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January 14, 2016

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 and
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, enclosed for electronic filing is Respond Power LLC's Motion to Strike Letter Filed by the Commonwealth Of Pennsylvania, by Attorney General Kathleen Kane Through the Bureau Of Consumer Protection, and Tanya J. McCloskey, Acting Pennsylvania Consumer Advocate, for the above-captioned matters.

Copies have been served on all parties as indicated in the attached Certificate of Service.

Very truly yours,



Karen O. Moury

KOM/bb
Enclosures

cc: Certificate of Service
David P. Zambito, Esq.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Administrative Law Judges
Elizabeth H. Barnes and Joel H. Cheskis

Pennsylvania Public Utility Commission Bureau of Investigation and Enforcement	:	
	:	
	:	
	:	Docket No. C-2014-2438640
v.	:	
	:	
Respond Power, LLC	:	
	:	
Commonwealth of Pennsylvania, et al.	:	
	:	Docket No. C-2014-2427659
v.	:	
	:	
Respond Power, LLC	:	

NOTICE TO PLEAD

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

Pursuant to 52 Pa. Code § 5.101(b), you are hereby notified to file a written response to the enclosed Motion to Strike Letter Filed by the Commonwealth of Pennsylvania, by Attorney General Kathleen Kane Through the Bureau of Consumer Protection, and Tanya J. McCloskey, Acting Pennsylvania Consumer Advocate within twenty (20) days from the date of service of this notice. If you do not file a written response denying the enclosed Motion to Strike within twenty (20) days of service, the Pennsylvania Public Utility Commission (Commission) may rule on this Motion without further input.

File with:

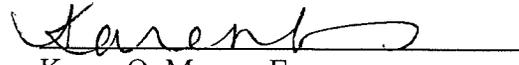
Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
P.O. Box 3265
Harrisburg, PA 17105-3265

With a copy to:

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John F. Povilaitis
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Harrisburg, PA 17101

Dated: January 14, 2016


Karen O. Moury, Esq.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Administrative Law Judges
Elizabeth H. Barnes and Joel H. Cheskis

Pennsylvania Public Utility Commission	:	
Bureau of Investigation and Enforcement	:	
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Respond Power, LLC	:	
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Commonwealth of Pennsylvania, et al.	:	
	:	
v.	:	Docket No. C-2014-2427659
	:	
Respond Power, LLC	:	

**RESPOND POWER LLC’S MOTION TO STRIKE LETTER FILED BY THE
COMMONWEALTH OF PENNSYLVANIA, BY ATTORNEY GENERAL KATHLEEN
KANE THROUGH THE BUREAU OF CONSUMER PROTECTION, AND TANYA J.
MCCLOSKEY, ACTING PENNSYLVANIA CONSUMER ADVOCATE**

Pursuant to Section 5.103 of the Pennsylvania Public Utility Commission’s regulations, 52 Pa. Code § 5.103, Respond Power LLC (“Respond Power” or “Company”), by and through its counsel, Karen O. Moury and John F. Povilaitis of Buchanan Ingersoll & Rooney PC and David P. Zambito and D. Troy Sellars of Cozen O’Connor, files this Motion to Strike (“Motion”) a Letter filed by the Commonwealth of Pennsylvania, by Attorney General Kathleen Kane through the Bureau of Consumer Protection, and Tanya J. McCloskey, Acting Consumer Advocate (“Joint Complainants”), on January 11, 2016, and in support thereof, avers as follows.

I. INTRODUCTION

The Letter filed by the Joint Complainants on January 11, 2016, which was not authorized by the Briefing Order issued by the Administrative Law Judges (“ALJs”) on October 28, 2015, purports to correct a typographical error and a discrepancy in the information that is set forth in their Main Brief filed on December 3, 2015. However, these so-called corrections go far beyond the correction of a mere typographical error and a discrepancy and, in reality, go to the very core of the remedies sought by the Joint Complainants in this proceeding. While the Joint Complainants appear to have now revised their proposed civil penalty to \$7.3 million -- down from \$7.3 billion, they have provided no explanation of how this civil penalty was calculated or referred to any specific record evidence in support of their new proposal. Moreover, they have not revised the formula set forth in their Main Brief or addressed how their new proposed civil penalty reflects the factors set forth in the Commission’s Policy Statement at 52 Pa. Code § 69.1201 (regarding factors and standards for evaluating litigated proceedings involving violations of the Public Utility Code and Commission regulations). As the Letter was not authorized to be filed, consideration of the Letter would violate Respond Power’s due process rights, and the Joint Complainants have not addressed the most fundamental issues necessary to carry their burden of proof on the proposed civil penalty, the Letter should be stricken in its entirety.

II. ARGUMENT

The ALJs’ Briefing Order required the filing of Main Briefs on or before December 3, 2015 and Reply Briefs on or before December 23, 2015. It further noted that any brief not filed and served on or before the date set forth therein would “not be accepted except by special permission.” Briefing Order at Ordering Paragraph 5. Well more than two weeks after the filing

of Reply Briefs, and without seeking the special permission of the ALJs, the Joint Complainants filed the Letter that is the subject of this Motion to Strike.

Characterizing the Letter as correcting a typographical error in footnote 54 on pages 168-169 of their Main Brief and a discrepancy in the information contained in the text on page 168 of their Main Brief, the Joint Complainants summarily claim -- without any basis in fact or law -- that the “amounts identified in the information in the text on page 169 of their Main Brief would be an appropriate civil penalty in this matter.” *See* Letter. In fact, however, the Joint Complainants’ so-called corrections go to the very core of the remedies they have sought as part of this proceeding, which were fully addressed by Respond Power’s Reply Brief, in which their discrepancies were highlighted. *See, e.g.*, Respond Power Reply Brief at 2-3, 154-156. Depending upon whether the Joint Complainants use their original formula or their original mathematics, the proposed civil penalty ranges from \$7.3 billion to \$7.3 million. Such “corrections” that the Letter purports to make are not ministerial or administrative in nature or appropriate for the subject of a one-page letter, submitted well after the due date for the filing of briefs has passed.

The Joint Complainants alleged in their Main Brief that Respond Power committed over 7.3 million violations of the Commission’s regulations and requested that Respond Power be required to pay a civil penalty in the amount of \$1,000 per violation. *See* Joint Complainants’ Main Brief at 168. They then made a mathematical, not a typographical, error in footnote 54, which carried over into the text of the Main Brief on page 169, in requesting a civil penalty of over \$7.3 million. Because the Joint Complainants’ request for a civil penalty and their proposed formula for calculation of that civil penalty did not match, Respond Power was required to respond in its Reply Brief to the possibility of a civil penalty of over \$7.3 billion.

Notably, the Joint Complainants' Letter still does not change the underlying formula, the absurdity of which was illustrated by the resulting \$7.3 billion proposed civil penalty when the mathematics were done correctly. Moreover, the Letter does not present any details or explanation -- based on record evidence -- to support the imposition of the Joint Complainants' proposed revised civil penalty of \$7.3 million or to explain how this amount was calculated.

As a result of these errors and inconsistencies, consideration of the Letter by the ALJs would violate Respond Power's due process rights. It is well-settled that when an action seeks to impose civil penalties, a respondent is entitled to full due process rights. *See Northview Motors, Inc. v. Commonwealth, Attorney Gen.*, 562 A.2d 977, 980 (Pa. Cmwlth. 1989); *Pocono Water Co. v. Pa. Pub. Util. Comm'n.*, 630 A.2d 971 (Pa. Cmwlth. 1993). As Respond Power was required in its Reply Brief to respond to moving targets due to the Joint Complainants' use of an absurd formula and their purported mathematical errors in proposing a civil penalty, it has had no opportunity to respond to the Joint Complainants' new proposed civil penalty or any underlying rationale for it. The fact that the amount of the civil penalty and the number of alleged violations were not even addressed until the filing of the Joint Complainants' Main Brief, as the Joint Complaint and the expert testimony were silent on these issues, already raised serious due process concerns that have been exacerbated by the Joint Complainants' errors and inconsistencies, and their subsequent submission of the Letter. *See* Respond Power Reply Brief at 154-158.

The Letter also omits any discussion of how the new proposal reflects the factors set forth in the Commission's Policy Statement at 52 Pa. Code § 69.1201.¹ Rather, in their Letter, the Joint Complainants summarily claim that their new proposed civil penalty is "appropriate"

¹ Even in a one-issue consumer complaint proceeding, one ALJ recently engaged in a thorough analysis of these factors before recommending the imposition of a civil penalty. *Darlington v. Blue Pilot Energy, LLC*, Docket No. F-2015-2500535 (Initial Decision served Jan. 8, 2016).

without any basis in law or fact. Indeed, the Joint Complainants have not even explained how their new proposal would be calculated, *i.e.*, through the imposition of a \$1 civil penalty for each alleged violation, through the imposition of \$1000 civil penalty for some violations and no civil penalty for other violations, or through some other method entirely. Accordingly, the ALJs are left with no rationale to support the proposed \$7.3 million civil penalty.

As the party with the burden of proof, it was incumbent upon the Joint Complainants to demonstrate that their proposed civil penalty is supported by the evidentiary record and valid legal arguments. *See Milkie v. Pa. Pub. Util. Comm'n*, 768 A.2d 1712 (Pa. Cmwlth. 2001) (regarding burden of proof). Through their silence on these issues, the Joint Complainants have simply failed to carry their burden. Indeed, their approach in proposing a civil penalty in this case highlights the inappropriateness of their unlawful reliance on a nonexistent pattern and practice theory in this proceeding as a substitute for proving each element of their allegations. This approach also demonstrates why the Commission may not rely on pattern and practice evidence in lieu of substantial evidence to support its decision. *See Respond Power Reply Brief* at 16-30. On the basis of the foregoing, the Letter should be stricken in its entirety.

III. CONCLUSION

WHEREFORE, Respond Power LLC respectfully requests that the Honorable Administrative Law Judges Elizabeth H. Barnes and Joel H. Cheskis grant this Motion to Strike the Letter filed by the Joint Complainants on January 11, 2016.

Respectfully submitted,

Dated: January 14, 2016



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Counsel for Respond Power LLC

**BEFORE THE
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	:	
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 documents upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

Via U.S. MAIL AND E-MAIL:

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Dated this 14th day of January, 2016.



Karen O. Moury, Esq.