**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Commonwealth of Pennsylvania, *et al.* :

:

v. : C-2014-2427659

:

Respond Power LLC :

Pennsylvania Public Utility Commission, :

Bureau of Investigation and Enforcement : C-2014-2438640

:

v. :

:

Respond Power LLC :

**ORDER**

**GRANTING IN PART AND DENYING IN PART**

**PRELIMINARY OBJECTIONS FILED AGAINST**

**THE FORMAL COMPLAINT OF THE**

**BUREAU OF INVESTIGATION AND ENFORCEMENT**

**Procedural History**

On August 21, 2014, the Pennsylvania Public Utility Commission (Commission) Bureau of Investigation and Enforcement (I&E) filed with the Commission a formal Complaint against Respond Power LLC (Respond or “the Company”), Docket Number C-2014-2438640. In the Complaint, I&E averred that it instituted an investigation of Respond centered on allegations of slamming and related unauthorized marketing practices as alleged in a telephone call to the Commission’s Bureau of Consumer Services (BCS) on October 24, 2013. I&E further averred that the phone call was from an individual who identified himself as a senior door-to-door sales agent of Respond and that the sales and marketing tactics being used by agents of Respond included the use of false identities and associated identification materials, circumvention of the Commission’s sales verification procedures by pretending to be the customer on verification calls and the forging of customer signatures on sales contracts and/or other enrollment materials. Additionally, I&E averred that BCS had received 1,050 informal complaints against Respond between February 1, 2014 and July 31, 2014 regarding various issues, including slamming and false and deceptive practices. I&E’s Complaint averred six hundred and thirty nine (639) counts against Respond and sought a civil penalty of $1,000 for each count for a total civil penalty of $639,000. I&E also sought refunds for affected customers and the rescission of Respond’s authority to operate in Pennsylvania.

On September 2, 2014, the Office of Attorney General Bureau of Consumer Protection (OAG) filed a Notice of Intervention. On September 3, 2014, the Office of Consumer Advocate (OCA) filed a Notice of Intervention and Public Statement. The OAG and the OCA had jointly filed a separate formal Complaint against Respond on June 20, 2014, Docket Number C-2014-2427659. In their Complaint, the OAG and OCA averred, among other things, that they had received numerous contacts and complaints from consumers related to variable rates charged by Respond.

On September 30, 2014, Respond filed an Answer to I&E’s Complaint. In its Answer, Respond admitted or denied the various averments made by I&E. In particular, Respond averred that the Commission does not have jurisdiction to enforce the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTP/CPL). Respond further averred that an employee of its third party contractor had recently been terminated for unauthorized switching (i.e., slamming) of a customer and that its third party contractors are required to implement a “zero tolerance” policy toward slamming. Respond further averred that during the time BCS received a large number of calls, the Polar Vortex of 2014 occurred. Respond added that I&E’s Complaint overstates the number of informal complaints on which it is based and the number of alleged violations. Respond concluded that I&E’s Complaint should be dismissed with prejudice.

Also on September 30, 2014, Respond filed Preliminary Objections in response to I&E’s Complaint. In its Preliminary Objections, which was accompanied by a Notice to Plead, Respond seeks the dismissal of approximately 500 counts of the 639 count Complaint on the basis of several grounds. Respond argued, as discussed below, that the Commission lacks jurisdiction to enforce provisions of the UTP/CPL and lacks the statutory authority to regulate the prices of electric generation suppliers (EGSs). Respond further argued that the Commission previously approved its Disclosure Statement and that I&E failed to state allegations that would result in the finding of a violation of Commission regulations. Respond also seeks the dismissal of the request for relief that seeks the issuance of refunds.

On October 17, 2014, I&E filed an Answer to Respond’s Preliminary Objections. In its Answer, I&E argued that Respond’s Preliminary Objections should be dismissed because, among other things, the Commission does not lack jurisdiction to enforce its own regulations, some of which require a determination of whether the Pennsylvania UTP/CPL has been violated. I&E further argued that it is authorized to file a formal complaint with the Commission alleging a violation of a statute that the Commission has jurisdiction to administer. I&E further admitted or denied the various averments made by Respond in its Preliminary Objections and concluded that Respond’s Preliminary Objections should be dismissed and the I&E Complaint sustained.

The OCA also filed an Answer to Respond’s Preliminary Objection on October 17, 2014. In its Answer, the OCA argued that the Commission must make determinations regarding violations of the UTP/CPL in order to determine whether its regulations incorporating the law have been violated. The OCA added that the Commission has previously recognized its authority to broadly consider overlapping statutes and, as such, Respond’s argument that the Commission lacks jurisdiction to hear various counts in I&E’s Complaint raising violations of the UTP/CPL should be dismissed. The OCA also argued that the Commission possesses jurisdiction to determine if Respond’s use of its Disclosure Statement violates Commission regulations and that the Commission possesses jurisdiction to order refunds. The OCA concluded that Respond’s Preliminary Objections should be overruled.

On October 23, 2014, I&E filed a Petition to Consolidate the Formal Complaints against Respond Power, LLC seeking consolidation of the Complaint filed by the OCA and OAG with the Complaint filed by I&E. No opposition was filed in response to I&E’s Petition. As a result, on October 28, 2014, I&E’s Petition was granted.

As a final preliminary matter, it is noted that several Petitions for Interlocutory Review have been filed by the OCA, OAG and other EGSs in this and other similar cases regarding many of the issues that are present in Respond’s Preliminary Objections addressed in this Order. On November 13, 2014, Vice Chairman Coleman issued a Motion addressing a Petition for Interlocutory Review filed in Commonwealth of Pa, *et al.* v. Blue Pilot Energy, Docket No. C-2014-2427655 (Blue Pilot Motion). In the Blue Pilot Motion, Vice Chairman Coleman discussed issues that were also raised by Respond in the instant Preliminary Objections, as discussed further below. The Blue Pilot Motion was approved by a 5-0 vote. No Order has yet been issued in response to Blue Pilot Motion. Neither has the Commission has acted on other Petitions that remain outstanding and that may affect issues raised in Respond’s Preliminary Objections. Nonetheless, Preliminary Objections are required to be disposed of within thirty (30) days of assignment to the Presiding Officer so this Order is being issued at this time. To the extent the Commission issues an Order contradicting determinations made in this Order, those matters can be addressed at a future point.

Respond’s Preliminary Objections are ready for disposition. For the reasons discussed below, Respond’s Preliminary Objections will be granted in part and denied in part.

**Legal Standard**

Section 5.101 of the Commission’s Rules of Administrative Practice and Procedure provides for the filing of Preliminary Objections. 52 Pa.Code § 5.101. Commission Preliminary Objection practice is comparable to Pennsylvania civil practice respecting the filing of Preliminary Objections. Equitable Small Transportation Intervenors v. Equitable Gas Company*,* 1994 Pa PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994) (Equitable). Section 5.101(a) provides:

(a) *Grounds.* Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections. Preliminary objections must be accompanied by a notice to plead, must state specifically the legal and factual grounds relied upon and be 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 a proceeding.

52 Pa.Code § 5.101(a)(1)-(7).

For purposes of disposing of Preliminary Objections, the Commission must accept as true all well pleaded, material facts of the nonmoving party, as well as every reasonable inference from those facts. County of Allegheny v. Commonwealth of Pennsylvania, 490 A.2d 402 (Pa. 1985); Commonwealth of Pennsylvania v. Bell Telephone Co. of Pa., 551 A.2d 602 (Pa. Cmwlth. 1988). The Commission must view the Complaint in this case in the light most favorable to I&E and should dismiss the Complaint only if it appears that I&E would not be entitled to relief under any circumstances as a matter of law. Equitable, *supra*; *see also*, Interstate Traveler Services, Inc. v. Commonwealth, Department of Environmental Resources, 406 A.2d 1020 (Pa. 1979).

In its Preliminary Objections, Respond seeks dismissal with prejudice of approximately 500 of the 639 counts included in I&E’s Complaint based on lack of jurisdiction or legal insufficiency of pleading. Respond’s Preliminary Objections are organized into six arguments correlating to the individual paragraphs contained in the I&E Complaint. Each of these arguments will be addressed in turn below.

**Paragraphs 30 and 37 (Counts 7-15) – The Commission Lacks Jurisdiction To Determine Whether Respond Violated The Unfair Trade Practices/Consumer Protection Law But Has Jurisdiction To Determine Whether Respond Violated The Commission’s Own Consumer Protection Regulations.**

In its Preliminary Objection, Respond argued that paragraphs 30 and 37 of I&E’s Complaint, comprising Counts 7-15, should be dismissed to the extent they allege violations of the UTP/CPL and Section 54.43(f) of the Commission’s regulations. Respond cites several decisions for the proposition that “it is well-settled that the Commission does not have jurisdiction to enforce the provisions of the Consumer Protection Law.” With regard to Section 54.43(f), Respond argued that this provision does not set forth a standard to which EGSs must adhere but rather establishes that if the licensee’s employees, agents or representatives engage in unlawful marketing or billing acts, those actions are the responsibility of the EGS. Respond does not dispute that responsibility but argued that this is a violation of Section 111.8 of the Commission’s regulations, not Section 54.43(f). Therefore, Respond argues that Counts 7-15 should be dismissed due to legal insufficiency.

In response to Respond’s Preliminary Objections, I&E argued, among other things, that Respond’s argument confuses the concept of enforcing the UTP/CPL with the concept of finding a violation of the UTP/CPL as a precursor to finding a violation of the Commission’s regulations. I&E further argued that, if the UTP/CPL is found to be violated, so too is the Commission regulation citing to the UTP/CPL which the Commission does have the authority to enforce.

Similarly, the OCA argued that the Commission must make determinations regarding violations of the UTP/CPL in order to determine whether its regulations incorporating the law have been violated. The OCA added that I&E is seeking for the Commission to apply its own regulations requiring compliance with the UTP/CPL which is fully within the Commission’s jurisdiction. The OCA argued that the Commission must apply the UTP/CPL “harmoniously where appropriate.” The OCA further distinguished the cases Respond relied upon when making its Preliminary Objection and cites to various Commission decisions where it has considered and reached conclusions regarding overlapping statutes.

The Commission’s jurisdiction over the UTP/CPL was addressed in Preliminary Objections Respond filed against the OCA/OAG Complaint. In response to those Preliminary Objections, we held that the Commission lacks jurisdiction to determine whether Respond violated the UTP/CPL but has jurisdiction to determine whether Respond violated Commission consumer protection regulations. As noted above, the OCA and OAG filed a Petition for Interlocutory Review with the Commission on this issue in a similar proceeding involving Blue Pilot Energy, LLC. *See*, Blue Pilot Motion, *supra*. A similar Petition for Interlocutory Review filed on these issues in this case against the OCA/OAG Complaint remains outstanding.

In the Blue Pilot Motion, Vice Chairman Coleman answered in the negative the OCA/OAG material question regarding whether the Commission has authority and jurisdiction to determine whether a violation of UTP/CPL has occurred, relying on the reasons provided in the underlying Order. Vice Chairman Coleman further stated agreement with the Order’s conclusion that the Commission has jurisdiction over alleged violations of its own regulations that prohibit deceptive or misleading conduct. Although no Opinion and Order has yet been entered by the Commission in response to the Blue Pilot Motion, the same disposition of the issue will be applied here.

To begin, with regard to issues pertaining to enforcement of the UTP/CPL, it is well settled that the Commission may not exceed its jurisdiction and must act within it. City of Pittsburgh v. Pa. Pub. Util. Comm’n., 43 A.2d 348 (Pa. Super 1945) (Pittsburgh). Jurisdiction may not be conferred by the parties where none exists. Roberts v. Martorano, 235 A.2d 602 (Pa. 1967) (Roberts). Subject matter jurisdiction is a prerequisite to the exercise of the power to decide a controversy. Hughes v. Pa. State Police, 619 A.2d 390 (Pa. Cmwlth 1992) (Hughes). As a creation of the legislature, the Commission possesses only the authority that the state legislature has specifically granted to it in the Public Utility Code. 66 Pa.C.S. §§ 101, *et seq*. Its jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. Feingold v. Bell, 383 A.2d 791 (Pa. 1977) (Feingold).

We noted when addressing Respond’s Preliminary Objections in response to the OCA/OAG Complaint that the Commission has stated that it does not have jurisdiction to enforce the UTP/CPL. *See*, Mid-Atlantic Power Supply Assoc. v. PECO Energy Co., Docket No. P-00981615, 1999 Pa PUC LEXIS 30 (entered May 19, 1999) (MAPSA); *see also*, David P. Torakeo v. Pennsylvania American Water Co., Docket No. C-2013-2359123, Opinion and Order (entered April 3, 2014) (“to the extent that the Complainant is challenging the ALJ’s finding regarding our jurisdiction over the allegations that PAWC’s actions violated the UTPCPL, this Exception is also denied. As the ALJ determined, it is clear under Pennsylvania law that the Commission does not have jurisdiction over such claims.”).

In this case, I&E relies on the UTP/CPL as the basis for its position in Counts 7-15 that Respond, its employees, agents or representatives engaged in unfair, fraudulent, deceptive or otherwise unlawful marketing acts in that the Company’s employee’s, agents or representatives through its door-to-door sales people misrepresented to three customers an affiliation with a local EDC or a government program. The Complaint also references various Commission regulations that prohibit EGSs from engaging in fraudulent deceptive or other unlawful marketing. *See* *e.g.*, 52 Pa.Code §§ 54.43(f), 111.8, 111.9 and 111.12(d)(1). These regulations, however, do not equate to providing the Commission with jurisdiction to hear claims brought pursuant to UTP/CPL. The Commission, however, does have jurisdiction to determine whether its own regulations prohibiting deceptive or misleading conduct have been violated. The Commission can therefore hear claims regarding misleading and deceptive practices under Title 52 but not under UTP/CPL.

I&E argued in its Answer to Respond’s Preliminary Objection that the Commission is within its jurisdiction to hear Counts 7-15 because “Respond confuses the concept of ‘enforcing the provisions of Consumer Protection Law’ with the concept of finding a violation of the Consumer Protection Law as a precursor (and subsequently enforcing) Commission regulations.” I&E argued that “this concept is not a novel one,” as the Commission Court addressed this exact situation in Harrisburg Taxicab & Baggage Co. v. Pa. Pub. Util. Comm’n., 786 A.2d 288, 292-93 (Pa. Commw. 2001) (Harrisburg Taxi). Similarly, in its Answer to Respond’s Preliminary Objection, the OCA argued that Harrisburg Taxi allows the Commission to incorporate another agency’s regulations. That argument was previously rejected and will be rejected again here.

In Harrisburg Taxi, the Commonwealth Court determined that the Commission had authority to enforce provisions of the Pennsylvania Vehicle Code pursuant its authority under Section 1501 of the Public Utility Code that requires the Commission to ensure the safety of utility facilities, such as a taxicab. Id. at 293. The Court saw such overlapping jurisdiction as “exactly the type of sensible cooperation and mutual adjustment between the agencies.” Id. In this case, however, I&E relies on the Commission’s own regulations – not statutory authority – in support of its position that the Commission has jurisdiction to hear cases regarding the UTP/CPL. Reliance on its own regulations is not comparable to the Commission’s express authority to regulate the safety of taxicabs explicitly granted by the General Assembly in Section 1501.

In addition, in MAPSA, *supra*, the Commission found that the electric distribution company (EDC) created confusion regarding customer choice through its advertising campaign but noted that Section 2811 limits the Commission’s remedial authority in this area. In particular, Section 2811(d) requires the Commission to refer findings of anticompetitive or discriminatory conduct to the Attorney General. 66 Pa.C.S. § 2811(d)(1). The Commission noted that “there is an administrative agency having more extensive expertise in this area to which this matter is deferred.”

As noted above, the Commission is a creation of the legislature and possesses only the authority that the state legislature has specifically granted to it and its jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. Feingold. Neither such express or strong and necessary implication is present here. In contrast, for example, authority conferred by the General Assembly through Section 1501 of the Public Utility Code to regulate taxicab facilities, as was the case in Harrisburg Taxi, does create overlapping jurisdiction. *Cf.*, MAPSA (noting that the Attorney General has more extensive expertise in this area) and Harrisburg Taxi (noting that two agencies possess overlapping authority). Overlapping jurisdiction is not present here where, for example, the remedies for findings of deceptive trade practices vary. C. Leslie Pettko, *et al*. v. Pennsylvania American Water Co., 39 A.3d 473, 484 (Pa. Cmwlth 2012) (the Commission does not have the authority to award civil penalties up to $5,000, as is allowed under the UTP/CPL); *see also*, 73 Pa.C.S. § 201-8. Respond’s Preliminary Objection will therefore be granted in part.

Having determined that the Commission does not have jurisdiction to hear cases brought under the UTP/CPL, however, does not equate to allowing utilities to engage in misleading or deceptive conduct. Utilities must still comply with the Commission’s regulations which prohibit such activities. Similarly, any issues regarding a utility’s compliance with the UTP/CPL must be brought in a forum that has jurisdiction to hear such claims. In Counts 7-15, I&E averred violations of various provisions of the Commission’s regulations. The Commission does have jurisdiction to hear claims that its own regulations have been violated. This portion of Respond’s Preliminary Objection will be denied in part.

Also similar to Respond’s Preliminary Objections in response to the OCA/OAG Complaint, Respond’s claim that Counts 7-15 are legally insufficient will also be denied. In civil practice, a Preliminary Objection based on legal insufficiency is referred to as a demurrer. Preliminary Objections in the form of a demurrer will be sustained only in cases which are free and clear of doubt and where dismissal is clearly warranted by the record. Community Life Support Systems, Inc., *et al*. v. Commonwealth of Pennsylvania, 689 A.2d 1014, 1017 (Pa. Cmwlth. 1997) (Community Life). Any doubt must be resolved in favor of overruling a demurrer. Id.; *see also*, Hoffman v. Misericordia Hospital of Philadelphia, 439 Pa. 501, 267 A.2d 867 (1970) (Hoffman) (“the question presented by the demurrer is whether on the facts averred, the law states with certainty that no recovery is possible”).

In Counts 7-15, I&E averred, among other things, that Respond’s employees, agents or representatives through its door-to-door sales people misrepresented to three customers an affiliation with a local EDC or a government program. I&E argued in Counts 7-15 that these actions violate various Commission regulations, including Section 111.12, which requires suppliers to provide accurate and timely information to customers about their products and services. *See*, 52 Pa.Code § 111.12.

When accepting as true I&E’s averment that Respond’s employees, agents or representatives through its door-to-door sales people misrepresented to three customers an affiliation with a local EDC or a government program, it does not appear that I&E would not be entitled to relief under any circumstances as a matter of law. I&E has averred claims upon which relief can be granted regarding whether Respond violated Commission regulations because it was averred, for example, that information was misrepresented to some customers. When accepting this averment as true, it is not free and clear of doubt that dismissal is clearly warranted by the record.

As such, Respond’s Preliminary Objection regarding Counts 7-15 of the

Complaint will be granted in part and denied in part. The Preliminary Objection will be granted to the extent the Complaint seeks Commission jurisdiction over the UTP/CPL but will be denied with regard to the Commission’s jurisdiction over its own consumer protection regulations and with regard to Respond’s argument regarding the legal insufficiency of the Complaint.

**Paragraphs 31 and 38 (Counts 16-62) – The Commission Lacks Jurisdiction To Determine Whether Respond Violated The Unfair Trade Practices/Consumer Protection Law But Has Jurisdiction To Determine Whether Respond Violated The Commission’s Own Consumer Protection Regulations.**

In its Preliminary Objection, Respond argued that paragraphs 31 and 38 of the Complaint should be dismissed in their entirety because they are based wholly on alleged violations of the UTP/CPL. Respond further argued that, if these allegations also implicate provisions in the Commission’s regulations, they should have been referenced and that, absent such reference to a law which the Commission has jurisdiction to administer and enforce, Respond should not be required to litigate factual averments in these counts. Respond referenced its prior argument regarding the Commission’s lack of jurisdiction to enforce provisions of the UTP/CPL noted in its Preliminary Objection regarding Counts 7-15.

In response to Respond’s Preliminary Objection, I&E also referenced, and incorporated in full, its response to Respond’s Preliminary Objection regarding Counts 7-15, noting that Respond “confuses the concept of ‘enforcing the provisions of the Consumer Protection Law’ with the concept of finding a violation of the Consumer Protection Law as a precursor to finding (and subsequently enforcing) Commission regulations.” I&E reiterated that the Commission is enforcing its own regulations, not enforcing the UTP/CPL.

Similarly, the OCA’s Answer to Respond’s Preliminary Objection discussed the issues involving the UTP/CPL with regard to Counts 7-15, 16-62 and 524-568 and, therefore, its arguments are incorporated herein as well.

As a result, because the same arguments and same responses with regard to Counts 7-15 were reiterated with regard to Counts 16-62, so too will the same result be incorporated herein. Therefore, the Preliminary Objection will be granted to the extent the Complaint seeks Commission jurisdiction over the UTP/CPL but will be denied with regard to the Commission’s jurisdiction over its own consumer protection regulations. Counts 16-62 are not being dismissed in their entirety to the extent Section 54.43(f) and 111.12(d)(1) incorporate provisions over which the Commission does have jurisdiction. *See e.g.*, 52 Pa.Code § 111.12(d)(1) (“a supplier may not engage in misleading or deceptive conduct as defined by State or Federal law, ***or by Commission rule, regulation or order***.”) (emphasis added). The Commission clearly has jurisdiction over allegations of violations of those sections and I&E will be allowed to proceed to a hearing on those allegations.

As such, Respond’s Preliminary Objection regarding Counts 16-62 of the Complaint will also be granted in part and denied in part. The Preliminary Objection will be granted to the extent the Complaint seeks Commission jurisdiction over the UTP/CPL but will be denied with regard to the Commission’s jurisdiction over its own consumer protection regulations.

**Paragraphs 32 and 39 (Counts 63-492) – The Commission Has Jurisdiction To Determine Whether Prices Charged By An EGS Reflect Marketed Prices And Prices Agreed Upon In The Disclosure Statement, As Well As Comply With Other Commission Regulations.**

In its Complaint, I&E averred that Respond failed to disclose material pricing terms in its Disclosure Statement and that its prices did not conform to the Disclosure Statement. In its Preliminary Objection, Respond argued that I&E’s argument should be dismissed because the Commission does not have jurisdiction to regulate EGS prices and therefore cannot establish the price that Respond “should have” charged under its variable rate plans. Respond also argued that I&E’s argument is legally insufficient because the Commission previously approved Respond’s Disclosure Statement and therefore I&E failed to state a claim upon which relief can be granted. Respond argues that the Commission does not have jurisdiction to regulate EGS prices.

In response, I&E argued that its Complaint does not seek to regulate Respond’s prices but determine whether Respond billed in accordance with its marketed prices, promises of savings by sales representatives and agreed upon prices in the Disclosure Statement. I&E further denied that the Commission approved Respond’s Disclosure Statement but that it was only reviewed for regulatory compliance by BCS, noting that “the gist of the relevant portions of the Formal Complaint is that the information in the Disclosure Statement is not consistent with what the customers were told at the time of signing up.” I&E also denied that it is attempting to regulate Respond’s prices but that it takes issue with Respond’s claims of guaranteed savings and not delivering on that promise.

In its Answer to Respond’s Preliminary Objection, the OCA argued that the Commission possesses jurisdiction to determine if Respond’s use of its Disclosure Statement violates Commission regulations. The OCA further argued that I&E’s Complaint “clearly alleges violations of the Commission’s regulations related to Respond’s misuse of its Disclosure Statement,” noting that I&E seeks to enforce Commission regulations regarding EGS marketing and billing practices, not rates. The OCA also refuted Respond’s argument that the Commission previously approved its Disclosure Statement.

With regard to Respond’s first argument that the Commission does not have authority to regulate EGSs prices, this argument will be rejected because I&E’s Complaint does not seek to regulate the prices charged by Respond. I&E stated in its Complaint that Respond’s employees, agents or representatives engaged in unfair, fraudulent or deceptive marketing acts to eighty-six (86) customers by failing to disclose material terms and conditions of service. I&E noted that “these acts include, failing to specify whether the customer is signing up for a fixed or variable rate, including vague conditions of variability in its Disclosure Statement, and having no limit on price variability in its Disclosure Statement.” While Respond argued that “the allegations set forth in Paragraph 32 of the Complaint appear to be focused on a lack of disclosure of material terms and conditions, the title of the count suggests a review of pricing,” we disagree. The averments pertain to the relation of Respond’s rates charged to its Disclosure Statement and promises of savings, as I&E noted.

This is particularly true when reading paragraph 32 of I&E’s Complaint in conjunction with paragraph 39 which avers the various Commission regulations I&E contends Respond violated. This includes Section 54.4(a), for example, which requires EGS prices to reflect the marketed prices and the agreed upon prices in the Disclosure Statement. 52 Pa.Code § 54.4(a). This Section does not require EGSs to charge a particular rate, nor does the I&E Complaint seek to require Respond to charge a particular rate. This Section requires EGSs to charge customers the prices they agreed to charge them when the customer agreed to take service with the EGS. Respond could have charged whatever price it determined to charge, so long as the price charged reflected the price that was marketed and agreed to in the Disclosure Statement. There is no attempt to limit the prices charged by Respond, as Respond argues in its Preliminary Objection.

As noted above, in civil practice, a Preliminary Objection based on legal insufficiency is referred to as a demurrer. Preliminary Objections in the form of a demurrer will be sustained only in cases which are free and clear of doubt and where dismissal is clearly warranted by the record. Community Life. Any doubt must be resolved in favor of overruling a demurrer. Id.; *see also*, Hoffman. I&E should be given the opportunity to proceed to a hearing to determine whether Respond violated Section 54.4(a) by charging customers prices that do not reflect the prices they marketed to customers or the agreed upon price in the Disclosure Statement. *See also*, 52 Pa.Code §§ 54.5(c)(2), 54.7(a), 111.12(d)(4). These are factual determinations that should not be dismissed on a preliminary basis. This portion of Respond’s Preliminary Objection must, therefore, be denied.

With regard to Respond’s second argument that I&E’s averment is legally insufficient because its Disclosure Statement was previously approved by BCS, this argument will also be rejected. I&E and the OCA are correct that the BCS review of Respond’s Disclosure Statement does not mean there can be no complaint ever brought regarding whether Respond charged rates that were consistent with marketed prices or the prices agreed upon in the Disclosure Statement. As I&E noted, “it is not the review of Disclosure Statement that is at issue in this case, it is the accuracy of such statement as it compares to the marketed prices and guarantees of real savings over the price to compare.” Similarly, the OCA noted “it is not appropriate for Respond to use BCS’s process for reviewing Disclosure Statements as a cloak to protect the Company from its alleged improper use of its Disclosure Statement when it charged customers prices that did not conform to the Disclosure Statement or the prices marketed or agreed to by the customers.” We agree, particularly because these are also factual determinations that should not be dismissed on a preliminary basis but should be heard in a hearing. As a result, this portion of Respond’s Preliminary Objection must, therefore, also be denied.

Finally, it is noted that the Blue Pilot Motion, *supra*, addressed this issue as well. In doing so, Vice Chairman Coleman answered in the affirmative whether the Commission has the authority and jurisdiction to determine whether the prices charged to customers by an EGS conform to the EGS disclosure statement regarding pricing. Although, again, no Order has yet been entered in response to the Blue Pilot Motion, the same reasoning applies here.

As such, Respond’s Preliminary Objection regarding Counts 63-492 of I&E’s Complaint will be denied.

**Paragraphs 33 and 40 (Counts 492-524) – I&E Has Stated A Claim Upon Which Relief Can Be Granted Regarding Section 56.141 Of The Commission’s Regulations.**

In its Complaint, I&E argued that Respond, its employees, agents or representatives did not utilize good faith, honesty and fair dealing with eleven residential customers because it failed to adequately staff its call centers and perform other customer relations activities. In its Preliminary Objection, Respond argued that Counts 492-524 should be dismissed because they are legally insufficient to the extent they allege violations of Section 56.141 of the Public Utility Code. Respond argued that while it “recognizes that Code Section 2809 requires the Commission to ensure that the Chapter 56 billing standards and practices for residential utility service are maintained, nothing in Chapter 56 purports to apply to the prices that are charged to consumers by EGS.” Respond further argued that those allegations are legally insufficient because they fail to state a claim upon which relief may be granted.

In response to Respond’s Preliminary Objection, I&E argued that neither paragraphs 33 nor 40 purport that anything in Chapter 56 of the Commission’s regulations applies to prices that are charged to consumers. I&E argued that “rather, these paragraphs allege that Respond inadequately handled and resolved customer disputes and inadequately staffed call centers to handle customer complaints in a timely fashion,” noting that many consumers complained about being on hold in excess of an hour, being disconnected or receiving an automated message that the call center was closed.

The OCA did not discuss this issue in its Answer.

Similar to the disposition of Respond’s Preliminary Objection regarding Counts 63-492, *supra*, where Respond argued that I&E’s Counts regarding the Disclosure Statement should be dismissed because the Commission does not have jurisdiction to determine the price Respond “should have” charged a customer, here too Respond misreads the I&E Complaint to aver something it does not. Respond argued that Counts 492-524 of I&E’s Complaint should be dismissed because “nothing in Chapter 56 purports to apply to the prices that are charged to consumers by EGSs.” Yet, I&E’s Complaint does not seek to regulate the prices charged by Respond. In fact, neither paragraph 33 nor paragraph 40 of I&E’s Complaint use the words “price” or “rates” or anything that would imply that I&E seeks to determine the prices that are charged to consumers by EGSs, as Respond averred in its Preliminary Objection. Furthermore, nor does Section 56.141 of the Commission’s regulations use the words “price” or “rates.”

Instead, Section 56.141 provides:

1. *Attempted resolution.* If, at any time prior to the actual termination of service, a customer advises the public utility that the customer disputes any matter covered by this chapter, including, but not limited to, credit determinations, deposit requirements, the accuracy of public utility metering or billing or the proper party to be charged, the public utility shall attempt to resolve the dispute in accordance with § 56.151 (relating to general rule).

52 Pa.Code § 56.151. In its Complaint, I&E avers that Respond “did not utilize good faith, honesty and fair dealing with 11 residential customers by failing to adequately staff its call centers, provide reasonable access to company representatives for the purposes of submitting complaints, failing to properly investigate customer disputes, failing to timely cancel accounts, and failing to notify customers of the results of the company’s investigation into a dispute.” I&E added that some customers complained of being on hold for long periods of time, many exceeding an hour, being suddenly disconnected and/or receiving messages that the call center was not open. These are appropriate averments to raise when pursuing a violation of Section 56.141 of the Public Utility Code. None of these averments raise issues regarding prices that are charged to consumers by EGSs, as Respond argues.

As a result, Respond’s Preliminary Objection regarding Counts 492-524 is without merit and will be rejected.

**Paragraphs 34 and 41 (Counts 524-568) – The Commission Lacks Jurisdiction To Determine Whether Respond Violated The Unfair Trade Practices/Consumer Protection Law But Has Jurisdiction To Determine Whether Respond Violated The Commission’s Own Consumer Protection Regulations**

In its Complaint, I&E argued that Respond’s employees, agents or representatives engaged in unfair, fraudulent or deceptive marketing acts to nine customers by not disclosing to the customer whether the rate was fixed or variable, including some instances where neither “fixed” nor “variable” are checked on the sales agreement. I&E argued that such actions violate various provisions of the Commission’s regulations as well as the UTP/CPL. In its Preliminary Objection, Respond argued, as it has in other Counts regarding the UTP/CPL, that these Counts should be dismissed because the Commission lacks jurisdiction to enforce provisions of the UTP/CPL.

In response to Respond’s Preliminary Objection, I&E again referenced and fully incorporated therein, its arguments in response to Respond’s Preliminary Objection regarding Counts 7-15. I&E argued that “the Commission has the authority to examine Respond’s actions to determine whether it violated Pennsylvania consumer protection law, before enforcing its own regulations referencing compliance with such law.” I&E argued that Respond’s Preliminary Objection should again be denied.

As with its Answer to Respond’s Preliminary Objection regarding Counts 16-62, *supra*, the OCA’s Answer to Respond’s Preliminary Objection discussed the issues involving the UTP/CPL with regard to Counts 7-15, 16-62 and 524-568 and, therefore, its arguments are incorporated herein as well.

As a result, because the same arguments and same responses with regard to Counts 7-15 and 16-62 were again reiterated with regard to Counts 524-568, so too will the same result again be incorporated herein. Therefore, the Preliminary Objection will be granted to the extent the Complaint seeks Commission jurisdiction over the UTP/CPL but will be denied with regard to the Commission’s jurisdiction over its own consumer protection regulations. Counts 524-568 are again not being dismissed in their entirety to the extent Section 54.43(f) and 111.12(d)(1) incorporate provisions over which the Commission does have jurisdiction. *See e.g.*, 52 Pa.Code § 111.12(d)(1) (“a supplier may not engage in misleading or deceptive conduct as defined by State or Federal law, ***or by Commission rule, regulation or order***.”) (emphasis added). The Commission clearly has jurisdiction over allegations of violations of those sections and I&E will be allowed to proceed to a hearing on those allegations.

As such, Respond’s Preliminary Objection regarding Counts 524-568 of the Complaint will also be granted in part and denied in part. The Preliminary Objection will be granted to the extent the Complaint seeks Commission jurisdiction over the UTP/CPL but will be denied with regard to the Commission’s jurisdiction over its own consumer protection regulations.

**Paragraph 45 – The Commission Has The Authority To Direct Respond To Issue Refunds In Appropriate Circumstances**

In its Complaint, I&E’s requested relief included that Respond provide a refund to each of the affected customer accounts to which a refund has not already been provided, consisting of the difference between the amount each customer was billed and the customer’s respective price to compare charged by their local EDC. In its Preliminary Objection, Respond argued that this proposal should be dismissed for lack of jurisdiction since the Commission does not have statutory authority to direct the issuance of refunds by EGSs. Respond further argued that Sections 1301 and 1312, regarding rates and refunds, respectively, apply only to “public utilities” and that these provisions are not applicable because EGSs are not public utilities for purposes of pricing. Respond cited to a recent decision of an Administrative Law Judge in support of its position.

In response, I&E argued that the Commission has the authority to order EGSs to issue customer refunds when it engages in fraudulent, misleading, deceptive “and/or outright illegal behavior.” I&E further argued that this authority is not tied to the regulation of EGS prices but to any deceptive and misleading sales tactics of the EGS. I&E specifically cites to Section 54.4(a) of the Commission’s regulations, among other Commission regulations and provisions of the Public Utility Code, in support of its position that it is entirely legal to order an EGS to provide customer refunds and distinguished the decision of the Administrative Law Judge relied upon by Respond in its Preliminary Objection.

In its Answer to Respond’s Preliminary Objection, the OCA argued that Respond’s Preliminary Objection lacks merit because the Commission has ordered equitable remedies, including refunds, in numerous cases. The OCA concludes that it is not clear and free from doubt that the Commission lacks authority to direct refunds in this matter and Respond’s Preliminary Objection should be overruled.

To begin, as noted above, in civil practice, a Preliminary Objection based on legal insufficiency is referred to as a demurrer. Preliminary Objections in the form of a demurrer will be sustained only in cases which are free and clear of doubt and where dismissal is clearly warranted by the record. Community Life. Any doubt must be resolved in favor of overruling a demurrer. Id.; *see also*, Hoffman.

Similar to the Blue Pilot Motion, *supra*, Vice Chairman Coleman also issued a Motion in Joseph Nadav v. Respond Power LLC, Docket Number C-2014-2429159 (Nadav Motion) on November 13, 2014. In the Nadav Motion, Vice Chairman Coleman stated, among other things, that “while I agree that the Commission lacks the authority to regulate EGS rates, it is well settled that EGSs may be required to provide refunds to retail customers in appropriate circumstances.” Such circumstances include the unauthorized switching of customers, similar to what I&E averred in the instant Complaint.

Furthermore, Respond’s Preliminary Objection will be denied because Section 1312 of the Public Utility Code allows the Commission authority to direct refunds. Section 1312 provides, in pertinent part:

1. **General Rule.—**If, in any proceeding involving rates, the commission shall determine that any rate received by a public utility was unjust or unreasonable, or was in violation of any regulation or order of the commission, or was in excess of the applicable rate contained in an existing and effective tariff of such public utility, the commission shall have the power and authority to make an order requiring the public utility to refund the amount of any excess paid by any patron, in consequence of such unlawful collection, within four years prior to the date of the filing of the complaint, together with interest at the legal rate from the date of each such excessive payment.

66 Pa.C.S. § 1312(a). Section 1312 gives the Commission jurisdiction to order Respond to issue refunds. To hold otherwise would be contrary to the public interest. To the extent that the Commission would not be allowed to direct EGSs like Respond to issue refunds to its customers under Section 1312 when, after notice and an opportunity to be heard, refunds are deemed appropriate, it would likewise lose its ability to regulate EGSs for other purposes essential to the public interest, such as issuing civil penalties. *See*, 66 Pa.C.S. § 3301.

Holding that the Commission cannot order refunds to be issued in this case creates an unreasonable result. This is particularly true at this preliminary stage of the proceeding when accepting as true all well pleaded materials facts averred in the Complaint, as well as every reasonable inference from those facts, and viewing the Complaint in the light most favorable to I&E as is required when disposing of Respond’s Preliminary Objection. When doing so, it is not clear and free from doubt that dismissal of this requested relief is warranted by the current record. I&E indicated in the Complaint that the relief sought included refunding to each of the affected customer accounts to which a refund has not already been provided, consisting of the difference between the amount each customer was billed and the customer’s respective price to compare charged by their local EDC. In making this argument, I&E is not attempting to regulate Respond’s prices charged but simply to obtain refunds if refunds are found to be appropriate. I&E should be given the opportunity to be heard in an administrative hearing regarding this request and not have this request be dismissed on a preliminary basis.

As such, Respond’s Preliminary Objection that I&E’s requested relief of refunds should be stricken because the Commission lacks jurisdiction to order refunds will be denied. The Commission has authority to direct Respond to issue refunds pursuant to the Public Utility Code, if appropriate.

**Conclusion**

In conclusion, the standard for granting a Preliminary Objection is high. All well pleaded material facts, as well as every reasonable inference from those facts, must be accepted as true and the Complaint must be viewed in the light most favorable to I&E. Even then, the Complaint will only be dismissed if it appears that I&E would not be entitled to relief under any circumstances as a matter of law. Respond has failed to satisfy this high standard with regard to its claims that certain Counts in the Complaint are insufficiently plead or with regard to claims that the Commission does not have the authority to order an EGS to issue refunds. Respond has satisfied this high standard, however, with regard to claims that the Commission has no jurisdiction to hear claims regarding the UTP/CPL. Nonetheless, however, the Commission can hear claims regarding its own consumer protection regulations. Those Preliminary Objections brought by Respond will, therefore, be granted in part and denied in part.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Preliminary Objections filed by Respond Power LLC against the Pennsylvania Public Utility Commission Bureau of Investigation and Enforcement at Docket Number C-2014-2438640 dated September 30, 2014 are hereby granted in part and denied in part.
2. That those Counts in the Complaint filed by the Pennsylvania Public Utility Commission Bureau of Investigation and Enforcement regarding the Pennsylvania Unfair Trade Practices/Consumer Protection Law are hereby stricken.
3. That all other Counts raised in the Complaint filed by the Pennsylvania Public Utility Commission Bureau of Investigation and Enforcement shall proceed to a Hearing.

Date: November 17, 2014

Elizabeth Barnes

Administrative Law Judge

Joel H. Cheskis

Administrative Law Judge

**C-2014-2427659 - ATTORNEY GENERAL PA & OFFICE OF CONSUMER ADVOCATE v. RESPOND POWER LLC**

***REVISED 8/26/14***

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