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October 15, 2015

**VIA E-FILING**

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

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

Dear Secretary Chiavetta:

On behalf of Blue Pilot Energy, LLC, enclosed for filing is the Motion to Compel Joint Complainants' to Respond to Certain Interrogatories and Requests for Production of Documents in Blue Pilot Energy, LLC's Discovery Request Set IV, in the above-captioned matter.

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

Very truly yours,



Karen O. Moury

KOM/bb  
Enclosure  
cc: Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**MOTION TO COMPEL JOINT COMPLAINANTS' TO RESPOND TO CERTAIN  
INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS IN  
BLUE PILOT ENERGY, LLC'S DISCOVERY REQUEST SET IV**

Pursuant to 52 Pa. Code § 5.342(g), Respondent Blue Pilot Energy, LLC (“Blue Pilot”) respectfully moves the Administrative Law Judges (“ALJs”) to enter an Order compelling the Office of Consumer Advocate (“OCA”) and Commonwealth of Pennsylvania (“OAG”) (collectively, “Joint Complainants”) to provide full and complete answers and responses to certain interrogatories and requests for production of documents in Blue Pilot’s fourth set of Interrogatories and Requests for Production (“Set IV”) within five days. In support of this Motion, Blue Pilot states as follows:

**INTRODUCTION**

Joint Complainants initiated this action by filing their Joint Complaint on June 20, 2014, wherein they alleged that Blue Pilot failed to provide accurate pricing information, charged prices that allegedly did not conform with the disclosure statement, allegedly made misleading and deceptive promises of savings, allegedly lacked good faith when handling customer complaints, and allegedly failed to comply with the Telemarketer Registration Act. Blue Pilot denies all of these allegations. On September 23, 2015, Blue Pilot served Set IV on the Joint

Complainants, which requests, among other things, the factual basis for Joint Complainants' allegations, the identity of customers Joint Complainants allege were misled or deceived, and communications with outside parties.<sup>1</sup> On October 1, 2015, counsel for Blue Pilot, OCA, and OAG held a conference call to discuss Joint Complainants' objections to Set IV. Further communications between the parties allowed some, but not all, of the objections to be resolved. Joint Complainants filed their Objections to Set IV on October 5, 2015, wherein they object to certain requests on the purported basis that the requests are irrelevant, privileged, and would be unduly burdensome to answer.

The information sought in Set IV is none of these things. Rather, the information sought is designed to provide Blue Pilot with the factual basis upon which they relied when they filed their Joint Complaint. The identity of consumers that Joint Complainants allege were misled or deceived, the factual basis of Joint Complainants' allegations, and the communications Joint Complainants have held with outside parties regarding this proceeding are directly relevant to this proceeding. Further, Blue Pilot seeks the facts, not any privileged information, in these requests. Finally, this information is needed in order for Blue Pilot to properly prepare its defense to Joint Complainants' allegations. For these reasons, Blue Pilot requests that Your Honors enter an order compelling Joint Complainants to fully respond to Set IV within five days.

## **ARGUMENT**

### **I. Legal Standard**

Joint Complainants have availed themselves of the privilege of filing a lawsuit and taking discovery from Blue Pilot, but, as the Commission has made clear, having such "full

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<sup>1</sup> See Blue Pilot Energy, LLC's Fourth Set of Interrogatories and Requests for Production of Documents to Joint Complainants, attached as Exhibit 1. Blue Pilot would note that this document incorrectly identifies these discovery requests as the "Third" set, rather than the "Fourth" set.

participation rights also carry obligations such as . . . the obligation to respond to discovery requests . . .” *Interpretation of Procedural Rules Regarding Party Status, Rights and Obligations*, No. M-00061975, 2007 WL 7232877 (Pa. PUC Apr. 18, 2007). “[T]he scope of discovery is very broad.” *In re Pa. Tel. Co.*, No. M-00031772 (Pa. PUC Dec. 6, 2005). 52 Pa. Code § 5.321(c) outlines the discovery parameters:

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

*See also Application of Walter J. Jackson III t/a Jacksons Moving*, A-2014-2401884, 2014 WL 3011765, at \*3 (June 17, 2014) (“Commission regulations provide for the propounding of written interrogatories to a party regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.”) (citing 52 Pa.Code §§ 5.321(c), 5.341). “Discovery itself is designed to promote free sharing of information so as to narrow the issues and limit unfair surprise. It is a tool which serves each litigant and promotes judicial economy.” *Pittsburgh Bd. of Public Educ. v. M.J.N.*, 524 A.2d 1385, 1388 (Pa. Cmwlth. Ct. 1987). The party resisting discovery “bears the burden of showing that the information requested is not discoverable.” *SmithKline Beecham Corp. v. Apotex Corp.*, 2004 U.S. Dist. LEXIS 8990, \*3 (E.D. Pa. Mar. 23, 2004) (citing *Josephs v. Harris Corp.*, 677 F.2d 985, 992 (3d Cir. 1982)).

Despite the breadth of discovery that is permissible, Blue Pilot seeks very narrow, and very specific discovery – *i.e.*, the facts supporting the Joint Complaints’ allegations against Blue Pilot, the identities of the customers that Joint Complainants allege were deceived or misled, and

the communications Joint Complainants have had with outside parties regarding this proceeding. As described below, Blue Pilot should be entitled to such basic discovery.

## **II. Joint Complainants Should Fully Response to Set IV**

### **A. Discovery Request IV-3**

Discovery Request IV-3 requests the identity of all consumers that Joint Complainants' allege were misled or deceived and the facts that support Joint Complainants' allegation:

Identify each consumer that supports your contention that a consumer was misled or deceived by BPE, explaining in full and complete detail all facts relied upon.

Blue Pilot is willing to limit this discovery request to the extent that Joint Complainants would only be compelled to identify the consumers that Joint Complainants allege were misled or deceived by Blue Pilot, rather than also providing the specific facts for each of those consumers.

Joint Complainants object to this request, claiming that it seeks attorney work product and would be unreasonably annoying and burdensome to answer.<sup>2</sup> According to Joint Complainants, they will not provide Blue Pilot with the identities of consumers Joint Complainants' allege were misled or deceived until Joint Complainants file "their brief in final form."<sup>3</sup> No party should be permitted to hide from disclosure relevant facts upon which they have relied, or intend to rely, to prove any aspect of their claims. Neither objection has merit.

#### **1. The Work Product Doctrine Does Not Permit Joint Complainants to Avoid Their Discovery Obligations**

Joint Complainants cannot take cover behind a claim of "legal analysis" to avoid providing Blue Pilot with the *facts* upon which they base their claims. "Due process requires that parties be permitted to discover the basis for an opposing party's case so that parties can

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<sup>2</sup> Objections of Joint Complainants to Blue Pilot Energy, LLC Interrogatories and Requests for Production of Documents Set IV, attached as Exhibit 2, at 5-7.

<sup>3</sup> *Id.* at 6.

adequately prepare for litigation.” *Application of Walter J. Jackson III t/a Jacksons Moving*, A-2014-2401884, 2014 WL 3011765, at \*3 (June 17, 2014) (citing *Gaudenzia, Inc. v. Zoning Board of Adjustment of City of Philadelphia*, 4 Pa. Commw. 355, 287 A.2d 698 (1972)). To this end, Blue Pilot propounded Set IV upon Joint Complainants in order to discover the factual basis behind Joint Complainants’ allegations. Blue Pilot is entitled to this information so that it can adequately prepare its defense in this proceeding. To be clear, Blue Pilot does not seek information relating to any purported privileged information. Rather, it seeks only the alleged facts that would support Joint Complainants’ allegations.

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

deposition question and holding that defendant was entitled to inquire into the factual bases of the government's allegations).

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

Discovery Request IV-3 might be classified as a "contention" interrogatory. *Compare, e.g., R. Braun Medical, Inc. v. Abbott Laboratories*, 155 F.R.D. 525, 527 (E.D.Pa.1994) (defining contention discovery as, *inter alia*, that which asks a party to "state all the facts upon which it bases a contention"), and *Leotta v. Firestone Tire and Rubber*, 1989 WL 51797, at \*2-3 (E.D.Pa. May 12, 1989) (explaining "contention interrogatories" embrace questions asking whether a party makes some specified contention, or asking a party to state all the facts or

evidence on which it bases some specified contention), with *In re Domestic Drywall Antitrust Litig.*, 300 F.R.D. 228, 230 (E.D. Pa. 2014) (“These interrogatories are not truly ‘contention’ interrogatories.... Interrogatories can ask contentions of facts, or law, or constitute mixed fact and law interrogatories. In this case, the interrogatories seek facts on which Plaintiffs base their claims, such as the names of the alleged conspirators, dates of communications, and the products subject to price fixing.”) and *U.S. ex rel. Hunt v. Merck-Medco Managed Care, LLC*, No. 00 CV 737, 2005 WL 1971885, at \*2 (E.D. Pa. Aug. 15, 2005) (“Medco’s ‘Contention Interrogatories’ are not, in fact, contention interrogatories. ... [A]ll of the interrogatories seek information that formed the basis for the allegations made in Plaintiffs’ Complaint or Amended Complaint. Because Medco’s ‘Contention Interrogatories’ do not seek Plaintiffs’ contentions, but rather the factual basis of Plaintiffs’ allegations and/or the identification of documents that bear on the allegations, the Court finds that they do not constitute contention interrogatories.”). Either way, Blue Pilot is entitled to discovery from Joint Complainants to learn the purported identities of individuals that Joint Complainants allege support their claims against Blue Pilot in this proceeding. See *Susquehanna Commercial Fin., Inc. v. Vascular Res., Inc.*, No. 1:09-CV-2012, 2010 WL 4973317, at \*10 (M.D. Pa. Dec. 1, 2010) (“An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.”); *Leotta v. Firestone Tire & Rubber*, No. CIV. A. 88-3989, 1989 WL 51797, at \*2 (E.D. Pa. May 12, 1989) (“An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact. Furthermore, Professor Moore states: ‘[i]nterrogatories requesting mere factual opinions or

contentions may be elicited under Rule 33(b).’ Moreover, ‘[m]ixed questions of fact and law and questions which seek to discover a party's legal theory based on the facts elicited from other interrogatories are permissible under Rule 33(b).’”) (quoting 4A J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 33.17[2] at 33–91 (2d ed.1987)); *In re Domestic Drywall Antitrust Litig.*, 300 F.R.D. 228, 231 (E.D. Pa. 2014) (“Accordingly, Plaintiffs should provide the facts currently available, from the information that has already been exchanged and from their own investigation.”).

Joint Complainants contend that the work product doctrine shields them from providing the identities of consumers they allege were deceived or misled.<sup>4</sup> In support of that contention, Joint Complainants rely upon *Sedat, Inc. v. Dep't of Env'tl. Res.*, 163 Pa. Commw. 29, 641 A.2d 1243 (Pa. Commw. Ct. 1994). That case is readily distinguishable, as the subject of discovery sought there was a legal memorandum created by a state attorney. *Id.* In contrast, Blue Pilot here merely seeks the identities of individuals that Joint Complainants allege were misled or deceived by Blue Pilot – which is discoverable and not protected by the work product doctrine. See *Ford Motor Co. v. Edgewood Props.*, 257 F.R.D. 418, 422, 2009 U.S. Dist. LEXIS 42001, \*5 (D.N.J. 2009) (“Underlying facts are not protected by the work product doctrine.”).

Joint Complainants have filed a Motion for Entry of Judgment against Blue Pilot, representing to Your Honors that sufficient evidence existed at that time to enter judgment against Blue Pilot. Joint Complainants relied on the sworn testimony of their experts when they filed that Motion. Yet, Joint Complainants refuse to provide Blue Pilot with the identity of consumers they allege were misled or deceived. Blue Pilot is entitled to know this information so that Blue Pilot may prepare its defense.

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<sup>4</sup> Objections of Joint Complainants to Blue Pilot Energy, LLC Interrogatories and Requests for Production of Documents Set IV at 5-6.

**2. Discovery Request IV-3 is Not Unreasonably Burdensome and Joint Complainants Cannot Avoid Their Discovery Obligations by Simply Referring to Unspecified Consumer Statements and Future Expert Testimony**

Joint Complainants allege that it would be unreasonably burdensome to identify the consumers they allege were misled or deceived. Instead, they defer to the entire record as support.<sup>5</sup> However, a party may not produce records in lieu of answering an interrogatory when the burden of extracting the requested information is unequal. “If the answering party gives a vague description of the record sought, the burden of discovery imposed upon the interrogating party would be heavier than that upon the answering party due to the latter’s familiarity with said records.” *Northampton Borough Med. Auth. v. Remsco Assocs. Inc.*, 22 Pa. D & C. 3d 541, 544 (Pa. C.P. 1981) (interrogatory answer referring requesting party to “various letters of transmittal of Remsco and the engineer” held incomplete for lack of specificity); *see also Gerffert Co., Inc. v. Dean*, No. 09 CV 266, 2012 WL 2054243, at \*3 (E.D.N.Y. June 6, 2012) (“Although referencing responsive documents is permitted . . . , to simply state ‘see documents produced herewith’ without a reference to Bates numbers or other description identifying the documents responsive to each request is insufficient”). In any event, Blue Pilot would have no ability to determine the identities of these individuals if Joint Complainants merely point Blue Pilot to a pile of paper. Yet that is exactly what they suggest should suffice. By simply referring to all of the consumer statements produced in this proceeding and unnamed expert witnesses, Joint Complainants have failed to provide the level of specificity required under Pennsylvania law. Instead, they are forcing Blue Pilot to find the proverbial needle in a haystack of documents that they control. Moreover, there is no way to discern from Joint Complainants’ objection which consumers Joint Complainants allege were misled or deceived. Accordingly, Blue Pilot requests

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<sup>5</sup> *Id.* at 7.

that Your Honors order Joint Complainants to respond to this discovery requests and identify the individuals that Joint Complainants allege were misled or deceived.

Joint Complainants further attempt to defer their discovery obligations to the future testimony of unspecified experts is similarly improper. Indeed, it is akin to a game of “hide the ball.” Joint Complainants cannot refuse to provide the factual basis of any alleged violation simply because Joint Complainants’ experts may rely on those same facts. Testimony of any alleged expert witness cannot by definition take the place of a fact. That expert can only use pre-existing facts to attempt to render an opinion regarding the relevance of that specific fact to an allegation in the proceeding. Stated differently, just because Joint Complainants and their experts rely upon the same factual basis does not make those facts undiscoverable until revealed by Joint Complainants’ experts. The expert could not have generated the facts. The only way that those experts could learn any “facts” is through the party that retained them to render an opinion. An expert witness cannot supply the facts. Joint Complainants’ cannot hide the facts that form the basis of their allegations in this proceeding under the guise of expert opinion, nor can their experts create facts upon which Joint Complainants base their allegations. Accordingly, Your Honors should order Joint Complainants to provide the identity of consumers Joint Complainants allege were misled or deceived.

**B. Discovery Request IV-110**

Discovery Request IV-110 similarly requests the factual basis of the claims made by Joint Complainants:

Set forth in full and complete detail each and every fact that supports any allegation or claim that you assert in this proceeding that Blue Pilot violated any Pennsylvania law or any regulation or rule of the Commission.

Joint Complainants object to this request, claiming that it seeks attorney work product and would be unreasonably annoying and burdensome to answer.<sup>6</sup> According to Joint Complainants, they will not provide Blue Pilot with the factual basis for their claims until they file their brief.<sup>7</sup> No party should be permitted to hide from disclosure relevant facts upon which they have relied, or intend to rely, to prove any aspect of their claims. Neither objection has merit.

**1. The Work Product Doctrine Does Not Permit Joint Complainants to Avoid Their Discovery Obligations**

As set forth above, Joint Complainants cannot take cover behind a claim of “legal analysis” to avoid providing Blue Pilot with the *facts* upon which they base their claims. To be clear, Blue Pilot does not seek information relating to any purported privileged information. Rather, is seeks only the alleged facts that would support Joint Complainants’ allegations.

Joint Complainants have filed a Motion for Entry of Judgment against Blue Pilot, representing to Your Honors that sufficient evidence existed at that time to enter judgment against Blue Pilot. Joint Complainants relied on the sworn testimony of their purported experts when they filed that Motion. Yet, Joint Complainants refuse to provide Blue Pilot with the alleged facts that would support their claims and that motion. Blue Pilot is entitled to know this information so that Blue Pilot may prepare its defense.

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<sup>6</sup> Objections of Joint Complainants to Blue Pilot Energy, LLC Interrogatories and Requests for Production of Documents Set IV at 11-13.

<sup>7</sup> *Id.* at 12.

**2. Discovery Request IV-110 Is Not Unreasonably Burdensome and Joint Complainants Cannot Avoid Their Discovery Obligations by Simply Referring to Unspecified Consumer Statements and Future Expert Testimony**

Joint Complainants allege that it would be unreasonably burdensome to provide the factual basis that they contend support their claims. Instead, they defer to the entire record as support.<sup>8</sup> However, as set forth above, a party may not produce records in lieu of answering an interrogatory when the burden of extracting the requested information is unequal. By simply referring to all of the consumer statements produced in this proceeding and unnamed expert witnesses, Joint Complainants have failed to provide the level of specificity required under Pennsylvania law. Instead, they are forcing Blue Pilot to find the proverbial needle in a haystack of documents that they control. Moreover, it is unclear from Joint Complainants' responses which of the documents support the various allegations set forth in the individual paragraphs of the Joint Complaint. Accordingly, Blue Pilot requests that Your Honors order Joint Complainants to supplement their responses with the specific facts that support their allegations.

**C. Discovery Requests IV-106 and 112**

Discovery Requests IV-106 and 112 request information on Joint Complainants' communications with Blue Pilot's customers. Discovery Request IV-106 provides:

Identify each and every meeting relating in any way to discussions with or about the 96 consumer witnesses identified as the "OAG-OCA Witness List to Blue Pilot" in the Supplemental Response of the Office of Attorney General Bureau of Consumer Protection's Responses to Blue Pilot Energy, LLC Interrogatories and Requests for Production Set I, whether in person, teleconference, or video conference. In your response, include the date, time, place, individuals present, a description of what was discussed, and any decisions made.

Discovery Request IV-112 provides:

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<sup>8</sup> *Id.* at 13.

Set forth in full and complete detail each and every communication and/or conversation that You, Your agents and/or attorneys have had with any Pennsylvania consumer, whether or not they were a customer of Blue Pilot, regarding the Subject Matter of this Action or Blue Pilot in general.

Joint Complainants object to these requests, claiming they are irrelevant, seek attorney work product, and responding would be unreasonably annoying and burdensome.<sup>9</sup>

Blue Pilot is willing to limit these discovery requests to the extent that Joint Complainants would only be compelled to identify the meetings Joint Complainants held with Blue Pilot consumers that were not among the 97 consumers previously identified by Joint Complainants. For any Blue Pilot consumer not previously identified, Blue Pilot still requests the name of the consumer and date of the meeting. If no such meetings took place, Joint Complainants should state as such.

Communications with third parties are not privileged. *See Pa. Dep't of Educ. v. Bagwell*, 114 A.3d 1113, 1124 (Pa. Commw. Ct. 2015). Further, this information is not attorney work product. Blue Pilot requests only the names and dates of meetings, not the mental impressions of attorneys representing Joint Complainants that attended those meetings. Finally, Blue Pilot has no other method of obtaining this information. Accordingly, Blue Pilot requests that Your Honors order Joint Complainants to identify the names and dates of any meetings held with Blue Pilot consumers other than the 97 consumers previously identified by Joint Complainants.

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<sup>9</sup> Objections of Joint Complainants to Blue Pilot Energy, LLC Interrogatories and Requests for Production of Documents Set IV at 8-10 and 19-22

**D. Instruction 1 and Discovery Request IV-111**

Joint Complainants object to the request in Instruction No. 1 for a detailed privilege log. As detailed in Blue Pilot's letter dated October 5, 2015<sup>10</sup> and Joint Complainants' Objection, however, Blue Pilot has agreed to the broader and categorical approach to privilege logs that the parties have provided throughout the course of this proceeding. Joint Complainants' concern actually appears to be with Discovery Request IV-111, which provides:

Set forth in full and complete detail each and every communication and/or conversation that You, Your agents and/or attorneys have had with any other public utility commission, consumer protection agency, investigator, or attorney regarding the Subject Matter of this Action or Blue Pilot in general.

To the extent that Joint Complainants object to this request on the grounds that communications regarding "Blue Pilot in general" are not relevant, Blue Pilot agrees to limit the request to communications regarding matters relevant to this the claims raised by Joint Complainants in this proceeding.

Joint Complainants object to this request, claiming that it seeks attorney work product; that the information is protected by the investigative privilege; and, by way of their objection to Instruction No. 1, that the request is unreasonably annoying and burdensome. Joint Complainants' objections lack merit and Joint Complainants should be compelled to produce this information.

**1. The Investigative Privilege Only Applies Where Disclosure Would Have a Substantial Negative Impact on the Investigation**

Joint Complainants allege that the information sought in Discovery Request IV-111 is protected by the investigative privilege because the information was "gathered for purposes of tactical decisions during this proceeding," would "impair [OAG's] role as the chief law

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<sup>10</sup> See Letter to OCA and OAG, dated October 5, 2015, attached as Exhibit 3, at 3-4.

enforcement officer,” and is “not solely factual data.”<sup>11</sup> Joint Complainants fail to explain any of these conclusions and essentially demand that Your Honors and Blue Pilot take Joint Complainants word that it would be against “the public interest.”<sup>12</sup> This does not meet the requirements for withholding information based on an alleged investigative privilege.

To be clear, Blue Pilot is only seeking factual information – i.e., the communications Joint Complainants have had with other public utility commissions, consumer protection agency, and investigators regarding this matter. It is not seeking the communications themselves. These facts are discoverable under Pennsylvania law.

Joint Complainants cite to *In re Buchanan*, but tellingly fail to cite the holding in that case. There, the Pennsylvania Supreme Court held:

It is not enough for the Commonwealth merely to assert that an investigation is ongoing. **The Commonwealth must make a specific showing** that the release of the report would have **a substantial negative impact on its investigation** – for example, by keeping witnesses from coming forth or preventing investigators from verifying information that they receive from informants.

880 A.2d 568, 577 (Pa. 2005) (emphasis added). With this high burden on the government, the Supreme Court affirmed the Superior Court’s determination:

The panel majority noted that the trial court had failed to make specific findings of fact that would permit the Superior Court to determine whether release of Buchanan's autopsy report would actually substantially hinder or jeopardize the ongoing investigation. We believe the panel's approach is generally sound on this record. Upon remand, the trial court should determine whether the Commonwealth can establish that the release of the report in this case in fact poses a threat of substantially hindering or jeopardizing the ongoing investigation. In this consideration, the trial court may, pursuant to its broad discretionary authority, conduct an in camera review of the autopsy report, and consider additional evidence if proffered. Additionally, the trial court is free to determine whether a less restrictive means, such as redaction, is adequate to protect the Commonwealth's interests. Finally, if appropriate, the trial court may require an

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<sup>11</sup> Objections of Joint Complainants to Blue Pilot Energy, LLC Interrogatories and Requests for Production of Documents Set IV at 16-18.

<sup>12</sup> *Id.* at 18.

additional showing by the Commonwealth that continued sealing of the report for a reasonable period is required to ensure the integrity of the ongoing investigation.

*Id.*, 880 A.2d at 577-578.

Joint Complainants' bald assertion that information on their communications with other public utility commissions, consumer protection agency, and investigators regarding this matter is subject to a blanket investigative privilege fails to meet this standard. Moreover, Joint Complainants never even attempted an explanation that might support the requirements outlined in *In re Buchanan*. Indeed, at this late stage of the proceeding, little investigation remains. Joint Complainants' time for identifying further consumer witnesses has expired. Some of those consumers appeared at the hearing held on March 30 through April 1, 2015. Joint Complainants have further served on Blue Pilot and received responses to 146 discovery requests spanning twelve separate sets. Joint Complainants also filed a Motion for Entry of Judgment against Blue Pilot representing to Your Honors that sufficient evidence existed at that time to enter judgment against Blue Pilot. Joint Complainants relied on the sworn testimony of their experts when they filed that Motion. The only reason that Joint Complainants identify for hoping to shield disclosure of this information is for "tactical decisions." It is unclear what these tactical decisions could be, but Pennsylvania law does not permit the government to hide relevant discovery that may impair the government's case. Joint Complainants fail to "make a specific showing that the release of [the information] would have a substantial negative impact on its investigation." *Id.*

## **2. Discovery Request IV-111 Does Not Seek Attorney Work Product**

Joint Complainants allege that the information sought is attorney work product, but fail to explain the basis for this assertion. Discovery Request IV-111 requests that Joint Complainants set forth the communications Joint Complainants have had with other public utility commissions, consumer protection agency, and investigators regarding this matter. Communications with third

parties are not privileged. *See Pa. Dep't of Educ. v. Bagwell*, 114 A.3d 1113, 1124 (Pa. Commw. Ct. 2015).

To the extent that Joint Complainants allege that the information sought is privileged, Blue Pilot has requested that Joint Complainants identify the communications and set forth the basis for the claim of privilege. Joint Complainants cannot use the parties' agreement to not require a detailed privilege log for every claim of privilege as both a shield from compiling extensive privilege logs – which was the purpose of the agreement – and as a sword to attack a legitimate request to learn the communications Joint Complainants have had with external individuals and entities about this case. Accordingly, Blue Pilot requests Your Honors order Joint Complainants to set forth the communications Joint Complainants have had with other public utility commissions, consumer protection agencies, and other investigators regarding this matter.

**E. Discovery Request IV-113**

Discovery Request IV-113 provides:

Identify all documents that support each of the statements identified in requests 102 through 112 above, identifying for each request which documents support the facts alleged.

Joint Complainants objects to this request “to the extent it seeks information related to Set IV-106, 110, 111, and 112, as such requests are beyond the permissible scope of discovery.”<sup>13</sup> For the reasons stated above, Blue Pilot requests that Your Honors order Joint Complainants to respond to this request.

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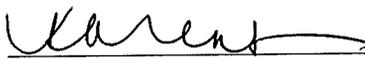
<sup>13</sup> Objections of Joint Complainants to Blue Pilot Energy, LLC Interrogatories and Requests for Production of Documents Set IV at 23.

**CONCLUSION**

Based on the foregoing, Blue Pilot requests Your Honors enter an order requiring Joint Complainants to respond to Set IV, including discovery requests IV-3, 106, and 110-113.

October 15, 2015

BUCHANAN INGERSOLL & ROONEY PC

By:   
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*Attorneys for Blue Pilot Energy, LLC*

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# EXHIBIT 1

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**Buchanan Ingersoll & Rooney PC**

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September 23, 2015

**VIA EMAIL AND FIRST-CLASS MAIL**

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

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

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

Dear Complainants:

On behalf of Blue Pilot Energy, LLC, enclosed you will find Blue Pilot Energy, LLC's Third Set of Interrogatories and Requests for Production of Documents to Joint Complainants (Public Version) 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/tlg

Enclosures

cc: Rosemary Chiavetta, Secretary (*cover letter and Certificate of Service only via efilng*)  
Certificate of Service

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

**BLUE PILOT ENERGY, LLC’S THIRD SET OF INTERROGATORIES AND  
REQUESTS FOR PRODUCTION OF DOCUMENTS TO JOINT COMPLAINANTS**

Blue Pilot Energy, LLC (“Blue Pilot” or “BPE”), by and through its undersigned counsel and pursuant to Sections 5.341 and 5.342 of the Pennsylvania Public Utility Commission’s (“Commission” or “PUC”) regulations, 52 PA. CODE §§ 5.341, 5.342, hereby propounds the following Interrogatories and Requests for Production of Documents upon Commonwealth of Pennsylvania, Bureau of Consumer Protection and the Office of Consumer Advocate (“Joint Complainants”). In accordance with 52 PA. CODE § 5.342, the requested responses and documents shall be served upon the undersigned within the time period prescribed by the Commission for this docket.

**DEFINITIONS**

The following definitions shall be used throughout BPE’s Interrogatories and Request for Production of Documents to Joint Complainants, as defined below.

1. “Action” means the lawsuit captioned *Commonwealth of Pennsylvania, et al. v. Blue Pilot Energy, LLC*, filed before the Pennsylvania Public Utility Commission, Docket No. C-2014-2427655.

2. “Commission” means the Pennsylvania Public Utility Commission.

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3. “Joint Complainants” or “AG” or “OCA” means Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection (Attorney General) and Complainant Acting Consumer Advocate Tanya J. McCloskey, Pennsylvania Office of Consumer Advocate, and any agents, experts, employees, representatives, attorneys, and all other persons acting on her or their behalf.

4. “Concerning” or “concern” means directly or indirectly, in whole or in part, referring to, relating to, connected with, commenting on, impinging or impacting upon, affecting, responding to, supporting, pertaining to, showing, describing, analyzing, reflecting, or constituting.

5. “Correspondence” shall refer to any and all written or electronic communications of any kind, including without limitation, e-mails, text messages, instant messages, documents, letters, forms, memoranda, reports, notes, worksheets, drafts, working papers, contracts, agreements, or other papers whether handwritten, typed, printed, or reproduced photostatically or photographically, including all film, microfilm, photographs, audiotapes, videotapes, drawings or other visual representations and any computer, magnetic, mechanical, or electronic recordings. The term “correspondence” extends to and specifically encompasses all non-identical copies of any responsive documents and all such non-identical copies should be produced.

6. “Document” and “documents” are used herein in the broadest sense possible, and without limitation, to refer to originals (or identical copies where originals are unavailable), copies with notations, comments, analyses, and post-preparation changes and non-identical copies of originals, of any tangible source of information of every type and description, however, and by whomever created, prepared, produced, reproduced, or disseminated, and regardless of its location, which is, as of the date of service of these Interrogatories, in the custody of, or in any

## PUBLIC VERSION

way subject to, the control of you or your attorneys. "Document" and "documents" also include, but are not limited to, e-mails, text messages, instant messages, expert reports, investigative reports, witness statements, writings, sales transaction receipts, cash register receipts, credit card receipts, credit card slips, coupons, checkbook registers, advertisements, marketing materials, letters, minutes, correspondence, telegrams, telefaxes, faxes, bulletins, instructions, handwritten notes, typewritten notes, notes, transcripts, sound recordings of any kind, slides, movie film and negatives, photographs and their negatives, printouts, minutes of meetings, memoranda, inter-office communications, studies, analyses, reports, advertisements, sales listings, rental listings, broker agreements, catalogues, results of investigations, leases, contracts, licenses, agreements, working papers, statistical records, ledgers, work sheets, books of account, general ledgers, trial balances, audited and un-audited financial statements, tax returns, vouchers, charge slips, time sheets or logs, telephone messages or logs, telephone diaries, telephone bills, diaries, purchase orders, acknowledgements, invoices, price lists, registers, charts, tables, authorizations, budgets, analyses, projections, brochures, circulars, proofs, sheets, books, magazines, checks, cancelled checks, life insurance applications, illustrations, notices, bills, premium notices, cancellation notices, annual reports, notebooks, computer disks, diskettes, electronic communications of any kind, tapes or any information which can be retrieved from a computer, stenographers' notebooks, desk calendars, or papers similar to any of the foregoing. "Document" and "documents" are not limited to the manner of representation of any information called for, which includes, but is not limited to, letters, words, numbers, symbols, characters, electronic data, pictures, graphic presentations, or sounds, or any combination thereof. "Document" and "documents" also include, but are not limited to, preliminary drafts, versions, or revisions of any of the aforementioned, and underlying, preparatory, or supporting materials thereto. The terms

**PUBLIC VERSION**

“document” and “documents” also refer to electronically stored information (“ESI”) in whatever form, including without limitation, emails, word processing files, recordings of conversations, and Excel spreadsheets.

7. “Dr. Esomin’s Affidavit” means the Affidavit signed by Dr. Steven L. Estomin under oath on June 17, 2015, and attached as Exhibit G in support of the Joint Motion of the Commonwealth of Pennsylvania Bureau of Consumer Protection and the Office of Consumer Advocate for Entry of Judgment against Blue Pilot Energy, LLC, filed on June 22, 2015.

8. “EGS” means an Electric Generation Supplier.

9. “Joint Complaint” shall mean the Joint Complaint filed by the Commonwealth of Pennsylvania, by attorney General Kathleen G. Kane through the Bureau of Consumer Protection and the Acting Consumer Advocate Tanya J. McCloskey in this Action.

10. “Licensing Order” means *the License Application of Blue Pilot Energy, LLC for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as an Aggregator and Broker/Marketer of Retail Electric Power*, Docket No. A-2011-2223888, Order (Jun. 10, 2011).

11. “Joint Motion for Entry of Judgment” means the Joint Motion of the Commonwealth of Pennsylvania Bureau of Consumer Protection and the Office of Consumer Advocate for Entry of Judgment against Blue Pilot Energy, LLC, filed on June 22, 2015.

12. “Ms. Alexander’s Affidavit” means the Affidavit signed by Barbara R. Alexander under oath on June 18, 2015, and attached as Exhibit F in support of the Joint Motion of the Commonwealth of Pennsylvania Bureau of Consumer Protection and the Office of Consumer Advocate for Entry of Judgment against Blue Pilot Energy, LLC, filed on June 22, 2015.

**PUBLIC VERSION**

13. “Ms. Everette’s Affidavit” means the Affidavit signed by Ashley E. Everette under oath on June 18, 2015, and attached as Exhibit H in support of the Joint Motion of the Commonwealth of Pennsylvania Bureau of Consumer Protection and the Office of Consumer Advocate for Entry of Judgment against Blue Pilot Energy, LLC, filed on June 22, 2015.

14. “OAG” means joint complainant Commonwealth of Pennsylvania, by attorney General Kathleen G. Kane through the Bureau of Consumer Protection, and any agents, employees, representatives, attorneys, and all other persons acting on her or their behalf.

15. “OCA” means joint complainant Tanya J. McCloskey jointly with the Office of Consumer Advocate, and any agent, employees, representatives, attorneys, and all other persons acting on her or their behalf.

16. “OSBA” means intervenor Pennsylvania Office of Small Business Advocate, and any agents, employees, representatives, attorneys, and all other persons acting on its behalf.

17. The term “person” refers to both individuals and entities, including without limitation any natural person, corporation, division, subsidiary, partnership, proprietorship, firm, association, company, and joint venture whether public or private, as well as any governmental agency, division, or department.

18. “PTC” means Price-to-Compare.

19. “Preliminary Objection Answer” shall refer to July 21, 2014 Answer of the Commonwealth of Pennsylvania and the Office of Consumer Advocate to the Preliminary Objections of Blue Pilot Energy, LLC.

20. The terms “relating to,” “regarding,” or “concerning” mean in connection with, constituting, analyzing, connecting, containing, describing, discussing, embodying, evidencing, reporting or commenting on, inquiring about, setting forth, explaining, reflecting, identifying,

**PUBLIC VERSION**

stating, considering, referring to, mentioning, alluding to, or in any way pertaining to, in whole or in part or having any logical or factual connection whatsoever with the Subject Matter of this Action (as defined below).

21. “Respondent” means Blue Pilot Energy, LLC.

22. The phrase “Subject Matter of this Action” means the facts and claims alleged in the Joint Complaint, and all defenses and facts asserted by BPE in its Answer, and generally refers to any of the claims and defenses asserted by any party in this Action.

23. “You” and “your” shall refer to Complainant, and any of your agents, assigns, servants, employees, contractors, other representatives, and all persons acting on your behalf, including your attorneys.

**INSTRUCTIONS**

1. If you claim any form of privilege, whether based on statute or otherwise, as a ground for not describing any requested oral communication or document, state the following:

(a) the date thereof;

(b) the name, the present or last known home and business addresses and the telephone numbers thereto, the title (or position), occupation, and employer or each of the participants in said oral communication, or of those individuals who prepared, produced, or reproduced, or who were recipients of said document;

(c) the name, the present or last known home and business address and the telephone numbers thereto, the title (or position), and the occupation of each person present during all or any part of said oral communications;

(d) a description of the oral communication or of the document sufficient to identify it without revealing the information for which the privilege is claimed;

**PUBLIC VERSION**

(e) a description of the subject matter of the communication in sufficient detail to allow the Court to adjudicate the validity of your claim; and

(f) each and every fact and/or legal basis upon which you claim any such privilege.

2. Whenever a date, amount, or other computation or figure is requested, the exact date, amount, or other computation or figure should be given or the best estimate thereof; and the answer shall state that the date, amount, or other computation is an estimate or approximation.

3. Where facts are set forth in the answers or portions thereof are supplied upon information and belief, rather than upon your direct personal knowledge, you should so state, and specifically identify each source of such information and belief. Should you be unable to answer any interrogatory or portion thereof by either actual knowledge or upon information and belief, you should so state and detail your efforts to obtain such knowledge.

4. Each interrogatory must be addressed in full and, if needed, on supplemental sheets.

5. Reference to an individual, partnership, or corporation should include any and all agents, employees, representatives, attorneys, and all other persons or entities acting on his, her, or its behalf or under his, her, or its control.

6. When referring to a person, the term, "identify," means to give, to the extent known, the person's full name, present or last known address, and when referring to a natural person, additionally, the present or last known place of employment.

7. When referring to documents, the term, "identify," means to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s), and recipient(s).

**PUBLIC VERSION**

8. These Interrogatories shall be deemed to be continuing, and you shall supplement your responses with any additional information (including, but not limited to, any conclusions, opinions, or contentions) that is different from that set forth in your answers to these Interrogatories, which you acquire subsequent to that date of answering these Interrogatories, up to and including the date you acquired such information.

9. If you cannot answer any particular Interrogatory in full after exercising all due diligence to secure the information to do so, state the answer to the fullest extent, specifying your inability to answer the remainder and stating whether information or knowledge concerning the unanswered portion exists, including who has such additional information or knowledge.

10. All documents that respond in whole or in part, to any part of any paragraph of the following requests shall be produced in their entirety, including all attachments and enclosures.

11. You shall produce the documents requested as they are kept in the usual course of business or shall organize and label them to correspond with the numbered paragraphs or interrogatory questions set below. If you consider that a document is responsive to more than one request, you shall so indicate by placing appropriate interrogatory question numbers on the document.

12. For each Interrogatory:

- (a) identify the person who has answered the interrogatory;
- (b) identify each document relied upon, or which forms a basis for the answer or which corroborates the answer given. Cite the specific pages of each document on which you rely; and

**PUBLIC VERSION**

(c) identify each person who assisted or participated in preparing and/or supplying any of the information given in answer to, or relied upon in preparing answers to the interrogatory.

13. These Interrogatories and Document Requests cover all information, documents and tangible items, in your possession, custody, and control, including, but not limited to, information in the possession of your officers, employees, agents (*e.g.*, technical consultants), servants, representatives, attorneys, or other persons directly or indirectly employed or retained by you, or anyone else acting on your behalf or otherwise subject to your control.

14. Whenever in these Interrogatories there is a request to identify a “document,” state or identify:

- (a) its date;
- (b) its addressee and all other persons receiving copies;
- (c) the type of document (*e.g.*, letter, memorandum, contract, report, accounting record, etc.);
- (d) its title;
- (e) its substance;
- (f) its custodian; and
- (g) its present or last known location.

You need not provide a description as detailed as the foregoing if the document is produced in response to these Interrogatories and if such information is readily discernible from the document. The final version and each draft of each document should be identified separately. Each original and each non-identical copy (bearing marks or notations not found on the original) of each final version and draft of each document should be identified separately.

**PUBLIC VERSION**

15. Words used in the plural also shall be taken to mean and include the singular.

Words used in the singular also shall be taken to mean and include the plural.

16. The words, “and” and “or,” shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather than exclusive.

17. The relevant time period covered by each Interrogatory is January 1, 2010 to the present, unless otherwise stated or indicated by the context of the Request.

18. Each of the foregoing instructions is incorporated into each of the Interrogatories listed herein.

**INTERROGATORIES & REQUESTS FOR PRODUCTION OF DOCUMENTS**

1. State all facts in full and complete detail and identify all documents that support your allegations contained in Paragraph 50 of the Joint Complaint that at least 36 “complainants indicated that their service with respondent was initiated by a telemarketing call from Respondent.”

2. Identify and describe all consumer surveys and empirical studies regarding how BPE’s conduct was deceptive and misleading.

3. Identify each consumer that supports your contention that a consumer was misled or deceived by BPE, explaining in full and complete detail all facts relied upon.

4. Identify all documents that support each of the statements identified in requests 1 through 3 above, identifying for each request which documents support the facts alleged.

5. Identify all qualifications regarding any expertise held by Barbara Alexander with respect to linguistic and/or psychological analyses of how consumers perceive contract terms.

6. Identify all qualifications regarding any expertise held by Barbara Alexander in consumer marketing and/or consumer perception of marketing and advertising claims made by advertisers.

7. Identify every sales call reviewed by Ms. Alexander and identify the substance of each sales call that forms the basis of Ms. Alexander’s opinions.

8. Explain in detail all facts relied upon for the allegations in Paragraph 5 of Ms. Alexander’s Affidavit that “Blue Pilot has primarily offered variable price plans to Pennsylvania consumers. However, many or most of these variable rate plans included an introductory or initial fixed price for 60-90 days.”

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9. Explain in detail all facts relied upon for the allegations in Paragraph 9 of Ms. Alexander's Affidavit that Blue Pilot amended its Disclosure Statement and Agreement in "March or April 2014."

10. Explain in detail all facts relied upon for the allegations in Paragraph 9 of Ms. Alexander's Affidavit that Blue Pilot's amended Disclosure Statement and Agreement "did not govern the price that impacted the vast majority of customers who contacted the OCA or the OAG."

11. Identify each and every customer of Blue Pilot that comprises the "vast majority of customers who contacted the OCA or the OAG" that Ms. Alexander refers to in Paragraph 9 of her Affidavit.

12. Explain in detail all facts relied upon for the allegations in Paragraph 11 of Ms. Alexander's Affidavit, including that "consumers did not have the written terms of service or disclosure statements prior to agreeing to enroll with Blue Pilot and relied on the sales agents' statements about the pricing terms to enroll with Blue Pilot."

13. Explain in detail all facts relied upon for the allegations in Paragraph 12 of Ms. Alexander's Affidavit, including that "Based on consumer testimony and Blue Pilot's typical practice, the vast majority of customers did not sign their enrollment forms or terms and conditions, but enrolled with a third party verification recording as the evidence of their agreement to switch to Blue Pilot."

14. Explain in detail all facts relied upon for the allegations in Paragraph 13 of Ms. Alexander's Affidavit.

15. Explain in detail how "Blue Pilot marketed its variable price plans to Pennsylvania consumers by emphasizing savings" for each call relied upon by Ms. Alexander in Paragraph 17 of her Affidavit.

16. Identify each communication where Blue Pilot "emphasiz[ed] savings" as referred to by Ms. Alexander in Paragraph 17 of her Affidavit.

17. Explain in detail how Blue Pilot "failed to describe the meaning or potential result of the variable price term in its agreements" for each call relied upon by Ms. Alexander in Paragraph 17 of her Affidavit, specifically identifying each call relied upon for this allegation.

18. Explain in detail how Blue Pilot failed to "fully or correctly describe the variable price terms and conditions that are actually included in Blue Pilot's Disclosure Statement and Agreement" for each call relied upon by Ms. Alexander in Paragraph 18 of her Affidavit, specifically identifying each call relied upon for this allegation.

19. Explain in detail how the Blue Pilot "downplay[ed] any potential for significant rate increases" for each call relied upon by Ms. Alexander in Paragraph 18 of her Affidavit, specifically identifying each call relied upon for this allegation.

## PUBLIC VERSION

20. Explain in detail how Blue Pilot “led [customers] to believe they could immediately leave Blue Pilot if they were not happy or if the price increased” for each call relied upon by Ms. Alexander in Paragraph 18 of her Affidavit, specifically identifying each call relied upon for this allegation.

21. Explain in detail all facts relied upon for the allegation in Paragraph 18 of Ms. Alexander’s Affidavit that “customers who cancelled were required to wait anywhere from 1-2 billing periods.”

22. Explain in detail how Blue Pilot “creates the impression that Blue Pilot will initiate action to respond to changes in prices after 60-90 days” for each call relied upon by Ms. Alexander in Paragraph 18 of her Affidavit, specifically identifying each call relied upon for this allegation.

23. Explain in detail how Blue Pilot “creates the impression ... that contact with Blue Pilot after [60-90 days] will result in being ‘taken care of’” for each call relied upon by Ms. Alexander in Paragraph 18 of her Affidavit, specifically identifying each call relied upon for this allegation.

24. In Paragraph 18 of Ms. Alexander’s Affidavit, Ms. Alexander alleges that the phrase “taken care of” is “designed to suggest that customers need not worry about the potential for higher prices.” Do Joint Complainants allege that Blue Pilot agents used the phrase “taken care of”? If so, identify every sales call in which Joint Complainants contend this phrase was used.

25. Explain the factual basis for Ms. Alexander’s contention that Blue Pilot agents created the impression that Blue Pilot would “take[] care of” customers such that “customers need not worry about the potential for higher prices” as alleged in Paragraph 18 of Ms. Alexander’s Affidavit.

26. Explain in detail how the phrase “taken care of” is “designed to suggest that customers need not worry about the potential for higher prices” as alleged in Paragraph 18 of Ms. Alexander’s Affidavit.

27. Explain in detail how Blue Pilot “promise[d] notification prior to changes in prices,” for each call relied upon by Ms. Alexander in Paragraph 18 of her Affidavit, specifically identifying each call relied upon for this allegation..

28. Explain in detail how Blue Pilot “clearly misrepresent[ed] the impact of ‘competition’ in keeping rates low under the variable price term of these plans” for each call relied upon by Ms. Alexander in Paragraph 18 of her Affidavit, specifically identifying each call relied upon for this allegation.

29. Explain in detail how “Blue Pilot’s oversight and training of its sales representatives to ensure compliance with Pennsylvania’s consumer protection requirements, as outlined in the Commission’s marketing and telemarketing sales requirements in the regulations, is defective and deficient” as alleged in Paragraph 19 of Ms. Alexander’s Affidavit.

**PUBLIC VERSION**

30. Explain in detail all facts relied upon for the allegation that “Blue Pilot lacks any internal policies and programs that the Company can actually document to detect violations of Pennsylvania regulations and requirements, investigate potential violations, and take proactive steps to prevent future violations” as alleged in Paragraph 21 of Ms. Alexander’s Affidavit.

31. Explain in detail all facts relied upon for the allegation that “Blue Pilot has not delivered savings to Pennsylvania customers as claimed in its promotional and sales statements and as documented in the analysis done by Ms. Ashley Everette on behalf of the Joint Complainants” as alleged in Paragraph 22 of Ms. Alexander’s Affidavit.

32. Do you contend that Blue Pilot promised savings for every month it would ever serve each customer? If so, identify all facts and documents which support this contention, including the identity of each sales call in which this occurred.

33. Explain in detail all facts relied upon for the allegation that “Blue Pilot has failed to document how or whether its actual variable prices charged to Pennsylvania customers have conformed to its written terms of serve” as alleged in Paragraph 23 of Ms. Alexander’s Affidavit.

34. Explain in detail all facts relied upon for the allegation that Blue Pilot’s Disclosure Statement and Agreement contained “vague language that does not include a plain language explanation of how Blue Pilot will set prices” as alleged in Paragraph 23 of Ms. Alexander’s Affidavit.

35. Explain in detail all facts relied upon for the allegation that “Blue Pilot’s actual practices in establishing prices cannot be rationally documented or explained” as alleged in Paragraph 23 of Ms. Alexander’s Affidavit.

36. Explain in detail all facts relied upon for the allegation that “Blue Pilot has charged prices to Pennsylvania customers that do not conform to any reasonable interpretation of its Disclosure Statement and Agreement” as alleged in Paragraph 23 of Ms. Alexander’s Affidavit.

37. Explain in detail all facts relied upon for the allegation that “Blue Pilot has failed to conform its telemarketing sales practices to the requirements of the Commission’s regulations that require compliance with Pennsylvania’s Telemarketing Registration Act (TRA)” as alleged in Paragraph 24 of Ms. Alexander’s Affidavit.

38. Explain in detail all facts relied upon for the allegation that Blue Pilot’s “terms and conditions in its Disclosure Statement and Agreement fail to conform to the requirements of the TRA” as alleged in Paragraph 24 of Ms. Alexander’s Affidavit.

39. Explain in detail all facts relied upon for the allegation that “Nor do Blue Pilot’s contract terms conform to the requirements of the TRA with respect to disclosures and terms” as alleged in Paragraph 24 of Ms. Alexander’s Affidavit.

40. Explain in detail all facts relied upon for the allegation that Blue Pilot’s “Customer Care Script” issues in early 2014 “is misleading” as alleged in Paragraph 25 of Ms. Alexander’s Affidavit.

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41. Explain in detail all facts relied upon for the allegation that Blue Pilot's policy in offering credits and rebates to some customers "did not treat all customers who were similarly situated fairly" as alleged in Paragraph 26 of Ms. Alexander's Affidavit.

42. Explain in detail all facts relied upon for the allegation that "The dollar amount of 'credits' -- \$49,710 -- and 'refunds' -- \$173,744 -- pale in comparison to the extremely high prices charged by Blue Pilot to Pennsylvania customers in early 2014" as alleged in Paragraph 26 of Ms. Alexander's Affidavit.

43. Explain in detail all facts relied upon for the allegation that "Blue Pilot's handling of customer complaints about high prices, misleading sales conduct, slamming, and other allegations reflected in its complaint records failed to conform to the Commission's regulations for investigating and handling customer complaints as found in Chapter 56 of the Commission's regulations" as alleged in Paragraph 27 of Ms. Alexander's Affidavit.

44. Explain in detail all facts relied upon for the allegation that "Blue Pilot's marketing practices, its oversight and training of marketing agents, and its disclosures and pricing practices are unfair, deceptive and inadequate and that these practices constitute noncompliance with the Public Utility Code and the Commission's regulations that govern the retail energy market" as alleged in Paragraph 28 of Ms. Alexander's Affidavit.

45. Explain in detail all facts relied upon for the allegation that "Blue Pilot enticed Pennsylvania consumers to enter into variable price plans with promises of savings and failed to deliver those promises" as alleged in Paragraph 28 of Ms. Alexander's Affidavit.

46. Explain in detail all facts relied upon for the allegation that "Blue Pilot's marketing and sales activities failed to properly describe its pricing terms, and Blue Pilot's pricing methodology failed to conform to its own Disclosure Statement and Agreement" as alleged in Paragraph 28 of Ms. Alexander's Affidavit.

47. Explain in detail all facts relied upon for the allegation that "Blue Pilot also enrolled customers by means of telemarketing sales calls without obtaining actual customer signatures on contracts or complying with the disclosures and other terms required by the Commission's telemarketing regulations" as alleged in Paragraph 28 of Ms. Alexander's Affidavit.

48. Explain in detail all facts relied upon for the allegation that "There is a pattern and practice revealed in Blue Pilot's sales calls, verification calls, and its handling of customer complaints 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" as alleged in Paragraph 28 of Ms. Alexander's Affidavit, specifically identifying each call relied upon for this allegation.

49. Please describe what is meant by the phrase "pattern and practice" as used in Paragraph 28 of Ms. Alexander's Affidavit. Do you contend that every Blue Pilot customer was the subject of "false, deceptive, and misleading statements"? Do you contend that a majority of Blue Pilot customers were the subject of "false, deceptive, and misleading statements"? How

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many customers do you contend were subject to “false, deceptive, and misleading statements”? Explain in detail all facts relied upon for your response, specifically identify each call relied upon for your response.

50. Explain in detail all facts relied upon for the allegation that “Blue Pilot’s responses to its customers’ complaints and contacts regarding Blue Pilot’s high variable prices charged in early 2014 were insufficient and discriminatory with respect to rebates and credits issued to affected customers” as alleged in Paragraph 28 of Ms. Alexander’s Affidavit.

51. Explain in detail all facts relied upon for the allegation that “Blue Pilot’s advertisements and marketing materials used in 2013 and early 2014 (as well as those relied on earlier based on the consumer testimony and exhibits in the record) were deceptive and misleading because they falsely suggest that selecting Blue Pilot would result in savings and lower bills” as alleged in Paragraph 28(a) of Ms. Alexander’s Affidavit.

52. Explain in detail all facts relied upon for the allegation that “Blue Pilot’s pricing disclosures are vague, insufficient and deceptive” as alleged in Paragraph 28(b) of Ms. Alexander’s Affidavit.

53. Explain in detail all facts relied upon for the allegation that Blue Pilot “charges prices that do not conform to its Disclosure Statement and Agreement” as alleged in Paragraph 28(b) of Ms. Alexander’s Affidavit.

54. Explain in detail all facts relied upon for the allegation that “Blue Pilot has charged prices to Pennsylvania consumers that do not comply with the promotional statements and verification scripts that induced customers to enroll” as alleged in Paragraph 28(b) of Ms. Alexander’s Affidavit.

55. Explain in detail all facts relied upon for the allegation that “Blue Pilot has engaged in a pattern and practice of deceptive and misleading statements in its interactions with Pennsylvania consumers in both its sales and verification calls and in its responses to the many customers who attempted to contact Blue Pilot about the extremely high prices charged by Blue Pilot starting in January 2014” as alleged in Paragraph 28(c) of Ms. Alexander’s Affidavit.

56. Please describe what is meant by the phrase “pattern and practice” as used in Paragraph 28(c) of Ms. Alexander’s Affidavit. Explain in detail all facts relied upon for your response, and specifically identify each call or communication with a prospective or actual Blue Pilot customer relied upon for your response.

57. Explain in detail all facts relied upon for the allegation that “Blue Pilot’s actions in response to its high variable prices in early 2014 were unreasonable, particularly in light of the Company’s poor customer service and its inconsistent policies related to credits and refunds” as alleged in Paragraph 28(d) of Ms. Alexander’s Affidavit.

58. Explain in detail all facts relied upon for the allegation that “Blue Pilot has not had sufficient managerial and technical abilities to conduct energy sales in Pennsylvania” as alleged in Paragraph 28(e) of Ms. Alexander’s Affidavit.

**PUBLIC VERSION**

59. Explain in detail all facts relied upon for the allegation that “Blue Pilot has failed to properly supervise and train its sales agents and customer service personnel” as alleged in Paragraph 28(e) of Ms. Alexander’s Affidavit.

60. Explain in detail all facts relied upon for the allegation that “Blue Pilot’s compliance functions are insufficient” as alleged in Paragraph 28(e) of Ms. Alexander’s Affidavit.

61. Explain in detail all facts relied upon for the allegation that Blue Pilot had “improper enrollments and other actions” as alleged in Paragraph 28(e) of Ms. Alexander’s Affidavit.

62. To the extent not already addressed in an earlier request, explain in detail all facts relied upon in Ms. Alexander’s Affidavit.

63. Identify all documents that support each of the statements identified in requests 5 through 62 above, identifying for each request which documents support the facts alleged.

64. Identify all qualifications regarding any expertise held by Dr. Steven L. Estomin with respect to linguistic and/or psychological analyses of how consumers perceive contract terms.

65. Identify all qualifications regarding any expertise held by Dr. Estomin in consumer marketing and/or consumer perception of marketing and advertising claims made by advertisers.

66. Explain in detail all facts relied upon for the allegations in Paragraph 6 of Dr. Estomin’s Affidavit that Blue Pilot amended its Disclosure Statement and Agreement in “March or April 2014.”

67. Explain in detail all facts relied upon for the allegations in Paragraph 7 of Dr. Estomin’s Affidavit that Blue Pilot’s Disclosure Statement and Agreement “does not provide any indication or guidance as to how the wholesale market conditions would be translated into the prices that customers would see on their monthly bills.”

68. Provide sample language of how you contend a disclosure statement for a variable rate plan based on wholesale market conditions should read.

69. Explain in detail all facts relied upon for the allegations in Paragraph 7 of Dr. Estomin’s Affidavit that Blue Pilot’s Disclosure Statement and Agreement “is so general and vague that no customer would be able to assess the reasonableness of the rates being charged by Blue Pilot for any particular month.”

70. Explain in detail all facts relied upon for the allegations in Paragraph 8 of Dr. Estomin’s Affidavit that the method by which Blue Pilot calculated rates “is not explained by Blue Pilot other than the statement that they were [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]”

**PUBLIC VERSION**

71. Explain in detail all facts relied upon for the allegations in Paragraph 9 of Dr. Estomin's Affidavit that "Once the range of factors represented as being considered by Blue Pilot in the establishment of its per-kWh rates to its Pennsylvania residential and commercial variable rate plan customers was used to establish a cost basis, the Company then added an [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]"

72. Explain in detail all facts relied upon for the allegations in Paragraph 9 of Dr. Estomin's Affidavit regarding the determination of Blue Pilot's "per-kWh costs in [January 2014]."

73. Explain in detail all facts relied upon for the allegations in Paragraph 9 of Dr. Estomin's Affidavit that "the rate developed by Blue Pilot is not based on PJM market costs, as the Company states in its Disclosure Statement and Agreement, but rather is a rate that is essentially fabricated by Blue Pilot and unrelated to PJM market costs in any meaningful or consistent way."

74. Explain in detail all facts relied upon for the allegations in Paragraph 10 of Dr. Estomin's Affidavit that "If the per-kWh rates charged by Blue Pilot to its residential and commercial customers under its variable rate plans in Pennsylvania were based on PJM market costs, I would expect to see a range of rates over the course of a month, consistent with changes in the PJM wholesale power markets."

75. Explain in detail all facts relied upon for the allegations in Paragraph 10 of Dr. Estomin's Affidavit that "For [Blue Pilot's] rates to be consistent with Blue Pilot's Disclosure Statement and Agreement, the PJM wholesale market costs over the period covering the usage represented on the February and March billings would need to be stable."

76. Explain in detail all facts relied upon for the allegations in Paragraph 11 of Dr. Estomin's Affidavit that "The February rate, therefore, should reflect a mix of January and February costs, and the March rate should reflect a mix of February and March costs."

77. Explain in detail all facts relied upon for the allegations in Paragraph 11 of Dr. Estomin's Affidavit that "Blue Pilot rates charged to its customers under variable rate plans were [not] based on PJM market prices."

78. Explain in detail all facts relied upon for the allegations in Paragraph 12 of Dr. Estomin's Affidavit that there should "be between 18 and 23 standard billing cycles in any given month."

79. Explain in detail all facts relied upon for the allegations in Paragraph 12 of Dr. Estomin's Affidavit that "the same rate should be applicable to only a relatively small percentage of customers in any given month even when market fluctuations are relatively minor."

80. Explain in detail all facts relied upon for the allegations in Paragraph 12 of Dr. Estomin's Affidavit that "Blue Pilot's pricing methodology was not consistent with the Company's Disclosure Statement and Agreement."

## PUBLIC VERSION

81. Explain in detail all facts relied upon for the allegations in Paragraph 13 of Dr. Estomin's Affidavit that the "distribution of rates is wholly inconsistent with the Blue Pilot Disclosure Statement and Agreement and the assertion that rates to its variable rate customers are based on PJM markets."

82. Explain in detail all facts relied upon for the allegations in Paragraph 14 of Dr. Estomin's Affidavit that "certain customers of Blue Pilot received bills later in 2014 reflecting charges that were well in excess of PJM market costs and could not be seen as being reasonably reflective of those costs."

83. Explain in detail all facts relied upon for the allegations in Paragraph 14 of Dr. Estomin's Affidavit that "There appears to be no meaningful relationship between PJM market costs and the rates charged by Blue Pilot over this period for this customer."

84. Explain in detail all facts relied upon for the allegations in Paragraph 15 of Dr. Estomin's Affidavit that there was "no meaningful relationship between PJM market costs and the rates charged by Blue Pilot, which contradicts the language in the Company's Disclosure Statement and Agreement."

85. Explain in detail all facts relied upon for the allegations in Paragraph 16 of Dr. Estomin's Affidavit that the "data are inconsistent with the language in the Company's Disclosure Statement and Agreement."

86. Explain in detail all facts relied upon for the allegations in Paragraph 17 of Dr. Estomin's Affidavit that "the rates charged by Blue Pilot are not materially related to PJM wholesale market conditions, which is in direct conflict with the language of the Blue Pilot Disclosure Statement and Agreement."

87. Explain in detail all facts relied upon for the allegations in Paragraph 17(a) of Dr. Estomin's Affidavit that "even though PJM wholesale market prices changed over the February and March 2014 period, Blue Pilot's rates, in general, did not."

88. Explain in detail all facts relied upon for the allegations in Paragraph 17(b) of Dr. Estomin's Affidavit that "the predominant rates charged were applicable to a major portion of the Blue Pilot customer base within each of the EDC service areas, even though the usage (and the underlying PJM costs) differed given differences in the days associated with the multiple billing cycles associated with the months. This means that the variations in market costs were not translated into changes in rates, again conflicting with the Company's Disclosure Statement and Agreement."

89. Explain in detail all facts relied upon for the allegations in Paragraph 17(c) of Dr. Estomin's Affidavit that "The Blue Pilot Disclosure Statement and Agreement provides no meaningful guidance on how PJM wholesale market conditions are used to develop the rates charged to variable rate residential and commercial customers in Pennsylvania, and the Company has stated that no set formula was relied upon to translate PJM wholesale market costs into rates."

PUBLIC VERSION

90. Explain in detail all facts relied upon for the allegations in Paragraph 17(d) of Dr. Estomin's Affidavit that "Blue Pilot appears to apply a 'gross margin' to the costs incurred to supply power to its variable rate customers in a manner that eliminates any meaningful or consistent correspondence that may otherwise have existed between PJM market costs and the variable rates charged by Blue Pilot."

91. Explain in detail all facts relied upon for the allegations in Paragraph 17(e) of Dr. Estomin's Affidavit that "The Company apparently continued to employ this method of establishing rates, at least to some customers, well after the December 2013, January 2014, and February 2014 period when PJM wholesale prices for portions of that three-month period were significantly higher than typical."

92. To the extent not already addressed in an earlier request, explain in detail all facts relied upon in Dr. Estomin's Affidavit.

93. Identify all documents that support each of the statements identified in requests 64 through 92 above, identifying for each request which documents support the facts alleged.

94. Explain in detail all facts relied upon for the allegations in Paragraph 19 of Ms. Everette's Affidavit that "In November 2013, Blue Pilot charged its residential customers an average of **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL** more than the Price to Compare and its commercial customers an average of **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL** more than the Price to Compare."

95. Explain in detail all facts relied upon for the allegations in Paragraph 21 of Ms. Everette's Affidavit that "In January 2014, Blue Pilot charged its residential customers an average of **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL** more than the Price to Compare and its commercial customers an average of **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL** more than the Price to Compare."

96. Explain in detail all facts relied upon for the allegations in Paragraph 22 of Ms. Everette's Affidavit that "In February 2014, Blue Pilot charged its residential customers an average of **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL** more than the Price to Compare and its commercial customers an average of **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL** more than the Price to Compare."

97. Explain in detail all facts relied upon for the allegations in Paragraph 23 of Ms. Everette's Affidavit that "In March 2014, Blue Pilot charged its residential customers an average of **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL** more than the Price to Compare and its commercial customers an average of **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL** more than the Price to Compare."

98. Explain in detail all facts relied upon for the position that the usage levels of PPL's customers could serve as a proxy for the usage of Blue Pilot's customers in November 2013 through March 2014 for the purpose of quantifying damages, as stated in Paragraph 25 of Ms. Everette's Affidavit.

**PUBLIC VERSION**

99. Explain in detail all studies and/or surveys conducted to support the application of the average PPL customer usage for every BPE customer in calculating damages in Ms. Everette's Affidavit.

100. To the extent not already addressed in an earlier request, explain in detail all facts relied upon in Ms. Everette's Affidavit.

101. Identify all documents that support each of the statements identified in requests 94 through 100 above, identifying for each request which documents support the facts alleged.

102. Explain in detail why Joint Complainants alleged that Blue Pilot should be assessed damages based on the price Blue Pilot charged that was above the Price to Compare in their Joint Motion for Entry of Judgment.

103. Do you allege that Blue Pilot represented that its rates would always be below the PTC? If so, identify all facts and documents that support this assertion, including identifying every sales call in which you allege this occurred.

104. Explain in detail all facts relied upon for allegation that judgment should be entered in amount of \$1,387,569.85 against BPE, as alleged in the Joint Motion for Entry of Judgment.

105. Under BPE's Disclosure Statement and Agreement that you contend was applicable during the time period relevant to this Action, do you contend that BPE was permitted to make a profit from its Pennsylvania operations? If so, do you contend there were any limitations to the profit BPE could potentially make? If so, identify those limitations and explain the basis for those limitations.

106. Identify each and every meeting relating in any way to discussions with or about the 96 consumer witnesses identified as the "OAG-OCA Witness List to Blue Pilot" in the Supplemental Response of the Office of Attorney General Bureau of Consumer Protection's Responses to Blue Pilot Energy, LLC Interrogatories and Requests for Production Set I, whether in person, teleconference, or video conference. In your response, include the date, time, place, individuals present, a description of what was discussed, and any decisions made.

107. Attach copies of any and all agendas, emails, notes, or documents used during or resultant of any meeting or discussion referenced in Request 106, above, or any other documents related to the meeting, including all correspondence, whether email or hardcopy, delivered to or from the aforementioned 96 consumer witnesses.

108. Identify each and every person You have retained or specially employed, to provide expert testimony, advice or consultation for any purpose or reason in this action. For each person You expect to call as an expert witness, set forth the subject matter on which the witness is expected to testify, the qualifications of the witness, and a summary of the grounds for the witness's opinion.

**PUBLIC VERSION**

109. Do You contend that Blue Pilot failed to provide any of its customers in Pennsylvania with electric service? If Your answer is “yes,” set forth all of the facts that support Your contention.

110. Set forth in full and complete detail each and every fact that supports any allegation or claim that you assert in this proceeding that Blue Pilot violated any Pennsylvania law or any regulation or rule of the Commission.

111. Set forth in full and complete detail each and every communication and/or conversation that You, Your agents and/or attorneys have had with any other public utility commission, consumer protection agency, investigator, or attorney regarding the Subject Matter of this Action or Blue Pilot in general.

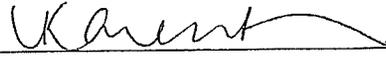
112. Set forth in full and complete detail each and every communication and/or conversation that You, Your agents and/or attorneys have had with any Pennsylvania consumer, whether or not they were a customer of Blue Pilot, regarding the Subject Matter of this Action or Blue Pilot in general.

113. Identify all documents that support each of the statements identified in requests 102 through 112 above, identifying for each request which documents support the facts alleged.

**PUBLIC VERSION**

September 23, 2015

BUCHANAN INGERSOLL & ROONEY PC

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*Attorneys for Blue Pilot Energy, LLC*

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**COMMONWEALTH OF  
PENNSYLVANIA, ET AL.,**

**Complainants,**

**v.**

**BLUE PILOT ENERGY, LLC,**

**Respondent.**

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: **Docket No. 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**

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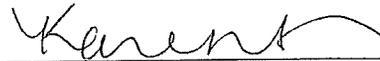
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Dated this 23<sup>rd</sup> day of September, 2015.



Karen O. Moury, Esq.

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# EXHIBIT 2

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**KELLEY DRYE & WARREN LLP**

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AFFILIATE OFFICE  
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October 5, 2015

**BY EMAIL**

Candis A. Tunilo  
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Pennsylvania Office of Consumer Advocate  
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**Re: *October 1, 2015 Conference Call re: Blue Pilot's Request for Supplementation on its First Set of Discovery Requests to Joint Complainants and Joint Complainants' Objections to Blue Pilot's Fourth Set of Discovery Requests***

Dear Ms. Tunilo and Ms. Tulman:

On September 28, 2015, Blue Pilot Energy, LLC ("Blue Pilot") sent letters to both the Commonwealth of Pennsylvania ("OAG") and Pennsylvania Office of Consumer Advocate ("OCA") (collectively, "Joint Complainants") requesting that OAG and OCA supplement numerous discovery requests from Blue Pilot's First Set of Discovery Requests. On October 1, 2015, the parties held a conference call to discuss Blue Pilot's request for supplementation to its previous discovery requests and Joint Complainants' objections to Blue Pilot's Fourth Set of Discovery Requests. This letter addresses each of those subjects.

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**Blue Pilot's Request for OCA and OAG to Supplement  
Their Responses to Blue Pilot's First Set of Discovery**

Based on our conference call on October 1, 2015, my understanding is that OAG and OCA objects to further supplementation on the grounds that: (1) the OCA and OAG have fully supplemented their responses; (2) OCA and OAG is not required to supplement with information that will later be covered in their expert reports; (3) the requests seek legal analysis beyond legal disclosure requirements; and (4) an oral agreement was reached a year ago with Dan Blynn regarding the sufficiency of OCA and OAG's responses. Following the call, I sent OAG and OCA an email noting that neither Dan Blynn nor Mark Robeck believe that any such agreement was made. I further requested that you summarize your recollection of the alleged agreement, given that it was oral and a significant amount of time had since passed. Ms. Tunilo responded that Joint Complainants do not have a summary, but only notes.

It is Blue Pilot's position that Joint Complainants have not fully responded to these requests, which go to the very heart of Joint Complainants' allegations in this proceeding. As discussed, Joint Complainants cannot defer their discovery obligations by simply referring to later testimony of unspecified experts. A party's expert cannot create facts upon which that party bases its allegations. Further, Joint Complainants cannot take cover behind a claim of "legal analysis" to avoid providing Blue Pilot with the *facts* upon which they base their claims.

At this point, Joint Complainants have only alleged the Commission regulations that they claim Blue Pilot violated; however, they have failed to allege any specific facts that would support allegations that those regulations were violated. Blue Pilot is entitled to know the factual basis that supports any alleged claimed violation against it. Finally, as to the alleged agreement, we do not believe any such agreement was entered and disagree that Blue Pilot waived its right to the answers sought. More to the point, even if the parties agreed a year ago that Joint Complainants' responses were sufficient at that time – which Blue Pilot denies – those responses must now be supplemented. In most of the responses, Joint Complainants deferred to unnamed expert testimony, testimony of consumers, and Blue Pilot's discovery responses. Since that time, certain consumer testimony has been entered into the record and Joint Complainants have submitted three affidavits of their purported experts in an attempt to prove their claims in this proceeding. In addition, Blue Pilot has responded to twelve sets of discovery requests, and Joint Complainants have filed a Motion for Entry of Judgment representing to the ALJs that sufficient evidence existed as of June 2015 to enter judgment against Blue Pilot, which Joint Complainants supported with the sworn testimony from their purported experts. In short, while the factual basis that would support Joint Complainants' claims should have been disclosed long ago, at this juncture it is imperative that Blue Pilot be informed what Joint Complainants claim it did that would subject it to liability.

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While we would like to resolve these issues without troubling the ALJs, it would appear that we are at an impasse. Please let me know if you believe further discussion may be of any assistance.

**Joint Complainants' Objections to Blue Pilot's Fourth Set of Discovery Requests**

On October 2, 2015, Ms. Tunilo emailed a document summarizing Joint Complainants understanding of the conference call. Ms. Tunilo's summary and Blue Pilot's response follows. Note that the text that appears in bold and underlined under the Joint Complainants' position appears in Ms. Tunilo's original email and has not been added by Blue Pilot.

**Interrogatory Definition No. 6:**

**Joint Complainants:** Joint Complainants noted their previous agreement with Blue Pilot wherein Blue Pilot agreed that the request that all "drafts" be provided be stricken from these definitions, as providing such for expert testimony/reports/affidavits and documents filed by OCA attorneys with the Commission or other agencies/courts is beyond the permissible scope of discovery (§§ 5.323 and 5.324). Additionally, locating drafts of documents (that may or may not even exist) is unreasonably burdensome (§ 5.361). Joint Complainants wanted to be sure that their previous agreement regarding Interrogatory Definition #6 was still applicable. **By e-mail dated October 1, 2015, Blue Pilot has agreed to continue to limit this definition accordingly.**

**Blue Pilot's Response:** Agreed.

**Interrogatory Definition No. 1:**

**Joint Complainants:** Joint Complainants noted their previous objection to the unreasonably burdensome requested privilege log and their previous agreement with Blue Pilot that Blue Pilot accept a general description of the information for which a privilege is claimed and the privilege that is claimed. **Blue Pilot indicated that it would get back to Joint Complainants about this request. BPE responded to Joint Complainants via email on October 1, 2015, and it appears Blue Pilot seeks information in a privilege log, which is additional to and contrary to the agreement reached by the parties on this issue on August 7, 2015.**

**Blue Pilot's Response:** Blue Pilot is unaware of any August 7, 2015, agreement and assumes this was a typo by Joint Complainants and it was meant to read "August 7, 2014."

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Blue Pilot would request that Joint Complainants clarify whether this was a typo and, if so, let Blue Pilot know which agreement is being referred to and provide a copy of the agreement. Blue Pilot agrees to a broader, categorical approach to privilege logs as the parties have done throughout the course of this proceeding. What Joint Complainants appear to refer to here is Blue Pilot Discovery Request IV-111, which is addressed below.

**Discovery Request IV-1:**

**Joint Complainants:** OAG indicated that it already provided Blue Pilot with this information in its response to Blue Pilot's RPD Set I-2 and IR Set II-37. Therefore, Joint Complainants requested Blue Pilot withdraw this request. **By e-mail dated October 1, 2015, Blue Pilot indicated that it would withdraw this question if OAG agrees that its response to RPD Set II-37 is fully responsive to this request. OAG agrees that its response to RPD Set I-2 and IR Set II-37 is fully responsive to this request.**

**Blue Pilot's Response:** Blue Pilot agrees to withdraw the request as to OAG with OAG's agreement that OAG's response to Blue Pilot Discovery Request II-37 is fully responsive to this request. If OCA were to state that OAG's response to Blue Pilot Discovery Request II-37 is fully responsive to Blue Pilot Discovery Request IV-1 as to OCA as well, Blue Pilot could withdraw the request as to OCA. Alternatively, OCA can simply respond to this request with the same information OAG used in responding to Blue Pilot Discovery Request II-37 if that answer is fully responsive.

Discovery Requests Relating to the Affidavits Submitted by Joint Complainants' Experts in Support of Joint Complainants' Motion for Entry of Judgment:

**Joint Complainants:** Joint Complainants submit that information relating to the affidavits attached to Joint Complainants' Motion for Entry of Judgment are no longer relevant to a claim or defense in this proceeding, as they are not nor will they become part of the record in this proceeding and, as such, will not be considered by the ALJs in the ultimate resolution of this proceeding. The affidavits served solely as support for Joint Complainants' Motion for Entry of Judgment. Since the ALJs have already ruled on Joint Complainants' Motion for Entry of Judgment, the affidavits are no longer relevant to any claim or defense in this proceeding. Therefore, Joint Complainants request that Blue Pilot withdraw these requests. **Since these requests are not related to a viable claim or defense in this matter, as the affidavits were solely to support the Motion for Entry of Judgment that BPE has**

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**already defended and the ALJs have already resolved, Joint Complainants request that these requests be withdrawn.**

**Blue Pilot's Response:** Blue Pilot disagrees. The affidavits submitted by the Joint Complainants are already a part of the record of this proceeding. The affidavits represent sworn testimony from Joint Complainants' experts as to the claims made by Joint Complainants. Blue Pilot further disagrees that the Joint Complainants' Motion for Entry of Judgment is not related to Joint Complainants' claims in this proceeding. If that were the case, it should never have been filed. Indeed, the Motion for Entry of Judgment solely involves the claims made in this matter and Blue Pilot is entitled to learn the facts which form the basis of the allegations made against it. Blue Pilot will not withdraw these requests.

**Discovery Request IV-2:**

**Joint Complainants:** Blue Pilot clarified that "consumer surveys" and "empirical studies" refers to any study regarding BPE's marketing practices inside or outside of this case. Joint Complainants indicated that they have already provided to Blue Pilot all information they have received from consumers and have no further information at this time. **Blue Pilot indicated that Joint Complainants should state in their response that they have not performed any "consumer surveys" or "empirical studies."**

**Blue Pilot's Response:** Agreed as long as Joint Complainants represent that they have not, in fact, performed any consumer surveys or empirical studies regarding how Blue Pilot's conduct was deceptive and misleading. Furthermore, Joint Complainants must stipulate that they will not attempt to admit into the record in this proceeding any consumer surveys or empirical studies alleging that Blue Pilot's conduct was deceptive and/or misleading and if they do attempt to admit such material into this proceeding, it will be stricken.

**Discovery Request IV-3:**

**Joint Complainants:** Joint Complainants object to this request to the extent that it seeks legal analysis. Joint Complainants have turned over all information and documents received from consumers, including all OAG complaints and the testimony that they did not serve. Blue Pilot had the opportunity to cross-examine the consumers whose testimony

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is in the record. Joint Complainants will rely on the testimony and evidence in the record, along with their expert and other non-consumer testimonies that will be served pursuant to the litigation schedule and cross-examination of Blue Pilot's witnesses, to support the allegations in their Joint Complaint. Any further analysis of those facts equates to seeking Joint Complainants' legal analysis, which will be provided by Joint Complainants in their brief. It is beyond the scope of permissible discovery to request such analysis in these data requests. See 52 Pa. Code § 5.323(a). **Since the data request seeks legal analysis that will be provided in Joint Complainants' brief in this proceeding, to which Blue Pilot will have an opportunity to respond with its own legal analysis, Joint Complainants submit this is beyond the permissible scope of discovery and request that it be withdrawn.**

**Blue Pilot's Response:** Blue Pilot disagrees with Joint Complainants' assessment of Blue Pilot's Discovery Request IV-3 and will not withdraw the request. Blue Pilot is entitled to know the underlying facts behind Joint Complainants' allegations.

**Discovery Request IV-106 and 112:**

**Joint Complainants:** Joint Complainants indicated that they turned over all documents and information received from consumers and the correspondence sent by Joint Complainants to BPE consumers that is within the permissible scope of discovery. Also, Joint Complainants provided a general description of anything not provided pursuant to a privilege or was otherwise outside the scope of permissible discovery. Joint Complainants indicated that they have no further information at this time. **As Joint Complainants have already responded fully and completely (and appropriately and timely supplemented) to other variations of these data requests, Joint Complainants request that these be withdrawn.**

**Blue Pilot's Response:** It is Blue Pilot's understanding that Joint Complainants represented that there had been no correspondence with Blue Pilot's customers other than the form letters that the Joint Complainants sent to consumers that have been provided to Blue Pilot, the written testimony that has been provided to Blue Pilot, the live testimony, and a few phone calls made by consumers to Joint Complainants to schedule time slots for the live testimony wherein the conversation was limited to scheduling matters. If this consists of all communication made with the consumers, Blue Pilot requests that Joint Complainants represent as much.

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**Discovery Request IV-108:**

**Joint Complainants:** Joint Complainants object to this request to the extent it seeks information related to persons Joint Complainants contemplated retaining but did not actually retain as a witness in this proceeding, which is beyond the permissible scope of discovery. Joint Complainants submit that they have already provided this information as it pertains to Joint Complainants intended witnesses in this proceeding. By email dated October 1, 2015, **Blue Pilot agrees that this request does not include persons that Joint Complainants only contemplated retaining but did not actually retain.**

**Blue Pilot's Response:** Agreed.

**Discovery Request IV-111:**

**Joint Complainants:** Joint Complainants object to this request, as it seeks attorney mental impressions, notes, etc. **By e-mail dated October 1, 2015, Blue Pilot indicated that it does not believe it is seeking mental impressions. Blue Pilot requested Joint Complainants to provide the date, persons involved, subject matter of the correspondence, and the basis for any asserted privilege to the extent any correspondence might be perceived to contain attorney work product. Joint Complainants maintain that this data request cannot possibly seek anything but attorney mental impressions. For instance, the OCA has already provided information about non-attorney OCA employees' conversations with BPE consumers in OCA responses to IR Set I-6 and I-7 and RPD Set I-16 and I-17. As such, the only other communications that may exist that would be responsive to this request, would be attorney communications, most of which are beyond the permissible scope of discovery. Those that are within the scope of discovery have already been provided in prior responses. Joint Complainants also submit that providing the log that Blue Pilot is requesting is unduly burdensome and contrary to the agreement reached by OAG/OCA & BPE regarding privilege logs on 8/7/2014. Based on the foregoing, Joint Complainants request that the data request be withdrawn.**

**Blue Pilot's Response:** Blue Pilot seeks to know all communications Joint Complainants have had with any outside individuals and entities regarding this matter. External communications are not privileged. To the extent that Joint Complainants allege the communications are privileged, Blue Pilot has simply asked that Joint Complainants identify the communications and set forth the basis for the claim of privilege. Joint Complainants cannot use the parties' agreement to not require a detailed privilege log for

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every claim of privilege as both a shield from compiling extensive privilege logs – which was the purpose of the agreement – and as a sword to attack a legitimate request to learn the communications Joint Complainants have had with external individuals and entities about this case. Blue Pilot will not withdraw the request.

**Discovery Requests IV-3 and 110:**

**Via email on October 2, 2015, Joint Complainants provided as follows:** [W]e are still unclear what BPE is looking for in Set IV-3 and IV-110. In our opinion, asking us to set forth in detail each and every fact that supports any allegation or claim we assert in this proceeding is essentially asking us for our brief, which the attorneys will draft and file per the ALJs' direction after the close of the record. Asking us to provide that now, while we're still litigating the case, is outside the permissible scope of discovery and unduly burdensome. Yesterday you stated that is not what is sought in these DRs. It would be helpful if you could give us an example of what you think adequate responses to these DRs would entail.

**Blue Pilot's Response:** As stated above, Blue Pilot is entitled to learn the factual basis that support Joint Complainants claims. We are not seeking to have Joint Complainants provide their "brief," but rather provide us with the specific facts that they allege supports each claim. As an example, if Joint Complainants allege that Blue Pilot misled a customer, Joint Complainants should provide all facts that support such an allegation.

Sincerely,



Travis Cushman

# EXHIBIT 3

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

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October 5, 2015

Karen O. Moury, Esq.  
Buchanan Ingersoll & Rooney PC  
409 N. Second Street  
Harrisburg, PA 17101-1357

RE: Commonwealth of Pennsylvania, by Attorney General  
KATHLEEN G. KANE, Through the Bureau of Consumer  
Protection,  
And  
TANYA J. McCLOSKEY, Acting Consumer Advocate,  
Complainants

v.  
Blue Pilot Energy, LLC  
Respondent  
Docket No. C-2014-2427655

Dear Ms. Moury:

Enclosed please find the Objections of Joint Complainants Commonwealth of Pennsylvania and the Office of Consumer Advocate to Blue Pilot Energy, LLC Interrogatories and Requests for Production of Documents Set IV.

Also enclosed is a copy of the Certificate of Service for these Objections, which has been filed with Secretary Chiavetta of the Pennsylvania Public Utility Commission.

Respectfully Submitted,

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

Enclosures

cc: Rosemary Chiavetta, Secretary (Certificate of Service)  
Certificate of Service

190344

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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**OBJECTIONS OF JOINT COMPLAINANTS COMMONWEALTH OF PENNSYLVANIA  
AND THE OFFICE OF CONSUMER ADVOCATE TO BLUE PILOT ENERGY, LLC  
INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS  
SET IV**

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Pursuant to 52 Pa. Code §§ 5.342(c) and 5.349(d), the Commonwealth of Pennsylvania, Office of Attorney General, by First Deputy Attorney General, Bruce R. Beemer, through the Bureau of Consumer Protection (OAG or BCP) and the Office of Consumer Advocate (OCA) (collectively Joint Complainants) submit these Objections to Blue Pilot Energy LLC's (Blue Pilot or the Company) fourth set of Interrogatories and Requests for Production of Documents (Blue Pilot Set IV), Instruction No. 1 and Questions 103, 106, 110, 111, 112, and 113.

**I. INTRODUCTION**

On September 23, 2015, Blue Pilot served Blue Pilot Set IV on the Joint Complainants. Blue Pilot's Interrogatories Set IV consists of 113 questions. The Joint Complainants

communicated their objections to Blue Pilot on October 1, 2015, and on October 2, 2015, Joint Complainants again reached out to Blue Pilot in an attempt to resolve the remaining objections. The parties were not able to resolve all of the Joint Complainants' objections. As such, Joint Complainants submit these objections to Blue Pilot Set IV, Instruction No. 1 and Questions 103, 106, 110, 111, 112, and 113 and request that these Objections be sustained.

## II. OBJECTIONS

In proceedings before the Public Utility Commission (Commission), a participant may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party or participant. 52 Pa. Code § 5.321(c). However, Section 5.361 of the Pennsylvania Code specifically limits the scope of discovery in proceedings before the Commission. In particular, Section 5.361 provides the following:

- (a) No discovery or deposition is permitted which:
  - (1) Is sought in bad faith.
  - (2) Would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent, a person or participant.
  - (3) Relates to a matter which is privileged.
  - (4) Would require the making of an unreasonable investigation by the deponent, a participant or witness.

52 Pa. Code § 5.361(a). Further, with regard to hearing preparation material, the discovery "may not include the disclosure of the mental impressions of a party's attorney or his conclusions, opinions, memoranda, notes, summaries, legal research or legal theories." 52 Pa. Code § 3.323(a).

**A. BLUE PILOT SET IV, INSTRUCTION NO. 1 IS UNREASONABLY ANNOYING AND BURDENSOME.**

Joint Complainants object to Blue Pilot Set IV, Instruction No. 1, because it is unreasonably burdensome.

Blue Pilot Interrogatory Instruction Set IV-1 states:

1. If you claim any form of privilege, whether based on statute or otherwise, as a ground for not describing any requested oral communication or document, state the following:

- (a) the date thereof;
- (b) the name, the present or last known home and business addresses and the telephone numbers thereto, the title (or position), occupation, and employer or each of the participants in said oral communication, or of those individuals who prepared, produced, or reproduced, or who were recipients of said document;
- (c) the name, the present or last known home and business address and the telephone numbers thereto, the title (or position), and the occupation of each person present during all or any part of said oral communications;
- (d) a description of the oral communication or of the document sufficient to identify it without revealing the information for which the privilege is claimed;
- (e) a description of the subject matter of the communication in sufficient detail to allow the Court to adjudicate the validity of your claim; and
- (f) each and every fact and/or legal basis upon which you claim any such privilege.

Pursuant to the Commission's regulation, discovery which would cause unreasonable annoyance or burden is not permitted. See 52 Pa. Code § 5.361(a). To require Joint Complainants to create a log that identifies all of this detailed information for each and every document or oral communication that they deem privileged is unreasonably annoying and burdensome.

On October 1, 2015, Joint Complainants communicated their objection to the privilege log to Blue Pilot and requested that Blue Pilot accept a general description of the information for

which a privilege is claimed and the privilege that is claimed, as Blue Pilot had previously agreed to do for privileged information relating to discovery requests. Blue Pilot responded via letter dated October 5, 2015, "Blue Pilot agrees to a broader, categorical approach to privilege logs as the parties have done throughout the course of this proceeding." In that same letter, however, in response to Joint Complainants' objection to Set IV-111, Blue Pilot responded, in pertinent part, as follows:

To the extent that Joint Complainants allege the communications are privileged, Blue Pilot has simply asked that Joint Complainants identify the communications and set forth the basis for the claim of privilege. Joint Complainants cannot use the parties' agreement to not require a detailed privilege log for every claim of privilege as both a shield from compiling extensive privilege logs- which was the purpose of the agreement- and as a sword to attack a legitimate request to learn the communications Joint Complainants have had with external individuals and entities about this case.

Based on this response, it appears that Blue Pilot intends to retain the ability to demand a privilege log pursuant to Instruction No. 1 at its discretion, despite its agreement to accept a more general privilege log and despite the fact that Joint Complainants have, throughout the course of this proceeding, been abiding by the parties' agreement that a more general privilege log would be acceptable to comply with Instruction No. 1. To the extent that Blue Pilot seeks to invoke Instruction No. 1 at its discretion, Joint Complainants object.

Under Instruction No. 1, Joint Complainants would have to identify each and every e-mail, call, or in-person meeting that constitutes privileged communications. Joint Complainants do not retain this information in the format requested. Such oral or documentary communications could number in the thousands, and as such, Blue Pilot's requested privilege log could take months to research and assemble. Moreover, Joint Complainants submit that providing such a log would not give Blue Pilot any further information as to whether to dispute

the privilege upon which the information was withheld. Therefore, Joint Complainants request that their Objection to Blue Pilot Set IV, Instruction No. 1 be sustained.

**B. BLUE PILOT SET IV-3 IMPERMISSIBLY SEEKS PRIVILEGED ATTORNEY WORK PRODUCT AND IS UNREASONABLY ANNOYING AND BURDENSOME.**

Blue Pilot Set IV-3 provides as follows:

Identify each consumer that supports your contention that a consumer was misled or deceived by [Blue Pilot], explaining in full and complete detail all facts relied upon.

**1. BLUE PILOT SET IV-3 IMPERMISSIBLY SEEKS PRIVILEGED ATTORNEY WORK PRODUCT.**

The Joint Complainants object to Blue Pilot Set IV-3 insofar as it requires the Joint Complainants to disclose their attorneys' mental impressions, conclusions, opinions, or legal theories. Such information is attorney work product, which is beyond the permissible scope of discovery.

Section 5.323(a) of the Pennsylvania Code is consistent with Pa. R.C.P. 4003.3 which codifies the attorney work product privilege and states the following:

The discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

Pa. R.C.P. 4003.3. In the Commonwealth of Pennsylvania, the existence of the attorney work product privilege when attorneys act in their professional capacity for governmental agencies is well established. Sedat, Inc. v. Department of Environmental Resources, 163 Pa. Commw. 29, 33, 614 A.2d 1243, 1244 (1994), citing Okum v. Unemployment Compensation Board of Review, 77 Pa. Commw. 386, 465 A.2d 1324 (1983). To allow the respondent access to such

privileged information, would allow him to “. . . get the benefit of the agency’s legal and factual research and reasoning, enabling him to litigate ‘on wits borrowed from the adversary.’” Worse yet, he could gain insight into the agency’s general strategic and tactical approach to deciding when suits are brought, how they are conducted, and on what terms they may be settled.” Sedat, 163 Pa. Commw. At 34, 641 A.2d at 1245, quoting F.T.C. v. Grolier, 462 U.S. 19, 30-31, 103 S.Ct. 2209, 2216, 76 L.Ed.2d 387, 397-98 (1983) (J. Brennan, concurring). Furthermore, the Pennsylvania Supreme Court has held:

As has been observed, the work product protection supports our judicial system, based on the adversarial process by allowing counsel privacy to develop ideas, test theories, and explore strategies in support of the client’s interest, without fear that the documents in which the ideas, theories and strategies are written will be revealed to the opposing counsel. Allowing counsel to document legal theories without concern of disclosure encourages better representation of clients, which in turn benefits justice.

Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity, 625 Pa. 301, 312-13 (Pa. 2014).

Here, Blue Pilot has asked Joint Complainants to explain in full and complete detail all facts relied upon that support their contention that a customer was misled or deceived. Joint Complainants have turned over all information and documents received from consumers, including but not limited to all OAG complaints and the testimony that they did not serve. Blue Pilot had the opportunity to cross-examine the consumers whose testimony is in the record. Joint Complainants will rely on the testimony and evidence in the record, their expert and other non-consumer testimonies that will be served pursuant to the litigation schedule, and cross-examination of Blue Pilot’s witnesses to support the allegations in their Joint Complaint. Discovery seeking any further analysis of those facts by counsel for Joint Complainants equates to seeking Joint Complainants’ preliminary legal analysis, which will be provided by Joint Complainants in their brief in final form. It is beyond the scope of permissible discovery to

request such analysis in these data requests. Based on the foregoing, Joint Complainants request that their Objection to Blue Pilot Set IV-3 be sustained.

**2. BLUE PILOT SET IV-3 IS UNREASONABLY ANNOYING AND BURDENSOME.**

Joint Complainants submit that it would be unreasonably annoying and burdensome to require Joint Complainants to lay out each fact that supports their claim that a consumer was misled or deceived at this time. Pursuant to the Commission's regulation, discovery which would cause unreasonable annoyance or burden is not permitted. See 52 Pa. Code § 5.361(a). Joint Complainants have served the written testimony of approximately 97 consumer witnesses, 49 of whom provided additional testimony at the hearings on March 30, 2015 through April 1, 2015. Thirty-five additional testimonies were moved into the record by stipulation. Many of those consumers provided numerous statements, exhibits, or both, which support Joint Complainants' position that Blue Pilot misled or deceived consumers. Additionally, the Joint Complainants will serve expert and other non-consumer testimonies on October 20, 2015, which will contain further information that supports Joint Complainants' allegation that Blue Pilot misled and deceived consumers. Joint Complainants will provide their legal analysis, specifically identifying which facts support this allegation, in their brief. To require Joint Complainants to provide Blue Pilot with this information in advance of filing their brief would be unreasonably annoying and burdensome.

Therefore, Joint Complainants request that their Objection to Blue Pilot Set IV-3 be sustained.

**C. BLUE PILOT SET IV-106 IMPERMISSIBLY SEEKS PRIVILEGED ATTORNEY WORK PRODUCT AND IS UNREASONABLY ANNOYING AND BURDENSOME.**

Blue Pilot Set IV-106 provides as follows:

Identify each and every meeting relating in any way to discussions with or about the 96 consumer witnesses identified as the "OAG-OCA Witness List to Blue Pilot" in the Supplemental Response to the Office of Attorney General Bureau of Consumer Protection's Response to Blue Pilot Energy, LLC Interrogatories and Requests for Production Set I, whether in person, teleconference, or video conference. In your response, include the date, time, place, and individuals present, a description of what was discussed, and any decision made.

**1. BLUE PILOT SET IV-106 IMPERMISSIBLY SEEKS PRIVILEGED ATTORNEY WORK PRODUCT.**

The Joint Complainants object to Blue Pilot Set IV-106 insofar as it requires the Joint Complainants to disclose specific information relating to discussions between or among an attorney(s) at the OAG and/or the OCA or representative employees acting under the direction of the attorney(s) at the OAG or OCA regarding their mental impressions, conclusions, opinions, and/or legal theories about the 96 consumer witnesses identified in Set IV-106. Such information is attorney work product, which is beyond the permissible scope of discovery.

Section 5.323(a) of the Pennsylvania Code is consistent with Pa. R.C.P. 4003.3 which codifies the attorney work product privilege and states the following:

The discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

Pa. R.C.P. 4003.3. In the Commonwealth of Pennsylvania, the existence of the attorney work product privilege when attorneys act in their professional capacity for governmental agencies is well established. Sedat, Inc. v. Dep't of Env'tl. Res., 163 Pa. Commw. 29, 33, 614 A.2d 1243, 1244 (1994), citing Okum v. Unemployment Compensation Board of Review, 77 Pa. Commw. 386, 465 A.2d 1324 (1983). To allow the respondent access to such privileged information, would allow him to "... get the benefit of the agency's legal and factual research and reasoning,

enabling him to litigate ‘on wits borrowed from the adversary.’ Worse yet, he could gain insight into the agency’s general strategic and tactical approach to deciding when suits are brought, how they are conducted, and on what terms they may be settled.” Sedat, 163 Pa. Commw. At 34, 641 A.2d at 1245, quoting F.T.C. v. Grolier, 462 U.S. 19, 30-31, 103 S.Ct. 2209, 2216, 76 L.Ed.2d 387, 397-98 (1983) (J. Brennan, concurring). Furthermore, the Pennsylvania Supreme Court has held:

As has been observed, the work product protection supports our judicial system, based on the adversarial process by allowing counsel privacy to develop ideas, test theories, and explore strategies in support of the client’s interest, without fear that the documents in which the ideas, theories and strategies are written will be revealed to the opposing counsel. Allowing counsel to document legal theories without concern of disclosure encourages better representation of clients, which in turn benefits justice.

Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity, 625 Pa. 301, 312-13 (Pa. 2014).

Moreover, when a representative employee of the attorney who is acting as the agent of the attorney and is directed by the attorney to do the desired preparatory work in the investigation of a case and its preparation for trial, the product of that work becomes a part of the hiring attorney’s work product, just as if the work had been done by the attorney in person or by an employee of his office. 35 ALR 3d 412, 429. See also Brant v. Turnamian, 9 Pa. D. & C. 4<sup>th</sup> 216, 219 (Com. Pl. 1991).

As far as communications that Joint Complainants had with the consumer witnesses, Joint Complainants have turned over all documents and information received from consumers and the correspondence sent by Joint Complainants to Blue Pilot consumers that is within the permissible scope of discovery.<sup>1</sup>

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<sup>1</sup> See OCA Responses to Blue Pilot Set I, Interrogatory Nos. 6, 7, 9, 12, 14; see also OAG Response to Blue Pilot Set I, Interrogatory No. 12; see also OAG Responses to Blue Pilot Set I, Request for Production Nos. 2 and 22; see also OCA Responses to Blue Pilot Set I, Request for Production Nos. 16 and 17; see also OAG Responses to

Here, Blue Pilot also requests information relating to discussions that Joint Complainants had about their consumer witnesses and specifically requests a description of what was discussed and any decisions made. Conversations between or among the OAG and the OCA attorneys regarding their consumer witnesses included the mental impressions, conclusions, opinions, and/or legal theories of the attorneys, which are beyond the permissible scope of discovery. Based on the foregoing, Joint Complainants request that their Objection to Set IV-106 be sustained.

**2. BLUE PILOT SET IV-106 IS UNREASONABLY ANNOYING AND BURDENSOME.**

Furthermore, Joint Complainants submit that it would be unreasonably annoying and burdensome to require Joint Complainants to disclose each and every discussion they had relating to the 96 consumer witnesses identified in Set IV-106. Pursuant to the Commission's regulation, discovery which would cause unreasonable annoyance or burden is not permitted. See 52 Pa. Code § 5.361(a). The OAG and the OCA have had numerous discussions about the consumer witnesses relating to strategy and procedure and how to comply with the ALJs' directives. Joint Complainants do not retain this information in the format requested and it could take months for Joint Complainants to attempt to gather this information. Therefore, Joint Complainants request that their Objection to Set IV-106 be sustained.

**D. BLUE PILOT SET IV-110 IMPERMISSIBLY SEEKS PRIVILEGED ATTORNEY WORK PRODUCT AND IS UNREASONABLY ANNOYING AND BURDENSOME.**

Blue Pilot Set IV-110 provides as follows:

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Blue Pilot Set III ; see also OCA Responses to Blue Pilot Set III; Consumer Direct Testimonies, Volumes 1, 1A, 2, and 2A.

Set forth in full and complete detail each and every fact that supports any allegation or claim that you assert in this proceeding that Blue Pilot violated any Pennsylvania law or any regulation or rule of the Commission.

**1. BLUE PILOT SET IV-110 IMPERMISSIBLY SEEKS PRIVILEGED ATTORNEY WORK PRODUCT.**

The Joint Complainants object to Blue Pilot Set IV-110 insofar as it requires the Joint Complainants' attorneys to disclose their mental impressions, conclusions, opinions, or legal theories. Such information is attorney work product, which is beyond the permissible scope of discovery.

Section 5.323(a) of the Pennsylvania Code is consistent with Pa. R.C.P. 4003.3 which codifies the attorney work product privilege and states the following:

The discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

Pa. R.C.P. 4003.3. In the Commonwealth of Pennsylvania, the existence of the attorney work product privilege when attorneys act in their professional capacity for governmental agencies is well established. Sedat, Inc. v. Dep't of Env'tl. Res., 163 Pa. Commw. 29, 33, 614 A.2d 1243, 1244 (1994), citing Okum v. Unemployment Compensation Board of Review, 77 Pa. Commw. 386, 465 A.2d 1324 (1983). To allow the respondent access to such privileged information, would allow him to ". . . get the benefit of the agency's legal and factual research and reasoning, enabling him to litigate 'on wits borrowed from the adversary.' Worse yet, he could gain insight into the agency's general strategic and tactical approach to deciding when suits are brought, how they are conducted, and on what terms they may be settled." Sedat, 163 Pa. Commw. At 34, 641 A.2d at 1245, quoting F.T.C. v. Grolier, 462 U.S. 19, 30-31, 103 S.Ct. 2209, 2216, 76 L.Ed.2d

387, 397-98 (1983) (J. Brennan, concurring). Furthermore, the Pennsylvania Supreme Court has held:

As has been observed, the work product protection supports our judicial system, based on the adversarial process by allowing counsel privacy to develop ideas, test theories, and explore strategies in support of the client's interest, without fear that the documents in which the ideas, theories and strategies are written will be revealed to the opposing counsel. Allowing counsel to document legal theories without concern of disclosure encourages better representation of clients, which in turn benefits justice.

Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity, 625 Pa. 301, 312-13 (Pa. 2014).

Here, Blue Pilot has asked Joint Complainants to explain in full and complete detail each and every fact that supports any allegation or claim that Blue Pilot violated any Pennsylvania law or any regulation or rule of the Commission that Joint Complainants assert in this proceeding. Joint Complainants have turned over all information and documents received from consumers, including but not limited to all OAG complaints and the testimony that they did not serve. Blue Pilot had the opportunity to cross-examine the consumers whose testimony is in the record. The Joint Complainants will serve expert and other non-consumer testimonies on October 20, 2015, pursuant to the litigation schedule adopted in this proceeding. Joint Complainants will rely on the testimony and evidence in the record, along with their expert and other non-consumer testimonies that will be served pursuant to the litigation schedule and cross-examination of Blue Pilot's witnesses, to support the allegations in their Joint Complaint. Any further analysis of those facts equates to seeking Joint Complainants' legal analysis, which will be provided by Joint Complainants in their brief. It is beyond the scope of permissible discovery to request such analysis in these data requests. Therefore, Joint Complainants request that their Objection to Set IV-110 be sustained.

**2. BLUE PILOT SET IV-110 IS UNREASONABLY ANNOYING AND BURDENSOME.**

Furthermore, Joint Complainants submit that it would be unreasonably annoying and burdensome to require Joint Complainants to lay out each fact that supports any allegation or claim that Blue Pilot violated any Pennsylvania law or any regulation or rule of the Commission that Joint Complainants assert in this proceeding. Pursuant to the Commission's regulation, discovery which would cause unreasonable annoyance or burden is not permitted. See 52 Pa. Code § 5.361(a). Joint Complainants have served the written testimony of approximately 96 consumer witnesses, 49 of whom provided additional testimony at the hearings on March 30, 2015 through April 1, 2015. Thirty-five additional consumer testimonies were moved into the record by stipulation. Many of those consumers provided numerous statements and exhibits which support Joint Complainants' allegations in this proceeding that Blue Pilot violated Pennsylvania law or regulation or rule of the Commission. Additionally, the Joint Complainants will serve expert and other non-consumer testimonies on October 20, 2015, which will contain further evidence that supports Joint Complainants' allegations in this proceeding. Joint Complainants will provide their legal analysis, specifically identifying which facts support which allegations, in their brief. To require Joint Complainants to provide Blue Pilot with this information in advance of filing their brief would be unreasonably annoying and burdensome. Based on the foregoing, Joint Complainants request that their Objection to Set IV-110 be sustained.

**D. BLUE PILOT SET IV-111 REQUESTS INFORMATION THAT IS NOT RELEVANT OR LIKELY TO LEAD TO ADMISSIBLE EVIDENCE IN THIS PROCEEDING, IMPERMISSIBLY SEEKS PRIVILEGED ATTORNEY WORK PRODUCT, AND SEEKS INFORMATION THAT IS PROTECTED BY THE INVESTIGATIVE PRIVILEGE.**

Blue Pilot Set IV-111 provides as follows:

Set forth in full and complete detail each and every communication and/or conversation that You, Your Agents and/or attorneys have had with any other public utility commission, consumer protection agency, investigator, or attorney regarding the Subject Matter of this Action or Blue Pilot in general.

1. **BLUE PILOT SET IV-111 SEEKS INFORMATION THAT IS NOT RELEVANT OR LIKELY TO LEAD TO ADMISSIBLE EVIDENCE.**

In Set IV-111, Blue Pilot has specifically requested information not relating to this proceeding, as it has requested information relating to “Blue Pilot in general.” Joint Complainants submit that information that is not related to the subject matter of this proceeding is not relevant and is not likely to lead to relevant or admissible evidence in this proceeding. Discovery that is not relevant or not reasonably calculated to lead to admissible evidence is not permitted under the Commission’s regulations. 52 Pa. Code § 5.321(c). If the information is not related to this proceeding, Joint Complainants submit that the information is neither relevant nor is it likely to lead to admissible evidence.

Based on the foregoing, Joint Complainants request that their Objection to Blue Pilot Set IV-111 be sustained insofar as it asks for information relating to “Blue Pilot in general.” Joint Complainants, however, object to the request in its entirety for the reasons explained below.

2. **BLUE PILOT SET IV-111 IMPERMISSIBLY SEEKS PRIVILEGED ATTORNEY WORK PRODUCT.**

The Joint Complainants object to Blue Pilot Set IV-111 insofar as it requires the Joint Complainants to disclose specific information relating to communications by, between or among an attorney(s) at the OAG and/or the OCA or representative employees acting under the direction of an attorney(s) regarding their mental impressions, conclusions, opinions, or legal theories regarding this proceeding. Such information is attorney work product, which is beyond the permissible scope of discovery.

Section 5.323(a) of the Pennsylvania Code is consistent with Pa. R.C.P. 4003.3 which codifies the attorney work product privilege and states the following:

The discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

Pa. R.C.P. 4003.3. In the Commonwealth of Pennsylvania, the existence of the attorney work product privilege when attorneys act in their professional capacity for governmental agencies is well established. Sedat, Inc. v. Dep't of Env'tl. Res., 163 Pa. Commw. 29, 33, 614 A.2d 1243, 1244 (1994), citing Okum v. Unemployment Compensation Board of Review, 77 Pa. Commw. 386, 465 A.2d 1324 (1983). To allow the respondent access to such privileged information, would allow him to "... get the benefit of the agency's legal and factual research and reasoning, enabling him to litigate 'on wits borrowed from the adversary.' Worse yet, he could gain insight into the agency's general strategic and tactical approach to deciding when suits are brought, how they are conducted, and on what terms they may be settled." Sedat, 163 Pa. Commw. At 34, 641 A.2d at 1245, quoting F.T.C. v. Grolier, 462 U.S. 19, 30-31, 103 S.Ct. 2209, 2216, 76 L.Ed.2d 387, 397-98 (1983) (J. Brennan, concurring). Furthermore, the Pennsylvania Supreme Court has held:

As has been observed, the work product protection supports our judicial system, based on the adversarial process by allowing counsel privacy to develop ideas, test theories, and explore strategies in support of the client's interest, without fear that the documents in which the ideas, theories and strategies are written will be revealed to the opposing counsel. Allowing counsel to document legal theories without concern of disclosure encourages better representation of clients, which in turn benefits justice.

Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity, 625 Pa. 301, 312-13 (Pa. 2014).

Moreover, when a representative employee of the attorney who is acting as the agent of the attorney and is directed by the attorney to do the desired preparatory work in the investigation of a case and its preparation for trial, the product of that work becomes a part of the hiring attorney's work product, just as if the work had been done by the attorney in person or by an employee of his office. 35 ALR 3d 412, 429. See also Brant v. Turnamian, 9 Pa. D. & C. 4<sup>th</sup> 216, 219 (Com. Pl. 1991).

Joint Complainants maintain that this data request cannot possibly seek anything but attorney mental impressions, conclusions, opinions, or legal theories that are beyond the permissible scope of discovery, as it goes to the attorneys' communications with other agencies and attorneys. Therefore, Joint Complainants request that their Objection to Set IV-111 be sustained.

**3. BLUE PILOT SET IV-111 SEEKS INFORMATION THAT IS PROTECTED BY THE INVESTIGATIVE PRIVILEGE.**

Additionally, Blue Pilot Set IV-111 seeks information that is not permitted because it is protected by the investigative privilege. The Pennsylvania Supreme Court has recognized an investigative privilege to protect information from being discovered during ongoing government investigations. See In re Buchanan, 583 Pa. 620, 880 A.2d 568 (2005). See also Commonwealth V. Kauffman, 413 Pa. Super. 527, 605 A.2d 1243, 1247 (1992) (Court held that this privilege "requires the court to balance the government's interest in ensuring the secrecy of the documents whose discovery is sought against the need of the private litigant to obtain discovery of relevant materials in possession of the government"). The investigative privilege has been defined as "the government's privilege to prevent disclosure of certain information whose disclosure would be contrary to the public interest." Frankenhauser v. Rizzo, 59 F.R.D. 339, 342 (E.D. Pa. 1993); See also U.S. v. Lang, 766 F.Supp. 389 (D.Md.1991) (Court found that one party is seeking

notes integral to the continuing investigation of another party and of a possible civil enforcement action; moreover, such selective note-taking can provide clues as to the focus of the on-going investigation and thus are not discoverable).

Information requested in Blue Pilot Set IV-111 is protected by the investigative privilege. The OCA statute states: "it shall be [the Consumer Advocate's] duty, in carrying out the responsibilities under this act, to ... initiat[e] proceedings if in his judgment such may be necessary ... ." 71 P.S. Sec. 309-4(a). Further, subpart (b) states that "[t]he Consumer Advocate may exercise discretion in determining the interests of consumers which will be advocated in any particular proceeding and in determining whether or not ... to initiate any particular proceeding and, in so determining, shall consider the public interest, the resources available and the substantiality of the effect of the proceedings on the interest of consumers."

Communications and/or conversations between the OCA and/or its agents or attorneys and other public utility commissions, consumer protection agencies, investigators, or attorneys regarding the subject matter in this proceeding or Blue Pilot in general includes protected information gathered solely for the purpose of allowing the Acting Consumer Advocate to exercise her statutory authority to determine whether or not to initiate proceedings in the interest of consumers and information gathered for purposes of tactical decisions during this proceeding. Disclosure of such information would be contrary to the public interest, because it would prevent the free flow of information to the OCA, inhibiting the OCA's ability to gain the necessary information that is required in order to determine whether to initiate proceedings in the interest of the public and information gathered for the purposes of tactical decisions during this proceeding.

Additionally, the Attorney General is vested with the authority to bring an action “in the name of the Commonwealth” when she deems it to be “in the public interest” against “any person” engaging in any method, act or practice declared unlawful by the Consumer Protection Law. 73 P.S. § 201-4. Further, the Bureau of Consumer Protection has the duty to investigate fraud, misrepresentation and deception in the sale of consumer goods and services. 71 P.S. § 307-2. The Attorney General’s evaluation in bringing this case will be chilled by disclosing the information Blue Pilot seeks in this Interrogatory and would otherwise impair her role as the chief law enforcement officer as established by the Pennsylvania Constitution. Pa. Const. art. IV, § 4.1.

Communications between Joint Complainants and other public utility commissions, consumer protection agencies, investigators, or attorneys is not solely factual data. Blue Pilot is essentially seeking an evaluative summary because this is information that would have been included in the overall strategic and tactical approach in the determination of whether to file suit against Blue Pilot and information gathered for purposes of tactical decisions during this proceeding; thus, this information is protected from discovery under the investigative privilege. Therefore, Joint Complainants request that their Objection to Set IV-111 be sustained.

**E. BLUE PILOT SET IV-112 REQUESTS INFORMATION THAT IS NOT RELEVANT OR LIKELY TO LEAD TO ADMISSIBLE EVIDENCE IN THIS PROCEEDING, IMPERMISSIBLY SEEKS PRIVILEGED ATTORNEY WORK PRODUCT, AND IS UNREASONABLY ANNOYING AND BURDENSOME.**

Blue Pilot Set IV-112 provides as follows:

Set forth in full and complete detail each and every communication and/or conversation that You, Your agents, and/or attorneys have had with any Pennsylvania consumer, whether or not they were a customer of Blue Pilot, regarding the subject matter of this Action or Blue Pilot in general.

**1. BLUE PILOT SET IV-112 REQUESTS INFORMATION THAT IS NOT RELEVANT OR LIKELY TO LEAD TO ADMISSIBLE EVIDENCE.**

In Set IV-112, Blue Pilot has specifically requested information relating to communications and/or conversations with “any Pennsylvania consumer, whether or not they were a customer of Blue Pilot,” regarding this proceeding or “Blue Pilot in general.” In responses to prior discovery requests of Blue Pilot, Joint Complainants have turned over all documents and information received from Blue Pilot consumers and the correspondence sent by Joint Complainants to Blue Pilot consumers that are within the permissible scope of discovery and have timely supplemented that information when additional information became available.<sup>2</sup>

As far as communications with Pennsylvania consumers who were never Blue Pilot customers or information that is related to Blue Pilot in general and is not related to the subject matter in this proceeding, Joint Complainants submit that such information is not likely to lead to relevant or admissible evidence in this proceeding. Discovery that is not relevant or not reasonably calculated to lead to admissible evidence is not permitted under the Commission’s regulations. 52 Pa. Code § 5.321(c). If the information is not related to this proceeding or related to Blue Pilot customers, Joint Complainants submit that the information is neither relevant nor is it likely to lead to admissible evidence. Therefore, Joint Complainants request their Objection to Set IV-112 be sustained insofar as it relates to communications with consumers who were never Blue Pilot customers and communications that are not related to the

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<sup>2</sup> See OCA Responses to Blue Pilot Set I, Interrogatory Nos. 6, 7, 9, 12, 14; see also OAG Response to Blue Pilot Set I, Interrogatory No. 12; see also OAG Responses to Blue Pilot Set I, Request for Production Nos. 2 and 22; see also OCA Responses to Blue Pilot Set I, Request for Production Nos. 16 and 17; see also OAG Responses to Blue Pilot Set III; see also OCA Responses to Blue Pilot Set III; Consumer Direct Testimonies, Volumes 1, 1A, 2, and 2A.

subject matter of this proceeding. Furthermore, Joint Complainants object to Set IV-112 in its entirety, for the reasons set forth below.

**2. BLUE PILOT SET IV-112 IMPERMISSIBLY SEEKS PRIVILEGED ATTORNEY WORK PRODUCT.**

The Joint Complainants object to Blue Pilot Set IV-112 insofar as it requires the Joint Complainants to disclose specific information relating to discussions between (an) attorney(s) at the OAG and/or the OCA or agent(s) acting under the direction of (an) attorney(s) at the OAG or OCA and a consumer, as such communications/conversations included the mental impressions, conclusions, opinions, and/or legal theories of the attorney(s) or agent(s). Such information is attorney work product, which is beyond the permissible scope of discovery.

Section 5.323(a) of the Pennsylvania Code is consistent with Pa. R.C.P. 4003.3 which codifies the attorney work product privilege and states the following:

The discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

Pa. R.C.P. 4003.3. In the Commonwealth of Pennsylvania, the existence of the attorney work product privilege when attorneys act in their professional capacity for governmental agencies is well established. Sedat, Inc. v. Dep't of Env'tl. Res., 163 Pa. Commw. 29, 33, 614 A.2d 1243, 1244 (1994), citing Okum v. Unemployment Compensation Board of Review, 77 Pa. Commw. 386, 465 A.2d 1324 (1983). To allow the respondent access to such privileged information, would allow him to "... get the benefit of the agency's legal and factual research and reasoning, enabling him to litigate 'on wits borrowed from the adversary.' Worse yet, he could gain insight into the agency's general strategic and tactical approach to deciding when suits are brought, how

they are conducted, and on what terms they may be settled.” Sedat, 163 Pa. Commw. At 34, 641 A.2d at 1245, quoting F.T.C. v. Grolier, 462 U.S. 19, 30-31, 103 S.Ct. 2209, 2216, 76 L.Ed.2d 387, 397-98 (1983) (J. Brennan, concurring) Furthermore, the Pennsylvania Supreme Court has held:

As has been observed, the work product protection supports our judicial system, based on the adversarial process by allowing counsel privacy to develop ideas, test theories, and explore strategies in support of the client’s interest, without fear that the documents in which the ideas, theories and strategies are written will be revealed to the opposing counsel. Allowing counsel to document legal theories without concern of disclosure encourages better representation of clients, which in turn benefits justice.

Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity, 625 Pa. 301, 312-13 (Pa. 2014).

Moreover, when a representative employee of the attorney who is acting as the agent of the attorney and is directed by the attorney to do the desired preparatory work in the investigation of a case and its preparation for trial, the product of that work becomes a part of the hiring attorney’s work product, just as if the work had been done by the attorney in person or by an employee of his office. 35 ALR 3d 412, 429. See also Brant v. Turnamian, 9 Pa. D. & C. 4<sup>th</sup> 216, 219 (Com. Pl. 1991).

Here, Blue Pilot has also requested information relating to discussions that Joint Complainants had with Blue Pilot consumers regarding the subject matter of this proceeding or Blue Pilot in general.<sup>3</sup> Conversations between the OAG and/or the OCA and Blue Pilot consumers regarding this proceeding included the mental impressions, conclusions, opinions, and/or legal theories of the attorneys, which are beyond the permissible scope of discovery. Joint Complainants have turned over all documents and information received from consumers

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<sup>3</sup> As discussed in Section E.I. above, information regarding communications and/or conversations with consumers that have never been Blue Pilot customers is not relevant or likely to lead to admissible evidence in this proceeding.

and the correspondence sent by Joint Complainants to Blue Pilot consumers that is within the permissible scope of discovery.<sup>4</sup> The information that is responsive to this request that has not been disclosed falls outside the permissible bounds of discovery. Therefore, Joint Complainants request that their Objection to Set IV-112 be sustained.

**3. BLUE PILOT SET IV-112 IS UNREASONABLY ANNOYING AND BURDENSOME.**

Furthermore, pursuant to the Commission's regulations, discovery which would cause unreasonable annoyance or burden is not permitted. See 52 Pa. Code § 5.361(a). Joint Complainants submit that it would be unreasonably annoying and burdensome to require Joint Complainants to disclose each and every communication and/or conversation that Joint Complainants and/or their agents and/or attorneys had with Pennsylvania consumers, whether or not they were a customer of Blue Pilot, relating to the subject matter of this proceeding or Blue Pilot in general. The OAG and the OCA have had numerous informal conversations with consumers but do not track whether these conversations included the subject matter of this proceeding or Blue Pilot. To the extent Blue Pilot customers contacted the OCA or filed a complaint with the OAG, Joint Complainants have already turned over all the information related thereto and timely supplemented when additional information became available. Because it is unlikely Joint Complainants could gather the requested information and because Joint Complainants have already provided all information they have received from Blue Pilot's customers, Joint Complainants submit that Set IV-112 is unreasonably annoying and burdensome.

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<sup>4</sup> See OCA Responses to Blue Pilot Set I, Interrogatory Nos. 6, 7, 9, 12, 14; see also OAG Response to Blue Pilot Set I, Interrogatory No. 12; see also OAG Responses to Blue Pilot Set I, Request for Production Nos. 2 and 22; see also OCA Responses to Blue Pilot Set I, Request for Production Nos. 16 and 17; see also OAG Responses to Blue Pilot Set III ; see also OCA Responses to Blue Pilot Set III; Consumer Direct Testimonies, Volumes 1, 1A, 2, and 2A.

**F. BLUE PILOT SET IV-113 IMPERMISSIBLY SEEKS INFORMATION THAT IS BEYOND THE SCOPE OF DISCOVERY.**

Blue Pilot Set IV-112 provides as follows:

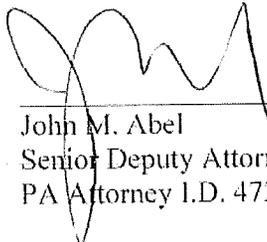
Identify all documents that support each of the statements identified in requests 102 through 112 above, identifying for each request which documents support the facts alleged.

For the reasons expressed above, Joint Complainants object to this request to the extent it seeks information related to Set IV-106, 110, 111, and 112, as such requests are beyond the permissible scope of discovery. Therefore, Joint Complainants request Set IV-113 be limited accordingly.

III. CONCLUSION

WHEREFORE, the Joint Complainants respectfully request that their Objections to Blue Pilot Set IV, Instruction No. 1 and Questions 103, 106, 110, 111, 112, and 113 be sustained.

Respectfully submitted,



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

Margarita Tulman  
Deputy Attorney General  
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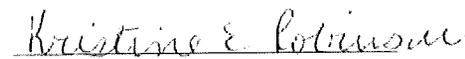
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Date: October 5, 2014  
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CERTIFICATE OF SERVICE

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

I hereby certify that I have this day served a true copy of the foregoing document, the  
Objections of Joint Complainants Commonwealth of Pennsylvania and the Office of Consumer  
Advocate to Blue Pilot Energy, LLC Interrogatories and Requests for Production of Documents Set  
IV, in the manner and upon the persons listed below:

Dated this 5th day of October 2015.

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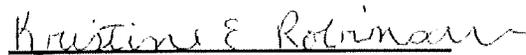
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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**COMMONWEALTH OF  
PENNSYLVANIA, ET AL.**

v.

**BLUE PILOT ENERGY, LLC**

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:  
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:

**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).

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Dated this 15<sup>th</sup> day of October, 2015.



Karen O. Moury, Esq.