

Karen O. Moury
717 237 4820
karen.moury@bipc.com

409 North Second Street
Suite 500
Harrisburg, PA 17101-1357
T 717 237 4800
F 717 233 0852
www.buchananingersoll.com

July 10, 2014

VIA E-FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Commonwealth of Pennsylvania, et al. v. Respond Power LLC
Docket No. C-2014-2427659

Dear Secretary Chiavetta:

On behalf of Respond Power LLC, I have enclosed for electronic filing the Preliminary Objections of Respond Power LLC to the Joint Complaint of Commonwealth of Pennsylvania, et al. in the above-captioned matter.

Copies have been served on all parties as indicated in the attached certificate of service.

Very truly yours,



Karen O. Moury

KOM/tlg
Enclosure

cc: Chief Administrative Law Judge Charles E. Rainey, Jr. (via First-Class Mail)
Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**COMMONWEALTH OF
PENNSYLVANIA, ET AL.,**

v.

RESPOND POWER, LLC,

:
:
:
:
:
:

DOCKET NO. C-2014-2427659

NOTICE TO PLEAD

TO: John M. Abel	Candis A. Tunilo
Nicole R. Beck	Christy M. Appleby
Bureau of Consumer Protection	Office of Consumer Advocate
Office of Attorney General	555 Walnut Street
15 th Floor, Strawberry Square	5 th Floor, Forum Place
Harrisburg, PA 17120	Harrisburg, PA 17101

Pursuant to 52 Pa. Code § 5.101(b), you are hereby notified that, if you do not file a written response denying or correcting the enclosed Preliminary Objections of Respond Power, LLC to the Joint Complaint of Commonwealth of Pennsylvania, et al. within **ten (10) days** from service of this Notice, the facts set forth by Respond Power, LLC in the Preliminary Objections may be deemed to be true, thereby requiring no other proof. All pleadings, such as a Reply to Objections, must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served to counsel for Respond Power, LLC, and where applicable, the Administrative Law Judge presiding over the case.

File with:

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
P.O. Box 3265
Harrisburg, PA 17105-3265

With a copy to:

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

Dated: July 10, 2014



Karen O. Moury, Esq.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

COMMONWEALTH OF PENNSYLVANIA,	:	
BY ATTORNEY GENERAL KATHLEEN	:	
KANE, THROUGH THE BUREAU OF	:	
CONSUMER PROTECTION	:	
and	:	
TANYA J. McCLOSKEY, ACTING	:	DOCKET NO. C-2014-2427659
CONSUMER ADVOCATE	:	
Complainants	:	
v.	:	
RESPOND POWER, LLC,	:	
Respondent	:	

**PRELIMINARY OBJECTIONS
OF RESPOND POWER LLC
TO THE JOINT COMPLAINT OF
ATTORNEY GENERAL
AND ACTING CONSUMER ADVOCATE**

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

Respond Power LLC (“Respond Power”), through its counsel, Karen O. Moury and Buchanan Ingersoll & Rooney PC, files these Preliminary Objections pursuant to Section 5.101(a) of the Pennsylvania Public Utility Commission (“Commission”) regulations, 52 Pa. Code § 5.101(a) (1) (3) and (4), to the above-captioned Joint Complaint filed by the Attorney General and the Acting Consumer Advocate (“Joint Complainants”), and in support thereof, avers as follows:

I. Introduction and Background

1. On this same date, Respond Power filed an Answer to the Joint Complaint (“Respond Power Answer”).

2. Through these Preliminary Objections, Respond Power seeks dismissal with prejudice of Counts III, IV, VII, VIII and IX of the Joint Complaint.

3. Respond Power is an electric generation supplier (“EGS”) licensed by the Commission to supply electricity or electric generation services to the public within the Commonwealth of Pennsylvania. *License Application of Respond Power LLC for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as a Supplier of Retail Electric Power*, Docket No. A-2010-2163898 (August 19, 2010) (“*Licensing Order*”).

4. Since receiving its EGS license in 2010, Respond Power has supplied electric generation services under variable rate plans to tens of thousands of residential, small commercial and large commercial customers throughout Pennsylvania.

5. As part of its license application filed with the Commission on February 2, 2010, Respond Power submitted (as Attachment A/Appendix B to the application) a proposed Disclosure Statement, which was approved by the Commission’s *Licensing Order*.¹ Respond Power Answer ¶ 43 and Exhibit A.

¹ 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. Respond Power requested and received a copy of the complete application from the Commission’s Secretary. The proposed Disclosure Statement submitted with the application, which is included in Exhibit A, was provided by the Secretary. 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>. Respond Power is familiar with the review and approval of proposed Disclosure Statements by the Commission’s Bureau of Consumer Services (“BCS”) during the licensing process because of being subjected to that review during the license application proceeding of its affiliate, Major Energy LLC at Docket No. A-2009-2118836, which received a license as a natural gas supplier on October 9, 2009. Respond Power then used the same Disclosure Statement that had been approved by BCS for Major Energy LLC when it submitted its EGS license application.

6. Under Respond Power's variable rate plan, it provided the Commission-approved Disclosure Statement to consumers explaining that: (i) the price may vary from month to month; (ii) the rate is set by Respond Power; (iii) the rate reflects Respond Power's generation charge based on the PJM Day-Ahead Market, Installed capacity, transmission system losses, estimated state taxes, other costs and a profit margin; and (iv) the consumer may contact Respond Power for its current variable rate. The Commission-approved Disclosure Statement further provided that Respond Power's goal is to charge a price that is less than what the customer would have paid to the local utility company, but that it could not guarantee savings due to market fluctuations and conditions. Jt. Compl. ¶ 76 and Appendix B.

7. Prior to January 2014, no customers had filed formal complaints with the Commission against Respond Power concerning its variable rate contracts. From the time Respond Power received its license in 2010 until January 2014, only two customers have filed formal complaints with the Commission against Respond Power and both were quickly resolved through settlement agreements.²

8. During the month of January 2014, wholesale prices for hourly energy supply in the day ahead and particularly the real time markets increased exponentially in response to a combination of sustained cold weather ("Polar Vortex"). New records were set for winter electricity use in Pennsylvania and throughout the service area of PJM Interconnection, LLC ("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. *See Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, Docket No. M-2014-2406134 (February 20, 2014) ("*Variable Price Order*").

² The complaints are docketed at Docket No. F-2012-2291997 (unauthorized switching) and Docket No. F-2014-2399569 (incorrect charges on the bill and misrepresentation as an electric distribution company).

9. To serve its retail customers in Pennsylvania, Respond Power incurred costs, at various times during the winter months, increases in excess of ten times its typical costs.

10. As a result of those abnormally high wholesale costs, Respond Power exercised its discretion under its variable price contracts and made a business decision to increase customers' rates to recover at least a portion of those costs. While that business decision resulted in the filing of a relatively high number of customer complaints and in customers returning to the electric distribution company for default generation supply, it was a decision that Respond Power made for business reasons that it is not required to explain in a deregulated environment. If a customer signed a variable price contract for heating oil or propane gas, and the price later rose significantly, the customer would have no regulatory body from which to seek a refund or credit. This situation is no different.

11. On June 20, 2014, the Joint Complainants filed the Joint Complaint, asserting nine causes of action against Respond Power, as follows: Count I – Misleading and Deceptive Claims of Affiliation with Electric Distribution Companies; Count II – Misleading and Deceptive Promises of Savings; Count III – Failing to Disclose Material Terms; Count IV – Deceptive and Misleading Welcome Letters and Inserts; Count V – Slamming; Count VI – Lack of Good Faith Handling of Complaints; Count VII – Failing to Provide Accurate Pricing Information; Count VIII – Prices Nonconforming to Disclosure Statement; and Count IX – Failure to Comply with the Telemarketer Registration Act.

12. As further explained below, Respond Power moves for the dismissal of Counts III, IV, VII, VIII and IX with prejudice due to lack of Commission jurisdiction, insufficient specificity of a pleading and/or legal insufficiency of a pleading.

II. Legal Standards for Preliminary Objections

13. The Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary objections. 52 Pa. Code § 5.101; see also *Equitable Small Transportation Interveners v. Equitable Gas Company*, Docket No. C-00935435 (July 18, 1994).

14. The grounds for preliminary objections are limited to those set forth in 52 Pa Code § 5.101(a) as follows:

- (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
- (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
- (3) Insufficient specificity of a pleading.
- (4) Legal insufficiency of a pleading.
- (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
- (6) Pendency of a prior proceeding or agreement for alternative dispute resolution.
- (7) Standing of a party to participate in the proceeding.

15. The Commission's procedure regarding the disposition of preliminary objections is similar to that utilized in Pennsylvania civil practice. *Equitable Small Transportation Interveners*, supra.

16. The Commission may dismiss a complaint without hearing if, in its opinion, a hearing is not necessary in the public interest. 52 Pa. Code § 5.21(d).

17. A preliminary objection in civil practice seeking dismissal of a pleading will be granted only where relief is clearly warranted and free from doubt. *Interstate Traveller Services, Inc. v. Pa. Dept. of Environmental Resources*, 406 A.2d 1020 (Pa. 1979); *Rivera v. Philadelphia*

Theological Seminary of St. Charles Borromeo, Inc., 595 A.2d 172 (Pa. Super. 1991). The Commission has adopted this standard. *Montague v. Philadelphia Electric Company*, 66 Pa. PUC 24 (1988).

III. Argument

A. Count III of the Joint Complaint Should be Dismissed on the Basis of Legal Insufficiency of Pleading

18. The foregoing paragraphs are incorporated herein.

19. Count III alleges that the Disclosure Statements provided by Respond Power failed to disclose that customers were signing up for a variable rate and cites various Commission’s regulations in Chapter 54, Subchapter A of 52 Pa. Code, which are applicable to customer information and disclosure statements.³ Although Count III interchangeably uses the phrases “Terms and Conditions of Service” (Jt. Compl. ¶ 43), “sales agreements” (Jt. Compl. ¶ 44) and “disclosure statement” (Jt. Compl. ¶ 46), Respond Power submits that all of the phrases refer to the “Disclosure Statement” attached to the Joint Complaint as Appendix B. As Count III is legally insufficient and states no claim upon which relief may be granted, it should be dismissed pursuant to Section 5.101(a)(4) of the Commission’s regulations, 52 Pa. Code § 5.101(a)(4).

³ Count III also contains a reference the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.* (“Consumer Protection Law”). It is well-settled that the Commission does not have jurisdiction to enforce the provisions of the Consumer Protection Law. *See Mid-Atlantic Power Supply Assoc. v. PECO Energy Co.*, Docket No. P-00981615, 1999 Pa. PUC LEXIS 30 (Order entered May 19, 1999); *Pa. Pub. Util. Comm’n., et al. v. The Bell Telephone Co. of Pa.*, 71 Pa. PUC 338, 341 (1989); *MacLuckie v. Palmco Energy PA, LLC*, Docket No. C-2014-2402558 (Initial Decision dated June 16, 2014). *See also Pettko v. Pennsylvania American Water Company*, 39 A.3d 473 (2012). Since Count III alleges violations of Commission regulations, Respond Power is not filing a preliminary objections to Count III on the basis of a lack of Commission jurisdiction. To the extent these claims are pursued, Respond Power reserves the right to raise the issue of subject matter jurisdiction at that time. *See City of Pittsburgh v. Pa. Public Utility Comm’n*, 157 Pa. Super. 595, 43 A.2d 348 (1945).

20. Under “Terms of Service” for “Electric,” Respond Power’s Disclosure Statement for variable price plans clearly provides: “Your price may vary from month to month.” Jt. Compl., Appendix B.

21. Respond Power’s Disclosure Statement was approved by the Commission during the licensing process and the terms and conditions, including the variable pricing information, has not been altered since that time. In *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) (“*Hoke*”), the Commission relied on prior approval of language in a disclosure statement in finding that an EGS had not violated any Commission regulations or orders. It is essential that EGSs be able to rely on Commission approval of disclosure statements with certainty that they will not later be called upon to defend certain provisions as being inconsistent with the Commission’s regulations.

22. Count III should be dismissed on the basis of legal insufficiency of the pleading in that it does not state a claim upon which the Commission can grant relief because the Disclosure Statement was approved by the Commission and clearly discloses that the price may vary from month to month.

B. Count IV of the Joint Complaint Should be Dismissed on the Basis of Lack of Jurisdiction

23. Count IV alleges that Respond Power uses welcome letters and inserts that violate provisions of the Consumer Protection Law. Count IV should be dismissed for lack of Commission jurisdiction pursuant to Section 5.101(a)(1) of the Commission’s regulations, 52 Pa. Code § 5.101(a)(1).

24. The Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. Pa. Public Utility Comm’n*, 157 Pa. Super. 595, 43 A.2d 348 (1945). Jurisdiction

may not be conferred by the parties where none exists. *Roberts v. Martorano*, 427 Pa. 581, 235 A.2d 602 (1967). Neither silence nor agreement of the parties will confer jurisdiction where it otherwise would not exist, *Commonwealth v. VanBuskirk*, 303 Pa. Super. 148, 449 A.2d 621 (1982), nor can jurisdiction be obtained by waiver or estoppel, *Scott v. Bristol Twp. Police Dep't*, 669 A.2d 457 (Pa. Cmwlth. 1995).

25. As a creature of the General Assembly, the Commission has only the powers and authority granted to it by the General Assembly contained in the Public Utility Code (“Code”), 66 Pa.C.S § 101 *et seq.* *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).

26. The Code does not authorize the Commission to enforce the provisions of the Consumer Protection Law. Moreover, both the Commission and the courts have recognized the Commission’s lack of jurisdiction to enforce the provisions of the Consumer Protection Law. *See Mid-Atlantic Power Supply Assoc. v. PECO Energy Co.*, Docket No. P-00981615, 1999 Pa. PUC LEXIS 30 (Order entered May 19, 1999); *Pa. Pub. Util. Comm’n., et al. v. The Bell Telephone Co. of Pa.*, 71 Pa. PUC 338, 341 (1989); *MacLuckie v. Palmco Energy PA, LLC*, Docket No. C-2014-2402558 (Initial Decision dated June 16, 2014). *See also Pettko v. Pennsylvania American Water Company*, 39 A.3d 473 (2012).

27. Count IV should be dismissed for lack of Commission jurisdiction because it alleges only violations of the Consumer Protection Law, which the Commission does not have jurisdiction to enforce.

C. Count VII of the Joint Complaint Should be Dismissed on the Basis of Insufficient Specificity of Pleading

28. Count VII alleges that Respond Power failed to provide accurate pricing information. Jt. Compl. ¶¶ 75-85. Citing the Commission regulations at 52 Pa. Code § 54.5(c), the Joint Complaint alleges that Respond Power's variable pricing terms "fail to adequately state the conditions of variability and the limits on price variability." Jt. Compl. ¶¶ 77-78. Further citing the Commission regulations at 52 Pa. Code § 54.43(l), the Joint Complaint alleges that Respond Power has failed to provide pricing information in plain language and use common terms so that consumers could determine from the Disclosure Statement the price that they would or could be charged by Respond Power or how the price would be calculated by Respond Power. Jt. Compl. ¶¶ 79-80 and 83-84. Count IV should be dismissed on the basis of insufficient specificity of pleading pursuant to Section 5.101(a)(1) of the Commission's regulations, 52 Pa. Code § 5.101(a)(1).⁴

29. Paragraphs 75 through 85 of the Joint Complaint do not explain or describe how Respond Power's Disclosure Statement is allegedly deficient. Respond Power's Commission-approved Disclosure Statement clearly provides that the price may vary from month to month and that it is set by Respond Power on the basis of a variety of factors, including PJM market conditions and a profit margin. The Commission's regulations at 52 Pa. Code § 54.5(c), which govern disclosure statements, provide the list of items that must be included, if applicable. It is

⁴ Count VII also contains a reference the Consumer Protection Law. *seq.* It is well-settled that the Commission does not have jurisdiction to enforce the provisions of the Consumer Protection Law. *See Mid-Atlantic Power Supply Assoc. v. PECO Energy Co.*, Docket No. P-00981615, 1999 Pa. PUC LEXIS 30 (Order entered May 19, 1999); *Pa. Pub. Util. Comm'n., et al. v. The Bell Telephone Co. of Pa.*, 71 Pa. PUC 338, 341 (1989); *MacLuckie v. Palmco Energy PA, LLC*, Docket No. C-2014-2402558 (Initial Decision dated June 16, 2014). *See also Pettko v. Pennsylvania American Water Company*, 39 A.3d 473 (2012). Since Count VII alleges violations of Commission regulations, Respond Power is not filing a preliminary objections to Count VII on the basis of a lack of Commission jurisdiction. To the extent these claims are pursued, Respond Power reserves the right to raise the issue of subject matter jurisdiction at that time. *See City of Pittsburgh v. Pa. Public Utility Comm'n*, 157 Pa. Super. 595, 43 A.2d 348 (1945).

not clear from the Joint Complaint what additional provisions the Joint Complainants believe should be included in Respond Power's Disclosure Statement, particularly in view of the "as applicable" language in those regulations and the Commission's approval of the Disclosure Statement.

30. Count VII should be dismissed because it contains insufficient specificity concerning its allegations about shortcomings of Respond Power's Disclosure Statement.

D. Count VII of the Joint Complaint Should be Dismissed on the Basis of Legal Insufficiency of Pleading

31. In the alternative, to the extent that Count VII is decipherable as to the alleged violations, it appears that the Joint Complaint is alleging that the Commission-approved Disclosure Statement violate the Commission's regulations because it does not disclose an initial price or provide sufficient information as to the conditions of variability and limits on price variability. Because these allegations are legally insufficient and fail to state a claim upon which relief may be granted, Count VII should be dismissed pursuant to Section 5.101(a)(4) of the Commission's regulations, 52 Pa. Code § 5.101(a)(4).

32. Respond Power's Disclosure Statement was approved by the Commission's *Licensing Order* and the terms and conditions, including the variable pricing information, has not been modified since that time. See Respond Power Answer, Exhibit A and Joint Complaint, Appendix B. In *Hoke*, the Commission relied on prior approval of language in a disclosure statement in finding that an EGS had not violated any Commission regulations or orders. It is essential that EGSs be able to rely on Commission approval of disclosure statements with certainty that they will not later be called upon to defend certain provisions as being inconsistent with the Commission's regulations.

33. Moreover, Respond Power’s Commission-approved Disclosure Statement fully complies with the Commission’s regulations at 52 Pa. Code § 54.5(c), which require EGS disclosure statements for residential and small business customers to disclose the contract’s terms of service *if applicable*. Under the clear language of the regulations, only applicable terms and conditions must be disclosed.

34. The current regulations do not require Disclosure Statements to contain initial prices unless they are applicable. By contrast, the newly-promulgated regulations require disclosure statements for variable price contracts to include the price to be charged, per kilowatt-hour, for the first billing cycle of generation service. *See 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) (“*Final-Omitted Customer Information Regulations*”);⁵ 52 Pa. Code § 54.5(c)(2)(iii). In *Hoke*, the disclosure statement was similar to that used by Respond Power. As described in the *Hoke* Initial Decision, under the “Pricing and Payment” section, the disclosure statement used by the EGS did not contain an initial price and rather explained that the rate would be disclosed at the time of enrollment. *Id.* at 8.

35. Respond Power’s Commission-approved Disclosure Statement for variable price contracts does not contain initial prices because they are not applicable to Respond Power’s variable price contracts. The initial price is pegged to the wholesale market and other factors as described in the Disclosure Statement. Since a customer’s account currently does not get switched for up to 45 days after signing up, Respond Power does not know the initial price when the customer agrees to switch. For that reason, rather than set forth an initial price, Respond

⁵ The Final-Omitted Customer Information Regulations were published in the *Pennsylvania Bulletin* on June 14, 2014 and go into effect on July 14, 2014.

Power's Disclosure Statement advises customers they may contact Respond Power for the current variable rate.

36. Respond Power's Disclosure Statement contains no limits on price variability because limits are not part of Respond Power's offering and therefore are inapplicable. The regulations only require conditions of variability (i.e. on what basis prices will vary) and limits on price variability to be included in disclosure statements, *if applicable*. 52 Pa. Code § 54.5(c)(2). Respond Power's Disclosure Statement clearly discloses the conditions of variability as including the PJM Day-Ahead Market, Installed capacity, transmission losses, estimated state taxes, other costs and a profit margin. Jt. Compl., Appendix B. The Commission has recognized that it is unlikely that many market-priced, variable contracts have very explicit formulaic rates that establish how the retail rate is calculated from transparent wholesale price components. *Variable Price Order*. Although the Commission discussed in the *Variable Price Order* the possibility of requiring more disclosure about how prices are calculated, the Commission did not revise that requirement of its regulations when it amended its regulations directly in response to the Polar Vortex crisis and accompanying variable price increases. *See Final-Omitted Customer Information Regulations*. Respond Power's description of the conditions of variability is completely adequate and the Joint Complaint fails to allege any specific departures from the Commission's regulations.

37. As to limits on variable prices, Respond Power is aware of the Commission's 2000 order in *Petition of Shell Energy Services Co., L.L.C. For Declaratory Order and in the Alternative, Waiver of 52 Pa. Code § 54.5(c)(2)*, Docket No. P-00001848 (December 20, 2000) ("Shell Energy Order"), which was attached to comments filed by the Residential Customer Group, including OCA, in the *Variable Price Order* proceeding. In the *Shell Energy Order*, the

Commission reviewed a disclosure statement of an EGS and found that it did not meet the requirements of the Commission's regulations because it did not contain price limits, such as floor and ceiling prices. Respond Power submits that the *Shell Energy Order* is of no precedential value and offers no meaningful guidance. In light of more recent pronouncements by the Commission, it is clear that the Commission has renounced the *Shell Energy Order*.

38. The Commission expressly set forth its current views about limits in variable price contracts when revising its regulations in direct response to the Polar Vortex crisis and resulting variable price increases. See *Final-Omitted Customer Information Regulations*. In promulgating the *Final-Omitted Customer Information Regulations*, the Commission flatly rejected proposals to require limits in variable price contracts. 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).

39. Because Respond Power's Disclosure Statement fully complies with the Commission's regulations, and it was approved by BCS during the licensing process, Count VII of the Complaint should be dismissed for lack of legal sufficiency and the failure to state a claim upon which relief can be granted.

E. Count VIII of the Joint Complaint Should be Dismissed on the Bases of Lack of Commission Jurisdiction and Legal Sufficiency of Pleading

40. Count VIII alleges that the prices charged by Respond Power did not conform to the variable rate pricing provision of its Disclosure Statement. Claiming that Respond Power's prices "were not reflective of the cost to serve residential customers" (Jt. Compl. ¶ 88), the Joint Complaint avers that the cost to serve the average residential hearing customer in January 2014 should not have exceeded approximately \$0.23 per kWh. Jt. Compl ¶ 89. Count VIII alleges no violation of the Code, Commission regulations or orders or other laws. Because the Commission does not regulate the prices of EGSs and Count VIII of the Joint Complaint is legally insufficient in that it does not state a claim upon which can be granted, Count VIII should be dismissed for lack of Commission jurisdiction and legal sufficiency of pleading pursuant to Section 5.101(a)(1) and (4), 52 Pa. Code § 5.101(a)(1) and (4)

41. The Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly contained in the Code. *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937 (Order entered May 2008); *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2f 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). 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).

42. Respond Power, as an EGS, is not a public utility subject to Commission regulation, except in limited circumstances. *Delmarva Power & Light Co. v. Pa. Pub. Util. Comm'n*, 870 A.2d 901 (Pa. 2005) (*Delmarva*). In *Delmarva*, the Pennsylvania Supreme Court

held that the definition of “public utility” at 66 Pa.C.S. § 102 does not include EGSs except for the limited purposes set forth in 66 Pa.C.S. § 2809, regarding licensing requirements, and 66 Pa.C.S. § 2810, regarding revenue neutral reconciliation. The Pennsylvania Supreme Court further noted that the Commission could forbear from regulating EGSs, pursuant to 66 Pa. C.S. § 2809(e), if it determined that the requirements of 66 Pa.C.S. § 2809 were unnecessary due to competition among EGSs.

43. Under Section 2806(a) of the Public Utility Code (“Code”), 66 Pa.C.S. § 2806(a), the Commission does not regulate generation service. Further, the Commission has recognized that the rates consumers pay in the retail electric market are governed by the terms of their contract with their supplier. *See Variable Price Order*. In addition, the Commission has concluded that it has no statutory authority to limit the prices charged by EGSs. *Petition of PECO Energy Company for Approval of its Default Service Plan*, Docket No. P-2012-2283641 (Order adopted March 6, 2014). In fact, 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 consumer. 52 Pa. Code §54.5(b)(10).

44. The Commission lacks subject matter jurisdiction over EGS prices and has no authority to order the issuance of a refund. More specifically, the Commission has no jurisdiction over the issue of whether an EGS is charging an unreasonable, unjust or illegal rate for electric generation service. *Tustin v. Respond Power LLC*, Docket No. 2014-2417552 (Order dated June 27, 2014). *See also Russell v. Respond Power LLC*, Docket No. C-2014-2417551 (Order dated July 3, 2014); *Yaglidereliler Corporation v. Blue Pilot Energy, LLC*, Docket No. C-2014-2413732 (Initial Decision dated June 18, 2014).

45. Specifically, in the *Tustin* Order, the Administrative Law Judge (“ALJ”) stated as follows:

Regarding the issue of a refund, Respondent is correct that the Commission lacks authority to order a refund to Complainant. The Commission may not regulate the rates that the Respondent charged the Complainant for electric generation service since the EGS is not a public utility except for the limited purposes of 66 Pa. C.S. §§ 2809 and 2810. Therefore, the Commission has no jurisdiction over the issue of whether Respondent charged Complainant an unreasonable, unjust or illegal rate for electric generation service.

Tustin Order at p. 4.

46. Moreover, the Joint Complainants do not have standing to represent individual consumers before the Commission and seek refunds on their behalf. Section 701 of the Public Utility Code provides that the Commonwealth through the Attorney General (“AG”) may be a complainant before the Commission in any matter solely as an advocate for the Commonwealth as a consumer of public utility services. While Respond Power is not challenging the AG’s standing to participate in this proceeding, it is clear that the AG may not represent individual utility consumers. Similarly, the Office of Consumer Advocate’s enabling statute does not authorize it to represent the interests of individual utility consumers before the Commission. *See* 71 P.S. § 309-1, *et seq.*

47. Respond Power further notes that to the extent that the Joint Complainants are seeking to re-litigate the formal complaints that have already been settled, this should not be permitted. The law clearly provides that if a party complained against satisfies the complaint, the Commission shall dismiss the complaint and the party shall be relieved from responsibility for that matter. 66 Pa.C.S. § 703(a).

48. Because the Commission has no jurisdiction to regulate prices charged by EGSs or direct the issuance of refunds and Count VIII is legally insufficient in that it has failed to

allege any violation of the Code, Commission regulations or orders or otherwise set forth a claim upon which relief may be granted, Count VIII should be dismissed. Further, Appendix C attached to the Joint Complaint, purporting to show the costs of serving residential customers in June 2014, should be stricken as it is completely irrelevant to this proceeding. Cost of service ratemaking is a principle that applies to regulated utility rates. *See Lloyd v. Pa. Pub. Util. Comm'n*, 904 A.2d 1010, 2006 Pa. Commw. LEXIS 438 (2006). Cost of service ratemaking has no place in a complaint proceeding reviewing sales and marketing practices of EGSs. As the Commission does not regulate EGS prices, EGSs set their prices through a multitude of methods that take into consideration a variety of factors. Appendix C is irrelevant and should be stricken.

F. Count IX of the Joint Complaint Should be Dismissed on the Basis of Legal Insufficiency of Pleading and Lack of Commission Jurisdiction

49. Count IX alleges that Respond Power failed to comply with the Telemarketer Registration Act (“TRA”), 73 P.S. § 2241, *et seq.* because it did not reduce its sales of electricity made during a telemarketing call to a written contract and obtain the consumer’s signature on the written contract pursuant to Section 2245(a)(7) of the TRA. The Joint Complaint ignores the exception to the TRA’s requirement for a written contract when “[t]he contractual sale is regulated under other laws of this Commonwealth.” 73 P.S. § 2245(d). Because the Commission does not have jurisdiction to enforce the TRA and Count IX is legally insufficient and fails to state a claim on which relief can be granted, Count IX should be dismissed pursuant to Section 5.101(a)(1) and (4) of the Commission’s regulations, 52 Pa. Code § 5.101(a)(1) and (4).

50. The Commission’s regulations at 52 Pa. Code § 54.5 set forth the requirements applicable to EGS contracts with residential and small business customers. The disclosure statement required by those regulations serves as the contract. In addition to providing the

applicable terms and conditions, the disclosure statement must include the 3-day right of rescission period, relevant definitions applicable to the service and statements about the entities that regulate each aspect of electric service. Further, the Commission's regulations at 52 Pa. Code § 57.176 require EGSs to obtain from the customer a signed document whose sole purpose is to obtain the customer's consent to change EGSs, which shall be accepted as valid and result in the initiation of the customer's request. 52 Pa. Code § 57.176.

51. Since the contractual sale of electric generation supply is regulated under the Commission's regulations, Respond Power was exempt from providing a written contract pursuant to the TRA. 73 P.S. § 2245(d).

52. Moreover, the Commission does not have jurisdiction to enforce the TRA. The Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly contained in the Public Utility Code. *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937 (Order entered May 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). 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).

53. No provision of the Code authorizes the Commission to enforce the TRA. In fact, the Commission has recognized that it lacks jurisdiction to enforce the TRA. *See In re Marketing and Sales Practices for the Retail Residential Energy Market*, Docket No. L-2010-2208332 (October 24, 2102). In that rulemaking proceeding, the Independent Regulatory

Review Commission noted that the AG administers both the Consumer Protection Law and the TRA and questioned how the Commission would administer or enforce its regulations requiring compliance with those laws. The Commission referred to its long-standing Memorandum of Understanding with the AG under which it can refer matters that fall under the AG's jurisdiction. *Id.* at 8.

54. Because Count IX alleges violations of the TRA without recognizing the exception for contractual sales regulated by the Commonwealth and fails to state a claim upon which relief can be granted, and the Commission does not have jurisdiction to enforce the TRA, Count IX should be dismissed.

IV. Conclusion

WHEREFORE, for the foregoing reasons, Respond Power LLC respectfully requests that the Commission grant these Preliminary Objections and (i) dismiss Counts III, IV, VII, VIII and IX of the Joint Complaint on the basis of lack of Commission jurisdiction, insufficiency of pleading and legal sufficiency of pleading, as more fully described above, and (ii) grant Respond Power such other relief as may be just and reasonable under the circumstances.

Respectfully submitted,

Dated: July 10, 2014



Karen O. Moury
Buchanan Ingersoll & Rooney PC
409 North Second Street
Suite 500
Harrisburg, PA 17101
(717) 237-4820

Attorneys for Respond Power LLC

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**COMMONWEALTH OF
PENNSYLVANIA, ET AL.,**

v.

RESPOND POWER, LLC,

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DOCKET NO. C-2014-2427659

CERTIFICATE OF SERVICE

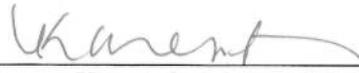
I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

Via First-Class Mail

John M. Abel
Nicole R. Beck
Bureau of Consumer Protection
Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120

Candis A. Tunilo
Christy M. Appleby
Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101

Dated this 10th day of July, 2014.



Karen O. Moury, Esq.