

Karen O. Moury
717 237 4820
karen.moury@bipc.com

409 North Second Street
Suite 500
Harrisburg, PA 17101-1357
T 717 237 4800
F 717 233 0852
www.buchananingersoll.com

July 7, 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 in Limine 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 e-mail and 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

NOTICE TO PLEAD

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

Pursuant to 52 Pa. Code § 5.103(b), you are hereby notified that, if you do not file a written response denying or correcting the enclosed Motion in Limine of Respond Power LLC within **twenty (20) days** from service of this Notice, the facts set forth by Respond Power LLC in the Motion in Limine 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.

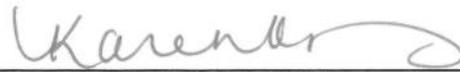
File with:

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: July 7, 2014



Karen O. Moury, Esq.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

JUSTIN L. HERP

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RESPOND POWER LLC

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Docket No. C-2014-2413756

MOTION IN LIMINE OF RESPOND POWER LLC

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 in Limine (“Motion”), pursuant to Section 5.103 of the Pennsylvania Public Utility Commission’s (“Commission”) regulations, 52 Pa. Code § 5.103, 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 had previously 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 the 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 the 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 the 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. On June 4, 2014, Respond Power filed a Motion for Summary Judgment alleging, *inter alia*, that the Commission lacks jurisdiction to award the relief requested by Complainant, i.e., a refund of rates paid or an adjustment of rates billed for electric generation services.

7. On June 24, 2014, the Office of Consumer Advocate (“OCA”) filed a Notice of Intervention and an Answer to the Motion for Summary Judgment.

8. By Order dated June 25, 2014, the ALJ denied Respond Power’s Motion for Summary Judgment on the basis of allegations raised in the Complaint about the marketing and sales practices of Respond Power. This Order further concluded that the Commission’s jurisdiction to regulate prices and order refunds should have been raised through preliminary objections filed pursuant to the Commission’s regulations at 52 Pa. Code § 5.101(a).

9. Also, on June 25, 2014, the ALJ granted an unopposed continuance requested by the Complainant and rescheduled the hearing for August 1, 2014.

10. By this Motion, Respond Power seeks clarification of the issues that may be raised at the August 1, 2014 to assist the Complainant, the OCA and Respond Power in preparing

for that hearing and to conserve resources so that only those issues that may properly be considered by the Commission are addressed at that hearing.

11. Specifically, Respond Power requests that the ALJ issue an Order clarifying that the issues at the August 1, 2014 hearing will be limited to a consideration of whether Respond Power complied with the Commission's regulations addressing sale and marketing practices at 52 Pa. Code § 53.43, and noting that the presentation of any evidence concerning the Complainant's request for a refund will be excluded from the hearing. Such clarifications would promote administrative efficiency and judicial economy, allowing the parties to focus on the issues that are subject to the Commission's jurisdiction.

II. Argument

12. Although the Commission's regulations permit parties to raise the lack of subject matter jurisdiction through the filing of preliminary objections, an issue of subject matter jurisdiction may be raised at any time. It is well settled that the Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. Pa. Public Utility Comm'n*, 157 Pa. Super. 595, 43 A.2d 348 (1945). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 427 Pa. 581, 235 A.2d 602 (1967). Neither silence nor agreement of the parties will confer jurisdiction where it otherwise would not exist, *Commonwealth v. VanBuskirk*, 303 Pa. Super. 148, 449 A.2d 621 (1982), nor can jurisdiction be obtained by waiver or estoppel, *Scott v. Bristol Twp. Police Dep't*, 669 A.2d 457 (Pa. Cmwlth. 1995).

13. The case of *In Re: Structural Separation of Bell Atlantic-Pennsylvania, Inc. Retail and Wholesale Operations*, Docket No. M-00001353, 2000 Pa. PUC LEXIS 56 (Initial Decision dated June 16, 2000), was cited by the ALJ in support of the conclusion that Respond Power untimely raised issues of the Commission's subject matter jurisdiction in this case. However, in

that case, the ALJ had found that a standing argument should have been raised earlier in the proceeding especially when several opportunities had been presented for doing so. That decision does not conflict with the long line of Commission and appellate cases finding that subject matter jurisdiction may be raised at any time.

14. The Commission lacks subject matter jurisdiction over EGS prices and has no authority to order the issuance of a refund. In an order denying preliminary objections in a different case due to allegations about sales and marketing practices, the presiding ALJ stated as follows:

Regarding the issue of a refund, Respondent is correct that the Commission lacks authority to order a refund to Complainant. The Commission may not regulate the rates that the Respondent charged the Complainant for electric generation services since the EGS is not a public utility except for the limited purposes of 66 Pa.C.S. §§ 2809 and 2810. Therefore, the Commission has no jurisdiction over the issue of whether Respondent charged Complainant an unreasonable, unjust or illegal rate for the electric generation service.

Tustin v. Respond Power LLC, Docket No. 2014-2417552 (Order dated June 27, 2014).

15. In a similar matter, a different ALJ issued an order partially granting preliminary objections and cautioning the complainant about the Commission's limited ability to grant a remedy against an EGS. She noted that the Commission may impose a civil penalty for violations of regulations, payable to the Commonwealth's General Fund, but cannot award monetary damages or direct the refund or credit to a complainant's account due to the Commission's lack of jurisdiction to regulate the rates of an EGS. *Russell v. Respond Power LLC*, Docket No. C-2014-2417551 (Order dated July 3, 2014). *See also MacLuckie v. Palmco Energy PA, LLC*, Docket No. C-2014-2402558 (Initial Decision dated June 16, 2014); *Yaglidereliler Corporation v. Blue Pilot Energy, LLC*, Docket No. C-2014-2413732 (Initial Decision dated June 18, 2014).

16. These ALJ decisions and orders are consistent with statutory provisions and recent pronouncements of the Commission concerning a lack of jurisdiction over EGS prices. Under Section 2806(a) of the Public Utility Code (“Code”), 66 Pa.C.S. § 2806(a), the Commission does not regulate generation service. Further, 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 February 20, 2014). In addition, the Commission has concluded 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). 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).

17. 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).

18. 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.

19. The lack of Commission jurisdiction to order EGSs to issue refunds to customers warrants the issuance of an Order by the ALJ clarifying the scope of the August 1, 2014 hearing. Absent such clarification, the Complainant, the OCA and Respond Power may expend resources to address the Complainant's request for a refund that will ultimately be deemed unnecessary.

III. Conclusion

WHEREFORE, for the foregoing reasons, Respond Power LLC respectfully requests that the Commission grant its Motion in Limine and provide clarifications concerning the evidence and arguments that may be offered during the hearing scheduled for August 1, 2014.

Respectfully submitted,

Dated: July 7, 2014



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

Attorneys for Respond Power LLC

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

JUSTIN L. HERP	:	
	:	
v.	:	Docket No. C-2014-2413756
	:	
RESPOND POWER LLC	:	

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

Justin L. Herp
220 Bennett Drive
Butler, PA 16001
Phoenix_1@hotmail.com

Barrett C. Sheridan
Hobart J. Webster
Office of Consumer Advocate
5th Floor, Forum Place
555 Walnut Street
Harrisburg, PA 17101-1923
bsheridan@paoca.org
bpierce@paoca.org

Dated this 7th day of July, 2014.



Karen O. Moury, Esq.