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September 26, 2023

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Via Electronic Filing
Rosemary Chiavetta, Secretary
Pa. Public Utility Commission
400 North Street
Harrisburg, PA 17120

RE: Robert Naborn and Cynthia Pronko v. Direct Energy Services, LLC
Docket No. F-2023-3037611

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the Exceptions of Direct Energy Services, LLC, with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,

/s/ Karen O. Moury

Karen O. Moury

Enclosure

cc: Certificate of Service (with Enclosure)
ra-osa@pa.gov (with Enclosure)

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of the foregoing Exceptions upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

Via Email Only

Robert Naborn
Cynthia Pronko
307 Runnymede Ave.
Jenkintown, PA 19046
Rob.naborn@gmail.com

The Honorable Arlene Ashton
Administrative Law Judge
PA Public Utility Commission
801 Market Street, Suite 4063
Philadelphia, PA 19107
aashton@pa.gov

Date: September 26, 2023

/s/ Karen O. Moury
Karen O. Moury, Esquire
Counsel for
Direct Energy Services, LLC

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Robert Naborn and Cynthia Pronko, Complainants	:	
v.	:	Docket No. F-2023-3037611
Direct Energy Services, LLC, and PECO Energy Company Respondents	:	

DIRECT ENERGY SERVICES, LLC EXCEPTIONS

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Date: September 26, 2023

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Pursuant to 66 Pa. C.S. § 332(h) and 52 Pa. Code § 5.533, Direct Energy Services LLC ("Direct Energy") files these Exceptions to the September 6, 2023, Initial Decision ("ID") of Administrative Law Judge ("ALJ") Arlene Ashton. The ID sustained the Formal Complaint filed by Robert Naborn ("Mr. Naborn") and Cindy Pronko ("Ms. Pronko") (collectively, the "Complainants") against Direct Energy for action or inaction that the ALJ identified as a violation of Section 1501 of the Public Utility Code ("Code"), which requires "public utilities" to provide adequate service to customers.[1]

I. INTRODUCTION AND SUMMARY OF EXCEPTIONS

Direct Energy is a natural gas supplier ("NGS") licensed by the Pennsylvania Public Utility Commission ("Commission" or "PUC") to provide natural gas supply services to retail customers throughout Pennsylvania. As an NGS, Direct Energy is not a public utility. Importantly, in sustaining the Complaint against Direct Energy, the ID did not identify any provision in the Natural Gas Choice and Competition Act ("Choice Act"),[2] or the Commission's regulations that Direct Energy supposedly violated in its interactions with the Complainants. Rather, the ID erroneously found that in furnishing customer service to the Complainants, Direct Energy had provided "inadequate service" under Code Section 1501, which is applicable only to public utilities, not NGSs. On that basis alone, the ID should be reversed and the Complaint against Direct Energy should be dismissed. Moreover, the evidentiary record demonstrates that Direct Energy provided more than adequate customer service in attempting to assist the Complainants in their desire to return to Direct Energy for natural gas supply services.

[1] 66 Pa. C.S. § 1501.
[2] 66 Pa. C.S. §§ 2201-2212

This matter arises from a unique set of circumstances where the Complainants inadvertently canceled their natural gas supply services with Direct Energy while using the telephone based Interactive Voice Response ("IVR") System of PECO Energy Company ("PECO") on July 22, 2022. As summarized by Mr. Naborn:

> I noticed that my electricity contract was up for renewal. And I did the research and found that PECO offered the best deal. So I called PECO, the number that was specified for this purpose, and while I was on the phone waiting to speak to a human being, a voice message came on that asked me if I wanted to change both gas and electricity to PECO. *I was taken aback, and I really don't know what I answered, but I had to push a button*…. 10 minutes later I was on the phone with a human being. And [PECO's representative] said that I had pushed a button for yes, I want to switch, and that it was already done. I said, "No, I think that is incorrect. And if so, If I did push the button for yes, then I would like that to be changed back to no." [PECO's representative] said that was impossible, that the system didn't allow for a correction.

N.T. 16-17. (emphasis added). The selection made by Mr. Naborn led to PECO sending a "drop" transaction on July 25, 2022 through electronic data interchange ("EDI") to Direct Energy, with an effective date of August 22, 2022. N.T. 69. Although the Complainants contacted Direct Energy to advise of the mistaken drop, Direct Energy was obligated by the Commission's regulations to return the Complainants to PECO's default service, upon receipt of the drop transaction from PECO. The only solutions available to the Complainants were to persuade PECO to cancel the drop transaction or to reenroll with Direct Energy. The Complainants did neither, which is not attributable to any action or inaction on the part of Direct Energy.

Direct Energy sought to assist the Complainants with the results of their mistake by asking PECO to reinstate the Complainants' account while simultaneously advising the Complainants to complete a new enrollment in order to be served by Direct Energy again. As the record reflects, Direct Energy relayed this accurate information to the Complainants no less than 4 times from August 25, 2022 through March 21, 2023. Yet the Complainants did not submit a

new enrollment to Direct Energy until March 22, 2023, and only then it was a result of Direct Energy's offer of settlement of this matter to honor the prior terms of the contract.

Despite no findings of a lack of compliance by Direct Energy with the Commission's regulations, and Direct Energy's efforts to help the Complaints return to Direct Energy for natural gas service, the ID faulted Direct Energy for allegedly not providing complete and accurate information to the Complainants and for Direct Energy not offering the Complainants their prior rate terms sooner than March 2023. Yet, the clear fact of the matter was that under the Commission's regulations, an NGS may not enroll a customer *without the customer affirmatively signing up for service and completing the verification process necessary to do so*. If Direct Energy had acted without the Complainants completing new enrollment and verification (which Direct Energy consistently instructed them to do), Direct Energy would have been in direct violation of the Commission's "zero tolerance" policy pertaining to rules against "slamming." The ID wholly overlooked the obligations that Direct Energy has to honor the customer's selection, whether it was made inadvertently or not. Further, in finding that Direct Energy should have offered the Complainants a return to their prior terms of service prior to doing so as part of an attempted settlement of this matter, the ID unlawfully asserted authority over the private contractual relationship between the Complainants and Direct Energy.

For these reasons, Direct Energy respectfully requests that the Commission modify the ID and dismiss the Complaint against Direct Energy.

II. EXCEPTIONS

A. Exception No. 1: The Initial Decision erred as a matter of law in finding that Direct Energy – a *Natural Gas Supplier* – violated 66 Pa. C.S. § 1501. (ID at 23-31; COL ¶ 8; Ordering ¶ 3, 4)

The ID found that Direct Energy's "actions/inactions constitute inadequate service under Section 1501 of the Public Utility Code." ID at 31. As more thoroughly discussed in Direct Energy's Exception No. 2, the "actions/inactions" found to be "inadequate service" were based on the ID's finding that Direct Energy "misled" the Complainants when in fact Direct Energy worked with Mr. Naborn and with PECO to undo the Complainant's action to cancel Direct Energy's service in PECO's system - where the error occurred. The ALJ viewed these efforts by Direct Energy as misleading, and determined that Direct Energy did not provide "complete and accurate information concerning (a) how to immediately reinstate Direct Energy as their NGS, and (b) the availability of terms of service other than those published on-line." ID at 31.

While Direct Energy excepts to the ID's factual holdings and application of the Commission's civil penalty factors (Exception No. 2), Direct Energy initially challenges the foundational basis in law for the ID's finding of a violation. Importantly, Section 1501, and the statutory requirement for "adequate service" is the standard with which *Public Utilities* must comply. This obligation does not apply to NGSs which were created and are regulated pursuant to the Choice Act. The ID should be reversed based on the plain statutory language of the Public Utility Code and *significant* binding precedent from the appellate courts that has made clear that NGSs, like Direct Energy, are not "Public Utilities" and Section 1501's "Services and Facilities" provisions are clearly not applicable to NGSs under the Choice Act.[3]

[3] As NGSs operate in a competitive market, their customers are not captive and are free to choose another supplier or return to default service if they are not satisfied with the services they are receiving.

Chapter 15 of the Public Utility Code – Services and Facilities, and in particular, 66 Pa. C.S. § 1501 (Character of Service and Facilities) only applies to "Public Utilities" as defined in the Public Utility Code at 66 Pa. C.S. § 102. In pertinent part, Section 1501 provides:

> Every ***public utility*** shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public.

66 Pa. C.S § 1501 (emphasis added).

The Choice Act gives retail customers in Pennsylvania, like the Complainants, the ability to purchase gas from independent NGSs while continuing to receive distribution services from local distribution companies.[4] The Choice Act defines "Natural Gas Supplier" in 66 Pa. C.S. § 2202 and defines the scope of the Commission's oversight and regulation of competitive natural gas suppliers:

> An entity other than a natural gas distribution company, but including natural gas distribution company marketing affiliates, which provides natural gas supply services to retail gas customers utilizing the jurisdictional facilities of a natural gas distribution company.

66 Pa. C.S. § 2202.

The Commonwealth Court has clearly held that a "Natural Gas Supplier" who is not a *natural gas distribution company*, is not a "Public Utility" as defined in 66 Pa. C.S. § 102, succinctly holding:

[4] *Equitable Gas Co., a Div. of Equitable Res. v. Com., Pennsylvania Pub. Util. Comm'n*, 880 A.2d 48, 50–51 (Pa. Commw. Ct. 2005) ("…pursuant to the Natural Gas Choice and Competition Act, 66 Pa.C.S. §§ 2201–2212, retail customers in Pennsylvania may now also purchase gas from independent natural gas suppliers… while continuing to receive distribution services from local distribution companies like the petitioners herein.")

> *[A] natural gas supplier that is not a natural gas distribution company is not a public utility as defined in section 102 (relating to definitions) [66 Pa.C.S. § 102] to the extent that the natural gas supplier is utilizing the jurisdictional distribution facilities of a natural gas distribution company or is providing other services authorized by the commission.*
>
> *Id.* (emphasis added). Clearly, the General Assembly has excluded natural gas suppliers from the definition of "public utility" when the NGSs use the distribution services of natural gas distribution companies. This exclusion is unambiguous and, as such, we must give force and effect to the plain meaning of the statute. *See Oberneder v. Link Computer Corp.,* 548 Pa. 201, 206, 696 A.2d 148, 150 (1997) (holding that when the words of a statute are free from ambiguity, its letter is not to be disregarded under the pretext of pursuing its spirit).

Indep. Oil & Gas Ass'n of Pennsylvania v. Pennsylvania Pub. Util. Comm'n, 789 A.2d 851, 855 (Pa. Commw. Ct. 2002). Further, the Commonwealth Court has held that the Choice Act is clear that Natural Gas Suppliers are not "Public Utilities" unless specific statutory language applies:

> It is undisputed that the distribution companies are public utilities in the gas utilities group and, therefore, that they are subject to assessment under Section 510 and that the PUC's expenses in regulating them are properly classified as direct costs. However, pursuant to the Natural Gas Choice and Competition Act, 66 Pa.C.S. §§ 2201–2212, retail customers in Pennsylvania may now also purchase gas from independent natural gas suppliers (referred to by the Commission and other parties as NGSs) while continuing to receive distribution services from local distribution companies like the petitioners herein. The dispute centers around the status of these natural gas suppliers, **which are not public utilities for purposes of assessments** under Section 510.

Equitable Gas Co., a Div. of Equitable Res. v. Com., Pennsylvania Pub. Util. Comm'n, 880 A.2d 48, 50–51 (Pa. Commw. Ct. 2005)(emphasis added)(*citing Independent Oil and Gas Ass'n of Pennsylvania v. Pennsylvania Pub. Util. Comm'n,* 804 A.2d 693 (Pa. Cmwlth. 2002)).

Additionally, while the focus of this exception is on the definition of "natural gas supplier" under the Choice Act, the Pennsylvania Supreme Court has held that as related to the

comparable "electric generation supplier" ("EGS") definition under the Electricity Generation Customer Choice and Competition Act, 66 Pa. C.S. §§ 2801 – 2815, suppliers are clearly excluded from the definition of "public utility" for most purposes, subject to limited express exemptions. *Delmarva Power & Light Co. v. Com.*, 582 Pa. 338, 352, 870 A.2d 901, 909 (2005). With these statutory mandates in mind, the appellate courts have made clear the PUC's purview is strictly limited to entities over which the legislature has granted the PUC authority.[5]

In holding that Direct Energy's actions/inactions amounted to "inadequate service" in violation of Section 1501, which is applicable only to "Public Utilities," the ID made a fundamental error of law which must be reversed. Direct Energy is not a "Public Utility" to be regulated under Chapter 15 of the Public Utility Code. Direct Energy, by clear appellate precedent, cannot be found to have provided "inadequate service" under Section 1501 of the Public Utility Code. Therefore, the ID should be reversed on this erroneous application of law.

B. <u>Exception No. 2</u>: The Initial Decision erred in recommending a Civil Penalty against Direct Energy as Direct Energy did not mislead or provide incomplete information to the Complainants. (ID at 35-37; Ordering ¶ 4)

The ID faulted Direct Energy for not providing, in the ALJ's view, complete and accurate information to the Complainant, or for misleading the Complainants to believe that PECO could fix the Complainant's error and reinstate their account with Direct Energy. ID at 31. The ID also faulted Direct Energy for not reviving Complainants' prior rates and terms sooner than March

[5] See *Bethlehem Steel Corp. v. Pennsylvania Public Utility Commission,* 552 Pa. 134, 144, 713 A.2d 1110, 1115 (1998) ("It is for the legislature, not the PUC or this court to determine what business activity comes within the purview of the PUC. Because the legislature has determined [which] businesses .... are not public utilities, ... we are constrained to determine that they are not subject to regulation by the PUC. If the legislature determines that such businesses should, in fact, be regulated by the PUC, it can always amend the Public Utility Code to that effect.")

2023 during settlement negotiations. ID at 31. As discussed below, these findings are based on inaccurate and incomplete readings of the evidentiary record and must be reversed.

a) Direct Energy went above and beyond any customer service expectations to attempt to assist the Complainants, and the record does not support a finding that Direct Energy misled or provided incomplete or inaccurate information at any time.

Assuming, *arguendo*, that the ID's application of Section 1501's "inadequate service" standard to Direct Energy's conduct is lawful (it is not), the ID ignored the significant efforts by Direct Energy to assist the Complainants and ultimately faulted Direct Energy for a chain of events that were not caused by any Direct Energy action or inaction. At bottom, this entire event was caused by Complainants' own inadvertent cancelation of their account with Direct Energy through PECO's IVR system. Yet, despite both Complainants' own culpability and the ALJ findings that PECO's IVR contributed to the problem, along with PECO's failure to stop or undo the cancelation request made on PECO's system (ID at 21-22), the ID pins blame on Direct Energy, who was simply a third party to the underlying circumstances that tried, in good faith, to assist in resolving the issue while also complying with the law. Direct Energy went as far as working directly with PECO on Complainants' behalf to see if PECO would undo the error Complainants made. As to the point made by the ID that the Direct Energy customer service representative with whom the Complainants initially spoke should have known of a delay in the receipt of a drop transaction from PECO,[6] that information is irrelevant to the customer service provided by Direct Energy. The representative simply and accurately noted when the Complainants called that no drop transaction had been received at that time.

[6] RD at 25.

Simply stated, it is not appropriate to find Direct Energy to have violated anything under these circumstances. A brief summary of the events of this case is provided below:

January 31, 2022 – Complainants initially enrolled with Direct Energy, and Direct Energy sent an enrollment letter and Terms of Service to Complainants for their natural gas supply service. See N.T. 68-69; DES Exhibit No. 1. The contract provided Mr. Naborn a 30-month fixed rate natural gas service from Direct Energy.

July 22, 2022 – Direct Energy received a call from Complainants, stating they accidentally submitted a request to switch their services back to PECO on PECO's IVR system. N.T. 69. As of this date, the Direct Energy service representative accurately informed Complainants that no cancel order had been received from PECO. *Id.* Complainants requested that Direct Energy reject a request to cancel if it comes through from PECO. *Id.*

July 25, 2022 – PECO sent Direct Energy an inbound cancellation order, with an effective service end date of August 22, 2022. N.T. 69-70. Under Chapter 59 of the Commission's regulations, Direct Energy was obligated to comply with PECO's in-bound cancelation order, and returned the account to PECO. *Id.* As Direct Energy's witness Mr. Halstead testified, Direct Energy had to comply with this request otherwise it would have violated the Commission's regulations which could lead to legal or enforcement consequences – regardless of the Customer's stated intention for Direct Energy to not honor a cancelation order from PECO. *Id.*

August 25, 2022 – Complainants contacted Direct Energy for the first time since July 22, 2022. Direct Energy informed him of the cancellation request received from PECO, and that Direct Energy was required to honor it. N.T. 70. Direct Energy *explicitly informed Complainants on August 25 that a new enrollment was needed to switch back to Direct Energy*. N.T. 70. Direct Energy opened an escalation for Complainants for further investigation. N.T. 70-71.

August 29 – August 30, 2022 – Direct Energy made three (3) attempts to contact the Complainants to discuss possible resolutions of their issue. N.T. 71 Each of these attempts were unsuccessful, *and the Complainants did not return Direct Energy's calls*. *Id.*

September 14, 2022 – Complainants called Direct Energy, and again Direct Energy *explicitly informed Complainants that a new enrollment is needed to return to Direct Energy*. N.T. 71. However, Direct Energy went above and beyond its obligations and informed Complainants it would submit a request to PECO to see if PECO would reinstate the natural gas account and undo the cancelation they sent Direct Energy (with which Direct Energy was required to comply). N.T. 71.

September 16, 2022 - Direct Energy sent the request to PECO requesting that PECO reinstate the Complainant's account. PECO did not respond. N.T. 71.

September 18, 2022 – Direct Energy sent another request via email to PECO, marking the matter URGENT. N.T. 72.

September 19, 2022 – Direct Energy sent Complainants an email, updating them on the status of communications with PECO. N.T. 72-73; DES Exhibit 2. Later that day, PECO informed Direct Energy that it was unable to reinstate the account. N.T. 73-74.

September 20, 2022 – Direct Energy and Complainants exchanged a final email regarding Direct Energy's efforts to have PECO undo the cancelation and reinstate the account. N.T. 73-74; DES Exhibit 2. Direct Energy then left Complainants a voicemail (transcribed in Complainant's Exhibit No. 1) which again clearly stated *that a new enrollment was required*, and that Complainants should contact Direct Energy directly or review pagasswitch.com for more information. N.T. 74-75. At no time prior to this voicemail did Complainants make a request to Direct Energy that they be reenrolled at their prior rate and terms of service. N.T. 76.

March 21, 2023 – After no direct contact from the Complainants for seven months (aside from the filing of the instant complaint - N.T. 76), Direct Energy reached out to Complainants for purposes of settlement. N.T. 76. Direct Energy offered, in settlement, to provide Complainants service at their prior contract rate, and to extend their contract terms. N.T. 77-78. Direct Energy was under no obligation to offer these terms, and did so for purposes of settlement. *Complainants were instructed to submit a new enrollment* and as a settlement offer, Direct Energy would manually update the price to the contracted price from January 2022. N.T. 78.

March 22, 2023 – Complainants accepted Direct Energy's offer of settlement, and Direct Energy received a new enrollment from Mr. Naborn. Direct Energy manually updated the pricing and voluntarily extended Complainant's contract term by 6-months to provide him with the full 30-months of their original contract term. N.T. 78-79.

Based on this evidentiary record, the ID inexplicably found that Direct Energy's conduct amounted to "inadequate service" under Section 1501. Direct Energy strenuously disputes this arbitrary finding. As shown above, Direct Energy at all times complied with the Commission's rules and regulations, and worked diligently on the Complainants' behalf with PECO to undo their own inadvertent cancelation. No fewer than four (4) times did Direct Energy instruct Complainants that they must submit a new enrollment to receive service from Direct Energy. On multiple occasions the Complainants did not respond to or return Direct Energy's attempts to reach him. *See e.g.* correspondence above from August 29-30, 2022; September 20, 2022. Most egregiously, the Complainants did not contact Direct Energy at any time again after September

20, 2022. Simply put, even if Section 1501's "inadequate service" standard applied (it does not), Direct Energy's conduct surely cannot be considered "inadequate" under the circumstances.

The ID went on to incorrectly find that Direct Energy failed to provide Complainants with information on how to reenroll with Direct Energy. ID at 31. This is patently incorrect. Again, on no less than four (4) occasions Direct Energy informed Complainants that new enrollment was needed. As shown in Complainant's Exhibit No. 1, Direct Energy clearly gave Complainants the directions on how to complete a new enrollment. The Choice Act enables customers to shop for competitive natural gas supply and that ability requires customers to act diligently on their own behalf – including taking affirmative actions to enroll with a supplier. Complainants were informed repeatedly by Direct Energy on how to submit a new enrollment if they chose to do so. Direct Energy was not obligated to reinstate Complainants' prior rate and terms, but did so as an offer of settlement of this matter. Direct Energy cannot be found in violation when the Complainants did not contact Direct Energy at any time from September 20, 2022 until Direct Energy made an offer of settlement on March 21, 2023. Indeed, as Direct Energy's Mr. Halstead testified on Direct Examination:

> Attorney Beard: Q. Now, why did Direct Energy wait from October 20, 2022 until March 2023, or approximately six months, to contact Mr. Naborn?
>
> Mr. Halstead: A. Well, for the final correspondence that Direct Energy had with Mr. Naborn provided him steps to become a Direct Energy customer again, if he so chose. And given that fact that PECO refused to reinstate his account with Direct Energy -- so that included calling Direct Energy, visiting its website or visiting PA-switch. Effectively, the ball was in Mr. Naborn's court at that time, if he wanted to become a Direct Energy customer again.
>
> Attorney Beard: Q. And why didn't Direct Energy simply reinstate Mr. Naborn's account on its own action?
>
> Mr. Halstead: A. Well, so Direct Energy takes the regulatory Commission's rules and regulations seriously and acts responsibly

> and in compliance with the requirements of the law, when it comes to enrolling customers. And enrolling a customer requires multiple steps, including important factors like third-party verification and other legal requirements. Direct Energy can't simply itself reinstate Mr. Naborn's account without his information, or with his information, as doing so would be -- effectively be a slam, which Direct Energy or any energy subsidiary would not do.

N.T. 76-77.

Additionally, Direct Energy's witness Mr. Halstead made abundantly clear that Direct Energy repeatedly informed Complainants that they must submit a new enrollment because their account had been canceled and PECO would not reinstate the account:

> Mr. Halstead: A. So as I stated, we - - Direct Energy does not and did not have the ability to reinstate your account. That was why we reached out to PECO requesting that your account be reinstated, if they could reinstate it. Because I stated we weren't able to create a new account for you without a new enrollment, because your account had been cancelled. We need your authorization in order to create a new account with Direct Energy. And that was why there was no account between August 22 and March 21st with Direct Energy, because no new enrollment had been submitted.
>
> I understand that basically from the voicemail you received, that Malissa provided you with the current pricing options as available on the website. And at that point, from the information that I have, you had not asked to be reinstated by Direct Energy at your previous pricing. And that was basically -- the reinstatement of your account was only something that we thought could be done by PECO. Direct Energy does not have the ability to reinstate your account without a new enrollment once it's cancelled.
>
> Mr. Naborn: Q. But in March you did have that.
>
> Mr. Halstead: A. No.
>
> Mr. Naborn Q. I can't follow. If in September you decided I could not be re-enrolled, why six months later you did know that?
>
> Mr. Halstead: A. You could have been re-enrolled at any time, sir. You just had to submit a new enrollment.
>
> Mr. Naborn Q. But that's not -– did you volunteer that information to me? How would I know that --

> Mr. Halstead: A. I believe in multiple stages you were told that you could re-enroll with Direct Energy, based on my review of the Complaint.
>
> Mr. Naborn Q. Right. But Direct Energy said, "We cannot do this without the help of PECO." That's why I have this Complaint going here. So -- and then six months later, you turn around and say you can do it this way. Why did it take six months?
>
> Mr. Halstead A. I can only keep stating -- I don't know how else I can explain it. Direct Energy does not have the ability to reinstate your account. We have the ability -- from the time that your account was cancelled, you had the ability to submit a new enrollment. You did not take that opportunity until March.
>
> When you chose to re-enroll in March, it just so happened that the pricing that you'd had in January was available as a current pricing option with Direct Energy. At no point in March did we reinstate your account. You re-enrolled by submitting a new enrollment.
>
> N.T. 85-87.

Simply put, as Mr. Halstead testified on Cross Examination by Mr. Naborn: "*You could have been re-enrolled at any time... You just had to submit a new enrollment*" and the unrefuted record evidence shows that Direct Energy informed Complainants of the need to submit a new enrollment. The ID erred in finding that the Complainants' carried their burden of proof[7] that they were uninformed or mis-informed. Direct Energy in no way misled the Complainants on the affirmative action of submitting a new enrollment that the Complainants must take.

b) The ID's application of a $1,000 civil penalty and analysis of the 52 Pa. Code § 69.1201(c) must be reversed.

As shown above, Direct Energy cannot be found to have violated any law or regulation, let alone the "inadequate service" standard of Section 1501. Further, the Commission has no authority to find a violation against Direct Energy for not entering into a contract with the Complainants after Complainants canceled their service as more thoroughly discussed in

[7] ID at 15.

Exception No. 3 below. Indeed, the ID is simply wrong that Direct Energy "fail[ed] to provide reasonable service… and provid[ed] misleading information to the Complainants." ID at 35. Where no violation can be found, the ID erred in applying the Commission's civil penalty criteria as defined in 52 Pa. Code §62.1201(c).

Regarding the first civil penalty criterion, the ID erred in finding that Direct Energy's conduct was "designed to shift attention" or to "convince the Complainants that responsibility or 'blame' for the problem should be shouldered by PECO." ID at 35. This finding lacks evidentiary support in the record. Direct Energy did not concoct a scheme to shift blame – that is a facially inaccurate conclusion to draw under the circumstances. Direct Energy's Witness Mr. Halstead testified under oath and truthfully that in his experience, there are utilities that have the ability to reinstate improperly canceled accounts which is why Direct Energy endeavored to inquire with PECO for them to do so. When asked by Judge Ashton, Mr. Halstead responded as follows:

> Judge Ashton: Q. Okay. What was it that made you think that? Or what was it that made DES believe that PECO could reinstate that account and write that series of e-mails?
>
> Mr. Halstead: A. It's been Direct Energy's experience that there are utilities that have the ability to reinstate accounts when they're improperly cancelled.
>
> Judge Ashton: Q. So what was it that made DES believe PECO could do so in this case?
>
> Mr. Halstead: Q. It was a question of whether they could, and that's why we reached out to them.
>
> …
>
> Judge Ashton: Q. … But what made you think that this utility -- that is, PECO -- could do it in this particular circumstance? Had PECO done that previously under these same circumstances?
>
> Mr. Halstead: A. I don't have any confirmation that PECO did that under these same circumstances. I think we haven't had a situation where a customer affirmatively chose to cancel their account at the utility

> and then requested that that be – that their cancellation be rescinded. So this is the only case that I've dealt with where a customer actively chose to cancel and then requested it be reinstated. There have been situations where utilities at – has erroneously cancelled an account -- I believe it must be as a result of their own errors -- and they've been able to reinstate; but not when a customer has specifically chosen to cancel and then tried to rescind that cancellation.

N.T. 90-91. The ID's finding that Direct Energy "willfully misled" the Complainants in this case is completely unwarranted, and the clear responses to the ALJ's questions showed that Direct Energy was attempting, in good faith, to work with the utility on the customer's behalf based on its experiences with other utilities. There simply was no misrepresentation or fraud in Direct Energy's actions, and no civil penalty is warranted.

With regard to the fourth civil penalty criterion, the ID erred in finding that this criterion suggests a higher penalty as "the supply of accurate and complete information to customers and avoidance of misleading information are critical to maintaining consumer confidence in public utilities and the Commission's role as a fair and impartial regulator." ID at 35. As discussed above, at no time did Direct Energy supply inaccurate information to the Complainant. Direct Energy consistently told the Complainants that they would need to submit a new enrollment with Direct Energy – a fact made abundantly clear on the record. Indeed, Direct Energy provided Complainants with completely accurate information that they must submit a new enrollment to receive service from Direct Energy on August 25, 2022 (N.T. 70), September 14, 2022 (N.T. 71), September 20, 2022 (N.T. 74-75), and March 21, 2023 (N.T. 76). Ultimately, the Complainants did, after their own delay, submit a new enrollment as part of Direct Energy's efforts to settle this matter (N.T. 76). To the extent that the ID faults Direct Energy for trying to work with PECO to reinstate the account on its own good-faith efforts and experience with other utilities (N.T. 90-91), Direct Energy's efforts should not be viewed as an attempt to mislead a customer.

With regard to the fifth and sixth civil penalty criterion, the duration of the violation and history of occurrences, the ID erred in assigning fault to Direct Energy for any delay that occurred or that the delay was based on any bad faith by Direct Energy. As just discussed, the Complainants were accurately informed as early as August 25, 2022 that they must complete a new enrollment. Any delay after this date was the fault of the customer, not Direct Energy. Indeed, the customer did ultimately complete a new enrollment on March 22, 2023. At no time did Direct Energy mislead Complainants on what was required, despite Direct Energy's parallel attempt to have PECO reinstate the account from their end.

Regarding the final civil penalty criterion, to deter future "misrepresentations," as discussed above, deterrence in this unique *and customer-initiated occurrence where the customers' own actions canceled their account with Direct Energy*, it is very unlikely to be repeated, and in-fact no misrepresentation occurred from Direct Energy. Therefore, the Commission should reverse the ID and find that no civil penalty is warranted.

C. Exception No. 3: The Initial Decision erred as a matter of law by *de facto* regulating the contractual relationship between Complainants and Direct Energy when finding that Direct Energy should not have delayed in offering to revive Complainants' rates and terms from the 2022 enrollment. (ID at 31, 36; FOF 43).

While the ID correctly recognized that matters of Direct Energy's contracts with customers are beyond the Commission's jurisdiction,[8] the ID nonetheless went on to find a violation against Direct Energy for not entering into a contract with the Complainants after the Complainants canceled their 2022 contract through PECO's IVR, and in particular for not offering from the date of cancelation to revive the parties contract at the Complainant's prior

[8] ID at 15; citing *See Yaglidereliler Corp. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2413732, (Opinion and Order entered Jan. 16, 2015), (citing *Allport Water Auth. v. Winburne Water Co*., 393 A.2d 673 (Pa. Super. 1978)).

contract rates and terms. ID at 31, 36. The crux of the ID's finding is that Direct Energy should not have waited seven months to re-enroll the Complainants at their 2022 enrollment terms and rate. This is *de facto* regulating Direct Energy's ability (and in the ALJ's view – requirement) to enter into a new contractual agreement with the Complainants over which the Commission has no jurisdiction.

As an NGS, Direct Energy does not have any obligation to enter into a contract with a customer, and the Commission has no jurisdiction to direct Direct Energy to establish or revive a contractual relationship with a customer. The Commission's subject matter jurisdiction over Direct Energy is set forth in 66 Pa. C.S. § 2208, and this give the Commission the unquestionable authority to ensure that Direct Energy meets its obligation to comply with the Choice Act and the PUC regulations. This, however, plainly does not extend the Commission's subject matter jurisdiction over Direct Energy's discretionary business decisions to enter into contracts with customers (or here revive a canceled contract's terms during settlement negotiations), especially when a customer's own actions cancels the previously negotiated terms. Unlike an NGDC as a supplier of last resort,[9] there is no obligation that Direct Energy provide service or enter into contracts with anyone. To hold otherwise would be to make Direct Energy a *de facto* supplier of last resort, binding Direct Energy to enter into a contract with the Complainant, which simply is not permissible under the law and not something the Commission can enforce.

The Commission does not have traditional ratemaking authority over competitive suppliers and has not asserted authority to regulate competitive supply rates. Further, the Courts and this Commission have held that the Commission lacks the statutory authority to set a

[9] 66 Pa. C.S. § 2207.

competitive supplier's rates and terms of service, or to even direct a supplier to issue a refund for services rendered.[10] Importantly, the Commission does not have subject matter jurisdiction to interpret the terms and conditions of a contract between a competitive supplier and a customer as the ID recognized.[11] There is simply no basis for the ID to assert *de facto* authority over Direct Energy's managerial discretion to enter into or revive a contract with a customer after the customer's contract was canceled by the customer, inadvertently or not. Indeed, the ID's holding that "Direct Energy presented no evidence that it was unable to make such an offer on July 22, 2022" is simply outside the Commission's jurisdiction base a finding of violation. ID at 30. The Commission has no role in Direct Energy's ability "to make such an offer" and thus the ID must be reversed.

Looking beyond the Commission's purview, it is fundamental that after a contract has been cancelled, it is still possible for that contract to be renewed, reinstated, and have new life breathed into it *by a proper offer, acceptance, and consideration*.[12] As the ID recognized, Direct Energy in-fact made an offer to the Complainants to provide him natural gas supply service after their initial contract was cancelled by informing him no less than four (4) times that they could submit a new enrollment to Direct Energy. That those terms were not Complainant's prior, now canceled contract rates and terms does not provide a basis for the ID to find Direct Energy in violation of any law. Direct Energy was not obligated to offer the Complainants their prior rate and term after they canceled their January 2022 contract inadvertently or not. Indeed, as the ID

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[10] *Blue Pilot Energy, LLC v. Pa. Public Utility Commission*, 241 A.3d 1254, 1267 (October 27, 2020). *See also Paul W. Kerr v. Energy Plus Holdings LLC*, Docket No. F-2022-3032332 (Order issued July 7, 2022, at 7) (the Commission does not have jurisdiction to direct an EGS to issue a refund).

[11] ID at 15; citing *See Yaglidereliler Corp. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2413732, (Opinion and Order entered Jan. 16, 2015), (citing *Allport Water Auth. v. Winburne Water Co*., 393 A.2d 673 (Pa. Super. 1978)).

[12] *Buff v. Fetterolf*, 207 Pa. Super. 92, 215 A.2d 327 (1965).

recognized, Direct Energy could not *sua sponte* reenroll the Complainant[13] as doing so would have amounted to a "slam" by enrolling the Complainants without the necessary provisions, consent, and third-party verifications that govern a customer's enrollment. Yet, Direct Energy made clear to the Complainants a simple fact – they were free to enroll with Direct Energy at any time, either directly or through pagasswitch.com, and recited Direct Energy's current offerings,[14] and the ball was in their court to act.[15] The Complainants did not act, and did not contact Direct Energy again until Direct Energy made an offer of settlement during the litigation of this proceeding.

Therefore, the ID erred as a matter of law by *de facto* regulating the contractual relationship between Complainants and Direct Energy when finding that Direct Energy should have offered to revive Complainants' contract at the rate and terms of their 2022 enrollment sooner than it did. The ID, therefore, must be reversed.

13 ID at 25.
14 Complainant's Exhibits No. 1.
15 N.T. 77.

III. CONCLUSION

WHEREFORE, Direct Energy Service, LLC respectfully requests that the Commission grant these Exceptions and modify the Initial Decision to dismiss the Formal Complaint against Direct Energy.

Respectfully submitted,

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