

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Andrew Perrong	:	
	:	
v.	:	Docket # C-2020-3019899
	:	
Frontier Utilities Northeast, LLC	:	

**ANSWER TO RESPONDENT FRONTIER UTILITIES NORTHEAST, LLC’S
PRELIMINARY OBJECTIONS**

Complainant ANDREW PERRONG hereby replies to the preliminary objections of FRONTIER UTILITIES NORTHEAST, LLC (hereinafter “Respondent”) as follows:

1. Denied. This averment is a conclusion of law to which no responsive pleading is required. Therefore, this averment is deemed denied. Furthermore, this averment attempts to characterize the formal complaint, which speaks for itself, and any attempt to characterize its contents is therefore denied. To the extent that this averment contains an averment that is not a conclusion of law, that averment is denied.

2. Denied. This averment is a conclusion of law to which no responsive pleading is required. To the extent that this averment contains an averment that is not a conclusion of law, that averment is denied.

3. Denied. This averment is a conclusion of law to which no responsive pleading is required. To the extent that this averment contains an averment that is not a conclusion of law, that averment is denied.

4. Denied. This averment is a conclusion of law to which no responsive pleading is

required. To the extent that this averment contains an averment that is not a conclusion of law, that averment is denied.

5. Denied. This averment is a conclusion of law to which no responsive pleading is required. To the extent that this averment contains an averment that is not a conclusion of law, that averment is denied.

6. Denied. This averment is a conclusion of law to which no responsive pleading is required. To the extent that this averment contains an averment that is not a conclusion of law, that averment is denied.

7. Denied. This averment is a conclusion of law to which no responsive pleading is required. This averment is denied insofar as it mischaracterizes the power granted to the PUC by the General Assembly to find that provisions of the Utility Code have been violated and impose penalties for those violations. To the extent that this averment contains another averment that is not a conclusion of law, that averment is denied.

8. Denied. This averment attempts to characterize the formal complaint and the supplemental narrative thereto, which speaks for itself, and any attempt to characterize its contents is therefore denied. Denied insofar as this averment makes conclusions of law to which no responsive pleading is required. Denied in all other respects.

9. Denied. This averment is a conclusion of law to which no responsive pleading is required. Denied insofar as this averment purports to assert that complainant is authorized by statute to bring an action under the Telemarketing and Consumer Fraud and Abuse Prevention Act or Telemarketing Sales Rule. To the extent that this averment contains an averment that is not a conclusion of law, that averment is denied.

10. Denied. This averment is a conclusion of law to which no responsive pleading is required. To the extent that this averment contains an averment that is not a conclusion of law, that averment is denied.

11. Denied. This averment is a conclusion of law to which no responsive pleading is required. To the extent that this averment contains an averment that is not a conclusion of law, that averment is denied.

12. Denied. This averment is a conclusion of law to which no responsive pleading is required. Therefore, this averment is deemed denied. Furthermore, this averment attempts to characterize the formal complaint, which speaks for itself, and any attempt to characterize its contents is therefore denied. To the extent that this averment contains an averment that is not a conclusion of law, that averment is denied.

13. Denied. This averment is a conclusion of law to which no responsive pleading is required. Therefore, this averment is deemed denied. Furthermore, this averment attempts to characterize the formal complaint, which speaks for itself, and any attempt to characterize its contents is therefore denied. To the extent that this averment contains an averment that is not a conclusion of law, that averment is denied.

14. Denied. This averment is a conclusion of law to which no responsive pleading is required. Therefore, this averment is deemed denied. Furthermore, this averment attempts to characterize the formal complaint, which speaks for itself, and any attempt to characterize its contents is therefore denied. To the extent that this averment contains an averment that is not a conclusion of law, that averment is denied.

15. Denied. Complainant incorporates his responses herein by reference.

16. Denied. This averment is a conclusion of law to which no responsive pleading is required. To the extent that this averment contains an averment that is not a conclusion of law, that averment is denied.

17. Denied. This averment is a conclusion of law to which no responsive pleading is required. To the extent that this averment contains an averment that is not a conclusion of law, that averment is denied.

18. Denied. This averment attempts to characterize the formal complaint and the supplemental narrative thereto, which speaks for itself, and any attempt to characterize its contents is therefore denied. Denied insofar as this averment makes conclusions of law to which no responsive pleading is required. Denied in all other respects.

19. Denied. This averment is a conclusion of law to which no responsive pleading is required. To the extent that this averment contains an averment that is not a conclusion of law, that averment is denied.

CONCLUSION

Complainant prays that the Commission overrule Respondent's Preliminary objections and grant any other relief in favor of Complainant that it deems meet and just.

Dated: **July 30, 2020**

/s/

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**MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENT FRONTIER
UTILITIES NORTHEAST, LLC’S PRELIMINARY OBJECTIONS**

I. INTRODUCTION

This formal complaint seeks to hold Frontier Utilities Northeast, LLC (hereinafter “Respondent”) accountable for their odious violations of the Commission’s Regulations, namely 52 Pa. Code § 111.10, by, *inter alia*, calling complainant’s telephone number on the National Do-Not-Call Registry, calling the complaint with a “spoofed” caller ID, misrepresenting their endorsement and sponsorship by PECO and the PUC, as well as failing to identify themselves as competitive electric suppliers.

Rather than own up to these loathsome actions, Respondent has resorted to sophistic objections challenging the subject matter jurisdiction of the Commission to enforce the portions of Complainant’s complaint dealing with violations of the Telemarketing and Consumer Fraud and Abuse Prevention Act (“TCFAPA”) and the Telemarketing Sales Rule (“TSR”) under 52 Pa. Code § 111.10(a)(3). In a futile attempt to shirk responsibility for and draw attention away from its most egregious and obvious violations pertaining to its illegal telemarketing, Respondent attempts to confuse the Commission into conflating its power to determine violations of its Regulations, which incorporate state and federal law by reference, with determining violations of

the state and federal laws themselves. *See* 52 Pa. Code § 111.12(d)(1) (“conduct as defined by State or Federal law”). In essence, what Respondent is doing is attempting to hoodwink the Commission into thinking it lacks subject matter jurisdiction over any provision of its Regulations when that provision is defined in terms of state or federal law. Respondent’s preliminary objections are meritless and specious and should therefore be overruled *in toto*.

II. STANDARDS FOR PRELIMINARY OBJECTIONS

The Commission’s Regulations authorize filing preliminary objections under similar circumstances to those authorized before courts of general jurisdiction within the Commonwealth. 52 Pa. Code § 5.101(a). Similarly, preliminary objections are similar to those of motions under Rule 12 of the Federal Rules of Civil Procedure. Accordingly, all instances of material facts as stated in the complaint, as well as every inference deducible from them, must be treated as true when ruling on the preliminary objections. *Turner v. Med. Ctr., Beaver, PA, Inc.*, 454 Pa. Super 645, 646 (1996). Accordingly, the Commission must be able to say *with certainty* that the law does not permit it to exercise its jurisdiction based on the facts pled in the complaint. *Id.* Preliminary objections may only be sustained when there is no doubt that the Commission lacks jurisdiction and therefore cannot exercise its power. *Interstate Traveler Servs., Inc. v. Cmwlth. Dept. of Env. Resources*, 486 Pa. 536, 38 (1979).

III. THE COMMISSION HAS JURISDICTION OVER THE ALLEGATIONS IN THE COMPLAINT WHICH INCORPORATE STATE AND FEDERAL LAW

The crux of Respondent’s argument conflates what it perceives as Complainant’s attempt to enforce the provisions of the TCFAPA and TSR with what the Complainant is actually doing: holding Respondent accountable for their violations of 52 Pa. Code § 111.10(a)(3), which incorporates by reference both the TCFAPA and TSR in defining what conduct constitutes a

violation of that provision. Indeed, it is clear that the General Assembly conferred onto the Commission the power to determine violations of its Regulations and enforce its provisions. To achieve this goal, it authorized private enforcement of these Regulations through formal complaints. If Respondent is to be believed, and taken to its logical end, the Commission would lack subject matter jurisdiction over any complaint arising out of a violation of its Regulations when that violation incorporates by reference federal or state law. It is clear that the General Assembly would never have intended such an absurd result.

a. Complainant's assertions are entirely consistent with existing legal doctrines and the legislative scheme.

Respondent claims that the Commission must have subject matter jurisdiction over the underlying statutes which are incorporated by reference in the Commission's Regulations. This argument is entirely without merit and is belied by the PUC's Supplier Marketing Guidelines, which stress that the guidelines are "based on statutory law and regulations" and incorporate numerous state and federal statutes by reference. *See generally* No. M-2010-2185981 (Pa. PUC Nov. 4, 2010). What Complainant is doing, and what the General Assembly seems to have intended to be done, is applying a statute in determining if a violation of another statute has occurred in a manner similar to the application of a statute in asserting that a defendant was negligent, as in the doctrine of negligence *per se*. Respondent's argument would essentially eliminate the doctrine of negligence *per se* by requiring plaintiffs seeking to invoke the doctrine to have both standing and the court to have subject matter jurisdiction over the statute alleged to have been violated.

Neither a plaintiff's standing to sue under a statute nor a court's subject-matter jurisdiction over cases arising out of a statute, however, are requisite elements of negligence *per se*. *Cabiroy v. Scipione*, 767 A.2d 1078, 1081 (Pa. Super. 2001) (holding that federal statute's lack of a

private cause of action did not bar state negligence *per se* claim). The Commission should follow the same reasoning as the Superior Court held in *Cabiroy* and find that it does have subject matter jurisdiction over its Regulations based on violations of state and federal telemarketing and consumer protection law, even if the Commission undisputedly lacks subject matter jurisdiction over those statutes themselves.

It seems incongruous that the General Assembly, knowing that it created the formal complaint mechanism, drafted the Commission's Regulations, and authorized these procedures, would define prohibited conduct in terms of federal law and then deny the Commission the ability to evaluate the alleged conduct of suppliers under that same definition based on a purported lack of standing or subject matter jurisdiction. Indeed, private individuals cannot bring an action to enforce the provisions of the TCFAPA even if they wanted to, contrary to Respondent's assertions. The TCFAPA does not authorize a private enforcement action by a private individual in any court. *See* 15 U.S.C. § 6103 ("Actions by States"). It is therefore incongruous that the General Assembly, knowing this, would nevertheless incorporate the statute by reference in 52 Pa. Code § 111.10(a)(3).

It is clear that the intent of the General Assembly, then, was to give the Commission the subject matter jurisdiction to determine violations of its Regulations by using, in some instances, both federal and state statutes as guideposts. The intent of the General Assembly to use the TCFAPA and TSR's provisions to *define* compliance with 52 Pa. Code § 111.10(a)(3) is demonstrated in 52 Pa. Code § 111.12(d)(1), which specifically prohibits a supplier from engaging in "misleading or deceptive conduct *as defined by State or Federal law.*" 52 Pa. Code § 111.12(d)(1) (emphasis added).

To be clear, Complainant is not attempting to hold Respondent accountable for its violations of the TCFAPA or TSR under those statutes and is not seeking any determination that a violation of those statutes has taken place. Rather, Complainant is asking the Commission to do something similar to what the courts of this Commonwealth do all the time in cases of negligence *per se*, in holding that Respondent violated, *inter alia*, 52 Pa. Code § 111.10(a)(3) and 52 Pa. Code § 111.12(d)(1) by virtue of their actions which violate the TCFAPA and TSR. Complainant pleads these violations as a necessary element of meeting his burden of proof and in alleging the specific conduct committed by Respondent that violates the Code. Taking these allegations as true, as the Commission must for the purpose of ruling on the Preliminary Objections, Complainant has adequately pled such violations.

b. The Commission's exercise of subject matter jurisdiction over provisions of the Commission's Regulations which incorporate federal statutes is entirely consistent with its previous decisions.

The Commission has, in the past, utilized properly promulgated statutory law and regulations as guidelines for supplier conduct and in analyzing whether the conduct of a supplier is or was proscribed under its Regulations. *Kiback v. IDT Energy, Inc.*, No. C-2014-2409676, 2015 WL 5011613, at *16 (Pa. PUC Aug. 20, 2015). In multiple instances, and of particular relevance here, the Commission determined that a supplier violated 52 Pa. Code § 111.10(a)(3) by applying the TCFAPA and TSR. For instance, the Commission assessed a penalty under 52 Pa. Code § 111.10(a)(3) against a supplier who violated 16 C.F.R. § 310.4(b) by, *inter alia*, contacting a complainant on the do-not-call list repeatedly. *Krain v. Choice Energy LLC*, No. C-2016-2581006, 2017 WL 6766263, at *4 (Pa. PUC Dec. 18, 2017). Similarly, in analyzing proscribed conduct under 16 C.F.R. § 310.3(a)(1)(i) the Commission assessed a penalty under 52

Pa. Code § 111.10(a)(3) against a supplier who utilized deceptive practices while telemarketing. *Kiback*, 2015 WL 5011613, at *16.

Recently, the Commission entered into a settlement with a particularly egregious and violative supplier. In support of this settlement, the Commission's Bureau of Investigation and Enforcement recognized that failure of telemarketing agents to comply with federal and state regulations governing telemarketing sales constituted violations of 52 Pa. Code § 111.10(a). *PUC v. Verde Energy USA, Inc.*, No. C-2020-3017229 (Pa. PUC June 30, 2020). On this point, the cases relied on by Respondent are distinguishable. In *Commonwealth v. Respond Power LLC*, for instance, the Complainant attempted to enforce the provisions of the Telemarketer Registration Act in proceedings before the Commission. No. C-2014-2427659 (Pa. PUC Aug. 20, 2014). The Complainant here, however, does not seek any holding that any state or federal statute, such as the UTPCPL, was violated by Respondent, and does not seek any award payable to him under the UTPCPL. *Torakeo v. Pa. Am. Water Co.*, No. C-2013-2359123 (Pa. PUC Apr. 3, 2014).

Complainant is well aware that the Commission cannot grant him any judgment under the statutes which are incorporated by reference in its Regulations, but can only impose a fine or other statutory penalty on Respondent arising out of its violations of its Regulations. Unlike in the cases relied upon by Respondent, the Complainant is not seeking any relief for violations of, nor seeking to enforce any of the legal provisions present in, the UTPCPL, TCFAPA, nor the TSR and does not dispute that asking the Commission to do so would exceed the limits of its jurisdiction. Complainant only seeks the remedies explicitly granted to the Commission for violations of its Regulations, to include monetary penalties payable to the Commission and license suspension/revocation.

c. The Commission's exercise of subject matter jurisdiction does not conflict with any state or federal statute, including the TCFAPA and the TSR.

Finally, the Commission's use of the TCFAPA and TSR in defining guideposts for proscribed conduct under 52 Pa. Code § 111.10(a)(3) in no way conflict with the TCFAPA nor the TSR. As a preliminary matter, the Commission is not determining alleged violations of the TCFAPA nor the TSR. The Commission is merely using these statutes as definitions in determining violations of 52 Pa. Code § 111.10(a)(3).

In doing so, as described above, the Commission in no way exceeds the limits of the jurisdiction granted to it either by statute, regulation, or the General Assembly. The Commission is doing no more than what the Courts of Common Pleas do when they analyze federal statutes over which they do not exercise subject matter jurisdiction in state tort actions. Moreover, the Commission is in no way prevented from doing so by the text of the statutes themselves.

The TCFAPA states that "Nothing contained in this section shall prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any civil or criminal statute of such State." 15 U.S.C. § 6103(f)(1). The Commission is a State official, and the Commission is a tribunal which is empowered to determine violations of its Regulations. The TSR has similar language, stating that "Nothing contained in this Section shall prohibit any attorney general or other authorized state official from proceeding in state court on the basis of an alleged violation of any civil or criminal statute of such state." 16 C.F.R. § 310.7(b).

IV. COMPLAINANT'S COMPLAINT IS LEGALLY SUFFICIENT

Respondent raises a demurrer to Complainant's issues relating to "issues, claims, and/or allegations of violations of federal law or regulations and Pennsylvania's Telemarketer Registration Act. In support of this position, Respondent states that the allegations in the

Complaint state no factual averments over which the Commission may find that Respondent violated any of its Regulations, including 52 Pa. Code § 111.10(a)(3).

This demurrer is entirely without merit, as it is based on the theory that the Commission may not determine violations of its own Regulations without exceeding the limits of its jurisdiction when such Regulations incorporate by reference federal and state law over which the Commission lacks subject matter jurisdiction. For the reasons stated above, this position is untenable, as the Commission may clearly incorporate definitions in federal and state law in determining violations of its own Regulations while remaining within its jurisdiction. The Commission may therefore use the definitions present in the statutes referenced by the Complainant and compare them with the conduct alleged. The Commission can see that the Complainant has alleged facts sufficient to make a determination as to the violative conduct under 52 Pa. Code § 111.10(a)(3).

Furthermore, Respondent's demurrer fails because of the plain text of 52 Pa. Code § 111.12(d)(1), which empowers the Commission to find a violation of its regulations if Respondent engages in any "misleading or deceptive conduct as defined by State or Federal law, or by Commission rule, regulation or order." *Accord Verde Energy USA, Inc.*, No. C-2020-3017229. On the basis of this statutory language alone, Complainant has pled facts with adequate specificity in his Amended Complaint and Supplemental Narrative, which if treated as true, as they must for the purposes of Respondent's demurrer, would constitute misleading or deceptive conduct as defined under federal law. *Compare* Am. Compl. Narrative ¶ 7 with 16 C.F.R. § 310.4(b)(1)(iii)(B), 47 U.S.C. § 227(c); Am. Compl. Narrative ¶ 8 with 16 C.F.R. § 310.4(a)(8), 47 U.S.C. § 227(d).

V. CONCLUSION

Respondent improperly conflates enforcement of the provisions of the Commission's Regulations, which incorporate by reference state and federal statutes in defining violative conduct, with the enforcement and holdings of violations of the statutes themselves. On this basis, Respondent states that the Commission enforcing any provision of its Regulations which incorporate federal and state statutes would exceed the limits of its jurisdiction. Similarly, Respondent demurs on this basis. However, this argument is entirely inconsistent with the legislative scheme and prior law, the Commission's prior decisions, and the statutory scheme. For these reasons, the Complainant prays that the Commission OVERRULE Respondent's Preliminary Objections.

Dated: **July 30, 2020**

_____/s/_____

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CERTIFICATE OF SERVICE

Pursuant to 52 Pa. Code § 1.54, I hereby certify that I served a copy of the foregoing via

E-Mail and First Class Mail, to:

Deanne O'Dell, Esquire
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I also certify that I e-filed the foregoing with the Commission via their web portal.

Dated: **July 30, 2020**

/s/

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