

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

555 Walnut Street, 5th Floor, Forum Place
Harrisburg, Pennsylvania 17101-1923
(717) 783-5048
800-684-6560

FAX (717) 783-7152
consumer@paoca.org

December 23, 2015

Rosemary Chiavetta
Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

RE: Commonwealth of Pennsylvania, *et al.* v. Respond Power LLC
Docket No. C-2014-2427659

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

Secretary Chiavetta:

Enclosed please find Joint Complainants' Reply Brief, in the above-referenced proceeding.

Copies have been served as indicated on the enclosed Certificate of Service.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Candis A. Tunilo".

Candis A. Tunilo
Assistant Consumer Advocate
PA Attorney I.D. #89891

Enclosures

cc: Honorable Elizabeth Barnes, ALJ
Honorable Joel Cheskis, ALJ
Certificate of Service

*196330

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Commonwealth of Pennsylvania, by Attorney	:	
General KATHLEEN G. KANE, Through the	:	
Bureau of Consumer Protection,	:	Docket No. C-2014-2427659
And	:	
TANYA J. McCLOSKEY, Acting Consumer	:	
Advocate,	:	
Complainants	:	
v.	:	
RESPOND POWER, LLC,	:	
Respondent	:	
PENNSYLVANIA PUBLIC UTILITY	:	
COMMISSION, BUREAU OF	:	
INVESTIGATION AND ENFORCEMENT,	:	Docket No. C-2014-2438640
Complainant	:	
v.	:	
RESPOND POWER, LLC,	:	
Respondent	:	

REPLY BRIEF OF JOINT COMPLAINANTS

John M. Abel
Senior Deputy Attorney General
PA Attorney I.D. 47313

Nicole R. DiTomo
Deputy Attorney General
PA Attorney I.D. 315325

Bureau of Consumer Protection
Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
T: (717) 787-9707
F: (717) 787-1190
jabel@attorneygeneral.gov
nditomo@attorneygeneral.gov

Counsel for:
Bruce R. Beemer, First Deputy Attorney General
Office of Attorney General
Bureau of Consumer Protection

Candis A. Tunilo
PA Attorney I.D. 89891

Kristine E. Marsilio
PA Attorney I.D. 316479
Assistant Consumer Advocates

Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923
T: (717) 783-5048
F: (717) 783-7152
ctunilo@paoca.org
kmarsilio@paoca.org

Counsel for:
Tanya J. McCloskey
Acting Consumer Advocate
Office of Consumer Advocate

DATE: December 23, 2015

PUBLIC VERSION

TABLE OF CONTENTS

I. INTRODUCTION	1
II. LEGAL STANDARDS	7
A. Introduction.	7
B. The General Assembly Granted the Commission the Power to Impose Requirements Necessary to Prevent Deterioration of the Quality of Electric Service.....	7
C. Respond Power’s Arguments That the Commission May Not Interpret Private Contracts, Nor Regulate EGS Prices Are Irrelevant.	9
D. The Commission’s Powers to Order Remedies Are Not Limited for EGSs.....	14
E. The Commission’s Power to Order EGSs to Issue Refunds Has Been Established.....	18
F. The Commission Has Jurisdiction to Enforce Its Own Regulations Which May Incorporate Standards Set Forth In Other Laws.....	19
G. The Commission’s Jurisdiction over EGS Marketers and Billing Practices Is Not Limited.	22
H. Establishment of Pattern and Practice Evidence.....	23
1. Introduction.	23
2. The Commission May Base its Decision on the Patterns and Practices Demonstrated through the Expert and the Customer Testimonies and Exhibits.....	24
3. The “Substantial Evidence” Requirement Is a Discrete Statutory Requirement Unrelated to “Pattern and Practice” Evidence.	25
4. Joint Complainants Have Presented No Unauthenticated Hearsay Statements.	26
5. The Commission May Rely on Consumer Testimony and Draw Inferences Concerning the Company’s General Practices.	28
6. The Fact That Circumstances of Each Transaction Vary Does Not Change the Conclusion That Respond Power Engaged in Unfair, Misleading and Deceptive Sales and Marketing Practices.	30
G. Conclusion.....	32
III. SUMMARY OF ARGUMENT	32
IV. REPLY ARGUMENT	33
A. Establishment of Pattern & Practice.	33
B. Company Operations.	33
C. Joint Complaint.....	33
1. Count I – Misleading and Deceptive Claims of Affiliation with EDCs.....	33

2.	Count II – Misleading and Deceptive Promises of Savings.	38
a.	The Consumer Testimony Is Compelling, Not Vague and Inconsistent.	39
b.	The Disclosure Statement Does Not Refute Statements of Savings by the Company’s Sales Agents.....	45
c.	The Company’s Training Emphasized and Continues to Emphasize Savings.....	48
d.	Conclusion.....	51
3.	Count III – Failing to Disclose Material Terms.	51
4.	Count IV – Deceptive and Misleading Welcome Letters and Inserts.	55
5.	Count V – Slamming.....	57
a.	Introduction.	57
b.	Consumer Testimony.....	61
c.	Conclusion.....	77
6.	Count VI – Lack of Good Faith Handling of Complaints.....	77
7.	Count VII – Failing to Provide Accurate Pricing Information.	83
a.	Respond Power’s Disclosure Statement Has Not Been Approved by the Commission.....	85
b.	Respond Power’s Disclosure Statement Was Not in Compliance with the Commission’s Regulations in Effect Prior to the First Quarter of 2014.	88
c.	Section 54.5(c)(1) and (2) Are Not Unconstitutionally Vague.	90
d.	Conclusion.....	94
8.	Count VIII – Prices Nonconforming to Disclosure Statement.	95
9.	Count IX – Failure to Comply with the TRA.....	101
D.	Relief Requested.....	103
1.	Introduction.	103
2.	“Reconciliation of Remedies” Is Not a Recognized Legal Concept.	107
3.	License Revocation.....	110
4.	Refunds.....	113
5.	Civil Penalty and Contributions.	116
6.	EGS License Conditions.....	119
V. JOINT COMPLAINANTS’ OBJECTIONS TO I&E/RESPOND POWER SETTLEMENT.....		122
A.	Introduction.....	122

B.	The Settlement is legally defective.	125
C.	Refunds.	127
1.	The Refund Provisions in the Settlement do not Provide for a Fair Disbursement of Refunds to Respond Power’s Customers.....	127
2.	The Amount of Refunds in the Settlement is Wholly Inadequate.	129
3.	The Processes Outlined in the Settlement for Customers to Obtain Refunds are Not in the Public Interest.	132
4.	There is an Inconsistency in the Settlement and the Statements in Support Regarding the Disbursement of the Refunds to Consumers who Filed Informal Complaints at the Commission.	133
D.	Reverter Provision.	134
E.	Alternate Refund Method.	135
F.	EGS License Retention.	136
G.	Third-Party Administrator and Distribution of Refunds.....	139
H.	Door-to-Door Marketing.....	141
I.	Oversight and Business Modifications.	143
J.	Hardship Fund and Civil Penalty.	144
K.	Rosi Factor Analysis.	146
L.	Conclusion.	154
VI.	CONCLUSION	155

TABLE OF AUTHORITIES

	Page(s)
Cases	
<u>Baltimore and Ohio Railroad Co. v. Occupational Safety and Health Review Commission,</u> 179 U.S. App. D.C. 97, 548 F.2d 1052 (D.C. Cir. 1976)	21
<u>Barone v. Pa. PUC,</u> 86 Pa. Commw. 393 (Pa. Commw. Ct. 1984).....	15
<u>Commonwealth v. Barud,</u> 545 Pa. 297, 681 A.2d 162 (Pa. 1996)	93
<u>Commonwealth v. Mayfield,</u> 574 Pa. 460, 832 A.2d 418 (Pa. 2003)	93
<u>Commonwealth v. McCoy,</u> 2006 Pa. Super. 33, 895 A.2d 18 (Pa. Super. 2006)	93
<u>Commonwealth v. Parker White Metal Co.,</u> 512 Pa. 74, 515 A.2d 1358 (Pa. 1986)	92, 93
<u>County of Erie v. Verizon North, Inc.,</u> 879 A.2d 357 (Pa. Commw. Ct. 2005)	22
<u>Delmarva Power & Light v. Pa. PUC,</u> 870 A.2d 901 (Pa. 2005)	12, 13, 18, 114
<u>Design and Development, Inc. v. Vibromatic Manufacturing, Inc.,</u> 48 F.R.D. 71 (E.D. Pa. 1973).....	46
<u>Elkin v. Bell Tel. Co.,</u> 420 A.2d 371 (Pa. 1980).....	22
<u>Gillis, et al. v. Respond Power, LLC,</u> E.D. Pa Case No. 14-3856, Order (Aug. 31, 2015)	30
<u>Harrisburg Taxicab & Baggage Co., v. Pa. PUC,</u> 786 A.2d 288, 2001 Pa. Commw. LEXIS 778 (Pa. Commw. Ct. 2001)	21
<u>LP Water & Sewer Co. v. Pennsylvania PUC,</u> 722 A.2d 733 (Pa. Commw. Ct. 1998)	29
<u>Mid-Atlantic Power Supply Ass'n v. PECO Energy Co.,</u> 92 PA PUC 414 (May 19, 1999).....	21, 22

<u>MKP Enters. v. Underground Storage Tank Indemnification Bd.,</u> 39 A.3rd 570 2012 Pa. Commw. LEXIS 62 (Pa. Commw. Ct. 2012)	28
<u>Morrow v. The Bell Tel. Co. of Pa.,</u> 479 A.2d 548 (Pa. Super. Ct. 1984)	9
<u>Pa. PUC and Irwin A. Popowsky, Consumer Advocate v. Jeffrey Foley, Kathleen</u> <u>Foley and Emlenton Water Co.,</u> 359 M.D. 2009, Order (Feb. 26, 2010)	16
<u>Petite v. United States,</u> 361 U.S. 529 (1960)	105
<u>Rinaldi v. United States,</u> 434 U.S. 22 (1977)	105
<u>Steuart v. McChesney,</u> 498 Pa. 45, 444 A.2d 659 (Pa. 1982)	46
<u>Union Storage Co. v. Speck,</u> 194 Pa. 126, 45 A. 48 (Pa. 1899)	46
<u>Village of Hoffman Estates v. Flipside, Hoffman Estates,</u> 455 U.S. 489 (1982)	91, 92, 94
<u>Weston v. Reading Co.,</u> 282 A.2d 714 (Pa. 1977)	22
Administrative Decisions	
<u>Application of Major Energy Services, LLC to Amend its Natural Gas Supplier</u> <u>License, Docket No. A-2009-2118836, Tentative Order (Mar. 29, 2012)</u>	151
<u>Balla v. Redstone,</u> Docket No. C-0099270, Order (June 23, 2005)	15, 143
<u>Bianchi v. PG&W,</u> 61 Pa. PUC 385 (1986)	15
<u>Binh Tran v. Major Energy, LLC/Respond Power, LLC,</u> Docket No. C-2014-2417540, Opinion and Order (July 30, 2015)	57, 58, 59
<u>C.S. Warthman Funeral Home, et al. v. GTE North, Inc.,</u> 1993 Pa. PUC LEXIS 214	17

<u>Commonwealth of Pennsylvania by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric,</u> Docket No. C-2014-2427656.....	110
<u>Commonwealth of Pennsylvania by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. HIKO Energy, LLC,</u> Docket No. C-2014-2427652.....	<i>passim</i>
<u>Commonwealth of Pennsylvania by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. HIKO Energy, LLC,</u> Docket No. C-2014-2427652, Final Order (Dec. 3, 2015)	5, 107, 152, 153
<u>Commonwealth of Pennsylvania by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. HIKO Energy, LLC,</u> Docket No. C-2014-2427652, Initial Decision (Aug. 21, 2015)	107, 108
<u>Commonwealth of Pennsylvania by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. IDT Energy, Inc.,</u> Docket No. C-2014-2427657.....	110
<u>Commonwealth of Pennsylvania by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. IDT Energy, Inc.,</u> Docket No. C-2014-2427657, Order (Dec. 18, 2014), 2014 WL 7339557 (2015).....	<i>passim</i>
<u>Commonwealth of Pennsylvania by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. Respond Power, LLC,</u> Docket No. C-2014-2427659, Order (Apr. 9, 2015).....	<i>passim</i>
<u>Commonwealth of Pennsylvania by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. Respond Power, LLC,</u> Docket No. C-2014-2427659, Order Granting in Part and Denying in Part Motion to Strike (Mar. 6, 2015).....	27, 44
<u>Commonwealth of Pennsylvania by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. Respond Power, LLC,</u> Docket No. C-2014-2427659, Order Granting/Denying Preliminary Objections (Aug. 20, 2014), 2014 Pa. PUC LEXIS 395.....	12, 20, 21

<u>Customer Information Disclosure Requirements for Natural Gas Suppliers Providing Natural Gas Supply to Residential and Small Business Customers, Docket No. L-2015-2465942, Proposed Rulemaking Order at 22 (Mar. 26, 2015); 45 Pa.B. 2705</u>	86
<u>Deborah Harris v. UGI Utilities, Inc., Docket No. C-20032233, Order (Feb. 12, 2004)</u>	14, 15, 143
<u>Ely v. Pennsylvania Water, 2006 Pa. PUC LEXIS 75</u>	17
<u>Herp v. Respond Power, LLC, Docket No. C-2014-2413756, Initial Decision (Dec. 17, 2014)</u>	<i>passim</i>
<u>Hoke v. Ambit Northeast, LLC d/b/a Ambit Energy, Docket No. C-2013-2357863, Order (Jan. 16, 2014)</u>	85, 87, 88
<u>In the Matter of the Investigation into the Marketing, Advertising, and Trade Practices of American Power Partners, LLC; Blue Pilot Energy, LLC; Major Energy Electric Services, LLC and Major Energy Services, LLC; and Xoom Energy Maryland, LLC, Case No. 9346, Order (Apr. 1, 2014)</u>	151
<u>Interim Guidelines on Marketing and Sales Practices for Electric Generation Suppliers and Natural Gas Suppliers, Docket No. M-2010-2185981, Order (Nov. 5, 2010)</u>	155
<u>Joint Application of Aqua Pennsylvania, Inc. and Emlenton Water, Docket No. A-2008-2074746, Order (Dec. 29, 2008)</u>	16
<u>Kiback v. IDT Energy, Inc., Docket No. C-2014-2409676, Order (Aug. 20, 2015), 2015 Pa. PUC LEXIS 53.....</u>	<i>passim</i>
<u>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 (Aug. 19, 2010)</u>	<i>passim</i>
<u>Re: Marketing and Sales Practices for the Residential Energy Market, Docket No. L-2010-2208332, Corrected Final Rulemaking Order at 8 (Oct. 24, 2012)</u>	102
<u>Nadav v. Respond Power, LLC, Docket No. C-2014-2429159, Order (Dec. 19, 2014), 2014 WL 4374216</u>	19, 151
<u>Office of Consumer Advocate v. Utility.com, Inc., 212 PUR4th 255 (2001)</u>	29

<u>Office of Small Business Advocate v. FirstEnergy Solutions Corp.,</u> Docket No. P-2014-242556, Order (Jan. 26, 2015).....	9, 10, 11
<u>Petition of PPL Electric Utilities Corporation for Approval of Its Smart Meter</u> <u>Technology Procurement and Installation Plan,</u> Docket No. M-2014-2430781, Opinion and Order (Sept. 3, 2015).....	37
<u>Pa. PUC v. Reed,</u> 1992 Pa. PUC LEXIS 40 Pa. PUC 19.....	17
<u>Pennsylvania Public Utility Commission, Bureau of Investigation and</u> <u>Enforcement v. HIKO Energy, LLC,</u> Docket No. C-2014-2431410.....	<i>passim</i>
<u>Pennsylvania Public Utility Commission, Bureau of Investigation and</u> <u>Enforcement v. HIKO Energy, LLC,</u> Docket No. C-2014-2431410, Final Order (Dec. 3, 2015)	<i>passim</i>
<u>Pennsylvania Public Utility Commission, Bureau of Investigation and</u> <u>Enforcement v. HIKO Energy, LLC,</u> Docket No. C-2014-2431410, Initial Decision (Aug. 21, 2015)	<i>passim</i>
<u>Pennsylvania Public Utility Commission, Bureau of Investigation and</u> <u>Enforcement v. Public Power, LLC,</u> Docket No. M-2012-2257858, Order (Dec. 19, 2013)	60
<u>Pennsylvania Public Utility Commission, Bureau of Investigation and</u> <u>Enforcement v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas and</u> <u>Electric, et. al.,</u> Docket No. M-2013-2325122, Opinion and Order (Oct. 2, 2014)	60
<u>Petition of Shell Energy Services Co., L.L.C. For Declaratory Order and in the</u> <u>Alternative, Waiver of 52 Pa. Code § 54.5(c)(2),</u> Docket No. P-00001848, Order (Dec. 20, 2000)	89
<u>Richard Sanderman v. LP Water and Sewer Company,</u> 87 Pa. PUC 734 (1997)	29
<u>Rulemaking to Amend the Provisions of 52 Pa. Code, Section 54.5 Regulations</u> <u>Regarding Disclosure Statement for Residential and Small Business</u> <u>Customers and to Add Section 54.10 Regulations Regarding the Provision of</u> <u>Notices of Contract Expiration or Changes in Terms for Residential and Small</u> <u>Business Customers, Docket No. L-2014-2409385, Final-Omitted</u> Rulemaking Order (Apr. 3, 2014).....	88, 89, 90
<u>Towne v. Great American Power, LLC,</u> Docket No. C-2012-2307991, Order (Oct. 18, 2013)	45, 46

Werle v. Respond Power, LLC,

Docket No. C-2014-2429158, Order (Feb. 23, 2015), 2014 WL 6807071.....19, 151

Constitutions

Pa. Const. art I, § 26.....92
U.S. Const. amend. XIV.91, 92

Statutes

71 P.S. § 309-4(a)105
2 Pa. C.S. § 704.....26
66 Pa. C.S. § 102.....17
66 Pa. C.S. § 308(b)106
66 Pa. C.S. § 308.2.....123, 134
66 Pa. C.S. § 308.2(a)106
66 Pa. C.S. § 308.2(a)(11).....139
66 Pa. C.S. § 332.....24
66 Pa. C.S. § 501..... *passim*
66 Pa. C.S. § 502.....15, 16
66 Pa.C.S. § 2802(14).....5, 6, 10
66 Pa. C.S. § 2807.....10
66 Pa. C.S. § 2807(d)(1) *passim*
66 Pa. C.S. § 2809..... *passim*
66 Pa. C.S. § 2809(a)78
66 Pa. C.S. § 2809(b)111
66 Pa. C.S. § 2809(c)111
66 Pa. C.S. § 2809(e) *passim*
66 Pa. C.S. § 3301.....8
Electricity Generation Customer Choice and Competition Act, 66 Pa. C.S. Ch. 28 *passim*

Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1 <i>et seq.</i>	<i>passim</i>
Telemarketer Registration Act, 73 P.S. § 2241 <i>et seq.</i>	<i>passim</i>
TRA, 73 P.S. § 201-4.....	105
TRA, 73 P.S. § 2245(a)(7).....	102
TRA, 73 P.S. § 2245(c).....	102
TRA, 73 P.S. § 2245(d)	102

Regulations

52 Pa. Code Ch. 54	<i>passim</i>
52 Pa. Code Ch. 56	11, 78, 112
52 Pa. Code § 3.1	16
52 Pa. Code § 3.1 <i>et seq.</i>	17
52 Pa. Code § 3.6(b)	16
52 Pa. Code § 3.7	16
52 Pa. Code § 29.402(1)	21
52 Pa. Code § 54.3	10
52 Pa. Code § 54.4	11, 155
52 Pa. Code § 54.4(a).....	<i>passim</i>
52 Pa. Code § 54.5	<i>passim</i>
52 Pa. Code § 54.5(a).....	<i>passim</i>
52 Pa. Code § 54.5(c).....	<i>passim</i>
52 Pa. Code § 54.5(c)(1)	<i>passim</i>
52 Pa. Code § 54.5(c)(2).....	<i>passim</i>
52 Pa. Code § 54.5(c)(2)(ii)	88
52 Pa. Code § 54.5(c)(2)(iii).....	89
52 Pa. Code § 54.6	10

52 Pa. Code § 54.7	10, 155
52 Pa. Code § 54.7(a).....	55
52 Pa. Code § 54.10	10
52 Pa. Code § 54.41(b)	113
52 Pa. Code § 54.42	111, 112, 155
52 Pa. Code § 54.42(a)(9).....	<i>passim</i>
52 Pa. Code § 54.43	23, 155
52 Pa. Code § 54.43(1)	<i>passim</i>
52 Pa. Code § 54.43(f)	<i>passim</i>
52 Pa. Code § 54.122(3)	10, 21
52 Pa. Code § 56.1	155
52 Pa. Code § 56.1(a).....	81, 83
52 Pa. Code § 56.141	155
52 Pa. Code § 56.141(a).....	78, 81, 83
52 Pa. Code § 56.151	78, 81, 83, 155
52 Pa. Code § 56.152	79, 83, 155
52 Pa. Code § 57.171 <i>et seq.</i>	58
52 Pa. Code § 57.177(b)	<i>passim</i>
52 Pa. Code § 65.151	79
52 Pa. Code § 65.152	79
52 Pa. Code § 69.251	23
52 Pa. Code § 69.1201	146
52 Pa. Code § 69.1201(b)	147
52 Pa. Code § 111.2	58
52 Pa. Code § 111.4.....	<i>passim</i>

52 Pa. Code § 111.5	<i>passim</i>
52 Pa. Code § 111.7	102, 103
52 Pa. Code § 111.7(b)	40, 58
52 Pa. Code § 111.8	155
52 Pa. Code § 111.9	155
52 Pa. Code § 111.10	20, 103, 155
52 Pa. Code § 111.10(a).....	20
52 Pa. Code § 111.10(a)(1)	101, 102
52 Pa. Code § 111.10(a)(2)	101
52 Pa. Code § 111.10(c).....	101
52 Pa. Code § 111.12	155
52 Pa. Code § 111.12(d)(1).....	<i>passim</i>
52 Pa. Code § 111.12(d)(4).....	55
52 Pa. Code § 111.12(d)(5).....	84, 85, 94, 95
52 Pa. Code § 111.13	83, 155
52 Pa. Code § 111.13(a).....	79, 81
52 Pa. Code § 111.13(b)	79, 81
67 Pa. Code Chapter 175	21
Other Authorities	
Fed. R.C.P. 23(a)(4).....	30
Pa. R.E. 611(c)	44

I. INTRODUCTION

The Office of Consumer Advocate (OCA) and the Office of Attorney General (OAG) (collectively Joint Complainants) submit this Reply Brief in response to the arguments raised in the Main Briefs of Respond Power, LLC (Respond Power or the Company) and the Bureau of Investigation and Enforcement (I&E). The Company's arguments in its Main Brief were thoroughly addressed in the Joint Complainants' Main Brief, or were rejected in prior Orders of the Administrative Law Judges (ALJs) and the Public Utility Commission (Commission) in this case. Similarly, the arguments raised by I&E have been thoroughly addressed by the Joint Complainants to support their position that the Settlement between I&E and Respond Power should be rejected as not in the public interest. The Joint Complainants will not repeat here the extensive discussion contained in the Joint Complainants' Main Brief but will highlight the key failings and flaws in the positions of the Company and I&E.

Suffice it to say that nothing contained in the Company's or I&E's Main Brief alters the Joint Complainants' position that Respond Power violated the Public Utility Code and multiple Commission regulations and orders, using unfair, misleading and deceptive marketing and sales practices to persuade customers to switch to Respond Power, and then charging the customers on variable rates any price that Respond Power saw fit to charge, regardless of its Disclosure Statement or promises in its advertising and marketing. The Joint Complainants have established by the testimony of its expert witnesses and the testimony of 169 consumers who provided their own personal, first-hand experiences with Respond Power, a pattern and practice of noncompliance with the Public Utility Code and the Commission's regulations and Orders, including the regulations that incorporate the standards of the consumer protection laws of this Commonwealth.

Respond Power failed in its Main Brief, as well as throughout this proceeding, to respond in any meaningful way to the substantial evidence adduced by the Joint Complainants. Respond Power's Main Brief rests on thinly constructed legal arguments that try to limit the Commission's jurisdiction and authority to enforce the Public Utility Code and its regulations, or a shifting of blame approach that attempts to blame the weather, blame the consumer victims, or blame the Commission and its website, PaPowerSwitch.com, or Electric Distribution Companies (EDCs) or blame the OCA and OAG for pursuing this case.

Respond Power devotes the bulk of its Main Brief to addressing issues that have already been decided by the ALJs or Commission, such as the Commission's authority over various issues in this case or the admission of consumer testimony. Respond Power simply ignores the overwhelming evidence that consumers from all across the Commonwealth consistently identified the same illegal business practices, attacking this testimony as lacking in credibility or suggesting that it was just a response to a publicity campaign by the OAG and OCA. While the ALJs will make the ultimate determination on the credibility of all of the sworn witnesses in this proceeding, Respond Power's bald assertions are nothing more than a further attempt to divert attention from the Company's many failings demonstrated by the testimony of consumers and the expert witnesses presented by Joint Complainants. Indeed, Respond Power did not present a single sales agent to rebut the first hand experiences of the consumers that testified in this proceeding. In fact, Respond Power's bare assertions in its Main Brief have no basis in fact or in the record, as the testimony of the consumer witnesses demonstrated.

The Company's response to the facts and evidence adduced by Joint Complainants' expert witnesses is equally lacking. Respond Power has mounted no substantive defense to the facts and evidence reflected in the testimonies of Joint Complainants' expert witnesses, and

indeed, one is not possible. The Joint Complainants provided detailed expert testimony based on Respond Power's own business documents and call recordings that Respond Power's marketing and sales practices, its oversight and training of its sales agents, and its disclosures and pricing practices are not in compliance with the Public Utility Code or the Commission's regulations and orders governing the retail electric market. This evidence included the Company's own documents and scripts, which were shown to be false and deceptive on their face, and a detailed review of actual recorded sales calls and third party verification calls that fully demonstrated the systemic failings of the Company that resulted in this pattern and practice of unfair and deceptive conduct.

The Company's Main Brief does not rebut that evidence but instead, simply tries to rely on the conclusory statements of the Company's witnesses that were not supported by any documentation or evidence. Although the Company's rebuttal testimony was replete with conclusory statements about how Respond Power conducts its business (and repeated in its Main Brief), the Company was unable to provide any documents or evidence to support the vague claims and provided no facts or evidence to contradict the Joint Complainants' expert testimony. This stands in stark contrast to the detailed evidence provided by Joint Complainants' expert witnesses and the pervasive and extensive consumer witness testimony.

The Joint Complainants provided detailed Findings of Fact in Appendix C of their Main Brief regarding the evidence adduced in this proceeding. Among the salient points shown are the following:

- Respond Power sales agents consistently represented, in explicit or implicit ways, that they were affiliated with the Public Utility Commission or customers' EDCs. OAG/OCA M.B. at App. C. at 6-8.
- Respond Power's promotional materials, as well as its Welcome Letters and inserts contain deceptive and misleading statements about savings,

competitive prices, lowering customers' energy bills, and other benefits that were not provided by the Company. OA/OCA M.B. at App. C at 14.

- Respond Power's sales agents followed the sales scripts and incentives provided by Respond Power and promoted savings, competitive pricing policies and alleged historical savings of up to 10% compared to utility rates, while a review of historical billing data showed that the Company charged customers significantly more than the price to compare 69% of the time. OAG/OCA M.B. at App. C at 8-10.
- None of the customers for whom Respond Power provided data saved money over their entire terms of service with the Company. OAG/OCA M.B. at App. C at 10.
- The Company's disclosure statement in fine print applies to both fixed and variable rate electric and natural gas supply. Many customers did not recall receiving it and it was difficult to understand because it spoke to so many options. OAG/OCA M.B. at App. C at 11-12.
- Respond Power prices are not tied to the PJM markets, as claimed in Respond Power's Disclosure Statement, and there is no meaningful relationship between Respond Power's prices and wholesale market prices or the Disclosure Statement. OAG/OCA M.B. at App. C at 21.

These unfair and deceptive practices, along with Respond Power's lack of proper training, oversight and discipline of its sales force, have significantly harmed Pennsylvania consumers and the retail market. These harms were compounded by Respond Power's failure to provide adequate and reasonable customer service or to treat customers fairly and in good faith when customers attempted to reach Respond Power to obtain some relief.

Respond Power and I&E rely heavily on their Settlement as a reason to dismiss the Joint Complaint and argue for the Commission to simply adopt the Settlement to resolve the Joint Complainants' allegations. Respond Power M.B. at 4-6, 189-215; I&E M.B. at 14-33. The two-party Settlement reached, without the participation of the OAG, the OCA or the Office of Small Business Advocate (OSBA), provides no basis to dismiss the Joint Complaint or forego appropriate remedies for the many violations demonstrated by the Joint Complainants. The

evidence offered in this proceeding, the multiple and extensive violations shown, the unfair and deceptive practices documented, the improper billings shown, and the lack of any credible business operations to conform to the Pennsylvania requirements demonstrate that acceptance of the Settlement would not be in the public interest, the consumers' interests or in the interest of effectively monitoring and enforcing the Public Utility Code and the Commission's regulations and orders governing the retail market.

Despite the arguments presented by Respond Power and I&E that anything beyond accepting this wholly inadequate and non-unanimous Settlement would be contrary to the Commission's authority, the Commission has made clear its intent to foster a robust retail energy market in Pennsylvania and to meet its responsibility to monitor and enforce the market rules. In two recent cases concerning complaints against an Electric Generation Supplier (EGS), Chairman Gladys M. Brown issued a Statement declaring that:

The Commission has and will continue to work diligently to foster a robust energy market in Pennsylvania. This mission requires the PUC not only to properly design the market, but also to effectively monitor and enforce the market. It is unfortunate that the PUC has come to this juncture with these two Complaints. However, these proceedings serve as an example of the Commission's responsibility to be a retail energy market watchdog. This outcome today serves as a reminder to the retail supply industry that the Commission will not hesitate to take action against bad actors. More importantly, I hope these proceedings provide some consolation to all utility customers that the Commission will always work tirelessly for their protection.

Statement of Chairman Gladys M. Brown, December 3, 2015, at 2.¹

Respond Power makes much of the argument that under Chapter 28 the Commission does not regulate EGS prices, citing to 66 Pa.C.S. § 2802(14); however, a review of the language of

¹ Pa. PUC Bureau of Investigation and Enforcement v. HIKO Energy, LLC, Docket No. C-2014-2431410. Order (Dec. 3, 2015) (Rejected the exceptions of HIKO and affirmed civil penalties of approximately \$1.8 million) and Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. HIKO Energy, LLC, Docket No. C-2014-2427652, Order (Dec. 3, 2015) (Adopted the Initial Decision of Aug. 21, 2015 that recommended approval of the Joint Petition for Settlement in its entirety without modification, requiring over \$2 million in refunds, \$25,000 in hardship fund payments, and various modifications to business practices).

this Section is enlightening as to the Commission's authority to protect the public. Section 2802(14) in relevant part provides:

*The 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.***

66 Pa.C.S. § 2802(14). (Emphasis added).

This case requires that the Commission enforce its regulations designed to inform, educate and protect consumers as required by Chapter 28, 66 Pa. C.S. Ch. 28, and provide appropriate remedies for the many violations of the Commission's regulations, the unfair and deceptive marketing practices that induced customers to switch to Respond Power, and the failure to charge prices that were in any way meaningfully tied to its Disclosure Statement.

Joint Complainants respectfully submit that Respond Power's significant failings have harmed Pennsylvania consumers and the Pennsylvania retail market. The demonstrated violations are significant and widespread and must be remedied. The Settlement reached between Respond Power and I&E is wholly inadequate to address these serious violations and should be rejected. Joint Complainants have provided a comprehensive set of remedies, including appropriate refunds to consumers, appropriate civil penalties and license revocation that will address these actions and provide some relief to Respond Power's customers. The Joint complainants have also provided for license conditions if Respond Power is permitted to retain its license or re-enter the Pennsylvania retail market at some time in the future, Joint Complainants urge the ALJs and the Commission to adopt the comprehensive remedies and refunds supported in the Joint Complainants' Main Brief and in this Reply Brief.

II. LEGAL STANDARDS

A. Introduction.

Respond Power has made several jurisdictional arguments in the initial sections of its legal argument (Respond Power M.B. at 42-88) which repeat in various substantive sections throughout its Main Brief. All are either invalid, inapplicable to this case, or already decided in the Joint Complainants' favor. In summary, Respond Power argues the following points:

- The Commission has no authority over private contracts.
- The Commission does not regulate EGS prices.
- The Commission has no authority to order EGS refunds.
- The Commission has no authority to enforce the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1 *et seq.* (Consumer Protection Law) and the Telemarketer Registration Act, 73 P.S. § 2241 *et seq.* (TRA).
- The Commission has limited jurisdiction over EGS Marketing Practices.
- The Commission is not authorized to issue injunctive relief and has no equitable powers.
- The Commission is not authorized to consider “pattern and practice” evidence.
- The Commission may not rely upon unauthenticated hearsay statements.

Joint Complainants will, in this section, address these jurisdictional arguments fully, but will also refer to this section and discuss these points further in the substantive sections that follow, as needed.

B. The General Assembly Granted the Commission the Power to Impose Requirements Necessary to Prevent Deterioration of the Quality of Electric Service.

As noted above, Respond Power has made numerous arguments regarding the Commission's jurisdiction in its legal standards section and throughout its Main Brief. If these arguments were valid, the Commission would be precluded from effectively monitoring the retail market and enforcing the Electricity Generation Customer Choice and Competition Act (Choice Act), 66 Pa. C.S. Ch. 28, and other provisions of the Public Utility Code and Commission regulations as they relate to electric generation suppliers (EGSs), as the General Assembly intended.

Respond Power asserts that the Commission does not have the power to order EGSs to issue refunds (Respond Power M.B. at 50-61), nor to issue injunctive relief of any kind (Respond Power M.B. at 70-73). Respond Power has offered scant evidence in defense of the widespread noncompliance demonstrated by the Joint Complainants; rather the Company argues, without much legal support, that the Commission has very limited jurisdiction to do anything about the violations. The General Assembly could not have intended this result. If Respond Power's arguments were valid, the Commission would essentially be left only with the options of imposing civil penalties pursuant to Section 3301, 66 Pa. C.S. § 3301, or revocation of the EGS's license pursuant to 66 Pa. C.S. Section 2809, 66 Pa. C.S. § 2809. This would be an untenable result for both the retail market and consumer protection.

Acceptance of these arguments would hamstring the Commission in EGS cases and would run directly contrary to the grant of broad powers by the General Assembly through Section 501 of the Public Utility Code, 66 Pa. C.S. Section 501; it would also undermine the Commission's ability to enforce the Choice Act, as the General Assembly intended. Through its broad authority, which the Commission has recently acknowledged in several proceedings, the Commission may both order EGSs to issue refunds and to require prospective modifications to

business practices to correct the full range of regulatory violations demonstrated. See e.g. Kiback v. IDT Energy, Inc., Docket No. C-2014-2409676, Order (Aug. 20, 2015), 2015 Pa. PUC LEXIS 53; Commonwealth of Pennsylvania by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. IDT Energy, Inc., Docket No. C-2014-2427657, Order (Dec. 18, 2014), 2014 WL 7339557 (2015). These remedies are essential to ensure that the present quality of electric service provided to customers does not deteriorate, as required by Section 2809(e) of the Code, 66 Pa. C.S. § 2809(e).

Acceptance of Respond Power's arguments would also be inconsistent with the Commission's obligation to effectively monitor and enforce retail energy market regulations and protect consumers in accordance with Chapter 28. The Commission should reject these baseless contentions relative to issuance of refunds and other remedies and act to protect consumers and the retail market.

C. Respond Power's Arguments That the Commission May Not Interpret Private Contracts, Nor Regulate EGS Prices Are Irrelevant.

Respond Power argues that nothing in the Public Utility Code authorizes the Commission "to interpret the terms and conditions of a private contract between an EGS and its customers." Respond Power M.B. at 43. The Company relies heavily on Office of Small Business Advocate v. FirstEnergy Solutions Corp., Docket No. P-2014-242556, Order (Jan. 26, 2015) (FES). Joint Complainants submit that the Order in FES supports precisely the relief sought in the instant case, contrary to Respond Power's arguments.

The Commission agreed with FirstEnergy Solutions that its jurisdiction over EGSs does not extend to interpreting the terms and conditions of a contract between an EGS and a commercial customer to determine whether a breach has occurred. FES at 18, citing Morrow v.

The Bell Tel. Co. of Pa., 479 A.2d 548 (Pa. Super. Ct. 1984). Joint Complainants have not claimed a breach of contract in this case, nor have Joint Complainants asked the Commission to interpret a contract. In FES the Commission went on to state that it is authorized, pursuant to the Public Utility Code, specifically 66 Pa. C.S. §§ 2807 and 2809 and pursuant to Chapter 54 of its regulations, 52 Pa. Code Ch. 54, to ensure that an EGS, in the following specific ways, complies with the law by:

- Abiding by the standards of conduct and disclosure, pursuant to 52 Pa. Code § 54.5;
- Complying with the marketing and sales regulations set forth in 52 Pa. Code §§ 54.3, 54.6, 54.7, 54.43(1), 54.43(f), and 54.122(3); and
- Adhering to the marketing and sales regulations, and the contract expiration /change of terms notice requirements, set forth in 52 Pa. Code § 54.10.

FES at 18-19. Consistent with the Commission's jurisdiction as articulated in FES, the Joint Complainants have grounded the Counts of the Joint Complaint in the provisions of Chapter 28 and the pertinent Commission regulations, *not* in breach of contract. Thus, all relief requested is squarely within the scope of the Commission's jurisdiction, as delegated by the General Assembly in the Choice Act.

The Commission decision on interlocutory review in a similar case echoes the discussion in FES as to the scope of the Commission's EGS enforcement authority. In Commonwealth of Pennsylvania by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. IDT Energy, Inc., Docket No. C-2014-2427657, Order (Dec. 18, 2014), 2014 WL 7339557 (2015) (IDT Interlocutory Order), the Commission agreed that, while it does not have traditional ratemaking authority over EGSs pursuant to Chapter 13 of the Code, its subject-matter jurisdiction over EGSs is governed by Sections 2807 and 2809 of the Code, 66 Pa. C.S. §§ 2807 and 2809. Id. at *38-39; see also 66 Pa. C.S. § 2802(14). Just as in FES discussed above, the Commission concluded that the lack of

traditional ratemaking authority does not preclude it from enforcing its Chapter 54 regulations on bill format (Section 54.4), disclosure statements (Section 54.5), and Chapter 56 - Standards and Billing Practices for Residential Utility Service (52 Pa. Code Ch. 56) with respect to EGSs. Id. at *39. The Commission specifically concluded as follows:

In this case, Count VI of the Joint Complaint concludes by averring that the prices charged by IDT do not conform to the variable rate pricing provisions in IDT's Disclosure Statement. We conclude that the Commission has jurisdiction and authority over this issue under Sections 54.5(a) and 54.5(a) of our regulations which require that an EGS's billed price reflect its disclosure statement. Therefore, the Commission has jurisdiction and authority to determine whether IDT billed customers in accordance with its Disclosure Statement.

Id. at *41.

These conclusions were repeated in the case of Kiback v. IDT Energy, Inc., Docket No. C-2014-2409676, Order (Aug. 20, 2015), 2015 Pa. PUC LEXIS 53 (Kiback). As the Commission stated in that Order:

Our customer choice Regulations are devoted to establishing a regulatory framework that ensures full and fair implementation of a competitive market for all stakeholders, including competitive providers, their representatives, and their customers. Chapter 54, subchapter A, addressing customer information is intended 'to require that electricity providers enable customers to make informed choices by providing adequate and accurate customer information.'

* * *

Customer information includes written, oral, and electronic communications used by providers to communicate prices and terms to consumers under the definition of customer information.... Prices billed must reflect the prices marketed and agreed to in the disclosure statement.... Advertised prices must reflect prices billed and in disclosure statements....All of this information is subject to our review for compliance purposes.

* * *

Subchapter B addresses EGS licensing and standards, with Section 54.43 governing EGS standards and billing practices. ... These regulations require that consumers be provided accurate information about their services. ... The

regulations also hold EGSs responsible for any fraudulent, deceptive, or other unlawful marketing or billing acts by employees, agents, or representatives.

Id. at 21-22. (Internal citations omitted); see also Herp v. Respond Power, LLC, Docket No. C-2014-2413756, Initial Decision (Dec. 17, 2014) (Herp) (The ALJ agreed that the contractual nature of the transaction between the consumer complainant and the EGS did not preclude consideration of whether rates were consistent with the representations of the door-to-door sales agent and the terms of the disclosure statement).

Respond Power also relies upon Delmarva Power & Light v. Pa. PUC, 870 A.2d 901 (Pa. 2005) (Delmarva) for its argument that the Commission does not regulate EGS prices. Respond Power M.B. at 47-49. It bears repeating that the Joint Complainants are not asking the Commission to regulate prices; rather, Joint Complainants have alleged that the prices charged do not conform to the Disclosure Statement. OAG/OCA M.B. at 117-123. The Commission has already addressed this issue in this case and confirmed that its jurisdiction extends to determining whether the prices charged are consistent with an EGS's Disclosure statement, even though it cannot regulate prices. Commonwealth of Pennsylvania by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. Respond Power LLC, Docket No. C-2014-2427659, Order Granting/Denying Preliminary Objections (Aug. 20, 2014), 2014 Pa. PUC LEXIS 395 (Respond Power PO Order).

Respond Power erroneously asserts that to determine whether the prices charged conform to the Disclosure Statement, the Commission must review the various wholesale market costs identified, consider other costs incurred and impute a "just and reasonable" profit margin. Respond Power M.B. at 45. Joint Complainants have not requested this type of "just and reasonable" rate review, as Respond Power suggests. See OAG/OCA M.B. at 106-109. Rather, Joint Complainants offered the expert testimony of Dr. Steven L. Estomin, who concluded that,

based on his analysis, Respond Power's prices charged could not be shown to be connected to the factors set forth in the Disclosure Statement. See Section IV.C.8, herein. The Company's assertion that the Joint Complainants' analysis is tantamount to a traditional cost of service analysis is specious. Respond Power M.B. at 45.

Respond Power also relies on Delmarva in attempt to further support its argument that the Commission is without jurisdiction to decide Joint Complainants' issues concerning Respond Power's lack of compliance with Commission regulations. Respond Power M.B. at 47. The Pennsylvania Supreme Court in Delmarva directly addresses only the issue of whether the Commission's Fiscal Office could assess EGSs for the administrative expenses of the Commission, the OCA and the OSBA pursuant to the forbearance language in the first sentence of 66 Pa. C.S. § 2809(e). Delmarva, 582 Pa. 338, 353-54, 870 A.2d 901, 910. In deciding the issue, however, the Court did not limit the Commission's jurisdiction in regulating EGSs. Indeed, the Delmarva Court noted that, pursuant to 66 Pa. C.S. Ch. 28 and specifically, the second sentence of 66 Pa. C.S. § 2809(e), the Commission could regulate EGSs as public utilities by applying the Code provisions that were "necessary to ensure that the present quality of service provided by electric utilities does not deteriorate." Id. at 354-55, 910-11. To a certainty, if the Commission were unable to ensure that prices billed reflect the prices advertised, marketed and agreed to in the disclosure statement, quality of service for electric customers would decline.

Joint Complainants submit that because the issues they have raised in this proceeding are directly connected to quality of service, the language of Delmarva supports Joint Complainants' position on the jurisdictional issues. This case was brought solely to enforce the Commission's quality of service regulations enacted pursuant to, *inter alia*, Section 2809, which the Delmarva Court stated is appropriate under the language of the statute. Id.

Respond Power's jurisdictional arguments relative to the contractual nature of the transaction and the EGSs rates are, at this point, nothing but makeweight arguments. These arguments should be disregarded as irrelevant.

D. The Commission's Powers to Order Remedies Are Not Limited for EGSs.

Respond Power argues that the Commission has no authority to order injunctive relief. Respond Power M.B. at 70-73. The Joint Complainants, however, do not request "injunctive relief," nor have they sought an "injunction" *per se*. See gen'ly OAG/OCA Exh. 1 (Joint Complaint). A review of the relief sought in the Joint Complaint at pages 21-22, shows that the Joint Complainants have asked the Commission to find Respond Power in violation of the Commission's regulations and orders (¶ B); order restitution by way of refunds (¶ D); order the Company to prohibit its sales people from engaging in deceptive behaviors and statements (¶¶ E-G); order the Company to cease and desist switching customers without their consent (¶ H); order Respond Power to implement proper customer dispute procedures, *inter alia* (¶ I) and order Respond Power to discontinue all marketing practices that violate pertinent laws and regulations (¶ J).² As such, it is unclear what nexus the Company seeks to introduce between this argument and the relief requested in the Joint Complaint.

If Respond Power, however, means to suggest that the Commission does not have the power to order the remedies sought in the Joint Complaint because the Commission cannot order "injunctive relief," that suggestion is plainly contradicted by many years of enforcement and prevention of violations through the issuance of orders specific to the violations demonstrated. It is routine for the Commission to provide specific relief to remedy demonstrated violations of the Public Utility Code or Commission regulations. For example, in Deborah Harris v. UGI

² The only reference to an injunction in the Joint Complaint is in Paragraph 102, in which the Joint Complainants refer to the Consumer Protection Law, 73 P.S. §201-4.1. Joint Complainants did not seek an injunction pursuant to the Consumer Protection Law, *ab initio*, however.

Utilities, Inc., Docket No. C-20032233, Order (Feb. 12, 2004) (Harris v. UGI), the consumer complainant and OCA challenged the utility's unauthorized substitution of propane service for natural gas service to a group of approximately thirty residential customers. Id. at 2. The Commission affirmed the ALJ's decision on a Petition for Emergency Relief requiring that, *inter alia*, the utility notify and educate the affected customer group, refrain from termination of gas service, perform safety inspections and remediate damage to customers' properties. Id. at 13-14.

The Harris v. UGI order demonstrates how the Commission may respond to noncompliance with orders requiring relief tailor-made for the situation. See also Barone v. Pa. PUC, 86 Pa. Commw. 393 (Pa. Commw. Ct. 1984), rev'd and remanded sub nom. Bianchi v. PG&W, 61 Pa. PUC 385 (1986) (Court reversed a Commission order dismissing water pressure complaints and remanded for Commission consideration of appropriate remedies); Balla v. Redstone, Docket No. C-0099270, Order (June 23, 2005) (Commission order required utility to perform feasibility study to determine most efficient method for eliminating maximum contaminant level exceedances that had rendered water unsuitable for all household purposes). Orders imposing remedies specific to the violations demonstrated, as Joint Complainants have sought, are commonplace regulatory enforcement tools squarely within the Commission's power and authority.

Respond Power asserts, in error, that "[t]he Commission is not a governmental entity endowed with equitable powers; rather, [the General Assembly] specifically gave the Commission the ability to seek injunctive relief from courts of equity." Respond Power M.B. at 70, citing 66 Pa. C.S § 502. Respond Power seems to suggest that the Commission's exercise of equitable powers by way of directing relief tailor-made to the situation against noncompliant EGSs is limited to seeking injunctive relief in court. This argument ignores that Sections 501

and 502, 66 Pa. C.S. §§ 501 and 502, must be read together. Section 502 states that the Commission *may* seek a remedy in court, but this should in no way be read to limit the Commission's broad authority to act through its own administrative processes under Section 501 to frame remedies. 66 Pa. C.S. §§ 501 and 502.

For example, in cases involving the Emlenton Water Company, the Commission issued an order requiring the utility to provide refunds with interest to its customers who were subject to misapplication of the company's tariff (consisting of unauthorized STAS charges, state sales tax and over billing). Joint Application of Aqua Pennsylvania, Inc. and Emlenton Water, Docket No. A-2008-2074746, Order at 4 (Dec. 29, 2008). When the company failed to comply with the order, the OCA and the Commission sought mandamus and contempt order against the company in the Commonwealth Court to enforce that portion of the order. Pa. PUC and Irwin A. Popowsky, Consumer Advocate v. Jeffrey Foley, Kathleen Foley and Emlenton Water Co., 359 M.D. 2009, Order, Feb. 26, 2010. The administrative action followed by the court proceeding demonstrates that Section 502 is intended to afford the Commission an additional procedural avenue to enforce its orders, as necessary. Many years of enforcement proceedings and violation-specific remedies reflect that the ability to seek equitable remedies in court under Section 502 does *not* limit the Commission's power to impose equitable relief on its own pursuant to Section 501. 66 Pa. C.S. §§ 501 and 502.

In a footnote, Respond Power acknowledges that the Commission has authority to issue injunctive relief in emergency situations pursuant to 52 Pa. Code § 3.1, but asserts that it is limited to situations which present a "clear and present danger to life or property," and where the standards set forth in 52 Pa. Code §§ 3.6(b) and 3.7 are met. Respond Power M.B. at 71, FN 159. Regulations, however, cannot create jurisdictional powers in and of themselves; the grant

of power must be from the General Assembly through provisions of the Public Utility Code. The annotations for 52 Pa. Code §§ 3.1, et seq., show that Section 501 of the Public Utility Code, 66 Pa. C.S. § 501, is one of several statutory sections referenced as authority for promulgating each of the subparts allowing for interim emergency orders as a form of injunctive relief. The Commission, however, has ordered equitable remedies in non-emergency cases as well. See e.g. Pa. PUC v. Reed, 1992 Pa. PUC LEXIS 40, 46 Pa. PUC 19 (Commission directed respondent, who was authorized to transport as a class D carrier, to refund overcharges to his customers); Ely v. Pennsylvania Water, 2006 Pa. PUC LEXIS 75 (Commission determined this was a classic case for the application of equitable estoppel when respondent damaged property while replacing a water line and made countless verbal assurances that it would remediate); C.S. Warthman Funeral Home, et al. v. GTE North, Inc., 1993 Pa. PUC LEXIS 214 (Complainants were permitted to introduce into evidence the letter and promise of respondent that it would provide toll-free calling to support a claim of equitable estoppel).

Nothing in the Choice Act suggests that the Commission’s ability to frame remedies to correct regulatory violations by EGSs – which are “public utilities” by definition with respect to quality of service issues³ – should be narrower than the remedies that may be imposed upon other public utilities regulated by the Commission. As Joint Complainants discussed in their Main Brief at pages 171-72, the Commission’s authority to impose license conditions on suppliers is well established. The notion that the General Assembly has not granted the Commission sufficient powers to act in this proceeding to prevent future regulatory violations and correct for those that occurred in the past, as it has done for decades, is unsupported and must be rejected.

³ In Section 102, 66 Pa. C.S. § 102, the definition of “public utility” excludes EGSs, save for, *inter alia*, the limited purposes in Section 2809, regarding requirements for EGSs. 66 Pa. C.S. § 2809(e).

E. The Commission's Power to Order EGSs to Issue Refunds Has Been Established.

Respond Power argues that the Commission does not have jurisdiction to order that an EGS pay refunds. Respond Power M.B. at 50-61. Joint Complainants have fully supported their position that the Commission has jurisdiction, pursuant to Sections 501 and 2809(e) of the Public Utility Code, 66 Pa. C.S. §§ 501 and 2809(e), to order across-the-board refunds in this case. OAG/OCA M.B. at 139-153. Those arguments will not be repeated in full herein.

In summary, however, the Commission has both affirmed and invoked its power to order an EGS to issue refunds multiple times in this and other recent cases. See Commonwealth of Pennsylvania by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. Respond Power, LLC, Docket No. C-2014-2427659, Order at 27-28 (Apr. 9, 2015) (Respond Power Interlocutory Order); IDT Interlocutory Order at 17-18. In the IDT Interlocutory Order, the Commission specifically held that, in addition to having the authority to direct EGS refunds for slamming violations or when a customer has, otherwise, been switched to an EGS without his or her consent pursuant to 52 Pa. Code § 57.177(b), the Commission has plenary authority under Section 501 to direct an EGS to issue a credit or refund for an over bill. IDT Interlocutory Order at 17-18. Further, as discussed above in Section II.C, the Pennsylvania Supreme Court in Delmarva confirmed that in regulating the service of EGSs, the Commission shall impose the requirements “necessary to ensure that the present quality of service ... does not deteriorate, including ... assuring that” standards and billing practices for residential utility service are maintained. Delmarva at 254-55, 911 citing 66 Pa. C.S. § 2809(e).

The Commission recently clarified that its authority to direct refunds includes instances when an EGS fails to abide by regulatory standards governing telemarketing or in any

“appropriate circumstances.” Kiback v. IDT Energy, Inc., Docket No. C-2014-2409676, Order at 31-33 (Aug. 20, 2015), 2015 Pa. PUC LEXIS 53, *29-30; see also Werle v. Respond Power, LLC, Docket No. C-2014-2429158, Order at 8-9 (Feb. 23, 2015), 2014 WL 6807071 (Commission explicitly overruled the portion of the ALJ’s Initial Decision concluding that the Commission lacked jurisdiction to order a refund or credit); Nadav v. Respond Power, LLC, Docket No. C-2014-2429159, Order at 7 (Dec. 19, 2014), 2014 WL 4374216.

In light of these recent decisions, it is clear that the Commission has jurisdiction to order EGSs to issue refunds, as such remedies are essential to preserving the quality of electric service in this Commonwealth. 66 Pa. C.S. §§ 501 and 2809(e). As such, Respond Power’s arguments to the contrary must be rejected.

F. The Commission Has Jurisdiction to Enforce Its Own Regulations Which May Incorporate Standards Set Forth In Other Laws.

Respond Power argues that the Commission does not have jurisdiction to enforce the Consumer Protection Law, 73 P.S. § 201-1 *et seq.*, and the TRA, 73 P.S. § 2241 *et seq.* Respond Power M.B. at 63-66. Joint Complainants have already fully briefed this jurisdictional issue and incorporate such herein. See OAG/OCA M.B. at 123-129. In summary, while the Commission held that it does not have direct enforcement authority pursuant to these laws, the Commission may enforce its own regulations which incorporate those statutory standards. Indeed, the Commission has already addressed these issues earlier in this case. See Respond Power Interlocutory Order.

In its Preliminary Objections, the Company argued that the Commission’s regulations set forth the requirements applicable to EGS contracts with residential and small business customers, citing 52 Pa. Code § 54.5. Respond Power POs at ¶ 50. These regulations set forth the requirements for the disclosure statements, the required 3-day right of rescission period,

relevant definitions applicable to the service, and statements about the entities that regulate service. Respond Power POs ¶ 50. Respond Power concluded by stating that since the contractual sale of electric generation supply is regulated under the Commission's regulations, Respond Power is exempt from providing a written contract pursuant to the TRA. Respond Power POs ¶ 51. The Company makes the same arguments here. Respond Power M.B. at 63-65.

The ALJs issued an Order Granting in Part and Denying in Part Preliminary Objections in this matter on August 20, 2014. See gen'ly Respond Power PO Order. While the ALJs stated that enforcement of EGS compliance with the TRA would be more appropriately done in a forum with jurisdiction over the TRA, that does not prevent the review and disposition of Count IX of the Joint Complaint to the extent that there are violations of Sections 54.43(f), 111.10, and 111.12(d)(1) of the Commission's regulations, 52 Pa. Code §§ 54.43(f), 111.10, and 111.12(d)(1). Respond Power PO Order at 20. The Commission upheld the ALJs' Respond Power PO Order in this regard in its Order of April 9, 2015. See Respond Power Interlocutory Order at 25. Joint Complainants submit that, as detailed herein, the Company's business practices are not in accordance with the requirements of the TRA, and are therefore, misleading and deceptive. Thus, the Company's business practices constitute violations of 52 Pa. Code §§ 111.10(a), 54.43(f) and 111.12(d)(1). Joint Complainants seek only that this Commission enforce its own regulations which incorporate the TRA standards. Again, this issue has already been decided.

Similarly, the ALJs decided that the Commission does not have direct enforcement authority pursuant to the Consumer Protection Law, but does have jurisdiction to consider whether the Company's Welcome Letter and Inserts were misleading pursuant to the various

Commission regulations prohibiting EGSs from engaging in fraudulent, deceptive advertising and marketing, *i.e.*, 52 Pa. Code §§ 54.43(f), 54.122(3) and 111.12(d)(1). Respond Power PO Order at 9, 11. The Commission upheld this portion of the ALJs' Order as well. Respond Power Interlocutory Order at 24-25. The fact that the Commission does not specifically enforce the Consumer Protection Law does not mean that the Commission may not *interpret* the provisions of that law where they are incorporated into its own regulatory standards. See Harrisburg Taxicab & Baggage Co., v. Pa. PUC, 786 A.2d 288, 2001 Pa. Commw. LEXIS 778 (Pa. Commw. Ct. 2001) (Commission was able to determine whether vehicles complied with DOT regulations at 67 Pa. Code Chapter 175 where those provisions were incorporated into its own regulatory code at 52 Pa. Code § 29.402(1)). The Court noted in that case that the Commission's decision to incorporate DOT regulations in an area where two agencies possess overlapping authority was in no way inappropriate; in fact, the Court found it "salutary." Id. citing Baltimore and Ohio Railroad Co. v. Occupational Safety and Health Review Commission, 179 U.S. App. D.C. 97, 548 F.2d 1052, 1055 (D.C. Cir. 1976).

Respond Power again relies upon the Commission's decision in Mid-Atlantic Power Supply Ass'n v. PECO Energy Co., 92 PA PUC 414 (May 19, 1999) (MAPSA), for its position that the Commission has no jurisdiction over Consumer Protection Law or TRA issues. While Respond Power correctly states that the Commission cannot *enforce* the Consumer Protection Law or the TRA, the Company erroneously suggests that this is tantamount to the Commission lacking jurisdiction to consider Consumer Protection Law and TRA issues at all even though incorporated into the Commission's regulations. MAPSA does not stand for this proposition. In MAPSA, the Commission specifically found that the letters at issue were deceptive and inaccurate. MAPSA, 92 PA PUC 414, 430. The Commission then referred the finding to the

OAG under its Memorandum of Understanding with the Commission for consideration of further enforcement.⁴ Id.

This approach is consistent with jurisdictional determinations of the courts in public utility matters. See e.g. Elkin v. Bell Tel. Co., 420 A.2d 371, 376 (Pa. 1980) (Use of the agency's special experience and expertise in complex areas and promote consistency and uniformity in the area of administrative policy); Weston v. Reading Co., 282 A.2d 714, 714 (Pa. 1977) (Protection of the integrity of the regulatory scheme dictates that the parties preliminarily resort to the agency that administers the scheme for the resolution of disputes); County of Erie v. Verizon North, Inc., 879 A.2d 357, 357 (Pa. Commw. Ct. 2005) (Allowing the Public Utility Commission to adjudicate a dispute in the first instance would preserve all right of the parties, while allowing them and any subsequent reviewing court, to benefit from the Commission's opinions).

These jurisdictional issues have been fully considered and decided. As such it is not appropriate or necessary to revisit these issues at this stage of the case.

G. The Commission's Jurisdiction over EGS Marketers and Billing Practices Is Not Limited.

Respond Power argues that the Commission's jurisdiction over EGS marketing practices and billing is "limited." Respond Power M.B. at 66-70. The Joint Complainants have fully set forth the statutory and regulatory grounds for the Commission's oversight of EGSs in the Commonwealth through the Choice Act and regulations promulgated thereunder and incorporate the discussion herein. OAG/OCA M.B. at 9-17. The Joint Complainants, given the extensive

⁴ Pursuant to the Commission's Memorandum of Understanding with OAG, if the Commission finds that its regulations requiring compliance with the Consumer Protection Law and the TRA have been violated, the Commission is to refer the matter to OAG for consideration of enforcement proceedings pursuant to the Consumer Protection Law or TRA and seek remedies in another forum, as provided for in the statutes. As such there is no requirement that the matter be decided by the Commonwealth Court in the first instance, as Respond Power suggests in its Main Brief at pages 63 through 66.

legislative and regulatory background for the highly detailed rules and regulations that govern EGS billing, advertising, door-to-door marketing, telemarketing and customer service, cannot agree that the Commission’s jurisdiction is in any sense of the word “limited.”

The Company further argues that the Commission’s jurisdiction is “limited to determining whether the EGS or its agent departed from the *specific and clear requirements*” set forth in the regulations. Respond Power M.B. at 67. (Emphasis added). Then, Respond Power argues haphazardly that the Commission “may not enforce *vague or general standards* that do not provide fair notice as to what is required of EGSs or what is prohibited” as such would be a violation of its due process rights. *Id.* at 67-68. (Emphasis added). The Company offers 52 Pa. Code §§ 54.5 and 54.43 as examples of the vague standards which, if applied, would violate its due process rights. This argument is fully addressed in Section IV.C.7, herein and as such, will not be repeated here. In summary, Joint Complainants submit that the Company’s constitutional arguments are misplaced and must be rejected.

Joint Complainants would add, however, that the Respondent is incorrect when it states that the Commission has not defined “plain language.” In 1992, the Commission adopted a Policy Statement on Plain Language Guidelines, codified at 52 Pa. Code § 69.251.

H. Establishment of Pattern and Practice Evidence.

1. Introduction.

Joint Complainants have extensively briefed the issues surrounding the establishment of pattern and practice in their Main Brief and incorporate the discussion herein. OCA/OAG M.B. at 142-148. In summary, adjudications based upon a sampling of customers’ experiences with a particular company are more the rule than the exception before this Commission. Moreover, a rule against such consideration would undercut both the Attorney General’s and the OCA’s

abilities to bring cases in their representative capacities under their respective statutes. OAG/OCA M.B. at 142-143. Nonetheless, the Joint Complainants will briefly address each of the Respond Power and I&E points relating to the establishment pattern and practice. Respond Power M.B. at 73-87; I&E M.B. at 8-12.

2. The Commission May Base its Decision on the Patterns and Practices Demonstrated through the Expert and the Customer Testimonies and Exhibits.

Respond Power and I&E assert that the Commission does not have jurisdiction to use pattern and practice evidence. Respond Power M.B. at 73; I&E M.B. at 7-8. Joint Complainants would note that the type of evidence and the amount of evidence that the Commission may use is really not a jurisdictional issue at all. The suggestion that a particular provision of the Public Utility Code would have to support the use of this type of evidence is a false premise. The Commission clearly has the power to apply the law pertaining to the various statutes and regulations governing the EGS retail marketing and sales practices that Joint Complainants have invoked in the Joint Complaint. See e.g. 66 Pa. C.S. Ch. 28. The Commission also clearly has the authority to accept all types of relevant evidence into the record and to make determinations based on that evidence. 66 Pa. C.S. § 332. Respond Power’s suggestion that some additional statutory authority is required to allow the Commission to consider a particular type of evidence is erroneous. The Commission has the discretion to decide what type and what quantum of evidence is necessary to support claims alleging regulatory violations and whether the phrase “pattern and practice” is used or not, that discretion does not change.

The suggestions that Joint Complainants should have used this phrase in the Joint Complaint or that they should have moved any testimony into the record “through the proposed pattern and practice approach” in order to rely on it for disposition in this matter are plainly

incorrect.⁵ See Respond Power M.B. at 74. In addition to the extensive consumer testimony admitted into the record in this matter, the expert testimony of Barbara Alexander addresses virtually *nothing but* Respond Power’s marketing, billing and customer service practices from an overall company operations perspective and incorporates information from the sworn testimony of the consumer witnesses as well as a review of the Company’s sales and verification call recordings. See OAG/OCA St. 1, 1-SR, 1-SR (Suppl). Further, Joint Complainants’ expert witnesses Dr. Steven L. Estomin and Ashley E. Everette address virtually *nothing but* the Company’s Disclosure Statement, calculations of pricing and whether customers saved money. See gen’ly OAG/OCA St. 2 and 2-SR; OAG/OCA St. 3, 3-SR (Rev) and 3-SR (Suppl). For the Company to suggest, after this expert testimony and the testimony of 169 customers, that it did not understand that the Joint Complainants were challenging the Company’s overall practices as violating the Public Utility Code and the Commission’s regulations and orders is wholly without merit and must be rejected.

3. The “Substantial Evidence” Requirement Is a Discrete Statutory Requirement Unrelated to “Pattern and Practice” Evidence.

The Respond Power/I&E arguments concerning “pattern and practice” evidence are a mishmash of jurisdictional, evidentiary and constitutional points which, whether considered alone or together, are unpersuasive. Respond Power M.B. at 73-88; I&E M.B. at 8-12. Respond

⁵ Joint Complainants note that they suggested that consumer evidence be admitted into the record using the “pattern and practice” approach often used in cases by the Federal Trade Commission. See Joint Memorandum of Law Regarding the Admission of Pattern of Practice Evidence (Feb. 3, 2015). The ALJs did not rule on the suggestion, and as such, Joint Complainants moved forward with the presentation of as many consumers witnesses as possible over the five allotted hearing days. Joint Complainants note that there is a difference between the *admission of evidence* of pattern or practice (*i.e.* some unauthenticated or hearsay evidence may be permitted into the record if adequately corroborated by other authenticated, non-hearsay evidence) and the *finding of a pattern or practice in the operation of a business* (*i.e.* that the pattern or practice in the company’s daily operations affects all of its customers). In this case, the *admission* of pattern or practice evidence is moot, as all the evidence in this matter was authenticated and overcame hearsay or other evidentiary challenges. What is not moot at this point is Joint Complainants’ request for the Commission to find that Respond Power *engaged in a pattern or practice* in its operations as an EGS in the Commonwealth of, *inter alia*, misleading and deceiving consumers and failing to charge prices that conformed to the Disclosure Statement.

Power and I&E assert that the use of “pattern and practice” evidence would vary from the “substantial evidence” requirement in 2 Pa. C.S. § 704. Respond Power M.B. at 83; I&E M.B. at 10. This so-called “flaw” confuses the quantum of evidence standard with the quality of evidence appropriately admitted. In other words, whether the Commission receives evidence from a subgroup of customers or from all of the customers, the “substantial evidence” standard must be met and is an entirely discrete statutory requirement under the Administrative Procedure Act. 2 Pa. C.S. § 704. Here, it has clearly been met.

4. Joint Complainants Have Presented No Unauthenticated Hearsay Statements.

Respond Power further asserts, under its “pattern and practice” argument, that “unauthenticated hearsay statements may not be relied upon to support findings and conclusions” and that the consumer testimony in this proceeding is unauthenticated hearsay. Respond Power M.B. at 77. This assertion, too, is plainly wrong, for several indisputable reasons.

First, Joint Complainants would point out that the consumer direct testimonies were preserved in written form at the request of the ALJs as a measure to expedite the proceedings. Tr. at 16, 18-19. Second, prior to each consumer’s cross-examination, the ALJ noted on the record that the parties had stipulated to the authenticity of the customer’s statement. See e.g., Tr. 66-67, 79-80, 83, 84, 93-94. Respond Power cannot be heard to argue now that the statements that its counsel agreed were authentic at the time of the hearing are somehow “unauthenticated” at the briefing phase. Respond Power M.B. at 77.

Respond argues further that the written statements made by the consumers “were not made during a hearing and are offered to prove the truth of the matters asserted” and “[a]s such, they constitute hearsay under the evidentiary rules and may not be admitted into the record unless presented for cross-examination or through stipulation.” Id. As noted just above, the

evidentiary record reflects that Company counsel did, in fact, stipulate to the authenticity of the written testimony admitted into the record, and those consumers whose testimonies were not admitted by stipulation swore to their written testimony under oath and were subject to cross-examination by Respond Power's counsel.

Moreover, by virtue of the ALJs' Order Granting Continuance dated October 28, 2014, the Company was required to submit any motion to strike consumer testimony in writing, which it did. The ALJs made a ruling on that Motion. See Commonwealth of Pennsylvania by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. Respond Power, LLC, Docket No. C-2014-2427659, Order Granting in Part and Denying in Part Motion to Strike (Mar. 6, 2015) (Motion to Strike Order). Respond Power's arguments based on hearsay were rejected by the ALJs, who concluded that statements made by Respond Power's agents or employees to the consumer or to a relative of the consumer providing testimony that is available to testify, or who are willing to adopt the testimony of the relative, or whose statements fall within a hearsay exception, were to be admitted. Motion to Strike Order at 11. The ALJs granted Respond Power's Motion only to the extent that the third parties were unavailable during the hearing or their statements were not within any exception to the hearsay rule – these amounted to only three instances.⁶ Id. Otherwise, all of Respond Power's objections to the consumer testimony were overruled.

The ALJs' Motion to Strike Order constitutes the "law of the case" on the hearsay issues; the time to object to evidence is long past and, to the extent that Respond Power did not make such objections timely, the Company has waived them. Finally, if written statements are "hearsay" just because they are written prior to the time of hearing – and if such statements

⁶ At the time of hearings for cross-examination, counsel for Respond Power withdrew its hearsay objection to the testimony of Emma Eckenroth. Tr. 250-251.

cannot lose their “hearsay” nature, even when sworn to *and* authenticated at the time of hearing -
- Respond Power’s witness statements fall within that same category and should not be considered competent evidence, either. For that matter, all pre-served written testimony in every Commission proceeding would be considered hearsay.

All of Respond Power’s arguments concerning evidence which has been duly admitted into the record by the ALJs are untimely and have been waived, since not made prior to the hearings in writing, pursuant to the ALJs’ October 28, 2014 Order Granting Continuance and as such, should be disregarded.

5. The Commission May Rely on Consumer Testimony and Draw Inferences Concerning the Company’s General Practices.

Respond argues that the Commission may not rely on consumer testimony to make findings concerning other consumer transactions involving Respond Power. Respond Power M.B. at 82-84. This is tantamount to saying that the Commission may not draw inferences from the specific probative factual evidence before it in order to reach the legal conclusion that Respond Power engaged in certain practices generally. It is well-established law that, in administrative proceedings, findings of fact can be based upon record evidence and any reasonable and logical inferences that may be drawn therefrom. MKP Enters. v. Underground Storage Tank Indemnification Bd., 39 A.3rd 570, 580-582, 2012 Pa. Commw. LEXIS 62 at **21-25 (Pa. Commw. Ct. 2012). Indeed, it is the job of a decision maker to determine the nature and extent of company actions and decide whether and to what extent Commission regulations were violated, based upon the evidence before it, even if not every single affected customer has testified.

Moreover, as noted, the submission of the expert testimonies of Ms. Barbara R. Alexander concerning the Company’s marketing and sales practices generally, Dr. Steven L.

Estomin concerning the prices charged to all customers and the Disclosure Statement and Ms. Ashley E. Everette concerning overall prices billed to customers and the historical savings claims render this point entirely moot. See OAG/OCA M.B. at App. C.

Ms. Alexander reviewed Company documents provided in discovery as well as all of the statements and other documents provided by consumers and reached conclusions relevant to Respond Power's overall business practices. OAG/OCA St. 1, 1-SR, and 1-SR (Suppl). Ms. Everette addressed the prices charged by Respond Power to its customers both during the Polar Vortex and prior thereto. OCA St. 3, 3-SR (Rev) and 3-SR (Suppl). Ms. Everette determined that none of the Respond Power's customers whose data was provided experienced savings as promised over the long run, and when asked for information in support of the Company's statement that its customers had realized historical savings, the Company provided nothing. OAG/OCA M.B. at 53, FN 13. By virtue of Ms. Alexander's and Ms. Everette's expert testimonies, no need exists for the Commission to draw inferences from the consumer testimony alone.

Joint Complainants would again point out that Commission adjudications involving a subgroup of a company's customers, rather than each and every customer, are more the rule than the exception. See OAG/OCA M.B. at 139-45, citing e.g. Richard Sanderman v. LP Water and Sewer Company, 87 Pa. PUC 734 (1997), aff'd LP Water & Sewer Co. v. Pennsylvania PUC, 722 A.2d 733 (Pa. Commw. Ct. 1998) (Court specifically rejected Company argument that only the Complainant should receive a refund); Office of Consumer Advocate v. Utility.com, Inc., 212 PUR4th 255 (2001) (Commission sustained OCA complaint for refunds and lost savings on behalf of all customers). Neither I&E nor Respond Power has identified any Commission case in which each and every customer of a company has been required to testify in order to support a

finding that a regulatory violation has occurred and that refunds should be ordered. Joint Complainants know of no such case.

A requirement that every customer testify would present an impossible hurdle and one that the courts have never imposed. While the phrase “pattern and practice” may have been borrowed from Federal Trade Commission cases, consideration of representative evidence to determine whether regulatory violations have occurred justifying across-the-board relief to all customers is simply not new to this Commission or to the courts.

Substantial evidence supports the allegations in the Joint Complaint in this case. The consumer witness testimony is overwhelming and is corroborated by other consumer testimony and by the Company documents analyzed by Ms. Alexander, Dr. Estomin and Ms. Everette in their testimonies as to the Company’s overall general marketing, sales, billing and customer service practices. As such, and as explained above in Footnote 5, Respond Power’s and I&E’s assertions regarding “pattern and practice” are not accurate and must be rejected.

6. The Fact That Circumstances of Each Transaction Vary Does Not Change the Conclusion That Respond Power Engaged in Unfair, Misleading and Deceptive Sales and Marketing Practices.

Respond Power and I&E argue that, because the facts and circumstances of each consumer transaction vary so much, pattern and practice evidence is “inappropriate.” Respond Power M.B. at 85-87; I&E M.B. at 11. As support for this premise, the Company provides a federal court order denying class certification for Respond Power customers because the class did not meet the “commonality” requirement. Gillis, et al. v. Respond Power, LLC, E.D. Pa Case No. 14-3856, Order at 6-7(Aug. 31, 2015) at 6-7, citing Fed. R.C.P. 23(a)(4).

As Respondent noted elsewhere in its Main Brief, and as noted by I&E in its Main Brief, the Commission does not have jurisdiction to entertain class action cases. Respond Power M.B.

at 75-76; I&E M.B. at 8-9. This proceeding, however, is not a class action but is instead, a proceeding brought by statutory advocates pursuant to their statutory authorities to represent consumers (OCA) and the public interest (OAG). See OAG/OCA M.B. at 142-43; Section IV.D.1, herein. It is therefore ironic that Respond Power and I&E now rely upon a class action determination to support their position here.

As discussed in the Main Brief, the mailing of documents to an entire customer group is part and parcel of showing that a pattern and practice of violations has occurred. While perhaps not using the phrase “pattern and practice,” the Commission regularly has had to consider documentary, statistical and testimonial evidence throughout its history to determine whether the actions of utilities, their employees and their contractors comply with the Public Utility Code and regulations promulgated thereunder and Commission orders – without hearing from every single customer individually. See OAG/OCA M.B. at 22-27. Moreover, as Ms. Alexander concluded, in summary:

Based on my review of the consumer direct testimony and exhibits and the responses by Respond Power to the discovery in this proceeding, I find that Respond Power’s marketing practices, its oversight and training of marketing agents, and its disclosures and pricing practices are unfair, deceptive and inadequate and that these practices constitute noncompliance with the Public Utility Code and the Commission’s regulations that govern the retail energy market. These unfair and deceptive practices have adversely impacted Pennsylvania consumers. Respond Power enticed Pennsylvania consumers to enter into variable price plans with promises of savings and failed to deliver those promises. Respond Power’s marketing and sales activities failed to properly describe its pricing terms, and Respond Power’s pricing methodology failed to conform to its own Disclosure Statement. Respond Power also enrolled customers by means of telemarketing sales calls without obtaining an actual customer signature on a contract or complying with the disclosures and other terms required by the Commission’s telemarketing regulations. There is a pattern and practice revealed in Respond Power’s sales calls, verification calls, and its handling of customer complaints of the Company and its representatives and agents making false, deceptive, and misleading statements about the structure and operation of the Pennsylvania retail market, default service and the Price to Compare, and how Respond Power’s products will benefit consumers. Finally,

Respond Power's responses to its customers' complaints and contacts regarding Respond Power's high variable prices charged in early 2014 were insufficient and discriminatory with respect to rebates and credits issued to affected customers.

OAG/OCA St. 1 at 4-5. Embodied in the Joint Complainants' expert testimony are the conclusions that support overall findings relative to Respond Power's widespread unfair and deceptive business practices. The Commission does not have to rely solely on individual customer testimony of a subgroup of Respond Power customers. It is clear that the individual variations in the customers' understanding of written materials or experience with Respond Power sales agents, while precluding the federal court's finding of "commonality" in the class action context, did *not* interfere with Ms. Alexander's ability to draw conclusions about the Company's practices and the effects upon customers' quality of electric service across-the-board throughout Pennsylvania.

In conclusion, the fact that individual circumstances may vary enough to preclude federal class certification under the federal rules should not interfere with the Commission's adopting the proposed Findings of Fact and Conclusions of Law submitted by the Joint Complainants, particularly where the Joint Complainants' expert testimonies and exhibits soundly corroborate the testimony of the Respond Power customers.

G. Conclusion.

In conclusion, the pertinent provisions of the Public Utility Code, appellate precedent and recent Commission orders in similar cases confirm the Commission's jurisdiction to decide this case and to grant all of the relief sought by the Joint Complainants.

III. SUMMARY OF ARGUMENT

Joint Complainants fully articulated their Summary of Argument in their Main Brief. Nothing in the Company's or I&E's Main Briefs alter the relief that Joint Complainants submit is

necessary and appropriate in this proceeding. As such, Joint Complainants incorporate herein Section III-Summary of Argument of their Main Brief.

IV. REPLY ARGUMENT

A. Establishment of Pattern & Practice.

Joint Complainants fully discussed this topic in Section IV.A of their Main Brief and incorporate the discussion herein. To the extent Respond Power or I&E raised issues regarding the establishment of pattern and practice, the issues are addressed in other sections of this Reply Brief and will not be repeated here.

B. Company Operations.

Joint Complainants fully discussed this topic in Section IV.B of their Main Brief and incorporate the discussion herein. To the extent Respond Power or I&E raised issues regarding the Company's operations generally, the issues are addressed in other sections of this Reply Brief and will not be repeated here.

C. Joint Complaint.

1. Count I – Misleading and Deceptive Claims of Affiliation with EDCs.

In its Main Brief, Respond Power asserts that the consumer testimony did not support Joint Complainants' allegations in Count I of the Joint Complaint and other consumer testimony showed that consumers' memories were vague or that consumers lacked a general understanding of the subject matter.⁷ Respond Power M.B. at 95-96. Additionally, Respond Power asserts that

⁷ As discussed in Section II.H.4 above, the Company's argument that consumer testimony is uncorroborated hearsay must be rejected, although it appears the Company makes this argument only with regard to the consumer testimony that is not favorable to Respond Power. See Respond Power M.B. at 96 ("While some consumers suggested otherwise, their testimony is uncorroborated 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 ...").

its sales agents are trained to indicate to consumers that they represent Respond Power, and the Company maintains vigorous quality control efforts. Id. at 96-98.⁸

Other than stating that the Company's sales agent training is designed to ensure that sales agents clearly indicate that they represent Respond Power, the Company failed to address the consumer testimony regarding the Company's salespeople's misrepresentations about: (1) their affiliation with the EDC or a government agency or program; (2) the PTC or how the EDC purchases electricity; or (3) a requirement that consumers choose a supplier or risk losing electric service. See OAG/OCA M.B. at 39-43. Further, the Company failed to address Joint Complainants' expert testimony regarding the Company's lack of adequate training of its sales agents. Joint Complainants' expert witness Ms. Alexander reviewed the consumer testimonies and hearing transcripts in this proceeding and the Company's own training materials, scripts, and sales and verifications call recordings provided by the Company in responses to discovery. Based on her review, Ms Alexander concluded:

Several of these calls and consumer testimonies confirm that Respond Power's telemarketing and door-to-door sales agents misrepresented their identities, attempted to link their sales activities to EDCs or some government sanctioned program, thus leading the customers to assume that the transactions were authorized or approved by the state.

The evidence in the consumer testimonies and calls I summarized above suggests that some of Respond Power's door-to-door sales agents made deceptive and fraudulent statements about the utility's prices (e.g., the agent that claimed the consumer was in a "red zone" with higher prices or the agent that repeatedly linked his sales presentation to making sure that the authorized "discount" would be provided on her bill).

⁸ Also, Respond Power asserts that to the extent that its sales agents failed to properly identify themselves or misrepresented themselves as being affiliated with the EDC, the Company's Settlement with I&E adequately addresses the issue. Id. at 98-99. As discussed in Sections IV.D.6 and V below and in Sections IV.D.4 and V of Joint Complainants' Main Brief, the Settlement between the Company and I&E is not adequate to address the violations proven by Joint Complainants.

OAG/OCA St. 1 at 64-65. See also OAG/OCA St. 1 at 57, 59, 61-63; see also e.g. Consumer Testimonies of Mary Show at 50; Dale R. Heffelfinger at 2-3; Robert Ziegler at 62; Phyllis Court at 697; Marcella Bell at 11; Collen Cheri at 629; Heidi Scapellato at 328; Thomas Leong at 504 and Tr. at 418 and 423; Linda Rose at 31; and Cynthia Clapperton at 837-39 at Tr. at 653-55. See gen'ly OAG/OCA M.B. at App. C at FOF 68-73. Additionally, Ms. Alexander testified:

there is a pattern of misrepresentation and fraudulent statements by Respond Power's sales agents concerning their relationship with the local EDC and other statements that sought to associate Respond Power's activities with an official state program. Approximately 16 consumers testified that the Respond Power salesperson promoted an affiliation with the EDC or other entity.

OAG/OCA St. 1 at 42.

In its reliance on training and scripts to its defense, Respond Power cites to the testimonies of Mr. James L. Crist and Mr. Elliott Wolbrom. See Respond Power M.B. at 97-98. Joint Complainants' expert witness Ms. Alexander testified in Surrebuttal Testimony regarding Mr. Crist's Rebuttal Testimony on this point as follows:

Respond Power hired Mr. Crist on July 2, 2015. His Rebuttal Testimony served on July 21, 2015, regarding Respond Power's door-to-door and telemarketing sales practices was based solely on interviews with Respond Power personnel. In preparing his Rebuttal Testimony, Mr. Crist did not listen to any sales calls between Respond Power and Pennsylvania consumers. Nor did he review the Company's discovery responses, consumer testimony, exhibits, or transcripts of the hearings. As a result, the basis for Mr. Crist's testimony appears to rely solely on what various Respond Power employees told him and not based on any objective analysis and evaluation of what Respond Power's employees and its third party vendors have actually done

OAG/OCA St. 1-SR at 30. (Internal footnotes omitted). See also OAG/OCA St. 1-SR at Exh. BRA 1-SR. Mr. Crist's testimony provides no support for the Company's position.

With regard to Mr. Wolbrom's Rebuttal Testimony about the Company's rigorous vendor selection process and agent training and oversight, Ms. Alexander testified:

Mr. Wolbrom did not provide any documents, citations, or other evidence offered to support any of these statements in his Rebuttal Testimony.

* * *

According to Mr. Wolbrom, since all these training and supervisory activities occurred on the phone or in person, these processes are "... regretfully not tangible (*sic*) or documented."

* * *

Furthermore, when asked to provide more details about the vendors visited for training, the identification of the individual that conducted the training, and the dates of the training, Respond Power was unable to provide any specific details in terms of specific travel, vendors visited, or dates or times, stating, "[a]s discussed previously, exact details of these visits were not previously notated."

OAG/OCA St. 1-SR at 3, 5-6. Ms. Alexander concluded:

It is inconceivable to me that a licensed EGS that operates in as many states as Respond Power and Major Energy operate does not have or cannot provide any documents or electronic evidence of meetings (including but not limited to Outlook calendar entries, email confirmations of meetings, or notes taken during meetings), memoranda, instructions, training, compliance audits, enforcement activities, or other indicia of oversight of its third party agents as claimed by Mr. Wolbrom. Furthermore, it seems logical to assume that Respond Power's third party vendors retained documentation of their actions to support their contractual obligations and interactions with their client, and the Company failed to provide any documentation it could have obtained from the Company's vendors.

Id. at 7.

Additionally, in its Main Brief the Company failed to address the testimony of Joint Complainants' expert witness Ms. Alexander on these issues or her testimony that the Company's door-to-door marketer uniforms *themselves* are deceptive because they are so similar to the uniforms worn by utility workers (*i.e.* hard hats and safety vests) without any valid basis related to the sale of Respond Power's products and services.

Joint Complainants submit that Respond Power's reliance on its vendor selection process and sales agent training, without being able to provide documentation or more specific details,

does not overcome or otherwise mitigate its conduct that violated and continues to violate the Commission's regulations and orders. Furthermore, the Company did not call any of the sales agents involved in the sales presentations to the consumer witnesses to rebut any of the consumers' testimony regarding door-to-door sales presentations. The Company entered into the record approximately fourteen⁹ call recordings related to the 169 consumers whose testimonies are in the record, of which only two were sales calls and neither refuted the consumers' testimonies about the sales presentations.¹⁰ Joint Complainants submit that the lack of rebuttal evidence from Respond Power in this matter is similar to the lack thereof by the EGS in Kiback v. IDT Energy, Inc., Docket No. C-2014-2409676, Order at 31-32 (Aug. 20, 2015), which led the Commission to find that IDT had failed to refute Mr. Kiback's credible evidence.

Joint Complainants have shown that Respond Power's salespeople have misled and deceived consumers by stating that they are from the EDC or a government entity. Further, Joint Complainants have shown that Respond Power's salespeople have misled and deceived consumers about the PTC or a requirement to choose a supplier or risk losing electric service. Finally, Joint Complainants have shown in this proceeding that Respond Power's door-to-door salesperson uniform, which consists of a safety vest and hard hat, is *itself* deceptive in that it matches uniforms generally worn by EDC field workers. Respond Power has failed to refute Joint Complainants' compelling evidence and has no documentation whatsoever to support any

⁹ Joint Complainants note that with regard to No. 125 in Appendix A, Record Evidence, of their Main Brief, in addition to Ms. Butterworth's consumer testimony being admitted into the record were the Company's Exhibits 6 (transcript of TPV call recording) and 6a (proprietary TPV call recording).

¹⁰ In fact, the sales calls provide additional evidence in support of Joint Complainants' allegations in Count I that the Company's sales agents provided incorrect information about the consumer's EDC. See RP Exh. 19 at 3-4 (sales call recording of Lisa Hodge circa October 2013) (Respond Power salesperson explains that PPL reads Ms. Hodge's smart meter every 15 minutes, which makes her eligible for a special demand response-type of program) cf. Petition of PPL Electric Utilities Corporation for Approval of Its Smart Meter Technology Procurement and Installation Plan, Docket No. M-2014-2430781, Opinion and Order at 8 (Sept. 3, 2015) (PPL's Petition for approval to install updated smart meters based, in part, on the limitations in the ability of the current system to provide fifteen-minute interval data and other near real-time information).

of its claims or testimony. As such, Respond Power should be found to have violated the following Sections of the Commission's regulations: (1) 54.43(f) (relating to EGS responsibility for fraudulent, deceptive or other unlawful marketing acts by employees, agents and representatives); (2) 111.4 (relating to supplier responsibility develop standards and qualifications for individuals it hires as agents); (3) 111.5 (relating to supplier responsibility to adequately train and monitor its agents); and (4) 111.12(d)(1) (relating to compliance with the Consumer Protection Law), 52 Pa. Code §§ 54.43(f), 111.4, 111.5, and 111.12(d)(1).

2. Count II – Misleading and Deceptive Promises of Savings.

In its Main Brief, Respond Power asserts that Joint Complainants' evidence in support of the allegations in Count II is flawed. Specifically, the Company asserts that the consumer testimony is uncorroborated hearsay¹¹ and that regardless, the witnesses demonstrated confusion about electric choice and some testimony was vague and inconsistent. Respond Power M.B. at 100-108. Additionally, the Company asserts that the consumer testimony is refuted by Respond Power's Disclosure Statement, and further, the Company trained its vendors and sales agents not to guarantee savings. Id. at 108-113.¹²

Joint Complainants submit that the Company failed to address their expert testimony regarding the Company's promises of savings. As Ms. Alexander testified:

Respond Power included promotional statements in its marketing materials to Pennsylvania consumers that promoted savings, competitive pricing policies, alleged historical annual savings of up to 10% compared to utility rates, yet failed to describe in any detail the variable price feature of its products. ... In fact, the promotional materials and sales scripts used by Respond Power's agents

¹¹ As discussed in Section II.H.4 above, the Company's argument that consumer testimony is uncorroborated hearsay must be rejected.

¹² Also, Respond Power asserts that the Company's Settlement with I&E adequately addresses the issues raised in Joint Complainants' Count II. Id. at 113-14. As discussed in Sections IV.D.6 and V below and in Sections IV.D.4 and V of Joint Complainants' Main Brief, the Settlement between the Company and I&E is not adequate to address the violations proven by Joint Complainants.

were clearly intended to emphasize the potential for savings and to downplay and not clearly describe the variable price feature of the product being promoted.

OAG/OCA St. 1 at 30. Further, the Company failed to address its own promotional materials that plainly state that the Company *will provide savings* to customers on their electric generation supply. See OAG/OCA M.B. at 45-47.

a. The Consumer Testimony Is Compelling, Not Vague and Inconsistent.

Joint Complainants' expert witness Ms. Alexander testified that the consumer testimony in this proceeding shows that Respond Power salespeople routinely promised savings. Specifically, Ms. Alexander testified:

There is a clear pattern in the testimony of these consumers that the Respond Power sales representatives promised savings and the customer witnesses signed up with Respond Power to get lower bills. Consumers routinely testified that they were promised savings of 10% or more. Of the testimony of 153 consumer witnesses moved into the record at the hearings, approximately 116 testified that the Respond Power salesperson promised them savings if they switched

OAG/OCA St. 1 at 42. See also OAG/OCA M.B. at App. C at FOF 77. See also I&E St. 1 at 17-18.

In its Main Brief, the Company, however, relies on a few examples of consumer testimony to support its claims that the consumer testimony, *generally*, is vague and inconsistent and therefore, not credible. See Respond Power M.B. at 101-103. Joint Complainants submit that they have shown that Respond Power has not provided Disclosure Statements to all of its customers. In this proceeding, approximately 61 of Joint Complainants' consumer witnesses testified that they did not receive or did not recall receiving a Disclosure Statement from the Company. See OAG/OCA St. 1 at 42; see also OAG/OCA M.B. at App. C at FOF 81. Respond Power has not provided any evidence showing that it did, in fact, provide Disclosure Statements to any of the consumer witnesses that testified that they did not receive the Disclosure Statement.

Although the Commission's regulations at 52 Pa. Code § 111.7(b) require that the Company keep a record of the date that the Disclosure Statement was provided to the customer and the method by which it was provided for at least six billing cycles, the Company provided no such records for any of its customers in this proceeding.

In its Main Brief, the Company cites to its cross-examination of four consumers relating to receipt of the Company's Disclosure Statement and asserts that because consumers did not review all of their mail or remember all of their mail, the consumers' testimony that they did not receive the Disclosure Statement should be discounted. Respond Power M.B. at 101-102. Joint Complainants submit, however, the Company does not appropriately characterize three of the four testimonies it cites, as the Company has taken the consumer statements out of the context of their testimony as a whole. For instance, the exchange with Cassandre Urban, whose husband enrolled with Respond Power on March 13, 2013, regarding receipt of the Company's Disclosure Statement went as follows:

Q. Right. Okay. You testified that you don't remember receiving a disclosure statement; correct?

A. That is correct.

Q. Do you open and review all of your mail?

A. I do.

Q. So you would remember mail that you received, every piece of mail you received since 2013, early 2013?

A. Well, I wouldn't - - I can't say I remember every piece of mail I received, but I do look through the mail. I'm very conscientious about what comes in, and I do look at it.

Tr. at 160.

Similarly, the exchange with Ms. Malloy, who switched to Respond Power in 2012, regarding her recollection of the sale and receipt of the Disclosure Statement went as follows:

Q. So would you say that you have a strong recollection of the conversations that took place at that time [relating to sales presentation in 2012]?

A. I think so.

* * *

Q. You also testified in response to Question 14 [of your Direct Testimony] that you never received a copy of the disclosure statement.

A. I didn't know and I didn't see it until I got a copy from the Attorney General's office.

Q. You did sign an enrollment form, though. You testified to that in Question 16 [of your Direct Testimony]; correct?

A. Right. But I asked for a copy and the person at the door told me I would get one in the mail, which I never received.

Q. You don't remember seeing that come in the mail?

A. No.

Q. Now, this would have been about three years ago. Do you think it's possible that it came and you missed it or just don't remember it?

A. It's possible, but I always keep my papers in a certain way, and it wasn't there.

Tr. at 481, 483-84. Also, Judy Joline testified on cross-examination that neither she nor her husband, who brings in the mail, remembers receiving Respond Power's Disclosure Statement.

Tr. at 904-905.

Joint Complainants submit that although Respond Power attempted to rely on a single response from the consumers that they cannot recall *every* single piece of mail they have received over the past two or three years, the testimony of these witnesses, taken as a whole on this subject, is not vague or inconsistent. To the contrary, these testimonies are strong and

reliable that the consumers, as a habit, reviewed all of their mail as it was received, and they did not receive a Disclosure Statement from Respond Power.

Next, the Company cites *select portions* of approximately seven consumer testimonies about their sales presentations to support its claims that the consumer testimony, *generally*, is vague and inconsistent and therefore, not credible. See Respond Power M.B. at 102-103. Joint Complainants submit, however, the Company did not appropriately characterize the testimony and takes many statements made during testimony out of the context of the testimony as a whole. For instance, Ms. Joanne Blizard testified on cross-examination that she would not say she had a strong recollection of the details of a conversation that occurred a few years ago, but she did have “an old electric bill where [she] jotted down the name of the person [she] spoke to, and [the person] said it was a variable rate and that [she] would have .05 for two months,” which she was presumably using to refresh her recollection of the transaction. Tr. at 328. Further, the Company stated that Mary Bagenstose testified during cross-examination that she did not remember much about her enrollment, but Ms. Bagenstose did not make that statement during cross examination. Tr. at 490-91. Instead, Ms. Bagenstose testified to the best of her recollection and specifically recalled signing a document when she switched to Respond Power, seeing Respond Power’s charges on her PPL bill a month or two later and receiving a letter from PPL confirming her switch to Respond Power. Id.

Additionally, the Company states that Cynthia Rumpf “could not address any particulars of the [enrollment] transaction” during cross-examination. Respond Power M.B. at 102. Ms. Rumpf, however, testified during cross-examination about the details of the Respond Power sales agent’s presentation and whether she received the savings promised, as follows: “[t]o be totally honest, I don’t feel that it was as I was told when the young fellow came to the door that [the

savings] was a great amount less. It may have been a dollar or two but not what they were professing.” Tr. at 121. Likewise, Jodi Zimmerman testified that while she did not remember verbatim the sales presentation or the names of the Company agents at her door or on the phone, but when asked if she had “a strong recollection of the transaction,” Ms. Zimmerman testified “[y]es.” Tr. at 335-36. Further, Michael Rogowski testified that he vaguely remembered the sales agreement he signed, but he did recall the details of the Respond Power sales agent’s presentation, *i.e.* that the plan was not presented as fixed or variable but was explained as “we’re going to save you money” and neither fixed or variable was checked on his sales agreement. Tr. at 407-409; RP Exh. 37.

In its Main Brief, the Company also relies on the testimony of its witness Mr. James L. Crist that some consumer complaints are not credible “because the topic of energy pricing is not commonplace” and that consumers who visited the shopping sections of EDCs’ websites or PaPowerSwitch.com, which contain statements about the potential to save money by shopping for electricity supply, may have formed an impression that they will save money by switching and this impression tainted the consumers’ interpretations of the Respond Power sales presentation. Respond Power M.B. at 103-105. The Company also refers to consumers’ testimonies that they had been contacted by other EGSs with sales pitches and received communications from their EDCs about electric choice, which according to the Company, “naturally made it difficult for consumers to recall specific details about their sales experience with Respond Power.” See Respond Power M.B. at 103-104. Additionally, the Company asserts that the “extensive media campaign” by OAG and the consumer direct testimony forms, which

contained a leading question,¹³ damaged the credibility of the consumer testimony. Id. at 106-108.

Joint Complainants submit these arguments should be rejected. Mr. Crist did not review the consumer testimony or consumer complaints exchanged in discovery in this proceeding, and he did not listen to any of the Company's sales or verification call recordings. Therefore, his opinions regarding the credibility or reliability of the consumer witnesses *in this proceeding* cannot be supported. See OAG/OCA St. 1-SR at Exh. BRA 1-SR. Also, the Company's attempt to shift the focus from its own marketing and sales activities to those of other EGSs or the consumer education performed by the Commission and EDCs or the OAG's investigation into EGS pricing in early 2014 is not supported by the evidence in this proceeding. The Company's arguments ignore the overwhelmingly consistent consumer testimony on this issue, which is supported by expert testimony regarding their review and analyses in this proceeding, and the following, which are all discussed in the Joint Complainants' Main Brief: (1) the sales scripts that the Company provided in discovery and which were used by the Company's sales agents emphasized savings, both historical and future; (2) Respond Power's marketing materials state that the Company *will provide savings* to customers; and (3) the Company's Welcome Letter and Inserts contained statements regarding savings that customers would enjoy, which are misleading

¹³ Respond Power's objection to Question 12 of the consumer direct testimony forms being leading has already been overruled. See Motion to Strike Order. Respond Power moved to strike the question and the related follow-up questions in its Motion to Strike dated February 23, 2015. As the Joint Complainants asserted in opposition to the Company's Motion, Question 12 is not improperly leading, and even if it was, Rule of Evidence 611(c) merely states that leading questions *should* not be used except necessary to develop the witness's testimony. Joint Complainants further asserted that had the question been asked live in the courtroom and an objection based on leading was sustained, the Joint Complainants would have the opportunity to re-phrase, and here, the Company had the opportunity to cross-examine the witnesses on their answers to Question 12 and its follow-up subparts. Also, Joint Complainants noted that, pursuant to the ALJs' directive, they endeavored, within the extreme time constraints imposed to obtain, organize, reproduce and serve the consumer testimonies in support of their Joint Complaint in the interest of conserving the time and resources of the Commission and all parties, so it would be an unduly harsh penalty to strike consumer testimony based on the question that is not improperly misleading but was designed to develop the consumers' testimonies. See gen'ly Joint Complainants' Answer to Respond Power Motion to Strike Consumer Direct Testimony (Mar. 3, 2015) at ¶¶ 16-23, which are incorporated herein.

on their face. See OAG/OCA M.B. at 45-52, 76-80. See also OAG/OCA Exh. 1 (Joint Complaint) at App. A; Wolbrom Cross Exh. 1-A at PAOAG-RP-0008718; Wolbrom Cross Exh. 1; Wolbrom Cross Exh. 2-A at PAOAG-RP-0005260; Wolbrom Cross Exh. 2; Wolbrom Cross Exh. 3; Consumer Testimony of Cheryl Ann Reed at Exh. CR-1; OAG/OCA St. 1 at Exh. BRA-2 at 12.

Further, the Company did not present evidence that rebutted the consumers' testimony, such as testimony from the sales agents, sales call recordings or agent training and compliance records. In fact, Ms. Alexander testified that the Company's sales calls confirm that savings was emphasized and the promotional materials promised savings. See OAG/OCA St. 1 at 43-65. Joint Complainants submit that the lack of rebuttal evidence from Respond Power in this matter is similar to the lack thereof by the EGS in Kiback v. IDT Energy, Inc., Docket No. C-2014-2409676, Order at 31-32 (Aug. 20, 2015), which led the Commission to find that IDT had failed to refute Mr. Kiback's credible evidence.

b. The Disclosure Statement Does Not Refute Statements of Savings by the Company's Sales Agents.

In its Main Brief, the Company asserts that the consumers' testimony regarding the sales agents' promises of savings is refuted by Respond Power's Disclosure Statement, which *inter alia* "left no doubt as to the variable nature of the contract." Respond Power M.B. at 108-11. Respond Power also relies on the statement in its Disclosure Statement that the Company could not guarantee savings and asserts that under Pennsylvania law, the written documentation must be what is relied upon rather than general statements made during a sales pitch.¹⁴ Id. at 109-10.

¹⁴ Joint Complainants submit that the cases relied upon by the Company do not support its claim that the terms in the Disclosure Statement trump any statements made by the Company's salespeople. Furthermore, the Company's claim ignores the Commission's regulations that require that the marketed prices equal the disclosed prices and the prices charges. See 52 Pa. Code §§ 54.4(a) and 54.5(a). Regarding the cases cited by the Company, Towne v. Great American Power, LLC, Docket No. C-2012-2307991, Order (Oct. 18, 2013), is not relevant to the

Joint Complainants submit that these arguments must be rejected. As discussed in Joint Complainants' Main Brief, the Company's Disclosure Statement is a pre-printed document with very fine print intended to be used for *both* fixed rate and variable rate electric generation supply service with Respond Power and *both* fixed rate and variable rate natural gas supply service with Respond Power's affiliate, Major Energy. OAG/OCA M.B. at 67, citing OAG/OCA St. 1 at Exh. BRA-2 at 3-4. Joint Complainants' expert witness Ms. Alexander testified that, in reviewing the Disclosure Statement, there is a lot of doubt as to the nature of the plan consumers enter into with Respond Power. Specifically, Ms. Alexander testified:

[T]he Disclosure Statement [] included terms for both variable and fixed price plans with no identification by the Company as to which program the customer was enrolled. Further, the Disclosure Statement does not identify whether the new

Company's argument but is certainly supportive of Joint Complainants claims in this proceeding. In Towne, the consumer complainant complained about the EGS's overly zealous telemarketing campaign, which included, *inter alia*, misleading and deceptive statements about the EGS's affiliation with Duquesne Light Company, but he was not switched to the EGS. Id. at 18. In Towne, the Commission found "the conduct by [the EGS] to be potentially detrimental to the ongoing enhancements and the ultimate success of Pennsylvania's retail electric market" and that "this Commission must continue to send a clear message to EGSs that the egregious and deliberate behavior utilized in this case, including the use of potentially misleading statements that could result in slamming, will not be tolerated." Id. at 22.

Stewart v. McChesney, 498 Pa. 45, 47, 444 A.2d 659, 660 (Pa. 1982), involved the interpretation of a first right of refusal clause in a contract. The Company cites this case for the proposition that "the intent of the parties to a written contract is to be regarded as being embodied in the writing itself." Respond Power M.B. at 110. While the Court recognizes the rule cited by the Company, the Court goes on to also recognize that "[w]e are not unmindful of the dangers of focusing only upon the words of the writing in interpreting an agreement" and "[s]ome of the surrounding circumstances always must be known before the meaning of the words can be plain and clear; and proof of the circumstances may make a meaning plain and clear when in the absence of such proof some other meaning may also have seemed plain and clear." 498 Pa. 45, 49-50, 444 A.2d 659, 661-62. Similarly, in Union Storage Co. v. Speck, 194 Pa. 126, 133, 45 A. 48, 49 (Pa. 1899), which involved the time for payment for the storage of whisky, the Court explained the parole evidence rule as follows: "[t]he general rule undoubtedly is, that parole evidence is not admissible to contradict or alter the terms or provisions of a written instrument ... Oral evidence for any such purpose is generally inadmissible *unless a foundation for its introduction is previously laid by competent proof of fraud, accident or mistake.*" Design and Development, Inc. v. Vibromatic Manufacturing, Inc., 48 F.R.D. 71, 73 (E.D. Pa. 1973), involved relief sought from a default judgment to enforce a settlement agreement, which agreement was entered into with the counsel and advice of an attorney. Joint Complainants submit that these cases do not support Respond Power's argument that there is a hard and fast rule about the written terms of an agreement being the only part of an agreement the courts will consider. Further, the cases do not provide even persuasive authority for the Commission, as the agreements in these cases involved arm's length transactions between sophisticated parties, not a one-size-fits-all Disclosure Statement like that used by Respond Power for both electric and natural gas supply service and for fixed and variable priced plans, and which use thereof is subject to the requirements in the Commission's regulations.

customer enrolled his or her gas account, electric account or both. This is highly confusing for all customers.

OAG/OCA St. 1 at 35. As Joint Complainants also discussed in their Main Brief, the evidence further shows that consumers were, in fact, confused by the Company's Disclosure Statement, and in some cases, Respond Power representatives tampered with the sales agreement and checked the box marked "variable" after presenting a fixed price plan to consumers and obtaining the consumers' agreement to enroll in the fixed price plan. OAG/OCA M.B. at 69-72. Furthermore, the Company's argument that Pennsylvania law requires that written documentations be given precedence over oral sales statements ignores the Commission's regulations that require that the prices billed equal the prices disclosed *and the prices marketed*. See 52 Pa. Code §§ 54.4(a) and 54.5(a). The Company mistakenly assumes that its agents and employees can "say anything, do anything," during their sales pitches, even if the pitch is deceptive or confusing, and then avoid any liability whatsoever by relying on a subsequently delivered Disclosure Statement that is confusing in and of itself. The Commission's regulations flatly reject such an approach.

Respond Power, as a licensed EGS, must comply with the Public Utility Code and the Commission's regulations and orders, and therefore, the Company's reliance on un-related contract case law must be rejected. The ALJ's findings in Herp v. Respond Power, LLC support Joint Complainants' allegations and evidence regarding Count II. In Herp, the ALJ found:

I find this disclosure statement to be somewhat misleading as it informs the customer that the goal is to provide power at a price less than the local utility company's price; however, Respond Power cannot always guarantee that every month the customer will see savings. I find the testimony of Mr. Herp credible that when he read this paragraph, he did not catch the word "goal." From Mr. Herp's testimony, by missing the word "goal" he believed the disclosure essentially stated: "Respond Power each and every month will deliver your power at a price that is less than what you would have paid had you purchased your

power from your local utility company . . .” Missing the word “goal” changes the meaning of the sentence.

* * *

I find the phrase of “can not always guarantee” to be an odd choice of words. By negating the word “always,” the phrase implies that Respond Power sometimes can guarantee and sometimes cannot guarantee. Alternatively, a possible truth from this phrase is that there is no guarantee. The phrase does not state “can not ever guarantee” or that there is no guarantee. The phrase is confusing and misleading, probably giving some consumers false hopes of guaranteed monthly savings.

Herp v. Respond Power, LLC, Docket No. C-2014-2413756, Initial Decision at 21 (Dec. 17, 2014). (Emphasis added). Joint Complainants submit that the same findings are appropriate in this proceeding.

c. The Company’s Training Emphasized and Continues to Emphasize Savings.

In its Main Brief, the Company asserts that the Company’s vendor selection process, training programs and quality control measures assured that customers were not promised or guaranteed savings. Respond Power M.B. at 111. The Company asserts that since its current Chief Marketing Officer, Mr. Wolbrom, took the position in April 2012, the Company’s vendor oversight has improved significantly. The Company also relied on Mr. Wolbrom’s and Mr. Small’s testimonies that Respond Power’s customers did experience savings in 2011 and low rates in 2011 and 2012 to support the Company’s claim that its customers did save historically. See Respond Power M.B. at 111-13.

Joint Complainants submit that as discussed in Section IV.C.1 above regarding Count I, the Company is unable to document any of its claims of a rigorous vendor selection process, training or quality control. See also OAG/OCA St. 1-SR at 3, 5-6, 7. With regard to the Company’s assertions that the Respond Power marketing materials which explicitly state that a

consumer will save money by switching to Respond Power and about which Mr. Wolbrom was cross-examined were not shown to have been used recently, Joint Complainants assert that there is adequate evidence that these fliers, which contain *explicit promises of savings* by switching to Respond Power, were used to entice consumers to enroll as recently as March 2013, less than one year before the polar vortex. See Wolbrom Cross Exh. 1 and 1-A. See also Consumer Testimonies of Robert Becker. Further, the Company continued to welcome new customers to the benefits of being a Respond Power customer, such as annual savings on electric bills, throughout 2013. See Wolbrom Cross Exh. 3 (Email from Respond Power to consumer confirming enrollment dated Oct. 7, 2013). Additionally, the Company's training materials direct their sales agents to promise savings. See OAG/OCA M.B. at FN 12¹⁵ citing OAG/OCA St. 1 at Exh. BRA-2 at 109.¹⁶

With regard to the Company's assertions that customers did save in 2011 (referring to Exhibit EW-1) and experienced low rates in 2011 and 2012 (referring to Exhibit AS-4 Revised), Joint Complainants' expert witness Ms. Everette testified that the Company's evidence does not support these statements. Specifically, Ms. Everette found:

Mr. Wolbrom testified that "the reference to historical savings is factual. Exhibit EW-1 demonstrates that Respond Power has clearly saved Pennsylvania customers money in the past" (Respond Power Statement No. 1, pages 11-12). Exhibit EW-1 lists a single price for each EDC per month as the price that was charged by Respond Power. Exhibit EW-1 then compares this price to the PTC

¹⁵ Portions of FN 12 in Joint Complainants' Main Brief were mistakenly designated confidential. As corrected, FN 12 should read: Joint Complainants submit that the evidence in this matter shows that Respond Power, in fact, directed its sales agents to promise savings. As stated in a Company Weekly Memo to sales agents: "We do not offer any dollar amount rebate or refund from the utility or from Major/Respond/ or DSS. We provide savings to the customer on [the] supply portion of their monthly bill." See Exh. BRA-2 at 109.

¹⁶ Other training materials direct the sales agent to strongly emphasize savings. See e.g. OAG/OCA St. 1 at Exh. BRA-2 at 88 **BEGIN CONFIDENTIAL**

CONFIDENTIAL

END

and calculates the percentage of savings. This one-price-per-month approach appears to match what Respond Power represented in discovery:

* * *

However, the billing summaries provided by Mr. Small in Exhibit AS-4 clearly show that Respond Power did not, in fact, charge only one price per month. For example, in October 2011, Respond Power charged PPL customers at least five different prices, and each price was between 6% and 14% higher than the price listed on Mr. Wolbrom's Exhibit EW-1 []. Thus, any references to savings that may otherwise be inferred from Mr. Wolbrom's exhibit are misleading, because Respond Power did not charge the prices listed to all customers.

OAG/OCA St. 3-SR (Rev) at 10-11. Ms. Everette further testified that besides the prices in Exhibit EW-1 being more than the PTC in 42% of the months, the prices are otherwise not reliable because they do not match prices that were charged to the customers whose billing summaries were provided in Exhibit AS-4 Revised. *Id.* at 11; see also OAG/OCA St. 1-SR at 16-17 (Ms. Alexander testified that even a high level review of Exhibit EW-1 shows that many of the entries are labeled with a minus sign indicating the price is higher than the applicable PTC).

Further, Ms. Everette testified regarding her analysis of Exhibit AS-4 Revised as follows:

The billing data in Mr. Small's Revised Exhibit AS-4 included 615 monthly bills prior to December 2013. Of these, customers paid less than the PTC in only 213 months, or 35% of the time. In the other 402 months (65% of the time), customers paid more than the PTC.

When customers did save over the PTC, they saved an average of 3.5%. When they did not save over the PTC, the average rate charged was 45% more than the PTC.

OAG/OCA St. 3-SR (Suppl) at 3.

As such, Joint Complainants submit that Respond Power's assertions that it adequately trains agents not to guarantee or promise savings and that the Company did provide savings to its customers are not supported by the evidence. Rather, the Company's evidence supports Joint

Complainants' allegations that the Company and its agents promised savings to customers as a means to induce them to enroll, but the Company did not deliver the promised savings.

d. Conclusion.

As Joint Complainants asserted in their Main Brief at pages 44-65, Respond Power made misleading and deceptive promises of savings in order to induce consumers to enroll and did not deliver the promised savings. Further, claims of historical savings by the Company are unsupported. As such, Joint Complainants submit that Respond Power should be found in violation of the Commission's regulations at Sections 54.43(f) (relating to EGS responsibility for fraudulent, deceptive or other unlawful marketing acts by employees, agents and representatives); 111.4 (relating to supplier responsibility develop standards and qualifications for individuals it hires as agents); 111.5 (relating to supplier responsibility to adequately train and monitor its agents); 111.12(d)(1) (relating to compliance with the Consumer Protection Law); and 54.4(a) and 54.5(a) (failure to bill prices that matched the marketed prices), 52 Pa. Code §§ 54.43(f), 111.4, 111.5, 111.12(d)(1), 54.4(a) and 54.5(a).

3. Count III – Failing to Disclose Material Terms.

Regarding the Joint Complainants' allegations and evidence related to Count III, the Company, in its Main Brief, relied on Mr. Crist's testimony about the Company's one-page document that, according to Mr. Crist, includes a Sales Agreement on the front and the Disclosure Statement on the back and contains a statement that the customer received the Disclosure Statement above the customer's signature line. Respond Power M.B. at 116. The Company also relied on Mr. Wolbrom's testimony that the Company reviews all of its product offerings with its vendors, managers and agents and that the sales agents are trained to highlight different aspects of the variable rate versus the fixed rate options. Id. Additionally, the

Company relied on the experiences of two consumer witnesses to support its position that the issues Joint Complainants raise in Count III stem from consumer unawareness or misunderstanding or from the Commission's website, PaPowerSwitch.com. Id. at 116-17. Joint Complainants submit that these arguments do not rebut Joint Complainants' evidence.¹⁷

Joint Complainants submit that Mr. Crist's testimony about the one-page document including both the Sales Agreement and the Disclosure Statement, which the customer signs indicating he or she is in receipt of the Disclosure Statement, is irrelevant. This document is used only for door-to-door sales, not all sales. See OAG/OCA St. 1 at 32-33 and Exh. BRA-2 at 10. Further, as set forth in Joint Complainants' Main Brief and above in Section IV.C.2.b, the Company's Disclosure Statement, besides being in fine print that is difficult to read, is confusing because it contains terms for *both* fixed and variable rate plans and for *both* electric and natural gas supply without any designations which terms apply to the customer receiving the Disclosure Statement and which has also led to the ease of Respond Power sales agents altering Sales Agreements from fixed price plans to variable price plans after obtaining a customer's signature to enroll. See OAG/OCA M.B. at 68-72. See also OAG/OCA St. 1 at 35-38, 58, 60 and 61; I&E St. 1 at 24-27.

Joint Complainants further submit that Mr. Wolbrom's testimony regarding the vendor, manager and agent training to highlight the different aspects of the variable rate versus fixed rate plan options is not supported by the evidence, including the Company's training scripts. See

¹⁷ Also, Respond Power asserts that to the extent it has failed to disclose material terms to customers, the Company's Settlement with I&E adequately addresses the issue. Respond Power M.B. at 118. As discussed in Sections IV.D.6 and V below and in Sections IV.D.4 and V of Joint Complainants' Main Brief, the Settlement between the Company and I&E is not adequate to address the violations proven by Joint Complainants.

OAG/OCA St. 1 at Exh. BRA-2 at 88, 90 and 93.¹⁸ Furthermore, in a Weekly Memo to sales agents, the Company's vendor states: "Major Energy is going through an audit with the public utility commission so it is critical that our paperwork is done correctly 110% of the time. Always make sure that the variable box is checked off properly on the order form" OAG/OCA St. 1 at Exh. BRA-2 at 109. As such, Joint Complainants submit that Respond Power does not adequately train its agents and representatives regarding the material terms of its plans. See OAG/OCA M.B. at 67-76.

In its Main Brief, the Company cited to the sales call for consumer witness Lisa Hodge, one of the two sales call recordings the Company put into evidence in this proceeding. Respond Power M.B. at 116-17; RP Exh. 19. Again, Joint Complainants submit that the sales call does not support the Company's argument that adequate training is provided. In the sales call, the Company's telemarketer sales agent provided some explanation regarding variable rates, but then the sales agent also made the following statements regarding the fixed rate plans: "I wouldn't recommend that yet" and "[i]t's not as good as the variable." The agent then presented a Respond Power program to Ms. Hodge that used PPL's smart meters in a way that, in actuality, PPL's smart meters did not perform at the time of this sales call in October 2013 (and still do not perform until PPL fully deploys its new meters). See Footnote 10 above. The sales agent used this demand-response type of program to downplay her explanation of variable rates to Ms. Hodge with promises of cash-back for reducing usage at times designated by Respond Power. Joint Complainants submit that the sales agent, therefore, did not provide accurate, material terms to Ms. Hodge.

¹⁸

Next, the Company cited to the experience of consumer witness David Wenger to support its assertions that customer confusion about whether he or she was on a fixed rate plan stemmed from the set-up of the Commission's website PaPowerSwitch.com. See Respond Power M.B. at 117. Respond Power's interpretation of Mr. Wenger's experience, however, is not supported by Mr. Wenger's testimony. Mr. Wenger testified that he was shopping for *fixed* price products on a website, which was presumably PaPowerSwitch but Mr. Wenger could not confirm the name of the site. Tr. at 880-82. Mr. Wenger was specific that he was *not* shopping for a variable price plan, as he testified: [t]he variable, I don't even look at them" and regarding fixed – "[t]hat's all I buy." Tr. at 882, 884. After reviewing the supplier list on the website, Mr. Wenger determined to choose Respond Power's fixed price plan, clicked and was taken directly to Respond Power's website, where he enrolled in what he believed was a fixed price plan. Id. at 884, 885 ("when I clicked on Respond, it said fixed underneath it"). Mr. Wenger also testified that "[t]o this day, I don't even know it was [] variable." Tr. at 885.

Further, although the Company in its Main Brief on page 117 asserted that Mr. Wenger "neglected to review the terms and conditions" before enrolling with Respond Power, the Company asked Mr. Wenger if he "remember[ed] seeing a spot there, sort of a link that that it would say click for terms and conditions?" to which Mr. Wenger answered: "[n]o." Tr. at 882. Joint Complainants submit that Mr. Wenger's confusion stems from Respond Power's failure to provide adequate and accurate information about the material terms of the plan as part of the enrollment feature of the Company's website.

The Company also stated that other consumers who testified that they did not realize or understand that they had entered into a variable price plan had "ample opportunities to become aware of that had they reviewed Respond Power's fluctuating prices on their electric bills."

Respond Power M.B. at 117. Joint Complainants submit that it is Respond Power's obligation to provide consumers with adequate and accurate information; it is not the consumers' obligation to piece the information together from various sources and figure out the material terms on their own. As discussed in Joint Complainants' Main Brief, the material terms of a customer's plan with Respond Power were not provided in the Sales Agreement, Disclosure Statement or Welcome Letters to customers. See OAG/OCA M.B. at 65-75. Joint Complainants submit that Respond Power has violated and continues to violate the Commission's regulations at Sections 54.4(a), 54.5(c)(2), 54.7(a), 111.4 (supplier shall develop standards and qualifications for individuals it hires as agents), 111.5 (relating to agent training) and 111.12(d)(4) (relating to consumer protection), 52 Pa. Code §§ 54.4(a), 54.5(c)(2), 54.7(a), 111.4, 111.5 and 111.12(d)(4).

4. Count IV – Deceptive and Misleading Welcome Letters and Inserts.

In its Main Brief, Respond Power asserted that Joint Complainants failed to assert any violations of the Public Utility Code or Commission regulations or orders, so it should be dismissed. Respond Power M.B. at 118. The Company further asserted that the referenced Welcome Letters and Inserts (attached to the Joint Complaint) were used over a few month period prior to July 2012, and the Company, once it learned of their use, prohibited their continued distribution and no such materials have been used since April 2012. Id. Also, the Company asserted that Joint Complainants failed to provide evidence that consumer witnesses relied on these documents in deciding to switch to Respond Power, and regardless, the documents were used when Respond Power's prices did result in savings to customers. Id. at 118-19.¹⁹

¹⁹ Also, Respond Power asserts that to the extent its Welcome Letters and Inserts were misleading and deceptive, the Company's Settlement with I&E adequately addresses the issue. Respond Power M.B. at 119. As discussed in Sections IV.D.6 and V below and in Sections IV.D.4 and V of Joint Complainants' Main Brief, the Settlement between the Company and I&E is not adequate to address the violations proven by Joint Complainants.

Joint Complainants submit that the Company's assertions are not adequate to prevail regarding Count IV. First, in Count IV the Joint Complainants alleged violations of the Commission's regulations at Sections 54.43(f) and 111.12(d)(1) (relating to compliance with the Consumer Protection Law), 52 Pa. Code §§ 54.43(f) and 111.12(d)(1). See gen'ly OAG/OCA Exh. 1 (Joint Complaint) at Count IV, ¶ 56. Further, as discussed in the Joint Complainants' Main Brief, they have provided compelling expert testimony and exhibits regarding the deceptive and misleading nature of *all* of the versions of the Company's Welcome Letters and inserts used in Pennsylvania. See OAG/OCA M.B. at 76-80, citing OCA/OAG Exh. 1 (Joint Complaint) at ¶ 55 and App. A (The Company's Welcome Letters and Inserts contain such statements as "We keep our customers by offering real savings" and "Respond Power offers REAL savings – NOT GIMMICKS"); OAG/OCA St. 1 at 34-35, Exh. BRA-2 at 12 and Consumer Testimony of Viktor Ogir at Exh. VO-2 (The Company's Welcome Letter states that "ADDED BENEFITS" includes "[c]ompetitive rates, historical annual savings"); and Consumer Testimony of Cheryl Ann Reed at 275, 278 and Exh. CR-1 (The Company's Welcome Letter stated: "You have now joined the hundreds of thousands of others who have chosen Respond Power to be your Energy Service Company and in saving up to 10% annually. In this past year alone, our customers have already seen average savings of 8-13%." Ms. Reed enrolled in July 2012 and testified that she did not save the average 8-13% as promised). Joint Complainants submit that Respond Power's Welcome Letters and Inserts are deceptive and misleading because, as discussed in Section IV.C.2.c above and in the Joint Complainants' Main Brief at pages 53-65 regarding Misleading and Deceptive Promises of Savings, significantly more often than not, the Company charged its customers more than the price to compare, and the Company did not provide customers savings "up to 10%" and "average savings of 8-13%" over time. As

such, Respond Power's Welcome Letter and Inserts violate the Commission's regulations at Sections 54.43(f) and 111.12(d)(1) (relating to compliance with the Consumer Protection Law), 52 Pa. Code §§ 54.43(f) and 111.12(d)(1).

5. Count V – Slamming.

a. Introduction.

Joint Complainants have demonstrated that Respond Power switched numerous consumers to its generation supply without the consumers' consent (*i.e.* slammed) in violation of the Public Utility Code, 66 Pa. C.S. § 2807(d)(1), and the Commission's regulations, 52 Pa. Code § 54.42(a)(9). See OCA/OAG M.B. at 80-88; see also gen'ly OAG/OCA Exh. 1 (Joint Complaint) at Count V. In its Main Brief, Respond Power asserts that the Commission's regulations do not impose any obligation on EGSs 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. Respond Power M.B. at 120. In support of its argument, Respond Power relies on the Commission's decision in Binh Tran v. Major Energy, LLC/Respond Power, LLC, Docket No. C-2014-2417540, Opinion and Order (July 30, 2015) (Binh Tran). Specifically, Respond Power asserts, "Respond Power's practice [...] 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 [Binh Tran]." Respond Power M.B. at 120.

Joint Complainants submit that Respond Power mischaracterizes the holding in Binh Tran. In Binh Tran, the Commission did not make a determination as to the sufficiency of Respond Power's enrollment processes. Rather, the Commission considered the circumstances of one individual consumer and determined that the evidence on record in that proceeding was insufficient to conclude that Respond Power violated the Public Utility Code or Commission

regulations or Orders in its enrollment of that one customer. Specifically, the Commission determined that the Complainant did not meet his burden of proof, because “the record [was] devoid of any information regarding whether or not [the Complainant] identified persons authorized to make changes to his account.” *Id.* at 9. The Commission further held that even if the Complainant presented evidence sufficient to satisfy the burden of proof, Respond Power presented enough evidence to rebut the Complainants’ evidence, because the Complainant’s sister indicated that she was authorized to switch the account, Respond Power sent the Complainant a disclosure statement upon enrollment, and the Complainant acknowledged receipt of the disclosure statement and bills listing Respond Power as the supplier. *Id.*

As Joint Complainants stated in their Main Brief, pursuant to the Commission’s regulations, EGSs are responsible for verifying that the individual making a switch is either the customer of record or his designee. *See* 52 Pa. Code §§ 54.42(a)(9), 111.2, 111.7(b), and 57.171 *et seq.* The Commission did not modify that requirement in Binh Tran. Rather, in Binh Tran, the Commission looked at the evidence on record in that proceeding to determine whether the Complainant met his burden of proof and whether Respond Power presented enough evidence to rebut the evidence establishing the violations.

While Joint Complainants have not argued that Respond Power slammed all of its Pennsylvania customers, Joint Complainants have met their burden of proof in this proceeding to establish that Respond Power switched numerous consumers to its generation supply without the consumers’ consent in violation of the Public Utility Code, 66 Pa. C.S. § 2807(d)(1), and the Commission’s regulations, 52 Pa. Code § 54.42(a)(9). *See e.g.* Section IV.C.5(b), *infra*. In its Main Brief, Respond Power asserts, “Respond Power presented evidence showing that despite allegations of being slammed, customers repeatedly discovered that another adult member of the

household authorized the switch.” Respond Power M.B. at 121. Of the approximately twelve consumer witnesses who submitted testimony on behalf of Joint Complainants and alleged slamming, three consumer witnesses (Danielle Groff, Tina Andrews, and Raymond Weaver) acknowledged that another individual switched their account. See OAG/OCA Consumer Testimony of Danielle Groff at 152 and Tr. at 510-11; see also Tr. at 152-53, see also Tr. at 386-87. Joint Complainants submit that the evidence on record regarding the enrollment of these three consumers is distinguishable from Bin Trahn. Unlike in Binh Tran, Joint Complainants have met their burden of proof in all three instances, as the evidence demonstrates that the accounts were in the names of the consumer witnesses, and the consumer witnesses never provided the individuals who switched their accounts authorization to do so. See OAG/OCA Consumer Testimony of Danielle Groff at 152 and Tr. at 510-11; see also Tr. at 149, 153; see also Tr. at 385. Furthermore, Respond Power has failed to rebut the evidence of “slamming” in this proceeding, as discussed in more detail in Section IV.C.5(b), below. As identified in Joint Complainants’ Main Brief, evidence of slamming was also provided by several I&E witnesses. Joint Complainants submit that many of those instances of slamming can also be distinguished from Binh Tran for reasons similar to those discussed herein. Thus, Joint Complainants submit that Respond Power’s reliance on Binh Tran in this proceeding is misplaced.

In its Main Brief, Respond Power also asserts, “[N]o consumer making this claim [that they had been switched without authorization] raised the dispute within two billing cycles such as to be eligible for a refund under the Commission’s regulations.” Respond Power M.B. at 127. Throughout Section IV.B(e) of its Main Brief (relating to slamming), Respond Power cites

Section 57.177(b) in support of this contention. See e.g. Id. at 122. Section 57.177 is titled “Customer dispute procedures” and provides, in pertinent part:

When the customer’s dispute has been filed within the first two billing periods since the customer should reasonably have known of a change of the EGS and the dispute investigation establishes that the change occurred without the customer’s consent, the customer is not responsible for EGS bills rendered during that period.

52 Pa. Code § 57.177(b). Joint Complainants submit that Section 57.177(b) of the Commission’s regulations is not applicable in this proceeding: This proceeding is not a customer dispute proceeding, and Joint Complainants are not seeking full refunds for each customer that Respond Power switched to its generation supply without the consumers’ consent. Rather, Joint Complainants are relying on the evidence of improper enrollments to establish that Respond Power has engaged in numerous violations of the Public Utility Code and Commission regulations and orders. The evidence of slamming also demonstrates that Respond Power does not have sufficient procedures in place to safeguard against fraudulent enrollments. Furthermore, the evidence of improper enrollments supports Joint Complainants’ position that Respond Power’s training, oversight, and disciplinary procedures are inadequate.

Moreover, Section 57.177(b) of the Commission’s regulations is not a bar to receiving refunds. In fact, the Commission has approved settlements initiated by the Commission’s Bureau of Investigation and Enforcement which required EGSs to issue refunds to customers for alleged slamming violations without any recognition of whether the customers filed individual complaints or the timeframe in which the complaint may have been filed. See Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas and Electric, et. al., Docket No. M-2013-2325122, Order (Oct. 2, 2014); see also Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Public Power, LLC, Docket No. M-2012-2257858, Order (Dec. 19, 2013). As

such, Joint Complainants submit that Respond Power's reliance on Section 57.177(b) of the Commission's regulations is misplaced.

The evidence of "slamming" on record in this proceeding supports a ruling that Respond Power switched numerous consumers to its generation supply without the consumers' consent (*i.e.* slammed) in violation of the Public Utility Code, 66 Pa. C.S. § 2807(d)(1), and the Commission's regulations, 52 Pa. Code § 54.42(a)(9).

b. Consumer Testimony.

• **Teresa Cole**

Joint Complainants met their burden of proving that Respond Power switched Teresa Cole to its generation supply without the her consent in violation of the Public Utility Code, 66 Pa. C.S. § 2807(d)(1), and the Commission's regulations, 52 Pa. Code § 54.42(a)(9). As discussed in Section IV.C.5 of Joint Complainant's Main Brief, Ms. Cole testified that she was approached by a friend's neighbor who told Ms. Cole that she worked for a company that helped people lower their cell phone bills and utilities. OAG/OCA Consumer Testimony of Teresa Cole at 1097. The neighbor asked Ms. Cole if she was interested in making extra money and said that Ms. Cole could earn thousands of dollars weekly. See Id. Ms. Cole declined the offer, and the neighbor began to ask about Ms. Cole's electric bill. See Id. The neighbor told Ms. Cole that if Ms. Cole gave the neighbor her address, the neighbor would contact Ms. Cole with information about lowering her electric bill. See Id. Ms. Cole gave the neighbor her address. See Id. This communication was the only contact Ms. Cole had with the neighbor regarding her electric supplier or billing. See Id. Ms. Cole was switched to Respond Power without her knowledge or authorization, resulting in a drastic increase in her electric bill. See Id. at 1096. It was later

determined that the neighbor and her boyfriend were the ones who enrolled Ms. Cole with Respond Power. See Id. at 1097. Thus, Joint Complainants have met their burden of proof.

In its Main Brief, Respond Power relies on an Electric Letter of Authorization which purports to be electronically signed by Ms. Cole and contains Ms. Cole's account number as proof that Respond Power was authorized to make the switch. Respond Power M.B. at 122. During cross-examination, however, Ms. Cole provided testimony demonstrating that she never provided anyone with the information contained in the Letter of Authorization and, in fact, the information is inaccurate. Specifically, the following exchange occurred during cross-examination of Ms. Cole:

Q. Do you understand that the one document that says "Electric Letter of Authorization" appears to be a document where you gave your authority to process an enrollment for you? Is that what that appears to be?

A. No. All I have is a letter, a piece of paper, that [...] is on letterhead but what is attached is not on letterhead. It has an address, an email address of `teresa.cole@comcast.net`. I've never used that email address. And the letter before that is just something that says "Signature," and it says "Teresa Cole, 09/20/2012," but this is all typed. There's nothing in my handwriting, there's nothing with me consenting. I've never used my full first and last name on any emails.

Q. So your testimony is that `teresa.cole@comcast.net` is not your email address?

A. That is correct, nor has it ever been.

Q. What did you give [the neighbor who enrolled you with Respond Power] the day that you had the conversation with her?

A. My name and my address.

Q. Did you give her your account number?

A. No, I did not.

Tr. at 69-70. The apparent falsification by a Respond Power representative of Ms. Cole's consent on the Electric Letter of Authorization is corroborated by expert and other consumer testimonies in this proceeding, wherein the record demonstrates that Respond Power representatives altered sales agreements after customers had signed up for service.²⁰ See OAG/OCA M.B. at 71- 72.

In its Main Brief, Respond Power further asserts, "Ms. Cole did not raise a dispute within two billing cycles, which is required to qualify for a refund under the Commission's regulations." Respond Power M.B. at 122. Respond Power cites Section 57.177(b) in support of this contention. Id. As stated above, 52 Pa. Code § 57.177(b) is clearly not applicable in this proceeding and, nevertheless, is not a bar for Ms. Cole to receive a refund.

Moreover, even if Section 57.177(b) of the Commission's regulations applied in this case, the evidence demonstrates that Ms. Cole acted reasonably in noticing a change of EGS and acted diligently in disputing the switch. Ms. Cole testified as to why she did not initially realize she was with Respond Power, as follows:

I did not know this was happening. When I first purchased my home, I was on a budget plan, so, you know, I just was paying the amount that was in my budget plan. And no, I didn't look at the bills every month in detail, I just paid the amount that was in my budget, until one month I opened my bill and it was outrageously high and I called PP&L, and that's what they said at first, that I was switched to Respond Power. I never requested to be switched to Respond Power.

I didn't know it was Respond Power. You open up a PP&L invoice from a PP&L address in a PP&L envelope and you think you have PP&L services. I never was in the habit of reading my bills from front to back, especially if I thought they were coming from that particular company. It wasn't until I opened the bill and

²⁰ Furthermore, prior to the polar vortex, Respond Power was the subject of an informal investigation by the Commission's Bureau of Investigation and Enforcement that resulted from a whistleblower phone call alleging that Respond Power's door-to-door agents were using false identities and associated identification materials, circumvented the Commission's sales verification procedures by pretending to be the customer on the verification calls, and forging customer signatures on sales contracts and/or other enrollment materials. I&E St. 1 at 9-10.

seen (sic) it was over a thousand dollars in charges and when PP&L pointed it out to me that on the back of the bill is (sic) says Respond Power. It's not even on the front of the bill, it's on the back of the bill.

Tr. at 70-71. Furthermore, Ms. Cole testified that she attempted to contact Respond Power when she became aware that Respond Power was her supplier. OAG/OCA Consumer Testimony of Teresa Cole at 1099. Thus, Joint Complainants submit that the evidence demonstrates that Respond Power improperly enrolled Teresa Cole without her authorization.

- **Donald Johnson**

Joint Complainants also met their burden of proving that Respond Power switched Donald Johnson to its generation supply without the his consent in violation of the Public Utility Code, 66 Pa. C.S. § 2807(d)(1), and the Commission's regulations, 52 Pa. Code § 54.42(a)(9). As stated in Joint Complainants' Main Brief, Mr. Johnson testified that a Respond Power sales representative indicated to Mr. Johnson that the representative was only comparing Respond Power's rate with Met-Ed's rate. OAG/OCA Consumer Testimony of Donald Johnson at 418-19. Mr. Johnson testified that the representative told Mr. Johnson to sign the form only to show that the representative had made a presentation at Mr. Johnson's house. Id. at 420. Yet, the record demonstrates that Respond Power switched Mr. Johnson's account. See Id. at 422. As such, Joint Complainants have met their burden of proof.

In its Main Brief, Respond Power asserts, "Given Mr. Johnson's lack of attention to his electric account, and his delay in raising a dispute[,] his testimony about enrollment is not credible." Respond Power M.B. at 122. First, Respond Power did not provide any evidence to rebut Mr. Johnson's testimony regarding the misleading sales representations. Respond Power's mere assertion that Mr. Johnson's testimony is "not credible" or that he lacked attention to his electric account is not supported by the record nor is it a valid defense to such

misrepresentations. Joint Complainants note Mr. Johnson's testimony regarding his failure to receive a Disclosure Statement or Welcome Letter from the Company or any letter from Met-Ed. OAG/OCA Consumer Testimony of Donald Johnson at 419-420 and Tr. at 220. Joint Complainants further note Mr. Johnson's testimony that he did not see Respond Power's charges on his bill until he contacted Met-Ed about a shut-off notice, and Met-Ed informed him that he was switched to Respond Power. Tr. at 220; see also OAG/OCA Consumer Testimony of Donald Johnson at 422. The evidence demonstrates that Mr. Johnson contacted Respond Power after learning that his account had been switched. See OAG/OCA Consumer Testimony of Donald Johnson at 420. This testimony does not support Respond Power's assertions in its Main Brief.

Respond Power further asserts in its Main Brief, "[Mr. Johnson] did not complain within two billing cycles so as to be eligible for a refund." Id. As stated above, 52 Pa. Code § 57.77(b) is clearly not applicable in this proceeding and, nevertheless, is not a bar for Mr. Johnson to receive a refund. Moreover, the evidence as discussed above demonstrates that Mr. Johnson acted reasonably in noticing a change of EGS and acted diligently in disputing the switch.

Thus, Joint Complainants submit that the evidence demonstrates that Respond Power improperly enrolled Donald Johnson without his authorization.

- **Cynthia Clapperton**

Joint Complainants have also met their burden of proving that Respond Power switched Cynthia Clapperton to its generation supply without her consent in violation of the Public Utility Code, 66 Pa. C.S. § 2807(d)(1), and the Commission's regulations, 52 Pa. Code § 54.42(a)(9). As discussed in Joint Complainants' Main Brief, Ms. Clapperton testified that Respond Power representatives led her to believe that she was speaking with individuals from

PPL about participation in a program with PPL that was helping individuals who wanted to lower their electric rates. See Tr. at 653-55; see also OAG/OCA Consumer Testimony of Cynthia Clapperton at 837-39. Ms. Clapperton did not knowingly sign up with Respond Power. See Tr. at 653-55; see also OAG/OCA Consumer Testimony of Cynthia Clapperton at 837-39. As such, Joint Complainants have met their burden of proof.

In its Main Brief, Respond Power asserts, “During the hearings, Respond Power played a TPV recording, which disclosed that Ms. Clapperton had authorized a switch to Respond Power.” Respond Power M.B. at 123. After listening to the TPV at the hearing, however, Ms. Clapperton explained that the third-party verification call was only a portion of the conversation she had regarding switching. Specifically, the following exchange occurred:

Q. Ma’am, what I wanted to ask you was that portion [of the tape] that we heard this morning, that wasn’t the entire (sic) of your conversation that day with the person on the other line; correct?

A. That’s correct.

Q. What else was discussed before we heard the tape?

A. Well, what was discussed before that was that there was a - - I wanted to lower my rate and I was under the assumption that this was with PP&L and that this was a plan with PP&L, and I thought that this was another entity with PP&L. I did not understand this. And the people that spoke to me from Respond Power, the part that you did not hear, were very good at speaking to me in a way that I did not understand it, to be quite honest with you. I’m not a stupid person, I’m a college-educated person, but they had a way of explaining it to me in a way that I did not understand that I was not going to be with PP&L.

Q. So when you take into account the entirety of the conversation that day, along with the portion that was played today, you were left with the distinct impression at the end of the day that you were with PP&L, is that correct?

A. Absolutely.

Tr. at 654-55. Thus, while it may appear that Ms. Clapperton gave authorization to be switched to Respond Power from the third-party verification call on its own, the evidence demonstrates

that a Respond Power sales agent misled Ms. Clapperton into believing that she was, in fact, giving authorization to PPL to enroll her in a special plan. The third-party verification call does not relieve Respond Power of its liability for making misrepresentations to customers or switching customers without their informed authorization.

Furthermore, Ms. Clapperton did not acknowledge receipt of a Disclosure Statement from Respond Power. Ms. Clapperton also testified that she never received a Welcome Letter or any other mailings from Respond Power. Consumer Testimony of Cynthia Clapperton at 839. Additionally, Ms. Clapperton explained that she did not notice that she had switched companies, because she pays the same amount of money every month on a budget plan. Id. at 837.

Thus, Joint Complainants submit that the evidence demonstrates that Respond Power improperly enrolled Cynthia Clapperton without her informed authorization.

- **Danielle Groff**

Joint Complainants have also met their burden of proving that Respond Power switched Danielle Groff to its generation supply without her consent in violation of the Public Utility Code, 66 Pa. C.S. § 2807(d)(1), and the Commission's regulations, 52 Pa. Code § 54.42(a)(9). As discussed in Joint Complainants' Main Brief, Ms. Groff testified that she did not authorize Respond Power to switch her account. See OAG/OCA Consumer Testimony of Danielle Groff at 152. Ms. Groff's account was in her name. See Tr. at 511. The evidence establishes that Ms. Groff's mother signed Ms. Groff up with Respond Power *without Ms. Groff's authorization or consent*. See Id.; see also Tr. at 510-11. Therefore, Joint Complainants have met their burden of proof.

Respond Power failed to provide any argument in its Main Brief regarding Ms. Groff's enrollment. Joint Complainants also note that Ms. Groff testified that she never received a

Disclosure Statement from Respond Power. OAG/OCA Consumer Testimony of Danielle Groff at 153. Furthermore, Ms. Groff testified that she never received a Welcome Letter or other mailings from Respond Power. Id. at 154. Ms. Groff also testified that she does not recall getting a confirmation letter from PECO saying she had signed up with Respond Power. Tr. at 510.

Thus, Joint Complainants submit that the evidence demonstrates that Respond Power improperly enrolled Danielle Groff without her authorization.

- **Tina Andrews**

Joint Complainants have also met their burden of proving that Respond Power switched Tina Andrews to its generation supply without the her consent in violation of the Public Utility Code, 66 Pa. C.S. § 2807(d)(1), and the Commission's regulations, 52 Pa. Code § 54.42(a)(9). As discussed in Joint Complainants' Main Brief, Ms. Andrews testified that she did not sign up with Respond Power. See OAG/OCA Consumer Testimony of Tina Andrews at 955; see also Tr. at 144. Ms. Andrews was switched to Respond Power by her son. See Tr. at 152-53. Ms. Andrews never provided authorization to PPL for her son to change her account. See Tr. at 153. Therefore, Joint Complainants have met their burden of proof.

In its Main Brief, Respond Power relies solely on the fact that Ms. Andrews' son indicated that he was authorized to switch the account to rebut the evidence of the improper enrollment. Respond Power M.B. at 121. Joint Complainants submit that such evidence in and of itself is no defense to the improper enrollment. Joint Complainants note that Ms. Andrews testified that she never received a disclosure statement. OAG/OCA Consumer Testimony of Tina Andrews at 956. Furthermore, Ms. Andrews testified that she never received a Welcome Letter or other mailings from the EGS. See Id. at 956-57. Ms. Andrews testified that she did not

know she was switched until she started receiving the high bills. Tr. at 153. At that time, she contacted PPL, who informed her of the switch, and she attempted to switch back. Id.

As such, Joint Complainants submit that the evidence demonstrates that Respond Power improperly enrolled Ms. Andrews without her authorization.

- **Wayne Womelsdorf**

Joint Complainants have also met their burden of proving that Respond Power switched Wayne Womelsdorf to its generation supply without the his consent in violation of the Public Utility Code, 66 Pa. C.S. § 2807(d)(1), and the Commission’s regulations, 52 Pa. Code § 54.42(a)(9). As stated in Joint Complainants’ Main Brief, Ms. Womelsdorf testified that he did not sign up with Respond Power. OAG/OCA Consumer Testimony of Wayne Womelsdorf at 195. Mr. Womelsdorf further testified that the account is in his name. Tr. at 742. Mr. Womelsdorf, however, provided evidence that Respond Power charges were appearing on his bills. See Exh. WW-1 at 200-204. Therefore, Joint Complainants have met their burden of proof.

In its Main Brief, Respond Power asserts:

Respond Power presented evidence showing that [Mr. Womelsdorf’s] wife had authorized the switch to Respond Power, indicating to the TPV representative that she was authorized to make a change on the account. 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. Womelsdorf’s account was not switched to Respond Power without authorization.

Respond Power M.B. at 123. In support of its assertion that Mr. Womelsdorf’s wife authorized the switch, Respond Power relies on a third-party verification recording in which the consumer “authorizing” the switch indicates that she is “Lorraine Womelsdorf.” Id. The evidence on record in this proceeding, however, calls into question the credibility of that recording. For example, after Respond Power played the TPV for Mr. Womelsdorf at the hearing for cross-

examination, the following exchange took place between Respond Power counsel and Mr. Womelsdorf:

Q. Is Lorraine Womelsdorf your wife?

A. Yes.

Q. Was that her voice on the recording?

A. I don't know. I don't know. I can't - - to tell you the truth, I don't know.

[...]

A. She's claiming she didn't do anything like that, so I don't know.

Tr. at 740-41. Furthermore, Mr. Womelsdorf testified that he did not authorize his wife to change his account. Tr. at 744. Moreover, Mr. Womelsdorf testified that he never received a Welcome Letter or other mailings from the Company. OAG/OCA Consumer Testimony of Wayne Womelsdorf at 197. Mr. Womelsdorf also testified that he never received a confirmation letter from PPL. Tr. at 741.

As such, Joint Complainants submit that the evidence demonstrates that Respond Power improperly enrolled Ms. Womelsdorf without his authorization.

- **Donna Noren**

Joint Complainants have also met their burden of proving that Respond Power switched Donna Noren to its generation supply without her consent in violation of the Public Utility Code, 66 Pa. C.S. § 2807(d)(1), and the Commission's regulations, 52 Pa. Code § 54.42(a)(9). As stated in Joint Complainants' Main Brief, Ms. Noren testified that she believed that she was agreeing to obtain pricing information by signing the paperwork provided by the Respond Power door-to-door solicitor. OAG/OCA Consumer Testimony of Donna Noren at 250. As further evidence that Ms. Noren did not intend to sign up with Respond Power, Ms. Noren testified that

the document she signed did not indicate that she was signing up for a fixed or variable rate, but Respond Power later altered the document by adding a check mark. Id. at 252-53. Ms. Noren further testified that she was already under contract with another company and thought she would compare prices, not switch. Id. at 250-251. Ms. Noren explained that the Respond Power representative used Ms. Noren’s account number from her bill without her permission to switch her supplier. Id. at 250. As such, Joint Complainants have met their burden of proof.

Respond Power provides no argument in its Main Brief regarding Ms. Noren’s enrollment. Joint Complainants further note that Ms. Noren testified that she did not verify her enrollment via a third-party verifier, and Respond failed to provide any evidence to rebut her testimony. Id. at 254. Ms. Noren further testified that when she became aware that she had switched suppliers, she contacted Penelec immediately to “stay with them.” Id. at 255. Additionally, Ms. Noren testified that she contacted Respond Power three months later when she realized that she was still with Respond Power. Id.

As such, Joint Complainants submit that the un rebutted evidence demonstrates that Respond Power improperly enrolled Ms. Noren without his authorization.

- **Trent Tyson**

Joint Complainants have also met their burden of proving that Respond Power switched Trent Tyson to its generation supply without the his consent in violation of the Public Utility Code, 66 Pa. C.S. § 2807(d)(1), and the Commission’s regulations, 52 Pa. Code § 54.42(a)(9). As discussed in Joint Complainants’ Main Brief, Mr. Tyson received a call in 2013 and was told he was being switched from PP&L to Respond Power. OAG/OCA Consumer Testimony of Trent Tyson at 446. Respond Power never told Mr. Tyson that the switch was optional. Id. As such, Joint Complainants have met their burden of proof.

Respond Power provides no argument in its Main Brief regarding Mr. Tyson's enrollment.²¹ Therefore, Joint Complainants submit that the evidence demonstrates that Respond Power improperly enrolled Mr. Tyson without his authorization.

- **Michael Lucisano**

Joint Complainants have also met their burden of proving that Respond Power switched Michael Lucisano to its generation supply without his consent in violation of the Public Utility Code, 66 Pa. C.S. § 2807(d)(1), and the Commission's regulations, 52 Pa. Code § 54.42(a)(9). As discussed in Joint Complainants' Main Brief, Mr. Lucisano testified that he never signed a contract with Respond Power. OAG/OCA Consumer Testimony of Michael Lucisano at 473. Mr. Lucisano explained, "My account with Peco is in my name alone. I have never signed a document with Respond Power, spoken with Respond Power, received ANY paperwork from Respond Power and in general, had no idea who Respond Power was." *Id.* Mr. Lucisano received a bill for more than \$1200 in the mail. *Id.* After calling PECO to investigate, he was informed that he was with Respond Power. *Id.* Joint Complainants, therefore, submit that they have met their burden of proof.

Respond Power has provided no evidence to demonstrate that Mr. Lucisano or anybody else on his behalf authorized a switch.

In its Main Brief, Respond Power argues:

[T]he Company's records demonstrate that [Michael Lucisano and his wife] were served 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

²¹ Joint Complainants acknowledge the TPV recording on record in this proceeding wherein Mr. Tyson authorizes his enrollment and the operator states, "Your choice is voluntary [...]. Do you understand?" See Tr. at 777. To the extent Respond Power seeks to rely on its third party verification call in its Reply Brief as proof that Mr. Tyson understood that switching was voluntary, Joint Complainants submit that a third-party verification call does not relieve Respond Power of its liability for its sales representatives failing to provide material information to consumers or obtaining informed authorization from a consumer prior to initiating a switch.

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.

Respond Power M.B. at 126. Respond Power's assertion is neither a valid defense to Respond Power's improper enrollment or Mr. Lucisano nor is it supported by the evidence in this proceeding. The record demonstrates that Mr. Lucisano acted reasonably in discovering the switch and diligently upon learning that he was with Respond Power. Specifically, Mr. Lucisano testified that he never received a Disclosure Statement, Welcome Letter, or any other mailings from Respond Power. *Id.* at 471-72. Mr. Lucisano also never received a letter from PECO informing him of the switch. Tr. at 1139. Mr. Lucisano testified that he "immediately reached out to Respond Power" and stopped service with the Company "immediately" after learning of the switch. OAG/OCA Consumer Testimony of Michael Lucisano at 470, 473.

As such, Joint Complainants submit that the evidence demonstrates that Respond Power improperly enrolled Mr. Lucisano without his authorization.

- **Eileen Bowers**

Joint Complainants have also met their burden of proving that Respond Power switched Eileen Bowers to its generation supply without her consent in violation of the Public Utility Code, 66 Pa. C.S. § 2807(d)(1), and the Commission's regulations, 52 Pa. Code § 54.42(a)(9). As discussed in Joint Complainants' Main Brief, Ms. Bowers testified that her boyfriend at the time spoke to a Respond Power door-to-door sales representative and signed a paper "authorizing" the switch, but only Ms. Bowers had the authority to change her account. OAG/OCA Consumer Testimony of Eileen Bowers at 636-37 and Tr. at 676-77. Upon realizing that her boyfriend had signed the paperwork, Ms. Bowers chased the salesperson down the street and took back all the papers that her boyfriend had signed. OAG/OCA Consumer Testimony of

Eileen Bowers at 636-37 and Tr. at 676-77. Ms. Bowers told Respond Power that she did not want the Company as her supplier, but two months later, Respond Power switched her account anyway. OAG/OCA Consumer Testimony of Eileen Bowers at 638; Tr. at 677; Exh. EB-1. Thus, Joint Complainants submit that they have met their burden of demonstrating that Respond Power switched Eileen Bowers without proper authorization.

Respond Power did not provide any argument in its Main Brief regarding Ms. Bowers' enrollment. Moreover, Joint Complainants note that Ms. Bowers testified that she never received a Welcome Letter or other mailings from Respond Power. OAG/OCA Consumer Testimony of Eileen Bowers at 638. Ms. Bowers further testified that she did not know where to find the charges from an electric generation supplier on her electric bill. Tr. at 675. Ms. Bowers also testified that she never received a confirmation letter from PECO indicating the switch. Id.

Additionally, Ms. Bowers testified:

[Respond Power] waited two months and snuck [their charges] on my bill. I did not notice right away because my electric bill was normal. I did not notice until the winter when my bills became astronomical. I pulled out my last year's bill to compare usage and then noticed that Respond Power was on my bills. [...]

When I discovered this I called PECO right [away] and they told me that I had to contact Respond Power [...]. I called Respond Power [...].

Exh. EB-1 at 640.

Joint Complainants submit that the evidence demonstrates that Respond Power improperly enrolled Ms. Bowers without her authorization.

- **Paul Hassinger**

Joint Complainants have also met their burden of proving that Respond Power switched Paul Hassinger to its generation supply without the his consent in violation of the Public Utility Code, 66 Pa. C.S. § 2807(d)(1), and the Commission's regulations, 52 Pa. Code § 54.42(a)(9).

As discussed in Joint Complainants' Main Brief, Mr. Hassinger testified that he was a Respond Power customer in 2011; however, when he moved into a new apartment in October 2012, Mr. Hassinger started a new account, and told a Respond Power representative that he was not interested in enrolling with the Company again. OAG/OCA Consumer Testimony of Paul Hassinger at 901-05. Although Mr. Hassinger never authorized a switch to Respond Power with his new account, Respond Power switched his account. Id. Joint Complainants submit that they have met their burden of proof.

In its Main Brief, Respond Power has failed to provide any evidence to dispute Mr. Hassinger's claim that Respond Power switched his account without authorization. Rather, Respond Power asserts:

[Mr. Hassinger] did not complain until a year and a half later in April 2014. Given Mr. Johnson's (sic) 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.

Respond Power M.B. at 123. Again, 52 Pa. Code § 57.177(b) is clearly not applicable in this proceeding and, nevertheless, is not a bar for Mr. Hassinger to receive a refund. Moreover, the record demonstrates that Mr. Hassinger acted reasonably in discovering the switch and acted diligently upon learning that he was with Respond Power. Mr. Hassinger testified that he never received a Disclosure Statement from Respond Power. OAG/OCA Consumer Testimony of Paul Hassinger at 902. Furthermore, Mr. Hassinger never received a Welcome Letter or other mailings from Respond Power. Id. at 903. Moreover, Mr. Hassinger testified that his wife looks at the electric bills each month, and she did not see Respond Power listed as their supplier on the bills. Tr. at 710-11. Mr. Hassinger testified that PECO determined that Respond Power had been hiding their fee

“through a percentage on our billing document.” *Id.* at 717; see also OAG/OCA Consumer Testimony of Paul Hassinger at 905. Mr. Hassinger testified that when they found out about Respond Power’s charges, they were “furious” and requested to be switched back to PECO. OAG/OCA Consumer Testimony of Paul Hassinger at 905. They also contacted the Commission and filed a complaint. *Id.*; Tr. at 711. Joint Complainants submit that Respond Power’s claim that Mr. Hassinger’s testimony is not credible or that he lacked attention to his electric account is not supported by the record nor is it a valid defense to switching Mr. Hassinger’s account without authorization.

As such, Joint Complainants submit that the evidence demonstrates that Respond Power improperly enrolled Mr. Hassinger without his authorization.

- **Raymond Weaver**

Joint Complainants have also met their burden of proving that Respond Power switched Raymond Weaver to its generation supply without the his consent in violation of the Public Utility Code, 66 Pa. C.S. § 2807(d)(1), and the Commission’s regulations, 52 Pa. Code § 54.42(a)(9). As discussed in Joint Complainants’ Main Brief, Mr. Weaver’s utility account is solely in his name. Tr. at 385. Mr. Weaver testified that his wife is not authorized to switch his account, because Mrs. Weaver was involved in an accident that left her in a state unable to make important decisions. *Id.* Yet, Respond Power accepted her enrollment to switch Mr. Weaver’s utility account. *Id.* at 386-87. Mr. Weaver did not realize he was switched to Respond Power until he received his electric bill. *Id.* at 382. Therefore, Joint Complainants have met their burden of proof.

In its Main Brief, Respond Power relies solely on the fact that Mr. Weaver’s wife indicated that she was authorized to switch the account to rebut the evidence of the improper

enrollment. Respond Power M.B. at 122. Joint Complainants submit that such evidence in and of itself is no defense to the improper enrollment. Joint Complainants note that Mr. Weaver testified that he never received a Disclosure Statement, Welcome Letter or other mailings from Respond Power. OAG/OCA Consumer Testimony of Raymond Weaver at 727-28. Mr. Weaver further testified that he noticed Respond Power on his charges the first month he received a bill with Respond Power charges, and he “went right back to PP&L as soon as [he] could get on it.” Tr. at 383.

Joint Complainants submit that the evidence demonstrates that Respond Power improperly enrolled Mr. Weaver without his authorization.

c. Conclusion.

The evidence on record in this proceeding establishes that Respond Power switched numerous consumers to its generation supply without the consumers’ consent (*i.e.* slammed) in violation of the Public Utility Code, 66 Pa. C.S. § 2807(d)(1), and the Commission’s regulations, 52 Pa. Code § 54.42(a)(9). In its Main Brief, Respond Power asserts that the civil penalty that Respond Power has agreed to pay as part of the Settlement “more than adequately addresses any proven instances of slamming.” Respond Power M.B. at 127. Joint Complainants strongly disagree and submit that consumers who were slammed by Respond Power are entitled to refunds for their generation charges and that the total fines as identified by Joint Complainants in Section IV.D.(3) of the Main Brief are appropriate.

6. Count VI – Lack of Good Faith Handling of Complaints.

Joint Complainants averred that Respond Power failed to adequately staff its call center, failed to provide reasonable access to Company representatives for purposes of submitting complaints, failed to properly investigate customer disputes, failed to properly notify customers

of the results of the Company's investigation into a dispute when such investigation was conducted, and failed to utilize good faith, honesty and fair dealing in its interactions with customers in violation of the Commission's regulations, 52 Pa. Code §§ 56.1(a), 56.141(a), 56.151 and 56.152, and the Company's Licensing Order.²² See OCA/OAG M.B. at 88-105; see also gen'ly OAG/OCA Exh. 1 (Joint Complaint) at Count VI.

In response to the allegation that Respond Power failed to staff its call center, Respond Power asserts in its Main Brief that "the Commission's regulations do not impose standards on EGSs for the staffing of its call center or for handling calls from consumers." Respond Power M.B. at 128. Respond Power further asserts 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." Id. at 129. Respond Power concludes that "[t]he evidence presented by Joint Complainants fails to establish that Respond Power violated any of the requirements imposed by the provisions of Chapter 56. Id. at 130.²³

As Joint Complainants stated in their Main Brief, Section 2809 makes it a condition of receiving a license that an EGS conform to the Commission's regulations regarding standards and billing practices (*i.e.* Chapter 56). 66 Pa. C.S. § 2809(a). Pursuant to the Commission's regulations, EGSs are required to implement a process for responding to and resolving customer inquiries, disputes and complaints and to provide documentation of, *inter alia*, said inquiry, dispute, or complaint and the resolution of the matter. See 52 Pa. Code §§ 56.141(a), 56.151,

²² 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 (Aug. 19, 2010) (Licensing Order).

²³ Also, Respond Power asserts that any concerns the Commission has about Respond Power's customer service are fully addressed by the commitments in the Settlement. Respond Power M.B. at 131. As discussed in Sections IV.D. and V. below and in Section IV.D. and V. of Joint Complainants' Main Brief, the Settlement between the Company and I&E is not adequate to address the violations proven by Joint Complainants.

56.152, and 111.13(a), (b). Thus, contrary to Respond Power's assertion in its Main Brief, the Public Utility Code and the Commission's regulations do impose standards on EGSs for the handling of customer complainants, and an inability to answer calls from customers with inquiries, disputes, or complaints and execute the Company's process for responding to and resolving customer complaints is a violation of the Commission's rules and regulations.

In support of their position that Respond Power failed to adequately staff its call center, Joint Complainants have shown, *inter alia*:

- Respond Power was unable to answer 6,868 calls during the period December 2013 through May 2014 and the 'drop rate' (*i.e.* calls in which the customer hung up due to the long wait time to speak to a representative) was an average of 14.5%, but was over 20% during some periods during this time frame. OAG/OCA M.B. at 91.
- By being unable to talk to anyone at Respond Power, the customers were unable to exercise their dispute rights as found in 66 Pa. C.S. § 2809(e) and 52 Pa. Code §§ 65.151-152 and/or drop Respond as their supplier-thus prolonging the time they were a customer and exposing them to continued high billings. Id. at 92-94.
- When customers were successful in getting through to Respond Power and requested to speak to a supervisor regarding their complaint, Respond Power's representatives typically told the consumer that it would not be possible or that no different response would result by speaking to a manger or supervisor. Id. at 94.

Respond Power did not dispute this evidence. Instead, Respond Power tries to argue in its Brief that these failings must be looked at as an industry wide occurrence due to the Polar Vortex. As noted in Joint Complainants' Main Brief, however, the fact that other EGSs may have encountered difficulties does not relieve Respond Power of its responsibility to adequately staff its call center. More to the point, it was Respond Power who increased its charges to customers, often by 100%, 200%, or 300% in one month. Respond Power has an obligation to have

appropriate processes in place when it takes such actions. The evidence here shows that it did not.

Thus, Joint Complainants submit that they have met their burden of proving that Respond Power failed to adequately staff its call center and provide reasonable access to Company representatives in violation of the Commission's regulations and the Company's Licensing Order.

Additionally, Joint Complainants alleged that Respond Power failed to properly investigate customer disputes, and when such investigation was conducted, Respond Power failed to notify customers of the results of the Company's investigation. OAG/OCA M.B. at 96-99; see also gen'ly OAG/OCA Exh. 1 (Joint Complaint) at Count VI. Specifically, Joint Complainants have shown, *inter alia*:

- Many Respond Power customers described actions and statements by the Respond Power sales agents that, if true, would constitute an unfair and deceptive sales practice, but none of the Respond Power customer service representatives offered to investigate these allegations and none of these allegations were treated as complaints, which would trigger further investigation. OAG/OCA M.B. at 97.
- Of the customers who called Respond Power from February 2014 through May 2014 to claim that they had been promised savings, Respond Power did not initiate an investigation into any of those complaints or impose disciplinary action on any agent. Id.
- Instead of initiating an investigation into complaints regarding variable rates or higher-than-normal bills, Respond Power's customer service department relied on a script which blamed the high prices on extreme weather and wholesale market conditions without assuming any responsibility for the high prices or making any reference to the Company's Disclosure Statement that would justify such high prices. Id.
- Respond Power did not initiate an investigation into all slamming complaints and, to the extent Respond Power did initiate an investigation into slamming complaints, Respond Power did not always notify the consumers of the results of the investigation. Id. at 97-98.

- Of the customers who contacted Respond Power from February 2014 through May 2014 alleging slamming, “almost none of those complaints made it into Respond Power’s database of agent misconduct.” Id. at 98.

Respond Power did not dispute this evidence or provide any argument in its Main Brief regarding this evidence. As such, Joint Complainants request a finding that Respond Power failed to properly investigate customer disputes, and when such investigation was conducted, Respond power failed to notify customers of the results of the Company’s investigation in violation of the Commission’s regulations, 52 Pa. Code §§ 56.141(a), 56.151, and 111.13(a) and (b).

Joint Complainants also alleged that Respond Power failed to utilize good faith, honesty and fair dealing in its dealings with customers in violation of 52 Pa. Code § 56.1(a) and the Company’s Licensing Order. OAG/OCA M.B. at 99-105; see also gen’ly OAG/OCA Exh. 1 (Joint Complaint) at Count VI. Specifically, Joint Complainants have shown:

- Respond Power failed to investigate consumer complaints. OAG/OCA M.B. at 96-100.
- Respond Power utilized a customer service script that guided Respond Power representatives to take no responsibility for the prices charged and provide misleading and deceptive statements to consumers. Id. at 97, 100.
- Respond Power failed to implement a fair and consistent policy for evaluating refunds. Id. at 100-102.
- Respond Power offered refunds to customers on the condition that the customers enter into a fixed rate contract with Respond Power. Id. at 101.
- Respond Power offered refunds to customers on the condition that customers release their claims against Respond Power. Id.
- Respond Power failed to issue adequate refunds. Id. at 102, 104.
- When Respond Power issued “re-bills” or “re-rates” to customers, Respond Power improperly directed customers not to pay the supply portion of their bills. Id. at 102-103.

Respond Power only addressed the evidence regarding the requirement that customers agree to one-year fixed rate contracts to qualify for a refund. In its Main Brief, Respond Power stated that it “has refuted this claim through Mr. Small who testified that consumers were given thousands of dollars in refunds without making this commitment.” Respond Power M.B. at 130. In the very next sentence, however, Respond Power acknowledges that it did require at least some customers to enter into a fixed rate contract in order to obtain a refund, stating, “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.” Id. Respond Power further asserts that it is not obligated to issue any refunds to customers, but was “free to make the business decision to attempt, when possible, to link refunds to one-year fixed price contract[s].” Id.

Joint Complainants submit that the evidence on record in this proceeding demonstrates that a majority, if not all, of Respond Power’s customers who were offered a refund had to agree to remain a Respond Power customer and/or enter into a fixed rate contract with Respond Power. See e.g. FOF 106. Joint Complainants submit, however, that if Respond Power used the approach of offering refunds in the context of a new fixed rate contract for some customers and not for others, such conduct further demonstrates that Respond Power failed to utilize fair dealings with consumers in violation of the Commission’s regulations. Furthermore, as discussed in Joint Complainants’ Main Brief, Respond Power’s decision to link refunds to fixed price contracts was made at the expense of customers. OAG/OCA M.B. at 104-105.

Joint Complainants submit that they have met their burden and request a finding that Respond Power failed to adequately staff its call center, failed to provide reasonable access to Company representatives for purposes of submitting complaints, failed to properly investigate

customer disputes, failed to properly notify customers of the results of the Company's investigation into a dispute when such investigation was conducted, and failed to utilize good faith, honesty and fair dealing in its dealings with customers in violation of the Commission's regulations, 52 Pa. Code §§ 56.1(a), 56.141(a), 56.151, 56.152, and 111.13 and the Company's Licensing Order.

7. Count VII – Failing to Provide Accurate Pricing Information.

In its Main Brief, Respond Power asserts that its Disclosure Statement was approved by the Commission, relying on its communications with the Bureau of Consumer Services (BCS) regarding the disclosure statement for the Company's natural gas affiliate Major Energy. See Respond Power M.B. at 132-34. The Company also asserts that its Disclosure Statement complied with the Commission's regulations in effect at the time. Id. at 135-38.

Further, the Company asserts that Joint Complainants' expert witnesses, Ms. Alexander and Dr. Estomin, failed to accurately set forth the standard in the Commission's regulations in their analyses and conclusions regarding Respond Power's Disclosure Statement. Respond Power M.B. at 137-38. The Company claims that the Commission's regulation at 52 Pa. Code § 54.5(c) was unconstitutionally vague if the Commission interprets the regulation in the manner suggested by Joint Complainants. Id. at 138.

Joint Complainants submit that Respond Power did not address all of the Commission regulations that Joint Complainants averred the Company violated. See OAG/OCA Exh. 1 (Joint Complaint) at Count VII; OAG/OCA M.B. at 106-16. Specifically, Joint Complainants averred that with regard to the pricing provisions in the Company's Disclosure Statement, consumers could not determine the price that they would or could be charged by Respond Power or how the price would be calculated by the Company in violation of the Commission's regulations at

Sections 54.5(c) (requiring that variable pricing terms include the conditions of variability and the limits on price variability), 54.43(1) (requiring that suppliers “provide accurate information about their electric generation services using plain language and common terms in communications with consumers” and “in a format that enables customers to compare the various electric generation services offered and the prices charged for each type of service”), and Sections 54.43(f) and 111.12(d)(1) (requiring compliance with consumer protection laws), 52 Pa. Code §§ 54.5(c), 54.43(1), 54.43(f) and 111.12(d)(1). See gen’ly OAG/OCA Exh. 1 (Joint Complaint) at Count VII. See also 52 Pa. Code § 111.12(d)(5) (Requires that EGSs “ensure that product or service offerings made by a supplier contain information, verbally or written, in plain language designed to be understood by the customer”).

As Joint Complainants discussed in their Main Brief, the Commission’s customer choice standards “are high, specific, and unequivocal” and “are intended to ensure fairness and integrity in the competitive market” so that “consumers [may] make informed choices and the market flourish.” See Kiback v. IDT Energy, Inc., Docket No. C-2014-2409676, Opinion and Order at 24 (Aug. 20, 2015). Joint Complainants’ expert witnesses Dr. Estomin and Ms. Alexander analyzed Respond Power’s Disclosure Statement and testified that the pricing provision does not identify all of the factors that the Company uses to calculate prices and that in addition to using incorrect terms, there is no useful information for consumers to determine how Respond Power will calculate and charge prices. See OAG/OCA M.B. at 107-10, citing OAG/OCA St. 2 at 9-10; OAG/OCA St. 2-SR at 6; and OAG/OCA St. 1 at 36-37 and FN 44. Based on his analysis, Dr. Estomin concluded that:

[T]he Company’s Disclosure Statement, while representing that prices are based on the PJM spot market, is in fact so vague as to be without real meaning. Whatever meaning can be imputed to the amorphous pricing mechanism alluded to in the Company’s Disclosure Statement is then negated by the Company’s

perspective that rates can be established at any level, at any time, in any service area through changes in the Company's profit margin.

OAG/OCA St. 2-SR at 9. Based on her analysis, Ms. Alexander concluded that:

[I]t is clear that consumers, particularly residential and small business consumers who are generally not knowledgeable about the structure of the retail and wholesale electric markets, would not be able to determine what price Respond Power might charge based on publicly available information. Further, the Disclosure Statement provides no basis for any customer to determine whether or not Respond Power has complied with its pricing obligations by providing the information necessary for the customer to examine or question the basis for the monthly price charged in light of the language in this document.

OAG/OCA St. 1 at 37.

Joint Complainants submit that they have shown that the Company has violated 52 Pa. Code §§ 54.5(c), 54.43(1), 54.43(f), 111.12(d)(1) and 111.12(d)(5), and the Company's arguments in its Main Brief do not rebut Joint Complainants' evidence and should be rejected.

a. Respond Power's Disclosure Statement Has Not Been Approved by the Commission.

In its Main Brief, Respond Power argues that the pricing provision in Major Energy's disclosure statement went through "many iterations" before the Company received approval from BCS, and Respond Power used the same language in its electric Disclosure Statement, which it attached to its EGS license application. Respond Power M.B. at 133. The Company asserted that since the Commission did not make any changes to the Disclosure Statement language, by issuing the Company's Licensing Order, the Commission approved the language in the Disclosure Statement. Id. at 133-34. The Company also relied on Hoke v. Ambit Northeast, LLC d/b/a Ambit Energy, Docket No. C-2013-2357863, Order (Jan. 16, 2014). Id. at 134.

Joint Complainants submit that Respond Power's reliance on BCS's informal approval of Major Energy's disclosure statement for natural gas supply as equivalent to Commission approval of Respond Power's Disclosure Statement for electric supply is erroneous. As Joint

Complainants asserted in their Main Brief, informal approvals from BCS are not binding on the Commission and are subject to withdrawal or change at any time. See OAG/OCA M.B. at 1110-

11. As the Commission recently held:

As for the NGS Parties' request that the Commission allow suppliers to ask for reviews of their disclosure statements by Commission staff, we note that informal reviews and opinions are always available upon request. Pursuant to 52 Pa. Code § 1.96, informal opinions are provided solely as an aid to the requester and are not binding upon the Commonwealth or the Commission. Informal opinions are also subject to withdrawal or change at any time to conform with new or different interpretations of the law. Suppliers interested in informal opinions should contact the Bureau of Consumer Services and/or OCMO. However, we remind suppliers of their duty to develop and maintain expertise in these regulations in order to ensure effective compliance. See 66 Pa. C.S. § 2208.

See Customer Information Disclosure Requirements for Natural Gas Suppliers Providing Natural Gas Supply to Residential and Small Business Customers, Docket No. L-2015-2465942, Proposed Rulemaking Order at 22 (Mar. 26, 2015); 45 Pa.B. 2705. (Some internal citations omitted).

Furthermore, in a consumer complaint case involving Respond Power, ALJ Barnes rejected the Company's argument that its Disclosure Statement had been approved by the Commission. See Herp v. Respond Power, LLC, Docket No. C-2014-2413756, Initial Decision at 19-20 (Dec. 17, 2014). Specifically, ALJ Barnes found:

The License Order is silent as to an express approval of the language contained in the "Disclosure Statement of Respond Power LLC" as filed on February 2, 2010, as part of the Application at Appendix B, Attachment A. Unlike in its affiliates' licensing order, wherein the Commission expressly stated that it approved a proposed disclosure statement as attached to Major Energy Services LLC's (Major Energy) application, no such statement was made in the Order approving Respond Power's application. Respond Power argues that the Commission implicitly approved the language in this disclosure statement attached to Respond Power's Application even though it did not expressly state so in its License Order.

* * *

In comparing and contrasting the “Disclosure Statement of Respond Power LLC” (also referred to as “Draft Disclosure Statement”) as attached to the Application at to Respondent’s Exhibit No. 2 “Respond Power LLC and Major Energy Services LLC, Affiliates Disclosure Statement” (also referred to as “Affiliates Disclosure Statement”), I find some similar language, but there are a lot of differences. Even assuming the Commission implicitly approved the language in the draft disclosure statement attached to the application by approving the application, there is insufficient evidence to find that the Commission approved the “Affiliates Disclosure Statement” as was provided to Complainant.

Despite Mr. Small’s testimony that “there was some back and forth” between the company and the Commission’s Bureau of Consumer Services regarding the language in the draft disclosure statement, Mr. Small’s opinion is unsupported by any corroborative evidence in the record to show there was a Commission staff determination or final Commission approval of the Affiliate Disclosure Statement. I am unaware of any Commission order or Secretarial Letter approving this particular Affiliates Disclosure Statement. Further, scrutiny of the Affiliate Disclosure Statement shows some regulatory violations, which leads me to believe it was not approved by the Commission or Commission Staff in this final form.

* * *

The Commission’s 2010 *License Order* does not include any similar language [about the disclosure statement conforming to structure and format as determined by the Commission]. Indeed, the *License Order* contains only one mention of “disclosure,” and that is in reference to the need for Respond Power to “comply with the standards of conduct and disclosure for licensees set out in Commission regulations at 52 Pa.Code §54.43....” The *License Order* neither discusses the content of any proposed disclosure statement nor approves a disclosure statement.

Id. at 19-20, 23 (Internal citations omitted). Joint Complainants submit that the same analysis, findings and resolution are appropriate in this proceeding.

Joint Complainants further submit that Respond Power’s reliance on Hoke is misplaced. The dispute in Hoke involved, *inter alia*, the issue of whether Ambit’s terms and conditions and disclosure statement properly identified the plan as variable with a one-month introductory rate, which the ALJ found they did. See Hoke, Docket No. C-2013-2357863, Initial Decision at 9 (Nov. 21, 2013). Also, Joint Complainants note that no exceptions were filed by the *pro se* consumer to the Hoke Initial Decision, and it was therefore, adopted by the Commission per

procedure. As such, the Commission did not perform its own analysis of the issues in that case. Id. at Order (Jan. 16, 2014). Regardless, the issue here is whether Respond Power's Disclosure Statement adequately discloses the material terms of its electric supply plans, and as such, findings related to another EGS's disclosure statement are irrelevant. Consequently, the Company's argument that the Commission approved its Disclosure Statement and that approval insulates the Company from Joint Complainants' claims in Count VII should be rejected.

b. Respond Power's Disclosure Statement Was Not in Compliance with the Commission's Regulations in Effect Prior to the First Quarter of 2014.

Respond Power asserted that its Disclosure Statement complied with all Commission regulations in effect while it was being used, specifically, Section 54.5(c)(1) and (2), 52 Pa. Code §§ 54.5(c)(1) and (2).²⁴ Respond Power M.B. at 134-35. Respond Power argued that because the Company's offering did not contain an initial price and the regulations in effect at the time did not require the inclusion of an initial price, which the Commission confirmed in its April 3, 2014 Order,²⁵ the Company's Disclosure Statement met the requirements of Section 54.5(c). Id. at 135. Further, Respond Power argued that the Commission confirmed in the Chapter 54 Final-Omitted Rulemaking Order that a statement of whether or not there were any limits on how high a variable price could go was not required by the previous version of the regulation, 52 Pa. Code § 54.5(c)(2)(ii). Id.

²⁴ The version of Section 54.5(c), which forms the basis for Joint Complainants' allegations in Count VII, required that variable pricing statement, if applicable, include the conditions of variability and the limits on price variability. See OAG/OCA Exh. 1 (Joint Complaint) at Count VII.

²⁵ See 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, Final-Omitted Rulemaking Order (Apr. 3, 2014) (Chapter 54 Final-Omitted Rulemaking Order).

Joint Complainants submit that the Commission did not confirm that its regulations did not require the inclusion of an initial price or state if there were any limits on a variable price in the Chapter 54 Final-Omitted Rulemaking Order, as the Company claimed. With regard to the inclusion of an initial price in the disclosure statement, the Commission stated: “the Commission is aware that not all EGSs operating in the Commonwealth operate the same way” in providing an initial price in the disclosure statement, and “we believe it is essential to provide customers with the rate that will be charged for the first billing cycle upon the EGS’s enrollment of that customer.” Chapter 54 Final-Omitted Rulemaking Order at 14-15. As such, the Commission changed the language in 52 Pa. Code § 54.5(c)(2)(iii) to remove any doubt that an initial price must be identified in the disclosure statement. Id. With regard to whether an explanation of any limits, including any lack thereof, on how a variable price may change, the Commission noted “the potential [for] misinterpretation of the current language at § 54.5 (c)” and removed “if applicable” from the regulation in order to make it more clear that an explanation of limits on variable prices must be stated in a disclosure statement.²⁶ Id. at 11. Joint Complainants submit that the changes made to Section 54.5(c) in the Commission’s Chapter 54 Final-Omitted Rulemaking Order were to make the Commission’s expectations regarding compliance more clear, not to confirm that certain standards were not required prior to the Order.

²⁶ Respond Power asserted that these statements by the Commission were, in fact, the Commission agreeing that the requirements of 52 Pa. Code § 54.5(c) “were vague and ambiguous.” See Respond Power M.B. at 138. The Commission made no such statement in the Chapter 54 Final-Omitted Rulemaking Order. Rather, in its comments to the Commission, a commenter asserted that the “if applicable” language in Section 54.5(c) was “ambiguous and can be misinterpreted.” The Commission agreed with the commenter *only* “regarding the potential [for] misinterpretation.” See Chapter 54 Final-Omitted Rulemaking Order at 11. In a 2000 case, however, the Commission specifically directed that in order to comply with Section 54.5(c), a floor and ceiling price had to be conveyed. See Petition of Shell Energy Services Co., L.L.C. For Declaratory Order and in the Alternative, Waiver of 52 Pa. Code § 54.5(c)(2), Docket No. P-00001848, Order (Dec. 20, 2000). Pursuant to its Licensing Order, Respond Power must educate itself regarding the Public Utility Code and the Commission’s regulations *and orders* and comply therewith.

Further, in a recent consumer complaint case against Respond Power, the ALJ found that Respond Power's Disclosure Statement is misleading and not in compliance with the Commission's regulations prior to the Chapter 54 Final-Omitted Rulemaking Order. See Herp v. Respond Power, LLC, Docket No. C-2014-2413756, Initial Decision at 21-22 (Dec. 17, 2014).

In her analysis of the Respond Power's Disclosure Statement, the ALJ found:

If the EGS offers no guarantee that the customer will ever experience a savings from what its local utility company would have charged, then a more truthful disclosure would have been to state as such. Nowhere in the disclosure does the company state that there is a variable rate cap on what it can charge its customers. However, the company is essentially stating that your rates may vary but since the goal is to deliver your power at a price less than the local utility company, you should experience savings. There is no express notice or warning to the customer that he or she could experience an unlimited percentage increase in monthly bills.

Also, nowhere in the disclosure does the company state there is no cap or maximum rate to which it can charge. Even though it states, "your price may vary from month to month" this does not expressly state that there is no cap on the price. The burden of knowing the variable rates appears to be on the customer to call Respond Power for the then current variable rate or to try to figure out the rate from the monthly bills it receives from the local utility company.

* * *

Thus, the Commission is concerned customers receive clear and unequivocal disclosures whether oral or written. I find a reasonable customer could be misled by the written disclosure statement in Respondent's Exhibits 1-2. Therefore, I find a violation of the Commission's *License Order* for using an unclear and misleading disclosure statement which I doubt was ever approved in its final form by the Commission.

Id. at 21-22, 24.

Based on the foregoing, Joint Complainants submit that Respond Power's assertion that its Disclosure Statement complied with the Commission's regulations at the time of its use should be rejected.

c. Section 54.5(c)(1) and (2) Are Not Unconstitutionally Vague.

The Company also argued that even the Commission’s regulations in their current form do not require the inclusion of a specific formula or methodology for calculating the variable price that will be charged. Respond Power M.B. at 136-37. Respond Power further argued that to the extent the Commission would interpret the regulations in this manner, the regulations are unconstitutionally vague because they do not give the Company fair notice that additional information is required in its Disclosure Statement. Respond Power M.B. at 137-39.

As explained in their Main Brief, Joint Complainants have not asserted that the Company must include a precise formula it will use to calculate variable rate prices in its Disclosure Statement. See OAG/OCA M.B. at 113, citing OAG/OCA St. 2-SR at 6 (Dr. Estomin testified that he did not suggest that Respond Power provide a mathematical prescription or spreadsheet on how the rates are calculated; instead, Dr. Estomin testified that the Company’s Disclosure Statement does not provide any information that would allow a customer determine if the rate being charged in a given month is reasonable or appropriate).

Additionally, Joint Complainants submit that the Commission’s regulations at 52 Pa. Code § 54.5(c)(1) and (2) are not and were not unconstitutionally vague, and it would not violate Respond Power’s due process rights if a finding is made that Respond Power violated 52 Pa. Code § 54.5(c)(1) and (2), as the Company argued. See Respond Power M.B. at 138. The cases cited by the Company do not support the Company’s claim of constitutional violations.

In Village of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489 (1982),²⁷ relied upon by the Company, the United States Supreme Court identified the test for deciding a facial

²⁷ In this challenge pursuant to the Fourteenth Amendment of the United States Constitution, the Court held that a village’s ordinance, which required businesses that sell any items “designed or marketed for use with illegal cannabis or drugs” to be licensed, was not facially overbroad because it did not reach constitutionally protected conduct and was not facially vague because the ordinance was reasonably clear in its application to the complainant. Village of Hoffman Estates, 455 U.S. at 491, 505.

challenge to the overbreadth and vagueness of a law, pursuant to the United States Constitution, as first determining whether the law reaches a substantial amount of constitutionally protected conduct (*i.e.* free speech), and if not the overbreadth challenge fails.²⁸ Village of Hoffman Estates, 455 U.S. 489, 494. The facial vagueness challenge is then examined and may only be upheld if the law is impermissibly vague in all of its applications.²⁹ Id. at 494-95. The complainant’s conduct should be examined before analyzing any other hypothetical applications of the law. Id. at 495. Economic regulation, however, is subject to a less strict vagueness test because of the more narrow subject matter and because businesses are expected to consult relevant legislation in advance of action and may have the ability to inquire for a clarification of a regulation’s meaning. Id. at 498. As such, the principal inquiry is whether the law affords fair warning of what is proscribed. Id. at 503.

In Commonwealth v. Parker White Metal Co., 512 Pa. 74, 515 A.2d 1358 (Pa. 1986), the Pennsylvania Supreme Court, in a challenge to two provisions involving criminal penalties of the Solid Waste Management Act based on due process and vagueness,³⁰ stated that the guidelines a court must use in due process/void for vagueness challenges to *penal* laws included a

²⁸ In its Main Brief, Respond Power does not make a challenge as to the “overbreadth” of the Commission’s regulations at 52 Pa. Code § 54.5(c)(1) and (2). See Respond Power M.B. at 138.

²⁹ In its Main Brief, Respond Power does not make a challenge regarding “discriminatory enforcement” of the Commission’s regulations at 52 Pa. Code § 54.5(c)(1) and (2), which is a form of objection to a regulation for vagueness. See Respond Power M.B. at 138.

³⁰ This case also involved challenges to the two provisions pursuant to the Fourteenth Amendment of the United States Constitution, Article I, Section 26 of the Pennsylvania Constitution. 512 Pa. 74, 82-90. The Court identified the applicable test as first requiring a determination of whether the law created a classification of the unequal distribution of benefits or imposition of burdens.³⁰ 512 Pa. 74, 84. Finding that the sections of the law in question did not create such classifications, the Court stated that an equal protection problem could, therefore, only arise upon enforcement of the law, which is an issue of selective enforcement by a prosecutor or agency. Id. at 86. Ultimately, the Court found that there is no equal protection violation in a law merely because it allows the prosecutor or agency to choose from two different penalty provisions for similar unlawful conduct and that the mere possibility that the law might be selectively enforced does not invalidate the law. Id. at 86-87. In its Main Brief, Respond Power does not challenge that the Commission’s regulations at 54.5(c)(1) and (2) violate equal protection considerations. See Respond Power M.B. at 138.

determination of whether the law defined the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. 512 Pa. 74, 91. In Parker White Metal Co., the Court found no due process violation because the two provisions, although referring to the same conduct but proscribing different penalties, identified the prohibited conduct and courts have consistently upheld the authority of a prosecutor to choose between procedures and sentencing alternatives. 512 Pa. 74, 93-94. Similarly, Commonwealth v. Mayfield, 574 Pa. 460, 464, 832 A.2d 418, 420 (Pa. 2003) and Commonwealth v. McCoy, 2006 Pa. Super. 33, 895 A.2d 18 (Pa. Super. 2006) involved due process and vagueness challenges to a penal laws, and the Courts determined the laws were constitutional. Commonwealth v. Barud, 545 Pa. 297, 681 A.2d 162 (Pa. 1996) also involved a challenge to a penal law, wherein the Pennsylvania Supreme Court found various constitutional due process and vagueness problems with the Driving Under the Influence Statute, finding that the law swept unnecessarily broadly into activities that are lawful, such as driving with a blood alcohol content below the amount prescribed in the law to be unlawful. 545 Pa. 297, 305-308.

Joint Complainants submit that Respond Power made a two-paragraph argument in its Main Brief that a finding that the Company violated 52 Pa. Code § 54.5(c)(1) and (2) would violate the Company's due process rights and cited several cases, but the exact nature of the Company's constitutional challenge or the test that the Company asserts should be used to determine if the regulation passed constitutional muster and application thereof in this proceeding is unclear. Furthermore, Joint Complainants submit that the cases cited by Respond Power, while identifying the tests to determine if an ordinance requiring licensure for certain

conduct or penal laws are unconstitutionally vague, do not support the Company's constitutional challenge to Sections 54.5(c)(1) and (2).

It appears that Respond Power demands a level of precision regarding prohibited conduct, which is simply not required as a matter of law. As the United States Supreme Court re-affirmed in Village of Hoffman Estates, economic regulation is subject to a less strict vagueness test because of the more narrow subject matter and because businesses are expected to consult relevant legislation in advance of action and may have the ability to inquire for a clarification of a regulation's meaning. 455 U.S. 489, 498. Joint Complainants submit that Section 54.5(c) is an economic regulation relating to the narrow subject matter of EGS disclosure statements for variable rate pricing. Further, Respond Power had the ability, and the obligation, to review the Commission's applicable tentative and final rulemaking orders and subsequent orders involving all regulations applicable to the Company upon receiving its EGS license, and if Respond Power still required a clarification of a regulation's requirements, the Company could have sought clarification by the Commission. As such, Joint Complainants submit that the Company's constitutional arguments should be rejected.

d. Conclusion.

Joint Complainants submit that the Company's Disclosure Statement is deficient because it does not provide accurate pricing information. Specifically, the Company failed to provide information in plain language and common terms and in a format that would enable customers to compare various electric generation services offered and the prices charged for each type of service in violation of 52 Pa. Code § 54.43(1). Additionally, the Company failed to ensure that its offering "contain[ed] information, verbally or written, in plain language designed to be understood by the customer," as required by 52 Pa. Code § 111.12(d)(5). These failures include

the Company's use of terms, such as "basic service price," inconsistently with their meanings in the Commission's regulations and the Company's use of a pricing provision so vague that customers did not know what they would or could be charged. Additionally, the Company fails to adequately identify the conditions and limits on price variability, as the Company does not list all of the factors that could affect the calculation of the price charged or that the profit margin, which is identified in the Disclosure Statement, is itself variable. These omissions violate the Commission's regulation at 52 Pa. Code § 54.5(c). Joint Complainants have also shown that the Company's omissions and actions in this regard are misleading, deceptive and have caused confusion for consumers, and the Company is therefore, also in violation of the Commission's regulations at 52 Pa. Code §§ 54.43(f) and 111.12(d)(1), requiring compliance with consumer protection laws. As such, Joint Complainants respectfully request a finding that Respond Power has violated and continues to violate the Commission's regulations at 52 Pa. Code §§ 54.5(c), 54.43(1), 54.43(f), 111.12(d)(1) and 111.12(d)(5).

8. Count VIII – Prices Nonconforming to Disclosure Statement.

In its Main Brief, Respond Power asserts that Joint Complainants alleged that the Company's prices in early 2014 did not reflect the cost of serving residential customers in early 2014, but Count VIII must be dismissed because this is an analysis and ratemaking principle that applies to regulated utility rates but not EGS rates. Respond Power M.B. at 140. Further, Respond Power describes the Commission's Order on Interlocutory Review³¹ as answering a "narrow question posed by the Joint Complainants in a vacuum," that the Commission could determine whether an EGS's price conformed to its disclosure statement. Respond Power M.B. at 140-41.

³¹ Commonwealth of Pennsylvania by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. Respond Power, LLC, Docket No. C-2014-2427659, Opinion and Order (Apr. 9, 2015) (Order on Interlocutory Review).

Joint Complainants submit that Respond Power has misstated Joint Complainants' claim in Count VIII and erroneously applied the affidavit attached the Joint Complaint. In Count VIII, Joint Complainants refer to and incorporate Respond Power's variable rate pricing provision, which states the Respond Power rate would reflect the Company's Generation Charge in 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" and a profit margin. See OAG/OCA Exh. 1 (Joint Complaint) at ¶ 86. As the variable rate pricing provision appears, *on its face*, to state that Respond Power will determine its prices based on its costs to serve, and having had an expert determine that the costs to serve in early 2014 would have been approximately 23¢ per kWh, Joint Complainants had sufficient basis *to allege* that Respond Power's variable rate plan prices in early 2014 did not conform to the variable rate pricing disclosure in the Company's Disclosure Statement. As such, the affidavit attached to the Joint Complaint provided the basis for the allegations in Count VIII.³²

During this proceeding, however, Joint Complainants' expert Dr. Estomin conducted a complete analysis of this issue specific to Respond Power, using the information the Company provided in responses to discovery to determine whether the variable rate prices the Company charged in early 2014 were calculated by the Company pursuant to the list of price-affecting items identified in the Company's Disclosure Statement, and Dr. Estomin determined that the prices were not calculated in conformity with the list of identified costs in the Disclosure Statement. In fact, Dr. Estomin testified that he could find no meaningful connection between

³² Joint Complainants submit that Count VIII is not the sole Count supporting the requested remedies. See also e.g. Count II – Misleading and Deceptive Promises of Savings.

the factors identified in the Company's Disclosure Statement and the prices charged. See OAG/OCA St. 2 at 6.

As the Joint Complainants stated in their Main Brief, Joint Complainants' expert witness Dr. Estomin conducted an analysis of the cost components identified in the variable rate pricing provision of Respond Power's Disclosure Statement and the prices that Respond Power charged its customers on variable rate plans in January, February and March 2014 and concluded that:

The Company's Disclosure Statement explains to customers that the rates charged by Respond Power over any given billing cycle would be based on the PJM day-ahead energy price, other PJM and related charges, plus a profit adder. From examination and analysis of Respond Power's rates, it is clear that the Company's customers served under the variable rate plans were charged rates that were not determined by the factors specified in the Company's Disclosure Statement. Additionally, the available evidence suggests that Respond Power does not determine rates that are based on costs in any meaningful and consistent way. Further, even if Respond Power's rates were based on the costs that the Company incurred, those costs were not consistent with the Company's Disclosure Statement.

OAG/OCA St. 2 at 6. Simply put, Dr. Estomin could find no meaningful connection between the factors identified in the Company's Disclosure Statement and the prices charged. In fact, Dr. Estomin determined that the variable rates that Respond Power charged "could not possibly be tied to the costs that the Company incurred for the provision of electricity to its variable rate customers." OAG/OCA St. 2 at 13-14.

In its Main Brief, Respond Power argues that the Company's variable price is based on a number of factors such that the Commission cannot perform a simple comparison of Respond Power's prices with the elements in the Disclosure Statement.³³ Respond Power M.B. at 141.

³³ Joint Complainants submit that this is an admission by Respond Power of its violation of 52 Pa. Code § 54.43(1), which requires the Company to provide information in plain language and common terms and in a format that would enable customers to compare various electric generation services offered and the prices charged for each type of service. See OAG/OCA Exh. 1 (Joint Complaint) at Count VII. If the Commission cannot perform "a simple comparison" of the Company's prices based on the elements identified in the Disclosure Statement, neither can consumers.

The Company further argues that since there are no requirements for EGS profit margins, the Commission would be unable to fully re-create the development of the Company's price because the Commission would not be able to impute a reasonable rate of return to determine what the profit margin should have been. *Id.* at 141, 143-44. The Company also argues that the Commission will be on a slippery slope of engaging in a traditional cost of service analysis if it engages in a review of what the Company's prices should have been. Respond Power M.B. at 142, 143-44.

Joint Complainants submit that these Company arguments can be boiled down to the claim that it can simply charge whatever price it chooses regardless of its Disclosure Statement.³⁴ The Company's argument effectively shields it from any further scrutiny no matter what it does. Critically, the analysis performed by the Joint Complainants' expert witness in his testimony was not to determine what prices should have been, but to determine if there was any relationship between the prices actually charged and the Disclosure Statement. Dr. Estomin concluded that there was no relationship, and the Company did not refute that conclusion.

The Company relies on the testimony of Mr. Crist, arguing that the Commission lacks requirements regarding EGS profit margins and the Commission cannot perform a cost of service analysis for an EGS. Instead, the Company asserts that the review would entail "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" or whether prices complied with any ceiling or specific index in the disclosure statement. Respond Power M.B. at 141-42, 143-44. Joint Complainants submit that these arguments are circular and ignore the

³⁴ The Company also refers to its Disclosure Statement as being Commission approved. As discussed in Section IV.C.7.a above, the Commission has not approved Respond Power's Disclosure Statement.

disclosure requirements in the Commission's regulations. Furthermore, as Dr. Estomin testified in response to Mr. Crist's statements:

[T]he Company's Disclosure Statement, while representing that prices are based on the PJM spot market, is in fact so vague as to be without real meaning. Whatever meaning can be imputed to the amorphous pricing mechanism alluded to in the Company's Disclosure Statement is then negated by the Company's perspective that rates can be established at any level, at any time, in any service area through changes in the Company's profit margin.

OAG/OCA St. 2-SR at 9. (Emphasis added).

The Company also argues that because it used the terms "other costs" and "profit margin" in the variable rate pricing provision in the Disclosure Statement, Joint Complainants' "costs of service approach" is problematic. Respond Power M.B. at 142-43. Respond Power cited to Dr. Estomin's testimony that "other costs" could include many types of costs but then misconstrued other points in Dr. Estomin's testimony. Dr. Estomin did not testify that "other costs" *should* be accepted as a catchall category that includes anything; instead, Dr. Estomin merely recognized the Company's position as such. Further, although argued by the Company, Dr. Estomin did not testify that Respond Power should have included a price formula in its Disclosure Statement. As Dr. Estomin testified:

In my Direct Testimony, I do not suggest that the Company provide a mathematical prescription or spreadsheet of how the Company's rates are calculated. What I did state is that the Company's Disclosure Statement does not provide any information that would allow a customer to determine, within some level of approximation, if the rate being charged for a given month is reasonable or appropriate based on available cost data or information that could be provided by Respond Power.

OAG/OCA St. 2-SR at 6.

Finally, the Company relies on its CEO Mr. Horowitz's testimony, wherein Mr. Horowitz testified that the Company relied on actual costs of commodity, and he provided a comparison of *retail prices* that Respond Power charged its customers and *wholesale*

prices.³⁵ See Respond Power M.B. at 144-45. Further, the Company claims that Mr. Horowitz testified that had the Company added a 2¢ profit margin to its PJM Day Ahead costs and “other costs,” Respond Power would have charged customers significantly more than it did. Id. at 145-46.

Joint Complainants submit that Mr. Horowitz’s testimony does not rebut Joint Complainants’ showing that the Company’s prices did not conform to the factors identified in the Disclosure Statement. As Dr. Estomin testified regarding Mr. Horowitz’s comparison of its retail prices charged to wholesale prices:

A comparison of retail prices over a billing cycle with a maximum day-ahead wholesale market price in the highest priced hour in the calendar quarter is without any meaning whatsoever. No meaningful inferences can be drawn from such a comparison.

OAG/OCA St. 2-SR at 1. Mr. Horowitz’s comparison of the prices gleaned from *two separate and distinct markets* should be rejected.

Additionally, Joint Complainants submit that the Company claims that Mr. Horowitz testified that had the Company added a 2¢ profit margin to its PJM Day Ahead costs and “other costs,” Respond Power would have charged customers significantly more than it did are not supported by Mr. Horowitz’s testimony. Joint Complainants sought a clarification from Mr. Horowitz of whether a certain identified sum in his Rebuttal Testimony was savings passed onto customers from the Company’s hedges or the additional amount the Company would have charged customers had it charged a 2¢ profit, and Mr. Horowitz could not provide an explanation of the meaning of his Rebuttal Testimony. See Tr. 1354-56.

Joint Complainants submit that Respond Power’s prices charged to customers in the first quarter of 2014 did not conform to the Company’s Disclosure Statement in violation of 52 Pa.

³⁵ These wholesale prices were not Respond Power’s actual costs to purchase power. See OAG/OCA St. 2-SR at 2.

Code §§ 54.4(a) and 54.5(a). As such, Joint Complainants request a finding that Respond Power's prices charged to residential variable rate customers in the first quarter of 2014 did not conform to the Company's Disclosure Statement in violation of the Commission's regulations at 52 Pa. Code §§ 54.4(a) and 54.5(a).

9. Count IX – Failure to Comply with the TRA.

Respond Power argues in its Main Brief that the Commission does not have jurisdiction to enforce the provisions of the TRA, and even if the Commission had such jurisdiction, the Joint Complainants have not established any violations. Respond Power M.B. at 147. As detailed above in Section II.F, the Joint Complainants are properly before the Commission. The Commission has incorporated the TRA into its own regulations and therefore, has authority to address this issue.

Furthermore, the Joint Complainants have met their burden of proof and have submitted evidence to prove:

- Respond Power failed to provide a written contract that complied with the requirements of the TRA, thereby violating Section 111.10(a)(1)-(2) of the Commission's regulations, 52 Pa. Code § 111.10(a)(1)-(2), that require a supplier, or its agent who conducts telemarketing and sales activities on its behalf, to comply with the TRA;
- Respond Power failed to mail the required terms of services or disclosure documents violating Section 111.10(c) of the Commission's regulations, 52 Pa. Code § 111.10(c); and
- Respond Power failed to confirm whether its third-party telemarketing vendors were properly registered as telemarketers, violating Section 111.10(a)(2) of the Commission's regulations, 52 Pa. Code § 111.10(a)(2).

Respond Power, in its Main Brief, relied on an exception in Section 2245(d) of the TRA, 73 P.S. § 2245(d), to claim that the Company was exempt from providing a written contract pursuant to the TRA because Respond Power's sale of electric supply was regulated by other laws of the Commonwealth, specifically in 52 Pa. Code § 111.7.³⁶ Respond Power M.B. at 147-48. Respond Power also asserts that Section 54.5 of the Commission's regulations, 52 Pa. Code § 54.5, dictates the terms of an EGS's disclosure statement. Respond Power argues that the disclosure statement is the contractual sale of electric generation supply, and thus, Respond Power is exempt from providing a written contract pursuant to the TRA. The Joint Complainants submit, however, that EGSs are subject to all requirements of the TRA, except the requirement that the EGS register with the OAG.³⁷ See 52 Pa. Code § 111.10(a)(1).

The Joint Complainants thoroughly responded to these two assertions in their Main Brief. See OAG/OCA M.B. at 124-29, 130-31. Neither Section 54.5 nor Section 111.7 of the Commission's regulations, 52 Pa. Code §§ 54.5 and 111.7, negate or supersede Respond Power's requirement to provide a written contract that provides the disclosures required by Section 2245(c) of the TRA, 73 P.S. § 2245(c), and to obtain a customer's signature to confirm enrollment as required by Section 2245(a)(7) of the TRA, 73 P.S. § 2245(a)(7). EGSs are subject to all requirements of the TRA, except the requirement that they register with the OAG. See 52 Pa. Code § 111.10(a)(1) and Rulemaking Re: Marketing and Sales Practices for the Residential Energy Market, Docket No. L-2010-2208332, Corrected Final Rulemaking Order at 8 (Oct. 24, 2012) ("We also take this opportunity to remind suppliers of their obligation to

³⁶ Ironically, the Joint Complainants would again note that Respond Power argues elsewhere in its Brief that the Commission does not regulate Respond Power's sale of electricity or the prices it can charge. Respond Power also argues that the Commission has no jurisdiction over its "contracts."

³⁷ The Company does not address Joint Complainants' expert testimony that Respond Power's third-party telemarketing vendors were not properly registered with the OAG in violation of 52 Pa. Code § 111.10(a)(2). See OAG/OCA M.B. at 129 citing OAG/OCA St. 1 at 73 and Exh. BRA-4. As such, Respond Power has admitted to this violation.

respect all federal, state and local laws related to sales and marketing and to note that nothing in these regulations is intended to vacate or supersede any other existing federal, state or local requirement.”).

Joint Complainants submit that the Company’s legal arguments regarding jurisdiction and the meaning of the Commission’s regulations at 52 Pa. Code §§ 54.5 and 111.7 must be rejected. Joint Complainants have shown that Respond Power has violated the Commission’s regulation at 52 Pa. Code § 111.10 by failing to comply with the TRA, failing to provide Disclosure Statements to customers, failing to ensure its telemarketing vendors complied and continue to comply the obligation to register with the OAG. With these failings, Joint Complainants submit that Respond Power has also violated the Commission’s regulations at Sections 54.43(f) and 111.12(d)(1), 52 Pa. Code §§ 54.43(f) and 111.12(d)(1), which prohibit misleading and deceptive conduct.

D. Relief Requested.

1. Introduction.

As Joint Complainants discussed in their Main Brief, the appropriate remedies in this litigated proceeding include license revocation, refunds, a civil penalty and hardship fund contributions. See OAG/OCA M.B. at 131-70. Joint Complainants also discussed license conditions, should the Commission determine not to revoke Respond Power’s EGS license. See OAG/OCA M.B. at 170-75.

In the its Main Brief, Respond Power argues that its Settlement with I&E addresses the allegations in both the Joint Complaint and I&E’s Formal Complaint, as the Complaints contain the same allegations with the exception of three allegations contained in the Joint Complaint³⁸

³⁸ Respond Power identifies the three allegations in the Joint Complaint that are not included in I&E’s Formal Complaint as: (1) violations of the TRA; (2) failing to provide accurate pricing information; and (3) letters and

that are not in I&E's Formal Complaint and two allegations in I&E's Formal Complaint³⁹ that are not in the Joint Complaint. Respond Power M.B. at 186-89. The Company asserts that its Settlement with I&E contains remedies "designed to adequately and effectively address all of the allegations contained in both" Complaints. *Id.* at 188. As discussed in more detail in Section V below and Section V of Joint Complainants' Main Brief, Joint Complainants object to the I&E/Respond Power Settlement as wholly inadequate to address the Company's significant violations of the Public Utility Code and Commission's regulations and orders. As such, Joint Complainants submit that it is not appropriate to find that the Settlement is adequately designed to address the allegations in the Joint Complaint, particularly based on the substantial evidence adduced by the Joint Complainants. Further, it is irrelevant to compare the I&E/Respond Power Settlement to settlements of other EGS cases, as each case must be determined on its own facts and circumstances.

Also in its Main Brief, Respond Power asserts that having to defend itself against three⁴⁰ governmental entities with their own position as to the proper resolution of the matter has led to an absurd situation where I&E is now litigating against Joint Complainants and the Company

inserts that violate the Consumer Protection Law. Respond Power M.B. at 187-88. Joint Complainants submit that, as discussed above in Sections IV.C.9, IV.C.7 and IV.C. 4, the Company does not accurately identify Joint Complainants' allegations against Respond Power, the bases for the allegations, the overwhelming evidence supporting the allegations or the Commission's jurisdiction to adjudicate the allegations. See also OAG/OCA M.B. at Sections IV.C.9, IV.C.7 and IV.C.4.

³⁹ Respond Power identifies the two allegations in I&E's Formal Complaint that are not included in the Joint Complaint as: (1) billing errors and (2) inaccurate or incomplete sales agreements, including that some agreements failed to note whether the customer signed up for a fixed or variable price. Respond Power M.B. at 188. Joint Complainants note that they alleged that the Company failed to disclose material terms, such as the price being fixed or variable, in Count III of the Joint Complaint. Further, as discussed in Section IV.C.3 above and in Section IV.C.3 of Joint Complainants' Main Brief, Joint Complainants showed, *inter alia*, that customers' sales agreements were improperly changed from fixed to variable by Respond Power sales agents after obtaining customers' signatures on the documents.

⁴⁰ Joint Complainants note that there is a fourth government agency involved in this proceeding, as the OSBA intervened in both the Joint Complaint and the I&E Formal Complaint proceedings prior to their consolidation.

must defend “multiple civil prosecutions by several governmental entities for substantially the same acts, transactions, or conduct.” Respond Power M.B. at 189. The Company claims the situation is akin to dual prosecutions of a criminal defendant, which is frowned upon as unfair and an inefficient use of governmental resources. See Respond Power M.B. at 190, citing Petite v. United States, 361 U.S. 529 (1960), Rinaldi v. United States, 434 U.S. 22 (1977), and United States Attorneys’ Manual 9-2.031 (July 2009).⁴¹ Respond Power further asserts that it is bad public policy to permit several public advocates to pursue an EGS for the same alleged conduct and “fight with each other in the process of doing so.” Id. at 189. The Company asserts that the Commission should discourage the “excesses of government” of requiring Respond Power to defend itself against three public advocates that all “have the same mission of protecting residential customers” by approving the Company’s Settlement with I&E and concluding this matter. Id. at 190-91.

As Joint Complainants discussed in their Main Brief, the OAG and the OCA are statutory advocates with statutory obligations. See OAG/OCA M.B. at 142-43. Further, the OCA, OAG and I&E do not all represent exclusively residential consumers, as claimed by Respond Power. The OCA is authorized to represent the interests of consumers before the Commission in any matter properly before the Commission. 71 P.S. § 309-4(a). Additionally, this action was brought by the Attorney General “in the name of the Commonwealth,” as authorized by the Consumer Protection Law, because the Attorney General had reason to believe that the Company is using or is about to use any “unlawful method, act or practice” and further determined the proceedings would be in the “public interest.” See 73 P.S. § 201-4. With regard to I&E, “[i]f

⁴¹ Petite involved an internal Department of Justice policy *designed for efficiency within the Department* as well as fairness to defendants. 361 U.S. 529, 530. The Court noted that the United States Attorney General recognized the same policy in its office. Id. at 531; Rinaldi, 434 U.S. 22, 27-29. Joint Complainants submit that such policy is merely that, a policy. Such policy is not recognized in the statutes empowering the OCA, OAG and I&E in this proceeding.

necessary to protect the public interest, the Law Bureau, pursuant to its prosecutor function, may initiate and participate in proceedings before the commission.” 66 Pa. C.S. §§ 308(b) and 308.2(a). Joint Complainants submit that these three agencies fulfill different functions, as they represent different interests pursuant to statute, and at times may not agree on the appropriate resolution of matter as it relates to their constituency. In this proceeding, Joint Complainants and I&E filed complaints near in time, and the proceeding was consolidated.

Joint Complainants submit that Respond Power’s assertion that this regulatory structure is overly onerous and should be discouraged must be rejected. It is not appropriate for the Company to request that the Commission discourage the OCA and OAG, or any other statutory advocate, from carrying out their statutory duties. Further, Respond Power decided, of its own volition, to come to the Commonwealth and obtain licensure to compete in Pennsylvania’s competitive retail electric market. The Company should have made itself aware of the regulatory structure in Pennsylvania prior to seeking an EGS license and was directed to comply with the Public Utility Code and the Commission’s regulations and orders. As discussed at length in Joint Complainants’ Main Brief and this Reply Brief, Respond Power obtained its EGS license and then engaged in practices that violated the Public Utility Code and Commission regulations and orders, to the harm of the Company’s Pennsylvania customers. As such, it is improper for the Company to now claim that it is a victim of “prosecutorial overzealousness.” See Respond Power M.B. at 190.

Joint Complainants further submit that Respond Power has created this “absurd situation.” The Company essentially sought to shop for the most sympathetic plaintiff when the Company negotiated with one statutory advocate without including the other parties to the proceeding in an effort to reach a settlement and then attempt to force it on the other parties to

the proceeding. As stated above, Joint Complainants object to the Settlement as wholly inadequate to address the numerous violations by Respond Power of the Public Utility Code and the Commission's regulations and orders, which have been demonstrated by the substantial evidence of three expert witnesses, one non-consumer witness and 169 consumer witnesses and which violations remain ongoing. See Section V below and OAG/OCA M.B. at Section V.

2. “Reconciliation of Remedies” Is Not a Recognized Legal Concept.

In its Main Brief, the Company asserts that if the Company's Settlement with I&E is approved, “it is necessary for the Commission to reconcile any remedies afforded by the Settlement with those sought by the Joint Complainants” so that the Company is not penalized twice for the same conduct. Respond Power M.B. at 191. The Company claims that the ALJs “recognized the importance of reconciling the remedies” in the proceedings against HIKO⁴² but do not provide a citation to a discussion regarding “reconciling remedies.” Id.

Joint Complainants submit that Respond Power misinterprets the proceedings in the HIKO cases. In I&E v. HIKO, I&E sought a civil penalty, refunds for customers in HIKO's guaranteed 1% to 7% savings program in the amount of the minimum 1% discount, and EGS license revocation. See I&E v. HIKO I.D. at 4. In OAG/OCA v. HIKO, Joint Complainants sought refunds; license suspension or revocation, if applicable; a civil penalty; and an order from the Commission directing HIKO and its employees, agents and representatives to cease the prohibited conduct. See OAG/OCA v. HIKO I.D. at 1. These matters were not consolidated, but I&E was a party in OAG/OCA v. HIKO, and the OCA and OAG were parties in I&E v.

⁴² Commonwealth of Pennsylvania by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. HIKO Energy, LLC, Docket No. C-2014-2427652, Initial Decision (Aug. 21, 2015) (OAG/OCA v. HIKO I.D.) (final Order entered Dec. 3, 2015) (OAG/OCA v. HIKO Final Order); Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. HIKO Energy, LLC, Docket No. C-2014-2431410, Initial Decision (Aug. 21, 2015) (I&E v. HIKO I.D.) (final Order entered Dec. 3, 2015) (I&E v. HIKO Final Order).

HIKO.⁴³ I&E v. HIKO I.D. at 4. Joint Complainants and OSBA reached a settlement with HIKO, and the parties filed a Joint Petition for Approval of Settlement; I&E did not oppose the settlement “as long as nothing in the settlement precluded I&E from separately prosecuting its complaint.” OAG/OCA v. HIKO I.D. at 3-4.

In the settlement HIKO agreed to refunds, *inter alia*, to the guaranteed savings group reflecting a 3.5% discount off the Price to Compare (PTC) as well as contributions to EDCs’ hardship funds and extensive business modifications. See OAG/OCA v. HIKO I.D. at 11-23. I&E litigated its claims against HIKO in I&E v. HIKO. As the ALJs recognized, the vast majority of I&E’s brief in support of its position primarily focused civil penalties and the request to revoke HIKO’s EGS license. I&E v. HIKO I.D. at 60. In its complaint proceeding, I&E sought refunds in an amount *less than* the amount HIKO had agreed to provide in the company’s settlement with Joint Complainants (I&E sought refunds reflecting 1% savings; HIKO agreed to refunds reflecting 3.5% savings), and the ALJs, therefore, found that I&E’s requested refund relief is *fully satisfied* by the settlement. I&E v. HIKO I.D. at 61. The ALJs denied I&E’s request for license revocation, however, due to the “substantial consumer relief” in the settlement with Joint Complainants. Id. at 60.

Joint Complainants submit that the ALJs’ analysis regarding relief in I&E v. HIKO does not provide support for Respond Power’s arguments here. First, I&E *did not oppose* Joint Complainants’ settlement with HIKO. Second, I&E was permitted to litigate its complaint and seek a litigated result and remedies of I&E’s choosing, and the OCA and OAG did not oppose I&E’s ability to go forward with its litigation or oppose the relief that I&E sought in I&E v. HIKO. Third, I&E obtained a finding of multiple violations of one Commission regulation, 52

⁴³ OSBA was a party to OAG/OCA v. HIKO but not a party to I&E v. HIKO.

Pa. Code § 54.4(a), and an order of relief in the form of a civil penalty. See I&E v. HIKO I.D. at 62-63; I&E v. HIKO Final Order at 43-44.

Yet, in this matter where Joint Complainants object to the I&E/Respond Power Settlement as wholly inadequate, the Company asserts that *because* it reached the Settlement with I&E, Joint Complainants' claims should effectively disappear. Joint Complainants submit that the Company's Settlement with I&E does not *fully satisfy* the relief sought by Joint Complainants, especially with regard to refunds.⁴⁴

Also, should additional remedies beyond those agreed to in the Settlement be imposed on Respond Power based on the Joint Complaint, Respond Power would not be penalized twice, as the Company asserts. All of the terms in the I&E/Respond Power Settlement, including the business modifications, are completely voluntary on the Company's part, and the Settlement specifically provides that they "are not and should not be considered to be or construed as admissions of liability or wrongdoing on the part of the Company." Settlement at ¶ 18. Further, the Settlement terms "are not to be used in any further proceeding, including but not limited to, the Commission, the Pennsylvania court system or the federal court system, relating to this or any other matter, as evidence of unlawful behavior, or as an admission of unlawful behavior by the Company." Id. Joint Complainants, however, are seeking remedies based on findings of violations of the Public Utility Code and the Commission's regulations and orders.

⁴⁴ As discussed in Section V.C and V.D of Joint Complainants' Main Brief and herein, the Company may not be required to pay the entire settlement refund amounts due to the reverter provision. As such, the Company's request for a credit of \$3 million (*i.e.* the refund amount in the Settlement) is not appropriate. See Respond Power M.B. at 199. The proper credit would be for refunds amount *actually paid* pursuant to the Settlement. See OAG/OCA M.B. at 149 FN 44. Furthermore, the Settlement provides a credit to Respond Power for the one-time re-billing event of February 2014, which Joint Complainants submit would not be appropriate for any refund order pursuant to the Joint Complaint because the Joint Complainants' refund calculation already provides Respond Power credit for the re-billed price. See OAG/OCA M.B. at 150-52. These credits provisions alone reduce the Settlement's refund value to approximately \$1 million, which pales in comparison to the **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL** that Joint Complainants have proven is due to customers.

Finally, Joint Complainants submit that Respond Power's comparisons of this proceeding to the Joint Complainants' proceedings against IDT Energy, Inc.⁴⁵ (IDT) and Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric⁴⁶ (PaG&E) are irrelevant, as each case must be determined based on its own facts and circumstances. See Respond Power M.B. at 193-94. As the Commission stated in the I&E v. HIKO Final Order when it rejected a similar argument by HIKO:

With respect to HIKO's claims that the ALJs did not properly consider the level of civil penalties approved against other EGSs, including those in settled cases, we find HIKO's argument to be erroneous. First, as to the precedential value of settlements, while the facts in *Bell* are different, that does not diminish the well-established legal principle often invoked by and before this Commission that settlements do not set precedent. Cases that proceed to a settled conclusion are often incomparable in many ways.

I&E v. HIKO Final Order at 52-53. As such, Respond Power's comparisons to other EGS cases should be rejected.

3. License Revocation.

In their Main Briefs, Respond Power and I&E assert that because the Company has agreed to modifications of its sales, marketing and business practices in its Settlement with I&E, no purpose would be served by revocation or suspension of its EGS license. Respond Power M.B. at 208; I&E M.B. at 31. The Company and I&E also rely on the lack of license revocation or suspension in I&E v. HIKO and settlements by other EGSs with Joint Complainants. Respond Power M.B. at 208-209; I&E M.B. at 31-32. As discussed in Section V below and in Section V of Joint Complainants' Main Brief, the Company's Settlement with I&E is wholly

⁴⁵ Commonwealth of Pennsylvania by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. IDT Energy, Inc., Docket No. C-2014-2427657.

⁴⁶ Commonwealth of Pennsylvania by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric, Docket No. C-2014-2427656.

inadequate to address the Joint Complaint. Further, as discussed in the Section immediately above, the Company's and I&E's reliance on the findings and orders in OAG/OCA v. HIKO and I&E v. HIKO are misplaced and not applicable to this proceeding. Also, the Commission and `explicitly rejected a comparison by HIKO to other EGS cases involving Joint Complainants and I&E, stating that each case must be decided on its own merits. See I&E v. HIKO Final Order at 52-53. As such, Respond Power's and I&E's assertions should be rejected.

In its Main Brief, the Company also asserts that the Commission's authority to suspend or revoke an EGS's license is limited to instances where the EGS fails to fulfill its financial responsibility requirements of maintaining a bond or other security and state tax obligations, which are the only specific instances identified for license suspension or revocation under 66 Pa. C.S. § 2809(c). Respond Power M.B. at 209. Although Respond Power acknowledges that the Commission's regulation at 52 Pa. Code § 54.42 also provides that an EGS's license may be suspended or revoked for the violations listed therein, the Company asserts that there have been no allegations of the Company failing to maintain its obligations identified in Section 2809(c), and therefore, the Commission's authority to direct license suspension or revocation pursuant to 52 Pa. Code § 54.42 "is unclear, or nonexistent." Respond Power M.B. at 209. Joint Complainants submit that the Company's assertion ignores 66 Pa. C.S. § 2809(b) that a license would be issued only if, *inter alia*, "it is found that the applicant is fit, willing and able to perform properly the service proposed and to conform to the provisions of this title and the lawful orders and regulations of the [C]ommission under this title, including the [C]ommission's regulations regarding standards and billing practices" See 66 Pa. C.S. § 2809(b). It is axiomatic that if the Commission has the power to grant the license, it also has the power to take it away.

Moreover, Joint Complainants submit that the Company's assertion must be rejected, as it ignores the Commission's duties pursuant to 66 Pa. C.S. § 2809(e). Section 2809(e) requires that the Commission impose requirements necessary to maintain the present quality of service provided by electric utilities does not deteriorate, including assuring that 52 Pa. Code Ch. 56 (relating to standards and billing practices for residential utility service) are maintained. See 66 Pa. C.S. § 2809(e). The Commission promulgated Section 54.42 of its regulations pursuant to, *inter alia*, 66 Pa. C.S. § 2809. See 52 Pa. Code Ch. 54. As such, Joint Complainants submit that the Commission's authority to revoke Respond Power's EGS license in this proceeding is clear. See also OAG/OCA M.B. at 134.

As Joint Complainants discussed in their Main Brief, license revocation is appropriate in this proceeding and necessary to ensure the integrity of the Commonwealth's competitive retail electricity market.⁴⁷ See OAG/OCA M.B. at 133-39. The Settlement contains various business modifications, but these modifications are not adequate to address all of the violations shown in this matter. Notably:

- Respond Power's advertisements and marketing materials used in 2013 and early 2014 (as well as those relied on earlier based on the consumer testimony and exhibits in the record) were deceptive and misleading because they falsely suggest that selecting Respond Power would result in savings and lower bills;
- Respond Power's pricing disclosures are vague, insufficient and deceptive. Further, the Company charges prices that do not conform to its Disclosure Statement. In addition, Respond Power has charged prices to Pennsylvania consumers that do not comply with the promotional statements and verification scripts that induced customers to enroll;
- Respond Power has engaged in a pattern and practice of deceptive and misleading statements in its interactions with Pennsylvania consumers in both its sales and verification calls and in its responses to the many customers who

⁴⁷ Joint Complainants submit that it would be appropriate with a permanent revocation of the Company's EGS license to extend that revocation to include the prohibition of the Company's owners, directors and officers from maintaining the same or similar positions in a licensed or license-seeking supplier in the Commonwealth.

attempted to contact Respond Power about the extremely high prices charged by Respond Power starting in January 2014;

- Respond Power’s actions in response to its high variable prices in early 2014 were unreasonable, particularly in light of the Company’s poor customer service and its inconsistent policies related to refunds; and
- Respond Power has not had sufficient managerial and technical abilities to conduct energy sales in Pennsylvania. Respond Power has failed to properly supervise and train its marketing agents, including door-to-door, telemarketing and customer service personnel. In addition, Respond Power’s compliance functions are insufficient. These failures have contributed to improper enrollments and other actions, as described in more detail in my testimony, which have adversely impacted Pennsylvania consumers.

OAG/OCA M.B. at 137-38, citing OAG/OCA St. 1 at 5-6. As such, Joint Complainants submit that permanent revocation of Respond Power’s EGS license is not only appropriate but necessary to ensure the integrity of the Commonwealth’s competitive retail electricity market.⁴⁸ Joint Complainants further submit that failure to revoke Respond Power’s EGS license would send a signal to other licensed suppliers that these types of overt violations and disregard for the Commission’s authority and jurisdiction are acceptable.

4. Refunds.

In its Main Brief, Respond Power asserts the Commission lacks jurisdiction to order refunds in this matter, and should the Commission find that it has the jurisdiction to direct refunds, none are appropriate in this matter pursuant to the two exceptions the Commission carved out of the “no refund rule” in the IDT Interlocutory Order⁴⁹ and the third exception carved out in Kiback v. IDT Energy, Inc., Docket No. C-2014-2409676, Order (Aug. 20, 2015). See Respond Power M.B. at 194-98. According to Respond Power, the two exceptions

⁴⁸ Further, as in other instances of a supplier leaving Pennsylvania, Respond Power’s customers should be provided written notice as required in 52 Pa. Code § 54.41(b) that Respond Power is withdrawing from the market and advised that they may choose another supplier or return to default service.

⁴⁹ Commonwealth of Pennsylvania by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. IDT Energy, Inc., Docket No. C-2014-2427657. Opinion and Order (Dec. 18, 2014) (IDT Interlocutory Order).

to the “not refund rule” carved out in the IDT Interlocutory Order are when a customer is slammed and when an EGS overbills a customer by failing to bill in accordance with the disclosure statement. Id. at 195. According to Respond Power, the third exception to the “no refund rule” carved out in Kiback is when a customer is promised by an EGS salesperson that the price would always be below the PTC but the EGS charges the customer prices that are higher than the applicable PTC. Id. at 196.

Joint Complainants submit that the Commission has not announced a “no refund rule” with regard to suppliers, and as such, there are no exceptions carved out. Rather, the Commission found that it has the plenary authority under Section 501, 66 Pa. C.S. § 501, to direct an EGS to issue a credit or refund for an overbill in order to carry out the consumer protections in the Choice Act, 66 Pa. C.S. Ch. 28. See IDT Interlocutory Order at 17-18; Kiback, Order at 33. Joint Complainants discuss the Commission’s authority and jurisdiction to direct Respond Power to pay refunds to customers in this proceeding in their Main Brief at pages 139-48, and Joint Complainants incorporate the discussion herein.

Joint Complainants submit that the Commission’s authority to direct suppliers to issue refunds is clear under the Commission’s plenary power in 66 Pa. C.S. § 501. Further, as discussed above in Section II.C, if the Commission determines that the requirement is necessary to maintain the present quality of service standards and billing practices for residential utility service, and the Commission may require EGSs to provide refunds to customers. See 66 Pa. C.S. § 2809(e); See also Delmarva, 582 Pa. 338, 354-55, 870 A.2d 901, 911 (Pa. 2005). Here, Joint Complainants have shown, *inter alia*, that Respond Power’s prices charged did not match the Company’s salespeople’s promises of savings or the Disclosure Statement, in violation of, *inter alia*, billing practices in 52 Pa. Code §§ 54.4(a) and 54.5(a). As such, the Company’s assertions

that the Commission lacks authority or jurisdiction to direct refunds in this matter or that there are narrow circumstances in which the Commission may direct refunds, none of which apply to this matter, must be rejected.

Although the Company asserts that the refunds provided for in the Settlement are sufficient to also address Joint Complainants' prayer for relief in the form of refunds, as discussed in Section V below and Section V of Joint Complainants' Main Brief, the Settlement is wholly inadequate to address Joint Complainants' claims. As Joint Complainants discussed in their Main Brief, Joint Complainants have shown that, as required by 52 Pa. Code §§ 54.4(a) and 54.5(a) (requiring consistency among the marketed, disclosed and billed prices), Respond Power did not bill its variable rate customers in accordance with the terms identified in its Disclosure Statement in December 2013 or January, February and March 2014 in violation of the Public Utility Code and Commission regulations. See OAG/OCA M.B. at 148-52. Further, the Company did not deliver savings promised by Respond Power and its salespeople to induce customers to enroll. See OAG/OCA M.B. at 44-65, 76-80. Based on the customer billing data made available, Joint Complainants calculated that the aggregate amount due to Respond Power's customers for this period is approximately **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL**.⁵⁰ Id. citing OAG/OCA St. 3-SR (Rev) at 9. As such, Joint Complainants submit that for the Company's violations of, *inter alia*, 52 Pa. Code §§ 54.4(a) and 54.5(a) in failing to bill prices that conformed to its Disclosure Statement and promises of savings, Respond Power should be directed to provide full refunds to its customers for all amounts billed over the applicable PTCs for December 2013 through March 2014 and a full

⁵⁰ As Joint Complainants' witness Ms. Everette testified, based upon the Company's discovery responses, any "re-rates" (*i.e.* rebillings in February 2014 to some PPL and PECO customers) have already been accounted for in her calculations of overcharges by the Company. See OAG/OCA St. 3-SR (Rev) at 9-10. As such, the Company is not entitled to a credit on this amount for the value of the re-billings. See OAG/OCA M.B. at 151-52.

accounting of thereof in a compliance filing.⁵¹ Further, Respond Power should be directed to provide a full and complete accounting of the amounts billed over the applicable PTCs/refunds due for its customers as part of a compliance filing.

5. Civil Penalty and Contributions.

Respond Power asserts that the civil penalty in the Company's Settlement with I&E in the amount of \$125,000, which exceeds the civil penalties in Joint Complainants' settlements with other EGSs, is in the public interest and should be approved. Respond Power M.B. at 172-73, 193. Respond Power further asserts that no additional civil penalty is warranted because Joint Complainants did not propose a specific amount or present testimony analyzing the Rosi Factors. Id. at 193. The Company also notes that Joint Complainants have not asserted in Objections to the Settlement with I&E that the civil penalty is not adequate. Id.

Joint Complainants submit that as the Commission stated in the I&E v. HIKO Final Order, settlements in other cases are often incomparable and do not set precedent. See I&E v. HIKO Final Order at 52-53. As such, Respond Power's attempts to compare this matter to settlements in other cases should be rejected. Furthermore, Joint Complainants set forth a complete analysis of the civil penalty they assert should be leveled against Respond Power based on facts of record in this proceeding and a full Rosi Factor analysis in their Main Brief at pages 153-170.

Specifically, as detailed in their Main Brief, Joint Complainants submit that, for the violations of the Company's Licensing Order, the Public Utility Code and the Commission's

⁵¹ Joint Complainants reiterate that they recognize that disbursement of such a large refund amount to a large group of customers is a major undertaking. Joint Complainants are willing to offer assistance in the coordination and disbursement of refund amounts using the administrator that stands ready to coordinate and disburse refund amounts to customers pursuant to the settlements in the PaG&E (Docket No. C-2014-2427656), IDT (Docket No. C-2014-2427657) and HIKO (Docket No. C-2014-2427652) cases. While the use of the administrator process is efficient, it is not without cost. Therefore, in the event this process is used, the Company should be directed to pay the costs thereof.

regulations regarding consumer protections, disclosures, training and compliance monitoring of agents, billing in accordance with the marketing and disclosure statements, addressing customer complaints and switching of consumer accounts without proper authorization, Respond Power should be directed to pay a civil penalty in the amount of \$1,000 per violation, and the total penalty should be calculated using the Company's total number of variable rate plan customers in December 2013, January 2014, February 2014 and March 2014. Joint Complainants further submit that they have established the Company's violations over a much longer period of time, but the effects were felt most significantly by customers during December 2013 through March 2014. In this proceeding, Joint Complainants have established that Respond Power has violated at least 24⁵² of the Commission's regulations, with 5 of the regulations being violated in more than one way (52 Pa. Code §§ 54.4(a) (Counts II, III and VIII); 54.43(f) (Counts I, II, IV, VII and IX); 111.4 (Counts II and III), 111.5 (Counts II and III) and 111.12(d)(1) (Counts I, II, IV, VII and IX). All together Joint Complainants have established 36 specific violations of the Commission's regulations.⁵³ See gen'ly OAG/OCA M.B. at Section IV.C. This would result in

⁵² See OAG/OCA Main Brief at 158-60 and Section III above for the specific list of regulations violated.

⁵³ Respond Power had **BEGIN CONFIDENTIAL** **END CONFIDENTIAL** fewer customers in March 2014 than in December 2013 **BEGIN CONFIDENTIAL** **END CONFIDENTIAL**. See Respond Power St. 4-Rev at 5. If an even number of customers left Respond Power in each of the months January, February and March, approximately **BEGIN CONFIDENTIAL** **END CONFIDENTIAL** would have left Respond Power each month. Thus, the total number of customers in January, February and March would be **BEGIN CONFIDENTIAL** **END CONFIDENTIAL**, respectively.

Regarding the number of variable customers, Mr. Crist stated that the number of fixed rate customers grew by **BEGIN CONFIDENTIAL** **END CONFIDENTIAL** in December 2013 to **BEGIN CONFIDENTIAL** **END CONFIDENTIAL** March 2014. Id. If the number of fixed rate customers grew by an even number in each of the months January, February and March, the number of fixed rate customers in January, February and March would be **BEGIN CONFIDENTIAL** **END CONFIDENTIAL**, respectively. The number of customers on a variable rate is the difference between the total number of customers and the number of customers with a fixed rate. Therefore, using the above calculations, the number of customers with a variable rate were **BEGIN CONFIDENTIAL** **END CONFIDENTIAL** in December 2013, **BEGIN CONFIDENTIAL** **END CONFIDENTIAL** in January 2014, **BEGIN CONFIDENTIAL** **END CONFIDENTIAL** in February 2014 and **BEGIN CONFIDENTIAL** **END CONFIDENTIAL** in March 2014.

a civil penalty of **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL**. Joint Complainants submit that each of these violations of the Commission's regulations is also a violation of the Company's Licensing Order, and Respond Power should be assessed a civil penalty in the amount of least \$1,000 per violation for a total of at least \$36,000 for violations of the Licensing Order. Additionally, Respond Power should be assessed a civil penalty of at least \$1,000 per violation of the Public Utility Code, 66 Pa. C.S. § 2807(d)(1), for each of the twelve proven instances of slamming in this proceeding for a total of at least \$12,000. See OAG/OCA M.B. at Section IV.C.5 and Section IV.C.5 above. Thus, the sum of \$48,000 for the Licensing Order violations and the slamming violations should be added to the civil penalty identified above.

Joint Complainants submit that Respond Power's assertions that no further civil penalty is warranted should be rejected. Joint Complainants further submit that the civil penalty they have asserted is appropriate will deter the types of conduct shown to have occurred in this proceeding, which negatively impacts other market participants and the success of the retail market as a whole, and as such, is appropriate and necessary in this proceeding.

In its Main Brief, Respond Power asserts that it has agreed to a minimum contribution of \$25,000 to EDCs' hardship funds, and this is in the range of voluntary contributions by EGSs in other settlements with Joint Complainants. See Respond Power M.B. at 208. The Company further asserts that the Commission lacks authority to direct contributions to EDCs' hardship funds outside the context of a settlement. Id.

Joint Complainants submit that the calculation should be as follows: **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL**.

As Joint Complainants discussed in their Main Brief, given the amount and seriousness of the violations shown in this proceeding, it is appropriate to direct Respond Power to make sizeable contributions to the EDCs' hardship funds of at least \$150,000. See OAG/OCA M.B. at 170. As evidenced in the consumer testimonies, Respond Power's customers experienced great hardship and financial difficulties because of Respond Power's violations of its Licensing Order and the Commission's regulations. See e.g. Consumer Testimonies of Teresa Cole at 1101 (Has received monthly shut-off notices since her experience with Respond Power); Brittney Blymire at 775 (Unable to pay the bill and receives shut-off notices); Carol Sterck at 878 (Has difficulty paying \$527.77 per month pursuant to her PPL budget to cover Respond Power's charges); and Deborah Courtright Tr. at 206 (Is a widow living on social security, and it took all of her social security check to pay her electric bill). Further, the Commission has the plenary authority under 66 Pa. C.S. § 501 to require Respond Power to make contributions to EDCs' hardship funds.⁵⁴ As such, the Commission may require contributions to EDCs' hardship funds if it determines doing so is necessary.

Joint Complainants submit that customers continue to struggle to afford their electric bills in the Commonwealth. Contributions to EDCs' hardship funds will assist consumers who have experienced difficulties as a result of high electric bills. As such, Joint Complainants submit that contributions to EDCs' hardship funds should be part of the comprehensive relief directed in this matter.

6. EGS License Conditions.

In its Main Brief, Respond Power asserts that the Commission does not have the authority to impose injunctive relief, but regardless, the Company agreed to several conditions

⁵⁴ Joint Complainants note that Respond Power would not receive hardship fund contributions back, as these would go to the utility to support customers retaining service.

on its EGS license in its Settlement with I&E, which adequately address the allegations in the Joint Complaint. Respond Power M.B. at 208. As discussed above in Section II.D, it is unclear what nexus Respond Power is attempting with its claim that the Commission may not direct injunctive relief, as Joint Complainants have requested that the Commission, *inter alia*, direct the Company to stop violating and comply with the Public Utility Code and the Commission's regulations and orders (*i.e.* enforce compliance). See OAG/OCA Exh. 1 (Joint Complaint) at 21-22. As such, the Company's assertions in this regard should be rejected, as they are unsupported and irrelevant.

In their Main Brief, Joint Complainants asserted that the substantial violations of the Public Utility Code and the Commission's regulations and orders by the Company demonstrated in this proceeding are significant, particularly with regard to door-to-door marketing for which the Company provided in adequate training and no oversight. See OAG/OCA M.B. at 30-34, 158-60, 170-71. As discussed in Section V herein and Section V of Joint Complainants' Main Brief, the I&E/Respond Power Settlement is wholly inadequate to address these violations. As such, should the Commission determine to not revoke Respond Power's EGS license or determine to allow a possible reinstatement of the license, conditions should be placed on the Company's EGS license based on the Joint Complainants' proven violations and the ALJs' and Commission's specific findings of wrongdoing by the Company.

With regard to specific license conditions for Respond Power in this proceeding, Joint Complainants' expert witness Barbara R. Alexander testified:

Should this Commission determine to suspend, rather than revoke Respond Power's license, I recommend that, as a minimum, that Respond Power adopt reforms as a condition of any continued or renewed retail supplier license as follows:

- The Company must document that its sales misrepresentations and sales practices have been significantly reformed, including, but not limited to documentation that Respond Power has implemented revised training materials and actually conducted the required training for any agent authorized to market to and enroll Pennsylvania consumers;
- The Company has revised its sales scripts and other promotional materials to properly and completely explain the plan terms of service in plain language with terms approved for use in Pennsylvania and without any reference to savings or lower bills unless those promises are reflected in the Disclosure Statement and delivered through the prices charged to consumers;
- The Company discloses historical variable prices charged to the customers for each EDC in which it markets;
- The Company correctly identifies the customer's EDC Price to Compare when referencing utility prices;
- The Company demonstrates with reports and relevant documents that internal investigations and audits have occurred with information on when, where, and with what results;
- The Company revises its Disclosure Statement, welcome letters, and other disclosures required by Pennsylvania law and the Commission's regulations that respond to the defects I have identified throughout my testimony;
- The Company adopts practices designed to conform to the Commission's regulation requiring that EGSs comply with the TRA; and
- The Company adopts internal recordkeeping and documentary controls that will enable Respond Power to report on its Pennsylvania sales and compliance activities for each of its door-to-door and telemarketing sales vendors.

See OAG/OCA M.B. at 172-72 citing OAG/OCA St. 1 at 85-86. Joint Complainants submit that Respond Power should be directed to make these showings through a filing with the Commission, subject to review by the parties in a compliance proceeding. After receiving testimony and comment, the Commission could rule on the sufficiency of the filing. See Id.

Additionally, Joint Complainants submit that the door-to-door modifications in the Company's Settlement with I&E are wholly inadequate to address the Company's significant abuses documented on the record in this proceeding. According to the Company, the modifications in its Settlement with I&E go beyond other EGS settlements and include elements requiring marketers to wear photo identification, state the reason for the visit, identify the Company as an EGS that does not represent the EDC, and offer a business card. Respond Power M.B. at 212. As discussed in Joint Complainants' Main Brief, the magnitude and severity of the violations by Respond Power's door-to-door marketers and the Company's lack of training and oversight should be addressed with a moratorium on door-to-door marketing by the Company unless and until extensive modifications to the Company's door-to-door marketing practices, training and compliance monitoring is approved by the Commission and implemented as confirmed by the Commission. See OAG/OCA M.B. at 174.

V. JOINT COMPLAINANTS' OBJECTIONS TO I&E/RESPOND POWER SETTLEMENT

A. Introduction.

In their Main Brief, the Joint Complainants have shown that the I&E/Respond Power Settlement is not in the public interest for the following reasons:

- The Settlement is legally defective insofar as it seeks to settle claims of Joint Complainants, who are statutorily authorized to represent the consumers' and publics' interests, without their consent or input when Joint Complainants have diligently moved forward with their burden of proof in this matter.
- The "Release of Claims" provision in Paragraph 22 of the Settlement is inappropriate in this case, because it seeks to bar customers impacted by the Joint Complaint from potential relief under the Joint Complaint.
- The refund provisions in the Settlement do not provide for a fair disbursement of refunds to Respond Power's customers, because customers eligible for refunds are divided into two groups, despite the fact that there is no allegation or statement that one group's injuries are different or more substantial than the injuries in the

other group of consumers or that Respond Power's alleged violations of Commission regulations, policies and the Public Utility Code were more egregious to one group over the other.

- The amount of refunds in the Settlement is wholly inadequate and improperly deducts almost a million dollars in "rebillings" and nearly \$250,000 in "voluntary" refunds from the Refund Pool.
- The processes outlined in the Settlement for customers to obtain refunds are not in the public interest, because there is a disparity in the treatment of the two groups of customers eligible to receive a refund, and the process to obtain a refund for customers in the "silent" group is unnecessarily complex and will likely limit the number of customers who actually receive a refund in that group.
- There is an inconsistency in the Settlement and I&E's Statement in Support regarding whether all customers who filed informal complaints with the Commission will be eligible to receive a refund. Specifically, in I&E's Statement in Support, it appears that not all customers who filed informal complaints with the Commission will receive refunds, but rather I&E will be placed in the role of adjudicating the merits of informal complaints, which is outside the authority of I&E pursuant to 66 Pa. C.S. § 308.2.
- There is an inconsistency in the Settlement and I&E's Response to Joint Complainants' Initial Objections, wherein it is unclear whether customers who provided written testimony in this consolidated proceeding will be included in the first group of customers eligible for a refund under Paragraph 20 of the Settlement.
- The Settlement provides that funds that remain in the Refund Pool will be returned to Respond Power twelve months after the date of the letter sent by the Administrator, except that if customers claimed less than \$500,000, Respond Power will contribute the difference between total refunds claimed and \$500,000 to the electric distribution companies' (EDCs) Hardship Funds. Given this provision, there is no incentive for Respond Power to assist or cooperate in ensuring that the Refund Pool will be fully utilized.
- The alternative refund method is inadequate and unlikely to result in a different level of investigation into customer complaints and offers of refunds by Respond Power than that to date.
- In the Settlement, I&E commits to actively promote license retention by Respond Power and actively oppose the Joint Complainants' request for this penalty, which the Joint Complainants and I&E have developed on the record through consumer and expert testimonies.

- The Settlement is unnecessarily complex and, again, contains unjustified differential treatment of the two customers groups in that it appears that the distribution of refunds to customers who filed informal complaints with the Commission will be effectuated differently than the distribution of refunds to the “silent” customers. Specifically, the use of a third-party administrator seems to be limited to the distribution of refunds to customers who did not file an informal complaint at the Commission. The Settlement is unclear as to who will be distributing the refunds to customers who filed an informal complaint at the Commission or who will bear that expense.
- The \$50,000 amount that Respond Power will pay towards the costs and expenses of the Administrator under the Settlement is inadequate, in light of the fact that the Settlement provides for a two-step process for the distribution of refunds to customers who did not file an informal complaint at the Commission. These costs are likely to significantly exceed \$50,000, the excess of which will be deducted from the Refund Pool, thereby reducing the amounts available for refunds to customers.
- The Settlement authorizes Respond Power to obtain the third-party administrator, but does not require Respond Power to obtain an Administrator in a cost-effective manner or to retain an independent third-party administrator.
- The Settlement fails to implement adequate measures to remedy Respond Power’s door-to-door marketing violations and ensure future compliance with Pennsylvania law and Commission rules and regulations.
- The Settlement contains business modification that I&E did not seek in its Formal Complaint, and Joint Complainants are not included in the provisions pertaining to reporting requirements, document review, and ongoing compliance monitoring.
- The minimum contribution of \$25,000 to the EDCs’ Hardship Fund in the Settlement is inadequate.

See OAG/OCA M.B. at 175-202.

In their Main Briefs, Respond Power and I&E rely extensively on the Settlement’s resemblance to other settlement agreements between Joint Complainants and other EGSs in support of their position that the I&E/Respond Power Settlement is in the public interest. See e.g. Respond Power M.B. at 156; see also e.g. I&E M.B. at 22-25. Joint

Complainants submit that Respond Power's and I&E's reliance on other EGS settlements is not appropriate, as the Commission has recognized that settlements do not set precedent. See I&E v. HIKO Final Order at 52. The Commission has stated that cases that proceed to settlements are often incomparable in many ways. Id. at 52-53.

Those Settlements were based on the investigation and facts in those cases. Joint Complainants submit that the terms and conditions of settlements in these types of proceedings must be determined on a case-by-case basis, taking into consideration a company's overall business operations, number and type of customers, usage and prices charged, types of violations alleged, extent of violations and the resulting harm as well as the actions taken to address the harm. Moreover, prior investigations and investigations in other states should be considered when evaluating settlement terms and conditions in similar proceedings. Second, even in comparison to other EGS settlements, Joint Complainants submit that there are substantial differences between this Settlement and other EGS settlements. As a result, Joint Complainants submit that the Settlement is not in the public interest.

B. The Settlement is legally defective.

In their Main Briefs, both Respond Power and I&E assert that the Settlement adequately addresses the requests for relief made by both I&E and Joint Complainants. See Respond Power M.B. at 155; see also I&E M.B. at 25-29. As discussed in Joint Complainants' Main Brief, the Settlement does not adequately address the requests for relief made by Joint Complainants. Further, the Settlement is legally defective insofar as it seeks to settle the claims of Joint Complainants, who are statutorily authorized to represent the consumers' and the public's interests, without their consent or input when Joint Complainants have diligently moved forward with their burden of proof in this matter. OAG/OCA M.B. at 176-181. Additionally, the

“Release of Claims” provision in Paragraph 22 of the Settlement is inappropriate in this case, because it seeks to bar customers impacted by the allegations in the Joint Complaint from potential relief under the Joint Complaint. Id. at 179-180.

While I&E maintains in its Main Brief that the Settlement substantially resolves many of the issues in the Joint Complaint, I&E makes no argument to dispute Joint Complainants’ position that the Settlement is legally deficient insofar as it seeks to settle Joint Complainants’ claims or includes a “Release of Claims” provision which may bar customers from relief under the Joint Complaint. In response to Joint Complainants’ position that the Settlement is insufficient insofar as it seeks to settle Joint Complainants’ claims, Respond Power argues that the purpose of consolidation was to “avoid unnecessary delay or cost” and “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.” Respond Power M.B. at 158. Respond Power concludes, “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.” Id. (Emphasis added).

Respond Power has expressly acknowledged one key problem with the Settlement- it only satisfies one of the Complaints. While Joint Complainants do not dispute that there can be benefits of consolidating certain proceedings at the Commission, consolidation does not permit the respondent in a consolidated proceeding to enter into a settlement most beneficial to that party with the one plaintiff that is most willing to make that agreement over the objections of the other consolidated plaintiff(s). Joint Complainants submit that such an outcome would be tantamount to permitting “plaintiff shopping.” Thus, to the extent that Respond Power and I&E

are attempting to settle Joint Complainants' claims through their Settlement, Joint Complainants object.

Moreover, Respond Power asserts that in objecting to the Release of Claims provision in the Settlement, Joint Complainants "mistakenly view themselves as representing individual consumers." Respond Power M.B. at 158. Respond Power, however, completely mischaracterizes Joint Complainants' objection. Joint Complainants have consistently acknowledged their role in this proceeding as acting in their representative capacities as government agencies on behalf of the consumer interest and public interest as a whole, not on behalf of the specific individual consumers who filed complaints. See e.g. OAG/OCA M.B. at 142-43. Here, Joint Complainants are concerned that the Release of Claims provision in the I&E/Respond Power Settlement will bar the consumers from obtaining the relief that Joint Complainants are seeking in their role as statutory advocates in this proceeding.

Thus, to the extent that Respond Power and I&E purport to settle Joint Complainants' claims in their Settlement, Joint Complainants object, as such a provision is not in the public interest.

C. Refunds.

1. The Refund Provisions in the Settlement do not Provide for a Fair Disbursement of Refunds to Respond Power's Customers.

Joint Complainants have demonstrated that the refund provisions in the Settlement do not provide for a fair disbursement of refunds to Respond Power's customers, because customers eligible for refunds are divided into two groups, despite the fact that there is no allegation or statement that one group's injuries are different or more substantial than the injuries in the other group of consumers or that Respond Power's alleged violations of Commission regulations,

policies and the Public Utility Code were more egregious to one group over the other. See OAG/OCA M.B. at 181- 86.

In its Main Brief, I&E makes no argument to dispute Joint Complainants' position that the Settlement does not provide for a fair disbursement of refunds to Respond Power's customers. In its Main Brief, Respond Power argues that the Commission does not have jurisdiction to award relief to customers who did not file complaints. Respond Power M.B. at 162. Respond Power further asserts that Joint Complainants have failed to establish that consumers who contacted the Commission were denied the opportunity to file informal complaints. Id. at 163.

As discussed in in great detail Joint Complainants' Main Brief and in Section II, supra, the Commission has jurisdiction in this proceeding to direct an EGS to issue refunds to customers, regardless of whether the customers filed a complaint at the Commission. See OAG/OCA M.B. at 139-45 and Section II, supra. Indeed, Respond Power's own Settlement contains a provision for refunds for consumes that did not file informal complaints, although as Joint Complainants have shown, it is wholly inadequate. The evidence in this case demonstrates that Respond Power engaged in a pattern and practice of misleading and deceptive conduct that impacted all Respond Power customers. See Section II.H.5, supra. As such, Joint Complainants submit that the Commission has the jurisdiction to order Respond Power to issue refunds to all Respond Power customers in this case.

As for Respond Power's claim that Joint Complainants have failed to establish that consumers were denied the opportunity to file informal complaints, Joint Complainants submit that Respond Power mischaracterizes Joint Complainants' argument. Joint Complainants are not claiming that customers were denied the opportunity to file an informal complaint at the

Commission, nor are they intending to critique the actions that any agency took in response to the consumer calls during early 2014. Rather, Joint Complainants have shown that Respond Power's customers were affected on a universal basis from Respond Power's pattern and practice of misleading and deceptive behavior and charging prices that did not conform to its advertising and marketing materials, sales pitches, or its Disclosure Statement.

Respond Power makes no argument in its Main Brief as to why one group's injuries are different or more substantial than the injuries in the other group of consumers or that Respond Power's alleged violations of Commission regulations, policies and the Public Utility Code were more egregious to one group over the other. These affected customers responded in a number of different ways. For example, some customers contacted the Commission, others contacted the Bureau of Consumer Protection (whether at the recommendation of Commission staff or at their own discretion), others contacted the OCA or another agency, yet others suffered the consequences "silently" for various reasons. Moreover, of the consumer contacts to the Commission, some were considered inquiries, others were taken in as informal complaints, yet other consumers filed written Formal Complaints. The evidence, though, demonstrates that customer harm was widespread from these practices, and Joint Complainants submit that an individual customer's response to the harm he or she suffered should not affect the refund amount he or she is offered in this proceeding.

2. The Amount of Refunds in the Settlement is Wholly Inadequate.

Joint Complainants have shown that the amount of refunds in the Settlement is wholly inadequate and improperly deducts almost a million dollars in "rebillings" and nearly \$250,000 in "voluntary" refunds from the Refund Pool. OAG/OCA M.B. at 186-188.

In their Main Brief, Respond Power and I&E improperly rely on settlements in other EGS proceedings to support their position that the refund provisions are in the public interest. See Respond Power M.B. at 160, 171-72; see also I&E M.B. at 24-25. Specifically, with regard to the adequacy of the refund amount in the Settlement, I&E asserts:

The proposed Settlement amounts (civil penalty and restitution) fall squarely between HIKO and PaG&E, which is right where it should be. PaG&E had 2,588 customer contacts, IDT had 2,456 customer contacts and HIKO had 363 customer contacts.⁵⁵ Respond Power had 709 customer contacts with Joint Complainants and 1,206 with BCS (some of which were duplicates). All of these complaints involved the same types of violations, and were resolved via settlement agreement with OCA/OAG.

I&E M.B. at 24-25 (Emphasis omitted). Additionally, Respond Power asserts:

Respond Power recognizes that the total amounts of refund pools for Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric (PG&E) and IDT Energy, LLC (“IDT”) are 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. 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. Moreover, those EGSs issued more refunds to customer on their own terms prior to execution of their settlements, for their own business reasons such as for media purposes or to retain customers.

Id. at 160. (Internal footnotes omitted).

The comparison to other EGS settlements is not meaningful, not supported by the record and is pure conjecture. Joint Complainants further submit that I&E’s narrow comparison of the EGSs in its assessment of a sufficient refund amount, in which I&E compares the customer contacts that Joint Complainants received about other EGSs to those that Joint Complainants received about Respond Power is wholly inadequate and fails to take into consideration the

⁵⁵ While I&E provides no citation to this information, it appears that I&E is referencing the number of customer contacts received by the OAG and the OCA regarding variable rates relating to each EGS as of June 20, 2014, the date Joint Complainants filed their Joint Complaints against the respective EGSs.

evidence on record in this proceeding of the promises made, the prices charged, and the resulting harm. Again, Joint Complainants submit that an adequate amount of refunds must be determined on a case-by-case basis based on a company's number and type of customers, usage and prices charged, types of violations alleged and the resulting harm as well as the actions taken to address the harm.

Furthermore, Respond Power's mere assumption that PG&E [PaG&E] and IDT charged higher average customer prices and had larger customer bases is completely unsupported by any evidence on record in this proceeding. Moreover, Joint Complainants note that the fact that Respond Power did not voluntarily issue more refunds to customers, as it points out in its Main Brief, only supports Joint Complainants' position that the refund amount in the Settlement is inadequate. Relying on actual evidence in this proceeding that is specific to Respond Power's customer base and charges, Joint Complainants detailed in their Main Brief the refund amount that they deem appropriate in this proceeding, which is approximately **BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL**, far more than Respond Power has agreed to provide in the Settlement (and possibly even more in light of the reverter provision in Paragraph 21(d) of the Settlement.) See OAG/OCA M.B. at 148-152, 192-94; see also Section V.D., infra. As such, Joint Complainants submit that the refund amount in the Settlement is wholly inadequate.

Additionally, in its Main Brief, Respond Power addresses Joint Complainants' concern regarding the deduction of nearly a million dollars in "rebillings" from the Refund Pool. Respond Power M.B. at 160-61. Respond Power asserts, "Joint Complainants have consistently throughout this proceeding tried to deny credit to Respond Power for the good will that it demonstrated." Id. at 162. Joint Complainants note, however, that as explained in their Main

Brief, they did give Respond Power credit for these “rebillings,” as these rebill amounts are already reflected in the overbill amounts calculated by OCA witness Ashley Everette. OAG/OCA M.B. at 186-87.

Moreover, Respond Power asserts, “Ms. Alexander was unable to explain how customers would be 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.” Id. at 162. Contrary to Respond Power’s assertion, however, Ms. Alexander explained that Respond Power’s implementation of the “rebills” actually put customers “in danger of disconnection.” Tr. at 1432. Specifically, Ms. Alexander testified:

The difference is that in this case, [...] [Respond Power] did not collect money from customers and then give it back. Here they issued what they called a billing error but it was not, and then told people not to pay a portion of their bill which the utilities had already told [Respond Power] they had to [stop saying] because it was putting these people in danger of disconnection.

So we have the facts of the matter before us as to how this so-called rebill was implemented that impacts my concern about how this was treated in the settlement.

Id.

As such, Joint Complainants submit that it is inappropriate to give the Company a double credit for its rebillings by also deducting the rebilling amount from the Refund Pool in the Settlement.

3. The Processes Outlined in the Settlement for Customers to Obtain Refunds are Not in the Public Interest.

Joint Complainants have shown that the processes outlined in the Settlement for customers to obtain refunds are not in the public interest, because there is a disparity in the treatment of the two groups of customers eligible to receive a refund, and the process to obtain a

refund for customers in the “silent” group (as Respond Power and I&E refer to this group) is unnecessarily complex and will likely limit the number of customers who actually receive a refund in that group.⁵⁶ See OAG/OCA M.B. at 188-190. Specifically, in order for consumers in the group designated as the “silent” consumers to obtain a refund, they must first receive and then mail back a completed form to the Settlement Administrator within 60 days of receipt of a letter advising of the minimum refund amount, whereas it appears that the consumers who filed an informal complaint with the Commission will receive a refund without further action. Id. at 188.

In their Main Briefs, neither Respond Power nor I&E provide any argument to support the disparity in the treatment of the two groups of customers eligible to receive a refund. In response to Joint Complainants’ argument that the refund process for customers in the “silent” group is unnecessarily complex, Respond Power merely asserts, “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.” Respond Power M.B. at 165. As Joint Complainants have demonstrated in their Main Brief, however, even the requirement to return a preprinted form with the customer’s signature or other indication of the customer’s desire for a refund will likely result in a significant portion of the customer class not receiving any refund. See OAG/OCA M.B. at 189.

As such, limiting the number of customers that are likely to receive a refund by requiring customers to fill out and return a form prior to receiving any refund is problematic, particularly with the reverter provision of the Settlement as discussed below.

⁵⁶ Under the terms of the Settlement, funds that remain in the Refund Pool will be returned to Respond Power twelve months after the date of the letter sent by the Administrator, except that if customers have claimed less than \$500,000, Respond Power will contribute the difference between total refunds claimed and \$500,000 to the EDCs’ Hardship Funds. Settlement at ¶ 21(d).

4. There is an Inconsistency in the Settlement and the Statements in Support Regarding the Disbursement of the Refunds to Consumers who Filed Informal Complaints at the Commission.

Joint Complainants have demonstrated that there is an inconsistency in the Settlement and I&E's Statement in Support regarding whether all customers who filed informal complaints with the Commission will be eligible to receive a refund. OAG/OCA M.B. at 190-91. Specifically, in I&E's Statement in Support, it appears that not all customers who filed informal complaints with the Commission will received refunds, but rather I&E will be placed in the role of adjudicating the merits of informal complaints, which is outside the authority of I&E pursuant to 66 Pa. C.S. § 308.2. Id. There is also an inconsistency in the Settlement and I&E's Response to Joint Complainants' Initial Objections, wherein it is unclear whether customers who provided written testimony in this consolidated proceeding will be included in the first group of customers eligible for a refund under Paragraph 20 of the Settlement. Id. at 191-92.

In their Main Brief, neither Respond Power nor I&E make any attempt to clarify these inconsistencies. Joint Complainants submit that the failure of Respond Power and I&E to clarify these inconsistencies raises concerns with the parties' own mutual understandings of the Settlement.

D. Reverter Provision.

Joint Complainants have alleged that the reverter provision in the Settlement is not in the public interest, because it creates a disincentive for Respond Power to assist or cooperate in ensuring that the Refund Pool will be fully utilized. OAG/OCA M.B. at 192. In their Main Briefs, neither Respond Power nor I&E provide any argument to address Joint Complainants' concerns that the reverter provision provides no incentive for Respond Power to assist or cooperate in ensuring that the Refund Pool will be fully utilized. Rather, Respond Power merely

implies that the reverter provision is appropriate, stating, “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.” Respond Power M.B. at 166. Respond Power fails to provide any evidence to support its position that the reverter provision is “fair and reasonable.” Moreover, Joint Complainants’ expert witness Barbara Alexander testified that there are various reasons that customers will fail to return their “claim” for a refund, despite the fact that they feel aggrieved. Specifically, Ms. Alexander stated:

[N]ot all customers will understand the form, some will misunderstand the form (and might even view it as a scam to get them to enroll with the EGS), and others will simply fail to follow through due to the pressure of other obligations on their time and effort. [...] With every required step or barrier to pursue their complaint (e.g., speak to a supervisor, file a complaint in writing, appeal a decision to a government agency, respond to the requirement to submit additional documentation or information, etc.), fewer of those affected will take the necessary steps even though all the customers that experienced the poor service or dissatisfaction start out with exactly the same attributes and have suffered the same behavior that gave rise to the complaint.

OAG/OCA St. 1-Objec. at 8.

Moreover, Joint Complainants submit that the fairness and reasonableness of this provision must be viewed in consideration of the fact that Respond Power will retain the third-party administrator under the terms of the Settlement, and the process for obtaining a refund from the Refund Pool is unnecessarily complex for customers to navigate. With those provisions in mind, Joint Complainants submit that the reverter provision of the Settlement is not “fair and reasonable” and is not in the public interest.

E. Alternate Refund Method.

Joint Complainants have also demonstrated that the alternate refund method in the Settlement is inadequate and unlikely to result in a different level of investigation into customer complaints and offers of refunds by Respond Power than that to date. OAG/OCA M.B. at 194.

I&E provides no argument in its Main Brief to dispute Joint Complainants' concerns regarding the alternate refund method. Furthermore, in its Main Brief, Respond Power merely asserts, "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." Respond Power M.B. at 167.

As stated in Joint Complainants' Main Brief, however, Respond Power has paid merely \$39,788 in cash refunds to customers. See OAG/OCA M.B. at 150. Moreover, many consumer witnesses testified that Respond Power outright refused to consider a refund when they called the Company to complain about their bills. See Id. As such, Joint Complainants submit that the Settlement terms are insufficient in ensuring compliance with the agreement.⁵⁷

F. EGS License Retention.

Joint Complainants object to the Settlement insofar as I&E commits in the Settlement to actively promote license retention by Respond Power and actively oppose the Joint Complainants' request for this penalty, which the Joint Complainants have supported on the record through consumer and expert testimonies. See OAG/OCA M.B. at 195. Specifically, Joint Complainants have demonstrated that license revocation is appropriate in this proceeding because of Respond Power's actions as an EGS in the Commonwealth in which Respond Power violated the Public Utility Code and multiple Commission regulations and orders. As stated in Joint Complainants' Main Brief, Joint Complainants' witness Ms. Alexander testified:

Based on my review of the consumer testimony and the responses of Respond Power to the discovery in this proceeding, I find that Respond Power's marketing practices, its oversight and training of marketing agents, and Disclosure Statement and pricing and billing practices are unfair, deceptive and inadequate and that

⁵⁷ Moreover, the fact that the Settlement does not identify Joint Complainants as parties that will have the opportunity to request such information from the Company only further supports Joint Complainants' position that the I&E/Respond Power Settlement cannot be viewed as a full resolution of Joint Complainants' claims.

these practices constitute significant defects in Respond Power's compliance with the Public Utility Code and the Commission's regulations that govern the retail energy market. These unfair and deceptive practices have adversely impacted Pennsylvania consumers.

OAG/OCA St. 1 at 83. Moreover, regarding the counts in the Joint Complaint, Joint Complainants have demonstrated that the Company has violated the Public Utility Code and multiple Commission regulations and Orders in the following instances, *inter alia*: (1) the failure to adequately train and monitor sales agents; (2) representations in marketing material and by salespeople of historical savings which were not accurate; (3) promises of future savings with Respond Power in marketing material and by salespeople, which the Company did not intend to provide; (4) the failure to provide accurate pricing information in the Disclosure Statement; (5) the failure to charge prices that conformed to the Disclosure Statement; (6) switching customers' electric accounts without their express consent; (7) failing to properly investigate and resolve customer complaints; (8) failing to obtain customer signatures on contracts when the customers were switched via telemarketer; and (9) misleading and deceiving consumers about the Company's affiliation with the EDC or government entities. Joint Complainants further submit that these actions by Respond Power have adversely impacted the development of the competitive market in Pennsylvania, and if the Company is permitted to retain its EGS license, such adverse impacts will continue. As such, Joint Complainants submit that the Settlement is inadequate, *inter alia*, in addressing the Company's violations of the Public Utility Code and Commission regulations and orders, and I&E's commitment to actively promote license retention is inappropriate.

In response to Joint Complainants' concern that I&E has committed in the Settlement to promote license retention by Respond Power, despite all of the evidence on record in this proceeding demonstrating that such a remedy is appropriate, Respond Power and I&E argue that

license revocation is not appropriate in this case in light of the Settlement commitments made by Respond Power. See Respond Power M.B. at 167; see also I&E M.B. at 31. In support of their arguments, both Respond Power and I&E cite the ALJs' Initial Decision dated August 21, 2015 in the proceeding initiated by I&E against HIKO.

Respond Power's and I&E's reliance on the I&E v. HIKO I.D., however, is misplaced.

Denying license revocation in the I&E v. HIKO I.D., the ALJs stated:

In addition to its requests for civil penalties, I&E further proposes that HIKO's license to do business as an EGS in Pennsylvania be rescinded. The vast majority of the Brief submitted by I&E, however, pertained to civil penalties and primarily includes a request to revoke HIKO's license only as part of the requested relief. In contrast, HIKO provided argument in its Brief why its license should not be revoked [...]. Although we agree with I&E that the conduct is egregious, we are denying this requested relief only because the Company has agreed with OAG/OCA and the Office of Small Business Advocate (OSBA) to substantial relief in a separate, but concurrent decision.

I&E v. HIKO I.D. at 60. Adopting the Initial Decision of the ALJs, the Commission held, "We agree with the ALJs' relief ordered here as it dovetails with the comprehensive settlement reached by the parties in the *OAG/OCA-HIKO Settlement*." See I&E v. HIKO Final Order at 45; see also Commonwealth of Pennsylvania by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. HIKO Energy, LLC, Docket No. C-2014-2427652.

The present case differs from I&E v. HIKO in several respects. Here, Joint Complainants have detailed extensively in their Main Brief why license revocation is appropriate in this case. See gen'ly OAG/OCA M.B. at Section IV.D.1. Specifically, Joint Complainants have shown that Respond Power lacks the managerial and technical expertise and willingness to comply with the Public Utility Code and the Commission's regulations and orders, and as such,

license revocation is warranted in this case. See gen'ly OAG/OCA M.B. at Sections IV. through IV. B. Additionally, Joint Complainants have demonstrated that, here, the I&E/Respond Power Settlement does not contain substantial consumer protections, as the ALJs noted as essential in not recommending license revocation in the I&E v. HIKO I.D.. See gen'ly OAG/OCA M.B. at Section V.

Respond Power further asserts that Joint Complainants did not seek license revocation in any of the other proceedings against EGSs in which a settlement has been reached, and Joint Complainants have provided no reasons why Respond Power should be treated differently. Respond Power M.B. at 167. Whether or not Joint Complainants sought license revocation in other proceedings is irrelevant to the facts established in this case. The evidence on record in this proceeding fully supports license revocation. Joint Complainants have demonstrated that Respond Power's business operations are wholly insufficient and have resulted in numerous violations of the Public Utility Code and the Commission's regulations and Orders. The Settlement does not adequately remedy those violations. The Joint Complainants submit that the Settlement falls far short of ensuring compliance with the Public Utility Code, Commission regulations and Orders or providing appropriate protections and remedies for consumers now or in the future. See 66 Pa. C.S. § 308.2(a)(11).

G. Third-Party Administrator and Distribution of Refunds.

As stated above, Joint Complainants have shown in their Main Brief that the Settlement is unnecessarily complex and, again, contains unjustified differential treatment of the two customers groups in that the distribution of refunds to customers who filed informal complaints with the Commission will be effectuated differently than the distribution of refunds to the

“silent” customers. OAG/OCA M.B at 195-197. Specifically, the use of a third-party administrator seems to be limited to the distribution of refunds to customers who did not file an informal complaint at the Commission. Settlement at ¶ 21. The Settlement is unclear as to who will be distributing the refunds to customers who filed an informal complaint at the Commission or who will bear that expense.

I&E does not provide any argument in its Main Brief to dispute Joint Complainants’ concerns regarding the third-party administrator and distribution of refunds provisions in the Settlement. In its Main Brief, Respond Power, again, improperly relies on the settlements in other EGS cases and mischaracterizes Joint Complainants’ objections. Specifically, Respond Power asserts:

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 that refunds will be “based on the individual customer’s usage, price charged and refund amounts already received directly from Respond Power. This language mirrors that which is contained in other settlement agreements between Joint Complainants and other EGSs, which have been approved by the ALJs.

Respond Power M.B. at 164. (Internal footnotes omitted). While Joint Complainants maintain that Respond Power’s reliance on other settlements is inappropriate, Joint Complainants note that the other settlements, unlike this one, provided for a third-party administrator to distribute refunds to all customers. Joint Complainants objection, here, is to the fact that the Settlement is unclear as to who will be distributing the refunds to the informal complainants or who will bear that expense. OAG/OCA M.B. at 196. While Respond Power provides in its Main Brief that Respond Power will distribute the refunds to the informal complainants, Respond Power makes no attempt to justify the differential treatment of the two classes of customers or to clarify who

will pay the expense of distributing refunds to the informal complainants. Thus, Joint Complainants object to the Settlement to that extent.

In their Main Brief, Joint Complainants also demonstrated that \$50,000 is an inadequate amount to pay towards the costs and expenses of a third-party administrator, especially in light of the two-step process required to obtain a refund and the fact that the Settlement authorizes Respond Power to obtain the third-party administrator without requiring Respond Power to do so in a cost effective manner or to retain an independent third-party. OAG/OCA M.B. at 198. These costs are likely to significantly exceed \$50,000, the excess of which will be deducted from the Refund Pool, thereby reducing the amounts available for refunds to customers. Id.

In their Main Briefs, neither Respond Power nor I&E present any evidence to demonstrate that \$50,000 is sufficient. In fact, Respond Power acknowledges in its Main Brief that modifications to the Settlement may be appropriate to ensure that \$50,000 is a sufficient amount for Respond Power to pay towards the third-party administrator and to ensure that Respond Power retains an independent third-party administrator in a cost-effective manner. See Respond Power M.B. at 166.

As such, Joint Complainants submit that the third-party administrator provisions of the Settlement are not in the public interest, because they provide for unjustified differential treatment of customers, the \$50,000 contribution to the administrator cost is not adequate to cover likely expenses and the remaining costs will be deducted from the Refund Pool, and Respond Power is not required to obtain an independent third-party administrator or obtain a third-party administrator in a cost-effective manner.

H. Door-to-Door Marketing.

Joint Complainants have demonstrated that the Settlement fails to implement adequate remedial measures to remedy Respond Power's door-to-door marketing violations and ensure future compliance with Pennsylvania law and Commission rules and regulations. OAG/OCA M.B. at 199-201.

I&E fails to provide any argument addressing Joint Complainants' concerns regarding the door-to-door marketing provisions on the Settlement. In its Main Brief, Respond Power asserts that the overall business modifications outlined in the Settlement "mirror the provisions in other settlements with EGSs, which were approved by the ALJs." Respond Power M.B. at 168; see also Id. at 173-174. Respond Power further asserts, "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." Id. Respond Power equates the Settlement provisions relating to door-to-door marketing to 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." Id. Respond Power concludes, "[G]iven the Commission's lack of jurisdiction to award injunctive relief, the Settlement provisions [...] [relating to door-to-door marketing] are reasonable and should be approved without modification." Id.

Again, the comparison to other EGSs is not meaningful or supported by the record. Additionally, as demonstrated in Joint Complainants' Main Brief, Respond Power has engaged in serious door-to-door marketing abuses. See OAG/OCA Main Brief at 199-201. Moreover, the record demonstrates that the Settlement is insufficient with respect to addressing whether or under what conditions the Company should be allowed to continue door-to-door marketing in Pennsylvania, requiring sufficient documentation and proof of training and oversight, and implementing processes to ensure compliance. Id. Furthermore, the Settlement does not

adequately specify what information the training will cover nor does it address Joint Complainants' concerns regarding Respond Power's contracts with its third-party vendors, as discussed on page 33 of Joint Complainants' Main Brief. Additionally, as discussed in Section V.I., below, Joint Complainants object to the Settlement to the extent that it does not identify Joint Complainants as parties that will have the opportunity to review Respond Power's training program, despite the fact that Respond Power and I&E believe the Settlement to be a full resolution of the allegations in the Joint Complaint.

As for Respond Power's assertion that the Settlement provisions relating to door-to-door marketing are adequate given the Commission's lack of jurisdiction to award injunctive relief, Joint Complainants strongly disagree. As discussed in Section II, supra, the Respond Power's assertion that the Commission lacks jurisdiction to award injunctive relief is plainly contradicted by many years of enforcement and prevention of violations through the issuance of orders specific to the violations demonstrated. See e.g. Harris v. UGI; see also Balla v. Redstone. Acceptance of Respond Power's argument would hamstring the Commission in EGS cases and would run directly contrary to the grant of broad powers by the General Assembly through Section 501 of the Public Utility Code, 66 Pa. C.S. § 501; it would also undermine the Commission's ability to enforce the Choice Act, as the General Assembly intended. As such, Joint Complainants submit that Respond Power's assertion that the provisions related to door-to-door marketing are adequate given the Commission's lack of jurisdiction to issue injunctive relief is entirely unfounded.

As discussed in Joint Complainants' Main Brief, Joint Complainants submit that the Settlement is not in the public interest, as it fails to implement adequate remedial measures to

remedy Respond Power's door-to-door marketing violations and ensure future compliance with Pennsylvania law and Commission rules and regulations. OAG/OCA M.B. at 199-201.

I. Oversight and Business Modifications.

Joint Complainants object to the Settlement insofar as it contains business modifications that I&E did not seek in its Formal Complaint, and Joint Complainants are not included in the provisions pertaining to reporting requirements, document review, and on-going compliance monitoring. See OAG/OCA M.B. at 201.

In its Main Brief, I&E does not address Joint Complainants concerns regarding oversight and business modifications. In its Main Brief, Respond Power asserts that since I&E originally sought license revocation, I&E was permitted to accept extensive modifications to and restrictions of Respond Power's sales and marketing practices, in lieu of license revocation. Respond Power M.B. at 169. Respond Power further states, "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." Id.

Joint Complainants submit that the real concern here is that it appears that Respond Power and I&E have incorporated in the Settlement relief sought solely by Joint Complainants in an attempt to settle Joint Complainants' claims over their objection. Yet, Respond Power and I&E have failed to include Joint Complainants in any of provisions pertaining to reporting requirements, document review, and on-going compliance monitoring. Respond Power cannot have it both ways (*i.e.* settle Joint Complainants' claims, but leave Joint Complainants out of the Settlement). Thus, to that extent Joint Complainants object to the Settlement.

J. Hardship Fund and Civil Penalty.

As shown in Joint Complainants' Main Brief, the minimum contribution of \$25,000 to the EDCs' Hardship Funds in the Settlement is inadequate given the significant impact that the prices charged by Respond Power had on its customers. OAG/OCA M.B. at 202. Furthermore, Joint Complainants have presented evidence demonstrating the appropriate civil penalty amount in this proceeding in Section IV.D.3 of their Main Brief. The civil penalty amount of \$125,000 in the Settlement is far less than the civil penalty amount supported by the record in this proceeding. As such, Joint Complainants submit that the civil penalty amount in the Settlement is disproportionate to the harms demonstrated.

I&E fails to provide any argument as to the sufficiency of the Hardship Fund amount in its Main Brief. As for the civil penalty amount, I&E improperly relies on the settlements in other proceedings initiated by Joint Complainants against EGSs, and, as stated above in Section V.C.2, asserts:

The proposed Settlement amounts (civil penalty and restitution) fall squarely between HIKO and PaG&E, which is right where it should be. PaG&E had 2,588 customer contacts, IDT had 2,456 customer contacts and HIKO had 363 customer contacts.⁵⁸ Respond Power had 709 customer contacts with Joint Complainants and 1,206 with BCS (some of which were duplicates). All of these complaints involved the same types of violations, and were resolved via settlement agreement with OCA/OAG.

I&E M.B. at 24-25. (Emphasis omitted). In its Main Brief, Respond Power also improperly relies on the settlements in other proceedings initiated by Joint Complainants against EGSs and specifically compares the Hardship Fund and Civil Penalty Provisions in other settlements to the Hardship Fund and Civil Penalty Provisions in this Settlement. Respond Power M.B. at 172-73.

⁵⁸ Again, while I&E provides no citation to this information, it appears that I&E is referencing the number of customer contacts received by the OAG and the OCA regarding variable rates relating to each EGS as of June 20, 2014, the date Joint Complainants filed their Joint Complaints against the respective EGSs.

Such comparisons as those made by Respond Power and I&E are not appropriate, as settlement terms and conditions must be determined on a case-by-case basis. Respond Power's I&E's narrow assessment of a sufficient civil penalty amount and Respond Power's narrow assessment of a Hardship Fund amount are deficient and fail to take into consideration the evidence on record in this proceeding. Joint Complainants further submit that I&E's comparison of the EGSs in its assessment of a sufficient civil penalty amount, in which I&E compares the customer contacts that Joint Complainants received about other EGSs to those that Joint Complainants received about Respond Power is deficient and fails to take into consideration the evidence on record in this proceeding. Furthermore, Joint Complainants submit that Respond Power's narrow comparison of specific provisions in this Settlement to specific provisions in other EGS settlements does not provide for a fair assessment of the Settlement in its entirety.

Joint Complainants submit that the contribution to the EDCs' Hardship Fund and the Civil Penalty provisions in this Settlement are not adequate in light of the evidence on record in this proceeding and in consideration of the Settlement terms in their entirety.

K. Rosi Factor Analysis.

The Commission has promulgated a Policy Statement at 52 Pa. Code § 69.1201 that sets forth ten factors (Rosi Factors) that the Commission will consider in evaluating settled and litigated proceedings and determining whether a fine for violating a Commission order, regulation or statute is appropriate. As stated in Joint Complainants' Main Brief, the factors and standards that will be considered by the Commission include the following:

- (1) Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.

(2) Whether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.

(3) Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated cases. When conduct has been deemed intentional, the conduct may result in a higher penalty.

(4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.

(5) The number of customers affected and the duration of the violation.

(6) The compliance history of the regulated entity which committed the violation. An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.

(7) Whether the regulated entity cooperated with the Commission's investigation. Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty.

(8) The amount of the civil penalty or fine necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount.

(9) Past Commission decisions in similar situations.

(10) Other relevant factors.

See 52 Pa. Code § 69.1201(b). In their Main Briefs, both Respond Power and I&E apply the Rosi factors in support of their position that the Settlement is in the public interest. See Respond

Power M.B. at 169-186; I&E M.B. at 15-25. For the reasons stated in Sections V.A. through V.J. above, Joint Complainants submit that the Settlement is not in the public interest.

Furthermore, Joint Complainants specifically note that they disagree with Respond Power's and I&E's Rosi factor analyses and submit that their analysis as discussed in their Main Brief should be relied upon.⁵⁹ See OAG/OCA M.B. at 161-170. For example, throughout their analyses both Respond Power and I&E rely extensively on the settlements and Initial Decisions in other EGS proceedings. See gen'ly Respond Power M.B. at 169-186; see also gen'ly I&E M.B. at 14-25. It bears repeating that the comparison to other EGS settlements is not appropriate or supported by the record, and the parties' reliance on the ALJs' approval of other Settlements is not meaningful, as the evidence on record in this proceeding differs from other proceedings and the I&E/Respond Power Settlement contains substantial differences that makes this Settlement not in the public interest. See Sections V.A-V.J, supra.

Moreover, with regard to the first Rosi Factor, while Respond Power acknowledges that the allegations in the Joint Complaint and the I&E Complaint are of a serious nature, Respond Power also asserts that "no allegations have been made to suggest that Respond Power directed or trained its sales representatives to promise savings or make any other guarantees." Respond Power M.B. at 175. Despite Respond Power's allegation to the contrary, Joint Complainants have demonstrated that Respond Power's training of its sales agents was wholly deficient, and training materials relied upon by Respond Power's agents reflect claims of savings that Respond Power did not regularly deliver to its customers. See OAG/OCA M.B. at 30-34. For example, Joint Complainants' witness Barbara Alexander testified that Respond Power does not take any

⁵⁹ In Joint Complainants' Main Brief, Joint Complainants analyzed the Rosi factors as they pertain to Joint Complainants' request for a civil penalty in their litigated proceeding. See OAG/OCA M.B. at 161- 170. Nevertheless, Joint Complainants submit that their analysis is applicable here and supports their conclusion that the Settlement is not in the public interest.

proactive steps to train and monitor its third party vendors or assure compliance with the Public Utility Code and Pennsylvania regulations and consumer protection policies. Id. at 21- 26. Additionally, Ms. Alexander reviewed the confidential training documents provided through discovery. OAG/OCA St. 1 at 21-23; see also Exh. BRA-2 at 15-90. Ms. Alexander testified that there is no training material on how to avoid fraudulent statements or misrepresentations to consumers. OAG/OCA St. 1 at 31. Ms. Alexander also testified that one training document she reviewed contained statements such as **BEGIN CONFIDENTIAL** [REDACTED]

[REDACTED] **END**

CONFIDENTIAL. Id. at 22. Indeed, the training materials repeat the deceptive and misleading statements that are the foundation of the written promotional materials and emphasize the intent to offer savings to prospective customers. Id. at 31.

Additionally, citing to the I&E v. HIKO I.D., Respond Power states, “This is not a situation where an executive level decision was made to increase prices despite a written guarantee to the contrary.” Id. at 176. Indeed, Respond Power’s conduct was not a single bad decision as in I&E v. HIKO, but a pattern and practice that permeated the Company. Respond Power’s conduct is far more serious than HIKO’s in I&E v. HIKO. The evidence in this proceeding demonstrates that Respond Power engaged in a pattern and practice of deceptively marketing to consumers by, *inter alia*, emphasizing savings and in many cases promising savings in order to induce consumers to switch to the Company. Power did not deliver savings to customers at any time, and customers endured hardship therefrom. Thus, to the extent that Respond Power is suggesting that its actions were less serious than those of HIKO, Joint Complainants strongly disagree.

Moreover, with regard to the fifth Rosi Factor,⁶⁰ both Respond Power and I&E improperly analyze the number of affected customers and the duration of the alleged violations in terms of the number of customers who contacted the OAG and the OCA. Respond Power M.B. at 179; I&E M.B. at 18. Moreover, Respond Power considers the number of customers who field an informal complaint at the Commission. Respond Power M.B. at 179. Respond Power also asserts that only consumer testimony on record in this proceeding can be relied upon in determining remedies or directing relief. Respond Power M.B. at 179-80. Joint Complainants submit that Respond Power's and I&E's reliance on the number of customer contacts that Joint Complainants received about other EGSs is not a proper measurement of the number of affected customers and the duration of the alleged violations. The evidence on record in this proceeding, provided by expert, non-consumer, and consumer witnesses demonstrates that the Company's conduct of deceptive and misleading marketing, disclosures and billing has impacted all of the Company's customers, as each customer was (1) subjected to the Company's deceptive marketing techniques via receipt of marketing materials and a welcome letter; (2) received, or would have received had one been provided, the same Disclosure Statement; and (3) received bills with prices that did not conform to the marketing materials or Disclosure Statement. See OAG/OCA M.B. at Sections IV.B and IV.C.1-4, 7, 8.

With regard to the sixth Rosi Factor, Respond Power implies that its compliance history demonstrates that there is no pattern and practice of unlawful activity. See Respond Power M.B. at 181. Additionally, I&E asserts that "Respond Power has no prior history of non-compliance."

⁶⁰ Joint Complainants also note in their Rosi factor analyses, both Respond Power and I&E fail to analyze the third Rosi Factor (*i.e.* whether the conduct at issue was deemed intentional or negligent), as such factor is only considered in litigated proceedings. See Respond Power M.B. at 177; see also I&E M.B. at 17. As stated in their Main Brief, Joint Complainants submit that the evidence demonstrates that Respond Power engaged in intentional and willful deceptive misrepresentations. See OAG/OCA M.B. at 161. Joint Complainants submit that such information is significant in evaluating Joint Complainants' requested relief in their litigated proceeding.

I&E M.B. at 19. Joint Complainants submit that, as discussed in their Main Brief, although the Company's compliance history prior to January 2014 seemed adequate in that few complaints were filed with the Commission, the misleading and deceptive conduct and pervasive violations of the Commission's regulations and orders that Joint Complainants have shown in this proceeding and detailed at length in Section IV of their Main Brief, is indicative of frequent, recurrent violations. See OAG/OCA M.B. at 163. These frequent, recurring violations came to light with the Polar Vortex.

Furthermore, as noted by Joint Complainants in their Main Brief, the Commission imposed various compliance and reporting conditions to the natural gas supplier license of Respond Power's affiliate Major Energy in response to the Commission's concerns regarding the number of 2010 and 2011 informal complaints, which contained allegations of compliance problems and inappropriate behavior. See e.g. Application of Major Energy Services, LLC to Amend its Natural Gas Supplier License, Docket No. A-2009-2118836, Tentative Order at 2 (Mar. 29, 2012) (Final Order adopting license conditions entered May 21, 2012). Additionally, other state utility commissions have recently investigated Respond Power and its affiliates for, *inter alia*, allegedly providing false and misleading information about the expected range and nature of variable prices, advertising to customers that the supplier's variable rate would not exceed the Standard Offer Service (electric) or Sales Service (natural gas) price for the relevant utility, and providing inadequate information to allow a customer to make an informed choice regarding the purchase of electricity and natural gas services. See In the Matter of the Investigation into the Marketing, Advertising, and Trade Practices of American Power Partners, LLC; Blue Pilot Energy, LLC; Major Energy Electric Services, LLC and Major Energy Services, LLC; and Xoom Energy Maryland, LLC, Case No. 9346, Order at 1 (Apr. 1, 2014) (Maryland

Show Cause Order). Furthermore, in Pennsylvania, Respond Power has been subject to investigation through complaints brought by individual consumers, as well as the Formal Complaint of I&E that has been consolidated with the Joint Complaint. See e.g. Herp v. Respond Power, LLC, Docket No. C-2014-2413756; Werle v. Respond Power, LLC, Docket No. C-2014-2429158; Nadav v. Respond Power, LLC, Docket No. C-2014-2429159.

Thus, while Respond Power's compliance history in Pennsylvania prior to January 2014 may have appeared adequate, the Company's sales agents were committing a large number of violations of the Public Utility Code and the Commission's regulations and orders throughout its EGS license history in the Commonwealth, which did not come to light until the Polar Vortex. Thus, Joint Complainants submit that Respond Power's and I&E's analysis of the sixth Rosi factor is inadequate, as Respond Power and I&E fail to consider the proceedings initiated against Major Energy and in other states.

With regard to the eighth Rosi Factor, I&E considers the amount of civil penalty or fine necessary to deter future actions in light of the number of customers who provided testimony in this consolidated proceeding or contacted Joint Complainants. I&E M.B. at 20. I&E further implies that the ALJs can only consider the consumer testimony on record in this proceeding in determining an appropriate civil penalty amount. Id. at 21. Joint Complainants submit that I&E's implication is not proper. The ALJs can and should consider all evidence on record in this proceeding, including testimony provided by expert, non-consumer, and consumer witnesses in this proceeding. The evidence establishes that the Company's conduct of deceptive and misleading marketing, disclosures and billing has impacted all of the Company's customers. In light of this evidence, Joint Complainants submit that the amount of civil penalty in the Settlement is wholly inadequate to deter future violations.

Furthermore, with regard to the ninth Rosi Factor, both Respond Power and I&E rely on the OAG/OCA v. HIKO I.D. Since the parties filed Main Briefs in this proceeding, the Commission issued an Opinion and Order in OAG/OCA v. HIKO and also in I&E v. HIKO on December 3, 2015. As the ALJs had done in their Initial Decisions, the Commission considered the OAG/OCA v. HIKO and the I&E v. HIKO proceedings concurrently. See I&E v. HIKO Final Order at 45. In the OAG/OCA v. HIKO Final Order, the Commission approved in its entirety an extensive settlement petition that required the EGS to, *inter alia*, issue refunds to customers, make contributions to the EDCs' hardship funds, and make extensive business modifications. See OAG/OCA v. HIKO Final Order at 1-3; see also I&E v. HIKO Final Order at 45. Joint Complainants again submit that the Commission has recognized that settlements do not set precedent, as cases that proceed to a settled conclusion are often incomparable in many ways. See I&E v. HIKO Final Order at 52-53. In the I&E v. HIKO Final Order, the Commission approved the ALJs' recommendation that the EGS be assessed a civil penalty of \$1,836,125, which amounts to \$125 per violation for 14,689 total violations of one Commission regulation. See I&E v. HIKO Final Order at 5, 54. The violations were for each bill sent that did not conform to the company's disclosure statement. I&E v. HIKO Final Order at 25-27; see also I&E v. HIKO I.D. at 26-35. Joint Complainants note that their civil penalty request in this proceeding would be much higher if they had asked the Commission to take into consideration each bill sent that did not conform to Respond Power's Disclosure Statement, as the Commission did in I&E v. HIKO.

Here, the Joint Complainants have established that Respond Power deceptively marketed to all consumers by, *inter alia*, emphasizing savings and in many cases promising savings in order to induce consumers to switch to the Company. Respond Power did not deliver savings to

customers either historically or during the winter of 2014 and did not bill in conformance with its Disclosure Statement. Joint Complainants have identified a number of regulations that Respond Power violated each and every day. As such, Joint Complainants maintain that Respond Power's actions and omissions, as established in this proceeding, warrant the maximum civil penalty amount being assessed.

L. Conclusion.

For all of the reasons discussed in Section V.A through V.K, above, Joint Complainants submit that the Settlement is not in the public interest and request the ALJs deny the Settlement.


VI. CONCLUSION

WHEREFORE, for the reasons set forth above and in Joint Complainants' Main Brief, Joint Complainants respectfully request that the ALJs find that Respond Power violated the Commission's regulations at 52 Pa. Code §§ 54.4, 54.5, 54.7, 54.42, 54.43, 56.1, 56.141, 56.151, 56.152, 111.4, 111.5, 111.8, 111.9, 111.10, 111.12 and 111.13, the Commission's orders, specifically the Company's Licensing Order and the 2010 Interim Guidelines, Interim Guidelines on Marketing and Sales Practices for Electric Generation Suppliers and Natural Gas Suppliers, Docket No. M-2010-2185981, Order (Nov. 5, 2010), and the Public Utility Code at 66 Pa. C.S. § 2807(d)(1).

By way of relief for the Company's violations of the Public Utility Code and the Commission's regulations and Orders, Joint Complainants request that the ALJs order Respond Power to refund all charges to consumers that were over and above the Price to Compare in the customers' respective service territories from January 1, 2014 through the date of the resolution of this matter, impose a civil penalty on Respond Power, and direct the Company to make sizeable contributions to the EDCs' hardship funds. Additionally, Joint Complainants submit that the evidence in this proceeding clearly shows that Respond Power lacks the managerial and technical expertise to retain its EGS license, and therefore, Joint Complainants request permanent license revocation. Should the Commission determine to not revoke Respond Power's EGS license or determine to allow a possible reinstatement of the license, conditions

should be placed on the Company's EGS license based on the Joint Complainants' proven violations and the ALJs' and Commission's specific findings of wrongdoing by the Company.

Respectfully submitted,



John M. Abel
Senior Deputy Attorney General
PA Attorney I.D. 47313

Nicole R. DiTomo
Deputy Attorney General
PA Attorney I.D. 315325


Bureau of Consumer Protection
Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
T: (717) 787-9707
F: (717) 787-1190
jabel@attorneygeneral.gov
nditomo@attorneygeneral.gov

Counsel for:

Bruce R. Beemer, First Deputy Attorney General
Office of Attorney General

Bureau of Consumer Protection

Date: December 23, 2015



Candis A. Tunilo
PA Attorney I.D. 89891

Kristine E. Marsilio
PA Attorney I.D. 316479
Assistant Consumer Advocates

Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923
T: (717) 783-5048
F: (717) 783-7152
ctunilo@paoca.org
kmarsilio@paoca.org

Counsel for:

Tanya J. McCloskey
Acting Consumer Advocate

CERTIFICATE OF SERVICE

Commonwealth of Pennsylvania, by :
Attorney General KATHLEEN G. KANE, :
Through the Bureau of Consumer Protection, :

And :

TANYA J. McCLOSKEY, Acting Consumer :
Advocate, :

Complainants :

Docket No. C-2014-2427659

v. :

RESPOND POWER, LLC, :

Respondent :

PENNSYLVANIA PUBLIC UTILITY :
COMMISSION, BUREAU OF :
INVESTIGATION AND ENFORCEMENT, :

Complainant :

v. :

Docket No. C-2014-2438640

RESPOND POWER, LLC, :

Respondent :

I hereby certify that I have this day served a true copy of the foregoing document, the

Joint Complainants' Reply Brief, in the manner and upon the persons listed below:

Dated this 23rd day of December 2015.

SERVICE BY E-MAIL & HAND DELIVERY

Adam Young, Esq.*
Michael Swindler, Esq.*
Bureau of Investigation & Enforcement
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

SERVICE BY E-MAIL & FIRST CLASS MAIL, POSTAGE PREPAID

Karen O. Moury, Esq.*
John F. Povilaitis, Esq.
Buchanan Ingersoll & Rooney PC
409 N. Second Street
Harrisburg, PA 17101-1357

Sharon Webb, Esq.*
Office of Small Business Advocate
Commerce Building, Suite 202
300 North Second Street
Harrisburg, PA 17101

David P. Zambito, Esq.*
D. Troy Sellars, Esq.*
Cozen O'Connor
17 N. 2nd St., Suite 1410
Harrisburg, PA 17101



Candis A. Tunilo
Assistant Consumer Advocate
PA Attorney I.D. # 89891
E-Mail: CTunilo@paoca.org

Kristine E. Marsilio
Assistant Consumer Advocate
PA Attorney I.D. # 316479
E-Mail: KRobinson@paoca.org

Counsel for
Office of Consumer Advocate
555 Walnut Street 5th Floor, Forum Place
Harrisburg, PA 17101-1923
Phone: (717) 783-5048
Fax: (717) 783-7152
196329

*Receiving Proprietary Information
If Applicable