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July 10, 2014

**VIA ELECTRONIC MAIL**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2<sup>nd</sup> Floor (filing room)  
PO Box 3265  
Harrisburg, PA 17105-3265

RE: Commonwealth of Pennsylvania, by 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; Docket No. C-2014-2427656;  
**PRELIMINARY OBJECTIONS TO JOINT COMPLAINT**

Dear Secretary Chiavetta:

Enclosed for filing with the Commission are the Preliminary Objections to Joint Complaint filed in the above-captioned docket. Copies of this document have been served in accordance with the attached Certificate of Service.

Thank you for your attention to this matter. If you have any questions related to this filing, please do not hesitate to contact my office.

Very truly yours,

Todd S. Stewart  
*Counsel for Energy Services Providers, Inc.  
Pennsylvania Gas & Electric*

TSS/jld  
Enclosure  
cc: Per Certificate of Service

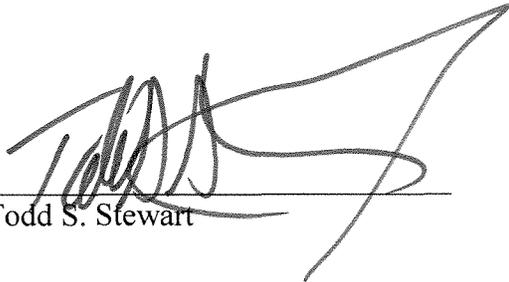
**CERTIFICATE OF SERVICE**

I, Todd S. Stewart, Esquire, hereby certify that on July 10, 2014, I served a true and correct copy of the foregoing Preliminary Objections to the Joint Complaint on the persons listed below, as follows:

**VIA ELECTRONIC AND FIRST CLASS MAIL**

Candis A. Tunilo, Assistant Consumer Advocate  
Brandon J. Pierce, Assistant Consumer Advocate  
Office of Consumer Advocate  
555 Walnut Street  
5th Floor, Forum Place  
Harrisburg, Pennsylvania 17101-1923

John M. Abel, Senior Deputy Attorney General  
Nichole R. Beck, Deputy Attorney General  
Bureau of Consumer Protection  
Office of Attorney General  
15th Floor, Strawberry Square  
Harrisburg, Pennsylvania 17120



Todd S. Stewart

DATED: July 10, 2014

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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Commonwealth of Pennsylvania, by  
Attorney General KATHLEEN G. KANE,  
Through the Bureau of Consumer Protection,

AND

TANYA J. McCLOSKEY, Acting Consumer  
Advocate,

Complainants,

v.

ENERGY SERVICES PROVIDERS, INC. d/b/a  
PENNSYLVANIA GAS & ELECTRIC,

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Respondent.

Docket No. C-2014-2427656

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**NOTICE TO PLEAD**

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TO: Candis A. Tunilo, Assistant Consumer Advocate  
Brandon J. Pierce, Assistant Consumer Advocate  
Office of Consumer Advocate  
555 Walnut Street  
5th Floor, Forum Place  
Harrisburg, Pennsylvania 17101-1923

John M. Abel, Senior Deputy Attorney General  
Nichole R. Beck, Deputy Attorney General  
Bureau of Consumer Protection  
Office of Attorney General  
15th Floor, Strawberry Square  
Harrisburg, Pennsylvania 17120

Pursuant to 52 Pa. Code §§5.101 *et seq.* you are hereby notified that Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric (“ESPI”) has filed Preliminary Objections to which you may answer within ten (10) days unless otherwise provided in Chapter 5 of Title 52 of the Pennsylvania Code. Your failure to answer will allow the presiding officer to rule on the Preliminary Objections without a response from you, thereby requiring no other proof. All Pleadings such as a reply to these Preliminary Objections must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served on the undersigned counsel for Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric (“ESPI”).



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DATED: July 10, 2014

*Counsel for Energy Services Providers, Inc.  
d/b/a Pennsylvania Gas & Electric*

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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Commonwealth of Pennsylvania, by  
Attorney General KATHLEEN G. KANE,  
Through the Bureau of Consumer Protection,

AND

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PENNSYLVANIA GAS & ELECTRIC,

Respondent.

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Docket No. C-2014-2427656

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**PRELIMINARY OBJECTIONS  
TO JOINT COMPLAINT**

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Respondent Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric (“ESPI”), files these Preliminary Objections to the Joint Complaint pursuant to 52 Pa Code § 5.101(a), and in connection therewith avers as follows:

**I. INTRODUCTION AND BACKGROUND**

1. ESPI is an electric generation supplier (“EGS”) licensed by the Pennsylvania Public Utility Commission (the “Commission”) to supply electric generation services to residential, small commercial, large commercial, industrial, and government consumers throughout Pennsylvania.

2. Consistent with this license, ESPI offers variable rate electric generation services to residential consumers throughout Pennsylvania.

3. ESPI markets and advertises its variable rate plans through telephone and internet solicitations. ESPI will provide printed information regarding its variable rate plans to a potential customer upon request.

4. All of ESPI's telephone sales are confirmed through an independent third-party verification ("TPV") process. During the TPV process, the consumer must confirm that they understand that their charges from ESPI for electricity will be based on a month-to-month variable rate.

5. If an individual agrees to purchase electricity from ESPI, ESPI will send the new customer a Welcome Letter and a Disclosure Statement. A copy of the Welcome Letter is attached hereto as Exhibit "A." A copy of the Disclosure Statement is attached to the Complaint.

6. Like the TPV, the Welcome Letter and the Disclosure Statement inform ESPI's customers that they will be charged a "variable rate."

7. As explained in the Disclosure Statement, this variable rate changes daily and the rate charged by ESPI will reflect "your cost of electricity, including energy, other wholesale market services, the associated transmission and distribution charges and other market-related factor for your utilities transmission zone within the PJM ISO; plus all applicable taxes, fees, charges, costs, expenses, and margins."

8. In January and February 2014, Pennsylvania experienced abnormally cold weather. The cold weather contributed to increased and, on some days, record breaking use of electricity. As consumer usage spiked to unprecedented levels on these days, so did wholesale prices for electricity. As a result (and consistent with its Disclosure Statement), ESPI passed

some of these wholesale price increases to its residential variable rate customers, but absorbed the rest, and experienced a \$12.5 million gross loss in Pennsylvania in January; and in addition paid over \$4 million in rebates to customers to help them with their electricity bills.

9. On June 20, 2014, Attorney General Kathleen G. Kane through the Bureau of Consumer Protection (the “Attorney General”) and the Acting Consumer Advocate Tanya J. McCloskey (the “OCA”) (together referred to as the “Joint Complainants”) filed a joint complaint (the “Joint Complaint”) with the Commission.

10. The Joint Complaint contains seven counts: Count I – Misleading and Deceptive Promises of Savings; Count II – Slamming; Count III – Misleading and Deceptive Welcome Letter; Count IV – Lack of Good Faith Handling of Complaints; Count V – Failing to Provide Accurate Pricing Information; Count VI – Prices Nonconforming to Disclosure Statement; and Count VII – Failure to Comply with the Telemarketer Registration Act.

11. According to the Joint Complaint, many of these counts are based on information and complaints allegedly received by the Attorney General and the OCA from unnamed variable rate residential customers of ESPI and/or allegations made by ESPI customers in Formal Complaints filed with the Commission.

12. ESPI has settled all Formal Complaints that were filed with the Commission against ESPI prior to the Joint Complainants initiation of this dispute. Each of these settlements was confirmed with the Commission through the filing a Certificate of Satisfaction.

13. Contemporaneously with the filing of these Preliminary Objections, ESPI filed an Answer to the Joint Complaint, which generally denies any wrongdoing.

14. Through these Preliminary Objections, ESPI is seeking dismissal of each Count of the Joint Complaint in whole or in part, as follows:

a. Counts I, II, IV, and V should be dismissed for insufficient specificity because they are not pled in sufficient detail to allow ESPI to conduct a meaningful investigation and prepare a coherent response or defense.

b. Counts I, II, III, V, VI, and VII should be dismissed for lack of jurisdiction and legal insufficiency to the extent that those counts allege that ESPI violated or is violating the Consumer Protection Law, 73 P.S. § 201-1, *et seq.*, because the Commission lacks jurisdiction and authority to enforce or adjudicate violations under the Consumer Protection Law.

c. Each Count should be dismissed for lack of jurisdiction to the extent it seeks monetary damages or refunds because the Commission lacks authority to award such relief.

d. Counts I, II, and IV should be dismissed for legal insufficiency to the extent they are based on allegations in Formal Complaints that were filed by consumers because ESPI has settled all Formal Complaints that were filed by consumers prior to the Joint Complainants' initiation of this dispute and, therefore, cannot be forced to litigate the allegations in those Formal Complaints.

e. Count VII should be dismissed in its entirety for lack of jurisdiction and legal insufficiency because it is based on alleged violations of the Telemarketer Registration Act, which the Commission has no authority to enforce.

f. Count VII should be dismissed in its entirety for legal insufficiency because it is based on alleged violations of the Telemarketer Registration Act, which does not apply to ESPI.

g. Count V should be dismissed in its entirety for legal insufficiency because the Disclosure Statement complies with all Commission regulations.

## **II. ARGUMENT**

**A. Legal Standard.**

15. The Commission's regulations allow a respondent to file preliminary objections to a complaint. 52 Pa. Code § 5.101. Preliminary motion practice before the Commission is similar to that utilized in Pennsylvania civil practice. *Equitable Small Transportation Interveners v. Equitable Gas Company*, 1994 Pa. PUC LEXIS 69, PUC Docket No. C-00935435 (July 18, 1994) (citing Pa.R.C.P 1017). A preliminary objection in civil practice seeking dismissal of a pleading will be granted where relief is clearly warranted and free from doubt. *Interstate Traveller Services, Inc. v. Pa. Dept. of Environmental Resources*, 486 Pa. 536, 406 A.2d 1020 (Pa. 1979).

16. In determining whether to sustain preliminary objections, all well-pleaded material, factual averments and all inferences fairly deducible therefrom are presumed to be true. *Marks v. Nationwide Ins. Co.*, 762 A.2d 1098, 1099 (Pa. Super. Ct. 2000), *appeal denied*, 788 A.2d 381 (Pa. 2001). The pleaders' conclusions of law, unwarranted inferences from facts, argumentative allegations or expressions of opinion should not be considered to be admitted as true. *Id.* The preliminary objections should be sustained if, based on the facts averred by the plaintiff, the law says with certainty that no recovery is possible. *Soto v. Nabisco, Inc.*, 32 A.3d 787, 790 (Pa. Super. Ct. 2011), *appeal denied*, 50 A.3d 126 (Pa. 2012).

**B. Preliminary Objection #1: Counts I, II, IV, and V Are Not Pled with Sufficient Specificity.**

17. Counts I, II, IV, and V should be dismissed pursuant to 52 Pa. Code § 5.22(a)(3) because they are not pled with sufficient specificity.

18. The Commission's rules of procedure state that a formal complaint must contain a "clear and concise statement of the act or omission being complained of including the result of any informal complaint or informal investigation." 52 Pa. Code § 5.22(a)(5). This rule is

intended to provide the respondent with sufficient information to understand the allegations made against it so that the respondent can conduct a meaningful investigation and prepare a coherent response or defense. *See Angelo Rodriguez v. Philadelphia Gas Works*, Docket No. F-2009-2110772 (Initial Decision entered Nov. 16, 2009).

19. Here, Counts I, II, IV, and V do not provide ESPI with an opportunity to conduct a meaningful investigation and prepare a coherent defense because those claims are based on bare-bones allegations of vague accusations by unnamed individuals who are purported to be customers of ESPI.

20. For example, in Count I, the Joint Complainants allege that ESPI violated the Commission's regulations and orders and the Consumer Protection Law because its employees, agents, and/or representatives supposedly promised savings that failed or might fail to materialize. These allegations are based exclusively on the accusations of consumers who contacted the Attorney General or OCA and the OCA's review of some Formal Complaints that were filed against ESPI with the Commission. The Joint Complaint makes no attempt to allege or describe: (1) who these consumers are; (2) which of ESPI's employees, agents, or representatives made the purported promises; (3) what was misleading or deceptive about each of these purported promises; or (4) when each purported promise was made.

21. In Count II, the Joint Complainants allege that ESPI violated the Commission's regulations and orders and the Consumer Protection Law by switching consumers to ESPI without the consumers' consent. These allegations are also based exclusively on the accusations of consumers who contacted the Attorney General or OCA and the OCA's review of some Formal Complaints that were filed against ESPI with the Commission. The Joint Complaint makes no attempt to allege or describe: (1) who these consumers are; or (2) when and under

what circumstances each of these consumers was supposedly switched to ESPI without proper consent.

22. In Count IV, the Joint Complainants allege that ESPI violated the Commission's regulations and orders by failing to implement appropriate procedures for resolving disputes with residential consumers. These allegations are based exclusively on the accusations of consumers who contacted the OCA and/or filed Formal Complaints against ESPI with the Commission who allegedly complained that they could not get through to ESPI on the telephone and/or that their messages left for ESPI went unanswered. The Joint Complaint makes no attempt to identify: (1) who these consumers are; (2) when each of these consumers tried to contact ESPI; (3) where they left their message; or (4) what the nature of their call was.

23. In Count V, the Joint Complainants allege that ESPI violated the Commission's regulations and the Consumer Protection Law by failing to provide pricing information when requested by consumers. These allegations are based exclusively on the accusations of consumers who contacted the Attorney General. The Joint Complaint makes no attempt to identify: (1) who these consumers are; (2) when each of these consumers contacted ESPI; or (3) what pricing information was purportedly requested but not provided.

24. ESPI had approximately 100,000 customers in Pennsylvania at the beginning of January 2014. During the period in question -- January 2014, through the end of March 2014 -- ESPI received approximately 173,000 calls to its customer service lines from Pennsylvania customers, potential customers and former customers. Without the identifying information described above, ESPI is not able to conduct a meaningful investigation of the anonymous accusations alleged in the Joint Complaint and prepare a coherent defense of the claims based on those accusations. Therefore, Counts I, II, IV, and V, which rely on such anonymous

accusations, should be dismissed for failure to plead facts with the specificity required by 52 Pa. Code § 5.22(a)(5).

**C. Preliminary Objection #2: Counts I, II, III, V, VI, and VII Should Be Dismissed for Lack of Jurisdiction and Legal Insufficiency Because the Commission Cannot Enforce the Consumer Protection Law.**

25. The Commission should dismiss Counts I, II, III, V, VI, and VII for lack of jurisdiction and for legal insufficiency to the extent that those counts allege that ESPI violated or is violating the Consumer Protection Law, 73 P.S. § 201-1, *et. seq.* because the Commission lacks jurisdiction to enforce the Consumer Protection Law.

26. The Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly. *In Hynn Yoo and Yu Shin Yoo v. Philadelphia Gas Works*, 2014 Pa. PUC LEXIS 257, Docket No. C-2013-2369915 (Initial Decision entered April 7, 2014) (citing *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937 (Order entered May 28, 2008) and *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977)). The Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. Pa. Pub. Util. Comm'n*, 43 A.2d 348 (Pa. Super. 1945). Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Comm. Ct. 1992), *appeal denied*, 637 A.2d 293 (Pa. 1993).

27. Furthermore, in order to be legally sufficient, a complaint must set forth “an act or thing done or omitted to be done or about to be done or omitted to be done by the respondent in violation, or claimed violation, of a statute which the Commission has jurisdiction to administer, or of a regulation or order of the Commission.” 52 Pa. Code § 5.22(a)(4); *see, e.g., James Drake v. Pennsylvania Electric Co.*, Docket No. C-2014-2413771, Initial Decision Sustaining Preliminary Objection and Dismissing Complaint, 2014 WL 2003281, \*4 (May 7, 2014).

28. The Commission’s jurisdiction over EGSs like ESPI is set forth in 66 Pa. C.S. § 2809(e). Nothing in 66 Pa. C.S. § 2809(e) or any other statute passed by the General Assembly expressly or impliedly grants the Commission jurisdiction to enforce the Consumer Protection Law against an EGS. Indeed, it is well settled that the Commission lacks jurisdiction to enforce the Consumer Protection Law. *See Mid-Atlantic Power Supply Assoc. v. PECO Energy Co.*, Docket No. P-00981615, 1999 Pa. PUC LEXIS 30 (Order entered May 19, 1999); *Pa. P.U.C. et al. v. The Bell Telephone Co. of Pa.*, 71 Pa. P.U.C. 338, 341 (1989)); *see also MacLuckie v. Palmco Energy PA, LLC*, Docket No. C-201402402558 (Initial Decision entered June 16, 2014). Consequently, the Commission does not have the power to adjudicate alleged violations of the Consumer Protection Law.

29. Moreover, a simple reading of the Consumer Protection Law makes clear that the General Assembly intended for courts to enforce its provisions, not administrative agencies like the Commission. *See* 73 P.S. 201-4.1 (“Whenever any court issues a permanent injunction to restrain and prevent violations of this act as authorized in section 4 above, the court may in its discretion direct that the defendant or defendants restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any violation of this act, under terms and conditions to be established by the court.”) (emphasis added); 73 P.S. § 201-5 (providing that the Attorney General may accept assurances of voluntary compliance but that “[a]ny such assurance shall be in writing and filed with the court”) (emphasis added); 73 P.S. § 201-8 (“if the court finds that a person, firm or corporation is wilfully using or has wilfully used a method, act or practice declared unlawful by section 3 of this act, the Attorney General or the appropriate District Attorney, acting in the name of the Commonwealth of Pennsylvania, may recover, on behalf of the Commonwealth of Pennsylvania, a civil penalty . . .”) (emphasis added);

73 P.S. § 201-9 (“Upon petition by the Attorney General, the court having jurisdiction, may, in its discretion, order the dissolution, suspension or forfeiture of the franchise or right to do business of any person, firm or corporation which violates the terms of an injunction issued under section 4 of this act. In addition, the court may appoint a receiver of the assets of the company.”) (emphasis added); 73 P.S. § 201-9.1 (“When a receiver is appointed by the court pursuant to this act, he shall have the power to sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys, and effects, lands and tenements, books, records, documents, papers, choses in action, bills, notes and property of every description of the person or persons for whom the receiver is appointed, received by means of any practice declared to be illegal and prohibited by this act, including property with which such property has been mingled if it cannot be identified in kind because of such commingling, and to sell, convey, and assign the same and hold and dispose of the proceeds thereof under the direction of the court. Any person who has suffered damages as a result of the use or employment of any unlawful practices and submits proof to the satisfaction of the court that he has in fact been damaged, may participate with general creditors in the distribution of the assets to the extent he has sustained provable losses. The court shall have jurisdiction of all questions arising in such proceedings and may make such orders and judgments therein as may be required.”) (emphasis added).

30. The effect of this lack of Commission authority to adjudicate alleged violations of the Consumer Protection Law is twofold. First, to the extent the Joint Complaint seeks enforcement of that statute, it must be dismissed for lack of subject matter jurisdiction. Second, to the extent Joint Complainants’ claims are predicated on alleged violations of the statute, they must be dismissed for legal insufficiency.

31. Counts I, II, V, VI, and VII are based, in part, on allegations that ESPI violated the Consumer Protection Law. Because the Commission does not have jurisdiction to enforce the Consumer Protection Law against EGSs like ESPI, it is without authority to determine whether the allegations of the Joint Complaint constitute violations of that statute. Therefore, these counts should be dismissed for lack of subject matter jurisdiction and for legal insufficiency to the extent that they rely on allegations that that ESPI violated the Consumer Protection Law.

32. Count III is based entirely on ESPI's alleged violations of the Consumer Protection Law. Count III does not allege that ESPI violated any other law, regulation, or order. Consequently, Count III should be dismissed in its entirety for lack of jurisdiction and for legal insufficiency.

**D. Preliminary Objection #3: The Commission Lacks Jurisdiction to Award Monetary Damages or Direct ESPI to Provide Refunds to Customers.**

33. In ¶ D of their demand for relief (Joint Complaint at 16), the Joint Complainants assert that if the Commission were to conclude that ESPI violated a legal duty owed to its customers, the Commission should order ESPI to “provide appropriate restitution, including without limitation to, refunding all charges to its customers that were over and above the Price to Compare in the customers’ respective service territories from January 1, 2014 through the date of resolution of this matter, as well as any late, cancellation and/or termination fees and/or other such penalties charged to customers as a result of [ESPI’s] charges and customers leaving [ESPI] to obtain generation service elsewhere.”

34. As explained above, the Commission’s powers are limited to those granted in statute by the General Assembly.

35. The Commission and courts of this Commonwealth have long recognized that “the statutory array of the Commission’s remedial and enforcement powers does not include the power to award damages. That power, instead, resides with the Courts of Common Pleas.” *James Coppedge v. PECO Energy Co*, Docket No. F-2009-213589 (Order entered Aug. 3, 2010) (citing *Feingold v. Bell of Pennsylvania*, 383 A.2d 791, 794-795 (Pa. 1977)).

36. Furthermore, the law is clear that EGSs are not “public utilities” except for the limited purposes of 66 Pa. C.S. § 2809 and 2810, *see Delmarva Power & Light Co. v. Commonwealth*, 870 A.2d 901, 910 (Pa. 2005) (citing 66 Pa. C.S. § 102) and that, therefore, the Commission cannot regulate the rates that an EGS charges to its customers. *See Yaglidereliler Corp. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2413732 (Initial Decision entered June 18, 2014). As a result, the Commission does not have the authority or jurisdiction to order an EGS to provide refunds or credits to its customers or to award any other monetary damages. *Id.*

37. The Joint Complainants appear to base their demand for monetary relief on the Consumer Protection Law. (*See* Joint Complaint ¶ 80.) However, as argued above, the Commission lacks jurisdiction to enforce the Consumer Protection Law or to use that law’s provisions to order the payment of damages or restitution. Only a court can enforce the Consumer Protection Law by ordering the payment of damages or restitution. *See* 72 P.S. 201-4.1 (“Whenever any court issues a permanent injunction to restrain and prevent violations of this act as authorized in section 4 above, the court may in its discretion direct that the defendant or defendants restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any violation of this act, under terms and conditions to be established by the court.”) (emphasis added).

38. Because the Commission does not have authority or jurisdiction to award damages or order an EGS like ESPI to provide refunds or credits to its electric generation customers, the Commission should dismiss the Joint Complaints' request for relief in ¶ D on page 16 of the Joint Complaint for lack of subject matter jurisdiction and legal insufficiency.

**E. Preliminary Objection #4: Counts I, II, and IV Should Be Dismissed Because the Underlying Formal Complaints Have Been Satisfied Through Settlements.**

39. Counts I, II, and IV should be dismissed for legal insufficiency to the extent they are based on allegations in Formal Complaints that were filed by consumers against ESPI between January 1, 2014 and April 21, 2014.

40. Any individual can file a Formal Complaint with the Commission. *See* 66 Pa. C.S. § 701. However, the General Assembly also provided by statute that, "If any party complained against . . . shall satisfy the complaint, the commission shall dismiss the complaint. Such party shall be relieved from responsibility only for the specific matter complained of." *See* 66 Pa. C.S. § 703(a).

41. Here, ESPI has resolved all Formal Complaints that were filed by consumers against ESPI prior to the filing of the Joint Complaint through settlements. Each settlement was confirmed with the Commission through the filing a Certificate of Satisfaction.<sup>1</sup>

42. Because 66 Pa. C.S. § 703(a) relieves ESPI from responsibility for any purported wrongdoing alleged in a Formal Complaint that was subsequently settled, Counts I, II, and IV should be dismissed for legal insufficiency to the extent that they rely on information contained in Formal Complaints that consumers filed against ESPI.

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<sup>1</sup> ESPI is aware of one Formal Complaint filed by a consumer on July 2, 2014, that is pending against ESPI.

**F. Preliminary Objection #5: Count VII Should Be Dismissed For Lack Of Jurisdiction Because The Commission Cannot Enforce the Telemarketer Registration Act.**

43. The Commission should dismiss Count VII for lack of jurisdiction and for legal insufficiency because it is based on alleged violations of the Telemarketer Registration Act.

44. As explained above, the Commission's powers are limited to those granted in statute by the General Assembly.

45. The General Assembly defined the Commission's jurisdiction over EGSs like ESPI in Pa. C.S. § 2809(e). Nothing in 66 Pa. C.S. § 2809(e) or any other statute provides the Commission with jurisdiction to enforce the Telemarketer Registration Act against EGSs.

46. Count VII is based entirely on ESPI's alleged violations of the Telemarketer Registration Act. Because the Commission does not have jurisdiction to enforce the Telemarketer Registration Act, it cannot determine whether the conduct alleged constitutes a violation of that statute. Count VII should therefore be dismissed in its entirety.

**G. Preliminary Objection #6: Count VII Should Be Dismissed for Legal Insufficiency.**

47. Count VII is based exclusively on ESPI's alleged violation of provisions of the Telemarketing Registration Act that require certain businesses to reduce their telemarketing sales to detailed written contracts that are signed by customers. As explained in more detail below, EGSs like ESPI are exempt from these provisions of the Telemarketing Registration Act because their sales are regulated by other laws of this Commonwealth. Consequently, Count VII should be dismissed in its entirety for legal insufficiency pursuant to 52 Pa. Code § 5.101(a)(4).

48. Section 5.101 of the Commission's Rules permits dismissal of a pleading for legal insufficiency. 52 Pa. Code § 5.101(a)(4). In order to be legally sufficient, a complaint must set forth "an act or thing done or omitted to be done or about to be done or omitted to be done by the

respondent in violation, or claimed violation, of a statute which the Commission has jurisdiction to administer, or of a regulation or order of the Commission.” 52 Pa. Code § 5.22(a)(4); *see, e.g., James Drake v. Pennsylvania Electric Co.*, Docket No. C-2014-2413771, Initial Decision Sustaining Preliminary Objection and Dismissing Complaint, 2014 WL 2003281, \*4 (May 7, 2014). Since ESPI is exempt from the provisions of the Telemarketing Registration Act described below, the conduct alleged in the Joint Complaint, even if true, cannot constitute a violation of that statute.

49. The Telemarketing Registration Act provides that, as a general matter, a business engaged in telemarketing must reduce any sale of goods or services to a written contract and obtain the purchasing consumer’s written signature on the written contract. *See* 73 P.S. § 2245(a)(7). The Telemarketing Registration Act also provides that, generally, such a written contract must contain specific information, including: a detailed description of the consumer goods and services purchased which shall match the oral description given in the telemarketing solicitation; any oral or written representations made during the telemarketing solicitations; and a statement that read, “You are not obligated to pay any money unless you sign this contract and return it to the seller.” *See* 73 P.S. § 2245(c).

50. Importantly, however, the General Assembly also included provisions in the Telemarketing Registration Act that specifically exempts certain businesses from these requirements. *See* 73 P.S. § 2245(a)(7) (noting exceptions to written contract at 73 P.S. § 2245(d)). More specifically, the General Assembly provided that “a signed, written contract is not needed if . . . [t]he contractual sale is regulated under other laws of this Commonwealth.” *See* 73 P.S. § 2245(d).

51. Here contractual sales between ESPI and its customers are regulated by the Commission at 52 Pa. Code §§ 54.1, *et seq.*, and 111.01, *et seq.* These regulations constitute binding “laws” that must be followed by ESPI and other EGSs. *See* 66 Pa. C.S. § 501; *see also Giant Good Stores, Inc. v. Commonwealth*, 713 A.2d 177, 180 (Commw. Ct. 1998) (“regulations establish binding norms having the force of law”); *Black’s Law Dictionary* 1311 (8th ed. 2004) (defining the term regulation as “a rule or order, having legal force, usually issued by an administrative agency”).

52. Because contractual sales between ESPI and its customers are indisputably “regulated under other laws of this Commonwealth,” the Telemarketing Registration Act’s requirement at 73 P.S. § 2245(a)(7) and 73 P.S. § 2245(c) do not apply to ESPI. Consequently, Count VII should be dismissed in its entirety.

**H. Preliminary Objection #7: Count V Should Be Dismissed for Legal Insufficiency.**

53. The Commission’s regulations provide that an EGS’ disclosure statement must disclose “terms of service” to residential customers, including, “***if applicable***” a “variable pricing statement.” *See* 52 Pa. Code § 54.5(c)(2)(emphasis added). The regulations specify that the “variable pricing statement, ***if applicable***, must include: (i) conditions of variability (state on what basis prices will vary[;] (ii) [l]imits on price variability.” *See* 52 Pa. Code § 54.5(c)(2)(i)-(ii) (emphasis added).

54. In Count V, the Joint Complainants allege that ESPI violated and continues to violate 52 Pa. Code § 54.5(c) because ESPI’s Disclosure Statement does not state the conditions of variability and the limits on price variability. Both arguments fail as a matter of law.

55. The variable pricing statement in ESPI's Disclosure Statement plainly provides a statement regarding the basis on which a customer's price for electricity will vary. More specifically, the variable pricing statement in ESPI's Disclosure Statement provides:

Price. Your rate for the Commodity Charges will be a variable rate that changes daily and includes Transmission Charges and estimated total state taxes, including gross receipts tax, but excludes applicable state and local tax. Each month your rate will reflect your cost of electricity, including energy, other wholesale market-related services, the associated transmission and distribution charges and other market-related factors for your utilities transmission zone within the PJM ISO, plus all applicable taxes, fees, charges, costs, expenses and margins.

*See, Disclosure Statement.*

56. Because the variable pricing statement in ESPI's Disclosure Statement quite obviously discloses "on what basis prices will vary," the Joint Complainants' allegation that ESPI violated and is violating 52 Pa. Code § 54.5(c) by failing to state the conditions of variability within its Disclosure Statement must fail as a matter of law. The Joint Complainants are correct in pointing out that the variable pricing statement in ESPI's Disclosure Statement does not state any limit on price variability. Joint Complainants are mistaken, however, in concluding that the lack of such a statement constitutes a violation of the Commission's regulation at 52 Pa. Code § 54.5(c)(2)(ii). Indeed, 52 Pa. Code § 54.5(c)(2)(ii) clearly provides that a statement regarding the limits on price variability is only required, "if applicable" to the terms and conditions of the EGS's sale of electricity to consumers. In other words, the regulation only requires a statement regarding the limit on variability if the EGS' terms and conditions include a limit on the price that a customer could pay for electricity. Moreover, in a recent change to this regulation (which was not effective at times relevant to the Joint Complaint), the Commission for the first time required that, "if there is no limit on price variability, the EGS shall clearly and conspicuously state that there is no limit on how much the

price may change from one billing cycle to the next.” Adding this specificity where there previously was none supports the conclusion that 52 Pa. Code § 54.5(c)(2)(ii) did not require an EGS to include statement regarding a limit on price variability in its disclosure statement if the EGS did not provide such a limit as part of its terms of service. Consequently, because ESPI does not place a limit on price variability, this regulation is “not applicable” to ESPI. As a result, the Joint Complainants’ attempt to state a claim against ESPI under 52 Pa. Code § 54.5(c) should fail as a matter of law.

57. Count V also includes an allegation that ESPI violated 52 Pa. Code § 54.43(1) by failing to provide information to consumers about ESPI’s electric generation service “using plain language and common terms” and “in a format that enables consumers to compare the various electric generation services offered and the prices charged for each type of service.” These arguments also have no merit.

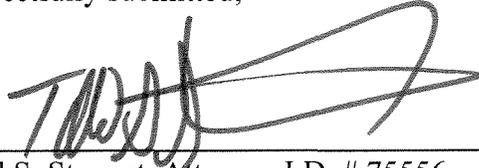
58. ESPI’s Disclosure Statement provides information to consumers using “plain language and common terms” such as: “variable rate;” “taxes;” the “cost of electricity;” the cost of “wholesale market-related services;” “fees;” “charges;” “costs;” “expenses;” and “margins.” These terms and phrases are all easily understood by ordinary consumers. Consequently, the Commission should conclude that ESPI complied with the Commission’s regulations by using plain language and common terms in its Disclosure Statement. Moreover, the Commission should conclude that ESPI’s Disclosure Statement complies with the Commission’s regulations because a consumer could use the Disclosure Statement to compare ESPI’s services and prices to those of other EGSs. Indeed, given the complexities and nuances of electricity markets and the fact that the price for electricity at the wholesale level is subject to fluctuations, it is difficult (if

not impossible) to imagine how else ESPI could simply and succinctly describe the various factors that affect the variable rates charged to ESPI's customers.

59. The Joint Complainants may be of the opinion, as a matter of policy, that the price of electricity for consumers should be set at a particular price or subject to strict limits and that variable rates which reflect fluctuations caused by market forces should be prohibited. However, that opinion is not the law. Moreover, an adversarial proceeding against ESPI is not the proper forum to express that opinion. Because ESPI's Disclosure Statement complies with all Commission regulations, the Commission should dismiss Count V as a matter of law pursuant to 52 Pa. Code § 5.101(a)(4).

**WHEREFORE**, ESPI respectfully requests that its Preliminary Objections be granted in their entirety and that the Commission grant the relief requested herein.

Respectfully submitted,



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*Counsel for Energy Services Providers, Inc.  
d/b/a Pennsylvania Gas & Electric*



Customer Name  
BillAddr2  
BillAddr3 Zip

July 9, 2014

RE: Account number 111111111111

Dear Contact1:

Welcome to Pennsylvania Gas & Electric<sup>1</sup> ("PAG&E"). On behalf of everyone at PAG&E, we would like to thank you for enrolling in our competitive electricity supply program. We are committed to helping you lower your total energy costs. There are no fees for choosing PAG&E as your supplier, and there are no fees if you ever choose to go back to the utility. Plus, after 12 months of service with PAG&E, you will be eligible to receive a 12% rebate on your single highest month's electricity supply charge by completing and returning to us the enclosed rebate certificate.

You will soon receive a letter from your utility confirming your enrollment with us. Your utility will continue to read your meter and deliver your electricity, just as they do now, and your utility's monthly bills will include the electricity provided by PAG&E.

We have summarized the terms of your enrollment in our program below, but you should read the full enclosed Terms and Conditions.

- ❖ Utility: xxxxx
- ❖ Account number: 111111111111
- ❖ Product: Variable, 12% after 12
- ❖ Term: Month-to-month
- ❖ Price: Starting price of \$x.xxx per kWh for Month 2012
- ❖ Tax: Price includes gross receipts tax
- ❖ Cancellation fee: \$0
- ❖ In order to continue to receive our competitively priced variable rate and to be eligible to receive any applicable rebates, your account with the utility must remain current and not delinquent.

If your account is exempt from sales tax, please fax a copy of your applicable tax exemption certificate to (888) 829-5797. Be sure to reference your utility account number.

If you have any questions regarding your energy supply charges, please do not hesitate to call us toll-free at (866) 706-7361, Monday through Friday, 8:00 a.m. – 5:30 p.m. EST, and a Customer Service Representative will assist you. Be sure to visit us online at, [www.PAGandE.com](http://www.PAGandE.com).

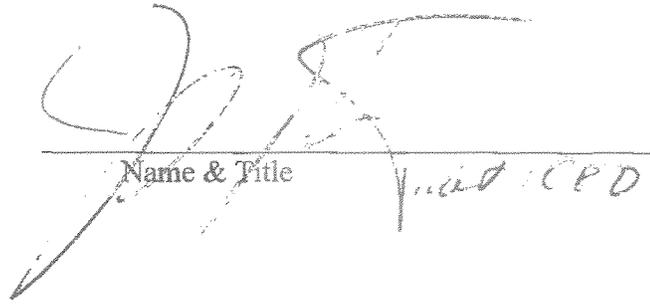
Sincerely,

PAG&E's Customer Service Team  
Enclosures: Terms and Conditions  
Rebate Certificate

<sup>1</sup> Pennsylvania Gas & Electric is not a utility or affiliated with a utility. PAG&E currently offers service to most customers falling within residential and small business rate classes. PAG&E will not accept enrollments for net metered accounts.

## VERIFICATION

I, Jeffrey Mayer on behalf of U.S. Gas & Electric, hereby state that the facts set forth are true and correct to the best of my knowledge, information and belief, and that I expect 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 authorities).

  
Name & Title *Jeffrey Mayer CPD*

DATED: 7/7/14