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December 3, 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 Brief, for the above-captioned matters.

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

Very truly yours,

Karen O. Moury

KOM/bb
Enclosures

cc: Certificate of Service
David P. Zambito, Esq.

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

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

BRIEF
ON BEHALF OF
RESPOND POWER LLC

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I. INTRODUCTION

Respond Power, LLC ("Respond Power") is an electric generation supplier ("EGS") licensed by the Commission since 2010 to provide electric generation services to retail customers throughout Pennsylvania pursuant to the Electricity Generation Customer Choice and Competition Act ("Competition Act" or "Chapter 28"),[1] which was enacted into law in 1996. Under the Competition Act, retail customers have the opportunity to choose the company from whom they purchase electric generation services, while their electric distribution companies ("EDCs") continue to deliver the electricity to their homes and businesses. When passing the Competition Act, the General Assembly declared that "[c]ompetitive market forces are more effective than economic regulation in controlling the cost of generating electricity,"[2] and that "the generation of electricity will no longer be regulated as a public utility."[3]

As a licensed EGS, Respond Power has served tens of thousands of retail electric customers in Pennsylvania, the vast majority of whom were on variable price contracts. Since receiving its license in 2010 and until January 2014, Respond Power was named as the respondent on only two formal complaints filed by consumers. Neither of those complaints pertained to variable prices and both were quickly settled to the satisfaction of the consumers. Respond Power likewise experienced minimal informal complaint activity during that time. Additionally, the Company was cooperative with the Commission's Bureau of Consumer Services ("BCS"), participated in informative sessions hosted by the Office of Competitive Market Oversight ("OCMO") and sought OCMO's informal opinion as necessary.

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[1] 66 Pa. C.S. §§ 2801-2815.
[2] 66 Pa. C.S. § 2802(5).
[3] 66 Pa. C.S. § 2802(14).

In January 2014, Pennsylvania -- along with other portions of Northeast United States -- experienced a phenomenon that became known as the "Polar Vortex." A "perfect storm" occurred during the Polar Vortex, in which temperatures were frigid over a prolonged period, resulting in new records for winter electricity use through the service area of PJM Interconnection, LLC ("PJM"). **Extremely high demand combined with particularly high forced generator outage rates to produce record high costs in the PJM-administered energy markets. As a result, many EGSs serving Pennsylvania customers on variable price retail supply contracts increased their retail prices to recover these record-breaking wholesale energy costs.**

Respond Power was one of many EGSs that made a business decision to increase variable prices in an effort to recover at least some of these costs from retail customers and avoid going out of business. The Company's informal and formal complaint volume at the Commission immediately spiked, due to customers' frustration with the high prices and the length of time it took to switch to another EGS or back to the EDC.

Besides the lengthy switching process, the Polar Vortex unearthed several other shortcomings in the electric retail market that contributed to consumer frustration, including:

- Many customers do not understand the difference between the EDC and the EGS;
- Customers seldom reviewed disclosure statements that were provided to them or were not even aware that they had received them in person and/or through the mail;
- Despite clear terms in disclosure statements about prices varying each month and the absence of ceilings or limits, customers typically did not understand the extent to which price swings could occur;
- Some customers expected to receive advance notice of monthly changes in variable prices;

- Many customers did not review their confirmation letters from EDCs, informing them of a change to an EGS;
- Adults in a household sometimes did not notify other adults in the same household that a switch to an EGS had been made;
- Customers generally believed that the only reason for switching to an EGS was to save money "forever" or always pay less than they would have paid the EDC; and
- Many customers did not review their monthly electric bills or know where to look on those bills to view EGS charges.

On June 20, 2014, the Commonwealth of Pennsylvania by Attorney General Kathleen Kane through the Bureau of Consumer Protection ("OAG"), and Tanya J. McCloskey, Acting Pennsylvania Consumer Advocate ("OCA") (collectively referred to as the "Joint Complainants") initiated this proceeding by the filing of a Joint Complaint against Respond Power. In filing the Joint Complaint, the OAG and OCA recited the high volume of consumer contacts and complaints they had received about EGSs' variable prices in early 2014, of which Respond Power was accountable for only a small percentage. The Bureau of Investigation and Enforcement ("I&E") also filed a Complaint against Respond Power on August 21, 2014. I&E likewise noted the overall higher than normal volume of complaints filed against EGSs as a result of the price increases stemming from the Polar Vortex and the smaller percentage attributable to Respond Power.

The Joint Complainants and I&E alleged violations of the Public Utility Code[4] ("Code") and Commission regulations regarding Respond Power's sales, marketing and business practices prior to, during and following the Polar Vortex. As a result of those alleged violations, the Joint Complainants and I&E sought various remedies including refunds to consumers, a civil penalty

[4] 66 Pa. C.S. §§ 101 *et seq.*

and license revocation. Due to the common issues of law and fact raised by the Joint Complaint and the I&E Complaint, and the desire to avoid inconsistent outcomes and cumulative penalties, the Administrative Law Judges ("ALJs") consolidated these matters for hearing and disposition on October 28, 2014.

Without admitting any wrongdoing but recognizing the importance to consumers and the retail market of full and accurate information and disclosures to consumers to address many of the lessons learned from the Polar Vortex, Respond Power reached a full and comprehensive settlement with I&E. This agreement culminated in the filing on September 18, 2015 of an Amended Petition for Approval of Settlement ("Settlement"). While this Settlement is pending review by the ALJs and the Commission, the Joint Complainants have refused to join the Settlement and continue to litigate the consolidate Joint Complaint and challenge the adequacy of the Settlement.

The Settlement demonstrates Respond Power's commitment to work with the Commission and wholly addresses the concerns raised about Respond Power's variable price increases as result of the Polar Vortex of 2014 and the Company's associated sales, marketing and business practices. Under the Settlement, Respond Power would be subjected to wide-ranging regulatory oversight despite its status as a private company and its role as an otherwise lightly-regulated EGS in the deregulated energy market in Pennsylvania.

Respond Power's total financial responsibility under the Settlement is $3.2 million, and the Company specifically agrees to: (i) provide significant financial relief in the form of refunds to the consumers who complained to the Commission's BCS from February 1, 2014 through June 30, 2014 about Respond Power; (ii) establish an additional refund pool that will be administered by a third party administrator to give all customers served by Respond Power in

January through March 2014 the opportunity to now make claims for refunds; (iii) forego offering variable price products to new customers for two years; (iv) modify its marketing practices and materials to enhance the quality and content of the information that is provided to consumers about its products; (v) design and implement improved training programs for its sales representatives and third-party contractors; (vi) increase internal quality control and compliance monitoring efforts; (vii) staff its call center to answer calls within specified timeframes and develop an action plan for handling periods of high call volumes; and (vii) provide quarterly reports to the Commission regarding complaints and disputes. In addition, Respond Power agrees to pay a civil penalty in the amount of $125,000 and contribute up to $50,000 toward the costs and expenses of the third party administrator for the additional refund pool as part of the Settlement. The Company will also contribute $25,000 to the EDCs' hardship funds, with the potential for a greater contribution if consumers do not claim money that is set aside for the additional refund pool described above.

The injunctive relief agreed to by Respond Power in this Settlement is nearly identical to the language contained in settlement agreements among the Joint Complainants and other electric generation suppliers ("EGSs"), which have been approved by Initial Decisions issued by the same Administrative Law Judges ("ALJs") presiding over this proceeding. Most importantly, Respond Power's financial commitments under the Settlement are consistent with, if not more compensatory, than those previous settlements. *See 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) ("*PG&E Initial Decision*"); *Commonwealth of Pennsylvania, et al. v. Hiko Energy, LLC*, Docket No. C-2014-2427652 (Initial Decision issued

August 21, 2015) ("*Hiko Initial Decision*");[5] *Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Initial Decision issued November 19, 2015) ("*IDT Initial Decision*"). For all of the foregoing reasons, this comprehensive Settlement is in the public interest, and approval of this Settlement would fully resolve and appropriately address all issues raised in this consolidated proceeding.

II. STATEMENT OF THE CASE

A. Procedural Background

1. Licensing Order

On August 19, 2010, the Commission approved the EGS license application of Respond Power and authorized the Company to supply electricity or electric generation services to the public within the Commonwealth of Pennsylvania. *License Application of Respond Power LLC for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as a Supplier of Retail Electric Power*, Docket No. A-2010-2163898 (August 19, 2010) ("*Licensing Order*"). This license was issued pursuant to the Commission's authority under Section 2809 of the Code.[6] Since receiving its license to operate as an EGS in 2010, Respond Power has supplied electric generation services under variable rate plans to tens of thousands residential, small commercial and large commercial customers throughout Pennsylvania.[7]

2. Joint Complaint

On June 20, 2014, the Joint Complainants filed a Joint Complaint against Respond Power. By this Complaint, the Joint Complainants alleged that they had received numerous

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[5] The *Hiko Initial Decision* was adopted by the Commission, without modification, on December 3, 2015, the date on which this Main Brief was filed.
[6] 66 Pa. C.S. § 2809.
[7] Respond Power Statement No. 4-Revised at 5:12-16.

contacts and complaints from consumers related to variable rates charged by electric generation suppliers EGSs, including Respond Power. As a result, the Joint Complainants averred nine separate counts against Respond Power, as follows:

> Count I – Alleged Misleading and Deceptive Claims of Affiliation with Electric Distribution Companies
>
> Count II – Alleged Misleading and Deceptive Promises of Savings
>
> Count III – Alleged Failing to Disclose Material Terms
>
> Count IV – Alleged Deceptive and Misleading Welcome Letter and Inserts
>
> Count V – Alleged Slamming
>
> Count VI – Alleged Lack of Good Faith Handling of Complaints
>
> Count VII – Alleged Failing to Provide Accurate Pricing Information
>
> Count VIII – Alleged Prices Nonconforming to Disclosure Statement
>
> Count IX – Alleged Failure to Comply with the Telemarketer Registration Act

The Joint Complainants made several requests for relief, including restitution in the form of refunds to consumers, a civil penalty in an unidentified amount, license suspension or revocation and injunctive measures. The Office of Small Business Advocate ("OSBA") and I&E intervened in that proceeding on July 10, 2014 and August 1, 2014, respectively.

On July 10, 2014, Respond Power filed an Answer and New Matter in response to the Complaint, in which it admitted or denied the various averments made by the Joint Complainants and specifically denied that any of its actions violated Pennsylvania law or the orders and regulations of the Commission. Further, Respond Power denied that consumers were misled or deceived as to the price they would pay for electricity. To the contrary, Respond Power averred that consumers knowingly entered into agreements to purchase electric generation services through variable rate plans under which prices would vary monthly on the basis of wholesale market conditions and other factors, including a profit margin.

In its New Matter, Respond Power alleged that the Joint Complaint had completely ignored the market conditions starting in January 2014 that precipitated the variable price increases to which many customers were exposed, resulting in a spike in the volume of informal and formal complaints filed by consumers with the Commission. Respond Power further noted that the Polar Vortex[8] weather crisis that occurred in early 2014 significantly increased its costs to serve customers. In addition, Respond Power contended that various issues raised by the Joint Complainants are beyond the Commission's jurisdiction and requested that the Joint Complaint be dismissed with prejudice.

Also, on July 10, 2014, Respond Power filed Preliminary Objections to the Joint Complaint seeking dismissal of Counts III (disclosure of material terms), IV (welcome letter and inserts), VII (providing accurate pricing information), VIII (prices conforming to disclosure statement) and IX (complying with the Telemarketer Registration Act) of the Joint Complaint. In these Preliminary Objections, Respond Power contended that the Commission had approved its Disclosure Statement; that the Commission does not have jurisdiction over prices charged by EGSs; and that the Commission does not have statutory authority to enforce the Unfair Trade Practices and Consumer Protection Law ("Consumer Protection Law" or "CPL")[9] or the Telemarketer Registration Act ("TRA").[10]

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[8] The Polar Vortex was a period of colder than normal temperatures over a sustained period, generally beginning in December 2013 and continuing through March 2014, which was experienced in the northeast and central United States and substantial portions of eastern Canada. Record cold temperatures were set in over 49 major cities in the United States on January 7, 2014, including Pittsburgh at -9 F. The average daily temperature in the United States was calculated to be 17.9F which was the coldest average since January 13, 1977, creating a record of a 17-year period between record lows. Respond Power Statement No. 4-Revised at 3:18-24.

[9] 73 P.S. §§ 201-1 *et seq.*

[10] 73 P.S. §§ 2242 *et seq.*

On July 21, 2014, the Joint Complainants filed an Answer to Respond Power's Preliminary Objections. On July 30, 2014, the Joint Complaints filed an Answer to Respond Power's New Matter.

On August 20, 2014, the Administrative Law Judges ("ALJs") issued an Interim Order Granting in Part and Denying in Part Respond Power's Preliminary Objections ("*Interim Order on Preliminary Objections*"). By this *Interim Order on Preliminary Objections*, the ALJs ruled that the Commission lacks jurisdiction to determine whether Respond Power violated the Consumer Protection Law but did not dismiss Count III (disclosure of material terms) of the Joint Complaint because they concluded that the Commission has jurisdiction to determine whether Respond Power violated the Commission's own consumer protection regulations. As to Count IV (welcome letter and inserts), the ALJs similarly found that the Commission lacks jurisdiction to enforce the Consumer Protection Law but again did not dismiss Count IV since the Commission has jurisdiction to determine whether Respond Power violated the Commission's own consumer protection regulations. With respect to Count VII (providing accurate pricing information), the ALJs rejected Respond Power's contention that these allegations were insufficiently plead or legally insufficient. The ALJs struck Count VIII (prices conforming to disclosure statement) on the basis that the Commission lacks jurisdiction over EGS prices. As to Count IX (complying with the TRA), the ALJs found that the Commission lacks jurisdiction to hear complaints brought under the TRA but may consider whether Respond Power violated the Commission's own telemarketing regulations.

An Initial Prehearing Conference convened on August 25, 2014. The following counsel were present: Karen O. Moury, Esquire, on behalf of Respond Power; John Abel, Esquire, and Nicole DiTomo, Esquire, on behalf of the OAG; Candis A. Tunilo, Esquire, and Kristine

Marsilio, Esquire, on behalf of the OCA; Michael Swindler, Esquire, and Adam Young, Esquire, on behalf of I&E; and Sharon Webb, Esquire, on behalf of the OSBA. The ALJs issued their first Procedural Order on August 25, 2014 affording the parties an opportunity to submit a joint proposed procedural schedule on or before August 29, 2014 regarding the following dates: (i) a deadline date for the OCA/OAG to serve written direct testimony or affidavits of approximately 90 consumer witnesses; (ii) proposed date(s) for a telephonic evidentiary hearing wherein written direct testimony or affidavits of the consumer witnesses will be admitted into the record subject to cross examination and/or objections; and (iii) a date for a further prehearing conference to schedule the remaining deadlines and evidentiary hearings. The parties collaborated and made this submission August 29, 2014.

On September 3, 2014, the ALJs issued Procedural Order #2, establishing that: (i) the Joint Complainants would submit written direct testimony of consumer witnesses by October 24, 2014; (ii) evidentiary hearings for purposes of admitting the written direct testimony of the consumer witnesses subject to cross examination and timely objections would be held on November 10 and 12, 2014; and (iii) that a further prehearing conference would be held on November 25, 2014.

On September 3, 2014, Respond Power filed an unopposed Motion for Protective Order. On the same date, the ALJs issued a Protective Order for this proceeding.

On September 8, 2014, the Joint Complainants filed a Joint Petition for Interlocutory Review and Answer to Material Questions ("Interlocutory Petition"), in response to the ALJs' *Interim Order on Preliminary Objections* issued on August 20, 2014. The parties filed briefs on September 18, 2014 in support of or opposing the Interlocutory Petition. By Secretarial Letter dated September 30, 2014, the Commission waived the 30-day period for consideration of the

Interlocutory Petition that is set forth in Section 5.303 of the Commission's regulations,[11] in order to afford the Commission adequate time to address the questions raised.

On October 22, 2014, Respond Power filed an unopposed Motion for Continuance of the evidentiary hearings scheduled for November 10 and 12, 2014 for the purposes of: (i) ensuring that it had sufficient time to retrieve and review enrollment documents and call recordings and to prepare for the cross-examination of approximately 200 consumer witnesses identified by the Joint Complainants on October 16, 2014, as compared to the roughly 90 consumer witnesses estimated at the time of the prehearing conference; (ii) providing ample time for the parties to engage in meaningful settlement discussions, which would not be possible prior to November 10, 2014; and (iii) giving the parties adequate opportunity to ensure the efficient handling of logistics associated with the evidentiary hearings, including the scheduling of consumer witnesses and the use of exhibits and call recordings.

3. I&E Complaint

On August 21, 2014, I&E filed a Formal Complaint against Respond Power, noting that from February 1, 2014 through July 31, 2014, the Commission's BCS had received over 1,000 informal complaints about Respond Power. Drawing from the allegations set forth in these informal complaints, I&E's Complaint contained 649 counts or alleged violations of the Code, Commission regulations or Commission orders, in the following categories:

- Counts 1-6 - Alleged Slamming
- Counts 7-15 - Alleged Misleading and Deceptive Claims of Affiliation with Electric Distribution Companies or "Government Programs"
- Counts 16-62 - Alleged Misleading and Deceptive Promises of Savings

[11] 52 Pa. Code § 5.303.

- Counts 63-492 - Alleged Failure to Disclose Material Pricing Terms in Disclosure Statement/Prices Nonconforming to Disclosure Statement
- Counts 492-524 - Alleged Lack of Good Faith in Handling Customer Complaints/Cancellations
- Counts 524-568 - Alleged Incorrect Billing
- Counts 581-639 - Alleged Failure to Properly Train and Monitor Sales Representatives

I&E made several requests for relief, including a civil penalty in the amount of $639,000 (representing $1,000 per alleged violation), refunds for consumers and a revocation of Respond Power's EGS license. OCA and OAG intervened in the I&E Complaint proceeding on September 3, 2014 and September 4, 2014, respectively.

On September 30, 2014, Respond Power filed an Answer to the I&E Complaint, in which it admitted or denied various averments and specifically denied that any of its actions violated Pennsylvania law or the orders and regulations of the Commission. Further, Respond Power denied that consumers were misled or deceived as to the price they would pay for electricity. To the contrary, Respond Power averred that consumers knowingly entered into agreements to purchase electric generation services through variable rate plans under which prices would vary monthly on the basis of wholesale market conditions and other factors, including a profit margin.

Also on September 30, 2014, Respond Power filed Preliminary Objections seeking dismissal of approximately 500 counts of I&E's 649-count Complaint on several grounds, including: (i) the Commission's lack of jurisdiction to enforce the Consumer Protection Law; (ii) the Commission's lack of statutory authority to regulate the prices of EGSs; and (iii) the Commission's prior approval of Respond Power's Disclosure Statement, coupled with the failure of the Complaint to offer any allegations that, if proven, would result in a finding of a violation

of Commission regulations. I&E filed an Answer to Respond Power's Preliminary Objections on October 17, 2014.

On October 23, 2014, I&E filed an unopposed Petition to Consolidate its Complaint with the Joint Complaint. Noting that the Joint Complaint and I&E Complaint raise similar questions or law and fact and seek substantially similar remedies, I&E contended that consolidation would: (i) expedite the administrative process; (ii) preserve judicial resources; (iii) prevent inconsistent outcomes/cumulative penalties; and (iv) save Respond Power from having to simultaneously defend two similar complaints.

4. Consolidated Proceeding

On October 28, 2014, the ALJs issued an Order Granting Petition to Consolidate Formal Complaints ("*Consolidation Order*"), concluding that "[b]ecause these Complaints contain common questions of law and fact and consolidation will avoid unnecessary delay or cost, they should be consolidated." *Consolidation Order* at 3. The ALJs further explained as follows:

> [B]oth Complaints involve allegations of violations of the same provisions of the Public Utility Code. This includes various provisions in Chapters 54, 56 and 11. Additionally, both Complaints contain similar allegations of 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. Finally, both Complaints contain similar requests for relief, including penalties, rescission of authority and refunds.

Id. at 3-4. As the Complaints involve common questions of law and fact, the ALJs found that the requirements of Section 5.81 of the Commission's regulations[12] regarding consolidation had been satisfied. The ALJs also recognized that "consolidation of these two Complaints will preserve judicial resources and provide other benefits such as preventing inconsistent outcomes

[12] 52 Pa. Code § 5.81.

and cumulative penalties, and save Respond from having to defend two similar complaints simultaneously." *Consolidation Order* at 4.

Also on October 28, 2014, the ALJs issued an Order Granting Motion for Continuance. By that Order, the ALJs: (i) cancelled the hearings scheduled for November 10 and 12, 2014 and rescheduled them for January 26, 2015 through January 30, 2015; (ii) directed the parties to coordinate the most efficient means for admitting the pre-served consumer testimony, subject to cross-examination and timely objections, including entering into any stipulations or waiving the need for cross examination; (iii) directed Respond Power to indicate to the ALJs and the parties no later than December 22, 2014 which customers it intends to cross-examine; (iv) directed Respond Power to circulate to the ALJs and the parties no later than January 12, 2015 the exhibits it intends to use during the evidentiary hearings; (v) directed Respond Power to file any Motions to Strike pre-served consumer testimony no later than January 19, 2015; (vi) cancelled the Further Prehearing Conference scheduled for November 25, 2014 and rescheduled it for February 20, 2015; and (vii) encouraged the parties to continue settlement discussions and to advise the ALJs of all future settlement activity.

On November 17, 2014, the ALJs issued an Order Granting in Part and Denying in Part Preliminary Objections Filed Against the Formal Complaint of the Bureau of Investigation and Enforcement. Specifically, Respond Power's Preliminary Objections were granted to the extent that the I&E Complaint alleged violations of the Consumer Protection Law and the TRA. However, no counts were dismissed in recognition of the Commission's jurisdiction to enforce its own consumer protection and telemarketing regulations.

On December 19, 2014, Respond Power filed a second unopposed Motion for Continuance, requesting a 30-45 day continuance of the evidentiary hearings scheduled for

January 26 through January 30, 2015. The sole reason cited by Respond Power was that it had made a concerted effort to avoid devoting resources to hearing preparations that could be more appropriately utilized to achieve a settlement of this matter, including a provision for the issuance of refunds to consumers, which the Commission lacks the statutory authority to require. Respond Power noted that it had provided a proposed settlement term sheet to the parties on October 24, 2014 and had not yet received a counter-proposal, despite being promised one by December 12, 2014. As a result, Respond Power contended that the Joint Complainants had delayed the onset of meaningful settlement discussions to the point that Respond Power would now be required to prepare for evidentiary hearings involving the testimony of over 200 witnesses in less than four weeks, taking into consideration the intervening holidays. In support of its request, Respond Power emphasized that the need for sufficient time to prepare for these hearings was particularly compelling given the high stakes of this proceeding where the Joint Complainants and I&E are seeking significant relief including license revocation or suspension, substantial civil penalties, and the issuance of refunds to consumers.

On December 22, 2014, Respond Power advised the ALJs and the parties that it intended to conduct cross-examination of all of the consumer witnesses for whom written testimony was submitted by the Joint Complainants and I&E. Respond Power further notified the ALJs and the parties that as it continued to prepare for the hearings scheduled on January 26 through 30, 2015, it would identify any consumer witnesses for whom cross-examination would not be necessary and would so inform the ALJs and the parties. Respond Power indicated its expectation to provide that information no later than January 12, 2015, the date on which cross-examination exhibits were due.

On December 29, 2014, the ALJs issued an Order Granting Second Motion for Continuance. By that Order, the ALJs: (i) noted that the continuance would be granted due to the "high stakes of this proceeding" for Respond Power; (ii) indicated that no further continuances would be granted; (iii) cancelled the hearings scheduled for January 26 through 30, 2015 and rescheduled them for March 9 through 13, 2015; (iv) directed Respond Power to indicate to the ALJs and the parties no later than February 2, 2015 which customers it intends to cross-examine; (v) directed Respond Power to circulate to the ALJs and the parties no later than February 17, 2015 the exhibits it intends to use during the evidentiary hearings; (vi) required Respond Power to file any Motions to Strike consumer testimony no later than February 23, 2015; (vii) cancelled the Further Prehearing Conference scheduled for February 20, 2015 and scheduled a Further Prehearing Conference on January 27, 2015; and (viii) encouraged the parties to continue settlement discussions and to advise the ALJs of all future settlement activity.

On December 30, 2014, Respond Power filed a Motion for Scheduling of Settlement Conference and Assignment of Settlement Judge ("Settlement Motion"). By the Settlement Motion, Respond Power requested the scheduling of a settlement conference by mid-January 2015, which would be facilitated by an ALJ. Citing the Commission's policy promoting settlements, Respond Power also noted that the assignment of a settlement ALJ in this proceeding was appropriate due to: (i) the unprecedented nature of the Joint Complaint; (ii) the complexity and uniqueness of the issues; (iii) the participation of hundreds of consumer witnesses; (iv) the use of third party verification recordings; and (v) the likelihood of weeks of evidentiary hearings and months of highly contested litigation if settlement is not achieved. Based on a review of settlement documents that had been exchanged to date, Respond Power suggested that the assignment of a settlement ALJ to participate in these discussions offered the

highest likelihood of success. By Order dated January 2, 2015, the ALJs directed that all objections or responses to Respond Power's Settlement Motion be filed on or before January 9, 2015.

On January 8, 2015, Respond Power submitted a letter to the ALJs asking that its Settlement Motion be held in abeyance, noting that the parties had held a settlement conference call on January 7, 2015. Due to the productive discussions engaged in by the parties during that call, Respond Power suggested that placing the Settlement Motion on hold would alleviate the need for the parties to file responses or objections and instead allow them to use those resources to focus on settlement discussions.

Also on January 8, 2015, the ALJs issued a Further Prehearing Conference Order establishing a Further Prehearing Conference for January 27, 2015 and advising the parties that the remaining schedule for this proceeding would be developed during the Further Prehearing Conference, including the dates for the submission of pre-served written testimony, and hearings for the admission of that pre-served expert testimony, subject to cross-examination and any timely motions. Additionally, the ALJs informed the parties that a discussion would be held regarding the most efficient means for admitting the pre-served consumer testimony into the record, including entering into any stipulations or waiving the need to cross-examine any witnesses and engaging in any other activity that will help expedite the evidentiary hearings.

On January 27, 2015, a Further Prehearing Conference convened, as scheduled. On January 29, 2015, the ALJs issued Procedural Order #4, establishing a schedule for the remainder of the proceeding, including the service of the Joint Complainant and I&E Direct Testimony by May 8, 2015; Respond Power Rebuttal Testimony by July 1, 2015; Surrebuttal Testimony by July 31, 2015; and evidentiary hearings on August 10 through 12, 2015. Also, by

Procedural Order #4, the ALJs continued to encourage the parties to engage in any activity that would help expedite the evidentiary hearings scheduled for March 9 through 13, 2015 and to continue settlement discussions.

At the Further Prehearing Conference on January 27, 2015, the ALJs directed the Joint Complainants and Respond Power to submit Memoranda of Law regarding reliance by the Commission on "pattern and practice" evidence by February 3, 2015 and February 13, 2015. The parties submitted Memoranda of Law in accordance with that directive.

On February 12, 2015, Respond Power filed an Application for Deposition by Written Questions, noting that the procedures set forth therein were consistent with an informal agreement reached by the Joint Complainants, I&E and Respond Power under section 5.322 of the Commission's regulations.[13] Attached to the Application as Exhibits A and B were draft letters and the questions that would be sent to each consumer witness. Following this filing, the parties agreed to implement a more informal approach, under which Respond Power would simply circulate written questions to the consumer witnesses and share responses received by Respond Power with all parties. Respond Power began sending written questions to the consumer witnesses on February 17, 2015 and no order was required to address Respond Power's Application for Deposition by Written Questions.

On February 17, 2015, Respond Power served copies of hearing exhibits on the ALJs and the parties, pre-marked as RP Exhibit Nos. 1-36. By that letter, Respond Power also provided

[13] *52 Pa. Code § 5.322.*

the names of six consumer witnesses sponsored by I&E and twenty-nine witnesses sponsored by the Joint Complainants for whom it would waive cross-examination.[14]

On February 23, 2015, Respond Power filed a Motion to Strike Pre-Served Consumer Direct Testimony. By that Motion, Respond Power sought to strike all or portions of identified consumer testimony and exhibits on three grounds, including: (i) the failure of nearly all of the statements to comply with the Commission's regulations governing written testimony; (ii) the inclusion of answers to a leading question in nearly all of the statements about whether sales representatives had guaranteed savings; and (iii) the inclusion of inadmissible hearsay and double hearsay in many of the statements. The Joint Complainants filed a Joint Answer to the Motion to Strike on March 3, 2015.

On March 6, 2015, the ALJs issued an Order Granting in Part and Denying in Part Motion to Strike. Rejecting most of Respond Power's objections to the proffered consumer testimony, the ALJs struck portions of three pieces of testimony on the grounds that they that contained double hearsay, where consumers had testified as to what they were told by representatives of the electric distribution company, the Commission, neighbors, coworkers and the Police Department.

On March 9 through 13, 2015, evidentiary hearings were convened for the purpose of admitting consumer witness testimony of the Joint Complainants and I&E, subject to cross-examination. Prior to the hearings, Respond Power stipulated to the authenticity of the pre-served testimony to expedite the hearings. Over the course of the hearings, the written testimony

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[14] Since two of these witnesses provided testimony on behalf of both I&E and the Joint Complainants, Respond Power's waiver of cross-examination applied to thirty-three witnesses. During the hearings, Respond Power elected to forego cross-examination of some additional witnesses.

of 169 consumer witnesses was admitted into the record, subject to cross-examination. During cross-examination, Respond Power used several exhibits, which were admitted into the record.

On March 27, 2015, Respond Power submitted a letter to the ALJs renewing its Settlement Motion that had been previously filed on December 30, 2014 and had been held in abeyance for a period of time at Respond Power's request. Again, Respond Power noted that the parties' settlement positions were too divergent for meaningful progress to be made and suggested that participation in settlement discussions by an ALJ would facilitate its efforts to reach a comprehensive settlement with the Joint Complainants and I&E. Although I&E indicated no opposition to the Settlement Motion, the Joint Complainants filed a response opposing the Settlement Motion on April 6, 2015.

On April 9, 2015, the Commission entered an Order addressing the Interlocutory Petition ("*Respond Power Interlocutory Order*"). At the outset, the Commission noted that the questions raised by the Interlocutory Petition were controlled by its decisions in the matters of *Commonwealth of Pa., et al. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655 (Order entered December 11, 2014) ("*Blue Pilot Interlocutory Order*"), and *Commonwealth of Pa., et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Order entered December 18, 2014) ("*IDT Interlocutory Order*"). Consistent with those decisions, the Commission's *Respond Power Interlocutory Order*: (i) granted interlocutory review; (ii) agreed with the ALJs that the Commission does not have jurisdiction to enforce the Consumer Protection Law or TRA, but may find violations of its own regulations; and (iii) declined to dismiss Count VIII (prices conforming to disclosure statement) on the basis that although the Commission does not regulate EGS prices, it may determine whether an EGS's prices conform to the disclosure statement.

On April 14, 2015, the ALJs issued an Interim Order denying Respond Power's Settlement Motion ("*Interim Order on Settlement Motion*"), citing the opposition of the Joint Complainants. Finding that Section 5.231(c) of the Commission's regulations[15] provides for "parties" to request the assignment of a settlement judge, the ALJs concluded that this provision in the regulations is not meant to enable one party to force another party to engage in the formalized settlement process. The ALJs suggested, however, that if "all parties should agree in the future that they have reached an impasse which could benefit from the scheduling of a settlement conference and assignment of a settlement judge, the parties may make such a request." *Interim Order on Settlement Motion* at 6.

On April 30, 2015, Respond Power submitted a letter to the ALJs containing an unopposed request for a modification of the procedural schedule, citing the need for additional time between the filing of Direct Testimony by the Joint Complainants and I&E and the filing of Rebuttal Testimony by Respond Power. By this letter, Respond Power proposed that: (i) the Joint Complainant and I&E Direct Testimony be served on May 18, 2015; (ii) Respond Power Rebuttal Testimony be served on July 21, 2015; (iii) Surrebuttal Testimony be served on August 19, 2015; and (iv) evidentiary hearings be moved from August 10 through 12, 2015 to August 26 through 28, 2015. On May 1, 2015, the ALJs issued Procedural Order #5 approving Respond Power's proposed modifications to the procedural schedule.

Evidentiary hearings were held on August 26 and 27, 2015, during which public and proprietary versions of Respond Power's pre-served testimony and exhibits were admitted as follows:

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[15] 52 Pa. Code §5.231(c).

- Rebuttal Testimony of Eliott Wolbrom - Respond Power Statement No. 1 and Exhibit EW-1
- Rebuttal Testimony of Saul Horowitz - Respond Power Statement No. 2-Revised
- Rebuttal Testimony of Adam Small - Respond Power Statement No. 3-Revised and Exhibits AS-1, AS-2, AS-3 and AS-4-Revised
- Rebuttal Testimony of James L. Crist - Respond Power Statement No. 4-Revised and Exhibits JC-1, JC-2, JC-3 and JC-4

Mr. Wolbrom is the Chief Marketing Officer of Respond Power. Having served in that role since 2012, Mr. Wolbrom previously had twelve years of experience building, growing, marketing and managing businesses across a variety of industries. His testimony focuses on Respond Power's marketing activities in Pennsylvania and describes how Respond Power operates from marketing, sales, quality control and customer service perspectives.[16]

Mr. Horowitz joined Respond Power in 2008 and served as the Chief Executive Officer. Prior to that time, he had over ten years of experience in the retail energy market, having previously been founder and Chief Executive Officer of Econnergy Energy Company, Inc. (a/k/a Gateway Energy Services Corporation). His testimony discusses Respond Power's variable pricing activities in Pennsylvania and explains the factors that went into determining prices charged by Respond Power in early 2014.[17]

Mr. Small is Respond Power's General Counsel, a position he has held for four years. In that role, he has worked on Respond Power's licensing applications, as well as contracts and terms and conditions for vendors and customers. He also oversees the quality control personnel and reviews complaint responses to various regulatory bodies. His testimony provides an

[16] Respond Power Statement No. 1 at 1:7-12.
[17] Respond Power Statement No. 2-Revised at 1:6-8.

overview of the informal complaints filed by consumers with the Commission's Bureau of Consumer Services against Respond Power. He describes the trends in complaint volumes from 2013, through the Polar Vortex and into 2015. He also discusses Respond Power's Disclosure Statement and its approval by the Commission.[18]

Mr. Crist is President of Lumen Group, Inc., a consulting firm focused on energy regulatory and market issues. For nearly forty years, Mr. Crist has worked in some capacity in the energy industry, serving the past 19 years as a consultant on regulated and deregulated energy company strategy, market strategy and regulatory issues. With considerable experience in several states on energy restructuring programs, Mr. Crist participated in 2010 in the Commission's development of interim guidelines on marketing and sales practices. His testimony focuses on Respond Power's business model and organization structure; sales activities and customer enrollments; marketing practices; training practices; price disclosures; enrollment verifications; and response to customer inquiries due to the high volume of contacts and complaints early in 2014.[19]

5. Settlement

On August 26, 2015, Respond Power and I&E filed a Petition for Approval of Settlement, which contained terms and conditions to fully satisfy the consolidated I&E Complaint, including provisions for: (i) a $3.0 million refund pool for customers served by Respond Power in January, February and March 2014; (ii) a payment up to $50,000 to cover the costs and expenses of a third party administrator; (iii) a minimum contribution to EDCs' hardship funds of $25,000; (iv) a civil penalty of $125,000; (v) a 24-month moratorium on

[18] Respond Power Statement No. 3-Revised at 1:6-10.
[19] Respond Power Statement No. 4-Revised at 1:20-2:28.

selling variable rate products to new customers; and (vi) extensive modifications to Respond Power's sales, marketing and business practices, including restrictions and obligations associated with third party verifications, disclosure statement, training, compliance monitoring, customer service and reporting. By the Petition for Approval of Settlement, Respond Power and I&E committed to filing a Stipulation of Facts and Supporting Statements within thirty days.

On September 18, 2015, Respond Power and I&E filed an Amended Petition for Approval of Settlement ("Settlement"). Attached to the Settlement are Exhibit A, Stipulation of Facts; Appendix A, I&E's Statement in Support of Amended Settlement; and Appendix B, Respond Power's Statement in Support of Amended Settlement.

On September 28, 2015, the Joint Complainants filed Joint Initial Objections ("Objections") to the Settlement and requested that the ALJs convene a further on-the-record evidentiary hearing for the purposes of: (i) requiring Respond Power and I&E to produce witnesses on the Settlement; (ii) permitting the Joint Complainants to cross-examine those witnesses; and (iii) allowing the Joint Complainants to present evidence regarding the Joint Complainants' Objections to the Settlement.

On October 5, 2015, Respond Power filed a Response to the Joint Complainants' Objections, contending that an evidentiary hearing on a proposed settlement: (i) was unprecedented and convoluted; (ii) would exceed any process that is legally due to the Joint Complainants; and (iii) would discourage parties in future Commission proceedings from entering into non-unanimous settlements. Respond Power further argued that the ALJs should adjudicate the Settlement on the basis of its terms, the Stipulation of Facts, the Supporting Statements accompanying the Settlement, and the extensive record developed in this proceeding. However, Respond Power recognized that the ALJs may have questions about the Settlement and

noted its willingness to participate in an on-the-record hearing for the purpose of addressing those questions.

On October 7, 2015, the ALJs issued Procedural Order #6, which: (i) scheduled a further evidentiary hearing for October 15, 2015; (ii) afforded the Joint Complainants the opportunity to submit written supplemental testimony setting forth their formal objections to the Settlement no later than October 13, 2015, which would be admitted subject to cross-examination and timely objections at the hearing on October 15, 2015; (iii) noted that Respond Power and I&E would have the opportunity at the hearing on October 15, 2015 to present oral responsive testimony to any supplemental testimony served by the Joint Complainants; (iv) directed Respond Power and I&E to have witnesses available for that hearing who are knowledgeable about the Settlement and able to answer questions about it; and (v) indicated that at the conclusion of the hearing, a schedule would 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 Joint Complaint.

On October 15, 2015, an evidentiary hearing convened consistent with the ALJs' Procedural Order #6.[20] Respond Power presented Mr. Small, and I&E presented Mr. Daniel Mumford to answer questions about the Settlement. Although the ALJs permitted the parties to ask questions of Mr. Small and Mr. Mumford, the ALJs limited those inquiries to clarifying questions and did not permit cross-examination intended to substantively challenge or undermine the Settlement. Respond Power also presented Mr. Small to orally respond to written testimony offered by the Joint Complainants in opposition to the Settlement.

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[20] This hearing was also used to address remaining housekeeping items related to the litigation of the Joint Complaint.

By Briefing Order dated October 28, 2015, the ALJs established a briefing schedule for all parties to file Main Briefs and Reply Briefs on December 3, 2015 and December 23, 2015. This Main Brief is filed in accordance with the Briefing Order.

B. Factual Background

Respond Power has been licensed as an EGS since 2010, supplying electric generation services to tens of thousands residential, small commercial and large commercial customers throughout Pennsylvania.[21] During that time, Respond Power has marketed products in Pennsylvania through door-to-door sales representatives, telemarketers and a friends and family program.[22] Although Respond Power also marketed some fixed price plans, the vast majority of the contracts entered into customers were for variable prices.[23]

Under Respond Power's variable price plan, it provided a Commission-approved Disclosure Statement to all consumers explaining that: (i) the price may vary from month to month; (ii) the rate is set by Respond Power; (iii) the rate reflects Respond Power's generation charges based on the PJM Day-Ahead Market, Installed capacity, transmission system losses, estimated state taxes, other costs and a profit margin; and (iv) the consumer may contact Respond Power for its current variable rate. The Disclosure Statement expressly provided that Respond Power's goal is to charge a price that is less than what the consumer would have paid to the EDC, but that it could not guarantee savings due to market fluctuations and conditions. It also noted that customers could cancel at any time without paying a cancellation or early termination fee.[24]

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[21] RP Exhibit No. 40, ¶ 106.
[22] Respond Power Statement No. 1 at 1:24-25.
[23] Respond Power Statement No. 4-Revised at 5:14-16.
[24] RP Exhibit No. 1.

Prior to January 2014, no customers had filed formal complaints with the Commission against Respond Power concerning its variable rate contracts. From the time Respond Power received its license in 2010 until January 2014, only two customers filed formal complaints with the Commission against Respond Power, neither of which related to variable prices or promises of savings, and both were quickly resolved through settlement agreements to the satisfaction of the affected consumers.[25] Also before January 2014, Respond Power experienced minimal informal complaint activity.[26] Additionally, Respond Power cooperated with the Commission's BCS, participated in informative sessions hosted by the Office of Competitive Market Oversight ("OCMO") and sought OCMO's informal opinion as necessary.[27]

During the month of January 2014, wholesale prices for hourly energy supply in the day ahead and particularly the real time markets increased exponentially in response to sustained cold weather that is commonly referred to as the Polar Vortex. New records were set for winter electricity use in Pennsylvania and throughout the service area of PJM Interconnection, LLC ("PJM"). High demand combined with particularly high forced outage rates for a number of generators to produce record high costs in the PJM-administered energy markets. For instance, average wholesale day-ahead LMP prices for Pennsylvania in January 2014 were estimated at $148/MWh compared to $44/MWh in December 2013. Similarly, estimated energy uplift charges, which are energy charges billed to EGSs in addition to LMP costs, were estimated at $631 million in the month of January 2014, which is equivalent to a full year of uplift charges for the period 2010-2012. *See Review of Rules, Policies and Consumer Education Measures*

[25] Respond Power Statement No. 3-Revised at 2:25-30; the complaints are docketed at Docket No. F-2012-2291997 (unauthorized switching) and Docket No. F-2014-2399569 (incorrect charges on the bill and misrepresentation as an EDC).
[26] Respond Power Statement No. 3-Revised at 1:20-2:21.
[27] Respond Power Statement No. 3-Revised at 4:27-29; 5:6-9; 6:3-7; Exhibit AS-1; Exhibit AS-3.

Regarding Variable Rate Retail Electric Products, Docket No. M-2014-2406134 (Order entered March 4, 2014) ("*Variable Price Order*").

In the *Variable Price Order*, the Commission recognized that "[a]s a result of these high PJM energy market prices, many electric generation suppliers (EGSs) serving Pennsylvania customers with variable-priced retail supply contracts needed to increase their retail prices to customers in order to recover the higher wholesale electric energy costs they incurred in January 2014." *Id.* at 2. The Commission further observed that "[d]ue to the foregoing events as well as higher than usual energy use due to prolonged cold weather, some Pennsylvania retail electric customers received very high electric bills in amounts two to three times (and even higher) than what they would normally be billed during this time of year." *Id.*

Like many other EGSs, Respond Power exercised its discretion under its variable-priced contracts and made a business decision to increase retail customers' rates to recover at least a portion of those wholesale price spikes. That business decision, which Respond Power was permitted to make in a deregulated environment in a manner that was consistent with its Disclosure Statement, resulted in the filing of a significant number of formal and informal complaints with the Commission. Although the number of formal complaints spiked in early 2014, Respond Power has successfully resolved the vast majority of them through settlements.[28] Similarly, informal complaints filed with BCS against Respond Power by consumers spiked in the first half of 2014.[29] However, even with the high volume of informal complaints filed with the Commission by Respond Power customers in early 2014, primarily driven by the increase in wholesale market-based variable prices, Mr. Small testified that the number of complaints that

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[28] Respond Power Main Brief at p. 183.
[29] Respond Power Statement No. 3-Revised at 1:24-28.

were filed represented a *de minimis* portion of all of the customers served by Respond Power. He further testified that by 2015, the number of informal complaints filed against Respond Power had dropped to a level that is consistent with what Respond Power had experienced prior to the Polar Vortex.[30]

Respond Power's experience with the spike in informal complaints in early 2014 mirrored the Commission's overall experience related to complaints filed against EGSs serving customers on variable-priced contracts. Mr. Mumford testified:[31]

> Starting in February 2014 and throughout the winter and spring of 2014, BCS received an unusually high number of informal complaints from consumers concerning many different electric generation suppliers. The volume of formal complaints filed with the Commission's Secretary and assigned to the Office of Administrative Law Judge also increased notably during this same time period. Informal complaints against regulated electric and gas utilities increased during this time period as well.

He explained this influx of complaints as follows:[32]

> Most of the increased complaint volume could be attributed to the extreme cold weather that residents of Pennsylvania experienced in or about January of 2014 (a.k.a. the "Polar vortex"). The extreme cold weather resulted in complaints from consumers that had a variety of causes. Many complaints were from consumers who experienced a large increase in their bills that was caused by increased consumption levels – customers not fully understanding the link between heating their homes, consumption levels and bill amounts. Many complaints concerned increases in the rate that the customer was paying – especially consumers who were on variable-rate generation supply contracts.

In the *Variable Price Order*, the Commission referred to "a record number of inquiries and informal complaints related to high bills over the last several weeks." *Id.* at 2. Indeed, between February 1, 2014 and June 30, 2014, BCS received 8,673 informal complaints against

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[30] Respond Power Statement No. 3-Revised at 1:20-30 and 2:1-9.
[31] I&E Statement No. 1 at 6:21-7:5.
[32] I&E Statement No. 1 at 7:20-18.

EGSs, compared to a total of 2,125 informal complaints from consumers regarding EGSs for the entire calendar year of 2013.[33] The monthly 2014 informal complaint volumes involving EGSs from February through June, compared to the same months in 2013, are particularly illustrative of the spikes caused by the Polar Vortex, as shown below:[34]

Informal Complaint Volumes Involving Electric Generation Suppliers

	2013	2014
February	171	2,442
March	302	3,506
April	231	1,342
May	173	813
June	134	570

The experiences of the OCA and the OAG were very similar. In early 2014, the OCA received 2,434 contacts from consumers regarding EGS variable prices, while 7,503 consumers filed complaints with the OAG concerning EGS variable prices during this time.[35] Notably, a relatively small percentage of the consumers who contacted the OCA and OAG about EGSs' variable prices were served by Respond Power. Specifically, less than 8% of the consumers who contacted the OCA involved Respond Power, while less than 7% of the consumers who complained to the OAG related to Respond Power.[36] These figures demonstrate that the

[33] Settlement, Exhibit A, Stipulation of Facts ¶¶ 36-37.
[34] Settlement, Exhibit A, Stipulation of Facts ¶ 37.
[35] Settlement, Exhibit A, Stipulation of Facts ¶¶ 38 and 39.
[36] Settlement, Exhibit A, Stipulation of Facts ¶¶ 38 and 39.

onslaught of consumer complaints due to variable prices stemming from the Polar Vortex reflected an industry-wide occurrence.

C. Regulatory and Legal Background

1. Passage of Competition Act

On December 3, 1996, the Competition Act was enacted into law in Pennsylvania.[37] The Competition Act establishes a framework that provides retail customers direct access to a competitive market for the generation and sale or purchase of electricity, while ensuring that safe, affordable and reliable transmission and distribution services are available.[38] In passing the Competition Act to allow retail customers to choose the entity that supplies their generation service, the General Assembly proclaimed that "[c]ompetitive market forces are more effective than economic regulation in controlling the cost of generating electricity."[39]

The General Assembly further declared that "[t]his Commonwealth must begin the transition from regulation to greater competition in the electricity generation market to benefit all classes of customers and to protect this Commonwealth's ability to compete in the national and international marketplace for industry and jobs."[40] Notably, the General Assembly emphasized that "[t]he generation of electricity will no longer be regulated as a public utility function except as otherwise provided for in this chapter. Electric generation suppliers will be required to obtain licenses, demonstrate financial responsibility and comply with such other requirements concerning service as the commission deems necessary for the protection of the public."[41]

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[37] 66 Pa. C.S. §§ 2801-2815.
[38] 66 Pa. C.S. § 2802(3).
[39] 66 Pa. C.S. § 2802(5).
[40] 66 Pa. C.S. § 2802(7).
[41] 66 Pa. C.S. § 2802(14) (emphasis added).

By the Competition Act, the General Assembly authorized the Commission to implement the electric choice program through the promulgation of regulations and orders giving retail customers direct access to a competitive generation market, while ensuring that customers continue to receive "safe and affordable transmission and distribution service...at levels of reliability" to which they had become accustomed prior to passage of the Competition Act.[42] The Commission has implemented the Competition Act through a series of regulations and orders that establish standards for EDCs and EGSs and offer protections to consumers.

A review of Chapter 28 demonstrates that the Commission's regulatory oversight of EGSs is indeed very limited. Specifically, the statutory requirements applicable to EGSs are primarily set forth in Code Section 2809,[43] which focuses on licensing and financial responsibility. In addition, Code Section 2809(e) allows the Commission to forbear from applying the Code's requirements to EGSs "which it determines are unnecessary due to competition among" EGSs.[44] Code Section 2809(e) further requires the Commission to impose requirements on EGSs that are "necessary to ensure that the present quality of service provided by electric utilities does not deteriorate, including assuring that adequate reserve margins of electric supply are maintained and assuring that 52 Pa. Code Ch. 56 (relating to standards and billing practices for residential service) are maintained." *Id.* Code Section 2810 also provides that EGSs must pay the Commonwealth's gross receipts tax.[45]

In *Delmarva Power & Light Co. v. Pa. Pub. Util. Comm'n*, 582 Pa. 338, 870 A.2d 901 (Pa. 2005) ("*Delmarva*"), the Pennsylvania Supreme Court held that the definition of "public

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[42] 66 Pa. C.S. § 2802(3).
[43] 66 Pa. C.S. § 2809(a)-(d).
[44] 66 Pa. C.S. § 2809(e).
[45] 66 Pa. C.S. § 2810.

utility" in Code Section 102[46] does not include EGSs except for the limited purposes set forth in Code Sections 2809 and 2810 (relating to licensing and gross receipts tax).[47] The *Delmarva* Court specifically concluded that the Commission was not permitted to impose annual assessments on EGSs because the clear language of Code Section 510[48] authorized the Commission to assess only "public utilities," which term does not include EGSs except for the limited purposes noted above.[49] *Id.* at 352-353.

2. Implementation of Competition Act

In implementing the Competition Act, the Commission has steadfastly adhered to the fundamental principles underlying a competitive retail market and has not interfered with the pricing activities or day-to-day operations or management decisions of EGSs. For instance, the Commission's regulations adopted early in the implementation of the Competition Act require bills for customers who have chosen electric generation services from an EGS to include a statement noting that "[g]eneration prices and charges are set by the electric generation supplier you have chosen."[50] The Commission's regulations also require EGS disclosure statements to contain this language.[51]

More recently, in the *Variable Price Order*, the Commission declared that "[t]he rates consumers pay in the retail electric market are governed by the terms of their contract with their supplier." *Id.* at 3. Noting that some customer contracts "had no ceiling on the variable rate that could be charged by the EGS," the Commission concluded that "[w]hile a variable rate may offer

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[46] 66 Pa. C.S. § 102.
[47] 66 Pa. C.S. §§ 2809-2810.
[48] 66 Pa. C.S. § 510.
[49] On December 22, 2014, the Code was amended by Act 155 of 2014 to permit the Commission to impose annual fees on EGSs to fund the oversight of EGS activities. 66 Pa.C.S. §2809(g).
[50] 52 Pa. Code § 54.4(b)(10)(i).
[51] 52 Pa. Code § 54.5(f)(1).

substantial savings when wholesale market prices are low, customers may experience very high bills during periods of market volatility such as occurred with the recent cold weather." *Id.* The Commission emphasized that "[i]t is important for consumers on variable rates to carefully review the terms and conditions of their contracts to determine if they are at risk for large rate increases at any given time." *Id.*

Since that time, the Commission has continued to hold that it does not regulate EGS prices. *Blue Pilot Interlocutory Order* at 18 (the Commission "does not have traditional ratemaking authority over competitive suppliers and does not regulate competitive supply rates"). *See also IDT Interlocutory Order* at 24. Additionally, in *Nadav v. Respond Power LLC*, Docket No. C-2014-2429159 (Order entered December 19, 2014) ("*Nadav*"), the Commission dismissed a consumer complaint claiming excessive variable rates due to its lack of jurisdiction over EGS prices. The Commission's lack of statutory authority to regulate EGS prices has been recently reinforced by the Commonwealth Court. *CAUSE-PA v. Pa. Pub. Util. Comm'n.*, 445 C.D. 2014 and *McCloskey v. Pa. Pub. Util. Comm'n.*, 596 C.D. 2014 (Slip Opinion issued July 14, 2015) ("*CAUSE-PA*") at 24-25.

In its regulatory oversight of EGSs, rather than attempting to limit product offerings or regulate EGS prices, the Commission has consistently focused on consumer education and efforts designed to ensure that consumers receive information they need from EGSs to compare offers and make informed decisions in selecting an EGS. A key example of an initiative that was intended to fulfill both objectives is www.PaPowerSwitch.com, the shopping website developed by the Commission to share extensive information about the electric choice program, the opportunity for consumers to save on their electric bill and the various prices and products offered by EGSs.

3. Regulatory Response to Polar Vortex

In response to the high volume of bill inquiries and informal complaints arising from the Polar Vortex, the Commission immediately took several steps that are outlined in the *Variable Price Order* as follows:

- Issued a press release on January 31, 2014 advising consumers receiving electricity from EGSs to carefully review the terms of their contracts;
- Posted a "consumer alert" on February 14, 2014 as a slider on the PUC's website that consumers on variable contracts may see their prices increase; and that such consumers should check their contracts; evaluate competitive offers at www.PaPowerSwitch.com; contact their EDC to sign up for budget billing and to discuss a payment arrangement or assistance program; and to conserve energy;
- Re-issued its January 31, 2014 press release on February 14, 2014;
- Posted an abridged version of the above-referenced slider message on February 18, 2014 on the home page of www.PaPowerSwitch.com;
- Developed a separate page on www.PaPowerSwitch.com devoted to information on fixed vs. variable products;
- Developed a fact sheet specifically on "fixed" vs. "variable" rates;
- Added a fixed vs. variable Q&A to the existing "Shopping for Electricity" fact sheet and enhanced the Q&A under "Frequently Asked Questions" on www.papowerswitch.com to help ensure that consumers are better educated about variable rates.

Id. at 5.[52] The Commission also posed a series of questions to stakeholders soliciting comments about possible enhanced disclosure requirements for variable price contracts. *Id.* at 7.

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[52] After issuance of the *Variable Price Order*, the Commission took additional measures to better inform consumers about variable price contracts, including:

- the release of a video on fixed and variable prices on March 20, 2014 (http://www.puc.pa.gov/about_puc/press_releases.aspx?ShowPR=3322); and
- the issuance of a press release on May 27, 2014 announcing website updates to educate about variable rates and encourage consumers to keep shopping (http://www.puc.pa.gov/about_puc/press_releases.aspx?ShowPR=3361).

In addition, the Commission took steps to ensure that customers were aware of their ability to choose an EGS by:

By final-omitted regulations[53] adopted on April 3, 2014, the Commission revised the customer information disclosure regulations for variable price contracts to provide for various enhancements including: (i) more details on conditions of liability, including whether there are limits on variability; (ii) a statement of the initial price; (iii) customer access to historical pricing information; and (iv) a separate contract summary that highlights key terms and conditions in a uniform and consistent manner. *Rulemaking to Amend the Provisions of 52 Pa. Code, Section 54.5 Regulations Regarding Disclosure Statement for Residential and Small Business Customers and to Add Section 54.10 Regulations Regarding the Provision of Notices of Contract Expiration or Changes in Terms for Residential and Small Business Customers*, Docket No. L-2014-2409385 (Order entered April 3, 2014) ("*New Disclosure Requirements Order*"). These regulations also require EGSs to provide more timely information on notices that inform consumers about contract renewals and changes in terms.

In adopting these final-omitted regulations, the Commission recognized the need for greater transparency in the information that is provided to consumers so that they are adequately informed about the scope and limits of price variability. The Commission rejected proposals, however, that would have required EGSs to place price ceilings in their variable price contracts and instead required EGSs to prominently disclose that there is no ceiling if that is the case. *New*

- releasing a video on April 10, 2014 teaching electricity shoppers what to do at the end of a contract (http://www.puc.pa.gov/about_puc/press_releases.aspx?ShowPR=3337);
- issuing a press release on May 13, 2014 reminding consumers that papowerswitch.com can help them find stability and savings
- (http://www.puc.pa.gov/about_puc/press_releases.aspx?ShowPR=3350); and
- *(iii) releasing a video on May 30, 2014 on how to shop for an EGS* (http://www.puc.pa.gov/about_puc/press_releases.aspx?ShowPR=3363).

[53] Due to the Polar Vortex crisis, the Commission used a rarely-utilized tool of adopting final regulations without first promulgating a proposed rulemaking. 45 P.S. § 1204(3). However, the Commission afforded interested parties an opportunity to submit comments prior to adoption of the final-omitted regulations, which were approved by the Independent Regulatory Review Commission ("IRRC") on May 22, 2014, and published in the *Pennsylvania Bulletin* on June 14, 2014 at 44 Pa.B. 3522.

Disclosure Requirements Order at 12-13. The Commission also declined to require EGSs to provide advance notice of a variable price change, instead opting for greater disclosure in terms of EGSs communicating to customers when they can expect to see price changes and when they will learn about them. *Id.* at 21.

In requiring the inclusion of an EGS Contract Summary, the Commission noted that it would provide "in an easy-to-read, one-page document, the most important terms of the disclosure statement," observing that "[m]any customers either do not read the 'fine print' of their disclosure statements or are confused by the 'legalese' included therein." *New Disclosure Requirements Order* at 26. The Commission observed that "more education is needed regarding the terms of a contract," referencing its recent actions such as clarifying the presentation of information available on www.PaPowerSwitch.com and updating the definitions of "variable" and "fixed price" contracts. *Id.* at 25.

Also in the *Variable Price Order*, the Commission noted that "the large fluctuations in wholesale and retail prices again magnified an often frustrating aspect of shopping for electricity – the length of time it takes to switch to an alternative electricity supplier." *Id.* at 4. Responding to those frustrations expressed by consumers and enhancing their ability to participate in the retail electric market, the Commission also adopted final-omitted regulations on April 3, 2014 allowing switches to occur in as little as three business days. *Rulemaking to Amend the Provisions of 52 Pa. Code, Chapter 57 Regulations Regarding Standards for Changing a Customer's Electricity Generation Supplier*, Docket No. L-2014-2409383 (Order entered April

3, 2014).[54] In addition, the Commission issued a Secretarial Letter on September 8, 2014 informing EGSs of their role in accelerating the timeframe for customers to switch EGSs by promptly notifying the EDC of the customer's selection.

In addition to issuing various directives to the industry designed to improve disclosures and the switching process, the Commission committed in the *Variable Price Order* to investigating "the causes of these underlying wholesale cost spikes and pursu[ing] all appropriate FERC complaints, and PJM tariff and operating manual modifications necessary to improve the efficient functioning of wholesale PJM markets." *Id.* at 2, footnote 2. The Commission further noted that it would participate in all PJM stakeholder processes and OPSI working groups to help implement modifications to energy and capacity market rules necessary to achieve these objectives. *Id.*

Other entities have also addressed issues that came under the spotlight during the Polar Vortex. Specifically, the Federal Energy Regulatory Commission ("FERC") has taken numerous steps in response to the unprecedented energy crisis that occurred in early 2014. Citing concerns about market performance during the 2013-2014 Winter, FERC initiated a proceeding on price formation at Docket No. AD14-14. As part of the price formation proceeding, FERC staff specifically examined use of uplift payments, offer price mitigation, scarcity and shortage pricing and operator actions that affect prices. In addition, FERC issued a notice of proposed rulemaking at Docket No. RM15-24-000 to address practices that may fail to compensate resources at prices that reflect the value of service and signal future action on offer price caps, mitigation, uplift transparency and uplift drivers. Also, in the wake of the gas supply issues

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[54] These final-omitted regulations were also approved by IRRC on May 22, 2014 and were published in the *Pennsylvania Bulletin* on June 14, 2014 at 44 Pa.B. 3522

during January 2014, FERC issued a notice of proposed rulemaking at Docket No. RM14-2, addressing gas and electric coordination and specifically proposing to modify gas scheduling timelines to be consistent with gas industry timelines. A final rule was issued in April 2015 and PJM made a compliance filing on July 23, 2015 at Docket No. ER15-2260, in which it proposed to modify the timing of its Day Ahead energy market to be more consistent with the new gas timeframes.

III. SUMMARY OF ARGUMENT

Similar to the lessons learned by regulators following the Polar Vortex, the unprecedented energy crisis experienced in Pennsylvania in early 2014 revealed some opportunities for improvements in Respond Power's sales, marketing and business practices. As a result, Respond Power has agreed in its Settlement with I&E to: (i) forego offering variable price products to new customers for a two-year period; (ii) implement numerous modifications to its practices affecting door-to-door marketing, telemarketing, third party verifications, disclosure statements and customer service; (iii) deploy an enhanced training and compliance monitoring program; and (iv) subject itself to far-ranging oversight by the Commission for the next five years despite its role as a licensed EGS in a largely deregulated environment. While Respond Power has admitted no wrongdoing in the Settlement, it has made these commitments because it understands the importance to consumers and the retail market of full and accurate disclosures to consumers, as well as the assurance of fair and transparent marketing practices.

In addition to these extensive license conditions and costly modifications to sales, marketing and business practices, Respond Power has agreed to offer $3 million in refunds to consumers, which includes refunds for all customers who complained to the Commission in early 2104 and provides an opportunity for all other customers served by Respond Power in January through March 2014 to now claim refunds. Respond Power has further committed to pay a

substantial civil penalty of $125,000 and to make a minimum contribution of $25,000 to EDCs' hardship funds, with the potential for that donation to increase to $500,000 if consumers decline to claim refunds. The Company has also agreed to pay up to $50,000 of the costs incurred to retain a third-party administrator to administer and disburse refunds to consumers.

Approval of the Settlement without modification will fully address all issues and allegations in this consolidated proceeding and deliver valuable benefits to former and current Respond Power customers, without further delay. The Joint Complaint filed by the OAG and OCA and the Complaint filed by I&E allege violations of the same provisions of the Commission's regulations, set forth similar factual allegations and request the same relief. Indeed, in consolidating the Complaints for hearing and disposition, the ALJs recognized that consolidation would preserve judicial resources and provide other benefits such as preventing inconsistent outcomes and cumulative penalties and saving Respond Power from having to defend two similar complaints simultaneously.

Despite the comprehensive remedies established by the Settlement to address the full scope and breadth of the allegations raised by both Complaints in this consolidated proceeding, the Joint Complainants continue to challenge and oppose the Settlement. This opposition persists even though the Settlement contains terms and conditions that mirror or exceed provisions in agreements negotiated by the Joint Complainants with other EGSs, which have been approved by the ALJs.

As a result, Respond Power is now forced to battle on three different fronts, against two different public advocates -- over the exact same issues and requested relief.[55] By this Main Brief, Respond Power is advocating that: (i) the Settlement is in the public interest and should be expeditiously approved without modification; (ii) the Joint Complainants have failed to carry their burden of proving the alleged violations of Commission regulations in the Joint Complaint and have sought relief that is beyond the Commission's statutory authority to grant; and (iii) to the extent that the Commission finds any violations of its regulations, the Settlement fully and comprehensively addresses all issues raised by both the I&E Complaint and the Joint Complaint in this proceeding that has been consolidated for hearing and disposition.

Notably, many of the positions taken by the Joint Complainants in this proceeding are based on unrecognized theories of the Commission's statutory authority. By way of example, the Joint Complainants allege that Respond Power has violated state consumer protection laws, which the Commission has said it does not have jurisdiction to enforce. They also encourage the Commission to perform a cost of service analysis of Respond Power's prices by reviewing the wholesale costs and other costs incurred by Respond Power and imputing a just and reasonable profit margin to determine the price that Respond Power "should" have charged in a price-deregulated electric retail market. Given the Commission's lack of statutory authority to regulate EGS prices, this exercise would be inappropriate, as well as any directives requiring Respond Power to issue refunds to customers as a result of this review. In addition, relying on an unprecedented and unauthorized pattern and practice approach, the Joint Complainants seek the

[55] Respond Power posits that, as a matter of public policy, it makes very little sense to have three taxpayer/ratepayer-funded entities all pursing the same issues and remedies on behalf of the same constituency. Aside from being a drain on Respond Power's limited resources, this protracted litigation has been a drain upon public resources. Moreover, this triplication of efforts by public advocates serves only to discourage EGSs from further investing in the Commonwealth's competitive retail market at a time when the market is struggling.

issuance of Commission-ordered refunds to consumers by who have not even filed a complaint or submitted any information about their own individual sales transactions with Respond Power. They further advocate for these refunds on the basis of the uncorroborated hearsay testimony of an extremely small percentage of Respond Power customers.

Unfortunately, the outcome intended by the ALJs in consolidating the Complaints -- of saving Respond Power from having to simultaneously litigate both Complaints -- has not been realized as a result of the Joint Complainants' desire to "swing for the fences," having already reached several settlements with other EGS. However, by approving the Settlement without modification, the ALJs can effectively prevent inconsistent outcomes and cumulative penalties, as they also observed should occur through consolidation, while reaching a result that is in the public interest, as represented by the chief enforcement advocate for the Commission. As each and every allegation and request for relief in the Joint Complaint is more than adequately addressed by the Settlement, no purpose would be served by imposing any additional remedies.

IV. ARGUMENT

A. Preliminary Issues of Commission Jurisdiction

Subject matter jurisdiction is a threshold inquiry underlying many of the issues raised in this consolidated proceeding, including the alleged violation of state consumer protection laws and requests for relief contained the Joint Complaint. In this Section of its Main Brief, Respond Power addresses the Commission's statutory authority to consider these issues and award the relief that has been requested. The legal principles upon which Respond Power challenges the Commission's subject matter jurisdiction are set forth in the paragraph immediately below, and in the interest of brevity, will not be repeated each time that issues are raised by Respond Power throughout this Main Brief concerning the Commission's statutory authority.

As a creation of the General Assembly, the Commission has only the powers and authority granted to it by the General Assembly and contained in the Code.[56] *See City of Phila. v. Phila. Elec. Co.*, 473 A.2d 997, 999-1000 (Pa. 1984) ("We begin our inquiry by recognizing that the authority of the Commission must arise from the express words of the pertinent statutes or by strong and necessary implication therefrom...It is axiomatic that the Commission's power is statutory; and the legislative grant of power in any particular case must be clear."); *see also Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791, 795 (Pa. 1977) ("*Feingold*"); *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937 (Order entered May 28, 2008). It is well-settled that 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. Pennsylvania State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992), *alloc. denied*, 637 A.2d 293 (Pa. 1993).

1. Commission Jurisdiction over EGS Contracts and Prices

a. The Commission may not interpret private contracts.

Nothing in the Code authorizes the Commission to interpret the terms and conditions of a private contract between an EGS and its customers. Indeed, the Commission has concluded that its jurisdiction over EGSs "does not extend to interpreting the terms and conditions of a contract between an EGS and a customer to determine whether a breach has occurred or setting the rates an EGS can charge." *Office of Small Business Advocate v. FirstEnergy Solutions Corp.*, Docket

[56] 66 Pa. C.S. §§ 101 *et seq.*

No. P-2014-2421556 (Order entered January 26, 2015) ("*FES*") at 18. Rather, these are matters for civil courts of common pleas of competent jurisdiction. *See Allport Water Auth. v. Winburne Water Co.*, 258 Pa. Super. 555, 393 A.2d 673 (Pa. Super. 1978) ("*Allport Water*") (Commission lacks jurisdiction to address disputes involving private contracts); *Adams et al. v. Pa. Pub. Util. Comm'n*, 819 A.2d 631 (Pa. Cmwlth. 2003).

As the case law envisions, Pennsylvania county courts of common pleas have resolved contractual disputes between EGSs and their customers. *See, e.g., Tech Met, Inc. et al. v. Strategic Energy, LLC* (Court of Common Pleas of Allegheny County – Civil Division, Docket No. GD-05-030407, Memorandum and Order of Court (Wettick, J.) entered June 4, 2014) (A copy of Judge Wettick's Order granting summary judgment in favor of the EGS is attached hereto as Appendix A). Moreover, in prior cases involving disputes between EGSs and their customers, the Commission has limited its inquiry to whether the EGSs have violated the Code or Commission regulations. *See, e.g., Bracken v. Champion Energy Services, LLC*, Docket No. C-2011-2256514 (Opinion and Order entered June 12, 2012) ("*Bracken*"); *Bosche v. Direct Energy Services, LLC*, Docket No. C-2013-2361740 (Initial Decision issued December 3, 2013 and Final Order entered December 12, 2014) ("*Bosche*").

In *FES*, although the OSBA had raised questions about the prices that were being charged by the EGS, the Commission was not persuaded that the issue involved billing practices. Instead, the Commission appropriately observed that the real issue in the case required an interpretation of a private contract. *FES* at 20. Finding that it may not interpret a private contract, the Commission concluded that it "can only ensure that an EGS is abiding by the standards of conduct and disclosure, the marketing and sales Regulations, and the contract expiration/change-of-terms notice requirements, and that the rate billed by an EGS was

calculated in accordance with those materials." *FES* at 18-19 (footnotes omitted). The Commission properly found that to provide OSBA the requested relief – of declaring that FES may not recover ancillary service costs as a pass-through event – it would need to interpret the language in the FES contract. *See, generally, Morrow v. The Bell Tel. Co. of Pa.*, 479 A.2d 548 (Pa. Super. 1984) ("*Morrow*") (the courts retain jurisdiction of a suit for damages based on negligence or breach of contract wherein a utility's performance of its legally imposed and contractually adopted obligations are examined and applied to a given set of facts); *see also Virgilli v. Southwestern Pennsylvania Water Authority*, 427 A.2d 1251, 1254 (Pa. Cmwlth. 1981) ("[w]hile Southwestern's claim may ultimately affect Mather's rates, such a result does not divest a common pleas court of its jurisdiction to resolve a private contract dispute").

As was the case in *FES*, the same is true in this proceeding regarding the Joint Complainants' claim that Respond Power's prices were nonconforming to the Disclosure Statement (Count VIII). The only way to reach that determination is to interpret the language and terms of the private contract between Respond Power and its customers. The Disclosure Statement provides that the prices will be set by Respond Power and will reflect Respond Power's generation charges based on the PJM Day-Ahead Market, Installed capacity, transmission system losses, estimated state taxes, other costs and a profit margin.[57] In order to determine whether Respond Power's prices conformed to its Disclosure Statement, the Commission would need to review the various wholesale market costs identified therein, consider what other costs Respond Power incurred and impute a "just and reasonable" profit margin. In other words, the Commission would essentially need to perform a traditional cost of

[57] RP Exhibit No. 1.

service analysis that is typically reserved for a review of public utilities' rates. *See, e.g., Lloyd v. Pa. Pub. Util. Comm'n.*, 904 A.2d 1010, 2006 Pa. Commw. LEXIS 438 (2006) ("*Lloyd*").

It is simply not possible to determine whether an EGS's prices conform to their disclosure statements in a situation where a variable-priced disclosure statement does not contain a specific index, formula, pricing methodology or ceiling. Yet, neither this form of rigid price formula for variable price agreements nor a ceiling on variable prices is required by Commission regulations.[58] Nor was such a formula used by Respond Power in its contracts with customers.

Therefore, the Commission's authority to consider whether an EGS's prices conform their disclosure statements, to the extent it refrains from contract interpretation, is limited to situations in which an EGS charges a fixed price or elects to establish variable prices on the basis of a specific index, formula pricing methodology or to place a ceiling on its variable prices. For instance, if an EGS has a fixed price contract with a customer to provide electricity at 9 cents per kWh for a period of six months, and the EGS charges the customer 10 cents per kWh after a period of only five months, the Commission may be able to determine that the EGS's price in the sixth month did not conform to the disclosure statement. Similarly, if an EGS has a variable price contract with a customer that contains a 15 cent/kWh ceiling, and the EGS charges the customer 20 cents/kWh, the Commission may be able to determine that the EGS's price did not conform to the disclosure statement.[59]

As the Commission recognized in *FES*, the Commission's legal authority over EGSs' sales, marketing and billing practices does not extend to deciding disputes over the interpretation

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[58] 52 Pa. Code § 54.5.

[59] It is important to note, as is more fully discussed below, that even though Respond Power acknowledges the authority of the Commission to determine whether the EGS's prices conformed to the disclosure statement under these circumstances, the Commission's statutory authority to address those departures is limited to the remedies permitted by the Code, including civil penalties, and do not include refunds.

of words or phrases in EGS contracts. Not only would the adjudication of an EGS-customer private contract dispute exceed the Commission's statutory authority, but it would also run afoul of the Commonwealth's policies and deter EGS participation and stifle product innovation in Pennsylvania's retail market. The policy of the Commonwealth, as expressed in the Competition Act, is that the generation of electricity be deregulated in order to control prices and encourage product innovation.[60] If the Commission begins interpreting words and phrases in EGS contracts as they relate to market conditions or other costs, or to determine "just and reasonable" profit margins for EGSs, it will completely undermine the express and fundamental principles upon which the Competition Act is based.

b. The Commission does not regulate EGS prices.

Further, nothing in the Code authorizes the Commission to regulate the prices of EGSs. Code Section 1301 is the only provision that gives the Commission statutory authority to determine "just and reasonable" rates.[61] It clearly applies only to rates demanded or received by a "public utility," which term does not include EGSs like Respond Power for this purpose. Specifically, Code Section 2806(a) provides that "the generation of electricity shall no longer be regulated as a public utility service or function except as otherwise provided for in this chapter."[62] Also, the Pennsylvania Supreme Court has found that the definition of "public utility" in Code Section 102[63] does not include EGSs except for the limited purposes set forth in Code Sections 2809 and 2810.[64] *Delmarva.* Those sections have no bearing on prices charged by EGSs. Code Section 2809 establishes the requirement for EGSs to be licensed, and Code

[60] *See, e.g.*, 66 Pa. C.S. §§ 2802(14), 2806(a), 2809.
[61] 66 Pa. C.S. § 1301.
[62] 66 Pa. C.S. § 2806(a).
[63] 66 Pa. C.S. § 102.
[64] 66 Pa. C.S. §§ 2809 and 2810.

Section 2810 requires EGSs to pay state taxes so as to ensure revenue neutrality to the Commonwealth of Pennsylvania.[65] Moreover, in enacting the Competition Act, the General Assembly made it clear that the price of generation supply is exempt from regulation, noting that "[c]ompetitive market forces are more effective than economic regulation in controlling the cost of generating electricity."[66]

Indeed, the Commission has recognized its lack of jurisdiction to regulate prices charged by EGSs. *Blue Pilot Interlocutory Order* at 18; *see also IDT Interlocutory Order*; *Nadav*. Similarly, on interlocutory review, the Commission granted an EGS's motion for summary judgment and dismissed the consumer complaint because the only allegation was that the prices were too high. *CRH Catering Company, Inc. v. Blue Pilot Energy, LLC*, Docket No. P-2014-2451865 (Order entered February 24, 2015) ("*CRH Catering*"). In *CRH Catering*, the Commission noted that it is well-settled that the Commission's jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom, and that "it is equally well-settled that the Commission does not have traditional ratemaking authority over competitive suppliers and cannot regulate competitive supply rates." *Id.* at 16. Observing that this conclusion is based upon a plain reading of Code Sections 102, 2806, 2809 and 2810,[67] the Commission stated that "the Code neither expressly nor implicitly gives the Commission subject matter jurisdiction over a claim that the rate charged by the EGS is too high." *Id.*

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[65] 66 Pa. C.S. §§ 2809-2810.
[66] 66 Pa. C.S. § 2802(5).
[67] 66 Pa. C.S. §§ 102, 2806, 2809 and 2810.

These rulings are consistent with the conclusions previously set forth by the Commission in the *Variable Price Order*, where the Commission noted that the rates consumers pay in the retail electric market are governed by the terms of their contract with their EGS and that some variable price contracts have no ceiling on the rate that could be charged. The Commission further observed that while a variable rate may offer substantial savings when wholesale market prices are low, customers may experience very high bills during periods of market volatility. *Variable Price Order* at 3.

Moreover, the Commission's lack of statutory authority to regulate prices that EGSs charge their customers has been recently reinforced by the Commonwealth Court in *CAUSE-PA*. While the *CAUSE-PA* decision has already been cited as supporting the ability of the Commission to "bend competition,"[68] it is noteworthy that the conclusions in that case were premised on policy concerns affecting low-income customers on assistance programs and other utility customers who subsidize those programs. While clearly recognizing that the Commission does not have jurisdiction to regulate EGS prices, the Court in *CAUSE-PA* found that the Commission could, under very limited and specific circumstances, adopt certain parameters regarding EGS services that would only be applicable to EGSs who voluntarily opt to participate in *future* Commission-authorized programs that are designed to enable low-income customers to shop for electricity. *CAUSE-PA* at 29. Nothing in the *CAUSE-PA* decision supports the concept that the Commission may step in months or years later to review, regulate or in any way limit prices charged to customers by EGSs under private contracts.

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[68] *See Pa. Pub. Util. Commission, Bureau of Investigation and Enforcement v. Hiko Energy, LLC*, Docket No. C-2014-2431410 (Initial Decision issued August 21, 2015) ("*Hiko Initial Decision II*"), at 27. The *Hiko Initial Decision II* was adopted by the Commission, without modification, on December 3, 2015, the date on which this Main Brief was filed.

2. Commission Jurisdiction over EGS Refunds

The Joint Complaint seeks relief in the form of a refund or credit to potentially all customers who were served by Respond Power in early 2014. This request for relief raises numerous questions about the Commission's jurisdiction, all of which must be resolved in Respond Power's favor. As a threshold matter, for the reasons fully discussed below, the Commission lacks statutory authority to direct an EGS to issue refunds to customers. While this fundamental lack of subject matter jurisdiction is the focus of this section, other flaws in the Joint Complainants' request for refunds are discussed in the pattern and practice section of this Main Brief.[69]

a. A logical nexus exists between the lack of statutory authority to regulate EGS prices and the lack of statutory authority to require EGSs to issue refunds.

Without the statutory authority to regulate EGS prices or to determine whether they are excessive, or unjust or unreasonable, it logically follows that the Commission may not require EGSs to issue rate refunds to consumers. In an Initial Decision issued on June 24, 2014, ALJ Salapa succinctly described this logical nexus, as follows:

> The Commission may not regulate the rates that the Respondent charged the Complainant for electric generation service since it is not a public utility except *for the limited purposes of 66 Pa. C.S. §§ 2809 and 2810. Therefore, the* Commission has no jurisdiction over the Respondent to the extent that the Complainant contends that the Respondent has charged it an unreasonable, unjust or illegal rate for electric generation service. Since the Commission lacks the

[69] On pages 73-87 of this Main Brief, Respond Power notes that even if the Commission would have any authority to direct an EGS to issue refunds, it may award such relief only to customers who file informal or formal complaints. It may not direct an EGS to issue refunds to customers who provided testimony as part of this proceeding, since they are not complainants and the Joint Complainants are not authorized to represent individual consumers or seek relief on behalf of individual consumers in Commission proceedings. And it certainly may not direct an EGS to issue refunds to customers who were not involved in any way in a Commission proceeding.

authority to regulate rates charged for electric generation service, it lacks the authority to order a refund or credit to the Complainant.

Yaglidereliler Corp. v. Blue Pilot Energy, LLC, Docket No. C-2014-2413732 (Initial Decision issued June 24, 2014) at 9.[70]

b. Express statutory authority to direct the issuance of refunds by EGSs is nonexistent.

Code Section 1312 is the only statutory provision authorizing the issuance of refunds by the Commission and it provides the Commission with statutory authority to direct the issuance of refunds only by a public utility if the rates are determined to be "unjust or unreasonable."[71] In the *IDT Interlocutory Order*, the Commission correctly concluded that Code Section 1312 does not empower it to direct EGSs to issue refunds to customers because EGSs are not "public utilities" under the Code except for the limited purposes of Code Sections 2809 and 2810, neither of which applied in that proceeding nor apply here. *Id.* at 16. Moreover, as the Pennsylvania Commonwealth Court has found, this authority to direct the issuance of refunds by a public utility is expressly limited to situations in which the Commission has determined that the rates are unjust and unreasonable. *National Fuel Gas Distribution Corporation v. Pennsylvania Public Utility Commission*, 76 Pa. Cmwlth. 102, 464 A.2d 546 (1983). Since EGSs are not public utilities for the purposes of pricing, it is not within the purview of the Commission to

[70] While Respond Power recognizes that this Initial Decision was later remanded to the ALJ and the matter was settled by the parties, Respond Power notes that the Commission remanded this matter for a different purpose and made no comment about this language in its remand order entered on January 16, 2015. Respond Power is offering this quote for its persuasive value to support its argument regarding the logical nexus between a lack of statutory authority to regulate EGS rates and the lack of statutory authority to direct EGSs to issue refunds to consumers. Further, Respond Power notes that other ALJs have endorsed this logical nexus and employed similar reasoning in cases that were later settled by the parties. *See, e.g., Tustin v. Respond Power LLC*, Docket No. C-2014-2417552 (Interim Order issued by ALJ Barnes on June 26, 2014); *Russell v. Respond Power LLC*, Docket No. C-2014-2417551 (Interim Order issued by ALJ Colwell on July 3, 2014).

[71] 66 Pa. C.S. § 1312.

determine whether the prices are unjust and unreasonable pursuant to Code Section 1301.[72] Therefore, no Code Section 1312[73] refund authority exists.

The conclusions in the *IDT Interlocutory Order* regarding the Commission's lack of statutory authority to direct EGSs to issue refunds are consistent with a recent federal court decision interpreting FERC's refund authority. The authority of FERC to award refunds by entities that are not public utilities was challenged after the California energy crisis of 2000 and 2001. In *Bonneville Power Admin. v. F.E.R.C. ("Bonneville Power")*, 422 F.3d 908 (2005), the United States Court of Appeals for the Ninth Circuit considered whether FERC's statutory authority to direct public utilities to issue refunds extended to other entities. The issue arose when prices soared several years after moves to deregulate and restructure the California market. In an effort to remedy what it termed a "dysfunctional" and "seriously flawed" market, FERC ordered both public utilities and non-public utilities to make refunds. Entities that did not qualify as public utilities challenged the refund orders. As the federal agency charged with regulation of all facilities for transmission and sale of electric energy for resale in interstate commerce, FERC acknowledged that it did not have regulatory rate authority over power sales by non-public utilities, but found that it had authority to order them to abide by market rules and therefore to direct them to issue refunds. FERC based its decision on its broad regulatory authority over the sale of electric energy for resale in interstate commerce.

In reversing FERC's refund orders, the Ninth Circuit Court resolved this question based on a straightforward analysis of FERC's enabling statute, finding that "[t]he text is clear and

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[72] 66 Pa. C.S. § 1301.
[73] 66 Pa. C.S. § 1312.

unambiguous." *Bonneville Power* at 911. The Court emphasized that it was "not unmindful of the impact our decision may have on the overall refunds claimed by California ratepayers. But it is not our task to second guess Congress's judgment as to the breadth of FERC's refund authority. Our role is a limited one – interpreting the statute as Congress wrote it." *Id.*

A review of other provisions of the Code likewise uncovers neither express nor strongly implied authority for the Commission to direct the issuance of refunds by EGSs. Code Section 3301[74] expressly sets forth the remedies that the Commission may impose for violations of the Code, Commission regulations or Commission orders by public utilities or any other person or corporation subject to the Code. In authorizing the Commission to impose civil penalties in an amount not to exceed $1,000 per violation, Code Section 3301[75] provides for no other civil remedies, including restitution, refunds or damages.[76]

In addition, Code Section 2809(c)[77] authorizes the Commission to suspend or revoke an EGS's license under specified circumstances, including the failure to maintain a bond or other security to ensure its financial responsibility and the failure to pay state taxes. Nowhere in Chapter 28, however, is the Commission authorized to direct an EGS to issue refunds as a result of a violation of the Code, Commission regulations or Commission orders. Also, the civil penalties authorized by Code Section 3301[78] and the license suspension or revocation remedies

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[74] 66 Pa. C.S. § 3301.
[75] *Id.*
[76] Throughout Chapter 33, however, the Code provides other remedies that may be available to the Commission for certain violations, including criminal penalties, none of which are applicable here. *See, e.g.*, 66 Pa.C.S. § 3304 (relating to unlawful issuance and assumption of securities).
[77] 66 Pa. C.S. §2809(c).
[78] 66 Pa. C.S. § 3301.

authorized by Code Section 2809(c)[79] are reiterated in Section 54.42 of the Commission's regulations, without any mention of refunds.[80]

Indeed, the only mention in the Commission's regulations about a refund by an EGS appears in Section 57.177(b),[81] which provides that a customer who has been switched to an EGS without consent and files a dispute within the first two billing periods is not responsible for EGS bills rendered during that period. While the Commission's statutory authority to promulgate that regulation is unclear (or nonexistent) and the application of that provision to an EGS has not been challenged through the appellate review process, it is irrelevant to the vast majority of consumer complaints identified in this proceeding. Notably, this refund authority does not require the Commission to determine what the EGS's price "should" have been.

Clearly, if the General Assembly had desired to empower the Commission to direct EGSs to issue refunds, it would have amended Code Section 1312[82] or Code Section 3301[83] or included express authority in the Competition Act. It would have also set forth a basis for deciding when refunds should be awarded, such as following a determination that the prices charged by the EGS were not "just and reasonable" or did not conform to the disclosure statement. It would have also set forth a basis for the calculation of refunds and established a process through which the Commission would make these determinations when it does not regulate EGS prices. It would have also indicated whether prior lower prices should offset such refunds. Yet, the General Assembly did none of these things.

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[79] 66 Pa. C.S. §2809(c).
[80] 52 Pa. Code § 54.42.
[81] 52 Pa. Code § 57.177(b).
[82] 66 Pa. C.S. § 1312.
[83] 66 Pa. C.S. § 3301.

c. The broad authority given to the Commission under Code Section 501 does not authorize it to direct EGSs to issue refunds.

Notwithstanding a recognition of its lack of statutory authority under Code Section 1312,[84] and the absence of any enabling language in Code Section 3301[85] or the Competition Act, the Commission has found that it has "plenary authority" under Code Section 501[86] to direct an EGS to issue a credit or refund for an over bill under limited circumstances. *IDT Order* at 17-18. In relying on Code Section 501[87] for authority to direct an EGS to issue a refund, the Commission has disregarded the express language of Code Section 501[88] and the Statutory Construction Act of 1972,[89] as well as long-standing case law.

Code Section 501 confers on the Commission "general administrative power and authority to supervise and regulate all public utilities doing business within the Commonwealth."[90] As EGSs are not public utilities except for limited purposes specified in the Competition Act and further explained in *DelMarva*, EGSs are clearly not public utilities for purposes of Code Section 501.[91] Therefore, any reliance on Code Section 501[92] for authority to require EGSs to issue refunds to customers must fail.

Even if Code Section 501[93] authority applied to EGSs, it does not empower the Commission to direct EGSs to issue refunds. The Pennsylvania Supreme Court has held that if the text of the Code not does provide the Commission with specific authority, a strong and

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[84] 66 Pa .C.S. § 1312.
[85] 66 Pa. C.S. § 3301.
[86] 66 Pa. C.S. § 501.
[87] *Id.*
[88] *Id.*
[89] 1 Pa. C.S. §§ 1501 *et seq.*
[90] 66 Pa. C.S. § 501 (emphasis added).
[91] *Id.*
[92] *Id.*
[93] *Id.*

necessary implication from those words is required to provide such authority. *PECO Energy Co. v. Pa. Pub. Util. Comm'n*, 568 Pa. 39, 791 A.2d 1155, 1159-1160 (2002). Similarly, the Commonwealth Court has emphasized that the broad general powers granted to the Commission by Code Section 501[94] must be read in light of the enumerated powers set forth in the Code and in conjunction with the purpose of the Commission to regulate and control public utilities in determining cost and service to the public. *United Telephone Co. of Pennsylvania v. Pennsylvania Pub. Util. Comm'n*, 676 A.2d 1244 (Pa. Cmwlth. 1996); *Fairview Water Co. v. Pa. Pub. Util. Comm'n.*, 502 A.2d 162, 509 Pa. 384 (1985).

In *ARRIPPA v. Pa. Pub. Util. Comm'n*, 966 A.2d 1204 (2009) (*"ARRIPA"*), the Commonwealth Court reviewed a Commission decision to determine whether the text of the Code provided the requisite "strong and necessary implication" authorizing the Commission to determine ownership of alternative energy credits. The enabling statute, the Alternative Energy Portfolio Standards Act ("AEPS"), empowered the Commission "to establish an alternative energy credits program as needed to implement this act."[95] These duties expressly included the creation and administration of a an alternative energy credits certification, tracking and reporting program, and entailed establishment of a process for qualifying alternative energy systems and determining the manner credits can be created, accounted for, transferred and retired.[96] In 2007, the General Assembly amended the AEPS to specifically address ownership of alternative energy credits. The Court concluded that the Commission had jurisdiction over this issue because of "the unique nature of alternative energy credits and the provision in AEPS for the Commission's

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[94] *Id.*
[95] 73 P.S. § 1648.3(e)(1).
[96] 73 P.S. § 1648.3(e)(2)-(2)(i).

extensive oversight of them," as well as a "process that implicates the particular expertise of the Commission." *ARRIPA* at 1212.

By contrast, on the issue of directing EGSs to issue refunds to customers, the Commission has pointed to Code Section 2809(e)[97] as supporting its exercise of jurisdiction. Code Section 2809(e), however, only authorizes the Commission to "impose requirements necessary to ensure that the present quality of service provided by electric utilities does not deteriorate, including assuring that adequate reserve margins of electric supply are maintained and assuring that 52 Pa. Code Ch. 56 (relating to standards and billing practices for residential utility service) are maintained."[98] In the *IDT Interlocutory Order*, the Commission relied on the Code Section 2809(e)[99] reference to the Chapter 56[100] standards and billing practices as giving it implicit statutory authority to direct EGSs to issue refunds.

By obligating the Commission to assure that the standards and billing practices for residential utility service are maintained by electric utilities, the General Assembly did not confer implicit authority upon the Commission to direct EGSs to issue refunds to consumers. Nothing in Chapter 56[101] addresses refunds by either EDCs or EGSs. Rather, Chapter 56[102] establishes the rules for billing and payment standards, such as billing frequency; estimated billing; billing for previously unbilled public utility; billing information; payment due dates; accrual of late payment charges; application of partial payments; and electronic payments. Chapter 56[103] also sets forth the rules applicable to termination of service, restoration of service and the disposition

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[97] 66 Pa. C.S. § 2809(e).
[98] *Id.* (emphasis added).
[99] 66 Pa. C.S. § 2809(e).
[100] 52 Pa. Code Ch. 56.
[101] *Id.*
[102] *Id.*
[103] *Id.*

of informal and formal complaints. Therefore, the reference in Code Section 2809(e)[104] to billing standards and billing practices contained in Chapter 56[105] provides no support for the Commission's exercise of Section 501[106] authority to direct the issuance of refunds by EGSs.

Indeed, the other language contained in Code Section 2809(e) is more relevant to this inquiry, in that it permits the Commission to "forbear from applying requirements of this part which it determines are unnecessary due to competition among" EGSs.[107] Specifically, the Commission should forbear from applying any provisions of the Code that would result in a determination that an EGS's prices were unreasonable or excessive, supporting a directive for the issuance of a refund, since such a determination is unnecessary due to competition among EGSs. Rate regulation of EGSs is unnecessary because of competitive alternatives.

Such forbearance would be consistent with other provisions in the Code making it clear that EGSs prices are not regulated the Commission. Enactment of the Competition Act was largely based upon the principle that "it is now in the public interest to permit retail customers to obtain direct access to a competitive generation market as long as safe and affordable transmission and distribution service is available at levels of reliability that are currently enjoyed by the citizens and businesses of this Commonwealth."[108] Code Section 2802(5) declared that "[c]ompetitive market forces are more effective than economic regulation in controlling the cost of generating electricity."[109] Without the ability to regulate EGS prices -- a premise with which

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[104] 66 Pa. C.S. § 2809(e).
[105] 52 Pa. Code Ch. 56.
[106] 66 Pa. C.S. § 501.
[107] 66 Pa. C.S. § 2809(e).
[108] 66 Pa. C.S. § 2802(3).
[109] 66 Pa. C.S. § 2802(5).

the Commission agrees[110] -- it logically follows that it likewise has no ability to direct the issuance of refunds.

d. The lack of statutory authority to award damages is akin to the lack of authority to direct EGSs to issue refunds.

The rationale relied upon by the courts in concluding that the Commission lacks statutory authority to award damages is particularly compelling here. In *Feingold*, the Pennsylvania Supreme Court found that the remedial and enforcement powers vested in the Commission by the Code were designed to allow the Commission to enforce its orders and regulations, but not to empower the Commission to award damages or to litigate a private action for damages on behalf of a complainant. Under the *Feingold* holding, the Commission is authorized by the Code to determine whether an EGS has violated its orders or regulations and to impose remedies prescribed by the Code, but it must leave any determination regarding restitution or refunds to the courts.[111]

Also, in the matter of *Elkin v. Bell Tel. Co. of Pa.*, 420 A.2d 371 (Pa. 1980), the Pennsylvania Supreme Court referred to the Commission's "rather extensive statutory responsibility for ensuring the adequacy, efficiency, safety and reasonableness of public utility services" before concluding that the General Assembly has "withheld from the PUC the power to award damages." *Id.* at 375. See also *Behrend v. Bell Telephone*, 363 A.2d 1152, 1158 (Pa. Super. 1976), *vacated and remanded on other grounds*, 374 A.2d 536 (Pa. 1977) ("The courts retain jurisdiction of a suit for damages based on negligence or breach of contract wherein a utility's performance of its legally imposed and contractually adopted obligations are examined

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[110] *IDT Interlocutory Order* at 18.

[111] The Commission has acknowledged its lack of statutory authority to award equitable remedies including restitution. *IDT Interlocutory Order* at 25-26.

and applied to a given set of facts.") (citation and footnote omitted). *Adams et al. v. Pa. Pub. Util. Comm'n*, 819 A.2d 631 (Pa. Cmwlth. 2003); *see also Leveto v. Nat'l Fuel Gas Dist. Corp.*, 366 A.2d 270 (Pa. Super. 1976); *Litman v. Peoples Natural Gas Co.*, 449 A.2d 720 (Pa. 1982). *See, generally, Morrow* (the courts retain jurisdiction of a suit for damages based on negligence or breach of contract wherein a utility's performance of its legally imposed and contractually adopted obligations are examined and applied to a given set of facts).

In *Poorbaugh v. Pa. Public Utility Commission*, 666 A.2d 744 (Pa. Cmwlth. 1995), the Commonwealth Court followed this well-established precedent and specifically discussed the importance of administrative agencies and courts applying their respective expertise in resolving legal issues. Here, while the Commission has administrative expertise to determine whether an EGS has committed violations of the Code, Commission regulations or Commission orders, it is obligated to leave questions of contract interpretation and the determination of appropriate remedies for any breaches of contract to the courts that have the necessary legal expertise. For instance, in resolving contractual disputes, courts have found the written documentations must be relied upon rather than general statements allegedly made during a sales pitch. *See Steuart v. McChesney*, 498 Pa. 45, 48, 444 A.2d 659, 661 (Pa. 1982) (In Pennsylvania, "the intent of the parties to a written contract is to be regarded as being embodied in the writing itself"). *See also Union Storage Co. v. Speck*, 194 Pa. 126, 133, 45 A. 48, 49 (Pa. 1899) ("All preliminary negotiations, conversations and verbal agreements are merged in and superseded by the subsequent written contract....").

As the appellate courts have made clear in extensive case law, the Commission's jurisdiction to decide whether public utilities have provided adequate service as required by

Code Section 1501[112] does not include the ability to determine any damages that should be awarded to the consumer if the public utility failed to provide adequate service. The issue of refunds raised by this proceeding is akin to damages, and the same reasoning must apply. Merely because the Commission has jurisdiction over the sales, marketing and billing practices of EGSs in connection with providing electric generation services does not empower the Commission to regulate rates or require EGSs to refund money to consumers. The fact that Respond Power is an EGS, not a public utility, provides even greater support for its argument that the Commission's jurisdiction is limited and does not include the ability to effectively award damages to consumers.[113]

e. Statutory construction rules require that specific provisions prevail over general provisions in a statute.

The Statutory Construction Act of 1972 mandates that specific provisions in a statute prevail over general provisions.[114] *See Robinson Township Washington County v. Commonwealth of Pennsylvania*, 83 A.3d 901 (Pa. 2013). Here, the specific provisions include: (i) Code Section 1312, which specifically addresses refunds and expressly limits the

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[112] 66 Pa. C.S. § 1501.

[113] The issuance of a refund must either be based upon a statutory authorization or an exercise of equity. *Pennsylvania Life Ins. Co. v. Pennsylvania National Life Ins. Co.*, 417 Pa. 168, 173, 208 A.2d 780, 783 (1965) ("Equity will afford relief if the statutory remedy is inadequate or its pursuit would work irreparable harm"). While the PUC has statutory authority to issue refunds under 66 Pa. C.S. § 1312(a) in proceedings involving rates charged by public utilities, it does not have statutory authority to order refunds as a form of damages for alleged marketing violations. *See Pettko at* 484-86 (holding that the PUC has no power to award relief based upon alleged fraudulent conduct claims sounding under the Unfair Trade Practices and Consumer Protection Law). *See also Feingold* at 795 (holding that that the General Assembly preserved traditional judicial remedies, such as the award of damages, in the hands of the courts.) Accordingly, any order directing refunds in the instant case could only be based upon the exercise of equity powers which, as a traditional judicial basis for the award of damages, is beyond the jurisdiction of the Commission. Pennsylvania Courts of Common Pleas have routinely awarded refunds as a form of equitable relief. *See, e.g., Belin v. Bundy*, 27 Pa. D. &C. 3d 760 (Pa. C.P. 1983) (Court of Common Pleas exercising its equitable powers to order the refund of illegally collected tax proceeds); *Evans Equipment Corp v. Borough of Sharpsville*, 37 Pa. D. & C. 489 (Pa. C.P. 1965) (Court of Common Pleas exercising its equitable powers to order the refund of a contractor's forfeited deposit paid in connection with an unsuccessful bid for constructing and paving certain streets).

[114] 1 Pa. C.S. § 1933.

Commission's authority to direct public utilities to issue refunds following a determination that the rate charged was unjust or unreasonable;[115] (ii) Code Section 3301, which sets forth civil penalties as the permitted remedies that are available when EGSs violate the Code, Commission regulations or Commission orders;[116] and (iii) Code Section 2809, which is part of the Competition Act and provides for suspension or revocation of EGS licenses under specified circumstances.[117] Neither together nor separately do these specific provisions authorize the Commission to direct the issuance of refunds by EGSs.

Under the Statutory Construction Act of 1972,[118] the lack of express authority under Code Section 1312,[119] Code Section 3301[120] or the Competition Act[121] to direct an EGS to issue a refund prevails over any general authority the Commission has over EGSs under Code Section 501.[122] Therefore, in addition to relying on general statutory authority applicable only to public utilities, while ignoring specific statutory authority regarding refunds, civil penalties and license suspension and revocation, the Commission has inappropriately interpreted the Code.

In addition, in *Popowsky v. Pa. Public Utility Commission*, 869 A.2d 1144 (Pa. Cmwlth. 2005), the Commonwealth Court expressly rejected an unlawful attempt by the Commission to broaden its authority under Code Section 1307(a)[123] to permit a public utility to establish a surcharge for its wastewater collection service. In reversing the Commission decision in *Popowsky*, the Commonwealth Court relied heavily on the fact that another provision in the

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[115] 66 Pa. C.S. § 1312.
[116] 66 Pa. C.S. § 3301.
[117] 66 Pa. C.S. § 2809.
[118] 1 Pa. C.S. § 1933.
[119] 66 Pa. C.S. § 1312.
[120] 66 Pa. C.S. § 3301.
[121] 66 Pa. C. S. §§ 2801-2815.
[122] 66 Pa. C.S. § 501.
[123] 66 Pa. C.S. § 1307(a).

Public Utility Code expressly addressed surcharges and did not permit the approval of a wastewater surcharge. Noting that Code Section 1307(g)[124] specifically permits water utilities to recover certain infrastructure improvement costs through a surcharge, the Commonwealth Court found that the general language of Code Section 1307(a)[125] relating to surcharges did not authorize the Commission to permit wastewater utilities to recover such costs through a surcharge. *Popowsky* at 1158. The Court concluded that "[t]he PUC's belief that there is no limit on its authority to approve the use of a surcharge as the means for any utility to recover its costs for any facility addition is contrary to precedent and to sound principles of statutory construction." *Popowsky* at 1160.

3. Commission Jurisdiction under State Consumer Protection Laws

The Joint Complaint alleges that Respond Power has violated the Consumer Protection Law and the TRA. However, as the Commission has already determined, it does not have jurisdiction to enforce the requirements of either of those state consumer protection laws. In ruling on Respond Power's Preliminary Objections, the ALJs concluded that the Commission does not have statutory authority to consider claims arising from alleged violations of the CPL or TRA, and dismissed Count III (disclosure of material terms), Count IV (welcome letter and inserts) and Count IX (complying with the TRA) to the extent that they sought relief based on the CPL or TRA. *Interim Order on Preliminary Objections* at 5-8, 10-11, 18-20. On interlocutory review of the *Interim Order on Preliminary Objections*, the Commission agreed with the ALJs, concluding that it lacks statutory authority to hear complaints under these state consumer protection laws. *Respond Power Interlocutory Order* at 24-25.

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[124] 66 Pa. C.S. § 1307(g).
[125] 66 Pa. C.S. § 1307(a).

These rulings are consistent with prior Commission pronouncements. In *Mid-Atlantic Power Supply Assoc. v. PECO Energy Co.*, Docket No. P-00981615, 1999 Pa. PUC LEXIS 30 (Order entered May 19, 1999) ("*MAPSA*"), the Commission ruled that it has no statutory authority to enforce the Consumer Protection Law. In MAPSA, the Commission found that the EDC had created confusion regarding customer choice through its advertising campaign but noted that Code Section 2811 limits the Commission's remedial authority in this area.[126] In particular, Code Section 2811(d) requires the Commission to refer findings of anticompetitive or discriminatory conduct to the Attorney General.[127] The Commission noted that there is an administrative agency having more extensive expertise in this area to which this matter is deferred. *See also David P. Torakeo v. Pennsylvania American Water Co.*, Docket No. C-2013-2359123 (Opinion and Order entered April 3, 2014) ("*Torakeo*") ("to the extent that the Complainant is challenging the ALJ's finding regarding our jurisdiction over the allegations that PAWC's actions violated the UTPCPL, this Exception is also denied. As the ALJ determined it is clear under Pennsylvania law that the Commission does not have jurisdiction over such claims").

The Commission recognized its lack of jurisdiction to enforce both the CPL and the TRA in *In Re Marketing and Sales Practices for the Retail Residential Energy Market*, Docket No. L-2010-2208332 (Order entered October 24, 2012) ("*Marketing Rulemaking Order*"). In that rulemaking proceeding, the Independent Regulatory Review Commission ("IRRC") had commented that the OAG administers both the CPL and the TRA and questioned how the Commission would administer or enforce its regulations requiring compliance with those laws.

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[126] 66 Pa. C.S. § 2811(d).
[127] 66 Pa. C.S. § 2811(d)(1).

In explaining how it would handle allegations about violations of the CPL and TRA, the Commission noted that it has a long-standing Memorandum of Understanding with the OAG, under which it refers matters that more appropriately fall under the OAG's purview for appropriate enforcement. *Id.* at 5-8.

The Joint Complainants have relied on *Harrisburg Taxicab & Baggage Co. v. Pa. Pub. Util. Comm'n.*, 786 A.2d 288, 292-93 (Pa. Cmwlth. 2001) ("*Harrisburg Taxicab*") for the concept that the Commission is permitted to incorporate another agency's regulations into its own and then enforce them. In *Harrisburg Taxicab*, the Commonwealth Court determined that the Commission has authority to enforce provisions of the Pennsylvania Vehicle Code pursuant to its authority under Code Section 1501,[128] which requires the Commission to ensure the safety of utility facilities, such as a taxicab. *Id.* at 293. The Court saw such overlapping jurisdiction as "exactly the type of sensible cooperation and mutual adjustment between the agencies." *Id.*

However, in this case, the Joint Complainants rely on the Commission's own regulations -- not statutory authority -- in support of their position that the Commission has jurisdiction to hear cases regarding the Consumer Protection Law. As the ALJs have properly determined, "[r]eliance on its own regulations is not comparable to the Commission's express authority to regulate the safety of taxicabs explicitly granted by the General Assembly in Section 1501." *Interim Order on Preliminary Objections* at 9. The ALJs further correctly noted that overlapping jurisdiction is not present here, where, for example, the remedies for findings of deceptive trade practices vary. *C. Leslie Pettko, et al. v. Pennsylvania American Water Co.*, 39 A.3d 473, 484 (Pa. Cmwlth. 2012) ("*Pettko*") (the Commission does not have the authority to award civil

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[128] *66* Pa. C.S. § 1501.

penalties up to $5,000, as is allowed under the Consumer Protection Law). Consistent with the ALJs' conclusion, any issues regarding Respond Power's compliance with the Consumer Protection Law must be brought in a forum that has jurisdiction to hear such claims. *Preliminary Objection Order* at 9.

4. Commission Jurisdiction over EGS Marketing Practices

The Competition Act authorizes the Commission to establish regulations requiring EDCs and EGSs to "provide adequate and accurate customer information to enable customers to make informed choices regarding the purchase of all electricity services offered by that provider."[129] Additionally, Code Section 2807(d) requires that "[i]nformation shall be provided to consumers in an understandable format that enables consumers to compare prices and services on a uniform basis." *Id.*

In adopting regulations to implement these directives of the Competition Act, the Commission has required EGSs to use common and consistent terminology in customer communications, including marketing, billing and disclosure statements.[130] Further, the Commission requires EGSs to provide accurate information about their electric generation services using plain language and common terms in communications with consumers and to provide information in a format that enables customers to compare the various electric generation services offered and the prices charged for each type of service.[131] The Commission's regulations also provide that the contract's terms and conditions of service shall be disclosed, including a variable pricing statement if applicable including conditions and limits

[129] 66 Pa. C.S. § 2807(d).
[130] 52 Pa. Code § 54.3(1).
[131] 52 Pa. Code § 54.43(1).

on variability.[132] In addition, the Commission requires EGSs' advertised prices to reflect prices in disclosure statements and billed prices.[133] *See Bosche* at 5-6.

In addition, Chapter 111 of the Commission's regulations establishes a series of rules and requirements applicable to EGSs' marketing and sales practices for the retail residential market.[134] Among the provisions in Chapter 111 are requirements for agent qualifications and standards;[135] agent training and discipline;[136] customer authorization to transfer account, including verification and documentation;[137] agent misrepresentation;[138] door-to-door sales;[139] telemarketing;[140] receipt of disclosure statement and right to rescind transaction;[141] consumer protection;[142] customer complaints;[143] and notification regarding marketing or sales activity.[144] Chapter 111 also provides that EGSs are responsible for the actions of their agents.[145]

In reviewing the marketing practices of an EGS, the Commission's jurisdiction is limited to determining whether the EGS or its agent departed from the specific and clear requirements set forth in its own regulations that are applicable to the particular sales transaction and customer class. However, the Commission may not enforce vague or general standards that do not provide fair notice as to what is required of EGSs or of what is prohibited. *See Vill. of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982) ("*Hoffman*"). By way of

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[132] 52 Pa. Code § 54.5(c)(2).
[133] 52 Pa. Code § 54.7(a).
[134] 52 Pa. Code, Ch. 111.
[135] 52 Pa. Code § 111.4.
[136] 52 Pa. Code §§ 111.5 and 111.6.
[137] 52 Pa. Code § 111.7.
[138] 52 Pa. Code § 111.8.
[139] 52 Pa. Code § 111.9.
[140] 52 Pa. Code § 111.10.
[141] 52 Pa. Code § 111.11.
[142] 52 Pa. Code § 111.12.
[143] 52 Pa. Code § 111.13.
[144] 52 Pa. Code § 111.14.
[145] 52 Pa. Code § 111.3; *see also* 52 Pa. Code § 54.43(f).

example, the Joint Complainants' criticize Respond Power's Disclosure Statement because consumers could not determine the price they would or could be charged or how the price would be calculated. To the extent that Section 54.5 of the Commission's regulations[146] is interpreted as requiring that level of detail, when it clearly only requires the disclosure of conditions on *variability and limits on variability, as applicable, such interpretation would be a violation of* Respond Power's due process rights. Another example is Section 54.43 of the Commission's regulations which requires EGSs to "use plain language and common terms in communications with consumers."[147] However, nowhere does the Commission define "plain language" or establish any clear standards for how compliance with this requirement may be achieved.[148]

5. Commission Jurisdiction over EGS Billing Practices

The Competition Act also sets forth the billing requirements for the electric choice program, establishing basic rules applicable to EGSs and EDCs including the need for customer bills to "contain unbundled charges sufficient to enable the customer to determine the basis for those charges."[149] In addressing the limited regulation of EGSs, Code Section 2809(e) requires the Commission to "impose requirements necessary to ensure that the present quality of service provided by electric utilities does not deteriorate, including assuring that adequate reserve margins of electric supply are maintained and assuring that 52 Pa. Code Ch. 56 (relating to standards and billing practices for residential utility service) are maintained."[150] While the Commission has frequently acknowledged that many of the standards and billing practices in

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[146] 52 Pa. Code § 54.5.
[147] 52 Pa. Code § 54.43(1).
[148] 52 Pa. Code § 69.251.
[149] 66 Pa. C.S. § 2807(c)(1).
[150] 66 Pa. C.S. § 2809(e).

Chapter 56[151] do not apply to EGSs due to their inability to physically terminate customers,[152] the Commission has required EGSs to comply with those provisions that are applicable, such as in the issuance of make-up bills. *Bracken* at 7. Despite Commission references to Section 2809(b) as specifically requiring EGSs to comply with Commission regulations,[153] a careful review of that section reveals that it only pertains to the licensing process and authorizes the Commission to issue a license to an EGS applicant if it finds that the applicant is fit, willing and able to perform properly the service provided and to conform to the provisions of the Code and Commission regulations, including regulations regarding standards and billing practices.[154]

Under Section 54.4 of the Commission's regulations, "EGS prices billed must reflect the marketed prices and the agreed upon prices in the disclosure statement."[155] This section of the Commission's regulations also establishes the bill formats and components that apply only to the extent to which an entity has responsibility for billing customers and to the extent that the charges are applicable.[156] A required element of the bill for customers who have chosen an EGS is a paragraph that informs them as follows:[157]

(i) Generation prices and charges are set by the electric generation supplier you have chosen.

(ii) The Public Utility Commission regulates distribution prices and services.

(iii) The Federal Energy Regulatory Commission regulates transmission prices and services.

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[151] 52 Pa. Code Ch. 56.
[152] *See, e.g., Application of MidAmerican Energy Services LLC for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as a Supplier of Retail Electric Power*, Docket No. A-2015-2496354 (Order adopted October 1, 2015).
[153] *IDT Interlocutory Order* at 17.
[154] 66 Pa. C.S. § 2809(b).
[155] 52 Pa. Code § 54.4(a).
[156] 52 Pa. Code § 54.4(b).
[157] 52 Pa. Code § 54.4(b)(10).

Since Respond Power does not perform the billing functions, most of the requirements set forth in the Code and the Commission's regulations on billing are inapplicable. Respond Power's obligation under the provisions noted above is to forward prices to the EDCs for inclusion in customer bills that reflected marketed prices and the agreed upon prices in its Disclosure Statement.

6. Commission Jurisdiction to Order Injunctive Relief

The Commission is not a governmental entity endowed with equitable powers. The General Assembly did not grant the Commission injunctive powers; rather, it specifically gave the Commission the ability to seek injunctive relief from courts of equity. Code Section 502 provides that "[w]henever the commission shall be of opinion that any person or corporation, including a municipal corporation, is violating, or is about to violate, any provisions of this part...the commission may institute injunction, mandamus or other appropriate legal proceedings, to restrain such violations.[158] This statute is in accord with the division of powers among the three branches of the Commonwealth's government, as the granting of injunctive relief is an extraordinary exercise of a court's equitable powers which should be issued with caution and should only be considered when there is no adequate remedy under the law. *Maritrans GP Inc., v. Pepper, Hamilton & Scheetz*, 529 Pa. 241, 259, 602 A.2d 1277, 1286 (1992); *Big Bass Lake Cmty. Ass'n v. Warren*, 950 A.2d 1137, 1144 (Pa. Cmwlth. 2008).

If the General Assembly had wanted to give the Commission broad injunctive powers, it could have done so through the Code. The maxim *expressio unius est exclusio alterius* teaches

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[158] 66 Pa. C.S. § 502. This statutory provision is substantially similar to Section 903 of a previous version of the Public Utility Law which the Supreme Court of Pennsylvania interpreted as the legislature's providing a means for the Commission to come before the court to prevent the violation of a provision of the Public Utility Law by obtaining an injunction. *Pa. Pub. Util. Comm'n. v. Israel*, 52 A.2d 317 (Pa. 1947).

that the express mention of one thing in a statute implies the exclusion of other things. *See Lamar Advertising Co. v. Zoning Hearing Bd.*, 939 A.2d 994, 1000 (Pa. Cmwlth. 2007); *see also L.S. v. David Eschbach, Jr., Inc.*, 583 Pa. 47, 874 A.2d 1150 (2005). As the General Assembly gave the Commission only the ability to seek an injunction from the courts, it is abundantly clear that the Commission is not vested with the ability to issue injunctive relief.[159] Therefore, the request of the Joint Complainants for the Commission to "*impose a permanent injunction* to restrain and prevent violations of the Consumer Protection Law and restore to any person in interest any moneys or property that may have been acquired by any means of any violation of the Consumer Protection Law" is clearly beyond the scope of the Commission's authority and should be summarily denied.[160]

The Commission's lack of injunctive powers is consistent with Pennsylvania case law which limits the Commission's ability to interfere with company management decisions. *See Metropolitan Edison v. Pa. Pub. Util. Comm'n*, 437 A.2d 76, 80 (Pa. Cmwlth. 1981) (explaining that "[t]he company manages its own affairs to the fullest extent consistent with the protection of the public's interest, and only as to such matters is the commission authorized to intervene, and

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[159] The Commission's exercise of injunctive relief is limited to emergency relief in situations which present "a clear and present danger to life or property or which is uncontested and requires action prior to the next scheduled public meeting." 52 Pa. Code § 3.1. Further, such an order can only be entered after an administrative law judge finds that: the petitioner's right to relief is clear, the need for relief is immediate, the injury would be irreparable if relief is not granted, and the relief requests is not injurious to the public interest. 52 Pa. Code §§ 3.6(b), 3.7. Further, any such order expires upon the closing of the case. 52 Pa. Code § 3.11. Any order from the Commission dealing with Respond Power's prospective marketing activities would be in the nature of permanent injunctive relief, and would clearly fall outside of the Commission's power to issue emergency injunctive relief. Neither economic harm nor speculative considerations present "irreparable harm." *Petition of Direct Energy Services, LLC for Emergency Order Approving a Retail Aggregation Bidding Program for Customers of Pike County Light & Power Company*, Docket No. P-00062205 (Order entered Apr. 20, 2006) (holding that rate increases did not constitute a clear and present danger to life or property); *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mt., Inc.*, 573 Pa. 637, 828 A.2d 995 (2003).

[160] *Cf.* Joint Complaint, ¶ 102 (citing 73 P.S. § 201-4.1) (emphasis added). The inescapable conclusion that the injunction requested by the Joint Complainants is beyond the powers of the Commission is bolstered by the fact that the statute relied on by them for the injunctive relief they seek in the Consumer Protection Law, over which the Commission has already ruled that it does not have jurisdiction to enforce.

then only for the special purposes mentioned in the act"); *see also Nat'l Fuel Gas Distrib. v. Pa. Pub. Util. Comm'n*, 464 A.2d 546 (Pa. Cmwlth. 1983) ("As a general matter, utility management is in the hands of the utility and the Commission may not interfere with lawful management decisions . . . ."). While Respond Power is not a "public utility" as defined by the Code, the same principle of deference to company management decisions should apply to EGSs -- particularly given the intent of the Competition Act to establish competitive retail markets.[161] Indeed, the Commission's regulatory oversight of an EGS is very limited and does not include the authority to micro-manage the EGS's day-to-day business decisions.[162]

Moreover, nowhere in the law is the Commission authorized to vest public advocates with the authority to oversee the management decisions of an EGS. The Legislature's intent was for government officials to have a limited role in the competitive retail markets in order to foster lower prices and creative offerings. The goal of the instant proceeding should be to strike an appropriate balance, consistent with the Code, which protects customer interests and allows Respond Power to continue to exercise managerial prerogative over its own affairs.

The Commission may nevertheless indirectly provide injunctive relief through its ability to enforce one of its orders approving a settlement in which a settling party voluntarily agreed to injunctive relief. In this proceeding, Respond Power has voluntarily agreed to various forms of

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[161] *See* 66 Pa. C.S. §§ 2802(5) ("Competitive market forces are more effective than economic regulation in controlling the cost of generating electricity."); 2802(7) ("This Commonwealth must begin the transition from regulation to greater competition in the electricity generation market to benefit all classes of customers and to protect this Commonwealth's ability to compete in the national and international marketplace for industry and jobs");and 2802(14) ("The procedures established under this chapter provide a fair and orderly transition from the current regulated structure to a structure under which retail customers will have direct access to a competitive market for the generation and sale or purchase of electricity.").

[162] *See, e.g.*, 66 Pa. C.S. § 2809.

injunctive relief as part of the Settlement with I&E.[163] If the Commission is in favor of these forms of injunctive relief, it should adopt the Settlement without modification -- as the Commission lacks jurisdiction to impose the relief in response to the Joint Complaint. As explained in more detail below, the relief available in the event that allegations of the Joint Complaint are substantiated is limited to the remedies specifically identified in the Code. Respond Power posits that such relief is far less than the relief voluntarily offered by Respond Power through the Settlement Petition.

7. Commission Jurisdiction to Use Pattern and Practice Evidence

In their Joint Memorandum of Law ("Joint Memo") filed on February 3, 2015, the Joint Complainants purported to set forth "the legal framework for the acceptance of evidence from a large group of customers to establish a misleading or deceptive pattern of practice into the record."[164] The key proposal of the Joint Memo was for the Joint Complainants "to present a sample of consumer witnesses and permit the remaining consumers to submit sworn affidavits in lieu of testifying."[165] In support of that approach, the Joint Complainants cited federal decisions involving proceedings initiated by the Federal Trade Commission ("FTC") involving large volumes of consumers. Notably, the Joint Complainants made no mention of pattern and practice in the Joint Complaint and launched into this proposal midway through this proceeding without even citing any provision in the Code permitting the Commission to entertain pattern and practice evidence or class action types of proceedings. Likewise, the Joint Complainants have failed to identify any Commission precedent for implementing such an approach.

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[163] *See* Settlement, Section IV (pp. 11-36).
[164] Joint Memo at 2.
[165] Joint Memo at 4.

Respond Power submitted a Memorandum of Law ("Respond Power Memo") on February 13, 2015 opposing this proposal, citing three fundamental flaws including: (i) the Commission's lack of statutory authority to implement a pattern and practice concept that would require a departure from its obligation to base its decisions on substantial evidence; (ii) unauthenticated hearsay statements may not be lawfully relied upon as evidence to support findings and conclusions; and (iii) the unique circumstances involved in each electricity supply sales transaction, coupled with due process principles, mandate that Respond Power be given the opportunity to cross-examine each and every witness whose testimony is offered into the record or relied upon to reach a finding or conclusion.[166]

When the evidentiary hearings were held on March 9 through 13, 2015 for the purpose of admitting consumer witness testimony, either subject to cross-examination or by stipulation, the Joint Complainants did not attempt to move any testimony into the record through the proposed pattern and practice approach. Had such an attempt been made, Respond Power would have objected on the grounds set forth in the Respond Power Memo. Since any attempt to do so should have occurred at that time, Respond Power does not expect the Joint Complainants to resurrect this argument during the briefing stage.

To the extent, however, that the Joint Complainants seek to rely on any unadmitted consumer testimony to support their arguments, Respond Power contends that the ALJs should reject those efforts outright as untimely. Even if such a request would be entertained at this stage, it should be denied for the reasons noted below. These arguments apply with even greater force to any attempts by the Joint Complainants to use testimony that has been admitted in the

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[166] *Respond Power Memo at 2.*

record to argue that other Respond Power customers, who have not been heard from at all as part of this proceeding, are entitled to any relief.

a. The Commission has no jurisdiction to entertain pattern and practice claims or class action type proceedings.

Code Section 701 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.[167] Neither Code Section 701[168] nor any other provision of the Code authorizes the Commission to rely on pattern and practice evidence or to 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. Therefore, the Commission does not have jurisdiction over class action lawsuits or to hear pattern and practice claims.

Indeed, the ALJs have observed that "[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."[169] *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). *See also Painter v. Aqua PA, Inc.*, Docket No. C-2011-2239557 (Opinion and Order entered May 22, 2014); *Pettko v. Pennsylvania American Water Company*, Docket No. C-2011-

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[167] 66 Pa.C.S. § 701.
[168] *Id.*
[169] The Joint Complainants have referred to Pennsylvania Rules of Civil Procedure as supporting the use of a representative sampling of customers to obtain relief for an entire class as part of a class action proceeding. Pa. C.R.P. 1702. Given the Commission's rejection of prior attempts to be used a forum for a class action lawsuit, the civil rules allowing the use of a sampling of customers to support class action relief are irrelevant and inapplicable here.

2226096 (Administrative Law Judge Order dated October 5, 2011 adopted by Commission Order on February 18, 2013). As a result, only consumers who have filed complaints with the Commission have any recourse or ability to request the imposition of a penalty or seek other relief.

b. The Joint Complainants have no authority to seek relief on behalf of individual consumers.

Moreover, the Joint Complainants do not have authority to pursue what is effectively a class action lawsuit at the Commission, as neither party has standing to represent individual consumers or to seek relief on their behalf. While the OAG's enabling statute[170] authorizes the initiation of civil actions to address violations of the Consumer Protection Law, the Commission has already determined that it is not the appropriate forum to hear those claims. *Respond Power Interlocutory Order* at 24-25. Further, Code Section 701 expressly provides that the "Commonwealth through the Attorney General may be a complainant before the Commission in any matter solely as an advocate for the Commonwealth as a consumer of public utility services."[171] Similarly, the OCA's enabling statute authorizes it to represent the general interests of consumers as a party, as opposed to the interests of individual utility consumers.[172] While its enabling statute also references its ability to name a consumer or group of consumers in an action brought in the name of the Commonwealth, it does not specify any ability to initiate a class action lawsuit; in any event, the Joint Complaint in this case did not name a consumer or group of consumers.[173]

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[170] 73 P.S. § 201-4.
[171] 66 Pa. C.S. § 701 (emphasis added).
[172] 71 P.S. § 309-4(a); *see also Suprick v. Commonwealth Telephone Co.*, Docket No. 00903161, 1995 WL 945164.
[173] 71 P.S. § 309-4(d).

c. The Commission may not rely on unauthenticated hearsay statements to make factual findings and legal conclusions.

Additionally, the Commission may not rely on unauthenticated hearsay statements in making factual findings and legal conclusions. Pennsylvania Rule of Evidence 801 defines "hearsay" as a statement that the declarant makes outside a current trial or hearing and that a party offers in evidence to prove the truth of the matter asserted in the statement.[174] The statements made by the consumers in their "testimonies" were not made during a hearing and are offered to provide the truth of the matters asserted. As such, they constitute hearsay under the evidentiary rules and may not be admitted into the record unless presented for cross-examination or through stipulation.[175]

Hearsay is not admissible as evidence under Pennsylvania Rule of Evidence 802, except as specifically provided by the rules, a statute or the Pennsylvania Supreme Court.[176] 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*, Docket No. C-2011-2244309 (Initial Decision dated February 2, 2012, Final Order entered March 29, 2012) ("*Viridian*"); *Gibson v. W.C.A.B.*, 861 A.2d 938 (Pa. 2004) ("*Gibson*"); and *Anthony v. PECO Energy Co.*, Docket No. C-2014-2408057 (Order entered July 30, 2014) ("*Anthony*").

It is also well-settled that a finding based wholly on hearsay cannot support a legal conclusion by an administrative agency. *Walker v. Unemployment Compensation Board of*

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[174] P.R.E. 801.
[175] Further, Pennsylvania Rule of Evidence 901 requires the authentication of documentary evidence. P.R.E. 901. Under the Commission's regulations, written testimony is subject to the same rules of admissibility and cross-examination of the sponsoring witness as if it were presented orally in the usual manner. 52 Pa. Code § 5.412. In Commission hearings, the author of the prepared testimony is called to authenticate it as a witness.
[176] P.R.E. 802.

Review, 367 A.2d 366 (Pa. Cmwlth. 1976) ("*Walker*"). 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. Pub. Util. Comm'n., Bureau of Investigation and Enforcement v. Yellow Cab Co. of Pittsburgh*, Docket No. 2012-2249031, 2013 WL 5912555 (Pa. P.U.C. Oct. 8, 2013) ("*Yellow Cab*"). Even when hearsay is not excluded, the Commission has refused to make findings of fact without separate evidence corroborating it. *See, e.g., Jackson v. PECO Energy Co.*, Docket No. F-2013-2351046 (July 5, 2013) ("*Jackson*"); *Davis v. Equitable Gas, LLC*, Docket No. C-2011-2252493, 2012 WL 3838095 (April 27, 2012) ("*Davis*").

d. Reliance on the residual exception to the hearsay rule is misplaced.

i. The residual exception to the hearsay rule is not recognized in Pennsylvania.

The Joint Complainants' attempt to rely on the residual exception to the hearsay rule in Federal Rule of Evidence 807[177] is misplaced. While it may be appropriate at times to look beyond the Pennsylvania Rules of Evidence for guidance as to the admissibility of evidence, it is neither necessary nor proper to do so in this situation. Pennsylvania Rule of Evidence 802 expressly notes that exceptions to the hearsay rule are limited to those set forth in the Pennsylvania Rules of Evidence or prescribed by the Pennsylvania Supreme Court or a statute.[178] Particularly since the residual exception to the hearsay rule has been expressly rejected by the Pennsylvania Supreme Court, it may not be relied upon here. *See Commonwealth v. Stallworth*, 566 Pa. 349, 781 A.2d 110, 128, n.2 (2001).

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[177] F.R.E. 807.
[178] P.R.E. 802.

ii. Federal courts rarely rely on the residual exception because there must be a clear basis of trustworthiness to support the out-of-court statements, which is not present here.

Even if relevant Pennsylvania legal precedent existed for applying the residual exception in a Commission proceeding, federal courts have expressed significant skepticism about its use and have stressed that it be applied only in very limited circumstances. The courts' rationale for using it rarely is that there must be a "clear basis of trustworthiness" to support the out-of-court statements, and the burden is on the party seeking to invoke the residual exception to clearly demonstrate the existence of those requisite guarantees of trustworthiness. *See Reassure Am. Life Ins. Co. v. Warner*, 2010 WL 4782776, *2 (S.D. Fla. 2010). The Joint Complainants have made no effort to establish this clear basis of trustworthiness. To the contrary, particularly given the solicitation of the consumer statements by the Joint Complainants for purposes of litigation and the clear expectation on the part of many consumers for restitution, these guarantees could not be made.

iii. Cases cited by the Joint Complainants are distinguishable.

In addition, the cases cited by the Joint Complainants in support of the residual exception to the hearsay rule are distinguishable from the present case. For instance, the Joint Complainants heavily rely on the decision in *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 608-609 (9th Cir. 1993) for use of the residual exception to the hearsay rule here. However, the circumstances are very different. In *Figgie*, the Ninth Circuit Court admitted letters that consumers provided at the time they purchased the product at issue – heat detectors. Notably, they were not admitted to prove liability or wrongdoing but only to establish the prices that customers paid for the heat detectors during the remedy phase of the case. Moreover, the letters were sent by the consumers without solicitation by the FTC. By contrast, the Joint Complainants in the present case actively solicited the customer statements using template questionnaires that

were specifically framed to elicit responses that would advance the Joint Complainants' theory of the case.[179] The use of leading questions to elicit details of transactions that occurred many months or years before distinguishes the statements submitted in this proceeding from those used in *Figgie*, and underscores the importance of having the "testimonies" in this case authenticated and subjected to cross examination.

The other FTC cases cited by the Joint Complainants are similarly distinguishable. Specifically, *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564 (7th Cir. 1989), involved the admission of consumer complaint letters to prove only that the defendant was on notice of potentially fraudulent activity. Again, they were not admitted to prove liability. Also, a key factor relied upon by the Seventh Circuit Court in *Amy Travel* to admit the letters was that the customer-affiants were located throughout the country, unlike this case. Similarly, the other case relied upon by the Joint Complainants, *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1294 (D. Minn. 1985), involved the admissibility of customer affidavits to establish the total amount of customer injury, not liability. In *Kitco*, the District Court in Minnesota also ruled it would be too expensive and time consuming to call witnesses from all parts of the country for that purpose

Not only are all of the consumer witnesses in the present case located in Pennsylvania, but a process was established to allow the witnesses to authenticate their testimony and be subjected to cross-examination by telephone. The ability of witnesses to testify telephonically weighs heavily in favor of rejecting any notion advanced by the Joint Complainants to rely on any testimony that has not been authenticated and subjected to cross-examination (except by stipulation). The circumstances were already less than ideal for Respond Power since consumers

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[179] RP Exhibit No. 39.

were not required to travel or provide in-person testimony on cross examination from a witness stand in a crowded hearing room. It was very simple and far less intimidating for the consumers to provide telephonic testimony, which most certainly resulted in greater customer participation than if in-person testimony had been required.

iv. Federal and state courts have rejected efforts to admit customer letters under the residual exception in circumstances that are very similar to those present here.

Notably, several federal courts have rejected the FTC's attempts to admit customer letters under the residual exception in circumstances that are very similar to those present here. For instance, in *FTC v. Washington Data Resources*, 2011 WL 2669661 (M.D. Fla. July 7, 2011), the Middle District Court in Florida did not permit the FTC to introduce letters that were obtained through outreach by the FTC to certain consumers to procure a declaration for the purpose of litigation. Because the FTC offered them as substantive evidence of alleged deceptive statements and misleading marketing material, the federal court in *Washington Data Resources* noted that the statements were *not* trustworthy.

State courts have likewise rejected attempts by an Attorney General to introduce affidavits under the residual exception in consumer protection proceedings that bear strikingly similar circumstances as are present here. For instance, in *People v. Shifrin*, 2014 WL 785220 (Feb. 27, 2014), the Colorado Court of Appeals ruled that customer affidavits were not admissible because the: (i) affiants knew that litigation was pending; (ii) the affiants stood to receive substantial restitution based on their affidavits; (iii) the affidavits were not written spontaneously or independently, but were obtained by representatives of the Attorney General's office; and (iv) the Attorney General's office had procured the affidavits to further its position in the litigation.

All four of the above-referenced factors are present here. The consumer witnesses who presented written statements were obviously aware that the litigation was pending. While Respond Power contends that the Commission may not award any relief to individual consumer witnesses as part of this proceeding, it is clear from reading the "testimonies" that the affiants believe otherwise and have discussed this possibility with the Joint Complainants.[180] Moreover, the Joint Complainants heavily promoted the litigation through the media, urging consumers to come forward, and thereafter actively soliciting customers to testify.[181] Clearly, reliance on the residual exception to the hearsay rule is not appropriate in this case due to the Pennsylvania Supreme Court's express rejection of this exception, and any attempts by the Joint Complainants to have the Commission rely on unadmitted consumer statements to reach any findings should be rejected outright.

c. The Commission may not rely on admitted consumer testimony to make any findings as to what may have occurred during other consumers' sales transactions.

Given the well-established case law discussed above precluding any reliance on unadmitted consumer statements or affidavits as part of this proceeding, the rationale and principles underlying those decisions apply with even greater force to "silent consumers." Clearly, the Joint Complainants went to great lengths to encourage customers on variable price contracts to come forward to complain and further solicited those who did complain to submit written testimony. To the extent that consumers elected not to complain or to submit testimony, their experiences cannot be considered by the Commission since no factual allegations are available to review or challenge.

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[180] *See, e.g.*, 186, 319-320, 620, 999 and 1118.
[181] RP Exhibit No. 38 and RP Exhibit No. 39.

Code Section 332(a) places the burden of proof for an order on the proponent of the order.[182] 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. Pennsylvania Public Utility Commission*, 578 A.2d 600 (Pa. Cmwlth. 1990) ("*Lansberry*"). 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) ("*Margulies*").

Additionally, it well-settled that the Commission's decision must be supported by substantial evidence in the record.[183] 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. Pennsylvania Public Utility Commission*, 489 Pa. 109, 413 A.2d 1037 (1980) ("*Norfolk*").

In accordance with these well-established principles, Joint Complainants are obligated to present substantial evidence to support their factual allegations and claims of violations of the Code and Commission regulations. The Joint Complainants have pointed to nothing in the Code or Pennsylvania case law that would permit the Commission to conclude, on the basis of evidence related to some EGS consumers, that the EGS has committed a violation of the Code or Commission regulations in their dealings with other consumers. To Respond Power's knowledge, the Commission has never found violations or assessed penalties based upon assumptions about how a customer may have been affected by a utility's actions, without any

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[182] 66 Pa.C.S. § 332(a).
[183] 2 Pa.C.S. § 704.

customer-specific evidence. Further, due to the requirement that Commission decisions be based on substantial evidence, it would be unable to do so.

To the extent that the Joint Complainants intend to prove multiple violations by Respond Power, it is incumbent upon them to present substantial evidence of each and every specific violation alleged. The Joint Complainants cannot expect to 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.*

Furthermore, reliance on pattern and practice evidence to find violations or award relief would violate Respond Power's fundamental rights of due process, which require that it be given the full opportunity to confront and cross examine the witnesses who have offered "testimony" against it. "[G]overnment licenses to engage in a business or occupation create an entitlement to partake of profitable activity, and therefore, are property rights." *Philadelphia Entertainment and Development Partners, L.P. v. Pennsylvania Gaming Control Bd.*, 34 A.3d 261 (Pa. Cmwlth. 2011). The principle that due process is fully applicable to adjudicative hearings involving substantial property rights is well established. *See Soja v. Pennsylvania State Police*, 45 A.2d 613, 500 Pa. 188 (1982) ("*Soja*"). In *Soja*, the Pennsylvania Supreme Court observed that where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. *See also Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S.Ct. 1011, 1021, 25 L Ed. 2d 287 (1970). The Court in *Soja* also stressed the importance of cross examination when the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might not be truthful or might be motivated by inappropriate factors.

f. The unique facts and circumstances of each individual sales transaction render any pattern and practice approach inappropriate.

Additionally, a pattern and practice approach is not appropriate in this proceeding due to the unique facts and circumstances of each individual sales transaction. In *Dunn v. Allegheny County Property Assessment Appeals and Review*, 794 A.2d 416 (2002), the Pennsylvania Commonwealth Court set forth the five criteria that must be met for a suit to proceed as a class action, as follows: (i) the class is so numerous that joinder of all members is impracticable; (ii) there are questions of law or fact common to the class; (iii) the claims and defenses of the representative parties are typical of the claims or defenses of the class; (iv) the representative parties will fairly and adequately assert and protect the interests of the class; and (iv) a class action provides a fair and efficient method for adjudication of the controversy. *Id.* at 423.

Here, a review of the consumer statements shows that each consumer described a unique interaction with Respond Power and that each interaction involved many nuances that warrant a more in-depth review. While some of the consumer statements contain vague and generalized allegations that they were promised savings for an undefined or indefinite time period, others are specific about a percentage of savings for a defined time period. Also, some statements describe a consumer's understanding, which may have been from any number of sources other than Respond Power, while others claim that sales representatives of Respond Power made specific promises to them. Still others testified that they knew their prices would vary but that they did not realize the extent to which that might occur. Some customers had been served by Respond Power for several years (and saving money) before the prices increased as a result of the Polar Vortex, while some had signed up only weeks or a few months before that unprecedented

event.[184] Each customer's unique experience is precisely the 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).

In fact, 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 Power 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*, Docket No. 14-38576 (Order dated August 31, 2015). (The Court's Order is attached as Appendix B).

Even if the Commission would have the statutory authority to entertain pattern and practice claims and require EGSs to issue refunds, it would have no basis for calculating refunds in this proceeding for any consumers beyond some of those who filed informal or formal complaints or provided written testimony. This case does not present a situation of an alleged billing error or intentional overbilling that affected all consumers in exactly the same way. For instance, the allegations in this proceeding do not involve a scenario where Respond Power allegedly overcharged customers by a specific amount over a price that was guaranteed by the

[184] Settlement, Exhibit A, Stipulation of Facts ¶¶ 33 and 34.

Disclosure Statement. Moreover, the circumstances presented in this case are very different from a simple billing error by a public utility that may be uncovered during an audit and result in the issuance of refunds to all customers.

Due to the varied and unique experiences described by the consumers who testified in this proceeding, if the Commission would determine that refunds may be and should be awarded, it would be necessary for the Commission to customize each refund to reflect the individual customer's uncorroborated hearsay testimony that was actively solicited by the Joint Complainants. For all other customers served by Respond Power, the Commission would have no way of knowing what their experiences were or have any barometer for determining what an appropriate refund amount might be. The inability of the Commission to require the application of a simple mathematical formula by Respond Power upon which to base the calculation of refunds to its entire customer base demonstrates both the logistical and legal shortcomings of the Joint Complainants' proposed refund relief.

g. The Commission's approach in handling situations involving multiple customers is to consider the number of customers affected by a violation in determining appropriate penalties.

Rather than employing a pattern and practice approach to situations involving multiple customers, the Commission has considered the number of customers affected by a violation in determining appropriate penalties.[185] The Commission's Policy Statement specifically provides for the Commission to consider the number of customers affected by a violation in making this determination.[186]

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[185] *See* 52 Pa. Code § 69.1201; s*ee also Rosi v. Bell Atlantic-Pa., Inc. and Sprint Communications Company*, Docket No. C-00992409 (Order entered February 10, 2000) ("*Rosi*").
[186] 52 Pa. Code § 69.1201(c)(5).

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). Further, the Commission's consideration of a pattern of allegations has been viewed in the context of a public utility's compliance history in establishing an appropriate civil penalty. *See Pa. Pub. Util. Comm'n., Bureau of Investigation and Enforcement v. UGI*, Docket No. M-2013-2338981, 308 PUR 4th 301, 2013 Pa. PUC LEXIS 782 (2013) (for purposes of determining civil penalty, compliance history was indicative of a pattern of allegations regarding gas safety violations, as well as a failure on the part of management to adequately focus on gas safety issues).

B. OCA/OAG Complaint Allegations

1. Burden of Proof and Standard of Review

As the proponent of a rule or order, the Joint Complainants in this proceeding bear the burden of proof pursuant to Section 332(a) of the Code.[187] To establish a sufficient case and satisfy the burden of proof, the Joint Complainants must show that the Respond Power is responsible or accountable for the problems described in the Joint Complaint or has violated either its duty under the Public Utility Code or the orders or regulations of the Commission.[188] *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). Such a showing must be by a preponderance of the evidence. *Lansberry.* That is, the Joint Complainants' evidence must be more convincing, by even the smallest amount, than that presented by Respond Power. *Margulies.* Additionally, any finding of fact necessary to support

[187] 66 Pa. C.S. § 332(a).
[188] 66 Pa. C.S. § 701.

the Commission's adjudication must be based upon substantial evidence. *Mill v. Cmwlth., Pa. Pub. Util. Comm'n*, 447 A.2d 1100 (Pa. Cmwlth. 1982); *Edan Transportation Corp. v. Pa. Pub. Util. Comm'n*, 623 A.2d 6 (Pa. Cmwlth. 1993), 2 Pa.C.S. § 704. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk; Erie Resistor Corp. v. Unemployment Compensation Bd. of Review*, 166 A.2d 96 (Pa. Super. 1960); *Murphy v. Commonwealth, Dep't. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

Upon the presentation by a complainant of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence to rebut the evidence of the customer shifts to the respondent. If the evidence presented by the respondent is of co-equal value or "weight," the burden of proof has not been satisfied. The complainant now has to provide some additional evidence to rebut that of the respondent. *Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983). While the burden of going forward with the evidence may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001).

2. Clarification of Issues by Commission on Interlocutory Review

On April 9, 2015, the Commission entered the *Respond Power Interlocutory Order* addressing the Interlocutory Petition filed by the Joint Complainants on September 8, 2014. At the outset, the Commission noted that the questions raised by the Interlocutory Petition were controlled by the rulings in the Commission's *Blue Pilot Interlocutory Order* and *IDT Interlocutory Order*. Consistent with those decisions, the Commission: (i) granted interlocutory review; (ii) agreed with the ALJs that the Commission does not have jurisdiction to hear complaints about the Consumer Protection Law or TRA; and (iii) declined to dismiss Count VIII

(prices conforming to disclosure statement) on the basis that although the Commission does not regulate EGS prices, it may determine whether an EGS's prices conform to the disclosure statement.

a. State Consumer Protection Laws.

In finding that it does not have jurisdiction to enforce either the CPL or the TRA, the Commission agreed "with the conclusion of the presiding ALJs that the Commission has jurisdiction over alleged violations of our own Regulations, which jurisdiction includes determining whether the Commission's Regulations prohibiting deceptive and/or misleading conduct and/or the Commission's telemarketing regulations have been violated by an EGS." *Respond Power Interlocutory Order* at 24 (footnotes omitted). In support of this conclusion, the Commission referred to the reasoning and rationale set forth in the *Blue Pilot Interlocutory Order*.

However, despite clearly recognizing and concluding that the Code neither expressly nor implicitly gives the Commission subject matter jurisdiction to determine violations of the CPL or TRA, the Commission inexplicably, inconsistently and incorrectly offered the TRA as an example of a telemarketing regulation with which EGSs must comply. Specifically, the Commission indicated that Section 111.10 of its regulations[189] requires EGSs to comply with the Telemarketer Registration Act, except for the registration requirement and concluded that "[t]hus, as one example, EGSs are required under the Commission's telemarketing regulations to comply with the TRA provisions governing state/federal "Do Not Call" lists." *Respond Power Interlocutory Order* at 24, fn. 11.

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[189] 52 Pa. Code § 111.10.

The reference to this example is completely at odds with the Commission's reasoning and analysis in the *Blue Pilot Interlocutory Order*, where the Commission expressly adopted the ALJ's findings that the Commission has no "jurisdiction to determine whether EGSs have been compliant with the TRA." *Id.* at 17. Also, in the *Blue Pilot Interlocutory Order*, the Commission found that including a provision in its regulations requiring EGSs to comply with provisions of the TRA "does not equate to the General Assembly providing the Commission with jurisdiction to hear claims brought pursuant to the TRA." *Id.* at 17.

The Commission properly answered the question on interlocutory review as to its lack of statutory authority to enforce the provisions of the TRA, meaning that it cannot consider whether an EGS violated the "Do Not Call" list or any other requirements of the law, including the section providing for telemarketing sales to be reduced to a written contract. Since Count IX (complying with the TRA) only alleges violations of the TRA, it should be dismissed in its entirety consistent with the *Respond Power Interlocutory Order*.[190]

Likewise, as Count IV (welcome letter and inserts) alleges only violations of the Consumer Protection Law, it should be dismissed in its entirety.[191] In the *Respond Power Interlocutory Order*, the Commission confirmed its earlier rulings that it does not have jurisdiction to enforce the Consumer Protection Law. *Id.* at 24-25. *See MAPSA*; *see also Pa. Pub. Util. Comm'n, et al. v. The Bell Telephone Co. of Pa.*, 71 Pa. PUC 338, 341 (1989); *Torakeo* ("to the extent that the Complainant is challenging the ALJ's finding regarding our

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[190] Although Count IX (complying with TRA) refers to Section 111.10(a)(1) of the Commission's regulations, 52 Pa. Code § 111.10(a)(1), the only language in that provision requires compliance with the Telemarketer Registration Act, and no other standards are established therein.

[191] Although Count IV (welcome letter and inserts) refers to Sections 54.43(f) and 111.12(d)(1) of the Commission's regulations, 52 Pa. Code §§ 54.43(f) and 111.12(d)(1), both references are to provisions requiring compliance with the Consumer Protection Law and are expressly cited for that purpose.

jurisdiction over allegations that PAWC's actions violated the UTPCPL, this Exception is also denied. As the ALJ determined, it is clear under Pennsylvania law that the Commission does not have jurisdiction over such claims").

In the *Interim Order on Preliminary Objections*, the ALJs rejected the Joint Complainants' argument -- which rejection was not disturbed on interlocutory review -- that the Commission may consider claims under the Consumer Protection Law because it is allowed to incorporate other laws into its regulations. In *Harrisburg Taxicab*, the Commonwealth Court determined that the Commission had authority to enforce provisions of the Pennsylvania Vehicle Code pursuant to its authority under Code Section 1501 that requires the Commission to ensure the safety of utility facilities, such as a taxicab. *Id.* at 293. Because the Joint Complainants sought to rely on the Commission's regulations – not statutory authority – in support of their position that the Commission has jurisdiction to hear cases regarding the Consumer Protection Law, the ALJs properly found that reliance "on its own regulations is not comparable to the Commission's express authority to regulate the safety of taxicabs explicitly granted by the General Assembly in Section 1501." *Interim Order on Preliminary Objections* at 7.

The ALJs further noted that in *MAPSA*, the Commission found that the EDC had created confusion regarding customer choice through its advertising campaign but noted that Code Section 2811 limits the Commission's remedial authority in this area, specifically requiring a referral of findings to the Attorney General.[192] In *MAPSA*, the Commission deferred the issues to OAG, as an administrative agency with more extensive expertise in this area.

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[192] 66 Pa.C.S. § 2811(d)(1).

b. Prices Conforming to Disclosure Statement

The other issue addressed in the *Respond Power Interlocutory Order* concerns the Commission's jurisdiction to regulate the prices of EGSs and its ability to determine whether prices charged by an EGS conform to the Disclosure Statement. As discussed above, the Commission concluded that it does not "have traditional ratemaking authority over competitive suppliers and does not regulate competitive supply rates." *Id.* at 26. As to whether Respond Power's prices conformed to its Disclosure Statement, the Commission found that a sufficient nexus existed between allegations of EGS pricing in the Joint Complaint and the required disclosures under the Commission's regulations to "withstand preliminary objection." *Id.* at 27.

Now that the evidentiary record has been developed in this proceeding, it is clear that any determination as to whether Respond Power's prices conformed to its Disclosure Statement would require the Commission to essentially engage in a cost of service analysis by reviewing various cost elements in the wholesale market and imputing a "just and reasonable" profit margin. It is simply not possible to exercise this authority in a situation where disclosure statements for variable prices do not contain a specific index, formula pricing methodology or ceiling – none of which are required by the Commission's regulations (even following a review and revisions as a result of the Polar Vortex).[193] Therefore, any authority the Commission has to consider whether an EGS's prices conform to their disclosure statements is limited to situations in which a fixed price is established or a specific index, formula pricing methodology or ceiling is set forth for a variable price, and a simple comparison may be made.

[193] *See* 52 Pa. Code § 54.5.

Given the Commission's clear conclusions of its lack of jurisdiction over EGS prices, it logically follows that it does not have the statutory authority to engage in a cost of service analysis, examine wholesale market conditions, determine what an appropriate profit margin is for an EGS or otherwise arrive at a price that it believes the EGS should have charged. Therefore, while the Commission was concerned that it was premature at the preliminary objection phase of the proceeding to dismiss Count VIII (prices conforming to disclosure statement), such dismissal is now warranted. As the ALJs noted in the *Interim Order on Preliminary Objections*, Count III (disclosure of material terms) and Count VII (providing accurate pricing information) of the Joint Complaint adequately address other allegations about Respond Power's Disclosure Statement and whether it complied with the Commission's regulations. *Id.* at 17.

3. Merits of OCA/OAG Allegations

a. Count I – Allegation of Claims of Affiliation with Electric Distribution Companies

In Count I of the Joint Complaint, the Joint Complainants allege that Respond Power's sales representatives: (i) failed to properly identify themselves as affiliated with Respond Power when engaging in door-to-door sales; (ii) failed to clearly state that they are not affiliated with the EDCs when engaging in door-to-door sales; (iii) deceived consumers by claiming to be affiliated with the consumer's EDC; and (iv) deceived consumers in order to induce consumers to switch to Respond Power.[194] The Joint Complainants contend that this alleged conduct violated Sections 111.8 and 111.9 of the Commission's regulations, which require sales representatives to display an identification badge, immediately identify the EGS they represent

[194] Joint Complaint ¶ 30.

and state that they are not working for the EDC.[195] Count I also alleges that Respond Power failed to adequately train and monitor its agents, as required by Sections 111.4 and 111.5 of the Commission's regulations.[196] The Joint Complainants further generally claimed that these alleged activities violated the Consumer Protection Law, which the Commission does not have jurisdiction to enforce.[197]

In response to Question No. 8 in the Joint Complainants' pre-printed testimony form, which asked "Did the sales representatives identify themselves as being with the EGS?; and If so, when?," many consumers testified that the Respond Power representatives properly identified themselves at the outset of the sales transaction. This testimony included a variety of affirmative responses, such as: "as soon as conversation began;" "first thing;" "upon arrival;" and "at the beginning of the call."[198]

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[195] 52 Pa. Code §§ 111.8-111.9.

[196] 52 Pa. Code §§ 111.4-111.5; Joint Complaint, ¶ 31.

[197] Since the Commission has said that it does not have jurisdiction to enforce the Consumer Protection Law and the Joint Complainants have not specifically linked any alleged activities to particular violations of the Consumer Protection Law, Respond Power is not including any argument in its Main Brief to refute such claims. Respond Power reserves the right, however, to respond to these arguments in its Reply Brief if the Joint Complainants include argument in their Main Brief contending that any alleged activities violate particular provisions of the Consumer Protection Law. Rather than continuing to repeat this statement throughout its Main Brief, Respond Power notes that it applies equally to the claims in Counts II (alleged promises of savings), III (disclosure of material terms), IV (welcome letter and inserts), and Count VII (providing accurate pricing information) which also allege violations of the Consumer Protection Law.

[198] *See, e.g.*, Joint Complainants' Consumer Testimony of Marcella Bell ("Yes, she told me she was from Respond Power LLC when I answered the door") (p. 12); Joint Complainants' Consumer Testimony of Brittney Blymire ("Yes, as soon as conversation began") (p. 774); Joint Complainants' Consumer Testimony of Alex Bobsein ("Yes, right away, and he was wearing an ID") (p. 866); Joint Complainants' Consumer Testimony of Robert Clair ("She told me right away what company she was with (Respond Power)) (p. 786); Joint Complainants' Consumer Testimony of Joseph Cochi ("Yes when I answered the door") (p. 124); Joint Complainants' Consumer Testimony of Matthew Colicigno ("Yes. Right away.") (p. 569); Joint Complainants' Consumer Testimony of Toni Dornsife ("Yes. When he arrived.") (p. 481); Joint Complainants' Testimony of Megan Foley ("Yes, immediately") (p. 467); Joint Complainants' Consumer Testimony of Joan Fox ("Yes at beginning of call") (p. 846); Written Consumer Testimony of Daniel Hyatt ("Yes first thing") (p. 911); Joint Complainants' Consumer Testimony of Jennifer Kosydar ("Yes, at the beginning of the call") (p. 159); Joint Complainants' Testimony of Doug Landis ("Yes, when he arrived at my door") (p. 107); Joint Complainants' Consumer Testimony of Michael May ("Yes, at the time he approached my home") (p. 1074); Joint Complainants' Consumer Testimony of Sheryl McCloskey ("He identified who he was and who he worked for upon introduction") (p. 921; Joint Complainants' Consumer Testimony of Chris

While some consumers suggested otherwise, their testimony is uncorrobated hearsay which has been offered to prove the truth of the matter asserted, *i.e.* that Respond Power's sales representatives failed to properly identify themselves, which may not be relied upon by the Commission in making any findings, consistent with the discussion above. Moreover, a review of the responses to Question No. 8 shows that the memories of consumers about transactions that occurred years ago were vague in many instances.[199] Other consumers, in responding to that question and other questions, generally showed a lack of understanding of the various roles of the Commission, the EDCs and the EGSs in Pennsylvania's electric choice program, or were confused by the terminology.[200]

Moreover, Respond Power offered testimony to demonstrate that its sales representatives are provided with training and scripts to use during sales transactions that are designed to ensure that they clearly indicate that they are representing Respond Power.[201] Because of the need for sales representatives to explain the proposed service (*i.e.*, for clarity on which entity will furnish

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Musselman ("Yes, start of call") (p. 1052); Joint Complainants' Consumer Testimony of Kenneth Ream ("upon arrival") (p. 1056); Joint Complainants' Consumer Testimony of Cherryann Reed ("Yes she did, when she came to my home) (p. 276); Joint Complainants' Consumer Testimony of Eric Rodabaugh ("Yes, when I answered the door") (p. 822); Joint Complainants' Consumer Testimony of Michael Rogowski ("Yes up front") (p. 410); Joint Complainants' Consumer Testimony of Cynthia Rumpf ("Yes, he had a name tag on") (p. 944); Joint Complainants' Consumer Testimony of Matthew Weeks ("Yes. When they came to the door.") (p. 430); Joint Complainants' Consumer Testimony of Roberta White ("Yes, right after she said her name.) (p. 1088); and Joint Complainants' Consumer Testimony of Richard Yost ("Yes they did have identification").

[199] *See, e.g.,* Joint Complainants' Consumer Testimony of Phyllis Court ("I don't remember" or "I don't recall" in response to several questions, including Question No 8) (p. 698-699); Joint Complainants' Consumer Testimony of David and Beverly Goodall ("I can't recall, but I don't believe so") (p. 770); and Joint Complainants' Consumer Testimony of Qing Liu ("I'm not sure. It was long ago.") (p. 687).

[200] *See, e.g.*, Joint Complainants' Consumer Testimony of George Barron ("West Penn said we had to choose") (p. 348); Joint Complainants' Consumer Testimony of Jean Buraczewski ("They said they were with Respond Power. I don't know what EGS even is.") (p. 990); Joint Complainants' Consumer Testimony of Nancy and Michael Eyles (Response to Question No. 8 asking whether the sales representatives identified themselves as being with the EGS: "No – Respond Power.") (p. 706); Joint Complainants' Consumer Testimony of Shirley Sauders ("I can't recall. It was sometime in 2011. I thought it was still PP&L.") (p. 735).

[201] Respond Power Statement No. 4-Revised at 7-9.

a bill or be called upon in the event of emergencies),[202] and the overall complexities of the electric choice program, these conversations inherently have the potential to confuse customers as to which entity is selling the generation as compared to the entity that is delivering the product.

Mr. Crist testified that the sales scripts used by Respond Power include, as the very first point, an explanation that the sales representative is working for Respond Power, a licensed EGS.[203] Further, he explained that all door-to-door agents are required to wear apparel bearing the name "Respond Power," as well as an identification badge around their neck that includes a photograph and information clearly indicating they are representing Respond Power.[204] The agents also provide copies of Respond Power's Sales Agreement and Disclosure Statement to prospective customers.[205] The Sales Agreement itself contains six numbered statements, the first of which is an acknowledgement by the customer that the representative is from Respond Power and the second of which reiterates this point that the agent is not from the local utility.[206] As Mr. Crist testified, "[a]ll of this is to make sure that the customer sees that the agents are representing Respond, and not their local utility."[207]

Further, Mr. Wolbrom testified as to the selection process that Respond Power follows in choosing vendors to conduct its sales and marketing activities. Describing the due diligence that is followed prior to engaging with any third party sales vendor, Mr. Wolbrom explained that Respond Power performs an "aggressive and thorough internal online investigation, learning

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[202] Respond Power Statement No. 1 Revised at 9:14-22.
[203] Respond Power Statement No. 4-Revised at 8:12-13
[204] Respond Power Statement No. 4-Revised at 9:14-21.
[205] Respond Power Statement No. 4-Revised at 9:15-17.
[206] Respond Power Statement No. 4-Revised at 10:17-24.
[207] Respond Power Statement No. 4-Revised at 9:22-23.

everything we can about the vendor, its owners, managers and agents before we even speak with them."[208] Only if the vendor passes Respond Power's initial screening process does it engage in an interview to gauge "the integrity, ethics and salesmanship of the vendor."[209]

Mr. Wolbrom also addressed Respond Power's oversight and training program regarding its vendors, testifying that "Respond Power's marketing team maintains outstanding and continuous oversight and communication with all of our vendors."[210] He noted that Respond Power's Marketing Department conducts formal phone calls with every vendor every single week which serve "as the forum where concerns are addressed, training and direction is given, ground feedback is provided to the vendor and issues are discussed from an operational or QC perspective."[211] Coupled with these formal weekly calls, Mr. Wolbrom referred to "informal communications that occur daily, and often hourly," which are used to transmit any information in real-time that our vendors need to know.[212] Additionally, Mr. Wolbrom testified that Respond Power conducts scheduled and unscheduled visits with its vendors to: "(i) provide training; (ii) inspect the premises for quality assurance; and (iii) meet the agents in person for Q&A."[213] He emphasized that Respond Power's Customer Service, Quality Control ("QC") and Marketing Departments "work in concert to ensure that information freely flows among these departments so that vendors are held accountable."[214]

To the extent that the Commission finds that any sales representatives failed to properly identify themselves or misrepresented themselves as being affiliated with the EDC, despite the

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[208] Respond Power Statement No. 1 at 2:6-8.
[209] Respond Power Statement No. 1 at 2:10-11.
[210] Respond Power Statement No. 1 at 5:30-6:1-2.
[211] Respond Power Statement No. 1 at 6:6-8.
[212] Respond Power Statement No. 1 at 6:9-11.
[213] Respond Power Statement No. 1 at 6:20-22.
[214] Respond Power Statement No. 1 at 6:22-24.

extensive training and quality control efforts that are already underway, the Settlement adequately addresses these findings by placing significant additional responsibilities on Respond Power.

Specifically, the Settlement requires every communication by a Respond Power sales representative to begin with a statement indicating that he or she is calling or visiting on behalf of Respond Power and does not represent the customer's local utility.[215] Additionally, the Settlement obligates Respond Power to include a clear and conspicuous display of its brand identification and its independence from the EDC in all advertising to consumers.[216] Further, the third party verification ("TPV") scripts are required by the Settlement to include a question aimed at ensuring that the customer understands that Respond Power is not the EDC.[217] Also, Respond Power has committed to implementing enhanced training and compliance monitoring programs to ensure compliance with all Commission regulations.[218]

b. Count II - Allegation of Claims of Customer Savings

In Count II of the Joint Complaint, the Joint Complainants allege that Respond Power promised savings that did not materialize in violation of various provisions of the Consumer Protection Law.[219] They also claim that Respond Power failed to adequately train and monitor its agents, in violation of Sections 111.4 and 111.5 of the Commission's regulations.[220]

The Joint Complainants' evidence in support of Count II is flawed in several material respects. As they have failed to carry their burden of proof, Count II should be dismissed.

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[215] Settlement, Section IV ¶ 25.B. (Marketing) (p. 15) and Section IV ¶ 25.F. (Door-to-Door Marketing) (pp. 25-26).
[216] Settlement, Section IV ¶ 25.B. (Marketing) (pp. 16-17).
[217] Settlement, Section IV ¶ 25.C. (Third Party Verifications) (p. 18).
[218] Settlement, Section IV ¶ 25.E. (Training) (pp. 22-24) and F. (Compliance Monitoring) (pp.29-33).
[219] Joint Complaint ¶ 40.
[220] 52 Pa. Code §§ 111.4-111.5; Joint Complaint ¶ 41.

Initially, consistent with the discussion above, all of the evidence about alleged "promised savings" is uncorroborated hearsay testimony, which may not be relied upon by the Commission to support any findings. Additionally, many of the witnesses' statements demonstrated confusion about the electric choice program, while others offered vague and inconsistent accounts of their experiences, casting serious doubts on their credibility. Moreover, this uncorroborated hearsay testimony was elicited through an aggressive media campaign and a pre-printed series of questions that led consumers who were in search of refunds to answer the questions a certain way. Further, not only is the hearsay testimony of the consumer witnesses uncorroborated by any evidence in the record, but it is directly refuted by Respond Power's Disclosure Statement and contrary to the training and oversight of vendors and sales representatives that is performed by Respond Power.

i. All evidence offered by the Joint Complainants is uncorroborated hearsay testimony.

As discussed earlier,[221] "hearsay" is defined as an out-of-court statement offered to prove the truth of the matter asserted. *Commonwealth v. Harvey*, 666 A.2d 1108 (Pa. Super. 1995). In this case, some consumer witnesses testified that the Respond Power sales representative told them that they would save money by switching to Respond Power, as compared to the EDC's price to compare ("PTC"). This testimony was offered to prove that their prices later exceeded the PTC contrary to the representations of Respond Power sales representatives and to support the issuance of a refund to consumers. As such, they are out-of-court statements that are offered to prove the truth of the matter asserted and constitute hearsay.

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[221] Respond Power Main Brief at pp. 94-98.

Under Pennsylvania law, the hearsay rule is not a technical rule of evidence but a fundamental rule of law which must be followed by administrative agencies in hearings when a party seeks to place facts crucial to an issue into the record. *Viridian; C.S. Warthman Funeral Home v. GTE North, Inc.*, Docket No. C-00924416 (Order entered June 4, 1992); *Bleilevens v. Commonwealth of Pa. State Civil Service Commission*, 312 A.2d 109 (Pa. Cmwlth. 1973). Importantly, the inclusion of hearsay in the record does not mean that it can form the basis for a finding. To the contrary, 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. See also Yellow Cab* (crucial findings may not be established solely by hearsay evidence); *Jackson* (Commission has expressly refused to make findings of fact on the basis of hearsay without separate evidence corroborating it).

The hearsay testimony of the consumer witnesses was not corroborated by any other evidence admitted in the record. As the parties with the burden of proof and the obligation to establish their case by a preponderance of the evidence, it was incumbent upon the Joint Complainant to produce evidence, such as through the testimony of the sales representatives. No such efforts were made. *See Gruelle c/o Toll Diversified Properties, Inc. v. PPL Electric Utilities Corporation and Blue Pilot Energy, LLC*, Docket No. C-2015-2463573 (Initial Decision issued November 18, 2015).

ii. Consumer witnesses' testimonies are not credible.

Moreover, many of the consumer witnesses' allegations and testimony were confusing, inconsistent and unclear in several regards, casting serious doubts on their credibility regarding a sales pitch that was made several months or several years prior to submission of the testimony. For instance, several consumers claimed to have received neither Respond Power's Disclosure Statement nor the confirmation letter that is sent by the EDC. However, on cross examination,

they agreed that they do not review all of the mail or remember all of the mail, especially dating back many months or years.[222]

By way of further example, Ms. Joanne Blizard acknowledged that she does not have a strong recollection about a sales transaction that occurred over three years ago.[223] Even in her written testimony, she indicated that she did not remember whether the Respond Power representative identified himself as being with an EGS and generally provided very little detail about the transaction.[224] Similarly, Ms. Mary Bagenstose, who enrolled with Respond Power in early 2011, left many of the questions blank on the pre-printed testimony form,[225] and during cross-examination, she testified that she did not remember much at all about her enrollment.[226] Ms. Valerie Hildebeitel likewise did not respond to many of the questions on the pre-printed testimony form,[227] and said that she did not recall her 2012 sales transaction at all.[228] Also, during the evidentiary hearings, Ms. Cynthia Rumpf was not sure if she had enrolled in 2011 or 2012; and although she remembered enrolling, she could not address any particulars of the transaction.[229] Another consumer, Ms. Jodi Zimmerman, testified that she remembers the main topics of the discussion from January 2012 but does not recall the "verbatim of what was said" or the "specific details."[230] Similarly, in trying to recall the sales agreement he was given in 2012, Mr. Michael Rogowski testified that that he "vaguely" remembers it "because it's been so long

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[222] *See, e.g.*, Tr. 160, 220, 484 and 905.
[223] Tr. 328.
[224] Joint Complainants' Consumer Testimony of Joanne Blizard (pp. 897-900).
[225] Joint Complainants' Consumer Testimony of Mary Bagenstose (pp. 166-168).
[226] Tr. 490-491.
[227] Joint Complainants' Consumer Testimony of Valerie Hildebeitel (pp. 619-621).
[228] Tr. 345.
[229] Tr. 120.
[230] Tr. 335-336.

ago."[231] Although Mr. Michael O'Hagan remembered switching to Respond Power, he left many of the questions on the pre-printed form blank and responded to several other questions with "Don't recall."[232]

Testifying for Respond Power, Mr. Crist explained why some consumer complaints are not credible or verifiable, as follows:[233]

> My opinion, based on my over 30 years of experience in dealing with energy customers and thousands of discussions concerning energy pricing, is that some complaints are not credible or verifiable because the topic of energy pricing is not commonplace when compared to discussion about a local sports team, or national news, or the latest electronic gadget. Consumers may be confused and as time passes people tend to forget facts, especially if they were not particularly interesting to them initially.

Also, it is noteworthy that at the same time that Respond Power sales representatives were engaged in sales and marketing activities, customers were also being contacted by other EGSs with sales pitches. For instance, Ms. Colleen Mohr testified that she "was constantly getting letters in the mail and constantly getting phone calls" from other EGSs.[234] Similarly, Ms. Cassandre Urban indicated that "she would receive mailings all the time about switching" from other EGSs.[235] Likewise, Ms. Linda Rose testified that she received offers from other EGSs "constantly."[236] Mr. Michael Hofkin recounted his experience, as follows: "Well, I got so many mailings in the mail from PP&L and from various electric companies, I must have gotten ten different electric companies sending me stuff in the mail." Indeed, the receipt of mailings and

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[231] Tr. 408.
[232] Joint Complainants' Consumer Testimony of Michael O'Hagan, (pp. 110-114); Tr. 772-773.
[233] Respond Power Statement No. 4-Revised at 22:10-15.
[234] Tr. 110.
[235] Tr. 160.
[236] Tr. 627.

offers from other EGS was a common theme throughout much of the consumer testimony.[237] Mr. Joseph Hartz even testified that he and his wife were inundated with EGS offers "all guaranteeing a lower rate."[238] Receiving all of these competing offers naturally made it difficult for consumers to recall specific details about their sales experience with Respond Power.

In addition, consumers were hearing from their EDCs about their ability to choose and EGS and potentially save money. Pursuant to Commission directives set forth in a December 15, 2011 Secretarial Letter,[239] the EDCs sent all residential and small business customers a postcard signed by all five Commissioners (by February 29, 2012) containing the simple message: "Shop, Switch, Save."[240] Also, starting in November 2012, the EDCs mailed to all residential and small business customers a Commission-endorsed tri-fold flyer emphasizing the possibility of saving by choosing an EGS. It offered specific examples of savings.[241] Many consumers in this proceeding confirmed receipt of those mailings and specifically recalled that they contained references to saving money.[242] Indeed, Ms. Marie O'Reilly testified that the EDC is always telling customers that they can "look for cheaper electricity."[243]

Further, as Mr. Crist testified, every EDC website contains an educational section that reviews the electric choice program and provides instructions on how to shop and compare. He noted that the "EDC websites generally explain that the selection of an EGS may result in

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[237] *See, e.g.*, 224, 246, 277, 319, 361, 748-749, and 806; Joint Complainants' Consumer Testimony of Harold Whymeyer (p. 884), Exh. HAW-4.
[238] Tr. 103.
[239] *Investigation of Pennsylvania's Retail Electricity Market*, Docket No. I-2011-2237952 (Secretarial Letter dated December 15, 2011).
[240] Respond Power Statement No. 4-Revised at 24:15-29; Exhibit JC-3.
[241] Respond Power Statement No. 4-Revised at 24:15-29; Exhibit JC-4. *See Investigation of Pennsylvania's Retail Electricity Market*, Docket No. I-2011-2237952 (Order entered March 1, 2012, at pp. 7-12) and (Order entered June 21, 2012).
[242] *See, e.g.*, 81, 86, 136, 160-161, 666-667, 926, 1117-1118.
[243] Tr. 224. 463, 570, 638-639,

savings."[244] He gave specific examples from different EDC websites including one that simply states: "You may save money."[245] From his review of the EDC's websites, Mr. Crist concluded that he did not believe that they are "deliberately attempting to shield consumers from the fact that a shopping customer may not save money," and "it is clear...that they are not guaranteeing savings."[246] Yet, he offered his opinion that consumers who "review the EDC website may form an impression that they WILL save money."[247]

Additionally, the Commission's shopping website, www.PaPowerSwitch.com, has always contained a message about potential savings.[248] As Mr. Crist noted, on the homepage is the message "you may be able to save money."[249]

As a result of all of these sales and educational efforts, customers were consistently hearing about the opportunity to save money if they switched to an EGS. Mr. Crist testified that rather than Respond Power sales representatives creating expectations of savings, that "expectation may have been created from many legitimate and public sources, with far more promotional clout and exposure than a conversation with a single sales agent."[250] Consumers entered the conversation with Respond Power sales representatives with the mindset that this was a money-saving opportunity. As some consumer witnesses testified: why else would they shop?[251] Customers heard what they wanted to hear or what they expected to hear based on their prior exposure to sales pitches and consumer education campaigns.

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[244] Respond Power Statement No. 4-Revised at 23:24-27.
[245] Respond Power Statement No. 4-Revised at 24:6-7.
[246] Respond Power Statement No. 4-Revised at 24:8-11.
[247] Respond Power Statement No. 4-Revised at 24:11-12.
[248] Settlement, Exhibit A, Stipulation of Facts ¶ 40.
[249] Respond Power Statement No. 4-Revised at 24:18-19.
[250] Respond Power Statement No. 4-Revised at 24:25-27.
[251] *See, e.g.*, Tr. 260.

The extensive media campaign conducted by the OAG also damaged the credibility of the consumer testimony. Pleading with consumers to contact her office and file complaints, Attorney General Kane referred to "price gouging" and consumers being "improperly overcharged for their electricity."[252] She also issued a press release when the Joint Complaint was filed noting the allegations that EGSs "had enticed consumers by promising low or 'competitive' rates if the consumer switched," and her efforts to get refunds for those consumers.[253] Many consumer witnesses acknowledged hearing about this proceeding through Attorney General Kane's media outreach.[254] Indeed, Mr. Robert Becker testified that it was this outreach that really prompted him to complain.[255] Several consumers also testified as to their expectation for a refund,[256] with some noting that they had discussed this subject with the Joint Complainants,[257] and others characterizing this proceeding as a class action lawsuit.[258] Without question, the testimony of these selected witnesses was undoubtedly tainted by the overly-aggressive pursuit of potential victims by the Joint Complainants.

Further damaging the credibility of the consumer witness testimony were the forms sent to them by the Joint Complainants that contained a leading question aimed at eliciting a response that Respond Power sales representatives guaranteed savings. In the statements submitted by the Joint Complainants, Question No. 12.a. asks: "Did the EGS salesperson guarantee savings?" and

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[252] RP Exhibit No. 38, Exhibit 9 (Press Release issued in February 2014).
[253] RP Exhibit No. 38, Exhibit 9 (Press Release issued in June 2014).
[254] *See, e.g.*, 111, 130, 161, 186, 205, 224-225, 246, 271-272, and 361,
[255] Tr. 319. Ms. Marian Campbell likewise indicated that she contacted the OAG because of reading articles in the newspaper about the action against Respond Power. Tr. 571.
[256] *See, e.g.*, 186, 319-320, 640, 999, and 1118.
[257] *See, e.g.*, 205, 241, 610-611, 662, and 681-682.
[258] *See, e.g.*, Tr. 617, 627 and 640.

Question No. 12.b. asks each witness: "If yes, please explain." This same question appears in I&E's statements as Question Nos. 11.a. and 11.b.

It is well-settled that a party may not lead its own witness with suggestive questions. *See In Re Rogan Estate*, 404 Pa. 205, 214, 171 A.2d 177, 181 (1961); *Pascone v. Thomas Jefferson Univ.*, 516 A.2d 384, 388 (Pa. Super. 1986).[259] The prohibition against the use of leading questions on direct examination equally applies to administrative proceedings. *See Harbison v. W.C.A.B. (Donnelley)*, 496 A.2d 1306, 1309 (Pa. Cmwlth. 1985) (impermissible for counsel to literally place the sought-after answers into the witnesses' mouths). Moreover, answers to inappropriate leading questions are not admissible and may not be used to support the examining parties' case. *Wilson v. A.P. Green Indus., Inc.*, 2002 Pa. Super. 294, 807 A.2d 922, 926 (Pa. Super. 2002).

A leading question has been defined as one that puts the desired answer in the mouth of the witness. *Cmwlth. v. Dreibelbis*, 493 Pa. 466, 476, 426 A.2d 1111, 1116 (1981). The guaranteed savings question does exactly that, especially by following up with a second part to explain if the answer was yes. While other questions are more general, asking the consumer to describe the problem or their interactions with the sales representative, the guaranteed savings question makes it clear to the consumer witness that he or she is expected to answer "yes." Despite many consumers suggesting nothing about promised savings in response to the prior more general questions, most of them responded "yes" to the guaranteed savings question, including consumers who did not even switch to Respond Power or claimed that they did not

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[259] *See also* Pa.R.E. 611(c).

switch to Respond Power. Even those who mentioned promises of savings earlier in their testimony had access to the full set of written questions prior to responding to any of them.

The consumer witnesses were generally aware that the Joint Complainants are trying to recover money for them from Respond Power based on allegedly misleading statements by Respond Power regarding pricing and savings. Asking the consumers, "Did the EGS salesperson guarantee savings?" clearly suggests that an affirmative answer is both desired and the one most likely to produce a refund for the witness. Had the question been phrased appropriately, consumers would not have been encouraged to answer in the affirmative, but rather would have provided their actual, unprompted recollection of the facts.

The Joint Complainants could have easily elicited relevant testimony without signaling the desired answer. For instance, they could have asked if the EGS salesperson talked about savings. As of the time when the consumer testimony was served on Respond Power, it was no longer possible to re-word the question since the desired answer that the EGS salesperson guaranteed savings had already been suggested to each witness. In essence, the Joint Complainants -- as they have throughout this proceeding -- manipulated the consumer testimony to match the worst-case allegations of the Joint Complaint and suggested that the tainted evidence is applicable to an entire class of customers, rather than allowing the evidence to simply speak for itself on a consumer-by-consumer basis.

iii. The uncorroborated hearsay that was generally not credible for a variety of reasons was clearly refuted by the Disclosure Statement.

Not only is the hearsay testimony of the consumer witnesses uncorroborated by any evidence in the record, it is directly refuted by the Disclosure Statement. Regardless of any impression that the consumer witnesses may have been under based on EDC and Commission educational materials, media campaigns of Attorney General Kane and their conversations with

Respond Power and other EGS sales representatives, the Disclosure Statement left no doubt as to the variable nature of the contract and about the fact that the price would vary on the basis of market conditions and would have no ceiling. The Disclosure Statement clearly provided that although it is Respond Power's goal to save customers money, it cannot guarantee savings.

It is beyond dispute that Respond Power's Disclosure Statement did not guarantee savings. To the contrary, pointing to wholesale market fluctuations and conditions, it expressly stated that Respond Power could *not* guarantee savings. Specifically, the Disclosure Statement explained that: (i) the price may vary from month to month; (ii) the rate is set by Respond Power; (iii) the rate reflects Respond Power's generation charges based on the PJM Day-Ahead Market, Installed capacity, transmission losses, estimated state taxes, other costs and a profit margin; and (iv) the consumer may contact Respond Power for its current variable rate. The Disclosure Statement also indicated that Respond Power's goal is to charge a price that is less than what the consumer would have paid to the EDC, but that it could not guarantee savings.[260] Finally, the Disclosure Statement provided that the variable rate customers could cancel the agreement, without a termination fee, at any time.[261]

Respond Power does not dispute the importance of the oral statements of its sales representatives. *See Kiback Order at 24-25.* What Respond Power disputes is the Commission's ability to rely on a consumer's hearsay testimony of those oral statements when that is the only evidence in the record to support the claims of what was said, especially when those self-serving claims are directly refuted by other evidence in the record. Given that the written contract contradicts what some consumer witnesses claim the sales representatives told them, it is the

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[260] RP Exhibit No. 1, Paragraph 1, Basic Service Prices, Electric, Variable Rate.
[261] RP Exhibit No. 1, Paragraph 4, Cancellation Provisions.

terms and conditions of service clearly explained in the Disclosure Statement that are controlling. As Mr. Crist testified, the written words of the Disclosure Statement must prevail over memories of what consumers believed that a sales agent told them, particularly due to the many terms that are important to a transaction involving the selection of an EGS.[262]

Verbal discussions between a sales agent and a prospective customer inherently have the potential for a misunderstanding, especially with the amount of information that must be shared during a sales pitch for electric generation supply. For that reason, under Pennsylvania law, particularly since these conversations inevitably lead to a "he said, she said" debate when disputes later arise, the written documentation must be what is relied upon rather than general statements made during a sales pitch. *See Steuart v. McChesney*, 498 Pa. 45, 48, 444 A.2d 659, 661 (Pa. 1982). (In Pennsylvania, "the intent of the parties to a written contract is to be regarded as being embodied in the writing itself"). *See also Union Storage Co. v. Speck*, 194 Pa. 126, 133, 45 A. 48, 49 (Pa. 1899). ("All preliminary negotiations, conversations and verbal agreements are merged in and superseded by the subsequent written contract...."). To award a complainant relief on the basis of alleged oral representations is contrary to Pennsylvania law and would render the contract meaningless.

As the Commission has recognized, consumers bear some responsibility to make choices that are appropriate for their individual circumstances. *William Towne v. Great American Power, LLC*, Docket No. C-2012-2307991 (Opinion and Order entered October 18, 2013 at 22). "A person of age is presumed to know the meaning of words in a contract, and if, relying upon his own ability, he enters into an agreement not to his best interests he cannot later be heard to

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[262] Respond Power Statement No. 4-Revised at 23:10-17.

complain that he was not acquainted with its contents and did not understand the meaning of the words used in the instrument which he signed." *Design & Development, Inc. v. Vibromatic Mfg, Inc.*, 58 F.R.D. 71, 73 (E.D. Pa. 1973).

Indeed, the Joint Complainants would have the ALJs and the Commission believe not only that all consumers were similarly mislead by Respond Power's sales agents but also that all consumers were equally ignorant of the clear and concise terms of Respond Power's Disclosure Statement. Respond Power submits that the Joint Complainants do not give consumers enough credit for being savvy shoppers who are intellectually capable of understanding the Disclosure Statement. Certainly, even if a consumer was misled by an agent, the consumer could have sought clarification from Respond Power upon reading the Disclosure Statement and even exercised the three-day rescission option.

iv. Respond Power trained its vendors and sales representatives not to guarantee savings.

In addition to the vendor selection process, training programs and QC measures explained by Mr. Wolbrom and discussed above,[263] Respond Power went to great lengths to ensure that customers were not promised or guaranteed savings. Specifically, Respond Power trained its sales representatives to explain that after the initial rate, the variable price can change on the basis of several factors, including unknown and volatile wholesale market conditions. Clearly, Respond Power did not authorize or encourage its sales representatives to promise any savings compared to the EDC's PTC. As Mr. Wolbrom testified:[264]

> Specific to variable rates, all agents are trained and instructed to never guarantee savings, to explain the potential for variance and volatility in price considering the

[263] Respond Power Main Brief at pp. 94-98
[264] Respond Power Statement No. 1 at 7:4-8.

> rate will be based on the wholesale market, to note the ability to cancel without a fee and to cover the terms and conditions contained in the Disclosure Statement.

He also noted that the volatility and inherent variability of rates are "driven home during trainings and are a part of all sales scripts."[265] Mr. Wolbrom stressed that Respond Power does not guarantee savings, and noted that in marketing materials and sales scripts/presentations, the Company uses phrases such as "may save," "possibly save," "hope to save" and "potentially save."[266] He further testified that references to "historical savings" in marketing materials were factual.[267]

During cross-examination of Mr. Wolbrom, two marketing materials were presented that referred to savings without Respond Power's normal qualifying language.[268] Although Respond Power later stipulated to the authenticity of these documents, Mr. Wolbrom could not confirm that either had been used by Respond Power vendors. He only knew that they had not been used since he has been in the position of Chief Marketing Officer since April 2012.[269] The Joint Complainants did not establish that they were in use during 2012 or 2013, and in fact, one of the consumers had signed up in 2011 and presumably received the document at that time.[270] It is unclear when the other consumer may have received the document since there was a discrepancy in the agent name and number between the marketing material and the sales agreement.[271] Mr. Wolbrom emphasized that the oversight of vendor materials has significantly improved since

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[265] Respond Power Statement No. 1 at 7:20-21.
[266] Respond Power Statement No. 1 at 9:6-9.
[267] Respond Power Statement No. 1 at 11-30-12:2; Exhibit EW-1.
[268] Wolbrom Cross Examination Exhibits 1 and 2.
[269] Tr. 1319-1320.
[270] Wolbrom Cross Examination Exhibit 2; Tr. 1308-1310.
[271] Tr. 1301-1302, 1320.

2012, and that vendors are no longer permitted to produce their own materials.[272] In any case, as Mr. Wolbrom pointed out, customers did experience savings in 2011.[273] He also emphasized that some customers were previously served by other EGSs, so the expected savings may have been in relation to what they would have paid those entities.[274]

In addition to Mr. Wolbrom's evidence showing historical savings, Mr. Small provided several examples of consumers who experienced low rates during in 2011 and 2012.[275] Indeed, many consumer witnesses conceded that they saved money in some months they were served by Respond Power or that they had no complaints about their prices for many months or years prior to 2014.[276]

v. No further remedies are warranted.

Even if the Commission determines, on the basis of uncorroborated hearsay, that Respond Power engaged in unlawful marketing through oral representations of its sales representative, the Settlement addresses such findings. Specifically, the Settlement establishes a refund pool that gives an opportunity for all customers of Respond Power to claim a refund. Every customer who informally complained to the Commission in early 2014 would automatically receive a refund, while all other customers served by Respond Power in January through March 2014 would be able to claim a refund (regardless of whether they even believe that they were in any way misled).[277] Also, the Settlement bars Respond Power from offering

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[272] Tr. 1320-1322.
[273] Tr. 1322. *See also* Exhibit EW-1, attached to Respond Power Statement No. 1.
[274] Respond Power Statement No. 1 at 10:2-6.
[275] Respond Power Statement No. 4-Revised at 13-17; Exhibit AS-4-Revised.
[276] *See, e.g.*, Tr. 271:9 ("at first they were low"); 297 (no complaints in 2012 or 2013); 407 (satisfied with prices during 2012 and 2013); 467 (rate was lower than EDC rate at the beginning); and 541-542 (satisfied in 2012 and saw price rising in 2013 but stayed with Respond Power).
[277] Settlement, Section III ¶¶ 20-21 (Refunds) (pp. 8-10).

variable price contracts to new customers for two years and contains numerous provisions designed to enhance Respond Power's training and quality control program, including specific sales scripts that may not use terms such as "competitive" or "savings" and must emphasize the volatility of variable prices.[278] Moreover, the Settlement provides for a civil penalty of $125,000 and a minimum contribution to EDC hardship funds of $25,000, which more than adequately address any findings of violations under Count II.[279]

Thus, the remedies to which Respond Power has voluntarily agreed in the Settlement far exceed any remedies available to the Joint Complainants. The Joint Complainants bear the burden of proof in this proceeding and they simply have not met it, except perhaps -- when viewed in the light most favorable to the Joint Complainants -- with regard to a limited number of consumers who actually provided testimony in this proceeding.

As explained above, the Joint Complainants cannot reasonably argue that Respond Power should be penalized on a mere assumption that all consumers were similarly misled by Respond Power's sales agents. Along similar lines, the Commission lacks the authority to rely upon "pattern and practice" evidence to make such a determination and the authority to order refunds and injunctive relief. The Settlement should accordingly be approved without modification. It represent that greatest relief that the Commission can lawfully award in this proceeding, and that relief is only available because of Respond Power's voluntary agreement to provide the relief in order to get this matter behind it and move forward in its business.

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[278] Settlement, Section IV ¶ 25.A. (Product Offering) (p. 12) and Section IV ¶ 25.B. (Marketing) (pp. 12-17).
[279] Settlement, Section III ¶ 23 (Civil Penalty) (p. 11) and Section III ¶ 21 (Refunds) (pp. 8-10).

c. Count III - Allegation Regarding Failure to Disclose Material Terms

In Count III of the Joint Complaint, the Joint Complainants allege that Respond Power failed to disclose material terms and conditions of the contracts to consumers. The specific allegations are that: (i) Respond Power's sales representatives did not inform some customers that they were signing up for a variable rate; (ii) the Disclosure Statement did not state whether the price was fixed or variable; and (iii) some Sales Agreements did not indicate that they were for fixed or variable rate contracts.[280] The Joint Complainants cited several Commission regulations in Count III, including: Sections 54.5(b) and 111.11, which require EGSs to provide customers with a copy of the Disclosure Statement;[281] Section 111.12(d)(4), which requires EGSs to provide accurately and timely information to customers about their services and products;[282] Section 54.4(a), which requires EGS prices billed to reflect the marketed prices and the agreed-upon prices in the Disclosure Statement;[283] Section 54.4(c)(2), which requires EGSs offering a variable price plan to include the conditions and limits on price variability in their Disclosure Statements;[284] and Section 54.7(a), which requires EGS's advertised prices to reflect the prices in their Disclosure Statement and billed prices.[285] They also claim that Respond Power failed to adequately train and monitor its agents, in violation of Sections 111.4 and 111.5 of the Commission's regulations.[286]

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[280] Joint Complaint ¶¶ 43 and 44.
[281] 52 Pa. Code §§ 54.5(b) and 111.11.
[282] 52 Pa. Code § 111.12(d)(4).
[283] 52 Pa. Code § 54.4(a).
[284] 52 Pa. Code § 54.4(c)(2).
[285] 52 Pa. Code § 54.7(a); Joint Complaint ¶¶ 46-50; the Joint Complainants also claim the alleged conduct violated the Consumer Protection Law.
[286] 52 Pa. Code §§ 111.4-111.5; Joint Complaint ¶ 53.

As explained by Mr. Crist, Respond Power used a one-page double-sided Sales Agreement and Disclosure Statement. On the Sales Agreement, which is the first page of the document, sales representatives were required to check either the fixed rate or variable rate boxes. Right above the customer's signature is a statement verifying that the customer has received a copy of the Disclosure Statement. The back of the document served as the Disclosure Statement and contained the terms and conditions of service for both fixed and variable rates.[287]

Additionally, Mr. Wolbrom testified that Respond Power reviews all product offerings with its vendors, managers and agents. With respect to variable prices, agents are trained and instructed to explain the potential for variance and volatility since they will be based on the wholesale market.[288] He further explained that as part of the training and sales scripts, agents are instructed to highlight "the inherent variability of rates and the no-cancel fee element of the variable product, and the price protection and cancel-fee elements of a fixed rate product."[289]

Indeed, many consumers testified in this proceeding that they were aware that they had agreed to a variable price contract.[290] The customer service representative who assisted Ms. Lisa Hodge expressly cautioned her about the volatility of variable rates, noting that there is no way to know what "next month's variable rate is."[291] She added that the "variable rates are going to change, period"[292] and warned Ms. Hodge that she would "need to keep an eye on it to make sure that it doesn't go too high where" she can't afford it.[293] Ms. Hodge opted for the variable rate

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[287] Respond Power Statement No. 4-Revised at 10-11.
[288] Respond Power Statement No. 1 at 7:1-2 and 4-7.
[289] Respond Power Statement No. 1 at 7:15-21.
[290] *See, e.g.*, 297, 498, 559, 787, 949 and 969.
[291] Tr. 439:8-10.
[292] Tr. 439: 19-20.
[293] Tr. 440:6-8.

anyway because it had no cancellation fee.[294] Other customers who indicated that they did not realize or understand that they had entered into a variable price contract had ample opportunities to become aware of that had they reviewed Respond Power's fluctuating prices on their electric bills. Many of them testified, however, that they did not review the EGS charges on their bills or even know where to look on their bills to find the EGS charges,[295] with one consumer suggesting that it seemed like "they were hiding" them.[296]

Some customers believed that they were on a fixed rate because they selected on one www.PaPowerSwitch.com and then went to Respond Power's website to enroll. For instance, this is exactly what happened to Mr. David Wenger, who used his zip code to compare prices available on www.PaPowerSwitch.com and chose Respond Power. However, when he enrolled on Respond Power's website, he neglected to review the terms and conditions.[297] Had he reviewed the terms and conditions, he would have learned that Respond Power only offered a variable price through online enrollment.[298] As Mr. Small explained, prior to October 2014, www.PaPowerSwitch.com did not allow a consumer to directly link to the product. Rather, if consumers saw a product that they wanted to select, they clicked on the EGS's name and were directed to the EGS's website. It has since been changed, however, to permit a consumer to directly link to a particular product offered by the EGS.[299] Therefore, Respond Power should not be held responsible for situations where consumers believed they were linking directly to the product but were actually only be directed to the Company's website.

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[294] Tr. 445.
[295] Tr. 224, 336, 796, 908 and 1061.
[296] Tr. 938.
[297] Tr. 880-882.
[298] Respond Power Statement No. 3-Revised at 9:24.
[299] Respond Power Statement No. 12:21-27; See Secretarial Letter dated October 21, 2014, which is not docketed but is available for review at the following link: http://www.puc.pa.gov//pcdocs/1320485.doc.

Even despite all of the shortcomings in the Joint Complainants' evidence on variable price contract disclosure, to the extent that the Commission finds that some consumers were not told by the Respond Power sales representatives that they were enrolled on a variable price contract, various provisions of the Settlement adequately address such a finding. In particular, Respond Power points to the moratorium on variable price marketing and the enhanced disclosures regarding variable prices that it agreed to as part of the Settlement.[300]

d. Count IV – Allegation Regarding Welcome Letters

In Count IV of the Joint Complaint, the Joint Complainants allege that Respond Power sent Welcome Letters and Inserts to consumers that contained statements violating the Consumer Protection Law.[301] As Count IV alleges only violations of the Consumer Protection Law and contains no allegations of violations of the Code, Commission regulations or Commission Orders, it should be dismissed in its entirety.

Further, in its Answer, Respond Power acknowledged that the referenced Welcome Letters and Inserts had been in use over a few-month period more than two years prior to July 2014 and noted that upon learning of their use by a vendor, it immediately pulled them back and prohibited their continued distribution. Mr. Wolbrom's testimony confirmed that no such materials have been in use since April 2012.[302] In any event, the Joint Complainants have failed to offer testimony from any consumer witnesses who received these particular documents and in some way relied upon them in their decision to switch to Respond Power and, as such, have

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[300] Settlement, Section IV ¶ 25.A. (Product Offerings). (p. 12); Section IV ¶ 25.B (Marketing) (pp. 12-17); and Section IV ¶ 25.D (Disclosure Statement) (pp. 20-22).
[301] Joint Complaint ¶¶ 55 and 58-60.
[302] *RP Exhibit No. 40* ¶ 55; *Tr. 1319-1320.*

failed to satisfy their burden of proof. Moreover, they were in use during a time when Respond Power's prices did result in savings to consumers.[303]

Any concerns about these Welcome Letters and Inserts have been fully addressed by the Settlement. In particular, specific provisions of the Settlement would prohibit Respond Power from referring to savings at all, except in the context of an explicit, affirmative guaranteed savings program.[304]

e. Count V – Allegation of Slamming

In Count V of the Joint Complaint, the Joint Complainants allege that some customers were switched to Respond Power without authorization, in violation of Code Section 2807(d)(1)[305] and Section 54.42(a)(9) of the Commission's regulations.[306]

Before addressing the specific consumer witness allegations, Respond Power posits that the Joint Complainants are relying on a legally flawed theory in pursuing these allegations. Testifying for the Joint Complainants, Ms. Alexander opined: "EGSs have an obligation under Pennsylvania's regulations to take the necessary steps to avoid enrollment by a person who is not authorized to enroll...Respond Power has failed to take responsibility for enrollment by individuals that are listed on the EDC's bill."[307] She reiterated on cross-examination her view that an account being enrolled by another adult in the household "would not obviate the claim of slamming."[308]

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[303] Tr. 1322; Respond Power Statement No. 1 at 11:30-12:2 and Exhibit EW-1.
[304] Settlement, Section IV ¶ 25.B. (Marketing) (p. 11-12).
[305] 66 Pa. C.S. § 2807(d)(1).
[306] 52 Pa. Code § 54.42(a)(9).
[307] OAG/OCA Statement No. 1-SR at 23:11-15.
[308] Tr. 1195.

Ms. Alexander's interpretation or understanding of the Commission's regulations is simply incorrect. Section 57.175 of the Commission's regulations establish the ability of a customer to "identify persons authorized to make changes to the customer's account" by providing "the EDC with a signed document identifying by name those persons who have the authority to initiate a change of the customer's EGS."[309] This regulation does not, however, impose any obligation on the EGS to secure a signed document or otherwise confirm with the EDC that the person making the change has been authorized by the customer to make such changes. In *Binh Tran v. Respond Power LLC,* Docket No. C-2014-2417540 (Order entered July 30, 2015) ("*Tran*"), the Commission reversed an Initial Decision of the ALJ that had placed that burden on the Company. The Commission appropriately dismissed the complaint since the Commission's regulations do not require an EGS to take this step during the enrollment process.

Respond Power's practice, as demonstrated time and time again through TPVs, is to ask the person requesting the change if he or she is over 18 years of age and authorized to make decisions on the account, which the Commission found was sufficient in *Tran.* In addition, EDCs send confirmation letters to customers upon receipt of the EGS' notice of enrollment, which is also intended to avoid unauthorized switches and ensure that consumers are aware of changes made to their accounts.[310] Further, the Commission has taken steps to enhance the visibility of EGS charges on EDC consolidated bills, which is yet another measure that should help with consumer awareness regarding account changes. *See Investigation of Pennsylvania's Retail Electricity Market; Joint Electric Distribution Company-Electric Generation Supplier Bill,* Docket No. M-2014-2401345 (Order entered May 22, 2014).

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[309] 52 Pa. Code § 57.175.
[310] 52 Pa. Code § 57.173(2).

Moreover, Respond Power presented evidence showing that despite allegations of being slammed, customers repeatedly discovered that another adult member of the household authorized the switch or that they had simply forgotten that they made the switch, as shown by the specific examples discussed below. In each of these situations, Respond Power demonstrated that no slam had occurred and that certainly no refund is warranted.

Mr. Steven Martin claimed to have been switched to Respond Power without his authorization.[311] During the hearings, Respond Power presented a TPV recording, which showed that Mr. Martin had authorized the switch.[312] He explained that although he did not remember ever doing it, he now agrees that he did in fact authorize Respond Power to enroll his account.[313]

Ms. Tina Andrews also testified that she never signed up with Respond Power.[314] During the hearings, Respond Power presented a TPV recording showing that Ms. Andrew's son had authorized the enrollment and had indicated that he was authorized to make this change.[315] Therefore, Ms. Andrew's account was not switched without authorization.

Mr. Donald Johnson claimed that he did not sign up with Respond Power in November 2013, and that his signature was only intended to obtain a rate comparison.[316] He further testified that he did not receive a Disclosure Statement from Respond Power or a confirmation letter from the EDC; however, he acknowledged that he does not review all of his mail. He also indicated that he did not see Respond Power charges on his bills because he does not review the

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[311] Joint Complainants' Testimony of Steven Martin (p. 564).
[312] *Tr. 400-403; RP Exhibit No.24; RP Exhibit No. 24-A (Proprietary).*
[313] Tr. 396.
[314] Joint Complainants' Consumer Testimony of Tina Andrews (p. 955).
[315] Tr. 149-152; RP Exhibit No. 32; RP Exhibit No. 32A (Proprietary).
[316] *Joint Complainants' Consumer Testimony of Donald Johnson (p. 419).*

bottom section of the bills.[317] He did not complain about the switch to Respond Power until six months later in May 2014.[318] Given Mr. Johnson's lack of attention to his electric account, and his delay in raising a dispute his testimony about his enrollment is not credible. Moreover, he did not complain within two billing cycles so as to be eligible for a refund.

Mr. Raymond Weaver testified that his account was switched without authorization. During the hearings, Respond Power presented a TPV recording demonstrating that Mr. Weaver's wife had enrolled the account, claiming to be authorized to make a change on the account.[319] Therefore, Mr. Weaver's account was not changed without authorization.

Ms. Teresa Cole testified that she did not sign up with Respond Power.[320] However, at the hearings, Respond Power introduced an "Electric Letter of Authorization," which was electronically signed by Ms. Cole on September 20, 2012.[321] Although Ms. Cole referred to a conversation with a friend's neighbor about enrolling, she indicated that she had not provided this individual with her account number. As this information was contained on the authorization, Respond Power properly made the switch. Ms. Cole also claimed to have never received a confirmation letter from the EDC, which it is required to provide pursuant to the Commission's regulations by the end of the next business day following receipt of the customer's selection from the EGS.[322] In any event, Ms. Cole did not raise a dispute within two billing cycles, which is required to qualify for a refund under the Commission's regulations.[323]

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[317] Tr. 220.
[318] Joint Complainants' Consumer Testimony of Donald Johnson (p. 420).
[319] Tr. 391-393; RP Exhibit No. 26; RP Exhibit No. 26-A (Proprietary).
[320] Joint Complainants' Consumer Testimony of Teresa Cole (p. 1096).
[321] RP Exhibit No. 36.
[322] 52 Pa. Code § 57.173(2).
[323] 52 Pa. Code § 57.177(b).

Ms. Cynthia Clapperton also claimed that she did not enroll with Respond Power and that she thought she was still receiving electric generation service from the EDC.[324] During the hearings, Respond Power played a TPV recording, which disclosed that Ms. Clapperton had authorized a switch to Respond Power.[325] Therefore, she was not slammed by Respond Power.

Although Mr. Paul Hassinger enrolled with Respond Power in 2011, he testified that he did not re-enroll with Respond Power when he moved in October 2012.[326] He claimed to have received no confirmation letter from the EDC in October 2012, and he testified that he did not review his bills. He did not complain until a year and a half later in April 2014.[327] Given Mr. Johnson's lack of attention to his electric account, and his failure to promptly raise this dispute, his testimony about his enrollment is not credible. Moreover, he did not raise a dispute within two billing cycles so as to qualify for a refund.

Mr. Wayne Womelsdorf testified that he did not sign up with Respond Power.[328] However, at the hearings, Respond Power presented evidence showing that his wife had authorized the switch to Respond Power, indicating to the TPV representative that she was authorized to make a change on the account.[329] Mr. Womelsdorf explained that he did not see the confirmation letter from the EDC or the bills containing Respond Power charges because his wife handles those matters. Therefore, Mr. Womeldorf's account was not switched to Respond Power without authorization.

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[324] *Joint Complainants' Consumer Testimony of Cynthia Clapperton* (p. 837).
[325] Tr. 651-652; RP Exhibit No. 29; RP Exhibit No. 29-A.
[326] Joint Complainants' Consumer Testimony of Paul Hassinger (p. 463).
[327] EGSs are only required to maintain verification records for six billing cycles under 52 Pa. Code § 111.7(b)(4).
[328] Joint Complainants' Consumer Testimony of Wayne Womelsdorf (p. 195).
[329] Tr. 739-741; RP Exhibit No. 18; RP Exhibit No. 18-A (Proprietary).

Although Ms. Shirley Sauders does not remember signing up with Respond Power, she recalled receiving a card hanging on her door one day that she thought was from PP&L, which she now believes may have been from Respond Power.[330] She has no recollection of any interactions with Respond Power or receiving a confirmation letter from the EDC, and she only reviews her EDC bill to see how much she owes.[331] She complained about the bill in the Spring of 2014.[332] As Ms. Sauders started receiving service from Respond Power in July 2011 and raised no disputes for almost three years, her slamming claim is not credible, and she has no entitlement to a refund.

Mr. Fred Jones testified that he was slammed by Respond Power.[333] During the hearing, Respond Power demonstrated through a TPV recording that Mr. Jones authorized the switch.[334] While Mr. Jones initially claimed that he did not know if that was his voice, he later acknowledged that it was him on the recording.[335]

Mr. Walter Stelma claimed to have been slammed by Respond Power. However, as Mr. Small testified, he listened to the TPV where Mr. Stelma authorized the enrollment and reviewed a Sales Agreement signed by Mr. Stelma. Moreover, BCS reviewed the case information and declared that he was not switched without authorization.[336]

Ms. Marsha Lewis also testified that she was switched to Respond Power without her authorization.[337] Respond Power waived cross-examination of Ms. Lewis, based upon the

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[330] Joint Complainants' Consumer Testimony of Shirley Sauders (p. 734); Tr. 889.
[331] Tr. 890.
[332] Joint Complainants' Consumer Testimony of Shirley Sauders (p. 734).
[333] I&E Consumer Testimony of Fred Jones (p. 24).
[334] Tr. 1028-1030; RP Exhibit No. 4; RP Exhibit No. 4-A (Proprietary).
[335] Tr. 1031.
[336] Respond Power Statement No. 3-Revised at 10:22-27; AS Exhibit-2.
[337] I&E Consumer Testimony of Marsha Lewis (p. 118).

stipulation by I&E that: (i) a TPV was performed; (ii) Ms. Lewis authorized the enrollment; (iii) she exercised her right to rescind the selection; (iv) she was never switched to Respond Power; and (v) she was never billed any charges by Respond Power.[338] Therefore, Ms. Lewis was not slammed by Respond Power.

Ms. Rachel Butterworth testified that she did not sign up with Respond Power and that she did not even recall having any interactions with Respond Power. She only recalled agents visiting her from another EGS.[339] At the hearing, Respond Power played a TPV recording, during which Ms. Butterworth had clearly authorized the enrollment.[340] She acknowledged at the hearing that it was her voice on the recording.[341] Therefore, she consented to the switch to Respond Power.

Ms. Evelyn Somerville likewise claimed to have been switched to Respond Power without authorization.[342] During the hearing, Respond Power produced a TPV recording of Ms. Somerville authorizing the switch.[343] She did not dispute that it was her voice on the recording.[344] Ms. Somerville was not slammed by Respond Power.

Ms. Sadie Skrzat also testified that she did not authorize a switch to Respond Power and did not recall receiving a letter from the EDC, noting that "it was a couple of years ago, so I don't remember."[345] During the hearing, Respond Power presented a copy of the Sales

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[338] Tr. 1048.
[339] Tr. 1081-1082.
[340] Tr. 1088-1089; RP Exhibit No. 7; RP Exhibit No. 7-A (Proprietary).
[341] Tr. 1090.
[342] Tr. 1120-1121.
[343] Tr. 1123-1125; RP Exhibit No. 10; RP Exhibit No. 10A (Proprietary).
[344] Tr. 1125.
[345] Tr. 1131.

Agreement, which Mr. Skrzat confirmed contained her signature.[346] Therefore, Ms. Skrzat consented to the switch to Respond Power.

Mr. Michael Lucisano and Ms. Suzanne Zukowski claimed that they did not sign up with Respond Power. They also do not recall receiving any correspondence about the enrollment, including a confirmation letter from the EDC. However, the Company's records demonstrate that they were served by Respond Power from December 15, 2011 through May 16, 2014. During that time Respond Power's charges would have appeared on their bills, and it was incumbent upon them to review those bills and timely raise a dispute if they did not authorize the switch. Therefore, their testimony alleging a slam is not credible, and in any event, they are far outside the two billing cycle window to claim a refund.

Mr. Andrew Ciocco testified that he did not authorize a switch to Respond Power.[347] However, the Sales Agreement attached to his testimony shows that Lauren McLear enrolled the account with Respond Power in May 2012, claiming to be over 18 years old and authorized to make account decisions.[348] At the hearings, Mr. Ciocco confirmed that Ms. McLear lived at his residence at that time.[349] Mr. Ciocco claimed to have never received a confirmation letter from the EDC or ever noticed Respond Power charges on his bill.[350] Due to his failure to raise any issues about the switch until years later, and his failure to monitor his bills, Mr. Ciocco's slamming claim is not credible and he has no basis upon which to claim a refund under the Commission's regulations.

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[346] RP Exhibit No. 14; Tr. 1132.
[347] I&E Consumer Testimony of Andrew Ciocco (p. 72).
[348] Exhibit AC-4 (p. 82).
[349] Tr. 1148.
[350] Tr. 1146-1147.

As demonstrated time and time again by Respond Power during the evidentiary hearings, consumers who claimed they had been switched without authorization were in fact properly enrolled. Moreover, no consumer making this claim raised the dispute within two billing cycles such as to be eligible for a refund under the Commission's regulations. Even to the extent that the Commission would find that any of the consumers who testified in this proceeding were enrolled with Respondent without their authorization, the civil penalty that Respond Power agreed to pay as part of the Settlement more than adequately addresses any proven instances of slamming.

f. Count VI - Allegation of Lack of Good Faith Handling of Complaints

In Count VI of the Joint Complaint, the Joint Complainants allege that Respond Power did not utilize good faith, honesty and fair dealings with residential customers and failed to: (i) adequately staff its call center; (ii) provide reasonable access to Company representatives for purposes of submitting complaints; (iii) properly investigate customer disputes; and (iv) properly notify customers of the results of the Company's investigation into a dispute.[351] Count VI also alleges that Respond Power representatives told customers that a refund would be provided only if the customers entered into a one-year fixed price agreement with Respond Power and that if a customer had already switched suppliers, the Respond Power representative refused to inquire further into the customer's complaint.[352] The Joint Complainants contend that this conduct

[351] Joint Complaint ¶ 74.
[352] Joint Complaint ¶ 69.

violates various provisions in Chapter 56, including Sections 56.1(a), 56.141(a), 56.151 and 56.152,[353] as well as the *Licensing Order* at 3.

As a threshold matter, Respond Power notes that the Commission's regulations do not impose standards on EGSs for the staffing of its call centers or for handling calls from consumers. Indeed, the Commission's regulations do not even impose these requirements on public utilities, except that EDCs are required to report various statistics concerning telephone access, including the percent of calls answered within 30 seconds, the average busy-out rate and the call abandonment rate for each call center.[354]

Mr. Crist testified that prior to the Polar Vortex, Respond Power experienced extremely minimal complaint activity and was "very capably staffed to handle such complaints and provide remedies."[355] He added that "under normal circumstances, based on the entire time Respond operated in Pennsylvania from 2010 through the end of 2013, Respond's staffing levels and processes were entirely adequate to meet the customer service demands."[356]

Mr. Crist explained that after the Polar Vortex, complaints spiked to unprecedented levels, and that although Respond Power's staff worked diligently to handle the onslaught of calls, it was difficult and produced dissatisfaction among customers. He observed that this "was very typical of the retail energy industry at the time. Energy marketers were struggling to manage the huge increase of calls from customers, as were utilities themselves."[357] Mr. Wolbrom also testified that "numerous EGSs, including Respond Power, experienced high call

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[353] 52 Pa. Code §§ 56.1(a), 56.141(a), 56.151 and 56.152.
[354] 52 Pa. Code § 54.153.
[355] Respond Power Statement No. 4-Revised at 21:14-16.
[356] Respond Power Statement No. 4-Revised at 21:17-20.
[357] Respond Power Statement No. 4-Revised at 5:27-6-1.

volume and longer call duration during the first quarter of 2014."[358] I&E's witness, Mr. Mumford, likewise referred to the tremendous spike in calls the Commission received from consumers during that time.[359] Mr. Strupp, testifying for the Joint Complainants, further noted that he "was one of the agents tasked with handling the influx of variable electric rate related complaints during the winter of 2014."[360] As Mr. Crist observed, "[t]hese were unexpected, difficult times."[361]

Respond Power believes that it is critical to view this situation in the context of the industry-wide occurrence that was happening during and following the Polar Vortex, when it received an unprecedented number of calls, mirroring situations faced by other entities during that time, including other EGSs, EDCs, BCS, OCA and OAG. Additionally, as Mr. Wolbrom testified, customer service in a deregulated environment is a function that should be left to the market to control. Providing good customer service can set an EGS apart from others who may be offering consumers similar or even higher prices. If a customer is not satisfied with the responsiveness of the EGS in answering telephone calls or other inquiries, he or she can simply choose to purchase electric generation services elsewhere.[362]

Moreover, the provisions of Chapter 56 cited by the Joint Complainants establish no specific standards. Section 56.1 is a "[s]tatement of purpose and policy" and explains that every privilege or duty required under Chapter 56 "imposes an obligation of good faith, honesty and fair dealing in its performance and enforcement."[363] Section 56.141(a) requires regulated

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[358] Respond Power Statement No. 1 at 15:1-9.
[359] I&E Statement No. 1 at 7:10-8:3; *see also* Variable Price Order.
[360] OAG/OCA Statement No. 4 at 1.
[361] Respond Power Statement No. 4-Revised at 6:2-3.
[362] Respond Power Statement No. 1 at 15:12-21.
[363] 52 Pa. Code § 56.1.

companies to "attempt to resolve the dispute" with the customer prior to the actual termination of service.[364] Section 56.151, in pertinent part, requires an investigation of customer disputes "using methods reasonable under the circumstances" and notification to the customer of the outcome of the investigation.[365] Section 56.152 sets forth the contents of what must be included in the company's report when responding to an informal complaint filed with BCS.[366] The evidence presented by the Joint Complainants fails to establish that Respond Power violated any of the requirements imposed by the provisions of Chapter 56.

The Joint Complainants have also claimed that Respond Power required customers to agree to one-year fixed contract agreements in order to qualify for a refund, suggesting that this interaction would have constituted bad faith in handling complaints.[367] However, Respond Power has refuted this claim through Mr. Small who testified that consumers were given thousands of dollars in refunds without making this commitment.[368] The Company further explained that this approach of offering refunds in the context of a new fixed rate was used to help moderate the short-term effect of the wholesale price increases on consumers.[369] Moreover, in a deregulated environment, where EGS prices are not regulated and Respond Power was not obligated to issue any refunds to consumers, it was free to make the business decision to attempt, when possible, to link refunds to one-year fixed price contract, and consumers were free to reject those offers.

If the Commission finds that Respond Power violated some provision of its regulations in handling calls, Respond Power has agreed as part of the Settlement to comply with numerous

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[364] 52 Pa. Code § 56.141(a).
[365] 52 Pa. Code § 56.151(2) and (5).
[366] 52 Pa. Code § 56.152.
[367] OAG/OCA Statement No. 1 at 79:12-15.
[368] Respond Power Statement No. 3-Revised at 9:9-13; Tr. 1471-1472.
[369] Respond Power Statement No. 1 at 13:4-9.

requirements related to customer service. Specifically, Respond Power has committed to: (i) staffing its call center to provide timely access to live customer service representatives so that consumers' hold times within normal business hours are no more than ten minutes and emails are answered within 24 hours; (ii) providing a timely response to voice mail messages left on its customer service toll-free number outside of normal business hours within 24 hours; (iii) checking its voice mail message system at the beginning of each day; (iv) using reasonable measure to prevent the voice mail message system from becoming full such that consumers cannot leave a voice mail message; (v) responding to all inquiries made by letter within five business days; (vi) developing and implementing an action plan for handling periods of high call volumes; and (vii) reporting to I&E and BCS within 30 days if it experiences a period of high call volumes in which it was unable to comply with the standards established by the Settlement.[370] Therefore, any concerns the Commission has about Respond Power's customer service are fully addressed by the commitments made by Respond Power in the Settlement.

g. Count VII - Allegation of Failure to Provide Accurate Pricing Information

In Count VII of the Joint Complaint, the Joint Complainants allege that Respond Power's Disclosure Statement fails to provide accurate pricing information because: (i) it does not adequately state the conditions of variability and limits on price variability; (ii) it does not provide pricing information in plain language using common terms that consumers understand; (iii) consumers could not determine from the Disclosure Statement the price that they would or could be charged by Respond Power or how the price would be calculated by Respond Power; and (iv) it did not provide information to customers in a manner that would allow them to

[370] Settlement, Section IV ¶ 25.H. (Customer Service) (pp. 34-36).

compare offers.[371] The Joint Complainants contended that due to these alleged shortcomings in Respond Power's Disclosure Statement, the Company violated Sections 54.5(c) and 54.43(1) of the Commission's regulations.[372] The Joint Complainants' allegations about Respond Power's Disclosure Statement ignore several key points.

i. Respond Power's Disclosure Statement was approved by the Commission.

At the outset, it is important to note that Respond Power's Disclosure Statement was reviewed and approved by the Commission. During the license application process, BCS reviews draft disclosure statements submitted by EGSs. As the Commission office with primary responsibility for EGS license applications, the Bureau of Technical Utility Services ("TUS") forwards the draft disclosure statement to BCS for review. A BCS analyst reviews the draft disclosure statement to ensure that it includes the elements required by the Commission's regulations.[373] The analyst may also look for any use of terminology, jargon or acronyms that is contrary to plain language guidance.[374] The BCS analyst then interacts with the EGS applicant informally via telephone or email until the analyst is satisfied that the disclosure statement is substantially in compliance with the regulations. This informal finding is then communicated to TUS and the EGS applicant. Disclaimers are provided to EGS applicants noting that the informal opinion is not binding on the Commission.[375]

When Respond Power filed its application for an EGS license, it included a proposed Disclosure Statement as Attachment A, Appendix B, which provided that:

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[371] Joint Complaint ¶¶ 78, 83-85.
[372] 52 Pa. Code §§ 54.5(c) and 54.43(1). Joint Complaint ¶¶ 77-80l; the Joint Complainants likewise claim that the Disclosure Statement violates the Consumer Protection Law; Joint Complaint ¶ 82.
[373] 52 Pa. Code § 54.5.
[374] 52 Pa. Code § 54.43(1) and 52 Pa. Code § 69.251.
[375] 52 Pa. Code § 1.96.

> Your price may vary from month to month. This rate is set by Respond Power and reflects their Generation Charge as reflected by the PJM Day-Ahead Market, Installed capacity (the cost of reserve or standby power), electricity lost on the transmission system ("losses"), estimated state taxes, and any other costs that Respond Power incurs to deliver your electricity to your electric Utility's Transmission System (where they receive the electricity). For their services, Respond Power adds a profit margin to the electricity and Respond Power's goal each and every month is to deliver your power at a price that is less than what you would have paid had your purchased your power from your local utility, however, due to market fluctuations and conditions, Respond Power cannot always guarantee that every month you will see savings. Commodity charges exclude Pennsylvania sales tax, if applicable. You may contact Respond Power for our current Variable Rate.[376]

The variable pricing language contained in the Disclosure Statement that is the subject of this proceeding exactly mirrors that language, by providing that:

> Your price may vary from month to month. This rate is set by Respond Power and reflects their Generation Charge as reflected by the PJM Day-Ahead Market, Installed capacity (the cost of reserve or standby power), electricity lost on the transmission system ("losses"), estimated state taxes, and any other costs that Respond Power incurs to deliver your electricity to your electric Utility's Transmission System (where they receive the electricity). For their services, Respond Power adds a profit margin to the electricity and Respond Power's goal each and every month is to deliver your power at a price that is less than what you would have paid had your purchased your power from your local utility, however, due to market fluctuations and conditions, Respond Power cannot always guarantee that every month you will see savings. Commodity charges exclude Pennsylvania sales tax, if applicable. You may contact Respond Power for our current Variable Rate.[377]

As Mr. Small testified, Respond Power shares a common Disclosure Statement with its affiliate, Major Energy Services LLC (a licensed natural gas supplier),[378] which went through many iterations in 2009 before being approved by BCS. Respond Power then used the same language when filing its EGS license application, and the Commission made no requests for

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[376] R.P. Exhibit No. 40, Exhibit A.
[377] R.P. Exhibit No. 1, Terms of Service, Basic Service Prices, Electric, Variable Rate.
[378] *Application of Major Energy Services LLC to Become a Licensed Supplier of Natural Gas Services*, Docket No. A-2009-2118836 (Order entered October 8, 2009).

changes to that language.[379] By issuing the *Licensing Order* approving Respond Power's application to operate as an EGS in Pennsylvania, without making any changes to the language in the Disclosure Statement that was submitted with the application, the Commission approved that language.

In *Hoke v. Ambit Northeast, LLC d/b/a Ambit Energy*, Docket No. C-2013-2357863 (Initial Decision issued December 4, 2013) (Final Order entered January 16, 2014) ("*Hoke*"), the Commission relied upon the prior approval of the language contained in an EGS's disclosure statement in finding that the EGS had not violated any Commission regulations or orders. It is essential that EGSs be able to rely on Commission approval of disclosure statements with certainty that they will not later be called upon to defend certain provisions as being inconsistent with the Commission's regulations.[380]

ii. Respond Power's Disclosure Statement complies with the Commission's regulations that were in effect at that time.

Moreover, Respond Power's Disclosure Statement that is the subject of this proceeding complies with all requirements of the Commission's regulations that were in effect while it was being used. The pertinent provisions of the Commission's regulations governing disclosure statements required as follows:

> (c) The contract's terms of service shall be disclosed, including the following terms, if applicable:
>
> (1) Generation charges shall be disclosed according to the actual prices.

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[379] Respond Power Statement No. 3-Revised at 12:4-8; Exhibit AS-3. *See also* Respond Power Answer to Joint Complaint ¶ 43, footnote 2. A review of the docket entries confirms that although other items in the application were revised during the licensing process, no changes were made to the Disclosure Statement. (http://www.puc.pa.gov/about_puc/consolidated_case_view.aspx?Docket=A-2010-2163898)

[380] To the extent that the Commission later determines that more information or details are needed in the disclosure statement, Respond Power recognizes the ability of the Commission to direct an EGS to make changes to its disclosure statement. However, an EGS should not be penalized for providing customers language in its disclosure statement that was submitted with its application and approved by the Commission.

(2) The variable pricing statement, if applicable, must include:
(i) *Conditions of variability (state on what basis prices will vary).*
(ii) Limits on price variability.[381]

As to the Joint Complainants' criticism that Respond Power's Disclosure Statement did not contain an initial price, the regulations in effect at that time did not require the inclusion of an initial price. Specifically, the regulations required this information "if applicable." Since Respond Power's offering did not contain an initial price, this requirement was not applicable. Rather the Disclosure Statement referred the customer to the Company to obtain the current price.

In adopting the *New Disclosure Requirements Order* on April 3, 2014, the Commission removed the words "if applicable" from the regulations and expressly added a provision requiring EGSs to include the initial price in variable price contracts. In emphasizing its desire to enhance the prior disclosure requirements, the Commission confirmed that initial prices were not previously required by the regulations. *Id.* at 11, 14-15.

The Joint Complainants also criticize the lack of any price limits in Respond Power's Disclosure Statement. Again, price limits were required to be disclosed only "if applicable," which they were not, again in the *New Disclosure Requirements Order*, the Commission verified that the prior regulations did not require EGSs to provide any limits in their disclosure statements. In fact, the Commission rejected proposals to impose such a requirement going forward. Rather, the Commission now requires EGSs to expressly note any limits that do exist, and if there is no limit on price variability, to clearly and conspicuously state that there is no

[381] 52 Pa. Code § 54.5(c)(1) and (2), as published at 37 Pa. B. 4996 (September 15, 2007).

limit on how much the price may change from one billing cycle to the next. *Id.* at 12.[382] In changing the requirements to make limits or the lack of limits known in the disclosure statement, the Commission said that it was seeking to ensure that "customers know whether their generation charges could possibly increase drastically, depending on any number of factors, over the life of a contract." *Id.* at 13.

As to the requirement in the regulations for EGSs to provide the conditions of variability, or the basis for prices to vary, Respond Power's Disclosure Statement informs consumers that the price will vary on the basis of PJM wholesale market conditions and notes that savings are not guaranteed due to fluctuations in the wholesale market. This level of disclosure complies with the requirement in the regulations and is similar to countless EGS disclosure statements approved by the Commission and in use in Pennsylvania.[383] In fact, in Comments filed to the Commission's *Variable Price Order*, OCA acknowledged that it had "not yet seen an EGS terms and conditions containing explicit formulaic pricing parameters for variable-priced products. Variable price disclosures state that price will vary based on, inter alia, market conditions, wholesale energy costs, retail competition, and other non-specific terms. This could be a result of the complex PJM wholesale markets that may not lend themselves to such an approach."[384]

Indeed, in the *Variable Price Order*, the Commission acknowledged that "it is unlikely that many market-priced, variable contracts have very explicit formulaic rates that establish how the retail rate is calculated from transparent wholesale price components. Thus, many current disclosure statements may not precisely describe how contract prices change as a function of the

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[382] 52 Pa. Code § 54.5(c)(2)(ii).
[383] *See, e.g.* Joint Complaint, Appendix A in *Commonwealth et al. v Blue Pilot Energy, LLC*, Docket No. C-2014-2427655 (Joint Complaint filed June 20, 2014).
[384] OCA Comments filed April 3, 2014 at 39 (http://www.puc.pa.gov/pcdocs/1277994.pdf).

underlying wholesale costs or other price indices." *Id.* at 3. As a result, the Commission focused on possible changes to the regulations to provide advance notice to customers of price changes, specifics as to how the new price has been calculated and more useful and standardized information to customers so that they can better understand that variable price change. *Id.* at 4.

The regulations, even after being changed by the *New Disclosure Requirements Order*, do not require the inclusion of a specific methodology or explicit formulaic pricing parameters for variable priced-products.[385] By explaining that prices will vary on the basis of PJM market conditions and will include a profit margin, Respond Power's Disclosure Statement adequately provides the conditions of variability.

The real gist of the Joint Complainants' allegations regarding Respond Power's Disclosure Statement is that "consumers could not determine from the Disclosure Statement the price that they would or could be charged by the Respondent or how the price would be calculated."[386] Similarly, Ms. Alexander criticized the Disclosure Statement because it "did not contain any substantive information about the variable price feature that allows any reasonable consumer to understand the basis for how the price will be calculated or may change."[387] Also, Dr. Estomin testified that in his view, "information should be provided that would allow a customer to determine within some degree of reasonableness whether the price that they were being charged was appropriate."[388]

However, the Joint Complaint, Ms. Alexander and Dr. Estomin have failed to accurately set forth the standard required by the Commission's regulations. To the extent that the

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[385] By contrast, the Commission's regulations applicable to natural gas suppliers ("NGSs") require the inclusion of the "NGS's specific prescribed variable pricing methodology." 52 Pa. Code § 62.75(c)(2)(i).
[386] Joint Complaint ¶ 84.
[387] OAG/OCA Statement No. 1 at 36:1-4.
[388] Tr. 1210.

Commission would interpret the regulations in the manner suggested by the Joint Complainants, they are unconstitutionally vague because they do not give Respond Power fair notice that additional information is required in the Disclosure Statement, which was already approved by the Commission.

Therefore any finding of a violation by Respond Power in connection with the content of its Disclosure Statement would run afoul of its due process rights. The United States Supreme Court has explained that, in order to satisfy the Fifth Amendment's Due Process Clause – made applicable to the states through the Fourteenth Amendment – laws must not fail to "give [a] person of ordinary intelligence a reasonable opportunity to know what is prohibited..." *Hoffman* at 497; *Cmwlth. v. Parker White Metal Co.*, 515 A.2d 1358, 1367 (Pa. 1986) (due process requires that the proscribed conduct and range of penalties be unambiguously identified). Due process demands that a law not be vague. *Cmwlth. v. Mayfield*, 832 A.2d 418, 422 (Pa. 2003); *Cmwlth.* v. Barud, 681 A.2d 162, 165 (Pa. 1996). A law is vague if it fails to provide fair notice as to what conduct is forbidden or if it prevents the gauging of the future, contemplated conduct, or if it encourages arbitrary or discriminatory enforcement. *Cmwlth. v. McCoy*, 895 A.2d 18, 30 (Pa. Super. Ct. 2006). A vague law is one whose terms necessarily require people to guess at its meaning. *Mayfield*, 832 A.2d at 422. If a law is deficient (*i.e.*, vague) in any of these ways, then it violates due process and is constitutionally void. *Id.*

In fact, its *New Customer Disclosure Requirements Order*, the Commission agreed with a commenter's statement that requirements for "conditions of variability" and "limits on price variable" were vague and ambiguous and needed to be clarified as they were subject to "potential misinterpretation." *Id.* at 11. The Commission further stated its belief that "more specific

direction should be provided to EGSs regarding the level of detail the Commission expects regarding the variability in retail generation supply pricing." *Id.* at 12.

Therefore, enforcement of the Commission's regulations against Respond Power in the manner sought by the Joint Complainants would violate Respond Power's due process rights. For this reason and because Respond Power's Disclosure Statement regarding price fully complied with the Commission requirements that were in effect at that time and was approved by the Commission during the licensing process, Count VII should be dismissed.

To the extent that the Commission determines that the Disclosure Statement in effect during the relevant time period was deficient in some way, it is noteworthy that the Commission required all EGSs to submit revised disclosure statements in July 2014 so they could be reviewed for compliance with the revised regulations promulgated via the *New Disclosure Requirements Order.*[389] Additionally, the Settlement contains specific provisions requiring a further review and approval of Respond Power's Disclosure Statement upon approval of the Settlement and any time that Respond Power makes a change for the next five years.[390]

h. Count VIII - Allegation of Nonconformity of Prices to Disclosure Statement

In Count VIII, the Joint Complainants allege that Respond Power's prices charged to variable rate customers in early 2014 "were not reflective of the cost to serve residential customers."[391] Attached to the Joint Complaint is an Affidavit of Dr. Estomin, which claims that the average residential heating customer in January 2014 should not have exceeded

[389] Secretarial Letter dated June 23, 2014, Docket No. L-2014-2409385.
[390] Settlement, Section IV ¶ 25.D. (Disclosure Statement) (pp. 20-22).
[391] *Joint Complaint* ¶ 88.

approximately $0.23 per kWh.[392] Therefore, the Joint Complainants alleged that the prices charged by Respond Power did not conform to the variable rate pricing provision of Respond Power's Disclosure Statement.[393]

Regardless of how Count VIII is titled, the only factual allegations contained therein are that Respond Power's prices did not reflect of serving residential customers in early 2014. Indeed, the Affidavit attached to the Joint Complaint analyzes cost of service, which is a ratemaking principle applicable to regulated utility rates and not a requirement that applies to EGS prices. *See Lloyd.* In the *Interim Order on Preliminary Objections*, the ALJs correctly observed that the "[n]othing in the Affidavit correlates the prices charged by Respond to the Disclosure Statement," and that rather, it discusses concepts of the cost to serve which is irrelevant to EGS pricing. *Id.* at 16. As discussed above,[394] Count VIII should be dismissed outright because the Commission does not regulate the prices charged by EGSs, and in the case of a variable-priced contract that is not based on a specific, prescribed methodology, formula or index, the Commission would have to conduct a cost of service analysis in order to determine what price it believes Respond Power should have charged.

On interlocutory review, the Commission merely found that Count VIII should survive Preliminary Objections because in theory, the Commission may be able to find that an EGS has charged prices that do not conform to its disclosure statement. The Commission did not, however, suggest that it could step into the shoes of an EGS and determine what a "just and reasonable" variable price would have been under a contract where the price varies due to

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[392] Joint Complaint ¶ 89, Appendix C.
[393] Joint Complaint ¶ 90.
[394] *Respond Power Main Brief at pp.139-147.*

fluctuations in the wholesale market and includes a profit margin. Such a conclusion would have been at odds with its statutory authority and its past pronouncements regarding its lack of jurisdiction to regulate EGS prices. Rather, it considered the narrow question posed by the Joint Complainants in a vacuum and found that it may determine whether a price conforms to a disclosure statement.

However, as the record has developed in this proceeding, it has become clear that Respond Power's variable price is based on a number of factors, including PJM's day ahead prices, other specified costs, other unspecified costs and a profit margin, such that the Commission cannot perform a simple comparison of Respond Power's prices with the elements of its disclosure statement. Perhaps most compelling of all of the Commission's limitations on reviewing EGS prices is the profit margin component. The Commission has no requirements for an EGS's profit margin -- nothing to require that it to be defined, flat, limited or disclosed. Therefore, even if the Commission attempted to perform a cost-of-service analysis and considered all of the different costs that it believes should have gone into the development of Respond Power's price, it would still be unable to impute a "reasonable rate of return" to determine what Respond Power's profit margin should have been.

To the extent that the Commission can consider whether an EGS has billed its customer in accordance with its disclosure statement, without engaging in interpretation of a private contract, the Commission is clearly limited by statute to determinations that do not require it to engage in ratemaking or place limitations on prices charged by EGSs. For instance, the review might entail a consideration of whether the disclosure statement permitted variable prices or whether the initial prices that were charged matched any initial prices included in the disclosure statement. While the Commission's statutory authority might also extend to considering whether

an EGS's prices complied with any ceiling or specific index in the disclosure statement, there is no dispute in this case that the disclosure statement[395] does not contain an initial price, a specific index or a ceiling price. Moreover, those inquiries seem to tread into the area of contract interpretation that the Commission cannot do. *See, e.g., FES; Allport Water.*

While Dr. Estomin attempts to frame the issue as one of whether Respond Power's variable prices in early 2014 conformed to the Disclosure Statement, he unavoidably interchanges the principles of cost of service with the various elements contained in the Disclosure Statement. For instance, he testified that "the Company's determination of the power supply rate does not bear any meaningful relationship to the costs that the Company incurs.[396] On cross-examination, when asked whether Respond Power's prices should reflect its costs of service, he responded as follows: "I think in order to be consistent with its disclosure statement, the answer to that is yes, to the extent that that's what's represented in the disclosure statement."[397] This testimony illustrates the slippery slope that the Commission will be on if it engages in a review to determine what it believes Respond Power's prices should have been; it will unavoidably be drawn into a traditional cost of service analysis that is reserved for determinations of whether public utilities' rates are just and reasonable.

The Joint Complainants' emphasis on the cost of service approach is also problematic considering the inclusion of "other costs" and "a profit margin" in the Commission-approved Disclosure Statement. As Dr. Estomin acknowledged, many other costs could fall in to the "other costs" category of the Disclosure Statement, including hedging costs, transmission costs,

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[395] Joint Complaint, Appendix A.
[396] OAG/OCA Statement No. 2 at 15:16-17.
[397] Tr. 1210.

ancillary costs, scheduling costs, supplier fees, PJM monthly fees, imbalance charges, purchase of receivables, processing fees, EDI expenses, renewable energy costs, overhead costs and management fees.[398] Indeed, Dr. Estomin testified that "the catch category of other costs is pretty much undefined and I guess can include anything."[399] Although Dr. Estomin offered reasons why he did not believe hedging costs should fall under the category of "other costs," he testified that it was not inappropriate for Respond Power to consider hedge benefits in computing prices.[400] Also despite his own personal preference for consumers to be able to calculate whether a price charged by an EGS is reasonable, he conceded that many of the elements of EGS prices would not be readily available to consumers and that it would take a sophisticated customers to "ferret out all that information themselves."[401]

As to "profit margin," Dr. Estomin acknowledged that the Commission's regulations do not require any disclosures as to whether they can be modified or how they must be calculated.[402] Mr. Crist's testimony confirmed that "[t]here is absolutely no regulation, rule or reason why Respond's profit margin must be stable, or for that matter, is even a subject to be discussed. This is the nature of the unregulated energy marketer business."[403]

Despite never having operated an EGS or priced an energy product for sale to retail customers,[404] Dr. Estomin concluded that Respond Power did not price its product in a manner that is consistent with its Disclosure Statement or in a way that reflected its costs of service.[405]

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[398] Tr. 1211-1213.
[399] Tr. 1212.
[400] Tr. 1221-1222.
[401] Tr. 1215.
[402] Tr. 1209.
[403] Respond Power Statement No. 4-Revised at 18:12-14.
[404] Tr. 1208-1209.
[405] OAG/OCA Statement No. 2 at 13:13-14:5.

As Mr. Crist testified, Dr. Estomin is "frozen in regulated utility mode."[406] Mr. Crist further explained that this not a regulated rate case and Respond Power's Disclosure Statement is not the basis for a cost of service study. Citing Dr. Estomin's desire for a price formula to be included in Respond Power's Disclosure Statement, Mr. Crist noted his shock that Dr. Estomin would expect Respond Power to provide other competitive marketers with enough information to actually determine with some accuracy what prices Respond Power would charge.[407] Further, Mr. Crist appropriately observed that Respond Power "is not required to produce prices based on costs nor is it required to produce cost details to determine if its price is just and reasonable."[408]

Despite the lack of any obligation to reveal its price formula or methodology in the Disclosure Statement, Respond Power presented the testimony of Mr. Horowitz to generally explain how its prices are calculated. As Mr. Horowitz's testimony demonstrated, Respond Power used the factors set forth in its Disclosure Statement in establishing variable prices, which shows that the Company did not violate the Commission's regulations.

Specifically, Mr. Horowitz testified that Respond Power relied on the "actual costs of commodity that were specifically included in the Disclosure Statement that every Respond Power customer received."[409] He listed those cost components as including PJM Day Ahead Market prices, capacity costs, line losses and taxes. He also identified "other costs" that Respond Power incurs as including real time pricing, long term hedges, transmission costs, ancillary costs, scheduling costs, supplier fees, imbalance charges, PJM monthly fees, purchase

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[406] Respond Power Statement No. 4-Revised at 17:22.
[407] Respond Power Statement No. 4-Revised at 17:9-14.
[408] Respond Power Statement No. 4-Revised at 17:22-24.
[409] Respond Power Statement No. 2-Revised at 1:17-19.

of receivables, processing fees, EDI expenses, renewable energy costs, overhead and management fees.[410]

In addition, Mr. Horowitz offered some perspective on the retail prices charged to Respond Power's variable price customers in the context of wholesale prices during early 2014. The chart below, developed with information included in Mr. Horowitz's testimony for the first quarter of 2014, shows: (i) the highest prices in the PJM Day Ahead Market for each EDC territory; (ii) the highest price Respond Power charged to full cycle customers in each EDC territory; (iii) the average prices in the PJM Day Ahead Market (plus costs directly related to the commodity but not including any hedges) for each EDC territory; and (iv) the average prices charged by Respond Power to full cycle customers in each EDC territory.[411]

Comparison of Highest and Average PJM Day Ahead Prices and Highest and Average Prices Charged by Respond Power to Retail Customers
(shown in dollars/kWh)

	Highest PJM Day Ahead Prices	Highest Prices Charged by Respond Power	Average PJM Day Ahead Prices	Average Prices Charged by Respond Power
PECO	1.005	.399	.190	.211
PPL	.999	.399	.179	.234
MetEd	.997	.25	.176	.158
Penelec	.925	.25	.141	.159
West Penn	.920	.25	.122	.141
Penn Power	.899	.20	.097	.105
Duquesne	.847	.20	.106	.125

Other than Metropolitan Edison Company's service territory, where Respond Power's average price was lower than the average PJM Day Ahead prices, Mr. Horowitz acknowledged that on average, Respond Power charged more than the average PJM Day Ahead prices.

[410] Respond Power Statement No. 2-Revised at 1:20-2:2.
[411] Respond Power Statement No. 2-Revised at 1:15-4:8.

However, he noted that the average PJM Day Ahead prices do not include imbalance charges, PJM monthly fees, renewable energy costs, overhead costs or management fees.[412] He also testified that imbalance charges were extremely high during that time.[413] Indeed, even Dr. Estomin acknowledged his expectation that Respond Power's average charges would be higher than the average PJM Day Ahead prices.[414] In addition, Mr. Horowitz explained that Respond Power added a profit margin, consistent with the Disclosure Statement. Mr. Horowitz further testified that if Respond Power had added a profit margin of $.02/kWh to all of its PJM Day Ahead costs and other costs, which it did not, the Company would have charged Pennsylvania customers significantly more than it did.[415]

The Joint Complainants have failed to carry their burden of proof that Respond Power considered any other factors, beyond those specified in its Disclosure Statement, in establishing variable prices in early 2014. Any further inquiry by the Commission is inappropriate. The Commission's statutory authority clearly does not extend to reviewing wholesale market conditions, considering expenses incurred by an EGS to purchase electricity, determining a reasonable profit margin for the EGS to recover or performing any of the other traditional ratemaking functions that are applicable to rates charged by public utilities. Since this is the exercise that would be required to determine whether Respond Power's variable prices conformed to the disclosure statement, Count VIII should be dismissed in its entirety.

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[412] Respond Power Statement No. 2-Revised at 4:10-17.
[413] Tr. 1368.
[414] OAG/OCA Statement No. 2SR at 2:17-19.
[415] The actual amount is available in the proprietary record of this case at Respond Power Statement No. 2-Revised at 4:20.

i. Count IX - Allegations Regarding Telemarketing

In Count IX, the Joint Complainants allege that Respond Power violated a provision of the TRA because the Company did not provide consumers who were enrolled through a telemarketing call with a contract that complied with and contained information required by Sections 2245(a)(7) and 2245(c) of the Telemarketer Registration Act, 73 P.S. §§ 2245(a)(7) and 2245(c).

As discussed above, the Commission does not have jurisdiction to enforce the provisions of the TRA. Even if the Commission had such jurisdiction, the Joint Complainants have not established that Respond Power violated any provisions of the TRA. The Joint Complainants correctly note that Section 2245(a)(7) of the TRA requires entities that sell goods or services made during a telemarketing call to reduce the sale to a written contract and obtain the customer's signature on the written contract.[416] They fail to mention, however, that Section 2245(a)(7) expressly exempts entities from this requirement if "[t]he contractual sale is regulated under other laws of this Commonwealth."[417] As the sale of electric generation services is regulated by the Commission under the Code and its regulations, the requirement to reduce the requirement to a written contract that is signed by the customer is inapplicable.

Indeed, Section 111.7 of the Commission's regulations require EGSs to "establish a written, oral or electronic transaction process for a customer to authorize the transfer of the customer's account to the supplier."[418] Allowing the process to be oral or electronic, the Commission has steered clear of written contract requirement and has likewise not imposed any

[416] 73 P.S. § 2245(a)(7).
[417] 73 P.S. § 2245(d)(1).
[418] 52 Pa. Code § 111.7(a).

obligation on EGSs to obtain a signature from the customer. Similarly, while Section 2245(c) of the TRA[419] specifies the elements that must be contained in a contract, unless the sale is regulated under other laws of the Commonwealth, Section 54.5 of the Commission's regulations establishes the necessary components of disclosure statements, or contracts.[420] Moreover, Respond Power sends a written contract, in the form of its Disclosure Statement, to each customer enrolled through telemarketing in compliance with the Commission's regulations.[421]

C. Settlement of I&E Complaint Allegations

1. Burden of Proof and Standard of Review

It is the policy of the Commission to encourage settlements."[422] Settlements, whether partial or full, conserve valuable resources of the Commission and the parties. Importantly, 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. Public Utility Commission, et al. v. City of Lancaster – Bureau of Water*, Docket No. R-2010-2179103 (Order entered July 14, 2011). Rather, the Commission reviews settlements to determine whether the terms are in the public interest. *See, e.g., Pa. Pub. Util. Comm'n., Law Bureau Prosecutory Staff v. PPL Electric Utilities Corporation*, Docket No. M-2009-2058182 (Order entered November 23, 2009).

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[419] 73 P.S. § 2245(c).
[420] 52 Pa. Code § 54.5.
[421] Respond Power Statement No. 3-Revised at 8:18-25.
[422] 52 Pa. Code § 5.231.

2. Applicable Legal Standards

The Commission's Policy Statement,[423] which sets forth specific factors and standards that are used in evaluating settled cases, is a codification of the Commission's decision in *Rosi v. Bell Atlantic-Pa., Inc. and Sprint Communications Company*, Docket No. C-00092409 (Order entered February 10, 2000). These factors and standards are utilized by the Commission in determining if a civil penalty is appropriate, as well as if a proposed settlement is reasonable and approval of the settlement agreement is in the public interest.[424] Although the same criteria are used in the evaluation of both litigated and settled cases, they are not applied in as strict a fashion to settled cases, and the parties in settled cases are afforded flexibility in reaching amicable resolutions to complaints as long as the settlement is in the public interest.[425]

3. Key Settlement Terms and Conditions

a. Refunds

Under the Settlement, Respond Power has agreed to issue refunds in the total amount of $3,000,000 ("Total Refund Pool") to customers served by Respond Power during January, February and March 2014, which includes the amount of $971,279.45 in voluntary reductions of charges through rebillings already performed by Respond Power in February 2014 and voluntary refunds previously provided by Respond Power to customers in the amount of $248,873.58.[426] Of the $1,779,846.97 that remains in the refund pool, the amount of $313,351.33 in additional

[423] 52 Pa. Code § 69.1201.
[424] 52 Pa. Code § 69.1201(a).
[425] 52 Pa. Code § 69.1201(b).
[426] Settlement, Section III ¶ 19 (Refunds) (pp. 7-8); Settlement, Exhibit A, Stipulation of Facts ¶¶ 43 and 44.

refunds will be issued to about 1,200 customers who informally complained to the Commission from February 1, 2014 through June 30, 2014 ("Informal Complainant Refund Pool).[427]

The remaining amount in the refund pool, of $1,466,495.64 ("Net Refund Pool") may be claimed by all other customers served by Respond Power during January through March 2014. A third party administrator will communicate with those customers and offer a minimum amount of refund that may be claimed. Customized refunds will be calculated on the basis of an individual customer's usage and prices that were charged, offset by any refunds already issued to those customers. To qualify for a refund, the customers will simply need to mail a response back to the administrator within 60 days.[428]

The Settlement further provides that any customer who declines an offer of a refund may contact the Company directly with complaints and request a refund. This provision also commits Respond Power to using its best efforts to investigate the customer's complaint and negotiate an agreement under which the customer will accept a refund in exchange for a release of claims.[429]

b. Other Monetary Commitments

In addition to the creation of the Informal Complainant Refund Pool and the Net Refund Pool, Respond Power has agreed to contribute up to $50,000 to cover the costs and expenses of the third party administrator.[430] In response to the Objections of the Joints Complainants expressing concerns about this provision, Respond Power has noted that modifications to the

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[427] Settlement, Section III ¶ 20 (Refunds) (p. 8). This time period is appropriate in view of complaint trends. Stipulation of Facts ¶¶ 36 and 37; Joint Complaint ¶¶ 15 and 18. Also, by June 30, 2014, customers would have received multiple bills containing higher variable prices and should have known whether they were affected and felt aggrieved. *See* 52 Pa. Code § 57.177 (Commission's slamming regulations afford customers two months' of bills to notice a change in EGS and register a dispute).

[428] Settlement, Section III ¶ 21 (Refunds) (pp. 8-10).

[429] Settlement, Section III ¶ 22 (Refunds) (p.10).

[430] Settlement, Section III ¶ 21 (Refunds) (pp. 8-9).

Settlement would be acceptable that require it: (i) to retain, in consultation with I&E, an independent third party-administrator; (ii) to do so in a cost-effective manner; and (iii) to revisit the contribution if the cost of the third-party administrator exceeds $50,000 by more than a specified amount.[431]

Further, Respond Power has agreed to pay a civil penalty in the amount of $125,000. Under this provision, Respond Power may not recover this payment from Pennsylvania generation customers or claim a tax deduction.[432] Respond Power has also agreed to contribute a minimum of $25,000 to the EDCs' hardship funds. This commitment has the potential to rise to $500,000 if customers do not make claims for refunds from the additional refund pool.[433]

c. Injunctive Relief/Modifications to Business Practices

i. Variable Pricing

By way of injunctive relief and modifications to its current practices relating to marketing and sales, compliance monitoring and training, Respond Power has agreed that it will not offer variable price contracts to new customers for a period of two years commencing September 1, 2015. After the expiration of that two-year period, Respond Power will be free to offer variable price contracts in a manner that is consistent with the Commission's regulations at the time.[434]

ii. Marketing

Respond Power has expressly committed to complying with the CPL and TRA, as well as the Code and all Commission regulations, orders and policies. Among the commitments made by Respond Power with respect to marketing are that the Company and its representatives will

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[431] Respond Power Response to Joint Initial Objections at 15.
[432] Settlement, Section III ¶ 23 (Civil Penalty) (p. 11).
[433] Settlement, Section III ¶ 21 (Refunds) (pp. 9-10).
[434] Settlement, Section IV ¶ 25.A. (Product Offering) (p. 12).

not make misrepresentations to consumers or make any representations about savings that may be realized by switching to Respond Power (unless it is in conjunction with an explicit, affirmative guaranteed savings program).

It has also agreed to refraining from using words such as "risk free," "competitive," or "guaranteed" in describing its prices. Further, if Respond Power resumes the marketing of variable prices after the two-year moratorium, it has committed to telling all potential customers that the price can change every month and that there is no limit on how high the price can go. Respond Power has also agreed to make changes to its website to more conspicuously display its terms and conditions and provide greater assurances that consumers will review them.[435]

iii. Third Party Verifications

For third party verifications ("TPV"), Respond Power has agreed to follow a specific script set forth in the Settlement that is designed to ensure that a customer understands that they are agreeing to a variable rate that changes monthly and has no ceiling. For instance, one question in the TPV is: "Do you understand that there is no limit on how the price can go? Respond Power has further agreed that all TPVs will be performed outside the presence of the Respond Power sales representative.[436]

iv. Disclosure Statement

Respond Power has also agreed to submit a copy of its current Disclosure Statement to the Commission following approval of this Settlement and to continue to provide amended Disclosure Statements to the Commission for five years. Additionally, Respond Power has committed to providing an updated Disclosure Statement to all customers on variable rate

[435] Settlement, Section IV ¶ 25.B. (Marketing) (pp. 12-17).
[436] Settlement, Section IV ¶ 25.C. (Third Party Verifications) (pp. 18-19).

products. If Respond Power resumes the marketing of variable prices in the future, it has agreed to provide a specific description of how its price will be calculated and to avoid the use of phrases such as "market-based" or set on "market conditions" in describing its pricing method, unless the customer can calculate the price using publicly available information.[437]

v. Training

As to training, Respond Power has agreed to implement a new program that is specifically tailored to Pennsylvania requirements and to provide to the Commission a detailed description of the program that will be implemented. Under the Settlement, the program will include initial training and subsequent refresher training on a quarterly basis for all Respond Power employees, agents and third-party contractors. The enhanced training program will also highlight the fact that deceptive or intimidating sales practices will not be tolerated by Respond Power.[438]

vi. Door-to-Door Marketing

A portion of the new training program described above will be specifically geared toward door-to-door marketing. This program will be designed to ensure that all sales representatives produce photo identification depicting the name of the marketing representative and Respond Power's trade name and logo; identify the reason for the visit, stating that Respond Power is an independent energy marketer and does not represent the EDC; and offer a business card including name, identification number and telephone number.[439]

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[437] Settlement, Section IV ¶ 25.D. (Disclosure Statement) (pp. 20-22).
[438] Settlement, Section IV ¶ 25.E. (Training) (pp. 22-24).
[439] Settlement, Section IV ¶ 25.F. (Door-to-Door Marketing) (pp. 24-29).

vii. Compliance Monitoring

In addition, Respond Power has agreed to increase its internal quality control efforts, which will include the recording of all communications between customers and Respond Power's customer service representatives and requiring its telemarketers to record and maintain all communications with consumers that result in a sale. The enhanced compliance monitoring will also entail the weekly review of a statistically valid sample of recorded calls and follow-up investigations of additional calls if any non-compliant calls are identified. Respond Power has further agreed to promptly take specific remedial actions against sales representatives and third-party contractors in the event of violations.[440]

viii. Reporting

Within 30 days of implementing the training and compliance monitoring programs described above, Respond Power has committed to provide quarterly reports to the Commission for a period of five years, explaining all internal audits and investigations performed during the reporting period. This report will list all customer complaints and disputes received by Respond Power.[441]

ix. Customer Service

With respect to customer service, Respond Power has agreed to maintain a staff of customer service representatives necessary to handle calls and electronic mails within timeframes specified in the Settlement and to develop and implement an action plan for handling periods of high call volumes. If Respond Power experiences a period of high call volumes during which it does not comply with the timeframes set forth in the Settlement, it has committed

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[440] Settlement, Section IV ¶ 25.F. (Compliance Monitoring) (pp. 29-33).
[441] Settlement, Section IV ¶ 25.G. (Reporting) (pp. 33-34).

to provide a report to the Commission of the occurrence, which contains an explanation of the reasons and a description of remedial measures implemented by the Company.[442]

4. Merits of Settlement

a. Summary of Key Terms

The Settlement fully resolves all issues arising from the variable price increases that were charged to retail customers during the 2014 Polar Vortex as a result of the record-breaking wholesale prices that were paid by Respond Power, including associated concerns with Respond Power's marketing, sales and business practices. It addresses these issues by developing a fair and workable mechanism for issuing refunds to all customers of Respond Power in January, February and March 2014; establishing a significant civil penalty for the allegations set forth in both the Joint Complaint and the I&E Complaint; providing for a contribution to EDCs' hardship funds; and imposing extensive injunctive relief on Respond Power, including major modifications to its marketing, sales and business practices.

Through this Settlement, Respond Power is assuming total financial responsibility in the amount of $3.2 million, besides the costs it will incur to implement the modifications to its marketing, sale and business practices, and subjecting itself to far-reaching regulatory oversight as a licensed EGS in a mostly deregulated environment. The injunctive relief agreed to by Respond Power in this Settlement is nearly identical to the language contained in settlement agreements among the Joint Complainants and other EGSs, which have been approved by Initial Decisions issued by the ALJs. Most importantly, Respond Power's financial commitments under

[442] Settlement, Section IV ¶ 25.H. (Customer Service) (pp. 34-36).

the Settlement are consistent with, if not more compensatory, than those previous settlements. *See PG&E Initial Decision*; *Hiko Initial Decision; IDT Initial Decision.*

Despite these various attributes of the Settlement and its resemblance in all key respects to the settlement agreements between the Joint Complainants and other EGSs already approved by the ALJs, the Joint Complainants have filed Objections to the Settlement and offered testimony in opposition to the Settlement. A key difference between the Settlement and the settlement agreements with other EGSs is that I&E, rather than the Joint Complainants, will determine how the refunds will be distributed to consumers. Certainly, as the Commission's own prosecutory bureau, I&E is well-equipped to establish a proper distribution method for these refunds to consumers.

Also, rather than simply issuing refunds to all customers who were served by Respond Power in early 2014, the vast majority of whom have not complained, the Settlement provides for substantial refunds to consumers who felt aggrieved and took steps to complain and seek a remedy. This approach is consistent with the practice that occurs at the Commission every day when consumers file informal and formal complaints and companies resolve them through settlements. Those settlements benefit only the complaining customers. However, the Settlement between I&E and Respond Power goes further than the normal approach by giving every customer served by Respond Power during early 2014 the opportunity to now claim a refund. Further, nothing in the Settlement precludes those customers from continuing to seek alternative relief from the Commission or the Company rather than accepting a refund under the Settlement.

While the Joint Complainants may not like these differences, that is not a justification to reject or modify the Settlement. Respond Power and I&E have fully explained the manner in

which the Settlement will be implemented and have justified its provisions through their Statements in Support. Each of the specific objections raised by the Joint Complainants is intended to urge the ALJs scrutinize the Settlement in a way that has not occurred in the other proceedings where similar settlement agreements were presented. The Commission should not permit the Joint Complainants' petty criticisms of the Settlement, driven by reasonable and appropriate differences between the Settlement and the agreements they have negotiated with other EGSs, to undermine its value to consumers and the retail market or otherwise affect its approval.

b. The Settlement addresses and resolves all issues in the consolidated proceeding.

Initially, the Joint Complainants contend that the Settlement is legally defective because "I&E and Respond Power...purport to settle the Joint Complainants' claims as well as I&E's claims in their Settlement."[443] Pointing to the reliance of Respond Power and I&E on consumer contacts and complaints received by OCA and OAG and the written consumer testimony and expert testimony sponsored by OCA and OAG as supporting the Settlement, the Joint Complainants suggest that "I&E and Respond Power consider the actions to have become inseparable."[444]

The Joint Complainants have lost sight of the fact that this proceeding was consolidated for hearing *and disposition* and that the record developed in this consolidated proceeding may be relied upon to consider whether the Settlement is in the public interest. In consolidating the Joint Complaint and the I&E Complaint, the ALJs concluded that "[b]ecause these Complaints contain

[443] Objections at 6.
[444] Objections at 7.

common questions of law and fact and consolidation will avoid unnecessary delay or cost, they should be consolidated." *Consolidation Order* at 3. Explaining that both Complaints involve alleged violations of the same provisions of the Code, contain comparable factual allegations and make similar requests for relief, the ALJs found that "consolidation of these two Complaints will preserve judicial resources and provide other benefits such as preventing inconsistent outcomes and cumulative penalties and save Respond from having to defend two similar complaints simultaneously." *Consolidation Order* at 4. Yet, that is exactly what the Joint Complainants would have Respond Power do now that one of the Complaints in this consolidated proceeding has been fully satisfied by the Settlement.

The Joint Complainants also argue that the "Release of Claims" provision in the Settlement, which requires a customer to release the Company from future claims in exchange for a refund, would be unenforceable as to law because it would bar two state agencies from complying with their statutory authority to protect these interests.[445] This argument illustrates a major shortcoming in the Joint Complainants' case. They mistakenly view themselves as representing individual consumers. As discussed above,[446] OAG does not even have standing as a complainant in proceedings before the Commission except on behalf of the Commonwealth as a customer, and OCA has no statutory authority to represent individual consumers. Under the Settlement, the release of claims would be executed by individual consumers and prevent them from later making their own individual claims against Respond Power in connection with the allegations involved in this consolidated proceeding. Individual consumers would be free to decline the refunds offered pursuant to the Settlement, but if they accepted them, it is difficult to

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[445] Objections at 7-8.
[446] Respond Power Main Brief at p. 76.

surmise how that outcome would in any way affect the Joint Complainants' rights in this consolidated proceeding.

In any event, by simultaneously adjudicating the Joint Complaint and Settlement in the Initial Decision, the ALJs can ensure that the remedies are reconciled in a fair manner. Moreover, the Joint Complainants have had all the process that is due to them by having an opportunity to file written Objections to the Settlement, submit testimony opposing the Settlement and now address in their Main Brief why they do not believe the Settlement satisfies any allegations of their Joint Complaint. The Settlement should accordingly be adopted without modification and in full resolution of this consolidated complaint proceeding.

c. Given the Commission's lack of statutory authority to direct Respond Power to issue refunds to any customers, the refund provisions in the Settlement are more than sufficient and appropriate.

i. Total Refund Pool

Most of the Joint Complainants' challenges relate to the refund provisions in the Settlement, including arguments about the sufficiency of the Total Refund Pool of $3 million established by Paragraph 19. In view of the discussion above about the Commission's lack of statutory authority to direct Respond Power to issue refunds to any customers,[447] the provisions in the Settlement establishing for refunds to all informal complainants during the first half of 2014 and to all customers of Respond Power in early 2014 who now come forward go well above and beyond any relief the Commission may award.

Respond Power recognizes that the total amounts of the refund pools for Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric ("PG&E") and IDT Energy, LLC ("IDT") are

[447] Respond Power Main Brief at pp. 50-63.

substantially higher than the Total Refund Pool produced by this Settlement. For example, PG&E agreed to a total refund pool of over $6.8 million, and IDT agreed to a total refund pool of over $6.5 million.[448] However, it is likely that those EGSs each had significantly higher average customer prices and larger customer bases that would, by pure math, result in a larger refund pool.[449] Moreover, those EGSs issued more refunds to customers on their own terms prior to execution of their settlements, for their own business reasons such as for media purposes or to retain customers. Therefore, for comparison purposes, it is more appropriate to consider the Net Refund Pool established by Paragraph 21 of the Settlement, which is nearly $1.5 million. Particularly given the number of customers who contacted the Joint Complainants about each EGS, this amount compares favorably to PG&E's agreement to refund an additional $2.3 million to customers and IDT's agreement to refund an additional $2.4 million to customers as part of their settlement agreements with the Joint Complainants.[450]

The Joint Complainants also contend that the Settlement overstates the amount of the Total Refund Pool by crediting Respond Power for $971,279.45 in voluntary re-rates or reductions in charges through rebillings performed in February 2014. Their theory, as explained by Ms. Alexander in testimony objecting to the Settlement, is that these amounts were never collected from customers.[451]

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[448] *See* PG&E Joint Petition for Approval of Settlement (filed on March 24, 2015) ¶ 33; IDT Joint Petition for Approval of Settlement (filed August 4, 2015) ¶ 38.

[449] It is noted that 2,588 customers contacted the Joint Complainants about PG&E and 2,456 customers contacted the Joint Complainants about IDT, compared to the 709 customers who contacted the Joint Complainants about Respond Power. Settlement, Exhibit A, Stipulation of Facts ¶¶ 38 and 39. Therefore, PG&E and IDT had over 300 percent more complaints about their prices than did Respond Power.

[450] Settlement, Exhibit A, Stipulation of Facts ¶¶ 45 and 47.

[451] OAG/OCA Statement No. 1-Objection at 3:11-12. It is worth noting that during cross-examination, Ms. Alexander acknowledged having no direct experience over the last twenty years of her consultant career in structuring a refund pool; administering or distributing refunds to large groups of customers; communicating with large groups of customers about refunds; performing studies about the behavior of consumers in filing complaints

The fact is, however, that these amounts were originally billed to consumers by Respond Power. As Mr. Small testified, when upper level management learned about the high prices that had been calculated in conformance with the Disclosure Statement and forwarded to the EDCs for billing, the executive team called a meeting on a weekend and decided they wanted to "help retain the customers, be able to continue operating, and to ease the financial burden of the customers."[452] As a result, the decision was made to cancel those bills and rebill at a lower rate, branding them as "billing errors" for ease of consumer understanding.[453] He further explained that upper level management saw the bills as errors and made the call to "have the company make less money but still be able to operate."[454]

The Company could have elected to allow the bills to remain in place and to later issue refunds to customers who paid them or issue credits to customers who did not, or to do nothing at all, and presumably then get credit for these refunds by the Joint Complainants. However, Mr. Small testified that the Company "felt this was a proactive approach and it eased the financial burden on customers more" than if the bill had remained in place and refunds had been offered later.[455] The effect on consumers' wallets was the same as if they had later received refunds in the same amounts, except that they were better off because they did not have that initial outlay of money and they did not experience the stress associated with paying the higher amount that was

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against businesses; drafting or administering releases of claims; billing large groups of customers, cancelling those bills, re-rating charges and reissuing bill; or negotiating refunds with customers on behalf of a business. Although this testimony was not stricken upon Respond Power's motion, Ms. Alexander's lack of direct experience in handling the vast majority of the provisions in the Settlement renders her testimony to be nothing more than that of a paid lay witness.

[452] Tr. 1466-1468.

[453] Tr. 1468.

[454] Tr. 1468.

[455] Tr. 1467.

initially billed.[456] Rather than simply acknowledging that Respond Power voluntarily tried to minimize the impact upon its customers (at its own expense) by collecting less than that to which it was legally entitled to collect, the Joint Complainants have consistently throughout this proceeding tried to deny credit to Respond Power for the good will that it demonstrated.

When asked to explain the difference between proactively rebilling customers and later issuing refunds, Ms. Alexander responded: "[t]he difference is that in this case, customers were -- they did not collect money from customers and then give it back....And the customers might have been different customers...The calculation might have been different...we have a different set of facts here that is quite different from the situation in which an EGS voluntarily hands out refunds to people who call up and complain about their bill."[457] Indeed, Ms. Alexander was unable to explain how customers would have been better off if the bills had remained in place and the Company had issued refunds later because there is no difference, except as Mr. Small explained – customers were actually better off.

ii. Informal Complainant Refund Pool

The Joint Complainants also take issue with the Settlement's different treatment of customers who filed informal complaints with the Commission from February 1, 2014 through June 30, 2014, or the Informal Complainant Refund Pool which is established in Paragraph 20. Every day at the Commission, it is customary for consumers who file complaints to receive settlements, including monetary refunds or adjustments, from regulated companies. In fact, as discussed above, the Commission does not have jurisdiction to award relief of to consumers who did not file complaints, particularly customers of EGSs whose prices are not regulated.

[456] Tr. 1467.
[457] Tr. 1432-1433.

Moreover, the Settlement also provides a process for all other customers served by Respond Power in January, February and March 2014 to now claim refunds, through the Net Refund Pool established by Paragraph 21. Further, it expressly grants all consumers the opportunity to seek relief elsewhere, including through the submission of requests for refunds directly to the Company.

As to the testimony of Mr. Strupp indicating that the Commission had referred some consumers to the OAG,[458] the Joint Complainants did not establish that any of those consumers were denied the opportunity to file informal complaints.[459] Mr. Strupp conceded that the Commission could have accepted an informal complaint and also referred the customer to the OAG, but that he had not investigated that possibility.[460]

In fact, Mr. Small testified that at least three of the individuals identified by Mr. Strupp as having been referred to the OAG by the Commission had filed informal complaints with the Commission.[461] Mr. Small also testified that he had reviewed many BCS closing reports on informal complaints that mention referrals to the OAG or OCA on the basis that the Commission does not have jurisdiction.[462] The Commission's referral of consumers to the OAG, regardless of whether the customer elected to file an informal complaint with the Commission or not, is actually consistent with Code Section 2811(d)[463] and the long-standing Memorandum of Understanding between the Commission and the OAG for the referral of electric competition

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[458] OAG/OCA Statement No. 4-Objection at 2:8-10.
[459] Mr. Mumford testified that not everyone who calls the BCS Hotline files an informal complaint. Tr. 1412, 1415.
[460] Tr. 1460-1461.
[461] Tr. 1472.
[462] Tr. 1472-1473.
[463] 66 Pa. C.S. § 2811(d).

complaints. *Marketing Rulemaking Order*. Mr. Strupp was aware of neither the provision in the Code or the Memorandum of Understanding.[464]

Therefore, any concerns that some consumers were deprived of the opportunity to be included in the Informal Complainant Refund Pool are without merit. Consumers had a full and fair opportunity to file complaints (either formal or informal) with the Commission, and are still free to do so now, or, alternatively seek relief from the Company.

iii. Net Refund Pool

The Joint Complainants further contend that the Settlement is deficient in its explanation of the way in which refunds will be calculated for the "silent" group of customers who would be eligible to claim refunds from the Net Refund Pool established by Paragraph 21. The Settlement expressly provides that refunds will be "based on the individual customer's usage, price charged and refund amounts already received directly from Respond Power."[465] This language mirrors that which is contained in settlement agreements between the Joint Complainants and other EGSs, which have been approved by the ALJs. *See PG&E Initial Decision*;[466] *Hiko Initial Decision*;[467] *IDT Initial Decision*.[468] No basis whatsoever exists for singling out the Settlement between Respond Power and I&E for purposes of requiring a greater level of detail.

Also concerning the Net Refund Pool established by the Settlement, the Joint Complainants criticize the requirement for customers to send a form into a third party administrator to claim a refund. It is hardly burdensome to expect consumers who did not file informal complaints with the Commission when their variable prices were increased to now

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[464] Tr. 1460.
[465] Settlement, Section III ¶ 21 (Refunds) (p. 9).
[466] *See* Joint Petition for Approval of Settlement (filed on March 24, 2015) ¶ 34.
[467] *See* Joint Petition for Approval of Settlement (filed May 2, 2015) ¶ 23.b.
[468] *See* Joint Petition for Approval of Settlement (filed August 4, 2015) ¶ 38.a.

come forward and file claims if they wish to obtain refunds. As Mr. Small explained, the process contemplated by the Settlement is very simple and straightforward, in that a consumer will only need to mail back a form and will undergo no further screening or questioning.[469]

The Joint Complainants also raise concerns about the retention of a third-party administrator for the Net Refund Pool. The concerns include: (i) using a third-party administrator for the Net Refund Pool and not for Informal Complainant Refund Pool will make the process unnecessarily complex; (ii) the Settlement's use of a two-step process for the distribution of refunds to customers (mailing a letter and receiving a response) under the Net Refund Pool may render inadequate Respond Power's $50,000 contribution to the administrator's costs; and (ii) Respond Power is authorized to retain the third-party administrator for the Net Refund Pool and the Settlement contains no requirement for Respond Power to retain an independent third-party administrator or to do so in a cost-effective manner.

Respond Power disagrees that the use of a third-party administrator for the Net Refund Pool and not the Informal Complainant Refund Pool will be unnecessarily complex. Consistent with the express terms of the Settlement, Respond Power will distribute the funds to the known group of informal complainants and the third party administrator will distribute the funds to the group of previously-silent customers who now claim refunds. It is very straight-forward and requires no further explanation or rationale.

As to whether the $50,000 contribution to third-party administrator costs to which Respond Power has committed for the Net Refund Pool is sufficient, any concerns are speculative, at best. The Joint Complainants have presented no evidence in support of this

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[469] Tr. 1472.

concern. However, any concerns that the ALJs may have can easily be addressed through a modification of the Settlement to include language requiring Respond Power and I&E to revisit this provision if the cost of the third-party administrator exceeds $50,000 by more than a specified amount. Likewise, modifications to the Settlement to require Respond Power to retain an independent third-party administrator and to do so in a cost-effective manner would be acceptable to Respond Power.

The Joint Complainants also oppose the reverter provision in the Settlement, which allows some of the funds set aside for the Net Refund Pool to be returned to Respond Power if consumers do not claim certain minimum amounts. Specifically, if customers claim less than $500,000 of the funds in the Net Refund Pool, Respond Power will contribute the difference between $500,000 and the amount of refunds claimed to EDCs' hardship funds. The remaining amount would be returned to Respond Power.[470] If customers do not feel aggrieved and therefore do not claim the available refunds, as a matter of policy, it is fair and reasonable for the monies to be returned to Respond Power.

iv. Alternate Refund Method

The Joint Complainants also critique the alternate refund method established by the Settlement, which expressly acknowledges that customers who do not claim or receive a refund under the Settlement may directly contact Respond Power to request a refund.[471] Although the Settlement obligates the Company to use its best efforts to investigate the customer's complaint and to negotiate an agreement under which the customer will accept a refund in exchange for a release of claims, the Joint Complainants note the lack of any reporting requirement such as is

[470] Settlement, Section III ¶ 21 (Refunds) (pp. 9-10).
[471] Settlement, Section III ¶ 22 (Refunds) (p. 10).

included in other settlement agreements with EGSs.[472] Respond Power submits that I&E would be free under its authority delegated by the Commission or as a signatory of the Settlement to request information from the Company at any time regarding the implementation of this provision.

d. The Settlement is designed to ensure compliance with Commission regulations and warrants license retention by Respond Power.

The Joint Complainants also challenge I&E's commitment as part of this consolidated proceeding to promote license retention by Respond Power, claiming that this provision is not designed to ensure compliance with Commission regulations. The Settlement explicitly provides that I&E's willingness to support license retention is in recognition of the many concessions made by Respond Power,[473] including extensive modifications to business practices, reporting requirements, training of vendors and sales representatives, compliance monitoring efforts and customer service, and the two-year moratorium on marketing variable prices. Given the significant Settlement commitments made by Respond Power, no purpose would be served by a license suspension or revocation. *Hiko Initial Decision II* at 60-62. Moreover, the Joint Complainants did not seek license suspension or revocation in any of the proceedings in which it entered into settlements with the EGSs, and it has provided no reasons for why Respond Power should be treated any differently. *See PG&E Initial Decision; Hiko Initial Decision and IDT Initial Decision.*

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[472] *See, e.g.*, Joint Petition for Approval of Settlement (filed August 4, 2015) ¶ 40.e.
[473] Settlement, Section III ¶ 24 (License Revocation and Suspension) (p. 11).

e. The Settlement's extensive modifications to Respond Power's door-to-door marketing practices are sufficient to ensure compliance with applicable requirements.

The Joint Complainants contend that the Settlement does not require extensive modifications to Respond Power's door-to-door marketing practices, training and compliance monitoring. They also claim that it contains no door-to-door marketing ban.

By contrast, Respond Power notes that the Settlement's overall modifications to its marketing, sales and business practices, along with the Company's commitments relating to training, compliance monitoring and customer service, mirror the provisions in other settlements with EGSs, which were approved by the ALJs.[474] A significant difference, however, is that the Settlement between Respond Power and I&E includes a section specifically focused on door-to-door marketing practices.[475] Under those provisions, Respond Power has agreed not to engage in any door-to-door sales solicitations of Pennsylvania consumers until it has fully implemented the training program and completed the initial training and testing described in the Settlement.[476] This commitment is effectively a temporary ban on door-to-door marketing, with the ban being lifted only upon I&E and BCS being satisfied with the enhanced training program implemented by Respond Power. No further ban is warranted, and particularly given the Commission's lack of jurisdiction to award injunctive relief, the Settlement's provisions for a temporary ban subject to the implementation of an enhanced training program are reasonable and should be approved without modification.[477]

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[474] *See, e.g.*, Joint Petition for Approval of Settlement (filed August 4, 2015) ¶¶ 45, 48 and 49; *IDT Initial Decision.*
[475] Settlement, Section IV ¶ 25.F. (Door-to-Door Marketing) (pp. 24-29).
[476] Settlement, Section IV ¶ 25.F. (Door-to-Door Marketing) (p 29).
[477] The desire on the part of the Joint Complainants to ban Respond Power from door-to-door marketing is not surprising, considering the stance that the OCA has taken in comments filed with the Commission, effectively seeking to ban or severely limit door-to-door marketing in its entirety. *See Interim Guidelines on Marketing and*

f. The existing record is sufficient to support the injunctive relief contained in the Settlement.

The Joint Complainants argue that I&E did not seek injunctive relief in its Complaint, and that the reporting requirements imposed by the Settlement do not include the Joint Complainants in the review of any new document or training materials or ongoing compliance monitoring. It is noteworthy that I&E had originally sought revocation of Respond Power's EGS license, which is the ultimate injunctive relief. As part of the Settlement, I&E was certainly free to accept extensive modifications and restrictions on Respond Power's sales and marketing practices, in lieu of license revocation. As to the inclusion of the Joint Complainants in the review of documents, training materials and ongoing compliance monitoring, this was not done since they were not a party to the Settlement.

5. Public Interest Nature of Settlement

When reviewed in its entirety, the Settlement is in the public interest and should be approved without modifications by the ALJs.[478] It contains provisions for significant financial relief in the form of refunds to consumers; includes a substantial civil penalty and voluntary contribution to EDCs' hardship funds; bars Respond Power from variable price marketing for two years; and imposes extensive modifications to Respond Power's business, sales and marketing practices.

As demonstrated through the discussion below, these components of the Settlement between Respond Power and I&E are identical to those contained in settlement agreements

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Sales Practices for Electric Generation Suppliers and Natural Gas Suppliers, Docket No. M-2010-2185981 (Comments filed August 16, 2010).

[478] Respond Power has expressed its acceptance, however, of modifications to the Settlement to provide for the third party administrator for the Net Refund Pool to be independent and retained in a cost-effective manner, and for Respond Power to consult with I&E if the costs of the third party administrator exceed the $50,000 contribution by a specified amount.

reached by the Joint Complainants and other EGSs, which have been approved by the ALJs. Moreover, in all material respects, the injunctive relief mirrors what was included in those other settlement agreements, except that it contains a longer moratorium on variable price marketing and includes a training and quality control section specifically geared to door-to-door marketing.

It is noteworthy that the Commission does not require settlements to be perfect; nor does it require them to be exactly the same in every respect to previously-negotiated settlements among other parties in similar proceedings. Rather, Settlements are approved by the Commission if they are found to be in the public interest. A Settlement that comprehensively fashions remedies to address all issues raised in this consolidated proceeding is clearly in the public interest and should be approved.

a. The refund pool established by the Settlement is in the public interest.

The Settlement establishes a Total Refund Pool in the amount of $3 million to provide financial relief to customers served by Respond Power during January, February and March 2014. Included in the Total Refund Pool is an Informal Complainant Refund Pool, through which $313,351.33 will be refunded to customers who filed informal complaints from February 1, 2014 through June 30, 2014 with the Commission. Also included in the Total Refund Pool is the Net Refund Pool of $1,466,495.64, which will be offered to all other customers served by Respond Power during the first quarter of 2014.[479] The Net Refund Pool will be administered and distributed by a third-party administrator, with Respond Power paying up to $50,000 of the costs and expenses of the administration of the pool. If consumers do not claim at least $500,000

[479] The Total Refund Pool also includes the amount of $971,279.45, which has already been credited to customers through a voluntary reduction of charges performed by Respond Power in February 2014, and the amount of $248,873.58, which has already been voluntarily refunded to customers by Respond Power. Settlement, Section III ¶ 19 (Refunds) (pp. 7-8).

of this amount, Respond Power will contribute the difference between $500,000 and the amount of refunds claimed to the EDCs' hardship funds, in addition to a $25,000 minimum contribution to which Respond Power has committed as part of this Settlement.

The ALJs should conclude that this Total Refund Pool is in the public interest. As the ALJs have already observed, a refund pool that gives numerous affected consumers financial relief, "provides a level of assurance to the marketplace that the EGSs' actions will be watched," and aids in the development of the retail competitive market. *See PG&E Initial Decision* at 39 and 43; *Hiko Initial Decision* at 31. In the *IDT Initial Decision,* the ALJs further noted their reluctance to "delve too deeply into mechanics or functioning of the refund pool, especially in light of the overall benefits provided in the remainder of the settlement." *Id.* at 42. They also emphasized that while the settlement provides for a large lump sum refund pool for the benefit of consumers, they "are not forcing consumers to take the refund amount provided in this settlement and forego any other claim" and that "[c]onsumers have the ability to choose and we believe that is in the public interest." *Id.*

Here, all customers served by Respond Power during January, February and March 2014 will be eligible for refunds, but are free to decline the amounts offered if they wish to pursue their claims elsewhere. The Settlement also establishes a mechanism, as the ALJs have previously recognized in other cases, to expedite refunds to customers in Pennsylvania and provides some form of financial relief to customers who complained to the Commission and the Joint Complainants. *See PG&E Initial Decision* at 38-39; *Hiko Initial Decision* at 31. Further, the issuance of voluntary refunds by an EGS is consistent with past Commission precedent, and nothing precludes a party from agreeing to perform under a settlement that which the party may not necessarily be legally obliged to do under law. *PG&E Initial Decision* at 39 and 42; *Hiko*

Initial Decision at 32, 34-45; *IDT Initial Decision* at 41. Therefore, Respond Power submits that the same rationale that was employed in the prior initial decisions approving settlements among the Joint Complainants and other EGSs supports a finding that the Total Refund Pool established by the Settlement is in the public interest.

b. The civil penalty and contribution to EDC hardship funds is in the public interest.

The Settlement includes a civil penalty in the amount of $125,000 and provides for a $25,000 minimum contribution to the EDCs' hardship funds. In addition, if customers claim less than $500,000 from the Net Refund Pool that is being administered by a third party administrator, additional contributions will be made to the EDCs' hardship funds, allocated on the basis of the number of customers Respond Power served in each EDC territory as of January 1, 2014.[480]

The ALJs should find that these provisions are in the public interest. In reviewing a settlement with another EGS, the ALJs concluded that a $25,000 civil penalty and a $100,000 contribution to the EDCs' hardship funds, viewed together, were reasonable, appropriate and in the public interest. *PG&E Initial Decision* at 45-46. The ALJs observed that these remedies are "consistent with Commission precedent and will aid in the development of a competitive market for the provision of electric generation service while aiding low income customers." *Id.* at 46. Similarly, in the *IDT Initial Decision*, the ALJs found "the $25,000 civil penalty and the $75,000 contribution to EDC's hardship funds to be reasonable" and "responsive to the issues raised in the Joint Complaint." *Id.* at 46.

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[480] Settlement, Section III ¶ 22 (Refunds) and ¶ 23 (Civil Penalty) (pp. 10-11).

Here, Respond Power is agreeing to pay a civil penalty five times that approved in the *PG&E Initial Decision*, while also committing to substantial contributions to the EDCs' hardship funds. Viewed together, Respond Power's civil penalty and minimum contribution to the EDCs' hardship funds of $150,000 exceeds the commitments of both PG& and IDT. Therefore, the same rationale employed by the ALJs in the *PG&E Initial Decision* and *IDT Initial Decision* support a finding that these provisions are in the public interest.

c. The Settlement's injunctive relief is in the public interest.

The Settlement provides extensive injunctive relief provisions requiring numerous modifications to Respond Power's business practices, which are almost identical to those that were found by the ALJs to be in the public interest in similar proceedings. *PG&E Initial Decision* at 46-50; *Hiko Initial Decision* at 37-45; *IDT Initial Decision* at 47-51. These provisions include a two-year moratorium on offering variable price contracts to new customers, and significant changes to Respond Power's marketing and sales practices, compliance monitoring efforts, training programs and complaint handling procedures. They also include a series of obligations to which Respond Power will adhere in marketing electric generation services in Pennsylvania related to sales scripts; third party verification scripts; the use of terminology such as "savings," "competitive," and "guaranteed;" and its Disclosure Statement. Respond Power will also be subjected to far-reaching regulatory oversight by the Commission.

The ALJs have observed that these nearly identical injunctive relief provisions are appropriate and in the public interest because they address the various issues raised in the Joint Complaint. *PG&E Initial Decision* at 49. Moreover, these substantial actions "further the policy of the Commonwealth to 'permit retail customers to obtain direct access to a competitive generation market,' 66 Pa.C.S. §§ 2802(3), and should be adopted without modification." *Hiko Initial Decision* at 44. Also, in the *IDT Initial Decision*, the ALJs found that the significant

changes to business practices will allow the company "to be a viable competitor for the provision of electric generation service in Pennsylvania while ensuring numerous protections for consumers." *Id.* at 51.

While Respond Power does not admit to any wrongdoing in connection with the Settlement or in making these significant modifications to its marketing, sales and business practices, it acknowledges having learned valuable lessons as a result of the customer complaints that were filed following the variable price increases in early 2014 and from the consumer witnesses who testified in this proceeding. Clearly, many consumers did not have a sufficient understanding of the workings of the retail competitive market, particularly as to variable pricing, and would benefit from having more information conveyed to them.

This overall lack of consumer awareness was acknowledged by the Commission in the *Variable Price Order* when it observed that existing regulatory requirements may need to be changed to ensure that consumers understand how the prices can change. As a result, the Commission took several steps to increase consumer education efforts, including the posting of a consumer alert on www.PaPowerSwitch.com, developing a separate page on www.Pa.PowerSwitch.com and the addition of a Q&A for inclusion under "Frequently Asked Questions" on PaPowerSwitch.com to help ensure that consumers are better educated about variable rates. *See Variable Price Order* at 5. In addition, in the aftermath of the Polar Vortex, the Commission revised its customer information disclosure regulations to enhance the information that is provided to consumers about variable prices, including a requirement to provide warning that there is no ceiling. *New Disclosure Requirements Order.* With perfect hindsight, it is clear that this additional information will benefit consumers and the competitive retail market.

d. The Settlement is consistent with the factors and standards in the Policy Statement.

Importantly, the Settlement is consistent with the factors and standards set forth in the Commission's Policy Statement.[481] The Settlement provides immediate, concrete benefits in the form of significant refunds to current and former customers of Respond Power, and obligates Respond Power to pay a substantial civil penalty and make a generous contribution to EDCs' hardship funds. In addition, it requires Respond Power to make numerous enhancements to its marketing and sales practices, training program, compliance monitoring efforts, customer service and reporting requirements, which are all designed to improve the quality and content of information that is provided to consumers.

i. Whether conduct was of a serious nature.

The first factor that is considered under the Policy Statement is whether the allegations were of a serious nature, such as willful fraud or misrepresentation, as opposed to administrative or technical errors.[482] Allegations in the Joint Complaint and the I&E Complaint concerning misleading representations by Respond Power sales representatives and the use of misleading marketing materials are of a serious nature.

However, no allegations have been made to suggest that Respond Power directed or trained its sales representatives to promise savings or make any other guarantees. To the contrary, Respond Power has offered testimony to demonstrate that its training and oversight of sales representatives were specifically designed to avoid any guarantees of savings.[483] Indeed, the scripts that have been included in the record show that Respond Power's sales representatives

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[481] 52 Pa. Code § 69.1201.
[482] 52 Pa. Code § 69.1201(c)(1).
[483] Respond Power Statement No. 1 at 5:22-7:21.

were trained to use qualifying language such as possible or potential when discussing savings with customers.[484] Moreover, marketing materials contained the same qualifying language.[485] The record also includes evidence showing that phrases such as "historical savings" were true at various times prior to the Polar Vortex.[486]

Importantly, Respond Power's Disclosure Statement expressly stated that the Company could not guarantee savings.[487] This is not a situation where an executive level decision was made to increase prices despite a written guarantee to the contrary. *See Hiko Initial Decision-II.*

In addressing the nature of the conduct in evaluating other settlement agreements, the ALJs have been satisfied that the remedies of a moratorium on variable rate sales and refunds to consumers address the seriousness of the allegations. *See Hiko Initial Decision* at 46. Similarly, in the *PG&E Initial Decision* the ALJs similarly found that the nature of the allegations warranted approval of the Settlement without modification, including the $25,000 civil penalty. *Id.* at 50. *See also IDT Initial Decision* at 52.

ii. Whether resulting consequences of conduct were of a serious nature.

The second factor that is evaluated under the Policy Statement is whether the resulting consequences of the actions were of a serious nature, such as whether personal injury or property

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[484] BRA-2, p. 93; I&E Exhibit 5. In fact, the Commission itself has focused on the possible savings from switching to an EGS in promoting electric choice through PaPowerSwitch.com. Settlement; Exhibit A, Stipulation of Facts ¶ 40.
[485] Respond Power Statement No. 1 at 9:6-9; Joint Complainants' Consumer Witness Testimony, Volume I, page 28 (Exh. VW-1).
[486] Respond Power Statement No. 1 at 11:24-30; Exhibit EW-1.
[487] RP Exhibit No. 1; Respond Power Statement No. 3 at 6: 24-25.

damage were involved.[488] Here, no allegations have been raised about personal injury or property damage.

Rather, the allegations relate to financial harm to customers and to an adverse impact on the competitive retail market. While some customers testified to having difficulty paying their bills when variable prices were increased, Respond Power submits that those increases were consistent with contracts into which they entered. Further, Respond Power made voluntary reductions in the charges for many of those customers in the amount of nearly $1 million and has already issued refunds in the amount of almost $250,000. The Settlement affords additional substantial financial relief to customers who complained to the Commission and offers a generous $1.5 million Net Refund Pool, from which other customers may claim refunds. It also provides for contributions to EDCs' hardship funds.

In the *PG&E Initial Decision*, the ALJs concluded that the financial difficulties experienced by consumers and the potential effect of the alleged conduct on the retail market warranted approval of these provisions and the overall settlement without modification. *Id.* at 51. Further, in the *Hiko Initial Decision*, the ALJs observed that the disbursement of refunds and a contribution to the EDCs' hardship funds are appropriate remedies to address the consequences of the alleged conduct. *Id.* at 46-47. *See also IDT Initial Decision* at 53.

iii. Whether conduct was deemed intentional or negligent.

The third factor identified by the Policy Statement is whether the conduct at issue was deemed intentional or negligent.[489] "This factor may only be considered in evaluating litigated

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[488] 52 Pa. Code § 69.1201(c)(2).
[489] 52 Pa. Code § 69.1201(c)(3).

cases." *Id.* Therefore, this factor is not relevant here. *See PG&E Initial Decision* at 51; *Hiko Initial Decision* at 47, footnote 10; *IDT Initial Decision* at 53.

iv. Whether Company has made efforts to modify internal practices and procedures.

The fourth factor that is considered under the Policy Statement is whether Respond Power has made efforts to modify internal practices and procedures to address the allegations at issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision.[490]

In addition to the measures noted above, including refunds and contributions to EDCs' hardship funds to help customers who were financially affected by the variable price increases, Respond Power has agreed as part of this Settlement to implement numerous modifications in its marketing practices, including a stay-out from offering variable price contracts to new customers for two years. The Settlement also includes specific provisions regarding sales scripts, third party verification scripts, disclosure statements, marketing materials, training, compliance monitoring and reporting.

Noting that PG&E had agreed not to offer variable rate plans for 18 months and that the PG&E settlement agreement provided for several modifications to its internal practices and procedures, the ALJs concluded that approval of the settlement without modification was in the public interest. *PG&E Initial Decision* at 51-52. In the *Hiko Initial Decision,* the ALJs found that refunds, contributions to the EDCs' hardship funds and modifications to business practices supported approval of the settlement. *Id.* at 47. Also, in the *IDT Initial Decision*, the ALJs observed that a 21-month moratorium on the sale of variable rate products was "reasonable to

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[490] 52 Pa. Code § 69.1201(c)(4).

allow time for IDT to implement the modifications to business practices so that a variable rate service may be a competitive option for some customers in the future." *Id.* at 54. The ALJs further noted that "variable rate products are permitted under Pennsylvania law and may offer benefits to consumers." *Id.*

Given the ALJs' findings and conclusions in the initial decisions approving settlement agreements between the Joint Complainants and other EGSs, they should likewise find these modifications as supporting approval of the Settlement in this proceeding. The modifications are identical to the injunctive relief approved in those initial decisions, except that the Settlement reached by Respond Power and I&E provides for a longer variable rate moratorium and includes a section geared toward improving the disclosures and quality of information provided to potential customers by door-to-door sales representatives.

v. Number of affected customers and duration of alleged violations.

The fifth factor that is evaluated under the Policy Statement is the number of customers who were affected and the duration of the alleged violations.[491] The Joint Complaint identified 709 customers of Respond Power who contacted the OAG and OCA. The I&E Complaint noted that 1,206 customers filed informal complaints with the Commission from February 1, 2014 through June 30, 2014. Even if there was no overlap between those two groups of customers, and there was some overlap, the total number of customers who were affected would be less than 2,000. Only about 10% of those customers submitted written testimony as part of this proceeding, and the written testimony of approximately 169 consumers were admitted in the record either by stipulation or following cross-examination. The remaining pieces of consumer

[491] 52 Pa. Code § 69.1201(c)(5).

testimony that were served by the Joint Complainants and I&E are not in the record and may not be relied upon in determining remedies or directing relief. Without doubt, the number of consumers who testified in this proceeding represents a *de minimis* number of the total customers served by Respond Power in early 2014.

In considering the number of affected customers in similar proceedings, the ALJs considered the 2,500 contacts received by the Joint Complainants from PG&E customers to be "substantial," but determined that the refunds and contributions to the EDCs' hardship funds were reasonable and in the public interest, especially considering the injunctive relief outlined in the settlement agreements. *PG&E Initial Decision* at 52-53. *See also Hiko Initial Decision* at 47; *IDT Initial Decision* at 55-56.

The Settlement in this consolidated proceeding will result in refunds for the approximately 1,200 customers who filed informal complaints with the Commission and establishes a mechanism for all other customers served by Respond Power in early 2014, including those who complained to the Joint Complainants, to receive a refund. If customers do not claim the amount that is set aside for the non-complaining customers, up to $500,000 will be contributed to the EDCs' hardship funds, including the $25,000 minimum contribution to which Respond Power has committed. These remedies, along with the injunctive relief provided in the Settlement, are consistent with provisions in the other settlement agreements approved by the ALJs and should also be approved here.

vi. Compliance history.

The sixth factor is the compliance history of Respond Power.[492] Respond Power has no prior compliance history with the Commission.[493] Before January 2014, two formal complaints had been filed with the Commission against Respond Power and both were quickly resolved through settlements to the satisfaction of the customers.[494] 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 similar allegations and the same time period at issue here. Indeed, several formal complaints filed with the Commission involving the same allegations and time period at issue here have been dismissed during the pendency of this proceeding.[495] The mere fact that formal complaints arising from price increases during the Polar Vortex were fully litigated and adjudicated in Respond Power's favor demonstrates that there is no "pattern and practice" of unlawful activity.

In the *PG&E Initial Decision*, the ALJs concluded that the settlement, including a $25,000 civil penalty, was in the public interest, despite PG&E having a prior settlement agreement with I&E involving the slamming of 300 customers that resulted in the imposition of a $150,200 civil penalty and various corrective measures. *Id.* at 53-54. *See PG&E Initial Decision* at 53-54; *Pa. Pub. Util. Comm'n., Bureau of Investigation and Enforcement v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas and Electric*, Docket No. M-2013-2325122

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[492] 52 Pa. Code § 69.1201(c)(6).
[493] I&E Statement No. 1 at 32:7-11.
[494] Respond Power Statement No. 3-Revised at 2:23-30.
[495] *See. e.g., Werle v. Respond Power LLC*, Docket No. C-2014-2429158 (Initial Decision issued November 18, 2014; Final Order entered February 23, 2015); *Nadav v. Respond Power LLC*, Docket No. C-2014-2429159 (Order entered December 19, 2014); *Tran v. Respond Power LLC*, Docket No. C-2014-2417540 (Order entered July 30, 2015); *Friz v. Respond Power LLC*, Docket No. F-2014-2453884 (Initial Decision issued February 11, 2015; Final Order entered March 19, 2015).

(Order entered October 2, 2014) ("*PG&E Slamming Order*"). Likewise, the ALJs approved a $25,000 civil penalty for IDT as being in the public interest, although it had previously paid a fine of $39,000 and agreed to modifications to its business practices stemming from a settlement agreement with I&E that involved slamming. *IDT Initial Decision* at 56-57. *See Pa. Pub. Util.Comm'n, Bureau of Investigation and Enforcement v. IDT Energy, Inc.*, Docket No. M-2013-2314312 (Order entered October 17, 2013) ("*IDT Slamming Order*").

Given Respond Power's unblemished compliance history since receiving its license in 2010, and in recognition of the other provisions of the Settlement, the civil penalty of $125,000 agreed to by Respond Power is more than sufficient to address the concerns raised in this consolidated proceeding. Particularly since the civil penalty is higher than that agreed to by the Joint Complainants in settlements with other EGSs who have prior compliance histories, no basis exists in this proceeding exists to modify that amount.

vii. Whether Respond Power cooperated with Commission's investigation.

The seventh factor that is considered under the Policy Statement is whether Respond Power cooperated with the Commission's investigation.[496] I&E has indicated that Respond Power was cooperative during the informal investigation that led to the filing of the I&E Complaint, and was cooperative in formal and informal discovery and settlement negotiations.[497] Additionally, before and since the filing of the Joint Complaint and the I&E Complaint, the Company has worked to resolve issues with individual consumers. Numerous cases have been

[496] 52 Pa. Code § 69.1201(c)(7).
[497] Settlement, Appendix A, I&E Statement in Support at 19.

closed due to settlements resulting in the filing of certificates of satisfaction.[498] In the *Hiko Initial Decision*, the ALJs relied on the Joint Complainants' assertion that the company had cooperated in the investigation, including discovery and settlement negotiations, and concluded that the ability of the parties to comprehensively resolve this matter demonstrates cooperation. *Id.* at 48. Similarly, in the *PG&E Initial Decision*, the ALJs commended the parties for their cooperation in reaching a comprehensive settlement of these various complex issues. *Id.* at 54. *See also IDT Initial Decision* at 57-58.

viii. Whether the amount of the civil penalty is sufficient to deter future violations.

The eighth factor that is evaluated under the Policy Statement is the amount of civil penalty that is necessary to deter future violations.[499] Respond Power's financial responsibility under the Settlement, in addition to the costs associated with making extensive modifications to marketing, sales and business practices, is $3.2 million, including a civil penalty of $125,000.

This civil penalty is significantly higher than the amounts of $25,000 agreed to by each PG&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. *See PG&E Slamming Order; IDT Slamming Order.* In the *PG&E Initial Decision*, the ALJs recognized the total refund pool as well as the additional amounts agreed to as part of the settlement agreement, including the civil penalty, costs for administering the refund pool and a contribution to the EDCs' hardship funds were substantial and should deter future

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[498] *See, e.g., Tustin v Respond Power LLC*, Docket No C-2014-2417552 (Certificate of Satisfaction filed December 5, 2014); *Russell v. Respond Power LLC*, Docket No. C-2014-2417551 (Certificate of Satisfaction filed September 29, 2014); *Slocum v. Respond Power LLC*, Docket No. C-2014-2429154 (Certificate of Satisfaction filed November 13, 2014); *Lewis v. Respond Power LLC*, Docket No. C-2014-2411127 (Certificate of Satisfaction filed November 19, 2014).

[499] 52 Pa. Code § 69.1201(c)(8).

violations. *Id.* at 54-55. Similarly, in the *IDT Initial Decision*, the ALJs were satisfied that when the settlement was viewed in its entirety, the provisions were sufficient to deter IDT from violations in the future. *Id.* at 58-59.

The same package of settlement terms exists in this proceeding, and it is likewise appropriate to consider the totality of the payments that Respond Power has made or will make pursuant to the Settlement. Respond Power's hefty financial commitments of $3.2 million, combined with the modifications to its marketing, sales and business practices, are more than sufficient to act as a deterrent going forward. Moreover, the intense regulatory oversight that will accompany Respond Power's day-to-day operations in Pennsylvania will ensure that ongoing compliance with the Commission's regulations is achieved.

Respond Power recognizes that the total amounts of the settlement packages for PG&E and IDT are higher than the amount produced by this Settlement. For example, PG&E agreed to a total refund pool of over $6.8 million and IDT agreed to a total refund pool of over $6.5 million. However, it is likely that those EGSs each had significantly higher average customer prices and larger customer bases that would, by pure math, result in a larger refund pool.[500] Moreover, those EGSs issued significant refunds to customers on their own terms prior to execution of their settlements, for their own business reasons such as for media purposes or to keep customers.

Therefore, for comparison purposes, and to assist in a determination of whether the Settlement is in the public interest, it is more appropriate to consider the net refund pools.

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[500] Specifically, 2,588 customers contacted the Joint Complainants about PG&E and 2,456 customers contacted the Joint Complainants about IDT, compared to the 709 customers who contacted the Joint Complainants about Respond Power. PG&E and IDT had over 300 percent more complaints about their prices. Settlement, Exhibit A, Stipulation of Facts ¶¶ 38 and 39.

PG&E agreed to refund an additional $2.3 million to customers, while IDT agreed to refund an additional $2.4 million to customers as part of their settlement agreements with the Joint Complainants.[501] These refund pools compare favorably to Respond Power's nearly $1.5 million in additional refunds provided for by the Settlement, particularly given the number of customers who contacted the Joint Complainants about PG&E and IDT, as compared to Respond Power.

ix. Past Commission decisions in similar situations.

The ninth factor that is considered under the Policy Statement relates to past Commission decisions in similar situations.[502] While the Commission has not issued a final order involving similar allegations against an EGS, the ALJs found in the *PG&E Initial Decision* that the settlement was consistent with prior settlements approved by the Commission that involved EGSs and provided for refunds, civil penalties, contributions to EDCs' hardship funds and injunctive relief. *Id.* at 55. As discussed above, the financial payment and modifications to business practices are very similar between the settlement agreement involving PG&E and the Settlement in this proceeding. In the *Hiko Initial Decision*, the ALJs likewise found the settlement to be consistent with prior Commission-approved settlements and to constitute a comprehensive resolution of the issues. *Id.* at 48-49. *See also IDT Initial Decision* at 59-60.

x. Other relevant factors.

The tenth factor to consider is "other relevant factors."[503] Because the Settlement: (i) provides for significant financial relief to current and former Respond Power customers; (ii) precludes Respond Power from offering a variable price for two years; (iii) modifies the

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[501] Settlement, Exhibit A, Stipulation of Facts ¶¶ 45 and 47.
[502] 52 Pa. Code § 69.1201(c)(9).
[503] 52 Pa. Code § 69.1201(c)(10).

Company's marketing and sales practices to improve the quality of the information that is provided to prospective customers; (iv) requires the implementation of a new training program for employees, agents and contractors that designed to reinforce Pennsylvania's requirements; (v) enhances Respond Power's compliance monitoring efforts, and (vi) subjects Respond Power to wide-ranging regulatory oversight for five years, it is in the public interest and should be approved as full satisfaction of all allegations in this consolidated proceeding. In the *Hiko Initial Decision*, the ALJs also noted that a comprehensive settlement avoids litigation, conserves resources and provides for expedited relief to affected customers. *Id.* at 49. The ALJs added in the *PG&E Initial Decision* that a settlement is in the public interest because it alleviates the uncertainty associated with fully litigating a case. *Id.* at 55-56. *See also IDT Initial Decision* at 62-63.

D. Identification of Overlapping Allegations in Joint Complaint and I&E Complaint

Many of the allegations in the Joint Complaint are mirrored in the I&E Complaint and relate to the same marketing, sales and business practices that are described in the I&E Complaint. Specifically, both the Joint Complaint and the I&E Complaint allege misleading and deceptive claims of affiliation with EDCs; misleading and deceptive promises of savings; failure to disclosure material terms; prices nonconforming to the disclosure statement; slamming; and lack of good faith in handling complaints. Indeed, the ALJs recognized the commonality of factual and legal issues when granting I&E's Petition to Consolidate these Complaints. *Consolidation Order* at 3.

The Joint Complaint contains only three allegations that do not appear in the I&E Complaint. One concerns compliance with the TRA, which the Commission has found that it

does not have the jurisdiction to enforce.[504] *Respond Power Interlocutory Order* at 24-25. In any event, the allegation made in Count IX of the Joint Complaint is that Respond Power did not provide consumers with a contract following a telemarketer sale, which is not required by the TRA when a transaction is regulated by other laws of the Commonwealth.[505] Moreover, Respond Power sent a written disclosure statement to every customer who enrolled through a telemarketer, which contained all of the elements required by the TRA, except that Respond Power did not obtain a written signature from the customer since that is not required by Commission regulations.[506]

Another count in the Joint Complaint that does not appear in the I&E Complaint relates to an alleged failure to provide accurate pricing information.[507] In Count VII, the Joint Complainants allege that Respond Power's Disclosure Statement does not contain sufficient information about the conditions and limits of price variability. As the Commission approved the variable pricing language contained in Respond Power's Disclosure Statement as part of the licensing process, this allegation has no merit. *See Hoke.* Also, these allegations are based on an inaccurate interpretation of the Commission's regulations, which do not require EGSs to use a specific pricing methodology or to place limits on prices that may be charged. Even when the Commission revised its regulations in response to the Polar Vortex, it did not impose these requirements.[508] In any event, the Settlement provides for Respond Power to submit a new draft Disclosure Statement to BCS and to submit any changes for five years; therefore, any ongoing concerns about Respond Power's Disclosure Statement have been fully addressed.

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[504] Joint Complaint, Count IX.
[505] 73 P.S. § 2245(d).
[506] Respond Power Statement No. 3-Revised at 8:20-25; 52 Pa. Code §§ 54.5 and 111.7(a).
[507] Joint Complaint, Count VII.
[508] 52 Pa. Code § 54.5

The third count in the Joint Complaint that is not in the I&E Complaint relates to welcome letters and inserts in use several years ago, which the Joint Complaint contends violate the Consumer Protection Law.[509] As the Commission has concluded that it does not have jurisdiction to enforce the Consumer Protection Law, Count IV does not contain any allegations upon which the Commission may award any relief. *Respond Power Interlocutory Order* at 24-25. In any case, Respond Power noted in its Answer to the Joint Complaint that the welcome letter and inserts appended to the Joint Complaint were used by a vendor over a few-month period more than two years prior to July 10, 2014, and Mr. Wolbrom confirmed this in his testimony.[510] As part of the Settlement, Respond Power has agreed to ensure that all marketing materials do not contain references to savings, competitive rates or market-based prices and further to implement an enhanced training and compliance monitoring program for sales representatives and vendors. Therefore, no further relief is warranted by this count.

The I&E Complaint also contains two allegations that do not appear in the Joint Complaint. Specifically, I&E alleged billing errors[511] and inaccurate or incomplete sales agreements, including an allegation that some agreements failed to note whether the customer signed up for a variable or fixed price.[512] As such, these allegations overlap with those contained in the Joint Complaint.

Despite these minor differences in the allegations, the Settlement produces results and fashions specific remedies that are specifically designed to adequately and effectively address all of the allegations contained in both the Joint Complaint and the I&E Complaint. The injunctive

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[509] Joint Complaint, Count IV.
[510] RP Exhibit No. 40 ¶ 55; Tr. 1319.
[511] I&E Complaint, ¶ 35.
[512] I&E Complaint ¶ 34.

relief agreed to by Respond Power in this Settlement is nearly identical to the language contained in settlement agreements among the Joint Complainants and other EGSs concerning similar allegations, which have been approved by the ALJs. Additionally, the financial commitments made by Respond Power in this Settlement are consistent with or exceed amounts that have been previously agreed to by the Joint Complainants and approved by the ALJs. *See generally PG&E Initial Decision; Hiko Initial Decision; and IDT Initial Decision.* Approval of this Settlement would fully address all of the issues raised in this consolidated proceeding.

E. Relief for Substantiated Allegations

In the instant consolidated proceeding, Respond Power has been litigating against three separate governmental entities, all of which are indirectly funded by the taxpayers and ratepayers on whose behalf the entities are ostensibly advocating. Each of the governmental entities appears to have its own position as to what the proper resolution of the instant proceeding should be. While Respond Power has been able to agree to settlement terms with one entity, I&E, the other two continue to push for alternative remedies. This approach has led to an absurd situation in which: (i) I&E is now actively litigating against OAG and OCA over the appropriateness of its settlement with Respond Power – ultimately at taxpayer and ratepayer expense (as OAG is funded by tax dollars and I&E and OCA are both funded by utility assessments which are passed through to ratepayers), and (ii) Respond Power has the burdens associated with defending multiple civil prosecutions by several governmental entities for substantially the same acts, transactions, or conduct. In addition to being patently unfair to Respond Power, the prosecution of this case highlights bad public policy which allows several public advocates to pursue a market participant for the same alleged conduct and to fight with each other in the process of doing so. This was exactly the outcome that the ALJs sought to avoid when consolidating the I&E Complaint with the Joint Complaint.

While the instant proceeding is civil in nature, the United States Supreme Court and the United States Department of Justice have both long recognized that subjecting a criminal defendant to such dual prosecutions is unwarranted, unfair, and an inefficient utilization of limited governmental resources. *Petite v. United States*, 361 U.S. 529 (1960); *Rinaldi v. United States*, 434 U.S. 22, 31 (1977) ("The overriding purpose of the *Petite* policy is to protect the individual from any unfairness associated with needless multiple prosecutions."); *United States Attorneys' Manual* 9-2.031 (July 2009). If such consideration is warranted in criminal cases where the need to protect the public is of paramount concern, then certainly such considerations should also be recognized in the instant proceeding.

The ALJs and the Commission should not hesitate to weigh the burdens foisted upon Respond Power by OAG and OCA's continued litigation of the case and litigation of the Settlement. Indeed, Respond Power, at great expense, has had to defend itself actively against three public advocates in this proceeding -- all purporting to have the same mission of protecting residential customers. Along these lines, the Commission should take into consideration, as a matter of public policy, the fact that all three governmental entities that are litigating against Respond Power -- and now against each other -- are funded either by taxpayers or ratepayers (who include the very people whom the advocates are purporting to defend). Such excesses of government should be discouraged. Respond Power, as well as Pennsylvania's taxpayers and ratepayers, are victims of prosecutorial overzealousness in this highly-publicized and politically-charged case.[513]

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[513] The overly aggressive media campaign launched by Attorney General Kane in early 2014 (RP Exhibit No. 38) evidences the excessive priorities placed on a matter that the Commission immediately acted to address. Likewise, the testimony offered by Acting Consumer Advocate McCloskey before the Pennsylvania State Consumer

The Settlement Petition is clearly reasonable and in the public interest. It should simply be approved, and this matter -- after over a year and a half of litigation -- should be finally concluded.

1. Reconciliation of OCA/OAG Remedies with Settlement Remedies if Settlement Approved

In this consolidated proceeding, if the Settlement is approved, it is necessary for the Commission to reconcile any remedies afforded by the Settlement with those sought by the Joint Complainants. As a matter of fundamental fairness, the remedies need to be reconciled so that Respond Power is not penalized twice for the same conduct simply because several governmental entities are pursuing the same allegations.

In the separate proceedings involving Hiko's variable price increases in early 2014, the ALJs reviewed a settlement agreement between Hiko and the Joint Complainants in the *Hiko Initial Decision* and an unsettled complaint filed by I&E in the *Hiko Initial Decision II*. Even though those matters had not been consolidated, the ALJs reviewed the matters concurrently and referred to the initial decision issued in the other proceeding. The ALJs further recognized the importance of reconciling the remedies so that Hiko would not be subjected to cumulative penalties and inconsistent outcomes. For instance, the ALJs found in the *Hiko Initial Decision II* that because of the extensive modifications to business practices being approved as part of the settlement agreement in the *Hiko Initial Decision,* no purpose would be served by revoking Hiko's license. *Hiko Initial Decision II* at 60-62. It is noteworthy, however, that in the settlement agreement, which resulted in the issuance of the *Hiko Initial Decision*, contained no

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Protection and Professional License Committee on April 1, 2014 regarding variable rate plans attacked many of the Commission's basic rules of disclosure while advancing extreme proposals.

civil penalty. Therefore, that issue was a focal point of the *Hiko Initial Decision II.* In this consolidated proceeding, however, the Settlement addresses every element of relief that was sought by both the I&E Complaint and the Joint Complaint.

As shown by the chart and follow-up discussion below, approval of the Settlement would not only fully satisfy the I&E Complaint, but it would also wholly and appropriately address the factual and legal allegations raised by the Joint Complaint.

Joint Complaint Count	**Relief Awarded by the Settlement**
Count I-Alleged Misleading Claims of Affiliation with Electric Distribution Companies	• Sales representatives' communications to clearly convey relationship with Respond Power and not with EDC • Enhanced training of sales representatives, compliance monitoring and reporting • Clear display of Respond Power brand information in all advertising
Count II-Alleged Misleading Promises of Savings	• No misrepresentations; no references to savings; no use of terms such as "risk free," "competitive," or "guaranteed) • Limited references to EDC's PTC • Enhanced training of sales representatives, compliance monitoring and reporting
Count III-Alleged Failure to Disclose Material Terms	• No variable price marketing for two years • Disclosure in all sales communications and written materials that variable prices can change every month and there is no limit on how high the price can go • Provision of historical variable pricing information • Enhancements to website enrollment screens • Specific questions during TPV focused on variable pricing
Count IV-Alleged Misleading Welcome Letter	• Restrictions on use of various terms in marketing materials relating to savings or competitive or risk free rates
Count V-Alleged Slamming	• Compliance with regulations concerning consent to switch and authorization from customer of record
Count VI-Alleged Lack of Good Faith Handling of Complaints	• Compliance with specified timeframes for investigating consumer complaints and issuing reports to consumers • Maintain staff of customer service representatives sufficient to provide timely access by consumers and timely responses by Company • Implement action plan for handling periods of high call volumes • Submit reports to I&E and BCS in event of non-compliance

Joint Complaint Count	Relief Awarded by the Settlement
Count VII-Alleged Failure to Provide Accurate Pricing Information	• Submission of revised disclosure statement to I&E and BCS within 60 days after approval of Settlement • Submission of any subsequent amendments to I&E and BCS for five years
Count VIII-Alleged Prices Nonconforming to Disclosure Statement	• Use of specific pricing methodology for variable prices • Refrain from reference to "market conditions" or "market-based" rates unless price can be determined from publicly available information
Count IX-Telemarketer Registration Act	• No relief warranted because Commission lacks jurisdiction to enforce TRA and EGSs are exempt from TRA's written contract requirements due to oversight by Commission

In addition to the specific injunctive relief described in the chart, the other remedies established by the Settlement including $3.2 million in refunds to consumers, the payment of a civil penalty in the amount of $125,000 and the minimum contribution of $25,000 to EDCs' hardship funds fully addresses all alleged violations of the Joint Complaint.

Notably, the civil penalty provided for in the Settlement is significantly higher than the amounts of $25,000 agreed to by PG&E and IDT as part of their settlements with the Joint Complainants, despite both EGSs having previously had penalties imposed upon them by the Commission as a result of informal investigations conducted by I&E.[514] *See PG&E Slamming Order; IDT Slamming Order.* Although the Joint Complainants sought a civil penalty as part of the requested relief in the Joint Complaint, they proposed no specific amount and offered no testimony analyzing the factors set forth in the Commission's Policy Statement that establishes criteria to determine appropriate civil penalties.[515] Moreover, they advanced no arguments in their Objections to the Settlement to suggest that the civil penalty was inadequate. Therefore, the

[514] Settlement, Exhibit A, Stipulation of Facts ¶¶ 45 and 47.
[515] 52 Pa. Code § 69.1201.

civil penalty included in the Settlement is sufficient to address all alleged violations in this consolidated proceeding.

With respect to the minimum contribution of $25,000 to EDCs' hardship funds, which the Joint Complainants have described as insufficient, this is the same amount agreed to by the Joint Complainants and approved by the ALJs in the *Hiko Initial Decision*.[516] While the other EGS settlements provided for contributions of $100,000 and $75,000,[517] which were approved by the *PG&E Initial Decision* and *IDT Initial Decision*, respectively, Respond Power notes that substantially more consumers contacted the OCA and complained to the OAG about these EGSs.[518] In addition, the Settlement has the potential for contributions by Respond Power up to $500,000 to the EDCs' hardship funds if customers do not claim the available refunds. Particularly given the voluntary nature of this contribution that the Commission could not otherwise require of Respond Power, this provision of the Settlement is more than adequate and fully addresses the alleged violations raised by the Joint Complaint,

2. Specific Remedies

a. Refunds

At the outset, Respond Power reiterates its position that the Commission lacks statutory authority to direct EGSs to issue refunds. Therefore, any refunds requested by the Joint Complainants beyond the $3 million that Respond Power has agreed to as part of the Settlement must be denied. Even if the Commission decides that it may direct an EGS to issue refunds, the

[516] Settlement, Exhibit A, Stipulation of Facts ¶ 46.
[517] Settlement, Exhibit A, Stipulation of Facts ¶¶ 45 and 47.
[518] Settlement, Exhibit A, Stipulation of Facts ¶¶ 38 and 39.

circumstances under which it has ordered that such relief or under which it has suggested that such relief may be ordered are not present here.

In its unappealable *IDT Interlocutory Order*, the Commission carved out two exceptions to its "no refund rule," which have been succinctly summarized as follows:

> First, the Commission noted that, pursuant to 52 Pa. Code § 57.177(b), it could direct an EGS to refund charges when a customer has been switched to an EGS without the customer's consent. Second, the Commission stated that it had the authority, pursuant to 66 Pa. C.S. § 501, to order a credit or refund where the EGS overbills a customer by failing to bill a customer in accordance with its disclosure statement, in violation of 52 Pa. Code §§ 54.4(a) and 54.5(a) and 66 Pa. C.S. § 2809(b).

Friz v. Respond Power LLC and PPL Electric Utilities Corporation, Docket No. F-2014-2453884 (Initial Decision issued February 11, 2015 at 10; Final Order entered March 9, 2015) ("*Friz Initial Decision*").

While Respond Power contends that the Commission lacks the requisite statutory authority to direct an EGS to issue a refund under any circumstances,[519] Respond Power also notes that neither of the exceptions carved out by the *IDT Interlocutory Order* apply to this case. Specifically, the Joint Complainants have not carried their burden of proving that any of the consumer witnesses testifying in this proceeding were switched to Respond Power without their consent or that Respond Power charged prices that did not conform to its disclosure statement. Even to the extent that the Commission finds any situations where a consumer was switched

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[519] Respond Power notes that the regulation cited by the Commission in the *IDT Interlocutory Order*, 52 Pa. Code § 57.177(b), which purports to authorize the Commission to require EGSs to provide full refunds to customers of all generation charges resulting from an unauthorized switch, has not undergone appellate review. As subject matter jurisdiction is always a ripe inquiry, Respond Power posits that it is likely that the application of this regulation to an EGS would withstand such review. As has been demonstrated in this Main Brief, the Commission simply lacks the statutory authority to direct the issuance of refunds by EGSs.

without authorization, disputes were made well beyond the two-month billing cycle established by the Commission's switching regulations for the consumers to claim refunds.

As to the Joint Complainants' allegation that Respond Power charged prices that did not conform to its disclosure statement, Respond Power has argued that such a determination in this proceeding would require the Commission to engage in a traditional cost of service analysis, which it may do in a competitive retail market. Further, Respond Power has demonstrated that it established prices in a manner that was consistent with the factors set forth in its Disclosure Statement.[520]

Since the issuance of the *IDT Interlocutory Order*, the Commission has again exceeded its statutory authority by carving out yet a third exception to the no refund rule. *Kiback Order.* Specifically, in the *Kiback Order*, the Commission directed an EGS to issue a refund to a customer who had allegedly been promised by an EGS sales representative that his price would always be below the price to compare charged by the EDC. In the *Kiback Order*, the Commission emphasized the credibility of the witness. No refunds should be issued in this proceeding in reliance on the *Kiback Order.*

Whereas the Commission's prior adoption of the *Friz Initial Decision* on March 9, 2015 provided the regulated industry with clear direction on the Commission's interpretation of the *IDT Interlocutory Order* and the limited circumstances under which it believes it may direct an EGS to issue a refund to a customer, the *Kiback Order* has introduced a level of uncertainty into the electric retail market that leaves EGSs in the dark on their ability to charge prices to customers that are consistent with the contract. Through the *Kiback Order*, the Commission has

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[520] Respond Power Main Brief at pp. 131-138.

announced that it will rewrite a contract between an EGS and its customers, on the basis of uncorroborated and self-serving hearsay evidence introduced by consumers years or months after a sales transaction. As a result, EGSs have no certainty that their private contracts or the prices charged in conformance with those contracts will be honored by the Commission. Moreover, the *Kiback Order* is flawed in that it relies on uncorroborated hearsay testimony to make factual findings and legal conclusions.

Therefore, the *Kiback Order* should be disregarded by the ALJs since the Commission is not required to follow its own precedent, absent a situation involving the doctrine of *res judicata*. In *Philboro Coach Corp. v. Pa. Public Utility Commission*, 67 Pa. Cmwlth. 176, 179, 446 A.2d 725 (1982), the Commonwealth Court found that any failure of the Commission to follow its prior rulings is not an error of law that is subject to review. Similarly, in *Duquesne Light Co. v. Pa. Public Utility Commission*, 176 Pa. Super. 568, 577, 107 A.2d 745 (2014), the Superior Court concluded that the Commission was not bound by its prior decision since the matter did not involve the doctrine of *res judicata*.

In order for the doctrine of *res judicata* to apply, there must be a concurrence of four elements: (i) identity in the thing sued for; (ii) identity of the cause of action; (iii) identity of persons and parties to the action; and (iv) identity in the quality of the persons for or against whom the claim is made. *See Namcorp, Inc. v. Zoning Hearing Board of Horsham Township*, 558 A.2d 898 (Pa. Cmwlth. 1989). As the *Kiback Order* involved different parties and was based on the very specific circumstances and factual scenarios that were present in that case, its conclusions should have no bearing on the outcome in this proceeding.

Moreover, any further extension of the no refund rule beyond the very specific circumstances underlying the *Kiback Order* will completely undermine the ability of EGSs to

price their products in the competitive retail market. Additional rulings like the *Kiback Order* will encourage customers to devise any theory they can at a later date to get out of paying an increase in their electric charges that is lawfully based on the terms of their private contract with the EGS – a contract that the Commission has said it has no jurisdiction to interpret or determine a breach thereof.

In any event, even under the *Kiback Order*, no refunds could be ordered for any consumer who has not filed a complaint, or at the very minimum, has submitted testimony in this proceeding. Without a sworn statement as to what the Respond Power sales representative supposedly told the consumer, no basis would exist upon which to direct the issuance of a refund. For instance, in the *Kiback Order*, the Commission ordered a refund based on the difference between the EDC's price to compare and the price that the company charged the complainant, because that remedy reflected what the complainant had allegedly been told. Some consumer witnesses in this proceeding testified that the sales representatives used the EDC's price to compare as a point of reference, while others testified vaguely about possible savings. It would be improper to view testimony offered by a *de minimis* percentage of Respond Power's total customers and conclude that all (or any others than possibly those who testified) had a particular experience, warranting a certain outcome in the form of a refund.

i. Amount

As part of the Settlement, Respond Power has agreed to refund a total of $3 million - Total Refund Pool - to customers that it served during January through March 2014 The issuance of voluntary refunds by an EGS is consistent with past Commission precedent, and nothing precludes a party from agreeing to perform under a settlement that which the party may not be legally obliged to do under law. *PG&E Initial Decision* at 39 and 42; *Hiko Initial Decision* at 32, 34-35; *IDT Initial Decision* at 41. This refund amount is more than sufficient to

address the allegations in the Joint Complaint as it goes well above and beyond any relief the Commission may award, both in terms of dollars and the breadth of consumers who may make claims for refunds under the Settlement.

ii. Credits Against Refunds

To the extent that the Commission would direct the issuance of a greater refund amount (which it should not), the $3 million already committed to by Respond Power as part of the Settlement should be credited against any such amount. Further, it would be appropriate to recognize credits of over $1.2 million that are part of the Total Refund Pool of $3 million. Specifically, in February 2014, Respond Power voluntarily reduced charges billed to consumers in the amount of $971,279.45.[521] After that, Respond Power issued voluntary refunds to customers in the amount of $248,873.58.[522] These amounts, along with the Informal Complainant Pool and the Net Refund Pool (for silent customers), should all be considered as credits against any refund amount ordered by the Commission.

iii. Customer Classes

Under the Settlement, customers who filed informal complaints with the Commission from February 1, 2014 through June 30, 2014 would receive refunds in the amount of $313,351.33 from the Informal Complainant Refund Pool (after the subtraction of amounts already refunded to these consumers).[523] As these customers filed informal complaints seeking remedies, it is appropriate to carve out a portion of the refunds to issue to those customers. Also, because they filed informal complaints, the Commission has jurisdiction to award remedies,

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[521] Settlement, Section III ¶ 19 (Refunds) (pp. 7-8).
[522] Settlement, Section III ¶ 19 (Refunds) (pp. 7-8).
[523] Settlement, Section III ¶ 20 (Refunds) (p. 8).

albeit not refunds. In addition, the Settlement sets aside $1,466,495.64 for refunds (previously referred to as "Net Refund Pool") to all customers served by Respond Power in January 2014, February 2014 and March 2014.[524] Further, the Settlement provides that any other customer of the Company who does not receive an offer of funds from the Net Refund Pool may contact the Company directly to request a refund and obligates the Company to use its best efforts to investigate the complaint and negotiate an agreement for a refund in exchange for a release of claims.[525]

Given all of these provisions and avenues through which customers of the Company may obtain refunds, in addition to filing complaints with the Commission, the full breadth of Respond Power's customers are covered by the Settlement. Therefore, no further relief is necessary or warranted.

iv. Method of Distribution

The Settlement provides that Respond Power will distribute the Informal Complainant Refund Pool in accordance with a distribution method provided by I&E, "which will be based on the individual customer's usage, price charged and refund amounts already received directly from Respond Power."[526] It further notes that the refund determination will be designed so as to fully utilize the Informal Complainant Refund Pool. At the hearing on October 15, 2015, Mr. Small testified that the Company will use a third-party vendor to determine current addresses for those customers who may have moved since early 2014.[527]

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[524] Settlement, Section III ¶ 21 (Refunds) (pp. 8-10).
[525] Settlement, Section III ¶ 22 (Refunds) (p. 10).
[526] Settlement, Section III ¶ 20 (Refunds) (p. 8).
[527] Tr. 1409.

For the Net Refund Pool, the Settlement provides that a third party administrator will send a letter to all other customers served by Respond Power during January, February and March 2014. Upon submission of a claim form, those customers will be issued refunds in accordance with a distribution method that will also be based on the individual customer's usage, price charged and refund amounts already received directly from Respond Power. Again, the refund determinations will be designed so as to fully utilize the Net Refund Pool. However, to the extent that funds remain in the Net Refund Pool after one year, they will be returned to Respond Power, unless customers have claimed less than $500,000 of the amount available. In that situation, Respond Power will contribute the difference between total refunds claimed and $500,000 to the EDCs' hardship funds, allocated by the ratio of the Company's customers in the EDC territory to the total amount of Company customers in Pennsylvania as of January 1, 2014.[528]

These provisions adequately address the distribution of refunds, and no further relief is appropriate or warranted. As the Commission's own prosecutory bureau, I&E is certainly equipped to determine a fair distribution method for the refunds in both in the Informal Complainant Refund Pool and the Net Refund Pool.

v. Selection/Payment of Administrator

Under the Settlement, Respond Power will retain, in consultation with I&E, a third-party administrator to administer the distribution of the Net Refund Pool.[529] Further, the first $50,000 of costs and expenses of the administrator will be paid by Respond Power. If the costs and expenses of the administrator exceed $50,000, any such costs and expenses shall be deducted

[528] Settlement, Section III ¶ 21 (Refunds) (pp. 8-10).
[529] Settlement, Section III ¶ 21 (Refunds) (pp. 8-10).

from the Net Refund Pool.[530] Further, Respond Power has indicated that it would not oppose a modification to the Settlement that requires it to retain an independent third-party administrator in a cost-effective manner.[531] In addition, Respond Power has noted its willingness to accept a modification to the Settlement that requires it to revisit the $50,000 contribution if the cost of the third-party administrator exceeds that amount by a certain dollar figure or percentage.[532] As the Commission could not require retention of a third-party administrator or dictate the selection process, the Settlement establishes an appropriate process for administering refunds.

b. Civil Penalty

Code Section 3301[533] authorizes the Commission to impose a civil penalty not exceeding $1,000 for a violation of the Code or regulations. Respond Power contends that it would be improper for the Commission to conclude that it violated the Code or regulations when the only evidence in the record is uncorroborated hearsay. In this respect, the Joint Complainants have clearly failed to satisfy their burden of proof. However, in the event that the Commission concludes that Respond Power violated its marketing or billing regulations, an application of the factors set forth in the Commission's Policy Statement[534] warrants the imposition of no additional civil penalty beyond the amount of $125,000 established by the Settlement. In fact, only I&E has submitted testimony addressing the factors in the policy statement and its request for a civil penalty has been fully satisfied. The Joint Complainants requested an unspecified

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[530] Settlement, Section III ¶ 21 (Refunds) (pp. 8-10).
[531] Response to Joint Initial Objections at 15.
[532] Response to Joint Initial Objections at 15. Respond Power notes that it expressed this willingness despite the fact that the $50,000 commitment in the Settlement favorably compares with the amounts agreed to by other EGSs and approved by the ALJs. Specifically, PG&E agreed to $100,000, Hiko agreed to $50,000 and IDT agreed to $75,000. Settlement, Exhibit A, Stipulation of Facts ¶¶ 45, 46 and 47. *See PG&E Initial Decision; Hiko Initial Decision and IDT Initial Decision.*
[533] 66 Pa. C.S. § 3301.
[534] 52 Pa. Code § 69.1201.

amount of civil penalty in the Joint Complaint and offered no testimony in support of a particular amount of civil penalty. Therefore, Respond Power has no basis upon which to argue against the imposition of a higher penalty than has been agreed to as part of the Settlement. Importantly, the analysis above supporting the Settlement as being in the public interest demonstrates the adequacy of the $125,000 civil penalty.[535]

To the extent that the ALJs believe that a further civil penalty is necessary, any additional penalty amount should be significantly lower than $1,000 per violation. The Policy Statement, as discussed above,[536] sets forth several factors that the Commission considers in evaluating litigated and settled proceedings and determining whether a fine for violating the Code, regulations or orders should be imposed, as well as the amount of any civil penalty. Given the prior discussion, Respond Power will not repeat each factor here but will highlight a few key points for the Commission's consideration.

Clearly, the written contract - in the form of the Disclosure Statement - furnished to all customers by the Company did not guarantee savings and, to the contrary, it expressly provided that that savings cannot be guaranteed.[537] Moreover, Mr. Wolbrom explained that Respond Power's sales representatives are trained to explain that savings cannot be guaranteed. Further, the Company trained sales representatives to describe the variable nature of the contract.[538] This case is a far cry from a situation where an EGS made a business decision to increase variable prices and ignore its written contract guaranteeing savings to thousands of customers. *See Hiko Initial Decision II.*

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[535] Respond Power Main Brief at pp. 169-185.
[536] Respond Power Main Brief at pp. 169-185.
[537] RP Exhibit No. 1.
[538] Respond Power Statement No. 1 at 7:20-21.

Moreover, Respond Power acted quickly in early February 2014 to voluntary reduce customer charges in the amount of nearly $1 million. Thereafter, Respond Power issued voluntary refunds in the amount of almost $250,000 to consumers. Additionally, it has agreed to issue another $1.8 million in refunds as part of the Settlement with I&E, so that all customers served by the Company in January through March 2014 will be eligible to receive refunds. Importantly, it has also agreed in the Settlement to forego variable price marketing for two years and to significantly modify its marketing and sales practices as well as its business operations.

Notably, Respond Power has an unblemished compliance history, as well as a history of cooperating with the Commission's BCS, I&E and OCMO.[539] This factor should weigh heavily in support of a minimal additional civil penalty, if any, as a result of this consolidated proceeding. In the *Hiko Initial Decision II*, the ALJs emphasized that a "respondent's compliance history and the need to deter further violations are important considerations when weighing the amount of the civil penalty." *Id.* at 47. Noting that Hiko Energy, LLC ("Hiko") was operating under a conditional license due to prior compliance issues at the time of its admitted and intentional violations, and had experienced a lapse in maintaining security levels, the ALJs described these facts as weighing in favor of a higher civil penalty. *Id.* at 46-47.

Moreover, the record in the proceeding addressed by the *Hiko Initial Decision II* involved an entirely different scenario than exists in the instant proceeding. Beginning in August 2013, Hiko offered a variable rate product that included a six-month introductory price guarantee to be at least 1-7% less than the PTC of the customer's local utility. *Hiko Initial Decision II* at 11. Following the Polar Vortex, Hiko's chief executive officer decided not to honor the 1% less price

[539] Respond Power Statement No. 3-Revised at 4:27-29; 5:6-9; Exhibit AS-1; Exhibit AS-3.

to compare introductory rate guarantee and the CEO and Hiko's management made "the business decision to intentionally overbill approximately 5,700 customers enrolled in the guaranteed savings plan during the months of January – April 2014." *Hiko Initial Decision II* at 12 (Finding of Fact 26). As a result, evidence in the proceeding showed that customers were overbilled approximately $1.8 million. *Hiko Initial Decision II* at 12 (Finding of Fact 27). The ALJs then found that a civil penalty of $125 per violation was appropriate, noting that the penalty reflected the average overcharge in each bill rendered to a consumer. *Hiko Initial Decision II at 62.*

Since that case involved an executive management decision to increase variable prices, intentionally ignoring a written contract that guaranteed savings for a period of time, any additional civil penalty imposed on Respond Power should be substantially lower per violation. Respond Power did not guarantee savings through its written contracts, and its executive management met on a weekend in early 2014 to develop a plan for helping customers deal with the price spikes caused by record high wholesale costs and higher than normal usage due to frigid temperatures.[540] Further, as compared to the situation addressed in the *Hiko Initial Decision II* where a specific percentage of savings had been promised prior to enrollment and the affected group of customers could be easily identified, the factual allegations in the present case vary from one customer to another. Notably, many consumers did not even allege that long-term savings had been promised by Respond Power's sales representatives.[541]

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[540] Tr. 1466-1468.

[541] *See, e.g.* Joint Complainants' Consumer Testimony of Mary Bagenstose (p. 166); Joint Complainants' Consumer Testimony of Alex Bobsein (p. 864); Joint Complainants' Consumer Testimony of Joseph Cochi (p. 123); Joint Complainants' Consumer Testimony of Gerard LeBlanc (p. 425); Joint Complainants' Consumer Testimony of Michael O'Hagan (p. 110); Joint Complainants' Consumer Testimony of Thomas Strellec (p. 189); and Joint Complainants' Consumer Testimony of Cassandre Urban (p. 995).

Moreover, any additional civil penalty should be assessed on the basis of the number of affected customers, as determined by the admitted testimony in this proceeding, rather than through the "per bill" approach used by the ALJs in the *Hiko Initial Decision II* at 31-33. Contrary to the situation underlying the *Hiko Initial Decision II*, this case does not lend itself to counting the number of bills that contained prices that were, for example, higher than the EDC's price to compare. In any event, an EGS should not be penalized on a per bill basis. To the extent that Respond Power is found to have promised certain customers that their prices would not exceed a certain amount or that they would experience savings of a specific percentage or range, any additional civil penalty that is deemed warranted should be based on the number of customers to whom such promises were made and not fulfilled. As it is within the EDC's prerogative, consistent with Commission regulations, to determine the frequency with which consumers are billed, a per bill approach is not appropriate.

Importantly, the civil penalty that Respond Power has agreed to pay under the Settlement is within the range of civil penalties that the Commission has approved as being in the public interest in other proceedings where EGS marketing and sales practices have been alleged to violate the Code, Commission regulations or Commission orders. In *Pa. Pub. Util. Comm'n., Bureau of Investigation and Enforcement v. ResCom Energy LLC*, Docket No. M-2013-2320112 (Order entered November 13, 2014) ("*ResCom Order*"), the Commission approved a settlement involving allegations of misleading market practices where sales representatives of the EGS were falsely representing that they were associated with the EDC, as well as slamming. This matter came to the attention of the Commission's Office of Competitive Market Oversight when EDCs became concerned with high rescission rates in their respective service areas and by customer calls specifically identifying "ResCom/Positive Energy" as the source of the problematic calls.

ResCom Order at 3. In approving the settlement, the Commission required the EGS to pay a civil penalty in the amount of $59,000. In another case involving only slamming allegations, the Commission approved a settlement imposing a civil penalty in the amount of $64,450. *Pa. Pub. Util. Comm'n., Bureau of Investigation and Enforcement v. Public Power*, LLC, Docket No. M-2012-2257858 (Order entered December 19, 2013). *See also PGE Slamming Order; IDT Slamming Order.*

A review of civil penalties approved for public utilities likewise demonstrates the reasonableness of the civil penalty that Respond Power has agreed to pay as part of the Settlement. In *Pa. Pub. Util. Comm'n., Bureau of Investigation and Enforcement v. UGI Utilities, Inc.-Gas Division*, Docket No. M-2013-231-2313375 (Order entered April 23, 2014), the Commission approved a $96,000 civil penalty amidst allegations relating to a natural gas ignition incident that required the company to revise its operating procedures. In a case involving an allegedly improper termination of service that preceded a fire, which resulted in a serious injury to an occupant of a residence, the Commission found that a $200,000 civil penalty was in the public interest. *Pa. Pub. Util. Comm'n., Bureau of Investigation and Enforcement v. Pennsylvania Electric Company*, Docket No. M-2008-2027681 (Order adopted March 12, 2009). Even in a situation where an allegedly improper termination of service preceded a fire resulting in the death of two children, a civil penalty of $300,000 was approved by the Commission. *Pa. Pub. Util. Comm'n., Law Bureau Prosecutory Staff v. PPL Electric Utilities Corp.*, Docket No. M-2008-2057562 (Order adopted March 26, 2009).

c. Contributions to EDCs' hardship funds

The Settlement provides for a minimum contribution of $25,000 to EDCs' hardship funds, and offers the potential for a contribution up to $500,000 to the extent that consumers do not claim refunds that will be made available under the Net Refund Pool.[542] Notably, this donation is also within the range of contributions agreed to by other EGSs and approved by the ALJs.[543] Given that this represents a voluntary contribution which the Commission could not require among the remedies that are available to it under the Code, it fully addresses the allegations of the Joint Complaint.

d. License Conditions

While Respond Power's position is that the Commission does not have statutory authority to impose injunctive relief, the Company has agreed to several conditions on its EGS license as part of the Settlement, which the Commission may approve and enforce. Also, no other conditions are necessary as the Settlement adequately addresses all allegations of the Joint Complaint.

Because Respond Power has made significant commitments in agreeing to extensive modifications of its sales, marketing and business practices, no purpose would be served by a suspension or revocation of its license. In the *Hiko Initial Decision II*, the ALJs were persuaded by these commitments that Hiko made as part of a settlement in a separate proceeding with the Joint Complainants in concluding that no suspension or revocation of the company's license was warranted. *Id.* at 60-62. The ALJs specifically observed that the concessions made by Hiko in

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[542] Settlement, Section III ¶ 21 (Refunds) (pp. 8-10).

[543] Settlement, Exhibit A, Stipulation of Facts ¶¶ 46, 47 and 48. PG&E agreed to contribute $100,000 to the EDCs' hardship funds, while Hiko and IDT agreed to contribute $50,000 and $75,000, respectively. *See PG&E Initial Decision; Hiko Initial Decision and IDT Initial Decision.*

the other proceeding demonstrated "a willingness to correct its business practices and comply with regulations in the future regarding its retail market activities." *Id.* at 63. Likewise, the other EGSs who have entered into settlements with the Joint Complainants are not being subjected to any license suspension or revocation. *See PG&E Initial Decision; Hiko Initial Decision and IDT Initial Decision.*

Respond Power also notes that Code Section 2809(c)[544] authorizes the Commission to suspend or revoke an EGS's license only under specified circumstances, which have not been alleged in this consolidated proceeding. Specifically, Code Section 2809(c)[545] provides that no EGS license shall "remain in force" unless the EGS fulfills its financial responsibility requirements of maintaining a bond or other security in a form and amount approved by the Commission remains current on its state tax obligations. No other provision in the Code addresses the suspension or revocation of an EGS license. Although Section 54.42 of the Commission's regulations[546] provides that a license may be suspended or revoked and civil penalties may be imposed against an EGS for a variety of violations of the Code and Commission regulations, the Commission's statutory authority to suspend or revoke a license for reasons other than those noted in Code Section 2809(c) is unclear, or nonexistent.

i. Product Offerings

Under the Settlement, Respond Power has agreed to forego the marketing of variable price plans to new customers for two years. This moratorium more than adequately addresses all concerns raised during this consolidated proceeding. It is noteworthy that this is the longest

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[544] 66 Pa. C.S. § 2809(c).
[545] *Id.*
[546] 52 Pa. Code § 54.42.

moratorium agreed to by any EGS, and the shorter time periods were approved by the ALJs.[547] No further relief is warranted or appropriate.

ii. Marketing

Respond Power has expressly committed to complying with the CPL and TRA, as well as the Code and all Commission regulations, orders and policies. Among the commitments made by Respond Power with respect to marketing are that the Company and its representatives will not make misrepresentations to consumers or make any representations about savings that may be realized by switching to Respond Power (unless it is in conjunction with an explicit, affirmative guaranteed savings program). It has also agreed to refraining from using words such as "risk free," "competitive," or "guaranteed" in describing its prices. If Respond Power resumes the marketing of variable prices after the two-year moratorium, it has committed to telling all potential customers that the price can change every month that that there is no limit on how high the price can go. Further, Respond Power has agreed to make changes to its website to more conspicuously display its terms and conditions and provide greater assurances that consumers will review them.[548] These commitments are nearly identical to the agreements made by other EGSs and approved by the ALJs. Nothing more is warranted or appropriate to address the Joint Complaint.

iii. Third Party Verifications

For TPVs, Respond Power has agreed to follow a specific script set forth in the Settlement that is designed to ensure that a customer understands that they are agreeing to a

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[547] Settlement, Exhibit A, Stipulation of Facts ¶¶ 45, 46 and 47. PG&E agreed to an 18-month moratorium on selling variable rate products to new customers, while Hiko agreed to a 15-month stay-out and IDT agreed to forego the marketing of variable price products for 21 months. *See PG&E Initial Decision; Hiko Initial Decision; and IDT Initial Decision.*

[548] Settlement, Section IV ¶ 25.B. (Marketing) (pp. 12-17).

variable rate that changes monthly and has no ceiling. For instance, one question in the TPV is: "Do you understand that there is no limit on how the price can go? Respond Power has further agreed that all TPVs will be performed outside the presence of the Respond Power sales representative. The provisions in the Settlement addressing TPVs mirror those contained in other settlement agreements, which were approved by the ALJs. Therefore, they fully satisfy the allegations raised by the Joint Complaint.

iv. Disclosure Statement

Respond Power has also agreed to submit a copy of its current Disclosure Statement to the Commission following approval of this Settlement and to continue to provide amended Disclosure Statements to the Commission for five years. Additionally, Respond Power has committed to providing an updated Disclosure Statement to all customers on variable rate products. If Respond Power resumes the marketing of variable prices in the future, it has agreed to provide a specific description of how its price will be calculated and to avoid the use of phrases such as "market-based" or set on "market conditions" in describing its pricing method, unless the customer can calculate the price using publicly available information.[549] Again, these provisions of the Settlement reflect the same commitment made by other EGSs and approved by the ALJs. As a result, no additional relief is required to address the allegations of the Joint Complaint.

v. Training

As to training, Respond Power has agreed to implement a new program that is specifically tailored to Pennsylvania requirements and to provide to the Commission a detailed

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[549] Settlement, Section IV ¶ 25.D. (Disclosure Statement) (pp. 20-22).

description of the program that will be implemented. Under the Settlement, the training program will include initial training and subsequent refresher training on a quarterly basis for all Respond Power employees, agents and third-party contractors. The enhanced training program will also highlight the fact that deceptive or intimidating sales practices will not be tolerated by Respond Power.[550] These commitments are consistent with those made by other EGSs as part of settlement agreements approved by the ALJs. Therefore, the training program that Respond Power has agreed to as part of the Settlement fully addresses the concerns raised in the Joint Complaint about Respond Power's training of its agents and sales representatives.

vi. Door-to-Door Marketing

A portion of the new training program described above will be specifically geared toward door-to-door marketing. This program will be designed to ensure that all sales representatives produce photo identification depicting the name of the marketing representative and Respond Power's trade name and logo; identify the reason for the visit, stating that Respond Power is an independent energy marketer and does not represent the EDC; and offer a business card including name, identification number and telephone number.[551] These commitments go beyond the provisions in other settlement agreements approved by the ALJs. They further require Respond Power to forego door-to-door marketing until such time as the new training program is approved by I&E, and fully implemented and tested. Respond Power's agreement to focus a portion of the training program on door-to-door marketing addresses the issues raised by the Joint Complaint and no further relief is appropriate or warranted.

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[550] Settlement, Section IV ¶ 25.E. (Training) (pp. 22-24).
[551] Settlement, Section IV ¶ 25.F. (Door-to-Door Marketing) (pp. 24-29).

vii. Compliance Monitoring

In addition, Respond Power has agreed to increase its internal quality control efforts, which will include the recording of all communications between customers and Respond Power's customer service representatives and requiring its telemarketers to record and maintain all communications with consumers that result in a sale. The enhanced compliance monitoring will also entail the weekly review of a statistically valid sample of recorded calls and follow-up investigations of additional calls if any non-compliant calls are identified. Respond Power further has agreed to promptly take specific remedial actions against sales representatives and third-party contractors in the event of violations.[552] These provisions are identical to the commitments made by other EGSs and approved by the ALJs. As such, they wholly satisfy the Joint Complainants' allegations concerning Respond Power's oversight of its sales representatives and third-party vendors.

viii. Reporting

Within 30 days of implementing the training and compliance monitoring programs described above, Respond Power has committed to provide quarterly reports to the Commission for a period of five years, explaining all internal audits and investigations performed during the reporting period. This report will list all customer complaints and disputes received by Respond Power.[553] Again, the Settlement is consistent with the provisions agreed to by other EGSs and approved by the ALJs. Nothing further should be required of Respond Power.

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[552] Settlement, Section IV ¶ 25.F. (Compliance Monitoring) (pp. 29-33).
[553] Settlement, Section IV ¶ 25.G. (Reporting) (pp. 33-34).

ix. Customer Service

With respect to customer service, Respond Power has agreed to maintain a staff of customer service representatives necessary to handle calls and electronic mails within timeframes specified in the Settlement and to develop and implement an action plan for handling periods of high call volumes. If Respond Power experiences a period of high call volumes during which it does not comply with the timeframes set forth in the Settlement, it has committed to provide a report to the Commission of the occurrence, which contains an explanation of the reasons and a description of remedial measures implemented by the Company.[554] As Respond Power's commitments mirror those made by other EGSs and approved by the ALJs, the Settlement fully addresses the concerns raised by the Joint Complaint regarding Respond Power's consumer complaint handling, and no additional relief is appropriate or warranted.

[554] Settlement, Section IV ¶ 25.H. (Customer Service) (pp. 34-36).

V. CONCLUSION

On the basis of the foregoing, Respond Power LLC respectfully requests that the Pennsylvania Public Utility Commission: (i) approve, without modification (except to the limited extent described herein), the Amended Petition for Approval of Settlement filed by Respond Power and the Commission's Bureau of Investigation and Enforcement on September 18, 2015; (ii) dismiss the Joint Complaint filed by the Commonwealth of Pennsylvania by Attorney General Kathleen Kane, through the Bureau of Consumer Protection, and Tanya J. McCloskey, Acting Pennsylvania Consumer Advocate, or alternatively, conclude that the Settlement fully addresses all issues and provides adequate remedies to resolve all allegations raised by the Joint Complaint; and (iii) grant such as other relief as the Commission may deem just and appropriate.

Respectfully submitted,

Dated: December 3, 2015

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APPENDIX A

APPENDIX A

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

TECH MET, INC., ALFRED POZZUTO, G. MONEY, INC. d/b/a NORTH PARK CLUBHOUSE, MR. MAGIC CAR WASH, INC., and JOHN TIANO, on their own behalf and on behalf of all others similarly situated,	CIVIL DIVISION NO. GD-05-030407 MEMORANDUM AND ORDER OF COURT
Plaintiffs	HONORABLE R. STANTON WETTICK, JR.
vs.	
STRATEGIC ENERGY, LLC,	
Defendant	

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Appendix A

MEMORANDUM AND ORDER OF COURT

WETTICK, J.

This is a breach of contract class action brought against defendant, Strategic Energy, LLC ("Strategic") on behalf of all Pennsylvania commercial/business customers who entered into a Power Supply Coordination Service Agreement ("Service Agreement") with Strategic.[1] Plaintiffs contend that they have been overcharged.

Strategic is an electricity supplier. Strategic purchases electricity in large blocks from Duquesne Light or other sources which it resells to customers pursuant to the terms and conditions of its Service Agreement with the customer. With limited exceptions, through the Service Agreement, Strategic guarantees its customers that the price for electricity will not exceed a specified amount (the price set forth on its Pricing Attachment) for five years.[2]

Plaintiffs contend that Strategic has charged them amounts in excess of the amounts permitted by the Service Agreement. They seek to recover the difference between the amount paid for the electricity and the lesser amount permitted by the Service Agreement.

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[1]Attachment 1 is the Service Agreement between Strategic and Tech-Met Services, Inc. The other named plaintiffs executed similar writings; but see p. 5.

[2]Strategic contends that when electricity was undergoing deregulation in 2000, there was much uncertainty regarding electricity costs. The benefit of buying from Strategic, as opposed to buying directly from Duquesne Light, was to achieve price certainty in an uncertain market. (12/9/13 Argument T. 23.)

Strategic contends that its prices have never exceeded the amounts permitted by the Service Agreement.

The subject of this Memorandum and Order of Court is Strategic's motion for summary judgment seeking dismissal of plaintiffs' Complaint on the ground that plaintiffs were never overcharged.

Relevant discovery has been completed. Thus, the issue is whether the evidence, construed in plaintiffs' favor, will support a verdict in plaintiffs' favor.

The prices that Strategic may charge its customers are governed by the following provisions of the Service Agreement:

> **4. PSC Services Fee:**
>
> The PSC Services Fee is 0.3 cents per kilowatt-hour for each kilowatt-hour of Electricity provided under this Agreement. The PSC Services Fee is included in the price paid by the Buyer.
>
> . . .
>
> **7. Price:**
>
> The Price to be paid by Buyer for the Electricity and BSC Services provided hereunder during the Term of this Agreement shall not exceed that set forth on the Pricing Attachment below. All pricing terms are inclusive of applicable costs for Energy, Capacity, Transmission, Ancillary Services, Delivery Services, applicable taxes up to the Point of Delivery, overhead expenses as defined by Strategic Energy, and the PSC Services Fee.

STRATEGIC'S INTERPRETATION

Strategic contends that under the Service Agreement (Attachment 1), the price it may charge shall not exceed the price set forth "on the Pricing Attachment" (Attachment 2). Plaintiffs do not challenge the evidence showing that Strategic has never charged a

price that exceeded that set forth on the Pricing Attachment. Thus, according to Strategic, summary judgment should be entered dismissing plaintiffs' Complaint.

PLAINTIFFS' INTERPRETATION

According to plaintiffs, the price set forth in the Pricing Attachment is only a ceiling. The actual price, if it does not exceed the ceiling, consists of the sum of Duquesne Light's costs for energy, capacity, transmission, ancillary services, delivery services, applicable taxes up to the point of delivery, overhead expenses as defined by Strategic Energy and PSC Services Fee. Under this interpretation of ¶ 7, the maximum price that Strategic may charge is the amount of Duquesne Light's actual costs plus 0.3 cents per kilowatt-hour.

COURT'S INTERPRETATION

I find that the only reasonable reading of ¶ 7 is that offered by Strategic.

The first sentence of ¶ 7 permits Strategic to charge the amount set forth in the Pricing Attachment. The second sentence protects the buyer by explaining that the price set forth in the Pricing Attachment includes costs which Strategic incurs for energy, capacity, transmission, ancillary services, delivery services, applicable taxes up to the point of delivery, overhead expenses as defined by Strategic, and the PSC Services Fee.

Paragraph 4 describes the PSC Services Fee and reiterates that it is included in the price paid by the buyer.

Plaintiffs contend that the first sentence of ¶ 7 only establishes a maximum price that may be charged because ¶ 7 states that the price "shall not exceed that set forth in

the Pricing Attachment below." (Emphasis added.) According to plaintiffs, a contract uses the phrase "shall not exceed" only when there is another method for calculating price that may be less than the price set forth in the Pricing Attachment.

However, the Service Agreement cannot be read in the manner which plaintiffs propose unless the Service Agreement also provides for a lesser price under certain circumstances. In other words, it could not have been the intention of the parties for the first sentence of ¶ 7 to be construed as only setting a maximum price if the Agreement does not also include a lesser price that shall be charged under some circumstances.

Plaintiffs apparently propose that the second sentence of ¶ 7 be read as follows: "The price to be paid by the Buyer for the electricity and PSC services provided under the Service Agreement shall be the sum of the costs Strategic incurs for energy, capacity, transmission, ancillary services, delivery services, applicable taxes up to the point of delivery, overhead expenses as defined by Strategic Energy, and the PSC Services Fee."

However, this is not a reasonable construction of the second sentence of ¶ 7. There is nothing in the language of ¶ 7 that in any way suggests that the price shall be based on Strategic's costs. Thus, I am left with a single method governing the price that may be charged.

If ¶ 7 consisted of only the first sentence, the only reasonable construction of the Agreement would be that Strategic is permitted to charge the amount set forth in the Pricing Attachment. This is so because pricing is governed by ¶ 7, and this is the only provision governing the price to be paid. Where a second sentence is added that does

not refer to the price to be paid, there is no difference between the two-sentence paragraph and the one-sentence paragraph.

A contract shall be construed to give meaning to each sentence in ¶ 7. This is accomplished only if the second sentence is construed as describing costs that are included in the price to be paid by the buyer as set forth in the Pricing Attachment. The language of the second sentence does not support any other construction that gives meaning to both sentences.

At least one of the Service Agreements between plaintiffs and Strategic, at ¶ 7, included a second paragraph which reads as follows:

> If, during the term of this Agreement, regulatory changes create additional charges, not currently included in the Price, which Buyer would be subject to regardless of whether Buyer was receiving service from Strategic Energy, the Host Utility or any other provider of electric service ("Incremental Charge"), and Strategic Energy is unable to mitigate such incremental Charge, then Strategic Energy shall pass through such incremental Charge to be paid by Buyer above the Price.

Plaintiffs contend that the inclusion of this second paragraph supports plaintiffs' position that the price to be paid consists of the sum of the costs. However, this additional paragraph is equally consistent with an interpretation that the price to be paid shall not exceed that set forth in the Pricing Attachment, but Strategic may pass on an incremental charge to be paid by the buyer "above the Price."

While I base my ruling on the language of the Agreement, I agree with Strategic that parol evidence also supports its construction of ¶ 7.

Strategic buys electricity at different times and at different prices. None of the purchases can be traced to specific customers. Thus, there is no way to calculate the costs of energy for individual customers.

The Service Agreements between Strategic and plaintiffs do not require Strategic to purchase only from Duquesne Light. Furthermore, it appears that Strategic does not purchase exclusively from Duquesne Light. These purchases from other sellers are not segregated from Strategic's purchases from Duquesne Light. (12/9/13 Argument T. 12.) Plaintiffs never explain how costs of energy will be calculated in these circumstances.

There is testimony in the record that where Strategic successfully managed down the price (see definition of *Power Supply Coordination (PSC) Services* at ¶ 5 of the Service Agreement), Strategic did not charge the full amount provided for in the first sentence of ¶ 7. (Wilson Dep. T. 124-28.) This is consistent with the use of the phrase *shall not exceed* in the first sentence of ¶ 7.

Finally, common sense dictates that Strategic would not have agreed to provide price certainty over a five-year period for a nominal payment of .3 cents per kilowatt-hour per month. See Deposition of Vogel at 148-49 and Exhibit G of Vogel Deposition—.3% of monthly charge for 6200 kilowatts is $18.60.

CONCLUSION

In this case, there are only two interpretations offered by the parties. The language of the Service Agreement offers no support for calculating a price based on the sum of Strategic's costs for energy, capacity, transmission, ancillary services, delivery services, applicable taxes up to the point of delivery, overhead expenses as defined by Strategic Energy, and the PSC Services Fee. This leaves a construction supported by the language of ¶ 7, namely "the Price to be paid by the Buyer for the

Electricity and PSC Services provided hereunder during the Term of this Agreement shall not exceed that set forth in the Pricing Attachments below."

For these reasons, I grant defendant's motion for summary judgment and dismiss plaintiffs' Complaint with prejudice.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

TECH MET, INC., ALFRED POZZUTO, G. MONEY, INC. d/b/a NORTH PARK CLUBHOUSE, MR. MAGIC CAR WASH, INC., and JOHN TIANO, on their own behalf and on behalf of all others similarly situated, Plaintiffs vs. STRATEGIC ENERGY, LLC, Defendant	NO. GD-05-030407

ORDER OF COURT

On this 4 day of June, 2014, it is hereby ORDERED that defendant's motion for summary judgment is granted, and plaintiffs' Complaint is dismissed with prejudice.

BY THE COURT:

WETTICK, J.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARBARA GILLIS, THOMAS GILLIS, SCOTT R. McCLELLAND, and KIMBERLY A. McCLELLAND, individually and on behalf of all others similarly situated	:	CIVIL ACTION
	:	No. 14-3856
v.	:	
RESPOND POWER, LLC	:	

MEMORANDUM

NORMA L. SHAPIRO, J. **AUGUST 31, 2015**

This is a class action against Respond Power, LLC ("Respond"), an electric generation supplier in Pennsylvania. Between November 2010 and June 2014, Respond entered into variable rate contracts with Pennsylvania customers for residential electrical service. The class representatives allege that every variable rate contract promised customers a rate cap and that Respond breached those contracts and violated the implied covenant of good faith and fair dealing. Plaintiffs move to certify the putative class as to their contract and implied covenant claims. Because the requirements of Federal Rule of Civil Procedure 23(a) are not met, class certification will be denied.

I. BACKGROUND

The putative class consists of all Pennsylvania residents who entered into variable rate contracts with Respond between November 2010 and June 2014. Am. Compl. ¶ 59. Approximately 50,000 Respond customers entered into variable rate contracts during the proposed class period. Am. Compl. ¶ 11.

This action turns on the meaning of an allegedly uniform Disclosure Statement ("Disclosure Statement") included in all of Respond's variable rate contracts. Am. Compl. ¶ 2; Ex.

A. Respond does not deny that the Disclosure Statement was uniform and included in every one of its variable rate contracts during the proposed class period. Tr. at 9(22)-10(4). In relevant part, the Disclosure Statement reads: "Respond Power's goal each and every month is to deliver your power at a price that is less than what you would have paid had your [sic] purchased your power from your local utility company, however, due to market fluctuations and conditions, Respond Power cannot always guarantee that every month you will see savings." Ex. A.[1]

Plaintiffs argue that the Disclosure Statement promised customers a variable monthly rate capped at the rate charged by their local utility. Am. Compl. ¶ 72. They allege that Respond breached its variable rate contracts by failing to adhere to the alleged rate cap. *Id.* Plaintiffs further allege that Respond breached the implied covenant of good faith and fair dealing by failing to disclose that its rates could exceed local utility rates. Am. Compl. ¶ 86. Plaintiffs move to certify the proposed class as to those two claims.

Class representatives

The representatives of the putative class are Barbara Gillis, her son Thomas Gillis, Scott McClelland, and his wife Kimberly McClelland.

On April 25, 2013, one of Respond's door-to-door salespeople encouraged the Gillises to leave their local utility PECO for Respond and gave them a copy of the Disclosure Statement. Am. Compl. ¶ 8. The Gillises switched to Respond. Am. Compl. ¶ 9. Respond charged the Gillises a monthly rate higher than the PECO rate from July 2013 through February 2014. Am. Compl. ¶ 9. Thomas Gillis has stated that he did not believe Respond was bound by a rate cap or that an

[1] Respond's Disclosure Statement provides that it "shall be construed under and . . . governed by the laws of the State of Pennsylvania without regard to the application of its conflicts of law principles." Ex. A at ¶ 13.

increase in Respond's variable rate was in violation of any contractual term; rather, in his view, "it was not good business practice." King Cert. ¶ 5 at 55(3-9). He also stated that, at the time he entered into Respond's variable rate agreement, he was not guaranteed a rate cap by Respond's sales representative. King Cert. ¶ 5 at 33(4-22). Barbara Gillis has stated she did not know if Respond was bound by a rate cap. King Cert. ¶ 4 at 55(9-22).

The McClellands left their local utility Penelec for Respond after, on May 7, 2013, one of Respond's door-to-door salespeople encouraged them to make the switch and gave them a copy of the Disclosure Statement. Am. Compl. ¶ 10. Respond charged the McClellands a rate higher than the Penelec rate from July 2013 through April 2014. Am. Compl. ¶ 11. Kimberly McClelland has stated that she was not assured a rate cap by her sales representative, just a "surplus of energy." King Cert. ¶ 6 at 17(2-13). She also stated that she did not know if the Disclosure Statement promised a rate cap. *Id.* at 51(20-25). Scott McClelland was not present when the McClellands' variable rate contract was signed; his understanding of the contract's terms was based on conversation with his wife and his grasp of energy deregulation in Pennsylvania. King Cert. ¶ 7 at 86(2-13).

II. DISCUSSION

To be certified, a "putative class must satisfy the four requirements of Rule 23(a) and the requirements of either Rule 23(b)(1), (2), or (3)." *Marcus v. BMW of N. Am.*, 687 F.3d 583, 591 (3d Cir. 2012); FED. R. CIV. P. 23.

Rule 23(a) requires that a class be "so numerous that joinder of all members is impracticable" (numerosity); "there are questions of law or fact common to the class" (commonality); "the claims or defenses of the representative parties" must be "typical of the claims

or defenses of the class" (typicality); and the class representatives must "fairly and adequately protect the interests of the class" (adequacy). FED. R. CIV. P. 23.

Numerosity

Because joinder would be impracticable for the approximately 50,000 Respond customers who entered into variable rate contracts with Respond between November 2010 and June 2014, the numerosity requirement is satisfied.

Typicality and Adequacy

The Third Circuit has held that "[t]he proper consideration in assessing typicality . . . include[s] three distinct, though related, concerns: (1) the claims of the class representative must be generally the same as those of the class in terms of both (a) the legal theory advanced and (b) the factual circumstances underlying that theory; (2) the class representative must not be subject to a defense that is both inapplicable to many members of the class and likely to become a major focus of the litigation; and (3) the interests and incentives of the representative must be sufficiently aligned with those of the class." *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 599 (3d Cir. 2009).

Although the class representatives rely on the same legal theory and underlying facts as the rest of the putative class, namely that Respond broke a contractual promise to adhere to a rate cap and breached the implied covenant of good faith and fair dealing by failing to disclose that its rates could exceed those of local utilities, the class representatives are vulnerable to certain defenses that may be inapplicable to the rest of the putative class. Three of the four class representatives either believed Respond was not contractually bound by a rate cap (Thomas Gillis) or did not know if it was (Barbara Gillis and Kimberly McClelland). King Cert. ¶ 4 at 55(9-22); ¶ 5 at 55(3-9); ¶ 6 at

51(20-25). The fourth (Scott McClelland) believed the contract provided for a cap, but his understanding of the contract was based not on its terms, but rather conversation with his wife and a general understanding of energy deregulation. King Cert. ¶ 7 at 86(2-13). The class representatives have also said they were not guaranteed rate caps by Respond's sales representatives. *King Cert. ¶ 5 at 33(4-22); ¶ 6 at 17(2-13).*

If Respond's Disclosure Statement expressly provided for a rate cap, the sales experiences and contractual intent of the class representatives would not be material. But it does not. It states that Respond's "goal" is to beat the price charged by local utilities and adds the caveat that Respond "cannot always guarantee" monthly savings. Ex. A. Plaintiffs construe the word "goal" to mean "promise." That is an implausible reading of the contract. *See, e.g., Kripp v. Kripp*, 849 A.2d 1159, 1163 (Pa. 2004) ("If left undefined, the words of a contract are to be given their ordinary meaning."). But even if the contract were treated as ambiguous, "it is parol evidence that reveals the parties' intent." *Id.* at 1165. Parol and extrinsic evidence may not support plaintiffs' preferred reading of the contract: at the time they entered into a variable rate agreement with Respond, three of the four class representatives either did not believe or did not know if Respond was contractually bound by a rate cap. Nor do they claim they were guaranteed a rate cap by Respond's sales representatives. These factual circumstances make the class representatives vulnerable in ways other members of the putative class may not be. Typicality is not satisfied.[2]

The class representatives are not adequate for the same reason they are not typical. The adequacy inquiry has two parts: the first "tests the qualifications of the counsel to represent the class. . . . The second component of the adequacy inquiry seeks to uncover conflicts of interest

[2] All the class representatives entered into contracts with Respond in 2013. Yet the proposed class covers customers from as far back as 2010. This disparity raises typicality concerns.

between named parties and the class they seek to represent. There are clear similarities between the components of the typicality inquiry relating to the absence of unique defenses and the alignment of interests, and this second part of the adequacy inquiry." *In re Schering Plough*, 589 F.3d 585, 602 (3d Cir. 2009). The class representatives are subject to defenses that may not apply to other members of the putative class and, for that reason, may not "fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). Adequacy is not satisfied.

Commonality

In *Wal-Mart Stores, Inc. v. Dukes*, the United States Supreme Court clarified the stringency of the commonality requirement. 131 S.Ct. 2541 (2011). "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Id.* at 2551. The putative class claims "must depend upon a common contention" and "[t]hat common contention . . . must be of such a nature that it is capable of classwide resolution-which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* "What matters to class certification . . . is not the raising of common questions-even in droves-but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.*

Plaintiffs argue that two questions are common to the putative class: (1) whether Respond's uniform Disclosure Statement promised a rate cap; and (2) whether Respond breached the implied covenant of good faith and fair dealing by failing to disclose that its rates could exceed those charged by local utilities.

Those questions will not yield common answers. The Disclosure Statement does not expressly provide for a rate cap; if deemed ambiguous, parol and other extrinsic evidence would

need to be considered to resolve its meaning. That evidence would vary by customer, especially since Respond hired numerous third-party vendors for door-to-door solicitation and used at least five different companies for telephone solicitation in Pennsylvania. Small Dep. at 17(20-24), 60(9-20). The class representatives themselves do not share the same understanding of their contractual rights. Respond's 50,000 variable rate customers could not be expected to either. Commonality is not satisfied.[3]

III. CONCLUSION

Because the putative class does not comply with the typicality, adequacy, and commonality requirements of Federal Rule of Civil Procedure 23(a), class certification will be denied. Plaintiffs may proceed with this action in their individual capacities. An appropriate Order follows.

[3] For the same reasons, individual questions would predominate over questions common to the class. The putative class would not be certifiable under Rule 23(b)(3). Because the Disclosure Statement is not susceptible to interpretation on a classwide basis, certification under Rule 23(b)(2) would also be denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARBARA GILLIS, THOMAS GILLIS, SCOTT R. McCLELLAND, and KIMBERLY A. McCLELLAND, individually and on behalf of all others similarly situated	:	CIVIL ACTION
	:	No. 14-3856
v.	:	
RESPOND POWER, LLC	:	

ORDER

AND NOW, this 31st day of August, 2015, upon consideration of plaintiffs' motion for class certification (paper no. 34), defendant's response in opposition (paper no. 36), plaintiffs' reply in further support of the motion for class certification (paper no. 37), and oral argument on plaintiffs' motion for class certification, it is **ORDERED** that:

1. Plaintiffs' motion for class certification (paper no. 34) is **DENIED**.

2. Plaintiffs' motion for leave to file under seal (paper no. 33) is **DENIED AS MOOT**.

/s/ Norma L. Shapiro
J.

APPENDIX C

(Proposed Findings of Fact)

Proposed Findings of Fact

1. Respond Power LLC ("Respond Power" or "Company") is an electric generation supplier ("EGS") licensed by the Commission since August 19, 2010 to provide electric generation services to retail customers throughout Pennsylvania. Respond Power Answer to Complaint; *License Application of Respond Power LLC for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as a Supplier of Retail Electric Power*, Docket No. A-2010-2163898 (Order entered August 19, 2010).

2. Saul Horowitz became Chief Executive Office of Respond Power in 2008. Respond Power Statement No. 2-Revised at 1.

3. Adam Small has been Respond Power's General Counsel since 2011. Respond Power Statement No. 3-Revised at 1.

4. Eliott Wolbrom has served as Respond Power's Chief Marketing Officer since 2012. Respond Power Statement No. 1 at 1.

5. James L. Crist is President of Lumen Group, Inc., a consulting firm focused on energy regulatory and market issues. Respond Power Statement No. 4 at 1-2.

6. As a licensed EGS, Respond Power has served tens of thousands of retail electric customers in Pennsylvania. Respond Power Statement No. 4-Revised at 5.

7. Respond Power has marketed products in Pennsylvania through door-to-door sales representatives, telemarketers and a friends and family program. Respond Power Statement No. 1 at 1.

8. Although Respond Power also marketed some fixed price plans, the vast majority of the contracts entered into customers were for variable prices. Respond Power Statement No. 4-Revised at 5.

9. Under Respond Power's variable price plan, it provided a Commission-approved Disclosure Statement to all consumers explaining that: (i) the price may vary from month to month; (ii) the rate is set by Respond Power; (iii) the rate reflects Respond Power's generation charges based on the PJM Day-Ahead Market, Installed capacity, transmission system losses, estimated state taxes, other costs and a profit margin; and (iv) the consumer may contact Respond Power for its current variable rate. The Disclosure Statement expressly provided that Respond Power's goal is to charge a price that is less than what the consumer would have paid to the EDC, but that it could not guarantee savings due to market fluctuations and conditions. It also noted that customers could cancel at any time without paying a cancellation or early termination fee. RP Exhibit No. 1.

10. Prior to January 2014, no customers had filed formal complaints with the Commission against Respond Power concerning its variable rate contracts. Respond Power Statement No. 3-Revised at 2.

11. Since receiving its license and until January 2014, Respond Power was the named respondent on only two formal complaints filed by consumers. Neither of those complaints pertained to variable prices and both were quickly settled to the satisfaction of the consumers. Respond Power Statement No. 3-Revised at 2.

12. Respond Power experienced minimal informal complaint activity prior to 2014. Respond Power Statement No. 3-Revised at 1-2.

13. Additionally, the Company was cooperative with the Commission's Bureau of Consumer Services ("BCS"), participated in informative sessions hosted by the Office of Competitive Market Oversight ("OCMO") and sought OCMO's informal opinion as necessary. Respond Power Statement No. 3-Revised at 4-6; Exhibits AS-1 and AS-3.

14. During the month of January 2014, wholesale prices for hourly energy supply in the day ahead and particularly the real time markets increased exponentially in response to sustained cold weather that is commonly referred to as the Polar Vortex. New records were set for winter electricity use in Pennsylvania and throughout the service area of PJM Interconnection, LLC ("PJM"). High demand combined with particularly high forced outage rates for a number of generators to produce record high costs in the PJM-administered energy markets. For instance, average wholesale day-ahead LMP prices for Pennsylvania in January 2014 were estimated at $148/MWh compared to $44/MWh in December 2013. Similarly, estimated energy uplift charges, which are energy charges billed to EGSs in addition to LMP costs, were estimated at $631 million in the month of January 2014, which is equivalent to a full year of uplift charges for the period 2010-2012. *See Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, Docket No. M-2014-2406134 (Order entered March 4, 2014) ("*Variable Price Order*").

15. Due to Respond Power's business decision amidst the Polar Vortex to increase variable prices in a manner that was consistent with its Disclosure Statement, the volume informal and formal complaints filed against the Company spiked in the first half of 2014. Respond Power Statement No. 3-Revised at 1.

16. Even with the high volume of informal complaints filed against Respond Power at the Commission, the number of complaints that were filed represented a de minimis portion of all of the customers served by Respond Power. Respond Power Statement No. 3-Revised at 2.

17. By 2015, by 2015, the number of informal complaints filed against Respond Power had dropped to a level that is consistent with what Respond Power had experienced prior to the Polar Vortex. Respond Power Statement No. 3-Revised at 1-2.

18. Respond Power's experience with the spike in informal complaints in early 2014 mirrored the Commission's overall experience related to complaints filed against EGSs serving customers on variable-priced contracts. I&E Statement No. 1 at 6-7.

19. As of February 20, 2014, the Commission had experienced a record number of inquiries and informal complaints related to high bills, with BCS receiving 8,673 informal complaints against EGSs, compared to a total of 2,125 informal complaints from consumers regarding EGSs for the entire calendar year of 2013. Settlement, Exhibit A, Stipulation of Facts ¶¶ 36-37.

20. Between February 1, 2014 and June 30, 2014, BCS received 8,673 informal complaints against EGSs, 1,206 (13.9%) of which were regarding Respond Power. During 2014, BCS received a total of 1,282 informal complaints against Respond Power. Settlement, Exhibit A, Stipulation of Facts ¶ 36.

21. During calendar year 2013, BCS received a total of 2,125 informal complaints from consumers regarding EGSs, compared to a total of 10,506 informal complaints received from consumers regarding EGSs in 2014. Whereas 735 of the informal complaints filed in 2013 related to bills, rates or prices charged by EGSs, 4,538 of the informal complaints filed in 2014 related to bills, rates or prices charged by EGSs. BCS' monthly informal complaint data for the calendar years 2013 and 2014shows the following:

- In January 2013 and January 2014, the number of informal complaints received by BCS regarding EGSs was similar (208 and 231, respectively)
- In February 2014, 2,442 informal complaints were filed with BCS regarding EGSs, compared to 171 in February 2013
- In March 2014, 3,506 informal complaints were filed with BCS regarding EGSs, compared to 302 in March 2013
- In April 2014, 1,342 informal complaints were filed with BCS regarding EGSs, compared to 231 in April 2013
- In May 2014, 813 informal complaints were filed with BCS regarding EGSs, compared to 173 in May 2013
- In June 2014, 570 informal complaints were filed with BCS regarding EGSs, compared to 134 in June 2013

Settlement, Exhibit A, Stipulation of Facts ¶ 37.

22. The Office of Attorney General and the Office of Consumer Advocate had similar experiences. In early 2014, the OCA received 2,434 contacts from consumers regarding EGS variable prices, while 7,503 consumers filed complaints with the OAG concerning EGS variable prices during this time. Settlement, Exhibit A, Stipulation of Facts ¶¶ 38-39.

23. Less than 8% of the consumers who contacted the OCA involved Respond Power, while less than 7% of the consumers who complained to the OAG related to Respond Power. Settlement, Exhibit A, Stipulation of Facts ¶¶ 38-39.

24. In response to the high volume of bill inquiries and informal complaints arising from the Polar Vortex, the Commission immediately took several steps to enhance consumer education, including the issuance of press releases; the posting of a consumer alert on the Commission's website about variable prices; and the development of a separate page on www.PaPowerSwitch.com devoted to information on fixed vs. variable products. *Variable Price Order* at 5.

25. Respond Power employed a vendor selection process, training program and quality measures that were designed to ensure that their sales representatives provided accurate information to customers about the prices and terms and conditions; properly identified themselves as working for Respond Power; explained the volatility of variable prices; and did not promise or guarantee savings. Respond Power Statement No. 1 at 2-10.

26. Since 2012, Respond Power has used qualifying language in marketing materials about savings, such as "may save," "possibly save," "hope to save" and "potentially save." Respond Power Statement No. 1 at 9.

27. Since 2012, references to "historical savings" have been accurate; and prior to 2012, references to "real savings" were accurate due to the price savings that Respond Power was offering customers. Respond Power Statement No. 1 at 11-12; Exhibit EW-1.

28. During the license application process, BCS reviews draft disclosure statements submitted by EGSs. As the Commission office with primary responsibility for EGS license applications, the Bureau of Technical Utility Services ("TUS") forwards the draft disclosure statement to BCS for review. A BCS analyst reviews the draft disclosure statement to ensure that it includes the elements required by the Commission's regulations at 52 Pa. Code § 54.5. The analyst may also look for any use of terminology, jargon or acronyms that is contrary to plain language guidance, as referenced in 52 Pa. Code § 54.43(1) and 52 Pa. Code § 69.251. The BCS analyst then interacts with the EGS applicant informally via telephone or email until the analyst is satisfied that the disclosure statement is substantially in compliance with the regulations. This informal finding is then communicated to TUS and the EGS applicant. Disclaimers are provided to EGS applicants noting that the informal opinion is not binding on the Commission, pursuant to 52 Pa. Code § 1.96. Settlement, Exhibit A, Stipulation of Facts ¶ 41.

29. The Commission approved Respond Power's Disclosure Statement. Respond Power Statement No. 3-Revised at 12; Exhibit AS-3.

30. All customers enrolled by Respond Power receive a Disclosure Statement. For door-to-door transactions, Respond Power provided a copy of the Sales Agreement with the Disclosure Statement on the reverse side to every customer and then mailed a copy of the

Disclosure Statement to the customer. Customers solicited over the telephone received the Disclosure Statement in the mail. Respond Power Statement No. 3-Revised at 8.

31. Respond Power charges appeared on the electric distribution companies' ("EDCs") bills sent to customers. Respond Power Statement No. 3-Revised at 17.

32. EDCs sent confirmation letters to consumers after being enrolled with Respond Power. Respond Power Statement No. 3-Revised at 17.

33. PaPowerSwitch.com, which is the website developed under the Commission's control and supervision to promote electric choice and provide educational materials, has continuously included references to possible price savings. Settlement, Exhibit A, Stipulation of Facts ¶ 40.

34. Every EDC website contains an educational section that reviews the electric choice program and provides instructions on how to shop and compare. The EDC websites generally explain that the selection of an EGS pay result in savings. Respond Power Statement Statement No. 4-Revised at 23-24.

35. EDCs sent Commission-sponsored postcards and tri-fold flyers to all residential and small business customers in 2012. Respond Power Statement No. 4-Revised at 24; Exhibits JC-3 and JC-4.

36. Several EGSs contacted consumers with offers offering savings during the 2010-2013 timeframe. *See, e.g.*, Joint Complainants' Consumer Testimony of Harold Whymeyer (p. 884), Exh. HAW-4; Tr. 103.

37. Attorney General Kane conducted an extensive media campaign soliciting consumers to contact her offices and file complaints, referring to "price gouging" by EGSs. RP Exhibit No. 38.

38. In February 2014, Respond Power implemented voluntary reductions of charges through re-rating and re-billing customers in the amount of $971,279.45. Settlement, Exhibit A, Stipulation of Facts ¶ 43.

39. From January 1, 2014 through August 25, 2015, Respond Power voluntarily refunded $248,873.58 to customers. Settlement, Exhibit A, Stipulation of Facts ¶ 43.

40. From January 1, 2014 through August 25, 2015, Respond Power voluntarily refunded $248,873.58 to customers. Settlement, Exhibit A, Stipulation of Facts ¶ 44.

APPENDIX D
(Proposed Conclusions of Law)

Proposed Conclusions of Law

1. As a creation of the General Assembly, the Commission has only the powers and authority granted to it by the General Assembly and contained in the Public Utility Code ("Code"), 66 Pa. C.S. §§ 101 *et seq.* *See City of Phila. v. Phila. Elec. Co.*, 473 A.2d 997, 999-1000 (Pa. 1984).

2. 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. Pennsylvania State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992), *alloc. denied*, 637 A.2d 293 (Pa. 1993).

3. Nothing in the Code authorizes the Commission to interpret the terms and conditions of a private contract between an EGS and its customers. Indeed, the Commission has concluded that its jurisdiction over EGSs "does not extend to interpreting the terms and conditions of a contract between an EGS and a customer to determine whether a breach has occurred or setting the rates an EGS can charge." *Office of Small Business Advocate v. FirstEnergy Solutions Corp.*, Docket No. P-2014-2421556 (Order entered January 26, 2015) at 18.

4. Interpretations of private contracts these are matters for civil courts of common pleas of competent jurisdiction. *See Allport Water Auth. v. Winburne Water Co.*, 258 Pa. Super. 555, 393 A.2d 673 (Pa. Super. 1978).

5. The generation of electricity is no longer regulated as a public utility service function except for the limited purposes set forth in Code Section 2809 (licensing) and Code Section 2810 (taxes). 66 Pa. C.S. § 2806(a); *Delmarva Power & Light Co. v. Pa. Pub. Util. Comm'n*, 582 Pa. 338, 870 A.2d 901 (Pa. 2005) ("*Delmarva*").

6. The Commission does not regulate the prices of EGSs. 66 Pa. C.S. § 1301 ("just and reasonable" rates analysis only applies to public utilities).

7. Code Section 1312 only authorizes the Commission to direct public utilities to issue refunds when a determination has been made that their rates are not just and reasonable. 66 Pa. C.S. § 1312.

8. Code Section 3301 sets forth the remedies that are available to the Commission when regulated entities violate the Code, Commission regulations or Commission orders, including civil penalties, and does not authorize directives for the issuance of refunds. 66 Pa. C.S. § 3301.

9. Code Section 2809(c) authorizes the Commission to suspend or revoke an EGS's license under specified circumstances, including the failure to maintain a bond or other security to ensure financial responsibility and the failure to pay taxes, and does not authorize directives for the issuance of refunds. 66 Pa. C.S. § 2809(c).

10. Code Section 501 confers on the Commission "general administrative power and authority to supervise and regulate all public utilities, which does not include EGSs for these purposes. 66 Pa. C.S. § 501; *Delmarva.*

11. As nothing in the text of the Code provides a strong and necessary implication authorizing the Commission to direct EGSs to issue refunds, Code Section 501 may not be relied upon to infer that authority. *PECO Energy Co. v. Pa. Pub. Util. Comm'n*, 568 Pa. 39, 791 A.2d 1155, 1159-1160 (2002).

12. The Commission is not permitted to award damages to complainants. *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791, 795 (Pa. 1977); *Elkin v. Bell Tel. Co. of Pa.*, 420 A.2d 371 (Pa. 1980).

13. The Statutory Construction Act of 1972 mandates that specific provisions in a statute prevail over general provisions. 1 Pa. C.S. § 1933; *See Robinson Township Washington County v. Commonwealth of Pennsylvania*, 83 A.3d 901 (Pa. 2013).

14. The Commission does not have jurisdiction to enforce the provisions of the Consumer Protection Law or the Telemarketer Registration Act. *Mid-Atlantic Power Supply Assoc. v. PECO Energy Co.*, Docket No. P-00981615, 1999 Pa. PUC LEXIS 30 (Order entered May 19, 1999); *David P. Torakeo v. Pennsylvania American Water Co.*, Docket No. C-2013-2359123 (Opinion and Order entered April 3, 2014); *In Re Marketing and Sales Practices for the Retail Residential Energy Market*, Docket No. L-2010-2208332 (Order entered October 24, 2012).

15. The Commission may not enforce vague or general standards that do not provide fair notice as to what is required of EGSs or of what is prohibited. *See Vill. of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982).

16. The Commission does not have injunctive powers; rather, it has the ability to seek injunctive relief from courts of equity. 66 Pa. C.S. § 502; *Maritrans GP Inc., v. Pepper, Hamilton & Scheetz*, 529 Pa. 241, 259, 602 A.2d 1277, 1286 (1992).

17. Code Section 701 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. Neither Code Section 701 nor any other provision of the Code authorizes the Commission to rely on pattern and practice evidence or to 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. Therefore, the Commission does not have jurisdiction over class action lawsuits or to hear pattern and practice claims. 66 Pa. C.S. § 701; *see also Painter v. Aqua PA, Inc.*, Docket No. C-2011-2239557 (Opinion and Order entered May 22, 2014); *Pettko v. Pennsylvania American Water Company*, Docket No. C-2011-2226096 (Administrative Law Judge Order dated October 5, 2011 adopted by Commission Order on February 18, 2013).

18. The Attorney General may be a complainant before the Commission in any matter solely as an advocate for the Commonwealth as a consumer of public utility services. 66 Pa. C.S. § 701.

19. The Office of Consumer Advocate is authorized to represent the general interests of consumers as a party, not the interests of individual utility consumers. 71 P.S. § 309-4(a); *see also Suprick v. Commonwealth Telephone Co.*, Docket No. 00903161, 1995 WL 945164.

20. A finding based wholly on hearsay cannot support a legal conclusion of an administrative agency. *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366 (Pa. Cmwlth. 1976). Uncorroborated hearsay may not be the basis for a finding of fact. *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).

21. The residual exception to the hearsay rule has been expressly rejected by the Pennsylvania Supreme Court. *See Commonwealth v. Stallworth*, 566 Pa. 349, 781 A.2d 110, 128, n.2 (2001).

22. Federal courts rarely apply the residual exception because there must be a clear basis of trustworthiness to support the out-of-court statements. *See Reassure Am. Life Ins. Co. v. Warner*, 2010 WL 4782776, *2 (S.D. Fla. 2010).

23. Code Section 332(a) places the burden of proof for an order on the proponent of the order. 66 Pa. C.S. § 332(a). *Samuel J. Lansberry, Inc. v. Pennsylvania Public Utility Commission*, 578 A.2d 600 (Pa. Cmwlth. 1990).

24. 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)

25. Commission decisions 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. Pennsylvania Public Utility Commission*, 489 Pa. 109, 413 A.2d 1037 (1980).

26. A pattern and practice approach is not appropriate in this proceeding due to the unique facts and circumstances of each individual sales transaction. *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*, Docket No. 14-38576 (Order dated August 31, 2015).

27. In Pennsylvania, written contracts supersede all preliminary negotiations, conversations and verbal agreements. *See Steuart v. McChesney*, 498 Pa. 45, 48, 444 A.2d 659, 661 (Pa. 1982).

28. The Commission's regulations do not require EGS to verify with the electric distribution company during the enrollment that the person making a change to the account is an authorized customer of record. 52 Pa. Code § 57.175.

29. Respond Power's Disclosure Statement complied with the Commission's regulations that were in effect during the relevant time period. 52 Pa. Code § 54.5(c)(1) and (2), as published at 37 Pa. B. 4996 (September 15, 2007).

30. The Joint Complainants failed to carry their burden of proof with respect to Counts I (Alleged Claims of Affiliation with EDCs), II (Alleged Claims of Savings), III (Alleged Failure to Disclose Material Terms), V (Alleged Slamming), or VII (Alleged Failure to Provide Accurate Pricing Information).

31. The Commission does not have jurisdiction to address Counts IV (Allegations regarding Welcome Letters), VIII (Alleged Nonconformity of Prices to Disclosure Statement) and IX (Allegations Regarding Telemarketing).

32. The Amended Petition for Approval of Settlement filed by Respond Power and the Bureau of Investigation and Enforcement on September 18, 2015 is in the public interest. 52 Pa. Code § 69.1201.

33. The Settlement fully resolves all factual and legal allegations raised in this consolidated proceeding and contains remedies that adequately address any allegations of the Joint Complaint that have been substantiated.

APPENDIX E
(Proposed Ordering Paragraphs)

Proposed Ordering Paragraphs

1. That the Joint Complaint filed by the Attorney General Kathleen Kane, through the Bureau of Consumer Protection, and Tanya J. McCloskey, Acting Pennsylvania Consumer Advocate on June 20, 2014 is denied.

2. That the Amended Petition for Approval of Settlement filed by Respond Power LLC and the Bureau of Investigation and Enforcement on September 18, 2015 is approved in its entirety, without modification.

3. That the Amended Petition for Approval of Settlement fully resolves and adequately all factual and legal allegations raised in this consolidated proceeding.

4. That the Stipulation of Facts attached as Exhibit A in Support of the Amended Petition for Approval of Settlement is admitted into the record of this proceeding.

5. That the Formal Complaint filed by the Bureau of Investigation and Enforcement on August 21, 2014 be marked satisfied.

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 U.S. MAIL AND E-MAIL:

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Dated this 3rd day of December, 2015.

Karen O. Moury, Esq.