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July 30, 2014

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
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Harrisburg, PA 17105-3265

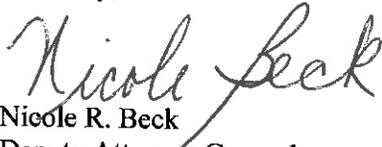
Re: Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane,
Through the Bureau of Consumer Protection and Tanya J. McCloskey,
Acting Consumer Advocate v. Energy Services Providers, Inc. d/b/a
Pennsylvania Gas & Electric: Docket No. C-2014-2427656;
JOINT REPLY TO NEW MATTER

Dear Secretary Chiavetta:

Enclosed please find the Joint Reply to the New Matter 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.

Sincerely,


Nicole R. Beck
Deputy Attorney General

Enclosures

cc: Honorable Elizabeth H. Barnes (*with enclosures*)
Honorable Joel H. Cheskis (*with enclosures*)
Certificate of Service (*with enclosures*)

**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	:	

JOINT REPLY OF THE COMMONWEALTH OF PENNSYLVANIA
AND THE OFFICE OF CONSUMER ADVOCATE
TO THE NEW MATTER OF ENERGY SERVICES PROVIDERS, INC. d/b/a
PENNSYLVANIA GAS & ELECTRIC

Pursuant to Section 5.63 of the Pennsylvania Public Utility Commission's (Commission) regulations regarding Replies to New Matter, 52 Pa. Code § 5.63, 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 Reply to the New Matter of Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric (Respondent or PaG&E), in the

above-captioned proceeding. The Joint Complainants incorporate herein all paragraphs and allegations in their Joint Complaint filed in this action and aver the following:

82. Respondent's introduction paragraph requires no responsive pleading. By way of further answer, to the extent that an answer may be required, the Joint Complainants incorporate herein paragraphs 1 through 81 in their Joint Complaint and the allegations contained therein.

83. Denied. It is specifically denied that the Commission reviews and approves Electric Generation Supplier (EGS) disclosure statements.

84. It is specifically denied that Respondent charged prices in early 2014 that conformed to PaG&E's Disclosure Statement or the Public Utility Code, the Commission's regulations and orders. See Joint Complaint at Counts I, III, V and VI. Additionally, Respondent provides information that is within PaG&E's possession, and strict proof thereof is demanded at hearings in this matter. It is denied that the stated information in any way absolves Respondent of the violations alleged in the Joint Complaint.

85-90. After reasonable investigation, Joint Complainants are without sufficient knowledge or information to form a belief as to the veracity of the averments set forth herein, as the information is in the possession of PaG&E. Same are therefore denied and strict proof thereof is demanded at hearings in this matter. It is denied that the stated information in any way absolves Respondent of the violations alleged in the Joint Complaint.

91. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied.

First Affirmative Defense

92. Respondent's introduction paragraph requires no responsive pleading. By way of further answer, to the extent that an answer may be required, the Joint Complainants incorporate

herein Paragraphs 1 through 81 in their Joint Complaint and the allegations contained therein and Paragraphs 82 through 91 of the Joint Reply to New Matter.

93. Denied. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. By way of further answer, to the extent that an answer may be required, Joint Complainants incorporate their Answer to Respondent's Preliminary Objections herein.

Second Affirmative Defense

94. Respondent's introduction paragraph requires no responsive pleading. By way of further answer, to the extent that an answer may be required, the Joint Complainants incorporate herein Paragraphs 1 through 81 in their Joint Complaint and the allegations contained therein and Paragraphs 82 through 93 of the Joint Reply to New Matter.

95. 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, the Commission's regulations require compliance with the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.* (Consumer Protection Law). 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). See

also Elkin v. Bell Telephone Co. of Pennsylvania, 491 Pa. 123, 133, 420 A.2d 371, 376 (1980).

The Consumer Protection Law defines such conduct and it would not be a reasonable interpretation 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.

As a preliminary matter, the Commission must invoke the statute and case law under the Consumer Protection Law, interpret it, and apply it harmoniously where appropriate. See Duquesne Light Co. v. Borough of Monroeville, 449 Pa. 573, 298 A.2d 252 (1972); Pettko v. Pennsylvania American Water Co., 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).

Third Affirmative Defense

96. Respondent's introduction paragraph requires no responsive pleading. By way of further answer, to the extent that an answer may be required, the Joint Complainants incorporate herein Paragraphs 1 through 81 in their Joint Complaint and the allegations contained therein and Paragraphs 82 through 95 of the Joint Reply to New Matter.

97. 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, the Commission's regulations require an EGS and its agents to comply with the provisions of the Telemarketer Registration Act (TRA), 73 P.S. § 2241, *et seq.* See 52 Pa. Code § 111.10(a)(1). See also Harrisburg Taxicab, 786 A.2d at 292-93.

EGSs are subject to all requirements of the TRA, except the requirement that they register with the OAG. On February 8, 2010, Attorney General Thomas W. 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). 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 in order 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, the Commission does have jurisdiction to determine if Respondent violated the TRA as part of determining whether Respondent violated the Commission's regulation requiring compliance with the TRA.

Fourth Affirmative Defense

98. Respondent's introduction paragraph requires no responsive pleading. By way of further answer, to the extent that an answer may be required, the Joint Complainants incorporate herein Paragraphs 1 through 81 in their Joint Complaint and the allegations contained therein and Paragraphs 82 through 97 of the Joint Reply to New Matter.

99. Denied. This paragraph states conclusions of law to which no response is required. By way of further answer, Joint Complainants are not requesting in the Joint Complaint that the Commission regulate Respondent's prices. Instead, the Joint Complainants seek Commission review of, *inter alia*, Respondent's deceptive marketing practices of promising, *inter alia*, savings over the Price to Compare (PTC) and then billing customers at prices greatly in excess of the PTC. See Joint Complaint at Counts I, III, V and VI and App. A. Additionally, Joint Complainants seek review of PaG&E's failure to charge prices in early 2014 that conformed to its Disclosure Statement. See Joint Complaint at Counts V and VI and App. B and C. The Commission has the authority under the Public Utility Code to regulate EGS billing and marketing practices. 66 Pa. C.S. § 2809(e). 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).

By way of further answer, 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.4th 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.¹ 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

¹ 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.

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).

Fifth Affirmative Defense

100. Respondent's introduction paragraph requires no responsive pleading. By way of further answer, to the extent that an answer may be required, the Joint Complainants incorporate herein Paragraphs 1 through 81 in their Joint Complaint and the allegations contained therein and Paragraphs 82 through 99 of the Joint Reply to New Matter.

101. 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, it is denied that Joint Complainants' claims are barred because of improper venue. By way of further answer, Joint Complainants incorporate Paragraph 99 above herein.

Sixth Affirmative Defense

102. Respondent's introduction paragraph requires no responsive pleading. By way of further answer, to the extent that an answer may be required, the Joint Complainants incorporate herein Paragraphs 1 through 81 in their Joint Complaint and the allegations contained therein and Paragraphs 82 through 101 of the Joint Reply to New Matter.

103. 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, Joint Complainants incorporate Paragraph 99 above herein. The primary jurisdiction doctrine, created by judges, exists to make use of the agency's special experience and expertise in complex areas and to promote consistency and uniformity in the area of administrative policy. See Elkin v. Bell Telephone Co. of Pennsylvania, 491 Pa. 123, 133, 420 A.2d 371, 376 (1980).

While courts should not develop a dependency on an agency whenever a controversy involves some issue within the domain of the agency's expertise, 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). The Commonwealth Court has stated 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. See Harrisburg Taxicab, 786 A.2d at 292-93. See also City of Philadelphia v. Pa. PUC, 702 A.2d 1139 (Pa. Commw. Ct. 1997).

As such, the claims in the Joint Complaint are not barred, nor should the Commission defer this matter, in whole or in part, pursuant to the doctrine of primary jurisdiction.

Seventh Affirmative Defense

104. Respondent's introduction paragraph requires no responsive pleading. By way of further answer, to the extent that an answer may be required, the Joint Complainants incorporate herein Paragraphs 1 through 81 in their Joint Complaint and the allegations contained therein and Paragraphs 82 through 103 of the Joint Reply to New Matter.

105. Denied. It is specifically denied that PaG&E is entitled to a set-off or reduction in damages awarded in this matter.

Eighth Affirmative Defense

106. Respondent's introduction paragraph requires no responsive pleading. By way of further answer, to the extent that an answer may be required, the Joint Complainants incorporate herein Paragraphs 1 through 81 in their Joint Complaint and the allegations contained therein and Paragraphs 82 through 105 of the Joint Reply to New Matter.

107. Denied. It is specifically denied that PaG&E is entitled to a set-off or reduction in damages awarded in this matter.

Ninth Affirmative Defense

108. Respondent's introduction paragraph requires no responsive pleading. By way of further answer, to the extent that an answer may be required, the Joint Complainants incorporate herein Paragraphs 1 through 81 in their Joint Complaint and the allegations contained therein and Paragraphs 82 through 107 of the Joint Reply to New Matter.

109. 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, the Joint Complainants are not seeking to re-litigate Formal Complaints that have already been resolved. 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). Joint Complainants bring this action to represent the interests of consumers and the public interest at large. See 71 P.S. § 309-4; 73 P.S. § 201-4.

Tenth Affirmative Defense

110. Respondent's introduction paragraph requires no responsive pleading. By way of further answer, to the extent that an answer may be required, the Joint Complainants incorporate herein Paragraphs 1 through 81 in their Joint Complaint and the allegations contained therein and Paragraphs 82 through 109 of the Joint Reply to New Matter.

111. 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, Joint Complainants incorporate the allegations in their Joint Complaint herein.

Eleventh Affirmative Defense

112. Respondent's introduction paragraph requires no responsive pleading. By way of further answer, to the extent that an answer may be required, the Joint Complainants incorporate herein Paragraphs 1 through 81 in their Joint Complaint and the allegations contained therein and Paragraphs 82 through 111 of the Joint Reply to New Matter.

113. 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, it is specifically denied that the Joint Complainants' claims are barred under any legal theory.

Twelfth Affirmative Defense

114. Respondent's introduction paragraph requires no responsive pleading. By way of further answer, to the extent that an answer may be required, the Joint Complainants incorporate herein Paragraphs 1 through 81 in their Joint Complaint and the allegations contained therein and Paragraphs 82 through 113 of the Joint Reply to New Matter.

115. 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, it is

denied that the Joint Complainants' claims are barred because of the doctrine of accord and satisfaction, as Joint Complainants bring this action to represent the interests of consumers and the public interest at large. See 71 P.S. § 309-4; 73 P.S. § 201-4.

Thirteenth Affirmative Defense

116. Respondent's introduction paragraph requires no responsive pleading. By way of further answer, to the extent that an answer may be required, the Joint Complainants incorporate herein Paragraphs 1 through 81 in their Joint Complaint and the allegations contained therein and Paragraphs 82 through 115 of the Joint Reply to New Matter.

117. 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, Joint Complainants incorporate Paragraph 99 above herein. By way of further answer, the Commission also has the authority to direct injunctive relief, civil penalties and suspend or revoke PaG&E's EGS license. See 66 Pa. C.S. § 103(c); 52 Pa. Code § 54.42.

WHEREFORE, Joint Complainants respectfully request that judgment be entered against the Respondent, in favor of the Joint Complainants, and that the Commission grant the relief requested in the Joint Complaint.

Respectfully submitted,


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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing Joint Reply of the Attorney General and the Office of Consumer Advocate to the New Matter of Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric, in the manner and upon the persons listed below:

Dated this 30th day of July 2014.

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