

COMMONWEALTH OF PENNSYLVANIA



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June 5, 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 Joint Answer of the Commonwealth of Pennsylvania, Bureau of Consumer Protection and the Office of Consumer Advocate to the Motion to Dismiss Joint Complaint of Blue Pilot Energy, LLC, in the above-referenced proceeding.

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

Respectfully Submitted,

A handwritten signature in cursive script that reads "Kristine E. Robinson".

Kristine E. Robinson
Assistant Consumer Advocate
PA Attorney I.D. #316479

Enclosure

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

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

JOINT ANSWER OF THE COMMONWEALTH OF PENNSYLVANIA,
BUREAU OF CONSUMER PROTECTION
AND OFFICE OF CONSUMER ADVOCATE
IN OPPOSITION TO THE MOTION TO DISMISS JOINT COMPLAINT
OF BLUE PILOT ENERGY, LLC

Pursuant to 52 Pa. Code § 5.103(c), the Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection (BCP or OAG) and the Acting Consumer Advocate Tanya J. McCloskey (OCA) (collectively referred to as Joint Complainants) hereby submit this Answer to the Motion to Dismiss Joint Complaint of Blue Pilot Energy, LLC (Blue Pilot or the Company) filed with the Pennsylvania Public Utility Commission (Commission) on May 14, 2015. Joint Complainants submit that there is no basis in law or fact to dismiss the Joint Complaint. If Blue Pilot does not intend to continue litigating this proceeding, as indicated in Paragraph 5 of its Motion to Dismiss, Joint Complainants submit

that entry of a default judgment is the appropriate relief. To that end, the Joint Complainants intend to file a Motion for Entry of Judgment against Blue Pilot shortly. Accordingly, Joint Complainants request that the ALJs deny Blue Pilot's Motion to Dismiss Joint Complaint. In support thereof, the Joint Complainants submit as follows:

I. INTRODUCTION

On June 20, 2014, the BCP and the OCA filed a Joint Complaint against Blue Pilot with the Commission, pursuant to the Public Utility Code, 66 Pa. C.S. Ch. 28, the Commission's regulations, 52 Pa. Code Ch. 54, 56 and 111, the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.* (CPL) and the Telemarketer Registration Act, 73 P.S. § 2241, *et seq.* (TRA). The Joint Complaint includes five separate counts and alleges that Blue Pilot 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 TRA. With respect to relief, the Joint Complainants request that the Commission find, *inter alia*, that Blue Pilot violated the Public Utility Code and the Commission's regulations and orders; provide restitution to Blue Pilot's customers; impose a civil penalty; and order Blue Pilot to make various modifications to its practices and procedures; and revoke or suspend the Company'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 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 August 25, 2014, a Prehearing Conference was convened and a litigation schedule was adopted for the submission of consumer testimony.

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

Pursuant to the litigation schedule, on October 17, 2014, Joint Complainants served consumer direct testimony from 97 consumer witnesses.

On December 11, 2014, the Commission issued an Order on Joint Complainants' Petition for Interlocutory Review and Answer to Material Questions in which it determined that 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.

Hearings for cross-examination of the consumer witnesses were held on March 30 - April 1, 2015. A Further Prehearing Conference to determine the remainder of the litigation schedule was held on February 4, 2015.

On May 4, 2015, Blue Pilot filed a letter with the Commission at Docket No. A-2011-2223888 providing notice pursuant to 52 Pa. Code § 54.41(b) of the Company's intent to abandon its Pennsylvania customers, seeking waiver of the 90-day notice requirement in 52 Pa. Code § 54.41(b), and seeking approval of a 30-45-day notice period. On May 18, 2015, Joint Complainants filed a Joint Answer to Blue Pilot's Letter Notice to Abandon. In that Answer, Joint Complainants did not oppose Blue Pilot's request to abandon its provision of generation supply to its Pennsylvania customers and cease the provision of retail electric generation supply in Pennsylvania. Joint Complainants, however, did oppose Blue Pilot's request for immediate cancellation of its license, as there are several outstanding Formal Complaints against Blue Pilot at the Commission.

On May 14, 2015, Blue Pilot filed this Motion to Dismiss Joint Complaint (Motion or Motion to Dismiss) at the above docket. As explained in more detail in Section III, below, Joint Complainants submit that there is no basis in law or fact to dismiss the Joint Complaint. The Joint Complainants filed a Joint Complaint within the Commission's jurisdiction; Joint Complainants have prosecuted their Joint Complaint; In accordance with the ALJs' procedural

schedule, the Joint Complainants have participated in good faith settlement negotiations; and Blue Pilot has failed to demonstrate that Joint Complainants would not be entitled to relief under any circumstances as a matter of law. If Blue Pilot does not intend to continue litigating this proceeding, as indicated in Paragraph 5 of its Motion to Dismiss, Joint Complainants submit that a motion to dismiss is not the appropriate relief, as it would deny the Joint Complainants and consumers their right to obtain the necessary judgment and relief as requested in the Joint Complaint. Accordingly, Joint Complainants request that the ALJs deny Blue Pilot's Motion to Dismiss Joint Complaint.

II. LEGAL STANDARD

The Commission's regulations provide as follows regarding formal complaints:

A person complaining of an act done or omitted to be done by a person subject to the jurisdiction of the Commission, in violation, or claimed violation of a statute which the Commission has jurisdiction to administer, or of a regulation or order of the Commission, may file a formal complaint with the Commission.

52 Pa. Code § 5.21. Generally, the filing of a formal complaint entitles the complainant to a formal hearing before the Commission. See 52 Pa. Code § 5.103. The Commission's regulations allow for preliminary motions and motions for summary judgment and judgment on the pleadings to be filed in response to a formal complaint. Id.; See also 52 Pa. Code §§ 5.101 and 5.102.

Additionally, the Commission's regulations at 52 Pa. Code § 5.103 authorize a request by motion for relief desired, as Blue Pilot did here regarding this Motion to Dismiss. A motion made pursuant to 52 Pa. Code § 5.103 must set forth the ruling or relief sought, and state the grounds therefore and the statutory or other authority upon which the proponent of the motion relies. See 52 Pa. Code § 5.103.

III. ANSWER

Joint Complainants first note that Blue Pilot has not made a motion for summary judgment or judgment on the pleadings, and neither would be appropriate under the circumstances. Instead, Blue Pilot filed its Motion to Dismiss pursuant to 52 Pa. Code § 5.103. Joint Complainants submit that there is no valid basis for granting Blue Pilot's Motion to Dismiss. In its Motion, Blue Pilot makes three primary arguments as to why the ALJs should dismiss the Joint Complaint: 1) Blue Pilot no longer has the resources to continue litigating this proceeding, and it has notified its remaining Pennsylvania customers that it will cease business operations in Pennsylvania; 2) Blue Pilot has resolved nearly every customer complaint; and 3) Blue Pilot has attempted to resolve this proceeding. The arguments asserted by Blue Pilot are not valid reasons for granting a motion to dismiss, and the Company fails to provide any legal basis to support these arguments. Upon review of the Commission's regulations, Joint Complainants submit that there are three valid reasons for granting a motion to dismiss: 1) the Commission lacks jurisdiction to hear the formal complaint; 2) the complainant has failed to prosecute the formal complaint; or 3) the complainant has failed to state a claim upon which relief can be granted. See 52 Pa. Code §§ 5.101, 5.102, 5.371, 5.372.

Blue Pilot does not assert in its Motion that the Joint Complaint should be dismissed because of lack of jurisdiction or on the grounds that Joint Complainants failed to state a claim upon which relief may be granted. These assertions must be raised in Preliminary Objections. See 52 Pa. Code § 5.101. As discussed in the Introduction in Section I, above, there has already been extensive Preliminary Objection litigation in this case, and the Commission has ruled that it has jurisdiction and that the Joint Complainants have properly raised causes of action upon which the Commission could order relief. Therefore, Blue Pilot's Motion to Dismiss is not valid

on the grounds that the Commission lacks the jurisdiction to hear the Joint Complaint or that Joint Complainants failed to state a claim upon which relief may be granted.

Blue Pilot also does not assert in its Motion that the Joint Complaint should be dismissed because Joint Complainants failed to prosecute the Joint Complaint. Such an assertion could be made if, for example, Joint Complainants were not cooperating in discovery or obeying the ALJs' Orders. See 52 Pa. Code §§ 5.371, 5.372. Joint Complainants have fully complied with the Commission's discovery rules and the ALJs' Orders in this matter. Joint Complainants have avidly prosecuted their Joint Complaint by serving consumer direct testimony from 97 consumer witnesses. Of these testimonies, approximately 83 have been moved into the record in this matter along with exhibits. Additionally, Joint Complainants are willing to serve the testimony of expert and other non-consumer witnesses regarding Blue Pilot's marketing and billing practices pursuant to the remainder of the litigation schedule. Therefore, Blue Pilot's Motion to Dismiss is not valid on the ground that Joint Complainants failed to prosecute the Joint Complaint.

Based on these reasons, Blue Pilot's Motion to Dismiss Joint Complaint should be denied. Joint Complainants will, however, address the Company's arguments in support of Blue Pilot's Motion to Dismiss.

A. Neither Blue Pilot's Available Resources for Litigation Nor Notification that It Will Cease Its operations in Pennsylvania Support a Motion to Dismiss.

Joint Complainants submit that Blue Pilot's claims that it no longer has the resources for litigation and that it has notified its remaining Pennsylvania customers that it will cease its operations in Pennsylvania are not valid grounds for dismissing the Joint Complaint. The Joint Complainants have alleged that Blue Pilot violated Pennsylvania law and Commission orders

and regulations. Joint Complainants have moved ample evidence into the record to support the allegations in their Joint Complaint and would provide additional evidence through the submission of expert and other non-consumer testimonies pursuant to the litigation schedule. The Company's desire to leave the Pennsylvania competitive electric market does not relieve it of any responsibility for the allegations in the Joint Complaint. In Joint Complainants' Answer to Blue Pilot's Letter Notice to Abandon, Joint Complainants requested the Commission hold any decision until pending formal complainants against Blue Pilot are resolved. See 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, Joint Answer of the Office of Consumer Advocate and Office of Attorney General Bureau of Consumer Protection to Blue Pilot Energy, LLC Letter Notice to Abandon at 3 (May 18, 2015).

B. Blue Pilot's Alleged Resolution of Customer Complaints Does Not Relieve Blue Pilot from Liability under the Joint Complaint and is Not Grounds for a Motion to Dismiss.

Joint Complainants submit that the resolution of individual consumer complaints does not relieve Blue Pilot from liability under the Joint Complaint. See e.g., 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, Order Denying Motion In Limine at 6 (December 1, 2014) (PaG&E Order). In the PaG&E Order, another Joint Complaint case brought against Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric (PaG&E), the ALJs held the following:

It would be against public policy to allow [PaG&E] to be relieved of all future liability for its regulatory violations through the satisfaction of individual

complaints. The mere fact that some consumer complaints have been satisfied in no way absolves [PaG&E] for its conduct under the law to the extent [PaG&E] engaged in a broader array of unfair and deceptive practices.

... Evidence of the underlying consumer complaints is being used in this case for purposes of supporting the Joint Complainants allegations (i.e., that [PaG&E] engaged in misleading and deceptive promises of savings, slamming, misleading and deceptive welcome letter, lack of good faith handling of complaints, etc.). Furthermore, the relief sought in the underlying complaints is likely different than the relief sought by the Joint Complainants ...

[T]he OCA and OAG are acting in their representative capacities as government agencies on behalf of the public interest as a whole, not on behalf of the specific individual consumers whose prior complaints may be referenced in the record of this case. As we noted in the August 20, 2014 Order Granting In Part And Denying In Part Preliminary Objections, and as the Joint Complainants argued in their Answer to [PaG&E's] Motion, both the OCA and the OAG are authorized to represent consumer interests before the Commission. *See*, 71 P.S. § 309-4(a) and (b); 73 P.S. § 201-4. Neither the OCA nor the OAG act as a private attorney for any given customer and are not seeking to do that in this case. Rather, the Joint Complainants are proceeding in this matter on behalf of the public interest ... The Joint Complainants are able to bring complaints based on the public interest that an individual consumer alone would not be able to bring. This is the opportunity to do that.

Id.

In this proceeding, Joint Complainants are also acting in their representative capacities, and the mere fact that Blue Pilot may have resolved some consumer complaints does not absolve Blue Pilot of its conduct as alleged in the Joint Complaint.

C. When Parties to a Formal Complaint Proceeding Before the Commission Do Not Reach a Settlement, a Formal Hearing Before the Commission is Proper.

Joint Complaints submit that engaging in settlement negotiations that do not culminate in a settlement does not warrant the granting of a Motion to Dismiss. Generally, the filing of a formal complaint at the Commission entitles the complainant to a formal hearing before the Commission. See 52 Pa. Code § 5.21(d). The failure to settle a case is not a viable basis in which to dismiss the Joint Complaint, and neither the Public Utility Code nor the Commission's

regulations support Blue Pilot's position. Joint Complainants further note that they are open to further settlement discussions with Blue Pilot.

IV. CONCLUSION

WHEREFORE, Joint Complainants respectfully request the ALJs to deny Blue Pilot's Motion to Dismiss Joint Complaint, because there is no basis in law or fact to dismiss the Joint Complaint.

Respectfully Submitted,



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DATE: June 5, 2015

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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 Joint Answer of the Commonwealth of Pennsylvania, Bureau of Consumer Protection and the Office of Consumer Advocate to the Motion to Dismiss Joint Complaint of Blue Pilot Energy, LLC, in the manner and upon the persons listed below:

Dated this 5th day of June 2015.

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