

**cBEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

NOTICE TO PLEAD

TO: FRONTIER UTILITIES NORTHEAST, LLC

c/o: Deanne M. O'Dell, Esquire
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101

Pursuant to 52 Pa. Code § 5.342(g)(1), you are hereby notified that an answer to the enclosed Motion to Compel must be filed within five days of service thereof upon you, or a judgment may be entered against you.

All pleadings must be filed with the Secretary of the Pennsylvania Public Utility Commission with a copy served to Complainant, Andrew R. Perrong, and where applicable, the Administrative Law Judge presiding over the proceeding.

File with:*

Hon. Elizabeth Barnes, Administrative Law
Judge & Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
PO Box 3265
Harrisburg, PA 17105
ebarnes@pa.gov

With a copy to:

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

*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>.

Dated: **October 29, 2020**

_____/s/_____
Andrew Perrong, *Complainant Pro-Se*

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MOTION TO COMPEL DISCOVERY RESPONSES

I. INTRODUCTION

On October 9, 2020, Complainant, ANDREW PERRONG, served its First Set of Interrogatories and First Set of Requests for Documents on Respondent, FRONTIER UTILITIES NORTHEAST, LLC (“Respondent”). On October 19, 2020, Frontier formally objected to *every single* Interrogatory (less one) and Requests for Documents propounded upon it, including the definitions of “Respondent,” “You,” “Lead Generation,” “Vendor,” and the relevant time period, as defined in the “Definitions” section of the requests. Respondent objected to each of these responses, *inter alia*, because of its pending Motion for Summary Judgment, which the Commission has denied. Pursuant to the procedures set forth in 52 Pa. Code §§ 5.103, 5.321 and 5.342(g), Complainant, requests that the Commission overrule Respondent’s objections and compel Respondent to respond fully to all interrogatories and requests for documents.

Virtually all of Respondent’s objections state that the requested information is not proportional to the needs of the case, irrelevant, and immaterial. This is despite the fact that the Commission’s rules specifically forbid objections based on the relatedness of the material to the claim or defense of the party seeking discovery or that of another party, in this case Respondent. *See* 52 Pa. Code § 5.321(c). As explained below, Respondent’s objections are meritless and should be DENIED.

II. STANDARDS FOR DISCOVERY

Section 5.321(c) of the Commission's Rules provide that "a participant may obtain discovery regarding *any matter*, not privileged, which is relevant to the subject matter involved in the pending action." 52 Pa. Code § 5.321(c). Critically, discovery is permitted regardless of whether the information sought "relates to the claim or defense of the party seeking discovery or to the claim or defense of another party or participant." *Id.*

In addition, even inadmissible information is discoverable. "It is not ground for objection that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." 52 Pa. Code § 5.321(c). In keeping with this presumption of broad discovery, the Commission allows participants "wide latitude" in discovery. *Lee v. Verizon Pa. Inc.*, No. C-20054564, 2006 Pa. PUC LEXIS 28 (Feb. 28, 2006). Critically, the Commission has expressed a desire to "liberally" apply relevancy tests when considering discovery requests. *PUC v. Equitable Gas Co.*, 61 Pa. PUC 468 (May 16, 1986).

III. RESPONSES TO RESPONDENT'S OBJECTIONS

a. Responses to General Objections

Respondent's objections begin with boilerplate "General Objections," directed at all the discovery requests at issue here. In interpreting the general objections, Respondent states that it "expressly asserts each of these general objections to each and every interrogatory and request for documents and specifically incorporates the general objections as though they were stated in full." Objections ¶11. Similarly, it incorporates and does not waive general objections for any request. Objections ¶12. But the widescale incorporation of general objections make it almost impossible for Complainant or the Administrative Law Judge to understand clearly to which

request the exception is taken. *Ruddy v. Pa. Gas & Water Co.*, 36 Pa. D&C.2d 705, 707 (Pa. Ct. Com. Pl., Luzerne Cty. 1965).

Its objections raise the issue of the pendency of its Motion for Summary Judgment, which has been denied, so this objection is moot. Objections ¶1. Next, it objects on the basis that some or all of the information is “confidential” and seeks the adoption of a Protective Order, but at least some of this information could not conceivably be considered “confidential” under the high bar set in 52 Pa. Code § 5.365(a). Objections ¶2. Critically, the general rule for a protective order is a presumption of openness, and will only be granted if it constitutes the “least restrictive means of limitation which will provide the necessary protections from disclosure.”

Moreover, none of the factors in 5.365(a) are satisfied. Complainant is not a competitor, so disclosure is unlikely to cause unfair economic or competitive damage. 52 Pa. Code § 5.365(a)(1). Next, much of the information sought is already known by both the Commission and others in the deregulated energy market in general, such as the available vendors for marketing and TPV information, or seeks information which is specific to Complainant. 52 Pa. Code § 5.365(a)(2). Third, the information sought would be essentially worthless to Respondent’s competitors, since it pertains to Respondent’s actions and the specific claims at issue in this proceeding. 52 Pa. Code § 5.365(a)(3). Fourth, the information sought has already been developed through Complainant’s interactions with the Respondent, as detailed in his Formal Complaint, and was not developed independent of those interactions. 52 Pa. Code § 5.365(a)(4). Finally, there is a presumption that information in formal complaint proceedings, like any legal proceeding, be open and available to the public. 52 Pa. Code § 5.365(a)(5).

Next, Respondent objects on what may be characterized as burden and privilege objections. Objections ¶¶3, 4, 5. But neither Complainant nor the Administrative Law Judge should be

required to weigh Respondent's burden nor search for applicable privileges in the absence of specific evidence why the information sought constitutes burdensome or privileged information. Fascinatingly, Respondent has not articulated nor located *any evidence* which justifies these objections with any degree of particularity, instead making them generalized. Notably, Respondent is required to "include a description of the facts and circumstances purporting to justify the objection" and has failed to do so. 52 Pa. Code § 5.342(c)(3). This should prove fatal.

Respondent also objects to Complainant's definitions of "Respondent," "You," "Lead Generation," and "Vendor." Objections ¶¶6, 7, 8. But these objections, too, must fail. For instance, 52 Pa. Code § 111.3(b) imputes liability of a supplier, like Respondent, on the actions taken by its agent. Therefore, the inclusion of "agents, attorneys, or representatives" is in keeping with this provision. Next, the proposed definition of "Lead Generation" is essentially an amalgamation of "Agent," "Sales and marketing," and "Telemarketing as those terms are defined in 52 Pa. Code § 111.2. Similarly, the definition of "Vendor" closely follows that of "Agent" as defined in the Utilities Code. *See* 52 Pa. Code § 111.2.

Finally, Respondent objects to the time frame specified as overly broad. Objections ¶9. But starting from one month prior to the conduct complained of through to present is critical to resolve Complainant's claims. Such a time period, for example, may capture at what time, if any, Respondent's vendor was terminated or otherwise disciplined. 52 Pa. Code § 111.6. It may very well be the case that Respondent's vendor was never terminated or terminated many months after its illegal conduct, which are particularly relevant here.

b. Responses to Interrogatory Objections

Interrogatory Perrong I-1: "Identify each and every person who provided the information to answer interrogatories in this proceeding and specify the interrogatories about which each such person provided information."

In its objections, Respondent states that identifying the person(s) who provided the answers to Complainant's interrogatories is "unduly burdensome," despite being required by 52 Pa. Code § 5.342(a)(2). To read an interrogatory which requests the provision of information which is expressly afforded to Complainant by statute as "overly burdensome and sought in bad faith" is facially frivolous.

Interrogatory Perrong I-2: "Identify all vendors involved in any manner with the conduct described in Complainant's Supplemental Narrative, including, but not limited to, those vendors involved in lead generation."

Respondent objects to this interrogatory because it claims that it is, in large part, irrelevant. But the identity of any potentially responsible vendors at issue in this case is relevant for a number of reasons. Not the least of which, Respondent contends that it did not authorize its Vendor to contact Complainant. *See Mot. for Summ. J. n. 1.* Respondent claims that the caller was not its agent, despite having both apparent and actual authority to sign up victims and having direct access to its TPV system. Respondent's time frame objection is equally unpersuasive because Respondent only seeks the vendors "involved . . . with the conduct described in . . . Complainant's Supplemental Narrative." That Respondent does not directly make calls to persons in Pennsylvania is irrelevant, since it hired vendors to do so, although it seemingly disputes this fact. Those vendors, who have heretofore been unnamed, are liable for its actions. 52 Pa. Code § 111.3(b). Moreover, there is nothing confidential nor sensitive about the fact that Respondent uses vendors or identifying the vendors involved in the conduct at issue in this case. Finally, its summary judgment objection is moot because said motion has been denied.

Interrogatory Perrong I-3: “Identify and describe the work of each vendor identified in Interrogatory #2, *supra*.”

Complainant incorporates his response to objection Interrogatory Perrong I-2. Moreover, the “work of each vendor” is not ambiguous. Of relevance here, Webster’s defines work as “to perform or carry through a task requiring sustained effort or continuous repeated operations.” The interrogatory requests the nature of the work, or operations, that each vendor performs. Complainant is at a loss for how to respond to this objection if it demonstrates an inability to comprehend a question that is plain and unambiguous on face.

Interrogatory Perrong I-4: “Identify all third parties or sub-vendors used by your vendors identified in Interrogatory #2, *supra*.”

Complainant incorporates his response to objection Interrogatory Perrong I-2 and I-3. In this interrogatory, Complainant seeks information as to the identity of any sub-vendors, or, in other words, subcontractors, and similar such entities, used by its vendors. To the extent that Respondent is knowledgeable of who these entities are (e.g. call centers hired by a marketing consulting firm), Respondent should identify them under the same rationale in Interrogatory Perrong I-2.

Interrogatory Perrong I-5: “Identify each of the individuals that spoke with Complainant from your company, any of its vendors, or otherwise during or regarding the events described in Complainant’s Supplemental Narrative.”

Complainant’s interactions with Respondent are based, in large part, on his interactions with an individual calling himself “Jordan Smith.” However, it appears this is a fake name.

Complainant had wanted to seek testimony from Mr. Smith regarding the interactions at issue here, but without Respondent identifying this person’s identity, he has been unable to do so.

Given that Respondent has insinuated that it does not know who “Jordan Smith” and seems to argue that it never hired or authorized Mr. Smith to conduct any actions on its behalf. It is also

entirely possible that there are a universe of persons calling themselves “Jordan Smith” and that Complainant interacted with multiple agents of Respondent who all call themselves the same name, in addition to other agents with whom Complainant interacted (e.g. TPV agents). For similar reasons to those articulated in his response to objection Interrogatory Perrong I-2, which are incorporated herein by reference, identification of the individuals who interacted with Complainant, in any manner, is critical to the evidence and claims in this case.

Interrogatory Perrong I-6: “Identify any person (whether employed by you or not) whom you have disciplined, reprimanded, or taken similar action against for engaging in, facilitating, or allowing allegedly unlawful or unauthorized conduct violative of the Pennsylvania Utilities Code to occur. In your answer, please identify all persons involved in any investigation, describe the reasons for your disciplinary action or reprimand, and describe the action taken against the person.”

As a preliminary matter, the information sought in this interrogatory is plainly not privileged. In Pennsylvania, the attorney-client privilege only “protects those disclosures that are necessary to obtain informed legal advice which might not have been made absent the privilege. The privilege only applies *where the client's ultimate goal is legal advice.*” *Joe v. Prison Health Servs., Inc.*, 782 A.2d 24, 31–32 (Pa. Commw. Ct. 2001) (emphasis added) (internal citations omitted). Here, documents which reflect the discipline and reprimand of a vendor are plainly not intended to further legal advice, as they were likely produced in the ordinary course of business to further business purposes. Moreover, 52 Pa. Code § 111.6 specifically charges Respondent with developing discipline procedures, and is therefore of supreme relevance to Complainant’s claim. The remainder of Respondent’s objections are likewise meritless for reasons already discussed. Respondent could have disciplined the vendor or entities involved after the calls in question, may have waited until this complaint was filed to discipline its vendors and the entities involved, and very well may not have disciplined them at all. That Respondent claims that this interrogatory is argumentative and that it did not commit telemarketing makes it an ostrich that

completely ignores the Complainant's well-pled allegations. Respondent may not argue *its own* interpretation of the facts to avoid discovery aimed at shedding light on those facts. Finally, the identity of Respondent's employees who conduct marketing activities is already a matter of public record, so this objection cannot stand, either. *See* 52 Pa. Code §§ 111.7(b)(5), 111.8, 111.14.

c. Responses to Requests for Documents Objections

Request Perrong-RD-I-1: “Please produce all non-attorney-client-privileged documents identified in or used to research or draft responses to interrogatories in this proceeding.”

Despite the fact that this requests only seeks “non-attorney-client privileged documents,” Respondent objects on the basis of the attorney-client, work product, and trial material privileges. Such an objection is clearly inapplicable here. Moreover, the production of documents relied upon or identified in responding to Complainant's interrogatories are not overly broad or unduly burdensome. As Complainant has demonstrated, his interrogatories are narrowly tailored and specific, and it is hardly burdensome to produce documents which are ready-to-hand. *See* Martin Heidegger, *Being and Time* at 1.3 ¶16, p. 102 (John Macquarrie & Edward Robinson trs., 1962).

Request Perrong-RD-I-2: “Please produce all documents related to Complainant, including, but not limited to, all documents evidencing your relationship with Complainant or your investigation into the allegations made by the Complainant.”

As a preliminary matter, the information sought in this request is plainly not privileged. In Pennsylvania, the attorney-client privilege only “protects those disclosures that are necessary to obtain informed legal advice which might not have been made absent the privilege. The privilege only applies *where the client's ultimate goal is legal advice.*” *Joe*, 782 A.2d at 31–32 (emphasis

added) (internal citations omitted). This request is clearly aimed at obtaining, *inter alia*, documents pertaining to the Complainant that Respondent intends to introduce, such as it already has done. Its burden argument fails for similar reasons. Finally, the request is sufficiently specific. The request clearly identifies a category of documents, “all” of them, and Respondent did not object to Complainant’s instructions and definitions as it pertains to documents. Finally, Respondent’s characterization that this request is misleading and implies “a relationship with Complainant” is clearly no basis to withhold the requested information. As has been said, Respondent is entitled to its interpretation of the facts, but cannot use this interpretation to withhold relevant discovery.

Request Perrong-RD-I-3: “Please produce all documents relating to your failure, alleged failure, or possible failure by you, or any vendor, to comply with the Pennsylvania Utilities Code specific to the conduct and allegations in the Complaint.”

As a preliminary matter, the information sought in this request is plainly not privileged. In Pennsylvania, the attorney-client privilege only “protects those disclosures that are necessary to obtain informed legal advice which might not have been made absent the privilege. The privilege only applies *where the client's ultimate goal is legal advice.*” *Joe*, 782 A.2d at 31–32 (emphasis added) (internal citations omitted). This request is clearly aimed at obtaining, *inter alia*, documents “specific to the conduct and allegations in the Complaint” related to the conduct alleged therein. As such, the request is clearly proportional and limited to documents “specific to the conduct and allegations in the Complaint.” Moreover, the subject matter of this request clearly falls in the scope of acceptable discovery because it is the very essence of the claim Complainant is asserting: violations of the Utilities Code. *See Aristotle, Metaphysics* at VII.4 (W.D. Ross tr., 1928). Complainant seeks documents relating to these violations. Moreover, as has already been repeatedly asserted, the time frame of documents from March 2019 to present is

necessary because there may exist documents which would tend to support Complainant's assertions in this complaint which were created or existed outside the dates in question (e.g. compilations of agent activity for April 2019 compiled in May 2019 or as part of a year-end report). Additionally, Respondent's objections as to the allegedly argumentative nature and interpretation of the facts in this case are no matter since Respondent is entitled to its interpretation of the facts, but cannot use this interpretation to withhold relevant discovery. Finally, as has been described already, any privacy interest of Respondent's employees is *de minimis* given that marketing activity is inherently public.

Request Perrong-RD-I-4: "Please produce all documents relating to the failure, alleged failure, or possible failure of your vendors to comply with any agreements, contracts, statements of work, policies or other instruction(s) specific to the conduct and allegations in the Complaint."

As a preliminary matter, the information sought in this request is plainly not privileged. In Pennsylvania, the attorney-client privilege only "protects those disclosures that are necessary to obtain informed legal advice which might not have been made absent the privilege. The privilege only applies *where the client's ultimate goal is legal advice.*" *Joe*, 782 A.2d at 31–32 (emphasis added) (internal citations omitted). This request is clearly aimed at obtaining, *inter alia*, documents "specific to the conduct and allegations in the Complaint" related to the consequences of the conduct alleged therein. Respondent has already claimed that it did not "authorize" some or all of the conduct in question. *See* Mot. for Summ. J. n. 1. Notwithstanding the fact that this does not matter for the purpose of imposing liability under the Utilities Code, Complainant is entitled to review any evidence propounded by Respondent to support this allegation. The documents sought are clearly designed to allow the Complainant to test these assertions and interpret any provisions on which Respondent may claim that its vendors committed unauthorized conduct or otherwise exceeded the scope of their authority. Moreover, as has

already been repeatedly asserted, the time frame of documents from March 2019 to present is necessary because there may exist documents which would show that, for example, Respondent allowed its vendors to violate other portions of its contracts with impunity. Additionally, Respondent's objections as to the allegedly argumentative nature and interpretation of the facts in this case are no matter since Respondent is entitled to its interpretation of the facts, but cannot use this interpretation to withhold relevant discovery. Finally, as has been described already, any privacy interest of Respondent's vendors (or employees) is *de minimis* given that marketing activity is inherently public.

Request Perrong-RD-I-5: "Please produce all documents constituting or relating to audits, investigations, inquiries, or studies, by you or any third party including, but not limited to, any independent auditor, law firm, or governmental agency, regarding the Complainant or the Complaint. This request is not limited to audits, investigations, inquiries and studies commissioned or directed by you."

As a preliminary matter, the information sought in this request is plainly not privileged. In Pennsylvania, the attorney-client privilege only "protects those disclosures that are necessary to obtain informed legal advice which might not have been made absent the privilege. The privilege only applies *where the client's ultimate goal is legal advice.*" *Joe*, 782 A.2d at 31–32 (emphasis added) (internal citations omitted). This request is clearly aimed at obtaining, *inter alia*, documents specific to the "Complainant or the Complaint". Respondent has already launched personal attacks on the Complainant based on his unrelated litigation conduct in other cases and sent an employee to investigate his residential mailing address by photographing it. *See generally* Mot. for Summ. J. Complainant is entitled to review these sorts of documents, and any similar such evidence propounded by Respondent, which it may use in the hearing in an attempt to discredit the Complainant. The documents, including any audits, sought are clearly designed to allow the Complainant to test these assertions. Moreover, as has already been repeatedly

asserted, the time frame of documents from March 2019 to present is necessary because there are very clearly documents related to the Complainant and the Complaint (such as the photographs taken by Respondent's employee), which were created after March of 2019. Additionally, Respondent's objections as to the allegedly argumentative nature and interpretation of the facts in this case are no matter since Respondent is entitled to its interpretation of the facts, but cannot use this interpretation to withhold relevant discovery. The request is obviously *prima facie* intelligible and Complainant has already clarified its scope and relevancy. "Inquiries" has its ordinary meaning as defined in Merriam Webster's, "a request for information; a systematic investigation."

Request Perrong-RD-I-6: "All contracts or documents representing agreements for any of the entities identified in Interrogatory #2, *supra*."

This request is relevant because Respondent chose to make its relationship with its vendors and contractors an issue in this case by alleging, *inter alia*, that it did not authorize its vendors to conduct any activity on its behalf. Notwithstanding the fact that Complainant contends that this argument should not have any weight because of the imputed liability in Chapter 111, without reviewing the contracts and documents representing the agreements whereby such vendors were retained, Complainant has no way of knowing, rebutting, or addressing these allegations. They are therefore supremely relevant to Complainant's claim. Additionally, as such documents and contracts were likely entered into prior to the calls at issue in this case, the time period is appropriate. The request is also specific and unambiguous, seeking contracts and similar documents representing agreements between Respondent and any vendors which may have participated in the conduct at issue in this case, not limited to contracts but also arrangements with regard to Complainant, such as demands for indemnification. Again, the common meaning of agreement as defined by Webster's should control, "harmony of opinion, action, or character;

the act or fact of agreeing; an arrangement as to a course of action.” The confidentiality of such information is also concerning because Complainant is not a competitor and his use for knowledge of Frontier’s business relationships pertains only to the facts at issue here.

Request Perrong-RD-I-7: “All communications with any entity referencing the Complainant or the Complaint.”

Complainant desires to make clear that he is seeking any *non-privileged* communications through this request. This would include, for instance, any documents referencing the Complainant sent between principles of Respondent and any Vendors it hired. Such documents would constitute discoverable business records that are essential to Complainant’s claims and are therefore relevant and proportional. Complainant does not seek Frontier’s communications wholesale, but only those non-privileged communications which reference the Complainant and the Complaint. Moreover, Respondent likely already has these documents ready-to-hand as part of its prehearing preparations, and it is hardly burdensome to produce documents which are ready-to-hand. *See* Heidegger, *supra*, at 1.3 ¶16. Finally, any “entity” should be given its ordinary meaning in Webster’s, “BEING, EXISTENCE; something that has separate and distinct existence and objective or conceptual reality.” This includes not only natural persons, both in and out of Respondent’s organization, but Vendors, contractors, TPV companies, and other similar legal entities, including employees hired by them.

CONCLUSION

Complainant prays that the Commission OVERRULE Respondent’s objections and compel Respondent to respond fully to the Interrogatories and Requests for Documents propounded on it, as well as grant any other relief it deems meet and just. The Commission has demonstrated a preference for liberal discovery in such matters, it is clear that the requests are

reasonably calculated to lead to the discovery of admissible evidence, and are not burdensome.

For these reasons, the requests propounded on Respondent are appropriate and Respondent should produce the requested information.

Dated: **October 29, 2020**

/s/

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Complainant Pro-Se
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Phone: 215-791-6957
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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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Hon. Elizabeth Barnes
Administrative Law Judge
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I also certify that I e-filed the foregoing with the Commission via their web portal.

Dated: **October 29, 2020**

/s/

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