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July 20, 2015

ELECTRONICALLY FILED

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

***RE: Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane,
Through the Bureau of Consumer Protection and Tanya J. McCloskey,
Acting Consumer Advocate, Complainants vs. Energy Services Providers,
Inc., d/b/a Pennsylvania Gas & Electric, The Company
Docket No. C-2014-2427656***

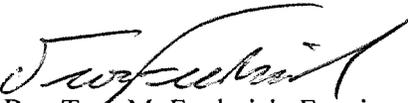
Dear Secretary Chiavetta:

Enclosed please find Exceptions of Intervener Sobiech to the June 30, 2015, Initial Decision which was electronically filed this date relative to the above-referenced matter. You will also find attached Certificates of Service for the same.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

MARCUS & MACK, P.C.


By: Troy M. Frederick, Esquire

TMF/dmf
Enclosures

cc: Hon. Charles E. Rainey, Jr. w/enclosures
Parties of Record w/enclosures

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Commonwealth of Pennsylvania, by Attorney
General KATHLEEN G. KANE, Through the
Bureau of Consumer Protection,

And

Docket No. C-2014-2427656

TANYA J. McCLOSKEY, Acting Consumer
Advocate,
Complainants

v.

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

**EXCEPTIONS OF INTERVENER SOBIECH TO THE
JUNE 30, 2015 INITIAL DECISION**

AND NOW COMES Intervener Thomas Sobiech, by and through his counsel, Jonathan Shub, Esquire and Kohn Swift & Graf, P.C., Scott George, Esquire and Seeger Weiss, LLP and Troy M. Frederick, Esquire and Marcus & Mack, P.C., and files the following *Exceptions Of Intervener Sobiech To The June 30, 2015 Initial Decision* and in support thereof respectfully avers as follows:

EXCEPTIONS

EXCEPTION NO. 1:

THE ADMINISTRATIVE LAW JUDGES ERRED IN PERMITTING THE PARTIES TO INCLUDE THE PROVISION IN THE SETTLEMENT AGREEMENT REQUIRING THE COMPANY'S CUSTOMERS TO SIGN GENERAL RELEASES TO RECEIVE REFUNDS FROM THE SETTLEMENT FUND AS IT IS BEYOND THE JURISDICTION AND PRACTICE OF THE PUC TO ADJUDICATE AND/OR INTERFERE WITH PRIVATE CAUSES OF ACTION SUCH AS BREACH OF CONTRACT

EXCEPTION NO. 2:

THE ADMINISTRATIVE LAW JUDGES ERRED IN FINDING THAT THE PUC HAS AUTHORITY TO ORDER AND/OR PERMIT ELECTRIC GENERATION SUPPLIERS, SUCH AS THE COMPANY, TO REFUND MONEYS RELATING TO RATE DISPUTES AS SUCH ACTIONS ARE CLEARLY BEYOND THE SCOPE OF THE PUC'S AUTHORITY

EXCEPTION NO. 3:

THE ADMINISTRATIVE LAW JUDGES ERRED IN APPROVING THE SETTLEMENT WITHOUT KNOWING AND TAKING INTO CONSIDERATION HOW MANY OF THE COMPANY'S CUSTOMERS WERE HARMED BY ITS CONDUCT AND WITHOUT KNOWING AND TAKING INTO CONSIDERATION THE EXTENT OF THE FINANCIAL HARM CAUSED BY THE COMPANY

EXCEPTION NO. 4:

THE ADMINISTRATIVE LAW JUDGES ERRED IN FINDING THAT THE PUC AND THE OFFICE OF CONSUMER ADVOCATE HAVE THE JURISDICTION OVER AND AUTHORITY TO REPRESENT, RESPECTIVELY, CONSUMERS WHO HAVE NOT FILED COMPLAINTS WITH THE PUC AGAINST EGSs WHICH ARE CORPORATIONS AND NOT PUBLIC UTILITIES

ARGUMENT

EXCEPTION NO. 1:

THE ADMINISTRATIVE LAW JUDGES ERRED IN PERMITTING THE PARTIES TO INCLUDE THE PROVISION IN THE SETTLEMENT AGREEMENT REQUIRING THE COMPANY'S CUSTOMERS TO SIGN GENERAL RELEASES TO RECEIVE REFUNDS FROM THE SETTLEMENT FUND AS IT IS BEYOND THE JURISDICTION AND PRACTICE OF THE PUC TO ADJUDICATE AND/OR INTERFERE WITH PRIVATE CAUSES OF ACTION SUCH AS BREACH OF CONTRACT.

The Administrative Law Judges (ALJs) erred in permitting the parties to include the provision in the Settlement agreement requiring the Company's customers to sign general releases to receive refunds from the Settlement Fund as it is beyond the jurisdiction and practice of the PUC to adjudicate and/or interfere with private causes of action such as breach of contract.

The *June 30, 2015, Initial Decision* requires the Company's affected customers to sign general releases, disposing of their private causes of action against the Company, if they wish to receive any amount of a refund, from the settlement fund of \$2,325,000. (*Initial Decision* at 19 ¶ 43 and 37 at ¶ 1). Further, the Company, as far as Petitioner Sobiech is aware, did not require its customers to execute general releases when it decided to refund/provide rebates for the first \$4,511,563 to its customers. In fact, the Company's President, Doug Marcille, advised a local Harrisburg reporter that there are never strings attached to rebates from the Company. <https://www.youtube.com/watch?v=r28TTVWbFEU> at 26:50-27:52.

It is undisputed that the PUC does not have jurisdiction over private breach of contract claims, yet the ALJs have approved a settlement that requires affected customers to sign a general release purportedly waiving such claims. *Id.* at 56, and *Commonwealth of Pennsylvania, et al v. IDT Energy, Inc.*, Pennsylvania Public Utility Commission, Docket No. C-2014-2427657, 2014 WL 4374209 (Aug. 20, 2104).

The ALJs stated in their *Initial Decision*, “[a]dmittedly, the Commission does not normally require as a part of refund relief, that a *pro se* residential or small business customer sign a release of claims in order to receive a refund. We are not compelled to delve deeply in to the mechanics or functioning of the refund pool, especially in light of the overall benefits provided in the remainder of the Settlement.” *Initial Decision* at 41. The ALJs went on to state, “[n]ormally, the Commission does not require customers to waive any other rights the party may have to pursue criminal charges or civil causes of actions they might have against a utility as a contingency to receiving a refund.” *Id.* at 42. It is Intervener Sobiech's position that the PUC should not now require the Company's customers to waive private causes of action to be

reimbursed for the Company's misconduct and that requiring customers to do so exceeds the jurisdiction of the PUC.

The ALJs also admitted that they are unsure of the legal consequences of requiring customers to sign a general release to partake in a refund: “[w]hether this release clause would be enforceable in another jurisdiction if a customer both accepted the refund, and then also pursued a separate cause of action despite having signed the release, is an issue for another jurisdiction.”

Id. Finally, the ALJs stated:

It is apparent that the Settlement benefits consumers, although maybe financially not to the extent Mr. Sobiech contends they ought to benefit, *it protects PaG&E from some potential future legal claims against the Company* and is apparently a manageable enough refund amount such that the Company can continue to conduct business in Pennsylvania. *The Settlement may also reduce the size of class action law suits as customers sign the release and collect a refund from the refund pool.*

We have no interest in exceeding our authority by attempting to limit any cause of action that may be brought in another jurisdiction, and do not believe that we are doing so by approving the Settlement in its entirety without modification. If a consumer elects to pursue the remedy created in this Settlement or somewhere else, he or she is free to do so. Such a result is within the Commission's authority to approve as part of a larger settlement. (Emphasis added) *Id.* at 42.

This eluded to tradeoff by the ALJs is critical in determining the extent of the PUC's jurisdiction in this matter. The ALJs state, “[w]e are not compelled to delve deeply in to the mechanics or functioning of the refund pool, *especially in light of the overall benefits provided in the remainder of the Settlement.*” (Emphasis added). *Initial Decision* at 41. The *overall benefits provided in the remainder of the Settlement* refers to the agreed to changes in the way the Company does business in Pennsylvania, which Petitioner Sobiech has not filed exceptions to.

The ALJs have ignored the fact that the PUC does not have jurisdiction over private causes of action against the Company, or that their approval of this Settlement may limit those causes of action, in order to preserve the agreed to changes in the Company's business practices in Pennsylvania over which the PUC does have jurisdiction. The ALJs further state, "[w]e have no interest in exceeding our authority by attempting to limit any cause of action that may be brought in another jurisdiction, *and do not believe that we are doing so by approving the Settlement in its entirety without modification.*" *Id.* at 42 and 56. Although they believe this is a reasonable tradeoff, it does not change the fact that the PUC lacks the authority to approve such a bargain. Jurisdiction does not operate on a sliding scale. The PUC either has jurisdiction over private causes of action or it does not.

The ALJs correctly acknowledge that limiting a cause of action that can be brought in another jurisdiction would exceed the authority of the PUC. As such, it is impossible to explain why they are doing just that by permitting the release provision of the settlement to proceed. The ALJs further state, "[w]hether this release clause would be enforceable in another jurisdiction if a customer both accepted the refund, and then also pursued a separate cause of action despite having signed the release, is an issue for another jurisdiction." *Id.* at 42. The explanation that they are unsure of the legal ramifications of a general release is insufficient to permit the PUC to exceed its authority in such a manner especially when, as is the case here, there is a class action being litigated against the Company in the United States District Court for the Eastern District of Pennsylvania at docket number 2:14-CV-04464-GAM. In fact, the ALJs refer to class actions in their initial decision when discussing the general release requirement as follows: "*it protects PaG&E from some potential future legal claims against the Company...*" and "*The Settlement may also reduce the size of class action law suits as customers sign the release and collect a*

refund from the refund pool.” Initial Decision at 42. However, it is not the place of the PUC to attempt to interfere with or attempt to limit private causes of action to protect the Company over its customers.

For the reasons set forth above, Intervener Sobiech respectfully requests that the Commission reverse the approval of the Settlement.

EXCEPTION NO. 2:

THE ADMINISTRATIVE LAW JUDGES ERRED IN FINDING THAT THE PUC HAS AUTHORITY TO ORDER AND/OR PERMIT ELECTRIC GENERATION SUPPLIERS, SUCH AS THE COMPANY, TO REFUND MONEYS RELATING TO RATE DISPUTES AS SUCH ACTIONS ARE CLEARLY BEYOND THE SCOPE OF THE PUC’S AUTHORITY.

The ALJs erred in finding that the PUC has authority to order and/or permit electric generation suppliers, such as the company, to refund moneys relating to rate disputes as such actions are clearly beyond the scope of the PUC’s authority. “To begin, it is well settled that the Commission may not exceed its jurisdiction and must act within it. *City of Pittsburgh v. Pa. Pub. Util. Comm’n.*, 43 A.2d 348 (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.* (Emphasis added) *Feingold v. Bell*, 383 A.2d 791 (Pa. 1977) (*Feingold*).” *Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.*,

Pennsylvania Public Utility Commission, Docket No. C-2014-2427657, 2014 WL 4374209 (Aug. 20, 2104).

The ALJs recognize that they lack the authority under *66 Pa. C.S. § 1312*, entitled *Refunds*, to force the Company to issue a refund. *Initial Decision* at 40 citing *Commonwealth of Pa, et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Opinion and Order entered Dec. 18, 2014) (IDT Order). In *Delmarva Power & Light Co. v. Commonwealth*, the Pennsylvania Supreme Court determined that the Pennsylvania Public Utility Commission's Fiscal Office could not assess EGSs for the administrative expenses of the PUC, OCA, or OSBA as EGSs were not public utilities. *Delmarva Power & Light Co. v. Commonwealth*, 582 Pa. 338, 353, 870 A.2d 901, 910 (2005). In making this decision, the Supreme Court stated:

Nevertheless, the General Assembly made an exception to this rule by permitting EGSs to be deemed public utilities for "the limited purposes" described in sections 2809 and 2810. See 66 Pa. C.S. § 102 []. Notably, in making this limited exception, the General Assembly did not also state that EGSs could be deemed public utilities for purposes of section 510. ***Given this omission, we must presume that the General Assembly did not intend for EGSs to be considered public utilities for purposes of section 510 assessments.*** See 1 Pa. C.S. § 1924 ("Exceptions expressed in a statute shall be construed to exclude all others."); *Kmonk-Sullivan v. State Farm Mut. Auto. Ins. Co.*, 567 Pa. 514, 788 A.2d 955, 962 (Pa. 2001) ("An exception expressly provided in a statute is a strong indication that the legislature did not intend to exclude unexpressed items."). *Id.* at 902.

As was the case in *Delmarva*, "[t]he Code's definition of 'public utility' states plainly and clearly that 'the term does not include . . . (vi) [EGSs], except for the limited purposes as described in sections 2809 (relating to requirements for electric generation suppliers) and 2810 (relating to revenue neutral reconciliation)." *66 Pa. C.S. § 102* []. Based on this unambiguous language, it is clear that the General Assembly did not intend for EGSs to be characterized as public utilities for most purposes." *Id.* at 901. Because the General Assembly specifically did

not state that an EGS was a public utility for the purposes of refunds under *66 Pa. C.S. § 1312*, the PUC lacks the jurisdiction and authority to order and/or permit an EGS to issue refunds related to billing disputes. *Id.* The PUC cannot create authority where none was given.

Despite lacking any authority under the section relating to refunds, the PUC contends that it has plenary authority to issue refunds under *66 Pa.C.S. § 501*, entitled *General Powers*, which does not address refunds. *Id.* This agency over reach is impermissible in Pennsylvania. “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.” (Emphasis added) *Feingold v. Bell*, 383 A.2d 791 (Pa. 1977) (*Feingold*). *Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.*, Pennsylvania Public Utility Commission, Docket No. C-2014-2427657, 2014 WL 4374209 (Aug. 20, 2104). Because the PUC was not granted the authority to issue refunds in this scenario under *66 Pa. C.S. § 1312*, entitled *Refunds*, it is clearly impermissible for the PUC to attempt to exercise jurisdiction over the rate dispute aspects of this litigation, especially since the PUC has opted not to make any inquiry into whether there was an actual over charge and, if so, what the extent of the overcharge was.

To further complicate the analysis regarding the extent of the PUC’s authority to order and/or permit the company, to refund moneys acquired by means of violations of the commission’s regulations, the ALJs attempt to rely on Section 201-4.1 of the UTP/CPL which they had dismissed from this action when they granted the Company’s Preliminary Objections.

Id. At 39-40. The ALJs stated:

Joint Complainants initially contended that PaG&E violated the Pennsylvania Unfair Trade Practices and Consumer Protection

Law (UTP/CPL) at 73 P.S. § 201-1 – 201-9. ***On August 20, 2014, six Counts of the Complaint were stricken in part because we held that the Commission lacks jurisdiction to hear complaints under the TRA and UTP/CPL and the Commission lacks jurisdiction to consider the equitable remedy of restitution because we are not a court of law, rather an agency.*** Although this interim order was appealed for interlocutory review on September 2, 2014 and September 8, 2014, by PaG&E and the Joint Complainants, respectively, the Commission has not yet ruled on the petitions for interlocutory review.

Therefore, it is worth noting that under Section 201-4.1 of the UTP/CPL, whenever any court issues a permanent injunction to restrain and prevent violations of the act, the court may in its discretion direct that the defendant restore to any person in interest any moneys or property which may have been acquired by means of violation of the act, under terms and conditions established by the court.

If the Commission were to apply this standard to the instant case, ***inferring that we as an agency have similar discretionary powers,*** we find that it is in the public interest, given the high number of complaints related to PaG&E's bills in January – April 2014, and given that the Settlement enjoins PaG&E from violating the Commission's regulations which incorporate aspects of the UTP/CPL, to approve the terms of Settlement directing PaG&E to refund moneys acquired by means of violations of the Commission's regulations under the terms and conditions set forth in the Settlement. (Emphasis added) *Id.* at 39-40.

It is clear from the above statement that the ALJs, in approving the subject settlement, have acted outside the authority granted to the PUC to determine such matters. In *Virgilli*, the Commonwealth Court explained as follows:

Although the public utility law grants to the Commission general supervisory and regulatory power over public utilities, 66 Pa. C.S. § 501, the Code does not confer an exclusive jurisdiction to decide all matters involving regulated public utilities. ***On the contrary, except as otherwise expressly provided in the Code, the Commission's powers and duties do not "abridge or alter the existing rights of action or remedies in equity or under common or statutory law of this Commonwealth."*** 66 Pa. C.S. § 103(c). In addition, our courts have construed the Public Utility Code as creating many areas of concurrent jurisdiction between the PUC

and the Commonwealth's courts. See, e.g., *Rogoff v. Buncher*, 395 Pa. 477, 151 A.2d 83 (1959); *Leveto v. National Fuel Gas Distribution*, 243 Pa. Superior Ct. 510, 366 A.2d 270 (1976). (Emphasis added),

Virgilli v. Sw. Pa. Water Auth., 427 A.2d 1251, 1253 (1981). Given that in *Virgilli* the issue involved a public utility, which EGS' undisputedly are not, the authority granted to the Commission is even more restrained in this matter. In *Virgilli* the Court went on to state:

“[f]urthermore, the Code does not grant the PUC general supervisory power over contracts involving public utilities. See Leveto, supra; Myers v. Pennsylvania Public Utility Commission, 164 Pa. Superior Ct. 431, 65 A.2d 256 (1949). While Southwestern's claim may ultimately affect Mather's rates, such a result does not divest a common pleas court of its jurisdiction to resolve a private contract dispute.” Id. at 1254. “An authority formed under the Municipal Authorities Act has no inherent powers and may do only those things that the legislature has expressly or by necessary implication placed within its power to do. [] Likewise, an administrative agency, such as the PUC, ‘cannot, by mere usage, invest itself with authority or powers not fairly or properly within the legislative grant; it is the law which is to govern rather than departmental opinions in regard to it.’”
(Internal citations omitted).

Susquehanna Area Reg'l Airport Auth. v. Pa. PUC, 911 A.2d 612, 617 n.8 (Pa. Cmwlth. 2006).

The PUC is not a court of law. The PUC does not have the discretion of a court of law. The PUC certainly lacks regulatory authority over an EGS' rates and it likewise lacks the authority to force consumers to waive private causes of action against the Company.

For the reasons set forth above, Intervener Sobiech respectfully requests that the Commission reverse the approval of the Settlement.

EXCEPTION NO. 3:

THE ADMINISTRATIVE LAW JUDGES ERRED IN APPROVING THE SETTLEMENT WITHOUT KNOWING AND TAKING INTO CONSIDERATION HOW MANY OF THE COMPANY’S CUSTOMERS WERE HARMED BY ITS CONDUCT AND WITHOUT KNOWING AND TAKING INTO CONSIDERATION THE EXTENT OF THE FINANCIAL HARM CAUSED BY THE COMPANY:

The ALJs erred in approving the Settlement without knowing and taking into consideration how many of the Company’s customers were harmed by its conduct and without knowing and taking into consideration the extent of the financial harm caused by the Company. The Commonwealth of Pennsylvania House of Representatives Consumer Affairs Committee Chair, Robert Godshall, stated during an interview that it was the PUC who was responsible for ensuring that EGSs, including the Company, prove what they claimed they paid for electricity during the “polar vortex”. <https://www.youtube.com/watch?v=r28TTVWbFEU> at 29:20 - 29:46. However, it is clear that PUC has opted not do so in this matter.

The *Initial Decision* states:

In the instant case, we find the refund pool is in the public interest because *those consumers who paid more than they believed that they would be required to pay for electric generation service based on their interactions with PaG&E will be remunerated for the additional amount they paid above their EDC’s PTC*, which is a reasonable amount. It may not be an amount punitive in nature or compensatory for damage claims resulting from the misconduct, *but financially reimburses the customers a reasonable amount of money*. (Emphasis added). *Initial Decision* at 42-43.

We disagree with Mr. Sobiech’s arguments regarding this factor. In particular, *it is not necessary to know the precise number of people that were affected by the actions covered in the Settlement. The refund pool is substantial and large enough to remunerate those customers who have not yet received a refund from the Company*. (Emphasis added). *Id.* at 52.

It is simply impossible for the PUC to know whether *those consumers who paid more than they believed that they would be required to pay for electric generation service based on their interactions with PaG&E will be remunerated for the additional amount they paid above their EDC's PTC* because the PUC does not know how many of the Company's customers were overcharged nor does the PUC know how much those customers were overcharged. The standard to be applied in this situation is whether the Settlement is in the public interest not whether the settlement is in the Company's best interest. *See the Initial Decision.*

For the reasons set forth above, Intervener Sobiech respectfully requests that the Commission reverse the approval of the Settlement.

EXCEPTION NO. 4:

THE ADMINISTRATIVE LAW JUDGES ERRED IN FINDING THAT THE PUC AND THE OFFICE OF CONSUMER ADVOCATE HAVE THE JURISDICTION OVER AND AUTHORITY TO REPRESENT, RESPECTIVELY, CONSUMERS WHO HAVE NOT FILED COMPLAINTS WITH THE PUC AGAINST EGSs WHICH ARE CORPORATIONS AND NOT PUBLIC UTILITIES:

The ALJs erred in finding that the PUC and the Office of Consumer Advocate (OCA) have the jurisdiction over and authority to represent, respectively, consumers who have not filed complaints with the PUC against EGSs which are corporations and not public utilities. The ALJs briefly address this issue in the *Initial Decision*:

The Commission *is authorized to direct refunds to complainants who are customers of EGSs.* 66 Pa.C.S. §501. *However, in the instant case, the customers themselves are not the complainants in the cause of action.* Rather, Joint Complainants are statutory advocates for consumers in Pennsylvania. We infer from this Settlement that Joint Complainants have the legal authority to issue a request for proposals (RFP) or request for qualifications (RFQ) and hire an independent third-party Administrator, which would collect and distribute the fund monies. This would give the affected consumers financial relief. *Initial Decision* at 38-39.

Aside from the mere existence of the proposed settlement, which is where the ALJs appear to find the authority for the Joint Complainants to act on behalf of the tens of thousands of the Company's customers who have not filed formal complaints with the PUC, they do not cite any other authority in support of such approval. *Id.*

Paragraph 2 of the *Joint Complaint* states: "Tanya J. McCloskey is the Acting Consumer Advocate. The Office of Consumer Advocate is the agency authorized by law to represent the interests of utility *consumers* before the Commission as provided in 71 P.S. § 309-1, et seq." (Emphasis added). However, in this instance, the Company's customers are not considered "consumers" under 71 P.S. § 309-1.

71 P.S. § 309-1, Definitions, states:

As used in this article:

"COMMISSION" means the Pennsylvania Public Utility Commission.

"CONSUMER" means any person (i) who makes a direct use or is the ultimate recipient of a product or a service supplied by any *person or public utility* subject to the authority of the commission or (ii) who may be a direct user or ultimate recipient of a product or service supplied by any *person or public utility* subject to the authority of the commission and may be affected in any way by any action within the authority of the commission. The term "consumer" includes any "person," "corporation" or "municipal corporation" as defined in section 2 of the act of May 28, 1937 (P.L. 1053, No. 286), known as the "Public Utility Law."

"PUBLIC UTILITY" means public utility as defined in section 2(17), act of May 28, 1937 (P.L. 1053, No. 286), known as the "Public Utility Law." (Emphasis added).

66 Pa.C.S. § 102 defines "Person" as: "Individuals, partnerships, or associations *other than corporations*, and includes their lessees, assignees, trustees, receivers, executors, administrators, or other successors in interest." (Emphasis added). It is clear from looking at

the authority granted to the OCA under 71 P.S. § 309-1 that it lacks the authority to represent the Company's customers as said customers are not considered "consumers" because the Company is neither a "person" nor a "public utility" but rather is a corporation. 66 Pa.C.S. § 102; 71 P.S. § 309-1 and *Joint Complaint* at 3 ¶ 6.

In further support, § 309-4.1. entitled, *Assessment upon public utilities, disposition, appropriation and disbursement of such assessments* was found not to apply to Electric Generation Suppliers, such as the Company, as the same are not public utilities. The Supreme Court of Pennsylvania held:

At issue in this appeal is whether the Pennsylvania Public Utility Commission's Fiscal Office (the "Fiscal Office") may assess electric generation suppliers ("EGSs") for the administrative expenses of the ***Public Utility Commission (the "Commission"), the Office of Consumer Advocate ("OCA"), and the Office of Small Business Advocate ("OSBA")***. We hold that the Fiscal Office may not assess EGSs for such expenses. (Emphasis added).

Delmarva Power & Light Co. v. Commonwealth, 870 A.2d 901, 902 (2005).

In *Delmarva*, the EGSs argued that "the Fiscal Office could not assess them for the OCA's and the OSBA's administrative expenses because section 904-A.1 of the Administrative Code and section 399.46 of the Small Business Advocate Act only permit the Fiscal Office to assess 'public utilities.'" *Id.* at 903. The Supreme Court held:

Nevertheless, the General Assembly made an exception to this rule by permitting EGSs to be deemed public utilities for "the limited purposes" described in sections 2809 and 2810. See 66 Pa. C.S. § 102 [] Notably, in making this limited exception, the General Assembly did not also state that EGSs could be deemed public utilities for purposes of section 510. Given this omission, we must presume that the General Assembly did not intend for EGSs to be considered public utilities for purposes of section 510 assessments. [] See 1 Pa. C.S. § 1924 ("Exceptions expressed in a statute shall be construed to exclude all others."); *Kmonk-Sullivan v. State Farm Mut. Auto. Ins. Co.*, 567 Pa. 514, 788 A.2d 955, 962 (Pa. 2001) ("An exception expressly provided in a statute is a strong

indication that the legislature did not intend to exclude unexpressed items.” *Id.* at 910.

Delmarva applies to the issue at hand. The Office of Consumer Advocate under 71 P.S. § 309-1 lacks the authority to represent the Company’s customers as said customers are not considered “consumers” because the Company is neither a “person” nor a “public utility” but rather is a corporation. 66 Pa.C.S. § 102; 71 P.S. § 309-1 and Joint Complaint at 3 ¶ 6.

As was discussed above, the PUC does not have jurisdiction over private causes of action or over refunds related to rate disputes, and as such, neither does OCA. 71 P.S. § 309-4 states in part, “[i]n addition to any other authority conferred upon him by this act, the Consumer Advocate is authorized, and it shall be his duty, in carrying out his responsibilities under this act, to represent the interest of consumers as a party, or otherwise participate for the purpose of representing an interest of consumers, before the commission *in any matter properly before the commission...*” For the sake of economy, and to address whether the issues of refunds and general releases are matters properly before the Commission, Intervener Sobiech incorporates the foregoing arguments from Exceptions 1 & 2 above as if set forth herein in their entirety.

Further, the ALJs attempt to minimize the potential effect of their overreach by claiming that if the Company’s customers do not wish to receive a refund, they can simply pursue other judicial remedies. *Initial Decision* at 39. However this is not exactly accurate as any unclaimed funds from the proposed settlement fund will revert to the Commonwealth pursuant to the Settlement. *Id.* at 18. Specifically, paragraph 40 reads: “Any unclaimed funds from the Refund Pool shall be forwarded to the Pennsylvania Department of the Treasury pursuant to unclaimed property requirements for the customer(s) entitled to the refund.” If any of the Company’s customers wish to pursue remedies outside of the Settlement fund, as suggested by the ALJs, the fact that any unclaimed monies will revert to the Commonwealth may prevent them from making

a recovery. As such, the PUC should not attempt to exercise jurisdiction it lacks over the private causes of action of parties who have not filed complaints with the PUC.

For the reasons set forth above, the PUC does not have jurisdiction or authority over the private causes of action of parties, especially those who have not filed complaints with the PUC, and the OCA lacks standing and/or the authority to represent the Company's customers in this proceeding. As such, the settlement should be rejected/stricken.

CONCLUSION

For the reasons set forth above, Intervener Sobiech respectfully submits that the Initial Decision approving the Settlement should be overturned/stricken.

Date: July 20, 2015

Respectfully Submitted By,
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Attorneys for Intervener Sobiech

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Commonwealth of Pennsylvania, by Attorney
General KATHLEEN G. KANE, Through the
Bureau of Consumer Protection,

And

Docket No. C-2014-2427656

TANYA J. McCLOSKEY, Acting Consumer
Advocate,
Complainants

v.

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

CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed Exceptions of Intervener Sobiech to the June 30, 2015, Initial Decision on the Commission's electronic filing system. Further, I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of §1.54 (relating to service by a party) by e-filing, e-mail, and/or first-class mail (unless otherwise noted):

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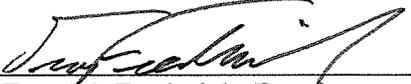
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July 20, 2015


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