

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

555 Walnut Street, 5th Floor, Forum Place  
Harrisburg, Pennsylvania 17101-1923  
(717) 783-5048  
800-684-6560

FAX (717) 783-7152  
consumer@paoca.org

January 22, 2015

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 Exceptions, in the above-referenced proceeding.

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

Respectfully submitted,

A handwritten signature in black ink that reads "Barrett Sheridan".

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

Enclosures

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

200913

RECEIVED  
2015 JAN 22 AM 11:46  
SECRETARY'S OFFICE

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Justin L. Herp

v.

Respond Power LLC

:  
:  
:  
:  
:

Docket No. C-2014-2413756

---

REPLY EXCEPTIONS  
OF THE OFFICE OF CONSUMER ADVOCATE

---

Barrett C. Sheridan  
Pa. Attorney Id. No. 61138  
E-Mail: bsheridan@paoca.org

Hobart J. Webster  
Pa. Attorney Id. No. 314639  
E-Mail: hwebster@paoca.org  
Assistant Consumer Advocates

Counsel For:  
Tanya J. McCloskey  
Acting Consumer Advocate

Office of Consumer Advocate  
555 Walnut Street 5th Floor, Forum Place  
Harrisburg, PA 17101-1923  
Phone: (717) 783-5048  
Fax: (717) 783-7152

Dated: January 22, 2015

SECRETARY'S OFFICE

2015 JAN 22 AM 11:46

RECEIVED

**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. REPLIES TO EXCEPTIONS..... 2

    OCA Reply to Respond Power’s Exception No. 1: ALJ Barnes Properly Determined That Respond Power’s Disclosure Statement Does Not Comply With Commission Regulations..... 2

        A. ALJ Barnes Considered And Properly Rejected Respond Power’s Contract Law Argument, As Based On Respond Power’s Disclosure Statement. .... 2

        B. The Commission Should Reject Respond Power’s Two New, Improper And Untimely Claims Regarding The Evidentiary Record. .... 7

    OCA Reply to Respond Power’s Exception No. 2: ALJ Barnes Initial Decision Is Soundly Based Upon The First Person Testimony Of Mr. Herp And Mr. Hackett ..... 9

    OCA Reply to Respond Power’s Exception No. 3: ALJ Barnes’ Determination That Respond Power’s Illegal Marketing and Billing Support Issuance of a Refund to Mr. Herp is Within the Commission’s Authority ..... 14

    OCA Reply to Respond Power’s Exception No. 4: ALJ Barnes’ Determination That Respond Power’s Conduct Has Violated Commission Regulations Is Soundly Supported..... 19

    OCA Reply to Respond Power’s Exception No. 5: ALJ Barnes’ Determination Of An Appropriate Civil Penalty Is Soundly Based Upon The Record And Review Of The Commission’s Section 69.2014(a) Criteria ..... 23

III. CONCLUSION ..... 25

## TABLE OF CITATIONS

### Cases

Walker v. Unemployment Compensation Bd. of Rev., 367 A.2d 366 (Pa Cmwlt. 1976).... 12, 13

### Administrative Decisions

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 to expand Major Energy’s service area, subject to conditions for 18 months.) ..... 9

Commonwealth of Pa. v. Blue Pilot Energy, Opinion and Order, Docket No. C-2014-2427655 (Dec. 11, 2014) ..... 16

Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc., Docket No. C-2014-2427657 passim

Jos. Nadav v. Respond Power LLC, Docket No. C-2014-2429159, Opinion and Order at 7 (Dec. 19, 2014) ..... 18

Joseph Nadav v. Respond Power, LLC, C-2014-2429159, Motion of Vice Chairman John F. Coleman, Jr. dated November 13, 2014..... 21

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) ..... 3, 4, 16

Petition of PECO Energy for Approval of its Default Service Plan, Docket No. P-2012-2283641, Opinion and Order (Mar. 6, 2014), appeal pending, sub nom CAUSE-PA v. Pa. Pub. Util. Comm’n, 445 C.D. 2014 and McCloskey v. Pa. Pub. Util. Comm’n..... 16

Public Utility Commission v. MXEnergy Electric, Inc., PUC Docket No. M-2012-2201861 (Opinion and Order entered May 3, 2012)..... 21

Rahman v. Verizon Pennsylvania, Inc., Docket No. F-02009165, Opinion and Order at 8 (May 15, 2007) ..... 13

Review of Rules, Policies, and Consumer Education Measures Regarding Variable Rate Retail Electric Products, Docket No. M-2024-2406134, Opinion and Order (Feb. 20, 2014)..... 16

### Statutes & Regulations

52 Pa. Code § 5.406(a)(1) ..... 8

52 Pa. Code § 54.1 ..... 5

52 Pa. Code § 54.5(c)(10)..... 19

52 Pa. Code § 54.7(a)..... 20

52 Pa. Code §§ 54.1, 54.2 ..... 5

52 Pa. Code §§ 54.4(a), 54.5(a), 54.7(a)..... 6

52 Pa. Code§ 54.43(1)(f) and (g) ..... 20

52 Pa. Code § 111.12(d)(2) and (4) ..... 22

52 Pa. Code § 111.7(a)(1)(i) ..... 22

52 Pa. Code § 54.42(a)..... 20

66 Pa.C.S. § 3301..... 23

66 Pa.C.S. §§ 102, 501, 1301, 1312, 2802(14), 2803, 2807(d), 2809(f) ..... 14

## I. INTRODUCTION

The Office of Consumer Advocate (OCA) urges the Commission to adopt the well-reasoned Initial Decision (I.D.) issued by Administrative Law Judge (ALJ) Elizabeth Barnes on December 19, 2014. Based upon a thorough review of the record and respective legal arguments of the parties, ALJ Barnes determined that Respond Power's sales agent and disclosure statement presented misleading and false information which led the formal complainant Mr. Justin Herp to enroll with Respond Power, based upon expectations of savings relative to the price-to-compare (PTC) of his utility West Penn Power. ALJ Barnes determined that Respond Power's training and oversight of its sales and marketing, as conducted by third parties, is inadequate and that Respond Power violated provisions of the Commission's Chapter 54 and 111 regulations. ALJ Barnes further determined that Respond Power's disclosure statement is deficient under the Commission's regulations and did not suffice to communicate in plain language and with clarity Respond Power's variable pricing terms and conditions. ALJ Barnes held that Mr. Herp provided credible testimony that Respond Power's sales agent made misrepresentations that persuaded Mr. Herp to enroll with Respond Power and that Respond Power's marketed price did not conform with Respond Power's disclosure statement price or Respond Power's billed prices.

ALJ Barnes' decision that Respond Power should provide Mr. Herp with a refund or credit based on the difference between West Penn Power's price-to-compare and Respond Power's billed rate for the billing for the several months of service is soundly based upon the record and within the Commission's authority, as set forth in the Commission's IDT Order,<sup>1</sup> entered just after the Initial Decision issued. The Commission should adopt the ALJ's sound application of relevant factors relating to the amount of a civil penalty that should be imposed.

---

<sup>1</sup> Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc., Docket No. C-2014-2427657 (IDT Order).

For the reasons set forth in the OCA Main Brief and Reply Brief and these Reply Exceptions, the Commission should deny Respond Power's Exceptions. Respond Power acknowledges the Commission's recent IDT Order, although Respond Power disputes that any refund can or should issue. The Commission should deny Respond Power's Exceptions and adopt the well-reasoned and supported Initial Decision of ALJ Barnes.

## II. REPLIES TO EXCEPTIONS

**OCA Reply to Respond Power's Exception No. 1: ALJ Barnes Properly Determined That Respond Power's Disclosure Statement Does Not Comply With Commission Regulations.** (Respond Power Exc. at 6-17; I.D. at 13, 18-24, 33-43; OCA M.B. at 1-4, 7-8, 12-18; OCA R.B. at 6-10).

### A. ALJ Barnes Considered And Properly Rejected Respond Power's Contract Law Argument, As Based On Respond Power's Disclosure Statement.

In her I.D., ALJ Barnes considered and rejected Respond Power's two-part argument that because the Commission at least implicitly approved Respond Power's disclosure statement and Respond Power provided Mr. Herp with its disclosure statement, the written disclosure statement trumps any misrepresentations by Respond Power's sales agent under Pennsylvania contract law.

I.D. at 19. As the I.D. states:

Respond Power argues that since the actual disclosure statement given to the Complainant at the time of the point of sale was pre-approved by the Commission, it does not matter what the sales representative may have said to the Complainant in order to induce him to switch to Respond Power, as the terms of the written sales agreement and accompanying disclosure statement are controlling. This argument is without merit as I am not finding a breach of contract under Pennsylvania contract law.

I.D. at 19. Rather than decide Mr. Herp's formal complaint based on contract law, ALJ Barnes explained that:

I am determining if there were violations of applicable statutes under the Competition Act, regulations under Chapter 54, 56 and 11 of 52 Pa. Code, and violations of Commission Orders.

Id.; see also I.D. at 12-14.

ALJ Barnes carefully examined Respond Power's claim that the Commission had at least implicitly approved the language of Respond Power's disclosure statement, as presented in the combined Respond Power and Major Energy disclosure statement entered as Respond Power Exhibit 2 (Affiliates Disclosure Statement). I.D. at 18-19, 22-23; see Respond Power M.B. at 5. ALJ Barnes found that Respond Power's License Order,<sup>2</sup> "was silent as to express approval of the language of" Respond Power's 2010 draft disclosure statement, as submitted with its EGS license application. I.D. at 19. As to the disclosure statement entered into the record as Respond Power Exhibit 2, ALJ Barnes also found:

that there is a lack of evidence to show this Affiliates Disclosure Statement was approved by the Commission; therefore, I don't find there to be any presumption that it is in compliance with our regulations.

I.D. at 20; see OCA M.B. at 12-15; OCA R.B. at 8-10.

Having correctly found that Respond Power's disclosure statement was not entitled to any presumption of compliance with the Commission's regulations, ALJ Barnes examined the language and presentation of the Respond Power portion of the single-page, joint disclosure statement entered as Respond Power Exhibit 2. I.D. at 20-23. ALJ Barnes paid specific attention to the variable rate pricing portion of Respond Power's disclosure statement, as Mr. Herp testified that he had skimmed the disclosure statement, after signing the sales agreement, and "saw things that seemed to correspond with what the sales agent was advertising." I.D. at 21, 29; TR at 33-34. ALJ Barnes found Respond Power's variable rate description in the Affiliates Disclosure Statement "to be somewhat misleading..." and that the testimony of Mr. Herp was credible that when he read the passage he believed the disclosure essentially stated

---

<sup>2</sup> License Application of Respond Power LLC for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as a Supplier of Retail Electric Power, Docket No. A-2010-2163898, Order at 3 (Aug. 19, 2010) (License Order).

“Respond Power each and every month will deliver your power at a price that is less than what you would have paid had you purchased your power from your local utility company...” and that the word “goal” did not stand out to him. I.D. at 4, 21. ALJ Barnes also found “the phrase of ‘can not always guarantee’ to be an odd choice of words” in the Respond Power Exhibit 2 disclosure statement, as susceptible of several interpretations regarding whether Respond Power was guaranteeing savings relative to the utility’s price-to-compare. I.D. at 21-22.

Based on her review of Mr. Herp’s credible testimony and the Affiliates Disclosure Statement, ALJ Barnes properly concluded:

*I find a reasonable customer could be misled by the written disclosure statement in Respondent’s Exhibits 1-2. Therefore I find a violation of the Commission’s License Order for using an unclear and misleading disclosure statement which I doubt was ever approved in its final form by the Commission.*

I.D. at 24.

From her testing of Respond Power’s Main Brief claim that its Exhibit 2 disclosure statement is compliant with the Commission’s regulations, ALJ Barnes also identified specific elements which appear to not comply with the Commission’s regulations. Regarding the provisions that require that “EGS prices billed must reflect the marketed prices and the agreed upon prices in the disclosure statement,” ALJ Barnes stated:

*I find in favor of the Complainant on this issue because the evidence supports a finding that Respond Power’s prices billed did not reflect the marketed prices promised to Mr. Herp by Mr. Majek. Further the terms of the disclosure statement regarding the agreed upon variable rate were misleading and therefore should not be controlling.*

I.D. at 33; OCA M.B. at 7-8. ALJ Barnes properly held that Respond Power’s disclosure statement does not comply with Respond Power’s License Order and multiple Commission regulations that govern both the manner and presentation of how Respond Power must communicate with consumers, to provide them with adequate and accurate information. See e.g.

I.D. at 37 (non-compliance with Section 54.5(c)(10) which requires Penalties, Fees and Exceptions to be presented in larger font.); see also OCA. R.B. at 9-10; see also I.D. at 33, 36-39, 41-43, 50-51.

In its Exceptions, Respond Power asks the Commission to reject ALJ Barnes' findings that Respond Power's disclosure statement does not comply with Commission regulations and instead rule that the relevant language of Respond Power's disclosure statement was approved by the Commission and was consistent with the Commission regulations in effect at the time of the Complainant's enrollment. Respond Power Exc. at 6. Respond Power asks the Commission to reverse Conclusions of Law 3, 5, 8, 9, and 15. Id. at 17; see I.D. at 50-51. Respond Power faults ALJ Barnes for reviewing the actual Affiliates Disclosure Statement, as presented to Mr. Herp during the sales contact, "in hindsight solely from the perspective of one customer..." a customer who missed the word "goal" through no fault of Respond Power. Id. at 10-11, 12. Respond Power also excepts to ALJ Barnes' conclusion that Respond Power's disclosure statement is confusing and misleading and to ALJ Barnes' conclusions that Respond Power's disclosure statement is not compliant. Id. at 6-17.

Respond Power's Exception No. 1 must be denied. As a licensed EGS, Respond Power has an obligation to provide adequate and accurate information to consumers to enable them to make informed decisions about the purchase of electric supply service, including comparisons. OCA M.B. at 7-8; 52 Pa. Code § 54.1. The "adequate and accurate customer information" that Respond Power must provide includes all "[w]ritten, oral, and electronic communications" used by Respond Power "to communicate to consumers prices and terms of service." 52 Pa. Code §§ 54.1, 54.2. Respond Power's obligations to provide consistent, accurate and adequate information extend from the earliest of sales and marketing communications to prospective

customers through to Respond Power's billing of the agreed upon price for supply service. 52 Pa. Code §§ 54.4(a), 54.5(a), 54.7(a).

ALJ Barnes conducted an appropriate and complete review of the merits of Respond Power's defense, as based on both the language and format of Respond Power Exhibit 2, the joint disclosure statement for Respond Power and its affiliate Major Energy. ALJ Barnes correctly rejected Respond Power's common law contract arguments and instead measured Respond Power's Exhibit 2 disclosure statement against Respond Power's obligations as a licensed EGS to provide consumers with adequate and accurate information in plain language and consistent with all Commission regulations. ALJ Barnes observed Respond Power's disclosure statement including the "tiny type" and Respond Power's failure to present certain provisions in a larger typeface does not conform with Respond Power's obligation to provide consumers with "clear and unequivocal disclosures," compliant with the Commission's regulations. See, e.g. I.D. at 20, 24, 32-33. Respond Power's single-page disclosure statement, as combined with the disclosure statement for its affiliate Major Energy, failed to live up to Respond Power's claim that its disclosure statement is compliant with the Commission's regulations as in effect at the time of Mr. Herp's enrollment. See Respond Power M.B. at 5. As ALJ Barnes stated "[t]he record evidence clearly demonstrates that Respond Power is in violation of Commission regulations that are directed at protecting consumers and promotion of a fair competitive market for electric supply." I.D. at 32-33.

The OCA submits that ALJ Barnes' findings and conclusions of law that Respond Power's disclosure statement does not comply with the License Order and Commission regulations is well reasoned and supported by both the record evidence and her careful analysis

and consideration of Respond Power's position. The Commission should deny Respond Power's Exception No. 1.

B. The Commission Should Reject Respond Power's Two New, Improper And Untimely Claims Regarding The Evidentiary Record.

The OCA submits that the Commission must also reject two improper and unsupported claims made by Respond Power for the first time in its Exception No. 1. First, Respond Power suggests that its own Exhibit No. 2 Affiliates Disclosure Statement as entered into the record is not necessarily the same size as the document used in marketing and enrollment. Respond Power Exc. at 11. According to Respond Power:

The ALJ also refers to the font or print on the Affiliates Disclosure Statement as "tiny." [I.D. at 19] 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.

Id. at 11. Thus, Respond Power asks the Commission to accept Respond Power Exhibit No. 2 solely for the content and not for the size or presentation of the combined Respond Power and Major Energy disclosure statements. Id. The Commission must categorically reject Respond Power's unfounded and unwarranted attack on its own authenticated and admitted Respond Power Exhibit No. 2. Respond Power submitted two exhibits into the record. Respond Power Exhibit No. 1 is the sales agreement or enrollment form that Respond Power agent Larry Majek presented to Mr. Herp for Mr. Herp's signature, as both Mr. Herp and Respond Power witness Small testified. TR. at 16-17, 58-59. Respond Power Exhibit No. 2 is Respond Power's disclosure statement which Respond Power witness Small testified was provided to Mr. Herp "on the back of the [sales] agreement." TR. 59. Mr. Herp testified to the same relationship between the sales agreement and disclosure agreement, as two sides of a single page document. TR. 15-16. In addition to the testimony of Mr. Herp, fellow Butler, Pennsylvania resident Earl Hackett

testified that he signed a sales agreement of the same type as Respond Power Exhibit 1. TR. 46-47. Mr. Hackett testified that the disclosure agreement contained in Respond Power Exhibit 2 was the same as on the back of Mr. Hackett's sales agreement. TR. at 47. Three witnesses, including Respond Power's General Counsel testified that the disclosure statement set forth in Respond Power Exhibit 2 occupied no more space than the reverse side of Respond Power's sales agreement. The time for Respond Power to claim that Respond Power Exhibit 2 is not an accurate copy in all respects, including form, lay-out and size of font, of the disclosure statement provided to Mr. Herp is past. The Commission should reject Respond Power's improper collateral attack on its own record evidence.

The second improper request by Respond Power is for the Commission to make an inference, in Respond Power's favor, based on Respond Power's opinion that "there is an absolute dearth of formal complaints filed with the Commission against Respond Power from August 2010 to January 2014." Respond Power Exc. at 14. Respond Power describes a search conducted by some unidentified person at some point in time which supposedly shows two complaints were filed against Respond Power during that time. *Id.* at fn. 40. Respond Power asks the Commission "to take office [sic] notice of these complaints as public documents, pursuant to Section 5.406 of the Commission's regulations, 52 Pa. Code § 5.406(a)(1)." Respond Power Exc. at 14.

The Commission must deny Respond Power's request for official notice. Section 4.506(a)(1) relates to the offer of public documents into evidence. Respond Power cites to two formal complaints but asks the Commission to accept as probative fact the alleged *absence* of other formal complaints. Respond Power's request for official notice and proposed inferences in its favor are untimely and unfairly presented in the Exceptions phase on this proceeding, where

the evidentiary record is closed and Respond Power's witness and General Counsel Mr. Small is unavailable for cross-examination. For example, evidence regarding non-public informal complaints could counter the self-serving inferences which Respond Power requests the Commission draw.<sup>3</sup> The Commission should deny Respond Power's request to supplement the evidentiary record and so invite the Commission to make inferences in its favor.

**OCA Reply to Respond Power's Exception No. 2: ALJ Barnes Initial Decision Is Supported By The First Person Testimony Of Mr. Herp And Mr. Hackett**

(Respond Power Exceptions at 17-21; I.D. at 3-11, 14-15, 18-44; OCA M.B. at 1-3, 7-17; OCA R.B. at 1-12).

In the I.D., ALJ Barnes faced two conflicting views of the importance of the Respond Power sales agent Larry Majek's contact with Mr. Herp. Mr. Herp testified as to his first hand interaction with the Respond Power sales agent who approached Mr. Herp at his home, inquired whether Mr. Herp would like to learn about Respond Power's services and convinced Mr. Herp to sign a sales agreement and enroll with Respond Power. I.D. at 28-29. Mr. Hackett provided his own account of his first hand contact with a different Respond Power sales agent at his home. I.D. at 29-30.

Consistent with his formal complaint, Mr. Herp testified that he was initially convinced by the statements of Respond Power's sales agent that if he switched to Respond Power, Mr. Herp would receive savings on his electric supply charges. Mr. Herp received the Affiliates Disclosure Statement *after* he signed the sales agreement to enroll with Respond Power. Mr. Herp gave the disclosure statement a quick look, checking for confirmation of the key elements of the Respond Power's agent's sales pitch. I.D. at 28-29. After several months of billings from

---

<sup>3</sup> 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 to expand Major Energy's service area, subject to conditions for 18 months.) (Major Energy II). The Commission imposed conditions and reporting requirements, based on concerns regarding Major Energy's fitness arising in part from the number of informal complaints received compared to other natural gas suppliers. Tentative Order at 2 (Mar. 29, 2012).

Respond Power, Mr. Herp realized that the product advertised and the product delivered were completely different. I.D. at 29; TR. at 23. Mr. Herp faulted Respond Power's sales agent for misrepresenting Respond Power's variable price service. I.D. at 29.

On the other hand, ALJ Barnes took note of Respond Power's position that it is impossible for Respond Power to know exactly what a sales agent told Mr. Herp during a sales pitch made during a door-to-door marketing campaign. I.D. at 15-16. For this and other reasons, Respond Power insisted the statements of the sales agent do not control, where the Affiliates Disclosure Statement contradicts the sales agent's statements. I.D. at 16-17. Respond Power presented its General Counsel Adam Small to testify as to its enrollment procedures including the use of third party contractors for marketing.

ALJ Barnes made several determinations regarding the probative value of the admitted testimony. Specifically, ALJ Barnes stated:

I find the testimony of Mr. Herp to be credible that Respond Power's door-to-door sales agent promised that as an enrolled customer of Respond Power, Mr. Herp's variable priced supply service would provide savings relative to West Penn Power and was capped or constrained by West Penn Power's price-to-compare.

I.D. at 28. ALJ Barnes took note of Mr. Herp's direct testimony regarding his personal impressions and understanding of Respond Power's variable priced service:

[t]hat Mr. Herp agreed to a variable service product is not in dispute. However, based upon the statement made by Respond Power's agent, Mr. Herp understood that Respond Power "offered rates that were always lower than the local utility company, in my case West Power." N.T. 14. "[I]t was my understanding that this variable rate did have a cap, and that being the rate -- the current rate offered by local utility company." N.T. 26.

I.D. at 28. ALJ Barnes also took note that:

Mr. Herp reported that "[w]hen the sale agent left, I thought I had purchased a better utility product than West Penn." N.T. 16. "[I]t was my understanding that this variable rate did have a cap, and that being the rate --- the current rate offered by my local utility company." N.T. 26.

I.D. at 28.

ALJ Barnes contrasted the testimony of Mr. Herp and Mr. Hackett with that of Respond Power witness Adam Small and determined that the:

testimony of Respond Power General Counsel and witness Adam Small was insufficient to counter Mr. Herp's testimony that Respond Power made misrepresentations regarding limits on the variability of Respond Power's pricing, as corroborated by Mr. Hackett who heard a similar message from a different Respond Power sales agent in the same community in roughly the same time period.

I.D. at 30. ALJ Barnes further concluded that Mr. Herp had offered credible testimony regarding his contact with Respond Power's sales agent, which lead Mr. Herp to sign up to switch to Respond Power. I.D. at 30.

ALJ Barnes took notice that Respond Power did not present its sales agent Mr. Majek to testify; indeed, Respond Power witness Small did not know if Mr. Majek was still working as an independent contractor for Respond Power. I.D. at 30. ALJ Barnes rejected Respond Power's reliance on its disclosure statement, finding that

the terms and conditions of the contract to be clear and I find that the testimony of Mr. Herp to be credible in support of a finding that the agent, Larry Majek, did contact Mr. Herp in person and did make misrepresentations promising monthly savings in comparison to West Penn Power's charges, in conflict with the disclosure statement and terms given to Mr. Herp with the Service Agreement.

Upon consideration of the testimony of Mr. Hackett and Respond Power's witness, ALJ Barnes held that the testimony of Mr. Hackett describing a similar sales contact from a different Respond Power sales agent "corroborates the testimony of Mr. Herp and rebuts Mr. Small's vague testimony that agents are instructed to discuss variable rates and not guarantee savings."

I.D. at 32.

Based upon the credible testimony of Mr. Herp, ALJ Barnes found that:

Mr. Majek made false or misleading representations regarding the rates that Respond Power would be charging Mr. Herp under the variable rate service agreement. The testimony of Mr. Hackett refutes the testimony of Mr. Small that his agents are trained to not guarantee savings. Complainant has sustained his burden of proof in showing Respond Power violated 52 Pa.Code § 111.12(d)(2) and (4). I further find that Respond Power violated 52 Pa.Code § 111.9(b) as its agent, Larry Majek, did not comply with regulations governing marketing, consumer protection and door-to-door sales including consumer protection regulations at Chapter 54 and billing practices in Chapter 56.

I.D. at 42-43.

Nonetheless, Respond Power's Exception No. 2 faults the ALJ for improperly relying "on uncorroborated hearsay testimony that was in direct contravention of the written Affiliates Disclosure Statement." Respond Power Exc. at 17. Further, Respond Power faults the I.D. for "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..." Id. According to Respond Power, this hearsay evidence should only be afforded probative effect to support a finding if corroborated by competent evidence in the record. Id. at 18, citing Walker v. Unemployment Compensation Bd. of Rev., 367 A.2d 366 (Pa Cmwlth. 1976)(Walker). Respond Power further faults ALJ Barnes for not according the testimony of its witness Mr. Small regarding Respond Power's oversight and training of its agents, conduct of field audits, etc. more weight. Id. at 19-20.

The Commission should deny Respond Power's Exception No. 2. First, Respond Power is *incorrect* that Mr. Herp's testimony is somehow "hearsay testimony" that requires corroboration to support a finding of fact. Mr. Herp's testimony is his first person account of his personal knowledge, as provided under oath and subject to cross-examination by Respond Power's counsel. Mr. Hackett's testimony is also his first person account of his interaction with a Respond Power agent.

Although Respond Power uses the label “hearsay” liberally, Respond Power does not cite to a legal definition. Pennsylvania Rule of Evidence Rule 801(c) defines “hearsay” as meaning “a statement that (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.” Pa. R.E. Rule 801. Mr. Herp’s first person testimony regarding his impressions, understanding and state of mind after listening to the sales pitch of Respond Power’s sales agent is not hearsay testimony. Nor is Mr. Hackett’s testimony regarding his personal encounter with a different Respond Power sales agent hearsay.

In Rahman v. Verizon Pa., Inc., the Commission granted the pro se complainant’s objection that the testimony of the Verizon witness, where based upon review of Verizon’s business records, rather than first hand knowledge of Verizon’s steps taken to terminate Ms. Rahman’s service was uncorroborated hearsay. The Commission noted, under the same Walker decision as cited by Respond Power, that “... the *Walker* decision tells us that the portion of the Verizon witness’ testimony that is not based on first hand knowledge or is not supported by other competent evidence cannot be the basis for a finding in this case.” Rahman v. Verizon Pennsylvania, Inc., Docket No. F-02009165, Opinion and Order at 8 (May 15, 2007)(Rahman).

The Commission denied Verizon reconsideration, noting:

The Verizon PA witness offered testimony as to the events she *assumed* had occurred, based on Verizon PA’s practices and policies. **However, the only evidence in the record of the actual events that transpired in this case was Ms. Rahman’s testimony. In such an instance, greater weight must clearly be given to the testimony of the person who was actually there.**

Rahman, Opinion and Order at 7 (Sept. 4, 2007)(Rahman Recons. Order) (emphasis added).

Based on Walker, Rahman, Rahman Reconsideration Order, and Pa. R.E. Rule 801(c)’s definition of hearsay, the Commission should deny Respond Power’s Exception No. 2 in its

entirety. Further, ALJ Barnes correctly recognized that Mr. Small's testimony regarding Respond Power's training, oversight, field audits of its sales contractors and their agents was general and that Mr. Small did not have first hand knowledge of Mr. Majek's conduct during the sales contact with Mr. Herp. I.D. at 9, 20, F.O.F. Nos. 50, 51. ALJ Barnes did not err in according less probative weight to Mr. Small's general testimony of how Respond Power's direct sales program is supposed to work, than to the first hand testimonies of Mr. Herp and Mr. Hackett.

**OCA Reply to Respond Power's Exception No. 3: ALJ Barnes' Determination That Respond Power's Illegal Marketing and Billing Support Issuance of a Refund to Mr. Herp is Within the Commission's Authority.**  
(Respond Power Exc. at 21-32; I.D. at 25-36; OCA M.B. at 15-17; OCA R.B. at 2-6).

ALJ Barnes issued the I.D. in this proceeding on December 17, 2014. ALJ Barnes examined Mr. Herp's request for a refund and the OCA's position that Mr. Herp should be provided equitable relief, where Respond Power's agent induced Mr. Herp to switch to Respond Power for variable price service, based on promises of savings relative to the West Penn Power's price-to-compare. I.D. at 25-36. In the I.D., ALJ Barnes reviewed the interplay between the Commission's general powers under Section 501, Sections 1301 and 1312, Section 102's definition of public utilities, as well as Sections 2803, 2802(14), 2807(d) and 2809(f) of the Competition Act. I.D. at 25-28; 66 Pa.C.S. §§ 102, 501, 1301, 1312, 2802(14), 2803, 2807(d), 2809(f). ALJ Barnes considered and rejected Respond Power's position, that Respond Power is not a "public utility" or "other corporation" (both subject to Section 501) subject to the Commission's authority to direct Respond Power to issue credits or refunds, "as contrary to the public interest and would not protect the public. To only be able to apply civil penalties or suspend or revoke a license without an equitable remedy in the form of a refund to the harmed

customer is insufficient to protect the customer and unreasonable.” I.D. at 27. ALJ Barnes determined that:

[t]here is sufficient evidence to warrant the finding of a violation of Commission regulations, and from that finding I am also finding legal authority under 66 Pa.C.S. §§ 501, 1301 and 1312 to provide the Complainant with the equitable relief he requests in the form of a credit or refund, the difference between what he owes Respond Power for electric generation supply during the months of November 2013 through March 2014 and what he would have owed West Penn Power for the same service at a lower price per kWh.

I.D. at 36, 52 (Conclusion of Law 16).

Just one day after the I.D. was issued, the Commission entered its Opinion and Order, ruling on two separate Petitions for Interlocutory Review and Answer to Material Question(s) in the IDT Order case. In the IDT Order, the Commission ruled the authority to order refunds provided by Section 1312 “does not apply to EGSs.” IDT Order at 16. The Commission further explained that it does have authority pursuant to its powers under Section 501:

Notwithstanding our Section 1312 analysis pursuant to the Code, we hold that the Commission has plenary authority pursuant under Section 501, 66 Pa.C.S. § 501, to direct an EGS to issue a credit or refund for an over bill. Under Section 501 and related case law, the Commission has broad authority to enforce the provisions of the Code, including the Electricity Generation Customer Choice and Competition Act (Electric Competition Act), 66 Pa.C.S. §§ 2801-2812, and is vested with broad powers to protect the rights of the public.

...  
*Directing a billing adjustment for an EGS over bill of supply charges is within the Commission’s Section 501 powers to carry out the consumer protections in the Electric Competition Act that are applicable to competitive electricity generation supply service. These consumer protections include the Section 2809(b) requirement that EGSs comply with the Commission’s Regulations, including the Chapter 54 billing and disclosure regulations.*

IDT Order at 17-18 (footnotes omitted). The Commission also ruled that it does not have authority to require parties to provide restitution as equitable relief, if the parties are unwilling.

IDT Order at 26.

The OCA submits that the Commission's IDT Order supports adoption of ALJ Barnes' I.D., modified to conform with the Commission's statement of authority of plenary authority under Section 501 and authority to implement and enforce the consumer protection provisions of the Electric Competition Act. The OCA submits that the Commission has the necessary authority to order Respond Power to provide a refund to Mr. Herp, based on ALJ Barnes' thorough and well documented determination that Respond Power has violated its License Order and related Commission's regulations directed at protecting consumers.

In its Exceptions, Respond Power raises several points in opposition to ALJ Barnes' determination that the Commission has the authority to order Respond Power to issue a refund. Respond Power Exc. at 21-32. Respond Power states that: 1) the Commission does not have statutory authority to limit prices charged by EGSs; 2) customers bear the responsibility to review the terms and conditions of agreements with EGSs for electric supply; and 3) the Commission does not have subject matter jurisdiction to interpret the terms and conditions of a contract between a consumer and an EGS to determine whether a breach of contract has occurred. Respond Power Exc. at 22-24.<sup>4</sup>

The OCA submits that these citations do not detract from the soundness of ALJ Barnes' determination that the Commission has subject matter jurisdiction and authority to order Respond Power to issue a refund or credit. As Commission has emphasized, first in Towne and more recently in MacLuckie, it is the EGS's responsibility to provide oral and written

---

<sup>4</sup> Respond Power cites to: 1) Review of Rules, Policies, and Consumer Education Measures Regarding Variable Rate Retail Electric Products, Docket No. M-2024-2406134, Opinion and Order (Feb. 20, 2014)(Variable Rate Order); 2) Petition of PECO Energy for Approval of its Default Service Plan, Docket No. P-2012-2283641, Opinion and Order (Mar. 6, 2014), appeal pending sub nom CAUSE-PA v. Pa. Pub. Util. Comm'n, 445 C.D. 2014 and McCloskey v. Pa. Pub. Util. Comm'n; and 3) Commonwealth of Pa. v. Blue Pilot Energy, Opinion and Order, Docket No. C-2014-2427655 (Dec. 11, 2014).

communications which are clear and unequivocal disclosures. I.D. at 23-24; OCA M.B. at 11-12. Further, ALJ Barnes properly rejected Respond Power's position that Mr. Herp's Formal Complaint should be decided based on Pennsylvania contract law, where ALJ Barnes stated clearly that Mr. Herp's complaint will be decided based on the Public Utility Code, regulations and Commission orders. I.D. at 12-13, 19.

Respond Power acknowledges but opposes the Commission's IDT Order as legally unsound. Respond Power Exc. at 24-25. Respond Power posits that it is unavoidable that consumers may be incited to file wrongful complaints and the Commission may wrongly venture into interpretation of private contracts, beyond its powers. Id. at 25-28.

The Commission has correctly determined in the IDT Order that it does have the authority to direct an EGS such as Respond Power to issue a refund for an over bill or credit, where the EGS has violated those provisions of the Electric Generation Act or Commission regulations that are intended to provide consumers with protection when deciding whether to switch suppliers and on what terms and conditions. The Commission also affirmed its authority to issue refunds in appropriate circumstances involving EGS and consumers in its recent Nadav Order:

However, we do not agree with the ALJ's statement that because we lack the authority to regulate EGS rates, we also lack the authority to order a refund or credit to be provided to the Complainant. In this regard, it is important to note that we have interpreted Section 2807(d)(1) of the Public Utility Code, 66 Pa. C. S. § 28079(d)(1), to find that a refund is an appropriate remedy when a customer's supplier has been changed without the customer's affirmative consent. Additionally, our Regulations require an EGS to provide a full refund to customers of all generation charges resulting from an unauthorized switch. 52 Pa. Code § 57.177. This Regulation, which was approved by the Independent Regulatory Review Commission, has been in effect since 1998 and has the presumption of reasonableness. Accordingly, while we find that we lack the authority to regulate EGS rates, we conclude that we may require EGSs to provide refunds to retail customers in appropriate circumstances.

Jos. Nadav v. Respond Power LLC, Docket No. C-2014-2429159, Opinion and Order at 7 (Dec. 19, 2014)(Nadav Order) (PUC sustained ALJ Order granting preliminary objections, as modified).

Based on ALJ Barnes' sound I.D. as well as the Commission's IDT Order and Nadav Order, the Commission should deny Respond Power's Exception which opposes any directive to issue Mr. Herp a refund. Mr. Herp gave clear notice to Respond Power and the Commission through his formal complaint that Respond Power induced him to switch through the misleading statements made by Respond Power's sales agent about Respond Power's pricing for variable priced electric supply, where the sales agent informed Mr. Herp that Respond Power's price would not exceed the price-to-compare of his EDC West Penn Power. I.D. at 1-2. The OCA submits that ALJ Barnes properly concluded that among other violations, Respond Power did not comply with the Commission's Chapter 54 requirements that:

EGS prices billed must reflect the marketed prices and the agreed upon prices in the disclosure statement. I find in favor of the Complainant on this issue because the evidence supports a finding that Respond Power's prices billed did not reflect the marketed prices promised to Mr. Herp by Mr. Majek. Further the terms of the disclosure statement regarding the agreed upon variable rate were misleading and therefore should not be controlling. Under this provision, and under the provision of 66 Pa.C.S. 1312 (relating to Refunds), a refund consisting of the difference between the amount Complainant was actually billed at Respond Power's variable rate less the amount he would have been billed at West Penn Power's price-to-compare during the time that he was a customer of Respond Power from November 26, 2013 through March 26, 2014, is warranted.

I.D. at 33. The OCA acknowledges that ALJ Barnes did not have the benefit of the Commission's IDT Order to consult, regarding Section 1312 as limited to public utilities, when she issued the I.D. In all other respects, the OCA submits that ALJ Barnes' I.D. is soundly based and the Commission should direct Respond Power to issue a credit or refund, consistent with the

I.D. and the Commission's affirmative statements that it possesses authority to direct Respond Power to issue a credit or refund in a case such as this.

**OCA Reply to Respond Power's Exception No. 4: ALJ Barnes' Determination That Respond Power's Conduct Has Violated Commission Regulations Is Soundly Supported....**

(Respond Power Exc. 32-37; I.D. at 32-41; OCA M.B. at 3-5, 8, 12-17; OCA R.B. at 2-9).

The I.D. appropriately finds that Respond's conduct violated multiple provisions of the Commission's regulations. The OCA urges the Commission to adopt this well-reasoned conclusion. In I.D., the ALJ finds that Respond Power violated Section 54.4(a) of the Commission's regulations by not billing Mr. Herp "the prices marketed to him by" Respond's sales agent. I.D. at 33. This is an appropriate conclusion based on the record evidence regarding the solicitation of Mr. Herp by Respond's agent. Section 54.4(a) is intended to ensure that EGSs bill customers in a manner that is consistent with their customer solicitations. As the ALJ stated:

Section 54.4(a) provides EGS prices billed must reflect the marketed prices and the agreed upon prices in the disclosure statement. I find in favor of the Complainant on this issue because the evidence supports a finding that Respond Power's prices billed did not reflect the marketed prices promised to Mr. Herp by Mr. Majek [Respond's sales agent]. Further, the terms of the disclosure statement regarding the agreed upon variable rate were misleading and therefore should not be controlling.

I.D. at 33.

In their Exceptions, Respond challenges the ALJ's conclusion that Respond's disclosure statement language violates 52 Pa. Code § 54.5(c)(10). The OCA submits that the Commission should adopt the ALJ's conclusions which are fully supported by the record evidence. As identified in the I.D., the Affiliates Disclosure Statement that was given to Mr. Herp differs significantly from the Draft Disclosure Statement attached to Respond Power's initial

Application that was filed with the Commission. I.D. at 37. As the ALJ concluded, in contrast with the disclosure statement that Mr. Herp received, the disclosure statement that Respond filed with the Commission:

has fewer terms on two pages in approximately a 10 point font and is more easily readable than the approximately 8 point font on the Affiliates Disclosure Statement which is single spaced and on only one side of a page. The Draft Disclosure Statement has Paragraph No. 3 Penalties, Fees and Exceptions in a larger font and bolded, whereas the same Paragraph No. 3 in the Affiliates Disclosure Statement is not in a larger font and the paragraph is not bolded. **This alone is a violation of 52 Pa.Code § 54.5(c)(10).**

I.D. at 37. (Emphasis added).

The ALJ also found that Respond violated Section 54.7(a) of the Commissions regulations, 52 Pa. Code § 54.7(a), because the prices advertised to Mr. Herp by Respond's sales agent did not reflect the actual billed prices. I.D. at 37. As the ALJ concluded:

The evidence supports a finding that Respond Power violated 52 Pa.Code § 54.7(a) because the prices advertised by Mr. Majek to Mr. Herp did not reflect the actual billed prices Mr. Herp received in the months of November, 2013 through March, 2014.

I.D. at 37. ALJ Barnes further found that Mr. Herp sustained his burden of proof "that Respond Power did not comply with the Public Utility Code and Commission regulations and orders in violation of 52 Pa.Code § 54.42(a)." I.D. at 38. The OCA submits that the Commission should reject the flawed argument put forward by Respond and adopt the ALJ's conclusion that Respond Power violated Section 54.42(a).

The ALJ also found 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). The OCA submits that the Commission should adopt this well-reasoned finding. 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 acknowledges that it is responsible

for the acts of its agents, including the sales agent who solicited Mr. Herp. Respond Exceptions at 35.

Respond argues that these provisions merely establishes responsibility for the actions of agents and does not set a standard that an EGS can violate. The OCA submits that the ALJ correctly rejected this argument. As she stated:

There is no doubt that the Commission is a strong proponent of competition among electric generation suppliers and the ability of consumers to shop for and choose their own electric generation supplier. However, the Commissioners have also emphasized the importance of fair and honest sales and marketing practices in safeguarding consumers and preserving the integrity of the electric generation market.<sup>5</sup>

I.D. at 38. The ALJ also specifically addressed the nature of the standards established by 54.43 when she stated, “Section 54.43 of the Commission’s regulations sets forth a code of conduct for EGS’s...” I.D. at 38.

The ALJ also found several violations of Chapter 111 of the Commission's regulations. The OCA submits that the Commission should adopt the well-reasoned conclusions of the ALJ. Section 111.3 of the Commission’s regulations provides that an EGS, such as Respond, may use an agent to conduct marketing or sales activities, but only in accordance with applicable Commission rules, regulations, and orders. As the regulation makes clear, a supplier may be responsible for representations made by an agent in the course of sales and marketing contacts with Complainant. Respond argues that Chapter 111 does not contain any standard that Respond can be found to have violated. Respond Exceptions at 36. The ALJ disagreed with this argument.

---

<sup>5</sup> E.g., Public Utility Commission v. MXEnergy Electric, Inc., PUC Docket No. M-2012-2201861 (Opinion and Order entered May 3, 2012), Joseph Nadav v. Respond Power, LLC, C-2014-2429159, Motion of Vice Chairman John F. Coleman, Jr. dated November 13, 2014..

The Commission's regulations regarding consumer protection at Section 111.12(d)(2) provide:

- (d) A supplier:
  - (2) May not make false or misleading representations including misrepresenting rates or savings offered by the supplier.

\* \* \* \*

- (4) Shall provide accurate and timely information about services and products being offered. Information includes rates being offered, contract terms, early termination fees and right of cancellation and rescission.

52 Pa.Code § 111.12(d)(2) and (4).

In her I.D., the ALJ found that Mr. Herp had carried his burden of proving that Respond's agent had made false and misleading representations. As she stated:

I find Complainant's testimony credible that Mr. Majek made false or misleading representations regarding the rates Respond Energy would be charging Mr. Herp under the variable rate service agreement. The testimony of Mr. Hackett refutes the testimony of Mr. Small that his agents are trained to not guarantee savings. Complainant has sustained his burden of proof in showing Respond Power violated 52 Pa.Code § 111.12(d)(2) and (4). I further find Respond Power violated 52 Pa.Code § 111.9(b) as its agent, Larry Majek, did not comply with regulations governing marketing, consumer protection and door-to-door sales including consumer protection regulations at Chapter 54 and billing practices in Chapter 56.

I.D. at 42-43. The OCA urges the Commission to adopt this well-founded conclusion.

The ALJ also concluded that Respond violated 52 Pa.Code § 111.7(a)(1)(i) which provides:

- (a) a supplier shall establish a written, oral or electronic transaction process for a customer to authorize the transfer of the customer's account to the supplier.
  - (1) a document used to complete a transaction must include a means to identify, when an agent is involved, the agent who completed the transaction and a notation indicating whether the transaction was the result of:
    - (i) a door-to-door call or other in-person contact with an agent.

52 Pa.Code § 111.7(a)(1)(i). I.D. at 41.

The ALJ addressed the record evidence which formed the basis of her conclusion that Respond violated § 111.7(a)(1)(i) when she stated:

The Sales Agreement (Respondent's Exhibit 1) is the document used to complete the transaction with Mr. Herp and it does not have any indication whether this was a door-to-door or in-person contact with an agent in violation of 52 Pa.Code § 111.7(a)(1)(i).

I.D. at 41. She went on to state:

In fact, there is no indication whether the agent contacted the customer by telephone, in-person, or received a written completed sales agreement without any interaction at all between the customer and agent. Additionally, although there appears to be a verification record, Respondent did not offer it into evidence to show compliance with this regulation. Accordingly, I find Respond Power violated 52 Pa.Code § 111.7(a)(1)(i).

I.D. at 41.

The OCA submits that the Commission should adopt the ALJ's well-reasoned conclusion that Respond violated multiple Commission regulations.

**OCA Reply to Respond Power's Exception No. 5: ALJ Barnes' Determination Of An Appropriate Civil Penalty Is Soundly Based Upon The Record And Review Of The Commission's Section 69.2014(a) Criteria.**

(Respond Power Exc. at 38-39; I.D. at 45-52; OCA M.B. at 17-18).

ALJ Barnes reviewed the request of Mr. Herp and the OCA for the assessment of an appropriate civil penalty, as permitted by Section 3301, and agreed that a civil penalty is appropriate:

*Respond Power violated the Commission's License Order and several consumer protection regulations by its agent's misrepresentation of promised savings in comparison to West Penn Power's prices during his in-person sales pitch to Complainant at Complainant's residence.*

I.D. at 45-46; OCA M.B. at 17-18; 66 Pa.C.S. § 3301. ALJ Barnes set forth the Commission's factors and standards to be considered, as enumerated in Section 69.1201(a) and (c) of the Commission's regulations. I.D. at 45-46, quoting from 52 Pa.Code § 69.1201.

The OCA supports ALJ Barnes' determination that a civil penalty of \$10,000 is appropriate. ALJ Barnes properly considered the record evidence that supported Mr. Herp's

formal complaint claim that Respond Power's sales agent provided misleading information about Respond Power's variable pricing that induced Mr. Herp to switch, as corroborated by the testimony of Mr. Hackett who had a similar sales contact with a different Respond Power sales agent. ALJ Barnes also considered and found unwarranted Respond Power's dual claim that its disclosure statement was Commission-approved and compliant with the Commission's regulations then in effect. ALJ Barnes' determination that a \$10,000 civil penalty is warranted is appropriate based upon her consideration of the Commission's Section 69.2101 factors as well as the numerous violations by Respond Power of its License Order and individual regulations. See I.D. at 45-46. The Commission's factors are applied more strictly in a litigated proceeding. OCA M.B. at 18, 52 Pa. Code § 69.1201(b).

Respond Power opposes both the amount of ALJ Barnes' proposed civil penalty and that ALJ Barnes has 'stacked' violations which at most arise from the conduct of "a rogue agent who departed from the training script...." Respond Power Exc. at 39. Respond Power requests that the Commission substitute some forward-looking interaction between Respond Power and the Commission's Bureau of Consumer Services and Office Competitive Market Oversight to improve Respond Power's internal protocols and compliance. Id.

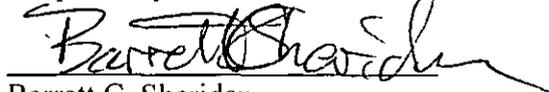
The Commission should reject Respond Power's exception in its entirety. ALJ Barnes' determination that Respond Power's oversight and training of its third party marketers is inadequate, the Respond Power's disclosure statement is not compliant, as well as her determination that Mr. Herp has sustained his formal complaint and shown that Respond Power mislead him in marketing its electric supply service all support the imposition of a civil penalty of \$10,000 as determined by ALJ Barnes. The Commission should reject Respond Power's

alternative proposal of no civil penalty as unwarranted based on the full record of this litigated proceeding.

### III. CONCLUSION

As set forth above and as supported by the Office of Consumer Advocate Main Brief and Reply Brief, the OCA respectfully requests that the Commission adopt the Initial Decision of Administrative Law Judge Elizabeth Barnes. The OCA requests that the Commission direct Respond Power to issue an appropriate refund and direct Respond Power to pay an appropriate civil penalty.

Respectfully Submitted,



Barrett C. Sheridan  
Assistant Consumer Advocate  
PA Attorney I.D. # 61138  
E-Mail: BSh Sheridan@paoca.org

Hobart J. Webster  
Assistant Consumer Advocate  
PA Attorney I.D. #314639  
E-Mail: HWebster@paoca.org

Counsel for:  
Tanya J. McCloskey  
Acting Consumer Advocate

Office of Consumer Advocate  
555 Walnut Street 5th Floor, Forum Place  
Harrisburg, PA 17101-1923  
Phone: (717) 783-5048  
Fax: (717) 783-7152

January 22, 2015  
200919

RECEIVED  
2015 JAN 22 AM 11:47  
SECRETARY'S OFFICE

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 Exceptions, 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 22<sup>nd</sup> day of January 2015.

SERVICE BY E-MAIL & FIRST CLASS MAIL, POSTAGE PREPAID

Karen O. Moury, Esq.  
Buchanan Ingersoll Rooney PC  
409 North Second St., Suite 500  
Harrisburg, PA 17101

SERVICE BY FIRST CLASS MAIL, POSTAGE PREPAID

Justin L. Herp  
220 Bennett Dr.  
Butler, PA 16001

Saul Horowitz, CEO  
Dmitry Lapin, Compliance Analyst  
Major Energy/Respond Power  
100 Dutch Hill Rd., Suite 310  
Orangeburg, NY 10962



Barrett C. Sheridan  
Assistant Consumer Advocate  
PA Attorney I.D. # 61138  
E-Mail: [BSheridan@paoca.org](mailto:BSheridan@paoca.org)

Hobart J. Webster  
Assistant Consumer Advocate  
PA Attorney I.D. # 314639  
E-Mail: [HWebster@paoca.org](mailto:HWebster@paoca.org)

Counsel for  
Office of Consumer Advocate  
555 Walnut Street 5th Floor, Forum Place  
Harrisburg, PA 17101-1923  
Phone: (717) 783-5048  
Fax: (717) 783-7152  
\*187415

RECEIVED  
2015 JAN 22 AM 11:47  
PA POST  
SECRETARY'S BUREAU