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July 28, 2016

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. Fair View Energy, Inc.; Docket No. C-2016-2547502

Dear Secretary Chiavetta:

On behalf of Fair View Energy, Inc., enclosed for filing is a Motion to Strike Ex Parte Communication of Non-Party, 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: Chief Administrative Law Judge Charles E. Rainey (via email only)
Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PENNSYLVANIA PUBIC UTILITY COMMISSION, BUREAU OF INVESTIGATION AND ENFORCEMENT,	:	
Complainant	:	
	:	DOCKET NO. C-2016-2547502
	:	
v.	:	
	:	
FAIR VIEW ENERGY, INC.,	:	
Respondent.	:	

MOTION TO STRIKE EX PARTE COMMUNICATION OF NON-PARTY

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

Fair View Energy, Inc. ("Fair View" or "Company"), by and through its counsel, Karen O. Moury, Kathleen Ryan and Buchanan Ingersoll & Rooney PC, pursuant to Sections 5.101 and 5.103 of the Pennsylvania Public Utility Commission ("Commission") regulations, 52 Pa. Code §§ 5.101 and 5.103, files this Motion to Strike Ex Parte Communication of Non-Party ("Motion". This Motion the unauthorized ex parte communication sent to the Commission's Secretary by Mr. John Holmes, CEO of Frontline Power Solutions on July 16, 2016, which was served on the parties and made part of the formal record of this proceeding by Secretarial Letter dated July 18, 2016. As Mr. Holmes is not a party to this proceeding, has no standing to participate in this proceeding, and has filed a pleading, which is unauthorized by the Commission's regulations and includes scandalous and impertinent matter, the ex parte communication should be stricken from the Commission's formal record of this proceeding. In support hereof, Fair View further avers as follows:

I. Background

1. On May 25, 2016, the Commission's Bureau of Investigation and Enforcement ("I&E") filed a Formal Complaint ("Complaint") against Fair View, alleging that the Company engaged in the unlicensed brokering of electric generation services in Pennsylvania between April 2015 and March 2016.

2. On June 15, 2016, Fair View timely filed an Answer and New Matter to the Complaint. In the Answer and New Matter, Fair View alleged that until I&E initiated its informal investigation in February 2016, it was not aware of any legal requirement for an entity to obtain an electric generation supplier ("EGS") license in Pennsylvania prior to engaging in brokering activities.

3. I&E filed a Reply to the New Matter on July 5, 2016.

4. I&E served Interrogatories and Requests for Production of Documents – Set I on Fair View on July 5, 2016.

5. On July 25, 2016, Fair View timely served responses to I&E's Interrogatories and Requests for Production of Documents.

6. The Complaint is awaiting the scheduling of a hearing before the Office of Administrative Law Judge.

7. On July 16, 2016, Mr. Holmes sent an ex parte email communication to the Commission's secretary in this proceeding, commenting on issues pending in the Complaint proceeding concerning the knowledge of Fair View's principals as to the legal requirement for an EGS license from the Commission to engage in the activities alleged in the Complaint.

7. On July 25, 2016, Fair View filed an application with the Commission for an electric generation supplier ("EGS") license to serve all customer classes throughout

Pennsylvania as a broker/marketer. In the application, Fair View fully disclosed the pending Complaint proceeding. The application has been docketed at A-2016-2558553 and has been assigned to the Bureau of Technical Utility Services. Mr. Holmes has filed a protest to the application, as a result of the publication of notice in the Scranton Times. The protest was received by the Commission's Secretary on June 6, 2016 and published to the Commission's website on July 27, 2016.

II. Applicable Legal Standards

9. The Commission's Rules of Administrative Practice and Procedure ("Rules") permit the filing of preliminary objections and provide that they "may be filed in response to a pleading except motions and prior preliminary objections." 52 Pa. Code § 5.101(a); *see also Equitable Small Transportation Interveners v. Equitable Gas Company*, Docket No. C-00935435 (July 18, 1994). The Commission's Rules also permit the filing of a motion to request relief that is desired by a party; such motions may be made at any time. 52 Pa. Code § 5.103.

10. 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.

11. The Commission's procedure regarding the disposition of preliminary objections is similar to that utilized in Pennsylvania civil practice. *Equitable Small Transportation Interveners*, supra. 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).

12. Under the Commission's Rules, the pleadings that are permitted in an action before the Commission include: application and protest; formal complaint, answer, new matter and reply to new matter; order to show cause and answer; petition and answer; preliminary objections; and motions. 52 Pa. Code § 5.1

13. Under the Commission's Rules, an intervenor (other than a statutory advocate) may participate in a Commission proceeding only upon "order of the presiding officer or the Commission upon grant of a petition to intervene." 52 Pa. Code § 5.71.

14. For a person to be eligible to intervene in a Commission proceeding, the petition to intervene must show that the person has a right conferred by statute, has an interest that may be directly affected and which is not adequately represented by existing participants and as to which the petitioner may be bound by the action of the Commission in the proceeding. Petitions to intervene must, therefore, set forth facts from which the alleged intervention right or interest can be determined, the grounds of the proposed intervention and the petitioner's position regarding the issues in the proceeding. 52 Pa. Code §§ 5.72 – 5.73. Further, petitions to

intervene are required to be filed no later than the date fixed for the filing of responsive pleadings. 52 Pa. Code § 5.74(b)(1).

15. Under Section 334(c) of the Public Utility Code (“Code”), *ex parte* communications are prohibited. Such communications include any off-the-record communications to or by any member of the commission, administrative law judge, or employee of the commission, regarding the merits of any fact in issue of any matter pending before the commission in any contested on-the-record proceeding.” 66 Pa. C.S. § 334(c).

III. Argument

16. The only parties in this contested on-the-record proceeding are I&E, which filed the Complaint, and Fair View, the Respondent which filed an Answer and New Matter. No petitions to intervene have been filed by any other potential party.

17. The Commission’s Rules specifying the pleadings that may be filed in a formal proceeding do not authorize the filing of unsolicited comments by a person who is not a party to the proceeding and has not even filed a petition to intervene seeking to gain party status. 52 Pa. Code § 5.1. Therefore, the email communication sent by Mr. Holmes to the Commission’s Secretary on July 16, 2016 is not an authorized pleading under the Commission’s Rules and should be stricken.

18. Moreover, since the *ex parte* email communication violated Section 66 Pa. C.S. § 334(c), the Commission’s Secretary was required to cure the violation by serving it on the parties and publish the communication on the Commission’s website.¹ In the *ex parte* communication, which is now publicly available, Mr. Holmes disclosed information about private litigation between Fair View and Frontline Power Solutions (“Frontline”) that is under seal, and made

¹ Although the email communication is not part of the evidentiary record upon which the Commission may base a decision, it is in the Commission’s formal record (52 Pa. Code 1.72), from which it should be stricken.

derogatory comments about Fair View's principals.² As a result of this unauthorized and ex parte communication appearing on the Commission's website, it is accessible by the public and has the potential to jeopardize Fair View's reputation within the energy industry. Accordingly, due to the inclusion of scandalous and impertinent matter in the email communication, it should be stricken from the formal record pursuant to 52 Pa. Code § 5.101(a)(2) and promptly removed from the Commission's website.

19. In addition, Mr. Holmes lacks standing to participate in this proceeding. Standing to participate in proceedings before an administrative agency is primarily within the discretion of the agency. *Pennsylvania National Gas Association v. T.W. Phillips Gas and Oil Co.*, 75 Pa. PUC 598, 603 (1991). Generally, the Commission has held that a person or entity has standing when the person or entity has a direct, immediate and substantial interest in the subject matter of a proceeding. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975). As Mr. Holmes has no direct, immediate and substantial interest in this proceeding, and is not aggrieved in any way, he lacks standing to participate. Therefore, pursuant to 52 Pa. Code § 5.101(a)(7), the email communication should be stricken from the formal record Mr. Holmes lacks standing in this proceeding.

20. It is free from doubt that Mr. Holmes is not a party to this proceeding, that he lacks standing to participate as a party in this proceeding, that the *ex parte* communication contains scandalous and impertinent comments, and that the communications is not a pleading authorized by the Commission's regulations for filing in a formal proceeding.


² In the interest of full and complete disclosure in its EGS application to operate as a broker/marketer in Pennsylvania, Fair View listed this litigation as having been resolved. Out of respect for the terms of the settlement of that litigation, Fair View did not reveal any other details. See Fair View application at 5.a. where it lists a 2015 matter in the *United States District Court of the District of Rhode Island: Frontline Power Solutions, LLC and John T. Holmes v. Jay Snyder and Fair View Energy, Inc.*, Case No.: 1:15-cv-00411-M-PAS. As further noted in the application at 5.b., the District Court of Rhode Island ordered the matter to be dismissed with prejudice following the filing of a Stipulation to Voluntarily Dismiss With Prejudice.

IV. Conclusion

WHEREFORE, Fair View Energy, Inc. hereby requests that the ex parte communication of Mr. John Holmes be stricken from the record in this proceeding and that the Commission grant Fair View such other relief as is just and reasonable under the circumstances.

Dated: July 28, 2016

Respectfully submitted,



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Counsel for Fair View Energy, Inc.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

v.

**FAIR VIEW ENERGY, INC.,
Respondent.**

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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 Email and First-Class Mail

Michael L. Swindler
Stephanie Wimer
Kourtney Myers
Pennsylvania Public Utility Commission
Bureau of Investigation & Enforcement
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mwindler@pa.gov
stwimer@pa.gov
komyers@pa.gov

Via Email only

John Holmes, CEO
Frontline Power Solutions
johnholmes@frontlinepowersolutions.com

Dated this 28th day of July, 2016.



Karen O. Moury, Esq.