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VIA ELECTRONIC FILING

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

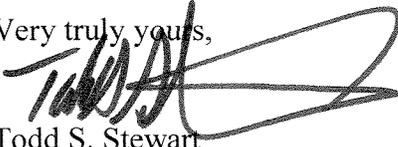
RE: Commonwealth of Pennsylvania, by Attorney General KATHLEEN G. KANE, Through the Bureau of Consumer Protection, and TANYA J. McCLOSKEY, Acting Consumer Advocate, v. ENERGY SERVICES PROVIDERS, INC. d/b/a PENNSYLVANIA GAS & ELECTRIC; Docket No. C-2014-2427656; **BRIEF OF ENERGY SERVICES PROVIDERS, INC. d/b/a PENNSYLVANIA GAS & ELECTRIC IN SUPPORT OF PETITION FOR INTERLOCUTORY COMMISSION REVIEW AND ANSWER TO A MATERIAL QUESTION**

Dear Secretary Chiavetta:

Enclosed for electronic filing with the Commission is Energy Services Providers, Inc.'s Brief in Support of Petition for Interlocutory Commission Review and Answer to a Material Question in the above-captioned docket. Copies have been served in accordance with the attached Certificate of Service.

Thank you for your consideration in this matter. Please do not hesitate to contact me if you have any questions or concerns.

Very truly yours,



Todd S. Stewart

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

TSS/jld

Enclosure

cc: Administrative Law Judge Elizabeth H. Barnes (w/encl.)
Administrative Law Judge Joel H. Cheskis (w/encl.)
Per Certificate of Service

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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**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,	:	
	:	Docket No. C-2014-2427656
Complainants,	:	
	:	
v.	:	
	:	
ENERGY SERVICES PROVIDERS, INC.	:	
d/b/a PENNSYLVANIA GAS & ELECTRIC,	:	
	:	
Respondent.	:	

**BRIEF OF ENERGY SERVICES PROVIDERS, INC.
d/b/a PENNSYLVANIA GAS AND ELECTRIC
IN SUPPORT OF PETITION FOR INTERLOCUTORY
COMMISSION REVIEW AND ANSWER TO MATERIAL QUESTION**

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

A. Procedural History

On June 20, 2014, the Attorney General’s Bureau of Consumer Service and the Office of Consumer Advocate (collectively “Joint Complainants” or “AG/OCA”), filed a complaint (the “Complaint”) against Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric (“ESPI”), an electric generation supplier (“EGS”), with the Public Utility Commission (“PUC” or “Commission”). The Complaint requests *inter alia* that the PUC order ESPI to issue refunds of rates allegedly charged in violation of Commission regulations.¹ ESPI submitted preliminary objections requesting *inter alia* that Administrative Law Judges Elizabeth Barnes and Joel H. Cheskis (“ALJs”) dismiss the Joint Complainants’ request for refunds.² By Interim Order dated August 20, 2014 (“August 20 Order”), the ALJs denied this preliminary objection. ESPI submitted a petition for interlocutory review of this issue on September 2, 2014, and now submits this brief in support thereof.

B. Material Question

Does the Commission have statutory authority or subject matter jurisdiction to order electric generation suppliers to issue refunds to customers?

Suggested Answer: **No.**

C. Summary of the Argument

The Commission has only those powers granted by the legislature. Here, the legislature’s grant of authority over EGSs is found in the Public Utility Code (“Code”) and does not include the power to order an EGS to issue refunds. The Code clearly gives the Commission the power to order refunds only of “rates” charged by “public utilities.” Rates by definition can only be

¹ See Complaint at 16.

² Preliminary Objections at ¶ 38.

charged by public utilities. EGSs are not public utilities except for the purposes of two statutory exceptions, neither of which authorizes the Commission to order EGSs to pay refunds. As the Pennsylvania Supreme Court explained in *Delmarva Power and Light*,³ the presence of these two exceptions precludes any other exception to the rule that EGSs are not public utilities. Additionally, analysis of these two exceptions shows that neither of them expressly or implicitly authorizes the Commission to order EGSs to pay refunds. Finally, comparing Section 1312 of the Code, the Commission's statutory authorization to order refunds by a "public utility," with Section 3301, the Commission's statutory authorization to order civil penalties from a "public utility, or any other person or corporation subject to this part," shows that the legislature knew how to subject an entity such as an EGS to refunds, and chose not to do so.

Instead of engaging in any meaningful statutory analysis or following the dictate of Pennsylvania's highest court, the August 20 Order holds that it would be "against the public interest" and "create an unreasonable result" if EGSs were not subject to refunds. However, policy preferences and desired results cannot dictate a question of statutory interpretation where the language of the statute is clear and unambiguous, free from doubt, and interpreted as such by the Pennsylvania Supreme Court, as is the case here. Moreover, even if the relevant statutory language were ambiguous, which it is not, the interpretation proffered by the August 20 Order would nevertheless have to be rejected as contravening the fundamental purpose and intent of the General Assembly in enacting the Electricity Generation Customer Choice and Competition Act (the "Competition Act"),⁴ which expressly deregulated retail electricity generation rates and

³ *Delmarva Power & Light Co. v. Pennsylvania Public Utility Comm'n*, 870 A.2d 901 (Pa. 2005).

⁴ Electricity Generation Choice For Customers Of Electric Cooperatives Act, Taxicabs, Electricity Generation Customer Choice And Competition Act, 1996 Pa. Legis. Serv. Act 1996-138 (H.B. 1509), §§ 2, 4 (Purdon's) (codified at 66 Pa. C.S. §§ 102, 2801-2815).

provided retail customers with direct access to a competitive market for the purchase and sale of electricity.⁵

Any order for refunds requires a baseline “appropriate rate” against which to calculate the amount of refund. The determination of an “appropriate rate” for an EGS constitutes regulation of rates over which the Commission clearly has no authority. Moreover, subjecting suppliers to potential refunds whenever prices increase – which is when consumers and advocates complain – creates an artificial disincentive for suppliers to enter the market in times of high prices, thus distorting market signals, with potential ill pricing effects. It was not the General Assembly’s intent in enacting the Competition Act to have the Commission engage in rate regulation or interfere with the retail generation market; to the contrary, having found that the market is a more efficient rate setter than regulation, the legislature established a policy of permitting the market to set rates and implemented that policy by permitting EGSs to price their services free from Commission regulation.

Whether the Commission has the power to order EGSs to issue refunds is not only a question of law; it is a question of utmost regulatory, economic, and political importance. It is imperative therefore, that the Commission, as the custodian of the Commonwealth’s competitive retail electric market, considers the long-term economic effects of investing itself with the authority to order refunds (without the approval of the General Assembly). Doing so would not only violate the express terms of the Public Utility Code and frustrate the intent of the Competition Act – it would also set a precedent with potentially detrimental long-term effects on the generation supply market. It is the Commission’s duty to implement the General Assembly’s

⁵ 66 Pa. C.S. § 2802(13)-(14).

directives as expressed in the Competition Act, which in this case requires a finding that the Commission does not have the power to order EGSs to pay refunds.

II. ARGUMENT

A. Scope and Standards of Review

The PUC should consider the material question anew through interlocutory review and reverse the August 20 Order's rejection of ESPI's preliminary objection to the Commission's jurisdiction over and authority to order EGS refunds.

1. Interlocutory Review

A party to a proceeding may request interlocutory review and answer to a material question in order to "prevent substantial prejudice or expedite the conduct of the proceeding."⁶ Commission interlocutory review and response in the negative to the material question is imperative to prevent substantial prejudice and expedite this proceeding. Without an order declaring that the Commission is without the power to order refunds, all parties will be required to expend the time and resources necessary for discovery and litigation concerning refunds. Further, determination of this issue will increase the probability of settlement, which the Commission encourages, because a Commission decision will clarify the extent of any potential liability faced by ESPI. The factual basis of this proceeding occurred many months ago and the time necessary to present and defend a case on refunds could further delay this matter. Here, both expediency and prejudicial effects merit interlocutory review.

⁶ 52 Pa. Code § 5.302(a); *Pa. Pub. Util. Comm'n v. C S Water & Sewer Assoc.*, Docket No. R-881147 (July 22, 1991) (interlocutory review of ALJ's denial of proposed settlement granted to avoid hardship imposed by further litigation and to expedite conduct of the proceedings, leading to the approval of the settlement).

2. Review of Denial of Preliminary Objections

Preliminary motion practice before the Commission is similar to that utilized in Pennsylvania civil practice.⁷ A preliminary objection in civil practice seeking dismissal of a pleading will be granted where relief is clearly warranted and free from doubt.⁸ In determining whether to sustain preliminary objections, all well-pleaded material, factual averments and all inferences fairly deducible therefrom are presumed to be true.⁹ The pleaders' conclusions of law, unwarranted inferences from facts, argumentative allegations or expressions of opinion should not be considered to be admitted as true.¹⁰ The preliminary objections should be sustained if, based on the facts averred by the plaintiff, the law says with certainty that no recovery is possible.¹¹ Such determinations are necessarily legal conclusions.

The August 20 Order denied ESPI's preliminary objections based on the ALJs' legal conclusion that section 1312 of the Public Utility Code¹² empowers the Commission to order an EGS to provide refunds to its customers.¹³ The Commission has *de novo* review over such legal conclusions,¹⁴ and the Commission, therefore, is not bound by the conclusions or reasoning of the August 20 Order.

Here, presuming all of the facts and allegations contained in the Complaint are true, and a violation of the Code or Commission regulations has been shown, the Commission simply does not have the legal authority to order refunds. Since, as demonstrated below, the law is clear that

⁷ *Equitable Small Transportation Interveners v. Equitable Gas Company*, 1994 Pa. PUC LEXIS 69, PUC Docket No. C-00935435 (July 18, 1994) (citing Pa.R.C.P 1017).

⁸ *Interstate Traveller Services, Inc. v. Pa. Dept. of Environmental Resources*, 406 A.2d 1020 (Pa. 1979).

⁹ *Marks v. Nationwide Ins. Co.*, 762 A.2d 1098, 1099 (Pa. Super. 2000), *appeal denied*, 788 A.2d 381 (Pa. 2001).

¹⁰ *Id.*

¹¹ *Soto v. Nabisco, Inc.*, 32 A.3d 787, 790 (Pa. Super. 2011), *appeal denied*, 50 A.3d 126 (Pa. 2012).

¹² 66 Pa. C.S. § 1312.

¹³ August 20 Order at 14.

¹⁴ *G.G.&C. Bus Co., Inc. v. Pa. Pub. Util. Comm'n*, 400 A.2d 941, 944 (Pa. Cmwlth. 1979).

the Commission lacks statutory authority and jurisdiction to order EGSs like ESPI to issue refunds to customers, the Commission should reverse the August 20 Order and grant ESPI's preliminary objection.

B. The Commission Lacks Statutory Authority and Jurisdiction to Order an EGS to Issue Refunds

The August 20 Order concluded that section 1312 of the Code empowers the Commission to order EGSs to issue refunds based on a policy determination that the lack of Commission jurisdiction to order refunds “would be contrary to public interest” and “create an unreasonable result.”¹⁵ This conclusion is based on at least two fundamental legal errors and must be rejected. *First*, the ALJs’ holding violates the plain language of the Public Utility Code as amended by the Competition Act: section 1312 expressly limits the Commission’s authority to order refunds to public utilities, and section 102 expressly excludes EGSs from the definition of “public utility” for purposes of section 1312. These provisions are clear and unambiguous. Moreover, no legal authority permits the Commission to disregard such clean and unambiguous statutory limits on Commission authority in the name of promoting the “public interest” or avoiding an “unreasonable result.” *Second*, the ALJs’ holding frustrates the intent of the General Assembly in enacting the Competition Act. Refund authority amounts to rate regulation. By signaling to EGSs that they may be forced to refund charges collected during periods of high demand and high prices, the assertion of refund authority will *reduce* the competitive supply of energy. Commission regulation of electric generation supply rates via refund would thus thwart the Competition Act’s fundamental intent to create a competitive market for the retail supply of electricity generation.

¹⁵ August 20 Order, at 14.

1. The Public Utility Code expressly excludes EGSs from the Commission’s jurisdiction over public utilities and its authority to order refunds.

The Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly within the Public Utility Code.¹⁶ The Commission must act within, and cannot exceed, its jurisdiction.¹⁷ Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy.¹⁸

The plain language of section 1312 of the Code only gives the Commission the authority to order a “public utility” to issue refunds:

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 collection¹⁹

Under the doctrine of *expressio unius est exclusio alterius*, the specific authorization to order “public utilities,” and **only** “public utilities,” to pay refunds demonstrates the General Assembly’s intent to exclude **non**-public utilities from the Commission’s power to order refunds.²⁰ Consequently, the Commission has the authority and jurisdiction to order EGSs to issue refunds only if they are “public utilities.”²¹

¹⁶ *Yaglidereliler Corporation v Blue Pilot Energy, LLC*, Docket No. C-2014-2413732, Initial Decision Granting Motion for Summary Judgment, 2014 WL 3011778 at *5 (June 18, 2014); *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937 (May 28, 2008); *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977).

¹⁷ *Yaglidereliler*, 2014 WL 3011778 at *5; *City of Pittsburgh v. Pa. Pub. Util. Comm’n*, 43 A.2d 348 (Pa. Super. 1945).

¹⁸ *Yaglidereliler*, 2014 WL 3011778 at *5; *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992), *alloc. denied*, 637 A.2d 293 (Pa. 1993).

¹⁹ 66 Pa. C.S. § 1312(a) (emphasis added).

²⁰ *See Atcovitz v. Gulph Mills Tennis Club, Inc.*, 812 A.2d 1218, 1223 (Pa. 2002) (“We must infer that, under the doctrine of *expressio unius est exclusio alterius*, the inclusion of a specific matter in a statute implies the exclusion of other matters.”); *Popowsky v. Pennsylvania Pub. Util. Comm’n*, 869 A.2d 1144, 1159 (Pa. Cmwlth.

The definition of “public utility” in section 102 of the Code²² expressly provides that EGSs are not “public utilities” except in two very limited circumstances. The Competition Act amended the definition to explicitly state that the term does not include EGSs except for the “limited purposes as described in sections 2809 (relating to requirements for electric generation suppliers) and 2810 (relating to revenue-neutral reconciliation),” neither of which empowers the Commission to order an EGS to issue refunds.²³ The Pennsylvania Supreme Court construed this statutory exemption of EGSs from public utility regulation in *Delmarva Power & Light Co. v. Pennsylvania Public Utility Commission*²⁴ (“*Delmarva*”), which holds that EGSs are not “public utilities” for the purpose of section 510 of the Code (relating to assessments). The Court first concluded that, based on the “unambiguous language” of section 102, “it is clear that the General Assembly did not intend for EGSs to be characterized as public utilities for most purposes.”²⁵ The Court then observed that while the General Assembly made an exception this rule by permitting EGSs to be deemed public utilities for the limited purposes of sections 2809 and 2810, it did not state a similar exception for the purposes of section 510.²⁶ Therefore, pursuant to Pennsylvania’s rule of statutory construction that “[e]xceptions expressed in a statute shall be construed to exclude all others,”²⁷ the Court was required to “presume that the General

2005) (“[T]he principle expressed in the maxim *expressio unius est exclusio alterius* defeats the PUC’s proffered construction [of section 1307(a)]. Under this doctrine, the inclusion of a specific matter in a statute implies the exclusion of other matters.”) (citing *Atcovitz*).

²¹ See *Delmarva Power & Light Co. v. Com.*, 870 A.2d 901, 909 (2005) (since the plain language of 66 Pa. C.S. § 510 only gave the Fiscal Office the authority to assess “public utilities,” the Fiscal Office may only assess EGSs if they are “public utilities”).

²² 66 Pa. C.S. § 102 “Public Utility” (2)(vi).

²³ Competition Act § 2 (codified at 66 Pa. C.S. § 102 “Public Utility” (2)(vi)).

²⁴ 870 A.2d 901 (Pa. 2005).

²⁵ 870 A.2d at 910.

²⁶ *Id.*

²⁷ 1 Pa. C.S. § 1924.

Assembly did not intend for EGSs to be considered public utilities for purposes of section 510 assessments.”²⁸

The *Delmarva* holding is dispositive of the question now before the Commission. EGSs may not be deemed “public utilities” for purposes of section 1312 for precisely the same reason that they may not be deemed “public utilities” for purposes of section 510. Like section 510, section 1312 was not included in the exception to section 102’s exclusion of EGSs from the definition of “public utility” for the limited purposes of sections 2908 and 2910. Since “[e]xceptions expressed in a statute shall be construed to exclude all others,”²⁹ the Commission “*must* presume that the General Assembly did not intend for EGSs to be considered public utilities” for purposes of section 1312.³⁰

Section 3301 providing for civil penalties gives further guidance to the limited nature of refunds. In section 3301, the legislature declared civil penalties applicable not just to public utilities, but also to “any other person or corporation subject to this part.”³¹ The phrase “any other person or corporation subject to this part” must be given effect and cannot be interpreted as mere surplusage,³² meaning the legislature recognized that not all entities over which the Commission has jurisdiction are public utilities and specifically gave the Commission the authority to order entities other than public utilities to pay civil penalties. Moreover, where the

²⁸ *Delmarva*, 870 A.2d at 910 (citing 1 Pa. C.S. § 1924 and *Kmonk–Sullivan v. State Farm Mut. Auto. Ins. Co.*, 788 A.2d 955, 962 (Pa. 2001) (“An exception expressly provided in a statute is a strong indication that the legislature did not intend to exclude unexpressed items.”)).

²⁹ 1 Pa. C.S. § 1924.

³⁰ *Delmarva*, 870 A.2d at 910 (emphasis added).

³¹ 66 Pa. C.S. § 3301 (If any public utility, or any other person or corporation subject to this part, shall violate any of the provisions of this part, or shall do any matter or thing herein prohibited; or shall fail, omit, neglect, or refuse to perform any duty enjoined upon it by this part; or shall fail, omit, neglect or refuse to obey, observe, and comply with any regulation or final direction, requirement, determination or order made by the commission, or any order of the commission prescribing temporary rates in any rate proceeding, or to comply with any final judgment, order or decree made by any court, such public utility, person or corporation for such violation, omission, failure, neglect, or refusal, shall forfeit and pay to the Commonwealth a sum not exceeding.”) (emphasis added).

³² *Cherry v. Pa. Higher Educ. Assist. Agency*, 620 A.2d 687, 691 (Pa. Cmwlth. 1993) (citing 1 Pa. C.S. § 1922).

legislature includes specific language in one section of a statute and excludes it from another, it should not be implied where excluded.³³ Thus, the language granting civil penalty authority over entities other than public utilities in section 3301 but exclusion of that language from section 1312 precludes refund authority for entities other than public utilities. Clearly, the legislature knew how to make the civil penalties provision of the code applicable to more than just public utilities, and chose not to do the same with refund authority. This is another clear signal of the legislature’s intent that the Commission does not have the power to order EGSs to order refunds.

The ALJs’ stated bases for holding that section 1312 “gives the commission jurisdiction to issue refunds”³⁴ do not withstand scrutiny. The April 20 Order asserts that “to hold otherwise would be contrary to the public interest” and “create[] an unreasonable result,”³⁵ *not* because the public interest requires the Commission to have the ability to order EGSs to pay refunds, but because the Commission’s inability to do so would prevent the Commission from regulating EGSs “for other purposes”:

To the extent that the Commission would not be allowed to direct EGSs like ESP to issue refunds to its customers under Section 1312 when, after notice and an opportunity to be heard, refunds are deemed appropriate, it would likewise lose its ability to regulate EGSs *for other purposes* essential to the public interest, such as ensuring adherence to the Commission’s consumer protection regulations . . . and issuing civil penalties. See, 66 Pa.C.S. § 3301.

This is plainly incorrect. The General Assembly has already delineated the Commission’s authority and jurisdiction to regulate EGSs. As discussed above, the Commission may regulate EGSs as public utilities only for the “limited purposes” of sections 2809 and 2810. Section 2809 prescribes the “[f]orm of regulation of electric generation suppliers” in subsection (e):

³³ *Id.* (citing *Samilo v. Insurance Dept.*, 510 A.2d 412 (Pa. 1986)).

³⁴ *August 20 Order* at 14.

³⁵ *Id.*

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.³⁶

Because section 2809 is expressly included as one of the two limited exceptions (in Section 102) to the provision that otherwise excludes EGSs from the definition of public utility, acknowledging that section 1312 is not one of the two exceptions, and that the Commission therefore has no authority to order EGSs to issue refunds, would have no effect on the Commission's regulation of EGSs' quality of service, electric supply margins, or standards and billing practices for residential utility service. Similarly interpreting section 1312 as written will have no effect on applicability of the Code's civil penalties provision to EGSs. Unlike section 1312, section 3301 subjects not only public utilities, but also "any other person or corporation subject to this part" to liability for civil penalties for violations of the Code and Commission orders.³⁷ Holding that section 1312, which is limited to public utilities, does not apply to EGSs would have no bearing on the application of section 3301, which is not so limited.

In answering ESPI's Preliminary Objection to their demand for refunds, the Joint Complainants quoted section 2809(e) of the Code and suggested that it implies the power to order refunds.³⁸ Any similar assertion in their brief in opposition to ESPI's petition for interlocutory review should be rejected. Section 2809(e) first provides that "[t]he commission may forbear from applying requirements of this part which it determines are unnecessary due to

³⁶ 66 Pa. C.S. § 2809(e).

³⁷ 66 Pa. C.S. § 3301.

³⁸ See Answer of the Commonwealth of Pennsylvania and the Office of Consumer Advocate to the Preliminary Objections of Energy Service Providers, Inc. d/b/a Pennsylvania Gas and Electric, at 24.

competition among electric generation suppliers.”³⁹ As the Supreme Court held in *Delmarva*, this sentence is not a grant of authority, but rather, an acknowledgement of the Commission’s power to withhold from exercising authority granted elsewhere in the statute.⁴⁰ The section goes on to require the Commission to impose requirements necessary to ensure continued quality of service, giving two examples – maintaining adequate reserve margins and assuring maintenance of the standards and billing practices in 52 Pa. Code § 56.1 *et al.* This requirement cannot support an inference of authority to order refunds because refunds are not “necessary” to enforcing the Commission’s standards or maintaining quality of service.⁴¹

2. Ordering EGSs to Issue Refunds Would Frustrate the Fundamental Intent of the Competition Act.

As argued above, the exclusion of EGSs from the definition of public utility and thus from the Commission’s jurisdiction and power to order refunds is clear from the unambiguous words of sections 102 and 1321 of the Public Utility Code. The ALJs’ contrary ruling must be rejected for this reason alone. However, even if the controlling statutory provisions were unclear or ambiguous, which they are not, the ALJs’ ruling must be rejected because, if adopted, it would thwart the fundamental intent of the Competition Act.

Any order for of a refund first requires a determination of a baseline “appropriate rate” against which to measure the rate charged and a calculation of the amount to be refunded.⁴² Any determination of this baseline constitutes rate regulation, especially where, as here, the Joint Complainants declare the Price to Compare to be the “appropriate rate” and would have the Commission effectively set that rate as the maximum rate ESPI could lawfully charge for the

³⁹ 66 Pa. C.S. § 2809(e).

⁴⁰ *Delmarva*, 870 A.2d at 910.

⁴¹ The Commission has already promulgated regulations in Chapter 54 providing for civil penalties for EGS violations of PUC regulations, including both Chapters 54 and 56. *See, e.g.*, 54 Pa. Code § 54.42.

⁴² *See* 66 Pa. C.S. § 1312.

time period in question. Applying this type of rate regulation to EGSs would directly contravene the expressed intent of the General Assembly in enacting the Competition Act.

In 1996, the General Assembly declared that “[c]ompetitive market forces are more effective than economic regulation in controlling the cost of generating electricity.”⁴³ It therefore removed electric generation supply rates from the Commission’s regulatory jurisdiction and allowed the market to determine electric generation prices,⁴⁴ except in the case of default service provided by electric distribution companies, which remain regulated.⁴⁵ The purpose of rate deregulation was to provide retail customers access to the competitive market while ensuring “reliability and safety.”⁴⁶ Notably, nowhere in the Competition Act or in any of its legislative history does the General Assembly consider, much less endorse, any type of rate regulation or refund mechanism for suppliers. The legislative history confirms the fundamental intent of the statute – to allow the competitive market to lower prices of supply.⁴⁷

Simple supply side economic price signals show how refunds are harmful to allowing market forces to lower prices over the long-term. When demand increases, so does price.⁴⁸

⁴³ 66 Pa. C.S. § 2802(5).

⁴⁴ See Competition Act § 2 (amending 66 Pa. C.S. § 102 “Public Utility” (2)(vi)); 66 Pa. C.S. § 2802(14) (“The generation of electricity will no longer be regulated as a public utility function except as otherwise provided for in this chapter.”).

⁴⁵ See 66 Pa. C.S. § 2807(d)(7).

⁴⁶ 66 Pa. C.S. § 2802(12).

⁴⁷ S. 180-62, 1st Sess., at 2687-2688 (Pa. Nov. 25, 1996). A letter from Irwin A. Popowsky, former Consumer Advocate was included in the legislative record. In this letter the Consumer Advocate voiced his support that the generation of electricity should be subject to competitive forces, acknowledging that “the price charged for generation will be established by the market, rather than by regulation.” *Id.* See also *Indianapolis Power & Light Co. v. Pennsylvania Public Utility Comm’n*, 711 A.2d 1071, 1078 (Pa. Cmwlth. 1998) (explaining that the purpose of Competition Act is clear: ... to invite competition in an effort to lower electric generation rates for the citizens of this Commonwealth), *appeal denied*, 727 A.2d 1124, *cert. denied*, 526 U.S. 1005.

⁴⁸ Cf. David B. Spence, *The Politics of Electricity Restructuring: Theory vs. Practice*, 40 Wake Forest L. Rev. 417, 431-32 (2005) (describing FERC’s rationale in concluding market-based wholesale rates will benefit consumers in the long run: “If sellers and buyers are free to agree upon prices, and if there are no significant barriers to entry for sellers, then rates should approach competitive rates over the long term. That is, whenever scarcity pushes rates upward, generating higher profits for sellers, new sellers will enter the market driving rates back down toward competitive levels. This approach implies not only that rates will and should sometimes be high,

Increased prices prompt more suppliers to enter the market, thus increasing supply. Competition among these suppliers, over time, results in lower prices than would have been charged to meet the increased demand. Thus, over the long-term, prices during periods of greater demand will be both lower and more stable if market forces are permitted to govern price, uninhibited by artificial signals.⁴⁹ The potential for government-ordered refunds during periods when high demand produces high prices is an artificial signal, in that it interferes with the competitive market. It tells suppliers that when wholesale prices rise in response to increased demand – that is, when consumers or advocates such as the OCA are most likely to seek refunds – suppliers may not be permitted to recover the increased cost of supply from their retail customers. This potential for refunds signals suppliers not to enter the market and even potentially leave the market when increased demand causes prices to rise. As competitive suppliers are thus driven from or discouraged from entering the market, true market pricing will be distorted, supply will not increase, and prices will not decrease or stabilize at higher demands. Taken to its logical conclusion, this scenario results in ever-higher prices for consumers and, as supply could fall in times of high demand, increased scarcity of electricity.

This scenario is not hypothetical – the variable prices for which refunds are demanded in this proceeding were the result of extremely high demand during the “polar vortex” of the winter of 2014. In order to meet this increased demand, retailers such as ESPI had to pay higher prices in the wholesale market, which, in the case of customers with variable price plans, were then passed along to consumers.⁵⁰ Unlike fixed-price plans, variable price plans do not provide the EGS with additional margin above cost during periods of low wholesale prices that can be used

but also that circumscribing increases in rates through regulation may reduce the benefits accruing to consumers in the long run by discouraging entry of new sellers into the market.”).

⁴⁹ *Id.*

⁵⁰ *See* Testimony of Chairman Robert F. Powelson before the Pennsylvania House of Representatives Consumer Affairs Committee, at 1-2 (March 20, 2014).

to offset increases in wholesale prices during periods of increased demand. If the Commission forces suppliers like ESPI to refund charges for variable-priced retail energy service provided during these high price and demand periods, thus preventing them from recovering their variable wholesale energy costs, the signal to competitive suppliers would be plain: leave the market. The General Assembly intended for a robust competitive market governing prices without such artificial regulatory signals. This is the “public interest” set forth by the General Assembly and the policy that must be promoted when implementing the statute.

III. CONCLUSION

For the reasons herein, ESPI respectfully requests that the PUC: (1) review and answer in the negative the material question set forth in ESPI’s September 2, 2014 Petition for Interlocutory Commission Review; and (2) reverse the August 20 Order’s rejection of ESPI’s preliminary objection regarding refunds.

Respectfully submitted,



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