**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

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|  | Public Meeting held February 11, 2016 |
| Commissioners Present:  Gladys M. Brown, Chairman  Andrew G. Place, Vice Chairman  Pamela A. Witmer  John F. Coleman, Jr.  Robert F. Powelson |  |

Commonwealth of Pennsylvania, by C-2014-2427656

Attorney General Kathleen G. Kane, Through

The Bureau of Consumer Protection

And

Tanya J. McCloskey, Acting Consumer Advocate

v.

Energy Services Providers, Inc. d/b/a

Pennsylvania Gas & Electric

**TENTATIVE FORM OPINION AND ORDER**

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**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Initial Decision (I.D.) of presiding Administrative Law Judges (ALJs) Elizabeth H. Barnes and Joel H. Cheskis, issued June 30, 2015, and the Exceptions filed thereto by Mr. Thomas Sobiech on July 20, 2015. *See* 52 Pa. Code § 5.533(a). Replies to the Exceptions of Mr. Sobiech were filed by Energy Services Providers, Inc., d/b/a Pennsylvania Gas & Electric (Pa. G&E, Respondent, or Company), and the Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, (OAG) and Tanya J. McCloskey, Acting Consumer Advocate, (OCA) (together, OAG/OCA or Joint Complainants) (OAG/OCA R.Exc.), on July 30, 2015.

As will be discussed in more detail in this Opinion and Order, Mr. Sobiech is the lead plaintiff in a federal class action lawsuit filed against Pa. G&E. The lawsuit is based on the same, or substantially the same, conduct allegedly engaged in by Pa. G&E that is the subject of the proceedings before this Commission. The suit seeks damages for

Mr. Sobiech and all others similarly situated, and is pending before the United States District Court, Eastern District of Pennsylvania, at Civil Action No. 2:14:CV:04464-GAM.

On consideration of the Initial Decision, the Exceptions of Mr. Sobiech in opposition to approval of the Settlement, and the Replies to the Exceptions, we shall tentatively adopt the Initial Decision, as modified, and as clarified by the condition of acceptance set forth in this Opinion and Order. The Exceptions of Mr. Sobiech shall be denied consistent with this approval. In light of the clarifications in this Opinion and Order, we shall provide the signatories to the Settlement seven (7) days in which to file comments with this Commission in response to the clarification and condition set forth in this Opinion and Order.

**BACKGROUND**

Pa. G&E is an electric generation supplier (EGS) licensed by the Commission pursuant to Section 2809 of the Public Utility Code (Code), 66 Pa. C.S. § 2809, to provide competitive electric generation supply to end-user customers. *See License Application of Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric Company*, Docket No. A-2010-2212241 (Order entered May 9, 2011) (*Pa. G&E Licensing Order I*).

Pursuant to the Electricity Generation Customer Choice and Competition Act (Act), 66 Pa. C.S. §§ 2801-2812, the generation of electricity is no longer regulated as a public utility function in Pennsylvania. Only the distribution of electricity is continued to be regulated as a natural monopoly subject to the direct jurisdiction of the Commission. 66 Pa. C.S. § 2802(16). Retail customers are provided direct access to the competitive market for the generation and sale or purchase of electricity. *See* 66 Pa. C.S. § 2802(12)-(13).

Since the deregulation of electric generation in Pennsylvania, the rates consumers pay in the retail electric generation market are governed by the terms of their contract with their supplier. *See, e.g., Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, Docket No. M-2014-2406134 (Order entered March 4, 2014) (*Variable Rate Order*), at 3. Electric generation suppliers are, however, required to obtain licenses from the Commission, demonstrate financial responsibility, and comply with various statutory and regulatory requirements concerning service as are necessary for the protection of the public. *See* 66 Pa. C.S. §§ 2802(14), 2807(d)(2), and 2809; *also* 52 Pa. Code §§ 54.1-54.10.

Pa. G&E provides variable rate[[1]](#footnote-2) electric generation service to residential, small commercial (25 kWh and under), large commercial (over 25 kWh), industrial and government consumers in the electric distribution service territories of Allegheny Power, Duquesne Light and Power Company, PECO Energy Company, PPL Utilities, Inc., Pike County Power and Light Company, and UGI Utilities, Inc. *See* Joint Formal Complaint

(Complaint) of OAG and OCA, *infra*, at ¶¶ 6-7, citing *Pa. G&E Licensing Order I*.

Pa. G&E’s license to provide EGS service was later expanded to include the electric distribution company (EDC) service territories of Citizens’ Electric Company of Lewisburg, Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and Wellsboro Electric Company. Complaint at ¶ 8, citing *License Application of Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric Company*, Docket No. A-2010-2212241 (Order entered August 1, 2011) (*Pa. G&E Licensing Order II*).

This proceeding is a joint Complaint filed with the Commission by the OAG and OCA on June 20, 2014, against Pa. G&E. The Complaint was initiated as a result of consumer contacts and consumer complaints received by these agencies and by the Commission regarding the EGS service provided by Pa. G&E.

On or about February, 2014, the OCA began receiving a high volume of calls and written correspondence (approximately 3,000 contacts) from residential consumers on variable rate plans with EGS companies regarding the level of electric generation charges on the consumers’ bills. Complaint at ¶ 17. As of May 5, 2014, the OCA collected information from 2,343 consumer contacts of which 826, or 34%, were customers of Pa. G&E. Complaint at ¶¶ 18-19.

The OAG/OCA Complaint averred that, upon information and belief, from January 1, 2014, to April 21, 2014, approximately 500 complaints were filed at the Commission by consumers regarding variable rates charged by EGS companies. Complaint at ¶ 21. Additionally, the OAG/OCA averred that, approximately, 6,500 informal complaints and nearly 10,000 inquiries were made by consumers to the Commission regarding variable rates charged by EGS companies. *Id*. Of the approximately 203 Commission formal, consumer complaints reviewed by the OAG/OCA, 23, or 11%, involved Pa. G&E as the EGS service provider. *Id*.

From February 27, 2014, to June 4, 2014, the OAG received approximately 7,503 consumer complaints regarding variable rates charged by EGS providers. Of these 7,503 complaints, 1,762, or 23%, involved Pa. G&E. Complaint at ¶ 20.

Based, *inter alia*, on the foregoing, on June 20, 2014, the OAG and the OCA jointly filed the instant Complaint. The Complaint raised seven (7) counts, summarized below.

Count I – Misleading and Deceptive Promises of Savings, alleges, *inter alia*, that employees, agents, and/or representatives of Pa. G&E engaged in and continue to engage in activities that are fraudulent, deceptive, and/or in violation of the Commission’s Regulations, Orders, and the Unfair Trade Practices and Consumer Protection Law, 73 P. S. §§ 201-1 *et seq.*, (Consumer Protection Law or CPL), by promising savings to customers as inducement to use Pa. G&E’s service, which savings may not, and for many customers, did not, materialize. Complaint at 7.

As explained in the factual background to the Complaint and expanded upon later therein, the OAG and the OCA note that a percentage of the Pa. G&E-related consumer complaints involved consumers’ understanding and/or belief that they would be provided a rate that was guaranteed to be at or below the “Price to Compare” (PTC), or savings over the PTC. *See* Complaint at ¶¶ 23-26.[[2]](#footnote-3)

In Count II – Slamming, the Joint Complainants aver that certain consumers with whom they were in contact state that they did not consent to switch service to Pa. G&E. Complaint at ¶¶ 33-35.

In Count III – Misleading and Deceptive Welcome Letter, the Joint Complainants aver, *inter alia*, that Pa. G&E’s claims in its Welcome Letter to customers represent benefits of its services that the Company did not provide, in violation of the CPL. *See* Complaint at 9.

Count IV – Lack of Good Faith Handling of Complaints, alleges that

Pa. G&E has violated and continues to violate Commission Regulations by failing to adequately staff its call center; failing to provide reasonable access to Pa. G&E’s representatives for purposes of submitting complaints; failing to properly investigate consumer disputes; failing to properly notify consumers of the results of its investigation of a dispute when such investigation was concluded; and failing to utilize good faith, honesty, and fair dealing in Pa. G&E’s dealings with consumers. Complaint at 10-11.

In Count V – Failing to Provide Accurate Pricing Information, the Joint Complainants attach language from Pa. G&E’s Disclosure Statement provided to its customers. Based on review of this Disclosure Statement, the Joint Complainants alleged, *inter alia*, that Pa. G&E has violated and continues to violate the Commission’s Regulations by failing to provide the information requested by its consumers. They additionally allege a violation of Commission Regulations on the part of Pa. G&E by its failing to provide pricing information in plain language and using common terms that consumers understand, and failing to disclose all material terms of Pa. G&E’s services such that consumers could not determine from the Disclosure Statement the price that they would or could be charged by Pa. G&E, or how the price would be calculated. Complaint at 12.

Based on the foregoing, the Joint Complainants asserted that Pa. G&E violated and continues to violate Commission Regulations by failing to provide information to its consumers in a manner that would allow them to compare offers. Complaint at 12.

In Count VI, Prices Nonconforming to Disclosure Statement, it was alleged that the prices charged by Pa. G&E to its customers in early 2014 were not reflective of the cost to serve its residential customers. Complaint at ¶ 65. The Joint Complainants additionally assert that the prices charged do not conform to the variable rate pricing provisions of the Company’s Disclosure Statement. Complaint at ¶ 67.

In Count VII, Failure to Comply With the Telemarketer Registration Act, the Joint Complainants state that Pa. G&E did not provide consumers with a contract that contained all of the required information set forth in Sections 2245(a)(7) and 2245(c) of the Telemarketer Registration Act (TRA), 73 P. S. §§ 2245(a)(7) and 2245(c). The TRA is incorporated by reference in the CPL, 73 P. S. § 2246. And, the Commission’s Regulations require compliance with the TRA and CPL. Complaint at 14, citing 52 Pa. Code §§ 54.43(f), 111.10(a).

For relief, the OAG and OCA requested that the Commission find that Pa. G&E has violated the TRA, the CPL, and Commission Regulations, impose a civil penalty upon the Company for such violations and suspend or revoke Pa. G&E’s license. Complaint at 16. The Joint Complainants further requested that the Commission order the Company to provide appropriate restitution to its customers, including, without limitation, refunding all charges that were over and above the PTC, or a refund of any fees and/or penalties incurred by customers as a result of leaving Pa. G&E to obtain service elsewhere. *Id*.

Additionally, the Joint Complainants sought an order directing Pa. G&E to cease and desist from switching customers without the customer’s explicit consent. The Complainants also requested the issuance of an order permanently enjoining Pa. G&E from practices that violate the TRA and CPL, and an order that directs Pa. G&E to implement proper consumer dispute procedures and adequately staff, train, and monitor its employees and/or agents in such procedures. Complaint at 16.

**HISTORY OF THE PROCEEDING**

**Procedural History**

As noted, the Complaint was filed on June 20, 2014, by the OAG and the OCA, and assigned Docket No. C-2014-2427656. I.D. at 2.

On July 10, 2014, Pa. G&E filed an Answer and New Matter in response to the Complaint. In the Answer, Pa. G&E admitted or denied the various averments made by the Joint Complainants. Pa. G&E averred that its variable pricing for EGS service followed the wholesale price of electricity in precisely the manner disclosed by Pa. G&E and the manner agreed to by its customers. I.D. at 3.

In its New Matter, accompanied by a Notice to Plead, the Company responded that the Commission previously reviewed and approved the Disclosure Statement it used with its customers and that at all times during the period covered by the allegations in the Complaint, Pa. G&E’s pricing was consistent with the Disclosure Statement, except to the extent that Pa. G&E voluntarily absorbed extremely high wholesale electricity prices. *Id.* Pa. G&E also responded that its customer service department historically was staffed with approximately ten (10) individuals and had a very favorable response time for calls. Pa. G&E, thereafter, interposed thirteen affirmative defenses to the Complaint and requested that the Complaint be dismissed, with prejudice. *Id*.

On July 10, 2014, Pa. G&E also filed Preliminary Objections in response to the Complaint. *See* 52 Pa. Code § 5.101. In its Preliminary Objections, accompanied by a Notice to Plead, the Company sought dismissal of each Count of the Complaint for various reasons, including insufficient specificity, lack of Commission jurisdiction, and legal insufficiency. *Id*.

Also on July 10, 2014, the Office of Small Business Advocate (OSBA) filed a Notice of Appearance, Notice of Intervention, and a Public Statement formally intervening into the proceeding. *Id*.

On July 21, 2014, and July 30, 2014, the Joint Complainants filed an Answer in opposition to the Preliminary Objections and a Reply in opposition to Pa. G&E’s New Matter.

On July 30, 2014, a Prehearing Conference Notice was issued establishing an Initial Prehearing Conference for August 25, 2014. ALJs Barnes and Cheskis were assigned as Presiding Officers. *Id*. at 4.

On July 31, 2014, the Commission’s Bureau of Investigation and Enforcement (I&E) filed a Notice of Intervention.

On August 20, 2014, presiding ALJs Barnes and Cheskis addressed and ruled upon Pa. G&E’s Preliminary Objections. On consideration of the Preliminary Objections and responses thereto, the ALJs issued an Order Granting in Part and Denying in Part Preliminary Objections (*August 20, 2014 Order*).

In the *August 20, 2014 Order*, the ALJs recommended that six Counts of the Complaint be stricken, in part, based on a determination that the Commission lacked jurisdiction to hear complaints under the TRA and the CPL, 73 P.S. §§ 201-1 – 201-9.2, and that the Commission also lacked jurisdiction to consider the common law, equitable remedy of restitution. All other issues alleged in the Complaint were allowed to proceed to a hearing. *See* I.D. at 4-5.

On September 2, 2014, Pa. G&E filed a Petition for Interlocutory Review and Answer to Material Question in response to the *August 20, 2014 Order* and raised the following question:

Does the Commission have statutory authority or subject matter jurisdiction to order electric generation suppliers to issue refunds to consumers?

*See* Pa. G&E Petition at 2.

On September 8, 2014, the OAG/OCA filed a Joint Petition for Interlocutory Review and Answer to Material Question seeking review of, and answer to, the following questions regarding the *August 20, 2014 Order*:

1. Does the Commission have the authority and jurisdiction to determine whether a violation of the Unfair Trade Practices and Consumer Protection Law (CPL) and the Telemarketer Registration Act (TRA) has occurred when considering whether the Commission’s regulations – which require compliance with these laws – have been violated?
2. Does the Commission have the authority and jurisdiction to order equitable remedies, including restitution?

*See* OAG/OCA Petition at 1.

By Secretarial Letter of September 10, 2014, the Commission waived the thirty (30) day period for consideration of petitions seeking interlocutory Commission review pursuant to 52 Pa. Code § 5.303. *See* 52 Pa. Code §§ 1.2(c); *also* *C.S. Warthman Funeral Home, et al. v. GTE North, Inc.*, Docket No. C-00924416 (Order entered June 4, 1993).

A Commission order addressing the merits of the foregoing petitions for interlocutory review was not entered. In the Initial Decision, the presiding ALJs recommended that the petitions be dismissed as moot. *See* I.D. at 61; I.D. Ordering Paragraph #4.[[3]](#footnote-4)

An Initial Prehearing Conference was convened on August 25, 2014. The following counsel were present and the hearing: Todd Stewart, Esquire, and Christopher Lewis, Esquire on behalf of Pa. G&E; John Abel, Esquire, Nicole DiTomo, Esquire, and Margarita Tulman, Esquire on behalf of the OAG; Candis A. Tunilo, Esquire and Kristine E. Robinson, Esquire on behalf of the OCA; Stephanie M. Wimer, Esquire and Michael L. Swindler, Esquire, on behalf of I&E; and Sharon Webb, Esquire, on behalf of the OSBA.

On November 7, 2014, the Joint Complainants pre-served written direct testimony of over two hundred consumers. I.D. at 5.

On November 25, 2014, Pa. G&E filed an unopposed Motion for Continuance of the evidentiary hearings. This Motion was granted by Order dated December 5, 2014. As a result, evidentiary hearings scheduled for December 15-19, 2014 were cancelled and rescheduled. The Further Prehearing Conference scheduled for January 8, 2015 was cancelled. The Further Prehearing Conference was subsequently held on January 27, 2015. I.D. at 6.

On February 12, 2015, the Parties advised the presiding ALJs that a settlement in principle had been reached and requested that the litigation schedule be suspended. I.D. at 6. A conference call was held regarding that request and an Order Suspending Litigation Schedule was issued on February 24, 2015. A Further Prehearing Conference was also held on February 24, 2015 to discuss the various procedural aspects pertaining to the proposed Settlement. *Id*.

**Proposed Settlement and Sobiech Notice of Intervention and Public Statement**

On March 24, 2015, Pa. G&E, the Joint Complainants, and I&E (Settling Parties), submitted a Joint Petition for Approval of Settlement. Each of the Settling Parties submitted a Statement in Support of the Settlement. I.D. at 6. The OSBA did not join the Settlement but does not oppose it. *Id*. The Settling Parties attached to the Settlement as Exhibit A, a Stipulation of Facts in Support of Settlement. The Settling Parties agreed to these stipulated facts for the purpose of supporting the Commission’s review and approval of the proposed Settlement. The Stipulation of Facts was admitted into the record as part of the Initial Decision. *Id*.

After the submission of the proposed Settlement, on March 27, 2015,

Mr. Thomas Sobiech filed a Notice of Intervention. Mr. Sobiech is a former customer of Pa. G&E. In his Notice of Intervention, Mr. Sobiech requested permission to intervene in the proceedings to protect his rights and the rights of “all other customers that have contracted with U.S. Gas & Electric, Inc., i/t/d/b/a Pennsylvania Gas & Electric, Energy Service Providers, Inc., i/t/d/b/a Pennsylvania Gas & Electric and Pennsylvania Gas & Electric.” *See* Notice of Intervention*.*

In the Notice of Intervention, Mr. Sobiech also explained: 1) that he contracted with Pa. G&E for electric supply service for his home and began receiving service on October 31, 2013; 2) that he is the lead plaintiff in a lawsuit seeking damages for himself and all others similarly situated (class action lawsuit) filed against Pa. G&E in the United States District Court, Eastern District of Pennsylvania, Civil Action No. 2:14:CV:04464-GAM; 3) that the conduct that is the subject of the federal civil action is the same conduct involved in proceedings before the Commission; 4) that Pa. G&E is aware of the lawsuit, has vigorously defended the suit, and that a case management conference is scheduled; and 5) that he became aware of the proposed Settlement on March 26, 2015. *Id*.

Mr. Sobiech also included with his Notice of Intervention a pleading styled, “Public Statement . . . and Request for Hearing” (Public Statement), in which he explained his position concerning the proposed Settlement.

Mr. Sobiech is opposed to Commission approval of the Settlement. He takes the position that the Settlement is not in the best interests of the Company’s customers or the citizens of the Commonwealth. This position is based on the fact that, in Mr. Sobiech’s opinion, *inter alia,* the proposed Settlement exceeds the authority of the Commission. The objection of Mr. Sobiech is mostly grounded upon the fact that the Settlement includes a provision, discussed *infra*, that would require any participating customer to sign a general release, purporting to release Pa. G&E from all private causes of actions in a civil court of law that the customer may have against Pa. G&E, including claims for breach of contract, as a condition of receiving a refund from a refund pool that is to be established under the terms of the proposed Settlement. Mr. Sobiech states, “[f]or any customer of The Company to take advantage of the proposed settlement, said customer is required to execute a general release that would discharge The Company from any and all claims for liability regardless of whether the PUC has jurisdiction over said claims.” *See* Public Statement at 2.

In the Public Statement Mr. Sobiech also expresses his opposition to the Settlement based on its alleged insufficiency. Mr. Sobiech relies on the fifth criterion of the Commission’s Factors and Standards for Evaluating Litigated and Settled Proceedings, 52 Pa. Code § 69.1201 (*Commission Settlement Guidelines*), and also references comments of I&E and the Company as taken from their Statements in Support of the Settlement, to assert that all of Pa. G&E’s customers may have been affected by the conduct alleged in the Complaint. Yet, the Statements in Support do not disclose how many customers were, in fact, “defrauded” by Pa. G&E. To Mr. Sobiech, the number of customers who were actually harmed by the Company is a critical issue that should be determined for reasons of assessing the sufficiency of the Settlement. *See* Public Statement at 3.

In summary, based on the Notice of Intervention and Public Statement,

Mr. Sobiech argued that the Commission is not the proper venue for this case nor does the Commission have jurisdiction to permit the Joint Complainants and Settling Parties to engage in a resolution of the case that requires aggrieved customers to release private causes of action as a condition of obtaining the benefits of the Settlement.

On receipt of the Sobiech Notice of Intervention and Public Statement, the presiding ALJs informed the Parties by e-mail dated March 31, 2015, that these filings would be considered as a Petition to Intervene under the Commission’s Rules of Practice and that any Answers would be due on April 16, 2015. I.D. at 7.

On April 16, 2015, the Joint Complainants and Pa. G&E filed Answers in Opposition to the Sobiech Notice of Intervention and Reply Comments to the Public Statement (treated as a petition to intervene). Also on April 16, 2015, I&E filed a letter indicating that it had no response.

After consideration of the Notice of Intervention, Public Statement, and responses, the intervention of Mr. Sobiech was granted. *See April 23 Order*. Mr. Sobiech was given until May 13, 2015, to file an *Amicus Curiae* brief and the other Parties an additional ten (10) days thereafter to file reply briefs.[[4]](#footnote-5)

On May 13, 2015, Mr. Sobiech filed an *Amicus Curiae* brief. On

May 22, 2015, Pa. G&E filed a reply to the *Amicus Curiae* brief. On May 26, 2015, the Joint Complainants filed a reply to the *Amicus Curiae* brief.

The record in this case was closed on May 26, 2015, when the replies to *Amicus Curiae* briefs were submitted. By Initial Decision issued June 30, 2015, the presiding ALJs recommended approval of the Settlement in its entirety, without modification, and concluded that approval of the Joint Petition and Settlement was in the public interest. I.D. at 7. The Exceptions and Replies to Exceptions were filed thereafter.

**DISCUSSION**

**Legal Standards**

This Commission has a policy of encouraging settlements. *See* 52 Pa. Code § 5.231(a); *also* 52 Pa. Code §§ 69.401 *et seq*., relating to settlement guidelines for major rate cases, and our Statement of Policy relating to the Alternative Dispute Resolution Process (Mediation), 52 Pa. Code § 69.391, *et seq*. Settlementslessen the time and expense that Parties must expend litigating a case and, at the same time, conserve administrative resources. This Commission has stated that results achieved through settlement are often preferable to those achieved at the conclusion of a fully litigated proceeding. 52 Pa. Code § 69.401.

This Commission’s evaluation of whether to approve a settlement is not based on a “burden of proof” standard, as is utilized for contested matters. *See* I.D. at 15; *Pa. PUC, et al. v. City of Lancaster - Bureau of Water*, Docket Nos. R-2010-2179103, *et al*. (Order entered July 14, 2011), at 11.[[5]](#footnote-6) The Commission must review proposed settlements to determine whether the terms are in the public interest. *Pa. PUC v. York Water Co*., Docket No. R-00049165 (Order entered October 4, 2004); *Pa. PUC v. C.S. Water and Sewer Assocs.*, 74 Pa. P.U.C. 767 (1991); *Pa. PUC LBPS v. PPL Utilities Corporation*, Docket No. M-2009-2058182 (Order entered November 23, 2009); *Pa. PUC v. Phila. Gas Works*, Docket No. M-00031768 (Order entered January 7, 2004); *Warner v. GTE North, Inc*., Docket No. C-00902815 (Order entered April 1, 1996); 52 Pa. Code § 69.1201.

We evaluate whether a proposed settlement satisfies the “public interest” standard by a preponderance of the evidence of benefits, and such burden can be met by showing a likelihood or probability of public benefits that need not be quantified or guaranteed. *Popowsky v. Pa. PUC*, 594 Pa. 583, 937 A.2d 1040 (2007) (*Popowsky*) (“substantial” public interest standard discussed in the context of a merger reviewed under Section 1103 of the Code, 66 Pa. C.S. § 1103). The pertinent inquiry of a reviewing court in the context of the analysis of the public interest of Section 1103 of the Code, *supra*, is stated as follows:

In summary, as indicated in [*City of York*](http://www.lexis.com/research/buttonTFLink?_m=189f8ae45877d46c6f56f559107faa6d&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b594%20Pa.%20583%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=110&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b449%20Pa.%20136%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzt-zSkAb&_md5=5b248d8ec02e01a6a662663dd52b614a)*,* the appropriate legal framework requires a reviewing court to determine whether substantial evidence supports the Commission's finding that a merger will affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way. In conducting the underlying inquiry, the Commission is not required to secure legally binding commitments or to quantify benefits where this may be impractical, burdensome, or impossible; rather, the PUC properly applies a preponderance of the evidence standard to make factually-based determinations (including predictive ones informed by expert judgment) concerning certification matters.

*Popowsky*, 594 Pa. at 611, 937 A.2d at 1057.

This Commission has historically defined the public interest as including ratepayers, shareholders, and the regulated community. *See* [*Pa. PUC v. Bell Atlantic-Pennsylvania, Inc.*, Docket No. R-00953409 (Order entered September 29, 1995).](http://www.lexis.com/research/buttonTFLink?_m=61ce868366ad7f2d1aa43dd057107ec5&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2008%20Pa.%20PUC%20LEXIS%20689%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=17&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b1995%20Pa.%20PUC%20LEXIS%20193%2cat%2034%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=27&_startdoc=21&wchp=dGLzVzt-zSkAz&_md5=e81fc73a633f87cfde4afd3daa047b96) What is in the public interest is decided by examining the effect of the proposed Settlement on these “stakeholder” entities. *Id*. The public interest is best served, however, by ensuring that the underlying transaction complies with applicable law. *See Dauphin County Indus. Dev. Auth. v. Pa. PUC*, 2015 WL 5238841, 2015 Pa. Commw. LEXIS 381 (September 9, 2015) (Commonwealth Court Order reversing Commission approval of a joint settlement due to the Court’s plenary review and disapproval of the Commission’s interpretation of Section 2807(f)(5) of the Act, 66 Pa. C.S. § 2807(f)(5)).[[6]](#footnote-7)

Additionally, we note that the statutory provisions of Sections 501 and 2809 of the Code, 66 Pa. C.S. §§ 501, 2809, apply to this Commission’s regulation of EGS companies. *See, e.g., Comm. of Pa., et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Order entered December 18, 2014) (*IDT Order*). We have recently, in the *IDT Order*, interpreted our general authority pursuant to Section 501 of the Code, to apply to, *inter alia*, billing and other disputes arising between an EGS and a customer. As a general rule, the interpretations of the agency charged with a statute’s administration and execution are entitled to great weight and the Legislature is presumed to favor public interests over private interests. *See, e.g., Chappell v. Pa. PUC*, 425 A.2d 873 (Pa. Cmwlth. 1981); *also* *Muscarella v. Comm. of Pa.*, 87 A.3d 966 (Pa. Cmwlth. 2014), citing *Community Car Pool Service, Inc. v. Pa. PUC*, 533 A.2d 491 (Pa. Cmwlth. 1987); *Carol Lines, Inc. v. Pa. PUC*, 477 A.2d 601 (Pa. Cmwlth. 1984); 1 Pa. C.S. §§ 1921(c)(8), 1922(5).

In furtherance of the statutory provisions of the Code that are applicable to this Commission’s review of settlements, we have, as cited above, promulgated detailed Regulations which specifically identify those standards and considerations that will govern our review. Pursuant to the *Commission Settlement Guidelines*, it is noted that “these factors and standards will be utilized by the Commission in determining if a fine for violating a Commission order, regulation, or statute is appropriate, as well as if a proposed settlement for a violation is reasonable and approval of the settlement agreement is in the public interest.” 52 Pa. Code § 69.1201(a). These guidelines further state that “when applied in settled cases, these factors and standards will not be applied in as strict a fashion as in a litigated proceeding. The parties in settled cases will be afforded flexibility in reaching amicable resolutions to complaints and other matters so long as the settlement is in the public interest.” 52 Pa. Code § 69.1201(b).

Based on the foregoing, we shall review the Initial Decision, the Exceptions and Replies to Exceptions, and give due consideration to the concerns raised by

Mr. Sobiech according to the above-cited statutory provisions and Commission Regulations.

**Terms of the Settlement**

The Settlement includes three primary subject areas: 1) refunds; 2) penalties and contributions to Hardship Funds; and 3) injunctive relief. The text of the Settlement’s terms, with the original paragraph numbers maintained, is set forth and discussed in detail at pages 17-32 of the Initial Decision (pp. 8-31 of the Settlement).

We summarize the terms and conditions of the Settlement, drawing heavily from the summary provided in the Initial Decision.

**Refund Pool**

The Settlement provides that Pa. G&E will agree to pay the total sum of $6,836,563 into a refund pool (Refund Pool), which will provide a funding source for refunds and/or credits to eligible customers. This amount includes $4,511,563 that the Company has previously, voluntarily paid in cash refunds to customers and an additional $2,325,000 that will be included in the Refund Pool on the effective date of the Commission’s Order in this proceeding. I.D. at 37.

Pursuant to the Settlement, the OAG and OCA will determine which customers were affected by Pa. G&E’s conduct that is the subject of the Complaint and determine how much restitution to offer the affected consumer based on that customer’s usage, price charged, and refund amount already received. I.D. at 37.

The Settlement also provides for the establishment of a third-party administrator to manage and distribute the refunds from the Refund Pool. I.D. at 37. The first $100,000 of administrative costs and expenses of the Refund Pool’s administration will be paid by Pa. G&E. *See* Settlement ¶ 35. Thereafter, the costs of administration will come from the Refund Pool itself. *Id*. The Refund Pool administrator will use its best efforts to distribute the funds from the pool within 180 days of the Commission’s final order in this proceeding. The administrator will provide monthly reports to the OAG, the OCA, the Company and designated Commission staff, until all fund monies are distributed and the fund is exhausted and terminated. I.D. at 37-38. “Commission staff,” as used in the Settlement, was interpreted by the presiding ALJs to include, at a minimum, the Commission’s Bureau of Consumer Services (BCS) and the Office of Administrative Law Judge, which are the two offices that handle informal and formal consumer complaints. It was recommended that these offices should be made aware of the distributions from the Refund Pool. I.D. at 38.

Any funds remaining in the Refund Pool after all disbursements are issued to eligible consumers will be divided and distributed to the appropriate EDCs’ hardship fund on a *pro rata* basis. The distribution to the appropriate hardship fund will be made pursuant to an allocation that is to be determined based on the ratio of the Company’s customers in the EDC’s territory to the total amount of customers of the Company in Pennsylvania as of January 1, 2014. I.D. at 38. Any unclaimed funds in the Refund Pool will be forwarded to the Pennsylvania Department of the Treasury for disposition pursuant to the unclaimed property procedures for those customers who are entitled to a refund. The Settlement also requires that the Company honor all commitments to customers enrolled in the Company’s rebate programs and additionally provides that customers can contact Pa. G&E directly with any requests for a refund. *Id*.

This Commission finds it significant to observe, at this juncture, that an affected customer will have other options to pursue a refund in addition to the Refund Pool according to the terms of the Settlement should that consumer not be satisfied with the offer arrived at by the OAG/OCA. TheSettlement states as follows:

42. Additional Refund Method – Any customer of the Company that does not receive or accept an offer of funds from the Refund Pool pursuant to ¶¶ 33, 34 and 38 hereto shall be entitled to seek a refund as follows:

a. The customer may contact the Company directly with complaints and request for a refund.

b. The Company shall use its best efforts to investigate the customer’s complaint.

c. The Company shall use its best efforts to negotiate an agreement pursuant to which the customer will agree to accept a refund from the Company in exchange for the release [sic] any claims or causes of action that the customer has or may have against the Company.

d. If the customer is not satisfied with the Company’s investigation and/or the Company’s settlement offer, the customer may file a formal complaint with the Pennsylvania Public Utility Commission.

e. For one year after the Commission’s final order in this proceeding, the Company shall provide quarterly reports to the [Bureau of Consumer Protection], OCA and designated Commission staff, setting [forth] the names of the complainants, the general nature of the complaints, and the disposition thereof.

Settlement at ¶ 42.

In addition to the foregoing, the Settlement contains a provision, ¶ 43, that requires that customers who receive payment from the Refund Pool sign a “release of claims,” discharging Pa. G&E from any and all claims arising from, or related to, the conduct alleged in the Complaint. I.D. at 38. The Settlement also requires that the Settling Parties to the proceeding sign a similar release. *Id*.[[7]](#footnote-8)

The terms and condition of the Settlement regarding the signing of a general release are, as noted, the major concern of Mr. Sobiech in his request to intervene and in his Exceptions, *infra*. The ALJs, after discussing the overall context in which the release would be a part of the Settlement, recommended that this provision of the Settlement be approved as in the public interest. I.D. at 39-43.

**Civil Penalty and Contribution to EDC Hardship Funds**

Pursuant to the terms of the Settlement, Pa. G&E will agree to the imposition of a civil penalty in the amount of $25,000, which it will not be entitled to claim as a tax deduction. I.D. at 44, citing Section 3301 of the Code, 66 Pa. C.S. § 3301. The civil penalty was considered in conjunction with the Company’s agreement to also contribute the amount of $100,000 to the respective EDC’s hardship fund. I.D. at 45. According to ¶ 46 of the Settlement, Pa. G&E will make a total contribution of $100,000 to the EDCs’ hardship funds that shall be allocated by the ratio of Pa. G&E customers in the EDC’s service territory to the total amount of Pa. G&E customers in Pennsylvania as of January 1, 2014.

**Injunctive Relief**

According to the section of the Settlement entitled, “Injunctive Relief,” the Company, in addition to complying with all Commission Orders, Regulations, and policies, commits to implement several, significant, modifications to its business practices for all residential and small business customers. The areas in which Pa. G&E will make the modifications include, but are not limited to: 1) Product Offerings; 2) marketing; 3) revisions to the Company’s Disclosure Statement; 4) revisions to the Company’s third party verification procedures for switching customers; 5) training of internal and external sales representatives; 6) compliance monitoring; and 7) customer service procedures. *See* I.D. at 46-50.

The overall changes to Pa. G&E’s business practices are comprehensive and designed to enhance and improve upon the quality of the Company’s existing customer service. For, example, the Company will agree not to sell variable rate EGS supply products in Pennsylvania for a period of eighteen months, beginning March 1, 2015. During this period, Pa. G&E will only offer fixed rate products pursuant to which the customer’s price will be fixed for a period of six-months or longer. *See* Settlement at ¶ C.47.a.1.

Also, under the terms of the Settlement, Pa. G&E will agree to various changes in its business operations. These changes include, *inter alia*, voluntarily adopting response and performance metrics for reasonably timely customer access to a “live” customer service representative, whether the customer seeks such access via telephone and/or e-mail. The Company will commit to maintain an average hold time for consumers calling the Company of no more than ten (10) minutes. *See* Settlement at ¶ C. 47.h.2.(i)-(iv). Customer e-mails will be answered within twenty-four (24) hours, unless sent on weekends or holidays, in which case the response time shall be within 24 hours of the first business day following the weekend or holiday. The Company commits to provide responses to voice mail messages left on its customer service, toll-free number, outside of normal business hours, not later than 24 hours after the message was left, unless the message is left on a weekend or holiday, in which case the call shall be responded to within 24 hours of the first business day following the weekend or holiday; responses to all inquiries made by letter are to be made within five (5) business days of receipt of said letter.  *Id*.

Pursuant to the Settlement, the Company’s marketing agents and/or employees have agreed to a prescribed “script” that specifically sets forth the information that is to be relayed to the consumer during the marketing or solicitation phase for that customer. For example, according to the terms of the Settlement, the Company’s employees, agents, salespersons, or marketers, will inform the potential customer as follows:

9. Every communication by a PaG&E representative with a potential customer shall begin with the sales representative stating: My name is [Sales Representative’s Name]. I am calling on behalf of Pennsylvania Gas & Electric. PaG&E can provide you with your electricity. I do not work for or represent your electric utility.

10. During sales calls, PaG&E representatives shall inform customers that if they switch, they will continue to receive one bill for electricity, from the utility and that the bill will include distribution charges from the utility and generation/transmission charges from PaG&E.

11. If PaG&E offers variable rate products to residential and small business consumers in the Commonwealth, after the time period set forth in Paragraph 47(a)(1) above, the PaG&E salesperson must state the following during any of its variable rate sales contacts:

After \_\_\_ month(s) [if Introductory Price period is applicable], the price you pay under this variable rate contract can change every month.  This is not a fixed rate contract.  Variable means the price can go up or down. There is no limit on how high the price can go.

Settlement at C.47.b.¶¶ 9-11.

Additionally, the Settlement obligates Pa. G&E to provide significant details in its Disclosure Statements regarding the variable rate products that it will offer so as to enable consumers to engage in thorough and informed decision making concerning the Company’s services. Pa. G&E agrees to provide a statement of the average price per kWh, as required by 52 Pa. Code § 54.7(b)(2), and also include 24 months of price data for purposes of calculating the average price per kWh. The disclosure information will be included in all of Pa. G&E’s variable rate product marketing materials that offer terms of service for acceptance by residential and small business consumers and in the Company’s welcome documents to consumers that have enrolled in variable rate products. *See* Settlement at C.47.b.¶¶ 14-20; *also* C.47.4.d.

If the Company offers variable rate products after the time period specified in the Settlement during which it has agreed to only offer fixed rate products, Pa. G&E also agrees to provide a statement of the total impact of its average price under the program for the levels of monthly usage at 500 kWh, 1,000 kWh and 2,000 kWh. The information disclosed is to be organized according to a chart specimen included in the Settlement that is presented in a form easily read and understood by the consumer. *See* Settlement at C.47.b.¶ 20; *also* C.47.4.d.

The Settlement adds additional protocols to be observed by Pa. G&E’s sales and marketing employees and/or agents, and further obligates the Company to use scripted language, questions, and statements, concerning the third party verification process. *See* Settlement at C.47.c.

In summary, the Injunctive Relief section of the Settlement includes wholesale revisions to Pa. G&E’s business practices that are designed to bring the Company into further compliance with both the letter and the spirit of Commission Regulations and statutory provisions pertaining to EGS companies and the products they offer.

**Miscellaneous**

The Settlement includes qualifying and conditional language and terms whereby the Settling Parties stipulate that they have agreed to the provisions of the Settlement without admission of guilt or liability. I.D. at 32. The Parties expressly reserve the right to withdraw from the Settlement if any of its terms are modified. *Id*. The Parties reserve their right to continue litigation if the Commission does not approve the Settlement. They also state that the Settlement is made without any admission against, or prejudice to, any position which any Settling Party may adopt in subsequent litigation. *Id*.

Finally, the Parties agree that the Settlement does not preclude them from taking other positions in separate proceedings involving an EGS company relative to that company’s marketing and billing practices. I.D. at 32*.*

**Positions of the Parties**

Each of the Settling Parties expressed their reasons for support of the Settlement based on considerations of the public interest. A summary of the positions of the Parties, borrowing heavily from the Initial Decision, is as follows:

**Joint Complainants**

In their Statement in Support, the Joint Complainants provided an extensive summary of their litigation position and also provide background information concerning the volume and nature of consumer complaints that led to the filing of the Complaint. The Joint Complainants contended that the Commission’s approval of the Joint Petition is in the public interest because the terms and conditions of the Settlement satisfactorily address the broad range of issues raised in the Complaint and that the Settlement, taken as a whole, constitutes a reasonable compromise of the complex issues presented. I.D. at 33.

The Joint Complainants further explained that the Settlement supports and promotes the continued development of the electric retail choice market in Pennsylvania. They highlight the Settlement’s terms and conditions under which Pa. G&E will increase the provision of full and accurate information and disclosures to consumers, as well as implement fair and transparent marketing and billing practices. These concessions achieved by the Settlement are of paramount importance both to consumer protections and the continued development of a retail electricity choice market. The Joint Complainants add that the Settlement is in the public interest because the benefits to amicably resolving the disputed issues through mutual agreement outweigh the risks and expenditures of continued litigation, given the inherent unpredictability of the outcome of a contested proceeding.

The Joint Complainants include in their Statement in Support, an analysis and summary of the Commission’s criteria set forth in the *Commission’s Settlement Guidelines*, referenced by the Parties as “*Rosi Factors*,”[[8]](#footnote-9) to argue for approval of the Settlement as consistent with the criteria. Their position is based on an assessment of the conduct by

Pa. G&E that is involved in the Complaint and the Company’s demonstrated willingness to remediate the concerns that were raised in the litigation. *See* Settlement, Appendix A at 9‑16.

The Joint Complainants conclude their Statement in Support with a summary of the Injunctive Relief provisions agreed to in the Settlement. They state, “These modified practices should lead to more fully informed consumers and correspondingly, a better functioning retail choice market.” Settlement, Appendix A at 25.

**Pa. G&E**

In its Statement in Support of the Settlement, Pa. G&E explains that approval of the Joint Petition is in the public interest and that the Settlement should be adopted without modification because it is significant both in its scope and precedential nature as the first resolution of a series of similar complaints brought against other EGSs by the Joint Complainants. *See* Settlement Appendix B, at 1.

Pa. G&E also takes the position that the Settlement meets the criteria under which the Commission will approve settlements alleging violations of the Commission’s Regulations and the Code. However, the most significant aspects of the Settlement, explains the Company, go beyond the criteria enumerated in the Commission’s Policy Statement. Settlement Appendix B, at 2. Those considerations are: 1) the refunds and injunctive relief will be provided to consumers much sooner pursuant to the Settlement instead of through the uncertainties and delays inherent in administrative and appellate litigation; and 2) the Settlement provides a model for resolution of similar disputes in the EGS industry, thus potentially multiplying the substantial public benefits generated by the Settlement. Settlement Appendix B, at 2-3.

Pa. G&E concludes its Statement in Support by providing an analysis of the *Commission’s Settlement Guidelines* to the facts of the instant litigation. The Company, based on consideration of those factors, submits that the Settlement is in the public interest and should be approved without modification. *See* I.D. at 34.

**I&E**

I&E takes the position that the Joint Petition is in the public interest and should be adopted without modification because it will resolve all issues related to the Joint Complaint involving allegations of the Company’s inappropriate sales, marketing, billing and disclosure practices. And, the Company has been cooperative and proactive in identifying corrective actions that can enhance the experience of customers and reduce the risk of similar consumer complaints in the future. *See* I.D. at 35.

I&E further noted that the Settlement is in the public interest because it serves to maintain the integrity of the retail electric generation market in Pennsylvania. I&E cites the refund provisions of the Settlement, the contribution to be made to the appropriate EDC’s hardship fund, the civil penalty, and the various injunctive relief provisions, as reasons why it believes that the Settlement is in the public interest and should be approved without modification. I.D. at 35.

I&E also discussed the various factors considered by the Commission with regard to the propriety of imposing civil penalties. I&E finds it particularly important that Pa. G&E has agreed not to offer variable rate plans for a period of eighteen (18) months. During this period, the Company will only offer fixed rate products to consumers. Also, the substantial total amount of refunds, in the opinion of I&E, serves as a sufficient deterrent to the Company from future violations. I.D. at 35.

I&E concludes its Statement in Support by observing that reasonable settlement terms can represent economic and programmatic compromise but allow the parties to move forward and to focus on implementing the agreed upon remedial actions. I&E explains that the Settlement is in the public interest because it avoids the necessity of further administrative and potential appellate proceedings at substantial cost to the parties. For the foregoing reasons, I&E requested that the Settlement be approved in its entirety without modification. I.D. at 35.

**OSBA**

The OSBA neither joined nor opposed the Settlement.

**Mr. Sobiech**

As noted, Mr. Sobiech filed a Notice of Intervention and Public Statement.[[9]](#footnote-10) He also submitted an *Amicus Curiae* brief in this proceeding.

In the Public Statement, Mr. Sobiech expressed opposition to Commission approval of the Settlement and asserted that approval would, unlawfully, exceed the authority of this agency. Additionally, he criticized the Settlement and cited the *IDT Order* in support of his argument that the Commission has held that it does not have jurisdiction to interpret a private contract in a dispute between a customer and an EGS. Based on this consideration and other concerns, Mr. Sobiech objects that the Settlement is not in the public interest and should not be approved as submitted. We note that Mr. Sobiech, in his Exceptions, states that he does not object to the agreed-to changes in the way Pa. G&E proposes to conduct business in Pennsylvania. *See* Exceptions (Exc.) at 4.

The essence of Mr. Sobiech’s position is that, based on the lack of Commission jurisdiction to interpret or determine whether a private contract has been breached, the agency, therefore, does not have the ability to release the private contract claim that could, potentially, be the subject of his class action lawsuit. Also, Mr. Sobiech argues that neither does this Commission, as an administrative agency, have the authority to require that the Company’s aggrieved customers waive their right to pursue a private breach of contract claim against Pa. G&E in exchange for partaking in the Settlement. *See, e.g.,*

Public Statement at 3.

Mr. Sobiech also expresses concern over the precedent that the Commission’s approval of the Settlement would have on the EGS industry in Pennsylvania. Mr. Sobiech references the statements of Pa. G&E in support of the Settlement that explain that expedited approval is in the public interest as the proposed Settlement in this Complaint could provide a “model” or “template” for the resolution of other proceedings. This position is based on the fact that the Settlement is the product of extensive negotiations between an EGS industry leader and the Pennsylvania public advocates. *See* Public Statement at 3-4.

Mr. Sobiech levels harsh criticism towards the potential precedential aspect of the Settlement as stated in the Statement in Support of Pa. G&E. Mr. Sobiech characterizes the Settlement as a “sweetheart” deal that could have the unfavorable effect of setting the stage for other, similar, settlements that require the EGS companies to pay, in Mr. Sobiech’s opinion, a fraction of the damages for which they could be liable in exchange for releasing them from any other private actions by Pennsylvania customers. *See* Public Statement at 4.

Mr. Sobiech additionally opposes the Settlement because, in his opinion, the Settlement is overly vague in three areas: 1) the Settlement fails to identify which customers are entitled to relief; 2) fails to identify how many customers are entitled to relief; and 3) fails to identify the guidelines and procedures by which it will be determined which

Pa. G&E customers will be entitled to relief. *See* Public Statement at 4-5.

In addition to vagueness, Mr. Sobiech opposes the Settlement and argues that it is deficient in three areas. He argues that: 1) the Settlement fails to establish the amount of money that Pa. G&E overbilled him, or other customers; 2) fails to identify the timeframe within which customers suffered damage so as to be eligible for relief from the proposed Settlement; and 3) the Settlement amount is deficient in light of the requirement for a general release of a customer’s claim. Public Statement at 4-5.

In his *Amicus* brief, Mr. Sobiech reiterated his objection to the Settlement, again characterizing it as a “sweetheart deal” for the EGS because the refund amount is tied to a release of claims in other jurisdictions. We reprint the pertinent text of the summary of the position of Mr. Sobiech taken from the Initial Decision:

In his *Amicus Curiae* brief, Mr. Sobiech objects to the Settlement arguing that it is a “sweetheart deal” for the EGS because the refund amount is tied to a release of claims in other jurisdictions. Thus, in order for a customer to receive potentially a more expedient refund, he/she must execute a “release of claims” wherein the customer agrees, in exchange for funds, to release, acquit and forever discharge the Company and all of it [sic] current and former officers, shareholders, and employees from any and all claims arising from or related to the conduct alleged in the Joint Complaint. Mr. Sobiech argued that this will have the potential effect of reducing the number of complainants in a federal or state class action against the Company outside the scope of the instant proceeding.

Mr. Sobiech contends the Commission lacks jurisdiction to grant the relief requested. Further, he contends the Settlement is insufficient to show how many customers the company defrauded. Although Mr. Sobiech agrees with Joint Complainants that the resulting consequence of the conduct at issue was of a serious nature, he is concerned the Company is reluctant to accept responsibility for the resulting consequences of its conduct to its customers who faced terminations, shut-offs and economic distress. Mr. Sobiech argued that the proposed civil penalty of $25,000 does little to deter the Company or other EGSs from engaging in similar behavior in the future. Also, in citing to the Stipulation of Facts in Support of the Settlement that accompanied the Settlement, Mr. Sobiech contends the refunds are inadequate and do not completely reimburse customers for their financial losses sustained as a result of the misconduct. Mr. Sobiech further contends that the Joint Petition impermissibly gives access to refunds to only those customers of the Company on a variable rate plan during the months of January – March, 2014 for relief from misconduct, to the exclusion of all other customers of PaG&E.

Mr. Sobiech further contends that the internal corrective action plan may help to prevent the conduct alleged from occurring again, but there needs to be a more substantial civil penalty in order to assure the misconduct does not reoccur. Mr. Sobiech argued that the Company has already shown a poor compliance history with Commission regulations regarding slamming in the case of *Pa. Pub. Util. Comm’n v. Energy Service Providers d/b/a Pa. G&E,* Docket No. M-2013-2325122, slip op. (Pa. PUC Oct. 2, 2014), 2014 Pa. PUC LEXIS 707. Therefore, Mr. Sobiech contends the Settlement as a whole is not in the public interest. As discussed further below, Mr. Sobiech also discussed each of the factors that the Commission uses to examine whether a Settlement is in the public interest.

I.D. at 35-36.

Based on the foregoing, Mr. Sobiech opposed Commission approval of the Settlement as it was structured.

**ALJs’ Recommendations**

On review and consideration of the positions of the Parties in this matter, and on application of the *Commission* *Settlement Guidelines*, ALJs Barnes and Cheskis recommended that the Commission approve the Settlement without modification. *See* I.D. at 32-57. The particular concerns in opposition to adopting the Settlement, as raised by Mr. Sobiech, were rejected.

We reprint the essential Findings of Fact for purposes of our discussion and review, below, noting that Finding of Fact Nos. 22-36, will be reprinted below in connection with our discussion and disposition of Mr. Sobiech Exception No. 3, *infra*:

3. On June 20, 2014, the Joint Complainants filed a formal Complaint at Docket No. C-2014-2427656 against PaG&E averring that they had received numerous contacts and complaints from consumers related to variable rates charged by PaG&E, including approximately 23 formal complaints filed by consumers at the Commission and that these complaints alleged, *inter alia*, that: (i) customers received bills with rates for electric generation supply from PaG&E that were higher than the rates offered by local utilities even though the Company had solicited the customers’ business through promises of rates that would be lower than those of the local utilities; (ii) the customers were switched to receiving their electric generation supply from PaG&E without the customers giving consent to do so; and (iii) PaG&E mishandled customer complaints. Exh. A.

4. The Joint Complainants averred that PaG&E offers variable rate electric generation service to customers and uses a variety of marketing and advertising mediums to solicit residential customers for its variable rate plans, including telephonic, internet, mass direct mail, and print solicitations.

5. Joint Complainants averred seven separate counts against PaG&E, including, but not limited to, making misleading and deceptive promises of savings, slamming and failing to provide accurate pricing information, and made several requests for relief, including providing restitution and prohibiting deceptive practices in the future.

\* \* \*

9. On July 10, 2014, PaG&E filed an Answer and New Matter in response to the Complaint admitting or denying the various averments made by the Joint Complainants, including, in particular, denying that any of its actions violated Pennsylvania law or the orders and regulations of the Commission or that it misled or deceived any of its customers regarding the price customers would pay for their electricity to their harm or detriment and that, on the contrary, its variable pricing followed the wholesale price of electricity in precisely the manner disclosed by PaG&E and agreed to by its customers. Exh. A.

10. In its New Matter, PaG&E averred, among other things, that the Commission previously reviewed and approved PaG&E’s Disclosure Statement and that PaG&E’s pricing was consistent with the Disclosure Statement, except to the extent that PaG&E charged some customers less than called for under the terms of the Disclosure Statement and voluntarily absorbed extremely high wholesale electricity prices during the unprecedented “polar vortex”1 experienced in January, February, and March of 2014. PaG&E averred thirteen affirmative defenses and requested that the Commission dismiss the Joint Complaint with prejudice. Exh. A.

1 A polar vortex is a system of upper-level winds that circle around one of the poles. In the northern hemisphere, the arctic polar vortex interacts extensively with the polar jet stream and may affect weather patterns at mid-latitudes. When the arctic polar vortex is strong, it acts to contain the coldest air masses in the polar regions favoring periods of milder winter temperatures in northern North America, Europe and Asia. When the winds of the polar vortex weaken, however, or interact with high-amplitude wave patterns in the jet stream, the shape of the vortex may become distorted. The circulation pattern around the pole may become increasingly asymmetrical, elongated and, in more extreme cases, may even split into two or more patterns. When this happens large incursions of arctic air may follow southward pointing lobes of the jet stream into mid-latitudes causing a period of colder than normal winter temperatures. http://climatechange.cornell.edu/what-is-a-polar-vortex.

\* \* \*

19. On November 7, 2014, the Joint Complainants pre-served written direct testimony of over two hundred consumers. Exh. A.

20. The pre-served Customer Witness statements include the witnesses’ signed verifications that the facts set forth in their statements were true and correct to the best of their knowledge, information and belief and the statements were verified subject to the penalties of Section 4904 of the Crimes Code, 18 Pa.C.S. §4904, relating to unsworn falsification to authorities. Exh. A.

21. Most of the Customer Witness statements contain complaints about PaG&E’s charges for electric generation service provided during the period January – March 2014. Exh. A.

\* \* \*

39. On January 26, 2015, PaG&E filed a motion to strike each Customer Witness’ statement in part and several statements in their entirety. Exh. A.

40. A Further Prehearing Conference was held on January  27, 2015.

41. On February 12, 2015, the parties indicated that a Settlement in principle had been reached and requested that the litigation schedule be suspended.

43. A Further Prehearing Conference was held on February 24, 2015 to discuss the various procedural aspects pertaining to the Settlement in principle.

44. Because a Settlement in principle was reached in this matter before Joint Complainants’ response to PaG&E’s motion to strike was due and hearings for the cross-examination of the Customer Witnesses were convened, the presiding officers have not yet ruled on PaG&E’s motion to strike and it is now moot, and the Joint Complainants have not moved into the record the written direct testimonies of the Customer Witnesses. Exh. A.

45. If a settlement had not been reached between the signatory parties and hearings would have been held: (a) Joint Complainants would have moved for admission of the Customer Witnesses direct testimony into the record; (b) PaG&E would have challenged the admissibility and accuracy of the allegations made by the Customer Witnesses through cross-examination exhibits; (c) Joint Complainants would have served and moved into evidence expert testimony in support of the Joint Complaint; and (d) PaG&E would have served and moved into evidence factual testimony, expert testimony, and other evidence in support of its defenses. Exh. A.

46. On March 24, 2015, PaG&E, the Joint Complainants and I&E submitted a Joint Petition for Approval of Settlement with each of the parties including with the Joint Petition Statements in Support of the Settlement.

47. Although the OSBA is a non-signatory party, it filed a letter of non-opposition.

48. On March 27, 2015, Thomas Sobiech, a former customer of PaG&E, filed a Notice of Intervention and Public Statement averring that the Commission lacks jurisdiction to approve the Settlement and that it is not in the public interest.

I.D. at 8-14.

**ALJs’ Recommendation – Refund Pool**

ALJs Cheskis and Barnes concluded that the provisions in the Settlement which addressed the creation and administration of a Refund Pool were in the public interest. *See* I.D. at 37-43. After a thorough discussion of recent Commission proceedings involving formal complaints against EGS companies, the ALJs concluded that the Refund Pool and its process to give financial relief to consumers who voluntarily agree to participate, was in the public interest and consistent with the Commission’s *IDT Order*, the Commission’s Order in *Pa. PUC, Bureau of I&E v. Energy Services Providers, Inc. d/b/a Pa. Gas and Electric and U.S. Gas and Electric d/b/a Pa. Gas and Electric*, Docket No. M-2013-2325122 (Order entered October 2, 2014) (*October 2014 Order*), as well as other Commission precedent. I.D. at 41.

The ALJs duly acknowledged the concerns raised by Mr. Sobiech regarding the signing of a general release as a condition of obtaining payment from the Refund Pool. The ALJs rejected the objections and position of Mr. Sobiech that the inclusion of the provision (Paragraph # 43 of the Settlement), regarding the signing of a general release was an impediment to Commission approval of the Settlement without modification. The pertinent reasoning of the ALJs concerning the Refund Pool, its operation, and the primary objections of Mr. Sobiech, is reprinted below:

With regard to Mr. Sobiech’ s contention that it is not in the public interest to require the harmed customers of PaG&E to sign releases in order to receive a refund under this Settlement agreement, we disagree. If a customer is an active plaintiff in a separate proceeding (*i.e*. averring breach of contract) against PaG&E, he or she has the choice of 1) receiving the refund amount offered to him/her as determined by the third party Administrator of the Refund pool in the instant case and releasing PaG&E from further claims against the company, or 2) refusing the offered refund amount and pursuing a separate claim in another concurrent jurisdiction, *i.e.*, federal or state trial court. That decision is at the discretion of the consumer. Some consumers might want the more expedient resolution by accepting a refund amount from the Administrator of the Refund Pool. Others may hold out for a resolution in a separate lawsuit.

Admittedly, the Commission does not normally require as a part of refund relief, that a *pro se* residential or small business customer sign a release of claims in order to receive a refund. We are not compelled to delve deeply in to the mechanics or functioning of the refund pool, especially in light of the overall benefits provided in the remainder of the Settlement. This is a unique complaint in that the OAG and OCA are statutory advocates for consumers in Pennsylvania and the Joint Complainants in this case. They have negotiated a large lump sum refund pool amount for the benefit of those customers that complained directly to OAG or OCA about PaG&E, as well as other aggrieved customers who may not have come forward yet. However, other than Mr. Sobiech, no individual customers of PaG&E have intervened in the instant case. Some may have pending disputes in other jurisdictions or even before the Commission in the informal or formal stage. Whether this release clause would be enforceable in another jurisdiction if a customer both accepted the refund, and then also pursued a separate cause of action despite having signed the release, is an issue for another jurisdiction.

Normally, the Commission does not require customers to waive any other rights the party may have to pursue criminal charges or civil causes of actions they might have against a utility as a contingency to receiving a refund. However, nothing precludes a party from agreeing to perform under a settlement that which the party may not necessarily be legally obliged to do under law. *See e.g., Pa.P.U.C., Law Bureau Prosecutory Staff v. PPL Electric Utilities Corporation*, Docket No. M-2009-205812 (Opinion and Order entered September 10, 2009) (*PPL Order*) (approving a settlement prohibiting Friday terminations). It is apparent that the Settlement benefits consumers, although maybe financially not to the extent Mr. Sobiech contends they ought to benefit, it protects PaG&E from some potential future legal claims against the Company and is apparently a manageable enough refund amount such that the Company can continue to conduct business in Pennsylvania. The Settlement may also reduce the size of class action law suits as customers sign the release and collect a refund from the refund pool.

We have no interest in exceeding our authority by attempting to limit any cause of action that may be brought in another jurisdiction, and do not believe that we are doing so by approving the Settlement in its entirety without modification. If a consumer elects to pursue the remedy created in this Settlement or somewhere else, he or she is free to do so. Such a result is within the Commission’s authority to approve as part of a larger settlement.

In the instant case, we find the refund pool is in the public interest because those consumers who paid more than they believed that they would be required to pay for electric generation service based on their interactions with PaG&E will be remunerated for the additional amount they paid above their EDC’s PTC, which is a reasonable amount. It may not be an amount punitive in nature or compensatory for damage claims resulting from the misconduct, but financially reimburses the customers a reasonable amount of money.

In order for the market for the competitive provision of electric generation service to flourish in Pennsylvania, consumers must have confidence that the price they are paying is the price they were told they would be paying. While the Settlement does not provide that the averments in the Complaint are true the Settlement compensates numerous consumers for amounts they believe they were overcharged and provides a level of assurance to the marketplace that the EGSs’ actions will be watched and any inappropriate actions will be raised with the Commission. The Commission takes seriously its role in the development the competitive provision of electric generation service and this Settlement is in the public interest because the refund provisions aid in that development.

As such, we find that the refund provisions contained in the Settlement agreement are in the public interest and support adopting the Settlement in its entirety without modification.

I.D. at 41-43.

**ALJs’ Recommendation – Civil Penalty**

On consideration of those provisions of the Settlement providing for the imposition of a civil penalty and Pa. G&E making a concomitant contribution to the hardship fund, the presiding ALJs also concluded that this condition of the Settlement was in the public interest and should be approved without modification. I.D. at 44.

The presiding ALJs reviewed recent Commission decisions concerning civil penalties involving EGS companies and concluded that the Settlement amount in the instant proceeding was consistent with prior Commission decisions approving civil penalties on EGS companies for similar violations of the Code and Commission Regulations. The ALJs reasoned, in pertinent part:

In particular, we note that, in the *October, 2014 Order*,[[10]](#footnote-11) the Commission found that a civil penalty of $1,000 for the 108 accounts physically switched to PaG&E without customer consent, for a total of $108,000 was appropriate. This amount was similar to the Commission’s decision in cases involving slamming intentional in nature where $1,000 civil penalties per account switched were imposed. *Pa. Pub. Util. Comm’n v. I Energy Inc.*, Docket No. M-00021618 (April 18, 2000); *Pa. Pub. Util Comm’n, Law Bureau Prosecutory Staff v. Mxenergy Electric, Inc*., Docket No. M-2012-2201861 (August 29, 2013); *Pa. Pub. Util Comm’n, Bureau of Investigation and Enforcement v. Public Power, LLC* Docket No. M-2012-2257858 (December 19, 2013) (penalties less than $1,000 per account were levied for accounts not yet physically switched, but in the process).

Similarly, in *Pa. Pub. Util. Comm’n Bureau of Investigation and Enforcement v. IDT Energy, Inc.,* M-2013-

2314312 (Opinion and Order entered October 17, 2013) (*IDT 2013 Order*), the Commission approved a settlement between I&E and IDT Energy, LLC. That case was initiated after an informal investigation which identified thirty-nine violations among twenty-one Bureau of Consumer Services (BCS) complaints between 2010 and 2012. In three instances, an agent or agents of the Company failed to obtain direct oral confirmation or written authorization from the customer to change the EGS, resulting in physically switching the electric generation supplier of those accounts without authorization of the consumer or without proper verification. The Commission directed IDT to pay a civil settlement amount of $39,000 to the Commonwealth General Fund.

With regard to the provision in the Settlement that the Company will make a total contribution of $100,000 to the EDC’s Hardship Funds with the contribution allocated by the ratio of PaG&E customers in the EDC’s territory to the total amount of PaG&E customers in Pennsylvania as of January 1, 2014, we find this provision of the Settlement is also in the public interest and supports adopting the Settlement without modification. This is particularly true because of the strain placed on Hardship Funds and low-income consumers as a result of the increased bills consumers paid during the months at issue in this case. The Hardship Funds benefit all low-income consumers in the EDCs’ territories, not solely the customers of PaG&E.

As a result, we find the $25,000 civil penalty taken in consideration with a $100,000 contribution to EDCs’ Hardship Funds to be reasonable and a pragmatic compromise between the parties allowing them to more expeditiously implement the agreed upon remedial actions.

I.D. at 44-46.

**ALJs’ Recommendation – Injunctive Relief**

With regard to the Injunctive Relief provisions in the Settlement, the ALJs also found these stipulations favorable and in the public interest. In addition to finding that Commission approval in the present Complaint would be consistent with other administrative decisions that have approved settlements calling for modifications to the respondent-EGS’ business practices, the ALJs further reasoned:

As such, the provisions in the Settlement are responsive to the issues raised in the Joint Complaint and constitute a reasonable resolution of those issues. Section 2807 of the Electricity Generation Customer Choice and Competition Act, for example, requires that “the Commission establish regulations to ensure that an EDC does not change a customer’s electricity supplier without direct oral confirmation from the customer of record or written evidence of the customer’s consent to a change of supplier.” 66 Pa.C.S. § 2807(d)(1). As a result, Section 54.42 of the Commission’s regulations prohibits a licensed EGS from “transferring a customer without the customer’s consent.” 52 Pa.Code § 54.42(a)(9). Additionally, the Commission’s regulations provide standards of conduct and disclosure for EGSs that make EGSs responsible for any fraudulent or deceptive or other unlawful marketing or billing acts performed by the EGS, its employees, agents or representatives. 52 Pa.Code § 54.43(f); *see also*, 52 Pa.Code § 111.12(d)(1) (“a supplier may not engage in misleading or deceptive conduct as defined by State or Federal law, or by Commission rule, regulation or order.”). Finally, the Commission has several regulations requiring the use of “good faith, honesty and fair dealings” and requiring EGSs to investigate a dispute, including providing the consumer with information necessary to make an informed judgment and issue a report within 30 days. 52 Pa.Code §§ 56.1(a), 56.141(a), 56.151 and 56.152. The various provisions of the Settlement are in the public interest and should be adopted without modification because they seek to ensure PaG&E’s compliance with these, and other, Commission regulations.

\* \* \*

Furthermore, the injunctive relief provisions of the Settlement are consistent with other Commission decisions approving settlements that included modifications to a utility’s business practices. In PPL Order, *supra*, the Commission approved a settlement that included, among other things, extensive modifications to customer service representative procedures, call scripts, training and supervision, in addition to the imposition of a civil penalty and contributions to low-income programs. Id. at 11-16. Similarly, in Pa.P.U.C., Law Bureau Prosecutory Staff v. UGI Utilities, Inc., Docket No. C-20066664 (Opinion and Order entered Feb. 6, 2009) (UGI Order), the Commission approved a settlement that required procedural revisions and training and education programs, in addition to the payment of a civil penalty, and other related issues. Id. at 6-8. The provisions included in the Settlement at issue in this proceeding are consistent with these prior Commission decisions.

\* \* \*

As such, we find that the injunctive relief provisions contained in the Settlement agreement are in the public interest and support adopting the Settlement in its entirety without modification.

I.D. at 48-50.

In conclusion, the presiding ALJs considered and applied the *Commission’s Settlement Guidelines*, to recommend approval of the Settlement as in the public interest. *See* I.D. at 50-57.

**EXCEPTIONS AND REPLIES**

In the Initial Decision the ALJs recommend that the Commission approve the Joint Petition for Approval of Settlement. The Joint Petition has, as signatories, the OAG, the OCA, the Commission’s I&E, and Pa. G&E, and proposes a resolution of the above-captioned proceeding.

**Mr. Sobiech’s Exception No.1: The Administrative Law Judges Erred in Permitting the Parties to Include the Provision in the Settlement Agreement Requiring the Company’s Customers to Sign General Releases to Receive Refunds from the Settlement Fund as it is Beyond the Jurisdiction and Practice of the PUC to Adjudicate and/or Interfere With Private Causes of Action Such as Breach of Contract**

In Exception No. 1, Mr. Sobiech reiterates his objection to approval of the Settlement, to the extent the Settlement includes the provision that would obligate the participating customer to sign a release as a condition of receiving refunds from the Refund Pool. Exc. at 2-6.[[11]](#footnote-12)

The arguments of Mr. Sobiech raise the lack of Commission jurisdiction over private causes of action, recently discussed in the *IDT Order*,the reasoning of the ALJs in approving the Settlement wherein the ALJs acknowledged the unprecedented aspect of conditioning the receipt of funds from the Refund Pool on the signing of a release,[[12]](#footnote-13) and the uncertainty of the legal consequences of signing a release concerning potential private causes of action in other forums. Exc. at 2-6.

Mr. Sobiech views it as critical that the ALJs elected not to delve deeply into the mechanics or functioning of the pool in relation to his concerns that approval of the Settlement is not in the public interest based on the Commission’s lack of jurisdiction over private causes of action. Exc. at 4-5. The benefits of the proposed Settlement do not, in Mr. Sobiech’s view, alter the legal analysis that the Commission does not possess the requisite jurisdiction for approval of the Settlement with the objectionable condition. Exc. at 5. Mr. Sobiech observes, “The PUC either has jurisdiction over private causes of action or it does not.” *Id*.

Finally, Mr. Sobiech argues that the uncertainty of the legal ramifications of a general release in this proceeding present insufficient grounds for the Commission to exceed its authority – especially in light of a pending federal class action lawsuit. Exc. at 5-6.

**Pa. G&E’s Replies**

The Company filed Replies to the Exceptions (Pa. G&E R. Exc.) of Mr. Sobiech. As a preface to its specific responses to the Exceptions, Pa. G&E summarizes those aspects of the Settlement on which it argues supports approval. Pa. G&E R.Exc. at 1‑2. Pa. G&E emphasizes that all of the concrete benefits of the Settlement will inure to the public immediately. This is in contrast to the uncertainty of benefits under a fully litigated proceeding wherein the right to appeal exists. Pa. G&E R.Exc. at 1.

Pa. G&E further summarizes the specific points on which it argues counsel in favor of denying each of Mr. Sobiech’s Exceptions. Pa. G&E R.Exc. at 2.

In specific reply to Exception No. 1, Pa. G&E counters that nothing in the Settlement or Initial Decision suggests or requires the Commission to adjudicate and/or interfere with private causes of action such as breach of contract. Pa. G&E R.Exc. at 2. The Company further explains that the Settlement does not compromise any customer’s rights without that customer’s voluntary, informed consent. *Id*. Consequently, customers are free to accept or reject any offer from the Settlement administrator and are free to pursue any claim they may have individually. It is only if a customer accepts an offer that the customer is required to sign a release. *Id*. The Company points out that Mr. Sobiech has elected to pursue his claim(s) against it in federal court and on this basis, Mr. Sobiech has, effectively, rejected any offer from the Settlement administrator. Pa. G&E R.Exc. at 2-3. Pa. G&E asserts that, due to the fact that Mr. Sobiech will suffer no “cognizable” harm as a result of the Settlement, he, therefore, lacks standing to oppose Commission approval of the Settlement. Pa. G&E R.Exc. at 3.

In concluding its reply to Exception No. 1, Pa. G&E criticizes the position of Mr. Sobiech as without citation to any authority in support of the proposition that the Commission lacks jurisdiction or authority to approve a settlement simply because it includes an agreement by the Respondent to pay refunds to customers who are willing to release claims they may have against it. Pa. G&E R.Exc. at 3. The Company responds that there is precedent that clearly shows that the inclusion of a general release in a settlement agreement is not a bar to Commission approval. *Id*., citing *Pa. PUC v. Verizon Pa., Inc*., Docket No. M-00021592 (Order entered January 25, 2002); 2002 WL 17299987 (*Verizon –Structural Separation Implementation Settlement*).

**Joint Complainants’ Replies**

The OAG/OCA, in their Joint Replies, emphasize the limited participation of

Mr. Sobiech in this matter, as determined by the *April 23 Order*. The Joint Complainants advise that, pursuant to the order granting Mr. Sobiech intervention, he was directed to accept the record as it stood at the time of intervention, was not permitted to introduce additional evidence, not significantly broaden the issues, and was not permitted to represent the interests of other consumers in the proceeding. OAG/OCA R.Exc. at 2.

In specific reply to Mr. Sobiech’s Exception No. 1, the Joint Complainants take the position that the ALJs did not commit legal error in approving the Settlement with the provision for the signing of a general release as a condition of receiving a refund from the Refund Pool. They explain that Mr. Sobiech will not be bound by the provision or be required to release his claim against Pa. G&E based on Commission approval of the Settlement. They emphasize that it is the customer, himself/herself, that may choose to resolve their claim and execute a release prior to obtaining a refund under the Settlement’s terms. OAG/OCA R.Exc. at 4.

Importantly, OAG/OCA cite two cases that they submit should be examined for the proposition that the Commission has the jurisdiction to approve a settlement that contains a general release and has previously approved settlements containing such a release. *See* OAG/OCAR.Exc. at 5, citing *Pa. PUC v. Bell Telephone Co. of Pa.*, Docket No. R-811819 (Order entered November 14, 1988) (*Bell Proceeding*) and also the *Verizon –Structural Separation Implementation Settlement*, *supra*.

In concluding their Reply to Exception No. 1, the OAG/OCA state that the Commission is not adjudicating or interfering with private causes of action under the terms of the Settlement, but rather, is giving the consumer the option to determine whether it is in their best interests to accept a refund or to pursue a separate claim in another forum.

OAG/OCA R.Exc. at 6.

**Disposition – Exception No. 1**

The presiding ALJs reached fifty-two Findings of Fact, many of which were adopted from the Exhibit A to the Settlement, and drew twenty-one (21) Conclusions of Law. We, hereby, adopt the ALJs’ Findings of Fact and Conclusions of Law, unless expressly rejected upon their consideration or discussion, or modified or rejected by necessary implication from our discussion. *See* I.D. at 7-14; 57-61.

As a threshold consideration, the concerns and objections to the Settlement prosecuted by Mr. Sobiech raise issues of first impression for this Commission. We advise the Parties, however, that any issue or Exception that we do not specifically address should be deemed to have been duly considered and rejected without further discussion. It is well settled that the Commission is not required to consider, expressly or at length, each contention or argument raised by the parties. *Consolidated Rail Corporation v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, generally*, *Univ. of Pa. v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

Additionally, as a preliminary matter, we note that to the extent Mr. Sobiech’s Exceptions are objecting to the terms of the Settlement, not only as they apply to him, but also, as they apply to other Pa. G&E customers, the Order Granting Intervention limited Mr. Sobiech’s participation in this proceeding to advocating strictly on his own behalf.[[13]](#footnote-14) As such, any claims Mr. Sobiech has made regarding the potential impacts of the Settlement on other PA G&E customers are beyond the scope of the Order Granting Intervention and will not be considered.

To determine whether the Settlement should be approved, this agency must decide whether the proposed terms and conditions are in the public interest. *See, e.g.,* [*Pa. PUC v. C.S. Water and Sewer Associates*, *supra*;](http://www.lexis.com/research/buttonTFLink?_m=8f7710ade25b5eb7871173b2f3b59ffe&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2013%20Pa.%20PUC%20LEXIS%20173%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=4&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b74%20Pa.%20PUC%20767%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzt-zSkAA&_md5=0fa8a6e34e5ecac1bf3e1aa67a3298ef) [*Pa. PUC v. Phila. Elect. Co.*, 60 Pa. P.U.C. 1 (1985).](http://www.lexis.com/research/buttonTFLink?_m=8f7710ade25b5eb7871173b2f3b59ffe&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2013%20Pa.%20PUC%20LEXIS%20173%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=5&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b60%20Pa.%20PUC%201%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzt-zSkAA&_md5=ca77a1cbe0cf8f56d36f029f1dc49a1f) This Commission’s assessment of the benefits of the terms and conditions meeting the criteria of what is in the public interest need not be quantifiable. *Popowsky*. We must, as the circumstances dictate, exercise our informed judgment and evaluate the public interest so as to take into consideration the various interests and concerns of the stakeholders involved. *Id*.

On consideration of the positions of the Parties and our review of the analysis of the presiding ALJs, we have no reservation in adopting their reasoning and their conclusion that the terms and conditions of the Settlement establish by a preponderance of the relevant evidence, substantial benefits to the public interest that are achieved by the Settlement. We conclude, therefore, that approval of the Settlement is in the public interest as it creates overall benefits to the various stakeholders involved, represents a reasonable compromise of the litigated positions of the Parties, and will promote the goals of the General Assembly to establish a robust competitive market for electric generation supply to Pennsylvania retail consumers. 66 Pa. C.S. §§ 2802(5), (7).

Exception No. 1 of Mr. Sobiech is focused on the language in paragraph 43 of the Settlement, which contemplates the execution of a “Release of Claims” in exchange for payment from the Refund Pool. The pertinent section is reprinted below:

43. Release – No customer shall be paid any funds from the Refund Pool without executing a “Release of Claims” pursuant to which the customer agrees, in exchange for payment of the funds, to release, acquit, and forever discharge the Company and all of it [sic] current and former officers, shareholders, and employees from any and all claims arising from or related to the conduct alleged in the Joint Complaint. Further, as part of this settlement agreement, the Office of Attorney General, the Office of Consumer Advocate, the Office of Small Business Advocate, and the Public Utility Commission’s Bureau of Investigation and Enforcement release the Company and all of [its] current and former officers, shareholders, and employees from any and all claims arising from or related to the conduct alleged in the Joint Complaint.

We disagree that adopting a Settlement requiring a customer who elects to receive a refund from the Refund Pool to sign a release as a condition of obtaining payment is an impediment to the authority of this Commission to approve the Settlement. We disagree, based on three primary considerations:

First, the parties to a proceeding before the Commission may resolve their disputes according to terms and conditions that are mutually agreeable as between them. This is entirely consistent with the policy of the Commission to encourage settlements.[[14]](#footnote-15) Moreover, the *quid pro quo* involved in signing a release to resolve a claim is well-recognized by Pennsylvania courts. *See Buttermore v. Aliquippa Hospital*, 522 Pa. 325, 329-30, 561 A.2d 733, 735 (1989) (Parties with possible claims may settle their differences upon such terms as are suitable to them. . . . They may agree for reasons of their own that they will not sue each other or any one for the event in question).

Second, nothing in the Settlement or the Initial Decision suggests or requires the Commission to adjudicate and/or interfere with private causes of action such as breach of contract. Rather, in adjudicating the Settlement, the Commission is adjudicating a Complaint brought by the entity designated by statute to represent consumers of public utility services before the Commission against an EGS licensed by the Commission. Furthermore, the Complaint being adjudicated includes allegations that the Commission-licensed supplier violated Pennsylvania law, including the Commission’s marketing and billing regulations applicable to EGSs.[[15]](#footnote-16) Consequently, the Commission possesses the requisite jurisdiction over both the Parties to this proceeding and the subject matter of the Complaint that the Settlement proposes to resolve. *See* Finding of Fact #3.

Third, the Settlement does not compromise any customer’s right to pursue a claim against Pa. G&E outside of this Commission proceeding. Based on the terms of the Settlement, customers are free to accept a refund and sign a release or reject a refund and pursue a separate claim against Pa. G&E in another forum. The overriding conclusion here is that each customer will have the right to determine whether the conditions of obtaining payment from the Refund Pool are satisfactory in order to resolve his or her claims against the Company. If a customer is not willing to resolve his or her claim under the Settlement terms and conditions, the customer is free to pursue other rights against Pa. G&E.

For these reasons, we believe the Commission has the authority to approve the Settlement.

Notwithstanding our denial of the Exception No. 1 of Mr. Sobiech, we find it necessary to clarify our adoption of the Initial Decision and modify the proposed Settlement obligations of the OAG and OCA regarding notice to consumers who elect to receive payment from the Refund Pool. Specifically, we propose to direct that, as an express condition of our approval of the Settlement, the OAG and OCA shall certify to the Commission that the following notice has been provided to each consumer who voluntarily elects to receive payment from the Refund Pool and sign a “Release of Claims:”

**Signing the Release of Claims and receipt of payment from the Refund Pool may affect your right to recover amounts for the same conduct of Pennsylvania Gas & Electric Company that could result from legal proceedings against this supplier in a court of law.**

We note that this directive is entirely consistent with the position of the OAG/OCA in their Answer to Mr. Sobiech’s Petition to Intervene, wherein they stated the intent to provide customers with information that is necessary for them to make informed decisions regarding whether to accept the refund in exchange for a release of their claims. The OAG/OCA should advise in their comments if they object to this notice language and if so, they should propose alternative language.

**Mr. Sobiech’s Exception No. 2: The Administrative Law Judges Erred in Finding That the PUC has Authority to Order and/or Permit Electric Generation Suppliers, Such as the Company, to Refund Moneys Relating to Rate Disputes as Such Actions are Clearly Beyond the Scope of the PUC’s Authority**

In Exception No. 2, Mr. Sobiech extensively disputes this Commission’s jurisdiction over EGS companies to argue that, to the extent we would direct an EGS company to provide refunds to consumers as part of the proposed Settlement, the ALJs have recommended action outside of the authority granted to the Commission. Exc. at 6-10.

Mr. Sobiech cites the *IDT Order* for the proposition that EGS companies are not “public utilities” within the meaning of the Code for purposes of the exercise of our refund authority found in Section 1312 of the Code, 66 Pa. C.S. § 1312. Exc. at 7-8, citing *Delmarva Power and Light Co. v. Commonwealth*, 582 Pa. 338, 870 A.2d 901 (2005) (*Delmarva*).

Mr. Sobiech also takes the position that the exercise of our plenary authority under Section 501 of the Code, 66 Pa. C.S. § 501, to direct a refund as part of the proposed Settlement is also an overreach. Exc. at 9-10, citing *Virgilli v. Southwestern Pa. Water Auth*., 427 A.2d 1251 (Pa. Cmwlth. 1981) (*Virgilli*); also Exc. at 10 citing *Susquehanna Area Regional Airport Auth. v. Pa. PUC*, 911 A.2d 612, 617 at n.8 (Pa. Cmwlth. 2006).

Mr. Sobiech argues that the presiding ALJs further complicated the analysis of the Commission’s jurisdiction by discussing remedies under the Consumer Protection Law as applicable or analogous to this case when those counts pertaining to Pa. G&E’s alleged violation of these laws had been stricken based on the Company’s Preliminary Objections. Exc. at 8-9.

In conclusion, Mr. Sobiech takes the position that the Commission lacks regulatory authority over an EGS’ rates and, likewise, the Commission lacks the authority to “force” consumers to waive private causes of action against Pa. G&E.

**Pa. G&E’s Replies**

In its Replies, Pa. G&E casts aspersions on the motivating factors driving

Mr. Sobiech’s objections to the proposed Settlement. The Company takes the position that Mr. Sobiech’s displeasure with any refunds provided to consumers is motivated by a desire to benefit his class action attorneys and not the public. Pa. G&E R.Exc. at 4.

Apart from the motivation of Mr. Sobiech, Pa. G&E further responds by explaining that there is no law which would preclude an EGS from providing refunds to its customers in an effort to settle a dispute. In fact, asserts Pa. G&E, the Commission has approved settlements involving the voluntary payment of refunds by EGS companies in the cases of *Pa. PUC, Bureau of Investigation & Enforcement v. Public Power, LLC*, Docket No. M-2012-2257858 (Order entered December 18, 2013); and *IDT Order*. Pa. G&E R.Exc. at 4-5. Pa. G&E cites specific language from the *IDT Order*, wherein the Commission expressly acknowledged and endorsed the voluntary payment of refunds as an acceptable means for an EGS to resolve a dispute arising under the Code or Commission Regulations. *Id*. at n.1.

**Joint Complainants’ Replies**

The Joint Complainants respond that in the *IDT Order* and also in similar proceedings involving EGS companies, the Commission has approved the issuance of refunds that an EGS agreed to as part of a settlement to resolve a complaint. OAG/OCA R.Exc. at 6-7, citing *IDT Order*, *Public Power*, *Pa. PUC, Bureau of Investigation & Enforcement v. Pa. Gas & Electric*, Docket No. M-2013-2325122 (Order entered October 2, 2014) (*Pa. G&E – Gas*). Thus, they argue that Mr. Sobiech fails to distinguish this settled proceeding from a fully litigated one. OAG/OCA R.Exc. at 7.

The Joint Complaints additionally assert that Mr. Sobiech mischaracterizes the nature of the Complaint filed against Pa. G&E as a “rate” dispute, in his reliance on *Delmarva*. OAG/OCA R.Exc. at 7. They explain that the Complaint encompassed allegations, *inter alia*, of specific violations of the Commission’s Chapter 54 Regulations, 52 Pa. Code § 54.1-54.204. *Id*.

Regarding the allegations of Mr. Sobiech that Section 501 of the Code, 66 Pa. C.S. § 501, does not provide the Commission with the requisite authority to approve the Joint Petition and Settlement, the Joint Complainants extensively quote from the *IDT Order* to highlight the Commission’s discussion of the applicability of this provision to disputes involving EGS companies. OAG/OCA R.Exc. at 8-9.

Finally, in reply to the allegations that the presiding ALJs improperly applied statutory authority from the Consumer Protection Law to this proceeding, the Joint Complainants point out that the ALJs did not expressly rely on these provisions in concluding that refunds are proper. OAG/OCA R.Exc. at 10. Instead, argue the Joint Complainants, the ALJs relied on the *IDT Order* and *Pa. G&E – Gas* for reference to Commission precedent involving the question of whether an EGS could provide refunds under appropriate circumstances. *Id*.

**Disposition - Exception No. 2**

On consideration of Mr. Sobiech’s Exception No. 2, we find that the Replies of both Pa. G&E and the OAG/OCA sufficiently rebut the contentions in opposition to the lawfulness of our approval of the Settlement, albeit with certain clarifications. Under the applicable provisions in the Settlement, the Company will voluntarily issue refunds to customers as part of a comprehensive settlement of these proceedings. As noted in our *Commission Settlement Guidelines*, we will provide parties the necessary flexibility to resolve a dispute so as to avoid the uncertainty of a litigated disposition. Based on the foregoing, the objections of Mr. Sobiech in this area have been extensively addressed by this Commission in the *IDT Order* and in *Blue Pilot*.

Notwithstanding that the instant proceeding has resulted in a settlement under which the EGS will voluntarily provide rebates and/or refunds to consumers, we must emphasize to Mr. Sobiech that our authority in the area of billing disputes between an EGS and a consumer does not derive from the “refund” authority of Section 1312 of the Code, 66 Pa. C.S. § 1312, that applies to “public utilities.” As explained in the *IDT Order*, the *FES Declaratory Order*, and *Blue Pilot*, the authority derives from Section 501 of the Code, 66 Pa. C.S. § 501. The authority of the Commission to direct a billing adjustment, even in a litigated context, has been reaffirmed in a recent proceeding, *Kiback v. IDT Energy, Inc.*, Docket No. C-2014-2409676 (Order entered August 20, 2015).

In the *IDT Order* we concluded, *inter alia*, that Section 501 of the Code provided authority to correct an overbilling by an EGS company to a customer.

We expressly concluded that directing a billing adjustment for an EGS over bill of supply charges is within the Commission’s Section 501 powers to carry out the consumer protections in the Act that are applicable to competitive electricity generation supply service. *See IDT Order* at 17-18. As a billing adjustment is a potential remedy in a litigated setting, a voluntary refund of disputed EGS charges is also an outcome that can be accomplished in the context of a comprehensive settlement.

Additionally, we agree with the positions of the Joint Complainants that the ALJs’ discussion of the Consumer Protection Law was not in express reliance on those statutory provisions, but necessary to place the issues before them in the proper context for purposes of reviewing the terms of the Settlement. *See Kiback v. IDT Energy, Inc.*, *supra*, at 33, n. 10.

Finally, we conclude that Mr. Sobiech’s reliance on *Delmarva* and *Virgilli*  are injected out of context. *See* discussion of Exception No. 4, *infra*. Contrary to the position of Mr. Sobiech, the *Virgilli* court has expressly recognized that courts have construed the Code as creating many areas of concurrent jurisdiction between the Commission and the Commonwealth’s courts. *See Virgilli,* citing*, e.g.,* [*Rogoff v. Buncher*, 395 Pa. 477, 151 A.2d 83 (1959)](http://www.lexis.com/research/buttonTFLink?_m=6c86a0ebdd81f5241ccf0e9b55c1efcc&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b58%20Pa.%20Commw.%20340%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=12&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b395%20Pa.%20477%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzt-zSkAl&_md5=6ddedba56ea0f3a6b3ffa0accc13ef99); [*Leveto v. National Fuel Gas Distribution*, 366 A.2d 270 (Pa. Super. 1976)](http://www.lexis.com/research/buttonTFLink?_m=6c86a0ebdd81f5241ccf0e9b55c1efcc&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b58%20Pa.%20Commw.%20340%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=13&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b243%20Pa.%20Super.%20510%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzt-zSkAl&_md5=71005e9fe3e4d9980645d6f55f10c085).

**Mr. Sobiech’s Exception No. 3: The Administrative Law Judges Erred in Approving the Settlement Without Knowing and Taking into Consideration How Many of the Company’s Customers Were Harmed by its Conduct and Without Knowing and Taking into Consideration the Extent of the Financial Harm Caused by the Company**

In Exception No. 3, Mr. Sobiech requests that the Commission reverse the Initial Decision and decline to approve the Settlement. This request is based on allegations that the Settlement resolves the formal complaints against Pa. G&E without knowing and taking into consideration how many customers were harmed by the Company’s conduct and without knowing and taking into consideration the extent of financial harm caused by the Company’s conduct. Exc. at 11. He cites the pertinent portion of the ALJs’ discussion of the sufficiency of the funding of the Refund Pool[[16]](#footnote-17) to argue that the amount placed therein is not based on a precise assessment of the number of customers who were harmed. Thus, Mr. Sobiech argues, it is impossible for the Commission to approve the Settlement without a more quantitative acknowledgement of how many customers there are who paid more for electric generation above the “Price to Compare.”

We understand the objection of Mr. Sobiech to complain that there is not sufficient evidence to determine whether the Refund Pool amount will be sufficient to compensate all, potential, consumers affected by the alleged conduct of Pa. G&E. Exc. at 12.

**Pa. G&E Replies**

The Replies of Pa. G&E to Mr. Sobiech’s Exception No. 3 are terse. The Company primarily relies upon the arguments of the OAG/OCA in their Joint Reply Brief, to assert that the Settlement was reached after extensive discovery and is the product of extensive negotiations between the Parties. Pa. G&E R.Exc. at 5-6. In reliance on these considerations, the Company holds that the benefits of the proposed Settlement support its adoption without the necessity for additional fact finding. Pa. G&E R.Exc. at 6.

**Joint Complainants’ Replies**

In their Joint Replies, the OAG/OCA respond that the Settlement, including the amount of the Refund Pool, is based on ample information as to which customers were affected by Pa. G&E’s conduct and adequately considers the harm suffered by individual customers. OAG/OCA R.Exc. at 10-12.

The Joint Complainants explain the process they intend to use in determining which customers were affected by the Company’s conduct and how much restitution is to be offered. OAG/OCA R.Exc. at 11. The Joint Complainants confirm that the nucleus of customers to be considered by restitution are the following:

. . . those who were on variable rate plans and billed for usage in January, February, or March 2014 and stated their intention to offer refunds to all of those customers after taking into account a customer’s usage, price charged and refunds already received from PaG&E directly.

OAG/OCA R.Exc. at 11, referencing Settlement Appendix A at 8; Settlement at ¶ 34.

Based on the foregoing, the OAG/OCA are confident that the Settlement and Statements in Support contain “ample” information regarding which customers were affected and adequately considers the extent of harm suffered by individual customers. OAG/OCA R.Exc. at 12.

**Disposition – Exception No. 3**

The decision of the Commission must be supported by substantial evidence. [2 Pa. C.S. § 704](http://www.lexis.com/research/buttonTFLink?_m=18bf1f41cc0e1e211b3bc6b337b963fe&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2015%20Pa.%20PUC%20LEXIS%20251%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=6&_butInline=1&_butinfo=2%20PACS%20704&_fmtstr=FULL&docnum=13&_startdoc=11&wchp=dGLbVzB-zSkAl&_md5=4e0d0fad3807b024f2873cf5a739befd). “Substantial evidence” has been found to be such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. [*Norfolk & Western Ry. Co. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980);](http://www.lexis.com/research/buttonTFLink?_m=18bf1f41cc0e1e211b3bc6b337b963fe&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2015%20Pa.%20PUC%20LEXIS%20251%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=7&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b489%20Pa.%20109%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=13&_startdoc=11&wchp=dGLbVzB-zSkAl&_md5=b5bf9e0f4b485abffa0bf20340b3dce6) [*Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 166 A.2d 96 (Pa. Super. 1961);](http://www.lexis.com/research/buttonTFLink?_m=18bf1f41cc0e1e211b3bc6b337b963fe&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2015%20Pa.%20PUC%20LEXIS%20251%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=8&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b194%20Pa.%20Super.%20278%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=13&_startdoc=11&wchp=dGLbVzB-zSkAl&_md5=3d5a929b640c22530d05fb001274c53c) *and Murphy v. Comm., Dept. of Public Welfare, White Haven Center*, [480 A.2d 382 (Pa. Cmwlth. 1984).](http://www.lexis.com/research/buttonTFLink?_m=18bf1f41cc0e1e211b3bc6b337b963fe&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2015%20Pa.%20PUC%20LEXIS%20251%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=9&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b480%20A.2d%20382%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=13&_startdoc=11&wchp=dGLbVzB-zSkAl&_md5=325156594eee22d1d73c29f6efd3cd0c)

In his Exception No. 3, Mr. Sobiech emphasizes an issue that must, of necessity, be of concern to this Commission. In their Reply Brief, the OAG/OCA note that the information exchanged between the Joint Complainants and the Company established the factual basis on which the refund/settlement pool was created and, therefore, there is no “blind bargain” reached with the Company. *See* OAG/OCA Reply Brief at 10. The Joint Complainants also confirm that the Refund Pool will be applicable for possible refund for a “window” of approximately three months, January – March 2014, for payment.

On review of the record, we are able to make an informed judgment and approve the Settlement and deny the Exception of Mr. Sobiech in this regard. The pertinent Findings of Fact, Nos. 22-35, detail the number of witness statements and witness allegations that would, potentially, have been placed into the record had the matter proceeded to hearing.[[17]](#footnote-18) We reprint the pertinent Findings of Fact of the presiding ALJs below:

22. Approximately 27 Customer Witness statements contain complaints about PaG&E’s charges for electric generation service provided during periods prior to January – March 2014. Exh. A.

23. Approximately 110 Customer Witnesses averred that the PaG&E sales representatives had stated that PaG&E’s rate would always be less than or equal to the Electric Distribution Company’s (“EDC”) Price-to-Compare (“PTC”). Exh. A.

24. Approximately 91 Customer Witnesses averred that the PaG&E sales representatives had guaranteed PaG&E’s rate. Exh. A.

25. Approximately 141 Customer Witnesses averred that the PaG&E sales representatives had guaranteed savings over the EDC’s PTC. Exh. A.

26. Approximately 139 Customer Witnesses averred that PaG&E’s telemarketing representative had made misleading or confusing statements. Exh. A.

27. Approximately 19 Customer Witnesses averred that PaG&E’s Welcome Letter contained misleading or confusing statements. Exh. A.

28. Approximately 11 Customer Witnesses averred that PaG&E’s Price Disclosure was misleading or confusing. Exh. A.

29. Approximately 55 Customer Witnesses averred that PaG&E’s use of the term “competitive” to describe its service was misleading. Exh. A.

30. Approximately 43 Customer Witnesses averred that PaG&E’s use of the phrase “variable rate” was misleading. Exh. A.

31. Approximately 93 Customer Witnesses averred that PaG&E’s rates were excessive. Exh. A.

32. Approximately 43 Customer Witnesses averred that the Customer Witness’s electric generation service was switched to PaG&E without the Customer Witness’s authorization. Exh. A.

33. Approximately 55 Customer Witnesses averred that the Customer Witness was unable to contact PaG&E to complain about their charges. Exh. A.

34. Approximately 59 Customer Witnesses averred that the Customer Witnesses’ complaints were mishandled by PaG&E. Exh. A.

35. Approximately 2 Customer Witnesses averred that PaG&E did not provide the Customer Witnesses PaG&E’s current variable rate when requested. Exh. A.

36. Many Customer Witnesses averred that they suffered financial difficulties after receiving PaG&E’s charges – approximately 9 Customer Witnesses averred that they received Shut-Off Notices from their EDCs after receiving PaG&E’s charges; approximately 35 Customer Witnesses averred that they entered into a payment plan or paid off the charges over several months; approximately 5 Customer Witnesses averred that they borrowed money in order to pay the charges; and approximately 38 Customer Witnesses averred that they were on a limited or fixed income or generally had difficulty paying the charges. Exh. A.

I.D. at 11-14.

A comparison of the number of customers affected, as drawn from the Findings of Fact concerning the number of witness statements, with the amount to be placed in the Refund Pool, in addition to amounts that have been previously rebated to Pa. G&E’s customers, leads us to conclude that the Settlement is sufficiently supported. [[18]](#footnote-19) These comparisons, along with the informed judgment of the statutory advocates, convince us that the Settlement is clearly in the public interest, notwithstanding the lack of mathematic or numerical precision for which it suffers criticism by Mr. Sobiech. The overall benefits that support a finding of the meeting of the public interest standard need not be set forth with mathematic certainty. *Popowsky.*

Based on the foregoing, we shall deny the Exception No. 3 of Mr. Sobiech.

**Mr. Sobiech’s Exception No. 4: The Administrative Law Judges Erred in Finding That the PUC and the Office of Consumer Advocate Have the Jurisdiction Over and the Authority to Represent, Respectively, Consumers Who Have Not Filed Complaints With the PUC Against EGSs Which Are Corporations and Not Public Utilities**

In his Exception No. 4, Mr. Sobiech attacks the statutory authority of the OCA (and this Commission) to represent consumers who have not filed complaints with the Commission against EGSs. Mr. Sobiech first points out that EGS companies are not “public utilities” within the definition found in the Code. Exc. at 12. Rather, argues Mr. Sobiech, EGS companies are “corporations.” He goes on to question the authority of the OCA to legally represent EGS customers who are not, in his view, “consumers” within the definition of consumers found in 71 P.S. § 309-1. *Id*. As argued by Mr. Sobiech, “consumer” is defined in the statute as follows:

**§ 309-1. Definitions (Adm. Code § 901-A)**

As used in this article:

“COMMISSION” means the Pennsylvania Public Utility Commission.

“CONSUMER” means any person (i) who makes a direct use or is the ultimate recipient of a *product or a service supplied by any person or public utility subject to the authority of the commission* or (ii) *who may be a direct user or ultimate recipient of a product or service supplied by any person or public utility subject to the authority of the commission and may be affected in any way by any action within the authority of the commission*. The term “consumer” includes any “person,” “corporation” or “municipal corporation” as defined in section 2 of the act of May 28, 1937 (P.L. 1053, No. 286), known as the "Public Utility Law."

“PUBLIC UTILITY” means public utility as defined in section 2(17), act of May 28, 1937 (P.L. 1053, No. 286), known as the “Public Utility Law.”

71 P.S. § 309-1 (emphasis added).

Mr. Sobiech heavily relies on the holding in *Delmarva* to take the position that an EGS is neither a “person” nor a “public utility” within the definitions of those terms as they are set forth in the applicable legislation related to entities over which the Commission may exercise authority for purposes of financial assessments, 66 Pa. C.S. § 510. Mr. Sobiech carries over this reasoning to also argue for the inapplicability of those terms to EGS companies or their end-user customers, for purposes of representation before the Commission by the OCA. Exc. at 15-16.

**Pa. G&E’s Replies**

In its Replies, the Company clarifies that the OCA’s representation is not of any individual consumer, but of the collective interests and rights of consumers in this dispute. Pa. G&E R.Exc. at 6. The Company further notes that the attack on the enabling authority of the OCA is not relevant to the extent it does not so question the authority of the OAG in this matter and the OAG would remain in the case nonetheless. *Id*.

Also, Pa. G&E contends that the position of Mr. Sobiech is inaccurate as it is based on improper application of the principles of statutory construction. The Company engages in a detailed analysis of Mr. Sobiech’s position regarding the definitions of “consumer,” “public utilities,” and “persons,” ultimately to conclude, that Mr. Sobiech’s attempt to distinguish an EGS company as a “corporation” distinct from a person that provides a product or a service to a consumer is specious. Essentially, the Company explains that an EGS is a “person” within the meaning of the administrative statute at 71-P.S. § 309-1, and, thus, is an entity over which there is express authorization for the exercise of Commission authority when the matter involves a subject over which the Commission has regulatory authority.

**Joint Complainants’ Replies**

The OAG/OCA, as expected, maintains that their authority to represent the interests of consumers is clear. OAG/OCA R.Exc. at 12-13. The OAG/OCA engage in a detailed discussion of *Delmarva* and conclude that the Complaint is directly related to maintaining the quality of electric service and assuring that the Commission’s Regulations and Orders are not violated. OAG/OCA R.Exc. at 16.

As a related issue, the OAG/OCA clarifies that the funds in the Refund Pool will not be considered as “unclaimed funds” should a consumer elect to pursue remedies separate from the Refund Pool. OAG/OCA R.Exc. at 16. They state that the intent of the Settlement is to allow consumers who refuse a refund to pursue other remedies and that the Settling Parties did not intend for monies that are refused by customers to be treated as unclaimed funds. OAG/OCA R.Exc. at 17.

**Disposition – Exception No. 4**

Substantial portions of our disposition of Mr. Sobiech’s Exception No. 1 are applicable to the arguments in his Exception No. 4. As an initial observation, we find the distinctions as argued by Mr. Sobiech between a “public utility,” “person,” and “corporation,” as the terms are set forth in the Code and in 71 P.S. § 309-1, to be without merit. For reasons discussed above, pertaining to the authority and to the jurisdiction of the Commission, we find that an EGS is a “person” within the definition of 71 P.S. § 309-1, under the authority of the Commission which directly provides a product or service to an ultimate recipient of a product or service in this matter.

We also find the attack on the statutory authority of the OCA in this matter to be sufficiently foreclosed. The Office of Consumer Advocate was legislatively established in 1976 as an arm of the Department of Justice to represent consumers of public utility services in proceedings before the Commission and before *any other agency or court in regard to any matter which involves regulation by the Commission*. *See Widoff, Consumer Advocate et al., Petitioners v. The Disciplinary Bd. of the Supreme Court of Pa. et al.*, 420 A.2d 41 (Pa. Cmwlth. 1980). Whether this proceeding were prosecuted before an administrative agency, such as the Commission, or filed with a court, the OCA has been duly authorized to represent the interest of consumers. As discussed above, as an EGS, Pa. G&E is subject to regulation (albeit limited) by the Commission. As such, we shall deny the Exception No. 4 of Mr. Sobiech.

**Commission Settlement Guideline Factors**

The ALJs discussed the pertinent Settlement Guideline factors at pages 5-57 of the Initial Decision. We, hereby, adopt said discussion and recommendations as our own and the public interest benefits discussed, above, are incorporated by reference.

**CONCLUSION**

Based on the foregoing, we shall deny the Exceptions of Thomas Sobiech, and adopt the Initial Decision as clarified and modified by the discussion and approval in this Opinion and Order. We shall issue this Order in Tentative Form for the purposes of any forthcoming comments; **THEREFORE**,

**IT IS ORDERED**:

1. That the Exceptions filed by Thomas Sobiech on July 20, 2015, are denied.
2. That the Initial Decision issued on June 30, 2015 by Administrative Law Judges Elizabeth H. Barnes and Joel H. Cheskis, is adopted, subject to the modification and clarification expressed in this Opinion and Order, and this Opinion and Order shall be issued in Tentative Form.
3. That the Joint Petition for Approval of Settlement dated March 24, 2015, and submitted at Docket Number C-2014-2427656 by the Commonwealth of Pennsylvania by Attorney General Kathleen G. Kane, Tanya J. McCloskey, Acting Consumer Advocate, Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric, and the Bureau of Investigation and Enforcement is, hereby, approved, subject to the condition that the Attorney General Kathleen G. Kane and Tanya J. McCloskey, Acting Consumer Advocate, or their successors in office, shall certify to the Commission that the following notice has been provided to each consumer who voluntarily elects to receive payment from the Refund Pool and sign a Release of Claims:

**Signing the Release of Claims and receipt of payment from the Refund Pool may affect your right to recover amounts for the same conduct of Pennsylvania Gas & Electric Company that could result from legal proceedings against this supplier in a court of law.**

1. That the Commonwealth of Pennsylvania by Attorney General Kathleen G. Kane, Tanya J. McCloskey, Acting Consumer Advocate, Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric, and the Bureau of Investigation and Enforcement, shall have seven (7) days from the date of entry of this Opinion and Order to file comments with the Commission in response to the clarification and condition set forth in Ordering Paragraph No 3 of this Opinion and Order.
2. That should no comments be filed with the Commission pursuant to Ordering Paragraph No. 4, this Tentative Order shall become final without further action by this Commission.
3. That should comments be filed with the Commission pursuant to Ordering Paragraph No. 4, the matter shall be disposed of through an appropriate, Final Order.
4. That the Stipulation of Facts in Support of the Settlement submitted on March 24, 2015 as Exhibit A to Joint Petition for Approval of Settlement is admitted into the record of this proceeding.
5. That the two Petitions for Interlocutory Review filed in this proceeding on September 2, 2014 and September 8, 2014 respectively are hereby denied and dismissed as moot.
6. That the Motion to Strike Customer Testimony filed by Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric on January 26, 2015 is hereby denied and dismissed as moot.
7. That upon filing of the certification described in Ordering Paragraph No.. 3, this Docket No. C-2014-2427656 shall be marked closed.

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**BY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: February 11, 2016

ORDER ENTERED: March 9, 2016

1. As the name implies, a variable rate may be defined as “An all-inclusive, per-kWh price that can change by the hour, day, month, etc., according to the terms and conditions in the supplier’s disclosure statement. . . . [T]he rate may change with market conditions.” *See* [www.PAPowerSwitch.com](http://www.PAPowerSwitch.com). [↑](#footnote-ref-2)
2. 52 Pa. Code § 69.1803 defines PTC as follows: “*PTC—Price-to-compare*—A line item that appears on a retail customer’s monthly bill for default service. The PTC is equal to the sum of all unbundled generation and transmission related charges to a default service customer for that month of service.” [↑](#footnote-ref-3)
3. In light of this Commission’s disposition of the Initial Decision issued

   June 30, 2015, the Exceptions and Replies to Exceptions, addressing the proposed Settlement, we shall adopt the ALJs’ recommendation. We, hereby, conclude that those issues arising with regard to the *August 20, 2014 Order* seeking interlocutory Commission review are moot. [↑](#footnote-ref-4)
4. The Order granting intervention directed that Mr. Sobiech take the case as it then stood. Order at 5-6. Thus, Mr. Sobiech was permitted the opportunity to submit Exceptions and/or Replies to Exceptions in response to the Initial Decision as necessary. Also, Mr. Sobiech was not permitted to represent the interests of other customers. *Id*. at 6. [↑](#footnote-ref-5)
5. The burden of proof is met when the party on whom the burden is placed meets that burden by a preponderance of the evidence. A preponderance of the evidence is established by presenting evidence that is more convincing, by even the smallest amount, than that presented by the other parties to the case. [*Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).](http://www.lexis.com/research/buttonTFLink?_m=470ca40ed8631ccf658db98795d0e691&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2011%20Pa.%20PUC%20LEXIS%201391%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=11&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b364%20Pa.%2045%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=11&_startdoc=11&wchp=dGLzVzt-zSkAz&_md5=3b55efab80a5f76c487e3a484311d5fd) Also, the Commission’s decision must be based on substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Dutchland Tours, Inc. v. Pa. PUC,* 337 A.2d 922 (Pa. Cmwlth. 1975). [↑](#footnote-ref-6)
6. Application for Reargument or Rehearing *En Banc* filed September 23, 2015. [↑](#footnote-ref-7)
7. The Settling Parties state that it is their intent that the terms and conditions of the Settlement not be used as evidence of unlawful behavior or admission of guilt in the Pennsylvania court system or the federal court system. Settlement at 9. [↑](#footnote-ref-8)
8. *Joseph A. Rosi v. Bell-Atlantic-Pennsylvania, Inc. and Sprint Communications, L.P.,*, Docket No. C-00992409 (Order entered March 16, 2000). [↑](#footnote-ref-9)
9. Mr. Sobiech attached a copy of his First Amended Complaint in the federal class action civil action to the Public Statement. [↑](#footnote-ref-10)
10. Referenced as *Pa. G&E – Gas*, *infra*. [↑](#footnote-ref-11)
11. Mr. Sobiech states that he does not except to the agreed-to changes in the way Pa. G&E does business in Pennsylvania. Exc. at 4. [↑](#footnote-ref-12)
12. Mr. Sobiech points out that it is his understanding that the Company did not require customers to sign general releases as a condition of receiving refunds/rebates for the first $4,511,563 it voluntarily provided. Exc. at 3. [↑](#footnote-ref-13)
13. Additionally, because Mr. Sobiech is not an attorney, the Commission’s regulations prohibit him from representing other Pa. G&E customers. *See* 52 Pa. Code §§ 1.21 and 1.22. Further, Mr. Sobiech’s attorney did not enter his appearance on behalf of any other Pa. G&E customers in this proceeding. [↑](#footnote-ref-14)
14. 52 Pa. Code § 5.231(a). [↑](#footnote-ref-15)
15. The relevant Commission regulations are found in Chapter 54, Title 52 of the Pennsylvania Code. [↑](#footnote-ref-16)
16. I.D. at 42-43, 52. [↑](#footnote-ref-17)
17. We duly note the outstanding motion to strike certain of these statements by the Company. This motion was not addressed due to the proposed Settlement. [↑](#footnote-ref-18)
18. A Pa. G&E Customer List was also filed (under proprietary seal) with the Commission as part of this proceeding. [↑](#footnote-ref-19)