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July 20, 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 to Amended Complaint 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 to Amended Complaint** 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](mailto: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](mailto:bobbwillia@pa.gov)



Date: July 20, 2020

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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 :

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**NOTICE TO PLEAD**

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**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 Objections** of Frontier Utilities Northeast LLC to the Amended Complaint of Andrew Perrong, 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  
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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>.



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Deanne O'Dell, Esquire

Date: July 20, 2020

Attorney 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 :

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**PRELIMINARY OBJECTIONS OF  
FRONTIER UTILITIES NORTHEAST LLC  
TO THE AMENDED COMPLAINT OF ANDREW PERRONG**

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Pursuant to 52 Pa. Code § 5.101, Frontier Utilities Northeast LLC (“Frontier” or “Respondent”) submits the following Preliminary Objections to the Amended Complaint of Andrew Perrong (“Mr. Perrong” or “Complainant”), which the Pennsylvania Public Utility Commission (“PUC” or “Commission”) served on Frontier on June 26, 2020.<sup>1</sup> 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 Amended Complaint contemporaneously with the filing of these Preliminary Objections. In addition and because Complainant intends the Amended Complaint to respond to Frontier’s Preliminary Objections filed in response to his Initial Formal Complaint (and did not file a separate answer to the Preliminary Objections), Frontier is simultaneously filing a Motion for Ruling on Preliminary Objections requesting a ruling on Frontier’s Preliminary Objections prior to permitting Mr. Perrong to file an additional amended complaint. In further support hereof, Frontier avers as follows.

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<sup>1</sup> Mr. Perrong’s Initial Formal Complaint was served on Frontier on May 26, 2020. Frontier filed an Answer and New Matter as well as Preliminary Objections on June 15, 2020.

## INTRODUCTION

Mr. Perrong's Amended 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 to the Amended Complaint (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 Amended Complaint is legally insufficient as to those issues, claims, and/or allegations.

That being said, Frontier is not challenging in these Preliminary Objections the Complainant's ability to assert a violation of Section 111.10 of the Commission's regulations which governs the telemarketing practices of licensed electric generation suppliers. *See* Amended Complaint, Narrative at ¶¶ 10-12; *see* Frontier's Answer and New Matter to Amended Complaint, ¶4, (l)-(n) However, these allegations 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.<sup>2</sup> The Commission's procedure regarding the disposition of preliminary objections is similar to that utilized in Pennsylvania civil practice.<sup>3</sup>

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<sup>2</sup> 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.

<sup>3</sup> *Id.*

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;
- (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.<sup>4</sup> Frontier may not rely on its own factual assertions, but must accept for the purposes of disposition of the preliminary objections all well-pleaded, material facts of the other party, as well as every inference fairly deducible from those facts.<sup>5</sup> However, the Commission need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion.<sup>6</sup>

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.<sup>7</sup>

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

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

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

<sup>7</sup> *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).

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

6. To act on the Amended Complaint, the Commission must have jurisdiction.<sup>8</sup>

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

8. The Amended Complaint alleges that a person, allegedly acting on behalf of Frontier, engaged in conduct that violates the Federal Telemarketing and Consumer Fraud Abuse Prevention Act (“Federal Consumer Fraud Act”) and regulations promulgated thereunder (referred to as the telemarketing sales rule “TSR”).<sup>13</sup> See Amended Complaint, Narrative at ¶¶ 7-8, 11, 12, and 16 (referencing 16 CFR §§ 310.3(b)(1)(iii)(B)m 319,4(a)(3), 310.3(a)(2)(vii) and 310.4(b)(1)(iii)(A)). Although Complainant states that he is “not seeking to enforce any of the rights granted under the Pennsylvania Telemarketer Registration Act . . . nor the [Federal] Telemarketing Sales Rule,” he explains how the alleged actions identified in the Amended Complaint constituted alleged violations of these rules and, therefore, are “*prima facie*” violations

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<sup>8</sup> 52 Pa. Code § 5.101(a)(1).

<sup>9</sup> *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).

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

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

<sup>12</sup> *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa.Cmwlt. 1992), appeal denied, 637 A.2d 293 (Pa. 1993).

<sup>13</sup> The TCFAPA is codified at 15 U.S.C. §§ 6101-6108. Complainant references 16 CFR §§ 310.3 and 310.4 which are regulations of the Federal Trade Commission enforcing the TCFAPA.

of 52 Pa. Code § 111.10(a)(2) and 52 Pa. Code § 111.10(a)(3). *See* Amended Complaint, Narrative at ¶ 4. More specifically, the Amended Complaint alleges that Frontier engaged in conduct that violates:

- (a) The TSR’s prohibition on initiating an outbound telephone call to the person when that person’s telephone number is on the “do-not-call” registry. *See* Amended Complaint, Narrative at ¶¶ 7 and 16 (note that Complainant references 16 CFR § 310.3(b)(1)(iii)(B) but this is assumed to be an error and the correct reference should be 16 CFR § 310.4(b)(1)(iii)(B));
- (b) The TSR’s prohibition on failing to transmit the telephone number to any caller identification which has been called “spoofing,”<sup>14</sup> *See* Amended Complaint, Narrative at ¶ 8 referencing 16 CFR § 310.4(a)(8); and
- (c) The TSR’s prohibition on misrepresenting an affiliation with, or endorsement or sponsorship by, any person or government entity. *See* Amended Complaint, Narrative at ¶ 11 referencing 16 CFR § 310.3(a)(2)(vii).

9. 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.

10. **The Commission does not have jurisdiction to determine alleged violations of the Federal Consumer Fraud Act or the TSR.** Jurisdiction over violations of the Federal Consumer Fraud Act is with the courts, not the Commission. Nothing in the Federal Consumer Fraud Act or the Public Utility Code empowers the Commission to determine violations of the Federal Consumer Fraud Act. Given that the Commission does not have jurisdiction over the Federal Consumer Fraud Act claims, the Complainant is not entitled to claim violations of these federal laws nor that such alleged federal law violations would constitute “*prima facie*” violations

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<sup>14</sup> <https://www.fcc.gov/consumers/guides/spoofing-and-caller-id> , at “What is spoofing?” (Last visited July 20, 2020).

of Commission regulations and any claim that the actions violated these federal laws should be expeditiously dismissed.

11. **The regulation cited by the Complainant does not state the Commission will determine alleged violations of the Federal Consumer Fraud Act.** 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 Federal Consumer Fraud Act or any other Federal law,<sup>15</sup> even if it were 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 Federal Consumer Fraud Act.<sup>16</sup> Nor could it, since (as described herein) the Commission only has the power granted by the Pennsylvania General Assembly, and the Federal Consumer Fraud Act (and other relevant Federal laws and regulations<sup>17</sup>) only authorize actions alleging violations in the courts.

12. In sum, Complainant cannot be permitted to cite references to federal laws that are not enforced by the Commission to claim that those laws have been violated by the facts as alleged and, therefore, the violations of those federal laws constitute grounds to support his claim that the

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<sup>15</sup> 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 only, 15 USC §§ 6103 to 6104, so that a judicial determination of a violation may be made by the courts - not before the Commission. Likewise, the TSR authorizes actions in courts only, see 16 CFR § 310.7, not before the Commission.

<sup>16</sup> *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.

<sup>17</sup> *See* footnote 15.

Pennsylvania regulations have been violated. Violations of those federal laws can only be determined by the courts, not the Commission. Granting these Preliminary Objections is necessary to refocus and limit this matter on the rules and requirements of the Commission, and whether or not the alleged facts constitute violations of the Commission's regulations.

13. The Amended Complaint also claims a violation of Pennsylvania's Telemarketer Registration Act as another basis to support his view that the Commission's regulations have been violated. *See* Amended Complaint, Narrative at ¶¶ 4, 8. However, the Commission has dismissed prior state telemarketing claims governed by laws enforced by the Pennsylvania Attorney General.<sup>18</sup> These state telemarketing laws include Pennsylvania's Telemarketer Registration Act<sup>19</sup> and Unfair Trade Practices and Consumer Protection Law.<sup>20</sup> Just like the federal claims, jurisdiction over violations of these two state laws is with the courts,<sup>21</sup> not the Commission. Those

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<sup>18</sup> *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.").

<sup>19</sup> 73 P.S. § 2241, *et seq.* Violation 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 Amended 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.

<sup>20</sup> 73 P.S. § 201-1, *et seq.*

<sup>21</sup> *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) ("[T]o 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 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.

laws are enforced by 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.<sup>22</sup>

14. Frontier submits that any and all references, issues, claims, and/or allegations regarding the Federal Consumer Fraud Act, the TSR, and Pennsylvania's Telemarketer Registration Act – 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 equipment – should be dismissed on the grounds that the Commission lacks jurisdiction to determine that violations of these laws have occurred. 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 Federal Consumer Fraud Act, the TSR and Pennsylvania's Telemarketer Registration Act should be stricken as impertinent matters over which the Commission will not exert its jurisdiction at this time.

**B. Dismissal Based on Legal Insufficiency of the Amended Complaint**

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

16. 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.

17. Before acting on a complaint, the Commission must determine that a complainant is entitled to the requested relief.<sup>23</sup> As the party seeking relief, the Complainant bears the burden

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<sup>22</sup> 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.

<sup>23</sup> 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.<sup>24</sup>

18. The issues, claims, and/or allegations in the Amended 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 or other laws not subject to Commission jurisdiction.

19. Frontier demurs and objects to claims in the Complaint regarding issues, claims, and/or allegations of violations of federal law or regulations and Pennsylvania's Telemarketer Registration Act.

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<sup>24</sup> 66 Pa. C.S. § 332(a).

## 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 in the Amended Complaint to the extent they purport to invoke federal law, the Pennsylvania's Telemarketer Registration Act, and any other matter over which the Commission does not exercise jurisdiction; 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: July 20, 2020

Attorneys for  
Frontier Utilities Northeast LLC

**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: July 20, 2020

  
\_\_\_\_\_  
Frontier Utilities Northeast LLC