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February 6, 2015

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street – Filing Room
Harrisburg, PA 17120

RE: Commonwealth of Pennsylvania, by Attorney General KATHLEEN G. KANE, Through the Bureau of Consumer Protection, and TANYA J. McCLOSKEY, Acting Consumer Advocate, v. ENERGY SERVICES PROVIDERS, INC. d/b/a PENNSYLVANIA GAS & ELECTRIC; Docket No. C-2014-2427656; **ESPI'S MOTION TO STRIKE PRE-SERVED CUSTOMER TESTIMONY**

Dear Secretary Chiavetta:

Enclosed for filing in the referenced matter is Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric's ("PaG&E") Motion to Strike Pre-Served Customer Testimony. A copy of this document has been served in accordance with the attached Certificate of Service.

Please do not hesitate to contact me if you have any questions regarding this matter.

Very truly yours,

Todd S. Stewart
Christopher M. Arfaa
*Counsel for Energy Services Providers, Inc.,
d/b/a Pennsylvania Gas & Electric*

CMA/das
Enclosure

cc: Administrative Law Judge Elizabeth H. Barnes (w/encl.)
Administrative Law Judge Joel H. Cheskis (w/encl.)
Per Certificate of Service

MAILING ADDRESS: P.O. BOX 1778 HARRISBURG, PA 17105

CERTIFICATE OF SERVICE

I hereby certify that on this day I served a true and correct copy of the foregoing document on the persons listed below by the means indicated:

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DATED: February 6, 2015

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Commonwealth of Pennsylvania, by Attorney
General KATHLEEN G. KANE, Through the
Bureau of Consumer Protection, and TANYA J.
McCLOSKEY, Acting Consumer Advocate,

Complainants,

v.

ENERGY SERVICES PROVIDERS, INC.
d/b/a PENNSYLVANIA GAS & ELECTRIC,
Respondent.

Docket No. C-2014-2427656

NOTICE TO PLEAD

TO: **Candis A. Tunilo**, Assistant Consumer Advocate
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PLEASE TAKE NOTICE that Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric has filed a Motion to Strike Pre-Served Customer Testimony (“Motion”) in the above-captioned proceeding. Pursuant to 52 Pa. Code § 5.103, **you are hereby notified that that a responsive pleading shall be filed within twenty (20) days of service of the Motion.** Your failure to file a responsive pleading will allow the presiding officer to rule on the Motion without a response from you. All pleadings must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served on the undersigned counsel.

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**BEFORE THE
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Commonwealth of Pennsylvania, by Attorney
General KATHLEEN G. KANE, Through the
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ENERGY SERVICES PROVIDERS, INC.
d/b/a PENNSYLVANIA GAS & ELECTRIC,

Respondent.

Docket No. C-2014-2427656

**ENERGY SERVICES PROVIDERS, INC. d/b/a PENNSYLVANIA GAS & ELECTRIC'S
MOTION TO STRIKE PRE-SERVED CUSTOMER TESTIMONY**

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Attorneys for ENERGY SERVICES PROVIDERS, INC. d/b/a PENNSYLVANIA GAS & ELECTRIC

DATED: February 6, 2015

Pursuant to 52 Pa. Code § 5.103 and the Order Granting Continuance entered December 8, 2014, in the above-captioned matter, Respondent, Energy Service Providers, Inc. d/b/a Pennsylvania Gas & Electric (“ESPI”), by its undersigned attorneys, respectfully moves the Presiding Officers for an order striking and ruling inadmissible certain portions of the customer witness testimony and exhibits pre-served by the Joint Complainants. In support of this motion, ESPI states as follows.

I. INTRODUCTION

1. On November 17, 2014, the Joint Complainants pre-served served the written testimony and exhibits of approximately 250 ESPI customers on ESPI and the Presiding Officers. The testimony includes the witnesses’ written responses to a standard set of written questions drafted by the Joint Complainants and provided to each prospective witness.

2. On December 8, 2014, the Presiding Officers issued an Order Granting Continuance, which, among other things, scheduled evidentiary hearings for the purpose of receiving the customer witness testimony into the record after, and subject to, cross examination by ESPI. The Order Granting Continuance also directed ESPI to file any motions to strike the pre-served customer witness testimony no later than February 6, 2015.

3. ESPI moves to strike certain parts of the pre-served customer witness testimony (and exhibits) on three different grounds. *First*, each affirmative answer to Joint Complainants’ question 12.a. – “Did the EGS salesperson guarantee savings?” – and every answer to follow-up question 12.b. (“If yes, please explain”) should be stricken and ruled inadmissible because

question 12.a. “literally puts the desired answer in the mouth of the witness”¹ and thus constitutes an impermissible leading question of a friendly witnesses on direct examination. **Second**, third-party statements offered for the truth of the matter asserted contained in certain witness statements and exhibits should be stricken and ruled inadmissible pursuant to the rule against hearsay. **Third**, the testimony of one witness that on its face demonstrates that the witness’s memory is impaired should be stricken and ruled inadmissible on the basis of incompetency.

II. ARGUMENT

4. The Commission’s Rules vest the Presiding Officers with the authority to control the receipt of evidence, including ruling on the admissibility of evidence, 52 Pa. Code § 5.403(a)(1), and directs them to “actively employ these powers to direct and focus the proceedings consistent with due process,” *id.* § 5.403(b). The Rules further provide: “Written testimony is subject to the same rules of admissibility and cross-examination of the sponsoring witness as if it were presented orally in the usual manner.” 52 Pa. Code § 5.412(c). “While the [Public Utility Commission] as an administrative agency having quasi-judicial functions is not limited by the strict rules relating to the admissibility or exclusion of evidence and actions at law, the essential principles should be observed.”² Accordingly, while not strictly bound by the rules of evidence, the essential principles thereof can be relied upon in proceedings before the

¹ *Com. v. Dreibelbis*, 493 Pa. 466, 476, 426 A.2d 1111, 1116 (1981) (citing *In re Kelly's Estate*, 399 Pa. 153, 159 A.2d 739 (1960)).

² *Pittsburgh and Lake Erie Railroad Company v. Pennsylvania Public Utility Commission*, 85 A.2d 646, 653 (Pa. Super. Ct. 1952).

Commission.³ For the reasons set forth below, the portions of the pre-served customer testimonies identified herein should therefore be stricken and ruled inadmissible at the hearings in this matter.

A. Questions 12a of the Customer Witness Testimonies Is Impermissibly Leading and the Answers to Questions 12.a. and 12.b. Should Therefore Be Stricken and Ruled Inadmissible.

5. Questions 12.a. and 12.b. of the pre-served customer testimonies ask the following questions of every witness:

12. a. Did the EGS salesperson guarantee savings?

b. If yes, please explain.

Question 12.a. is a leading question improperly directed to a friendly witness on direct examination. Therefore, any affirmative answers to that question, and any answers to the follow-up question 12.b., are inadmissible and should be stricken.

6. “[I]t has long been held that one may not lead his own witness with suggestive questions.”⁴ The rule against the use of leading questions on direct examination applies in

³*Bleilevens v. Commonwealth State Civil Service Commission*, 312 A.2d 109, 111 (Pa. Commw. 1973).

⁴*In re Rogan Estate*, 404 Pa. 205, 214, 171 A.2d 177, 181 (1961); *Pascone v. Thomas Jefferson Univ.*, 516 A.2d 384, 388 (Pa. Super. Ct. 1986); *see also* Pa. R.E. 611(c). Pennsylvania Rule of Evidence 611(c) provides:

Leading questions should not be used on direct or redirect examination except as necessary to develop the witness’s testimony. Ordinarily, the court should allow leading questions: (1) on cross-examination; and (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party. A witness so examined should usually be interrogated by all other parties as to whom the witness is not hostile or adverse as if under redirect examination.

administrative hearings.⁵ It also applies with full force to pre-recorded testimony presented in written form.⁶ Furthermore, answers to inappropriate leading questions are not admissible and may not be used to support the examining party's case.⁷

7. "A leading question has been defined as one which puts the desired answer in the mouth of the witness."⁸ In this case, given the context in which the pre-served customer testimony was solicited and produced, the "desired answer" to question 12.a. – "yes, the salesperson guaranteed savings" – is clearly suggested. Each customer witness knows that the Joint Complainants are trying to recover money for ESPI customers (including the customer witnesses) based on allegedly misleading statements by ESPI regarding pricing and savings. In this context, question 12.a., "Did the EGS salesperson guarantee savings," clearly suggests that an affirmative answer is both desired and the one most likely to produce a refund for the customer witness. Had the question been phrased appropriately, customers would not have been

⁵ See *Harbison v. W.C.A.B. (Donelley)*, 496 A.2d 1306, 1309 (Pa. Commw. Ct. 1985) ("While it is true that the referee at these hearings has broad discretion as to evidentiary questions, he cannot allow counsel to literally place the sought-after 'answers into the witnesses mouths'.") (quoting *Tomshuck v. Wallin Concrete Corp.*, 146 Pa. Super. 390, 395, 23 A.2d 74, 77 (1942)).

⁶ See *Pascone v. Thomas Jefferson Univ.*, 357 Pa. Super. at 532, 516 A.2d at 388 ("The limitation on the form of questions which a party may ask his own witness is not modified by Pa.R.C.P. 4020(d) which permits the introduction of deposition testimony by either party. 'The distinction, applicable to live witnesses called to the stand, between the direct examination form of questioning and the cross-examination form of questioning, remains fully applicable.'" (quoting 10 Goodrich-Amram 2d § 4020(d):2).

⁷ *Wilson v. A.P. Green Indus., Inc.*, 2002 Pa. Super 294, ¶12, 807 A.2d 922, 926 (Pa. Super. Ct. 2002) ("Answers to such inappropriate leading questions are not admissible and may not serve as the basis for surviving a summary judgment motion.") (citing Pa.R.E. 611, and *Pascone v. Thomas Jefferson Univ.*, 357 Pa. Super. 524, 516 A.2d 384, 387 (1986)).

⁸ *Com. v. Dreibelbis*, 493 Pa. 466, 476, 426 A.2d 1111, 1116 (1981) (citing *In re Kelly's Estate*, 399 Pa. 153, 159 A.2d 739 (1960)).

encouraged to answer in the affirmative, but rather would have provided their actual, unprompted recollection of the facts.⁹

8. Therefore, the affirmative responses to question 12.a and any follow-up responses to question 12.b. should be stricken from each and every pre-served customer witness testimony and ruled inadmissible into the evidentiary record of this proceeding.¹⁰ Such a determination will also save scarce hearing time that would otherwise be required to cross-examine each witness as to these answers.

B. Third Party Statements Contained In The Customer Witness Statements And Exhibits Should Be Stricken And Ruled Inadmissible Pursuant To The Rule Against Hearsay.

9. A number of the pre-served customer witness testimonies, either in the witness statements or in the attached exhibits, refer to statements supposedly made by persons other than the witness or a PaG&E representative as support for the witness's claims. As statements that (i) were not made while testifying at the hearing in this matter, and (ii) are being offered to prove the truth of the matters asserted, these statements are plainly hearsay. Pa. R.E. 801(c). Since these statements do not fall within any of the exceptions to the rule against hearsay, they are inadmissible and must be stricken from the customer witnesses' testimonies. *See* Pa. R.E. 802.

10. In *Durkin v. Equine Clinics, Inc.*, 546 A.2d 665 (Pa. Super 1988), the Court quoted Justice Musmanno in his decision in *Commonwealth v. Baez*, 494 Pa. 388, 431 A.2d 909 (1981):

⁹ The Joint Complainants easily could have elicited the relevant testimony without signaling the desired answer -- for example: "Did the EGS salesperson say anything about savings and, if so, what?" This is no longer possible now that the desired testimony -- "the EGS salesman guaranteed savings" -- has been suggested to each witness.

¹⁰ *See Wilson v. A.P. Green Indus.*, 2002 Pa. Super 294, ¶ 12, 807 A.2d at 926; *Pascone v. Thomas Jefferson Univ.*, 357 Pa.Super. at 516 A.2d at 387.

The primary object of a trial in American courts is to bring to the tribunal . . . those persons who know of their own knowledge the facts to which they testify. If it were not for this absolute sine qua non, trials could be conducted on paper without the presence of a single flesh and blood witness. But with such a pen-and-ink procedure, there would be no opportunity to check on testimonial defects such as fallacious memory, limited observation, purposeful distortions, and outright fabrication. The great engine of cross-examination would lie unused while error and perjury would travel untrammelled to an unreliable and often tainted judgment. Accordingly, nothing is more adamantly established in American trial procedure than that no one may testify to what someone else told him. He may only relate what is within his own memory brought to him by the couriers of his own senses.¹¹

11. These considerations apply with no less force here: “The Hearsay Rule is not a technical rule of evidence but a basic, vital and fundamental rule of law which ought to be followed by administrative agencies at those points in their hearings when facts crucial to the issue are sought to be placed upon the record.”¹² The rule regarding the admission of hearsay evidence in administrative proceedings can be summed up as follows:

With respect to the evidentiary effect to be given hearsay evidence in administrative proceedings, . . . this court has established a rule that hearsay evidence, properly objected to, is not competent to support a finding of the board, but hearsay evidence, admitted without objection, will be given its natural and probative effect and may support a finding of the board, if it is corroborated by any competent evidence in the record.¹³

12. ESPI hereby objects to and moves to strike the portions of the pre-served witness testimonies and exhibits described below.

13. Statement of Linda Bauer (vol. 2A, p.220). The narrative attached to this testimony (p.224), presumably intended to be an exhibit, contains statements attributed to

¹¹ 546 A.2d at 668-669.

¹² *Bleilevens v. Com. State Civil Serv. Comm'n*, 312 A.2d 109, 111 (Pa. Commw. Ct. 1973)

¹³ *Bracie v. Commonwealth Unemployment Compensation Board of Review*, 382 A.2d 1295, 1297 (Pa. Commw. 1978) (citing *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366 (Pa. Commw. 1976)).

representatives of a non-party, American Power & Gas (“AP&G”). Specifically, the third paragraph contains statements attributed to AP&G representative “Chelsea” that disparage ESPI, and the fourth paragraph contains assertions by “Chelsea” and another AP&G representative, “John,” regarding the plan offered by AP&G to the witness. These statements are clearly hearsay and are offered to prove the truth of the criticisms of ESPI and the comparative merits of AP&G’s plan.

14. Statement of Daniel Jerchau (vol. 5, p.920). Two exhibits to this testimony contain hearsay. Exhibit DJ-1 is a one-page letter to ESPI dated February 14, 2014. (p.924) The second paragraph of Exhibit DJ-1 describes the witness’s ESPI rate and bill for January, 2014 and quotes a statement by an unidentified PPL employee: “The PPL woman said, ‘That is a ridiculous number’.” The fourth paragraph of Exhibit DJ-1 states that the witness contacted Agent Vicki Ross of the PUC and asserts that “Agent Ross agreed that this increase is a ridiculous number....” The fifth paragraph of Exhibit DJ-1 states that “Agent Ross told me that there is talk in Harrisburg right now, of a bill to place a cap on these outrageous increases.”

15. Exhibit DJ-2, a one-page letter to PPL dated February 13, 2014 (p.925), repeats the statements of “Agent Ross.” The second paragraph of Exhibit DJ-2 states that “Agent Ross agreed that this increase is a ridiculous number....,” and the fifth paragraph of Exhibit DJ-2 states that “Agent Ross told me that there is talk in Harrisburg right now, of a bill to place a cap on these outrageous increases.”

16. The third-party statements contained in Exhibits DJ-1 and DJ-2 are hearsay offered to prove that ESPI’s January rate increase was improper.

17. Statement of Thomas and Julia Kester (vol. 2C, p.468). Several documents are included with this testimony as Exhibit T/JK-1, including a letter dated July 2, 2014 to Mr. Greg

Strupp of the Pennsylvania Office of Attorney General (pp. 476-477). The paragraph beginning at the bottom of page 476 and continuing on to page 477 contains multiple references information reported in “local media” and “news accounts” relating to the alleged experiences of other ESPI customers. These assertions are intended to suggest that ESPI acted inappropriately.

18. Statement of David G. Schappell (vol. 2C, p.415). The hearsay in this testimony is contained in the witness’s response to Question 20, which asks: “If you were able to contact your EGS, please describe the relief, if any, the EGS offered you.” (p.417) The response, “I was told by a friend that they keep putting you off and didn’t follow up and call back”, is hearsay offered for the truth of the matter asserted.

19. Statement of Julie Smith (vol. 5, p.939). Exhibit JS-1 to this testimony (a letter dated September 18, 2014 to counsel for the Office of Attorney General, together with several attachments) contains inadmissible hearsay in the form of an email from a non-witness, which appears to be offered to prove the level of electric bills for a previous owner(s) of a property. (p.949) The only conceivable purpose of including this exhibit is to prove the stated levels of the previous electric bills.

20. Each of the statements described above was made outside the hearing of this matter by a person who will not be subject to cross-examination. There is no basis to conclude that the hearsay statements are trustworthy, as they obviously were procured as part of the witness’ participation in this matter against ESPI. They do not fall within any of the exceptions to the rule against hearsay, and therefore they should be stricken from the testimonies and ruled inadmissible at hearing. Pa. R.E. 802.

C. Testimony That Demonstrates Witness Incompetence Due To Impaired Memory Should Be Stricken.

21. Witness Albert Zusman (vol. 5, pp.993-999) includes a letter to counsel for the Office of Attorney General as part of his written testimony. (p.996) In that letter, he states: “Sadly, I must tell you that at age 74 my memory is not what it once was. I fear that many of the points on the form that you have asked me to complete are no longer clear to me.” (p.996)

22. The Pennsylvania Rules of Evidence provide a person is incompetent to testify “if the court finds that because of a mental condition or immaturity the person: ... has an impaired memory.” Pa. R.E. 601(b)(3).

23. Mr. Zusman’s forthright admission of memory impairment due to advanced age establishes that he is incompetent to testify in this proceeding. While it could be argued that this determination should await *voir dire* before the Presiding Officers, the ensuing questions may be embarrassing or even humiliating to the witness. Rather than subjecting Mr. Zusman to such questioning, ESPI submits that the witness’s own statement should be accepted as evidence of an impaired memory due to advanced age sufficient to render him incompetent to testify. Such a determination *in limine* will also save scarce hearing time.

III. CONCLUSION

For all of the foregoing reasons, ESPI respectfully requests that the Presiding Officers grant this Motion and enter Order that provides:

1. That each and every affirmative answer to question 12.a. of the customer witness testimonies, and each and every follow-up answer to question 12.b., is inadmissible and shall be stricken from each and every customer witness statement introduced into the record of this matter;

2. That the hearsay statements identified in ESPI's Motion are inadmissible and shall be stricken from the respective customer witness statements and exhibits introduced into the record of this matter;

3. That the testimony of Mr. Albert Zusman is inadmissible and shall not be introduced into the record of this matter;

4. That the Joint Complainants shall provide corrected copies of each customer witness statement and exhibit affected by this Order at the hearings scheduled for February 24-27, 2015; and

5. Such further relief as may be just and reasonable.

Respectfully submitted,

DATED: February 6, 2015



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