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April 13, 2021

Via Electronic Filing

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

Re: Stonycreek Township v. Direct Energy Business, LLC
Docket No. C-2021-3024812

Dear Secretary Chiavetta:

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

Sincerely,

/s/ Karen O. Moury

Karen O. Moury

KOM/lww
Enclosure

cc: Cert. of Service w/enc.

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of Direct Energy's Preliminary Objections upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

Via Email Only

William G. Barbin, Esquire
Gleason Barbin & Markovitz
206 Main Street
Johnstown, PA 15901
wgbarbin@atlanticbb.net

Jennifer D. Wagner
Stonycreek Township
1610 Bedford Street
Johnstown, PA 15902
jwagner@stonycreektownship.com

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

Dated: April 13, 2021

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

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Stonycreek Township,	:	
	:	
Complainant,	:	
	:	
v.	:	Docket No. C-2021-3024812
	:	
	:	
Direct Energy Business, LLC,	:	
	:	
Respondent.	:	

NOTICE TO PLEAD

To: William G. Barbin, Esquire
Gleason Barbin & Markovitz
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You are hereby notified that an Answer to the enclosed **Preliminary Objections** of Direct Energy Business, LLC must be filed within 10 days of the date of service.

All pleadings, such as an Answer to Preliminary Objections, must be filed with the Secretary of the Pennsylvania Public Utility Commission with a copy served to counsel for Direct Energy Business, LLC and the Office of Administrative Law Judge.

File with:

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265
<https://efiling.puc.pa.gov/>

With an electronic copy to:

Karen O. Moury, Esquire
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Karen O. Moury

Karen O. Moury, Esquire

Date: April 13, 2021

Counsel for Direct Energy Business, LLC

BEFORE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Stonycreek Township, :
Complainant, :
v. : Docket No. C-2021-3024812
Direct Energy Business, LLC, :
Respondent. :

**PRELIMINARY OBJECTIONS
OF DIRECT ENERGY BUSINESS, LLC**

TO: CHIEF ADMINISTRATIVE LAW JUDGE CHARLES E. RAINEY, JR.:

Pursuant to 52 Pa. Code § 5.101(a)(3) of the regulations of the Pennsylvania Public Utility Commission (“Commission”), Direct Energy Business, LLC (“Direct Energy”) submits the following Preliminary Objections to the Complaint of Stonycreek Township (“Township” or “Complainant”), requesting dismissal of the Complaint.

The basis for Direct Energy’s request is that the Complaint contains insufficient specificity to allow Direct Energy to ascertain what it is alleged to have done in violation of the Public Utility Code, Commission regulations or Commission orders. Direct Energy is not simultaneously filing an Answer since such is not required under the Commission’s regulations until further directed by the presiding officer or the Commission, or unless the Complainant files an Amended Complaint.¹ In view, however, of the Commission’s regulations, which require that all preliminary objections be raised at one time,² Direct Energy is also requesting dismissal of the Complaint on the basis of

¹ 52 Pa. Code § 5.101(e)(1)-(2).

² 52 Pa. Code § 5.101(c).

legal insufficiency of a pleading and the lack of the Commission’s jurisdiction to adjudicate the dispute raised by the Complaint. In support of these Preliminary Objections, Direct Energy states as follows:

I. INTRODUCTION AND BACKGROUND

1. Direct Energy is an electric generation supplier (“EGS”), licensed by the Commission to supply electric generation services to retail customers throughout Pennsylvania.³

2. The Complaint was served on Direct Energy by the Commission on March 24, 2021. Direct Energy is timely filing these Preliminary Objections, which are due within twenty days of service of the Complaint.⁴

3. In Paragraph 4 of the Complaint, the Township describes a dispute that it has with Albireo Energy, LLC (“Albireo”), which according to Commission records holds an EGS license as a broker/marketer.⁵ Although the Complainant listed Albireo in Paragraph 2, along with Direct Energy, a review of Commission records shows that a complaint has not been docketed against Albireo.⁶

4. Paragraph 4 of the Complaint also references Taylor Consulting and Contracting, LLC (“Taylor”), with whom the Township entered into a contract for purposes of providing an energy supplier for the Township. It also refers to a subsequent merger of Taylor and Albireo.

³ Commission Docket No. A-110025. The Commission originally issued the license to Strategic Energy Partners, Ltd. on July 13, 1997, and then approved a change of the name on September 27, 2000 to Strategic Energy LLC. Thereafter, the Commission approved a change of the name on November 19, 2008 to Direct Energy and issued the license in Direct Energy’s name.

⁴ 52 Pa. Code §5.101(d).

⁵ Commission Docket No. A-2019-3009085. Although the Public Utility Code and Commission regulations refer to both types of entities as EGSs, the distinction is that some EGSs are authorized to provide electric generation services to customers, while other EGSs are authorized to provide only broker/marketer services to customers. *See* 66 Pa.C.S. § 2803 (definitions of “broker or marketer” and “electric generation supplier.”); 52 Pa. Code § 54.31 (relating to definitions).

⁶ <https://www.puc.pa.gov/utility/1122058>.

According to the Commission's records: (a) Taylor obtained a broker/marketer license from the Commission on March 2, 2009;⁷ (b) on November 20, 2018, Taylor notified the Commission that it had been purchased by Albireo and indicated that its legal entity name would remain as Taylor;⁸ (c) Taylor requested approval on November 14, 2019 to abandon its broker/marketer license, explaining that Albireo had obtained an EGS license to operate as a broker/marketer in Pennsylvania;⁹ and (d) the Commission issued a Secretarial Letter on December 6, 2019 approving the abandonment of Taylor's EGS license as a broker/marketer.¹⁰

5. The gist of the Complaint is that the Township received no notice of the merger between Taylor and Albireo, and that Albireo (rather than Taylor) brokered an agreement on behalf of the Township with Direct Energy for a 36-month period, beginning in January 2021. The Complainant also references Albireo's alleged threats of legal action and the imposition of early termination fees if the Township switches from Direct Energy to a different EGS.

6. Importantly, none of the factual allegations in the Complaint are directed at Direct Energy. The Township does not allege that Direct Energy had or has any involvement in the dispute that it describes with Albireo. Additionally, the Complaint does not aver that Albireo was acting as an agent for Direct Energy or that Direct Energy otherwise has any responsibility for the actions of Albireo, which holds its own EGS license as a broker/marketer.

7. Further, the Complainant does not allege any wrongdoing by Direct Energy or describe any actions taken by Direct Energy to cause the problem that is the subject of the Complaint. Even if all averments in the Complaint are accepted as true, they demonstrate no

⁷ Commission Docket No. A-2008-2077880.

⁸ Commission Docket No. A-2008-2077880.

⁹ Commission Docket No. A-2019-3014672.

¹⁰ *Id.*

violation by Direct Energy of the Public Utility Code, Commission regulations or Commission orders.

8. Moreover, the Complaint does not request that Direct Energy be required to grant the Complainant any relief. In Paragraph 5 of the Complaint, the only relief requested is the resolution of a contractual dispute between Albireo and the Township. This request for relief neither involves Direct Energy nor falls within the Commission's jurisdiction to entertain.

9. Additionally, the Complainant only seeks relief from Albireo, which it appears has not been added as a party to this proceeding or to a separate proceeding.

10. Therefore, the Complaint should be dismissed.

II. ARGUMENT

A. Applicable Legal Standards

11. The Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary objections.¹¹ The Commission's procedure regarding the disposition of preliminary objections is similar to that utilized in Pennsylvania civil practice. *Id.*

12. Under Section 5.101(a) of the Commission's regulations, preliminary objections must specifically state the legal and factual grounds relied upon and be limited to the following:

- (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding;
- (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter;
- (3) Insufficient specificity of a pleading;
- (4) Legal insufficiency of a pleading;

¹¹ 52 Pa. Code § 5.101(a)(1)-(7). *Equitable Small Transportation Interveners v. Equitable Gas Company*, 1994 Pa. P.U.C. LEXIS 69, Docket No. C-00935435 (July 18, 1994).

(5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action;

(6) Pendency of a prior proceeding or agreement for alternative dispute resolution; and

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

13. The moving party may not rely on its own factual assertions, but must accept for the purposes of disposition of the preliminary objection, all well-pleaded, material facts of the other party, as well as every inference fairly deducible from those facts.¹² However, the Commission need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations or expressions of opinion.¹³

14. In deciding the preliminary objections, the Commission must determine whether based on the well-pleaded factual averments of the party, recovery or relief is possible.¹⁴

15. The filing of preliminary objections 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.¹⁵

16. If a preliminary objection alleges insufficient specificity in a pleading, an answer is not required until further directed by the presiding officer or the Commission. Alternatively, if an amended pleading is filed in response to a preliminary objection alleging insufficient specificity in a pleading, the preliminary objection will be deemed to be moot.¹⁶

¹² *County of Allegheny v. Cmwlt. of Pa.*, 490 A.2d 402 (Pa. 1985).

¹³ *Stanton-Negley Drug Co. v. Dep't of Pub. Welfare*, 927 A.2d 671, 673 (Pa. Cmwlt. 2007).

¹⁴ *Department of Auditor General, et al. v. SERS, et al.*, 836 A.2d 1053, 1064 (Pa. Cmwlt. 2003); *P.J.S. v. Pa. State Ethics Commission*, 669 A.2d 1105 (Pa. Cmwlt. 1996).

¹⁵ 66 Pa.C.S. § 703(a); *Lehigh Valley Power Committee v. Pa. PUC*, 563 A.2d 557 (Pa. Cmwlt. 1989).

¹⁶ 52 Pa. Code § 101(e).

B. Insufficient Specificity of a Pleading, 52 Pa. Code § 5.101(a)(3).

17. Under Section 5.101(a)(3) of the Commission’s regulations, preliminary objections may be filed against a complaint alleging insufficient specificity of a pleading.¹⁷

18. Section 701 of the Public Utility Code permits any person to “complain in writing, setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission.”¹⁸

19. Under Section 5.22 of the Commission’s regulations, a complaint must contain a clear and concise statement of the act or omission being complained of and a clear and concise statement of the relief sought.¹⁹

20. To withstand a preliminary objection alleging insufficient specificity, a pleading must contain averments of all the facts that the complaining party will have to prove in order to prevail and enable the responding party to prepare a defense.²⁰

21. The Complaint in this proceeding does not contain any allegations of wrongdoing by Direct Energy or seek any relief from Direct Energy. The gist of the Complaint is the Township received no notice of the merger between Taylor and Albireo, and that Albireo (rather than Taylor) brokered an agreement on behalf of the Township with Direct Energy for a 36-month period, for electric generation services beginning January 2021. The Complainant also references Albireo’s alleged threats of legal action and the imposition of early termination fees.

¹⁷ 52 Pa. Code § 5.101(a)(3).

¹⁸ 66 Pa.C.S. § 701.

¹⁹ 52 Pa. Code § 5.22(a)(4).

²⁰ *Podolak v. Tobyhanna Tp. Bd. of Supervisors*, 37 A.3d 1283, 1288-89 (Pa. Cmwlth. 2012).

22. In addition, the Complainant does not allege that Direct Energy is responsible for the actions of Albireo. Even if such an allegation had been included, the Commission does not hold EGSs responsible for the acts of other EGSs. Rather, each licensee is responsible for its own misdeeds. Section 54.43(f) holds an EGS responsible “for any fraudulent deceptive or unlawful marketing or billing acts performed by...its agents or representatives.”²¹ The text of Section 54.43(f) does not make one licensee responsible for the acts of a different licensee or for the acts of employees, agents or representatives of a different licensee. In citing this provision in the regulations, the Commission has explained that if an unlicensed “independent marketing services provider under contract with the EGS misrepresents an offer to a consumer or uses deceptive practices to attract the customer to the EGS, the Commission will hold the EGS responsible.”²²

23. Moreover, in *Hickory Hollow Farms c/o Lamar Harish v. Liberty Power Holdings LLC and Unified Energy Alliance*,²³ the Administrative Law Judge agreed that an EGS is not responsible for the alleged misconduct of another EGS. That situation also involved an EGS supplying electric generation services and an EGS operating as a marketer or broker. As the ALJ ruled, the Commission’s regulation at 52 Pa. Code 54.43(f) makes an EGS responsible only for its agent or employees, but not those of another licensed EGS, or that EGS’s agents or employees.

24. The Complaint does not contain a clear and concise statement of an act or omission by Direct Energy or include a clear and concise statement of the relief sought, and does not contain factual or legal averments enabling Direct Energy to prepare a defense.

²¹ 52 Pa. Code §54.43(f).

²² Secretarial Letter dated December 10, 2009, Docket No. M-2009-2082042, on the topic of third parties who provide marketing and sales support to licensed EGSs.

²³ *Hickory Hollow Farms c/o Lamar Harish v. Liberty Power Holdings LLC and Unified Energy Alliance*, Docket No. C-2016-2559494 (Order dated May 8, 2017, Sustaining the Preliminary Objections of Liberty Power Holdings, LLC in part, at 19-20). Since Liberty Power Holdings LLC filed a certificate of satisfaction on May 11, 2017, this issue was not addressed by the Commission’s Order entered on August 31, 2017.

25. Therefore, on the basis of Section 5.101(a)(3), the Complaint should be dismissed.

C. Legal Insufficiency of a Pleading, 52 Pa. Code § 5.101(a)(4).

26. Under Section 5.101(a)(4) of the Commission's regulations, preliminary objections may be filed against a complaint alleging legal insufficiency of a pleading.²⁴

27. The material facts alleged by the Complaint are: (a) the Township signed a contract with Taylor for the purpose of providing an energy supplier for the Complainant; (b) Taylor merged with Albireo without the knowledge of the Township; (c) Albireo, on the Township's behalf, entered into an agreement with Direct Energy for 36 months of electric generation services beginning in January 2021; (d) the Township has moved to the provider, nTherm, LLC,²⁵ breaking ties with Taylor; and (e) Albireo is threatening the Township with a breach of contract lawsuit and demanding termination fees of \$4,420.00.

28. Even if all of these material assertions in the Complaint are accepted as true, they do not present a case in which Direct Energy could be found to have violated any provision of the Public Utility Code, Commission regulations or Commission orders.

29. Since the Complaint does not allege any wrongdoing on the part of Direct Energy, Direct Energy should not be required to expend any additional resources to further defend this Complaint.

30. Therefore, on the basis of Section 5.101 (a)(4), the Complaint should be dismissed.

²⁴ 52 Pa. Code § 5.101(a)(4).

²⁵ According to the Commission's records, nTherm, LLC holds an EGS license to provide electric generation services. Commission Docket No. A-2018-3006576.

D. Lack of Commission Jurisdiction, 52 Pa. Code § 5.101(a)(1).

31. Under Section 5.101(a)(1) of the Commission’s regulations, preliminary objections may be filed against a complaint alleging lack of jurisdiction.²⁶

32. As a creation of the General Assembly, the Commission has only the powers and authority granted to it by the General Assembly and contained in the Public Utility Code.²⁷ It is well-settled that the Commission must act within, and cannot exceed, its jurisdiction.²⁸ Jurisdiction may not be conferred by the parties where none exists.²⁹ Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy.³⁰

33. The only request for relief contained in the Complaint is for the Commission to resolve a contractual dispute between Albireo and the Township, find that a breach has occurred and direct Albireo to waive a portion or all of the early termination fee.

34. The Commission’s jurisdiction does not include authority to resolve contractual disputes and award damages. Specifically, the Commission does not have jurisdiction to determine if a party breached a contract or to settle disputes arising under a contract.³¹ Recognizing this lack of statutory authority, the Commission has specifically held that its jurisdiction over EGSs “does not extend to interpreting the terms and conditions of a contract between an EGS and a customer

²⁶ 52 Pa. Code § 5.101(a)(1).

²⁷ See *City of Phila. v. Phila. Elec. Co.*, 473 A.2d 997, 999-1000 (Pa. 1984) (“We begin our inquiry by recognizing that the authority of the Commission must arise from the express words of the pertinent statutes or by strong and necessary implication therefrom...It is axiomatic that the Commission’s power is statutory; and the legislative grant of power in any particular case must be clear.”); see also *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791, 795 (Pa. 1977); *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937 (Order entered May 28, 2008).

²⁸ *City of Pittsburgh v. Pa. PUC*, 43 A.2d 348 (Pa. Super. 1945).

²⁹ *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967).

³⁰ *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992), *alloc. denied*, 637 A.2d 293 (Pa. 1993).

³¹ See, e.g., *Allport Water Auth. v. Winburne Water Co.*, 393 A.2d 673 (Pa. Super. Ct. 1978) (such disputes must be pursued through courts of competent jurisdiction).

to determine whether a breach has occurred.”³² In addition, the Pennsylvania courts have long held that the powers of the Commission do not include the power to award monetary damages, such as claims for damages resulting from a breach of contract.³³ Rather, the court of common pleas retains jurisdiction for monetary damages resulting from a breach of contract.³⁴

35. Therefore, as the relief requested by the Complaint is beyond the Commission to grant and on the basis of Section 5.101(a)(1), the Complaint should be dismissed.

E. Lack of Nonjoinder of Necessary Party, 52 Pa. Code § 5.101(a)(5).

36. Under Section 5.101(a)(5) of the Commission’s regulations, preliminary objections may be filed against a complaint for nonjoinder of a necessary party.³⁵

37. Although the Complainant listed Albireo as a co-respondent in this proceeding, it appears that the Commission did not docket the complaint against Albireo. Due to the focus of the Complaint on Albireo’s activities, it is imperative that Albireo be a party to this proceeding. Moving forward without Albireo would not be consistent with judicial economy and would not likely result in an outcome that fairly adjudicates this proceeding.

38. Therefore, on the basis of Section 5.101 (a)(5), the Complaint should be dismissed.

IV. CONCLUSION

WHEREFORE, on the basis of the foregoing, Direct Energy Business, LLC respectfully requests dismissal of the Complaint filed by Stonycreek Township and any other relief deemed as may be deemed appropriate.

³² *Office of Small Business Advocate v. FirstEnergy Solutions Corp.*, Docket No. P-2014-2421556 (Order entered January 26, 2015, at 18).

³³ *See, e.g., Elkin v. Bell Telephone Company*, 420 A.2d 371 (Pa. 1980); *Feingold v. Bell of Pennsylvania*, 383 A.2d 791 (Pa. 1978).

³⁴ *See, e.g., Behrend v. Bell Telephone Company*, 363 A.2d 1152 (Pa. Super. 1976).

³⁵ 52 Pa. Code § 5.101(a)(5).

Respectfully submitted,

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Date: April 13, 2021

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