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June 15, 2020

Via Electronic Filing

Rosemary Chiavetta, Secretary
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Andrew Perrong v. Frontier Utilities Northeast LLC
Docket No. C-2020-3019899

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Frontier Utilities Northeast LLC's ("Frontier") Preliminary Objections with regard to the above-referenced matter. Copies to be served in accordance with the Certificate of Service.

Sincerely,

A handwritten signature in blue ink that reads "Deanne M. O'Dell".

Deanne M. O'Dell, Esq.

DMO/lww

Enclosure

cc: Cert. of Service w/enc.

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of the foregoing **Preliminary Objections** upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

Via Email and First Class Mail

Andrew Perrong
1657 The Fairway, Suite 131
Jenkintown, PA 19046
andyperrong@gmail.com

Office of Administrative Law Judge
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
2nd Floor, L-M West
400 North Street
Harrisburg, PA 17120
bobbwillia@pa.gov



Date: June 15, 2020

Deanne M. O'Dell, Esquire
Attorneys for
Frontier Utilities Northeast LLC

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

ANDREW PERRONG :
Complainant :
 : Docket No. C-2020-3019899
v. :
 :
FRONTIER UTILITIES NORTHEAST LLC, :
Respondent :

NOTICE TO PLEAD

TO: Andrew Perrong
1657 The Fairway, Suite 131
Jenkintown, PA 19046

You are hereby notified that a reply to the new matter in the enclosed **Preliminary Objection** of Frontier Utilities Northeast LLC, must be filed within 10 days of the date of service.

All pleadings, such as an Answer to the Preliminary Objections, must be filed with the Secretary of the Pennsylvania Public Utility Commission with a copy served to counsel for Frontier Utilities Northeast, LLC, and where applicable, the Administrative Law Judge presiding over the proceeding.

File with:*

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

With a copy to:

Deanne O'Dell, Esquire
Eckert Seamans Cherin & Mellott, LLC
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*Due to the COVID-19 pandemic, the Pennsylvania Public Utility Commission is encouraging individuals to eFile documents. Information regarding eFiling with the Commission is available at <https://www.puc.pa.gov/efiling/default.aspx>.



Deanne O'Dell, Esquire

Attorney for
Frontier Utilities Northeast LLC

Date: June 15, 2020

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

ANDREW PERRONG,	:	
	Complainant	:
		Docket No. C-2020-3019899
v.	:	
	:	
FRONTIER UTILITIES NORTHEAST LLC,	:	
	Respondent	:

**PRELIMINARY OBJECTIONS OF
FRONTIER UTILITIES NORTHEAST, LLC**

Pursuant to 52 Pa. Code § 5.101, Frontier Utilities Northeast LLC (“Frontier” or “Respondent”) submits the following Preliminary Objections to the Complaint of Andrew Perrong (“Mr. Perrong” or “Complainant”), which the Pennsylvania Public Utility Commission (“PUC” or “Commission”) served on Frontier on May 26, 2020. Pursuant to 52 Pa. Code §§ 5.61 and 5.101(d) of the Commission’s regulations, Frontier is filing an Answer with New Matter to the Complaint contemporaneously with the filing of these Preliminary Objections. In further support hereof, Frontier avers as follows.

INTRODUCTION

Mr. Perrong’s Complaint raises issues, claims, and/or allegations concerning Frontier’s telemarketing practices, including alleged violations of Federal telemarketing laws and Federal telemarketing regulations. For the reasons stated herein and in Frontier’s Answer and New Matter (which, as noted below, is incorporated herein by reference), the issues, claims, and/or allegations related to Federal telemarketing laws and Federal telemarketing regulations should be dismissed because (a) the Commission lacks jurisdiction over those issues, claims, and/or allegations, and (b) the Complaint is legally insufficient as to those issues, claims, and/or allegations.

That being said, Frontier is not challenging by way of these Preliminary Objections the Complainant's ability to assert a violation of Section 111.10(b) of the Commission's regulations.¹ Without making any admissions as the truth of the allegations, Frontier admits that a minor part of the Complaint alleges that a person, allegedly acting on behalf of Frontier, engaged in misleading conduct in violation of that Section. *See* Complaint, Supplemental Narrative at 5, 6. That, however, should be the only issue in this docket going forward.

PRELIMINARY OBJECTIONS

1. To the extent deemed necessary or appropriate, the "Introduction" to these Preliminary Objections is incorporated herein by reference.

2. The Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary objections.² The Commission's procedure regarding the disposition of preliminary objections is similar to that utilized in Pennsylvania civil practice.³

3. Under Section 5.101(a) of the Commission's regulations, preliminary objections must specifically state the legal and factual grounds relied upon and be limited to the following:

- (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding;
- (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter;
- (3) Insufficient specificity of a pleading;
- (4) Legal insufficiency of a pleading;
- (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action;

¹ 52 Pa.Code § 111.10(b) provides: "An agent who contacts customers by telephone shall, after greeting the customer, immediately identify himself by name, identify the supplier the agent represents and the reason for the telephone call. The agent shall state that he is not working for and is independent of the local distribution company or another supplier. The agent may not say or suggest to a customer that a utility customer is required to choose a competitive energy supplier."

² 52 Pa. Code § 5.101(a)(1)-(7). *Equitable Small Transportation Interveners v. Equitable Gas Company*, PUC Docket No. C-00935435, Opinion and Order entered July 18, 1994, 1994 Pa. P.U.C. LEXIS 69.

³ *Id.*

- (6) Pendency of a prior proceeding or agreement for alternative dispute resolution; and,
- (7) Standing of a party to participate in the proceeding.

4. The filing of preliminary objections serves judicial economy by avoiding a hearing where no factual dispute exists. If no factual issue pertinent to the resolution of a case exists, a hearing is unnecessary.⁴ Frontier may not rely on its own factual assertions, but must accept for the purposes of disposition of the preliminary objection all well-pleaded, material facts of the other party, as well as every inference fairly deducible from those facts.⁵ However, the Commission need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion.⁶

5. In deciding the preliminary objections, the Commission must determine whether, based on the well-pleaded factual averments of the party, recovery or relief is possible.⁷

A. Dismissal Based On Lack Of Commission Jurisdiction Over Federal Telemarketing Laws And Regulations

6. To act on the Complaint, the Commission must have jurisdiction.⁸

7. Not all acts or functions performed by a regulated entity fall under the jurisdiction of the Commission. The Commission, as a creation of the Pennsylvania General Assembly, has only the powers and authority granted to it by the Pennsylvania General Assembly contained in

⁴ 66 Pa.C.S. § 703(a); *Lehigh Valley Power Committee v. Pa. PUC*, 563 A.2d 557 (Pa. Cmwlth. 1989).

⁵ *County of Allegheny v. Cmwlth. of Pa.*, 490 A.2d 402 (Pa. 1985).

⁶ *Stanton-Negley Drug Co. v. Dep't of Pub. Welfare*, 927 A.2d 671, 673 (Pa. Cmwlth. 2007).

⁷ *Department of Auditor General, et al. v. SERS, et al.*, 836 A.2d 1053, 1064 (Pa. Cmwlth. 2003); *P.J.S. v. Pa. State Ethics Commission*, 669 A.2d 1105 (Pa. Cmwlth. 1996).

⁸ 52 Pa. Code § 5.101(a)(1).

the Public Utility Code.⁹ The Commission must act within, and cannot exceed, its jurisdiction.¹⁰ Jurisdiction may not be conferred by the parties where none exists.¹¹ Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy.¹²

8. The Complaint alleges that a supposed agent of Frontier engaged in conduct that violates the Federal Telephone Consumer Protection Act (“TCPA”).¹³ See Complaint at ¶ 4 (other: illegal telemarketing), Complaint, Supplemental Narrative at ¶ 3; Complaint at ¶ 5 (seeking relief regarding “violations of the [TCPA]”). Specifically, the Complaint alleges that Frontier engaged in conduct that violates:

- (A) The TCPA’s prohibition on telemarketing in violation of the National “Do Not Call” Registry (or List),¹⁴ which is administered jointly by the Federal Trade Commission (“FTC”) and the Federal Communications Commission (“FCC”), see Complaint at ¶ 4 (other: illegal telemarketing); Complaint, Supplemental Narrative at ¶ 2, 6, 7, 8;
- (B) The TCPA’s prohibition on provision of misleading or inaccurate caller identification information,¹⁵ which has been called “spoofing,”¹⁶ see Complaint at ¶ 4 (other: illegal telemarketing); Complaint, Supplemental Narrative at ¶ 3; and
- (C) The TCPA’s requirements on using automated telephone equipment,¹⁷ see Complaint at ¶ 4 (other: illegal telemarketing); Complaint, Supplemental Narrative at ¶ 4; Complaint at ¶ 5 (seeking relief regarding violation of 47 USC 227(b)).

⁹ *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, PUC Docket No. C-20066937, Opinion and Order entered May 28, 2008; *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977).

¹⁰ *City of Pittsburgh v. PUC*, 43 A.2d 348 (Pa.Super. 1945).

¹¹ *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967).

¹² *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa.Cmwlth. 1992), appeal denied, 637 A.2d 293 (Pa. 1993).

¹³ The TCPA is codified as 47 U.S.C. § 227. It was passed in 1991.

¹⁴ 47 USCS § 227(c).

¹⁵ 47 USCS § 227(e).

¹⁶ <https://www.fcc.gov/consumers/guides/spoofing-and-caller-id> , at “What is spoofing?”

¹⁷ 47 USCS § 227(b).

9. The principal enforcement mechanism under the TCPA is a private civil action¹⁸ in the federal or state courts.¹⁹

10. **The Commission does not have jurisdiction to determine alleged violations of the TCPA.** Jurisdiction over violations of the TCPA is with the courts,²⁰ not the Commission. Nothing in the TCPA or the Public Utility Code empowers the Commission to determine violations of the TCPA. Given that the Commission does not have jurisdiction over the TCPA claims, the Complainant's TCPA claims should be expeditiously dismissed. Upon information and belief, Frontier avers that Complainant's TCPA claim is an attempt to pursue extra-judicial discovery in support of a putative TCPA class action that was filed by Complainant's business associate and Complainant's counsel (in other previously filed TCPA cases) in the United States District Court for the Eastern District of Pennsylvania. .²¹

11. **The regulation cited by the Complainant does not state the Commission will determine alleged violations of the TCPA.** Section 111.10(a) of the Commission's regulations state that a "supplier and its agents shall comply with regulations that govern marketing, consumer protection and telemarketing sales. . . ." Nothing in that regulation evidences any intent by the Commission to determine violations of the TCPA or any other Federal law,²² even if it were

¹⁸ 47 U.S.C. § 227(b)(3) ("A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State . . ."); The Act also allows for enforcement actions by state attorneys general. Id. § 227(f)(1).

¹⁹ See *Mims v. Arrow Fin. Services, LLC*, 565 U.S. 1036 (2012); *Aronson v. Fax.com Inc.*, 51 Pa.D.&C.4th 421 (C.P. Allegheny 2001) (allowing TCPA claims to proceed before the Court of Common Pleas).

²⁰ See footnotes 18 to 19 and the accompanying text.

²¹ See *Frey v. Frontier Utilities Northeast LLC*, Civ. No. 19-2372-KSM (E.D. Pa.), Order dated Apr. 13, 2020 [ECF No. 76].

²² 52 Pa.Code § 111.10(a)(3) provides that a "supplier and its agents shall comply with the Telemarketing and Consumer Fraud and Abuse Prevention Act (15 U.S.C.A. § § 6101—6108) [(the "Federal Consumer Fraud Act")] and 16 CFR Part 310 (relating to telemarketing sales rule) [(the "TSR")." Nothing in the regulations indicates that the Commission is empowered to determine violations of either the Federal Consumer Fraud Act or the TSR (or both). The Federal Consumer Fraud Act authorizes actions in courts, 15 USCS § 6103 to 6104, not before the Commission. Likewise, the TSR authorizes actions in courts, see 16 CFR 310.7, not before the Commission.

authorized to do so (which it is not – as stated in the above Paragraph). In promulgating that regulation, the Commission did not confer onto itself the power to determine violations of the TCPA.²³ Nor could it, since (as described herein) the Commission only has the power granted by the Pennsylvania General Assembly and the TCPA (and other relevant Federal laws and regulations²⁴) only authorize actions alleging TCPA violations in the courts.

12. The relief requested herein based on the Commission's lack of jurisdiction to enforce federal telemarketing laws is consistent with the Commission's dismissal of prior state telemarketing claims governed by laws enforced by the Pennsylvania Attorney General.²⁵ These state telemarketing laws include Pennsylvania's Telemarketer Registration Act²⁶ and Unfair Trade Practices and Consumer Protection Law.²⁷ Just like the federal claims, jurisdiction over violations of these two state laws is with the courts,²⁸ not the Commission. Those laws are enforced by

²³ See *Rulemaking Re: Marketing and Sales; Practices for the Retail Residential Energy Market*, PUC Docket No. L-2010-2208332, Corrected Final Rulemaking Order entered October 24, 2012, 2012 Pa. PUC LEXIS 1877, wherein the Commission (1) deleted references to "State and Federal laws" as originally proposed in 111.10(a) and (2) disclaimed that the Commission would enforce requirements under State laws based on the Commission's Memorandum of Understanding with the Attorney General.

²⁴ See footnote 22.

²⁵ See *Commonwealth v. Respond Power LLC*, PUC Docket No. C-2014-2427659, Order Granting In Part And Denying In Part Preliminary Objections dated August 20, 2014 at 20, 2014 Pa. PUC LEXIS 395 ("Enforcement of EGS compliance with the TRA [Telemarketer Registration Act] would appropriately be done in a forum with jurisdiction over the TRA, not the Commission."); *Commonwealth v. IDT Energy, Inc.*, PUC Docket No. C-2014-2427657, Opinion and Order entered December 18, 2014 at 23, 2014 Pa. PUC LEXIS 715 (Holding that the Commission does not have "authority and jurisdiction to determine whether an EGS has committed violations of the TRA [Telemarketer Registration Act] when considering whether the Commission's Regulations - which require EGS compliance with the TRA - have been violated.").

²⁶ 73 P.S. § 2241, *et seq.* Violations of Pennsylvania's Telemarketing Registration Act is also a violation of the Unfair Trade Practices and Consumer Protection Law. See 73 P.S. § 2246. That being said, the Complaint makes not reference to, or allegations concerning, the Pennsylvania's Telemarketing Registration Act or the Pennsylvania Do Not Call Registry, which was created by 73 P.S. § 2245.2.

²⁷ 73 P.S. § 201-1, *et seq.*

²⁸ See 73 P.S. §§ 201-4, 201-4.1, 201-5, 201-8, 201-9, 201-9.1, 201-9.2. *Commonwealth v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655, Opinion and Order entered December 11, 2015. See also, *David P. Torakeo v. Pennsylvania American Water Co.*, Docket No. C-2013-2359123, Opinion and Order (entered April 3, 2014) ("to the extent that the Complainant is challenging the ALJ's finding regarding our jurisdiction over the allegations that PAWC's actions violated the UTPCPL, this Exception is also denied. As the ALJ determined, it is clear under Pennsylvania law that the Commission does not have jurisdiction over such claims."); *Cedar Crest Professional Park VII LP v. Nextera Energy Services Pennsylvania, LLC*, Docket No. C-2016-2559494, Interim Order On

Pennsylvania's Attorney General, and the Commission has agreed under a long-standing Memorandum of Understanding to refer such matters to the Attorney General for enforcement.²⁹

13. Frontier submits that any and all references, issues, claims, and/or allegations regarding the TCPA—including (but not limited to) references, issues, claims, and/or allegations regarding the National “Do Not Call” Registry, spoofing, or calls made using automated telephone equipment³⁰—should be dismissed on the grounds that the Commission lacks jurisdiction. Alternatively, Frontier submits that, pursuant to 52 Pa. Code § 5.101(a)(2), any and all of said references, issues, claims and/or allegations regarding the TCPA should be stricken as impertinent matters over which the Commission will not exert its jurisdiction.

B. Dismissal Based on Legal Insufficiency of the Complaint.

14. Paragraphs 1 to 13 are incorporated herein by reference.

15. Section 5.101(a)(4) of the Commission's regulations permit the filing of a preliminary objection on the grounds that the complaint lacks legal sufficiency.

16. Before acting on a complaint, the Commission must determine that a complainant is entitled to the requested relief.³¹ As the party seeking relief, the Complainant bears the burden

Preliminary Objections dated February 5, 2016; *Mid-Atlantic Power Supply Assoc. v. PECO Energy Co.*, Docket No. P-00981615, 1999 Pa PUC LEXIS 30 (entered May 19, 1999); see also, *Pa. Pub. Util. Comm'n, et al. v. The Bell Telephone Co. of Pa.*, 71 Pa. PUC 338, 341 (1989).

See In Re Marketing and Sales Practices for the Retail Residential Energy Market, Docket No. L-2010-2208332 (Order entered October 24, 2012), at 5-8.

²⁹ *See In Re Marketing and Sales Practices for the Retail Residential Energy Market*, Docket No. L-2010-2208332 (Order entered October 24, 2012), at 5-8.

³⁰ Even if the Commission had jurisdiction over Mr. Perrong's TCPA claim (which it does not), his claim is facially invalid. Mr. Perrong alleges that he was called on his private residential line through the use of an automated telephone dialing system (“ATDS”). But the TCPA does not prohibit calls to residential lines through the use of an ATDS. *See* 47 U.S.C. 227(b)(1)(B).

³¹ *See* 52 Pa.Code § 5.101(a)(4), 5.102.

proving (a) that Frontier is in violation of the Public Utility Code, the Commission's Regulations, or the Commission's Orders and (b) his right to the requested relief.³²

17. The issues, claims, and/or allegations in the Complaint, as described in Paragraph 8 of these Preliminary Objections, do not set forth any factual averments that form the basis for any finding that Frontier has violated any law, regulation, or order of the Commission. Rather, Complainant requests that the Commission declare that Frontier has violated requirements set forth in Federal laws or regulations.

18. Frontier demurs to claims in the Complaint regarding issues, claims, and/or allegations of violations of Federal law or regulations.

CONCLUSION

WHEREFORE, based upon the foregoing, Frontier respectfully requests that the Commission: (a) grant these Preliminary Objections so as to dismiss the Complainant's claims to the extent they purport to invoke Federal law; and (b) grant any other relief in favor of Frontier that is deemed to be reasonable, appropriate, and in the public interest.

Respectfully submitted,



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Date: June 15, 2020

Attorneys for
Frontier Utilities Northeast LLC

³² 66 Pa. C.S. § 332(a).

Verification

I, Scott Birmingham, am Director – Northeast Markets for Frontier Utilities Northeast LLC, hereby verify that I am authorized to and do make this Verification for it, and that the facts set forth in the forgoing Preliminary Objections are true and correct to the best of my knowledge, information and belief, and further that I expect Frontier Utilities Northeast LLC, to prove the same at any hearing in this matter.

Dated: June 15, 2020



Frontier Utilities Northeast LLC