

COMMONWEALTH OF PENNSYLVANIA



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June 28, 2014

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

RE: Justin L. Herp v. Respond Power LLC
Docket No. C-2014-2413756

Dear Secretary Chiavetta:

Enclosed please find the Answer of The Office of Consumer Advocate to the Respond Power LLC Motion in Limine, in the above-referenced proceeding.

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

Respectfully submitted,

A handwritten signature in black ink that reads "Barrett C. Sheridan".

Barrett C. Sheridan
Assistant Consumer Advocate
PA Attorney I.D. # 61138

Enclosures

cc: Honorable Elizabeth H. Barnes, ALJ
Certificate of Service

187417

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Justin L. Herp

v.

Respond Power LLC

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Docket No. C-2014-2413756

ANSWER OF
THE OFFICE OF CONSUMER ADVOCATE
TO THE RESPOND POWER LLC
MOTION IN LIMINE

I. INTRODUCTION

The Office of Consumer Advocate (OCA) files this Answer to the Motion In Limine (Motion) filed by Respond Power LLC (Respond Power or Company) pursuant to 52 Pa. Code Section 5.102(b). Respond Power filed its Motion on July 7, 2014 requesting that the presiding Administrative Law Judge (ALJ) limit the scope of evidence and issues to be addressed as part of Mr. Justin Herp’s formal complaint against Respond Power. Respond Power requests that the presiding ALJ issue an order “clarifying” that the only issue in dispute is “whether Respond Power complied with the Commission’s regulations addressing sale and marketing practices at 52 Pa. Code § 53.43 [sic]....”¹ Motion, ¶ 11. Further, Respond Power requests that the ALJ bar the presentation of any evidence concerning Mr. Herp’s request for a refund. Id.

¹ The section cited by Respond Power appears inapplicable. Section 53.43 pertains to the maintaining of publicly available tariffs by noncommon carriers. 52 Pa. Code § 53.43. Whether Respond Power intended to cite to Section 54.43 “Standards of Conduct and Disclosure for Licensees” is unclear. As set forth in this Answer, the OCA

The OCA submits that Respond Power's Motion should be denied. At the outset, the OCA notes that much of Respond Power's Motion in Limine relitigates its Motion for Summary Judgment. ALJ Barnes denied Respond Power's Motion for Summary Judgment noting that the material facts in dispute implicated questions of Respond Power's compliance with numerous Commission regulations under Chapters 54, 56, and 111, as well as Section 2807(d)(2) of the Public Utility Code. Order Denying Motion for Summary Judgment at 4-7 (entered June 25, 2014)(June 25 Order). Yet, Respond Power's Motion in Limine requests that ALJ "clarify" that only Respond Power's compliance with a single section of the Commission's sales and marketing regulations is in dispute. Motion, ¶ 11.

Nor should the presiding ALJ enter an order restricting the scope of Mr. Herp's testimony and evidence, as requested by Respond Power. As the presiding officer, ALJ Barnes will have the ability to rule on the relevance and/or materiality of evidence as it is proffered. Rather than promote administrative efficiency as claimed by Respond Power, the requested restriction on development of the evidentiary record would both impair Mr. Herp's request for relief and impede determination of an appropriate remedy, should Respond Power be found to have violated Commission's orders, rules, the Public Utility Code, or other Pennsylvania consumer protection laws.

As set forth in this OCA Answer, Respond Power's Motion in Limine must be denied.

submits that the scope of Mr. Herp's complaint calls into question Respond Power's compliance with a broader range of legal obligations than one single section of the Commission's regulations.

II. ARGUMENT

A. The Commission's Administrative Hearing Process Assures The Fair And Efficient Development Of The Evidentiary Record

Respond Power's Motion asks the ALJ to issue an order that would limit the development of the evidentiary record even before the hearing has commenced. Respond Power's request for a civil practice form of relief should not be granted in the context of Mr. Herp's formal complaint before the Commission.

The Commission has recognized that the motion in limine procedure may serve a purpose in civil practice. However, the Commission has generally viewed "a *Motion in Limine* [as] an inappropriate vehicle to challenge the introduction of evidence in an administrative proceeding." Re Duquesne Light Company, 57 Pa. PUC 313, 315 (1983). The motion in limine "is a procedure for obtaining a ruling on the admissibility of evidence prior to or during trial, but before the evidence has been offered." Application of PECO Energy Company, Docket No. A-00110550F0147, Opinion and Order at 21 (June 22, 2000)(PECO). The Commission has found less need for such a civil procedure tool in administrative practice:

While it is true that the traditional use of a Motion in Limine is to prevent prejudice that might occur merely by offering the evidence to a jury, [fn omitted] as the proceeding before us is an administrative proceeding, the possibility of prejudicing the trier of fact by the mere offering of the evidence is remote.

Re Duquesne at 317. Rather than grant a blanket exclusion of evidence, the Commission relies on the ALJ as "capable of ruling on the relevance and/or admissibility of each piece of proffered evidence." Id. The Public Utility Code and Commission's rules only require that evidence "be relevant and material to the issues presented and be substantial enough to support the Commission's decision in order to be admissible." Application of Apollo Gas Co., Docket No.

A-120450F003, Fourth Interim Order of ALJ Corbett, 1991 Pa. PUC LEXIS 61, 3 (Aug. 2, 1991)(Apollo Gas); see also Joint Application of West Penn Power d/b/a Allegheny Power, et al, Docket No. A-2010-2176520, Order on Motion in Limine at 2 (Sept. 28, 2010)(Denied motion in limine that sought to exclude Direct Energy testimony as outside the scope of the proceeding and beyond the Commission's authority to grant Direct Energy's request for relief). A motion to strike the offer of specific evidence is the more appropriate tool, rather than a motion in limine. Apollo Gas, 1991 Pa. PUC LEXIS 61, 2.

The OCA submits that Respond Power's Motion is without merit. Respond Power's request that the presiding ALJ issue a "clarification order" in reality asks the ALJ to decide in a vacuum the admissibility of evidence not yet presented. Grant of Respond Power's motion could harm Mr. Herp's interest. See PECO at 22 (An order that would exclude evidence in advance of a determination of the relevance and materiality of evidence could violate the due process rights of parties.) The OCA submits that the ALJ's authority to control the receipt of evidence and make determinations as to the admissibility of evidence provide sufficient administrative efficiency without sacrifice of procedural protections and substantive rights.

B. Respond Power's Request For Clarification That The Scope Of This Proceeding Is Limited Must Be Denied As Inconsistent With Mr. Herp's Complaint And ALJ Barnes' Order Denying Summary Judgment

Respond Power requests that the presiding ALJ issue a "clarification order" stating that only Respond Power's compliance with a single Commission sales and marketing regulation, "Section 53.43" [sic] is in dispute. Motion ¶¶ 10, 11. The OCA submits that Respond Power's position that the scope of this proceeding is limited to its compliance with a single regulation is patently incorrect and inconsistent with Mr. Herp's formal complaint and ALJ Barnes' June 25 Order that denied Respond Power's Motion for Summary Judgment.

Mr. Herp's formal complaint is but the start of development of the factual and legal record regarding whether and how Respond Power's sales and marketing induced Mr. Herp to switch to Respond Power for electric supply service and the consequences of Respond Power's actions. The OCA opposed Respond Power's Motion for Summary Judgment, identifying a broad range of possible violations by Respond Power of its legal obligations to Mr. Herp, including but not limited to the Public Utility Code and the Commission's regulations at Chapters 54, 56, and 111, 52 Pa. Code Ch. 54, 56, 111. ALJ Barnes denied summary judgment, noting that Mr. Herp's formal complaint calls into question "whether Respond Power provided Complainant with accurate and adequate information to make an informed decision about whether to switch to Respond Power for service." June 25 Order at 5. ALJ Barnes observed that there "are consumer protections which must be followed as set forth in 66 Pa.C.S. § 2807(d)(2) and the Commission's regulations found in Chapters 54 and 56 of the Pennsylvania Code. 52 Pa. Code §§ 54.1-54.7."

The OCA recognizes that ALJ Barnes' June 25 Order does not reflect a judgment on the merits of Mr. Herp's formal complaint and whether Respond Power has in fact violated any of its legal obligations as a licensed electric generation supplier (EGS). Even so, the OCA submits that there is no foundation for Respond Power's position that the scope of this proceeding is limited to the question of Respond Power's compliance with a single Commission regulation. See Motion ¶ 11. Respond Power's request for the issuance of a "clarification order" in its favor must be denied.

C. Respond Power's Request For An Order Excluding Evidence Regarding Mr. Herp's Request For A Refund Must Be Denied On Multiple Grounds

Respond Power acknowledges that its Motion for Summary Judgment included the allegation “that the Commission lacks jurisdiction to award the relief requested by Complainant, i.e. a refund of rates paid or an adjustment of rates billed for electric generation services.” Motion ¶ 6. Respond Power acknowledges that ALJ Barnes denied Respond Power's Motion for Summary Judgment. *Id.*, ¶ 8. Nonetheless, Respond Power requests that the presiding ALJ grant its Motion in Limine and order that “the presentation of any evidence concerning the Complainant's request for a refund will be excluded from the hearing.” *Id.*, ¶ 11. In support, Respond Power repeats arguments regarding the Commission's subject matter jurisdiction that Respond Power made in its Motion for Summary Judgment. *Id.*, ¶¶ 12, 14, 16-19. Respond Power suggests that entry of such a one-sided order in its favor will benefit all parties through the promotion of “administrative efficiency and judicial economy....” *Id.*

The OCA submits that multiple grounds support denial of Respond Power's request to exclude any evidence pertaining to Mr. Herp's request for a refund. First, Respond Power's Motion is an improper vehicle to relitigate its Motion for Summary Judgment. Second, the benefits of speed and efficiency claimed by Respond Power would unreasonably come at the sacrifice of Mr. Herp's rights to a just proceeding. Third, grant of Respond Power's Motion would prevent development of the record regarding Mr. Herp's right to relief for the consequences of any violation by Respond Power of its legal obligations, including but not limited to, whether Respond Power provided Mr. Herp with adequate and accurate information before he decided to switch service and whether Respond Power's marketed prices matched the agreed upon disclosed prices and matched the billed prices. See 52 Pa. Code §§ 54.1, 54.4(a),

54.5(a), 54.7(a). Fourth, grant of Respond Power's Motion would impair the Commission's ability to determine an appropriate remedy, for any proven violation by Respond Power.

1. Respond Power's Motion In Limine Improperly Seeks To Relitigate Its Motion For Summary Judgment

The OCA submits that Respond Power's Motion is procedurally improper. Respond Power did not timely raise preliminary objections, including issues pertaining to the Commission's jurisdiction. See June 25 Order at 6. ALJ Barnes denied Respond Power's Motion for Summary Judgment. Id. A motion in limine is an improper vehicle to seek to relitigate a prior motion lost. Apollo Gas, 1991 Pa. PUC LEXIS 61, 2 (ALJ denied objections to discovery and then denied motion in limine request for limitation of the scope discovery). Respond Power should not be permitted to relitigate its Motion for Summary Judgment through its Motion in Limine.

2. Respond Power's Motion In Limine Would Impair Mr. Herp's Right To A Just Proceeding

As discussed above, Respond Power's request to exclude evidence not yet offered or subject to review for relevance and/or materiality is unusual relief in the context of the Commission's administrative process. In the June 25 Order, ALJ Barnes determined that consideration of untimely preliminary objections raised by Respond Power would be unfair to Mr. Herp as a pro se complainant, pursuant to Section 1.2(d). 52 Pa. Code § 1.2(d). The OCA submits that the entry of an order excluding the receipt of evidence related to Mr. Herp's request for relief would be equally unfair and unjust. Section 1.2(a) favors the "speedy, just and inexpensive determination of every action...." 52 Pa. Code § 1.2(a). The OCA submits that the phrase "speedy, just and inexpensive" is not a multiple choice. Section 1.2(d) particularly favors

liberal construction of the Commission's rules in the context of pro se complainant proceedings. 52 Pa. Code § 1.2(d); Grmusa v. Dominion Retail, Inc., Docket No. C-2009-2124359, Order at 5 (Apr. 16, 2010)(Grmusa). Mr. Herp should be allowed a full opportunity to present evidence which is relevant, material and sufficient to support a Commission order.

3. The Commission Has Jurisdiction And Authority To Rule On Mr. Herp's Request For A Refund As A Consequence Of Respond Power's Alleged Violations

Mr. Herp's request for a refund or credit is within the Commission's jurisdiction and authority. Section 501 grants the Commission authority to enforce the Public Utility Code and the Commission's regulations and Orders. 66 Pa.C.S. § 501. EGSs are considered public utilities for the purposes describe in Section 2809 of the Public Utility Code. 66 Pa.C.S. §§ 102, 2809; see also Delmarva Power & Light Co. v. Pa. PUC, 870 A.2d 901, 909-10 (Pa. 2005).

Section 2809(e) of the Public Utility Code states:

Form of regulation of electric generation suppliers. – The commission may forbear from applying requirements of this part which it determines are unnecessary due to competition among electric generation suppliers. In regulating the service of electric generation suppliers, the commission shall impose requirements necessary to ... assuring that 52 Pa. Code Ch. 56 (relating to standards and billing practices for residential utility service) are maintained.

66 Pa.C.S. § 2809(e). Section 2809(e) allows the Commission to forbear from applying the Public Utility Code but does not limit the Commission in this instance. In addition to imposing requirements to assure that EGSs maintain standards and billing practices consistent with Chapter 56, Chapter 54 of the Commission's regulations also relate to EGSs' billing practices. See 52 Pa. Code Ch. 54, 56. Section 54.43(f) states 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.” 52 Pa. Code § 54.43(f). Chapter 111 of the Commission’s regulations also govern the conduct of Respond Power and its agents engaged in the sales and marketing of electric supply service. 52 Pa. Code Ch. 111. Section 111.12(d) is intended to protect consumers and states that EGSs “[m]ay not make false or misleading representations including misrepresenting rates or savings offered by the supplier.” 52 Pa. Code § 111.12(d).

Mr. Herp’s Formal Complaint states that Respond Power made misrepresentations including promises of savings relative to the price to compare (PTC) of his electric distribution company, misrepresentations that induced him to switch to Respond Power for electric supply service. If proven, then Respond Power is in violation of one or more Commission regulations that are directed at protecting consumers and promotion of a fair competitive market for electric supply.

In Grumsa, the complainant alleged that the EGS Dominion Retail enticed him to switch from Duquense Light to Dominion Retail with promises of 10% savings; the complainant asked for a refund and fines. Grumsa v. Dominion Retail, Inc., Docket No. C-2009-2124359, Initial Decision at 1 (Dec. 1, 2009)(Grumsa I.D.). The presiding officer granted the EGS’s preliminary objections that challenged the Commission’s jurisdiction over the EGS’s pricing and private contract and the sufficiency of the complaint. Id. at 2-3, 7-9. The Commission reversed the presiding officer’s initial decision, noting:

The Complaint alleged that the Complainant was charged a higher rate than what was represented to him by Dominion Retail. The Commission's jurisdiction over electric generation suppliers, such as Dominion Retail, is contained within the Competition Act. 66 Pa. C.S. §§ 2801 *et seq.* Furthermore, the Commission has promulgated rules for EGSs to follow as a condition of receiving a license to operate. 52 Pa. Code § 54.43. One of these conditions

is that an EGS' advertised prices must match its billed prices, and that billed prices must reflect marketed prices. 52 Pa. Code §§ 54.4(a) and 54.7(a). This Commission has set forth rules that EGSs must follow and has the obligation, and, therefore, the jurisdiction, to enforce those rules.

Grmusa at 5. The Commission remanded the formal complaint to the Office of Administrative Law Judge for a full hearing to provide the complainant with an opportunity to be heard. The OCA submits that the Commission categorically has jurisdiction over complaints that request relief for an alleged violation of an EGS's obligation to match the billed price to the marketed price.

The Commission has ordered equitable relief in other instances. See e.g. Pa. PUC v. Reed, 1972 Pa. PUC LEXIS 40, 46 Pa. PUC 19; Ely v. Pennsylvania Water, Docket No. C-20055616, Order at 1 (July 10, 2006); C.S. Warthman Funeral Home, et al., v. GTE North, Inc., Docket No C-00924416, Order (June 4, 1993).

The OCA submits that the Commission does have jurisdiction over Respond Power and jurisdiction to enforce its regulations that govern Respond Power's conduct towards both prospective and acquired consumers, ranging from Respond Power's marketing, sales, enrollment, and billing activities. Respond Power's request for an order excluding all evidence pertaining to Mr. Herp's request for a refund is clearly contrary to the Public Utility Code, Commission regulations, and Mr. Herp's right to seek relief for harms that that a consequence of Respond Power's solicitation of Mr. Herp to switch his electric supply service.

4. Evidence Of Harm Resulting From Violations By Respond Power Is Relevant To The Commission's Consideration Or An Appropriate Penalty

Apart and in addition to Mr. Herp's personal request for relief, the OCA submits that evidence regarding the economic consequences of any misconduct or violations by Respond

Power of its obligations under the Public Utility Code, Commission regulations, and related law is relevant to the consideration of an appropriate civil penalty. 66 Pa.C.S. § 3301(a); see e.g. 52 Pa. Code §§ 54.42; 111.3(c). The first factor of the Commission’s “Factors and Standards for Evaluating Litigated and Settled Proceedings” is consideration:

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

52 Pa. Code § 69.1201(c)(1). The second factor is:

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

52 Pa. Code § 69.1201(c)(2). Thus, while the willful fraud an EGS agent in the sales and marketing of electric supply service could alone support imposition of a civil penalty, record evidence that the act of EGS’s agent resulted in economic harm could influence the size of the penalty and so is relevant.² Alternatively, restitution or credits provided by an EGS to offset a consumer’s loss may weigh in favor of a lesser penalty. David Marciniszyn v. PECO Energy and PPL, Inc., 2000 Pa. PUC LEXIS 82, 16-17. Although Respond Power casts its Motion as promoting administrative efficiency, the issuance of an order excluding evidence regarding Mr. Herp’s request for a refund would reduce Respond Power’s civil penalty risk, in the event of any determination of misconduct by Respond Power.

The OCA submits that Respond Power’s request for a clarification order, if granted, would also shortchange development of the legal framework for a Commission order.

²² The Commission’s factors are applied more strictly in litigated proceedings than in review of settlements. 52 Pa. Code § 69.1201(b).

See Motion ¶¶ 10, 11, 19. Respond Power filed its present Motion pursuant to Section 5.103. Motion at 1, citing 52 Pa. Code § 5.103. The OCA submits that a “clarification order” is the wrong outcome, for an ALJ ruling on a motion that involves a question of jurisdiction. Section 5.103(d) provides:

If a motion involves a question of jurisdiction, the establishment of a prima facie case or standing, the presiding officer may render a final determination with regard to a motion prior to the termination of hearings by issuing an initial or recommended decision.

52 Pa. Code § 5.103(d). ALJ Barnes has already determined that the Commission does have jurisdiction to hear Mr. Herp’s formal complaint. June 25 Order at 6. The OCA submits that any decision that the Commission’s jurisdiction is limited should be presented as an initial decision or recommended decision, which would allow for the filing of exceptions, not through the issuance of a “clarification order.” 52 Pa. Code § 5.533.

The OCA submits that Respond Power’s request for an order excluding all evidence pertaining to Mr. Herp’s request for a refund must be denied. Contrary to Respond Power’s claim of administrative speed and efficiency benefits for all, the issuance of a “clarification order” as requested by Respond Power would unreasonably tilt the administrative process in Respond Power’s favor to the detriment of Mr. Herp as the pro se complainant and the public interest in deterring wrongful conduct by EGSs.

III. ANSWER

1. Admitted.

2. No response is required. The Formal Complaint of Mr. Herp speaks for itself.

3. Denied that Respond Power filed an Answer setting forth averments. A compliance analyst for Respond Power filed a Letter Answer that contained unverified statements. See July 25 Order at 5-6. No response required as to Respond Power's statement regarding settlement negotiations. Strict proof required.
4. Admitted.
5. Admitted.
6. No response required. The Motion for Summary Judgment is of record and speaks for itself.
7. Admitted.
8. No response required. The July 25 Order denying Respond Power's Motion for Summary Judgment speaks for itself.
9. Admitted.
10. Respond Power's statement of purpose requires no answer. Denied as to Respond Power's claim that grant of its Motion in Limine is proper and will provide benefits. The OCA Answer as set forth in II. A., B., and C. and III., *infra*, is incorporated by reference.
11. Denied that Respond Power's request for relief is proper and will provide benefits. The OCA Answer as set forth in II. A., B., and C. and III., *infra*, is incorporated by reference.
12. Denied. Respondent's allegations constitute conclusions of law, which require no response and are, therefore, denied.
13. Denied. Respondent's allegations constitute conclusions of law, which require no response and are, therefore, denied. The July 25 Order speaks for itself. The Respondent's Motion reads into the July 25 Order a conflict which does not exist. The July 25 Order ruled that preliminary objections not timely raised are waived as a general matter. July 25 Order at 6. The

July 25 Order acknowledges that subject matter jurisdiction may be raised at other times. The OCA Answer as set forth in II. A., B., and C. and III., *infra*, is incorporated by reference.

14. Denied. Respondent's allegations constitute conclusions of law, and are denied. Further, Respondent cites to an Order on Preliminary Objections which was decided in favor of the consumer complainant and against Respond Power. Tustin v. Respond Power LLC, Docket No. 2014-2417552, Order Denying Preliminary Objections (June 27, 2014)(Tustin). In Tustin, ALJ Barnes ruled in the affirmative that the:

Commission has jurisdiction over complaints involving the marketing and sales activities of electric generation suppliers. Therefore, since the instant Complaint involves the marketing and sales activities of Respond, the Commission has jurisdiction to hear this Complaint. 66 Pa. C.S. §2807(d)(2). See also, *Grmuska v. Dominion Retail, Inc.*, C-2009-2124359, Order (April 16, 2010).

Tustin at 4. The ALJ found that the complaint set forth a prima facie case “involving consumer protection issues and Chapter 111 of the Pennsylvania Code” as well as “additional consumer protections which must be followed as set forth in 66 Pa. C.S. § 2807(d)(2) and the Commission’s regulations found in Chapters 54 and 56 of the Pennsylvania Code. 52 Pa. Code §§ 54.1 - 54.7.” Id. at 5. The OCA denies that Tustin supports Respond Power’s request for a clarification order. The Commission’s Chapter 54, 56, and 111 regulations governing EGSs are based in part on the Commission’s authority under Section 1501 of the Public Utility Code and specific provisions of Chapter 28. See e.g. Marketing and Retail Sales Practices for the Residential Energy Market, Docket No. L-2010-2208332, 43 Pa.B. 3473, 3489 (Final regulations adopted “pursuant to 501, 504, 1501, 1504, 2206(b), 2208(b), 2807(d)(1), 2809(b) and (e) ... and the regulations promulgated thereunder...”)(June 29, 2013). As a licensed EGS, Respond Power must be “fit, willing and able to perform properly the service proposed and to conform to

the provisions of this title, *including the commission's regulations regarding standards and billing practices*, and that the proposed service, to the extent authorized by the license, will be consistent with the public interest and the policy declared in this chapter; otherwise, such application shall be denied.” 66 Pa.C.S. § 2809(b)(emphasis added). The Commission’s jurisdiction and authority over the quality of Respond Power’s service, including marketing and sales, billing, and handling of customer disputes is no less than the Commission’s authority over the quality of service provided by electric distribution company utilities.

15. Denied. Respondent’s allegations constitute conclusions of law, and are denied. By way of further answer, the OCA incorporates its response to III.14, above. The OCA further notes the Initial Decisions filed in MacLuckie v. Palmco Energy PA, LLC, Docket No. C-2014-2402558 and Yagliderelirer Corp. v. Blue Pilot Energy, LLC, Docket No. C-2014-2413732 are not final, where parties have filed exceptions.

16. Denied. Respondent’s allegations constitute conclusions of law, and are denied. By way of further answer, the two Commission orders post-date Respond Power’s sales and marketing contact with Mr. Herp that induced him to switch to Respond Power and cannot control. Further, it is denied that a billing notice as required by Section 54.5(b)(10), even if provided by Respond Power to Mr. Herp, supports Respond Power’s Motion. The initial wrongful conduct by Respond Power, as alleged by Mr. Herp’s Formal Complaint, pre-dates receipt of such a bill notice from Respond Power.

17. Denied. Respondent’s allegations constitute conclusions of law, and are denied. By way of further answer, as discussed in II.C.3. *infra*, the Commission held in Grmusa that it had the obligation and jurisdiction to enforce compliance by the EGS with Commission regulations under the provisions of the Competition Act set forth in Chapter 28 of the Public Utility Code.

Grmusa at 5. The Commission recognized that the formal complaint concerned an allegation that the complainant was charged a higher rate by the EGS than the EGS had represented and that the complainant request a refund and civil fine. Grmusa at 5; Grmusa I.D. at 1. The Commission reversed the presiding ALJ's grant of the EGS's preliminary objections and ordered a full hearing for the consumer complainant. In Grmusa, the Commission stated that the EGS's obligation that "advertised prices must match billed prices, and billed prices must reflect marketed prices" is but one of the regulations and conditions that an EGS must follow and the Commission has the jurisdiction to enforce.

18. Denied. Respondent's allegations constitute conclusions of law, and are denied. The OCA incorporates III.14-17, above. By way of further answer, the case of David B. Lytle v. T.W. Phillips Gas & Oil Co., 2002 Pa. PUC LEXIS 44 is inapposite, where the contract at issue was between the natural gas utility and a credit card company. In contrast, as discussed above in II.C. and III.14 and 17., the Commission has express jurisdiction over the sales and marketing activities of EGSs, including the minimum requirements for disclosure statements.

19. Respondent states a prayer for relief which is denied, for the reasons set forth in II. and III, *infra*.

IV. CONCLUSION

For the foregoing reasons, the Respond Power LLC's Motion in Limine should be denied.

Respectfully Submitted,



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July 28, 2014

00186119.3

CERTIFICATE OF SERVICE

Re: Justin L. Herp v. Respond Power LLC
Docket No. C-2014-2413756

I hereby certify that I have this day served a true copy of the foregoing document, Answer of The Office of Consumer Advocate to the Respond Power LLC Motion in Limine, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 28th day of June 2014.

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