

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

ERIN HITCHNER and JONATHAN W.  
WALKER, individually and all behalf of all  
others similarly situated,

Plaintiffs,

v.

GATEWAY ENERGY SERVICES  
CORPORATION,

Defendant.

Civil Action No.

**Class Action Complaint**

Plaintiffs Erin Hitchner and Jonathan W. Walker (“Plaintiffs”), by and through their undersigned counsel, Kohn, Swift & Graf, P.C. and Barbat, Mansour & Suciu PLLC on behalf of themselves and all other persons similarly situated, bring this Class Action Complaint against Gateway Energy Services Corporation (“Gateway” or “Defendant”), and allege as follows upon personal knowledge as to themselves and their own acts and experiences and, as to all other matters, upon information and belief based upon, *inter alia*, investigations conducted by their attorneys.

**NATURE OF THIS CASE**

1. This action seeks to redress the deceptive and bad faith pricing practices of Defendant that have caused thousands of New Jersey consumers to pay considerably more for their electricity than they should otherwise have paid.

2. Defendant has taken advantage of the deregulation of the retail electricity market in New Jersey by luring consumers into switching energy suppliers with false promises that it offers market-based variable rates for electricity.

3. Defendant's representations are deceptive. In fact, Defendant's variable rates are substantially higher than those otherwise available in the energy market, and its rates do not reflect changes in the wholesale cost that Defendant pays for the energy it supplies to its retail customers. As a result, New Jersey consumers are being fleeced millions of dollars in exorbitant charges for electricity.

4. Plaintiffs, on behalf of the class they seek to represent, bring this lawsuit based on Gateway's breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment under common law, as well as to redress Defendant's unlawful and unconscionable consumer practices under the New Jersey Consumer Fraud Act, N.J.S.A. § 56:8-1 *et seq.* Through its deceptive and unconscionable practices, upon information and belief, Gateway bilked the class, tens of thousands of current and former customers with variable-rate electricity plans, out of millions of dollars. Accordingly, this lawsuit seeks, *inter alia*, injunctive relief, actual damages and refunds, treble damages, punitive damages, attorneys' fees, and the costs of this suit.

### **PARTIES**

5. Plaintiffs Erin Hitchner and Jonathan W. Walker are married citizens of New Jersey residing in Woodstown, New Jersey. Ms. Hitchner and Mr. Walker were customers of Gateway from approximately 2011 through approximately July 2017, and as a result of Defendant's deceptive conduct, they incurred excessive charges for electricity.

6. Defendant Gateway is a citizen of New York, having been organized under the laws of New York, and with a principal place of business or corporate headquarters in Montebello, New York, in Rockland County. Gateway has thousands of customers in New Jersey, and tens of millions of dollars in revenues.

## **JURISDICTION**

7. This Court has original jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. § 1332 (the "Class Action Fairness Act").

8. This action meets the prerequisites of the Class Action Fairness Act, because the claims of the Class defined below exceed the sum or value of \$5,000,000; the Class has more than 100 members; and diversity of citizenship exists between at least one member of the Class and Defendant.

9. The Court has personal jurisdiction over Defendant Gateway because it is incorporated in New York and is headquartered in this judicial district.

## **OPERATIVE FACTS**

### **The History Of New Jersey's Energy Industry**

10. In 1999, New Jersey deregulated the market for electricity supply, a major break with past policy. Prior to deregulation, electricity was supplied and distributed solely by local utility companies. Over the last several years, a number of states, including New Jersey<sup>1</sup>, have begun to change the regulations in the energy industry purportedly to enhance competition between energy providers. The notion is that competition would result in independent energy companies ("ESCOs") being more aggressive than the utility in reducing wholesale purchasing costs and thereby lower retail residential rates.

11. ESCOs such as Gateway have various options to buy electricity at wholesale for resale to retail customers in New Jersey, including: owning electricity production facilities;

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<sup>1</sup> New Jersey consumers who do not choose to switch to an ESCO for their energy supply continue to receive their supply from their local utility. In New Jersey, the Board of Public Utilities ("NJBPUP") holds market-based auctions that purchase electricity on behalf of such customers; the utilities then charge these customers a rate based upon the market-based auction outcome. A third-party consultant on behalf of the NJBPUP manages the auctions, and the bidding processes and results are made publicly available. As a result, these auctions reflect market-determined prices.

purchasing electricity from wholesale marketers and brokers at the price available at or near the time it is used by the retail consumer; and by purchasing electricity in advance of the time it is used by consumers, either by purchasing electricity to be used in the future or by purchasing futures and forward contracts for the delivery of electricity in the future at a predetermined price. The point of deregulation is to allow ESCOs to use these and other innovative purchasing strategies to reduce electricity costs.

12. As part of the deregulation plan, ESCOs (like Gateway) do not have to file the electricity rates they charge with the New Jersey Board of Public Utilities (“NJBP”) or the method by which they set their rates.

13. If a customer switches to an ESCO, the customer will have his or her energy “supplied” by the ESCO, but still “delivered” by their existing utility. The customer’s existing utility continues to bill the customer for both the energy supply and delivery costs. The only difference to the customer is which company sets the price for the customer’s energy supply.

14. After a customer switches to an ESCO, the customer’s energy supply charge—based either on a customer’s kilowatt-hour (for electricity)—is calculated using the supply rate charged by the ESCO and not the regulated rate charged by customer’s former utility. The supply rate charged is itemized on the customer’s bill as the number of kilowatt-hours (“kWh”) multiplied by the rate. For example, if a customer uses 300 kWh at a rate of 11.0¢ per kWh, the customer will be billed \$33.00 (300 times \$.11) for his/her energy supply.

15. Defendant takes advantage of the deregulation and the lack of regulatory oversight in the energy market to deceptively charge New Jersey consumers exorbitant rates for electricity. In theory, energy deregulation allows consumers to shop around for the best energy rates. However, Defendant exploits the deregulated market by using the false promise of competitive rates based on market conditions in order to deceive consumers into purchasing

energy from it. In fact, Defendant's rates are substantially higher than rates charged by other ESCOs or local utilities and bear no relation to other market rates or the wholesale cost of electricity.

16. The end result is that, instead of benefitting from switching to Gateway, a typical customer loses out – to the tune of hundreds or even thousands of dollars per year. Thus, Gateway deceptively causes its customers to pay considerably more for electricity services than they should have and otherwise would have paid.

**Plaintiffs' Hitchner and Walker's Experience**

17. In or around December 2010, Defendant solicited Plaintiffs to switch from their local utility, Atlantic City Electric ("ACE"), to Defendant's electricity service. In a telephone call, a Gateway sales representative offered lower rates for electricity than the rates Plaintiffs were paying with ACE.

18. On or around December 13, 2010, and prior to signing up with Gateway, Defendant also solicited Plaintiffs with a letter, which Plaintiffs read and on which they relied, representing that its electricity price is "22% Below Atlantic City Electric Utility Prices." *See* Gateway Letter, attached as Exhibit "A".

19. Furthermore, in a separate letter dated December 14, 2010, Gateway promised that "[w]e are dedicated to your complete satisfaction by providing you with competitive energy prices, attractive pricing plans and excellent customer service." Gateway further promised that "you will benefit from our energy-buying expertise." In addition, Gateway represented that its "fixed-rate plans are intended to protect you from future price increases." *See* Gateway Letter, attached as Exhibit "B".

20. As a result of Defendant's solicitations, Plaintiffs made the switch to Defendant for electricity in January 2011.

21. Plaintiffs were initially placed on a fixed-rate plan for electricity, but they were subsequently switched to a variable rate plan.

22. The representation that Defendant's variable rate would be based on market prices was reinforced and confirmed by Defendant's solicitation in the form of a standard Residential Terms & Conditions, which was provided to Plaintiffs. The Terms & Conditions (attached as Exhibit "C") represent that the variable rate "is a rate set by us each month based on our evaluation of a number of factors that affect the total price of . . . electricity . . . the major components that influence our analysis in a typical month[include] . . . the cost of . . . electricity . . . obtained for delivery to customers in your utility territory for the upcoming month. Because we often acquire supply over time in preparation for future deliver needs (in an effort to mitigate the volatility in price) and do not acquire all of our required . . . electricity from the spot market, our supply costs may not directly follow spot market prices."

23. Defendant's Terms & Conditions also represents that its prices will be competitive with rates otherwise available in the market: "We evaluate, if known, the prices that your utility and other competitors' in your area plan to charge in the upcoming month."

24. Any reasonable consumer would understand based on these representations that Defendant's variable rates would be competitive with the rates offered by the local utility and other ESCOs. Ms. Hitchner and Mr. Walker reasonably expected that Defendant's variable rates for electricity would be based on market conditions, *i.e.*, competitive and reflective of Defendant's wholesale cost for purchasing electricity.

25. Ms. Hitchner and Mr. Walker paid Defendant's variable rate from approximately 2014 until approximately July 2017. In or around July or August 2017, they cancelled their

electricity service with Defendant. The following table is a representative sampling<sup>2</sup> which identifies the billing periods during this time, the variable rates Defendant charged Plaintiffs, the corresponding rates Atlantic City Electric would have charged for electricity, and the then-prevailing wholesale rate for electricity:

Billing Period	Gateway's Rate	Atlantic City Rate	Wholesale Rate <sup>3</sup>
3/18/17- 4/19/17	.1503/KWH	.0867/KWH	.0501/KWH
4/20/17-05/18/17	.1670/KWH	.0867/KWH	.0516/KWH
5/19/17-6/19/17	.1699/KWH	.0867/KWH- .089346/ KWH <sup>4</sup>	.0437/KWH
6/20/17-7/18/17	.17755/KWH	.079419/KWH- .089346/KWH <sup>5</sup>	.0482/KWH

26. That Defendant's variable rate is not in fact a competitive market rate based on the wholesale cost of electricity is demonstrated by the fact that Defendant's rate was significantly higher than ACE's rates. In fact, there are numerous months where Defendant's rate was *more than double ACE's rate*. Furthermore, there are numerous months where Defendant's rate was *more than triple the wholesale rate*.

27. ACE's rates are reflective of market prices because they are based on publicly held auctions. The electric utilities, on behalf of New Jersey, hire a consultant to run an annual

<sup>2</sup> Upon information and believe, Gateway overcharged Plaintiffs by at least thousands of dollars in total for electricity as compared to what ACE was charging.

<sup>3</sup> The Wholesale Rate was calculated by adding the Weighted Locational Marginal Pricing (LMP) and other PJM Charges, such as capacity, ancillary services, etc.

<sup>4</sup> From May to June 2017, Plaintiffs' total electricity usage was 1722 kWh. The first rate listed applies to the first 750 kWh used. The second rate listed applies to the remaining 972 kWh used.

<sup>5</sup> From June to July 2017, Plaintiffs' total electricity usage was 1851 kWh. The first rate listed applies to the first 750 kWh used. The second rate listed applies to the remaining 1101 kWh used.

auction to purchase from suppliers/generators. The auction purchases one-third of the annual electricity demand for three years for consumers that do not choose a third-party supplier. This is referred to as a rolling three-year auction.

28. While ACE and Defendant may not purchase electricity in precisely the same manner, overtime, the costs they incur should be commensurate. Defendant's represent in its Terms & Conditions that it purchases electricity supply in advance to mitigate potential price spikes. In fact, there is a highly competitive electricity market where Defendant can purchase electricity for future use (either in a physical purchase of electricity for future use or as a swap transaction), and therefore, their cost for purchasing electricity reflects market prices, albeit over a longer term than daily spot rates. Similarly, ACE and other New Jersey utilities purchase electricity in rolling auctions that cover periods of more than just short term daily purchases. Therefore, while ACE rates may not precisely match Defendant's rate, they should be commensurate. Indeed, Defendant represents that one of their major considerations in setting prices is the price that utilities charge for electricity.

29. That Defendant's rates do not reflect market costs for wholesale electricity is also demonstrated by the disconnect between changes in wholesale electricity prices and Defendant's costs. While the wholesale (PJM spot market) rate might show more short-term fluctuations than Defendant's costs (because Defendant claims that it does not purchase all of its electricity on the spot market), overtime, the wholesale (PJM spot market) rate is an accurate reflection of wholesale market costs.

30. The cost of wholesale electricity is the primary component of the non-overhead costs that Defendant incurs. Indeed, Defendant concedes and represents as much, listing the "cost of . . . electricity" as the first factor in the "major components that influence our analysis in a typical month."



31. The other factors Defendant identifies in the Terms & Conditions other than the wholesale cost of electricity that affect its variable rate (such as transmission and line losses) are relatively small in terms of the overall costs Defendant incurs to provide retail electricity. Therefore, these other cost factors cannot explain the drastic increases in Defendant's variable rate or the reason its rates are disconnected from changes in wholesale costs.

32. Defendant's identification of "profit" amongst the factors it considers does not justify its outrageously high rates. A reasonable consumer might understand that an ESCO will attempt to make a reasonable profit by selling consumers retail electricity. However, such a consumer would also expect that such profits would be consistent with profit margins obtained by other suppliers of electricity in the market, and also that Defendant's profiteering at the expense of its customers would not be so extreme that its rate bears no relation to market prices but is instead outrageously higher.

33. Thus, Defendant's statements with respect to the electricity rates it will charge are materially misleading because consumers do not receive a price based on the specified factors like wholesale costs and competitor pricing. Instead, consumers are charged rates that are substantially higher and untethered from the specified market factors. Defendant intentionally fails to disclose this material fact to its customers because no reasonable consumer who knows the truth about Defendant's exorbitant rates would choose Defendant as an electricity supplier.

34. Defendant's statements and omissions regarding its electricity rates are materially misleading because the most important consideration for any reasonable consumer when choosing an energy supplier is price.

35. Defendant's misstatements and omissions caused injury to Plaintiffs Hitcher and Walker. Plaintiffs would not have enrolled in Defendant's service plan but for its false misrepresentations. Had Plaintiffs known that the rates they would be charged by Defendant

would be substantially higher than their local utility provider and bear no relation to other market rates or the wholesale cost of electricity, they would not have made the decision to switch.

36. Defendant knows full well that it charges a rate that is unconscionably high, and the misrepresentations it makes with regard to the rate being market-based were made for the sole purpose of inducing consumers to sign up for Defendant's electricity supply so that it can reap outrageous profits to the direct detriment of New Jersey consumers without regard to the consequences that high utility bills cause such consumers. As such, Defendant's actions were actuated by actual malice or accompanied by wanton and willful disregard for consumers' well-being.

37. Similarly, other Class members have routinely paid substantially more for their energy supplies since switching to Defendant's electricity plans.

38. Gateway's unfair and deceptive scheme as alleged herein constitutes a continuing violation over the course of each and every time Plaintiffs (or any other class member) was overcharged for electricity. Further, Gateway actively concealed its wrongful conduct by maintaining to Plaintiffs and other members of the class, in Gateway's marketing, invoicing, and other communications directed to consumers, that the prices Gateway charged for electricity were the result of competitive market forces when, in reality, they were the result of Gateway's fraud. Plaintiffs and other members of the class could not discover through reasonable diligence the nature of Gateway's wrongful conduct earlier by virtue of Gateway's active concealment of its wrongdoing.

**CLASS ACTION ALLEGATIONS**

39. Plaintiffs bring this action on their own behalf and additionally, pursuant to Rule 23(b)(2) and (3) of the Federal Rules of Civil Procedure, on behalf of the following Class:

**All of Gateway's New Jersey State residents who were charged a variable rate for electricity from 2014 to the present.**

40. Excluded from the Class are Defendant; any parent, subsidiary, or affiliate of Defendant; any entity in which Defendant has or had a controlling interest, or which Defendant otherwise controls or controlled; and any officer, director, legal representative, predecessor, successor, or assignee of Defendant.

41. This action is brought as a class action for the following reasons:

a. The Class consists of thousands of persons and is therefore so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

b. There are questions of law or fact common to the Class that predominate over any questions affecting only individual members, including:

i. whether Defendant violated N.J.S.A. 56: 8-1 et seq.;

ii. whether Defendant breached its contract with New Jersey consumers by charging variable rates not based on market conditions;

iii. whether Defendant breached the covenant of good faith and fair dealing by exercising its unilateral price-setting discretion in bad faith, *i.e.*, to price gouge;

iv. whether Plaintiffs and the Class have sustained damages and, if so, the proper measure thereof; and

v. whether Defendant should be enjoined from continuing to charge variable rates not based on market conditions;

- c. The claims asserted by Plaintiffs are typical of the claims of the members of the Class;
- d. Plaintiffs will fairly and adequately protect the interests of the Class, and Plaintiffs have retained attorneys experienced in class and complex litigation, including class litigation involving consumer protection and ESCOs;
- e. Prosecuting separate actions by individual class members would create a risk of inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for Defendant;
- f. Defendant has acted on grounds that apply generally to the Class, namely representing that its variable rates are based on market conditions, *i.e.*, competitive and reflective of the wholesale market, when Defendant's rates are in fact substantially higher, so that final injunctive relief prohibiting Defendant from continuing its deceptive practices is appropriate with respect to the Class as a whole;
- g. A class action is superior to other available methods for the fair and efficient adjudication of the controversy, for at least the following reasons:
  - i. Absent a class action, Class members as a practical matter will be unable to obtain redress, Defendant's violations of their legal obligations will continue without remedy, additional consumers and purchasers will be harmed, and Defendant will continue to retain its ill-gotten gains;
  - ii. It would be a substantial hardship for most individual members of the Class if they were forced to prosecute individual actions;
  - iii. When the liability of Defendant has been adjudicated, the Court will be able to determine the claims of all members of the Class;

iv. A class action will permit an orderly and expeditious administration of Class claims, foster economies of time, effort, and expense, and ensure uniformity of decisions;

v. The lawsuit presents no difficulties that would impede its management by the Court as a class action; and

vi. Defendant has acted on grounds generally applicable to Class members, making class-wide monetary and injunctive relief appropriate.

42. Defendant's violations of N.J.S.A. 56: 8-1 *et seq.*, and the common law are applicable to all members of the Class, and Plaintiffs are entitled to have Defendant enjoined from engaging in illegal and deceptive conduct in the future.

**FIRST CAUSE OF ACTION**  
**(Violation of N.J.S.A. 56: 8-1 *et seq.*)**

43. Plaintiffs Hitcher and Walker repeat and re-allege the allegations contained in paragraphs 1-42 above as if fully set forth herein.

44. The Consumer Fraud Act prohibits, *inter alia*:

The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression, or omission, in connection with the sale or advertisement of any merchandise. . . .

N.J.S.A. § 56:8-2.

45. Plaintiffs and other members of the class are "persons" within the meaning of N.J.S.A. 56:8-1(d).

46. Defendant's conduct alleged herein constitutes a "sale" within the meaning of N.J.S.A. 56:8-1(e).

47. Defendant Gateway has engaged in unfair, unlawful and deceptive acts in trade and commerce which have the capacity and tendency to deceive and, in fact, did deceive Plaintiffs and the class, and damaged Plaintiffs and class members.

48. Defendant's misrepresentations and false, deceptive, and misleading statements and omissions with respect to the variable rates it charges for electricity, as described above, constitute affirmative misrepresentations in connection with the marketing, advertising, promotion, and sale of electricity in violation of the Consumer Fraud Act.

49. Defendant's false, deceptive, and misleading statements and omissions would have been material to any potential consumer's decision to purchase electricity from Defendant.

50. Defendant also failed to inform customers that its variable rates for electricity are substantially higher than those based on the market price of electricity and do not reflect the wholesale cost of purchasing electricity. That information would have been material to any consumer deciding whether to purchase electricity from Defendant.

51. Defendant further deceptively and consciously misrepresented the most determinative factors it uses to set variable rates.

52. Defendant knew at the time it promised prospective customers that they would be charged a variable rate based on market conditions that this promise was false.

53. Defendant made these false, deceptive, and misleading statements and omissions with the intent that consumers rely upon such statements.

54. Defendant's intentional concealments were designed to deceive current and prospective variable rate customers into believing that rates will be commensurate with market conditions and the specified factors in the Terms & Conditions. Defendant benefits from reliance and deprives consumers from informed purchasing decisions and savings.

55. Defendant's affirmative conduct and omissions constitute unlawful practices beyond a mere breach of contract. Rather, Defendant's practices are unconscionable and outside the norm of reasonable business practices.

56. Plaintiffs and the other members of the Class entered into agreements to purchase electricity from Defendant for personal use and suffered ascertainable losses as a direct and proximate result of Defendant's actions in violation of the Consumer Fraud Act.

57. As a consequence of Defendant's wrongful actions, Plaintiffs and the other members of the Class suffered an ascertainable loss of monies based on the difference in the rate they were charged versus the rate they would have been charged had Defendant charged a rate based on market conditions and the factors specified in the Terms & Conditions, or had they not switched to Defendant from their previous supplier.

58. Plaintiffs and other members of the Class suffered an ascertainable loss caused by Defendant's misrepresentations and omissions because they would not have entered into an agreement to purchase electricity from Defendant if the true facts concerning their rates had been known.

59. By reason of the foregoing, Defendant is liable to Plaintiffs and the other members of the Class for trebled compensatory damages, punitive damages, attorneys' fees, and the costs of this suit. N.J.S.A. §§ 56:8-2.11, 8-2.12, 8-19.

60. Defendant knows full well that it charges a rate that is unconscionably high, and the misrepresentations it makes with regard to the rate being market-based were made for the sole purpose of inducing consumers to sign up for Defendant's electricity supply so that it can reap outrageous profits to the direct detriment of New Jersey consumers without regard to the consequences high utility bills cause such consumers. As such, Defendant's actions were unconscionable and actuated by bad faith, lack of fair dealing, actual malice, or accompanied by

wanton and willful disregard for consumers' well-being. Defendant is therefore additionally liable for punitive damages, in an amount to be determined at trial.

**SECOND CAUSE OF ACTION**  
**(Breach of Contract)**

61. Plaintiffs Hitcher and Walker repeat and re-allege the allegations contained in paragraphs 1-42 above as if fully set forth herein.

62. Plaintiffs and the other members of the Class entered into valid contracts with Defendant for the provision of electricity.

63. Pursuant to the Agreement, Defendant agreed to charge a variable rate for electricity based on market conditions, in particular the wholesale cost of purchasing electricity for delivery to customers from the same utility territory, and the prices charged by local utility companies and other competitors.

64. Pursuant to the Agreement, Plaintiffs and the other members of the Class paid the variable rates charged by Defendant for electricity.

65. However, Defendant failed to perform its obligations under the Agreement to charge rates based primarily upon electricity costs and additional market conditions. Indeed, Defendant charged a variable rate for electricity that was untethered from the factors upon which the parties agreed the rate would be based.

66. Plaintiffs and the other members of the Class were damaged as a result because they were billed, and they paid, a charge for electricity that was higher than they would have been had Defendant based its rates on the factors agreed upon.

67. By reason of the foregoing, Defendant is liable to Plaintiffs and the other members of the Class for the damages that they have suffered as a result of Defendant's actions, the amount of such damages to be determined at trial, plus attorneys' fees.



**THIRD CAUSE OF ACTION**  
**(Breach of Implied Covenant of Good Faith and Fair Dealing)**

68. Plaintiffs Hitcher and Walker repeat and re-allege the allegations contained in paragraphs 1-42 above as if fully set forth herein.

69. Every contract in New Jersey contains an implied covenant of good faith and fair dealing in the performance and enforcement of the contract. The implied covenant is an independent duty and may be breached even if there is no breach of a contract's express terms.

70. Under the contract, Defendant had unilateral discretion to set the variable rate for electricity based on market conditions and other factors, such as the amount of profit Defendant hoped to earn from the sale of electricity in a customer's utility area.

71. Plaintiffs reasonably expected that the variable rates for electricity would, notwithstanding Defendant's profit goals, reflect the market and wholesale prices for electricity and that Defendant would refrain from price gouging. Without these reasonable expectations, Plaintiffs and other Class members would not have agreed to buy electricity from Defendant.

72. Defendant breached the implied covenant of good faith and fair dealing by arbitrarily and unreasonably exercising its unilateral rate-setting discretion to price gouge and frustrate Plaintiffs and other Class members' reasonable expectations that the variable rates for electricity would be commensurate with market conditions.

73. As a result of Defendant's breach, Defendant is liable to Plaintiffs and other members of the Class for actual damages in an amount to be determined at trial, and attorneys' fees.

**FOURTH CAUSE OF ACTION**  
**(Unjust Enrichment)**

74. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1-42 above as if fully set forth herein.

75. By engaging in the conduct described above, Defendant has unjustly enriched itself and received a benefit beyond what was contemplated in the contract, at the expense of Plaintiffs and the other members of the Class.

76. It would be unjust and inequitable for Defendant to retain the payments that Plaintiffs and the Class(es) made for excessive electricity charges.

77. By reason of the foregoing, Defendant is liable to Plaintiffs and the other members of the Class for the damages that they have suffered as a result of Defendant's actions, the amount of which shall be determined at trial, plus attorneys' fees.

WHEREFORE, Plaintiffs respectfully request that the Court should enter judgment against Defendant as follows:

1. Certifying this action as a class action, with the Class as defined above;
2. On Plaintiffs' First Cause of Action, awarding against Defendant damages that Plaintiffs Hitchner and Walker and the other members of the Class have suffered, trebled, and granting appropriate injunctive relief;
3. On Plaintiffs' Second Cause of Action, awarding against Defendant damages that Plaintiffs Hitchner and Walker and the other members of the Class have suffered as a result of Defendant's actions;
4. On Plaintiffs' Third Cause of Action, awarding against Defendant damages that Plaintiffs Hitchner and Walker and the other members of the Class have suffered as a result of Defendant's actions;
5. On Plaintiffs' Fourth Cause of Action, awarding against Defendant damages and/or injunctive relief that Plaintiffs Hitchner and Walker and the other members of the Class have suffered as a result of Defendant's actions;
6. Awarding Plaintiffs and the Class punitive damages;

7. Awarding Plaintiffs and the Class interest, costs, and attorneys' fees; and
8. Awarding Plaintiffs and the Class such other and further relief as this Court deems just and proper.

**DEMAND FOR TRIAL BY JURY**

Pursuant to Federal Rule of Civil Procedure Rule 38, Plaintiffs hereby demand a trial by jury.

Dated: January 16, 2018

Respectfully Submitted By:

/s/ Jonathan Shub  
Jonathan Shub (N.Y. Bar # 4747739)  
Kevin Laukaitis (*Pro Hac Vice*  
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*Attorneys for Plaintiffs and  
the Putative Class*

# **EXHIBIT A**



5-DIGIT 08098 000203

Jonathan Walker

66 Laurel Lane

Pilesgrove, NJ 08098-2402



**22% Below  
Atlantic City Electric  
Utility Prices**

Dear Jonathan Walker,

~~As a resident of New Jersey, you can choose your electric supply company. With long winter nights here, I would ask you to review your electric bill carefully. If you have Atlantic City Electric as your supplier, you are simply paying more than you should.~~

This is what has compelled me to write to you. Gateway's current fixed electricity price is **22% below** Atlantic City Electric's pricing\*.

**22%\* BELOW  
Atlantic City Electric utility prices**

So, this is the perfect time to switch. There are no fees and your utility does not change. Gateway has been providing energy service to residential customers since 1997 and, by switching today, you too can benefit from our years of experience.

In addition, you'll also receive our **Visa® Prepaid Card worth up to \$75\*\*** when you successfully enroll your electricity and natural gas with us.

So don't wait! Please call **(877) 402-0910** or visit our website at **www.gesc.com/ATL** today and have your latest utility bill handy, so you can take advantage of these savings over Atlantic City Electric. I wouldn't reach out to you if I didn't think that you would benefit from one of our great plans.

~~I hope to welcome you soon as one of our most-valued customers.~~

Sincerely,

William D. Cateno  
Senior Vice President of Sales & Marketing

Customer Code: 28093399  
License #: GSL-0020 / ESL-0022

\*22% savings is available to New Jersey residents, and is based on comparing Gateway's current fixed rate of 10.19 cents per kWh through May 31, 2011, to Atlantic City Electric's Price to Compare effective October 1, 2010, of 13.15 cents per kWh, as posted on Atlantic City Electric's website.

\*\* The \$75 Visa® Prepaid Card is contingent on signing up for both natural gas and electricity. You will be issued a \$50 natural gas Visa® Prepaid Card and/or a \$25 electric Visa® Prepaid Card after one month of paid service with us. Restrictions may apply.

Switching to a competitive third-party supplier is not mandatory, and you have the option of remaining with your utility for basic gas & electric supply service. Budget billing is also available by calling Gateway Energy.

# **EXHIBIT B**



Erin Hitchner  
66 Laurel Lane  
Pilesgrove, NJ 08098-2402

December 14, 2010

Electric rate plan: Fixed, \$0.10190/kWh  
Special promotion: Gateway Energy \$75 Visa®  
Prepaid Card Promotion

Dear Erin Hitchner:

Congratulations on choosing Gateway Energy Services as your energy supplier. You have taken your first step toward managing your energy costs with one of the most highly regarded energy suppliers in the country. We're working on your enrollment application and look forward to receiving your acceptance and serving you soon. By switching to Gateway Energy, you'll join the millions of customers who have been participating in energy choice since the 1990s.

Gateway Energy is one of the largest independent energy suppliers in the U.S. serving thousands of customers in 35 markets across eight states, the District of Columbia and Ontario, Canada. Our energy pricing plans are designed to give you a range of buying options depending on your energy requirements.

**About your energy plan**

You have selected our fixed-rate plan for electricity. Your account application is being processed with your utility. Once your account is activated, Gateway Energy will purchase electricity on your behalf and arrange for billing and delivery through your utility. You will benefit from our energy-buying expertise, while keeping the same reliable service from your utility including delivery of your energy, maintenance, meter reading and emergency-call assistance.

**Gateway Energy service and supply charges on your bill**

Your service will begin with the billing cycle following processing and acceptance of your enrollment request. Your monthly invoice will include Gateway Energy supply charges and your utility delivery charges.

We are dedicated to your complete satisfaction by providing you with competitive energy prices, attractive pricing plans and excellent customer service. To find out more about Gateway Energy, visit us at [www.gesc.com](http://www.gesc.com).

Thank you for choosing Gateway Energy.

Sincerely,  
Gateway Energy Services Corporation

**Terms and conditions**

The terms and conditions of service are included in this package. Our fixed-rate plans are intended to protect you from future price increases. You will incur an Early Termination Fee of \$12.50 per month or partial month if you cancel your service prior to the end of your initial term. Please review all the information contained in this package and retain it for your records.

**Special promotion terms and conditions**

**Here are the terms and conditions of the promotion you selected.**

**Terms and conditions:** The \$50 natural gas Visa® Prepaid Card and/or the \$25 electric Visa® Prepaid Card will be issued following the completion of your first paid month of natural gas and/or electric supply once this promotion has been applied to your Gateway Energy account(s). Please allow 6 to 8 weeks from mailing of rebate request forms for processing and delivery. No Visa® Prepaid Card will be issued for documentation received more than 180 days after initial Enrollment Consent Form date. No Visa® Prepaid Card will be issued if your account(s) is in arrears or inactive, if your energy usage or credit does not meet Gateway Energy's requirements, or if you received a Gateway Energy promotion within the last 18 months. No Visa® Prepaid Card will be issued if you cancel service(s) prior to completion of your first month of supply. This promotion is only available to new customers for a limited time and is only valid on fixed- and/or variable-rate natural gas and/or electric products. This offer may not be combined with other promotions or special rates, can be cancelled at any time and is available to customers in all natural gas and electricity service areas in New Jersey. Note: Gateway Energy reserves the right to bill you for the full value of your Visa® Prepaid Card if you are issued a card and you choose to cancel your Gateway Energy service within the first 90 days.

**How to contact Gateway Energy**

For more information, please contact our Customer Service Department at (800) 805-8586 9 a.m. – 8 p.m. ET Monday – Thursday, or 9 a.m. – 6 p.m. ET Friday. You can also send an e-mail to customerservice@gesc.com.

**Verify your information**

Please verify that your name, address, utility company and utility account number shown on this letter are correct. If you need to update your information, please contact our Customer Service Department at (800) 805-8586.

Utility company:	Atlantic City Electric
Utility account:	314617299966
Electric rate plan selected:	Fixed, \$0.10190/kWh
Effective until:	June 1, 2011
Early termination fee:	\$12.50 per month or partial month remaining in your initial term.
Special promotion:	Gateway Energy \$75 Visa® Prepaid Card Promotion



# **EXHIBIT C**



## New Jersey Residential Terms & Conditions

Your Residential Energy Sales Agreement ("Agreement") with Gateway Energy Services Corporation ("Gateway Energy"), an independent supplier, shall consist of: (i) your telephonic, electronic or written agreement to initiate service and begin enrollment with Gateway Energy ("Enrollment Consent") and (ii) the terms and conditions contained below. Throughout this document, the words "you" and "your" refer to the customer identified in the Enrollment Consent. The words "we", "us" and "our" refer to Gateway Energy.

### Electricity or Natural Gas Emergencies

In the event of an electricity or natural gas emergency or service interruption, contact your local distribution company ("utility") at one of the telephone numbers listed below. You should also contact your local emergency personnel.

Atlantic City Electric: (800) 833-7476; Elizabethtown Gas: (800) 492-4009; JCP&L: (888) 544-4877; New Jersey Natural Gas: (800) 427-5325; PSE&G: (800) 436-7734; Rockland Electric (877) 434-4100; or South Jersey Gas: (800) 582-7060

### Agreement to Sell and Purchase Energy

You agree to purchase, and we agree to sell to you, all of the electricity or natural gas necessary to satisfy your requirements for the utility account(s) identified in your Enrollment Consent during the term of the Agreement. You agree to initiate service and begin enrollment with us. You appoint us as your agent to acquire the supplies necessary to meet your electricity or natural gas needs. Your utility will continue to provide delivery services and respond to leaks or other emergencies should they occur. You agree to accept the measurements as determined by the utility for purposes of accounting for the electricity or natural gas supplied by the utility. If the utility is unable to read your meter, the utility will estimate your usage and your charges will be calculated accordingly and adjusted on a future bill.

### Term

This Agreement shall be binding as of the date your enrollment or re-enrollment is accepted by us, which will not be before the expiration of your 14-day right of rescission as required under the New Jersey Board of Public Utilities ("NJ BPU"). Our actual supply of electricity or natural gas under this Agreement shall begin on the date that the utility deems your switch to us effective or the date that the utility deems your rate change effective for rate-plan changes. Your switch or rate change may take up to 2 billing cycles to take effect. Regardless of the actual effective date of this Agreement, you will only be charged for supply under this Agreement once we have begun the supply of electricity or natural gas. The initial term of the Agreement ("Initial Term") is the term specified in your Enrollment Consent or, if no term is specified, 12 months. Your Agreement shall automatically renew on a month-to-month basis (each a "Renewal Term") at the current rate plan unless one party notifies the other party in writing, at least 30 days prior to the anticipated renewal date, that it does not wish for the Agreement to renew.

### Material Change Notice

From time to time, we may make changes to our terms and conditions. If we make any changes that are material to your Agreement, we will send you a written notice at least 30 days prior to making such changes. The changes will automatically take effect unless you notify us within 25 days after the date of our written notice that you wish to terminate this Agreement instead of accepting the changes.

### Price

The price for all electricity or natural gas sold under this Agreement during the Initial Term of the Agreement and any Renewal Terms shall be the rate agreed to in the Enrollment Consent, plus all applicable taxes. There are no additional fees for switching your electricity or natural gas service. Our price does not include utility distribution service and other utility-related charges, which are separate amounts that you must pay to the utility. Additional details are below:

**Variable-Rate Plan:** The price for all electricity or natural gas sold under our Variable-Rate Plan is a rate set by us each month based on our evaluation of a number of factors that affect the total price of electricity or natural gas to a customer. The following description is not exhaustive of all factors that may influence our pricing decision each month, but it

does describe the major components that influence our analysis in a typical month. Each month our management uses the information described below, along with numerous other considerations, to determine how low a price we can charge in the upcoming month.

- We determine the cost of all electricity or natural gas (including, where applicable, transmission costs, storage costs, transportation costs and line losses) that we have already obtained for delivery to customers in your utility territory for the upcoming month. Because we often acquire supply over time in preparation for future delivery needs (in an effort to mitigate the volatility in price) and do not acquire all of our required electricity or natural gas from the spot market, our supply costs may not directly follow spot market prices.
- If additional supplies of electricity or natural gas will be required for the upcoming month, we will determine the anticipated cost to acquire such additional supplies from the spot market.
- If we expect to have surplus supply for the upcoming month, we evaluate the expected income we may receive from selling the surplus. Additionally, with electricity, we may expect to have surplus or shortfall in any given hour of the upcoming month. In this case, we evaluate the expected income or costs that may be incurred by eliminating the surplus or shortfall.
- We evaluate, if known, the prices that your utility and other competitors in your area plan to charge in the upcoming month.
- We evaluate the amount of profit we hope to earn from the sale of electricity or natural gas in your utility territory.
- We evaluate any taxes that must be included in the rate we charge for electricity or natural gas in your jurisdiction.
- From time to time, and as a direct result of sudden or drastic increases in price, we may experience a higher level of cost to supply our customers than we wish to bill our customers in a single period. In these circumstances, we may amortize this expense to our customers over multiple billing cycles.

**Price-Protection Plan:** The price you will pay for all electricity or natural gas under our Price-Protection Plan is a variable rate, as described above, but with a ceiling rate and a premium as specified in your Enrollment Consent. The premium represents the cost of locking in to your ceiling rate. If the variable rate rises above the ceiling rate, you will pay no more than the ceiling rate plus the premium.

**Fixed-Rate Plan:** The price you will pay for all electricity or natural gas under our Fixed-Rate Plan is the rate as specified in your Enrollment Consent.

### Contact Us

You may contact our Customer Service Department at (800) 805-8586 9 a.m.–8 p.m. ET Monday–Thursday and 9 a.m. –6 p.m. ET Friday. Hours subject to change. You may write to us at: Gateway Energy Services Corporation, 400 Rella Blvd., Suite 300, Montebello, NY 10901 or e-mail us at [customerservice@gesc.com](mailto:customerservice@gesc.com).

### Customer Rights and Information

You will receive a confirmation notice for your choice of supplier and have 14 calendar days from the date of such notice to contact your utility and rescind the selection. This agreement is not binding until the 14-day confirmation period has expired and you have not rescinded the supplier selection. You may obtain additional information by calling us at the contact information above, or the NJ BPU's Division of Consumer Relations at (800) 624-0241. Gateway Energy is licensed by the NJ BPU and its license number is GSL-0020 (for natural gas) and ESL-0022 (for electricity).

### Information Release Authorization

Your signature on the Enrollment Consent is your authorization for us and our agents to obtain and review information regarding your credit history from credit-reporting agencies, and information from the utility, which could include: account number; phone number; address; meter-read, service or rate-class data; electric or gas consumption history; billing determinants; and payment history. We may use such information to determine whether to begin or to continue to provide you with energy supply service, and to bill and collect monies owed. These authorizations shall remain in effect as long as the Agreement is in effect. You may rescind these authorizations at any time by either calling or providing written notice to us. We reserve the right to reject your enrollment or terminate our Agreement with you, in whole or with respect to any particular account(s) covered by the Agreement, in the event these

authorizations are rescinded. you fail to meet or maintain satisfactory credit standing as determined by us, or fail to meet minimum or maximum threshold consumption levels as determined by us. If you fail to remit payment in a timely fashion, we may report the delinquency to a credit-reporting agency.

### **Dispute Resolution**

If you have a billing dispute involving our service, please contact our Customer Service Department as provided above. You must still pay your bill in full, but may deduct the specific amount in dispute while the charges remain in dispute. If the dispute cannot be resolved within 45 days, a complaint or request for an Alternate Dispute Resolution procedure may be submitted by either party by contacting the NJ BPU at (800) 624-0241.

### **Termination**

Any or all of your account(s) that are terminated or cancelled shall be returned to the utility unless you contract with another supplier for electricity or natural gas supply. It may take several billing cycles for your account(s) to be returned to the utility. You are required to pay all of the charges for the electricity or natural gas supplied by us until such time as the utility or other supplier actually begins supplying the electricity or natural gas to your account(s).

*Termination of Variable-Rate Plan:* You may cancel your Variable-Rate Plan Agreement without penalty, at any time, by contacting our Customer Service Department at the number provided. We may terminate the Agreement without penalty at any time; in whole or with respect to any particular account(s) covered by the Agreement by providing you with 30 days' advance written notice of such termination. If we are terminating due to nonpayment or other breach of this Agreement, you will have 30 days to remedy the breach or nonpayment.

*Termination of Price-Protection Plan or Fixed-Rate Plan:* We may terminate your Price-Protection Plan or Fixed-Rate Plan Agreement, in whole or with respect to any particular account(s), for nonpayment of your energy charges or if you breach this Agreement. If you terminate this Agreement, in whole or with respect to any particular account(s), or if we terminate this Agreement due to breach or nonpayment, you will be charged an early termination fee ("Early Termination Fee"), as liquidated damages, in the amount agreed to in your Enrollment Consent, in addition to any energy charges you may already owe. An Early Termination Fee shall become due and payable immediately upon the effective date of the termination of service to the account(s). The Early Termination Fee is not a penalty, but is intended to compensate us for the cost of buying electricity or natural gas in advance on your behalf.

*Termination as a result of Relocation, Disability or Death:* You may terminate this Agreement upon 48 hours' notice, without penalty, as a result of relocation, disability and/or death.

### **Billing and Payment**

Depending on your location and other relevant factors, you will receive either: (i) one bill from your utility which will include our charges (for the supply) as well as the utility charges (for the delivery), or (ii) separate bills from Gateway Energy and your utility. Past-due charges may incur a late fee of 1.5% per month or the interest rate posted in your utility's tariff. If you fail to remit payment when due, or if you breach any of the other terms and conditions of the Agreement, then, in addition to any other remedies we may have, we have the right to terminate the Agreement, in whole or with respect to any particular account(s) covered by the Agreement, upon 30 days' written notice, provided that you do not make payment or correct the problem that caused the termination within the 30-day period. Failure to make full payment may be grounds for disconnection of utility services. A \$20 fee per account may be assessed for any payment returned due to insufficient funds. If any payments made by you directly to us are rejected two times in a one-year period, the only form of payment acceptable will be a certified check, money order or electronic funds transfer. If you make a payment for a lesser amount, which includes a statement or letter indicating that the lesser payment constitutes full payment, we may accept such payment without prejudice to any other rights or remedies that we may have against you and we may apply it to your account(s) as a partial payment.

### **Title**

All electricity or natural gas sold pursuant to the Agreement shall be delivered to a location ("Point of Delivery") which shall constitute the point at which the sale occurs and title to the energy passes to you from us. For natural gas, the Point of Delivery shall be the point where the utility interconnects with the interstate pipeline. For electricity, the Point of Delivery shall be, depending on the specific transaction, either a location outside the State of New Jersey or Gateway Energy's PJM load bus that corresponds to the utility or zone in which the meter is located.

### **Default Liability**

Our liability shall be limited to direct actual damages only, which will not exceed the amount of your single largest monthly invoice during the preceding 12 months. In no event shall we be liable for any punitive, incidental, consequential, exemplary, indirect, third-party claims or other damages whether based on contract, warranty, tort, negligence, strict liability or otherwise, or for lost profits arising from a breach of the Agreement.

### **Governing Law**

This Agreement is made and shall be construed in accordance with the laws of the State of New Jersey. If, at some future date, there is a change in any law, rule or pricing structure which shall have a detrimental economic impact upon our performance under the Agreement; or in the event that compliance with such change shall result in a material change in the way prices are calculated under the Agreement; or we are otherwise prevented, prohibited or frustrated from fulfilling our obligations under the Agreement; we shall have the right to terminate the Agreement, in whole or with respect to any particular account(s) covered by the Agreement, upon 30 days' notice.

### **Assignment**

You may not assign the Agreement, in whole or in part, or any of your rights or obligations without our prior written consent. We may, without your consent: (a) transfer, sell, pledge, encumber or assign the Agreement or the accounts, revenues or proceeds in connection with any financial or billing services agreement; (b) transfer or assign the Agreement, in whole or in part, to an affiliate of Gateway Energy, or any other approved third party supplier or entity authorized by the NJ BPU. This Agreement shall be binding on each party's successors and legal assigns.

### **Severability**

If any provision of the Agreement is held by a court or regulatory agency of competent jurisdiction to be invalid, void or unenforceable, the remaining provisions shall continue in full force without being invalidated in any way.

### **No Warranties**

We provide no warranties, express or implied, and we specifically disclaim any warranty of merchantability or fitness for a particular purpose. Additionally, unless expressly stated otherwise on your Enrollment Consent, we specifically disclaim any warranty or guaranty that the price charged by us for the energy supplied pursuant to the Agreement will be lower than the price that you would have been charged by the utility or another third-party supplier.

### **Delay or Failure to Exercise Rights**

No partial performance, delay or failure on our part in exercising any rights under the Agreement and no partial or single exercise thereof shall constitute a waiver of such rights or of any other rights hereunder.

### **Force Majeure**

We shall make commercially reasonable efforts to provide service, but do not guarantee a continuous supply of energy. Certain causes and events out of our control ("Force Majeure Events") may result in interruptions in service. We shall not be liable for any such interruptions caused by a Force Majeure Event. We do not transmit or deliver energy. Therefore, we are not and shall not be liable for damages caused by Force Majeure Events, including acts of God; acts of any governmental authority; accidents; strikes; labor disputes; required maintenance work; inability to access the utility's system; non-performance by the utility, including, but not limited to, a facility outage on its distribution lines; changes in laws, rules or regulations of any governmental authority; or any cause beyond our control.

### **Taxes and Laws**

Except as otherwise provided in the Agreement or by law, all taxes due and payable with respect to your performance of your obligations under the Agreement, shall be paid by you. Any lawful tax exemption will only be recognized on a prospective basis from the date that you provide valid tax-exemption certificates to us.

### **Entire Agreement**

The Agreement (including the Enrollment Consent) sets forth the entire agreement between the parties. Any and all prior or contemporaneous agreements, understandings and representations between the parties, whether verbal or written, are superseded by the Agreement.