleged in the Complaint is remedied and that such conduct is prevented from occurring in the future.

Respond has also agreed not to offer variable rate plans for a period of 24 months, beginning September 1, 2015. This is the most restrictive stay-out period of the 4 major EGS cases litigated or settled in the past year. In part, this time period allows for the implementation of the modifications to the business practices so that a variable rate plan may be a viable competitive option for some customers in the future.

With regard to the fifth factor, the number of customers affected and the duration of the violation, I&E avers that between February 1, 2014 and June 30, 2014, the Commission's Bureau of Consumer Services (BCS) received 1,206 informal complaints regarding Respond. Joint Complainants averred that they received approximately 709 contacts from Respond customers from early February 2014 through early June 2014. While some of these contacts are undoubtedly duplicates, it is fair to say that the number of customers who were likely impacted by the Company's conduct as alleged in the Formal Complaint is significant, but not as significant as the number of customers affected in other approved EGS settlements of a similar nature. For example, in PaG&E, the number of customer contacts with Joint Complainants was approximately 2,588, in IDT it was 2,456, whereas in HIKO the number of customer contacts with Joint

Complainants was 363.⁴ Thus, Respond's conduct may have affected more customers than affected by HIKO's conduct, but far less than those affected by PaG&E's and IDT's conduct.

The sixth factor is the compliance history of the regulated entity. 52 Pa. Code § 69.1201(c)(6). "An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty." *Id.* Respond has no prior history of non-compliance. Although some formal complaints are currently pending before the Commission, an adjudication of them while this Settlement is being considered would not constitute a prior "compliance history" since those cases involve the same allegations and time period at issue here. Moreover, the injunctive terms of the Settlement will help to ensure compliance with regulatory standards going forward. That is, the significant monetary and injunctive provisions of this Settlement will ensure that Respond becomes a compliant utility.

As such, this factor supports adopting the Settlement in its entirety without modification, along with the civil penalty and EDC hardship contribution included therein, as being in the public interest because, in particular, because of the extensive modifications to the Company's business practices that are required in the Settlement.

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

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

With regard to the eighth factor, the amount of the civil penalty or fine necessary to deter future actions, I&E asserts that the total settlement package of \$3,200,000 consisting of a refund pool of \$3,000,000, including what Respond previously disbursed to consumers (\$971,279.45 in voluntary reductions of charges through re-billings performed by Respond in February 2014, and voluntary refunds that were previously provided by Respond to customers in the amount of \$248,873.58), and the additional refund amount agreed to as part of the Settlement (\$313,351.33), along with the additional monies comprising the \$125,000 civil penalty, \$50,000 towards administrator fees, and \$1,466,495.64 made available for refunds to all other customers served by Respond during January, February and March 2014, of which \$525,000 is guaranteed either to customers or an EDC hardship fund, is significant and appropriate enough to deter future misconduct. This civil penalty is significantly higher than the \$25,000 civil penalty agreed to by PaG&E and IDT as part of their settlements with the Joint Complainants, even though both EGSs have previously had penalties imposed upon them by the Commission, as a result of an I&E investigation.

Moreover, the total number of customers that provided testimony in this consolidated case is 221, of which 153 are part of the record. A mathematically precise

breakdown of a specific dollar amount per violation is unnecessary, but would illustrate that given the number of affected customers providing written testimony of record upon which to find substantial evidence to warrant a civil penalty, the \$125,000 civil penalty is appropriate. Even accounting for the 1,206 BCS contacts and 709 Joint Complainant contacts (of which some are duplicates) the civil penalty is sufficient, adequate, and in the public interest.

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

I&E submits that this Settlement is consistent with prior Commission decisions in similar situations. This case presents its own set of facts, involving a number of affected

customers unique to this case, wherein violations attributable to each customer are based on the unique facts of each customer's interaction with Respond and/or its third-party sales agent. The above-cited cases, however, are illustrative of the fact that the terms of the Settlement reached in the instant case are just, reasonable, and in the public interest. In PaG&E, above, the Commission approved a civil penalty of \$150,200 for slamming or attempting to slam 319 customer accounts. Docket No. C-2013-2314312, (Opinion and Order entered October 17, 2013). The Commission also ordered refunds to those customers slammed and approved the settlement terms for PaG&E to modify its business practices to avoid future misleading, unlawful or fraudulent business practices. In IDT, above, the Commission approved a settlement for a \$39,000 civil penalty for 21 affected customers, 3 of which were actually slammed. The remaining violations alleged consisted of fraudulent, deceptive, and unlawful business practices, and violating the Telemarketer Registration Act (73 P.S. §§ 2241, *et seq.*). Docket No. C-2013-2314312, (Opinion and Order entered October 17, 2013).

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

In this second PaG&E case, the ALJs issued an Initial Decision approving without modification the settlement agreement between PaG&E and Joint Complainants requiring (in addition to extensive business practice modifications similar to those imposed by the instant Settlement) PaG&E to pay a \$25,000 civil penalty, a \$100,000 EDC Hardship Fund contribution, a net refund pool of \$2,325,000, and an 18-month stay-out from offering variable rate plans. This PaG&E case involved violations nearly identical to those alleged in I&E's Formal Complaint against Respond, yet related to 2,588 customer contacts with Joint Complainants. Joint Complainants received only 709 customer contacts relating to Respond during the same timeframe, for the same alleged violations. This is approximately 27% of the customer contacts received for PaG&E.

Likewise, in HIKO, the ALJs issued an Initial Decision approving without modification the settlement agreement between HIKO and Joint Complainants requiring (in addition to extensive business practice modifications similar to those imposed by the instant Settlement) HIKO to pay no civil penalty,⁵ a \$25,000 EDC Hardship Fund contribution, a net refund pool of \$2,025,383.85, and a 15-month stay-out from offering variable rate plans. This HIKO case involved violations nearly identical to those alleged in I&E's Formal Complaint against Respond, yet related to 363 customer contacts with

⁵ In a separate but related litigated matter, *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), the ALJs issued an Initial Decision imposing a civil penalty against HIKO in the amount of \$1,836,125 for alleged violations different than those alleged by Joint Complainants. I&E alleged that HIKO's actions in 2014 constituted deliberate and egregious misconduct in that HIKO expressly, unambiguously, and clearly guaranteed a 12-month introductory period discount of 1-7% over the price to compare. After which HIKO's Chief Executive Officer and management decided not to honor its contractual promises for as many as four consecutive billing cycles from January through and including April, 2014. HIKO's action resulted in 14,689 deliberate overcharges of over 5,700 customers.

Joint Complainants. Joint Complainants received only 709 customer contacts relating to Respond during the same timeframe, for the same alleged violations.

Finally, in *Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Initial Decision issued November 19, 2015), the ALJs approved without modification a comprehensive settlement agreement requiring (in addition to extensive business practice modifications similar to those imposed by the instant Settlement) IDT to pay a \$25,000 civil penalty, a \$75,000 EDC Hardship Fund contribution, a net refund pool of \$2,400,000, and 21 month stay-out from offering variable rate plans. This IDT case involved violations nearly identical to those alleged in I&E's Formal Complaint against Respond, yet related to 2,456 customer contacts with Joint Complainants. Again, Joint Complainants received only 709 customer contacts relating to Respond during the same timeframe, for virtually the same alleged violations. This is approximately 28% of the customer contacts received for IDT.

To briefly summarize for comparison purposes, I&E's Settlement Agreement with Respond has a potential total value of \$3,200,000, consisting of a \$125,000 civil penalty, a minimum EDC Hardship Fund contribution of \$25,000, \$50,000 in administrator fees, a net refund pool of \$1,779,846.97, a 24-month stay-out from offering variable rate plans, and extensive modifications to business practices nearly identical to the settlement agreements approved by Initial Decision in PaG&E and HIKO, and proposed in the pending IDT matter. The proposed Settlement amounts (civil penalty and restitution) fall squarely between HIKO and PaG&E, which is right where it should be. PaG&E had

2,588 customer contacts, IDT had 2,456 customer contacts and HIKO had 363 customer contacts. Respond had 709 customer contacts with Joint Complainants and 1,206 with BCS (some of which were duplicates). All of these complaints involved the same types of violations, **and were resolved via settlement agreement with OCA/OAG.**

Moreover, Respond has no prior compliance history with the Commission, whereas, as discussed above, PaG&E and IDT do. All of these factors support a finding that this comprehensive Settlement is just, reasonable, and in the public interest.

III. THE RELIEF OUTLINED IN THE SETTLEMENT AGREEMENT SUBSTANTIALLY ADDRESSES THE VIOLATIONS OUTLINED IN THE JOINT COMPLAINT.

I&E maintains that the Settlement Agreement substantially resolves many of the issues in the Joint Complaint. The Joint Complainants averred that on or about February 10, 2014, the OCA began receiving “a high volume of calls and written correspondence from residential consumers on variable rate plans with [electric generation suppliers] EGSs regarding the level of electric generation charges on the consumers’ electric bills.” Joint Complainants averred that as of May 4, 2014, the OCA had collected information from 2,434 of its consumer contacts, 189 (8%) of which were regarding Respond. Moreover, Joint Complainants alleged that from February 27, 2014 through June 4, 2014, the OAG received 7,503 consumer complaints related to variable rates charged by EGSs. Of these 7,503 consumer complaints, 503 (7%) were regarding Respond.

I&E’s Formal Complaint was based upon eighty-six (86) informal complaints received by the Commission’s BCS between February 1, 2014 and June 30, 2014. While

a total of 1,206 informal complaints were received during this time, I&E chose a sampling of the most egregious informal complaints for the basis of its Formal Complaint.

In its Formal Complaint, I&E averred six (6) counts alleging unfair, fraudulent or deceptive marketing acts by slamming six (6) customer accounts; fifteen (15) counts alleging unfair, fraudulent, deceptive or otherwise unlawful marketing acts in that the Company's employees, agents or representatives through its door-to-door sales people misrepresented to three (3) customers an affiliation with a local EDC or a government program; forty-seven (47) counts alleging misrepresentation to forty-seven (47) customers that Respond's rates would be competitive or always be lower than or equal to the PTC, or otherwise employed other unethical and/or fraudulent tactics for the purposes of inducing a customer to switch to respondent such as guaranteeing savings over the PTC, or guaranteeing a savings of up to 10%; four hundred thirty counts (430) alleging failure to disclose material terms and conditions of service including the material terms and conditions of price variability, the limits on variability, and billing amounts inconsistent with advertised prices, marketed prices, or the agreed upon prices in the disclosure statement for eighty-six (86) customers; thirty-three (33) counts alleging that Respond, its employees, agents or representatives, did not utilize good faith, honesty and fair dealing with eleven (11) residential customers in that the Company, its employees, agents or representatives, failed to adequately staff its call centers, provide reasonable access to company representatives for the purposes of submitting complaints, failed to properly

investigate customer disputes, failed to timely cancel accounts, and failed to notify customers of the results of the Company's investigation into a dispute; forty-five (45) counts alleging that Respond marketed the electric generation supplier services of Respond to nine (9) Pennsylvania consumers, including circumventing the Commission's sales verification procedures, by falsely pretending to be the customer on verification calls, forging customer signatures on sales contracts and/or other enrollment materials, not disclosing to the customer whether the rate was fixed or variable and/or checking the "variable" box on the sales agreement after the customer has signed; fourteen (14) counts alleging failure to comply with the Electricity Generation Customer Choice and Competition Act, 52 Pa. Code §§ 54.1 *et seq.*, in that the Company or agent(s) or representative(s) of the Company billed a generation rate on fourteen (14) customer invoices that did not reflect the price agreed upon in the written enrollment materials; and fifty-nine (59) counts alleging that Respond failed to properly train and monitor its employees, agents or representatives on responsible and ethical sales practices. In its Answer, each of these allegations was denied by Respond, and defended accordingly at hearing.

Similarly, for roughly the same time period in 2014, Joint Complainants' first count alleged that the OCA and OAG received complaints from seventeen (17) customers alleging misleading and deceptive claims of affiliation with electric distribution companies; Joint Complainants' second count alleges that the OCA and OAG received complaints from one hundred twenty-six (126) consumers alleging misleading and

deceptive promises of savings; Joint Complainants' third count alleges that the OCA and OAG received complaints from sixty-one (61) customers alleging a failure to disclose material terms; Joint Complainants' fourth count alleges that Respond used deceptive and misleading welcome letters and inserts; Joint Complainants' fifth count alleges that the OCA and OAG received complaints from forty-three (43) consumers alleging slamming; Joint Complainants' sixth count alleges that the OCA and OAG received complaints from ninety-six (96) consumers alleging that Respond's lack of good faith handling of complaints; Joint Complainants' seventh count alleges generally that Respond failed to provide consumers with accurate pricing information; Joint Complainants' eighth count alleges generally that Respond charged customers prices not conforming to the disclosure statement; and Joint Complainants' ninth count alleges that fifty-four (54) consumers that complained to OCA and OAG were signed up through a telemarketing call, and that Respond failed to comply with the Telemarketer's Registration Act.

Both the Joint Complaint and I&E's Formal Complaint alleged violations of the same provisions of the Public Utility Code and its regulations, namely Chapters 54, 56, and 111 of the Commission's Regulations for the same period of time. 52 Pa. Code Ch. 54.1 *et seq*, 56.1 *et seq*, and 111.1 *et seq*. Both the Joint Complaint and I&E's Formal Complaint contain similar factual allegations including, but not limited to, deceptive and misleading sales tactics, failure to conform to the terms of the disclosure statement, failure to disclose material pricing terms, charging prices not conforming to the disclosure statement, misleading promises of savings, and slamming of customer accounts.

I&E's Settlement with Respond addresses, among other things, refunds to the 1,206 consumers that filed informal complaints with the Commission between February 1, 2014 and June 30, 2014. Many of the 189 consumers that contacted OCA and the 503 consumers that contacted the Attorney General are covered as part of the 1,206 in the Settlement Agreement. To the extent that any are not, and substantial evidence of record exists supporting Code violations for these customers, then the ALJs have the authority to address such violations outside of the Settlement. However, for the purposes of the civil penalty for any of these violations, I&E seeks no additional civil penalty beyond the \$125,000 civil penalty in the Settlement.

In essence, with the exception of the Telemarketer's Registration Act allegation, I&E's Formal Complaint and the Joint Complaint cover substantially the same time period and the same violations. The only significant difference is that in some instances the individual customers relied upon to substantiate violations vary. The civil penalty, the EDC Hardship Fund contribution, and the remedial actions outlined in the Settlement Agreement adequately address the requests for relief made by both I&E and Joint Complainants.

IV. GIVEN THE EXTENSIVE REMEDIAL MEASURES OUTLINED IN THE SETTLEMENT AGREEMENT, LICENSE REVOCATION IS NOT BEING SOUGHT IN THIS CASE.

On February 2, 2010, Respond filed an application seeking to become a licensed electric generation supplier (EGS) in the service territories of Allegheny Power, Duquesne Light Company, Metropolitan Edison Company, Pennsylvania Electric

Company, Pennsylvania Power Company, PECO Energy Company, PPL Electric Utilities, Inc., and UGI Utilities, Inc. within the Commonwealth of Pennsylvania. The application was filed pursuant to the Commission's regulations at 52 Pa. Code §§ 54.31-54.43, which became effective on August 8, 1998, and which were established under Section 2809 of the Public Utility Code, 66 Pa.C.S. §2809.

The Public Utility Code at § 2809 provides in pertinent part that:

License Requirement.--No person or corporation, including municipal corporations which choose to provide service outside their municipal limits except to the extent provided prior to the effective date of this chapter, brokers and marketers, aggregators and other entities, shall engage in the business of an electric generation supplier in this Commonwealth unless the person or corporation holds a license issued by the Commission.

66 Pa.C.S. § 2809.

In its licensing Order, issued August 18, 2012, the Commission required Respond to comply with applicable Chapter 56 residential service regulations as set forth in the Commission Order *Guidelines for Maintaining Customer Service at the Same Level of Quality Pursuant to 66 Pa. C.S. §2807(d), and Assuring Conformance with 52 Pa. Code Chapter 56 Pursuant to 66 Pa. C.S. §2809(e) and (f)*, at Docket No. M-00960890 F0011, Order entered July 11, 1997. Additionally, the Commission noted that Respond must comply with, and ensure that its employees, agents, representatives and independent contractors comply with the standards of conduct and disclosure for licensees set out in Commission regulations at 52 Pa. Code § 54.43 that were enacted to protect consumers of this Commonwealth. These standards include, *inter alia*, the provision of timely and

accurate information about the services offered by the licensee, the practice of nondiscrimination in service in regard to race, color, religion, national origin, marital status, etc., the safeguarding of a consumer's personal information, and compliance with applicable state and federal consumer protection laws.

There is no doubt about the Commission's statutory authority to grant EGS licenses, coupled with the Commission's statutory authority to rescind or modify any of its Orders, gives the Commission the authority to revoke an EGS' license, after due process. *See* 66 Pa.C.S. § 2809; 66 Pa. C.S. § 501(a). As the independent prosecutory bureau tasked with enforcing compliance with Commission orders and regulations, I&E submits that, given the Settlement Agreement filed in this case and all the remedial actions to be undertaken therein, this case does not warrant the revocation of Respond's license. The factors discussed in the preceding section, when applied to this joint proceeding, do not indicate that the revocation of Respond's license is appropriate at this juncture. Especially in light of the myriad concessions and business practice modifications committed to in the Settlement. 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.

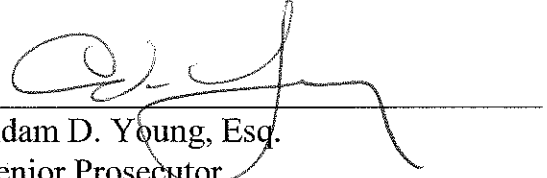
Many EGSs and public utilities alike were stung by the soaring cost of electricity during the polar vortex months. Lessons were learned industry-wide, as well as here at the Commission, wherein new regulations were imposed in June 2014 in response to the issues created by variable rate contracts coupled with unexpected soaring costs. While this does not excuse the actions of Respond and/or its third-party vendors, I&E submits that Respond should be given an opportunity to implement the measure in the proposed Settlement and have the opportunity to operate safely and legally.

While the stories told on the record in this proceeding by the consumers affected indicate that Respond might have had some business practice deficiencies, as well as issues with some third-party vendors, there is nothing to indicate that the Company is incapable of addressing all of these deficiencies and becoming a compliant EGS going forward. To that end, the Settlement Agreement provides a comprehensive framework through which Respond can become compliant.

V. CONCLUSION

For the foregoing reasons, the ALJs and the Commission should approve the Settlement Agreement as filed.

Respectfully submitted:

A handwritten signature in black ink, appearing to read 'A. D. Young', is written over a horizontal line.

Adam D. Young, Esq.
Senior Prosecutor
Pa. Attorney ID# 91822

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Dated: December 3, 2015

APPENDIX A

Proposed Findings of Fact:

1. I&E Incorporates herein the *Stipulation of Facts in Support of Settlement Agreement* filed September 18, 2015 at Docket No. C-2014-2438640.

Proposed Conclusions of Law:

1. Section 701 of the Public Utility Code authorizes the Commission to hear complaints about acts done or omitted by a regulated entity in violation of any law the Commission has jurisdiction to administer.
2. Section 332(a) of the Public Utility Code places the burden of proof for an order on the proponent of the order.
3. The proponent of the order must prove each element of its case by a preponderance of evidence.
4. A preponderance of evidence is established by presenting evidence that is more convincing, by even the smallest amount, than that presented by the other parties to the case.
5. The Commission's decision must be supported by substantial evidence in the record.
6. Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.
7. 66 Pa.C.S. § 3301 allows for the imposition of a civil penalty not to exceed \$1000 for each violation of the Code, Commission regulations, or Orders.
8. EGSs are not "public utilities" as defined under 66 Pa.C.S. §102.
9. EGSs are only public utilities for the limited purposes of Sections 2809 and 2810 of the Public Utility Code, 66 Pa.C.S. §§ 2809 and 2810.
10. The Commission does not have the authority to regulate the rates of EGSs.

11. No provision of the Public Utility Code grants jurisdiction to the Commission to entertain a pattern and practice, or class-action, type of case.
12. The Commission has only the powers and authority granted to it by the General Assembly and contained in the Public Utility Code.
13. The Commission must act within, and cannot exceed, its jurisdiction.
14. Jurisdiction may not be conferred by the parties where none exists.
15. Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy.
16. Applying 52 Pa. Code § 69.1201, and the factors set forth therein for evaluating litigated and settled proceedings involving violations of the Public Utility Code and Commission regulations, the Settlement Agreement is in the public interest.

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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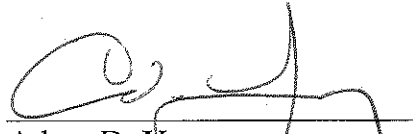
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Date: December 3, 2015