



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

IN REPLY PLEASE  
REFER TO OUR FILE

Bp8# 2297092

April 29, 2014

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

Re: Pennsylvania Public Utility Commission, Bureau of Investigation and  
Enforcement v. Glacial Energy of Pennsylvania, Inc.; C-2012-2297092

Dear Secretary Chiavetta:

Enclosed please find The Bureau of Investigation and Enforcement's Prehearing Conference Memorandum in the above referenced matter. Copies have been served on the parties as indicated in the attached certificate of service.

Sincerely,

Heidi L. Wushinske, Prosecutor  
Bureau of Investigation and Enforcement

Enclosures  
cc. Per Certificate of Service

RECEIVED  
2014 APR 29 PM 3:00  
PA PUC  
SECRETARY'S BUREAU

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Pennsylvania Public Utility  
Commission, Bureau of  
Investigation and Enforcement** :

v. :

**C-2012-2297092**

**Glacial Energy of Pennsylvania, Inc.** :

**PREHEARING CONFERENCE MEMORANDUM OF THE PUBLIC UTILITY  
COMMISSION**

Pursuant to the Prehearing Conference Order on Remand issued by the Honorable David A. Salapa on April 2, 2014, the Bureau of Investigation and Enforcement (I&E) of the Pennsylvania Public Utility Commission (Commission) files this initial prehearing conference memorandum.

**A. Service List**

The following is the Commission's entry on the service list in this matter:

Heidi L. Wushinske  
Prosecutor  
Bureau of Investigation and Enforcement  
Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265  
Phone: (717) 214-9594  
Fax: (717) 783-3458  
hwushinske@pa.gov

**RECEIVED**  
**2014 APR 29 PM 3:01**  
PA PUC  
SECRETARY'S BUREAU

**B. Possible Settlement**

The parties have engaged in settlement negotiations in the past. I&E, in good faith, believes that there is no likelihood of a settlement of the disputed issues at this time.

**C. Proposed Plan and Schedule of Discovery**

I&E asserts that all necessary discovery relating to the substance of the Complaint proceeding has been completed and no further discovery is necessary.

**D. Other Proposed Orders with Respect to Discovery**

I&E has no proposed orders with respect to discovery.

**E. Proposed Schedule for the Submission of Written Testimony, Conducting an In-Person Hearing, and Submission of Briefs**

I&E contends that the written direct testimony in this proceeding has already been completed. I&E and Glacial both submitted written direct testimony, and I&E submitted rebuttal testimony, in accordance with your honor's Prehearing Order #2 issued January 2, 2013. I&E knows of no new material facts that would necessitate further written direct testimony pertaining to the facts and counts set forth in I&E's Complaint. Therefore, I&E proposes the schedule set forth below:

Evidentiary hearings in Harrisburg	June 17, 18 2014
Close of record	June 18, 2014
Main briefs	July 18, 2014
Reply briefs	August 1, 2014

RECEIVED  
2014 APR 29 PM 3:01  
PA PUE  
SECRETARY'S BUREAU

**F. Witnesses**

As stated in section E above, I&E asserts that the written direct testimony portion of this proceeding has already been completed. I&E reserves the right to have certain witnesses deemed “hostile” for purposes of their live testimony. For the purpose of live testimony, I&E intends to call the following witnesses:

1. Scott Granger  
Bureau of Investigation and Enforcement  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265  
(717) 425-7593

Mr. Granger will testify as to the Commission’s regulations, the requirements of the “application to offer, render, furnish, or supply electricity or electricity generation services to the public in the Commonwealth of Pennsylvania,” and how Glacial’ s application was inadequate, deficient and/or misleading.

2. Roger McAuley  
15085 Huntington Gates Dr.  
Poway, CA 92064  
(415)-305-8488

Mr. McAuley’s testimony will focus on Gary Mole’s role and involvement with Franklin Power.

RECEIVED  
2014 APR 29 PM 3:01  
PA PUC  
SECRETARY'S BUREAU

3. Michael V. Petras  
24269 Dawnridge Dr.  
Los Altos Hills, CA 94024  
(650) 862-6320

Mr. Petras's testimony will focus on Gary Mole's role and involvement in Franklin Power.

4. Gary Mole  
5326 Yacht Have Grande  
Box 36  
St. Thomas, V.I. 00802

I&E believes that Mr. Mole's testimony is material to the resolution of this case. The Commission agreed with I&E on this issue, stating: "I&E and Glacial do not agree on, *inter alia*, Gary Mole's role with Franklin and Touchdown. Consequently, we find that there are issues of material fact that still need to be addressed in this proceeding." *Pa. PUC, Bureau of Investigation and Enforcement v. Glacial Energy of Pennsylvania*, p. 17, Docket No. C-2012-2297092 (Opinion and Order entered Mar. 6, 2014). Mr. Mole's testimony is crucial to the resolution of these issues.

I&E would like to reserve the right to call additional witnesses, as necessary, and will notify your honor and all parties of record.

**G. Issues and Sub-Issues**

The issues in this case are as follows:

1. That the Application, in response to the "compliance question" (#16), should have disclosed the existence of the Complaint of TXU Energy Delivery

RECEIVED  
2014 APR 29 PM 3:01  
PA PUC  
SECRETARY'S BUREAU

Company and CenterPoint Houston Energy, LLC, to Revoke Retail Electric Service Provider Certificate No. 10068 of Energy West Resources, LTD, PUC Final Order, consolidated at PUCT Docket No. 31166 (July 17, 2006);

2. That this disclosure should have been made because Gary Mole, Glacial's Chief Operating Officer, is a person identified in the application and either Mr. Mole, an affiliate, or predecessor of either was a defendant or respondent before an administrative body (PUC Texas);

3. Sub-issues include Mr. Mole's role and involvement with Franklin Power, the subsequent creation of Glacial Energy, and Gary Mole's failure to include his involvement with Franklin Power anywhere on Glacial Pa's application, including but not limited to Mr. Mole's resume;

4. Sub-issues also include Glacial's failure to identify Franklin Power as a predecessor of the applicant, Glacial Energy, in response to Question No. 1 of the application.

#### **H. Evidence**

At this time, I&E intends to offer the following evidence:

Relating to issues "A" and "B" above, I&E intends to offer the Complaints of TXU Energy Delivery Company and CenterPoint Houston Energy, LLC, to Revoke Retail Electric Service Provider Certificate No. 10068 of Energy West Resources, LTD, PUC Final Order, consolidated at PUCT Docket No. 31166 (July 17, 2006) and supporting documentation; and Glacial PA's application to offer, render, furnish, or supply electricity or electricity generation services to the public in the Commonwealth

of Pennsylvania. I&E also intends to offer the testimony of Scott Granger and the testimony of Gary Mole.

Regarding the sub-issues identified in “C” and “D” above, I&E intends to offer corporate documents and correspondence regarding and relating to Franklin Power and Glacial Energy, as well as the testimony of Michael V. Petras and Roger McAuley.

**I. Glacial’s Recent Chapter 11 Bankruptcy Filing Does Not Automatically Stay This Complaint Proceeding**

I&E opposes any attempts to stay the formal complaint proceeding at C-2012-2297092, in which I&E seeks revocation of Glacial’s electric generation supplier (EGS) license. I&E asserts that this proceeding should not be stayed for several reasons. Continuation of the proceeding is lawful because: (1) proceedings filed by governmental units as an exercise of their police and regulatory powers are exempt from the automatic stay provisions of the Bankruptcy Code; (2) a Pennsylvania EGS license is not a property right; and (3) the filing of a federal bankruptcy petition does not preempt all state law.

**1. This Proceeding is an Exercise of the Commission’s Police and Regulatory Powers and is Exempt from the Section 362 Automatic Stay Provisions**

The section 362 automatic stay provisions of the Bankruptcy Code protect debtors from certain collection efforts and halt the commencement or continuation of legal proceedings against a debtor while a bankruptcy administration is proceeding. 11 U.S.C. § 362(a). However, there are numerous exceptions to the section 362 automatic stay, including an exception for police and regulatory powers of governmental units. The

filing of a bankruptcy petition does not operate as an automatic stay of “the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit’s . . . police and regulatory power, including the enforcement of a judgment other than a money judgment. . . .” 11 U.S.C. § 362(b)(4). This complaint proceeding falls under the exception for police and regulatory powers of governmental units.

Bankruptcy courts have applied two tests in deciding which governmental proceedings are excepted from the section 362 automatic stay: (1) the pecuniary purpose test; and (2) the public policy test. *In re: Charter First Mortgage, Inc.*, 42 B.R. 380 (D. Ct. Or. 1980). Under the pecuniary purpose test, the courts determine whether the government action relates primarily to the protection of the government's pecuniary interest in the debtor's property or to matters of safety and welfare. *City & County of San Francisco v. PG&E Corp.*, 433 F.3d 1115 (9th Cir. 2006). Under the public policy test, the courts determine whether the government seeks to 'effectuate public policy' or to adjudicate 'private rights. *Id.* Thus, the courts examine the specific acts the government wishes to carry out and determine whether execution would result in an economic advantage to the government or its citizens over third parties in relation to the debtor's estate, or whether the action is commenced by the government to vindicate the public interest as opposed to a specific individual's or entity's interest. *In re: Charter First Mortgage, Inc.* 42 B.R. at 382; *U.S. Intern. Trade Com'mn. v. Jaffee*, 433 B.R. 538 (E.D. Va. 2010).

In this case, I&E filed a complaint against Glacial seeking revocation of its license to prevent further harm to the public convenience, interest, and safety. I&E requests no monetary penalties in this proceeding. Rather, I&E seeks to enforce Glacial's failure to disclose in its application to the Commission that its Chief Corporate Officer owned and operated another EGS whose Texas certificate was revoked for failing to satisfy financial obligations. I&E also seeks to protect the electric retail marketplace by deterring future fraudulent license applications. The complaint proceeding in this case passes the public interest test because I&E seeks to protect the public as a whole, and the pecuniary purpose test, since I&E is not seeking any money. Thus, this proceeding qualifies for the section 362(b)(4) exception to the automatic stay.

The Commission has also addressed the section 362(b)(4) exemption and found that a proceeding to revoke a certificate of public convenience was not subject to the automatic stay provisions of the Bankruptcy Code, but was exempt under section 362(b)(4). *Application of Richard Harvitz t/a Richard's Executive Limousine Service*, Docket No. A-00108504 (Order entered Dec. 22, 2000); 11 U.S.C. § 362(b)(4). In this case, the Commission revoked Petitioner's certificate of public convenience and subsequently denied its Petition for Reinstatement. In addressing Petitioner's Petition for Reconsideration, the Commission noted that the filing of a petition under the Bankruptcy Code did *not* operate as a stay on the commencement or continuation of a proceeding by an administrative agency to enforce such agency's regulatory power and revocation of Petitioner's certificate of public convenience "was *merely* an act to enforce the Commission's regulatory powers."

## 2. A Pennsylvania EGS License is Not a Property Right

Pennsylvania law is clear; a PUC-issued certificate is a privilege and not a property right.<sup>1</sup> *Loma, Inc. v. Pa. PUC*, 682 A.2d 424, 428 (Pa. Commw. Ct. 1996) (stating that “[t]his Court has consistently held that a certificate of public convenience issued by the PUC is a mere privilege, not a contract right or a property interest. . . .”); *See also Fiore v. Commonwealth*, 668 A.2d 210 (Pa. Commw. Ct. 1995); *Cresco, Inc. v. Pa. PUC*, 622 A.2d 997 (Pa. Commw. Ct. 1993), *appeal denied*, 637 A.2d 292 (Pa. 1993); *Pa. PUC v. Zanella Transit, Inc.*, 417 A.2d 860 (Pa. Commw. Ct. 1980). The Commission has recently addressed this issue, finding that a certificate of public convenience is a privilege, not a property interest. *Application of PCA EMStar Holdings, LP t/a EMSTAR*, Docket Nos. A-6415259 and A-2012-2333117 (Order entered Aug. 29, 2013). A revocable privilege cannot give rise to a property interest characteristic of an asset.

Pennsylvania jurisdictional utilities and suppliers have no property rights in the certificates they hold. The PUC has authority to grant, deny, or even condition a utility’s request to begin, transfer or abandon service. *Borough of Duncannon v. Pa. PUC*, 213 A.2d 139 (Pa. Super. Ct. 1965); *Modern Transfer Co. v. Pa. PUC*, 125 A.2d 463 (Pa. Super. Ct. 1956). Because it has no inherent property value and cannot be sold or transferred without the review and approval of the PUC, the revocation of Glacial’s EGS

---

<sup>1</sup> Although the existing case law deals with certificates of public convenience, a certificate to a public utility is akin to a license for an EGS. EGS licenses have all of the same restrictions and conditions as certificates regarding issuance, transferring, or abandoning service.

license is properly the subject of a PUC proceeding and is not stayed by the filing of a bankruptcy petition.

**3. The Filing of a Federal Bankruptcy Petition Does Not Preempt All State Law**

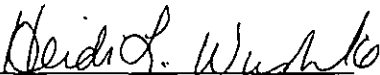
The filing of a Chapter 11 federal bankruptcy petition does not halt the Commission's state authority to seek revocation of a privilege. The federal courts reject attempts to supersede or preempt state statutes or regulations that are reasonably designed to protect the public health or safety from identified hazards, including an ongoing obligation to comply with local codes regarding the delivery of public utility service.

*Robinson v. Michigan Consol. Gas Co., Inc.*, 918 F.2d 579, 588-89 (6<sup>th</sup> Cir. 1990) (citing *Midlantic Nat. Bank v. New Jersey Dep't of Env'tl. Prot.*, 474 U.S. 494, 501 (1986)). The federal courts exercise special caution before finding state health and safety regulations invalid under the supremacy clause. *Robinson*, 918 F.2d at 589 (citing *Saravia v. 1736 18<sup>th</sup> St., N.W., Ltd. P'ship*, 844 F.2d 823 (D.C. Cir. 1988)).

The proceeding before the Commission addresses distinctly state issues, including public safety and an interest in a stable and functioning electric supply infrastructure. I&E has alleged that Glacial's Pennsylvania operations harm the public safety and interest by failing to disclose Gary Mole's interest in a previous company that defaulted on its obligations to pay its generation charges and forced its customers to return to a provider of last resort. The underlying pattern of Gary Mole's companies' failures to pay their creditors, ultimately imposes higher costs on consumers and destabilizes the competitive marketplace.

**WHEREFORE**, for all the foregoing reasons, the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission respectfully requests that, after consideration of the record, the Office of Administrative Law Judge and the Commission deny Glacial's request to stay this proceeding.

Respectfully submitted,



Heidi L. Wushinske  
Prosecutor  
PA Attorney ID No. 93792

Stephanie M. Wimer  
Prosecutor  
PA Attorney ID No. 207522

Wayne T. Scott  
First Deputy Chief Prosecutor  
PA Attorney ID No. 29133

Pennsylvania Public Utility Commission  
Bureau of Investigation and Enforcement  
P.O. Box 3265  
Harrisburg, PA 17105-3265  
(717) 787-5000

Dated: April 29, 2014

RECEIVED  
2014 APR 29 PM 13:01  
PA PUC  
SECRETARY'S BUREAU


## CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing documents in accordance with the requirements of 52 Pa. Code § 1.54 *et seq.* (relating to service by a participant).

### Notification by email addressed as follows:

John McGahren, Esq.  
Stephanie Feingold, Esq.  
Morgan Lewis & Bockius LLP  
502 Carnegie Center  
Princeton, NJ 08540-6241

The Honorable David Salapa  
Office of Administrative Law Judge  
Commonwealth Keystone Building  
P.O. Box 3265  
Harrisburg, PA 17105-3265



Heidi L. Wushinske  
Prosecutor  
Attorney ID #93972  
(Counsel for Pennsylvania Public Utility  
Commission)

P.O. Box 3265  
Harrisburg, PA 17105-3265  
(717) 787-5000

Dated: April 29, 2014

RECEIVED  
2014 APR 29 PM 01 01  
PA PUC  
SECRETARY'S BUREAU