

COMMONWEALTH OF PENNSYLVANIA



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September 19, 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 Reply Brief, in the above-referenced proceeding.

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

Respectfully submitted,

A handwritten signature in cursive script that reads "Barrett Sheridan".

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

Enclosures

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

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

REPLY BRIEF
OF THE OFFICE OF CONSUMER ADVOCATE

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Dated: September 19, 2014

I. INTRODUCTION

The Office of Consumer Advocate (OCA) files this Reply Brief in response to the Brief filed by Respond Power LLC (Respond Power or Company) in the matter of the Formal Complaint filed by Mr. Justin L. Herp of Butler, Pennsylvania.

On September 2, 2014, Mr. Herp and the OCA filed separate Main Briefs in support of Mr. Herp's Formal Complaint. Mr. Herp's Main Brief succinctly summarizes his case and request for relief, based on his testimony and exhibits introduced during the evidentiary hearing and cross-examination of the Company's witness. The OCA Main Brief addressed the Commission's jurisdiction to rule on Mr. Herp's formal complaint and request for relief, where Respond Power has violated Commission regulations designed to protect consumers. As set forth in the OCA Main Brief, the record evidence supports Mr. Herp's formal complaint claim that Respond Power's sales agent misled Mr. Herp and so induced him to enroll with Respond Power. The OCA Main Brief addressed Respond Power's defense that its disclosure statement controls.

Respond Power filed its Main Brief on September 2, 2014. The OCA files this Reply Brief to address the errors in Respond Power's summary of the record and theory of the law.

II. ARGUMENT

A. The Commission Has The Jurisdiction And Authority To Enforce Its Regulations And Grant Mr. Herp's Formal Complaint

In its Main Brief, Respond Power sets forth the proposition that Mr. Herp's formal complaint concerns a private contract and that the Commission lacks jurisdiction over the prices that Respond Power may charge. Respond M.B. at 5-11. Respond Power states that the Commission also lacks jurisdiction to order refunds of EGS charges. *Id.* at 8-11.

Respond Power's position that the Commission has no jurisdiction over Mr. Herp's formal complaint and request for relief must be rejected by the Commission. Respond Power's ability to offer electric supply service to Pennsylvania consumers is based upon the Commission's grant of a license to Respond Power. OCA M.B. at 7. To qualify for a license under Section 2809(b), Respond Power must be "fit, willing and able ... to conform to the provision of this title, [Title 66] including the commission's regulations regarding standards and billing practices" and Respond Power's service must "be consistent with the public interest and the policy declared in this chapter [Chapter 28]." The Commonwealth has recognized that "[e]lectric service is essential to the health and well-being of residents" as well as to public safety and economic development. 66 Pa.C.S. § 2802(9). Through the Electricity Generation Customer Choice and Competition Act, the Commonwealth declared that EGSs "will be required to obtain licenses, demonstrate financial responsibility and comply with such other requirements concerning service *as the commission deems necessary for the protection of the public.*" 66 Pa.C.S. § 2802(14)(emphasis added). The Commission has jurisdiction over Respond Power as a licensed EGS and is authorized to impose requirements for the protection of the public.

The OCA submits that the mere mention of Respond Power's prices for electric supply does not implicate rate-setting activities which are outside of the Commission's authority. Section 2807(d)(2) of the Public Utility Code and the Commission's Chapter 54 regulations require Respond Power to communicate pricing information so that the consumer may make an informed comparison. 66 Pa.C.S. 2807(d)(2); 52 Pa. Code § 54.1.¹ Mr. Herp's complaint is directed at whether Respond Power adequately and accurately communicated information about Respond Power's variable price service, in compliance with the law. As Mr. Herp testified, he considered and relied upon the information about Respond Power's variable price service, as communicated by Respond Power's sales agent, to compare with West Penn Power's price for electric supply service. OCA M.B. at 9; Tr. 15. The Commission's jurisdiction to assure that EGSs disclose adequate and accurate pricing information does not cross into the area of setting Respond Power's rates. See Use of Fixed Price Labels for Products with a Pass-Through Clause, Docket No. M-2013-2362961, Final Order at 5, fn. 3 (Nov. 14, 2013)(Fixed Price Order).

The Commission has jurisdiction over Respond Power and Mr. Herp's request for relief. 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. Grmusa v. Dominion Retail, Inc., Docket No. C-2009-2124359, Initial Decision at 1 (Dec. 1, 2009)(Grmusa I.D.). The presiding officer granted the EGS's preliminary objections that challenged the Commission's jurisdiction over the EGS's pricing and private

¹ The Commission's Chapter 54 regulations require EGSs 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.

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 v. Dominion Retail, Inc., Docket No. C-2009-2124359, Order at 5 (Apr. 16, 2010)(Grmusa Order).²

Respond Power's citation to various ALJ rulings on preliminary objections or motions for summary judgment are not proof that the Commission lacks jurisdiction over Mr. Herp's formal complaint and request for equitable relief. See Respond Power M.B. at 8. Exceptions have been filed in response to the initial decisions in Yaglidereliler and MacLuckie, so no final Commission ruling has been entered. Yaglidereliler Corp. v. Blue Pilot Energy, LLC, Docket No. C-2014-2413732; MacLuckie v. Palmco Energy PA, Docket No. C-2014-2402558. Those ALJ decisions that turn on the Commission's lack of rate-setting authority are not relevant, in light of the Grmusa Order and the discussion above.

The OCA submits that the Commission has the authority to grant Mr. Herp's request for equitable relief. As set forth in the OCA Main Brief, Mr. Herp clearly testified that the misrepresentations and omissions made by Respond Power's sales agent induced him to enroll

² The Commission remanded the complaint to the OALJ for a full hearing. Mr. Grmusa's complaint was satisfied and closed.

with Respond Power. OCA M.B. at 7-10. The Commission has granted equitable relief, including equitable estoppel in other matters. OCA M.B. at 17; see e.g. Ely v. Pennsylvania Water, Docket No. C-20055616, Order at 1 (July 10, 2006) (The Commission determined this was a classic case for the application of equitable estoppel when Respondent damaged Complainants' asphalt driveway while replacing a water line on the neighboring property and made countless verbal assurances that the driveway would be restored); C.S. Warthman Funeral Home, et. al. v. GTE North, Inc., Docket No. C-00924416 (June 4, 1993) (Complainants were permitted to introduce into evidence the letter and promise of Respondent that it would provide toll free calling to support a claim of equitable estoppel); Electric Distribution Company Procedures for Processing Pilot Customer Supplier Selections, Docket No. M-00960890, 1998 Pa. PUC LEXIS 49 (Jan. 15, 1998) (discussing the Commission's broad authority under Ch. 28 of the Commission's regulations, including ordering restitution); Scheffer v. Columbia Gas of Pennsylvania, Inc., Docket No. C-2010-2153353, Order (Nov. 1, 2011) (illustrating the Commission's equitable authority under Ch. 56 of the Commission's regulations where a complainant incurred gas supply costs during the time period in which Columbia failed to help the complainant switch); Pa.PUC v. Reed, 1972 Pa. PUC LEXIS 40; 46 Pa. PUC 19 (1972) (Commission directed Respondent, who was authorized to transport as a class D carrier, to refund overcharges to his customers).

Respond Power suggests that the Commission's decision in Utility.com is not probative. Respond M.B. at 9-10; see OCA v. Utility.com, Inc., 212 P.U.R.^{4th} 255 (2001) (Utility.com Final Order). The OCA disagrees. In the Utility.com Final Order, the Commission sustained the OCA's complaint for refunds as well as "lost savings," i.e. "the amount of money

that a customer could have been able to save either staying with Utility.com or transferring to a comparable supplier had Utility.com given” notice of its departure from the Pennsylvania market as required by Commission regulations. Id. at 262, 264. The Commission accepted the OCA’s calculation of the amount of refunds and lost savings and ordered that the OCA Formal Complaint “is sustained, but shall not be considered to be satisfied in full, nor shall it be closed until receipt of a report that shows all refunds and lost savings claimed on behalf of former customers have been paid by Utility.com, Inc.” Id. at 264.

The OCA submits that the Commission has jurisdiction over Respond Power and has jurisdiction to enforce the Commission’s regulations that govern the conduct of EGSs in the sales and marketing and billing for electric supply service. Further, the Commission has the jurisdiction to grant equitable relief to Mr. Herp, for the reasons set forth in the OCA briefs.

B. Respond Power’s Disclosure Statement Does Not Relieve Respond Power Of The Obligation That Its Marketed Price Match Its Billed Price

The Commission should not adopt Respond Power’s position that its conduct is blameless and that Mr. Herp caused or failed to mitigate his woes. In its Main Brief, Respond Power states that it provides adequate training and monitoring of its sales agents. Respond M.B. at 12. Respond Power claims that Mr. Herp did not prove that Respond Power’s sales agent misled Mr. Herp because the communications were oral and have the potential for misunderstanding. Respond M.B. at 12-16. Further, Respond Power suggests that what its sales agent told Mr. Herp during the in person, door-to-door marketing contact is immaterial, so long as Respond Power’s disclosure statement provided Mr. Herp with complete and accurate information. Id. at 12. Respond Power states that it complied with Section 54.5 of the Commission’s regulations by providing Mr. Herp with a copy of the disclosure statement of his enrollment, a disclosure

statement approved by the Commission and compliant with Commission regulations prior to July 2014. Id. at 13-14. Respond Power suggests that any harm experienced by Mr. Herp is the result of a lack of diligence on his part. Id. at 15-17.

The OCA Main Brief sets forth a detailed review of the evidence which supports Mr. Herp's claim that Respond Power's sales agent made deceptive statements and omitted key information in describing the terms and conditions of Respond Power's variable rate service. OCA M.B. at 7-13. Both Mr. Herp and fellow Butler, Pennsylvania resident Mr. Hackett testified that different Respond Power sales agents described Respond Power's variable priced service as changeable but not above West Penn Power's price-to-compare. Mr. Herp testified that the sales agent's omission of the qualifier that it is Respond Power's "goal" to provide savings was critical. Respond Power's position that Mr. Herp has not proven that he was misled is inconsistent with the clear record evidence.

The fact that Respond Power engages in some training and monitoring of sales agents cannot insulate Respond Power from responsibility for the misconduct of its sales agents. As summarized in the OCA Main Brief, Respond Power is "responsible for any fraudulent deceptive or other unlawful marketing or billing acts performed by the licensee, its employees, agents or representatives." OCA M.B. at 2-3, citing 52 Pa.Code § 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 may not "make false or misleading representations including misrepresenting rates or savings offered by the supplier." 52 Pa. Code § 111.12(d)(2). The testimony of Mr. Herp and Mr. Hackett describing two separate yet similarly flawed and misleading sales contacts by Respond

Power agents contradict Respond Power's position that its sales conduct is adequate. The Commission's regulations impose a high level of responsibility and accountability on Respond Power as a licensed EGS for the protection of consumers and to promote confidence in the electric generation supply market.

Respond Power's suggestion that the oral communications of its sales agents are superseded by the disclosure statement, once provided, is contrary to the Commission's regulations. As a licensed EGS,³ Respond Power must comply with applicable residential service regulations in Chapters 54 and 56 of the Commission's regulations. OCA M.B. at 2-4, 7-8, citing 52 Pa. Code Ch. 54 and 56. 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). As set forth in the OCA Main Brief, Respond Power violated these regulations and other relevant Commission regulations through Respond Power's marketing and billing of electric supply service to Mr. Herp.

Nonetheless, Respond Power asks the Commission to find that it is not liable for any misrepresentations or omissions or misunderstandings created by Respond Power's sales agent's communications with Mr. Herp. According to Respond Power, the fact that the Commission

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).

approved its disclosure statement and that Mr. Herp was provided with a copy should absolve Respond Power from any consequences of the marketing contact. See Respond M.B. at 14-15.

The OCA disagrees. The OCA examined Respond Power's claim that the Commission approved its disclosure statement as part of its licensing application. OCA M.B. at 14. The August 2010 Respond Power License order *does not* support the testimony of Respond Power's witness. *Id.* In October 2009, the Commission approved Major Energy's natural gas supply license application, stating that Major Energy's disclosure statement "conforms to structure and format as determined by the Commission." Application of Major Energy Services, LLC To Become A Licensed Supplier Of Natural Gas Supply, Docket No. A-2009-2118836, Order at 4 (Oct. 8, 2009)(Major Energy I). There is no comparable affirmative statement included in the 2010 Respond Power License order. Instead, the Respond Power License order contains only one mention of "disclosure," and 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...." Respond Power License at 3. Respond Power has not explained whether or how its joint disclosure statement with Major Energy was reviewed and approved by the Commission when Major Energy received approval to expand its service territory in 2012.⁴ The OCA submits that it is both the content and presentation of information in a disclosure statement which is important. For example, Section 54.5(c)(10) requires "[a]n explanation of penalties, fees or exceptions, printed in the type size larger than the type size appearing in the terms of

⁴ 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).

service.” 52 Pa. Code § 54.5(c)(10). Respond Power’s claim that the disclosure statement provided to Mr. Herp has been reviewed and approved by the Commission is not credible.⁵

Respond Power’s position that Mr. Herp could not have been misled because he received a copy of Respond Power’s disclosure statement is inconsistent with the Commission’s 2013 description of the role played by disclosure statements in the enrollment process. In the Fixed Rate Order, the Commission expressed concern “that these offers can be misleading, especially when the EGS prominently advertises a fixed price but places the pass-through clause far down in the fine print in the disclosure statement.” Fixed Rate Order at 5. Applied to the facts of Mr. Herp’s case, the Commission should find that Respond Power’s offer of variable rate service, which its sales agent explained would provide savings relative to West Penn Power’s price-to-compare, was in fact misleading. Respond Power’s fine print statement that it is only Respond Power’s “goal” to provide savings cannot excuse Respond Power from liability for the misconduct of its sales agent. OCA M.B. at 12-14.

Respond Power’s insistence that Mr. Herp is to blame because he did not read the disclosure statement until after he filed his complaint is both factually incorrect and contrary to the Commission’s oft-stated position. First, Respond Power has mischaracterized the record evidence. Mr. Herp testified that the Respond Power sales agent only showed him the disclosure statement on the back of the sales agreement *after* he signed the agreement. OCA M.B. at 9-10, Tr. 15-16, 87-88. Mr. Herp briefly read the disclosure statement *after* the sales agent obtained

⁵ Nor is Respond Power’s citation to Hoke v. Ambit NE, LLC, Docket No. C-2013-2357863, Initial Decision (Nov. 21, 2013) persuasive. In Hoke, the customer’s confusion was due in part to information presented on the Commission’s PaPowerSwitch website. Hoke did not concern a printed, joint disclosure statement like Respond Power’s, where the customer enrolled through the EGS Ambit’s website. Further, the ALJ referred Ambit’s disclosure statement to the Commission’s Bureau of Consumer Services for additional review. See Hoke at 6.

his signature to the sales agreement. 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." OCA M.B. at 12; Tr. 34. Respond Power's Main Brief fails to acknowledge this testimony by Mr. Herp. Respond Power's position that Mr. Herp did not read the disclosure statement until after he filed his formal complaint is incorrect.

The OCA submits that Mr. Herp exercised sufficient diligence. OCA M.B. at 11-12, citing William Towne v. Great American Power, LLC, Docket No. C-2012-2307991, Opinion and Order at 22 (Oct. 18, 2013)(Towne)(Consumers do bear some responsibility to make appropriate choices. Egregious and potentially misleading marketing conduct by EGSs will not be tolerated.) In the 2013 Fixed Rate Order, the Commission stated:

While consumers are expected and encouraged to carefully review the disclosure statements, presenting a product as having a fixed price that in fact can vary for any number of reasons could be seen as misleading. Additionally, even if a consumer read the entire disclosure, most are not so well-versed in wholesale electric markets that they understand what is meant by terms such as "RTO, NERC, PJM," etc., and just what kind or magnitude of pricing changes could result.

Fixed Rate Order at 5. To reduce the potential for customer confusion and dissatisfaction with the competitive electric supply marketplace, the Commission revised certain terminology and provided EGSs with guidance for phrasing their disclosure statements. The OCA submits that Respond Power would unreasonably hold Mr. Herp to a more strict standard for review of

Respond Power's disclosure statement than is evidenced by the Commission's Towne and Fixed Rate Order.

The Commission should reject Respond Power's position that the adequacy of its disclosure statement and Mr. Herp's alleged failure to review the disclosure statement when he received it justify dismissal of Mr. Herp's formal complaint.

V. CONCLUSION

For the reasons set forth in the OCA's Main Brief and this Reply Brief, 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, and such other relief as is appropriate.

Respectfully Submitted,



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September 19, 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 Reply 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:

Dated this 19th day of September 2014.

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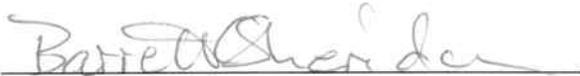
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