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December 21, 2021

Via Electronic Filing

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

Re: Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v.
Discount Power, Inc.; Docket No. M-2021-3022658

Dear Secretary Chiavetta:

On behalf of Discount Power, Inc., enclosed for electronic filing please find a Motion to Strike the Comments filed by Michael Zimmerman to the Tentative Order entered on October 28, 2021 in the above-captioned 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.

Michael L. Swindler, Deputy Chief Prosecutor (*via email – mswindler@pa.gov*)

Daniel Mumford, Office of Competitive Market Oversight (*via email – dmumford@pa.gov*)

Office of Special Assistants (*Word version via email – ra-OSA@pa.gov*)

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of Discount Power, Inc.'s Motion to Strike Comments of Michael Zimmerman upon the person(s) listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

Via Email Only

Michael Zimmerman
3812 Howley St.
Pittsburgh, PA 15201
Michael.zimmerman222@gmail.com

Kayla L. Rost
Prosecutor
Bureau of Investigation and Enforcement
Pa. Public Utility Commission
400 North Street
Harrisburg, PA 17120
karost@pa.gov

Dated: December 21, 2021

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

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility	:	
Commission, Bureau of Investigation	:	
and Enforcement	:	Docket No. M-2021-3022658
	:	
v.	:	
	:	
Discount Power, Inc.	:	

**DISCOUNT POWER, INC.’S MOTION TO STRIKE
COMMENTS OF MICHAEL ZIMMERMAN**

TO THE HONORABLE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

Pursuant to the regulations of the Pennsylvania Public Utility Commission (“Commission”) at 52 Pa. Code § 5.103, Discount Power, Inc. (“DPI”) files this Motion to Strike the Comments submitted by Michael Zimmerman (“Mr. Zimmerman”) to the Tentative Order entered by the Commission on October 28, 2021. In the Tentative Order, the Commission solicited comments from interested parties concerning the Joint Petition for Approval of Settlement (“Settlement”) filed by DPI and the Commission’s Bureau of Investigation and Enforcement (“I&E”).

By this Motion to Strike, DPI respectfully requests that Mr. Zimmerman’s Comments be stricken on the grounds that: (i) they seek to introduce new and unsubstantiated allegations that are beyond the timeframe of I&E’s investigation and are irrelevant to whether the terms of Settlement are in the public interest; (ii) if they are relied upon by the Commission in ruling on the Settlement, DPI will be deprived of its fundamental rights of due process; (iii) an individual consumer may not represent the interests of other customers; (iv) the Comments wholly

disregard the fact that the Settlement is based on allegations that were not proven; and (v) the Commission may not grant the relief that is requested.

I. BACKGROUND

1. On August 27, 2021, I&E and DPI filed the Settlement, along with Statements in Support of the Settlement, requesting the Commission’s approval without modification.

2. The Settlement was the culmination of an Informal Investigation initiated by I&E based on information provided by the Office of Competitive Market Oversight (“OCMO”) relating to allegations of deceptive and misleading telemarketing practices by DPI from 2019 to May 2021.

3. I&E is the entity established to prosecute complaints against public utilities and other entities subject to the Commission’s jurisdiction pursuant to 66 Pa. C.S. § 308.2(a)(11); *see also Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Order entered August 11, 2011) (delegating authority to initiate proceedings that are prosecutorial in nature to I&E).

4. DPI is an electric generation supplier licensed by the Commission at Docket A-2012-2328004 to supply generation services to retail customers throughout the Commonwealth.

5. By Tentative Order entered on October 28, 2021, the Commission sought comments of interested parties on the Settlement within 25 days of publication in the *Pennsylvania Bulletin*. The Settlement was published in the *Pennsylvania Bulletin* on November 13, 2021, making comments due on or before December 8, 2021.

6. Mr. Zimmerman submitted late-filed Comments as a residential electric consumer on December 9, 2021.¹

7. By this Motion to Strike, DPI respectfully requests that Mr. Zimmerman's Comments be stricken in their entirety by the Commission.

II. LEGAL STANDARDS

8. It is the Commission's policy to encourage settlements. 52 Pa. Code § 5.231(a).

9. The focus of inquiry for determining whether a proposed settlement should be approved is whether its terms are in the public interest. *See, e.g., Pa. PUC v. PPL Electric Utilities Corporation*, Docket No. M-2009-2058182 (Order entered November 23, 2009).

10. The Commission's Policy Statement at 52 Pa. Code § 69.1201, which sets forth various factors and standards that are used in evaluating settled cases, is a codification of the Commission's decision in *Rosi v. Bell Atlantic-Pa., Inc. and Sprint Communications Company*, Docket No. C-00092409 (Order entered February 10, 2000). These factors and standards are utilized by the Commission in determining if a proposed civil penalty is appropriate, as well as if an overall proposed settlement is reasonable and its approval is in the public interest. 52 Pa. Code § 69.1201(a). Although the same criteria are used in the evaluation of both litigated and settled cases, they are not applied in as strict a fashion to settled cases, and the parties in settled cases are afforded flexibility in reaching amicable resolutions as long as the settlement is in the public interest. 52 Pa. Code § 69.1201(b).

11. As an administrative agency of the Commonwealth, the Commission is required to provide due process to the parties appearing before it. Due process is satisfied only when the

¹ Although Mr. Zimmerman filed the Comments as an individual, he is in-house regulatory counsel for an electric distribution company. *See Pa. Public Utility Commission v. Duquesne Light Company*, Docket No. R-2021-3024750 (Prehearing Memorandum filed May 25, 2021, p. 9)

parties are afforded notice and the opportunity to appear and be heard. *Schneider v. PUC*, 479 A.2d 10, 15 (Pa. Cmwlth. 1984), *citing Fusaro v. PUC*, 382 A.2d 794 (Pa. Cmwlth. 1978).

III. ARGUMENT

A. The Alleged Telemarketing Call on December 6, 2021 is Irrelevant to Whether the Settlement is in the Public Interest.

12. I&E's Informal Investigation examined DPI's sales and marketing practices from 2019 through May 2021. The call that Mr. Zimmerman allegedly received on December 6, 2021 is outside the timeframe of that investigation and therefore beyond the scope of this proceeding. As such, this allegation is irrelevant to whether the Settlement is in the public interest and otherwise comports with the Policy Statement at 52 Pa. Code § 69.1201. *See Pa. Public Utility Commission, Bureau of Investigation and Enforcement v. Verde Energy USA, Inc.*, Docket No. C-2020-3017229 (Order entered October 7, 2021, at pp. 17-19) (the purpose of soliciting comments on settlements is to allow the Commission to determine whether the terms of settlement are reasonable and in the public interest based on the allegations that were investigated; it would be improper to rely on additional factual averments).

13. In evaluating a settlement, the Commission reviews the allegations investigated by I&E and considers whether the civil penalty and other provisions of the settlement satisfactorily address those specific allegations. *See Pa. Public Utility Commission, Bureau of Investigation and Enforcement v. Clearview Electric, Inc. d/b/a Clearview Energy*, Docket No. C-2020-3020127 (Order entered October 28, 2021, at 11-21). DPI is unaware of any precedent where the Commission has considered allegations of events that occurred after the timeframe of I&E's investigation. Indeed, it is customary for settlements related to enforcement actions to cover a specific period of time. *See Pa. Public Utility Commission, Bureau of Investigation and*

Enforcement v. PPL Electric Utilities Corporation, Docket No. M-2020-3011455 (Order entered August 5, 2021; Tentative Order entered April 16, 2020, at p. 2) (investigation focused on instances involving utility’s billing practices during 2017 and 2018).

14. Mr. Zimmerman claims that the alleged telemarketing call he received “apparently from DPI” on December 6, 2021, if substantiated, would bear on several applicable factors of the Commission’s Policy Statement for evaluating settlements.² This contention overlooks the Commission’s reliance on the Policy Statement to examine the specific allegations of the investigation and determine whether the settlement terms appropriately resolve those allegations. Therefore, an event that allegedly occurred outside the timeframe of the investigation has no bearing on the factors identified by the Policy Statement.

15. Moreover, even if subsequent events could be considered, the alleged December 6, 2021 telemarketing call would not alter any of the factors relied upon by the Commission to evaluate settlements. For example, a single telemarketing call would not change the seriousness of the alleged violations, particularly given I&E’s description of the conduct as being serious due to the allegations involving misrepresentation.³ In addition, an allegation concerning a telemarketing call that occurred after the filing of the Settlement does not alter DPI’s prior compliance history, which remains unblemished to date - no formal complaints have been sustained against DPI. Similarly, Mr. Zimmerman’s new allegation of a telemarketing call well past the timeframe of the investigation does nothing to alter the fact that DPI cooperated with I&E’s investigation.

² Page 4 of the PDF.

³ I&E’s Statement in Support at 7-8.

B. DPI's Due Process Rights Would Be Violated if the Commission Relies on Mr. Zimmerman's Comments to Hold the Settlement in Abeyance.

16. It would be a violation of DPI's fundamental rights of due process for the Commission to hold the Settlement in abeyance based on an allegation of a single telemarketing call from an unknown source that occurred more than 6 months after the time period investigated by I&E, to which DPI has had no opportunity to respond.

17. As a licensed electric generation supplier, DPI entered into the Settlement with I&E based on a business decision to resolve the Informal Investigation and focus on its operations. The Commission's review and disposition of the Settlement should not be delayed on the basis of a single alleged telemarketing call that is outside the timeframe of I&E's investigation.

C. An Individual Consumer May Not Represent the Interests of Other Customers.

18. Mr. Zimmerman's Comments improperly rely on an alleged single telemarketing call from an unknown source to jump to the far-reaching and speculative conclusion about the possibility of a "larger telemarketing campaign intended to ensnare multiple customers in the Commonwealth."⁴

19. It is well-settled that as an individual consumer, Mr. Zimmerman may not assert complaints on behalf of other customers. *Pettko v Pennsylvania Water Company*, Docket No. C-2011-2226096 (Order Granting in Part and Denying in Part Motion for Judgment on the Pleadings dated October 5, 2011, at 6); *Painter v Aqua PA, Inc.*, Docket No. C-2011-2239556 (Opinion and Order entered May 22, 2014, at 2, fn. 1).

⁴ Page 4 of the PDF.

20. To the extent that Mr. Zimmerman desires to follow up on the December 6, 2021 telemarketing call that he allegedly received, that should occur through a separate proceeding rather than delaying approval of the Settlement.

D. DPI Admits No Wrongdoing in the Settlement.

21. Mr. Zimmerman’s Comments improperly make numerous assumptions as to DPI’s conduct that was the focus of I&E’s investigation as constituting regulatory violations. This tactic is completely at odds with provisions of the Settlement which, among other things, explicitly recognize that DPI admitted no wrongdoing.

22. For example, Mr. Zimmerman describes the alleged December 6, 2021 call as giving “reason to believe that DPI may be continuing the same sorts of misconduct that the Proposed Settlement is ostensibly intended to deter.”⁵ On this basis, he suggests that further investigation is “warranted to determine the nature and extent of such misconduct.”⁶

23. Referring to DPI as having engaged in “misconduct” is inconsistent with the provisions of the Settlement. Paragraph 43 of the Settlement expressly acknowledges that if this matter had been litigated, DPI would have denied or raised defenses to each of the allegations and defended against the same at hearing. In addition, Paragraph 44 recognizes the inherent unpredictability of the outcome of a contested proceeding as a reason supporting the Settlement. Of particular note, Paragraph 56 explicitly states that the Settlement “represents a compromise of positions and does not in any way constitute a finding or an admission concerning the alleged violations of the Code and the Commission’s regulations.”

⁵ Page 4 of the PDF.

⁶ Page 4 of the PDF.

E. The Commission May Not Grant the Relief Requested.

24. By his Comments, Mr. Zimmerman urges the Commission to hold the Settlement in abeyance and direct a further investigation of DPI, based upon a single telemarketing call he allegedly received on December 6, 2021 that he states was “apparently from DPI.”⁷

25. The Tentative Order solicited comments on the Settlement so that the Commission can make a determination as to whether its terms are in the public interest. Tentative Order at 10. In issuing the Tentative Order, the Commission did not invite interested parties to request relief in the nature of holding the Settlement in abeyance and directing a further investigation of DPI.

26. Moreover, Mr. Zimmerman’s suggestion that the “Commission direct further investigation of DPI,” runs afoul of the protections afforded to entities regulated by the Commission for a bifurcation of the enforcement and adjudication functions. *See Lyness v. Commonwealth of Pennsylvania*, 529 Pa. 535, 605 A.2d 1204 (1992) (bans the commingling of prosecutorial and adjudicative functions). The Commission adopted an administrative policy in compliance with *Lyness*, which eliminated the potential for Commission-level involvement in the initiation of prosecutions and investigations. *See LP Water & Sewer Co. v. Pennsylvania PUC*, 722 A.2d 733, 736 (1998). Section 308.2(b) codified this case law by providing that Commission employees may not engage in a commingling of these functions. 66 Pa.C.S. § 308.2.

27. Consistent with the prohibition on the commingling of prosecutorial and adjudicative functions, the Commission’s Order in *Implementation of Act 129 of 2008*;

⁷ Mr. Zimmerman’s Comments are unnumbered; Page 2 of the PDF.

Organization of Bureaus and Offices, Docket No. M-2008-2071852 (Order entered on August 11, 2011, at 3-5), created I&E to serve as the prosecutory bureau. The Order designated I&E as the entity to initiate enforcement actions in the public interest.

28. Therefore, while the Commission may refer matters to I&E for any action that is appropriate in the enforcement bureau's discretion, it is not within the Commission's power to direct I&E to conduct a further investigation of DPI. Since the Commission cannot grant the relief requested by Mr. Zimmerman, his Comments should be stricken.

III. CONCLUSION

For the reasons set forth above, Discount Power, Inc. respectfully requests that the Commission grant this Motion to Strike Michael Zimmerman's Comments and disregard them in considering whether the terms of the Settlement, based on the investigation conducted by the Bureau of Investigation and Enforcement, are reasonable and in the public interest.

Respectfully submitted,

Date: December 21, 2021

Karen O. Moury

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Verification

I, Karen O. Moury, state that I am an Attorney of Record for Discount Power, Inc. and that as such I am authorized to make this verification on its behalf. I hereby state that the facts contained in the foregoing Motion are true and correct (or are true and correct to the best of my knowledge, information and belief). I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904, relating to unsworn falsification to authorities.

December 21, 2021

Karen O. Moury

Karen O. Moury, Esquire