

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

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January 26, 2015

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 Second Prehearing Memorandum of Joint Complainants Commonwealth of Pennsylvania and the Office of Consumer Advocate, 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	:	

SECOND PREHEARING MEMORANDUM
OF JOINT COMPLAINANTS COMMONWEALTH
OF PENNSYLVANIA AND THE OFFICE OF CONSUMER ADVOCATE

Pursuant to Section 333 of the Public Utility Code, 66 Pa. C.S. § 333, the Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection (BCP) and the Acting Consumer Advocate Tanya J. McCloskey (OCA) (collectively referred to as Joint Complainants), provide the following information:

I. INTRODUCTION

On June 20, 2014, the Joint Complainants filed a Joint Complaint with the Public Utility Commission (Commission) pursuant to, *inter alia*, the Public Utility Code, 66 Pa. C.S. Ch. 28, and the Commission's regulations, 52 Pa. Code Ch. 54, 56 and 111. The Joint Complaint includes seven separate counts and alleges that Energy Services Providers, Inc. d/b/a/ Pennsylvania Gas & Electric (PaG&E or Respondent) violated Pennsylvania law and

Commission orders and regulations. Specifically, the seven counts in the Joint Complaint are: (1) misleading and deceptive promises of savings; (2) slamming; (3) misleading and deceptive welcome letter; (4) lack of good faith handling of complaints; (5) failing to provide accurate pricing information; (6) prices nonconforming to disclosure statement; and (7) failure to comply with the Telemarketer Registration Act (TRA). With respect to relief, the Joint Complainants request that the Commission find, *inter alia*, that Respondent violated the Public Utility Code and the Commission's regulations and Orders; provide restitution to Respondent's customers; impose a civil penalty; order Respondent to make various modifications to its practices and procedures; and revoke or suspend Respondent's Electric Generation Supplier (EGS) license, if warranted.

On July 10, 2014, PaG&E filed Preliminary Objections to the Joint Complaint and an Answer with New Matter to the Joint Complaint generally denying the alleged violations. On July 21, 2014, the Joint Complainants filed an Answer to Preliminary Objections. By Order dated August 20, 2014, Administrative Law Judges Joel H. Cheskis and Elizabeth Barnes (ALJs) granted in part and denied in part PaG&E's Preliminary Objections. Specifically, the ALJs held: 1) that the Commission lacks jurisdiction to hear complaints under the Unfair Trade Practices and Consumer Protection Law (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, but could order refunds pursuant to 66 Pa. C.S. § 1312.

On September 8, 2014, Joint Complaints filed a Petition for Interlocutory Review and Answer to Material Questions with the Commission. Specifically, Joint Complaints sought for the Commission to answer the following questions: (1) Does the Commission have authority and

jurisdiction to determine whether a violation of the CPL and TRA has occurred when considering whether the Commission's regulations—which require compliance with these laws—have been violated and (2) Does the Commission have the authority and jurisdiction to order equitable remedies including restitution. On September 2, 2014, PaG&E filed a Petition for Interlocutory Review and Answer to Material Question with the Commission seeking for the Commission to answer: Does the Commission have statutory authority or subject matter jurisdiction to order electric generation suppliers to issue refunds to customers? On September 12, 2014, Joint Complainants filed a Brief in Opposition to PaG&E's Petition for Interlocutory Review. On September 18, 2014, the Joint Complainants filed a Brief in Support of their Material Questions, and PaG&E filed a Brief in Opposition. The Commission's Orders are pending.¹ On July 30, 2014, Joint Complainants filed a Reply to PaG&E's New Matter.

¹ On September 8, 2014, Joint Complainants also filed Petitions for Interlocutory Review and Answers to Material Questions in three other cases. See Commonwealth of Pennsylvania, by Attorney General KATHLEEN G. KANE, Through the Bureau of Consumer Protection, And TANYA J. McCLOSKEY, Acting Consumer Advocate v. Blue Pilot Energy, LLC, Docket No. C-2014-2427655 (Blue Pilot); Commonwealth of Pennsylvania, by Attorney General KATHLEEN G. KANE, Through the Bureau of Consumer Protection, And TANYA J. McCLOSKEY, Acting Consumer Advocate v. Respond Power, LLC., Docket No. C-2014-2427659; Commonwealth of Pennsylvania, by Attorney General KATHLEEN G. KANE, Through the Bureau of Consumer Protection, And TANYA J. McCLOSKEY, Acting Consumer Advocate v. IDT Energy, Inc., Docket No. C-2014-2427657 (IDT). Also on September 8, 2014, IDT filed a Petition for Interlocutory Review and Answer to Material Question with the Commission.

In the Blue Pilot Petition, Joint Complainants also asked whether the Commission has the authority and jurisdiction to determine whether a violation of the CPL and TRA has occurred when considering whether the Commission's regulations- which require compliance with these laws- have been violated. The Commission issued an Order in the Blue Pilot proceeding (Blue Pilot Order) on December 11, 2014, in which it determined that while it does not have the authority and jurisdiction to determine whether a violation of the CPL and TRA has occurred, it does have jurisdiction over alleged violations of its own Regulations. Blue Pilot Order at 20-21. This jurisdiction includes determining whether the Commission's Regulations prohibiting deceptive, and/or misleading conduct and/or the Commission's telemarketing regulations have been violated by an EGS. Blue Pilot Order at 17-18. Therefore, the Commission concluded that it can hear claims alleging fraudulent, deceptive, and/or misleading conduct brought against Blue Pilot under the Commission's Regulations and claims alleging improper verification of enrollment of residential customers brought against Blue Pilot under the Commission's telemarketing Regulations. Id.

On December 18, 2014, the Commission issued an Order in the IDT Proceeding (IDT Order) in which it addressed the Petitions for Interlocutory Review and Answer to Material Question(s) filed by the Joint Complainants and IDT. In the IDT Petition, the Joint Complainants also asked whether the Commission has the authority and jurisdiction to order equitable remedies including restitution. In the IDT Order, the Commission answered this

On August 25, 2014, a Prehearing Conference was convened and a litigation schedule was adopted for the submission of consumer testimony. Pursuant to the litigation schedule, on November 7, 2014, Joint Complainants served direct testimony from 245 consumer witnesses. Hearings for cross examination of the consumer witnesses were initially scheduled for December 15-19, 2014, and a Further Prehearing Conference to determine the remainder of the litigation schedule was scheduled for January 8, 2015. On November 25, 2014, PaG&E filed a Motion for Continuance of evidentiary hearings. On December 5, 2014, the ALJs granted the Motion for Continuance, rescheduling the hearings for February 24-27, 2015. The ALJs rescheduled the Further Prehearing Conference for January 27, 2015. Accordingly, the Joint Complainants submit the following:

question in the negative. IDT Order at 25-27. In its Petition for Interlocutory Review and Answer to Material Question, IDT asked the Commission whether it has the authority under Section 1312 of the Public Utility Code to order electric generation suppliers to issue refunds to customers. The Commission determined that while it does not have the authority under Section 1312 of the Public Utility Code to order electric generation suppliers to issue refunds to customers, the Commission can direct EGSs to issue refunds for “slamming” or direct refunds when a customer has, otherwise, been switched to an EGS without the customer’s consent pursuant to 52 Pa. Code § 57.177(b). IDT Order at 16-17. Additionally, the Commission noted that it has plenary authority under 66 Pa. C.S. § 501 to direct an EGS to issue a credit or refund for an over bill. Id. at 17. The Commission further stated:

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.

Id. at 17-18. (Internal footnotes omitted.)

Although the Commission’s Order in the PaG&E proceeding is pending, the Commission has indicated that it intends for the Orders in the four proceedings to be consistent with each other. See Commonwealth of Pennsylvania, by Attorney General KATHLEEN G. KANE, Through the Bureau of Consumer Protection, And TANYA J. McCLOSKEY, Acting Consumer Advocate v. Blue Pilot Energy, LLC, Docket No. C-2014-2427655, Motion of Vice Chairman John F. Coleman, Jr. (November 13, 2014).

II. ISSUES

A. Misleading and Deceptive Promises and Welcome Letter

Whether PaG&E engaged in misleading and deceptive conduct in violation of the Commission's regulations at 52 Pa. Code §§ 54.43(f) and 111.12(d)(1). Joint Complaint at Counts I and III and App. A.

B. Slamming

Whether PaG&E engaged in slamming in violation of the Public Utility Code, 66 Pa. C.S. § 2807(d)(1) and the Commission's regulations, 52 Pa. Code § 54.42(a)(9). See Joint Complaint at Count II.

C. Handling of Customer Complaints

Whether Respondent failed to adequately handle customer complaints and use good faith, honesty and fair dealing with Respondent's residential customers with complaints in violation of the Commission's regulations at 52 Pa. Code Ch. 56 and PaG&E's Licensing Orders, License Application of Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as a Supplier and Aggregator of Retail Electric Power, Docket No. A-2010-2212421, Order (May 9, 2011) and License Application of Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as a Supplier and Aggregator of Retail Electric Power, Docket No. A-2010-2212421, Order (Aug. 1, 2011). See Joint Complaint at Count IV.

D. Pricing Information and Disclosure Statement

Whether Respondent's Disclosure Statement complies with the Commission's regulations at 52 Pa. Code §§ 54.5(c) and 54.43(1). See Joint Complaint at Count V and App. B. Whether

PaG&E's prices charged in early 2014 conformed to its variable rate pricing provision in its Disclosure Statement in violation of 66 Pa. C.S. § 2809 and 52 Pa. Code §§ 54.4 and 54.5. See Joint Complaint at Count VI and App. B and C.

E. Failure to Comply with the Commission's Regulations at 52 Pa. Code §§ 53.43(f) and 111.10(a).

Whether Respondent violated and continues to violate the Commission's regulations at 52 Pa. Code §§ 54.43(f) and 111.10(a). See Joint Complaint at Count VII.

F. Remedies

By way of remedies for Respondent's violations of the Public Utility Code and the Commission's regulations and orders, Joint Complainants seek refunds for customers, civil penalties and if warranted, suspension or revocation of Respondent's license. Further, Joint Complainants request that the Commission order PaG&E to discontinue the prohibited conduct and implement procedures to ensure compliance with all applicable laws and the Commission's regulations and Orders.

III. SERVICE ON JOINT COMPLAINANTS

As identified in Joint Complainants Prehearing Memorandum dated August 19, 2014, The OCA will be represented in this case by Candis A. Tunilo and Kristine E. Robinson, Assistant Consumer Advocates. Copies of all documents should be served on the OCA as follows:

Candis A. Tunilo
Kristine E. Robinson
Assistant Consumer Advocates
Office of Consumer Advocate
5th Floor, Forum Place
555 Walnut Street
Harrisburg, PA 17101-1923
Telephone: (717) 783-5048

Facsimile: (717) 783-7152
E-mail: ctunilo@paoca.org
krobinson@paoca.org

The BCP will be represented in this case by John M. Abel and Nicole R. (Beck) DiTomo, Deputy Attorneys General. Copies of all documents should be served on the BCP as follows:

John M. Abel
Senior Deputy Attorney General
Nicole R. (Beck) DiTomo
Deputy Attorney General
Office of Attorney General
Bureau of Consumer Protection
15th Floor, Strawberry Square
Harrisburg, PA 17120
Telephone: (717) 787-9707
Facsimile: (717) 787-1190
E-mail: jabel@attorneygeneral.gov
nditomo@attorneygeneral.gov²

IV. DISCOVERY MODIFICATIONS

Joint Complainants do not propose any modifications to the discovery rules at this time.

On January 22, 2015, Joint Complainants requested an emergency discovery conference call with the ALJs and parties regarding Joint Complainants' objections to Notices and Depositions by Written Questions that PaG&E served on Joint Complainants' consumer witnesses. Joint Complainants object to the Notices and Depositions on the bases that they violate 66 Pa. C.S. § 333 and the Commission's regulations at 52 Pa. Code §§ 5.321(c), 5.345(a) and 5.361(a). On January 23, 2015, the ALJs advised the parties to be prepared to discuss the objections at the Further Prehearing Conference on January 27, 2015. Joint Complainants filed written Objections with the Commission contemporaneously with this Second Prehearing Memorandum. Joint Complainants are prepared to discuss and resolve the Objections at the Further Prehearing Conference.

² Please note Ms. DiTomo's new email address.

V. SETTLEMENT

The parties are engaged in ongoing Settlement discussions. The Joint Complainants are willing to continue to engage in settlement discussions in this matter.

VI. PROPOSED SCHEDULE

Joint Complainants proposed the following schedule for the second half of the litigation schedule to PaG&E for consideration:

Direct Testimony of Expert Witnesses- May 1, 2015

Rebuttal Testimony- June 12, 2015

Surrebuttal Testimony- July 13, 2015

Hearings- July 22-23, 2015

Joint Complainants continue to discuss the schedule with PaG&E and hope to have a schedule that is acceptable to the parties to present to the ALJs at the Prehearing Conference. Joint Complainants will work with the ALJs and the parties to determine the dates for filing briefs in this proceeding. Joint Complainants propose that briefing dates be established at the conclusion of hearings.

VII. WITNESSES

On November 7, 2014, Joint Complainants served 245 pieces of testimony from consumer witnesses. Additionally, as identified in Joint Complainants' Prehearing Memorandum dated August 19, 2014, the Joint Complainants intend to present the direct, rebuttal, and surrebuttal testimonies, as may be necessary, of Dr. Steven L. Estomin and Ms. Barbara R. Alexander. These witnesses will present expert testimony in written form and may also attach various exhibits, documents, and explanatory information which will assist in the presentation of the Joint Complainants' case. Their contact information is as follows:

Steven L. Estomin, Ph.D.
Exeter Associates, Inc.
10480 Little Patuxent Parkway
Suite 300
Columbia, Maryland 21044
E-mail: sestomin@exeterassociates.com

Barbara R. Alexander
83 Wedgewood Drive
Winthrop, ME 04364
E-mail: barbalex@ctel.net

In order to expedite the resolution of this proceeding, the Joint Complainants request that copies of all interrogatories, testimony, and answers to interrogatories be mailed directly to the witnesses identified above as well as mailing a copy to counsel for the Joint Complainants.

Also as identified in Joint Complainants' Prehearing Memorandum dated August 19, 2014, Joint Complainants also intend to call:

Gregory Strupp
Consumer Protection Agent
15th Floor, Strawberry Square
Harrisburg, PA 17120
E-mail: gstrupp@attorneygeneral.gov

VIII. MISCELLANEOUS

During a conference call with the ALJs and parties on October 31, 2014, the ALJs directed Joint Complainants to submit a memorandum of law regarding pattern and practice evidence before the commencement of the hearings for cross-examination of consumer witnesses. Joint Complainants propose to submit the memorandum of law on February 2, 2015.

Respectfully Submitted,



John M. Abel
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Acting Consumer Advocate

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 Second Prehearing Memorandum of Joint Complainants Commonwealth of Pennsylvania and the Office of Consumer Advocate, in the manner and upon the persons listed below:

Dated this 26th day of January 2015.

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