



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

November 19, 2012

Rosemary Chiavetta, Secretary
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Pennsylvania Public Utility Commission Bureau of Investigation
and Enforcement v. Public Power, LLC
Docket Number M-2012-2257858

Dear Secretary Chiavetta:

Enclosed please find the original of the Settlement Agreement and both Parties' Statements in Support to be filed in the above-captioned proceeding.

Should you have any questions, please feel free to contact me.

Sincerely,

Michael L. Swindler
Prosecutor

Enclosures

cc: Per Certificate of Service

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SECRETARY'S BUREAU

3. Section 501(a) of the Code, 66 Pa.C.S.A. § 501(a), authorizes and obligates the Commission to execute and enforce the provisions of the Code.

4. The Commission has delegated its authority to initiate proceedings that are prosecutory in nature to I&E and other bureaus with enforcement responsibilities.

Delegation of Prosecutory Authority to Bureaus with Enforcement Responsibilities, Docket No. M-00940593 (Order entered September 2, 1994), as amended by Act 129 of 2008, 66 Pa.C.S.A. § 308.2(a)(11).

5. Public Power is a jurisdictional electric generation supplier (“EGS”) certificated by the Commission to operate within PECO’s service territory, among others. Public Power is a public utility as defined by 66 Pa.C.S.A. § 102, and is engaged in, *inter alia*, the provision of public utility service for compensation as an electric generation supplier.¹

6. Public Power, as a provider of electric generation service for compensation, is subject to the power and authority of the Commission pursuant to Section 501(c) of the Public Utility Code.

7. Pursuant to the provisions of the applicable Commonwealth statutes and regulations, the Commission has jurisdiction over the subject matter and the actions of Public Power in its capacity as an EGS serving customers in Pennsylvania.

8. Section 3301 of the Code, 66 Pa.C.S.A. § 3301, authorizes the Commission to impose civil penalties on any public utility or on any other person or corporation

¹ “Electric generation supplier” is defined in Section 2803 of the Electricity Generation Customer Choice and Competition Act, 66 Pa.C.S. §§ 2801-2812; also see, 52 Pa. Code § 57.171.

subject to the Commission's authority for violations of the Code or Commission regulations or both. Section 3301 further allows for the imposition of a separate fine for each violation and each day's continuance of such violation(s). Specifically with regard to standards for changing a customer's electric generation supplier, the Commission is empowered to assess fines under the aforementioned 66 Pa.C.S. Chapter 33, pursuant to 52 Pa. Code § 57.177(e).

9. I&E initiated an informal investigation of Public Power consistent with Sections 331(a) and 506 of the Public Utility Code, 66 Pa.C.S. §§ 331(a) and 506, and 52 Pa. Code § 3.113. This investigation focused on the transmission in July 2011, by a third party vendor, of enrollments to change the electric generation supplier of a number of customers in PECO's service territory to Public Power.

10. As a result of negotiations between Public Power and I&E (hereinafter "Parties"), the Parties have agreed to resolve their differences as encouraged by the Commission's policy to promote settlements. See, 52 Pa. Code § 5.231. The duly authorized Parties executing this Settlement Agreement agree to the settlement terms set forth herein and urge the Commission to approve the Settlement Agreement as submitted as being in the public interest.

II. Background

11. On or about July 20, 2011, North American Power and Gas, LLC ("North American Power"), another EGS serving the PECO service territory, contacted PECO to

request an investigation of a possible slamming incident involving Public Power.² Public Power voluntarily investigated the enrollments in question and found that its third-party marketing vendor, Energy Choice Partners (“ECP”), had uploaded a large number of customer accounts in the PECO service territory to the database of Public Power’s Electronic Data Interchange (“EDI”) vendor.

12. Public Power contacted ECP regarding the issue and it was determined that ECP had mistakenly uploaded an incorrect file to Public Power’s EDI database which was then transmitted to PECO on or about July 19, 2011. Public Power was advised by ECP that the incorrect file contained North American Power customers enrolled months earlier when ECP was engaged in similar marketing efforts for that EGS.

13. On July 21, 2011, Public Power representatives, including the Company’s Chief Operating Officer, had numerous telephone conversations with PECO personnel to discuss how to rectify the error.³

14. On July 22, 2011, at the request of Public Power, PECO began rescinding the erroneous customer enrollments to Public Power since it was necessary for PECO to complete its rescission action within the 10-day waiting period set forth in Section 57.173(2), 52 Pa. Code § 57.173(2), or by July 27, 2011.

² This form of “slamming” has been referred to by the Commission as “enrolling customers to receive electric generation supply service without proper customer authorization.” *Pennsylvania Public Utility Commission Law Bureau Prosecutory Staff v. PEPCO Energy Services*, Docket No M-00011588 (Tentative Order entered December 20, 2001).

³ PECO advised Public Power that as the jurisdictional electric distribution company, it had already initiated the process of changing the EGS for 2,937 accounts from the uploaded file by sending to each of these customers the standard enrollment letter entitled “Confirmation of New Electric Generation Supplier.” PECO stated that it sends this letter to a customer after it receives and accepts an enrollment transaction from a supplier, pursuant to 52 Pa. Code § 57.173(2).

15. On July 27, 2011, PECO briefed the Commission's Office of Competitive Market Oversight ("OCMO") on the data entry error by Public Power's vendor during a weekly working group conference call.

16. Through PECO's diligent efforts to manually rescind the erroneous EGS enrollments, all but 263 of the 2,937 erroneous customer enrollments were successfully rescinded within the 10-day waiting period.⁴

17. With the lapse of the 10-day waiting period, the remaining 263 customer accounts were physically switched to Public Power. Once PECO supplied Public Power with the list of the 263 accounts, Public Power worked diligently with those customers to ensure that they were promptly returned to their selected EGS of choice. Public Power served as EGS on these accounts for one billing cycle (generally 30 days) before switching them back to their proper EGS, consistent with EDC supplier coordination tariffs, EDI protocols and 52 Pa. Code § 57.174 directing EDCs to make EGS changes "at the beginning of the first feasible billing period..."⁵

18. North American Power, the competitive EGS most impacted by ECP's data entry error which had initially contacted PECO, provided I&E with a letter in April 2012 commending the actions of Public Power in rectifying the mistake.⁶

⁴ I&E determined from its investigation that Public Power offered to reimburse PECO for the costs related to its rescission of the erroneous Public Power enrollments, but according to PECO it declined the offer "in order to support the competitive process."

⁵ The electric generation rate paid to Public Power by the 263 customers whose accounts were switched for one billing cycle before being returned to their EGS of choice was lower than the rate they would have been charged by their EGS of choice.

⁶ Attached to this Settlement Agreement as "Appendix A" is the letter of Chris Sattler, Chief Operating Officer, North American Power and Gas, LLC ("North American Power") dated April 25, 2012. In his letter to the I&E prosecutor, Mr. Sattler noted that the majority of the customers erroneously transferred

19. On July 29, 2012, OCMO held a conference call with representatives of Public Power to discuss the need for Public Power to: immediately notify OCMO/Commission in the future when something of this nature occurs; send letters to customers explaining what happened; describe the arrangement that Public Power had with the broker and the EDI provider; discuss possible reimbursement of PECO's costs to manually rescind the enrollments; confirm that the mistaken enrollments had stopped; and identify steps that Public Power had taken to avoid recurrence of a similar mistake.

20. OCMO subsequently referred the matter involving Public Power to the Law Bureau Prosecutory Staff (now I&E) for an informal investigation or other action as deemed appropriate. As OCMO explained, “[A]lthough it appears to have been an honest error, OCMO is referring the matter to [Prosecutory Staff] due to the volume of customers who were essentially slammed....”

III. Alleged Violations

21. Based on information obtained through its investigation as described above and a review of the Commission's regulations and relevant statutes, I&E was prepared to contend by the filing of a formal complaint that Public Power violated certain provisions of Title 52 of the Pennsylvania Code⁷ as well as of the Public Utility Code⁸ in that:

had selected North American Power as their EGS of choice and that once it discovered the erroneous transfer, North American Power “regularly communicated” with Public Power during the resolution of the incident and felt that Public Power “did an exemplary job to rectify the issue” and were satisfied with the resolution.

⁷ Specifically, §§ 54.42(a)(9) and 54.43(f) of the Electricity Generation Choice & Competition Act, 52 Pa. Code § 54.1, *et seq.*

⁸ Specifically, Chapter 57 of the Commission's regulations, Subchapter M., Standards for Changing a Customer's Electricity Generation Supplier. 52 Pa. Code §§ 57.171-177.

- A. The action of the Company or agent of the Company initiated the process of switching the electric generation supplier on 2,937 customer accounts and resulted in physically switching the electric generation supplier on 263 of those accounts without the authorization of the customers.

If proven, this would have violated Chapter 54 of the Commission's regulations, specifically Section 54.42(a)(9) of the Electricity Generation Customer Choice and Competition Act, 52 Pa. Code § 54.1, *et seq.*

- B. The action of the Company or agent of the Company initiated the process of switching the electric generation supplier on 2,937 customer accounts and resulted in physically switching the electric generation supplier on 263 of those accounts without the authorization of the customers.

If proven, this would have violated Chapter 54 of the Commission's regulations, specifically Section 54.43(f) of the Electricity Generation Customer Choice and Competition Act, 52 Pa. Code § 54.1, *et seq.*

- C. The action of the Company or agent of the Company initiated the process of switching the electric generation supplier on 2,937 customer accounts and resulted in physically switching the electric generation supplier on 263 of those accounts without the authorization of the customers.

If proven, this would have violated Chapter 57 of the Commission's regulations, Subchapter M., Standards for Changing a Customer's Electricity Generation Supplier, 52 Pa. Code §§ 57.171-177.

- D. The Company failed to furnish and maintain adequate, efficient, safe and reasonable service and facilities in the provision of service as an electric generation supplier.

If proven, this would have violated 66 Pa.C.S. § 1501.

22. If the matter had been litigated, Public Power would have contended that neither its actions nor the actions of its third party vendor violated either the Pennsylvania Code or the Public Utility Code and that it should not be fined or penalized for any offense.

23. Throughout the entire investigatory process, Public Power and I&E remained active in communications and informal discovery and continued to explore the possibility of resolving this investigation, which ultimately culminated in this Settlement Agreement. During the investigatory process, Public Power complied with I&E's requests for information and documentation. Throughout the investigation, Public Power and I&E maintained ongoing communications.

24. I&E acknowledges that Public Power has fully cooperated with this investigation.

IV. Settlement Terms

25. Public Power and I&E desire to: (i) terminate I&E's informal investigation and (ii) settle this matter completely without litigation.

26. Although Public Power disputes or disagrees with the allegations above, it fully acknowledges the seriousness of slamming and recognizes the need to prevent the reoccurrence of a similar situation. Moreover, the Parties recognize that this is a disputed claim and, given the inherent unpredictability of the outcome of a contested proceeding, the Parties further recognize the benefits of amicably resolving the disputed issues.

27. Public Power and I&E, intending to be legally bound and for consideration given, desire to fully and finally conclude this informal investigation and agree to stipulate as to the following terms solely for the purposes of this Settlement Agreement:

A. Public Power will pay a civil settlement amount of sixty-four thousand four hundred and fifty dollars (\$64,450.00) to resolve all allegations of

slamming and to fully and finally settle all possible liability and claims of alleged violations of the Pa. Code and the Public Utility Code arising from, or related to, the accidental transmission, on or about July 19, 2011, of the incorrect data file.⁹ Said payment shall be made by check to “Commonwealth of Pennsylvania” and presented to the Commission within thirty (30) days after the Commission has entered a final order approving the Settlement Agreement and no portion of this payment shall be recovered from the Pennsylvania generation customers of Public Power.

B. Public Power will provide to each of the 263 customers physically switched to Public Power in error a refund for the electric generation portion of their bill for the period of time they were served by Public Power, not to exceed sixty (60) days. These customer refunds, totaling \$22,161.68, will be made within thirty (30) days of the date of the Order approving this Settlement Agreement. Following the payment of these refunds, Public Power will file with the Commission a verification acknowledging that all scheduled refund payments have been made, satisfying this settlement provision and no portion of this payment shall be recovered from the Pennsylvania generation customers of Public Power.

C. Public Power has taken corrective action and implemented revisions to its operating procedures which will act as safeguards against the transmission of

⁹ This amount includes the 263 customer accounts that were physically switched to Public Power and the remaining 2,674 customer accounts that were not physically switched to Public Power, but that did each receive an enrollment confirmation letter in error before having the enrollments rescinded by the EDC.

erroneous or otherwise improper EGS enrollment data to the EDC. The pertinent portions of Public Power's modified enrollment procedures are briefly described as follows:

- The sales agency obtains a prospective customer's account information and a third-party verification ("TPV") is completed by the customer.
- The sales agency transmits the prospective customer information in an electronic file to Public Power's customer database, daily.
- An account profile for each prospective customer is generated from the uploaded electronic file.
- The enrollment information is "held" in Public Power's customer database and is no longer automatically transmitted to Public Power's EDI vendor.
- Each TPV is independently reviewed and is either "accepted" or "rejected."
- Public Power's TPV vendor provides it with a daily report which confirms both the existence of a TPV for each prospective customer and whether or not the TPV was "accepted" or "rejected" by the third-party reviewer.
- If a TPV is valid, i.e. "accepted," the information for each TPV automatically synchronizes with the corresponding account profile.

- Only when Public Power’s customer database confirms that a valid TPV exists for a prospective customer, does the database transmit that customer’s enrollment information to Public Power’s EDI vendor for transmittal to the EDC.
- If no TPV exists for a prospective customer or if the TPV is invalid, i.e. “rejected,” Public Power’s customer database rejects the associated customer account profile and will not permit transmittal of a rejected account to the EDI vendor.
- In addition to the foregoing operational safeguards, Public Power has established a Quality Control Department to follow-up with new and prospective customers and to monitor the performance of third-party sales agents, including an agent’s compliance with Public Power’s marketing procedures and code of conduct.

D. In exchange for the action taken by Public Power as described above, I&E agrees not to institute any formal complaint relating to the unauthorized customer enrollments that are the subject of this Settlement Agreement.

E. The terms and conditions in this Settlement Agreement cannot be used and will not be admissible in any future proceeding, including, but not limited to, the Commission, the Pennsylvania court system or the federal court system, relating to this or any other matter as proof of unlawful and/or improper

behavior, or as an admission of unlawful and/or improper behavior by Public Power.

28. In consideration of the Company's payment of a monetary civil settlement and its compliance with the non-monetary terms of this settlement, as specified herein, I&E agrees to forebear the institution of any formal complaint that relates to the company's conduct as described in the Settlement Agreement. Nothing contained in this Settlement Agreement shall adversely affect the Commission's authority to receive and resolve any *informal or formal complaints filed by any affected party with respect to the incident*, except that no penalties beyond the civil settlement amount agreed to herein may be imposed by the Commission for any actions identified herein.

VI. Applicability of the Commission's *Rosi* decision and its Policy Statement, Factors and standards for evaluating litigated and settled proceedings involving violations of the Public Utility Code and Commission regulations

29. In *Rosi v. Bell Atlantic Pennsylvania, Inc., et al.*, 94 PA PUC 103, Docket No. C-00992409 (Order entered March 16, 2000), the Commission adopted a test for evaluating an enforcement outcome in a slamming case to determine whether it was in the public interest. In *Pennsylvania Public Utility Commission v. NCIC Operator Services*, Docket No. M-00001440 (December 21, 2000), the Commission adopted the *Rosi* standards for review of all violations of the Public Utility Code and Commission regulations. The *Rosi* standards were reviewed by the Parties in this case. The Parties submit that this Settlement Agreement conforms to the requirements for settlements found in *Rosi* and that the terms of this Settlement Agreement are in the public interest.

30. The Parties further assert that approval of this Settlement Agreement is consistent with the Commission's Policy Statement, *Factors and standards for evaluating litigated and settled proceedings involving violations of the Public Utility Code and Commission regulations – statement of policy*, at 52 Pa. Code § 69.1201 ("Policy Statement"). Under the Policy Statement, while many of the *Rosi* standards may still be applied, the Commission specifically recognized that in settled cases the parties "will be afforded flexibility in reaching amicable resolutions to complaints and other matters so long as the settlement is in the public interest." 52 Pa. Code § 69.1201(b). The Commission's Policy Statement provides for ten (10) factors and standards to be considered by the Commission.

31. The first standard addresses whether the conduct at issue was of a serious nature. 52 Pa. Code § 69.1201(c)(1). On or about July 13, 2011, ECP, a marketing company retained by Public Power to market its generation supply services to electric consumers in PECO service territory, sent an electronic file to the Company to be forwarded to PECO purportedly containing a list of customers who desired to be switched to EGS, Public Power. Instead of containing new enrollees for Public Power, the electronic file actually contained customer accounts of another EGS that the vendor had previously done business with. When the error was brought to Public Power's attention, Public Power promptly contacted PECO and worked collaboratively with the EDC to rescind the improper enrollments. It has not been alleged that Public Power's conduct (or that of ECP) involves willful fraud or misrepresentation. Rather, based on I&E's informal investigation, it appears that the conduct of both Public Power and of the

vendor acting on behalf of Public Power which led to the unauthorized enrollment of the affected customers was unintentional and inadvertent.

32. The second standard addresses whether the resulting consequence of the conduct in question was of a serious nature. 52 Pa. Code § 69.1201(c)(2). The I&E investigation has determined that the customers who received electricity from Public Power before being switched back to their EGS of choice were unaffected financially (in fact, Public Power charged less for the electricity consumed by them than their EGS of choice would have); however, regardless of their accidental nature, the enrollments resulting from uploading the wrong file were unauthorized, and the act of enrolling customers to receive electric generation supply service without proper customer authorization, or “slamming”, has been recognized by the Commission as a serious consequence.¹⁰ Accordingly, I&E believes that the resulting consequence of the action of Public Power or its agent, whether inadvertent or not, was of a serious nature.

33. The third standard addresses whether the conduct was intentional or unintentional. 52 Pa. Code § 69.1201(c)(3). Since this standard may apply to litigated proceedings, it is not applicable here. I&E has nevertheless determined that the unintentional nature of the conduct in question is a valid mitigating factor in this case.

34. The fourth standard addresses whether the Company made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. 52 Pa. Code § 69.1201(c)(4). The Company voluntarily *modified its electronic systems and internal operating procedures, as described in*

¹⁰ The Commission has stated that it maintains a “zero tolerance” regarding slamming.

Paragraph 27.C, above, to prevent this type of error from recurring. As such, the Company is taking appropriate action to address concerns and decrease the likelihood of similar incidents in the future.

35. In the process of negotiating this Settlement Agreement, all of the other factors in the Policy Statement were considered. Specifically, the Parties reviewed the number of customers affected, the compliance history of the Company, the Company's cooperation with the Commission, and the amount necessary not only to deter future violations but to recognize alleged violations in the past. This incident garnered the attention of the Commission due primarily to the number of customers that were involved in this enrollment error. This Settlement Agreement was amicably negotiated and recognizes the Respondent's good faith efforts to comply with the Commission's regulations and other mitigating factors, including the extraordinary showing of cooperation among all parties involved to resolve the error while minimizing any impacts upon the affected electric customers.

36. The Parties submit that a settlement avoids the necessity for the prosecuting agency to prove elements of each violation. In return, the opposing party in a settlement agrees to pay a lesser sum to avoid the possibility of a larger fine or penalty resulting from litigation. This settlement represents a compromise by both Public Power and I&E of their respective litigation positions. Any fines and penalties resulting from a litigated proceeding, such as *Rosi*, typically are different from payments resulting from a settlement.

37. The Settlement Agreement meets the standards set forth in the Commission's Policy Statement at 52 Pa. Code § 69.1201. The Parties submit that the Settlement Agreement is in the public interest because it effectively addresses the slamming issue that was the subject of I&E's investigation, avoids the time and expense of litigation, which entails hearings, travel for the company's out-of-state witnesses and counsel, and the preparation and filing of briefs, exceptions, reply exceptions, and possible appeals.

38. With the Commission's approval that the terms and conditions in this Settlement Agreement are in the public interest, Public Power agrees to, along with the non-monetary terms set forth above, pay a civil settlement amount of \$64,450, plus refunds of \$22,161.68, for a total settlement amount of \$86,611.68, within thirty (30) days of the date of the Order approving this Settlement Agreement, to resolve completely the allegations raised by I&E's investigation. Moreover, Public Power agrees not to seek recovery of any portion of this settlement amount from its Pennsylvania generation customers.

39. This Settlement Agreement is a full and final resolution of the Commission's investigation related in any way to the matters described in this Settlement Agreement.

40. Public Power and I&E have agreed to this settlement in the interests of avoiding formal litigation and moving forward in the conduct of business in Pennsylvania.

41. Public Power and I&E have entered into and seek the Commission's approval of the Settlement Agreement pursuant to 52 Pa. Code § 3.113. This Settlement Agreement is subject to all applicable administrative and common law treatments of settlements, settlement offers, and/or negotiations. The validity of this Settlement Agreement is expressly conditioned upon the Commission's approval under applicable public interest standards without modification, addition, or deletion of any term or condition herein. Accordingly, this Settlement Agreement is made without any admission against or prejudice to any position which any Party might adopt during litigation of this case if this settlement is rejected by the Commission or withdrawn by any of the parties as provided below. This Settlement Agreement is, therefore, a compromise and is conditioned upon the Commission's approval of the terms and conditions contained herein without modification or amendment.

42. If the Commission fails to approve by tentative and final order this Settlement Agreement, including any of the terms or conditions set forth herein, without modification, addition, or deletion, then either Party may elect to withdraw from this Settlement Agreement by filing a withdrawal in response to the tentative or final order within twenty (20) days of the date the tentative or final order is entered. None of the provisions of this Settlement Agreement shall be considered an admission of fact or law or be binding upon the Parties if one of them files a withdrawal.

43. *This document represents the Settlement Agreement in its entirety. No changes to obligations set forth herein may be made unless they are in writing and are*

expressly accepted by the Parties involved. This Settlement Agreement shall be construed and interpreted under Pennsylvania law.

44. None of the provisions of the Settlement Agreement or statements herein shall be considered an admission of any fact or culpability. I&E acknowledges that this Settlement Agreement is entered into with the express purpose of settling the asserted, disputed claims regarding the specific alleged violations of the Commission's regulations and Public Utility Code.

WHEREFORE, Public Power, LLC and the Pennsylvania Public Utility Commission's Bureau of Investigation and Enforcement respectfully request that the Commission adopt an order approving the terms and conditions of this Settlement Agreement as being in the public interest.

Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement

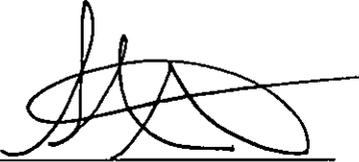
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Date: 19 NOV 12

Respectfully Submitted,

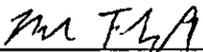
Public Power, LLC

By: 

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Date: 11-14-2012

Public Power, LLC
By Crius Energy, LLC, Its Manager

By: 

Michael J. Fallquist
Chief Executive Officer
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Stamford, CT 06901

Date: 11/13/12

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility :
Commission Bureau of :
Investigation and Enforcement, :
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Complainant :
: :
v. :
: :
Public Power, LLC, :
: :
Respondent :

Docket No. M-2012-2257858

**STATEMENT IN SUPPORT OF SETTLEMENT AGREEMENT
OF PENNSYLVANIA PUBLIC UTILITY COMMISSION
BUREAU OF INVESTIGATION AND ENFORCEMENT**

The Pennsylvania Public Utility Commission Bureau of Investigation and Enforcement (“I&E”) submits this Statement In Support Of Settlement Agreement at the above docket. The specific terms of the settlement are found at Paragraphs 29 through 32 of the Settlement Agreement. I&E submits that the settlement as memorialized by the Settlement Agreement was amicably reached by Public Power, LLC (“Public Power”) and I&E (hereinafter collectively referred to as “Parties”) and balances the duty of the Pennsylvania Public Utility Commission (“Commission”) to protect the public interest with the interests of the Company, the Company’s customers and all electric consumers in Pennsylvania.

This matter involves Public Power, a jurisdictional electric generation supplier (“EGS”) certificated by the Commission to operate within PECO’s service territory, among others. In July 2011, another EGS serving in PECO’s service territory contacted PECO to request that it look into the transfer of a larger number of its customers to Public Power. Upon investigation, Public Power determined that its third-party marketing vendor, Energy Choice Partners (“ECP”), had mistakenly uploaded an incorrect file containing a large number of customer accounts in the PECO service territory to the database of Public Power’s Electronic Data Interchange (“EDI”) vendor which was then transmitted to PECO. PECO accepted the file as containing customers enrolling to receive electric generation supply from Public Power and initiated the process of changing the EGS for the 2,937 accounts by sending each customer a letter confirming the transfer.

A dialog ensued between PECO and Public Power regarding how to rescind the erroneous enrollment requests and the process was initiated within 48 hours of when PECO first learned of the mistake. Thanks to the efforts of PECO and the cooperation of all parties involved, all but 263 EGS transfers were canceled before taking effect.¹ The following week, PECO briefed the Commission’s Office of Competitive Market Oversight (“OCMO”) on the data entry error by Public Power’s vendor during a weekly working group conference call. The matter was then assigned to I&E to initiate an informal investigation.

¹ The remaining 263 accounts were returned to their EGS of choice after one billing period with Public Power.

Although the action of Public Power's third-party vendor technically amounted to the "slamming" of 2,937 customers, the EGS enrollments appeared to be the result of an inadvertent error. In making a determination that the instant settlement was appropriate, I&E weighed the Commission's clear "zero tolerance" mandate that it would "not tolerate unlawful activity that threatens to harm Pennsylvania consumers and thereby the burgeoning retail electricity market in Pennsylvania"² against a multitude of mitigating circumstances present here. Most importantly, all but 263 of the 2,937 erroneous EGS enrollments were rescinded before any actual supplier transfer took place. As such, ninety-one percent (91%) of the slammed customers only received the letter intended to confirm their supply transfer to Public Power. The remaining 263 customers who were physically transferred to Public Power were returned to their supplier of choice after only one billing cycle. And, according to Public Power, during that 30-day billing cycle, the customers' unit rate for gas was actually lower than the rate being charged by their supplier of choice. In addition to the unintentional nature of the slamming incident, numerous other factors were considered, including that Public Power and the EDS, PECO, appeared to have worked together in a cooperative and diligent manner to resolve the error and that the other EGS involved even commended Public Power for its efforts to expeditiously rectify its vendor's error.

The Settlement Agreement addresses the allegations raised in I&E's informal investigation while avoiding the time and expense of litigation, including but not limited to, discovery, preparation of witness testimony, hearings, briefs, exceptions and appeals.

² See, *Pennsylvania Public Utility Commission, Law Bureau Prosecutory Staff v. MXenergy Electric, Inc.*, M-2012-2201861 (Opinion and Order entered May 3, 2012).

The Settlement Agreement, as proposed, is in the public interest and should be approved by the Commission. The Settlement Agreement sets forth the following terms:

A. Public Power will pay a civil settlement amount of sixty-four thousand four hundred and fifty dollars (\$64,450.00) to resolve all allegations of slamming and to fully and finally settle all possible liability and claims of alleged violations of the Pa. Code and the Public Utility Code arising from, or related to, the accidental transmission, on or about July 19, 2011, of an incorrect data file.³ Said payment shall be made by check to “Commonwealth of Pennsylvania” and presented to the Commission within thirty (30) days after the Commission has entered a final order approving the Settlement Agreement and no portion of this payment shall be recovered from the Pennsylvania generation customers of Public Power.

B. Public Power will provide to each of the 263 customers physically switched to Public Power in error a refund for the electric generation portion of their bill for the period of time they were served by Public Power, not to exceed sixty (60) days. These customer refunds, totaling \$22,161.68, will be made within thirty (30) days of the date of the Order approving this Settlement Agreement. Following the payment of these refunds, Public Power will file with the Commission a verification acknowledging that all scheduled refund payments have been made, satisfying this settlement provision and no portion of this

³ This amount includes the 263 customer accounts that were physically switched to Public Power and the remaining 2,674 customer accounts that were not physically switched to Public Power, but that did each receive an enrollment confirmation letter in error before having the enrollments rescinded by the EDC.

payment shall be recovered from the Pennsylvania generation customers of Public Power.

C. Public Power has taken corrective action and implemented revisions to its operating procedures which will act as safeguards against the transmission of erroneous or otherwise improper EGS enrollment data to the EDC.⁴

Public Power has, as stated above, agreed to pay a fair and equitable civil settlement amount totaling \$64,450.00⁵ and to provide refunds to the customers actually switched to Public Power of \$22,161.68 for a total settlement amount of \$86,611.68. This sum is in accord and satisfaction of disputed claims and is not an admission of liability of any sort by Public Power. This settlement amount was reached after taking into consideration past settlements regarding similar incidents that were approved by this Commission which acted as a foundation from which the Parties could determine a reasonable settlement amount in this case.⁶

In the instant matter involving Public Power, 2,937 customers were impacted by the inadvertent switching error, compared to 314 in Conectiv and 8 in PEPCO. Similarities as well as defining distinctions were all considered in reaching a settlement

⁴ The pertinent portions of Public Power's modified enrollment procedures are set forth in the Settlement Agreement at Paragraph 27.C.

⁵ This settlement amount was loosely based on an assessment of \$150 for each of the 263 customers actually switched, plus \$25,000 for the remainder of the customers who each received only a letter before the transfer was rescinded.

⁶ See, *Pennsylvania Public Utility Commission v. Conectiv Energy*, Docket No. M-00991273 (Order entered April 18, 2000) 94 Pa.P.U.C. 198 (2000)(Conectiv agreed to a \$10,000 settlement payment for the inadvertent slamming of 314 customers during a retail access pilot program) and *Pennsylvania Public Utility Commission v. PEPCO*, Docket No. M-00011588, (Order entered December 20, 2001) (PEPCO agreed to pay in settlement what amounted to \$250 for each of 8 customers switched without authorization due to negligent data entry errors). It should also be noted that in PEPCO's case, and distinguished from the instant matter, the data entry errors were accompanied by other alleged wrongful acts and were also not the first time that such issues regarding PEPCO had been brought to the Commission's attention.

amount that would be deemed by this Commission as an appropriate balance of all mitigating factors while adequately reflecting the seriousness of the allegations and promoting ongoing regulatory compliance and compliance with Commission policy. It is the position of I&E that the settlement reached, including a total civil settlement amount to be paid by Public Power of \$64,450.00, plus an additional \$22,161.68 in refunds to the 263 customers actually switched in this incident (for a total of \$86,611.68), in addition to the non-monetary procedural changes implemented by Public Power, is reasonable and should be found by this Commission to be in the public interest.

The agreement of the Parties to settle this case is made without any admission or prejudice to any position that the Parties might adopt during subsequent litigation, including but not limited to, in the event that this settlement is rejected by the Commission or otherwise properly withdrawn by any of the Parties.

Had this matter proceeded to hearing, I&E would have alleged that the Company committed numerous violations of the Public Utility Code and the Company would have contested these allegations. Specifically, I&E would have alleged in its case-in-chief as follows:

- A. The action of the Company or agent of the Company, initiated the process of switching the electric generation supplier on 2,937 customer accounts and resulted in physically switching the electric generation supplier on 263 of those accounts, without the authorization of the customers.

If proven, this would have violated Chapter 54 of the Commission's regulations, specifically Section 54.42(a)(9) of the Electricity Generation Customer Choice and Competition Act, 52 Pa. Code § 54.1, *et seq.*

- B. The action of the Company or agent of the Company, initiated the process of switching the electric generation supplier on 2,937 customer accounts and resulted in physically switching the electric generation supplier on 263 of those accounts, without the authorization of the customers.

If proven, this would have violated Chapter 54 of the Commission's regulations, specifically Section 54.43(f) of the Electricity Generation Customer Choice and Competition Act, 52 Pa. Code § 54.1, *et seq.*

- C. The action of the Company or agent of the Company, initiated the process of switching the electric generation supplier on 2,937 customer accounts and resulted in physically switching the electric generation supplier on 263 of those accounts, without the authorization of the customers.

If proven, this would have violated Chapter 57 of the Commission's regulations, Subchapter M., Standards for Changing a Customer's Electricity Generation Supplier, 52 Pa. Code § 57.171-179.

- D. The Company failed to furnish and maintain adequate, efficient, safe and reasonable service and facilities in the provision of gas service.

If proven, this would have violated 66 Pa.C.S. § 1501.

In *Rosi v. Bell Atlantic Pennsylvania Inc., et al.*, 94 PA PUC 103, Docket No. C-00992409 (Order entered March 16, 2000), as set forth in *Pennsylvania Public Utility Commission v. NCIC Operator Services*, Docket No. M-00001440 (December 20, 2000), the Commission adopted and utilized standards for determining whether a particular enforcement outcome is in the public interest. The standards set forth in *Rosi* were reviewed by I&E. I&E submits that this Settlement Agreement complies with the requirements for settlements found in *Rosi* and that the terms of the Settlement Agreement are in the public interest.

I&E further asserts that approval of this Settlement Agreement is consistent with the Commission's Policy Statement, *Factors and standards for evaluating litigated and settled proceedings involving violations of the Public Utility Code and Commission regulations – statement of policy*, at 52 Pa. Code § 69.1201 ("Policy Statement"). Under the Policy Statement, while many of the *Rosi* standards may still be applied, the Commission specifically recognized that in settled cases the parties "will be afforded flexibility in reaching amicable resolutions to complaints and other matters so long as the settlement is in the public interest." 52 Pa. Code § 69.1201(b). The Commission's Policy Statement provides for ten (10) factors and standards to be considered by the Commission. The application of these standards and support for the instant settlement are set forth in the body of the Settlement Agreement.

Finally, a settlement avoids the necessity for the prosecuting agency to prove elements of each violation. In return, the opposing party in a settlement avoids the

possibility of a greater fine or penalty. Both parties negotiate from their initial litigation positions. The fines and penalties in a litigated proceeding, such as *Rosi*, have always been different from those that result from a settlement. I&E submits that this is the reason that *Rosi* listed whether penalties arise from a settlement or a litigated proceeding as one of its tests.

The Settlement Agreement is in the public interest because it effectively addresses the allegations identified by the informal investigation, avoids the time and expense of litigation which entails hearings, filings of briefs, exceptions, reply exceptions, and possible appeals. The Company has also agreed to pay a fair and equitable civil settlement amount, including refunds to affected customers, and has improved its procedural safeguards to avoid an erroneous data transfer of such magnitude occurring in the future. Moreover, the Settlement Agreement is consistent with the Commission's Policy Statement at 52 Pa.Code § 69.1201, *Factors and standards for evaluating litigated and settled proceedings involving violations of the Public Utility Code and Commission regulations – statement of policy*.

Commission Rules and Regulations encourage the settlement of proceedings and, consequently, Public Power and I&E convened frequent and extensive conferences and discussions during the course of this proceeding. These discussions ultimately resulted in the foregoing Settlement Agreement which is a full and final resolution of the Commission's investigation.

In addition to the foregoing reasons, based upon I&E's analysis of these matters, acceptance of this proposed settlement is in the public interest because resolution of this

case by settlement rather than litigation will avoid the substantial time and expense involved in continuing to formally pursue all allegations in this proceeding. Moreover, acceptance of the Settlement Agreement at this time will ensure that the Company will immediately implement the changes in their policies enumerated in the Settlement Agreement instead of at the end of what could be protracted litigation.

WHEREFORE, I&E represents that it supports the settlement of this matter as memorialized by the Settlement Agreement as being in the public interest and respectfully requests that the Commission approve the foregoing Settlement Agreement, including all terms and conditions contained therein in its entirety.

Respectfully submitted,



Wayne T. Scott, First Deputy Chief Prosecutor
Michael L. Swindler, Prosecutor
Bureau of Investigation and Enforcement

Dated: November 19, 2012

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility	:	
Commission Bureau of	:	
Investigation and Enforcement,	:	
	:	
Complainant	:	
	:	
v.	:	Docket No. M-2012-2257858
	:	
	:	
Public Power, LLC,	:	
	:	
Respondent	:	

**STATEMENT IN SUPPORT OF SETTLEMENT AGREEMENT
OF PUBLIC POWER, LLC**

Public Power, LLC , a limited liability company formed pursuant to the laws of the Commonwealth of Pennsylvania (“Public Power” or the “Company”) hereby submits its Statement in Support of the Settlement Agreement (“Settlement”) of the above-referenced informal investigation by the Bureau of Investigation and Enforcement (“I&E”) of the Pennsylvania Public Utility Commission (“Commission”).

Public Power believes that the Settlement is consistent with the factors and standards first articulated by the Commission in Rosi v Bell Atlantic Pennsylvania, Inc. et.al., 94 PA PUC 103, Docket No. C-00992409 (order entered March 16, 2000) and subsequently adopted in the Commission’s statement of policy for evaluating settlements of alleged violations of the Public Utility Code (the “Code”) and Commission regulations. See 52 Pa. Code § 69.1201 (the “Statement of Policy”). In particular, the Statement of Policy provides that the Commission’s policy is to afford the parties flexibility to reach an amicable resolution provided the resolution is

consistent with the public interest. In reaching the Settlement, the parties in this matter were guided by the factors and standards set forth in 52 Pa. Code § 69.1201. The Settlement adequately sets forth the facts underlying the allegations of I&E (See II Background) and the respective positions of the parties. It is the product of both a thorough and professional investigation by I&E and of a cooperative dialogue between the Company and I&E. The Settlement is consistent with the public interest and should be approved.

Public Power acknowledges the seriousness of I&E's allegations, but believes that its conduct was lawful and appropriate and in compliance with the Code. Public Power would like to reassure the Commission that it takes its obligations as an electric generation supplier (EGS") seriously, as demonstrated by (i) its cooperation with I&E, (ii) its past history of regulatory compliance, and (iii) the fact that at all times relevant to this matter, it acted proactively and in good faith to resolve a situation which arose when a marketing company working for the Company unknowingly sent the wrong data file for uploading to PECO. As soon as it learned of the error, Public Power worked collaboratively with PECO to immediately rescind the mistaken proposed enrollments. Approximately 91% of the mistaken proposed enrollments were successfully stopped within the ten-day waiting period without affecting the customers' service. Of the 263 customers whose mistaken enrollments could not be stopped before being switched to Public Power, in each instance they were switched back to their previous EGS provider as soon as possible (after one billing cycle) and each paid less for the electric generation portion of their bill that month than if he or she had purchased power from his or her chosen EGS. Significantly, Public Power voluntarily modified its electronic systems and internal procedures to prevent this type of error from recurring in the future.

The mistaken enrollments were not the result of willful or fraudulent conduct by the Company or its marketing agent; but, rather were the result of an inadvertent mistake. Their conduct was not designed to mislead or confuse consumers and was not part of a marketing campaign or strategy to acquire new customers. In fact, the Commission's Office of Competitive Market Oversight ("OCMO") acknowledged the lack of wrongful intent on the part of Public Power when it characterized the situation as being one of "honest error." Similarly, I&E has determined that the "unintentional" nature of the conduct was a mitigating factor in arriving at the Settlement. The error was a one time, unintentional, isolated incident of limited duration.

It should also be noted that the "honest error" did not result in significant harm to consumers. Over 90% of the customer accounts listed on the incorrect data file were unaffected except for the receipt of a letter advising them of the proposed change of EGS and of the opportunity to rescind. While the Company regrets any inconvenience or confusion such a letter may have caused, it appears quite strongly that the effect, if any, on those customers was de minimus since none of them were actually switched as a result of uploading the incorrect file. The customers that were switched actually saved money on their electric bills and were promptly returned to their EGS of choice. Public Power acknowledges that PECO and North American Power, LLC ("NAP") were also affected. Public Power, on its own initiative, offered to reimburse PECO for its costs, which declined the offer; and, as noted in the Settlement (see Exhibit A), NAP, a competing EGS, wrote a letter to I&E commending Public Power's remedial conduct.

Public Power accepted responsibility for the "honest error" of its agent as demonstrated by its subsequent conduct, which should be viewed as a model of cooperation between an EGS and an electric distribution company ("EDC"). The Company's then chief operating officer and

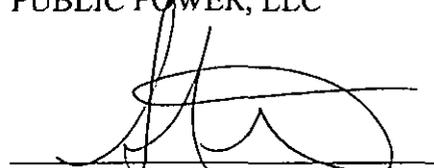
her executive assistant were directly involved in responding to, and correcting, the situation in concert with PECO. Perhaps most importantly, Public Power voluntarily changed its internal procedures and policies in response to this mistake to avoid recurrence. I&E has noted that there was an extraordinary showing of cooperation among all parties involved and concluded that the changes to Public Power's internal procedures were appropriate in addressing its concerns and decreasing the likelihood of similar incidents in the future. The changes to Public Power's enrollment procedures are designed to improve the quality of customer service, protect consumers and are in the public interest.

Public Power respectfully submits that, under all of the circumstances, the Settlement is in the public interest because it (i) complies with the standards set forth in the Commission's Statement of Policy, (ii) effectively addresses the issues identified by I&E's investigation (particularly the prompt and voluntary implementation of remedial action by Public Power to avoid similar mistakes in the future) and (iii) avoids the time and expense of litigation which entails hearings, filings of briefs, exceptions, reply exceptions, and possible appeals (thus conserving the resources of the Commission and its staff, I&E and Public Power).

The Company has also agreed to pay a fair and equitable civil settlement amount and to reimburse those customers whose accounts were actually switched for one billing cycle for the electric generation portion of their bill. The monetary terms of the Settlement take into account the nature and consequences of this matter as well as the unintentional and inadvertent nature of the incident by Public Power, a company that has, in all respects, and without exception, been a responsible corporate citizen.

In light of the foregoing and of the Commission's policy to promote settlements and the desire of both parties to resolve this matter without formal litigation, Public Power respectfully requests that the Commission adopt an order approving the terms and conditions of the Settlement as being in the public interest.

Respectfully submitted,
PUBLIC POWER, LLC

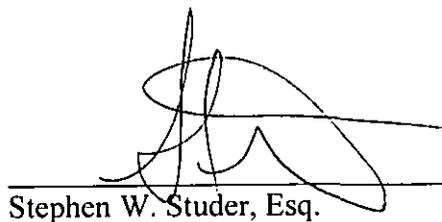


Stephen W. Studer, Esq.
Its Attorney
Berchem, Moses & Devlin, P.C.
75 Broad Street
Milford, CT 06460
203-783-1200
SStuder@bmdlaw.com

CERTIFICATION

This is to certify that a copy of the foregoing Statement in Support of Settlement Agreement of Public Power, LLC was mailed postage prepaid on the above date to:

Michael L. Swindler, Prosecutor
Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120



Stephen W. Studer, Esq.

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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing Settlement Agreement and Statements in Support, upon the person(s) listed and in the manner indicated below:

Notification by first-class mail addressed as follows:

Stephen W. Studer, Esquire
Berchem, Moses & Devlin, P.C.
75 Broad Street
Milford, CT 06460



Michael L. Swindler
Prosecutor
PA Attorney ID No. 43319
(Counsel for the Pennsylvania Public
Utility Commission, Bureau of
Investigation and Enforcement)

P.O. Box 3265
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(717) 783-6369

Dated: November 19, 2012

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