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Subject: Cases 15-M-0127 et al. - Ruling Confirming Oral Ruling on PULP's Motion for Sanctions

9/13/17

To the Parties:

Yesterday we scheduled a conference call for today with the parties to discuss PULP's motion for sanctions against Agway and Robison. As we clarified in our September 13, 2017 email, which was in response to Mr. Berkley's September 12, 2017 email, the purpose of the call was to make an oral ruling with respect to our findings and to discuss available remedies and sanctions. We conducted the call today, with representatives from PULP, Agway, and Robison participating. All other parties were invited to monitor the call, but we did not take roll to determine which of them chose to be on the line. No other party chose to comment when given the opportunity to do so at the end of the call. This email will serve as a written confirmation of our oral ruling, and to provide written guidance to Agway and Robison as to the exact nature of the deficiencies we identified.

As we stated on the call, we reviewed in detail the parties' motion papers, as well as the discovery responses provided by Agway and Robison, and find certain responses to be deficient and not compliant with the Commission's August 3, 2017 Order and our ruling of May 25, 2017. In so finding, we reject Agway's argument that the Commission's Order and the ruling did not apply to it. We generally admonished the representatives of Agway and Robison for these deficiencies.

As we explained, we find Agway's response to PULP-ESCO 6, 7, 12, 17-19 to be adequate. We find Agway's responses to PULP-ESCO 1-5, 8-11, 13-16 to be deficient in varying degrees. With regard to Robison, we find its responses to PULP-ESCO 1, 4, 6-10, 12-13, 17-19 to be adequate. We find Robison's responses to PULP-ESCO 2-3, 5, 11, 14-16 to be deficient. (The detailed explanation of these deficiencies is provided below.)

We articulated our belief that PULP's proposed sanction – to take facts as established – is not currently workable. PULP did not offer specific facts to be taken as established, and we do not believe that the nature of these discovery requests lends themselves to obvious facts to be established. In addition, we do not find it to be appropriate to independently establish such facts without providing all of the other parties with an opportunity to be heard. Considering that initial testimony is due in two days, there is no time to provide the parties with such opportunity.

Another available sanction (see 16 NYCRR §5.10) is to preclude the recalcitrant ESCOs from offering evidence in their testimony regarding the matters within the discovery requests. However, we do not find that to be an effective sanction, given the apparent reluctance of Agway and Robison to

provide the information. In addition, we noted that the parties always retain the right to make an application to strike testimony and evidence if it was not disclosed upon request during discovery.

Given the limitations inherent in each of the above remedies, we crafted a sanction that we believe is appropriate. Specifically, we directed Agway and Robison to remedy the identified deficiencies by **12:00 p.m. on September 14, 2017**. While we have every expectation that Agway and Robison will work diligently to comply with this directive, we nonetheless articulated a further sanction that could be imposed if they fail to comply. Specifically, we authorized PULP to make a further application after initial testimony is filed proposing specific facts to be taken as established.

We also denied Agway's request for a 48-hour stay of this ruling.

As we promised, below is an explanation of our findings with respect to specific discovery responses.

Agway

a. PULP-ESCO 1-3, PULP-ESCO 8, PULP-ESCO 15

We have reviewed Agway's May 24th responses to PULP's discovery requests and find them to be wholly insufficient. For example, PULP-ESCO 1-3, 8, 10, and 15 asked each ESCO to provide identify and provide documents related to: the means by which the ESCO's products were sold in the State; all sales scripts, marketing materials, promotional materials, and related documents; internal sales materials; scripts used to obtain customer authority to switch their service; door-to-door marketing campaigns, and related sales scripts; and the terms and conditions of service and other documents provided by customers. PULP asked for all information and documents related to the period between 2012 and 2016. (While the request covered 2011 as well, the May 25 Ruling, as subsequently clarified, set the period for permissible discovery to begin in 2012.)

However, Agway's responses to PULP offer only its current information and documents. Agway failed to indicate whether it was conducting sales between 2012 and 2016 and, if so, what sales methods were used during that time. It also failed to indicate whether the current scripts and marketing materials, including those for door-to-door campaigns, and customer disclosure documents have been used continuously since 2012 or whether other documents were used previously. (Notably, Agway simply claims to not be "currently" conducting door-to-door sales campaigns, but does not indicate whether such sales tactic previously was used by the company. As such, its response is not responsive to PULP's request.)

Furthermore, Agway did not provide any meaningful response to PULP-ESCO 8 in its May 24th response. Rather, Agway indicated that it would "supplement" its response with the "current script" at some unspecified time. It does not appear that this script was provided to PULP until July 11, 2017, and that script is labeled as "proposed." Thus, while this is not necessarily a deficiency, per se, it nevertheless remains unclear to us whether the script provided is actually one used by Agway. A clarification on this point is required.

b. PULP-ESCO 4

In response to PULP-ESCO 4, which requested a list of all the sales/marketing trainings that Agway has conducted since 2012 that covered various statutes, rules and regulations relating to unfair trade practices and marketing activities, Agway simply stated that it "employs customer service representatives" and that those representatives "receive extensive training on the fundamentals of energy, the nature and origination of deregulation, the EnergyGuard value added products and services, and the various pricing options available." Agway asserted that the training of its representatives

consists of “ongoing coaching” and other “training and updates depending on a variety of factors,” and that this training is designed to comply with “New York Uniform Business Practices, HEFPA, and other New York statutes.”

This general assertion that certain, unnamed employees are provided with “coaching” and training is not adequately responsive to PULP’s request that specifically asked for the dates and location of any training, and the names of attendees as well as the instructor(s).

c. PULP-ESCO 5 and PULP-ESCO 11

PULP-ESCO 5 requested that the ESCO provide a copy of its internal compliance program, policy and corporate structure that has been in effect since 2012. In response, Agway provided an internet link to its “most recent 10-K filing.” Not only is this response in contravention of the May 25 Ruling’s directive (page 16) to provide a specific location within public filings for where responsive information can be found, it does not address PULP’s request for information related to compliance programs that may have existed since 2012.

PULP-ESCO 11 requested the number and nature of customer complaints regarding the ESCO’s retail prices and bills and its sales and marketing practices that had been handled and resolved since 2012. In response, Agway provided a link to a document available on the Department of Public Service website, without specifying what the document is or where in the document the responsive information could be found. In fact, when the address provided by Agway is entered into a web browser, one discovers that the link is to the Department’s general Consumer Complaint Statistics page, where there are monthly reports, organized by year (dating to 2000), for all complaints lodged against all ESCOs operating in the State. This is a wholly unresponsive and unreasonable action on Agway’s part.

d. PULP-ESCO 9

This discovery request required the ESCO to identify telemarketing campaigns and any telemarketing contractors used, as well as sales scripts used by the contractors and/or ESCO employees. In addition, the request asked for the resulting sales activities, by month, for each distribution service territory. In response to this request, Agway refused to provide any information, asserting that the results of its telemarketing efforts are highly sensitive and competitive information that falls outside the scope of the proceeding and is irrelevant. Agway has utterly failed to provide the requested information even after the May 25 Ruling and Commission Order determined that the information sought by PULP’s discovery requests was relevant and must be disclosed, and that the Protective Order would serve to protect confidential information from disclosure.

e. PULP-ESCO 13 and PULP-ESCO 14

PULP-ESCO 13 required the ESCO to “describe fully” its “current policies and procedures for handling consumer complaints, training programs for those handling customer complaints” and to indicate whether those policies and training have changed at all since 2012. PULP-ESCO 14 required the ESCO to identify the individuals responsible for supervising the handling of customer complaints, as well as the amount of time each supervisor has held his or her position, and to whom each supervisor reports, in chart form. PULP also asked for information as to whether each named individual had been trained with respect to the Uniform Business Practices, HEFPA and other New York statutes regarding unfair trade practices.

In response, Agway generally explained that it receives individual complaints from Department of Public Service Office of Consumer Services (DPS OCS) staff, which “can have multiple categories” of complaints. Agway states in a highly conclusory fashion that the complaints are processed through DPS OCS’s Quick Resolution System (QRS). Agway states that, if the complaint is not resolved to the

satisfaction of the customer or DPS OCS, it is “reclassified as a formal complaint” and moved to DPS OCS’s Standard Resolution System (SRS).

Inasmuch as Agway does not describe any internal complaint-handling process, it should affirmatively state whether it has such process, and provide a description of such, or it should affirmatively state that it has no such process in place.

With respect to PULP-ESCO 14, Agway provides the names and titles of two individuals, a “Customer Care and Energy Guard Specialist” and a “Specialist – Contract and Quality Control,” who it claims are “primarily involved in complaint processing.” Agway does not provide any information regarding (a) whether these individuals hold supervisory positions, (b) their length of service with Agway, or (c) where these individuals fit within a management chart (no chart was provided). And, instead of indicating whether these employees have been trained with respect to the relevant statutory and regulatory authority, Agway simply states that the individuals “have and continue to operate in conformance” therewith. This information is insufficient to be meaningfully responsive to PULP’s discovery requests.

f. PULP-ESCO 16

PULP-ESCO 16 requested, for each type of variable rate contract entered into since 2012, the methodology the ESCO uses to calculate a residential customer’s monthly bill, and an example of the calculation using an average of 750 kWh. In addition, PULP asked the ESCO to explain how the methodology complies with the sales and promotional materials used as the terms and conditions provided to customers. In response, Agway refused to provide the exact methodology, claiming that such information is confidential and trade secret. Instead, it refers PULP to its disclosure statement, which provides a general overview of how a rate is calculated.

Even assuming the exact methodology is confidential information entitled to protection from public disclosure, however, PULP is a signatory to the Protective Order adopted in these proceedings and, therefore, is entitled to receive such information. Thus, the alleged confidential nature of the information does not provide Agway with reasonable grounds to withhold the information from PULP.

Robison Energy

a. PULP-ESCO 2 and PULP-ESCO 3

PULP-ESCO 2 asked the ESCO to provide all sales scripts, marketing and promotional materials and related documents that the ESCO uses to promote and explain its products to customers, from January 2012 to present. PULP-ESCO 3 asked the ESCO to provide all internal sales training materials that have been used since 2012, and indicate how the training materials were provided to employees that market, promote or sell the ESCO’s products.

In response, Robison initially provided three links to YouTube videos of television commercials that it claims to have run on “local cable television.” In its supplemental response of August 25, Robison additionally provides photocopies of promotional and marketing materials. It does not, however, indicate when these materials and commercials came into use and whether they are being used currently. In addition, Robison neglects to include any of the requested scripts. As a result of these deficiencies, it is difficult to believe that Robison has provided PULP with a complete response to PULP-ESCO 2.

With respect to PULP-ESCO 3, Robison originally refused to provide any information, asserting confidentiality. In its supplemental response, Robison simply asserts that “it does not have training material that is specific to its ESCO business. Rather, any trainings involve the full range of Robison’s services and products” (Robison’s Supplemental Responses, filed August 25, 2017, p. 2). However, Robison offers no reason why it could not have provided either the totality of its training materials or at least that aspect of its materials that are relevant to its ESCO business.

b. PULP-ESCO 5

PULP-ESCO 5 requested that the ESCO provide a copy of its internal compliance program, policy and corporate structure that has been in effect since 2012. In its initial response, Robison refused to provide any information on the basis that the information was publicly available and, in any event, irrelevant to the proceedings. In its supplemental response, Robison provided a confidential document entitled “Robison Energy, LLC Quality Assurance Program” that is dated February 1, 2013. This document provides a highly generalized outline of the steps Robison takes to train and educate its staff, including customer service and sales representatives. This document is not meaningfully responsive to the information request, however.

c. PULP-ESCO 11 and PULP-ESCO 14

PULP-ESCO 11 asked the ESCO to provide the “number and nature” of customer complaints about (a) retail prices and bills and (b) sales and marketing practices. PULP-ESCO 14 required the ESCO to identify the individuals responsible for supervising the handling of customer complaints, as well as the amount of time each supervisor has held his or her position, and to whom each supervisor reports, in chart form. PULP also asked for information as to whether each named individual had been trained with respect to the Uniform Business Practices, HEFPA and other New York statutes regarding unfair trade practices,

In its initial response to PULP-ESCO 11, Robison did not provide any information, stating that the information was publicly available and otherwise irrelevant. In its supplemental response, Robison asserts that it “does not internally categorize the very few complaints it receives,” and provides a breakdown of its DPS OCS QRS inquiries and SRS complaints as recorded on the Department’s Consumer Complaint Activity Repots, which are found on the Department’s website. However, Robison admits that the Department’s report does not offer detail on customer inquiries or complaints related to retail prices and bills. While Robison may not categorize the complaints, it receives, categorizing the complaints is not the same as documenting their receipt. And it is difficult to believe that it has no internal system or policy that tracks or documents customer complaints at all.

As for PULP-ESCO 14, Robison did not provide responsive information in its original response. In its supplemental response, it provided the name of an individual who handles its customer complaints, and indicates that the person has 10 years of experience working with customers and handling complaints. Robison fails to indicate, however, whether this person has been trained in any of the relevant statutes, rules or regulations.

d. PULP-ESCO 15

PULP-ESCO 15 asked the ESCO to provide a copy of the terms and conditions and other relevant disclosure documents provided to its residential customers since 2012. In its initial response, Robison asserted that this information is available in publicly filed documents and refused to provide the information. In its supplemental response, Robison asserts provides the relevant documents that have been used since 2013. It does not offer why it did not provide a responsive document for 2012.

e. PULP-ESCO 16

PULP-ESCO 16 requested, for each type of variable rate contract entered into since 2012, the methodology the ESCO uses to calculate a residential customer’s monthly bill, and an example of the calculation using an average of 750 kWh. In addition, PULP asked the ESCO to explain how the methodology complies with the sales and promotional materials used as the terms and conditions provided to customers. In its initial response, Robison referred to the methodology used to determine its variable rates that is included in the Customer Disclosure Statement, a component of the customer

agreement, which is publicly available on the Department's website. In its supplemental response, Robison simply states that it does not offer variable rate electric products to its customers. Robison does not explain the discrepancy between these two responses, nor does it indicate when it apparently ceased offering variable rate products to its residential customers.

Erika Bergen and Ashley Moreno

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