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October 13, 2020

Via Electronic Filing

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

Re: Zimmerman v. Discount Power, Inc., Docket No. C-2020-3021020

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Discount Power, Inc.'s Preliminary Objections with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,

Karen O. Moury

Karen O. Moury

KOM/lww

Enclosure

cc: Cert. of Service w/enc.

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of Discount Power, Inc.'s Preliminary Objections upon the person(s) listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

Via Email Only

Michael Zimmerman
3812 Howley St.
Pittsburgh, PA 15201
Michael.zimmerman222@gmail.com

Via Email and First Class Mail

Hon. Charles E. Rainey, Jr.
Chief Administrative Law Judge
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265
bobbwillia@pa.gov

Dated: October 13, 2020

/s/ Karen O. Moury
Karen O. Moury, Esq.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Michael Zimmerman, :
Complainant :
 : Docket No. C-2020-3021020
v. :
 :
Discount Power, Inc., :
Respondent :

NOTICE TO PLEAD

TO: Michael Zimmerman
3812 Howley Street
Pittsburgh, PA 15201
Michael.zimmerman222@gmail.com

You are hereby notified that an Answer to the enclosed **Preliminary Objections** of Discount Power, Inc. must be filed within 10 days of the date of service.

All pleadings, such as Answer to Preliminary Objections, must be filed with the Secretary of the Pennsylvania Public Utility Commission with a copy served to counsel for Discount Power, Inc., 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:

Karen O. Moury, Esquire
Sarah Stoner, Esquire
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/s/ Karen O. Moury

Karen O. Moury, Esquire

Date: October 13, 2020

Attorneys for Discount Power, Inc.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Michael Zimmerman,	:	
Complainant	:	
	:	Docket No. C-2020-3021020
v.	:	
	:	
Discount Power, Inc.,	:	
Respondent	:	

**PRELIMINARY OBJECTIONS
OF DISCOUNT POWER, INC.**

Pursuant to 52 Pa. Code § 5.101, Discount Power, Inc. (“Discount Power”) submits these Preliminary Objections to the Formal Complaint (“Complaint”) of Michael Zimmerman (“Complainant”),¹ which was filed with the Pennsylvania Public Utility Commission (“Commission” or “PUC”) on July 21, 2020 and which was served on Discount Power by Secretarial Letter dated July 24, 2020.² In support hereof, Discount Power avers as follows.

I. INTRODUCTION

1. Discount Power is an electric generation supplier (“EGS”) licensed by the Commission to supply electric generation supply services to retail customers throughout the Commonwealth of Pennsylvania.³

¹ Complainant filed a single Complaint with the Commission, naming both Discount Power and SFE Energy Pennsylvania, Inc. (“SFE”) as Respondents. The Commission assigned separate docket numbers for each Respondent. Therefore, by this Answer, Discount Power is only addressing the allegations related to Discount Power. SFE’s docket number is C-2020-3020973.

² Responsive pleadings were originally due on August 13, 2020. By Secretarial Letters dated August 6, 2020, September 1, 2020 and September 22, 2020, the Commission granted Discount Power’s unopposed requests for 20-day extensions for filing responsive pleadings, which are now due October 13, 2020.

³ *License Application of Discount Power, Inc.*, Docket No. A-2012-2328004 (Order entered June 13, 2013).

2. On July 13, 2020, Complainant enrolled with Discount Power for electric generation supply at the rate of 7.79 cents per kilowatt hour for six months.

3. Complainant subsequently rescinded the contract and was returned to default service. As a courtesy, Discount Power issued a refund to Complainant covering his supply charges for the 7 days he was served by Discount Power.

4. Complainant now alleges that Discount Power engaged in misleading and deceptive marketing practices during a sales call that was conducted by telephone.

5. In its Answer filed on this same date, Discount Power refutes the material factual averment set forth in the Complaint that could lead to the finding of a violation of the Public Utility Code, Commission regulation or Commission order.

6. Through the filing of these Preliminary Objections, Discount Power seeks to narrow the issues that must be addressed in this proceeding, thereby conserving valuable resources of the parties and the Commission. Discount Power's arguments seek dismissal of certain allegations and requests for relief on the grounds that the Commission lacks statutory authority to enforce laws that are not within its jurisdiction and may not grant relief that goes beyond the scope of its jurisdiction.

II. ARGUMENT

A. Applicable Legal Standards

7. The Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary objections.⁴

⁴ 52 Pa. Code § 5.101(a)(1)-(7).

8. Under Section 5.101(a) of the Commission's regulations, 52 Pa. Code § 5.101(a)(1)-(7), 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.

9. The moving party 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

10. 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

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).

B. Dismissal Based on Lack of Commission Jurisdiction, 52 Pa. Code § 5.101(a)(1).

11. Section 5.101(a)(1) of the Commission’s regulations permits the filing of a preliminary objection based on a lack of Commission jurisdiction. 52 Pa. Code § 5.101(a)(1).

12. The Commission is a creation of the General Assembly and only has the powers and authority granted to it by the General Assembly that are contained in the Public Utility Code.⁸ The Commission must act within and cannot exceed its jurisdiction.⁹ Jurisdiction cannot be conferred by the parties where none exists.¹⁰ Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy.¹¹

(i) Other State and Federal Laws

13. The Complaint alleges violations of state laws, including the Pennsylvania Unfair Trade Practices and Consumer Protection Law (“CPL”)¹² and the Telemarketer Registration Act (“TRA”),¹³ and federal laws.¹⁴ Nothing in the Public Utility Code authorizes the Commission to enforce the provisions of the CPL, TRA and federal laws. Indeed, the Commission has held that it lacks jurisdiction to enforce the CPL and TRA, despite inclusion of references to those statutes

⁸ *Shedlosky v. Pa. Electric Co.*, Docket No. C-20066937 (Order entered May 28, 2008); *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977).

⁹ *City of Pittsburgh v. Pa. Pub. Util. Comm’n*, 43 A.2d 348 (Pa.Super. 1945).

¹⁰ *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967).

¹¹ *Hughes v. Pa. State Police*, 619 A.2d 390 (Pa.Cmwlth. 1992), alloc. denied, 637 A.2d 293 (Pa. 1993).

¹² 73 P. S. §§ 201-1 - 201-9.2.

¹³ 73 P. S. §§ 2241-2249.

¹⁴ Complaint, Paras. 64, 70, 79, 84, 95.

in its marketing regulations.¹⁵ This same reasoning and result applies to federal laws referenced in those regulations.¹⁶

14. Given the Commission's lack of statutory authority to enforce provisions of the CPL, TRA and federal laws, Discount Power requests that the Office of Administrative Law Judge ("OALJ") grant these Preliminary Objections and issue an Order dismissing the averments in the Complaint that allege violations of those laws. Such an Order would provide clarity to the parties and ensure that Discount Power need not expend the resources to defend these claims during the litigation of this Complaint. It would also conserve the Commission's resources.

(ii) Refunds on Behalf of Other Customers

15. The Complaint requests that the Commission direct Discount Power to refund monies it received from customers, including Complainant, who enrolled with Discount Power.¹⁷ Section 1312 of the Public Utility Code is the only provision that addresses refunds and the Commission's authority under that section only applies to public utilities, which Discount Power is not (except for limited purposes that are not applicable here).¹⁸ Regardless of whether the Commission has statutory authority to require an EGS to issue a refund to a customer, Discount

¹⁵ *Commonwealth v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655 (Order entered December 11, 2014), at 16-17. Even in the Order adopting the regulations which include references to the CPL and the TRA, the Commission acknowledged that these laws are administered and enforced by the Office of Attorney General. *Marketing and Sales Practices for the Retail Energy Market*, 43 Pa.B. 3473 (June 29, 2013).

¹⁶ The Commission only has authority to enforce federal laws when the General Assembly so empowers it. *See Gas and Hazardous Liquids Pipelines Act*, Act 127 of 2011; *Act 127 of 2011 – The Gas and Hazardous Liquids Pipeline Act; Assessment of Pipeline Operators – Jurisdiction over Class 1 Transmission*, Docket No. M-2012-2282031 (Order entered May 24, 2012).

¹⁷ Complaint, Para. 106.

¹⁸ 66 Pa. C.S. §1312; *See Delmarva Power & Light Co. v. PUC*, 582 Pa. 338, 870 A.2d 901 (Pa. 2005). Although the Commission has agreed to the inapplicability of Section 1312 to EGSs, it has relied upon its plenary authority under Section 501 of the Public Utility Code to direct EGSs to issue refunds under limited situations. 66 Pa.C.S. §501. That that issue is currently on appeal. *See Commonwealth v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655 (Order entered July 19, 2018), at 95-96. *Blue Pilot Energy, LLC v. Pa. PUC*, Case No. 1054 CD 2019.

Power has voluntarily refunded Complainant the entire amount he paid in supply charges for the 7 days he was served by Discount Power.

16. As to Complainant's request for refunds on behalf of other customers, the Commission has found that since class actions are not permitted under the Public Utility Code, complainants may not represent interests of any other customer.¹⁹ Although Section 701 of the Public Utility Code authorizes the filing of complaints regarding the acts or omissions of a regulated entity, nothing in that section or any other section of the statute allows for the filing of class action complaints.²⁰ In the absence of statutory authority, the Commission may not entertain a complainant's requests for relief on behalf of other "similarly situated" customers.²¹

17. The limited situations in which the Commission has awarded across-the-board relief to customers as a result of an individual complaint being filed are not applicable here. For example, in *Richard Sanderman v. LP Water and Sewer Company*,²² the Commission ordered relief for customers who had not complained. In *Sanderman*, the issue was whether a regulated public utility should be required to refund monies that were collected for water and sewerage tariffs but not tariffed or approved by the Commission. It involved known charges paid by customers that were not properly tariffed at the Commission. The complainant in that case was not permitted to represent other consumers' interests; rather, the Commission, upon becoming aware of charges having been unlawfully imposed, was able to grant relief to all affected

¹⁹ *Pettko v. Pennsylvania Water Company*, Docket No. C-2011-2226096 (Order Granting in Part and Denying in Part Motion for Judgment on the Pleadings dated October 5, 2011), at 6; *Painter v. Aqua PA, Inc.*, Docket No. C-2011-2239556 (Opinion and Order entered May 22, 2014), at 2, fn. 1 (noting that the Initial Decision had dismissed complainant's claims for relief on behalf of other customers and the complainant did not except to that portion of the Initial Decision).

²⁰ 66 Pa.C.S. §701.

²¹ *Pettko* at 6.

²² *Richard Sanderman v. LP Water and Sewer Company*, 87 Pa. PUC 734 (1997).

customers. In the present case, Complainant cannot speak to the experiences of other individual consumers during sales calls or show how much each consumer paid to Discount Power.

Therefore, the Commission would have no way of determining whether any relief is warranted or how to calculate refunds.

18. Notably, the *Sanderman* case, as other cases in which the Commission has awarded relief on the basis of an individual complaint,²³ involved a public utility, which may be subjected to a refund directive by the Commission pursuant to Code Section 1312.²⁴ Due to its applicability only to public utilities, it cannot be relied upon in this proceeding to award refunds to Discount Power's customers.

19. In view of the Commission's lack of statutory authority to entertain class actions or permit an individual consumer to represent the interest of other customers, Discount Power requests that the OALJ grant these Preliminary Objections and issue an Order dismissing the requests in the Complaint for refunds for other customers. Such an Order would provide clarity and ensure that Discount Power need not expend the resources to defend these requests during the litigation of this Complaint. It would also conserve the Commission's resources.

WHEREFORE, Discount Power, Inc. respectfully requests that the Commission (a) grant these Preliminary Objections; (b) dismiss the allegations and requests for relief in the Complaint that are beyond the Commission's jurisdiction to address; and (c) grant any other relief deemed appropriate.

²³ See, e.g., *Lytle v. T.W. Phillips Gas and Oil Co.*, 97 Pa. PUC 476 (2002) (Commission ordered utility to refund fees charged to customers who paid their bills by credit card since the fees were not in the tariff).

²⁴ 66 Pa. C.S. § 1312.

Respectfully submitted,

/s/ Karen O. Moury

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Date: October 13, 2020

Attorneys for Discount Power, Inc.

Verification

I, Joel Glassman, state that I am Chief Operating Officer for Discount Power, Inc. (“Discount Power”) and I state that the facts set forth in the foregoing Preliminary Objections are true and correct to the best of my knowledge, information and belief. I expect that Discount Power will be able to prove the facts set forth in the Answer and New Matter at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904, relating to unsworn falsification to authorities.

October 13, 2020



Joel Glassman
Chief Operating Officer, Discount Power, Inc.