

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Green Hills Manor and the Heritage of Green Hills	:	
	:	
	:	Docket No. C-2014-2420911
v.	:	
	:	
UGI Energy Services, LLC	:	

**REPLY BRIEF OF
UGI ENERGY SERVICES, LLC**

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I. INTRODUCTION

This proceeding was initiated on July 11, 2014, when UGI Energy Services, LLC (“UGIES” or the “Company”) was served with a Complaint filed by Green Hills Manor and the Heritage of Green Hills (“Green Hills”) alleging that service for its four accounts under its contract with UGIES for competitive electric generation supply should have commenced on December 20, 2013, instead of January 20, 2014. In its Complaint, Green Hills requested that the Commission direct UGIES to roll back the start date or negotiate an alternate rate for the lapsed month. At the evidentiary hearing, Green Hills changed the relief it sought and requested that the Pennsylvania Public Utility Commission (“Commission”) reform its contract with UGIES to change the start date to December 20, 2013, and direct UGIES to pay Green Hills \$27,759.50 for the increased expenses for electric generation supply service that it incurred for the billing period at issue. Now, for the first time in a post-hearing brief, Green Hills requests a credit for UGIES’s alleged fraudulent, deceptive, or other unlawful marketing and sales activities.

In a Post Hearing Order¹ issued by Administrative Law Judge Dennis J. Buckley (the “ALJ”) on December 22, 2014, the ALJ directed the parties to submit briefs on the limited issue of whether the Commission has jurisdiction over the relief requested by Green Hills. On January 22, 2015, UGIES and Green Hills submitted their Main Briefs.² UGIES herein submits this Reply Brief in response to Green Hills’ Main Brief.

For the reasons explained below, the Complaint should be dismissed because (1) the Commission lacks jurisdiction over the issues raised in the Complaint and the latest relief

¹ *Green Hills Manor v. UGI Energy Services, LLC*, Docket No. C-2014-2420911 (Dec. 22, 2014) (“Post Hearing Order”).

² In citations, UGIES’s Main Brief is hereafter referred to as “UGIES MB,” and Green Hills’ Main Brief is hereafter referred to as “Green Hills MB.”

requested by Green Hills for the first time in its Main Brief, and (2) UGIES did not engage in fraudulent, deceptive, or other unlawful marketing and sales activities.

II. SUMMARY OF ARGUMENT

Green Hills has violated UGIES's due process rights and failed to comply with the ALJ's Post Hearing Order. In its Main Brief, Green Hills changes its claim and requested relief. At the evidentiary hearing, Green Hills specifically stated that it is seeking contract reformation under 66 Pa. C.S. § 508 and compensation for the increased expenses it incurred by continuing to receive electric generation supply service from Liberty Power Holdings, LLC ("Liberty") for the time period in question. *See* Post Hearing Order at p. 2 ("Counsel for Complainant specifically stated that what is sought is contract reformation"). In its Main Brief, for the first time, Green Hills states that it is requesting a credit for UGIES's alleged fraudulent, deceptive, or other unlawful marketing and sales activities. By waiting until a post-hearing brief to present this new claim and requested relief, Green Hills has denied UGIES notice and a meaningful opportunity to respond to these claims and examine the merits of Green Hills' contentions. Moreover, the ALJ's Post Hearing Order explicitly instructed the parties to examine whether the Complaint and Green Hills' requested relief of contract reformation under 66 Pa. C.S. § 508 were properly before the Commission. Since Green Hills' Main Brief does not address contract reformation at all and discusses an entirely different jurisdictional question, Green Hills wholly failed to comply with the express terms of the Post Hearing Order.

In addition, even if Green Hills were permitted to change its claim and requested relief in its post-hearing brief, the Commission lacks jurisdiction to examine the issues raised in the Complaint and to award the latest requested relief. The Commission's jurisdiction over electric generation suppliers' ("EGSs") activities is limited. Although the Commission has recently stated that it has jurisdiction over fraudulent, deceptive, or unlawful marketing and sales

activities of EGSs, Green Hills presents no evidence of such activity. Rather, Green Hills focuses on the “intent” of UGIES in entering into its contract with Green Hills and whether UGIES failed to fulfill an alleged obligation to start service on December 20, 2013. Such a contract dispute must be brought before the appropriate Court of Common Pleas. Furthermore, it is well-established that the Commission lacks the power to award monetary damages. Green Hills’ “credit” is simply nothing more than expectation damages, which the Commission cannot award. The Commission also cannot direct UGIES to provide a credit because this case does not involve overbilling or slamming by UGIES.

Finally, even assuming, *arguendo*, that the Commission had jurisdiction, there is nothing in the record to suggest that UGIES engaged in any fraudulent, deceptive, or other unlawful marketing and sales activities. Green Hills knew the term of its existing electric supply contract with Liberty Power, while UGIES did not. UGIES incorporated the contractual start dates for Green Hill’s electricity accounts into a Master Power Sales Agreement (“MPSA”) and incorporated Confirmation Agreements, which Green Hills duly executed. UGIES thereafter simply abided by the unambiguous terms set forth in the MPSA and all four customer confirmation agreements. Green Hills also is attempting to introduce parol evidence to create an ambiguity in the contract where none exists. Parol evidence can only be introduced to interpret an ambiguous term in a contract. Moreover, such a contract interpretation question must be handled by the appropriate Court of Common Pleas. Further, UGIES should not be punished for acting in accordance with the express terms of the contract. To do otherwise would have breached the contract and would have slammed Green Hills by starting service before the agreed-upon start date.

III. REPLY ARGUMENT

The Commission must not allow Green Hills, which is a medium-sized commercial customer experienced with shopping, to continually change its claim and requested relief, especially when a new claim is raised for the first time in a post-hearing brief. Further, the issues raised in the Complaint and Green Hills' latest requested relief are not properly before the Commission. To the extent that UGIES should otherwise be held liable for abiding by the express terms of the MPSA and the customer confirmation agreements, that question must be decided by the appropriate Court of Common Pleas. Nevertheless, if the ALJ determines that the issues raised in the Complaint and Green Hills' latest requested relief are properly before the Commission, the Complaint should be dismissed because there is no evidence that UGIES engaged in any fraudulent, deceptive, or other unlawful marketing and sales activities. Thus, for these reasons and those discussed in more detail below, the Complaint must be dismissed.

A. GREEN HILLS' POST-HEARING ATTEMPT TO CHANGE ITS CLAIM AND REQUESTED RELIEF VIOLATES UGIES'S DUE PROCESS RIGHTS AND THE TERMS OF THE ALJ'S POST HEARING ORDER

Green Hills' attempt to change its claim and requested relief in a post-hearing brief violates UGIES's due process rights and fails to comply with the terms of the ALJ's Post Hearing Order. In its Complaint, Green Hills requested that the Commission roll back the start date or negotiate an alternate rate for the December 20, 2013, to January 20, 2014 billing period. At the hearing, Green Hills requested a contract reformation under 66 Pa. C.S. § 508 and, as argued by UGIES in its Main Brief, damages for breach of the reformed contract. Now in a post-hearing brief, for the first time in this proceeding, Green Hills requests a credit for UGIES's alleged violations of the marketing and sales activities provisions under the Pennsylvania Public Utility Code and the Commission's regulations. Changing its claim and requested relief in its Main Brief violates UGIES's due process rights and the ALJ's Post Hearing Order.

UGIES's due process rights are violated by this post-hearing change in Green Hills' claim and requested relief because it had no notice or opportunity to respond on the record regarding either the form of relief (i.e., the "credit") or the underlying claim (i.e., fraudulent, deceptive, or other unlawful marketing and sales activities). *See Barasch v. Pa. PUC*, 546 A.2d 1296, 1305 (Pa. Cmwlth. 1988), *petition for allowance of appeal denied*, 567 A.2d 655 (1989) (observing that parties are entitled to "the essential elements of due process," which are "notice" and "an opportunity to be heard," when the Commission's action is "adjudicatory in nature and involve[s] substantial property rights"). At the hearing, Green Hills specifically stated that it was seeking contract reformation under 66 Pa. C.S. § 508. Green Hills also claimed that it was entitled to compensation from UGIES for the increased expenses it incurred by continuing to receive electric generation supply service from Liberty. After the parties presented evidence based on these claims, Green Hills now seeks a "credit" for alleged fraudulent, deceptive, or other unlawful marketing and sales activities. Due process demands that UGIES be given a meaningful opportunity to develop evidence at the hearing regarding these issues and this form of relief. *See Mid-Atlantic Power Supply Ass'n v. PECO Energy Co.*, Docket Nos. P-00981615, *et al.*, 1999 Pa. PUC LEXIS 30, at *54-55 (Order Entered May 19, 1999) (concluding that a party entitled to due process must be given "adequate notice" and a "[m]eaningful opportunity to be heard," which "includes reasonable examination and cross-examination").

Green Hills must not be permitted to sandbag UGIES with a new claim and requested relief in a post-hearing brief. The Commission prohibits parties from raising new issues for the first time at the briefing stage of a proceeding. *See, e.g., Pa. PUC v. Pa. Power and Light Co.*, Docket Nos. R-822169, *et al.*, 55 P.U.R.4th 185, 57 Pa. PUC 559, 596-97 (Order Entered Aug. 19, 1983) ("Merits aside, it is highly inappropriate for a party to propose a completely new

adjustment for the first time in its brief.”); *Enron Capital & Trade Res. Corp. v. Peoples Natural Gas Co.*, Docket No. R-00973928C0001, 1997 Pa. PUC LEXIS 178, at *10-11 (Nov. 13, 1997) (Recommended Decision) (“Enron cannot be permitted to introduce an argument at the briefing stage which it did not introduce in the evidentiary phase of this proceeding . . . Imposing [the alternative proposal] without the other parties having notice and an opportunity to be heard would violate their due process rights.”), *affirmed*, 1998 Pa. PUC LEXIS 199 (Order Entered Aug. 24, 1998). Green Hills waived its opportunity to make these claims and request this new relief. Therefore, raising these issues in its post-hearing brief has clearly deprived UGIES of notice and a meaningful opportunity to develop evidence at the evidentiary hearing regarding this claim and requested relief. Thus, Green Hills has violated UGIES’s due process rights.

In addition, Green Hills failed to comply with the express terms of the ALJ’s Post Hearing Order by changing its claim and requested relief. As noted by the ALJ in his Post Hearing Order, “[C]ounsel for Complainant specifically stated that what is sought is contract reformation. See, 66 Pa. C.S. § 508.” Post Hearing Order, p. 2. Consequently, the ALJ instructed the parties to brief the following limited issue:

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

Id. Instead of briefing this limited issue of the Commission’s jurisdiction to award the requested relief under 66 Pa. C.S. § 508, Green Hills briefed an entirely different jurisdictional question regarding its newest claim and requested relief. In fact, neither Section 508 nor contract reformation is mentioned anywhere in Green Hills’ Main Brief. Therefore, Green Hills completely failed to comply with the Post Hearing Order.

Green Hills is struggling desperately to shape a claim against UGIES that will legally permit the Commission to impose the extraordinary and unprecedented remedy of passing through the high variable rate charges of another supplier -- Liberty Power -- from whom Green Hills was contractually obligated to take service. Green Hills' constant changes to its claim and requested relief should not be permitted. The courts have long held that the integrity of adjudications must be protected by preventing litigants from "playing fast and loose" with the judicial system by switching positions to suit their own ends. *Sunbeam Corp. v. Liberty Mutual Ins. Co.*, 781 A.2d 1189, 1192 (Pa. 2001), *reargument denied*, 2001 Pa. LEXIS 2597 (Pa. Dec. 5, 2001); *Ligon v. Middletown Area Sch. Dist.*, 584 A.2d 376, 380 (Pa. Cmwlth. 1990). Here, Green Hills repeatedly changes its claim and requested relief to see which one sticks. For reasons discussed in UGIES's Main Brief, contract reformation under 66 Pa. C.S. § 508 is not proper because UGIES is not a "public utility." UGIES MB, pp. 8-9. It is likely that Green Hills changed its requested relief when it realized that arguing such a point would be folly. However, that is no excuse for a litigant to alter its entire claim and requested relief in a post-hearing brief. Moreover, Green Hills' repeated attempts to alter its case to keep it before the Commission only further proves UGIES's point -- this case belongs in a Court of Common Pleas.

B. THE COMMISSION LACKS JURISDICTION OVER THIS DISPUTE

Assuming Green Hills is permitted to present an entirely new claim and requested relief for the first time in a post-hearing brief, the Commission still lacks jurisdiction over the issues raised in the Complaint and the latest relief requested by Green Hills. Green Hills' Complaint is, in essence, a breach of contract claim that seeks damages, over which the Commission wholly lacks jurisdiction. Therefore, for the reasons discussed in more detail below, the Complaint must be dismissed.

1. The Commission Lacks Jurisdiction over the Issues Raised in the Complaint

The Commission lacks jurisdiction over the issues raised in the Complaint. Since the Commission is a “creature of statute,” it only possesses those powers that are granted to it by the Legislature and those “which arise by necessary implication.” *Feingold v. Bell of Pa.*, 383 A.2d 791, 794 (Pa. 1977) (citations omitted). As discussed in UGIES’s Main Brief, the Commission has limited jurisdiction over EGSs and their contracts. *See* UGIES MB, pp. 6-7. Importantly, the Commission has limited jurisdiction over certain EGS activities, which are outlined in Sections 2809 and 2810 of the Pennsylvania Public Utility Code, 66 Pa. C.S. §§ 2809-2810, and the Commission’s relevant regulations, such as 52 Pa. Code §§ 54.3-54.7. These regulations address EGSs’ bill format, disclosure statements, marketing and sales activities, and contract expiration notices. *See id.* The Commission’s regulations also outline standards of conduct for EGSs, one of which is that the “licensee is responsible for any fraudulent[,], deceptive[,], or other unlawful marketing or billing acts performed by the licensee, its employe[es], agents, or representatives.” 52 Pa. Code § 54.43(f).

Green Hills now, for the first time in a post-hearing brief, characterizes its claim as seeking a credit for fraudulent, deceptive, or otherwise unlawful marketing and sales activities performed by UGIES. Specifically, Green Hills alleges in its post-hearing brief that UGIES violated 66 Pa. C.S. § 2802(9) and 52 Pa. Code §§ 54.2, 54.4(a), 54.7, and 54.43. *See* Green Hills MB, p. 7. However, Green Hills provides no further discussion on how these particular statutory and regulatory provisions apply to the facts at hand. This general averment of violations without more is insufficient to support Green Hills’ argument that the Commission has jurisdiction over the issues raised in the Complaint.

For instance, Green Hills fails to articulate how UGIES can violate a Definitions section of the Commission's regulations (see 52 Pa. Code § 54.2), how the facts support a claim that UGIES's billed prices did not reflect the marketed prices (see 52 Pa. Code § 54.4(a)), how UGIES's advertised prices did not reflect prices in disclosure statements and billed prices (see 52 Pa. Code § 54.7), or how UGIES's actions run contrary to the declaration of policy that "[e]lectric service is essential to the health and well-being of residents, to public safety and to orderly economic development, and electric service should be available to all customers on reasonable terms and conditions" (see 66 Pa. C.S. § 2802(9)). Nevertheless, these are four of the five violations that Green Hills raises for the first time in its post-hearing brief. Therefore, at its core, Green Hills' latest argument is that UGIES violated 52 Pa. Code § 54.43 by allegedly engaging in fraudulent, deceptive, or other unlawful marketing or billing acts.

In an effort to support its claim that the Commission has jurisdiction over the issues raised in the Complaint, Green Hills simply cites and quotes large portions of two recent decisions by the Commission. But Green Hills utterly fails to apply these decisions to the case, preferring to rely on broad statements, such as, "Applying *IDT Energy* and *Yaglidereliler*, the Commission has jurisdiction to hear this matter and this Complaint is properly before it." See Green Hills MB, pp. 2-6. A closer examination and an application of the cases cited by Green Hills demonstrate that the Commission does not have jurisdiction over this Complaint.

In *IDT Energy*, the Commission found, among other things, that the Commission has the authority to direct an EGS to issue a credit or refund when a customer has been overcharged in violation of its disclosure statement. See *Commonwealth v. IDT Energy, Inc.*, Docket No. C-2014-2427657, at pp. 16-18 (Order Entered Dec. 18, 2014). Indeed, in its Main Brief, Green Hills block quotes these passages about the Commission's authority to issue refunds for

overcharging. *See* Green Hills MB, p. 3. However, Green Hills is not alleging that UGIES overcharged Green Hills in violation of its disclosure statement, namely because UGIES did not charge Green Hills at all for the billing period in question since it did not provide competitive electric generation supply to Green Hills during that time. Rather, Green Hills requests a credit to compensate it for the allegedly fraudulent, deceptive, or otherwise unlawful marketing and sales activities of UGIES. It is completely unclear how *IDT Energy* provides support for that position, and even more so because Green Hills wholly fails to apply the decision to the facts of this case.

The other case quoted at length by Green Hills is *Yaglidereliler Corp. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2413732 (Order Entered Jan. 16, 2015). *Yaglidereliler* involved a complaint filed by a customer against an EGS for the excessive charges it incurred through a variable rate product. *Id.* at p. 2. The complainant contended that the EGS assured him EGS that his rate was the “most reasonably priced” and that he “never would have expected” for the rate to increase so much. *Id.* at p. 19. The Commission found that it had jurisdiction to evaluate the “propriety of Blue Pilot’s marketing,” particularly if “additional oral information provided by an EGS representative may have had a bearing on the Complainant’s informed decision to agree to a variable rate product with Blue Pilot.” *Id.* at p. 21. Therefore, the Commission found it “does have subject matter jurisdiction to regulate certain aspects of the services provided by EGSs, including their marketing and sales activities and practices.” *Id.* at p. 22. Consequently, the Commission concluded that Blue Pilot was not entitled to a judgment as a matter of law because there were material facts in dispute as to whether Blue Pilot violated 52 Pa. Code § 54.43 by not providing accurate information and by engaging in “fraudulent, deceptive, or other unlawful marketing or billing acts.” *Id.*

Green Hills, on the other hand, wholly fails to substantiate that any of UGIES's marketing or billing acts were fraudulent, deceptive, or otherwise unlawful. Instead, Green Hills focuses on the "intent" of UGIES when entering into its contract with Green Hills. Specifically, Green Hills alleges that "UGIES intended to initiate its service without a supplier gap, but failed to take steps necessary to determine the end date of the Liberty Power contract." *See* Green Hills MB, p. 6. Green Hills is struggling desperately to shape a claim against UGIES that will legally permit the Commission to impose the extraordinary and unprecedented remedy of passing through the high variable rate charges of another supplier -- Liberty Power -- from whom Green Hills was contractually obligated to take service. In reality, Green Hills is truly asking the Commission to interpret the terms and conditions of the MPSA and the customer confirmation agreements to determine UGIES' intent. As discussed at length in UGIES's Main Brief, the Commission does not have jurisdiction to interpret the contract terms at issue. *See* UGIES MB, pp. 7-8. As a result, the Commission does not have the ability to review the MPSA and customer confirmation agreements to determine UGIES' intent. Even if the Commission did have that power, the start date is unambiguously stated in the MPSA and the four customer confirmation agreements. Therefore, UGIES' intent is explicitly laid out in the black and white terms of the contract.

Moreover, Green Hills' argument is that UGIES engaged in fraudulent, deceptive, or unlawful marketing and sales activities by "intend[ing] to initiate its service without a supplier transaction gap, but fail[ing] to take steps necessary to determine the end date of the Liberty Power contract." *See* Green Hills MB, p. 6. In actuality, Green Hills is alleging that UGIES had a duty under its contract with Green Hills to begin service on December 20, 2013, and that UGIES breached that duty. For the reasons discussed in UGIES's Main Brief, the Commission

lacks jurisdiction to interpret the terms and conditions to determine whether a breach of contract occurred. *See* UGIES MB, pp. 7-8. Hence, Green Hills is attempting to present its breach of contract dispute as a violation of the Commission's regulations prohibiting fraudulent, deceptive, or other unlawful marketing and sales activities. This latest attempt by Green Hills to avoid the Courts of Common Pleas must be rejected. Thus, the Commission lacks jurisdiction over the issues raised in the Complaint.

2. The Commission Lacks Jurisdiction over the Requested Relief Even as Reformulated in Green Hills' Main Brief

Green Hills' Complaint should be dismissed because the Commission lacks jurisdiction over the requested relief -- even as reformulated in Green Hills' Main Brief. The latest requested relief is still essentially a claim for damages. Dropping its request for contract reformation under 66 Pa. C.S. § 508 and compensation for the increased expenses, on which the parties were instructed to discuss in their Main Briefs, Green Hills now states that it is seeking a "credit" for \$25,209.71³ to its account. This credit amounts to contract damages, calculated as the difference between the variable rate charges Green Hills paid to Liberty during the December 2013 – January 2014 billing cycle and the charges Green Hills would have paid had it contracted with UGIES to commence service a month sooner. It is well-settled that the Commission does not have the power to award damages. As stated by the Supreme Court of Pennsylvania, "It is clear that the remedial and enforcement powers vested in the PUC by the Public Utility Law were designed to allow the PUC to enforce its orders and regulations but not to empower the PUC to award damages." *Feingold v. Bell of Pa.*, 383 A.2d 791, 795 (Pa. 1977). Previously, Green Hills attempted to sidestep this clear precedent by characterizing its relief as contract reformation. It

³ UGIES notes that this is the amount stated in Green Hills' Main Brief, although the amount of \$27,759.50 was used in the Post Hearing Order and UGIES's Main Brief.

now seeks to avoid this precedent again by re-characterizing its relief as a “credit.” However, the relief requested by Green Hills still amounts to damages, which the Commission wholly lacks authority to award.

As discussed in UGIES’s Main Brief, this is a cause of action ultimately seeking damages for the alleged actions or inactions of UGIES, which is beyond the jurisdiction of the Commission. *See* UGIES MB, p. 10. Green Hills seeks damages from UGIES to compensate it for the expenses that it did not expect to incur during the December 20, 2013, to January 20, 2014 billing period based upon the alleged actions or inactions of UGIES. By definition, Green Hills seeks expectation damages for breach of contract to place it “in as good a position as [it] would have been had the contract been performed, that is, had there been no breach.” *Trosky v. Civil Serv. Comm’n*, 652 A.2d 813, 817 (Pa. 1995) (internal quotation marks omitted) (quoting Restatement (Second) of Contracts § 344 cmt. a). Green Hills alleges that UGIES intended for service to begin on December 20, 2013, but failed to take the steps necessary to ensure a smooth supplier transition. The rates charged by Liberty during that billing period exceeded what Green Hills presumably expected to pay under its contract with UGIES. Green Hills seeks to be compensated for paying these increased expenses so that it can be in as good of a position had the contract been performed by UGIES, meaning that service would have begun immediately after the end of the Liberty contract. Therefore, Green Hills seeks expectation damages from UGIES. Since the Commission lacks the power to award monetary damages, Green Hills’ latest requested relief is not properly before the Commission.

In addition, Green Hills claims it is seeking a credit, not a refund, from UGIES. *See* Green Hills MB, pp. 7-8. Green Hills admits that a refund would be an improper remedy here because UGIES was not the supplier during the December 20, 2013, to January 20, 2014 billing

period, and UGIES agrees with Green Hills. *See* Green Hills MB, p. 7; UGIES MB, p. 12 n.7. However, Green Hills' attempt to distinguish between a credit and a refund is in error because the Commission has made no such distinction when discussing the remedies available from EGSs. *See IDT Energy*, at pp. 17-18; *Nadav v. Respond Power, LLC*, Docket No. C-2014-2429159, at p. 7 (Order Entered Dec. 19, 2014). Both are considered "billing adjustments" by the Commission, and the Commission only has held that it has the power to order an EGS to provide a billing adjustment (whether a credit or a refund) when there has been slamming or overbilling by that EGS. *See IDT Energy*, at pp. 17-18; *Nadav*, at p. 7. In *IDT Energy*, the Commission held that it "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" and to "direct EGS refunds for 'slamming'" or otherwise switching a customer without his or her consent. *Id.* at pp. 17-18 (emphasis added). The Commission stated further that "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." *Id.* at p. 18. In *Nadav*, the Commission found that it did not "lack authority to order a refund or credit," concluding "that a refund is an appropriate remedy when a customer's supplier has been changed without the customer's affirmative consent." *Id.* at p. 7 (emphasis added) (citing 66 Pa. C.S. § 2807(d)(1)). Moreover, the Commission likewise found that the Commission's regulations "require an EGS to provide a full refund to customers of all generation charges resulting from an unauthorized switch." *Id.* (citing 52 Pa. Code § 57.177). In this case, however, Green Hills does not allege slamming or overbilling and, therefore, the Commission lacks the power to order UGIES to provide a billing adjustment, whether it is a credit or a refund.

Green Hills also offers an alternate form of relief for the first time in its Main Brief. *See* Green Hills MB, p. 8. It suggests that the Commission should bifurcate the proceeding and have the Commission address the marketing and sales activity of UGIES and the Court of Common Pleas handle enforcement. *Id.* For reasons discussed previously, proffering this remedy at this late stage of the proceeding violates UGIES's due process rights and the terms of the Post Hearing Order. UGIES submits that the proper result is for the Commission to dismiss Green Hills' Complaint in its entirety. As explained previously explained, the Commission wholly lacks jurisdiction over the issues raised in the Complaint and the latest requested relief. Therefore, the Commission should not bifurcate the proceeding because it lacks jurisdiction over both the issues raised in the Complaint and the requested relief.

C. THE COMPLAINT SHOULD BE DISMISSED BECAUSE GREEN HILLS HAS FAILED TO MEET ITS BURDEN OF PROOF THAT UGIES ENGAGED IN FRAUDULENT, DECEPTIVE, OR OTHER UNLAWFUL MARKETING AND SALES ACTIVITIES

Green Hills' Complaint also should be dismissed because it has failed to meet its burden of proof that UGIES engaged UGIES in fraudulent, deceptive, or other unlawful marketing and sales activities. *See* 66 Pa. C.S. § 332(a); 52 Pa. Code § 54.43(f). At the outset, it is critical to remember that Green Hills is a commercial customer experienced with shopping for competitive electric generation supply. (Tr. 29-30, 61). The contract it entered into with UGIES was an arms-length transaction between an EGS and a commercial customer, and the terms in the MPSA and customer confirmation agreements are explicit regarding the start date.

Green Hills filed this Complaint because it is simply unhappy with the deal it struck and wants compensation for its own failures. If the MPSA and customer confirmation agreements stated the wrong start date, then Green Hills should not have signed them. Green Hills is the only party that had access to the MPSA, the customer confirmation agreements, and its contract

with Liberty. Moreover, Green Hills had several months to review these documents in its possession and find that there would be a gap in service. Under the Commission's regulations and the terms of Green Hills' contract with Liberty, Green Hills should have received multiple written notices of the end of the fixed price period under its contract (Tr. 31) and could have revisited the new contractual start date with UGIES at the time of those notices. It also could have contacted Liberty or Metropolitan Edison Company (its electric distribution company) before the billing period at issue began to see when service would stop with Liberty and begin with UGIES. Considering Green Hills' concerns also only arose after the January bill was generated, it appears that Green Hills failed to take any of these actions. (Tr. 54-58).

In addition, Green Hills is attempting to create an ambiguity where none exists by introducing parol evidence. Parol evidence can only be introduced to interpret an ambiguous term in a contract. *See Yocca v. Pittsburgh Steelers Sports, Inc.*, 854 A.2d 425, 437 (Pa. 2004) (quoting *Estate of Herr*, 161 A.2d 32, 34 (Pa. 1960); citing *Waldman v. Shoemaker*, 80 A.2d 776, 778 (Pa. 1951)). As explained by the Supreme Court of Pennsylvania, "where a term in the parties' contract is ambiguous, 'parol evidence is admissible to explain or clarify or resolve the ambiguity, irrespective of whether the ambiguity is created by the language of the instrument or by extrinsic or collateral circumstances.'" *Id.* Here, however, the start date is unambiguous in the MPSA and all four customer confirmation agreements. Therefore, even if the Commission had jurisdiction to interpret the terms of the contract, which it does not, Green Hills cannot rely on conversations between Green Hills and UGIES that occurred prior to contract execution to interpret the clear and unambiguous start date in the contract. Moreover, even assuming parol evidence could be considered, a Court of Common Pleas would be the appropriate court to oversee and evaluate that evidence.

Further, Green Hills presented no evidence to substantiate its claim that UGIES engaged in any fraudulent, deceptive, or other unlawful marketing and sales activities. The record actually demonstrates that there was nothing fraudulent, deceptive, or unlawful about how UGIES disclosed the start date in the MPSA and the customer confirmation agreements. Though utterly lacking in specificity, it appears that Green Hills' newly ascribed fraud theory is based on an alleged statement by the marketing representative of UGIES, Ryan McCormick, that there would be a "smooth transition" from Liberty to UGIES. It is well-settled under Pennsylvania Law that a business, its agents, or both can be liable for fraudulent misrepresentation if a misrepresentation of fact or law is fraudulently made for the purpose of inducing another to act or refrain from acting.⁴

Mr. McCormick's alleged statement – if made at all⁵ – patently fails to meet any of the required elements of fraudulent misrepresentation. There is no knowing falsehood, no materiality and no intent to mislead by UGIES, and certainly no justifiable reliance on the part of Green Hills. Mr. McCormick presented Green Hills with a pricing offer for a specific term of service, which Green Hills accepted. (Tr. 49). UGIES then prepared and presented the written MPSA and associated confirmations, containing specific service commencement dates for each of Green Hills' electricity accounts, which Green Hills duly executed and considers binding, valid and enforceable. (Tr. 27-28). There is no basis from these facts to determine any fraudulent misrepresentation by UGIES.

⁴ The elements of intentional or fraudulent misrepresentation are as follows:

- (1) A representation;
- (2) which is material to the transaction at hand;
- (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false;
- (4) with the intent of misleading another into relying on it;
- (5) justifiable reliance on the misrepresentation; and
- (6) the resulting injury was proximately caused by the reliance.

Bortz v. Noon, 729 A.2d 555, 560 (Pa. 1999).

⁵ Mr. McCormick stated that he did not recall if he said this or not. (Tr. 48).

Certainly, UGIES should not be held accountable for failing to comply with a non-existent obligation.

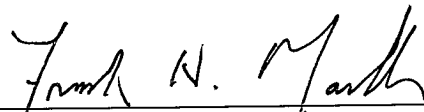
Notwithstanding, UGIES appreciates the unfortunate circumstance that Green Hills found itself in regarding the variable rate of Liberty during the billing period at issue. However, if Green Hills has a sustainable claim for any potential relief, it is with Liberty --- the EGS that actually provided service during the December 2013 – January 2014 billing period – not UGIES.⁶ UGIES should not be held liable for complying with the unambiguous, plain-language terms set forth in the MPSA and customer confirmation agreement. UGIES did not engage in any fraudulent, deceptive, or unlawful marketing and sales activities. UGIES simply abided by the terms of its contract and had it done anything to the contrary (*i.e.*, starting service on December 20, 2013), it would have been in breach of contract and would have slammed Green Hills. Thus, Green Hills has failed to meet its burden of proof that UGIES engaged in fraudulent, deceptive, or other unlawful marketing and sales activities.

⁶ In its Main Brief, UGIES contends that Liberty is an indispensable party to this proceeding and that Green Hills' failure to name it as a party is an independent basis for dismissing the Complaint. *See* UGIES MB, pp. 12-13.

IV. CONCLUSION

WHEREFORE, UGI Energy Services, LLC respectfully requests that Administrative Law Judge Dennis J. Buckley find that the Complaint and its requested relief are not properly before the Pennsylvania Public Utility Commission and dismiss the Complaint of Green Hills Manor and the Heritage of Green Hills.

Respectfully submitted,



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Date: February 2, 2015

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CERTIFICATE OF SERVICE

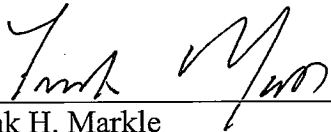
I hereby certify that a true and correct copy of the foregoing has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

VIA E-MAIL & FIRST CLASS MAIL

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Date: February 2, 2015



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