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October 14, 2014

VIA E-FILING

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

Re: Grace John v. Respond Power LLC
Docket No. C-2014-2443611

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 Grace John 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**

GRACE JOHN

v.

RESPOND POWER LLC

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:
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Docket No. C-2014-2443611

NOTICE TO PLEAD

TO: Grace John
P.O. Box 356
Blakeslee, PA 18610

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 Grace John 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: October 14, 2014



Karen O. Moury, Esq.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

GRACE JOHN	:	
	:	
v.	:	Docket No. C-2014-2443611
	:	
RESPOND POWER LLC	:	

**PRELIMINARY OBJECTIONS OF RESPOND POWER LLC
TO THE COMPLAINT OF GRACE JOHN**

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 Grace John (“Complainant”) on the grounds that the Commission does not have jurisdiction over prices charged by electric generation suppliers (“EGSs). Since the only allegation in the Formal Complaint is that the prices charged by Respond Power were too high, 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 her

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 Grace John. (Compl. ¶ 1.)

4. The Complainant's mailing address is P.O Box 356, Blakeslee, PA 18610. (Compl. ¶ 1.)

5. Respond Power is an 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 Complainant under a variable rate plan from August 1, 2012 until April 3, 2014, after which Complainant has received electric generation service under a fixed rate plan from Respond Power.

7. During Complainant's enrollment with Respond Power, the variable rate for electric generation service increased consistent with the disclosure statement provided to her at the time of enrollment.

8. On June 24, 2014, Complainant filed a Formal Complaint with the Commission against Respond Power requesting that the Commission direct Respond Power to issue a refund for certain charges imposed by Respond Power from December 2013 through March 2014. (Compl. ¶ 4.)

9. On September 22, 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 Complainant's only allegation is that she is dissatisfied with "large charges" from 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 her 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 charged Complainant a large amount, 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 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: October 14, 2014



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

Attorneys for Respond Power LLC

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

GRACE JOHN

v.

RESPOND POWER LLC

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Docket No. C-2014-2443611

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

Grace John
P.O. Box 356
Blakeslee, PA 18610

Paul E. Russell
PPL Services Corporation
Office of General Counsel
Two North Ninth Street
Allentown, PA 18101-1139

Dated this 14th day of October, 2014.



Karen O. Moury, Esq.