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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 Brief of Respond Power LLC in Opposition to Joint Petition of Office of Attorney General and Office of Consumer Advocate for Interlocutory Review and Answer to Material Questions 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: Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Commonwealth of Pennsylvania, by Attorney	:	
General KATHLEEN G. KANE, Through the	:	
Bureau of Consumer Protection,	:	
	:	
And	:	
	:	
TANYA J. McCLOSKEY, Acting	:	
Consumer Advocate,	:	Docket No. C-2014-2427659
	:	
Complainants	:	
	:	
v.	:	
	:	
RESPOND POWER LLC,	:	
	:	
Respondent	:	

**BRIEF OF RESPOND POWER LLC IN OPPOSITION TO
JOINT PETITION OF OFFICE OF ATTORNEY GENERAL AND
OFFICE OF CONSUMER ADVOCATE FOR INTERLOCUTORY
REVIEW AND ANSWER TO MATERIAL QUESTIONS**

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Dated: September 18, 2014

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I. INTRODUCTION AND PROCEDURAL HISTORY

Pursuant to Section 5.302(b) of the Commission's regulations, 52 Pa. Code 5.302(b), Respond Power LLC ("Respond Power") submits this Brief in Opposition to the Joint Petition for Interlocutory Review and Answer to Material Questions ("Joint Petition") of the Office of Attorney General and the Office of Consumer Advocate ("Joint Complainants") filed on September 8, 2014. The Joint Petition should be denied because it does not provide compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding.

Further, if interlocutory review is granted, the Commission should conclude that it lacks jurisdiction to enforce the provisions of the Unfair Trade Practices Act and Consumer Protection Law, 73 P.S. § 201-1, *et seq.* ("CPL"), and the Telemarketer Registration Act, 73 P.S. 2241, *et seq.* ("TRA"). Moreover, the Commission should find that it does not regulate the prices charged to customers by an electric generation supplier ("EGS") and therefore cannot determine what an appropriate price would be for an EGS to charge a customer under a variable rate contract - particularly one that has no caps on the amount that may be charged.

This proceeding was initiated by the Joint Complainants on June 20, 2014 when they filed a Joint Complaint against Respond Power, asserting nine causes of action, 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.

On July 10, 2014, Respond Power filed Preliminary Objections seeking dismissal of Counts III, IV, VII, VIII and IX with prejudice due to, *inter alia*, lack of Commission jurisdiction. On August 20, 2014, Administrative Law Judges (“ALJs”) Barnes and Cheskis issued an Order Granting in Part and Denying in Part Respond Power’s Preliminary Objections (“*Interim Order*”). Specifically, the ALJs struck Count VIII (Prices Nonconforming to Disclosure Statement) in its entirety and struck Counts III (Failing to Disclose Material Terms), IV (Deceptive and Misleading Welcome Letters and Inserts) and Count IX (Failure to Comply with the Telemarketer Registration Act) in part, consistent with the discussion in the *Interim Order*. The relevant discussion in the *Interim Order* centered on the Commission’s lack of jurisdiction to hear claims regarding the CPL and TRA and concluded that the Commission could still consider the allegations contained in Counts III, IV and IX in the context of the Commission’s own regulations. The *Interim Order* also struck Count VIII in its entirety on the basis that the Commission does not have jurisdiction to regulate EGS rates.

On September 8, 2014, the Joint Complainants filed this Joint Petition seeking to have the following material questions answered in the affirmative:

- 1) Does the Commission have authority and jurisdiction to determine whether a violation of the Unfair Trade Practices Act and Consumer Protection Law (“CPL”) and Telemarketer Registration Act (“TRA”) has occurred when considering whether the Commission’s regulations – which require compliance with these laws – have been violated?
- 2) Does the Commission have the authority and jurisdiction to determine whether the prices charged to customers by an electric generation supplier (“EGS”) conform to the EGS disclosure statement regarding pricing?

By this Brief, Respond Power opposes the Joint Petition. If the Commission addresses the material questions presented in the Joint Petition, it should answer the material questions in the negative and uphold the ALJs’ *Interim Order* striking Count VIII in its entirety and striking Counts III, IV and IX to the extent they allege violations of the CPL or the TRA.

II. SUMMARY OF ARGUMENT

The Joint Complainants have failed to present compelling reasons why interlocutory review is necessary to avoid irreparable harm or to expedite the conduct of the proceeding. To the contrary, even with the partial dismissal of Counts III, IV and IX, the Joint Complainants are free to develop an evidentiary record on those claims within the context of the Commission's regulations. Moreover, the dismissal of Count VIII will expedite the conduct of the proceeding since it properly removes a set of claims that the Commission does not have jurisdiction to adjudicate. To the extent the Commission later determines that Count VIII should not have been dismissed, the Commission may remand the proceeding to the ALJs to cure any error. Denial of the Joint Petition is particularly appropriate given the ALJs' decisions to properly dismiss Count VIII in its entirety since the Commission does not have jurisdiction to regulate EGS prices or to determine what is an appropriate price charged by an EGS and to dismiss portions of Counts III, IV and IX due to the Commission's lack of jurisdiction to hear claims under the CPL or TRA.

It is well-established that the Commission only has that jurisdiction as specifically granted it by the General Assembly. Nothing in the Public Utility Code authorizes the Commission to enforce the provisions of the CPL and the TRA. Inclusion of a requirement in its regulations requiring compliance with these laws does not confer subject matter jurisdiction on the Commission to determine whether violations have occurred. Therefore, the first material question must be answered in the negative.

The second material question is not a proper recitation or reflection of the allegations in Count VIII (Prices Nonconforming to Disclosure Statement). While the Joint Complainants characterize the question as whether the Commission may determine whether prices charged by the EGS conform to the EGS disclosure statement, Count VIII avers that Respond Power's prices "were not reflective of the cost to serve residential customers." Joint Complaint ¶ 88. Count

VIII is clearly focused on the price charged by Respond Power and cuts right to the heart of electric competition.

Since the enactment of Chapter 28 of the Code, EGS prices have been set by EGSs, not by the Commission. Under the terms of its disclosure statement, Respond Power's prices vary on a month-to-month basis to reflect various factors, including fluctuations in wholesale market conditions, and there are no ceilings on the prices that may be charged. Absent an ability to regulate EGS prices, the Commission cannot determine what that price "should" have been. It would be especially inappropriate for the Commission to judge Respond Power's variable price against a price that reflects "the cost to serve residential customers" over a discrete time period. Cost of service principles are related to utility ratemaking and have nothing to do with the way in which EGSs procure energy or set prices. As such, those concepts have no place in a discussion about EGS prices.

It is simply not appropriate for the Commission to determine a price that Respond Power should have charged. Even if the Commission could determine that an EGS overcharged a customer, it does not have jurisdiction to award refunds as sought by the Joint Complaint.

III. ARGUMENT

A. The Joint Petition Should Be Denied Because It Does Not Present Compelling Reasons Why Interlocutory Review Will Prevent Substantial Prejudice Or Expedite The Conduct Of The Proceeding.

Under Section 5.302, a Petition for Interlocutory Review must present "compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding." 52 Pa. Code 5.302(b). The Commission has set a high threshold of extraordinary circumstances to justify granting interlocutory review, noting that the pertinent consideration is whether interlocutory review is necessary because an error and "any prejudice flowing therefrom could not be satisfactorily cured during the normal Commission review

process.” *Application of Rasier-PA LLC*, Docket No. P-2014-2431743 (Order adopted July 24, 2014), at 5. *See also Joint Application of Bell Atlantic Corp. and GTE Corp.*, Docket No. A-310200F0002, *et al.* (Order entered June 14, 1999).

Generally, Petitions for Interlocutory Review are not favored, as the preferred approach is to permit proceedings to move forward in the normal course in order to provide all parties, the presiding officer, and the Commission with a full opportunity to develop the record, brief issues, and present arguments at each stage. *Re: Philadelphia Gas Works Universal Service and Energy Conservation Plan*, Docket No. M-00072021 (Order entered October 23, 2009), at 3. Further, the Commission does not routinely grant interlocutory review and has typically declined to answer material questions absent a showing that some harm would result that would not be reparable through normal procedural avenues. *Pa. PUC v. Philadelphia Gas Works*, Docket Nos. P-2009-2097639 and R-2009-2139884 (Order entered April 15, 2010).

The Joint Complainants have failed to present compelling reasons why interlocutory review is necessary to expedite the conduct of the proceeding or avoid irreparable harm. It is unclear how expanding the issues to be addressed would result in the proceeding being expedited. Granting interlocutory review to address issues beyond the Commission’s jurisdiction would be contrary to judicial economy and cause parties to devote resources to addressing issues that the ALJs have properly found do not belong in this proceeding

As to any harm arising from a denial of interlocutory review, the Joint Complainants contend that the *Interim Order* will restrict development of the evidentiary record. While that is normally the result of the dismissal of claims in any litigation, the Commission has not concerned itself with that outcome in the past. *See Berkery v. PECO Energy Co.*, Docket No. C-2010-2170223 (Order adopted January 13, 2011) (“*Berkery*”). In *Berkery*, the Commission

acknowledged that an evidentiary record had not been built, but did not grant interlocutory review. “Simply put, this matter must be left to run its course.” *Berkery* at p. 7.

Moreover, even with the partial dismissal of Counts III, IV and IX, the Joint Complainants are still free to develop an evidentiary record on factual allegations within the context of the Commission’s regulations. Ultimately, the question of whether the Commission may hear claims made under the CPL and TRA is a legal one that need not be resolved until the conclusion of the proceeding.

As to the dismissal of Count VIII, the *Interim Order* will actually expedite the conduct of the proceeding since it removes a set of claims that are outside the Commission’s jurisdiction. As such, it will promote judicial economy by allowing the parties to focus their resources on the issues are properly before the Commission. If the Commission later determines that Count VIII should not have been dismissed, the Commission will be able to remand the matter to the ALJs to cure any error. Therefore, the Joint Complainants cannot demonstrate that they would be irreparably harmed by a denial of interlocutory review.

Denial of the Joint Petition is particularly appropriate given the ALJs’ decisions to appropriately dismiss Count VIII in its entirety since the Commission does not have jurisdiction to regulate EGS prices or to determine what is an appropriate price charged by an EGS. Further, the partial dismissal of Counts III, IV and IX due to the Commission’s lack of jurisdiction to hear claims under the CPL or TRA properly limits the legal issues that need to be addressed by the parties during the proceeding.

B. If The Commission Grants the Joint Complainants' Joint Petition, It Should Conclude That The Commission Does Not Have Authority and Jurisdiction To Determine Whether A Violation Of The Unfair Trade Practices Act and Consumer Protection Law Or The Telemarketer Registration Act Has Occurred Despite The Commission's Regulations Requiring Compliance With These Laws.

It is well-established that the Commission only has that jurisdiction as specifically granted it by the General Assembly. Nothing in the Public Utility Code authorizes the Commission to enforce the provisions of the CPL and the TRA. Inclusion of a requirement in its regulations requiring compliance with these laws does not confer subject matter jurisdiction on the Commission to determine whether violations have occurred. Therefore, the first material question must be answered in the negative.

As a creation of the General Assembly, the Commission has only the powers and authority granted to it by the General Assembly and contained in the Public Utility Code, 66 Pa. C.S. §§ 101 *et seq* ("Code"). *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937 (Order entered May 28, 2008) ("*Shedlosky*"). The Commission's jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977) ("*Feingold*"). 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) ("*Pittsburgh*"). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967) ("*Roberts*"). Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992), alloc. denied, 637 A.2d 293 (Pa. 1993) ("*Hughes*").

1. The Commission Does Not Have Jurisdiction to Enforce the CPL.

Count III of the Joint Complaint avers that disclosure statements provided by Respond Power failed to disclose that customers were signing up for variable rates and alleges violations

of both Commission regulations and provisions of the CPL. Arguing, *inter alia*, that the Commission does not have jurisdiction to enforce the CPL, Respond Power sought dismissal of Count III. The ALJs' *Interim Order* granted the Preliminary Objections in part, properly striking the portions of Count III that alleged violations of the CPL due to the lack of Commission jurisdiction to hear claims under that law.

Count IV of the Joint Complaint alleges that Respond Power used welcome letters and inserts that violate provisions of the CPL. Respond Power likewise sought dismissal of Count IV on the basis of the Commission's lack of jurisdiction to enforce the provisions of CPL. On that ground, the ALJs' *Interim Order* granted the Preliminary Objections in part, properly striking the portions of Count IV that alleged violations of the CPL.

Specifically with respect to the CPL, the Commission has stated that it does not have jurisdiction to enforce its provisions. *See Mid-Atlantic Power Supply Assoc. v. PECO Energy Co.*, Docket No. P-00981615, 1999 PUC LEXIS 30 (Order entered May 19, 1999); *see also*, *David P. Torakeo v. Pennsylvania American Water Co.*, Docket No. C-2013-2359123 (Opinion and Order entered April 3, 2014) (it is clear under Pennsylvania law that the Commission does not have jurisdiction over claims raised under the CPL). *See also 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).

The Joint Complainants contend that the Commission has jurisdiction to enforce the CPL because of its incorporation into its own regulations. *See* 52 Pa. Code §§ 54.43(f) and 111.12(d)(1). However, incorporating a law into its regulations does not confer authority on the Commission that does not separately exist under the statute. The Joint Complainants' reliance on *Harrisburg Taxicab & Baggage Co. v. Pa. Pub. Util. Comm'n.*, 786 A.2d 288 (Pa. Commw. 2001) ("*Harrisburg Taxi*") in support of this argument is misplaced. In *Harrisburg Taxi*, the

Commonwealth Court determined that the Commission had authority to enforce provisions of Pennsylvania's Vehicle Code pursuant to Code Section 1501, which requires the Commission to ensure the safety of utility facilities. Due to the overlapping jurisdiction, the Court determined that it made sense for the Commission to incorporate provisions of the Vehicle Code into its own regulations. Absent the underlying statutory authority of the Commission to enforce the provisions of the CPL, this argument fails.

2. *The Commission Does Not Have Jurisdiction to Enforce the TRA.*

Count IX of the Joint Complaint alleges that Respond Power failed to comply with the TRA 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. This allegation ignores the express exception to this requirement for a written contract when "[t]he contractual sale is regulated under other laws of this Commonwealth." 73 P.S. § 2245(d). In its Preliminary Objections, Respond Power sought dismissal of Count IX on the grounds that the Commission's lack of jurisdiction to enforce the TRA, as well as the failure of the Joint Complainants to state a claim upon which relief may be based due to the Commission's regulations governing disclosure statements. *See* 52 Pa. Code § 54.5; 52 Pa. Code § 57.176. The ALJs *Interim Order* properly concluded that the Commission does not have jurisdiction to enforce the TRA, and found that the other grounds for dismissal were moot.

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 CPL 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.

C. If The Commission Grants The Joint Complainants' Joint Petition, It Should Determine That The Commission Does Not Have Authority And Jurisdiction To Regulate EGS Prices Or To Decide The Prices That Should Be Charged For Electric Generation Service.

The Joint Complainants' second material question is not a proper recitation or reflection of the allegations in Count VIII (Prices Nonconforming to Disclosure Statement) of the Joint Complaint. While the Joint Complainants characterize the question as whether the Commission may determine if prices charged by the EGS conform to the EGS disclosure statement, Count VIII actually avers that Respond Power's prices "were not reflective of the cost to serve residential customers." Joint Complaint ¶ 88. Count VIII is clearly focused on the price charged by Respond Power. It is not about whether Respond Power followed the terms and conditions of its disclosure statement or otherwise engaged in misleading marketing practices, which are the subject of other counts. Contending that the Commission lacks jurisdiction to regulate EGS prices, Respond Power's Preliminary Objections sought dismissal of Count VIII. On that basis, the ALJs' Interim Order properly dismissed Count VIII.

Based on the ruling on Count VIII, the material question that the Joint Complainants should have posed based on the ruling on Count VIII is:

Does the Commission have the authority and jurisdiction to calculate the cost to serve residential customers and use that cost to determine the price that should have been charged by the EGS?

The answer to that material question is clearly no. The answer to the material question that was posed also must be no.

As the Commission does not have statutory authority and jurisdiction to regulate prices charged by EGSs, it may not determine the price that it believes should have been charged to customers. Yet, that is exactly what the Joint Complainants are asking the Commission to do. They are suggesting that the Commission calculate a price that would have been reflective of the cost to serve residential customers during a relatively short period of time in 2014, and then effectively hold Respond Power to that price as a ceiling in their private contract with consumers. Using that price as the ceiling, they are asking the Commission to conclude that Respond Power's price did not conform to its disclosure statement because it was higher than that price.

The Joint Complainants argue that they are not seeking to have the Commission regulate EGS prices. Rather, they claim they want the Commission to determine that the prices charged by Respond Power did not conform to its disclosure statement. However, for the Commission to make that determination, the Commission would have to decide what the price should have been. The Joint Complainants seek to use cost of service principles that are reserved for public utility ratemaking as the basis for calculating what would have been a proper rate for Respond Power to charge customers during the well-documented Polar Vortex in early 2014.

Count VIII cuts right to the heart of electric competition. Under Chapter 28 of the Code EGS rates are set by the EGS, not by the Commission. Under the terms of its disclosure statement, Respond Power's prices vary on a month-to-month basis to reflect various factors, including fluctuations in wholesale market conditions, and there no there are ceilings on the prices that may be charged. Absent an ability to regulate EGS prices, the Commission cannot determine what that price "should" have been. It would be especially inappropriate for the Commission to judge Respond Power's variable price against a price that reflects "the cost to serve residential customers" for a certain time period. Cost of service principles are related to

utility ratemaking and have nothing to do with the way in which EGSs procure energy or set prices. As such, those concepts have no place in a discussion about EGS prices. It is simply not appropriate for the Commission to determine the price that Respond Power should have charged.

As a creation of the General Assembly, the Commission has only the powers and authority granted to it by the General Assembly and contained Code. *Shedlosky, supra*. The Commission's jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. *Feingold, supra*. The Commission must act within, and cannot exceed, its jurisdiction. *Pittsburgh, supra*. Jurisdiction may not be conferred by the parties where none exists. *Roberts, supra*. Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. *Hughes, supra*.

Nothing in the Code authorizes the Commission to regulate the prices of EGSs, to consider whether rates charged by EGSs are unjust, unreasonable or illegal or to direct the issuance of a refund. To the contrary, Code Section 2806(a) provides that the generation of electricity shall no longer be regulated as a public utility service or function except as otherwise provided for in this chapter." 66 Pa. C.S. § 2806(a). In short, the Commission does not have jurisdiction over prices charged by EGSs or to address disputes regarding private contracts between EGSs and their customers. Pennsylvania appellate courts have long recognized that the Commission does not have authority to settle disputes under private contracts. *See, e.g., Allport Water Auth. v. Winburne Water Co.*, 393 A.2d 673, 675 (Pa. 1978).

The Pennsylvania Supreme Court has found that the definition of "public utility" in Code Section 102 does not include EGSs except for the limited purposes set forth in Code Sections 2809 and 2810, 66 Pa. C.S. §§ 2809 and 2810. *Delmarva Power & Light Co. v. Pa. Pub. Util. Comm'n*, 870 A.2d 901 (Pa. 2005). Those provisions have no bearing on prices charged by EGSs. Code Section 2809 establishes the requirement for EGSs to be licensed, 66 Pa. C.S. §

2809(e), and Code Section 2810 requires EGSs to pay state taxes so as to ensure revenue neutrality to the Commonwealth of Pennsylvania. 66 Pa.C.S. § 2810.

As support for Count VIII, the Joint Complainants have cited the provision in Code Section 2809(e) relating to the imposition of requirements to ensure that “standards and billing practices” are maintained by EGSs. However, this language in Code Section 2809(e) has nothing to do with EGS prices. It relates specifically to 52 Pa. Code Chapter 56, which addresses a whole host of issues including billing standards, payment arrangements, and termination of service but does not purport to regulate prices charged by EGSs or public utilities, for that matter, whose rates are regulated by the Commission pursuant to Code Chapter 13.

Indeed, the Commission has recognized its lack of jurisdiction to limit prices charged by EGSs. For instance, the Commission’s regulations require bills of customers purchasing electric generation services from EGSs to include a statement noting that generation prices and charges are set by the EGS chosen by the customer. 52 Pa. Code § 54.5(b)(10). *See also* *Petition of PECO Energy Company for Approval of its Default Service Plan*, Docket No. P-2012-2283641 (March 6, 2014) (“*PECO Default Service Plan Order*”).¹ In the *PECO Default Service Plan Order*, the Commission heard from numerous parties with competing interests on this issue, in the context of whether the Commission may cap the prices that low-income customers pay to EGSs, and concluded that “we have not found any arguments that convince us that we have statutory authority to limit prices charged by EGSs.” *Id.* at 11.

In an Order adopted on February 20, 2014, responding to significant variable price increases in the retail market, the Commission sought comments from interested parties on the adequacy of disclosure and notice requirements, as well as the speed with which a consumer may

¹ Order is currently on appeal to the Commonwealth Court of Pennsylvania, *CAUSE-PA v. Pa. Pub. Util. Comm’n.*, 445 C.D. 2014 and *McCloskey v. Pa. Pub. Util. Comm’n.*, 596 C.D. 2014.

switch to a different EGS. *See Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, Docket No. M-2014-2406134 (February 20, 2014) (“*Variable Rate Order*”). In the *Variable Rate Order*, the Commission noted that the rates consumers pay in the retail electric market are governed by the terms of their contract with their EGS and that some variable price contracts have no ceiling on the rate that could be charged. The Commission further observed that while a variable rate may offer substantial savings when wholesale market prices are low, customers may experience very high bills during periods of market volatility such as occurred in early 2014.

Likewise, several ALJs have concluded that the Commission does not regulate EGS prices and have further determined that the Commission may not order the issuance of refunds by EGSs.² For instance, in *Yaglidereliler Corp. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2413732 (Initial Decision dated June 18, 2014), ALJ Salapa dismissed a complaint that sought a refund of “excessive rates,” finding that “the Commission lacks the authority to order the Respondent to provide either a refund or credit to the Complainant.” *Id.* at 9. ALJ Salapa reasoned as follows:

The Commission may not regulate the rates that the Respondent charged the Complainant for electric generation service since it 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 Respondent to the extent that the Complainant contends that the Respondent has charged it an unreasonable, unjust or illegal rate for electric generation service. Since the Commission lacks the authority to regulate rates charged for electric generation service, it lacks the authority to order a refund or credit to the Complainant.

Id. at 9.

² While refunds are not directly before the Commission in this Joint Petition, the whole purpose of Count VIII is to lay a foundation for the request for relief in the Joint Complaint for the issuance of refunds to customers.

Finally, the Code provisions addressing just, reasonable and legal rates and providing for refunds when rates do not comply with these standards apply solely to public utilities, and not to EGSs. For instance, Code Section 1301 requires that every rate made, demanded, or received by any “public utility” shall be just and reasonable, and in conformity with regulations or orders” of the Commission. 66 Pa. C.S. § 1301. Similarly, Section 1312 authorizes the Commission to direct the issuance of refunds by “public utilities” in any proceeding involving rates upon a determination that any rate received by a public utility was unjust or unreasonable, or was in violation of any regulation or order of the Commission, or was in excess of the applicable rate contained in an existing and effective tariff of such public utility. 66 Pa.C.S. § 1312. Since EGSs are not public utilities for the purposes of pricing, these provisions are not applicable.

IV. CONCLUSION

For the reasons noted above, Respond Power respectfully requests that the Commission: deny the Joint Petition for Interlocutory Review. If the Commission undertakes interlocutory review, Respond Power respectfully requests that the Commission answer the material questions in the negative.

Respectfully submitted,

Dated: September 18, 2014



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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

CERTIFICATE OF SERVICE

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

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