

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

555 Walnut Street, 5th Floor, Forum Place
Harrisburg, Pennsylvania 17101-1923
(717) 783-5048
800-684-6560

FAX (717) 783-7152
consumer@paoca.org

August 19, 2014

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

RE: Commonwealth of Pennsylvania, by Attorney General
KATHLEEN G. KANE, Through the Bureau of Consumer
Protection,
And
TANYA J. McCLOSKEY, Acting Consumer Advocate,
Complainants

v.
Blue Pilot Energy, LLC
Respondent

Docket No. C-2014-2427655

Secretary Chiavetta:

Enclosed please find the Prehearing Memorandum of Joint Complainants Commonwealth of Pennsylvania and the Office of Consumer Advocate, in the above-referenced proceeding.

Copies have been served as indicated on the enclosed Certificate of Service.

Respectfully Submitted,

Handwritten signature of Candis A. Tunilo in cursive.

Candis A. Tunilo
Assistant Consumer Advocate
PA Attorney I.D. #89891

Enclosures

cc: Honorable Elizabeth Barnes, ALJ
Honorable Joel Cheskis, ALJ
Certificate of Service

*185199

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Commonwealth of Pennsylvania, by Attorney	:	
General KATHLEEN G. KANE, Through the	:	
Bureau of Consumer Protection,	:	
	:	
And	:	Docket No. C-2014-2427655
	:	
TANYA J. McCLOSKEY, Acting Consumer	:	
Advocate,	:	
Complainants	:	
	:	
v.	:	
	:	
BLUE PILOT ENERGY, LLC,	:	
Respondent	:	

PREHEARING MEMORANDUM
OF JOINT COMPLAINANTS COMMONWEALTH
OF PENNSYLVANIA AND THE OFFICE OF CONSUMER ADVOCATE

Pursuant to Section 333 of the Public Utility Code, 66 Pa. C.S. § 333, and the August 8, 2014 Prehearing Conference Order, the Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection (BCP) and the Acting Consumer Advocate Tanya J. McCloskey (OCA) (collectively referred to as Joint Complainants), provide the following information in accordance with the Prehearing Conference Order in this matter:

I. INTRODUCTION

On June 20, 2014, the Joint Complainants filed a Joint Complaint with the Public Utility Commission (Commission) pursuant to the Public Utility Code, 66 Pa. C.S. Ch. 28, the Commission’s regulations, 52 Pa. Code Ch. 54, 56 and 111, the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.* (Consumer Protection Law), and the Telemarketer Registration Act, 73 P.S. § 2241, *et seq.* (TRA). The Joint Complaint includes five

separate counts and alleges that Blue Pilot Energy, LLC (Respondent or Blue Pilot) violated Pennsylvania law and Commission Orders and regulations. Specifically, the five Counts in the Joint Complaint are: (1) failing to provide accurate pricing information; (2) prices nonconforming to disclosure statement; (3) misleading and deceptive promises of savings; (4) lack of good faith handling of complaints; and (5) failure to comply with the Telemarketer Registration Act.

With respect to relief, the Joint Complainants request that the Commission find that Respondent violated the Public Utility Code, the Consumer Protection Law, the TRA, and the Commission's regulations and Orders; provide restitution to Respondent's customers; impose a civil penalty; order Respondent to make various modifications to its practices and procedures; and revoke or suspend Respondent's Electric Generation Supplier (EGS) license, if warranted.

II. ISSUES

A. Pricing Information and Disclosure Statement

One of the issues raised in the Joint Complaint is whether Respondent's Disclosure Statement complies with the Commission's regulations at 52 Pa. Code §§ 54.5(c), 54.43(1), 54.43(f) and 111.12(d)(1) and the Consumer Protection Law, 73 P.S. § 201-2(4)(xxi). See Joint Complaint at Count I and App. A. Specifically, Joint Complainants aver that Blue Pilot failed to provide to customers the conditions of variability and the limits on variability and also failed to provide information in plain language using common terms and in a format that enables consumers to compare prices. See Joint Complaint at Count I and App. A. Another issue is whether Respondent's prices charged in early 2014 conformed to Blue Pilot's variable rate pricing provision in its Disclosure Statement. See Joint Complaint at Count II and App. B.

In support of their allegations, Joint Complainants will call customers of Respondent that have filed complaints with the BCP or the Commission and consumers that have provided information regarding Respondent to the OCA. Additionally, Joint Complainants will submit expert testimony and written testimony of other witnesses and cross examine Respondent's witnesses.

By way of remedies for Respondent's conduct regarding its pricing, Joint Complainants seek restitution, civil penalties and if warranted, suspension or revocation of Respondent's license. Further, Joint Complainants request that the Commission order Blue Pilot to (1) provide appropriate restitution, including without limitation, refunding all charges to its customers that were over and above the Price To Compare in the customers' respective service territories from January 1, 2014 through the date of resolution of this matter, as well as any late, cancellation and/or termination fees and/or other such penalties charged to customers as a result of the Respondent's charges and customers leaving Respondent to obtain generation service elsewhere and (2) discontinue and permanently enjoin all other practices that violate the Public Utility Code, the Commission's regulations or Orders, and the Consumer Protection Law.

B. Misleading and Deceptive Promises of Savings

One of the issues raised in the Joint Complaint is whether Blue Pilot engaged in misleading and deceptive conduct in violation of the Commission's regulations at 52 Pa. Code §§ 54.43(f), 111.4, 111.5 and 111.12(d)(1) and the Consumer Protection Law, 73 P.S. §§ 201-2(4)(v), (xi) and (xxi). See Joint Complaint at Count III. The Commission's regulations themselves incorporate the Consumer Protection Law, and therefore, the Commission is required to make determinations pursuant to the Consumer Protection Law in order to determine if the Respondent violated the Commission's regulations. See 52 Pa. Code §§ 54.122(3) and

111.12(d)(1). See also Harrisburg Taxicab & Baggage Co. v. Pa. PUC, 786 A.2d 288, 292-93 (Pa. Commw. Ct. 2001). Specifically, Joint Complainants aver that Respondent led consumers to believe their rate with Blue Pilot would always save them money over the Price to Compare or always be lower than or equal to the Price to Compare or competitive therewith as inducement for consumers to switch to Blue Pilot for electric generation. See Joint Complaint at Count III.

In support of their allegations, Joint Complainants will call customers of Respondent that have filed complaints with the BCP or the Commission and consumers that have provided information regarding Respondent to the OCA. Additionally, Joint Complainants will submit expert testimony and written testimony of other witnesses and cross examine Respondent's witnesses.

By way of remedies for Respondent's misleading and deceptive promises of savings, Joint Complainants seek restitution, civil penalties and if warranted, suspension or revocation of Respondent's license. Further, Joint Complainants request that the Commission order Blue Pilot to (1) prohibit its salespeople from making pricing promises to consumers that are deceptive and inaccurate and (2) discontinue and permanently enjoin all other practices that violate the Public Utility Code, the Commission's regulations or Orders, and the Consumer Protection Law.

C. Handling of Customer Complaints

One of the issues raised in the Joint Complaint is that Respondent failed to adequately handle customer complaints and use good faith, honesty and fair dealing with Respondent's residential customers with complaints in violation of the Commission's regulations at 52 Pa. Code Ch. 56 and Blue Pilot's Licensing Order, License Application of Blue Pilot Energy, LLC for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as an Aggregator and Broker/Marketer of Retail Electric Power, Docket No. A-2011-2223888,

Order (June 10, 2011). Specifically, Joint Complainants aver that Respondent's customers could not reach Blue Pilot with their billing complaints and questions and that Blue Pilot did not return messages left by its customers and refused to address the customers' complaints and disputes about their rates. Further, Joint Complainants aver that Respondent did not utilize the procedure for handling of customer disputes set forth in the Commission's regulations at 52 Pa. Code Ch. 56. See Joint Complaint at Count IV.

In support of their allegations, Joint Complainants will call customers of Respondent that have filed complaints with the BCP or the Commission and consumers that have provided information regarding Respondent to the OCA. Additionally, Joint Complainants will submit expert testimony and written testimony of other witnesses and cross examine Respondent's witnesses.

By way of remedies for Respondent's improper handling of customer complaints, Joint Complainants seek restitution, civil penalties and if warranted, suspension or revocation of Respondent's license. Further, Joint Complainants request that the Commission order Blue Pilot to (1) implement proper customer dispute procedures and adequately staff, train and monitor all employees and agents in such procedures and (2) discontinue and permanently enjoin all other practices that violate the Public Utility Code and the Commission's regulations or Orders.

D. Failure to Comply with the Telemarketer Registration Act

One of the issues raised in the Joint Complaint is whether Respondent violated and continues to violate the Telemarketer Registration Act (TRA), 73 P.S. §§ 2245(a)(7) and 2245(c), and the Commission's regulations at 52 Pa. Code §§ 54.43(f) and 111.10(a), which require compliance with the TRA. See Request for Opinion, 2010 Pa. AG LEXIS 1 (Feb. 8, 2010). See also Joint Complaint at Count V. Specifically, Joint Complainants aver that in

transactions initiated by a telemarketing call, the TRA requires Blue Pilot to reduce the sale to a written contract and obtain the consumer's signature and provide a contract to consumers that contains: (1) a detailed description of the consumer goods and services purchased which shall match the oral description given in the telemarketing solicitation; (2) any oral or written representations made during the telemarketing solicitation; and (3) a statement that reads: "You are not obligated to pay any money unless you sign this contract and return it to the seller." See Joint Complaint at Count V.

In support of their allegations, Joint Complainants will call customers of Respondent that have filed complaints with the BCP or the Commission and consumers that have provided information regarding Respondent to the OCA. Additionally, Joint Complainants may submit expert testimony and written testimony of other witnesses and cross examine Respondent's witnesses.

By way of remedies for Respondent's violations of the TRA, Joint Complainants seek restitution, civil penalties and if warranted, suspension or revocation of Respondent's license. Further, Joint Complainants request that the Commission order Blue Pilot to discontinue and permanently enjoin all other practices that violate the Public Utility Code, the Commission's regulations or Orders, and the Consumer Protection Law and the TRA.

III. SERVICE ON JOINT COMPLAINANTS

The OCA will be represented in this case by Candis A. Tunilo and Kristine E. Robinson, Assistant Consumer Advocates. Copies of all documents should be served on the OCA as follows:

Candis A. Tunilo
Kristine E. Robinson
Assistant Consumer Advocates
Office of Consumer Advocate
5th Floor, Forum Place
555 Walnut Street
Harrisburg, PA 17101-1923
Telephone: (717) 783-5048
Facsimile: (717) 783-7152
E-mail: ctunilo@paoca.org
krobinson@paoca.org

The BCP will be represented in this case by John M. Abel and Nicole R. Beck, Deputy Attorneys General. Copies of all documents should be served on the BCP as follows:

John M. Abel
Senior Deputy Attorney General
Nicole R. Beck
Deputy Attorney General
Office of Attorney General
Bureau of Consumer Protection
15th Floor, Strawberry Square
Harrisburg, PA 17120
Telephone: (717) 787-9707
Facsimile: (717) 787-1190
E-mail: jabel@attorneygeneral.gov
nbeck@attorneygeneral.gov

IV. DISCOVERY MODIFICATIONS

Joint Complainants do not propose any discovery modifications in this matter.

V. SETTLEMENT

Joint Complainants are willing to engage in settlement discussions in this matter.

VI. PROPOSED SCHEDULE

The Joint Complainants will work with Administrative Law Judges Barnes and Cheskis (ALJs) and the parties to develop a mutually agreeable procedural schedule. At this time discovery is ongoing between the parties. The parties have served various interrogatories and requests for production of documents, and not all responses have yet been received. As these responses are received and reviewed, parties may seek to obtain depositions and serve additional written discovery. It is not clear at this time how much additional discovery is contemplated by the parties.

Given the somewhat uncertain timeframe needed for discovery, Joint Complainants submit that discovery remain ongoing and that a second prehearing conference be scheduled for at least 60 days from now. At the second prehearing conference, the parties can present a litigation schedule regarding the submission of expert, company personnel and other written testimony, hearings and briefs for the ALJs' consideration.

Joint Complainants submit, however, that hearings may be scheduled for consumer fact witnesses before written testimony is due. Joint Complainants recommend that consumer witness hearings be targeted for November 2014 so that the presentation of such testimony may be completed before the holidays and winter weather make scheduling difficult. As stated in Section VII below, Joint Complainants have identified approximately 40 potential consumer fact witnesses to present testimony in person, by affidavit, and telephonically. Joint Complainants are prepared to call a sufficient number of consumer fact witnesses in order to enable the ALJs to make determinations regarding Joint Complainants' allegations and will work with the ALJs and the parties to present evidence from a sufficient number of consumer witnesses from which the ALJs seek to receive testimony. Joint Complainants will work with the ALJs, the Commission

scheduling office and the parties to determine the dates and locations for hearings for the customer fact witnesses.

VII. WITNESSES

The Joint Complainants intend to present the direct, rebuttal, and surrebuttal testimonies, as may be necessary, of Dr. Steven L. Estomin and Ms. Barbara R. Alexander. These witnesses will present testimony in written form and may also attach various exhibits, documents, and explanatory information which will assist in the presentation of the Joint Complainants' case.

Steven L. Estomin, Ph.D.
Exeter Associates, Inc.
10480 Little Patuxent Parkway
Suite 300
Columbia, Maryland 21044
E-mail: sestomin@exeterassociates.com

Barbara R. Alexander
83 Wedgewood Drive
Winthrop, ME 04364
E-mail: barbalex@ctel.net

Joint Complainants request that copies of all discovery requests, testimony, and answers to discovery be mailed directly to the expert witnesses identified above, as well as mailing copies to counsel for the Joint Complainants.

Joint Complainants also intend to call:

Heather M. Weaver
Consumer Protection Agent
15th Floor, Strawberry Square
Harrisburg, PA 17120
E-mail: hweaver@attorneygeneral.gov

Additionally, Joint Complainants have identified approximately 40 consumer fact witnesses. Joint Complainants will identify the consumer fact witnesses they intend to call for the ALJs and parties as soon as possible. Joint Complainants specifically reserve the right to call additional witnesses, as necessary. As soon as Joint Complainants have determined any additional witness or witnesses will be necessary for any portion of their case, Joint Complainants will notify the ALJs and all parties of record.

Respectfully Submitted,



John M. Abel
Senior Deputy Attorney General
PA Attorney I.D. 47313

Nicole R. Beck
Deputy Attorney General
PA Attorney I.D. 315325

Bureau of Consumer Protection
Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
T: (717) 787-9707
F: (717) 787-1190
jabel@attorneygeneral.gov
nbeck@attorneygeneral.gov

Counsel for:

Kathleen G. Kane, Attorney General
Bureau of Consumer Protection

DATE: August 19, 2014
188950



Candis A. Tunilo
PA Attorney I.D. 89891

Kristine E. Robinson
PA Attorney I.D. 316479
Assistant Consumer Advocates

Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923
T: (717) 783-5048
F: (717) 783-7152
ctunilo@paoca.org
krobinson@paoca.org

Counsel for:

Tanya J. McCloskey
Acting Consumer Advocate

CERTIFICATE OF SERVICE

Commonwealth of Pennsylvania, by	:	
Attorney General KATHLEEN G. KANE,	:	
Through the Bureau of Consumer Protection,	:	
	:	
And	:	
	:	
TANYA J. McCLOSKEY, Acting Consumer	:	
Advocate,	:	
Complainants	:	
	:	Docket No. C-2014-2427655
v.	:	
	:	
BLUE PILOT ENERGY, LLC	:	
Respondent	:	

I hereby certify that I have this day served a true copy of the foregoing, Prehearing Memorandum of Joint Complainants Commonwealth of Pennsylvania and the Office of Consumer Advocate, in the manner and upon the persons listed below:

Dated this 19th day of August 2014.

SERVICE BY E-MAIL & INTER-OFFICE MAIL

Michael Swindler, Esq.
Stephanie M. Wimer, Esq.
Wayne T. Scott, Esq.
Bureau of Investigation & Enforcement
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

SERVICE BY E-MAIL & FIRST CLASS MAIL, POSTAGE PREPAID

Daniel S. Blynn, Esq.
Mark R. Robeck, Esq.
Kelley Drye & Warren LLP
3050 K Street, NW, Suite 400
Washington, DC 20007

Sharon Webb, Esq.
Office of Small Business Advocate
Commerce Building, Suite 1102
300 North Second Street
Harrisburg, PA 17101

Karen O. Moury, Esq.
Buchanan Ingersoll & Rooney PC
409 N. Second Street
Harrisburg, PA 17101-1357

SERVICE BY FIRST CLASS MAIL, POSTAGE PREPAID

Mark R. Robeck
Blue Pilot Energy, LLC
250 Pilot Rd., Suite 300
Las Vegas, NV 89119



Candis A. Tunilo
Assistant Consumer Advocate
PA Attorney I.D. # 89891
E-Mail: CTunilo@paoca.org

Kristine E. Robinson
Assistant Consumer Advocate
PA Attorney I.D. # 316479
E-Mail: KRobinson@paoca.org

Counsel for
Office of Consumer Advocate
555 Walnut Street 5th Floor, Forum Place
Harrisburg, PA 17101-1923
Phone: (717) 783-5048
Fax: (717) 783-7152
185179