

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

January 30, 2015

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 Second 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,

Candis A. Tunilo

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	:	
	:	
TANYA J. McCLOSKEY, Acting Consumer	:	
Advocate,	:	
Complainants	:	
	:	Docket No. C-2014-2427655
v.	:	
	:	
BLUE PILOT ENERGY, LLC	:	
Respondent	:	

SECOND 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, 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:

I. INTRODUCTION

On June 20, 2014, the BCP and the OCA filed a Joint Complaint with the Public Utility Commission (Commission) pursuant to, *inter alia*, the Public Utility Code, 66 Pa. C.S. Ch. 28 and the Commission’s regulations, 52 Pa. Code Ch. 54, 56 and 111. The Joint Complaint includes five separate counts and alleges that Blue Pilot Energy, LLC (Blue Pilot or Respondent) violated Pennsylvania law and Commission orders and regulations. Specifically, the five counts

in the Joint Complaint are: I) failing to provide accurate pricing information; II) prices nonconforming to disclosure statement; III) misleading and deceptive promises of saving; IV) lack of good faith handling of complaints; and V) failure to comply with the Telemarketer Registration Act (TRA). With respect to relief, the Joint Complainants request that the Commission find, *inter alia*, that Respondent violated the Public Utility Code and the Commission's regulations and orders; provide restitution to Respondent's customers; impose a civil penalty; and order Respondent to make various modifications to its practices and procedures; and revoke or suspend Respondent's Electric Generation Supplier (EGS) license, if warranted. The Bureau of Investigation and Enforcement and the Office of Small Business Advocate intervened in the proceeding.

On July 10, 2014, Blue Pilot filed Preliminary Objections to the Joint Complaint and an Answer to the Joint Complaint generally denying the alleged violations. On July 21, 2014, the Joint Complainants filed an Answer to Preliminary Objections. By Order dated August 20, 2014, Administrative Law Judges Joel H. Cheskis and Elizabeth Barnes (ALJs) granted in part and denied in part Blue Pilot's Preliminary Objections. Specifically, the ALJs found: 1) that the Commission lacks jurisdiction to hear complaints under the Unfair Trade Practices and Consumer Protection Law (CPL) and the TRA even though compliance with these Acts is required by the Commission regulations, and 2) that the Commission lacks jurisdiction to determine if the prices charged to customers conformed to the disclosure statement provided to the customer.

On September 8, 2014, Joint Complaints filed a Petition for Interlocutory Review and Answer to Material Questions with the Commission.¹ Specifically, Joint Complaints sought for

¹ On September 8, 2014, Joint Complainants also filed Petitions for Interlocutory Review and Answers to Material Questions in three other cases. See Commonwealth of Pennsylvania, by Attorney General KATHLEEN G.

the Commission to answer the following questions: (1) Does the Commission have authority and jurisdiction to determine whether a violation of the CPL and TRA has occurred when considering whether the Commission's regulations—which require compliance with these laws—have been violated and (2) Does the Commission have the authority and jurisdiction to determine whether the prices charged to customers by an EGS conform to the EGS disclosure statement regarding pricing. On September 18, 2014, the Joint Complainants filed a Brief in Support of their Material Questions, and Blue Pilot filed a Brief in Opposition.

On December 11, 2014, the Commission issued an Order (December 11 Order) in which it determined that while it does not have the authority or jurisdiction to determine whether a violation of the CPL or TRA has occurred, the Commission can hear claims alleging fraudulent, deceptive, and/or misleading conduct brought against Blue Pilot under the Commission's Regulations and can also hear claims alleging improper verification of enrollment of residential customers brought against Blue Pilot under the Commission's telemarketing regulations. Further, the Commission determined that it has the authority and jurisdiction to determine whether the prices charged to customers by an EGS conform to the EGS disclosure statement regarding pricing.

KANE, Through the Bureau of Consumer Protection, And TANYA J. McCLOSKEY, Acting Consumer Advocate v. IDT Energy, Inc., Docket No. C-2014-2427657; Commonwealth of Pennsylvania, by Attorney General KATHLEEN G. KANE, Through the Bureau of Consumer Protection, And TANYA J. McCLOSKEY, Acting Consumer Advocate v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric, Docket No. C-2014-2427656; Commonwealth of Pennsylvania, by Attorney General KATHLEEN G. KANE, Through the Bureau of Consumer Protection, And TANYA J. McCLOSKEY, Acting Consumer Advocate v. Respond Power, LLC, Docket No. C-2014-2427659.

On January 8, 2015, BCP filed a Petition for Review of the Commission's holding regarding the CPL and TRA issues with the Commonwealth Court. On January 21, 2015, the Commonwealth Court issued an Order, quashing BCP's Petition pursuant to Pa. R.A.P. 311(f).

On August 25, 2014, a Prehearing Conference was convened and a litigation schedule was adopted for the submission of consumer testimony. Pursuant to the litigation schedule, on October 17, 2014, Joint Complainants served consumer direct testimony from 97 consumer witnesses.

Hearings for cross examination of the consumer witnesses were initially scheduled for November 13-14, 2014, and a Further Prehearing Conference to determine the remainder of the litigation schedule was scheduled for November 25, 2014. On October 22, 2014, Blue Pilot filed a Motion for Continuance seeking to have continued the evidentiary hearings scheduled for November 13-14, 2014. On October 28, 2014, the ALJs issued an Order granting Blue Pilot's Motion for Continuance; rescheduling the hearings for February 2-6, 2014; and rescheduling the Further Prehearing Conference for February 20, 2015. On December 31, 2014, Blue Pilot filed a second Motion for Continuance, which was granted by Order dated January 7, 2015. In the January 7th Order, the ALJs rescheduled the evidentiary hearings for March 30 - April 3, 2015 and rescheduled the Further Prehearing Conference to February 2, 2015. Joint Complainants submit this Second Prehearing Memorandum accordingly.

II. ISSUES

A. Pricing Information and Disclosure Statement

Whether Respondent's Disclosure Statement complies with the Public Utility Code, 66 Pa. C.S. § 2809 and the Commission's regulations at 52 Pa. Code §§ 54.5(c), 54.43(1), 54.43(f) and 111.12(d)(1). See Joint Complaint at Count I and App. A. Whether Respondent's prices

charged in early 2014 conformed to Blue Pilot's variable rate pricing provision in its Disclosure Statement in compliance with the Public Utility Code, 66 Pa. C.S. § 2809, and the Commission's regulations at 52 Pa. Code §§ 54.4 and 54.5. See Joint Complaint at Count II and App. A and B. See also December 11 Order at 18-20.

B. Misleading and Deceptive Promises of Savings

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). See Joint Complaint at Count III. See also December 11 Order at 19, FN 9.

C. Handling of Customer Complaints

Whether 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). See Joint Complaint at Count IV.

D. Failure to Comply with the Commission's Regulations at 52 Pa. Code §§ 54.43(f) and 111.10(a)

Whether Respondent violated and continues to violate the Commission's regulations at 52 Pa. Code §§ 54.43(f) and 111.10(a).

E. Remedies

By way of remedies for Respondent's violations of the Public Utility Code and the Commission's regulations and Orders, Joint Complainants seek refunds to customers, civil

penalties and if warranted, suspension or revocation of Respondent's license. Further, Joint Complainants request that the Commission order Blue Pilot to discontinue the prohibited conduct and implement procedures to ensure compliance with all applicable laws and the Commission's regulations and Orders.

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 Margarita Tulman,² Deputy Attorneys General. Copies of all documents should be served on the BCP as follows:

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

² Joint Complainants' Prehearing Memorandum dated August 19, 2014 incorrectly provided that the BCP will be represented in this case by Nicole R. Beck rather than Margarita Tulman.

Telephone: (717) 787-9707
Facsimile: (717) 787-1190
E-mail: jabel@attorneygeneral.gov
mtulman@attorneygeneral.gov

IV. DISCOVERY MODIFICATIONS

Joint Complainants do not propose any modifications to the discovery rules at this time.

V. SETTLEMENT

Joint Complainants provided a settlement proposal to the Company on December 15, 2014. The Joint Complainants are willing to continue to engage in settlement discussions in this matter.

VI. PROPOSED SCHEDULE

Joint Complainants and Blue Pilot have reached an agreement for the second half of the litigation schedule as follows:

Direct Testimony of Expert Witnesses- June 12, 2015

Rebuttal Testimony- August 3, 2015

Surrebuttal Testimony- September 10, 2015

Hearings- September 16-18, 2015

Joint Complainants will work with the ALJs and the parties to determine the dates for filing briefs in this proceeding. Joint Complainants propose that briefing dates be established at the conclusion of hearings.

VII. WITNESSES

On October 17, 2014, Joint Complainants served 97 pieces of testimony from consumer witnesses. Additionally, as identified in Joint Complainants' Prehearing Memorandum dated August 19, 2014, 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 expert 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. Their contact information is as follows:

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

In order to expedite the resolution of this proceeding, the Joint Complainants continue their request that copies of all interrogatories, testimony, and answers to interrogatories be mailed directly to the witnesses identified above as well as mailing a copy to counsel for the Joint Complainants.

Also as identified Joint Complainants' Prehearing Memorandum dated August 19, 2014, Joint Complainants also intend to call:

Heather M. (Weaver) Troutman
Consumer Protection Agent
15th Floor, Strawberry Square
Harrisburg, PA 17120
E-mail:³ htroutman@attorneygeneral.gov

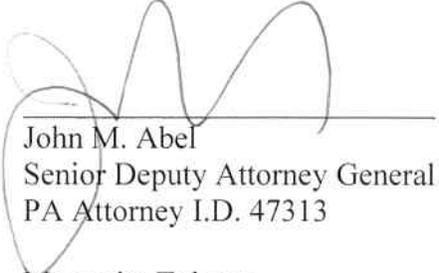
Joint Complainants will present Ms. Troutman's testimony in written form, and she may attach various exhibits, documents, and explanatory information, which will assist in the presentation of the Joint Complainants' case.

³ Please note Ms. Troutman's email address has changed.

VIII. MISCELLANEOUS

As required by the ALJs in other Joint Complaint cases, Joint Complainants assume that the ALJs would like for them to submit a memorandum of law regarding pattern and practice evidence before the commencement of the hearings for cross-examination of consumer witnesses. Joint Complainants propose to submit the memorandum of law on February 9, 2015. Joint Complainants propose that Blue Pilot's Answer be due by February 19, 2015.

Respectfully Submitted,



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

Margarita Tulman
Deputy Attorney General
PA Attorney I.D. 313514

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
mtulman@attorneygeneral.gov

Counsel for:

Kathleen G. Kane, Attorney General
Bureau of Consumer Protection

DATE: January 30, 2015
201144



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 document, the Second 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 30th day of January 2015.

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.
Catherine Wilmarth, 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

Candis A Tunilo

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