BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Andrew Perrong	:	
	:	
v.	:	Docket # C-2021-3024359
	:	
Alpha Gas & Electric LLC	:	

COMPLAINANT ANDREW PERRONG'S REPLY BRIEF

Pursuant to 52 Pa. Code § 5.501, and the briefing orders entered in this case, Complainant Andrew Perrong ("Perrong" or "Complainant") submits this reply brief in support of the claims made against Respondent Alpha Gas & Electric LLC ("Alpha" or "Respondent") and in opposition to Alpha's main brief.

INTRODUCTION

Alpha's main brief is inadequate and will not allow it to escape liability for its misconduct in contacting the Complainant. Both Complainant's main brief and this reply make it clear, through a preponderance of the evidence, that Alpha, through its vendor, committed the violations alleged in the Complaint. Furthermore, the recordings advanced in support of the Complaint were legally obtained, and that the Commission possesses the authority to adjudicate the violations described in the Complaint, including those violations based on state and federal telemarketing laws.

First, as described more fully in Complainant's main brief, the mountain of evidence produced by both the Complainant and by Alpha and its vendor in discovery prove that the call took place and belie Respondent's contention that it has no explanation for the call or why Alpha was mentioned on them. Second, the recordings which Complainant introduced are admissible and were not obtained illegally for at least three separate reasons, not the least of which because they were obtained with consent. Finally, the Commission has the ability, expertise, and jurisdiction to

adjudicate the Complainant's claims, which sound in prohibited conduct proscribed by the Utility Code. As the Commission has done on at least two prior occasions,[1] the Commission should impose the penalties and other remedies requested in the Complaint and Complainant's main brief.

ALPHA'S LIABILITY FOR THE CALL

Alpha's Discovery Proves Its Involvement in the Call Complainant Received

The documents produced by Alpha's vendor in discovery prove that the call took place. Nowhere in Alpha's main brief does Alpha address the issue, advanced at oral argument and reiterated in Complainant's brief, that the screenshot it produced of the vendor's computer has a file open on it which appears to be a recording of the call at issue in this case. See Tr. 17:4–21. This fact was unopposed at the hearing and remains unaddressed in Alpha's main brief. See Tr. 35:5–7. An audio file opened on the vendor's computer, visible in the bottom right-hand corner, has the name "20210215-120431_..." Alpha Conf. Ex. 3 at 6–7. This file reflects the exact date and time, down to the second, that the call was answered by a human being. Moreover, despite the *vendor providing other documents to Alpha in discovery*, this audio clip has not been produced by anyone.

One's imagination can run wild for an explanation why, despite having requested the file in discovery, neither Alpha nor its vendor have produced this recording. However, as Occam's Razor simply states, the simplest explanation is probably the best one. The vendor will not produce this file because this is its own recording of the call, the production of which sinks Alpha's defense.[2] No attempt has even been made to justify the file's very existence or why it reflects the exact date and time of the call alleged in this case, let alone why it was not produced.

[1] *See Krain v. Choice Energy LLC*, No. C-2016-2581006 (Pa. PUC filed Feb. 15, 2016); *Towne v. Great Am. Power*, No. C-2012-2307991 (Pa. PUC filed May 29, 2012).
[2] This recording is an independent grounds for why the recordings of the call proffered by the Complainant are not illegal.

Instead, despite its insistence that it has "no idea why the individual on the call mentioned Alpha's name near the end as the supplier that would be serving Mr. Perrong," Alpha posits the ridiculous conspiracy theory that the person "may have been seeking the possibility of personal gain by making it appear that Alpha's agents were acting in violation of the Commission regulations and then pursuing legal action against Alpha." Alpha Main Br. at 14. In spite of this bold assertion, Alpha does not provide a *single iota of evidence* for why it suspects it is the victim of an international conspiracy to discredit it by having individuals contact the Complainant illegally. Respondent has no explanation for why this entire scheme also involved other agents in the background state Alpha's name at least twice (once at 1:05, with a male voice saying "Alpha" and once at 3:50, with a male voice saying "The supplier is [unintelligible], A as in apple."), make numerous misrepresentations during the call, attempt to sell the Complainant the Respondent's alternative electric services, and then disconnect the call. The spelling out of Alpha's name by agents in the background, in fact, mirrors Complainant's interaction (spelling out Alpha at 9:22). There is no rational explanation how this conduct could result in personal gain–financial or otherwise–of any sort by having the Complainant file this Complaint before the Commission. However, the vendor, who is paid a per sign up, has every incentive to break the law, its contract, and blast calls via automated technology to obtain as many commissions as possible.

Respondent has presented no evidence to demonstrate why anyone would have an interest in implicating them as placing the call at issue, or why anyone would have hatched such a bizarre plot to injure Alpha. *Cf. United States v. Stelmokas*, 100 F.3d 302, 313 (3d Cir. 1996). Complainant has identified no such plot ever alleged before the Commission in any circumstance. Respondent cites no reason why the Commission should believe its theory or reject the obvious explanation that the vendor, who is paid a commission per call, broke the terms of its contract and script in order to sign up as many customers as possible. Alternatively, one might suspect a nefarious side-deal

between the vendor and Respondent. But Respondent cites no correspondence it received threatening its proffered conspiracy. Nor does it suspect any entity, such as a disgruntled vendor or employee, who may have perpetrated such conduct, let alone such entities' motives for doing so.

Finally, Alpha cites an "unblemished compliance history" as evidence that it could not have perpetrated the conduct alleged here. Alpha Main Br. at 11. But what Alpha fails to mention is that its predecessor company, HIKO Energy LLC, received a $1.8 million fine for price gouging its customers during the 2014 Polar Vortex. *See HIKO Energy, LLC v. PUC,* 209 A.3d 246 (Pa. June 5, 2019). More concerningly, Alpha has been the subject of at least two prior federal lawsuits regarding the exact same illegal marketing conduct described in this case. *See Zelma v. Alpha Gas and Electric, LLC*, No. 2:14-cv-04330 (D.N.J. filed July 10, 2014). In one of the two cases, Alpha agreed to pay a $1.1 million class action settlement to settle telemarketing claims of similar ilk to its conduct in this case. *Abramson v. Alpha Gas and Electric, LLC,* No. 7:15-cv-05299 (S.D.N.Y. filed July 8, 2015). Put simply, Alpha has a checkered past and a black eye compliance history which supports Complainant's assertion that its vendor placed the illegal call complained of herein.

Alpha's Discovery Proves It Independently Violated the Utility Code at Least 394 Times

The Commission need not consider any of Complainant's evidence, including the recordings, to find that Alpha violated the Utility Code. The Code, 52 Pa. Code § 111.10(a)(2), requires all vendors to register as telemarketers under the Telemarketer Registration Act and also requires vendors to comply with its provisions, which prohibit sending out inaccurate caller ID information. Respondent has not disputed that its vendor did not do so and has not produced any evidence to demonstrate that its vendor was registered. By engaging in marketing without doing so, Alpha's vendor and agent violated 52 Pa. Code § 111.10(a)(2). The provision of inaccurate caller ID information is also proscribed by other portions of the Code. 52 Pa. Code § 111.10(a)(3).

Next, Alpha's vendor admitted that it sent spoofed caller IDs. This admission, a declaration against interest, appears in the *very documents Alpha produced in discovery*. The WhatsApp chat reflects that Alpha's vendor admitted to Alpha that it "contacted" at least "394" persons using a spoofed caller ID. Alpha Conf. Ex. 3 at 2. The caller ID the vendor claimed it was using, 985-432-9863, could not possibly have been valid since the 432 exchange does not exist in the 985 area code. Moreover, the number was incapable of receiving "inbound" calls as Alpha claimed it authorized its vendor to do. The calls that were sent using that number were therefore "spoofed," as spoofing is when a caller deliberately falsifies the information transmitted to a caller ID display to disguise their identity. *Caller ID Spoofing*, FTC (Mar. 17, 2021), https://www.fcc.gov/spoofing.

The Commission need not employ any special expertise to ascertain this fact. It has held suppliers liable for spoofing before. A telephone number either exists or it does not. It can simply call the number and observe that it is invalid. Furthermore, it can take judicial notice by cross-referencing the number with the official government database listing assigned telephone numbers. *See Central Office Code Utilized Report*, SOMOS, INC. D/B/A NORTH AMERICAN NUMBERING PLAN ADMINISTRATOR, https://nationalnanpa.com/enas/coCodeReportUnsecured.do?reportType=7.[3]

Accordingly, the evidence produced *by Alpha* demonstrates that its vendor was spoofing caller IDs separately and apart from the call Complainant received, including the 985-432-9863 number. Alpha has also conceded that its vendor was not registered as a telemarketer as required by law. These are, in and of themselves, independent bases to find that the Utility Code was violated.

[3] Upon visiting the webpage, select the state of Louisiana and select area code 985. Notice that "432" does not appear under the NXX column. Accordingly, it can be verified that the caller ID is invalid and was therefore spoofed. Somos, Inc. is the corporation selected by the Federal Communications Commission to act as the North American Numbering Plan Administrator since 2018. As such, its records and this fact is judicially noticeable by the Commission as from a source whose accuracy cannot reasonably be questioned. 225 Pa. Code § 201(b)(2); *see also Harris v. Unemployment Comp. Bd. of Review*, 247 A.3d 477, 488 n.14 (Pa. Commw. Ct. 2021) (permitting judicial notice of government records).

THE RECORDINGS

The Recordings Are Admissible for at Least 3 Reasons; Alpha Acted in Bad Faith by Challenging Admissibility at the 11th Hour.

The recordings are admissible. The Wiretapping and Electronic Surveillance Control Act ("Wiretapping Act") states that it is *not* unlawful for a person to intercept a wire where all parties to the communication have given prior consent to such interception. 18 Pa. Cons. Stat. § 5704(4). The recordings make clear that, on at least three separate occasions, Complainant stated that the call was recorded. By continuing to converse with the Complainant, the parties to the call provided their consent to recording. *Commonwealth v. Byrd*, 235 A.3d 311, 320 (Pa. 2020) (After receiving [a warning that a call 'may be monitored or recorded'], proceeding to speak into the receiver is consent by conduct and therefore, the recording of such interceptions are not unlawful.").

Even assuming that the consent was not expressed but rather implied, the Supreme Court of Pennsylvania has made it clear that implied consent to record a conversation suffices under the Wiretapping Act. No reasonable person who is a party to a conversation where it is disclosed that the call is being recorded would expect that they would not be recorded, and it follows that they would not transfer the call to an individual who would not consent to the same. *See Commonwealth v. De Marco*, 578 A.2d 942, 948 (Pa. 1990) (reasonable persons assume that they will be recorded by an answering machine). Furthermore, unlike Respondent claims, the Wiretap Act does not require proof of actual knowledge of recording and simply relies on a "reasonable person" standard and mere disclosure, not explicit consent, to trigger the exception. *Byrd*, 235 A.3d at 319.

Next, the recordings were not illegally obtained because they were not made using an "electronic, mechanical, or other device." See 18 Pa. Cons. Stat. § 5702. Rather, both recordings were made by a telephone system and telephone, respectively. Tr. 23:1–19. This equipment is ordinarily connected to telephone facilities. *Id.* The recordings therefore fall outside the scope of

the Wiretapping Act. The Wiretapping Act *excludes* from the definition of "electronic, mechanical, or other device" "Any telephone or telegraph instrument, equipment or facility, or any component thereof, . . . furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business.". 18 Pa. Cons. Stat. § 5702(1). In considering similar language to the Wiretapping Act, numerous courts have held that monitoring and recording devices which are part of telephone systems come squarely within the "telephone equipment" exception to wiretapping laws. *See, e.g., Stalley v. ADS All. Data Sys., Inc.*, 997 F. Supp. 2d 1259, 1262 (M.D. Fla. 2014), *aff'd*, 602 F. App'x 732 (11th Cir. 2015) (telephone system that recorded calls fell under "telephone equipment" exception); *James v. Newspaper Agency Corp.*, 591 F.2d 579, 581 (10th Cir. 1979) (monitoring device installed by newspaper for customer service purposes was telephone equipment); *O'Sullivan v. NYNEX Corp.*, 687 N.E.2d 1241, 1244 (Mass. 1997) (recorder attached to telephone lines was telephone equipment). Accordingly, because the recordings were made using telephone equipment, they fall outside the scope of the Wiretapping Act.

Finally, Respondent is unable to have it both ways. It cannot simultaneously claim that it had no involvement in the call whatsoever and does not know who is on it and simultaneously claim it is an "aggrieved person" under the Wiretapping Act. 18 Pa. Cons. Stat. § 5702. Respondent claims it was not a party to the conversation, and even under Complainant's theory, because Respondent's vendor placed the call, the Respondent is still not a party. Furthermore, the interception was not "directed" "against" the Respondent. If anyone, the interception was "directed" against the caller–Respondent's vendor, not the Respondent. Although an issue of first impression in Pennsylvania, other courts have held, based on identical language in federal law, that being referred to in intercepted communications or even being the ultimate target of an investigation does not give rise to standing to exclude or suppress evidence because such actions by third parties are insufficient to be an "aggrieved person". *See United States v. Castaneda-Ontiveros,*

2019 WL 3891141, at *2 (D. Kan. Aug. 19, 2019) (referenced in conversations); *United States v. Palafox*, 2019 WL 2079748, at *4 (D. Nev. May 10, 2019) (target of investigation).

Furthermore, Respondent's own discovery proves that they possess a recording of the call that their vendor created. Telemarketers who contact the Complainant have no reasonable expectation of privacy during a telemarketing call, especially when the Complainant disclosed that the call was being recorded and especially given that Respondent's vendor recorded its own copy of the call. *Commonwealth v. Brion*, 652 A.2d 287, 288 (Pa. 1994) ("[T]he Act requires that a person uttering an oral communication . . . must have a specific expectation that the contents of a discussion will not be electronically recorded."). Accordingly, the provisions of the Wiretapping Act do not apply because a recording was made by the very party, the Respondent, seeking to prevent the admission of other recordings purportedly unlawfully made by the Complainant. *De Marco*, 578 A.2d at 948 (1990).

Equity also counsels against excluding the recordings because Respondent acted in bad faith. Respondent did not avail itself of the most appropriate remedy to argue the admissibility of the recordings, which would be a motion in limine, either before or during the hearing. Instead, Respondent misled the Complainant, the Administrative Law Judge, and the Commission by stating that it was "not going to object" to the admission of the recordings. Tr. 22:13–14. Attorney Moury mentioned the Wiretapping Act only in passing. Tr. 22:1–11. Only now does the Respondent try to shoehorn such arguments into its main brief, but this belies their position at oral argument. There, Respondent stated that they did not object to the recordings and that they didn't "have anything to hide." Tr. 20:20–25. The ALJ admitted the recordings as Perrong Confidential Exhibits 2 and 3. Because the Respondent brings up its argument as to admissibility at 11th hour, after the recordings were admitted, it should not be entitled to seek to exclude this evidence now.

The Recordings Are Authenticated

Although the Respondent also argues that the recordings are unauthenticated because the other parties to the recording are not identified, such argument fails because that is not what the evidentiary standard is. The Pennsylvania Rules of Evidence do not require the Complainant to authenticate each voice on the recording or even know who the individuals are, contrary to Respondent's assertions. Conclusive proof of authenticity of a recording is not required; all that is required is that the evidence, including circumstantial evidence, authenticate the document. *In re F.P.*, 878 A.2d 91, 94 (Pa. Super. 2005). Under the Rules, several methods exist for authenticating the recording of a telephone conversation. Here, Complainant testified that the number was assigned to him at the time and that the recordings accurately reflect his recollection of them. Tr. 23:1–19. This testimony is sufficient to prove evidence about the telephone conversation. *See* PA. R. EVID. 901(6)(A).

The Rules contemplate that a caller may be identified because of distinctive characteristics of the call and other circumstantial evidence regarding the call. *See* PA. R. EVID. 901(4). Although the caller identifying itself as calling from the Respondent is not sufficient in and of itself, the contents of the conversation, the characteristics and circumstances of the call, and other evidence all authenticate it. *See Commonwealth v. Serrano*, 61 A.3d 279, 290 (Pa. Super. 2013). It is highly improbable that the caller would be calling from any supplier other than the one named in the call: in this case, Alpha. The Complainant is not required to explain why the person would have any incentive to lie. As the person advancing this theory, that evidentiary burden is on the Respondent.

As articulated above, there is no evidence offered by the Respondent to support a finding that the caller lied when they stated that the electric provider would be Alpha. Furthermore, the characteristics and circumstances of the call further authenticate the call as originating from Alpha, through its vendor. During at least two points in the call, one can hear other agents referencing

Alpha. Perrong Conf. Ex. 2 at 1:05, 3:50. At 1:05, a male voice in the background is heard saying "Alpha" and once at 3:50, a male voice in the background is heard saying "The supplier is [unintelligible], A as in apple." *Id.* The script stating that the supplier will be Alpha, and subsequently spelling out the name of the supplier, is reiterated during that portion of the call that Complainant heard. *Id.* at 9:22 (stating that the supplier would be Alpha and spelling out the same).

Finally, Respondent does not address the fact that its vendor possesses a copy of the call recording that it made on its computer but has not produced it to Respondent or Complainant, despite Complainant having requested it in discovery. The fact that the file, which bears the exact date and time of the call, is open on the vendor's computer highlights the obvious fact that Alpha's vendor listened to a recording of the call after Alpha received Complainant's complaint. There is no other explanation for why its vendor would be listening to a file with the exact date and time of the call when sending a screenshot to Alpha in an attempt to exculpate its conduct as a result of a complaint for that exact call. Failure to obtain recordings of illegal calls, in fact, is *de rigueur* for the Respondent, as articulated by the sheer frustration in the inability to obtain them in its WhatsApp conversations with its vendor. Alpha Conf. Ex. 3 at 1. This circumstantial evidence, therefore, is more than sufficient to authenticate the Complainant's two recordings.

COMMISSION AUTHORITY

The Commission Can Adjudicate Utility Code Violations Premised on State and Federal Law

The Commission unquestionably has the authority to adjudicate the Complaint and this matter. In the Formal Complaint and the main brief, Complainant alleges three broad sets of violations: (1) 52 Pa. Code § 111.10(a)(2), pertaining to compliance with the Telemarketer Registration Act, (2) 52 Pa. Code § 111.10(a)(3), pertaining to compliance with federal telemarketing regulations, and (3) 52 Pa. Code § 111.10(b), pertaining to supplier conduct during

consumer interactions. Respondent takes issue with the Commission's authority to adjudicate violations of 52 Pa. Code § 111.10(a)(2) and (a)(3). However, Complainant is not seeking to hold the Respondent liable under the underlying federal and state statutes. Respondent attempts to confuse the Commission into conflating its power to determine violations of its Regulations, which incorporate state and federal law by reference and which the Commission can interpret, with determining violations of the state and federal laws themselves and granting relief under those underlying statues. *See* 52 Pa. Code § 111.12(d)(1) ("conduct as defined by State or Federal law").

In essence, what Respondent is doing is attempting to hoodwink the Commission into thinking it lacks subject matter jurisdiction over any provision of its regulations when that provision is defined in terms of state or federal law. The Commission is more than capable, however, of interpreting its own regulations and the underlying statutes on which they are based. The questions posed by the underlying federal and state telemarketing laws are simple and do not require extensive analysis or adjudication. The Commission has done so before.

The bases for finding violations of the same were discussed at length in Complainant's main brief and Complainant sees no need to rehash them here. What is even more shocking is that Respondent's arguments were already advanced by another attorney at the same Eckert Seamans law firm in a separate action by the Complainant. In that case, the Commission rejected those arguments and stated the obvious: that the Commission has the authority to enforce its own regulations, even when those regulations are premised on violations of federal or state law. *See* Order Denying Respondent's Preliminary Objections, *Perrong v. Frontier Utils. NE, LLC*, No. C-2020-3019899 (Pa. PUC Aug. 11, 2020) (Document Number 1672861).

In *Riedel v. The Human Relations Comm'n of the City of Reading*, 739 A.2d 121, 124 (Pa. 1990), the Supreme Court explained that jurisdiction relates solely to the competency of the particular court or administrative body to determine controversies of the general class to which the

case then presented for its consideration belongs. The Commission has consistently held that it has subject matter jurisdiction to regulate certain aspects of the services provided by EGSs, specifically concerning issues involving EGS conduct towards residential customers as referenced in Chapter 111 of Title 52, Pennsylvania Code. This includes violations of the Utility Code premised on federal and state telemarketing laws. *See, e.g., Krain v. Choice Energy LLC*, No. C-2016-2581006 (Pa. PUC filed Feb. 15, 2016) (calling complainant after complainant requested not to be contacted); *Towne v. Great Am. Power*, No. C-2012-2307991 (Pa. PUC filed May 29, 2012) (calls in violation of federal telemarketing laws). Section 501 grants the Commission authority to enforce the Public Utility Code and the Commission's regulations and Orders. 66 Pa.C.S. § 501. As the Commission has done in the past, so too the Commission should do here.

PENALTIES

A Rosi *Analysis Supports Assessment of a Civil Penalty*

Complainant acknowledges that he did not address the *Rosi* factors in his main brief. However, the *Rosi* factors counsel in favor of, rather than against, the proposed civil penalty. Firstly, the nature of the conduct is egregious. Although it does not rise to the level of "slamming" or price-gouging, Alpha's conduct nevertheless is serious. In *Bureau of Investigation and Enf't v. Verde Energy USA, Inc.*, the Bureau requested an $8.8 million civil penalty and license revocation of a supplier who, as here, "spoofed" caller ID numbers, misrepresented themselves as agents of a utility, and making other misleading statements. No. C-2020-3017229 (Pa. PUC filed Jan. 30, 2020). In *Verde Energy*, the Bureau identified 1,422 incidents where the supplier failed to comply with the regulations regarding telemarketing, just as alleged here, and proposed a civil penalty of $1,000 per incident. As in numerous other cases before the commission, even a single

telemarketing call utilizing caller ID spoofing, let alone the 394 cases of caller ID spoofing proven in discovery, warrants a civil penalty because Alpha knew of the conduct but did nothing.

Next, the consequences of the conduct are high. The Commission has repeatedly recognized that unlawful marketing conduct, including illegal telemarketing, harms the alternative energy supply market and consumer choice. The Complainant was charged for the call, and the call speaks for itself, containing numerous misrepresentations and aggressive sales tactics. Administrative Law Judge Barnes realized the consequences of such conduct in scolding another supplier for conducting an "aggressive" "telemarketing blitzkrieg" which included misleading statements. *See* Anya Litvak, *Ben Towne Teaches Great American Power a Lesson*, PITTSBURGH POST-GAZETTE (Oct. 6, 2013), https://www.post-gazette.com/business/businessnews/2013/10/06/Ben-Towne-teaches-Great-American-Power-a-lesson/stories/201310060044.

Third, modifications to Alpha's practices are necessary. Despite at least two federal lawsuits regarding its illegal marketing conduct, including one in which Alpha agreed to pay $1.1 million as a class settlement, Alpha has not learned its lesson. The imposition of a penalty by the Commission is the logical next step and one can only hope that this will (hopefully) cause Alpha to cease its conduct and police its vendors with greater zeal. Given that the Complainant received the call from Alpha, its "practices and procedures" are clearly inadequate, either because its vendors simply ignore their contractual obligations or because Alpha engages in unspoken side agreements with their vendors to engage in prohibited conduct. Furthermore, Alpha's compensation structure, which pays a commission per sign up, incentivizes high-pressure sales tactics.

Fourth, discovery has revealed that Complainant is not the only consumer who received the call. Although Complainant was the only one to have the courage to file this formal Complaint, there remain at least 394 other victims of Alpha's conduct, as discovery has revealed, and potentially thousands more. As to this fifth factor, Alpha's completely inadequate compliance

history, which includes a major Commission investigation and fine of its predecessor company and two federal lawsuits, also weigh in favor of assessing a penalty. And although the Commission has not (yet) investigated Alpha, Alpha's prior history demonstrates, as articulated above, that its current measures are inadequate to deter future violations.

Eighth, prior Commission decisions show that a civil penalty of $1,000 per violation is warranted here. The Commission imposed civil penalties of $5,000 and $10,000 in telemarketing cases before and has not hesitated to impose penalties of $1,000 per violation even with thousands of violations. A separate civil penalty for each violation is appropriate when each violation can be feasibly segregated into distinct and discrete violations. *Newcomer Trucking, Inc. v. PUC*, 531 A.2d 85 (Pa. Cmwlth. 1987). In the instant case, the Respondent (1) failed to have its vendor register as a telemarketer under Pennsylvania law, (2) called a number on the Do Not Call Registry, (3) called a number with a spoofed Caller ID, and (4) made at least five individual misrepresentations on the call spanning generally two categories of proscribed conduct: pricing misrepresentations and affiliation misrepresentations, warranting a civil penalty of $5,000, as the Commission has imposed for telemarketing violations involving conduct of a lesser degree but greater frequency. In fact, in *Towne, supra*, the Commission actually *increased* a civil penalty against an alternative electric supplier from $5,000 to $10,000 because the supplier's illegal telemarketing conduct was "detrimental to the ongoing enhancements and the ultimate success of Pennsylvania's retail electric market." *Towne,* No. C-2012-2307991.

Injunctive Relief is Warranted

Finally, this case cries out for injunctive relief. Despite Alpha claiming to have robust compliance measures in place, discovery revealed that Alpha *did not even attempt to verify* the telephone numbers its vendor claimed it was using. Tr. 68:18–21. This was so even in the case of

multiple complaints regarding the vendor. *See* Tr. 67:1–25, 68:1–6. The WhatsApp chat, Alpha Conf. Ex. 3, reveals a different picture from the sunshine-and-rainbows "angelic vendor" narrative proffered by Alpha. It reveals an out-of-control vendor whom Alpha was powerless (or altogether unwilling) to control. Alpha did not exercise any of its contractual rights with its vendor and didn't even verify if its vendor was using the script it provided. Tr. 75:4–8. In the entirety of its relationship with the vendor, Alpha only performed quality control on *one* call. Tr. 68:12–14.

Alpha's conduct and interactions with its vendor has demonstrated, through wholly inadequate and lackluster actions, that it cannot be trusted to police its vendor, let alone itself. The Commission must therefore step in and police Alpha by doing what Alpha refuses to do: terminate a vendor involved in wholesale illegal marketing conduct. Therefore, the Commission, in accordance with its authority to do so, should issue an injunction prohibiting the Respondent from ever engaging with the vendor it hired for any purpose, as the vendor has demonstrated that it cannot be trusted to comply with the law. Alpha had the chance to prove the adequacy of its compliance policies by demonstrating that it could police itself. It failed.

CONCLUSION

The evidence presented by the Complainant in this case, as well as the documents produced in discovery by the Respondent, all support a finding that the Respondent committed the violations of the Utility Code outlined in Complainant's main brief. Respondent has not undertaken to explain the existence of a file containing a recording of the call on its vendor's computer nor has explained why its vendor was not registered as a telemarketer and admitted to using spoofed caller IDs. The recordings presented by the Complainant, which were legally obtained, show, through a preponderance of the evidence, that Alpha committed the acts alleged herein. The Commission has the statutory authority to adjudicate Complainant's claims and should proceed to impose the monetary penalties and injunctive relief requested in Complainant's main brief.

Dated: **September 14, 2021**

_____/s/_____

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CERTIFICATE OF SERVICE

Pursuant to 52 Pa. Code § 1.54, I hereby certify that I served a copy of the foregoing Main Brief, to:

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I also certify that I e-filed the foregoing with the Commission via their web portal, with a physical copy to:

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

and

Hon. Charece Z. Collins
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Dated: **September 14, 2021**

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