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June 12, 2014

VIA E-FILING

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

Re: Elizabeth Russell v. Respond Power LLC
Docket No. C-2014-2417551

Dear Secretary Chiavetta:

On behalf of Respond Power LLC, I have enclosed for electronic filing the Preliminary Objections of Respond Power LLC to the Formal Complaint of Elizabeth Russell 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: Chief Administrative Law Judge Charles E. Rainey, Jr. (via First-Class Mail)
Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

ELIZABETH RUSSELL

v.

RESPOND POWER LLC

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:
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Docket No. C-2014-2417551

NOTICE TO PLEAD

TO: Elizabeth Russell
747 East Beaver Avenue
State College, PA 16801

Pursuant to 52 Pa. Code § 5.101(b), you are hereby notified that, if you do not file a written response denying or correcting the enclosed Preliminary Objections of Respond Power LLC to the Formal Complaint of Elizabeth Russell within **ten (10) days** from service of this Notice, the facts set forth by Respond Power LLC in the Preliminary Objections may be deemed to be true, thereby requiring no other proof. All pleadings, such as a Reply to Objections, 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.

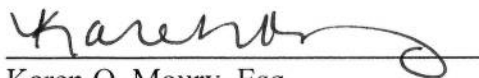
File with:

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
Buchanan Ingersoll & Rooney, PC
409 North Second Street
Suite 500
Harrisburg, PA 17101

Dated: June 12, 2014



Karen O. Moury, Esq.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

ELIZABETH RUSSELL	:	
	:	
v.	:	Docket No. C-2014-2417551
	:	
RESPOND POWER LLC	:	

**PRELIMINARY OBJECTIONS TO THE COMPLAINT OF
ELIZABETH RUSSELL**

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 these Preliminary Objections pursuant to Section 5.101(a) of the Pennsylvania Public Utility Commission (“Commission”) regulations at 52 Pa. Code § 5.101(a)(4), and in support thereof, avers as follows:

I. Introduction

1. Through these Preliminary Objections, Respond Power seeks the dismissal of a Formal Complaint filed by Elizabeth Russell (“Complainant”), who received residential retail electric generation service from Respond Power at 747 East Beaver Avenue, State College, PA 16801. The Complainant seeks a refund in the amount of \$750 due to increases in variable rates. (Compl. ¶ 5).

2. Because the Complainant admits that she was on a variable rate program with Respond Power, does not allege that the increases in variable rates violated the terms of her contract with Respond Power and does not allege a violation of any law which the Commission has jurisdiction to administer, the Formal Complaint should be dismissed.

II. Background

3. The Formal Complaint identifies the Complainant as Elizabeth Russell. (Compl. at ¶ 1.)

4. The Complainant's mailing address is 747 East Beaver Avenue, State College, PA 16801. (Compl. ¶ 1.)

5. 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.

6. Respond Power provided residential retail electric generation service to the Complainant from October 25, 2013 until March 27, 2014.

7. Respond Power provided service to the Complainant under a variable rate plan. (Compl. ¶ 4).

8. During the Complainant's enrollment with Respond Power, the variable rate for electric generation service increased. (Compl. ¶ 4).

9. On April 11, 2014, the Complainant filed a Formal Complaint with the Commission against Respond Power at the above-captioned docket requesting that the Commission direct Respond Power to issue a refund in the amount of \$750, which the Complainant estimates as representing the difference between a fixed and variable rate during the period of enrollment, assuming a fixed rate contract would have included a rate that was equal to the initial variable rate. (Compl. ¶¶ 4 and 5.)

10. On April 23, 2014, the Formal Complaint was served on Respond Power.

III. Preliminary Objection Regarding Legal Insufficiency Pursuant to 52 Pa. Code § 5.101(a)(4).

11. The Complainant's only claim in the Formal Complaint is that she should receive a refund of rate increases imposed by Respond Power under a variable rate plan. The Complainant does not allege that the increase violated the terms of her variable rate contract with Respond Power or that the increase violated any laws which the Commission has jurisdiction to administer. As such, the Formal Complaint is legally insufficient and fails to state a claim upon which the Commission can grant relief.

12. The Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary objections. 52 Pa. Code § 5.101; see also *Equitable Small Transportation Interveners v. Equitable Gas Company*, Docket No. C-00935435 (July 18, 1994).

13. 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.

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

15. The Commission may dismiss a complaint without hearing if, in its opinion, a hearing is not necessary in the public interest. 52 Pa. Code § 5.21(d).

16. While the Commission generally refrains from dismissing complaints filed by *pro se* complainants without allowing them an opportunity to develop an evidentiary record, an administrative law judge has the discretion to dismiss a complaint on preliminary motion if that dismissal is neither arbitrary nor capricious, and is otherwise in accordance with the law. *Guesman v. Columbia Gas of Pennsylvania, Inc.*, Docket No. C-2012-2326301 (Final Order entered January 4, 2013) (citing *Graham v. Philadelphia Suburban Water Company and Bell-Atlantic Pennsylvania, Inc.*, Docket No. C-00957557 (Order entered June 12, 1996)).

17. The Formal Complaint contains no allegations that would constitute a violation of the Public Utility Code ("Code"), 66 Pa.C.S. §§ 101 *et seq.*, Commission order or regulation. Assuming all the facts pleaded in the Complaint to be true, the Complainant has failed to state a claim upon which the Commission could grant relief.

18. 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).

19. The moving party may not rely on its own factual assertions, but must accept for the purposes of disposition of the preliminary objection, all well-pleaded, material facts of the other party, as well as every inference fairly deducible from those facts. *County of Allegheny v. Commw. of Pa.*, 490 A.2d 402 (Pa. 1985). Therefore, in ruling on a preliminary objection, the Commission must assume, for decisional purposes only, that the factual allegations of the Formal Complaint are true. *Id.*

20. Assuming all facts in the Formal Complaint as true, Respond Power increased the Complainant's variable rates.

21. Under Section 2806 of the Public Utility Code ("Code"), 66 Pa. C.S. § 2806(a), the Commission does not regulate generation service. The Commission has recognized that "the rates consumers pay in the retail electric market are governed by the terms of their contract with their supplier." *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 at p. 3, ("Variable Rate Order"). The Commission also observed in the Variable Rate Order 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. In addition, the Commission has 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. Further, 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 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 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; *Dominion Power & Light Co. v. Com. Of PA, and Pa. Publ. Util. Comm'n, PPL Energy Plus, 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.

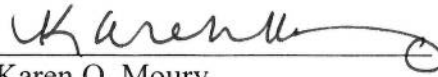
23. Therefore, the Formal Complaint is legally insufficient because it fails to state a claim upon which the Commission can grant relief. *See* 52 Pa. Code § 5.101(a)(4); *Roc v. Flaherty*, supra. Furthermore, a hearing is not necessary and would not serve the public interest in this matter. *See* 66 Pa.C.S. §703(b).

IV. Conclusion

WHEREFORE, for the foregoing reasons, Respond Power LLC respectfully requests that the Commission grant these Preliminary Objections and (i) dismiss the Formal Complaint in its entirety because the Complainant has not stated a claim for which relief may be granted and (ii) grant the Company such other relief as may be just and reasonable under the circumstances.

Respectfully submitted,

Dated: June 12, 2014

A handwritten signature in cursive script, reading "Karen O. Moury", written over a horizontal line.

Karen O. Moury
Buchanan Ingersoll & Rooney PC
409 North Second Street
Suite 500
Harrisburg, PA 17101
(717) 237-4820

Attorney for Respond Power LLC

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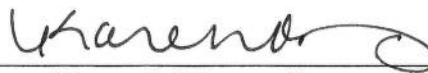
CERTIFICATE OF SERVICE

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 First-Class Mail

Elizabeth Russell
747 East Beaver Avenue
State College, PA 16801

Dated this 12th day of June, 2014.



Karen O. Moury, Esq.