

COMMONWEALTH OF PENNSYLVANIA



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September 18, 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

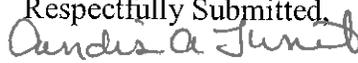
Respondent

Docket No. C-2014-2427656

Secretary Chiavetta:

Enclosed please find the Joint Brief of the Commonwealth of Pennsylvania and the Office of Consumer Advocate in Support of Petition for Interlocutory Review and Answer to Material Questions, in the above-referenced proceeding.

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

Respectfully Submitted,

Candis A. Tunilo
Assistant Consumer Advocate
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Enclosures

cc: Honorable Elizabeth Barnes, ALJ
Honorable Joel Cheskis, ALJ
Certificate of Service

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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

JOINT BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA AND THE OFFICE OF
CONSUMER ADVOCATE IN SUPPORT OF PETITION OF
FOR INTERLOCUTORY REVIEW
AND ANSWER TO MATERIAL QUESTIONS

I. INTRODUCTION

In this proceeding, Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, through the Bureau of Consumer Protection (Commonwealth) and the Office of Consumer Advocate (OCA) (hereinafter Joint Complainants) filed a Joint Complaint against Energy Services Providers d/b/a Pennsylvania Gas & Electric (Respondent or PaG&E) with the Pennsylvania Public Utility Commission (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.* (CPL), and the Telemarketer Registration Act, 73 P.S. § 2241, *et seq.* (TRA). The Joint Complaint was filed on June 20, 2014. The Joint Complaint contains seven Counts.

On July 10, 2014, PaG&E filed Preliminary Objections to the Joint Complaint. In its Preliminary Objections, PaG&E sought, *inter alia*: dismissal of Joint Complaint Counts I, II, IV and V for lack of specificity of the pleading; and dismissal of Counts I, II, III, V, VI and VII for lack of Commission jurisdiction and legal insufficiency. See gen'ly PaG&E POs. On July 21, 2014, Joint Complainants filed an Answer to the Preliminary Objections asserting that PaG&E's Preliminary Objections are unsupported. See gen'ly Joint Ans. PaG&E POs. The Joint Complainants argued that it is clear and free from doubt that the Complaint is legally sufficient and that 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 gen'ly Joint Ans. to PaG&E POs.

The matter was assigned to Administrative Law Judges Joel H. Cheskis and Elizabeth Barnes (ALJ). By Order dated August 20, 2014 (August 20 Order), the ALJs granted in part and

denied in part PaG&E's Preliminary Objections.¹ Specifically, the ALJs held: 1) that the Commission lacks jurisdiction to hear complaints under the CPL and TRA even though compliance with these Acts is required by the Commission regulations, and 2) that the Commission lacks jurisdiction to consider the equitable remedy of restitution.² As a result, the August 20 Order struck *in part* Count I (Misleading and Deceptive Promises of Savings), Count II (Slamming), Count III (Misleading and Deceptive Welcome Letter), Count V (Failing to Provide Accurate Pricing Information), Count VI (Prices Nonconforming to Disclosure Statement), and Count VII (Failure to Comply with the TRA) to the extent that these Counts consider the CPL or TRA and stated that the Commission did not have the power to order restitution.³

On September 8, 2014, the Joint Complainants filed their Joint Petition for Interlocutory Review and Answer to Material Questions seeking review of the August 20 Order. Through the instant request for interlocutory review, the Joint Complainants respectfully request that: 1) the Commission reaffirm that it has authority and jurisdiction to determine whether a violation of the CPL or TRA has occurred when considering whether the Commission's regulations—which require compliance with the CPL and TRA—have been violated and 2) the Commission reaffirm that it has the authority and jurisdiction to order equitable remedies, including restitution.

¹ The ALJs issued Orders on Preliminary Objections in four of the Joint Complaint cases filed by the Commonwealth and the OCA at Docket Nos. C-2014-2427655 (Blue Pilot Energy, LLC), C-2014-2427659 (Respond Power, LLC), C-2014-2427657 (IDT Energy, Inc.), and C-2014-2427656 (Energy Service Providers, Inc. d/b/a Pennsylvania Gas & Electric). On September 8, 2014, Joint Complainants filed a Petition for Interlocutory Review and Answer to Material Questions in each case. Joint Complainants note that though similar, the four Orders on Preliminary Objections do not reach the same conclusions as to several counts, so the material questions vary for each case.

² The Joint Complainants note that the ALJs precluded claims pursuant to the Unfair Trade Practices and Consumer Protection Law in this proceeding but did not in one of the other proceedings in which the Joint Complainants filed Petitions for Interlocutory Review and Answer to Material Questions.

³ The August 20 Order did permit the Joint Complainants to pursue the issuance of refunds.

As explained below, the Commission has the jurisdiction and legal authority to decide the controversy as fully set forth in the Joint Complaint. The narrowing of the Commission's legal authority over EGSs, as occurs under the ALJs' August 20 Order, would limit the Commission's ability to protect consumers and provide oversight, which is authorized under the Public Utility Code and its own regulations. Accordingly, the August 20 Order should be reversed and the Joint Complaint should proceed to full evidentiary hearings on all Counts.

II. MATERIAL QUESTIONS PRESENTED

Pursuant to Section 5.302 of the Commission's regulations, 52 Pa. Code § 5.302, the Joint Complainants request that the Commission grant review of and answer the following questions in the affirmative:

- 1) Does the Commission have authority and jurisdiction to determine whether a violation of the Unfair Trade Practices and Consumer Protection Law (CPL) and the Telemarketer Registration Act (TRA) has occurred when considering whether the Commission's regulations—which require compliance with these laws—have been violated?
- 2) Does the Commission have the authority and jurisdiction to order equitable remedies, including restitution?

By answering these questions in the affirmative, the Commission will ensure that all legal claims within the Commission's authority and jurisdiction can be properly pursued.

III. SUMMARY OF ARGUMENT

The Joint Complainants submit that the Commission has authority and jurisdiction to determine whether a violation of the CPL and/or TRA has occurred when considering whether the Commission's regulations requiring an EGS's compliance with these laws have been violated. To be clear, the Joint Complainants do not ask the Commission to enforce the CPL and TRA, as the ALJs appear to have assumed. See August 20 Order at 8-9. Rather, the Joint Complainants request that the Commission consider whether PaG&E has complied with the CPL

and TRA as it is required to do by the Commission's regulations. The Commission must make such a determination in order to find a violation of its regulations. The Commission can make this determination and has done so frequently with regard to overlapping statutes.

Joint Complainants also submit that the Commission has the authority and jurisdiction to order equitable remedies, including restitution. The Joint Complainants have not requested damages. Rather, the Joint Complainants requested that the Commission order equitable remedies within its authority. See Jt. Comp. at 16. The Joint Complainants have requested that the Commission consider remedies that would have the effect of putting customers back in the position that they would have been in if not for the violations. The Commission has previously found that it has such authority.

IV. ARGUMENT

A. Compelling Reasons for Review

Interlocutory review of the Joint Complainants' Material Questions is necessary to prevent significant prejudice to the Joint Complainants. The August 20 Order dismissed in part Counts I, II, III, V, VI and VII, thus depriving the Joint Complainants of their day in court on these claims. Additionally, the August 20 Order has improperly limited the Commission's jurisdiction and authority to consider various claims, which will restrict development of the evidentiary record. If the Joint Complainants are not able to properly pursue their legal claims, significant prejudice and harm to the Joint Complainants and to the interests of the consumers that they represent will result. It is in the public interest and consumer interest to allow the development of an accurate and complete factual record for Commission review.

Furthermore, there is a compelling interest in the Commission reaffirming that it has the authority and jurisdiction over key issues relating to the protection of consumers regarding

EGSs' marketing and sales conduct, billing practices, and disclosure statements. The Commission's oversight on these matters is critical to the integrity of, and confidence in, the retail electric market.

Additionally, the ALJs in this matter issued three other Orders contemporaneously with the August 20 Order that dispose of Preliminary Objections in the Joint Complainants' cases against other EGSs. These four Orders dispose of the same, or similar, Counts in the Joint Complaints in different ways. These differences will lead to the inconsistent development of the factual records in these matters, and lead to confusion in these and future matters as to the permissible scope of the Commission's jurisdiction and authority.

The Joint Complainants submit that resolving these issues now will expedite the conduct of the proceeding and ensure that a full and complete record is developed for the Commission's review.

B. Material Questions

1. The Commission has authority and jurisdiction to determine whether a violation of the CPL and/or TRA has occurred when considering whether the Commission's regulations—which requires compliance with these laws—have been violated.

The August 20 Order strikes in part Counts I, II, III, V and VII of the Joint Complaint as they relate to claims brought pursuant to the CPL. See August 20 Order at 10-11. The ALJs conclude that the Commission's regulations requiring compliance with the CPL and TRA "do not equate to providing the Commission with jurisdiction to hear claims brought pursuant to the [CPL]." August 20 Order at 9. Further, the August 20 Order strikes Count VII of the Joint Complaint as it relates to claims brought pursuant to the TRA. August 20 Order at 21. The ALJs conclude that the Commission does not have the authority to enforce the TRA. Id. The Joint Complainants, however, do not ask the Commission to enforce the CPL and TRA. Rather,

the Joint Complainants ask the Commission to apply its own regulations requiring compliance with the CPL and TRA. The Commission routinely considers overlapping statutes and has concluded that it has the jurisdiction and authority to find violations of overlapping statutes when it bears on compliance with the Public Utility Code and the Commission's regulations.

The Commission's regulations at Sections 54.122(3) and 111.12(d)(1), 52 Pa. Code §§ 54.122(3) and 111.12(d)(1), expressly authorize the Commission to prevent an EGS from engaging in misleading or deceptive conduct as defined by State or Federal law, or by Commission rule, regulation or order. Additionally, the Commission's regulations specifically require compliance with the CPL and TRA. See e.g. 52 Pa. Code 54.42(a)(8) (requiring compliance with Pennsylvania consumer protection law); 52 Pa. Code § 111.10 (requiring compliance with "the act," which is defined in Section 111.2 as the TRA). Section 54.42(a) requires a licensee to comply with all "requirements of the code and Commission regulations and orders." 52 Pa. Code § 54.42(a). To find a violation of Sections 54.42(a)(8), 111.10, 111.12(d)(1) or 54.122(3) of its regulations, the Commission must consider evidence regarding the CPL and TRA and determine whether provisions of the these laws have been violated.

The Commission has previously recognized its authority to broadly consider such overlapping statutes. In its recent order on the Use of Fixed Price Labels for Products With a Pass-Through Clause, Docket No. M-2013-2362961, Final Order (Nov. 14, 2013) (November 14 Order), the Commission stated as follows:

[T]his matter does not just concern the Commission or the Public Utility Code – it is a matter that also involves other laws such as the UTPCPL. The Commission cannot focus solely on our regulations and the Public Utility Code to the exclusion of other laws that may also be applicable to the matter at hand. . . . The guidance we provide is not a mandate; however, to the extent that an EGS fails to follow that guidance, *it takes the risk that a consumer or other agency may file a complaint asserting a violation of the Public Utility Code, Commission*

regulations or the UTPCPL. Any such case would be decided based on the specific facts and circumstances presented.

November 14 Order at 23-24. (Emphasis added). The Commission's analysis is equally applicable to claims brought pursuant to the CPL and TRA because they are laws "applicable to the matter at hand."

Under the Public Utility Code and its regulations, the Commission has the authority, and indeed the duty, to determine whether the conduct alleged constitutes a violation of State or Federal law, including the CPL and TRA. 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). In order to make a determination as to whether the Commission's own regulations and the Public Utility Code have been violated with regard to the CPL or TRA, the Commission must utilize the CPL's and TRA's statutory language and case 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).

The Commission has often applied other statutes in proceedings such as the current matter. In MAPSA, a case that the ALJs rely on in dismissing in part Counts I, II, III, V and VII as they relate to the CPL, the Commission did exactly what the ALJs found that the Commission could not do. In MAPSA, the Mid-Atlantic Power Supply Association (MAPSA) filed a complaint against PECO alleging that the utility's marketing was unfair, deceptive, false, and misleading, and caused customers to remain with PECO rather than enter the competitive electric retail market. The Commission determined that PECO had violated the Electric Generation Customer Choice and Competition Act with regard to unfair/deceptive and anticompetitive acts such that those violations may also be a violation of consumer protection laws. The Commission

specifically noted that simply because a violation may be a violation of the Public Utility Code and/or the Commission's regulations, as well as a violation of another law, that does not divest the Commission of jurisdiction over the claim *as it relates to a violation of the other law implicated*.

[T]he Commission's jurisdiction spans the breadth of the Public Utility Code, 66 Pa. C.S. §§ 101-3316. *Concurrent jurisdiction with another governmental entity does not divest the Commission of jurisdiction retained or exercised under another section of the Code.*

MAPSA v. PECO Energy Co., 1999 PaPUC LEXIS 30, 48-49 (1999). (Emphasis added). Here, the Joint Complaint has been brought pursuant to Chapter 28 of the Public Utility Code and various Commission regulations that were enacted pursuant to Chapter 28, Sections 501, 504, 1501, 1504, and Chapter 28 of the Public Utility Code. MAPSA does not support the ALJs' dismissal of Counts I, II, III, V and VII regarding the CPL.

The ALJs also rely on Harrisburg Taxicab to support their decision to dismiss in part Counts I, II, III, V and VII as they relate to the CPL and TRA, but in so doing have created a distinction between statutory and regulatory authority that the Court did not make in that case. Harrisburg Taxicab plainly supports the Commission's authority to consider overlapping concurrent statutes. 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 & Baggage Co. v. Pa. PUC, 786 A.2d 288, 292-93 (Pa. Commw. Ct. 2001).

The August 20 Order attempts to distinguish Harrisburg Taxicab, stating that it was based on statutory authority, whereas in this matter the Joint Complainants rely only on the Commission's regulations and not statutory authority to support the position that the

Commission has jurisdiction to hear CPL and TRA claims. This contention is inaccurate. Harrisburg Taxicab was based on both statutory and regulatory violations, with the Complaint “alleging numerous violations of PUC regulations found at 52 Pa. Code §§ 29.314(b)(4) - (6), 29.316(c), 29.402(1) and 29.403(2) as well as a violation of Section 1501 of the Public Utility Code.” Harrisburg Taxicab, 786 A.2d at 290.⁴

In dismissing Counts I, II, III, V and VII in part, the ALJs put weight on the fact that Harrisburg Taxicab was expressly brought under Section 1501 of the Public Utility Code and concerned safety. While the Joint Complainants do not agree that this fact is germane, the Joint Complaint was brought pursuant to Chapter 28 of the Public Utility Code and under Chapters 54 and 111 of the Commission’s regulations, which were implemented by the authority granted to the Commission under Sections 501, 504, 1501, 1504, and Chapter 28 of the Public Utility Code and concerns essential consumer protections. While the Court in Harrisburg Taxicab makes no distinction as to whether the claim is based on statutory or regulatory authority, even if such was the case, the Joint Complaint is consistent with Harrisburg Taxicab. More to the point, Harrisburg Taxicab makes it clear that “the decision of the PUC to incorporate DOT’s regulations in its own regulations represents exactly the type of sensible cooperation and mutual adjustment between the agencies advocated by the United States Court of Appeals.” Harrisburg Taxicab, 796 A.2d at 293.⁵

⁴ In its analysis, the Court in Harrisburg Taxicab makes no distinction between statutory and regulatory authority.

⁵ Other examples in which the Commission has considered and reached conclusions regarding overlapping statutes include Barasch v. Bell Tel. Co., 529 Pa. 523, 605 A.2d 1198, 130 P.U.R. 4th 280 (1992) (The Commission considered whether a service violates the Wiretap Act); see also City of Philadelphia v. Pa. PUC, 702 A.2d 1139 (Pa. Commw. Ct. 1997) (The Commission must consider a county’s obligations under Act 78 in implementing telecommunication deregulation under the Public Utility Code and Telecom Act); Pa. PUC v. Columbia Gas of Pa., Docket No. R-2010-2215623, Order (Mar. 15, 2012), aff’d PCOC v. Pa. PUC, 635 C.D. 2012 (Pa. Commw. Ct. 2014) (The Commission found that the company’s customer assistance program did not violate the requirements of the federal Low-Income Home Energy Assistance Act).

Finally, Section 501 of the Public Utility Code states that “[t]he express enumeration of powers of the commission in this part shall not exclude any power which the commission would otherwise have under any provisions of this part.” In other words, even if the Public Utility Code does not “explicitly grant” the Commission “express authority,” this does not mean that the Commission does not have authority. Rather, Section 501 states the Commission has power over those matters that are within its province even if not specifically enumerated, and—*equally important*—the enumeration of some powers is not to the exclusion of others.

The Commission should determine that it has jurisdiction and authority over this issue—as provided for in the Public Utility Code and the Commission’s regulations—so as to meaningfully protect consumers as enunciated by the Code and regulations.

2. The Commission has the authority and jurisdiction to order equitable remedies, including restitution.

The August 20 Order disallowed the Joint Complainants from seeking restitution, an equitable remedy, partially on the basis of the Utility.com case.⁶ Utility.com, however, supports the Joint Complainants’ position. Further, the Commission has ordered equitable remedies, including refunds, in numerous cases.⁷ See e.g. Ely v. Pennsylvania Water, Docket No. C-20055616, Order at 1 (July 10, 2006) (The 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

⁶ On September 2, 2014, PaG&E, filed a Petition for Interlocutory Review and Answer to Material Question, wherein it seeks that the Commission answer the material question as to whether the Commission has the authority and jurisdiction to order refunds. In their Brief in Opposition to PaG&E’s Petition submitted on September 12, 2014, Joint Complainants discuss at length the Commission’s authority and jurisdiction to order refunds. The Joint Complainants also filed a Brief in Opposition to IDT’s Petition for Interlocutory Review and Answer to Material Questions, which addresses the same question of refunds, on September 18, 2014.

⁷ The August 20 Order recognized the Commission’s authority to issue refunds pursuant to Section 1312(a) of the Public Utility Code but found that the Commission could not consider restitution. August 20 Order at 14.

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); Electric Distribution Company Procedures for Processing Pilot Customer Supplier Selections, Docket No. M-00960890, 1998 Pa. PUC LEXIS 49 (Jan. 15, 1998) (The Commission has broad authority under Chapter 28 of the Commission's regulations, including ordering restitution); 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); Grmusa v. Dominion Retail, Inc., Docket No. C-2009-2124359, Order (Apr. 16, 2010) (Commission asserted its jurisdiction over, and authority to, provide equitable remedies based on the misrepresentations of an EGS).

The ALJs also seek to distinguish the Utility.com case referenced by the Joint Complainants. In Utility.com, the OCA sought equitable remedies for service not received and for "lost savings" on behalf of customers. Utility.com, Final Order at 262. The August 20 Order cites Utility.com for the proposition that the Commission can order restitution only in cases in which the parties have submitted to the jurisdiction of the Commission. August 20 Order at 12-13. According to the August 20 Order, the parties in Utility.com submitted to the Commission's jurisdiction through the Terms of Service. The August 20 Order then goes on to state that no such agreement exists in the instant matter. PaG&E's Disclosure Statement (Terms of Service), however, includes a clause entitled "Dispute Resolution" that states, in part (from the consumer's point of view), "[i]f I am still not satisfied, I may call the PUC toll free at (800) 782-1110, or write the PUC, Bureau of Consumer Services, P.O. Box 3265, Harrisburg, PA 17105-3265." Joint Complaint at Appendix B. PaG&E includes in its Disclosure Statement the same type of

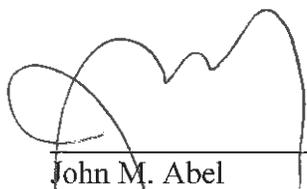
clause the ALJs found compelling in Utility.com to assert jurisdiction. On the basis of the August 20 Order's reasoning (while still incorrect in Joint Complainants' view), the Joint Complainants' situation is analogous to that in Utility.com.

The Joint Complainants submit that the Commission has the authority to direct equitable remedies, including restitution, and should affirm this authority.

V. CONCLUSION

WHEREFORE, for the reasons set forth above, the Office of Attorney General, Bureau of Consumer Protection and the Office of Consumer Advocate respectfully request that the Commission answer the material questions in the affirmative, allow Counts I, II, III, V and VII to be fully developed and considered, and allow the Joint Complainants to seek the equitable remedy of restitution.

Respectfully submitted,



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Through the Bureau of Consumer Protection,	:	
	:	
And	:	
	:	
TANYA J. McCLOSKEY, Acting Consumer	:	
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	:	
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 document, the Joint Brief of the Commonwealth of Pennsylvania and the Office of Consumer Advocate in Support for Interlocutory Review and Answer to Material Questions, in the manner and upon the persons listed below:

Dated this 18th day of September 2014.

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