

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

555 Walnut Street, 5th Floor, Forum Place
Harrisburg, Pennsylvania 17101-1923
(717) 783-5048
800-684-6560

FAX (717) 783-7152
consumer@paoca.org

October 20, 2015

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

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

v.

Blue Pilot Energy, LLC

Respondent

Docket No. C-2014-2427655

Secretary Chiavetta:

Enclosed please find the Answer of the Commonwealth of Pennsylvania and the Office of Consumer Advocate to the Motion of Blue Pilot Energy, LLC to Compel Joint Complainants' Responses to Blue Pilot Interrogatories/Requests for Production of Documents Set IV-3, 106, 110, 111, 112 and 113, in the above-referenced proceeding.

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

Respectfully Submitted,

A handwritten signature in cursive script that reads "Candis A. Tunilo".

Candis A. Tunilo
Assistant Consumer Advocate
PA Attorney I.D. #89891

Enclosure

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

*185199

CERTIFICATE OF SERVICE

Commonwealth of Pennsylvania, by :
Attorney General KATHLEEN G. KANE, :
Through the Bureau of Consumer Protection, :
 :
And :
 :
TANYA J. McCLOSKEY, Acting Consumer :
Advocate, :
Complainants :
 :
v. :
 :
BLUE PILOT ENERGY, LLC :
Respondent :

Docket No. C-2014-2427655

I hereby certify that I have this day served a true copy of the foregoing document, the Answer of the Commonwealth of Pennsylvania and the Office of Consumer Advocate to the Motion of Blue Pilot Energy, LLC to Compel Joint Complainants' Responses to Blue Pilot Interrogatories/Requests for Production of Documents Set IV-3, 106, 110, 111, 112, and 113, in the manner and upon the persons listed below:

Dated this 20th day of October 2015.

SERVICE BY E-MAIL & INTER-OFFICE MAIL

Michael Swindler, Esq.
Stephanie M. Wimer, Esq.
Bureau of Investigation & Enforcement
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

SERVICE BY E-MAIL & FIRST CLASS MAIL, POSTAGE PREPAID

Travis G. Cushman, Esq.
Mark R. Robeck, Esq.
Kelley Drye & Warren LLP
3050 K Street, NW, Suite 400
Washington, DC 20007

Geoffrey W. Castello, Esq.
Kelley Drye & Warren LLP
One Jefferson Road
Parsippany, NJ 07054

Sharon Webb, Esq.
Office of Small Business Advocate
Commerce Building, Suite 202
300 North Second Street
Harrisburg, PA 17101

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

Candis A. Tunilo

Candis A. Tunilo
Assistant Consumer Advocate
PA Attorney I.D. # 89891
E-Mail: CTunilo@paoca.org

Kristine E. Marsilio
Assistant Consumer Advocate
PA Attorney I.D. # 316479
E-Mail: KRobinson@paoca.org

Counsel for
Office of Consumer Advocate
555 Walnut Street 5th Floor, Forum Place
Harrisburg, PA 17101-1923
Phone: (717) 783-5048
Fax: (717) 783-7152
185179

**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	:	

ANSWER OF THE COMMONWEALTH OF PENNSYLVANIA
AND THE OFFICE OF CONSUMER ADVOCATE
TO THE MOTION OF BLUE PILOT ENERGY, LLC
TO COMPEL JOINT COMPLAINANTS' RESPONSES
TO BLUE PILOT INTERROGATORIES/REQUESTS FOR PRODUCTION OF
DOCUMENTS SET IV-3, 106, 110, 111, 112, AND 113

Pursuant to 52 Pa. Code §§ 5.342(g) 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 this Answer to the Motion of Blue Pilot Energy LLC (Blue Pilot or the Company) to Compel Joint Complainants' Responses to Blue Pilot's fourth set of Interrogatories and Requests for Production of Documents (Blue Pilot Set IV), Questions 3, 106, 110, 111, 112, and 113. For the reasons set forth below, the Company's Motion should be denied.

I. INTRODUCTION

On September 23, 2015, Blue Pilot served Blue Pilot Set IV on the Joint Complainants. Blue Pilot Set IV consists of 113 questions. The Joint Complainants communicated their objections to Blue Pilot on October 1, 2015. 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, on October 5, 2015, Joint Complainants submitted written objections to Blue Pilot Set IV, Instruction No. 1 and Questions 3, 106, 110, 111, 112, and 113 pursuant to 52 Pa. Code § 5.342(c) and 5.349(d). On October 15, 2015, Blue Pilot filed a Motion to Compel Joint Complainants' Responses to Blue Pilot Set IV-3, 106, 110, 111, 112, and 113. Joint Complainants submit this Answer to Blue Pilot's Motion to Compel.

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-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.

In its Motion to Compel, Blue Pilot states that it would be 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. Motion to Compel at 4.¹

As explained in more detail in Sections 1 and 2, below, Blue Pilot Set IV-3 impermissibly seeks attorney work product and is unreasonably annoying and burdensome, because Blue Pilot already has access to the requested information. 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

¹ Joint Complainants note that Blue Pilot’s suggested “limitation” to this discovery request alters the question. Joint Complainants have alleged that Blue Pilot engaged in a pattern and practice of, *inter alia*, misleading and deceptive behavior in violation of Pennsylvania law and Commission orders and regulations. In the initial request, Blue Pilot seeks information that supports this position. In the proposed limitation, however, Blue Pilot seeks the identity of all customers that Joint Complainants allege were misled or deceived. It is Joint Complainants’ position that deception was not limited to the customers who testified in this proceeding or filed complaints with the OAG, the Commission, or the Better Business Bureau or contacted the OCA.

Blue Pilot misled or deceived consumers. Blue Pilot had the opportunity to cross-examine the consumers whose testimony is in the record. Furthermore, Joint Complainants have turned over all information and documents received from consumers, including but not limited to all OAG complaints and all information received from OCA from Blue Pilot customers.

Joint Complainants in their legal briefs to the ALJs and the Commission 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. Blue Pilot has all of this information in its possession. Discovery seeking further analysis of these documents impermissibly seeks privileged attorney work product and is unreasonably annoying and burdensome.

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. See 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, or at the very least, identify the consumers that Joint Complainants alleged were misled or deceived by Blue Pilot. See Motion to Compel at 4. Soon after receiving the data requests, Joint Complainants contacted Blue Pilot’s counsel to resolve some confusion about Set IV-3. On October 2, 2015, counsel for OCA sent an email to counsel for Blue Pilot stating:

Also, Travis, we 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.

See Exhibit A, attached hereto. Blue Pilot counsel responded in a letter dated October 5, 2015, as follows:

Blue Pilot is entitled to learn the factual basis that support the Joint Complainants [*sic*] 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.

See Exhibit B at page 8, attached hereto. Joint Complainants, still unsure what was sought in Set IV-3, again sought clarification in a document emailed to Blue Pilot's counsel on October 7, 2015, which asked:

Joint Complainants remain unsure what is sought in these data requests, as the further explanation provided by Blue Pilot recites the data requests without providing an example. Is what Blue Pilot seeking is a response something like the following?

Consumer A – testified in direct testimony he was misled by Blue Pilot salesperson that he would save money by switching Blue Pilot

Consumer B – testified in redirect that she was deceived by Blue Pilot salesperson because she was led to believe the price would stay below her utility's price

Cross Exhibit X – TPV recording shows that consumer did want to switch but was switched anyway

See Exhibit C at pages 7-8, attached hereto. Blue Pilot has not responded to Joint Complainants' requests for clarification.

In its Motion to Compel, however, Blue Pilot argues that Set IV-3 is not seeking attorney work product, but rather the facts that support Joint Complainants' allegations. Motion to Compel at 4-6. Blue Pilot cites numerous cases in support of its position that it is entitled to this "factual" information. Id. While Set IV-3 requests all "facts" relied upon, Blue Pilot is not, in

fact, seeking facts, as it already has all applicable facts in its possession, because it has the consumer testimonies and exhibits in the record and the transcripts of the hearings on March 30-31 and April 1, 2015. These are the same pieces of evidence from which Joint Complainants would “detail all facts relied upon” as requested in Blue Pilot Set IV-3. As such, Blue Pilot is seeking Joint Complainants’ organization of these facts by counsel for Joint Complainants. Such a request equates to seeking Joint Complainants’ legal analysis of what record facts support their allegations. It is beyond the scope of permissible discovery to request such analysis in data requests.

Next, Blue Pilot indicates that Joint Complainants are attempting to “hide the identity” of the consumer witnesses who support their allegations. Motion to Compel at 6. Blue Pilot, however, knows the identities of the 97 consumer witnesses whose testimony was served by Joint Complainants and which testimony and exhibits were moved into the record and, therefore, could be relied upon by Joint Complainants in their briefs and argument in this matter and by the ALJs in deciding this matter. Furthermore, Joint Complainants have turned over all information and documents received from consumers, including but not limited to all OAG complaints and all information received from consumers by the OCA. Joint Complainants have not extracted identifying information from any of these communications. Accordingly, Joint Complainants have not, in any manner, hidden these identities from Blue Pilot.

Blue Pilot asserts that Blue Pilot Set IV-3 might be classified as a “contention” interrogatory, and Blue Pilot concludes that “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.” Motion to Compel at 6. To the

contrary, Joint Complainants submit that Blue Pilot is not entitled to the requested information, whether it is classified as a contention interrogatory or not.

Joint Complainants first note that Blue Pilot cites numerous federal decisions in an attempt to define contention interrogatories, but does not provide any argument as to whether the Commission permits contention interrogatories or whether contention interrogatories are proper at this stage in the proceeding. Contention interrogatories have been defined as:

any question that asks another party to indicate what it contends ... whether it makes some specified contention ... to state all the facts on which it bases some specified contention ... to take a position, and then to explain or defend that position, with respect to how the law applies to facts ... [or] to spell out the legal basis for, or theory behind, some specified contention.

Fisher & Porter Co. v. Tolson, 143 F.R.D. 93, 95 (E.D. Pa. 1992) (Fisher) (internal citations omitted). Questions, however, seeking the identification of witnesses or documents are not contention interrogatories. Fisher at 96. Joint Complainants note that even federal courts, which Blue Pilot relies on in support of its position that it is entitled to have Joint Complainants identify these consumers, have recognized that contention interrogatories may be inappropriate at certain stages of a proceeding or inappropriate altogether. See e.g. B. Braun Med. V. Abbott Lab., 155 F.R.D. 525, 527 (E.D. Pa. 1994) (Braun); see also Storie v. United States, 142 F.R.D. 317, 319 (E.D. Mo. 1991) (“Many courts have debated the usefulness of contention interrogatories in many different types of cases.”). Courts have also denied motions to compel contention interrogatories, recognizing that requiring an answer to contention interrogatories may delve into trial strategies of counsel and may also be burdensome because of the level of detail sought. See e.g. Storie at 319; see also In re Convergent Technologies Sec. Litigation, 108 F.R.D. 328, 333 (N.D. Cal. 1985) (“No party has an absolute right to have answers to contention interrogatories ... If it were clear, for example, that by using some other discovery tool a party could acquire

information of comparable quality while imposing less of a burden on an opponent, a court would be constrained to rule that a contention interrogatory need not be answered, regardless of when in the pretrial period it was served.).

Joint Complainants submit that even if Blue Pilot Set IV-3 qualifies as a “contention interrogatory” to the extent that Blue Pilot is seeking Joint Complainants to identify specific facts that support their position that Blue Pilot misled and deceived customers, such a request impermissibly seeks strategy of counsel and, as explained in Section 2, below, would be unreasonably burdensome. To the extent that Blue Pilot is seeking the identification of consumer witnesses who support Joint Complainants’ position that Blue Pilot misled and deceived customers, Blue Pilot already has that information in its possession.

Even when contention interrogatories are permitted, the party serving contention interrogatories bears the burden of proving that securing early answers assists the goals of discovery. Braun at 527. At the Commission, it is well established that the sort of legal analysis Blue Pilot is seeking here is provided in the form of a main brief and not earlier. Joint Complainants note that Blue Pilot will have the opportunity to file a reply brief pursuant to the litigation schedule established in this proceeding. Blue Pilot has not provided any reason why having this information sought in Set IV-3 prior to receiving Joint Complainants’ main brief assists in the goals of discovery. As already stated, Blue Pilot has access to the same evidence admitted into the record to date as Joint Complainants. As such, Blue Pilot Set IV-3 is a request for Joint Complainants to organize the evidence for the Company.

Finally, Blue Pilot attempts to distinguish this case from Sedat regarding attorney work product privilege, arguing that here, Blue Pilot is merely seeking the identities of individuals that Joint Complainants allege were misled or deceived by Blue Pilot. As noted above, Joint

Complainants have already provided Blue Pilot with the identities of consumers who support Joint Complainants' position that Blue Pilot misled or deceived customers. Any further analysis is impermissible attorney work product.

Based on the foregoing, Joint Complainants request that the Company's Motion to Compel Set IV-3 be denied.

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 regulations, discovery which would cause unreasonable annoyance or burden is not permitted. See 52 Pa. Code § 5.361(a). As stated above, 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 pursuant to the litigation schedule, which will contain further information and analysis that supports Joint Complainants' allegations that Blue Pilot misled and deceived consumers.² Joint Complainants will provide their legal analysis, specifically identifying which facts support these allegations, in their main brief. To require Joint Complainants to provide Blue Pilot with this

² In its Motion, Blue Pilot states that Joint Complainants have not named their expert witnesses. Motion to Compel at 9-10. Joint Complainants note that such information was provided to Blue Pilot in Joint Complainants' Response to Blue Pilot Set I-2 on August 22, 2014 and Supplemental Responses to Blue Pilot Interrogatory Set I-2 served on August 18, 2015 (OAG) and August 19, 2015 (OCA). Joint Complainants also identified their expert witnesses in their Prehearing Memorandum, dated August 19, 2014.

information in advance of filing their brief and prior to serving all testimony would be unreasonably annoying and burdensome.

Blue Pilot fails to make any argument supporting its position that Set IV-3 is not unreasonably annoying and burdensome. Instead, Blue Pilot argues that it is not appropriate for Joint Complainants to “defer to the entire record as support.” Motion to Compel at 9. This argument, however, completely fails to address the fact that the request is unreasonably annoying and burdensome. Responding to this request would require Joint Complainants to analyze and identify any evidence that could support their position that Blue Pilot misled and deceived customers before the compilation and filing of briefs in support of the complaint. Such an analysis would solely be completed by attorneys who continue to work on the litigation of this matter as required by the litigation schedule. Furthermore, the record in this proceeding is not closed, and Joint Complainants intend to introduce additional evidence to support this position. Joint Complainants also note that such an analysis is open to interpretation, and Joint Complainants’ strategy and opinion regarding which statements and/or consumers support a position may evolve as more evidence is introduced and the case develops. To require Joint Complainants to conduct this sort of detailed analysis at this stage in the proceeding and then be under an obligation to continually supplement the response as additional evidence is moved into the record is unreasonably annoying and burdensome.

Based on the foregoing, Joint Complainants request that the Company’s Motion to Compel Set IV-3 be denied.

B. 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:

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.

As explained in more detail in Sections 1 and 2, below, Blue Pilot Set IV-106 impermissibly seeks attorney work product and is unreasonably annoying and burdensome, because Blue Pilot already has access to much of this information.³ 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 violated Pennsylvania law and Commission rules and regulations. Blue Pilot had the opportunity to cross-examine the consumers whose testimony is in the record. Furthermore, Joint Complainants have turned over all information and documents received from consumers, including but not limited to all OAG complaints and all information received from OCA from Blue Pilot customers. To the extent that Blue Pilot does not have all information responsive to this request, all additional facts and information responsive to this request will be provided timely pursuant to 52 Pa. Code § 5.324(2) when Joint Complainants serve their expert testimony in accordance with the litigations schedule in this proceeding.

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. Blue Pilot has or will timely have all of this information in its possession. Discovery seeking further

³ Also, as discussed above in relation to Set IV-3, Joint Complainants have requested clarification regarding the information sought in Set IV-110 but have not received adequate clarification from Blue Pilot.

analysis of these documents impermissibly seeks privileged attorney work product and is unreasonably annoying and burdensome.

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. See 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).

While Set IV-110 requests each and every "fact" that supports any allegation or claim asserted in this proceeding, Blue Pilot is not, in fact, seeking facts, as it already has all applicable facts in its possession, because it has the consumer testimonies and exhibits in the record and the transcript of the hearings on March 30-31 and April 1, 2015. These are the same pieces of evidence from which Joint Complainants would "set forth in full and complete detail each and every fact" as requested in Blue Pilot Set IV-110. As such, Blue Pilot is seeking Joint Complainants' organization of these facts by counsel for Joint Complainants. Such a request equates to seeking Joint Complainants' legal analysis of what record facts support their allegations, which will be provided in final form in Joint Complainants' brief. It is beyond the scope of permissible discovery to request such analysis in data requests.

Blue Pilot asserts that Joint Complainants should be required to provide Blue Pilot with any facts that will be relied upon by Joint Complainants' expert witnesses, because Joint Complainants relied upon the sworn testimony of their expert witnesses in their Motion for Entry of Judgment. Motion to Compel at 11. Joint Complainants first note that Blue Pilot inappropriately assumes that Joint Complainants' expert testimony will be identical to the Affidavits supporting their Motion for Entry of Judgment. Furthermore, the Commission's

regulations provide that a discovery response shall be considered timely if provided via written, direct testimony that is submitted in accordance with the procedural schedule. See 52 Pa. Code § 5.324(2).

Based on the foregoing, Joint Complainants request that the Company's Motion to Compel Set IV-10 be denied.

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 regulations, 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 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 pursuant to the litigation schedule, 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 these allegations, in their main brief. To require Joint Complainants to provide Blue Pilot with this information in advance of filing their brief would be unreasonably annoying and burdensome.

Blue Pilot fails to make any argument supporting its position that Set IV-110 is not unreasonably annoying and burdensome. Instead, Blue Pilot argues that it is not appropriate for Joint Complainants to refer “to all of the consumer statements produced in this proceeding and unnamed⁴ expert witnesses.” Motion to Compel at 12. This argument, however, completely fails to address the fact that the request is unreasonably annoying and burdensome. Responding to this request would require Joint Complainants to analyze and identify any evidence that could support any of their allegations. Such an analysis would be solely completed by attorneys and could take weeks given that the Joint Complainants’ attorneys continue to work on the litigation of this matter as required by the litigation schedule. Furthermore, the record in this proceeding is not closed, and Joint Complainants intend to introduce additional evidence to support their allegations. Joint Complainants also note that such an analysis is open to interpretation, and Joint Complainants’ strategy and opinion regarding which statements and/or exhibits support a position may evolve as more evidence is introduced and the case develops. To require Joint Complainants to perform this type of analysis at this stage in the proceeding and then be under an obligation to continually supplement the response as additional evidence is moved into the record is unreasonably annoying and burdensome.

Blue Pilot also asserts, ‘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.’ Motion to Compel at 12. Joint Complainants submit that such an analysis is open to interpretation. Blue Pilot has access to all the same facts as Joint Complainants. Joint

⁴ In its Motion, Blue Pilot states that Joint Complainants have not named their expert witnesses. Motion to Compel at 9-10. Joint Complainants note that such information was provided to Blue Pilot in Joint Complainants’ Response to Blue Pilot Set I-2 on August 22, 2014 and Supplemental Responses to Blue Pilot Interrogatory Set I-2 served on August 18, 2015 (OAG) and August 19, 2015 (OCA). Joint Complainants also identified their expert witnesses in their Prehearing Memorandum, dated August 19, 2014.

Complainants' opinion regarding which statements and/or consumers support various allegations may differ from those of Blue Pilot and may evolve as more evidence is introduced and the case develops. Blue Pilot's allegation supports Joint Complainants' position in Section 1, above, that such a request impermissibly seeks attorney work product.

Based on the foregoing, Joint Complainants request that the Company's Motion to Compel Set IV-110 be denied.

C. BLUE PILOT SET IV-112 REQUESTS INFORMATION THAT IS NOT RELEVANT OR LIKELY TO LEAD TO ADMISSIBLE EVIDENCE IN THIS PROCEEDING, AND SET IV-106 AND IV-112 IMPERMISSIBLY SEEK ATTORNEY WORK PRODUCT AND ARE 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 (sic) 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.

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.

In its Motion to Compel, Blue Pilot has indicated that it is willing to limit these discovery requests to the extent that Joint Complainants would only be required to identify the meetings that Joint Complainants held with Blue Pilot consumers that were not among the 97 consumers previously identified by Joint Complainants. Motion to Compel at 13. Despite the fact that Set IV-106 specifically requests "a description of what was discussed, and any decision made" and

Set IV-112 specifically requests Joint Complainants to “[s]et forth in full and complete detail each and every communication and/or conversation,” Blue Pilot maintains in its Motion to Compel that it is merely seeking “the name of the consumer and the date of the meeting.” Joint Complainants note that Blue Pilot has already requested this information in Blue Pilot Interrogatories to OCA Set I-5, 6, 7, 9, 12, and 14; Blue Pilot RPD to OCA Set I-16, 17; Blue Pilot Interrogatories to OAG Set I-12; and Blue Pilot RPDs to OAG Set I-2 and 22; Blue Pilot Set III to OCA; and Blue Pilot Set III to OAG. Joint Complainants fully answered these discovery requests and timely supplemented when additional information became available.

As originally written, Set IV-106 and IV-112 impermissibly seek attorney work product. Even with Blue Pilot’s proposed limitation of these requests, Set IV-106 and IV-112 are unreasonably annoying and burdensome, and Set IV-112 is not relevant or likely to lead to admissible evidence in this proceeding.

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

Blue Pilot Set IV-112 as originally written or with Blue Pilot’s proposed limitation is not relevant or likely to lead to admissible evidence. As originally written, 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.”

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 Complaints submit that such information 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 or related to Blue Pilot customers, Joint Complainants submit that the information is neither relevant nor is it likely to lead to admissible evidence. While Blue Pilot has indicated that it will limit this request to Blue Pilot customers, Blue Pilot is still impermissibly seeking information related to "Blue Pilot in general" whether or not it relates to the subject matter of this proceeding.

As far as information relating to Blue Pilot customers, 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.⁵

Based on the foregoing, Joint Complainants request that the Company's Motion to Compel Set IV-112 be denied.

**2. BLUE PILOT SET IV-106 AND IV-112
IMPERMISSIBLY SEEK PRIVILEGED ATTORNEY
WORK PRODUCT.**

The Joint Complainants object to Blue Pilot Set IV-106 and Set IV-112 as originally written insofar as they require 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, as such communications/conversations included the mental impressions, conclusions, opinions, and/or legal theories of the attorney(s) or

⁵ 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 and 2.

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. 4th 216, 219 (Com. Pl. 1991).

In Set IV-106 and IV-112, Blue Pilot has requested details relating to discussions that Joint Complainants had with Blue Pilot consumers regarding the subject matter of this proceeding or Blue Pilot in general and also discussions about the Blue Pilot consumer witnesses.⁶ Specifically, Set IV-106, as originally written, requests "a description of what was discussed, and any decisions made," and Set IV-112 requests Joint Complainants to "[s]et forth in full and complete detail each and every communication and/or conversation." Conversations among the OAG and/or the OCA 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 and the correspondence sent by Joint Complainants to Blue Pilot

⁶ As originally written, Set IV-112 also requests information regarding communications and/or conversations with consumers that have never been Blue Pilot customers. As stated above, Blue Pilot, in its Motion to Compel, agreed to limit this request to Blue Pilot consumers. To the extent that Blue Pilot will seek to enforce the original request, Joint Complainants submit that 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, as discussed in Section C.3. below.

consumers that is within the permissible scope of discovery.⁷ Any additional information that is responsive to these requests that have not been disclosed falls outside the permissible bounds of discovery.

Based on the foregoing, Joint Complainants request that the Company's Motion to Compel Set IV-106 and IV-112 be denied.

3. BLUE PILOT SET IV-106 AND IV-112 ARE UNREASONABLY ANNOYING AND BURDENSOME.

Even with Blue Pilot's proposed limitation to Set IV-106 and IV-112, these requests are unreasonably annoying and burdensome. 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 any former or current Blue Pilot Pennsylvania consumers, relating to the subject matter of this proceeding or Blue Pilot in general. The OAG and the OCA may have had numerous informal conversations with consumers and do not track whether such possible conversations included the subject matter of this proceeding or Blue Pilot.

Furthermore, to the extent that Blue Pilot is still seeking communications about the consumer witnesses, as requested in Set IV-106, Joint Complainants submit that such a request is also unreasonably annoying and burdensome, as Joint Complainants have already provided all

⁷ See OCA Responses to Blue Pilot Set I, Interrogatory Nos. 5, 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 and 2.

communications that are within the permissible scope of discovery to Blue Pilot in prior discovery responses.

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-106 and IV-112 is unreasonably annoying and burdensome.

Based on the foregoing, Joint Complainants request that the Company's Motion to Compel Set IV-106 and IV-112 be denied.

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

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.

Blue Pilot Set IV-111 seeks information that is not relevant or likely to lead to admissible evidence in this proceeding. In its Motion to Compel, Blue Pilot agreed to limit the request to communications regarding matters relevant to the claims raised by Joint Complainants in this proceeding. Motion to Compel at 14. Even with this proposed limitation, Set IV-111 is not relevant or likely to lead to admissible evidence and impermissibly seeks information that is protected by the investigative privilege, constitutes attorney work product, and is unreasonably annoying and burdensome.

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

Blue Pilot Set IV-111 requests information that is not relevant or likely to lead to admissible evidence. 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). Specifically, Joint Complainants have requested information relating to communications between Joint Complainants and/or their agents and/or their attorneys and other public utility commissions, consumer protection agencies, investigators, or attorneys. Such information is not relevant to any claim or defense that Blue Pilot could raise and is not likely to lead to admissible evidence.

Furthermore, Joint Complainants submit that information relating to "Blue Pilot in general" is not relevant or likely to lead to admissible evidence. Joint Complaints 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 and is not the proper subject of discovery. 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. In its Motion to Compel, Blue Pilot appears to limit the request to remove the language, "or Blue Pilot in general." To the extent that was not Blue Pilot's intention, Joint Complainants object.

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

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 was 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).

In its Motion to Compel, Blue Pilot asserts that the information sought in Set IV-111 is not protected by the investigative privilege. Motion to Compel at 14-16. In support of this position, Blue Pilot states that it “is only seeking factual information – i.e., the communications Joint Complainants have had with other public utility commissions, consumer protection agency (sic), and investigators regarding this matter.” Motion to Compel at 15. Blue Pilot further asserts that “[i]t is not seeking the communications themselves.” Id. First, Joint Complainants note that Blue Pilot’s assertion that “[i]t is not seeking the communications” is confusing. The discovery requests specifically requests Joint Complainants to “[s]et forth in full and complete detail each and every communication and/or conversation ...” 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.

Blue Pilot next argues that Joint Complainants have failed to demonstrate that the requested information is protected by the investigative privilege, as they have not shown that the release of the information would have a substantial negative impact on their investigations. Motion to Compel at 15-16. Joint Complainants submit that the release of information requested in Blue Pilot Set IV-111 is protected by the investigative privilege, and Joint Complainants have outlined in their Objections to Set IV-111 how the release of the information sought in Set IV-111 would have a substantial negative impact on their investigations.

As explained in Joint Complainants' Objections to Set IV-111, 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 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. For example, the Joint Complainants submit that if communications relating to the OCA's strategical and tactical approach are discoverable, public utility commissions, other consumer protection agencies, investigators and attorneys may be less willing to engage in such communications with the OCA. As a result, the Acting Consumer Advocate's ability to exercise her statutory authority will be substantially, negatively impacted.

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 in the same way as described above relating to the OCA and would otherwise impair the Attorney General's role as the chief law enforcement officer as established by the Pennsylvania Constitution. Pa. Const. Art. IV, § 4.1.

Based on the foregoing, Joint Complainants request that the Company's Motion to Compel Set IV-111 be denied.

3. 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 his or her 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. 4th 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. Further, Joint Complainants submit that even identifying who Joint Complainants may be communicating with can, in some circumstances, reveal Joint Complainants' strategy and/or tactical approach in a proceeding.

Based on the foregoing, Joint Complainants request that the Company's Motion to Compel Set IV-112 be denied.

4. TO THE EXTENT BLUE PILOT IS SEEKING A PRIVILEGE LOG AS DEFINED IN SET IV, INSTRUCTION NO. 1, SUCH A REQUEST IS UNREASONABLY ANNOYING AND BURDENSOME.

To the extent that Blue Pilot seeks to enforce Blue Pilot Interrogatory Instruction No. 1 at its discretion, Joint Complainants object. Such request is inconsistent with a prior agreement between Joint Complainants and Blue Pilot and is unreasonably annoying and 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.

This interrogatory instruction was also in Blue Pilot Set I served on the OAG and the OCA in July 2014. Joint Complainants communicated their objection to this instruction in August 2014, and the parties reached an agreement. Specifically, an agreement was reached on August 7, 2014, as follows:

Blue Pilot agrees to accept a log with less detail if OAG and the AG agree (i) to provide in good faith a log with the information necessary for Blue Pilot to determine the basis of the privilege claim and whether to challenge the claim, and (ii) to provide additional information for any logged document Blue Pilot feels is insufficient.

See Exhibit D at page 1, attached hereto (In this document, Joint Complainants' summary of objections is in black, and Blue Pilot's responses to the objections are in red). This agreement remained through additional sets of Blue Pilot discovery requests to Joint Complainants. Now, Blue Pilot seeks to enforce the instruction with respect to one discovery request, Set IV-111.

On October 1, 2015, Joint Complainants requested that Blue Pilot verify the parties' agreement that Blue Pilot would accept a general description of the information for which a privilege is claimed and the privilege that is claimed. 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." See Exhibit B at page 4, attached hereto. 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.

See Exhibit B at pages 7-8, attached hereto. Based on this response, it appears that despite its agreement to accept a more general privilege log throughout discovery in this proceeding 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, Blue Pilot has determined to seek an extensive privilege log for one discovery request out of the hundreds of requests the Company has served on Joint Complainants. To the extent that Blue Pilot seeks to invoke Instruction No. 1 at its discretion, Joint Complainants object.

Joint Complainants submit that such a request is also unreasonably annoying and burdensome. Pursuant to the Commission's regulations, discovery which would cause unreasonable annoyance or burden is not permitted. 52 Pa. Code § 5.361(a). To require Joint Complainants to identify each and every e-mail, call, or in-person meeting that constitutes

privileged communications with other public utility commissions, consumer protection agencies, investigators, or attorneys is unreasonably annoying and burdensome. Such oral or documentary communications could be extensive, and as such, Blue Pilot's request could take some time to research and assemble. Moreover, Joint Complainants submit that providing such information would not give Blue Pilot any further information as to whether to dispute the privilege upon which the information is withheld than the general privilege log the parties agreed to in August 2014.

Joint Complainants have no objection to continuing to comply with their previous agreement to provide Blue Pilot with a more general privilege log. To the extent that Blue Pilot is seeking a more extensive privilege log, Joint Complainants request that Blue Pilot's Motion to Compel be denied.

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

Blue Pilot Set IV-113 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.

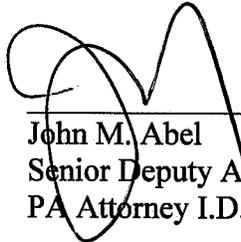
For the reasons expressed above, Joint Complainants object to this request to the extent it seeks information related to Set IV-106, 110, 111, and 112, as such requests are beyond the permissible scope of discovery.

Based on the foregoing, Joint Complainants request that Blue Pilot's Motion to Compel Set IV-113 be denied.

III. CONCLUSION

WHEREFORE, the Joint Complainants respectfully request that Blue Pilot's Motion to Compel Set IV, Questions 3, 106, 110, 111, 112, and 113 be denied.

Respectfully submitted,



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

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

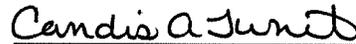
Bureau of Consumer Protection
Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
T: (717) 787-9707
F: (717) 787-1190
jabel@attorneygeneral.gov
mtulman@attorneygeneral.gov

Counsel for:

Bruce R. Beemer, First Deputy Attorney General
Office of Attorney General
Bureau of Consumer Protection

Date: October 20, 2015

213242



Candis A. Tunilo
PA Attorney I.D. 89891

Kristine E. Robinson
PA Attorney I.D. 316479
Assistant Consumer Advocates

Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923
T: (717) 783-5048
F: (717) 783-7152
ctunilo@paoca.org
krobinson@paoca.org

Counsel for:

Tanya J. McCloskey
Acting Consumer Advocate

EXHIBIT A

Tunilo, Candis

From: Tunilo, Candis
Sent: Friday, October 2, 2015 11:23 AM
To: 'Cushman, Travis'; Moury, Karen
Cc: 'mtulman@attorneygeneral.gov'; Robinson, Kristine E.; 'jabel@attorneygeneral.gov'; 'Castello, Geoffrey'
Subject: RE: BPE - Discovery Objections

Also, Travis, we 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.

Thanks, Candis

From: Tunilo, Candis
Sent: Friday, October 2, 2015 9:11 AM
To: 'Cushman, Travis'; Moury, Karen
Cc: mtulman@attorneygeneral.gov; Robinson, Kristine E.; jabel@attorneygeneral.gov; Castello, Geoffrey
Subject: RE: BPE - Discovery Objections

Travis: attached please find Joint Complainants' summary of objections that we discussed in our call yesterday. Kindly let us know whether the Company is willing to continue to work with us to resolve these.

Thanks, Candis

From: Cushman, Travis [mailto:TCushman@KelleyDrye.com]
Sent: Thursday, October 1, 2015 3:03 PM
To: Tunilo, Candis; Moury, Karen
Cc: mtulman@attorneygeneral.gov; Robinson, Kristine E.; jabel@attorneygeneral.gov; Castello, Geoffrey
Subject: RE: BPE - Discovery Objections

Thank you Candis. We are fine with these definitions. In addition, we agree that BPE's DR IV-108 does not include persons that Joint Complainants only contemplated retaining but did not actually retain. With regard to DR IV-111, we are not seeking mental impressions. To the extent that any correspondence might be perceived to contain attorney work-product, we would request that OCA and OAG provide the date, persons involved, subject of the correspondence, and the basis for any asserted privilege, just as would be required on a privilege log. We can drop VI-1 as to OAG if OAG agrees that their response to BPE DR II-37 is everything that OAG has that is responsive to this request.

Best,

Travis

EXHIBIT B

KELLEY DRYE & WARREN LLP

A LIMITED LIABILITY PARTNERSHIP

WASHINGTON HARBOUR, SUITE 400

3050 K STREET, NW

WASHINGTON, DC 20007

(202) 342-8400

FACSIMILE

(202) 342-8451

www.kelleydrye.com

TRAVIS CUSHMAN

DIRECT LINE: (202) 342-8573

EMAIL: TCushman@KelleyDrye.com

NEW YORK, NY
LOS ANGELES, CA
CHICAGO, IL
STAMFORD, CT
PARSIPPANY, NJ

BRUSSELS, BELGIUM

AFFILIATE OFFICE
MUMBAI, INDIA

October 5, 2015

BY EMAIL

Candis A. Tunilo
Assistant Consumer Advocate
Pennsylvania Office of Consumer Advocate
555 Walnut Street, 5th Floor
Harrisburg, PA 17101

Margarita Tulman
Deputy Attorney General
Pennsylvania Office of Attorney General
Bureau of Consumer Protection
15th Floor, Strawberry Square
Harrisburg, PA 17120

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.

October 5, 2015

Page Two

**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.

October 5, 2015

Page Three

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."

October 5, 2015

Page Four

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**

October 5, 2015

Page Five

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

October 5, 2015

Page Six

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.

October 5, 2015

Page Seven

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

October 5, 2015
Page Eight

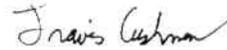
every claim of privilege as both a shield from compiling extensive privilege logs – which was the purpose of the agreement – and as a sword to attack a legitimate request to learn the communications Joint Complainants have had with external individuals and entities about this case. Blue Pilot will not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

Summary of Conference Call RE: OCA and OAG Objections to Blue Pilot Set IV

- Interrogatory Definitions #6: 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 Instruction #1: 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.” 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.

Joint Complainants: OAG and OCA confirm the date of the agreement resolving objections and issues related to Blue Pilot Sets I was August 7, 2014.

- Interrogatory/RPD #1: 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.

Joint Complainants: As the OCA indicated in its objection to Blue Pilot Set II-37, the OCA does not and has not organized the information it collected from consumers in this manner. As such, Mr. Blynn agreed to withdraw the data request. To the extent any consumer would have volunteered the information that they signed up via telemarketing during his or her contact with the OCA, that information was provided to Blue Pilot in OCA's responses to Blue Pilot RPD Set I-16 and I-17. The OCA does not have any further information to provide regarding this data request. It is the OCA's understanding that OAG has already provided its own verified responses as identified above.

- Interrogatories/RPDs requesting information relating to the affidavits attached to the Motion for Entry of Judgment: 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 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.

Joint Complainants: We disagree that the affidavits are already in the record in this proceeding. Written testimony is not in the record until a motion is made by its proponent party and granted by the presiding ALJ. This is generally done at hearing or by stipulation of the parties. By way of example, Joint Complainants would direct you to the procedures employed to admit consumer direct testimonies in this proceeding at the hearings earlier this year. Also, we would direct you to the Commission's procedural rules regarding admission of evidence into the record of a proceeding. Joint Complainants submit that we will have to agree to disagree on the relevancy of data requests related to the affidavits. That said, Joint Complainants intend to provide responses to these data requests pursuant to the Commission's rules on discovery.

- Interrogatory/RPD # 2: 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.

Joint Complainants: Joint Complainants have not requested that this data request be withdrawn; we merely needed additional information regarding what Blue Pilot meant by the terms “consumer surveys” and “empirical studies.” Joint Complainants noted in this summary that Blue Pilot provided additional information regarding the meaning of these terms. As such, Joint Complainants will submit a response, and therefore, there is no need for a stipulation regarding this data request.

- Interrogatory/RPD # 3: 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 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.

Joint Complainants: OAG and OCA have served an objection to this data request.

- Interrogatory/RPD #106 and #112: 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.

Joint Complainants: Joint Complainants note that Blue Pilot's Response does not address the "or about" language in the IV-106. OAG and OCA have served objections to these data requests.

- Interrogatory/RPD #108: 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.

- Interrogatory/RPD #111: 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 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.

Joint Complainants: OAG and OCA have served an objection to this data 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.

Joint Complainants: Joint Complainants remain unsure what is sought in these data requests, as the further explanation provided by Blue Pilot recites the data requests without providing an example. Is what Blue Pilot seeking is a response something like the following?

Consumer A – testified in direct testimony he was misled by Blue Pilot salesperson that he would save money by switching Blue Pilot

Consumer B – testified in redirect that she was deceived by Blue Pilot salesperson because she was led to believe the price would stay below her utility's price

Cross Exhibit X – TPV recording shows that consumer did want to switch but was switched anyway

Joint Complainants have served objections to these data requests.

212910

EXHIBIT D

Summary of Conference Call RE: OCA and OAG Objections to Blue Pilot Set I

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

Blue Pilot agrees that draft of experts reports is beyond the scope of discovery and need not be produced. However, drafts of other material is not beyond the scope of discovery and if it can be located with a reasonable search then it should be produced. In other words, Blue Pilot does not agree that just because a document is a draft means searching for it is unreasonably burdensome.

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

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

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

Blue Pilot disagrees that Section 5.342(a) prohibits requesting that an interrogatory answer include the information requested in Instruction #12(b) and (c) and does not agree to strike those instructions.

- RPD #2 and #13: These requests are unreasonably broad. Joint Complainants request that they be limited to documents in Joint Complainants' possession specifically mentioning BPE, as determined after a reasonable investigation by Joint Complainants. Joint Complainants would also provide any documents responsive to these requests that they intend to introduce at hearings. Joint Complainants note that some of these documents may be provided subject to the protective agreement discussed on the call. Blue Pilot indicated that it would get back to Joint Complainants about this limitation.

Blue Pilot agrees to this modification, but reserves its rights to object to terms of the protective agreement, which it has yet to see.

- RPD #5 and #6: This request is beyond the permissible scope of discovery regarding experts per Sections 5.324 and 5.349. Joint Complainants request that these be stricken without prejudice to Blue Pilot to request the workpapers and documents relied upon by Joint Complainants' experts in their testimony/reports/affidavits. Blue Pilot indicated it would get back to Joint Complainants about this request.

Blue Pilot agrees to limit these two requests to the scope of discovery from experts set forth in Section 5.324.

- RPD #10: Joint Complainants object to this request to the extent that it seeks legal research. That stated, Joint Complainants will respond to the extent that legal research is not required to do so. Blue Pilot indicated it would get back to Joint Complainants about this request.

Blue Pilot agrees that the OCA/AG need not perform legal research to respond to this request, but believes any documents in its possession, including any orders or decisions of the Commission, ALJ's or court's, which it possesses and relied upon to deny referenced allegation should be produced. Blue Pilot also agrees that the failure to produce any decision in response to this interrogatory because it is not currently known to OCA/AG is not a basis to object to OCA/AG's use of such decision in legal briefing later submitted in this case.

- RPD #53: Joint Complainants object to this request to the extent that it seeks the legal research, theories, summaries, conclusions, etc of Joint Complainants. Joint Complainants request that Blue Pilot agree to limit this request accordingly. Blue Pilot indicated it would get back to Joint Complainants about this request.

Blue Pilot agrees to exclude legal research and other work product, and to qualify this request to documents you intend to offer to the court for any purpose to prove any of the claims made in the Joint Complaint.

- RPD #25 - #31, #47: Joint Complainants object to these requests to the extent they seek privileged information. The parties agreed that Blue Pilot is not seeking privileged information in these requests.

Blue Pilot agrees to this limitation, but not the requirement to log responsive information on the privileged log.

- RPD #9: The parties agree that for this request Joint Complainants will only provide a list of testimonies submitted in proceedings by Dr. Estomin and copies of any reports related to his affidavit in this matter.

Blue Pilot agrees to this limitation without waiving its right to request additional information.

- Interrogatory #2: The parties agree that the language “all you considered calling” is stricken from this request.

The language Blue Pilot agrees to strike is “or that you have considered calling”.

- Interrogatory #13: The parties agree that OCA will provide the names of the formal complainants for the 11 Formal Complaints that the OCA reviewed, as referenced in Paragraph 18 of the Joint Complaint.

Blue Pilot understands that OCA/AG are not aware of any other Formal Complaints filed against Blue Pilot. If that is not true, Blue Pilot requests the information called for in response to this interrogatory to the extent that OCA/AG are in possession of such.

- Interrogatories ##30-33 (OCA): The parties reached an agreement limiting the timeframes in these requests to those documents that OCA is aware of after a reasonable investigation from 1999-2001 and 2010-present.

Blue Pilot agrees but without waiving its right to later request the information for other years.

188276