

**ECKERT  
SEAMANS**  
ATTORNEYS AT LAW

Eckert Seamans Cherin & Mellott, LLC  
213 Market Street  
8<sup>th</sup> Floor  
Harrisburg, PA 17101

TEL 717 237 6000  
FAX 717 237 6019  
www.eckertseamans.com

Carl R. Shultz  
717.255.3742  
cshultz@eckertseamans.com

March 6, 2015

**Via Electronic Filing**

Rosemary Chiavetta, Secretary  
PA Public Utility Commission  
PO Box 3265  
Harrisburg, PA 17105-3265

Re: Pramukh Swami Maharaj LLC v. Liberty Power Holdings, LLC  
Docket No. C-2014-2419263

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Liberty Power Holdings, LLC's Post-Hearing Brief with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,



Carl R. Shultz

CRS/jls  
Enclosure

cc: Hon. Jeffrey A. Watson (w/enc.)  
Cert. of Service (w/enc.)

## Certificate of Service

I hereby certify that I have, this day, effected service of a true and correct copy of the forgoing **Brief** upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121, as follows:

### Via U.S. Mail

Thomas T. Niesen, Esquire  
Charles E. Thomas, III, Esquire  
Thomas Niesen & Thomas, LLC  
212 Locust Street, Suite 600  
P.O. Box 9500  
Harrisburg, Pa 17108-9500

*Counsel for Complainant  
Pramukh Swami Maharaj LLC*

Date: March 6, 2015



---

Carl R. Shultz, Esquire  
Attorney for Liberty Power Holdings, LLC

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pramukh Swami Maharaj LLC,	:	
Complainant	:	
	:	Docket No. C-2014-2419263
v.	:	
	:	
Liberty Power Holdings, LLC	:	
Respondent	:	

---

**LIBERTY POWER HOLDINGS, LLC'S  
POST-HEARING BRIEF**

---

Carl R. Shultz, Esquire  
(I.D. No. 70328)  
Eckert Seamans Cherin & Mellott, LLC  
213 Market Street, 8<sup>th</sup> Floor  
Harrisburg, PA 17101  
Telephone: 717-237-6000

**Attorney for Liberty Power Holdings, LLC**

## Table of Contents

	Page
<b>TABLE OF AUTHORITIES</b> .....	<b>ii</b>
<b>I. INTRODUCTION</b> .....	<b>1</b>
<b>II. COUNTER-STATEMENT OF THE CASE</b> .....	<b>1</b>
<b>III. SUMMARY OF ARGUMENT</b> .....	<b>3</b>
<b>IV. ARGUMENT</b> .....	<b>4</b>
A. The Complainant Is A Medium-Sized Business.....	4
B. No Violation of Applicable Regulations Was Alleged .....	5
C. Complainant Had Valid Contract With Liberty Power .....	7
D. Liberty Power Provided Adequate and Accurate Information On Contract Expiration.....	9
1. Terms .....	9
2. Notices .....	13
E. Liberty Power Charged A Reasonable Price for Electric Generation Service In The Billing Periods of January 2014 And February 2014 .....	16
F. The Complainant Is Not Entitled To The Requested Relief.....	18
G. The Additional Allegations Of Impropriety Are Without Merit .....	20
H. Complainant Has Failed To Satisfy Its Burden Of Proof.....	21
<b>V. CONCLUSION</b> .....	<b>22</b>

## Table of Authorities

Cases	Page(s)
<i>Allport Water Auth. v. Winburne Water Co.</i> , 393 A.2d 673 (Pa. Super. 1978) .....	12
<i>Bee v. Unemployment Compensation Board of Review</i> , 119 A.2d 558 (Pa. Super. 1956) .....	14
<i>Chartiers Industrial and Commercial Development Authority v. Allegheny County Board of Property Assessment Appeals and Review</i> , 645 A.2d 944 (Pa. Cmwlth. 1994), <i>appeal denied</i> , 653 A.2d 1234 (Pa. 1994).....	14
<i>City of Pittsburgh v. PUC</i> , 43 A.2d 348 (Pa. Super 1945) .....	10, 17
<i>Commonwealth Dept. of Public Welfare v. UEC, Inc.</i> , 397 A.2d 779 (Pa. 1979).....	12
<i>Commonwealth v. Shaffer</i> , 288 A.2d 727 (Pa. 1972).....	14
<i>Elkin v. Bell</i> , 420 A.2d 371 (1980).....	12
<i>Elliot Co. v. Workers' Comp. Appeal Bd. (Shipley)</i> , 785 A.2d 480 (Pa. Cmwlth. 2002).....	22
<i>Erie Resistor Corp. v. Unemployment Comp. Bd. of Review</i> , 166 A.2d 96 (Pa. Super. 1961) .....	22
<i>Feingold v. Bell</i> , 383 A.2d 791 (Pa. 1977).....	10, 12
<i>Hughes v. Pa. State Police</i> , 619 A.2d 390 (Pa. Cmwlth 1992).....	10
<i>Murphy v. Pa. Dept. of Public Welfare, White Haven Center</i> , 480 A.2d 382 (Pa. Cmwlth. 1984).....	22
<i>Norfolk &amp; Western Ry. Co. v. PUC</i> , 413 A.2d 1037 (Pa. 1980).....	22
<i>Pettko v. Pennsylvania American Water Co.</i> , 39 A.3d 473 (Pa.Cmwlth. 2012).....	15
<i>Philadelphia Gas Works v. PUC</i> , 898 A.2d 671 (Pa. Cmwlth. 2006).....	22
<i>Roberts v. Martorano</i> , 235 A.2d 602 (Pa. 1967).....	10
<i>Yellow Cab Company v. PUC.</i> , 524 A.2d 1069 (Pa. Cmwlth. 1987).....	22

**Administrative Cases**

*Commonwealth of Pennsylvania, et al. v. Blue Pilot Energy, LLC*,  
PUC Docket No. C-2014-2427655, Opinion and Order (December 11, 2014) .....passim

*Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.*,  
PUC Docket No. C-2014-2427657, Opinion and Order (December 18, 2014) .....passim

*Ellis v. PECO Energy Co.*,  
Docket No. C-2011-2256958, Initial Decision (May 17, 2013)..... 17

*Nadav v. Respond Power LLC*,  
Docket No. C-2014-2429159, Opinion and Order (December 12, 2014) ..... 18

*Petition of PECO Energy Company for Approval of its Default Service Plan*,  
Docket No. P-2012-2283641, Opinion and Order (March 12, 2014)..... 18

*Review of Rules, Policies and Consumer Education Measures Regarding Variable  
Rate Retail Electric Products*, Docket No. M-2014-2406134, Opinion and Order  
(March 4, 2014) ..... 18

*Shastri Narayanswarupdas, LLC v. Liberty Power*,  
Docket No. C-2014-2420139, Initial Decision (January 25, 2015).....6, 7

*Thom Greco, d/b/a Phoenix Estates v. PPL Electric Utilities Corporation*,  
Docket Nos. C-2010-2198079; C-2011-2229033, Opinion and Order (August 31, 2012) ..... 14

*Thomas Masters v. Duquesne Light Company*,  
PUC Docket No. C-2013-2382732, Initial Decision dated April 17, 2014, adopted by Final  
Order (May 28, 2014) ..... 14

*Tracey D. Friz v. Respond Power LLC and PPL Electric Utilities Corporation*,  
Docket No. F-2014-2453884, Initial Decision (February 11, 2015) ..... 19

**Statutes**

**Page(s)**

13 Pa. C.S. § 2209 ..... 11

13 Pa. C.S. § 2305 ..... 11

2 Pa. C.S. § 704 ..... 22

66 Pa. C.S. §§ 101, *et seq.* ..... 10

66 Pa. C.S. § 332 ..... 22

66 Pa. C.S. § 501 ..... 19

<b>Regulations</b>	<b>Page(s)</b>
52 Pa. Code § 5.231.....	21
52 Pa. Code § 52.....	4
52 Pa. Code § 54.....	4, 5, 6, 20
52 Pa. Code § 57.174.....	20
52 Pa. Code § 69.401.....	21
52 Pa. Code §§ 111.1-111.14 .....	6
52 Pa. Code §§ 51.1 to 54.3.....	5

**Other Authorities**

<i>Disclosure Statement for Residential and Small Business Customers; Notices of Contract Expiration or Changes in Terms for Residential and Small Business Customers, 44 Pa.B. 3484 (June 14, 2014) .....</i>	6
<i>Standards for Changing a Customer's Electricity Generation Supplier, 44 Pa.B. 3539 (June 14, 2014).....</i>	14
<i>Standards for Changing a Customer's Electricity Generation Supplier, 44 Pa.B. 3483 (June 13, 2014).....</i>	20

**I. Introduction**

Liberty Power Holdings, LLC (“Liberty Power” or “Respondent”) respectfully submits this Post-Hearing Main Brief (“Brief”) pursuant to the agreed-upon briefing schedule (wherein both parties would submit initial briefs on March 6, 2015 and reply briefs on March 20, 2015) for the telephonic hearing held by Administrative Law Judge (“ALJ”) Jeffrey A. Watson on Friday, December 19, 2014 in the above-captioned matter.

**II. Counter-Statement Of The Case**

Complainant is a medium-sized business. It has peak loads above 25 kW, but below 500 kW. It is neither a residential nor a small business customer as those terms are defined in Chapters 54 and 111 of the Commission’s Regulations.

Complainant enrolled electric accounts with Liberty Power on a fixed rate product for a 30-month term. Electric generation service under that fixed price Contract began in June 2011 and ended in December 2013.

Prior to the expiration of the 30-month fixed price agreement, Liberty Power informed the Complainant that service by Liberty Power would continue under a variable price agreement – if no other action was taken by the Complainant. The renewal (or continuation) provision was contained in Liberty Power’s Terms and Conditions (which Complainant acknowledged receiving by signing the fixed price agreement). That continuation provision also stated that two notices would be sent to the Complainant prior to the expiration of the 30-month term. The two notices (required by the fixed price agreement) were sent to the Complainant (at the Complainant’s billing address) on September 13, 2013 (Initial Notice) and October 15, 2013 (Renewal Notice). The notices were not returned to Liberty Power, and are legally presumed to have been received by the Complainant. No evidence was presented to rebut that presumption.

The Complainant did not act prior to the expiration of the 30-month fixed price agreement to (a) renew with Liberty Power under different terms (b) select another electric generation supplier, or (c) return to default service. Accordingly, following the end of the said fixed price agreement, electric generation service by Liberty Power continued under a variable price agreement.

Complainant's meters were read on (or about) January 15, 2014. Liberty Power received a de-enrollment notification from PECO for the Complainant's accounts on January 22, 2014. Electric generation service from Liberty Power to the Complainant's accounts under variable prices continued until Complainant's next meter read date, February 17, 2014. At that time, both of said accounts were returned (by PECO) to default service. No early termination or cancellation fees were charged by Liberty Power.

The Complainant is unhappy with the variable price charged by Liberty Power for two billing periods, January 2014 and February 2014. Each of these billing periods followed the expiration of the 30-month term of the fixed price Contract. The variable rate charged by Liberty Power was reasonable. The variable rates reflected market conditions and were consistent with the variable price provision in Liberty Power's Rollover Rate Plan Terms and Conditions, which was provided with the aforementioned notices.

The Complainant requested that a billing adjustment so that the price from its expired fixed price Contract would replace the variable price charged by Liberty Power.

### **III. Summary Of Argument**

The Complainant did not satisfy its burden of showing that Liberty Power failed to provide contract documents and notices to the Complainant. The record shows that the Complainant was sent a copy of the Terms, on more than one occasion. The Terms, the Initial Notice and the Renewal Notice are legally presumed to have been received by the Complainant, and no evidence was presented by the Complainant to rebut that presumption.

The Complainant did not show that any rate charged by Liberty Power was unreasonable. The Commission does not regulate Liberty Power's rates, and no effort was made by the Complainant to show that the variable rate charged in the billing periods of January and February 2014 were calculated in error or in breach of the contractual variable rate provision. It is well-settled that personal opinion (based on a simple comparison with the price-to-compare) is not sufficient to show that Liberty Power's rates were unreasonable.

The Complainant did not establish its entitlement to the requested relief. The Complainant did not demonstrate a violation of applicable statute, regulations or orders. And, under the circumstances presented by this Complaint, the Commission's determination of a reasonable rate for Liberty Power would constitute impermissible "rate regulation." The request for adjustment is being made without regard to (a) the pricing provision in Liberty Power's Rollover Variable Rate Plan and (b) Liberty Power's costs to provide electric generation service under the then-applicable market conditions.

#### IV. Argument

The Complainant is not entitled to any relief, and the Formal Complaint must be denied. At its core, the Formal Complaint alleges that the rates charged by Liberty Power – following the end of the 30-month fixed price Contract – were too high. However, the Complainant did not satisfy its burdens. The Complainant has not raised issues that are within the jurisdiction of the Commission, and key elements are missing from the Complainant’s case.

##### A. **The Complainant Is A Medium-Sized Business.**

The Complainant is a business. The Complainant has non-residential PECO electric accounts. Complainant Exhibit 1, Complainant Exhibit 3; Complainant Exhibit 4; Liberty Power Exhibit 1. These electric accounts are associated with the “Rodeway Inn” in Springfield, Pennsylvania. Tr. 18. The Complainant uses a different address (i.e., the “billing address”) to receive bills and correspondence for said accounts. Complainant Exhibit 1, Complainant Exhibit 3; Complainant Exhibit 4; Liberty Power Exhibit 1; Liberty Power Exhibit 2; Liberty Power Exhibit 3. The Complainant’s billing address is located in Baltimore, Maryland. *Id.*

The Complainant is a medium-sized business customer. It is not a “small business customer” because it has peak loads of more than 25 kW. Chapter 54 of the Commission’s regulations defines a “small business customer” as a “... corporation ... or other business entity that receives electric service ... whose maximum registered peak load was less than 25 kW within the last 12 months.”<sup>1</sup> 52 Pa. Code § 54.2 (definitions). In fact, each of the subject accounts had loads of greater than 25 kW in the applicable months. *See* Complainant Exhibit 3 (327.kW

---

<sup>1</sup> The definition of “small business customer” consists of Section 52.2 contains a two-part conjunctive definition. 52 Pa. Code § 54.2. Only the second part of the definition (relating to peak load) is set forth above. The applicability of the customer information regulations on small business customers is addressed at 52 Pa. Code § 54.1(b). *See* footnote 2, *infra*.

and 163.80 kW); Complainant Exhibit 4 (50.60 kW and 37.80 kW). And, the 13 month-usage information provided in those records shows that similar usage occurred in earlier periods. *Id.* It should be noted that the Complainant does not have loads greater than more than 500 kW. So, the Complainant would not be considered to be a large commercial customer.

**B. No Violation of Applicable Regulations Was Alleged**

The Complainant did not demonstrate a violation of applicable statute, regulations or orders. No violations or statute or orders was alleged in the Complaint or proven at the hearing.

When serving medium or large business customers, Liberty Power is required to abide by Sections 54.1 to 54.3 of the Commission’s “Customer Information” Regulations.<sup>2</sup> 52 Pa. Code §§ 51.1 to 54.3. Section 54.1 explains the purpose of the Customer Information Regulations. Section 54.2 provides definitions for said Regulations. Section 54.3 relates to certain marketing and sales activities. The Commission’s standards of conduct also relate to marketing and sales activities by electric generation suppliers (“EGSs”). *See, e.g.*, 52 Pa. Code §§ 54.43(1), 54.43(f), 54.122(3).

To be clear, additional regulations exist. These regulations are not applicable to EGSs serving medium or large business customers. These inapplicable regulations apply to EGSs serving residential customers and small business customers. The Commission also has marketing and sales rules applicable to residential and small business customers at 52 Pa. Code §§ 54.6 and

---

<sup>2</sup> 52 Pa. Code § 54.1(b) (“As to the scope of this subchapter, this section [54.1] and § § 54.2—54.3 apply to all customers, including large commercial and industrial customers. Sections 54.4—54.9 apply only to residential and small business customers, as the term is defined in § 54.2 (relating to definitions).”).

{L0578939.2}

54.7. Said regulations include requirements on bill format,<sup>3</sup> disclosure statements,<sup>4</sup> marketing and sales activities,<sup>5</sup> and contract expiration notices.<sup>6</sup> The Commission also has regulations 52 Pa. Code §§ 111.1-111.14 that are applicable to residential customers only. In addition, EGSs serving residential customers also are required to comply with the standards and billing practices in Chapter 56 of the Commission's Regulations.

Here, at the hearing, no violation of regulations applicable to medium business customers (such as 52 Pa. Code §§ 54.1 to 54.3, 54.43(1), 54.43(f), 54.122(3)) was alleged or proven by the Complainant. Instead, Complainant sought to provide violations of the Commission's requirements on disclosure statements (52 Pa. Code § 54.5) and contract expiration notices (52 Pa. Code § 54.10). But, as noted, the said regulations are not applicable to a medium business customer, such as the Complainant.

In January 2015, ALJ Jandebeur issued an Initial Decision in the matter of *Shastri Narayanswarupdas, LLC v. Liberty Power*, Docket No. C-2014-2420139, Initial Decision dated January 25, 2015 ("Shastri"),<sup>7</sup> dismissing a complaint because that Complainant, also a hotel, did

---

<sup>3</sup> 52 Pa. Code § 54.4.

<sup>4</sup> 52 Pa. Code § 54.5.

<sup>5</sup> 52 Pa. Code §§ 54.3, 54.6, and 54.7; 52 Pa. Code §§ 54.43(1) and 54.43(f); 52 Pa. Code §§ 54.122(3).

<sup>6</sup> 52 Pa. Code § 54.10 (effective June 2014). This regulation is prospective only. *Disclosure Statement for Residential and Small Business Customers; Notices of Contract Expiration or Changes in Terms for Residential and Small Business Customers*, 44 Pa. Bull. 3484, 3522 (June 14, 2014). That regulation was promulgated after the relevant events set forth in the Complaint had already occurred.

<sup>7</sup> In *Shastri* the period for filing exceptions lasts until March 11, 2015, which is 20 days from February 19, 2015 (the date on the Secretarial Letter serving notice of that Initial Decision).

not meet its burden of proof to show. The logic and conclusion in *Shastri* may be summarized as follows:

The Complainant is not a small business customer. ... The Complainant argues that it did not receive notices of the term expiration date from the Respondent. The Customer Terms and Conditions that are part of the contract indicated that the Complainant would receive notice of its upcoming term expiration. The Respondent argues that they were sent on September 13, 2013, and October 15, 2013, and were not returned as undeliverable, and therefore presumed received. ... There is no requirement in the Public Utility Code that a [non-small] commercial customer receive any additional notices, therefore, I will not rule on whether it was received or not. ... The Complainant did not meet its burden of proof to show that the Respondent is responsible or accountable for the problem described in the Complaint. ... The Complainant is not entitled to a refund.

*Shastri*, Initial Decision, pp. 4-6.

Liberty Power submits that the same result should be reached in this proceeding. To this end, Liberty Power notes that the decision in *Shastri* is particularly relevant because (a) the testimony on behalf of that hotel was presented by Jatin Thakker, who also presented testimony in this matter on the subject hotel, (b) that hotel was also represented by the same legal counsel as the subject hotel; and (c) both proceedings raised the same issues against Liberty Power.

### **C. Complainant Had Valid Contract With Liberty Power**

The Complainant was a party to a valid and enforceable contract with Liberty Power for electric generation supply service. The Complainant enrolled its electric accounts with Liberty Power on fixed rate product (\$0.095 kWh) for a 30 month term. Complainant Exhibit 1; Liberty Power Exhibit 1 at Plan Description and Written Authorization. Liberty Power began providing electric generation service to Complainant, under that agreement, on June 15, 2011. Tr. 57. By its terms, said 30-month term expired in December 14, 2013. Tr. 57.

The entire agreement between the Complainant and Liberty Power consists of (a) the signed Energy Services Enrollment Agreement (“Written Authorization”); (b) Liberty Power’s Terms and Conditions (“Terms”); and (c) the Liberty Power Plan Description (“Plan Description”) (collectively, the “Contract”). Liberty Power Exhibit 1, at Terms, p. 1, “Entire Agreement” Paragraph. The complete Contract is Liberty Power Exhibit 1.

Each of the foregoing documents, including the Terms, were sent to the Complainant. Tr. 57. The Complainant could then accept the Contract by signing and returning a copy of the Written Authorization. Tr. 58. This was done. Tr. 46.; Complainant Exhibit 1; Liberty Power Exhibit 1. In doing so, the Complainant acknowledged receipt of the Terms. Tr. 46; Liberty Power Exhibit 1, at Written Authorization. The face-side of the Written Authorization states (in the relevant part) that:

By signing below, you confirm that ... you have received a copy of this Agreement and the Customer Terms and Conditions, have read each of them and under the contents.

*Id.* That provision appears in boldface type directly above the signature line. Liberty Power then sent a copy of the complete Contract to the Complainant via a “Welcome Kit.” Tr. 57-58. The Welcome Kit was sent to the Complainant at the Complainant’s billing address. Tr. 57-58.

**D. Liberty Power Provided Adequate and Accurate Information On Contract Expiration**

Liberty Power provided adequate and accurate information to the Complainant. Specifically, the Complainant was adequately and accurately informed that its electric accounts would be switched to variable rates upon the expiration of the 30-month fixed price product - if no other action was taken by the Complainant.

1. Terms

The Terms provide that, following the end of the 30-month fixed price product, electric generation service by Liberty Power will continue on a variable rate - if no other action is taken by the Complainant. Liberty Power Exhibit 1, at Terms, p. 1, “Term and Automatic Renewal” Paragraph.

To avoid the plain language in the Terms, the Complainant raises a series of arguments. None of the Complainant’s arguments regarding the Terms should be adopted by the Commission.

*Commission Jurisdiction Over The Terms*

First, the Complainant argues that the Terms make the regulations applicable to small business customers applicable to the Complainant (who as discussed above is not a small business customer for purposes of the regulations). Tr. 51-52; 59-60. **This argument contradicts the law.**

The Terms in an agreement cannot change the scope of the Commission’s jurisdiction or the application of the Commission’s regulations. To begin, it is well settled that the Commission may not exceed its jurisdiction and must act within it. *City of Pittsburgh v. PUC.*, 43 A.2d 348

{L0578939.2}

(Pa. Super 1945) (Pittsburgh). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967) (*Roberts*). Subject matter jurisdiction is a prerequisite to the exercise of the power to decide a controversy. *Hughes v. Pa. State Police*, 619 A.2d 390 (Pa. Cmwlth 1992) (*Hughes*). As a creation of the legislature, the Commission possesses only the authority that the state legislature has specifically granted to it in the Public Utility Code, 66 Pa. C.S. §§ 101, *et seq.* Its jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. *Feingold v. Bell*, 383 A.2d 791 (Pa. 1977) (*Feingold*).

#### *Scope Of The Integrated Contract*

Next, the Complainant argues that the Terms are not a part of the entire agreement between the Complainant and Liberty Power.<sup>8</sup> **This is not the case.** The Terms are an integrated part of the Contract.

The plain language in the Written Authorization references both the Terms and the Plan Description. Liberty Power Exhibit 1, at Written Authorization. The plain language of the Written Authorization explicitly states that other terms and conditions are memorialized in the Terms. Liberty Power Exhibit 1, at Written Authorization (explaining that the Early Termination Fee) is described in the “Termination of Service” section of the Terms. To emphasize the

---

<sup>8</sup> It should be noted that this argument contradicts the above-described jurisdictional argument made by the Complainant. The Complainant must accept that the Terms are a part of the Contract in order to argue (as it does) that the Terms confer jurisdiction upon the Commission. But, in advancing this argument, the Complainant’s position is that the entire agreement consists of only the Written Authorization. In contrast, as explained above, Liberty Power’s consistent position is that the entire integrated agreement consists of the Written Authorization, the Terms, and the Plan Description.

importance of the Terms, the Written Authorization contains an acknowledgement that the customer has received, read and understood the Terms.

The Complainant's argument raises a question of contract interpretation.<sup>9</sup> If the Terms are integrated, the price (variable) and the length (month-to-month) for the period following the 30-month fixed price Contract were memorialized at the time of contract formation. Liberty Power Exhibit 1. They were further memorialized by the notices, which contained copies of the terms and conditions for Liberty Power's Rollover Variable Rate Plan. Liberty Power Exhibits 2 and 3.

If the Terms are not integrated (as the Complainant argues), the applicable price for the period following the 30-month fixed price Contract must be settled by the Courts. The Commission does not have traditional ratemaking authority over competitive electric generation suppliers and does not regulate competitive supply rates.<sup>10</sup> *Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.*, PUC Docket No. C-2014-2427657, Opinion and Order entered December 18, 2014, p. 24. (*IDT Energy*); *Commonwealth of Pennsylvania, et al. v. Blue Pilot Energy, LLC*, PUC Docket No. C-2014-2427655, Opinion and Order entered December 11, 2014, p. 18-19 (*Blue Pilot*). It is the Courts (not the Commission) that are empowered to settle open price terms,<sup>11</sup> order "equitable" remedies (including restitution)<sup>12</sup>, and to award damages.<sup>13</sup>

---

<sup>9</sup> To be clear, the Complainant's position does not relate to Section 54.5, which relates to disclosure statements for residential and small business customers. *See* footnote 6, *supra*.

<sup>10</sup> This conclusion is supported by a plain reading of Code Sections 102, 2806, 2809, and 2810 and related case law. *See* 66 Pa. C.S. §§ 102; 2806; 2809; 2810.

<sup>11</sup> Reasonable price can be established by the Courts – if there is an open price term. 13 Pa. C.S. §§ 2305 (Open price term), 2209 (modification of contract).

{L0578939.2}

That being said, in either scenario, the ultimate issue is whether (or not) Liberty Power has complied with (or breached) the pricing provision for the period following the 30-month fixed price Contract must be resolved.<sup>14</sup> But, the Commission does not have subject matter jurisdiction to interpret the terms and conditions of a contract between an EGS and a customer to determine whether a breach of the contract has occurred. *IDT Energy* at 24; *Blue Pilot* at 19. See also *Allport Water Auth. v. Winburne Water Co.*, 393 A.2d 673 (Pa. Super. 1978).

#### *Receipt Of The Terms By Complainant*

Lastly, the Complainant argues that it never received a copy of the Terms. This argument is linked to the scope of the integrated agreement, which is discussed above. That being said, **the Complainant's argument on its failure to receive the Terms is contradicted by other more credible evidence.** As noted above, the Complainant confirmed that it had received a copy of Terms by signing the Written Authorization. However, at the Hearing, Mr. Thakker testified that the Complainant did not receive the Terms for the 30-month fixed price product. Tr. 46-47. That testimony is directly contradicted by the Written Authorization and by Mr. Knapp's testimony. 46, 57-58; Complainant Exhibit 1; Liberty Power Exhibit 1, at Written Authorization. Mr. Knapp

---

<sup>12</sup> *IDT Energy* at 25-26 (no power to award equitable remedies). Quantum meruit is an equitable remedy to provide restitution for unjust enrichment in the amount of the reasonable value of services. See, e.g., *Commonwealth Dept. of Public Welfare v. UEC, Inc.*, 397 A.2d 779, 782 (Pa. 1979) (quantum meruit is "the reasonable value of the services performed").

<sup>13</sup> See *Elkin v. Bell*, 491 Pa. 123, 420 A.2d 371 (1980) (no power to award damages); and, *Feingold (same)*.

<sup>14</sup> The parties intended for service by Liberty Power to continue - if no other action was taken by the Complainant. See Liberty Power Exhibits 1 to 3. The Complainant's litigation positions are consistent with Liberty Power's intension because the Complainant has not objected to the continuation of service by Liberty Power beyond the 30-month fixed price term. The Complainant has only actually objected to the price charged by the Liberty Power for the periods beyond the 30-month term. Tr. 24-25.

testified that it was not possible for a potential customer to have received a Written Authorization without the accompanying Terms. Tr. 58. To wit: the Welcome Kit, including the Terms, was sent to the Complainant at the Complainant's billing address. Tr. 57-58. For the reasons set forth in Section D.2 herein, that Welcome Kit, including the Terms, is presumed to have been received by the Complainant. No evidence was presented by the Complainant to prove the presumption wrong.

## 2. Notices

Liberty Power provided two notices to the Complainant prior to the expiration of said fixed term Contract. Liberty Power Exhibit 2; Liberty Power Exhibit 3. The notices provided that, following the end of the 30-month fixed price product, electric generation service by Liberty Power will continue on a variable rate - if no other action is taken by the Complainant. To be clear, Liberty Power agreed, as a part of the Contract, to provide these notices. Liberty Power Exhibit 1, at Terms, p. 1, "Term and Automatic Renewal" Paragraph. These notices were not issued pursuant to Section 54.10, which relates to expiration notices for residential and small business customers.<sup>15</sup>

The notices are effective. Under the Contract, notices are effective upon receipt by the person to whom addressed. Liberty Power Exhibit 1, at Terms, p. 2, "Notices" Paragraph. The notices were sent to the Complainant at the Complainant's billing address, and were not returned as undeliverable. Tr. 57. The notices are, therefore, presumed to have been received by the Complainant. *Chartiers Industrial and Commercial Development Authority v. Allegheny County Board of Property Assessment Appeals and Review*, 645 A.2d 944 (Pa. Cmwlth. 1994), *appeal*

---

<sup>15</sup> See footnote 6, *supra*.

{L0578939.2}

*denied*, 653 A.2d 1234 (Pa. 1994). That presumption is used and applied by the Commission. *See Thomas Masters v. Duquesne Light Company*, PUC Docket No. C-2013-2382732, Initial Decision dated April 17, 2014 (ALJ Watson) (dismissing formal complaint), adopted by Final Order (Act 294) entered May 28, 2014; *Thom Greco, d/b/a Phoenix Estates v. PPL Electric Utilities Corporation*, PUC Docket No. C-2010-2198079; C-2011-2229033, Opinion and Order entered August 31, 2012 (explaining that as to the 2010 complaint, the ALJ found that the Complainant failed to prove that he did not receive the notice of termination. The ALJ stated that PPL had the correct mailing address, and the notice was not returned as undeliverable. The ALJ noted that notice mailed to a party's last known address and not returned by the United States Postal Service is presumed to have been received.).

At the hearing, the Complainant merely stated that the notices were not received. Tr. 29-30. No evidence was presented by the Complainant to prove the presumption wrong. *See Commonwealth v. Shaffer*, 288 A.2d 727, 735 (Pa. 1972) (stating "[a] rebuttable presumption forces the defendant to come forth or suffer inevitable defeat on the issue in controversy"); *Bee v. Unemployment Compensation Board of Review*, 119 A.2d 558, 559 (Pa. Super. 1956) ("Presumably [the notice] was received by claimant for it was not returned by the postal authorities.").

The notices are adequate and accurate. The notices informed the Complainant that action was needed before December 2013. At that time, switches in suppliers or returns to default service occurred on the meter read date (according to the customer's regular EDC meter-reading schedule for billing purposes). *See Standards for Changing a Customer's Electricity Generation Supplier*, 44 Pa. Bull. 3539 (June 14, 2014). Changes in supplier (or return to default service) could take from 16 to 45 days. *Id.*; *See also* Liberty Power Exhibit 1, at Written Authorization {L0578939.2}

“... the switch may not be reflected on your bill for up to two (2) billing cycles.”). The Complainant’s meter read date fell in the middle of the month. *See* Complainant Exhibit 3 (meter readings on January 16, February 17 and March 18; Complainant Exhibit 4 (meter readings on January 15, February 17 and March 18). Action by or before December 2013 would help ensure that the change could occur on the meter read scheduled for the Complainant. *See* Liberty Power Exhibit 1, at Written Authorization (switch will occur on meter read dates).

The Complainant points to an alleged error in the Options Notice. Tr. 74-75. Both notices adequately and accurately inform the Complainant that the 30-month fixed price Contract ended in December 2013. Liberty Power Exhibit 2; Liberty Power Exhibit 3. That information is set forth in capital letters in boldface type at the top of the notice. *Id.* The alleged error consists of the lack of a specific date (i.e., meter read date) in option 3 of the Options Notice. However, for the reasons discussed above, the regulation requiring a specific date is not applicable to this situation.<sup>16</sup> Thus, the lack of a specific date does not render said notice either inadequate or inaccurate. In addition, this alleged error may be viewed as minor (or technical) because the Complainant did not rely on the content of either notice (which was presumed received by the Complainant) and, accordingly, could not have been misled or deceived by the notices.<sup>17</sup>

---

<sup>16</sup> *See* footnotes 2 and 6, *supra*.

<sup>17</sup> The Courts have determined that the Public Utility Code does not authorize the Commission to remedy fraudulent conduct. *Pettko v. Pennsylvania American Water Co.*, 39 A.3d 473 (Pa.Cmwlth. 2012). And, the Commission does not have jurisdiction to enforce the Unfair Trade Practices Consumer Protection Law. *See, e.g., IDT Energy, supra; Blue Pilot, supra.*

{L0578939.2}

**E. Liberty Power Charged A Reasonable Price for Electric Generation Service In The Billing Periods of January 2014 And February 2014**

The Complainant is unhappy with the variable price charged by Liberty Power for two billing periods, January 2014 and February 2014. Both of these billing months followed the expiration of the 30-month term of the fixed price Contract. The Complainant alleges that the variable price charged by Liberty Power for generation is too high, unfair and/or unreasonable Tr. 52.

Liberty Power is entitled to be paid the reasonable value of the electric generation supply services provided by Liberty Power to the Complainant. That reasonable price is the variable price, as determined by Liberty Power. Liberty Power acted to provide electric generation service to the Complainant in the billing periods for January 2014 and February 2014. This was done consistent with (a) the continuation provision in the Terms; (b) the variable price provision in Liberty Power's Rollover Rate Plan Terms and Conditions, which was provided with the aforementioned notices; and (c) the lack of action by the Complainant to (1) contact Liberty Power to renew under different terms (2) select another EGS, or (3) return default service.

During this past winter (2013-2014), Liberty Power's variable rates increased to reflect Liberty Power's costs. Tr. 81. The increase in the default variable rate experienced by the Complainant was due to the extreme weather associated with the Polar Vortex event resulting in significant market volatility. Tr. 81-82. These variable rates were adjusted consistent with the variable rate provisions in Liberty Power's Rollover Variable Rate Terms and Conditions. Tr. 81-82. The variable rates billed to the Complainant for the applicable billing periods reflect the correct variable price charged by Complainant. Tr. 64-65.

The Complainant's challenge to Liberty Power's variable rates for the billing periods for January 2014 and February 2014 lacks a solid foundation. To support its allegation that Liberty Power's variable rates for said billing periods is too high, the Complainant emphasizes that said variable rates were higher than the price-to-compare (as stated on PECO's bills). Tr. 18, 52, 78-79; Complainant Exhibits 3 and 4. This comparison amounts to nothing more than mere personal opinion or perception, which do not constitute evidence. *See Pennsylvania Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12, 14 (Pa. 1987) (Mere bald assertions, personal opinions or perceptions do not constitute evidence); *Ellis v. PECO Energy Co.*, Docket No. C-2011-2256958, Initial Decision dated May 17, 2013, p. 11, adopted by Final Order (Act 294) entered July 3, 2013 (A customer cannot establish a case merely by stating his personal beliefs or by posing questions without offering concrete proof).

That being said, the Commission has concluded that it lacks jurisdiction to determine if an EGS is reasonable based on a simple comparisons of prices. *Blue Pilot, supra*. In *Blue Pilot*, it was averred that the variable prices charged by Blue Pilot to residential customers did not conform to the variable rate pricing provision of Blue Pilot's Disclosure Statement. The record compared the prices charged by Blue Pilot to an analysis of Blue Pilot's cost to serve its customers. But, nothing in the record correlated the prices charged by Blue Pilot to the Disclosure Statement. Accordingly, the Commission concluded that it lacked jurisdiction to review the prices charged by Blue Pilot.

Simply put, the Complainant did not satisfy its burden of showing that Liberty Power's variable rate is unreasonable. The Complainant did nothing to correlate the prices charged by Liberty Power to Liberty Power's Rollover Variable Rate Plan. In fact, there is no allegation that the variable prices charged do not conform to the variable rate pricing provision of Liberty  
{L0578939.2}

Power's Rollover Variable Rate Plan,<sup>18</sup> which was set forth in the notices. Liberty Power Exhibits 2 and 3. And, nothing in the records demonstrates that Liberty Power made an error or charged an incorrect price.

Additionally, even on a more general level, it is now abundantly clear that the Commission lacks jurisdiction to regulate the prices charged by EGSs. *See Blue Pilot, supra; Nadav v. Respond Power LLC*, Docket No. C-2014-2429159, Opinion and Order entered December 12, 2014 ("Nadav") (wherein Commission dismissed a complaint on preliminary objections that claimed excessive variable rates due to the lack of jurisdiction over prices charged by the EGS). *See also* PECO Default Service Plan Order<sup>19</sup> wherein the Commission concluded, on page 6, that "we have not found any arguments that convince us that we have the statutory authority to limit the prices charged by EGSs." and the Variable Rate Order<sup>20</sup> wherein the Commission noted, on page 3, that customers on variable rate plans "may experience very high bills during periods of market volatility such as occurred with the recent cold weather."

#### **F. The Complainant Is Not Entitled To The Requested Relief**

The Complainant has requested that the Commission direct a billing adjustment from Liberty Power. *See IDT Energy*, p. 17-18 (holding that the Commission has plenary authority

---

<sup>18</sup> Non-conformance to the variable rate pricing provision of Liberty Power's Rollover Variable Rate Plan could constitute a breach of the Agreement. But, the Commission lacks jurisdiction over such issues.

<sup>19</sup> *Petition of PECO Energy Company for Approval of its Default Service Plan*, Docket No. P-2012-2283641, Opinion and Order entered March 12, 2014.

<sup>20</sup> *Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, Docket No. M-2014-2406134, Opinion and Order entered March 4, 2014.

under Section 501, 66 Pa. C.S. § 501, to direct an EGS to issue a credit or refund for an over bill). Specifically, the Complainant has requested that the price from its expired 30-month fixed price Contract replace the variable price charged by Liberty Power for said month. Tr. 36-37; Complainant Exhibit 2. Granting this billing adjustment would entitle the Complainant to a refund of \$32,703.82.

In February 2015, ALJ Salapa issued an Initial Decision in the matter of *Tracey D. Friz v. Respond Power LLC and PPL Electric Utilities Corporation*, Docket No. F-2014-2453884, Initial Decision dated February 11, 2015 (“Friz”), dismissing a complaint that challenged an EGS’s increase in variable rates.<sup>21</sup> ALJ Salapa found that the Commission lacks jurisdiction to rule on the parties’ responsibilities under the contract or order an EGS to refund any charges for electric generation supply service. In doing so, ALJ Salapa noted that the Commission carved out two exceptions to the no refund rule in the *IDT Energy, supra*. These exceptions are (1) when a customer has been switched to an EGS without consent and (2) where the EGS fails to bill a customer in accordance with its disclosure statement.

The exceptions to the no refund rule are not applicable to the circumstances presented by this matter. The Complainant did not allege that it was switched to Liberty Power without its consent. Nor could it; the Complainant became a customer of Liberty Power in 2011. The Complainant did nothing to correlate the prices charged by Liberty Power to Liberty Power’s Rollover Variable Rate Plan. That point is discussed in greater detail above in Section IV.E. It follows that the Complainant has not stated a claim for refund upon which relief can be granted by the Commission. Simply put, under the circumstances presented by this Complaint, the

---

<sup>21</sup> In *Friz*, the period for filing exceptions lasts until March 3, 2015, which is 20 days from February 11, 2015 (the date on the Secretarial Letter serving notice of that Initial Decision).

Commission determination of refund – based on a reasonable rate for Liberty Power – would constitute impermissible “rate regulation.” The requested billing adjustments would be a retroactive determination of the reasonable price of the electric generation service provided by Liberty Power, as the Complainant’s EGS. The request for the billing adjustment by the Complainant is being made without regard to (a) the pricing provision in Liberty Power’s Rollover Variable Rate Plan and (b) Liberty Power’s costs to provide electric generation service under the then-applicable market conditions.

**G. The Additional Allegations Of Impropriety Are Without Merit**

The hearing constituted a broad and unfocused fishing expedition for potential improprieties. Each of these alleged improprieties is discussed herein. Nothing in these alleged improprieties entitles the Complainant to any relief.

*Timing of Return to Default Service*

The Complainant is unhappy with the timing of its return to default service in February 2014. Tr. 81-82 This allegation of impropriety is not directed at Liberty Power. PECO, as the Complainant’s EDC, handles switching the Complainant’s accounts to and from an EGS. *See, e.g.,* 52 Pa. Code §§ 54.123, 57.172, 57.173. During the relevant times (as discussed above), switching could only occur on the meter read date. (The timing for switches has now changed<sup>22</sup>). PECO processed the Complainant’s switch from Liberty Power to default service on the Complainant’s next meter read date. Such timing was reasonable and adequate under the then-applicable rules and regulations.

---

<sup>22</sup> 52 Pa. Code § 57.174 (Time frame requirement). Section 57.174 was amended June 13, 2014 (effective June 14, 2014). *See Standards for Changing a Customer's Electricity Generation Supplier*, 44 Pa.B. 3483, 3539 (June 13, 2014).

### *Customer Service*

The Complainant is unhappy with Liberty Power's customer service. Tr. 23. None of the alleged improprieties regarding customer service constitute a violation of applicable regulations.

### *Failure to Reach Amicable Resolution*

The Complainant seeks to create a negative inference from the lack of a settlement. Tr. 50. Such efforts must be rejected. Liberty Power policy encourages amicable resolutions, and efforts were made to resolve this Complaint. The subject Complaint was not resolved. However, this does not warrant a negative inference.<sup>23</sup> See 52 Pa. Code § 5.231(d) (Offers of settlement, of adjustment, or of procedure to be followed, and proposed stipulations not agreed to by every party, including proposals intended to resolve discovery disputes, will not be admissible in evidence against a counsel or party claiming the privilege). The lack of a settlement does not constitute a violation of applicable regulations.

### **H. Complainant Has Failed To Satisfy Its Burden Of Proof**

Complainant has failed to satisfy its burden. Complainant is the party asking for action or relief from the Commission. As the party seeking relief, Complainant has the burden of proof<sup>24</sup>

---

<sup>23</sup> The policy of the Commission is to encourage settlements. The Commission has stated that settlement rates are often preferable to those achieved at the conclusion of a fully litigated proceeding. 52 Pa. Code §§ 5.231 and 69.401.

<sup>24</sup> The term "burden of proof" means a duty to establish a fact by a preponderance of the evidence. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950); and *Feinstein v. Philadelphia Suburban Water Company*, 50 Pa. PUC 300 (October 6, 1976). "Preponderance of the evidence" means one party must present evidence that is more convincing, by even the smallest amount, than the evidence presented by the other party. *Id.* Accordingly, one must review the record in this case to determine whether Complainant has satisfied her burden of proof. If the review indicates the burden has been satisfied, one must then determine whether Respondent has submitted evidence of co-equal value or weight to refute Complainant's evidence. If this has

{L0578939.2}

to show that the Respondent has in some manner violated the provisions of the Public Utility Code (Code) or the regulations of the Commission. 66 Pa. C.S. § 332(a). Furthermore, one must exercise care to ensure substantial evidence in the record supports the decision of the Commission. *See, e.g.*, Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704; and *Yellow Cab Company v. PUC.*, 524 A.2d 1069 (Pa. Cmwlth. 1987). "Substantial evidence" means such relevant evidence that a reasonable mind may accept as adequate to support a conclusion. *Philadelphia Gas Works v. PUC*, 898 A.2d 671 (Pa. Cmwlth. 2006). The pertinent inquiry is whether substantial evidence exists to support the Commission's findings. *Elliot Co. v. Workers' Comp. Appeal Bd. (Shipley)*, 785 A.2d 480 (Pa. Cmwlth. 2002). More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. PUC*, 413 A.2d 1037 (Pa. 1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 166 A.2d 96 (Pa. Super. 1961); and *Murphy v. Pa. Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

## V. CONCLUSION

The Complainant is not entitled to any relief, and the Formal Complaint must be denied in its entirety. Proposed Findings of Law and Proposed Ordering Paragraphs are set forth in Appendix A.

Neither the allegations made by the Complainant nor the relief requested by the Complainant are within the jurisdiction of the Commission:

---

occurred, the burden of proof cannot be satisfied, unless the party bearing the burden of proof presents additional evidence. *Morrissey v. Pa. Dept. of Highways*, 225 A.2d 895 (Pa. 1967); *Burleson v. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982).

{L0578939.2}

- The Complainant did not demonstrate a violation of applicable statute, regulations or orders. No potential violations were alleged with any degree of specificity in either the Complaint or at the hearing. The Complainant merely seeks to establish a violation of regulations that are not applicable to an EGS providing service to a medium-sized business, such as the Complainant.
- The Complainant did not establish its entitlement to the requested relief. Under the circumstances presented by this Complaint, the Commission determination of a reasonable rate for Liberty Power would constitute impermissible “rate regulation.” The request for adjustment is being made without regard to (a) the pricing provision in Liberty Power’s Rollover Variable Rate Plan and (b) Liberty Power’s costs to provide electric generation service under the then-applicable market conditions.

The key elements of Complainant’s case are not supported by substantial evidence:

- There is a lack of substantial evidence on the allegation that Liberty Power failed to provide contract documents and notices to the Complainant. The record shows that the Complainant sent a copy of the Terms, on more than one occasion. The Terms, the Initial Notice and the Renewal Notice are legally presumed to have been received by the Complainant, and no evidence was presented by the Complainant to rebut that presumption.
- There is a lack of substantial evidence on the allegation that any rate charged by Liberty Power was unreasonable. The Commission does not regulate Liberty Power’s rates, and no effort was made by the Complainant to show that the variable rate charged in the billing periods for January and February 2014 were calculated in error or in breach of the contractual variable rate provision. It is well-settled that personal opinion (based on a simple comparison with the price-to-compare) is not sufficient to show that Liberty Power’s rates were unreasonable.

Respectfully submitted,



---

Carl R. Shultz, Esquire  
(I.D. No. 70328)  
Eckert Seamans Cherin & Mellott, LLC  
213 Market Street, 8<sup>th</sup> Floor  
Harrisburg, PA 17101  
Telephone: 717-237-6000

Date: March 6, 2015

**Attorney for Liberty Power Holdings, LLC**

## Appendix A

### Proposed Findings of Fact

1. Complainant Pramukh Swami Maharaj LLC is a business.
2. The Complainant's jurisdictional electric distribution company (EDC) is PECO Electric Company (PECO).
3. The Complainant has non-residential PECO electric accounts.
4. These electric accounts are associated with the "Rodeway Inn" in Springfield, Pennsylvania. Tr. 18.
5. The Complainant's service address is 675 Baltimore Pike, Springfield, Pennsylvania 19064.
6. The Complainant uses a different address (i.e., the "billing address") to receive bills and correspondence for said accounts.
7. Complainant's billing address is 8005 Pulaski Highway, Baltimore, Maryland 21237.
8. Respondent is Liberty Power Holdings, LLC, which is licensed by the Pennsylvania Public Utility Commission (Docket No. A-110175) to provide electric generation supplier services to the public in all electric distribution company ("EDC") service territories within the Commonwealth of Pennsylvania. This includes (but not limited to) authorization to provide electric generation supplier services in the service territory of PECO.

9. Complainant has peak loads above 25 kW, but below 500 kW.

10. Liberty Power sent documents to the Complainant. These documents consisted of (a) an unsigned Energy Services Enrollment Agreement (“Written Authorization”); (b) Liberty Power’s Terms and Conditions (“Terms”); and (c) the Liberty Power Plan Description (“Plan Description”).

11. Complainant signed and returned the Written Authorization to Liberty Power in April 2011.

12. By signing the Written Authorization, the Complainant (a) enrolled its electric accounts with Liberty Power on a fixed rate product for a 30-month term, and (b) acknowledged receiving a copy of the Terms.

13. The Terms include a renewal (or continuation) provision. That continuation provision also stated that two notices would be sent to the Complainant prior to the expiration of the 30-month term. That provision further provided that electric generation service by Liberty Power would continue on a variable rate - if no other action is taken by the Complainant, prior to the expiration of the 30-month term.

14. Complainant was enrolled with Liberty Power for electric generation supplier service on April 27, 2011.

15. In June 2011, Liberty Power mailed a “Welcome Kit” to the Complainant at the Complainant’s billing address. The documents consisted of an (a) the signed Written Authorization; (b) the Terms; and (c) the Plan Description (collectively, the “Contract”).

16. The Welcome Kit was not returned to Liberty Power
17. Liberty Power began providing electric generation service to Complainant, under that 30-month fixed price Contract, on June 15, 2011. Tr. 57.
18. Complainant received consolidated bills from PECO reflecting both PECO's charges for distribution service and Liberty Power's charges for electric generation service.
19. Liberty Power sent a notice (Initial Notice) to the Complainant at the Complainant's billing address on September 13, 2013.
20. The Initial Notice provided adequate and accurate information on the upcoming expiration of the Contract.
21. The Initial Notice included a copy of Liberty Power's Rollover Rate Plan Terms and Conditions, which provided a variable price provision.
22. The Initial Notice was not returned to Liberty Power.
23. Liberty Power sent a notice (Renewal Notice) to the Complainant at the Complainant's billing address on October 15, 2013).
24. The Renewal Notice provided adequate and accurate information on the upcoming expiration of the Contract
25. The Renewal Notice included a copy of Liberty Power's Rollover Rate Plan Terms and Conditions, which provided a variable price provision.
26. The Renewal Notice not returned to Liberty Power.

27. By its terms, electric generation service under said 30-month fixed price Contract expired in December 14, 2013.

28. The Complainant did not act prior to the expiration of the 30-month fixed price agreement to (a) renew with Liberty Power under different terms (b) select another electric generation supplier, or (c) return default service.

29. Following the end of the said fixed price agreement, electric generation service by Liberty Power continued under Liberty Power's Rollover Rate Plan Terms and Conditions.

30. Complainant's meters were read on (or about) January 15, 2014.

31. In January 2014, PECO billed the Complainant for the services provided by both PECO and Liberty Power.

32. Liberty Power received a de-enrolment notification from PECO for the Complainant's accounts on January 22, 2014.

33. Complainant's meters were read on (or about) February 17, 2014.

34. Electric generation service from Liberty Power to the Complainant's accounts under variable prices ended on February 17, 2014. At that time, both of said accounts were returned (by PECO) to default service.

35. In February 2014, PECO billed the Complainant for the services provided by both PECO and Liberty Power.

36. No early termination or cancellation fees were charged by Liberty Power.

37. On May 1, 2014, the Complainant filed, with the Pennsylvania Public Utility Commission (“Commission” or “PUC”), a Formal Complaint (“Complaint”) against Liberty Power Holdings, LLC.

38. On May 27, 2014, Liberty Power filed an Answer in response to the Complaint. In its Answer, Liberty Power admitted or denied the various averments made by the Complainant.

39. An Interim Order Setting A Resolution Conference was entered on May 27, 2014.

40. The Initial Call-In Telephonic Hearing was scheduled for October 28, 2014.

41. The Complainant Not Represented by Counsel at that time

42. On November 10, 2014, the Initial Call-In Telephonic Hearing was rescheduled set for December 19, 2014.

43. Counsel for Complainant entered a Notice of Appearance on November 14, 2014.

44. Initial Call-In Telephonic Hearing was held on December 19, 2014.

45. The record consists of 90 pages of transcribed testimony and seven exhibits:

- Complainant Exhibit 1 (Written Authorization)
- Complainant Exhibit 2 (Rate Differential Calculation)
- Complainant Exhibit 3 (Consolidated bills for Account 89807-00106)
- Complainant Exhibit 4 (Consolidated bills for Account 34188-00502)
- Liberty Power Exhibit 1 (Contract Documents). This Exhibit contains a copy of the Written Authorization, the Terms and the Plan Description.

- Liberty Power Exhibit 2 (Initial Notice)
- Liberty Power Exhibit 3 (Renewal Notice).

### **Proposed Conclusions of Law**

1. The Commission has jurisdiction over the parties to and subject matter of this proceeding.
2. Pursuant to 66 Pa. C.S. § 332(a), the burden of proof in this proceeding is upon the Complainant, Pramukh Swami Maharaj LLC.
3. The entire agreement between the Complainant and Liberty Power consists of (a) the signed Written Authorization; (b) the Terms; and (c) the Plan Description.
4. The Commission does not have subject matter jurisdiction to interpret the terms and conditions of a contract between an EGS and a customer to determine whether a breach of the contract has occurred. *IDT Energy* at 24; *Blue Pilot* at 19. *See also Allport Water Auth. v. Winburne Water Co.*, 393 A.2d 673 (Pa. Super. 1978).
5. Complainant is neither a residential nor a small business customer as those terms are defined in Chapters 54 and 111 of the Commission’s Regulations.
6. When serving medium or large business customers, Liberty Power is required to abide by Sections 54.1 to 54.3 of the Commission’s “Customer Information” Regulations.<sup>25</sup> 52

---

<sup>25</sup> 52 Pa. Code § 54.1(b) (“As to the scope of this subchapter, this section [54.1] and §§ 54.2—54.3 apply to all customers, including large commercial and industrial customers. Sections 54.4—54.9 apply only to residential and small business customers, as the term is defined in § 54.2 (relating to definitions).”).

Pa. Code §§ 51.1 to 54.3. Section 54.1 explains the purpose of the Customer Information Regulations. Section 54.2 provides definitions for said Regulations. Section 54.3 relates to certain marketing and sales activities. The Commission's standards of conduct also relate to marketing and sales activities by electric generation suppliers ("EGSs"). *See, e.g.*, 52 Pa. Code §§ 54.43(1), 54.43(f), 54.122(3).

7. Notice mailed to a party's last known address and not returned by the post office is presumed to have been received. *Volk v. Unemployment Comp. Bd. of Review*, 49 A.3d 38 (Pa. Cmwlth, 2012); *Chartiers Industrial and Commercial Development Authority v. Allegheny County Board of Property Assessment Appeals and Review*, 645 A.2d 944 (Pa. Cmwlth. 1994).

8. The Welcome Kit, including the Terms, is presumed to have been received by the Complainant. No evidence was presented by the Complainant to prove the presumption wrong.

9. The Initial Notice, including the Liberty Power's Rollover Variable Rate Terms and Conditions, is presumed to have been received by the Complainant. No evidence was presented by the Complainant to prove the presumption wrong.

10. The Renewal Notice, including the Liberty Power's Rollover Variable Rate Terms and Conditions, is presumed to have been received by the Complainant. No evidence was presented by the Complainant to prove the presumption wrong.

11. It is well settled that the Commission may not exceed its jurisdiction and must act within it. *City of Pittsburgh v. PUC.*, 43 A.2d 348 (Pa. Super 1945) (Pittsburgh).

12. Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967) (*Roberts*).

13. Subject matter jurisdiction is a prerequisite to the exercise of the power to decide a controversy. *Hughes v. Pa. State Police*, 619 A.2d 390 (Pa. Cmwlth 1992) (*Hughes*).

14. As a creation of the legislature, the Commission possesses only the authority that the state legislature has specifically granted to it in the Public Utility Code, 66 Pa. C.S. §§ 101, *et seq.*

15. The Commission's jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. *Feingold v. Bell*, 383 A.2d 791 (Pa. 1977) (*Feingold*).

16. Liberty Power's variable rate for the billing period contained in the January 2014 bill is reasonable. That variable rate was calculated consistent with (a) the continuation provision in the Terms; and (b) the variable price provision in Liberty Power's Rollover Rate Plan Terms and Conditions.

17. Liberty Power's variable rate for the billing period contained in the February 2014 bill is reasonable. That variable rate was calculated consistent with (a) the continuation provision in the Terms; and (b) the variable price provision in Liberty Power's Rollover Rate Plan Terms and Conditions.

18. The Commission does not have traditional ratemaking authority over competitive electric generation suppliers and does not regulate competitive supply rates. *Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.*, PUC Docket No. C-2014-2427657, Opinion and Order entered December 18, 2014, p. 24. (*IDT Energy*); *Commonwealth of Pennsylvania, et al. v. Blue*

*Pilot Energy, LLC*, PUC Docket No. C-2014-2427655, Opinion and Order entered December 11, 2014, p. 18-19 (*Blue Pilot*).

19. It is the Courts (not the Commission) that are empowered to settle open price terms, order “equitable” remedies (including restitution), and to award damages.

20. Mere bald assertions, personal opinions or perceptions do not constitute evidence. *See Pennsylvania Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12, 14 (Pa. 1987).

21. A customer cannot establish a case merely by stating his personal beliefs or by posing questions without offering concrete proof. *Ellis v. PECO Energy Co.*, Docket No. C-2011-2256958, Initial Decision dated May 17, 2013, p. 11, adopted by Final Order (Act 294) entered July 3, 2013.

22. Complainant has not sustained its burden of proof. The Complainant has failed to meet his burden of proving that it is entitled to the relief it was seeking from the Commission.

### **Proposed Ordering Paragraphs**

THEREFORE,

IT IS ORDERED:

1. That the Complaint filed by Pramukh Swami Maharaj LLC against Liberty Power Holdings, LLC at Docket No. C-2014-2419263 is denied and dismissed.

2. That the Secretary's Bureau should mark Docket No. C-2014-2419263 as closed.