**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Commonwealth of Pennsylvania, *et al.* :

:

v. : C-2014-2427659

:

Respond Power LLC :

Pennsylvania Public Utility Commission, :

Bureau of Investigation and Enforcement : C-2014-2438640

:

v. :

:

Respond Power LLC :

**INTERIM ORDER**

**GRANTING MOTION TO STRIKE**

**AND CLOSING THE HEARING RECORD**

On October 15, 2015, the final evidentiary hearings were concluded in the above-captioned consolidated proceedings involving a formal complaint filed jointly by the Commonwealth of Pennsylvania, Office of Attorney, and the Acting Consumer Advocate (“Joint Complainants”) against Respond Power LLC (Respond) and a formal complaint filed by the Public Utility Commission’s Bureau of Investigation and Enforcement (I&E) against Respond. At the conclusion of the hearing, a schedule for the submission of main and reply briefs was established. A Briefing Order dated October 28, 2015 was issued memorializing the agreement for the submission of parties’ main briefs on December 3, 2015 and reply briefs on December 23, 2015 and setting forth various requirements for those briefs. Pursuant to the Briefing Order, the Joint Complainants, Respond and I&E each submitted main briefs on December 3, 2015 and the Joint Complainants and Respond both submitted reply briefs on December 23, 2015. On January 8, 2016, an off-the-record conference call was held amongst the parties and the Presiding Officers to discuss two issues pertaining to the proprietary treatment of certain information contained in the briefs.

On January 11, 2016, the Joint Complainants submitted a letter indicating that, upon further review of the information that was the subject of the conference call held on January 8, 2016, they had determined that there was a typographical error in footnote 54 of their main brief. In particular, the Joint Complainants stated in the letter that a dollar sign ($) was inadvertently inserted on the last full line of footnote 54 that caused a discrepancy with the information in the text and the remainder of the footnote. The Joint Complainants added in the letter that they “maintain, however, that the amounts identified in the text on page 169 of their Main Brief would be an appropriate civil penalty in this matter based on the evidence identified and discussed in their Main Brief.”

On January 14, 2016, Respond filed a Motion to Strike the January 11th letter filed by the Joint Complainants. In its Motion, Respond argued that the “so-called corrections go far beyond the 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.” Respond added that the Joint Complainants have provided no explanation for how the civil penalty they proposed in their briefs was calculated or referred to any specific record evidence in support of their new proposal. Respond also argued that the letter was not authorized to be filed and that consideration of the letter would violate the Company’s due process rights. Respond concluded that the Joint Complainants have not addressed the most fundamental issues necessary to carry their burden of proof on the proposed civil penalty and that the letter should, therefore, be stricken.

On January 28, 2016, the Joint Complainants filed an answer to Respond’s motion. In its answer, the Joint Complaints argued that Respond has mischaracterized the January 11th letter and that the letter does not violate Respond’s due process rights but is appropriate and promotes judicial economy. The Joint Complainants argued that they have clearly set forth their claim for a civil penalty and that the January 11th letter did not change that position. The Joint Complainants continue to rely on footnote 54 in their main brief to support their calculation of a civil penalty. In response to the Company’s argument that the letter was not authorized to be filed, the Joint Complainants argued that the January 11th letter did not alter or enhance their briefs but served to clarify a typographical error and recognize a discrepancy for the purposes of promoting judicial economy and clarifying confusion. The Joint Complainants argued that Respond’s motion should be denied.

No other answers to Respond’s motion were received. Respond’s motion is ready for disposition. For the reasons discussed below, Respond’s motion will be granted and the January 11th letter filed by the Joint Complainants will be stricken from consideration.

Respond filed its motion pursuant to Section 5.103 of the Commission’s regulations. Section 5.103 allows parties to make a request by motion for relief desired and requires that the motion set forth the ruling or relief sought, and state the grounds therefor and the statutory or other authority upon which it relies. 52 Pa.Code § 5.103(a).

The January 11th letter will be stricken because the letter does more than correct a typographical error but addresses a substantive issue present in this proceeding to which Respond does not have an opportunity to provide a response. We will address any ambiguities or apparent mathematical errors in briefs in our Initial Decision. Accordingly, the January 11th letter shall be stricken from the record.

Had the Joint Complainants requested to modify their main brief prior to the deadline for submission of reply briefs, there would be no denial of due process because Respond would have had an opportunity to respond thereafter in its reply brief. However, we find the letter addresses topics not covered in the post-hearing phone conference with the parties and requests a substantive change to the main brief.

It is not sufficient for the Joint Complainants to submit the January 11th letter in an attempt to “clarify confusion.” All parties had the same opportunity to present their arguments based on the record developed in this proceeding. We recognize that the record in this case is substantial and the issues are numerous. To the extent that a party was unable to clearly articulate its position on a particular issue within the time allotted for, and agreed to by, the parties to do so, it is unreasonable for that party to attempt to clarify any confusion following the submission of the briefs with a letter. This is particularly true where doing so may cause an unfair advantage to that party. The Joint Complainants have the burden to demonstrate that the civil penalty they propose should be adopted and they were required to make that demonstration in their main brief.

Furthermore, there may be other typographical errors contained in the Joint Complainants’ briefs, and other parties’ briefs as well. Typographical errors are not rare and are understandable. Letters should not be submitted following the conclusion of briefs to correct any typographical errors. To the extent the January 11th letter seeks to “promote judicial economy,” it would not promote judicial economy if letters were submitted to correct typographical errors every time they appeared in a brief. To the extent that parties sought to clarify any confusion created by typographical errors contained in briefs, such a practice would not “promote judicial economy,” but, rather, create significant additional work for the Commission. Such a practice should not be encouraged. Rather, to the extent any confusion is created following the submission of briefs, Presiding Officers are free to seek clarification of such confusion on their own, as we did in the off-the-record conference call held with the parties on January 8, 2016.

As a result, Respond’s Motion to Strike the letter submitted by the Joint Complainants on January 11, 2016 will be granted.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Motion to Strike the 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, dated January 14, 2016, is hereby granted.
2. That the letter submitted by the Commonwealth of Pennsylvania, by Attorney General Kathleen Kane Through the Bureau of Consumer Protection, and Tanya J. McCloskey, Acting Pennsylvania Consumer Advocate, dated January 11, 2016, is hereby stricken from consideration.
3. That the record at consolidated Docket Nos. C-2014-2427659 and C-2014-2438640 is closed for decision writing.

Date: February 5, 2016

Elizabeth Barnes

Administrative Law Judge

Joel H. Cheskis

Administrative Law Judge

**C-2014-2427659 - ATTORNEY GENERAL PA & OFFICE OF CONSUMER ADVOCATE v. RESPOND POWER LLC**

***REVISED 10/5/15***

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