

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

555 Walnut Street, 5th Floor, Forum Place  
Harrisburg, Pennsylvania 17101-1923  
(717) 783-5048  
800-684-6560

FAX (717) 783-7152  
consumer@paoca.org

July 21, 2014

Rosemary Chiavetta  
Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120

RE: 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

Respondent

Docket No. C-2014-2427656

Secretary Chiavetta:

Enclosed please find the Answer of the Commonwealth of Pennsylvania and the Office of Consumer Advocate to the Preliminary Objections of Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric in the above-referenced proceeding.

Copies have been served as indicated on the enclosed Certificate of Service.

Respectfully Submitted,

Handwritten signature of Candis A. Tunilo in cursive.

Candis A. Tunilo  
Assistant Consumer Advocate  
PA Attorney I.D. #89891

Enclosures

cc: Office of Administrative Law Judge  
Certificate of Service

\*185180

CERTIFICATE OF SERVICE

Commonwealth of Pennsylvania, by	:	
Attorney General KATHLEEN G. KANE,	:	
Through the Bureau of Consumer Protection,	:	
	:	
And	:	
	:	
TANYA J. McCLOSKEY, Acting Consumer	:	
Advocate,	:	
Complainants	:	
	:	Docket No. C-2014-2427656
v.	:	
	:	
ENERGY SERVICES PROVIDERS, INC. d/b/a	:	
PENNSYLVANIA GAS & ELECTRIC	:	
Respondent	:	

I hereby certify that I have this day served a true copy of the foregoing Answer of the Commonwealth of Pennsylvania and the Office of Consumer Advocate to the Preliminary Objections of Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric, in the manner and upon the persons listed below:

Dated this 21st day of July 2014.

SERVICE BY E-MAIL & INTER-OFFICE MAIL

Johnnie Simms, Esq.  
Michael Swindler, Esq.  
Bureau of Investigation & Enforcement  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120

SERVICE BY E-MAIL & FIRST CLASS MAIL, POSTAGE PREPAID

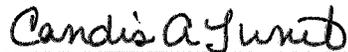
Christopher A. Lewis, Esq.  
Charles A. Fitzpartrick, IV, Esq.  
Blank Rome LLP  
One Logan Square 130 North 18<sup>th</sup> Street  
Philadelphia, PA 19103-6998

Sharon Webb, Esq.  
Office of Small Business Advocate  
Commerce Building, Suite 1102  
300 North Second Street  
Harrisburg, PA 17101

Todd S. Stewart, Esq.  
Hawke McKeon & Sniscak LLP  
P.O. Box 1778  
100 N. Tenth Street  
Harrisburg, PA 17105-1778

SERVICE BY FIRST CLASS MAIL, POSTAGE PREPAID

Michelle Mann  
PA Gas & Electric  
3700 Lakeside Dr., 6<sup>th</sup> Fl.  
Miramar, FL 33027



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Candis A. Tunilo  
Assistant Consumer Advocate  
PA Attorney I.D. # 89891  
E-Mail: [CTunilo@paoca.org](mailto:CTunilo@paoca.org)

Brandon J. Pierce  
Assistant Consumer Advocate  
PA Attorney I.D. # 307665  
E-Mail: [BPierce@paoca.org](mailto:BPierce@paoca.org)

Counsel for  
Office of Consumer Advocate  
555 Walnut Street 5th Floor, Forum Place  
Harrisburg, PA 17101-1923  
Phone: (717) 783-5048  
Fax: (717) 783-7152 185171

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Commonwealth of Pennsylvania, by Attorney	:	
General KATHLEEN G. KANE, Through the	:	
Bureau of Consumer Protection,	:	
	:	
And	:	Docket No. C-2014-2427656
	:	
TANYA J. McCLOSKEY, Acting Consumer	:	
Advocate,	:	
	:	
Complainants	:	
	:	
v.	:	
	:	
Energy Services Providers, Inc. d/b/a	:	
Pennsylvania Gas & Electric,	:	
Respondent	:	

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ANSWER OF THE COMMONWEALTH OF PENNSYLVANIA  
AND THE OFFICE OF CONSUMER ADVOCATE  
TO THE PRELIMINARY OBJECTIONS OF  
ENERGY SERVICES PROVIDERS, INC.  
D/B/A PENNSYLVANIA GAS AND ELECTRIC

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Pursuant to Sections 5.61 and 5.101 of the Pennsylvania Public Utility Commission's (Commission) regulations regarding Answers to Preliminary Objections, 52 Pa. Code §§ 5.61 and 5.101, the Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection (BCP) and the Acting Consumer Advocate Tanya J. McCloskey (OCA) (collectively referred to as Joint Complainants), provide the following Answer to the Preliminary Objections of Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric (Answer), in the above-captioned proceeding.

## I. INTRODUCTION

On June 20, 2014, the Joint Complainants filed a Joint Complaint with the Commission, pursuant to the Public Utility Code, 66 Pa. C.S. Ch. 28, the Commission's regulations, 52 Pa. Code Ch. 54, 56 and 111, the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.* (Consumer Protection Law), and the Telemarketer Registration Act, 73 P.S. § 2241, *et seq.* (TRA). The Joint Complaint includes seven separate counts and alleges that Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric (Respondent or PaG&E) violated Pennsylvania law and Commission Orders and regulations.<sup>1</sup> With respect to relief, the Joint Complainants request that the Commission find that Respondent violated the Public Utility Code, the Consumer Protection Law, and the TRA, and the Commission's regulations and Orders; provide restitution to Respondent's customers; impose a civil penalty; order Respondent to make various modifications to its practices and procedures; and revoke or suspend Respondent's Electric Generation Supplier (EGS) license, if warranted.

On July 10, 2014, Respondent filed Preliminary Objections to the Joint Complaint. In its Preliminary Objections, Respondent asserts that because the allegations deprive Respondent of the opportunity to investigate and prepare a meaningful defense, Counts I, II, IV, and V are not pled with sufficient specificity. As discussed in detail in Paragraphs 17 through 24 in Section III below, Joint Complainants have pleaded facts in Counts I, II, IV and V of the Joint Complaint sufficient for Respondent to investigate and prepare a meaningful defense in this matter. The Commission's discovery procedures are available to Respondent to seek further information it

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<sup>1</sup> The seven separate counts in the Joint Complaint are as follows: I) misleading and deceptive promises of savings; II) slamming; III) misleading and deceptive welcome letter; IV) lack of good faith handling of complaints; V) failing to provide accurate pricing information; VI) prices nonconforming to disclosure statement; and VII) failure to comply with the Telemarketer Registration Act.

claims is necessary to investigate and prepare a defense. As such, PaG&E's Preliminary Objection that Counts I, II, IV and V are insufficiently pleaded should be overruled.

Respondent also asserts in its Preliminary Objections that 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. As discussed in detail in Paragraphs 25 through 32 in Section III below, the Commission has the jurisdiction to incorporate other laws and agency regulations into its decisions insofar as the other laws and agency regulations are incorporated into the Commission's regulations. See Harrisburg Taxicab & Baggage Co. v. Pa. PUC, 786 A.2d 288, 292-93 (Pa. Commw. Ct. 2001) (Harrisburg Taxicab). As such, PaG&E's Preliminary Objection that the Commission lacks jurisdiction to decide Counts I, II, III, V, VI, and VII should be overruled.

Next, in its Preliminary Objections, Respondent asserts that the Commission lacks jurisdiction to award monetary damages to direct Respondent to provide refunds to customers. As discussed in detail in Paragraphs 33 through 38 in Section III below, Joint Complainants have not sought monetary damages in the Joint Complaint. The Commission has the jurisdiction to order the penalties and equitable relief sought in this matter. As such, PaG&E's Preliminary Objection that the Commission lacks jurisdiction to provide refunds to customers should be overruled.

Additionally, in its Preliminary Objections, Respondent asserts that Counts I, II, and IV should be dismissed because the underlying Formal Complaints have been satisfied through settlements. As discussed in detail in Paragraphs 39 through 42 in Section III below, Respondent's purported satisfaction of Formal Complaints filed against it is irrelevant to the powers and duties of the Joint Complainants to address the consumer and public interest in this

matter. As such, PaG&E's Preliminary Objection that Counts I, II and IV should be dismissed because the underlying Formal Complaints have been satisfied should be overruled.

Respondent also asserts in its Preliminary Objections that Count VII should be dismissed for lack of jurisdiction because the Commission cannot enforce the TRA. As discussed in detail in Paragraphs 43 through 46 in Section III below, the Commission has jurisdiction to make determinations pursuant to the TRA insofar as the TRA is incorporated into the Commission's regulations. See 52 Pa. Code § 111.10(a)(1). See also Harrisburg Taxicab, 786 A.2d at 292-93. As such, PaG&E's Preliminary Objection that the Commission lacks jurisdiction to enforce the TRA should be overruled.

Next, Respondent asserts that Count VII of the Joint Complaint should be dismissed for legal insufficiency, as Respondent's failure to provide written contracts in connection with telephone sales and obtain customer signatures is not a violation of the TRA. In Count VII, the Joint Complainants allege that the Commission's regulations require that EGSs comply with the TRA and the Consumer Protection Law. Joint Complaint at ¶¶ 70, 75. Joint Complainants assert that the TRA requires Respondent to, *inter alia*, reduce any sale of goods or services made during a telemarketing call to a written contract and obtain the customer's signature on the written contract, but PaG&E does not do so. See Joint Complaint at ¶¶ 71, 73. As discussed in detail in Paragraphs 47 through 52 in Section III below, all provisions of the TRA, except the registration requirement, apply to EGSs. See 52 Pa. Code § 111.10(a)(1); Request for Opinion, 2010 Pa. AG LEXIS 1, \*4-5 (Feb. 8, 2010) (AG Opinion); See also Harrisburg Taxicab, 786 A.2d at 292-93. As such, PaG&E's Preliminary Objection that it is exempt from the TRA should be overruled.

Finally, Respondent asserts in its Preliminary Objections that Count V should be dismissed for legal insufficiency. In support of this Preliminary Objection, Respondent asserts that its failure to state a limit on price variability on its disclosure statement does not violate the Commission's regulations. Joint Complainants assert that the Commission's regulations require that variable pricing terms in a disclosure statement must adequately state the condition of variability and the limits on price variability, and Respondent does not do so in its disclosure statement. See Joint Complaint at ¶¶ 53, 54. Also in Count V, Joint Complainants assert that PaG&E's disclosure statement fails to provide accurate information about Respondent's services using plain language and common terms. See Joint Complaint at ¶ 56. As discussed in detail in Paragraphs 53 through 59 in Section III below, Count V is legally sufficient pursuant to 66 Pa. C.S. § 2807(d) and 52 Pa. Code §§ 54.43(1) and 54.5(c). As such, PaG&E's Preliminary Objection that Count V is legally insufficient should be overruled.

The Joint Complainants submit that PaG&E's Preliminary Objections are unsupported, as set forth in more detail below, and should be overruled. It is clear and free from doubt that the Joint Complaint is sufficiently pleaded and seeks that the Commission make determinations pursuant to the Commission's powers and jurisdiction. As such, PaG&E's Preliminary Objections to the Joint Complaint must be overruled.

## **II. LEGAL STANDARD**

The Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary objections. 52 Pa. Code §§ 5.101 (a)(1)-(7). The grounds for preliminary objections are limited to the following:

- (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.

- (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
- (3) Insufficient specificity of a pleading.
- (4) Legal insufficiency of a pleading.
- (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
- (6) Pendency of a prior proceeding or agreement for alternative dispute resolution.
- (7) Standing of a party to participate in the proceeding.

52 Pa.Code § 5.101(a).

In deciding whether to grant or deny a preliminary objection, the truth of all facts averred in the complaint must be assumed, and it must be determined whether, based on well-pleaded factual averments of the complainant, recovery or relief is possible. See Feingold v. Bell of Pa., 383 A.2d 791 (Pa. 1977); See also Equitable Small Transp. Intervenors v. Equitable Gas Co., 1994 Pa PUC LEXIS 69, \*3. Further, any inferences fairly deducible from the facts must be accepted for purposes of the disposition of the preliminary objections. See Commonwealth v. Bell Telephone Co., 551 A.2d 602 (Pa. Commw. Ct. 1988). The Commission shall deny a preliminary objection, in favor of the non-moving party, if there are any doubts that must be resolved. Boyd v. Ward, 802 A.2d 705, 707 (Pa. Commw. Ct. 2002); Weber v. PPL Electric Utilities Corp., Docket No. C-2008-2052894, Order at 4 (March 23, 2009). Also, preliminary objections must be denied, where factual or legal issues remain to be examined. See P. J. S. v. PA State Ethics Comm'n, 669 A.2d 1105 (Pa. Commw. Ct. 1996).

Preliminary objections alleging “legal insufficiency of pleading,” serve judicial economy by avoiding a hearing where no factual dispute exists. Drake v. Pennsylvania Electric Co.,

Docket No. C-2014-2413771, Order at 5 (May 7, 2014). The Commission will find a complaint legally sufficient if it provides the following:

...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.

Drake, Order at 4; 52 Pa. Code § 5.22(a)(5).

The purpose of a preliminary objection raising specificity is to ensure that an adverse party to answer and defend will not be unduly impaired by a complainant's vagueness in stating grounds of his or her suit. Stilp v. Commonwealth, 910 A.2d 775 (Pa. Commw. Ct. 2006), order aff'd, 601 Pa. 429, 974 A.2d 491 (2009). When a respondent files a preliminary objection alleging "insufficient specificity of a pleading," an answer is not required until further directed by the presiding officer or the Commission. 52 Pa.Code § 5.101(e)(1). Such preliminary objection requires consideration of the following questions:

[W]hether the complaint is sufficiently clear to enable the defendant to prepare his defense, or whether the plaintiff's complaint informs the defendant with accuracy and completeness of the specific basis on which recovery is sought so that the defendant may know without question upon what grounds to make his or her defense.

Rambo v. Greene, 906 A.2d 1232, 1269 (Pa. Super. 2006).

With regard to preliminary objections asserting lack of jurisdiction, it is well settled that the Commission has the power and authority granted to it by the General Assembly contained in the Public Utility Code to enforce the Public Utility Code, its Orders and regulations. See 66 Pa. C.S. § 501. See also Lasko v. Windstream Pennsylvania, LLC, 2011 Pa. PUC LEXIS 696, \*9. One can file a formal complaint with the Commission alleging violation of a statute that the

Commission has jurisdiction to administer. Id. at \*7. This is exactly what Joint Complainants have done by filing the Joint Complaint.

### III. ANSWER

1. Admitted upon information and belief. See Joint Complaint at ¶¶ 6-8.

2-8. Respondent provides facts in these paragraphs that are based on information in the possession of Respondent and are therefore, denied. Strict proof thereof is demanded at evidentiary hearings in this matter.

9-11. The Joint Complaint is of record in this matter and speaks for itself. As such, no response is required to these paragraphs.

12. Joint Complainants are without sufficient information to form a belief as to the veracity of the averments herein. The averments are, therefore, denied.

13. It is admitted that Respondent filed an Answer on the same date as Respondent filed Preliminary Objections. It is specifically denied that Respondent has not engaged in any wrongdoing. See gen'ly Joint Complaint.

14. This paragraph is summary in nature, and therefore, no response is required. By way of further answer, however, Joint Complainants incorporate the below Paragraphs herein.

a. It is denied that Counts I, II, III, V, VI and VII are pleaded with insufficient specificity. Joint Complainants incorporate Paragraphs 17 through 24 below herein. By way of further answer, the proper remedy for preliminary objections based on insufficient specificity is to provide the opportunity to amend the complaint.

b. It is denied that Counts I, II, III, V, VI and VII are legally insufficient. It is denied that the Commission lacks jurisdiction to determine if Respondent has violated the

Consumer Protection Law. Joint Complainants incorporate Paragraphs 25 through 32 below herein.

c. It is denied that the Joint Complaint should be dismissed to the extent it seeks refunds. It is denied that Joint Complainants seek monetary damages in the Joint Complaint. By way of further answer, Joint Complainants incorporate Paragraphs 33 through 38 below herein.

d. It is denied that Counts I, II and IV are legally insufficient to the extent that Respondent settled Formal Complaints brought by consumers against Respondent. By way of further answer, Joint Complainants incorporate Paragraphs 39 through 42 below herein.

e. It is denied that Count VII should be dismissed for legal insufficiency or lack of Commission jurisdiction. By way of further answer, Joint Complainants incorporate Paragraphs 43 through 46 below herein.

f. It is denied that Count VII should be dismissed for legal insufficiency. By way of further answer, Joint Complainants incorporate Paragraphs 47 through 52 below herein.

g. It is denied that Count V should be dismissed for legal insufficiency. It is specifically denied that PaG&E's Disclosure Statement complies with the Commission's regulations. By way of further answer, Joint Complainants incorporate Paragraphs 53 through 59 below herein.

15-16. These paragraphs state conclusions of law to which no response is required. By way of further answer, the Joint Complainants incorporate Section II above herein.

Counts I, II, IV and V Are Pleaded With Sufficient Specificity.

17. Denied. Respondent's allegations constitute conclusions of law, which require no response and are, therefore, denied. The Joint Complaint is of record in this matter and speaks for itself. By way of further answer, the Commission's regulations on the content required in a

formal complaint is based on Pennsylvania's Rule of Civil Procedure 1019, which requires a plaintiff to plead all the facts that he must prove in order to achieve recovery on the alleged cause of action. The pleading must be sufficiently specific so that the defending party will know how to prepare its defense. Higgins v. Nat'l Fuel Gas Distrib. Corp., Docket No. C-2012-2338926, Initial Decision (Feb. 26, 2013), citing Dep't of Transp. v. Shipley Humble Oil Co., 370 A.2d 438 (Pa. Commw. Ct. 1977). In addition, a party is not required to plead evidence, and preliminary objections shall not be used to make a party plead purely evidentiary matters. Local No. 163, Intern. Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America v. Watkins, 417 Pa. 120, 207 A.2d 774 (1965). As such, a more specific complaint will not be ordered to develop matters that are essentially evidentiary because a defendant that needs more information to prepare his defense can do so through discovery procedures. See e.g. Totani v. Lansford-Coaldale Joint Water Authority, 2 Pa. D. & C.3d 143, 146 (Carbon Co. 1975).

Joint Complainants maintain that all allegations against Respondent have been specifically pleaded in accordance with the Commission's regulations, and all allegations are sufficiently specific. The Joint Complaint has provided to Respondent enough information and facts such that Respondent may prepare and file an adequate answer and prepare a proper defense to all averments in the Joint Complaint.

Further, the requirement of specificity is more easily met when the matters are equally or more in the knowledge of the objecting party. Local No. 163, 417 Pa. at 122, 207 A.2d at 778; See also Philadelphia County Intermediate Unit No. 26 v. Commonwealth Dep't. of Educ., 60 Pa. Commw. 546, 552, 432 A.2d 1121, 1126 (1981)(A more specific pleading was not necessary because the information sought was either evidentiary in nature or of such a character that the objecting party's knowledge of the facts was equal, if not superior, to that of the pleader). Where

pleadings, along with information already in the possession of the defendant, apprise defendant of what it is required to defend, preliminary objections should be dismissed. See e.g. Big Boys Auto v. Bon Ton Store, 15 D. & C.2d 551 (Luzerne Co. 1958).

It was the Respondent who, the Joint Complainants allege, engaged in the methods, acts and practices with consumers, which constitute violations of the Public Utility Code, the Commission's regulations and Orders, the TRA, and the Consumer Protection Law. Respondent is, therefore, in a better position to know the information that Respondent is now demanding to be pleaded in the Joint Complaint. The information that Respondent claims must be pleaded in the Joint Complaint is evidentiary in nature and is more properly addressed in discovery. Therefore, Respondent's Preliminary Objection should be overruled.

18. Denied as stated. Respondent's allegations constitute conclusions of law to which no response is required. By way of further answer, Joint Complainants incorporate Paragraph 17 above herein.

19. Denied. Respondent's allegations constitute conclusions of law, which require no response and are, therefore, deemed denied. Joint Complainants incorporate Paragraph 17 above herein. By way of further answer, the Joint Complaint does not include "bare-bones allegations of vague accusations by unnamed individuals," as Joint Complainants identified the consumers as PaG&E customers that were contacted by PaG&E salespeople. Certainly, Respondent has information regarding its customers that filed Formal Complaints with the Commission or Complaints with the Office of Attorney General. Joint Complainants are not required to fully identify and describe the injured consumers who are or may be entitled to restitution nor specify the sums that represented the harm inflicted on each consumer; these amounts are better known to the Respondent than to Joint Complainants and not needed to determine if Respondent

violated the Public Utility Code, Commission's regulations or Orders, or the Consumer Protection Law. Commonwealth v. Peoples Benefit Servs., Inc., 895 A.2d 683, 690 (Pa. Commw. Ct. 2006). Respondent is thus in error when it asserts that Joint Complainants should be required to identify who, specifically, made representations to consumers, how the representations were communicated, when they were communicated, to whom they were communicated, in what context they were communicated, or other details as to specific conduct that constitutes the wrongful acts. Upon further discovery, the Commission will be in a position to determine what sort of restitution, if any, is appropriate for consumers to the extent that evidence is submitted to that effect. See e.g. Harker v. Farmers Trust Co., 73 Pa. D. & C.2d 217 (Cumberland Co. 1975) (Defendant's preliminary objections, including a motion for a more specific complaint with regard to the basis of plaintiff's claims for damages, were dismissed; Defendant's request that plaintiff be required to supply a listing of plaintiff's losses by virtue of which he made his damages claims was ruled a matter for discovery).

Specific allegations as to time and place are not required under Pennsylvania Rules of Civil Procedure 1019. See e.g. Commonwealth v. TAP Pharm. Prods., Inc., 885 A.2d 1127, 1136 (Pa. Commw. Ct. 2005). See also Commonwealth v. Nat'l Apartment Leasing Co., 108 Pa. Commw. 300, 308, 529 A.2d 1157, 1161 (1987). (Allegations by the joint complainant that the landlord violated the Consumer Protection Law by engaging in a "course of conduct" by improperly withholding security deposits sufficiently described unlawful practice to enable landlord to prepare a defense, even though the complaint did not set forth time, place and date of violations).

20. Denied. The Joint Complaint is of record in this matter and speaks for itself. By way of further answer, Joint Complainants incorporate Paragraph 19 above herein. Additionally, Joint Complainants aver sufficient information in Count I regarding:

(1) who these consumers are (they are current or former PaG&E customers. See Joint Complaint at ¶¶ 19-21 and 23-26;

(2) which of PaG&E's employees, agents or representatives made the purported promises (they are PaG&E employees, agents or representatives engaged in the sale of PaG&E's electric generation). See Joint Complaint at ¶¶ 23-26;

(3) what was misleading or deceptive about each of these purported promises (the promises led consumers to believe they would realize savings, and they then received bills from Respondent that were two or three times more than the Price to Compare (PTC)). See Joint Complaint at ¶¶ 23-26; and

(4) when each purported promise was made (the promises were made at the time of sale). See Joint Complaint at ¶¶ 23-26.

21. Denied. The Joint Complaint is of record in this matter and speaks for itself. By way of further answer, Joint Complainants incorporate Paragraph 19 above herein. Additionally, Joint Complainants aver sufficient information in Count II regarding:

(1) who these consumers are (they are current or former PaG&E customers) See Joint Complaint at ¶¶ 19-21 and 33-35; and

(2) when or under what circumstances each of these consumers was supposedly switched to Respondent without proper consent (consumers were switched to PaG&E prior to the billing periods in early 2014) See Joint Complaint at ¶¶ 17-21.

22. Denied. The Joint Complaint is of record in this matter and speaks for itself. By way of further answer, Joint Complainants incorporate Paragraph 19 above herein. Additionally, Joint Complainants aver sufficient information in Count IV regarding:

(1) who these consumers are (they are current or former PaG&E customers) See Joint Complaint at ¶¶ 19-21 and 47-48;

(2) when each of these consumers tried to contact PaG&E (they tried to contact PaG&E after receiving bills that were two or three times more than the PTC). See Joint Complaint at ¶¶ 23-26 and 47-48;

(3) where they left their message (consumers left their messages with PaG&E). See Joint Complaint at ¶¶ 47-48; and

(4) what the nature of their contact was (consumers sought to contact PaG&E after receiving bills that were two or three times more than the PTC to complain about the bills). See Joint Complaint at ¶¶ 23-26 and 47-48.

23. Denied. The Joint Complaint is of record in this matter and speaks for itself. By way of further answer, Joint Complainants incorporate Paragraph 19 above herein. Additionally, Joint Complainants aver sufficient information in Count V regarding:

(1) who these consumers are (they are current or former PaG&E customers). See Joint Complaint at ¶¶ 20 and 55;

(2) when each of these consumers tried to contact PaG&E. (they tried to contact PaG&E after receiving bills that were two or three times more than the PTC in early 2014). See Joint Complaint at ¶¶ 20 and 55; and

(3) what pricing information was purportedly requested but not provided (customers called PaG&E to “obtain [their] current rate for that day.” See Joint Complaint at ¶¶ 53 and 55.

24. Joint Complainants are without information sufficient to form a belief regarding the veracity of the statements in paragraph 24 of Respondent's Preliminary Objections regarding PaG&E's total number of customers and total number of calls received in early 2014, as the information is solely within PaG&E's possession. These statements are, therefore, denied. It is denied that Respondent could not conduct a meaningful investigation and prepare a coherent defense in this matter. Discovery procedures are designed to permit defendants to conduct meaningful investigations into claims against them and prepare defenses. These discovery procedures are available to Respondent in this matter. See 52 Pa. Code § 5.321 *et seq.* It is specifically denied that Counts I, II, IV and V are not pleaded with sufficient specificity. By way of further answer, Joint Complainants incorporate Paragraphs 19 through 24 above herein.

The Commission Has Jurisdiction To Find Violations Of The Consumer Protection Law.

25. Denied. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. To the extent that an answer may be required, Counts I, II, III, V, VI and VII of the Joint Complaint should not be dismissed because the Commission's regulations require compliance with the Consumer Protection Law, 73 P.S. § 201-1, *et seq.* See 52 Pa. Code §§ 54.43(f) and 111.12(d)(1). These regulations, in pertinent part, establish standards and practices for marketing and sales activities for EGSs and their agents to ensure the fairness and integrity of the competitive residential market. The Commission has directed that EGSs and their agents comply with the standards set forth in the regulations when engaged in sales and marketing activities involving residential customers. See 52 Pa. Code § 111.1. By way of further response, the Commission in its own regulations has dictated that an EGS may not engage in misleading or deceptive conduct as defined by State or Federal law, or by Commission rule, regulation or order. See 52 Pa. Code §§ 54.122(3) and 111.12(d)(1). The

Consumer Protection Law defines such conduct and it would make little sense for the Commission's regulations to compel compliance with this law and at the same time, withhold from the Commission the authority to make determinations pursuant to this law insofar as the law is incorporated into the Commission's regulations.

26. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. By way of further answer, Joint Complainants incorporate Section II above herein. To the extent that an answer may be required, the Commission is appropriately within its jurisdiction to enforce the Public Utility Code, its regulations and Orders as well as to make determinations pursuant to other statutes, such as the Consumer Protection Law, that are incorporated into the Commission's regulations. See 66 Pa. C.S. § 501; Harrisburg Taxicab, 786 A.2d at 293.

27. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. To the extent that an answer may be required, it is not required to allege actual injury nor prove actual deception. See e.g. Commonwealth v. Nickel, 26 Pa. D. & C.3d 115, 120 (Mercer Co. 1983). The question more properly posed is whether an act or a practice has the capacity or tendency to deceive, as deception itself is the evil designed to be prevented. Id. See also Peoples Benefit Servs., Inc., 895 A.2d at 690.

28. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. To the extent that an answer may be required, the Commission's regulations themselves authorize the Commission to make determinations pursuant to the provisions of the Consumer Protection Law. See 52 Pa. Code §§ 54.122(3) and 111.12(d)(1). The Commission must first determine whether the conduct alleged constitutes a violation of State or Federal law, including the Consumer Protection Law, or Commission

regulation or order. 52 Pa. Code §§ 54.43(f) and 111.12(d)(1); See also Elkin v. Bell Telephone Co. of Pennsylvania, 491 Pa. 123, 133, 420 A.2d 371, 376 (1980). As a preliminary matter, the Commission must invoke the statute and case law under the Consumer Protection Law, interpret it, and apply it harmoniously as guidance where appropriate. See Duquesne Light Co. v. Borough of Monroeville, 449 Pa. 573, 298 A.2d 252 (1972); Pettko v. Pennsylvania American Water Company, 39 A.3d 473, 484 (Pa. Commw. Ct. 2012). Moreover, since the adjudication of MAPSA v. PECO Energy Co., Docket No. P-00981615, in 1999, the Commission added the requirement that EGSs comply with the Consumer Protection Law to the Commission's regulations. Furthermore, the Commonwealth Court decided Harrisburg Taxicab, wherein the Court held that the Commission's decision to incorporate another agency's regulations into the Commission's own regulations is in no way inappropriate and such overlap does not divest the Commission of its statutory authority or duty. Harrisburg Taxicab & Baggage Co. v. Pa. PUC, 786 A.2d 288, 292-93 (Pa. Commw. Ct. 2001) (Harrisburg Taxicab). See also City of Philadelphia v. Pa. PUC, 702 A.2d 1139 (Pa. Commw. Ct. 1997). By allowing the Commission to adjudicate these disputes in the first instance, all rights of the parties will be preserved, as well as providing any subsequent reviewing court the benefit of the Commission's opinion. County of Erie v. Verizon North, Inc., 879 A.2d 357 (Pa. Commw. Ct. 2005). Joint Complainants note that Respondent's reliance on the Initial Decision in MacLuckie v. Palmco Energy PA, Docket No. C-2014-2402558, is misplaced, as the OCA timely filed Exceptions to the Initial Decision, and the Commission has not yet disposed of the Exceptions.

29. Denied as stated. The Commission's regulations at 52 Pa. Code §§ 54.43(f) and 111.12(d)(1) and the Consumer Protection Law speak for themselves. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. By

way of further answer, Joint Complainants incorporate Paragraph 28 above herein. In Harrisburg Taxicab, the Commonwealth Court held that the Commission's decision to incorporate another agency's regulations into the Commission's own regulations is in no way inappropriate and such overlap does not divest the Commission of its statutory authority or duty Harrisburg Taxicab, 786 A.2d 288, 292-93 (Pa. Commw. Ct. 2001). As such, the Commission has the jurisdiction to determine if Respondent violated the Consumer Protection Law in determining whether Respondent violated the Commission's regulations.

30. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. To the extent that an answer may be required, to promote consistency and uniformity in this industry and to maximize the ability to obtain effective and adequate relief on behalf of consumers who have been injured by violations of the Consumer Protection Law, the Commission must determine whether the conduct alleged constitutes a violation of State or Federal law, including the Consumer Protection Law, or Commission rule, regulation, or order. See 52 Pa. Code §§ 54.43(f) and 111.12(d)(1); See also Elkin, 491 Pa. at 133, 420 A.2d at 376. As a preliminary matter, the Commission must invoke the statute and case law under the Consumer Protection Law, interpret it, and apply it harmoniously as guidance where appropriate. See Duquesne Light Co., 449 Pa. 573, 298 A.2d 252; Pettko, 39 A.3d at 484; Harrisburg Taxicab, 786 A.2d at 292-93; City of Philadelphia v. Pa. PUC, 702 A.2d 1139. By allowing the Commission to adjudicate these disputes in the first instance, all rights of the parties will be preserved, as well as providing any subsequent reviewing court the benefit of the Commission's opinion. Verizon North, Inc., 879 A.2d 357. The Commission is appropriately within its jurisdiction to incorporate other laws, including the Consumer Protection Law, into its decisions. Harrisburg Taxicab, 786 A.2d at 292-93.

31. Denied. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. To the extent that an answer may be required, as stated above, the Commission is appropriately within its jurisdiction to incorporate other laws, including the Consumer Protection Law, into its decisions. Harrisburg Taxicab, 786 A.2d 288, 292-93 (Pa. Commw. Ct. 2001).

32. Denied. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. To the extent that an answer may be required, as stated above, the Commission is appropriately within its jurisdiction to incorporate other laws, including the Consumer Protection Law, into its decisions. Harrisburg Taxicab, 786 A.2d 288, 292-93 (Pa. Commw. Ct. 2001).

The Commission Has Jurisdiction To Award Penalties and Restitution In This Matter

33. No response is required, as the Joint Complaint is of record in this matter and speaks for itself.

34. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. To the extent that an answer may be required, it is admitted that as a creature of statute, the Commission has those powers granted to it by the General Assembly, one power of which is to enforce the Public Utility Code and the Commission's regulations and Orders. See 66 Pa. C.S. § 501.

35. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. To the extent that an answer may be required, to be clear, Joint Complainants have not sought monetary damages in the Joint Complaint. It is specifically denied, however, that the Commission lacks the authority to direct all forms of equitable relief, as implied by Respondent's Preliminary Objection. The Commission has the

authority to order equitable relief and has done so in other instances. See 66 Pa. C.S. § 103(c); OCA v. Utility.com, Inc., 212 P.U.R.4<sup>th</sup> 255 (2001) (Utility.com Final Order). In the Utility.com case, the OCA sought refunds of overpayments for service not received and for "lost savings" on behalf of customers. Utility.com Final Order at 262. In the Recommended Decision, ALJ Turner opined:

The ALJ opined that lost savings could be viewed as damages for breach of contract, and noted that the Commission does not exercise its jurisdiction over matters of damages. However, the ALJ notes that "the provisions of [the Public Utility Code] are cumulative and in addition to [the] rights of action and remedies" that exist under other statutory or common law. 66 Pa. C.S. § 103. Therefore, based on OCA's arguments, the ALJ recommends that the Commission find that it does have jurisdiction over lost savings.

See OCA v. Utility.com, Inc., 2001 Pa PUC LEXIS 32, \*23 (June 4, 2001). The Commission sustained the OCA's claims for refunds and lost savings.<sup>2</sup> Utility.com Final Order at 262. The Commission has ordered equitable relief in other cases as well. See e.g. Pa. PUC v. Reed, 1972 Pa. PUC LEXIS 40; 46 Pa. PUC 19 (1972) (Commission directed Respondent, who was authorized to transport as a class D carrier, to refund overcharges to his customers); Ely v. Pennsylvania Water, Docket No. C-20055616, Order at 1 (July 10, 2006) (Commission determined this was a classic case for the application of equitable estoppel when Respondent damaged Complainants' asphalt driveway while replacing a water line on the neighboring property and made countless verbal assurances that the driveway would be restored); C.S. Warthman Funeral Home, et. al. v. GTE North, Inc., Docket No. C-00924416 (June 4, 1993) (Complainants were permitted to introduce into evidence the letter and promise of Respondent that it would provide toll free calling to support a claim of equitable estoppel).

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<sup>2</sup> The Commission noted that there were no funds remaining from Utility.com's bond to pay refunds and lost savings and encouraged the OCA to seek alternative means of collection of these funds. Utility.com Final Order at 262.

36. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. By way of further answer, EGSs are considered public utilities for the purposes described in Section 2809 of the Public Utility Code (relating to requirements for EGSs). See 66 Pa. C.S. § 102. See also Delmarva Power & Light Co. v. Pa. PUC, 870 A.2d 901, 909-10 (Pa. 2005). Section 2809(e) of the Public Utility Code states:

**Form of regulation of electric generation suppliers.** – The commission may forbear from applying requirements of this part which it determines are unnecessary due to competition among electric generation suppliers. In regulating the service of electric generation suppliers, the commission shall impose requirements necessary to ... assuring that 52 Pa. Code Ch. 56 (relating to standards and billing practices for residential utility service) are maintained.

66 Pa. C.S. § 2809(e). Section 2809(e) allows the Commission to forbear from applying the Public Utility Code but does not limit the Commission in this instance. Moreover, with regard to standards and billing practices, the Commission must impose requirements assuring they are maintained by EGSs. 66 Pa. C.S. § 2809(e).

Additionally, any inference that Joint Complainants seek for the Commission to regulate Respondent's prices is denied. Instead, Joint Complainants seek to ensure that the advertised and disclosed prices of Respondent are in accordance with the billed prices and to prevent unjust enrichment for, *inter alia*, deceptive and misleading marketing and billing practices. As discussed in Paragraph 35 above, the Commission has the authority to order such relief.

37. It is denied that the Consumer Protection Law prevents the Commission from ordering equitable relief in this proceeding. By way of further answer, Joint Complainants incorporate Paragraph 35 and 36 above herein.

38. As discussed above in Paragraph 35, the Commission has the authority to order equitable relief. As such, the Commission has the authority to order the restitution Joint Complainants

request for PaG&E's customers, and PaG&E's Preliminary Objection to Paragraph D in the Joint Complainants' requested relief must be overruled.

Respondent's Purported Settlement Of Formal Complaints Does Not Foreclose The Relief Sought By Joint Complainants.

39. Denied. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. By way of further answer, the alleged filing and resolution of formal complaints with the Commission by consumers against Respondent is irrelevant and has little bearing to the Joint Complainants' causes of action and requested relief. All the allegations of the Joint Complaint are to be considered and appraised in light of the nature of the case. See e.g. Hock v. L.B. Smith, Inc., 69 Pa. D. & C.2d 420 (Columbia Co. 1974). This is a public action being brought by the Joint Complainants for injunctive relief, along with civil penalties and restitution.

Under the Administrative Code of 1929, the OCA is authorized to represent the interest of consumers before the Commission in any matter properly before the Commission. 71 P.S. § 309-4(a). The OCA "may exercise discretion in determining the interests of consumers which will be advocated in any particular proceeding and in determining whether or not to participate in or initiate any particular proceeding and, in so determining, shall consider the public interest, the resources available and the substantiality of the effect of the proceeding on the interest of consumers." 71 P.S. § 309-4(b).

This is an action being brought by the Attorney General "in the name of the Commonwealth," as authorized by the Consumer Protection Law, when she has reason to believe that any person is using or is about to use any unlawful method, act or practice and she further determines the proceedings would be in the "public interest." 73 P.S. § 201-4. The Attorney General is not acting on behalf on any one single claimant, but pursuant to her *parens patriae*

powers. See e.g. Commonwealth v. Foster, 57 Pa. D. & C.2d 203 (Allegheny Co. 1972) (Characterizes the Commonwealth's action by the Attorney General under the Consumer Protection Law as *parens patriae*).

The Attorney General does not act as the private attorney for any given customer but instead is authorized to bring a proceeding on behalf of the public at large "to protect the citizenry." Valley Forge Towers South Condominium v. Ron-Ike Foam Insulators, Inc., 393 Pa. Super. 339, 346, 574 A.2d 641, 644 (1990) aff'd 529 Pa. 512, 605 A. 2d 798 (1990). Proceedings brought by the Attorney General focuses on unfair and deceptive methods, acts and practices. 73 P.S. §§ 201-3, 201-4. Plainly, the conduct alleged here falls within the ambit of "trade and commerce" as defined by the Consumer Protection Law: there is no exclusion under that law for EGSs. 73 P.S. § 201-2(3). See e.g. Commonwealth v. Allstate Ins. Co., 729 A.2d 135, 140 (Pa. Commw. Ct. 1999) (holding that "there is nothing in any of the language of the Consumer Protection Law that insurance companies are not covered by its provisions, and the General Assembly could have included such language if it desired"). As such, the mere fact that some consumer complaints have been satisfied as the Respondent contends in no way absolves it for its conduct under the law to the extent it engaged in a broader array of unfair and deceptive business practices.

The Joint Complainants are seeking to address the consumer and public interest, based on the Commission's regulations and the Consumer Protection Law, a statute that has long been liberally construed for the purpose of benefiting the public at large by eradicating unfair or deceptive business practices. See e.g. Commonwealth v. Monumental Props., 459 Pa. 450,460, 478, 329 A.2d 812, 816, 826 (1974) (the Consumer Protection Law covers generally all unfair and deceptive acts or practices in the conduct of trade or commerce). Additionally, the

Commission has recognized that where there is one complaint made to the Commission, there are likely substantially more of the same nature that have not been formally made. See e.g. Arthur Rand v. GTE North, 1999 Pa. PUC LEXIS 55, \*9-10 (March 19, 1999). Furthermore, the Commonwealth Court has held that to allow a defendant to “avoid liability under the [Consumer Protection] Law by discontinuing its actions even after proceedings are commenced and claim that the matter is moot” would frustrate the purpose of the Consumer Protection Law. See Commonwealth v. Percudani, 844 A.2d 35, 46 (Pa. Commw. Ct. 2003).

40. Denied as stated. Paragraph 40 of PaG&E’s Preliminary Objections constitutes conclusions of law which require no response and are, therefore, deemed denied. By way of further answer, Joint Complainants incorporate Paragraph 39 above herein.

41. Respondent provides facts in these paragraphs that are based on information in the possession of Respondent and are, therefore, denied. By way of further answer, the Joint Complainants incorporate Paragraph 39 above herein.

42. Denied. Respondent’s allegations constitute conclusions of law which require no response and are, therefore, deemed denied. By way of further answer, the Joint Complainants incorporate Paragraph 39 above herein.

The Commission Has Jurisdiction To Make Determinations Pursuant To The Telemarketer Registration Act.

43. Denied. To the extent that an answer may be required, the Commission’s regulations require an EGS and its agents to comply with the provisions of the TRA. 52 Pa. Code § 111.10(a)(1). See also Harrisburg Taxicab, 786 A.2d at 292-93.

44. Denied as stated. Respondent’s allegations constitute conclusions of law which require no response and are, therefore, deemed denied. To the extent that an answer may be required, the Commission has jurisdiction to make determination pursuant to the TRA insofar as the

Commission's regulations incorporate the TRA, as discussed in Paragraph 28 above. See also 52 Pa. Code § 111.10(a)(1); Harrisburg Taxicab, 786 A.2d at 292-93.

45. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. To the extent that an answer may be required, the Commission's regulations state that an EGS and its agents must comply with the provisions of the TRA. 52 Pa. Code § 111.10(a)(1).

46. Denied. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. To the extent that an answer may be required, Count VII should not be dismissed because EGSs are subject to all of the requirements of the TRA, and the Commission has the authority to determine whether the conduct alleged constitutes a violation of the TRA. See 52 Pa. Code § 111.10(a)(1). See also Harrisburg Taxicab, 786 A.2d at 292-93.

Respondent Is Not Exempt From The Telemarketer Registration Act.

47. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. It is specifically denied that Respondent is exempt from the TRA. By way of further answer, on February 8, 2010, Attorney General Tom Corbett issued an advisory opinion in response to then Commission Chairman James H. Cawley's request for an "opinion regarding the applicability of the [TRA] to electric generation suppliers as defined in the Electricity Generation Customer Choice and Competition Act." See Request for Opinion, 2010 Pa. AG LEXIS 1 (Feb. 8, 2010) (AG Opinion), attached hereto as Appendix A. In response to Chairman Cawley's question whether the EGSs are excluded from the definition of "telemarketer" in the TRA, AG Corbett replied:

[E]lectric generation suppliers engaged in telemarketing are telemarketers for all purposes of the [Telemarketer Registration] Act except the requirement of Section

3(a), 73 P.S. § 2243(a), that telemarketers register with this Office, from which electric generation suppliers are excluded because they are licensed by the PUC under the Competition Act, 66 Pa. C.S. § 2809(a). Agents of suppliers, such as individuals and businesses initiating or receiving calls pursuant to contracts with suppliers, are not excluded from the definition of "telemarketer" and therefore must register.

AG Opinion at \*4-5. Clearly, it is intended that all provisions of the TRA, except the registration requirement apply to EGSs. Furthermore, the Commission incorporated the TRA into its regulations, and it, therefore, has the authority to make determinations pursuant to the TRA insofar as necessary to determine if Respondent violated the Commission's regulations. See 52 Pa. Code § 111.10(a)(1); Harrisburg Taxicab, 786 A.2d at 292-92. As such, Respondent is not exempt from the TRA, and Count VII of the Joint Complaint is properly before the Commission.

48. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. By way of further answer, Joint Complainants incorporate Paragraph 47 above herein.

49. No response is required since the statute speaks for itself.

50. No response is required since the statute speaks for itself.

51. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. Interestingly, though, Respondent asserts in its Preliminary Objections that the Commission does not have jurisdiction to regulate PaG&E's contractual sales. See e.g. PaG&E Preliminary Objection #3. To the extent that an answer may be required, the exception that the Respondent alludes to in Section 2245(d)(1) of the TRA states that a written contract is not needed if the sale of the good or service is regulated under other laws of the Commonwealth. 73 P.S. § 2245(d)(1). However, EGSs are subject to all requirements of the TRA, except the requirement that they register with the OAG. See AG Opinion at \*4-5. Since the exception under Section 2245(d)(1) of the TRA does not apply to

EGSs and their agents, each sale of electric generation made during a telemarketing call must be reduced to a written contract and must contain the provisions set forth in Section 2245(c) of the TRA. See 73 P.S. §§ 2245(a)(7) and (c)(1)-(5); 52 Pa. Code § 111.10(a)(1). See also AG Opinion at \*4-5. In addition, the EGS must obtain the consumer's signature on the written contract. See 73 P.S. § 2245(a)(7); 52 Pa. Code § 111.10(a)(1). See also AG Opinion at \*4-5.

52. Denied. Respondent's allegations constitute conclusions of law which require no response and which are deemed denied. To the extent that an answer may be required, Count VII should not be dismissed because EGSs are subject to all of the requirements of the TRA and the Commission has the authority to determine whether the conduct alleged constitutes a violation of the TRA.

Count V of the Joint Complaint is Legally Sufficient.

53. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied.

54. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. To the extent that an answer may be required, the Joint Complaint is of record in this matter and speaks for itself. Joint Complainants deny that the allegations in Count V that PaG&E's variable pricing term in its Disclosure Statement does not comply with 52 Pa. Code § 54.5(c) fail as a matter of law. By way of further answer, the Joint Complainants incorporate Paragraph 56 below herein.

55. Denied. To the extent that an answer may be required, it is denied that PaG&E's Disclosure Statement plainly provides a statement regarding the basis on which a customer's price for electricity will vary. See Joint Complaint at ¶ 56. Respondent's pricing term in its

Disclosure Statement is stated in the Joint Complaint at Paragraph 53. See also Joint Complaint at App. B.

56. Denied. To the extent that an answer may be required, it is specifically denied that 52 Pa. Code § 54.5(c) does not require that a limit on price variability be stated in PaG&E's price disclosure term in its Disclosure Statement. The Electric Generation Customer Choice regulations were promulgated in 1998 pursuant to Section 2807(d)(2) of the Public Utility Code, which requires the Commission to establish regulations to require EGSs:

[T]o provide adequate and accurate customer information to enable customers to make informed choices regarding the purchase of all electricity services offered by that provider. Information shall be provided to customers in an understandable format that enables consumers to compare prices and services on a uniform basis.

66 Pa. C.S. § 2807(d)(2). The Shell Energy Order was entered very close in time to the final effective date of the regulations and contains a clear instruction as to the interpretation of 52 Pa. Code § 54.5(c). See Petition of Shell Energy Services Co., L.L.C. For Declaratory Order and in the Alternative, Waiver of 52 Pa. Code § 54.5(c)(2), Docket No. P-00001848, Order (Dec. 20, 2000) (Shell Energy Order). Specifically, the Commission directed that in order to comply with Section 54.5(c), a floor and ceiling price had to be conveyed. See Shell Energy Order at 5.

Declaratory orders may be issued by the Commission to remove uncertainty and have the same binding effect of other orders entered by the Commission. See 66 Pa. C.S. § 331(f). Furthermore, an agency's interpretation of its own regulations is normally entitled to controlling weight. See Prof'l Paramedical Servs., Inc. v. Pa. PUC, 106 Pa. Commw. 278, 286, 525 A.2d 1274, 1278 (1987). There is no further Order that overrules or limits the Shell Energy Order for the time period stated in the Joint Complaint.

As such, PaG&E's assertions that 52 Pa. Code § 54.5(c) does not require that a limit on price variability be stated in PaG&E's price disclosure term in its Disclosure Statement or that

Section 54.5(c) does not apply to Respondent is incorrect and Paragraph 54 of the Joint Complaint is legally sufficient.

57. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. To the extent that an answer may be required, the Joint Complaint, and specifically Count V thereof, is of record in this matter and speaks for itself. It is specifically denied that Joint Complainants' allegations that the Disclosure Statement is not in compliance with 52 Pa. Code § 54.43(1) have no merit. By way of further answer, the Joint Complainants incorporate Paragraph 58 below herein.

58. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. To the extent that an answer may be required, it is specifically denied that individual terms in Respondent's Disclosure Statement, such as "cost of electricity," "wholesale market-related services" and "margins," or the combination of terms in Respondent's Disclosure Statement are easily understood by ordinary consumers. It is denied that PaG&E's Disclosure Statement complies with 52 Pa. Code § 54.43(1), which requires EGSs to "provide accurate information about their electric generation services using plain language and common terms in communications with consumers" and "in a format that enables consumers to compare the various electric generation services offered and the prices charged for each type of service." See 52 Pa. Code § 54.43(1). See also 66 Pa. Code § 2807(d).

PaG&E's Paragraph 58 merely states legal argument that Respondent should prevail regarding Count V of the Joint Complaint. As discussed in Section II above, in ruling on preliminary objections, the truth of all facts averred in the complaint must be assumed, and it must be determined whether, based on well-pleaded factual averments of the complainant, recovery or relief is possible. See Feingold, 383 A.2d 791; See also Equitable Small Transp.

Intervenors, 1994 Pa PUC LEXIS 69, \*3. Further, any inferences fairly deducible from the facts must be accepted for purposes of the disposition of the preliminary objections. See Bell Telephone Co., 551 A.2d 602. The Commission shall deny a preliminary objection, in favor of the non-moving party, if there are any doubts that must be resolved. Boyd v. Ward, 802 A.2d 705, 707 Pa. Commw. Ct. 2002); Weber v. PPL Electric Utilities Corp., Docket No. C-2008-2052894, Order at 4 (March 23, 2009).

Joint Complainants aver that Respondent's salespeople promised savings over the PTC. See Joint Complaint at ¶¶ 25, 26. Respondent's Welcome Letter thanks the customer "for enrolling in our highly competitive electricity supply program" and goes on to state that the Respondent is "committed to helping you lower your total energy costs." See Joint Complaint at ¶ 41 and App. A. Furthermore, Joint Complainants attached the affidavit of Dr. Steven L. Estomin to the Joint Complaint as Appendix C. Dr. Estomin analyzed the day-ahead and real-time market prices for electric energy during the winter of 2014 for electric and non-electric space heating residential customers and for several Electric Distribution Company (EDC) territories in Pennsylvania. See Joint Complaint at App. C, page 1. Dr. Estomin included several categories of PJM generation costs and EGS-specific costs, such as profit, in his analysis. See Joint Complaint at App. C, page 1. These categories analyzed by Dr. Estomin are comparable to the categories in PaG&E's pricing disclosure term that PaG&E claims are "all easily understood by ordinary consumers." Based on his analysis, Dr. Estomin concluded that the cost to serve the average residential heating customer in January 2014 should not have exceeded approximately \$0.23 per kWh. See Joint Complaint at ¶ 66; App. C, page 2. As such, the Joint Complainants have provided sufficient allegations that PaG&E's prices charged to

customers in early 2014 could not have been determined even if “ordinary consumers” had hired an expert to calculate the highest price they could expect to be charged.

As such, when the allegations and all facts fairly deducible therefrom are assumed to be true, Joint Complainants have clearly made a legally sufficient claim, and PaG&E’s Preliminary Objection that Count V is legally insufficient must fail.

59. Denied as stated. Respondent’s allegations constitute conclusions of law which require no response and are, therefore, deemed denied. Further, it is specifically denied that Joint Complainants are using the Complaint process to pursue an “opinion” and specifically denied that PaG&E’s characterization of any opinions Joint Complainants may have is accurate. By way of further answer, Joint Complainants have set forth specific allegations of patterns of misconduct by Respondent and Respondent’s employees, agents and representatives that violate the Public Utility Code, 66 Pa. C.S. Ch. 28, the Commission’s regulations, 52 Pa. Code Ch. 54, 56 and 111, the Consumer Protection Law, 73 P.S. § 201-1, *et seq.* and the Telemarketer Registration Act, 73 P.S. § 2241, *et seq.* As set forth above in Paragraphs 56 and 58, PaG&E’s Preliminary Objection to Count V of the Joint Complaint fails and must be overruled.

**IV. CONCLUSION**

WHEREFORE, Joint Complainants respectfully request that Respondent's Preliminary Objections to the Joint Complaint be overruled.

Respectfully submitted,

  
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John M. Abel  
Senior Deputy Attorney General  
PA Attorney I.D. 47313

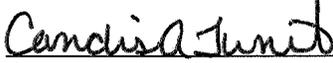
Nicole R. Beck  
Deputy Attorney General  
PA Attorney I.D. 315325

Bureau of Consumer Protection  
Office of Attorney General  
15<sup>th</sup> Floor, Strawberry Square  
Harrisburg, PA 17120  
T: (717) 787-9707  
F: (717) 787-1190  
jabel@attorneygeneral.gov  
nbeck@attorneygeneral.gov

Counsel for:

Kathleen G. Kane, Attorney General  
Bureau of Consumer Protection

DATE: July 21, 2014  
187042

  
\_\_\_\_\_  
Candis A. Tunilo  
PA Attorney I.D. 89891

Brandon J. Pierce  
PA Attorney I.D. 307665  
Assistant Consumer Advocates

Office of Consumer Advocate  
555 Walnut Street  
5<sup>th</sup> Floor, Forum Place  
Harrisburg, PA 17101-1923  
T: (717) 783-5048  
F: (717) 783-7152  
ctunilo@paoca.org  
bpierce@paoca.org

Counsel for:

Tanya J. McCloskey  
Acting Consumer Advocate

# APPENDIX A



OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

[NO NUMBER IN ORIGINAL]

2010 Pa. AG LEXIS 1

February 8, 2010

**SYLLABUS:**

[\*1]

Request for Opinion regarding the Telemarketer Registration Act and the Electricity Generation Customer Choice and Competition Act

**REQUESTBY:**

James H. Cawley, Chairman  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17120

**OPINIONBY:**

TOM CORBETT, Attorney General

**OPINION:**

On behalf of the Public Utility Commission ("PUC"), you have requested my opinion regarding the applicability of the Telemarketer Registration Act ("Telemarketer Act"), 73 P.S. §§ 2241-2249, to electric generation suppliers as defined in the Electricity Generation Customer Choice and Competition Act ("Competition Act"), 66 Pa. C.S. §§ 2801-2815.

As a threshold matter under Section 204(a)(1) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(a)(1), we must establish that the PUC's request for legal advice concerns "a matter or issue arising in connection with the exercise of the official powers or the performance of the official duties of the [PUC]."

The Competition Act requires electric utilities "to unbundle their rates and services and to provide open access over their transmission and distribution systems to allow competitive suppliers to generate and sell electricity directly [\*2] to consumers," 66 Pa. C.S. § 2802(14). The Act directs the PUC, by regulation, to require electricity providers to provide adequate and accurate customer information to enable customers to make informed choices regarding the purchase of electricity services. 66 Pa. C.S. § 2807(d)(2). PUC regulations require providers to notify consumers that information is available upon request, 52 Pa. Code § 54.6(h), and prohibit providers from releasing customer information to third parties without customer consent. 52 Pa. Code § 54.8.

Telephone communication is among the means by which electricity providers may seek to discharge their obligation under the Competition Act and regulations to inform customers of choices regarding the purchase of electricity. Section 3(b) of the Telemarketer Act, 73 P.S. § 2243(b), prohibits telemarketers from communicating with consumers by telephone in connection with the purchase of consumer goods or services "unless the telemarketer or the telemarketing business [\*3] which employs the telemarketer is registered with the Office of Attorney General" and otherwise circumscribes telemarketer activities.

This interplay between the communication requirements of the Competition Act and the communication restrictions of the Telemarketer Act provides ample basis for concluding that the applicability of the Telemarketer Act to electric generation suppliers is an issue "arising in connection with" the PUC's powers and duties. Accordingly, we proceed to address the questions presented in your opinion request.

**1. Is electric generation supply a "consumer good or service" as defined in the Telemarketer Act?**

Section 2 of the Telemarketer Act, 73 P.S. § 2242, defines "consumer goods and services" as "real or personal property or services used for personal, family or household purposes." Electricity is used in countless aspects and activities of daily life; thus electric generation supply is plainly a "service used for personal, family and household purposes" and therefore a "consumer service" within the meaning of the Act.

**2. Is an electric generation supplier excluded from the definition of "telemarketer" in the [\*4] Telemarketer Act? If so, what is the scope of the exclusion under the Act, does it extend to an agent of a supplier, and does it matter that the source of customer information used for telephone solicitation by a supplier or its agent is an electric distribution company?**

Section 2 of the Telemarketer Act, 73 P.S. § 2242, defines "telemarketer" as follows:

Any person or business which, in connection with telemarketing, initiates or receives telephone calls to or from a consumer in this Commonwealth, or when the person or business acting in connection with telemarketing is located within this Commonwealth when such calls are initiated or received. *For purposes of registration under section 3(a)*, "telemarketer" does not include any of the following...

(5) A person or business engaged in a business or occupation which is licensed by, certificated by or registered with a Federal or Commonwealth agency while acting within the scope of the business for which licensure, certification or registration is required.

(Emphasis added).

Under this definition, electric generation suppliers engaged in telemarketing are telemarketers for all purposes [\*5] of the Act except the requirement of Section 3(a), 73 P.S. § 2243(a), that telemarketers register with this Office, from which electric generation suppliers are excluded because they are licensed by the PUC under the Competition Act, 66 Pa. C.S. § 2809(a). Agents of suppliers, such as individuals and businesses initiating or receiving calls pursuant to contracts with suppliers, are not excluded from the definition of "telemarketer" and therefore must register. It is immaterial to the definition or the exclusion that the source of customer information used for telephone solicitation by suppliers or their agents is an electric distribution company.

**3. Is customer consent to the release of information given to an electric distribution company to enable competitive solicitations "an express request" to receive telephone solicitations from electric generation suppliers or their agents within the meaning of the Telemarketer Act?**

Section 2 of the Telemarketer Act, 73 P.S. § 2242, excludes from the definition of a "telephone solicitation call" a call to a residential [\*6] or wireless consumer "(1) in response to an express request of the residential or wireless consumer." You explain that customers of electric distribution companies may indicate to the company their general consent to the release of information about them to enable competitive solicitations by electric generation suppliers and that such consent may be given by an "opt-in" process in which the customer affirmatively agrees to the release of information or an "opt-out" process in which the customer does not object to (opt-out of) the release of information.

Regardless of process, customer consent to the release of customer information by an electric distribution company to enable competitive solicitations by electric generation suppliers does not constitute "an express request" to receive telephone solicitation calls. The "do-not-call list" defined in section 2 of the Telemarketer Act, 73 P.S. § 2242, protects consumers from unwanted telephone solicitation calls. See sections 5-9, 73 P.S. §§ 2245-2249. The protection of the do-not-call list is defeated if general consent to the release of information given by a consumer to one individual or business [\*7] operates as general consent to receive telephone solicitations from any number of other individuals or businesses.

**4. Is an electric generation supplier using customer information supplied by an electric distribution company for telephone solicitations shielded from liability under the "error" provision of the Telemarketer Act?**

Section 5(a) of the Telemarketer Act, 73 P.S. § 2245(a), shields a telemarketer who has complied with the four requirements (i)-(iv) of the provision from liability for a telephone solicitation call to a consumer who has previously indicated that he or she does not wish to receive such calls. It is immaterial to this "error" provision of the Act that an electric generation supplier or its agent uses customer information supplied by an electric distribution company in making telephone solicitation calls.

In summary, it is my opinion, and you are so advised, that electric generation suppliers are subject to all the requirements of the Telemarketer Act, as detailed herein, except the requirement that they register with this Office.

Finally, you are advised that, in accordance with Section 204(a)(1) of the Commonwealth [\*8] Attorneys Act, 71 P.S. § 732-204(a)(1), you are required to follow the advice set forth in this Opinion and shall not in any way be liable for doing so.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Consumer Protection Telemarketing Communications Law Privacy Telemarketing & Consumer Fraud & Abuse Prevention Act Energy & Utilities Law Transportation & Pipelines Electricity Transmission