

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

555 Walnut Street, 5th Floor, Forum Place
Harrisburg, Pennsylvania 17101-1923
(717) 783-5048
800-684-6560

FAX (717) 783-7152
consumer@paoca.org

June 21, 2014

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

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

v.

IDT Energy, Inc.

Respondent

Docket No. C-2014-2427657

Secretary Chiavetta:

Enclosed please find the Answer of the Commonwealth of Pennsylvania and the Office of Consumer Advocate to the Preliminary Objections of IDT Energy, Inc., in the above-referenced proceeding.

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

Respectfully Submitted,

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

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

Enclosures

cc: Office of Administrative Law Judge
Certificate of Service

*185180

CERTIFICATE OF SERVICE

| | | |
|--|---|---------------------------|
| Commonwealth of Pennsylvania, by | : | |
| Attorney General KATHLEEN G. KANE, | : | |
| Through the Bureau of Consumer Protection, | : | |
| | : | |
| And | : | |
| | : | |
| TANYA J. McCLOSKEY, Acting Consumer | : | |
| Advocate, | : | |
| Complainants | : | |
| | : | Docket No. C-2014-2427657 |
| v. | : | |
| | : | |
| IDT ENERGY, INC., | : | |
| Respondent | : | |

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

Dated this 21st day of July 2014.

SERVICE BY E-MAIL & INTER-OFFICE MAIL

Johnnie Simms, Esq.
Michael Swindler, Esq.
Bureau of Investigation & Enforcement
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

SERVICE BY E-MAIL & FIRST CLASS MAIL, POSTAGE PREPAID

Michael A. Gruin, Esq.
Stevens & Lee
17 N. 2nd Street, 16th Fl.
Harrisburg, PA 17101

Sharon Webb, Esq.
Office of Small Business Advocate
Commerce Building, Suite 1102
300 North Second Street
Harrisburg, PA 17101

SERVICE BY FIRST CLASS MAIL, POSTAGE PREPAID

Wayne Stoughton
IDT Energy Inc.
20 West Third St., Suite 10
Jamestown, NY 14702-0400



Candis A. Tunilo
Assistant Consumer Advocate
PA Attorney I.D. # 89891
E-Mail: CTunilo@paoca.org

Kristine E. Robinson
Assistant Consumer Advocate
PA Attorney I.D. # 316479
E-Mail: KRobinson@paoca.org

Counsel for
Office of Consumer Advocate
555 Walnut Street 5th Floor, Forum Place
Harrisburg, PA 17101-1923
Phone: (717) 783-5048
Fax: (717) 783-7152
185176

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

| | | |
|---|---|---------------------------|
| Commonwealth of Pennsylvania, by Attorney | : | |
| General KATHLEEN G. KANE, Through the | : | |
| Bureau of Consumer Protection, | : | |
| | : | |
| And | : | Docket No. C-2014-2427657 |
| | : | |
| TANYA J. McCLOSKEY, Acting Consumer | : | |
| Advocate, | : | |
| | : | |
| Complainants | : | |
| | : | |
| v. | : | |
| | : | |
| IDT Energy, Inc., | : | |
| | : | |
| Respondent | : | |

ANSWER OF THE COMMONWEALTH OF PENNSYLVANIA AND THE OFFICE OF
CONSUMER ADVOCATE TO THE PRELIMINARY OBJECTIONS OF
IDT ENERGY, INC.

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

I. INTRODUCTION

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

On July 10, 2014, IDT filed Preliminary Objections to the Joint Complaint. In its Preliminary Objections, IDT asserts that Count VI of the Joint Complaint should be dismissed pursuant to 52 Pa. Code § 5.101(a)(4) (Legal Insufficiency) and stricken pursuant to 52 Pa. Code §§ 5.101(a)(2) (Inclusion of Impertinent Material). In support of its Preliminary Objection, IDT asserts that the Commission does not have authority to regulate EGS prices. In Count VI, the Joint Complainants assert that IDT's salespeople promised savings over the Price to Compare (PTC) or led consumers to believe that IDT's rates would be competitive with the PTC. See

¹ The seven separate counts in the Joint Complaint are as follows: I) misleading and deceptive promises of savings; II) misleading and deceptive welcome letter and advertisements; III) slamming; IV) lack of good faith handling of complaints; V) failing to provide accurate pricing information; VI) prices nonconforming to disclosure statement; and VII) failure to comply with the Telemarketer Registration Act.

Joint Complaint at ¶¶ 21, 22, 24, 63. Also in Count VI, the Joint Complainants assert that IDT charged its variable rate customers prices at least as high as \$0.34 per kWh for electricity. Joint Complaint at ¶ 64. Joint Complainants further assert that the cost to serve the average residential heating customer in January 2014 in the PJM market should not have exceeded \$0.23 per kWh. Joint Complaint at ¶ 66. Joint Complainants thus assert that IDT's prices were nonconforming to its disclosure statement, which states that price would be based on "pricing as furnished by PJM clearing house, transportation or transmission, and other market and business price related factors." Joint Complaint at ¶¶ 53, 67. As discussed in detail below in Paragraphs 16 through 29 in Section III, Count VI is legally sufficient pursuant to 66 Pa. C.S. § 2809(e) and 52 Pa. Code §§ 54.43(f), 111.5, and 111.12(d)(1). As such, IDT's Preliminary Objection that Count VI is legally insufficient should be overruled.

➤

IDT also asserts in its Preliminary Objections that Count VII of the Joint Complaint should be dismissed pursuant to 52 Pa. Code § 5.101(a)(4), as IDT's failure to provide written contracts in connection with telephone sales and obtain customer signatures is not a violation of the TRA. In Count VII, the Joint Complainants allege that the Commission's regulations require that EGSs comply with the TRA and the Consumer Protection Law. See Joint Complaint at ¶ 75. Joint Complainants assert that the TRA requires Respondent to reduce any sale of goods or services made during a telemarketing call to a written contract and obtain the customer's signature on the written contract, but IDT does not do so. See Joint Complaint at ¶ 71. As discussed in detail below Paragraphs 30 through 36 in Section III, the Commission has the jurisdiction to incorporate other laws and agency regulations into its decisions insofar as the other laws and agency regulations are incorporated into the Commission's regulations. See Harrisburg Taxicab & Baggage Co. v. Pa. PUC, 786 A.2d 288, 292-93 (Pa. Commw. Ct. 2001).

The TRA is incorporated into the Commission's regulations in 52 Pa. Code § 111.10(a)(1). Additionally, all provisions of the Telemarketer Registration Act, except the registration requirement, apply to EGSs. See 52 Pa. Code § 111.10(a)(1); Request for Opinion, 2010 Pa. AG LEXIS 1, *4-5 (Feb. 8, 2010) (AG Opinion). As such, IDT's Preliminary Objection to Count VII for legal insufficiency should be overruled.

Finally, IDT asserts in its Preliminary Objections that Joint Complainant's request for restitution should be dismissed pursuant to 52 Pa. Code § 5.101(a)(4). As discussed in detail below in Paragraphs 37 through 48 in Section III, the Commission has the jurisdiction to order the penalties and equitable relief sought in this matter. As such, IDT's Preliminary Objection to Joint Complainants' prayer for relief should be overruled.

The Joint Complainants submit that IDT's Preliminary Objections are unsupported, as set forth in more detail below, and should be overruled. It is clear and free from doubt that the Joint Complaint is legally sufficient and seeks that the Commission make determinations pursuant to the Commission's powers and jurisdiction. Also, the Joint Complaint includes material pertinent to its allegations. As such, IDT's Preliminary Objections to the Joint Complaint must be overruled.

II. LEGAL STANDARD

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

- (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
- (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.

- (3) Insufficient specificity of a pleading.
- (4) Legal insufficiency of a pleading.
- (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
- (6) Pendency of a prior proceeding or agreement for alternative dispute resolution.
- (7) Standing of a party to participate in the proceeding.

52 Pa.Code § 5.101(a).

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

Preliminary objections alleging “legal insufficiency of pleading,” serve judicial economy by avoiding a hearing where no factual dispute exists. Drake v. Pennsylvania Electric Co., Docket No. C-2014-2413771. (Order entered on May 7, 2014). The Commission will find a complaint legally sufficient if it provides the following:

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

Drake, Docket No. C-2014-2413771; 52 Pa. Code § 5.22(a)(5).

With regard to preliminary objections alleging “the inclusion of impertinent material,” the Commission will find statements in a pleading to be impertinent if they are legally irrelevant to the cause of action or could not influence in leading to a result. Coppedge v. PECO Energy Co., Docket No. F-2009-2135893, Order at 5, FN 1 (August 3, 2010). Such statements are subject to being stricken. Id. Regarding a similar rule for preliminary objections in the Rules of Civil Procedure, Pa. R.C.P. 1028(a)(2), "scandalous and impertinent matter" has been defined as allegations immaterial and inappropriate to the proof of the cause of action. See e.g. Common Cause/Pennsylvania v. Commonwealth, 710 A.2d 108, 115 (Pa. Commw. Ct. 1998). Pennsylvania courts have been restrained in striking scandalous and impertinent pleadings, however. There is some authority for the proposition that, even if the pleading of damages was impertinent matter, that matter need not be stricken but may be treated as "mere surplusage" and ignored. Furthermore, the right of a court to strike impertinent matter should be sparingly exercised and only when a party can affirmatively show prejudice. See e.g. Commonwealth v. Hartford Accident & Indem. Co., 40 Pa. Commw. 133, 137-38, 396 A.2d 885, 888 (1979).

III. ANSWER

1. Upon information and belief, it is admitted that IDT was served with a notice of the Joint Complaint on June 20, 2014. The Joint Complaint is of record in this matter and speaks for itself. Of note, Exhibit 1 to IDT’s Preliminary Objections does not contain a complete copy of the Joint Complaint, as pages 15-17 are missing.

2-3. No response is required, as the Joint Complaint is of record in this matter and speaks for itself.

4-5. These paragraphs state conclusions of law to which no response is required. By way of further answer, the Joint Complainants incorporate Section II above herein.

6. No response is required, as IDT's Preliminary Objections are of record and speak for themselves. By way of further answer, as discussed herein IDT's Preliminary Objections asserting legal insufficiency and/or lack of jurisdiction are unsupported and must be overruled.

7. Denied. By way of further answer, Joint Complainants incorporate Paragraphs 16 through 29 below herein. Count VI is legally sufficient pursuant to 66 Pa. C.S. § 2809(e) and 52 Pa. Code §§ 54.43(f), 111.5, and 111.12(d)(1).

8. Denied. By way of further answer, Joint Complainants incorporate Paragraphs 30 through 36 in Section III below herein. The Commission has jurisdiction to make determinations regarding the TRA insofar as the Commission incorporated the TRA into its regulations. See 52 Pa. Code § 111.10(a)(1). See also Harrisburg Taxicab & Baggage Co. v. Pa. PUC, 786 A.2d 288, 292-93 (Pa. Commw. Ct. 2001). Additionally, all provisions of the TRA, except the registration requirement, apply to EGSs. See 52 Pa. Code § 111.10(a)(1); AG Opinion.

9. Denied. By way of further answer, Joint Complainants incorporate Paragraphs 37 through 48 in Section III below. The Commission has the jurisdiction to order the penalties and equitable relief sought in this matter.

10. Upon information and belief, it is admitted that IDT filed an Answer and New Matter on the same day IDT filed its Preliminary Objections.

11-15. These paragraphs state conclusions of law to which no response is required. By way of further answer, the Joint Complainants incorporate Section II above herein.

Count VI Of The Joint Complaint Is Legally Sufficient And Contains Pertinent Material To The Cause of Action.

16. Admitted in part. Denied in part. It is admitted that Count VI is labeled “Prices Nonconforming to Disclosure Statement.” The Joint Complaint is of record and speaks for itself. It is denied that Count VI (and other averments in the Joint Complaint as incorporated into Count VI by ¶ 63 thereof) does not set forth any averments which would lead to a conclusion that IDT’s prices did not conform to its disclosure statement. By way of further answer, the Joint Complainants incorporate the discussion of the averments in the Joint Complaint that support the conclusion that IDT’s *prices charged* to customers in early 2014 did not conform to IDT’s price disclosure contained in Paragraphs 18, 19 and 25 below herein.

17. No response is required, as the Joint Complaint is of record in this matter and speaks for itself.

18. These paragraphs state conclusions of law to which no response is required. By way of further answer, Electric Generation Suppliers (EGSs) are considered public utilities for the purposes described in Section 2809 of the Public Utility Code (relating to requirements for EGSs). See 66 Pa. C.S. § 102. See also Delmarva Power & Light Co. v. Pa. PUC, 870 A.2d 901, 909-10 (Pa. 2005). Section 2809(e) of the Public Utility Code states:

The commission may forbear from applying requirements of this part which it determines are unnecessary due to competition among electric generation suppliers. **In regulating the service of electric generation suppliers, the commission shall impose requirements necessary to ... assuring that 52 Pa. Code Ch. 56 (relating to standards and billing practices for residential utility service) are maintained.**

66 Pa. C.S. § 2809(e). (Emphasis added).

Chapter 54 of the Commission’s regulations also relates to EGSs’ billing practices. See 52 Pa. Code Ch. 54. Section 54.43(f) states that “[a] licensee is responsible for any fraudulent

deceptive or other unlawful marketing or billing acts performed by the licensee, its employees (sic), agents or representatives.” 52 Pa. Code § 54.43(f).

19. Denied as stated. This paragraph states a conclusion of law. The conclusion of law, however is not supported by IDT’s citation to 66 Pa. C.S. § 2806(a). Section 2806(a) of the Public Utility Code states that “[t]he generation of electricity shall no longer be regulated as a public utility service or function except as otherwise provided for in this chapter.” 66 Pa. C.S. § 2806(a).

Regardless, the Joint Complainants do not seek Commission review of the Respondent’s *offered prices* as asserted by IDT in its Preliminary Objections, and as such, IDT misstated the allegations and claims in the Joint Complaint. Instead, the Joint Complainants seek Commission review of IDT’s deceptive marketing practices of promising, *inter alia*, savings over the PTC and then billing customers at prices greatly in excess of the PTC. See Joint Complaint at Counts I and II and App. A. Also, the Joint Complainants seek Commission review of IDT’s Disclosure Statement that its monthly prices will be based on PJM market prices in light of the allegations of market pricing presented in Count VI of the Joint Complaint. The allegations and the facts alleged in support thereof clearly make out a sufficient claims for violations of Sections 54.43(f) (EGS responsible for fraudulent, deceptive or other unlawful marketing acts of employees, agents and representatives); 54.4(a) (prices billed must reflect marketed prices); 111.5 (EGS must monitor telephonic and door-to-door marketing activities to ensure agents are providing accurate and complete information and complying with applicable rules and regulations); and 111.12(d)(1) (EGSs must comply with the Consumer Protection Law). The Joint Complainants further assert that even in instances where deceptive marketing may not have occurred, Respondent *charged prices* that do not conform to Respondent’s price disclosure term. See Joint

Complaint at Counts V and VI and App. C. As explained in Paragraph 18 above, the Commission clearly has the authority over EGS marketing and billing practices. See 66 Pa. C.S. § 2809(e); 52 Pa. Code § 54.43(f). As such, IDT's Preliminary Objection regarding legal insufficiency of Count VI must be overruled.

20. Denied as stated. This paragraph states a conclusion of law. The conclusion of law, however, is not supported by IDT's citation to 66 Pa. C.S. § 2806(a). By way of further answer, the Joint Complainants incorporate Paragraphs 18 and 19 above herein.

21. Denied as stated. This paragraph states a conclusion of law. The conclusion of law and the case cited by IDT in support of the conclusion of law is currently before the Commonwealth Court, and therefore, it is not appropriate to cite as binding precedent. See McCloskey v. Pa. PUC, 569 C.D. 2014 (Advanced Form Brief submitted on July 10, 2014). By way of further response, the Joint Complainants incorporate Paragraphs 18 and 19 above herein.

22. Denied as stated. This paragraph states a conclusion of law. IDT is a public utility for the purposes described in Section 2809 and 2810 of the Public Utility Code (relating to requirements for EGSs). See 66 Pa. C.S. § 102. The case cited by IDT is currently before the Commonwealth Court, and therefore, it is not appropriate to cite as binding precedent. See McCloskey v. Pa. PUC, 569 C.D. 2014 (Advanced Form Brief submitted on July 10, 2014). The allegations in the Joint Complaint are sufficient to support a finding of "fraudulent, deceptive or other unlawful marketing or billing acts" for which IDT is responsible pursuant to 52 Pa. Code § 54.43(f). Additionally, Joint Complainants have sufficiently pleaded facts alleging violations of the Commission's regulations, specifically 52 Pa. Code § 111.5 (EGS must monitor telephonic and door-to-door marketing activities to ensure agents are providing accurate and complete information and complying with applicable rules and regulations) and 52 Pa. Code §

111.12(d)(1) (EGSs must comply with the Consumer Protection Law). See Joint Complaint at Counts I and II and App. A. By way of further answer, the Joint Complainants incorporate Paragraphs 18, 19 and 25 herein.

23. Denied as stated. This paragraph refers to Commission Orders, which speak for themselves. By way of further response, IDT's quotation from the February 20, 2014 Order is not relevant to Respondent's legal insufficiency claim regarding Count VI. In fact, any statement by the Commission that "the rates consumers pay in the retail electric market are governed by the terms of their contract with their supplier" (IDT Preliminary Objections at ¶ 23) supports the legal sufficiency of Joint Complainants' assertions that IDT charged prices that were not in compliance with IDT's own price disclosure statement provided to customers. By way of further answer, the Joint Complainants incorporate Paragraphs 18, 19 and 25 herein.

24. Denied. By way of further answer, the Commission's regulations require that EGS prices billed must reflect the prices marketed. 52 Pa. Code § 54.4(a). As alleged in the Joint Complaint, IDT marketed its prices by promising, *inter alia*, savings over the PTC and then billing customers at prices greatly in excess of the PTC. See Joint Complaint at Counts I and II and App. A. Furthermore, as discussed in Paragraph 25 below, Joint Complainants allege that IDT's *prices charged* to customers in early 2014 did not conform to IDT's price disclosure and have provided an expert's affidavit analyzing market prices in PJM in early 2014. See gen'ly Joint Complaint at ¶¶ 53, 55, 63-67 and App. A and C. As such, Joint Complainants have sufficiently pleaded facts to support a finding of a violation of, *inter alia*, Section 54.4(a) of the Commission's regulations. Joint Complainants incorporate Paragraphs 18, 19 and 25 herein.

25. It is denied that the Joint Complaint includes no averments that would allow the Commission to conclude that IDT's prices did not conform to the Disclosure Statement.

Specifically, the Joint Complainants attached the affidavit of Dr. Steven L. Estomin to the Joint Complaint as Appendix C. Dr. Estomin analyzed the day-ahead and real-time market prices for electric energy during the winter of 2014 for electric and non-electric space heating residential customers and for several Electric Distribution Company (EDC) territories in Pennsylvania. See Joint Complaint at App. C, page 1. Dr. Estomin included several categories of PJM generation costs and EGS-specific costs in his analysis. Joint Complaint at App. C, page 1. These categories analyzed by Dr. Estomin are comparable to the categories in IDT's pricing disclosure term. Based on his analysis, Dr. Estomin concluded that the cost to serve the average residential heating customer in January 2014 should not have exceeded approximately \$0.23 per kWh. See Joint Complaint at ¶ 66; App. C, page 2. As such, the Joint Complainants have provided sufficient allegations that IDT's prices charged to customers in early 2014 did not conform to IDT's price disclosure. See gen'ly Joint Complaint at ¶¶ 53, 55, 63-67 and App. A and C.

26. The Joint Complaint is of record in this matter and speaks for itself. By way of further answer, IDT's Disclosure Statement regarding variable pricing is provided in Paragraph 53 of the Joint Complaint. IDT's Disclosure Statement is attached to the Joint Complaint as Appendix B.

27. It is denied that the Joint Complaint includes no allegations upon which the Commission could rely to find that IDT's prices did not conform to the Disclosure Statement. By way of further answer, the Joint Complainants incorporate Paragraph 25 above herein.

28. It is denied that Count VI of the Joint Complaint fails to state a claim for which relief can be granted. By way of further answer, the Joint Complainants incorporate Paragraphs 18, 19 and 25 above herein.

29. It is denied that Joint Complainants' allegations regarding IDT's *prices charged* are an inappropriate attempt to seek Commission review of EGS pricing. It is denied that Count VI of

the Joint Complaint should be stricken as impertinent. As stated in Section II above, “impertinent matter” has been defined as allegations immaterial and inappropriate to the proof of the cause of action. See e.g. Common Cause/Pennsylvania, 710 A.2d at 115. As discussed above in Paragraphs 18, 19 and 25, the Joint Complainants have stated legally sufficient causes of action relating to IDT’s deceptive marketing of prices and *prices charged* that did not conform to IDT’s price disclosure statement, Welcome Letters or advertisements provided to customers. Joint Complainants incorporate Paragraphs 18, 19 and 25 above herein.

Count VII Of The Joint Complaint Is Legally Sufficient.

30. No response is required because the Joint Complaint speaks for itself.

31. Denied as stated. Respondent’s allegations constitute conclusions of law which require no response and are, therefore, deemed denied.

32. Denied as stated. Respondent’s allegations constitute conclusions of law which require no response and are, therefore, deemed denied. To the extent that an answer may be required, the exception that the Respondent alludes to in Section 2245(d)(1) of the Telemarketer Registration Act (TRA) states that a written contract is not needed if the sale of the good or service is regulated under other laws of the Commonwealth. 73 P.S. § 2245(d)(1). However, EGSs are subject to all requirements of the TRA, except the requirement that they register with the OAG. See Request for Opinion, 2010 Pa. AG LEXIS 1 (Feb. 8, 2010) (AG Opinion), attached hereto as Appendix A. In the AG Opinion, which was in response to the Commission Chairman Cawley’s question whether the EGSs are excluded from the definition of “telemarketer” in the TRA, Attorney General Thomas W. Corbett replied:

[E]lectric generation suppliers engaged in telemarketing are telemarketers for all purposes of the [Telemarketer Registration] Act except the requirement of Section 3(a), 73 P.S. § 2243(a), that telemarketers register with this Office, from which electric generation suppliers are excluded because they are licensed by the PUC

under the Competition Act, *66 Pa. C.S. § 2809(a)*. Agents of suppliers, such as individuals and businesses initiating or receiving calls pursuant to contracts with suppliers, are not excluded from the definition of "telemarketer" and therefore must register.

AG Opinion at *4-5.

Since the exception under Section 2245(d)(1) of the TRA does not apply to EGSs and their agents, each sale of electricity service made during a telemarketing call must be reduced to a written contract and must contain the provisions set forth in Section 2245(c) of the TRA. 73 P.S. §§ 2245(a)(7) and (c)(1)-(5); 52 Pa. Code § 111.10(a)(1). See also AG Opinion at *4-5. In addition, the EGS must obtain the consumer's signature on the written contract. 73 P.S. § 2245(a)(7); 52 Pa. Code § 111.10(a)(1). See also AG Opinion at *4-5. Furthermore, the Commission incorporated the TRA into its regulations, and it, therefore, has the authority to make determination pursuant to the TRA in order to determine if Respondent is in violation of the regulation. See 52 Pa. Code § 111.10(a)(1); Harrisburg Taxicab, 786 A.2d at 292-93.

33. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. Interestingly, though, Respondent asserts elsewhere in its Preliminary Objections that the Commission does not have jurisdiction to regulate IDT's sales. See e.g. IDT Preliminary Objection #1.

34. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied.

35. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied.

36. Denied. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. To the extent that an answer may be required, Count VII should not be dismissed because EGSs are subject to all of the requirements of the

TRA, and the Commission has the authority to determine whether the conduct alleged constitutes a violation of the TRA.

The Commission May Order Restitution In This Matter.

37. Denied. No response is required, as the Joint Complaint is of record in this matter and speaks for itself.

38. Denied. Paragraph 38 of IDT's Preliminary Objections contains a conclusion of law to which no authority is provided, and it is, therefore, denied. By way of further answer, the Commission has the authority to order equitable relief and has done so in other instances. See 66 Pa. C.S. § 103(c); OCA v. Utility.com, Inc., 212 P.U.R.4th 255 (2001) (Utility.com Final Order). In the Utility.com case, the OCA sought refunds of overpayments for service not received and for "lost savings" on behalf of customers. Utility.com Final Order at 262. In the Recommended Decision, ALJ Turner opined:

The ALJ opined that lost savings could be viewed as damages for breach of contract, and noted that the Commission does not exercise its jurisdiction over matters of damages. However, the ALJ notes that "the provisions of [the Public Utility Code] are cumulative and in addition to [the] rights of action and remedies" that exist under other statutory or common law. 66 Pa. C.S. § 103. Therefore, based on OCA's arguments, the ALJ recommends that the Commission find that it does have jurisdiction over lost savings.

See OCA v. Utility.com, Inc., 2001 Pa PUC LEXIS 32, *23 (June 4, 2001). The Commission sustained the OCA's claims for refunds and lost savings.² Utility.com Final Order at 262. The Commission has ordered equitable relief in other cases as well. See e.g. Pa. PUC v. Reed, 1972 Pa. PUC LEXIS 40; 46 Pa. PUC 19 (1972) (Commission directed Respondent, who was authorized to transport as a class D carrier, to refund overcharges to his customers); Ely v. Pennsylvania Water, Docket No. C-20055616, Order at 1 (July 10, 2006) (Commission

² The Commission noted that there were no funds remaining from Utility.com's bond to pay refunds and lost savings and encouraged the OCA to seek alternative means of collection of these funds. Utility.com Final Order at 262.

determined this was a classic case for the application of equitable estoppel when Respondent damaged Complainants' asphalt driveway while replacing a water line on the neighboring property and made countless verbal assurances that the driveway would be restored); C.S. Warthman Funeral Home, et. al. v. GTE North, Inc., Docket No. C-00924416 (June 4, 1993) (Complainants were permitted to introduce into evidence the letter and promise of Respondent that it would provide toll free calling to support a claim of equitable estoppel).

39-40. Denied. These paragraphs of IDT's Preliminary Objections contain conclusions of law to which no response is required.

41. Denied as stated. This paragraph states conclusions of law to which no response is required. By way of further answer, the Commission has authority over EGSs pursuant to 66 Pa. C.S. § 2809 and can revoke the license of an EGS. Joint Complainants incorporate Paragraph 18 above herein.

42. Denied as stated. This paragraph states conclusions of law to which no response is required. The conclusion of law that the Commission has no authority to regulate electricity generation *prices offered*, however, is not supported by IDT's citation to 66 Pa. C.S. § 2806(a). Section 2806(a) of the Public Utility Code states that "[t]he generation of electricity shall no longer be regulated as a public utility service or function except as otherwise provided for in this chapter." 66 Pa. C.S. § 2806(a). By way of further response, Joint Complainants incorporate Paragraph 19 above (discussion of the Commission's clear and well-established authority to regulate EGSs' billing and marketing practices and *prices charged*) herein.

43. Denied as stated. This paragraph states a conclusion of law. By way of further answer, the quote from the Joint Statement speaks for itself. The case cited by IDT is currently before

the Commonwealth Court, and therefore, it is not appropriate to cite as binding precedent. See McCloskey v. Pa. PUC, 569 C.D. 2014 (Advanced Form Brief submitted on July 10, 2014).

44. Denied as stated. This paragraph states conclusions of law to which no response is required. By way of further answer, Joint Complainants submit that Respondent's Preliminary Objection mischaracterizes the Joint Complaint. In the Joint Complaint, Joint Complainants are not requesting that the Commission regulate electricity generation prices offered by EGSs. Rather, as discussed in Paragraphs 25 and 28 above, the Joint Complainants assert that IDT's prices charged to customers in early 2014 did not conform to IDT's price disclosure. See gen'ly Joint Complaint at ¶¶ 53, 55, 63-67 and App. A and C. Moreover, the Joint Complainants assert that IDT's salespeople promised savings over the PTC or led consumers to believe that IDT's rates would be competitive with the PTC. See Joint Complaint at ¶¶ 21, 22, and 24.

45. Denied. This paragraph states conclusions of law to which no response is required. By way of further answer, Joint Complainants incorporate Paragraph 38 above herein.

46. Denied. Paragraph 46 of IDT's Preliminary Objections contains a conclusion of law to which no authority is provided, and it is, therefore, denied. The Joint Complainants, however, have sufficiently pleaded facts that support the finding that IDT's salespeople promised savings over the PTC or led consumers to believe that IDT's rates would be competitive with the PTC. See Joint Complaint at ¶¶ 21, 22, and 24. Here, Joint Complainants are seeking restitution in any amount paid by IDT's customers that exceeds the amount that they were promised by IDT's salespeople.

47. Denied. Paragraph 47 of IDT's Preliminary Objections contains a conclusion of law to which no response is required. By way of further answer, the quote from the Joint Statement speaks for itself. The case cited by IDT is currently before the Commonwealth Court, and

therefore, it is not appropriate to cite as binding precedent. See McCloskey v. Pa. PUC, 569 C.D. 2014 (Advanced Form Brief submitted on July 10, 2014).

48. Denied as stated. The Commission's regulations themselves incorporate the Consumer Protection Law. See 52 Pa. Code §§ 54.43(f) and 111.12(d)(1). The Commission has the jurisdiction to incorporate other laws and agency regulations into its decisions insofar as other laws and agency regulations are incorporated into the Commission's regulations. See Harrisburg Taxicab, 786 A.2d at 292-93. To promote consistency and uniformity in this industry and to obtain effective and adequate relief on behalf of consumers who have been injured by violations of the Consumer Protection Law, the Commission must determine whether the conduct alleged constitutes a violation of State or Federal law, including the Consumer Protection Law, or Commission rule, regulation, or order. 52 Pa. Code § 111.12(d)(1). See also Elkin v. Bell Telephone Co. of Pennsylvania, 491 Pa. 123, 133, 420 A.2d 371, 376 (1980). As a preliminary inquiry, the Commission must invoke the statute and case law under the Consumer Protection Law, interpret it, and apply it harmoniously where appropriate. See Duquesne Light Co. v. Borough of Monroeville, 449 Pa. 573, 298 A.2d 252 (1972); Pettko v. Pennsylvania American Water Company, 39 A.3d 473, 484 (Pa. Commw. Ct. 2012). Moreover, since the adjudication of MAPSA v. PECO Energy Co., Docket No. P-00981615, in 1999, the Commission added the requirement that EGSs comply with the Consumer Protection Law to the Commission's regulations. Furthermore, the Commonwealth Court decided Harrisburg Taxicab & Baggage Co. v. Pa. PUC, wherein the Court held that the Commission's decision to incorporate another agency's regulations into the Commission's own regulations is in no way inappropriate and such overlap does not divest the Commission of its statutory authority or duty. Harrisburg Taxicab, 786 A.2d at 292-93. See also City of Philadelphia v. Pa. PUC, 702 A.2d 1139 (Pa. Commw. Ct.

1997). By allowing the Commission to adjudicate these disputes in the first instance, all rights of the parties will be preserved, as well as providing any subsequent reviewing court the benefit of the Commission's opinion. County of Erie v. Verizon North, Inc., 879 A.2d 357 (Pa. Commw. Ct. 2005).

This is a public action being brought by the Joint Complainants for injunctive relief, along with civil penalties and restitution. Under the Administrative Code of 1929 the OCA is authorized to represent the interest of consumers before the Commission in any matter properly before the Commission. 71 P.S. § 309-4(a). The OCA "may exercise discretion in determining the interests of consumers which will be advocated in any particular proceeding and in determining whether or not to participate in or initiate any particular proceeding and, in so determining, shall consider the public interest, the resources available and the substantiality of the effect of the proceeding on the interest of consumers." 71 P.S. § 309-4(b).

This is an action being brought by the Attorney General "in the name of the Commonwealth," as authorized by the Consumer Protection Law, when she has reason to believe that any person is using or is about to use any unlawful method, act or practice and she further determines the proceedings would be in the "public interest." 73 P.S. § 201-4. The Attorney General is not acting on behalf on any one single claimant, but pursuant to her *parens patriae* powers. See Com. v. Foster, 57 Pa. D. & C.2d 203 (Allegheny Co. 1972) (characterizes the Commonwealth's action by the Attorney General under the Consumer Protection Law as *parens patriae*). See also Valley Forge Towers South Condominium v. Ron-Ike Foam Insulators, Inc., 393 Pa. Super. 339, 346, 574 A.2d 641, 644 (1990) *aff'd* 529 Pa. 512, 605 A. 2d 798 (1990) (the Pennsylvania Attorney General is authorized to bring a proceeding on behalf of the public at large to "protect the citizenry" from unfair or deceptive methods, acts, or practices).

49. Denied as stated. Paragraph 46 of IDT's Preliminary Objections contains a conclusion of law to which no response is required. For the reasons set out in paragraphs 37-48, however, IDT's Preliminary Objection seeking that Joint Complainant's request for an Order of restitution be dismissed must be overruled.

IV. CONCLUSION

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

Respectfully submitted,



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

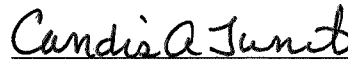
Margarita Tulman
Deputy Attorney General
PA Attorney I.D. 313514

Bureau of Consumer Protection
Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
T: (717) 787-9707
F: (717) 705-3795
jabel@attorneygeneral.gov
mtulman@attorneygeneral.gov

Counsel for:

Kathleen G. Kane, Attorney General
Bureau of Consumer Protection

DATE: July 21, 2014



Candis A. Tunilo
PA Attorney I.D. 89891

Kristine E. Robinson
PA Attorney I.D. 316479
Assistant Consumer Advocates

Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923
T: (717) 783-5048
F: (717) 783-7152
ctunilo@paoca.org
krobinson@paoca.org

Counsel for:

Tanya J. McCloskey
Acting Consumer Advocate

APPENDIX A



OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

[NO NUMBER IN ORIGINAL]

2010 Pa. AG LEXIS 1

February 8, 2010

SYLLABUS:

[*1]

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

REQUESTBY:

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

OPINIONBY:

TOM CORBETT, Attorney General

OPINION:

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

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

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

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

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

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

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

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

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

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

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

(Emphasis added).

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

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

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

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

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

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

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

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

Legal Topics:

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

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