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September 14, 2021

Via Electronic Filing

Rosemary Chiavetta, Secretary
PA Public Utility Commission
400 North Street
Harrisburg, PA 17120

Re: Andrew Perrong v. Alpha Gas and Electric LLC
Docket No. C-2021-3024359

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the Reply Brief of Alpha Gas and Electric LLC in the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,

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 the Reply Brief of Alpha Gas and Electric LLC upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

Via Email Only

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Hon. Charece Z. Collins
Administrative Law Judge
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Pa. Public Utility Commission
400 North Street
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Dated: September 14, 2021

Karen O. Moury

Karen O. Moury, Esquire

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Andrew Perrong,	:	
	Complainant	:
	:	
v.	:	Docket No. C-2021-3024359
	:	
Alpha Gas & Electric LLC,	:	
	Respondent	:

**REPLY BRIEF OF
ALPHA GAS & ELECTRIC LLC**

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Pursuant to the Late-Filed Exhibits and Briefing Order dated June 25, 2021, as modified by the Amended Briefing Schedule Order dated August 9, 2021, which were issued by Administrative Law Judge (“ALJ”) Charece Z. Collins, Alpha Gas & Electric LLC (“Alpha”) hereby submits this Reply Brief in response to the Main Brief filed by Andrew Perrong (“Complainant” or “Mr. Perrong”) on August 24, 2021.¹

I. SUMMARY OF ARGUMENT

Nothing in the Main Brief filed by the Complainant changes the fact that this Formal Complaint (“Complaint”) involves a single telephone call allegedly made by an Alpha agent to one consumer on February 15, 2021 regarding the sale and marketing of electric generation supply services.² Moreover, contrary to Mr. Perrong’s arguments in his Main Brief about his recording of this call being exempt from the Pennsylvania Wiretapping Law, it was obtained unlawfully due to a lack of consent of all parties and may not be relied upon as evidence to support factual findings in this proceeding.

Throughout the Main Brief, the Complainant raises new allegations for the first time, sets forth averments without citing to any record evidence, makes assumptions about the systems used by Alpha’s vendor without establishing any qualifications for doing so, and relies on evidence that is not in the record. In short, Mr. Perrong’s Main Brief leaps to factual conclusions based on his own personal views while ignoring the need to rely on evidentiary support for his allegations.

Further, the Complainant’s Main Brief does not address any of the evidence presented by Alpha to refute his claims about the call. An undisputed fact in the record is that Alpha had only

¹ Alpha incorporates its Main Brief (“Alpha MB”) in this Reply Brief by reference and is not reiterating its Statement of the Case, or Proposed Findings of Fact, Conclusions of Law and Ordering Paragraphs.

² Citations to the Complainant’s Main Brief are shown as “Compl. MB.”

one vendor under contract to provide telemarketing services. Those activities were considered “inbound” – not “outbound” telephone solicitations – because they were limited to situations in which customers signed up on an unrelated website to receive information about energy products and services or instances when customers called in to the vendor about other products and services and were asked if they would like to receive information about energy products and services. Not only is this business model clearly outlined by the contract, it is also consistent with the telemarketing script that Alpha presented as evidence in the proceeding. Yet, the Complainant ignores all of this evidence and asks the Commission to find that an Alpha agent made an outgoing telephone solicitation because of a call he received on February 15, 2021 due to one mention of Alpha by the sales person during an illegally recorded call.

Further, in his Main Brief, Mr. Perrong does not address the results of Alpha’s inquiries to its vendor to review the telephone numbers with which its agents had interactions on the date in question. Notably, the Complainant’s Main Brief conveniently ignores the fact that Mr. Perrong’s telephone number was not among them. Similarly, the vendor checked all of its records for February 15, 2021 and did not find the telephone number from which the Complainant claims that Alpha called him. Further, the male individual on the call identified himself as a name that does not match any of the agents that the vendor used for telemarketing activities under the Alpha contract. Indeed, Mr. Perrong admitted in his testimony and his Main Brief that there was no way to identify who the caller was. When the caller cannot be identified, no evidence exists to hold Alpha responsible.

In addition, the Complainant’s Main Brief repeatedly cites to provisions in federal and state laws that the Commission lacks the jurisdiction to administer and enforce. Even though the Commission regulations impose a requirement on suppliers to comply with federal and state

telemarketing laws, the Commission has said that it does not have jurisdiction to administer or enforce them. The only way to find a violation of those regulations would be to analyze and interpret the federal and state telemarketing laws, which are complex and outside the Commission's jurisdiction and expertise.

In summary, the Complainant has not carried his burden of proving that Alpha or its agent made any call to him. This Complaint involves an allegation of a single telemarketing call made to Mr. Perrong by an individual with whom Alpha is not familiar. It could have literally been anyone who called Mr. Perrong and the Complainant was not able to demonstrate otherwise. Simply, nothing in the record proves that a person working on behalf of and authorized by Alpha to conduct outbound telemarketing activities made an unsolicited call to Mr. Perrong. Notably, Mr. Perrong never enrolled with Alpha. The Complainant has failed to demonstrate by a preponderance of the evidence any violation by Alpha of the Public Utility Code, the Commission's regulations, or a Commission order. Therefore, Alpha respectfully requests that this Complaint be dismissed in its entirety.

Even if all allegations in the Complaint are accepted as true, the relief requested is well beyond the scope of what the Commission has ordered in other complaint proceedings. The requests for relief fail to take into consideration the criteria that the Commission relies upon in determining an appropriate civil penalty, if any, and wholly ignore Alpha's unblemished compliance history during the decade it has been licensed by the Commission. To the extent any portion of the Complaint is sustained, no civil penalty should be assessed. Finally, the Commission lacks jurisdiction to award the injunctive relief requested by the Complainant's Main Brief.

II. ARGUMENT

A. The Recording Was Illegally Obtained

In his Main Brief, the Complainant contends that the recording of the call he received on February 15, 2021 was lawfully obtained.³ Specifically, Mr. Perrong argues that his recording does not implicate the Pennsylvania Wiretapping and Electronic Surveillance Control Act (“Wiretapping Act”)⁴ because he used a device to record that call that he believes falls outside the scope of the Wiretapping Act, and because he stated that the call was being recorded.⁵ A review of the applicable law demonstrates that the recording of the call does, in fact, violate the Wiretapping Act and was illegally obtained without consent from all parties. For this reason and as discussed in detail in Alpha’s Main Brief, the call recording cannot be relied upon as evidence in this proceeding.⁶

1. The Recording Does Not Fall Within the “Telephone” Exemption to the Wiretap Act

First, Mr. Perrong argues that he recorded the call using “equipment which is ordinarily connected to telephone facilities” and therefore the equipment does not fall within the definition of an “electronic, mechanical or other device” under the Wiretapping Act.⁷ In making this argument, the Complainant only cites to the definitional section of the statute and does not provide any explanation as to why the type of equipment he used falls outside the scope of the Wiretapping Act. However, he appears to be arguing that because he claims he did not use an

³ Compl. MB at 3.

⁴ 18 Pa. C.S. § 5701, *et seq.*

⁵ Compl. MB at 3.

⁶ Alpha MB at 20-24.

⁷ Compl. MB at 3, *citing* 18 Pa. C.S. § 5702 (definitions) and Tr. 20.

“electronic, mechanical or other device” to make the recording, his recording is not an “intercept” of the call as defined by Section 5702 of the Act.

The statutory language and applicable case law demonstrate that the equipment used to record the call does, in fact, fall within the meaning of “electronic, mechanical or other device” and as a result the recording was obtained in violation of the Wiretapping Act. As Mr. Perrong explained, the call was made to his number via a voiceover IP (“VoIP”) line, which makes and receives calls over the internet rather than through a standard landline or directly to a cellular telephone.⁸ He testified that he pressed a record button and the recording was saved to an SD card on his computer.⁹ It is unclear from Mr. Perrong’s testimony whether he actually took this call on a telephone or through his computer or another device, as VoIP calls can be made to a variety of devices. In any event, this is well beyond the capability of a standard telephone as would have been contemplated by the Wiretapping Act when it was passed in 1978.

The Act defines “electronic, mechanical or other device” as “[a]ny device or apparatus...that can be used to intercept a wire, electronic or oral communication other than... [a]ny telephone or telegraph instrument...”¹⁰ This definition effectively means that communications cannot be “intercepted” by a “telephone” within the meaning of the Act. As technology has rapidly evolved in recent years, the courts have had occasion to address what devices may be considered a “telephone” and thus fall outside the scope of the Wiretapping Act.

In *Commonwealth v. Diego* (“*Diego*”), the Superior Court of Pennsylvania found that an iPad “is not a telephone or telegraph instrument under a common understanding of the relevant terms, and no reasonable person familiar with the now ubiquitous technology of tablet computers

⁸ Tr. 24-25.

⁹ Tr. 24.

¹⁰ 18 Pa. C.S. § 5702.

would misidentify an iPad as a mere telephone. The fact that an iPad or other tablet computer can perform functions similar or identical to a modern cellular phone is not dispositive...”¹¹ The Court went on to state that “adopting such an expansive interpretation of the term ‘telephone’ [to include an iPad] under the Wiretap Act is beyond the province of this Court. Indeed, if we were to extend [this] argument to its logical conclusions, any modern computer, in tablet form or otherwise, would have been considered a telephone under the Wiretap Act when it is used to transmit or receive an electronic communication. We decline to so radically expand the definition of ‘telephone’ under the Wiretap Act...”¹² The Court also recognized that “it is, at best, a dubious proposition that the authors of the 1978 Wiretap Act intended ‘telephone’ to include iPads, as the first tablet computers were not invented until the late 1980’s.”¹³

In this proceeding, it would be a similarly radical expansion to consider a call made to a VoIP line and recorded to an SD card on the Complainant’s computer to have been recorded by a “telephone.” Indeed, the *Diego* Court specifically recognized that devices such as a computer cannot be considered to be a “telephone” under the Act even if the computer can send and receive calls in the same way as a traditional telephone.¹⁴ This would significantly expand the scope of the Wiretapping Act beyond the legislature’s intent. Further, it is well outside the Commission’s authority to make such an expansive determination. The provisions of the Wiretapping Act must be strictly construed,¹⁵ and therefore the recording cannot be considered to

¹¹ *Commonwealth v. Diego*, 119 A.2d 370, 375 (Pa. Super. 2015).

¹² *Id.* at 375-376.

¹³ *Id.* at 376 (citations omitted).

¹⁴ *Id.* at 375-376.

¹⁵ *Id.*, citing *Commonwealth v. Spangler*, 809 A.2d 234, 237 (Pa. 2002).

have been made by a “telephone.” Because the recording does not fall within the telephone exemption, the Wiretapping Act clearly applies here.

2. The Complainant Did Not Obtain Consent to Record the Call

As explained in Alpha’s Main Brief,¹⁶ although the Crimes Code provides an exception when all parties to the wire communication have given prior consent to such interception,¹⁷ Mr. Perrong failed to obtain the required consent from all parties on the call before recording. Although he did state that the call was on a recorded line, this does not constitute consent to record. At the beginning of the call recording, the Complainant stated twice that the line was being recorded, but he stated this while an automated message was playing.¹⁸ When the female agent joined the call, Mr. Perrong stated that it was a recorded line, but it was unclear if the agent heard him say this and she did not respond or in any way give consent to being recorded.¹⁹ Further, the bulk of Mr. Perrong’s Complaint is based on statements made by the agent “Kevin Victor,” but Mr. Perrong did not inform Kevin Victor that the conversation was being recorded and did not obtain his consent.²⁰

The Wiretapping Act provides that “no person shall disclose the contents of any wire, electronic or oral communication, or evidence derived therefrom, in any proceeding in any court, board or agency of this Commonwealth.”²¹ While the Commission does not have jurisdiction to determine violations of the Wiretapping Act,²² the Wiretapping Act provides that an aggrieved

¹⁶ Alpha MB at 20-24.

¹⁷ 18 Pa. C.S. § 5704.

¹⁸ Perrong Conf. Exhs. 2 and 4.

¹⁹ *Id.*

²⁰ *Id.*

²¹ 18 Pa. C.S. § 5721.1(a).

²² *McClellan v. Pennsylvania Pub. Util. Comm'n*, 634 A.2d 686 (Pa. Cmwlth. 1993).

person who is a party to any proceeding before a Pennsylvania administrative agency may move to exclude the contents of any wire, electronic or oral communication.²³

Further, Section 5.403(a)(1) of the Commission's regulations authorizes the presiding officer to control the receipt of evidence, including ruling on the admissibility of evidence.²⁴ The presiding officer also has authority to confine the evidence to the issues in the proceeding and to impose "necessary limitations" upon the admission of evidence.²⁵ Section 5.403(b) of the Commission's regulations requires the presiding officers to "actively employ these powers to direct and focus the proceedings consistent with due process."²⁶ Limiting the receipt of illegally obtained evidence is not a new concept. For example, the "exclusionary rule" bars the use of illegally obtained evidence and the fruits of that evidence.²⁷ Additionally, the Commission has previously excluded evidence obtained illegally in violation of the Wiretapping Act.²⁸ In this case, Mr. Perrong obtained evidence illegally for the purpose of pursuing litigation against Alpha. As such, the recording cannot be used as evidence in this proceeding and cannot be considered in deciding this matter.

²³ 18 Pa. C.S. § 5721.1(b).

²⁴ 52 Pa. Code § 5.403(a)(1).

²⁵ 52 Pa. Code §§ 5.403 and 5.483.

²⁶ 52 Pa. Code § 5.403(b).

²⁷ See, e.g., *Commonwealth v. Arter*, 637 Pa. 541, 543, 151 A.3d 149, 151 (Pa. 2016). While the exclusionary rule has been, traditionally, limited to the principle that evidence seized in violation of Fourth Amendment rights (related to unreasonable searches and seizures) is not admissible in criminal cases, courts have recognized the notion that evidence obtained in violation of a person's legal rights, whether constitutional or statutory, should not be received in evidentiary proceedings. E.g., *United States v. Bonnell*, 483 F. Supp. 1070, 1075 n.8 (D. Minn. 1979), citing *United States v. Wade*, 388 U.S. 218, 240-41, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967); *Brewer v. Williams*, 430 U.S. 387, 398-400, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977) ("The term "exclusionary rule" is most commonly applied in the Fourth Amendment search-and-seizure context. However, as respondents note, fruits of poisonous trees are suppressed in other situations."). Further, Pennsylvania has extended the exclusionary rule to apply in certain administrative proceedings. See *Commonwealth v. Arter*, 637 Pa. at 543, 151 A.3d at 151 (holding that the exclusionary rule can be applied to parole and probation revocation proceedings under Article 1, Section 8 of the PA Constitution).

²⁸ See *Posten Taxi, Inc. v. Robert Burgit tdba City Limousine*, 94 Pa.P.U.C. 87, 2000 WL 1421552 (Opinion and Order entered Mar. 3, 2000).

B. The Complainant Failed to Meet His Burden of Proof As To Whether the Vendor Registered as a Telemarketer

1. Complainant Presented No Evidence That Alpha's Vendor Did Not Register as a Telemarketer

The Complainant's Main Brief argues that Alpha's vendor did not register as a telemarketer under the Telemarketer Registration Act ("TRA").²⁹ As discussed herein and in Alpha's Main Brief, the Complainant has not shown that the call he received was made by Alpha's vendor. Even assuming *arguendo* that the call was made by Alpha's vendor, the Complainant has presented no evidence that the vendor was not properly registered. Other than citing Section 111.10(a)(2) of the Commission's regulations³⁰ in his Complaint and noting what the TRA requires (*i.e.* registration and compliance), the Complaint does not include a factual averment that Alpha's vendor failed to register under the law. Even if it had, Alpha denied the material allegations of the Complaint in its Answer. More importantly, the Complainant did not present any evidence or otherwise address this argument prior to submitting his Main Brief. As such, the Complainant has failed to meet his burden of proof to show that Alpha or its vendor has violated Commission regulations by failing to register as a telemarketer under the TRA. Further, as discussed in Alpha's Main Brief, the Commission lacks jurisdiction to adjudicate any allegations that Alpha violated Section 111.10(a)(2).³¹

Mr. Perrong presented no evidence at the hearing that Alpha's vendor was not registered with the Commission. In fact, there was no mention whatsoever of this issue during the hearing. The Complainant did not present any exhibits or other evidence to substantiate his vendor

²⁹ Compl. MB at 2, 6.

³⁰ 52 Pa. Code § 111.10(a)(2).

³¹ Alpha MB at 7-8.

registration argument. He cannot now argue that Alpha's vendor was not registered when he failed to present a shred of evidence to this effect.

2. It Is the Complainant Who Has the Burden of Proof to Produce Evidence in Support of Allegations

The Complainant's Main Brief states that Alpha has not produced any evidence to demonstrate that its vendor was properly registered under the TRA.³² This statement evidences a clear misunderstanding of the burden of proof in this proceeding. It was not Alpha's duty to present evidence that the alleged vendor was properly registered. It is well settled that the Complainant has the burden of proof to show that the Commission's regulations have been violated. As the proponent of a rule or order, he bears the burden of proving his factual allegations and alleged violations of the Commission's regulations pursuant to Section 332(a) of the Public Utility Code.³³ To satisfy this burden, Mr. Perrong must demonstrate that Alpha violated either (a) the Public Utility Code or another statute administered by the Commission or (b) a regulation or order of the Commission.³⁴ Any violations must be shown by a preponderance of the evidence.³⁵ Preponderance of the evidence means that the party with the burden of proof has presented evidence that is more convincing than that presented by the other party.³⁶ In addition, the Commission's decision must be supported by "substantial evidence," which consists of evidence that a reasonable mind might accept as adequate to support a conclusion. A mere "trace of evidence or a suspicion of the existence of a fact" is insufficient.³⁷ A complainant

³² Compl. MB at 6.

³³ 66 Pa. C.S. § 332(a).

³⁴ *Patterson v. Bell Telephone Company of Pennsylvania*, 72 Pa. PUC 196 (1990).

³⁵ *Samuel J. Lansberry, Inc. v. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990) *alloc. den.*, 529 Pa. 654, 602 A.2d 863 (1992).

³⁶ *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

³⁷ *Norfolk and Western Railway Co. v. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980).

cannot establish a case merely by stating his or her personal beliefs, since assertions, personal opinions or perceptions do not constitute evidence.³⁸

Mr. Perrong has presented zero evidence that Alpha's alleged vendor was not registered. His personal beliefs or assertions are not evidence and are insufficient to sustain his argument. The Complainant has therefore failed to meet his burden of proof in this proceeding, and his claims regarding vendor registration must be rejected.

C. The Complainant Failed to Produce Evidence to Show that the Call Came from Alpha's Vendor

The Complainant relies on assumptions and speculation in an effort to establish that the call he received on February 15, 2021 came from the vendor under contract with Alpha.³⁹ The evidence presented by the Complainant does not establish that the call he received was made by or on behalf of Alpha. As discussed in detail in Alpha's Main Brief, the evidence presented in this proceeding does not establish any connection between the sales people and Alpha or its vendor.⁴⁰ The Complainant relies a screen shot of an audio file on the vendor's computer and various data produced from the vendor's ViciDial system as evidence that the call was made by Alpha's vendor. These assumptions are based on mere speculation by the Complainant, who is not an expert in these technical matters but rather makes significant leaps in logic to justify his position. His claims are not based on any factual evidence presented in this proceeding, and therefore his arguments must be rejected.

Mr. Perrong points to a screenshot from the computer of Alpha's vendor showing an audio file as evidence that the vendor made the call at issue here. He argues that the file name of

³⁸ *Pennsylvania Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987).

³⁹ Compl. MB at 7-8.

⁴⁰ Alpha MB at 13-15.

the call matches the date and time of the call he received, so the file must be a recording of the call made to him.⁴¹ There is no basis for this conclusion, which is based completely on speculation. There are a number other explanations for the file having a similar date and time in the title – for example, the vendor may have been reviewing calls from that same date and time when confirming that it did not make any calls to the Complainant’s phone number. Additionally, the file name the Complainant points to is incomplete as it shows an ellipsis (“...”) in the screen shot,⁴² yet the Complainant still claims that this must be a recording of the call to him based on a partial file name. The Complainant has presented no evidence that this recording is what he claims it to be. Instead, he makes an assumption based on incomplete information that is convenient to his argument but not supported by any facts presented in this proceeding.

The Complainant also argues that data produced from the ViciDial system does not substantiate Alpha’s position that its vendor did not place the call. He argues that Alpha’s exhibits only show “leads” rather than call records, and include telephone numbers that are not valid.⁴³ Once again, this argument is not based on evidence but rather on mere speculation. There is no evidence on the record that searching for “leads” in the vendor’s ViciDial system does not provide all relevant information. There is also nothing in the record substantiating the claim that telephone numbers in the system are invalid or duplicates, and further there is nothing to substantiate that such a fact would be relevant to this proceeding. Mr. Perrong seems to consider himself an expert in telemarketing operations and systems, but again, nothing in the record establishes that he is an expert that would qualify him in any way to make such assumptions.

⁴¹ Compl. MB at 7, *citing* Alpha Conf. Exh. 3 at 6-7.

⁴² Alpha Conf. Exh. 3 at 6-7.

⁴³ Compl. MB at 7, *citing* Alpha Conf. Exh. 3 at 8; Alpha Conf. Exh. 4.

Mr. Perrong also states that the vendor “made at least 394 outbound sales calls... and at least 25 such calls on the day the Complainant received the calls...”⁴⁴ This also does nothing to establish that the vendor placed the specific call at issue here. There is no evidence in the record to establish that these other calls are relevant in any way to this Complaint. Also, this statement appears to be based on a statement contained in Alpha Conf. Exh. 3, in which the vendor stated that it “had 394 interactions in our call center.”⁴⁵ However, as is discussed further below, this statement does not indicate that these were outbound calls to sell Alpha products. Rather, the WhatsApp chat with the agent goes on to clarify that the agents were on these calls to sell other products and the agents may “pitch Alpha as [a] cross sell.”⁴⁶ The evidence does not support the Complainant’s argument and therefore his argument must be rejected.

D. The Complainant Points to No Evidentiary Support for Claims that the Caller ID Identified by the Vendor is Spoofed

In his Main Brief, the Complainant argues that the telephone number of 985-432-9863, which is the number identified by Alpha’s vendor as what would appear on the caller ID when an agent calls a customer, was spoofed. He further claims that the vendor contacted 394 persons with that number displayed as the caller ID.⁴⁷ This allegation is not substantiated by the evidentiary record and should be disregarded.⁴⁸

⁴⁴ Compl. MB at 8.

⁴⁵ Alpha Conf. Exh. 3 at 2.

⁴⁶ *Id.*

⁴⁷ Compl. MB at 5-6, 11.

⁴⁸ *See* Alpha MB at 6-7 for discussion of burden of proof and the need for more than a mere “trace of evidence or a suspicion of the existence of fact,” citing *Norfolk and Western Railway Co. v. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980). This Reply Brief also addresses these issues in Section II.B.2 (pp. 10-11).

1. The Complainant Lacks Standing to Pursue this Issue

At the outset, any arguments about the vendor’s use of 985-432-9863 as the caller ID go well beyond the allegations in the Complaint. This number is irrelevant to the Complaint and its disposition. Mr. Perrong has not, and is not, claiming that this telephone number appeared on the caller ID when he received a call on February 15, 2021. Further, the Complainant has not alleged that he was harmed or affected in any way even if the vendor spoofed that telephone number. Therefore, Mr. Perrong lacks standing to pursue this claim.

It is well-settled that a party must have standing to pursue a formal complaint before the Commission. In order to have standing, the complainant must have a direct, immediate and substantial interest in the subject matter of the controversy.⁴⁹ The requirement that an interest be “direct” means that the person claiming to be aggrieved must show causation of the harm to his interest by the matter of which he complains.⁵⁰ The requirement that an interest be “immediate” and not a remote consequence of the matter concerns “the nature of the causal connection between the action complained of and the injury to the person challenging it.”⁵¹ The requirement of a “substantial” interest means that the interest must have substance – *i.e.*, there must be some discernable adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law.⁵² As Mr. Perrong has alleged no direct, immediate or substantial interest in the vendor’s alleged use of a spoofed caller ID that did not appear on the Complainant’s telephone records, he lacks standing to pursue this claim.

⁴⁹ *Waddington v. Pa. P.U.C.*, 670 A.2d 199, 202 (Pa. Cmwlth. 1995), *appeal denied*, 544 Pa. 679, 678 A.2d 368 (1996).

⁵⁰ *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 195, 346 A.2d 269, 282 (1975).

⁵¹ *Id.* at 197, 346 A.2d at 283.

⁵² *Id.* at 195, 346 A.2d at 282.

2. The Complainant Presented No Evidence to Support this Claim

While Mr. Perrong testified at the hearing that this number never existed, he presented no documentation to support that claim.⁵³ In his Main Brief, the Complainant includes references to extra record evidence from a website of the North American Numbering Plan administrator and describes a process that one could follow to determine whether the telephone number is valid.⁵⁴ In making this argument, the Complainant also refers to locations of the vendor to question why it would be using a Louisiana area code.⁵⁵ However, no evidence exists in the record as to the vendor's locations and it is speculation to assume that no valid basis exists for the vendor to use a Louisiana area code. Moreover, Mr. Perrong offers no reason for not presenting this information at the hearing. He had Alpha's discovery responses on June 10, 2021, two weeks prior to the hearing, and Alpha's proposed hearing exhibits on June 17, 2021, one week prior to the hearing.

As the Commonwealth Court explained in *Kyu Son Yi v. State Board of Veterinary Medicine*,⁵⁶ it is a denial of due process for an agency to rely on facts withheld from the record. Further, "[e]xtra record evidence cannot sustain an adjudication."⁵⁷ Moreover, taking judicial notice of Mr. Perrong's averment is not appropriate since this concept is applicable only to "matters of common knowledge."⁵⁸ Even when notice is taken, it "has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of

⁵³ Tr. at 29-30.

⁵⁴ Compl. MB at 5-6.

⁵⁵ Compl. MB at 11.

⁵⁶ *Kyu Son Yi v. State Board of Veterinary Medicine*, 960 A.2d 864, 869-870 (2008), citing *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 302-03 (explaining that due process requires that the party against whom evidence is presented must see or hear it in order to parry its effect and challenge the deductions made from them).

⁵⁷ *Kyu Son Yi* at 873.

⁵⁸ *Ohio Bell* at 301-302.

evidence. It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable.”⁵⁹

Here, Alpha had no opportunity at the hearing to dispute Mr. Perrong’s use of the website of the North American Numbering Plan administrator since this information was presented for the first time in his Main Brief. In *West Penn Power Co. v. Pennsylvania Public Utility Commission*,⁶⁰ the Court emphasized that before an agency can issue an adjudication relying on “official notice,” of a fact, it must give notice to the parties so that parties’ fundamental due process rights of notice and an opportunity to be heard are protected. The Court in *Kyu Son Yi* further recognized that a party must be given an opportunity to show to the contrary; the doctrine of official notice does not trump a party’s due process rights before an administrative agency.⁶¹

The Complainant cites the Commonwealth Court’s decision in *Harris v. Unemployment Comp. Bd. of Review*,⁶² for the proposition that agencies may take judicial notice of government records.⁶³ That is not an accurate characterization of the *Harris* holding. Rather, the Court in *Harris* permitted the agency to take official notice of its own handbook into consideration, not “government records” in general. Moreover, the Court explained that judicial notice does not necessarily establish a fact because like any evidence, it may be rebutted. In that instance, other evidence existed for the agency’s findings, making the claimant’s lack of opportunity to contest the handbook irrelevant. The “judicial notice” sought by the Complainant should be disregarded,

⁵⁹ *Id.* See also 52 Pa. Code § 5.408(c) (“Upon notification that facts are about to be or have been noticed, a party adversely affected shall have the opportunity upon timely request to show that the facts are not properly noticed or that alternative facts should be noticed.”).

⁶⁰ *West Penn Power Co. v. Pennsylvania Public Utility Commission*, 412 A.2d 903,906 (Pa. Cmwlth. 1980).

⁶¹ *Kyu Son Yi* at footnote 22.

⁶² *Harris v. Unemployment Comp. Bd. of Review*, 247 A.3d 477, 488 n. 14 (Pa. Commw. Ct. 2021).

⁶³ Compl. MB at 6, fn. 2.

but at a minimum, this matter should be remanded to the Office of Administrative Law Judge for additional hearings to permit Alpha to address the assertions raised for the first time in the Complainant's Main Brief.

3. Complainant Provided No Evidentiary Support for Claim that Vendor Contacted 394 Persons with this Number on the Caller ID

In his Main Brief, the Complainant claims that Alpha's vendor used the caller ID of 985-432-9863 to make 394 outbound sales calls. Yet, he fails to refer to any testimony or evidence in the record in support of this assertion. The only record evidence he cites is Alpha Confidential Exhibit 3 at 2, where Alpha's vendor indicated that it had a total of 394 interactions in the call center that spoke about Alpha.⁶⁴

However, that evidence does not support the Complainant's claim of 394 outbound sales calls. To the contrary, Alpha's contract with the vendor provided for inbound calls or customer sign-ups to receive calls about other products and services.⁶⁵ Once an individual made an inbound call to the vendor or signed up online with the vendor to receive calls about other products and services, the sales agent would then ask whether the consumer was interested in hearing about energy supply service.⁶⁶ Therefore, the vendor's reference to 394 "interactions in the call center" does not equate to 394 outbound telemarketing sales calls. The substantial evidence that would be needed to support a factual finding that Alpha's vendor made 394 outbound telemarketing solicitations using a spoofed caller ID is not in the record.⁶⁷

⁶⁴ Compl. MB at 5, 8.

⁶⁵ Tr. 46, 47, 49-53; Alpha Conf. Exh. 1, Section 8.

⁶⁶ Tr. 51-52.

⁶⁷ See footnote 48 of this Reply Brief, as well as Section II.B.2 (pp. 10-11).

E. Complainant Fails to Cite Evidentiary Support for Claims that Alpha Did Not Take Proper Actions in Dealing with Vendor

The Complainant’s Main Brief argues that Alpha took a “blind eye” to its vendor.⁶⁸ However, Mr. Perrong fails to produce evidence in support of his claim that Alpha did not exercise its contractual rights to police its vendor. Notably, although the Complainant refers to Mr. Small’s answer at the hearing as to whether the vendor was using the draft script that was identified as Alpha Confidential Exhibit 2, Mr. Perrong never established whether Mr. Small would have been the individual at Alpha with that responsibility. In any event, Alpha later produced an Alpha-approved script that was in use at the time Mr. Perrong received a call.⁶⁹

Mr. Perrong’s Main Brief also suggests that Alpha’s vendor could not produce calls upon which consumer complaints were based. For this assertion, he relies on a comment made by an Alpha representative during a WhatsApp chat with a representative of the vendor.⁷⁰ However, the vendor representative refuted that comment and produced the calls.⁷¹ The Complainant’s brief further argues, without any reference to evidence in the record, that Alpha continued to utilize the vendor.⁷² No evidentiary support exists for that claim. In addition, Mr. Perrong’s Main Brief inaccurately states that “in the entirety of its relationship with the vendor, Alpha only listened to *one* call recording between the vendor and a consumer.”⁷³ To the contrary, the question posed to Mr. Small was not how many call recordings Alpha had reviewed for this vendor, but rather how many Mr. Small had reviewed. Moreover, his answer was three or four,

⁶⁸ Compl. MB at 4.

⁶⁹ Alpha Conf. Exh. 7.

⁷⁰ Compl. MB at 4.

⁷¹ Alpha Conf. Exh. 3 at 1; Alpha Conf. Exh. 4.

⁷² Compl. MB at 4.

⁷³ Compl. MB at 4.

not one.⁷⁴ In addition, Mr. Small testified that the recordings are sent by the vendor to Alpha's marketing department.⁷⁵ Mr. Perrong presented no evidence to show how long Alpha contracted with the vendor, how many recordings Alpha reviewed or that Alpha failed to exercise its contractual rights.

Notably, two Alpha representatives participated in the WhatsApp chat with the vendor representative shortly after becoming aware of the allegations raised by Mr. Perrong.⁷⁶ During that discussion, Mr. Small and his colleague asked a number of questions to determine the validity of the Complainant's claim. The vendor checked all of its call records and did not find Mr. Perrong's telephone number or the telephone number that he alleges called him.⁷⁷ The vendor also provided a list of telephone numbers where agents had interactions involving Alpha on the day in question, and Mr. Perrong's number was not on the list.⁷⁸ Likewise, the caller ID that the Complainant references did not show up on any of the Alpha vendor's lists.⁷⁹ Further, although Mr. Perrong alleges that he spoke with Kevin Victor, no agent used by Alpha's vendor goes by that name.⁸⁰ Simply, Alpha took reasonable steps to investigate Mr. Perrong's allegations and was not required to do anything further.⁸¹

He also refers to Mr. Small's testimony that Mr. Perrong's complaint was either the second or third regarding that vendor possibly related to telemarketing calls to suggest a lack of

⁷⁴ Tr. at 67 at 16-17.

⁷⁵ Tr. at 67.

⁷⁶ Alpha Conf. Exh. 3.

⁷⁷ Tr. 53-54; Alpha Conf. Exh. 3.

⁷⁸ Alpha Conf. Exh. 4.

⁷⁹ Tr. 53-56; Alpha Conf. Exh. 3.

⁸⁰ Tr. 54-55; Alpha Conf. Exh. 3.

⁸¹ Alpha MB at 13-14, 16-17, 19-20.

sufficient oversight.⁸² However, he offers no evidence to support the claim that two or three complaints possibly involving telemarketing would raise any red flags particularly in view of the 394 interactions identified by the vendor and when the basis for those complaints is not clear. The record establishes that Alpha took reasonable steps to determine whether the vendor had improperly contacted Mr. Perrong, and nothing presented by the Complainant demonstrates otherwise.

F. The Relief Sought by the Complainant is Excessive

1. No Civil Penalty is Warranted

Mr. Perrong argues that Alpha should be assessed a civil penalty as a result of the call he received in amount between \$5,000 and \$8,000.⁸³ The Complainant seeks a separate civil penalty in the amount of \$394,000 in connection with his claims of the vendor making 394 other calls with a spoofed caller ID.⁸⁴ In making these proposals, the Complainant's Main Brief fails to make any effort to analyze the recommended civil penalty on the basis of the *Rosi* factors.⁸⁵ On that basis alone, Mr. Perrong's recommendation should be disregarded. As Alpha explained in its Main Brief, a review of the *Rosi* factors demonstrates that even if the Commission sustains a portion of the Complaint, no civil penalty should be assessed.⁸⁶

The Complainant refers to the Commission's decision in *Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. HIKO Energy, LLC*⁸⁷ as supporting the imposition of a civil

⁸² Compl. MB at 5.

⁸³ Compl. MB at 11-12.

⁸⁴ Compl. MB at 12.

⁸⁵ *Rosi v. Bell-Atlantic Pennsylvania, Inc.*, Docket No. C-00992409 (Order entered Mar. 16, 2000); 52 Pa. Code § 69.1201(a).

⁸⁶ Alpha MB at 26-31.

⁸⁷ *Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. HIKO Energy, LLC*, Docket No. C-2014-2431410 (Order entered December 3, 2015).

penalty in this proceeding.⁸⁸ As noted, however, in Alpha’s Main Brief, the HIKO involved a completely different set of facts, including the proven intentional overbilling of 5,700 customers, resulting in 14,689 billing violations.⁸⁹ Mr. Perrong also cites *Towne v. Great American, Power LLC*⁹⁰ to support his request for a civil penalty in connection with the call made to him. In that complaint proceeding, the Commission imposed a civil penalty of \$10,000. However, Alpha notes that the supplier in that case was described as engaging in a “telemarketing blitzkrieg in the spring of 2012” because the record showed that the supplier contacted the complainant by telephone 14 times within a period of 26 days. Further, the supplier had engaged the services of two third-party call centers and charged them with the objective of enrolling as many customers as possible within a relatively short period of time.⁹¹ Therefore, the facts in that case were far different from those alleged here of the Complainant receiving a single telephone call from a person he believes was associated with Alpha.

In addition, to the extent that the Commission entertained allegations in *Towne* regarding the supplier’s compliance with laws that the Commission lacks jurisdiction to administer or enforce, it appears that the supplier did not raise these issues.⁹² In any event, it is well-settled law that the Commission only has the authority that is bestowed on it by the General Assembly

⁸⁸ Compl. MB at 12.

⁸⁹ Alpha MB at 14. The Complainant’s Main Brief refers to the supplier in *HIKO* as a predecessor of Alpha. Compl. MB at 14. Again, no evidence exists in the record regarding any predecessor of Alpha. As Mr. Perrong made this reference for the sole purpose of somehow implicating Alpha in the prior conduct of the supplier in *HIKO*, and has no evidentiary support for the claim, it should be disregarded. *See License Application of Alpha Gas & Electric, LLC*, Docket No. A-2011-2254554 (Order entered October 31, 2021) (Commission made no mention of a predecessor in issuing a license to Alpha).

⁹⁰ *Towne v. Great American, Power LLC*, Docket No. C-2012-2307991 (Order entered October 18, 2013).

⁹¹ *Towne* at p. 5-6.

⁹² *See generally* *Towne*.

and that its lack of jurisdiction cannot be waived.⁹³ Therefore, the *Towne* decision offers no support for the Complainant's proposed civil penalty in this proceeding.

2. The Commission Does Not Have Statutory Authority to Enjoin Alpha From Contracting with the Vendor

Citing Section 3301 of the Public Utility Code,⁹⁴ the Complainant further requests that the Commission issue an injunction prohibiting Alpha from contracting with the vendor it was using at the time of the call that Mr. Perrong received. In addition, the Complainant proposes that the Commission enjoin the vendor from conducting any marketing activity on behalf of electric generation suppliers.⁹⁵

It is well-settled that the Commission has only the authority granted to it by the General Assembly. Nothing in the Public Utility Code authorizes the Commission to issue a preliminary injunction. The reference in Code Section 3301 to a preliminary injunction is related to such an order issued by a court of competent jurisdiction.⁹⁶ Moreover, Code Section 502 makes it clear that the Commission must institute injunction, mandamus or other appropriate legal proceedings with a court to restrain future violations of its regulations or orders.⁹⁷

The Commission is not authorized to enjoin Alpha from contracting with a particular vendor. In addition, due to the vendor not being a party to this proceeding, it would be inappropriate to enjoin the vendor from engaging with other energy suppliers in Pennsylvania.

⁹³ Alpha MB at 6-9.

⁹⁴ 66 Pa. C.S. § 3301.

⁹⁵ Compl. M.B. at 12.

⁹⁶ 66 Pa. C.S. § 3301.

⁹⁷ 66 Pa. C.S. § 502.

3. **As Mr. Perrong Was Not Directly Affected By the Caller ID Identified by the Vendor, He May Not Seek Relief on Behalf of Other Consumers**

Mr. Perrong was not directly affected by the caller ID identified by the vendor. An individual customer may not obtain relief on behalf of other consumers and that an individual may only represent his or her interests in proceedings before the Commission.⁹⁸ Code Section 701 authorizes the Commission to hear complaints about acts done or omitted by a regulated entity in violation of any law that the Commission has jurisdiction to administer or any regulation or order of the Commission.⁹⁹ However, nothing in Code Section 701 or elsewhere in the Code gives the Commission power to grant relief to consumers who are not named complainants. The Complainant's request in this regard is in the nature of a class action lawsuit, which the Commission has already found it does not have the statutory authority to entertain.¹⁰⁰

III. CONCLUSION

For the foregoing reasons, the Complainant has failed to meet his burden of proof to show that Alpha has violated the Public Utility Code, Commission regulations or a Commission order. Therefore, Alpha respectfully requests that this Complaint be dismissed in its entirety.

⁹⁸ 52 Pa. Code § 1.21.

⁹⁹ 66 Pa. C.S. § 701.

¹⁰⁰ *Commonwealth of Pennsylvania, et al. v Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric*, Docket No. C-2014-2427656 (Order Granting Petition to Intervene dated April 23, 2015). *See also Painter v. Aqua PA, Inc.*, Docket No. C-2011-2239557 (Opinion and Order entered May 22, 2014); *Pettko v. Pennsylvania American Water Company*, Docket No. C-2011-2226096 (Administrative Law Judge Order dated October 5, 2011 adopted by Commission Order on February 18, 2013).

Respectfully submitted,

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