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January 8, 2015

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 Exceptions Of Respond Power LLC To Initial Decision 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/bb
Enclosure
cc: Administrative Law Judge Elizabeth H. Barnes (via First-Class Mail)
Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

JUSTIN L. HERP, **Complainant**	:	
v.	:	**Docket No. C-2014-2413756**
RESPOND POWER LLC, **Respondent**	:	

EXCEPTIONS OF RESPOND POWER LLC TO INITIAL DECISION

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Dated: January 8, 2015

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I. INTRODUCTION

Respond Power LLC ("Respond Power") urges the Commission to reverse the Initial Decision ("I.D.") issued by the Administrative Law Judge ("ALJ") on December 19, 2014. The I.D. makes factual findings that are not supported by the record and commits several errors of law.

By these Exceptions, Respond Power describes the ALJ's various errors in concluding that its disclosure statement was not compliant with the Commission's regulations that were in effect at the time of the enrollment that is the subject of the proceeding. The key provisions of the disclosure statement relating to variable pricing were previously approved by the Commission and fully complied with the applicable customer information regulations.

Further, the ALJ improperly relied on uncorroborated hearsay testimony to conclude that Respond Power engaged in misleading or deceptive practices. It was inappropriate for the ALJ to make factual findings as to what a sales agent allegedly told the Complainant when there were no written documents to corroborate that testimony, and the only written document in the record addressing this subject is in direct contravention of that testimony. Moreover, these findings contradicted the unrefuted testimony of Respond Power's witness describing the various measures that are taken to ensure that sales agent do not engage in misleading misrepresentations in their dealings with customers.

The ALJ also erred in recommending that the Commission direct Respond Power to issue a refund to the Complainant. The Commission lacks the statutory authority to regulate the rates charged by an electric generation supplier or to interpret the terms of a written contract between a supplier and its customer to determine whether a breach has occurred. Even though the Commission has found that it may direct the issuance of refunds by EGSs in very limited situations, those circumstances are not present here.

The I.D. inappropriately found the same conduct to have violated multiple provisions of the regulations and also found that Respond Power had violated provisions that do not establish standards for electric generation suppliers to follow. For instance, the ALJ found that Respond Power violated a provision in the Commission's regulations that merely establishes the responsibility of electric generation suppliers for the actions of their agents. The Commission should not endorse the circular logic employed by the ALJ in finding that a violation of a regulation results in a violation of an order, which results in a violation of another regulation.

Finally, the ALJ failed to appropriately apply the relevant factors relating to the amount of a civil penalty that should be imposed. Essentially for one finding of improper conduct by a sales agent of Respond Power, the ALJ would impose a civil penalty of $10,000, which includes $1,000 civil penalties for infractions that were not substantiated and include minor issues such as not having cancellation fee language bolded in a disclosure statement that was inapplicable to the customer who was on a variable price contract.

Respond Power incorporates its Main Brief filed on September 2, 2014 and its Reply Brief filed on September 19, 2014 herein by reference.

II. BACKGROUND AND PROCEDURAL HISTORY

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.[1] Mr. Justin L. Herp ("Complainant") enrolled in a variable rate plan with Respond Power for electric generation services in October 2013, and began receiving

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[1] *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*").

these services on November 26, 2013.[2] 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.[3] 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.[4]

At the time of enrollment, Respond Power provided a double-sided one-page sales agreement and disclosure statement to the Complainant.[5] 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.[6] 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.[7]

In January 2014, wholesale prices for hourly energy supply in the day ahead and particularly the real time markets unexpectedly increased exponentially in response to sustained cold weather ("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.[8]

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[2] Herp Ex. 2; N.T. 58.
[3] Herp Ex. 6 and 7; N.T. 58.
[4] N.T. 32-33.
[5] Respondent Exhibit Nos. 1 and 2; N.T. 15.
[6] Respondent Exhibit No. 2.
[7] Respondent Exhibit No. 2.
[8] *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*").

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.[9]

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.[10] The second month, from December 25, 2013 through January 24, 2014, was billed at $.10990 per kWh.[11] In the third month, January 25, 2014 through February 26, 2014, the rate rose to $.14990 per kWh,[12] and in the Complainant's last month with Respond Power, February 27, 2014 through March 27, 2014, his rate increased to $.24990 per kWh.[13]

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 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.[14]

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[9] N.T. 61.
[10] Herp Ex. 2.
[11] Herp Ex. 3.
[12] Herp Ex. 4.
[13] Herp Ex. 5.
[14] Formal Complaint ¶ 5.

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.[15] 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.

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

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[15] 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.

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.

III. EXCEPTIONS

A. Exception No. 1: The I.D. contains several errors concerning Respond Power's disclosure statement, which fully complied with the Commission's regulations that were in effect at the time of the Complainant's enrollment.[16]

Although the Complainant did not allege any deficiencies with Respond Power's disclosure statement at any time and in fact conceded that he did not review the disclosure statement prior to enrolling with Respond Power, the ALJ took it upon herself to make the adequacy of the disclosure statement an issue in this proceeding.[17] In doing so, the ALJ engaged in a microscopic review of all provisions of the disclosure statement, including many that were irrelevant to the Complaint, essentially usurping the responsibilities of the Commission's Bureau of Consumer Services ("BCS"). In the I.D., the ALJ made several incorrect conclusions regarding the adequacy of Respond Power's disclosure statement and ignored the Commission's licensing process, which entails a review and approval of EGS disclosure statements by BCS. She also misinterpreted or misapplied requirements of the Commission's regulations concerning disclosure statements, resulting in numerous errors which should be reversed by the Commission. Therefore, the Commission should reject the ALJ's findings concerning the disclosure statement and instead confirm that the relevant language of Respond Power's disclosure statement was previously approved and was consistent with the Commission's regulations that were in effect at the time of the Complainant's enrollment.

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[16] Findings of Fact Nos. 48-52, I.D. at 13, 19-24, 29 and 36-37.
[17] Order Denying Motion for Summary Judgment at 5.

Section 54.5 of the Commission's regulations, which governed disclosure statements that were in effect until July 14, 2014, is published at 28 *Pa. Bulletin* 3780 (August 8, 1998) ("applicable disclosure statement regulations"). Following the 2014 Polar Vortex that began in January 2014, the Commission made several changes to the applicable disclosure statement regulations through a final-omitted rulemaking order adopted on April 3, 2014. (*"Disclosure Statement Rulemaking Order"*). Those regulations are published at 44 Pa. Bulletin 3522 (June 14, 1999), with an effective date of July 14, 2014, and are codified at 52 Pa. Code 54.5 ("new disclosure statement regulations").

Initially, the ALJ errs in concluding that Respond Power's disclosure statement was not approved by the Commission through the *Licensing Order*.[18] When Respond Power submitted its license application, it provided a proposed disclosure statement ("Draft Disclosure Statement") for review and approval consistent with the Commission's requirements.[19] Mr. Small testified that it was approved during that process.[20] Further, as the Commission knows, the license would not have been issued absent approval of the Draft Disclosure Statement. While the ALJ is correct that the Commission expressly approved the disclosure statement of Respond Power's affiliate, Major Energy Services LLC ("Major Energy") in its order approving the

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[18] I.D. at 20, 23-24.

[19] Respond Power's application is not available for review on the Commission's website because it was unpublished in 2012 due to the fact that it contained confidential information. A copy of the disclosure statement was obtained by Respond Power from the Commission's secretary and attached to its Answer as Exhibit A in the matter of Commonwealth et al. v. Respond Power LLC, Docket No. C-2014-2427659. Although it was not presented as evidence in this proceeding, the ALJ has reviewed and referenced in it the Initial Decision. Respond Power requests that the Commission take official notice of the proposed disclosure statement as a public document, pursuant to Section 5.406 of the Commission's regulations, 52 Pa. Code § 5.406(a)(1). A review of the docket entries shows that other items about the application were revised during the licensing approval process, but no changes were made to the Disclosure Statement. *See e.g.* http://www.puc.pa.gov//pcdocs/1083210.pdf.

[20] N.T. 60.

application,[21] a review of recent Commission orders approving EGS licenses demonstrates that such express approval is not the normal practice.[22] Nonetheless, the Commission requires the submission of a proposed disclosure statement with the application, which is reviewed and at least implicitly approved through the approval of the application and the issuance of a license.[23]

Moreover, the relevant language of the Draft Disclosure Statement relating to variable pricing has not been changed since it was approved.[24] Of particular significance, Respond Power notes that in the language used under Terms of Service, the description of the variable price is identical in both the Draft Disclosure Statement and the Affiliates Disclosure Statement.[25] Specifically, the variable price is described as: 1) varying from month to month; 2) being set by Respond Power; 3) reflecting PJM Day-Ahead Market, Installed capacity, electricity lost on the transmission system, estimated taxes and any other costs that Respond Power incurs to provide electricity; and 4) containing a profit margin. Both documents likewise explain that Respond Power's goal each and every month is to deliver power at a price that is less than what the customer would have paid the local utility company. They both also provide that due to market fluctuations and conditions, Respond Power cannot guarantee savings every month, and that current variable rate information may be obtained by contacting Respond Power.[26]

Since the Draft Disclosure Statement was at least implicitly approved by the Commission during the licensing process and the key provisions concerning variable pricing are identical in

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[21] *See Application of Major Energy Services LLC to Become a Licensed Supplier of Natural Gas Supply Services*, Docket No. A-2009-2118836 (Order entered October 8, 2009).
[22] *See, e.g., Application of Residents Energy, LLC for Approval to Supply Electricity or Electric Generation Services,* Docket No. A-2014-2433184 (Order adopted December 18, 2014); *Application of BlueRock Energy, Inc. for Approval to Supply Electricity or Electric Generation Services*, Docket No. A-2014-2444649 (Order adopted December 4, 2014).
[23] *http://www.puc.pa.gov/general/onlineforms/pdf/EGS_Lic_App.pdf.*
[24] N.T. 60.
[25] Respondent Exhibit No. 2, which is the disclosure statement provided to the Complainant.
[26] Respondent Exhibit No. 2.

the Draft Disclosure Statement and the Affiliates Disclosure Statement, 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).

Noting that Section 54.5(a) of the Commission's regulations (both the applicable and new disclosure statement regulations) requires an EGS's disclosure statement to reflect the billed prices, the ALJ infers that the term "disclosure statement" means a "regulatory-compliant" or "Commission-approved" disclosure statement. She further states that to define a disclosure statement to mean one that "has been materially altered from the original, Commission-approved disclosure statement, would be an absurd interpretation and would be equivalent to not protecting the public."[27]

These observations of the ALJ contain at least three errors. First, they assume that Respond Power's Affiliates Disclosure Statement was materially altered from the original, Commission-approved Draft Disclosure Statement. As no evidence was produced in the record of this proceeding to show that Respond Power's Draft Disclosure Statement was materially altered following the approval of its license application, this assumption was made in error. Second, these comments are premised on an apparent belief that an EGS is required to obtain Commission approval before making any changes to a disclosure statement, which is not a requirement of either the applicable or the new disclosure statement regulations. Even material alterations to reflect changing business models would be acceptable, provided they are compliant

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[27] I.D. at 13.

with the Commission's regulations. Third, the ALJ's observations are founded on the improper conclusion that Respond Power's Affiliates Disclosure Statement was in some way not compliant with the applicable customer information regulations.

Regardless of whether the Commission implicitly approved the key provisions in the Affiliates Disclosure Statement and despite the ALJ's criticisms of its clarity, a review of the Affiliates Disclosure Statement demonstrates that it fully complied with the Commission's regulations that were in effect until July 14, 2014 when revisions to those regulations were implemented.[28] 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. The language describing variable pricing, which mirrored that which was expressly approved in the *Major Energy Order*, placed the customer on notice that its price may vary monthly and that price changes would be based on a variety of factors including wholesale market conditions. It established no ceiling on the price and advised the customer to contact Respond Power for current pricing information. The applicable customer information regulations did not require the EGS to place limits on the variable prices, but only to disclose any limits that existed. In short, by including all applicable terms and conditions in the Affiliates Disclosure Statement, Respond Power fulfilled the requirements of the Commission's regulations that were in effect at that time.

Rather than accepting that the relevant language concerning variable pricing in the Affiliates Disclosure Statement was at least implicitly approved by the Commission when it issued Respond Power a license and rather than considering whether it complied with the applicable customer information regulations, the ALJ sought to review the Affiliates Disclosure

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[28] *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) ("*Disclosure Statement Rulemaking Order*").

Statement in hindsight solely from the perspective of one customer who incurred significant charges for electricity pursuant to a variable price contract. Particularly given the fact that the Complainant did not read the Affiliates Disclosure Statement until after filing the Complaint, it was meaningless to engage in this in-depth examination of the document.

In an attempt to find that Respond Power's Affiliates Disclosure Statement does not enjoy Commission approval, the ALJ engaged in a painstaking process to identify variations in the language used in the Draft Disclosure Statement and the Affiliates Disclosure Statement. She first points out that the Affiliates Disclosure Statement is for Major Energy's natural gas customers as well as Respond Power's electric customers.[29] While that is an accurate observation, it is of no consequence since the Commission's regulations do not prohibit an EGS who also operates as a natural gas supplier from using a joint disclosure statement. In fact, that would be an onerous requirement on EGSs who serve in both roles for their customers.

The ALJ also refers to the font or print on the Affiliates Disclosure Statement as "tiny." [30] Again, this is an irrelevant observation, especially since there is no evidence in the record to show that Respond Power provided the same size of document as an exhibit that is provided to customers. Rather, the Affiliates Disclosure Statement was introduced for the purpose of showing the language contained therein regarding variable pricing; Respond Power was not aware of the ALJ's plans after the hearing to scrutinize all aspects of the disclosure statement, including the font or print size of certain language. In any event, the applicable customer information regulations contain no requirements concerning font size,[31] and it is inappropriate to

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[29] I.D. at 20.
[30] I.D. at 19.
[31] The only provision addressing font size in the applicable customer information regulations is Section 54.5(c)(10), which requires the explanation of penalties, fees or exceptions to be printed in a larger size font than the remaining

judge the disclosure statement on that basis, especially when there is no indication that any key terms were in a smaller font size than other language.

The ALJ further finds the "disclosure statement to be somewhat misleading as it informs the customer that the goal is to provide power at a price less than the local utility company's price; however, Respond Power cannot always guarantee that every month the customer will see savings."[32] Finding that the Complainant's testimony credible that when he read this paragraph, he did not catch the word "goal," the ALJ indicates that "[m]issing the word 'goal' changes the meaning of the sentence."[33]

Again, the ALJ's observations are riddled with errors. First, she ignores the Complainant's testimony conceding that in fact, he did not read the disclosure statement until after filing the Complaint.[34] Rather, he testified that he simply turned over the sales agreement to see the disclosure statement on the back and skimmed over it quickly.[35] Therefore, even if the Commission now determines that the language is inadequate, it has no bearing on the outcome of this Complaint. Second, the ALJ is correct that missing the word "goal" changes the meaning of the sentence. However, the word "goal" was in the Affiliates Disclosure Statement (in the same font type and size as all of the other words) and it is not Respond Power's failure that the Complainant missed that word. Therefore, what the sentence says without the word "goal" is meaningless, and what the Complainant believed the disclosure statement said when he missed the word "goal" during his cursory review is of no significance.

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terms and conditions. 52 Pa. Code § 54.5(c)(10). Since the clause explaining penalties and fees is inapplicable to variable price products, it is irrelevant to this proceeding.

[32] I.D. at 21.

[33] I.D. at 21.

[34] N.T. 34-35.

[35] N.T. 34-35.

Next, the ALJ finds that "the disclosure statement does not explain the intervals at which prices can change, *i.e.* whether the local EDC's PTC changes on a quarterly basis versus the EGS' variable rate changes on a monthly basis."[36] A review of the Affiliates Disclosure Statement demonstrates that in the very first sentence under the electric heading, it clearly discloses that under the variable rate plan: "Your price may vary from month to month."[37] Therefore, Respond Power adequately disclosed that its price would change on a monthly basis. That was the extent of Respond Power's obligation. It had no duty, through the disclosure statement or the agent, to explain how frequently the EDC price changes occur. The Commission's applicable or new customer information regulations do not place that onus on the EGS, nor should they as that is a customer education issue that is appropriately left to the Commission and the EDCs.

Further scrutinizing Respond Power's Commission-approved language in the Affiliates Disclosure Statement, the ALJ finds "the phrase 'cannot always guarantee' to be an odd choice of words."[38] Concluding that the phrase is confusing and misleading, the ALJ says that it is "probably giving some consumers false hopes of guaranteed monthly savings."[39] Basically, the ALJ would have preferred that Respond Power said it cannot ever guarantee monthly savings. Such tweaking should be left to the experts in BCS who routinely review disclosure statements on a daily basis.

The ALJ's own preference for slightly different wording, in the context of reviewing a single disclosure statement in a vacuum, provides no basis for concluding that the phrase "cannot

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[36] I.D. at 21.
[37] Respondent Exhibit No. 2.
[38] I.D. at 21.
[39] I.D. at 21.

always guarantee" is confusing or misleading. Whether there is a different or even a better way to explain the product is not the standard. Rather, the standard is whether the disclosure statement accurately informs the customer of the applicable terms and conditions. Clearly, the Affiliates Disclosure Statement says Respond Power cannot guarantee savings. The wording naturally follows the statement that Respond Power's goal is to provide power at a price less than the EDC's PTC but that due to market fluctuations, it cannot guarantee that it will always achieve that goal. In fact, the absolute dearth of formal complaints filed with the Commission against Respond Power from August 2010 to January 2014 suggests that customers have been satisfied in the past with the Affiliates Disclosure Statement and with Respond Power's success fulfilling its goal to provide power at a price less than the EDC's PTC.[40]

The ALJ's next criticism of Respond Power's disclosure statement is that nowhere does it "state that there is a variable rate cap on what it can charge its customers" and there is no "express notice or warning to the customer that he or she could experience an unlimited percentage increase in monthly bills."[41] The ALJ goes on to observe that nowhere in the disclosure statement is there a "cap or maximum rate to which it can change."[42]

These observations, like others regarding Respond Power's Affiliates Disclosure Statement, also reflect errors. While it is true that the Affiliates Disclosure Statement does not contain a cap or a statement that there is no cap, the applicable disclosure statement regulations

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[40] A review of the Commission's website, using the utility code search tool, reveals that only two formal complaints were filed against Respond Power prior to January 2014. The complaints are docketed at Docket No. F-2012-2291997 (unauthorized switching) and Docket No. F-2014-2399569 (incorrect charges on bill and misrepresentation as an electric distribution company). Respond Power asks that the Commission take office notice of these complaints as public documents, pursuant to Section 5.406 of the Commission's regulations, 52 Pa. Code § 5.406(a)(1).

[41] I.D. at 21-22.

[42] I.D. at 22.

require neither. The applicable disclosure statement regulations only require the EGS to describe limits on price variability, *if applicable*, and contain no requirements to disclose that there is no cap 52 Pa. Code § 54.5(c)(2). Even when revising the applicable disclosure statement regulations and promulgating the new disclosure statement regulations in direct response to the 2014 Polar Vortex and resulting variable price increases, the Commission expressly and flatly rejected proposals to require limits in variable price contracts. *See Customer Information Disclosure Rulemaking Order.* Instead, the Commission amended its regulations to require EGSs to clearly explain the applicable limits, and if there is no limit on price variability, to require EGSs to clearly and conspicuously state that there is no limit. 52 Pa. Code § 54.5(c)(2)(ii).

In refraining from requiring EGSs to include limits in variable price contracts, the Commission acted in accordance with the views it has expressed elsewhere that it does not regulate the prices charged by EGSs. For instance, in the *Variable Price Order*, the Commission stated that "[t]he rates consumers pay in the retail electric market are governed by the terms of their contract with their supplier" and interpreted the existing regulations as requiring the disclosure statement to disclose "*any* limits on price variability." *Variable Price Order* at p. 3 (Emphasis added).

The ALJ's next observations are that the Draft Disclosure Statement contained errors regarding contact information, which do not appear in the Affiliates Disclosure Statement, and that the latter contains additional terms that are not in the Draft Disclosure Statement.[43] Citing these variations, the ALJ finds no "presumption that it is in compliance" with Commission

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[43] I.D. at 22.

regulations. These differences have no bearing on the variable pricing language that is identical in both disclosure statements, which is the only issue that is relevant to this proceeding.

She further notes that the "no refund policy" clause in the Affiliates Disclosure Statement "may be voidable given the Commission's recent rulings that the Commission has jurisdiction and authority to order an EGS to refund a customer in certain situations including switching a customer without their consent, i.e. 'slamming.' *See Joseph Nadav v. Respond Power LLC, Motion of Vice Chairman Coleman, November 13, 2104.*"[44] Again, the "no refund policy" clause in the Affiliates Disclosure Statement is not relevant to this proceeding. It simply states that since the commodity is immediately used and consumed upon delivery, it is not practical to return the product and therefore refunds are not provided. It has nothing to do with refunds of charges stemming from an unauthorized switch or any other circumstances in which the Commission may lawfully direct the issuance of a refund.

The ALJ also errs in her reliance on the Commission's reference to this proceeding in the decision in *William MacLuckie v. Palmco Energy PA LLC*, Docket No. C-2014-2402558 (Order entered December 4, 2014) ("*MacLuckie Order*").[45] Specifically, the ALJ seems to suggest that because the Commission characterized the instant proceeding as involving an unclear written disclosure when referencing it in the *MacLuckie Order*, it has already decided that the disclosure statement is not compliant with the regulations. However, the Commission's reference to this proceeding in the *MacLuckie Order* was nothing more than a general characterization of the nature of the complaint, as portrayed by the parties in that case, particularly by Palmco Energy PA LLC in its Reply Exceptions. The Commission itself did not suggest that this proceeding

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[44] I.D. at 22.
[45] I.D. at 23-24.

involves a disclosure statement that is not clear or not in compliance with the Commission's regulations. To the extent the Commission would have made such a suggestion, it would have inappropriately done so since that would have suggested a prejudging of the case before it has reviewed all of the evidence of record.

The ALJ erred in concluding that the disclosure statement is confusing and misleading. As a result, the Commission should reverse several of the violations imputed to Respond Power stemming from what the ALJ perceived to be an inadequate disclosure statement.[46]

B. Exception No. 2: The I.D. improperly relies on uncorroborated hearsay testimony to conclude that Respond Power engaged in misleading or deceptive marketing practices.[47]

In finding that Respond Power engaged in misleading or deceptive marketing practices, the ALJ improperly relies on uncorroborated hearsay testimony that was in direct contravention of the written Affiliates Disclosure Statement. The Complainant alleged that the sales agent told him that his price with Respond Power would always be lower than the EDC's PTC. In making this allegation, the Complainant referred to no advertising campaign or written marketing materials distributed by Respond Power containing such promises. To the contrary, the Complainant conveniently ignored the plain language of Respond Power's disclosure statement, which he was provided at the time of enrollment and which clearly provided that such savings cannot be guaranteed.

In relying wholly on the Complainant's hearsay testimony, which was not corroborated by recordings or documents and in fact was directly contravened by the written disclosure statement, the ALJ inappropriately finds that a Respond Power sales agent offered the

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[46] Conclusions of Law Nos. 3, 5, 8, 9 and 15.
[47] Finding of Fact Nos. 3, 46; I.D. at 19, 28-33.

Complainant electric rates that would be always lower than the EDC's PTC.[48] Hearsay evidence, admitted without objection, will be given its natural probative effect and may support a finding only if it is corroborated by any competent evidence in the record. *Walker v. Unemployment Compensation Bd. of Rev.*, 367 A.2d 366 (Pa. Cmwlth. 1976); *Goldson v. Metropolitan Edison Co.*, Docket No. 2013-2387326, 2014 WL 3555462 (June 30, 2014). Although the Pennsylvania Rules of Evidence are relaxed in administrative proceedings, it is a matter of law that crucial findings of fact may not be established solely by hearsay evidence. *Pa. P.U.C., Bureau of Investigation & Enforcement v. Yellow Cab Co. of Pittsburgh*, Docket No. 2012-2249031, 2013 WL 5912555 (October 8, 2013). Even when hearsay is not excluded, the Commission has refused to make findings of fact without separate evidence corroborating it. *See, e.g., Jackson v. PECO Energy Co.*, Docket No. F-2013-2351046 (July 5, 2013); *Davis v. Equitable Gas., LLC*, Docket No. C-2011-2252493, 2012 WL 3838095 (April 27, 2012).

While the ALJ viewed the testimony of Mr. Hackett as corroborating the Complainant's testimony, it was also improperly relied on as hearsay evidence.[49] Moreover, his testimony was solely about his own experience with a different sales agent of Respond Power and had no relevance to the Complainant's transaction. Indeed, despite the Complainant's efforts to have Mr. Hackett repeat his own testimony and contrary to the ALJ's, Mr. Hackett did not testify that the agent told him his rates would always be lower than the EDC's PTC. Rather, he testified that the agent told him that Respond Power offered competitive rates, which is a much more general and very different description.[50]

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[48] Finding of Fact No. 3.
[49] Finding of Fact No. 27, I.D. at 29.
[50] N.T. 51, 55.

The ALJ criticizes Respond Power for being "unable or unwilling to rebut the testimony" of the Complainant with any tape recordings of conversation between him and the sales agent or between the Complainant and a third-party verifier.[51] However, in a door-to-door sale, no recording is required under the Commission's regulations and would typically not be available. As to the third-party verification ("TPV") recording, Respond Power had no reason to offer it into evidence since the Complainant did not dispute the enrollment or the variable nature of his contract during the presentation of his case at the hearing. Moreover, the TPV recording could have shed no light on the prior conversation between the Complainant and Respond Power's sales agent. More importantly, and what the ALJ failed to consider in weighing the evidence, is that the Complainant, with the burden of proof, did not offer any recordings of what was allegedly said to him during the sales transaction or written documents to corroborate his hearsay testimony. This is especially significant since the written documentation provided to the Complainant at the time of the sale clearly provided that savings was not guaranteed.

The ALJ also claims that Respond Power offered no corroborative evidence in the form of customer service training manuals, customer scripts, audit reports, marketing materials or any investigation reports to show that the agent did not promise monthly savings compared to the EDC's prices.[52] However, Respond Power offered unrefuted testimony regarding several of these topics, including what agents are told to say (and not to say) during a sales transaction. Specifically, Mr. Small testified that 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

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[51] Finding of Fact No. 46, I.D. at 32.
[52] I.D. at 32.

programs.[53] He further testified that 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.[54] In addition, he noted that agents are advised that they will be suspended or terminated if they make any misrepresentations to prospective customers.[55] He also described monthly field audits of each marketer, along with monitoring by managers of agents' records and verification calls, which are performed to enforce these instructions.[56] With the natural turnover among agents selling electricity through door-to-door marketing, it is unreasonable to expect an EGS to produce testimony from them, especially given Mr. Small's unrefuted testimony about the steps taken by Respond Power to ensure that customer receive appropriate information.

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. Verbal 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. 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.

Given the clear terms of the Affiliates Disclosure Statement that savings were not guaranteed and Mr. Small's unrefuted testimony of the instructions and training provided to

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[53] N.T. 64.
[54] N.T. 64.
[55] N.T. 66.
[56] N.T. 65, 81 and 83.

agents about not guaranteeing savings to customers, the ALJ erred in relying on uncorroborated hearsay testimony to conclude that Respond Power's agent made misleading representations to the Complainant. Therefore, the Commission should reject these findings and reverse the violations based on this conclusion.[57]

C. Exception No. 3: The I.D. errs in recommending that the Commission direct Respond Power to issue a refund to the Complainant.[58]

The ALJ improperly concludes that Respond Power should be directed to issue a refund to the Complainant. While the Commission has recently found that it has statutory authority in limited circumstances to require an EGS issue a refund to a customer, those circumstances are not present here. The Commission should therefore reject the recommendation to direct the issuance of a refund to the Complainant by Respond Power.

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).

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[57] I.D. at 24, Conclusion of Law Nos. 3 and 9.
[58] I.D. at 36.

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*").[59] 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

[59] 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.

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 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.

The ALJ erred in relying on Code Sections 1301 and 1312 for authority to direct Respond Power to issue the Complainant a refund.[60] The Code provisions addressing just and reasonable rates and providing for refunds are applicable solely to public utilities, and not to EGSs. 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.

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[60] I.D. at 27-28.

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.

In *Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.,* Docket No. C-2014-2427657 (Order entered December 18, 2014) ("*IDT Energy Order*"), the Commission rejected the notion that Code Section 1312 provides authority to order EGSs to issue refunds to customers. In so concluding, the Commission recognizes that Section 1312 only authorizes it to direct public utilities to issue refunds to customers in certain circumstances, and EGSs are not public utilities except for limited purposes that are inapplicable here. Therefore, the ALJ's conclusions that Code Section 1312 authorizes the Commission to direct Respond Power to issue a refund to the Complainant should be reversed.

In *Commonwealth of Pennsylvania, et al. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655 (Order entered December 11, 2014) ("*Blue Pilot Order*"), the Commission acknowledged that it does "not have traditional ratemaking authority over competitive suppliers and does not regulate competitive supply rates." *Blue Pilot Order* at 18-19. The Commission further concluded that it "does not have subject matter jurisdiction to interpret the terms and conditions of a contract between an EGS and a customer to determine whether a breach of the contract has occurred." *See, e.g., Allport Water Auth. v. Winburne Water Co.*, 393 A.2d 673 (Pa. Super. Ct. 1978). *Blue Pilot Order* at 19. *See also John R. Evans, Small Business Advocate v. FirstEnergy Solutions Corporation*, Docket No. P-2014-2421556 (Motion adopted November 13, 2014) ("*FES Motion*").

Nonetheless, in the *IDT Energy Order*, the Commission found that it has plenary authority under Code Section 501 "to direct an EGS to issue a credit or refund for an over bill." *IDT Energy Order* at 17. In so ruling, the Commission concluded that having the authority to order EGS credits and/or refunds allows it to carry out the statutory protections in Code Section 2809(b) relating to compliance with billing and disclosure regulations when an EGS fails to bill a customer in accordance with its disclosure statement. The Commission went on to find that it lacks authority or jurisdiction to order "equitable" remedies including restitution. *IDT Energy Order* at 26.

At the outset, Respond Power respectfully contends that the Commission erred in concluding that Code Section 501 authorizes it to direct an EGS to issue a credit or refund to a customer. Particularly since the Code contains a specific provision expressly authorizing the Commission to direct the issuance of refunds to customers by public utilities, which the Commission acknowledges is not applicable to EGSs, it is inappropriate to rely on a general provision for authority to direct an EGS to issue a refund.

As the policy objectives of Chapter 28 are clear in deregulating the price that is charged by EGSs for electric supply, and the Commission has stated definitively that it does not regulate the rates charged by EGSs, the Commission cannot lawfully infer authority to direct an EGS to issue a refund when it believes it has issued an "over bill." Reliance on Code Section 2809(b) as specific authority is misplaced since that subsection relates solely to license applications and has nothing to do with the regulation of EGS prices or the issuance of refunds.

Even if the Commission limits this authority to a situation where a customer has been charged more than permitted by the disclosure statement, this exercise would necessarily entail a review and interpretation of the entire contract. For instance, if a complaint involved a fixed price of 7 cents and the EGS charged 8 cents, the Commission could not be sure the 8 cents was

higher than permitted under the contract unless it reviewed and interpreted the entire contract. A provision could easily be contained in the contract which permitted the EGS to pass-through certain charges in addition to the quoted fixed price. The Commission has already said that it lacks the statutory authority to engage in this exercise. *FES Motion.*

When considering the same exercise within the context of a variable price, the Commission's authority is even further diluted. Because a variable price reflects several factors, including wholesale market conditions, the Commission would have to step into the shoes of the EGS and to determine what price should have been charged by the EGS. Such intervention in EGS pricing issues would be completely contrary to the letter and spirit of Code Chapter 28.

Even assuming, for purposes of argument, that the Commission is authorized by the Code to direct the issuance of a refund by an EGS when it is clear that the price charged by the EGS did not match the price in the disclosure statement or written marketing materials, its authority ends there. It may not extend to a situation where the customer relies on alleged oral statements of the sales agent, which are directly in contravention with the written disclosure statement, to seek a refund of charges that were appropriately assessed in accordance with the terms and conditions of the contract. To permit a customer to claim months or years after enrollment that the EGS's sales agent promised that its price would never exceed the EDC's PTC and to receive a Commission-ordered refund on that basis exceeds any reasonable bounds of the Commission's statutory authority. This is especially true when there were no written marketing materials claiming such savings and the written disclosure statement expressly stated otherwise.

From a practical standpoint, if the Commission allows customers to claim months or years later that they relied on verbal statements of a sales agent and avoid payment of charges expressly permitted under the written disclosure statement, the Commission will open the floodgates to the filing of such complaints any time consumers are subjected to variable price

increases. Such a decision may even provide a motive for customers to lie about what was told them if the financial stakes are high enough, or at least generate far more misunderstandings about the product that was offered. 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). The Commission has also 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.

The ALJ took issue with Respond Power's legal argument about the controlling nature of the written documents.[61] Specifically, regarding Respond Power's legal arguments based on Pennsylvania contract law that written documents are controlling, the ALJ suggested that it demonstrated "a disregard for the Commission's regulations and brings into question whether Respond Power advised its third party marketer vendors to comply with the Commission regulations."[62] This inflammatory suggestion has no basis in the evidentiary record and is in fact directly contrary to the testimony offered by Respond Power, as described above.

Respond Power's analysis of Pennsylvania contract law was offered in support of its argument that the Complainant is not entitled to a refund, even if the Commission would have the authority to award one. By allowing a customer to alter the terms and conditions of a contract through offering testimony as to what the sales agent allegedly told him, and directing an EGS to issue a refund on that basis, the Commission would be venturing into private contract interpretation and breach of contract law, which it has said it may not do. *FES Motion.* To the

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[61] I.D. at 19.
[62] I.D. at 19.

extent the Commission ventures in that arena, in a breach of contract situation, the written document is controlling.

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 Employes' 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).

Verbal 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....").

Suggesting that the Complainant exercised some care during the sales transaction,[63] the ALJ completely overlooked the fact that the Complainant failed to review the written documentation. 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.[64] Yet, in this case, the Complainant testified that he did not read the one-page disclosure statement until after he had filed his Complaint.[65] 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, as he understood them, from the sales pitch of Respond Power's sales agent.[66]

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 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).

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[63] I.D. at 30.
[64] Herp Exhibits 1 through 5.
[65] N.T. 34-35.
[66] N.T. 15.

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.

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.

In directing the issuance of a refund, the ALJ also relies on the Commission's decision in *OCA v. Utility.com, Inc.*, 212 P.U.R. 4th 255 (2001) ("*Utility.com Order*").[67] 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

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[67] I.D. at 36.

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 contested the Commission's statutory authority 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.

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. 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.

D. Exception No. 4: The I.D. inappropriately finds the same conduct to have violated multiple provisions of the regulations, as well as provisions that do not establish standards for EGSs to follow.[68]

The ALJ recommends the imposition of a penalty of $1,000 per violation for a total civil penalty of $10,000. It is not clear, however, how the ALJ arrived at the conclusion that Respond Power committed ten violations of regulatory requirements. Starting on page 36 of the I.D., the ALJ discusses the specific sections of the regulations that she has determined were violated by Respond Power. That discussion appears to roughly correspond to Conclusions of Law Nos. 3 through 15. By these Exceptions, Respond Power addresses each violation identified by the ALJ.

Regarding Conclusion of Law No. 4, the ALJ finds that Respond Power violated Section 54.4(a) of the Commission's regulations by not billing the Complainant "the prices marketed to him by" the sales agent. This is an inappropriate conclusion since this provision addresses

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[68] I.D. at 36-43, Conclusions of Law Nos. 3-16.

addresses billing formats, and it is intended to ensure that EGSs bill customers in a manner that is consistent with marketing materials and disclosure statements. However, this case is not about proper billing, but rather about whether Respond Power's agent made misleading promises regarding savings. The Complainant never alleged that specific prices were marketed to him by Respond Power. As discussed above, Respond Power disputes that such misleading representations were made by its agent. However, to the extent the Commission finds that this occurred, the provision which Respond Power violated is in Chapter 111 regarding marketing practices, not a provision governing billing formats.

The citation to Section 54.4(c) on page 36 of the I.D. appears to be in error since that provision requires a billing entity to provide samples of customer bills to the Commission for review. 52 Pa. Code § 54.4(c). Also, that provision is not addressed in the Conclusions of Law. Respond Power believes that based on the discussion, this reference is intended to be to Section 54.5(c) of the Commission's regulations, which sets forth the requirements for a disclosure statement. While there is no corresponding Conclusion of Law, the ALJ concluded in the I.D. on page 24 that the disclosure statement was confusing and misleading, and it appears that she found that to be a violation of the *Licensing Order*.

As discussed above, the relevant language of the Affiliates Disclosure Statement was approved by the Commission during the licensing process; an EGS is permitted to change a disclosure statement after issuance of the license without seeking Commission approval; and Respond Power's Affiliates Disclosure Statement fully complied with the Commission's regulations that were in effect at the time of the Complainant's enrollment. Respond Power is fully prepared to work with BCS and the Office of Competitive Market Oversight ("OCMO") to ensure that its current disclosure statement complies with the regulations that are now in place, and in fact, notes that it has successfully undergone the review and approval process regarding

the Contract Summary per the Secretarial Letter dated June 23, 2014 at Docket No. L-2014-2409385.

As to the ALJ's determination that Respond Power violated Section 54.5(c)(10) of the Commission's regulations, that conclusion is due to the cancellation fee language not being printed in a type size that is larger than the remaining terms and conditions.[69] Since the cancellation fee was not even applicable to the Complainant, as it applies only to fixed price contracts, Respond Power contends that this language was not a proper subject of the ALJ's review in this proceeding. Also, the ALJ observes that it is not bolded, which is not a requirement of Section 54.5(c)(10). At most, any concerns about the cancellation fee provision warrants a referral to OCMO and BCS to determine whether the current disclosure statement is in compliance with all Commission regulations going forward.

The ALJ finds a violation of Section 54.7(a) of the regulations, 52 Pa. Code § 54.7(a), "because the prices advertised" by the sales agent to the Complainant did not reflect the actual billed prices.[70] However, Section 54.7(a) does not concern alleged misleading statements about price savings, which is the subject of the Complaint. It deals with advertising materials. Statements made by a single agent of Respond Power do not equate to advertising materials. *See* 52 Pa. Code § 54.7(c) (Commission staff will review advertising materials, upon request, pursuant to this section).

The ALJ next concludes that Respond Power violated Section 54.42(a) of the Commission's regulations, 52 Pa. Code § 54.42(a).[71] That provision, however, does not impose any particular standards on an EGS that it can be found to have violated. Rather, Section

[69] I.D. at 37.
[70] I.D. at 38.
[71] I.D. at 38-39.

54.42(a) puts EGSs on notice that if they do not comply with the Code, regulations and Commission orders, they are subject to the imposition of civil penalties and/or the suspension or revocation of their license.

The ALJ further finds that Respond Power violated Section 54.43(1)(f) and (g) of the Commission's regulations, 52 Pa. Code § 54.43(1)(f) and (g).[72] Section 54.43(1)(f) provides that an EGS is responsible for any fraudulent deceptive or other unlawful marketing acts performed by the licensee, its employees, agents or representatives. Respond Power does not dispute that it is responsible for the acts of its agents, including the sales agent who enrolled the Complainant. However, this provision merely establishes responsibility for the actions of agents and does not set a standard which an EGS can be found to have violated.

As to Section 54.43(1)(g), this is again simply a provision requiring compliance with relevant Commission regulations, orders and directives that may be adopted. To the extent Respond Power violated any regulations, orders or directives, it is appropriate to find a violation of the specific provision. However, to find that Respond Power violated a certain provision in the Commission's regulations and then to conclude that by violating that provision, it also violated the Commission's Licensing Order and other provisions in the regulations requiring compliance with regulations is absurd. Focusing on the particular provision in the regulations which an EGS has violated and imposing a civil penalty or other appropriate remedy, including compliance moving forward, is the most effective way to achieve compliance with the regulations by the offending EGS and others. Nothing is gained by finding that Respond Power violated a particular provision of the regulations and then using that violation to find multiple other

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[72] I.D. at 41-43.

violations of other regulations and orders. The circular logic employed by the ALJ should not be adopted by the Commission.

The ALJ also found several violations of Chapter 111 of the Commission's regulations. In particular, she concluded that Respond Power violated Section 111.3, which again only establishes an EGS's responsibility for the actions of its agents, which Respond Power is not disputing.[73] 52 Pa. Code § 111.3. No standard is set forth by this provision that an EGS can be found to have violated.

As to the ALJ's conclusion that Respond Power violated Section 111.7(a)(1)(i) of the Commission's regulations, that provision requires an EGS using a document to compete a transaction to include a means to identify when an agent is involved, the agent who completed the transaction and a notation indicating if the transaction was the result of a door-to-door call. 52 Pa. Code § 111.7(a)(1)(i). The ALJ's finding is that the document used to complete this transaction does not indicate if it was the result of a door-to-door call.[74] This issue was never addressed at the hearing or in any pleading in this proceeding. Had it been so addressed, Respond Power could have responded to the ALJ's allegation and had an opportunity to explain the notation that was used. It is noteworthy that this provision is not intended for the protection of the consumer, but rather for the Commission staff when enrollments need to be investigated. No violation of this provision is warranted. At most, again, this is an issue that Respond Power would welcome the opportunity to work with OCMO and BCS to ensure that its notation complies with the letter and spirit of the current regulations.

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[73] I.D. at 41-42.
[74] I.D. at 42-43.

The ALJ next finds that Respond Power violated Section 111.12(d)(2) and (4).[75] Section 111.12(d)(2) prohibits an EGS from making false or misleading representations including misrepresenting rates or savings offered by the supplier. As discussed above, in Exception No. 2, Respond Power disputes any factual findings regarding false or misleading representations since the only evidence is hearsay which is not corroborated by any other evidence. In fact, the hearsay testimony is in direct contravention of the written disclosure statement and the training and instructions that are given to sales agents by Respond Power. However, if the Commission is persuaded that Respond Power's sales agent made false or misleading representations about savings, this is the provision of the regulations that Respond Power should be found to have violated. As to Section 111.12(d)(4), this provision mirrors the disclosure statement language in Chapter 54, which has been fully addressed above. If the Commission decides that the Affiliates Disclosure Agreement does not comply with the applicable customer information regulations, also finding a violation of Section 111.12(d)(4) would serve no purpose.

The ALJ further found that Respond Power violated Section 111.9(b) because it did not comply with consumer protection regulations at Chapter 54 and billing practices in Chapter 56. 52 Pa. Code § 111.9(b).[76] However, there was no prior conclusion as to any violations of Chapter 56. As to Chapter 54, Respond Power has already discussed its compliance with those provisions. In any event, again, this is a general provision that requires EGSs to comply with certain regulations rather than imposing a particular standard that an EGS can be found to have violated.

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[75] I.D. at 42.
[76] I.D. at 42-43; Conclusion of Law No. 13.

E. Exception No. 5: The I.D. fails to appropriately apply the relevant factors relating to the amount of civil penalty.[77]

In arriving at the conclusion that each violation of the regulations committed by Respond Power warrants a $1,000 civil penalty, the ALJ failed to appropriately apply the factors that have been set forth by the Commission. *See* 52 Pa. Code § 69.1201; s*ee also Rosi v. Bell Atlantic-Pa., Inc. and Sprint Communications Company*, Docket No. C-00992409 (Order entered February 10, 2000) ("*Rosi*"). The conduct cited by the ALJ warranting the imposition of a civil penalty is the "agent's misrepresentations of promised savings in comparison to West Penn Power's price during his in-person sales pitch to Complainant at Complainant's residence."[78]

Besides inappropriately finding ten separate violations based on that one instance of a misleading representation by an agent, the ALJ failed to apply the civil penalty criteria to each of these separate violations. Rather, she looked at the severity of the misleading representation which she found to have occurred and concluded that each of the ten violations she identified warranted the imposition of a $1,000 penalty. For instance, this means that the ALJ would impose a $1,000 civil penalty on Respond Power for:

- Not having cancellation fee language bolded in a disclosure statement when the cancellation fee language did not even apply to the Complainant in this proceeding
- Supposedly failing to include notation on a sales agreement that the transaction was the result of door-to-door marketing

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[77] I.D. at 45-49.
[78] I.D. at 46.

- Violating the *Licensing Order* by violating Section 111.12(d)(2) of the regulations
- Violating two catch-all provisions in the regulations requiring EGSs to comply with Commission directives by violating Section 111.12(d)(2)
- Violating provisions in the regulations with which the *Licensing Order* required Respond Power to comply
- Being responsible for the actions of its agents

These $1,000 civil penalties would be imposed in addition to the penalties for actually violating specific regulations.

In recommending the imposition of a $10,000 civil penalty for essentially one violation of the Commission's regulations, the ALJ has far exceeded the Commission's authority. While Respond Power agrees that misleading statements of promised savings by an agent is a serious matter that, if true, has the potential to adversely affect the competitive market, Respond Power notes that this is not a case that presents a situation where an EGS has engaged in a willful company-wide campaign aimed at deceiving customers by guaranteeing savings. This is, at most, a rogue agent who departed from the training script that was provided to him.

Rather than stacking violations or imposing a $10,000 civil penalty for one finding of improper conduct by an agent, the Commission would be better served by ensuring that going forward, Respond Power has the necessary protocols in place to ensure compliance with the regulations. Respond Power welcomes the opportunity to work with BCS and OCMO. Due to the pending complaint proceeding filed by the Bureau of Investigation and Enforcement ("I&E"), no further referral to I&E is warranted.

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: January 8, 2015

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Attorneys for Respond Power LLC

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

JUSTIN L. HERP	:	
	:	
v.	:	**Docket No. C-2014-2413756**
	:	
RESPOND POWER LLC	:	

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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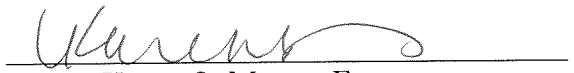
Dated this 8th day of January, 2015.



Karen O. Moury, Esq.