**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

Public Meeting held March 15, 2012

Commissioners Present:

Robert F. Powelson, Chairman

John F. Coleman, Jr., Vice Chairman

Wayne Gardner, Joint Dissenting Statement

James H. Cawley, Joint Dissenting Statement

Pamela A. Witmer

License Application of EnerPenn USA, LLC A-2011-2248532

d/b/a Y.E.P., d/b/a YEP Energy For Approval

to Offer, Render, Furnish or Supply Electricity

or Electric Generation Services as a Supplier

of Retail Electric Power

**(Petition for Reconsideration)**

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Petition for Reconsideration (Petition) filed by EnerPenn USA, LLC d/b/a Y.E.P., d/b/a YEP Energy (EnerPenn) on November 29, 2011, seeking reconsideration of our Opinion and Order entered November 14, 2011 (*November 2011 Order*), relative to the above-captioned proceeding.

**History of the Proceeding**

On June 17, 2011, EnerPenn filed an Application at the above docket number, seeking to become a licensed electric generation supplier (EGS) in the electric distribution company service territories throughout the Commonwealth of Pennsylvania. The Application was filed pursuant to the Commission’s regulations at 52 Pa. Code §§ 54.31-54.43, which became effective on August 8, 1998, and which were established under Section 2809 of the Public Utility Code (Code), 66 Pa. C.S. § 2809. On

July 6, 2011, the Commission issued a Secretarial Letter notifying EnerPenn that the period for consideration of its Application to market electricity had been extended until further order of the Commission. By the *November 2011 Order,* the Commission granted EnerPenn an EGS License, subject to certain conditions for a probationary period of eighteen months from the date EnerPenn begins offering service in the Commonwealth.

On November 29, 2011, EnerPenn filed the instant Petition seeking Commission reconsideration of its *November 2011 Order.* EnerPenn requests the removal of unwarranted conditions set forth therein that, it alleges, would place EnerPenn at a competitive disadvantage and that are not supported by substantial record evidence. As noted above, no Answers have been filed in response to the instant Petition.[[1]](#footnote-1) By Opinion and Order entered December 1, 2011, the Commission granted the Petition pending review of, and consideration on, the merits.

**Discussion**

We note that any issue that we do not specifically address herein has been duly considered and will be denied without further discussion. It is well settled that we are 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);](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=5&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b625%20A.2d%20741%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=ad2b02d95c2a9216e83b92a3570d4785) *also* see, generally, [University of Pennsyl­vania v. Pa. PUC, 485 A.2d 1217 (Pa. Cmwlth. 1984).](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=6&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b485%20A.2d%201217%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=9b1cc8319afd12440738bb82d74455ef)

**The *Duick* Standards for Reconsideration**

The Code establishes a party’s right to seek relief following the issuance of the Commission’s final decisions pursuant to Subsections 703(f) and (g), 66 Pa. C.S. §§ 703(f) and 703(g), relating to rehearings, as well as the rescission and amendment of orders. Such requests for relief must be consistent with Section 5.572 of our regulations, 52 Pa. Code § 5.572, relating to petitions for relief following the issuance of a final decision. The standards for granting a Petition for Reconsideration were set forth in *Duick v. Pennsylvania Gas and Water Company*, 19 Pa. PUC Lexis 4, \*12-13 (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 stated 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.

Additionally, a Petition for Reconsideration is properly before the Commission where it pleads newly discovered evidence, alleges errors of law, or a change in circumstances.

***November 2011 Order***

As stated above, the *November 2011 Order* granted EnerPenn an EGS License, subject to certain conditions for a probationary period of eighteen months from the date EnerPenn begins offering service in the Commonwealth. In the *November 2011 Order*, the Commission stated that:

Upon review of the information submitted by EnerPenn in support of its application we note that the conduct of EnerPenn’s affiliate in other states (particularly Texas) raises consumer protection concerns. However, we believe that if we grant EnerPenn an EGS license subject to similar conditions we imposed on Just Energy,[[2]](#footnote-2) it is unlikely that EnerPenn would replicate the problematic history of its affiliates in other jurisdictions. These extensive conditions go a long way toward addressing our concerns regarding consumer protection.

*November 2011 Order* at 5.

**Petition for Reconsideration**

EnerPenn argues that reconsideration is warranted because the *November 2011Order* relied upon certain regulatory and civil proceedings involving a non-jurisdictional affiliate to grant a conditional EGS license to EnerPenn. Based upon this reliance, EnerPenn asserts that the Commission made a *de facto* finding that EnerPenn will repeat the alleged consumer protection violations of its Texas affiliate Texpo Power, LP (Texpo). EnerPenn further argues that such a finding and conclusion is not supported by substantial record evidence. Petition at 5-6, ¶ 16.

In the course of Commission Staff’s review of EnerPenn’s Application, EnerPenn disclosed two proceedings involving its Texas affiliate: a regulatory action and a civil proceeding. Application at 4, Section 5; *November 2011 Order* at 5.

On January 4, 2011, the Public Utility Commission of Texas (PUCT) issued an order at Docket No. 39046, which approved the Settlement Agreement and Report to the PUCT regarding PUCT Staff’s investigation of Texpo for violations of PURA[[3]](#footnote-3) §§ 17.004 and 39.101 and Subchapter R of the substantive rules of the PUCT. That order was the result of Audit 2010050005 for Texpo which was part of an industry-wide audit that requested documents and confirmation of compliance with PUCT Customer Protection Rules for retail electric service. The PUCT Staff recommended an administrative penalty of $19,000. Texpo remitted payment to the PUCT on March 2, 2011. *Id.*

In the *TEXPO Order*, the PUCT found, based upon a compliance audit and Staff investigation, not consumer complaints, that Texpo was not in compliance with certain retail electric service customer protection rules such as:

1. Customers could not select a language other than English;

2. Customer Rights and disclosure/disconnection notices were not provided in Spanish;

3. The price per kWh was not provided;

4. Customer right of rescission was not provided in a proper format and how to exercise that right was not explained;

5. For written enrollments, Texpo did not provide a means for the customer to select English, Spanish, or the language used in the marketing of the product;

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

7. Texpo failed to indicate the presence or absence of early termination fees during telephone enrollment;

8. Contract expiration notice, Texpo’s service termination document did not indicate when the expiration notice would be sent;

9. Bill content, Texpo did not use proper terms regarding customer meter reads;

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

Petition at 8, 9, ¶ 24.

EnerPenn believes that Texpo’s voluntary and timely action to correct all alleged consumer protection violations would satisfy the Pennsylvania Commission’s test for legal fitness. Petition at 7, ¶ 19. EnerPenn further states that it cannot reasonably be inferred that the violations of Texpo rise to the level of a persistent disregard for, flouting, or defiance of the Code and the Commission’s orders and regulations. *Id.* The fact that Texpo was previously 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 Pennsylvania’s consumer protection regulations. *Id.* at ¶ 20. Most importantly, the PUCT expressly found and concluded that, prior to the settlement, Texpo corrected all of the alleged violations that formed the basis of the investigation. Petition at 5, ¶ 14. Additionally, EnerPenn through its EGS Application has committed to comply with Pennsylvania’s regulations, including all consumer protection provisions, and there is nothing in the record to suggest otherwise. *Id.* at 7, ¶ 21.

EnerPenn also explains in its Petition that the consumer protection rules in Texas are different than those established by the Pennsylvania Commission. *Petition* at 9. For example, Texas requires its EGSs to independently bill their customers while in Pennsylvania a consolidated billing model is employed. *Id.* Two of Texpo’s alleged violations were the result of direct billing, a condition that cannot occur in Pennsylvania. *Id.* Texas also imposes Spanish Language requirements and Pennsylvania does not. According to EnerPenn, three of Texpo’s alleged violations resulted from conflicting or ambiguous PUCT rules. *Id.* Lastly, the civil suit described above contested a lawful disconnection of the customer’s electricity service for non-payment. While termination of service is handled by the EGS in Texas, in Pennsylvania only the EDC can terminate a retail customer’s service for non-payment.

EnerPenn’s Texas affiliate was involved as a defendant in *Donald Scott Mackenzie v Texpo Power, L.P. d/b/a Y.E.P.,* Case No. 1-11-425, in the 382nd Judicial District of Rockwall County, Texas. On April 20, 2011, Donald Scott Mackenzie (Plaintiff) submitted a Petition and Request for Disclosure to the 382nd Judicial District of Rockwall County Texas wherein the Plaintiff asserted that Texpo engaged in deceptive business practices, common law fraud and, breach of contract. On May 25, 2011, an Order for Abating Lawsuit was filed by Texpo. On September 27, 2011, the case was dismissed with prejudice to the Plaintiff. *Id.* at 5, ¶ 15.

EnerPenn contends that compliance with the *November 2011 Order* will increase costs which will negatively impact its ability to offer competitively priced alternative electric supplies and that the *November 2011 Order* only penalizes EnerPenn for the potential of future violations of consumer protection requirements that may never occur. *Id*. at 11.

EnerPenn contends that the conditions imposed by our *November 2011 Order* are not based upon substantial record evidence, are not tailored to EnerPenn’s specific circumstances, were imposed without appropriate due process, and would put EnerPenn at a competitive disadvantage in Pennsylvania. Petition at 12. EnerPenn is therefore requesting that the Commission reconsider and rescind those portions of the *November 2011 Order* directing EnerPenn to comply with additional and extensive consumer protection conditions. *Id.* In the alternative, EnerPenn suggests that any conditions should be limited to those necessary to ensure that EnerPenn does not engage in violations similar to those alleged to have been committed by its Texas affiliate Texpo. *Id.* Lastly, EnerPenn states that to the extent necessary, the Commission should afford EnerPenn with notice and opportunity to be heard through an evidentiary hearing. *Id.*

**Disposition**

In reviewing the Petition, we will initially address whether the Petitioner has met the standards set forth in *Duick, supra*. Based on our review of the record and the Petitioner’s averments, we find that the Petitioner has met the *Duick* standards. EnerPenn did not have an opportunityto respond to the Commission’s concerns regarding the PUCT’s investigation prior to the issuance of our *November 2011 Order.* Consequently, EnerPenn did not submit pertinent information to address these concerns. We find that EnerPenn has offered new and novel arguments, and described additional facts and circumstances that were not previously considered by the Commission. Based on these new submissions, we find that reconsideration is warranted.

The information submitted by EnerPenn following the issuance of the *November 2011 Order* resolves many of the concerns regarding consumer protection, which gave rise to the conditions required in that Order. *November 2011 Order* at 5. For example, EnerPenn provided Commission staff with the name and contact information for a single point of contact with the company, a description of the customer service quality control process, a copy of telephone enrollment scripts, and a new disclosure statement. Based on this additional information, we agree with EnerPenn that there is no need for the conditions that the *November 2011 Order* placed on EnerPenn’s EGS license, nor is there a need for an eighteen-month probationary period. We will therefore modify the *November 2011 Order* accordingly.

**Conclusion**

For the foregoing reasons, we will grant the Petition for Reconsideration filed by EnerPenn USA, LLC and modify the *November 2011 Order,* consistent with this Opinion and Order; **THEREFORE,**

**IT IS ORDERED:**

1. That the Petition for Reconsideration filed by EnerPenn USA, LLC, on November 29, 2011, at this docket is granted.

2. That the Order entered on November 14, 2011 at this Docket Number shall be modified as follows:

a. Ordering Paragraph 2 shall be revised to read as follows:

2. That a license be issued authorizing EnerPenn USA, LLC d/b/a Y.E.P., d/b/a YEP Energy to begin to offer, render, furnish or supply electric generation supplier services to residential, small commercial (25 kw and under demand), large commercial (over 25 kw demand), industrial and governmental customers in the service territories throughout the Commonwealth of Pennsylvania.

b. Ordering Paragraphs 2a. through 2f., 3, 4, and 4a. through 4.c, and Appendix 1 shall be stricken from the Order.

3. In all other respects, the Order entered on November 14, 2011 at this Docket Number shall remain in full force and effect.

 **BY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: March 15, 2012

ORDER ENTERED: MARCH 15, 2012

1. On December 16, 2011, Commission staff met with representatives of EnerPenn regarding this unprotested Application. At that meeting, EnerPenn’s representatives submitted additional documentation supporting the Application, including but not limited to a new disclosure statement. [↑](#footnote-ref-1)
2. Docket No. A-2009-2097544, Order entered December 23, 2009. [↑](#footnote-ref-2)
3. Public Utility Regulatory Act, TEX. UTIL. CODE ANN. §§ 11.01-66.016 (Vernon 2007 & Supp 2010) (PURA). [↑](#footnote-ref-3)