

Michael Zimmerman
3812 Howley Street
Pittsburgh, PA 15201

October 23, 2020

Via Electronic Filing

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

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

Dear Secretary Chiavetta,

Enclosed for filing, please find Complainant's Answer to Discount Power, Inc.'s Preliminary Objections filed October 13, 2020 in the above-captioned proceeding. Copies have been served on the parties as indicated on the enclosed Certificate of Service. Please feel free to contact me with any questions, comments, or concerns.

Best Regards,

A handwritten signature in blue ink that reads "Michael Zimmerman". The signature is written in a cursive style with a long horizontal stroke at the end.

Michael Zimmerman

Enclosures

cc: Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**COMPLAINANT’S ANSWER
TO PRELIMINARY OBJECTIONS
OF DISCOUNT POWER, INC.**

Pursuant to 52 Pa. Code § 5.101, Michael Zimmerman (“Complainant”) submits this Answer to the Preliminary Objections of Respondent Discount Power, Inc. (“Discount Power”), which were filed with the Pennsylvania Public Utility Commission (“Commission”) on October 13, 2020. In support hereof, Complainant states as follows:

ANSWER TO PRELIMINARY OBJECTIONS

I. Introduction

1. Admitted.
2. Admitted, insofar as this paragraph describes a rate (7.79 cents per kWh) and duration (6 months) that are consistent with Complainant’s understanding of the corresponding terms of the product offered to him.

3. It is admitted that Complainant subsequently rescinded his enrollment with Discount Power. Complainant is without sufficient information or knowledge to form a belief regarding the calculation of any alleged subsequent payment by Discount Power, or the characterization of such payment as a “refund” or a “courtesy;” therefore, those averments are denied.
4. Admitted.
5. Denied. It is admitted that Discount Power’s Answer denies the material allegations in the Complaint; however, Discount Power’s denials do not “refute” such allegations.¹
6. Discount Power’s characterization of the purpose of its Preliminary Objections requires no response. To the extent Discount Power summarizes the content of its Preliminary Objections, such summary is admitted.

II. Argument

A. Applicable Legal Standards

7-10. Admitted.

B. The Commission Has Jurisdiction Over this Complaint

11. Admitted.

12. Admitted.

- (i) The Commission’s Regulations Require Suppliers to Comply with Other State and Federal Laws.

13. Discount Power’s first Preliminary Objection alleges that the Complaint asks the Commission to enforce state and federal laws outside its jurisdiction. This Preliminary

¹ See Black’s Law Dictionary (11th ed.) (defining “refute,” in relevant part, as: “To prove (a statement) to be false.”) Complainant expressly denies that Respondent has disproved any allegation in the Complaint.

Objection relies on a mischaracterization of the Complaint, and should be denied. Contrary to Discount Power’s averments, the Complaint does not ask the Commission to enforce the Pennsylvania Unfair Trade Practices and Consumer Protection Law (“CPL”), the Telemarketer Registration Act (“TRA”), or federal laws. Rather, the Complaint references these laws in a single footnote² as examples the Commission can look to in evaluating Discount Power’s compliance with 52 Pa. Code § 111.12(d)(1), which incorporates them by reference: “A supplier . . . [m]ay not engage in misleading or deceptive conduct as defined by State or Federal law, or by Commission rule, regulation or order.” (Emphasis added.)

Discount Power cites the Commission’s December 11, 2014, Order in *Commonwealth v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655 (“*Blue Pilot*”), in which the Commission found, in relevant part, that it lacks jurisdiction to enforce the CPL and TRA. In that same order, however, the Commission acknowledged that it can consider such other laws when determining a supplier’s compliance with Commission regulations.³ Discount Power elides the distinction between considering and enforcing the CPL and TRA, and in doing so, would impermissibly read the words “as defined by State or Federal law” out of the regulation entirely.

14. Discount Power requests an order “dismissing the averments in the Complaint that allege violations of those laws” i.e., CPL, TRA, and federal laws. Tellingly, Discount Power does not here identify the specific averments it wishes dismissed on these grounds. As discussed in paragraph 13 *supra*, the Complaint does not ask the Commission to enforce the CPL,

² Complaint ¶64 FN 2.

³ *Blue Pilot*, p. 18 FN 5 (“[52 Pa. Code § 111.10] requires EGSs to comply with the TRA, except for the registration requirement. Thus, as one example, EGSs are required under the Commission’s telemarketing regulations to comply with the TRA provisions governing state/federal “Do Not Call” lists.”)

TRA, or federal laws. Each allegation in the Complaint is brought under – and explicitly cites to – the Public Utility Code⁴ or Commission regulation or order, and falls within the Commission’s jurisdiction. This Preliminary Objection should be dismissed.

(ii) The Commission Has Broad Authority to Order Refunds to Remedy Supplier Misconduct.

15. The Commission has broad remedial authority under the Public Utility Code to order EGS refunds where appropriate, including in this proceeding. Discount Power misleadingly characterizes the Commission’s refund authority as applying only in “limited situations,”⁵ and implies that such situation does not obtain here. In fact, it is well-established that the Commission may order EGS refunds in “appropriate circumstances,” such as where an EGS employed deceptive practices to enroll customers without their affirmative consent.⁶

For example, as the Commission observed *Nadav v. Respond Power*:

[I]t is important to note that we have interpreted Section 2807(d)(1) of the Public Utility Code, 66 Pa. C. S. § 2807(d)(1), to find that a refund is an appropriate remedy when a customer’s supplier has been changed without the customer’s affirmative consent. Additionally, our Regulations require an EGS to provide a full refund to customers of all generation charges resulting from an unauthorized switch. 52 Pa. Code § 57.177. This Regulation, which was approved by the Independent Regulatory Review Commission, has been in effect since 1998 and has the presumption of reasonableness.⁷

⁴ As used herein, “Public Utility Code” refers to Title 66 of the Pennsylvania Consolidated Statutes, 66 Pa. C.S. §§ 101 *et. seq.*

⁵ Preliminary Objections ¶15 FN 18.

⁶ *Commonwealth or Pa. et. al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Order entered December 18, 2014) at 18; *see also Kiback v. IDT Energy, Inc.*, Docket No. C-2014-2409676 (Order entered August 20, 2015) at 32-34; 66 Pa. C.S. §§ 501, 2802, 2807, 2808, 2809, 3309; 52 Pa. Code § 57.177.

⁷ *Joseph Nadav v. Respond Power, LLC*, Docket No. C-2014-2429159 (Order entered December 19, 2014) at 7; *see also Herp v. Respond Power*, Docket No. C-2014-2413756 (Order entered January 28, 2016) at 46:

We have previously found that “having the authority to order EGS billing adjustments, including refunds, under the appropriate circumstances, helps ensure that EGSs comply with the Commission’s Regulations and bill customers in accordance with their disclosure statement — a fundamental consumer protection under the Electric Competition Act.” *IDT Material Question* at 18, citing 66 Pa. C.S. § 2802(14); *see also* 66 Pa. C.S. § 2807(d)(2). This fundamental consumer protection also

Here, the Complaint alleges that Discount Power engaged in several deceptive marketing practices, including misrepresenting its product and coaching Complainant's responses in the third-party verification process. These allegations, if proven, would fall well within the Commission's refund authority.

Finally, Discount Power apparently argues that this allegation of the Complaint is moot because Discount Power "voluntarily refunded Complainant the entire amount he paid in supply charges for the 7 days he was served by Discount Power."⁸ This argument must be rejected because it relies upon facts not in evidence,⁹ and therefore cannot be grounds for a preliminary objection. As Discount Power's own Preliminary Objections acknowledge, "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 deducible from those facts" (emphasis added).¹⁰ The Complaint did not plead any facts related to receipt of a refund from Discount Power. Therefore, the Commission must disregard Discount Power's Preliminary Objections' references to such alleged refund, and dismiss this Preliminary Objection accordingly.

includes EGSs' billing customers in accordance with their marketing. Our ability to protect individual consumers from deceptive practices is unreasonably restricted without the ability to right the financial wrong inflicted on a consumer through deceptive marketing. The effect on shopping can be stultifying. As Respond acknowledged, agents' misleading statements can adversely affect the competitive market. Under authority of Sections 501, 2802, 2807, 2809, and 3309 of the Code, our jurisdiction over EGSs includes the authority to order a refund under appropriate circumstances, including in this case to Mr. Herp.

⁸ Preliminary Objections ¶15.

⁹ Complainant did receive a check in the mail, ostensibly from Discount Power, after filing the Complaint. However, whether its amount is sufficient to reimburse Complainant for generation supply overcharges (or, indeed, if that is the purpose of the check) are questions of fact to be decided at hearing.

¹⁰ Preliminary Objections ¶9; *see also County of Allegheny v. Commonwealth*, 490 A.2d 402 (Pa. 1985); *Commonwealth v. Bell Telephone Co. of Pa.*, 551 A.2d 602 (Pa. Cmwlth. 1988).

16-19. Paragraph 106 of the Complaint, in part, urges the Commission to order refunds to customers subjected to deceptive marketing practices by Discount Power. Discount Power objects to this paragraph insofar as it seeks to represent the interests of other customers. This objection should be denied because it asks the Commission to ignore allegations in the Complaint suggesting widespread misconduct by Discount Power, and to forego the Commission's plenary authority to investigate and remedy such misconduct.

First, the nature and breadth of Discount Power's fraudulent schemes – including the extent to which it has subjected other customers to such schemes – are material issues in this proceeding.¹¹ For example, the Complaint alleges that Discount Power conducted inadequate training and oversight of its telemarketers,¹² which failures would necessarily impact multiple customers. These issues are well within the Commission's authority to hear. Longstanding precedent dating from the Commission's decision in *Rosi v. Bell Atlantic-Pennsylvania* provides that the Commission considers the number of customers affected by a given regulatory violation, among other factors, when determining the appropriate civil penalty.¹³ The Commission is appropriately positioned to consider the well-pleaded allegations in the Complaint that, if proven, will demonstrate that Discount Power's misconduct extends beyond the Complainant alone.

The Commission is further empowered to take remedial action, including ordering refunds, where the facts suggest that Discount Power's actions harmed other customers. As Discount Power observes, the Commission has on multiple occasions ordered refunds

¹¹ See Complainant, ¶2 (alleging “a broad, systematic, and sophisticated enterprise to deceive customers into overpaying for energy supply”).

¹² Complaint, ¶¶94-101.

¹³ *Rosi v. Bell Atlantic-Pennsylvania, Inc.*, 94 Pa.P.U.C. 103 (Order entered March 16, 2000) (establishing penalty factors including “4. The number of customers affected and the duration of the violation”).

to customers on the basis of a single customer's complaint.¹⁴ Discount Power argues that those examples are inapposite because they represented exercises of the Commission's section 1312 power to order public utilities to issue refunds, and that section 1312 does not apply to EGSs.¹⁵ This argument fails. Even accepting *arguendo* that the Commission cannot order EGS refunds under section 1312, as discussed in Paragraph 15 *supra*, the Commission finds ample refund authority elsewhere, including section 2807(d)(2).¹⁶

Finally, the objected-to portion of the Complaint, when read together with following paragraph requesting that the Commission initiate further investigation,¹⁷ reflects a logical step for the Commission to take at the conclusion of this Complaint. The Commission's regulations at 52 Pa. Code § 57.177(e) provide that the Commission may investigate an EGS on the basis of a customer complaint:

(e) In addition to customer-specific remedies, the Commission may, after investigation and decision, assess fines under 66 Pa.C.S. Chapter 33 (relating to violations and penalties) and initiate proceedings to revoke the license of an EGS that demonstrates a pattern of violating this subchapter. The Commission may order a particular EGS that has a pattern of violating this subchapter to obtain written authorization from every new customer as a condition of providing service in this Commonwealth. Nothing in this subchapter is intended to limit the Commission's authority.

¹⁴ Preliminary Objections ¶¶17-18 (citing *Richard Sanderman v. LP Water and Sewer Company*, 87 Pa.P.U.C. 734 (1997); *Lytle v. T.W. Phillips Gas and Oil Co.*, 97 Pa.P.U.C. 476 (2002)).

¹⁵ *Id.* ¶18.

¹⁶ “The commission shall establish regulations to require each electric distribution company, electricity supplier, marketer, aggregator and broker to provide adequate and accurate customer information to enable customers to make informed choices regarding the purchase of all electricity services offered by that provider . . .”; *see also* 52 Pa. Code § 57.177(b) (“When the customer's dispute has been filed within the first two billing periods since the customer should reasonably have known of a change of the EGS and the dispute investigation establishes that the change occurred without the customer's consent, the customer is not responsible for EGS bills rendered during that period. If the customer has made payments during this period, the company responsible for initiating the change of supplier shall issue a complete refund within 30 days of the close of the dispute. The refund or credit provision applies only to the generation charges”) (emphasis added); *see also* *IDT Energy, Kiback, Nadav, and Herp*, notes 6-7 *supra*.

¹⁷ Complaint ¶107.

Discount Power offers no explanation for why the Commission should ignore this authority.

In sum, Discount Power's Preliminary Objection is grounded in an unreasonably narrow, formalistic conception of the Commission's mandate to protect customers from supplier misconduct. Discount Power's conception conflicts with both the letter and the spirit of applicable customer protection law. Discount Power's Preliminary Objection should be dismissed.

III. Conclusion

WHEREFORE, Complainant hereby respectfully requests that the Commission dismiss the Preliminary Objections of Discount Power, and schedule this Complaint for evidentiary hearing.

Respectfully,

A handwritten signature in blue ink, appearing to read "Michael Zimmerman", is written over a light blue horizontal line.

Michael Zimmerman

Dated: October 23, 2020

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PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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	Complainant,	:
	:	
v.	:	Docket No. C-2020-3021020
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	:	
	Respondent.	:

VERIFICATION

I, Michael Zimmerman, hereby state that the facts set forth above are true and correct to the best of my knowledge, information and belief, and I expect to be able to prove the same 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).



Michael Zimmerman
3812 Howley Street
Pittsburgh, PA 15201

Dated: October 23, 2020

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	:	
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant):

ELECTRONIC MAIL

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On behalf of Discount Power, Inc.



Michael Zimmerman
3812 Howley Street
Pittsburgh, PA 15201

Dated: October 23, 2020