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**VIA E-FILING**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2nd Floor  
Harrisburg, PA 17120

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

Dear Secretary Chiavetta:

On behalf of Respond Power, LLC, enclosed for electronic filing is Respond Power LLC's Reply Brief, for the above-captioned matters.

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

Very truly yours,

  
Karen O. Moury

KOM/bb  
Enclosures

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



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## I. INTRODUCTION

On September 18, 2015, Respond Power LLC ("Respond Power" or "Company") and the Commission's Bureau of Investigation and Enforcement ("I&E") filed an Amended Petition for Approval of Settlement ("Settlement") in this consolidated proceeding, which fully satisfied the Complaint filed by I&E on August 21, 2014. The Settlement provides for \$3.0 million in refunds to all variable price customers served by Respond Power in early 2014; the imposition of a sizable civil penalty on Respond Power; substantial contributions by the Company to the electric distribution companies' ("EDCs") hardship funds; a two-year moratorium on variable price marketing by Respond Power; and extensive modifications to its existing marketing, sales and business practices, including changes to its disclosure statement, door-to-door marketing program, training and compliance monitoring measures, sales scripts, third party verification scripts and customer services. Further, under the Settlement, as a private company operating in a deregulated retail market, Respond Power would be subjected to intense regulatory oversight over the next five years.

Rather than joining this Settlement and allowing its benefits to immediately flow to Respond Power's current and former customers (and instead opposing it and delaying delivery of those benefits), Pennsylvania's Attorney General Kathleen G. Kane, through the Bureau of Consumer Protection ("OAG"), and Acting Consumer Advocate Tanya J. McCloskey ("OCA") (collectively referred to as "Joint Complainants"), have continued to litigate the Joint Complaint they filed on June 20, 2014 – which is substantially the same as the I&E Complaint. However, unlike I&E's case which is based on specific factual allegations, their entire case is premised wholly on a nonexistent legal theory of "pattern and practice," which has never been endorsed or recognized by the Commission. Indeed, the Joint Complainants are treating this proceeding as a class action lawsuit, which it is well-settled that the Commission has no jurisdiction to entertain.

Offering no valid legal support for their position, the Joint Complainants -- in a broad brush manner -- contend that the Commission may consider the testimony of select individual consumers in reaching a conclusion that Respond Power, as an electric generation supplier ("EGS"), has violated the Public Utility Code, multiple Commission regulations and its *Licensing Order*<sup>1</sup> in its dealings with every customer served from December 2013 through March 2014. Further, based on an absolute dearth of credible and persuasive evidence to support their claims, the Joint Complainants would have the Commission impose an excessive civil penalty of \$1,000 on Respond Power for each the over seven million alleged violations that appeared in their Main Brief for the first time, almost all of which are either fictitious or directly refuted by the record in this proceeding. When calculated according to the formula presented for the first time in their Main Brief, the Joint Complainants are actually seeking over \$7.3 **billion** (not million) in civil penalties from Respond Power.<sup>2</sup>

The haphazard manner in which the Joint Complainants have approached the calculation of civil penalties in this case also highlights (as discussed in more detail later in this Reply Brief) the fundamental due process and constitutional problems that would be created by granting the Joint Complainants' requested relief. At no point throughout this proceeding has Respond Power been apprised of the exact nature of the civil penalties being sought, other than from I&E. Likewise, now that the penalties have been set forth at the briefing stage, they are so clearly

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<sup>1</sup> *License Application of Respond Power LLC for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as a Supplier of Retail Electric Power*, Docket No. A-2010-2163898 (Order entered August 19, 2010) ("*Licensing Order*").

<sup>2</sup> Respond Power notes that in their Main Brief ("JC MB"), the Joint Complainants request the imposition of a civil penalty in the amount of approximately \$7.3 million – which translates to one dollar per alleged violation. JC MB at 168-68, fn. 54. However, based on the formula used by the Joint Complainants, and their request for \$1,000 per violation, the civil penalty actually being sought is over \$7.3 billion, nearly a tenth of the Commonwealth's annual operating budget and three times the Commonwealth's budget deficit, as set forth in the 2015-16 Governor's Executive Budget. Indeed, the Commonwealth's budget should not be balanced on the back of Respond Power. It is also more than the total gross operating revenues reported by electric distribution companies in Pennsylvania in calendar year 2014. Obviously, it would be impossible to justify the imposition of a multi-billion dollar civil penalty on Respond Power, which illustrates the absurdity of the formula used, each of the components relied upon and the legal arguments advanced by the Joint Complainants in proposing a civil penalty in this proceeding.

excessive (*i.e.*, whether \$7.3 million or \$7.3 billion -- whichever the actual request is) that they shock the conscience and would be considered criminal in nature and constitute an unlawful taking. The Commission should reject the irrational and overreaching approach of the Joint Complainants in favor of the rationality of the Respond Power and I&E settlement. Attorney General Kane and Acting Consumer Advocate McCloskey, in requesting the maximum possible penalties for all alleged violations without consideration of mitigating circumstances, have clearly overreached in this case. It is now the responsibility of the Commission, as an independent agency with adjudicatory powers, to rein in their prosecutorial overzealousness.

The Joint Complainants would also have the Commission, without statutory authority, direct the issuance of refunds totaling over \$18 million to every customer who was on a variable rate plan during that timeframe, irrespective of whether they complained or even felt aggrieved, or without consideration of the customer's understanding of his contract with Respond Power. Additionally, they would have the Commission revoke Respond Power's license, despite the Company's commitment under the Settlement to implement costly and extensive modifications to its sales, marketing and business practices and to operate under the Commission's close scrutiny for the next five years.

The evidentiary record relied upon by the Joint Complainants in support of their claims consists of: (i) biased expert testimony that relies on personal opinions as to the rules that should govern the functioning of the electric retail market and is based on flawed interpretations of the applicable regulations; (ii) irrelevant expert testimony comparing Respond Power's deregulated prices to the Company's costs of serving residential customers and to the regulated rates charged by electric distribution companies ("EDCs"); and (iii) the uncorroborated hearsay testimony of 169 consumers who were being served by Respond Power in early 2014 when the Company

raised its variable rates due to skyrocketing wholesale market prices in a way that was consistent with the conditions of variability set forth in its Commission-approved Disclosure Statement.

The scant consumer witness testimony,<sup>3</sup> which is relied upon by the Joint Complainants to argue that all of Respond Power's customers served from December 2013 through March 2014 were similarly affected, consists of uncorroborated hearsay that is laden with credibility issues. Through extensive media outreach and the active solicitation of complaints for purposes of litigation, Attorney General Kane referred to "price gouging" and claimed that electric consumers were being "improperly overcharged for their electricity."<sup>4</sup> In addition to planting seeds in consumers' minds about the possible impropriety of variable prices that were being charged by EGSs in a deregulated retail market, the Joint Complainants further damaged the credibility of the consumer testimony by using leading questions developed for purposes of litigation to solicit responses that Respond Power's sales representatives had guaranteed savings. Tainting the testimony even further, they also discussed the possibility of refunds with consumers.

These factors, along with widespread EGS marketing and consumer education done by the Commission, converged to form a mindset common among consumers that the only reason for switching to an EGS would be to obtain savings and that savings are an inherent guarantee of Pennsylvania's electric choice program. If they did not achieve savings each month or even over the long-term, consumers felt entitled to relief, regardless of what they had realized at the time of enrollment or became aware of while being served by Respond Power. On top of all of these influences, the consumers' memories are faulty due to lapses of time and the unimportance of the

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<sup>3</sup> 169 consumers comprise an extremely small percentage of Respond Power's customer base at the beginning of January 2014. RP St. 4 (Rev) at 5.

<sup>4</sup> RP Ex. 38.

sales transaction to them at the time, which resulted in the rendition of many inconsistent and inaccurate stories about what was discussed with sales agents.

A glaring omission from the record is evidence of billing data which is necessary to determine whether any promises of savings to individual consumers have materialized. The Joint Complainants presented sketchy information to show that a narrow segment of customers did not save money over certain time periods. They also did not evaluate each customer's testimony to determine whether individual consumers expected savings for one month, two months or longer, or compare those expectations to what the customers were actually charged by Respond Power during the applicable month(s).

Coupled with a grossly deficient evidentiary record, the Joint Complainants rely on flawed legal arguments that erroneously interpret the Public Utility Code, Commission regulations, and Commission orders, as well as other state laws and decisions of state and federal courts. These errors range from seeking relief that the Commission is not empowered to award to reading requirements into Commission regulations that do not exist and that in some instances the Commission has expressly rejected.

Further, in tabulating the total number of alleged violations, the Joint Complainants radically exaggerate this number in a whole host of ways, including by:

- (i) assuming that if a scant number of customers had a particular experience with Respond Power that all customers had the exact same experience;
- (ii) ignoring their own evidence which showed that numerous customers had interactions with Respond Power that were directly contrary to the allegations in the Joint Complaint;
- (iii) counting individual customers multiple times for a single alleged violation;
- (iv) alleging violations that could not have affected certain customers, such as by contending that Respond Power violated a telemarketing rule in its door-to-door marketing, and vice versa;

- (v) alleging that specific conduct violated several regulations that establish the same standard and contain no unique elements warranting a separate violation;
- (vi) alleging violations of regulations that establish an EGS's responsibility for the conduct of its agents, but that do not set forth any standards to which EGSs must adhere;
- (vii) alleging violations of state consumer protection laws that the Commission does not have the statutory authority to enforce; and
- (viii) alleging violations of regulations that were not identified in the Joint Complaint.

The actual number of substantiated allegations is *de minimis* in the truest sense of that phrase, even when the evidence is viewed in a light most favorable to the Joint Complainants, compared to the over seven million alleged violations claimed by the Joint Complainants. With the exception of very limited instances, the Joint Complainants have not demonstrated, through references to the evidentiary record and citations to specific provisions of the Commission's regulations, that the allegations in the Joint Complaint have been substantiated. Rather than producing a preponderance of evidence as necessary to carry their burden of proof, the Joint Complainants have relied on oversimplified generalities taken from the consumer testimony, and extrapolated them into broad-sweeping and inaccurate statements about Respond Power's sales, marketing and business practices. By glossing over the underlying facts and failing to connect the evidence in the record with the requirements of the Commission's regulations, the Joint Complainants have taken giant leaps in proposing expansive factual findings and over-reaching legal conclusions. In doing so, they have clearly failed to satisfy their burden of proof.

The shortcomings in the presentation of the Joint Complainants' case in this consolidated proceeding are voluminous and are described thoroughly by this Reply Brief. By way of example, although they claim that Respond Power violated 24 Commission regulations, they never identify the specific 24 regulations or provisions that are at issue. Similarly, in summary fashion, they proclaim that Joint Complainants have established 36 specific violations of the

Commission's regulations. While they have cited numerous regulations throughout their Main Brief, the inconsistencies in those references have caused the Company to spend an inordinate amount of time trying to identify exactly what it must defend. It was incumbent upon the Joint Complainants to articulate clearly each and every alleged violation and to demonstrate by a preponderance of the evidence that each alleged violation actually occurred. They have failed to do so, and the Commission cannot -- under the law -- simply say that "close is good enough."

Further, the Joint Complainants discuss some examples from the consumer testimony and then list dozens of other witnesses whose testimony supposedly show the same conduct.<sup>5</sup> However, when Respond Power drilled down into the details of that additional testimony, it became clear that there were many discrepancies throughout the different consumer witnesses' renditions of their own unique experiences, which are discussed in this Reply Brief. Even the specific pieces of testimony that the Joint Complainants discussed were often not accurately portrayed. Also, the Joint Complainants frequently offer criticisms about Respond Power's sales, marketing and business practices without explaining how they violated any regulation or even identifying which regulation and which element of the regulation they allege it violated.

By refusing to join the Settlement which, if approved, would fully address and resolve all allegations raised by the Joint Complaint, the Joint Complainants have delayed the delivery of the Settlement's benefits to consumers for several months. They have already used untold taxpayer and ratepayer resources to pursue unlawful and outrageous relief, which the evidentiary record and their legal arguments fail to support. Adoption by the Administrative Law Judges ("ALJs") and the Commission of the findings, conclusions and remedies proposed by the Joint Complainants would result in costly and protracted appellate litigation, delaying delivery of the Settlement's benefits to consumers for many years.

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<sup>5</sup> JC MB, Appendix C at 6-20.

The issues on appeal would include:

- (i) the lack of statutory authority for the Commission to rely on the testimony of select consumers as "pattern and practice" evidence in reaching findings of fact and conclusions of law and awarding remedies;
- (ii) the reliance on uncorroborated hearsay evidence in reaching findings of fact and conclusions of law;
- (iii) the reliance on testimony that is not credible;
- (iv) the lack of substantial evidence to support the Commission's findings of fact, conclusions of law and relief imposed;
- (v) the Commission's lack of statutory authority to interpret private contracts;
- (vi) the Commission's lack of statutory authority to regulate EGS prices and conduct cost of service analyses to determine what their prices "should" have been;
- (vii) the Commission's lack of statutory authority to direct the issuance of refunds by EGSs to consumers;
- (viii) the Commission's lack of statutory authority to direct injunctive relief;
- (ix) the Commission's lack of authority to revoke an EGS's license under the circumstances of this case;
- (x) the lack of due process that was afforded to Respond Power in responding to the certain factual and legal allegations, the total number of alleged violations and the level of the proposed civil penalty;
- (xi) the improper reliance on unenforceable, nonbinding interim guidelines; and
- (xii) a violation of Respond Power's due process rights in being found to have not complied with vague and unenforceable regulations.

Therefore, the Settlement should be approved, without modification, expeditiously so that its benefits may immediately flow to former and current customers of Respond Power, without the need for protracted appellate litigation. Further, the Joint Complaint should be deemed satisfied in full by the remedies provided in the Settlement. This resolution is fair and reasonable, allowing Respond Power to put this matter behind it and move forward with operating its business.

## II. SUMMARY OF ARGUMENT

### A. Introduction

Through their Main Brief, the Joint Complainants seek to rely on select individual consumer witness hearsay testimony laden with credibility issues and the broad sweeping unsubstantiated conclusions of its biased expert witnesses to support Commission findings that Respond Power has committed 36 violations of 24 Commission regulations in connection with serving each of its customers during the December 2013 through March 2014 timeframe. Their entire case is premised on a nonexistent legal theory of "pattern and practice" evidence, which has never been recognized by the Commission due to the laws mandating that complainants must prove their allegations by a preponderance of the evidence and that Commission decisions must be based on substantial evidence of record. The Joint Complainants have failed to cite any statutory authority or case law that would support the use of this approach in this consolidated proceeding.

As a result of the Joint Complainants' reliance on this concept of "pattern and practice evidence," they have discounted the need for them to present substantial evidence in support of each and every specific alleged violation. In prosecuting each Count of the Joint Complaint, they have failed to present substantial evidence, with citations to applicable regulations, to prove each element of their allegations. Through their reliance on the scant testimony of an extremely small percentage of Respond Power's customers, they seek to have the Commission conclude that all customers were affected in exactly the same way. Advancing this theory, they ignore the fact that each customer who testified in this proceeding had his or her own unique experience, which frequently directly contradicted the allegations of the Joint Complaint. Yet, they would have the Commission find over seven million violations of the regulations, based on the concept that if a violation was committed in connection with the Company's dealings with select

customers, then the Company must have committed the same violation of the same regulations in its dealings with every other customer it served during December 2013 through March 2014. This approach improperly counts many individual customers multiple times.

In their Main Brief, the Joint Complainants did not clearly provide a list of regulations that they allege the Company violated. As the chart attached as Appendix A shows, the regulations identified by the Joint Complaint, the Summary of Argument in the Joint Complainant's Main Brief, the discussion of each Count in their Main Brief and the Proposed Conclusions of Law in their Main Brief are not the same. As a result of these moving targets, Respond Power has spent an inordinate amount of time trying to identify the exact 24 regulations and 36 alleged violations so that it could merely test the Joint Complainants' math, let alone challenge the underlying factual assumptions and legal theories. Because the alleged violations in the Summary of Argument match the number of 36 alleged violations, that is the list that Respond Power has used for this Reply Brief.

In addition to the flimsy evidentiary record that is relied upon by the Joint Complainants in support of their claims, they routinely fail in their Main Brief to offer any explanation or legal argument as to how certain practices or conduct amounted to the violation of the Commission regulations they referenced. The Joint Complainants also rely on erroneous interpretations of many Commission regulations in summarily claiming that Respond Power has committed multiple violations. A brief description of their shortcomings for each Count is offered below.

B. Discussion of Counts/Allegations

1. Agent Standards, Training and Monitoring

The Joint Complainants, as the party with the burden of proof, have failed to prove by a preponderance of the evidence that Respond Power violated the Commission's regulations governing agent training and monitoring, as they alleged in connection with Counts I (EDC

affiliations), II (promises of savings) and III (disclosure of material terms). Rather, they have described the concerns of their expert witness, Ms. Barbara Alexander, about Respond Power's training and oversight of agents and have summarily alleged that due to her concerns, the Company has not complied with these regulatory requirements. To the extent that the Commission finds that Respond Power's agent training and monitoring program violated any regulations, the Company notes under the Settlement, it has agreed to implement a new training program, with approval of the Commission's staff and forego door-to-door marketing until such time as the new program can be implemented. It has also committed to deploy an enhanced compliance monitoring program as part of the Settlement.

2. Count I – EDC Affiliations

The Joint Complainants have failed to carry their burden of proving any more than a handful of instances in which Respond Power sales representatives failed to properly identify themselves as affiliated with Respond Power. To the contrary, the evidence of record overwhelmingly shows that the Company's sales agents clearly and immediately identified themselves to prospective customers as Respond Power representatives. If the Commission finds any violations of these regulations, the Settlement adequately addresses them by placing significant responsibilities on Respond Power in terms of sales scripts and verification scripts to ensure that customers always know that they are interacting with a Company representative.

3. Count II – Promises of Savings

In order to prove that Respond Power's sales representatives promised savings that did not materialize, it was incumbent upon the Joint Complainants to prove both sides of the equation -- that savings were promised for a specified period to individual customers and that those savings were not realized. Due to the many shortcomings on both sides of the equation, the Joint Complainants have failed to carry their burden of proof. They have simply not set forth

a preponderance of evidence to demonstrate that specific amounts of savings were guaranteed by Respond Power sales representatives that did not materialize.

If the Commission finds that Respond Power has violated any regulations due to its representatives promising savings that were not realized, the Settlement adequately addresses these issues. Specifically, under the Settlement, Respond Power is required to comply with all Pennsylvania laws, including the Unfair Trade Practices and Consumer Protection Law<sup>6</sup> ("Consumer Protection Law" or "CPL") and the Telemarketer Registration Act ("TRA").<sup>7</sup> It has also agreed to not make any representations about savings that customers may realize by switching except when referencing an explicit, affirmative guaranteed savings program. It has further committed to refraining from the use of terms such as "competitive" or "savings."

4. Count III – Disclosure of Material Terms

The Joint Complainants have failed to carry their burden of proof to show that its sales representatives have not adequately disclosed the variable feature of customers' plans. To the contrary, the evidence in the record shows that many customers were aware of the variable feature of their plan, through their sales agreement and/or their sales representative. If the Commission believes that the Joint Complainants have substantiated any allegations under Count III, the Settlement adequately addresses them. Specifically, Respond Power has agreed to a two-year moratorium on the marketing of variable prices, which it is already honoring as of September 1, 2015. Enhanced variable pricing disclosures are also required by the Settlement.

5. Count IV – Welcome Letter and Inserts

As Count IV alleges violations of the Consumer Protection Law, which the Commission does not have jurisdiction to enforce, it should be dismissed outright. Moreover, the Joint

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<sup>6</sup> 73 P.S. §§ 201-1 *et seq.*

<sup>7</sup> 73 P.S. §§ 2241 *et seq.*

Complainants have not proven that these materials were relied upon by any of the consumer witnesses in enrolling with Respond Power or provided any legal argument explaining how any of these materials violate the Consumer Protection Law, which they are asking the Commission to enforce. Any lingering concerns about these Welcome Letters and Inserts have been fully addressed by the Settlement. In particular, specific provisions of the Settlement would prohibit Respond Power from referring to savings at all, except in the context of an explicit, affirmative guaranteed savings program. It would also preclude Respond Power from referring to competitive rates. Respond Power has further agreed as part of the Settlement to comply with the requirements of the Consumer Protection Law.

6. Count V – Slamming

The Joint Complainants have failed to carry their burden of proof in establishing any more than a handful of slamming violations. Even by their own count, they have only proven twelve instances of slamming. If the Commission would find that any of the consumers who testified in this proceeding were enrolled with Respondent without their authorization, the civil penalty that Respond Power agreed to pay as part of the Settlement more than adequately addresses any proven instances of slamming. Further, Respond Power committed under the Settlement to ensure that the person enrolling the account has authorization to make a change, by requiring the person's affirmative representation that the person is the customer of record or is authorized by the customer of record to act on behalf of the customer.

7. Count VI – Complaint Handling

The Joint Complainants have failed to identify any details about the alleged delays experienced by consumers when trying to reach Respond Power during the Polar Vortex. Rather, they have made broad-sweeping statements about the Company's practices without proving the necessary elements of each alleged violation. If the ALJs and the Commission are

inclined to pore through the evidentiary record and identify the number of customers who did not have "reasonable access" to the Company, the number of investigations that should have been performed and were not performed, and the number of reports that should have been issued and were not issued, it may be possible to identify a limited number of instances in which Respond Power did not fulfill requirements imposed by the regulations during the extraordinary events of the Polar Vortex.<sup>8</sup> To the extent that the Commission finds that Respond Power violated its regulations in handling complaints, Respond Power has agreed as part of the Settlement to comply with numerous requirements related to customer service.

8. Count VII – Disclosure Statement

The Joint Complainants have demonstrated only that the Disclosure Statement does not fulfill the expectations of their expert witnesses, without any reference to a specific departure from a requirement in the Commission's regulations. To the extent that the Commission determines that the Disclosure Statement in effect during the relevant time period was deficient in some way, the Settlement contains provisions requiring a further review of Respond Power's Disclosure Statement upon approval of the Settlement and any time that Respond Power makes a change for the next five years.<sup>9</sup>

9. Count VIII – Prices Conforming to Disclosure Statement

Count VIII should be dismissed outright because the Commission does not regulate the prices charged by EGSs, and in the case of a variable-priced contract that is not based on a specific, prescribed methodology, formula or index, the Commission would have to conduct a cost of service analysis in order to determine what price it believes Respond Power should have

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<sup>8</sup> Respond Power suggests that the Commission should, in assessing violations, view the Polar Vortex as being akin to a *force majeure* event. The extraordinary circumstances of the event caused numerous entities, including OCA, OAG and the Commission's Bureau of Consumer Services, from being able to fulfill completely their duties to the public. RP MB 127-131.

<sup>9</sup> Settlement at pp. 20-22.

charged.<sup>10</sup> To the extent that the Commission has any concerns with Respond Power's price-setting during the Polar Vortex, they are more than adequately addressed by the Settlement, under which Respond Power has made monetary commitments of \$3.2 million, including substantial refund pools, and has agreed to implement costly modifications to its marketing, sales and business practices.

10. Count IX – Compliance with Telemarketer Registration Act

The Commission does not have jurisdiction to hear claims of alleged TRA violations and should dismiss Count IX in its entirety. On interlocutory review, the Commission agreed with this conclusion, noting that it can only review alleged violations of its own regulations. Further, the Joint Complainants have not proven that Respond Power has violated the TRA, and their arguments are based on a flawed interpretation of the requirements of the TRA. To the extent that the Commission has any concerns regarding compliance with the TRA, they are addressed by the provision in the Settlement which mandates such compliance.

C. Conclusion

Through expeditious approval of the Settlement in this consolidated proceeding, the Commission can ensure that its benefits flow promptly to all former and current Respond Power customers, and avoid appellate litigation that would result in years of delay. It fully resolves all issues raised by the Joint Complaint and more that adequately addresses any allegations of the Joint Complaint that have been substantiated.

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<sup>10</sup> RP MB at 140-144.

### III. ARGUMENT

#### A. Pattern and Practice

Through their Main Brief, the Joint Complainants seek to rely on select individual consumer witness hearsay testimony laden with credibility issues, and the broad sweeping unsubstantiated conclusions of its biased expert witnesses, to support Commission findings that Respond Power has committed 36 violations of Commission regulations in connection with serving each of its customers during the December 2013 through March 2014 timeframe. In its Main Brief, Respond Power has fully addressed the inability of the Commission to use pattern and practice evidence to reach findings of fact and conclusions of law.<sup>11</sup> For the reasons set forth therein and those discussed below, the Commission must reject the Joint Complainants' attempts to pursue class action type remedies and relief in this consolidated administrative proceeding.

Respond Power's position is based on the following key principles: (i) the Commission does not have jurisdiction to rely on pattern and practice evidence or to entertain class action types of proceedings; (ii) the Joint Complainants do not have authority to pursue what is effectively a class action lawsuit at the Commission because neither has standing to represent individual consumers or to seek relief on their behalf; (iii) a party in a Commission proceeding has the burden to prove each element of its case by a preponderance of evidence; (iv) Commission decisions must be supported by substantial evidence in the record, which is defined as such relevant evidence that a reasonable mind might accept as adequate to support a conclusion; (v) Respond Power has a fundamental right of due process that affords it the opportunity to confront and cross examine any witness who has offered testimony against it (or will receive relief from it); and (vi) a pattern and practice approach is not appropriate in this

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<sup>11</sup> RP MB at 73-88.

proceeding due to the unique facts and circumstances of each individual sales transaction and customer experience.

The Joint Complainants have not identified any statutory provision or case law that would suggest that the Commission may evaluate an EGS's conduct using a "pattern and practice" approach. In support of their theory, they refer to *Mid-Atlantic Power Supply Assoc. v. PECO Energy Co.*, Docket No. P-00981615, 92 PA PUC 414 (Order entered May 19, 1999), *aff'd*, 746 A.2d 1196 (2000) ("*MAPSA*"). However, the *MAPSA* decision offers absolutely no support for the Joint Complainants' position.

In *MAPSA*, a trade association of EGSs filed a complaint against PECO Energy Company ("PECO") alleging that PECO was engaged in marketing activities that were causing Pennsylvania consumers to remain with PECO and not participate in the competitive market. The trade association was not seeking remedies on behalf of consumers who may have foregone opportunities for savings; was not seeking the imposition of a civil penalty on PECO; and was not seeking to have PECO removed from its role of default service provider. Rather, the trade association simply wanted PECO to stop promoting default service and to refrain from making disparaging statements about EGSs. PECO's rights that were at issue in that proceeding were not of a property nature but of a constitutional nature -- could the Commission lawfully restrain its commercial speech?

Additionally, the trade association produced specific examples of written communications sent from PECO to its default service customers. The fact that these materials were widely distributed to all customers and contained statements promoting default service was not in dispute. Although the Commission found that PECO had created confusion regarding customer choice through its advertising campaign, it recognized the limits on the Commission's

remedial authority and referred the matter to the OAG as contemplated by Code Section 2811<sup>12</sup> and the Memorandum of Understanding between the OAG and the Commission. The Commission expressly rejected the ALJ's recommendation to impose a civil penalty on PECO.

Accordingly, *MAPSA* is nothing like this proceeding where the Joint Complainants are seeking to rely on the select testimony of individual consumers to have the Commission conclude that an Respond Power has violated numerous Commission regulations in connection with every customer with whom they have interacted; impose a multi-million or multi-billion civil penalty; direct contributions to EDCs' hardship funds; and revoke the Respond Power's license. As the Joint Complainants conceded, the Commission has not used the "precise phrase 'pattern and practice' in the past."<sup>13</sup> Indeed, the Commission has not even come close to using any remotely similar phrase in the context of adjudicating a complaint or enforcement proceeding.

The Joint Complainants include citations to Commission decisions involving investigations of overall utility practices for compliance with the Code and Commission regulations. At no time in any of these proceeding did the Commission discuss the imposition of penalties on a regulated entity on the basis of the experiences of a select group of customers. As those cases involved widespread issues affecting the adequacy of the utility's service to all customers in exactly the same way, they are not applicable here.

In *Investigation of W.P. Water Co., Inc. and W.P. Sanitary Co., Inc. Pursuant to Section 529 of the Pa. Public Utility Code, et al.*, Docket No. I-00070114 *et al.*, (Order entered March 31, 2009) ("*WP Order*"), the Commission initiated an investigation into whether it should order a capable public utility to acquire W.P. Water Co. Inc. ("*WP*") pursuant to Code

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<sup>12</sup> 66 Pa. C.S. § 2811.

<sup>13</sup> JC MB at 23.

Section 529,<sup>14</sup> which expressly confers this authority on the Commission. Relevant factors in such a proceeding are whether the existing utility has the financial, technical and managerial ability to make necessary improvements to provide adequate service to customers as required by Code Section 1501.<sup>15</sup> Notably, WP had no objection to the initiation of a take-over proceeding and viewed that result as both viable and practicable. *WP Order* at 3-4. Similarly, in *Investigation into Whether the Commission Should Order a Capably Public Utility to Acquire Clean Treatment Sewage Company Pursuant to 66 Pa. C.S. § 529*, Docket No. I-2009-2109324 (Order entered July 16, 2013), the Commission initiated an investigation that resulted in the wastewater utility being acquired and no civil penalty was imposed. The other proceeding involved the issuance of an emergency order, due to public health and safety concerns, to ensure a reasonably continuous supply of potable water that is suitable for all household purposes. No civil penalties or remedies for individual consumers were sought in that proceeding. *Joint Petition of the DEP and the OCA for Issuance of an Emergency Order Against Emlenton Water Co.*, Docket No. P-2008-2070480 (Order entered November 18, 2008). Nothing in these orders suggest that the Commission may consider the unique experiences of an extremely small percentage of an EGS's customers and conclude that the EGS has engaged in a pattern and practice of violating Commission regulations across its entire customer base.

The reliance by the Joint Complainants on federal cases brought by the Federal Trade Commission ("FTC") involving large volumes of customers is likewise misplaced.<sup>16</sup> In *FTC v.*

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<sup>14</sup> 66 Pa. C.S. § 529.

<sup>15</sup> 66 Pa. C.S. § 1501.

<sup>16</sup> Federal courts have broader powers, including equity powers, which the Commission simply does not have as a matter of law. It bears repeating *ad nauseam* throughout this case that "[a]s a creation of the General Assembly, the Commission has only the powers and authority granted to it by the General Assembly and contained in the Code." *See City of Phila. v. Phila. Elec. Co.*, 473 A.2d 997, 999-1000 (Pa. 1984). The Joint Complainants choose simply to ignore this bedrock principle of Pennsylvania public utility law throughout their advocacy for the expansion of the Commission's authority. If the Joint Complainants want the Commission to have the authority to consider -- and base violations upon -- pattern and practice evidence, their time and resources would be better spent trying to

*Kitco v. Nevada, Inc.*, 612 F. Supp. 1282, 1294 (D. Minn. 1985), the FTC had initiated an action against the manufacturing company seeking to enjoin the company from engaging in unfair and deceptive practices. The relevant issue in that proceeding was whether to admit twenty consumer affidavits, pursuant to the residual exception to the hearsay rule, to supplement the testimony provided by eight witnesses. The Court admitted fifteen of the proffered affidavits "to prove total consumer injury and establish the amount of the monetary" relief. *Kitco* at 1295. In doing so, the Court noted that it would be too expensive and time consuming to call witnesses from all part of the United States merely to establish total consumer injury. *Id.* Notably, in the absence of specific harm shown for any other consumers, the Court only awarded monetary relief to the witnesses and the affiants.

The use of the residual exception to the hearsay rule has been expressly rejected by the Supreme Court of Pennsylvania. *See Commonwealth v. Stallworth*, 566 Pa. 349, 781 A.2d 110, 128, n.2 (2001). Moreover, federal courts have expressed significant skepticism regarding its use, emphasizing that the burden is on the party seeking to invoke the residual exception to clearly demonstrate guarantees of trustworthiness. *See Reassure Am. Life Ins. Co. v. Warner*, 2010 WL 4782776, \*2 (S.D. Fla. 2010). The Joint Complainants have made no effort to establish this clear basis of trustworthiness. To the contrary, particularly given the solicitation of the consumer statements by the Joint Complainants for purposes of litigation and the clear expectation on the part of many consumers for restitution, these guarantees could not be made.

Notably, state courts have likewise rejected attempts by an Attorney General to introduce affidavits under the residual exception in consumer protection proceedings that bear strikingly

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convince the Pennsylvania Legislature, not the Commission, that a change to the Public Utility Code is necessary. In this regard, Respond Power notes that I&E, the prosecutory arm of the Commission, acknowledges and convincingly argues that the Commission lacks the authority to use pattern and practice evidence. *See I&E Main Brief at 7-14.*

similar circumstances as are present here. For instance, in *People v. Shifrin*, 2014 WL 785220 (Feb. 27, 2014), the Colorado Court of Appeals ruled that customer affidavits were not admissible because the: (i) affiants knew that litigation was pending; (ii) the affiants stood to receive substantial restitution based on their affidavits; (iii) the affidavits were not written spontaneously or independently, but were obtained by representatives of the Attorney General's office; and (iv) the Attorney General's office had procured the affidavits to further its position in the litigation. All of these factors are present in this proceeding.

The Joint Complainants cite *U.S. v. Nat'l Fin. Servs.*, 98 F.3d 131,140 (4<sup>th</sup> Cir. 1996), for the proposition that the mailing of deceptive information on a widespread basis can establish the foundation for liability. In that case, debt collectors repeatedly sent out computer-generated dunning notices to millions of magazine subscribers' accounts with relatively small balances, falsely threatening the initiation of legal proceedings. In finding that it was not necessary for the government to prove actual harm in order to assess penalties, the Court observed that threats of legal action are likely to be intimidating to consumers and that stress resulting from false threats of suit has been recognized as a compensable injury in private suits under the Fair Debt Collection Practices Act ("FDCPA").<sup>17</sup>

On that basis, the Court found that the notices caused significant injury to the public, warranting the imposition of a civil penalty on the debt collectors. No relief, however, was awarded to consumers by the Court's decision. Also, the instant proceeding is distinguishable in that it involves subjective issues about select individual consumers' understandings of their contractual rights, as opposed to millions of customers receiving collection notices falsely threatening litigation. Therefore, that decision has no applicability to the present case. Moreover, even though millions of collection letters threatening legal action were sent, violating

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<sup>17</sup> 15 U.S.C.A. § 169.

two separate statutory provisions, and the law authorizes a civil penalty for up to \$10,000 for each violation of the FDCPA, the Court assessed a civil penalty of \$550,000.

The United States Supreme Court's decision in *U.S. v. Reader's Digest Ass'n, Inc.*, 662 F.2d 955, 969 (3<sup>rd</sup> Cir. 1981), *cert. denied*, 455 U.S. 908 (1982), which is cited by the Joint Complainants for the proposition that the government is not obligated to adduce evidence of specific injuries to consumers, also does not provide any support for the Joint Complainants' approach in this proceeding. That case involved the widespread dissemination of several million simulated checks through bulk mailings. Again, the factual scenario in that case was far different and of a completely different magnitude than the instant proceeding to the point of being of no persuasive value to any of the pending issues.

The court decisions cited by the Joint Complainants, which address discrimination claims by employers, likewise do not support their theory in this proceeding. In *United States v. Iron Workers Local 86*, 443 F.2d 544, 552 (9<sup>th</sup> Cir. 1971), the Court considered whether the employers' policies constituted a "pattern or practice" of resistance to full employment by minorities. Finding that the employers had engaged in a pattern or practice of discriminatory conduct, the Court noted that its findings of repeated and routine discriminatory behavior were well-documented by statistical evidence showing a distinct absence of minority representation in special programs. Likewise in the other cases cited by the Joint Complainants, the Courts concluded that to prove a pattern or practice of discrimination in the workplace, the plaintiff must show that discrimination was the company's standard operating procedure. *See Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 104 S.Ct. 2794, 81 L. Ed. 2d 718 (1984).

Indeed, the use of "pattern or practice" evidence in the employment arena is now considered to be in disfavor as a result of the United States Supreme Court's decision in *Dukes v.*

*Walmart*, 131 S.Ct. 2541 (2011). In *Dukes*, Justice Scalia made it clear that the type of anecdotal evidence suggested by the Joint Complainants in their Main Brief will not stand as proof about a company's hiring or employment decisions and practices. If that type of argument does not persuade the Supreme Court of the United States in the context of a case alleging rights guaranteed by the Constitution of the United States regarding fair employment practices, it certainly should not be considered in the context of any dispute or claims arising out of a private contract.

The primary problem with the Joint Complainants' reliance on these employment discrimination cases is that they have nothing to do with whether the Commission has jurisdiction to consider whether the evidence in the record even establishes a "pattern or practice" of unlawful conduct. Moreover, Respond Power witnesses, Mr. Elliott Wolbrom, Mr. Adam Small and Mr. James Crist, have all provided testimony demonstrating that the Company's standard operating procedures involved numerous steps designed to ensure that consumers were not promised savings, that they knew who the sales agent represented, that they knew they were signing up for variable prices and that they accounts were switched only with their authorization.<sup>18</sup> Moreover, the Commission-approved Disclosure Statement cautioned consumers that savings could not be guaranteed, and the Company calculated prices in conformance with the factors set forth therein.

The fact that the Joint Complainants are relying on irrelevant cases involving millions of blatantly misleading mailings and patterns of discriminatory conduct in the workplace demonstrates the absurdity of considering a pattern and practice approach in this proceeding. Obviously, they have offered no applicable case law to support their theory of using this concept in a Commission proceeding because it does not exist.

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<sup>18</sup> RB MB at 97-99, 111-113, 116.

In fact, the Joint Complainants' nonexistent legal theory runs afoul of the fundamental principle that parties with the burden of proof must prove each element of their case by a preponderance of evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n.*, 578 A.2d 600 (Pa. Cmwlth. 1990) ("*Lansberry*"). Further, it is well-settled that the Commission's decision must be supported by substantial evidence in the record. Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and Western Railway Co. v. Pa. Pub. Util. Comm'n.*, 489 Pa. 109, 413 A.2d 1037 (1980) ("*Norfolk*").

In requesting that the Commission find that Respond Power committed multiple violations in their dealings with every consumer served by the Company over a four-month period, and asking the Commission to impose civil penalties, grant restitution and revoke Respond Power's license as a result of those alleged violations, the Joint Complainants cannot carry their burden of proof by pointing to the testimony and experiences of a select and extremely small group of individual consumers. Their expert witness testimony, which was offered by Ms. Alexander who has only testified on behalf of consumers,<sup>19</sup> is based on her biased description of the consumer testimony, contains her own personal views of the rules that should govern the retail market and includes many flawed interpretations of the Commission's regulations. Her testimony does not prove any violations of Commission regulations and may certainly not support findings of widespread violations warranting the relief requested by the Joint Complainants. Likewise, Dr. Steven Estomin's testimony that seeks to have Respond Power's unregulated prices dissected in a way that is reserved for public utility ratemaking, offers no support for finding violations of the Commission's regulations by Respond Power.

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<sup>19</sup> Tr. 1185, 1420.

In order to prove violations by Respond Power, it was incumbent upon the Joint Complainants to present substantial evidence in support of each and every specific alleged violation. The Joint Complainants cannot expect to prove a discrete number of violations and then ask the Commission to speculate that more violations must have occurred. For the Commission to do so would directly violate the bedrock principle that Commission findings cannot be based on a "mere trace of evidence or a suspicion of the existence of a fact sought to be established." *Norfolk*.

To the extent that the Joint Complainants needed to look beyond the Code and court decisions involving Commission proceedings, the only relevant case law relates to class action lawsuits. It is well-established that for a pattern and practice approach to be used in deciding a lawsuit, the party initiating the litigation must demonstrate at the outset that a number of criteria are met, including questions of law or fact that are common to the class. *Dunn v. Allegheny County Property Assessment Appeals and Review*, 794 A.2d 416 (2002). It has been determined that claims involving deceptive business practices are not suitable for class action treatment because of each customer's unique experience that the varying levels of reliance, causation and damages among individuals. *See Kostur v. Goodman Global, Inc.*, 2014 WL 6388432 (E.D. Pa. 2014). As noted in Respond Power's Main Brief, the United States District Court for the Eastern District recently denied the plaintiff's motion for class certification in a putative class action lawsuit filed against Respond Power regarding marketing and sales activities related to variable price contracts for these precise reasons.<sup>20</sup> Since the variable rate customers could not be expected to share the same understanding of their contractual rights, the Court found that the commonality requirement of class certification was not fulfilled. *Barbara A. Gillis, Thomas*

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<sup>20</sup> RP MB at 86, Appendix B.

*Gillis, Scott R. McClelland, and Kimberly A. McClelland, individually and on behalf of all others similarly situated v. Respond Power, LLC*, Docket No. 14-38576 (Order dated August 31, 2015).

The record in this consolidated proceeding contains countless instances of how those customer interactions varied, which are more fully described in the discussions of Counts I, II and III. Immediately below, however, are several examples of testimony relied upon by the Joint Complainants to prove that Respond Power promised long-term savings as alleged in Count II (promises of savings). These examples demonstrate why it is not possible or appropriate in this case to take the testimony of a very small number of Respond Power customers and make broad sweeping conclusions about what may have occurred across the rest of its customer base -- including customers who did not complain, despite extensive media outreach by Attorney General Kane, or submit testimony, despite personal outreach by the Joint Complainants:

- Mr. Robert Becker testified that the representative told him that he "could probably save money" and "kind of alluded" to that possibility.<sup>21</sup>
- Ms. Linda Rose testified that she did not have any expectations for a time period for any cost savings.<sup>22</sup>
- Mr. Joseph Cochi was "under the impression" that they would save up to 10% on their bill, but he did not recall being given "a timeframe of how long these savings would last" and was not guaranteed savings.<sup>23</sup>
- Mr. James Thorbahn did not perceive the Company as having guaranteed savings.<sup>24</sup>
- Ms. Vickey Atland testified that no time period was given for any savings.<sup>25</sup>
- Ms. Mary Bagenstose testified that when she enrolled in February 2011, she thought her price would be "lower" for a year and indicated her overall satisfaction with Respond Power's charges in 2011, 2012 and 2013.<sup>26</sup>

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<sup>21</sup> Tr. 322.

<sup>22</sup> JC Consumer Testimony at 32.

<sup>23</sup> JC Consumer Testimony at 124.

<sup>24</sup> JC MB at 62-63.

<sup>25</sup> JC Consumer Testimony at 803.

<sup>26</sup> Tr. 491.

- Mr. Alex Bobsein reviewed his disclosure statement,<sup>27</sup> understood that the rate was variable and saw the charges fluctuate prior to 2014.<sup>28</sup>
- Ms. Nancy Chappel's testimony indicated a general expectation that a customer would save money by switching to an EGS because otherwise -- "what would be the point of changing?"<sup>29</sup>
- Ms. Colleen Cheri, who enrolled in June 2011, did not testify as to any time period when such possible savings would be realized and acknowledged that she saved money.<sup>30</sup>
- Ms. Phyllis Court testified that she did not remember much of the conversation with the sales agent in January 2013.<sup>31</sup>
- Ms. Lakeyva Davis testified that she was told during her TPV that she would save money; however, a review of the TPV recording demonstrates otherwise.<sup>32</sup>
- Ms. Kathleen DiMaggio was not the customer who was solicited; rather, it was her son who was residing at a different location.<sup>33</sup>
- Ms. Megan Foley testified that the charges on her bills were consistent with what she was told during the door-to-door sales pitch.<sup>34</sup>
- Ms. Donna Geary testified that she reviewed variable price language in the Disclosure Statement at the time of enrollment and knew that Respond Power did not guarantee savings.<sup>35</sup>
- Ms. Danielle Groff was not at home at the time the Respond Power sales representatives visited her home and spoke with her mother.<sup>36</sup>
- Mr. Allen Gullickson did not even speak to a sales agent and testified that no savings were guaranteed.<sup>37</sup>
- Ms. Alice Kapel testified that the sales representative "estimated" savings, but provided no timeframe over which the lower rates were to remain in effect.<sup>38</sup>

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<sup>27</sup> JC Consumer Testimony at 867; Tr. 297.

<sup>28</sup> Tr. 297.

<sup>29</sup> JC Consumer Testimony at 855.

<sup>30</sup> JC Consumer Testimony at 628-629; Tr. 10.

<sup>31</sup> JC Consumer Testimony at 697.

<sup>32</sup> JC Consumer Testimony at 17; RP Ex. 27 and 27-A; Tr. 698-702.

<sup>33</sup> I&E Consumer Testimony at 123-124.

<sup>34</sup> Tr. 551.

<sup>35</sup> Tr. 758-759.

<sup>36</sup> JC Consumer Testimony at 152.

<sup>37</sup> JC Consumer Testimony at 460.

<sup>38</sup> JC Consumer Testimony at 176.

- Mr. David Lazzari testified that no timeframe was given for a rate that would be lower than his current supplier and further noted his rates were reasonable in 2013.<sup>39</sup>
- Ms. Jeanne Mann was not at home when her husband spoke to the Respond Power sales representative and enrolled their account.<sup>40</sup>
- When asked to describe the sales contacts with Respond Power's representative, Mr. Carl Moyer responded: "I do not recall anything more than the phone call."<sup>41</sup>
- Mr. Michael O'Hagan claims to have been quoted a rate lower than his EDC's PTC, but offered no timeframe for any expected savings and recalls nothing else about the transaction, except actually enrolling.<sup>42</sup>
- Ms. Tonya Reed testified that there was "no written or verbal guarantee" of savings made by the Respond Power sales representative.<sup>43</sup>
- Mr. Roberto Simoes testified that Respond Power did not guarantee savings.<sup>44</sup>
- Mr. William Stankewicz, knew the initial price would only be in effect for one month and that no one from Respond Power guaranteed him savings.<sup>45</sup>
- Mr. Michael Sumerano researched rates on [www.papowerswitch.com](http://www.papowerswitch.com) and had no contact with a Respond Power sales representative and he knew that he signed up for a variable rate, which could increase. He testified that nothing was guaranteed.<sup>46</sup>
- Ms. Esther Weyand was with another EGS before switching to Respond Power, and no evidence was offered to show the price that she paying the other EGS or what the other EGS was charging after she switched.<sup>47</sup>
- Ms. Jodi Zimmerman testified that she did "not remember specifics" of the sales contacts that she had with Respond Power sales representatives when she signed up for service in 2012.<sup>48</sup>

Respond Power emphasizes that these excerpts are from testimony relied upon by the Joint Complaints in their Main Brief in support of Count II. Additional examples exist in other

<sup>39</sup> JC Consumer Testimony at 710-711.

<sup>40</sup> JC Consumer Testimony at 128.

<sup>41</sup> JC Consumer Testimony at 87.

<sup>42</sup> JC Consumer Testimony at 111-112; Tr. 732.

<sup>43</sup> JC Consumer Testimony at 220.

<sup>44</sup> JC Consumer Testimony at 1061-1062; Tr. 373.

<sup>45</sup> JC Consumer Testimony at 540.

<sup>46</sup> JC Consumer Testimony at 593-594.

<sup>47</sup> JC Consumer Testimony at 403; Exh. EW-1; Tr. 367.

<sup>48</sup> JC Consumer Testimony at 454-455; Tr. 335-336.

consumer witness testimony presented in this proceeding stating that no savings were guaranteed.<sup>49</sup> These varying scenarios demonstrate why class action treatment is not suitable for the allegations raised by the Joint Complaint. Indeed, the fact that the Commission has dismissed formal complaints against Respond Power containing the same allegations that are involved in this proceeding further establishes why it would be inappropriate to make findings of patterns and practices.<sup>50</sup>

As highlighted above, and discussed in more detail in the section addressing Count II, even as to customers who claimed to have been promised savings, an expected time period for any promised savings is completely omitted from the Joint Complainants' analysis and requests for relief, despite the fact that many testified that they had no expectations for a specific timeframe. Another glaring omission from the Joint Complainants' presentation of their case regarding Count II is specific billing data for most of the customers who they claim were promised savings. For customers who did not allege that long-term savings were promised, it would be necessary to look at each customer's billing information to determine whether they had realized savings in any month or months. The Commission's inability to apply a simple mathematical formula to determine whether any promises of savings were realized by individual consumers demonstrates the absurdity of evaluating this case upon the basis of pattern and practice approach or a class action lawsuit.

Given the Commission's lack of statutory authority to entertain class action proceedings, and the requirement for the Commission to base its decisions on substantial evidence, adoption of the pattern and practice approach proposed by the Joint Complainants would be unlawful. Rather, the Commission must hold the Joint Complainants to the same standard as every other

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<sup>49</sup> See, e.g., JC Consumer Testimony at 655 (Frank); 159 (Kosydar); 395 (McCloe); 210 (Sprow); 977 (Trapp); 844 (Verhage); and 141 (Yingling).

<sup>50</sup> RP MB at 181.

complainant coming before the Commission and consider whether they have proven every element of their alleged violations with respect to the Company's dealings with each individual consumer.<sup>51</sup> A viable alternative to a review of the evidentiary record by the ALJs and the Commission in the granular detail that the Joint Complainants have not done is to approve the Settlement, which fully and adequately addresses all issues raised in this consolidated proceeding.

B. Company Operations

In describing the Company's operations, the Joint Complainants address Respond Power's compliance history and its agent training and monitoring programs.<sup>52</sup> Respond Power has described its overall operations in Pennsylvania, as well as its compliance history in its Main Brief.<sup>53</sup> As noted therein, Respond Power has an unblemished compliance record since receiving its license in 2010.<sup>54</sup>

Prior to January 2014, only two formal complaints had been filed with the Commission against Respond Power, and both were quickly resolved quickly through settlements to the satisfaction of the customers.<sup>55</sup> Also before 2014, Respond Power experienced minimal informal complaint activity, and in 2015 those levels returned to normal.<sup>56</sup> In addition, Respond Power has cooperated with the Commission's Bureau of Consumer Services ("BCS"), participated in

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<sup>51</sup> What this means is that the Commission must review the record to determine whether the Joint Complainants have proven that the Company violated specific regulations it is dealing with 169 of its former and current customers. See *Pa. Pub. Util. Comm'n., Bureau of Investigation and Enforcement v. HIKO Energy, LLC*, Docket No. C-2014-2431410 (Order entered December 3, 2015) ("*HIKO Order*") at 46. Specifically, this requires findings as to whether each of those 169 consumers was misled by Respond Power's sales representatives regarding affiliations with the EDC; whether each of them was promised savings that did not materialize; whether each of them was switched without authorization; whether each of them was unable to reach Respond Power's call center; and whether each of them was misled by Respond Power's Commission-approved Disclosure Statement. The remaining issues alleged by the Joint Complaint are not within the purview of the Commission to consider.

<sup>52</sup> JC MB at 27-35.

<sup>53</sup> RP MB at 1-2, 6, 26-31, 181-182.

<sup>54</sup> I&E St. 1 at 32.

<sup>55</sup> RP St. 3 (Rev) at 2.

<sup>56</sup> RP St. 3 (Rev) at 1-2.

informative sessions hosted by the Office of Competitive Market Oversight ("OCMO") and sought OCMO's opinion as necessary.<sup>57</sup> Regarding informal and formal complaints filed with the Commission in 2014 arising from variable price increases due to the Polar Vortex, most have been either satisfactorily resolved or dismissed.<sup>58</sup> Particularly due to the extensive modifications to sales, marketing and business practices, and enhancements to its training and compliance monitoring programs, which Respond Power has agreed to implement as part of the Settlement, the Company fully expects its pre-Polar Vortex compliance history to continue.

The Joint Complainants contend that the "Joint Complaint is not the first, or only, instance where Respond Power's sales and marketing activities have been investigated or the subject of a complaint."<sup>59</sup> They refer to an informal investigation that was initiated by I&E in November 2013. Notably, that informal investigation was rolled into the I&E Complaint, which was filed on August 21, 2014 and consolidated with the Joint Complaint on October 28, 2014, due to the common issues of fact and law. Therefore, it does not constitute a separate compliance matter and has been fully resolved and satisfied by the Settlement.

The Joint Complainants also refer to formal complaints filed by individual consumers. As they involve the same allegations and time period as are at issue in this consolidated proceeding, they are not reflective of a prior compliance history. Moreover, one of the complaints is still pending review by the Commission<sup>60</sup> and the other two were dismissed by the Commission.<sup>61</sup> As to the conditional license originally granted by the Commission to Respond Power's affiliate, Major Energy Services, LLC ("Major Energy"), the Company notes that it fully

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<sup>57</sup> RP St. No. 3 (Rev) at 4-6; Ex. AS-1; Ex. AS-3.

<sup>58</sup> RP St. No. 3 (Rev) at 2; RP MB at 181-183.

<sup>59</sup> JC MB at 28.

<sup>60</sup> *Herp v. Respond Power LLC*, Docket No. C-2014-2413756 (Initial Decision issued December 17, 2014).

<sup>61</sup> *Werle v. Respond Power LLC*, Docket No. C-2014-2429158 (Initial Decision issued November 18, 2014; Final Order entered February 23, 2015); *Nadav v. Respond Power LLC*, Docket No. C-2014-2429159 (Order entered December 19, 2014).

complied with those conditions during the eighteen-month term, with most informal complaints having no legitimate basis.<sup>62</sup> Also, a review of Major Energy's compliance history demonstrates that it has experienced minimal formal complaint activity since originally receiving its license in 2009.<sup>63</sup>

### C. Training and Monitoring of Agents

#### 1. Introduction

As to the Joint Complainants' assertions regarding Respond Power's training and oversight of its marketing agents, they have failed to demonstrate that Respond Power violated the Commission's regulations in Section 111.4 (agent qualifications and standards) or Section 111.5 (agent training).<sup>64</sup> Rather, they have described the concerns of their expert witness, Ms. Alexander, about Respond Power's training and oversight of agents and have summarily alleged that due to her concerns, the Company has not complied with these regulatory requirements. In Respond Power's Main Brief, the training and oversight of agents is discussed throughout the sections addressing specific Counts in which those allegations were made.<sup>65</sup> Through the Reply Brief, Respond Power is responding to the Joint Complainants' arguments concerning the training and oversight of agents in this section.

Respond Power demonstrates below that the Joint Complainants have failed to prove by a preponderance of the evidence that the Company departed from the Commission's regulations in training and monitoring of agents. Through its testimony, Company shows that it took numerous

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<sup>62</sup> This is shown through public documents on the Commission's website, which are published at Major Energy's application docket number: [http://www.puc.pa.gov/about\\_puc/consolidated\\_case\\_view.aspx?Docket=A-2009-2118836](http://www.puc.pa.gov/about_puc/consolidated_case_view.aspx?Docket=A-2009-2118836).

<sup>63</sup> This is confirmed through a review of the Commission's website, using the publicly available tool for searching regulated entities' compliance history:

[http://www.puc.pa.gov/about\\_puc/search\\_results/utility/authority\\_search/utility\\_detail\\_view.aspx?Utility=1211234](http://www.puc.pa.gov/about_puc/search_results/utility/authority_search/utility_detail_view.aspx?Utility=1211234).

See [http://www.puc.pa.gov/about\\_puc/press\\_releases.aspx?ShowPR=3579](http://www.puc.pa.gov/about_puc/press_releases.aspx?ShowPR=3579).

<sup>64</sup> 52 Pa. Code §§ 111.4-111.5. Please note that in this Reply Brief, Respond Power is providing the full citation for a regulation the first time it is mentioned and thereafter referring to it by Section number.

<sup>65</sup> RB MB at 97-99, 111-113, 116.

steps to train and monitor agents and quickly responded when it became aware of problems. To the extent that the Commission has concerns about the adequacy of Respond Power's agent training and monitoring program, the Company notes under the Settlement, it has agreed to implement a new training program, with approval of the Commission's staff and forego door-to-door marketing until such time as the new program can be implemented. It has also committed to deploy an enhanced compliance monitoring program as part of the Settlement. Therefore, these agreements adequately and fully address any concerns.

2. Discussion

a. Section 111.4 – Agent Standards

Section 111.4 of the Commission's regulations requires EGSs to develop standards and qualifications for its agents, conduct criminal background checks, disqualify certain individuals from being hired as agent and confirm that its vendors perform criminal background checks. Although the Joint Complainants allege that Respond Power violated Section 111.4 with respect to Counts I (EDC affiliations), II (promises of savings) and III (disclosure of material terms), at no point in their Joint Complaint or in their Main Brief do they offer any allegations, let alone prove, that Respond Power failed to develop standards and qualifications for its agents, conduct criminal background checks, disqualify certain individuals from being hired as agent, or confirm that its vendors perform criminal background checks. Yet, the Joint Complainants would have the Commission find that Respond Power violated this regulation no less than 611,640 times and extract a civil penalty of \$611,640 or \$611,640,000, depending on whether \$1 or \$1,000 is assessed per violation. As the Joint Complainants have not presented any evidence in support of these allegations, all of these alleged violations must be dismissed.

b. Section 111.5 – Agent Training and Monitoring

Section 111.5 of the Commission's regulations, which went into effect on June 29, 2013, governs the training and monitoring of EGS agents.<sup>66</sup> Subsection 111.5(a) requires EGSs to ensure the training of their agents on the applicable regulatory requirements and consumer protections; responsible and ethical sales practices; the EGS's products and pricing structures; the customer's right to rescind and cancel contracts; the applicability of an early termination fee; the need to adhere to and understand the script if one is used; the proper completion of transaction documents; the EGS's disclosure statement; the terms and definitions related to energy supply, transmission and distribution service; information on how customers may contact the EGS; and the confidentiality of customer information.

Under Subsection 111.5(b), EGSs are required to document agent training and maintain those records for three years. Subsection 111.5(c) requires EGSs to make training materials and training records available to the Commission upon request. Subsection 111.5(d) obligates EGSs, when they contract with vendors, to confirm that they have provided EGS-approved training to their agents. Under Subsection 111.5(e), EGSs are required to monitor telephonic and door-to-door marketing and sales to evaluate the training program and ensure that agents are providing accurate and complete information.

The Joint Complainants allege violations of Section 111.5 in connection with Counts I (EDC affiliations), II (promises of savings) and III (disclosure of material terms). In the Joint Complaint, no factual allegations are raised that are specific to the requirements of Section 111.5. For instance, the Joint Complaint contains no allegations that Respond Power

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<sup>66</sup> Prior to the promulgation of Chapter 111, the Commission had Interim Guidelines in place addressing many of the same issues. However, the Pennsylvania Supreme Court has equated agency guidelines to general statements of policy which do not establish a "binding norm." *Pa. Human Relations C'mmn v. Norristown Area School Dist.*, 473 Pa. 334, 350, 374 A.2d 671, 679 (1977). Accordingly, the Commission may not find violations of interim guidelines, which do not have the force and effect of law. *See also Woods Services, Inc. v. Dep't of Public Welfare*, 803 A.2d 260, 265 (Pa. Cmwlth. 2002).

failed to document training of an agent or maintain a record of the training. Similarly, it does not allege that Respond Power did not train its agents on its products and services, the Disclosure Statement or the applicability of early termination fees. Nor does it allege any failure by Respond Power to make training materials and training records available to the Commission.<sup>67</sup>

Notably, even their Main Brief does not offer any detail as to how the training and monitoring of Respond Power's agents departed from the requirements of Section 111.5. As they have done throughout this proceeding, the Joint Complainants simply rely on unsubstantiated generalities regarding Respond Power's sales and marketing practices, and the personal opinions of Ms. Alexander about how she believes that Respond Power should have trained and monitored their agents, to summarily allege and conclude that Respond Power has violated the Commission's regulations.<sup>68</sup>

For example, Ms. Alexander testified that the Company's written training materials lack information that specifically reflects Pennsylvania law, Commission regulations and consumer protection requirements.<sup>69</sup> Yet, neither she nor the Joint Complainants ever identified any particular Pennsylvania requirement that was omitted from those training materials. Moreover, Mr. Wolbrom testified that much of the training is not produced in written form, but is rather done online, over the phone or in person without documentation.<sup>70</sup>

In their Main Brief, the Joint Complainants rely on these and other general criticisms lodged by Ms. Alexander regarding the Company's agent training and monitoring programs, in alleging violations of Section 111.5.<sup>71</sup> However, as described in Respond Power's Main Brief, Mr. Wolbrom provided very specific and extensive testimony about Respond Power's selection

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<sup>67</sup> JC ¶¶ 20-31, 33-41, 43-53.

<sup>68</sup> JC MB at 31-34.

<sup>69</sup> JC MB at 31; OAG/OCA St. 1 at 24-25.

<sup>70</sup> RP St. 1 at 3.

<sup>71</sup> JC MB at 31-34.

of vendors, the training of agents and the monitoring of agents. Testifying about the selection process that Respond Power follows in choosing vendors to conduct its sales and marketing activities, Mr. Wolbrom described the Company's tireless efforts and due diligence that includes an aggressive and thorough investigation. Only if the vendor passes Respond Power's initial screening process does it engage in an interview to gauge the integrity, ethics and salesmanship of the vendor. During that process, Respond Power performs numerous measures to ensure the vendor's integrity and ethics, including checks of their criminal backgrounds and references and inspections of their sales offices. He also testified that when the contract is negotiated, significant elements are included to deter the vendor from engaging in unlawful practices, such as chargebacks and claw-backs and financial responsibility for unauthorized enrollments.<sup>72</sup>

As to training of agents, Mr. Wolbrom testified that the Company explains the product offerings, scripts, enrollment process, sales agreement and ethical marketing practices. Respond Power also reviews the Disclosure Statement and works "hard at making sure the agents know the products they are selling and that they are properly trained to speak about the product with the customer."<sup>73</sup> He further explained that after the initial training, the Company allows the vendor to begin marketing in a limited test phase so that it can closely monitor the operations.

The Joint Complainants contend that Respond Power does not sufficiently train its agents to clearly identify themselves as representatives of the Company.<sup>74</sup> However, Respond Power offered testimony to demonstrate that its sales representatives are provided with training and scripts to use during sales transactions that are designed to ensure that they clearly indicate that they are representing Respond Power. In fact, the sales scripts used by Respond Power include, as the very first point, an explanation that the sales representative is working for Respond Power,

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<sup>72</sup> RP MB at 111-113.

<sup>73</sup> RP St. 1 at 3.

<sup>74</sup> JC MB at 30-34.

a licensed EGS. Further, all door-to-door agents are required to wear apparel bearing the name "Respond Power," as well as an identification badge around their neck that includes a photograph and information clearly indicating they are representing Respond Power. In fact, all of the efforts that the Company takes as part of the training of sales representatives are designed to ensure that the customers understand that they represent Respond Power, and not their local utility. Moreover, consumers overwhelmingly testified in this proceeding that Respond Power sales representatives clearly identified themselves at the outset of the transaction, which demonstrates that these training efforts have been effective.<sup>75</sup>

The Joint Complainants also criticize Respond Power's training program for its failure to provide information about the variable price feature of the contracts.<sup>76</sup> However, as Respond Power showed, agents were trained and instructed to explain the potential for variance and volatility since they will be based on several factors, including unknown and volatile wholesale market conditions.<sup>77</sup> Also, as part of the training and sales scripts, agents were instructed to highlight the inherent variability of rates and the no-cancel fee element of the variable product, and the price protection and cancel-fee elements of a fixed rate product. As Mr. Wolbrom testified:<sup>78</sup>

Specific to variable rates, all agents are trained and instructed to never guarantee savings, to explain the potential for variance and volatility in price considering the rate will be based on the wholesale market, to note the ability to cancel without a fee and to cover the terms and conditions contained in the Disclosure Statement.

He also noted that the volatility and inherent variability of rates are driven home during trainings and are a part of all sales scripts.<sup>79</sup>

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<sup>75</sup> RP MB at 96-98.

<sup>76</sup> JC MB at 72.

<sup>77</sup> RP MB at 116.

<sup>78</sup> RP St. 1 at 7.

<sup>79</sup> RP MB at 116.

The Joint Complainants further challenge the adequacy of Respond Power's oversight of its vendors.<sup>80</sup> As to oversight of the vendors, Mr. Wolbrom testified that Respond Power's marketing team maintains outstanding and continuous oversight and communication with all of our vendors. He referred to formal weekly calls, where concerns are addressed and training and direction is given, and informal communications that occur daily or and often hourly to transmit any information in real-time that vendors need to know. Mr. Wolbrom also emphasized that Respond Power's Customer Service, Quality Control ("QC") and Marketing Departments work in concert to ensure that information freely flows among these departments so that vendors are held accountable.<sup>81</sup>

Another allegation lodged by the Joint Complainant is the lack of documentation produced by Respond Power concerning its training and oversight activities.<sup>82</sup> However, the Commission's regulations requiring EGSs to maintain records of agent training did not go into effect until June 29, 2013. The Joint Complainants have presented no evidence to show that any new agents were hired or trained after that date. In any event, Respond Power's own testimony in this proceeding acknowledged the need to adopt better internal recordkeeping and documentary controls.<sup>83</sup>

As discussed above, while they claim that the materials did not reflect any presentation of Pennsylvania consumer protection policies or Commission regulations, the Joint Complainants do not identify any particular piece of information that is missing from the materials.<sup>84</sup> They likewise presume that all training material is produced in written form, which is not required by the regulations and Mr. Wolbrom testified that it is not the case. They also refer to the training

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<sup>80</sup> JC MB at 30-34.

<sup>81</sup> RB MB at 111-113.

<sup>82</sup> JC MB at 36.

<sup>83</sup> RP St. 4 (Rev) at 28.

<sup>84</sup> JC MB at 72.

that had previously been provided where agents were instructed not to inform customers of a specific rate when discussing a variable price product.<sup>85</sup> However, as Mr. Small explained, Respond Power did not include an initial price until after the Commission's current regulations were promulgating requiring it to be disclosed at the time of enrollment.<sup>86</sup>

The Joint Complainants further contend that Respond Power's contracts with its third party vendors, which contain a compensation structure that provides incentives for successful enrollments, have potential negative effects.<sup>87</sup> However, Mr. Wolbrom refuted this testimony by explaining that Respond Power only pays vendors, not agents, for successful enrollments, and that at least one vendor contracted by Respond Power pays its agents hourly. More importantly, he testified that significant protections serve as major deterrents to ignoring the Company's instructions. He specifically referred to the fact that all vendors are subject to "claw-backs" and "chargebacks" for customers who cancel before a designated time. Mr. Wolbrom further explained that if customers cancel within a specified time after enrollment, both the vendor and the agent lose their money. He also noted that if a customer has a complaint related to the enrollment itself, the Company provides a refund and claws that back from the vendor.<sup>88</sup>

In their Main Brief, the Joint Complainants also raise concerns about the disciplinary procedures that are in place to address misconduct on the part of agents.<sup>89</sup> Again, Mr. Wolbrom's testimony refuted these concerns. Specifically, he testified that when the Company sees recurring problems or in some cases only one problem, if it is serious, agents are terminated.<sup>90</sup> As to the documentation of terminations, Mr. Wolbrom explained that the

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<sup>85</sup>JCMB at 32.

<sup>86</sup>RP St. 3 (Rev) at 4.

<sup>87</sup>JC MB at 33.

<sup>88</sup>RP St. 1 at 10.

<sup>89</sup>JC MB at 33-34.

<sup>90</sup>RP St. 1 at 11.

Company has not routinely taken that additional step, noting that most communications were done electronically, such as by telephone, Skype, text message and mobile applications due to the fast-paced nature of the business.<sup>91</sup>

### 3. Conclusion

Through the discussion above, Respond Power has demonstrated that the Joint Complainants have failed to prove that Respond Power's agent training and monitoring program departed from the requirements of Section 111.5 of the Commission's regulations. Despite their failure present a preponderance of evidence to support their claims contained in Counts I, II and III regarding agent training and monitoring and to demonstrate specific violations of Section 111.5 of the Commission's regulations, they seek to have Respond Power found to have violated them no less than 611,640 times and extract a civil penalty of \$611,640 or \$611,640,000, again depending on whether \$1 or \$1,000 is assessed per violation. For the reasons discussed, these alleged violations should be dismissed.

To the extent that the Commission has concerns about the Company's agent training and monitoring, Respond Power is not aware of any prior instances when the Commission has imposed civil penalties on a regulated entity on that basis, particularly when the regulations do not set forth any specific requirements that the Company failed to fulfill.<sup>92</sup> Rather, it would be appropriate for the Commission to impose conditions on a regulated entity designed to address any shortcomings in their training of personnel.

Therefore, the Settlement adequately addresses any allegations that the Commission believes the Joint Complainants substantiated by requiring Respond Power to implement a new

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<sup>91</sup>RP St. 1 at 8.

<sup>92</sup> Indeed, the imposition of civil penalties on Respond Power for violating a vague regulation would violate its due process rights, since it could have not reasonably been on notice as to the specific conduct that was required. *See Baggett et al. v. Bullitt et al.*, 377 U.S. 360 (1964).

training program specifically tailored to the requirements of the Code, the Consumer Protection Law, the Telemarketer Registration Act, and Commission regulations, orders and policies. The Settlement further obligates Respond Power to obtain the approval of the Commission's BCS and I&E prior to implementation. Under the Settlement, the training materials will accurately and comprehensively cover the applicable legal requirements, as well as an express warning that deceptive sales practices will not be tolerated by management and a material description of remedial steps that will be taken against sales and customer service representatives who engage in improper sales practices. Further, the Settlement requires refresher training of all representatives on a quarterly basis. A specific portion of the training program is geared toward door-to-door marketing, and the Settlement obligates Respond Power to forego such marketing until such time as the training is developed and implemented. Finally, the Settlement contains an enhanced compliance monitoring program that requires Respond Power to record all communications with customers and all telemarketing sales; it also provides for the Company to conduct reviews of call recordings and to perform follow-up investigations and issue refunds to customers who enrolled as the result of a non-compliant sales practice.<sup>93</sup>

D. Count I – Affiliation with Electric Distribution Companies

1. Introduction

Count I of the Joint Complaint alleged that Respond Power's sales representatives failed to properly identify themselves as being with the Company and represented that they were with the EDC. The Joint Complaint alleged that this conduct violated Sections 54.43(f),<sup>94</sup> 111.4, 111.5(a), 111.5(e), 111.8,<sup>95</sup> 111.9<sup>96</sup> and 111.12(d)(1)<sup>97</sup> of the Commission's regulations.

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<sup>93</sup> Settlement at pp. 22-33.

<sup>94</sup> 52 Pa. Code § 54.43(f).

<sup>95</sup> 52 Pa. Code § 111.8

<sup>96</sup> 52 Pa. Code § 111.9

<sup>97</sup> 52 Pa. Code § 111.12(d)(1).

Section 54.43(f) establishes that EGSs have the responsibility for the conduct of their agents, but imposes no standards on EGSs to which they must adhere. Sections 111.4 and 111.5 establish requirements for developing agent qualifications and for conducting agent training and monitoring. Section 111.8 addresses the need for agents to identify themselves during any type of sales transaction, while Section 111.9 imposes the same requirement for door-to-door sales. In their Main Brief, the Joint Complainants contend that they "have shown that Respond Power's marketing prices, on their face, are misleading and deceptive in that, among other things, they create confusion as to Respond Power's association or relationship with the consumer's EDC."<sup>98</sup>

As discussed below, the Joint Complainants have failed to carry their burden of proving more than a handful of instances in Respond Power sales representatives failed to properly identify themselves as affiliated with Respond Power. To the contrary, the evidence of record shows overwhelmingly that the Company's sales agents clearly and immediately identified themselves to prospective customers as Respond Power representatives. To the extent that the Commission finds any violations of these regulations, the Settlement adequately addresses them by placing significant responsibilities on Respond Power in terms of sales scripts and verification scripts to ensure that customers always know that they are interacting with a Company representative.

2. Discussion

a. Uniform

Initially, the Joint Complainants claim that Respond Power's uniform itself is suggestive of a relationship with the EDC, referring to Section 111.8(c) of the Commission's regulations, which prohibit EGS agents from wearing apparel, accessories or equipment that "suggests a relationship that does not exist with any EDC, NGDC, government agency or another

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<sup>98</sup> JC MB at 38.

supplier."<sup>99</sup> Although the Joint Complaint references Section 111.8, it does not include a specific reference to Section 111.8(c) of the regulations. It also does not set forth any factual allegations regarding the uniforms worn by Respond Power sales representatives. Yet, if Respond Power has correctly replicated the number of regulations that it has been alleged to have violated (based on the Summary of Argument in the Joint Complainants' Main Brief), the Joint Complainants seek to have the Commission find that Respond Power violated this regulation no less than 203,780 times and be penalized \$203,780 or \$203,780,000, depending on whether a \$1 or \$1,000 civil penalty is assessed.<sup>100</sup> As Respond Power has not been afforded notice and an opportunity to be heard on this allegation, and finding a violation of Section 111.8(c) would violate Respond Power's fundamental rights to due process, this allegation should be dismissed outright. *Commonwealth v. Thompson*, 444 Pa. 312, 316, 281 A.2d 856, 858 (1971) ("*Thompson*").

In any event, the Joint Complainants have not supported their claim that Respond Power's uniform in any way violates Section 118(c) of the Commission's regulations. They rely on the testimony of two consumer witnesses, neither of which support this claim. Ms. Olive Sprow alleged in her written testimony that Respond Power sales representatives were dressed in uniforms like her EDC.<sup>101</sup> On cross-examination, however, when asked whether she recalled what colors those uniforms were, Ms. Sprow responded as follows: "No, I don't because I'll tell you, I'm blind in my right eye and I can't see very good."<sup>102</sup> Likewise, the other testimony of Mr. Thomas DeMarco and Ms. Cynthia DeMarco focused on the credentials allegedly worn by the Respond Power sales representative but in no way suggested that Respond Power's uniform

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<sup>99</sup>52 Pa. Code § 111.8(c).

<sup>100</sup>This civil penalty would be assessed without regard for whether a customer was enrolled through the door-to-door marketing channel, whether this particular uniform was being worn at the time of a customer's enrollment, or whether a customer was confused or misled in any way.

<sup>101</sup>JC Consumer Testimony at 209.

<sup>102</sup>Tr. 562.

confused them.<sup>103</sup> Indeed, despite the Joint Complainants' speculation that the uniforms worn by Respond Power sales representatives were likely to confuse customers, and in fact did cause such confusion,<sup>104</sup> no testimony was presented from consumer witnesses in this proceeding to suggest that any aspect of Respond Power's uniform caused them to be confused.

Moreover, Respond Power specifically asked for and obtained the informal approval of the Office of Competitive Market Oversight ("OCMO") regarding its uniforms.<sup>105</sup> While Respond Power understands that staff opinions are not binding on the Commission, the Company submits that it demonstrated good faith in requesting this informal opinion and should be able to rely on it, with impunity, until such time as the Commission directs otherwise.

b. Proper Identification

The Joint Complainants further argue that "there is ample evidence in the record that Respond Power's salespeople...did not properly identify themselves as selling on behalf of the Company."<sup>106</sup> In support of this claim, the Joint Complainants refer to Ms. Alexander's testimony, where she suggested a "pattern of misrepresentation" based on the testimony of approximately 16 of the 169 consumer witnesses who testified in this proceeding.<sup>107</sup> Ms. Alexander conceded during cross-examination that she does not have any expertise in evaluating class action lawsuits or determining when a "pattern and practice" of conduct may

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<sup>103</sup>JC Consumer Testimony at 271.

<sup>104</sup>JC MB at 39-40.

<sup>105</sup>RP St. 3 (Rev) at 5; Exh. AS-1.

<sup>106</sup>JC MB at 40.

<sup>107</sup>JC MB at 40; OAG/OCA St. 1 at 42. Since Ms. Alexander does not specifically identify those 16 customers in her testimony, her reference is of no persuasive value in this proceeding. While they are likely the same consumers referred to by the Joint Complainants in their Main Brief, only the testimony that was admitted in this proceeding may be relied upon by the Commission in making findings of fact. Notably, the example offered by the Joint Complainants involving Ms. Norma Carlson should be disregarded in its entirety because Ms. Carlson's testimony was not admitted into the record. Further, Ms. Alexander's reference to it was not made in the context of affiliations with the EDC, and Ms. Carlson did not even allege that she was misled by Respond Power by sales representatives as to their identification. OAG/OCA St. 1 at 56.

exist.<sup>108</sup> Even if 16 customers were misled by the sales representative, which Respond Power will show did not occur, common sense suggests that it is such a microscopic number of Respond Power's total customer base during the relevant time period as to be completely insignificant in terms of drawing any conclusions about a pattern and practice of conduct.

Indeed, in Respond Power's Main Brief, the Company referred to numerous consumers who testified that the sales representatives properly identified themselves at the outset of the sales transaction.<sup>109</sup> Responding to the question on the pre-printed form which asked: "Did the sales representatives identify themselves as being with the EGS?", their testimony included a variety of affirmative responses, such as:

- "Yes, she told me she was from Respond Power LLC when I answered the door."<sup>110</sup>
- "He identified who he was and who he worked for upon introduction."<sup>111</sup>
- "Yes, right away, and he was wearing an ID."<sup>112</sup>
- "She told me right away what company she was with ("Respond Power")."<sup>113</sup>
- "Yes, he had a name tag on."<sup>114</sup>

As to the consumer witness testimony relied upon by the Joint Complainants in support of Count II, Ms. Mary Show, who enrolled prior to Chapter 111 going into effect, testified that she could not remember whether the Respond Power representatives identified themselves and that she inferred that they were from the EDC; however, she did not explain the basis for drawing that inference. For instance, she did not testify that any such comments were made by the Respond Power sales representatives.

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<sup>108</sup>Tr. 1420-1424.

<sup>109</sup>RP MB at 95-96.

<sup>110</sup>JC Consumer Testimony at 12.

<sup>111</sup>JC Consumer Testimony at 921.

<sup>112</sup>JC Consumer Testimony at 866.

<sup>113</sup>JC Consumer Testimony at 786.

<sup>114</sup>JC Consumer Testimony at 944.

Another witness relied on by the Joint Complainants is Ms. Cynthia Clapperton, who was clearly confused and her testimony is not credible. She testified that she had called the EDC and thought she may have been transferred, but did not recall switching to Respond Power.<sup>115</sup> However, a third party verification ("TPV") recording was admitted into the record, which clearly shows that Ms. Clapperton authorized a change to Respond Power as her EGS.<sup>116</sup>

The testimony of Ms. Kelly Ann McGuire contains nothing about the sales representative suggesting that he was with the EDC.<sup>117</sup> Also, Ms. Virginia Clayton conceded that the enrollment form clearly displayed the name of Respond Power and that the agent was wearing an identification badge.<sup>118</sup> Ms. Shirley Sauders testified that she did not even have any interaction with Respond Power agents in connection with her June 2011 enrollment. Rather, she claimed to have found a card hanging on her door one day that she "thought" was from her EDC. Her testimony was not credible because she indicated that she did not remember signing up with Respond Power, but supposedly knew the price she would pay and recalled getting rebate checks from Respond Power.<sup>119</sup>

c. Required to Switch

The Joint Complainants also refer to witnesses who supposedly testified that Respond Power sales representatives told them they had to switch in order to keep their electric service.<sup>120</sup> Again, the testimony they rely on does not support their claim. Mr. Rodger Cornish specifically testified that the sales representative identified himself as being with Respond Power, and that it was his understanding that his EDC "was getting out of the power generation business" so that he

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<sup>115</sup>JC Consumer Testimony at 837.

<sup>116</sup>Tr. 651; RP Ex. 29 and 29-A.

<sup>117</sup>JC Consumer Testimony at 746; Tr. 474-476.

<sup>118</sup>Tr. 688-689.

<sup>119</sup>JC Consumer Testimony at 734-735; Tr. 889, 894.

<sup>120</sup>JC MB 41-42.

"needed to find someone."<sup>121</sup> Notably, he did not claim that Respond Power conveyed that message to him. The same is true of Ms. Olive Sprow, who testified that she believed she was required to sign up with an EGS, but did not indicate that Respond Power sales representatives told her that. Indeed, there were specific instances in which consumers testified to having that impression, but getting it from other sources.<sup>122</sup>

Contrary to the Joint Complainants' claims, Ms. Carol Sterck did not even suggest that Respond Power told her she had to switch to keep her electric service. In noting that Respond Power's sales representative identified himself during the sales call, she explained that she believed that her provider at the time was stopping service.<sup>123</sup> She further testified at the hearing that she had been with another EGS, who she "thought for some reason" was "no longer going to continue the process."<sup>124</sup> Ms. Sterck added as follows: "There had been a lot of things in the newspaper about different companies switching back and forth, and that's when I got the phone call from Respond Power."<sup>125</sup>

Also, the Joint Complainants inaccurately portray the testimony of Mr. Paul Hassinger, who did not in any way suggest that he thought he had to choose an EGS to maintain his electric service. In fact, Mr. Hassinger, who had originally switched to the Company in 2011, testified that the sales representatives identified themselves as being with Respond Power.<sup>126</sup>

The testimony of Ms. Phyllis Court also does not support the claim that Respond Power sales representatives threatened the loss of electric service.<sup>127</sup> In fact, Ms. Court, who indicated that she did not "remember much of the conversation," testified that she thought "P.P.L. was

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<sup>121</sup>JC Consumer Testimony at 94.

<sup>122</sup>*See, e.g.*, JC Consumer Testimony at 348.

<sup>123</sup>JC Consumer Testimony at 877.

<sup>124</sup>Tr. 129.

<sup>125</sup>Tr. 129.

<sup>126</sup>JC Consumer Testimony at 463.

<sup>127</sup>JC MB at 42.

trying to get people to sign into a new supplier" and that "she would eventually be assigned to a new one."<sup>128</sup> If that is what the sales representatives led Ms. Court to believe when she was contacted in early 2013, amidst the Commission-sponsored EDC mailings encouraging customers to choose an EGS<sup>129</sup> and discussions within the context of the retail markets investigation about replacing EDCs as default providers,<sup>130</sup> a sales pitch of the nature was consistent with those messages. Moreover, nothing in the Commission's regulations precludes an EGS from providing current information to consumers about the state of the retail market.

d. Comparisons to EDC Rates

Other witness testimony relied upon by the Joint Complainants in support of Count I also does not demonstrate any violations of Commission regulations. Specifically, they refer to testimony about sales representatives informing prospective customers that the rates being charged by the EDCs were going up or that they were being over-charged by their EDCs.<sup>131</sup> One of these customers testified only that the Respond Power sales representative advised of "upcoming possible rate increases."<sup>132</sup> Another consumer said that she was told that her EDC "sets prices months in advance."<sup>133</sup>

Although the Joint Complainants characterize these statements as "incorrect,"<sup>134</sup> they offer no evidence to support this claim. Frequently, during the relevant time period, which spans from 2011 through 2013 for the customers identified by the Joint Complainants, the EDCs' prices

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<sup>128</sup>JC Consumer Testimony at 697.

<sup>129</sup>RB MB at 103-105.

<sup>130</sup>*See Investigation of Pennsylvania's Retail Electricity Market: End State of Default Service Final Order*, at Docket No. I-2011-2237952 (Feb. 15, 2013) ("*Electric RMI Order*").

<sup>131</sup>JC MB at 42.

<sup>132</sup>JC Consumer Testimony at 1013.

<sup>133</sup>JC Consumer Testimony at 32. The Joint Complainants mischaracterize the testimony of Mr. and Mrs. DeMarco, who at no time suggest that Respond Power sales representatives told them anything about the EDC PTC. In fact, they testified that the sales representative did not identify himself as being from Respond Power, but rather displayed EDC credentials. JC Consumer Testimony at 272.

<sup>134</sup>JC MB, App. C, Proposed FOF 73.

to compare ("PTC") were fluctuating and increasing.<sup>135</sup> Indeed, the Commission's consumer education campaign encouraged customers to compare what they were paying EDCs with what was being offered by EGSs.<sup>136</sup> By their very name, PTCs are intended to be compared with offers that are available in the market. It was not a violation of any regulation for Respond Power sales representatives to suggest that the EDCs' prices were higher or would be going higher, especially in the absence of any evidence demonstrating that those claims were inaccurate.

### 3. Conclusion

In their Main Brief, the Joint Complaints allege a total of 1,630,240 violations stemming from Count I. The specific regulations they identify as having been violated include:

- (i) Section 54.43(f), which establishes licensee responsibility for acts of agents;
- (ii) Section 111.4, which establishes agent qualifications and standards;
- (iii) Section 111.5(a), which requires EGSs to train agents;
- (iv) Section 111.5(e), which requires EGSs to monitor telephonic and door-to-door marketing and sales calls;
- (v) Section 111.8, which establishes the rules for agent identification;
- (vi) Section 111.8(c), which addresses uniforms worn by agents;
- (vii) Section 111.9, which sets forth the rules governing door-to-door sales; and
- (viii) Section 111.12(d)(1), which pertains to compliance with consumer protection laws.

The evidence overwhelmingly shows that Respond Power sales representatives consistently identified themselves as being from the company immediately or right at the outset of the sales transaction. For those few instances in which Respond Power sales representatives may have misled consumers about their affiliation with the EDC, the only regulation that

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<sup>135</sup><http://www.oca.state.pa.us/Industry/Electric/> (historical pricing information is available).

<sup>136</sup>RP MB 103-105.

Respond Power should be found to have violated is Section 111.8(b), which requires agents to identify themselves at the outset of a transaction as being with the EGS. No violations should be found of the remaining regulations for the following reasons:

- (i) Section 54.43(f) does not establish a standard that an EGS may be found to have violated; rather it merely establishes that EGSs are responsible for the conduct of their agents;
- (ii) Regarding Section 111.4, which establishes agent qualifications and standards, alleged departures have been identified;
- (iii) As to Section 111.5(a), which requires EGSs to train agents, the Joint Complainants have not proven that the training departed from any applicable standards contained in this Subsection; also the Company has demonstrated that it properly trained its agents to identify themselves as representatives of EDCs;
- (iv) As to Section 111.5(e), which requires EGSs to monitor telephonic and door-to-door marketing and sales calls, the Joint Complaints have not proven that Respond Power's monitoring departed from any standards set forth in this Subsection;
- (v) Regarding Section 111.8(c), which addresses uniforms worn by agents, this allegation was not set forth in the Joint Complaint, and has not been proven;
- (vi) Section 111.9, which sets forth the rules governing door-to-door sales, imposes the identical requirement as Section 111.8(b), and no other departures from the standards set forth in this Section have been alleged or proven; therefore, it is inappropriate to find a separate violation;<sup>137</sup>
- (vii) Section 111.12(d)(1), which pertains to compliance with consumer protection laws that may not be enforced by the Commission.

Further, the Settlement adequately addresses all allegations set forth in Count I by requiring every communication by a Respond Power sales representative to begin with a statement indicating that he or she is calling or visiting on behalf of Respond Power and does not represent the customer's local utility.<sup>138</sup> The Settlement also obligates Respond Power to include

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<sup>137</sup>It should also be noted that both Section 111.8(c) and Section 111.9 apply only to door-to-door marketing (and public events in the case of Section 111.8(c)). Therefore, even if the Commission finds that any of these provisions were violated, not all Respond Power variable rate customers would have been affected; and they certainly would not have been affected more than one time.

<sup>138</sup>Settlement at pp. 25-26.

a clear and conspicuous display of its brand identification and its independence from the EDC in all advertising to consumers.<sup>139</sup> Further, the third party verification ("TPV") scripts are required by the Settlement to include a question aimed at ensuring that the customer understands that Respond Power is not the EDC.<sup>140</sup> Finally, Respond Power has committed to implementing enhanced training and compliance monitoring programs to ensure compliance with all Commission regulations.<sup>141</sup>

E. Count II – Alleged Claims of Customer Savings

1. Introduction

Count II of the Joint Complaint alleged that Respond Power's sales representatives promised savings that did not materialize and that Respond Power failed to adequately train and monitor its agents. On the basis of those allegations, the Joint Complaint alleged that Respond Power violated the following regulations: Section 54.43(f), which hold licensees responsible for the acts of its agents; Section 111.4, which establishes agent qualifications and standards; Section 111.5, which addresses agent training; and Section 111.12(d)(1), which requires compliance with consumer protection laws.

In their Main Brief, the Joint Complainants contend that Respond Power also violated Section 54.4(a), which requires prices billed to reflect marketed prices,<sup>142</sup> and Section 54.5(a), which requires disclosure statements to reflect marketed and billed prices.<sup>143</sup> However, they do not count these regulations in calculating the total number of alleged violations, either in the Summary of Argument or in the Proposed Conclusions of Law.<sup>144</sup> This is an appropriate omission since these regulations were not alleged in the Joint Complaint and Respond Power was

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<sup>139</sup>Settlement at pp. 16-17.

<sup>140</sup>Settlement at p. 18.

<sup>141</sup>Settlement at pp. 22-24, 29-33.

<sup>142</sup>52 Pa. Code § 54.4(a).

<sup>143</sup>52 Pa. Code § 54.5(a).

<sup>144</sup>JC MB at 18-19, 25.

not placed on notice that it would be charged with these alleged violations. In any event, as demonstrated through the discussion below, the Joint Complainants have failed to demonstrate that Respond Power violated any of the cited regulations in Count II, including Sections 54.4(a) and 54.5(a) that the Joint Complainants mentioned for the first time in their Main Brief.

In an effort to prove that Respond Power's sales representatives promised savings that did not materialize, it was incumbent upon the Joint Complainants to prove both sides of the equation. First, they had to prove that savings for a specified period were promised to specific customers. Second, they were required to prove that any savings that were promised for a specified period were not realized by those individual consumers. In support of their allegations, the Joint Complainants rely on: (i) old marketing materials that were not relied upon by consumers to enroll with Respond Power; (ii) consumer hearsay testimony that is laden with credibility issues; (iii) actual billing data for a small group of customers for narrow time periods; and (iv) comparisons of Respond Power's charges to the EDCs' prices to compare ("PTC") for periods of time that bore no relationship to the consumer testimony regarding promised savings. In comparing Respond Power's charges to EDCs' PTCs, the Joint Complainants ignored the fact that consumers frequently testified that long-term savings were not promised and that those consumers did save money in some months. Due to the many shortcomings on both sides of the equation, the Joint Complainants have failed to carry their burden of proof. They have simply not set forth a preponderance of evidence to demonstrate that savings were guaranteed by Respond Power sales representatives and that any promised savings did not materialize.

In addition, if the Commission finds that Respond Power has violated any regulations due to its representatives promising savings that were not realized, the Settlement adequately addresses these issues. Specifically, under the Settlement, Respond Power is required to comply

with all Pennsylvania laws, including the Consumer Protection Law and the Telemarketer Registration Act. It has also agreed to not make any representations about saving customers may realize by switching except when referencing an explicit, affirmative guaranteed savings program. It has further committed that it will refrain from using any terms such as "risk free," "competitive," or "guaranteed", or any terminology that suggests that the price will be lower than the EDC's price to compare ("PTC").<sup>145</sup>

2. Discussion

a. Marketing Materials

In their Main Brief, the Joint Complainants have placed undue emphasis on a few particular marketing materials that Mr. Wolbrom described at the hearings as "quite old."<sup>146</sup> Mr. Wolbrom testified that those flyers or brochures were in use prior to 2012, explaining that since he has been the Chief Marketing Office of Respond Power, those materials have not been used.<sup>147</sup> He also emphasized that the oversight of vendor materials has significantly improved since he assumed this position, with vendors no longer being permitted to produce their own materials. Mr. Wolbrom further noted that marketing materials that have been in use during his tenure at Respond Power do not guarantee savings. Rather, the Company uses phrases such as "may save," "possibly save," "hope to save" and "potentially save." He also explained that references to "historical savings" in marketing materials were factual.<sup>148</sup>

Despite the Joint Complainants' heavy reliance on these old marketing materials that contain references to savings without Respond Power's normal qualifying language described by Mr. Wolbrom, they have failed to link these materials to any particular consumer witness who

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<sup>145</sup>Settlement at p. 13.

<sup>146</sup>JC MB at 45-46.; Tr. 1297; Wolbrom Cross Exh. 1, 1-A, 2 and 2-A.

<sup>147</sup>Tr. 1319-1320.

<sup>148</sup>RP MB at 111-113.

relied on the savings claims to enroll with Respond Power. The flier that has "Important Notice" across the top and the accompanying brochure that is marked "High Energy Bills" were included within the material provided to the OAG by Mr. Robert Becker with his complaint.<sup>149</sup> However, Mr. Becker did not testify that he received this material at the time of his enrollment in 2013. Nor did he offer testimony suggesting that he had enrolled with Respond Power in reliance on this material. In fact, his testimony does not reference this material at all.<sup>150</sup> Even when the Joint Complainants asked him a leading question on redirect examination about this material, specifically inquiring whether he had received a document from the sales representative that says at the top "Important Notice," Mr. Becker did not mention it. Rather, he referred only to having received the Disclosure Statement.<sup>151</sup>

Mr. Wolbrom's testimony offered an explanation as to why Mr. Becker would have had these materials his possession prior to his enrollment in April 2013. Specifically, Mr. Wolbrom testified, "I don't know when the customer received this" and noted that the agent name and telephone numbers on Mr. Becker's Sales Agreement did not match on the agent name and telephone number on the materials.<sup>152</sup> Although the Joint Complainants pressed Mr. Wolbrom to agree that these materials had been given to the customer at the time of enrollment due to the same agent code that was used on the documents, he explained that the Company recycles agent codes.<sup>153</sup> Mr. Wolbrom's testimony that these materials were not in circulation during 2013, coupled with the lack of any reference to it by Mr. Becker, demonstrate that they were not relied on by Mr. Becker (or any other customer, for that matter) in enrolling with Respond Power.

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<sup>149</sup>Wolbrom Cross Exh. 1-A.

<sup>150</sup>JC Consumer Testimony at 497-503; 315-326.

<sup>151</sup>Tr. 323. Respond Power also notes that Mr. Becker's written testimony indicated that he did not receive a welcome letter; however, he attached one to his OAG complaint. JC Consumer Testimony at 499; Wolbrom Cross Exh. 1-A. at p. 7.

<sup>152</sup>Tr. 1301-1302, 1306, 1320.

<sup>153</sup>Tr. 1302, 1305.

The Joint Complainants also refer to the testimony of I&E's witness, Mr. Daniel Mumford, regarding the flier which is titled the "Important Notice" and was attached to Ms. Lorraine Gummo's testimony as Exhibit LEG-1.<sup>154</sup> A review of Ms. Gummo's testimony reveals that she, like Mr. Becker, made no reference to this flier.<sup>155</sup> Because she does not discuss it, there is no evidence in the record as to when she received it, how she received it, if she reviewed it, if it was accompanied by any other document or explanation, or if she relied on it in any way.

As to the other piece of marketing material on which the Joint Complainants focus extensively, it is a notice that says across the top "Please Save This Important Info."<sup>156</sup> Again, Mr. Wolbrom testified that this flier was not in use during 2012 or 2013. Indeed, the consumer witness who provided this material to the OAG with her complaint, Ms. Linda Rose, enrolled with Respond Power in 2011.<sup>157</sup> As Mr. Becker, Ms. Rose also made no reference to this flier to her testimony.<sup>158</sup> Therefore, this document has also not been connected with any consumer witness testifying in this proceeding.

Moreover, even though these materials contain some references to savings without the usual qualifying language such as "may" or "possible," they also include such language. For instance, the materials say that the customer is getting "a chance to save on the supply portion" of the bill. They also indicate that the Company's saving expectations are based on historical annual savings and refer to average savings of their customers in the prior year.<sup>159</sup> These materials are not contractual in nature and do not describe specific terms and conditions.

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<sup>154</sup>I&E Consumer Testimony at 13.

<sup>155</sup>I&E Consumer Testimony at 6-10.

<sup>156</sup>Wolbrom Cross Exh. 2; JC MB at 46-47.

<sup>157</sup>JC Consumer Testimony at 31; Wolbrom Cross Exh. 2-A at p. 3.

<sup>158</sup>JC Consumer Testimony at 31-33; Tr. 624-632.

<sup>159</sup>Wolbrom Cross Exh. 1-A.

Likewise, they certainly do not promise any long-term or specific amount of savings. Additionally, courts have found that general statements about cost-effective or low prices are mere puffery and do not constitute actionable claims. *See Gordon & Breach Science Publishers SA v. Am. Inst. of Physics*, 905 F. Supp. 169, 182 (S.D.N.Y. 1985).

The Joint Complainants also contend that these materials are misleading because they include disparaging statements about other competitive products and services. They specifically refer to language cautioning consumers about "fixed price offerings" or "special gift offerings." In support of their position, they cite to the Commission's Order in *MAPSA*. The Joint Complainants' reliance on *MAPSA* is misplaced.

The issue in that proceeding was whether the EDC's marketing practices promoting provider of last resort service over competitive electric generation supply were deceptive and inaccurate. The gist of the Commission's decision, in directing the EDC to cease the marketing, was that it found the EDC had crossed the line from consumer education into marketing. The Commission's concern was with the EDC creating confusion regarding customer choice by encouraging them to do nothing. An obvious goal of the Commission was to ensure that EDCs were not interfering with the development of the electric retail market. For that reason, it was important for the Commission to ensure that the EDC was not making disparaging comments about products offered by EGSs.

Nothing in *MAPSA* suggests that EGSs should be precluded from comparing their products to those offered by the EDCs and by other EGSs. Indeed, the Commission has encouraged EGSs to make competitive offerings that give consumers a wide array of choices that may not be available from their EDC or other EGSs.<sup>160</sup> It was certainly not misleading for Respond Power to compare its variable price products to other products available to consumers

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<sup>160</sup>*Electric RMI Order.*

from other sources. Moreover, the Joint Complainants have failed to present the testimony of a single consumer witness who was misled in any way by those marketing materials or induced to enroll with Respond Power by them.

Regarding the confirmation email that Respond Power sent to Mr. William Stankewicz referenced by the Joint Complainants,<sup>161</sup> this communication does not constitute "marketing material" since it was sent after enrollment and, therefore, its reference to "yearly savings" did not induce the customer to enroll. Mr. Stankewicz likewise did not even refer to it in his testimony, the email apparently having no significance to him at all.<sup>162</sup> Also, as Mr. Wolbrom and Mr. Small, both testified, customers did historically experience savings.<sup>163</sup> Indeed, consumers confirmed such savings on several occasions.<sup>164</sup> Mr. Wolbrom specifically noted that some customers were previously served by other EGSs, so the expected savings would have been in relation to what they would have paid those entities, not the EDC.<sup>165</sup>

The Joint Complainants also refer to Welcome Letters sent to Respond Power's customers, such as the one attached to Ms. Gummo's testimony as Exhibit LEG-3, which were mailed to customers after their enrollment.<sup>166</sup> Ms. Gummo, who enrolled in August 2013, described it as "a standard welcome letter."<sup>167</sup> She did not testify as to any concerns about the language in the Welcome Letter, which Respond Power notes were not promotional materials and did not guarantee any savings. Importantly, Ms. Gummo offered no testimony suggesting that she had in any way relied on the Welcome Letter or was misled or induced by it into enrolling with Respond Power.

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<sup>161</sup>Wolbrom Cross Exh. 3; Wolbrom Cross Exh. 3-A; JC MB at 47.

<sup>162</sup>JC Consumer Testimony at 539-542; Tr. 425-433.

<sup>163</sup>Tr. 1322; Exhibit EW-1, attached to RP St. 1; RP St. 4 (Rev) at 13-17; Exhibit AS-4-Revised.

<sup>164</sup>*See, e.g.*, Tr. 297 (no complaints in 2012 or 2013); 407 (satisfied with prices during 2012 and 2013); and 541-542 (satisfied in 2012 and saw price rising in 2013 but stayed with Respond Power).

<sup>165</sup>RP St. 1 at 10.

<sup>166</sup>I&E Consumer Testimony at 15

<sup>167</sup>I&E Consumer Testimony at 6, 9.

They also refer to another version of Respond Power's Welcome Letter, which was attached to the testimony of Ms. CherryAnn Reed, who enrolled in July 2012.<sup>168</sup> Ms. Reed's only reference in her testimony to the Welcome Letter was her acknowledgement that she had received it and a notation that it was attached.<sup>169</sup> Again, she apparently viewed the letter as insignificant and in no way suggested that it had misled her or induced her into switching or staying with Respond Power. This version of Respond Power's Welcome Letter also does not guarantee savings, and as with the other Welcome Letter refers only to historical savings.<sup>170</sup>

Clearly, despite their repeated references and reliance to these materials throughout their Main Brief, the Joint Complainants have not proven that any consumer witnesses relied on any them in switching to Respond Power. Even the consumer witnesses they have referred to as examples did not mention, let alone describe any reliance upon, the materials in question in their testimony. As a result, the Joint Complainants' case for seeking to prove that Respond Power promised savings to consumers, as they have alleged, rests wholly on the hearsay testimony of the consumer witnesses.

b. Consumer Testimony

i. Uncorroborated hearsay

It is well-settled that uncorroborated hearsay may not be relied upon by the Commission in making findings of fact or in reaching conclusions of law. *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366 (Pa. Cmwlth. 1976) ("*Walker*").<sup>171</sup> Pennsylvania Rule of Evidence 801 defines "hearsay" as a statement that the declarant makes outside a current trial or hearing and that a party offers in evidence to prove the truth of the matter asserted in the

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<sup>168</sup>JC Consumer Testimony at 275, 280.

<sup>169</sup>JC Consumer Testimony at 277; Tr. 665-667.

<sup>170</sup>JC Consumer Testimony at 280.

<sup>171</sup>RP MB at 77-78.

statement.<sup>172</sup> The statements made by the consumers in their "testimonies" were not made during a hearing and are offered to prove the truth of the matters asserted. Specifically, they are testifying that they were promised a certain level of savings for the purpose of proving that the "promised" price is what they should be charged. As such, they constitute hearsay under the evidentiary rules. *See Gruelle c/o Toll Diversified Properties Inc. v. PPL Electric Utilities Corp. and Blue Pilot Energy, LLC*, Docket No. C-2015-2463573 (Initial Decision served November 18, 2015; Commission Order entered December 22, 2015) ("*Gruelle*") at 17 (testimony about a conversation with an EGS representative that is relied upon to support a case for overbilling and refund is hearsay).

ii. Credibility Issues

In addition to being uncorroborated hearsay, this testimony of alleged promised savings further lacks credibility due to numerous factors, as discussed in Respond Power's Main Brief.<sup>173</sup> To summarize here, those factors include: (i) the use of leading questions by the Joint Complainants to solicit responses from consumers that Respond Power's sales representatives had guaranteed savings;<sup>174</sup> (ii) the active solicitation of complaints for purposes of litigation, including references to "price gouging" and being "improperly overcharged for their electricity," by the Joint Complainants, which federal courts have found taints the credibility of consumers' claims;<sup>175</sup> (iii) the promotion of electric choice by the Commission, EDCs and other EGSs as a way in which consumers may realize savings on their electric bills;<sup>176</sup> (iv) a mindset among consumers that this proceeding is in the nature of a "class action lawsuit" and/or a general desire

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<sup>172</sup>P.R.E. 801.

<sup>173</sup>RP MB at 103-106.

<sup>174</sup>RP MB at 106-108.

<sup>175</sup>RP MB at 81, 106; *See FTC v. Washington Data Resources*, 2011 WL 2669661 (M.D. Fla. July 7, 2011).

<sup>176</sup>RP MB at 103-105.

on their part to receive refunds, which can affect the accuracy of the testimony;<sup>177</sup> (v) inconsistencies or confusion included within certain pieces of testimony;<sup>178</sup> (vi) a lack of understanding of many consumers about the overall electric choice program;<sup>179</sup> (vii) faulty memories due to lengthy lapses of time since sales transactions occurred and due to the unimportance of the transaction to the consumers at that time.<sup>180</sup>

In support of their claims that Respond Power sales representatives promised savings, the Joint Complainants highlight the experiences of specific individual customers and reference to several other pieces of witness testimony without any discussion. Every single piece of consumer testimony is fraught with more than one of the shortcomings identified above -- with every single witness suffering from faulty memories due to lapses of time and the unimportance of the transaction to them at the time. Respond Power's forthcoming discussion of the testimony that is relied upon by the Joint Complainants in support of Count II underscores some of the deficiencies associated with specific witness statements and establishes why the Joint Complainants have not carried their burden of proof.

Mr. Becker initially claimed that the sales representative told him that he could save money if he switched to Respond Power.<sup>181</sup> However, at the hearing, Mr. Becker testified that the representative told him that he "could probably save money" and that the representative "kind of alluded" to that possibility.<sup>182</sup> Further, although he thought he would save money as long as he was with Respond Power, he did not explain the basis for that understanding. Specifically, he did testify that his understanding was based on anything the sales representative said, which

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<sup>177</sup>RP MB at 81, 106; *See People v. Shifrin*, 2014 WL 785220 (Feb. 27, 2014); Tr. 186, 205, 241, 319-320, 610-611, 617, 627, 640, 662, 681-682, 999 and 1118.

<sup>178</sup>RP MB at 101-103.

<sup>179</sup>*See, e.g.*, JC Consumer Testimony at 865.

<sup>180</sup>RP MB at 102-103.

<sup>181</sup>JC Consumer Testimony at 497.

<sup>182</sup>Tr. 322.

means that it could have been based on any number of factors such as other EGS offers or EDC consumer education mailings, both of which he had received. Mr. Becker also indicated his desire for a refund, noting that he had heard about this proceeding through the OAG media coverage, which prompted him to complain.<sup>183</sup>

As their lead-off and apparently their "star witness" on the issue of alleged promised savings, Mr. Becker was far from adamant that savings had been promised. Additionally, his descriptions of the conversation with the sales representative were general and vague, with references to possibilities.

Throughout their Main Brief, the Joint Complainants rely on the Commission's recent decision in *Kiback v. IDT Energy, Inc.*, Docket No. C-2014-2409676 (Order entered August 20, 2015) ("*Kiback*"), where the Commission found that an EGS had violated the Commission's regulations on the basis of a consumer's testimony of what the sales agent told him. In reaching that decision, the Commission emphasized that the consumer "repeatedly held steadfast" in his claims of promised savings during multiple interactions with the same EGS, described the consumer as "adamant" about his recollection and characterized his testimony as "clear and convincing." *Kiback* at 26-27. By contrast, in *Dubois Manor Motel v. Blue Pilot Energy, LLC*, Docket No. C-2014-2433817 (Initial Decision served December 2, 2015), ALJ Hoyer dismissed a complaint because the consumer's testimony as to what he was told by the EGS sales agent was not credible and was directly contrary to the disclosure statement. It is important to keep these holdings in mind in reviewing the testimony relied upon by the Joint Complainants.

They next refer to the testimony of Ms. Rose. They claim that she "was promised savings if she switched to Respond Power, but the Company did not provide savings over the

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<sup>183</sup>JC Consumer Testimony at 499; Tr. 318-320.

long term to Ms. Rose."<sup>184</sup> To the contrary, Ms. Rose testified that she did not have any expectations for a time period for any cost savings.<sup>185</sup> She further explained that the 2011 enrollment was completed by her husband and that she heard only part of the sales pitch because they have a "very large, active dog" and she was "responsible for holding the dog back."<sup>186</sup> Even in response to the leading question about whether the sales representative guaranteed savings, Ms. Rose noted that a qualifying statement was made about the nature of the markets sometimes resulting in higher rates.<sup>187</sup> In addition, Ms. Rose's credibility is undermined by the fact that it contains hearsay within hearsay because it was her husband who actually spoke with the sales representative and signed the contract.<sup>188</sup> Also, Ms. Rose testified that she was constantly receiving offers from other EGSs, explaining a potential for confusion, and viewed this proceeding as a class action lawsuit through which she hoped to obtain a refund, which offers a motivation for her claims.<sup>189</sup>

Clearly, Ms. Rose's testimony from a sales transaction in 2011 completed by her husband while she held back their very large dog, at a time when she was hearing from other EGSs, in a proceeding where she is hoping to get a refund, is also not a ringing endorsement in support of the Joint Complainants' claims of promised savings. Ms. Rose did not testify that any savings were promised for the long-term, and in fact acknowledged the sales representatives' qualifications about constant savings. The evidence of record shows that, in fact, Ms. Rose saved money during several months that she was served by Respond Power.<sup>190</sup> Therefore, the

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<sup>184</sup>JC MB at 60.

<sup>185</sup>JC Consumer Testimony at 32 (question 11).

<sup>186</sup>JC Consumer Testimony at 31; Tr. 629.

<sup>187</sup>JC Consumer Testimony at 32 (question 12).

<sup>188</sup>Tr. 625.

<sup>189</sup>Tr. 627.

<sup>190</sup>RP St. 3 (Rev) at 15; OAG/OCA St. 3-SR at 5-6.

testimony of Ms. Rose does not show that she was promised long-term savings that were not delivered.

The Joint Complainants also rely on the testimony of Mr. Joseph Cochi in support of a long-term "promised savings" allegation. However, a review of his testimony clearly demonstrates otherwise. Mr. Cochi testified that he was "under the impression" that he would save up to 10% on his bill, but he did not recall being given "a timeframe of how long these savings would last."<sup>191</sup> Further, when asked whether the sales representative had guaranteed savings, he responded as follows: "I don't believe they did."<sup>192</sup> Therefore, there was no guarantee of savings, and certainly no long-term promise was made to Mr. Cochi. As the record shows, Mr. Cochi did in fact save money in the first two months and in other months during which he was served by Respond Power.<sup>193</sup> Therefore, his testimony does not support the Joint Complainants' assertions.

They next highlight the testimony of Ms. Shirley Sauders, who "thought" her rate would be 7 cents per kWh.<sup>194</sup> However, Ms. Sauders offered no basis for this assumption, indicating that she did not talk to anyone from Respond Power and does not "remember signing up" in 2011.<sup>195</sup> Simply stated, Ms. Sauders offered no testimony that supports claims of promised savings that were not delivered. Indeed, as Mr. Small's testimony shows, Respond Power charged Ms. Sauders below 7 cents per kWh during some months.<sup>196</sup>

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<sup>191</sup>JC Consumer Testimony at 124.

<sup>192</sup>JC Consumer Testimony at 124.

<sup>193</sup>Tr. 813; OAG/OCA St. 3-SR (Rev) at 4-5.

<sup>194</sup>JC Consumer Testimony at 735.

<sup>195</sup>JC Consumer Testimony at 734; Tr. 889.

<sup>196</sup>Exh. AS-4 (Rev) (*See* Ms. Sauders' supply history and pricing information for bills dated April 22, 2012 and May 22, 2012).

The Joint Complainants also highlight Mr. Gary Sinnott's testimony,<sup>197</sup> which shows significant customer confusion and is not credible evidence. Mr. Sinnott referred to his EDC as being "Direct Energy" and claimed that he did not sign up with Respond Power, but said that he expected a fixed rate for at least 12 months.<sup>198</sup> His testimony provided no explanation for that expectation. Further he answered the question about whether a TPV was performed with "N/A," while responding that the EGS sales agent was not present during the call.<sup>199</sup> Moreover, Mr. Sinnott does not recall receiving an adjustment in his charges in February 2014,<sup>200</sup> although he in fact did receive a reduction.<sup>201</sup> Mr. Sinnott also testified that he had received other EGS offers during that timeframe and mailings from the EDC about the electric choice program.<sup>202</sup> He further explained that he had heard news coverage about EGS prices in the Spring of 2014 and was offering testimony in hopes of getting a refund.<sup>203</sup> Clearly, due to numerous inconsistencies and inaccuracies, as well as other factors affecting his credibility, Mr. Sinnott's testimony is not trustworthy and cannot be relied upon to conclude that Respond Power promised him savings.

With respect to Mr. James Thorbahn, whose testimony the Joint Complainants rely on to support Count II, he testified that he did not perceive the Company as having guaranteed savings.<sup>204</sup> In fact, Mr. Thorbahn answered the leading guaranteed savings' question with an unequivocal "no." Therefore, Mr. Thorbahn's testimony fails to support the allegations set forth in Count II.

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<sup>197</sup>JC MB at 61-62.

<sup>198</sup>JC Consumer Testimony at 343-344.

<sup>199</sup>JC Consumer Testimony at 345.

<sup>200</sup>Tr. 752.

<sup>201</sup>OAG/OCA St. 3-SR (Rev) at 6-7.

<sup>202</sup>Tr. 748-749.

<sup>203</sup>Tr. 749.

<sup>204</sup>JC MB at 62-63.

The Joint Complainants also rely on the testimony of Mr. Harold Whymeyer in support of their allegations of long-term promised savings.<sup>205</sup> According to his testimony, he enrolled with Respond Power in October 2010 because his EDC was "advertising and sending letters" indicating that it would be in his "best interest" to switch to an EGS and that it would save him money. He also attached three written offers that he had received in 2010 from other EGSs offering to save him up to 10%. An offer from Direct Energy told him that he would "save up to 10% with a guaranteed fixed electricity rate," which would protect him from quarterly rate fluctuations. MXenergy described its 2010 Sure Savings Plan as "guaranteed to save you 10% through the end of 2010." An offer from Dominion Energy Solutions was described as a "guaranteed savings program" and promised to save Mr. Whymeyer 10% off the EDC's 2010 PTC.<sup>206</sup>

Against this backdrop, also including a mailing from his EDC that Mr. Whymeyer read as guaranteeing him savings if he switched to an EGS, a Respond Power sales representative visited his home. The only written material that Mr. Whymeyer included with his testimony relating to the transaction with Respond Power was actually a brochure promoting Respond Power's affiliate company, Major Energy. Nothing in that document references electric prices or potential savings, and even the savings references pertaining to natural gas are general and do not promise any particular percentage savings. In fact, Mr. Whymeyer testified that he did not rely on that brochure in selecting Respond Power.<sup>207</sup>

While Mr. Whymeyer claims that the Respond Power sales representative promised him 10% savings as compared to the EDC, his credibility is undermined by his perception that the EDC was guaranteeing him savings if he switched to an EGS and by the receipt of offers from

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<sup>205</sup>JC MB at 63-64.

<sup>206</sup>JC Consumer Testimony at 884-885, 894-896; Exh. HAW-4.

<sup>207</sup>JC Consumer Testimony at 892-893; Exh. HAW-3; Tr. 856-857.

other EGSs in the same timeframe ironically promising 10% savings. He clearly entered into the sales transaction with Respond Power with the mindset that he would save 10% if he switched. Moreover, he testified that from 2010 through 2013, he saw Respond Power's per kWh charges on the EDC bill, realized they were fluctuating and had no complaints, even though he did not think he was saving money.<sup>208</sup> He also knew that he could cancel at any time without penalty.<sup>209</sup>

Therefore, at any time during 2010, 2011, 2012 or 2013, Mr. Whymeyer could have left Respond Power if he was not realizing the savings that he claims now had been promised. Yet, he stayed with Respond Power for over three years, without complaint, demonstrating that he had not been promised long-term, or any, savings at all. Rather, he became aware of this proceeding through newspaper articles reporting on Attorney General Kane's claims of price gouging, and has developed a version of the 2010 sales transaction to match what he read.<sup>210</sup>

The Joint Complainants also rely on the testimony of Mr. Richard Yost to show that "the Company's door-to-door salespeople promised savings, but the Company did not provide savings over the long term."<sup>211</sup> A review of Mr. Yost's testimony reveals various factors damaging the witness' credibility. For example, in one response, he testified that the sales agents told him he would save money on a long-term basis, but in another answer, he indicated that he did not recall a time period for savings. In addition to this inconsistency between two responses, Mr. Yost offered vague information, without an explanation of details, about any "promises" that were made in early 2012. In fact, he recalled nothing specific about the entire transaction.<sup>212</sup> Therefore, his testimony likewise does not support the Joint Complainants' allegations set forth in Count II.

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<sup>208</sup>Tr. 853-855.

<sup>209</sup>Tr. 855.

<sup>210</sup>JC Consumer Testimony at 890-891; Exh. HAW-2.

<sup>211</sup>JC MB at 64-65.

<sup>212</sup>JC Consumer Testimony at 722-724.

The remaining consumer witnesses, whose testimony is relied upon by the Joint Complainants in support of Count II, without discussion, are identified in proposed Finding of Fact Nos. 77 and 78 in Appendix C, pp. 8-10. A review of these testimonies demonstrates that they likewise suffer from many of the same shortcomings identified above for the specific customers the Joint Complainants highlighted in their Main Brief.

For example, the Respond Power sales representative spoke with Ms. Deborah Altman's husband, who had difficulties answering some questions because "[i]t's hard to remember that far back."<sup>213</sup> Also, she testified the claims of promised savings were "vague" and did not suggest any time period.<sup>214</sup> Similarly, Ms. Vickey Atland testified that no time period was given for any savings.<sup>215</sup> The same was true for Ms. Marcella Bell, who provided no timeframe for expected savings.<sup>216</sup> Several other consumers did not testify that long-term savings were promised, and in most of those situations, no evidence was presented to demonstrate that savings had not been realized in a particular month or months.<sup>217</sup>

Ms. Roxey Andrews had received letters from her EDC suggesting that savings could be realized by switching.<sup>218</sup> She also saw Respond Power's charges on her bills and understood that she could cancel without penalty.<sup>219</sup> Additionally, she characterized this proceeding as a class action lawsuit, in which she would hope to get refunds.<sup>220</sup>

Ms. Mary Bagenstose testified that when she enrolled in February 2011, she thought her price would be "lower" for a year, and that she thinks she signed an enrollment form. However,

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<sup>213</sup>Tr. 1107.

<sup>214</sup>I&E Consumer Testimony at 99.

<sup>215</sup>JC Consumer Testimony at 803.

<sup>216</sup>JC Consumer Testimony at 12.

<sup>217</sup>See, e.g., JC Consumer Testimony at 359 (Emma Eckenroth), 625 (Virginia Clayton); 682 (June Keiser); 686 (Qing Liu); 715 (Patricia Dreisbach); 730 (Georgia Holt); 781 (Brad Gibson); 846 (Joan Fox); 1104 (Francis Krushinski); and 1124 (Leona Johnson).

<sup>218</sup>Tr. 639.

<sup>219</sup>Tr. 639.

<sup>220</sup>Tr. 640.

she did not answer the majority of the questions on the pre-printed questionnaire sent to her by the Joint Complainants about the transaction and indicated her overall satisfaction with Respond Power's charges in 2011, 2012 and 2013.<sup>221</sup>

Ms. Brittney Blymire also did not testify as to how long she expected Respond Power's price to "stay the same" and acknowledged receiving mailings from EDC suggesting that she could save money by switching.<sup>222</sup> Similarly, Ms. Denise Baker did not give any timeframe for how long such lower prices would be provided and acknowledged receiving mailings from her EDC suggesting that she could save money by switching.<sup>223</sup>

Mr. George Barron explained that he switched to Respond Power because he received a notice from the EDC indicating that he had the *right to choose* an EGS and that Respond Power had the lowest rate of those listed on the EGS. In response to another question, he testified that the EDC told him he *had to choose* an EGS. That inconsistency alone raise questions about Mr. Barron's credibility since he clearly interpreted a communication from the EDC telling him that he had a right to choose an EGS as one informing him that he had to choose an EGS. Also, he did not respond to the question asking how long he expected Respond Power's initial price to continue.<sup>224</sup>

Mr. Dwight Beall testified that he did not "vividly recall" portions of the transaction. In addition, his response to how long Respond Power's pricing would remain in effect, he responded that, "[i]f I recall, it was a year." His lack of recall concerning some details casts

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<sup>221</sup>Tr. 491.

<sup>222</sup>JC Consumer Testimony at 774; Tr. 81.

<sup>223</sup>JC Consumer Testimony at 336; Tr. 95.

<sup>224</sup>JC Consumer Testimony at 347-348.

doubt on his recollection of the entire conversation. Mr. Beall also acknowledged receiving mailings from the EDC suggesting that he could save money by switching to an EGS.<sup>225</sup>

Ms. Carol Birl enrolled with Respond Power in 2011 and offered vague testimony suggesting that the sales representative told her she would "notice the savings." She knew she enrolled in a variable rate plan and had no complaint about her pre-Polar Vortex prices.<sup>226</sup>

Mr. Alex Bobsein testified that when he enrolled in 2012, the sales representative "predicted that" he "could save around 10%" or that he "could drop" his bill "up to 10% annually." The characterization of these statements as predictions and the use of the word "could" demonstrate that no guarantees were made. Mr. Bobsein had reviewed his disclosure statement, understood that the rate was variable and saw the charges fluctuate. In short, he had no complaints about his prices in 2012 and 2013. A particularly frustrating aspect of Mr. Bobsein's experience was the switching timeframe after his variable prices increased.<sup>227</sup>

Ms. Kimberly Brown, who enrolled in May 2012, referred to a letter that she had received in the mail regarding savings but did not produce that letter with her testimony. Although she testified that she signed a paper that she received in the mail and sent it back to Respond Power, Mr. Small testified that the Company did not do any enrollment solicitations by mail. She further indicated that she had no verbal communications with Respond Power sales representatives. Acknowledging that she had a variable rate, Ms. Brown noticed fluctuations in the charges over her more than two years of service.<sup>228</sup> Absent a production of the letter referenced by Ms. Brown, and the fact that she had no verbal communications with Respond

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<sup>225</sup>JC Consumer Testimony at 206. Tr. 926.

<sup>226</sup>JC Consumer Testimony at 738-739.

<sup>227</sup>JC Consumer Testimony at 866-867; Tr. 297-298. The Joint Complainants also refer to Mr. Bobsein as a witness who expected to receive competitive rates; however, Mr. Bobsein did not allege that the sales representative used that term, and in fact, he only raised the issue in the context of his question to the sales representative about whether he could switch later if the rates became "uncompetitive." JC Consumer Testimony at 865. This testimony, which anticipates the possibility of higher rates in the future, actually contradicts any claims that he was promised savings.

<sup>228</sup>JC Consumer Testimony at 941; Tr. 611; RP St. 3 (Rev) at 13.

Power sales representatives, her testimony simply does not support any claims of promised savings that were not realized.

Ms. Jean Buraczewski also did not discuss any interactions with Respond Power sales representatives and did not testify as to how long she thought her initial price would remain in effect. Additionally, she noted that Respond Power called her at some point after she had enrolled to offer her a fixed rate due to the possibility of upcoming price increases – an offer she declined. Having declined that offer and then watched her variable prices increase to reflect wholesale market conditions, she is testifying in this proceeding in hopes of getting a refund.<sup>229</sup>

Regarding her 2012 enrollment, Ms. Marian Campbell testified that her memory was "a bit cloudy" and that she had received mailings from her EDC indicating that she could save money by switching to an EGS. She also indicated that she saw Respond Power charges on her bills and was satisfied with them in 2012 and 2013. However, after seeing an article in the newspaper about Attorney General Kane initiating this proceeding, she complained and hopes to get a refund.<sup>230</sup>

Ms. Nancy Chappel gave no indication of a time period over which she expected to receive savings over her current supplier. Also, her testimony indicated a general expectation that a customer would save money by switching to an EGS. For instance, she said that after reviewing the Disclosure Statement, which very clearly does not guarantee savings, that it was her understanding that she would pay was less than what she was currently paying because otherwise -- "what would be the point of changing?" She repeated this sentiment twice during her brief cross-examination and re-direct. Ms. Chappel specifically testified that she thought she would not have to pay Respond Power more than she paid her EDC -- not because of statements

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<sup>229</sup>JC Consumer Testimony at 989-990; Tr. 938.

<sup>230</sup>JC Consumer Testimony at 528; Tr. 570-571.

made by the Company's sales representative ---but because "what would be the point of changing your supplier if you're not going to save money."<sup>231</sup> Respond Power submits that Ms. Chappel's testimony is one of the most illustrative examples of consumers entering into sales transactions fully expecting long-term savings and continuing to believe that, regardless of what was said by sales agents or contained in written documentation.

Regarding her June 2011 enrollment, Ms. Colleen Cheri did not testify as to any time period when possible savings would be realized. Further, Ms. Cheri monitored the Respond Power charges on her bill and acknowledged that she saved money.<sup>232</sup>

Ms. Sharon Chludzinski testified that she was being served by a different EGS when she enrolled with Respond Power and that the price comparisons were made in the context of the other EGS.<sup>233</sup> No evidence was offered in the record to show what the other EGS was charging. Also, Ms. Chludzinski was monitoring Respond Power's charges on her electric bill.<sup>234</sup>

Ms. Rosalyn Christopher's testimony is a classic case of a selective memory. She provided no details in her testimony about the sales transaction other than that she would "save money."<sup>235</sup> She gave no timeframe over which she expected to save money, and as to other aspects of the enrollment, her answers were not responsive as to the questions of whether she received a disclosure statement or signed an enrollment form.<sup>236</sup> In addition to her vague and incomplete testimony, she claimed during cross-examination to have not received mailings from her EDC about the electric choice program or any offers from other EGSs, despite evidence in

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<sup>231</sup>JC Consumer Testimony at 854-655; Tr. 257, 264. The Joint Complainants also refer to Ms. Chappel as a witness who expected to receive competitive rates; however, she did not testify that the sales representative used that phrase. The only reference was in the Welcome Letter, which she received after her enrollment. Tr. 264.

<sup>232</sup>JC Consumer Testimony at 629; Tr. 10.

<sup>233</sup>Tr. 1003-1004.

<sup>234</sup>Tr. 1003.

<sup>235</sup>JC Consumer Testimony at 375.

<sup>236</sup>JC Consumer Testimony at 375-376.

the record showing that at least EDCs were regularly sending information to customers about shopping.<sup>237</sup>

Mr. Robert Clair testified that he did not remember what the sales agent went over with him, explaining that "[i]t was about a year or two ago."<sup>238</sup> Additionally, Mr. Clair noted that he is still a customer of Respond Power.<sup>239</sup>

Ms. Cynthia Clapperton testified that she called her EDC who told her that there was a special promotion with a lower rate. Although she claimed that she was never told she was switching to Respond Power, a recording of a TPV admitted into the record clearly demonstrates otherwise. Further, Ms. Clapperton did not indicate how long this lower rate was to remain in effect or did not respond to the question about whether the sales representative guaranteed savings.<sup>240</sup>

Ms. Phyllis Court expressly acknowledged that she did not remember much of the conversation with the sales agent prior to start service with Respond Power in January 2013. She testified as to the price she thought was offered and that she thought the initial price was for one year. She also did not offer testimony indicating when her prices increased, or whether that occurred prior to the expiration of the first year.<sup>241</sup>

Ms. Deborah Courtright's testimony did not offer a timeframe for when she thought the initial price would remain in effect following her 2012 enrollment. She further testified that she monitored Respond Power's charges on her bills and was satisfied with them in 2012 and 2013 even though she saw them slowly increasing. She knew that she could cancel at any time without penalty and cited the 30-60 day switching timeframe as a major source of her frustration

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<sup>237</sup>Tr. 1052-1053; RP St. 4 (Rev) at 23-24; Exh. JC-3 and JC-4.

<sup>238</sup>Tr. 577.

<sup>239</sup>Tr. 579.

<sup>240</sup>JC Consumer Testimony at 837-839; Tr. 651-652, 655; RP Ex. 29 and 29-A.

<sup>241</sup>JC Consumer Testimony at 697.

when prices increased in 2014, even though she had been advised of that timeframe when she signed up with Respond Power.<sup>242</sup>

Mr. Robert Cowan claimed in his testimony that no one called him to verify his enrollment with Respond Power. However, at the hearings, a recording of the TPV was admitted into evidence clearly showing that he had received a verification call. Moreover, during that call, the representative clearly advised Mr. Cowan that he "may receive savings of up to 10 percent based on historical averages."<sup>243</sup>

Ms. Lakeyva Davis testified that she was told during her TPV that she would save money. However, a review of the TPV recording demonstrates otherwise. At no time during the TPV does the representative even mention savings. She also did not testify as to any time period over which she was supposedly promised savings.<sup>244</sup>

Mr. William DiFilippo testified that in June 2013 he was offered a lower rate for the next several months and then the rates increased without notice. Later in his testimony, he added that he cannot recall the exact conversation.<sup>245</sup>

Ms. Kathleen DiMaggio was not the customer who was solicited; rather, it was her son who was residing at a different location.<sup>246</sup> Similarly, Ms. Danielle Groff was not at home at the time the Respond Power sales representatives visited her home and spoke with her mother.<sup>247</sup> Therefore, their testimony contains hearsay within hearsay and must be disregarded.

Ms. Nancy Eyles testified that the sales representative told her that he was offering a variable rate,<sup>248</sup> but that she thought the price was locked in. However, she gave no time period

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<sup>242</sup>JC Consumer Testimony at 1033; Tr. 204 and 207.

<sup>243</sup>I&E Consumer Testimony at 133; RP Ex. 13 and 13-A; Tr. 1068-1072.

<sup>244</sup>JC Consumer Testimony at 743; RP Ex. 27 and 27A; Tr. 698-702.

<sup>245</sup>JC Consumer Testimony at 793-794.

<sup>246</sup>I&E Consumer Testimony at 123-124.

<sup>247</sup>JC Consumer Testimony at 152.

<sup>248</sup>JC Consumer Testimony at 705.

for it being locked in or any expected savings, and testified that the bill they received was consistent with the representations that were made at the time of enrollment. Ms. Eyles also indicated her perception of this proceeding as a class action lawsuit.<sup>249</sup>

Ms. Megan Foley testified that she saw Respond Power charges on her bills in 2012 and 2013 and had no complaints about them. She also indicated that the charges on her bills were consistent with what she was told during the door-to-door sales pitch.<sup>250</sup>

Ms. Lynne Frank was with an EGS when she switched to Respond Power, and there is no evidence in the record as to the prices that were charged by the EGS at that time or after she left the EGS. Also, Ms. Frank provided testimony in hopes of getting a refund.<sup>251</sup>

Ms. Donna Geary's testified that the sales representative told her that Respond Power's rates would occasionally be higher. She also reviewed the variable price language in the Disclosure Statement at the time of enrollment and knew that Respond Power did not guarantee savings.<sup>252</sup>

The testimony of Mr. David Goodall and Ms. Beverly Goodall did not describe any basis for their assumption that the rate would remain below the EDC PTC indefinitely. They also noted that they had received mailings from their EDC suggesting that they could save money by switching to an EGS. Additionally, they saw in the newspaper that Attorney General Kane was soliciting complaints and that their primary purpose in testifying in this proceeding is to get a refund.<sup>253</sup>

Mr. Allen Gullickson's testimony is relied on by the Joint Complainants to support their claim that some consumers expected competitive rates. However, Mr. Gullickson did not testify

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<sup>249</sup>JC Consumer Testimony at 705-706; Tr. 614, 620.

<sup>250</sup>Tr. 550-551.

<sup>251</sup>Tr. 1117-1118.

<sup>252</sup>JC Consumer Testimony at 831; Tr. 758-759.

<sup>253</sup>JC Consumer Testimony at 770; Tr. 463.

that a Respond Power sales representative described them in that way. Rather, he testified that he understood that the rate was variable and that he believed "at the time, it was very competitive."<sup>254</sup> He did not even speak to a sales agent and expressly testified that no savings were guaranteed.<sup>255</sup>

Although Mr. Edward Jumper and Ms. Tanya Greiman originally testified that they thought the rate of "6.9%" allegedly offered by the Respond Power agent would remain in effect indefinitely,<sup>256</sup> they later suggested that they thought it would be in effect for a "reasonable amount of time." They also testified that they had received a letter from their EDC informing them that they had to choose an EGS.<sup>257</sup>

Ms. Alice Kapel testified that the sales representative "estimated" savings. She also did not provide a timeframe over which the lower rates were to remain in effect.<sup>258</sup>

Regarding his 2011 enrollment, Mr. George Keffas' testimony shows that he recalls very little about the transaction. He does not recall whether he signed anything; he believes the transaction was handled over the phone; and he does not remember whether he received a disclosure statement.<sup>259</sup> Also, he provided testimony in this proceeding in hopes of receiving a refund.<sup>260</sup>

Ms. Louvonne Kline's testimony refers to a rate that is "2 points lower" than her current rate and suggests that the sales representative had her sign an electronic type signature, which is not consistent with any evidence presented in this proceeding concerning Respond Power's enrollment process. At other points in her testimony she refers to the rate that she was allegedly

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<sup>254</sup>JC Consumer Testimony at 460.

<sup>255</sup>JC Consumer Testimony at 460.

<sup>256</sup>JC Consumer Testimony at 762.

<sup>257</sup>Tr. 535-537.

<sup>258</sup>JC Consumer Testimony at 176.

<sup>259</sup>In fact, in his written testimony, he claimed that he never received a disclosure statement, but on cross-examination, he testified that he does not remember. JC Consumer Testimony at 75-77; Tr. 899.

<sup>260</sup>Tr. 899-900.

as a percent. Also, although Ms. Kline originally testified that no verification was performed, she described a verification call during the hearing.<sup>261</sup> As a result of these inconsistencies, her testimony is not credible.

Mr. David Lazzari testified that no timeframe was given for a rate that would be lower than his current supplier and further noted that his rates were reasonable in 2013.<sup>262</sup> No evidence was offered to prove that his rates were below that of his "current supplier," or even what those rates were at any time while he was served by Respond Power.

Mr. Gerard LeBlanc switched to Respond Power from another EGS in June 2012 because the rate was cheaper, and no evidence was presented to show that the prices charged to Mr. LeBlanc by Respond Power were higher than he was paying or would have paid that particular EGS had he stayed.<sup>263</sup> Indeed, Mr. LeBlanc did not even suggest that his prices would always be lower than his former EGS.<sup>264</sup>

Regarding his 2012 enrollment, Mr. William Leinhos did not testify that a lower rate was to remain in effect indefinitely. At the hearings, Mr. Leinhos testified that the rate charged by Respond Power was initially lower than the EDC's PTC and that he had no complaints in 2012 or 2013. He also noted that he read in the newspaper about Attorney General Kane's media outreach "about these tactics of these companies."<sup>265</sup>

As to his January 2011 enrollment with Respond Power, Mr. Leong testified that he lacked recollection of some details "especially after so many years."<sup>266</sup> He also did not indicate a timeframe for any reduced prices, and agreed that the prices he paid Respond Power were fine

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<sup>261</sup>JC Consumer Testimony at 1083-1085; Tr. 196-197.

<sup>262</sup>JC Consumer Testimony at 710-711.

<sup>263</sup>JC Consumer Testimony at 425; Tr. 914-916.

<sup>264</sup>JC Consumer Testimony at 426.

<sup>265</sup>JC Consumer Testimony at 442; Tr. 467, 470.

<sup>266</sup>Tr. 417.

prior to February 2014. He stayed with the Company for three years, during which time his prices went up and down. If Mr. Leong had been told that his prices would only go down, as he testified, it seems that he would have complained or switched to a different EGS during those three years as his prices fluctuated.<sup>267</sup>

Regarding her 2012 enrollment, Ms. Mary Malloy did not explain the basis for her understanding that her rate would remain constant indefinitely and acknowledged that she could not think of any product or service for which the price stays exactly the same forever. She also testified that her bills were low "initially," although she did not review them, and that marketers were coming to her door very frequently.<sup>268</sup>

Ms. Jeanne Mann was not at home when her husband spoke to the Respond Power sales representative and enrolled their account. As her testimony contains hearsay within hearsay, it should be disregarded. Moreover, her husband knew that the variable rate being offered by Respond Power was lower than the price being charged by their EGS at that time, and reviewed historical pricing in making a decision to switch. No long-term savings were promised.<sup>269</sup>

Regarding his 2012 enrollment, Mr. James Martinez did not explain the basis for his understanding of a two-year price. However, he testified that he was satisfied with Respond Power's charges for two years, although he has never seen them on his bill from the EDC.<sup>270</sup>

According to the testimony of Mr. Michael May, the basis for his affirmative response to the leading guaranteed savings question on the written questionnaire was the Disclosure Statement. He explained that because the Disclosure Statement states that it is Respond Power's goal to deliver power at a price that is lower than the EDC's PTC, he viewed that as a savings

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<sup>267</sup>JC Consumer Testimony at 505; Tr. 418; RP St. 3 (Rev) at 15; Exh. AS-4 (Rev).

<sup>268</sup>JC Consumer Testimony at 258; Tr. 482, 486.

<sup>269</sup>JC Consumer Testimony at 128-129.

<sup>270</sup>JC Consumer Testimony at 181-182; Tr. 765.

guarantee. However, the very next phrase in the sentence cautions the consumer that Respond Power *cannot* guarantee that the price will be lower. Although Mr. May later testified that he also relied on what the salesperson told him, the lack of any reference to the sales representative in his prepared testimony or during cross-examination casts doubt on his credibility. Further, in the same way that Mr. May viewed the Disclosure Statement as making a guarantee that it certainly did not make, he also exaggerated the verbal statements of the salesperson at the hearing, especially when it was clear to him that the Joint Complainants wanted him to indicate reliance on the sales representative's statements.<sup>271</sup> Indeed, Respond Power submits that the testimony of Mr. May effectively illustrates the point that customers wanted to or expected to hear savings promises, or why else would they switch?

Ms. Mary Jean McEwen recalls almost nothing about her July 2013 enrollment. She only remembers that she received several phone calls, including some from other EGSs, and understood that that the price would be cheaper than the EDC.<sup>272</sup> She even conceded, during cross-examination, that to classify her recollection as strong "would be incorrect."<sup>273</sup>

Regarding her 2012 enrollment, Ms. Manulyn Mitchell testified that Respond Power's price was on a list of EGSs that was shown to her and that the initial rate was supposed to be locked in for a year.<sup>274</sup> Although she testified that her prices later increased, she did not testify as to the amount by which they increased or month or even year in which they increased. Also, she indicated that she had been solicited by other EGSs and that the person who showed her the

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<sup>271</sup>JC Consumer Testimony at 1075; Tr. 789, 791-793.

<sup>272</sup>JC Consumer Testimony at 1036-1038; Tr. 987-988. The entire third page of her written testimony contains the notation: "I truly don't remember." JC Consumer Testimony at 1038; Tr. 991.

<sup>273</sup>Tr. 988.

<sup>274</sup>JC Consumer Testimony at 246-247.

list of suppliers had an "electronic notebook," which has not been identified in this proceeding as a device used by Respond Power sales representatives.<sup>275</sup>

When asked to describe the sales contacts with Respond Power's representative, Mr. Carol Moyer responded: "I do not recall anything more than the phone call."<sup>276</sup> He also did not have any expectation to a time period for savings, and no evidence was introduced to show when or to the extent his prices increased.<sup>277</sup>

Ms. Colleen Mohr testified that the Disclosure Statement that she received seemed to be consistent with what she was told by the telemarketer. Therefore, her testimony claiming that the sales representative assured her that she would save money apparently omitted the parts of the telemarketer's explanation that no guarantees could be made. She also acknowledged that she was "constantly getting letters in the mail and constantly getting phone calls" from EGSs. Ms. Mohr further testified that she saw an article in the newspaper telling consumers to contact Attorney General Kane "about the high prices they got from whatever supplier they went to."<sup>278</sup>

Regarding her January 2012 enrollment, Ms. Kimberly Munn had no complaints about her charges for over two years and did not provide any time period of which she expected any savings. However, she is now seeking a refund.<sup>279</sup>

Mr. Victor Ogir had been with several EGSs, had spoken with many EGSs about their prices and acknowledged getting "at least a couple of calls a day to switch."<sup>280</sup> Although he answered the leading guaranteed savings question with a "yes," his explanation provided no support for this response. He simply referred to an attached brochure, which is simply a graphic

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<sup>275</sup>Tr. 797.

<sup>276</sup>JC Consumer Testimony at 87.

<sup>277</sup>JC Consumer Testimony at 88.

<sup>278</sup>JC Consumer Testimony at 1048; Tr. 110-111.

<sup>279</sup>JC Consumer Testimony at 915, 918; Tr. 818.

<sup>280</sup>JC Consumer Testimony at 553, 555; Exh. VO-3; Tr. 168, 173.

of a utility bill, showing where supply charges would appear.<sup>281</sup> The brochure does not even mention possible savings.

Mr. Michael O'Hagan claims to have been quoted a rate lower than his EDC's PTC, but offered no timeframe for any expected savings. He recalls nothing else about the transaction, except actually enrolling with Respond. Most of the questions on the questionnaire were left blank or answered with the response: "[d]on't recall."<sup>282</sup> He confirmed his lack of recollection at the hearing. A review of Mr. O'Hagan's testimony demonstrates that his true frustration with this process was the delay in switching, which he perceived as having been the fault of Respond Power.<sup>283</sup>

Mr. James O'Reilly did not testify as to a time period over which he expected to save or indicate whether he saved during any months because he did not review Respond Power's charges on his bills.<sup>284</sup> He testified, however, that "in the electric bill, they always tell you...you could look for cheaper electricity."<sup>285</sup> He also noted that he had received offers from other EGSs and that he had read about this proceeding in the local newspaper concerning "price gouging."<sup>286</sup>

Testifying about her July 2012 enrollment, Ms. Cherryann Reed referred to alleged statements of a Respond Power sales representative about saving money compared to the EDC's PTC, but offered no time period over which she expected to receive savings. Her testimony referenced price increases in early 2014, but contained no information about prices she paid in 2012 and 2013.<sup>287</sup> In fact, nothing has been introduced into the record to show what Ms. Reed

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<sup>281</sup>JC Consumer Testimony at 544, 548; Exh. VO-2.

<sup>282</sup>JC Consumer Testimony at 111-112.

<sup>283</sup>JC Consumer Testimony at 113; Tr. 732.

<sup>284</sup>JC Consumer Testimony at 16; Tr. 224.

<sup>285</sup>Tr. 224.

<sup>286</sup>Tr. 224-225.

<sup>287</sup>JC Consumer Testimony at 276, 278.

paid in those years and whether she saved money in any month or months compared to the EDC's PTC.

Ms. Tonya Reed specifically testified that there was "no written or verbal guarantee" of savings made by the Respond Power sales representative.<sup>288</sup> Her testimony is also lacking details about whether she saved money in certain months or when her prices were increased.

Discussing his Summer of 2012 enrollment, Mr. Michael Rogowski acknowledged that he only remembered the details "[v]aguely, because it's been so long."<sup>289</sup> He also testified that he was satisfied with the charges in 2012 and 2013. As to his expectations for savings, he claimed that he thought a lower rate would be in effect as long as the contract was current, despite signing a sales agreement, where the variable box is checked and he acknowledges receiving a copy of the terms and conditions, which indicated that his rate would vary monthly. He further acknowledged that "in the whole process, they did save [him] money."<sup>290</sup>

Mr. LaRue Rowe referenced a letter he received from Respond Power in support of his claim that the sales representative guaranteed savings. However, he did not produce the letter or indicate whether he received it prior to enrolling. He also testified that he had no interaction with a Respond Power sales agent and offered no explanation for his understanding about the prices.<sup>291</sup> Further, no evidence has been produced to show the prices he was charged.

Testifying about her 2011 enrollment, Ms. Cynthia Rumpf recalled signing up but does not remember "pinpoint specific details."<sup>292</sup> Although she testified that her understanding was that the her price would be less than the EDC's PTC, she indicated that she did not believe she was saving as much in 2011, 2012 and 2013 as she expected to from her recollection of the sales

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<sup>288</sup>JC Consumer Testimony at 220.

<sup>289</sup>Tr. 408.

<sup>290</sup>JC Consumer Testimony at 410; RP Ex. 37; Tr. 407-408, 410.

<sup>291</sup>I&E Consumer Testimony at 44.

<sup>292</sup>Tr. 120.

pitch but stayed with the Company.<sup>293</sup> Indeed, she raised no concerns or filed any complaints during that time.<sup>294</sup> A review of her supply history shows that for several months in 2012, she was charged less than 8 cents per kWh with a couple of months dipping below 7 cents per kWh.<sup>295</sup>

The testimony offered by Ms. Mary Show was inconsistent, which undermines her credibility. She testified at one point that it would be a "set price," and a couple of questions later, she testified that the price "may fluctuate." Also, she suggested that the price would last "indefinitely," while testifying later that it "would lock in for a year." During cross-examination, however, she was sure about one thing -- she unequivocally stated that she hopes to get a refund by offering testimony in this proceeding.<sup>296</sup>

Ms. Mickie Shreiber had no recollection of her 2011 enrollment other than Respond Power had the "best rates."<sup>297</sup> Otherwise, her written testimony is riddled with the answers "don't know" and "don't remember," including in response to the question about how long the initial rates would remain in effect. On October 2, 2014, a few days after the date of her testimony in this proceeding, Ms. Shreiber filed a formal complaint against Respond Power. In that complaint, she made no allegations of promised savings. Rather, she concocted a theory about having been switched without authorization and sought a refund or credit for charges imposed by the Company. In dismissing the complaint, ALJ Salapa noted that Ms. Shreiber had voluntarily enrolled with Respond Power in October 2011 and was seeking to avoid payment of charges after November 2013, when she filed a petition for Chapter 7 bankruptcy and was assigned a new account number by her EDC. Since the reason for creating a new account

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<sup>293</sup>Tr. 121.

<sup>294</sup>Tr. 121.

<sup>295</sup>Tr. 121; RP St. 3 (Rev) at 15-16; Exh. AS-4 (Rev).

<sup>296</sup>Tr. 525.

<sup>297</sup>JC Consumer Testimony at 102-104.

number was to protect her EDC's ability to collect arrearages accrued after the account, the ALJ correctly found that Respond Power had no obligation to seek her authorization to continue her enrollment. *Shreiber v. Respond Power, LLC*, Docket No. C-2014-2446282 (Initial Decision served July 28, 2015) ("*Shreiber*").

Mr. Roberto Simoes testified that he understood Respond Power to be offering a competitive market price when he signed up in 2011. He explained that he formulated this opinion through his research on [www.papowerswitch.com](http://www.papowerswitch.com) and then called the Company to enroll. Also, he testified that Respond Power did not guarantee savings.<sup>298</sup>

In Ms. Audra Spriggle's testimony, she claimed to have been offered a fixed rate for one year. However, she did not identify what that rate was supposed to have been or what she was charged by Respond Power. Her testimony simply does not prove that she was offered a price that was not honored. Moreover, she indicated that she was providing testimony as part of this proceeding in hopes of obtaining a refund.<sup>299</sup>

Mr. William Stankewicz, who signed up through Respond Power's website after shopping for electricity on [www.papowerswitch.com](http://www.papowerswitch.com), testified that he understood that Respond Power's prices would be "competitive" with the EDC's rates. However, he also indicated that he knew the initial price would only be in effect for one month and that no one from Respond Power guaranteed him savings. He further knew that he could cancel without a penalty, which he exercised his prerogative to do when prices increased.<sup>300</sup>

Mr. Walter Stelma testified that he did not enroll with Respond Power.<sup>301</sup> Notably, Mr. Stelma's testimony indicated under each question that he did not sign up but when he was

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<sup>298</sup>JC Consumer Testimony at 1061-1062; Tr. 373.

<sup>299</sup>Tr. 923.

<sup>300</sup>JC Consumer Testimony at 539-540; Tr. 428.

<sup>301</sup>JC Consumer Testimony at 67. This claim is addressed in the discussion of Count V (slamming).

asked the leading guaranteed savings question, he said he was not sure, but that the agent did indicate that he would save money.<sup>302</sup> Mr. Stelma's testimony provided no information as to the time period for any savings, and no evidence is in the record showing the prices he paid.

Although Ms. Diana Stewart referred to a "mailing" offering lower rates, she did not produce the letter, and during cross-examination, she acknowledged receiving mailings from other sources. She testified: "Yeah, there's always something coming. In fact, I just threw three away, and I can't tell you who they were."<sup>303</sup> She also did not remember whether she had called Respond Power or if Respond Power had called her.<sup>304</sup>

Ms. Vilma Stover testified that enrolled in March 2013 and that no timeframe was given for savings. She also provided no information about the prices that she was charged by Respond Power. Regarding certain details of the conversation, Ms. Stover testified that she "really did not remember what the gentleman said." In addition, she indicated that she had received a refund from Respond Power.<sup>305</sup>

Mr. Thomas Strellec did not indicate any time period over which any savings would be realized. Also, there is no evidence in the record as to the prices he was charged by Respond Power prior to February 2014.<sup>306</sup>

Mr. Michael Sumerano researched rates on [www.papowerswitch.com](http://www.papowerswitch.com) before going to Respond Power's website to enroll. Although he was "under the impression he was receiving a competitive variable rate," he did not formulate that view through discussions with a Respond

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<sup>302</sup>JC Consumer Testimony at 68.

<sup>303</sup>JC Consumer Testimony at 789; Tr. 978.

<sup>304</sup>Tr. 978-979.

<sup>305</sup>JC Consumer Testimony at 438-439; Tr. 869-870, 876-877.

<sup>306</sup>JC Consumer Testimony at 190.

Power agent. He had no contact with a Respond Power sales representative and he knew that he signed up for a variable rate, which could increase. He testified that nothing was guaranteed.<sup>307</sup>

Ms. Cassandre Urban saw Attorney General Kane's media outreach and alleged "price gouging" in her testimony. Although she thought she would be paying less than she was currently paying, she also noted that she had received mailings from her EDC suggesting savings were possible through switching to an EGS. She also did not indicate a time period for savings or provide any information about the prices that were charged by Respond Power.<sup>308</sup>

Although Mr. Matthew Weeks thought he signed up for a one-year fixed rate in 2012, he does not remember what the initial price was. He also testified that he was "somehow moved to a variable priced contract." Attached to his testimony was information circulated by Attorney General Kane stating that EGSs had engaged in "price gouging" and that some customers had discovered that their account had been switched to variable rate without warning. He also did not provide any evidence of charges imposed by Respond Power.<sup>309</sup>

Ms. Victoria Werkmeister testified that "over the last few years," she has received "a lot of offers from other EGSs" and that she wants a refund as part of this proceeding. She described the switching timeframe as particularly frustrating because it took two billing cycles.<sup>310</sup>

Ms. Esther Weyand was with another EGS before switching to Respond Power, and no evidence was offered to show the price that she paying the other EGS or what the other EGS was charging after she switched. Therefore, it is not possible to determine if any promises of savings were realized.<sup>311</sup>

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<sup>307</sup>JC Consumer Testimony at 593-594.

<sup>308</sup>JC Consumer Testimony at 995-996; 160-161.

<sup>309</sup>JC Consumer Testimony at 429; Tr. 360-361, 364.

<sup>310</sup>JC Consumer Testimony at 23-26; Tr. 246.

<sup>311</sup>JC Consumer Testimony at 403; Exh.EW-1; Tr. 367.

Ms. Roberta White has discussed the possibility of obtaining a refund as part of this proceeding with Attorney General Kane's office. She also testified that she decided to enroll with Respond Power after listening to what a sales representative told her neighbor, who is still a customer of Respond Power.<sup>312</sup>

Regarding her 2012 enrollment, Ms. Verdelle Williams testified that although she understood that Respond Power's rate was lower than that charged by the EDC, she did not have an expectation of how long that price would be charged. Also, Ms. Williams is still a customer of Respond Power because she accepted a one-year fixed rate.<sup>313</sup>

Ms. Jodi Zimmerman testified that she did "not remember specifics" of the sales contacts that she had with Respond Power sales representatives when she signed up for service in 2012. Although she thought she had a fixed rate, she did not indicate how much the rate was. Further, despite her understanding that it was two-year contract, she did not remember verbatim what was said "or the disclosure" or any "specific details." She also did not monitor charges or provide any information as to what she was billed by Respond Power prior to September 2013.<sup>314</sup>

Clearly, a great deal of the consumer testimony that has been relied upon by the Joint Complainants to support their claim that Respond Power's sales representatives promised savings that were not realized is not concise or adamant -- the standard by which the Commission views consumer testimony on claims of promised savings. It is filled with generalities, vague recollections and inconsistencies. For consumers seeking refunds, it is self-serving. As this testimony was actively solicited by the Joint Complainants for purposes of litigation, it does not have the trustworthiness that is needed for the Commission to rely on in the context of determining whether Respond Power has violated its regulations.

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<sup>312</sup>JC Consumer Testimony at 1087; Tr. 200-201.

<sup>313</sup>JC Consumer Testimony at 508-509.

<sup>314</sup>JC Consumer Testimony at 454-455; Tr. 335-336.

c. Consumer Savings

Although the Joint Complainants contend that Respond Power sales representatives promised savings that did not materialize, they present limited billing data to demonstrate that any promised savings was not realized by consumers. Also, in analyzing this limited billing data, they fail to consider whether a customer testified that long-term savings were guaranteed, such as for a specific time period (*i.e.*, six months or one year) or indefinitely.<sup>315</sup> This is a significant omission since, as shown above through a review of some of the testimony relied on by the Joint Complainants, many of the customers who claimed to have been guaranteed savings did not testify that they that this was to occur indefinitely, or forever.

By way of example, the Joint Complainants referred to the billing data of Ms. Linda Rose, who enrolled with Respond Power in 2011, and concluded that she did not receive savings over the course of the time that she was served. However, Ms. Rose testified that she understood that some months would be higher due to the nature of the market and she provided no time period over which she expected savings. Further, it is beyond dispute that in some months, her price was below the EDC's PTC.<sup>316</sup> Similarly, the Joint Complainants rely on the billing information provided by the Company for Mr. James Thorbahn, who enrolled in 2012, who was charged less than the EDC's PTC during several months. Mr. Thornbahn did not provide a timeframe for expected savings, and in fact, he testified that savings were not guaranteed.<sup>317</sup> Mr. Joseph Cochi also did not recall a timeframe for how long savings would last and was charged less than the EDC's PTC during his first two months in 2012.<sup>318</sup>

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<sup>315</sup>JC MB 53-65.

<sup>316</sup>JC MB at 59-60; JC Consumer Testimony at 32.

<sup>317</sup>JC Consumer Testimony at 826; JC MB at 62-63.

<sup>318</sup>JC Consumer Testimony at 123; JC MB at 60-62.

In short, the Joint Complainants have made no effort to consider the expectations or the actual experiences of any, let alone every single one, of the consumers upon whose testimony they rely. In order to carry their burden of proof in Count II, it was incumbent upon them to prove each element of their allegation. They had the obligation to examine the granular details of each consumer's testimony and the relevant billing data to demonstrate that any promised savings did not materialize.

### 3. Conclusion

In their Main Brief, the Joint Complaints allege a total of 815,120 violations stemming from Count II. The specific regulations they identify as having been violated include:

- (i) Section 54.43(f), which establishes licensee responsibility for acts of agents;
- (ii) Section 111.4, which establishes agent qualifications and standards;
- (iii) Section 111.5, which requires EGSs to train and monitor agents; and
- (iv) Section 111.12(d)(1), which pertains to compliance with consumer protection laws.

However, the Joint Complainants have presented flimsy evidence consisting of old marketing materials on which no consumers relied to enroll with Respond Power, sketchy billing data and uncorroborated hearsay of consumer testimonies that is fraught with credibility issues. They have not proven by a preponderance of the evidence that Respond Power's sales representatives promised long-term savings that did not materialize. To the extent that result could be shown by a granular review of individual customer information, they have failed to analyze the evidentiary record in this manner. Therefore, the Commission should dismiss Count II in its entirety.

If the ALJs are inclined to rely on uncorroborated hearsay and go through the evidentiary record to identify which consumers testified that they were promised savings for a specific or

even indefinite time period and then review any billing data that is available for those consumers in order to salvage some portions of Count II for the Joint Complainants, they should find that Respond Power has violated no more than one Commission regulation. Because the Joint Complainants did not allege in their Complaint that Respond Power violated Section 54.4(a) or 54.5(a) of the Commission's regulations, the only provision cited by the Joint Complainants that may be applicable is Section 111.12(d)(1). It states that an EGS "[m]ay not engage in misleading or deceptive conduct as defined by State or Federal law, or by Commission rule, regulation or order." Although this provision has been used in this proceeding in an effort to enforce compliance with the Consumer Protection Law and TRA, the Commission does not have the jurisdiction or expertise to enforce those laws. Due to the catch-all language regarding compliance with Commission regulations, Respond Power recognizes that if the Commission determines that it violated Section 54.4(a) or 54.5(a), it may be able to conclude instead that the conduct violated Section 111.12(d)(1). As noted earlier, however, Respond Power does not agree that this provision could be used to find a second and separate violation that is based on the same conduct.

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

that they were in any way misled).<sup>319</sup> Also, the Settlement bars Respond Power from offering variable price contracts to new customers for two years, and contains numerous provisions designed to enhance Respond Power's training and quality control program, including specific sales scripts that may not use terms such as "competitive" or "savings" and must emphasize the volatility of variable prices.<sup>320</sup> Moreover, the Settlement provides for a civil penalty of \$125,000 and a minimum contribution to EDC hardship funds of \$25,000, which more than adequately address any findings of violations under Count II.<sup>321</sup>

F. Count III – Disclosure of Material Terms

1. Introduction

In Count III, the Joint Complaint focused on Respond Power's disclosure of the variable rate feature of consumers' plans. It alleged that consumers were not informed by the sales representative that they had signed up for a variable rate; were provided Disclosure Statements that did not indicate whether their price was fixed or variable; or were provided a Sales Agreement that did not indicate whether they were for fixed or variable rate contracts. They also alleged that some consumers believed they had switched to a variable rate plan, but that the Company charged them variable prices.<sup>322</sup>

By their Main Brief, they allege that Respond Power violated Section 54.4(a), which requires billed prices to reflect marketed prices and the agreed upon prices in the disclosure statement; 54.5(c)(2),<sup>323</sup> which sets forth the required components of a variable pricing

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<sup>319</sup>Settlement at pp. 8-10.

<sup>320</sup>Settlement at pp. 12-17.

<sup>321</sup>Settlement at pp. 8-10.

<sup>322</sup>Joint Complaint ¶¶ 43-45, 52. Although there is also a reference in Count III to disclosure statements needing to include certain information in variable pricing statements, these issues will be addressed in the discussion of Count VII, which frankly appears to be redundant with Count III.

<sup>323</sup>52 Pa. Code § 54.5(c)(2).

statement in the disclosure statement; 54.7(a),<sup>324</sup> which requires advertised prices to reflect prices in disclosure statements and billed prices; and 111.12(d)(4),<sup>325</sup> which requires EGSs to provide accurate and timely information about prices and products being offered. They also allege that Respond Power violated Sections 111.4 and 111.5, which relate to agent standards, monitoring and training and are addressed in an earlier section of Respond Power's Reply Brief.<sup>326</sup>

As Respond Power demonstrates below, the Joint Complainants have failed to carry their burden of proof to show that its sales representatives have not adequately disclosed the variable feature of customers' plans. To the contrary, the evidence in the record shows that many customers were aware of the variable feature of their plan, through their sales agreement and/or their sales representative. While some customers did not recall signing up for a variable plan, they testified noticing fluctuations and stayed with Respond Power.

Additionally, the Settlement adequately addresses any allegations of Count III that the Commission believes the Joint Complainants have substantiated. Under the Settlement, Respond Power has agreed to a two-year moratorium on the marketing of variable prices, which it is already honoring as of September 1, 2015. It also has committed to refrain from making any representations about savings customers may realize from switching to Respond Power except when referencing an explicit, affirmative guaranteed savings program. Similarly, it has agreed not to use terms such as "risk free," "competitive," or "guaranteed," or even imply that the price will be lower than the EDC's PTC.<sup>327</sup> Therefore, the Settlement should be approved without modification.

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<sup>324</sup> 52 Pa. Code § 54.7(a).

<sup>325</sup> 52 Pa. Code § 111.12(d)(4).

<sup>326</sup> JC MB at 76.

<sup>327</sup> Settlement at pp. at 12-14.

2. Discussion

a. Content of Disclosure Statement, Sales Agreement and Welcome Letter

Through their Main Brief, the Joint Complainants focus on their "concerns with the Company's Disclosure Statement."<sup>328</sup> These "concerns" about the Disclosure Statement include criticisms about its so-called "fine print;" the use of it for fixed rate or variable rate electric generation supply service with Respond Power and fixed rate or variable rate natural gas supply service with Respond Power's affiliate, Major Energy; and the use of the same Disclosure Statement regardless of how the customer was enrolled. At no point, however, do the Joint Complainants explain how these elements of the Disclosure Statement violate any Commission regulations. They also ignore the testimony of Mr. Small that no customer has ever complained to the Commission's BCS about any of these aspects of the Disclosure Statement.<sup>329</sup>

The only regulations cited in the Joint Complaint regarding disclosure statements are Section 54.5(b),<sup>330</sup> which requires EGSs to provide them to consumers, and Section 54.5(c)(2), which addresses the variable pricing statement. Even in mentioning those provisions, the Joint Complainants did not set forth any alleged shortcomings of the nature described by Ms. Alexander. To the extent the Joint Complainants are relying on provisions of the Consumer Protection Law, the Commission has already determined that it lacks statutory authority to enforce that law. Moreover, the Joint Complainants have not identified or explained which provisions of the Consumer Protection Law would result in Respond Power's Disclosure Statement being unlawful.

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<sup>328</sup>JC MB at 66-69.

<sup>329</sup>RP St. 3 (Rev) at 3.

<sup>330</sup>52 Pa. Code § 54.5(b).

The same holds true for the Joint Complainants' criticisms of Respond Power's Sales Agreement and Welcome Letter, which are also discussed in connection with Count III. No specific provisions of the Commission's regulations are identified as having been violated. The Joint Complainants merely describe their concerns with the documents and then summarily conclude that on that basis, they violate the Commission's regulations.<sup>331</sup>

As explained by Respond Power's witness Mr. James Crist, the Company used a one-page double-sided Sales Agreement and Disclosure Statement, for door-to-door marketing enrollments. On the Sales Agreement, which is the first page of the document, sales representatives were required to check either the fixed rate or variable rate boxes. Right above the customer's signature is a statement verifying that the customer has received a copy of the Disclosure Statement. The back of the document served as the Disclosure Statement and contained the terms and conditions of service for both fixed and variable rates.<sup>332</sup>

The Joint Complainants maintained that specific consumer testimony supported their claims that the Sales Agreement likely confused consumers regarding the variable price feature of their plans. In support of this claim, they referred to the Sales Agreement that was attached to the testimony of Mr. Victor Ogir, which did not have the variable or fixed rate option checked.<sup>333</sup> However, Mr. Ogir testified that he knew he was on a variable rate, even though he had shopped around trying to find a fixed price.<sup>334</sup> In fact, during the hearing, Mr. Ogir seemed to notice for the first time that the variable box was not checked on his Sales Agreement, when he referred to

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<sup>331</sup>JC MB at 67-69.

<sup>332</sup>RP St. 4 (Rev) at 10-11.

<sup>333</sup>JC MB at 69-70; JC Consumer Testimony at 550; Exh. VO-2.

<sup>334</sup>JC Consumer Testimony at 54; Tr. 174-175.

it as an exhibit that was sent to him by someone.<sup>335</sup> Therefore, it is clear that Mr. Ogir was not confused by the Sales Agreement when he enrolled with Respond Power.

The Joint Complainants also refer to Mr. James O'Reilly, who testified that he had received a Sales Agreement with a price of 9 cents per kWh handwritten on it, while the copy maintained by Respond Power did not reflect any handwritten notes and had the variable rate box checked on the Sales Agreement.<sup>336</sup> A review of the Sales Agreement with a price of 9 cents per kWh handwritten on it shows that the variable rate box is also checked on the copy that Mr. O'Reilly was given by the Respond Power sales representative.<sup>337</sup> Therefore, even if the 9 cents per kWh was handwritten on the Sales Agreement by the agent, Mr. O'Reilly knew that he was enrolling in a variable rate plan. Moreover, it is more likely that the 9 cents per kWh was handwritten on the Sales Agreement by Mr. O'Reilly or someone else after the agent left since the agent's copy clearly did not have that information handwritten on it. While it would have been possible for the agent to add information after he left Mr. O'Reilly's residence, removing a price notation would have been much more difficult, if not impossible. Further, Mr. Small testified that the Company's Compliance Department reviews all sales applications "to ensure that there is nothing suspicious on the application, such as any extra notations or comments written by the sales agent."<sup>338</sup>

With respect to the testimony of I&E witness Mr. Daniel Mumford regarding Sales Agreements received from consumers, which did not have a variable rate box checked, and copies obtained from Respond Power for the same consumers having the variable rate box checked, Respond Power's witness Mr. Adam Small emphasized that the Company did not

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<sup>335</sup>Tr. 174.

<sup>336</sup>JC MB at 70; JC Consumer Testimony at 18, 21-22; Exh. JO-1.

<sup>337</sup>JC Consumer Testimony at 22, Exh. JO-1.

<sup>338</sup>RP St. 3 (Rev) at 4.

tamper with any documents before submitting them to the Commission's Bureau of Consumer Services. He explained as follows:<sup>339</sup>

We submitted all documents as we received them from our vendor. I understand that there were a few times where the variable rate check box was marked on our copy and not on the copy submitted by a customer, but we were unaware that the agent had forgotten to check that box at the door and only did it after giving the customer a copy. We would never intentionally submit a doctored document.

Mr. Small also testified that the Company's Compliance Department reviews each sales application to assure that the correct fields are filled out and checked off.<sup>340</sup>

b. Fixed Rate Plan

The Joint Complainants also cite to instances when customers believed that they had selected a fixed rate plan but was then charged variable prices. They claim that the customers would not have been alerted to this situation until the prices increased amidst the Polar Vortex crisis.<sup>341</sup> In several of these examples, the customers testified that they thought they signed up for a fixed rate but did not explain the basis for their understanding and they did not testify that a Respond Power sales representative told them that it would be a fixed rate.<sup>342</sup> Moreover, they had the opportunity to review their kWh charges on their bills and flag an error, if one had been made, months or years prior to the price increases in early 2014.

Although Mr. William DiFilippo testified that he thought he had signed up for a fixed rate for 12 months, he noted that he could not recall the exact conversation.<sup>343</sup> Additionally, a recording of the TPV that was done following his enrollment disclosed the variable nature of the plan.<sup>344</sup>

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<sup>339</sup>RP St. 3 (Rev) at 11.

<sup>340</sup>RP St. 3 (Rev) at 4.

<sup>341</sup>JC MB at 70.

<sup>342</sup>JC Consumer Testimony at 172 (Ingroff-Brown).

<sup>343</sup>JC Consumer Testimony at 794.

<sup>344</sup>RP Ex. 28 and 28-A.

After enrolling with Respond Power in June 2013, Ms. Carol Sterck noticed her charges increase in December 2013. If she had truly thought she was on a fixed rate, it seems that she would have complained or switched to another EGS at that time. However, she did not terminate service with Respond Power until March 2014.<sup>345</sup>

c. Disclosure of Variable Rate Feature By TPVs or Sales Agents

Contending that Respond Power sales representatives did not discuss whether the rate was fixed or variable, the Joint Complainants initially rely on the testimony of their witness, Ms. Alexander, who referred to the testimony of 52 witnesses who claimed that their salesperson did not discuss whether the rate was fixed or variable.<sup>346</sup> That testimony, however, is completely meaningless since it does not identify the 52 witnesses.

Further, the testimony of Ms. Alexander regarding calls with Ms. Shirley Van Winkle, which is relied upon by the Joint Complainants, is irrelevant since Ms. Van Winkle did not provide any testimony in this proceeding. In any event, Ms. Alexander's testimony is that the TPV did not mention the variable rate feature of the agreement. Nothing in the Commission's regulations require the TPV to highlight particular terms and conditions of the contract. Rather, Section 111.7(b) only requires the verification "confirm that the customer authorized the transfer of the customer's account to the supplier, and obligates the EGS to maintain a record of the verification."<sup>347</sup> *See also Petition for Clarification of Commission Supplier Marketing Regulations; 52 Pa. Code § 111.7*, Docket No. P-2015-2464976 (Order entered April 23, 2015), at 9 (verification is not required to include the terms and conditions agreed to by the customer, as that is the role of the disclosure statement). Therefore, not only should Ms. Alexander's testimony about Ms. Van Winkle's calls be disregarded in their entirety, the Joint Complainants

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<sup>345</sup>JC Consumer Testimony at 876.

<sup>346</sup>OAG/OCA St. 1 at 42.

<sup>347</sup>52 Pa. Code § 111.7(b).

argument about the lack of any explanation in the verification calls or scripts about how a variable price operates.<sup>348</sup>

As to witness testimony relied upon by the Joint Complainants in support of their claim that sales representatives did not discuss whether the rate was fixed or variable, Respond Power notes that many of the shortcomings described in connection with the allegations set forth in Count II are equally applicable here. The same faulty customer memories due to lapses of time and the lack of the transaction's importance in the consumer's lives at that time most certainly contributed to these assertions. Likewise, many of the same witnesses that were relied on to support Count II are also relied upon in support of Count III and have provided testimony in this proceeding in an effort to obtain a refund.<sup>349</sup>

For example, although Ms. Jeanne McCloe did not recall the sales agent discussing a variable rate, she also had very little recollection of the entire transaction. She believes she enrolled through a telemarketer but when asked to describe the sales contact, she referred to a recording where she answered prompts, which sounds like a verification call. She also testified that she did not recall a TPV but referenced hearing a recording of it that disclosed the variable feature of the plan. Ms. McCloe further explained that she thought her plan was fixed for "one year as others."<sup>350</sup>

Similarly, Ms. Susan Deiter simply did not recall whether being told the rate would be variable, and again, she had very little recollection of the sales transaction. She also testified that

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<sup>348</sup>JC MB at 74-75.

<sup>349</sup>Tr. 246 (Werkmeister); Tr. 661 (Rodkey); Tr. 571 (Campbell); Tr. 186 (Wines); Tr. 476 (McGuire); Tr. 923 (Spriggle); and Tr. 818 (Musselman).

<sup>350</sup>JC Consumer Testimony at 394-397.

she thought her initial rate would be effective until the end of the contract, but did not identify when she thought that would be.<sup>351</sup>

Ms. Marcella Bell knew that her rate was variable from reading the contract. She further testified that she did not expect her price to continue for a specified length of time.<sup>352</sup>

Although Ms. Jennifer Ashley claimed that she was told she would be on a fixed rate, she also testified that no TPV was performed. However, Respond Power produced a TPV demonstrating that a verification process was conducted, and further, that it disclosed that Ms. Ashley would be on a variable rate.<sup>353</sup> This evidence demonstrates that Ms. Ashley's testimony is not credible.

Discussing her 2012 enrollment, Ms. Mary Malloy testified that she thought she was on a fixed rate that would not change. However, she did not testify that a Respond Power sales representative told her that she would be on a fixed rate forever. Moreover, EGSs are permitted under Section 54.10 of the Commission's regulations to convert fixed rate contracts to month-to-month contracts when they expire.<sup>354</sup>

The testimony of Mr. Thomas DeMarco and Ms. Cynthia DeMarco that is offered in support of this contention does not indicate one way or the other whether fixed and variable rates were discussed.<sup>355</sup> Other witnesses testified that it was their understanding that they would be on a fixed rate, but they did not offer any explanation or testify that the Respond Power sales agent

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<sup>351</sup>JC Consumer Testimony at 232-233.

<sup>352</sup>JC Consumer Testimony at 12.

<sup>353</sup>JC Consumer Testimony at 185-187; RP Ex. 17 and 17-A.

<sup>354</sup>52 Pa. Code § 54.10.

<sup>355</sup>JC Consumer Testimony at 271-273.

told them it would be fixed.<sup>356</sup> In addition, Mr. Daniel Bastion's TPV disclosed the variable feature of his rate plan.<sup>357</sup>

Regarding his 2012 enrollment, Mr. Gerard LeBlanc testified that the variable rate box was checked on his contract. Although he knew where to look on the bills to review Respond Power's charges, he only looked at the total bill amounts.<sup>358</sup>

As to his 2012 enrollment, Mr. Matthew Weeks believed he signed up for a fixed rate for one year, although the variable box is checked on his Sales Agreement. He also does not remember his initial rate. Mr. Week's credibility was harmed by Attorney General Kane's media coverage highlighting the conversion of some contracts from fixed to variable rates. Although Mr. Week was on a variable rate plan from the outset, he was baited by that outreach to offer testimony that to support those particular claims.<sup>359</sup>

Ms. Zimmerman started receiving service from Respond Power in January 2012. Although it was her understanding that she was getting a fixed rate for two years, she does not remember specific details. Further, she was served by Respond Power for over years – until April 2014. No evidence was produced to show that initial rate changed before the expiration of two years.<sup>360</sup>

Ms. Toni Dornsife monitored the Respond Power charges on her bill and saw them increasing in 2013. However, she stayed with Respond Power. If she had not been advised that she was on a variable rate plan, increases in her charges should have alerted her that fact. Her

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<sup>356</sup>JC Consumer Testimony at 162 (Kulick); JC Consumer Testimony at 344 (Sinnott); and JC Consumer Testimony at 399 (Weyand).

<sup>357</sup>RP Ex. 20 and 20-A.

<sup>358</sup>JC Consumer Testimony at 426; Tr. 908, 912.

<sup>359</sup>JC Consumer Testimony at 429-430, 434; Tr. 361,

<sup>360</sup>JC Consumer Testimony at 454-455.

failure to raise any complaint during that time or cancel the contract, which she knew she could do without penalty, suggests that she was completely aware of the variable feature of her plan.<sup>361</sup>

Ms. Deborah Jandzio enrolled online and did not have any interactions with Respond Power sales representatives. She did not click on the terms and conditions on Respond Power's website.<sup>362</sup>

Regarding her June 2011 enrollment, Ms. Colleen Cheri offered very few details. Her testimony did not even address whether fixed or variable rates were discussed.<sup>363</sup> Indeed, Ms. Cheri testified that she monitored Respond Power's charges on her bill, and that after saving in the beginning, "they started to climb."<sup>364</sup> If Ms. Cheri believed her rate with Respond Power was fixed, one would expect her to have complained or switched when she saw the price increasing. She stayed with the Company, however, until March 2014.<sup>365</sup>

Ms. Phyllis Court did not "remember much of the conversation."<sup>366</sup> Although she did not recall a verification process, one was performed and disclosed the variable rate feature of her plan.<sup>367</sup>

Ms. Lynne Frank knew that she had enrolled in a variable rate plan. She is also hoping for a refund as part of this proceeding.<sup>368</sup>

Despite his testimony about the sales transaction, Mr. Richard Yost testified that he had no knowledge of Respond Power until the day he decided to write a complaint.<sup>369</sup> He had been served by Respond Power since February 2012, and his prices had fluctuated throughout that

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<sup>361</sup>JC Consumer Testimony at 480-481; Tr. 541, 546.

<sup>362</sup>JC Consumer Testimony at 576-577; 283.

<sup>363</sup>JC Consumer Testimony at 628-630.

<sup>364</sup>Tr. 271.

<sup>365</sup>JC Consumer Testimony at 628.

<sup>366</sup>JC Consumer Testimony at 697.

<sup>367</sup>RP Ex. 25 and 25-A.

<sup>368</sup>JC Consumer Testimony at 655; Tr. 1118.

<sup>369</sup>JC Consumer Testimony at 722-724; Tr. 1056.

time period. Mr. Yost's lack of awareness that he ever enrolled with Respond Power demonstrates that his testimony about what he may or may not have been told by Respond Power agents is not credible and should be disregarded.

Mr. Brad Gibson signed up in 2012 and thought he was on a fixed rate, although he does not recall a timeframe for the initial rate being discussed.<sup>370</sup> Upon the expiration of fixed rate contract, the Commission's regulations permit EGSs to convert them to month-to-month contracts.<sup>371</sup>

Mr. Robert Clair knew that his prices may fluctuate, and does not remember what the sales representative went over with him because it "was about a year or two ago." When he called to complain about the increase in the variable price, he enrolled in a fixed price contract with Respond Power.<sup>372</sup>

Testifying about her 2012 enrollment, Ms. Vickey Altland did not recall any explanation of a variable rate. However, she did not testify whether she enrolled in a fixed or variable rate at that time.<sup>373</sup> When an EGS converts a customer from a fixed price to a variable priced contract, the Commission's regulations so not require the EGS to contact the company to specifically explain the way that a variable rate plan works. Rather, the EGS is merely required to send the customer a new disclosure statement if the customer fails to respond to the renewal notice.<sup>374</sup>

Mr. David Wenger enrolled online and had no interactions with Respond Power sales representatives. He viewed offers on [www.papowerswitch.com](http://www.papowerswitch.com), which directed him to Respond Power's website. At that time, he did not review Respond Power's terms and conditions.<sup>375</sup>

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<sup>370</sup>JC Consumer Testimony at 781.

<sup>371</sup>52 Pa. Code § 54.10.

<sup>372</sup>JC Consumer Testimony at 786; Tr. 577, 579.

<sup>373</sup>JC Consumer Testimony at 802-803.

<sup>374</sup>52 Pa. Code § 54.10.

<sup>375</sup>JC Consumer Testimony at 816; 880-884.

Mr. Harold Whymeyer enrolled with the Company in 2010. He saw his Respond Power charges fluctuating and knew that he could cancel at any time without penalty. The fact that he stayed with Respond Power until February 2014 suggests that he knew all along that he was on a variable rate plan.<sup>376</sup>

As for Ms. Jean Buraczewski's testimony regarding her enrollment, she does not indicate one way or the other whether the sales representative discussed fixed and variable rate plans. In fact, the only mention of a fixed rate is when Respond Power contacted her prior to the winter of 2014 to offer the option of enrolling in a fixed rate plan to avoid rising prices.<sup>377</sup>

Ms. Deborah Courtright knew she enrolled in a variable rate plan in 2012, and the sales representative checked the variable rate box on her Sales Agreement. She also testified that monitored the Respond Power charges, was satisfied with them in 2012 and 2013 and knew that she could cancel at any time without penalty. Her major frustration was the 30-60 day switching timeframe.<sup>378</sup>

Ms. Louvonne Kline's testimony is not credible because she references an electronic form that was used by her sales agent and mentions electronically signing the enrollment form; the record contains no references to Respond Power using electronic signatures or forms for door-to-door enrollments. She also testified that no TPV was performed, but described the process at the hearing.<sup>379</sup>

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<sup>376</sup>JC Consumer Testimony at 884; Tr. 853-855.

<sup>377</sup>JC Consumer Testimony at 989-990.

<sup>378</sup>JC Consumer Testimony at 1032-1034; Tr. 204, 206.

<sup>379</sup>JC Consumer Testimony at 1083-1086; Tr. 196.

The testimony of Ms. Cassandre Urban is silent on the issue of whether the sales representative discussed variable and fixed prices. Therefore, it in no way supports this allegation of the Joint Complainants.<sup>380</sup>

Since Mr. Michael Trapp enrolled in 2012 through Respond Power's website, he had no interactions with the Company's sales representatives. Rather, he compared offers on [www.papowerswitch.com](http://www.papowerswitch.com) and selected Respond Power based on those comparisons.<sup>381</sup>

Mr. Michael Rogowski testified that he "vaguely recalls" the 2012 transaction because "it's been so long ago."<sup>382</sup> He also did not address in his testimony one way or another if he recalls the sales representative discussing variable rates.<sup>383</sup> Moreover, the variable rate box is checked on his Sales Agreement.<sup>384</sup>

Testifying about her 2011 enrollment, Ms. Rose indicated that she knew that she was on a variable rate plan. She testified in this proceeding in hopes of obtaining a refund.<sup>385</sup>

The testimony offered by Ms. Lakeyva Davis is silent on the issue of whether the sales representative discussed fixed and variable prices. Also, Ms. Davis testified that the verification process promised her savings, which was demonstrated otherwise during the hearing.<sup>386</sup> Therefore, her vague testimony on this issue provides no support for the allegations of the Joint Complainants.

Indeed, many consumers testified in this proceeding that they were aware that they had agreed to a variable price contract.<sup>387</sup> The customer service representative who assisted Ms. Lisa Hodge expressly cautioned her about the volatility of variable rates, noting that there is no way

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<sup>380</sup>JC Consumer Testimony at 995-997.

<sup>381</sup>JC Consumer Testimony at 976-978; Tr. 210-215.

<sup>382</sup>Tr. 408.

<sup>383</sup>JC Consumer Testimony at 409-411.

<sup>384</sup>RP Ex. 37; Tr. 409.

<sup>385</sup>JC Consumer Testimony at 31; Tr. 627.

<sup>386</sup>JC Consumer Testimony at 742-744; RP Ex. 27 and 27-A.

<sup>387</sup>See, e.g., Tr. 297, 498, 559, 787, 949 and 969.

to know what "next month's variable rate is."<sup>388</sup> She added that the "variable rates are going to change, period"<sup>389</sup> and warned Ms. Hodge that she would "need to keep an eye on it to make sure that it doesn't go too high where" she can't afford it.<sup>390</sup> Ms. Hodge opted for the variable rate anyway because it had no cancellation fee.<sup>391</sup>

The Joint Complainants have not carried their burden of proof by a preponderance of the evidence to show that Respond Power failed to disclose the variable rate feature of their plan to customers. While many customers may not recall being informed of that fact, others were aware of it because the sales agent explained it, it was noted on the Sales Agreement and/or it was disclosed during the TPV. Even many customers who claim now -- in the context of a proceeding where they hope to obtain refunds from Respond Power -- that they did not initially realize they had enrolled in a variable rate plan, certainly became aware of that when rates fluctuated and stayed with the Company for electric generation service.

d. Providing a Disclosure Statement

In their Main Brief, the Joint Complainants expand their allegations to include assertions that consumers did not receive a Disclosure Statement.<sup>392</sup> They also add an allegation and cite a new regulation<sup>393</sup> about maintaining verification records, including the date that the disclosure statement was provided to the customer and the method by which it was provided. Neither this

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<sup>388</sup>Tr. 439:8-10.

<sup>389</sup>Tr. 439: 19-20.

<sup>390</sup>Tr. 440:6-8.

<sup>391</sup>Tr. 445.

<sup>392</sup>JC MB, Appendix C, Proposed FOF 81 and 84. The Joint Complaint only cites the requirement in Section 54.5(b) in the Commission's regulations to provide a Disclosure Statement, but it does not allege that Respond Power failed to provide them. Respond Power also does not believe that the Joint Complainants are requesting the Commission to find that the Company violated Section 54.5(b) since this provision is not listed among the regulations referenced in the Summary of Argument. However, since it is set forth in the Proposed Conclusions of Law, Respond Power is addressing this claim in the Reply Brief, noting at the outset that it would violate Respond Power's due process rights for the Commission to find that it violated Section 54.5(b) in view of the Joint Complaint lacking this allegation. In any event, as Respond Power demonstrates below, the Joint Complainants have failed to prove that Respond Power did not routinely provide Disclosure Statements to customers.

<sup>393</sup> 52 Pa. Code § 111.7(b)(5).

allegation nor this regulation were mentioned in the Joint Complaint or even in the text of the Main Brief, but appears for the first time in the proposed Conclusions of Law.<sup>394</sup>

Particularly as to the Joint Complainants' new allegation in the Main Brief about the requirement for EGSs to maintain verification records for billing cycles that contain various pieces of information about the enrollment, Respond Power did not have any notice or an opportunity to be heard. The Joint Complainants failed to amend the Joint Complaint to include this allegation and citation to the Commission's regulations. Consideration of these allegations or making a finding that Respond Power violated Section 111.7(b)(5) of the Commission's regulations would violate the Company's fundamental principles of due process.<sup>395</sup>

Further, the Joint Complainants have not pointed to any evidence in the record that even suggests, let alone demonstrates, that Respond Power has not maintained verification records in accordance with Section 111.7(b)(5). As the regulations did not go into effect until June 29, 2013, the requirement to maintain verification records would not apply to any consumers who enrolled prior to that time. Moreover, the regulations require these records to be maintained for six billing cycles. Even as of the date when this litigation was initiated, on June 20, 2014, Respond Power would have been required to have those verification records for customers who enrolled since approximately December 20, 2013. The Joint Complainants have not offered any indication of the number of customers to whom the requirement would be applicable, even with respect to the customers who provided testimony in this proceeding. Respond Power notes that Section 111.7(b)(5) is referenced in the Joint Complainants' Proposed Conclusions of Law, but it is not included in the Summary of Argument where the 36 regulations are identified that Respond Power is charged with violating.

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<sup>394</sup>JC MB, Appendix C, Proposed COL 27. Although this appears here as part of Count IV, that appears to be an error, and the Joint Complainants intended to include this conclusion in Count III.

<sup>395</sup>*Thompson*.

As to the new claim alleging that Respond Power did not routinely provide a Disclosure Statement to customers, the Joint Complainants rely on the unsubstantiated testimony of Ms. Alexander in claiming that approximately 61 consumers who testified in this proceeding claimed to have not received a Disclosure Statement.<sup>396</sup> As Ms. Alexander's testimony does not identify the 61 consumers on which she based her conclusion, her testimony is of no probative value.

The Joint Complainants also refer to several consumers in their Main Brief as purportedly supporting this allegation.<sup>397</sup> A review of this testimony establishes that the Joint Complainants have not demonstrated by a preponderance of the evidence that Respond Power failed to provide Disclosure Statements to these consumer witnesses, let alone that Respond Power routinely failed to provide Disclosure Statements to consumers.

At the outset, Respond Power notes the lapses in time since the customers' enrollments, and the lack of importance to consumers of these transactions and associated documents.<sup>398</sup> Those factors, which contribute to faulty memories, apply to all of the consumer testimony referenced by the Joint Complainants. Particularly concerning the receipt of a legal document relating to a sales transaction that occurred many years or months earlier, it is reasonable that consumers would have no recollection. Also, the desires for refunds colored the testimony of some of these witnesses. Specific issues undermining the credibility of this testimony are discussed below.

Many of the witnesses relied upon by the Joint Complainants simply testified that they do not recall receiving a Disclosure Statement. For example, Ms. Loraine Gummo indicated that

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<sup>396</sup>JC MB at 67, fn. 19.

<sup>397</sup>JC MB, Appendix C, Proposed FOF 81. While it is possible that the 61 consumers mentioned by Ms. Alexander are included within those referenced in Proposed FOF 81, Respond Power has no way of knowing that since she did not identify them.

<sup>398</sup>RP St. 4 (Rev) at 22.

she was "not sure" if she received one. However, she testified that she received a Sales Agreement and a Welcome Letter.<sup>399</sup> As Mr. Small noted, the Disclosure Statement is on the reverse side of the Sales Agreement that is given to customers who enroll through the door-to-door marketing channel. It is also provided by mail with the Welcome Letter.<sup>400</sup>

The testimony of several witnesses was similar to that provided by Ms. Gummo. For example, Mr. Michael O'Hagan testified that he has no recollection of the entire transaction, except switching to Respond Power. However, he indicated that he had signed a Sales Agreement, which contained verification that he had received the Disclosure Statement.<sup>401</sup> Ms. Emma Eckenroth similarly testified that she did not remember whether she had received a Disclosure Statement, but recalled signing the Sales Agreement, which verified that she had received it.<sup>402</sup> Although Mr. Gerard LeBlanc testified that he does not recall receiving the Disclosure Statement, he signed the Sales Agreement containing the acknowledgement that he had.<sup>403</sup> This was also true for Mr. Thomas Leong regarding his 2011 enrollment.<sup>404</sup> Although Ms. Jodi Zimmerman initially indicated that she did not recall whether she received the Disclosure Statement, she later testified that it was on the back of the Sales Agreement, which she signed.<sup>405</sup> Ms. Mary Malloy, who had signed the Sales Agreement, added that it is possible that she missed the Disclosure Statement in the mail.<sup>406</sup> Regarding her 2011 enrollment,

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<sup>399</sup>I&E Consumer Testimony at 8-9.

<sup>400</sup>RP St. 3 (Rev) at 8.

<sup>401</sup>JC Consumer Testimony at 110-112; Tr. 732.

<sup>402</sup>JC Consumer Testimony at 360, 369; Exh. EE-1.

<sup>403</sup>JC Consumer Testimony at 426-427.

<sup>404</sup>JC Consumer Testimony at 505-506; Tr. 417.

<sup>405</sup>JC Consumer Testimony at 456-457.

<sup>406</sup>JC Consumer Testimony at 258; Tr. 484. Other witnesses who did not recall receiving the Disclosure Statement but signed the Sales Agreement acknowledging its receipt include: Mr. David Lazzari (JC Consumer Testimony at 711-12); Ms. Georgia Holt (JC Consumer Testimony at 731); Ms. Lakeyva Davis (JC Consumer Testimony at 743); Ms. Judith Folan (JC Consumer Testimony at 751); Mr. Brad Gibson (JC Consumer Testimony at 782); and Mr. Robert Clair (JC Consumer Testimony at 786). Witnesses also claimed not to have received the Disclosure Statement but acknowledged that they signed the Sales Agreement, which verified receipt of it, including: Ms. Toni Dornsife (JC Consumer Testimony at 481); Ms. Joanne Blizard (JC Consumer Testimony at 898); Mr. Robert

Ms. Cynthia Rumpf testified that she "may have" received a Disclosure Statement and she remembers "signing something."<sup>407</sup>

Mr. Mark Yingling left most of the questions blank on the written testimony form, suggesting that either he has very little recollection of the sales transaction or that he is simply seeking relief in the form of a refund.<sup>408</sup> Testifying about his February 2012, enrollment, Mr. Richard Yost indicated that he has no recollection of the entire transaction.<sup>409</sup> Mr. Moyer simply testified that he does "not recall" whether he received a Disclosure Statement.<sup>410</sup> Mr. Michael Hofkin provided similar testimony regarding his 2012 enrollment.<sup>411</sup>

Similarly, as to his February 2011 enrollment, Mr. George Keffas' recollection is not strong. He simply testified that he does not remember receiving a Disclosure Statement. When asked about whether he received a confirmation letter from the EDC, he did not recall that either, testifying that he "probably did."<sup>412</sup> Although Ms. Marian Campbell testified that she did not receive a Disclosure Statement, she indicated that her memory of the transaction was "[a] bit cloudy."<sup>413</sup> Ms. Valerie Hildebeitel's testimony was that she does not remember any sales contacts with Respond Power at all. When pressed about her recollection of the transaction and

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Ziegler (JC Consumer Testimony at 63); Mr. James Martinez (JC Consumer Testimony at 182); Ms. Verdelle Williams (JC Consumer Testimony at 508-510); and Ms. Joni Keller (JC Consumer Testimony at 1070-1071). Additionally, although Ms. Cherryann Reed claimed to have received no Disclosure Statement, she acknowledged receipt of the Welcome Letter. JC Consumer Testimony at 276. Similarly, Ms. Susan Morgan confirmed that she received a Welcome Letter. JC Consumer Testimony at 573; Tr. 680.

<sup>406</sup>JC Consumer Testimony at 140-142.

<sup>407</sup>JC Consumer Testimony at 944-945; Tr. 120.

<sup>408</sup>JC Consumer Testimony at 140-142.

<sup>409</sup>JC Consumer Testimony at 722-724; Tr. 1056. Other witnesses who simply do not remember receiving the Disclosure Statement include: Ms. Jennifer Kosydar (JC Consumer Testimony at 159); Ms. Sally Lenker (JC Consumer Testimony at 243); Mr. Trent Tyson (JC Consumer Testimony at 447); Mr. David Wenger (JC Consumer Testimony at 817); and Ms. Jean Buraczewski (JC Consumer Testimony at 990).

<sup>410</sup>JC Consumer Testimony at 88.

<sup>411</sup>JC Consumer Testimony at 149.

<sup>412</sup>JC Consumer Testimony at 75-77; Tr. 899

<sup>413</sup>JC Consumer Testimony at 527-528.

whether she may have received various documents, Ms. Hildebeitel testified that "I will say this. My husband might have done something. I have no idea."<sup>414</sup>

Other witnesses also lacked recollection of other details about the transaction or provided inconsistent testimony on other issues affecting their credibility. For example, Ms. Jeanne McCloe testified that she does "not recall" if she received a Disclosure Statement. However, she also testified that she did "not recall" if a TPV was done but later heard a recording of the TPV.<sup>415</sup> She does not even recall receiving mailings from her EDC about the electric choice program.<sup>416</sup>

Ms. Rachel Butterworth testified that she had no interactions with Respond Power at all. However, a recording of the TPV was produced during the hearing showed that she personally authorized a switch.<sup>417</sup> Therefore, her testimony about whether she received Disclosure Statement is meaningless.

Ms. Phyllis Court's testimony revealed her lack of recollection of the entire transaction. Although she does not remember receiving a Disclosure Statement, she also does not recall a TPV being performed. Respond Power produced a recording to demonstrate that a TPV was in fact done for Ms. Court.<sup>418</sup>

In addition to not recalling whether he had received a Disclosure Statement, Mr. Bryan Herneisey testified that he did not remember seeing different types of offers, including fixed and variable products, when he compared EGS offers on [www.papowerswitch.com](http://www.papowerswitch.com). Further, he

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<sup>414</sup>JC Consumer Testimony at 619-611; Tr. 346-347.

<sup>415</sup>JC Consumer Testimony at 395-396.

<sup>416</sup>Tr. 1044.

<sup>417</sup>I&E Consumer Testimony at 34; RP Ex. 6 (Rev) and 6-A (Rev).

<sup>418</sup>JC Consumer Testimony at 697-699; RP Ex. 25 and 25-A.

testified that he did not recall whether he clicked on the terms and conditions when he went to Respond Power's website to enroll.<sup>419</sup>

Testifying about her April 2011 enrollment, Ms. Evelyn Somerville indicated that she did not have any recollection of the transaction. However, Respond Power produced a recording of the TPV, showing that Ms. Somerville had personally authorized the enrollment of the account. Therefore, any testimony about whether she received a Disclosure Statement for an enrollment she does not recall occurring over four years ago is not credible.<sup>420</sup>

Mr. Walter Stelma claimed to have been switched without his authorization. However, the evidence produced in this proceeding shows that he signed a Sales Agreement and that a TPV revealed that he switched the account to Respond Power. In signing the Sales Agreement, Mr. Stelma verified that he had received the terms and conditions.<sup>421</sup>

Mr. Andrew Ciocco testified that he did not receive a Disclosure Statement in connection with his May 2012 enrollment. A review of the Sales Agreement, however, reveals that an individual residing in his home at the time switched the account, verifying that she had received a copy of the Disclosure Statement. He also claimed to have not seen Respond Power charges on his bills. When asked if he had received a confirmation letter from his EDC regarding the selection of Respond Power as his EGS, he responded: "Never."<sup>422</sup>

Although Ms. Mickie Shreiber's testimony was simply that she does not remember receiving a Disclosure Statement when she enrolled in 2011, she also indicated that she "most likely" received a Sales Agreement. In general, Ms. Shreiber's testimony is not credible because

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<sup>419</sup>I&E Consumer Testimony at 13; Tr. 1096.

<sup>420</sup>I&E Consumer Testimony at 62-64; RP Ex. 10 and 10-A.

<sup>421</sup>I&E Consumer Testimony at 67-69; RP St. 3 (Rev) at 8, 10; Exh. AS-2.

<sup>422</sup>I&E Consumer Testimony at 72-74, 82; Exh. AC-3; Tr. 1146-1148.

she recalled almost nothing about the sales transaction.<sup>423</sup> In addition, a few days after submitting her testimony for this proceeding, Ms. Shreiber filed a formal complaint with the Commission claiming to have been switched without authorization – an allegation that appears nowhere in her testimony here. That complaint was dismissed by the ALJ. *See Shreiber*.

Although Ms. Marsha Lewis testified that she did not receive a Disclosure Statement, she also erroneously testified that she was switched to Respond Power without authorization. In fact, a TPV was performed; she authorized the enrollment; she exercised her right to rescind the selection; she was never switched to Respond Power; and she was never billed any charges by Respond Power.<sup>424</sup> Her testimony about the Disclosure Statement offers no support for the Joint Complainants' allegations.

Mr. Robert Cowan claimed to have not received the Disclosure Statement. However, by signing the Sales Agreement, he confirmed that he had received it. Mr. Cowan also testified that no TPV was performed, which was shown to be incorrect at the hearing.<sup>425</sup> At best, Mr. Cowan was confused and his testimony may not be relied upon for any findings about the Disclosure Statement.

Although Ms. Sadie Skrzat testified that she did not receive a Disclosure Statement or even authorize a switch, Respond Power produced evidence demonstrating that Ms. Skrzat both authorized the switch to Respond Power and signed a Sales Agreement, verifying that she had received the Disclosure Statement. Also, Ms. Skrzat testified that she did not recall receiving a confirmation letter from the EDC, saying that she couldn't answer that one way or the other because "it was a couple of years ago" and she did not remember.<sup>426</sup>

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<sup>423</sup>JC Consumer Testimony at 102-104.

<sup>424</sup>I&E Consumer Testimony at 118-120; Tr. 1048.

<sup>425</sup>I&E Consumer Testimony at 130-131; RP Ex. 13 and 13-A; Tr. 1006.

<sup>426</sup>I&E Consumer Testimony at 135-137; RP Ex. 14; Tr. 1111-1112.

Ms. Judy Joline testified that her husband signed the Sales Agreement and he "never even looked" at the Disclosure Statement. She also noted that her husband usually gets the mail and sometimes he does not give all of it to her.<sup>427</sup>

Ms. Mary Show was "not sure" whether she had received the Disclosure Statement but believed that she received the Sales Agreement. She also did not recall receiving letters about electric choice from her EDC or mailings from other EGSs, explaining that "she might have thrown them away."<sup>428</sup>

Testifying about her online enrollment, Ms. Deborah Jandzio acknowledged not clicking on the terms and conditions and conceded testified that she does not remember all the mail she receives. Her credibility was further damaged by the fact that she offered testimony in this proceeding despite reaching a settlement agreement with Respond Power, under which she received a refund and agreed not to make disparaging statements about Respond Power.<sup>429</sup>

Ms. Danielle Groff conceded that her mother, who enrolled her account with Respond Power, may have received the Disclosure Statement. She also testified that she does not recall receiving a confirmation letter from the EDC.<sup>430</sup>

While Ms. Jennifer Ashley testified that she did not receive a Disclosure Statement, she also claimed that no TPV was performed. However, Respond Power introduced evidence establishing that a TPV was in fact conducted for Ms. Ashley.<sup>431</sup>

Ms. Louvonne Kline's testimony is not credible because she references an electronic form that was used by her sales agent and mentions electronically signing the enrollment form; the record contains no references to Respond Power using electronic signatures or forms for door-to-

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<sup>427</sup>Tr. 904-905.

<sup>428</sup>JC Consumer Testimony at 51; Tr. 525.

<sup>429</sup>Tr. 285-287, 293.

<sup>430</sup>JC Consumer Testimony at 152-154; Tr. 510.

<sup>431</sup>JC Consumer Testimony at 186-187; RP Ex. 17 and 17-A.

door enrollments. She also testified that no TPV was performed, but described the process at the hearing.<sup>432</sup>

Regarding his 2011 enrollment with Respond Power, Mr. Michael Lucisano testified that he did not receive a Disclosure Statement. However, he also testified that he did not receive a conformation letter from the EDC.<sup>433</sup> Similarly, Ms. Maghen Wines testified that she did not receive a Disclosure Statement, but that she signed a Sales Agreement. She also claimed to have not received a confirmation letter from the EDC.<sup>434</sup>

Mr. Walter Komski testified that it is pretty hard to remember what he received in the mail a couple of years ago and also noted that he may have thought it was junk mail and tossed it. He also claimed that he received no mailings from his EDC about electric choice.<sup>435</sup> Ms. Cassandre Urban acknowledged that she does not remember every piece of mail she received since early 2013.<sup>436</sup> Ms. Teresa Cole also claimed to have not received the confirmation letter from the EDC. She further conceded that he does not remember all mail.<sup>437</sup> Mr. Donald Johnson also has no recollection of receiving a confirmation letter from the EDC and acknowledged that he does not review all mail that he received.<sup>438</sup> Although Ms. Diana Stewart testified that she did not receive a Disclosure Statement, she later noted that there's "a little problem in rural mailing. A lot of times either you don't get it, you get someone else's. God help you, you never know when your mail's coming."<sup>439</sup>

Mr. Brian Williams and Ms. Lori Williams testified they remember all the mail they receive and that they never miss anything. However, besides Respond Power's Disclosure

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<sup>432</sup>JC Consumer Testimony at 1083-1086; Tr. 196.

<sup>433</sup>JC Consumer Testimony at 471; Tr. 1139.

<sup>434</sup>JC Consumer Testimony at 587-588; Tr. 185.

<sup>435</sup>Tr. 331-332.

<sup>436</sup>Tr. 160.

<sup>437</sup>Tr. 70, 74.

<sup>438</sup>Tr. 220.

<sup>439</sup>JC Consumer Testimony at 790; Tr. 979.

Statement, they also testified that they never heard of electric choice until a Respond Power telemarketer called, and that they had not receiving mailings from their EDC about shopping or offers from any other EGSs.<sup>440</sup> Similarly, Mr. Charles Moretti claimed that he always opens all mail, but he also testified that he never received a mailing from his EDC about the electric choice program. In fact, he said that he never heard of the ability to switch until Respond Power contacted him, although he later acknowledged that he probably had received telephone calls from other EGSs before that.<sup>441</sup> Given the mailings that were sent by the EDCs, it is not believable that that these witnesses review and remember all the mail they receive, or they would have been aware of their ability to choose an EGS prior to their contact with Respond Power.

Mr. Raymond Weaver did not even testify one way or another as to whether he had received a Disclosure Statement. In response to that question on the preprinted form, he indicated that a "contract was never signed."<sup>442</sup> Likewise, Mr. Paul Hassinger's testimony did not address whether he had received a Disclosure Statement.<sup>443</sup> Ms. Linda Rose testified that she received the Disclosure Statement from Respond Power.<sup>444</sup> The Joint Complainants' reference is to the hearing transcript, where counsel for Respond Power was discussing with Ms. Rose the fact that she did not review it before enrolling.<sup>445</sup>

Further, Ms. Tracy Frazier testified that the account was in her landlord's name and that the bills go to him, so it is understandable why she would not have received the Disclosure Statement.<sup>446</sup> Similarly, Ms. Tina Andrews testified that she does not live at the residence where the account was switched to Respond Power. Her son enrolled the account; therefore the

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<sup>440</sup>Tr. 240.

<sup>441</sup>Tr. 518-519.

<sup>442</sup>JC Consumer Testimony at 727.

<sup>443</sup>JC Consumer Testimony at 463-465.

<sup>444</sup>JC Consumer Testimony at 32.

<sup>445</sup>Tr. 625.

<sup>446</sup>I&E Consumer Testimony at 57-58; Tr. 1036-1037.

Disclosure Statement would have been mailed to him. Just as Ms. Andrews did not personally receive the Disclosure Statement, she also did not see the confirmation letter from her EDC.<sup>447</sup>

In addition to all of these instances undermining the Joint Complainants' claims as what the evidence in this proceeding shows, the record contains numerous instances in which customers testified that they did receive Disclosure Statements from Respond Power.<sup>448</sup> As demonstrated through a review of the consumer witness testimony, generally customers received Disclosure Statements, did not recall if they received them, missed them when they came in the mail, or signed Sales Agreements verifying that they had received them. Other testimony was not credible due to overall memory lapses or inconsistencies.

### 3. Conclusion

In their Main Brief, the Joint Complainants allege a total of 1,222,680 violations of Commission regulations arising from Count III. The specific regulations they identify as having been violated include:

- (i) Section 54.4(a), which requires billed prices to reflect marketed prices and the agreed upon prices in the disclosure statement;
- (ii) Section 54.5(c)(2), which sets forth the required components for a variable pricing statement in a disclosure statement;
- (iii) Section 54.7(a), which requires advertised prices to reflect prices in disclosure statements and billed prices;
- (iv) Section 111.4, which requires EGSs to establish agent standards;
- (v) Section 111.5, which requires EGSs to conduct agent training and monitoring; and
- (vi) Section 111.12(d)(4), which requires EGSs to provide accurate and timely information about services and products.

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<sup>447</sup>Tr. 144, 149, 151, 153; RP Ex. 32 and 32-A.

<sup>448</sup>See, e.g., JC Consumer Testimony at 12, 206, 383, 739, 803.

The Joint Complainants have not shown by a preponderance of the evidence relied upon to support Count III or through their legal arguments in the Main Brief that Respond Power's billed prices did not reflect marketed prices and the agreed upon prices in the Disclosure Statement, as required by Section 54.4(a). Likewise, they have not demonstrated that Respond Power's advertised prices did not reflect prices in the Disclosure Statement and billed prices, as required by Section 54.7(a). Even if some customers believed they were on a fixed plan, it was incumbent upon the Joint Complainants to establish the initial rate that the customer was provided and the time period for which the customer the rate was to be fixed and then demonstrate that the initial rate or the time period were not honored by Respond Power. The Joint Complainants did not review the testimony in this granular way or offer evidence to show the necessary elements to find violations of these regulations. Overall, Count III -- even by its title and in a review of the factual allegations -- is about adequate disclosures; it is not about billed prices, marketed prices or advertised prices. It is focused on whether sufficient information was provided to customers at the time of enrollment about the type of plan they selected. Therefore, no alleged violations should be found of Sections 54.4(a) and 54.7(a).

As to Section 54.5(c)(2), which addresses the necessary components of a variable pricing statement in a disclosure statement, the Joint Complainants' discussion of Count III does not identify any provisions of this regulation that Respond Power's Disclosure Statement violates. As the key arguments concerning the content of Respond Power's Disclosure Statement are addressed in Count VII of the Joint Complaint, it is not appropriate to review these issues here or to find any violations of Section 54.5(c)(2), as Respond Power demonstrates in its discussion of Count VII.

If the ALJs and the Commission are inclined to drill down into the evidentiary record in a way that the Joint Complainants have failed to do and determine for each individual customer whether they knew that they were on a variable rate plan and when they became aware of that fact, or if they were told they would receive a fixed rate for a certain period of time that was not honored, Respond Power should only be found to have violated Section 111.12(d)(4). To the extent that this review shows that Respond Power's sales representatives indeed did not provide accurate information to customers about the products they were selling, this is the applicable regulation.

If the Commission does find that Respond Power violated Section 111.12(d)(4) in connection with their dealings with a specified number of individual consumers, even despite all of the shortcomings in the Joint Complainants' evidence on variable price contract disclosure, various provisions of the Settlement adequately address such a finding. In particular, Respond Power points to the moratorium on variable price marketing and the enhanced disclosures regarding variable prices that it agreed to as part of the Settlement.<sup>449</sup> Notably, Respond Power committed to refrain from making any representations about savings customers may realize from switching to Respond Power except when referencing an explicit, affirmative guaranteed savings program. Similarly, it has agreed not to use terms such as "risk free," "competitive," or "guaranteed," or even imply that the price will be lower than the EDC's PTC.<sup>450</sup> Therefore, the Settlement should be approved, without modification.

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<sup>449</sup>Settlement at pp. 12-17, 20-22.

<sup>450</sup>Settlement at pp. at 12-14.

G. Count IV - Welcome Letters and Inserts

1. Introduction

In Count IV of the Joint Complaint, the Joint Complainants alleged that Respond Power sent Welcome Letters and Inserts to consumers that contained statements violating the Consumer Protection Law.<sup>451</sup> Since the Commission lacks the jurisdiction and expertise to review claims under the Consumer Protection Law, Count IV should be dismissed in its entirety.<sup>452</sup>

2. Discussion

Respond Power's Answer acknowledged that the referenced Welcome Letters and Inserts had been in use over a few-month period more than two years prior to July 2014 and noted that upon learning of their use by a vendor, it immediately pulled them back and prohibited their continued distribution. Mr. Wolbrom's testimony confirmed that no such materials have been in use since April 2012.<sup>453</sup> Moreover, they were in use during a time when Respond Power's prices did result in savings to consumers.<sup>454</sup>

In their Main Brief, the Joint Complainants rely on the same old brochures or fliers that Respond Power has already addressed in its discussion of Count II (promises of savings) in this Reply Brief. They also argue that the Welcome Letters, which were in use during the relevant time period, support their allegations in Count IV. However, this is inappropriate because the Joint Complaint did not make any allegations about the language that is contained in the more recent Welcome Letters, such as competitive rates and historical savings. Respond Power was not placed on notice through an amended Joint Complaint that the Joint Complainants sought to pursue allegations about the more recent Welcome Letters. In any event, Respond Power has also addressed any issues about these mailings in the discussion of Count II in this Reply Brief.

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<sup>451</sup>Joint Complaint ¶¶ 55 and 58-60.

<sup>452</sup>RP MB 63-66.

<sup>453</sup>RP Ex. 40 ¶ 55; Tr. 1319-1320.

<sup>454</sup>Tr. 1322; RP St. 1 at 12; Exh. EW-1.

### 3. Conclusion

As demonstrated above and in Respond Power's Main Brief,<sup>455</sup> the Joint Complainants have failed to offer testimony from any consumer witnesses who received these particular documents and in some way relied upon them in their decision to switch to Respond Power and, as such, have failed to satisfy their burden of proof. They have also not demonstrated how many customers received these brochures or fliers.

Although the Joint Complainants allege that Respond Power has violated Section 54.43(f) in connection with Count IV, that provision establishes no requirements for EGSs to follow. Rather, it holds EGSs accountable for the conduct of their agents. Therefore, Respond Power's distribution of any materials referred to in Count IV does not violate a standard set forth in Section 54.43(f). Additionally, the only other provision cited by the Joint Complainants in Count IV is Section 111.12(d)(1), which is relied on for its reference to compliance with state consumer protection laws. For the reasons noted above, the Commission may not determine whether Respond Power has violated the Consumer Protection Law. Indeed, the Joint Complainants have not even provided any legal argument explaining how any of these materials violate the Consumer Protection Law, which they are asking the Commission to enforce. Therefore, the 407,560 violations alleged by the Joint Complainants through Count IV should be dismissed.

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

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<sup>455</sup>RP MB at 118-119.

"competitive rates."<sup>456</sup> Respond Power has also agreed as part of the Settlement to comply with the requirements of the Consumer Protection Law.<sup>457</sup>

H. Count V - Slamming

1. Introduction

In Count V of the Joint Complaint, the Joint Complainants allege that some customers were switched to Respond Power without authorization, in violation of Code Section 2807(d)(1)<sup>458</sup> and Section 54.42(a)(9) of the Commission's regulations.<sup>459</sup> Despite their concession in the Main Brief to having only proven twelve instances of slamming, which Respond Power will show is not correct, the Joint Complainants not only seek to have Respond Power found to have violated Code Section 2807(d)(1) twelve times, they also ask the Commission to find that Respond Power violated the Commission's regulation referring to that section in the statute another 203,780 times.<sup>460</sup> They rely on a flawed legal theory in support of this request.

2. Discussion

a. Enrollment Process

Even though Respond Power asks prospective customers if they are authorized to enroll or make a change on the account before processing enrollments, the Joint Complainants claim that Respond Power violated Section 54.42(a)(9) because the Company did not do any further investigation to determine if the individual is either the customer of record or a person authorized

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<sup>456</sup>Settlement at pp. 11-12.

<sup>457</sup>Settlement at p. 12.

<sup>458</sup>66 Pa.C.S. § 2807(d)(1).

<sup>459</sup>52 Pa. Code § 54.42(a)(9).

<sup>460</sup>JC MB at 80-87.

to act on behalf of the customer. They refer to Section 57.175<sup>461</sup> of the Commission's regulations, which provide as follows:

A customer may identify persons authorized to make changes to the customer's account. To accomplish this, the customer shall provide the EDC with a signed document identifying by name those persons who have the authority to initiate a change of the customer's EGS.

Although this provision gives a customer a means by which to authorize other persons to switch their accounts, it does not require and the Commission has never interpreted it require that EGSs must obtain this signed document or otherwise verify with the EDC who is authorized to change the customer's EGS.

Earlier this year, in *Binh Tran v. Respond Power LLC*, Docket No. C-2014-2417540 (Order entered July 30, 2015) ("*Tran*"), the Commission had an opportunity to impose this requirement on Respond Power and declined to do so, instead reversing an Initial Decision of the ALJ that would have placed that burden on the Company. Respond Power's practice, as demonstrated time and time again through TPVs, is to ask the person requesting the change if he or she is over 18 years of age and authorized to make decisions on the account, which the Commission found was sufficient in *Tran*.<sup>462</sup>

If any problems arise with a person in a household making a change that was not authorized by the account holder, the Commission has protections in place to ensure that the account holder has an opportunity to quickly undo that change. Specifically, EDCs send confirmation letters to customers upon receipt of the EGS' notice of enrollment, which is also intended to avoid unauthorized switches and ensure that consumers are aware of changes made

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<sup>461</sup>52 Pa. Code § 57.175.

<sup>462</sup> The Joint Complainants have observed that the Commission dismissed the complaint because the complainant did not claim that his sister was not authorized. JC MB at 81, fn. 22. However, a question was directly raised by the ALJ's Initial Decision about Respond Power's verification process, and upon review, the Commission flagged no problems with it.

to their accounts.<sup>463</sup> Further, the Commission has taken steps to enhance the visibility of EGS charges on EDC consolidated bills, which is yet another measure that should help with consumer awareness regarding account changes. *See Investigation of Pennsylvania's Retail Electricity Market; Joint Electric Distribution Company-Electric Generation Supplier Bill*, Docket No. M-2014-2401345 (Order entered May 22, 2014).

Even aside from the lack of any existing regulatory requirement for an EGS to verify with the EDC who is authorized to make changes to a customer's account, the practical effect of such a burden would be the creation of an inappropriate obstacle to the EGS enrollment process. Inserting the "authorization step" contemplated by the Joint Complainants would be disruptive to the EGS enrollment process and be contrary to the Commission's policy of streamlining and easing the enrollment process for consumers. Notably, even though the Joint Complainants contend that Respond Power's practices are deficient, they do not suggest what additional steps the Company should take. For instance, they do not explain the process that an EGS would follow in obtaining this information or how the EDC would satisfy this new expectation. As the Commission is aware, communications between the EDC and EGS regarding the switching of customers occurs through the electronic data interexchange process, which would need to have a transaction developed to implement this requirement. *See, e.g., Guidelines for Electronic Data Interexchange*, Docket No. M-00960890, F0015 (Order entered July 13, 2000).

In fact, this authorization step proposed by the Joint Complainants directly conflicts with Commission's recent pronouncements that were designed to promote efficiency and reduce delays in EGS enrollments. Specifically, in *Rulemaking to Amend the Provisions of 52 Pa. Code, Chapter 57 Regulations Regarding Standards for Changing a Customer's Electricity Generation Supplier*, Docket No. L-2014-2409383, (Final-Omitted Rulemaking Order adopted

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<sup>463</sup>52 Pa. Code § 57.173(2).

April 3, 2014), the Commission accelerated the switching process so that consumers may be switched to an EGS within 3 business days. No consideration was given at that time to the need for any additional verification step for EGSs to communicate with EDCs and ensure that customers authorizing switches were listed on written documents on file with the EDC.

Similarly, the requirement suggested by the Joint Complainants is at odds with prior Commission decisions declining to place the EDC in a gatekeeper role during enrollments. In an effort to more easily enable customers to make switches when they do not have their account numbers readily available, the Commission established a process for EGSs to obtain this information directly from EDCs in *EDC Customer Account Number Access Mechanism for EGSs*, Docket No. M-2013-2355751 (Final Order entered July 16, 2013) ("*2013 Account Number Order*"). While requiring the EGSs to obtain letters of authorization from customers to request this information, the Commission expressly declined to place the EDC in a gatekeeper role of verifying these authorizations, noting that it is unacceptable to have EDCs policing EGS actions. *2013 Account Number Order* at 38-39. The Commission further explained that use of a web-based portal for exchange of customer information between EDCs and EGSs will benefit customers because their "choice of supplier will not be delayed simply because the EGS is waiting to hear back from the EDC as to the customer's account number." *2013 Account Number Order* at 21. Clearly, the Commission favors removing obstacles that delay switches to EGSs; in contrast, the Joint Complainants' proposal would create a new barrier by disrupting the whole process for the EGS to request and the EDC to provide a list of people authorized to make changes to the account.

b. Specific Alleged Slams

As to the specific twelve instances of alleged slamming identified by the Joint Complainants for the first time in their Main Brief,<sup>464</sup> Respond Power's Main Brief addressed eight of them and they will not be addressed here.<sup>465</sup> The remaining allegations are addressed briefly below:

- Ms. Eileen Bowers' boyfriend enrolled the account claiming to be her husband and confirming that he was authorized to make the switch; she did not see Respond Power's charges on her EDC bill over the course of ten months; and she did not see the confirmation letter from her EDC.<sup>466</sup>
- Ms. Danielle Groff's mother enrolled her account; she was served by Respond Power for five months and does not recall receiving a confirmation letter from the EDC.<sup>467</sup>
- Ms. Donna Noren just wanted pricing information but was able to contact the Company and only remained a customer for one month; she also received an adjustment on her bill.<sup>468</sup>
- Mr. Trent Tyson claimed that he did not realize it was optional to switch to an EGS; however, the TPV recording revealed that the representative advised him that his choice was voluntary.<sup>469</sup>

As demonstrated time and time again by Respond Power during the evidentiary hearings, consumers who claimed they had been switched without authorization were in fact properly enrolled. Regarding the Joint Complainants' request for the Commission to find that Respond Power committed 203,780 alleged violations of Section 54.42(a)(9), because it did not take unidentified additional steps that are not required by the Commission's regulations to ensure that the individual enrolling the account was authorized by the customer of record to do so are without merit and should be dismissed completely.

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<sup>464</sup>JC MB at 83-85.

<sup>465</sup>RP MB at 121-126.

<sup>466</sup>JC Consumer Testimony at 636; Tr. 675.

<sup>467</sup>JC Consumer Testimony at 152; Tr. 510.

<sup>468</sup>JC Consumer Testimony at 250; Tr. 865-866.

<sup>469</sup>JC Consumer Testimony at 446; Tr. 772, 777; RP Ex. 22 and 22-A.

### 3. Conclusion

The Joint Complainants have also failed to carry their burden of proof in establishing any more than a handful of violations of the slamming provisions in the Code and the Commission's regulations. Moreover, they have not demonstrated that any customers who raised a dispute within two billing cycles such as to be eligible for a refund under the Commission's regulations have not already received such relief. To extent that the Commission would find that any of the consumers who testified in this proceeding were enrolled with Respondent without their authorization, the civil penalty that Respond Power agreed to pay as part of the Settlement more than adequately addresses any proven instances of slamming. Further, Respond Power committed under the Settlement to ensure that the person enrolling the account has authorization to make a change, by requiring the person's affirmative representation that the person is the customers of record or is authorized by the customer of record to act on behalf of the customer.<sup>470</sup>

#### I. Count VI – Complaint Handling

##### 1. Introduction

In Count VI of the Joint Complaint, the Joint Complainants alleged that Respond Power did not utilize good faith, honesty and fair dealings with residential customers and failed to: (i) adequately staff its call center; (ii) provide reasonable access to Company representatives for purposes of submitting complaints; (iii) properly investigate customer disputes; and (iv) properly notify customers of the results of the Company's investigation into a dispute.<sup>471</sup> Count VI also alleges that Respond Power representatives told customers that a refund would be provided only if the customers entered into a one-year fixed price agreement with Respond Power and that if a

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<sup>470</sup>Settlement at pp. 14-15.

<sup>471</sup>Joint Complaint ¶ 74.

customer had already switched suppliers, the Respond Power representative refused to inquire further into the customer's complaint.<sup>472</sup>

The Joint Complainants contended in the Joint Complaint that this conduct violates various provisions in Chapter 56, including Sections 56.1(a), 56.141(a), 56.151 and 56.152.<sup>473</sup> Section 56.1(a) sets forth the purpose and policy of Chapter 56. Section 56.141(a) imposes an obligation on public utilities and EGSs to attempt to resolve disputes that involve specified matters. Section 56.151 sets forth the general rules governing the steps that must be taken when a dispute is initiated, such as not issuing a termination notice, investigating the matter and issuing a report to the complaining party. Section 56.152 addresses what must be included in a company's report.

In their Main Brief, they expanded the list of regulations to also include Section 111.13,<sup>474</sup> which requires EGSs to investigate customer inquiries, disputes and complaints and to implement an internal process for responding to and resolving customer inquiries, disputes and complaints. As this regulation was not identified in the Joint Complaint, and it imposes the same requirements on EGSs that are addressed in the licensing orders with respect to compliance with applicable provisions in Chapter 56, it would be inappropriate for the Commission to find that Respond Power has violated this regulation.

Respond Power demonstrates below that the Joint Complainants have failed to carry their burden of proof to show that the Company did not follow specific standards contained in the Commission's regulations. Its standard operating practices include timely complaint handling and prompt investigations, which were affected by the onslaught of calls received during the Polar Vortex. Also, the provisions in the Settlement adequately address any lingering concerns

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<sup>472</sup>Joint Complaint ¶ 69.

<sup>473</sup>52 Pa. Code §§ 56.1(a), 56.141(a), 56.151 and 56.152.

<sup>474</sup>52 Pa. Code § 111.3.

about these issues by imposing significant responsibilities on Respond Power for timely handling calls, having a plan to address unexpected high volumes of calls and reporting to the Commission when calls are not handled within the specific timeframes set forth therein.

2. Discussion

a. Staffing of Call Center

Regarding access to the Company, Respond Power has addressed these issues in its Main Brief.<sup>475</sup> As noted therein, the Commission's regulations do not impose any standards on EGSs for the staffing of its call centers or for handling calls from consumers. Respond Power also explained that prior to the Polar Vortex, it was very capably staffed to handle the complaint volume. While the Joint Complainants refer to the testimony of 74 consumer witnesses who stated that they had trouble contacting Respond Power or were not able to get a hold of the Company, they specifically discuss less than a dozen of those consumers' testimony.<sup>476</sup>

In their discussion, they do not clearly set forth specific time delays experienced by these customers or the other 62 consumers whose testimony they do not discuss. Because they suggest that some customers ended up having to stay with Respond Power an extra month because of not being able to contact the Company, they had an obligation to provide the details of each customer's experience. If the Joint Complainants had analyzed the testimony at that level, they could have made specific allegations that a specified number of customers would have been switched a month earlier had they been able to get through to the Company more quickly. With the 15-40 day switching timeframe that was in place at that time, with no option for mid-cycle switches, a brief delay in reaching the Company would have had no effect. Also, clearly many

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<sup>475</sup>RP MB at 127-129.

<sup>476</sup>JC MB at 91-95.

of the consumers who testified in this proceeding were able to contact the Company without any difficulty.<sup>477</sup>

b. Investigation of Disputes

With respect to the Joint Complainants' claims that Respond Power did not properly investigate disputes about the variable price increases or notify customers of the results of those investigations during the Polar Vortex, they do not identify what investigation should have been performed by Respond Power or identify a number of customers who allegedly did not receive any response or report from Respond Power. Obviously Respond Power already knew what the dispute was about and had a response ready for customers when they called. There was nothing further to investigate or to report back to consumers. As to slamming complaints that were lodged during that time period, the Joint Complainants claim that most of them were not included in Respond Power's database of agent misconduct. However, since slamming complaints are capable of being investigated through a review of documents and TPV recordings, Respond Power could have done those investigations and found no agent misconduct.<sup>478</sup>

Mr. Wolbrom provided testimony as to Respond Power's standard operating procedures when complaints are filed. He noted that the Director of Customer Service reports to him, which ensures fluid communications between the customer service and marketing teams. He further explained that all complaints and concerns that come into Respond Power's call center are investigated and escalated, when necessary, to the Quality Control and Legal Departments.

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<sup>477</sup>See, e.g., JC Consumer Testimony at 123, 185, 374, 382, 390, 682, 802, 897.

<sup>478</sup>Tr. 1192-1193.

Mr. Wolbrom emphasized that all slamming complaints are escalated and that they, along with guaranteed savings claims, immediately investigated and addressed with the vendor.<sup>479</sup>

c. Complaint Handling

The Joint Complainants also criticize the approach that Respond Power took in handling complaints.<sup>480</sup> These criticisms do not allege any specific violations of Commission regulations and are not pertinent to the adjudication of Count VI. Indeed, the lengthy discussion about the "re-bill event" goes well beyond the scope of both the specific allegations in Count VI and the nature of those allegations, as well as the regulations that have been cited. Respond Power addressed these issues in its Main Brief in connection with approval of the Settlement.<sup>481</sup>

The Joint Complainants have also claimed that Respond Power required customers to agree to one-year fixed contract agreements in order to qualify for a refund, suggesting that this interaction would have constituted bad faith in handling complaints.<sup>482</sup> However, Respond Power has refuted this claim through Mr. Small who testified that consumers were given thousands of dollars in refunds without making this commitment.<sup>483</sup> 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.<sup>484</sup> Moreover, in a deregulated environment, where EGS prices are not regulated and Respond Power was not obligated to issue any refunds to consumers, it was free to make the business decision to attempt, when possible, to link refunds to one-year fixed price contract, and consumers were free to reject those offers.

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<sup>479</sup>RP St. 1 at 14.

<sup>480</sup>JC MB at 99-105.

<sup>481</sup>RP MB 159-166.

<sup>482</sup>OAG/OCA Statement No. 1 at 79:12-15.

<sup>483</sup>RP St. 3 (Rev) at 9; Tr. 1471-1472.

<sup>484</sup>RP St. 1 at 13.

### 3. Conclusion

The Joint Complainants would have the Commission find that Respond Power committed 1,018,900 violations of the regulations resulting from these allegations in Count VI and impose a civil penalty on Respond Power in the amount of \$1,018,000 or \$100,018,000, depending on whether \$1 or \$1,000 per violation is assessed. To Respond Power's knowledge, the Commission does not routinely and may never have imposed civil penalties on public utilities or EGSs as a result of customers having difficulty contacting the company, or any of the other violations alleged by Count VI, especially during times when the entire industry is affected by an event such as the Polar Vortex.

Respond Power notes that Section 56.1(a) does not impose any specific standards or requirements and may not form the basis of violation. Indeed, it is not even among the provisions listed in Section 111.13(c) as a regulation in Chapter 56 to which EGSs are required to adhere. Also, as noted above, no violations may be found of Section 111.13 since the Joint Complaint did not reference this regulation. Moreover, it would violate the "double jeopardy" principle discussed below, which protects an entity from being found to have violated multiple identical provisions in the law for the same conduct.<sup>485</sup>

As to the remaining violations alleged by the Joint Complainants in Count VI, pertaining to access to the Company, investigating disputes and issuing reports to customers, they have again made broad sweeping statements about the Company's practices without proving the necessary elements of each alleged violation. If the ALJs and the Commission are inclined to pore through the evidentiary record and identify the number of customers who did not have "reasonable access" to the Company, the number of investigations that should have been performed and were not performed, and the number of reports that should have been issued and

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<sup>485</sup>This issue is discussed in the Civil Penalty section of this Reply Brief.

were not issued, it may be possible to identify a limited number of instances in which Respond Power did not fulfill requirements imposed by the regulations.

To the extent that the Commission finds that Respond Power violated some provision of its regulations in handling calls, Respond Power has agreed as part of the Settlement to comply with numerous requirements related to customer service. Specifically, Respond Power has committed to: (i) staffing its call center to provide timely access to live customer service representatives so that consumers' hold times within normal business hours are no more than ten minutes and emails are answered within 24 hours; (ii) providing a timely response to voice mail messages left on its customer service toll-free number outside of normal business hours within 24 hours; (iii) checking its voice mail message system at the beginning of each day; (iv) using reasonable measure to prevent the voice mail message system from becoming full such that consumers cannot leave a voice mail message; (v) responding to all inquiries made by letter within five business days; (vi) developing and implementing an action plan for handling periods of high call volumes; and (vii) reporting to I&E and BCS within 30 days if it experiences a period of high call volumes in which it was unable to comply with the standards established by the Settlement.<sup>486</sup> Therefore, any concerns the Commission has about Respond Power's customer service are fully addressed by the commitments made by Respond Power in the Settlement.

J. Count VII – Disclosure Statement

1. Introduction

In Count VII of the Joint Complaint, the Joint Complainants alleged that Respond Power's Disclosure Statement fails to provide accurate pricing information because: (i) it does not adequately state the conditions of variability and limits on price variability; (ii) it does not

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<sup>486</sup>Settlement at pp. 34-36.

provide pricing information in plain language using common terms that consumers understand; (iii) consumers could not determine from the Disclosure Statement the price that they would or could be charged by Respond Power or how the price would be calculated by Respond Power; and (iv) it did not provide information to customers in a manner that would allow them to compare offers.<sup>487</sup> The Joint Complainants contended that due to these alleged shortcomings in Respond Power's Disclosure Statement, the Company violated Sections 54.5(c) and 54.43(1) of the Commission's regulations.<sup>488</sup>

As Respond Power demonstrates below, Count VII should be dismissed in its entirety. The Joint Complainants have failed to identify any departures in the Commission-approved Disclosure Statement from the requirements in the Commission's regulations at Section 54.5. Moreover, since the Commission has adopted new regulations governing disclosure statements, the document under review in this proceeding has been replaced. Additionally, the Settlement adequately addresses any concerns that the Commission has regarding the allegations of Count VII. Respond Power has committed as part of the Settlement to submit its current Disclosure Statement to the Commission within 60 days following approval of the Settlement and to provide staff with any subsequently amended Disclosure Statements for five years. The Company will also be obligated to set forth specific information in the Disclosure Statement about variable pricing that exceeds the requirements of the Commission's regulations and to avoid references to market conditions.<sup>489</sup>

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<sup>487</sup>Joint Complaint ¶¶ 78, 83-85.

<sup>488</sup>52 Pa. Code §§ 54.5(c) and 54.43(1). Joint Complaint ¶¶ 77-801; the Joint Complainants likewise claim that the Disclosure Statement violates the Consumer Protection Law; Joint Complaint ¶ 82.

<sup>489</sup>Settlement at pp. 20-22.

2. Discussion

a. Commission Approval

In their Main Brief, the Joint Complainants erroneously contend that the Commission did not approve the Disclosure Statement that they are claiming violated the Commission's regulations. They correctly note that the email communications that Mr. Small included as Exhibit AS-3 pertained to the Disclosure Statement of its affiliate, Major Energy.<sup>490</sup> What they overlook is Mr. Small's explanation of the fact that Respond Power shares a common Disclosure Statement with Major Energy, which went through several iterations in 2009 before being approved by BCS. Respond Power then used the same language when filing its EGS application, and the Commission requested no changes.<sup>491</sup> By issuing the *Licensing Order* approving Respond Power's application to operate as an EGS in Pennsylvania, without making any changes to the language in the Disclosure Statement that was submitted with the application, the Commission approved that language.

b. Content of Disclosure Statement

The Joint Complainants further contend that Respond Power's Disclosure Statement does not comply with the Commission's regulations because it does not enable customers to determine what they could or should be charged.<sup>492</sup> Notably, they do not cite a provision in the regulations that requires an EGS to include this level of information in its Disclosure Statement regarding variable prices. That is because the Commission's regulations contain no such requirement. If an EGS would be required to include sufficient detail of their pricing methodology in its Disclosure Statement that residential and small business customers would be able to replicate the price, clearly the EGS's competitors would have no difficulty doing so.

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<sup>490</sup>JC MB at 110-112.

<sup>491</sup>RP MB at 132-134; Settlement, Exhibit A, ¶ 41.

<sup>492</sup>JC MB at 106-116.

As to the requirement in the regulations for EGSs to provide the conditions of variability, or the basis for prices to vary, Respond Power's Disclosure Statement informs consumers that the price will vary on the basis of PJM wholesale market conditions and notes that savings are not guaranteed due to fluctuations in the wholesale market. This level of disclosure complies with the requirement in the regulations and is similar to countless EGS disclosure statements approved by the Commission and in use in Pennsylvania.<sup>493</sup> In fact, in Comments filed with the Commission, OCA acknowledged that it had "not yet seen an EGS terms and conditions containing explicit formulaic pricing parameters for variable-priced products. Variable price disclosures state that price will vary based on, inter alia, market conditions, wholesale energy costs, retail competition, and other non-specific terms. This could be a result of the complex PJM wholesale markets that may not lend themselves to such an approach."<sup>494</sup> *See Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, Docket No. M-2014-2406134 (Order entered March 4, 2014) ("*Variable Price Order*").

Indeed, in the *Variable Price Order*, the Commission acknowledged that "it is unlikely that many market-priced, variable contracts have very explicit formulaic rates that establish how the retail rate is calculated from transparent wholesale price components. Thus, many current disclosure statements may not precisely describe how contract prices change as a function of the underlying wholesale costs or other price indices." *Id.* at 3. As a result, the Commission focused on possible changes to the regulations to provide advance notice to customers of price changes, specifics as to how the new price has been calculated and more useful and standardized information to customers so that they can better understand that variable price change. *Id.* at 4.

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<sup>493</sup>See, e.g. Joint Complaint, Appendix A in *Commonwealth of Pennsylvania, et al. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655 (Joint Complaint filed June 20, 2014).

<sup>494</sup>OCA Comments filed April 3, 2014 at 39 (<http://www.puc.pa.gov/pdocs/1277994.pdf>).

The regulations, even after being enhanced by the Commission, do not require the inclusion of a specific methodology or explicit formulaic pricing parameters for variable priced-products.<sup>495</sup> *Rulemaking to Amend the Provisions of 52 Pa. Code, Section 54.5 Regulations Regarding Disclosure Statement for Residential and Small Business Customers and to Add Section 54.10 Regulations Regarding the Provision of Notices of Contract Expiration or Changes in Terms for Residential and Small Business Customers*, Docket No. L-2014-2409385 (Order entered April 3, 2014) ("*New Disclosure Requirements Order*"). By explaining that prices will vary on the basis of PJM market conditions and will include a profit margin, Respond Power's Disclosure Statement adequately provides the conditions of variability. An important enhancement to the requirements as a result of the *New Disclosure Requirements Order* is that EGSs are required to either include a ceiling on variable prices or prominently indicate that there is no such limit.

### 3. Conclusion

The Joint Complainants allege 1,018,900 violations of the Commission's regulations arising from the Company's Commission-approved Disclosure Statement, which fully complied with the regulations that were in effect at that time. For these alleged violations, the Joint Complainants would have the Commission impose a \$1,018,000 or \$100,018,000 civil penalty on Respond Power. As they have demonstrated only that the Disclosure Statement does not fulfill the expectations of their expert witnesses, without any reference to a specific requirement in the Commission's regulations, Count VII should be dismissed in its entirety.

To the extent that the Commission determines that the Disclosure Statement in effect during the relevant time period was deficient in some way, it is noteworthy that the Commission

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<sup>495</sup>By contrast, the Commission's regulations applicable to natural gas suppliers ("NGSs") require the inclusion of the "NGS's specific prescribed variable pricing methodology." 52 Pa. Code § 62.75(c)(2)(i).

required all EGSs to submit revised disclosure statements in July 2014 so they could be reviewed for compliance with the revised regulations promulgated via the *New Disclosure Requirements Order*.<sup>496</sup> Additionally, the Settlement contains specific provisions requiring a further review and approval of Respond Power's Disclosure Statement upon approval of the Settlement and any time that Respond Power makes a change for the next five years.<sup>497</sup>

K. Count VIII – Prices Conforming to Disclosure Statement

1. Introduction

In Count VIII, the Joint Complainants alleged that Respond Power's prices charged to variable rate customers in early 2014 "were not reflective of the cost to serve residential customers."<sup>498</sup> Attached to the Joint Complaint is an Affidavit of Dr. Estomin, which claims that the average residential heating customer in January 2014 should not have exceeded approximately \$0.23 per kWh.<sup>499</sup> Therefore, the Joint Complainants alleged that the prices charged by Respond Power did not conform to the variable rate pricing provision of Respond Power's Disclosure Statement.<sup>500</sup> However, no regulations were alleged to have been violated in the Joint Complaint.

As discussed in the Respond Power's Main Brief, Count VIII should also be dismissed outright because the Commission does not regulate the prices charged by EGSs, and in the case of a variable-priced contract that is not based on a specific, prescribed methodology, formula or index, the Commission would have to conduct a cost of service analysis in order to determine what price it believes Respond Power should have charged.<sup>501</sup>

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<sup>496</sup>Secretarial Letter dated June 23, 2014, Docket No. L-2014-2409385.

<sup>497</sup>Settlement at pp. 20-22.

<sup>498</sup>Joint Complaint ¶ 88.

<sup>499</sup>Joint Complaint ¶ 89, Appendix C.

<sup>500</sup>Joint Complaint ¶ 90.

<sup>501</sup>RP MB at 140-144.

2. Discussion

a. Citation to New Regulations

By their Main Brief, the Joint Complainants now contend that Respond Power violated Section 54.4(a), which requires billed prices to reflected marketed prices and prices in an EGS's disclosure statement, and Section 54.5(a), which requires prices in disclosure statements to reflect marketed and billed prices.<sup>502</sup> As the Joint Complainants did not amend the Joint Complaint during this proceeding to allege violations of these regulations, Respond Power was not placed on notice of their intent to pursue these legal arguments, and Count VIII should be dismissed on that basis.

Also, from a practical standpoint, it is particularly telling that the Joint Complaint alleged no regulations that Respond Power was accused of violating. This is because, regardless of how Count VIII is titled, the only factual allegations contained therein are that Respond Power's prices did not reflect of serving residential customers in early 2014. In the *Interim Order on Preliminary Objections*, the ALJs correctly observed that the "[n]othing in the Affidavit correlates the prices charged by Respond to the Disclosure Statement," and that rather, it discusses concepts of the cost to serve which is irrelevant to EGS pricing. *Id.* at 16.

Further, the sections that the Joint Complainants have now accused Respond Power of violating cannot be applied to a variable price that has no ceiling and specific methodology contained within it. They pertain to billed prices matching disclosure statement prices. With a variable pricing statement that does not have a ceiling or specific formula and include profit margins, it is not possible to determine whether billed prices match the conditions of variability that are set forth in the disclosure statement.

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<sup>502</sup>JC MB at 117-122.

b. Prices Developed in Conformance with Disclosure Statement

Moreover, the Joint Complainants have failed to prove by a preponderance of the evidence that Respond Power's prices were not developed in conformance with its Disclosure Statement. To the contrary, the Company has shown that the prices it charged to customers during the Polar Vortex reflected the wholesale market conditions and other costs it incurred.<sup>503</sup>

3. Conclusion

To the extent that the Commission has any concerns with Respond Power's price-setting during the Polar Vortex, they are more than adequately addressed by the Settlement, under which Respond Power has made monetary commitments of \$3.2 million, including substantial refund pools, and has agreed to implement costly modifications to its marketing, sales and business practices.

L. Count IX – Compliance with Telemarketer Registration Act.

1. Introduction

By Count IX, the Joint Complainants alleged that Respond Power violated the Telemarketer Registration Act because the Company did not provide consumers who were enrolled through a telemarketing call with a contract containing information required by Sections 2245(a)(7) and 2245(c) of the Telemarketer Registration Act, 73 P.S. §§ 2245(a)(7) and 2245(c), and obtaining the consumers' signatures on such contracts.

Respond Power's Main Brief contains a thorough discussion of the Commission's lack of statutory authority to enforce the TRA.<sup>504</sup> In short, the Commission does not have jurisdiction to hear claims of alleged TRA violations. On interlocutory review, the Commission agreed with this conclusion, noting that it can only review alleged violations of its own regulations. Further,

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<sup>503</sup>RP MB at 144-146.

<sup>504</sup>RP MB at 63-66.

Respond Power has not violated the TRA and the Commission should dismiss Count IX in its entirety. To the extent that the Commission has any concerns regarding compliance with the TRA, they are addressed by the provision in the Settlement which mandates such compliance.<sup>505</sup>

2. Discussion

a. Signed Written Contract

In their Main Brief, the Joint Complainants contend that Respond Power violated the Commission's regulations by not securing consumers' signature on written contracts.<sup>506</sup> This argument simply ignores the fact that the Commission's regulations do not impose this requirement on EGSs.

Rather, the Commission's regulations require EGSs to "establish a written, oral or electronic transaction process for a customer to authorize the transfer of the customer's account to the supplier."<sup>507</sup> The Commission's regulations further obligate EGSs to send disclosure statements to customers, regardless of the enrollment method and dictate the necessary components of disclosure statements.<sup>508</sup> As nothing in the Commission's regulations requires EGSs to secure consumers' signatures on written contracts, Respond Power's practice of sending disclosure statements to customers enrolled through telemarketing satisfies the requirements of the applicable regulations.<sup>509</sup>

Even if the Commission had jurisdiction to enforce the TRA, the Joint Complainants' arguments also ignore the fact that the law exempts entities from the requirement to reduce a sale made during a telemarketing call to a written contract that is signed by the customer if "[t]he

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<sup>505</sup>Settlement at p. 12.

<sup>506</sup>JC MB at 128.

<sup>507</sup>52 Pa. Code § 111.7(a).

<sup>508</sup>52 Pa. Code § 54.5(b).

<sup>509</sup>RP St. No. 3 (Rev) at 8.

contractual sale is regulated under other laws of this Commonwealth."<sup>510</sup> Since the Commission's regulations set forth the rules governing the methods in which sales may be consummated and require specific elements that must be disclosed to customers, the TRA requirements for signed written contracts containing certain components are not applicable to Respond Power.

The Joint Complainants also argue that compliance with the TRA's requirements for a written contract signed by the customer is "a consumer protection policy."<sup>511</sup> Regardless of the views of the Joint Complainants about what would make good consumer protection policy, they are not the regulators and do not have the prerogative of ultimately deciding which consumer protections are appropriate for the electric retail market and need to be included in the Commission's regulations. While advocating for a written contract signed by the customer to avoid situations in which the customer agreed to a contract "based solely on oral representations over the phone," the Joint Complainants also suggest that "[c]onsumers should not assume the burden of reviewing and interpreting the terms presented in writing after the enrollment has been completed over the phone."<sup>512</sup> This nonsensical argument begs the question -- do the Joint Complainants want the consumers to receive a written contract after telemarketing sales or not? Regardless of the answer, the only requirements applicable to Respond Power are those imposed by the Commission, not those that the Joint Complainants would prefer to have in place.

b. Providing Disclosure Statements

In a last ditch attempt to have Count IX result in the finding by the Commission of violations by Respond Power, the Joint Complainants argue that "Respond Power failed to provide a disclosure statement to approximately 82 consumers whose testimony was admitted

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<sup>510</sup>73 P.S. § 2245(d)(1).

<sup>511</sup>JC MB at 128.

<sup>512</sup>JC MB at 128.

into the record in this proceeding, and the record establishes that Respond Power can provide no evidence that it routinely provided these documents to consumers who enrolled through a telemarketing call."<sup>513</sup> The Joint Complainants list these 82 consumers in their proposed Finding of Fact 124.<sup>514</sup> In advancing this argument, the Joint Complainants have inappropriately exaggerated and misrepresented the evidentiary record in this proceeding.

As a threshold matter, the Joint Complainants have already alleged the failure of Respond Power to send disclosure statements to customers in violation of Section 54.5(b) of the Commission's regulations as part of Count III, which Respond Power. As discussed above, they may not rely on the exact same alleged conduct to also contend that another Commission regulation (and a state law not enforced by the Commission) has been violated.

Additionally, the Joint Complainants have listed exactly the same 82 consumers in support of Count IX as were identified as supposedly buttressing their Count III allegations. They have not even bothered to identify which of the 82 consumers were enrolled by telemarketing, to which the TRA requirements would have applied if Respond Power's sale of electric generation service were not regulated by the Commission. Respond Power's review of the record reveals that about 20 of those customers were enrolled through telemarketing.<sup>515</sup>

Among those approximately 20 consumers identified by the Joint Complainants was Mr. Gary Sinnott who testified that he received the Disclosure Statement with the Welcome Letter after he enrolled with Respond Power.<sup>516</sup> Others among those 20 customers simply did not recall whether they had received the Disclosure Statement, and in fact many of them had

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<sup>513</sup>JC MB at 128-129.

<sup>514</sup>JC MB, Appendix C at 21-22.

<sup>515</sup>See, e.g., JC Consumer Testimony at 185 (Ashley); JC Consumer Testimony at 390 (Bastion).

<sup>516</sup>JC Consumer Testimony at 344.

little recall of the entire conversation, including Ms. Phyllis Court,<sup>517</sup> Mr. George Keffas,<sup>518</sup> Mr. Walter Komski,<sup>519</sup> Ms. Jennifer Koysdar,<sup>520</sup> Ms. Jeanne McCloe,<sup>521</sup> Mr. David and Mrs. Beverly Goodall,<sup>522</sup> Mr. Trent Tyson,<sup>523</sup> and Ms. Cassandre Urban.<sup>524</sup> Even some consumers who claimed they did not receive a Disclosure Statement demonstrated a lack of recollection regarding the whole transaction.<sup>525</sup> Still others among those identified by the Joint Complainants in support of Count IX were discredited because of inconsistencies in their testimony.<sup>526</sup>

Moreover, the Joint Complainants' claim that Respond Power provided no evidence that it routinely provided these documents to consumers who enrolled through a telemarketing call is wrong. Mr. Small specifically testified that the Company sends these customers a copy of the Disclosure Statement with their Welcome Letter.<sup>527</sup> Moreover, the Joint Complainants' own evidence of customers who received the Disclosure Statement with their Welcome Letter supports this testimony. For instance, Mr. Dwight Beall testified that he received the Disclosure Statement following his telephonic enrollment.<sup>528</sup> Ms. Victoria Werkmeister also confirmed that the Disclosure Statement arrived with the Welcome Letter.<sup>529</sup>

In any event, the burden was not on Respond Power to prove that it had sent the Disclosure Statement, but rather it was on the Joint Complainants to establish that the Company did not. The Joint Complainants simply failed to carry this burden.

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<sup>517</sup>JC Consumer Testimony at 698.

<sup>518</sup>Tr. 899.

<sup>519</sup>Tr. 331.

<sup>520</sup>Tr. 159.

<sup>521</sup>JC Consumer Testimony at 295. She is not even sure she enrolled through a telemarketer.

<sup>522</sup>JC Consumer Testimony at 770.

<sup>523</sup>JC Consumer Testimony at 447.

<sup>524</sup>JC Consumer Testimony at 996; Tr. 160.

<sup>525</sup>*See, e.g.*, JC Consumer Testimony at 898-899; 328.

<sup>526</sup>JC Consumer Testimony at 185-187; RP Ex. 17 and 17-A (Ashley).

<sup>527</sup>RP St. 3 (Rev) at 8.

<sup>528</sup>JC Consumer Testimony at 206. *See also* JC Consumer Testimony at 494 (Hartz); 702 (Hakim); 877 (Sterck); 1008 (Quaglio); and 1048 (Mohr).

<sup>529</sup>JC Consumer Testimony at 24.

### 3. Conclusion

Not only do the Joint Complainants urge the Commission to conclude that Respond Power did not comply with the TRA for customers it enrolled through other channels (including door-to-door marketing and online enrollments), they further argue that the Commission should find that Respond Power did not comply with the TRA for every customer it served during the December 2013 through March 2014 timeframe, including an unidentified number of customers who are improperly counted two, three or four times. Besides their reliance on a nonexistent legal theory, this approach ignores the fact that many consumers who enrolled through telemarketing testified that they did receive Disclosure Statements, including some identified in support of Count IX, and others simply testified that they did not recall or did not address the receipt of the disclosure statement at all.

Further, as Respond Power has noted above, other testimony was not credible due to lapses of time and inconsistencies in recalling many aspects of the transaction. The failure of the Joint Complainants to identify as part of Count IX the specific customers who were enrolled via telemarketing, and the resulting number of 203,780 alleged violations of a law the Commission cannot enforce, demonstrates the absurdity of the entire "pattern and practice" theory that is the underpinning of the results they are seeking.<sup>530</sup>

In any case, under the Settlement, Respond Power has committed to compliance with all state consumer protection laws, including the TRA, specifically through its telemarketing practices and as part of its enhanced training and compliance monitoring programs.<sup>531</sup>

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<sup>530</sup>The Joint Complainants also contend that Respond Power violated the TRA by retaining telemarketers who were not properly registered with the OAG. JC MB at 129. As that allegation was not included in Count IX, and the Joint Complaint was not amended during this proceeding, it would be a violation of Respond Power's due process rights to reach any findings with respect to this allegation. *Thompson*. In any event, since the Joint Complainants do not request the Commission to reach any conclusions of law concerning this allegation, Respond Power is providing no further response. JC MB, Appendix C at 28.

<sup>531</sup>Settlement at 12, 22-24, 30-33.

Moreover, Respond Power is obligated to comply with the Commission's regulations requiring it to maintain verification records of all enrollments, which show the date on which the Disclosure Statement is sent and the method(s) by which it is provided.<sup>532</sup>

M. Relief

1. Introduction

By way of relief, the Joint Complainants have requested that the Commission revoke Respond Power's license; direct refunds to consumers in an amount of over \$18 million; impose a civil penalty in the amount of either roughly \$7.3 million or \$7.3 billion (depending on whether the Joint Complainants are seeking \$1 per violation or \$1,000 per violation -- which is not clear from their Main Brief); and require Respond Power to make contributions of at least \$150,000 to the EDCs' hardship funds and an unidentified amount for a third party administrator to administer the refund pool. They make these requests on the basis of an alleged 7.3 million violations of the Commission's regulations, of which they have proven but a very few through the evidence they have presented. The number of alleged violations has been grossly overstated in a myriad of ways that have been discussed above, including by:

- (i) assuming that if a scant number of customers had a particular experience with Respond Power that all customers had the exact same experience;
- (ii) ignoring their own evidence which showed that numerous customers had interactions with Respond Power that were directly contrary to the allegations in the Joint Complaint;
- (iii) counting individual customers multiple times for a single alleged violation;
- (iv) alleging violations that could not have affected certain customers, such as by contending that Respond Power violated a telemarketing rule in its door-to-door marketing, and vice versa;
- (v) alleging that specific conduct violated several regulations that establish the same standard and contain no unique elements warranting a separate violation;

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<sup>532</sup>52 Pa. Code § 111.7(b)(5).

- (vi) alleging violations of regulations that establish an EGS's responsibility for the conduct of its agents, but that do not set forth any standards to which EGSs must adhere;
- (vii) alleging violations of state consumer protection laws that the Commission does not have the statutory authority to enforce; and
- (viii) alleging violations of regulations that were not identified in the Joint Complaint.

The actual number of substantiated allegations is *de minimis* in the truest sense of that phrase, even when the evidence is viewed in a light most favorable to the Joint Complainants, compared to the over seven million alleged violations claimed by the Joint Complainants. With the exception of very limited instances, the Joint Complainants have not demonstrated, through references to the evidentiary record and citations to specific provisions of the Commission's regulations, that the allegations in the Joint Complaint have been substantiated. Rather than producing a preponderance of evidence as necessary to carry their burden of proof, the Joint Complainants have relied on oversimplified generalities taken from the consumer testimony, and extrapolated them into broad sweeping and inaccurate statements about Respond Power's sales, marketing and business practices. By glossing over the underlying facts and failing to connect the evidence in the record with the requirements of the Commission's regulations, the Joint Complainants have taken giant leaps in proposing expansive factual findings and over-reaching legal conclusions. It is now the responsibility of the ALJs and the Commission to pull back the emotional and dramatic curtain and to act in accordance with the law.

As Respond Power demonstrated in its discussion of every single Count of this Joint Complaint, the Joint Complainants have failed to prove their allegations by a preponderance of the evidence. Specifically, they have not reviewed the evidentiary record in granular detail to identify specific instances where consumers were allegedly harmed by conduct of Respond Power that violated the Commission's regulations. Every complainant who appears before the

Commission seeking some form of relief is held to the same standard of proving their allegations, which means demonstrating through factual evidence and legal arguments that the respondent has committed violations of the law.

Rather than carrying that burden that is required of every other complainant, the Joint Complainants have sought special treatment from the Commission. They have concocted a theory under which they only need to show that particular conduct occurred with a select group of individual customers and then have the Commission find that the exact same conduct occurred across the Company's entire customer base. They have used this nonexistent concept to the extreme and in absurd ways. Two illustrative examples include their slamming allegations and their TRA allegations. Although, even by their count (with which Respond Power disagrees), they have proven twelve instances of slamming in this entire proceeding, they would have Respond Power found to have violated the Commission's regulations 203,780 times plus twelve more to account for the so-called proven slams.

As to compliance with the TRA, the Commission has concluded that it lacks the jurisdiction to enforce this law. Nonetheless, the Joint Complainants have continued to pursue their claims under it. As part of their argument, they claimed that 82 consumers testified in this proceeding that they did not receive or did not recall receiving a Disclosure Statement from Respond Power. Misinterpreting the applicability to Respond Power of the TRA requirements relating to a signed written contract, the Joint Complainants seek no less than 611,340 violations of Commission regulations that refer to the TRA, consumer protection laws and licensee responsibility for agents, because 82 consumers do not remember getting a Disclosure Statement from Respond Power. Of those 82, only 20 signed up through telemarketing, and most of their testimony was either vague or discredited in some way.

It is simply not reasonable for the Joint Complainants to expect that they can offer evidence from a select group of individual customers and have the Commission conclude that Respond Power committed numerous violations across its entire customer base. As a result of the Joint Complainants' failure to produce evidence of each element of every violation they alleged and demonstrate that their evidence proved that Respond Power violated the regulations they cited, the only way for the ALJs and the Commission to determine how many allegations have been substantiated is to review in granular detail the evidentiary record and the specific requirements of the Commission's regulations.

Alternatively, since the Settlement reached by Respond Power and I&E fully addresses all of the issues and allegations raised by this consolidated proceeding, including those limited instances in which departures from the Commission's regulations may be gleaned from the evidentiary record, it should be approved without modification so that the benefits to consumers may begin to flow immediately. In its Main Brief, Respond Power noted that for nearly one and a half years, it has been litigating against three separate governmental entities, all of which are indirectly funded by the taxpayers and ratepayers on whose behalf the entities are ostensibly advocating. While Respond Power has been able to reach a Settlement with one entity, I&E, the other two continue to push for alternative remedies.

This approach has led to an absurd situation in which: (i) I&E is now actively litigating against OAG and OCA over the appropriateness of its settlement with Respond Power -- ultimately at taxpayer and ratepayer expense (as OAG is funded by tax dollars and I&E and OCA are both funded by utility assessments which are passed through to ratepayers), and (ii) Respond Power has the burdens associated with defending multiple civil prosecutions by several governmental entities for substantially the same acts, transactions, or conduct. In addition to

being patently unfair to Respond Power, the prosecution of this case highlights bad public policy which allows several public advocates to pursue a market participant for the same alleged conduct and to fight with each other in the process of doing so. This was exactly the outcome that the ALJs sought to avoid when consolidating the I&E Complaint with the Joint Complaint.

As demonstrated through Respond Power's Main Brief, the Settlement is clearly reasonable and in the public interest. The Settlement contains provisions addressing each and every allegation that was raised in this consolidated proceeding. It provides for the issuance of refunds to all customers served by Respond Power in January through March 2014; imposes a civil penalty on Respond Power; calls for contributions to the EDCs' hardship funds; bars Respond Power from marketing variable prices for two years; prohibits Respond Power from engaging in door-to-door marketing until such time as an enhanced training program is developed, approved and implemented; requires extensive modifications to Respond Power's sales, marketing and business practices; provides for new sales scripts and new verification scripts; obligates Respond Power to have its Disclosure Statement reviewed by staff each time it is amended; restricts Respond Power's ability to refer to competitive rates, savings or even compare its product to that being offered by the EDCs; and subjects it to intense regulatory oversight for the next five years. It should simply be approved, and this matter -- after over a year and a half of litigation -- should be finally concluded.

## 2. License

At the core of the Joint Complainants' request for Respond Power's license to be revoked is the faulty assumption that the Company has committed millions of violations of the Commission's regulations when in fact a close review of the record may reveal a few departures from the regulations in connection with Respond Power's dealings with some of the individual customers who testified in this proceeding. As Respond Power argued in its Main Brief, the

record in this case does not support license revocation, even to the extent that the Commission has the statutory authority to order such a remedy.<sup>533</sup>

Because Respond Power has made significant commitments in the Settlement to make extensive modifications of its sales, marketing and business practices, no purpose would be served by a suspension or revocation of its license. Recently, the Commission declined to revoke the license of HIKO Energy, LLC ("HIKO") in a proceeding where the EGS had made indisputable written 6-month guaranteed savings commitments, which I&E demonstrated through documentary evidence (*i.e.*, specific billing data for the affected customers) had not been honored for 5,708 customers. *Pa. Pub. Util. Commission, Bureau of Investigation and Enforcement v. HIKO Energy, LLC*, Docket No. C-2014-2431410 (Order entered December 3, 2015) ("*HIKO Order*").

In declining to revoke HIKO's license at the urging of I&E, the Commission recognized the significant customer protections that were established in the settlement of a separate but companion proceeding. *See Commonwealth of Pennsylvania, et al. v. HIKO Energy, LLC*, Docket No. C-2014-2427652 (Order entered December 3, 2015). Despite describing the conduct at issue as "an intentional decision by a top HIKO executive" and referring to HIKO's "decision to violate its promised guaranteed savings" as "a deliberate choice of top management that affected over 5,700 customers," the Commission declined to revoke HIKO's license. *HIKO Order* at 27 and 34. Despite finding that "HIKO knowingly and deliberately chose to dishonor its promised and contracted-for savings," the Commission declined to revoke HIKO's license. *Id.* at 44. Despite noting that at the time of the proven violations that the Company was operating under a conditional or probationary license, the Commission declined to revoke HIKO's license.

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<sup>533</sup>RP MB at 208-209.

Rather, the Commission allowed the Company to continue to operate under strict conditions the Company had agreed to in its settlement with the Joint Complainants, which mirror the conditions included in the Settlement in this proceeding. The ALJs specifically observed that the concessions made by Hiko in the other proceeding demonstrated "a willingness to correct its business practices and comply with regulations in the future regarding its retail market activities." HIKO Initial Decision at 63. Likewise, the other EGSs who have entered into settlements with the Joint Complainants are not being subjected to any license suspension or revocation.<sup>534</sup> Indeed, despite its attempts to have HIKO's license revoked, I&E is actively advocating the retention of Respond Power's license in this consolidated proceeding. As the independent prosecutory bureau tasked with enforcing compliance with Commission orders and regulations, I&E does not believe that revocation of Respond Power's license is appropriate.<sup>535</sup>

This case does not contain any of the factors that the Commission had to consider in the *HIKO Order*. It does not involve written guarantees of savings for a specified time period. Rather, it involves testimony from a small percentage of Respond Power's customer base that sales representatives promised them savings; the testimony varies in whether those savings were expected for one month, two months or longer. Whereas the Commission had complete billing data showing what consumers were charged for the time period in question in the *HIKO Order*, the record in this case includes specific billing data for a narrow segment of consumer witnesses. The present case involves an EGS with an unblemished compliance record, as opposed to an EGS operating on a probationary license. This case also does not involve an upper level management decision or deliberate choice to dishonor contractual commitments. Rather, this case is about claims of a select group of individual consumers about verbal statements made to

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<sup>534</sup> RP MB at 209.

<sup>535</sup> I&E MB at 31.

them months and even years ago about possible savings and whether their prices would fixed or variable. As there is no comparison between the situation underlying the *HIKO Order* and the present proceeding, Respond Power should be permitted to continue operating as an EGS.<sup>536</sup>

As to the Joint Complainants' request for the imposition of license conditions or injunctive relief in the event that the Commission does not revoke Respond Power's license, Respond Power argued in its Main Brief that the Commission does not have statutory authority to award such relief.<sup>537</sup> However, the Company has agreed to several conditions on its EGS license as part of the Settlement, which the Commission may approve and enforce. Although the Joint Complainants contend that additional conditions are necessary and refer to several proposed conditions set forth in Ms. Alexander's testimony, they do not explain which of those is not already addressed by the Settlement.<sup>538</sup> A review of her testimony reveals that each of the conditions she proposed have been expressly addressed by the Settlement and/or are required by Commission regulations or other state consumer protection laws, with which Respond Power has agreed to comply under the Settlement, including revised training materials; revised sales scripts; disclosure of historical variable prices; correct identification of EDC PTCs; internal investigations and audits; disclosure statement; TRA requirements; and compliance monitoring and reporting.<sup>539</sup>

The Joint Complainants also ask the Commission to impose a moratorium on the Company's use of door-to-door marketing until Commission-approved modifications are implemented to its practices, training and compliance monitoring.<sup>540</sup> Under the Settlement, Respond Power has already agreed to implement enhancements to its door-to-door practices,

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<sup>536</sup> I&E MB at 32.

<sup>537</sup> RP MB 70-73.

<sup>538</sup> JC MB at 173.

<sup>539</sup> Settlement at pp. 11-36.

<sup>540</sup> JC MB at 174.

training and compliance monitoring in consultation with the Commission's I&E and BCS and to forego door-to-door sales solicitations until it has fully implemented those changes.<sup>541</sup> As to the Joint Complainants' proposal to have those plans filed for comment by interested parties, Respond Power submits that the Commission and its staff are certainly capable of performing the regulatory oversight that they are charged with performing by the General Assembly.

No other conditions are necessary as the Settlement adequately addresses all allegations of the Joint Complaint. Therefore, the Commission should approve the Settlement and in that manner require Respond Power to fulfill the conditions that largely mirror those requested by the Joint Complainants.

### 3. Refunds

In its Main Brief, Respond Power established that the Commission does not have statutory authority to direct an EGS to issue refunds.<sup>542</sup> Nonetheless, the Company has agreed to offer \$3 million in refunds to all customers who were served by Respond Power in early 2014. As this agreement is voluntary, it may and approved by the Commission. Nothing in the Joint Complainants' Main Brief confers the requisite statutory authority on the Commission to direct the issuance of refunds; only the General Assembly can bestow this power on the Commission.

The Joint Complainants contend that in their representational capacities as government agencies, they are permitted to act on the behalf of the consumer interest and public interest as a whole. However, nothing in their enabling statutes can confer statutory authority on the Commission. Moreover, although Respond Power recognizes that the Attorney General may bring actions "in the name of the Commonwealth" pursuant to the Consumer Protection Law, Code Section expressly provides that the "Attorney General may be a complainant before the

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<sup>541</sup>Settlement at pp. 24-29.

<sup>542</sup>RP MB at 50-62, 194-201.

commission in any matter solely as an advocate for the Commonwealth as a consumer of public utility services."<sup>543</sup>

They also cite to the case of *Richard Sanderman v. LP Water and Sewer Company*, 87 Pa. PUC 734 (1997) (*Sanderman*) as an instance when the Commission ordered across-the-board relief to groups of customers where not all of them had complained or testified. In *Sanderman*, the issue was whether a regulated public utility should be required to refund monies that were collected for water and sewerage tariffs but not tariffed or approved by the Commission. As that case involved a public utility, which may be subjected to a refund directive by the Commission pursuant to Code Section 1312,<sup>544</sup> it is not applicable to this proceeding. Also, it involved known charges paid by consumers to that were not properly tariffed at the Commission. In the present case, the record is lacking information about the charges individual customers paid as compared to their expectations. Also, EGS prices are not regulated, and the decision in *Sanderman* does not give authority to the Commission that only the General Assembly may bestow. The case of *Lytle v. T.W. Phillips Gas and Oil Co.*, 97 Pa. PUC 476 (2002) is likewise inapplicable here since it involves a public utility that is required to charge rates that are consistent with its filed tariff.

The Joint Complainants also rely on the Commission's decision in *Office of Consumer Advocate et al. v. Utility.com, Inc.*, 212 PUR 4<sup>th</sup> 255 (2001). However, that case is distinguishable from the present case in that it did not involve a situation where an EGS would be directed to issue refunds of its charges to customers in the context of a contractual pricing dispute. Rather, the case addressed the proper use of an EGS's bond after it had filed for bankruptcy. A question was raised as to whether the bond could be used to satisfy consumer

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<sup>543</sup>66 Pa. C.S. § 701.

<sup>544</sup>66 Pa. C.S. § 1312.

claims of "lost savings," meaning savings that consumers had expected to realize by being served by Utility.com or a comparable EGS but lost due to Utility.com's abrupt departure from the market. Although the Commission, in dictum, suggested that it had such jurisdiction to direct the use of the bond for this purpose, it did not order use of the bond to satisfy customer claims due to all available funds being directed to payment of the company's unpaid gross receipts tax. Regardless of the dictum in the *Utility.com Order* finding the ALJ's rationale relating to lost savings as persuasive, the Commission could not confer jurisdiction on itself; nor can other parties confer jurisdiction where none exists.

#### 4. Civil Penalty and Contributions

The Joint Complaint averred generally that the Commission had the authority to impose civil penalties pursuant to 52 Pa. Code §54.42<sup>545</sup> and then sought several forms of relief including the imposition of a civil penalty for alleged violations of the Code, Commission regulations and orders, and state consumer protection laws.<sup>546</sup> At no point did the Joint Complaint detail or quantify the amount of civil penalties sought or the method by which those civil penalties should be calculated. This silent approach stands in stark contrast to the Complaint of I&E which detailed every alleged violation as a separate count and requested a sum certain civil penalty for the alleged violations.<sup>547</sup> Likewise, I&E's expert witness offered testimony in support of the requested civil penalty, which, by contrast, the Joint Complainants did not.<sup>548</sup>

The Joint Complainants quantify the civil penalties they seek for the first time in their Main Brief, wherein they posit that "Respond Power should be directed to pay a civil penalty in

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<sup>545</sup>JC ¶ 101.

<sup>546</sup>JC, Wherefore Clause, ¶ c.

<sup>547</sup>I&E Complaint ¶ 44.

<sup>548</sup>I&E St. 1 at 27-34.

the amount of \$1,000.00 per violation and that 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."<sup>549</sup> Further, they opine that they have "established 36 specific violations of the Commission's regulations."<sup>550</sup> The Joint Complainants argue that Respond Power's total variable rate customers for that time period multiplied by 36 violations multiplied by \$1,000.00 per violation, equates to a base civil penalty of \$7,336,080.<sup>551</sup> That is, the Joint Complainants argue that regardless of whether any complaint was lodged by a variable rate customer, it should be assumed that every violation alleged in this proceeding was applicable to every variable rate customer. Further, they make assumptions about the total number of variable rate customers served by Respond Power because they do not have the exact number. In short, the Joint Complainants' logic and calculations for the imposition of civil penalties in this case are patently absurd.

That absurdity is most evident when their calculations are reviewed. The Joint Complainants miscalculated the civil penalty amount in their Main Brief. Using their methodology the civil penalty would be \$7,336,080,000.00 (Seven **billion** three hundred thirty six million eighty thousand dollars), not 7,336,080.00 (Seven million three hundred thirty six thousand eight dollars). Their calculation is off by a factor of 1,000. Moreover, for the reasons set forth below, an award of civil penalties under the Joint Complainants' logic and calculations would violate Respond Power's due process rights.

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<sup>549</sup>JC MB at 168.

<sup>550</sup>*Id.*

<sup>551</sup>*Id.* at 169. The Joint Complainants argue that this base amount should be enhanced by \$48,000.00 for alleged *Licensing Order* violations and slamming violations. *Id.* It appears that this requested enhancement for slamming is yet another attempt by the Joint Complainants to double count violations as the Joint Complainants have, apparently, already included the alleged violations of 66 Pa. C.S. § 2807(d)(1) in the Joint Complaint and their Main Brief. Joint Complaint ¶¶ 62-64; JC MB at 20, 22, 88, and 159.

The confusion regarding the Joint Complainants' requested civil penalties should be held against the Joint Complainants and they should be given no benefit of the doubt. As the complaining party, the Joint Complainants bear the burden of proof in this proceeding. The burden extends not only to the alleged violations but also to the requested relief. The relief must be justified based on any substantiated violations and after consideration of mitigating factors.

This is a serious case in which the livelihood of a company, and the jobs of its employees and the employees of its contractors, are at risk; and, as such, it is troublesome that the Joint Complainants have not taken enough care to perform a proper calculation of their requested civil penalties. Instead, they simply assert that every allegation should be deemed substantiated for every single customer served by Respond Power and that the maximum civil penalty should be imposed for each.

Attorney General Kane and Acting Consumer Advocate McCloskey, as senior and high-profile prosecutors within the Commonwealth, should be held to the highest expectations of diligence and Respond Power should not have been surprised by the revelation in the Joint Complainants' Main Brief that civil penalties in excess of \$7.3 billion are possibly being sought.

a. Due Process Rights

When an action seeks to impose civil penalties, a defendant is entitled to full due process rights. *Northview Motors, Inc. v. Commonwealth, Attorney Gen.*, 562 A.2d 977, 980 (Pa. Cmwlth. 1989). That is, the defendant must be (1) "informed with reasonable certainty of the nature of the accusation lodged against him, (2) [have] timely notice and opportunity to answer the charges and to defend against attempted proof of such accusation, and (3) the proceedings are conducted in a fair and impartial manner." *Id.* See also, *Pocono Water Co. v. Pa. Public Util. Comm'n*, 630 A. 2d 971 (Pa. Cmwlth. 1993) (reversing a penalty imposed by the Commission for failure to comply with a prior order on due process grounds because the Commission failed to

notice that compliance with the prior order would be an issue before the ALJ). Here, the Joint Complainants' suggested methodology for the imposition of civil penalties violates Respond Power's due process rights.

Respond Power was not provided adequate notice that the Joint Complainants would be seeking civil penalties based upon the total number of variable rate customers it had in December 2013. For example, the Joint Complainants allege (incorrectly) in Count VIII that the prices Respond Power "charged to customers in early 2014 were not reflective of the cost to serve residential customers."<sup>552</sup> In support of that allegation, the Joint Complainants attached the affidavit of Dr. Estomin which opined about January 2014 costs to serve residential customers.<sup>553</sup> In his affidavit, Dr. Estomin opined that his opinions were based upon four billing cycles running from January 1, 2014 through February 20, 2014.<sup>554</sup> It is clear that the Joint Complaint did not put Respond Power on sufficient notice that the number of customers it had in December 2013 could be used to form the basis for the imposition of a civil penalty and, accordingly, any civil penalty imposed based upon that figure would violate Respond Power's due process rights.

Respond Power's due process rights would be further violated if the Commission imposes a civil penalty for any regulations that were not cited by the Joint Complainants in the Complaint, as follows:

- Section 54.4(a) (billed prices) – Count VIII
- Section 54.5(a) (disclosure statement prices) – Count VIII
- Section 111.12(d)(5) (plain language ) – Count VII
- Section 111.13 (complaint handling) – Count VI

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<sup>552</sup>Joint Complaint, ¶ 88.

<sup>553</sup>*Id.* at ¶ 89.

<sup>554</sup>Joint Complaint, Appendix C, ¶ 6.

Respond Power's due process rights would likewise be violated if the Commission imposes a civil penalty for any factual allegations that were not made in the Joint Complaint, including Section 53.5(b), which establishes the requirement for an EGS to provide a disclosure statement to every customer. Although it was referenced in Count III, the Joint Complaint did not allege that Respond Power had failed to comply with the requirement. That allegation was raised for the first time in the Joint Complainants' Main Brief.

b. Proposed Civil Penalty Does Not Fit Alleged Violations

Imposition of a civil penalty on Respond Power under the methodology suggested by the Joint Complainants does not fit the alleged violations. *United States Steel Corp. v. Department of Environmental Resources*, 300 A.2d 508, 514 (Pa. Cmwlth. 1973); *Sunoco, Inc. (R&M) v. Dept. of Environmental Protection*, 856 A.2d 960 (Pa. Cmwlth. 2005). *See also, Eureka Stone Quarry, Inc. v. Dept. of Environmental Protection*, 957 A.2d 337, 349 (Pa. Cmwlth. 2008) (a penalty does not reasonably fit a violation if it strikes at the conscience of the court as being unreasonable). When the mathematics are properly performed, the Joint Complainants are requesting a civil penalty in excess of \$7.3 billion. To put this figure in perspective, that amount equates to slightly more than 107 times the Commission's budget for Fiscal Year 2014-2015 of \$68,356,000.00.<sup>555</sup> Such a figure would certainly shock the conscience of any reviewing court as being unreasonable. For that matter, even disregarding the mathematical error, the Joint Complainants' suggested penalty of more than \$7.3 million does not fit the violations. Such a civil penalty would be more than 10% of the Commission's entire annual budget. Surely such an amount does not fit the alleged violations in this case which center around approximately three months in 2014.

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<sup>555</sup>See [http://www.puc.pa.gov/about\\_puc.aspx](http://www.puc.pa.gov/about_puc.aspx).

c. Equivalent of a Criminal Penalty

The Joint Complainants' suggested methodology for calculating a civil penalty is so unreasonable or excessive that it transforms what was intended as a civil penalty into a criminal penalty. *Rex Trailer Co., Inc. v. United States*, 350 U.S. 148 (1956) (holding that unreasonable or excessive civil penalties can transform the remedy into a criminal penalty). Here the Joint Complainants suggest a civil penalty calculation methodology which would result in a civil penalty in excess of \$7.3 billion. Such a disproportionality large penalty takes the Joint Complainants' suggested civil penalty into the realm of a criminal penalty.

As an administrative agency limited to the powers provided to it by its enabling legislation, it is clear that the Commission lacks the jurisdiction to impose a criminal penalty. Accordingly, should the Commission employ the civil penalty calculus suggested by the Joint Complainants, it would be impermissibly exceeding its jurisdiction. Further, such a civil penalty calculation would deprive Respond Power of its criminal due process rights. *See United States v. Ward*, 448 U.S. 242, 248 (1980) ("The distinction between a civil penalty and a criminal penalty is of some constitutional import. The Self-Incrimination Clause of the Fifth Amendment, for example, is expressly limited to "any criminal case." Similarly, the protections provided by the Sixth Amendment are available only in "criminal prosecutions." Other constitutional protections, while not explicitly limited to one context or the other, have been so limited by decision of this Court. *See, e. g., Helvering v. Mitchell*, 303 U. S. 391, 399 (1938) (Double Jeopardy Clause protects only against two criminal punishments); *United States v. Regan*, 232 U. S. 37, 47-48 (1914) (proof beyond a reasonable doubt required only in criminal cases)").

d. Arbitrary and Capricious

Such an outrageous civil penalty would also be arbitrary and capricious, which is one that bears no rational connection to the relevant factors in the proceeding. *See Shandong Huarong*

*Machinery Co., Ltd. v. United States*, 435 F. Supp. 2d 1261 (2006). Here, the civil penalty requested by the Joint Complainants, whether it is \$7.3 million or \$7.3 billion, bears no rational connection to the evidentiary record and alleged violations of Commission regulations.

As a threshold matter, a civil penalty imposed by the Commission must be based on substantial evidence in the record. *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n.*, 489 Pa. 109, 413 A.2d 1037 (1980). The evidence presented by the Joint Complainants of select consumers' interactions or experiences with Respond Power, which comprise an extremely small segment of Respond Power's entire customer base, does not prove that Respond Power committed any violations of the Code, Commission regulations or Commission orders in their dealings with other consumers.

Moreover, the proposed civil penalty is based on a faulty assumption that Respond Power served a total of 203,780 variable rate customers during the specified timeframe. A review of the Joint Complainants' analysis for arriving at that number demonstrates that it is based on guesses and estimates.<sup>556</sup> They simply do not have an accurate count of the number of variable rate customers served by Respond Power during that time period. In addition, the total number of variable rate customers on which the Joint Complainants have relied in formulating a proposed civil penalty clearly includes many of the same customers - some twice, some three times and some four times for alleged violations that are not ongoing in nature.<sup>557</sup> On that basis alone, the Commission cannot use this analysis to impose a multi-million dollar or multi-billion dollar civil penalty on Respond Power. Below is a demonstration of how the Joint Complainants have radically exaggerated the number of alleged violations in connection with every single Count.

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<sup>556</sup>JC M.B. at 168-169, fn. 54.

<sup>557</sup>Despite the party with the burden of proof, they made no effort to determine how many individual customers were served by Respond Power in these months.

In formulating a proposed civil penalty in connection with Count I (EDC affiliations), the Joint Complainants ignore testimony that was offered by consumer after consumer in this proceeding that the Respond Power sales representative clearly identified himself at the outset of the sales transaction. Rather than focusing on the witnesses who testified that the sales representative claimed to be from an EDC and proposing an appropriate civil penalty to address those alleged violations, the Joint Complainants have alleged 1,630,240 violations associated with Count I of the Joint Complaint alone. This is because they propose to have Respond Power found to have committed violations of eight different regulations for each the estimated total number of variable rate customers served over a four-month period, including duplicates. Under the Joint Complainants' formula, even if person was initially misled by a Respond Power sales representative about their affiliation and then realized that affiliation before or shortly after enrolling, it is ludicrous to count a violation of the regulation more than one time.

As to Count II (promises of savings), the Joint Complainants likewise ignore the many customers who testified that they were not promised savings, as well as those who did not expect long-term savings and did save in some months. The allegation in the Joint Complaint was that Respond Power sales representatives promised savings that were not realized. Rather than focusing on the witnesses who testified that they were promised savings that were not realized and proposing a civil penalty to address those alleged violations, the Joint Complainants have alleged that Respond Power committed 815,120 violations of four Commission regulations, again assuming that all customers were promised savings that did not materialize.

With respect to Count III (disclosure of material terms), the Joint Complainants ignore the testimony of numerous witnesses in this proceeding who understood that they were signing up for a variable rate plan. Rather than focusing on the witnesses who testified that the Respond

Power sales agent failed to inform them of this feature or told them they were enrolling in a fixed rate plan, the Joint Complainants have alleged that the Company committed 1,222,680 violations.

Regarding Count IV (welcome letter and inserts), the Joint Complainants ignore the fact that the Commission does not have jurisdiction to entertain claims made under the Consumer Protection Law and allege that Respond Power violated two Commission regulations a total of 407,560 times. They also do not link these documents to any testimony suggesting that an individual consumer reviewed them and relied upon them in switching to Respond Power.

Count V (slamming) involves a very particular set of allegations that are unique to each customer and require the Commission to determine whether a customer was switched to an EGS without authorization. Even the Joint Complainants believe that only 12 customers who testified in this proceeding were switched without authorization and they separately request \$1,000 for each of those instances.<sup>558</sup> However, in addition, they have included 203,780 alleged violations in the total count so that Respond Power would be assessed a civil penalty for every variable rate customer served during December 2013 through March 2014 even though no evidence was presented that any of those customers -- other than the twelve alleged by the Joint Complainants -- were slammed. The Joint Complainants did not even bother to remove the twelve who testified in this proceeding from the total number of customers served by Respond Power, so the Company would be penalized multiple times for these twelve customers. In slamming cases, the Commission has assessed \$1,000 civil penalties per customer or per incident and has not considered the number of months the customer was served by the EGS. *See, e.g., Pa. Pub. Util. Comm'n., Law Bureau Prosecutory Staff v. MXenergy Electric, Inc.*, Docket No. M-2012-2201861 (Order entered August 29, 2013); *Pa. Pub. Util. Comm'n., Bureau of Investigation and*

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<sup>558</sup>JC MB at 169.

*Enforcement v. Public Power, LLC*, Docket No. M-2012-2257858 (Order entered December 19, 2013).

As to Count VI (complaint handling), the Joint Complainants ignore the fact that many consumers who testified in this proceeding were able to reach the Company in the wake of the Polar Vortex or did not try to contact the Company. They do not even consider whether any of the customers who testified as to having difficulties reaching the Company were harmed as a result, such as by a delay in returning to the EDC. They have alleged no harm at all to customers who did not receive an investigation report, and as to those who accepted refunds in exchange for entering a one-year fixed rate contract, that was the customer's choice in this deregulated environment. Rather than focusing on the customers who were unable to reach the Company or experienced unreasonable delays in reaching the Company, they have alleged 1,018,900 violations of five different Commission regulations.

With respect to Count VII (providing accurate pricing information), the Joint Complainants have ignored the testimony of several consumers in this proceeding who either understood the Disclosure Statement or never reviewed it. Rather than relying on consumer testimony indicating that the terms and conditions were not clear to them and proposing an appropriate civil penalty to address those concerns, they have alleged 1,018,900 violations of five different regulations.

Count VIII (prices conforming to disclosure statement), the Joint Complainants have sought to evaluate Respond Power's prices in the context of residential costs of service and EDCs' PTCs, while ignoring the Commission's lack of jurisdiction to regulate EGS prices or interpret private contracts. Citing two regulations and relying on their estimates of the total

number of variable rate customers served over a four-month period, they allege 407,460 violations of two different regulations.

In Count IX (complying with the TRA), the Joint Complainants have alleged 611,340 violations involving compliance with the Telemarketer Registration Act, which the Commission has acknowledged that it does not have jurisdiction to enforce.<sup>559</sup> Moreover, the Joint Complainants have misinterpreted the requirements of the TRA and their applicability to EGSs. In addition, they made no effort to determine which consumers served by Respond Power during the relevant time period were enrolled through telemarketing. Since many consumers were solicited by door-to-door marketers and some consumers enrolled online or through a friend and family program, the TRA requirement would clearly not apply to those enrollments, if it was applicable to Respond Power at all. Again, as the party with the burden of proof, it was incumbent upon the Joint Complainants to identify those consumers who were solicited by telemarketers if they wish to propose the imposition of civil penalties on Respond Power for violations of the TRA.

Another flaw in the Joint Complainants' civil penalty formula is the reliance on Section 54.43(f) of the Commission's regulations as a provision that can be violated. Section 54.43(f) provides that "[a] licensee is responsible for any fraudulent deceptive or other unlawful marketing or billing acts performed by the licensee, its employees, agents or representatives."<sup>560</sup> Respond Power does not dispute that it is responsible for the acts of its agents. However, in establishing an EGS's responsibility for the actions of its employees, agents or representatives, Section 54.43(f) does not establish a requirement with which EGSs must

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<sup>559</sup>This number includes 203,780 alleged violations of Section 54.43(f), which merely establishes a licensee's responsibility for the acts of its agents. Even if the Commission would view that provision as setting a standard with which EGSs must comply, which it should not, these alleged violations must fall in the context of Count IX since the Commission does not have statutory authority to entertain claims filed under the TRA.

<sup>560</sup>52 Pa. Code § 54.43(f).

adhere. Therefore, it does not set an industry standard which an EGS can be found to have violated. Of the alleged violations noted above within Counts I (EDC affiliations), II (promises of savings), IV (welcome letter and inserts), VII (providing accurate pricing information) and IX (complying with the TRA), a total of 1,018,900 of them involve Section 54.43(f). Similarly, with respect to Count VI (complaint handling), the Joint Complainants allege 203,780 violations of Section 56.1(a) of the Commission's regulations, which merely contain a statement of purpose and policy to explain the provisions of Chapter 56 and do not establish any standards or requirements to which EGSs must adhere. Indeed, Section 111.13(c), which requires EGSs to comply with various provisions of Chapter 56, does not identify Section 56.1(a) as containing a standard.<sup>561</sup>

In addition, their calculation of alleged violations also relies on various provisions in Chapter 111, which did not go into effect until June 29, 2013.<sup>562</sup> Many of Respond Power's customers, including several who testified in this proceeding, enrolled with the Company prior to that date. Therefore, the provisions in Chapter 111 are not applicable to their enrollments. Yet, the Joint Complainants -- as the party with the burden of proof -- have made no effort to identify which customers of Respond Power enrolled after June 29, 2013, so as to establish which enrollments would be subject to these requirements.

The Joint Complainants' methodology for calculating alleged violations also double counts the same conduct as violating more than one Commission regulation, which set identical standards and contain the same elements. This error occurs at least twice. Section 111.8(b) requires EGS agents, regardless of the type of sale, to identify themselves, upon first contact with customers, and identify the EGS they represent, while adding that they does not work for and are

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<sup>561</sup>52 Pa. Code § 56.1

<sup>562</sup>43 Pa. B. 3473 (June 29, 2013).

independent of the customer's EDC. Section 111.9(1) sets forth the same requirement within the rules specifically governing door-to-door sales. Those provisions are both cited in Count I (EDC affiliations). Similarly, both Section 54.43(1) and Section 111.12(d)(5) require the use of plain language by EGS, which are both referenced in Count VII (disclosure statement).

It is long established black-letter law that prosecuting an individual for the same offense twice violates the double jeopardy protections of the Fifth Amendment. This protection extends to the prosecution of individuals for identical offenses. *Gavieres v. United States*, 220 U.S. 338 (1911). While the same act may give rise to the violation of multiple statutes, if the elements for each violation are the same, then prosecution of both violations would place the defendant in double jeopardy. In determining if the offenses are identical, and in application one offense, "the test to be applied...is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299 (1932). *See also, Brown v. Ohio*, 432 U.S. 161 (1977).

Clearly, both of the examples noted above are identical offenses. Since all EGS agents, regardless of the type of sale, must identify themselves properly at the outset of the call, no additional fact is needed to prove a violation of either provision. The same is true of the two plain language regulations. To find otherwise could have an absurd result. An administrative agency could elect to have 100 regulations that all impose exactly the same standard or requirement, and determine that a regulated entity who has committed one act that violates the standard has committed 100 regulations. Such double counting should not be allowed or considered when calculating number of violations by Respond Power that are substantiated.

Finally, a civil penalty of \$7.3 billion would rise to the level of a regulatory taking. As the United States Supreme Court has recognized for regulatory takings:

The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. See Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."

*Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123-24 (1978) (internal quotations omitted).

The Court then identified several factors which will be used to determine if there has been a taking. Primary among those factors are [t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." In addition, the "character of the governmental action" — for instance whether it amounts to a physical invasion or instead merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good" — may be relevant in discerning whether a taking has occurred. *Lingle v. Chevron USA Inc.*, 544 US 528, 538-39 (2005)(quoting *Penn Cent. Transp. Co.*).

e. Appropriate Civil Penalty

Given the fact that the Joint Complainants have failed to present a formula that the Commission can use in determining an appropriate civil penalty, Respond Power has created the chart attached as Appendix B, which shows the number of violations actually alleged by the individual consumer witnesses in this consolidated proceeding. Even if the Commission assumes that the testimony of every single witness who is relied upon by the Joint Complainants in support of each Count of the Joint Complaint would have demonstrated a violation of Commission regulations, this chart demonstrates that imposing a civil penalty of \$100 per

violation would result in approximately \$35,000, which is far less than the civil penalty of \$125,000 agreed to as part of the Settlement. *See HIKO Order* (\$125 per violation for an intentional decision by the top executive to dishonor written contracts guaranteeing savings, which I&E demonstrated through record evidence affected over 5,000 customers). Even if the Commission would find that Respond Power violated seven different regulations in their interactions with the 169 consumer witnesses, a civil penalty based on \$100 per violation would be \$118,300.<sup>563</sup> It is noteworthy the \$1.8 million civil penalty imposed by the *HIKO Order*, which is the highest amount ever assessed by the Commission, was a fraction (less than 13%) of the \$14 million civil penalty sought by I&E. In this proceeding, Respond Power has agreed to pay a civil penalty that is roughly 20% of the \$639,000 civil penalty originally proposed by I&E.<sup>564</sup> Whereas the settlement agreement entered into by the Joint Complainants and HIKO was silent on the issue of civil penalty, the Settlement in this proceeding addressed every element that has been covered in the other agreements.

As Respond Power argued in its Main Brief, this level of civil penalty is in the public interest, particularly when it is viewed together with the \$25,000 minimum contribution to EDCs' hardship funds, a \$50,000 contribution to the costs and expenses of the third party administrator for the refund pool, and the costs associated with making extensive modifications to marketing, sales and business practices.<sup>565</sup> The Company also showed in its Main Brief that this amount is consistent with the outcomes in other similar proceedings and reflects a fair and appropriate consideration of the factors set forth in the Commission's Policy Statement.<sup>566</sup> As to the Joint Complainants' requests for a higher contribution to the EDCs' hardship funds and for retention of

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<sup>563</sup> In performing this calculation, Respond Power assumed one violation for each Count, except Count IV and IX, which allege violations of state consumer protection laws that the Commission lacks jurisdiction to enforce.

<sup>564</sup> I&E St. 1 at 27.

<sup>565</sup> RP MB at 193-194.

<sup>566</sup> 52 Pa. Code § 69.1201; RP MB at 202-207.

a third-party administrator for the refund pool, they should be rejected outright since the Settlement already adequately addresses both matters through voluntary contributions which the Commission may not require among the remedies that are available to the Commission under Code Section 3301.<sup>567</sup>

N. Approval of Settlement

The Settlement fully resolves all issues arising from the variable price increases that were charged to retail customers during the 2014 Polar Vortex as a result of the record-breaking wholesale prices that were paid by Respond Power, including associated concerns with Respond Power's marketing, sales and business practices. It addresses these issues by developing a fair and workable mechanism for issuing refunds to all customers of Respond Power in January, February and March 2014; establishing a significant civil penalty for the allegations set forth in both the Joint Complaint and the I&E Complaint; providing for a contribution to EDCs' hardship funds; and imposing extensive injunctive relief on Respond Power, including major modifications to its marketing, sales and business practices.<sup>568</sup>

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

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<sup>567</sup>66 Pa. C.S. § 3301.

<sup>568</sup>Settlement at pp. 6-36.

Decisions issued by the ALJs. Most importantly, Respond Power's financial commitments under the Settlement are consistent with, if not more compensatory, than those previous settlements.<sup>569</sup>

In their Main Brief, the Joint Complainants lodge several objections and oppose the Settlement that Respond Power entered into with the Commission's independent prosecutory bureau in this consolidated proceeding. The Joint Complainants seek rejection of the Settlement for a host of reasons that are driven by their desires to control the distribution of refunds to consumers and to take over the Commission's role of overseeing the Company by placing themselves into the role of Respond Power's regulator. Under the Settlement, it would be I&E that would determine how to distribute refunds on the basis of individual customer's usage, price charged and refund amounts already received directly from Respond Power. Also, under the Settlement, it would be I&E that would approve the enhanced training and the compliance monitoring programs. Further, it would be I&E that would receive reports about call center issues, review amended disclosure statements and monitor the Company's complaint activity. All of these functions are appropriate for I&E to assume since the Commission has delegated authority to it to perform an enforcement role. I&E is fully equipped to handle the responsibilities of implementing the Settlement and monitoring Respond Power's compliance with the all conditions and requirements.

The Joint Complainants contend that the Settlement is legally defective because if it is approved and the Commission determines that the remedies provided by it are sufficient to address the Joint Complaint, it will not be fair to them because they "have diligently moved forward with their burden of proof."<sup>570</sup> Respond Power notes that it has been dragged through nearly 18 months of costly litigation, which has included answering burdensome interrogatories

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<sup>569</sup>RP MB at 149-185.

<sup>570</sup>JC MB at 179.

and poring through volumes of handwritten consumer testimony, only to reach a fair and reasonable Settlement with the Commission's own prosecutory bureau and find itself still embroiled in litigation over the same issues of fact and law with two other government entities.

Even when it was served with the Joint Complainants' Main Brief and the long-awaited information as to which particular consumer testimony supports the specific instances of alleged violations of the Commission, Respond Power still cannot identify those links. Because the Joint Complainants have opted to forego any connection between the details in the evidentiary record and the requirements of the Commission's regulations, Respond Power has had to spend an inordinate amount of time reviewing witness testimony that the Joint Complainants -- as the party with the burden of proof -- had an obligation to describe and explain in support of their Joint Complaint. However, instead of assuming that responsibility, they took the easy route of glossing over the testimony and gleaning generalities from it to allege that Respond Power had committed over seven million violations of Commission regulations, which they identified in four different places in four different ways. The Joint Complainants also would have the Commission impose an over \$7 billion civil penalty on Respond Power, while violating its due process rights on numerous occasions and relying on nonexistent legal theories to forego the fundamental substantial evidence requirements applicable to Commission proceedings.

What is unfair about this proceeding is that Respond Power has demonstrated a commitment to work with the Commission, as with as with the Joint Complainants, to fully resolve all issues raised in this consolidated proceeding. Respond Power has negotiated in good faith with all parties, and has formally requested the assistance of an ALJ to facilitate settlement discussions on two occasions during this proceeding, only to have those requests opposed by the Joint Complainants. It is baffling to Respond Power why the Joint Complainants would not have

been willing to come to the settlement table with a facilitator. Respond Power was not concerned about what the facilitator's reaction or suggestions might be to its settlement position. The assistance of a neutral third party would have been valuable, and through such efforts, it may be that the parties could have avoided this costly and protracted litigation, which will continue in the appellate courts for years if the Joint Complainants have their way.

The Joint Complainants also characterize their interests as being different than those of I&E.<sup>571</sup> It is preposterous to make such a suggestion. They represent the interests of the exact same taxpayers and ratepayers, and they have made the same allegations against Respond Power. The Joint Complainants further contend that the Settlement is not in the public interest.<sup>572</sup> Respond Power submits that what is not in the public interest is allow these two government entities to delay the delivery of the Settlement's benefits to consumers and keep Respond Power from moving forward to operate its business.

The Joint Complainants also suggest that there are inconsistencies and misunderstandings within the various settlement documents and pleadings. The Commission need not be concerned about such matters. I&E and Respond Power negotiated this Settlement involving a complex set of issues with massive economic ramifications to the Company. The Settlement speaks for itself, and although Respond Power does not anticipate any difficulties with implementation, the Company is confident that any questions that arise can easily be addressed by the settling parties.

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<sup>571</sup>JC MB at 179.

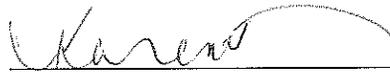
<sup>572</sup>*Id.*

#### IV. CONCLUSION

On the basis of the foregoing, Respond Power LLC respectfully requests that the Pennsylvania Public Utility Commission: (i) approve, without modification (except to the limited extent described herein), the Amended Petition for Approval of Settlement filed by Respond Power and the Commission's Bureau of Investigation & Enforcement on September 18, 2015; (ii) dismiss the Joint Complaint filed by the Commonwealth of Pennsylvania by Attorney General Kathleen Kane, through the Bureau of Consumer Protection, and Tanya J. McCloskey, Acting Pennsylvania Consumer Advocate, or alternatively, conclude that the Settlement fully addresses all issues and provides adequate remedies to resolve all allegations raised by the Joint Complaint; and (iii) grant such as other relief as the Commission may deem just and appropriate.

Respectfully submitted,

Dated: December 23, 2015



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# APPENDIX A

**List of Regulations Cited by the Joint Complainants\***

Complaint	Brief-Summary of Argument	Brief-Discussion of Counts (Conclusion)	Brief - Proposed Conclusions of Law**
Count I (EDC Affiliations)	54.43(f) 111.4 111.5 111.8 111.9 111.12(d)(1)	54.43(f) 111.4 111.5(a) 111.5 (e) 111.8 111.8(c) 111.9 111.12(d)(1)	54.43(f) 111.4 111.5(a)-(f) 111.8 111.9 111.12(d)(1)
Count II (Promises of Savings)	54.43(f) 111.4 111.5 111.12(d)(1)	54.4(a) 54.5(a) 54.43(f) 111.4 111.5 111.12(d)(1)	54.43(f) 111.4 111.5(a)-(f) 111.12(d)(1)
Count III (Material Terms)	54.4(a) 54.5(b) 54.5(c)(2) 54.7(a) 111.4 111.5 111.11 111.12(d)(4)	54.4(a) 54.5(c)(2) 54.7(a) 111.4 111.5 111.12(d)(4)	54.4(a) 54.5(b) 54.5(c)(2) 54.7(a) 111.4 111.5(a)-(f) 111.7(b)(5) 111.11 111.12(d)(4)
Count IV (Welcome Letter)	54.43(f) 111.12(d)(1)	54.43(f) 111.12(d)(1)	54.43(f) 111.12(d)(1)
Count V (Slamming)	54.42(a)(9)	54.42(a)(9)	54.42(a)(9)

**List of Regulations Cited by the Joint Complainants**

Complaint	Brief-Summary of Argument	Brief-Discussion of Counts (Conclusion)	Brief - Proposed Conclusions of Law**
Count VI (Complaint Handling)	56.1(a) 56.141(a) 56.151 56.152 111.13	56.1(a) 56.141(a) 56.151 56.152 111.13	56.1(a) 56.141(a) 56.151 56.152
Count VII (Disclosure Statement)	54.5(c) 54.43(1) 54.43(f) 111.12(d)(1) 111.12(d)(5)	54.5(c) 54.43(1) 54.43(f) 111.12(d)(1) 111.12(d)(5)	54.5(c) 54.43(1) 54.43(f) 111.12(d)(1)
Count VIII (Prices Nonconforming)	54.4(a) 54.5(a)	54.4(a) 54.5(a)	54.4(a) 54.5(a)
Count IX (Telemarketer Registration Act)	54.43(f) 111.10(a)(1) 111.12(d)(1)	54.43(f) 111.10 111.12(d)(1)	111.10(a)(1)

\* This list includes regulations, which the Joint Complainants have alleged in different places that Respond Power violated. The Joint Complainants also allege that Respond Power violated its Licensing Order 36 times and committed 203,780 violations of Code Section 2807(d)(1) (unauthorized switching).

\*\*The Proposed Conclusions of Law include Sections 111.4 and 111.5 in the category called Business Operations/Agent Training and Monitoring, rather than within the Counts. For ease of comparison, Respond Power places them on this chart with the Count to which they relate. Also, in the Proposed Conclusions of Law, the Joint Complainants interchanged the regulations for Counts III and IV, which Respond Power has corrected on this list.

# APPENDIX B

**Comparison of Joint Complainants' Allegations and Consumer Testimony**

	<b>Alleged Violations in Brief – Summary of Argument</b>	<b>Number of Alleged Violations</b>	<b>Joint Complainants' Proposed Civil Penalty – I<sup>a</sup></b>	<b>Joint Complainants' Proposed Civil Penalty – II<sup>b</sup></b>	<b>Number of Consumer Witnesses</b>	<b>Applicable Regulation</b>	<b>Civil Penalty Upon \$100 Per Consumer<sup>c</sup></b>
Count I – EDC Affiliation	54.43(f) (EGS responsibility) 111.4 (agent qualifications) 111.5(a) (agent training) 111.5(e) (agent monitoring) 111.8 (agent identification) 111.8(c) (agent uniform) 111.9 (door-to-door) 111.12(d)(1) (consumer protection laws)	1,630,240	\$1,630,240	\$1,630,240,000	35 <sup>d</sup>	111.8 (agent identification)	\$3,500

<sup>a</sup> Calculations based on proposed civil penalty in the Joint Complainants' Main Brief.

<sup>b</sup> Calculations based on formula for proposed civil penalty in the Joint Complainants' Main Brief.

<sup>c</sup> This assumes that the evidence is viewed in the light most favorable to the Joint Complainants, from the standpoint of relying on uncorroborated hearsay evidence, which lacks credibility due to numerous factors including: (i) use of leading questions by the Joint Complainants; (ii) solicitation of testimony by the Joint Complainants; (iii) desire for refunds on the part of consumers; (iv) inconsistencies in the testimony; (v) lack of understanding of many consumers about the electric choice program; (vi) lapse of time since solicitation were made; (vii) expectation of savings due to a variety of sources, including Commission-sponsored electric distribution company mailings, [www.papowerswitch.com](http://www.papowerswitch.com) and offers from other electric generation suppliers; and (viii) faulty memories due to unimportance of the transaction to consumers. **These customer counts also include those who did not testify in the way that was portrayed by the Joint Complainants and those who recanted their original testimony.** (Separate penalties for violation of *Licensing Order* would inappropriately penalize same conduct twice.)

<sup>d</sup> Count is based on consumer witnesses identified in JC MB at 37-44 and Proposed FOF 67, 68, 69, 70, 71, 72 and 73.

	Alleged Violations in Brief – Summary of Argument	Number of Alleged Violations	Joint Complainants' Proposed Civil Penalty – I <sup>a</sup>	Joint Complainants' Proposed Civil Penalty – II <sup>b</sup>	Number of Consumer Witnesses	Applicable Regulation	Civil Penalty Upon \$100 Per Consumer <sup>c</sup>
Count II – Promises of Savings	54.43(f) (EGS responsibility) 111.4 (agent qualifications) 111.5 (agent training) 111.12(d)(1) (consumer protection laws)	815,120	\$815,120	\$815,120,000	121 <sup>e</sup>	111.12(d)(1) (Commission regulations)	\$12,100
Count III – Disclosure of Material Terms	54.4(a) (billed prices) 54.5(c)(2) (variable pricing statement) 54.7(a) (disclosure statement prices) 111.4 (agent qualifications) 111.5 (agent training) 111.12(d)(4) (accurate info)	1,222,680	\$1,222,680	\$1,222,680,000	73 <sup>f</sup>	111.12(d)(4) (accurate information)	\$7,300

<sup>e</sup> Count is based on consumer witnesses identified in JC MB at 55-65 and Proposed FOF 77 and 78, which includes consumers who gave no expectation as to how long they would save money and did in fact save money in some months, as well as those who merely testified that they expected competitive rates.

<sup>f</sup> Count is based on consumer witnesses identified in JC MB at 67-76 and Proposed FOF 83, 84, 85 and 86. This count does not include the consumer witnesses who are identified in Proposed FOF 81 since this allegation was not made in the Joint Complaint, and the proposed FOF itself is only that consumer witnesses who testified that they did not recall receiving the disclosure statement, which if true, is not a violation by Respond Power of any regulation. In any event, many consumer witnesses listed in this Proposed FOF overlap with those listed in Proposed FOF 83, 84, 85 and 86.

	Alleged Violations in Brief – Summary of Argument	Number of Alleged Violations	Joint Complainants' Proposed Civil Penalty – I <sup>a</sup>	Joint Complainants' Proposed Civil Penalty – II <sup>b</sup>	Number of Consumer Witnesses	Applicable Regulation	Civil Penalty Upon \$100 Per Consumer <sup>c</sup>
Count IV – Welcome Letters and Inserts	54.43(f) (EGS responsibility) 111.12(d)(1) (consumer protection laws)	407,560	\$407,560	\$407,560,560	0	N/A	0
Count V – Slamming	54.42(a)(9) (switching without authorization)	203,780	\$203,780	\$203,780,000	12 <sup>g</sup>	54.42(9) (switching without authorization)	\$1,200
Count VI- Complaint Handling	56.1(a) (statement of policy) 56.141(a) (dispute procedures) 56.151 (general dispute rules) 56.152 (contents of company report) 111.13 (EGS responsibility)	1,018,900	\$1,018,900	\$1,018,900,000	113 <sup>h</sup>	56.151 (general dispute rules)	\$11,100

<sup>g</sup> Count is based on consumer witnesses identified in JC MB at 80-88 and Proposed FOF 93.

<sup>h</sup> Count is based on consumer witnesses identified in JC MB at 88-105 and Proposed FOF 100, 101, 102 and 109. Consumer witnesses identified in Proposed FOF 107 and 108 are not included since the Company was not obligated to offer refunds and the failure to do so, if the allegations are true, is not a violation of any Commission regulation, absent other information (such as a billing error) which has not been presented.

	Alleged Violations in Brief – Summary of Argument	Number of Alleged Violations	Joint Complainants' Proposed Civil Penalty – I <sup>a</sup>	Joint Complainants' Proposed Civil Penalty – II <sup>b</sup>	Number of Consumer Witnesses	Applicable Regulation	Civil Penalty Upon \$100 Per Consumer <sup>c</sup>
Count VII – Providing Accurate Pricing Information	54.5(c) (disclosure statement components) 54.43(1) (accurate information/plain language) 54.43(f) (EGS responsibility) 111.12(d)(1) (consumer protection laws) 111.12(d)(5) (plain language)	1,018,900	\$1,018,900	\$1,018,900,000	0	N/A	0
Count VIII – Prices Conforming to Disclosure Statement	54.4(a) (prices billed must reflect marketed prices) 54.5(a) (disclosure statement must reflect marketed and billed prices)	407,560	\$407,560	\$407,560,560	0	N/A	0
Count IX – Compliance with Telemarketer Registration Act	54.43(f) (EGS responsibility) 111.10(a) (compliance with TRA) 111.12(d)(1) (consumer protection laws)	611,340	\$611,340	\$611,340,000	0	N/A	0

Alleged Violations in Brief – Summary of Argument	Number of Alleged Violations	Joint Complainants' Proposed Civil Penalty – I <sup>a</sup>	Joint Complainants' Proposed Civil Penalty – II <sup>b</sup>	Number of Consumer Witnesses	Applicable Regulation	Civil Penalty Upon \$100 Per Consumer <sup>c</sup>
<b>TOTAL</b>	7,336,080	\$7,336,080	\$7,336,080,000	354		\$35,400

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

CERTIFICATE OF SERVICE

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

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Dated this 23<sup>rd</sup> day of December, 2015.

A handwritten signature in cursive script that reads "Karen O. Moury". The signature is written in black ink and is positioned above a horizontal line.

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Karen O. Moury, Esq.