



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

IN REPLY PLEASE  
REFER TO OUR FILE

September 12, 2014

**Via E-Filing**

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

Re: Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, through the Bureau of Consumer Protection, and Tanya J. McCloskey, Acting Consumer Advocate v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric  
Docket No. C-2014- 2427656  
**Brief in Opposition to Petition for Interlocutory Review**

Dear Secretary Chiavetta:

Enclosed for electronic filing is the Bureau of Investigation and Enforcement's Brief in Opposition to the Petition for Interlocutory Review and Answer to Material Question of Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric in the above-captioned matter.

Copies have been served on the parties of record in accordance with the attached Certificate of Service.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

Stephanie M. Wimer  
Prosecutor  
PA Attorney I.D. No. 207522

Enclosure

cc: Honorable Joel H. Cheskis  
Honorable Elizabeth H. Barnes  
As per 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 :

v. :

Docket No. C-2014-2427656

Energy Services Providers, Inc. :  
d/b/a Pennsylvania Gas & Electric :

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**BRIEF OF THE  
BUREAU OF INVESTIGATION AND ENFORCEMENT  
IN OPPOSITION TO  
THE PETITION FOR INTERLOCUTORY REVIEW  
AND ANSWER TO MATERIAL QUESTION OF  
ENERGY SERVICES PROVIDERS, INC.  
d/b/a PENNSYLVANIA GAS & ELECTRIC**

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**TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:**

AND NOW COMES the Bureau of Investigation and Enforcement (I&E) of the Pennsylvania Public Utility Commission (Commission), by and through its prosecuting attorneys, pursuant to 52 Pa. Code § 5.302(b), and files this Brief in opposition to the Petition for Interlocutory Review and Answer to a Material Question (Petition) filed on September 2, 2014 by Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric (ESPI or Petitioner) in the above-captioned proceeding. In opposition to ESPI's Petition, I&E argues as follows:

**I. STATEMENT OF THE CASE**

On June 20, 2014, the Office of Attorney General (OAG), through its Bureau of Consumer Protection, and the Office of Consumer Advocate (OCA) filed a Joint Complaint against ESPI alleging multiple violations of Pennsylvania law and Commission regulations and orders. ESPI is an electric generation supplier (EGS) that became licensed by the Commission to operate as an EGS in Pennsylvania on or about May 9, 2011 at A-2010-2212421. In the Joint Complaint, the OAG and OCA allege, *inter alia*, that ESPI engaged in misleading and deceptive promises of savings, switched customers to receive its supply service without their authorization, distributed a misleading and deceptive welcome letter, failed to handle customer complaints in good faith, failed to provide accurate pricing information, charged prices that did not conform to the Company's disclosure statement and failed to comply with the Telemarketer Registration Act, 73 P.S. § 2241 *et seq.*

ESPI filed an Answer and New Matter to the Joint Complaint on July 10, 2014. Also on July 10, 2014, ESPI filed Preliminary Objections to which the OAG and OCA replied on July 21, 2014. On July 30, 2014, the OAG and OCA filed a Joint Reply to New Matter. I&E filed a Notice of Intervention on July 31, 2014.

On August 20, 2014, the presiding Administrative Law Judges (ALJs) entered an Interim Order that granted, in part, and denied, in part, ESPI's Preliminary Objections.<sup>1</sup>

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<sup>1</sup> *Commonwealth of Pennsylvania, et al. v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas and Electric*, Docket No. C-2014-2427656, Order Granting in Part and Denying in Part Preliminary Objections (Order entered August 20, 2014) (hereinafter referred to as Interim Order).

Of significance to the instant Petition, the ALJs denied ESPI's Preliminary Objection, which argued that the Commission lacks jurisdiction to direct ESPI to provide refunds to customers. The ALJs concluded that Section 1312(a) of the Public Utility Code (Code), 66 Pa.C.S. § 1312(a), grants authority to the Commission to direct refunds. Section 1312(a) of the Code provides in pertinent part:

(a) General rule.--If, in any proceeding involving rates, the commission shall determine that any rate received by a public utility was unjust or unreasonable, or was in violation of any regulation or order of the commission, or was in excess of the applicable rate contained in an existing and effective tariff of such public utility, the commission shall have the power and authority to make an order requiring the public utility to refund the amount of any excess paid by any patron, in consequence of such unlawful collection, within four years prior to the date of the filing of the complaint, together with interest at the legal rate from the date of each such excessive payment.

66 Pa.C.S. § 1312(a). The ALJs further found that the Joint Complainants should be given the opportunity to be heard during a hearing regarding their request for refunds and the requested relief should not be dismissed on a preliminary basis.

An initial Prehearing Conference was held in this matter on August 25, 2014.

On September 2, 2014, ESPI filed the instant Petition, which seeks an Order from the Commission determining that the Commission is without subject matter jurisdiction or authority to direct EGSs to issue refunds.

## **II. COUNTER-STATEMENT OF MATERIAL QUESTION**

A. Has the Petitioner met the standards for interlocutory review?

Suggested Answer: No.

- B. Does the Commission have statutory authority and subject matter jurisdiction to order electric generation suppliers to issue refunds to customers?

Suggested Answer: Yes.

### III. SUMMARY OF ARGUMENT

The Commission should decline to answer ESPI's material question and provide the Joint Complainants with the opportunity at hearing to demonstrate how refunds to customers are warranted in this matter. ESPI fails to meet the standard for granting such petitions as required by 52 Pa. Code §§ 5.302-5.304.

The Commission has subject matter jurisdiction and statutory authority to direct EGSs to refund customers pursuant to Section 2809(e) of the Code, 66 Pa.C.S. § 2809(e), which obligates the Commission to ensure that 52 Pa. Code Ch. 56 standards and billing practices are maintained. To conclude that the Commission is unable to direct EGSs to refund customers if it is proven that EGSs billed prices that did not conform to the marketed price or the disclosure statement results in an outcome that is unlawful, absurd and contrary to the public interest.

### IV. ARGUMENT

- A. Interlocutory Review

The Commission's standards governing interlocutory review are found at Section 331(e) of the Code, 66 Pa.C.S. § 331(e), and Sections 5.302-5.304 of the Commission's regulations, 52 Pa. Code §§ 5.302-5.304. The Commission does not routinely grant interlocutory review except upon a showing by the petitioner of extraordinary

circumstances or compelling reasons. *In re: Application of Knight's Limousine Service, Inc.*, 59 Pa. P.U.C. 538 (1985). The Commission has determined that such a showing may be accomplished by a petitioner proving that, without interlocutory review, some harm would result which would not be reparable through normal avenues, that the relief sought should be granted now rather than later, or that granting interlocutory review would prevent substantial prejudice or expedite the proceeding. *See Re: Structural Separation of Bell Atlantic-Pennsylvania, Inc. Retail and Wholesale Operations*, Docket No. M-00001353 (Order entered July 20, 2000). Therefore, ESPI's question should be declined or determined to be improper, since this proceeding is in its early stages and the Joint Complainants should be given the opportunity at hearing to demonstrate how refunds to customers are warranted. As demonstrated herein, ESPI has failed to demonstrate either extraordinary circumstances or compelling reasons that would result in irreparable harm or prejudice necessary for the Commission to grant interlocutory review.

B. Commission's Authority to Issue Refunds

ESPI asks for a ruling from the Commission that would foreclose the possibility of the Commission being able to direct EGSs to issue refunds to customers. To the contrary, I&E asserts that the Commission has both the subject matter jurisdiction and statutory authority to direct EGSs to refund customers under certain circumstances. I&E cautions that answering ESPI's material question in the negative would result in undesirable widespread ramifications, beyond the instant matter, which would set a

precedent that prohibits the Commission from directing that refunds be issued, even when refunds are lawful and appropriate.

In the Interim Order, the presiding ALJs concluded that the Public Utility Code gives the Commission jurisdiction and authority to direct ESPI to issue refunds. The presiding ALJs found that to hold otherwise would be contrary to the public interest and would create an unreasonable result. (Interim Order at 14).

I&E agrees with the ruling of the presiding ALJs in the Interim Order as it pertains to the Commission's ability to direct EGSs to refund customers. ESPI *is* a public utility for the purposes set forth in 66 Pa.C.S. §§ 2809 and 2810. 66 Pa.C.S. § 102(2)(vi). *See also Delmarva Power & Light Co. v. Pa. P.U.C.*, 870 A.2d 901 (Pa. 2005). Therefore, the Commission has the express authority and subject matter jurisdiction to regulate ESPI and other EGSs as public utilities for the purposes established in Sections 2809 and 2810 of the Code.

For example, with regard to licensing requirements, EGSs are public utilities. 66 Pa.C.S. § 2809(b). Section 2809(b) of the Code states that the Commission will issue a license to an EGS upon finding that the EGS is **“fit, willing and able to perform properly the service proposed and to conform to the provisions of this title and the lawful orders and regulations of the commission under this title, including the commission’s regulations regarding standards and billing practices . . . .”** 66 Pa.C.S. § 2809(b) (emphasis added).

Likewise, the Commission is authorized to regulate EGSs as public utilities for the purposes set forth in Section 2809(e) of the Code, which provides as follows:

(e) 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 ensure that the present quality of service provided by electric utilities does not deteriorate, including assuring that adequate reserve margins of electric supply are maintained and **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)(emphasis added).

The Commission could forbear from regulating EGSs, pursuant to 66 Pa.C.S. § 2809(e), if it determined that the requirements of 66 Pa.C.S. § 2809 were unnecessary due to competition among the EGSs. The Commission did not forbear from regulating EGSs with respect to standards and billing practices and in fact promulgated regulations designed to ensure that EGSs maintain standards and billing practices for residential utility service. For example, Section 54.3 of the Commission's regulations sets forth standards and pricing practices for retail electricity service. 52 Pa. Code § 54.3. Section 54.4 of the Commission's regulations provides specific requirements pertaining to the format of electric bills for residential and small business customers. 52 Pa. Code § 54.4.

Of significance in the instant case, the Joint Complainants allege that the prices ESPI charged to its customers did not conform to the variable rate pricing provision of its disclosure statement. Joint Complaint at 63-67. The Joint Complainants further allege that certain customers understood that their rate for generation service would always be lower than or equal to the Price to Compare (PTC) and that ESPI billed these customers at rates that were at least two or three times greater than the PTC. Joint Complaint at

23. If proven, this act could constitute a violation of Section 54.4(a) of the Commission's regulations, which states, "EGS prices billed must reflect the marketed prices and the agreed upon prices in the disclosure statement." 52 Pa. Code § 54.4(a).

The Joint Complainants' requested relief of refunds is entirely lawful and appropriate if ESPI violated 52 Pa. Code § 54.4(a). The intent of the regulation is to require EGSs to bill prices that adhere to the terms and conditions of the marketed prices and disclosure statement. When EGSs breach the terms and conditions of their disclosure statements and bill prices that were not agreed to by the customer, the Commission must be able to direct EGSs to provide refunds in accordance with Section 2809(e) of the Code, which obligates the Commission to ensure that Chapter 56 standards and billing practices are maintained.<sup>2</sup> Therefore, Section 2809(e) of the Code provides a strong and necessary implication that the Commission has jurisdiction and authority to direct EGSs to issue refunds to customers who were overbilled. *See Feingold v. Bell*, 383 A.2d 791 (Pa. 1977) (Holding that since the Commission is a creature of statute, it has only those powers, which are expressly conferred upon it by the legislature and those powers, which arise by necessary implication). To hold otherwise is contrary to public interest and renders the language of Section 54.4(a) of the Commission's regulations to be meaningless if the Commission is unable to enforce it.

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<sup>2</sup> Chapter 56 directs public utilities to refund customers who were overbilled. In the event that a customer is overbilled due to an error in meter readings, Section 56.12(5)(iii) of the Commission's regulations requires a public utility to credit or refund the customer "the amount overbilled plus interest calculated under § 56.181(3) (relating to duties of parties; disputing party's duty to pay undisputed portion of bills; public utility's duty to pay interest whenever overpayment found)." 52 Pa. Code § 56.12(5)(iii). Similarly, when an EGS bills a customer a price that does not conform to the marketed price or disclosure statement, the Commission should direct the EGS to refund the customer the amount that he or she was overbilled so that Chapter 56 standards and billing practices are maintained.

Entering an order that grants ESPI's Petition at this time would deprive the Joint Complainants' from their opportunity to be heard at hearing pertaining to their requested relief of refunds. It would also establish a widespread and unwanted precedent that would preclude the Commission from directing EGSs to issue refunds in any case, even when refunds are lawful and appropriate.

## V. CONCLUSION

Wherefore the above listed reasons, the Bureau of Investigation and Enforcement respectfully requests that the Commission deny the Petition of Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric For Interlocutory Review and Answer to Material Question.

Respectfully submitted,



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Date: September 12, 2014

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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