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November 29, 2011

BY HAND

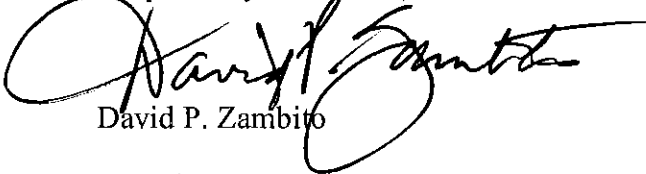
Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
P.O. Box 3265
Harrisburg, PA 17105-3265

RE: License Application of EnerPenn USA, LLC for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as a Supplier of Retail Electric Power - Docket No. A-2011-2248532

Dear Secretary Chiavetta:

Enclosed for filing is the Petition of EnerPenn USA, LLC for Reconsideration of Commission Order in the above-referenced proceeding. Copies have been provided to the persons as indicated on the Certificate of Service.

Respectfully Submitted,



David P. Zambito

DPZ/jl

Enclosures

cc: Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

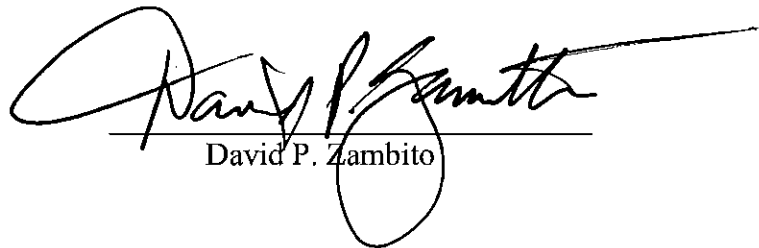
VIA E-MAIL & HAND DELIVERY

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Date: November 29, 2011



David P. Zambito

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

License Application of EnerPenn USA, :
LLC for Approval to Offer, Render, : Docket No. A-2011-2248532
Furnish or Supply Electricity or Electric :
Generation Services as a Supplier of Retail :
Electric Power :

**PETITION OF ENERPENN USA, LLC
FOR RECONSIDERATION OF COMMISSION ORDER**

EnerPenn USA, LLC d/b/a Y.E.P., d/b/a YEP Energy (“EnerPenn”), pursuant to the provisions of Section 5.572 of the Pennsylvania Public Utility Commission’s (“Commission”) regulations, 52 Pa. Code § 5.572, hereby files this Petition requesting reconsideration of the Commission’s Order entered November 14, 2011, at Docket No. A-2011-2248532 (“November 14 Order”). For the reasons explained herein, EnerPenn respectfully requests that the Commission reconsider its November 14 Order and remove unwarranted conditions set forth therein that would place EnerPenn at a competitive disadvantage and that are contrary to the record. In support thereof, EnerPenn states as follows:

I. INTRODUCTION

1. EnerPenn is a limited liability company, organized in the State of Texas, and registered to do business in Pennsylvania.

2. On June 17, 2011, EnerPenn filed the above-captioned Application seeking Commission approval to become licensed as an electric generation supplier (“EGS”) to provide retail electric power to residential, small commercial, large commercial, industrial and governmental customers throughout the Commonwealth of Pennsylvania.

3. Together with its Application, EnerPenn filed supporting exhibits and affidavits as required by the Commission's regulations at 52 Pa. Code §§ 54.31-54.43. EnerPenn also provided proofs of publication in Pennsylvania newspapers, as well as proofs of service to the interested parties as required by the Commission's regulations.

4. No parties protested, intervened, or otherwise opposed EnerPenn's Application.

5. In response to data requests served by the Commission's Bureau of Technical Utility Services, EnerPenn voluntarily disclosed certain regulatory and civil proceedings in the State of Texas that involved and were settled by an affiliate of EnerPenn, Texpo Power, LP ("Texpo").

6. Based upon these settled regulatory and civil proceedings involving EnerPenn's affiliate in the State of Texas, the Commission's November 14 Order adopted certain conditions that were imposed on a separate, unrelated EGS in a prior license proceeding. *See License Application of Pennsylvania Energy Savings Corp. for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as a Broker/Marketer and Aggregator Engaged in the Business of Supplying Electricity*, Docket No. A-2009-2097544 (December 23, 2009). The Commission's wholesale adoption of the conditions failed to take into consideration the specific facts and circumstances of EnerPenn.

7. There is nothing in the record to suggest that EnerPenn would replicate the alleged problems of its Texas affiliate. The November 14 Order ignores that the Texas regulatory and civil proceedings involving its affiliate have been fully resolved, and that EnerPenn's Texas affiliate corrected all of the alleged violations.

8. In the absence of finding a violation of the Commission's consumer protection regulations, the additional and extensive obligations imposed by the November 14 Order are

unfair, put EnerPenn at a competitive disadvantage, and are contrary to the Commission's policy to encourage competition in the retail electric market.

9. For the reasons explained in further detail below, EnerPenn respectfully requests that the Commission reconsider and rescind those portions of its November 14 Order directing that EnerPenn undertake additional, extensive conditions regarding consumer protection. In the alternative, EnerPenn respectfully requests that the Commission impose only conditions related specifically to violations alleged to have been committed by its Texas affiliate, Texpo. To the extent necessary, EnerPenn should be afforded notice and an opportunity to be heard through an evidentiary hearing.

II. ARGUMENT

A. Standard for Grant of Reconsideration Has Been Met.

10. The Commission's standards for granting reconsideration following final orders are set forth in *Duick v. Pennsylvania Gas and Water Co.*, 56 Pa. P.U.C. 553, 559 (1982):

A petition for reconsideration, under the provisions of 66 Pa. C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part. In this regard we agree with the Court in the Pennsylvania Railroad Company case, wherein it was said that "[p]arties ..., cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them...." What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission.

11. The Commission's November 14 Order relies upon regulatory and civil proceedings involving EnerPenn's Texas affiliate to conclude that additional consumer protections, above and beyond those imposed upon other EGSs operating within the

Commonwealth, are necessary for EnerPenn to operate as a licensed EGS.¹ The November 14 Order implies that there is a risk that EnerPenn “would replicate the problematic history of its affiliates in other jurisdictions.” November 14 Order, p. 5. Based thereon, the November 14 Order imposes “extensive conditions” to address the “concerns regarding consumer protection.” *Id.*

12. The November 14 Order’s reliance on the Texas proceedings is misplaced because it overlooks the fact that the alleged violations by EnerPenn’s Texas affiliate were either dismissed with prejudice or previously corrected and settled. Similarly, the November 14 Order overlooks that there is nothing in the record to suggest that EnerPenn would replicate the alleged problems of its Texas affiliate in Pennsylvania. Moreover, EnerPenn was never given a reasonable opportunity to demonstrate why the extensive conditions are inappropriate.

B. Substantial Evidence Demonstrates that EnerPenn is Legally Fit.

13. The November 14 Order relies upon an order entered by the Public Utility Commission of Texas (“PUCT”) approving a settlement between PUCT Staff and EnerPenn’s

¹ In this regard, EnerPenn notes that Texpo utilizes three brand names in the ERCOT market, the Independent System Operator for all restructured areas of Texas, with each brand name using separate and unique customer contracts, correspondence, websites and marketing materials. After an extensive industry-wide audit performed by the PUCT, Texpo was deemed to be non-compliant with ten PUCT Customer Protection Rules (the “Rules”). Texpo remedied all violations prior to the entry of the Texpo Order, and Texpo’s resulting fine of \$19,000 was among the lowest fines in the industry. EnerPenn disclosed the results of its affiliate’s audit in EnerPenn’s EGS application, as such audits and fines have become an industry standard over the past two years in the ERCOT market. To illustrate this point, several other EGSs and/or their affiliates, (collectively, “other EGSs”) that are currently licensed and operating in the Commonwealth of Pennsylvania have also been audited by the PUCT over the past two years. Such other EGSs have received higher fines than Texpo as the result of their respective audits, including but not limited to: (i) Stream SPE, Ltd., d/b/a Stream Energy, who was deemed to have been non-compliant with 29 consumer protection rules for retail electric service and agreed to an audit fine of \$74,000 (Docket No. 39696); (ii) Spark Energy, L.P., d/b/a Spark Energy, who was deemed to have been non-compliant with 20 consumer protection rules for retail electric service and agreed to an audit fine of \$44,500 (Docket No. 38394); (iii) Champion Energy Services, LLC, d/b/a Champion Energy Services, who was deemed to have been non-compliant with 12 consumer protection rules for retail electric service and agreed to an audit fine of \$30,000 (Docket No. 38905); and (iv) Ambit Texas, LLC, d/b/a Ambit Energy, who was deemed to have been non-compliant with 5 consumer protection rules for retail electric service and agreed to an audit fine of \$22,500 (Docket No. 38392). To Texpo’s knowledge and belief, there is not one ERCOT market participant that has been audited by the PUCT regarding compliance with the Rules that has not been fined. Also of note is that Texpo had not received any PUCT fines since entering the ERCOT market in 2006, prior to the systematic audits of market participants in ERCOT.

Texas affiliate, Texpo. *See Agreed Notice of Violation and Settlement Agreement Relating to Texpo Power, LP's Violation Of PURA §§ 17.004 and 39.101, As Well as P.U.C. Subst. R. 25.473, 25.474, 25.475, and 25.479, Concerning Customer Protection Rules for Retail Electric Service*, Docket No. 39046, 2011 Tex. PUC LEXIS 1011 (February 10, 2011) (“*Texpo Order*”). In the *Texpo Order*, PUCT found that, based upon a compliance audit and Staff investigation, Texpo Power was not in compliance with certain Texas customer protection rules for retail electric service. *Id.* at *2-4.

14. The parties in the *Texpo Order* entered into a settlement agreement, resolving all the violations identified in the compliance audit and Staff investigation, and Texpo agreed to pay an administrative penalty of \$19,000. *Id.* at *5. Importantly, however, PUCT expressly found and concluded that “[p]rior to settlement of this matter, [Texpo] corrected all of the violations that form the basis of the investigation.” *Id.* at 4.

15. The November 14 Order also relies upon a civil proceeding before the 382nd Judicial District of Rockwall County, Texas, wherein a civil plaintiff alleged that EnerPenn’s Texas affiliate, Texpo, engaged in purportedly deceptive business practices, fraud, and breach of contract. *Donald Scott Mackenzie v. Texpo Power, L.P. d/b/a Y.E.P.*, Case No. 1-11-425 (referred to herein as the “Civil Suit”). However, as recognized in the November 14 Order, this case was *dismissed with prejudice* by the Texas Court on September 27, 2011. Clearly, as concluded by the Rockwall County Court, the allegations of the civil complaint were unsubstantiated and lacked merit.

16. Notwithstanding the foregoing, the November 14 Order relies on the above-described regulatory and civil proceedings involving Texpo to make a *de facto* finding that

EnerPenn will repeat the alleged consumer protection violations of its Texas affiliate. This finding and conclusion is not supported by substantial record evidence.

17. It is well established that a finding of fact must be based exclusively on the evidence admitted to the record in the proceeding. *Kyu Son Yi v. State Board of Veterinary Medicine*, 960 A.2d 864, 870-871 (Pa. Cmwlth. 2008); *see also Met-Ed Indus. Users Group v. Pa. Pub. Util. Comm'n*, 960 A.2d 189, 193 n.2 (Pa. Cmwlth. 2008) (citing 2 Pa. C.S. § 704) (explaining that any finding of fact necessary to support an adjudication of the Commission must be based upon substantial evidence). Here, although information regarding the Texas regulatory and administrative proceedings were submitted in response to data requests, there is nothing in the record to suggest that EnerPenn would replicate the alleged problems of its affiliate in Texas. Further, the November 14 Order ignores that, as explained above, the alleged violations by EnerPenn's Texas affiliate were either dismissed with prejudice or previously corrected and settled.

18. The alleged violations which were settled were not indicative of Texpo's overall good history of compliance with the legal requirements of the PUCT. Such alleged violations were a result of an ERCOT industry wide audit to ensure that all market participants had documentation and processes that were compliant with the Rules and, as noted above, Texpo's alleged violations and resulting fine were among the lowest in the industry. Furthermore, Texpo has been found by the PUCT as having received a "lower than average complaint rate" for licensed retail electric providers over the past six months.² Further, in October 2011, after the conclusion of an Audit Review of Rate Reduction Reimbursements of Texpo, the PUCT determined that Texpo had adequate controls and procedures to implement and maintain the rate

² Through September 30, 2011, Texpo was ranked number 14 out of 38 market participants, with a lower than average rate of complaints for the prior six month period, as such rate is shown on the "Residential Retail Electric Provider Complaint Scorecard" (available at: <http://powertochoose.com/content/complaint/index.aspx>).

reduction program consistent with applicable rules and guidelines. *See* PUCT Filing Docket No. 39506, Item No. 3.

19. The Commission's test for legal fitness is whether the applicant has demonstrated a persistent disregard for, flouting or defiance of the Code and the Commission's orders and regulations. *See Re: O'Connor*, 54 Pa. P.U.C. 547 (1980); *Warminster Twp. Municipal Auth. v. Pa. Pub. Util. Comm'n*, 138 A.2d 240 (Pa. Super. 1958); *Re Perry Hassman*, 55 Pa. P.U.C. 661 (1982). It cannot reasonably be said that the violations of EnerPenn's Texas-based affiliate rise to the level of a persistent disregard for, flouting, or defiance of the law. To the contrary, the alleged violations were promptly and voluntarily remedied. As such, the conditions are unnecessary.

20. The fact that EnerPenn's affiliate previously was investigated for, corrected, and settled alleged violations of consumer protection regulations in Texas is simply too tenuous to support a finding or conclusion that EnerPenn will not comply with the consumer protection regulations adopted by this Commission.

21. The Commission has promulgated specific regulations that are applicable to all EGSs. Through its Application, EnerPenn has committed to comply with the Commission's regulations, including all consumer protection provisions, and there is nothing in the record to suggest otherwise.

C. Conditions Were Not Reasonably Tailored for EnerPenn.

22. Despite the lack of substantial record evidence to support a finding that the additional conditions are warranted, it appears that the November 14 Order seeks to impose on EnerPenn are the very same conditions that were adopted for Just Energy, an EGS with a pronounced history of violations in another state. *See License Application of Pennsylvania*

Energy Savings Corp. for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as a Broker/Marketer and Aggregator Engaged in the Business of Supplying Electricity, Docket No. A-2009-2097544 (December 23, 2009) (“*Just Energy Order*”). In the *Just Energy Order*, the Commission concluded that “based on the *repetition* of events in Illinois and the *lack of a resolution* in the most recent complaint in Illinois, it is *not apparent that the issues have been resolved* and that similar issues will not arise in Pennsylvania.” *Id.* p. 9 (emphasis added). The conditions adopted in the *Just Energy Order* were proposed by Just Energy and, moreover, were directly related to the various unresolved and ongoing consumer protection problems experienced by its affiliate in Illinois.

23. Unlike the *Just Energy Order*, the consumer protection problems experienced by EnerPenn’s Texas affiliate have been corrected, settled, and dismissed as explained above. Accordingly, EnerPenn should not be held to the same conditions.

24. Further, unlike the *Just Energy Order*, the conditions set forth in the November 14 Order are overwhelmingly unrelated and irrelevant to the alleged consumer protection violations by EnerPenn’s Texas affiliate. In the *Texpo Order*, the PUCT found that, based upon a compliance audit and Staff investigation, Texpo was not in compliance with the following Texas customer protection rules for retail electric service. :

Dual language requirement, Texpo’s Your Rights As a Customer document and disclosure/disconnection notices were not provided in Spanish;

Required authorization disclosures, Texpo did not provide a means of allowing the customer to select a language other than English;

Required authorization disclosures, Texpo did not provide the price of the available products per kWh;

Required authorization disclosures, Texpo did not indicate the right of rescission in the proper format or how to exercise that right;

Written enrollment, Texpo did not provide a means for the customer to select English, Spanish, or the language used in the marketing of the product;

Verification of authorization for door-to-door enrollment, Texpo's automated verification system did not inform the customer of the option to exit the system and nullify enrollment at any time;

Telephone enrollment, Texpo failed to indicate the presence or absence of early termination fees;

Contract expiration notice, Texpo's Terminations of Service document did not indicate when the expiration notice would be sent;

Bill content, Texpo failed to use proper terms regarding the customers meter read; and

Bill content, Texpo did not include a required notice in proper font.

Texpo Order, at *2-4. A review of the extensive conditions set forth in the November 14 Order clearly reveals that the additional requirements imposed on EnerPenn are largely unrelated to the problems experienced by its Texas affiliate. Consequently, even assuming, *arguendo*, that "EnerPenn would replicate the problematic history of its affiliates in other jurisdictions,"³ the conditions imposed by the November 14 Order would fail to address the specific problems experienced and corrected by its Texas affiliate.

25. Texpo's alleged violations in the ERCOT market are inapplicable to EnerPenn's future operations as an EGS in Pennsylvania for a number of reasons. As may be expected, the responsibilities of a market participant in Texas are not the same as those placed on an EGS in Pennsylvania. For example, Texpo is required to bill all customers directly, as opposed to the consolidated billing model utilized in Pennsylvania. Two of Texpo's alleged violations were the result of direct billing by Texpo, and such actions cannot be replicated in Pennsylvania due to the varying market structure and requirements. In addition, the PUCT imposes Spanish language

³ See November 14 Order, p. 5.

requirements, which obligate the retail electric supplier to provide limited documentation in both English and Spanish; whereas Pennsylvania does not possess such requirements. Three of Texpo's alleged violations were the result of conflicting and/or ambiguous PUCT rules concerning such dual language requirements, including two alleged violations that led to the translation of every customer document, website, and system interface by Texpo. Finally, the events that gave rise to the Civil Suit were solely based on the lawful disconnection of the customer's electricity service for non-payment, a practice that is handled by each applicable utility in Pennsylvania, not the EGS. Such disconnection was upheld as within the Rules, and the Civil Suit was dismissed with prejudice to the Plaintiff.⁴

D. EnerPenn Was Not Afforded a Reasonable Opportunity to Be Heard.

26. The conditions in the November 14 Order were included in the Commission's order by Commission Staff without EnerPenn being afforded notice of the specific conditions and a meaningful opportunity to be heard as to their appropriateness. *Cf.* Pennsylvania Administrative Agency Law, 2 Pa. C.S. §§ 501-508 (requiring reasonable notice and the opportunity to be heard); *Popowsky v. Pa. Pub. Util. Comm'n*, 805 A.2d 637 (Pa. Cmwlth. 2002) (explaining that the Commission, as an administrative agency, is bound by the due process provisions of constitutional law and by fundamental principles of fairness); *Butler Township Water Co. v. Pa. Pub. Util. Comm'n*, 473 A.2d 219, 222 (Pa. Cmwlth. 1984) (“[The] Commission’s power to act by way of order requires findings of fact, based on the evidence, necessary to support the order.”).

⁴ The informal complaint was closed on November 8, 2010 by the Customer Protection Division of the PUCT, stating that no Rules were violated in the disconnection of the customer's service.

E. Conditions Imposed on EGSs Must be on a Consistent Basis.

27. To the extent that the Commission has “concerns regarding consumer protection” and believes additional consumer safeguards are necessary in the retail electric market, the Commission should undertake a formal rulemaking in compliance with the Commonwealth Documents Law⁵ rather than through piecemeal adjudications of individual EGS license applications. Consistent requirements and conditions are necessary in order to ensure that all EGSs are treated fairly and equally with regard to the conditions under which they must operate in the Pennsylvania retail market.

28. In the absence of finding a violation of the Commission’s consumer protection regulations, the additional and extensive conditions imposed by the November 14 Order are unfair and put EnerPenn at a competitive disadvantage. In essence, the November 14 Order is penalizing EnerPenn for the possibility of some future violation that may never occur.

29. The extensive conditions set forth in the November 14 Order are applicable to EnerPenn, while other EGSs are permitted to operate within the Commonwealth without the burden and expense of complying with such additional obligations. Compliance with these conditions will increase costs for EnerPenn, which, in turn, will inhibit EnerPenn’s ability to offer alternative electric supplies at a price that is competitive to other EGSs and default service providers that are not subject to the same or similar obligations. In short, the conditions of the November 14 Order create an unlevel playing field and are contrary to the Commission’s policy to encourage competition in the retail electric market.

⁵ Act of July 31, 1968, P.L. 769, *as amended*, 45 P.S. §§ 1101-1603.

III. CONCLUSION

30. The additional and extensive obligations imposed by the November 14 Order are not based upon substantial record evidence, are not tailored to EnerPenn's specific circumstances, were imposed without appropriate due process, and put EnerPenn at a competitive disadvantage. Therefore, the Commission should reconsider and rescind those portions of its November 14 Order directing that EnerPenn comply with the additional, extensive conditions regarding consumer protection. In the alternative, the conditions should be limited to those necessary to ensure the EnerPenn does not engage in violations similar to those alleged to have been committed by its Texas affiliate. To the extent necessary, the Commission should afford EnerPenn with notice and opportunity to be heard through an evidentiary hearing.

WHEREFORE, for all the foregoing reasons, EnerPenn respectfully requests that the Commission reconsider and rescind the portion of its November 14, 2011 Order in the above-referenced proceeding which directs EnerPenn to comply with extensive conditions that have not been uniformly imposed upon other EGSs licensed in Pennsylvania, and approve the above-referenced application without condition.

Respectfully submitted,



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Date: November 29, 2011

*Counsel for Applicant EnerPenn USA, LLC
d/b/a Y.E.P., d/b/a YEP Energy*

VERIFICATION

I, Kevin Meers, being the Vice President of Operations at EnerPenn USA, LLC d/b/a Y.E.P., d/b/a YEP Energy, hereby state that the facts above set forth are true and correct to the best of my knowledge, information and belief and that I expect EnerPenn USA, LLC d/b/a Y.E.P., d/b/a YEP Energy to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Date: 11-28-11

