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INVESTIGATION OF BERKSHIRE	§	PUBLIC UTILITY COMMISSION
COMMUNITIES, LLC FOR	§	
VIOLATIONS OF PURA §§ 17.004(a),	§	OF TEXAS
39.102(a), 39.107(c), AND 39.352(a) AND	§	
16 TAC §§ 25.107(a), 25.471, AND	§	
25.475(c)	§	

MOTION TO OPEN FORMAL INVESTIGATION

On October 17, 2022, the Division of Compliance and Enforcement (DICE) of the Public Utility Commission of Texas (Commission) opened an informal investigation of Berkshire Communities, LLC (Berkshire) for violations related to the unauthorized resale of electricity and denial of tenants' rights to choose a retail electric provider (REP) in areas of the state subject to retail customer choice.

In communications with DICE Staff, Berkshire has identified itself, alongside what appears to be an affiliated entity known as “Berkshire Residential Investments,”¹ as an entity responsible for the ownership, management, or control of several individually-metered, multi-family apartment complexes located in areas with retail customer choice throughout the state of Texas. At least five of the apartment complexes within Berkshire’s apparent ownership, management, or control enroll tenants in an electricity service known as the “Energyze Program,” through which each participating apartment complex enrolls as the “customer of record” for retail electric service provided to its individually-metered rental units by a REP of the apartment complex’s choice. As the customer of record, each participating apartment complex takes title to the electricity provided to its individually-metered rental units before reselling that electricity by billing tenants for their individual monthly usage. Neither Berkshire, nor Berkshire Residential Investments, nor the individual participating apartment complexes have obtained the REP certifications necessary to engage in the above-described activities.

On October 31, 2022, DICE notified Berkshire of the investigation through its first informal request for information (RFI). DICE and Berkshire thereafter exchanged several communications related to the investigation before Berkshire ultimately ceased responding to DICE Staff’s outreach. Based on its communication with Berkshire, DICE believes the

¹ “Berkshire Residential Investments” is not registered as the name or assumed name of any business entity registered with the Texas secretary of state.

participating apartment complexes—each of which appears to be under the ownership, management, or control of Berkshire or Berkshire Residential Investments—have engaged in the unauthorized resale of electricity and violated numerous customer protections requirements established under PURA² and the Commission rules. However, DICE has been unable to decipher the exact nature of relationship between the relevant entities and, therefore, has been unable to determine the appropriate respondent(s) for a forthcoming enforcement action. For this reason, DICE now files this motion to open an official investigation of Berkshire so that it may engage in formal discovery to assess what business entity is to be properly held accountable for the resale of electricity to Berkshire’s tenants.³

I. APPLICABLE LAW

Under 16 Texas Administrative Code (TAC) § 22.241(a), the Commission may institute a formal investigation on its own motion or on the motion of Commission Staff. Orders and pleadings initiating investigations must specify the matters to be investigated and must be served on the person being investigated.

II. MATTERS FOR INVESTIGATION

A. Identity of Responsible Entity

Through its informal investigation of the matters discussed herein, DICE has determined that Berkshire’s implementation of the Energyze Program likely violates provisions of PURA and the Commission rules prohibiting the unauthorized resale of electricity, guaranteeing the right to retail customer choice, and protecting customers from unfair, fraudulent, or misleading business practices. However, DICE has been unable to identify which business entity—Berkshire, Berkshire Residential Investments, or the individual apartment complexes—is ultimately responsible for the implementation and oversight of the Energyze Program at the affected properties. DICE requests to open this investigation to initiate formal discovery and identify the correct respondent(s) to be named in a forthcoming enforcement action.

² Public Utility Regulatory Act, Tex. Util. Code §§ 11.001-66.016.

³ For matters of simplicity, DICE will hereafter refer to the universe of potential respondents as “Berkshire”.

B. Improper Provision of Retail Electric Service

Through the Energyze Program, a Berkshire-affiliated apartment complex becomes the customer of record with a REP of its choice, then re-sells the electricity provided to its individually-metered rental units to each unit's tenant. Berkshire's provision of electric service to tenants under the Energyze Program may violate PURA § 39.352(a), which states that, "[a]fter the date of customer choice, a person may not provide retail electric service in this state unless the person is certified by the Commission as a retail electric provider." Such resale would also constitute a violation of 16 TAC § 25.107(a)(1), which requires a person to obtain a REP certificate before purchasing, taking title to, or reselling electricity in order to provide retail electric service. Neither Berkshire, nor Berkshire Residential Investments, nor the individual affected apartment complexes are registered as REPs; therefore, the party responsible for the implementation and oversight of the Energyze Program at the Berkshire-affiliated properties is likely responsible for the unauthorized resale of electricity.

C. Prohibiting Customer Choice

In the areas of Texas served by the ERCOT power region, most buyers of retail electric service are entitled to their choice of a retail electric provider and to have that choice honored.⁴ Further, "[e]ach retail customer in this state, except retail customers of electric cooperatives and municipally owned utilities that have not opted for customer choice, shall have customer choice on and after January 1, 2002."⁵ Finally, "tenants of leased or rented property that is separately metered shall have the right to choose a retail electric provider, . . . and the owner of the property must grant reasonable and nondiscriminatory access to transmission and distribution utilities, retail electric providers, electric cooperatives, and municipally owned utilities for metering purposes."⁶ By preventing tenants from selecting a REP of their choosing, Berkshire's implementation of the Energyze Program interferes with its tenants' rights to customer choice.

Interfering with customer choice has broad implications. Not only does it violate one of the core principles of the restructured electric utility industry in Texas, but it also denies tenants access to the Commission's robust customer protection rules because the tenants are not

⁴ PURA § 17.004(a)(2).

⁵ PURA § 39.102(a).

⁶ PURA § 39.107(c).

recognized as the retail electric provider's customer of record. Placing a third party in a role as an intermediary between the provider and the customer denies tenants the minimum, mandatory protections guaranteed under 16 TAC § 25.471, and it prevents tenants from receiving the terms of service, Your Rights as a Customer, and Electricity Facts Label documents required under 16 TAC § 25.474, with the information that is required in 16 TAC § 25.475.

Tenants subject to an arrangement in which a third party acts as an intermediary with the REP of record could be disconnected without proper notice as required under 16 TAC § 25.483(a). Tenants that do not contract directly with their provider do not have reasonable access to service representatives as mandated by 16 TAC § 25.485(b). Such tenants cannot enter into payments plans, which, at a minimum, retail electric providers must make available to customers during certain months as well as during extreme weather emergencies.⁷ Such tenants also cannot dispute their electric charges with the provider as allowed under 16 TAC § 25.480(f) and do not receive notice concerning Critical Care Residential Customer and Chronic Condition Residential Customer status as required by 16 TAC § 25.497(d). As a result of such an arrangement, end use consumers are not properly informed, do not know their rights, and do not even have the authority to work with the provider if any issues with service arise.

DICE has reason to believe that Berkshire's implementation of the Energyze Program involves the unauthorized resale of electricity, denies tenants the right to choose their own REP, and interferes with customer protections guaranteed under PURA and the Commission rules. If the entity responsible for implementation and oversight of the Energyze Program at the Berkshire-affiliated properties is operating in violation of the law, it must be held accountable. This is why opening a formal investigation is imperative. DICE has exhausted its informal options for obtaining the information necessary to determine whether Berkshire is operating in compliance with the law and what business entity can properly respond to DICE's investigation.

III. MOTION TO INSTITUTE A FORMAL INVESTIGATION

DICE staff requests the Commission open a formal investigation to determine the appropriate respondent and prosecute the violations alleged above.

⁷ 16 TAC § 25.480(j)(2).

IV. CONCLUSION

The suspected violations discussed in this pleading are serious and could impact thousands of Texas consumers. For the reasons discussed above, Staff respectfully requests that the Commission issue an order to open a formal investigation into Berkshire so that DICE may determine which Berkshire-affiliated business entity is the proper respondent in this docket.

Dated: July 3, 2024

Respectfully Submitted:

PUBLIC UTILITY COMMISSION OF TEXAS

Barksdale English
Deputy Executive Director

Division of Compliance and Enforcement

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CERTIFICATE OF SERVICE

I certify that, unless otherwise ordered by the presiding officer, notice of the filing of this document was provided to all parties of record via electronic mail on July 3, 2024, in accordance with the Order Suspending Rules filed in Project No. 50664.

/s/ Merritt Lander
Merritt Lander