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September 2, 2014

**VIA E-FILING**

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

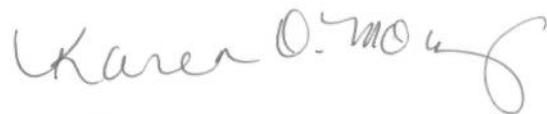
Re: Justin L. Herp v. Respond Power LLC  
Docket No. C-2014-2413756

Dear Secretary Chiavetta:

On behalf of Respond Power LLC, I have enclosed for electronic filing the Brief of Respond Power LLC in the above-captioned matter.

Copies have been served on all parties as indicated in the attached certificate of service.

Very truly yours,



Karen O. Moury

KOM/tlg  
Enclosure

cc: Administrative Law Judge Elizabeth H. Barnes (via e-mail and first-class mail)  
Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**JUSTIN L. HERP,  
Complainant**

v.

**RESPOND POWER LLC,  
Respondent**

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**Docket No. C-2014-2413756**

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**BRIEF  
ON BEHALF OF  
RESPOND POWER LLC**

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**BUCHANAN INGERSOLL & ROONEY, P.C.**

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**Dated: September 2, 2014**

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## **I. STATEMENT OF THE CASE**

Respond Power LLC (“Respond Power”) is an electric generation supplier (“EGS”) licensed by the Commission since August 19, 2010 to supply electricity or electric generation services to the public within the Commonwealth of Pennsylvania.<sup>1</sup> Mr. Justin L. Herp (“Complainant”) enrolled in a variable rate plan with Respond Power for electric generation services in October 2013, and began receiving these services on November 26, 2013.<sup>2</sup> At the request of the Complainant on March 7, 2014, he was returned to the electric distribution company (“EDC”), West Penn Power Company (“West Penn”), for default service on March 28, 2014.<sup>3</sup> Although the Complainant is a residential customer and was solicited at his home by Respond Power through a door-to-door marketing campaign, the account that was switched is a general service or business account, through which electricity is provided to a trailer park.<sup>4</sup>

At the time of enrollment, Respond Power provided a double-sided one-page sales agreement and disclosure statement to the Complainant.<sup>5</sup> Under the terms and conditions of the Complainant’s variable rate plan, rates are set by Respond Power and can vary on a monthly basis to reflect changes in the wholesale market.<sup>6</sup> The disclosure statement further provides that Respond Power’s goal is to charge a price that is less than what the customer would pay the EDC, but that savings cannot be guaranteed due to market fluctuations and conditions.<sup>7</sup>

In January 2014, wholesale prices for hourly energy supply in the day ahead and particularly the real time markets increased exponentially in response to sustained cold weather

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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-2014-2163898 (August 19, 2010) (“*Licensing Order*”).

<sup>2</sup> Herp Ex. 2; N.T. 58.

<sup>3</sup> Herp Ex. 6 and 7; N.T. 58.

<sup>4</sup> N.T. 32-33.

<sup>5</sup> Respondent Exhibit Nos. 1 and 2; N.T. 15.

<sup>6</sup> Respondent Exhibit No. 2.

<sup>7</sup> Respondent Exhibit No. 2.

("Polar Vortex"). New records were set for winter electricity use in Pennsylvania and throughout the service area of PJM Interconnection, Inc. ("PJM"). High demand combined with particularly high forced outage rates for a number of generators to produce record high costs in the PJM-administered energy markets.<sup>8</sup>

Following the Polar Vortex, Respond Power experienced costs that exceeded by more than ten times its typical costs to serve retail customers. As a result of those abnormally high wholesale costs, Respond Power exercised its discretion under the Complainant's variable price contract to increase the rates to recover a portion of those costs.<sup>9</sup>

The Complainant's first month of service with Respond Power, from November 26, 2013 through December 24, 2013, was billed at the rate of \$.05990 per kWh.<sup>10</sup> The second month, from December 25, 2013 through January 24, 2014, was billed at \$.10990 per kWh.<sup>11</sup> In the third month, January 25, 2014 through February 26, 2014, the rate rose to \$.14990 per kWh,<sup>12</sup> and in the Complainant's last month with Respond Power, February 27, 2014 through March 27, 2014, his rate increased to \$.24990 per kWh.<sup>13</sup>

On March 18, 2014, Complainant filed a Formal Complaint ("Complaint") with the Commission alleging that Respond Power's sales agent told him that if he switched to Respond Power, his rate for electric generation supply would always be lower than that charged by his EDC. In addition to seeking changes in the rules governing electric choice, Complainant's request for relief is a refund to reflect the difference between the amount charged by Respond

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<sup>8</sup> *Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, Docket No. M-2014-2406134 (February 20, 2014) ("*Variable Rate Order*").

<sup>9</sup> N.T. 61.

<sup>10</sup> Herp Ex. 2.

<sup>11</sup> Herp Ex. 3.

<sup>12</sup> Herp Ex. 4.

<sup>13</sup> Herp Ex. 5.

Power under a variable rate plan and the price to compare (“PTC”) that was being charged by his EDC during the time he was served by Respond Power.<sup>14</sup>

Respond Power filed an Answer on April 15, 2014, denying all allegations in the Complaint. Respond Power contended that Complainant was validly enrolled in a variable rate plan in October 2013 and denied that it owed him any refund.

On May 7, 2014, an initial telephonic hearing was scheduled for July 1, 2014. On June 4, 2014, Respond Power filed a Motion for Summary Judgment arguing that the complaint should be dismissed because the Commission lacks jurisdiction to direct Respond Power to order the issuance of a refund. On June 24, 2014, the Office of Consumer Advocate (“OCA”) filed a Notice of Intervention and an Answer in Response to the Motion for Summary Judgment. On June 25, 2014, the Complainant requested a continuance of the hearing. By Order dated June 25, 2014, Administrative Law Judge (“ALJ”) Barnes denied Respond Power’s Motion for Summary Judgment, finding that hearings were necessary to consider the adequacy of Respond Power’s disclosure statement and alleged misrepresentations made during the sales pitch.

On July 7, 2014, Respond Power filed a Motion in Limine seeking to clarify that the hearing would address only issues concerning whether it had violated Commission regulations governing marketing and sales activities and would exclude evidence related to the Complainant’s requests for a refund. The Complainant filed an Answer opposing the Motion in Limine on July 25, 2014.<sup>15</sup> The OCA filed an Answer opposing the Motion in Limine on July 28, 2014. By Order dated July 29, 2014, the ALJ denied the Motion in Limine.

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<sup>14</sup> Formal Complaint ¶ 5.

<sup>15</sup> Along with the Answer to the Motion in Limine, the Complainant raised new issues concerning estimated meter readings and argued that on this basis, all of his usage should be deemed to have occurred during the first month of Respond Power’s service. In lieu of filing a responsive pleading, Respond Power addressed these issues at the evidentiary hearing.

An evidentiary hearing was held on August 1, 2014. Complainant represented himself at the hearing and offered his own testimony as well as testimony of Mr. Earl Hackett. Respond Power was represented by legal counsel during the hearing and offered the testimony of Adam Small, General Counsel, Respond Power. The OCA participated in the hearing through the cross-examination of Mr. Small.

## **II. SUMMARY OF ARGUMENT**

The Commission lacks subject matter jurisdiction to award the relief requested by the Complainant - namely a refund or credit to reflect the difference between what he was charged by Respond Power and West Penn's price to compare ("PTC"). As an EGS, Respond Power is not a public utility except in very limited circumstances related to licensing and the payment of state taxes, neither of which is applicable here. Simply stated, the Complainant entered into a private variable rate contract, which under its clear terms and conditions allowed Respond Power to vary the prices for electric generation service on a monthly basis to reflect changes in the wholesale market. The Complainant has not alleged that the rate increases were inconsistent with the terms and conditions of his contract. Nor has the Complainant claimed that the disclosure statement was deficient in any way. To the contrary, the Complainant admitted that he did not read the contract until after filing his Complaint.

While the Complainant has alleged that a sales agent of Respond Power told him that the price would always be lower than West Penn's PTC, he has not proven that Respond Power misled him about his variable price contract. This is particularly true in view of the written information provided by Respond Power at the time of the sale, which clearly explained that the price may vary on a monthly basis and that no guarantees could be made about the price always being lower than the EDC's PTC due to fluctuations in market conditions. Although the Complainant testified that he did not review the disclosure statement before enrolling with

Respond Power, and that in fact, he did not read it until after he filed the Complaint against Respond Power, it was incumbent upon him to review the terms and conditions before entering into the contract. As the contract was provided to him at the time of the sale, Respond Power met its obligations to provide the Complainant will complete and accurate information.

Moreover, Respond Power's disclosure statement, which was approved by the Commission during the licensing process, fully complies with the Commission's regulations. It contains all of the applicable terms and conditions and leaves no doubt that variable prices may increase to reflect fluctuations in the wholesale market.

At the heart of the Complaint is the Complainant's displeasure with amount by which Respond Power increased his variable rates and his desire to avoid paying those charges. He seeks to pay Respond Power no more than West Penn's PTC over the entire period of time while he was served by Respond Power. Alternatively, he seeks to have all of his usage billed at Respond Power's initial price due to estimated meter readings by West Penn; as meter readings are not within the control of Respond Power, and West Penn subsequently issued rebills, no adjustment to the amount due to Respond Power is warranted. Since the Commission does not have jurisdiction over EGS pricing, to address disputes regarding private contracts between EGSs and their customers, or to direct Respond Power to issue a refund or credit, the Complainant's request for relief should be denied and the Complaint should be dismissed.

### **III. ARGUMENT**

#### **A. THE COMMISSION DOES NOT HAVE JURISDICTION OVER PRICES CHARGED BY ELECTRIC GENERATION SUPPLIERS AND MAY NOT DIRECT THE ISSUANCE OF A REFUND IN A DISPUTE CONCERNING ELECTRIC GENERATION PRICES.**

The Commission does not have jurisdiction over prices charged by EGSs or to address disputes regarding private contracts between EGSs and their customers. Pennsylvania appellate

courts have long recognized that the Commission does not have authority to settle disputes under private contracts. *See, e.g., Allport Water Auth. v. Winburne Water Co.*, 393 A.2d 673, 675 (Pa. 1978). Absent the ability to regulate EGS prices or address contractual disputes, the Commission does not have statutory authority to direct the issuance of a refund in connection with a dispute concerning those prices.

As a creation of the General Assembly, the Commission has only the powers and authority granted to it by the General Assembly and contained in the Public Utility Code, 66 Pa. C.S. §§ 101 *et seq* (“Code”). *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937 (Order entered May 28, 2008); *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977). The Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. Pa. Pub. Util. Comm’n*, 43 A.2d 348 (Pa. Super. 1945). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967) (“*Roberts*”). Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992), alloc. denied, 637 A.2d 293 (Pa. 1993).

Nothing in the Code authorizes the Commission to regulate the prices of EGSs, to consider whether rates charged by EGSs are unjust, unreasonable or illegal or to direct the issuance of a refund. To the contrary, Code Section 2806(a) provides that the generation of electricity shall no longer be regulated as a public utility service or function except as otherwise provided for in this chapter.” 66 Pa. C.S. § 2806(a).

The Pennsylvania Supreme Court has found that the definition of “public utility” in Code Section 102 does not include EGSs except for the limited purposes set forth in Code Sections 2809 and 2810, 66 Pa. C.S. §§ 2809 and 2810. *Delmarva Power & Light Co. v. Pa. Pub. Util. Comm’n*, 870 A.2d 901 (Pa. 2005). Those sections have no bearing on prices charged by EGSs.

Code Section 2809 establishes the requirement for EGSs to be licensed, 66 Pa. C.S. § 2809(e), and Code Section 2810 requires EGSs to pay state taxes so as to ensure revenue neutrality to the Commonwealth of Pennsylvania. 66 Pa.C.S. § 2810.

The Commission has recognized its lack of jurisdiction to limit prices charged by EGSs. For instance, the Commission's regulations require bills of customers purchasing electric generation services from EGSs to include a statement noting that generation prices and charges are set by the EGS chosen by the customer. 52 Pa. Code § 54.5(b)(10). *See also Petition of PECO Energy Company for Approval of its Default Service Plan*, Docket No. P-2012-2283641 (March 6, 2014) ("*PECO Default Service Plan Order*").<sup>16</sup> In the *PECO Default Service Plan Order*, the Commission heard from numerous parties with competing interests on this issue, in the context of whether the Commission may cap the prices that low-income customers pay to EGSs, and concluded that "we have not found any arguments that convince us that we have statutory authority to limit prices charged by EGSs." *Id.* at 11.

In an Order adopted on February 20, 2014, responding to significant variable price increases in the retail market, the Commission sought comments from interested parties on the adequacy of disclosure and notice requirements, as well as the speed with which a consumer may switch to a different EGS. *See Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, Docket No. M-2014-2406134 (February 20, 2014) ("*Variable Rate Order*"). In the *Variable Rate Order*, the Commission noted that the rates consumers pay in the retail electric market are governed by the terms of their contract with their EGS and that some variable price contracts have no ceiling on the rate that could be charged. The Commission further observed that while a variable rate may offer substantial savings when

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<sup>16</sup> Order is currently on appeal to the Commonwealth Court of Pennsylvania, *CAUSE-PA v. Pa. Pub. Util. Comm'n.*, 445 C.D. 2014 and *McCloskey v. Pa. Pub. Util. Comm'n.*, 596 C.D. 2014.

wholesale market prices are low, customers may experience very high bills during periods of market volatility such as occurred in early 2014. For that reason, the Commission emphasized the importance of consumers on variable rates “to carefully review the terms and conditions of their contracts to determine if they are at risk for large rate increases at any given time.” *Variable Rate Order* at 3.

Likewise, several ALJs have concluded that the Commission does not regulate EGS prices and may not order the issuance of refunds by EGS. In *Yaglidereliler Corp. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2413732 (Initial Decision dated June 18, 2014) (“*Yaglidereliler Initial Decision*”), ALJ Salapa dismissed a complaint that sought a refund of “excessive rates,” finding that “the Commission lacks the authority to order the Respondent to provide either a refund or credit to the Complainant.” *Id.* at 9. ALJ Salapa reasoned as follows:

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

*Id.* at 9. In dismissing the complaint, ALJ Salapa referred to the Commission’s regulations governing disclosure statements and marketing practices, noting that violations of those rules subject EGSs to penalties imposed by the Commission. *Id.* at 10.

In *Tustin v. Respond Power LLC*, Docket No. C-2014-2417552 (Initial Decision dated June 26, 2014), ALJ Barnes issued an Interim Order denying the Respondent’s preliminary objections due to the Commission’s jurisdiction over complaints involving the marketing and sales activities of EGSs. However, on the issue of a refund, ALJ Barnes concluded that “Respondent is correct that the Commission lacks authority to order a refund to Complainant”

and noted that violations of regulations may result in civil penalties against EGSs. *Id.* at 4-5. In reaching that conclusion, ALJ Barnes relied on a similar rationale as explained by ALJ Salapa in the *Yaglidereliler Initial Decision*.

In *Russell v. Respond Power LLC*, Docket No. C-2014-2417551 (Initial Decision dated July 3, 2014), ALJ Colwell issued an Interim Order granting in part and denying in part the Respondent's preliminary objections, finding as follows:

The Commission can impose a civil penalty, payable to the Commonwealth's General Fund, but cannot award monetary damages or direct the refund or credit to Complainant's account, as the Commission has no ability to regulate the rates of an EGS.

*Id.* at. 4.

The Code provisions addressing just, reasonable and legal rates and providing for refunds when rates do not comply with these standards apply solely to public utilities, and not to EGSs. For instance, Code Section 1301 requires that every "rate made, demanded, or received by any *public utility*...shall be just and reasonable, and in conformity with regulations or orders" of the Commission. 66 Pa. C.S. § 1301 (*emphasis added*). Similarly, Section 1312 authorizes the Commission to direct the issuance of refunds by "public utilities" in any proceeding involving rates upon a determination that any rate received by a public utility was unjust or unreasonable, or was in violation of any regulation or order of the Commission, or was in excess of the applicable rate contained in an existing and effective tariff of such public utility. 66 Pa.C.S. § 1312. Since EGSs are not public utilities for the purposes of pricing, these provisions are not applicable.

The only Commission decision of which Respond Power is aware that contains a discussion about refunds in connection with an EGS is *OCA v. Utility.com, Inc.*, 212 P.U.R. 4<sup>th</sup> 255 (2001) ("*Utility.com Order*"). 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, but rather addressed the proper use of an EGS's bond after it had filed for bankruptcy. A question was raised in that case as to whether the bond could be used to satisfy consumer 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.

Even aside from the wholly different factual scenario in the *Utility.com Order*, no party in that proceeding raised an issue of whether the Commission had jurisdiction to use bond money to satisfy consumer claims. 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. *Roberts, supra*.

The Complainant has requested that a refund (or credit) be made for the difference between the price he was charged by Respond Power and the EDC's PTC. That is not consistent, however, with the clear terms of his written contract with Respond Power. Moreover, as the Commission is aware, the EDC's PTC is a regulated rate that varies on a quarterly basis to reconcile with what has actually occurred in the market. At any given time, it bears no resemblance to actual market conditions. *See Investigation of Pennsylvania's Retail Electricity Market: End State of Default Service*, Docket No. I-2011-2237962 (February 14, 2013 at 14-15). By contrast, Respond Power's rate varies on a monthly basis to reflect current market conditions. No basis exists to direct a refund of the difference between those two rates, which are developed using different methodologies.

Moreover, immediately prior to switching to Respond Power, the Complainant was being served by a different EGS, Pennsylvania Gas and Electric, also on variable rate plan. Had the Complainant stayed with that EGS, his rate may have increased in the same way it did with Respond Power, due to variable rates fluctuating with market conditions. The Complainant, therefore, has not demonstrated that by switching to Respond Power, he incurred higher electric costs than if he had stayed with the other EGS.

Alternatively, the Complainant seeks to rely on estimated meter readings in support of his claim that he should only be required to pay Respond Power's initial price for the duration of the time he was served by Respond Power. As Respond Power has no control over the meter readings and simply provides rates to West Penn for billing purposes, it has no responsibility for the manner in which the rates were applied to the Complainant's usage.<sup>17</sup> In any event, Mr. Small testified that the Complainant was later rebilled by West Penn on the basis of actual data.<sup>18</sup>

In view of the Commission's lack of statutory authority to regulate or limit the prices charged by EGSs or to direct the issuance of refunds by EGSs, the Complainant's request for relief should be denied. As a creation of the General Assembly, the Commission cannot confer this authority on itself, and in fact, the Commission has already found that it does not regulate the prices charged by EGSs. Several ALJs have taken that finding to its logical conclusion in determining that the Commission may not order the issuance of refunds. From a practical standpoint, without the ability to regulate prices, or to review whether the prices charged are just and reasonable, there is no basis upon which to award a refund.

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<sup>17</sup> N.T. 61-62.

<sup>18</sup> N.T. 63 and 72 -73.

**B. COMPLAINANT DID NOT ESTABLISH THAT RESPOND POWER MISLED HIM ABOUT HIS VARIABLE PRICES.**

The Complainant alleges that the door-to-door sales agent told him that his price with Respond Power would always be lower than the EDC's price to compare. In making this allegation, the Complainant refers to no advertising or marketing materials distributed by Respond Power containing such promises. To the contrary, the Complainant conveniently ignores the plain language of Respond Power's disclosure statement, which he was provided at the time of enrollment and which clearly provides that such savings cannot be guaranteed.

As Mr. Small testified, Respond Power contracts with third parties to handle door-to-door marketing, telemarketing and internet marketing activities; approves all literature and training materials used by the third parties and their agents; and approves quality assurance programs.<sup>19</sup> Agents are instructed to tell prospective customers that their variable rate plans may change every month based on market fluctuations, are instructed not to guarantee savings, and are required to provide disclosure statements.<sup>20</sup> Further, agents are advised that they will be suspended or terminated if they make any misrepresentations to prospective customers.<sup>21</sup> Monthly field audits of each marketer, along with monitoring by managers of agents' records and verification calls, are performed to enforce these instructions.<sup>22</sup>

While it is not possible for Respond Power to know exactly what the sales agent told the Complainant during a sales pitch made as part of a door-to-door marketing campaign, Respond Power adequately trained the agent to provide the correct information. The whole purpose of the requirement to provide disclosure statements is to ensure that prospective customers are furnished with complete and accurate information at the time of enrollment. The Commission

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<sup>19</sup> N.T. 64.

<sup>20</sup> N.T. 64.

<sup>21</sup> N.T. 66.

<sup>22</sup> N.T. 65, 81 and 83.

has emphasized the importance of consumers on variable rates “to carefully review the terms and conditions of their contracts to determine if they are at risk for large rate increases at any given time.” *Variable Rate Order* at 3.

At the time of the sale, Respond Power’s sale agent provided the Complainant with a copy of the sales agreement, which clearly showed that he was enrolling in a variable rate plan.<sup>23</sup> The Complainant signed the agreement right below the line indicating that “I have received a copy of the Terms and Conditions.”<sup>24</sup> Consistent with Section 54.5 of the Commission’s regulations, 52 Pa. Code § 54.5, Respond Power also furnished the Complainant, at the time of the sale, with a written disclosure statement containing the terms and conditions of service.<sup>25</sup> The sales agreement and written disclosure statement were presented to the Complainant as a double-sided one-page document.<sup>26</sup>

Under the terms of service for electric variable rates, the disclosure statement clearly provides in the very first line: “Your price may vary from month to month.”<sup>27</sup> It further explains that the rate is set by Respond Power and reflects generation charges incurred in the PJM Day-Ahead Market, as well as installed capacity, transmission losses, estimated state taxes, other costs incurred by Respond power and a profit margin. The disclosure statement also describes Respond Power’s goal of charging a price that is lower than what would be charged by the EDC, but emphasizes that “due to market fluctuations and conditions, Respond Power cannot guarantee that every month you will see savings.”<sup>28</sup> The disclosure statement further advised that the customer could contact Respond Power for the current variable rate. In addition, the

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<sup>23</sup> Respondent Exhibit No. 1.

<sup>24</sup> Respondent Exhibit No. 1.

<sup>25</sup> Respondent Exhibit No. 2.

<sup>26</sup> N.T. 59.

<sup>27</sup> Respondent Exhibit No. 2.

<sup>28</sup> Respondent Exhibit No. 2.

disclosure statement contained language required by Pennsylvania law informing the Complainant that he could rescind the contract within three days. Finally, the disclosure statement contained no caps on the amount by which the variable rate could increase.<sup>29</sup>

Although the Complainant has not alleged any deficiencies with Respond Power's disclosure statement, ALJ Barnes' Order denying the Motion for Summary Judgment refers to the need to consider the adequacy of this disclosure statement. Respond Power contends that its disclosure statement was submitted to the Commission with its license application and approved by the Commission through the issuance of the *Licensing Order*.<sup>30</sup> As such, Respond Power should be able to rely on that approval with certainty that it will not later be called upon to defend the disclosure statement as being inconsistent with the Commission's regulations. *See Hoke v. Ambit Northeast, LLC d/b/a Ambit Energy*, Docket No. C-2013-2357863 (Initial Decision dated November 21, 2013) (Final Order entered January 16, 2014).

Moreover, Respond Power's disclosure statement complied with the Commission's regulations that were in effect until July 14, 2014 when revisions to those regulations were implemented.<sup>31</sup> Under Section 54.5(c) of the Commission's prior regulations, 66 Pa.C.S. § 54.5(c), EGSs were required to disclose the *applicable* terms of service. Those regulations, unlike the newly revised rules, did not require EGSs to include an initial price. In addition, those regulations, like the newly revised rules, did not require the EGS to place limits on the variable prices, but only to disclose if such limits existed. In short, by including all applicable terms and conditions in the disclosure statement, Respond Power fulfilled the requirements of the Commission's regulations that were in effect at that time.

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<sup>29</sup> Respondent Exhibit No. 2.

<sup>30</sup> N.T. 60.

<sup>31</sup> *Rulemaking to Amend the Provisions of 52 Pa. Code, Section 54.5 Regulations Regarding Disclosure Statement for Residential and Small Business Customers*, Docket No. L-2014-2409385 (April 3, 2014).

As the Commission has recognized, consumers bear some responsibility to make choices that are appropriate for their individual circumstances. *William Towne v. Great American Power, LLC*, Docket No. C-2012-2307991 (Opinion and Order entered October 18, 2013 at 22). Consumers must be aware of the terms of service they agree to when entering into a contract with an EGS, just as they would for any other contract. *See MacLuckie v. Palmco Energy PA, LLC*, Docket No. C-2014-2402558 (Initial Decision dated June 16, 2014 at 13). Yet, in this case, the Complainant testified that he did not read the one-page disclosure statement until after he had filed his Complaint.<sup>32</sup> He neither read it before signing the sales agreement nor during the three-day rescission period following his enrollment with Respond Power. He offered no explanation for not reading the disclosure statement other than that he chose to simply rely on alleged snippets of language from the sales pitch of Respond Power’s sales agent.<sup>33</sup>

It is well-settled under Pennsylvania law that a competent person who signs a document but fails to read it is nevertheless bound by its terms. *See Shafer v. State Employees’ Retirement Bd.*, 548 Pa. 320, 335, 696 A.2d 1186, 1193 (Pa. 1997) (“Under Pennsylvania law, it is presumed that an adult is competent to enter into an agreement and that the signed document evidences an accurate expression of the intent of the signatories”). “A person of age is presumed to know the meaning of words in a contract, and if, relying upon his own ability, he enters into an agreement not to his best interests he cannot later be heard to complain that he was not acquainted with its contents and did not understand the meaning of the words used in the instrument which he signed.” *Design & Development, Inc. v. Vibromatic Mfg, Inc.*, 58 F.R.D. 71, 73 (E.D. Pa. 1973).

Given that the written documentation contradicts what the Complainant claims the sales agent told him, it is the terms of service in the disclosure statement that are controlling. Verbal

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<sup>32</sup> N.T. 34-35.

<sup>33</sup> N.T. 15.

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

During the hearing, the Complainant ably represented himself and came across as intelligent and articulate. As a business man, he clearly knew or should have known the importance of reviewing the written documentation containing the terms and conditions of the service he was purchasing from Respond Power. This is especially true given the high volume of usage associated with this business account.<sup>34</sup> His failure to read the written contract precludes him from now avoiding the charges that were properly imposed by Respond Power in accordance with that contract. At the heart of this Complaint is the Complainant’s displeasure of a variable rate increase that was clearly permitted under his contract with Respond Power, and he should not be relieved of paying for the service consistent with the terms of that contract.

Even after enrolling in the variable rate plan and failing to rescind the contract during the three-day rescission period, the Complainant had opportunities to switch to the EDC or another EGS when Respond Power’s price began to rise in January 2014. However, he neglected to

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<sup>34</sup> Herp Exhibits 1 through 5.

properly review his bill, claiming that he was not aware where Respond Power's charges were placed on the bill. Reviewing Herp Exhibits 1 through 5, one only needs to look to the bottom right hand corner of the bill from the EDC to see the Respond Power charges (or the charges of the Complainant's prior EGS).

The Complainant had several opportunities to avoid the effects of the wholesale market on his electric prices. If the Complainant was not willing to have his electric prices fluctuate on the basis of wholesale market conditions, he needed only review the terms and conditions spelled out in the disclosure statement to learn that his prices would in fact reflect those conditions. Even if the Complainant had reviewed the terms and conditions after the sales agent left his home, he could have rescinded the contract within three days. By later reviewing his bill, the Complainant could have determined that his prices were increasing due to market conditions and returned to the EDC sooner if he wished. The Complainant took no steps to protect himself through the review of his contract and the monitoring of his bill, and it is inappropriate for him now to rely on allegations about language contained in the sales pitch as a way to avoid paying charges owed to Respond Power pursuant to a valid variable rate contract.

#### **IV. CONCLUSION**

Respond Power LLC respectfully requests the Formal Complaint of Justin L. Herp be dismissed with prejudice and that the Commission grant any other such relief that may be just and appropriate.

Respectfully submitted,

Dated: September 2, 2014

A handwritten signature in cursive script, appearing to read "Karen", is written above a horizontal line.

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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

<b>JUSTIN L. HERP</b>	:	
	:	
v.	:	<b>Docket No. C-2014-2413756</b>
	:	
<b>RESPOND POWER LLC</b>	:	

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).

**Via Email and First-Class Mail**

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Dated this 2<sup>nd</sup> day of September, 2014.

  
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Karen O. Moury, Esq.