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November 2, 2020

**Via Electronic Filing**

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

Re: Andrew Perrong v. Frontier Utilities Northeast LLC  
Docket No. C-2020-3019899

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Frontier Utilities Northeast LLC's ("Frontier") Motion To Strike Exhibits A and C Attached To Complainant's Memorandum Of Law In Opposition To Frontier Utilities Northeast, LLC's Motion For Summary Judgment in the above matter. Copies to be served in accordance with the Certificate of Service.

Sincerely,

A handwritten signature in blue ink that reads "Deanne M. O'Dell".

Deanne M. O'Dell, Esq.

DMO/lww

Enclosure

cc: Hon. Elizabeth Barnes w/enc.  
Cert. of Service w/enc.

## CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of Frontier Utilities Northeast LLC's Motion To Strike Exhibits A and C Attached To Complainant's Memorandum Of Law In Opposition To Frontier Utilities Northeast, LLC's Motion For Summary Judgment upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

### **Via Email Only**

Andrew Perrong  
1657 The Fairway, Suite 131  
Jenkintown, PA 19046  
[andyperrong@gmail.com](mailto:andyperrong@gmail.com)

Hon. Elizabeth Barnes  
Administrative Law Judge  
PA Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265  
[ebarnes@pa.gov](mailto:ebarnes@pa.gov)



Date: November 2, 2020

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Deanne M. O'Dell, Esquire  
Attorneys for  
Frontier Utilities Northeast LLC

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

ANDREW PERRONG,	:	
	:	
Complainant	:	
	:	Docket No. C-2020-3019899
v.	:	
	:	
FRONTIER UTILITIES NORTHEAST LLC,	:	
	:	
Respondent	:	

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**FRONTIER UTILITIES NORTHEAST LLC'S  
MOTION TO STRIKE EXHIBITS A AND C ATTACHED TO COMPLAINANT'S  
MEMORANDUM OF LAW IN OPPOSITION TO FRONTIER UTILITIES  
NORTHEAST LLC'S MOTION FOR SUMMARY JUDGMENT**

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Pursuant to 52 Pa. Code § 5.103, Frontier Utilities Northeast LLC (“Frontier”) submits this Motion to Strike Exhibits A and C included with the Memorandum of Law in Opposition to Frontier’s Motion for Summary Judgment (“Memorandum”) filed by Andrew Perrong (“Complainant” or “Mr. Perrong”) on October 26, 2020. The two exhibits purport to be a “transcript” of a recording made by Mr. Perrong of a call which he claims violates 52 Pa. Code § 111.10. Frontier recognizes that an Order Denying Frontier’s Motion for Summary Judgment was issued on October 28, 2020 (“October 28 Order”), and Frontier is not challenging the October 28 Order as part of this Motion. Rather, Frontier seeks to remove from the public docket information that: (a) was inappropriately included as part of the summary judgment motion process; (b) was unnecessary for the ultimate decision on Frontier’s Motion for Summary Judgment; and, (c) places on the public docket information that Mr. Perrong intends to rely on as evidence in this proceeding even though it has not been properly moved into the record pursuant to 52 Pa. Code § 5.402. In fact, Frontier objects to the inclusion of the illegally recorded call and purported transcript of it as evidence in this proceeding, and Frontier is filing a Motion in Limine, simultaneously with this filing, seeking to exclude the call recording and alleged transcripts from the evidentiary record in this proceeding. Frontier submits that Mr. Perrong

should not be permitted to use the motions process as a way to make public otherwise inadmissible documents or to preempt Frontier's due process rights to challenge the admissibility of the information before it is made available for public consumption.

As explained further below, the Commission's regulations do not permit Mr. Perrong to supplement his answer to Frontier's Motion for Summary Judgment with the so-called "Transcript." Further, Exhibits A and C contain information that is beyond the scope of permissible facts to be considered in adjudicating a motion for summary judgment. Finally, Frontier is not challenging the October 28 Order and striking Exhibits A and C from Mr. Perrong's Memorandum does not impact Your Honor's ruling. Striking the exhibits from a public filing does, however, ensure that contested information that has not been vetted through the established hearing process is not permitted to be placed on the public docket as a way to pre-judge the matter under consideration. As such, Frontier respectfully requests that Your Honor issue an order striking Exhibits A and C (and references thereto) from Mr. Perrong's Memorandum.

In support of its Motion, Frontier states as follows:

**I. INTRODUCTION AND BACKGROUND**

1. Frontier is licensed as an electric generation supplier by the Commission to provide electric generation supply services to residential and small commercial (25 kW and under demand) customers in the electric distribution company service territories within the Commonwealth, including (but not limited to) that of PECO Energy Company. Answer and New Matter at ¶ 2.

2. On May 25, 2020, Mr. Perrong filed a Formal Complaint against Frontier. In response, Frontier filed an Answer and New Matter as well as Preliminary Objections on June 15, 2020.

3. On June 26, 2020, Complainant filed an Amended Formal Complaint (“Complaint”). In response, on July 20, 2020, Frontier filed an Answer and New Matter, Preliminary Objections, and a Motion for Ruling on Preliminary Objections.

4. Paragraphs 4 and 5 of the Complaint explicitly allege violations of Section 111.10 of the Commission’s regulations. Compl. at ¶¶ 4, 5; Order Denying Respondent’s Preliminary Objections To Amended Complaint, dated Aug. 11, 2020 at 1 (procedural history). In subsequent pleadings filed by Mr. Perrong, he further confirmed that the Complaint is limited to alleging violations of 52 Pa. Code § 111.10. *See* Complainant’s Memorandum of Law, dated July 30, 2020.

5. Chapter 111 of the Commission’s regulations is applicable to sales and marketing activities involving residential customers. *See* 52 Pa. Code § 111.1 (general), 111.2 (definitions); *Rulemaking Re: Marketing and Sales; Practices for the Retail Residential Energy Market*, PUC Docket No. L-2010-2208332, Corrected Final Rulemaking Order entered October 24, 2012. Chapter 111 sets forth certain standards applicable to suppliers engaged in telemarketing to residential customers. *See* 52 Pa. Code § 111.10 (emphasis added).

6. On October 6, 2020, Frontier filed a Motion for Summary Judgment requesting dismissal of the Complaint on the basis that Chapter 111 of the Commission’s regulations are applicable only to residential customers and there is no material dispute that Complainant associated his telephone number with service to a business/commercial property and then intentionally misrepresented to the Commission that he was contacted regarding his residential electricity account.

7. On October 26, 2020, Complainant filed an Answer to Frontier’s Motion for Summary Judgment and his Memorandum . In his responsive pleadings, Mr. Perrong challenged

the basis for Frontier's Motion for Summary Judgment and included Exhibits A and C which Mr. Perrong claims are transcripts of his recordings of the call he received. Mr. Perrong relied on the information included within Exhibits A and C to support his claims that: (1) the call was made on behalf of Frontier; (2) the call violated Commission regulations; and (3) the call was to a residential address. Memorandum at unnumbered page 6.

8. On October 28, 2020, Your Honor issued an Order Denying Frontier's Motion for Summary Judgment. In denying Frontier's Motion, Your Honor held that there are material facts in dispute, including whether the phone number in question was associated with residential electric service and whether it was on a registry.

## **II. MOTION TO STRIKE**

### **A. Exhibits A and C Contain Information That is Beyond the Scope of Permissible Facts to be Considered in Adjudicating a Motion for Summary Judgment.**

9. The Commission's regulations do not permit Mr. Perrong to supplement his answer to Frontier's Motion for Summary Judgment with the so-called "Transcript" included as Exhibits A and C, nor do the regulations allow an ALJ to rely upon this information when ruling on a Motion for Summary Judgment.

10. The Commission's regulations explicitly identify the documents that can, permissibly, be included in response to a motion for summary judgment and relied upon by the presiding officer when ruling on same. Specifically, the regulations provide that an answer to a motion for judgment on the pleadings or summary judgment "may be supplemented **by depositions, answers to interrogatories or further affidavits and admissions.**" 52 Pa. Code § 5.102(b) (emphasis added). Further, "[a] motion for summary judgment must be based on the

pleadings<sup>1</sup> and depositions, answers to interrogatories, admissions and supporting affidavits.” *Id.* § 5.102(c). The presiding officer will grant a motion for summary judgment if the **pleadings, depositions, answers to interrogatories, admissions, and affidavits** show that there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law. 52 Pa. Code § 5.102(d)(1) (emphasis added).

11. Here, Mr. Perrong attached to his Memorandum two exhibits which he claims to be a “transcript” of a recording he made of a call with a third party Mr. Perrong claims is a Frontier representative. This “transcript” was not obtained through depositions or responses to interrogatories, nor does it constitute an affidavit or admission. As discussed, these are the only permissible documents that Mr. Perrong can attach to his answer to Frontier’s Motion for Summary Judgment. Further, this “transcript” does not constitute a pleading which Your Honor may also rely upon when ruling on Frontier’s Motion for Summary Judgment. As such, this information is beyond the scope of permissible facts to be considered in adjudicating Frontier’s Motion for Summary Judgment.

12. Further, striking Exhibits A and C will not impact the October 28 Order. The October 28 Order does not specifically reference or rely on these exhibits, and Your Honor could reach the same conclusion without the exhibits. For example, Mr. Perrong alleges in his Memorandum that the telephone number in question is a residential telephone number and that the number is on a national Do-Not-Call registry. Memorandum at unnumbered page 7. Mr. Perrong makes these statements without any reference to Exhibits A and C. As such, the October 28 Order could still stand without the impermissible inclusion of Exhibits A and C and

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<sup>1</sup> Pursuant to Section 5.1(a)(2), the pleadings in an action before the Commission include the formal complaint, answer, new matter, reply to new matter, and preliminary objections. 52 Pa. Code § 5.1(a)(2).

references thereto. Further, as noted, Frontier is not challenging the October 28 Order in this Motion.

**B. Striking Exhibits A and C From The Public Docket Is Necessary To Prevent Use Of The Motions Process To Make Public Otherwise Inadmissible And/Or Objectionable Documents Prior To The Hearing Process**

13. Frontier submits that Mr. Perrong should not be permitted to use the motions process as a way to make public otherwise inadmissible documents or to preempt Frontier's due process rights to challenge the admissibility of the information before it is made available for public consumption.

14. Fundamental fairness and due process considerations require that Exhibits A and C be stricken from Mr. Perrong's Memorandum. Due process requires notice and an opportunity to be heard. *Application Nunc Pro Tunc of Artesian Water Pennsylvania, Inc.*, Docket No. A-2017-2639994, Opinion and Order (Aug. 29, 2019), 2019 PA. PUC LEXIS 269, \*44, *citing Schneider v. Pa. PUC*, 479 A.2d 10, 15 (Pa. Cmwlth. 1984). Further, the Commission has defined prejudice as "an undue tendency to suggest decision on an improper basis." *C.S. Warthman Funeral Home, et. al. v. GTE North, Incorporated*, Docket No. C-00924416, Opinion and Order (June 4, 1993), 1993 Pa. PUC LEXIS 214, \*18, *citing Whistler Sportswear, Inc. v. Rullo*, 289 Pa. Super 230, 243, 433 A.2d 40, 47 (1981).

15. Exhibits A and C are inadmissible evidence in this proceeding, and Frontier is filing a Motion in Limine seeking to exclude these exhibits from the record. Further, in his Memorandum, Mr. Perrong has not laid the proper foundation for these exhibits (as would be required if these exhibits were to be entered into the record). For example, as attached to the Memorandum, Exhibits A and C violate the Best Evidence Rule,<sup>2</sup> have not been properly

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<sup>2</sup> The Best Evidence Rule provides that an original recording is required to prove its contents, except as otherwise provided in the Pennsylvania Rules of Evidence, by the Pennsylvania Supreme Court, or a

authenticated, and pose the risk of fraud or mistaken attribution.<sup>3</sup>

16. Mr. Perrong relied on the information included within Exhibits A and C to support his claims that: (1) the call was made on behalf of Frontier; (2) the call violated Commission regulations; and, (3) the call was to a residential address. Memorandum at unnumbered page 6. Allowing these exhibits to be available to the public would create “an undue tendency to suggest decision on an improper basis” as the “transcript” are not in evidence in this proceeding.

17. It would unfairly prejudice Frontier and violate Frontier’s due process rights to allow these otherwise inadmissible exhibits to become public record, particularly at this stage of

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statute. Pa. R.E. 1002. Section 1003 of the Pennsylvania Rules of Evidence also permits duplicates unless a genuine question is raised about the original’s authenticity or the circumstances make it unfair to admit the duplicate. Pa. R.E. 1003. A “duplicate” is defined as “a copy produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.” Pa. R.E. 1001. While the strict rules of evidence have been relaxed in agency hearings, the Commission has not abandoned all of these rules. *Frompovich v. PECO Energy Company*, Docket No. C-2015-2474602, Opinion and Order (May 3, 2018), 2018 Pa. PUC LEXIS 160, \*23; citing *Ronald and Beverly Dawes v. Pennsylvania Gas and Electric*, Docket No. F-2013-2361655, Initial Decision (January 14, 2014) (related to the authentication per Pa. R.E. Rules 901 of a third-party recording of a customer call and the application of the Best Evidence Rule).

As a supplement to his Memorandum, Mr. Perrong did not provide the original recording of the third party call, nor did he provide a “duplicate” of the original recording. Rather, Mr. Perrong provided an alleged transcript of the calls.

<sup>3</sup> Under the Pennsylvania Rules of Evidence, to be admissible, a recording must be authenticated by evidence sufficient to support a finding that the matter in question is what the proponent claims. Pa. R. E. 901(a). The Commission has held: “For evidence relied upon in an administrative proceeding to be considered competent, the evidence must be authenticated [...]” *Frompovich*, 2018 Pa. PUC Lexis at \*23. In the *Frompovich* case, the Commission explained the importance of the authentication requirements as follows:

The rationale for requiring authentication is that it provides a measure of protection against fraud or mistaken attribution [...]. *Commonwealth v. Brooks*, 508 A. 2d 316 (Pa. Super. 1986); *Commonwealth v. Harrison*, 434 A.2d 808 (Pa. Super. 1981). Improper authentication can lead to reversal on appeal. *Kopytin v. Aschinger*, 947 A.2d 739 (Pa. Super. 2008). As it is the duty of the ALJ to ensure that the evidentiary record is solid and reliable, permitting improper authentication is a breach of that duty.

*Id.* at \*24.

Here, Mr. Perrong did not authenticate, verify, or support the transcripts with an affidavit. He does not identify who transcribed these records, or when they were transcribed. The transcripts also contain editorializing (e.g. Jordan Smith’s name is in quotation marks).

the proceeding, when Mr. Perrong has not laid a proper foundation and without the presentation of a sponsoring witness and the opportunity for Frontier to examine the witness as required by due process considerations and 52 Pa. Code § 5.402.<sup>4</sup>

**III. CONCLUSION**

18. For the reasons explained above, Frontier respectfully requests that Your Honor issue an order striking Exhibits A and C (and references thereto) from Mr. Perrong's Memorandum.

**WHEREFORE**, for the foregoing reasons, Frontier respectfully requests that the Commission grant this Motion and strike Exhibits A and C (and references thereto) from Mr. Perrong's Memorandum.

Respectfully submitted,



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November 2, 2020

Attorneys for  
Frontier Utilities Northeast LLC

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<sup>4</sup> Section 5.402(a) of the Commission's regulations provides: "A party shall move the admission of evidence into the record upon presentation of the sponsoring witness, and after opportunity for other parties to examine the witness."