

Karen O. Moury
717 237 4820
Karen.moury@bipc.com

409 North Second Street, Suite 500
Harrisburg, PA 17101
T 717 237 4800
F 717 233 0852
www.buchananingersoll.com

July 10, 2014

VIA E-FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Commonwealth of Pennsylvania, et al. v. Blue Pilot Energy, LLC
Docket Nos. C-2014-2427655

Dear Secretary Chiavetta:

On behalf of Blue Pilot Energy, LLC, I have enclosed for electronic filing the Preliminary Objections of Blue Pilot Energy, LLC to the Joint Complaint of Commonwealth of Pennsylvania, et al. in the above-captioned matter.

Copies have been served on all parties as indicated in the attached certificate of service.

Very truly yours,



Karen O. Moury

KOM/tlg

Enclosure

cc: Chief Administrative Law Judge Charles E. Rainey, Jr. (via First-Class Mail)
Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

COMMONWEALTH OF PENNSYLVANIA, ET AL.	:	
	:	
	:	
Complainants,	:	
	:	Docket Nos. C-2014-2427655
v.	:	
	:	
BLUE PILOT ENERGY, LLC	:	
	:	
Respondent.	:	

NOTICE TO PLEAD

TO:	John M. Abel	Candis A. Tunilo
	Margarita Tulman	Christy M. Appleby
	Bureau of Consumer Protection	Office of Consumer Advocate
	Office of Attorney General	555 Walnut Street
	15 th Floor, Strawberry Square	5 th Floor, Forum Place
	Harrisburg, PA 17120	Harrisburg, PA 17101

Pursuant to 52 Pa. Code § 5.101(b), you are hereby notified that, if you do not file a written response denying or correcting the enclosed Preliminary Objections of Blue Pilot Energy, LLC to the Joint Complaint of Commonwealth of Pennsylvania, et al. within **ten (10) days** from service of this Notice, the facts set forth by Blue Pilot Energy, LLC in the Preliminary Objections may be deemed to be true, thereby requiring no other proof. All pleadings, such as a Reply to Objections, must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served to counsel for Blue Pilot Energy, LLC, and where applicable, the Administrative Law Judge presiding over the case.

File with:

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
P.O. Box 3265
Harrisburg, PA 17105-3265

With a copy to:

Karen O. Moury
Buchanan Ingersoll & Rooney, PC
409 North Second Street
Suite 500
Harrisburg, PA 17101

Dated: July 10, 2014



Karen O. Moury, Esq.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

COMMONWEALTH OF	:
PENNSYLVANIA, ET AL.,	:
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Complainants,	:
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v.	: Docket No. C-2014-2427655
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BLUE PILOT ENERGY, LLC,	:
	:
Respondent.	:

RESPONDENT BLUE PILOT ENERGY, LLC’S PRELIMINARY OBJECTIONS

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

Blue Pilot Energy, LLC (“BPE”), by and through its undersigned counsel, files these Preliminary Objections seeking dismissal with prejudice of Counts I, II, and V of the Complainants’ Joint Complaint, pursuant to Section 5.101(a) of the Pennsylvania Public Utility Commission’s (“Commission” or “PUC”) regulations, 52 Pa. Code § 5.101(a)(4), and in support thereof, avers as follows:

I. BACKGROUND

1. BPE is an electric generation supplier (“EGS”), licensed by the Commission since June 10, 2011, Docket No. A-2011-2223888, to supply electricity or electric generation services to residential, small commercial, large commercial, and industrial customers in electric distribution company service territories throughout Pennsylvania. Jt. Compl. ¶ 6.

2. As part of the licensure application process, BPE submitted, among other things, a copy of its Disclosure Statement and Agreement for Electric Service (“Disclosure Statement”) to the Commission for review and approval. Answer ¶ 6.

3. The Commission's Bureau of Consumer Services approved BPE's Disclosure Statement on May 26, 2011. *Id.* & Exh. 1.

4. BPE has only offered variable rate contracts to Pennsylvania residential consumers. *Id.* at ¶ 8(a).¹ Under those contracts, customers receive an initial rate, which is guaranteed for a specific period (typically 30, 60, or 90 days). After the rate-guarantee period expires, pursuant to the terms of their variable rate contracts, customers' rates may increase or decrease based on a number of factors, such as changes in wholesale energy market prices and "[s]udden, atypical fluctuations in climate conditions, including but not limited to, extraordinary changes in weather patterns." *See* Jt. Compl. ¶ 20 & App. A.

5. All material terms of a customer's contract are clearly and conspicuously disclosed to the customer prior to and during enrollment. These terms also are contained in BPE's Commission-approved Disclosure Statement, a copy of which is mailed to each customer following his or her enrollment. Answer ¶¶ 20, 54. The Disclosure Statement contains no cap on the amount by which a customer's rate may increase or decrease. *See* Jt. Compl. ¶ 20 & App. A; Answer ¶ 26 & Exh. 3.

6. BPE's customers may cancel their service at any time and for any reason, without incurring a termination fee. Jt. Compl., App. A.

7. When BPE began selling energy in Pennsylvania in or about December 2011, its retail rate was based upon BPE's projections of cost per kilowatt hour (kWh). In a number of instances before 2014, BPE lowered its customers' rates after their rate-guarantee periods ended.

8. Severe and unanticipated weather events, such as winter storms and polar vortices, plagued Pennsylvania and many other Eastern states during December 2013 and the

¹ In 2013, BPE implemented a trial program pursuant to which it sold 19 Pennsylvania business customers a two-year term plan with a fixed rate of \$0.069 per kWh. Pursuant to the terms of those customers' contracts, that guaranteed rate has not changed and remains in effect until 2015. *Id.*

first quarter of 2014. Recognizing such unprecedented weather, the PUC explained to consumers that “[t]he extreme cold has significantly increased the demand for electricity” and “remind[ed] consumers [that] the frosty temperatures and increased use of heating systems will translate into higher energy bills in the coming months.” Pa. PUC, Press Release, *PUC Urges Consumers to Conserve Energy During Frigid Temps*, Jan. 27, 2014.² PUC Chairman Robert Powelson specifically warned that consumers likely would be receiving “higher bills that will be associated with heating their homes during the winters’ extended cold.” *Id.*

9. In late January 2014, the PUC advised Pennsylvania consumers using a competitive supplier (such as BPE):

[T]o review their contract[s] as cold temperatures and high demand have driven the wholesale price of electricity higher. ***Customers with variable contracts or those with fixed contracts that have expired and were moved to a variable rate may see their prices increase.*** Consumers are urged to check their contracts . . . The PUC is seeing higher prices in the wholesale electric markets, which could translate into higher prices for some customers who have contracts with competitive suppliers that allow for prices to change. Consumers should check the terms and conditions they received when they enrolled with the competitive supplier or call the supplier to check the status of their prices. Some prices for those on variable rates may have already increased.

Pa. PUC, Press Release, *PUC Urges Shopping Consumers to Review Contracts, Cold Temps Could Mean Higher Prices for Those on Variable Rates*, Jan. 31, 2014 (emphasis added).³ The Commission again informed consumers that “cold temperatures and increased use of heating systems will translate into higher energy bills.” *Id.*

10. The Federal Energy Regulatory Commission (“FERC”) has noted that, during one of the polar vortices that hit Pennsylvania in January 2014 in particular, electricity prices surged

² Available at http://www.puc.pa.gov/about_puc/press_releases.aspx?ShowPR=3297 (last accessed July 3, 2014).

³ Available at http://www.puc.state.pa.us/about_puc/press_releases.aspx?ShowPR=3298) (last accessed July 3, 2014).

with the location marginal prices (“LMPs”) being near or above \$2,000/Mwh for a number of hours in PJM. FERC Staff Report, *Winter 2013-2014 Operations and Market Performance in RTOs and ISOs*, AD14-8-000, at 10 (Apr. 1, 2014).⁴ Similarly, the PUC identified the “historic demand” for electricity in the Commonwealth, and confirmed that “PJM reached an all-time winter peak” in early January. Pa. PUC, Press Release, *PUC Urges Consumers to Conserve Energy During Frigid Temps*, Jan. 7, 2014.⁵

11. As a result of these extreme weather events, BPE was forced to increase its rates to recover its costs for wholesale power that, in certain markets, increased 400% or more over the course of a month.

12. In January 2014, BPE submitted to the Commission a slightly revised version of its previously approved May 2011 Disclosure Statement, which, in relevant part, added verbiage to the “Price per Kilowatt Hour” section to address extreme weather events. The Commission’s Bureau of Consumer Services again reviewed and approved the revised Disclosure Statement on January 22, 2014. Answer ¶ 20 & Exhs. 2, 3.

13. In late March 2014, BPE suspended bringing on new customers in Pennsylvania until it could be sure that the cost per kWh to consumers would be stable. Answer ¶ 11. BPE has not lifted that self-imposed suspension. *Id.*

14. On June 20, 2014, Complainants Pennsylvania Attorney General Kathleen G. Kane and Tanya J. McCloskey, Acting Consumer Advocate for the Office of Consumer

⁴ Available at <https://www.ferc.gov/legal/staff-reports/2014/04-01-14.pdf> (last accessed July 3, 2014).

⁵ Available at http://www.puc.pa.gov/about_puc/press_releases.aspx?ShowPR=3283) (last accessed July 3, 2014).

Advocate (“OCA”), filed their Joint Complaint in this case.⁶ Complainants assert five causes of action against BPE: (1) Count I – Failing to Provide Accurate Pricing Information; (2) Count II – Prices Nonconforming to Disclosure Statement; (3) Misleading and Deceptive Promises of Savings; (4) Count IV – Lack of Good Faith Handling of Complaints; and (5) Count V – Failure to Comply With the Telemarketer Registration Act. *Jt. Compl.* ¶¶ 19-58.

15. For the reasons detailed below, Counts, I, II, and V fail to state a claim upon which the Commission can grant relief and/or the Commission lacks jurisdiction to grant relief. Those Counts should be dismissed as a matter of law.

II. ARGUMENT

A. Preliminary Objection Standard

16. The Commission’s Rules of Administrative Practice and Procedure permit a respondent to file a preliminary objection in response to a regulatory complaint, such as the Joint Complaint here. 52 Pa. Code § 5.101(a). A complaint may be dismissed on, among other grounds, the Commission’s lack of jurisdiction or the legal insufficiency of the complaint. *Id.* at § 5.101(a)(1), (4).

17. The preliminary objection standard under the Commission’s Rules is similar to that which governs preliminary objections under the Pennsylvania Rules of Civil Procedure. *Cermak v. W. Penn Power Co.*, No. C-2014-2413754, 2014 WL 2528243, at *2 (Pa. P.U.C. May 19, 2014).

⁶ On the same day, Complainants filed complaints against four other EGSs - Hiko Energy; IDT Energy; Respond Power; and Energy Services Providers d/b/a Pennsylvania Gas & Electric. All five complaints have an assembly-line quality in that the factual allegations are identical in all material respects and, in many cases, verbatim. However, Complainants assert a variety of additional causes of action against each of the other EGSs that are not asserted against BPE.

18. When considering a preliminary objection, the Commission generally accepts as true all well-pled, material facts of the non-movant, as well as all reasonable inferences deducible from those facts. *Id.* at *3. Further, the factual allegations in the Joint Complaint are to be viewed in the light most favorable to the Complainants. *Id.* The Commission, however, is not required to accept as true legal conclusions, unwarranted factual inferences, argumentative allegations, or expressions of opinion. *Armstrong Cty. Mem. Hosp. v. Dep't of Pub. Welfare*, 67 A.3d 160, 170 (Pa. Cmwlth. 2013).

19. Dismissal is appropriate where it appears that the Complainants “would not be entitled to relief under any circumstances as a matter of law.” *Cermak*, 2014 WL 2528243, at *3; *see also Ricks v. PECO Energy Co.*, No. C-2012-2325257, 2012 WL 6763612 (preliminary objections will be granted where the law is “certain[] . . . that no recovery or relief is possible”) (quoting *P.J.S. v. Pa. State Ethics Comm'n*, 669 A.2d 1105 (Pa. Cmwlth. 1996)).

B. BPE Provided Accurate Information About Its Prices (Count I)

20. Count I alleges that BPE violated Sections 54.43(1) and 54.5(c) of the Commission’s regulations. *Jt. Compl.* ¶¶ 19-27.⁷ More specifically, Complainants claim that BPE’s Disclosure Statement fails to provide consumers with “accurate pricing information in

⁷ Although the Joint Complaint is not the model of clarity, it appears that Complainants allege that BPE also violated the Pennsylvania Unfair Trade Practices and Consumer Protection Law’s (“UTPCPL”) “catch-all” provision, 73 Pa. Cons. Stat. § 201-2(4)(xxi). *See Jt. Compl.* ¶¶ 23-24 (“The Commission’s regulations require compliance with the [UTPCPL]. The [UTPCPL] prohibits fraudulent and deceptive conduct which creates a likelihood of confusion or misunderstanding.”); *see also id.* at ¶¶ 40, 57, 61 (alleging violations of and seeking relief under the UTPCPL). However, it is well-established and “clear under Pennsylvania law that the Commission does not have jurisdiction over [UTPCPL] claims.” *Torakeo v. Pa. Am. Water Co.*, No. C-2013-2359123, 2014 WL 1390784, at *6 (Pa. PUC Apr. 3, 2014) (citing *Mid-Atl. Power Supply Ass’n v. Pa. PUC*, 755 A.2d 723, 725 (Pa. Cmwlth. 2000), and *Pa. PUC v. Bell Tel. Co. of Pa.*, 71 Pa. P.U.C. 338, 341 (1989)); *MacLuckie v. Palmco Energy PA, LLC*, No. C-2014-2402558, 2014 WL 3011753, at *7 (Pa. PUC June 16, 2014) (Cheskis, J.) (“It is well settled . . . that the Commission does not have jurisdiction to enforce the UTP/CPL. The Commission cannot find that an entity has violated the UTP/CPL.”) (citations omitted). Thus, to the extent Complainants seek to assert UTPCPL claims against BPE, such claims necessarily must be dismissed.

plain language and using common terms that consumers understand,” in particular “the price that they would or could be charged . . . or how the price would be calculated . . .” *Id.* at ¶¶ 25-26. Complainants also claim that BPE’s Disclosure Statement “fail[s] to provide information to [BPE’s] customers in a manner that would allow them to compare offers.” *Id.* at ¶ 27. As detailed below, these allegations fail as a matter of law.

1. There Is No Violation of Commission Regulation or Order Because the Commission Approved the Very BPE Disclosure Statement That Complainants Challenge

21. First, as Complainants acknowledge, the Commission approved BPE’s energy generation supplier license in June 2011. *Id.* at ¶ 6. As part of that application process, BPE provided the Commission with a copy of its Disclosure Statement, which the Commission approved. *See* Answer ¶ 6 & Exh. 1. The Commission also approved the slightly revised version that is excerpted in and appended to the Joint Complaint. *See infra* at n.15. Such Commission review and approval is fatal to Complainants’ allegations of fraudulent or deceptive advertising and marketing conduct.

22. Recently, in *Hoke v. Ambit NE, LLC*, the Commission analyzed Sections 54.43(1) and 54.5(c), and found that, because the variable rate disclosure statement used by the EGS in that case had been approved by the PUC, there was no violation of any regulations or Commission orders. No. C-2013-2357863, 2013 WL 6681516, at *5-6 (Pa. PUC Nov. 21, 2013).

23. More specifically, in *Hoke*, after enrollment, the supplier mailed the complainant a disclosure statement, which contained language that previously had been approved by the Commission’s Bureau of Consumer Services. *Id.* at *2. The disclosure statement explained that “rates for the initial term and subsequent renewal terms [one-month periods] may vary dependent

upon price fluctuations in the entry and capacity markets, plus all applicable taxes.” *Id.* at *3. The supplier advertised that, under its variable rate plans, rates may vary month-to-month based upon commodity costs and market conditions, and that the introductory rate applied to the first billing cycle only. *Id.* The complainant, nonetheless, believed that the rates would remain stable and constant over a long period of time. *Id.* The complainant “was confused by language preapproved by the commission’s Bureau of Consumer Services in the disclosed terms of agreement,” which were contained in the disclosure statement, and filed a complaint alleging that the supplier’s variable rate advertising and marketing was false and deceptive. *Id.* at *1.

24. In its decision dismissing the complaint, the Commission found that the supplier did not violate either Section 54.43(1) (*i.e.*, the supplier, in fact, provided accurate information to the complainant about his electric generation service using plain language and common terms) or 54.5(c) (*i.e.*, the supplier, in fact, adequately disclosed to the complainant all variable pricing terms, including the conditions of variability and the limits on price variability), or any other regulations or Commission orders, because, “[a]s part of [the supplier’s] licensing process, it submitted a customer disclosure statement for review and approval by the Commission’s Bureau of Consumer Services. [The supplier] is still using the same disclosure statement approved by Commission Staff.” *Id.* at *5. At bottom, the Commission concluded that the supplier’s advertising and marketing was not “deceptive” or “fraudulent.” *Id.* at *6. The Commission also held that the disclosure statement that the complainant received from the supplier provided him “adequate notice” that he had a variable rate that could increase on a month-to-month basis. *Id.*

25. Similarly, just three weeks ago in *Yaglidereliler Corp. v. Blue Pilot Energy, LLC*, Judge Salapa found that the very same BPE Disclosure Statement challenged by Complainants here, in fact, “properly disclosed the terms and conditions of the electric generation supply

agreement with the customer and [BPE] billed the customer in accordance with those terms and conditions.” No. C-2014-2413732, 2014 WL 3011778, at *1 (Pa. PUC June 18, 2014) (Salapa, J.).

26. Complainants take issue with BPE’s Commission-reviewed and -approved Disclosure Statement, which clearly and conspicuously advises consumers of the nature and terms of their variable rate contracts.⁸ As in *Hoke*, such review and approval necessarily are fatal to Complainant’s claims for violation of Sections 54.43(1) and 54.5(c). For that reason alone, Count I should be dismissed.

2. Enforcement of Sections 54.43(1) and 54.5(c) Would Violate BPE’s Due Process Rights

27. The U.S. Supreme Court has explained that, in order to satisfy the Fifth Amendment’s Due Process Clause – made applicable to the states through the Fourteenth Amendment – laws must not fail to “give [a] person of ordinary intelligence a reasonable opportunity to know what is prohibited . . .” *Vill. of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982); *Com. v. Parker White Metal Co.*, 515 A.2d 1358, 1367 (Pa. 1986) (due process requires that the proscribed conduct and range of penalties be unambiguously identified). Due process demands that a statute not be vague. *Com. v. Mayfield*, 832 A.2d 418, 422 (Pa. 2003); *Com. v. Barud*, 681 A.2d 162, 165 (Pa. 1996). A statute is vague if it fails to provide fair notice as to what conduct is forbidden or if it prevents the gauging of future, contemplated conduct, or if it encourages arbitrary or discriminatory enforcement. *Com. v. McCoy*, 895 A.2d 18, 30 (Pa. Super. Ct. 2006). A vague law is one whose terms necessarily

⁸ It bears noting that BPE’s Disclosure Statement includes a “Definitions” section and otherwise incorporates terminology set forth in the Commission’s “Consumer’s Dictionary for Electric Competition,” which “provide[s] a common language for consumers.” *Compare* 1997 Customer Information Order, 180 P.U.R. 4th 61 (“staff developed a ‘Dictionary’ of terms for electric competition to assist EDCs and suppliers in meeting our requirement concerning the use of common and consistent terminology”) & App. D, *with* Jt. Compl., App. A.

require people to guess at its meaning. *Mayfield*, 832 A.2d at 422. If a law is deficient (*i.e.*, vague) in any of these ways, then it violates due process and is constitutionally void. *Id.*

28. Section 54.43(1) requires a supplier like BPE to provide “accurate information” about its electric generation services “using plain language and common terms in communications with consumers.” 52 Pa. Code § 54.43(1). Section 54.5(c) provides that, “if applicable,” a disclosure statements’ variable pricing provision must include “[c]onditions of variability (state on what basis prices will vary)” and any “[l]imits on price variability.” *Id.* at § 54.5(c)(2). None of these terms are defined within the relevant Code sections.

29. BPE’s Disclosure Statement clearly and conspicuously states (1) that the customer had a variable rate plan; (2) the customer’s specific initial rate; (3) the customer’s specific rate-guarantee period; (4) that, after that period, “[BPE] may increase [the customer’s] rate based on several factors, including changes in wholesale energy market prices in the PJM Markets,” and that “[the customer’s] variable rate will be based upon PJM wholesale market conditions,” which could be affected by “[s]udden, atypical fluctuations in climate conditions, including but not limited to, extraordinary changes in weather patterns.” Answer at Exh. 3. Yet, Complainants allege that BPE violated Sections 54.43(1) and 54.5(c) because consumers purportedly could not determine from that Disclosure Statement “the price they would or could be charged by [BPE] or how the price would be calculated.” Jt. Compl. ¶ 26.

30. To the extent that Sections 54.43(1) and 54.5(c) could be construed in the manner requested by Complainants, the regulations are unconstitutionally vague because they do not give BPE fair notice that the failure to provide information above and beyond that which BPE already discloses (and which was reviewed and approved by the Commission) violates those Commission regulations. In fact, in its recent June 14, 2014 Final-Omitted Rulemaking Order

amending Section 54.5, the Commission agreed with a commenter's statement that Section 54.5(c)(2)'s "conditions of variability" and "limits on price variability" disclosure requirements were vague and ambiguous and need to be "clarif[ied]"; the Commission further noted that the regulatory language was subject to "potential misinterpretation." 2014 Reg. Text. 358473 (NS) (June 14, 2014) ("[the Commission] believes that more specific direction should be provided to EGSs regarding the level of detail the Commission expects regarding the variability in retail generating supply pricing").

31. Thus, enforcement of Sections 54.43(1) and 54.5(c) against BPE in the manner that Complainants seek would violate BPE's due process rights. Accordingly, Count I fails for this reason as well.

C. The Commission Lacks Jurisdiction to Regulate The Rates BPE Charged Its Customers (Count II)

32. In Count II, Complainants allege that the rates that BPE charged customers during the extreme weather events of early 2014 were too high because "the cost to serve the average residential heating customer in January 2014 should not have exceeded approximately \$0.23 per kWh." Jt. Compl. ¶¶ 28-31. Complainants further claim that BPE's rates "do not conform to the variable rate pricing provision of the Company's [Commission-reviewed and -approved] Disclosure Statement." *Id.* at ¶ 32. Neither allegation, however, is sufficient to survive dismissal.

33. Under Code Section 2806(a), the Commission does not regulate the rate charged by generation suppliers. 66 Pa. Code § 2806(a); *Yaglidereliler*, 2014 WL 3011778, at *6 ("The Commission may not regulate the rates that [BPE] charged the Complainant for electric generation service since it is not a public utility . . ."). Rather, "the rates consumers pay in the retail electric market are governed by the terms of their contract with the supplier." *Review of*

Rules, Policies and Consumer Educ. Measures Regarding Variable Rate Retail Elec. Prods., Order, No. M-2014-2406134, at 3 (PUC Order adopted Feb. 20, 2014).⁹ In addition, the Commission recently acknowledged that it has no statutory authority to limit the prices charged by EGSs. *Petition of PECO Energy Co. for Approval of its Default Serv. Plan*, Order, No. P-2012-2283641, at 11 (PUC Order adopted Mar. 6, 2014). The Commission also has held that, where a respondent's rate-determination estimation processes were not challenged and/or not unreasonable, and the complainant seeks a refund based upon a hindsight analysis of what the rate should have been, dismissal is appropriate. *See C&D Techs., Inc. v. Pennsylvania Power and Light Co.*, 100 Pa. P.U.C. 1, No. 00992119, 2005 WL 389208, at *19 (Pa. PUC Feb. 4, 2005).¹⁰

34. Just a few weeks ago in *Yaglidereliler*, the Administrative Law Judge ("ALJ") made clear that "[the Commission] has no jurisdiction over [BPE] to the extent that the Complainant contends that the Respondent has charged it an unreasonable, unjust or illegal rate for energy generation service." 2014 WL 3011778, at *5. In that case, the complainant enrolled

⁹ The Commission has observed that it is incumbent on "consumers on variable rates to carefully review the terms and conditions of their contracts to determine whether they are at risk for large rate increases at any given time." *Id.*

¹⁰ In *C&D Techs.*, the Commission explained:

Complainants seek refunds based on a comparison of the actual PJM rate to respondent's estimate of the PJM rate used in calculating the buy-through charge. . . . Complainants have not taken issue with any aspect of respondent's process for developing its estimates nor have they disputed the validity that respondent used in preparing those estimates. Instead, their case consists entirely of comparing actual PJM rates, knowable only after-the-fact, to respondent's estimates, which had to be made before-the-fact. **Complainants rely on an improper hindsight analysis, which is not a valid basis for questioning the reasonableness of a utility's actions or decisions.** . . . Complainants seem to believe that respondent was obligated to make perfect predictions rather than mere good faith best estimates of what *the next day's* PJM rates were going to be. **Perfection is not a standard the Commission has ever imposed . . . Perfection in predicting a future event requires clairvoyance, and this is not the Commission's standard.**

Id. (underlined emphasis added).

with BPE in October 2013, and agreed to a variable rate for electric generation supply with an initial rate fixed at \$0.0790 per kWh for 90 days. *Id.* at *1-2. After enrollment, BPE mailed the complainant a copy of its Disclosure Statement, which confirmed both the complainant's initial price and that that price was fixed for 90 days. *Id.* at *2. The Disclosure Statement also stated that, after 90 days, the complainant's rate could vary on a month-to-month basis due to several factors, including wholesale electric prices. *Id.* As the ALJ noted, the Disclosure Statement contained no cap on the amount by which the variable rate could increase. *Id.*

35. After the complainant's 90-day rate-guarantee period expired, its rate increased to \$0.3999 per kWh due to the extreme weather events that hit Pennsylvania in January 2014. *Id.* at *1, *3. The complainant stated that a competing EGS offered the complainant a rate of \$0.09 per kWh and requested that the PUC direct BPE to charge the complainant that rate.

36. Construing the complainant's requested relief as seeking a refund (*i.e.*, restitution) or credit, the ALJ explained that the Commission "lacks the authority to order [BPE] to provide either a refund or credit to the Complainant." *Id.* at *5. In a straight-forward analysis, the ALJ acknowledged that the Commission did not have authority to regulate the rates charged by BPE – even to the extent that they might be "unreasonable, unjust or illegal" – and, thus, it lacked authority to order a refund or credit. *Id.*; *see also Tustin v. Respond Power LLC*, No. C-2014-2417552, at 4 (Pa. PUC June 26, 2014) ("Regarding the issue of a refund, Respondent is correct that the Commission lacks authority to order a refund to Complainant. The Commission may not regulate the rates that the Respondent charged the Complainant for electric generation services . .

. Therefore, the Commission has no jurisdiction over the issue of whether Respondent charged Complainant an unreasonable, unjust or illegal rate for electric generation services.”).¹¹

37. The Complainants’ allegations here are no different than those raised by the complainant and rejected in *Yaglidereliler*. More specifically, based on a facially flawed economic analysis,¹² Complainants here claim that BPE’s rates “were not reflective of the cost to serve residential customers” and should not have exceeded \$0.23 per kWh – in other words, that BPE’s rates were “unreasonable” or “unjust.” Jt. Compl. ¶¶ 31-32. In turn, Complainants request that the PUC order BPE “to provide appropriate restitution including without limitation refunding all charges to its customers that were over and above the Price to Compare . . .” *Id.* at ¶ 62(B). Because the Commission lacks jurisdiction to regulate BPE’s rates to order such relief, Count II should be dismissed with prejudice.¹³

D. BPE Complied With the Telemarketer Registration Act (Count V)

38. In Count V, Complainants allege that BPE violated the Pennsylvania Telemarketer Registration Act, 73 Pa. Cons. Stat. §§ 2241, *et seq.*, by failing to provide consumers with a written contract following their telephonic enrollment, which contains, among

¹¹ *Cf. McCall v. Pennsylvania Elec. Co.*, No. C-2009-2105240, 2010 WL 2911727 (Pa. PUC June 7, 2010) (“The Complainant seeks a remedy in the nature of restitution, but this Commission lacks authority to impose such a remedy on an unwilling public utility.”).

¹² Complainants rely exclusively upon an economic analysis performed by a paid expert who regularly works with the OCA, Dr. Steven Estomin. *See* Jt. Compl. ¶ 31 & App. B. Dr. Estomin’s remarkably terse and conclusory statement of what he believes should have been the maximum amount charged by BPE to its customers in January 2014 fails, among other deficiencies, to account for any of the fixed costs, overhead, advertising expenses, and other variable inputs that factor into BPE’s (and other EGSs’) rates. In any event, the Commission does not regulate EGS prices, nor does the Commission have in place any rules that require EGSs to base their rates on costs of service, which is a ratemaking principle applicable to regulated utility rates.

¹³ Complainants also are barred from seeking restitution on behalf of any individual BPE customers to whom BPE already has provided a refund. 66 Pa. Cons. Stat. § 703(a) (“If any party complained against . . . shall satisfy the complaint, the commission shall dismiss the complaint.”).

other things, a description of the services purchased and restatement of the material representations made during the telemarketing call. Jt. Compl. ¶¶ 49-58.

39. As a preliminary point, the Telemarketer Registration Act's requirement for a written contract does not apply where "[t]he contractual sale is regulated under other laws of this Commonwealth." 73 Pa. Cons. Stat. § 2245(d). Electricity sales are governed by the PUC's laws and regulations and, thus, the Telemarketer Registration Act's written contract requirement is not applicable to BPE's telephonic enrollments in the first instance. For that reason alone, Complainants fail to state a claim upon which relief can be granted and Count V should be dismissed.¹⁴

40. Even if the Act's written contract requirement did apply to BPE in this case, Complainants conspicuously fail to mention in their Joint Complaint that many BPE customers, in fact, do sign and return written contracts to BPE following a telemarketing call when they opt

¹⁴ Further, although the Commission's regulations require suppliers to comply with the Telemarketer Registration Act, the Commission does not have jurisdiction to enforce that law. The Commission, as a creature of statute, only has the authority expressly granted to it by the legislature (or which arises by necessary implication) – *i.e.*, that which is contained in the Public Utility Code. *Shedlosky v. Pa. Elec. Co.*, No. C-20066937 (Pa. PUC May 22, 2008); *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791, 794 (Pa. 1977); *W. Pa. Rys. Co. v. Pa. PUC*, 4 A.2d 545, 549-50 (Pa. Super. Ct. 1939) (PUC's authority is not boundless because its powers are statutory). Accordingly, the Commission cannot exceed its jurisdiction, and jurisdiction may not be conferred by the parties where none exists. *Yaglidereliler*, 2014 WL 3011778, at *5 (citing *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967); *City of Pittsburgh v. Pa. PUC*, 43 A.2d 348, 350 (Pa. Super. Ct. 1945) ("Notwithstanding there may be a strong desire to extend all considerations and courtesies possible to members of our armed forces, commissions and courts must act within, and cannot exceed, their jurisdiction.")).

In fact, the Commission has noted that it does not enforce the Telemarketer Registration Act. *See In re Mktg. and Sales Practices for the Retail Residential Energy Market*, 300 P.U.R. 4th 353, No. L-2010-2208332, at *4-5 (Order adopted Oct. 24, 2012). In that final rulemaking, a commenter noted that the Pennsylvania Attorney General administers and regulates the Telemarketer Registration Act, as well as the UTPCPL, and inquired how the Commission would enforce its regulations that require compliance with those laws. The Commission responded by referring to its 1998 Memorandum of Understanding with the Attorney General, pursuant to which the Commission can refer Telemarketer Registration Act and UTPCPL issues that fall under the Attorney General's jurisdiction to that Office for enforcement and/or resolution.

not to enroll telephonically. Answer ¶ 54. Regardless, the Commission has held that no written agreement following a telemarketing call is required where there is a recorded third-party verification (“TPV”) call followed by the provision of a written disclosure statement. *See, e.g., Dawes v. Pa. Gas & Elec.*, No. F-2013-2361655, 2014 WL 466614, at *12-14 (Pa. PUC Jan. 14, 2014) (holding that a valid, binding variable rate contract existed where respondent used Trusted TPV to verify complainant’s enrollment and terms thereof, and followed-up with a disclosure statement stating that rate was variable and setting forth initial rate); *Pa. PUC v. PECO Energy Co.*, 88 Pa. P.U.C. 402, No. R-00984298, 1998 WL 442683, at *10-11 (Pa. PUC May 28, 1998).

41. Indeed, in considering whether a consumer must sign and return an EGS’s disclosure statement, the PUC has “emphasize[d] that written contracts are not required but both oral and written sales agreements are ‘contracts.’ . . . [W]e offer that ‘terms of service’ best describes an agreement between a customer and a supplier.” *In re Elec. Generation Customer Choice and Competition Act – Customer Information*, 180 Pa. P.U.R. 4th 61 (Pa. PUC 1997) (hereinafter, “1997 Customer Information Order”); *see also Mackey v. Mackey*, 984 A.2d 529, 534 (Pa. Super. Ct. 2009) (“it is axiomatic that Pennsylvania courts recognize oral agreement as valid and enforceable contracts”). The Commission concluded that “***we will not require a customer to sign a written disclosure statement, as doing so would essentially require all contracts to be in writing. The required disclosure statement becomes the agreement of the parties unless the customer cancels the agreement by invoking the right of rescission prior to the starting date.***” 1997 Customer Information Order (emphasis added).

42. In *PECO Energy*, the Commission was called upon to decide the issue of whether suppliers should be able to enroll customers without obtaining such agreement in writing. 1998 WL 442683, at *10. The respondent argued that a conversation between an EGS and a customer

followed by a written confirmation was sufficient; OCA disagreed, arguing that an EGS must provide a written contract following telephonic enrollment. *Id.* Both the Administrative Law Judge and Commission expressly rejected OCA’s argument. *Id.* at *10-11.

43. BPE’s telephonic enrollment process followed by the provision of its “Disclosure Statement *and Agreement for Electric Service*,” see Jt. Compl., App. A (emphasis added), to consumers is identical to the practice utilized by the respondent and endorsed by the PUC in *Dawes, supra*. In fact, BPE uses the exact third-party verification service – Trusted TPV – as the respondent in *Dawes*. Answer ¶ 54.

44. BPE’s comprehensive Disclosure Statement, which is mailed to each customer shortly after telephonic enrollment, provides customers with all of the material terms of their contracts that were given during the telemarketing sales call and the separate TPV call. *See id.* For example, BPE’s Disclosure Statement re-confirms, among other things, (1) that the customer is purchasing electric services from BPE and provides a detailed description of that service; (2) the customer’s right of rescission; (3) that “You [the customer] have a variable rate plan”; (4) the customer’s initial guaranteed rate and the specific rate guarantee period;¹⁵ (5) how a customer may cancel service and that he or she may do so “at any time and for any reason without penalty”; and (6) how the customer will be billed for service. *See id.*

¹⁵ It bears noting that the version of the Disclosure Statement attached to the Joint Complaint was an updated, generic, template version of the document – which, in relevant part, added verbiage to the “Price per Kilowatt Hour” section to address extreme weather events – submitted by BPE and approved by the Commission in January 2014. *See* Answer ¶ 20 & Exh. 2. The actual Disclosure Statement that each BPE customer received after enrollment included that specific customer’s initial rate and rate-guarantee period – “You have a variable rate plan with a starting price set at RATE cents per kWh. This initial rate will be effective for at least the first [rate-guarantee period] days of service. Thereafter, your price may vary on a month-to-month basis. . . . At any time after [rate-guarantee period] of service, but not more frequently than monthly, Blue Pilot may increase or decrease your rate based on several factors . . .” Answer, Exh. 3, at ¶ 2 (“Price per Kilowatt Hour” section) (underlined emphasis added)

45. In short, each customer receives a written explanation from BPE that contains all the material terms of the parties' contract for service being provided, including all relevant variable rate disclosures in a clear and conspicuous manner. Further, each BPE customer is made aware of his or her right to rescind the contract and cancel at any time for any reason without incurring a penalty.

46. There is no allegation of consumer harm, or that consumers were unaware that they had enrolled and contracted with BPE under a variable rate agreement for electricity supply services.¹⁶ At most, Complainants assert a technical violation of the Telemarketer Registration Act and, under such circumstances, "no practical benefits inure nor is the public interest advanced by any further prosecution of [BPE]." *Pa. PUC Law Bureau Prosecutory Staff v. Worldxchange, Inc.*, Nos. C-20031989 & A-311038, 2004 WL 1773389 (Pa. PUC June 2, 2004) (holding that there were no "numbering compliance issues . . . notwithstanding numerous technical violations of the Public Utility Code and our regulations"); *Schneider v. Pa. PUC*, 479 A.2d 10, 16 (Pa. Cmwlth. 1984) (absolving Commission administrative law judge of "technical violation" of PUC regulation where petitioners were not prejudiced). To hold otherwise would significantly and unnecessarily elevate form over substance.

47. In short, no formal written and executed contract is required following a telemarketing enrollment where the EGS utilizes a TPV provider to record consent and the consumer is sent a hard-copy disclosure statement containing the material terms of service. *Dawes*, 2014 WL 466614, at *12-14. Given that this component of the Telemarketer

¹⁶ Nor could Complainants argue that no contract existed because a customer's acceptance of electricity and BPE's furnishing of invoices for the same establish the existence of a legally binding contract. *Scranton Elec. Co. v. Sch. Dist. of Borough of Avoca*, 37 A.2d 725, 728 (Pa. Super. Ct. 1944) ("Defendant admittedly received monthly bills during the entire period involved in this suit. It accepted and used the electric current during those years without any complaint whatsoever as to the rates charged or the amount alleged to be due for such services. It is immaterial whether there was or was not a formal contract between plaintiff and defendant.").

Registration Act has never been addressed dispositively by the Commission or Commonwealth courts, and that the Commission itself has stated that written contracts with EGS providers are not required, there is no violation of the Telemarketer Registration Act. Dismissal of Count V is appropriate.

III. CONCLUSION

48. For the foregoing reasons, BPE respectfully requests that the Commission grant its Preliminary Objection and dismiss with prejudice Counts I, II, and V of the Joint Complaint because the Commission lacks jurisdiction and/or Complainants do not and cannot state a claim upon which relief may be granted. Further, the Commission should award BPE such other relief as may be just and reasonable under the circumstances.

July 10, 2014

BUCHANAN INGERSOLL & ROONEY PC

By: 
Karen O. Moury
409 North Second Street, Suite 500
Harrisburg, PA 17101
Telephone: (717) 237-4820
Facsimile: (717) 233-0852

Mark R. Robeck
Daniel S. Blynn
KELLEY DRYE & WARREN LLP
3050 K Street, NW, Suite 400
Washington, DC 20007
Telephone: (202) 342-8400
Facsimile: (202) 342-8451

Attorneys for Blue Pilot Energy, LLC

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

COMMONWEALTH OF PENNSYLVANIA, ET AL.	:	
	:	
	:	
Complainants,	:	
	:	Docket Nos. C-2014-2427655
v.	:	
	:	
BLUE PILOT ENERGY, LLC	:	
	:	
	:	
Respondent.	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

Via First Class Mail

John M. Abel
Margarita Tulman
Bureau of Consumer Protection
Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120

Candis A. Tunilo
Christy M. Appleby
Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101

Dated this 10th day of July, 2014.



Karen O. Moury, Esq.