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September 19, 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 Reply 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

**REPLY BRIEF
ON BEHALF OF
RESPOND POWER LLC**

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Attorneys for Respond Power LLC

Dated: September 19, 2014

I. STATEMENT OF CASE

Respond Power LLC (“Respond Power”) files this Reply Brief in response to the Main Brief of the Office of Consumer Advocate (“OCA”). As Respond Power’s Main Brief contained a comprehensive discussion of the evidence, legal principles and its position on the issues, Respond Power will only address those matters raised by the OCA that were not previously addressed or require clarification. By this Reply Brief, Respond Power addresses three issues: 1) the OCA’s improper use of the testimony of Mr. Hackett; 2) prior Commission approval of the relevant variable pricing language in Respond Power’s disclosure statement; and 3) the OCA’s misplaced reliance on the Commission’s prior use of equitable relief as support for directing the issuance of a refund by an electric generation supplier (“EGS”). Respond Power incorporates herein by reference its arguments and analysis contained in its Main Brief filed on September 2, 2014.

II. SUMMARY OF ARGUMENT

By a formal complaint filed against Respond Power, Mr. Justin L. Herp (“Complainant”) seeks a refund (or credit) for the difference between his electric distribution company’s price to compare and the rates charged by Respond Power pursuant to a valid variable rate plan. Complainant failed to read the disclosure statement that was provided to him at the time of enrollment and now asserts that the sales pitch of Respond Power’s agent was misleading and induced him to make the switch. Because Respond Power properly disclosed the variable nature of the Complainant’s contract and adjusted his rates in a manner that was consistent with its terms and conditions, the complaint should be dismissed. Further, the Complainant’s request for a refund should be denied on the basis that the Commission does not regulate prices charged by electric generation suppliers and is not authorized to direct the issuance of refunds.

III. REPLY ARGUMENT

The OCA refers to testimony of Mr. Hackett as supporting the Complainant's position that he was misled by Respond Power's sales agent. OCA M.B. at 10. Mr. Hackett did not testify as to any firsthand knowledge of the Complainant's transaction. Moreover, this proceeding was not about Mr. Hackett's enrollment with Respond Power. Further, his testimony did not corroborate the Complainant's allegations, as Mr. Hackett did not claim to have been promised savings during his own enrollment. Rather, he testified that a different sales agent described Respond Power's prices as "competitive with other electric companies."¹

Without a full review of Mr. Hackett's enrollment,² it is simply inappropriate for the OCA to lump his brief testimony with the Complainant's allegations to argue 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." OCA M.B. at 12. The only factual allegation that is appropriate to address in this proceeding is whether Respond Power engaged in misleading marketing practices in its dealings with the Complainant. While the Complainant was free to present Mr. Hackett's testimony as a way of trying to establish his own credibility, the OCA's argument goes well beyond the scope of this proceeding and should be ignored by the Commission.

As to Respond Power's disclosure statement, Mr. Small testified that it was submitted with its application and approved by the Commission during the application process.³ The OCA argues that because Respond Power's licensing order does not contain specific language approving the disclosure statement, it was not approved by the Commission. OCA M.B at 14-

¹ N.T. 45.

² His final bill was not presented by the Complainant but would have shown a decline in his variable rate for the last month he was served by Respond Power. N.T. 63.

³ N.T. 60.

15. This argument ignores the Commission's license application approval process, which necessarily entails a review of all documents submitted with the application. A licensing order would not have issued absent approval of the disclosure statement. A review of Respond Power's license application shows that the variable rate language in its proffered disclosure statement mirrors the language in the disclosure statement being used at the time of the Complainant's enrollment.⁴ See *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 (August 19, 2010) (Application filed February 2, 2010, Attachment A/Appendix B).⁵ Therefore, Respond Power appropriately relied on Commission approval to use the disclosure statement in question and issues regarding its adequacy are not properly before the Commission. In fact, the Complainant has not made any allegations concerning the adequacy of the disclosure statement. In any event, to the extent that it is reviewed by the Commission during this proceeding, it fully complies with the regulations that were in effect at the time of the Complainant's enrollment, as explained in Respond Power's Main Brief, at page 14.

Finally, the OCA's reliance on three cases to support its argument that the Commission may order equitable relief and direct the issuance of refunds by EGSs is misplaced. Nothing in those cases changes the lack of statutory authority for the Commission to exercise jurisdiction over EGS prices or to order EGSs to refund (or credit) charges that are owed to an EGS under a private contract with its customer.

The first case cited by the OCA is *Pa. PUC v. Reed*, 1972 Pa. PUC LEXIS 40, 46 Pa. PUC 19. That case involved a complaint against a household goods mover for charging rates

⁴ Respondent Exhibit No. 2.

⁵ This document is not available on the Commission's website because it was unpublished in 2012; it is, however, a public record that is available for review in the Secretary's Bureau.

that did not conform to its tariff. The Commission directed the refund of the extra charges by the public utility to the customer, relying on its statutory authority to order a refund if a public utility charges a rate that is higher than the tariff. While the Commission relied on a different statutory provision at that time, the language is similar to what is now contained in Section 1312 of the Public Utility Code, 66 Pa.C.S. § 1312, which applies only to public utilities. Therefore, that decision has no bearing on the issue of whether the Commission may direct the issuance of a refund by an EGS.

The second case that the OCA relies on is *Ely v. Pennsylvania Water*, Docket No. C-20055616, 2006 Pa PUC LEXIS 74. The *Ely* case involved a customer who sought to have the water company restore his driveway that was damaged during work by the company's contractor. The ALJ had dismissed the complaint because the statute of limitations had passed. The Commission remanded the complaint back to the ALJ on the basis that the principle of equitable estoppel prevented the water company from raising the statute of limitations when its repeated assurances caused the customer to relax his vigilance. The Commission simply applied the principle of equitable estoppel to allow a customer to be heard on his complaint, so that a decision could be made as to whether the company provided adequate service. The *Ely* decision offers no support for the OCA's claim that the Commission may order equitable relief in the form of a refund to a customer whose rates are set by an EGS, not the Commission.

The last case cited by the OCA in support of this argument is *C.S. Warthman Funeral Home, et al. v. GTE North, Inc.*, Docket No. C-00924416 (June 4, 1993). That case involved a dispute about toll charges for telephone service and the Commission applied the doctrine of collateral estoppel to address certain questions about the admissibility of documents into the evidentiary record. The Commission merely used equitable principles to resolve a dispute that arose during the proceeding. Reliance on the *GTE* case to support a Commission directive that

Respond Power issue a refund to a customer who elected to be on a variable rate contract is wholly misplaced.

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 19, 2014



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JUSTIN L. HERP

v.

RESPOND POWER LLC

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Docket No. C-2014-2413756

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 19th day of September, 2014.



Karen O. Moury, Esq.