

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE INVESTIGATION)
INTO THE BUSINESS AND MARKETING) PSC DOCKET NO. 355-08
PRACTICES OF HORIZON POWER & LIGHT, LLC)
(FILED OCTOBER 15, 2008))

ORDER NO. 7626

AND NOW, this 18th day of August, 2009;

WHEREAS, on October 15, 2008, after receiving over one hundred (100) complaints from Delaware residents regarding various business and marketing practices of Horizon Power and Light, LLC ("Horizon"), an entity certified to provide electric supply service to residents of the State of Delaware, the Staff of the Delaware Public Service Commission ("Staff"), on its own motion, pursuant to 26 Del. C. §§206 and 1019, filed a complaint requesting the Delaware Public Service Commission (the "Commission") to initiate a docket to investigate the allegations made by these complainants against Horizon.

WHEREAS, the allegations against Horizon included various assertions of unfair and deceptive business practices, including:

1. Raising customers' rates without providing proper notice;
2. Misrepresenting to customers and potential customers the price reductions customers would receive on their electric rates;

3. Charging customers inappropriate cancellation or termination fees;

4. Terminating customer contracts prematurely;

5. Charging customers a rate in excess of Horizon's contract rate; and

6. Enrolling accounts as customers of Horizon without the customer's permission.

WHEREAS, on November 6, 2008, Horizon filed an Answer to the Staff's Complaint denying all of Staff's allegations that the Company had violated Delaware law. Horizon further asserted certain affirmative defenses to the Complaint.

WHEREAS, by letter dated November 12, 2008, the Commission's Executive Director assigned this matter to a Hearing Examiner to conduct appropriate hearings and to report her proposed findings and recommendations to the Commission.

WHEREAS, the Division of the Public Advocate, pursuant to 29 Del. C. §8716, exercised his statutory right of intervention in this proceeding on November 20, 2008 and actively participated throughout the course of this proceeding;

WHEREAS, in addition to the several written complaints referenced above, public comment sessions were held in Wilmington on March 30, 2009; in Dover on March 31, 2009; in Georgetown on April 1, 2009; and in Glasgow on April 2, 2009. The complaints of customers attending the comment sessions were substantially the same as the written complaints the Commission had received.

WHEREAS, on July 20, 2009, the Hearing Examiner conducted a

duly-noticed public evidentiary hearing at which the parties jointly submitted a "Settlement Agreement" (the "Settlement Agreement") designed to resolve the issues raised in Commission Staff's Complaint. See the Settlement Agreement" attached hereto as Exhibit "1."

WHEREAS, at the evidentiary hearing the parties testified that they believed the Settlement Agreement was in the public interests and should be accepted by the Commission;

WHEREAS, the Hearing Examiner has now submitted her Findings and Recommendations (July 28, 2009)(see Exhibit "A" attached hereto), in which she recommends Commission approval of the Settlement Agreement to resolve the issues raised in the proceeding; which provides that, among other things, the following:

1. Horizon and two of its principals, Neil Leibman (its Chief Executive Officer) and Tom O'Leary (the Chairman of the Board of Directors of Horizon's parent, Horizon Power Holdings, Ltd.) will pay a total of \$500,000 in full and complete settlement of the issues raised in the complaint. Staff will establish a Special Purpose Account into which all funds will be deposited. Upon Commission approval of the Settlement Agreement, Messrs. Leibman and O'Leary, in their individual capacities, will be jointly and severally liable for tendering to the Commission the sum of \$250,000, which the Commission shall deposit into the Special Purpose Account. Beginning on September 1, 2009, and continuing thereafter on or before the first of each successive

month for the next five months, Messrs. Leibman and O'Leary, in their individual capacities, shall be jointly and severally obligated to pay six successive monthly payments of \$25,000 to the Commission for deposit into the Special Purpose Account, for a total of \$150,000. Messrs. Leibman and O'Leary will be jointly and severally liable for a total of \$400,000 of the \$500,000. The Commission shall provide proof of each deposit made into the Special Purpose Account to the Public Advocate and to Horizon's counsel within seven (7) days after each such deposit. Settlement Agreement, Paragraphs 7(a) (3), (5).

2. On the first day of each successive month for the next four months, Horizon shall make four successive monthly payments of \$25,000 into the Special Purpose Account for a total of \$100,000 in additional payments. Settlement Agreement, Paragraph 7(a) (7).

3. Staff and the Public Advocate, in their sole and exclusive direction, shall determine which present and/or former Horizon customers will receive payment from the Special Purpose Fund and the amount of payment to be made to said customers. Horizon will be responsible for all administrative costs incurred in making such payments to present and/or former Horizon customers, including but not limited to the costs of mailing of notices. The monies used to pay for administrative costs will not be taken from the Special Purpose Account. Settlement Agreement, Paragraph 7(b).

4. In no event will any of the proceeds of the Special

Purpose Account be returned to Horizon, Neil Leibman or Tom O'Leary. Ex. 6 - Settlement Agreement, Paragraph 7(b).

5. Horizon will relinquish its Electric Supplier Certificate awarded to it by the Commission in Order No. 7104, and agrees not to reapply for an Electric Supplier Certificate in Delaware for two years from the date that the Commission approves relinquishment of Horizon's Certificate. Settlement Agreement, Paragraph 7(c).

6. Horizon will wind down its Delaware operations within sixty (60) days from the date the Commission approves the Settlement Agreement. Horizon will fully cooperate with the Staff, the Public Advocate, Horizon's present and/or former customers, and any other involved entity (e.g., a replacement electric supplier) in winding down its Delaware operations and transitioning its present customers to an electric supplier(s) to replace Horizon. Settlement Agreement, Paragraph 7(d).

7. Horizon admits that its conduct led to the filing of Staff's complaint and that its conduct has caused it to cease its Delaware operations. Settlement Agreement, Paragraph 7(e).

8. The Settling Parties irrevocably waive their rights to appeal a Commission order approving the Settlement Agreement.

9. The signatories may enforce the Settlement Agreement through any appropriate action before the Commission or any other available remedy in the Delaware state courts. The signatories also submit to jurisdiction and venue in Delaware with respect to all such proceedings. Furthermore, Horizon, and Messrs. Leibman

and O'Leary consent to appoint the Delaware Secretary of State as their agent for service of process in Delaware for all such proceedings. Ex. 6 - Settlement Agreement, Paragraph 12.

10. The Settlement Agreement does not affect the rights of present and/or former Horizon customers to bring separate actions against Horizon, but Horizon may claim as a set off any sums received by such customer(s) pursuant to the Settlement Agreement. Ex. 6 - Settlement Agreement, Paragraph 13.

WHEREAS, Section 512 of the Public Utilities Act directs the Commission to "encourage the resolution of matters brought before it through the use of stipulations and settlements," and provides that the Commission may, upon hearing, approve the resolution of matters through stipulations or settlements when the Commission finds such resolutions to be in the public interest. 26 Del. C. §512(a), (c).

WHEREAS, the parties' witnesses unanimously testified that the Settlement Agreement is in the public interest noting that settlement of this matter saves all the parties' attorneys' fees, time, and focuses on reimbursing, at least partially, consumers funds to which they are entitled.

WHEREAS, the Commission finds that the proposed Settlement Agreement is just and reasonable and that adoption of the Hearing Examiner's Report and Recommendations is in the public interest.

NOW, THEREFORE, IT IS HEREBY ORDERED BY THE AFFIRMATIVE VOTE OF NOT FEWER THAN THREE COMMISSIONERS:

1. That, by and in accordance with the affirmative vote of

a majority of the Commissioners, the Commission hereby adopts the Findings and Recommendations contained in the Report of the Hearing Examiner, dated July 28, 2009. A copy of the Report with those findings and recommendations is attached to the original hereof as "Exhibit A."

2. That, for the reasons set forth in the Hearing Examiner's Report, the Settlement Agreement proposed by Horizon Power and Light, LLC, the Division of the Public Advocate and the Commission Staff is found to be in the public interest. A copy of the Settlement Agreement is attached to the Hearing Examiner's Report as Exhibit "1."

3. That Commission Staff, the Division of the Public Advocate and Horizon Power and Light LLC are directed to provide the Commission with a status report regarding creation of the Special Purpose Account ("the Account"), payments to the Account, reimbursement to customers of the proceeds of the Account, Horizon's winding down of its operations in Delaware and all other matters relating to the Settlement Agreement sixty (60) days from the date of this Order and every sixty (60) days thereafter until the matters provided for in the Settlement Order are completed and concluded.

4. That the Commission reserves the jurisdiction and authority to enter such further orders in this matter as may be deemed necessary or proper.

PSC Order No. 7626 (Con't)

BY ORDER OF THE COMMISSION:

/s/ Arnetta McRae

Chair

/s/ Joann T. Conaway

Commissioner

/s/ Jaymes B. Lester

Commissioner

/s/ Dallas Winslow

Commissioner

/s/ Jeffrey J. Clark

Commissioner

ATTEST:

/s/ Katie Rochester

Acting Secretary

A T T A C H M E N T "A"

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE)
INVESTIGATION INTO THE) PSC DOCKET NO. 355-08
BUSINESS AND MARKETING PRACTICES)
OF HORIZON POWER & LIGHT, LLC)
(FILED OCTOBER 15, 2008)

FINDINGS AND RECOMMENDATIONS OF THE HEARING EXAMINER

RUTH ANN PRICE
SENIOR HEARING EXAMINER

DATED: JULY 28, 2009

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE)
INVESTIGATION INTO THE) PSC DOCKET NO. 355-08
BUSINESS AND MARKETING PRACTICES)
OF HORIZON POWER & LIGHT, LLC)
(FILED OCTOBER 15, 2008)

FINDINGS AND RECOMMENDATIONS OF THE HEARING EXAMINER

Ruth Ann Price, duly appointed Hearing Examiner in this Docket, reports to the Commission as follows:

I. APPEARANCES

On behalf of the Respondent, Horizon Power and Light, LLC ("Horizon" or "Company"):

Morris, Nichols, Arsht & Tunnell
BY: MICHAEL HOUGHTON, ESQUIRE
R. JUDSON SCAGGS, JR, ESQUIRE
GEOFFREY A. SAWYER, III, ESQUIRE

On behalf of the Public Service Commission Staff ("Staff"):

Murphy & Landon
BY: FRANCIS J. MURPHY, ESQUIRE
Regina A. Iorii, Esquire, Deputy Attorney General
David Bonar, Ombudsman and Government Services Liaison
Funmi I. Jegede, Public Utilities Analyst
Barbara Alexander, Staff Consultant

On behalf of the Division of the Public Advocate ("DPA"):

G. ARTHUR PADMORE, PUBLIC ADVOCATE
MICHAEL SHEEHY, DEPUTY DIRECTOR, PUBLIC ADVOCATE
KENT WALKER, ESQUIRE, DEPUTY ATTORNEY GENERAL

II. BACKGROUND

1. On October 15, 2008, after receiving over 100 complaints from Delaware residents regarding various business and marketing practices of Horizon Power and Light, LLC ("Horizon"),

an entity certified to provide electric supply service to residents of the State of Delaware, the Staff of the Delaware Public Service Commission ("Staff"), on its own motion pursuant to 26 Del. C. §§206 and 1019, filed a complaint (the "Complaint") requesting the Delaware Public Service Commission (the "Commission") to initiate a docket to investigate the allegations made by these complainants against Horizon. The allegations against Horizon included:

- Raising customers' rates without providing proper notice;
- Misrepresenting to customers and potential customers the price reductions that customers would receive on their electric rates;
- Charging customers inappropriate cancellation or termination fees;
- Terminating customer contracts prematurely;
- Charging customers a rate in excess of Horizon's contract rate; and
- Enrolling accounts as customers of Horizon without the customer's permission.

2. On November 6, 2008, Horizon filed an Answer to the Staff's Complaint, in which Horizon denied all of Staff's allegations that the Company had violated Delaware law and asserted certain affirmative defenses to the Complaint, including that Staff had waived or acquiesced in Horizon's conduct because Horizon had acted in accordance with its standard form of contract, which had been reviewed by Staff.

3. By letter dated November 12, 2008, the Commission's Executive Director assigned this matter to me to conduct

appropriate hearings and to report my proposed findings and recommendations to the Commission.

4. Pursuant to 29 Del. C. §8716, the Public Advocate exercised his statutory right of intervention in this proceeding on November 20, 2008.

5. Pursuant to my assignment, I approved a procedural schedule for public comment sessions, the submission of prefiled testimony, and evidentiary hearings, which was subsequently amended at the request of the parties.

6. In addition to the written complaints referenced above, public comment sessions were held in Wilmington on March 30, 2009; in Dover on March 31, 2009; in Georgetown on April 1, 2009; and in Glasgow on April 2, 2009. A total of ten customers attended the comment sessions. Their complaints mirrored the written complaints the Commission had received and which prompted the filing of the Complaint - primarily failure to receive contract documents, being charged a rate in excess of the rate offered by Horizon, and lack of prior notice of the expiration of contracts and the resulting increase in price.

7. Pursuant to the procedural schedule as amended, Staff submitted the prefiled direct testimony of its consultant Barbara Alexander on April 24, 2009. On May 27, 2009, Horizon submitted the prefiled direct testimony of Neil Leibman, its Chief Executive Officer ("CEO"). On May 29, 2009 and June 9, 2009, respectively, Staff submitted prefiled rebuttal testimony from Staff Public Utilities Analyst Funmi Jegede and Ms. Alexander. The Public

Advocate did not submit prefiled testimony.

8. Under the amended procedural schedule, evidentiary hearings were scheduled to be held on July 20-22, 2009. I requested the parties to submit stipulated facts on July 8, 2009 and scheduled a prehearing conference for July 9, 2009. By letter dated June 30, 2009, Deputy Attorney General Regina A. Iorii, Staff's in-house counsel, advised me that the Staff and Horizon had reached a settlement in principle, subject to being reduced to writing, and requested me to suspend the procedural schedule as it related to the submission of stipulated facts and the prehearing conference. Ms. Iorii indicated that the parties intended to use the first day of the scheduled evidentiary hearings to conduct a hearing on the proposed settlement. I granted the request to suspend the procedural schedule with respect to the stipulated facts and prehearing conference, and directed the parties to provide me with the proposed settlement on or before July 16, 2009.

9. On July 16, 2009, Ms. Iorii, on behalf of Staff, the Public Advocate and Horizon, submitted a "Settlement Agreement" (the "Settlement Agreement") intended to resolve the issues raised in the Complaint. On July 20, 2009, I conducted an evidentiary hearing at which the parties submitted their prefiled testimony into the record and presented testimonial evidence regarding the reasons the Settlement Agreement¹ should be accepted.

¹The record in this case consists of a 221-page transcript and six exhibits.

10. I hereby submit the following Findings and Recommendations regarding the Settlement Agreement for the Commission's consideration.

III. THE PREFILED TESTIMONY

A. Staff's Prefiled Direct Testimony

11. On April 24, 2009, Staff submitted the prefiled testimony of Barbara Alexander, Consumer Affairs Consultant and former Director of the Maine Public Utilities Commission's Consumer Assistance Division, whose consulting practice is directed toward consumer protection, customer service and low-income issues in rate cases in both competitive and regulated markets for electric, natural gas and telephone services. Ex. 2 (Alexander) at 2.²

12. Ms. Alexander reviewed several sources of information in evaluating Horizon's marketing and contract practices, including but not limited to the Complaint and the responses submitted by Horizon and Staff to numerous data requests. She concluded that: (1) Horizon's marketing and verification practices were deceptive and misrepresented the nature of the contract and the underlying price contained in the written contract; (2) Horizon had "improperly and unfairly" changed the prices charged to some customers without contractual authority; (3) Horizon had not maintained a means to track and evaluate customer complaints,

² Exhibits introduced at the June 20, 2009 evidentiary hearing will be cited as "Ex. __" or, in the case of testimony, as "Ex. __ (witness' name)" at __" for direct testimony and "Ex. __ (witness' name - R) at __" for rebuttal testimony. Transcript references will be cited as "Tr. at __."

and had failed to "properly" evaluate customer complaints and take steps to correct "obvious improper practices" by its sales agents; and (4) Horizon had failed to "properly oversee" the third-party contractors it hired to market its contracts to Delaware customers, contributing to the "overall mismanagement" of its marketing activities. Ex. 2 (Alexander) at 3-5. She cited various examples that she claimed supported each of her conclusions. *Id.* at 6-29. She further observed the number of complaints against Horizon that had been reported to the Commission, and testified that "[c]ustomer complaints represent the 'tip of the iceberg' in recording the actual number of the incidents that actually occur," based on her own ten-year experience at the Maine Public Utilities Commission and the results of independent research discussed in her prefiled testimony. *Id.* at 20-22.

13. Based on the foregoing, Staff witness Alexander recommended that: (1) the Commission revoke Horizon's certificate to sell electric generation supply in Delaware, either permanently or at least until an independent audit of Horizon's management and oversight of its marketing and sales activities demonstrated that it could conduct its business in Delaware fairly and lawfully; (2) if the Commission did not elect to revoke Horizon's certification, then (a) Horizon should be subject to a "full and complete audit at any time" with respect to its marketing practices and the charges assessed to Delaware customers; (b) current Horizon customers be permitted to return to Delmarva Power & Light Company's Standard Offer Service rates without incurring a

penalty, (c) current and former Horizon customers should be made whole for any losses they incurred while they were Horizon customers, including higher electricity prices charged by Horizon compared to Delmarva's rates and the imposition of any early termination fees; (d) the Commission prohibit Horizon from charging early termination fees for its current Delaware contracts to permit any customers desiring to cancel their current contracts to do so without penalty; and (e) require Horizon to pay for any audit required and supervised by the Commission; and (3) assess penalties against Horizon for its violations of its certificate and Commission regulations. *Id.* at 30-31.

B. Horizon's Prefiled Testimony

14. On May 27, 2009, Horizon submitted direct prefiled testimony from its Chief Executive Officer ("CEO"), Neil Leibman. Mr. Leibman denied that Horizon without notice had improperly charged market rates to customers at the expiration of their contracts. Mr. Leibman stated that the fact that Horizon was not going to be providing written notice of the month-to-month market prices was clearly and unambiguously contained in the terms of service submitted to the Commission as part of Horizon's certification process and that he had discussed this very provision with Staff Public Utilities Analyst Funmi Jegede. Ex. 5 (Leibman) at 3-4, 8, 13. He further testified that the Maryland and District of Columbia utility commissions had determined that Horizon's month-to-month contractual provision, which was identical to the month-to-month contractual provision in Delaware,

was legally permissible and was clearly set forth in the contracts provided to customers. *Id.* at 5. Additionally, he claimed that other states permitted month-to-month pricing. *Id.* at 5-6.

Mr. Leibman testified that charging Delaware customers the month-to-month rate, instead of a fixed rate for a specific term, cost Horizon approximately \$2,000,000.00, and much more in the Company's book value. *Id.* at 9.

15. As for the Horizon's marketing practices with which Ms. Alexander took issue, Mr. Leibman testified that Horizon took "very seriously" the complaints it received from the Commission or from customers regarding its marketing agents, and testified that all such complaints were resolved quickly, or typically within 24-48 hours. *Id.* at 10-12. Through investigation by Horizon and its third-party telemarketer, Mr. Leibman testified that the "10% discount" claims were based on an erroneous e-mail that was widely circulated by an individual not affiliated with Horizon in any way, and Horizon was assured by its third-party telemarketing firm in February 2008 that no representative has or was pitching a "10% discount". *Id.* at 10-11. Finally, Mr. Leibman contended that when Staff notified Horizon of the large volume of complaints regarding the market pricing that had gone into effect upon expiration of customers' contracts, Horizon had issued renewal letters to every customer that had been converted to month-to-month pricing and had hired two additional temporary employees (and now one permanent full-time employee) to call every Horizon customer in Delaware to advise the customer that his contract had expired and offer

renewal options or to place the customer back with Delmarva without penalty. *Id.* at 13.

C. Staff's Rebuttal Testimony

16. On May 29, 2009, Commission Staff submitted the prefiled rebuttal testimony of Public Utilities Analyst Funmi Jegede.

17. Ms. Jegede testified that she had never discussed with Mr. Leibman the fact that customers whose contracts expired would be placed on month-to-month pricing without notice. She further testified that Mr. Leibman had told her that Horizon preferred to offer 12-month fixed rate contracts, and it was her understanding that subsequent renewals would be for 12-month periods as well. (Ex. 3 (Jegede-R) at 4, 6). Ms. Jegede further testified that Horizon's written contract terms were implicitly inconsistent with its written terms of service, and that it was Horizon's responsibility to make sure that its contracts and terms of service complied with the Commission's regulations to which it, as a certificated electric supplier, was subject. *Id.* at 3-6. Finally, Ms. Jegede testified that she did not approve Horizon's contract, nor did she have the authority to do so. *Id.* at 6.

18. On June 9, 2009, Staff submitted prefiled rebuttal testimony from Ms. Alexander. Ms. Alexander testified that Mr. Leibman did not provide any specifics to support his assertions regarding month-to-month pricing, and in any event what was permissible in other jurisdictions was irrelevant to whether Horizon had violated Delaware regulations. Ex. 4 (Alexander-R).

19. Similarly, Ms. Alexander testified that Mr. Leibman had not provided any specific information regarding systematic monitoring of its third-party agents' marketing; rather, all of his explanations regarding review of the agents involved responses to complaints received about those agents. *Id.* at 4. To Ms. Alexander, Mr. Leibman's testimony confirmed that Horizon did not have any means in place to track and evaluate customer complaints. *Id.* at 5. She noted that Horizon did not respond to her testimony regarding Horizon's failure to disclose its fixed monthly charge or that its agents routinely misrepresented the nature of this charge in their sales calls to Delaware customers. *Id.* at 6.

IV. THE SETTLEMENT AGREEMENT

20. As noted previously, on July 16, 2009, the parties submitted for my consideration a Settlement Agreement to resolve the issues raised in the proceeding. Ex. 6. See Exhibit "A" attached hereto. The salient terms of the settlement are as follows:

(a) Horizon and two of its principals, Neil Leibman (its CEO) and Tom O'Leary (the Chairman of the Board of Directors of Horizon's parent, Horizon Power Holdings, Ltd.) will pay a total of \$500,000 in full and complete settlement of the issues raised in the complaint. Staff will establish a Special Purpose Account into which all funds will be deposited. Upon Commission approval of the Settlement Agreement, Messrs. Leibman and O'Leary, in their individual capacities, will be jointly and severally

liable for tendering to the Commission the sum of \$250,000, which the Commission shall deposit into the Special Purpose Account. Beginning on September 1, 2009, and continuing thereafter on or before the first of each successive month for the next five months, Messrs. Leibman and O' Leary, in their individual capacities, shall be jointly and severally obligated to pay six successive monthly payments of \$25,000 to the Commission for deposit into the Special Purpose Account, for a total of \$150,000. Messrs. Leibman and O'Leary will be jointly and severally liable for a total of \$400,000 of the \$500,000. Ex. 6 - Settlement Agreement, Paragraphs 7(a) (1)-(4), (6). The Commission shall provide proof of each deposit made into the Special Purpose Account to the Public Advocate and to Horizon's counsel within seven (7) days after each such deposit. Ex. 6 - Settlement Agreement, Paragraphs 7(a) (3), (5).

(b) Thereafter, on the first day of each successive month for the next four months, Horizon shall make four successive monthly payments of \$25,000 into the Special Purpose Account for a total of \$100,000 in additional payments. Ex. 6 - Settlement Agreement, Paragraph 7(a) (7). The Commission shall provide proof of each deposit made into the Special Purpose Account to the Public Advocate and to Horizon's counsel within seven (7) days after each such deposit. (Ex. 6 - Settlement Agreement, Paragraph 7(a)(7)).

(c) Staff and the Public Advocate, in their sole and exclusive discretion, shall determine which present and/or former

Horizon customers will receive payment from the Special Purpose Fund and the amount of payment to be made to said customers. Horizon will be responsible for all administrative costs incurred in making such payments to present and/or former Horizon customers, including but not limited to the costs of mailing of notices. The monies used to pay for administrative costs will not be taken from the Special Purpose Account. Ex. 6 - Settlement Agreement, Paragraph 7(b).

(d) In no event will any of the proceeds of the Special Purpose Account be returned to Horizon, Neil Leibman or Tom O'Leary. Ex. 6 - Settlement Agreement, Paragraph 7(b).

(e) Horizon shall relinquish the Electric Supplier Certificate awarded to it by the Commission in Order No. 7104, and agrees not to reapply for an Electric Supplier Certificate in Delaware for two years from the date that the Commission approves relinquishment of Horizon's Certificate. Ex. 6 - Settlement Agreement, Paragraph 7(c).

(f) Horizon will wind down its Delaware operations within 60 days from the date the Commission approves the Settlement Agreement. Horizon shall fully cooperate with the Staff, the Public Advocate, Horizon's present and/or former customers, and any other involved entity (e.g., a replacement electric supplier) in winding down its Delaware operations and transitioning its present customers to an electric supplier(s) to replace Horizon. Ex. 6 - Settlement Agreement, Paragraph 7(d).

(g) Horizon admits that its conduct led to the filing

of Staff's complaint and that its conduct has caused it to cease its Delaware operations. Ex. 6 - Settlement Agreement, Paragraph 7(e).

21. Other more general terms of the Settlement Agreement are:

(a) The provisions of the Settlement Agreement are not severable; therefore, if the Commission fails to approve it, or modifies any of the terms and conditions of the Settlement Agreement, the Settlement Agreement will terminate and be of no force and effect. Ex. 6 - Settlement Agreement, Paragraphs 8, 15.

(b) Commission approval of the Settlement Agreement will preclude any of its signatories from taking a contrary position with respect to issues specifically addressed and resolved in the Settlement Agreement in proceedings involving the review of the Settlement Agreement and in any appeals related to the Settlement Agreement. Further, the Settling Parties irrevocably waive their rights to appeal a Commission Order approving the Settlement Agreement. In the event that the Settlement Agreement does not become final, either because the Commission does not approve it or because it is the subject of a successful appeal and remand, each of the Settling Parties reserves its respective rights to submit additional testimony, file briefs or otherwise take positions as it deems appropriate in its sole discretion to litigate the issues in this proceeding. Ex. 6 - Settlement Agreement, Paragraphs 9, 10, 13. If the Settlement Agreement is approved by the Commission, it shall not

be regarded as precedent with respect to any investigation of unlawful conduct, regulatory violations, penalties, ratemaking or any other principle in any existing or future proceeding involving any of the signatories, or any other person or regulated entity of any kind. Ex. 6 - Settlement Agreement, Paragraph 9. However, the Settlement Agreement is made without admission against or prejudice to any interest to any factual or legal positions that any of the Settling Parties may assert in the event that the Commission does not enter a final order approving the Settlement Agreement without modifications, or in other proceedings before the Commission or other governmental body. Ex. 6 - Settlement Agreement, Paragraph 13.

(c) The signatories may enforce the Settlement Agreement through any appropriate action before the Commission or any other available remedy in the Delaware state courts. The signatories also submit to jurisdiction and venue in Delaware with respect to all such proceedings. Furthermore, Horizon, and Messrs. Leibman and O'Leary consent to appoint the Delaware Secretary of State as their agent for service of process in Delaware for all such proceedings. Ex. 6 - Settlement Agreement, Paragraph 12.

(d) The Settlement Agreement does not affect the rights of present and/or former Horizon customers to bring separate actions against Horizon, but Horizon may claim as a set off any sums received by such customer(s) pursuant to the Settlement Agreement. Ex. 6 - Settlement Agreement, Paragraph 13.

V. THE EVIDENTIARY HEARING

22. On July 20, 2009, I conducted a hearing in Dover for the purpose of taking testimony from the Settling Parties regarding the Settlement Agreement. No members of the public attended the hearing.

23. **Commission Staff.** Commission Staff Ombudsman and Government Services Administrator David Bonar testified for the Commission Staff in support of the Settlement Agreement. Mr. Bonar testified that the parties had conducted extensive discovery on the allegations of the Complaint. Tr. 201. He stated that while Staff was confident that it and the Public Advocate would have been able to prevail had the case gone to hearing, the proceedings had already been expensive and would have been more so if full evidentiary hearings, with witnesses providing testimony, had been held. *Id.* Additionally, if liability had been found and the Commission assessed penalties against Horizon, the Company could have appealed that decision to the Delaware Superior Court, which could cause further delay in concluding the proceedings. *Id.* Furthermore, Mr. Bonar noted that Section 1019(b)(2) requires the Commission, in determining the amount of any penalty, to consider the electric supplier's ability to pay any penalties assessed against it, and that Staff was concerned about the potential that Horizon could file for bankruptcy should a large penalty be imposed by the Commission,

which could limit or foreclose Horizon's ability to pay.³ Tr. 202. Therefore, securing Horizon's principals' agreement to be parties to the Settlement Agreement and to be jointly and severally personally liable for \$400,000 of the total \$500,000 settlement amount (an obligation that neither Staff nor the Public Advocate could have been required, given the legal concept that corporations are separate entities from their owners and principals) was a substantial benefit of the Settlement Agreement. *Id.*

24. Further, Mr. Bonar testified that the Commission may not have required Horizon to relinquish its electric supplier certificate, but that Horizon had agreed to do so in the settlement, which Staff believes was a significant benefit to Delaware residents. Tr. 202-203. Similarly, the Settlement Agreement requires Horizon to wind down its Delaware operations within 60 days of the date the Commission approves the Settlement Agreement and to cooperate with the Staff and Public Advocate in transitioning its current customers to another electric supplier, which will ensure that customers are not left without an electric supplier after Horizon's exit from Delaware. Tr. 203. Based on the foregoing, Mr. Bonar testified that Staff believes the Settlement Agreement is in the public interest. Tr. 204.

25. **The Division of the Public Advocate.** Michael D. Sheehy, the Deputy Public Advocate, testified on behalf of the Division in support of the Settlement Agreement. Mr. Sheehy

³ Horizon provided confidential information to Staff and the Public Advocate regarding its current financial condition.

specifically discussed the monetary savings that the Settlement Agreement would provide, including attorney and consultant fees for hearings and appeals that the parties would be spared as a result. Tr. 208. Mr. Sheehy also testified that the Settlement Agreement would enable Staff and the DPA to return funds to customers faster than might otherwise have occurred. *Id.*

26. **Horizon.** James F. Rigell, III, Horizon's President of Operations, testified on behalf of Horizon in support of the Settlement Agreement.⁴ He testified that the Settlement Agreement resolved all of the issues raised in the Complaint, and ultimately served the interests of Horizon's present and former customers, Horizon itself, and the general public. Tr. 212. He stated that Horizon had spent more than \$200,000 in attorneys' fees since the beginning of the proceedings, and was currently incurring more than \$30,000 in such fees every month, and such costs potentially threatened Horizon's ability to provide service to its present and future customers. *Id.* Mr. Rigell testified that the Settlement Agreement also promoted administrative economy, as the parties could use their resources for other matters, and confirmed that Messrs. Leibman and O'Leary had agreed to be personally jointly and severally liable for payment of \$400,000 of the \$500,000 total monetary amount of the settlement. Tr. 213-215. Finally, based on Horizon's evaluation of certain factors, namely the allegations

⁴ Mr. Rigell participated in the evidentiary hearing telephonically by agreement of the parties and the Hearing Examiner. A notary public was present with him in Houston to swear him in; however, with the agreement of Mr. Rigell and the parties, the court reporter present in Dover actually administered the oath to him.

that were raised by Staff in its October 15, 2008 Complaint, Horizon's defenses to those allegations, Horizon's level of culpability, lack of prior violations, the cost of additional litigation, and the good faith efforts of Horizon in its attempt to resolve some of the conduct alleged in Staff's complaint, the Company believed that the payment of \$500,000 and the other provisions of the Settlement Agreement constituted a fair resolution of the proceedings. Tr. 213-214. For all these reasons, Mr. Rigell testified that the Settlement Agreement was in the public interest. Tr. at 214.

VI. DISCUSSION AND FINDINGS

27. Section 512 of the Public Utilities Act directs the Commission to "encourage the resolution of matters brought before it through the use of stipulations and settlements," and provides that the Commission may, upon hearing, approve the resolution of matters through stipulations or settlements when the Commission finds such resolutions to be in the public interest. 26 Del. C. §512(a), (c).

28. After reviewing the Settlement Agreement and considering the testimony of the Staff, Public Advocate and Horizon witnesses regarding its benefits, I conclude that the Settlement Agreement is in the public interest and should be approved. First, the witnesses for all of the parties to the proceeding unanimously testified that they believe that the Settlement Agreement is in the public interest, a fact to which the Commission has traditionally given great weight.

29. Secondly, there are substantial financial reasons for concluding that the Settlement Agreement is in the public interest. Staff's witness testified convincingly that Staff was concerned that Horizon would not be able to pay the penalty the Commission might assess against Horizon if the Commission were to find that Horizon violated Delaware law, and ability to pay is a factor that the Commission must take into account in determining the penalty to be assessed against an electric supplier. If Horizon were found to have violated Delaware law and then demonstrated to the Commission that it was unable to pay the penalty assessed against it, it is possible that the Commission may have imposed a far smaller penalty than the \$500,000 provided for in the Settlement Agreement. Thus, the fact that Messrs. Leibman and O'Leary are parties to the Settlement Agreement and are both jointly and severally personally liable for \$400,000 of the \$500,000 settlement amount is a substantial benefit because, as discussed, the Commission could not have ordered Horizon's principals to pay any amount of any penalty assessed in the absence of their voluntary agreement to do so. While I acknowledge that the monetary amount of the settlement may not be sufficient to fully reimburse every complaining customer for the amount each contends to have been overcharged, I nonetheless conclude that \$500,000 represents a substantial sum. This result serves the public interests and represents a fair resolution of this proceeding in light of the allegations raised in Staff's October 15, 2008 Complaint and Horizon's defenses to

those allegations.

30. In addition, I believe the public interest is served by Horizon's voluntary relinquishment of its electric supplier certificate and its withdrawal from the Delaware market. The number of customer complaints that the Commission received about Horizon demonstrates that something was amiss. I am not determining the truth of the allegations of those complaints, or whether such allegations, if truthful, violated Delaware law, but am merely taking judicial notice of the number of customer complaints.

31. Although I am confident that neither Staff nor the Public Advocate will have to invoke the provisions regarding enforcement of the Settlement Agreement, I believe that those provisions are also in the public interest. Horizon is not a Delaware corporation, and neither Mr. Leibman nor Mr. O'Leary is a Delaware resident. Consequently, their consent to personal jurisdiction and venue in Delaware, their consent to appoint the Secretary of State as their agent for service of process, and their agreement that Delaware substantive law will apply to the interpretation of the Settlement Agreement will result in significant savings in time and resources for Staff and/or the Public Advocate should either be required to take steps to enforce the terms of the Settlement Agreement.

32. In summary, I find that the Settlement Agreement is in the public interest, and recommend that the Commission approve it in its entirety.

VII. RECOMMENDATION

33. For the reasons set forth above, I recommend that the Commission find that the Settlement Agreement is in the public interest, and approve the Settlement Agreement in its entirety. A proposed form of Order is attached for the Commission's consideration as "Exhibit "B."

Respectfully submitted,

/s/ Ruth Ann Price _____
Ruth Ann Price
Senior Hearing Examiner

Dated: July 28, 2009

A T T A C H M E N T "B"**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE**

IN THE MATTER OF THE INVESTIGATION)	PSC Docket No. 355-08
INTO THE BUSINESS AND MARKETING)	
PRACTICES OF HORIZON POWER &)	
LIGHT, LLC (Filed October 15, 2008))	

SETTLEMENT AGREEMENT

On this 20th day of July, 2009, Horizon Power & Light, LLC, a Maryland limited liability company (hereinafter "Horizon" or the "Company"), the Delaware Public Advocate ("Public Advocate"), and the Staff of the Delaware Public Service Commission ("Staff") (collectively, the "Settling Parties") hereby propose this settlement to resolve the issues raised in this proceeding that are within the jurisdiction of the Delaware Public Service Commission ("Commission").

INTRODUCTION

1. On January 23, 2007, Horizon obtained an Electric Supplier Certificate from the Commission, as set forth in Commission Order No. 7104. Since then, Horizon has supplied electricity to thousands of customers in Delaware. As a certificated "Electric Supplier" (as that term is defined in 26 *Del. C.* § 1001(11)), Horizon is subject to regulation by the Commission pursuant to 26 *Del. C.* Chapter 10, and is subject to the Commission's Rules For Certification And Regulation Of Electric Suppliers, adopted in Commission Order No. 7435 (Revised September 2, 2008) ("Regulations").

2. Neil Leibman is the Chief Executive Officer of Horizon and Tom D. O'Leary is the Chairman of the Board of Horizon's parent corporation, Horizon Power

Holdings, Ltd. Messrs. Leibman and O'Leary are executing this Settlement Agreement in their individual capacities, and Mr. Leibman is executing this Settlement Agreement also on behalf of Horizon

3. On October 15, 2008, Staff filed a Complaint against Horizon, which opened this docket. In its Complaint, Staff alleged, among other things, that: (a) the Commission received complaints from more than 180 customers of Horizon reflecting possible violations of Commission regulations, (b) Horizon charged Delaware customers unlawfully high electric rates, (c) Horizon increased electric rates for Delaware customers without proper written notice, and (d) Horizon's marketing agents made misrepresentations and used deceptive practices in the direct solicitation of Delaware customers.

4. On November 6, 2008, Horizon served an Answer to the Staff's Complaint, in which Horizon denied the Staff's allegations and asserted its defenses to the Complaint.

5. During the course of this proceeding, the Settling Parties have conducted substantial written discovery in the form of both informal and formal data requests, and Staff and Horizon have submitted prefiled testimony (Direct Testimony of Barbara Alexander - April 24, 2009; Direct Testimony of Neil Leibman - May 15, 2009; Direct Testimony of Funmi Jegede - May 29, 2009; and Rebuttal Testimony of Barbara Alexander - June 9, 2009).

6. The Settling Parties have conferred in an effort to resolve all issues raised in this proceeding. The Settling Parties acknowledge that the parties differ as to the proper resolution of many of the underlying issues in this proceeding. Notwithstanding these differences, the Settling Parties have agreed to enter into this Settlement Agreement on the terms and conditions contained herein, because they believe that this Settlement

Agreement will serve the interests of (a) the public, (b) Horizon's present and former customers, and (c) the Company. The Settling Parties agree that, subject to the approval of the Hearing Examiner, the terms and conditions of this Settlement Agreement will be presented to the Commission for the Commission's approval forthwith.

II. SETTLEMENT PROVISIONS

7. Now, therefore, for good and valuable consideration, the sufficiency of which is hereby acknowledged by all Settling Parties, the Settling Parties agree as follows:

a. The sum of \$500,000.00 shall be paid by or on behalf of Horizon, in full and complete settlement of the issues raised in the Complaint. The mechanics of the payment shall be as follows:

(1) Staff shall establish a Special Purpose Account with a financial institution within the State of Delaware.

(2) Upon execution of this Settlement Agreement by the Commission, Neil Leibman and Tom D. O'Leary, in their individual capacities, together shall be jointly and severally obligated to pay to the Commission the sum of \$250,000.00.

(3) The Commission shall deposit the \$250,000.00 into the Special Purpose Account and provide proof of the \$250,000 deposit to the Public Advocate and counsel for Horizon within seven (7) days of the \$250,000 deposit.

(4) Beginning on September 1, 2009, or the first day of the calendar month after the Commission approves this Settlement Agreement, whichever is later, and thereafter on or before the first of each successive month for the next five months (through and including February 1, 2010), Neil Leibman and Tom O'Leary, in their individual capacities, together shall be jointly and severally obligated to make six

successive monthly payments of \$25,000 to the Commission, for a total of \$150,000 in additional payments (\$25,000 x 6 monthly payments).

(5) The Commission shall deposit each such monthly payment into the Special Purpose Account and provide proof of each such deposit made pursuant to this paragraph (a) to the Public Advocate and counsel for Horizon within seven (7) days after each deposit.

(6) Pursuant to these subparagraphs (a) (2) and (a) (4), Neil Leibman and Tom D. O'Leary shall each be jointly and severally liable for a total of \$400,000.00 payable to the Commission. The insolvency of Horizon, and any bankruptcy or reorganization proceeding with respect thereto, shall not affect in any way the unconditional and absolute joint and several liability hereunder of Neil Leibman and Tom D. O'Leary.

(7) Thereafter, commencing on March 1, 2010 or the first day of the sixth calendar month after the Commission approves this Settlement Agreement, whichever is later, and thereafter on or before the first of each successive month for the next three months, Horizon shall be solely obligated to make four successive monthly payments of \$25,000 to the Commission for a total of \$100,000 in additional payments. The Commission shall deposit each such monthly payment into the Special Purpose Account and shall provide proof of each deposit made pursuant to this paragraph shall be provided to the Public Advocate and counsel for Horizon within seven (7) days after each deposit.

b. The Public Advocate and Staff will determine in their joint and exclusive discretion which present and former Delaware customers of Horizon will receive

payments from the Special Purpose Account and how much each will receive. All administrative costs of making such payments to present and/or former Delaware customers of Horizon shall be borne by Horizon, including the costs of issuing checks or credits to the customers, the cost of mailings and notices, and so forth, and shall not be paid from the Special Purpose Account. In no event shall any part of the Special Purpose Account revert to any of Horizon, its principals, investors or owners.

c. Horizon shall relinquish the Electric Supplier Certificate awarded to it by the Commission in Order No. 7104, and agrees not to reapply for an Electric Supplier Certificate in Delaware for two years from the date that the Commission approves Horizon's relinquishment of its Certificate.

d. Horizon will wind down its Delaware operations within 60 days from the date this Settlement Agreement is approved by the Commission. Horizon shall fully cooperate, in good faith, with the Commission, Staff, the Public Advocate, its present and former customers, and any other involved entity (for example, a replacement electric supplier) in winding down its operations in Delaware, and transitioning its present customers to an electric supplier or suppliers to replace Horizon.

e. Horizon admits that: (i) its conduct led to the filing of the Staff's Complaint; and (ii) Horizon's conduct has caused Horizon to cease its operations in Delaware.

III. ADDITIONAL PROVISIONS AND RESERVATIONS

8. The provisions of this Settlement Agreement are not severable.

9. This Settlement Agreement represents a compromise for the purposes of settlement and shall not be regarded as a precedent with respect to any investigation of

unlawful conduct, regulatory violations, penalties, ratemaking or any other principle in any existing or future proceeding involving one or more of the signatories hereto or any other person or regulated entity of any kind. However, consistent with and subject to the provisos expressly set forth below, this Settlement Agreement shall preclude any signatory hereto from taking a contrary position with respect to issues specifically addressed and resolved herein in proceedings involving the review of this Settlement Agreement and any appeals related to this Settlement Agreement. Except as expressly set forth herein, no signatory hereto necessarily agrees or disagrees with the treatment of any particular item, any procedure followed, or the resolution of any particular issue addressed in this Settlement Agreement, except that each signatory hereto agrees that the Settlement Agreement may be submitted to the Commission for a determination that it is in the public interest and that no signatory hereto will oppose such a determination. Except as expressly set forth below, none of the signatories hereto waives any rights it may have to take any position in future proceedings regarding the issues in this proceeding, including positions contrary to positions taken herein or previously taken.

10. In the event that this Settlement Agreement does not become final, either because it is not approved by the Commission or because it is the subject of a successful appeal and remand, each of the Settling Parties reserves its respective rights to submit additional testimony, file briefs, or otherwise take positions as it deems appropriate in its sole discretion to litigate the issues in this proceeding.

11. This Settlement Agreement shall become fully effective upon the Commission's issuance of a final order approving this Settlement Agreement and all the settlement terms and conditions without modification. After the issuance of such final

order, the terms of this Settlement Agreement shall be enforceable notwithstanding the pendency of a legal challenge to the Commission's approval of this Settlement Agreement or to actions taken by another regulatory agency or Court, unless such implementation and enforcement is stayed or enjoined by the Commission, another regulatory agency, or a Court having jurisdiction over the matter.

12. Any signatory hereto may enforce this Settlement Agreement through any appropriate action before the Commission or through any other available remedy in the State Courts of the State of Delaware. The signatories hereto consent to personal jurisdiction and venue in Delaware with respect to all such actions. Horizon, Neil Leibman, and Tom O'Leary hereby appoint the Delaware Secretary of State as their agent for service of process in all such actions.

13. This Settlement Agreement resolves all of the issues specifically addressed herein. The Settling Parties hereby irrevocably waive any right to appeal any Commission order approving this Settlement Agreement. This Settling Parties shall not assert contrary positions during subsequent litigation in this proceeding or related appeals; provided, however, that this Settlement Agreement is made without admission against or prejudice to any factual or legal positions which any of the Settling Parties may assert (a) in the event that the Commission does not issue a final order approving this Settlement Agreement without modifications; or (b) in other proceedings before the Commission or other governmental body so long as such positions do not attempt to abrogate this Settlement Agreement. This Settlement Agreement is determinative and conclusive of the issues addressed herein and, upon approval by the Commission, shall constitute a final adjudication as to the Settling Parties of all of the issues addressed herein. However, this

Settlement Agreement shall not affect the rights of Horizon's present and/or former customers to take separate actions against Horizon, including the filing of court proceedings to seek repayment of electric overcharges. In any such proceeding, Horizon may claim as a setoff any sums received by customers pursuant to this Settlement Agreement.

14. This Settlement Agreement is expressly conditioned upon the Commission's approval of each of the specific terms and conditions contained herein without modification. If the Commission fails to grant such approval, or modifies any of the terms and conditions herein, this Settlement Agreement will terminate and be of no force and effect. The Settling Parties shall make their best efforts to support this Settlement Agreement and to secure its approval by the Commission.

15. It is expressly understood and agreed that this Settlement Agreement constitutes a negotiated resolution of the issues in this proceeding and any related appeals to the State Courts of the State of Delaware.

16. Each of the Settling Parties has cooperated in the drafting and preparation of this Settlement Agreement. Consequently, the interpretation of this Settlement Agreement shall not be construed either "for" or "against" any Settling Party based upon its/his status as the drafter of any particular provision of this Settlement Agreement, or this Settlement Agreement as a whole.

17. This Settlement Agreement shall be governed by, construed, and interpreted in accordance with the substantive laws of the State of Delaware without giving effect to its conflict of laws principles.

18. Any notice required by this Settlement Agreement to be provided to the Settling Parties shall be provided by United States mail or overnight courier as follows:

If to Horizon:

Neil Leibman, Chief Executive Officer
Horizon Power and Light, LLC
800 Bering Drive
Suite 250
Houston, TX 77057

With a copy to:

Geoffrey A. Sawyer, Esquire
Morris, Nichols, Arsht & Tunnell
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899-1347

If to Neil Leibman:

Neil Leibman, Chief Executive Officer
Horizon Power and Light, LLC
800 Bering Drive
Suite 250
Houston, TX 77057

If to Tom O'Leary:

Tom D. O'Leary
Horizon Power and Light, LLC
800 Bering Drive
Suite 250
Houston, TX 77057

If to the Commission Staff:

Bruce H. Burcat
Executive Director
Delaware Public Service Commission
861 Silver Lake Boulevard, Suite 100
Dover, DE 19904

With a copy to:

Regina A. Iorii, Esquire
Deputy Attorney General
820 N. French Street, 6th Floor
Wilmington, DE 19801

If to the Public Advocate:

G. Arthur Padmore
Public Advocate
Elbert N. Carvel State Office Building
820 N. French Street, 4th Floor
Wilmington, DE 19801

With a copy to:

Kent Walker, Esquire
Deputy Attorney General
820 N. French Street, 6th floor
Wilmington, DE 19801

19. This Settlement Agreement may be executed in counterparts, and each counterpart shall constitute part of the original Settlement Agreement.

20. Each signatory represents that he or she has the authority to bind the Settling Party for whom the signatory executes this Settlement Agreement.

21. This Settlement Agreement sets forth the entire agreement among the parties with regard to the subject matter hereof, and should be construed as an integrated document.

IV. CONCLUSION

Intending to legally bind themselves and their successors and assigns, the undersigned parties have caused this Settlement Agreement to be signed by their duly authorized representatives.

Horizon Power & Light, LLC

Dated: 07/17/09

By: /s/ Neil Leibman

Title: CEO

Delaware Public Service Commission Staff

Dated: 07/16/09

By: /s/ Bruce H. Burcat

The Division of the Public Advocate

Dated: 07/20/09

By: /s/ Michael Sheehy

Neil Leibman, in his individual capacity

Dated: 07/17/09

By: /s/ Neil Leibman

Tom D. O'Leary, in his individual capacity

Dated: 07/17/09

By: /s/ Tom D. O'Leary