

COMMONWEALTH OF PENNSYLVANIA



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September 2, 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 Office of Consumer Advocate's Main Brief, 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

Docket No. C-2014-2413756

MAIN BRIEF
OF THE OFFICE OF CONSUMER ADVOCATE

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Dated: September 2, 2014

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I. INTRODUCTION

The Office of Consumer Advocate (OCA) files this Brief in support of the Formal Complaint filed on March 17, 2014 by Mr. Justin L. Herp of Butler, Pennsylvania. The OCA intervened in Mr. Herp's Formal Complaint on June 24, 2014. Mr. Herp's Formal Complaint contends that Respond Power LLC's (Respond Power or Company) did not meet its obligation as a licensed electric generation supplier (EGS) to provide consumers with adequate and accurate information to make informed decisions about whether to switch to Respond Power. In his verified Formal Complaint, Mr. Herp stated:

I was told that by switching to Respond Power my electric bill would always be lower than my distributor (west Penn power)s [sic] variable rate. That is not the case and I have seen a 150% increase to my electric supply cost since switching to respond power [sic] in January. They lied to get me to switch to their service.

Mr. Herp's Formal Complaint calls into question the legality of Respond Power's conduct, under the Public Utility Code, the Commission's regulations and relevant orders, and Pennsylvania consumer protection laws. Mr. Herp has requested equitable relief in the form of a credit or refund, so that Mr. Herp is no worse off for having switched to Respond Power in reliance upon the marketing claims of Respond Power's door-to-door sales agent. Tr. 88.

The OCA intervened in this proceeding to protect the interests of Pennsylvania consumers who shop for electric supply service. The OCA seeks to ensure that consumers are provided with adequate and accurate information enabling them to make informed decisions regarding whether to switch electric suppliers, including accurate information about pricing of electric supply. The OCA has actively engaged with Mr. Herp's formal complaint proceeding and has addressed questions of law and fact as they have arisen through pleadings to assure Respond Power's compliance and the protection of Pennsylvania consumers.

II. SUMMARY OF ARGUMENT

The OCA submits that the Commission has the authority to require Respond Power to comply with all applicable law and Commission regulations as a condition of Respond Power's license as an EGS in Pennsylvania. The Commission's Chapters 54, 56, and 111 regulations¹ are designed to protect consumers and assure that they have accurate and adequate information to make informed decisions when choosing between offers for electric supply service. When a sales agent for a licensed EGS makes misrepresentations, unsupported claims, or material omissions that lead a consumer to enroll with the EGS, the consumer has been denied those protections.

Through his Formal Complaint, Mr. Herp alleged that Respond Power's sales agent had lied to him about the pricing of Respond Power's variable rate service, misrepresentations which induced Mr. Herp to enroll with Respond Power. Mr. Herp testified during the August 1, 2014 hearing regarding what the Respond Power sales agent did and did not tell him about the pricing for Respond Power's service. Mr. Herp testified regarding the prices billed by Respond Power while he was Respond Power's customer. Mr. Herp introduced the testimony of Mr. William Hackett, Jr. to corroborate Mr. Herp's claim that Respond Power's door-to-door marketing message included misrepresentations regarding Respond Power's pricing.

Respond Power may not "make false or misleading representations including misrepresenting rates or savings offered by the supplier." 52 Pa. Code § 111.12(d)(2). Respond Power 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 §

¹ For the purpose of adjudication of Mr. Herp's Formal Complaint, the OCA's references to Commission regulations apply to the version of Chapters 54, 56, 57, and 111 in effect when Respond Power marketed its supply service to Mr. Herp through the time of Mr. Herp's switch away from Respond Power in March 2014 and the filing of his Formal Complaint.

54.43(f); accord, 52 Pa. Code § 111.3(f). Chapter 111 dictates that Respond Power ensure the training of its agents on a variety of subjects including Pennsylvania and federal consumer protection laws, ethical sales practices, and Respond Power's services and products. 52 Pa. Code § 111.5(a)(1), (2), (3). Respond Power's procedures for discipline of its sales agents for violations of Chapter 111 may be as strict as apply to the unauthorized transfer of customer accounts pursuant to Sections 57.171 et seq. 52 Pa. Code § 111.6, citing to §§ 57.171-57.179.

Mr. Herp testified that he agreed to switch to Respond Power for supply service based on the misrepresentation made by Respond Power's agent that Respond Power's prices for variable rate service would not be higher than West Penn Power's default service price-to-compare. Mr. Herp requests equitable relief in the form of an adjustment to his electric supply charges from Respond Power so he is no worse off as a result of Respond Power's sales agent's misconduct.

Respond Power will suspend or terminate a sales agent for making misleading or false representations to a consumer. Tr. 65-66. Yet, Respond Power is opposed to relief for Mr. Herp, as the consumer who relied upon those misrepresentations to his detriment. Respond Power did not directly contradict Mr. Herp's testimony regarding the misconduct of Respond Power's sales agent. Instead, Respond Power has relied upon its disclosure statement, as purportedly approved by the Commission. Tr. 80-81.

The OCA disputes Respond Power's position. The credible record evidence supports Mr. Herp's Formal Complaint claim that he was misled by Respond Power's sales agent and so wrongly induced to switch to Respond Power. Chapter 54 requires that there be continuity and consistency between the marketed or advertised price for Respond Power's service, the agreed upon price in the disclosure statement, and the billed price. 52 Pa. Code §§ 54.4(a), 54.5(a),

54.7(a).² If there is inconsistency between the marketing message communicated by Respond Power's sales agent and the content of Respond Power's disclosure statement regarding Respond Power's pricing, the OCA submits that the responsibility lies with Respond Power. Non-compliance by Respond Power with the Public Utility Code, relevant Commission regulations, orders, and consumer protection laws may result in suspension or revocation of Respond Power's license and/or the imposition of fines. 52 Pa. Code §§ 54.42(6), (7), (8), 54.43. The Commission has the authority to order equitable remedies, has done so in the past, and to do so under the present circumstances would be entirely consistently with past precedent.

III. PROCEDURAL HISTORY

Mr. Herp filed his verified Formal Complaint on March 17, 2014. Mr. Herp's Formal Complaint alleged that Respond Power made representations regarding savings that induced him to switch. After time as a customer of Respond Power, Mr. Herp determined that Respond Power's representations regarding savings were not true. Mr. Herp's Formal Complaint requested equitable relief and changes by the Commission to Pennsylvania's Electric Choice program to protect consumers. Mr. Herp attached bills from West Penn Power to document the prices charged by Respond Power while he was enrolled with Respond Power.

Respond Power submitted an Answer on April 15, 2014 (Answer) in the form of a single page letter written by a Compliance Analyst for Major Energy/Respond Power, with a copy of the Sales Agreement and Disclosure Statement attached.

² Sections 54.2 and 54.3 apply to all customers. Sections 54.4 through 54.9 of Subchapter A of Chapter 54 apply to residential and small business customers, as defined in Section 54.2. 52 Pa. Code § 54.1(b).

Respond Power enrolled Mr. Herp as a residential customer for service at his business, an apartment. Respond Power Exh. No. 1; Tr. 12; Tr. 32. Respond Power did not treat Mr. Herp as a potential commercial customer until March 2014 when he contacted Respond Power to discuss his high charges and switch to West Penn Power. Tr. 20.

ALJ Barnes issued a Prehearing Order on May 9, 2014.

Respond Power filed a Motion for Summary Judgment on June 4, 2014 requesting that the Commission deny the Formal Complaint of Mr. Justin Herp without a hearing and further proceeding.

The OCA filed a Notice of Intervention and Public Statement on June 24, 2014. The OCA also filed an Answer opposing Respond Power's Motion on June 24, 2014.

ALJ Barnes denied Respond Power's Motion for Summary Judgment. Order Denying Motion for Summary Judgment at 4-7 (entered June 25, 2014)(June 2014 Order). In her June 2014 Order, ALJ Barnes determined that the record showed that there are material facts in dispute. Further, ALJ Barnes noted that Mr. Herp's Formal Complaint called 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 2014 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." ALJ Barnes also noted the application of 52 Pa. Code § 111.12(d)(2) and (4) which bars suppliers from making false or misleading statements as well as 52 Pa. Code § 111.3 which authorizes suppliers to use an agent to conduct their sales and marketing activities in accordance with Commission rules, regulations, and orders and makes it clear that a supplier may be responsible for representations made by an agent in the course of sales and marketing contacts with Complainant.

In advance of the scheduled telephonic hearing, Respond Power filed a Motion in Limine on July 7, 2014. In its Motion, Respond Power requested that ALJ Barnes enter a "clarifying" order to limit the scope of the hearing to whether Respond Power had violated Section 54.43(a).

The OCA filed an Answer in Opposition to Respond Power's Motion in Limine on July 28, 2014.

Mr. Herp also filed an Answer on July 28, 2014, opposing Respond Power's Motion in Limine. Mr. Herp's Answer included a New Matter, raising a concern regarding a number of West Penn Power bills that applied Respond Power's prices, that varied month from to month, to estimated consumption.

ALJ Barnes issued an Order on July 29, 2014 denying Respond Power's Motion in Limine. (July 2014 Order). ALJ Barnes stated she was "unpersuaded to limit the scope of this proceeding to whether Respondent violated one regulation, because I specifically mentioned other regulations and statutes which may apply to the instant case" July 2014 Order at 2, citing to June 2014 Order at 4-7. ALJ Barnes also denied Respond Power's motion to exclude the presentation of any evidence during the hearing related to Mr. Herp's request for a refund. Id. at 2-3. ALJ Barnes determined that Respond Power's:

request for clarification actually requests a ruling on the admissibility of evidence not yet before me. This request shall be denied as it is inconsistent with my intent in the *Order Denying Motion for Summary Judgment* and in the interest of the due process rights of Complainant. If I had intended the request for relief in the form of a refund be stricken, then I would have indicated as such in an ordering paragraph.

Id. at 3.

On August 1, 2014, ALJ Barnes presided over a telephonic hearing. Mr. Herp testified and presented Herp Exhibits No. 1 to 14. Mr. Herp presented a second witness, Mr. Hackett, in support of his complaint. Respond Power presented the testimony of Respond Power General Counsel Adam Small and two exhibits. Respond Power Exhibit No. 1 is the sales agreement

with Mr. Herp. Respond Power Exhibit No. 2 is the disclosure statement that appears on the back of Respond Power's sales agreements.

IV. ARGUMENT

A. Introduction

Mr. Herp's Formal Complaint set forth a simple and basic claim: that a marketer from Respond Power made representations to him regarding the savings he would realize if he switched to Respond Power for electric supply service. Based on Mr. Herp's actual experience as a Respond Power customer, he did not realize the expected savings compared to West Penn Power's cost for electric supply. Instead his electric supply bill increased 150% over several months. Mr. Herp concluded that Respond Power had lied to him in order to induce him to enroll. Mr. Herp has requested that the Commission provide him with equitable relief, so that he is no worse off than if he had received electric supply service from West Penn Power for the time he was enrolled with Respond Power. Tr. 12, 88. Mr. Herp has not quantified the specific difference. Tr. 29-30.

As a licensed EGS,³ 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). Accordingly, Respond Power must comply with applicable residential service regulations in Chapters 54 and

³ See also 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 at 3 (Aug. 19, 2010) (Respond Power License).

56 of the Commission's regulations. 52 Pa. Code Ch. 54 and 56. Chapter 54 "Customer Information" requires the EGS to:

enable customers to make informed choices regarding the purchase of electricity services offered by providing adequate and accurate customer information. Information shall be provided to customers in an understandable format that enables customers to compare prices and services on a uniform basis.

52 Pa. Code § 54.1. The "adequate and accurate customer information" that Respond Power must provide includes all "[w]ritten, oral, and electronic communications" used by Respond Power "to communicate to consumers prices and terms of service." 52 Pa. Code §§ 54.1, 54.2. Respond Power's obligations to provide consistent, accurate and adequate information extend from the earliest of sales and marketing communications to prospective customers through to Respond Power's billing of the agreed upon price for supply service. 52 Pa. Code §§ 54.4(a), 54.5(a), 54.7(a).

The OCA submits that the Commission has jurisdiction over Respond Power as a licensed supplier and Mr. Herp's Formal Complaint claim that Respond Power made misrepresentations during the marketing phase that induced Mr. Herp to switch to his detriment. The Commission should provide Mr. Herp with equitable relief and impose other penalties on Respond Power as are appropriate and consistent with the evidentiary record, including the possibility of fines.

B. The Unrebutted Testimony Of Mr. Herp And Mr. Hackett Prove That Respond Power's Sales Agents In The Butler Area Violated Commission Regulations And Consumer Protections

The OCA submits that Mr. Herp has sustained his Formal Complaint with detailed, first person testimony that Respond Power's door-to-door sales agent promised that as an enrolled

customer of Respond Power, Mr. Herp's variable priced supply service would provide savings relative to West Penn Power and was capped or constrained by West Penn Power's price-to-compare. That Mr. Herp agreed to a variable service product is not in dispute. However, based upon the statements made by Respond Power's agent, Mr. Herp understood that Respond Power "offered rates that were always lower than the local utility company, in my case West Penn Power." Tr. 14. Mr. Herp reported that "[w]hen the sale agent left, I thought I had purchased a better utility product than West Penn." Tr. 16. "[I]t was my understanding that this variable rate did have a cap, and that being the rate --- the current rate offered by my local utility company." Tr. 26.

When the Respond Power sales agent approached Mr. Herp at his home, Mr. Herp already had some familiarity with shopping for electric supply service. Tr.14. Mr. Herp questioned Respond Power's agent about how Respond Power could offer savings compared to West Penn Power's rates. Tr. 14-15. Mr. Herp was convinced by the agent's explanation of Respond Power's purchasing approach that consistent savings compared to West Penn Power's Price-to-Compare was possible. Mr. Herp testified:

I figured West Penn was kind of my fallback utility company. They're my local utility company. So they'd be the standard that I would use any time I was shopping for electricity. I figured if it was always going to be lower than West Penn, that this could potentially work out good for us.

Tr. 15.

Based on the persuasive claims of the Respond Power sales agent, Mr. Herp agreed to enroll with Respond Power. The sales agent presented Mr. Herp with a filled in sales agreement. Mr. Herp recognized that the sales agreement indicated that he was signing up for a variable rate service, one that he understood based on the sales agent's statements "was supposed to be always

lower than West Penn's." Tr. 15-16. Mr. Herp signed the sales agreement. Only after he signed did the Respond Power sales agent show Mr. Herp the disclosure statement on the back of the sales agreement. Tr. 15-16, 87-88. Respond Power's sales agent did not review the disclosure agreement with Mr. Herp. Tr. 16. Mr. Herp briefly read the disclosure statement at that time and "saw things that seemed to correspond with what the sales agent was advertising." Tr. 33-34.

However, after experience with Respond Power's service and pricing from January to March 2014, Mr. Herp realized that the product advertised and the product delivered were completely different products. Tr. 23. Mr. Herp faults Respond Power's sales agent for misrepresenting Respond Power's variable rate service. Mr. Herp faults Respond Power's sales agent for not identifying the differences between Respond Power's service and that of West Penn Power – including that Respond Power could change its prices monthly rather than quarterly and that Mr. Herp would not be able to readily know Respond Power's price before consuming electricity. Tr. 24-24, 87-88.

Mr. Hackett testified in support of Mr. Herp. Like Mr. Herp, Mr. Hackett testified that he was solicited by a Respond Power sales agent at his home and induced to switch to Respond Power based on promises of savings compared to West Penn Power's rates for default service. Tr. 45. Mr. Hackett understood the rate would be variable but that there would be limits on the variability, capped at the level of West Penn Power's rates. Tr. 51.

The OCA submits that the testimony of Respond Power General Counsel and witness Adam Small is insufficient to counter Mr. Herp's testimony that Respond Power made misrepresentations regarding limits on the variability of Respond Power's pricing, as corroborated by Mr. Hackett who heard a similar message from a different Respond Power sales

agent in the same community in roughly the same time period. Respond Power's witness Adam Small simply testified that Respond Power sales agents are not allowed, based on training, to make misrepresentations as to pricing or savings. Tr. 64-65. According to Mr. Small, the penalty for such violations is suspension or termination of the sales agent.

The sales agent who persuaded Mr. Herp to switch to Respond Power was not presented by Respond Power to testify. Tr. 66-67. Indeed, Mr. Small did not even know if that sales agent was still working as an independent contractor for Respond Power's vendor Direct Sales Solutions at the time of Mr. Herp's initial complaint. Tr. 67, 85. To the best of his knowledge, Mr. Small did not know of any audit of that sales agent's conduct. Respond Power only sends out field auditors once a month with a random sampling of third party marketers. Tr. 83.

The OCA submits that Mr. Herp has supported his Formal Complaint with credible testimony, based on his first hand contact with Respond Power's sales and marketing agent. Mr. Herp did exercise some care and questioned the sales agent's claims that Respond Power's variable priced service would provide savings compared to West Penn Power's supply service. Tr. 14-15. The Commission has stated that "consumers do 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 at 22 (Oct. 18, 2013)(Towne). That statement does not mean that Respond Power is relieved of responsibility for misrepresentations by its sales agent. In Towne, the Commission emphasized that for Pennsylvania's retail electric market to succeed:

 this Commission must continue to send a clear message to EGSS that the egregious and deliberate behavior utilized in this case, including the use of potentially misleading statements that could result in slamming, will not be tolerated.

Towne at 22. In Mr. Herp's case, Respond Power's sales and marketing statements did actually mislead Mr. Herp and at least one other consumer, Mr. Hackett, to switch to Respond Power based on expectations of a variable rate service that would provide savings compared to West Penn Power's supply service. The OCA submits that Respond Power's lack of care and control, at a minimum, over its sales agents subjected Mr. Herp and Mr. Hackett to bills for electric supply priced far beyond their expectations. The Commission should not tolerate Respond Power's misleading sales and marketing conduct which caused financial distress to two consumers testifying in this case.

C. Respond Power's Disclosure Statement Does Not Exempt Respond Power From Liability For The False And Misleading Statements Of Its Agents.

Mr. Herp testified that he did receive Respond Power's disclosure statement, but only after he signed the sales agreement. Mr. Herp testified that he read it quickly at that stage, looking largely for confirmation or support of what Respond Power's sales agent had verbally communicated regarding Respond Power's variable priced supply service and purchasing. "I wasn't looking through it [Respond Power's disclosure statement] to see if the sales agent was telling me the truth or to try and catch them in a lie or something. I expected this pretty much said everything that he had told me." Tr. 34.

Mr. Herp later found material inconsistencies and omissions between the sales agent's claims and Respond Power's disclosure statement. For example, Mr. Herp stated that the word "goal" as used in Respond Power's disclosure statement "was certainly left out of the sales pitch." Tr. 26. Mr. Herp stated that omission was material:

You know, I have a lot of goals in life, too. That doesn't mean I'm going to acquire or achieve them all. And I'm certainly not going to, you know shop for electric service based on someone's goals.

Tr. 26.

Section 54.7(a) requires that Respond Power's "[a]dvertised prices shall reflect prices in disclosure statements and billed prices." 52 Pa. Code § 54.7(a). The obligation to provide adequate and accurate information so that Mr. Herp and other consumers might compare Respond Power's variable rate offer with other offers, such as West Penn Power's supply service lies squarely with Respond Power. 52 Pa. Code §§ 54.1, 54.2, 54.7(a).

Nonetheless, Respond Power's primary defense relies on its disclosure statement, which Respond Power states the Commission has approved as part of Respond Power's licensing application. Tr. 80-81. The OCA submits that Respond Power's position is contrary to the Commission's regulations and unsupported by Commission orders.

As discussed above, Chapter 54 imposes an obligation on Respond Power to assure that there is continuity and consistency in all communications, whether oral or print, regarding Respond Powers prices and terms of service. That continuum starts with the sales and marketing contacts – not the provision of a disclosure statement. Mr. Herp was looking for that consistency and confirmation in the disclosure statement shortly *after* he heard the sales pitch from Respond Power's sales agent and *after* he had signed the sales agreement.

Respond Power's inference that Mr. Herp should have ignored the sales agent's entire sales pitch as unreliable and not binding is without merit. Section 54.7(b) sets forth the requirements for EGS marketing materials "that offer terms of service for acceptance by consumers...." 52 Pa. Code § 54.7(b). To be treated as a stand-alone offer of Respond Power supply service, without the need for a sales agent contact, the OCA submits that Respond Power's disclosure statement for variable price service would need to include "the average price per kWh for usages of 500, 1,000 and 2,000 kWh of electricity in a table format" based on

Respond Power's factoring in "all costs associated with the rate charged to the customer...." 52 Pa. Code § 54.7(b)(2); see also 52 Pa. Code § 54.43(1) (Licensed EGSs shall "provide accurate information about their electric generation service using plain language [and] in a format that enables customers to compare the various electric generation services offered and the prices charged for each type of service.") To serve as a stand-alone combined marketing and disclosure statement that meets the Commission's regulations, the OCA submits that Respond Power's disclosure statement must include more particular information and in the required format regarding Respond Power's variable price supply offers.

Additionally, the OCA contests Respond Power's claim that the Commission has approved its disclosure statement. As evidenced by Respond Power Exhibit No. 2, Respond Power's disclosure statement covers both Major Energy's offer of gas supply and Respond Power's offer of electric supply. The OCA submits that Respond Power's license was approved by the Commission in 2010, after the Commission's 2009 grant of Major Energy's original natural gas supplier license,⁴ and before the Commission's 2012 grant of Major Energy's amended supplier license, expanding Major Energy's service territory.⁵ Only the 2009 Major Energy licensing order refers to the proposed disclosure statement. In Major Energy I, the PUC stated:

Major Energy has filed a customer disclosure statement applicable to both the residential and small commercial class. This statement conforms to structure and format as determined by the Commission.

Major Energy I at 4. The Commission's 2010 Respond Power License order does not include any similar language. Indeed, Respond Power License contains only one mention of "disclosure," and

⁴ Application of Major Energy Services, LLC To Become A Licensed Supplier Of Natural Gas Supply, Docket No. A-2009-2118836, Order (Oct. 8, 2009)(Major Energy I).

⁵ Application of Major Energy, LLC For Amendment Of Its Natural Gas Supplier License, Docket No. A-2009-2118836, Final Order (May 21, 2012) (Amendment granted, subject to conditions for 18 months.)(Major Energy II).

that is in reference to the need for Respond Power to “comply with the standards of conduct and disclosure for licensees set out in Commission regulations at 52 Pa. Code §54.43....”⁶ Respond Power License at 3. The Respond Power License order does not discuss the content of any proposed disclosure statement nor approve a disclosure statement.

Respond Power has not explained whether and how the Commission reviewed and approved Major Energy and Respond Power’s combined gas and electric single page disclosure statement.

As set forth above, there are multiple reasons why Respond Power’s disclosure statement does not contradict or override Mr. Herp’s Formal Complaint claim that he was induced by Respond Power’s sales agent to switch to Respond Power and that he relied upon the sales agent’s misrepresentations to his detriment.

D. The Commission Has Jurisdiction And Authority To Rule On Mr. Herp’s Request For A Refund As A Consequence Of Respond Power’s Violations Of Regulations Adopted To Protect Consumers And Promote Ethical Competition

Mr. Herp’s request for a refund or credit is within the Commission’s jurisdiction and authority. See July 2014 Order. 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

⁶ For example, the OCA submits that Respond Power’s disclosure statement appears to use the same size type for its explanation of “penalties, fees or exceptions” and neighboring terms and conditions, despite the requirement of Section 54.5(c)(10) that “[a]n explanation of penalties, fees or exceptions, printed in the type size larger than the type size appearing in the terms of service.” 52 Pa. Code § 54.5(c)(10). The OCA submits that this inconsistency also appears to undermine Respond Power’s claim of Commission review and approval.

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. As discussed above, Respond Power 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), see also 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. The record evidence clearly demonstrates that Respond Power is in violation of Commission regulations that are directed at protecting consumers and promotion of a fair competitive market for electric supply. "This Commission has set forth rules that EGSs must follow and has the obligation, and, therefore, the jurisdiction, to enforce those rules." Grmuska v. Dominion Retail, Inc., Docket No. C-2009-2124359, Order at 5 (Apr. 16, 2010)(Commission allowed a hearing for consumer who claimed EGS did not provide promised savings of 10%. Complaint satisfied before hearing.)

Mr. Herp has asked for equitable relief so he is no worse off than he was before. Tr. 88. As Mr. Herp has explained, the misrepresentations and omissions by Respond Power's sales agent induced Mr. Herp to switch to Respond Power for variable priced service that Mr. Herp

believed – based on statements by the sales agent – would not vary higher than West Penn Power’s supply price. The OCA submits that as the EGS, Respond Power can terminate sales agents that engage in misrepresentations and so protect Respond Power’s interests. However, Respond Power is still left with payment for electric supply sold to Mr. Herp, based on Respond Power’s billed prices, not Respond Power’s advertised and marketed prices that Respond Power’s sales agent misrepresented to Mr. Herp. So, as Mr. Herp testified “the product I was advertised and the product that was delivered were completely different products.” Tr. 24.

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 Mr. Herp’s formal complaint merits equitable relief based on the record.

E. The Commission Should Consider The Imposition Of Fines Against Respond Power, Based Upon The Record

The OCA submits that evidence regarding Respond Power’s violations of its obligations under the Public Utility Code, Commission regulations, and related law and the financial impact to Mr. Herp 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:

- (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 or misrepresentation by an EGS agent in the sales and marketing of electric supply service alone could support imposition of a civil penalty, the financial harm to Mr. Herp from Respond Power's billing for supply at prices higher than the price advertised and marketed to Mr. Herp is also relevant.⁷⁷ 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.

The OCA submits that in addition to providing Mr. Herp with equitable relief based on his Formal Complaint and testimony, the Commission should also consider the record evidence and impact of Respond Power's wrongful marketing and billing in weighing whether and the amount of an appropriate civil penalty.

⁷⁷ The Commission's factors are applied more strictly in litigated proceedings than in review of settlements. 52 Pa. Code § 69.1201(b).

V. CONCLUSION

The OCA respectfully requests that the Commission grant Mr. Herp's Formal Complaint and request for equitable relief, for the reasons set forth above and as supported by the record evidence. Further, the OCA requests that the Commission consider what other relief is appropriate, including the possible imposition of civil fines, to deter Respond Power from future violations of the Commission regulations and relevant orders.

Respectfully Submitted,



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September 2, 2014

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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, the Office of Consumer Advocate's Main Brief, 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:

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