Law Offices of David M. Wise, P.A.

11 Commerce Drive, Suite 308
Cranford, New Jersey 07016[1]
Phone 908 653 1700
Fax 908 276 6260
Cell 973 207 0361
E-mail dwise@CRANFORDLEGAL.COM

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BY E-MAIL AND REGULAR MAIL

Jaclyn A. Brilling, Secretary
Public Service Commission
Three Empire State Plaza
Albany, New York 12223

In re: CASE 12-M-0113 - Complaint of Metro Eleven Hotels, LLC Regarding Alleged Slamming by Just Energy: Initial Comments by Complainant

Dear Secretary Brilling:

Complainant HHLP Duo One Associates, LLC (Hersha) is sending this in response to the Notice of New Proceeding and Comment Process issued on April 3, 2012 which indicated that the record to Case 11-M-0598 was being filed in Case 12-M-0113 and requested initial comments addressing the following questions: (1) whether Just Energy's enrollment of the account in question was authorized; (2) if Just Energy's enrollment was not authorized, what remedy (e.g. rebilling) is warranted and in what amount, with supporting documentation; and (3) other information the parties believe will assist the Commission in understanding the facts and issues.

The proceeding concerns the validity of a purported five year "Natural Gas and Electricity Price Protection Program Customer Agreement" ("the Protection Agreement") dated February 2, 2010, between Metro Eleven Hotels, LLC, Hersha's predecessor as owner of the Hampton Inn ("the Inn") at 337 West 39th Street in New York, and Just Energy. (Exhibit A to 9/22/11 Letter Wise to Jasinke.) The Protection Agreement was apparently signed by Darrell Barr, a former custodial employee at the Inn during the course of a door-to-door solicitation by an independent sales agent of Just Energy named Daniel Domenech. As of February 2, 2010, Con Edison was providing all electricity and natural gas service to the Inn. Just Energy apparently started providing gas and electricity to the Inn in March of April 2010.

Hersha obtained title to the Inn from Metro Eleven on February 10, 2010 pursuant to an arm's length Purchase Contract dated November 11, 2009. Under the Purchase Contract, all service contracts for the Inn, including the Inn's existing

[1] New York State address: 179 East Little Neck Road North, P.O. Box 818, Babylon, N.Y. 11702

Con Edison utility contracts, in effect as of November 11, 2009 were assigned by Metro Eleven to Hersha, and Metro Eleven was prohibited from entering into new long-term service contracts without Hersha's written consent.

Hersha has made many filings in these PSC proceedings detailing the factual and legal basis of its claim and we would briefly summarize the critical filings in the record as follows:

A. On January 3, 2011, Hersha filed a slamming Complaint against Just Energy under 16 NYCRR 13.15, 16 NYCRR Party 12, and Section 5K of the Uniform Business Practices, Case 98-M-1343. (Also filed as Exhibit F to September 22, 2011 appeal.) Hersha served a copy of the Complaint upon Just Energy. The alleged Protection Agreement was attached as Exhibit A to this filing.

B. On May 6, 2011, OCS made an initial determination denying Hersha's slamming complaint. Exhibit I to Hersha's 9/22/2011 filing.

C. OCS then retracted the denial on May 13, 2011, indicating it would be directing Just Energy to re-rate the disputed bills at Con Edison's rate. Exhibit K to Hersha's 9/22/2011 filing

D. On September 8, 2011, OCS issued yet a third initial determination, this time again denying Hersha's slamming complaint (Exhibit L to Hersha's September 22, 2011 filing.) Among the grounds for the denial, the determination stated "it wasn't until the account holder attempted to negotiate a new lower price with the Energy Service Company (ESCO), did the slamming allegations occur." As discussed below, this statement was untrue, and based entirely on an ex parte misrepresentation by Just Energy to OCS.

E. On September 22, 2011, Hersha filed an Appeal to OCS's denial of the slamming dated September 8, 2011, requesting an informal hearing. The appeal was served on Just Energy and accompanied by Exhibits A through M. The appeal was accompanied with requests for OCS's entire file on Hersha's complaint as well as Just Energy's file on the matter. Just Energy never responded.

F. On October 21, 2011, OCS denied the request for the informal hearing and affirmed the denial of the slamming complaint. Among other grounds, OCS stated that OCS had no jurisdiction over complaints by commercial customers against ESCOs under 16 NYCRR Chapter 13.

G. On November 1, 2011 Hersha filed an appeal of the October 21, 2011 decision to the Commission pursuant to 16 NYCRR Section 12.13 and 12.05(a)(2).

H. On November 3, 2011, Ms. Nancy Lee, OCS Supervisor acknowledged Hersha's appeal and notified Hersha that the "amount in dispute in your case has been determined to be $82,518.00, the estimated re-rated balance."

I. On November 17, 2011, OCS belatedly provided Hersha with its file on the matter, including ex parte e-mails sent by Just Energy to OCS as well as a recording made by Just Energy of an apparent telephone conversation with Darrell Barr, the employee who signed the 5-year Protection Agreement, supposedly substantiating Mr. Barr's authority to execute the Protection Agreement on Metro Eleven's behalf.

J. On November 18, 2011, Hersha filed material showing that OCS did, in fact, have jurisdiction under 16 NYCRR Chapter 13 over Hersha's complaint based on the terms of Con Edison's Purchase of Receivables ("POR.") Under the POR program, Con Edison was required to purchase the receivables of ESCOS, but was given the authority to terminate service from customers for unpaid ESCO charges. To protect against improper terminations, however, the POR program gave these customers all the consumer protections of Chapter 13.[2]

K. On December 22, 2011, Hersha filed reply material transmitting three sworn affidavits:

    a. An affidavit by Brittany Root, Hersha Human Resources Coordinator, (i) a copy of Mr. Barr's June 28, 2009 job application with Metro Eleven ,and (ii) a job description of the position held by Mr. Barr at the time he signed the Protection Agreement, showing that the position was that of a low-level custodian performing tasks such as assisting in "replacing ceiling tiles, light bulbs, patching vinyl, etc." without any contractual or procurement related responsibilities.

    b. An affidavit by Michael Payne, Executive VP and General Counsel of Affiliated Power Purchasers International, LLC, concluding that the Protection Agreement itself, its signing by a low-level custodial employee, and the circumstances of its signing were all highly unusual and suspicious.

    c. An affidavit by Debra A. Chudnow transcribing the apparent recording of the telephone conversation between Mr. Barr and representatives of Just Energy supposedly evidencing his authority to enter into the Price Protection agreement.

[2] As it turns out, due to miscommunications about the pending proceedings by OCS, in January and again in April 2011, Con Edison notified Hersha that it was about to terminate gas and electric service to the Inn based on Hersha's withholding of the disputed Just Energy bills.

Hersha respectfully requests that the Commission review the entire record in making its determination. Hersha answers the three questions presented in summary form below.

<u>Question 1: Whether Just Energy's enrollment of the account in question was authorized</u>

To establish that Just Energy's enrollment of the account was authorized, Just Energy must establish either (a) that, based on his job description and assigned responsibilities, Mr. Barr had *actual authority* to enter into the Price Protection Agreement; or (b) that, based on appearances created by the words or deeds of Metro Eleven, Mr. Barr had *apparent authority* to enter into the Price Protection Agreement on Metro Eleven's behalf.[3] "Apparent authority will only be found where words of conduct <u>*of the principal – not the agent*</u>—are communicated to a third party, which give rise to a reasonable belief and appearance that the agent possesses authority to enter into the specific transaction at issue…An 'agent cannot by his own acts imbue himself with the apparent authority' to act for the principal.'" *Edinburg Volunteer Fire Co., Inc., v. Danko Emergency Equip. Co.,* 55 A.D.3rd 1108 (3rd Dep't 2008) (emphasis supplied.) "Parties dealing with an agent do so at their own peril and must make the necessary effort to discover the true scope of the agent's authority." *Id.*

On this basis, it is clear that Mr. Barr had neither actual nor apparent authority to enter into the Protection Agreement. Moreover, the terms of the Protection Agreement, itself, combined with the circumstances of its execution would have raised serious questions about its validity in the mind of any reasonable energy service company.

a. As evidenced by the June 28, 2009 job application (Exhibit A) and job description (Exhibit B) annexed to the Affidavit of Brittany Root, Mr. Barr was a low level custodial employee at the Hampton Inn who had been employed there no more than seven months when he signed the Protection Agreement. Mr. Barr's highest educational achievement was a GED high-school equivalency degree. The job description shows that Mr. Barr's duties involved only unskilled custodial functions such as "replacing ceiling tiles, light bulbs, patching vinyl, etc.," and that he had no authority pertaining to procurement or contracts of any sort, let alone highly sophisticated energy futures contracts, such as the Protection Agreement, involving commitments in excess of $1 million. Hence, Mr. Barr had no *actual authority* to execute the Protection Agreement.

[3] Because it is so apparent that Mr. Barr had no authority to bind Metro Eleven to the Protection Agreement, we leave open the question of whether Mr. Barr also had to show authority to bind Hersha, the purchaser of the Inn under the Purchase Contract. We do not, however, concede that authority to bind Metro Eleven also bound Hersha.

b. Nor did any words or acts by Metro Eleven clothe Mr. Barr with *apparent authority* to sign the Protection Agreement. To the contrary, the circumstances surrounding the signing of the Agreement would have raised a red flag in the eyes of any energy supply company performing due diligence.

c. According to Hersha witness Michael Payne, who has negotiated several hundred energy supply contracts on behalf of large users, energy contracts such as the five year Protection Agreement must generally be approved by the owner of the company, or officers at the level of CEO or CFO. Mr. Payne has never seen an "assistant building superintendent" execute a contract such as this, and any "reasonable supplier would be highly skeptical of an Agreement executed by an assistant building superintendent." Payne Aff. paras. 6(d) and 6(e).

d. Additionally, as of the February 2, 2010 signing date of the Protection Agreement, the Hampton Inn was already subject to the above-mentioned November 11, 2009 Purchase Contract, and the actual sale occurred February 10, 2010, only one week after the signing of the Protection Agreement. The Purchase Contract assigned all of the Inn's Service Contracts, including its utility contracts, in effect as of November 11, 2009 to Hersha and prohibited Metro Eleven from entering any new service contracts that was not made (a) "upon prior written notice," (b) "in the ordinary course of business," (c) "on terms consistent with the prevailing market," *and* (d) "with a term of no longer than one year." *See* Exhibit D to 9/22/11 letter, pages 5, 7, 9, and 28. The Protection Agreement failed to meet *any* of these four requirements.

e. As a public company, Hersha had filed the Purchase Contract with the SEC and the impending sale was publicized in the business press. (*See* Exhibits B and C to 9/22/11 letter.) Any reasonable due diligence inquiry on Just Energy's part would have disclosed the impending sale of the Inn, as well as the terms of the Purchase Contract, and called the legitimacy of the Protection Agreement into question.

f. Needless to say, it made no sense for Metro Eleven to be entering into a five-year agreement on a hotel in the process of being sold to an unrelated party. According to Mr. Payne, entering the Protection Agreement under these circumstances would be "extremely unusual and ill-advised." Payne Aff. para. 6(a).

g. Also raising serious questions about the validity of the Protection Agreement was that it was apparently entered into "on the spot" during a door-to-door solicitation by a commissioned sales agent. According to Mr. Payne, a hotel chain would never sign a large energy supply contract "such as the Protection Agreement for a 5 year commitment with Green components 'on the spot,' but would review the contract internally and/or with its consultant in detail before executing." Payne Aff. 6(f). According to Mr. Payne, "the only sorts of agreements normally executed" on the spot in the course of door-to-door solicitations "are for residential and small business customers." Payne Aff. 6(f).

h. It was also highly suspicious that the Protection Agreement was not supported by any additional correspondence between Just Energy and Metro Eleven, whether by paper or internet. According to Mr. Payne, agreements such as this "would normally be supported by emails, faxes and perhaps written materials," and the correspondence from the customer "would clearly be seen as coming from the customer's business email system, fax system, or be on company letterhead." Payne Aff. 6(g).

i. Adding further grounds for suspicion is that ESCOs such as Just Energy use independent sales agents who are compensated on a straight commission basis, which invites "aggressive sales tactics, including misrepresentations, to get agreements signed on the spot." Payne Aff. 6(h.) According to Mr. Payne, based on the level of commissions offered by companies such as Just Energy, the sales agent who obtained the Protection Agreement could have received a commission "in the $50,000 range," with "all or most of the commission…paid upfront." Payne Aff. 6(h). In other words, the sales agent who obtained Mr. Barr's signature on the Protection Agreement had a $50,000 incentive either to collude with Mr. Barr or delude Mr. Barr to obtain an unauthorized signature on the Protection Agreement.

j. Moreover, the extremely one-sided terms of the purported Protection Agreement should have been highly suspicious to Just Energy under any circumstances. To begin with, according to Mr. Payne, hotels and similar companies usually do not enter into supply agreements for terms longer than two years. "It would be highly unusual for a Hotel to lock into a supply contract with a 5 year term." Payne Aff. para. 6(b.)

k. Additionally, according to Mr. Payne, the prices of the Protection Agreement, $1.35/therm for gas commodity service (including Green Energy Option) and 15.5 cents/kWh for electricity commodity service (also including Green Energy Option), were "both in the high range of competitive prices that were being quoted to customers with usage profiles similar to the hotel's usage profile in the New York City market in February 2010." Payne Aff. para. 6(c.) According to Mr. Payne, the "prices for the Green Energy components are particularly higher than I would have expected to see."

l. Finally, the recorded telephone conversation transcribed by Debra A. Chudnow supposedly establishing Mr. Barr's authority does nothing of the sort. In material part, the relevant exchange between Mr. Barr and Just Energy's telephone representative (Selma, or "S") pertaining to Mr. Barr's authority consisted entirely of the following:

> Selma: Thank you so much. And what would be your position in the business?
>
> Barr: Uh, assistant chief engineer.
>
> ***
>
> Selma: Thank you so much sir. Are you the individual responsible for entering into and securing agreements like this 5 year price protection for you business?
>
> Barr: Yes.

m. Obviously, this Q & A did not disclose any "words of conduct *of the principal – not the agent*…which [could] give rise to a reasonable belief and appearance that the agent possesses authority to enter into the specific transaction at issue." *Edinburg Volunteer Fire Co., Inc. v. Danko Emergency Equip.,* 55 A.D.3rd 1108 (3rd Dep't 2008.) Emphasis supplied. Rather, at best, we have an agent (*i.e.* Mr. Barr) "imbu[ing] himself with apparent authority" by his own words. As of law, however, this can never give rise to apparent authority. *Id.* Moreover, the one-sided and wooden quality of the Q & A should itself raise questions about Mr. Barr.

n. If Just Energy had been serious about confirming that Mr. Barr genuinely had authority to sign this million-dollar-plus contract, Just Energy would have sought written confirmation from Metro Eleven's corporate headquarters, in Great Neck, but Just Energy never did so.

o. It bears noting that Just Energy is no stranger to abusive sales tactics by "door-to-door salespeople using high-pressure tactics and making misleading statements to customers," and settled a complaint by the Ohio Consumers' Counsel for these tactics for of $111,000 in November 2010.

p. It should also be noted that the New York State Legislature has recognized that aggressive door-to-door tactics by ESCOs such as on display here have been a problem and has enacted new legislation, N.Y. Gen. Bus. 349-d, "Energy Services Company Consumers Bill of Rights" to guard against these practices.

q. It finally bears noting that Just Energy and OCS have groundlessly attempted to shift fault here from Just Energy to Hersha because, during the transition period between the closing on the hotel sale and Hersha's assumption of full management of the hotels, Hersha's transition team paid six or seven invoices before lodging a complaint. First, these invoices were issued on Con Edison's letterhead, with Just Energy's name not appearing until page 4. (*See* invoices attached as Exhibit F to 9/22/2011 filing.) More importantly, Hersha, like all gas and electric customers, had the right to trust that the Con Edison bills it was receiving for the Inn were just and correct, and was under no due diligence obligation to comb through the bills for evidence of "slamming" or other wrongdoing. One of the Commission's prime functions is to foster that trust, not treat such trust as misplaced.

Question 2: If Just Energy's enrollment was not authorized, what remedy (e.g. rebilling) is warranted and in what amount, with supporting documentation;

According to the Uniform Business Practices, Case 98-M-1343, the appropriate remedy would be to re-rate Just Energy's charges to the charges under Con Edison's standard tariff for accounts in the Hampton Inn classification. According to the November 3, 2011 letter of Ms. Nancy Lee of OCS (copy annexed), the "amount in dispute in your case has been determined to be $82,518.00, the estimated re-rated balance."

In addition to a credit of $82,515 (with interest), we submit that the Commission might also consider a penalty of some sort against Just Energy. In particular, we submit that Just Energy has needlessly protracted these proceedings, and increased the cost to Hersha, by making less than candid ex parte representations to OCS. In particular, after OCS reversed its initial finding for Just Energy on May 13, 2011, Just Energy sent OCS an ex parte e-mail (*i.e.* no copy of Hersha)[4] stating as follows:

> Just Energy would also make note that the account began to flow on the Just Energy program on March 23rd, 2010, with no contact made from the customer until November 4, 2010. During the initial conversation between Mr. Bart Mehta and our customer service representative, Mr. Mehta expressed his concern that the electricity and natural gas rates seemed high to him. As a result of this conversation, Mr. Mehta was advised that Just Energy would provide him with an offer of a reduced rate in writing. Mr. Mehta expressed his agreement to consider a reduction in rate and made mention of multiple other properties that his company may be interested in signing with Just Energy should the rate proposal meet his expectations. **Mr. Mehta did not bring the validity of the agreement into question at this time.** (Emphasis supplied.)

In other words, Just Energy was attempting to paint a picture that Hersha had raised the "slamming" allegation merely as a *red herring* to obtain an untoward

[4] By contrast, Hersha cc'd Just Energy with all of its correspondence to OCS.

advantage in negotiating a more favorable price. OCS apparently found this persuasive and ruled against Hersha on September 8, 2011 largely based on this statement.

This ex parte statement by Just Energy, however, misrepresented the facts. As evidenced by the e-mails annexed at Exhibit E to Hersha's September 21, 2011 appeal excerpted below, throughout these communications, Hersha's position was consistent and unyielding throughout its initial communications with Just Energy: the Protection Agreement was unauthorized and invalid.

A. 11/3/10 e-mail: "this account was not signed by an authorized person of our company. So you do not have a valid contract."

B. 11/5/10 e-mail: "Hersha does not agree that an 'exit fee' as you say is warranted. Hersha's position is that the contract with Just Energy is not valid because it was not signed by an authorized officer with Hersha."

C. 11/5/10 letter: "Mr Barr…has absolutely no authority to sign…this Protection Agreement is void."

D. 11/09/10 e-mail: "Ever since we learned of the existence of your contract, we have consistently communicated to you that the contract is invalid because it is signed by an unauthorized person…We reject your exit fee demand as well as the offer to lower the price for electricity for the remaining period of the contract…Please be advised that we will be reverting back to our general supplier at the next meter reading date."

E. 11/9/10 letter: "we have consistently communicated to you that the contract is invalid, that Just Energy's actions with respect to the electricity and gas accounts for the property in question was unauthorized."

F. 11/11/10 e-mail: "The gentleman who signed this contract has no authority to bind this company to any obligation of this nature."

Such cursory discussion regarding lower rates as occurred between Just Energy and Hersha was all initiated by Just Energy, which demanded a huge exit fee from Hersha but then offered to waive it in return for a long-term contract on terms slightly more favorable to Hersha than the original Protection Agreement. In sum, Just Energy needlessly protracted these proceedings and their costs by materially misrepresenting the facts to OCS. The Commission should consider an appropriate penalty, such as requiring Just Energy to pay Hersha's reasonable attorney's fees.

<u>Question 3: Other information the parties believe will assist the Commission in understanding the facts and issues.</u>

We simply refer the Commission to Hersha's prior filings herein, particularly those of September 21, 2011, November 1, 2011, November 18, 2011, and December 22, 2011.

CONCLUSION

For the reasons stated above, the Commission should:

A. find that the Protection Agreement was unauthorized and Just Energy obtained the agreement through unlawful "slamming;"

B. re-rate Just Energy's charges on the accounts in question, with a re-rated overcharge in the sum of $82,518.00, with interest; and

C. direct Con Edison to re-bill the accounts in question accordingly; and

D. order Just Energy pay to Hersha's reasonable attorney's fees in this matter.

Respectfully submitted,

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DAVID M. WISE, Esq.
Law Offices of David M. Wise, P.A.
Attorney for Complainant
11 Commerce Drive
Cranford, NJ 07016
(908) 653-1700 (V)
(908) 276-6260 (F)

Cc: mmunnelly@justenergy.com
rhill@justenergyc.om
bealer@coned.com
schoenwetters@coned.com
Nancy.Lee@dps.ny.gov
secretary@justenergy.com
bart@hersha.com
Heather.Pratt@hersha.com