



COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
P.O. BOX 3265, HARRISBURG, PA 17105-3265

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April 11, 2014

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

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**Re: Pennsylvania Public Utility Commission, Bureau of Investigation and  
Enforcement v. ResCom Energy LLC  
Docket No. M-2013-2320112**

Dear Secretary Chiavetta:

Enclosed for filing please find the original of the Supplemental Statement in Support of the Bureau of Investigation and Enforcement relative to the above-referenced matter. Copies of this filing have been served in accordance with the attached Certificate of Service.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

Michael L. Swindler  
Prosecutor  
PA Attorney ID No. 43319

Enclosure

cc: As per Certificate of Service

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

Pennsylvania Public Utility  
Commission, Bureau of  
Investigation and Enforcement

v.

Docket No. M-2013-2320112

ResCom Energy LLC

**SUPPLEMENTAL STATEMENT IN SUPPORT  
OF SETTLEMENT AGREEMENT  
OF PENNSYLVANIA PUBLIC UTILITY COMMISSION  
BUREAU OF INVESTIGATION AND ENFORCEMENT**

**Introduction**

The Pennsylvania Public Utility Commission's ("Commission") Bureau of Investigation and Enforcement ("I&E") submits this Supplemental Statement In Support of Settlement Agreement ("Supplemental Statement") at the above docket as directed by the Commission's Opinion and Order entered March 19, 2014 ("March 19 Order"). In its March 19 Order, the Commission held the substantive review of the Settlement Agreement in abeyance and advised ResCom Energy LLC ("ResCom" or "Company") and I&E (hereinafter collectively referred to as "Parties") that more information was necessary in order to evaluate whether the civil penalty and corrective actions sufficiently address the alleged violations. The Parties were directed to file supplemental statements

in support of the filed settlement agreement within 30 days of the entry of the March 19 Order.

This Supplemental Statement is filed by I&E in order to provide further detail to substantiate that the Settlement Agreement amicably reached by the Parties and filed with the Commission on December 2, 2013, provides for a monetary civil penalty and non-monetary corrective actions taken or to be taken by the Company that sufficiently address the violations alleged by I&E. As a result of the supplemental details provided herein, I&E respectfully requests that the Commission conclude that the terms and conditions memorialized in the Settlement Agreement adequately balance the duty of the Commission to protect the public interest with the interests of the Company, the Company's customers, and all electric consumers in Pennsylvania and that the Settlement Agreement should be approved as filed.

### **Background**

This matter involves ResCom, an electric generation supplier ("EGS"), licensed by the Commission to operate within the service territories of all electric distribution companies ("EDCs") in Pennsylvania.<sup>1</sup> Informal complaints registered with the Commission's Bureau of Consumer Services ("BCS") during 2012 suggested that ResCom, through third-party marketing agents acting on ResCom's behalf, may have enrolled customer accounts without proper authorization to do so, or without proper verification of transactions, contrary to the "Standards for Changing a Customer's Electricity Generation Supplier" regulations at 52 Pa. Code §§ 57.171-179. These

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<sup>1</sup> The background related to I&E's investigation of ResCom is set forth in the Settlement Agreement and in I&E's original Statement in Support and will not be repeated here.

informal complaints also alleged that ResCom's independent third-party sales agents may have solicited electric generation supply service in a manner contrary to the Commission's supplier marketing guidelines<sup>2</sup> as well as provisions of Chapters 54 and 57 (52 Pa. Code), among other statutes and regulations. Allegations concerning ResCom also came from EDCs, other EGSs and other direct consumer contacts.

Based on its receipt of these informal complaints and multiple allegations, BCS requested that I&E conduct an investigation of possible slamming incidents involving ResCom.<sup>3</sup> Slamming has been recognized by the Commission as a serious consequence.<sup>4</sup> In *EDC Customer Account Number Access Mechanism for EGSs*, Docket No. M-2013-2355751 (Order entered April 18, 2013), the Commission defined "slamming" as "an unauthorized change to a customer's supply service." Such unauthorized *change* may or may not result in a physical switch to the new EGS. Often, the unintended or unauthorized EGS enrollment is cancelled during the required rescission period such that no physical switch takes place.<sup>5</sup> Allegations against third parties acting on behalf of ResCom included physical EGS switches, rescinded EGS changes and other unauthorized marketing acts.

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<sup>2</sup> The Commission's final form regulations regarding "Marketing and Sales Practices for the Retail Residential Energy Market" became effective on June 29, 2013 and supersede the temporary guidance provided in *Interim Guidelines for Marketing and Sales Practices for Electric Generation and Natural Gas Suppliers*, Docket No. M-2010-2185981 (Order entered November 5, 2010).

<sup>3</sup> This form of "slamming" has been referred to by the Commission as "enrolling customers to receive electric generation supply service without proper customer authorization." *Pennsylvania Public Utility Commission Law Bureau Prosecutory Staff v. PEPCO Energy Services*, Docket No M-00011588 (Tentative Order entered December 20, 2001).

<sup>4</sup> The Commission has stated that it maintains a "zero tolerance" policy regarding incidents of slamming.

<sup>5</sup> Even if a customer fully intended to execute an EGS switch at the time of enrollment, that customer is free to change his or her mind and cancel the EGS switch during the rescission period with no adverse consequences. Of course, as an authorized switch, such a rescinded enrollment would not be deemed a slamming violation.

I&E initiated an informal investigation into ResCom's enrollment practices as an EGS in Pennsylvania. The investigation concluded that some allegations appeared to be sufficiently credible to warrant moving forward with charges against ResCom for violations of the Public Utility Code and/or other applicable statutes and regulations in connection with some of the BCS customer complaints.

### **Alleged Violations**

The Commission's March 19 Order states, in pertinent part:

....we seek further information related to the number of customer that were affected by ResCom's allegedly illegal marketing practices, how many customers were allegedly slammed, how many customers ResCom allegedly attempted to slam but successfully rescinded, and how many Do Not Call violations allegedly occurred.

March 19 Order at 9.

I&E's investigation began with a review of the allegations summarized in the BCS memo to I&E. The Company was then directed to respond to data requests prepared and served upon ResCom by I&E to discern more information regarding the allegations raised. In its responses, ResCom pinpointed the source of some complaints to the unauthorized subcontracting of a third party call center. ResCom immediately terminated its business relationship with that third party call center.

ResCom explained that when a sales representative is accused of being deceptive, ResCom audits all sales of that agent to look for a pattern of deception. If the agent is found to have been deceptive, the agent's employment is terminated. With regard to informal complaint levels, ResCom explained that it was important to consider that ResCom also had high enrollment during the same periods, and that the ratio of

complaints to enrollments was a reasonable 1 out of every 700. With regard to excessive rescissions, it should be noted that customer rescissions during the allowable rescission period are not indicative in-and-of-themselves of illegal activity by the EGS.

After the investigation of complaints lodged against ResCom, I&E identified 13 customer complaints that contained 49 potential regulatory violations.<sup>6</sup> These 13 customer accounts represent “the total universe of potential customers that were affected by ResCom’s actions” in that I&E deemed these complaints to be sufficiently credible to warrant moving forward to a formal proceeding or, in the alternative, entering into settlement discussions between the parties. Of the 13 customer accounts in question, I&E alleges that three were physically switched and remained customers of ResCom for some period of time before being returned to their prior EGS, three had a supplier switch initiated, but the EGS enrollments were cancelled within the rescission period such that no physical EGS change took place, two involved unauthorized marketing practices in door-to-door sales, three involved unauthorized marketing practices in telemarketing sales and two involved Do Not Call violations.

In a separate matter, BCS was contacted by an individual who identified himself as a former sales agent for “Consumer Energy Partners” (“CEP”), a third party agent of ResCom. This individual claimed that the CEP call center agents contracted by ResCom called consumers whose telephone numbers were obtained from telephone directories and were not screened to omit telephone numbers of consumers on federal and state Do Not Call lists. These allegations, if found to be true, would result in the assessment of

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<sup>6</sup> I&E’s Statement in Support filed with the Settlement Agreement erroneously refers to 14 customer complaints.

additional EGS marketing violations against ResCom. I&E merged this new claim into its already ongoing investigation against ResCom. In I&E's investigation into the whistleblower Do Not Call allegations, ResCom acknowledged in responses to I&E's data requests that ResCom had an arrangement with CEP from August 2012 to May 2013 to solicit Pennsylvania residential consumers by telephone on behalf of ResCom.

ResCom indicated that CEP was responsible for obtaining its own leads, for maintaining and scrubbing those leads against any and all state, federal and internal Do Not Call lists and that under no circumstances was the marketer to call or solicit any persons on the state, federal or internal Do Not Call lists. ResCom stated that despite the conditions imposed upon CEP by ResCom, ResCom was not aware of the improper procedure followed by CEP to acquire phone numbers of Pennsylvania consumers, relying on the integrity of the marketer to comply with ResCom's directives. Upon learning of allegations regarding CEP's improper procedures, ResCom promptly terminated its business relationship with CEP.

There was no practical means by which ResCom could quantify the number of potential Do Not Call violations, if any, committed by marketer CEP. Consequently, I&E determined that while ResCom's oversight of its marketing partner was less than stellar, I&E lacked the information necessary to quantify the extent of CEP's Do Not Call violations. Consequently, the negotiation of the terms and conditions of settlement reached in the Settlement Agreement involved striking a fair balance between ResCom's questionable oversight of its marketing partner alleged by I&E and I&E's general claim against ResCom without quantifying the number of Do Not Call violations committed by

the third-party marketing partner on ResCom's behalf. Also taken into consideration was I&E's determination that ResCom fully cooperated with its investigation, was forthcoming in its responses to data requests, apologized for complaints which may have been caused by its actions or inactions and explained the immediate steps taken by the Company to improve its processes and procedures.

### **Civil Penalty**

The Settlement Agreement reached between I&E and ResCom proposes a monetary civil penalty of \$59,000. The civil penalty is intended to resolve all allegations of slamming and related unauthorized actions, including Do Not Call violations which occurred through 2013. The monetary fine equates to a payment of \$1,000 for each of the 49 violations alleged by I&E. This civil penalty is consistent with prior settlement agreements of a similar nature that were recently approved by this Commission.<sup>7</sup>

The separate whistleblower investigation resulted in an additional \$10,000 monetary settlement amount as payment related to ResCom's inadequate Do Not Call oversight.

I&E deems the total civil penalty reached in the Settlement Agreement of \$59,000 to be a fair and equitable resolution of this matter, allowing ResCom to more quickly implement improved policies, allowing I&E to avoid the preparation and service of extensive discovery and allowing the time and resources of both parties, as well as the Commission, to be redirected to other matters. Moreover, settlement flexibility allows parties to amicably agree to an overall monetary fine that does not necessarily correspond

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<sup>7</sup> For example, *I&E v. APG&E*, Docket No. M-2013-2311811 (Order entered October 17, 2013)(\$43,200 for 54 violations); *I&E v. IDT*, Docket No. M-2013-2314312 (Order entered October 17, 2013)(\$39,000 for 39 violations); *Law Bureau v. MXEnergy*, Docket No. M-2012-2201861 (Order entered December 5, 2013) (\$22,000 for 22 instances of slamming).

exactly to the number of violations alleged as would be done had the matter been litigated. It should not be anticipated that a settlement will encompass the amount of detail found in a litigated proceeding. In *Final Policy Statement for Litigated and Settled Proceedings Involving Violations of the Public Utility Code and the Commission's Regulations*, the Commission acknowledged the distinction between litigated and settled proceedings and emphasized that:

[i]n litigated cases, the parties have typically developed an evidentiary record regarding the alleged violation that can be evaluated by the presiding ALJ to determine the appropriate remedy. In settled cases, however, there may not be an evidentiary hearing, and the settlement may be the result of a compromise of positions....

Docket No. M-00051875 (Order entered November 30, 2007).

I&E acted to structure this settlement based on past settlements and the understanding that the Commission has taken a hard stand against such EGS improprieties and expressly communicated its zero tolerance policy regarding unauthorized marketing practices. Most importantly, for the reasons set forth above, the amicable resolution of this matter is in the public interest. The Commission should find that this civil penalty is sufficient to deter future violations.

### **Corrective Actions**

The Commission's March 19 Order states, in pertinent part:

Therefore, we seek further information on how ResCom has revised its operating procedures so as to safeguard against future slamming incidences.

March 19 Order at 9.

In addition to paying a monetary civil penalty, ResCom has agreed to engage in numerous enhancements to its existing internal procedures as well as be subject to additional regulatory oversight for a period of time in an effort to stem further unauthorized marketing acts by its designated sales agents. These efforts have been set forth in the Settlement Agreement at pages 11-14. As stated in Paragraph 33.b of the Settlement Agreement, these revisions to its operating procedures “will act as safeguards against future unauthorized EGS marketing practices of employees or agents of ResCom.” These operational enhancements primarily entail the Company’s marketing practices, hence the concentration in the Company’s corrective action on its marketing procedures.

Operationally, ResCom has acted or agreed to act to improve its oversight of third party marketing agents. Since the violations alleged of Chapter 54 and 57 specifically relate to EGS *marketing* practices, it follows that the settlement has outlined improvements to enhance those marketing practices in order to reduce the likelihood of future, similar violations. As set forth in the Settlement Agreement, those operational improvements include the creation of enrollment materials, marketing agent apparel and marketing script enhancements to improve awareness of the Company’s identity, addition of Caller ID numbers that accurately correspond to Company customer service centers, extension of customer call center hours, addition of a Company field trainer/inspector, and the change to a new phone carrier to better handle increased call volumes to customer call centers. In addition, ResCom agreed to a period of heightened Commission scrutiny, including the filing of written notices to BCS of policy or procedure changes, the filing of

quarterly complaint reports, and providing specific customer complaint documentations and recordings to BCS upon request. The action to improve marketing procedures by which all sales agents must follow and from which any unauthorized switching, or “slamming” would result, is appropriate and sufficiently encompasses the remedial action that has consistently been directed of EGSs in similar matters.

ResCom, has agreed, as stated above, to pay a fair and equitable civil settlement amount totaling \$59,000, and to take numerous corrective steps regarding its operating procedures. ResCom has been proactive in its efforts to rescind its business arrangements with third party marketing agencies that have not performed to the level demanded by ResCom or by the Commission. These monetary and non-monetary settlement terms are in accord and satisfaction of disputed claims and were reached after taking into consideration past settlements regarding similar incidents that were approved by or submitted to this Commission which acted as a foundation from which the Parties could determine reasonable settlement terms in this case.<sup>8</sup>

Commission Rules and Regulations encourage the settlement of proceedings and, consequently, ResCom and I&E convened conferences and discussions during the course of this proceeding. These discussions ultimately resulted in the foregoing Settlement Agreement which is intended as a full and final resolution of the Commission’s investigations.

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<sup>8</sup> A recent example is *Pennsylvania Public Utility Commission, Law Bureau Prosecutory Staff v. MXenergy Electric Inc.*, Docket No. M-2012-2201861 (Order entered May 3, 2012)(“*MXenergy Order*”), wherein this Commission stated, “[W]e simply do not believe that a \$500-per-customer penalty, even when combined with the corrective actions, is enough to remedy this situation or to deter potential future violations of the Code or our Regulations by an EGS.” *MXenergy Order* at 5. This settlement agreement is also similar in scope and terms of settlement to the settlement agreement entered into by the parties in *Pennsylvania Public Utility Commission Bureau of Investigation & Enforcement v. IDT Energy, Inc.*, at Docket No. M-2013-2314312, (Order entered October 17, 2013).

In addition to the foregoing reasons, based upon I&E's analysis of these matters, acceptance of this proposed settlement is in the public interest because resolution of this case by settlement rather than litigation will avoid the substantial time and expense involved in formally pursuing all allegations in this proceeding. Moreover, acceptance of the Settlement Agreement at this time will ensure that the Company will immediately implement the changes in their policies enumerated in the Settlement Agreement instead of at the end of what could be protracted litigation.

**WHEREFORE**, I&E represents that it supports the settlement of this matter as memorialized by the Settlement Agreement as being in the public interest and respectfully requests that the Commission approve the foregoing Settlement Agreement, including all terms and conditions contained therein, in its entirety.

Respectfully submitted,



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Wayne T. Scott, First Deputy Chief Prosecutor  
Michael L. Swindler, Prosecutor  
Bureau of Investigation and Enforcement

Dated: April 11, 2014

## CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons listed and in the manner indicated below:

**Notification by first class mail addressed as follows:**

Robert J. Metzler, Esquire  
Cohn Birnbaum & Shea, P.C.  
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(Counsel to ResCom Energy LLC)

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Office of Special Assistants  
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