

COMMONWEALTH OF PENNSYLVANIA



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November 10, 2014

Rosemary Chiavetta  
Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
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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 Answer of the Commonwealth of Pennsylvania and the Office of Consumer Advocate to Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric's Motion *in Limine* to Restrict the Introduction of Evidence, in the above-referenced proceeding.

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

Respectfully Submitted,  
*Candis A. Tunilo*  
Candis A. Tunilo  
Assistant Consumer Advocate  
PA Attorney I.D. #89891

Enclosures

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

\*185180

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

COMMONWEALTH OF PENNSYLVANIA, by	:	
Attorney General KATHLEEN G. KANE,	:	
Through the Bureau of Consumer Protection	:	
	:	
And	:	Docket No. C-2014-2427656
	:	
TANYA J. McCLOSKEY, Acting Consumer	:	
Advocate	:	
	:	
Complainants	:	
v.	:	
	:	
ENERGY SERVICES PROVIDERS, INC. d/b/a	:	
PENNSYLVANIA GAS & ELECTRIC	:	
Respondent	:	

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JOINT ANSWER OF THE COMMONWEALTH OF PENNSYLVANIA AND THE OFFICE  
OF CONSUMER ADVOCATE TO ENERGY SERVICES PROVIDERS, INC. d/b/a  
PENNSYLVANIA GAS & ELECTRIC'S MOTION *IN LIMINE* TO RESTRICT THE  
INTRODUCTION OF EVIDENCE

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Pursuant to 52 Pa. Code § 5.103(c), the Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, through the Bureau of Consumer Protection (Commonwealth or Attorney General) and the Office of Consumer Advocate (OCA) (hereinafter Joint Complainants), respectfully request the entry of an order denying Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric's (Respondent or PaG&E) Motion *in Limine* and directing that evidence of allegations contained in formal complaints against Respondent may be introduced and offered into the record by the Joint Complainants to establish patterns of practice and/or conduct by Respondent which violated 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.* (Consumer Protection Law), and the Telemarketer Registration Act, 73 P.S. § 2241, *et seq.* (TRA), as alleged in the Joint Complaint.

## I. INTRODUCTION

The Commonwealth and the OCA filed a Joint Complaint<sup>1</sup> on June 20, 2014 against 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 Consumer Protection Law, and the TRA.

On July 20, 2014, Respondent filed Preliminary Objections asserting, *inter alia*, that Counts I, II, and IV should be dismissed because the underlying Formal Complaints had been satisfied through settlements. PaG&E relied on Section 703(a) of the Public Utility Code, 66 Pa. C.S. § 703(a) in its Preliminary Objection, as it does in this Motion. By Order of August 20, 2014, Administrative Law Judges (ALJs) Elizabeth Barnes and Joel H. Cheskis denied PaG&E's Preliminary Objection and permitted these Counts to proceed to a hearing. Specifically, the ALJs reasoned:

To the extent that [PaG&E's] argument is akin to an argument of *res judicata*, this argument fails because there is no final valid judgment on the merits by the Commission that is required by *res judicata* to bar any future suit between the same parties on the same cause of action because the cases were resolved via settlements. Furthermore, for the doctrine of *res judicata* to prevail, four conditions must be met: (1) identity of issues, (2) identity of causes of action, (3) identity of persons and parties to the action, and (4) identity of the quality and capacity of the parties suing or sued. At a minimum, the identity of persons and parties to the action do not warrant granting [PaG&E's] Preliminary Objection in this case.

Additionally, it is a reasonable inference from the well pled material facts in Counts I, II and IV that the Joint Complainants intend to argue that the alleged

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<sup>1</sup> The seven separate counts in the Joint Complaint are as follows: I) misleading and deceptive promises of savings; II) slamming; III) misleading and deceptive welcome letter; IV) lack of good faith handling of complaints; V) failing to provide accurate pricing information; VI) prices nonconforming to disclosure statement; and VII) failure to comply with the Telemarketer Registration Act.

multiple violations of Commission regulations raise additional issues beyond the individual complaints filed that warrant a hearing – an issue that an individual complainant could not raise on behalf of another consumer. This would be consistent with the Attorney General’s *parens patriae* powers, as the Joint Complainants argued.

Commonwealth and OCA v. PaG&E, C-2014-2427656, Interim Order at 17 (Aug. 20, 2014) (August 20 Order).<sup>2</sup> (Internal citations omitted).

Understanding that a Preliminary Objection is procedurally different from determining the admissibility of evidence, the Joint Complainants nonetheless contend that the Respondent’s purported satisfaction of Formal Complaints is irrelevant to the powers and duties of the Joint Complainants to address the consumer and public interest in this matter. Furthermore, PaG&E’s reliance on Sections 703(a) and 316 of the Public Utility Code and related case law are misplaced. These Sections are intended to prevent subsequent claims by the same *parties*. See 66 Pa. C.S. §§ 703(a) and 316. Joint Complainants were not parties in the complaint cases identified by PaG&E, and Sections 703(a) and 316 bind only the parties to an action to the outcome of that action. As the ALJs recognized in the August 20 Order, the evidence of these complaints and complainants raises broader issues than those of an individual.

In the present Motion, the Respondent again seeks for the ALJs to limit or prevent the use of allegations by consumer formal complainants. Specifically, PaG&E asks the ALJs to prohibit the Joint Complainants’ introduction or admission of evidence into the record of the allegations contained in formal complaints<sup>3</sup> filed by consumers that have Certificates of Satisfaction submitted in their individual formal complaint dockets at the Commission. The Joint

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<sup>2</sup> PaG&E filed a Petition for Interlocutory Review and Answer to Material Question on September 2, 2014. Joint Complainants filed a Petition for Interlocutory Review and Answer to Material Questions on September 8, 2014. The Commission has not yet acted on these Petitions. Neither Petition, however, seeks interlocutory review of the ALJs’ determination of this issue.

<sup>3</sup> The list of formal complaints for which PaG&E has filed Certificates of Satisfaction was attached to Respondent’s Motion as Exhibit A.

Complainants intend to utilize the allegations of these formal complainants as part of the evidence to establish a pattern or practice of conduct by Respondent which violated the Public Utility Code, the Commission's regulations, the Consumer Protection Law, and the TRA. The formal complainants, whose testimony Joint Complainants intend to offer into evidence, also filed complaints with the Attorney General or provided information to the OCA. For the reasons set forth below, the Joint Complainants oppose any prohibition that might limit the full range of evidence or the statutory remedies which the Joint Complainants are authorized to pursue before the Commission.

## II. ARGUMENT

### A. Legal Standard

In its Motion, PaG&E seeks to limit the admissibility of relevant and material evidence in this matter. The Commission has recognized that a motion *in limine* procedure may serve a purpose in civil practice. However, the Commission has generally viewed "a *Motion in Limine* [as] an inappropriate vehicle to challenge the introduction of evidence in an administrative proceeding." Re Duquesne Light Company, 57 Pa. PUC 313, 315 (1983). The motion in limine "is a procedure for obtaining a ruling on the admissibility of evidence prior to or during trial, but before the evidence has been offered." Application of PECO Energy Company, Docket No. A-00110550F0147, Opinion and Order at 21 (June 22, 2000). The Commission has found less need for such a civil procedure tool in administrative practice:

While it is true that the traditional use of a Motion in Limine is to prevent prejudice that might occur merely by offering the evidence to a jury, as the proceeding before us is an administrative proceeding, the possibility of prejudicing the trier of fact by the mere offering of the evidence is remote.

Re Duquesne at 317. (Internal footnote omitted). Rather than grant a blanket exclusion of evidence, the Commission relies on the ALJ as "capable of ruling on the relevance and/or

admissibility of each piece of proffered evidence.” Id. The Public Utility Code and Commission’s rules only require that evidence “be relevant and material to the issues presented and be substantial enough to support the Commission’s decision in order to be admissible.” Application of Apollo Gas Co., Docket No. A-120450F003, Fourth Interim Order of ALJ Corbett, 1991 Pa. PUC LEXIS 61, 3 (Aug. 2, 1991) (Apollo Gas); see also Joint Application of West Penn Power d/b/a Allegheny Power, et al., Docket No. A-2010-2176520, Order on Motion *in Limine* at 2 (Sept. 28, 2010) (Denied motion *in limine* that sought to exclude Direct Energy testimony as outside the scope of the proceeding and beyond the Commission’s authority to grant Direct Energy’s request for relief). A motion to strike the offer of specific evidence is the more appropriate tool, rather than a motion *in limine*. Apollo Gas, 1991 Pa. PUC LEXIS 61, 2.

The cases upon which PaG&E relies in support of its request do not support the granting of PaG&E’s Motion. PaG&E relies on Pa. PUC v. Audubon Water Co., 92 Pa. PUC 206 (1999) and Pa. PUC v. PGW, 98 Pa. PUC 121 (2003) in its Motion. It is unclear from the Order in Audubon Water what issues intervenor Toll Brothers, Inc. sought to raise in the matter that were beyond the base rate case filed by Audubon Water Company.<sup>4</sup> Regardless, the ALJ permitted Toll Brothers, Inc. to intervene regarding issues material and relevant to the base rate case. See 92 Pa. PUC 206, 208. In PGW, the Commission upheld the ALJ’s granting of PGW’s motion *in limine* and striking portions of the union’s testimony and exhibits that suggested wording changes to PGW’s tariff as beyond the scope of the restructuring proceeding. 98 Pa. PUC 121, 130-31 (2003).

In the present matter, unlike Audubon Water and PGW, the factual testimony of consumers is relevant and material to the allegations in the Joint Complaint of a pattern of

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<sup>4</sup> The OCA was not able to locate the ALJ’s Order on the motion *in limine* in time permitted for filing this Answer.

violations of the Public Utility Code, Commission Orders and regulations and Pennsylvania law by PaG&E. The testimony of these consumers, regardless of whether their individual complaints against PaG&E have been marked satisfied, are clearly within the scope of this proceeding, since they are cited in the Joint Complaint.

Further, the motions *in limine* in Audubon Water and PGW were specific to intervenors trying to enlarge the scope of the proceedings. Here, PaG&E seeks to limit the scope of Joint Complainants' case, even though such attempt has already been denied by the ALJs' August 20 Order denying PaG&E's preliminary objection that certain Counts in the Joint Complaint that rely on allegations in consumer formal complaints that have been marked satisfied should be stricken as legally insufficient. Specifically, PaG&E's Motion seeks to restrict the development of the evidentiary record in this proceeding and thereby limit the Attorney General's and the OCA's abilities to prove the allegations in the Joint Complaint. As discussed above, the Commission has generally established that the limitation of evidence prior to the offering thereof is not appropriate in administrative hearings. As such, and for the additional reasons discussed herein, PaG&E's Motion should be denied.

B. Alleged Conduct is Admissible Evidence Regardless of Whether Certificates of Satisfaction Have Been Filed with the Commission.

1. This action is brought on behalf of the public interest, and it would be against public policy to allow a Respondent to be relieved of liability for public wrongs through the satisfaction of underlying individual complaints.

The filing and resolution of formal complaints with the Commission by consumers against Respondent is irrelevant to the Joint Complainants' causes of action and requested relief. These settlements cannot bar, limit or otherwise impair the Joint Complainants' claims in this action. All the allegations of the Joint Complaint are to be considered and appraised in light of

the nature of the case. See e.g. Hock v. L.B. Smith, Inc., 69 Pa. D. & C.2d 420 (Columbia Co. 1974). This is a public action being brought by the Joint Complainants for injunctive relief, along with civil penalties and restitution. It would be against public policy to allow a Respondent to be relieved from all future liability for its regulatory violations through the satisfaction of individual consumer complaints.

Under the Administrative Code of 1929, the OCA is authorized to represent the interests of consumers before the Commission in any matter properly before the Commission. 71 P.S. § 309-4(a). The Consumer Advocate “may exercise discretion in determining the interests of consumers which will be advocated in any particular proceeding and in determining whether or not to participate in or initiate any particular proceeding and, in so determining, shall consider the public interest, the resources available and the substantiality of the effect of the proceeding on the interest of consumers.” 71 P.S. § 309-4(b).

Additionally, this is an action being brought by the Attorney General “in the name of the Commonwealth,” as authorized by the Consumer Protection Law, when she has reason to believe that any person is using or is about to use any “unlawful method, act or practice” and she further determines the proceedings would be in the “public interest.” 73 P.S. § 201-4. The Attorney General is not acting on behalf on any one single claimant, but pursuant to her *parens patriae* powers. See e.g. Commonwealth v. Foster, 57 Pa. D. & C.2d 203 (Allegheny Co. 1972) (Characterizes the Commonwealth’s action by the Attorney General under the Consumer Protection Law as *parens patriae*).

The Attorney General does not act as the private attorney for any given customer but instead is authorized to bring a proceeding on behalf of the public “to protect the citizenry,” by, among other things, seeking injunctive relief, restitution, and civil penalties. Valley Forge

Towers South Condominium v. Ron-Ike Foam Insulators, Inc., 393 Pa. Super. 339, 346, 574 A.2d 641, 644 (1990), aff'd 529 Pa. 512, 605 A. 2d 798 (1990).<sup>5</sup> Proceedings brought by the Attorney General focus on unfair and deceptive methods, acts and practices. 73 P.S. §§ 201-3, 201-4. Plainly, the conduct alleged here falls within the ambit of “trade and commerce” as defined by the Consumer Protection Law, and there is no exclusion under that law for EGSs. 73 P.S. § 201-2(3). See e.g. Commonwealth v. Allstate Ins. Co., 729 A.2d 135, 140 (Pa. Commw. Ct. 1999) (Holding that “there is nothing in any of the language of the Consumer Protection Law that insurance companies are not covered by its provisions, and the General Assembly could have included such language if it desired”). As such, the mere fact that some consumer complaints have been satisfied as the Respondent contends in no way absolves PaG&E for its conduct under the law to the extent it engaged in a broader array of unfair and deceptive business practices.

Additionally, the Commission has recognized that where there is one complaint made to the Commission, there are likely substantially more of the same nature that have not been formally made. See e.g. Arthur Rand v. GTE North, 1999 Pa. PUC LEXIS 55, \*9-10 (March 19, 1999). Since this is a public action being brought by the Joint Complainants for injunctive relief, along with civil penalties and restitution, it would be against public policy to allow Respondent to be relieved from all future regulatory liability through the satisfaction of individual consumer complaints.

2. The Joint Complainants were not Parties to these Formal Complaints and as such, may use these Allegations in their own Action.

Respondent relies on Section 703 of the Public Utility Code in support of its Motion. Section 703 states that the satisfaction of a formal complaint shall relieve such party from

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<sup>5</sup> Likewise, the Consumer Advocate does not represent individual consumers. See gen'ly 71 P.S. § 309-4.

responsibility only for the specific matter complained of. See 66 Pa. C.S. § 703(a). Additionally, PaG&E asserts that in accordance with Section 316 of the Public Utility Code, the filing of a Certificate of Satisfaction results in the closing of a complaint case and thus bars subsequent claims on the same issues. See 66 Pa. C.S. § 316. Section 316 states in pertinent part: “[w]henever the commission shall make any rule, regulation, finding, determination or order, the same shall be prima facie evidence of the facts found and shall remain conclusive upon all parties affected thereby ... .” Id.

Joint Complainants submit that Sections 703(a) and 316 were not intended as vehicles for companies subject to the Commission’s jurisdiction to avoid regulatory enforcement. Such interpretation, of which the ALJs have already rejected in their August 20 Order on preliminary objections, would result in unsound public policy. A company could simply avoid any regulatory enforcement by settling individual complaints but continuing the illegal practices. Such a result would be absurd. Further, neither the OCA nor the Commonwealth was a party to the formal complaints listed in Respondent’s Exhibit A. Additionally, while the listed consumers may be fact witnesses in this current proceeding, they are not formal parties. As such, Sections 703(a) and 316 do not bar Joint Complainants’ use of such evidence to establish a pattern or practice of conduct by Respondent that violated the Public Utility Code, the Commission’s Orders and regulations, and Pennsylvania law and to pursue a broader public interest.

The Joint Complainants are seeking to address the consumer and public interest, based on the Public Utility Code, the Commission’s Orders and regulations, as well as the Consumer Protection Law, a statute that has long been liberally construed for the purpose of benefiting the public at large by eradicating unfair or deceptive business practices. See e.g. Commonwealth v.

Monumental Props., 459 Pa. 450,460, 478, 329 A.2d 812, 816, 826 (1974) (the Consumer Protection Law covers generally all unfair and deceptive acts or practices in the conduct of trade or commerce). The Consumer Protection Law is incorporated into the Commission's regulations. See 52 Pa. Code § 54.122(3) and 111.12(d)(1). Additionally, the Commonwealth Court has held that to allow a defendant to "avoid liability under the [Consumer Protection] Law by discontinuing its actions even after proceedings are commenced and claim that the matter is moot" would frustrate the purpose of the Consumer Protection Law. See Commonwealth v. Percudani, 844 A.2d 35, 46 (Pa. Commw. Ct. 2003).

Respondent's reliance on Lorrie Reynolds v. PPL Electric Utilities Corp., Docket No. C-2011-2255268, Order (Jan. 5, 2102) (Reynolds), and James E. Creehan v. Duquesne Light Co., Docket No. C-2012-2297124, Initial Decision (May 23, 2013) (Creehan), falls short of explaining that the Commission did not hear the additional complaints filed by these individual consumers because Section 316 of the Code prohibits a complainant from raising the same issues before the Commission a second time, not because the Commission had made a decision based upon the merits of the case. It is understandable that the Commission would seek to limit an individual's ability to file multiple formal complaints concerning the same issue, and that is the situation that Section 316 seeks to address. A Certificate of Satisfaction is meant to signal that a settlement between the parties was reached; not however, that the Commission has made a conclusive determination on the merits of the underlying allegations.

Additionally, while the "complainant is precluded from raising the same claims before the Commission a second time," Section 316 of the Code does not prohibit the Attorney General, the Consumer Advocate or the Commission's Bureau of Investigation and Enforcement from raising these claims in future enforcement actions. Creehan at 6, citing Reynolds. In both cases,

the original complainant attempted to relitigate the same issues before the Commission that were previously resolved by the filing of Certificates of Satisfaction. The Joint Complainants are not attempting to relitigate the same issues raised in the individually satisfied formal complaints but instead, plan to use the allegations contained therein and the allegations contained in similar complaints filed with the Commonwealth and similar information provided to the OCA to establish patterns of conduct that violate the law and seek remedies on behalf of the public interest, which the Joint Complainants have the statutory authority to obtain.

3. Respondent May Be Relieved From Providing Additional Monetary Relief But Is Not Relieved of Additional Statutory or Injunctive Relief.

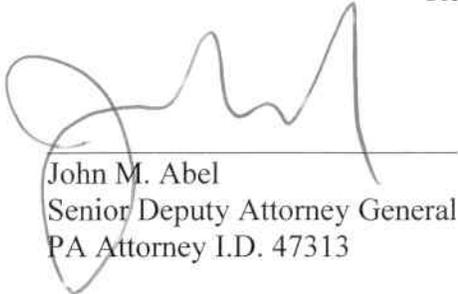
The Joint Complainants intend to prove their claims in part through evidence of conduct by consumer complainant fact witnesses. These fact witnesses have filed complaints with the Commonwealth and/or the Commission and/or provided information to the OCA. Many consumers filed complaints with multiple agencies seeking similar relief. The Joint Complainants continue to encourage Respondent to settle matters filed at the Commission. The Respondent may request that the ALJs consider the filed Certificates of Satisfaction as mitigation evidence when calculating any monetary relief in this action.

As stated above, the mere fact that some consumer complaints have been satisfied as the Respondent contends in no way absolves PaG&E for its conduct under the law to the extent it engaged in a broader array of unfair and deceptive business practices. Evidence of the alleged conduct contained in the individual formal complaints is admissible because it is relevant and material to this action. Combining the formal complaints filed with the Commission with the complaints filed with the Commonwealth and information received by the OCA will not confuse any of the issues related to the establishment of a pattern or practice nor will these witnesses cause any undue delay or waste of time.

**III. 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 the entry of an order denying the Defendant's Motion *in Limine* and directing that fact evidence from individual formal complainants be admissible in this matter.

Respectfully submitted,



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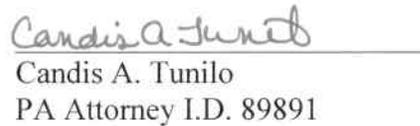
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CERTIFICATE OF SERVICE

Commonwealth of Pennsylvania, by :  
Attorney General KATHLEEN G. KANE, :  
Through the Bureau of Consumer Protection, :

And :

TANYA J. McCLOSKEY, Acting Consumer Advocate, :

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 Answer of the Commonwealth of Pennsylvania and the Office of Consumer Advocate to Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric’s Motion *in Limine* to Restrict the Introduction of Evidence, in the manner and upon the persons listed below:

Dated this 10th day of November 2014.

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