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July 21, 2014

VIA E-FILING

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

Re: Joseph Nadav v. Respond Power LLC
Docket No. C-2014-2429159

Dear Secretary Chiavetta:

On behalf of Respond Power LLC, I have enclosed for electronic filing the Preliminary Objections of Respond Power LLC to the Complaint of Joseph Nadav 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**

JOSEPH NADAV

v.

RESPOND POWER LLC

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Docket No. C-2014-2429159

NOTICE TO PLEAD

TO: Joseph Nadav
2050 Byberry Rd.
Philadelphia, PA 19116

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 Joseph Nadav 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: July 21, 2014



Karen O. Moury, Esq.

**BEFORE THE
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JOSEPH NADAV

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v.

Docket No. C-2014-2429159

RESPOND POWER LLC

**PRELIMINARY OBJECTIONS TO THE COMPLAINT OF
JOSEPH NADAV**

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) (1) and (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 Joseph Nadav (“Complainant”) on the grounds that the Commission does not have jurisdiction over prices charged by electric generation suppliers (“EGSs) and does not have jurisdiction to direct an EGS to issue a refund to a customer. Since the only allegation in the Formal Complaint is that the prices charged by Respond Power were too high and the only relief requested is a refund, it should be dismissed.

2. The Formal Complaint does not allege any violation of the Public Utility Code, 66 Pa.C.S. §§ 101 et seq. (“Code”), Commission regulations or orders. Nor does the Formal Complaint allege that the increase in variable rates violated the terms and conditions of his

contract with Respond Power. Because the Formal Complaint does not allege a violation of any law which the Commission has jurisdiction to enforce, it should be dismissed.

II. Background

3. The Complainant is Joseph Nadav. (Compl. ¶ 1.)

4. The Complainant's mailing address is 2050 Byberry Rd, Philadelphia, PA 19116. (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 commercial retail electric generation service to the Complainant under a variable rate plan from September 16, 2011 until May 19, 2014.

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

8. On May 9, 2014, the Complainant filed a Formal Complaint with the Commission against Respond Power at the above-captioned docket claiming that the rate was excessive and requesting that the Commission direct the issuance of a refund. (Compl. ¶ 5.)

9. On June 30, 2014, the Formal Complaint was served on Respond Power.

III. Legal Standards for Preliminary Objections

10. 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).

11. 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.

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

13. 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).

14. 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)).

15. 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).

16. 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.*

IV. Preliminary Objection: Lack of Jurisdiction and Legal Insufficiency of Pleading

17. As the Complainant's only allegation is that he was charged a high rate for electricity by Respond Power, the Formal Complaint does not state a claim upon which relief can be granted and it should be dismissed pursuant to Section 5.101(a) (1) and (4) of the Commission's regulations, 52 Pa. Code § 5.101(a) (1) and (4), for lack of Commission jurisdiction and legal insufficiency of pleading.

18. The Formal Complaint does not allege that the rates charged by Respond Power violated the terms and conditions of his variable rate contract or that the rates violated the Code, Commission regulations or orders or any law which the Commission has jurisdiction to administer.

19. Assuming all the facts pleaded in the Formal Complaint to be true, Respond Power increased the Complainant's variable rate, which is not within the Commission's subject matter jurisdiction to address.

20. During the month of January 2014, wholesale prices for hourly energy supply in the day ahead and particularly the real time markets increased exponentially in response to a combination of sustained cold weather, high demand and high forced outage rates for a number

of generators (“Polar Vortex”). See *Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, Docket No. M-2014-2406134 (February 20, 2014) (“*Variable Rate Order*”).

21. To serve its retail customers in Pennsylvania, Respond Power incurred costs, at various times during the winter months, in excess of ten times its typical costs. In turn, Respond Power increased variable rates of its retail customers.

22. Under Section 2806 of the Public Utility Code (“Code”), 66 Pa. C.S. § 2806(a), the Commission does not regulate generation service or the prices paid by retail customers to EGSs. 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.” *Variable Rate Order* at 3. 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. See also *Yaglidereliler Corporation v. Blue Pilot Energy, LLC*, Docket No. C-2014-2413732 (Initial Decision dated June 18, 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). 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).

23. 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.


24. Therefore, the Formal Complaint should be dismissed for lack of Commission jurisdiction and on the basis that it is a legally insufficient pleading because it fails to state a claim upon which the Commission can grant relief. *See* 52 Pa. Code § 5.101(a) (1) and (4). Furthermore, a hearing is not necessary and would not serve the public interest in this matter. *See* 66 Pa.C.S. §703(b).

V. 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 due to lack of Commission jurisdiction and 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: July 21, 2014


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

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Docket No. C-2014-2429159

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

Joseph Nadav
2050 Byberry Rd.
Philadelphia, PA 19116

Dated this 21st day of July, 2014.



Karen O. Moury, Esq.