

Buchanan Ingersoll & Rooney PC

Karen O. Moury
717 237 4820
Karen.moury@bipc.com

409 North Second Street, Suite 500
Harrisburg, PA 17101
T 717 237 4800
F 717 233 0852
www.buchananingersoll.com

July 20, 2015

VIA OVERNIGHT MAIL

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Commonwealth of Pennsylvania, et al. v. Blue Pilot Energy, LLC
Docket Nos. C-2014-2427655

Dear Secretary Chiavetta:

On behalf of Blue Pilot Energy, LLC, I have enclosed for electronic filing Blue Pilot Energy, LLC's Opposition to Joint Complainants' Motion for Entry of Judgment, in the above-captioned proceeding.

Copies have been served on all parties as indicated in the attached Certificate of Service.

Very truly yours,



Karen O. Moury

KOM/bb
Enclosure
cc: Certificate of Service

RECEIVED
2015 JUL 22 AM 11:07
PA PUC
SECRETARY'S BUREAU

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

RECEIVED

JUL 22 AM 11:07

PA PUC
SECRETARY'S BUREAU

COMMONWEALTH OF
PENNSYLVANIA, ET AL.,

Complainants,

v.

BLUE PILOT ENERGY, LLC,

Respondent.

:
:
:
:
:
:
:
:
:
:
:

Docket No. C-2014-2427655

**BLUE PILOT ENERGY, LLC'S OPPOSITION TO
JOINT COMPLAINANTS' MOTION FOR ENTRY OF JUDGMENT**

TO: ADMINISTRATIVE LAW JUDGES BARNES AND CHESKIS

Pursuant to 52 Pa. Code § 5.103, Blue Pilot Energy, LLC ("BPE"), by and through its counsel, files this opposition to the Joint Motion of the Commonwealth of Pennsylvania Bureau of Consumer Protection and the Office of Consumer Advocate ("Joint Complainants") for Entry of Judgment against Blue Pilot Energy, LLC (the "Motion"), and in support hereof, avers as follows:

INTRODUCTION

After surrendering its License to the Commission and filing a Motion to Dismiss BPE notified OCA that, given the pending Motion to Dismiss, BPE would not be responding to the few discovery requests outstanding. The Commission similarly suspended the procedural schedule during the pendency of the Motion to Dismiss. After deciding the Motion to Dismiss, the Commission instructed the parties to file a proposed procedural schedule to complete the remaining pre-hearing items while retaining the evidentiary hearing date set for September 16-18, 2015. Instead of filing a proposed procedural schedule, Joint Complainants filed the present

Motion seeking the extraordinary relief of judgment against BPE as sanctions for an alleged failure to respond to OCA's discovery.

The Motion is unsupported on all fronts, whether for the sanctions that Joint Complainants seek in the Motion, or as a motion for summary judgment. As an initial matter, Joint Complainants' requested relief, which is essentially in the form of a sanction, is entirely unprecedented. Even assuming that BPE had an obligation to continue responding to OCA's discovery during the pendency of its Motion to Dismiss and while the procedural schedule was in abeyance – which BPE denies because the procedural schedule was in abeyance– an entry of judgment against BPE is entirely inappropriate. Joint Complainants further neglect to inform the Commission that the relief sought in the Motion (which are actually in the form of damages) are dependent upon an affirmative decision on Joint Complainants' previous Joint Memorandum of Law Regarding the Admission of Pattern of Practice Evidence. This is a matter of first impression for the Commission, and the theories relied upon by Joint Complainants have recently been rejected by the Supreme Court.

Substantively, the Motion fails to offer any evidentiary support that could support entry of a judgment. Joint Complainants allege, in short, that BPE did not adequately inform its customers how their rates would be calculated. Joint Complainants fail to recognize that the Commission previously reviewed – and approved – BPE's *Disclosure Statement* which detailed the method in which BPE determined rates. Instead, Joint Complainants offer the idiosyncratic testimony of a few disgruntled customers who were dissatisfied with price increases that they experienced after a historic extreme weather event. These testimonies are frequently rebutted by the customers' own sales calls and TPVs, all of which have been provided to Joint Complainants.

Notably, the Motion attempts to compensate for a lack of evidentiary support for Joint Complainants' claims in this proceeding. In January 2014, BPE had 2,729 active customer

accounts. BPE serviced over 5,400 customers in Pennsylvania since its inception. (Affidavit of Raymond A. Perea (“Perea Aff.”), ¶ 2, attached hereto as Exhibit 1.) After this proceeding was filed, Joint Complainants served BPE with 97 statements from current or former BPE customers who purportedly complained about BPE. Not all of those complaints were uniform and not all of those complaints were even relevant to the claims raised by Joint Complainants in their Complaint. Ultimately, Joint Complainants did not even rely on all of those statements in their Motion. Assuming that the 97 customers that submitted a written statement to Joint Complainants offered a complaint that was relevant to the claims raised in the Complaint, that means that roughly 3.5% of BPE’s customers felt sufficiently moved to fill out a statement.¹ More important than the numbers, however, is the fact that of the 97 customers who made a statement, the gravamen of their complaint was that their variable rates went up.² Such statements do not even support the allegations in the Joint Complaint. Regardless of the reason why the 97 complained (in some cases Joint Complainants rely on a number much less than 97 to make an argument), these statements do not support the extraordinary relief that they request here. This is especially true because the nature and content of the statements that these 97 customers made were all over the map. No common theme can be found in these statements that supports Joint Complainants’ theory of liability.

Because they could not establish their case with sufficient evidence, Joint Complainants resort to the use of three so-called “experts.” In reality, Joint Complainants purchased the testimony from these three individuals because it could not be found in the record developed during the course of this proceeding. Each of the three should be stricken for a variety of reasons, including the fact that they advance impermissible legal conclusions and fabricate data.

¹ When considered in light of 5,400 customers, the 97 account for only 1.8% of BPE’s Pennsylvania customers.

² None of those customers felt moved to complain when their rates were lower than those charged by their EDC.

Without providing any supportable evidence independent of their own conclusions, these so-called experts merely conclude with an opinion that serves Joint Complainants' theory of liability and damages. In one case, one of the experts relies on the infirm conclusions of another of the experts creating a conclusion based on circular arguments. None of these individuals qualifies as an expert under Pennsylvania law. Finally, Joint Complainants also attempt to impermissibly shift their own burden of proof by insisting that Joint Complainants' own evidentiary failures requires BPE to prove its innocence.

The Commission cannot permit Joint Complainants to overcome their unsupported case by way of a discovery sanction. Factual issues drive the outcome of this proceeding, making any preliminary finding by the Commission impossible. Because Joint Complainants have failed to prove any violations of Commission regulations, and discovery sanctions cannot be used to deprive BPE of its due process rights, the Motion should be denied. To the extent that Joint Complainants intend to rest on the record in their Motion, this proceeding should be dismissed.

BACKGROUND

BPE is an electric generation supplier ("EGS"), licensed by the Commission since June 10, 2011, Docket No. A-2011-2223888, to supply electricity or electric generation services to residential, small commercial, large commercial, and industrial customers in electric distribution company service territories throughout Pennsylvania. As part of the licensure application process, BPE submitted, among other things, a copy of its Disclosure Statement and Agreement for Electric Service ("Disclosure Statement") to the Commission for review and approval. The Commission's Bureau of Consumer Services approved BPE's Disclosure Statement on May 26, 2011. See May 26, 2011 Email from Lisa Weary, Pa. PUC Bureau of Consumer Services, to Angela Janssen, Counsel to BPE (the "May 2011 Disclosure Statement") (attached hereto as Exhibit 2).

BPE has only offered variable rate contracts to Pennsylvania residential consumers.³ Under those contracts, customers receive an initial rate, which is guaranteed for a specific period (typically 30, 60, or 90 days). After the rate-guarantee period expires, pursuant to the terms of their variable rate contracts, customers' rates may increase or decrease based on a number of factors, such as changes in wholesale energy market prices and "[s]udden, atypical fluctuations in climate conditions, including but not limited to, extraordinary changes in weather patterns." See Revised Disclosure Statement and Agreement for Electric Service (attached hereto as Exhibit 3). All material terms of a customer's contract are clearly and conspicuously disclosed to the customer prior to and during enrollment. These terms also are contained in BPE's Commission-approved Disclosure Statement, a copy of which is mailed to each customer following his or her enrollment. The Disclosure Statement contains no cap on the amount by which a customer's rate may increase or decrease. *Id.* BPE's customers may cancel their service at any time and for any reason, without incurring a termination fee. *Id.*

When BPE began selling energy in Pennsylvania in or about December 2011, its retail rate was based upon BPE's projections of cost per kilowatt hour (kWh). In a number of instances before 2014, BPE lowered its customers' rates after their rate-guarantee periods ended. However, during December 2013 and the first quarter of 2014, severe and unanticipated weather events, such as winter storms and polar vortices, plagued Pennsylvania and many other Eastern states. Recognizing such unprecedented weather, the PUC explained to consumers that "[t]he extreme cold has significantly increased the demand for electricity" and "remind[ed] consumers [that] the frosty temperatures and increased use of heating systems will translate into higher energy bills in the coming months." Pa. PUC, Press Release, *PUC Urges Consumers to*

³ In 2013, BPE implemented a trial program pursuant to which it sold 19 Pennsylvania business customers a two-year term plan with a fixed rate of \$0.069 per kWh. Pursuant to the terms of those customers' contracts, that guaranteed rate has not changed and remained in effect until May/June of 2015.

Conserve Energy During Frigid Temps, Jan. 27, 2014.⁴ PUC Chairman Robert Powelson specifically warned that consumers likely would be receiving “higher bills that will be associated with heating their homes during the winters’ extended cold.” *Id.*

In late January 2014, the PUC advised Pennsylvania consumers using a competitive supplier (such as BPE):

[T]o review their contract[s] as cold temperatures and high demand have driven the wholesale price of electricity higher. ***Customers with variable contracts or those with fixed contracts that have expired and were moved to a variable rate may see their prices increase.*** Consumers are urged to check their contracts . . . The PUC is seeing higher prices in the wholesale electric markets, which could translate into higher prices for some customers who have contracts with competitive suppliers that allow for prices to change. Consumers should check the terms and conditions they received when they enrolled with the competitive supplier or call the supplier to check the status of their prices. Some prices for those on variable rates may have already increased.

Pa. PUC, Press Release, *PUC Urges Shopping Consumers to Review Contracts, Cold Temps Could Mean Higher Prices for Those on Variable Rates*, Jan. 31, 2014 (emphasis added).⁵ The Commission again informed consumers that “cold temperatures and increased use of heating systems will translate into higher energy bills.” *Id.*

The Federal Energy Regulatory Commission (“FERC”) has noted that, during one of the polar vortices that hit Pennsylvania in January 2014 in particular, electricity prices surged with the location marginal prices (“LMPs”) being near or above \$2,000/Mwh for a number of hours in PJM. FERC Staff Report, *Winter 2013-2014 Operations and Market Performance in RTOs and ISOs*, AD14-8-000, at 10 (Apr. 1, 2014).⁶ Similarly, the PUC identified the “historic demand” for electricity in the Commonwealth, and confirmed that “PJM reached an all-time winter peak”

⁴ Available at http://www.puc.pa.gov/about_puc/press_releases.aspx?ShowPR=3297 (last accessed July 5, 2015).

⁵ Available at http://www.puc.state.pa.us/about_puc/press_releases.aspx?ShowPR=3298 (last accessed July 15, 2015).

⁶ Available at <https://www.ferc.gov/legal/staff-reports/2014/04-01-14.pdf> (last accessed July 15, 2015).

in early January. Pa. PUC, Press Release, *PUC Urges Consumers to Conserve Energy During Frigid Temps*, Jan. 7, 2014.⁷

As a result of these extreme weather events, BPE was forced to increase its rates to recover its costs for wholesale power that, in certain markets, increased 400% or more over the course of a month. In January 2014, BPE submitted to the Commission a slightly revised version of its previously approved May 2011 Disclosure Statement, which, in relevant part, added verbiage to the “Price per Kilowatt Hour” section to address extreme weather events. The Commission’s Bureau of Consumer Services again reviewed and approved the revised Disclosure Statement on January 22, 2014. See Jan. 22, 2014 Email Chain between Jessica Renneker, BPE’s Dir. of Regulatory Affairs, and James Farley, Policy Analyst, Pa. PUC Bureau of Consumer Services (attached hereto as Exhibit 4); Revised Disclosure Statement, Ex. 3.

In late March 2014, BPE suspended bringing on new customers in Pennsylvania until it could be sure that the cost per kWh to consumers would be stable. BPE has not lifted that self-imposed suspension.

On June 20, 2014, Complainants Pennsylvania Attorney General Kathleen G. Kane and Tanya J. McCloskey, Acting Consumer Advocate for the Office of Consumer Advocate (“OCA”), filed their Joint Complaint in this case.⁸ Complainants assert five causes of action against BPE: (1) Count I – Failing to Provide Accurate Pricing Information; (2) Count II – Prices Nonconforming to Disclosure Statement; (3) Misleading and Deceptive Promises of Savings; (4) Count IV – Lack of Good Faith Handling of Complaints; and (5) Count V – Failure to Comply

⁷ Available at http://www.puc.pa.gov/about_puc/press_releases.aspx?ShowPR=3283 (last accessed July 15, 2015).

⁸ On the same day, Complainants filed complaints against four other EGSs - Hiko Energy; IDT Energy; Respond Power; and Energy Services Providers d/b/a Pennsylvania Gas & Electric. All five complaints have an assembly-line quality in that the factual allegations are identical in all material respects and, in many cases, verbatim. However, Complainants assert a variety of additional causes of action against each of the other EGSs that are not asserted against BPE.

With the Telemarketer Registration Act. Jt. Compl. ¶¶ 19-58. Since that time, BPE has responded to 106 discovery requests spanning eight separate sets from Joint Complainants and cross-examined a number of the consumer witnesses that filed complaints with the Commission during a hearing conducted on March 30 through April 1, 2015.

On May 4, 2015, BPE surrendered its License to the Commission and requested that the Commission immediately cancel its License.⁹ On May 14, 2015, BPE filed a Motion to Dismiss on the grounds that (1) BPE notified its remaining customers that it was ceasing its business in Pennsylvania and that they should begin taking steps to fill their electric service needs through other sources, (2) BPE resolved nearly every customer complaint, and (3) BPE had attempted to resolve this present proceeding. On June 1, 2015, the Commission suspended the Procedural Order. After filing the Motion to Dismiss, BPE informed OCA that BPE did not intend to respond to OCA's discovery in light of the pending Motion to Dismiss. Motion at Exhibits C and E. Counsel for BPE never represented that it would never respond to OCA's discovery. The Commission denied BPE's Motion to Dismiss on June 11, 2015, and directed the parties to provide a procedural schedule for the remainder of the proceeding within ten (10) days. Rather than provide a procedural schedule – or confer with BPE regarding any outstanding discovery – on June 22, 2015, Joint Complainants filed the present Motion.

ARGUMENT AND AUTHORITY

I. Joint Complainants' Requested Sanctions Are Unsupported and Inappropriate

Joint Complainants request the Commission grant the extraordinary relief of denying BPE's Due Process rights and enter judgment in Joint Complainants' favor based solely on the Commission's authority to enter sanctions for discovery deficiencies found in 52 Pa. Code §§ 5.371 and 5.372. In support, Joint Complainants' cite two cases wherein the Commission

⁹ At that time, BPE had only 218 remaining customers in Pennsylvania.

dismissed a *complainant's* action based on the complainant's failure to respond to discovery after multiple court orders, and otherwise evinced an intent to not prosecute the case. Both *Dizes v. Verizon Pennsylvania, Inc.*, 2009 Pa. PUC LEXIS 1195 (Ap. 14, 2009) and *Application of Pickups Moving Company, LLC for the Right to Begin to Transport, as a Motor Common Carrier, by Motor Vehicle, Household Goods in Use, Between Points in Pennsylvania*, 2014 Pa. PUC LEXIS 39, *6-8 (Jan. 28, 2014) are readily distinguishable, as the sanction involved dismissal of the complainant's case, rather than imposition of a judgment against a defendant. Further, the circumstances under which the plaintiffs did not cooperate were egregious. These cases in no way support the extraordinary and unprecedented relief requested by Joint Complainants.

In *Dizes v. Verizon Pennsylvania, Inc.*, 2009 Pa. PUC LEXIS 1195 (Ap. 14, 2009), the complainant refused to accept service of interrogatories. *See Dizes* at *12-13. After the complainant subsequently failed to respond to *three* orders entered by the ALJ to respond to interrogatories – and apparently misrepresented her ability to speak English to the Commission – the Commission dismissed the complainant's complaint. *Id.* at *17-18. In *Application of Pickups Moving Company, LLC for the Right to Begin to Transport, as a Motor Common Carrier, by Motor Vehicle, Household Goods in Use, Between Points in Pennsylvania*, 2014 Pa. PUC LEXIS 39, *6-8 (Jan. 28, 2014), the Commission similarly dismissed an applicant's application after the applicant failed to respond to two ALJ orders compelling the applicant to respond to discovery, never responded to any of the protestants' motions for sanctions, and never had an attorney enter an appearance. In both of those actions, unlike this proceeding, the Commission dismissed a complainant/applicant's complaint/application after disobeying multiple court orders and failing to demonstrate an intent to prosecute its own filed actions.

In contrast, Joint Complainants' Motion seeks to obtain a judgment against BPE, a defendant, in the substantial sum of \$1,387,569.85, a permanent revocation of BPE's license, and a penalty of "any funds BPE has available."¹⁰ BPE has continuously defended itself in this action and responded to Joint Complainants' overly burdensome and extensive discovery requests. Specifically, BPE has responded to 106 discovery requests spanning eight separate sets. During the pendency of BPE's Motion to Dismiss, for which the Commission appropriately placed the procedural schedule in abeyance, BPE left one discovery request in Set VIII and eight in Set IX outstanding. After the Commission denied BPE's Motion to Dismiss – and prior to the reinstating of a procedural schedule – Joint Complainants filed their Motion.¹¹

Joint Complainants offer no grounds for the extraordinary relief requested. Rather than simply work with BPE and the Commission to reinstate the procedural schedule, Joint Complainants rushed ahead and filed their Motion. As has been their uncompromising practice throughout this proceeding, Joint Complainants sought the most severe discovery sanction they could fathom – an unprecedented sanction that this Commission has itself never entered – for an action that should not justly be held sanctionable, as it occurred while the Motion to Dismiss was pending and the procedural schedule placed in abeyance. The Commission should not permit Joint Complainants Machiavellian approach and should accordingly deny the Motion.

¹⁰ Joint Complainants fail to cite any matter in which the Commission entered judgement against a defendant as a discovery sanction.

¹¹ Joint Complainants infer that BPE is unwilling to cooperate based on BPE's counsel's email stating that "In light of the Motion to Dismiss, Blue Pilot does not intend to serve responses." See Motion at Ex. E. At the time of this email, the Commission had suspended the procedural schedule. It would make little sense for BPE to have continued responding to the Joint Complainants' seemingly never ending discovery requests during this period.

II. Joint Complainants Improperly Infer Liability for Customers Not Involved in This Proceeding

Joint Complainants fail to inform the Court in their Motion that their requested relief is not limited to the customer witnesses whose testimonies they rely upon. Rather, Joint Complainants calculate their alleged damages based on every single BPE customer in Pennsylvania. Joint Complainants, however, offer no support for damages allegedly relating to any customer other than those consumer witnesses identified.¹² While never addressed in the Motion, Joint Complainants presumably rely on their argument contained in their previous Joint Memorandum of Law Regarding the Admission of Pattern of Practice Evidence (“PoP Motion”), on which the Commission has not ruled. Because the Motion contains no support for damages outside of the witnesses, the Commission should not entertain damages beyond those customers.

As a preliminary matter, BPE would note that the PoP Motion fails to cite any Commission authority for the extraordinary “framework” that Joint Complainants’ suggest the Commission should adopt. Joint Complainants essentially request that the Commission treat this proceeding as a class action; however, this is not a class action, the Commission is not authorized to hear or consider class action lawsuits, and BPE has not been provided with the types of due process guarantees that a defendant in a class action has under applicable rules. Further, Joint Complainants’ Complaint does not even contain the words “pattern” or “practice,”¹³ nor does it contain any allegations that BPE engaged in a “pattern of practice” of misconduct, or anything

¹² Based on the record developed during the cross-examination of the consumers presented at the hearing conducted on March 30 through April 1, 2015, it is clear that the gravamen of the complaints of the consumers who testified related to their displeasure with the fact that their rates went up during the extreme weather events at issue. Many consumers testified that it was disclosed and that they understood that they were purchasing a variable rate service.

¹³ So-called “pattern and practice” evidence is used primarily in actions brought under Title VII of the Civil Rights Act of 1964 and relies almost exclusively on statistical evidence. It has dubious application to the present proceeding.

similar. This so-called “pattern of practice” was unveiled by Joint Complainants far into the life of this proceeding.

As detailed in BPE’s Reply Memorandum of Law Regarding the Admissibility of Pattern and Practice Evidence, and which BPE relies upon in part here, the Supreme Court has held that the anecdotal evidence that Complainants suggest the Commission consider here will not stand as proof about a company’s practices. In *Walmart v. Dukes*, 131 S. Ct. 2541 (2011), the Supreme Court made clear that, at a minimum, some type of statistical analysis is required if a plaintiff desires to prove a “pattern and practice” of anything. In this case, Complainants have not even offered any statistical analysis, much less any evidence that would support such an analysis.

Complainants cannot attempt to prove a statistically insignificant number of alleged violations and then ask that the Commission take those small numbers and speculate about greater numbers. Such an approach impermissibly shifts the Joint Complainants’ burden of proof by forcing BPE to prove its innocence with respect to every other customer that it had in Pennsylvania, but whom never complained. The witness statements relied upon by Joint Complainants are not admissible to prove such across-the-board allegations because, at best, each of those statements recounts that particular customer’s experience with BPE. They do not prove that every one of BPE’s customers had the same experience with BPE.¹⁴

The approach also violates the requirement that Commission findings may not be based only on the “mere trace of evidence or a suspicion of the existence of a fact sought to be established.” *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm’n*, 489 Pa. 109, 413 A.2d 1037

¹⁴ Review of the witness statements shows a variety of idiosyncratic experiences with BPE and hardly gives rise to an argument that there was any “pattern and practice” because no such pattern or practice can be deciphered from a comparison of the statements. The only common thread is that the customers were upset that their rates increased. The cross-examination of witnesses relied upon by Joint Complainants makes abundantly clear that their complaints were disparate, at times confusing or contradictory, and at other times proof that they clearly understood the terms of the service that they received.

(1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 194 Pa. Superior Ct. 278, 166 A.2d 96 (1961); and *Murphy v. Comm., Dept. of Public Welfare*, 85 Pa. Cmwlth Ct. 23, 480 A.2d 382 (1984). The Commission has never found violations or assessed civil penalties based on assumptions about how customers might have been affected by a utility's actions without any evidence of violation against specific customers.

The Commission cannot permit the unfocused and incomplete statements of just a few disgruntled customers to violate the bedrock principles of due process and fairness. To do so would be not only unprecedented, but also unconstitutional. BPE urges the Commission to carefully consider these issues before it delves into this matter of first impression. The traditional obligation that the complaining party must bear the burden of proof through substantial evidence should be the only framework that the Commission follows in this proceeding.¹⁵

¹⁵ To the extent that Joint Complainants intend to rely on Barbara Alexander's opinion with respect to the pattern of practice argument, that reliance should not result in a finding against BPE because Alexander's net opinion is not based on any empirical evidence. There can be no doubt that Alexander parrots Joint Complainants' "pattern of practice" argument, but that is all she offers: argument. (Motion, Ex. B at 21) ("[t]here is a pattern and practice revealed in Blue Pilot's sales calls, verification calls, and its handling of customer complaint of the Company and its representatives and agents making false, deceptive, and misleading statements about the structure and operation of the Pennsylvania retail market, default service and the Price to Compare, and how Blue Pilot's products will benefit consumers."). That is not the opinion of an expert; it is an argument by a party who hopes that a judge will adopt it.

III. Joint Complainants' Purported Expert Testimony Should Be Stricken

Prior to being accepted by a Court as an expert, the expert must be qualified to proffer an opinion in the relevant subject matter.¹⁶ Pa.R.E. 702 sets forth the pertinent requirements:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson;
- (b) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; and
- (c) the expert's methodology is generally accepted in the relevant field.

Here, Joint Complainants' purported experts do not meet these requirements. It is well within the Commission's authority to limit or strike portions of submitted testimony that are inadmissible or beyond the scope of this proceeding. The Supreme Court has held that

The test to be applied when qualifying a witness to testify as an expert witness is whether the witness has any reasonable pretension to specialized knowledge on the subject under investigation. If he does, he may testify and the weight to be given to such testimony is for the trier of fact to determine.

Miller v. Brass Rail Tavern, Inc., 541 Pa. 474, 480-81, 664 A.2d 525, 528 (1995)

Joint Complainants proffered experts do not have the required "specialized knowledge" to offer an opinion in this proceeding because they do not provide any unique knowledge that will assist the Commission in making a ruling based on the allegations and claims made in the Complaint or this Motion. It is not even clear whether Everette, Alexander or Estomin support their opinions with the required "reasonable certainty" of one seeking to be qualified as an expert in a given field. *McMahon v. Young*, 442 Pa. 484, 276 A.2d 534 (1971). Nevertheless, Joint Complainants attempt to bypass their lack of evidentiary support by submitting the contrived and self-serving testimony of their own hired experts. This testimony does not reflect the testimony of the

¹⁶ A motion to admit Ashley Everette, Barbara Alexander and Steven L. Estomin as experts in this proceeding has not been made, and BPE has not had an opportunity challenge such a motion at the close of discovery.

consumer witnesses and improperly asserts the so-called experts' own idiosyncratic legal opinions into the record. The Joint Complainants' so-called experts further delve into issues of ratemaking, an area that the Commission has repeatedly found it does not have authority to rule upon. In reality, the testimony of Ashley Everett, Barbara Alexander and Steven L. Estomin constitutes nothing more than paid-for evidence. For all of these reasons, BPE objects to the admission of Everett, Alexander and Estomin as experts, and requests that their reports be excluded.

A. The Commission Should Strike Ashley Everett's Affidavit

1. Joint Complainants Failed to Disclose Ms. Everett as an Expert

Joint Complainants failed to previously disclose Ashley Everett as an expert, despite discovery requests from BPE inquiring as to the identity of all witnesses upon whom Joint Complainants would rely. Pursuant to 52 PA. Code § 5.332, Joint Complainants were required to supplement their discovery responses, but never disclosed Ms. Everett as an witness, expert or otherwise. Section 5.324(b) provides that an "expert witness whose identity is not disclosed ... will not be permitted to testify on behalf of the defaulting party at hearing." Because Joint Complainants failed to disclose Ms. Everett as an expert, her testimony should be stricken.

2. Ms. Everett's Affidavit Relies on Fabricated Numbers

The crux of Joint Complainants' damages claim relies upon Ms. Everett's Affidavit, wherein she assumes that any price BPE customers ever paid over the Price to Compare ("PTC") is recoverable. It is unclear why Joint Complainants placed their arguments regarding her testimony discretely in the middle of a section discussing BPE's marketing practices (in fact, it is sandwiched between a discussion of Ms. Alexander's testimony), as Joint Complainants appear to apply her purported damage analysis to all claims. Ms. Everett never analyzed the actual usage information for BPE's customers. Instead, she assumes without factual support that all

Blue Pilot customers consumed the same amount of electricity as PPL's average customer. From this, she then extrapolates the total amount of money BPE's customers were charged over the PTC. Neither the Motion nor Ms. Everett's Affidavit provides any justification for this mathematical sleight of hand. Ms. Everett's analysis is not based on a review of actual data and lacks any indicial of a carefully considered and thoughtful review of actual facts. Instead, it is based solely on Ms. Everett's incorrect assumptions and jumps to a conclusion that benefits the Joint Complainants' theory of liability.

Ms. Everett's response is fatally flawed on all fronts. As acknowledged by Ms. Everett, she fabricated the usage amounts for each of BPE's customers because she has no evidence regarding the actual usage. It should therefore go without saying that any number that Ms. Everett applied is wholly speculative and unsupported by a factual record. Nor did Ms. Everett perform any analysis to determine what the likely usage might be. Ms. Everett fails to acknowledge that demand for a service such as electricity falls as prices increase, such that BPE's customers likely consumed less than PPL's average customer. Ms. Everett's calculation based on the PTC is similarly flawed, as BPE never stated that it would charge the PTC – and in fact it had no obligation to do so. Indeed, Joint Complainants have never argued that BPE should have charged the PTC. Ms. Everett's calculation of damages based on the PTC constitutes an impermissible attempt to regulate BPE's ratemaking by imposing a requirement that before her opinion never applied to BPE, or any EGS for that matter.

Even assuming that any consumer incurred any damages, Ms. Everett's affidavit fails to account for the significant savings BPE's customers experienced for the majority of their tenure with BPE. In fact, there have never been any complaints by any consumer or the Joint Complainants that BPE did not charge enough for its electric service. If Ms. Evertte intended to provide an analysis of any consumers' hypothetical damages, such an analysis would have to

consider the amount of savings that a consumer enjoyed during the time that they purchased their electric from BPA. Further, Ms. Everette fails to account for previous settlements and refunds to consumers.¹⁷

Ms. Everette's analysis is further compromised by the fact that her purported damage calculations start in November 2013. Joint Complainants have never alleged any violations against BPE with respect to the rates charged in those months, and their Joint Complaint limits its requested damages to January 1, 2014. *See* Joint Complaint at 13, ¶ C. Accordingly, the Joint Complaint itself constitutes a factual that exposes the flaws in Ms. Everette's analysis. The portion of Ms. Everette's affidavit that relates to charges earlier than January 1, 2014, should be stricken.

Moreover, the entirety of Ms. Everette's affidavit is based on nothing more than the infirm assumptions contained in the PoP Motion. Only a very small percentage of BPE customers ever complained; yet, the affidavit assumes that Joint Complainants have proved some unspecified claim against BPE as to every single BPE customer. Even if BPE violated a regulation as to a certain customer, the Commission cannot extrapolate from that one instance that BPE violated any regulation with respect to the majority of consumers that never complained about BPE's services. Further, and as detailed below, the consumer witnesses testimonies were idiosyncratic and in no way reflective of each other, much less every other BPE customer that never took issue with BPE's services or the rates that they were charged.¹⁸

Ms. Everette's Affidavit is unsupported by the evidence, lacks any analysis of actual customer usage, engages in an impermissible attempt at ratemaking by alleging that any rate

¹⁷ Joint Complainants are barred from seeking restitution on behalf of any individual BPE customers to whom BPE already has provided a refund. 66 Pa. Cons. Stat. § 703(a) ("If any party complained against . . . shall satisfy the complaint, the commission shall dismiss the complaint.").

¹⁸ The flip side of the Joint Complainants' PoP Motion is that because 98% of BPE's customers never complained about their rates or the manner in which they purchased BPE's services, there was no PoP of violative behavior.

charged above the PTC constitutes damages, fails to account for the substantial savings achieved by BPE's customers for most of BPE's existence, goes outside of the timeline of this proceeding, and mistakenly assumes damages for every BPE customer regardless of whether the customer provided any testimony. Accordingly, Ms. Everette fails to set forth a methodology, much less one that is "generally accepted in the relevant field." Pa.R.E. 702(c). Ms. Everette's Affidavit should be stricken.

B. Barbara Alexander's Affidavit Should Be Stricken

Barbara Alexander is not qualified to render an expert opinion relating to consumer perception of the Disclosure Statements. According to her own affidavit, Ms. Alexander specializes in "consumer protection and public utility regulation." See Motion at Ex. F ¶ 3. She does not claim to have any expertise in linguistic or psychological analyses of how consumers perceive contract terms and her self-proclaimed "specialization," which appears to relate to the business of public utilities, does not qualify her to opine in the areas she seeks to offer testimony. In addition, Ms. Alexander does not purport to have any background relating to consumer marketing or consumers' perception of marketing and advertising claims made by advertisers. Significantly, Ms. Alexander conducted no consumer surveys to arrive at her conclusions and does not rely on any data relating to any such consumer survey. Indeed, despite citing to certain individual consumers in her affidavit, Ms. Alexander fails to cite any instance where a consumer testified that he or she was misled or deceived by BPE. Instead, Ms. Alexander comes to that conclusion on her own without any basis in fact. Ms. Alexander's entire testimony regarding what some hypothetical consumer might perceive is based on nothing other than her own conjecture. A plaintiff alleging that a representation is misleading is required to "produce extrinsic evidence of actual consumer confusion-it is not enough for a court to determine after the fact that a representation could have misled hypothetical consumers." *In re GNC Corp.*, No.

14-1724, ---F.3d---, 2015 WL 3798174 (4th Cir., June 19, 2015) (dismissing false advertising claim based on several states' consumer fraud statutes, including Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. Ann. § 201-1 *et seq.*). Joint Complainants allege that BPE "has violated and continues to violate the Commission's regulations by failing to provide accurate pricing information in plain language and using common terms consumers understand." Joint Compl., ¶ 25. In other words, the Complaint alleges that BPE misled consumers. Clearly Ms. Alexander arrived at an opinion that BPE's conduct was "deceptive and misleading" (Motion, Ex. B at 21-22) yet Ms. Alexander failed to base any of her opinions on any form of empirical study (i.e. consumer surveys) or her own empirically based research.¹⁹ Instead, she simply arrived at her net conclusion that BPE violated the law as a result of its alleged "deceptive and misleading" conduct. After that, Ms. Alexander was required to apply her studies or research to the facts of this proceeding. *See Snizavich v. Rohm and Haas Co.*, No. 1383 EDA 2012, 2013 Pa. Super. LEXIS 3192 (Pa. Super. Ct. Dec. 6, 2013). Similar to the expert at issue in *Snizavich*, Ms. Alexander's opinion lacks a scientific basis or authority. Ms. Alexander's report is bereft of any methodology at all, much less a methodology that is generally accepted in the relevant field. Instead, it is based on her subjective beliefs. Her report is not admissible. Pa.R.E. 702(c).

Accordingly, Ms. Alexander is wholly unqualified to opine with respect to what any hypothetical consumer might perceive with respect to any of BPE's statements. Indeed, Ms. Alexander fails to rely on any authority for her statements regarding what a hypothetical consumer might perceive and instead resorts to her own opinion. Ms. Alexander offers no

¹⁹ Ms. Alexander similarly arrives at the conclusion that BPE did not deliver savings to its Pennsylvania customers by relying solely on the affidavit of Ms. Everette, rather than perform any analysis to determine the savings BPE's customers actually received. *See* Motion at Ex. F ¶ 22. As discussed, Ms. Everette failed to review the savings BPE's customers received and limited her review solely to the time period of the extreme weather events.

methodology upon which she bases her opinions. Instead, she merely says it is so. Self-serving assertions that one's conclusions are correct is not admissible. *See Blum v. Merrell Dow Pharmaceuticals*, 705 A.2d 1314, 1323 (Pa. Super. 1997).

The best evidence of a consumer's understanding of the terms and conditions are the statements of those customers themselves. The Commission should not permit Joint Complainants to substitute a lack of evidence with the say-so of a hired expert. Accordingly, the portions of Ms. Alexander's testimony detailing how customers may have perceived BPE's Disclosure Statement and marketing materials, a topic about which she is neither qualified or supported by data, should be stricken.

Ms. Alexander further opines into areas outside of this Commission's jurisdiction. Specifically, Ms. Alexander offers opinions as to the rate that BPE charges. *See, e.g.*, Motion at Exhibit F ¶ 28(b). The Maryland Public Service Commission recently struck portions of Ms. Alexander's testimony that dealt with an EGS's rates, and the Commission should do the same here. *See Public Utility Law Judge's Ruling on Motion in Limine, In the Matter of the Investigation into the Marketing, Advertising, and Trade Practices of Xoom Energy Maryland, LLC*, Case No. 9346(a), April 15, 2015, attached hereto as Exhibit 5.

Finally, Ms. Alexander's opinion consists of inadmissible legal opinions and legal conclusions. *See, e.g.*, Motion at Exhibit F ¶ 28 ("In summary Blue Pilot has engaged in the following unfair and deceptive practices and violations of Pennsylvania law and regulations..."). This is not an opinion from an expert in the relevant field, which in this case would be consumer marketing. Rather, it reads more like an initial complaint of a party used for the purpose of initiating a lawsuit, or a legal brief filed by an attorney who is advocating a position for her client. It is a judgment declared by Ms. Alexander and meant to be the end of the matter. Such declarations, however, are reserved for courts and judges, not experts.

It is a basic rule of evidence that experts are not permitted to offer legal conclusions. *See, e.g., Pa.R.E. 702; Berkeley Inv. Grp. Ltd. V. Colkitt*, 455 F.3d 195, 217 (3d Cir. 2006) (“[T]he District Court must ensure that an expert does not testify as to the governing law of the case.”); *Casper v. SMG*, 389 F. Supp. 2d 618, 621 (D.N.J. 2005) (“The rule prohibiting experts from providing their legal opinions or conclusions is so well established that it is often deemed a basic premise or assumption of evidence law – a kind of axiomatic principle.”). This should be especially the case when the so-called expert arrives at nothing other than a net opinion seeking to support his or her opinion with an opinion. The reality is that Ms. Alexander, who possesses a Doctor of Jurisprudence has played in the role of an advocate for a party under the guise of an expert. In keeping with this rule, the Commission should strike Ms. Alexander’s testimony.

C. Steven L. Estomin’s Affidavit Should Be Stricken

Rate-making is outside of the Commission’s jurisdiction. “[T]he Commission does not have traditional ratemaking authority over competitive suppliers and does not regulate competitive supply rates. The Commission also does not have subject matter jurisdiction to interpret the terms and conditions of a contract between an EGS and a customer to determine whether a breach of the contract has occurred.” Opinion and Order, *Commonwealth of Pennsylvania, et al., v. Blue Pilot Energy, LLC*, C-2014-2427655, *18-19 (December 11, 2014). Dr. Steven L. Estomin’s affidavit, however, consists primarily of his belief regarding how BPE’s rates should have been charged. Specifically, Dr. Estomin opines that BPE’s rate did not fluctuate with the relevant PJM wholesale market conditions as he believes they should have. Motion at Exhibit G. The method in which BPE calculated its rates based on PJM wholesale

market conditions, or any other market conditions, is entirely outside the purview of this proceeding.²⁰ Accordingly, Dr. Estomin's Affidavit should be stricken.

IV. The Record Does Not Support an Entry of Judgment

As discussed in Section I, Joint Complainants' requested discovery sanction is unprecedented and entirely inappropriate. Even under any alternative theory for a merits-based judgment not advanced in the Motion, the relief sought here is not warranted based on this record. Motions for summary judgment, for instance, cannot be granted when there are still issues of material fact in dispute. *See* 52 Pa. Code § 5.102(d). The record here is not complete. At the time that the procedural schedule was still in effect, the Commission envisioned further hearings to develop the record. Accordingly, factual issues still drive the outcome of this proceeding. In order to escape their lack of evidentiary support, Joint Complainants rely on wildly conclusory and unsupported expert opinion which does not comport with the established facts. Joint Complainants further attempt to shift their own burden of proof to compensate for their evidentiary failures. Rather than submit a proposed procedural schedule, Joint Complainants filed the instant Motion and decided to rely on an incomplete record and the inadmissible and infirm testimony of Everrette, Alexander and Estomin. Because the record does not support entry of judgment, the Motion should be denied.

A. BPE Provided Accurate Pricing Information about Its Services in Accordance with the Commission's Directives

Pursuant to the Pennsylvania Code, BPE provided "accurate information about [its] electric generation services using plain language and common terms in communications with

²⁰ Dr. Estomin further fails, among other deficiencies, to account for any of the fixed costs, overhead, advertising expenses, and other variable inputs that factor into BPE's (and other EGSs') rates. Instead, he rushes to judgment and proposes an incomplete analysis based on nothing more than his own beliefs about what should have been charged.

consumers.” 52 Pa. Code § 54.43(1). At bottom, Joint Complainants take issue with BPE’s Disclosure Statement, which provides:

Price per Kilowatt Hour. You have a variable rate plan with a starting price set at **RATE cents per kWh**. This initial rate will be effective for at least the first [number] days of service. Thereafter, your price may vary on a month-to-month basis. This price includes Transmission Charges, but excludes applicable state and local Sales Taxes and the Distribution Charges from your local EDC. At any time after [number] days of service, but not more frequently than monthly, Blue Pilot may increase or decrease your rate based on several factors, including changes in wholesale energy market prices in the PJM Markets. Your variable rate will be based upon PJM wholesale market conditions. Sudden, atypical fluctuations in climate conditions, including but not limited to, extraordinary changes in weather patterns may be detrimental to Blue Pilot’s electricity customer relationships. Such fluctuations or conditions may result in Blue Pilot including unusual costs when supplying electricity service, which may be passed through as a temporary assessment on your bill. Please log on to www.bluepilotenergy.com or call Customer Service at 877-513-0246 for additional information about our current pricing.

Joint Complainants fail to mention that this Disclosure Statement was reviewed *and approved* by the Commission before it was sent to any consumer in Pennsylvania. Joint Complainants further fail to identify any consumers that found this language confusing. The consumer testimony that Joint Complainants do offer is often contradicted by documents BPE has already provided Joint Complainants and generally consists of customers simply expressing frustration that their rates increased. Nevertheless, Joint Complainants would have the Commission supplant its own earlier findings with those of Joint Complainants’ experts. Because BPE provided accurate pricing information about its services at the time that the consumer signed with BPE in accordance with the Commission’s directives, Joint Complainants’ Motion should be denied.

- 1. There can be no violation of Commission regulations or orders regarding BPE’s disclosure of pricing information because the Commission approved the very BPE Disclosure Statement that Joint Complainants challenge**

As part of the licensure application process, BPE submitted, among other things, a copy of its Disclosure Statement and Agreement for Electric Service (“Disclosure Statement”) to the

Commission for review and approval. The Commission's Bureau of Consumer Services approved BPE's Disclosure Statement on May 26, 2011. *See* May 26, 2011 Email from Lisa Weary, Pa. PUC Bureau of Consumer Services, to Angela Janssen, Counsel to BPE, Ex 2. In January 2014, BPE submitted to the Commission a slightly revised version of its previously approved May 2011 Disclosure Statement which, in relevant part, added verbiage to the "Price per Kilowatt Hour" section to address extreme weather events. The Commission's Bureau of Consumer Services again reviewed and approved the revised Disclosure Statement on January 22, 2014. *See* Jan. 22, 2014 Email Chain between Jessica Renneker, BPE's Dir. of Regulatory Affairs, and James Farley, Policy Analyst, Pa. PUC Bureau of Consumer Services, Ex. 4. The fact that the Commission reviewed and approved the Disclosure Statement is fatal to Joint Complainants' allegations of fraudulent or deceptive advertising and marketing conduct.

At issue here is whether it was reasonable for BPE to rely on the disclosures reviewed and approved by the Commission. This question was recently addressed in *Hoke v. Ambit NE, LLC*, wherein the Commission analyzed Sections 54.43(1) and 54.5(c) and found that, because the variable rate disclosure statement used by the EGS in that case had been approved by the PUC, there was no violation of any regulations or Commission orders. No. C-2013-2357863, 2013 WL 6681516, at *5-6 (Pa. PUC Nov. 21, 2013). More specifically, after enrollment, the supplier mailed the complainant a disclosure statement, which contained language that previously had been approved by the Commission's Bureau of Consumer Services. *Id.* at *2. The disclosure statement explained that "rates for the initial term and subsequent renewal terms [one-month periods] may vary dependent upon price fluctuations in the entry and capacity markets, plus all applicable taxes." *Id.* at *3. The supplier advertised that, under its variable rate plans, rates may vary month-to-month based upon commodity costs and market conditions, and that the introductory rate applied to the first billing cycle only. *Id.* The complainant,

nonetheless, believed that the rates would remain stable and constant over a long period of time. *Id.* The complainant “was confused by language preapproved by the commission’s Bureau of Consumer Services in the disclosed terms of agreement,” which were contained in the disclosure statement, and filed a complaint alleging that the supplier’s variable rate advertising and marketing was false and deceptive. *Id.* at *1.

In its decision dismissing the complaint, the Commission found that the supplier did not violate either Section 54.43(1) (*i.e.*, the supplier, in fact, provided accurate information to the complainant about his electric generation service using plain language and common terms) or 54.5(c) (*i.e.*, the supplier, in fact, adequately disclosed to the complainant all variable pricing terms, including the conditions of variability and the limits on price variability), or any other regulations or Commission orders, because, “[a]s part of [the supplier’s] licensing process, it submitted a customer disclosure statement for review and approval by the Commission’s Bureau of Consumer Services. [The supplier] is still using the same disclosure statement approved by Commission Staff.” *Id.* at *5. As a result, the Commission concluded that the supplier’s advertising and marketing was not “deceptive” or “fraudulent.” *Id.* at *6. The Commission also held that the disclosure statement that the complainant received from the supplier provided him “adequate notice” that he had a variable rate that could increase on a month-to-month basis. *Id.*

Complainants take issue with BPE’s Commission-reviewed and Commission-approved Disclosure Statement, which clearly and conspicuously advises consumers of the nature and terms of their variable rate contracts.²¹ As in *Hoke*, such review and approval necessarily are fatal to Joint Complainants’ claims for violation of Sections 54.43(1) and 54.5(c). For that

²¹ It bears noting that BPE’s Disclosure Statement includes a “Definitions” section and otherwise incorporates terminology set forth in the Commission’s “Consumer’s Dictionary for Electric Competition,” which “provide[s] a common language for consumers.” *Compare* 1997 Customer Information Order, 180 P.U.R. 4th 61 (“staff developed a ‘Dictionary’ of terms for electric competition to assist EDCs and suppliers in meeting our requirement concerning the use of common and consistent terminology”) & App. D, *with* Jt. Compl., App. A.

– reason alone, Joint Complainants cannot show that BPE failed to provide accurate pricing information because the Commission approved the very disclosure that Joint Complainants now complain of.

2. The Consumer Witness Testimony of a Few Disgruntled Customers Does Not Show that BPE Failed to Provide Accurate Pricing Information

Joint Complainants cannot escape the fact that the Commission has already agreed that BPE's Disclosure Statement fully informed BPE's customers regarding BPE's pricing information. Because the Disclosure Statement itself does not further Joint Complainants' case, Joint Complainants focus on the testimony of 83 witnesses (3% of BPE's total customer base) whose accounts are idiosyncratic and often easily contradicted. Indeed, Joint Complainants are unable to use the testimony of many of these witnesses, as their varied recollections do not support Joint Complainants' narrative. In the end, Joint Complainants cherry-pick the testimony of 52 witnesses (less than 2% of BPE's total customer base).

Of the 83 witnesses, Joint Complainants aver that 27 (less than 1%) testified that BPE "did not explain that the rate was variable and/or inaccurately led them to believe that the rate was fixed," Motion at 10 and 14. Joint Complainants further aver that 20 (less than 1%) testified that BPE provided them with inaccurate information about savings or competitive rates. Motion at 12 and 15. Finally, Joint Complainants aver that 17 (less than 1%) testified that they never received a disclosure statement or received it after they had enrolled. Motion at 13 and 16. Joint Complainants submit these accounts as unrebutted evidence, despite the fact that BPE has already produced to Joint Complainants substantial evidence that either contradicts many of these consumers or shows their recollection to be unreliable. For example:

- All allegations of Alexandra Moratelli are completely contradicted by her sales call. For example, while she testified that she understood that after the first three months "Blue Pilot would call or send a copy of [the] new price," in the sales call Ms. Moratelli

acknowledges that her initial rate could change after 60 days and that BPE would *not* call her if the rate would change. She also testified that the sales agent told her that the TPV agent was “from the government” and “just to make you consent.” This is completely contradicted by her sales call. *See* Sales Call of Alexandra Moratelli, attached as Exhibit 6.

- Sherri Kennedy testified that a sales agent promised to notify her “if anything changes” with the rate, but the sales call contradicts her testimony. Further, Ms. Kennedy acknowledged in her TPV that she had a variable rate that could change from month to month. *See* Sales Calls and TPV of Sherri Kennedy, attached as Exhibit 7.
- Allen Fitch testified that he signed up for a 2 year fixed rate, but his TPV states that his rate is variable. *See* TPV of Allen Fitch, attached as Exhibit 8.
- Lynn Ober testified that the BPE sales agent did not mention variable rates, but the sales call clearly demonstrates that the sales agent did tell Ms. Ober that the rate was good for 90 days and the TPV further provided that the rate was variable. *See* Sales Calls and TPV of Lynn Ober, attached as Exhibit 9.
- James A. Reed testified that he “would be notified ... prior to [a new rate] becoming effective.” However, his sales call contradicts this testimony. *See* Sales Calls of James A. Reed, attached as Exhibit 10.
- William C. Smith testified that he received a notice from Superior that it had sold its interest to Blue Pilot but his terms of service would remain the same and rates would be kept “reasonable to market conditions.” However, Mr. Smith’s sales calls and TPV contradict his testimony. *See* Sales Calls and TPV of William C. Smith, attached as Exhibit 11.
- Tracy Wesley testified that the Blue Pilot representative told her that the “rates would never be higher than [M]et-[E]d.” This is contradicted by her sales calls. *See* Sales Calls of Tracy Wesley, attached as Exhibit 12.
- Robert D’Adamo testified that his rate would be fixed at 13 cents per kWh, but his TPV clearly has him acknowledge his initial rate at 7.9 cents per kWh. *See* TPV of Robert D’Adamo, attached as Exhibit 13.
- Tammy M. Giles testified that she never received a TPV. This is not true. *See* TPV of Tammy M. Giles, attached as Exhibit 14.
- William C. Evans testified that he was quoted a rate of 7 cents/kWh for one year. However, Mr. Evans acknowledged in a TPV that his rate was variable. *See* TPV of William C. Evans, attached as Exhibit 15.
- Gary Euler testified that two BPE sales agents visited him at his business and signed him up for his home and business. However, BPE never employed any door-to-door salesmen and Mr. Euler’s sales calls demonstrate that his correspondence with BPE was all telephonic. *See* Sales Calls of Gary Euler, attached as Exhibit 16.

Despite this contradictory testimony, Joint Complainants argue that these consumers somehow support their argument. On the contrary, the record reveals that these consumers employed a selective memory regarding their experience with BPE. For the majority of BPE's existence, its customers did, in fact, enjoy savings – a fact that Joint Complainants entirely ignore. Further, such statements of future savings are no more than non-actionable puffery. See, e.g., Consumer Testimony of Betty Ellis, Motion at 12 (“I was told by Blue Pilot that I would ... save a lot (sic) going with them.”).

Joint Complainants identify a few customers that claim to have never received a Disclosure Statement or received it after they had been enrolled “for some time.” Motion at 13 and 16. However, BPE sent a Disclosure Statement to every customer after enrollment. Perea Aff. at ¶ 6, Ex. 1. Additionally, BPE has already produced to Joint Complainants the service agreements signed by four of the customers at the time they initiated service for whom Joint Complainants allege never received a disclosure statement. *See* Disclosure Statements for Tamrat Bekele, Mehmet Isik, Ifan Isik, and Yaglidereliler Corp., attached as Exhibit 17.

Much of Joint Complainants' support consists of outlandish claims made by a few disgruntled customers that can be easily refuted by reviewing the customers' sales calls and TPVs. Joint Complainants have these sales calls and TPVs, yet knowingly proffered testimony in their Motion which is directly contradicted by the factual record. Joint Complainants fail to demonstrate that BPE provided inaccurate pricing information to its customers. Instead, they proffer the complaints of a handful of individuals who were unhappy that their variable rate service rose during an extreme weather event, yet none of those same consumers complained when they paid less than when they were being charged by their EDC prior to the change in weather. In other words, despite agreeing to be charged a variable rate, they were only happy when that rate worked to their benefit.

3. **Joint Complainants’ Fail to Prove Their Case through “Expert” Testimony**

The Commission has already reviewed and approved BPE’s pricing information. This is not in dispute, and the Motion fails to explain why the Commission’s previous finding should be altered.²² Instead, Joint Complainants offer the testimony of two “experts” who conclude the opposite. As set forth above, Joint Complainants’ expert testimony should be stricken because it contradicts previous Commission findings and consists of impermissible legal conclusions. Further, Joint Complainants’ experts’ conclusions fail to demonstrate that BPE violated any Commission regulations.

The bulk of Ms. Alexander’s testimony centers around BPE’s marketing and promotional materials and sales scripts. *See* Motion at 18-19. Joint Complainants’ fail to identify any Commission requirement that advertisements contain the type of information that Ms. Alexander required. BPE’s marketing materials are just that – advertisements. The regulations do not require an advertisement – often meant to simply alert a prospective customer of a market participant – to fully explain how variable rates are calculated. Ms. Alexander also laments that BPE’s sales script discusses potential savings for customers before it informs of the rates varying “month to month.” Motion at 18. While Ms. Alexander’s misunderstanding of the purpose of a sales call is troubling in its own right, the order with which BPE presented this information to a customer in no way implicates the accuracy of its pricing information.

Both Ms. Alexander and Dr. Estomin take issue with BPE’s Disclosure Statement’s provision explaining that prices would be based on “PJM wholesale market conditions.” *See* Motion at 18-20. Ms. Alexander complains that the term “market” is not further explained and Dr. Estomin faults BPE for having neither a “set formula” nor mentioning that PJM wholesale

²² *Joint Complainants do not argue that it was unreasonable for BPE to rely on the Commission’s previous finding that its Disclosure Statement was acceptable.*

market conditions include projected electricity costs, day-ahead market costs, projected weather, fluctuations in generators' pricing into the PJM spot markets, and the spot price of natural gas.²³ Joint Complainants fail to identify any Commission regulation that requires BPE to further define "PJM wholesale market conditions" or to list the litany of various conditions that could impact the market. The phrase speaks for itself and customers were welcome to inquire further if they had any questions. Tellingly, the Motion fails to identify any customers that sought a further definition of what factors play into the PJM wholesale market. It is further worth noting that Joint Complainants fail to offer any evidence that it was unreasonable for BPE to rely on the Commission's own findings that this language appropriately informed customers of their pricing terms. Instead, the Joint Complainants rely upon the Monday morning quarterbacking of Alexander and Estomin to supplant the Commission's own authority.

BPE supplied its customers with a Disclosure Statement and Agreement that was approved by the Commission. BPE relied on the Commission when drafting these statements to ensure this information conformed with the legal requirements. It was reasonable for BPE to rely upon the Commission's review and approval of its Disclosure Statement. It would be unjust for the Commission, after the fact, to instruct BPE that the Disclosure Statement and Agreement were now unsuitable and subject to the imposition of fines against BPE for following the Commission's own guidance. Because Joint Complainants' experts fail to demonstrate that BPE failed to provide accurate pricing information as approved by the Commission, the Motion should be denied.

4. Enforcement of Sections 54.43(1) and 54.5(c) Would Violate BPE's Due Process Rights

²³ In this sense, Joint Complainants lead the Commission in a matryoshka doll-like search for further definitions. If the Disclosure Statement had provided that PJM wholesale market conditions include day-ahead market costs, Joint Complainants would complain that those day-ahead market costs were not explained.

The U.S. Supreme Court has explained that, in order to satisfy the Fifth Amendment’s Due Process Clause – made applicable to the states through the Fourteenth Amendment – laws must not fail to “give [a] person of ordinary intelligence a reasonable opportunity to know what is prohibited . . .” *Vill. of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982); *Com. v. Parker White Metal Co.*, 515 A.2d 1358, 1367 (Pa. 1986) (due process requires that the proscribed conduct and range of penalties be unambiguously identified). Due process demands that a statute not be vague. *Com. v. Mayfield*, 832 A.2d 418, 422 (Pa. 2003); *Com. v. Barud*, 681 A.2d 162, 165 (Pa. 1996). A statute is vague if it fails to provide fair notice as to what conduct is forbidden or if it prevents the gauging of future, contemplated conduct, or if it encourages arbitrary or discriminatory enforcement. *Com. v. McCoy*, 895 A.2d 18, 30 (Pa. Super. Ct. 2006). A vague law is one whose terms necessarily require people to guess at its meaning. *Mayfield*, 832 A.2d at 422. If a law is deficient (*i.e.*, vague) in any of these ways, then it violates due process and is constitutionally void. *Id.*

Section 54.43(1) requires a supplier like BPE to provide “accurate information” about its electric generation services “using plain language and common terms in communications with consumers.” 52 Pa. Code § 54.43(1). Section 54.5(c) provides that, “if applicable,” a disclosure statements’ variable pricing provision must include “[c]onditions of variability (state on what basis prices will vary)” and any “[l]imits on price variability.” *Id.* at § 54.5(c)(2). None of these terms are defined within the relevant Code sections.

BPE’s Disclosure Statement clearly and conspicuously states (1) that the customer had a variable rate plan; (2) the customer’s specific initial rate; (3) the customer’s specific rate-guarantee period; (4) that, after that period, “[BPE] may increase [the customer’s] rate based on several factors, including changes in wholesale energy market prices in the PJM Markets,” and that “[the customer’s] variable rate will be based upon PJM wholesale market conditions,” which

could be affected by “[s]udden, atypical fluctuations in climate conditions, including but not limited to, extraordinary changes in weather patterns.” Ex. 3. Yet, Complainants allege that BPE violated Sections 54.43(1) and 54.5(c) because consumers purportedly could not determine from that Disclosure Statement “the price that they would or could be charged by [BPE] or how the price would be calculated.” Motion at 20-21.

To the extent that Sections 54.43(1) and 54.5(c) could be construed in the manner requested by Complainants, the regulations are unconstitutionally vague because they do not give BPE fair notice that the failure to provide information above and beyond that which BPE already discloses (and which was reviewed and approved by the Commission) violates those Commission regulations. In fact, in its recent June 14, 2014 Final-Omitted Rulemaking Order amending Section 54.5, the Commission agreed with a commenter’s statement that Section 54.5(c)(2)’s “conditions of variability” and “limits on price variability” disclosure requirements were vague and ambiguous and need to be “clarif[ied]”; the Commission further noted that the regulatory language was subject to “potential misinterpretation.” 2014 Reg. Text. 358473 (NS) (June 14, 2014) (“[the Commission] believes that more specific direction should be provided to EGSs regarding the level of detail the Commission expects regarding the variability in retail generating supply pricing”).

Thus, enforcement of Sections 54.43(1) and 54.5(c) against BPE in the manner that Complainants seek would violate BPE’s due process rights. Accordingly, BPE cannot be held in violation of these sections.

B. BPE’s Variable Rate Conformed with the Disclosure Statement

Joint Complainants’ aver that the consumer testimony demonstrates that BPE’s rates did not conform with the Disclosure Statement. In support, Joint Complainants offer the testimony of George M. Dinger, who testified that he read the revised Disclosure Statement to require two

notices ahead of any price change. The revised Disclosure Statement in no way supports this claim, *see* Ex. 3, nor do Joint Complainants argue as much anywhere else in the Motion.

Joint Complainants also offer the testimony of two customers who claim they were told by customer service representatives that the prices increased because BPE “lost so many customers with the price increase that they needed to make up for their loss of money” and “because of the cold weather in the midwest.” Motion at 22-23. To the extent the Commission accepts this hearsay testimony, these customer service representatives were entirely mistaken and there is no evidence in the record that BPE supported any such statements. The Disclosure Statement clearly disclosed that prices were based on PJM wholesale market conditions.

Joint Complainants rely primarily on the expert testimony of Dr. Estomin in their allegation that BPE’s prices did not conform to the Disclosure Statement. In support, Dr. Estomin argues that the “predominant rate charged was the same in February and March even though the average per-kWh rate in the PJM day-ahead market in PPL service area, for example, fluctuated significantly.” Motion at 24 (quotes omitted). Estomin, however, fails to note that BPE’s Disclosure Statement clearly states that “Blue Pilot may increase or decrease your rate *based on several factors*, including changes in wholesale energy market prices in the PJM Markets. Your variable rate will be based upon PJM wholesale market conditions. Sudden, atypical fluctuations in climate conditions, including but not limited to, extraordinary changes in weather patterns may be detrimental to Blue Pilot’s electricity customer relationships. Such fluctuations or conditions may result in Blue Pilot including unusual costs when supplying electricity service, which may be passed through as a temporary assessment on your bill.” Prior to the Motion, Joint Complainants did not disclose this aspect of Dr. Estomin’s work and the affidavit should not be considered evidence. If it had been disclosed pursuant to the normal course of the Procedural Schedule, BPE would have had an opportunity to challenge this Dr.

Estomin's assumptions and opinion. Significantly, Dr. Estomin does not fault BPE for the rates charged in January, yet Joint Complainants seek damages for that month. This type of contradiction exposes Dr. Estomin's opinion for the sleight-of-hand that it is.

More significantly, BPE never represented that its rates would always adjust proportionally to the PJM markets, nor that the rates would be based exclusively on the "PJM day-ahead market." Rather, BPE stated that the rates would be based on PJM wholesale market conditions.²⁴ Dr. Estomin's conjecture regarding how BPE should have calculated its rates based on PJM wholesale market conditions is outside the jurisdiction of the Commission, as the Commission lacks ratemaking authority, and peculiar to his own way of thinking. It certainly is not supported by any facts in this record. Because Joint Complainants fail to show that BPE charged rates that did not conform with the Disclosure Statement, the Motion should be denied.

C. BPE's Marketing Complied with Applicable Regulations

To the extent that Joint Complainants rely on the consumer testimony, BPE refers to Section IV-A-2, above, discussing how such testimony is contradictory and unreliable. In fact, BPE's customers did enjoy savings for most of BPE's existence. Joint Complainants fail to offer any testimony that any customer was ever told rates would never increase. Most of the testimony supplied by Joint Complainants consists of nothing more than non-actionable puffery.

As with much of the Motion, Joint Complainants ask the Commission to rely on the legal conclusions and net opinions of their own hired experts rather than support their infirm allegations with actual evidence of wrongdoing. And these experts' analysis is flimsy. For example, Ms. Alexander primarily scrutinizes BPE's semantics and makes wildly unsupported conclusions yet she is in no way capable of arriving at such conclusions because she lacks the

²⁴ Dr. Estomin also testifies as to BPE's rates for customers from April through August 2014. This time period falls outside the scope of this proceeding, and the corresponding testimony should accordingly be stricken.

expertise to do so. Ms. Alexander takes issue with the part of the sales script wherein agents describe themselves as a “personal account representative” who will review the account every 80-90 days to determine if BPE has a better rate. Motion at 31. Ms. Alexander concludes that this “creates the impression that Blue Pilot will initiate action to respond to changes in prices after 60-90 days or that contact with Blue Pilot after that period will result in being ‘taken care of,’ a phrase and intent designed to suggest that customers need not worry about the potential for higher prices.” Here again, Joint Complainants substitute evidence of customers actually construing this statement as promising that BPE would inform them of any price increases with the impermissible legal opinion of a hired expert. Ms. Alexander fails to explain how an agent describing herself as a “personal account representative” equates to a promise that BPE will alert a customer prior to a change in rates. More important, however, Ms. Alexander fails to support her opinion with any extrinsic evidence of how an actual consumer may perceive such a statement. Instead, she simply tells the Commission how it must be perceived. The Commission should not permit such wildly unsupported testimony.

More fundamentally, the Commission should not permit Joint Complainants to shift their burden of proof to compensate for their own evidentiary failures. Ms. Alexander assumes that BPE’s oversight and training of its sales representatives was “defective and deficient” because BPE did not produce any documents related to internal compliance programs or policies or information on Pennsylvania’s consumer protection requirements. However, a lack of documentation is not evidence of defective training. To the contrary, BPE put all of its sales representatives through a thorough training regime and diligently oversaw their work. *See Perea Aff.*, Ex. 1 at ¶ 4. Instead, Ms. Alexander resorts to what is commonly referred to as “argument,” which is nothing more than advocacy for one’s client. That does not constitute

admissible evidence. Joint Complainants again attempt to shift their burden of proof by suggesting that their own lack of evidence requires BPE to prove its innocence.

Ms. Alexander complains that BPE's promotional materials and sales script emphasizes savings and do not explain the term "variable rate." As discussed above, there are no regulations that required BPE to fully explain how a variable rate works nor were they precluded from discussing potential savings. Furthermore, for most of BPE's history, its customers were able to enjoy savings. Thus, any statements regarding savings were factually accurate and correct. Finally, the Commission cannot take puffery as an example of a deceptive promise.

Ms. Alexander also cherry-picks the most unrepresentative BPE sales calls and extrapolates that these sales calls were representative of every call made in Pennsylvania. BPE made thousands of sales calls in Pennsylvania, yet Ms. Alexander is comfortable relying on only few to arrive at her unsupported conclusions. As discussed above, only a small number of BPE's customers ever took issue with BPE's practices, and those complainants are the only ones that the Commission should consider.

D. BPE Properly Handled Customer Complaints in Good Faith

The gravamen of Joint Complainants argument regarding BPE's handling of customer calls is that several consumer witnesses complained that BPE did not do enough, in their own estimation, to resolve their issues. Joint Complainants rely on the mistaken assumption that the customer's that expressed concern did, in fact, each have a valid complaint. The Joint Complainants fail to prove – or even allege – that the complaints underlying each of those calls had merit. During the hearing in March 30 through April 1, 2015, many consumers acknowledged that they were able to speak with a BPE customer representative. In some cases their problems were resolved, in other cases they were not. The reality is that the customers who were unhappy, were simply unhappy that they were charged for the variable rate product that

they agreed to when they signed with BPE. Accordingly, Joint Complainants cannot demonstrate a lack of good faith in handling those calls when Joint Complainants cannot prove that BPE had a duty to handle those calls in any other way.²⁵

Joint Complainants further rely on the testimony of Ms. Alexander, who similarly assumes that each customer complaint was in fact valid. Motion at 47-49. In her role as an advocate, Ms. Alexander argues that there is no evidence that BPE investigated certain types of sales calls regarding BPE's sales agents. Motion at 47-48. Not only does Ms. Alexander fail to offer any evidence that BPE fielded any such complaints with regard to its sales agent, she also fails to offer any evidence that BPE did not investigate any such complaints. The Commission cannot shift Joint Complainants' burden of proof and force BPE to prove its innocence. Finally, Ms. Alexander argues that "only a small number of customers overall" received a refund or credit from Blue Pilot. Motion at 49. As is typical of Ms. Alexander's testimony in this proceeding, she fails to provide the Commission with any context or factual support for her conclusions. Instead, she merely plays the role of an advocate. In fact, BPE resolved every outstanding consumer complaint brought directly to BPE other than those formally filed with the Commission. *See Perca Aff.* at ¶5, Ex. 1. Ms. Alexander fails to acknowledge that the majority of BPE's customers, which number in the thousands, never complained. Thus, it can be inferred that the majority of BPE's customers were content with BPE's service. While Ms. Alexander may not be satisfied with the number of refunds and credits BPE extended to its customers, that simply reflects the fact that BPE did not receive the volume of complaints Ms. Alexander implies it received. The problem with that implication is that there is no evidence to support it. Ms.

²⁵ BPE incorporates the arguments made in Section IV-A-2, above, regarding the contradictory and unreliable nature of the testimonies relied upon by Joint Complainants.

Alexander's "trust me" attitude is not a sufficient basis upon which to grant the Joint Complainants' requested relief.

To the extent that Joint Complainants allege BPE failed to adequately staff its call center, the Commission has no standards addressing the timelines for answering calls. BPE received a record number of calls, mirroring situations faced by other entities during the extreme weather and polar vortices crisis, which was recognized by the Commission in the *Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, Docket No. M-2014-2406134 (February 20, 2014). Nevertheless, BPE did in fact have an exceptional record of responding to customer calls. *See, e.g.*, BPE Customer Care Report, attached as Exhibit 18. Finally, as to the formal complaints that BPE settled, BPE is relieved of any responsibility as provided in Code Section 703(a).

E. BPE Complied with the Telemarketer Registration Act

BPE entered into valid contracts with customers who enrolled telephonically via a third-party verification ("TPV") process provided by Trusted TPV. During the TPV process, consumers were clearly and conspicuously advised that their rates were variable and may increase or decrease on a monthly basis and assented to those terms. Consumers were required to affirmatively acknowledge their understanding of those terms during the TPV process in order to complete enrollment. Many BPE customers signed and returned written contracts to BPE following a telemarketing call when they opted not to enroll telephonically. Regardless of enrollment method, BPE sent each new customer a copy of its "Disclosure Statement and Agreement for Electric Service," which also contains all material terms of that specific customer's rate plan. *See Perea Aff.* at ¶ 6, Ex. 1.

Joint Complainants allege that BPE violated the Pennsylvania Telemarketer Registration Act, 73 Pa. Cons. Stat. §§ 2241, *et seq.*, by failing to provide consumers with a written contract

following their telephonic enrollment, which contains, among other things, a description of the services purchased and restatement of the material representations made during the telemarketing call. Motion at 50. As a preliminary point, the Telemarketer Registration Act's requirement for a written contract does not apply where "[t]he contractual sale is regulated under other laws of this Commonwealth." 73 Pa. Cons. Stat. § 2245(d). Electricity sales are governed by the PUC's laws and regulations and, thus, the Telemarketer Registration Act's written contract requirement is not applicable to BPE's telephonic enrollments in the first instance. For that reason alone, the Motion should be denied.

Even if the Act's written contract requirement did apply to BPE in this case, Joint Complainants conspicuously fail to mention that many BPE customers did, in fact, sign and return written contracts to BPE following a telemarketing call when they opted not to enroll telephonically. Regardless, the Commission has held that no written agreement following a telemarketing call is required where there is a recorded TPV call followed by the provision of a written disclosure statement. *See, e.g., Dawes v. Pa. Gas & Elec.*, No. F-2013-2361655, 2014 WL 466614, at *12-14 (Pa. PUC Jan. 14, 2014) (holding that a valid, binding variable rate contract existed where respondent used Trusted TPV to verify complainant's enrollment and terms thereof, and followed-up with a disclosure statement stating that rate was variable and setting forth initial rate); *Pa. PUC v. PECO Energy Co.*, 88 Pa. P.U.C. 402, No. R-00984298, 1998 WL 442683, at *10-11 (Pa. PUC May 28, 1998).

Indeed, in considering whether a consumer must sign and return an EGS's disclosure statement, the PUC has "emphasize[d] that written contracts are not required but both oral and written sales agreements are 'contracts.' . . . [W]e offer that 'terms of service' best describes an agreement between a customer and a supplier." *In re Elec. Generation Customer Choice and Competition Act – Customer Information*, 180 Pa. P.U.R. 4th 61 (Pa. PUC 1997) (hereinafter,

“1997 Customer Information Order”); *see also Mackey v. Mackey*, 984 A.2d 529, 534 (Pa. Super. Ct. 2009) (“it is axiomatic that Pennsylvania courts recognize oral agreement as valid and enforceable contracts”). The Commission concluded that “*we will not require a customer to sign a written disclosure statement, as doing so would essentially require all contracts to be in writing. The required disclosure statement becomes the agreement of the parties unless the customer cancels the agreement by invoking the right of rescission prior to the starting date.*” 1997 Customer Information Order (emphasis added).

In *PECO Energy*, the Commission was called upon to decide the issue of whether suppliers should be able to enroll customers without obtaining an agreement in writing. 1998 WL 442683, at *10. The respondent argued that a conversation between an EGS and a customer followed by a written confirmation was sufficient; OCA disagreed, arguing that an EGS must provide a written contract following telephonic enrollment. *Id.* Both the Administrative Law Judge and Commission expressly rejected OCA’s argument. *Id.* at *10-11.

BPE’s telephonic enrollment process followed by the provision of its “Disclosure Statement *and Agreement for Electric Service*,” *see* Ex. 3 (emphasis added), to consumers is identical to the practice utilized by the respondent and endorsed by the PUC in *Dawes, supra*. In fact, BPE uses the exact third-party verification service – Trusted TPV – as the respondent in *Dawes*. BPE’s comprehensive Disclosure Statement, which was mailed to each customer after telephonic enrollment, provides customers with all of the material terms of their contracts that were given during the telemarketing sales call and the separate TPV call. *See id.* For example, BPE’s Disclosure Statement re-confirms, among other things, (1) that the customer is purchasing electric services from BPE and provides a detailed description of that service; (2) the customer’s right of rescission; (3) that “You [the customer] have a variable rate plan”; (4) the customer’s initial guaranteed rate and the specific rate guarantee period; (5) how a customer may cancel

service and that he or she may do so “at any time and for any reason without penalty”; and (6) how the customer will be billed for service. *See id.* In short, each customer received a written explanation from BPE that contained all the material terms of the parties’ contract for service being provided, including all relevant variable rate disclosures in a clear and conspicuous manner. Further, each BPE customer was made aware of his or her right to rescind the contract and cancel at any time for any reason without incurring a penalty.

Joint Complainants fail to show any consumer harm.²⁶ At most, Complainants assert a technical violation of the Telemarketer Registration Act and, under such circumstances, “no practical benefits inure nor is the public interest advanced by any further prosecution of [BPE].” *Pa. PUC Law Bureau Prosecutory Staff v. Worldxchange, Inc.*, Nos. C-20031989 & A-311038, 2004 WL 1773389 (Pa. PUC June 2, 2004) (holding that there were no “numbering compliance issues . . . notwithstanding numerous technical violations of the Public Utility Code and our regulations”); *Schneider v. Pa. PUC*, 479 A.2d 10, 16 (Pa. Cmwlth. 1984) (absolving Commission administrative law judge of “technical violation” of PUC regulation where petitioners were not prejudiced). To hold otherwise would significantly and unnecessarily elevate form over substance.

No formal written and executed contract is required following a telemarketing enrollment where the EGS utilizes a TPV provider to record consent and the consumer is sent a hard-copy disclosure statement containing the material terms of service. *Daves*, 2014 WL 466614, at *12-14. Given that this component of the Telemarketer Registration Act has never been addressed

²⁶ Nor could Complainants argue that no contract existed because a customer’s acceptance of electricity and BPE’s furnishing of invoices for the same establish the existence of a legally binding contract. *Scranton Elec. Co. v. Sch. Dist. of Borough of Avoca*, 37 A.2d 725, 728 (Pa. Super. Ct. 1944) (“Defendant admittedly received monthly bills during the entire period involved in this suit. It accepted and used the electric current during those years without any complaint whatsoever as to the rates charged or the amount alleged to be due for such services. It is immaterial whether there was or was not a formal contract between plaintiff and defendant.”).

dispositively by the Commission or Commonwealth courts, and that the Commission itself has stated that written contracts with EGS providers are not required, there is no violation of the Telemarketer Registration Act. The Motion should be denied.

F. Joint Complainants' "Miscellaneous" Section Is Unsupported and Should Be Stricken

Joint Complainants Motion seeks to add two new claims to this proceeding on the basis that BPE has somehow "consented" by not previously objecting to alleged evidence when it was presented. These claims involve alleged violations of 52 Pa. Code §§ 111.7(b)(2) and 111.9 regarding allegations that BPE "remain[ed] on the premises during the third party verification process" and conducted door-to-door sales activities without offering a business card. Motion at 57-60. BPE strongly objects to any new claims being added and maintains that it in no way consented to any new claims. The Joint Complainants never proffered anything BPE remotely considered to be a new claim and the Commission should not permit Joint Complainants' attempt to sneak claims through in such a manner.²⁷

The two claims themselves are unfounded. The first claim alleges that BPE remained "on the premises" during the TPV process based on Dennis Todaro's testimony that a sales agent explained to him how the TPV process works, including that he "say yes" after being prompted with each question. Joint Complainants' suggestion that Mr. Todaro, an employee of Mutual Aid Ambulance Service, is not capable of answering "no" to a question that is untrue is nonsensical. More to the point, the statement does not demonstrate that BPE actually did, in fact, remain "on the premises" during the TPV process.

Joint Complainants' allegations regarding Gary Euler are equally without basis. Joint Complainants represented that BPE violated several regulations with respect to in person door-

²⁷ To the extent that Joint Complainants are now seeking to amend their Complaint, that motion should be denied based on their failure to follow the proper procedural rule.

to-door sales in their interactions with Mr. Euler. Mr. Euler's testimony, however, is refuted by the sales calls which BPE has provided to Joint Complainants. *See Gary Euler Sales Calls, Ex. 16.* Contrary to Mr. Euler's testimony, he was not contacted by BPE by an in-person sales representative, but by a phone call. In fact, BPE has never conducted door-to-door sales. *See Perea Aff. at ¶ 7, Ex. 1.*

IV. The Complaint Should Be Dismissed

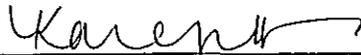
After BPE filed its Motion to Dismiss, the Commission suspended the existing procedural schedule. After the Motion to Dismiss was denied, the parties were directed to submit a revised procedural schedule. Rather than submit a new procedural schedule, Joint Complainants filed the Motion seeking judgment. To the extent that the Motion encompasses all of the evidence that Joint Complainants argue supports the allegations in their Complaint, the Complaint should be dismissed because Joint Complainants have failed to prove that BPE violated any of the Commission's regulations as alleged in the Complaint.

CONCLUSION

Based on the foregoing, BPE respectfully requests that the Commission deny Joint Complainants' Motion for Entry of Judgment.

July 20, 2015

BUCHANAN INGERSOLL & ROONEY PC

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

Geoffrey W. Castello
KELLEY DRYE & WARREN LLP
One Jefferson Road
Parsippany, New Jersey 07054
Telephone: (973) 503-5900
Facsimile: (973) 503-5950

Mark R. Robeck
Travis G. Cushman
KELLEY DRYE & WARREN LLP
3050 K Street, NW, Suite 400
Washington, DC 20007
Telephone: (202) 342-8400
Facsimile: (202) 342-8451

Attorneys for Blue Pilot Energy, LLC

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**COMMONWEALTH OF
PENNSYLVANIA, ET AL.**

v.

BLUE PILOT ENERGY, LLC

Docket Nos. C-2014-2427655

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

Via Email and First Class Mail

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

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

Sharon E. Webb
Office of Small Business Advocate
300 N. Second Street, Suite 202
Harrisburg, PA 17101

Steve Estomin
Exeter Associates, Inc.
10480 Little Patuxent Parkway
Suite 300
Columbia, Maryland 21044

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

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

Barbara R. Alexander
83 Wedgewood Drive
Winthrop, Maine 04364

RECEIVED
2015 JUL 22 AM 11:07
PA PUC
SECRETARY'S BUREAU

Dated this 20th day of July, 2015.



Karen O. Moury, Esq.

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

RECEIVED

JUL 22 2015

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

COMMONWEALTH OF
PENNSYLVANIA, ET AL.,

Complainants,

v.

BLUE PILOT ENERGY, LLC,

Respondent.

:
:
:
:
:
:
:
:
:
:
:

Docket No. C-2014-2427655

AFFIDAVIT OF RAYMOND A. PEREA

I, Raymond A. Perea, being duly sworn according to law, depose and say the following:

1. I am General Counsel and Manager of Blue Pilot Energy, LLC ("Blue Pilot" or "BPE"). I have held the position of General Counsel since November 10, 2010. I have full knowledge of the facts set forth herein and make this affidavit in support of Blue Pilot's Opposition to Joint Complainants' Motion for Entry of Judgment (the "Motion").
2. Blue Pilot has serviced over 5,400 customers in Pennsylvania since its inception.
3. In January 2014, Blue Pilot had 2,729 active accounts.
4. Blue Pilot put all of its sales representatives through a thorough training regime and diligently oversaw their work.
5. Blue Pilot resolved every outstanding consumer complaint filed with Blue Pilot other than Formal Complaints filed with the Commission; which are still pending.
6. Blue Pilot sent every customer a copy of its "Disclosure Statement and Agreement for Electric Service," which also contains all material terms of that specific customer's rate plan.
7. Blue Pilot has never employed door-to-door salesmen.

8. I am authorized to submit this Affidavit for and on behalf of Blue Pilot and represent that the facts set forth herein are true and correct to the best of my knowledge, information and belief.

[The remainder of this affidavit was intentionally left blank.]

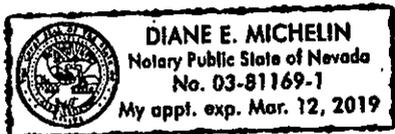
[Handwritten Signature]

Raymond A. Perea

Sworn and subscribed before me this 20th day of July 2015.

[Handwritten Signature]
Notary Public

My Commission expires on: 3/12/19



RECEIVED

JUL 22 2015

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

From: Weary, Lisa [mailto:lweary@state.pa.us]
Sent: Thursday, May 26, 2011 3:06 PM
To: Angela Janssen
Cc: Mick, David; Wax, Ralph
Subject: FW: APPROVED Blue Pilot Energy, LLC
Importance: High

The Bureau of Consumer Services has completed its review of the disclosure statement submitted by BLUE PILOT ENERGY, LLC and it is APPROVED.

Our Bureau of Fixed Utility Services will be notified of our determination by cc on this email and you will be hearing from them as to the remainder of your pending license application.

Thank you for your cooperation and attention.

Lisa Weary
PA PUC
(717) 787-4963

From: Angela Janssen [mailto:ajanssen@telecomcounsel.com]
Sent: Thursday, May 26, 2011 2:49 PM
To: Weary, Lisa
Cc: Kall Newton; jronneker@bluepilotenergy.com
Subject: Blue Pilot Energy, LLC
Importance: High

Ms. Weary,

Attached please find the updated Service Agreement to reflect your additional requested changes. Please let me know as soon as possible if you have any other questions or need additional information. Thank you.

Angela M. Janssen
Lance J.M. Steinhart, P.C.
Office Manager and Regulatory Specialist
1720 Windward Concourse, Suite 115
Alpharetta, Georgia 30005
www.telecomcounsel.com
(678) 775-2253 (Direct Dial)
(678) 775-1193 (E-Fax)

This transmission may be: (1) subject to the Attorney-Client Privilege; (2) an Attorney Work Product; or (3) Strictly Confidential. This transmission, including any

attachments, is for the sole use of the intended recipient. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply email and destroy all copies of the original message. Thank you for your cooperation.

*Blue Pilot Energy, LLC
Disclosure Statement and Agreement for Electric Service*

This Disclosure Statement and Agreement (the "Agreement") sets forth the terms and conditions that apply to your purchase of electric services from Blue Pilot Energy, LLC ("Blue Pilot" or the "Company"). In this Agreement, the terms "you," "your" and "Customer" shall mean: (a) for residential service, the account holder and/or the person whose name appears on the invoice for service under this Agreement; (b) for small business/commercial service, the account holder and/or the person and/or entity whose name appears on the bill for service under this Agreement, or an authorized agent thereof.

Right of Rescission. You may rescind your election of service from Blue Pilot, this Agreement, and any related agreements without penalty at any time before midnight Eastern Time of the 3rd business day after receiving this Agreement. Please provide Blue Pilot with the following information when requesting rescission: Customer name, address and phone number(s); and account/ meter number(s). To rescind, you must contact Blue Pilot by midnight Eastern Time of the 3rd business day: by Phone at 1- 877-513-0246, or by email at ccare@bluepiloteenergy.com.

Background: Blue Pilot is licensed by the Pennsylvania Public Utility Commission ("PA PUC") to offer and supply electric generation and related services in Pennsylvania. Blue Pilot's PA PUC license number is A-2011-2223888. Blue Pilot sets the generation prices and charges that you pay. The PA PUC regulates distribution prices and services. The Federal Energy Regulatory Commission regulates transmission prices and services. You will receive a single bill from your Electric Distribution Company (hereinafter, "EDC") that will contain the EDC's charges and Blue Pilot's charges.

Definitions:

- Generation Charge - Charge for production of electricity.
- Transmission Charge(s) - Charge(s) for moving high voltage electricity from a generation facility to the distribution lines of an Electric Distribution Company.
- Distribution Charge(s) - Charge(s) for delivering electricity over a distribution system to your home or business from the transmission system.

1. CONTACT INFORMATION

Blue Pilot Energy, LLC
250 Pilot Rd., Ste. 300
Las Vegas, NV 89119
1-800-451-6956 Corporate Office
1-877-513-0246 Customer Service
www.BluePilotEnergy.com

Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265
Choice Hotline Number: 1-800-692-7380

West Penn Power:
West Penn Power d/b/a Allegheny
Power
800 Cabin Hill Drive
Greensburg, PA 15601-1689
1-800-255-3443

Duquesne Light:
411 Seventh Street, MD 16-4
Pittsburgh, PA 15219
(412) 393-7100

PPL:
Two North Ninth Street
Allentown, PA 18108-1179
1-800-342-5775

Universal Service Program
LIURP: 1-800-207-1250

Universal Service Program
Customer Assistance Program:
1-888-393-7600

Universal Service Program
Low Income Home Energy
Assistance Program
1-800-342-5775

PECO:
2301 Market Street
Philadelphia, PA 19101-8699
1-800-494-4000

Met-Ed, Penelec, and Penn Power:
First Energy
2800 Pottsville Pike
Reading PA, 19612

Universal Service Program
Customer Assistance Program:
1-800-744-7040

Universal Service Program
Low Income Home Energy
Assistance Program:
1-800-720-3600

Any formal notices to Blue Pilot shall be sent to the address stated above (the "Notice Address"). Customer has the right to additionally receive this Agreement or any notices related to this Agreement or the services provided hereunder via electronic communications at Customer's request.

2. **Price per KWhour.** You have a variable rate plan with a starting price set at **RATE** cents per kWh. This initial rate will be effective for at least the first sixty (60) days of service. Thereafter, your price may vary on a month-to-month basis. This price includes Transmission Charges, but excludes applicable state and local Sales Taxes and the Distribution Charges from your local EDC. At any time after sixty (60) days of service, but not more frequently than monthly, Blue Pilot may increase or

General Terms and Conditions 012214-- Page 4

RECEIVED

JUL 22 2015

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

decrease your rate based on several factors, including changes in wholesale energy market prices in the PJM Markets. Your variable rate will be based upon PJM wholesale market conditions. Sudden, atypical fluctuations in climate conditions, including but not limited to, extraordinary changes in weather patterns may be detrimental to Blue Pilot's electricity customer relationships. Such fluctuations or conditions may result in Blue Pilot incurring unusual costs when supplying electricity service, which may be passed through as a temporary assessment on your bill. Please log on to www.bluepilotelectric.com or call Customer Service at 877-513-0246 for additional information about our current pricing.

3. **Cancellation Provisions.** Customer may cancel service at any time and for any reason without penalty. The cancellation will become effective on a date determined by the EDC. If the EDC cancels your electric service, then this agreement shall be cancelled on the date that your electric service is terminated. Cancellation will not relieve the Customer of any payment obligations for service. In the event of a Customer bankruptcy, late payment or nonpayment, fraud or misrepresentation, Blue Pilot has the right to cancel Customer's account, this Agreement and/or any related agreements. If Customer moves from the meter address Blue Pilot is servicing, Blue Pilot shall cancel service to that meter. If Blue Pilot cancels Customer's account, this Agreement or any related agreements for any reason other than for Customer non-payment, Blue Pilot will follow applicable rules in providing notice to you.
4. **Billing.** Customer will receive one monthly electric bill processed and provided by Customer's local EDC. Customer consents to the EDC disclosing basic account information to Blue Pilot. Payment is due to Customer's local EDC in accordance with the EDC's standard billing practices. Billing cycles may change from time to time without notice. Customers may contact their EDC for information about Universal Service Programs that may be available to them. Allegheny/West Penn at 800-207-1250, Duquesne Light at 888-393-7600, Met-Ed/Penelec 800.962.4848, or PPL at 800-342-5775. In the event there is a change (including a change in interpretation) in law, regulation, rule, ordinance, order, directive, filed tariff, decision, writ, judgment or decree by a governmental authority (including a regulatory agency or PJM); including, without limitation, changes affecting fees, costs, or charges imposed by PJM or a regulatory agency, changes in market rules, changes in load profiles or changes in nodal and zonal definitions; or upon the occurrence of any event that materially changes the obligations of Blue Pilot or the cost or expense of Blue Pilot performing its obligations under this agreement, these costs or expenses are your responsibility. These costs or expenses, including reasonable margin related thereto, will be assessed on your monthly bill or separate invoice.
5. **Purchase of Electric Service from Blue Pilot.** Customer agrees to purchase electric generation and related services from Blue Pilot for the service address(es) identified by Customer (the "Service Address"). Service from Blue Pilot will begin on the next regularly scheduled meter read date after your EDC has switched your account to Blue Pilot and will continue on a month to month basis until either you or Blue Pilot cancels service as provided in Section 3 above. The Blue Pilot per kWh rate does not include EGS Reconciliation Assessment, which is applied by the Company to recover costs associated with acquisition of required renewable energy credits and related administrative charges. This charge currently is set at 4.89% of total Blue Pilot Energy charges. Customer shall not resell electricity to any third party. If your electric service is terminated by your EDC, then your account, this Agreement and any related agreements with Blue Pilot shall be cancelled on the date that your electric service is terminated. You will owe Blue Pilot for amounts unpaid for its charges of electric generation service up to the date of termination. If you move from one address to another, your service may be cancelled.
6. **Security Deposit.** Blue Pilot does not require a security deposit from its Customers. If the Customer has paid a deposit to his/her current supplier, it is the Customer's responsibility to request a refund from his/her/its current supplier.
7. **Discrimination.** Blue Pilot does not discriminate, deny service, or require prepayment or a deposit for service based on a customer's race, creed, color, national origin, ancestry, sex, marital status, lawful source of income, level of income, sexual orientation, disability, familial status, location of customer in an economically distressed geographic area or qualification for low income or energy efficiency services.
8. **Renewal Provision/ Agreement Expiration/ Change In Terms:** If Customer has a fixed term agreement with Blue Pilot and it is approaching the expiration date or if we propose to change our terms of service, we will send you two (2) advance notices either in your bill or in separate mailings between 45 and 90 days before either the expiration date or the effective date of the changes. Your options will be explained in these two (2) advance notices. For Customers under variable rate pricing plans, a change to the variable price per kWh does not constitute a change in terms of service as outlined in this section.
9. **EMERGENCY:** In the event of an emergency, such as a power failure or a downed power line, Customers should contact their EDC. Allegheny/West Penn at 800-255-3443, Duquesne Light at 888-393-7000, Met-Ed at 888-544-4877, Penelec at 888-544-4877, PECO at 800-841-4141, or PPL at 800-342-5775.
10. **Dispute Resolution and Mandatory Agreement to Arbitrate On An Individual Basis.** Blue Pilot will work with you to answer/resolve any questions or concerns that you may have regarding the terms of this Agreement, the service you receive from Blue Pilot, or any other aspect of your relationship with Blue Pilot. If you are not satisfied after discussing any issue with Blue Pilot, you are welcome to contact the PA PUC at 1-800-692-7380.

You and Blue Pilot both agree to resolve Disputes (as defined below) only by arbitration or in small claims court (for qualifying claims), subject to specific exceptions listed herein. There is no judge or jury in arbitration, the procedures may be different, and is subject to very limited review by court, but an arbitrator can award you the same damages and relief, and must honor the same terms in this Agreement, as a court would. If the law allows for an award of attorneys' fees, an arbitrator can award them too. In addition, you and Blue Pilot also both agree that:

- (a) "Disputes" are any claims or controversies against each other related in any way to, or arising from Blue Pilot's services, this Agreement, or any related agreements, including but not limited to, billing, services and practices, policies, contract practices (including enforceability), service claims, privacy, or advertising, even if it arises after your services with Blue Pilot have terminated. Disputes include any claims that: (a) you bring against Blue Pilot or any of its employees, agents, affiliates, or other representatives; (b) you bring against a third party that are based on, relate to, or arise from Blue Pilot's services, this Agreement or any related agreements; or (c) that Blue Pilot brings against you. It also includes, but is not limited to, claims related in any way to, or arising from any aspect of the relationship between Customer and Blue Pilot, whether based in contract, tort, statute, fraud, misrepresentation, or any other legal theory.
- (b) The Federal Arbitration Act ("FAA") applies to this agreement to arbitrate, and this agreement to arbitrate is intended to be broadly interpreted. The arbitrator's decision and award is final and binding, with some exceptions under the FAA, and judgment on the award may be entered in any court with jurisdiction.
- (c) A party who intends to seek arbitration must first send to the other, by certified mail, a written notice of dispute ("Dispute Notice"). The Dispute Notice to Blue Pilot should be addressed to the Notice Address listed in Paragraph 1 above. The Dispute Notice must (a) describe the nature and basis of the claim or dispute; and (b) set forth the specific relief sought ("Demand"). If Blue Pilot and you do not reach an agreement to resolve the claim within 30 days after the Dispute Notice is received, you or Blue Pilot may commence an arbitration proceeding. During the arbitration, the amount of any settlement offer made by Blue Pilot or you shall not be disclosed to the arbitrator.
- (d) Unless we each agree otherwise, the arbitration will be conducted by a single neutral arbitrator and will take place in the county (or parish) of the Service Address.
- (e) The arbitration will be conducted by: (a) a neutral third party arbitrator mutually agreed upon by Customer and Blue Pilot; or (b) the American Arbitration Association (the "AAA"). The arbitration will be governed by the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes (collectively, "AAA Rules") of the AAA, as modified by this Agreement. Where the terms of this agreement to arbitrate conflict with the AAA Rules, the terms of this agreement to arbitrate shall override and govern. The AAA Rules are available online at adr.org, by calling the AAA at 1-800-778-7879, or by writing to the Notice Address for Blue Pilot. The arbitrator is bound by the terms of this agreement to arbitrate. All issues are for the arbitrator to decide, except that issues relating to the scope and enforceability of the arbitration provision are for the court to decide. If your claim is for \$10,000 or less, we agree that you may choose whether the arbitration will be conducted solely on the basis of documents submitted to the arbitrator, through a telephonic hearing, or by an in-person hearing as established by the AAA Rules. If your claim exceeds \$10,000, the right to a hearing will be determined by the AAA Rules. Regardless of the manner in which the arbitration is conducted, the arbitrator shall issue a reasoned written decision sufficient to explain the essential findings and conclusions on which the award is based. Except as otherwise provided for herein, Blue Pilot will pay all AAA filing, administration, and arbitrator fees for any arbitration initiated in accordance with this agreement to arbitrate. If, however, the arbitrator finds that either the substance of your claim or the relief sought in the Demand is frivolous or brought for an improper purpose (as measured by the standards set forth in Federal Rule of Civil Procedure 11(b)), then the payment of all such fees will be governed by the AAA Rules. However, nothing in this paragraph will require or allow you or Blue Pilot to arbitrate on a class-wide, representative or consolidated basis.

You and Blue Pilot each agree that arbitration will only be pursued on an individual basis, and will not be pursued on a classwide, representative or consolidated basis. This Agreement does not allow class, representative or collective arbitrations even if the AAA procedures or rules would. If for any reason any court or arbitrator holds that this restriction is unconscionable or unenforceable, then this agreement to arbitrate doesn't apply and the dispute must be brought in court.

- (f) You and Blue Pilot agree that notwithstanding this agreement to arbitrate, either party may bring qualifying claims in a small claims court located in Pennsylvania. In addition, this arbitration provision does not prevent you from bringing your dispute to the attention of federal, state, or local government agencies (including the PA PUC), and if the law allows, they can seek relief against Blue Pilot on your behalf.
- (g) If for any reason a claim proceeds in court rather than through arbitration, you and Blue Pilot agree that there will not be a jury trial. You and Blue Pilot unconditionally waive any right to trial by jury in any action, proceeding or counterclaim arising out of or relating in any way to this Agreement or the services provided by Blue Pilot. In the event of litigation, this paragraph may be filed to show a written consent to a trial by the court.

11. **Force Majeure.** Except for your obligation to make payments when due, neither party shall be liable to the other for any delay or failure to perform caused by an occurrence of *Force Majeure*. *Force Majeure* means occurrences beyond a party's reasonable control, including, without limitation, acts of God, strikes, lockouts or other industrial disturbances, acts of terrorism, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, hurricanes, storms, floods, washouts, civil disturbances, explosions, breakage, shortage or unavailability of transmission facilities, and actions of any governmental authority or your BDC that result in conditions, limitations, rules, or regulations that materially impair either party's ability to perform

hereunder. The affected party shall give to the other, reasonably prompt and detailed notice of the occurrence of any Force Majeure relied upon. If either party is unable, wholly or in part, by Force Majeure to perform or comply with any obligations or conditions of this Agreement, such party shall give immediate written notice, to the maximum extent practicable, to the other party. Such obligations or conditions, so far as they are affected by such Force Majeure, shall be suspended during the continuance of any inability so caused, and such party shall be relieved of liability and shall suffer no prejudice for failure to perform the same during the period. The party claiming suspension of obligations must in good faith attempt to mitigate and/or terminate the Force Majeure.

12. **Limitation Of Liability.** Blue Pilot will endeavor to provide service in a commercially reasonable manner; however, the Company does not guarantee a continuous supply of electrical energy. Blue Pilot does not generate or transport electricity and the Company does not provide services in connection with Customers' meters. Customer agrees that Blue Pilot is not responsible for actions of (or inaction by) regional transmission organization(s), independent system operator(s), or other third parties involved in the production and delivery of Customer's electrical supply. In addition, Blue Pilot's liability in connection with this Agreement or the services that it provides to Customer is limited to direct actual damages. **NEITHER PARTY SHALL BE LIABLE TO THE OTHER FOR ANY INDIRECT, SPECIAL, CONSEQUENTIAL (INCLUDING LOST PROFITS OR REVENUE), INCIDENTAL, INDIRECT, OR PUNITIVE DAMAGES FOR CLAIMS ARISING UNDER THIS AGREEMENT.**
13. **Representations and Warranties.** Blue Pilot makes no other representations or warranties, express or implied, except as expressly stated in this Agreement and expressly disclaims all other warranties, express or implied, including warranties of merchantability and fitness for a particular purpose. Electricity sold by Blue Pilot will be obtained from a number of generating sources, at the discretion of the Company. Blue Pilot does not commit to deliver electricity to Customer from any particular source, unless expressly agreed in writing between Customer and the Company.
14. **Assignment.** Customer may not assign any agreements or accounts with Blue Pilot, in whole or in part, or any of Customer's rights or obligations hereunder, without the prior written consent of Blue Pilot. Blue Pilot may, without Customer's consent: (i) transfer, sell, pledge, encumber or assign any agreement or the accounts, revenues or proceeds thereof in connection with any financing or other financial arrangement; (ii) transfer or assign agreements or accounts to an affiliate of Blue Pilot; (iii) transfer or assign agreements or accounts to any person or entity succeeding to all or substantially all of the assets of Blue Pilot; and/or (iv) transfer or assign agreements or accounts to a certified retail electric provider. In the case of (ii), (iii) or (iv), any such assignee shall agree in writing to be bound by the terms and conditions hereof. Blue Pilot shall provide customer with thirty (30) day's notice prior to Assignment. Customer agrees that, upon such assignment, Blue Pilot shall have no further obligations to Customer.
15. **Title, Risk of Loss and Indemnity.** Customer acknowledges that Blue Pilot does not have care, control or custody of Customer's property or premises, or of any electrical facilities, including, but not limited to, lines, wires, or the meter, located on or near Customer's property or premises. Customer further acknowledges that Customer is in exclusive control of (and responsible for any damages or injury caused by) electricity at and/or from the lines, wires, or the meter, located on or near Customer's property or premises. Title to electricity and risk of loss related to electricity shall transfer from Blue Pilot to Customer at the respective meter or the Service Address. **CUSTOMER SHALL INDEMNIFY, DEFEND, AND HOLD BLUE PILOT HARMLESS FROM ANY CLAIMS, INCLUDING CLAIMS FOR PERSONAL INJURY, DEATH, PROPERTY DAMAGE AND ATTORNEYS' FEES, ARISING FROM ANY ACT OR INCIDENT OCCURRING WHEN TITLE TO ELECTRIC SERVICE IS DEEMED TO BE IN THE EXCLUSIVE CONTROL OF THE CUSTOMER, DESPITE THE COMPANY'S NEGLIGENCE OR STRICT LIABILITY.**
16. **Waiver.** No waiver of any provision contained in this Agreement shall be deemed or shall constitute a waiver of any other provision, whether or not similar, nor shall any waiver constitute a continuing waiver. Failure of the Company to exercise any right hereunder shall not constitute a waiver hereunder and shall not impair the exercise of such rights at any later time.
17. **Governing Law.** With the exception of Paragraph 8 hereof, which is governed by the FAA, the terms of service under this Agreement are made under, and shall be governed by and construed in accordance with the laws of the State of Pennsylvania, exclusive of any conflict of laws provisions thereof that would apply the laws of another jurisdiction. Except as otherwise expressly provided herein, the Pennsylvania Uniform Commercial Code ("UCC") shall apply to the terms of service and electricity shall be considered a "good" (and not a "service") for purposes of the UCC.
18. **Complete Agreement.** This Agreement contains the complete understanding between Blue Pilot and the Customer and supersedes all other written or oral communications and representations.
19. **Customer Information Release Authorization:** You agree that your EDC may release to Blue Pilot certain information that it needs to provide service to you, including your address, telephone number, account numbers, historical usage information and peak electricity demand. Blue Pilot will not give or sell your personal information to any unaffiliated party without your consent unless we are required to do so by law or except as necessary to enforce this Agreement.

From: Jessica Renneker
Sent: Wednesday, January 22, 2014 3:30 PM
To: Farley, James
Subject: RE: Blue Pilot Energy, LLC

Jimmy -- Thanks for the feedback. We incorporated all of your suggestions immediately.

Thanks,
Jessica

From: Farley, James [mailto:JAFARLEY@pa.gov]
Sent: Wednesday, January 22, 2014 11:41 AM
To: Jessica Renneker
Subject: RE: Blue Pilot Energy, LLC

Hi Jessica

I reviewed the disclosure statement you provided and my comments are below:

RIGHT OF RESCISSION - The timeframe a customer can contact the company to rescind should be midnight not 6:00 PM. The regulations also state the customer can cancel the contract orally in writing or electronically if that is available. You should revise this information to advise the customer that the contract can also be cancelled in writing or electronically if this is available.

CONTACT INFORMATION - Blue Pilot Energy contact information should be listed prominently and include the company Internet address. The CONTACT INFORMATION section should also include the EDC/Provider of Last Resort and the Universal Service Program Name and phone numbers.

PRICE PER KILOWATT HOUR - The last sentence in this section advising the customer to contact the company for additional information and updates should be reworded to advise the customer that the customer can find the company's current variable price at the web address or by calling the company.

CANCELLATION PROVISIONS - We suggest you address some common reasons for cancellation beyond when the company cancels the service such as:

Non-Payment – If your electric service is terminated by your electric distribution company, then this agreement is cancelled on the date that your electric service is terminated. You will owe us for amounts unpaid for our charges for electric generation service up to the date of termination.

Customer-Initiated Cancellation – If you cancel this agreement before the end of the initial term, you will owe us for amounts unpaid up to the date of cancellation and we will charge the early cancellation fee mentioned above.

Customer Move – If the customer moves from the address listed above, this agreement is cancelled.

PURCHASE OF ELECTRIC SERVICE FROM BLUE PILOT - Regarding the EGS Reconciliation Assessment and the initial rate you quote the customer for the first 60 days of service, is this charge included in this initial rate and do you intend to assess this charge after the initial 60 day period has expired? The initial rate quoted in the disclosure statement must

RECEIVED

JUL 22 2015

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

be the rate you bill the customer during the initial 60 day period quoted in the disclosure statement. Because you are only charging a variable rate, including this charge in the variable rate after the initial 60 days has expired is not a problem.

ASSIGNMENT - Customer must be provided a 30 day notice prior to the EGS assigning an agreement, this information should be included in this section.

CUSTOMER INFORMATION RELEASE INFORMATION - Please insure that this section complies with § 54.8 Privacy of Customer Information, <http://www.pacode.com/secure/data/052/chapter54/chap54toc.html#54.8>.

Please add a section "RENEWAL PROVISIONS/AGREEMENT EXPIRATION/CHANGE IN TERMS", this section should include the following information "If Customer has a fixed term agreement and it is approaching the expiration date (renewal period) or if we propose to change our terms of service, we will send you two (2) advance notices either in your bill or in separate mailings between 45 and 90 days before either the expiration date or the effective date of the changes. We will explain your options in these two advance notices."

LIMITATION OF LIABILITY, REPRESENTATIONS AND WARRANTIES, GOVERNING LAW, FORCE MAJEURE, TITLE, RISK OF LOSS AND INDEMNITY, WAIVER, COMPLETE AGREEMENT: These sections are outside the scope of the customer information regulations. While the company may include these paragraphs, they are not reviewed as part of the disclosure statement approval process. However, should the company propose to change the terms of this agreement ('...any change in law...' and '...subject to all valid and applicable legislation and to all present and future orders, rules and regulations...') you are required to provide the 2 advance change notices. Please revise the language in these sections accordingly, if needed.

Please let me know if you have any questions about the information I have provided. Thanks.

Jimmy

-----Original Message-----

From: Jessica Renneker [<mailto:jrenneker@aninetworks.com>]

Sent: Friday, January 17, 2014 7:14 PM

To: Farley, James

Subject: Blue Pilot Energy, LLC

Hi Jimmy,

Attached, please find Blue Pilot Energy's updated Disclosure Statement for your files.

Have a great weekend. Please let me know if you have any questions or concerns.

Thanks,

Jessica

STATE OF MARYLAND
PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE INVESTIGATION *
INTO THE MARKETING, ADVERTISING,
AND TRADE PRACTICES OF AMERICAN *
POWER PARTNERS, LLC; BLUE PILOT
ENERGY, LLC; MAJOR ENERGY ELECTRIC *
SERVICES, LLC AND MAJOR ENERGY
SERVICES, LLC; AND XOOM ENERGY *
MARYLAND, LLC

BEFORE THE
PUBLIC SERVICE COMMISSION
OF MARYLAND

CASE NO. 9346

XOOM ENERGY MARYLAND, LLC

CASE NO. 9346(a)

April 15, 2015

PUBLIC UTILITY LAW JUDGE'S RULING ON MOTION IN LIMINE

On April 7, 2015, XOOM Energy Maryland, LLC ("XOOM") filed a *Motion in Limine* ("Motion"). In the Motion, XOOM asks that an order be issued to limit or strike certain testimony of the Maryland Office of People's Counsel's ("OPC") witness, which was pre-filed in this matter. On April 13, 2015, OPC filed its response to the Motion and opposed any portion of its witness' testimony being stricken. On April 14, 2015, oral argument on the Motion was held. Counsel representing the Company, OPC, and the Technical Staff ("Staff") each appeared at the hearing and each presented argument on the Motion.

The majority of the testimony which XOOM asks to be stricken addresses its methodologies and strategies utilized in calculating the variable price to be charged its customers. XOOM argues that, as the Maryland Public Service Commission ("Commission") does not have authority to regulate XOOM's rates, the testimony is not admissible. OPC counters that, even though

RECEIVED

JUL 22 2015

PA-PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU



STATE OF MARYLAND
PUBLIC SERVICE COMMISSION

the Commission may not regulate the rates of a competitive supplier, the Commission has the authority to determine whether the Company's disclosure of the components and costs of its variable rates are adequate and accurate and are not false or misleading. According to OPC, unless the Commission receives testimony on the pricing methodology and strategies, it will be unable to make this determination. Staff argues that it is important to have a complete record to make a determination and that striking the identified portions of the testimony is not warranted or appropriate.

Despite its lack of direct authority to regulate a competitive supplier's pricing policies and rates, in a recent case involving a competitive supplier,¹ the Commission expressed its concerns as to the supplier's pricing policy of passing through additional costs incurred in one regional transmission organization region to all of its variable rate customers because "the Maryland customers may not be fully informed that their variable rate may be calculated based upon market prices across such a wide geographic area."² The Commission found that the supplier "has an obligation to clearly disclose the terms of its service to its Maryland customers."³

¹ See Order No. 86211, *In the Matter of the Investigation into the Marketing Practices of Starion Energy PA, Inc.*, Case No. 9324 (March 7, 2014) ("Starion Order").

² Starion Order at 7.

³ *Id.*



STATE OF MARYLAND
PUBLIC SERVICE COMMISSION

I therefore conclude that not all testimony that addresses pricing methodologies, including a description of the costs recovered, is beyond the scope of this proceeding or the Commission's regulatory authority. Nevertheless, there must be some limit on the extent of the testimony addressing the Company's pricing policies or this proceeding may become enmeshed in a review of whether the Company actually incurred the costs it seeks to recover through rates or the reasonableness of other factors it may utilize to determine a competitive market price - similar to a rate case - which is beyond the scope of this proceeding. Consequently, I find that a small portion of Ms. Alexander's testimony falls into the category of a review of the reasonableness of the Company's pricing strategies rather than on whether the factors comprising the variable rates were adequately or accurately disclosed. It is a fine line indeed as to whether the testimony is merely to address the adequacy or accuracy of what has been disclosed to the customer as to the supplier's prices or is designed to highlight the reasonableness of the price. Accordingly, I have parsed through the sections of testimony requested to be stricken by XOOM and have redacted only those portions which I find are directed to the reasonableness of the strategy or pricing policies. Attachment I to the Confidential Version of this Ruling contains the pages of Ms. Alexander's testimony or exhibits which have been redacted to reflect the testimony I find should be stricken.

XOOM also requested Ms. Alexander's testimony addressing the "monthly administrative charge" be stricken. The Company cites

STATE OF MARYLAND
PUBLIC SERVICE COMMISSION

a portion of the language of Order No. 86768, which initiated this proceeding, to demonstrate that the proceeding is to review the Company's actions:

with respect to the customer complaints cited in the [Show Cause Order No. 86274], as well as any customer complaints subsequently filed, constitute: providing false and misleading information about the expected range and nature of variable prices; ... or providing inadequate information to allow a customer to make an informed choice regarding the purchase of electricity and natural gas.⁴

It argues that, as it never applied the charge and there is no evidence that any customer complained about the existence of this charge in the contract, any testimony about the charge is beyond the scope of the proceeding.

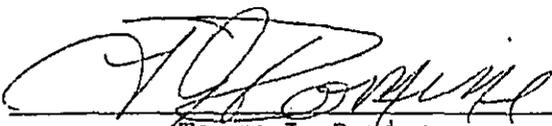
I will strike Ms. Alexander's testimony addressing the "monthly administrative charge" beginning on page 27, line 20 through page 28, line 7, including footnote 58 on page 28 as well as the two data request responses addressing the charge. Although I am puzzled at the inclusion of the provision in the Company's terms and conditions when the Company denies that it has ever charged it and would not charge it without additional adequate notice, I do not find any evidence that there are any allegations against the Company in any customer complaint upon which the Show Cause Order was initially issued or subsequent thereto. Accordingly, I agree with the Company that this portion of

⁴ Order No. 86768 at 2.



STATE OF MARYLAND
PUBLIC SERVICE COMMISSION

Ms. Alexander's testimony is beyond the scope of this proceeding as delegated by the Commission.



Terry J. Romine
Chief Public Utility Law Judge
Public Service Commission of Maryland

Attachment I - Omitted from Public Version

