

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

August 19, 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 Prehearing Conference Memorandum of Blue Pilot Energy, LLC 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 / AMS

Karen O. Moury

KOM/tlg
Enclosure
cc: Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

BLUE PILOT ENERGY, LLC’S PREHEARING CONFERENCE MEMORANDUM

TO ADMINISTRATIVE LAW JUDGES BARNES AND CHESKIS:

Blue Pilot Energy, LLC (“BPE”) hereby submits this Prehearing Conference Memorandum in accordance with 52 PA. CODE § 5.222 and the Prehearing Conference Order entered in this action on August 8, 2014.

NAME AND ADDRESS OF BPE’S LEGAL REPRESENTATION

The attorney representing BPE in this proceeding authorized to accept service is:

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

BPE agrees to receive service of documents electronically in this proceeding. Further, to the extent that materials are available and distributed electronically, BPE requests that copies be served upon Karen O. Moury at karen.moury@bipc.com, and her co-counsel Mark R. Robeck (*pro hac vice* pending) at mrobeck@kelleydrye.com, and Daniel S. Blynn (*pro hac vice* pending) at dblynn@kelleydrye.com.

INTRODUCTION AND BACKGROUND

BPE is an electric generation supplier (“EGS”), licensed by the Commission since June 10, 2011 to supply electricity or electric generation services to residential, small commercial, large commercial, and industrial customers in electric distribution company service territories throughout Pennsylvania. 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. The Commission’s Bureau of Consumer Services approved BPE’s Disclosure Statement on May 26, 2011.

BPE generally has offered only variable rate contracts to Pennsylvania residential consumers.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 (and as expressly stated in BPE’s Disclosure Statement), 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.”

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. The Disclosure Statement contains no cap on the amount by which a customer’s rate may increase or decrease. The Disclosure Statement also advises customers of their rescission

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; 10 of those customers remain on service with BPE. Pursuant to the terms of those customers’ contracts, that guaranteed rate has not changed and remains in effect until 2015. *Id.*

rights and that they may cancel their service at any time and for any reason, without incurring a termination fee.

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). Hoping to minimize customer attrition and prior to the unexpected wholesale price increases in 2014 described below, BPE held its customer rates near constant, sometimes achieving this by lowering its customers' rates after their rate-guarantee periods ended.

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

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.

The Commission again informed consumers that “cold temperatures and increased use of heating systems will translate into higher energy bills.”

The Federal Energy Regulatory Commission has noted that, during one of the polar vortices that hit Pennsylvania in January 2014 in particular, electricity prices surged with the location marginal prices being near or above \$2,000/Mwh for a number of hours in PJM. 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. 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.

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 specifically. The Commission’s Bureau of Consumer Services reviewed and approved the revised Disclosure Statement on January 22, 2014.

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. BPE has not lifted that self-imposed suspension.

On June 20, 2014, Complainants Pennsylvania Attorney General Kathleen G. Kane and Tanya J. McCloskey, Acting Consumer Advocate for the Office of Consumer Advocate (“OCA”), filed their Joint Complaint in this case. 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. On July 10, 2014, BPE filed Preliminary Objections seeking dismissal of Counts I, II, and V.

On July 10 and 31, 2014, the Office of Small Business Advocate and the PUC's Bureau of Investigation and Enforcement intervened in this action, respectively. BPE served both Intervenors with interrogatories and requests for production of documents. However, as a result of meet-and-confer conversations with each Intervenor, BPE either has withdrawn or narrowed each set of discovery based on the Intervenors' representations regarding their intended level of participation in the proceedings.

A Prehearing Conference has been scheduled for August 25, 2014, at 10:30 a.m. in Hearing Room 1 of the Commonwealth Keystone Building, 400 North Street, Harrisburg, Pennsylvania.

SETTLEMENT

BPE is open and available for settlement discussions with Complainants and Intervenors. BPE does not perceive any need to include specific dates for settlement conferences in the procedural schedule. BPE recognizes that any proposed settlement will be subject to the approval of the Pennsylvania Public Utility Commission.

DISCOVERY

BPE accepts the normal discovery rules outlined in Section 5.342 of the Commission's regulations, 52 PA. CODE § 5.342, and does not request any modification of them. BPE has fully participated, and will continue to participate in discovery consistent with the terms in the Presiding Officer's Prehearing Conference Order.

BPE does not propose any special orders regarding discovery. BPE and the Complainants and Intervenors have begun the exchange of and response to discovery requests.

BPE is not aware of any outstanding discovery disputes, though some may arise in the future. BPE intends to continue working with Complainants and Intervenors, through informal discovery, to expedite discovery as necessary.

LITIGATION SCHEDULE

BPE is ready to proceed to hearings during the week of March 23, 2015 and prefers that they be held in Harrisburg, Pennsylvania. BPE expects that two-to-three days would be sufficient for the hearings. BPE hopes to present the ALJs with a schedule agreeable to all participants at the August 25, 2014 prehearing conference and will work with the parties in an effort to develop a mutually acceptable litigation schedule in advance of that conference.

It is too early to finalize the preliminary pre-trial schedule, or to estimate the hearing dates, because the number of fact and expert witnesses are unknown.

WITNESSES

BPE may call the following witnesses: Raymond Perea and Joseph Kopyy. Raymond Perea is expected to give testimony regarding BPE's advertising and marketing practices, the PUC's approval of BPE's Disclosure Statement(s), training for BPE's employees, and BPE's customer service department, and investigations into and responses to customer complaints. Joseph Kopyy is expected to give testimony regarding the calculation of the rates BPE charges to its customers pursuant to their variable rate contracts (assuming such information is determined to be relevant following disposition of BPE's Preliminary Objections). These two potential witnesses' business addresses and telephone numbers are as follows:

Ray Perea, General Counsel & Manager
250 Pilot Road, Suite 300
Las Vegas, NV 89119
Phone: (800) 451-6956

Joseph Koppy, Chief Executive Officer & Manager
250 Pilot Road, Suite 300
Las Vegas, NV 89119
Phone: (800) 451-6956

BPE also intends to call expert witnesses, however, it has not yet determined who those specific individuals may be.

ISSUES

Complainants claim that BPE's Disclosure Statement fails to provide consumers with "accurate pricing information in 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 . . ." 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." BPE contends that the Commission's approval of its Disclosure Statements validates the sufficiency of the Disclosure Statements, and that, in any event, the Disclosure Statements also comply with applicable Commission regulations and orders.

BPE also contends that the Pennsylvania regulations governing provision of information to customers are unconstitutionally vague, and do not sufficiently guide BPE as to what information must be supplied and what terms are to be used; thus, those regulations – and their enforcement against BPE in the manner asserted by Complainants – violates the Due Process Clause of the U.S. Constitution. Similarly, the law does not give BPE fair notice that the failure to provide information above and beyond that which BPE already discloses in its Disclosure Statements (which were reviewed and approved by the Commission) violates those Commission regulations.

Complainants allege that the prices BPE charged its customers during the extreme weather events of early 2014 were too high, and assert that "the cost to serve the average

residential heating customer in January 2014 should not have exceeded approximately \$0.23 per kWh.” However, Respondents contend that the Commission does not have the jurisdiction to regulate the rate charged by EGSs, has no statutory authority to limit the prices charged by EGSs, and that the rates, instead, are governed by the terms of each customer’s contract with the supplier.

Complainants further allege that BPE violated the Telemarketer Registration Act by failing to provide consumers with a written contract following their telephonic enrollment. BPE argues that the Telemarketer Registration Act does not apply when “[t]he contractual sale is regulated under other laws of this Commonwealth,” in this case the PUC’s laws and regulations, and, therefore, the written contract requirement is not applicable to BPE’s telephonic enrollments. Even if the Act did apply, the Commission has held that no written agreement following a telemarketing call is required where there is a recorded third-party verification call followed by the provision of a written disclosure statement. Additionally, BPE contends that the Commission does not have jurisdiction to enforce the Telemarketer Registration Act.

PROTECTION OF CONFIDENTIAL INFORMATION

Confidential and proprietary information has been provided to the parties by BPE pursuant to an informal agreement reached via electronic mail to handle that information in a manner that is consistent with a draft Motion for Protective Order that BPE has shared with those parties. BPE is prepared to file the Motion for Protective Order with the presiding ALJs, seeking issuance of a Protective Order at the appropriate time.

CONSOLIDATION

BPE opposes the consolidation of this case with any of the other proceedings relating to rate increases caused by the inclement weather events of early 2014, given the highly sensitive

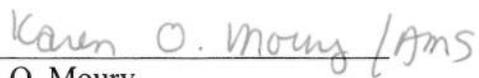
business material at issue and the varied allegations made in each complaint. While there may be common questions with respect to the requirements for disclosure statements, each company has different disclosure statements. Additionally, whether any consumers were misled requires a fact-specific analysis, which likely will need to be performed at an individual, consumer-specific level. Consolidating the complaints would also prejudice the individual customers and companies attempting to reach a speedy resolution of filed consumer complaints.

PUBLIC INPUT HEARINGS

BPE does not propose that public input hearings be held. While BPE is amenable to holding some limited hearings in other parts of Pennsylvania outside of Harrisburg to facilitate the ability of identified members of the public to offer testimony, BPE is opposed to the scheduling of open public input hearings of the nature that are held to permit testimony by consumers about proposed base rate increases.

Respectfully submitted,

August 19, 2014


Karen O. Moury
BUCHANAN INGERSOLL & ROONEY PC
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,

v.

BLUE PILOT ENERGY, LLC

Respondent.

:
:
:
:
:
:
:
:
:
:
:

Docket Nos. C-2014-2427655

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 E-Mail and First-Class Mail

Elizabeth H. Barnes
Joel H. Cheskis
Administrative Law Judges
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

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

Sharon E. Webb
Office of Small Business Advocate
300 N. Second Street, Suite 1102
Harrisburg, PA 17101

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

Michael L. Swindler
Stephanie M. Wimer
Wayne T. Scott
Pennsylvania Public Utility Commission
Bureau of Investigation & Enforcement
PO Box 3265
Harrisburg, PA 17105-3265

Dated this 19th day of August, 2014.

Karen O. Moury / AAS

Karen O. Moury, Esq.