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September 25, 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 No. C-2014-2427655

Dear Secretary Chiavetta:

On behalf of Blue Pilot Energy, LLC, I have enclosed for electronic filing the Motion of Blue Pilot Energy, LLC to Compel Office of Consumer Advocate's Responses to Certain Interrogatories and Production of a Privilege Log by both Complainants 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: Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**COMMONWEALTH OF  
PENNSYLVANIA, ET AL.**

**Complainants,**

**v.**

**BLUE PILOT ENERGY, LLC**

**Respondent.**

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**Docket Nos. C-2014-2427655**

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**NOTICE TO PLEAD**

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TO: John M. Abel  
Margarita Tulman  
Office of Attorney General  
Bureau of Consumer Protection  
15<sup>th</sup> Floor, Strawberry Square  
Harrisburg, PA 17120

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

You are hereby notified to file a written response to the enclosed Motion to Compel of Blue Pilot Energy LLC within **five (5) days** from service of this Notice. If you do not file a written response denying the enclosed Motion to Compel within five (5) days of service, the presiding officer may rule in favor of Blue Pilot Energy, LLC on the attached Motion without hearing. Failure to respond to this Motion could result in an order directing responses to Blue Pilot Energy, LLC's Interrogatories and Request for Production of Documents.

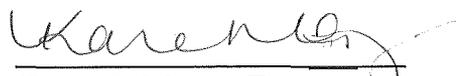
**File with:**

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, Esq.  
Buchanan Ingersoll & Rooney PC  
409 N. Second Street  
Suite 500  
Harrisburg, PA 17101

Dated: September 25, 2014

  
\_\_\_\_\_  
Karen O. Moury, Esq.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**MOTION TO COMPEL OFFICE OF CONSUMER ADVOCATE’S RESPONSES TO  
CERTAIN INTERROGATORIES AND  
PRODUCTION OF A PRIVILEGE LOG BY BOTH COMPLAINANTS**

Pursuant to 52 Pa. Code § 5.342(g), Respondent Blue Pilot Energy, LLC (“BPE”) respectfully moves the Administrative Law Judges (“ALJs”) to enter an Order compelling Complainant Office of Consumer Advocate (“OCA”) to provide full and complete answers and responses to BPE’s Interrogatory Nos. 19, 23, 27, 33, and 44 (Set II) within ten days. BPE also respectfully requests that the ALJs compel both Complainants to produce privilege logs within ten days, which contain information about the numerous documents over which each Complainant has asserted a privilege. In support of this Motion, BPE states as follows:

**I.     INTRODUCTION**

In Counts II and III of their Joint Complaint, Complainants claim that BPE made misleading and deceptive promises of savings to consumers, and failed to handle consumer complaints in good faith. Those allegations are based solely on consumers who either have complained to the Office of the Attorney General (“OAG”) or contacted OCA regarding their variable rate contracts with BPE and/or BPE’s rates. Specifically, Complainants make the following allegations in the Joint Complaint:

- Of the 10 consumers who contacted OCA, “3 [consumers] . . . stated that [BPE’s] salespeople promised guaranteed savings over the PTC and/or promised a price ‘competitive’ with the PTC as inducement for complainants to switch to [BPE].” *Jt. Compl. at ¶ 36.*
- Of the 11 formal complaints filed with the Commission against BPE that OCA reviewed, “at least 3 complainants averred that [BPE’s] salespeople promised guaranteed savings over the PTC and/or promised a price ‘competitive’ with the PTC as an inducement for complainants to switch to [BPE].” *Id. at ¶ 37.*
- Of the 11 formal complaints filed with the Commission against BPE that OCA reviewed, “at least 3 . . . of the complainants averred that when they attempted to contact [BPE] about the variable rate charges on their bills, they could not get through to the Company on the telephone and/or their emails to the Company went unanswered.” *Id. at ¶ 44.*
- Of the 10 consumers who contacted OCA, “3 [consumers] . . . stated that when they contacted [BPE] about the variable rate charges on their bills, the Company refused to address the customers’ complaints and disputes about their rates.” *Id. at ¶ 45.*

BPE served the following five Interrogatories (Nos. 19, 23, 27, 33, and 44 (Set II)) on OCA, which were designed to elicit OCA’s identification of the names and contact information for the specific consumers who form the foundation of the four OCA Joint Complaint allegations listed above:

19. Identify the three BPE customers who “stated that [BPE’s] salespeople promised guaranteed savings over the PTC and/or promised a price ‘competitive’ with the PTC as inducement for complainants to switch to [BPE],” as alleged in Paragraph 36 of the Joint Complaint. For each such person, identify that person’s (i) name, (ii) address(es), and (iii) telephone number(s).
23. Identify the three complainants who “averred that [BPE’s] salespeople promised guaranteed savings over the PTC and/or promised a price ‘competitive’ with the PTC as inducement for complainants to switch to [BPE],” as alleged in Paragraph 37 of the Joint Complaint. For each such person, identify that person’s (i) name, (ii) address(es), and (iii) telephone number(s).
27. Identify the three complainants who “averred that when they attempted to contact [BPE] about the variable rate charges on their bills, they could not

get through to the Company and/or their emails to the Company went unanswered,” as alleged in Paragraph 44 of the Joint Complaint. For each such person, identify that person’s (i) name, (ii) address(es), and (iii) telephone number(s).

33. Identify the three complainants who “stated that when they contacted [BPE] about the variable rate charges on their bills, [BPE] refused to address the customers’ complaints and disputes about their rates,” as alleged in Paragraph 45 of the Joint Complaint. For each such person, identify that person’s (i) name, (ii) address(es), and (iii) telephone number(s).

44. Identify each and every BPE customer who you allege was misled or deceived by BPE, as alleged in Count III of the Joint Complaint. For each such person, identify that person’s (i) name, (ii) address(es), and (iii) telephone number(s), and set forth all specific facts in full and complete detail how and when he or she was misled and/or deceived.

OCA, however, has refused to provide those consumers’ names and contact information as requested.<sup>1</sup>

Through this Motion, BPE seeks OCA’s answer those five Interrogatories and to obtain privilege logs from both Complainants, which log all of the otherwise responsive documents that each has withheld from BPE throughout discovery pursuant to claims of privilege and/or under the work product doctrine.

## **II. BACKGROUND**

On August 26, 2014, BPE separately served second sets of interrogatories and RFPs on OCA and OAG. On September 3, 2014, the parties met-and-conferred telephonically regarding OCA’s and OAG’s respective concerns regarding BPE’s second sets of discovery. The agreements that the parties reached during that meet-and-confer, and the discovery disputes that remained unresolved, were memorialized in a comprehensive “Summary of Conference Call RE:

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<sup>1</sup> Prior to filing this Motion, BPE asked OCA whether it would be serving belated responses to BPE’s second sets of discovery requests and, if so, when they would be served. *See* Sept. 24, 2014 Email from D. Blynn to C. Tunilo and K. Robinson (attached hereto as Exhibit “6”). OCA did not respond.

OCA and OAG Objections to Blue Pilot Set II” document that circulated amongst the parties on the morning of September 5, 2014 (the “Summary Document”).<sup>2</sup> A copy of that Summary Document is attached hereto as Exhibit “2.” While the parties reached agreement on a number of the discovery requests they were unable to resolve issues relating to (i) the logging of documents over which Complainants assert a privilege on a privilege log, and (ii) OCA’s informal objections to several categories of interrogatories. *See id.* at 3, 5-6.

Several hours after the Summary Document was circulated on September 5, OCA filed its Objections to BPE’s Second Set of Interrogatories (“OCA’s Objections”), specifically objecting to a sub-set of the interrogatories that remained unresolved following the September 3 meet-and-confer.<sup>3</sup> In particular, OCA objected to Interrogatory Nos. 13, 14, 17, 18, 21, 22, 25, 26, 31, 32, 35, 36, 39, and 40 (Set II). It did not, however, object to any other interrogatories contained in BPE’s second set – in other words, OCA did not file an Objection to Interrogatory Nos. 11, 12, 15, 16, 18-20, 23, 24, 27, 30, 33, 34, 37, 38, or 42-44 (Set II). Following an in-person meet-and-confer on September 10 in Harrisburg, Pennsylvania, BPE withdrew all of the discovery requests that were the subject of OCA’s formal Objections.<sup>4</sup>

OAG served timely responses to BPE’s second sets of discovery on September 15, 2014. OCA, however, has failed to respond to BPE’s second sets of discovery at all. BPE brings this Motion not on all of the unanswered discovery requests but, rather, seeking answers to the five

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<sup>2</sup> Notably, as permitted by 52 Pa. Code § 5.342(d), BPE offered to agree to an extension of the deadline by when Complainants were required to file formal Objections to BPE’s second sets of discovery in order to allow the parties additional time to attempt to resolve Complainants issues with the discovery requests. *See* Sept. 4, 2014 Email from D. Blynn to K. Robinson (attached hereto as Exhibit “1”) (“We are aware of the deadline for filing objections and, again, offer to agree to extend that deadline for a couple of days either informally or not oppose a formal extension to relieve the time-crunch on complainants’ end.”). Complainants did not respond to BPE’s offer.

<sup>3</sup> OAG did not file an Objection to the second sets of discovery served upon it.

<sup>4</sup> *See* Sept. 11, 2014 Email from D. Blynn to C. Tunilo (attached hereto as Exhibit “3”).

interrogatories specifically addressed herein and the production of privilege logs logging all documents that Complainants have withheld from BPE.

### III. ARGUMENT

#### A. Legal Standard

Complainants have availed themselves of the privilege of filing a lawsuit and taking discovery from BPE, but, as the Commission has made clear, having such “full participation rights also carry obligations such as . . . the obligation to respond to discovery requests . . .” *Interpretation of Procedural Rules Regarding Party Status, Rights and Obligations*, No. M-00061975, 2007 WL 7232877 (Pa. PUC Apr. 18, 2007). “[T]he scope of discovery is very broad.” *In re Pa. Tel. Co.*, No. M-00031772 (Pa. PUC Dec. 6, 2005). 52 Pa. Code § 5.321(c) outlines the discovery parameters:

[A] party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, content, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

“Discovery itself is designed to promote free sharing of information so as to narrow the issues and limit unfair surprise. It is a tool which serves each litigant and promotes judicial economy.” *Pittsburgh Bd. of Public Educ. v. M.J.N.*, 524 A.2d 1385, 1388 (Pa. Cmwlth. Ct. 1987).

Despite the breadth of discovery that is permissible, BPE seeks very narrow, very specific discovery – *i.e.*, the facts supporting OCA’s Joint Complaint allegations against BPE and the identities of the customers alleged in the Joint Complaint. As described below, BPE should be entitled to such basic discovery.

**B. OCA Is Required to Respond to the Discovery Requests That BPE Did Not Withdraw and to Which OCA Did Not File an Objection**

BPE's second sets of discovery were served on OCA on August 26, 2014. On September 5, OCA filed Objections to some of the discovery requests but not others. In particular, it did not object to Interrogatory Nos. 11, 12, 15, 16, 18-20, 23, 24, 27, 30, 33, 34, 37, 38, or 42-44 (Set II) even though the parties were unable to reach agreement on OCA's informal objections to those Interrogatories during their September 3, 2014 meet-and-confer. *See* Summary Document, at 4-6. OCA's responses to these Interrogatories were due on September 15, but it has failed to serve any discovery responses on BPE.

Under 52 Pa. Code § 5.342(c)(6), the filing of formal discovery Objections does "not excuse the answering party from answering the remaining interrogatories or subparts of interrogatories to which no objection is stated." Because it failed to file formal Objections to the 18 interrogatories noted above, OCA was obligated to answer them.<sup>5</sup> 52 Pa. Code § 5.342(c)(6). Yet, it chose not to, thus forcing BPE to file this Motion seeking the ALJs' assistance. OCA has waived its objections and should be compelled to respond to Interrogatory Nos. 19, 23, 27, 33, and 44. *See Smolsky v. Global Tel\*Link Corp.*, No. C-20078119, 2009 WL 161794 (Pa. P.U.C. Jan. 15, 2009) (adopting initial decision compelling discovery responses and awarding sanctions for each failure to timely submit discovery responses in order to deter future violations of the discovery rules); *Prater v. Verizon Pa. Inc.*, No. C-20031619, 2005 WL 1601743 (Pa. P.U.C. May 11, 2005) (ALJ granted motion to compel where complainant failed to respond to respondent's discovery requests in a timely manner).

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<sup>5</sup> Despite waiving its objections to all discovery requests that were not resolved during the parties' September 3 meet-and-confer and to which OCA did not file formal Objections, BPE is not seeking to compel responses to all outstanding discovery requests as is its right. Rather, in order to streamline the litigation, as explained above and in Section III(C), *infra*, BPE merely requests that OCA be compelled to answer five interrogatories – Nos. 19, 23, 27, 33, and 44 (Set II).

**C. BPE Is Entitled to Discover the Identities of the Consumers Alleged in the Joint Complaint (Interrogatory Nos. 19, 23, 27, 33, and 44 (Set II))**

BPE's second set of interrogatories sought, among other things, the names, addresses, and telephone numbers of the alleged BPE customers who provided OCA with information and statements that form the bases for a number of Joint Complaint allegations. Specifically, BPE served the following interrogatories on OCA:

20. Identify the three BPE customers who "stated that [BPE's] salespeople promised guaranteed savings over the PTC and/or promised a price 'competitive' with the PTC as inducement for complainants to switch to [BPE]," as alleged in Paragraph 36 of the Joint Complaint. For each such person, identify that person's (i) name, (ii) address(es), and (iii) telephone number(s).
24. Identify the three complainants who "averred that [BPE's] salespeople promised guaranteed savings over the PTC and/or promised a price 'competitive' with the PTC as inducement for complainants to switch to [BPE]," as alleged in Paragraph 37 of the Joint Complaint. For each such person, identify that person's (i) name, (ii) address(es), and (iii) telephone number(s).
28. Identify the three complainants who "averred that when they attempted to contact [BPE] about the variable rate charges on their bills, they could not get through to the Company and/or their emails to the Company went unanswered," as alleged in Paragraph 44 of the Joint Complaint. For each such person, identify that person's (i) name, (ii) address(es), and (iii) telephone number(s).
34. Identify the three complainants who "stated that when they contacted [BPE] about the variable rate charges on their bills, [BPE] refused to address the customers' complaints and disputes about their rates," as alleged in Paragraph 45 of the Joint Complaint. For each such person, identify that person's (i) name, (ii) address(es), and (iii) telephone number(s).
45. Identify each and every BPE customer who you allege was misled or deceived by BPE, as alleged in Count III of the Joint Complaint. For each such person, identify that person's (i) name, (ii) address(es), and (iii) telephone number(s), and set forth all specific facts in full and complete detail how and when he or she was misled and/or deceived.

OCA failed to object to these Interrogatories and has refused to answer them. Even if OCA had not waived any objections it might have to these Interrogatories – it has, *see supra* at Section III(B) – it still would be required to identify by name and contact information the various individuals alleged in the Joint Complaint, and tie them to each Joint Complaint allegation.

It is a fundamental principle that “a defendant is entitled under the rules of discovery to uncover the facts supporting the allegations in a plaintiff’s complaint.” *Parker v. Univ. of Pa.*, 128 Fed. Appx. 944, 948 (3d Cir. 2005); *Northampton Borough of Mun. Auth. v. Remsco Assocs. Inc.*, 22 Pa. D. & C.3d 541, 551-53 (Pa. C.P. 1981); *Flanigan v. Pottsville Hosp.*, 5 Pa. D. & C.4th 652, 53-55 (Pa. C.P. 1990) (denying plaintiff’s motion for protective order where defendant sought simply “to take discovery of facts which relate to the allegations in the complaint”). Pennsylvania courts have rejected plaintiffs’ attempts to withhold such facts on grounds of privilege and work-product, and compelled them to provide the “facts underlying the allegations of the complaint” even if “made known to [them] by [their] attorney as a result of counsel’s investigation of the case.” *Remsco*, 22 Pa. D. & C.3d at 551-53 (holding that defendant may discover from plaintiff the “facts underlying the allegations of the complaint” even if “made known to him by his attorney as a result of counsel’s investigation of the case”) (citing *Claster v. Citizens Gen. Hosp.*, 14 Pa. D. & C.3d 243 (1980)). The fact that a complaint was filed by the Government does not change the calculus. *See United States v. McDonnell Douglas Corp.*, 961 F. Supp. 1288, 1290 (E.D. Mo. 1997) (overruling work product objections to deposition question and holding that defendant was entitled to inquire into the factual bases of the government’s allegations).

Just as a plaintiff may not shield the facts that support the allegations of a complaint from discovery, it may not hide the identities of persons described only generally in its complaint.

Those identities are properly discoverable. *In re Aetna Inc. Sec. Litig.*, No. CIV. A. MDL 1219, 1999 WL 354527, at \*1-5 (E.D. Pa. May 26, 1999) (granting defendant's motion to compel response to interrogatories seeking the identity of persons described only generally in the complaint, and rejecting plaintiff's objections based on work product); *Thompson v. Jiffy Lube Int'l, Inc.*, No. 05-1203, 2007 WL 608343, at \*5 (D. Kan. Feb. 22, 2007) ("A defendant is entitled to discover the fact witnesses who were the sources of the allegations in the complaint."); *Miller v. Ventro Corp.*, No. C01-01287, 2004 WL 868202, at \*1-2 (N.D. Cal. Apr. 21, 2004) (ordering plaintiff to identify all confidential witnesses described in or referenced in the complaint and rejecting plaintiff's assertion of work product); *In re Theragenics Corp. Secs. Litig.*, 205 F.R.D. 631, 633-37 (N.D. Ga. 2002) (granting defendant's motion to compel answers to interrogatories seeking identities of individuals upon whom the plaintiffs relied in making the allegations in the complaint, and holding that the information was not entitled to work product protection). In *Miller*, the court explained:

Because Plaintiffs chose to build their complaint on a foundation of statements from twenty-two CWs [confidential witnesses], the identities of those individuals are highly relevant and reasonably calculated to lead to discoverable evidence. . . . It would be unfair to permit Plaintiffs to rely so heavily on the CWs in the complaint, yet to keep those identities from Defendants, especially given the schedule in this case. Defendants are not seeking any documents prepared by counsel, but are instead seeking a list of the subset of highly relevant potential witnesses. This list would not reveal counsel's mental impressions or processes and therefore is not protected by the work product doctrine.

2004 WL 868202, at \*2.

Just like the plaintiffs in *Miller*, Complainants here built their Joint Complaint on a foundation of hearsay consumer statements. OAG was able to identify by name and contact information in its discovery responses which of the 232 consumers complainants identified in the Joint Complaint specifically supported each individual allegation asserted by OAG. OCA should

be compelled to do the same with respect to the 21 total consumer contacts and formal complaints it relies upon the Joint Complaint.<sup>6</sup>

**D. Complainants Should Be Required to Produce Privilege Logs So That BPE Can Test Their Privilege Assertions**

In each set of its RFPs served on OCA and OAG, respectively, BPE included an instruction that “[i]f any document, ESI, or thing called for by a Request stated herein is withheld because you claim that such document, ESI [electronically stored information], or thing is protected under the attorney-client privilege, work product doctrine, or other privilege or doctrine,” the responding party must provide a privilege log setting forth several types of information for each document withheld. Despite that instruction – and despite failing to object to that instruction – neither OAG nor OCA has provided a privilege log.

Yet, each Complainant has withheld individual documents and categories of documents. For example, in its response to RFP No. 2 (Set I), OAG stated that unspecified “[e]-mails and documents between, among, or by the attorneys, agents, and support staff,” “[m]emos between, among, or by the attorneys, agents, and support staff,” and “[l]egal documents between, among, or by the attorneys and agents” were not produced on grounds that they are attorney work

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<sup>6</sup> During the September 3, 2014 telephonic meet-and-confer, OCA justified its refusal to identify the consumers identified in each of the allegations made in the Joint Complaint on grounds that, pursuant to 52 Pa. Code § 5.361(b), OCA does not organize the factual support – *i.e.*, the consumers’ names and contact information – in the format requested and, thus, OCA is absolved of answering the Interrogatory. Section 5.361(b), however, does not excuse OCA from responding to Interrogatory Nos. 19, 23, 27, 33, and 44 (Set II), which simply request the factual support for the allegations in the Joint Complaint. Section 5.361(b), by its terms, applies only in situations where a discovery request would require the answering party to “compil[e] . . . data or information which the answering party does not maintain in the format requested, in the normal course of business, or . . . requires the answering party [to] make a special study or analysis, if the study or analysis cannot be reasonably be conducted by the party making the request.” 52 Pa. Code § 5.361(b). BPE has not requested OCA to compile data or information, or conduct a special study or analysis. Rather, it simply has requested that OCA identify in an interrogatory response the names of and contact information for the consumers described in the Joint Complaint – the factual support for the Joint Complaint allegations against BPE – so that BPE can prepare its defense to those specific allegations. *Compare In re Utd. Tel. Co. of Pa.*, 77 Pa. P.U.C. 558 (1992) (rejecting respondent’s refusal to answer OCA interrogatories based on Section 5.361(b) because those interrogatories only sought the support for matters asserted by respondent in its Answer).

product. Exh. 4, at 8. OAG also broadly “submit[ted] that there are documents related to the review and summary of the complaints filed with the Bureau against [BPE] but claims attorney work-product privilege and investigative privilege” over them. *Id.* OCA similarly responded to RFP No. 2 (Set I) by noting that “OCA attorney notes, OCA attorney communications containing their mental impressions, OCA attorney summaries and legal research” were not produced on grounds that they are privileged. Exh. 5, at 1. Further, during the parties’ September 3, 2014 telephonic meet-and-confer regarding BPE’s second sets of discovery requests, OCA advised that it has withheld from production on grounds of privilege or work product certain OCA staff attorney email responses to *non-client, non-party customers* who contacted it about BPE.

A privilege log is necessary to enable BPE (and the ALJs if necessary) to test the propriety of Complainants’ privilege assertions. *T.M. v. Elwyn, Inc.*, 950 A.2d 1050, 1063 (Pa. Super. 2008) (party asserting privilege must provide privilege log or sufficiently detailed facts showing that the privilege was invoked to enable opposing party to test the invocation of privilege). “Without such a log, that part of the review process cannot begin.” *Velocity Int’l, Inc. v. Celebrity Healthcare Solutions, Inc.*, No. 09-102, 2010 WL 2196423, at \*4 (W.D. Pa. June 1, 2010) (citing cases). BPE is unable to evaluate the legitimacy of Complainants’ various privilege assertions or challenge them because Complainants steadfastly have refused to produce any privilege log. For instance, it is unclear how an email from an OCA staff attorney to a non-client, non-party consumer could be privileged or be considered work product in the first instance. That type of assertion without a sufficiently detailed privilege log only serves to underscore why a privilege log is necessary to allow BPE to test the privilege assertions here.

Complainants each should be required to provide a sufficiently detailed privilege log, which contains, at a minimum, (i) the document creation date; (ii) to, from, cc, and bcc (when

logging emails, letters, and facsimiles); (iii) author of the document (for non-communications); (iv) a description of the nature of the putatively privileged document in a manner that will enable BPE to assess the claim; and (v) the type of privilege asserted (*e.g.*, attorney-client privilege or work product). All documents withheld to date and going-forward should be required to be logged.

#### IV. CONCLUSION

For the reasons set forth above, BPE respectfully requests that OCA be compelled to provide full and complete answers and responses to Interrogatory Nos. 20 (Set I) and 19, 23, 27, 33, 37, and 44 (Set II) within ten days. BPE also respectfully requests that the ALJs compel both Complainants to produce privilege logs within ten days, which contain information about the numerous documents over which each Complainant has asserted a privilege.

September 25, 2014

BUCHANAN INGERSOLL & ROONEY PC

By: 

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Facsimile: (202) 342-8451

*Attorneys for Blue Pilot Energy, LLC*

# **EXHIBIT 1**

**Blynn, Daniel S.**

---

**From:** Blynn, Daniel S.  
**Sent:** Thursday, September 04, 2014 5:37 PM  
**To:** 'Robinson, Kristine E.'; Moury, Karen; Robeck, Mark  
**Cc:** Tunilo, Candis; [jabel@attorneygeneral.gov](mailto:jabel@attorneygeneral.gov); [mtulman@attorneygeneral.gov](mailto:mtulman@attorneygeneral.gov); 'Beck, Nicole R.'; Wilmarth, Catherine  
**Subject:** RE: OAG/OCA Objections to Blue Pilot Set II

Thanks, Kristine. We will review and provide our responses by the morning as early as possible. We are aware of the deadline for filing objections and, again, offer to agree to extend that deadline for a couple of days either informally or not oppose a formal extension to relieve the time-crunch on complainants' end.

Best,  
Dan

**From:** Robinson, Kristine E. [<mailto:KRobinson@paoca.org>]  
**Sent:** Thursday, September 04, 2014 3:24 PM  
**To:** Blynn, Daniel S.; Moury, Karen; Robeck, Mark  
**Cc:** Tunilo, Candis; [jabel@attorneygeneral.gov](mailto:jabel@attorneygeneral.gov); [mtulman@attorneygeneral.gov](mailto:mtulman@attorneygeneral.gov); 'Beck, Nicole R.'  
**Subject:** OAG/OCA Objections to Blue Pilot Set II

Dan,

Per our discussion yesterday, attached please find the summary of Joint Complainants' objections to Blue Pilot Set II. Please review, and let me know if you can agree to our requests. Thank you.

Kristine E. Robinson, Esq.  
Assistant Consumer Advocate  
Office of Consumer Advocate  
555 Walnut St.  
5th Floor, Forum Place  
Harrisburg, PA 17101-1923  
717-783-5048 (phone)  
717-783-7152 (fax)  
[krobinson@paoca.org](mailto:krobinson@paoca.org)

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Exh. 1, p.1

# **EXHIBIT 2**

## Blynn, Daniel S.

---

**From:** Blynn, Daniel S.  
**Sent:** Friday, September 05, 2014 12:00 PM  
**To:** 'Robinson, Kristine E.'; Moury, Karen; Robeck, Mark  
**Cc:** Tunilo, Candis; [jabel@attorneygeneral.gov](mailto:jabel@attorneygeneral.gov); [mtulman@attorneygeneral.gov](mailto:mtulman@attorneygeneral.gov); 'Beck, Nicole R.'; Wilmarth, Catherine  
**Subject:** RE: OAG/OCA Objections to Blue Pilot Set II  
**Attachments:** 2014.9.5 Comments on OAGsOCAs Objections to Second Sets of Discovery v2 (3).docx

Kristine,

BPE's responses (in blue text) are attached.

Best,  
Dan

---

**From:** Robinson, Kristine E. [<mailto:KRobinson@paoca.org>]  
**Sent:** Thursday, September 04, 2014 3:24 PM  
**To:** Blynn, Daniel S.; Moury, Karen; Robeck, Mark  
**Cc:** Tunilo, Candis; [jabel@attorneygeneral.gov](mailto:jabel@attorneygeneral.gov); [mtulman@attorneygeneral.gov](mailto:mtulman@attorneygeneral.gov); 'Beck, Nicole R.'  
**Subject:** OAG/OCA Objections to Blue Pilot Set II

Dan,

Per our discussion yesterday, attached please find the summary of Joint Complainants' objections to Blue Pilot Set II. Please review, and let me know if you can agree to our requests. Thank you.

Kristine E. Robinson, Esq.  
Assistant Consumer Advocate  
Office of Consumer Advocate  
555 Walnut St.  
5th Floor, Forum Place  
Harrisburg, PA 17101-1923  
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Summary of Conference Call RE: OCA and OAG Objections to Blue Pilot Set II

OCA, OAG, and Blue Pilot agreed to the following resolutions to Blue Pilot Set I. The OCA and OAG request that the same resolutions apply to Blue Pilot Set II:

- Interrogatory Definitions #6, #14 and RPD Definition #6: Joint Complainants request that the requirement that all “drafts” be provided be stricken from these definitions, as providing such for expert testimony/reports/affidavits and documents filed by OCA attorneys with the Commission or other agencies/courts is beyond the permissible scope of discovery (§§ 5.323 and 5.324). Additionally, locating drafts of documents (that may or may not even exist) is unreasonably burdensome (§ 5.361). Blue Pilot indicated it would get back to Joint Complainants about this request.

**Previous Agreement for Set 1: Blue Pilot agrees that draft of experts reports is beyond the scope of discovery and need not be produced. However, drafts of other material is not beyond the scope of discovery and if it can be located with a reasonable search then it should be produced. In other words, Blue Pilot does not agree that just because a document is a draft means searching for it is unreasonably burdensome.** Pursuant to Karen Moury’s e-mail of August 8, 2014, Blue Pilot agrees to the exclusion of “drafts” to the extent they would constitute privileged attorney work product.

- Interrogatory Instruction #1: Joint Complainants object to the unreasonably burdensome requested privilege log and instead request that Blue Pilot accept a general description of the information for which a privilege is claimed and the privilege that is claimed. Blue Pilot indicated that it would develop language for the Joint Complainants to consider.

**Previous Agreement for Set 1: The purpose of the information requested in the instruction is so Blue Pilot can determine the basis of the privilege claim and whether to challenge the claim, including whether any asserted privilege may have been waived. Because any challenge is necessarily on a document by document basis, then the log must be on a document by document basis. Without waiving the instruction, Blue Pilot agrees to accept a log with less detail if OAG and the AG agree (i) to provide in good faith a log with the information necessary for Blue Pilot**

to determine the basis of the privilege claim and whether to challenge the claim, and (ii) to provide additional information for any logged document Blue Pilot feels is insufficient.

The previous agreement in red text above did not work with respect to complainants' first sets of discovery responses. First, BPE did not receive any type of privilege log – categorical or on a document-by-document basis. Rather, there were broad and vague descriptions of privileged types of documents in each complainant's responses. Second, some documents – like the Christy Appleby email to a consumer that was referenced by OCA during the 9/3/14 conference call – were not even identified. BPE still has not been provided with that consumer's name despite assurances by the OCA that it would do so.

BPE needs to be able to test assertions of privilege over documents or categories of documents. Thus, there must be a true privilege log. BPE is amenable to a categorical privilege log of the Facciola-Redgrave framework (see <http://www.fclr.org/fclr/articles/html/2009/facciolaredgrave.pdf>). Further, complainants may propose certain categories of documents that are "presumptively privileged," such as purely internal emails discussing the litigation, claims, defenses, etc., and attorney notes that have not been disseminated beyond their respective offices. Those may be categorized with an index of the type discussed in the above-linked article. However, other types of documents, such as emails between the OAG or OCA and a consumer (like the previously-referenced Appleby email) need to be logged in standard format (*i.e.*, date (if referring to an email, letter, fax, etc.); to, from, cc, bcc; author of the document (for non-communications); a description of the nature of the putatively privileged document in a manner that will enable BPE to assess the claim; and the type of privilege asserted (e.g., attorney-client privilege, work product, etc.)). An example of a proper privilege log is below.

Moreover, BPE's requests for additional information for any "logged" document from complainants' responses to BPE's first sets of discovery were rebuffed during the 8/28 conference call. That further explains why the previous agreement no longer is amenable to BPE.

Date	To	CC	BCC	From	Description	Privilege
March 16, 2010	Jane Doe	N/A	N/A	John Doe	Email regarding response to FDA warning letter, containing inside counsel's mental impressions regarding same	Attorney Work Product; Attorney-Client Communication

- Interrogatory Instruction #12(b) and (c): Joint Complainants object to these, as they are beyond the permissible scope of discovery as set out in Section 5.323 and 5.324. It is also beyond the requirements for answers in Section 5.342(a). Additionally, providing this additional information about each response would be unreasonably burdensome. Blue Pilot indicated that it would get back to Joint Complainants about striking Instruction #12 (b) and (c).

**Blue Pilot disagrees that Section 5.342(a) prohibits requesting that an interrogatory answer include the information requested in Instruction #12(b) and (c) and does not agree to strike those instructions.** Pursuant to Karen Moury's e-mail of August 8, 2014, Blue Pilot requests nothing more than a reasonable search. Further, Blue Pilot does not request OCA and OAG to search their ESI beyond their technical limitations.

The parties agreed to the following resolutions regarding Blue Pilot Set II:

- Interrogatories # 1, 2: Joint Complainants submit that they have already identified witnesses they intend to call in responses to Blue Pilot Interrogatories Set I-2. Joint Complainants object to these interrogatories to the extent they require Joint Complainants to answer interrogatories already asked or identify their potential witnesses. Blue Pilot agrees to withdrawal Interrogatory #1. In resolution of the objection to Interrogatory #2, Joint Complainants offer to identify the consumer witnesses they intend to call as witnesses at an agreeable date, but no earlier than October 8, 2014. Blue Pilot agreed to get back to the Joint Complainants regarding whether this resolution would be satisfactory.

This compromise is acceptable to BPE.

- Interrogatories #s 3-8: Joint Complainants indicated that the information sought will be provided in expert testimony served pursuant to the litigation scheduled established in this matter. Blue Pilot indicated that it would get back to Joint Complainants about withdrawing Interrogatory #3. Blue Pilot agrees to withdrawal Interrogatories #s 4-8.

BPE agrees to withdraw Interrogatory Nos. 3-8 without prejudice to its right to renew them later if needed.

- Interrogatories #s 9-10: Joint Complaints submit that they identified in the Joint Complaint all violations of Commission regulations or orders that they are pursuing. If Joint Complainants identify additional Commission regulations or orders that they intend to pursue, they will amend their Joint Complaint accordingly. Blue Pilot agrees to withdrawal these interrogatories.

BPE agrees to withdraw Interrogatory Nos. 3-8 without prejudice to its right to renew them later if needed.

- Interrogatories #s 11, 12, 15, 16, 19, 20, 23, 24, 27, 28, 29, 30, 33, 34, 37, 38, 44: The OCA submits that it has not organized this information in the requested manner and is not required to do so. Blue Pilot agrees to withdrawal these Interrogatories from Set II to the OCA.

Complainants have alleged various numbers of unidentified “mystery” consumers to support the allegations in the joint complaint. BPE is entitled to know who those customers are and which complaints or contacts support the allegations. Further, BPE is entitled to know specifically what those customers said in their complaints/contacts that led to the specific joint complaint allegations. In short, BPE simply seeks to discover the factual bases for the allegations in the joint complaint. These are facts; not work product. While complainants may not organize their documents in any sort of way, that is not BPE’s problem, nor is it an excuse not to identify the

specific consumers, contacts, and complaints that are alleged in the joint complaint. 52 Pa. Code § 5.361(b) does not apply in the first instance and, even if it might apply, it is only applicable “if the study or analysis [that would be required of the responding party pursuant to the discovery request] cannot reasonably be conducted by the party making the request.” That is not the situation here. BPE has been forced to sift through stacks of unorganized complaints and consumer contacts produced by complainants, and is at its own peril to try to recreate their complaint allegations and tie those to various complaints/contacts. Even taking on that burden, BPE has been unable to find many of the consumers or contacts/complaints that purportedly support the joint complaint allegations. Thus, BPE will not withdraw Interrogatory Nos. 11, 12, 15, 16, 19, 20, 23, 24, 27, 30, 33, 34, 37, 38, and 44.

BPE will agree to withdraw Interrogatories 28 and 29 – regarding identifying each consumer telephone call and email that allegedly went unanswered by BPE – without prejudice to renew them later as needed if complainants will confirm that they do not have such information beyond the statements made by consumers contained in the complaint packets and customer contacts that already have been produced.

Interrogatories #s 13, 14, 17, 18, 21, 22, 25, 26, 31, 32, 35, 36, 39, 40: The OCA submits that it has already provided any non-privileged information from consumer contacts to Blue Pilot in responses to RPD to the OCA Set I-16 and I-17. Joint Complainants object to these interrogatories to the extent that they seek attorney work product. Blue Pilot has indicated that it will get back to Joint Complainants as to whether it will withdrawal these Interrogatories.

BPE will withdraw Interrogatory Nos. 13, 14, 17, 18, 21, 22, 25, 26, 31, 32, 35, 36, 39 and 40 without prejudice to renew them later as needed, if complainants agree to produce a privilege log of the type described above. In particular, any communications of the Appleby-consumer type need to be logged individually so that BPE may properly test any assertion of privilege.

- RPDs #s 10-11: Joint Complainants object to these RPDs, and submit that these RPDs are not relevant and will not lead to admissible evidence. In another EGS complaint case, the ALJs held that such information is not relevant. See attached Commission Order. Blue Pilot indicated that it would get back to Joint Complainants about withdrawing these requests.

BPE has been advised by Rita Tulman that OAG objects to RFP No. 2 (Set 2) served on it for the same reasons stated above with respect to RFP Nos. 10 and 11 (Set 2) served on OCA. The *Hiko* order that complainants attached does not hold that an EGS may not discover the unaccounted-for consumer complaints and contacts against non-respondent EGSs that are identified in the joint complaint. The issue there was whether Hiko could identify which of the third-party marketers it used also were used by the other respondent EGSs. The pending IDT motion to compel, however, does squarely address the discovery sought in RFP Nos. 10 and 11 directed to

OCA and RFP No. 2 directed to OAG. BPE will agree to withdraw these RFPs for now, pending resolution of the IDT motion to compel.

The OCA makes the following additional objections to Blue Pilot Set II:

- Interrogatories # 41-43: The OCA submits that this information has already been requested and provided to Blue Pilot in response to Blue Pilot Interrogatories Set I-28, and therefore, requests that the Interrogatories be withdrawn.

BPE will withdraw Interrogatory No. 41 (which seeks identification of each and every remedy OCA seeks) based on OCA's response to Interrogatory No. 28 (Set 1). However, BPE is entitled to discover, for the monetary remedies identified by OCA – *i.e.*, restitution and civil penalties – (1) what those amounts are (Interrogatory No. 43) and (2) how OCA calculates those amounts (Interrogatory No. 42). Interrogatory Nos. 42 and 43, thus, will not be withdrawn.

- RPD # 2-3: The OCA objects to Blue Pilot RPDs Set II-2 and II-3, because the information sought is not relevant and will not lead to admissible evidence. The OCA further submits that even if it was relevant and would likely lead to admissible evidence, it is unclear what information Blue Pilot is requesting in RPD Set II-2. By way of informal answer, however, the OCA refers Blue Pilot to the OCA's *Electric Shopping Guide*, located on the OCA's website and to the OCA's response to Blue Pilot Set I-33. The OCA requests that RPD #2 and #3 be withdrawn.

BPE will withdraw RFP No. 2 without prejudice to renew it later as needed, if OCA confirms that the "Price Comparison Charts (Archive)" available at [http://www.oca.state.pa.us/Industry/Electric/elecomp/Archive/pricecharts\\_archive.htm](http://www.oca.state.pa.us/Industry/Electric/elecomp/Archive/pricecharts_archive.htm) includes all "Residential Consumer's Electric Shopping Guides". In other words, there are no gaps or missing documents from those available on that website.

However, RFP No. 3 requests the underlying support that OCA used to assemble those Guides and BPE is entitled to discover such information so that it can prepare its response to complainants' expert, Stephen Estomin's affidavit supporting the joint complaint and previously produced analysis. The information OCA used to assemble its Guides is relevant and may lead to the discovery of admissible evidence. BPE will not withdraw RFP No. 3.

- RPDs #s 4-5: The OCA objects to Blue Pilot RPDs Set II-4 and II-5, because this information is not relevant and will not lead to admissible evidence. By way of informal answer, the OCA submits that such information is available on the OCA's website. The OCA requests that RPD #4 and #5 be withdrawn.

BPE will withdraw RFP No. 4 without prejudice to renew it later as needed, if OCA confirms that the links available at <http://www.oca.state.pa.us/Industry/Electric/elecstats/ElectricStats.htm> constitute all "Pennsylvania Electric Shopping Statistics." In other words, there are no gaps or missing documents from those available on that website.

However, as discussed above with respect to RFP No. 3, the information OCA used to assemble the information contained in the "Pennsylvania Electric Shopping statistics" documents is relevant and may lead to the discovery of admissible evidence. BPE will not withdraw RFP No. 5.

- RPDs #6- The OCA objects to this RPD on the grounds that it has already provided this information in response to Interrogatory Set I-33. Further, the information requested is not relevant and will not lead to admissible evidence because Blue Pilot does not participated in the OCA's *Electric Shopping Guide*, and it is overly burdensome and expensive for the OCA to copy and provide to Blue Pilot information that is available on the OCA's website. Accordingly, the OCA refers Blue Pilot to the OCA's *Electric Shopping Guide*, located on the OCA's website, and to the OCA's response to Blue Pilot Set I-33 and requests that the request be withdrawn.

BPE agrees to withdraw RFP No. 6 without prejudice to its right to renew it later if needed.

- RPDs # 7-9: The OCA objects to these RPDs on the grounds that this information is not relevant and will not lead to admissible evidence. All of the requested information relates to other companies, as Blue Pilot has not participated in the OCA's *Electric Shopping Guide*. Moreover, with respect to RPD # 8, the OCA *Electric Shopping Guide* is available to the public, and if the OCA could even respond, it would be extremely burdensome to do so. The OCA requests that RPD Set II-7, II-8 and II-9 be withdrawn.

BPE agrees to withdraw RFP No. 7 without prejudice to its right to renew it later if needed.

Before BPE will agree to withdraw RFP Nos. 8 and 9, however, it will need OCA to explain the alleged "extreme burden" with particularity so that we can assess the alleged burden. For example, why would it be burdensome and why would that burden be "extreme" to justify OCA not to respond to the discovery? What would OCA need to do to find documents responsive to these RFPs? If it simply would be running ESI searches using the basic Outlook search function or any other search tools within OCA's technical limitations, that likely will not be enough of a burden. If it's something more, that may be another story and BPE will consider the burden when deciding whether to withdraw these RFPs.

- RPD # 13: The OCA objects to RPD #13 on the ground that it is overly broad and burdensome. The OCA submits that it does not have any requested information relating to Heather Weaver. For documents concerning, referring, or relating to Dr. Estomin, the OCA refers Blue Pilot to the OCA's response to Blue Pilot RPD Set I-9. The OCA proposes to provide Blue Pilot with Barb Alexander's CV, which includes a list of her testimonies in resolution of OCA's objection to this request.

Along the same lines as the parties' agreement concerning Dr. Estomin from the first round of discovery, BPE will agree to accept Barb Alexander's CV, along with copies of (not links to) all of Ms. Alexander's reports.

The OAG makes the following additional objections to Blue Pilot Set II:

- Interrogatories #s 11 through 36: The OAG submits information for Interrogatories 11 through 14 was already provided to Blue Pilot in responses to RPD to the OAG Set I-32, and therefore, requests that the Interrogatories be withdrawn. The OAG submits information for Interrogatories 15 through 18 was already provided to Blue Pilot in responses to RPD to the OAG Set I-35, and therefore, requests that the Interrogatories be withdrawn. OAG submits that Interrogatories 19-27 relates to customers that contacted the OCA and OAG does not possess or have custody over information that OCA tracked with respect to their customer contacts, and therefore, requests that the Interrogatories be withdrawn. The OAG submits information for Interrogatories 28 through 36 has not been organized in the requested manner and the OAG is not required to do so, and therefore, requests that the Interrogatories be withdrawn.

BPE agrees to withdraw Interrogatory Nos. 13, 14, 17, 18, 31, 32, 35, and 35 without prejudice to its right to renew them later as needed, based upon John Abel's representation during the parties' 9/3/2014 conference call that OAG has not communicated with the consumer complainants beyond the correspondence contained in the previously produced complaint packets.

BPE further agrees to withdraw Interrogatory Nos. 19-27 without prejudice to its right to renew them later as needed based on OAG's representations above.

BPE disagrees that the information requested in Interrogatory Nos. 15 and 16 has been previously provided and will not withdraw those interrogatories. In particular, complainants have alleged various numbers of unidentified "mystery" consumers to support the allegations in the joint complaint. BPE is entitled to know who those customers are and which complaints or contacts support the allegations. Further, BPE is entitled to know specifically what those customers said in their complaints/contacts that led to the specific joint complaint allegations. In short, BPE simply seeks to discover the factual bases for the allegations in the joint complaint. These are facts; not work product. While complainants may not organize their documents in any sort of way, that is not BPE's problem, nor is it an excuse not to identify the specific consumers, contacts, and complaints that are alleged in the joint complaint. 52 Pa. Code § 5.361(b) does not

apply in the first instance and, even if it might apply, it is only applicable “if the study or analysis [that would be required of the responding party pursuant to the discovery request] cannot reasonably be conducted by the party making the request.” That is not the situation here. BPE has been forced to sift through stacks of unorganized complaints and consumer contacts produced by complainants, and is at its own peril to try to recreate their complaint allegations and tie those to various complaints/contacts. Even taking on that burden, BPE has been unable to find many of the consumers or contacts/complaints that purportedly support the joint complaint allegations. Thus, BPE will not withdraw Interrogatory Nos. 15, 16, 30, 33, 34, and 36.

BPE will agree to withdraw Interrogatories 28 and 29 – regarding identifying each consumer telephone call and email that allegedly went unanswered by BPE – without prejudice to renew them later as needed if OAG will confirm that it does not have such information beyond the statements made by consumers contained in the complaint packets that already have been produced.

- Interrogatories #s 38 through 40: The OAG submits information for Interrogatories 11 through 14 was already provided to Blue Pilot in responses to RPD to the OAG Set I-48, and therefore, requests that the Interrogatories be withdrawn.

BPE agrees to withdraw Interrogatory Nos. 38-40 without prejudice to its right to renew them later as needed, based upon John Abel’s representation during the parties’ 9/3/2014 conference call that OAG has not communicated with the consumer complainants beyond the correspondence contained in the previously produced complaint packets.

- Interrogatories # 41-43: The OAG submits that this information has already been requested and provided to Blue Pilot in response to Blue Pilot Interrogatories Set I-28, and therefore, requests that the Interrogatories be withdrawn.

BPE disagrees that this information has already been requested or been provided by OAG to BPE. OAG answered Interrogatory 8 (Set I) in relevant part as follows: “The Commonwealth is not seeking damages. The Commonwealth is seeking remedies as provided by law, including restitution to Blue Pilot’s customers.” BPE is entitled to discover if OAG is seeking any “remedies provided by law” beyond restitution. Likewise, BPE, as discussed above, BPE is

entitled to discover the extent of the monetary remedies and how those amounts were calculated. BPE will not withdraw these interrogatories.

- RPD # 2: The OAG objects to Blue Pilot RPD Set II-2, because the information sought is not relevant and will not lead to admissible evidence. The OCA requests that RPD Set II-2 be withdrawn.

BPE will agree to withdraw this RFP for now, pending resolution of the IDT motion to compel discussed above.

- RPD # 3: The OAG objects to Blue Pilot RPD Set II-3, because the information sought is not relevant and will not lead to admissible evidence. The OAG submits that RPD # 3 relates to customers that contacted the OCA and OAG does not possess or have custody over information that OCA tracked with respect to their customer contacts, and therefore, requests that RPD #3 be withdrawn.

BPE agrees to withdraw RFP No. 3 without prejudice to its right to renew it later as needed.

- RPD # 4: The OAG indicated that the information sought will be provided in expert testimony and written testimony of other witnesses served pursuant to the litigation scheduled established in this matter, and therefore, requests that RPD #4 be withdrawn.

BPE agrees to withdraw RFP No. 4 without prejudice to its right to renew it later as needed.

- RPD # 5: The OAG objects to this as beyond the scope of permissible discovery. For further response, see our objections to Interrogatories #3, and therefore, requests that RPD #5 be withdrawn.

BPE agrees to withdraw RFP No. 5 without prejudice to its right to renew it later as needed.

- RPD # 7: The OAG submits that this information has already been requested and provided to Blue Pilot in response to Blue Pilot RPD Set I-2, and therefore, requests that the Interrogatories be withdrawn.

BPE agrees to withdraw RFP No. 7 without prejudice to its right to renew them later as needed, based upon John Abel's representation during the parties' 9/3/2014 conference call that OAG has not communicated with the consumer complainants beyond the correspondence contained in the previously produced complaint packets.

190147

# **EXHIBIT 3**

## Blynn, Daniel S.

---

**From:** Blynn, Daniel S.  
**Sent:** Thursday, September 11, 2014 10:08 AM  
**To:** Tunilo, Candis  
**Cc:** 'Robinson, Kristine E.'; Abel, John; 'Tulman, Margarita'; Robeck, Mark; Wilmarth, Catherine; 'Moury, Karen O.'  
**Subject:** OCA/OAG v. BPE - OCA's Objections to BPE's Second Set of Interrogatories and RFPs

Candis,

As we discussed yesterday at the settlement meeting, given OCA's representations that it has had no communications with consumers beyond what is contained in the pink "contact packets," and that it has no notes of telephone conversations with other consumers and otherwise is unable to provide the substance of those conversations beyond "BP[E]'s rates, charges, billing and marketing practices," BPE will agree to withdraw Interrogatory nos. 13, 14, 17, 18, 21, 22, 25, 26, 31, 32, 35, 36, 39, and 40 (Set II) directed to OCA, thus resolving OCA's objections to those Interrogatories.

Further, given OCA's explanation that it simply compiles the rate/price information provided by EGSs and publishes the same in its Price Comparison Charts, Pennsylvania Electric Shopping Statistics reports, and Electric Shopping Guides, BPE will withdraw RFP nos. 3-5, 8 and 9 (Set II) directed to OCA, thus resolving OCA's objections to those RFPs.

Finally, BPE will accept a copy of Barb Alexander's CV for the time-being in order to resolve RFP no. 13 (Set II) directed to OCA. Note that, despite your assertion yesterday that OCA cannot be responsible for producing Alexander's testimony and reports from 30 years ago, BPE did not ask for those. Rather, Instruction no. 14 to the second set of RFPs advised that "[t]he relevant time covered by each Request is January 1, 2010 to the present, unless otherwise stated or indicated by the context of the Request." Regardless, BPE will withdraw RFP no. 13 (Set II) directed to OCA, thus resolving OCA's objection to that RFP.

Accordingly, all issues raised by OCA in its Objections now have been resolved.

Best,  
Dan

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[www.kelleydrye.com](http://www.kelleydrye.com)  
[www.adlawaccess.com](http://www.adlawaccess.com)

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# **EXHIBIT 4**

Commonwealth of Pennsylvania and Office of Consumer Advocate v. Blue Pilot Energy, LLC  
C-2014-2427655

Commonwealth of Pennsylvania Responses to Blue Pilot Energy, LLC Interrogatories and  
Requests for Production  
Set I

2. Any and all documents and/or correspondence concerning, referring, or relating to BPE.

**RESPONSE:**

Please see attached. Each consumer complaint maintains the following bates numbers:

<u>CONSUMER NAME/DOCUMENT</u>	<u>Bates</u>	
	<u>Start</u>	<u>End</u>
5 R Us LLC	1	28
Age Craft Manufacturing	29	32
Alexander John	33	37
American Legion Post	38	61
AmeriSource	62	123
AmeriSource	124	143
AmeriSource	144	163
Anderson, Arthur	164	173
Anderson, John	174	183
Anderson, John	184	190
Antique Center of Strabane	191	195
APSS, Inc.	196	207
Arnold, Joy	208	211
Automated Entrance Systems, Co., Inc.	212	225
Bacorn, Darrell	226	229
Barboza, Merlin	230	234
Barboza, Merlin	235	239
Barchik, Susan	240	266
Battersby, Matthew & Luann	267	338
Beck, Roland	339	349
Beeman, Linda	350	354
Primary Care Medicine	355	392
Bella, Deborah	393	473
Bella, Deborah	474	486
Bella, Deborah	487	497
Bensalem Senior Center	498	523
Bishop, Robert	524	538
Black, Clayton & Tamara	539	546
Brandt, Erik	547	552
Brotzman, David	553	557

Commonwealth of Pennsylvania and Office of Consumer Advocate v. Blue Pilot Energy, LLC  
C-2014-2427655

Commonwealth of Pennsylvania Responses to Blue Pilot Energy, LLC Interrogatories and  
Requests for Production  
Set I

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Bumbaugh, Renee	575	579
Bundy, Elsame	580	596
Burkholder, Robert	597	603
Buttillo, Thomas	604	609
Byers, Gerald	610	647
Calandi, Debbie	648	664
Calandi's Café & Ristorante	665	691
Campanella, Martha	692	698
Carrero, Ingrid	699	703
Casanova, Evelyn	704	708
Cassel, John	709	713
Chazan, Jerry	714	735
Chicarielli, Tami	736	740
Coolidge, Louella	741	744
Costa, Jaime	745	749
Coury, Michael	750	757
Covaleski, Jennifer	758	762
Crawford, Shari	763	767
D'Adamo, Robert	768	778
D'Angelo, Patrick	779	799
Danville Airport	800	809
Davidson, Donna	810	827
Davies, Barbara	828	832
DeBlasio Group	833	835
Deery, James	836	845
Delano Township	846	850
DeMartyn, Donald	851	858
Diethorn, Justina	859	863
Dingler, George	864	882
Distinctive Detail of Manheim	883	922
Dively, Susan	923	927
Duke, David	928	938
Durante, Loni	939	932
Dyle E. Bray Home Association	963	977
Eisenhofer, Fran	978	982
Elcock, Fred	983	1004

Commonwealth of Pennsylvania and Office of Consumer Advocate v. Blue Pilot Energy, LLC  
C-2014-2427655

Commonwealth of Pennsylvania Responses to Blue Pilot Energy, LLC Interrogatories and  
Requests for Production  
Set I

Ellingsen, Dan	1005	1014
Ellis, Charles & Betty	1015	1045
Epler, Jackie	1046	1050
Eric Animal Hospital	1051	1070
Espinoza, Juan	1071	1075
Estvanik, Dennis	1076	1080
Euler, Gary	1081	1109
Evans, Carol	1110	1131
Evans, William	1132	1162
Fairview Avenue BIC Chursh	1163	1167
Farabaugh Engineering & Testing	1168	1185
Faust, Dean	1186	1199
Fellin, Michael	1200	1209
Fickes, Rachel	1210	1214
Fickes Pumps Inc.	1215	1244
Fitch, Allen	1245	1252
Flowers by Regina	1253	1263
Folcarelli, John	1264	1278
Ford, Mark	1279	1291
Foster, Michael	1292	1343
Frable, Tracey	1344	1357
Fraps, Jennifer	1358	1362
Frey, Dennis	1363	1370
Fritz, Gerald & Barbara	1371	1383
Fuller, Ernest	1384	1396
Gaidos, James	1397	1411
Gehris, Wilmer	1412	1422
General American Resources, Inc.	1423	1427
George, Edward	1428	1434
Gilles, Tammy	1435	1442
Giran, Andrew & Karen	1443	1452
Osorio, Angel Gonzales	1453	1457
Gordon, Harold	1458	1468
Gorham Holding Corporation	1500	1469
Goss, John	1501	1508
Graboski, Robyn	1509	1513
Grasavage, Rebecca	1514	1518

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Green Outlet	1519	1546
Hamilton, Jeffrey	1547	1551
Hartman, Robert	1552	1564
Herman, Catherine	1565	1569
Hess, Larue & Louise	1570	1613
Hockenberry, Billie	1614	1620
Scottdale Pharmacy, Inc.	1621	1628
Holl, Rebecca	1629	1631
Hornberger, Scott	1632	1637
Hottenstein, William	1639	1645
Howard Johnsons Motor Lodge	1646	1649
Hubler, Brandon	1650	1657
Huckestein, Laurie	1658	1674
Iannis Pizzeria	1675	1678
Isik, Irfan	1679	1697
Mehmet, Isik	1698	1716
Jackovic, Tom	1717	1722
Jivani, Jyotsna	1723	1727
Jones, Karen	1728	1732
Kao, Chien-Ping	1733	1737
Katzeff, Joyce	1738	1754
Kelier's Country Store	1755	1782
Khadr, Aly	1783	1789
Keiffer, Robert	1790	1794
Kirchkesner, Joseph	1795	1799
Klein, Ray	1800	1807
Knepp, Kathy Jo	1808	1820
Kraft, Karen	1821	1873
Krause, April	1874	1890
Kreitz, Earl Jr.	1891	1903
Krivan Hall Association	1904	1923
Krout, Russel	1924	1952
Lamparter, William	1953	1957
Laukaitis, Rozalia	1958	1972
Lehman, Forrest & Megan	1973	2003
LeTersky, Jo Ann	2004	2008
LN Nails	2009	2024

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Lucchi, Tammy	2025	2034
Lutheran Church of Redeemer	2035	2060
Mauro, Karen	2061	2075
Meck, Denise	2076	2093
Zerfing, Melissa	2094	2114
Midler, Alan	2115	2119
Miller, Joan	2120	2127
Miller, Kim	2128	2171
Miller, Zach	2172	2174
Moratelli, Alexandra	2175	2180
Morrow, Linda	2181	2200
Mother's Nature, Inc.	2201	2210
Mowl, Russell	2211	2247
Mowl, Russell	2248	2285
Mutual Aid Ambulance Service, Inc	2286	2374
Myrtis's Preschool & Creative	2375	2395
Neil, Steven	2396	2404
Nentwig, Rachel	2405	2409
Neto, Carlos	2410	2417
Newswanger, Laverne	2418	2428
North Bethlehem Township	2429	2469
North Irwin Volunteer Fire Department	2470	2487
North Washington Volunteer Fire Dept.	2488	2503
Novak, Karen	2504	2520
Nye, Mary	2521	2540
Ober, Dale & Lynne	2541	2553
Old Joe's Service Center	2554	2562
Once Upon A Time Learning Center	2563	2572
Orff, David	2573	2577
Pagano's Family Restaurant	2578	2596
Pals, Pencils & Playdough Preschool/Daycare	2597	2606
Patel, Hitesh	2607	2622
Patterson, Carol	2623	2629
Payne, Jon	2630	2665
Payson, Greg	2666	2674
Perry, Richard	2675	2686
Pistella, Louis	2687	2707

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Policastro, Joann	2727	2729
Pollock, Mary	2730	2739
Preciado, Felisa	2740	2744
Provins, Thomas	2745	2754
Quinn, Tom & amy	2755	2768
Raffaele, Patrick	2769	2779
Ream, Terry	2780	2787
Reed, James	2788	2806
Reynolds, Yvonne	2807	2813
Rhoads, Joyce	2814	2819
Rinehimer, James	2820	2829
RJ Cackovic Inc. Auto Sales & Service	2830	2834
Rock, Elsie	2835	2839
Rogers, Edward	2840	2855
Rowles, Stephen	2856	2876
Rupp, Karen	2877	2898
Russell, William	2899	2928
Sadler, Bruce	2929	2946
Sauertieg, Amy	2947	2957
Schroeder, John	2958	2962
Schutz, John	2963	2979
Seton, James	2980	2982
Shaffer, Frederick	2983	2998
Shah, Jayanti	2999	3003
Sharifi, Gitee	3004	3009
Shaw, Barron	3010	3023
Show, David	3024	3029
Slickville Deli	3030	3037
Smart, Robert	3038	3059
Smith, William	3060	3062
Sosa, Mcylin	3063	3068
Stell, Terry	3069	3087
Stosic, Aurelija	3088	3099
Titusville Moose Lodge #84	3100	3137
TMV Inc.	3138	3155
Torres, Vidalina	3156	3161

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Townsend, Lewis & Marjorie	3162	3171
VanHorn, Jeffrey	3172	3189
Vetter, Martha	3190	3230
VFW	3231	3240
Village Service Center	3241	3245
Vinciguerra, John	3246	3303
Vu, Dai	3304	3308
Walker MacCartney Insurance	3309	3322
Walko, Larry	3323	3335
Warwick, John	3336	3360
Wawassan Post 422	3361	3363
Weaver, Neil	3364	3382
Weidner, Michael	3383	3390
Wensel, Walt	3391	3398
Wentzel, Charles & Maureen	3399	3403
Western PA Oral & Maxillofacial Surgery P.C.	3404	3440
Weyant, Marcy	3441	3445
Whisker, Nancy	3446	3475
Whiteman, Pamela	3476	3515
Wholesale Auto	3516	3520
Williams, Katherine	3521	3535
Willows Family Restaurant	3536	3540
Wintersteen, Linda	3541	3564
Witmer, Grace	3565	3595
Wranitz, William	3596	3602
Yaglidereliler Corp.	3603	3627
Yeager, Jerry	3628	3632
Yentzer, Rodney	3633	3654
Young, Cheryl	3655	3674
Zablosky, Daniel	3675	3706
Zimmerman, Ivan	3707	3712
Auer, Maurice	3719	3727
Trinity Excavating, Inc.	3728	3747
Wesley, Tracy	3748	3755

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The following documents were also Bates Stamped:

Redacted BP Disclosure Statement	3713	3718
BCP Doc Retention Policy	3756	3756

The following information requested also includes attorney notes, mental impressions, research and memos and is beyond the scope of permissible discovery pursuant to 52 Pa. Code 5.323(a) and 5.361(a)(3) (attorney-work product privilege), and therefore was not provided:

E-mails and documents between, among, or by the attorneys, agents, and support staff.  
Memos between, among, or by the attorneys, agents, and support staff.  
Legal documents between, among, or by the attorneys and agents.

The Commonwealth also submits that there are documents related to the review and summary of the complaints filed with the Bureau against Blue Pilot but claims attorney-work product privilege and investigative privilege pursuant to 52 Pa. Code §§ 5.323 and 5.361(a)(3).

# **EXHIBIT 5**

Responses of the Office of Consumer Advocate to Blue Pilot  
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2. Any and all documents and/or correspondence concerning, referring, or relating to BPE.\*\*\*Blue Pilot and the OCA agree to limit this request to documents specifically mentioning Blue Pilot, as determined after a reasonable investigation by the OCA.\*\*\*

ANSWER: Please see attached. After a reasonable investigation, the OCA found the attached documents that are responsive to this request and not privileged and not already provided in responses to Blue Pilot Interrogatories to the OCA Set I or Blue Pilot RPD to the OCA Set I. See also the OCA's CONFIDENTIAL responses to Blue Pilot RPD to the OCA Set I-16 and I-17.

Documents responsive to this request but not provided pursuant to privilege include: OCA attorney notes, OCA attorney communications containing their mental impressions, OCA attorney summaries and legal research.

# **EXHIBIT 6**

## **Blynn, Daniel S.**

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**From:** Blynn, Daniel S.  
**Sent:** Wednesday, September 24, 2014 1:39 PM  
**To:** 'Tunilo, Candis'; Robinson, Kristine E.  
**Cc:** Abel, John; mtulman@attorneygeneral.gov; Robeck, Mark; Wilmarth, Catherine; 'Moury, Karen O.'  
**Subject:** OAG/OCA v. BPE - OCA's Answers to BPE's 2nd Set of Interrogatories

Candis and Kristine,

We have not yet received OCA's answers to BPE's Interrogatory Nos. 11, 12, 15, 16, 18-20, 23, 24, 27, 30, 33, 34, 37, 38, or 42-44 (Set II). These interrogatories were never withdrawn by BPE and OCA did not file a formal Objection to them, as it did to a number of other BPE discovery requests on September 5. Pursuant to 52 Pa. Code sec. 5.342(c)(6), OCA is required to provide answers to all non-withdrawn BPE interrogatories to which OCA did not file Objections. Those answers were due on September 15, the same day that OAG served its responses to BPE's second set of discovery requests. Please advise whether OCA will be providing belated answers to BPE's outstanding interrogatories and, if so, when they will be served. Thanks in advance.

Best,  
Dan

---

**Daniel S. Blynn | Kelley Drye & Warren LLP**  
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[www.kelleydrye.com](http://www.kelleydrye.com)  
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