

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Michael Furman

v.

Energy Plus Holdings, LLC

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C-2020-3021334

**INITIAL DECISION**

Before  
Christopher P. Pell  
Deputy Chief Administrative Law Judge

**INTRODUCTION**

This Initial Decision dismisses the Complaint filed in this matter because the Commission lacks jurisdiction to determine the reasonableness of a rate charged by an Electric Generation Supplier.

**HISTORY OF THE PROCEEDING**

On August 14, 2020, Michael Furman (Complainant) filed a formal Complaint against Energy Plus Holdings, LLC (Energy Plus or Respondent) with the Pennsylvania Public Utility Commission (Commission). In the Complaint, the Complainant placed a checkmark in the box indicating “[i]ncorrect charges are on my bill.” In a letter attached to his Complaint, the Complainant stated, in pertinent part, the following:

We changed our service provider to Energy Plus in 2012 with the understanding that we would be saving money. I joined in good faith around July 2012 with a rate of \$0.07964/Kwh.

The “variable” rate gradually increased substantially with the following abbreviated schedule:

|           |       |
|-----------|-------|
| 2012- Aug | 0.089 |
| 12-Sep    | 0.094 |
| 12-Dec    | 0.094 |
| 2013-Mar  | 0.099 |
| 13-Apr    | 0.104 |
| 13-Aug    | 0.119 |
| 13-Sep    | 0.124 |
| 13-Oct    | 0.124 |
| 13-Dec    | 0.124 |
| 2014-Jan  | 0.124 |
| 14-Feb    | 0.124 |
| 14-Apr    | 0.124 |
| 14-Apr    | 0.144 |
| 14-May    | 0.144 |

The rate stayed at 0.144 through 2018 . . . (“??variable”)

As can be seen our “variable” rate increased from \$0.080 to \$0.144 with no explanation.

Our rate was not “variable”, it was gradually and steadily increasing and then remained constantly high.

Unfortunately, the bills were confusing, so I never noted the gradually increasing rate. Also, we have some changes in our home and appliances so never attributed our gradually increasing bill to rate increases. Additionally, I had personal medical issues including heart surgery and leg fractures during this period so was distracted by life.

Our monthly energy use ranges from 4800-9000 kw/month.

It took me years before I realized the rate had changed so drastically and that was why our bills had become so high. When I discovered this in 2018, I called, complained and they sent me “courtesy credit checks” in October and November 2018 totaling \$1424. I never stated to them nor insinuated that I accepted these checks as a resolution of my concerns. Prior to that I had received cashback rewards totaling \$523. All checks totaled \$1947. I finally cancelled their service since they had taken advantage of me.

When I had time to do final research recently, I calculated that the overcharge from \$0.08 to \$0.144 for our usage and the time period in question (from 2012 through 2018) resulted in \$18,610 more than if I had the initial \$0.08 rate!

I have enclosed the bills that are not very clear. I circled the rate which gradually raised from \$0.08 to \$0.144 and stayed steady at \$0.144 (not variable). I calculated that the overcharge from \$0.08 to \$0.144 for our usage and the time period in question (from 2012 through 2018) resulted in \$18,610 more than if I had the initial \$0.08 rate!

I acknowledge that Energy Plus sent me courtesy credits and cashback rewards equaling about \$1947 . . . but they overcharged me \$18,610 without notifications! I calculate that despite these courtesy checks and cashback rewards, I overpaid about \$16,000 during the time period in question.

Under the “requested relief” portion of the Complaint form, the Complainant indicated “I would like to be reimbursed for my overpayments.”

The Complainant also attached the first page of Metropolitan Edison Company (MetEd) bills issued to him on the following dates: July 31, 2012; August 30, 2012; December 31, 2012; March 4, 2013; April 1, 2013; July 2, 2013; August 1, 2013; September 3, 2013; November 4, 2013; December 4, 2013; January 2, 2014; February 3, 2014; April 1, 2014; May 1, 2014; May 29, 2014; July 2, 2014; September 2, 2014; October 30, 2014; December 1, 2014; December 1, 2014; February 2, 2015; May 4, 2015; July 6, 2015; August 3, 2015; September 3, 2015; October 1, 2015; November 4, 2015; December 2, 2015; August 1, 2016; September 29, 2016; February 1, 2017; and April 3, 2017. On each of these bills under the section captioned “Billing Information for Energy Plus Holdings” the Complainant circled the Commodity Charge charged by Energy Plus for the given time period.

On September 3, 2020, Energy Plus filed an Answer with New Matter, with attached Notice to Plead, to the Complaint. In its Answer, the Respondent averred: that the Complainant enrolled with Energy Plus on March 10, 2012, on a variable price plan with an initial rate of \$0.07195 per kilowatt hour (kWh); that Energy Plus charged the Complainant \$0.07195 per kWh during the first month; that the Complainant’s variable price increased over

the course of the six-year contract; that it is denied that the variable price stayed the same from May 2014 through 2018; that the changes in the Complainant's variable prices were consistent with the terms and conditions of service, which stated that the variable prices would reflect the cost of electricity, including energy, capacity, settlement, ancillaries, related transmission and distribution charges and other market-related factors plus all applicable taxes, fees, charges, costs, expenses and margins; that it is denied that the Complainant's variable price increased without explanation; that Energy Plus' energy supply rate appeared on the Complainant's utility bill each month from May 2012 through December 2018, along with Energy Plus' customer service number; and that under the terms and conditions of service, the Complainant was free to cancel his service with Energy Plus at any time.

Energy Plus further averred: that as a result of calls that the Complainant made to Energy Plus' call center about his variable prices in October and November 2018, Energy Plus issued "courtesy credits" in the amount of \$1,060.00 and \$383.72, totaling \$1,443.72; that the Complainant accepted those courtesy checks as a resolution of his billing concerns; that the Complainant earned cash back rewards under his variable price plan during the life of his account totaling \$3,448.85; and that the Complainant cancelled service with Energy Plus on December 3, 2018.

As New Matter, Energy Plus averred that the Commission lacks statutory authority to interpret the Complainant's contract to determine whether a breach had occurred. Energy Plus stated as follows:

Nothing in the Public Utility Code authorizes the Commission to interpret the terms and conditions of a private contract between an EGS<sup>[1]</sup> and its customers. The Commission itself has acknowledged that its jurisdiction over EGSs "does not extend to interpreting the terms and conditions of a contract between an EGS and a customer to determine whether a breach has occurred or setting the rates an EGS can charge. Rather, these are matters for civil courts of competent jurisdiction.

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<sup>1</sup> Electric Generation Supplier.

New Matter ¶ 23 (footnote omitted). Energy Plus further averred that even if the Commission could interpret the contract and determine that a breach has occurred, it does not regulate EGS rates.

Additionally, Energy Plus maintains that nothing in the Public Utility Code authorizes the Commission to direct EGSs to issue refunds to their customers. The only statutory provision that addresses refunds is Section 1312,<sup>2</sup> which is limited to public utilities, and EGSs are not public utilities, except for limited purposes that are not applicable here. As such, Section 1312 does not authorize the Commission to direct EGSs to issue refunds.

Energy Plus further avers that even if the Commission could order Energy Plus to issue a refund to the Complainant, it is barred by the statute of limitations in the Public Utility Code from awarding any relief for the period prior to August 14, 2017. Under Section 3314 of the Public Utility Code, no action may be brought more than three years after the date at which liability arose.<sup>3</sup> The statute of limitations in Section 3314 divests the Commission of jurisdiction to hear a dispute over matters that occurred more than three years ago. As the Complaint was filed on or around August 14, 2020, the Commission does not have jurisdiction to entertain requests for relief that encompass the services and bills rendered from May 2012 through August 14, 2017.

Lastly, Energy Plus avers that any authority the Commission may have had to consider the Complainant's request for a refund was relinquished by the Complainant when he, as a member of a class in a federal class action in *Wise v. Energy Plus Holdings*, No. 11-cv-7345 (S.D.N.Y.), did not opt out of the class settlement. Energy Plus maintains that the Complainant already obtained relief from Energy Plus through that settlement, thereby releasing Energy Plus from liability for any claims that were asserted or could have been asserted in that action.

Energy Plus endorsed its New Matter with a Notice to Plead. The Complainant's answer to the Respondent's New Matter was due on or before September 23, 2020.<sup>4</sup> The

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<sup>2</sup> 66 Pa.C.S. § 1312.

<sup>3</sup> 66 Pa. C.S. § 3314.

<sup>4</sup> 52 Pa.Code §§ 5.63(a), 1.12(a), 1.56(a)(1) and (b).

Complainant did not file a timely Answer to Respondent's New Matter with the Commission's Secretary.<sup>5</sup>

Also, on September 3, 2020, Energy Plus filed Preliminary Objections to the Complaint. In the Preliminary Objections, Energy Plus reiterated the arguments raised in New Matter. Energy Plus endorsed its Preliminary Objections with a Notice to Plead informing the Complainant that he had ten (10) days to file an Answer to the Preliminary Objections.<sup>6</sup> The Complainant did not file a timely Answer to the Preliminary Objection with the Commission's Secretary.<sup>7</sup>

By Call-In Telephonic Hearing Notice dated September 29, 2020, an Initial Call-In Telephonic Hearing was scheduled for November 17, 2020, at 10:00 a.m. and the matter, including Energy Plus' Preliminary Objections, was assigned to me.

For the reasons set forth below, I will grant Energy Plus' Preliminary Objections and dismiss the Complaint.

#### FINDINGS OF FACT

1. The Complainant is Michael Furman.
2. The Respondent is Energy Plus Holdings, LLC.

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<sup>5</sup> By email received by my legal assistant on October 13, 2020, the Complainant advised that he supplied a reply to New Matter on September 16, 2020 via email and first-class mail. However, no such responsive pleading is attached to this case on the Commission's internal docketing system. The Complainant did supply, via email to my legal assistant on October 14, 2020, a scanned copy of his reply to Energy Plus' New Matter.

<sup>6</sup> 52 Pa.Code § 5.101(b) provides that "[a] preliminary objection must contain a notice to plead which states that an answer to the objection shall be filed within 10 days of the date of service of the objection."

<sup>7</sup> I will note that the Complainant emailed an untimely response to Energy Plus' Preliminary Objections to my legal assistant on October 14, 2020. However, since Commission offices are currently closed due to the COVID-19 pandemic and we are not operating under normal circumstances, I will consider the Complainant's untimely response in my disposition of Energy Plus' Preliminary Objections.

3. On August 14, 2020, the Complainant filed a formal Complaint against the Respondent with the Commission.

4. The Respondent filed an Answer with New Matter on September 3, 2020.

5. On September 3, 2020, the Respondent filed Preliminary Objections.

6. On October 14, 2020, the Complainant submitted a response to Respondent's Preliminary Objections indicating that a review and comparison of the initial and subsequent rates Energy Plus charged him will show Energy Plus overcharged him, and that he should be reimbursed for these overcharges.

### DISCUSSION

The Commission's Rules of Practice and Procedure permit parties to file preliminary objections. The grounds for preliminary objections are limited to those set forth in 52 Pa. Code § 5.101(a) as follows:

- (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.
- (7) Standing of a party to participate in the proceeding.

52 Pa. Code § 5.101(a)

Here, the Respondent's preliminary objections assert lack of Commission jurisdiction, pursuant to 52 Pa. Code § 5.101(a)(1). Commission preliminary objection practice is analogous to Pennsylvania civil practice regarding preliminary objections. *Equitable Small Transp. Intervenor v. Equitable Gas Co.*, 1994 Pa PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994) (*Equitable*). A preliminary objection asserting lack of Commission jurisdiction, pursuant to the Commission's Rules of Practice and Procedure, is therefore analogous to preliminary objections allowed by Rule 1028 of the Pennsylvania Rules of Civil Procedure.

Preliminary objections in civil practice requesting dismissal of a pleading will be granted only where the right to relief is clearly warranted and free from doubt. *Interstate Traveller Servs., Inc. v. Pa. Dept. of Env't Res.*, 406 A.2d 1020 (Pa. 1979); *Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc.*, 595 A.2d 172 (Pa. Super. 1991). The Commission follows this standard. *Montague v. Philadelphia Elec. Co.*, 66 Pa. PUC 24 (1988).

The Commission may not rely upon the factual assertions of the moving party but must accept as true, for purposes of disposing of the motion, all well pleaded, material facts of the nonmoving party, as well as every inference from those facts. *Cnty. of Allegheny v. Commonwealth*, 490 A. 2d 402 (Pa. 1985); *Commonwealth v. Bell Tel. Co. of Pa.*, 551 A.2d 602 (Pa.Cmwlt. 1988). The Commission must view the Complaint in this case in the light most favorable to the Complainant and should dismiss the Complaint only if it appears that the Complainant would not be entitled to relief under any circumstances as a matter of law. *Equitable*.

The Commission regulation at 52 Pa. Code § 5.21(a) states that a person may file a formal complaint claiming violation of a statute that the Commission has jurisdiction to administer. The regulation at 52 Pa. Code § 5.21(d) authorizes the Commission to dismiss a complaint if a hearing is not necessary and authorizes preliminary objections to be filed in response to a complaint.

The regulation at 52 Pa. Code § 5.101(a)(1) permits the filing of a preliminary objection to dismiss a pleading for lack of Commission jurisdiction. The provision at 52 Pa. Code § 5.101(a)(1) 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. 66 Pa. C.S. § 703(a); *Lehigh Valley Power Comm. v. Pa. Pub. Util. Comm'n*, 563 A.2d 557 (Pa.Cmwlth. 1989); *Lehigh Valley Power Comm. v. Pa. Pub. Util. Comm'n*, 563 A.2d 548 (Pa. Cmwlth. 1989); *S.M.E. Bessemer Cement, Inc. v. Pa. Pub. Util. Comm'n*, 540 A.2d 1006 (Pa. Cmwlth. 1988); *White Oak Borough Auth. v. Pa. Pub. Util. Comm'n*, 103 A.2d 502 (Pa. Super. 1954).

The Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly contained in the Public Utility Code. *Shedlosky v. Pa. Elec. Co.*, Docket No. C-20066937 (Order entered May 28, 2008); *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977). The Commission must act within, and cannot exceed, its jurisdiction. *Pittsburgh v. Pa. Pub. Util. Comm'n*, 43 A.2d 348 (Pa.Super. 1945). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967). Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. *Hughes v. Pa. State Police*, 619 A.2d 390 (Pa.Cmwlth. 1992) *alloc. denied* 637 A.2d 293 (Pa. 1993).

Viewing the Complaint in this case in the light most favorable to the Complainant, the Complainant alleges that he became an Energy Plus customer in 2012. The Complainant further alleges that the rate he received from Energy Plus was not variable, that it instead increased and eventually levelled off at a high rate in 2014. The Complainant also explained that he did not recognize there was an issue with his rate until 2018 because the bills he received were confusing, and also acknowledged that personal issues distracted him from noticing the increase in his rate. The Complainant provided copies of thirty-two of the bills he received from MetEd between July 31, 2012 and April 3, 2017 to demonstrate the high rates he paid Energy Plus for electric generation. On each of these bills under the section captioned “Billing Information for Energy Plus Holdings” the Complainant circled the Commodity Charge

charged by Energy Plus for the given time period. The Complainant asserts that he should be reimbursed for those charges.

In response to the Complainant's Complaint, Energy Plus contends that the Commission does not have jurisdiction over the issues raised by the Complainant for several reasons. First, Energy Plus argues that since the Commission does not regulate EGS prices,<sup>8</sup> it has no jurisdiction to determine whether Energy Plus overcharged the Complainant. Energy Plus further argues that the Commission has no statutory authority to interpret the terms and conditions of a private contract between an EGS and its customers. Energy Plus maintains that the Commission has acknowledged that its jurisdiction over EGSs "does not extend to interpreting the terms and conditions of a contract between an EGS and a customer to determine whether a breach has occurred or setting the rates an EGS can charge."<sup>9</sup> Energy Plus further maintains that these are matters for civil courts of competent jurisdiction.<sup>10</sup> Accordingly, Energy Plus asserts that the Commission has no statutory authority to examine each of the factors listed in the contract to determine whether the variable prices charged by Energy Plus reflected them.

Additionally, Energy Plus argues that the Complainant knew he was enrolling in a variable rate plan and was aware that it could change on a monthly basis. Energy Plus further argues that the Complainant was with Energy Plus for over six years before deciding he did not like the variable price he was being charged. Energy Plus maintains that, since the Commission has no jurisdiction to determine whether it overcharged the Complainant, the Complaint should be dismissed.

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<sup>8</sup> 66 Pa.C.S. § 2802(5) ("[c]ompetitive market forces are more effective than economic regulation in controlling the cost of generating electricity"); *Coal. for Affordable Util. Servs. and Energy Efficiency in Pa. v. Pa. Pub. Util. Comm'n*, 120 A.3d 1087, 1094 (Pa. Cmwlth. 2015); *HIKO Energy, LLC v. Pa Pub. Util. Comm'n*, 163 A.3d 1079, 1100 (Pa.Cmwlth. 2017), *aff'd*, 209 A.3d 246 (2019).

<sup>9</sup> *Office of Small Bus. Advocate v. FirstEnergy Sols. Corp.*, Docket No. P-2014-2421556 (Order entered January 26, 2015) at 18.

<sup>10</sup> *See Allport Water Auth. v. Winburne Water Co.*, 393 A.2d 673 (Pa. Super. 1978) (Commission lacks jurisdiction to address disputes involving private contracts); *Adams v. Pa. Pub. Util. Comm'n*, 819 A.2d 631 (Pa.Cmwlth. 2003).

Next, Energy Plus argues that the Commission lacks statutory authority to direct Energy Plus to issue a refund to the Complainant. Energy Plus maintains that the only provision in the Public Utility Code that authorizes the Commission to direct the issuance of refunds is Section 1312, which is limited to public utilities.<sup>11</sup> Energy Plus further maintains that EGSs are not public utilities except for limited purposes, which are not applicable here,<sup>12</sup> and that the Commission has acknowledged that Section 1312 does not authorize it to require EGSs to issue refunds to customers.<sup>13</sup>

Energy Plus acknowledges that, notwithstanding the limited applicability of Section 1312, the Commission has found that in some instances it may rely on its plenary authority under Section 501 of the Public Utility Code<sup>14</sup> to order the issuance of refunds by an EGS.<sup>15</sup> However, Energy Plus argues that the circumstances under which the Commission has relied on its Section 501 authority are not present here, noting that the Commission's rationale for finding that it may, on some occasions, direct EGSs to issue refunds is linked to its oversight of the competitive market and ensuring that consumers are adequately protected when an EGS violates its regulations.<sup>16</sup>

Energy Plus argues that here, the Complainant makes no factual averments about the marketing practices of Energy Plus and does not allege that any promises of savings were made during the sales transaction. Energy Plus notes that the Complainant enrolled online and did not interact with a sales agent, and that he makes no claims that he was charged a higher price than permitted by the disclosure statement. Energy Plus further notes that, although the Complainant alleges that he was "overcharged" by Energy Plus, he offers no basis for that claim other than the

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<sup>11</sup> 66 Pa.C.S. § 1312.

<sup>12</sup> *See Delmarva Power & Light Co. v. Pa. Pub. Util. Comm'n*, 870 A.2d 901 (Pa. 2005).

<sup>13</sup> *See Commonwealth v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Order entered December 18, 2014), at 16-17.

<sup>14</sup> 66 Pa.C.S. § 501.

<sup>15</sup> *See Commonwealth v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655 (Order entered July 19, 2018), at 95-96.

<sup>16</sup> *IDT Order* at 17-18. *See Kiback v. IDT Energy, Inc.*, Docket No. C-2014-2409676 (Order entered August 20, 2015), at 25-27 (Commission ordered refund by supplier based on finding that the supplier's agent had promised savings compared to the utility rate for default service).

fact that his variable price increased over the life of the account, which was consistent with the terms and conditions of his contract.

Energy Plus maintains that the Complainant did not raise any allegations that could lead to a finding that Energy Plus violated the Public Utility Code, Commission Regulations, or a Commission Order. Energy Plus further maintains that even if the Commission's statutory authority includes the ability, under some circumstances, to require EGSs to issue refunds, the Complaint does not contain any factual averments to support the Commission's use of Section 501 in this proceeding.

In his response to Energy Plus' Preliminary Objections regarding the Commission's lack of jurisdiction, the Complainant asserts that this was not a variable price, this was a constantly increasing price. The Complainant further asserts that it is clear from his price history that Energy Plus gradually, and significantly, increased his price. The Complainant explains that his price was not variable, but constantly increasing. Additionally, the Complainant maintains that the pricing was very confusing, as presented on his bills, and that it took him years to realize that the price was gradually increasing. The Complainant indicates that all he wanted was a fair pricing structure, and that a review of his initial rate versus his increased rates will demonstrate that he was clearly overcharged. Accordingly, the Complainant believes that his price increased substantially and unfairly, and that there is good reason to go forward with his hearing as he should be reimbursed for his overpayments.

Having provided a brief summary of the Complaint, the Respondent's Preliminary Objections concerning Commission jurisdiction, as well as the Complainant's response to Respondent's Preliminary Objections, I will provide a brief explanation of the Commission's limited jurisdiction over Electric Generation Suppliers. An EGS is not a public utility, subject to Commission regulation, except in limited circumstances. *Delmarva Power & Light Co. v. Pa. Pub. Util. Comm'n*, 870 A.2d 901 (Pa. 2005) (*Delmarva*). In *Delmarva*, the Pennsylvania Supreme Court held that the definition of "public utility" at 66 Pa.C.S. § 102 does not include EGSs except for the limited purposes set forth in 66 Pa.C.S. § 2809, regarding licensing requirements and 66 Pa.C.S. § 2810, regarding revenue neutral reconciliation. The Pennsylvania

Supreme Court noted that the Commission could forbear from regulating EGSs, pursuant to 66 Pa.C.S. § 2809(e), if it determined that the requirements of 66 Pa.C.S. § 2809 were unnecessary due to competition among the EGSs.

Moreover, the Commission has addressed its authority over the rates charged by EGSs. In *Review of Rules, Policies and Consumer Educ. Measures Regarding Variable Rate Retail Elec. Prod.*, Docket No. M-2014-2406134 (Order entered March 4, 2014) (*Variable Rate Order*), the Commission recognized that in early 2014 many EGSs had to increase their retail prices to customers in order to recover the higher wholesale electric energy costs they incurred in January, 2014. In the *Variable Rate Order*, the Commission noted that in many cases, the EGSs voluntarily absorbed losses in order to maintain long term contractual relationships with their customers. However, the Commission acknowledged that not all EGSs acted to mitigate the financial hardships experienced by their customers and some EGSs passed on the costs to their retail customers.

As a result of the higher wholesale electric energy costs experienced by the EGSs, the *Variable Rate Order* observed that some of the EGSs' customers received higher electric bills. Some of these bills were two or three times the amount the customer would normally be billed. Most of these customers had entered into contracts with a variable rate that is adjusted monthly.

The *Variable Rate Order* stated that the rates consumers pay in the retail electric market are governed by the terms of the contract with their EGS. The Commission emphasized that it was important for consumers in variable rate contracts to review the terms and conditions of those contracts to determine if they were at risk for large rate increases.

Underlying this discussion in the *Variable Rate Order* is the acknowledgement by the Commission that it does not have jurisdiction to regulate the rates charged by an EGS or order a refund of unreasonable rates. The Commission has specifically addressed its authority to direct EGSs to refund charges for electric generation supply service. In *Commonwealth of Pennsylvania, by Attorney General, Kathleen G. Kane, through the Bureau of Consumer Prot.*

*and Tanya J. McCloskey, Acting Consumer Advocate v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Order entered December 18, 2014) (*IDT Order*), the Commission held that it lacked the authority, pursuant to 66 Pa.C.S. § 1312, to direct EGSs to refund charges for electric generation supply service. The Commission reached this conclusion because it reasoned that 66 Pa.C.S. § 1312 applied only to rates charged by public utilities and EGSs are not public utilities except for the limited purposes of 66 Pa.C.S. §§ 2809 and 2810. Therefore, the Commission could not generally refund charges for electric generation supply service.

However, the Commission also stated in the *IDT Order* that, pursuant to its authority at 66 Pa.C.S. § 501(a) it could order refunds in certain circumstances. First, the Commission noted that, pursuant to 52 Pa.Code § 57.177(b), it could direct an EGS to refund charges when a customer has been switched to an EGS without the customer's consent. Second, the Commission stated that it had the authority, pursuant to 66 Pa.C.S. § 501, to order a credit or refund where the EGS overbills a customer by failing to bill a customer in accordance with its disclosure statement, in violation of 52 Pa.Code §§ 54.4(a) and 54.5(a) and 66 Pa.C.S. § 2809(b).

Subsequently, in *Herp v Respond Power LLC*, Docket No. C-2014-2413756 (Opinion and Order entered January 28, 2016) (*Herp*), the Commission stated that an EGS' failure to abide by standards governing customer communications constitutes appropriate circumstances justifying ordering a credit or refund. *Shreiber v. Respond Power LLC*, Docket No. C-2014-2446282 (Opinion and Order entered February 11, 2016).

In his Complaint, the Complainant indicated that “[o]ur rate was not ‘variable’, it was gradually and steadily increasing and then remained constantly high.” The only relief sought by the Complainant is a refund. The Complainant has not raised claims that he was switched to an EGS without his consent, that Energy Plus failed to bill him in accordance with its disclosure statement, or that Energy Plus failed to abide by standards governing customer communications. Moreover, the Complainant's response to Energy Plus' Preliminary Objections clearly indicates that he wants the Commission to review his pricing structure because he believes his rate was unreasonable. Therefore, since the Complainant's Complaint requests that the Commission determine that the rate charged by Energy Plus was an unreasonable rate, and that

he should receive a refund of what he believes he overpaid as a result of that unreasonable rate, Energy Plus' Preliminary Objections are sustained and the Complainant's Complaint is dismissed for lack of subject matter jurisdiction.

Since I am dismissing the Complainant's Complaint for lack of Commission Jurisdiction, I will not address Energy Plus' arguments regarding the statute of limitations or the class action settlement.

### CONCLUSIONS OF LAW

1. Commission preliminary objection practice is analogous to Pennsylvania civil practice regarding preliminary objections. *Equitable Small Transp. Intervenors v. Equitable Gas Co.*, 1994 Pa PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

2. The Commission may not rely upon the factual assertions of the moving party but must accept as true, for purposes of disposing of the motion, all well pleaded, material facts of the nonmoving party, as well as every inference from those facts. *Cnty. of Allegheny v. Commonwealth*, 490 A. 2d 402 (Pa. 1985); *Commonwealth v. Bell Tel. Co. of Pa.*, 551 A.2d 602 (Pa. Cmwlt. 1988).

3. The Commission must view the Complaint in this case in the light most favorable to the Complainant and should dismiss the Complaint only if it appears that the Complainant would not be entitled to relief under any circumstances as a matter of law. *Equitable Small Transp. Intervenors v. Equitable Gas Co.*, 1994 Pa PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

4. The Commission must act within, and cannot exceed, its jurisdiction. *Pittsburgh v. Pa. Pub. Util. Comm'n*, 43 A.2d 348 (Pa.Super. 1945).

5. Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967).

6. Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. *Hughes v. Pa. State Police*, 619 A.2d 390 (Pa.Cmwlth. 1992) *alloc. denied* 637 A.2d 293 (Pa. 1993).

7. An Electric Generation Supplier is not a public utility, subject to Commission regulation, except in limited circumstances. *Delmarva Power & Light Co. v. Pa. Pub. Util. Comm'n*, 870 A.2d 901 (Pa. 2005) (*Delmarva*).

8. The Commission does not have the authority, pursuant to 66 Pa.C.S. § 1312, to direct Electric Generation Suppliers to refund charges for electric generation supply service, since 66 Pa.C.S. § 1312 applies only to rates charged by public utilities and Electric Generation Suppliers are not public utilities except for the limited purposes of 66 Pa.C.S. §§ 2809 and 2810. *Commonwealth of Pennsylvania, by Attorney General, Kathleen G. Kane, through the Bureau of Consumer Prot. and Tanya J. McCloskey, Acting Consumer Advocate v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Order entered December 18, 2014) .

9. The Commission has the authority, pursuant to 66 Pa.C.S. § 501, to order a credit or refund where an Electric Generation Supplier overbills a customer by failing to bill a customer in accordance with its disclosure statement, in violation of 52 Pa.Code §§ 54.4(a) and 54.5(a) and 66 Pa.C.S. § 2809(b). *Commonwealth of Pennsylvania, by Attorney General, Kathleen G. Kane, through the Bureau of Consumer Prot. and Tanya J. McCloskey, Acting Consumer Advocate v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Order entered December 18, 2014).

10. The Commission has the authority to direct an Electric Generation Supplier to issue a refund for “slamming” or direct refunds when a customer has, otherwise, been switched to an EGS without the customer’s consent. 52 Pa.Code § 57.177(b); *Commonwealth of Pennsylvania, by Attorney General, Kathleen G. Kane, through the Bureau of Consumer Prot. and Tanya J. McCloskey, Acting Consumer Advocate v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Order entered December 18, 2014).

