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September 30, 2014

VIA E-FILING

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

Re: Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement
v. Respond Power LLC; Docket No. C-2014-2438640

Dear Secretary Chiavetta:

On behalf of Respond Power LLC, I have enclosed for electronic filing the Preliminary Objections of Respond Power LLC to the Complaint of Bureau of Investigation and Enforcement 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**

**PENNSYLVANIA PUBLIC UTILITY
COMMISSION, BUREAU OF
INVESTIGATION AND ENFORCEMENT**

v.

RESPOND POWER LLC

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:
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Docket No. C-2014-2438640

NOTICE TO PLEAD

TO: Adam D. Young
Michael L. Swindler
Wayne T. Scott
Pennsylvania Public Utility Commission
Bureau of Investigation & Enforcement
PO Box 3265
Harrisburg, PA 17105-3265

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 Formal Complaint of Bureau of Investigation & Enforcement 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: September 30, 2014



Karen O. Moury, Esq.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PENNSYLVANIA PUBLIC UTILITY	:	
COMMISSION, BUREAU OF	:	
INVESTIGATION AND ENFORCEMENT	:	
	:	Docket No. C-2014-2438640
v.	:	
	:	
RESPOND POWER, LLC	:	

**PRELIMINARY OBJECTIONS OF RESPOND POWER LLC
TO THE COMPLAINT OF
PENNSYLVANIA PUBLIC UTILITY COMMISSION,
BUREAU OF INVESTIGATION AND ENFORCEMENT**

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) and (4), to the above-captioned Complaint filed by the Commission’s Bureau of Investigation and Enforcement (I&E), and in support thereof, avers as follows:

I. Introduction and Background

1. By these Preliminary Objections, Respond Power seeks dismissal of approximately 500 counts of the 649-count Complaint on the basis of several grounds. The reasons include the Commission’s lack of jurisdiction to enforce the provisions of the Pennsylvania’s Unfair Trade Practices and Consumer Protection Law (“Consumer Protection Law”), 73 P.S. §§ 201-1 *et seq.* and the Commission’s lack of statutory authority to regulate the prices of electric generation suppliers (“EGSs”). They further include the Commission’s prior approval of Respond Power’s disclosure statement, and the failure of the Complaint to offer

allegations that, if proven, would result in a finding of a violation of cited Commission regulations. Additionally, Respond Power seeks dismissal of the request for relief that seeks the issuance of refunds to reflect the difference between Respond Power's charges that were imposed under a valid variable rate plan and the price to compare ("PTC") charged by customers' local electric distribution company ("EDC").

2. Respond Power is an 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*").

3. 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.

4. Under its variable rate plan, Respond Power provided a 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 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. Respond Power Answer ¶ 32 and Exhibit A.

5. The variable pricing language in the disclosure statement mirrors the language that was included in the proposed disclosure statement, which was submitted by Respond Power as part of its license application filed with the Commission on February 2, 2010 and was thereby approved by the Commission's *Licensing Order*.¹ Respond Power Answer ¶ 32 and Exhibit B.

6. 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

7. Two major incidents gave rise to the filing of this Complaint. The first incident is set forth in the Complaint, where it is alleged that a whistleblower contacted the Commission's Bureau of Consumer Services ("BCS") in October 2013 claiming to have been a door-to-door sales agent for Respond Power and alleging various violations of the Commission's marketing and sales practices regulations. Complaint ¶¶ 17-18. While Respond Power has been unable to date to obtain the name of that individual through discovery, it believes that the individual is the same person who also contacted Respond Power in that timeframe. The person who contacted Respond Power making similar allegations did so after his termination by a third party contractor

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 was included as Exhibit B with Respond Power's Answer, 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.

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).

of Respond Power due to complaints from customers about unauthorized switches. The second incident is the Polar Vortex crisis, more thoroughly described below.

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 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*”).

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 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 August 21, 2014, I&E filed this Complaint referring to over one thousand informal complaints filed by Respond Power customers from February 1, 2014 through July 31,

2014 and setting forth a series of allegations including six instances of slamming, three instances of misleading claims of affiliation with electric distribution companies, forty-seven instances of misleading promises of savings, eleven instances of untimely complaint handling, nine incomplete sales agreements, and fourteen billing errors. Based upon a review of discovery responses provided by I&E, the Complaint also alleged that the eighty-six customers who filed the informal complaints which formed the basis of the Complaint also received inadequate disclosure statements from Respond Power. The discovery responses further reveal that that some of the informal complainants were counted twice, with the end result being that the Complaint is based on the informal complaints and allegations of seventy-six customers. Moreover, BCS found in favor of Respond Power on about one-third of those informal complaints, while others are still pending resolution by BCS.

12. In claiming that the Complaint consisted of 649 counts and seeking the imposition of a civil penalty on Respond Power of \$1,000 per count, I&E cited numerous redundant provisions of the Commission's regulations, the Consumer Protection Law and provisions in the Commission's regulations that merely establish that an EGS has responsibility for the actions of its employees, agents and representatives. While Respond Power will address through litigation the gross overstatement by I&E of the number of actual alleged violations, especially as compared to the underlying informal complaints, Respond Power seeks outright dismissal of approximately 500 of the counts on the grounds that the Commission lacks jurisdiction of the subject matter and that the counts are legally insufficient in that they fail to state a claim upon which relief can be granted.

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. Paragraphs 30 and 37 (comprising Counts 7-15) of the Complaint Should Be Dismissed for Lack of Commission Jurisdiction and Legal Insufficiency of Pleading to The Extent They Allege Violations of the Consumer Protection Law or the Commission’s Regulations at 52 Pa. Code § 54.43(f).

18. The foregoing paragraphs are incorporated herein.

19. Paragraphs 30 and 37 (comprising Counts 7-15) of the Complaint alleging misleading EDC affiliations should be dismissed to the extent that they allege violations of the Consumer Protection Law and Section 54.43(f) of the Commission’s regulations, 52 Pa. Code § 54.43(f).

20. 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, 441 (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).

21. 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).

22. 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 Code. *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937 (Order entered May 28, 2008); *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977). The Code does not authorize the Commission to enforce the provisions of the Consumer Protection Law.

23. As to the alleged violations of Section 54.43(f) of the Commission's regulations, 52 Pa. Code § 54.43(f), this provision states as follows: "[a] licensee is responsible for any fraudulent deceptive or other unlawful marketing or billing acts performed by the licensee, its employees, agents or representatives." This regulation does not set forth a standard to which EGSs must adhere but rather establishes that if the licensee's employees, agents or representatives engage in unlawful market or billing acts, those actions are the responsibility of the EGS. Respond does not dispute that responsibility. However, alleging that Respond Power's agents misrepresented an affiliation with the EDC does not, even if taken as true, establish a violation of Section 54.43(f) of the Commission's regulations, 52 Pa. Code § 54.43(f). Rather, if true, it establishes a violation of Section 111.8 of the Commission's regulations, 52 Pa. Code § 111.8 (relating to agent identification; misrepresentation), which is also referenced in these counts. The only significance of Section 54.43(f) is that it ensures that Respond Power is responsible for those actions, if they occurred, and that it cannot claim as a defense that it was an agent or representative who allegedly made the misleading statements.

24. Therefore, Respond Power requests dismissal of Counts 7-15 for lack of jurisdiction, pursuant to Section 5.101(a)(1) of the Commission's regulations, 52 Pa. Code §

5.101(a)(1), to the extent they allege violations of the Consumer Protection Law. Respond Power further seeks dismissal of Counts 7-15, pursuant to Section 5.101(a)(4) of the Commission's regulations, 52 Pa. Code § 5.101(a)(4) for legal sufficiency or failure to state a claim upon which relief can be granted, to the extent they allege violations of the Section 54.43(f) of the Commission's regulations, 52 Pa. Code § 54.43(f).

B. Paragraphs 31 and 38 (comprising Counts 16-62) of the Complaint Should Be Dismissed in Their Entirety for Lack of Commission Jurisdiction.

25. The foregoing paragraphs are incorporated herein.

26. Paragraphs 31 and 38 (comprising Counts 16-62) of the Complaint alleging promised savings should be dismissed in their entirety because they are based wholly on alleged violations of the Consumer Protection Law. If these factual allegations also implicate provisions in the Commission's regulations, they should have been referenced. Respond Power should not be required to litigate the factual averments in these counts absent an allegation that these actions violate a law which the Commission has jurisdiction to administer and enforce.

27. As explained above, the Commission lacks jurisdiction to enforce the provisions of the Consumer Protection Law. Therefore, Respond Power requests dismissal of Counts 16-62 for lack of jurisdiction, pursuant to Section 5.101(a)(1) of the Commission's regulations, 52 Pa. Code § 5.101(a)(1).

C. Paragraphs 32 and 39 (comprising Counts 63-492) of the Complaint Should Be Dismissed in Their Entirety Due to Lack of Jurisdiction and Legal Insufficiency of Pleading.

28. The foregoing paragraphs are incorporated herein.

29. Paragraphs 32 and 39 (comprising Counts 63-492) of the Complaint should be dismissed in their entirety due to lack of Commission jurisdiction and legal insufficiency of pleading. The Commission does not have statutory authority to regulate EGS prices and

therefore cannot establish a price that Respond Power “should” have charged under its variable rate plans in order to determine whether the prices conformed to the disclosure statement. Further, since the Commission has already approved Respond Power’s disclosure statement, which fully complies with the Commission’s regulations, these counts are legally insufficient in that they fail to state a claim upon which relief may be granted.

30. These counts, which are titled “Failure to Disclose Material Pricing Terms in Respond Power’s Disclosure Agreement/Prices not Conforming to Disclosure Agreement,” challenge the adequacy of Respond Power’s disclosure statement and seek a Commission review of the prices charged by Respond Power. While the allegations set forth in Paragraph 32 of the Complaint appear to be focused on a lack of disclosure of material terms and conditions, the title of the count suggests a review of pricing. Moreover, many of the regulations which Respond Power is alleged to have violated in Paragraph 39 of the Complaint relate to EGS pricing. For instance, the Complaint cites Section 54.4(a) of the Commission’s regulations, which states: “EGS prices billed must reflect the marketed prices and the agreed upon prices in the disclosure statement.” 52 Pa. Code § 54.4(a). Likewise, the Complaint refers to Section 54.7(a), which provides: “Advertised prices shall reflect prices in disclosure statements and billed prices.” 52 Pa. Code § 54.7(a). Ruling on these allegations would require the Commission to determine what Respond Power’s price “should” have been under its variable rate plans with these customers.

31. However, the Commission does not have jurisdiction to regulate EGS prices. As noted above, the Commission has only the powers and authority granted to it by the General Assembly and contained in the Code. Noting in the Code authorizes the Commission to regulate the prices of EGSs. 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).

32. The Pennsylvania Supreme Court has found that the definition of “public utility” in Code Section 102 does not include EGSs except for the limited purposes set forth in Code Sections 2809 and 2810, 66 Pa. C.S. §§ 2809 and 2810. *Delmarva Power & Light Co. v. Pa. Pub. Util. Comm’n*, 870 A.2d 901 (Pa. 2005). Those sections have no bearing on prices charged by EGSs. Code Section 2809 establishes the requirement for EGSs to be licensed, 66 Pa. C.S. § 2809(e), and Code Section 2810 requires EGSs to pay state taxes so as to ensure revenue neutrality to the Commonwealth of Pennsylvania. 66 Pa.C.S. § 2810.

33. 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*”).³ 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.

34. In its *Variable Price 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

³ 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.

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. The Commission emphasized the importance of consumers on variable rate plans “to carefully review the terms and conditions of their contracts to determine if they are at risk for large rate increases at any given time.” *Variable Price Order* at 3.

35. As to allegations about the inadequacy of Respond Power’s disclosure statement contained in these counts, they are legally insufficient in that they fail to state a claim upon which relief may be granted.

36. Respond Power’s disclosure statement was approved by the Commission during the licensing process, and the material 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.

37. Moreover, Respond Power’s Commission-approved disclosure statement complies with the Commission’s regulations at Section 54.5(c), which were in effect until July 14, 2014. Under the clear language of those regulations, only *applicable* terms and conditions must be disclosed. 52 Pa. Code § 54.5(c). Respond Power’s 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.

38. The regulations in effect at that time did 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*”)⁴ 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.

39. Respond Power’s Commission-approved disclosure statement for variable price contracts did not previously contain initial prices because they were not applicable to Respond Power’s variable price contracts. The initial price was pegged to the wholesale market and other factors as described in the disclosure statement. Since a customer’s account 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 Power’s disclosure statement in effect at that time advises customers they may contact Respond Power for the current variable rate.

40. Respond Power’s disclosure statement likewise 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

⁴ The Final-Omitted Customer Information Regulations were published in the *Pennsylvania Bulletin* on June 14, 2014 and go into effect on July 14, 2014.

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. Respond Answer, Exhibit A. As such, Respond Power's description of the conditions of variability is completely adequate and in fact the Complaint fails to allege any specific departures from the Commission's regulations.

41. 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. Further, the Commission flatly rejected proposals to require price limits, instead requiring EGSs to clearly explain the applicable limits, and if there is no limit on price variability to require EGSs to clearly state that there is no limit. *See Final-Omitted Customer Information Regulations*; 52 Pa. Code § 54.5(c)(2)(ii).

42. Therefore, Respond Power requests dismissal of Counts 63-492 of the Complaint for lack of jurisdiction, pursuant to Section 5.101(a)(1) of the Commission's regulations, 52 Pa. Code § 5.101(a)(1), because the Commission does not have statutory authority to regulate EGS generation prices. Respond Power further seeks dismissal of Counts 63-492 of the Complaint for legal insufficiency, pursuant to Section 5.101(a)(4) of the Commission's regulations, 52 Pa. Code § 5.101(a)(4), because Respond Power's disclosure statement fully complies with the

Commission's regulations that were in effect at that time and was approved during the licensing process. As such, these counts fail to state a claim upon which relief can be granted.

43. Alternatively, Counts 63-492 should be dismissed, pursuant to Section 5.101(a)(1) of the Commission's regulations, 52 Pa. Code § 5.101(a)(1), to the extent they allege violations of the Consumer Protection Law, which the Commission has no jurisdiction to enforce.

D. Paragraphs 33 and 40 (comprising Counts 492-524) of the Complaint Should Be Dismissed in Due Legal Insufficiency of Pleading to the Extent They Allege Violations of 52 Pa. Code § 56.141.

44. The foregoing paragraphs are incorporated herein.

45. Paragraphs 33 and 40 (comprising Counts 492-524) of the Complaint alleging untimely complaint handling should be dismissed due to legal insufficiency of pleading to the extent they allege violations of Section 56.141 of the Commission's regulations, 52 Pa. Code § 56.141. These allegations are legally insufficient in that they fail to state a claim upon which relief may be granted.

46. Section 56.141 of the Commission's regulations requires public utilities to attempt to resolve disputes by any matter covered by Chapter 56. 52 Pa. Code § 56.141. While Respond Power recognizes that Code Section 2809 requires the Commission to ensure that the Chapter 56 standards and billing practices for residential utility service are maintained, nothing in Chapter 56 purports to apply to the prices that are charged to consumers by EGSs. Because the facts as alleged in the complaint, even if taken as true, do not state a claim upon which relief may be granted under Section 56.141, Counts 492-524 should be dismissed to the extent they allege violations of Section 56.141, pursuant to Section 5.101(a)(4) of the Commission's regulations, 52 Pa. Code § 5.101(a)(4).

E. Paragraphs 34 and 41 (comprising Counts 524-568) of the Complaint Should Be Dismissed Due to Lack of Jurisdiction to the Extent They Allege Violations of the Consumer Protection Law.

47. The foregoing paragraphs are incorporated herein.

48. Paragraphs 34 and 41 (comprising Counts 524-568) of the Complaint should be dismissed due to lack of Commission jurisdiction to the extent they allege violations of the Consumer Protection Law.

49. As explained above, the Commission lacks jurisdiction to enforce the provisions of the Consumer Protection Law. Therefore, Respond Power requests dismissal of Counts 16-62 for lack of jurisdiction, pursuant to Section 5.101(a)(1) of the Commission's regulations, 52 Pa. Code § 5.101(a)(1).

F. Paragraph 45 of the Complaint Should Be Dismissed Due to Lack of Jurisdiction.

50. The foregoing paragraphs are incorporated herein.

51. Paragraph 45 of the Complaint should be dismissed for lack of jurisdiction since the Commission does not have statutory authority to direct the issuance of refunds by EGSs. As noted above, the Commission has only the jurisdiction expressly conferred upon it by the legislature and as contained in the Code.

52. 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 (*emphasis added*). Similarly, Section 1312 authorizes the Commission to direct the issuance of refunds by "public utilities" in any proceeding involving rates upon a determination that any rate received by a public utility was unjust or

unreasonable, or was in violation of any regulation or order of the Commission, or was in excess of the applicable rate contained in an existing and effective tariff of such public utility. 66 Pa.C.S. § 1312. Since EGSs are not public utilities for the purposes of pricing, these provisions are not applicable.

53. Several ALJs have concluded that the Commission does not regulate EGS prices and may not order the issuance of refunds by EGS. 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.

54. The Complaint seeks refunds that reflect the difference between the prices consumers were charged by Respond Power and the EDC’s PTC. That is not consistent, however, with the clear terms of the consumers’ written contract with Respond Power. Moreover, the EDC’s PTC is a regulated rate that varies on a quarterly basis to reconcile with what has actually occurred in the market. At any given time, it bears no resemblance to actual market conditions. *See Investigation of Pennsylvania’s Retail Electricity Market: End State of Default Service*, Docket No. I-2011-2237962 (February 14, 2013 at 14-15). By contrast, Respond Power’s rate varies on a monthly basis to reflect current market conditions. No basis

exists to direct a refund of the difference between those two rates, which are developed using different methodologies.

55. Paragraph 45 of the Complaint should be dismissed for lack of jurisdiction, pursuant to Section 5.101(a)(1) of the Commission's regulations, 52 Pa. Code § 5.101(a)(1), since the Commission does not have statutory authority to direct the issuance of refunds by EGSs.

IV. Conclusion

WHEREFORE, for the foregoing reasons, Respond Power LLC respectfully requests that the Commission grant these Preliminary Objections and dismiss the various and multiple counts, as more fully described above, on the basis of the lack of Commission jurisdiction and legal insufficiency of pleading, and grant Respond Power such other relief as may be just and reasonable under the circumstances.

Respectfully submitted,



Dated: September 30, 2014

Karen O. Moury
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Attorneys for Respond Power LLC

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PENNSYLVANIA PUBLIC UTILITY	:	
COMMISSION, BUREAU OF	:	
INVESTIGATION AND ENFORCEMENT	:	
	:	
v.	:	Docket No. C-2014-2438640
	:	
RESPOND POWER LLC	:	

CERTIFICATE OF SERVICE

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

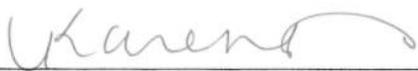
Via E-Mail and First-Class Mail

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Dated this 30th day of September, 2014.



Karen O. Moury, Esq.