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August 19, 2014

**VIA ELECTRONIC FILING**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2<sup>nd</sup> Floor (filing room)  
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 v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas &  
Electric; Docket No. C-2014-2427656; **ENERGY SERVICE PROVIDERS,  
INC. d/b/a PENNSYLVANIA GAS & ELECTRIC'S PREHEARING  
CONFERENCE MEMORANDUM**

Dear Secretary Chiavetta:

Enclosed please find Energy Service Providers, Inc. d/b/a Pennsylvania Gas & Electric's  
Prehearing Conference Memorandum in the above-captioned matter. Copies will be provided as  
indicated on the Certificate of Service

If you have any questions, please do not hesitate to contact the undersigned.

Very truly yours,



Todd S. Stewart  
Christopher M. Arfaa

CMA/das  
Enclosures

cc: Administrative Law Judge Elizabeth Barnes (by email and first class mail)  
Administrative Law Judge Joel H. Cheskis (by email and first class mail)  
Certificate of Service

**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

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**PREHEARING MEMORANDUM OF  
ENERGY SERVICES PROVIDERS, INC. d/b/a PENNSYLVANIA GAS & ELECTRIC**

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Pursuant to 52 Pa. Code § 5.222(d)(1), and the Prehearing Conference Order issued August 8, 2014, Energy Services Providers Inc. d/b/a Pennsylvania Gas & Electric (“ESPI”), respondent in the above-captioned matter, files this Prehearing Memorandum by and through their counsel, Hawke McKeon & Sniscak LLP and Blank Rome, LLP.

**A. Introduction and Procedural History**

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

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

ESPI markets and advertises its variable rate plans through telephone and internet solicitations and multi-level marketing. ESPI provides printed information regarding its variable rate plans to a potential customer upon request. All of ESPI's telephone sales are confirmed through an independent third-party verification ("TPV") process. During the TPV process, a consumer must confirm that she or he understands that ESPI's charges for electricity will be based on a month-to-month variable rate. If an individual agrees to purchase electricity from ESPI, ESPI will send the new customer a Welcome Letter and a Disclosure Statement. Like the TPV, the Welcome Letter and the Disclosure Statement inform ESPI's customers that they will be charged a "variable rate." As explained in the Disclosure Statement, this variable rate changes daily and the rate charged by ESPI will reflect "your cost of electricity, including energy, other wholesale market services, the associated transmission and distribution charges and other market-related factor for your utilities transmission zone within the PJM ISO; plus all applicable taxes, fees, charges, costs, expenses, and margins."

In January and February 2014, Pennsylvania experienced abnormally cold weather. The cold weather contributed to increased and, on some days, record breaking use of electricity. As consumer usage spiked to unprecedented levels on these days, so did wholesale prices for electricity. As a result (and consistent with its Disclosure Statement), ESPI passed some of these wholesale price increases to its residential variable rate customers, but absorbed the rest, and experienced a \$12.5 million gross loss in Pennsylvania in January; in addition, ESPI paid over \$4 million in rebates to customers to help them with their electricity bills.

On June 20, 2014, Attorney General Kathleen G. Kane through the Bureau of Consumer Protection (the “Attorney General”) and the Acting Consumer Advocate Tanya J. McCloskey (the “OCA”) (together referred to as the “Joint Complainants”) filed the above-captioned joint complaint (the “Joint Complaint”) with the Commission. The Joint Complaint contains seven counts: Count I – Misleading and Deceptive Promises of Savings; Count II – Slamming; Count III – Misleading and Deceptive Welcome Letter; Count IV – Lack of Good Faith Handling of Complaints; Count V – Failing to Provide Accurate Pricing Information; Count VI – Prices Nonconforming to Disclosure Statement; and Count VII – Failure to Comply with the Telemarketer Registration Act.

On July 10, 2014, ESPI timely filed an Answer to the Joint Complaint, which generally denied any wrongdoing and alleged certain New Matter, and Preliminary Objections seeking dismissal of each Count of the Joint Complaint in whole or in part. Also on July 10, 2014, the Office of Small Business Advocate (“OSBA”) and the Bureau of Investigation and Enforcement (“BI&E”) filed notices of intervention. The Joint Complainants jointly filed an Answer to ESPI’s Preliminary Objections on July 21, 2014, and a Reply to ESPI’s New Matter on July 30, 2014.

**B. Service List**

Paragraph 4 of the Prehearing Order limits each Party to one entry on the service list. ESPI requests that the following person be listed on the service list:

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Paragraph 4 also provides that an unlimited number of counsel may be on the e-mail distribution list. ESPI requests that the following counsel be added to the e-mail distribution list:

Christopher M. Arfaa	cmarfaa@hmslegal.com
Charles A. Fitzpatrick, IV	fitzpatrick-c@blankrome.com
Christopher A. Lewis	lewis@blankrome.com
Todd S. Stewart	tsstewart@hmslegal.com

**C. Settlement**

No settlement discussions have been held to date. ESPI is willing to discuss possible settlement at any time.

**D. Discovery**

The parties have initiated discovery and, to date, have resolved potential discovery disputes through cooperation and negotiation, thus avoiding the filing of objections, motions for protective orders and motions to compel.

ESPI does not propose any modifications to the Commission's discovery regulations at this time except with respect to the protection of confidential or proprietary information and customer information as set forth below.

**1. Confidential or Proprietary Information**

The litigation of this matter has required and will continue to require the production of confidential and/or proprietary information by ESPI. On August 15, 2014, ESPI filed a petition for protective order. The other parties have agreed to abide by the terms of the proposed protective order, and they have authorized ESPI to represent that they do not oppose its entry.

## 2. Customer Information

This proceeding also has required and will continue to require the production of information pertaining to ESPI's customers,<sup>1</sup> including names, addresses, telephone numbers, energy usage, billing and payment information. There are three potential sources of such customer information in this proceeding: (a) ESPI's customer records; (b) OCA's records of information collected directly from ESPI customers; and (c) the OAG's records of information collected directly from ESPI customers.

ESPI has designated and will continue to designate all customer information it produces or refers to in this proceeding as "confidential information" subject to the protections of the proposed protective order. Similarly, OCA has indicated to ESPI that it will designate all customer information collected by and produced or referred to by OCA as "confidential information" subject to the protections of the proposed protective order. However, the OAG has taken the position that it is not required to protect the information of ESPI customers that have submitted complaints to the OAG from public disclosure and that, therefore, it has not and will not designate such customers' information as "confidential" in the discovery requests, responses, and other documents served or filed by the OAG in this proceeding. It is ESPI's understanding that the basis for the OAG's position is that, when customers submit complaints about a business to the OAG, they give the OAG permission to disclose their information to that business.

The OAG has disclosed the identities of more than 90 ESPI customers, without designating such information "confidential" pursuant to the Protective Order, in discovery requests that were served on not only ESPI but also the OCA, the OSBA and the BI&E. ESPI has served discovery requests relating to such customers and anticipates that OAG will serve

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<sup>1</sup> References herein to ESPI's customers include ESPI's former as well as its current customers.

responses that disclose additional customer information without designating it as “confidential” and thus protected from further disclosure by the Protective Order. While discovery requests and responses are not filed in the public record, the failure to treat customer information contained in such requests and responses as “confidential” will allow disclosure in briefs, testimony, exhibits and hearings that, absent such treatment, will be available to the public.

In light of the large numbers of customers swept up by the allegations of the Joint Complaint, failure to protect *all* customer information that may be exchanged in this proceeding as “confidential” risks public disclosure of information regarding customers that have not given permission for such disclosure. In the case of customer information collected by the OAG, disclosure of such information absent confidential designation risks disclosure in public filings or submissions beyond the terms of the limited permission granted by the customer. In addition, providing confidential treatment to some, but not all, customer information imposes an unnecessary burden on the parties, the witnesses, the Presiding Officers, and the Commission when referring to such information in discovery requests, discovery responses, briefs, testimony, exhibits, decisions and orders.

In light of the foregoing, ESPI submits that *all* customer information produced or referred-to in this proceeding should be designated and treated as “confidential information” pursuant to the proposed protective order. Such treatment would promote the privacy of customer information consistent with Commission policy<sup>2</sup> and eliminate the administrative burden (and risk of error) inherent in treating some customers’ information differently from others’. ESPI respectfully requests the opportunity to be heard on this issue at the Prehearing Conference.

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<sup>2</sup> See 52 Pa. Code § 54.8 (relating to the privacy of EGS and EDC customer information).

**E. Proposed Schedule**

ESPI will work with the other parties and the Presiding Officers to establish a schedule for resolution of this matter.

**F. Witnesses**

ESPI is unable to identify the witnesses it expects to call at this time. The Joint Complainants have the burden of proof in this proceeding. ESPI's factual presentation, therefore, will largely be driven by the purported "facts" presented by the Joint Complainants in support of the claims asserted in the Joint Complaint that survive ESPI's Preliminary Objections.

**G. Presently Identified Issues<sup>3</sup>**

**1. Preliminary Issues**

**a. Issues presented by Preliminary Objections**

ESPI's Preliminary Objections present the following issues for determination:

- Whether Counts I, II, IV, and V of the Joint Complaint should be dismissed for insufficient specificity because they are not pled in sufficient detail to allow ESPI to conduct a meaningful investigation and prepare a coherent response or defense.
- Whether Counts I, II, III, V, VI, and VII of the Joint Complaint should be dismissed for lack of jurisdiction and legal insufficiency to the extent that those counts allege that ESPI violated or is violating the Consumer Protection Law, 73 P.S. § 201-1, et seq., because the Commission lacks jurisdiction and authority to enforce or adjudicate violations under the Consumer Protection Law.
- Whether each Count of the Joint Complaint should be dismissed for lack of jurisdiction to the extent it seeks monetary damages or refunds because the Commission lacks authority to award such relief.
- Whether Counts I, II, and IV of the Joint Complaint should be dismissed for legal insufficiency to the extent they are based on allegations in Formal Complaints that were filed by consumers, because ESPI has settled all Formal Complaints that

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<sup>3</sup> See 52 Pa. Code § 5.222(d)(1)(i). ESPI's listing of issues herein is not intended to limit ESPI's rights to identify, raise or litigate any issue raised by the Joint Complaint, any issue that may arise during the litigation of this matter, or any issue that ESPI may properly raise before the Commission or a reviewing court, which rights are hereby expressly reserved.

were filed by consumers prior to the Joint Complainants' initiation of this dispute and, therefore, cannot be forced to litigate the allegations in those Formal Complaints.

- Whether Count VII of the Joint Complaint should be dismissed in its entirety (a) for lack of jurisdiction because it is based on alleged violations of the Telemarketer Registration Act, which the Commission has no authority to enforce, and (b) for legal insufficiency because it is based on alleged violations of the Telemarketer Registration Act, which does not apply to ESPI.
- Whether Count V of the Joint Complaint should be dismissed in its entirety for legal insufficiency because the Disclosure Statement complies with all Commission regulations.

### **b. Standing of Commonwealth as Complainant**

On August 18, 2014, ESPI propounded an interrogatory on the Joint Complainants asking whether any of the ESPI customers referenced in the Joint Complaint is in fact the Commonwealth or an agency thereof. If the answer to this interrogatory is no, ESPI intends to move for summary judgment on the Commonwealth's claims on the basis of section 701 of the Public Utility Code, which provides in pertinent part: "The Commonwealth through the Attorney General may be a complainant before the commission in any matter *solely* as an advocate for the Commonwealth as a consumer of public utility services."<sup>4</sup>

## **2. Principal Issues**

The following principal issues must be decided in this proceeding:

- Whether ESPI has failed to conform to the provisions of the Public Utility Code, the lawful orders of the Commission, or the lawful regulations of the Commission, including the Commission's regulations regarding standards and billing practices, as alleged in the Joint Complaint, in violation of 66 Pa. C.S.A. § 2809; and
- If so, whether ESPI's conduct is such that the Public Utility Code requires, and due process permits, the sanctions demanded in the Joint Complaint.

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<sup>4</sup> 66 Pa. C.S.A. § 701 (emphasis added).

DATED: August 19, 2014

Respectfully submitted,



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

**CERTIFICATE OF SERVICE**

I hereby certify that on this day I served a true and correct copy of the foregoing document on the persons listed below by the means indicated:

**First Class Mail, Postage Prepaid, and Electronic Mail**

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DATED: August 19, 2014

  
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