

COMMONWEALTH OF PENNSYLVANIA



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July 30, 2015

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

v.

Energy Services Providers, Inc. d/b/a Pennsylvania Gas &
Electric

Respondent

Docket No. C-2014-2427656

Secretary Chiavetta:

Enclosed please find the Joint Reply Exceptions of Joint Complainants Commonwealth of Pennsylvania and the Office of Consumer Advocate to the Initial Decision, in the above-referenced proceeding.

Copies have been served as indicated on the enclosed Certificate of Service.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Kristine E. Robinson".

Kristine E. Robinson
Assistant Consumer Advocate
PA Attorney I.D. #316479

Enclosures

cc: Honorable Elizabeth Barnes, ALJ
Honorable Joel Cheskis, ALJ
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Certificate of Service

*185180

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	:	
	:	
	:	
Respondent	:	

REPLY EXCEPTIONS
OF JOINT COMPLAINANTS COMMONWEALTH OF PENNSYLVANIA
AND THE OFFICE OF CONSUMER ADVOCATE

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	REPLY EXCEPTIONS	3
	JOINT COMPLAINANTS' REPLY TO EXCEPTION 1: <u>The ALJs did not err in recommending approval of the Joint Petition, as a Commission order accepting the recommendation would not affect Mr. Sobiech's private causes of action</u>	3
	JOINT COMPLAINANTS' REPLY TO EXCEPTION 2: <u>Nothing precludes an EGS from agreeing to provide refunds as part of any settlement, and, nevertheless, the Commission specifically has the authority to issue refunds for the violations alleged in the Joint Complaint</u>	6
	JOINT COMPLAINANTS' REPLY TO EXCEPTION 3: <u>The Settlement and Statements in Support are based on ample information regarding which customers were affected by PaG&E's conduct and adequately consider the extent of harm suffered by individual customers</u>	10
	JOINT COMPLAINANTS' REPLY TO EXCEPTION 4: <u>The OCA has the authority to represent consumers of EGSs in proceedings related to Commission regulations governing the retail market and quality of service issues</u>	12
III.	CONCLUSION.....	18

TABLE OF AUTHORITIES

Page(s)

Cases

Delmarva Power & Light Co. v. Pa. PUC,
870 A.2d 901 (Pa. 2005) (Delmarva).....7, 8, 15, 16

Administrative Decisions

Commonwealth of Pennsylvania, by Attorney General KATHLEEN G. KANE,
Through the Bureau of Consumer Protection, And TANYA J. McCLOSKEY,
Acting Consumer Advocate v. Blue Pilot Energy, LLC,
Docket No. C-2014-2427655, Motion of Vice Chairman John F. Coleman, Jr.
(November 13, 2004).....8

Commonwealth of Pennsylvania, by Attorney General KATHLEEN G. KANE,
Through the Bureau of Consumer Protection, And TANYA J. McCLOSKEY,
Acting Consumer Advocate v. IDT Energy, Inc.,
Docket No. C-2014-2427657, Opinion and Order at 16 (December 18, 2014)
(IDT Order).....6, 7, 8, 9, 10

Pa. PUC Bureau of Investigation and Enforcement v. Energy Services Providers,
Inc. d/b/a Pennsylvania Gas and Electric and U.S. Gas and Electric d/b/a
Pennsylvania Gas and Electric,
Docket No. M-2013-2325122, Opinion and Order (October 2, 2014) (October,
2014 Order).....7, 10

Pa. PUC Bureau of Investigation and Enforcement v. Public Power, LLC,
Docket No. C-2012-2257858, Opinion and Order (December 19, 2013)7

Pa. PUC v. Bell Telephone Co. of Pa,
Docket No. R-811819, Order (Nov. 14, 1988)5

Pa. PUC v. Verizon Pennsylvania, Inc.,
Docket No. M-00021592, Order (Jan. 25, 2002).....5

Statutes

71 P.S. § 309-1.....13
73 P.S. § 201-11
73 P.S. § 22411
66 Pa. C.S. Ch. 28.....1

66 Pa. C.S. § 102.....	13
66 Pa. C. S. § 501.....	8
66 Pa. C.S. § 2809.....	13, 14, 15
66 Pa. C.S. §§ 2809(a) and (b).....	13, 14
66 Pa. C.S. § 2809(e)	14, 15

Regulations

52 Pa. Code Ch. 54, 56 and 111.....	1, 14
52 Pa. Code §§ 54.43(f) and 111.12(d)(1).....	10
52 Pa. Code § 57.177(b)	9

I. INTRODUCTION

On June 20, 2014, the Joint Complainants filed a Joint Complaint with the Commission, pursuant to the Public Utility Code, 66 Pa. C.S. Ch. 28, the Commission's regulations, 52 Pa. Code Ch. 54, 56 and 111, the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.* (Consumer Protection Law), and the Telemarketer Registration Act, 73 P.S. § 2241, *et seq.* (TRA). The Joint Complaint includes seven separate counts and alleges that Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric (PaG&E or the Company) violated Pennsylvania law and Commission Orders and regulations. The seven separate counts in the Joint Complaint are as follows: I) misleading and deceptive promises of savings; II) slamming; III) misleading and deceptive welcome letter; IV) lack of good faith handling of complaints; V) failing to provide accurate pricing information; VI) prices nonconforming to disclosure statement; and VII) failure to comply with the TRA. With respect to relief, the Joint Complainants requested that the Commission find that PaG&E violated the Public Utility Code, the Consumer Protection Law and the TRA, and the Commission's regulations and Orders; provide restitution to Respondent's customers; impose a civil penalty; order Respondent to make various modifications to its practices and procedures; and revoke or suspend Respondent's Electric Generation Supplier (EGS) license, if warranted.

The Commission's Bureau of Investigation and Enforcement (I&E) intervened in the proceeding on July 31, 2014, and the Office of Small Business Advocate (OSBA) intervened on July 10, 2014. On March 24, 2015, the Joint Complainants, PaG&E, and I&E (collectively Joint Petitioners) filed a Joint Petition for Approval of Settlement (Joint Petition or Settlement) seeking to resolve the matters alleged in the Joint Complaint.¹

¹ The Office of Small Business Advocate (OSBA) did not join in the Settlement but did not oppose the Settlement.

Thereafter, on March 27, 2015, Thomas Sobiech, on behalf of himself and all others similarly situated, filed a Petition to Intervene (Sobiech Petition), in which he objected to the Settlement and requested oral argument on the same. Pursuant to the ALJs' directive, on April 16, 2015, Joint Complainants filed an Answer to the Sobiech Petition requesting that the ALJs deny the Sobiech Petition. The Company also filed an Answer in opposition to the granting of the Sobiech Petition.

On April 23, 2015, the ALJs issued an Order granting the Sobiech Petition (Order Granting Intervention). In their Order Granting Intervention, the ALJs concluded that Thomas Sobiech, a former PaG&E customer, had a "substantial, immediate and direct" interest in this proceeding sufficient to warrant granting his intervention. Order Granting Intervention at 5. The ALJs also determined, however, that Mr. Sobiech must accept the record as it currently stands, may not introduce additional evidence, and is not permitted to significantly broaden the issues, in order to maintain the orderly progress of the case. Id. at 6. The ALJs also held that Mr. Sobiech, as an intervenor, is not permitted to represent the interests of other consumers in this proceeding and is only permitted to intervene on his own behalf. Id.

The ALJs limited Mr. Sobiech's participation as an intervenor to the submission of an "amicus brief" and exceptions or reply exceptions in response to the Initial Decision. Id. In the Order Granting Intervention, the ALJs also set a date for Reply Briefs by Joint Petitioners. On May 13, 2015, Mr. Sobiech submitted his *Amicus Curiae* Brief in Opposition to the Joint Petition for Approval of Settlement (Sobiech Brief). On May 22, 2015, PaG&E filed a Reply to the Sobiech Brief, and the Joint Complainants filed a Reply to the Sobiech Brief on May 26, 2015.

On June 8, 2015, the ALJs issued an Initial Decision, in which they recommended approval of the Joint Petition in its entirety without modification. Mr. Sobiech filed Exceptions

to the Initial Decision on July 20, 2015. For the reasons set forth below, Joint Complainants request that the Commission reject Mr. Sobiech's Exceptions and adopt the ALJs' Initial Decision.

II. REPLY EXCEPTIONS

JOINT COMPLAINANTS' REPLY TO EXCEPTION 1: The ALJs did not err in recommending approval of the Joint Petition, as a Commission order accepting the recommendation would not affect Mr. Sobiech's private causes of action.

In his Exceptions, Mr. Sobiech first asserts that the ALJs erred in permitting the parties to include in the Settlement a provision requiring the Company's customers to sign general releases to receive refunds from the Settlement Fund (Refund Pool), as it is beyond the jurisdiction and practice of the Commission to adjudicate and/or interfere with private causes of action, such as breach of contract. Sobiech Exc. at 2. Joint Complainants submit that the ALJs did not err in approving the Joint Petition, as the Commission has not adjudicated or interfered with Mr. Sobiech's private causes of action.

Under the terms of the Settlement, a customer must execute a "Release of Claims" in order to receive funds from the Refund Pool, in which the customer will release PaG&E and all of its current and former officers, shareholders, and employees from any and all claims arising from or related to the conduct alleged in the Joint Complaint. Settlement at ¶ 43. As further stated in the Settlement, the refund eligibility shall be determined "based on the individual customer's usage, price charged, and refund amounts already received directly from PaG&E." Settlement at ¶ 34.

Joint Complainants first note that to the extent Intervenor Sobiech's Exception regarding the release language in the Joint Petition purports to be made on behalf of all PaG&E customers, it must be rejected pursuant to the ALJs' Order granting the Sobiech Petition to Intervene,

wherein the ALJs held that Mr. Sobiech was permitted to intervene on his own behalf only. Thus, Mr. Sobiech's Exception should be limited to determining whether the Commission has adjudicated or interfered with Mr. Sobiech's private causes of action.²

Joint Complainants submit that even if eligible for a refund, Intervenor Sobiech would still not be bound by the Refund Pool and Release provisions of the Settlement should the Commission approve the Settlement. The Settlement permits each individual customer who is offered a refund to choose whether to accept the refund in exchange for releasing his or her claims against PaG&E. See Settlement at ¶ 43. That release is limited to claims arising from or related to the conduct alleged in the Joint Complaint. See Id. If a customer refuses the refund or is not offered a refund pursuant to the Settlement, the customer does not provide any release of claims to PaG&E. See Settlement at ¶¶ 42-43. Joint Complainants submit that Intervenor Sobiech will not be required to release his claims against PaG&E if the Commission approves the Settlement, because if eligible and offered a refund pursuant to the Settlement, Intervenor Sobiech can choose to forego the refund and pursue his claims against the Company through the Class Action or by filing a Formal Complaint at the Commission. In contrast to Mr. Sobiech's Exceptions, the Commission is not requiring customers to release their claims against the Company; it is the customers themselves that may choose to do so if they deem it to be in their best interests.³ Thus, the Commission has not, in any way, adjudicated or interfered with Mr. Sobiech's private causes of action.

² Nevertheless, Joint Complainants submit that a Commission order accepting the ALJs' recommendation would not interfere in any way with any individual customer's private causes of action for the same reasons that it would interfere with those of Mr. Sobiech, as discussed herein.

³ Joint Complainants also note that, when customers are offered refunds pursuant to the Settlement, Joint Complainants intend to provide the customers with information that is necessary for them to make informed decisions regarding whether to accept the refund in exchange for a release of their claims or pursue other methods to obtain a refund.

In support of his position that the Commission does not have the jurisdiction to approve the release language in the Settlement, Intervenor Sobiech asserts that the Company did not require its customers to execute general releases when it provided refunds to its customers prior to the Settlement and that the Commission does not normally require consumers to waive their rights as a contingency for receiving a refund. Sobiech Exc. at 3. These arguments lack merit. Whether the Company previously required customers to sign a general release upon receiving a refund is not relevant to this Settlement. Additionally, while some settlements that the Commission has approved do not contain general releases, that fact does not support a finding that the Commission lacks jurisdiction to do so. The Commission, in fact, has the jurisdiction to approve a settlement that contains a general release. See e.g. Pa. PUC v. Bell Telephone Co. of Pa., Docket No. R-811819, Order (Nov. 14, 1988); Pa. PUC v. Verizon Pennsylvania, Inc., Docket No. M-00021592, Order (Jan. 25, 2002).

Mr. Sobiech also argues that the Commission does not have the authority to limit a cause of action that can be brought in another jurisdiction, and the ALJs are unaware of the legal consequences in other jurisdictions of requiring customers to sign a general release in this proceeding. Sobiech Exc. at 4-5. Therefore, Mr. Sobiech concludes that the ALJs lack the authority to approve this Settlement. Id. As stated above, Joint Complainants submit that the Commission has the jurisdiction to approve a settlement that contains a general release. Furthermore, it bears repeating that the Commission is not requiring customers to release their claims against the Company; it is the customers themselves that may choose to do so if they deem it to be in their best interests to accept a refund from the Refund Pool.

In his Exceptions, Intervenor Sobiech also states that the ALJs made a “tradeoff” and implies that the ALJs accepted the release language as a tradeoff for the benefits provided in the

injunctive relief provisions of the Settlement. Sobiech Exc. at 4. Joint Complainants acknowledge that the Joint Petition, as with all settlements, is the result of compromise after extensive discovery, both formal and informal, and the exchange of information during settlement negotiations. While the ALJs may have acknowledged this compromise in their Initial Decision, they did not exceed their jurisdiction in doing so. As discussed above, the Commission is not adjudicating or interfering with private causes of action under the terms of the Settlement, but rather is giving consumers the option to determine whether it is in their best interests to accept an immediate refund or to pursue a separate claim before the Commission or in another forum.

For the reasons set forth above, Joint Complainants request that the Commission reject Mr. Sobiech's Exception No. 1 and approve the ALJs' Initial Decision.

JOINT COMPLAINANTS' REPLY TO EXCEPTION 2: Nothing precludes an EGS from agreeing to provide refunds as part of any settlement, and, nevertheless, the Commission specifically has the authority to issue refunds for the violations alleged in the Joint Complaint.

In his Exceptions, Mr. Sobiech next asserts that the ALJs erred in finding that the Commission has the authority to order and/or permit EGSs to refund money relating to "rate disputes." Sobiech Exc. at 6. Joint Complainants submit that nothing precludes an EGS from agreeing to issue refunds as part of any settlement, and, nevertheless, the Commission specifically has the authority to issue refunds for the violations alleged in the Joint Complaint.

In a similar proceeding against another EGS, the Commission held that nothing precludes an EGS from agreeing to issue refunds as part of a settlement of a Commission proceeding arising pursuant to the Code. See Commonwealth of Pennsylvania, by Attorney General KATHLEEN G. KANE, Through the Bureau of Consumer Protection, And TANYA J. McCLOSKEY, Acting Consumer Advocate v. IDT Energy, Inc., Docket No. C-2014-2427657,

Opinion and Order at 16 (December 18, 2014) (IDT Order). In fact, the Commission has approved the issuance of refunds that an EGS agreed to as part of a settlement to resolve a complaint. See IDT Order at 16; See also Pa. PUC Bureau of Investigation and Enforcement v. Public Power, LLC, Docket No. C-2012-2257858, Opinion and Order (December 19, 2013); See also Pa. PUC Bureau of Investigation and Enforcement v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas and Electric and U.S. Gas and Electric d/b/a Pennsylvania Gas and Electric, Docket No. M-2013-2325122, Opinion and Order (October 2, 2014) (October, 2014 Order). Thus, Joint Complainants submit that the ALJs did not err in approving the Settlement in which PaG&E agreed to provide refunds to customers.

Mr. Sobiech, however, fails to distinguish this settled proceeding from one which has been litigated, and he asserts that the Commission does not have the authority to issue refunds in “rate disputes.” See Sobiech Exc. at 6. In support of his position, Mr. Sobiech cites Delmarva Power & Light Co. v. Pa. PUC, 870 A.2d 901 (Pa. 2005) (Delmarva). See Sobiech Exc. at 7.

First, Joint Complainants note that Mr. Sobiech mischaracterizes the allegations in the Joint Complaint by summarizing the alleged violations as “rate disputes” and by relying on the holding in Delmarva, which addresses the issue of whether the Commission’s Fiscal Office could assess EGSs for the administrative expenses of the Commission, the OCA, and the Office of Small Business Advocate (OSBA). See Delmarva at 902. In their Joint Complaint, Joint Complainants have alleged, *inter alia*, that PaG&E engaged in misleading and deceptive practices in violation of the Commission’s Chapter 54 regulations, switched customer accounts without their consent, and charged prices that did not conform to its disclosure statement. See gen’ly Joint Complaint at Counts I-VII. Joint Complainants submit that it is neither proper to

characterize these allegations as “rate disputes” nor to compare the issues in this case to the issue in Delmarva.⁴

Mr. Sobiech further asserts that the Commission lacks authority under 66 Pa. C. S. § 501 (General Powers) to issue refunds in this proceeding. The Commission has already determined that it has the authority under 66 Pa. C. S. § 501 to issue refunds under similar circumstances, and the Commission has indicated its intent to issue a consistent order in this proceeding. See Commonwealth of Pennsylvania, by Attorney General KATHLEEN G. KANE, Through the Bureau of Consumer Protection, And TANYA J. McCLOSKEY, Acting Consumer Advocate v. IDT Energy, Inc., Docket No. C-2014-2427657, Opinion and Order at 17-18 (December 18, 2014); See Commonwealth of Pennsylvania, by Attorney General KATHLEEN G. KANE, Through the Bureau of Consumer Protection, And TANYA J. McCLOSKEY, Acting Consumer Advocate v. Blue Pilot Energy, LLC, Docket No. C-2014-2427655, Motion of Vice Chairman John F. Coleman, Jr. (November 13, 2014). Specifically, the Commission held:

Notwithstanding our Section 1312 analysis pursuant to the Code, we hold that the Commission has plenary authority under Section 501, 66 Pa. C.S. § 501, to direct an EGS to issue a credit or refund for an over bill. Under Section 501 and related case law, the Commission has broad authority to enforce the provisions of the Code, including the Electricity Generation Customer Choice and Competition Act (Electric Competition Act), 66 Pa. C.S. §§ 2801-2812, and is vested with broad powers to protect the rights of the public. These powers have been interpreted broadly to include both the express powers conferred by the Code and those implied powers necessarily implicit in the Code. *See Fairview Water Co. v. Pa. PUC*, 509 Pa. 384, 502 A.2d 162 (1985).

Directing a billing adjustment for an EGS over bill of supply charges is within the Commission’s Section 501 powers to carry out the consumer protections in the Electric Competition Act that are applicable to competitive electricity generation supply service. These consumer protections include the Section 2809(b) requirement that EGSs comply with the Commission’s Regulations, including the Chapter 54 billing and disclosure regulations. Having the authority to order EGS credits and/or refunds carries out these statutorily-prescribed consumer

⁴ Joint Complainants provide a more detailed analysis of why Delmarva is not applicable in this case in Joint Complainants’ Reply to Exception 4, below.

protections by ensuring that electric generation supply bills are adjusted accordingly when an EGS, for example, fails to bill a customer in accordance with its disclosure statement, in violation of the Commission's Chapter 54 Regulations and, in turn, Code Section 2809(b). Thus, having the authority to order EGS billing adjustments, including refunds, under the appropriate circumstances, helps ensure that EGSs comply with the Commission's Regulations and bill customers in accordance with their disclosure statement - a fundamental consumer protection under the Electric Competition Act. *See* 66 Pa. C.S. § 2802(14) (“ . . . Electric generation suppliers will be required to obtain licenses, demonstrate financial responsibility and comply with such other requirements concerning service as the commission deems necessary for the protection of the public.”).

Based on the foregoing, ordering EGS billing adjustments for an over bill of supply charges is fully consistent with the policy objectives of the Electric Competition Act as well. Under Section 2802(9) of the Code, 66 Pa. C.S. § 2802(9), electric service, including electric supply, is to be available to customers on reasonable terms and conditions. The ability to order an EGS to provide a refund to a customer that has been over charged in violation of its Disclosure Statement that has been required pursuant to the Code and/or the Commission's Regulations furthers this policy objective by ensuring that customers receive accurate bills and hence, receive service under reasonable terms and conditions.

IDT Order at 17-18. (Internal footnotes omitted.) Moreover, in the IDT Order, the Commission determined that while it does not have the authority under Section 1312 of the Public Utility Code to order EGSs to issue refunds to customers, the Commission can direct EGSs to issue refunds for “slamming” or direct refunds when a customer has, otherwise, been switched to an EGS without the customer's consent pursuant to 52 Pa. Code § 57.177(b). Id. at 16-17.

As Joint Complainants alleged, *inter alia*, that PaG&E engaged in misleading and deceptive practices in violation of the Commission's Chapter 54 regulations, switched customer accounts without their consent, and charged prices that did not conform to its disclosure statement, refunds are appropriate in this settled proceeding, and the Commission is within its authority to approve this Settlement.

Finally, Mr. Sobiech asserts that the ALJs improperly relied upon the Consumer Protection Law in determining that the Commission has the authority to issue refunds. See

Sobiech Exc. at 8-10. The Commission's regulations incorporate the Consumer Protection Law requirements. See 52 Pa. Code §§ 54.43(f) and 111.12(d)(1). As such, the ALJs noted the authority to issue refunds under the Consumer Protection Law in their Initial Decision. See Initial Decision at 40. Joint Complainants submit, however, that the ALJs did not expressly rely on the Consumer Protection law in concluding that refunds are proper in this proceeding. Id. at 40-41. Rather, the ALJs relied on the IDT Order, the October, 2014 Order, and other Commission precedent. See Initial Decision at 41 ("We find the refund pool established in the settlement to be consistent with the IDT Order and the October, 2014 Order, as well as other Commission precedent.") Regardless, as discussed above, the Commission has the authority to approve a settlement that includes a refund provision, and the Commission has the authority to order refunds in this proceeding.

Therefore, the Commission should reject Mr. Sobiech's Exception No. 2 and approve the ALJs' Initial Decision.

JOINT COMPLAINANTS' REPLY TO EXCEPTION 3: The Settlement and Statements in Support are based on ample information regarding which customers were affected by PaG&E's conduct and adequately consider the extent of harm suffered by individual customers.

Intervenor Sobiech argues that the ALJs erred in recommending approval of 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. Sobiech Exc. at 11. Joint Complainants submit that the Joint Petition 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 Joint Petition to fully resolve the allegations in the Joint Complaint. As a

settlement, the Joint Petition is the result of compromise by the Joint Petitioners and intended to resolve the allegations in the Joint Complaint in order to avoid the inherent uncertainty of litigation and preserve the resources of the Joint Petitioners and the Commission. As such, Joint Complainants submit that it is not necessary to identify in the Settlement the specific number of customers harmed by PaG&E's conduct and the extent of financial harm caused by the Company.

Further, the Settlement and Statements in Support contain ample information regarding which customers were affected by PaG&E's conduct alleged in the Joint Complaint and adequately consider the extent of harm suffered by individual customers. Specifically, the Settlement provides that Joint Complainants shall determine which customers were affected by the Company's conduct as alleged in the Joint Complaint and shall determine how much restitution to offer any individual customer. Settlement at ¶ 34. The Settlement further provides that the Joint Complainants will determine the refund amount to offer eligible customers based on the individual customer's usage, price charged, and refund amounts already received directly from PaG&E. Id. In their Statement in Support of the Settlement, Joint Complainants identified customers who were affected by PaG&E's conduct as alleged in the Joint Complaint as those who were on variable rate plans and billed for usage in January, February or March 2014 and stated their intention to offer refunds to all of those customers after taking into account a customer's usage, price charged and refunds already received from PaG&E directly. See Settlement Appendix A at 8; see also Settlement at ¶ 34. The Settlement Administrator, who will distribute the refunds to the customers, will provide monthly reports to the Joint Complainants, PaG&E and designated Commission staff that will include, at a minimum, the customer's name and other available identifying information, the amount of funds disbursed to

each customer, and the period for which the funds were dispersed. See Settlement at ¶ 38. Thus, the Settlement and Statements in Support contain ample information regarding which customers were affected by PaG&E's conduct and adequately consider the extent of harm suffered by individual customers.

In his Exceptions, Mr. Sobiech asserts, "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." Sobiech Exc. at 12. Joint Complainants submit that the Settlement is in the public interest and adequately protects the interests of consumers through: (1) continued government monitoring of the Company; (2) comprehensive injunctive relief that requires PaG&E to implement various modifications to its business practices; (3) a swift resolution of this matter; and (4) significant relief to eligible customers in the form of refunds. As such, Mr. Sobiech's Exception No. 3 should be denied.

JOINT COMPLAINANTS' REPLY TO EXCEPTION 4: The OCA has the authority to represent consumers of EGSs in proceedings related to Commission regulations governing the retail market and quality of service issues.

Finally, Intervenor Sobiech asserts that the ALJs erred in finding that the OCA has the authority to represent consumers who have not filed complaints with the Commission against EGSs. Sobiech Exc. at 12. Within this argument, Mr. Sobiech incorporates his arguments from his Exceptions Nos. 1 and 2, and, again, asserts that the Commission lacks jurisdiction here. Sobiech Exc. At 12, 15-16. Joint Complainants submit that Mr. Sobiech's assertions are not supported by law and, if interpreted as suggested by Mr. Sobiech, such interpretations would create a result that is not in the public interest.

The OCA has the authority to represent consumers of EGSs in this proceeding. The Office of Consumer Advocate is the agency authorized "to represent the interest of consumers

before the Pennsylvania Public Utility Commission.” 71 P.S. § 309-1. Intervenor Sobiech correctly states that “Consumer” is defined as follows under 71 P.S. § 309-1:

“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.”

71 P.S. § 309-1. In his Exceptions, Mr. Sobiech concludes that EGSs are neither “persons” nor “public utilities,” and, therefore, the OCA lacks the authority to represent the Company’s customers. Sobiech Exc. at 13-15. Mr. Sobiech, however, fails to recognize that the Public Utility Code specifically recognizes EGSs as public utilities for purposes of, *inter alia*, Section 2809 of the Public Utility Code, 66 Pa. C.S. § 2809. See 66 Pa. C.S. § 102. Specifically, Section 102 defines “Public Utility” and provides, in pertinent part, as follows:

(2) The term does not include:

...

(vi) Electric generation supplier companies, **except for the limited purposes as described in sections 2809 (relating to requirements for electric generation suppliers)** and 2810 (relating to revenue-neutral reconciliation).

See 66 Pa. C.S. § 102. (Emphasis added.)

Section 2809 of the Public Utility Code establishes the requirements for EGSs, including, *inter alia*, licensing requirements. Specifically, Section 2809 (a) and (b) provide as follows:

§ 2809. Requirements for electric generation suppliers.

(a) **License requirement.**--No person or **corporation**, including municipal corporations which choose to provide service outside their municipal limits except to the extent provided prior to the effective date of this chapter, brokers and marketers, aggregators and other entities, **shall engage in the business of an electric generation supplier in this Commonwealth unless the person or**

corporation holds a license issued by the commission. Consistent with 15 Pa.C.S. Ch. 74 (relating to generation choice for customers of electric cooperatives), electric cooperative corporations must possess a certificate for service to supply generation services beyond their territorial limits.

(b) **License application and issuance.**--An application for an electric generation supplier license must be made to the commission in writing, be verified by oath or affirmation and be in such form and contain such information as the commission may by its regulations require. **A license shall be issued to any qualified applicant, authorizing the whole or any part of the service covered by the application, if it is found that the applicant is fit, willing and able to perform properly the service proposed and to conform to the provisions of this title and the lawful orders and regulations of the commission under this title, including the commission's regulations regarding standards and billing practices,** and that the proposed service, to the extent authorized by the license, will be consistent with the public interest and the policy declared in this chapter; otherwise, such application shall be denied.

66 Pa. C.S. §§ 2809(a) and (b). (Emphasis added.) EGSs are recognized as public utilities for the purposes of Section 2809, which specifically requires EGSs to, *inter alia*, obtain a license from the Commission, perform properly the service proposed in their license application, and conform to the provisions of the Commission's regulations and orders, including the Commission's regulations regarding standards and billing practices. The Commission has extensively developed regulations that govern EGSs. In their Joint Complaint, the OAG and the OCA specifically allege violations of the Commission's regulations governing EGSs, 52 Pa. Code Ch. 54, 56 and 111. See gen'ly Joint Complaint at Counts I-VII. Thus, the OCA has the authority to represent the interest of consumers before the Commission in this proceeding.

Furthermore, Section 2809(e) of the Public Utility Code provides:

(e) **Form of regulation of electric generation suppliers.** — The commission may forbear from applying requirements of this part which it determines are unnecessary due to competition among electric generation suppliers. In regulating the service of electric generation suppliers, the commission shall impose requirements necessary to ensure that the present quality of service provided by electric utilities does not deteriorate, including assuring that adequate reserve margins of electric supply are maintained and assuring that 52 Pa. Code Ch. 56

(relating to standards and billing practices for residential utility service) are maintained.

66 Pa. C.S. § 2809(e). The Joint Complaint is directly related to maintaining the quality of electric service and assuring that the Commission's regulations and orders in this regard are not violated. See gen'ly Joint Complaint at Counts I-VII. Thus, the OCA has the authority to represent the interest of consumers before the Commission in this proceeding.

In support of his position that EGSs are not public utilities, Mr. Sobiech again relies on Delmarva. Sobiech Exc. at 14-15. The issue in Delmarva, however, is not the issue in this case. In fact, the Pennsylvania Supreme Court's Opinion in Delmarva directly supports the conclusion that the OCA is authorized to represent EGS consumers. As stated above, Delmarva addressed the issue of whether the Commission's Fiscal Office could assess EGSs for the administrative expenses of the Commission, the OCA, and the OSBA. See Delmarva at 902. In Delmarva, the Fiscal Office argued that the forbearance language in the first sentence of Section 2809 of the Public Utility Code gave it the discretion to apply any provision of the Public Utility Code. Delmarva at 904. The Pennsylvania Supreme Court held:

In determining what sections of the Code the Fiscal Office has the legal authority to apply to EGSs, **we agree with the Commonwealth Court below that we must look at the second sentence of section 2809(e) as that sentence plays off of the previous sentence by outlining those sections of the Code that may legally apply to EGSs as public utilities. According to that second sentence, the Fiscal Office may only impose on EGSs "those requirements necessary to ensure that the present quality of service provided by electric utilities does not deteriorate, including assuring that adequate reserve margins are maintained and assuring that 52 Pa. Code Ch. 56 (relating to standards and billing practices for residential utility service) are maintained."** 66 Pa. C.S. § **2809(e)**. Significantly, the Fiscal Office does not argue that it may assess EGSs pursuant to this sentence and as a result, it also does not claim or otherwise attempt to show that section 510 assessments are necessary to ensure the present quality of electric utility service. Given the absence of such a showing, we cannot find that section 510 assessments, which simply fund the administrative practices of the Commission, are necessary to maintain current standards of electric service. Furthermore, we note that these assessments have nothing to do with maintaining

reserve margins or adequate billing practices. Therefore, contrary to the finding of the Commonwealth Court, we hold that the Fiscal Office does not have the legal authority to assess EGSs as public utilities for the Commission's administrative costs pursuant to section 510 of the Code.

Delmarva at 911. (Emphasis added.) As stated above, the Joint Complaint is directly related to maintaining the quality of electric service and assuring that the Commission's regulations and orders in this regard are not violated. Thus, Joint Complainants submit that the OCA has the authority to represent consumers before the Commission in this proceeding.

Joint Complainants also note that Mr. Sobiech's interpretation would create a result that is not in the public interest. Under Mr. Sobiech's interpretation, if a consumer chooses an EGS, the OCA would not have the authority to represent that consumer's interest in any proceedings relating to, *inter alia*, quality of service and standards and billing practices under any circumstance.

Petitioner Sobiech also argues that the OCA does not have the authority to represent consumers in this matter because the OCA's authority is limited to matters that are properly before the Commission. Sobiech Exc. at 15. Mr. Sobiech refers to his Exceptions 1 and 2 to support his argument that these matters are not properly before the Commission. *Id.* For the reasons discussed in Joint Complainants' Replies to Exceptions 1 and 2, these matters are properly before the Commission and therefore, the OCA has the authority to represent consumers in this proceeding.

Finally, Mr. Sobiech argues that if the Company's customers wish to pursue remedies outside of the Refund Pool, the fact that the unclaimed monies will revert to the Pennsylvania Department of Treasury may prevent them from making a recovery. Sobiech Exc. at 15-16. Mr. Sobiech's argument, however, takes the Settlement out of context. Viewing the Settlement in its entirety, it is clear that the "unclaimed funds" provision of the Settlement (Joint Petition at ¶ 40)

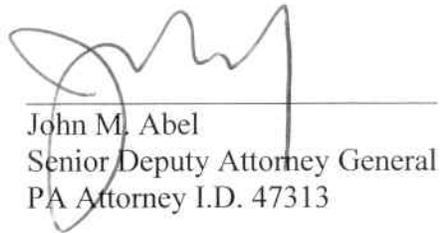
is not intended to apply when a consumer refuses a refund. The Settlement specifically provides, “Any customer of the Company that does not receive or accept an offer of funds from the Refund Pool ... [and] is not satisfied with the Company’s investigation and/or the Company’s settlement offer ... may file a formal complaint with the Pennsylvania Public Utility Commission.” See Joint Petition at ¶ 42. Additionally, a customer is only required to release his or her claims against the Company if he or she is offered and agrees to sign a release in exchange for the refund. See Joint Petition at ¶ 43. Thus, it is clear that the intent of the Settlement is to allow consumers who refuse a refund to pursue other remedies. It is also clear that Joint Petitioners did not intend for monies that are refused by customers to be treated as “unclaimed funds,” as such interpretation may prevent these customers from pursuing other remedies, as suggested by Mr. Sobiech. To the contrary, the “unclaimed funds” provision in the Settlement was intended to apply to monies that are not refused, but are not claimed. For example, the “unclaimed funds” provision may apply in a situation where a consumer has moved or passed away. Monies that are refused will go back in to the Refund Pool. Thus, Joint Complainants submit that under the terms of the Settlement, customers who do not wish to accept a refund are free to pursue other remedies.

Accordingly, Joint Complaints submit that the OCA has the authority to represent consumers against EGSs in proceedings related to Commission regulations governing the retail market and quality of service issues, and the Commission has jurisdiction over these issues. Therefore, the Commission should reject Mr. Sobiech’s Exception No. 4.

III. CONCLUSION

For all of the foregoing reasons, Joint Complainants submit that the Commission should reject Mr. Sobiech's Exceptions and approve the ALJs' Initial Decision recommending approval the Settlement.

Respectfully submitted,



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: :
And : Docket No. C-2014-2427656
: :
TANYA J. McCLOSKEY, Acting Consumer :
Advocate, :
Complainants :
: :
v. :
: :
ENERGY SERVICES PROVIDERS, INC. :
d/b/a PENNSYLVANIA GAS & ELECTRIC :
Respondent :

I hereby certify that I have this day served a true copy of the foregoing document, the Joint Reply Exceptions of Joint Complainants Commonwealth of Pennsylvania and the Office of Consumer Advocate to the Initial Decision, in the manner and upon the persons listed below:

Dated this 30th day of July 2015.

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