

COMMONWEALTH OF PENNSYLVANIA



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September 18, 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 Joint Brief of the Commonwealth of Pennsylvania and the Office of Consumer Advocate in Support of Petition for Interlocutory Review and Answer to Material Questions, in the above-referenced proceeding.

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

Respectfully Submitted,

A handwritten signature in cursive script that reads "Candis A. Tunilo".

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

Enclosures

cc: Honorable Elizabeth Barnes, ALJ
Honorable Joel Cheskis, ALJ
Certificate of Service

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Commonwealth of Pennsylvania, by Attorney
General KATHLEEN G. KANE, Through the
Bureau of Consumer Protection,

And

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Docket No. C-2014-2427659

JOINT BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA AND THE OFFICE OF
CONSUMER ADVOCATE IN SUPPORT OF PETITION FOR INTERLOCUTORY REVIEW
AND ANSWER TO MATERIAL QUESTIONS

I. INTRODUCTION

In this proceeding, the Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, through the Bureau of Consumer Protection (Commonwealth) and the Office of Consumer Advocate (OCA) (hereinafter Joint Complainants) filed a Joint Complaint against Respond Power, LLC (Respond) with the Pennsylvania Public Utility Commission (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.* (CPL), and the Telemarketer Registration Act, 73 P.S. § 2241, *et seq.* (TRA). The Joint Complaint was filed on June 20, 2014 and contains nine Counts.

On July 10, 2014, Respond filed Preliminary Objections arguing that five of the nine counts in the Complaint should be dismissed. On July 21, 2014, the Joint Complainants filed an Answer to the Preliminary Objections asserting that Respond's Preliminary Objections are unsupported. The Joint Complainants argued that it is clear and free from doubt that the Complaint is legally sufficient and sought that the Commission make determinations pursuant to the Commission's powers and jurisdiction. See gen'ly Joint Answer to Respond POs.

The matter was assigned to Administrative Law Judges Joel H. Cheskis and Elizabeth Barnes (ALJs). By Order dated August 20, 2014 (August 20 Order), the ALJs granted in part and denied in part Respond's Preliminary Objections.¹ Specifically, the ALJs held: 1) that the Commission lacks jurisdiction to hear complaints under the CPL and TRA even though compliance with these Acts is required by the Commission regulations, and 2) that the

¹ The ALJs issued Orders on Preliminary Objections in four of the Joint Complaint cases filed by the Commonwealth and the OCA at Docket Nos. C-2014-2427655 (Blue Pilot Energy, LLC), C-2014-2427659 (Respond Power, LLC), C-2014-2427657 (IDT Energy, Inc.), and C-2014-2427656 (Energy Service Providers, Inc. d/b/a Pennsylvania Gas & Electric). On September 8, 2014, Joint Complainants filed a Petition for Interlocutory Review and Answer to Material Questions in each case. Joint Complainants note that though similar, the four Orders on Preliminary Objections do not reach the same conclusions as to several counts, so the material questions vary for each case.

Commission lacks jurisdiction to determine if the prices charged to customers conformed to the disclosure statement provided to the customer. As a result, the August 20 Order struck Count VIII (Prices Nonconforming to Disclosure Statement) in its entirety and struck in part Count III (Failing to Disclose Material Terms), Count IV (Deceptive and Misleading Welcome Letters and Inserts), and Count IX (Failure to Comply with the TRA) to the extent that these Counts consider the CPL or TRA.

On September 8, 2014, the Joint Complainants filed their Joint Petition for Interlocutory Review and Answer to Material Questions seeking review of the August 20 Order. Through the instant request for interlocutory review, the Joint Complainants respectfully request that: 1) the Commission reaffirm that it has authority and jurisdiction to determine whether a violation of the CPL and TRA has occurred when considering whether the Commission's regulations—which require compliance with these laws—have been violated; and 2) the Commission reaffirm its authority and jurisdiction to determine whether the prices charged to customers by an electric generation supplier (EGS) conform to that EGS's disclosure statement.

As explained below, the Commission has the jurisdiction and legal authority to decide the controversy as fully set forth by the Joint Complaint. The narrowing of the Commission's legal authority over EGSs, as occurs under the ALJs' August 20 Order, would limit the Commission's ability to protect consumers and provide oversight, which is authorized under the Public Utility Code and its own regulations. Accordingly, the August 20 Order should be reversed and the Joint Complaint should proceed to a full evidentiary hearing on all Counts.

II. MATERIAL QUESTIONS PRESENTED

Pursuant to Section 5.302 of the Commission's regulations, 52 Pa. Code § 5.302, the Joint Complainants request that the Commission grant review of and answer the following questions in the affirmative:

- 1) Does the Commission have authority and jurisdiction to determine whether a violation of the Unfair Trade Practices and Consumer Protection Law (CPL) and the Telemarketer Registration Act (TRA) has occurred when considering whether the Commission's regulations—which require compliance with these laws—have been violated?
- 2) Does the Commission have the authority and jurisdiction to determine whether the prices charged to customers by an electric generation supplier (EGS) conform to the EGS disclosure statement?

By answering these questions in the affirmative, the Commission will ensure that all legal claims within the Commission's authority and jurisdiction can be properly pursued.

III. SUMMARY OF ARGUMENT

The Joint Complainants submit that the Commission has authority and jurisdiction to determine whether a violation of the CPL and/or TRA has occurred when considering whether the Commission's regulations requiring an EGS's compliance with these laws have been violated. To be clear, the Joint Complainants do not ask the Commission to enforce the CPL and TRA, as the ALJs appear to have assumed. See August 20 Order at 6, 19-20. Rather, the Joint Complainants request that the Commission consider whether the EGS has complied with the CPL and TRA as it is required to do by the Commission's regulations and as reaffirmed in Use of Fixed Price Labels for Products With a Pass-Through Clause, Docket No. M-2013-2362961, Final Order (Nov. 14, 2013). The Commission must make such a determination in order to find a violation of its regulations. See Jt. Comp. ¶¶ 42-60 (CPL) and ¶¶ 91-99 (TRA). The Commission can make this determination and has done so frequently with regard to overlapping statutes.

The Joint Complainants also submit that the Commission has the authority and jurisdiction to determine whether the prices charged to customers by an EGS conform to the EGS disclosure statement provided to the customer. The Joint Complainants do not ask the Commission to regulate price. See August 20 Order at 17. Rather, the Joint Complainants requested that the Commission determine whether the price charged to the customer was consistent with the description of the basis of the price provided in the disclosure statement. See Jt. Comp. ¶¶ 86-90. The Joint Complainants respectfully submit that the Commission has full authority to determine whether an EGS adhered to its disclosure statement and charged customers a price reflective of the marketed and disclosed price components.

IV. ARGUMENT

A. Compelling Reasons for Review

Interlocutory review of the Joint Complainants' Material Questions is necessary to prevent significant prejudice to the Joint Complainants. The August 20 Order dismissed Count VIII in its entirety and Counts III, IV, and IX in part, thus depriving the Joint Complainants of their day in court on these claims. Additionally, the August 20 Order has improperly limited the Commission's jurisdiction and authority to consider various claims, which will restrict development of the evidentiary record. If the Joint Complainants are not able to properly pursue their legal claims, significant prejudice and harm to the Joint Complainants and to the interests of the consumers that they represent will result. It is in the public interest and consumer interest to allow the development of an accurate and complete factual record for Commission review.

Furthermore, there is a compelling interest in the Commission reaffirming that it has the authority and jurisdiction over key issues relating to the protection of consumers regarding EGSs' marketing and sales conduct, billing practices, and disclosure statements. The

Commission's oversight on these matters is critical to the integrity of, and confidence in, the retail electric market.

Additionally, the ALJs in this matter issued three other Orders contemporaneously with the August 20 Order that dispose of Preliminary Objections in the Joint Complainants' cases against other EGSs. These four Orders dispose of the same, or similar, Counts in the Joint Complaints in different ways. These differences will lead to the inconsistent development of the factual record in these matters, and lead to confusion in these and future matters as to the permissible scope of the Commission's jurisdiction and authority.

The Joint Complainants submit that resolving these issues now will expedite the conduct of the proceeding and ensure that a full and complete record is developed for the Commission's review.

B. Material Questions

1. The Commission has authority and jurisdiction to determine whether a violation of the CPL and TRA has occurred when considering whether the Commission's regulations—which require compliance with these laws—have been violated.

The August 20 Order strikes Counts III, IV, and IX of the Joint Complaint as it relates to claims brought pursuant to the CPL and TRA. August 20 Order at 5, 10, 18. The ALJs conclude that the Commission does not have the authority to enforce EGS compliance with the CPL and TRA. *Id.* The Joint Complainants, however, do not ask the Commission to enforce the CPL or TRA. Rather, the Joint Complainants ask the Commission to apply its own regulations requiring compliance with the CPL and TRA. The Commission routinely considers overlapping statutes and has concluded that it has the jurisdiction and authority to find violations of overlapping statutes when it bears on compliance with the Public Utility Code and the Commission's regulations.

The Commission's regulations at Sections 54.122(3) and 111.12(d)(1), 52 Pa. Code §§ 54.122(3) and 111.12(d)(1), expressly authorize the Commission to prevent an EGS from engaging in misleading or deceptive conduct as defined by State or Federal law, or by Commission rule, regulation or order. Additionally, the Commission's regulations specifically require compliance with the CPL and TRA. See e.g. 52 Pa. Code 54.42(a)(8) (requiring compliance with Pennsylvania consumer protection law); 52 Pa. Code § 111.10 (requiring compliance with "the act", which is defined in Section 111.2 as the TRA). Section 54.42(a) requires a licensee to comply with all "requirements of the code and Commission regulations and orders." 52 Pa. Code § 54.42(a). To find a violation of Sections 111.10, 111.12(d)(1) or 54.122(3) of its regulations, the Commission must consider evidence regarding the CPL and TRA and determine whether provisions of those laws have been violated.

The Commission has previously recognized its authority to broadly consider such overlapping statutes. In its recent order on the Use of Fixed Price Labels for Products With a Pass-Through Clause, Docket No. M-2013-2362961, Final Order (Nov. 14, 2013) (November 14 Order), the Commission stated as follows:

[T]his matter does not just concern the Commission or the Public Utility Code – it is a matter that also involves other laws such as the UTPCPL. The Commission cannot focus solely on our regulations and the Public Utility Code to the exclusion of other laws that may also be applicable to the matter at hand. . . . The guidance we provide is not a mandate; however, to the extent that an EGS fails to follow that guidance, *it takes the risk that a consumer or other agency may file a complaint asserting a violation of the Public Utility Code, Commission regulations or the UTPCPL.* Any such case would be decided based on the specific facts and circumstances presented.

November 14 Order at 23-24. (Emphasis added). The Commission's analysis is equally applicable to claims brought pursuant to the TRA because it is a law "applicable to the matter at hand."

Under the Public Utility Code and its regulations, the Commission has the authority, and indeed the duty, to determine whether the conduct alleged constitutes a violation of State or Federal law, including the CPL and TRA. 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). In order to make a determination as to whether the Commission's own regulations and the Public Utility Code have been violated with regard to the CPL and TRA, the Commission must utilize the CPL and TRA's statutory language and case law, interpret it, and apply it harmoniously as guidance where appropriate. See Duquesne Light Co. v. Borough of Monroeville, 449 Pa. 573, 298 A.2d 252 (1972); Pettko v. PAWC, 39 A.3d 473, 484 (Pa. Commw. Ct. 2012).

The Commission has often applied other statutes in proceedings such as the current matter. In MAPSA, a case that the ALJs rely on in denying Counts III, IV, and IX, the Commission did exactly what the ALJs in the August 20 Order said the Commission cannot do. In MAPSA, the Mid-Atlantic Power Supply Association (MAPSA) filed a complaint against PECO alleging that the utility's marketing was unfair, deceptive, false, and misleading, and caused customers to remain with PECO rather than enter the competitive electric retail market. The Commission determined that PECO had violated the Electric Generation Customer Choice and Competition Act with regard to unfair/deceptive and anticompetitive acts such that those violations may also be a violation of consumer protection laws. The Commission specifically noted that simply because a violation may be a violation of the Public Utility Code and/or the Commission's regulations, as well as a violation of another law, does not divest the Commission of jurisdiction over the claim *as it relates to a violation of the other law implicated*.

[T]he Commission's jurisdiction spans the breadth of the Public Utility Code, 66 Pa. C.S. §§ 101-3316. *Concurrent jurisdiction with another governmental entity does not divest the Commission of jurisdiction retained or exercised under another section of the Code.*

MAPSA v. PECO Energy Co., 1999 Pa. PUC LEXIS 30, 48-49, Docket No. P-00981615 (1999). (Emphasis added). Here, the Joint Complaint has been brought pursuant to Chapter 28 of the Public Utility Code and various Commission regulations that were enacted pursuant to Chapter 28, Sections 501, 504, 1501, and 1504 of the Public Utility Code. MAPSA does not support the ALJs' dismissal of Counts III, IV, and IX regarding the CPL and TRA.²

The ALJs also rely on Harrisburg Taxicab to support their decision, but in so doing have created a distinction between statutory and regulatory authority that the Court did not make in that case. Harrisburg Taxicab plainly supports the Commission's authority to consider overlapping concurrent statutes. In Harrisburg Taxicab, the Commonwealth 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).

The August 20 Order attempts to distinguish Harrisburg Taxicab, stating that it was based on statutory authority, whereas in this matter the Joint Complainants rely only on the Commission's regulations and not statutory authority to support the position that the Commission has jurisdiction to hear CPL and TRA claims. This contention is inaccurate. Harrisburg Taxicab was based on both statutory and regulatory violations, with the Complaint "alleging numerous violations of PUC regulations found at 52 Pa. Code §§ 29.314(b)(4) - (6),

² Moreover, after MAPSA, the Commission added provisions to the Commission's regulations explicitly requiring EGSs to comply with the TRA. See 52 Pa. Code §§ 54.43(f), 54.122(3), and 111.12(d)(1).

29.316(c), 29.402(1) and 29.403(2) as well as a violation of Section 1501 of the Public Utility Code.” Harrisburg Taxicab, 786 A.2d at 290.³

In dismissing Counts III, IV, and IX in part, the ALJs put weight on the fact that Harrisburg Taxicab was expressly brought under Section 1501 of the Public Utility Code and concerned safety. While the Joint Complainants do not agree that this fact is germane, the Joint Complaint was brought pursuant to Chapter 28 of the Public Utility Code and under Chapters 54 and 111 of the Commission’s regulations, which were implemented by the authority granted to the Commission under Sections 501, 504, 1501, 1504, and Chapter 28 of the Public Utility Code and concerns essential consumer protections. While Harrisburg Taxicab makes no distinction as to whether the claim is based on statutory or regulatory authority, even if such was the case, the Joint Complaint is consistent with Harrisburg Taxicab. More to the point, Harrisburg Taxicab makes it clear that “the decision of the PUC to incorporate DOT’s regulations in its own regulations represents exactly the type of sensible cooperation and mutual adjustment between the agencies advocated by the United States Court of Appeals.” Harrisburg Taxicab, 796 A.2d at 293.⁴

Finally, Section 501 of the Public Utility Code states that “The express enumeration of powers of the commission in this part shall not exclude any power which the commission would otherwise have under any provisions of this part.” In other words, even if the Public Utility Code

³ In its analysis, Harrisburg Taxicab makes no distinction between statutory and regulatory authority.

⁴ Other examples in which the Commission has considered and reached conclusions regarding overlapping statutes include Barasch v. Bell Tel. Co., 529 Pa. 523, 605 A.2d 1198, 130 P.U.R. 4th 280 (1992) (The Commission considered whether a service violates the Wiretap Act); see also City of Philadelphia v. Pa. PUC, 702 A.2d 1139 (Pa. Commw. Ct. 1997) (The Commission must consider a county’s obligations under Act 78 in implementing telecommunication deregulation under the Public Utility Code and Telecom Act); Pa. PUC v. Columbia Gas of Pa., Docket No. R-2010-2215623, Order (Mar. 15, 2012), aff’d PCOC v. Pa. PUC, 635 C.D. 2012 (Pa. Commw. Ct. 2014) (The Commission found that the company’s customer assistance program did not violate the requirements of the federal Low-Income Home Energy Assistance Act).

does not “explicitly grant” the Commission “express authority” this does not mean that the Commission does not have authority. Rather, Section 501 states the Commission has power over those matters that are within its province even if not specifically enumerated, and—*equally important*—the enumeration of some powers is not the exclusion of others.

The Commission should determine that it has jurisdiction and authority over this issue—as provided for in the Public Utility Code and the Commission’s regulations—so as to meaningfully protect consumers as enunciated by the Code and regulations.

2. The Commission has the authority and jurisdiction to determine whether the prices charged to customers by an electric generation supplier (EGS) conform to the EGS disclosure statement provided to the customer.

The August 20 Order dismisses Count VIII of the Joint Complaint on the basis that the Commission cannot regulate the price an EGS charges. See August 20 Order at 14-15, 17. The Joint Complainants are not asking the Commission to regulate price. The Joint Complainants are asking the Commission to determine whether the price charged to customers was consistent with the pricing terms contained in the EGS’s disclosure statements. The August 20 Order also states that no averments in Count VIII put billing practices and the disclosure statements at issue. See August 20 Order at 17. This conclusion is inaccurate, as the disclosure statement is specifically put at issue in paragraph 90 of the Joint Complaint. See Jt. Comp. at ¶ 90.

Respond’s disclosure statement states, in relevant part, as follows:

[t]his rate is set by Respond Power and reflects their Generation Charge as reflected by the PJM Day-Ahead Market, Installed capacity (the cost of reserve or standby power), electricity lost on the transmission system (“losses”), estimated state taxes, and any other costs that Respond Power incurs to deliver your electricity to your electric Utility’s Transmission system.

Jt. Comp. at ¶ 76. In this case, the Joint Complaint, in Count VIII, avers that Respond’s prices charged to its variable rate customers did not conform to the basis for pricing stated in the

disclosure statement, as required by the Commission's regulations. See 66 Pa. C.S. § 2807(d)(2); 52 Pa. Code §§ 54.3(1), 54.43.

The August 20 Order dismissed Count VIII of the Joint Complaint, saying that it sought to regulate price. See August 20 Order at 14-15, 17. This is not an accurate description of the claim. The Joint Complainants, to establish facts in support of the allegation, presented an analysis of electric generation market pricing as furnished by PJM, since the disclosure statement conveys that the pricing is to be based on PJM market pricing. The Affidavit to the Joint Complaint presents this analysis. See Affidavit of Dr. Steven L. Estomin, ¶5. Simply because Count VIII uses numerical pricing information does not make the Count a request to regulate price. Rather, it provides evidence that the price charged was not in compliance with the elements that were to form the basis of the price as defined in Respond's disclosure statement. The determination of whether the marketed and disclosed price conforms to the price actually charged to the customer is squarely within the Commission's authority, as is the authority to determine whether the EGS provided adequate information to enable customers to make informed choices. See e.g. 52 Pa. Code §§ 54.42, 54.43, and 111.12.

Additionally, the August 20 Order incorrectly states that the Joint Complainants do not aver violations of billing practices and disclosures, and do not tie the Affidavit to the disclosure statement in either the Complaint or Answer to Preliminary Objections. As an initial matter, paragraph 86 of Count VIII incorporates by reference all preceding paragraphs as if fully pled, integrating paragraph 76 in Count VIII, which recites the disclosure statement. Further, the Joint Complaint and Answer to Preliminary Objections specifically stated as follows:

- It is averred, upon information and belief, that the aforementioned prices do not conform to the variable rate pricing provision of the Respondent's Disclosure Statement. Joint Complaint ¶ 90.

- Joint Complainants allege that Respond's billed prices did not conform to its marketed prices or its Disclosure Statement. Answer to Preliminary Objections ¶ 48.
- Dr. Estomin analyzed the day-ahead and real-time market prices . . . [in categories] comparable to the categories in Respond's pricing disclosure term. Answer to Preliminary Objections ¶ 48.

The Joint Complainants make numerous other references to billing practices and disclosure statements in Count VIII and their Answer to Preliminary Objections. See Joint Complaint at ¶¶ 86-90; Answer to Preliminary Objections ¶ 48.

In a case directly on point, Grmusa v. Dominion Retail, Inc., the Commission asserted its jurisdiction over the misrepresentations of an EGS. The complainant alleged that the EGS Dominion Retail enticed him to switch from Duquesne Light to Dominion Retail with promises of 10% savings. Grmusa v. Dominion Retail, Inc., Docket No. C-2009-2124359, Initial Decision at 1 (Dec. 1, 2009). The presiding officer granted the EGS's preliminary objections on the basis that the Commission did not have jurisdiction because the matter concerned price. Id. at 2-3, 7-9. The Commission reversed the presiding officer's initial decision, noting:

The Complaint alleged that the Complainant was charged a higher rate than what was represented to him by Dominion Retail. The Commission's jurisdiction over electric generation suppliers, such as Dominion Retail, is contained within the Competition Act. 66 Pa. C.S. §§ 2801 *et seq.* Furthermore, the Commission has promulgated rules for EGSs to follow as a condition of receiving a license to operate. 52 Pa. Code § 54.43. One of these conditions is that an EGS' advertised prices must match its billed prices, and that billed prices must reflect marketed prices. 52 Pa. Code §§ 54.4(a) and 54.7(a). This Commission has set forth rules that EGSs must follow and has the obligation, and, therefore, the jurisdiction, to enforce those rules.

Grmusa, Order at 5 (Apr. 16, 2010). Again, the Joint Complainants have not, and are not, asking the Commission to *regulate price* as stated by the August 20 Order. See August 20 Order at 14-15, 17. The Joint Complainants' aver that the aforementioned prices *actually charged* by

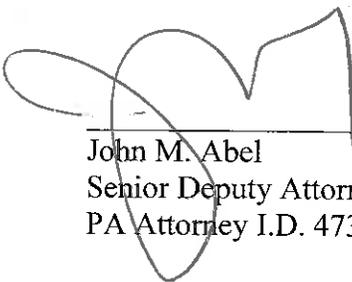
Respond to its variable rate customers *do not conform to the variable rate pricing provision* of Respond's Disclosure Statement and provide evidence in support of the claim.

The Commission has jurisdiction to determine if the price charged to the customer conforms to the advertised and disclosed price. The Commission should affirm its authority as enunciated by the Public Utility Code and the Commission's regulations.

V. CONCLUSION

WHEREFORE, for the reasons set forth above, the Office of Consumer Advocate and Office of Attorney General, Bureau of Consumer Protection respectfully request that the Commission answer the material questions in the affirmative, allow Counts III, IV, VIII, and IX to be fully developed and considered, and allow the Joint Complainants to seek the equitable remedy of restitution.

Respectfully submitted,



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