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July 30, 2015

VIA ELECTRONIC FILING

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

RE: Commonwealth of Pennsylvania, by Attorney General KATHLEEN G. KANE, Through the Bureau of Consumer Protection, and TANYA J. McCLOSKEY, Acting Consumer Advocate, v. ENERGY SERVICES PROVIDERS, INC. d/b/a PENNSYLVANIA GAS & ELECTRIC; Docket No. C-2014-2427656; **REPLIES OF ENERGY SERVICES PROVIDERS, INC. D/B/A PENNSYLVANIA GAS & ELECTRIC TO EXCEPTIONS**

Dear Secretary Chiavetta:

Enclosed for filing with the Commission are the Replies of Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric to Exceptions in the above-referenced matter. A copy of this document has been served in accordance with the attached Certificate of Service.

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

Very truly yours,

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

TSS/jld
Enclosure

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

CERTIFICATE OF SERVICE

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

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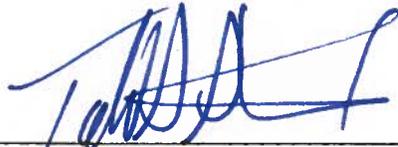
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DATED: July 30, 2015

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

Complainants,

v.

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

Docket No. C-2014-2427656

**REPLIES OF ENERGY SERVICES PROVIDERS, INC.
D/B/A PENNSYLVANIA GAS & ELECTRIC
TO EXCEPTIONS**

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DATED: July 30, 2015

NOW COMES Respondent Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric (“PAG&E”) and hereby submits its Replies to the Exceptions filed by Intervenor Thomas J. Sobiech, to the June 30, 2015, Initial Decision of Presiding Administrative Law Judges, Elizabeth Barnes and Joel Cheskis (the “ALJs”) approving the proposed settlement (the “Settlement”) of the Joint Complaint in the above-captioned matter.

INTRODUCTION

The Commission should approve the Settlement and deny each of Mr. Sobiech’s Exceptions because the Settlement is in the public interest.

The public interest is served because, in addition to the \$4,511,563 in cash refunds that PAG&E voluntarily provided to customers before entering into the Settlement (and which was incorporated into the relief provided to customers through the Settlement), the Company has agreed to: (i) pay an additional \$2,325,000 into a Refund Pool for customers; (ii) engage in a good faith effort to reach individual settlements with any customers who contact the company for a refund but who do not otherwise receive or accept an offer for a refund from the Refund Pool; (iii) pay up to \$100,000 of the cost of administering the Refund Pool; (iv) contribute \$100,000 to the EDC hardship funds; (v) pay a voluntary civil penalty of \$25,000; and, (vi) agree to injunctive relief instituting a variety of changes to its business practices, including an 18 month prohibition on the sale of variable rate electricity products which the Company began to observe in March 2015, as specified in the Settlement. Moreover, all of these concrete benefits will inure to the public immediately, and not months or years from now after the allegations in the Joint Complaint have been fully litigated and all appeals disposed of.

In addition, as explained in more detail below, the Commission should deny each of Mr. Sobiech’s exceptions because: (i) his exceptions are aimed at attempting to protect the interest

of his class action attorneys, not the interests of the public at large; (ii) the Settlement does not interfere with any individual's private cause of action against PAG&E; (iii) the Commission has authority to approve a settlement under which an EGS voluntarily provides refunds; (iv) no further fact finding is necessary to weigh the benefits of the Settlement; and (v) the ALJs did not misinterpret the OCA's authority to represent the interest of PAG&E's customers before the Commission.

REPLY TO EXCEPTION NO. 1: The Administrative Law Judges correctly approved the settlement, including the requirement of releases by customers opting to take voluntary refunds, as approval of the settlement does not adjudicate or interfere with any individual private causes of action.

Mr. Sobiech's first exception contends that the ALJs erred in approving a settlement that offers refunds to customers who are willing to release any claims they may have against PAG&E, "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." (Exceptions at 2.) However, nothing in the Settlement or the Initial Decision suggests, much less requires, the Commission "to adjudicate and/or interfere with private causes of action such as breach of contract." (Sobiech Exceptions, *passim*).

The Settlement does not compromise *any* customer's rights without that customer's voluntary, informed consent. Customers are free to accept or reject any offer from the Settlement administrator from the Refunds Pool; only if a customer accepts such an offer is the customer required to sign a release of his or her claims against PAG&E. If a customer rejects an offer, that customer is free to pursue any claim he or she may have as an individual against PAG&E. In effect, that is precisely what Mr. Sobiech has done by preemptively rejecting any offer from the Settlement administrator in favor of pursuing his individual claim against PAG&E

in federal court. Having rejected both the potential for an offer of funds from the Refund Pool and the release sight unseen, Mr. Sobiech will suffer no cognizable harm should the Commission approve the release procedure as part of the Settlement, and thus, he has no standing to oppose such approval.

Mr. Sobiech cites no authority for the proposition that the Commission lacks jurisdiction or authority to approve a settlement simply because it includes an agreement by the respondent to pay refunds to customers who are willing to release claims they might have against that party. Indeed, Commission precedent makes clear that the inclusion of general releases in a settlement agreement is not a bar to Commission approval. For example, as part of a settlement involving alleged failures by a telephone company to lift the “local service freeze” it placed on customers’ accounts, the company agreed to pay restitution to the affected customers, “*provided* that these customers agree in writing to *release and forever discharge* Verizon PA *from any and all claims* that arise out of or relate to the lifting of each customer’s local service freeze.” *Pennsylvania Pub. Util. Comm’n v. Verizon Pennsylvania, Inc.*, M-00021592, 2002 WL 1729987 (Jan. 25, 2002) (emphasis added). The Commission approved this provision and the rest of the settlement in terms that apply equally to this case:

After a review of the terms of the settlement agreement, we are satisfied that the agreement is in the public interest. This settlement rightly focuses on resolutions that benefit consumers and competition as opposed to expensive and time-consuming litigation.

Id.

REPLY TO EXCEPTION NO. 2: The Administrative Law Judges appropriately found that the Commission has the authority to approve a settlement under which a supplier voluntarily provides refunds as a condition of settlement.

In his second exception, Mr. Sobiech argues that the ALJs erred in concluding that the Commission has the jurisdiction and power “to order and/or permit” electric generation suppliers such as PAG&E to pay refunds to customers. (Exceptions at 6).

As an initial matter, the Commission should take note of this argument because it transparently shows that the driving force behind Mr. Sobiech’s exceptions is a desire to benefit his class action attorneys, not the public. Indeed, Mr. Sobiech’s argument is not that the refunds provided through the Settlement are insufficient to truly benefit the public. Rather, he argues that the Settlement would be flawed if it contains provisions that provide any refunds to PAG&E’s customers. In short, this is nothing more than an attempt by Mr. Sobiech to usurp the roles of the OAG, OCA, and Commission in order to maximize the potential payday for his attorneys through class action litigation separately filed elsewhere.

Putting aside the questionable motivation for this exception, Mr. Sobiech’s arguments should be rejected because they are directed towards an aspect of the Initial Decision that simply does not exist. The Initial Decision clearly does not require the Commission to “order” the payment of refunds. It merely approves the settlement of claims of statutory violations where the respondent has *voluntarily agreed* to provide refunds as a condition of the settlement. There is no law, and Mr. Sobiech cites none, which suggests that the respondent in litigation before the Commission cannot agree to voluntarily pay refunds to some of its customers as part of the settlement of that litigation. In fact, the Commission has previously approved settlements in which the respondent agreed to pay refunds.¹

¹ See e.g., *Pa. PUC Bureau of Investigation and Enforcement v. Public Power, LLC*, Docket No. M-2012-2257858 (Opinion and Order entered December 19, 2013); see also *Commonwealth of Pa. et al. v. IDT*

Mr. Sobiech cites the ALJs' discussion of the Unfair Trade Practices/Consumer Protection Law in support of his second exception. However, the ALJs did not suggest that the UTP/CPL was the source of the Commission's authority to approve the Settlement. They merely suggested that the Commission could consider the fact that that the Settlement promotes the policies of Pennsylvania's consumer protection laws in the course of its public interest determination. Mr. Sobiech's argument is yet another sleight-of-hand attempt to create error where none was committed. His second exception should be denied.

REPLY EXCEPTION NO. 3: It is not necessary for the Commission or the ALJs to engage in fact finding to determine precisely how many customers are alleged to have been harmed by the conduct at issue or the extent of any financial harm allegedly caused.

In his third exception, Mr. Sobiech argues that the ALJs erred in approving the settlement because they did not know precisely how many of PAG&E's customers were harmed by its alleged conduct and the precise amount of financial harm cause by that alleged conduct.

This argument should be rejected because, as correctly noted by the ALJs, "it is reasonable that all of PAG&E's variable rate customers may have been affected by the conduct alleged." *See* Initial Decision at 52. Indeed, as noted by the OAG and OCA, the settlement agreement:

Was reached after extensive discovery, both formal and informal, and information exchanged during settlement negotiations. Joint Petitioners utilized the information exchanged and the information obtained from PAG&E's customers to tailor the provisions in the [settlement agreement] to fully resolve the allegations in the Joint Complaint. As such, there is no "blind bargain."

Energy, Inc., Docket No. C-2014-2427657, slip op. at 16 (Opinion and Order entered Dec. 18, 2014) ("Notwithstanding Section 1312 of the Code, we note, however, that nothing precludes an EGS from agreeing to issue refunds as part of a settlement of a Commission proceeding arising pursuant to the Code.") (citations omitted).

Joint Reply Brief of the Commonwealth of Pennsylvania Bureau of Consumer Protection and the Office of Consumer Advocate to Intervenor Sobiech's *Amicus Curiae* Brief at 10. Moreover, the settlement agreement provides benefits to all of PAG&E's past, current, and future customers through: (i) potential offers of refunds from the Refund Pool; (ii) a duty for PAG&E to negotiate in good faith with any customers that do not receive or accept an offer from refunds from the Refund Pool; and/or (iii) changes to PAG&E's business practices.

These benefits support approval of the Settlement Agreement without further fact finding because, even if the Commission were to ultimately order similar payments and similar changes to PAG&E's business practices, the uncertainties and delays inherent in administrative and appellate litigation would result in delaying payments and implementing changes for many months, if not years. The Settlement thus provides immediate, concrete benefit to the public that would otherwise be unavailable in the near term.

REPLY EXCEPTION NO. 4: The ALJs did not misconstrue the authority of the OCA.

It is absolutely clear in this case, that OCA has not represented any individual PAG&E customer. To the contrary, the OCA has consistently represented the collective interests of past, present *and future* PAG&E customers consistent with its statutory responsibility. Again, Mr. Sobiech improperly attempts to supplant the statutory advocates by suggesting that the definitions in the OCA's authorizing statute, when conflated with the definitions of the Public Utility Code, somehow renders the OCA's conduct in this matter *ultra vires*. Mr. Sobiech makes this suggestion despite the fact that ALJ Cheskis was a senior attorney for the OCA for a number of years before joining the Commission as an ALJ, and is well versed in that agency's jurisdiction. Mr. Sobiech's Exception is of no real consequence in that he has in no way

challenged the Attorney General's authority. Nonetheless, Mr. Sobiech seeks to have the Commission reject the settlement and throw all customers into a potential class so that perhaps years from now, and after his counsel fees are paid, those customers may receive some refund amount—if he can prevail. The alternative provides concrete monetary benefits to customers in a very short timeframe, and provides injunctive conditions that otherwise would be unavailable. Mr. Sobiech's Exceptions, as a whole, demonstrate that in his view, no settlement is acceptable, and the Commission should not address any of the issues resolved by the Settlement, because any adjudication outside his lawsuit will impact his counsel's attorney fees. For all of these reasons, and because his legal argument is fallacious and would produce an absurd result, Mr. Sobiech's fourth Exception must be denied.

Even if the Commission proceeds to dissect Mr. Sobiech's Exception, the Exception must fail because his analysis ignores the basic rules of statutory construction. It is true that Pennsylvania courts have determined that electric generation suppliers such as PAG&E are not public utilities for purposes of Sections 510 and 1312 of the Public Utility Code. 66 Pa. C.S. §§ 510 & 1312, and it has thus far not been in dispute that EGSs, even if not public utilities, are subject to the Commission's jurisdiction for certain specified regulatory purposes, which purposes include the issues that remain in the AG/OCA Complaint in this matter. *See* 66 Pa. C.S. § 2809. Mr. Sobiech's suggestion to the contrary is specious and should be given no weight. Nonetheless, the status of EGSs as public utilities is simply another diversion, and a fruitless one at that, to attempt to disqualify the OCA from representing consumer interests before the Commission in a complaint proceeding against an EGS. The effort is pointless, because even if Mr. Sobiech were to succeed, and he should not – the OAG would remain in the case, thus rendering his argument ineffective, in addition to being wrong.

Mr. Sobiech's approach is to play word games, suggesting that the OCA does not have the statutory authority to represent "consumers" because the service at issue (provided by PAG&E) was not provided by a "person or public utility". To accomplish his linguistic gymnastics, Mr. Sobiech relies upon the definition of "consumer" as stated in the Office of Consumer Advocate's authorizing statute, 71 P.S. § 309-1. However, that same statute offers no definition of "person", so Mr. Sobiech conveniently transposes the definition of "person" from the Public Utility Code ("Code"), 66 Pa. C.S. § 102. And since the Code, for reasons which are not clear, separately defines "person" and "corporation", Mr. Sobiech argues that because PAG&E is a corporation, and is likewise not a "public utility", the service it provides does not fall within the definition of the term "consumer" and so the OCA is without authority. In short, Mr. Sobiech suggests that the "consumers" represented by the OCA are not actually "consumers" for purposes of the Administrative Code of 1929, as amended, because even though PAG&E is subject to certain pertinent provisions of the Code, it not a "public utility", but is a corporation and therefore cannot be a person.

Mr. Sobiech's argument fails. While 71 P.S. § 309-1 does incorporate the Code's definition of "person" for purposes of determining what form of legal entity may be a "consumer" it does not adopt the Code's definition of the term "person" for purposes of defining who provides the service. This is clear, because 71 P.S. § 309-1 separately incorporates the Code's definition of "public utility", but does not incorporate the Code's definition of "person" for purposes of the restriction on what form of entity must provide public utility service. The principle of statutory construction, *expressio unius est exclusio alterius*, makes it clear that if the legislature had intended to incorporate the definition of "person" from the Code, for purposes of limiting what legal entities provide products or services to a "consumer" as defined in 71 P.S. §

309-1, it would have so stated—and it plainly did not.² That is, 71. P.S. § 309-1 states that a “consumer” may be a “person, corporation or municipal corporation” as defined by the Code, but it does not state for purposes of what entity provides the “product or service” that the Code’s definition applies. Simply put, 71. P.S. §309-1 does not define “person” for this purpose, and without the unusual bifurcation of the definition of “person” in the Code, which does not include corporations, the ordinary definition of “person” which includes entities with legal existence, such as corporations, must be used.³

Accordingly, Mr. Sobiech’s fourth exception must be denied.

² See *Atcovitz v. Gulph Mills Tennis Club, Inc.*, 812 A.2d 1218, 1223 (Pa. 2002) (“We must infer that, under the doctrine of *expressio unius est exclusio alterius*, the inclusion of a specific matter in a statute implies the exclusion of other matters.”); *Popowsky v. Pennsylvania Pub. Util. Comm’n*, 869 A.2d 1144, 1159 (Pa. Cmwlth. 2005) (“[T]he principle expressed in the maxim *expressio unius est exclusio alterius* defeats the PUC’s proffered construction [of section 1307(a)]. Under this doctrine, the inclusion of a specific matter in a statute implies the exclusion of other matters.”) (citing *Atcovitz*).

³ The Rules of Civil Procedure make it clear that the definition of “person” “includes a corporation”, Pa. R.C.P Rule 76. Similarly, WEBSTER’S NEW WORLD DICTIONARY, (3rd Edition, 1991), defines “person” as “any individual or incorporated group having legal rights and responsibilities.”

CONCLUSION

For all of the foregoing reasons, Mr. Sobiech's exceptions should be DENIED.

DATED: July 30, 2015

Respectfully submitted,



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