

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

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January 28, 2016

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

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

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

Secretary Chiavetta:

Enclosed please find the Joint Answer of the Commonwealth of Pennsylvania, Office of Attorney General, and the Office of Consumer Advocate to Respond Power, LLC Motion to Strike Letter, in the above-referenced proceeding.

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

Respectfully Submitted,

A handwritten signature in cursive script that reads "Kristine E. Marsilio".

Kristine E. Marsilio
Assistant Consumer Advocate
PA Attorney I.D. #316479

Enclosures

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

*196330

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

JOINT ANSWER OF THE COMMONWEALTH OF PENNSYLVANIA, OFFICE OF
ATTORNEY GENERAL, AND THE OFFICE OF CONSUMER ADVOCATE
TO RESPOND POWER, LLC
MOTION TO STRIKE LETTER

TO ADMINISTRATIVE LAW JUDGES BARNES AND CHESKIS:

Pursuant to Section 5.61 of the Pennsylvania Public Utility Commission (Commission) regulations regarding answers to motions, 52 Pa. Code § 5.61, the Commonwealth of Pennsylvania, Office of Attorney General, through the Bureau of Consumer Protection (OAG or BCP) and the Acting Consumer Advocate Tanya J. McCloskey (OCA) (collectively referred to

as Joint Complainants), provide the following Answer to the Respond Power, LLC (Respond Power) Motion to Strike Letter in the above-captioned proceeding.

I. INTRODUCTION

On June 20, 2014, the OAG and the OCA filed a Joint Complaint with the Commission against Respond Power pursuant to, *inter alia*, the Public Utility Code, 66 Pa. C.S. Ch. 28, and the Commission's regulations, 52 Pa. Code Ch. 54, 56 and 111. The Joint Complaint includes nine separate counts. Specifically, the nine counts in the Joint Complaint are: (1) misleading and deceptive claims of affiliation with electric distribution companies; (2) misleading and deceptive promises of savings; (3) failing to disclose material terms; (4) deceptive and misleading welcome letter and inserts; (5) slamming; (6) lack of good faith handling of complaints; (7) failing to provide accurate pricing information; (8) prices nonconforming to disclosure statement; and (9) failing to comply with the Telemarketer Registration Act. With respect to relief, the Joint Complainants requested that the Commission find, *inter alia*, that Respond Power violated the Public Utility Code and the Commission's regulations and Orders; provide refunds to the Company's customers; impose a civil penalty; order Respond Power to make various modifications to its business practices; and revoke or suspend Respond Power's Electric Generation Supplier (EGS) license, if warranted.

Pursuant to the litigation schedule adopted in this matter, Joint Complainants timely filed their Main Brief on December 3, 2015 and their Reply Brief on December 23, 2015. Following a conference call convened by Administrative Law Judges Elizabeth Barnes and Joel H. Cheskis (ALJs) on January 8, 2016 in this proceeding, it came to Joint Complainants' attention that there was a typographical error in their Main Brief and a discrepancy between the text and a footnote,

which resulted in some confusion.¹ On January 11, 2016, Joint Complainants filed a Letter with the Commission, acknowledging the typographical and discrepancy errors. On January 14, 2016, Respond Power filed a Motion to Strike the Letter filed by Joint Complainants, seeking to strike the Letter in its entirety. For the reasons set forth below, Joint Complainants submit that the ALJs should deny Respond Power's Motion.

II. ANSWER

Respond Power makes two primary arguments in support of its Motion to Strike: 1) Joint Complainants' Letter in this proceeding goes beyond correcting a mere typographical and discrepancy error, and Joint Complainants have failed to support their "new proposal;" and 2) consideration of the Letter would violate Respond Power's due process rights. See Respond Power Motion at 2-5. For the reasons set forth below, Joint Complainants submit that Respond Power has mischaracterized the Letter filed by Joint Complainants in this proceeding. Furthermore, the Letter filed by Joint Complainants in this proceeding does not violate Respond Power's due process rights, is appropriate and promotes judicial economy.

First, Respond Power argues that the corrections in the Letter "go far beyond the correction of a mere typographical error and a discrepancy and, in reality, go to the very core of the remedies sought by Joint Complainants in this proceeding." Respond Power Motion at 2. Respond Power asserts that Joint Complainants have revised their civil penalty request from \$7 billion to \$7 million and have provided no explanation of or support for this proposal. Id. Respond Power further asserts that Joint Complainants have failed to revise the civil penalties formula set out in their Main Brief or address how the "new proposal" reflects the factors set forth in the Commission's Policy Statement at 52 Pa. Code § 69.1201 (Rosi Factors). Id.

¹ Said conference call was unrelated to the present matter.

Joint Complainants submit that Respond Power mischaracterizes Joint Complainants' Letter. The civil penalty amount was clearly set forth on page 169, line two of Joint Complainants' Main Brief. The Letter was not an attempt by Joint Complainants to change their civil penalty request. Rather, the Letter was served to promote judicial efficiency. During the January 8, 2016 conference call that was convened by the ALJs in this proceeding, it came to Joint Complainants' attention that there had been a typographical error in Footnote 54 on page 169 of Joint Complainants' Main Brief and a discrepancy in the information in the text on page 168 and the information in Footnote 54 on pages 168-69 of their Main Brief. Joint Complainants filed the Letter solely in an attempt to clear up any confusion. Again, Joint Complainants have not changed their request. In their Main Brief, Joint Complainants specifically requested a civil penalty in the amount of **BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL**. See OAG/OCA M.B. at 169. As stated in their Letter, Joint Complainants are still requesting a civil penalty in the amount of **BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL**. In fact, the Letter filed by Joint Complainants to clarify their request specifically provides, "Joint Complainants maintain [...] that the amounts identified in the text on page 169 of their Main Brief would be an appropriate civil penalty in this matter based on the evidence identified and discussed in their Main Brief." Joint Complainants submit that it would be improper to strike Joint Complainants' Letter, as the Letter only serves to promote judicial efficiency and clarify any confusion. As such, Joint Complainants submit that Respond Power's characterization of the revisions in Joint Complainants' Letter as "corrections [that] go to the very core of the remedies they have sought" is entirely unfounded.

Furthermore, as for Respond Power's assertions that Joint Complainants have failed to provide an explanation of or support for this "new proposal," Joint Complainants submit that

Footnote 54 of their Main Brief sets forth the calculation that Joint Complainants used to determine the total number of violations. As stated in their Letter, Joint Complainants acknowledge that there is a discrepancy between this Footnote and the text on page 168. Again, the Letter seeks to recognize this discrepancy but not otherwise change Joint Complainants' civil penalty request. Furthermore, Joint Complainants submit that the Letter does not change Joint Complainants' Rosi factor analysis as discussed on pages 155-70 of their Main Brief. Therefore, Joint Complainants submit that their Main Brief adequately explains and supports their civil penalty request.

Respond Power also asserts that the Letter was not authorized by the ALJs' Briefing Order issued on October 28, 2015. Joint Complainants submit that they properly served their Main Brief on December 3, 2015 and their Reply Brief on December 23, 2015, consistent with the ALJs' Briefing Order. The Letter served by Joint Complainants on January 11, 2016 did not alter or enhance the arguments made by Joint Complainants in their Main or Reply Briefs. As stated above, the Letter served to correct a typographical error and recognize a discrepancy for purposes of promoting judicial efficiency and clarifying confusion. The ALJs' Briefing Order does not prohibit such clarification. As such, Joint Complainants submit that their Letter is appropriate, and Joint Complainants have not acted inconsistently with the ALJs' Briefing Order.

Second, Respond Power asserts that consideration of the Letter would violate Respond Power's due process rights. Respond Power Motion at 4. Again, in their Main Brief, Joint Complainants specifically requested a civil penalty in the amount of **BEGIN CONFIDENTIAL** ██████████ **END CONFIDENTIAL**. See OAG/OCA M.B. at 168-69. While Joint Complainants did not initially realize that there was a typographical error and discrepancy between the text on pages 168 and Footnote 54 of their Main Brief, Respond Power recognized

this discrepancy prior to filing its Reply Brief. Specifically, in its Motion to Strike, Respond Power acknowledges that Joint Complainants requested a **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL** civil penalty in their Main Brief and asserts, “Because the Joint Complainants’ request for a civil penalty and their proposed formula for calculation of that civil penalty did not match, Respond Power was required to respond in its Reply Brief to the possibility of a civil penalty of over \$7.3 billion.” Respond Power Motion at 3. As Respond Power recognized this inconsistency in Joint Complainants’ Main Brief prior to filing its Reply Brief, Respond Power had the opportunity in its Reply Brief to respond to both possible requests for a civil penalty. Additionally, as pointed out numerous times throughout Respond Power’s Motion, in their Letter Joint Complainants have not introduced any new evidence or revised their underlying formula or Rosi factor analysis. See gen’ly Respond Power Motion at 2-5. As such, Respond Power has had the opportunity to respond to all arguments raised by Joint Complainants in their Main Brief. Therefore, consideration of the Letter is not a violation of Respond Power’s due process rights.

In support of its position that its due process rights would be violated if consideration of Joint Complainants’ Letter is permitted, Respond Power also asserts, “The fact that the amount of the civil penalty and the number of alleged violations were not even addressed until the filing of the Joint Complainants’ Main Brief, as the Joint Complaint and the expert testimony were silent on these issues, already raised serious due process concerns [...]” Respond Power Motion at 4. This statement, however, is a mere attempt by Respond Power to muddle the issue of whether the Letter filed by Joint Complainants on January 11, 2016 is appropriate. Any argument by Respond Power that its due process rights were violated because the requested civil penalty amount and the number of alleged violations were not disclosed until the filing of Joint

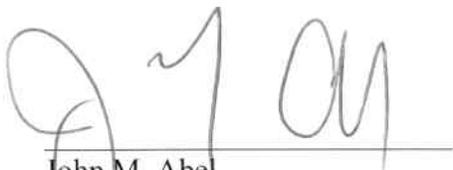
Complainants' Main Brief is not appropriate in this Motion to Strike Joint Complainants' Letter. Joint Complainants further submit that such assertion is wholly unfounded, as Respond Power had a full and complete opportunity to respond to all arguments and assertions in Joint Complainant's Main Brief in its Reply Brief.

Finally, Respond Power asserts that Joint Complainants have failed to carry their burden of proof and that "their approach in proposing a civil penalty in this case highlights the inappropriateness of their unlawful reliance on a nonexistent pattern and practice theory in this proceeding as a substitute for proving each element of their allegations." Respond Power Motion at 5. Respond Power further asserts, "This approach also demonstrates why the Commission may not rely on pattern and practice evidence in lieu of substantial evidence to support its decision." *Id.* Joint Complainants submit that this argument is also wholly improper here, as such argument does not support Respond Power's Motion to Strike Joint Complainants' Letter. In fact, this argument appears to be an inappropriate attempt by Respond Power to elaborate on arguments in its Main and Reply Briefs. Furthermore, Joint Complainants submit that they have met their burden of proof in this proceeding and have provided substantial evidence to prove each element of their allegations, as discussed in detail in their Main Brief and Reply Brief.

III. CONCLUSION.

On the basis of the foregoing, Joint Complainants respectfully request that the Administrative Law Judges deny the Respond Power Motion to Strike Letter Filed By Joint Complainants, as the Letter merely seeks to promote judicial efficiency and clarify confusion and does not violate Respond Power's due process rights.

Respectfully submitted,



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Date: January 28, 2016

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CERTIFICATE OF SERVICE

Commonwealth of Pennsylvania, by :
Attorney General KATHLEEN G. KANE, :
Through the Bureau of Consumer Protection, :
And :
TANYA J. McCLOSKEY, Acting Consumer :
Advocate, :
Complainants :
Docket No. C-2014-2427659

v. :

RESPOND POWER, LLC, :
Respondent :

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

v. :

Docket No. C-2014-2438640

RESPOND POWER, LLC, :
Respondent :

I hereby certify that I have this day served a true copy of the foregoing document, the Joint Answer of the Commonwealth of Pennsylvania, Office of Attorney General, and the Office of Consumer Advocate to Respond Power, LLC Motion to Strike Letter, in the manner and upon the persons listed below:

Dated this 28th day of January 2016.

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