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June 4, 2014

**VIA E-FILING**

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

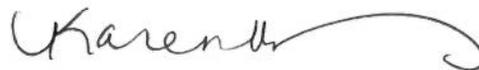
Re: Justin L. Herp v. Respond Power LLC  
Docket No. C-2014-2413756

Dear Secretary Chiavetta:

On behalf of Respond Power LLC, I have enclosed for electronic filing the Motion for Summary Judgment of Respond Power LLC 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: Administrative Law Judge Elizabeth H. Barnes (via First-Class Mail)  
Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**JUSTIN L. HERP**

v.

**RESPOND POWER LLC**

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**Docket No. C-2014-2413756**

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**NOTICE TO PLEAD**

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TO: Justin L. Herp  
220 Bennett Drive  
Butler, PA 16001

Pursuant to 52 Pa. Code § 5.102(b), you are hereby notified that, if you do not file a written response denying or correcting the enclosed Motion for Summary Judgment of Respond Power LLC within **twenty (20) days** from service of this Notice, the facts set forth by Respond Power LLC in the Motion for Summary Judgment may be deemed to be true, thereby requiring no other proof. All pleadings, such as a Reply to Motion, 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.

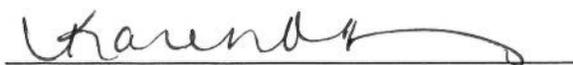
**File with:**

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, Esq.  
Buchanan Ingersoll & Rooney PC  
409 N. Second Street  
Suite 500  
Harrisburg, PA 17101

Dated: June 4, 2014

  
\_\_\_\_\_  
Karen O. Moury, Esq.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**JUSTIN L. HERP**

**v.**

**RESPOND POWER LLC**

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**Docket No. C-2014-2413756**

**MOTION OF RESPOND POWER LLC FOR SUMMARY JUDGMENT**

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

Respond Power LLC (“Respond Power”), by and through its counsel, Karen O. Moury, and Buchanan Ingersoll & Rooney PC, files this Motion for Summary Judgment (“Motion”), pursuant to Section 5.102(a) of the Pennsylvania Public Utility Commission’s (“Commission”) regulations, 52 Pa. Code § 5.102(a), and in connection therewith avers as follows:

**I. Introduction and Background**

1. Respond Power is an electric generation supplier (“EGS”) licensed by the Commission since August 18, 2010 at Docket No. A-2010-2163898 to supply electricity or electric generation services to the public within the Commonwealth of Pennsylvania.

2. On March 18, 2014, Justin L. Herp (“Complainant”) filed a Formal Complaint alleging that his electric generation charges increased by 150% in January 2014 and that Respond Power told him his electric generation charges would always be lower than West Penn Power Company’s (“West Penn”) generation rate. Complainant’s requested relief is for his bill to be adjusted to no more than the West Penn generation rate for the entire period he was served by Respond Power.

3. On April 15, 2014, Respond Power filed an Answer to the Formal Complaint generally denying any wrongdoing and averring that Complainant had been enrolled in a variable rate plan since October 2013 and that the rates on that plan are subject to change based on market conditions. Respond Power further averred that on March 7, 2014, it offered Complainant a fixed rate plan going forward, along with an adjustment to the bills to that fixed rate for the billing cycles ending on January 24, 2014 and February 26, 2014, and that Complainant rejected that offer.

4. On May 7, 2014, the Commission issued a Telephonic Hearing Notice scheduling an initial telephonic hearing for July 1, 2014 at 10:00 a.m. before Administrative Law Judge (“ALJ”) Elizabeth H. Barnes.

5. On May 9, 2014, ALJ Barnes issued a Prehearing Order setting forth instructions relating to the initial telephonic hearing.

6. Respond Power is timely filing this Motion so that disposition will not delay the hearing scheduled for July 1, 2014. However, Respond Power has no objection to rescheduling the hearing if the ALJ needs additional time to dispose of this Motion.

7. Through this Motion, Respond Power seeks dismissal of the Formal Complaint on the basis that increasing a generation charge under a variable price plan in a manner that is consistent with the disclosure statement does not constitute a violation of the Public Utility Code (“Code”), 66 Pa.C.S. §§101 *et. seq.* or Commission regulations.

8. Because the pleadings, as well as the attached Affidavit of Scott Foreman-Murray, In-House Counsel for Respond Power, (“Foreman-Murray Affidavit”),<sup>1</sup> demonstrate that there is no genuine issue of fact, Respond Power is entitled to relief as a matter of law.

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<sup>1</sup> The Foreman-Murray Affidavit is attached hereto and expressly incorporated herein.

Accordingly, Respond Power requests that this Motion be granted and that the Formal Complaint be dismissed.

## **II. Argument**

### **A. Summary Judgment Standard**

9. The Commission's Rules of Administrative Practice and Procedure permit parties to file preliminary motions. 52 Pa. Code §§ 5.101-103. Specifically, the Commission's regulations at 52 Pa. Code § 5.102(a) permit any party to move for summary judgment after the pleadings are closed, but within such time as not to delay a hearing. A motion for summary judgment must be based on the pleadings, depositions, answers to interrogatories, admissions and supporting affidavits. 52 Pa. Code § 5.102(c). The presiding officer must grant a motion for summary judgment if the pleadings, depositions, answers to interrogatories, admissions and affidavits show that there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law. 52 Pa. Code § 5.102(d)(1).

10. Summary judgment is properly granted where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Pennsylvania State Univ. v. County Of Centre*, 532 Pa. 142, 144 - 145, 615 A.2d 303, 304 (1992).

11. In the case of a motion for summary judgment, the moving party bears the burden of showing that no genuine issue of material fact exists and that it is entitled to a judgment as a matter of law. The Commission must view the record in the light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences. *First Mortgage Co. of Pennsylvania v. McCall*, 459 A.2d 406 (Pa. Super. 1983); *Mertz v. Lakatos*, 381 A.2d 497 (Pa.

Cmwlth. 1978). All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Thomson Coal Company v. Pike Coal Company*, 412 A.2d 466 (Pa. 1979). Summary judgment will be granted only where the right is clear and free from doubt.

12. The non-moving party in a motion for summary judgment must allege facts showing that an issue for trial exists. *Stover v. The UGI PennTelephone Co. of Pennsylvania*, Docket No. C-00923833 (Order entered July 21, 1992). The Commission has interpreted 52 Pa. Code Section 5.102(c) in conformity with Rule 1035 (now Rule 1035.1) of the Pennsylvania Rules of Civil Procedure. *South River Power Partners, L.P. v. West Penn Power Company*, Docket No. C-00935287 (Order entered November 6, 1996). In civil practice, a non-moving party may not rely solely upon denials in its pleadings, but must submit some materials to establish that a genuine issue of material fact exists. *Nicastro v. Cuyler*, 467 A.2d 1218 (Pa. Cmwlth. 1983); *Pennsylvania Gas & Water Co. v. Nenna & Frain, Inc.*, 467 A.2d 330 (Pa. Super. 1983); *Geriot v. Council of Borough of Darby*, 457 A.2d 202 (Pa. Cmwlth. 1983); *see also*, Pa. R.C.P. 1035.3, providing that “[s]ummary judgment may be entered against the non-moving party who does not respond.” Pa. R.C.P. 1035.3(d).

13. The provision at 52 Pa. Code § 5.102(c) serves judicial economy by avoiding a hearing where no factual dispute exists. If no factual issue pertinent to the resolution of a case exists, a hearing is unnecessary. 66 Pa. C.S. § 703(a); *Lehigh Valley Power Committee v. Pa. P.U.C.*, 563 A.2d 557 (Pa. Cmwlth. 1989); *S.M.E. Bessemer Cement, Inc. v. Pa. P.U.C.*, 540 A.2d 1006 (Pa. Cmwlth. 1988); *White Oak Borough Authority v. Pa. P.U.C.*, 103 A.2d 502 (Pa. Super. 1954).

**B. Respond Power Acted in Conformance with Disclosure Statement**

14. In the terms of service section of the disclosure statement provided to Complainant, Respond Power explained that the price may vary from month to month and that it sets the generation charges on the basis of PJM market rates plus a profit margin. Further, the disclosure statement provided that Respond Power's goal is to deliver power at a price that is less than Complainant would have paid had he purchased power from his local utility company. The disclosure statement expressly stated, however, that Respond Power could not guarantee that Complainant would see savings every month. The contract included no dollar or percentage caps or ceilings on the amount by which variable rates could change. Foreman-Murray Affidavit at ¶ 7.

15. Although Complainant claims that he was told that his generation charges would always be lower than West Penn's generation rate, the written disclosure statement clearly provides otherwise and demonstrates that there is no genuine issue of fact.

16. Likewise, a review of the third party verification recording demonstrates that Complainant was aware that he was enrolling in a variable rate plan. Foreman-Murray Affidavit at ¶ 8.

17. As has been well-documented in the media and acknowledged by the Commission, the Polar Vortex in January 2014 caused wholesale prices for hourly energy supply in the day ahead and the real time markets to increase exponentially, which resulted in significant increases in the prices paid by EGSs to secure the supply needed for their end-use retail customers. *Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, Docket No. M-2014-2406134, Order adopted on February 20, 2014 ("February 20 Variable Rate Order"). Specifically in the February 20 Variable Rate Order,

the Commission noted that new records were set for winter electricity use in Pennsylvania and throughout the service area of PJM Interconnection, LLC (“PJM”), with PJM recording 8 of the top 10 highest hourly usage periods ever observed. The Commission further referred to this high demand, in combination with particularly high forced outage rates for a number of generators, as producing record high costs in the PJM-administered energy markets. By way of example, the Commission explained that average wholesale day-ahead LMP prices for Pennsylvania in January 2014 were estimated at \$148 per MWh, compared to \$44 per MWh in December 2013. Additionally, the Commission noted that energy uplift charges, which are energy related charges billed to EGSs in addition to LMP costs, were estimated at \$631 million in the month of January 2014, which is equivalent to a full year of uplift charges for the period 2010-2012. To serve its retail customers in Pennsylvania, Respond Power incurred, at various times during the winter months, increases far in excess of its typical costs. Foreman-Murray Affidavit at ¶ 9.

18. Consistent with the terms of the disclosure statement issued to the Complainant, Respond Power adjusted the rate being charged to the Complainant to reflect those wholesale market increases. Foreman-Murray Affidavit at ¶ 10.

19. Upon request, Complainant was returned to the default service provider, West Penn Power Company, on May 14, 2014. Foreman-Murray Affidavit at ¶ 11.

20. The variable rate changes made by Respond Power for Complainant’s usage reflected in the March and April 2014 monthly bills were consistent with the terms of the disclosure statement. Respond Power is entitled to judgment in its favor as a matter of law and the Formal Complaint should be dismissed as legally insufficient.

### C. The Commission Does Not Regulate EGS Prices

21. Under Code Section 2806(a), 66 Pa.C.S. § 2806(a), the Commission does not regulate generation service. As recognized by the Commission in the February 20 Variable Rate Order, “the rates consumers pay in the retail electric market are governed by the terms of their contract with their supplier.” Order adopted on February 20, 2014 at p.3. The Commission further observed that it is incumbent on consumers on variable rates 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.” *Id.* In addition, the Commission has recently acknowledged that it has no statutory authority to limit the prices charged by EGSs. *Petition of PECO Energy Company for Approval of its Default Service Plan*, Docket No. P-2012-2283641, Order adopted March 6, 2014 at p. 11. In fact, 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 consumer. 52 Pa. Code §54.5(b)(10).

22. The Commission’s jurisdiction over prices charged by EGSs is limited to ensuring that the prices billed “reflect the marketed prices and the agreed upon prices in the disclosure statement.” 52 Pa. Code § 54.4(a). Similarly, the Commission’s regulations mandate that advertised prices “reflect prices in disclosure statements and billed prices.” 52 Pa. Code § 54.7. *See Ruhl v. Dominion Retail, Inc.* Docket No. C-2008-2061229, 2009 Pa. PUC LEXIS 122, Initial Decision issued on March 30, 2009, Final Order adopted on September 24, 2009; *Grmuska v. Dominion Retail, Inc.*, Docket No. C-2009-2124359, Order adopted March 25, 2010. (Commission’s jurisdiction is limited to whether EGSs advertised prices match billed prices and whether billed prices reflect marketed prices). The Complaint includes no allegations about Respond Power’s billed prices not matching the disclosure statement.

23. As to variable rate contracts, the Commission's regulations at 52 Pa. Code § 54.5 require the disclosure statement to disclose conditions of variability (*i.e.*, it must state on what basis prices will vary) and any limits on price variability. *See* February 20 Variable Rate Order at p. 3. The Complaint includes no allegations about the deficiency of Respond Power's disclosure statement. To the contrary, the disclosure statement indicated that the price would vary based on the PJM market and contained no limits on price variability.

24. Because Complainant has not stated a claim upon which relief can be granted, Respond Power is entitled to judgment in its favor and the Formal Complaint should be dismissed as legally insufficient.

**D. The Commission Does Not Have Jurisdiction to Direct Issuance of a Refund**

25. The Code does not authorize the Commission to direct issuance of a refund to a customer who has entered into a private contract with an EGS. The Commission's jurisdiction over EGSs is restricted to the activities set forth in 66 Pa.C.S. § 2809(e), which do not include the issuance of refunds. *See Ruhl, supra; Dominion Power & Light Co. v. Com. Of PA, and Pa. Publ. Util. Comm'n, PPL EnergyPlus, LLC v. Com. Of PA*, 870 A.2d 901 (Pa. 2005). Furthermore, "[a] private contract is beyond the pale of this Commission to review." *David B. Lytle v. T.W. Phillips Gas & Oil Company*, 2002 Pa. PUC LEXIS 44.

**E. The Remaining Allegations in the Formal Complaint Fail to State a Claim Upon Which Relief Can Be Granted**

26. The Formal Complaint cites no legal authority or other basis in support of the requested relief of a refund. As a result, Respond Power is entitled to judgment in its favor as a matter of law and the Formal Complaint should be dismissed as legally insufficient.

**III. Conclusion**

WHEREFORE, for the foregoing reasons, Respond Power LLC respectfully requests that the Commission grant its Motion for Summary Judgment, dismiss the Formal Complaint of Justin L. Herp , and grant Respond Power such other relief as may be just and reasonable under the circumstances.

Respectfully submitted,

Dated: June 4, 2014



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Karen O. Moury  
BUCHANAN INGERSOLL & ROONEY PC  
409 North Second Street  
Suite 500  
Harrisburg, PA 17101  
(717) 237-4820

*Attorney for Respond Power LLC*

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**JUSTIN L. HERP**

**v.**

**RESPOND POWER LLC**

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**Docket No. C-2014-2413756**

**AFFIDAVIT OF ADAM SMALL IN SUPPORT OF  
RESPOND POWER LLC'S MOTION FOR SUMMARY JUDGMENT**

I, Scott Foreman-Murray, being duly sworn according to law, depose and say the following:

1. My name is Scott Foreman-Murray, and my business address is 100 Dutch Hill Road, Suite 310, Orangeburg, New York 10962.
2. I am In-House Counsel of Respond Power LLC ("Respond Power").
3. As In-House Counsel for Respond Power, I am responsible for regulatory compliance, which includes addressing and responding to formal complaints.
4. As part of my job responsibilities, I am familiar with the Disclosure Statements issued by Respond Power to customers setting forth the terms and conditions under which they will receive electric generation services.
5. On March 18, 2014, Justin L. Herp ("Complainant") filed a Formal Complaint with the Commission regarding variable rate increases for electric generation service that were reflected in Complainant's March and April 2014 bills.
6. Respond Power began providing service to Complainant in October 2013.
7. In the terms of service section of the disclosure statement provided to Complainant, Respond Power explained that the price may vary from month to month and that it sets the generation charges on the basis of PJM market rates plus a profit margin. Further, the disclosure statement provided that Respond Power's goal is to deliver power at a price that is less than

Complainant would have paid had he purchased power from his local utility company. The disclosure statement expressly stated, however, that Respond Power could not guarantee that Complainant would see savings every month. The contract included no dollar or percentage caps or ceilings on the amount by which variable rates could change.

8. A review of the third-party verification recording also demonstrates that Complainant was aware of the fact that he was enrolling in a variable rate plan.

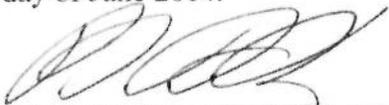
9. Starting in January 2014, due to the Polar Vortex and accompanying exponential increases in the wholesale prices for hourly energy supply in PJM's day ahead and the real time markets, Respond Power incurred, at various times during the winter months, increases far in excess of its typical costs to serve end-use retail customers.

10. For electric generation usage reflected in the March and April 2014 bills, Respond Power adjusted Complainant's variable rate, due to the exponential price increases in the PJM wholesale energy market and consistent with the disclosure statement provided to Complainant.

11. Upon request, Complainant was returned to West Penn Power Company for default generation service on May 14, 2014.

12. I am authorized to submit this Affidavit for and on behalf of Respond Power and represent that the facts set forth herein are true and correct to the best of my knowledge, information and belief.

Sworn and subscribed before me this 4<sup>th</sup>  
day of June 2014.

  
\_\_\_\_\_  
Notary Public  
My Commission expires on:



Bruce A. Rogers  
Notary Public State of New York  
No. 0290 4980484  
Qualified in Rockland County  
Commission Expires April 22, 20 16

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**JUSTIN L. HERP**

**v.**

**RESPOND POWER LLC**

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**Docket No. C-2014-2413756**

**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 First-Class Mail**

Justin L. Herp  
220 Bennett Drive  
Butler, PA 16001

Dated this 4<sup>th</sup> day of June, 2014.



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Karen O. Moury, Esq.