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September 18, 2014

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 OPPOSITION TO THE JOINT PETITION OF THE OFFICE OF ATTORNEY GENERAL AND OFFICE OF CONSUMER ADVOCATE FOR INTERLOCUTORY REVIEW AND ANSWER TO MATERIAL QUESTION**

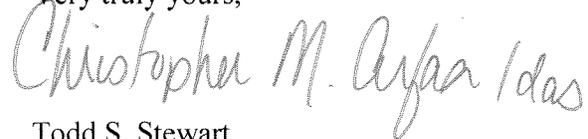
Dear Secretary Chiavetta:

Enclosed for electronic filing with the Commission is Energy Services Providers, Inc.'s Brief of Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric in Opposition to the Joint Petition of the Office of Attorney General and Office of Consumer Advocate for Interlocutory Review and Answer to Material Question in the above-captioned docket. Copies have been served in accordance with the attached Certificate of Service.

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
September 18, 2014
Page 2

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,

A handwritten signature in cursive script that reads "Christopher M. Arfaa / das".

Todd S. Stewart
Christopher M. Arfaa

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

TSS/CMA/das
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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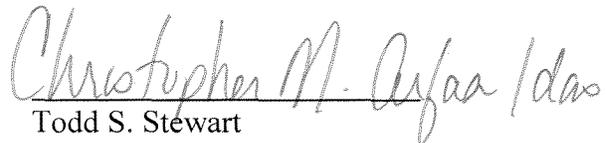
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DATED: September 18, 2014

**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

**BRIEF OF ENERGY SERVICES PROVIDERS, INC. d/b/a PENNSYLVANIA GAS AND
ELECTRIC IN OPPOSITION TO THE JOINT PETITION OF THE OFFICE OF
ATTORNEY GENERAL AND OFFICE OF CONSUMER ADVOCATE FOR
INTERLOCUTORY REVIEW AND ANSWER TO MATERIAL QUESTIONS**

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DATED: September 18, 2014

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY OF ARGUMENT 1

 A. Procedural History1

 B. Summary of the Argument3

II. ARGUMENT..... 3

 A. Interlocutory Review3

 B. The August 20 Order Correctly Holds That The Commission Lacks Authority
 or Jurisdiction to Determine Whether Conduct Violates The Pennsylvania
 Unfair Trade Practices and Consumer Protection Law and Telemarketer
 Registration Act.4

 C. The August 20 Order Correctly Holds That The Commission Lacks Authority
 or Jurisdiction to Order Restitution8

III. CONCLUSION 10

Pursuant to 52 Pa. Code § 5.301(b), Respondent, Energy Services Providers, Inc. d/b/a Pennsylvania Gas And Electric, by its undersigned attorneys, files this brief in opposition to the Joint Petition of The Office of Attorney General and Office of Consumer Advocate for Interlocutory Review and Answer to Material Questions, filed September 8, 2014.

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 (“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”). ESPI timely filed preliminary objections to the Complaint, arguing in part that Counts I, II, III, V, VI and VII should be dismissed for lack of subject matter jurisdiction and legal insufficiency to the extent that those counts require the PUC to determine whether ESPI has violated or is violating Pennsylvania’s Unfair Trade Practices and Consumer Protection Law (“Consumer Protection law”),¹ because the Commission lacks jurisdiction and authority to enforce or adjudicate violations under the Consumer Protection Law. ESPI’s preliminary objections also asserted in part that Count VII of the Complaint, which alleges that ESPI has violated or is violating the Telemarketer Registration Act,² should be dismissed for lack of subject matter jurisdiction and legal insufficiency both because the Commission has no authority to enforce that statute and because the statute does not apply to ESPI. In addition, ESPI’s preliminary objections argued in part that each Count of the Complaint should be dismissed for

¹ 73 P.S. § 201.

² 73 P.S. § 2241, *et seq.*

lack of jurisdiction to the extent it seeks monetary damages or refunds because the Commission lacks authority to award such relief.

Administrative Law Judges Elizabeth Barnes and Joel H. Cheskis (“ALJs”) granted ESPI’s preliminary objections in part and denied them in part by Interim Order dated August 20, 2014 (“August 20 Order”). Among other things, the August 20 Order dismissed Counts I, II, III, V, VI and VII of the Complaint to the extent that they would require the PUC to make rulings under the Consumer Protection Law and the Telemarketers Registration Act.³ The August 20 Order also held that while the Commission does have authority to direct ESPI to issue refunds, it does not have authority to order the payment of restitution.⁴

On September 8, 2014, the Joint Complainants filed their Joint Petition for interlocutory review and answer to the following questions:

- 1) Does the Commission have authority and jurisdiction to determine whether a violation of the Unfair Trade Practices and Consumer Protection Law (CPL) and 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?⁵

For the reasons stated below, these questions should be answered in the negative.

³ August 20 Order at 7-11, 18-2.

⁴ August 20 Order at 11-14. On September 2, 2014, ESPI filed a petition for interlocutory review and answer to material question with respect to the Commission’s jurisdiction and authority to order EGSs to issue refunds. ESPI and Joint Complainants filed briefs in support and in opposition, respectively, to ESPI’s petition on September 12, 2014.

⁵ Joint Petition at 1.

B. Summary of the Argument

It is well settled that the Commission may not exceed its jurisdiction and must act within it, and that, as a creation of the legislature, the Commission possesses only the authority that the state legislature has specifically granted to it in the Public Utility Code.

The August 20 Order correctly held that the Commission does not have jurisdiction or authority to enforce or adjudicate claims under the Consumer Protection Law or the Telemarketer Registration Act. As the ALJs concluded, references to such violations in the Commission's regulations cannot and do not, in themselves, confer such jurisdiction or authority.

The August 20 Order correctly held that the Commission does not have jurisdiction or authority to order monetary relief in the form of restitution. The "restitution" claimed in this case is indistinguishable from damages caused by the conduct alleged – deceptive marketing and breach of contract. It is well-settled that the Commission does not have jurisdiction or authority to award damages, and Joint Complainants may not evade this fundamental principle merely by calling damages "restitution." Whether the Commission has the authority to order various forms of equitable relief, such as injunctive relief, or recognizes equitable defenses, such as equitable estoppel, is wholly irrelevant to the issue at hand.

II. ARGUMENT

A. Interlocutory Review

The ALJs' diverging holdings with respect to restitution and refunds are closely related. Therefore, to the extent interlocutory review of the questions posed by the Joint Complainants is warranted, interlocutory review of the question raised by ESPI's petition – whether the Commission has jurisdiction and authority to order EGSs to issue refunds – is also warranted.

B. The August 20 Order Correctly Holds That The Commission Lacks Authority or Jurisdiction to Determine Whether Conduct Violates The Pennsylvania Unfair Trade Practices and Consumer Protection Law and Telemarketer Registration Act.

The ALJs properly dismissed Counts I, II, III, V, VI, and VII for lack of jurisdiction and for legal insufficiency to the extent that those counts allege that ESPI violated or is violating the Consumer Protection Law or the Telemarketer Registration Act because the Commission lacks jurisdiction to enforce those laws. The Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly.⁶ The Commission must act within, and cannot exceed, its jurisdiction.⁷ Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy.⁸ Furthermore, in order to be legally sufficient, a complaint must set forth “an act or thing done or omitted to be done or about to be done or omitted to be done by the respondent in violation, or claimed violation, of a statute which the Commission has jurisdiction to administer, or of a regulation or order of the Commission.”⁹

The Commission’s jurisdiction over EGSs like ESPI is set forth in 66 Pa. C.S. § 2809(e). Nothing in 66 Pa. C.S. § 2809(e) or any other statute passed by the General Assembly expressly or impliedly grants the Commission jurisdiction to enforce the Consumer Protection Law against an EGS. Indeed, it is well settled that the Commission lacks jurisdiction to enforce the

⁶ *In Hynn Yoo and Yu Shin Yoo v. Philadelphia Gas Works*, 2014 Pa. PUC LEXIS 257, Docket No. C-2013-2369915 (Initial Decision entered April 7, 2014) (citing *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937 (Order entered May 28, 2008) and *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977)).

⁷ *City of Pittsburgh v. Pa. Pub. Util. Comm'n*, 43 A.2d 348 (Pa. Super. 1945).

⁸ *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Comm. Ct. 1992), *appeal denied*, 637 A.2d 293 (Pa. 1993).

⁹ 52 Pa. Code § 5.22(a)(4); *see, e.g., James Drake v. Pennsylvania Electric Co.*, Docket No. C-2014-2413771, Initial Decision Sustaining Preliminary Objection and Dismissing Complaint, 2014 WL 2003281, *4 (May 7, 2014).

Consumer Protection Law.¹⁰ Moreover, a simple reading of the Consumer Protection Law makes clear that the General Assembly intended for courts to enforce its provisions, not administrative agencies like the PUC.¹¹ Therefore, to the extent a complaint filed with the

¹⁰ See *Mid-Atlantic Power Supply Assoc. v. PECO Energy Co.*, Docket No. P-00981615, 1999 Pa. PUC LEXIS 30 (Order entered May 19, 1999); *Pa. P.U.C. et al. v. The Bell Telephone Co. of Pa.*, 71 Pa. P.U.C. 338, 341 (1989); see also *MacLuckie v. Palmco Energy PA, LLC*, Docket No. C-201402402558 (Initial Decision entered June 16, 2014).

¹¹ See 72 P.S. 201-4.1 (“Whenever any court issues a permanent injunction to restrain and prevent violations of this act as authorized in section 4 above, the court may in its discretion direct that the defendant or defendants restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any violation of this act, under terms and conditions to be established by the court.”) (emphasis added); 73 P.S. § 201-5 (providing that the Attorney General may accept assurances of voluntary compliance but that “[a]ny such assurance shall be in writing and filed with the court”) (emphasis added); 73 P.S. § 201-8 (“if the court finds that a person, firm or corporation is wilfully using or has wilfully used a method, act or practice declared unlawful by section 3 of this act, the Attorney General or the appropriate District Attorney, acting in the name of the Commonwealth of Pennsylvania, may recover, on behalf of the Commonwealth of Pennsylvania, a civil penalty . . .”) (emphasis added); 73 P.S. § 201-9 (“Upon petition by the Attorney General, the court having jurisdiction, may, in its discretion, order the dissolution, suspension or forfeiture of the franchise or right to do business of any person, firm or corporation which violates the terms of an injunction issued under section 4 of this act. In addition, the court may appoint a receiver of the assets of the company.”) (emphasis added); 73 P.S. § 201-9.1 (“When a receiver is appointed by the court pursuant to this act, he shall have the power to sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys, and effects, lands and tenements, books, records, documents, papers, choses in action, bills, notes and property of every description of the person or persons for whom the receiver is appointed, received by means of any practice declared to be illegal and prohibited by this act, including property with which such property has been mingled if it cannot be identified in kind because of such commingling, and to sell, convey, and assign the same and hold and dispose of the proceeds thereof under the direction of the court. Any person who has suffered damages as a result of the use or employment of any unlawful practices and submits proof to the satisfaction of the court that he has in fact been damaged, may participate with general creditors in the distribution of the assets to the extent he has sustained provable losses. The court shall have jurisdiction of all questions arising in such proceedings and may make such orders and judgments therein as may be required.”) (emphasis added).

Commission is predicated on allegations that an EGS's conduct violated that statute, it must be dismissed.¹²

Similarly, nothing in 66 Pa. C.S. § 2809(e) or any other statute passed by the General Assembly expressly or impliedly grants the Commission jurisdiction to enforce the Telemarketer Registration Act against an EGS. In fact, EGSs are *exempt* from the Act. The Telemarketing Registration Act provides that, as a general matter, a business engaged in telemarketing must reduce any sale of goods or services to a written contract and obtain the purchasing consumer's written signature on the written contract.¹³ However, the Act specifically exempts certain businesses from these requirements.¹⁴ Specifically, the General Assembly provided that "a signed, written contract is not needed if . . . [t]he contractual sale is regulated under other laws of this Commonwealth."¹⁵ Here, contractual sales between ESPI and its customers are regulated by Chapters 54 and 111 of the Commission's regulations.¹⁶ These regulations constitute binding "laws" that must be followed by ESPI and other EGSs.¹⁷ Because contractual sales between ESPI and its customers are indisputably "regulated under other laws of this Commonwealth," the

¹² A different result might be warranted if the complaint alleged that a court of law had previously found the respondent to have violated the Consumer Protection Law. No such allegation has been made in this case.

¹³ See 73 P.S. § 2245(a)(7). The Telemarketing Registration Act also provides that, generally, such a written contract must contain specific information, including: a detailed description of the consumer goods and services purchased which shall match the oral description given in the telemarketing solicitation; any oral or written representations made during the telemarketing solicitations; and a statement that read, "You are not obligated to pay any money unless you sign this contract and return it to the seller." See 73 P.S. § 2245(c).

¹⁴ See 73 P.S. § 2245(a)(7).

¹⁵ See 73 P.S. § 2245(d).

¹⁶ 52 Pa. Code §§ 54.1, *et seq.*, 111.01, *et seq.*

¹⁷ See 66 Pa. C.S. § 501; *see also Giant Good Stores, Inc. v. Commonwealth*, 713 A.2d 177, 180 (Commw. Ct. 1998) ("regulations establish binding norms having the force of law"); *Black's Law Dictionary* 1311 (8th ed. 2004) (defining the term regulation as "a rule or order, having legal force, usually issued by an administrative agency").

Telemarketing Registration Act's requirement at 73 P.S. § 2245(a)(7) and 73 P.S. § 2245(c) do not apply to ESPI.

The Joint Complainants' argument, that the Commission has jurisdiction and authority to enforce and adjudicate violations of the Consumer Protection Law and the Telemarketer Registration Act because the Commission's regulations incorporate those statutes by reference, are meritless. As the ALJs observed, the precedent on which the Joint Complainants rely, *Harrisburg Taxicab & Baggage Co. v. Pa. PUC*,¹⁸ is entirely distinguishable from this case because in *Harrisburg Taxicab* the Commission's authority to enforce provisions of the Pennsylvania Vehicle Code arose from the express *statutory* authority to regulate the safety of taxicabs provided by section 1501 of the Public Utility Code.¹⁹ Here, in contrast, the Joint Complainants rely on the Commission's own regulations, *not* statutory authority, to support their position.²⁰ As the ALJs correctly concluded, "[r]eliance on its own regulations is not comparable to the Commission's express authority to regulate the safety of taxicabs explicitly granted by the General Assembly under Section 1501."²¹

Adjudication of alleged violations of the Consumer Protection Law and the Telemarketers Registration Act by the Commission would not only exceed the Commission's statutory authority, it would contravene the intent of the General Assembly to have such alleged violations adjudicated by courts. It also would interfere with the rights of the parties in any subsequent court action. The prevailing party before the Commission would undoubtedly argue that the Commission's determinations under the Consumer Protection Law and Telemarketers Registration Act are res judicata in the subsequent court action, thus depriving both the non-

¹⁸ 786 A.2d 288 (Pa. Commw. Ct. 2001).

¹⁹ See August 20 Order at 9 (citing *Harrisburg Taxicab*, 786 A.2d at 293).

²⁰ See *id.* at 9, 19.

²¹ *Id.* at 9.

prevailing party of its right to have such issues determined by the courts and the courts of the opportunity to adjudicate matters which the General Assembly has entrusted to them.

C. The August 20 Order Correctly Holds That The Commission Lacks Authority or Jurisdiction to Order Restitution

In their demand for relief, the Joint Complainants assert that if the Commission were to conclude that ESPI violated a legal duty owed to its customers, the Commission should order ESPI to “provide appropriate restitution, including without limitation to, refunding all charges to its customers that were over and above the Price to Compare in the customers’ respective service territories from January 1, 2014 through the date of resolution of this matter, as well as any late, cancellation and/or termination fees and/or other such penalties charged to customers as a result of [ESPI’s] charges and customers leaving [ESPI] to obtain generation service elsewhere.”²² The August 20 Order properly dismissed the Joint Complainants’ claims to the extent they sought “restitution,” on the ground that the Commission lacks authority to impose such a remedy on an unwilling party.²³

The ALJs’ holding is correct for at least three independent reasons. *First*, nothing in the Public Utility Code empowers the PUC to order restitution. *Second*, “[i]t is not to magic words, but to the essence of the underlying claims, we look in determining where jurisdiction properly lies.”²⁴ The “restitution” sought here is indistinguishable from direct damages for breach of contract – moneys paid by customers as a result of ESPI’s alleged failure to provide what it allegedly promised, and it is well-settled that the Commission does not have authority to award

²² Joint Complaint at 16 (request for relief para. D).

²³ August 20 Order at 12 (citing *Roger McCall v. Pennsylvania Electric Co.*, Docket No. C-2009-2105240, Opinion and Order (entered June 7, 2010)).

²⁴ *DeFrancesco v. W. Pennsylvania Water Co.*, 499 Pa. 374, 378, 453 A.2d 595, 597 (1982)

such relief.²⁵ *Third*, the Joint Complainants' demand for "restitution" is, in effect, a demand that ESPI be ordered to issue refunds of charges collected from its customers. The Commission's authority to order refunds is limited to "public utilities,"²⁶ and the law is clear that EGSs are not "public utilities" except for the limited purposes of 66 Pa. C.S. § 2809 and 2810,²⁷ neither of which authorizes the Commission to regulate EGS rates or compel EGSs to issue refunds. As a result, the Commission does not have the authority or jurisdiction to order an EGS to provide refunds or credits to its customers or to award any other monetary damages.²⁸ Complainants cannot circumvent the will of the General Assembly and create jurisdiction merely through wordplay.

The Joint Complainants have argued that the Commission may order refunds and restitution because it has provided "equitable relief" in the past.²⁹ This argument is unavailing. As the ALJs correctly concluded, the Joint Complainants' primary authority for this assertion – *OCA v. Utility.com, Inc.*³⁰ – is entirely distinguishable from this case, both for the reasons discussed in the August 20 Order³¹ and because the EGS in that case failed to answer the

²⁵ The Commission and courts of this Commonwealth have long recognized that "the statutory array of the Commission's remedial and enforcement powers does not include the power to award damages. That power, instead, resides with the Courts of Common Pleas." *James Coppedge v. PECO Energy Co.*, Docket No. F-2009-213589 (Order entered Aug. 3, 2010) (citing *Feingold v. Bell of Pennsylvania*, 383 A.2d 791, 794-795 (Pa. 1977)).

²⁶ See 66 Pa. C.S. § 1213.

²⁷ See *Delmarva Power & Light Co. v. Commonwealth*, 870 A.2d 901, 910 (Pa. 2005) (citing 66 Pa. C.S. § 102).

²⁸ See *Yaglidereliler Corp. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2413732 (Initial Decision entered June 18, 2014). The August 20 Order incorrectly holds that section 1321 does authorize the Commission to order EGSs to issue refunds. ESPI has sought interlocutory review of that question. See Brief of ESPI in Support of Interlocutory Review and Answer to Material Question (filed Sept. 12, 2014).

²⁹ See Answer to Preliminary Objections at 19-20.

³⁰ 212 P.U.R. 4th 255 (2001).

³¹ August 20 Order at 12.

complaint and thus was deemed to have admitted its allegations.³² With respect to the Joint Complainants' remaining arguments, the fact that the Commission has ordered nonmonetary injunctive relief and recognized the principle of equitable estoppel³³ has no bearing on whether the Commission has the authority to order the payment of money. Again, the Joint Complainants' labeling of their demand for the payment of money as "restitution" rather than "damages" does not change the essential monetary nature of the requested remedy.

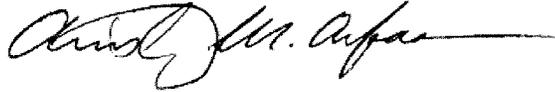
III. CONCLUSION

For all of the foregoing reasons, the OAG/OCA Petition for Interlocutory Review and Answers to Material Questions should be DENIED.

³² 212 P.U.R. 4th 255.

³³ See Answer to Preliminary Objections at 20.

Respectfully submitted,



DATED: September 18, 2014

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