

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

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July 21, 2014

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

RE: Commonwealth of Pennsylvania, by Attorney General
KATHLEEN G. KANE, Through the Bureau of Consumer
Protection,
And
TANYA J. McCLOSKEY, Acting Consumer Advocate,
Complainants

v.

Respond Power, LLC,

Respondent

Docket No. C-2014-2427659

Secretary Chiavetta:

Enclosed please find the Answer of the Commonwealth of Pennsylvania and the Office of Consumer Advocate to the Preliminary Objections of Respond Power, LLC, in the above-referenced proceeding.

Copies have been served as indicated on the enclosed Certificate of Service.

Respectfully Submitted,

Handwritten signature of Candis A. Tunilo in cursive.

Candis A. Tunilo
Assistant Consumer Advocate
PA Attorney I.D. #89891

Enclosures

cc: Office of Administrative Law Judge
Certificate of Service

*185196

CERTIFICATE OF SERVICE

Commonwealth of Pennsylvania, by :
Attorney General KATHLEEN G. KANE, :
Through the Bureau of Consumer Protection, :
: :
And :
: :
TANYA J. McCLOSKEY, Acting Consumer :
Advocate, :
Complainants :
: Docket No. C-2014-2427659
v. :
: :
RESPOND POWER, LLC, :
Respondent :

I hereby certify that I have this day served a true copy of the foregoing Answer of the Commonwealth of Pennsylvania and the Office of Consumer Advocate to the Preliminary Objections of Respond Power, LLC, in the manner and upon the persons listed below:

Dated this 21st day of July 2014.

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185177

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Commonwealth of Pennsylvania, by Attorney	:	
General KATHLEEN G. KANE, Through the	:	
Bureau of Consumer Protection,	:	
	:	
And	:	Docket No. C-2014-2427659
	:	
TANYA J. McCLOSKEY, Acting Consumer	:	
Advocate,	:	
	:	
Complainants	:	
	:	
v.	:	
	:	
Respond Power, LLC,	:	
	:	
Respondent	:	

ANSWER OF THE COMMONWEALTH OF PENNSYLVANIA
AND THE OFFICE OF CONSUMER ADVOCATE
TO THE PRELIMINARY OBJECTIONS OF
RESPOND POWER, LLC

Pursuant to Sections 5.61 and 5.101 of the Pennsylvania Public Utility Commission's (Commission) regulations regarding Answers to Preliminary Objections, 52 Pa. Code §§ 5.61 and 5.101, the Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection (BCP) and the Acting Consumer Advocate Tanya J. McCloskey (OCA) (collectively referred to as Joint Complainants), provide the following Answer to the Preliminary Objections of Respond Power, LLC (Answer), in the above-captioned proceeding.

I. INTRODUCTION

On June 20, 2014, the Joint Complainants filed a Joint Complaint with the Commission, pursuant to the Public Utility Code, 66 Pa. C.S. Ch. 28, the Commission's regulations, 52 Pa. Code Ch. 54, 56 and 111, the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.* (Consumer Protection Law) and the Telemarketer Registration Act, 73 P.S. § 2241, *et seq.* (TRA). The Joint Complaint includes nine separate counts and alleges that Respond Power, LLC (Respondent or Respond Power) violated Pennsylvania law and Commission orders and regulations.¹ With respect to relief, the Joint Complainants request that the Commission find that Respondent violated the Public Utility Code, the Consumer Protection Law, the TRA, and the Commission's regulations and orders; provide restitution to Respondent's customers; impose a civil penalty; and order Respondent to make various modifications to its practices and procedures; and revoke or suspend Respondent's Electric Generation Supplier (EGS) license, if warranted.

On July 10, 2014, Respondent filed Preliminary Objections to the Joint Complaint. In its Preliminary Objections, Respond Power first asserts that Count III of the Joint Complaint should be dismissed on the basis of legal insufficiency. In Count III, Joint Complainants assert that Respondent violated the Consumer Protection Law and the Commission's regulations and orders when Respondent failed to disclose material terms, causing many of Respondent's customers to believe they were on a fixed rate plan, when, in fact, Respondent charged these customers rates pursuant to a variable rate plan. Joint Complaint at ¶¶ 43-45, 52. In support of its Preliminary

¹ The nine separate counts in the Joint Complaint are as follows: I) misleading and deceptive claims of affiliation with electric distribution companies; II) misleading and deceptive promises of savings; III) failing to disclose material terms; IV) deceptive and misleading welcome letter and inserts; V) slamming; VI) lack of good faith handling of complaints; VII) failing to provide accurate pricing information; VIII) prices nonconforming to disclosure statement; and IX) failure to comply with the Telemarketer Registration Act.

Objection, Respondent asserts that there is no violation of Commission regulation or order, because the Commission approved the Respondent's disclosure statement. As discussed in detail in Paragraphs 18 through 22 in Section III below, Joint Complainants sufficiently aver that Respondent's use of its Disclosure Statement in conjunction with the deceptive and misleading statements regarding savings and Electric Distribution Company (EDC) affiliation made by Respondent's salespeople to customers and Respondent's welcome letters and inserts that promise, *inter alia*, "real savings" violates State law and the Commission's regulations and orders. As such, Respondent's Preliminary Objection to the legal sufficiency of Count III of the Joint Complaint should be overruled.

Respondent also asserts in its Preliminary Objections that Count IV of the Joint Complaint should be dismissed for lack of jurisdiction because the Commission cannot enforce the Consumer Protection Law. In Count IV, Joint Complainants assert that the Commission's regulations require compliance with the Consumer Protection Law, and that Respondent violated the Consumer Protection Law by making claims in its Welcome Letter and Inserts that represented benefits of its services that Respondent did not provide to its customers. See Joint Complaint at ¶¶ 55, 56, 58, 59 and App. A. As discussed in detail in Paragraphs 23 through 27 in Section III below, the Commission has the jurisdiction to incorporate other laws and agency regulations into its decisions, and the Commission may make determinations pursuant to the Consumer Protection Law insofar as it is incorporated into the Commission's regulations. See Harrisburg Taxicab & Baggage Co. v. Pa. PUC, 786 A.2d 288, 292-93 (Pa. Commw. Ct. 2001). As such, Respondent's Preliminary Objection that the Commission lacks jurisdiction to decide Count IV should be overruled.

In its Preliminary Objections, Respondent asserts that Count VII should be dismissed on the basis of insufficient specificity of pleading, because Joint Complainants do not explain how Respond Power's disclosure statement is deficient. In Count VII, Joint Complainants assert that the Commission's regulations require that variable pricing terms on a disclosure statement must adequately state the conditions of variability and the limits on price variability and provide accurate information about Respondent's electric generation service using plain language and common terms. See 52 Pa. Code §§ 54.43(1) and 54.5(c). Joint Complainants assert that Respondent did not comply with these requirements. See Joint Complaint at Count VII. As discussed in detail in Paragraphs 28 through 30 in Section III below, Joint Complainants have pleaded facts in Count VII of the Joint Complaint sufficient for Respondent to investigate and prepare a meaningful defense in this matter. The Commission's discovery procedures are available to Respondent to seek further information it claims is necessary. As such, Respond Power's Preliminary Objection that Count VII is insufficiently pleaded should be overruled.

Next, Respondent asserts that Count VII of the Joint Complaint should be dismissed on the basis of legal insufficiency of pleading. In support of this Preliminary Objection, Respondent asserts that its disclosure statement fully complies with Commission regulations. As stated above, Joint Complainants assert in Count VII that Respondent has not complied with the Commission's regulations. See Joint Complaint at Count VII. As discussed in detail in Paragraphs 31 through 39 in Section III below, Respond Power's Disclosure Statement and Respondent's use thereof fails to comply with the Public Utility Code or the Commission's regulations. As such, Respond Power's Preliminary Objection that Count VII is legally insufficient should be overruled.

Next, Respondent asserts that Count VIII of the Joint Complaint should be dismissed on the basis of lack of Commission jurisdiction and legal insufficiency of pleading. In support of this Preliminary Objection, Respondent asserts that the Commission lacks jurisdiction to regulate EGS prices. In Count VIII, the Joint Complainants assert that Respondent charged its variable rate customers prices at least as high as \$0.40 per kWh for electricity. See Joint Complaint at ¶ 87. Joint Complainants further assert the cost to serve residential heating customers in January 2014 in the PJM market should not have exceeded approximately \$0.23 per kWh. See Joint Complaint at ¶ 89 and App. C. Joint Complainants thus assert that Respondent's prices were nonconforming to its Disclosure Statement, which states that prices would be based on the PJM Day-Ahead Market. See Joint Complaint at ¶¶ 76, 90. Moreover, in support of this Preliminary Objection, Respondent asserts that the Commission does not have the authority to order the issuance of a refund. As discussed in detail in Paragraphs 40 through 48 in Section III below, when the allegations and all facts fairly deducible therefrom are assumed to be true, Joint Complainants have clearly made a legally sufficient claim in Count VIII. Respondent's assertion that Appendix C should be stricken must be overruled because the affidavit in Appendix C is provided in support of Joint Complainants' averments that Respondent's prices marketed and billed to customers were not in conformance with Respond Power's Disclosure Statement. Additionally, the Commission has the jurisdiction to rule on Count VIII. See 66 Pa. C.S. § 2809(e); 52 Pa. Code Ch. 54. As such, Respond Power's Preliminary Objection to Count VIII should be overruled.

Respondent also asserts that Count IX of the Joint Complaint should be dismissed on the basis of legal insufficiency of pleading and lack of Commission jurisdiction. Respondent alleges that a failure to provide written contracts in connection with telephone sales and obtain customer

signatures is not a violation of the TRA. Respondent further alleges that the Commission does not have jurisdiction to enforce the TRA. In Count IX, the Joint Complainants allege that the Commission's regulations require that EGSs comply with the TRA and the Consumer Protection Law. See Joint Complaint at ¶ 98. Joint Complainants assert that the TRA requires Respondent to reduce any sale of goods or services made during a telemarketing call to a written contract and obtain the customer's signature on the written contract, but Respondent does not do so. See Joint Complaint at ¶¶ 94, 96. As discussed in detail in Paragraphs 49 through 54 in Section III below, the Commission has jurisdiction to make determinations pursuant to the TRA insofar as the TRA is incorporated into the Commission's regulations. See 52 Pa. Code § 111.10(a)(1). See also Harrisburg Taxicab, 786 A.2d at 292-93. Additionally, all provisions of the TRA, except the registration requirement, apply to EGSs. See 52 Pa. Code § 111.10(a)(1); Request for Opinion, 2010 Pa. AG LEXIS 1, *4-5 (Feb. 8, 2010) (AG Opinion). As such, Respond Power's Preliminary Objection to Count IX should be overruled.

The Joint Complainants submit that Respond Power's Preliminary Objections are unsupported, as set forth in more detail below, and should be overruled. It is clear and free from doubt that the Joint Complaint is sufficiently pleaded and seeks that the Commission make determinations pursuant to the Commission's powers and jurisdiction. As such, Respond Power's Preliminary Objections to the Joint Complaint must be overruled.

II. LEGAL STANDARD

The Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary objections. 52 Pa. Code §§ 5.101 (a)(1)-(7). The grounds for preliminary objections are limited to the following:

- (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.

52 Pa. Code § 5.101(a).

In deciding whether to grant or deny a preliminary objection, the truth of all facts averred in the complaint must be assumed, and it must be determined whether, based on well-pleaded factual averments of the complainant, recovery or relief is possible. See Feingold v. Bell of Pa., 383 A.2d 791 (Pa. 1977); See also Equitable Small Transp. Interveners v. Equitable Gas Co., 1994 Pa PUC LEXIS 69, *3. Further, any inferences fairly deducible from the facts must be accepted for purposes of the disposition of the preliminary objections. See Commonwealth v. Bell Telephone Co., 551 A.2d 602 (Pa. Commw. Ct. 1988). The Commission shall deny a preliminary objection, in favor of the non-moving party, if there are any doubts that must be resolved. Boyd v. Ward, 802 A.2d 705, 707 (Pa. Commw. Ct. 2002); Weber v. PPL Electric Utilities Corp., Docket No. C-2008-2052894, Order at 4 (March 23, 2009). Also, preliminary objections must be denied, where factual or legal issues remain to be examined. See P. J. S. v. Pa. State Ethics Comm'n, 669 A.2d 1105 (Pa. Commw. Ct. 1996).

Preliminary objections alleging “legal insufficiency of pleading,” serve judicial economy by avoiding a hearing where no factual dispute exists. Drake v. Pennsylvania Electric Co.,

Docket No. C-2014-2413771, Order at 5 (May 7, 2014). The Commission will find a complaint legally sufficient if it provides the following:

...an act or thing done or omitted to be done or about to be done or omitted to be done by the respondent in violation, or claimed violation, of a statute which the Commission has jurisdiction to administer, or of a regulation or order of the Commission.

Drake, Order at 6; 52 Pa. Code § 5.22(a)(5).

The purpose of a preliminary objection raising specificity is to ensure that the ability of an adverse party to answer and defend will not be unduly impaired by a complainant's vagueness in stating grounds of his or her suit. Stilp v. Commonwealth, 910 A.2d 775 (Pa. Commw. Ct. 2006), aff'd, 601 Pa. 429, 974 A.2d 491 (2009). When a respondent files a preliminary objection alleging "insufficient specificity of a pleading," an answer is not required until further directed by the presiding officer or the Commission. 52 Pa. Code § 5.101(e)(1). Such preliminary objection requires consideration of the following questions:

[W]hether the complaint is sufficiently clear to enable the defendant to prepare his defense, or whether the plaintiff's complaint informs the defendant with accuracy and completeness of the specific basis on which recovery is sought so that the defendant may know without question upon what grounds to make his or her defense.

Rambo v. Greene, 906 A.2d 1232, 1269 (Pa. Super. Ct. 2006).

With regard to preliminary objections asserting lack of jurisdiction, it is well settled that the Commission has the power and authority granted to it by the General Assembly contained in the Public Utility Code to enforce the Public Utility Code, its Orders and regulations. See 66 Pa. C.S. § 501. See also Lasko v. Windstream Pennsylvania, LLC, 2011 Pa. PUC LEXIS 696, *9. One can file a formal complaint with the Commission alleging violation of a statute that the

Commission has jurisdiction to administer. Id. at *7. This is exactly what Joint Complainants have done by filing the Joint Complaint.

III. ANSWER

1. It is admitted, upon information and belief, that Respondent filed an Answer to the Joint Complaint on the same date it filed Preliminary Objections.

2-10. These paragraphs are introductory in nature. Respondent provides facts in these paragraphs that are based on information in the possession of Respondent and are therefore, denied. Strict proof thereof is demanded at hearings in this matter. Joint Complainants incorporate their responses detailed below, to the extent they are responsive to Respondent's assertions in these paragraphs, herein.

11. No response is required, as the Joint Complaint is of record and speaks for itself.

12. Respondent's Preliminary Objections are of record and speak for themselves. Joint Complainants deny that Respondent's Preliminary Objections have merit and request that they be overruled.

13-17. These paragraphs state conclusions of law to which no response is required. By way of further response, Joint Complainants incorporate Section II above herein.

Count III Of The Joint Complaint Is Legally Sufficient

18. Paragraph 18 does not require a response.

19. Denied. Respondent's allegations constitute conclusions of law, which require no response and are, therefore, denied. The Joint Complaint is of record and speaks for itself. By way of response specifically to Footnote 3, the Commission's regulations themselves incorporate the Consumer Protection Law, and therefore, the Commission to make determinations pursuant to the Consumer Protection Law in order to determine if the Respondent violated the

Commission's regulations. See 52 Pa. Code §§ 54.122(3) and 111.12(d)(1). See also 52 Pa. Code § 111.1 (EGSs shall comply with the standards set forth in the regulations). In determining whether Respondent violated its regulations, the Commission must determine whether the conduct alleged constitutes a violation of State or Federal law, including the Consumer Protection Law, or Commission regulation or order. 52 Pa. Code §§ 54.43(f) and 111.12(d)(1). See also Elkin v. Bell Telephone Co. of Pennsylvania, 491 Pa. 123, 133, 420 A.2d 371, 376 (1980). As a preliminary inquiry, the Commission must invoke the statute and case law under the Consumer Protection Law, interpret it, and apply it harmoniously where appropriate. See Duquesne Light Co. v. Borough of Monroeville, 449 Pa. 573, 298 A.2d 252 (1972); Pettko v. Pennsylvania American Water Co., 39 A.3d 473, 484 (Pa. Commw. Ct. 2012). Moreover, since the adjudication of Pa. PUC v. The Bell Telephone Co. of Pa., 71 Pa. PUC 338, in 1989 and MAPSA v. PECO Energy Co., Docket No. P-00981615, in 1999, the Commission added the requirement that EGSs comply with the Consumer Protection Law to the Commission's regulations. Furthermore, the Commonwealth Court decided Harrisburg Taxicab & Baggage Co. v. Pa. PUC, wherein the Court held that the Commission's decision to incorporate another agency's regulations into the Commission's own regulations is in no way inappropriate and such overlap does not divest the Commission of its statutory authority or duty. Harrisburg Taxicab & Baggage Co. v. Pa. PUC, 786 A.2d 288, 292-93 (Pa. Commw. Ct. 2001) (Harrisburg Taxicab). See also City of Philadelphia v. Pa. PUC, 702 A.2d 1139 (Pa. Commw. Ct. 1997). By allowing the Commission to adjudicate these disputes in the first instance, all rights of the parties will be preserved, as well as providing any subsequent reviewing court the benefit of the Commission's opinion. County of Erie v. Verizon North, Inc., 879 A.2d 357 (Pa. Commw. Ct. 2005).

20. Respond Power's Disclosure Statement is of record and speaks for itself. See Joint Complaint at App. B.

21. Denied. Respondent's allegations constitute conclusions of law, which require no response and are, therefore, denied. By way of further response, Joint Complainants deny the allegation that the Commission approved Respondent's disclosure statement in the Order approving Respond Power's EGS license application. See License Application of Respond Power LLC for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as a Supplier of Retail Electric Power, Docket No. A-2010-2163898, Order (Aug. 19, 2010) (Licensing Order). Joint Complainants further assert that any purported approval of Respondent's Disclosure Statement by the Bureau of Consumer Services (BCS) is not binding on the Commission. Also, Respond Power's reliance on Hoke v. Ambit NE, LLC, Docket No. C-2013-2357863 (Nov. 21, 2013), is misplaced, as Joint Complainants' allegation that Respondent's prices do not conform to its Disclosure Statement are specific to the facts of this case. It is worth noting, however, that in Hoke the ALJ found that it was the PaPowerSwitch website that led to the complainant's confusion regarding Ambit's price that would be charged after the first month but also referred Ambit's disclosure statement to BCS for additional review. See Hoke, Docket No. C-2013-2357863, I.D. at 6.

Joint Complainants aver that even if the Commission had approved Respondent's Disclosure Statement, such Commission review and approval is irrelevant to the facts of this alleged in this matter. Here, Joint Complainants aver that Respondent's use of its Disclosure Statement in conjunction with the deceptive and misleading statements regarding savings and EDC affiliation made by Respondent's salespeople to customers and Respondent's welcome letters and inserts that promise, *inter alia*, "real savings" violates State law and the

Commission's regulations and orders. See Joint Complaint at Counts I, II, III, IV, VII and VIII and App. A and B. These allegations are sufficient to support a finding that Respondent has violated and continues to violate the Consumer Protection Law and the Commission's regulations and orders as specifically averred in the Joint Complaint.

22. Denied as stated. Respondent's allegations constitute conclusions of law to which no response is required. For the reasons set forth above in Paragraphs 19 and 21, Respondent's Preliminary Objection seeking that Count III of the Joint Complaint be dismissed must be overruled.

The Commission Possesses The Jurisdiction To Determine Count IV Of The Joint Complaint.

23. Admitted in part and denied in part. The Joint Complaint speaks for itself in that the welcome letters and inserts used by Respond Power do violate provisions of the Consumer Protection Law. Count IV of the Complaint should not be dismissed because the Commission's regulations require compliance with the Consumer Protection Law. See 52 Pa. Code §§ 54.43(f) and 111.12(d)(1). By way of further response, the Commission is charged with determining whether an EGS has engaged in misleading or deceptive conduct as defined by State or Federal law, or by Commission rule, regulation or order. See 52 Pa. Code §§ 54.122(3) and 111.12(d)(1).

24. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. To the extent that an answer may be required, the Commission is appropriately within its jurisdiction to incorporate other laws, including the Consumer Protection Law, into its decisions. See Harrisburg Taxicab, 786 A.2d at 292-93. By way of further answer, Joint Complainants incorporate Paragraph 19 above herein.

25. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. To the extent that an answer may be required, it is admitted that as a creature of statute, the Commission has those powers granted to it by the General Assembly, one power of which is to enforce the Public Utility Code and the Commission's regulations and Orders. See 66 Pa. C.S. § 501.

26. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. By way of further answer, Joint Complainants incorporate Paragraph 19 above herein. Joint Complainants note that Respondent's reliance on the Initial Decision in MacLuckie v. Palmco Energy PA, Docket No. C-2014-2402558, is misplaced, as the OCA timely filed Exceptions to the Initial Decision, and the Commission has not yet disposed of the Exceptions.

27. Denied. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. To the extent that an answer may be required, as stated above, the Commission is appropriately within its jurisdiction to incorporate other laws, including the Consumer Protection Law, into its decisions. See e.g. Harrisburg Taxicab, 786 A.2d at 292-93.

Count VII Of The Joint Complaint Is Pleaded With Sufficient Specificity

28. Denied as stated. Respondent's allegations constitute conclusions of law to which no response is required. The Joint Complaint is of record in this matter and speaks for itself. By way of further answer, the Commission's regulations on the content required in a formal complaint is based on Pennsylvania's Rule of Civil Procedure 1019, which requires a plaintiff to plead all the facts that he must prove in order to achieve recovery on the alleged cause of action. The pleading must be sufficiently specific so that the defending party will know how to prepare

its defense. See e.g. Higgins v. Nat'l Fuel Gas Distrib. Corp., Docket No. C-2012-2338926, Initial Decision (Feb. 26, 2013). In addition, a party is not required to plead evidence, and preliminary objections shall not be used to make a party plead purely evidentiary matters. See Local No. 163, Intern. Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America v. Watkins, 417 Pa. 120, 207 A.2d 774 (1965). A more specific complaint will not be ordered to develop matters that are essentially evidentiary because if a Defendant needs more information to prepare his answers, he may use the discovery procedures. See e.g. Totani v. Lansford-Coaldale Joint Water Authority, 2 Pa. D. & C.3d 143, 146 (Carbon Co. 1975).

All allegations against Respondent have been specifically pled in accordance with the Commission's regulations, and all allegations are sufficiently specific. The Joint Complaint has provided to Respondent enough information and facts such that Respondent may prepare and file an adequate answer and prepare a proper defense to all averments of the Joint Complaint.

Further, the requirement of specificity is more easily met when the matters are equally or more in the knowledge of the objecting party. See Local No. 163, 417 Pa. at 122, 207 A.2d at 778. See also Philadelphia County Intermediate Unit No. 26 v. Commonwealth Dep't of Educ., 60 Pa. Commw. 546, 552, 432 A.2d 1121, 1126 (1981) (A more specific pleading was not necessary because the information sought was either evidentiary in nature or of such a character that the objecting party's knowledge of the facts was equal, if not superior, to that of the pleader). Where pleadings, along with information already in the possession of the defendant, apprise defendant of what it is required to defend, preliminary objections should be dismissed. See e.g. Big Boys Auto v. Bon Ton Store, 15 D. & C.2d 551 (Luzerne Co. 1958).

It was the Respondent who, the Joint Complainants allege, engaged in the methods, acts and practices with consumers, which constituted violations of the Public Utility Code, the Commission's regulations and Orders, and the Consumer Protection Law. Respondent is, therefore, in a better position to know the information that Respondent is now demanding to be pleaded in the Joint Complaint. The information that Respondent claims must be pleaded in the Joint Complaint is evidentiary in nature and is more properly addressed in discovery.

With regard to Footnote 4 in Respondent's Preliminary Objections, Joint Complainants deny these conclusions of law. By way of further response, Joint Complainants incorporate Paragraph 19 above herein.

29. Denied. Respondent's allegations constitute conclusions of law to which no response is required. The Joint Complaint is of record in this matter and speaks for itself. By way of further answer, the Joint Complainant's incorporate Paragraph 28 above herein.

30. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. For the reasons set forth above in Paragraph 28, Respondent's Preliminary Objection seeking that Count VII of the Joint Complainant should be dismissed must be overruled.

Count VII Of The Joint Complaint Is Legally Sufficient.

31. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. To the extent that an answer may be required, the Joint Complaint is of record in this matter and speaks for itself. It is specifically denied that Count VII is legally insufficient. Joint Complainants have clearly made a *prima facie* case that Respondent's Disclosure Statement, on its face, fails to meet the requirements stated in the Commission regulations. See Joint Complaint at Count VII. Further, Joint Complainants have

made a *prima facie* case that Respondent's use of its Disclosure Statement in conjunction with the deceptive and misleading statements regarding savings and EDC affiliation made by Respondent's salespeople to customers and Respondent's welcome letters and inserts that promise, *inter alia*, "real savings" violates State law and the Commission's regulations and orders. See Joint Complaint at Counts I, II, III, IV, VII and VIII and App. A and B.

32. Denied. Respondent's allegations constitute conclusions of law, which require no response and are, therefore, deemed denied. By way of further response, Joint Complainants deny the allegation that the Commission approved Respondent's Disclosure Statement in the Order approving Respond Power's EGS license application. See Licensing Order. As discussed in Paragraph 21 above, Respondent's reliance on Hoke is misplaced. Joint Complainants incorporate Paragraph 21 above herein. By way of further answer, it is denied that EGSs should rely on purported Commission approval of disclosure statements or use of such purported approval as a shield to protect EGS conduct.

33. Denied. Respondent's allegations constitute conclusions of law, which require no response and are, therefore, deemed denied. By way of further response, it is specifically denied that Respond Power's Disclosure Statement fully complies with 52 Pa. Code § 54.5(c). By way of further answer, Joint Complainants incorporate Paragraphs 36 through 38 below herein.

34. Denied. Respondent's allegations constitute conclusions of law, which require no response and are, therefore, deemed denied. By way of further response, Joint Complainants specifically deny that the Commission's regulations do not require that initial prices be provided to customers. See 52 Pa. Code §§ 54.4(a) and 111.12(d)(4). The newly promulgated Commission regulations are irrelevant to the time period complained of in the Joint Complaint. Further, Respondent's reliance on Hoke is misplaced, as the determination in Hoke is limited to

the facts in that case. It is, therefore, not appropriate to rely on Hoke as authority that Respond Power's Disclosure Statement, on its face, or in conjunction with the deceptive and misleading statements regarding savings and EDC affiliation made by Respondent's salespeople and in Respondent's welcome letters and inserts do not violate State law and the Commission's regulations and orders.

35. Admitted in part and denied in part. By way of further response, it is admitted that Respondent does not include initial prices in its Disclosure Statement. It is specifically denied that the Commission approved Respond Power's Disclosure Statement. See Licensing Order. Joint Complainants are without knowledge sufficient to admit or deny the remaining assertions of facts in Paragraph 35 of Respondent's Preliminary Objections. As such, these assertions are denied. By way of further answer, these assertions, even if proven, do not make for a viable affirmative defense, as Section 111.12(d)(4) of the Commission's regulations require Respondent to provide accurate and timely information to customers about their services and products, including their rates. See 52 Pa. Code § 111.12(d)(4). As such, the onus is not on customers to obtain pricing information accurately and timely from Respondent. The onus is, rather, on Respondent to provide accurate and timely pricing information to customers.

36. Admitted in part and denied in part. By way of further response, it is admitted that Respond Power does not provide a limit on price variability to customers in the Disclosure Statement. See Joint Complaint at ¶¶ 76-78 and App. B. It is denied that Respondent's interpretation of Section 54.5(c)(2) of the Commission's regulations is accurate. It is explicitly denied that Respondent's price disclosure term "clearly discloses the conditions of variability." It is explicitly denied that any statements made by the Commission in Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products, Docket

No. M-2014-2406134, Order (adopted Feb. 20, 2014/entered March 4, 2014) (March 4 Order Seeking Comments)² or Rulemaking to Amend the Provisions of 52 Pa. Code, Section 54.5 Regulations Regarding Disclosure Statement for Residential and Small Commercial Customers, Docket No. L-2014-2409385 (Apr. 3, 2014) (Final-Omitted Rulemaking) have any binding effect on the instant proceeding, as the facts alleged in the Joint Complaint are specific to the conduct of Respond Power. It is, therefore, not appropriate to rely on Commission statements in the March 4 Order Seeking Comments or the Final-Omitted Rulemaking as authority that Respond Power's Disclosure Statement, on its face, or in conjunction with the deceptive and misleading statements regarding savings and EDC affiliation made by Respondent's salespeople and in Respondent's welcome letters and inserts do not violate State law and the Commission's regulations and orders.

37. Denied as stated. Respondent's allegations constitute conclusions of law to which no response is required. By way of further answer, the comments of OCA to the March 4 Order Seeking Comments are contained in a document that speaks for itself. It is specifically denied that the Order in Petition of Shell Energy Services Co., L.L.C. For Declaratory Order and in the Alternative, Waiver of 52 Pa. Code § 54.5(c)(2), Docket No. P-00001848, Order (Dec. 20, 2000) (Shell Energy Order) provides no precedential value or meaningful guidance or that the Shell Energy Order was renounced for the time period in the Joint Complaint.

The Electric Generation Customer Choice regulations were promulgated in 1998 pursuant to Section 2807(d)(2) of the Public Utility Code, which requires the Commission to establish regulations to require EGSs:

² Of note, the Commission sought Comments from interested parties in its March 4 Order Seeking Comments. On April 3, 2014, the OCA submitted Comments jointly with AARP, the Pennsylvania Utility Law Project and Community Legal Services, Inc. to the March 4 Order Seeking Comments. The Commission has not acted on the Comments submitted by interested parties to the March 4 Order Seeking Comments.

[T]o provide adequate and accurate customer information to enable customers to make informed choices regarding the purchase of all electricity services offered by that provider. Information shall be provided to customers in an understandable format that enables consumers to compare prices and services on a uniform basis.

66 Pa. C.S. § 2807(d)(2). The Shell Energy Order was entered very close in time to the final effective date of the regulations and contains a clear instruction as to the interpretation of 52 Pa. Code § 54.5(c). Specifically, the Commission directed that in order to comply with Section 54.5(c), a floor and ceiling price had to be conveyed. See Shell Energy Order at 5.

Declaratory orders may be issued by the Commission to remove uncertainty and have the same binding effect of other orders entered by the Commission. See 66 Pa. C.S. § 331(f). Furthermore, an agency's interpretation of its own regulations is normally entitled to controlling weight. See Professional Paramedical Services, Inc. v. Pa. PUC, 106 Pa. Commw. Ct. 278, 286, 525 A.2d 1274, 1278 (1987). There is no further Order that overrules or limits the Shell Energy Order for the time period stated in the Joint Complaint.

38. Denied. Respondent's allegations constitute conclusions of law, which require no response and are, therefore, deemed denied. It is explicitly denied that any statements made by the Commission in the Final-Omitted Rulemaking have any binding effect on the instant proceeding, as the facts alleged in the Joint Complaint are specific to, *inter alia*, the deceptive and misleading conduct of Respond Power. It is, therefore, not appropriate to rely on Commission statements in the Final-Omitted Rulemaking as authority that Respond Power's Disclosure Statement, on its face, or in conjunction with the deceptive and misleading statements regarding savings and EDC affiliation made by Respondent's salespeople and in Respondent's welcome letters and inserts do not violate State law and the Commission's regulations and orders.

39. Denied as stated. Respondent's allegations constitute conclusions of law to which no response is required. By way of further answer, as discussed in Paragraphs 31 through 38 above, Count VII of the Joint Complaint is legally sufficient. It is denied that Respond Power's Disclosure Statement fully complies with the Commission's regulations or that the Disclosure Statement was approved by the Commission. As such, Respondent's Preliminary Objection asserting that Count VII of the Joint Complaint is legally insufficient must be overruled.

The Commission Has Jurisdiction To Rule On Count VIII Of The Joint Complaint, Which Is Sufficiently Plead.

40. No response is required, as the Joint Complaint is of record in this matter and speaks for itself. Respondent's assertion that Count VIII should be dismissed is addressed by Joint Complainants in Paragraphs 42 through 48 below.

41. Denied as stated. This paragraph contains conclusions of law to which no response is required. By way of further answer, it is admitted that as a creature of statute, the Commission has those powers granted to it by the General Assembly, one power of which is to enforce the Public Utility Code and the Commission's regulations and Orders. See 66 Pa. C.S. § 501.

42. Denied as stated. This paragraph states conclusions of law to which no response is required. By way of further answer, the Commission has those powers granted to it by the General Assembly, one power of which is to enforce the Public Utility Code and the Commission's regulations and Orders. See 66 Pa. C.S. § 501. EGSs are considered public utilities for the purposes described in Section 2809 of the Public Utility Code (relating to requirements for EGSs). See 66 Pa. C.S. § 102. See also Delmarva Power & Light Co. v. Pa. PUC, 870 A.2d 901, 909-10 (Pa. 2005). Section 2809(e) of the Public Utility Code states:

Form of regulation of electric generation suppliers. – The commission may forbear from applying requirements of this part which it determines are unnecessary due to competition among electric generation suppliers. In regulating

the service of electric generation suppliers, the commission shall impose requirements necessary to ... assuring that 52 Pa. Code Ch. 56 (relating to standards and billing practices for residential utility service) are maintained.

66 Pa. C.S. § 2809(e). Section 2809(e) allows the Commission to forbear from applying the Public Utility Code but does not limit the Commission in this instance. Moreover, with regard to standards and billing practices, the Commission must impose requirements assuring they are maintained by EGSs. 66 Pa. C.S. § 2809(e).

43. Denied as stated. This paragraph states conclusions of law to which no response is required. The conclusion of law that the Commission has no authority to regulate generation service, however, is not supported by Respondent's citation to 66 Pa. C.S. § 2806(a). Section 2806(a) of the Public Utility Code provides that "[t]he generation of electricity shall no longer be regulated as a public utility service or function *except as otherwise provided for in this chapter.*" 66 Pa. C.S. § 2806(a). (Emphasis added). Joint Complainant incorporate Paragraph 42 above herein. Chapter 54 of the Commission's regulations also relates to EGSs' billing practices. See 52 Pa. Code Ch. 54. Section 54.43(f) states that "[a] licensee is responsible for any fraudulent deceptive or other unlawful marketing or billing acts performed by the licensee, its employes (*sic*), agents or representatives." 52 Pa. Code § 54.43(f).

The case cited by Respond Power in support of the conclusion of law that the Commission has no authority to limit EGS prices is currently before the Commonwealth Court, and therefore, it is not appropriate to cite as binding precedent. See McCloskey v. Pa. PUC, 569 C.D. 2014 (Advanced Form Brief submitted on July 10, 2014). Additionally, it is denied that any Commission statements in the March 4 Order Seeking Comments have any binding effect on the instant proceeding, as the facts alleged in the Joint Complaint are specific to the conduct of Respond Power.

44-45. Denied as stated. These paragraphs state conclusions of law to which no response is required. By way of further answer, Joint Complainants are not asserting that the Commission has the authority to regulate EGS prices. Instead, the Joint Complainants seek Commission review of Respondent's deceptive marketing practices of promising, *inter alia*, savings over the PTC and then billing customers at prices greatly in excess of the PTC. See Joint Complaint at Counts I-IV and App. C. As explained in Paragraph 43 above, the Commission has the authority under the Public Utility Code to regulate EGS billing practices. 66 Pa. C.S. § 2809(e). One can file a formal complaint with the Commission, alleging violation of a statute that the Commission has jurisdiction to administer. Lasko v. Windstream Pennsylvania, LLC, 2011 Pa. PUC LEXIS 696, *7. Further, the Commission has ordered equitable relief in other instances. See e.g. Pa. PUC v. Reed, 1972 Pa. PUC LEXIS 40; 46 Pa. PUC 19 (Commission directed Respondent, who was authorized to transport as a class D carrier, to refund overcharges to his customers); Ely v. Pennsylvania Water, Docket No. C-20055616, Order at 1 (July 10, 2006) (Commission determined this was a classic case for the application of equitable estoppel when Respondent damaged Complainants' asphalt driveway while replacing a water line on the neighboring property and made countless verbal assurances that the driveway would be restored); C.S. Warthman Funeral Home, et. al. v. GTE North, Inc., Docket No. C-00924416 (June 4, 1993) (Complainants were permitted to introduce into evidence the letter and promise of Respondent that it would provide toll free calling to support a claim of equitable estoppel).

With regard to the Commission Orders and Initial Decision cited by Respondent, Joint Complainants submit that these cases were prosecuted by *pro se* complainants and are limited to the facts of the individual proceedings. They are not binding on the instant matter.

46. Denied as stated. This paragraph states conclusions of law to which no response is required. Joint Complainants submit, however, that Respondent has misstated Joint Complainants' authority to bring this action. As stated in the Joint Complaint, the OCA is the agency authorized by law to represent the interests of utility consumers before the Commission, as provided in 71 P.S. § 309-1, *et seq.*

The Attorney General is authorized by the Consumer Protection Law to bring an action in the name of the Commonwealth of Pennsylvania to restrain by temporary or permanent injunction unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce as provided in 73 P.S. § 201-4. The Consumer Protection Law further authorizes the Attorney General to take such action when she has reason to believe that any person is using or is about to use a method, act, or practice unlawful under the Consumer Protection Law and when she determines that proceedings would be in the public interest as provided in 73 P.S. § 201-4. The Attorney General, as the chief law officer of the Commonwealth of Pennsylvania pursuant to Article IV § 4.1 of the Pennsylvania Constitution, is further authorized to initiate and maintain this action, and does so, pursuant to the Commonwealth Attorneys Act, 71 Pa. Stat. § 732-204.

Joint Complainants are not bringing this action on behalf of individual consumers. Rather, Joint Complainants merely used information provided by individual consumers to formulate the Joint Complaint. In this action, Joint Complainants seek to represent the interests of consumers and the public interest, as they have been authorized to do pursuant to Pennsylvania Law, 71 P.S. § 309-1, *et seq.*; the Consumer Protection Law, 73 P.S. § 201-4; Article IV § 4.1 of the Pennsylvania Constitution; and the Commonwealth Attorneys Act, 71 P.S. § 732-204.

47. Denied as stated. This paragraph states conclusions of law to which no response is required. As explained in Paragraph 46 above, however, Joint Complainants are not seeking to relitigate Formal Complaints that have already been resolved. The Commission has recognized that where there is one complaint made to the Commission, there are likely substantially more of the same nature that have not been formally made. See e.g. Arthur Rand v. GTE North, 1999 Pa. PUC LEXIS 55, *9-10 (March 19, 1999). Joint Complainants bring this action to represent the interests of consumers and the public interest at large.

48. Denied as stated. This paragraph states conclusions of law to which no response is required. By way of further answer, Joint Complainants incorporate Paragraphs 42 through 47 above herein. As for Respondent's assertion that Appendix C of the Joint Complaint is irrelevant to this proceeding, Joint Complainants attached the affidavit of Dr. Steven L. Estomin to the Joint Complaint as Appendix C in support of the averments in the Joint Complaint that Respondent Power's billed prices did not conform to its marketed prices or its Disclosure Statement. Dr. Estomin analyzed the day-ahead and real-time market prices for electric energy during the winter of 2014 for electric and non-electric space heating residential customers and for several EDC territories in Pennsylvania. See Joint Complaint at App. C, page 1. Dr. Estomin included several categories of PJM generation costs and EGS-specific costs in his analysis. Joint Complaint at App. C, page 1. These categories analyzed by Dr. Estomin are comparable to the categories in Respondent's pricing disclosure term. Based on his analysis, Dr. Estomin concluded that the cost to serve the average residential heating customer in January 2014 should not have exceeded approximately \$0.23 per kWh. See Joint Complaint at ¶ 89 and App. C, page 2. It is clear that Appendix C is relevant to Joint Complainants' averments in the Joint Complaint.

Thus, when the allegations and all facts fairly deducible therefrom are assumed to be true, Joint Complainants have clearly made a legally sufficient claim, and Respondent's assertion that Appendix C should be stricken must be overruled. Additionally, the Commission has the jurisdiction to rule on Count VIII. See 66 Pa. C.S. § 2809(e); 52 Pa. Code Ch. 54. As set forth in Paragraphs 40 through 48 above, Respondent's Preliminary Objection to Count VIII of the Joint Complaint fails and must be overruled.

The Commission Has Jurisdiction To Rule On Count IX Of The Joint Complaint, Which Is Legally Sufficient.

49. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. To the extent that an answer may be required, the exception that the Respondent relies on is Section 2245(d)(1) of the TRA, which states that a written contract is not needed if the sale of the good or service is regulated under other laws of the Commonwealth. 73 P.S. § 2245(d)(1). However, EGSs are subject to all requirements of the TRA, except the requirement that they register with the OAG. On February 8, 2010, Attorney General Thomas W. Corbett issued an advisory opinion in response to then Commission Chairman James H. Cawley's request for an "opinion regarding the applicability of the [TRA] to electric generation suppliers as defined in the Electricity Generation Customer Choice and Competition Act." See Request for Opinion, 2010 Pa. AG LEXIS 1 (Feb. 8, 2010) (AG Opinion), attached hereto as Appendix A. In response to Chairman Cawley's question whether the EGSs are excluded from the definition of "telemarketer" in the TRA, AG Corbett replied:

[E]lectric generation suppliers engaged in telemarketing are telemarketers for all purposes of the [Telemarketer Registration] Act except the requirement of Section 3(a), 73 P.S. § 2243(a), that telemarketers register with this Office, from which electric generation suppliers are excluded because they are licensed by the PUC under the Competition Act, 66 Pa. C.S. § 2809(a). Agents of suppliers, such as individuals and businesses initiating or receiving calls pursuant to contracts with

suppliers, are not excluded from the definition of "telemarketer" and therefore must register.

AG Opinion at *4-5. Clearly, it is intended that all provisions of the TRA, except the registration requirement, apply to EGSs. Furthermore, the Commission incorporated the TRA into its regulations, and it, therefore, has the authority to make determinations pursuant to the TRA in order to determine if Respondent violated the Commission's regulations. See 52 Pa. Code § 111.10(a)(1); Harrisburg Taxicab, 786 A.2d at 292-92. The Commission does have jurisdiction to enforce the TRA as discussed in Paragraph 26 above. As such, Count IX should not be dismissed.

50. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. To the extent that an answer may be required, EGSs are subject to all requirements of the TRA, except the requirement that they register with the OAG. AG Opinion at *4-5.

51. Denied. Respondent's allegations constitute conclusions of law which require no response and which are deemed denied. To the extent that an answer may be required, EGSs are subject to all requirements of the TRA, except the requirement that they register with the OAG. AG Opinion at *4-5.

52. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. To the extent that an answer may be required, the Commission is appropriately within its jurisdiction to incorporate other laws, including the TRA into its decisions. See Harrisburg Taxicab, 786 A.2d at 292-93. By way of further answer, Joint Complainants' discussion in Paragraph 26 above applies to the TRA as well, and therefore, Paragraph 26 above is incorporated herein.

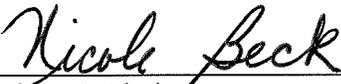
53. Denied as stated. To the extent that an answer may be required, the PUC Regulations require an EGS and its agents to comply with the provisions of the TRA. 52 Pa. Code § 111.10(a)(1). As a preliminary inquiry, the Commission must invoke the statute and case law under the TRA and interpret it as guidance where appropriate. See Harrisburg Taxicab, 786 A.2d at 292-93; Pettko, 39 A.3d at 484. By allowing the Commission to adjudicate these disputes in the first instance, all rights of the parties will be preserved, as well as providing any subsequent reviewing court the benefit of the Commission's opinion. Verizon North, Inc., 879 A.2d 357.

54. Denied. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. To the extent that an answer may be required, Count IX should not be dismissed because EGSs are subject to all of the requirements of the TRA, and the Commission has the authority to determine whether the conduct alleged constitutes a violation of the TRA.

IV. CONCLUSION

WHEREFORE, Joint Complainants respectfully request that Respondent's Preliminary Objections to the Joint Complaint be overruled.

Respectfully submitted,



John M. Abel
Senior Deputy Attorney General
PA Attorney I.D. 47313

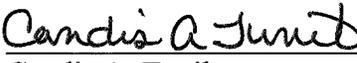
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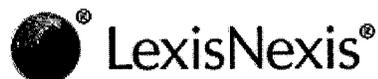
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APPENDIX A



OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

[NO NUMBER IN ORIGINAL]

2010 Pa. AG LEXIS 1

February 8, 2010

SYLLABUS:

[*1]

Request for Opinion regarding the Telemarketer Registration Act and the Electricity Generation Customer Choice and Competition Act

REQUESTBY:

James H. Cawley, Chairman
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17120

OPINIONBY:

TOM CORBETT, Attorney General

OPINION:

On behalf of the Public Utility Commission ("PUC"), you have requested my opinion regarding the applicability of the Telemarketer Registration Act ("Telemarketer Act"), 73 P.S. §§ 2241-2249, to electric generation suppliers as defined in the Electricity Generation Customer Choice and Competition Act ("Competition Act"), 66 Pa. C.S. §§ 2801-2815.

As a threshold matter under Section 204(a)(1) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(a)(1), we must establish that the PUC's request for legal advice concerns "a matter or issue arising in connection with the exercise of the official powers or the performance of the official duties of the [PUC]."

The Competition Act requires electric utilities "to unbundle their rates and services and to provide open access over their transmission and distribution systems to allow competitive suppliers to generate and sell electricity directly [*2] to consumers," 66 Pa. C.S. § 2802(14). The Act directs the PUC, by regulation, to require electricity providers to provide adequate and accurate customer information to enable customers to make informed choices regarding the purchase of electricity services. 66 Pa. C.S. § 2807(d)(2). PUC regulations require providers to notify consumers that information is available upon request, 52 Pa. Code § 54.6(h), and prohibit providers from releasing customer information to third parties without customer consent. 52 Pa. Code § 54.8.

Telephone communication is among the means by which electricity providers may seek to discharge their obligation under the Competition Act and regulations to inform customers of choices regarding the purchase of electricity. Section 3(b) of the Telemarketer Act, 73 P.S. § 2243(b), prohibits telemarketers from communicating with consumers by telephone in connection with the purchase of consumer goods or services "unless the telemarketer or the telemarketing business [*3] which employs the telemarketer is registered with the Office of Attorney General" and otherwise circumscribes telemarketer activities.

This interplay between the communication requirements of the Competition Act and the communication restrictions of the Telemarketer Act provides ample basis for concluding that the applicability of the Telemarketer Act to electric generation suppliers is an issue "arising in connection with" the PUC's powers and duties. Accordingly, we proceed to address the questions presented in your opinion request.

1. Is electric generation supply a "consumer good or service" as defined in the Telemarketer Act?

Section 2 of the Telemarketer Act, 73 P.S. § 2242, defines "consumer goods and services" as "real or personal property or services used for personal, family or household purposes." Electricity is used in countless aspects and activities of daily life; thus electric generation supply is plainly a "service used for personal, family and household purposes" and therefore a "consumer service" within the meaning of the Act.

2. Is an electric generation supplier excluded from the definition of "telemarketer" in the [*4] Telemarketer Act? If so, what is the scope of the exclusion under the Act, does it extend to an agent of a supplier, and does it matter that the source of customer information used for telephone solicitation by a supplier or its agent is an electric distribution company?

Section 2 of the Telemarketer Act, 73 P.S. § 2242, defines "telemarketer" as follows:

Any person or business which, in connection with telemarketing, initiates or receives telephone calls to or from a consumer in this Commonwealth, or when the person or business acting in connection with telemarketing is located within this Commonwealth when such calls are initiated or received. *For purposes of registration under section 3(a), "telemarketer" does not include any of the following...*

(5) A person or business engaged in a business or occupation which is licensed by, certificated by or registered with a Federal or Commonwealth agency while acting within the scope of the business for which licensure, certification or registration is required.

(Emphasis added).

Under this definition, electric generation suppliers engaged in telemarketing are telemarketers for all purposes [*5] of the Act except the requirement of Section 3(a), 73 P.S. § 2243(a), that telemarketers register with this Office, from which electric generation suppliers are excluded because they are licensed by the PUC under the Competition Act, 66 Pa. C.S. § 2809(a). Agents of suppliers, such as individuals and businesses initiating or receiving calls pursuant to contracts with suppliers, are not excluded from the definition of "telemarketer" and therefore must register. It is immaterial to the definition or the exclusion that the source of customer information used for telephone solicitation by suppliers or their agents is an electric distribution company.

3. Is customer consent to the release of information given to an electric distribution company to enable competitive solicitations "an express request" to receive telephone solicitations from electric generation suppliers or their agents within the meaning of the Telemarketer Act?

Section 2 of the Telemarketer Act, 73 P.S. § 2242, excludes from the definition of a "telephone solicitation call" a call to a residential [*6] or wireless consumer "(1) in response to an express request of the residential or wireless consumer." You explain that customers of electric distribution companies may indicate to the company their general consent to the release of information about them to enable competitive solicitations by electric generation suppliers and that such consent may be given by an "opt-in" process in which the customer affirmatively agrees to the release of information or an "opt-out" process in which the customer does not object to (opt-out of) the release of information.

Regardless of process, customer consent to the release of customer information by an electric distribution company to enable competitive solicitations by electric generation suppliers does not constitute "an express request" to receive telephone solicitation calls. The "do-not-call list" defined in section 2 of the Telemarketer Act, 73 P.S. § 2242, protects consumers from unwanted telephone solicitation calls. See sections 5-9, 73 P.S. §§ 2245-2249. The protection of the do-not-call list is defeated if general consent to the release of information given by a consumer to one individual or business [*7] operates as general consent to receive telephone solicitations from any number of other individuals or businesses.

4. Is an electric generation supplier using customer information supplied by an electric distribution company for telephone solicitations shielded from liability under the "error" provision of the Telemarketer Act?

Section 5(a) of the Telemarketer Act, 73 P.S. § 2245(a), shields a telemarketer who has complied with the four requirements (i)-(iv) of the provision from liability for a telephone solicitation call to a consumer who has previously indicated that he or she does not wish to receive such calls. It is immaterial to this "error" provision of the Act that an electric generation supplier or its agent uses customer information supplied by an electric distribution company in making telephone solicitation calls.

In summary, it is my opinion, and you are so advised, that electric generation suppliers are subject to all the requirements of the Telemarketer Act, as detailed herein, except the requirement that they register with this Office.

Finally, you are advised that, in accordance with Section 204(a)(1) of the Commonwealth [*8] Attorneys Act, 71 P.S. § 732-204(a)(1), you are required to follow the advice set forth in this Opinion and shall not in any way be liable for doing so.

Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Consumer Protection Telemarketing Communications Law Privacy Telemarketing & Consumer Fraud & Abuse Prevention Act Energy & Utilities Law Transportation & Pipelines Electricity Transmission