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December 23, 2015

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Green Hills Manor and The Heritage of Green Hills v. UGI Energy Services
Docket No. C-2014-2420911

Dear Secretary Chiavetta:

We are counsel to Green Hills Manor and The Heritage of Green Hills in the above matter and are submitting, via electronic filing, their Exceptions to the Initial Decision of Administrative Law Judge Dennis J. Buckley. A copy of the Exceptions is being served upon the persons and in the manner set forth on the certificate of service attached to them.

Sincerely,

THOMAS, NIESEN & THOMAS, LLC

By:

Thomas T. Niesen

Cc: Certificate of Service (w/encl.)
ra-OSA@pa.gov (w/encl.)
Douglas Walther (via email, w/encl.)

**Before The
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Green Hills Manor and
the Heritage of Green Hills**

v.

UGI Energy Services, LLC

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Docket No. C-2014-2420911

**EXCEPTIONS OF GREEN HILLS MANOR AND THE HERITAGE OF GREEN HILLS
TO THE INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
DENNIS J. BUCKLEY**

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DATED: December 23, 2015

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I. INTRODUCTION

This matter involves a dispute between Complainant Green Hills Manor/Heritage of Green Hills (“Green Hills” or “Complainant”) and UGI Energy Services, LLC (“UGIES” or “Respondent”) concerning UGIES’ failure to effect a “smooth transition” of electric procurement from Liberty Power Holdings, LLC, Green Hills’s prior electric generation supplier, to UGIES.

The intended start date for UGIES’ service was the end date of Green Hills’ fixed rate procurement contract with Liberty – December 19, 2013 – but UGIES did not initiate its service until January 23, 2014.

The incremental electric procurement costs incurred by Green Hills from December 20, 2013 to January 20, 2014 as a result of the failure on the part of UGIES to effect the intended smooth transition was \$25,209.71. Initial Decision, Finding of Fact 6.

By Initial Decision issued December 3, 2015, Administrative Law Judge Buckley concluded that UGIES did not accomplish a smooth transition of Green Hills from Liberty to UGIES. UGIES, instead, created a “supplier transaction gap,” although UGIES conceded that it did not intend to do so. Initial Decision, Finding of Fact 13 and at page 9.

Although the Initial Decision properly recognizes that UGIES conceded that it did not accomplish a smooth transition of Green Hills from Liberty to UGIES, the Initial Decision concludes that the Commission does not have authority to reform the contract between Green Hills and UGIES or otherwise grant the relief requested by Complainant. Initial Decision at 1.

Green Hills submits that the Commission has the authority to grant relief to Green Hills for the creation of the “supplier transaction gap” and submits the following Exceptions to the Initial Decision.¹

¹ Consistent with Section 5.533 of the Commission’s Rules of Practice and Procedure, 52 Pa. Code § 5.533, Green Hills, as appropriate, refers to and incorporates by reference relevant passages from its previously filed Main and Reply Briefs.

II. EXCEPTIONS

UGIES approached Green Hills, in early August 2013, regarding electric procurement. Tr. 10, 37 and 44. Although Green Hills had been using the assistance of an energy broker, UGIES told Green Hills that, going forward, Green Hills did not need a broker and that UGIES could save Green Hills extra money by cutting the broker out of the transaction. Tr. 11, 29 and 37.

As a result of their August 2013 meeting, it was Green Hills understanding that UGIES would be able to lock Green Hills in to rates lower than what would be available to Green Hills with a broker and that UGIES would handle the transition between the end of Green Hills existing procurement contract with Liberty and a new contract with UGIES. Tr. 11 and 38.

UGIES, however, did not effect a smooth transition from Liberty to UGIES. It, instead, created a one month “supplier transaction gap” from December 19, 2013 through January 23, 2014, during which Green Hills received power from Liberty at variable rates. The impact on rates resulted in an incremental electric cost to Green Hills of \$25,209.50 over and above what Green Hills would have paid had UGIES effected a smooth transition without a “supplier transaction gap.”

The creation of the unintended “supplier transaction gap” was addressed by Green Hills witnesses Brendlen (Tr. 11 – 12)² and Schmincke (Tr. 38).³ Significantly, as reflected in Finding of Fact 13 of the Initial Decision, the failure to effect a “seamless transition” from Liberty to

² Green Hills witness Brendlen testified at transcript page 11 that “[i]t was [his] understanding that [Mr. McCormick of UGIES] would be able to lock us in to rates without a broker ... and he would handle the transition between the end of our old contract and the new contract with UGIES.”

³ Green Hills witness Schmincke testified at transcript page 38 that “[i]t’s my memory that Mr. McCormick said that he would be able to handle the transition for us and that he would contact Liberty about the end date of our existing contract.”

UGIES was conceded by UGIES witness McCormick on cross examination at transcript pages 68 and 69:

Q. ... Did you intend to create what you call a supplier transaction gap between the end of the Liberty Power agreement and beginning of the UGI Energy Services agreement?

A. No.

Q. You did not intend to do that.

A. No.

Q. But that's what happened; right? Isn't that what happened?

A. Yes, yes.

Q. You didn't even accomplish what you intended to do in regard to transitioning the service from Liberty Power to UGI Energy Services, did you?

A. No.

The Initial Decision states that “[w]hat is at issue is UGIES’ responsibility for the billing of Complainant for \$25,209.71 by Liberty from December 20, 2013 to January 20, 2014.” Initial Decision at 5.⁴ The substantial evidence of record – indeed, the testimony of the witnesses of both Complainant and Respondent – places the responsibility for the incremental electric procurement charges solely on UGIES.

The substantial evidence of record shows, quite clearly and without any doubt, that UGIES did not accomplish either what it said it would do or what it intended to do when marketing its electric generation supply services and, instead, created a one month supplier transaction gap that was the direct cause of Green Hills’ increased electric procurement charges from December 20, 2013 to January 20, 2014.

⁴ Complainant’s calculation of the incremental cost of electric procurement is presented in Complainant’s Exhibit 4. Although the Initial Decision states that the calculation was performed by MetEd (Initial Decision at 2), the calculation was prepared by Green Hills witness Brendlen. Tr. 15 – 16.

1. **EXCEPTION NO. 1** - Green Hills excepts to that part of the Initial Decision which concludes that the Commission has no authority to grant the relief requested. Initial Decision at 1, 7 through 10 and Ordering Paragraph 1.

The Initial Decision concludes that the Commission has no statutory authority to grant relief in this case. Citing *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 (“*IDT Energy*”), the Initial Decision states, in that regard, that the Commission has “only authority to order a credit or refund where the EGS overbills a customer by failing to bill a customer in accordance with its disclosure statement.” Initial Decision at 10.

The Commission’s authority, however, is not limited to problems with the disclosure statement. In *Yaglidereliler Corporation v. Blue Pilot Energy LLC*, Docket No. C-2014-2413732 (Opinion and Order entered January 16, 2015) (“*Yaglidereliler*”), the Commission explained that its authority under the Public Utility Code and its Regulations is not limited to the disclosure statement but extends, also, to other written and oral communications by the supplier to the customer:

“ ... Residential and small business customers, however, are not necessarily well-versed in gas procurement and pricing practices. For this reason, it is all the more important that they be able to rely on all the information provided by their prospective supplier, whether oral or written, and that all disclosures be clear and unequivocal. If the Complainant were led to believe through oral communications that although variable, his rate would remain competitive and reasonable, that may have a bearing on the propriety of Blue Pilot’s marketing practices. . . .

Our definition of customer information in Chapter 54 of our Regulations includes written, oral, and electronic communications used by providers to communicate prices and terms to consumers. 52 Pa. Code § 54.2. This information is subject to our review, along with disclosure statements and billing, for compliance purposes. 52 Pa. Code § 54.9. . . .

* * *

Thus, upon receipt of a consumer complaint, we do not believe that an inquiry into the propriety of Blue Pilot's marketing must end with the review of its written disclosure statement, contract, and bills. . . .

With respect to marketing practices, we have previously recognized that not only must consumers take responsibility for their own actions, but also the behavior of all market participants, including our competitive providers, is important to ensure the development of a robust market through informative and reliable marketing practices"⁵

Here, the evidence is substantial and clear. UGIES, as stated above, told Green Hills that, going forward, Green Hills did not need a broker and that UGIES could save Green Hills extra money by cutting the broker out of the transaction. UGIES, further, told Green Hills that it would handle a smooth transition to UGIES services. Rather than a smooth transition, UGIES created a one month "supplier transaction gap." Green Hills incurred incremental electric procurement costs of \$25,209.71 as a direct result of this "gap."

The substantial monetary impact of UGIES' failure to effect the smooth transition is the responsibility of UGIES, not Green Hills, and the Commission has the jurisdictional authority to remedy the matter. The Commission, in *IDT Energy*, held that it has plenary authority under Section 501 of the Public Utility Code, 66 Pa. C.S. § 501, to direct an EGS to issue a credit or refund for an over bill and 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. P.U.C.*, 509 Pa. 384, 502 A.2d 162 (1985).⁶

⁵ *Yaglidereliler* at 20-22.

⁶ *See* Green Hills Main Brief, Sections II.A, II.B and II.C and Reply Brief, Sections III.A and III.C.

In *Werle v. Respond Power, LLC*, Docket No. C-2014-2429158 (Order entered February 23, 2015) (“*Werle*”), the Commission adopted an Initial Decision dismissing a private complaint while reaffirming its authority to require EGS’s to provide refunds to retail customers in appropriate circumstances. Notably, in her dissenting opinion in *Werle*, Chairman Brown explained that the Commission has “authority over EGS rates as they relate to items such as marketing, disclosure, and enrollments” and that the Commission, in *Nadav v. Respond Power, LLC*, Docket No. C-2014-2429159 (Order entered December 19, 2014) and *IDT Energy*, determined that “monetary remedies may be appropriately determined by the Commission in certain circumstances.”

Green Hills submits that this is a circumstance in which the Commission can and should exercise jurisdiction and direct a monetary remedy of \$25,209.71, the full amount of Green Hills’ incremental electric procurement costs. The Commission has held that it has jurisdiction over EGS rates as they relate to items such as *marketing, disclosure* and *enrollment*. Here, UGIES’ *marketing* to Green Hills was conducted through an in-person meeting in August 2013. UGIES was to handle *enrollment* and effect a smooth transition from Liberty to UGIES. Instead of a smooth transition, UGIES created a one month supplier transaction gap and conceded that it did so. UGIES has collected monies/rates from Green Hills from which the monetary remedy could be paid.^{7 8}

In defense of its failure to effect a smooth transition from Liberty to UGIES, UGIES claimed that it did not have a copy of the Green Hills electric procurement contract with Liberty

⁷ Green Hills received and paid for electric supply service from UGIES through early 2015 under the MPSA. See Complainant’s Exhibit 1.

⁸ The Initial Decision states that the dispute sounded in Complaint and at hearing as more like a contractual dispute brought under the theory of detrimental reliance than a straight forward billing dispute. Initial Decision at 6. A theory of detrimental reliance would not necessarily remove the case from Commission jurisdiction. Green Hills relied to its detriment on the marketing sales pitch presented by UGIES. The Commission, however, has held that it has jurisdiction over EGS rates as they relate to items such as marketing, disclosure and enrollment.

to effectively coordinate a smooth transition between the two services. This defense is not entitled to any weight. If UGIES needed the Liberty contract to become aware of the end date in order to accomplish a smooth transition, it need only have asked Green Hills for the contract but UGIES never did. Green Hills would have willingly given a copy of the contract to UGIES if UGIES had asked for it. Green Hills did not feel it was necessary to provide the contract since UGIES did not ask for it. Tr. 13 and 61.⁹

In defense of its failure to effect a smooth transition from Liberty to UGIES, UGIES also relied on the January 23, 2014 start date buried in the fine print of the UGIES Master Power Sales Agreement (MPSA). This defense is, likewise, not entitled to any weight. UGIES prepared the MPSA. It was supposed to create a smooth transition of service from Liberty to UGIES but it created documents that failed to do so. UGIES witness McCormick testified that he was told that the contract with the current supplier expired at the end of 2013 and Green Hills would need a January 2014 start for the new contract (Tr. 49 – 50 and 53), but he did not enroll Green Hills until three weeks into the month of January, actually much closer to February 1 than January 1. Tr. 66. Although Mr. McCormick knew that an understanding of the meter read cycle was critical to assuring a smooth transition of service, he did not inquire into the details of the end date of the Liberty contract. Tr. 67.^{10 11}

⁹ The comparative experience of the parties is significant in this regard. Mr. Brendlen who handled the transaction for Green Hills did not have any experience in shopping for electricity prior to August of 2013. Tr. 7. Mr. McCormick of UGIES, on the other hand, is a Certified Energy Professional. He candidly acknowledged that, comparatively, he is much more experienced in shopping for electricity than either Mr. Brendlen or Mr. Schmincke. Tr. 62 – 63.

¹⁰ The comparative experience of the parties is, again, significant in this regard. As set forth in footnote 9 *supra*, UGIES witness McCormick candidly acknowledged that, comparatively, he is much more experienced in shopping for electricity than either Mr. Brendlen or Mr. Schmincke. Tr. 62 – 63.

¹¹ Mr. Brendlen explained that the negotiation, preparation and execution of the MPSA was very time sensitive. In order to keep the low rates, UGIES said that Green Hills needed to act as quickly as possible. Tr. 24. Mr. Brendlen did confirm with Mr. McCormick that Mr. McCormick would take care of ending the Liberty contract and that there would be a smooth transition over into the UGIES contract. Tr. 24.

The Initial Decision concludes that the Commission can direct an EGS to refund charges when a customer has been switched to an EGS without the customer's consent. Initial Decision, Conclusion of Law 3. If the Commission can direct a refund under that type of "enrollment" circumstance, it is certainly reasonable and within the Commission's authority to direct a refund or credit when an EGS *fails to enroll a customer with the customer's consent* and as the EGS confirmed it would do.

Finally, the Initial Decision states that it may be argued that both Green Hills and UGIES were careless in their handling of this transaction. Initial Decision at 10. The Initial Decision, however, does not account for the fact that Green Hills was relying on UGIES and Mr. McCormick, a Certified Energy Professional, to handle the details and effect a smooth transition of service from Liberty to UGIES.

For all the reasons set forth above and in Green Hills Main and Reply Briefs, Green Hills' Exception No. 1 should be granted. The Commission should conclude that it has the statutory authority to grant relief and direct UGIES to refund/credit Green Hills the amount of \$25,209.50.

2. **EXCEPTION NO. 2** - Green Hills excepts to that part of the Initial Decision which concludes that the Commission has no authority to reform the contract between Green Hills and UGIES. Initial Decision at 1, 7 through 10 and Ordering Paragraph 1.

The Initial Decision also holds that the Commission has no statutory authority to reform the electric procurement contract between Green Hills and UGIES to reflect the smooth transition intended by both Green Hills and UGIES.

Reviewing Section 508 of the Public Utility Code, 66 Pa. C.S. § 508, the Initial Decision concludes, citing *Delmarva Power & Light Co. v. Pa. P.U.C.*, 870 A.2d 901 (Pa. 2005), that

UGIES is a licensee and not a public utility (except in limited circumstances). Initial Decision at 8 – 9. In *IDT Energy*, slip opinion page 16, the Commission explained, however, that EGSs are public utilities for purposes of 66 Pa. C.S. § 2809 and § 2810. The Commission, consequently, does have jurisdiction under Section 508 to reform a contract between an EGS and a customer to effect compliance with Sections 2809 and 2810 and Commission regulations thereunder. If the Commission were to agree with Green Hills and conclude that UGIES marketed its service with the objective of producing a smooth supplier transition and then failed to do so, the Commission would have the authority under Section 508 to reform the Green Hills/UGIES contract.¹²

Section 508 of the Public Utility Code, 66 Pa. C.S. § 508, provides that, if any obligation, term or condition of a contract between a public utility and any person or corporation shall be determined to be unjust, unreasonable, inequitable, or otherwise contrary or adverse to the public interest and the general well-being of this Commonwealth, then the Commission shall determine the just, reasonable, and equitable obligations, terms and conditions of such contract. Green Hills submits that the substantial evidence of record discussed in these Exceptions demonstrates that the electric procurement contract prepared by UGIES is unjust, unreasonable and inequitable given that it is inconsistent with the intent of the parties to effect a smooth transition of service from Liberty to UGIES. It is, for the same reasons, adverse to the public interest and the general well-being of the Commonwealth.

For all the reasons set forth above and in Green Hills Main and Reply Briefs, Green Hills' Exception No. 2 should be granted. The Commission should conclude that it has the statutory authority to reform the electric procurement contract between Green Hills and

¹² See Green Hills Reply Brief, Section III.B.


UGIES and reform the contract to reflect the smooth transition intended by both Green Hills and UGIES.¹³

¹³ Irrespective of whether the Commission concludes that it has the authority to reform the contract or not, the Commission has the authority to grant Green Hills the monetary relief requested as set forth in Exception No. 1 *supra*.

III. CONCLUSION

Green Hills submits that the Public Utility Commission should grant these Exceptions. For all the reasons set forth above and in Green Hills' Main and Reply Briefs, the Public Utility Commission should sustain this Complaint and direct UGI Energy Services LLC to provide Green Hills with a refund/credit in the amount of \$25,209.71.

Respectfully submitted,

By 
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*Attorneys for
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DATED: December 23, 2015

Before The
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the Heritage of Green Hills

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Docket No. C-2014-2420911

CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of December 2015, served a true and correct copy of the foregoing Exceptions of Green Hills Manor and The Heritage of Green Hills to the Initial Decision of Administrative Law Judge Dennis J. Buckley, upon the persons and in the manner set forth below:

VIA EMAIL AND FIRST CLASS MAIL, POSTAGE PREPAID

Honorable Dennis J. Buckley
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