



THOMAS, NIESEN & THOMAS, LLC

Attorneys and Counsellors at Law

THOMAS T. NIESEN
Direct Dial: 717-255-7641
tniesen@tntlawfirm.com

January 22, 2015

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Green Hills Manor and The Heritage of Green Hills v. UGI Energy Services
Docket No. C-2014-2420911

Dear Secretary Chiavetta:

We are counsel to Green Hills Manor and The Heritage of Green Hills in the above matter and are submitting, via electronic filing, their Main Brief pursuant to the Post Hearing Order of Administrative Law Judge Buckley dated December 22, 2014. A copy of the Main Brief is being served upon the persons and in the manner set forth on the certificate of service attached to it.

Sincerely,

THOMAS, NIESEN & THOMAS, LLC

By:

Thomas T. Niesen

Cc: Certificate of Service (w/encl.)
Douglas Walther (via email, w/encl.)

**Before The
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Green Hills Manor and
the Heritage of Green Hills

v.

UGI Energy Services, LLC

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Docket No. C-2014-2420911

**MAIN BRIEF OF GREEN HILLS MANOR AND THE HERITAGE OF GREEN HILLS
ADDRESSING WHETHER THIS COMPLAINT AND ITS REQUEST FOR RELIEF
IS PROPERLY BEFORE THE PUBLIC UTILITY COMMISSION**

Thomas T. Niesen, Esquire
PA ID # 31379
THOMAS, NIESEN & THOMAS, LLC
212 Locust Street, Suite 600
Harrisburg, PA 17101
Tel: 717-255-7641
Fax: 717-236-8278
tniesen@tntlawfirm.com

*Attorney for Green Hills Manor and The
Heritage of Green Hills*

DATED: January 22, 2015

I. INTRODUCTION

This matter involves a dispute concerning the enrollment start date for an electric generation supply agreement between Complainant Green Hills Manor/Heritage of Green Hills (“Green Hills” or “Complainant”) and UGI Energy Services, LLC (“UGIES” or “Respondent”). Green Hills and UGIES met in the summer of 2013 to discuss electric procurement. Green Hills, at that time, was purchasing fixed price electric generation supply from Liberty Power Holdings, LLC (“Liberty Power”).

Subsequent to their meeting in the summer of 2013, the parties moved forward with the intent of initiating electric generation supply service from UGIES at the conclusion of the Complainant’s contract with Liberty Power. This was the objective of both Green Hills and UGIES.

UGIES did not accomplish the transfer of service as intended by the parties. The fixed price electric supply contract with Liberty Power concluded in late December 2013. UGIES, however, did not enroll Complainant for service until late January 2014. The result was a supplier transaction gap of approximately one month from late December 2013 through late January 2014, during which Green Hills was charged a variable rate for electric service from Liberty Power that was \$25,209.71 higher than the rate it would have been charged by UGIES.¹

An evidentiary hearing was held on December 4, 2014 at which Complainant and Respondent presented testimony and exhibits for the evidentiary record and, at the conclusion of which Administrative Law Judge Buckley heard closing argument, while reserving a jurisdictional issue for briefing.

¹ The actual bill for generation service from Liberty Power was \$38,258.76 (191,055 kWh at \$0.20025 per kWh). At the UGIES rate, the bill for generation service would have been \$13,049.06 (191,055 kWh at \$0.0683 per kWh), a difference of \$25,209.71.

Thereafter, by Post Hearing Order dated December 22, 2014, Judge Buckley directed the filing of Main Briefs by January 22, 2015 addressing the following issue:

Whether this Complaint and its requested relief is properly before the Commission, or whether the Complaint is, in essence, a claim for damages that should be properly brought before a Court of Common Pleas?²

Complainant submits this Main Brief in accordance with the Post Hearing Order. For the reasons set forth below, Complainant maintains that the Public Utility Commission (“Commission”) retains jurisdiction to consider the instant Complaint and grant the relief requested herein.

II. THE PUBLIC UTILITY COMMISSION’S JURISDICTIONAL AUTHORITY

A. Recent Decisions of the Public Utility Commission

The Commission has had the opportunity to address its jurisdictional authority over complaints concerning electric generation supply services in several recent proceedings. These proceedings include *Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Opinion and Order entered December 18, 2014) (“*IDT Energy*”) and *Commonwealth of Pennsylvania, et al. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655 (Opinion and Order entered December 11, 2014) (“*Blue Pilot*”), cited in the Post Hearing Order, and, also, *Nadav v. Respond Power, LLC*, Docket No. C-2014-2429159 (Order entered December 19, 2014) (“*Nadav*”), *Werle v. Respond Power, LLC*, Docket No. C-2014-2429158 (Motion of Vice Chairman Coleman and Statement of Commissioner Brown – Public Meeting held January 15, 2015) (“*Werle*”) and *Yaglidereliler Corporation v. Blue Pilot Energy LLC*, Docket No. C-2014-2413732 (Opinion and Order entered January 16, 2015) (“*Yaglidereliler*”).

In *IDT Energy*, the Commission held as follows:

² The Post Hearing Order orders the filing of Reply Briefs by February 2, 2015.

[W]e hold that the Commission has plenary authority under Section 501, 66 Pa. C.S. § 501, to direct an EGS to issue a credit or refund for an over bill. Under Section 501 and related case law, the Commission has broad authority to enforce the provisions of the Code, including the Electricity Generation Customer Choice and Competition Act (Electric Competition Act), 66 Pa. C.S. §§ 2801-2812, and is vested with broad powers to protect the rights of the public. These powers have been interpreted broadly to include both the express powers conferred by the Code and those implied powers necessarily implicit in the Code. *See Fairview Water Co. v. Pa. PUC*, 509 Pa. 384, 502 A.2d 162 (1985).

Directing a billing adjustment for an EGS over bill of supply charges is within the Commission's Section 501 powers to carry out the consumer protections in the Electric Competition Act that are applicable to competitive electricity generation supply service. These consumer protections include the Section 2809(b) requirement that EGSs comply with the Commission's Regulations, including the Chapter 54 billing and disclosure regulations. Having the authority to order EGS credits and/or refunds carries out these statutorily-prescribed consumer protections by ensuring that electric generation supply bills are adjusted accordingly when an EGS, for example, fails to bill a customer in accordance with its disclosure statement, in violation of the Commission's Chapter 54 Regulations and, in turn, Code Section 2809(b). Thus, having the authority to order EGS billing adjustments, including refunds, under the appropriate circumstances, helps ensure that EGSs comply with the Commission's Regulations and bill customers in accordance with their disclosure statement - a fundamental consumer protection under the Electric Competition Act. *See* 66 Pa. C.S. § 2802(14) (“ . . . Electric generation suppliers will be required to obtain licenses, demonstrate financial responsibility and comply with such other requirements concerning service as the commission deems necessary for the protection of the public.”).

Based on the foregoing, ordering EGS billing adjustments for an over bill of supply charges is fully consistent with the policy objectives of the Electric Competition Act as well. Under Section 2802(9) of the Code, 66 Pa. C.S. § 2802(9), electric service, including electric supply, is to be available to customers on reasonable terms and conditions. The ability to order an EGS to provide a refund to a customer that has been over charged in violation of its Disclosure Statement that has been required pursuant to the Code and/or the Commission's Regulations furthers this policy objective by ensuring that customers receive accurate bills and hence, receive service under reasonable terms and conditions.³

³ *IDT Energy* at 16-17 (footnotes omitted); *See also Blue Pilot* at 20 (concluding that the Commission can determine whether an EGS has billed customers in accordance with its disclosure statement); *Nadav* at 7 (concluding that the Commission may require EGSs to provide refunds to retail customers in appropriate circumstances); *Werle*, Statement of Commissioner Gladys M. Brown (noting that the Commission has “authority over EGS rates as they relate to items such as marketing, disclosure, and enrollments” and that “monetary remedies may be appropriately determined by the Commission in certain circumstances”) (citing *Nadav*, *supra*, and *IDT Energy*, *supra*).

Most recently, in its Opinion and Order in *Yaglidereliler*, the Commission reversed the Initial Decision of Administrative Law Judge Salapa and referred for hearing a dispute over electric supplier charges. In doing so, the Commission, pertinent to matters raised in this proceeding and the discussions between Green Hills and UGIES, explained at length as follows:

We are aware that the extreme cold of last winter's weather was unexpected and caught many suppliers and customers alike by surprise. Residential and small business customers, however, are not necessarily well-versed in gas procurement and pricing practices. For this reason, it is all the more important that they be able to rely on all the information provided by their prospective supplier, whether oral or written, and that all disclosures be clear and unequivocal. If the Complainant were led to believe through oral communications that although variable, his rate would remain competitive and reasonable, that may have a bearing on the propriety of Blue Pilot's marketing practices. . . .

Our definition of customer information in Chapter 54 of our Regulations includes written, oral, and electronic communications used by providers to communicate prices and terms to consumers. 52 Pa. Code § 54.2. This information is subject to our review, along with disclosure statements and billing, for compliance purposes. 52 Pa. Code § 54.9. . . .

* * *

Thus, upon receipt of a consumer complaint, we do not believe that an inquiry into the propriety of Blue Pilot's marketing must end with the review of its written disclosure statement, contract, and bills. . . .

With respect to marketing practices, we have previously recognized that not only must consumers take responsibility for their own actions, but also the behavior of all market participants, including our competitive providers, is important to ensure the development of a robust market through informative and reliable marketing practices.

We also find the conduct by [the EGS] to be potentially detrimental to the ongoing enhancements and the ultimate success of Pennsylvania's retail electric market. As we have stated in prior cases, we strongly believe the competitive market can provide consumers with a variety of electric supply products and services, and that consumers do bear some responsibility to make choices that are appropriate for their individual circumstances. *However, for those market forces to work, this Commission must continue to send a clear message to [competitive suppliers] that the egregious*

and deliberate *behavior* utilized in this case, *including the use of potentially misleading statements* that could result in slamming, will not be tolerated.

William Towne v. Great American Power, LLC, Docket No.C-2012-2307991 (Order entered October 18, 2013) at 22 (emphasis added).

Although the Commission does not have traditional ratemaking authority over competitive suppliers and does not regulate competitive supply rates charged by EGSs, the Commission does have subject matter jurisdiction to regulate certain aspects of the services provided by EGSs, including their marketing and sales activities and practices. The Complainant should be afforded the opportunity of a hearing at which he may explain his conversations with Blue Pilot's representatives. These material facts, derived from oral communications beyond the information relied upon by Blue Pilot in its written materials, are all on, or reasonably inferred from, the record before us and are not at all free from doubt. Our Regulations regarding standards of conduct and disclosure for licensees requires that consumers be provided accurate information and that licensees be responsible for any fraudulent, deceptive, or other unlawful marketing or billing acts by employees, agents, or representatives. 52 Pa. Code § 54.43.⁴

In sum, in *IDT Energy*, the Commission held that it has plenary authority under Section 501 of the Code to direct an EGS to issue a credit or refund for an over bill and that, under Section 501 and related case law, it has broad authority to enforce the provisions of the Code, including the Electric Competition Act and is vested with broad powers to protect the rights of the public. These powers have been interpreted broadly to include both the express powers conferred by the Code and those implied powers necessarily implicit in the Code. In *Yaglidereliler*, the Commission held that it has subject matter jurisdiction to regulate certain aspects of the services provided by electric generation suppliers, including their marketing and sales activities and practices.

⁴ Yaglidereliler at 20-22.

B. The Commission Has Jurisdiction to Hear This Matter and This Complaint Is Properly Before It

Applying *IDT Energy* and *Yaglidereliler*, the Commission has jurisdiction to hear this matter and this Complaint is properly before it. A review of the hearing transcript will show that UGIES marketed its service with an intended start date corresponding with the end of the Liberty Power fixed rate contract – whenever that end date might have been. The marketing representative of UGIES, Mr. McCormick, unlike the representatives of Green Hills, is an experienced Certified Energy Professional.

UGIES suggested that the participation of Green Hills’ broker was not necessary to accomplish the transaction, but then “dropped the ball.” UGIES intended to initiate its service without a supplier transaction gap, but failed to take steps necessary to determine the end date of the Liberty Power contract. It failed to coordinate a smooth transition between the end of the Liberty Power contract and the beginning of the UGIES contract and, instead, created supply transaction documents and a supply arrangement that effected a one month supplier transaction gap where none was intended. Simply put, UGIES actions with respect to the marketing and contracting of the electric supply agreement with Green Hills directly caused the predicament Complainant found itself in relative to its energy supply services.

The result ended up costing Green Hills \$25,209.71 more for electric generation service than it would have paid if UGIES had accomplished what Green Hills reasonably believed UGIES would do and relied on UGIES to do. The excuse offered by UGIES that it did not have a copy of the Green Hills agreement with Liberty Power to effectively coordinate a smooth transition between the two services cannot stand. If UGIES needed the Liberty Power agreement to become aware of the end date of the Liberty Power

contract in order to accomplish a smooth transition, it need only have asked Green Hills for the agreement but UGIES never did.

UGIES marketed its service intending to produce a smooth supplier transition without supplier transaction gap. By failing to do so, UGIES violated the Public Utility Code and Commission regulations, including Section 2802(9) of the Electric Competition Act and 52 Pa. Code §54.2 (Definition of Customer Information), §54.4(a) (EGS prices billed must reflect the marketed prices), §54.7 (Advertised prices shall reflect prices in disclosure statements and billed prices) and §54.43 (A licensee is responsible for any fraudulent deceptive or other unlawful marketing or billing acts performed by the licensee, its employees, agents or representatives). Determining whether a violation of such regulations occurred is squarely within the ambit of the Commission's jurisdictional powers.⁵

C. The Commission Has Jurisdiction to Order the Requested Relief

Having established jurisdiction over the subject matter of the Complaint, the Commission also has jurisdiction to order the requested relief, consistent with its holding in *IDT Energy* and other pronouncements made by the Commission in recent cases. In *IDT Energy* specifically, the Commission recognized that billing adjustments would be fully consistent with the policy objectives of the Electric Competition Act.⁶

Here, relief would not be in the form of a refund since UGIES was not Green Hills' supplier during the period at issue. Appropriate relief here, rather, should be a

⁵ See *Blue Pilot* at 17 (confirming that the Commission has jurisdiction over alleged violations of its EGS regulations).

⁶ *IDT Energy* at 18. See also *Nadav* at 7 (concluding that the Commission is authorized to require EGSs to provide refunds to retail customers in appropriate circumstances) and *Werle*, Statement of Commissioner Gladys M. Brown (affirming that the Commission has authority to determine appropriate monetary remedies in EGS complaint cases).

Commission directive that UGIES provide a credit of \$25,209.71 to its Green Hills account. UGIES, in effect, should be required to provide Green Hills with a billing adjustment that reflects UGIES' originally intended marketing objective, i.e., a smooth transition of the service without the one month supplier transition gap. Such relief is just and reasonable given the circumstances and is clearly within the Commission's powers to order.

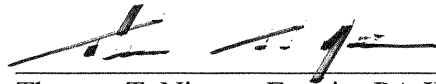
D. In the Absence of Jurisdiction to Order the Relief Requested, the Commission Still Should Address the Substantive Claim

Assuming *arguendo* that the Commission were to conclude that it does not have jurisdiction to order the relief requested above, the Commission should nevertheless address the marketing and sales activity of UGIES relative to the Complainant. With Commission findings and conclusions that UGIES violated the Public Utility Code and Commission Regulations, Green Hills would have the ability to address enforcement and monetary remedy with the court of common pleas. Bifurcation of issues in this way is common in regulatory proceedings. See *Elkin v. Bell Tel. Co. of Pennsylvania*, 420 A. 2d 371 (Pa. 1980) and *DeFrancesco v. W. Pennsylvania Water Co.*, 453 A.2d 595 (Pa. 1982).

III. CONCLUSION

For all the reasons set for the above, Green Hills Manor/Heritage of Green Hills submits that the Public Utility Commission should entertain and sustain this Complaint and direct UGI Energy Services LLC to provide it with a billing adjustment/account credit in the amount of \$25,209.71.

Respectfully submitted,



Thomas T. Niesen, Esquire PA ID # 31379
THOMAS, NIESEN & THOMAS, LLC
212 Locust Street, Suite 600
Harrisburg, PA 17101
Tel: 717-255-7641
Fax: 717-236-8278
tniesen@tntlawfirm.com

*Attorney for
Green Hills Manor and The Heritage of Green
Hills*

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CERTIFICATE OF SERVICE

I hereby certify that I have this 22nd day of January 2015, served a true and correct copy of the foregoing Main Brief Of Green Hills Manor And The Heritage Of Green Hills Addressing Whether This Complaint And Its Request For Relief Is Properly Before The Public Utility Commission, upon the persons and in the manner set forth below:

VIA EMAIL AND FIRST CLASS MAIL, POSTAGE PREPAID

Honorable Dennis J. Buckley
Administrative Law Judge
Pennsylvania Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265
debuckley@pa.gov

Frank H. Markle
Senior Counsel
UGI Corporation
460 North Gulph Road
King of Prussia, PA 19406
marklef@ugicorp.com



Thomas T. Niesen
PA ID # 31379