**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

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|  |  Public Meeting held April 9, 2015 |
| Commissioners Present:Robert F. Powelson, ChairmanJohn F. Coleman, Jr., Vice ChairmanJames H. CawleyPamela A. WitmerGladys M. Brown |  |

Commonwealth of Pennsylvania, *et al.*

 v. C-2014-2427659

Respond Power LLC

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Joint Petition for Interlocutory Review and Answer to Material Questions (Joint Petition) filed by the Pennsylvania Office of Attorney General (OAG) and the Pennsylvania Office of Consumer Advocate (OCA) (together, Joint Complainants) on September 8, 2014. The OAG and OCA request interlocutory Commission review and answer to two (2) questions that arise from the August 20, 2014, Order of Administrative Law Judges (ALJs) Elizabeth Barnes and Joel H. Cheskis, which order granted in part, and denied in part, preliminary objections filed by Respond Energy LLC (Respond or Company) in this proceeding. *See*, *Order Granting in Part and Denying in Part Preliminary Objections* (August 20 Order).

This proceeding is a joint Formal Complaint (Complaint) wherein the OAG and OCA are joint complainants and Respond, which is an electric generation supplier (EGS) pursuant to the Pennsylvania Public Utility Code (Code), 66 Pa. C.S. § 2809, has been named respondent. The Complaint was filed June 20, 2014. On July 10, 2014, and August 1, 2014, the Office of Small Business Advocate (OSBA) and the Commission’s Bureau of Investigation and Enforcement (I&E), respectively, filed notices of intervention and have intervened in the proceeding.[[1]](#footnote-1)

In the Joint Petition, the OAG and OCA request interlocutory Commission review and answer to the following questions:

1. Does the Commission have authority and jurisdiction to determine whether a violation of the Unfair Trade Practices and Consumer Protection Law (CPL) and 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 regarding pricing?

Joint Petition at 1.

The OAG/OCA propose that the foregoing questions be considered and answered in the affirmative.

On September 18, 2014, Briefs in support of the Joint Petition and in opposition thereto were filed by the OAG/OCA, and Respond, respectively.

By Secretarial Letter of September 30, 2014, we waived the thirty (30) day period for consideration of petitions seeking interlocutory Commission review pursuant to 52 Pa. Code § 5.303. *See* 52 Pa. Code §§ 1.2(c); *also,* *C.S. Warthman Funeral Home, et al. v. GTE North, Inc.*, Docket No. C-00924416 (Order entered June 4, 1993).

On consideration of the Joint Petition, and for the reasons explained more fully below, we conclude that the questions raised are controlled by this Commission’s recent decision in the matter of *Commonwealth of Pa., et al. v. Blue Pilot Energy, LLC,* Docket No. C-2014-2427655 (Order entered December 11, 2014) (*Blue Pilot*); *see also,* *Commonwealth of Pa., et al. v. IDT Energy, Inc*., Docket No*.* C-2014-2427657 (Order entered December 18, 2014) (*IDT*).

Based on the foregoing, we shall grant the Joint Petition, consistent with the discussion contained in this Opinion and Order and the extent that the legal questions presented are the same as those questions which were considered and resolved in *Blue Pilot* and *IDT*. We only address the legal questions of the Commission’s authority and jurisdiction over EGSs in the context of the issues raised in the Joint Petition. Any questions of fact which may distinguish our disposition in the present case from *Blue Pilot* and *IDT* should not be inferred.

**Background**

Respond is an EGS licensed by the Commission to provide EGS service to residential, small commercial, and large commercial customers in the service territories of Allegheny Power, Duquesne Light Company, Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, PECO Energy Company, PPL Utilities Corporation, and UGI Utilities, Inc. *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 of August 19, 2010); Complaint at ¶ 6.

Beginning on or about February, 2014, the OAG and OCA began receiving a significant amount (in excess of 2,000) of consumer contacts regarding EGS suppliers. Based on the percentages of these contacts that were identified as customers of Respond, the OAG and OCA determined that formal proceedings were necessary.

On June 20, 2014, the OAG and OCA filed the instant Complaint. The OAG/OCA Complaint advances nine counts. The counts, as summarized, are:

Count I – Misleading and Deceptive Claims of Affiliation With Electric Distribution Companies. The OAG and OCA aver that Respond, through its employees, agents, and/or representatives, has engaged in and continues to engage in the following activities that are fraudulent and in violation of Commission Regulations: (1) salespeople failing to properly identify themselves as affiliated with Respond when engaging in door-to-door sales; (2) salespeople failing to clearly state that they are not affiliated with the local electric distribution company (EDC) when engaging in door-to-door sales solicitations; (3) salespeople deceiving consumers by claiming to be affiliated with the local EDC when engaging in door-to-door sales solicitations; and (4) salespeople deceiving consumers concerning an affiliation with the EDC in order to induce customers to switch to Respondent. *See* Complaint at ¶ ¶ 20-31.

The OAG and OCA preface the allegations of Count I of the Complaint by noting the following: On or about February, 2014, the OCA received approximately 3,000 contacts from consumers regarding the charges for variable rate product offerings from EGS companies. Complaint at ¶ 15. As of May, 2014, the OCA collected information from 2,434 consumer contacts, of which 189 (approximately 8%), were customers of Respond. Complaint at ¶ 17. Of the 189 consumer contacts, 162 were telephone contacts and 27 were written correspondence. Of the twenty-seven (27) customers who provided written correspondence to the OCA complaining of their variable rate service, four (4) customers (approximately 15%) stated that Respond’s salesperson, in the initial contact, represented that they were from the customer’s EDC and used this representation to induce the customer to switch service to Respond. Complaint at ¶ 21.

Similarly, during the period February 27, 2014 through June 4, 2014, the OAG received 7,503 consumer complaints regarding variable rate EGS service. Complaint at ¶ 18. Of the 7,503 consumer complaints, 520 (or 7%), involved Respond. *Id*. Of the 520 complaints, thirteen (13) stated that representatives of Respond claimed to be from the consumers’ EDC and used this representation as an inducement to persuade the consumer to switch service. Complaint at ¶ 22.

Further, of the twenty (20) consumer complaints filed with the Commission that were reviewed by the OCA, four of the complainants (20%) alleged that a representative from Respond, in door-to-door sales solicitations, used the misrepresentation that this person was from the customer’s EDC as an inducement to persuade the customer to switch service. Complaint at ¶ 23.

In Count II – Deceptive and Misleading Promises of Savings – the OAG and OCA aver that Respond, through its employees, agents, and/or representatives, has engaged in and continues to engage in activities that are fraudulent and in violation of Commission Regulations and consumer protection laws by promising savings to customers as an inducement for them to switch to its service, which savings that were promised may not, and for many customers, did not, materialize. *See* Complaint at ¶¶ 32-40.

Of the previously referenced 520 consumer complaints received by the OAG, sixty-four (approximately 12%), of the complainants reported that Respond salespersons stated that their rates would be “competitive” with their EDC’s rates, or would always be lower than or equal to their EDC’s rates, while fifty-seven (nearly 11%), reported that Respond salespeople promised guaranteed savings over their EDC’s rates – known as the “Price to Compare” (PTC),[[2]](#footnote-2) as inducement for them to switch. Complaint at ¶¶ 33-34.

Of the twenty-seven consumer contacts investigated by the OCA that provided written correspondence, five reported similar representations concerning Respond salespersons’ promises of guaranteed savings. Complaint at ¶ 35. And, in the cases of at least five of the twenty formal complainants who filed with the Commission, the customer reported promises of guaranteed savings by sales representatives of Respond, which promises induced them to switch. In all these instances, (the OAG and OCA consumer complaints/contacts), the complainants received bills that were two to three times higher than the PTC. *Id*.

In Count III – Failing to Disclose Material Terms, the OAG and OCA allege, respectively, that sixty-one complainants reported that they were not informed that they had signed up for a variable rate plan, sixteen of which provided sales agreements with their complaints which agreements failed to indicate whether the plan was for a fixed or variable rate. Also, in five of the formal complaints filed with the Commission, the consumers reported that they were not informed that they had signed up for a variable rate plan. Complaint at ¶ 43-44.

The OAG and OCA also aver, upon information and belief, that many of the consumers who initiated contacts with them believed they were on a fixed rate plan but were charged pursuant to a variable rate arrangement. Complaint at ¶ 45.

In Count IV – Deceptive and Misleading Welcome Letter and Inserts, the OAG and OCA attach a specimen Respond Welcome Letter and Insert as Appendix A to the Complaint. The OAG and OCA, citing to various provisions of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (CPL)[[3]](#footnote-3) and Telemarketer Registration Act (TRA)[[4]](#footnote-4), assert that Respond’s claims in these documents represent benefits of its services that Respond did not provide and sponsorship that Respond does not have. Complaint at ¶ 58. The Joint Complainants further allege that the claims in the documents attached as Appendix A are deceptive, create a likelihood of customer confusion and misunderstanding, and are disparaging of the offers of other EGS companies. Complaint at ¶¶ 59-60.

Count V of the Complaint alleges Respond engaged in the practice of “slamming,” *i.e.*, the switching of a customer’s electric generation supplier without the customer’s consent. 66 Pa. C.S. § 2807(d)(1); 52 Pa. Code § 54.42(a)(9); Complaint at ¶¶ 62-66.

Count VI – Lack of Good Faith Handling of Complaints. The OAG and OCA assert that of the consumer complaints received by their departments and filed with the Commission, it was reported that when consumers tried to contact Respond about the variable rate charges on their bill, they could not get through to a representative by telephone and their e-mails to Respond went unanswered. Complaint at ¶¶ 67-68; 70-71.

At Complaint ¶ 69, the OCA advises that four of twenty-seven customers who provided written correspondence reported that when they contacted Respond concerning high variable rate charges on their bill, the representative stated that a refund would only be provided if the customer entered into a one-year fixed price agreement with Respond. If the customer had already switched suppliers, the Respond representative refused to inquire further into the complaint.

Based on the foregoing, the Joint Complainants allege that Respond has violated pertinent Commission Regulations by failing to adequately staff its call center, failing to provide reasonable access to Company representatives for the purpose of submitting complaints, failing to properly investigate customer disputes, failing to properly notify customers of the results of the Company’s investigation of a dispute when such investigation was conducted, and failing to use good faith, honesty, and fair dealings with its customers. Complaint at ¶ 74.

Count VII – Failing to Provide Accurate Pricing Information. The OAG and OCA attach a copy of Respond’s Disclosure Statement as Appendix B to the Complaint. The Joint Complainants reprint an excerpt from the Disclosure Statement regarding “Electric Variable Rate.” The OAG and OCA allege that the terms of Respond’s Disclosure Statement fail to adequately state the conditions of variability and the limits on price variability, in violation of the Commission’s Regulations. *See* 52 Pa. Code § 54.59(c); Complaint at ¶ 78. It is also alleged that the terms in the Disclosure Statement violate Commission Regulations and orders by failing to provide pricing information in plain language and in terms that consumers understand. Complaint at
¶ 83.

Count VIII – Prices Not Conforming to Disclosure Statement. In this count, the OAG and OCA refer to the Affidavit of Dr. Steven L. Estomin, attached as Appendix C to the Complaint, to argue that the prices charged by Respond to its variable rate customers did not conform to the variable rate pricing provisions of its Disclosure Statement.

In Count IX – Failure to Comply With the Telemarketer Registration Act, the OAG and OCA allege that Respond, through its sales agents/representatives, violated the TRA, which, *inter alia*, requires a company to reduce any sales of goods or services made pursuant to a telemarketing call/solicitation, to a written contract with the customer’s signature on the contract. Complaint at ¶ 94. According to the Joint Complainants, the Commission’s Regulations at 52 Pa. Code §§ 54.43(f) and 111.12(d)(1), require EGS compliance with the TRA. Complaint at ¶ 98.

Based on the foregoing allegations, and for relief, the OAG and OCA request that the Commission direct the consolidation of all similar formal complaints against Respond with their Complaint, find that Respond has violated the TRA and Commission Regulations, revoke Respond’s EGS license, and impose a civil penalty upon the Company.

Also, for relief, the OAG and OCA request that the Commission direct the issuance of restitution to customers, including, without limitation, a refund of charges to customers which charges were over the PTC, and the imposition of mandatory injunctive relief in the nature of prohibitions against Respond and its representatives, agents and/or employees, from insinuating any association with an EDC, or making price “guarantees” or engaging in unauthorized switching. *See* Complaint at 21-22. The OAG and OCA additionally request a directive that Respond implement proper customer dispute procedures and discontinue all marketing activities that violate the TRA and Commission Regulations. *Id*.

**I&E Formal Complaint at Docket No. C-2014-2438640**

By way of further background, on August 21, 2014, I&E filed a formal complaint against Respond (I&E Complaint). The I&E Complaint contained 639 counts. *See Bureau of Investigation and Enforcement v. Respond Power LLC,* Docket No.
C-2014-2438640.

The I&E counts include, *inter alia*, allegations of: (1) slamming;
(2) misleading and deceptive claims of affiliation with electric distribution companies; (3) misleading and deceptive promises of savings; (4) failing to disclose material pricing terms in Respond’s Disclosure Agreement - prices not conforming to Disclosure Agreement; (5) failing to act in good faith in handling customer complaints/cancellations; (6) providing customers with inaccurate and/or incomplete/fraudulent sales agreements; and (7) billing customers incorrectly. *See* I&E Complaint.[[5]](#footnote-5)

The OAG and OCA filed notices of intervention in the I&E Complaint on September 2, 2014, and September 3, 2014, respectively. On September 30, 2014, Respond filed an Answer to I&E’s Complaint admitting or denying the various averments. Respond, *inter alia*, requested that the Commission dismiss the I&E Complaint.

On October 23, 2014, I&E filed a Motion to Consolidate the I&E Complaint against Respond with the OAG/OCA Complaint. *See* 52 Pa. Code § 5.81.[[6]](#footnote-6) I&E averred that both the I&E Complaint and the OAG/OCA Complaint, allege violations of the same provisions of the Code and Commission Regulations. I&E further advised that both complaints contained similar factual allegations and that both complaints seek substantially the same remedies, including imposing a civil penalty upon Respond, rescinding the authority of Respond to do business as an EGS in Pennsylvania, and directing Respond to provide a refund to each customer consisting of the difference between the amount the customer was billed and the guaranteed discounted rate the customer was entitled to receive. Finally, I&E averred that consolidating the two complaints would expedite the administrative process, preserve judicial resources, prevent inconsistent outcomes/cumulative penalties against Respond and save Respond from having to defend two similar complaints simultaneously. The I&E Motion to Consolidate was not opposed by any Party.

By Order of October 28, 2014, the presiding ALJs granted the I&E Motion for consolidation. The I&E Complaint was, thereafter, consolidated with the OAG/OCA Complaint.

Subsequently, the I&E Complaint was the subject of an interim order addressing preliminary objections filed by Respond. By order of November 17, 2014, presiding ALJs Barnes and Cheskis considered and disposed of the preliminary objections filed by Respond to the I&E Complaint. *See* November 17 Order, *supra*.

In the November 17 Order, the presiding ALJs granted in part, and denied in part, Respond’s preliminary objections. At the time of the ALJs’ consideration and disposition of the preliminary objections filed by Respond to the I&E Complaint, they had the benefit of the Commission’s reasoning and disposition of substantially similar legal questions raised by the OAG and OCA in their petition for interlocutory review and answer to material questions which was decided in *Blue Pilot*.

No Party has filed a request for interlocutory Commission review of ALJ Barnes and Cheskis’ disposition of the Respond preliminary objections resulting from the November 17 Order at Docket No. C-2014-2438640.

We note that the consolidated proceedings involving the OAG/OCA Complaint and the I&E Complaint are under a common procedural schedule with evidentiary hearings scheduled for August 10-12, 2015. *See Procedural Order #4* (January 29, 2015).

**History of the Proceedings**

On June 20, 2014, the OAG and OCA filed their Complaint with the Commission at Docket No. C-2014-2427659. On July 10, 2014, Respond filed an Answer and New Matter in response to the Complaint, admitting or denying the various averments.

In New Matter, accompanied by a Notice to Plead, Respond averred, among other things, that the Complaint ignores the market conditions that started in January 2014 that precipitated the variable price increases to which many consumers were exposed resulting in a spike in the volume of informal and formal complaints filed by consumers with the Commission. *See* August 20 Order at 2. Respond further noted the Polar Vortex weather crisis that occurred that increased Respond’s costs. Respond averred that various issues raised by the Joint Complainants are beyond the Commission’s jurisdiction. Respond requested that the Complaint be dismissed with prejudice. *Id*.

Also on July 10, 2014, Respond filed Preliminary Objections in response to the Complaint, also accompanied by a Notice to Plead. Respond averred that five of the nine counts in the Complaint should be dismissed for lack of Commission jurisdiction, insufficient specificity of a pleading and/or legal insufficiency of a pleading, as discussed further below. August 20 Order at 2.

On July 21, 2014, the Joint Complainants filed an Answer to Respond’s Preliminary Objections. In their Answer, the Joint Complainants asserted that Respond’s Preliminary Objections are unsupported and should be overruled. The Joint Complainants argued, *inter alia*,that the Complaint is sufficiently pleaded and seeks that the Commission make determinations pursuant to the Commission’s powers and jurisdiction. Specifically, the Joint Complainants averred that the Commission has jurisdiction to hear cases brought pursuant to the CPL and the TRA.

On July 30, 2014, the OAG/OCA filed an Answer to Respond’s New Matter. In the Answer, the OAG/OCA denied that they have ignored market conditions and reference the affidavit attached to the Complaint regarding the cost to serve the average residential heating customer in the period in question. August 20 Order at 3. The OAG/OCA also denied that Respond adjusted its variable prices consistent with the terms and conditions of its Disclosure Statement in early 2014. *Id*.

As noted, an interim order, granting in part, and denying, in part, Respond’s preliminary objections was issued August 20, 2014. A Prehearing Conference establishing an Initial Prehearing Conference for this matter was noticed for August 25, 2014.

On September 8, 2014, the OAG and OCA filed their Joint Petition. On September 18, 2014, Briefs in support of the Joint Petition and in opposition thereto were filed by the Parties.

**Discussion**

We take official notice that the instant Complaint is one of four complaints filed by the OAG and the OCA prosecuting consumer claims against companies providing variable rate electric generation supplier service pursuant to Section 2809 of the Code, 66 Pa. C.S. § 2809. *See* 66 Pa. C.S. § 331(g), pertaining to official notice; *see also*, 52 Pa. Code § 5.408, pertaining to official and judicial notice of fact. The four complaints involve substantially similar, although not identical, issues.

The OAG and OCA have initiated formal complaints against EGS service providers at the following dockets: *Blue Pilot*, *supra*; *IDT*, *supra*; and *Commonwealth of Pa., et al. v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas &* Electric, Docket No. C-2014-2427656.

Each above-cited complaint has been the subject of interim orders of the presiding ALJs, granting in part, and denying, in part, preliminary objections filed by the EGS company/respondent. Subsequent to the interim orders, various Parties in the cases have filed Petitions for Interlocutory Commission Review and Answer to Material Questions based on the rulings of the presiding officers. *See* 52 Pa. Code
§ 5.301.

Specifically, the OAG and OCA raised the following questions for interlocutory Commission review in *Blue Pilot*, in response to an interim order of the presiding ALJs in that proceeding:

1. Does the Commission have authority and jurisdiction to determine whether a violation of the Unfair Trade Practices and Consumer Protection Law and Telemarketer Registration Act 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 conform to the EGS disclosure statement regarding pricing?

*Blue Pilot* at 2.

On review of the questions raised in *Blue Pilot* and the questions raised in the instant case, they are identical. Therefore, our disposition in this matter will be essentially governed by *Blue Pilot*. We expressly note, however, that the complaint allegations in *Blue Pilot* did not allege any counts regarding the practice of “slamming,” which allegations form a substantial part of the allegations against Respond in these consolidated cases.

**Legal Standards for Interlocutory Review**

The OAG/OCA Joint Petition is filed pursuant to the Commission’s Rules and Regulations at 52 Pa. Code § 5.302. Section 5.302(a), states, in pertinent part:

During the course of a proceeding, a party may file a timely petition directed to the Commission requesting review and answer to a material question which has arisen or is likely to arise. The petition must . . . state, in not more than three pages, the question to be answered and the compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding.

Upon the filing of a petition for interlocutory Commission review and answer to a material question, pursuant to 52 Pa. Code § 5.303(a), the Commission has the authority to either: (1) continue, revoke or grant a stay of proceedings if necessary to protect the substantial rights of the parties; (2) determine that the petition was improper and return the matter to the presiding officer; (3) decline to answer the question; or
(4) answer the question.

The standards for interlocutory review are well established. As the Parties acknowledge, the pertinent consideration is whether interlocutory review is necessary in order to prevent substantial prejudice – that is, the error and any prejudice flowing therefrom could not be satisfactorily cured during the normal Commission review process. *Joint Application of Bell Atlantic Corp. and GTE Corp.,* Docket Nos.
A-310200F0002, *et al.* (Order entered June 14, 1999); *Pa. PUC v. Frontier Communications of Pa. Inc.,* Docket No. R‑00984411 (Order entered February 11, 1999); *In* *re: Knights Limousine Service, Inc*., 59 Pa. P.U.C. 538 (1985).

The correctness of the Presiding Officer’s ruling is not a determinative issue when the Commission sets out to examine whether a petitioner has fulfilled the regulatory requirements for interlocutory review and answer to a material question. *See*

*Saucon Creek Assoc., Inc. v. Borough of Hellertown,* 69 Pa. P.U.C. 467 (1989); *Berkery v. PECO Energy, LLC*, Docket No. C-2010-20170223 (Order entered January 14, 2011).[[7]](#footnote-7)

Generally, petitions for interlocutory review are not favored, as the preferred approach is to permit proceedings to move forward in the normal course in order to provide all parties, the presiding officer, and the Commission, with a full opportunity to develop the record, brief issues, and present arguments at each stage. *Re: Philadelphia Gas Works Universal Service and Energy Conservation Plan*, Docket No. M-00072021 (Order entered October 23, 2009) at 3.

The Commission has determined that a showing supportive of interlocutory Commission review may be accomplished by a petitioner by its proving that, without such interlocutory review, some harm would result which would not be reparable through normal avenues, that the relief sought should be granted now, rather than later, and that granting interlocutory review would prevent substantial prejudice or expedite the proceeding. *Pa. PUC v. Philadelphia Gas Works*, Docket Nos. P-2009-2097639 and
R-2009-2139884 (Order entered April 15, 2010) (*PGW Order*).

**August 20 Order Regarding Preliminary Objections**

In the August 20 Order, the presiding ALJs granted, in part, and denied, in part, Respond’s preliminary objections. ALJs Cheskis and Barnes, on consideration of the positions of the Parties, concluded in pertinent part:

Respond has failed to satisfy this high standard with regard to its claims that certain Counts in the Complaint are insufficiently plead[ed]. Respond has satisfied this high standard, however, with regard to Count VIII which pertains to the specific prices charged by Respond. Finally, Respond has demonstrated that the Commission has no jurisdiction to hear claims regarding the UTP/CPL and the TRA. Nonetheless, however, the Commission can hear claims regarding its own consumer protection and telemarketing regulations. Those Preliminary Objections brought by Respond will, therefore, be granted in part and denied in part.

August 20 Order at 22 (emphasis supplied).

Based on the foregoing, *inter alia,* the following ordering paragraphs were entered:

2. That Count VIII raised in the Complaint is hereby

 stricken in its entirety.[[8]](#footnote-8)

1. That Count III, IV and IX raised in the Complaint are hereby stricken in part consistent with the above discussion.
2. That all other Counts raised in the Complaint shall proceed to a Hearing.

August 20 Order at 22-23.

**Position of the OAG and OCA**

In their Brief, the OAG and OCA argue that, as a threshold consideration, there are compelling reasons for granting interlocutory review now, rather than awaiting the issuance of a Recommended Decision, due to the limiting effect of the August 20 Order on the ability of the OAG and OCA to fully develop an evidentiary record for Commission review. Brief at 4.

The OAG/OCA assert that the August 20 Order will unduly restrict the development of the evidentiary record and significantly prejudice them (and the consumer interests they advocate) by not allowing for the full and adequate development of an accurate and complete evidentiary record for Commission review, contrary to the public interest. *Id*.

 The OAG and OCA also state that granting interlocutory review will expedite the conduct of this proceeding by giving consistency to the resolution of the legal issues presented concerning the authority and jurisdiction of the Commission over EGS services due to the contemporaneous litigation of the four formal complaints against EGS companies. Brief at 5.

Concerning the merits of their proposed material questions, regarding question #1, the OAG and OCA heavily rely on language in the Commission’s order, *Use of Fixed-Price Labels for Products With a Pass-Through Clause*, Docket No.
M-2013-2362961 (Order entered November 14, 2014) (*Pass-Through Order*), to argue that the CPL and TRA are, essentially, “overlapping” statutes relative to the Commission’s Regulations at Sections 54.122(3) and 111.12(d)(1). 52 Pa. Code
§§ 54.122(3); 111.12(d)(1). These Regulations, *inter alia*, expressly authorize the Commission to prevent an EGS from engaging in conduct that violates state and/or federal law. Brief at 5-6.

The OAG and OCA additionally point out that the Commission’s Regulations specifically reference the CPL and TRA and expressly require EGS compliance with these laws. Brief at 6 (citing 52 Pa. Code § 54.42(a)(8)). In order to find a violation of Commission Regulations which cross-reference the CPL and TRA, they argue, the Commission must consider evidence as to whether the provisions of those statutes have been violated. *Id*.

In support of the merits of their proposed material question #2, the OAG and OCA extensively seek to clarify their position in this formal complaint.

The OAG/OCA assert that they do not ask the Commission to regulate the price of EGS service. Brief at 10. Rather, the OAG/OCA are asking the Commission to determine whether the prices charged by Respond were consistent with the pricing terms contained in the Disclosure Statements. *Id*. The OAG and OCA take issue with the ALJs’ factual findings and statement that no averments in Count VIII place Respond’s billing practices and Disclosure Statement at issue. Brief at 10 (referencing August 20 Order at 17). The OAG/OCA argue that the ALJs’ findings do not accurately describe their claims. Brief at 11.

The OAG and OCA explain that in order to establish facts in support of their allegations that Respond’s prices charged to its variable rate customers did not conform to the basis for pricing stated in the disclosure statement, they presented an analysis of electric generation market pricing as furnished by PJM Interconnection LLC,[[9]](#footnote-9) since the disclosure statement conveys that pricing would be based on PJM market pricing. Brief at 10-11. The OAG/OCA make the argument that, simply because the Affidavit of their witness, Dr. Estomin, used numerical pricing information in his analysis, does not equate to an attempt to regulate price. The OAG/OCA state:

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. . . .

Brief at 11.

Finally, the OAG/OCA criticize the statement in the August 20 Order that they do not aver violations of Respond’s billing practices and disclosures and do not tie the Estomin Affidavit to the Disclosure Statement in either the Complaint or Answer to Preliminary Objections. Brief at 11. The OAG/OCA attempt to rebut the ALJs’ conclusion and refer to ¶ 90 of their Complaint which alleges, *inter alia*, that the prices do not conform to the variable rate pricing provisions of Respond’s Disclosure Statement. *Id.* These allegations are repeated in the OAG/OCA Answer to Respond’s Preliminary Objections. Brief at 11-12.

The OAG/OCA state that there are numerous other references to Respond’s billing practices and Disclosure Statement in Count VIII of the Complaint and its Answer to Preliminary Objection. They rely on the holding in *Grmusa v. Dominion Retail, Inc.*, Docket No. C-2009-2124359 (Order entered April 16, 2010), to distinguish the present Complaint from one seeking to regulate price, as in accord with *Grmusa* to the extent the Complaint avers that prices charged by Respond to its variable rate customers did not conform to the variable rate pricing provisions of its Disclosure Statement. Brief at 12-13.

**Position of Respond**

In its Brief, Respond alleges that, as a threshold consideration, the standards for interlocutory review have not been met. That is, even with the partial dismissal of Counts III, IV, and IX, and the entirety of Count VIII, of the Complaint, Respond alleges that the Joint Complainants are free to develop an evidentiary record on those claims within the context of the Commission’s Regulations. Brief at 3; 4-6.

Specifically, Respond replies that there is no authorization in the Code that gives the Commission leave to enforce the provisions of the CPL and the TRA. Inclusion of these requirements in Commission Regulations does not confer subject matter jurisdiction on the Commission to determine whether violations of these laws has occurred. Brief at 3.

Respond cites *Mid-Atlantic Power Supply Assoc. v. PECO Energy Co.*, Docket No. P-00981615 (Order entered May 19, 1999); *David P. Torakeo v. Pa. American Water Co.*, Docket No. C-2013-2359123 (Order entered April 3, 2014); *Pa. PUC, et al v. The Bell Telephone Co. of Pa.*, 71 Pa. P.U.C. 338, 341 (1989); and *MacLuckie v. Palmco Energy PA, LLC*, Docket No. C-2014-2402558 (Initial Decision dated June 16, 2014), for the proposition that the Commission does not have jurisdiction over claims under the CPL. Brief at 8.

Respond goes on to distinguish the legal holding of *Harrisburg Taxicab & Baggage Co. v. Pa. PUC*, 786 A.2d 288 (Pa. Cmwlth. 2001) (*Harrisburg Taxi*), discussed at pages 7-8 in the August 20 Order, from the circumstances in this proceeding.

Also, with regard to question #2, Respond explains that, while the OAG/OCA attempt to characterize the gravamen of Count VIII as whether the Commission may determine whether prices charged by the EGS conform to the EGS’s Disclosure Statement, the count is, in fact, focused on the price charged by Respond. This, according to Respond, “cuts right to the heart of electric competition.” Brief at 11. Respond explains:

Under Chapter 28 of the Code EGS rates are set by the EGS, not by the Commission. Under the terms of its disclosure statement, Respond Power’s prices vary on a month-to-month basis to reflect various factors, including fluctuations in wholesale market conditions, and there [sic] no there are ceilings on the prices that may be charged. Absent an ability to regulate EGS prices, the Commission cannot determine what that price “should” have been. It would be especially inappropriate for the Commission to judge Respond Power’s variable price against a price that reflects “the cost to serve residential customers” for a certain time period. Cost of service principles are related to utility ratemaking and have nothing to do with the way in which EGSs procure energy or set prices. . . .

Brief at 11-12.

Based on the foregoing, Respond concludes that the Commission has recognized its lack of jurisdiction to limit prices charged by EGS companies. Brief at 13. Respond cites the Commission’s order in *Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, Docket No.
M-2014-2406134 (order entered February 20, 2014) (*Variable Rate Order*), for the proposition that the rates consumers pay in the retail electric market are governed by the terms of their contract with their EGS. With regard to variable rate products, some variable rate/price contracts have no ceiling on the rate that could be charged. Thus, while a variable rate may offer substantial savings when wholesale market prices are low, customers may experience very high bills during periods of market volatility such as occurred in early 2014. Brief at 14.

**Disposition**

We expressly note that any issue that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. [*Consolidated Rail Corp. v. Pa. PUC,* 625 A.2d 741 (Pa. Cmwlth. 1993);](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=5&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b625%20A.2d%20741%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=ad2b02d95c2a9216e83b92a3570d4785) *also see, generally,* [*University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=6&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b485%20A.2d%201217%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=9b1cc8319afd12440738bb82d74455ef)

**The Standard for Interlocutory Review has been met**

Upon review of the OAG/OCA Joint Petition, briefs, and attachments in this matter, we conclude that we shall grant the Petition for Interlocutory Review and Answer to Material Questions filed by the OAG/OCA in this matter.

For those reasons substantially similar to the considerations addressed in *Blue Pilot* and *IDT*, we conclude that granting interlocutory review will expedite the conduct of multiple formal complaint proceedings initiated by the OAG/OCA against EGSs relating to variable rates by ensuring that the material questions raised in the cases are decided consistently. We observe that the presiding ALJs have applied this Commission’s determinations regarding substantially similar material questions in *Blue Pilot* and *IDT* to resolve issues that have been raised concerning the proper scope of these consolidated complaint proceedings in both the November 17 Order, *supra*, and in *Blue Pilot, supra,* *Order Granting in Part and Denying in Part Motion to Compel Responses to Joint Complainant Interrogatories VI-1and V1-7* (Order issued March 3, 2015).

**Material Question #1 – Commission Authority and Jurisdiction Under the CPL and TRA**

The OAG/OCA material question #1 is, as follows:

Does the Commission have authority and jurisdiction to determine whether a violation of the Unfair Trade Practices and Consumer Protection Law (CPL) and Telemarketer Registration Act (TRA) has occurred when considering whether the Commission’s regulations – which require compliance with these laws – have been violated?

Upon review and consideration, this question shall be answered in the negative. We agree, as we have held in *Blue Pilot*, with the reasoning and analysis of the presiding ALJs in the August 20 Order. *See Blue Pilot* at 16-18.

Although we answer the material question in the negative and reject the exercise of direct Commission jurisdiction and authority pursuant to the CPL and the TRA, we agree with the conclusion of the presiding ALJs that the Commission has jurisdiction over alleged violations of our own Regulations, which jurisdiction includes determining whether the Commission’s Regulations prohibiting deceptive and/or misleading conduct[[10]](#footnote-10) and/or the Commission’s telemarketing regulations[[11]](#footnote-11) have been violated by an EGS. We conclude that the Commission can hear claims alleging fraudulent, deceptive, and/or misleading conduct brought against Respond under the Commission’s Regulations and that the Commission can hear claims alleging improper verification of enrollment of residential customers, improper association of Respond with the EDC, and other allegations raised against the Company under the Commission’s telemarketing regulations.

**Material Question #2 – Commission Authority and Jurisdiction Over EGS Prices**

The second question raised by the OAG/OCA is reprinted below:

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 regarding pricing?

As noted above, the factual context in which this issue arises differs slightly from that in *Blue Pilot*, to the extent that there were no complaint counts expressly raised in the *Blue Pilot* complaint concerning slamming. In *Blue Pilot*, this precise question was, however, considered and answered in the affirmative. *Blue Pilot* at 18.

In *Blue Pilot*, we were careful to explain that the Commission does not have traditional ratemaking authority over competitive suppliers and does not regulate competitive supply rates. *See Blue Pilot* at 18-19. At the same time, the Commission also explained that it has subject matter jurisdiction to regulate certain aspects of the services provided by EGSs. Specifically in *Blue* Pilot, we expressly concluded that the Commission has jurisdiction and authority over whether the prices charged to consumers conformed to the variable rate pricing provisions in the company’s Disclosure Statement as required by Section 54.4(a) and 54.5(a) of our Regulations, 52 Pa. Code §§ 54.4(a), 54.5(a). *Blue Pilot* at 19-20.

In the present case, the OAG and OCA object to the ALJs’ striking of Count VIII of their complaint, in its entirety. The OAG/OCA objection is based primarily on the position that Count VIII does not purport to engage in matters tantamount to the regulation of EGS prices, but rather, lays an evidentiary foundation to show that Respond violated pertinent Commission Regulations by charging prices that did not conform to its required disclosures, or, otherwise, misrepresented prices charged to consumers.

To the extent the presiding ALJs concluded that Count VIII in these consolidated complaints should be dismissed, in its entirety, we observe that they have made a valid distinction regarding this Commission’s jurisdiction and authority to adjudicate issues disputing the ultimate, variable rate, charged by an EGS supplier (Count VIII in this Complaint, which count essentially corresponds to Count II in *Blue Pilot*), with claims asserting whether the rate charged was consistent with EGS disclosure requirements required by Commission Regulations. *See* August 20 Order at 14-18.

Based on the foregoing, we agree with and adopt the reasoning and conclusion of the presiding ALJs, to the extent consistent with *Blue Pilot* and our discussion herein, that there must be a sufficient nexus between allegations of EGS pricing not in conformity with its required disclosures pursuant to Commission Regulations for such complaint to withstand preliminary objection. Upon review of Count VIII of the Complaint alleging that Respond’s prices did not conform to its Disclosure Statement, we believe that such a sufficient nexus exists here to withstand preliminary objection.

Moreover, as previously noted, Count V of the Complaint alleges that Respond engaged in the practice of slamming. We reference our discussion in *IDT*, which was a complaint proceeding against an EGS company that involved allegations of slamming. In *IDT*, we recognized our plenary jurisdiction and authority pursuant to, *inter alia*, Section 501 of the Code, 66 Pa. C.S. § 501, to direct a billing adjustment for an EGS overbill of supply charges as within the Commission’s powers in order to carry out the consumer protections in the Electricity Generation Customer Choice and Competition Act that are applicable to competitive electricity generation supply service. *See IDT* at 16-18, discussing Section 1312 of the Code, 66 Pa. C.S. § 1312. We also expressly noted our Regulations which pertain to slamming as additional authority to direct a billing adjustment under appropriate circumstances. *Id*.

Based on the foregoing, we shall answer Material Question #2 in the affirmative, consistent with the discussion in this Opinion and Order.

**Conclusion**

For the reasons set forth above, we shall grant the OAG/OCA Joint Petition and answer the material questions presented, consistent with the discussion contained in this Opinion and Order; **THEREFORE,**

**IT IS ORDERED:**

1. That the Joint Petition for Interlocutory Review and Answer to Material Questions filed by the Pennsylvania Office of Attorney General and the Pennsylvania Office of Consumer Advocate on September 8, 2014, is, hereby, granted.
2. That the following material question is answered in the negative, consistent with the discussion contained in this Opinion and Order:

Does the Commission have authority and jurisdiction to determine whether a violation of the Unfair Trade Practices and Consumer Protection Law (CPL) and Telemarketer Registration Act (TRA) has occurred when considering whether the Commission’s regulations – which require compliance with these laws – have been violated?

3. That the following material question is answered in the affirmative, consistent with the discussion contained in this Opinion and Order:

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 regarding pricing?

4. That this matter is returned to the Office of Administrative Law Judge for such further proceedings as may be necessary.

 **BY THE COMMISSION:**

Rosemary Chiavetta

 Secretary

(SEAL)

ORDER ADOPTED: April 9, 2015

ORDER ENTERED: April 9, 2015

1. As will be noted, *infra*, I&E subsequently filed a separate formal complaint against Respond which complaint has been consolidated with the OAG/OCA complaint. [↑](#footnote-ref-1)
2. 52 Pa. Code § 69.1803 defines PTC as follows: “*PTC—Price-to-compare*—A line item that appears on a retail customer’s monthly bill for default service. The PTC is equal to the sum of all unbundled generation and transmission related charges to a default service customer for that month of service.” [↑](#footnote-ref-2)
3. 73 P.S. §§ 201-1 – 201-9.3; referenced, *inter alia*, at 52 Pa. Code
§ 54.43(f). [↑](#footnote-ref-3)
4. 73 P.S. §§ 2241, *et seq.*, referenced, *inter alia*, at 52 Pa. Code § 111.10. [↑](#footnote-ref-4)
5. In the Complaint I&E averred that it instituted an investigation of Respond that centered on allegations of slamming and related improper marketing practices as alleged in a telephone call to the Commission’s Bureau of Consumer Services (BCS). I&E averred that the phone call was from an individual who identified himself as a senior door-to-door sales agent of Respond. This person advised that the sales and marketing tactics being used by agents of Respond included the use of false identities and associated identification materials. *See Bureau of Investigation and Enforcement 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, Docket No. C-2014-2438640 (November 17 Order*)*. [↑](#footnote-ref-5)
6. 52 Pa. Code § 5.81(a), states: “The Commission or presiding officer, with or without motion, may order proceedings involving a common question of law or fact to be consolidated. The Commission or presiding officer may make orders concerning the conduct of the proceeding as may avoid unnecessary costs or delay.” [↑](#footnote-ref-6)
7. Our rules governing interlocutory review found at 52 Pa. Code §§ 5.301-5.303, replaced rules that formerly governed interlocutory review which were found at 52 Pa. Code § 3.191. The Commission’s past holdings under the former rules regarding the requisite criteria for interlocutory review are still valid. 69 Pa. P.U.C. at 468-469. [↑](#footnote-ref-7)
8. “Prices Not Conforming to Disclosure Statement.” [↑](#footnote-ref-8)
9. The Pennsylvania, New Jersey, Maryland Regional Transmission Organization (RTO). [↑](#footnote-ref-9)
10. The relevant regulations include 52 Pa. Code § 54.43(f) and 52 Pa. Code
§ 111.12(d)(1). [↑](#footnote-ref-10)
11. The relevant regulation is 52 Pa. Code § 111.10, which is applicable to residential customers only. This regulation requires EGSs to comply with the TRA, except for the registration requirement. Thus, as one example, EGSs are required under the Commission’s telemarketing regulations to comply with the TRA provisions governing state/federal “Do Not Call” lists. [↑](#footnote-ref-11)