

# Buchanan Ingersoll & Rooney PC

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January 13, 2015

## **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 Answer Of Respond Power LLC To Motion To Compel Of Joint Complainants Relating To Set V-4 Through V-13, in the above-captioned matter.

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

Very truly yours,



Karen O. Moury

KOM/bb

Enclosure

cc: Administrative Law Judge Elizabeth Barnes (*via email and First Class Mail*)  
Administrative Law Judge Joel Cheskis (*via email and First Class Mail*)  
Certificate of Service

**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** :  
**CONSUMER ADVOCATE** :  
**Complainants** :

**DOCKET NO. C-2014-2427659**

**v.** :

**RESPOND POWER LLC,** :  
**Respondent** :

**ANSWER OF RESPOND POWER LLC TO MOTION TO COMPEL OF JOINT  
COMPLAINANTS RELATING TO SET V-4 THROUGH V-13**

TO: ADMINISTRATIVE LAW JUDGES BARNES AND CHESKIS:

Pursuant to 52 Pa. Code § 5.342(g)(1), Respond Power LLC (“Respond Power”), by and through its counsel, Karen O. Moury, and Buchanan Ingersoll & Rooney PC, files this Answer to the Motion to Compel filed by the Joint Complainants, Commonwealth of Pennsylvania and the Office of Consumer Advocate, relating to the Interrogatories and Requests for Production of Documents – Set V-4 through V-13 (“Interrogatories”), and in support hereof, avers as follows:

**I. INTRODUCTION**

1. The Commission’s regulations provide that “a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.” 52 Pa. Code § 5.321(c). The regulations further state that while inadmissibility

at the hearing is not a ground for objection, the information sought must be “reasonably calculated to lead to the discovery of admissible evidence.” *Id.*

2. By the Interrogatories, the Joint Complainants request pricing and other information that Respond Power relied upon to establish prices charged to consumers under variable price contracts that provided for prices to vary monthly on the basis of several wholesale market factors and a profit margin.

3. The Commission has made it clear that it does not have traditional ratemaking authority over competitive electric generation suppliers (“EGSs”) and does not regulate competitive supply rates. *Commonwealth of Pennsylvania, et al. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655 (Order adopted November 13, 2014) (“*Blue Pilot Energy Order*”).

4. Jurisdiction to consider whether an EGS has billed its customers in accordance with its disclosure statement clearly does not include authority to review the expenses incurred by the EGS in purchasing electricity, consider the reasonableness of the EGS’s profit margin or determine a “just and reasonable” price on the basis of those factors.

5. Absent the statutory authority of the Commission to determine a price that would have been appropriate for Respond Power to charge in a competitive environment, information used by Respond Power to establish those prices is irrelevant to this proceeding and its production should not be compelled.

## **II. BACKGROUND**

6. Respond Power is an EGS licensed by the Commission since August 19, 2010 at Docket No. A-2010-2163898 to supply electricity or electric generation services to the public within the Commonwealth of Pennsylvania.

7. On June 20, 2014, the Joint Complainants filed a Joint Complaint (“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.

8. On July 10, 2014, Respond Power filed an Answer and New Matter to the Joint Complaint, and also filed Preliminary Objections moving for the dismissal of Counts III, IV, VII, VIII and IX with prejudice on various grounds including lack of Commission jurisdiction, insufficient specificity of pleading and legal insufficiency of pleading.

9. On July 10, 2014, the Office of Small Business Advocate (“OSBA”) filed a Notice of Intervention, and on August 1, 2014, the Commission’s Bureau of Investigation and Enforcement (“I&E”) filed a Notice of Intervention. OSBA and I&E are collectively referred to in this Motion as Intervenors.

10. On August 19, 2014, the presiding ALJs issued an Order Granting in Part and Denying in Part Preliminary Objections (“PO Order”). By the PO Order, the ALJs struck Count VIII in its entirety and struck Counts III, IV and IX to the extent they alleged violations of the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.*, and the Telemarketer Registration Act, 73 P.S. § 2241, *et seq.* A Petition for Interlocutory Review filed by the Joint Complainants on September 8, 2014 is pending before the Commission.

11. On August 21, 2014, I&E filed a Formal Complaint against Respond Power, setting forth similar allegations to those raised in the Joint Complaint in this proceeding. Respond Power filed an Answer and Preliminary Objections to I&E's Formal Complaint on September 30, 2014. I&E filed an Answer to the Preliminary Objections on October 17, 2014. An Order granting in part and denying in part the Preliminary Objections was issued on November 17, 2014. In addition, the ALJs issued an Order dated October 28, 2014 granting I&E's Petition to Consolidate its Formal Complaint with this Joint Complaint.

12. On August 25, 2014, the ALJs convened a prehearing conference. At that conference, the ALJs directed the parties to develop a proposed schedule setting forth dates (i) by when the Joint Complainants would serve written direct testimony or affidavits of their consumer witnesses; (ii) for evidentiary hearings wherein written testimony or affidavits from the consumers would be admitted into the record subject to cross examination and/or objections; and (iii) for a further prehearing memorandum conference to schedule remaining deadlines and evidentiary hearings.

13. The evidentiary hearings are scheduled for March 9-13, 2015. Key milestone dates between now and the dates of the evidentiary hearings include: a) the identification of consumer witnesses who Respond Power intends to cross examine by February 2, 2015; b) the distribution of hearing exhibits by Respond Power by February 17, 2015; and c) the filing by Respond Power of any Motions to Strike testimony by February 23, 2015.

### **III. ARGUMENT**

14. The Commission's regulations provide that "a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." 52 Pa. Code § 5.321(c). The regulations further state that while inadmissibility

at the hearing is not a ground for objection, the information sought must be “reasonably calculated to lead to the discovery of admissible evidence.” *Id.* The Commission has emphasized that the standard for discovery is relevance, not curiosity. *See Pennsylvania Public Utility Commission, et al. v. Pennsylvania American Water Company*, Docket No. R-2011-2232243 (Order on Motion to Compel dated July 21, 2011 at 21-22).

15. By the Interrogatories, the Joint Complainants request pricing and other information that Respond Power relied upon to establish prices charged to consumers under variable price contracts which provided that prices would vary monthly on the basis of several wholesale market factors and a profit margin.

16. The Commission has made it clear that it does not have traditional ratemaking authority over EGSs and that it does not regulate competitive supply rates. *Blue Pilot Energy Order, supra.* *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*”).<sup>1</sup> 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.

17. In addressing the Joint Complainants’ Petition for Interlocutory Review in the *Blue Pilot Energy Order*, the Commission simply answered the narrow question that was posed, which was whether the Commission has the statutory authority and jurisdiction to determine whether the prices charged to customers by an EGS conform to the disclosure statement. In answering that question in the affirmative, the Commission did not conclude, nor should it have

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<sup>1</sup> 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.

concluded, that it has the statutory authority and jurisdiction to determine what a “just and reasonable” price would have been under a variable price contract that is based on a variety of factors including wholesale market conditions and a profit margin.

18. As a creation of the General Assembly, the Commission has only the powers and authority granted to it by the General Assembly and contained in the Public Utility Code, 66 Pa. C.S. §§ 101 *et seq* (“Code”). *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937 (Order entered May 28, 2008); *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977). The Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. Pa. Pub. Util. Comm’n*, 43 A.2d 348 (Pa. Super. 1945). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967) (“*Roberts*”). Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992), alloc. denied, 637 A.2d 293 (Pa. 1993).

19. Nothing in the Code authorizes the Commission to regulate or establish EGS prices. 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).

20. 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, 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. §§ 2809-2810.

21. Code Section 1301 is the only provision that gives the Commission statutory authority to determine “just and reasonable” rates. It clearly applies only to rates demanded or received by any “public utility,” which does not include EGSs for these purposes. 66 Pa.C.S. § 1301.

22. In enacting Chapter 28 of the Code, the General Assembly made it clear that the price of generation supply is exempt from regulation, noting that “[c]ompetitive market forces are more effective than economic regulation in controlling the cost of generating electricity.” 66 Pa.C.S. § 2802(5).

23. In an Order adopted on February 20, 2014, the Commission sought comments from interested parties regarding significant variable price increases in the retail market. *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*”). 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. *Variable Rate Order* at 3.

24. In answering the Joint Complainants’ narrow question in the Petition for Interlocutory Review in the affirmative in the *Blue Pilot Energy Order*, the Commission did not conclude that it may step into the shoes of an EGS and determine what a “just and reasonable” variable price would have been under a contract where the price varies due to fluctuations in the wholesale market and includes a profit margin. Such a conclusion would have been at odds with its statutory authority and its past pronouncements regarding its lack of jurisdiction to establish

or limit EGS prices. Rather, it considered the narrow question that was posed in a vacuum and found that it may determine whether a price conforms to a disclosure statement, concluding that Count II, titled “Prices Nonconforming to Disclosure Statement,” should not be dismissed outright.

25. In considering whether an EGS has billed its customer in accordance with its disclosure statement, the Commission is limited by statute to determinations that do not require it to engage in ratemaking or place limitations on prices charged by EGSs. For instance, the review could entail a consideration of whether the disclosure statement permitted variable prices or whether the initial prices that were charged matched any initial prices included in the disclosure statement.

26. While the Commission’s statutory authority might also extend to considering whether an EGS’s prices complied with any ceiling or specific index in the disclosure statement, there is no factual dispute in this case that the disclosure statement<sup>2</sup> does not contain an initial price, a specific index or a ceiling price. Moreover, those inquiries seem to tread into the area of contract interpretation that the Commission has found it cannot do. *See, e.g., Allport Water Auth. v. Winburne Water Co.*, 393 A.2d 673 (Pa. Super. Ct. 1978); *Blue Pilot Energy Order* at 19; *See also John R. Evans, Small Business Advocate v. FirstEnergy Solutions Corporation*, Docket No. P-2014-2421556 (Motion adopted November 13, 2014).

27. In any event, the Commission’s statutory authority clearly does not extend to reviewing wholesale market conditions, considering expenses incurred by an EGS to purchase electricity, determining a reasonable profit margin for the EGS to recover or performing any of the other traditional ratemaking functions that are applicable to rates charged by public utilities.

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<sup>2</sup> Joint Complaint, Appendix A.

Therefore, it is inappropriate for Respond Power to be compelled to provide this “cost of service” type of information to the Joint Complainants.

**IV. CONCLUSION**

WHEREFORE, Respond Power LLC respectfully requests that the Commission deny the Motion to Compel filed by the Joint Complainants.

Respectfully submitted,

Dated: January 13, 2015



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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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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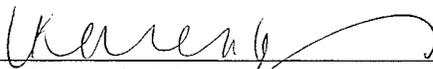
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Dated this 13<sup>th</sup> day of January, 2015.

  
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Karen O. Moury, Esq.