

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

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October 21, 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' Supplemental Responses to Blue Pilot Interrogatories/Requests for Production of Documents Set I, in the above-referenced proceeding.

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

Respectfully Submitted,

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

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

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	:	
	:	Docket No. C-2014-2427655
v.	:	
	:	
BLUE PILOT ENERGY, LLC	:	
Respondent	:	

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

Dated this 21st day of October 2015.

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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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ANSWER OF THE COMMONWEALTH OF PENNSYLVANIA  
AND THE OFFICE OF CONSUMER ADVOCATE  
TO THE MOTION OF BLUE PILOT ENERGY, LLC  
TO COMPEL JOINT COMPLAINANTS' SUPPLEMENTAL RESPONSES  
TO BLUE PILOT INTERROGATORIES/REQUESTS FOR PRODUCTION OF DOCUMENTS  
SET I

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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' supplemental responses to Blue Pilot's first set of Interrogatories and Requests for Production of Documents (Blue Pilot Set I). Joint Complainants submit that they have fully answered Blue Pilot's Sets I and timely

supplemented their responses in this matter. For this reason and the additional reasons set forth below, the Company's Motion should be denied.

## I. INTRODUCTION

On July 30, 2014, Blue Pilot served Blue Pilot Sets I on the Joint Complainants.<sup>1</sup> Blue Pilot Sets I consists of 38 interrogatories to the OCA, 33 interrogatories to the OAG, 53 Requests for Production of Documents (RPDs) to the OCA, and 53 RPDs to the OAG. Via teleconference on August 5, 2014, Joint Complainants communicated their objections to Sets I to Blue Pilot and attempted to resolve the objections. Following that conversation, on August 7, 2014, Joint Complainants provided Blue Pilot with a written summary of their objections to Blue Pilot Sets I, and Blue Pilot provided Joint Complainants with a written response to Joint Complainants' objections in the same document. See Exhibit A, attached hereto (Joint Complainants' objections are in black; Blue Pilot's responses are in red). Upon receiving Blue Pilot's written responses, one objection remained outstanding between the parties related to Interrogatory Definitions 6 and 14 and RPD Definition #6, all of which required that drafts of documents as well as final versions of responsive documents be provided in responses. This objection, however, was resolved after additional telephone calls and emails between OCA counsel and Blue Pilot counsel. The final resolution was reached on August 8, 2014. See Exhibit B, which contains the emails exchanged by counsel.<sup>2</sup> As such, Joint Complainants did not serve objections.

Thereafter, Joint Complainants had served all of their responses to Blue Pilot's Sets I by August 28, 2014, and have since supplemented their responses several times pursuant to discovery

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<sup>1</sup> Blue Pilot Sets I included Interrogatories Set I and Requests for Productions of Documents Set I directed to the OCA and included Interrogatories Set I and Requests for Productions of Documents Set I directed to the OAG. These data requests are attached to Blue Pilot's Motion to Compel as Exhibit I.

<sup>2</sup> Also addressed in one of these emails was Joint Complainants' request for a clarification of Instruction 12 relating to Blue Pilot Set II directed to the OCA.

requirements. See Motion to Compel at FN 2 and Exhibits 5-15 attached to the Motion. On August 22, 2015, Blue Pilot’s counsel sent a “meet and confer” letter to OAG explaining “numerous deficiencies” in OAG’s responses to Blue Pilot Sets I. See Exhibit C, attached hereto. On August 26 and 28, 2014, Blue Pilot’s counsel sent “meet and confer” letters to OCA explaining “numerous deficiencies” in OCA’s responses to Blue Pilot Sets I. See Exhibit D, attached hereto. Also on August 26, 2014, Blue Pilot served Set II directed to the OCA and Set II directed to the OAG, which data requests sought much of the same information already provided in the Joint Complainants’ responses to Sets I.<sup>3</sup>

The parties convened a teleconference to discuss the “meet and confer” letters relating to Sets I on August 28, 2014. Present on this teleconference was Blue Pilot counsel Mark Robeck, Catherine Wilmarth and Daniel Blynn; OAG counsel John Abel and Margarita Tulman; and OCA counsel Candis Tunilo, Kristine (Robinson) Marsilio and Dianne Dusman. During the call, Joint Complainants informally provided additional information to Blue Pilot’s counsel and the parties reached an agreement regarding additional information that Joint Complainants would provide to Blue Pilot. On September 2 and 9, 2014, counsel for OCA provided additional information via emails to Blue Pilot’s counsel and updates regarding when the remaining additional information would be provided. See Exhibit G, attached hereto. The remaining additional information was provided by OCA to counsel for Blue Pilot during an in-person settlement meeting on September 10, 2014. On September 5, 2014, OAG sent a letter to counsel for Blue Pilot attaching additional

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<sup>3</sup> Regarding Blue Pilot Sets II, which sought much of the same information as Blue Pilot Sets I, the Joint Complainants and counsel for Blue Pilot convened a teleconference on September 3, 2014, to discuss Joint Complainants’ objections to Blue Pilot Sets II. The OCA and Blue Pilot had reached a full resolution of the OCA’s objections to Blue Pilot Set II, and Blue Pilot’s counsel memorialized that in an email dated September 11, 2014. See Exhibit E, attached hereto. Specifically, counsel for Blue Pilot stated: “[a]ccordingly, all issues raised by OCA in its Objections now have been resolved.” Id. On September 25, 2014, however, Blue Pilot filed a Motion to Compel, *inter alia*, OCA’s responses to Blue Pilot Set II. The parties again resolved their discovery dispute, and counsel for Blue Pilot sent a letter to the ALJs on September 30, 2014, advising the ALJs that a ruling on the motion was no longer needed and stating: “BPE has received much of the information that it requested and is willing to forego the receipt of other material that was the subject of the Motion.” See Exhibit F, attached hereto.

information and summarizing the parties' agreements regarding responses to Sets I directed to OAG. See Exhibit H, attached hereto.

No other issues regarding Joint Complainants' responses to Blue Pilot Sets I were raised until over one year later when counsel for Blue Pilot sent letters dated September 28, 2015, to counsel for Joint Complainants regarding insufficient responses to Blue Pilot Sets I. See Exhibits 16 and 17, attached to the Motion to Compel. Via emails dated September 29 and 30, 2015, Joint Complainants explained that the issues raised in the September 28, 2015, letters have already been resolved. See Exhibit G, attached hereto. A teleconference was convened by the parties on October 1, 2015, wherein Joint Complainants explained that an agreement had been reached regarding responses to Blue Pilot Sets I during the teleconference of August 28, 2014, which had been convened to discuss the Company's "meet and confer" letters. Later on October 1, 2015, counsel for Blue Pilot requested that Joint Complainants provide a summary of the agreement reached on August 28, 2014. Counsel for OCA replied that Joint Complainants would "do our best to provide a summary of the agreement reached on August 28, 2014 call as soon as we can," but that it could take some time given other pressing matters. See Exhibit I, attached hereto.

Regardless, on October 16, 2015, Blue Pilot filed a Motion to Compel Joint Complainants' Supplemental Responses to Blue Pilot Set I. Specifically, in its Motion to Compel, Blue Pilot requests the ALJs to compel the OCA to "fully supplement and respond to Set I, including Interrogatory Nos. 2, 15-27, and 34-37, and Requests for Production Nos. 4, 25-28, and 53 "and to compel the OAG "to fully supplement and respond to Interrogatories Nos. 2, 15-27, 29-31, and 37, and Requests for Production Nos. 4-5, 25-28, and 51." Motion to Compel at 20. In essence, Blue Pilot is seeking Joint Complainants to supplement their responses and provide "each and every factual basis that supports their claims in this proceeding." Motion to Compel at 2. Joint

Complainants submit that the Motion to Compel is moot because the parties reached an agreement regarding responses to Blue Pilot Sets I, and therefore, the Motion to Compel should be denied. Joint Complainants provide the following additional information.

## **II. LEGAL STANDARD**

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).

With regard to hearing preparation material, however, 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). Further, 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).

The Commission’s rules provide that parties may modify the discovery rules in Chapter 5 of the Commission’s regulations and that “parties are encouraged to exchange information on an informal basis.” 52 Pa. Code § 5.322.

### III. RESPONSE TO MOTION TO COMPEL

#### A. The Additional Information Sought by Blue Pilot Is Privileged Attorney Work Product.

In its Motion to Compel, Blue Pilot argues that the work product doctrine does not permit Joint Complainants to avoid their discovery obligation. Motion to Compel at 5-9. It is unclear to which interrogatories in Sets I Blue Pilot's argument pertains, as Blue Pilot fails to cite any specific interrogatories or RPDs in this section. Accordingly, Joint Complainants submit that Blue Pilot's argument that the work product doctrine does not permit Joint Complainants to avoid their discovery requests should be dismissed.

Nevertheless, as discussed extensively in Section I, above, Joint Complainants have served full and complete responses to Blue Pilot Sets I, to the extent required by the Commission's discovery rules, and have timely supplemented those responses as additional information became available. See Motion to Compel at FN 2 and Exhibits 5-15 attached to the Motion to Compel. Joint Complainants have produced everything in their possession that is responsive to Blue Pilot's Sets I, as agreed to by the parties and within the permissible scope of discovery. To the extent that Blue Pilot is seeking further information, it seems that in its Motion to Compel, Blue Pilot is seeking an order compelling Joint Complainants to produce supplemental responses to Blue Pilot Sets I that would disclose the attorneys' mental impressions, conclusions, opinions, or legal theories. Such information is attorney work product, which is beyond the permissible scope of discovery pursuant to 52 Pa. Code 5.323(a).

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).

While Blue Pilot fails to state what specific information it is seeking in this section of its Motion to Compel, Blue Pilot states that it “propounded Set I upon Joint Complainants in order to discover the factual basis behind Joint Complainants' allegations.” Motion to Compel at 5. Blue Pilot cites numerous cases in support of its position that it is entitled to this “factual” information.

Motion to Compel at 6. Joint Complainants submit, however, that Blue Pilot already has all applicable facts<sup>4</sup> in its possession, because it has the consumer and non-consumer testimonies and exhibits admitted into the record and has access to 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 the “factual basis behind [their] allegations,” which, in practice before the Commission, is completed in proposed findings of fact that are attached to a party’s main brief. To the extent that Blue Pilot is seeking information that was received from consumers prior to the filing of the Joint Complaint, Joint Complainants have already produced such information and timely supplemented when additional responsive information became available. Because Blue Pilot already has access to all of “facts” in this proceeding, it appears that Blue Pilot is seeking an order directing Joint Complainants’ to organize the facts for Blue Pilot. Such organization of facts would be completed by counsel, and therefore, equates to seeking Joint Complainants’ legal analysis of what facts support which of their allegations. Again, this is akin to requesting that Joint Complainants draft proposed findings of facts, which request would be ongoing because of the duty to supplement responses. Joint Complainants submit that such request is beyond the scope of permissible discovery.

Next, Blue Pilot asserts that a plaintiff may not shield the facts that support the allegations of a complaint from discovery. Motion to Compel at 6. Joint Complainants note that in this section, Blue Pilot does not assert that Joint Complainants have shielded any consumer, expert or other identities in this case nor does Blue Pilot provide any facts to support that conclusion. Joint Complainants again note that Blue Pilot also fails to identify to which interrogatories this argument pertains. Nevertheless, Joint Complainants submit that Blue Pilot knows the identities of the 97

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<sup>4</sup> Although not defined in Blue Pilot’s Motion to Compel, Joint Complainants submit that the term “facts” refers to record evidence upon which the ALJs could rely in their decision in this proceeding.

consumer witnesses whose testimony was served by Joint Complainants and which testimonies 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. Blue Pilot also knows the identities of the expert and other non-consumer witnesses that Joint Complainants will present in this matter.<sup>5</sup> 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. Accordingly, Joint Complainants have not, in any manner, hidden identities from Blue Pilot.

Blue Pilot asserts that several of the interrogatories that are subject to this Motion to Compel might be classified as “contention” interrogatories, and Blue Pilot concludes that “either way, Blue Pilot is entitled to discovery from Joint Complainants to learn the purported factual basis that Joint Complainants allege support their claims against Blue Pilot in this proceeding.” Motion to Compel at 6-7. Blue Pilot, however, does not specify which interrogatories may be classified as contention interrogatories. Regardless, Joint Complainants submit that Blue Pilot is not entitled to any more of a “factual basis” than Blue Pilot already has in its possession, whether any of the interrogatories in Set I are classified as contention interrogatories 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

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<sup>5</sup> The direct testimonies of these witnesses were served by Joint Complainants on October 20, 2015, pursuant to the litigation schedule.

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, upon which Blue Pilot relies 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 some interrogatories in Blue Pilot Sets I are classified as contention interrogatories to the extent that Blue Pilot is seeking Joint Complainants to set forth the factual bases that supports their claims, such a request impermissibly seeks strategy of counsel and would be unreasonably burdensome, as discussed in Section C, below. 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. As already stated, Blue Pilot has access to the same evidence admitted into the record to date as Joint Complainants. As such, Blue Pilot is seeking for Joint Complainants to organize the evidence for the Company. At the Commission, it is well established that the sort of legal analysis Blue Pilot is seeking here is provided in the form of proposed findings of fact attached to 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 Joint Complainants' legal analysis prior to receiving Joint Complainants' main brief assists in the goals of discovery.

Finally, Blue Pilot attempts to distinguish this case from Sedat regarding attorney work product privilege, arguing that here, Blue Pilot is merely seeking the factual basis for the allegations made in the Joint Complaint. Motion to Compel at 9. As noted above, Blue Pilot already has all applicable facts in its possession. Any further analysis is impermissible attorney work product. Based on the foregoing, Joint Complainants request that the Company's Motion to Compel Set I be denied.

B. Discovery Related to Expert Witnesses Sought by Blue Pilot Has Been Timely Provided.

In its Motion to Compel, Blue Pilot asserts that Joint Complainants' attempt to defer their discovery obligations to the future testimony of unspecified<sup>6</sup> experts is improper. Motion to Compel at 10. In this section, Blue Pilot again fails to identify the discovery responses to which

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<sup>6</sup> In its Motion, Blue Pilot states that Joint Complainants have not specified their expert witnesses. Motion to Compel at 10. Joint Complainants note that such information was provided to Blue Pilot in Joint Complainants' Responses to Blue Pilot Sets I-2 on August 20, 2014 (OAG) and August 22, 2014 (OCA). OAG supplemented this response on October 8, 2014 and August 18, 2015. OCA supplemented this response on October 10, 2014 and August 19, 2015. Joint Complainants also identified their expert witnesses in their Prehearing Memoranda dated August 19, 2014 and January 30, 2015.

this argument pertains. As such, Joint Complainants' submit that this argument should be dismissed.

Nevertheless, Joint Complainants submit that the Commission's regulations provide that discovery of facts known or opinions held by an expert may be properly responded to by: (1) identifying the expert(s) that will be called and the subject matter upon which the expert is expected to testify and (2) serving the written direct testimony of the expert(s) at least 20 days prior to the date on which the expert is scheduled to testify or in accordance with the litigation schedule established by the presiding officer. See 52 Pa. Code § 5.324(a)(2). Thus, to the extent that Joint Complainants responded to discovery requests in Blue Pilot Sets I by identifying the expert witnesses who would provide information responsive to the requests in his/her expert testimonies, such a response is permissible pursuant to the Commission's regulations. Thereafter, on October 20, 2015, Joint Complainants served their expert testimonies, providing additional information responsive to Blue Pilot Sets I, which is consistent with Joint Complainants' responses to Sets I indicating that such information would be provided at that time. As the expert testimonies have been served in this proceeding, Blue Pilot's argument set forth in Section B of its Motion to Compel is moot.

C. Joint Complainants' Responses to Blue Pilot Sets I Directing the Company to Evidence in the Record Are Proper, as any Further Analysis of Facts in the Record Is Attorney Work Product and Unreasonably Annoying and Burdensome.

Blue Pilot argues that it is not appropriate for Joint Complainants to "defer to the entire record as support for each individual allegation against Blue Pilot." Motion to Compel at 10. Again, Blue Pilot again fails to identify any discovery responses to which this argument pertains. As such, Joint Complainants submit that this argument should be dismissed.

Nevertheless, while Blue Pilot fails to cite to any specific discovery responses in this section of its Motion to Compel, Blue Pilot requests that the ALJs order Joint Complainants to supplement their responses to Blue Pilot Sets I with the specific facts that support their allegations. To the extent Blue Pilot requested specific facts that support Joint Complainants' allegations in Sets I, and Joint Complainants' responded by directing Blue Pilot to the evidence in the record, such a response is proper, as requiring any further analysis of these facts constitutes attorney work product, as discussed in Section III.A, above, and is 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). Supplementing Sets I as requested by Blue Pilot would require Joint Complainants to analyze and identify any evidence that could support any of the allegations in their Joint Complaint. Joint Complainants have served the written testimony of approximately 97 consumer witnesses, 49 of whom provided additional testimony at the hearings on March 30 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 and the Commission's regulations and orders. Additionally, the Joint Complainants served expert and other non-consumer testimonies on October 20, 2015, pursuant to the litigation schedule, which contain further evidence that supports Joint Complainants' allegations in this proceeding and which Joint Complainants will seek to have admitted into the record in this matter at hearings in February 2016. 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 and to supplement as additional evidence in admitted into the record would be unreasonably annoying and burdensome.

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 pursuant to the litigation schedule. Furthermore, the record in this proceeding is not closed, and Joint Complainants may introduce additional evidence to support their allegations. Joint Complainants also note that such an analysis is open to interpretation, and Joint Complainants' strategy and opinions regarding which statements and/or exhibits support an allegation 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 admitted into the record is unreasonably annoying and burdensome.

Blue Pilot also asserts that "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 11. Joint Complainants submit that such an analysis is open to interpretation. Joint Complainants' opinions 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 that the supplemental information Blue Pilot seeks in Sets I impermissibly seeks attorney work product. Based on the foregoing, Joint Complainants request that the Company's Motion to Compel Sets I be denied.

D. Joint Complainants Have Timely Supplemented Their Responses.

Blue Pilot also asserts that Joint Complainants must supplement their Sets I discovery responses. Motion to Compel at 11-12. Again, Joint Complainants note that in this particular section, Blue Pilot fails to identify which discovery responses Joint Complainants have failed to supplement. Rather, Blue Pilot denies that any agreement regarding Joint Complainants' objections and responses to Blue Pilot Sets I exists. This denial is made in light of Joint Complainants' provision of letters and emails between Blue Pilot and Joint Complainants that support the existence of an agreement and detail some of the terms of the agreement. The events leading up to the agreement regarding Sets I and relevant events that took place after the agreement was reached are discussed at length in Section I, above. Joint Complainants maintain that they have fully responded to Blue Pilot Sets I pursuant to the agreement and have timely supplemented their Sets I responses.<sup>7</sup> Joint Complainants have produced everything in their possession that is responsive to Blue Pilot's Sets I, as agreed to by the parties and within the permissible scope of discovery.

**IV. SPECIFIC DISCOVERY REQUESTS SOUGHT TO BE SUPPLEMENTED**

A. Joint Complainants Have Provided Full and Complete Responses to Blue Pilot Interrogatories Sets I-15 through I-19.

Blue Pilot asserts that Joint Complainants' responses to Interrogatories Sets I-15 through I-19 "fail to answer the interrogatories." Motion to Compel at 13. Blue Pilot Interrogatories Sets I-15 through I-19 request Joint Complainants to "state all facts in full and complete detail that support your allegation, and the manner in which you intend to prove" that allegation as alleged in

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<sup>7</sup> Of note, Blue Pilot cites to the affidavits attached to Joint Complainants' Motion for Entry of Judgment as evidence to prove claims in this proceeding. Joint Complainants submit that the affidavits were attached to the Motion for use by the ALJs in resolving the Motion for Entry of Judgment; the affidavits will not be considered by the ALJs for purposes of their decision on the Joint Complaint after full litigation unless the affidavits are admitted into the record. Currently, the affidavits are not in the record.

the Joint Complaint. As discussed extensively in Section I, above, Joint Complainants have served full and complete responses to Blue Pilot Sets I pursuant to the agreement reached by the parties' counsel and have timely supplemented those responses as additional information became available.

Additionally, as discussed in Section III.A., above, to the extent that Blue Pilot is seeking further information in responses to Blue Pilot Sets I-15 through I-19, Joint Complainants would be merely organizing information for Blue Pilot's counsel, which equates to disclosure of the attorneys' mental impressions, conclusions, opinions, or legal theories. Such information is attorney work product, which is beyond the permissible scope of discovery. See 52 Pa. Code § 5.323(a). Furthermore, as discussed in Section III.C., above, such a request is unreasonably annoying and burdensome. Discovery which would cause unreasonable annoyance or burden is not permitted at the Commission. See 52 Pa. Code § 5.361(a).

Blue Pilot has access to all the same facts as Joint Complainants, because it has the consumer testimonies and exhibits admitted into the record and access to the transcripts of the hearings on March 30-31, and April 1, 2015. These are the same facts that Joint Complainants will use to support their allegations in their main brief. Joint Complainants submit that it is unclear why Blue Pilot relies in its Motion to Compel on the affidavits that Joint Complainants attached to their Motion for Entry of Judgment. The purpose of those affidavits was to provide support for Joint Complainants' Motion for Entry of Judgment. Joint Complainants cannot rely on those affidavits in proving the allegations in their Joint Complaint unless the affidavits are admitted into the record. They do not become part of the record by attaching them to a motion. See e.g. 52 Pa. Code § 5.402.

Based on the foregoing, Joint Complainants request that the Company's Motion to Compel Joint Complainants' responses to Sets I-15 through I-19 be denied.

B. Joint Complainants Have Provided Full and Complete Responses to Blue Pilot Interrogatories Sets I-20 and RPDs Sets I-25 through I-28.

Blue Pilot Interrogatories Sets I-20 and RPDs Sets I-25 through I-28 seek the factual bases for allegations Joint Complainants have made against Blue Pilot. Blue Pilot asserts that Joint Complainants' responses to Blue Pilot Interrogatories Sets I-20 and RPDs Sets I-25 through I-28 "do not provide the facts sought in this Interrogatory and Requests for Production." Motion to Compel at 13. Joint Complainants have served full and complete responses to Blue Pilot Sets I pursuant to the agreement reached by the parties' counsel and have timely supplemented those responses as additional information became available.

Additionally, as discussed in Section III.A, above, to the extent that Blue Pilot is seeking further information in response to Blue Pilot Interrogatories Sets I-20 and RPDs Sets I-25 through I-28, Joint Complainants would be merely organizing information for Blue Pilot's counsel, which equates to disclosure of the attorneys' mental impressions, conclusions, opinions, or legal theories. Such information is attorney work product, which is beyond the permissible scope of discovery. See 52 Pa. Code § 5.323(a). Furthermore, as discussed in Section III.C., above, such a request is unreasonably annoying and burdensome. Discovery which would cause unreasonable annoyance or burden is not permitted at the Commission. See 52 Pa. Code § 5.361(a).

Blue Pilot has access to all the same facts as Joint Complainants, because it has the consumer testimonies and exhibits in the record and access to the transcripts of the hearings on March 30-31, and April 1, 2015. These are the same facts that Joint Complainants will use to support their allegations in their main brief. Joint Complainants submit that it is unclear why Blue Pilot relies in its Motion to Compel on the affidavits that Joint Complainants attached to their Motion for Entry of Judgment. The purpose of those affidavits was to provide support for Joint Complainants' Motion for Entry of Judgment. Joint Complainants cannot rely on those affidavits

in proving the allegations in their Joint Complaint unless the affidavits are admitted into the record. They do not become part of the record by attaching them to a motion. See e.g. 52 Pa. Code § 5.402.

Based on the foregoing, Joint Complainants request that the Company's Motion to Compel Joint Complainants' supplemental responses to Blue Pilot Interrogatories Sets I-20 and RPDs Sets I-25 through I-28 be denied.

C. Joint Complainants Have Provided Full and Complete Responses to Blue Pilot Interrogatories Sets I-21 Through I-27.

In its Motion to Compel, Blue Pilot seeks the factual basis regarding what standards Joint Complainants allege Blue Pilot should have followed and what Joint Complainants believe constitutes a compliant and adequate disclosure statement, as requested in Blue Pilot Interrogatories Sets I-21 through I-27. Motion to Compel at 15-16. In response to these requests, Joint Complainants identified the expert witness who would provide information responsive to these requests in his/her expert testimony pursuant to 52 Pa. Code § 5.324(a)(2).<sup>8</sup> The Commission's regulations provide that discovery of facts known or opinions held by an expert may be properly responded to by: (1) identifying the expert(s) that will be called and the subject matter upon which the expert is expected to testify and (2) serving the written direct testimony of the expert(s) at least 20 days prior to the date on which the expert is scheduled to testify or in accordance with the litigation schedule established by the presiding officer. See 52 Pa. Code § 5.324(a)(2). Thereafter, on October 20, 2015, Joint Complainants served their expert testimonies, providing additional information responsive to Blue Pilot Sets I, which is consistent with Joint

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<sup>8</sup> In its Motion, Blue Pilot states that Joint Complainants have not specified their expert witnesses. Motion to Compel at 16. Joint Complainants note that such information was provided to Blue Pilot in Joint Complainants' Responses to Blue Pilot Sets I-2 on August 20, 2014 (OAG) and August 22, 2014 (OCA). OAG supplemented this response on October 8, 2014 and August 18, 2015. OCA supplemented this response on October 10, 2014 and August 19, 2015. Joint Complainants also identified their expert witnesses in their Prehearing Memoranda dated August 19, 2014 and January 30, 2015.

Complainants' responses to Sets I indicating that such information would be provided at that time. As the expert testimonies have been served in this proceeding, Blue Pilot's argument that Joint Complainants have not provided adequate responses to Interrogatories Sets I-21 through I-27 is moot.

D. Joint Complainants Have Provided Full and Complete Responses to Blue Pilot Interrogatories to OAG Set I-30 through I-31 and Interrogatories to the OCA SET I-35 through I-36.

In its Motion to Compel, Blue Pilot seeks the “ ‘elements of cost and profits that [Joint Complainants] believe can be included in an EGS’s determination of a rate ... under a variable rate plan,’ as well as ‘all limitations to the rate,’ ” as requested in Blue Pilot Interrogatories Sets I-30-31 (OAG) and I-35-36 (OCA). Motion to Compel at 17. In response to these requests, Joint Complainants identified Dr. Steven L. Estomin as the expert witness who would provide information responsive to these requests in his expert testimony pursuant to 52 Pa. Code § 5.324(a)(2).<sup>9</sup> The Commission’s regulations provide that discovery of facts known or opinions held by an expert may be properly responded to by: (1) identifying the expert(s) that will be called and the subject matter upon which the expert is expected to testify and (2) serving the written direct testimony of the expert(s) at least 20 days prior to the date on which the expert is scheduled to testify or in accordance with the litigation schedule established by the presiding officer. See 52 Pa. Code § 5.324(a)(2). Thereafter, on October 20, 2015, Joint Complainants served their expert testimonies, providing additional information responsive to Blue Pilot Sets I, which is consistent with Joint Complainants’ responses to Sets I indicating that such information would be provided at

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<sup>9</sup> In its Motion, Blue Pilot states that Joint Complainants have not specified their expert witnesses. Motion to Compel at 17. Joint Complainants note that such information was provided to Blue Pilot in Joint Complainants’ Responses to Blue Pilot Sets I-2 on August 20, 2014 (OAG) and August 22, 2014 (OCA). OAG supplemented this response on October 8, 2014 and August 18, 2015. OCA supplemented this response on October 10, 2014 and August 19, 2015. Joint Complainants also identified their expert witnesses in their Prehearing Memoranda dated August 19, 2014 and January 30, 2015.

that time. As Dr. Estomin's direct testimony has been served pursuant to the litigation schedule in this proceeding, Blue Pilot's arguments regarding Interrogatories Sets I-30-31 (OAG) and I-35-36 (OCA) are moot.

E. Joint Complainants Have Provided Full and Complete Responses to Blue Pilot Interrogatories to OAG Set I-29 and Interrogatories to the OCA I-34 and RPDs Sets I-4, 51, and 53.

Blue Pilot submits in its Motion to Compel, "Joint Complainants have still not provided any clarity on what documents they plan to use at the evidentiary hearing and what documents they otherwise intend to use to prove the allegations made in the Joint Complaint." Motion to Compel at 18. As such, Blue Pilot requests the ALJs to order Joint Complainants to supplement their responses to Blue Pilot Interrogatories Set I-29 (OAG) and I-34 (OCA) and RPDs Sets I-4, 51, and 53. Id.

In their responses to Interrogatories and RPDs, Joint Complainants stated that they may use any document identified or provided in their discovery responses or other parties' discovery responses or produced pursuant to subpoena. To the extent Blue Pilot requested that Joint Complainants produce documents, the Joint Complainants fully responded, within the permissible scope of discovery, and produced the documents. As such, Joint Complainants maintain that they may use any those documents as tangible evidence in this proceeding. Joint Complainants submit that any documents attached as exhibits by consumers to their direct testimonies were documents that had already been produced to Blue Pilot in responses to discovery to the extent Joint Complainants had them in their possession. Blue Pilot, however, has not identified any specific exhibit in the record that was not produced by Joint Complainants in responses to discovery. As such, Blue Pilot has identified nothing that supports its contention of a "trial by ambush."

By way of further response, as discussed extensively in Section I, above, Joint Complainants have served full and complete responses to Blue Pilot Sets I pursuant to the agreement reached by the parties' counsel and have timely supplemented those responses as additional information became available. Joint Complainants have provided full and complete responses to Blue Pilot Sets I and have no further responsive documents that are within the permissible scope of discovery to produce. If any further responsive documents become available, Joint Complainants will produce them as required by the Commission's discovery rules.

Additionally, as discussed in Section III.A., above, to the extent that Blue Pilot is seeking further information in responses to Blue Pilot Interrogatories Set I-29 (OAG) and Set I-34 (OCA) and RPDs Sets I-4, 51, and 53, Joint Complainants would be organizing information for Blue Pilot's counsel, which equates to disclosure of the attorneys' mental impressions, conclusions, opinions, or legal theories. Such information is attorney work product, which is beyond the permissible scope of discovery. See 52 Pa. Code § 5.323(a). Furthermore, as discussed in Section III.C., above, such a request is unreasonably annoying and burdensome. Discovery which would cause unreasonable annoyance or burden is not permitted at the Commission. See 52 Pa. Code § 5.361(a).

Based on the foregoing, Joint Complainants request that the Company's Motion to Compel Joint Complainants' responses to Blue Pilot Interrogatory Set I-29 (OAG) and Set I-34 (OCA) and RPDs Sets I-4, 51, and 53 be denied.

F. Joint Complainants Have Provided Full and Complete Responses to Blue Pilot Interrogatories Sets I-2.

Blue Pilot asserts that Joint Complainants have failed to identify the individuals who will provide testimony on behalf of Joint Complainants in this proceeding. Motion to Compel at 19-20. Specifically, Blue Pilot states that OAG did not properly identify Dr. Steven L. Estomin or

Barbara R. Alexander in OAG's responses to Blue Pilot Interrogatories Set I-2. Motion to Compel at 19. Yet, Blue Pilot goes on to acknowledge that OCA did identify Dr. Steven L. Estomin or Barbara R. Alexander in the OCA's responses to Blue Pilot Interrogatories Set I-2. Motion to Compel at 19. Joint Complainants note that they identified these expected expert witnesses in their Prehearing Memoranda dated August 19, 2014, and January 30, 2015, as well as in their responses to discovery. Blue Pilot then goes on to argue that Joint Complainants did not provide an adequate description of the expected subject matter upon which the experts were expected to testify. Id. Joint Complainants submit that they have provided full and complete responses to Blue Pilot Interrogatories Sets I-2 and timely supplemented when additional information became available. See Exhibits 5, 6, 9, 10, 14, and 15, attached to the Motion to Compel, as the responses speak for themselves.

Based on the foregoing, Joint Complainants request that the Company's Motion to Compel Joint Complainants' responses to Blue Pilot Interrogatories Sets I-2 be denied.

G. Joint Complainants Have Provided Full and Complete Responses to Blue Pilot Interrogatories Sets I-37.

Blue Pilot requests the ALJs order Joint Complainants "to specifically state which consumer statement contains an alleged admission [by Blue Pilot] and whether this consists of every admission Joint Complainants claim was made by Blue Pilot or otherwise supplement their response[s]" to Sets I-37. Motion to Compel at 20. As discussed extensively in Section I, above, Joint Complainants have served full and complete responses to Blue Pilot Sets I pursuant to the agreement reached by the parties' counsel and have timely supplemented those responses as additional information became available.

Since, Joint Complainants have already produced the information they have received from consumers, within the permissible scope of discovery, to Blue Pilot through responses and

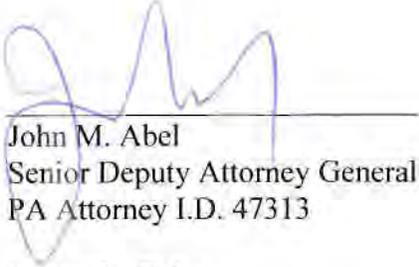
supplemental responses, both Blue Pilot's counsel and Joint Complainants' counsel have access to the same information for purposes of identifying admissions by Blue Pilot. Therefore, as discussed in Section III.A., above, to the extent that Blue Pilot is seeking further information in responses to Blue Pilot Sets I-37, Joint Complainants would be merely organizing information for Blue Pilot's counsel, which equates to disclosure of the attorneys' mental impressions, conclusions, opinions, or legal theories. Such information is attorney work product, which is beyond the permissible scope of discovery. See 52 Pa. Code § 5.323(a). Furthermore, as discussed in Section III.C., above, such a request is unreasonably annoying and burdensome. Discovery which would cause unreasonable annoyance or burden is not permitted at the Commission. See 52 Pa. Code § 5.361(a).

Based on the foregoing, Joint Complainants request that the Company's Motion to Compel Joint Complainants' responses to Sets I-37 be denied.

### III. CONCLUSION

WHEREFORE, the Joint Complainants respectfully request that Blue Pilot's Motion to Compel Supplemental Responses to Blue Pilot Sets I 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

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Counsel for:

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

Date: October 21, 2015

213203



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Counsel for:

Tanya J. McCloskey  
Acting Consumer Advocate

# EXHIBIT A

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.

# EXHIBIT B

## Tunilo, Candis

---

**From:** Robeck, Mark <MRobeck@KelleyDrye.com>  
**Sent:** Thursday, August 7, 2014 9:59 PM  
**To:** Tunilo, Candis  
**Cc:** Moury, Karen; jabel@attorneygeneral.gov; mtulman@attorneygeneral.gov; Robinson, Kristine E.; Blynn, Daniel S.  
**Subject:** Re: Summary of OAG/OCA objections to Blue Pilot Set I

If prepared in connection with litigation, yes. If comments to proposed rules and the like, no.

Sent from my iPhone

On Aug 7, 2014, at 8:55 PM, "Tunilo, Candis" <CTunilo@paoca.org> wrote:

Thank you for the reply, Mark. One follow-up question: With regard to the first bullet point RE providing drafts of documents, do you agree that providing drafts of documents prepared by OAG or OCA attorneys for submission to the PUC or other agencies or courts, etc are also beyond the permissible scope of discovery?

Thanks, Candis

---

**From:** Robeck, Mark [<mailto:MRobeck@KelleyDrye.com>]  
**Sent:** Thursday, August 07, 2014 8:35 PM  
**To:** Tunilo, Candis; Moury, Karen  
**Cc:** [jabel@attorneygeneral.gov](mailto:jabel@attorneygeneral.gov); [mtulman@attorneygeneral.gov](mailto:mtulman@attorneygeneral.gov); Robinson, Kristine E.; Blynn, Daniel S.; Robeck, Mark  
**Subject:** RE: Summary of OAG/OCA objections to Blue Pilot Set I

Our responses are reflected in red in the attached.

---

**Mark R. Robeck | Partner**  
**Kelley Drye & Warren LLP**  
202.342.8675 | [mrobeck@kelleydrye.com](mailto:mrobeck@kelleydrye.com)

---

**From:** Tunilo, Candis [<mailto:CTunilo@paoca.org>]  
**Sent:** Thursday, August 07, 2014 4:45 PM  
**To:** Moury, Karen; Robeck, Mark  
**Cc:** [jabel@attorneygeneral.gov](mailto:jabel@attorneygeneral.gov); [mtulman@attorneygeneral.gov](mailto:mtulman@attorneygeneral.gov); Robinson, Kristine E.  
**Subject:** Summary of OAG/OCA objections to Blue Pilot Set I  
**Importance:** High

Karen and Mark: attached is a summary of the OAG/OCA objections to Blue Pilot Set I. We've noted the objections for which we are awaiting a response from Blue Pilot. As Karen is aware, it is expected that

parties make a reasonable effort to resolve objections before written objections are submitted. Mark indicated that he would get back to us today, but we have not yet heard from him.

Joint Complainants' objections are due tomorrow. We would appreciate a response from Blue Pilot regarding whether it can accept the objection resolutions suggested by OAG and OCA in the attached document.

Thank you,

Candis A. Tunilo  
Assistant Consumer Advocate  
Office of Consumer Advocate  
555 Walnut Street  
5th Floor, Forum Place  
Harrisburg, PA 17101-1923  
(717) 783-5048

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## Tunilo, Candis

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**From:** Moury, Karen O. <karen.moury@bipc.com>  
**Sent:** Friday, August 08, 2014 11:52 AM  
**To:** Tunilo, Candis; mtulman@attorneygeneral.gov  
**Subject:** BPE - Discovery Objections

Candis and Rita,

As to Definition #6 - "Document" and "document," BPE agrees to the exclusion of "preliminary drafts, versions or revisions" to the extent they would constitute privileged attorney-client work product. So, I think we're all squared away on that one.

Regarding Instruction #12 requesting documents which corroborate the answer, BPE is not asking for a comprehensive search, but rather a search where you would reasonably expect to find responsive documents. BPE does not believe that requires a search of every file or every email custodian. BPE is not asking OCA and AG to search your ESI beyond your technical limitations, assuming you agree that BPE is likewise not obligated to conduct such a search.

If you wish to further discuss Instruction #12, please give me a call. Thank you.

Karen

**Karen O. Moury**  
Attorney at Law

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Suite # 500  
Harrisburg, PA 17101-1357  
717 237 4820 (o)  
717 571 1420 (c)  
[karen.moury@bipc.com](mailto:karen.moury@bipc.com)

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**Buchanan Ingersoll & Rooney PC**

KNOW GREATER PARTNERSHIP

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# EXHIBIT C

KELLEY DRYE & WARREN LLP

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AFFILIATE OFFICE  
MUMBAI, INDIA

August 22, 2014

**VIA FIRST-CLASS AND ELECTRONIC MAIL**

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

**Re: Com. v. Blue Pilot Energy, LLC, No. C-2014-2427655 (Pa. PUC)**

Dear Rita:

This is a meet and confer letter regarding complainant Commonwealth of Pennsylvania's ("OAG") responses to Blue Pilot Energy, LLC's first sets of interrogatories and requests for production. As explained more fully below, OAG's respective discovery responses suffer from numerous deficiencies. I would like to schedule a telephone conversation to discuss the issues raised herein with respect to OAG's discovery responses, and am generally available next Tuesday through Thursday next week (August 26, 27, and 28). Please respond as to your availability.

OAG's Answers to Interrogatory Nos. 5-9, 13-16, 18, and 20; and Responses to Requests for Production Nos. 5-10, 16-19, 23, 24, 30, 31, 38, 39, 40, 41, 44, 45, 46, 47, 51, and 52. In its response to each of these discovery requests, OAG has responded in whole or in part that: "The Commonwealth submits that to our knowledge and understanding this request will be responded to, as appropriate, by the Office of Consumer Advocate." The discovery rules require that the "party" to whom an interrogatory or document request is served must provide "full and complete" responses to each interrogatory and document request unless an objection is made.<sup>1</sup> 52 Pa. Code § 5.342(a)(4); *see also* 52 Pa. Code § 5.349(d) ("The party upon whom the request [for production] is served" shall respond to the specific request); *Poulos v. Com.*, 575 A.2d 967,

<sup>1</sup> OAG did not serve objections to any aspect of BPE's first sets of discovery.

Margarita Tulman  
August 22, 2014  
Page Two

969-70 (Pa. Cmwlth. 1990) (entering judgment of *non pros* against plaintiff Commonwealth where, although it timely submitted responses to defendant's discovery requests, the responses were incomplete and insufficient, and consisted of "circuitous explanation[s]" as to why the Commonwealth could not answer each of defendant's discovery requests).

As you know, BPE served separate, independent sets of discovery on joint complainant Office of Consumer Advocacy ("OCA"), and expects that OCA will fully and completely respond to each of those requests. While some of the discovery requests served upon OAG and OCA overlap, that does not relieve OAG of its responsibility to respond to each and every one of the requests that were served upon it. OAG may not simply "pass the buck" to its joint complainant to answer questions that BPE directed to OAG. OAG has availed itself of the privilege of filing a lawsuit and taking discovery from BPE, but, as the Commission has made clear, having such "full participation rights also carry obligations such as . . . the obligation to respond to discovery requests . . ." *Interpretation of Procedural Rules Regarding Party Status, Rights and Obligations*, No. M-00061975, 2007 WL 7232877 (Pa. PUC Apr. 18, 2007).

BPE is entitled to discover all of the factual bases underlying the allegations contained in the Joint Complaint from each of the complainants in this case. The facts and documents OAG has may be the same as the ones OCA possesses; they may not. BPE does not know. For those reasons, OAG is required to respond to each of BPE's discovery requests fully and completely in its own right. Please provide complete responses to each of BPE's interrogatories and produce any and all documents within OAG's possession, custody, or control in response to BPE's requests for production as soon as possible. If OAG has no responsive information or documents, please so state.

OAG's Answer to Interrogatory No. 20. BPE is entitled to discovery the specific facts underpinning each allegation in the Joint Complaint. Thus, it served Interrogatory No. 20 on OAG, which states, "[s]et forth in full and complete detail all of the facts that support your allegations contained in Paragraphs 13, 21, 25, 26, 27, 29, 30, 32, 34, 35, 36, 37, 41, 42, 48, 50, 54, and 58 of the Joint Complaint." In response, OAG answered broadly and vaguely, in relevant part: "Please see the response to RPD-2 for the facts that support the allegations contained in [all but five of the Joint Complaint paragraphs identified above]."<sup>2</sup> By way of further answer, it is the Commonwealth's understanding and belief that a responsive answer will be found in the testimony of expert witnesses."

As a preliminary matter, generally, a party may produce records in lieu of an answering an interrogatory when the burden of extracting the requested information would be substantially equal for either party. However, "[i]f the answering party gives a vague description of the record

<sup>2</sup> OAG further explained that "the facts that support the allegations contained in [the five other paragraphs] will be responded to, as appropriate, by the [OCA]."

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sought, the burden of discovery imposed upon the interrogating party would be heavier than that upon the answering party due to the latter's familiarity with said records." *Northampton Borough Med. Auth. v. Remsco Assocs. Inc.*, 22 Pa. D & C. 3d 541, 544 (Pa. C.P. 1981) (interrogatory answer referring requesting party to "various letters of transmittal of Remsco and the engineer" held incomplete for lack of specificity); *see also Gerffert Co., Inc. v. Dean*, No. 09 CV 266, 2012 WL 2054243, at \*3 (E.D.N.Y. June 6, 2012) ("Although referencing responsive documents is permitted . . ., to simply state 'see documents produced herewith' without a reference to Bates numbers or other description identifying the documents responsive to each request is insufficient"). By identifying all of the documents produced in response to Request for Production No. 2, OAG has failed to provide the level of specificity required under Pennsylvania law; it is forcing BPE to find the proverbial needle in a haystack of documents. Moreover, it is unclear from OAG's response which of the documents it produced in response to Request for Production No. 2 supports the allegations set forth in the various individual paragraphs of the Joint Complaint. Please identify, by Bates number, each document produced by OAG that supports the allegations set forth in each of the above-identified paragraphs of the Joint Complaint as soon as possible.

OAG's Answers to Interrogatory Nos. 21-27. Count IV of the Joint Complaint alleges that BPE lacked good faith in the manner that it handled consumer complaints about the variable rates charged on their bills – *i.e.*, that BPE's complaint handling processes failed to satisfy the standards set by Commission regulations and orders in a number of respects. BPE seeks discovery into what specifically it failed to do, what those standards are, and what it should have done to avoid assertion of Count IV against it. To that end, Interrogatory Nos. 21-27 requested that OAG provide "in full and complete detail, and without resort to legal conclusions, what constitutes what *you believe*" (emphasis added) to be or constitute "adequate staffing" of an EGS call center (No. 21); "reasonable access" to an EGS's representatives for purposes of submitting complaints (No. 22); an EGS's "proper investigation" into a customer dispute (No. 23); "proper notification" to customers of the results of an EGS's investigation into a dispute when such investigation is conducted (No. 24); and, an EGS's "good faith, honesty and fair dealing in its dealings with customers" (No 25).

Another allegation that is cornerstone to the Joint Complaint is that the disclosure statement for BPE's variable rate plans does not comply with Commission regulations or orders, or Pennsylvania law. BPE simply seeks to discover from OAG what, in fact, constitutes a legally compliant and adequate disclosure statement. Such a disclosure statement must exist or have existed, otherwise OAG would have no legal basis to assert that BPE's disclosure statement does not pass muster in the first instance. Thus, Interrogatory Nos. 26 and 27 request OAG to "[s]et forth in full and complete detail, and without resort to legal conclusions, what *you believe* constitutes an EGS disclosure statement for a variable rate plan that is compliant with Commission orders and regulations, and Pennsylvania law," (emphasis added) and to "[i]dentify

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any and all EGS disclosure statements for variable rate plans that you believe comply with Commission orders and regulations, and Pennsylvania law.....”

OAG’s rote answer to each of the above-described interrogatories is that “[i]t is the Commonwealth’s understanding and belief that a responsive answer will be found in the testimony of expert witnesses.” Those answers are wholly unresponsive to the interrogatories posed. BPE is not seeking to know what an expert will testify regarding what constitutes proper complaint handling or a sufficient disclosure statement; rather, it is seeking to know what support OAG had for its allegations at the time it filed the Joint Complaint. BPE also seeks to discover what OAG, *itself*, understands would comply with Commission regulations or orders, and Pennsylvania law. If OAG had no support for its claims, cannot explain what it believes constitutes proper, good faith complaint handling, and/or cannot identify what it understands to constitute a legally sufficient disclosure statement, it should so state. Accordingly, please provide detailed responses to Interrogatory Nos. 21 to 27, supplying the information specifically sought as soon as possible.

Interrogatory No. 33. “[T]he scope of discovery is very broad.” *In re Pennsylvania Tel. Ass’n*, M-00031772, 2005 WL 3440840 (Pa. PUC Dec. 6, 2005). Accordingly, many of BPE’s document requests seek documents and/or correspondence that “concern,” “refer,” and/or “relate” to a variety of issues relevant to the claims asserted in the Joint Complaint, and specifically contemplate the production of, among other things, email and other electronically stored information (“ESI”). Indeed, the definition of “document” in BPE’s requests for production specifically references ESI, such as email, word processing files, recordings of conversations, and Excel spreadsheets. Discovery of a party’s ESI is no different than discovery of its hard-copy documents and specifically is permitted in Pennsylvania; it is a standard element of discovery in civil litigation. *See, e.g., PTSI, Inc. v. Haley*, 71 A.3d 304, 316 (Pa. Super. 2013) (noting that the discovery of ESI is governed by the same standards “as with all discovery” in Pennsylvania).

Interrogatory No. 33 requests OAG to:

Set forth in full and complete detail every step and/or action you took to identify and locate documents and information responsive to these Interrogatories and BPE’s first set of requests for production, *including, but not limited to, how and where you searched for and collected responsive documents and ESI. If you utilized any keywords or search terms/phrases when searching ESI, please list each term or phrase, and the corresponding number of documents that hit on each term.* (emphasis added)

Yet, OAG’s answer to this interrogatory merely states that you “located and searched through the consumer complaints filed against Blue Pilot . . .” Electronic discovery requires much more than

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simply sifting through several hundred consumer complaints. At the very least, OAG is required to search the ESI of the 37 individuals' ESI who it identified as being "likely to possess information relevant to the Subject Matter of this Action" in response to Interrogatory No. 1, and any other relevant custodian's ESI for responsive electronic documents. Based on OAG's answer to Interrogatory No. 33, it does not appear to have done so.

Please supplement OAG's response to Interrogatory No. 33 and state whether it has complied with its electronic discovery obligations and, if it has performed a search for responsive ESI, identify what search tool it used, whose ESI was searched, and what keywords or search terms/phrases were utilized. If OAG has not performed the required ESI search, please contact me immediately so that we can collaborate on a reasonable set of search terms and phrases.

OAG's Response to Request for Production No. 2. In its response to Request for Production No. 2, OAG states that unspecified "[e]-mails and documents between, among, or by the attorneys, agents, and support staff," "[m]emos between, among, or by the attorneys, agents, and support staff," and "[l]egal documents between, among, or by the attorneys and agents" were not produced on grounds that they are attorney work product. Similarly, OAG "submit[ted] that there are documents related to the review and summary of the complaints filed with the Bureau against [BPE] but claims attorney work-product privilege and investigative privilege" over them.

Instruction No. 3 to BPE's requests for production stated that "[i]f any document, ESI, or thing called for by a Request stated herein is withheld because [OAG] claim[s] that such document, ESI, or thing is protected under the attorney-client privilege, work product doctrine, or other privilege or doctrine" – as it has – OAG must provide a privilege log setting forth several types of information for each document withheld. A privilege log is necessary to enable BPE (and the PUC if necessary) to test the propriety of the privilege assertion. *T.M. v. Elwyn, Inc.*, 950 A.2d 1050, 1063 (Pa. Super. 2008) (party asserting privilege must provide privilege log or sufficiently detailed facts showing that the privilege was invoked to enable opposing party to test the invocation of privilege). "Without such a log, that part of the review process cannot begin." *Velocity Int'l, Inc. v. Celebrity Healthcare Solutions, Inc.*, No. 09-102, 2010 WL 2196423, at \*4 (W.D. Pa. June 1, 2010) (citing cases). As noted above, *supra* n.1, OAG did not object to that instruction. Thus, it must produce a privilege log setting forth the information identified in Instruction No. 3 on a document-by-document basis to allow BPE to test those privilege assertions. Please provide such privilege log as soon as possible.

OAG's Response to Request for Production No. 11. In Request for Production No. 11, BPE seeks "[a]ny and all documents containing any admission that you contend BPE made regarding the Subject Matter of this Action." OAG directed BPE to the entirety of the documents OAG produced in response to Request for Production 2 and "any consumer complaints which *may* include an admission by [BPE]." (emphasis added). BPE did not ask OAG for documents that "may" contain an admission but only those that do contain a BPE admission. Please identify as

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soon as possible, by Bates number, those specific documents produced in response to Request for Production No. 2 and any specific consumer complaints, which, *in fact*, contain any BPE admission, as requested by Request for Production No. 11. If no responsive documents exist, please so state.

OAG's Response to Request for Production No. 12. This production request seeks any and all BPE advertisements, marketing material, customer contracts, or disclosure statements independently within the Commonwealth's possession, custody, or control (*i.e.*, beyond the documents that BPE has produced to OAG and OCA in this Action). OAG's response, however, broadly directs BPE to "response to RPD-2 which reference consumer complaints." BPE is not seeking complaints in this Request but, rather, "BPE advertisements and/or marketing material, customer contracts, or disclosure statements." Please identify, by Bates number, any such documents independently within the Commonwealth's possession, custody, or control within the set of documents produced in response to Request for Production No. 2 or state that Commonwealth has no such responsive documents.

OAG's Responses to Requests for Production Nos. 26-31, 47, and 51. OAG's responses to each one of these document requests is the same: "Please see response to RPD-2. The Commonwealth would refer Blue Pilot to any and all documents used or written by the expert[s] in this case, including their report and testimony." As explained above in the discussion regarding OAG's answer to Interrogatory No. 20, OAG is required to identify, by Bates number, the specific documents that it produced in response to Request for Production No. 2, which are responsive to each specific Request for Production Nos. 26-31, 47, and 51. Moreover, please identify, by Bates number, the unspecified "documents used or written by the expert[s] in this case." Please provide such further responses as soon as possible so that BPE may continue to prepare its defense in this Action.

OAG's Response to Request for Production No. 34. OAG's response to this production request is that "[t]he Commonwealth does not *maintain* any documents" (emphasis added) called for by the request. It is unclear from that response, however, whether the Commonwealth does not, in fact, have such documents within its possession, custody, or control. Please confirm that, following the required search through its documents and ESI, described above, the Commonwealth has no responsive documents.

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OAG's Response to Request for Production No. 43. Rather than identifying any specific documents (or stating that it has none to produce) in its response to Request for Production No. 43, OAG has provided a narrative, cribbed heavily from the Joint Complaint, more appropriate for an interrogatory response. Please provide documents responsive to Request for Production No. 43 or state that it has none.

Sincerely,

  
Daniel Blynn

cc. Counsel of Record (via electronic mail)

# EXHIBIT D

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August 26, 2014

**VIA FIRST-CLASS AND ELECTRONIC MAIL**

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

**Re: Com. v. Blue Pilot Energy, LLC, No. C-2014-2427655 (Pa. PUC)**

Dear Candis:

This is a meet and confer letter regarding complainant Pennsylvania Office of Consumer Advocate's ("OCA") partial responses to Blue Pilot Energy, LLC's ("BPE") first sets of interrogatories and requests for production.<sup>1</sup>

As a preliminary matter, OCA produced its documents in hard-copy, paper format (individual documents paper-clipped and not stapled)<sup>2</sup> without any Bates numbers or confidentiality designations, despite specific instruction to produce responsive documents electronically in "single page .TIFF format, with an opt load file that is compatible with Concordance or similar document review tool" along with various metadata.<sup>3</sup> Production in such manner and format is a standard method of producing documents and specifically was requested here. Sedona Conference, *Cooperation Guidance for Litigators and In-House Counsel*, 11 (Mar. 2011) (identifying "[s]ingle or multi-page TIFF images, with Bates labels and confidentiality

<sup>1</sup> As of the date of this letter, OCA still has not produced responses to Interrogatory Nos. 29-33 of BPE's first set of interrogatories to OCA. Please advise when those responses will be forthcoming.

<sup>2</sup> We have spent considerable time trying to piece together documents in a number of instances where individual papers slipped free of the paper-clips.

<sup>3</sup> OCA did not object to that instruction or manner of production.

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designations” as a “typical production format”).<sup>4</sup> As I explained in my August 25, 2014 email to you, BPE will incur the costs associated with scanning and Bates numbering the documents OCA produced on August 22; however, all future OCA productions must be produced in an electronic manner with sequentially Bates-numbered pages (containing confidentiality designations as necessary).<sup>5</sup> We can recommend quality third-party electronic discovery vendors to assist OCA upon your request.

As explained more fully below, OCA’s respective discovery responses suffer from numerous other deficiencies. I would like to schedule a telephone conversation to discuss the issues raised herein with respect to OAG’s discovery responses, and am generally available next Tuesday or Wednesday, September 2 or 3. Please respond as to your availability.

OCA’s Answers to Interrogatory Nos. 3, 4, 10, and 11; and Responses to Requests for Production Nos. 13, 15, 20-22, 28, 32, 33, 35-37, 42-45, 48, and 49. In its response to each of these discovery requests, OCA has responded in whole or in part that BPE refer to joint complainant Commonwealth of Pennsylvania’s (“OAG”) responses. The discovery rules require

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<sup>4</sup> The Sedona Conference is a nonprofit legal policy research and education organization comprised of judges, attorneys, and electronic discovery experts dedicated to resolving electronic document production issues. Since 2003, the Conference has published a number of documents concerning ESI and is the recognized standard bearer for electronic discovery issues. Many courts, including those in Pennsylvania, expressly have endorsed its principles. *See, e.g., Susquehanna Commercial Fin., Inc. v. Vascular Resources, Inc.*, No. 1:09-CV-2012, (M.D. Pa. Dec. 1, 2010) (“In order to resolve disputes that arise regarding the production of metadata or ESI, courts have generally referred to the Sedona Principles and Sedona Commentaries, which are recognized as ‘the leading authorities on electronic document retrieval and production.’”) (citations omitted).

<sup>5</sup> In your August 26, 2014 email to me, you state that you are “not familiar with a requirement that a party incur costs to use a process for production because another party prefers it.” Unfortunately, “discovery always entails some degree of cost and inconvenience.” *Wyatt v. Kaplan*, 686 F.2d 276, 284 n.15 (5th Cir. 1982); *see also Econ Mktg. Inc. v. Side II Assocs. Ltd.*, No. 3975 Civil 1991, 1992 WL 573010, at \*3 (Pa. Cmwlth. Dec. 10, 1992) (“Pennsylvania courts have recognized that all discovery potentially involves some expense, annoyance or inconvenience”); *Michael v. Meier*, 8 F.R.D. 464, 477 (W.D. Pa. 1948) (“Every law suit is burdensome and expensive to the party litigants, but where it is found necessary to bring about a fair, impartial and thorough administration of justice, all sources of information must be made available regardless of expense or inconvenience [sic] resulting therefrom.”). It is simply a reality in civil litigation. Bates numbering is one of the most basic components of discovery – electronic or otherwise. It allows courts and parties to refer to documents in a simple manner, and greatly streamlines depositions and motions practice. Notably, courts have ordered parties who failed to produce documents with Bates numbers to pay the requesting party’s costs to number the produced documents. *See, e.g., Magnello v. TJJ Cos., Inc.*, No. 3:05CV1176, 2007 WL 4105322, at \*4 (D. Conn. Nov. 15, 2007). You co-complainant Commonwealth of Pennsylvania produced documents electronically (albeit not specifically in the format instructed) and with Bates numbering; BPE also produced Bates-stamped documents electronically. This is fundamental to the discovery process and OCA must do the same.

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that the “party” to whom an interrogatory or document request is served must provide “full and complete” responses to each interrogatory and document request unless an objection is made.<sup>6</sup> 52 Pa. Code § 5.342(a)(4); *see also* 52 Pa. Code § 5.349(d) (“The party upon whom the request [for production] is served” shall respond to the specific request); *Poulos v. Com.*, 575 A.2d 967, 969-70 (Pa. Cmwlth. 1990) (entering judgment of *non pros* against plaintiff Commonwealth where, although it timely submitted responses to defendant’s discovery requests, the responses were incomplete and insufficient, and consisted of “circuitous explanation[s]” as to why the Commonwealth could not answer each of defendant’s discovery requests).

As you know, BPE served separate, independent sets of discovery on joint complainant OAG. While some of the discovery requests served upon OCA and OAG overlap, that does not relieve OCA of its responsibility to respond to each and every one of the requests that were served upon it. OCA may not simply “pass the buck” to its joint complainant to answer questions that BPE directed to OCA. OCA has availed itself of the privilege of filing a lawsuit and taking discovery from BPE, but, as the Commission has made clear, having such “full participation rights also carry obligations such as . . . the obligation to respond to discovery requests . . .” *Interpretation of Procedural Rules Regarding Party Status, Rights and Obligations*, No. M-00061975, 2007 WL 7232877 (Pa. PUC Apr. 18, 2007).

BPE is entitled to discover all of the factual bases underlying the allegations contained in the Joint Complaint from each of the complainants in this case. The facts and documents OCA has may be the same as the ones OAG possesses; they may not. BPE does not know. For those reasons, OCA is required to respond to each of BPE’s discovery requests fully and completely in its own right. Please provide complete responses to each of BPE’s interrogatories and produce any and all documents within OCA’s possession, custody, or control in response to BPE’s requests for production as soon as possible. If OCA has no responsive information or documents to a specific discovery request, it should so state.

OCA’s Answer to Interrogatory No. 1. This Interrogatory requests that OCA “[i]dentify all persons whom [it] believe[s] are likely to possess information relevant to the Subject Matter of this Action,” and to provide, among other things, “the subject or subjects of the information,” “the person’s title or business position,” “the nature of the person’s involvement with any component of the Subject Matter of this Action,” and address and telephone numbers for each such individual.

In response, OCA broadly identified a number of non-named “[e]mployees of the OCA,” “consultants and witnesses identified in these responses,” “[e]mployees of the Pennsylvania Public Utility Commission” across four office locations, “[e]mployees of the Office of Small Business Advocate,” “[c]urrent and former employees, agents and representatives of [BPE],

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<sup>6</sup> OAG did not serve objections to any aspect of BPE’s first sets of discovery.

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“[m]embers of the Pennsylvania General Assembly and their staff,” “[e]mployees of [non-specified] utility regulatory agencies in the Mid-Atlantic and Northeast states,” and “[e]mployees of [non-specified] consumer protection agencies in the Mid-Atlantic and Northeast states.” Those answers are not responsive to BPE’s interrogatory. For each such individual noted above, please provide the specific information requested – *i.e.*, as name, title, address, telephone number, subject of information that she or he possesses, and involvement with any component of the Subject Matter of this Action – as soon as possible.

OCA’s Answer to Interrogatory No. 20. BPE is entitled to discover the specific facts underpinning each allegation in the Joint Complaint. Thus, it served Interrogatory No. 20 on OCA, which states, “[s]et forth in full and complete detail all of the facts that support your allegations contained in Paragraphs 13, 21, 25, 26, 27, 29, 30, 32, 34, 35, 36, 37, 41, 42, 48, 50, 54, and 58 of the Joint Complaint.” In response, OCA answered broadly and vaguely: “Please see responses to Blue Pilot RPD to OCA Set I-16 and I-17. Additionally, the OCA intends to present consumer fact witness and expert and written testimony of other witnesses in support of the allegations. Additionally, the OCA intends to cross-examine representatives, agents, and employees of Blue Pilot.”

As a preliminary matter, generally, a party may produce records in lieu of an answering an interrogatory when the burden of extracting the requested information would be substantially equal for either party. However, “[i]f the answering party gives a vague description of the record sought, the burden of discovery imposed upon the interrogating party would be heavier than that upon the answering party due to the latter’s familiarity with said records.” *Northampton Borough Med. Auth. v. Remsco Assocs. Inc.*, 22 Pa. D & C. 3d 541, 544 (Pa. C.P. 1981) (interrogatory answer referring requesting party to “various letters of transmittal of Remsco and the engineer” held incomplete for lack of specificity); *see also Gerffert Co., Inc. v. Dean*, No. 09 CV 266, 2012 WL 2054243, at \*3 (E.D.N.Y. June 6, 2012) (“Although referencing responsive documents is permitted . . ., to simply state ‘see documents produced herewith’ without a reference to Bates numbers or other description identifying the documents responsive to each request is insufficient”). By identifying all of the documents produced in response to Request for Productions No. 16 and 17, OCA has failed to provide the level of specificity required under Pennsylvania law; it is forcing BPE to find the proverbial needle in a haystack of documents. Moreover, it is unclear from OCA’s response which of the documents it produced in response to Request for Production Nos. 16 and 17 support the allegations set forth in the various individual paragraphs of the Joint Complaint. Please identify, by Bates number or otherwise with particularity, each document produced by OCA that supports the allegations set forth in each of the above-identified paragraphs of the Joint Complaint as soon as possible.

Moreover, what OCA intends to present or whose testimony it plans to submit later in this litigation is irrelevant to the interrogatory posed – *i.e.*, the specific facts that support the allegations in the Joint Complaint. Complainants must have had a factual basis for each of the

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Joint Complaint allegations before this action was filed and BPE is entitled to discover those facts. Please provide a narrative setting forth in full and complete detail all of the facts that support the allegations contained in Paragraphs 13, 21, 25, 26, 27, 29, 30, 32, 34, 35, 36, 37, 41, 42, 48, 50, 54, and 58 of the Joint Complaint, as requested by Interrogatory No. 20. If OCA has no facts for one or more of the allegations, it should so state.

OAG's Answers to Interrogatory Nos. 21-27. Count IV of the Joint Complaint alleges that BPE lacked good faith in the manner that it handled consumer complaints about the variable rates charged on their bills – *i.e.*, that BPE's complaint handling processes failed to satisfy the standards set by Commission regulations and orders in a number of respects. BPE seeks discovery into what specifically it failed to do, what those standards are, and what it should have done to avoid assertion of Count IV against it. To that end, Interrogatory Nos. 21-27 requested that OCA provide "in full and complete detail, and without resort to legal conclusions, what constitutes what *you believe*" (emphasis added) to be or constitute "adequate staffing" of an EGS call center (No. 21); "reasonable access" to an EGS's representatives for purposes of submitting complaints (No. 22); an EGS's "proper investigation" into a customer dispute (No. 23); "proper notification" to customers of the results of an EGS's investigation into a dispute when such investigation is conducted (No. 24); and, an EGS's "good faith, honesty and fair dealing in its dealings with customers" (No 25).

Another allegation that is cornerstone to the Joint Complaint is that the disclosure statement for BPE's variable rate plans does not comply with Commission regulations or orders, or Pennsylvania law. BPE simply seeks to discover from OCA what, in fact, constitutes a legally compliant and adequate disclosure statement. Such a disclosure statement must exist or have existed, otherwise OCA would have no legal basis to assert that BPE's disclosure statement does not pass muster in the first instance. Thus, Interrogatory Nos. 26 and 27 request OCA to "[s]et forth in full and complete detail, and without resort to legal conclusions, what *you believe* constitutes an EGS disclosure statement for a variable rate plan that is compliant with Commission orders and regulations, and Pennsylvania law," (emphasis added) and to "[i]dentify any and all EGS disclosure statements for variable rate plans that you believe comply with Commission orders and regulations, and Pennsylvania law. . . ."

OCA's rote answer to each of the above-described interrogatories is that responsive information will be presented by way of Barbara Alexander's testimony at some later date. Those answers are wholly unresponsive to the interrogatories posed. BPE is not seeking to know what an expert will testify regarding what constitutes proper complaint handling or a sufficient disclosure statement; rather, it is seeking to know what support OCA had for its allegations at the time it filed the Joint Complaint. BPE also seeks to discover what OCA, *itself*, understands would comply with Commission regulations or orders, and Pennsylvania law, and whether OCA has, within its possession, custody, or control any examples of what does comply. If OCA had no support for its claims, cannot explain what it believes constitutes proper, good faith complaint

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handling, and/or cannot identify what it understands to constitute a legally sufficient disclosure statement, it should so state. Accordingly, please provide detailed responses to Interrogatory Nos. 21 to 27, supplying the information specifically sought as soon as possible.

OCA's Response to Request for Production No. 1. OCA has refused to provide certain documents in response to this Request because it believes that they also are in BPE's possession. It is Black Letter law, however, that "it is not a bar to the discovery of relevant material that the same material may be in the possession of the requesting party or obtainable from another source." *Fort Washington Resources, Inc. v. Tannen*, 153 F.R.D. 78, 79 (E.D. Pa. 1994); *Swindell Dressler Int'l Co. v. Travelers Cas. And Sur. Co.*, 827 F. Supp. 2d 498, 505 n.8 (W.D. Pa. 2011) ("the fact that the document may also be available from another source is irrelevant"). "Thus, [one party] must produce the requested documents regardless of their existence in the possession of [the other]." *Fort Washington*, 153 F.R.D. at 79. The rationale for that basic discovery principle is simple – even if documents were once in the requesting party's possession, they may no longer be. Regardless, the party upon whom discovery is served is not relieved of its obligation to produce documents within its own possession, custody, or control simply because they exist elsewhere. Accordingly, please produce any and all responsive documents that OCA has withheld as soon as possible.

OCA's Response to Request for Production No. 2. In its response to Request for Production No. 2, OAG states that unspecified "OCA attorney notes, OCA attorney communications containing their mental impressions, OCA attorney summaries and legal research" were not produced on grounds that they are privileged.

Instruction No. 3 to BPE's requests for production stated that "[i]f any document, ESI, or thing called for by a Request stated herein is withheld because [OCA] claim[s] that such document, ESI, or thing is protected under the attorney-client privilege, work product doctrine, or other privilege or doctrine" – as it has – OCA must provide a privilege log setting forth several types of information for each document withheld. A privilege log is necessary to enable BPE (and the PUC if necessary) to test the propriety of the privilege assertion. *T.M. v. Elwyn, Inc.*, 950 A.2d 1050, 1063 (Pa. Super. 2008) (party asserting privilege must provide privilege log or sufficiently detailed facts showing that the privilege was invoked to enable opposing party to test the invocation of privilege). "Without such a log, that part of the review process cannot begin." *Velocity Int'l, Inc. v. Celebrity Healthcare Solutions, Inc.*, No. 09-102, 2010 WL 2196423, at \*4 (W.D. Pa. June 1, 2010) (citing cases). OCA did not object to that instruction. Thus, it must produce a privilege log setting forth the information identified in Instruction No. 3 on a document-by-document basis to allow BPE to test those privilege assertions. Please provide such privilege log as soon as possible. In addition, on that log, please provide information for any documents withheld from OCA's production in response to any other production request, such as Request for Production Nos. 8, 16, and 23.

Candis A. Tunilo  
August 26, 2014  
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Further, as a point of clarity, OCA attached a single document to its response to this Request, but states “[a]fter a reasonable investigation, the OCA found the attached documents that are responsive to this request and not privileged and not already provided” in OCA’s other discovery responses. Did OCA intend for any other documents to be attached to this Request, as its response suggests, or is there only one attachment?

OCA’s Response to Request for Production No. 3. In its response to this Request, OCA states that, “. . . OCA has nothing further to provide beyond the documents that have already been identified or provided in” OCA’s other discovery responses, yet does not identify by Bates number or in any other particular way the documents that OCA already provided, which are responsive to Request for Production No. 3. That response is insufficient. *Remsco*, 22 Pa. D & C. 3d at 544; *Gerffert*, 2012 WL 2054243, at \*3. Please identify those specific documents as soon as possible so that BPE may continue preparing its defense in this action.

OCA’s Response to Request for Production No. 8. This Request seeks “[a]ny and all documents concerning, referring, or relating to any testimony, affidavits, declarations, or reports that Dr. Steven L. Estomin has provided in other formal or informal investigations, or regulatory or private litigation, including, but not limited to, any motions, briefs, and/or decisions.” In early August 2014, BPE agreed to limit the Request for the time-being to the provision of a “list of testimonies submitted in proceedings by Dr. Estomin and copies of any reports related to his affidavit in this matter.” While OCA attaches Dr. Estomin’s *curriculum vitae*, which ostensibly includes a list of his testimonies and reports, OCA has failed to produce any reports by Dr. Estomin despite its agreement to do so. Rather, it has provided links to just two “[p]ublicly available reports prepared by Dr. Estomin.” First, OCA must actually produce those and any other responsive publicly available reports for the reasons discussed above regarding OCA’s response to Request for Production No. 1. Second, this document request seeks all reports, not just those that are publicly available. Please produce all responsive public and non-public reports as soon as possible.

OAG’s Response to Request for Production No. 11. In Request for Production No. 11, BPE seeks “[a]ny and all documents containing any admission that you contend BPE made regarding the Subject Matter of this Action.” OCA directed BPE to the entirety of the documents BPE has produced in this litigation and all of BPE’s interrogatory answers, as well as all of the information OCA had collected from the 83 BPE customers identified in Paragraph 16 of the Joint Complaint and all other documents that OCA has collected from BPE customers since May 5, 2014 (*e.g.*, “See also responses to [BPE] RPD to the OCA Set I-16 and I-17”). OCA, however, does not identify by Bates number or in any other particular way the specific documents within those broad sets that contain a BPE admission. Such identification is required. *Remsco*, 22 Pa. D & C. 3d at 544; *Gerffert*, 2012 WL 2054243, at \*3. Please identify those specific documents that contain BPE admissions as soon as possible so that BPE may continue assembling its defense in this action, and prepare to depose OCA and serve additional

Candis A. Tunilo  
August 26, 2014  
Page Eight

interrogatories regarding the substance of those admissions. If no such documents exist, please so state.

OCA's Responses to Requests for Production Nos. 12, 14, 25-28, 30, 32, 33, 36-46, 48, and 49. These Requests seek production of all documents that support the specific allegations made in various paragraphs of the Joint Complaint. OCA's response to each Request, however, is similar – it directs BPE to the entirety of all documents produced in response to other specific interrogatories and/or document requests.

For example, in its response to Request for Production No. 25 – which seeks “[a]ny and all documents that support or relate to, or upon which you base your claim that ‘[BPE] has violated and continues to violate the Commission’s regulations by failing to provide accurate pricing information in plain language and by using common terms that consumers understand,’ as alleged in Paragraph 25 of the Joint Complaint” – OCA states, in relevant part, “[p]lease see responses to [BPE’s] Interrogatories to the OCA Set I-15, I-34 and I-37.”

- OCA's response to Interrogatory 15, in turn, directs BPE to OCA's responses to Request for Production Nos. 16<sup>7</sup> and 17,<sup>8</sup> and other documents relating to Dr. Estomin.
- OCA's response to Interrogatory No. 34 identifies “any document identified or provided in the OCA's responses to Blue Pilot Interrogatories Set I and RPD Set I to OCA” – *i.e., every single document that OCA has produced in this litigation* – among other documents.
- OCA's response to Interrogatory No. 37 refers to OCA's responses to Request for Production Nos. 2,<sup>9</sup> 16, and 17, OAG's responses to BPE's Interrogatory No. 32, and “the responses to discovery by other parties in this proceeding.”

These types of labyrinthine are inappropriate for a number of reasons. First, as demonstrated above, in many cases, the documents being identified consist of every document produced by OCA and/or other parties in this litigation without specifying which one of those documents support each allegation specifically (which is what is called for by the respective document requests). Second, it is clear that OCA has not taken the time to consider which of the

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<sup>7</sup> The documents OCA produced in response to Request for Production No. 16 purport to contain the information that OCA collected from the 83 BPE customers identified in Paragraph 16 of the Joint Complaint.

<sup>8</sup> The documents OCA produced in response to Request for Production No. 17 purport to contain the information that OCA has collected from BPE customers since May 5, 2014.

<sup>9</sup> OCA's response to Request for Production further cross-references its responses to Requests for Production Nos 16 and 17, and a BPE disclosure statement.

Candis A. Tunilo  
August 26, 2014  
Page Nine

documents it produced, in fact, support each of the allegations in the Joint Complaint. Using OCA's response to Request for Production No. 25 as an example again, it is clear that OCA's internal document retention policy, for instance – one of the documents that falls within the broad categories of documents identified by OCA in response to that Request – does not support any complaint allegation, much less one about BPE's alleged failure to provide "accurate pricing information in plain language and by using common terms that consumers understand." Yet OCA identifies it as such a supporting document.

OCA is obligated to provide clear and specific responses to each discovery request in this action. It has not done so. Rather, it has simply directed BPE to pick through all or many of the documents produced in this action, and try to deduce on its own and its own peril, which documents support each Joint Complaint allegation. Please submit as soon as possible supplemental responses to the aforementioned Requests and identify, by Bates number or otherwise, the specific documents upon which the various claims and allegations contained in the Joint Complaint are based.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Blynn", with a long horizontal flourish extending to the right.

Daniel Blynn

cc: Counsel of Record (via electronic mail)

KELLEY DRYE & WARREN LLP

A LIMITED LIABILITY PARTNERSHIP

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3050 K STREET, NW

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DANIEL S. BLYNN

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EMAIL: dblynn@kelleydrye.com

August 28, 2014

**VIA ELECTRONIC MAIL**

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

**Re: Com. v. Blue Pilot Energy, LLC, No. C-2014-2427655 (Pa. PUC)**

Dear Candis:

This letter supplements my August 26, 2014 meet-and-confer letter regarding complainant Pennsylvania Office of Consumer Advocate's ("OCA") partial responses to Blue Pilot Energy, LLC's ("BPE") first sets of interrogatories and requests for production. Although OCA's complete discovery responses were due more than a week ago, we gave the Office an extension upon its assurance that it would "do [its] best to have the responses to [BPE] by . . . Friday, August 22."<sup>1</sup> On August 22, OCA produced partial responses to BPE's first sets of discovery and promised the balance of the responses by "early next week [the week of August 25]."<sup>2</sup> Despite that promise – and despite my request to you for such responses<sup>3</sup> (to which OCA has not responded) – OCA still has not produced responses to Interrogatory Nos. 29-33 of BPE's first set of interrogatories to OCA. Please provide responses to these Interrogatories immediately.

As explained more fully below, in addition to the deficiencies detailed in my August 26 letter, OCA's discovery responses also suffer from other deficiencies.

OCA's Answer to Interrogatory No. 6. This Interrogatory asked OCA to "[i]dentify all communications (whether written or oral) and/or contact between [it] and each of the 83 BPE

<sup>1</sup> Aug. 18, 2014 Email from C. Tunilo to K. Moury.

<sup>2</sup> Aug. 22, 2014 Email from C. Tunilo to D. Blynn.

<sup>3</sup> Aug. 27, 2014 Email from D. Blynn to C. Tunilo.

Candis A. Tunilo  
August 28, 2014  
Page Two

customers identified in Paragraph 16 of the Joint Complaint,” and provide, among other things, the date of each communication and the content of each communication. In response, OCA provided a list identifying each customer with whom it communicated, the customers’ respective phone numbers and the address for 17 of the 83 customers, and the OCA employee who had each communication. However, OCA failed to provide the date of each communication and its content as specifically requested. Please supplement your response to Interrogatory No. 6 with the requested information as soon as possible. In addition, please confirm that OCA does not have address information for the 66 customers for whom it did not provide such information; alternatively, if address information exists, please provide it.

OCA’s Response to Request for Production No. 16. Request for Production No. 16 seeks “[a]ny and all documents concerning, referring, or relating to and/or constituting the information OCA had collected from the 83 BPE customers as of May 5, 2014, as alleged in Paragraph 16 of the Joint Complaint.” In response, OCA produced pink-colored packets of correspondence received from nine customers.

First, please confirm that OCA does not have any responsive documents for the 74 customers for whom packets were not provided.

Second, please produce a list identifying each consumer by name, address, and telephone number to whom OCA sent complaint solicitation documents (*i.e.*, the distribution list), as well as a copy of each solicitation letter that was sent (if only one version of the solicitation letter was sent, you may produce a form copy of that letter). Such documents clearly “concern, refer, or relate” to the information that OCA collected from BPE customers.

Third, please confirm that all packets that you previously produced are complete as they exist in OCA’s files. For instance, some packets do not contain a copy of the solicitation document that contains the heading “Consumer Information Regarding Variable Electric Rates”; others appear to be missing one or both of the two supporting pages where consumers were asked to provide various information. *See, e.g.*, Sherri Kennedy packet; Felisa Preciado packet. Some pages further appear to have information that was cut-off. *See* Mark Johnston packet (first page).

Fourth, one of the packets – Felisa Preciado’s – has a notation, which suggests that OCA attempted to respond and/or reach the consumer: “3/21 – Called and left message to call me back.” The content of that message (and related information) should have been produced in response to Interrogatory No. 6 (see above), but was not. Please supplement you response to Interrogatory No. 6 as soon as possible with that, as well as information for any other voice messages that were left for the relevant consumers.

OCA’s Response to Request for Production No. 52. Rather than produce any documents in response to this Request, OCA simply noted that responsive documents “are available on the

Candis A. Tunilo  
August 28, 2014  
Page Three

Pennsylvania Public Utility Commission's website." As explained in my August 26 letter, regardless of whether those documents are available on the PUC website, OCA is required to produce them if they are within its possession, custody, or control. It is Black Letter law that "it is not a bar to the discovery of relevant material that the same material may be in the possession of the requesting party or obtainable from another source." *Fort Washington Resources, Inc. v. Tannen*, 153 F.R.D. 78, 79 (E.D. Pa. 1994); *Swindell Dressler Int'l Co. v. Travelers Cas. And Sur. Co.*, 827 F. Supp. 2d 498, 505 n.8 (W.D. Pa. 2011) ("the fact that the document may also be available from another source is irrelevant"). "Thus, [one party] must produce the requested documents regardless of their existence in the possession of [the other]." *Fort Washington*, 153 F.R.D. at 79. Accordingly, please produce any and all responsive documents as soon as possible.

We look forward to discussing the issues raised herein and those raised in my August 26, 2014 letter this afternoon during our 2:30 pm call.

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel Blynn", with a long horizontal flourish extending to the right.

Daniel Blynn

cc: Counsel of Record (via electronic mail)

# EXHIBIT E

## Tunilo, Candis

---

**From:** Blynn, Daniel S. <DBlynn@KelleyDrye.com>  
**Sent:** Thursday, September 11, 2014 10:08 AM  
**To:** Tunilo, Candis  
**Cc:** Robinson, Kristine E.; Abel, John; 'Tulman, Margarita'; Robeck, Mark; Wilmarth, Catherine; Moury, Karen  
**Subject:** OCA/OAG v. BPE - OCA's Objections to BPE's Second Set of Interrogatories and RFPs

Candis,

As we discussed yesterday at the settlement meeting, given OCA's representations that it has had no communications with consumers beyond what is contained in the pink "contact packets," and that it has no notes of telephone conversations with other consumers and otherwise is unable to provide the substance of those conversations beyond "BP[E]'s rates, charges, billing and marketing practices," BPE will agree to withdraw Interrogatory nos. 13, 14, 17, 18, 21, 22, 25, 26, 31, 32, 35, 36, 39, and 40 (Set II) directed to OCA, thus resolving OCA's objections to those Interrogatories.

Further, given OCA's explanation that it simply compiles the rate/price information provided by EGSs and publishes the same in its Price Comparison Charts, Pennsylvania Electric Shopping Statistics reports, and Electric Shopping Guides, BPE will withdraw RFP nos. 3-5, 8 and 9 (Set II) directed to OCA, thus resolving OCA's objections to those RFPs.

Finally, BPE will accept a copy of Barb Alexander's CV for the time-being in order to resolve RFP no. 13 (Set II) directed to OCA. Note that, despite your assertion yesterday that OCA cannot be responsible for producing Alexander's testimony and reports from 30 years ago, BPE did not ask for those. Rather, Instruction no. 14 to the second set of RFPs advised that "[t]he relevant time covered by each Request is January 1, 2010 to the present, unless otherwise stated or indicated by the context of the Request." Regardless, BPE will withdraw RFP no. 13 (Set II) directed to OCA, thus resolving OCA's objection to that RFP.

Accordingly, all issues raised by OCA in its Objections now have been resolved.

Best,  
Dan

---

**Daniel S. Blynn | Kelley Drye & Warren LLP**  
Washington Harbour, Suite 400  
3050 K Street, NW, Washington, DC 20007-5108  
(w) 202.342.8634 | (c) 336.403.1512 | [dblynn@kelleydrye.com](mailto:dblynn@kelleydrye.com)  
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[www.adlawaccess.com](http://www.adlawaccess.com)



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# EXHIBIT F

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

409 North Second Street  
Suite 500  
Harrisburg, PA 17101-1357  
T 717 237 4800  
F 717 233 0852  
www.buchananingersoll.com

September 30, 2014

**VIA EMAIL AND FIRST CLASS MAIL**

The Honorable Elizabeth H. Barnes  
The Honorable Joel H. Cheskis  
Administrative Law Judge  
P.O. Box 3265  
Harrisburg, PA 17105-3265

Re: Commonwealth of Pennsylvania, et al. v. Blue Pilot Energy, LLC; Docket No. C-2014-2427655

Dear Administrative Law Judges Barnes and Cheskis:

This is to follow up on the Motion of Blue Pilot Energy, LLC ("BPE") filed on September 25, 2014 to Compel Office of Consumer Advocates's Responses to Certain Interrogatories and Production of a Privilege Log by both Complainants. As a result of the Motion to Compel being filed, the parties have resolved their differences and no longer need a ruling on the Motion. In summary, BPE has received much of the information that it requested and is willing to forego the receipt of other material that was the subject of the Motion.

Copies have been served on all parties has indicated in the attached certificate of service.

Sincerely,



Karen O. Moury

cc: Certificate of Service  
Secretary Chiavetta (eFiled only)

KOM/tg

# EXHIBIT G

## Tunilo, Candis

---

**From:** Tunilo, Candis  
**Sent:** Tuesday, September 2, 2014 4:05 PM  
**To:** dblynn@kelleydrye.com; Robeck, Mark (MRobeck@KelleyDrye.com) (MRobeck@KelleyDrye.com); Moury, Karen  
**Cc:** Robinson, Kristine E.; jabel@attorneygeneral.gov; mtulman@attorneygeneral.gov; Beck, Nicole R. (nbeck@attorneygeneral.gov)  
**Subject:** Follow up to OCA responses to Blue Pilot Set I

Dan and Mark: in follow up to our conversation on Thursday, August 28<sup>th</sup> wherein you requested additional, more specific information regarding the OCA employees likely to have knowledge of information relevant to this matter, we informally provide the following additional information to OCA's response to Blue Pilot Interrogatories Set I-1:

The following OCA employees may possess information relevant to this matter:

Tanya J. McCloskey, Acting Consumer Advocate

Candis A. Tunilo, Esquire

Kristine E. Robinson, Esquire

Christy M. Appleby, Esquire

Aron J. Beatty, Esquire

Vanessa Diaz, Legal Intern

Andrew Spangenberg, Legal Intern

Dianne E. Dusman, Esquire

Ashley Everette, Regulatory Analyst

Darryl A. Lawrence, Esquire

Brandon J. Pierce, Esquire

Barrett C. Sheridan, Esquire

Denise Smith, Clerk Typist II

Victoria Stone, Clerk II

Hobart J. Webster, Esquire

Kevin Yiengst, Call Center Representative

Sheri Steigleman, Call Center Representative

Heather Yoder, Consumer Liaison

We will provide you with copies of the PUC Formal Complaints against Blue Pilot and Dr. Estomin's report on a CD likely on Thursday when I return to the Office. I will also try to obtain additional information regarding the non-public reports of Dr. Estomin to provide to you informally by the end of the week.

Candis

Candis A. Tunilo  
Assistant Consumer Advocate  
Office of Consumer Advocate  
555 Walnut Street  
5th Floor, Forum Place  
Harrisburg, PA 17101-1923  
(717) 783-5048

## Tunilo, Candis

---

**From:** Tunilo, Candis  
**Sent:** Tuesday, September 9, 2014 11:04 AM  
**To:** Moury, Karen; dblynn@kelleydrye.com; Robeck, Mark (MRobeck@KelleyDrye.com) (MRobeck@KelleyDrye.com)  
**Cc:** jabel@attorneygeneral.gov; Robinson, Kristine E.; mtulman@attorneygeneral.gov; Beck, Nicole R. (nbeck@attorneygeneral.gov)  
**Subject:** Follow up to OCA responses to BP Set I  
**Categories:** Discovery-related follow up

Karen, Dan and Mark: In follow up to our conversation on August 28<sup>th</sup> regarding OCA's responses to Blue Pilot Set I, here is further information regarding the proprietary reports of Dr. Estomin not provided:

Many of the projects on which Dr. Estomin has worked in the last five years related to wholesale and/or retail electricity market issues and/or generation pricing have resulted in the production of confidential documents that cannot be provided. These documents include electricity market analyses in the context of the preparation of competitive solicitations for electric power conducted by the U.S. Department of Defense, Defense Logistics Agency; market analyses and projections related to electric power supply negotiations with utility providers being conducted by the U.S. Air Force and the U.S. Army; and analyses of electric utility supply arrangements of individual U.S. Air Force bases to facilitate potential negotiations with utility suppliers.

With regard to the copies of the Formal Complaints identified in the OCA's responses, I will bring them to the meeting tomorrow at OAG.

With regard to downloading Dr. Estomin's report onto a CD, the link to which was provided in the responses to Set I, the OCA's IT person is on vacation, so I will not be able to get that to you this week. In the meantime, you have the link to the report to view it, download it, print it, search it, etc.

Candis

Candis A. Tunilo  
Assistant Consumer Advocate  
Office of Consumer Advocate  
555 Walnut Street  
5th Floor, Forum Place  
Harrisburg, PA 17101-1923  
(717) 783-5048

# EXHIBIT H



COMMONWEALTH OF PENNSYLVANIA  
OFFICE OF ATTORNEY GENERAL

KATHLEEN G. KANE  
ATTORNEY GENERAL

Bureau of Consumer Protection  
Public Protection Division  
15<sup>th</sup> Floor, Strawberry Square  
Harrisburg, Pennsylvania 17120  
Telephone: (717) 787-9707  
Fax: (717) 705-3795  
September 5, 2014

SENT VIA USPS FIRST CLASS MAIL & ELECTRONIC MAIL

Daniel S. Blynn, Esq.  
Kelley Drye & Warren LLP  
3050 K Street, NW, Suite 400  
Washington, DC 20007

Re: Commonwealth of Pennsylvania and the Office of Consumer Advocate v. Blue Pilot Energy, LLC, Docket Nos. C-2014-2427655

Dear Dan:

Per our meet and confer conversation that took place on August 28, 2014 concerning your August 22, 2014 letter requesting clarification on the Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection ("OAG") discovery responses, the OAG offers the following responses.

The CD-ROM, enclosed herewith, replaces in its entirety the CD-ROM provided to you on August 20, 2014. Consistent with our August 28, 2014 telephone conversation, we offered and are producing the materials in a form acceptable for loading into virtually all eDiscovery platforms. The documents on this replacement disc take the form of single-page TIF files titled as the Bates number, document level text files containing extracted text and load files containing metadata, together with an Opticon image cross-reference file.

With respect to this replacement CD-ROM, please note that the Bates numbering convention has changed and entirely replaces any Bates endorsements contained on the original disc. The enclosed disc contains the following Bates range: PAOAG-BP-0000001 through PAOAG-BP-0003762

Additionally, OAG discovery responses of August 20, 2014 made reference to the Blue Pilot Disclosure Statement formerly identified by reference to Bates numbers OAG-BP-03713 through OAG-BP-03718. These pages may not be found at PAOAG-BP-0002804 through PAOAG-BP-

0002809. Our prior reference to the Document Retention Policy found at OAG-BP-03756 may now be found at PAOAG-BP-0000612.

Further, the production has been placed into an encrypted container which was created by and may be easily decrypted using the freely available TrueCrypt software program. The password will be emailed to you upon your acknowledgement of receipt.

By way of clarification, the consumer complaint files provided to Blue Pilot by OAG, to our knowledge, is the sum total of written correspondence between OAG and the consumers. This production is on an ongoing basis and further correspondence between consumers and OAG, as it comes in, will be provided to Blue Pilot. The facts that OAG used to form the basis of the lawsuit came from the consumer complaints and any information that OCA possesses. Moreover, OAG does not possess, have custody over or control any information that OCA tracked with respect to their customer contacts.

As requested, the following is a more detailed response to Interrogatory No. 20:

The facts that support the allegations in paragraph 13 are the persons listed in the attached document to OAG's response to Interrogatory No. 3 and their respective consumer complaints provided in the response to Request for Production No. 2.

We anticipate that the facts that support the allegations in paragraph 21 will be provided through the expert testimony of Barbara R. Alexander and Steve L. Estomin pursuant to 52 Pa. Code § 5.324(a)(2) and the litigation schedule adopted in this proceeding. We anticipate they will testify regarding Blue Pilot's failure to adequately state the conditions of variability and the limits on price variability in violation of the Commission's regulation. We anticipate that the facts that support this allegation will also be provided through consumer fact witness testimony and any documents provided by the consumers. Additionally, we anticipate that the facts that support this allegation will be provided through documents provided by Blue Pilot through discovery responses and any cross-examination of representatives, agents and employees of Blue Pilot.

We anticipate that the facts that support the allegations in paragraph 25 will be provided through the expert testimony of Barbara R. Alexander and Steve L. Estomin pursuant to 52 Pa. Code § 5.324(a)(2) and the litigation schedule adopted in this proceeding. We anticipate that they will testify regarding Blue Pilot's failure to provide accurate pricing information in plain language and using common terms that consumers understand. We anticipate that the facts that support this allegation will also be provided through consumer fact witness testimony and any documents provided by the consumers. Additionally, we anticipate that the facts that support this allegation will be provided through documents provided by Blue Pilot through discovery responses and any cross-examination of representatives, agents and employees of Blue Pilot.

We anticipate that the facts that support the allegations in paragraph 26 will be provided through the expert testimony of Barbara R. Alexander and Steve L. Estomin pursuant to 52 Pa. Code § 5.324(a)(2) and the litigation schedule adopted in this proceeding. We anticipate that they will testify regarding consumers not being able to determine from the disclosure statement the price

that they would or could be charged by Blue Pilot or how the price would be calculated by Blue Pilot. We anticipate that the facts that support this allegation will also be provided through consumer fact witness testimony and any documents provided by the consumers. Additionally, we anticipate that the facts that support this allegation will be provided through documents provided by Blue Pilot through discovery responses and any cross-examination of representatives, agents and employees of Blue Pilot.

We anticipate that the facts that support the allegations in paragraph 27 will be provided through the expert testimony of Barbara R. Alexander and Steve L. Estomin pursuant to 52 Pa. Code § 5.324(a)(2) and the litigation schedule adopted in this proceeding. We anticipate that they will testify regarding Blue Pilot's failure to provide information to its customers in a manner that would allow them to compare offers. We anticipate that the facts that support this allegation will also be provided through consumer fact witness testimony and any documents provided by the consumers. Additionally, we anticipate that the facts that support this allegation will be provided through documents provided by Blue Pilot through discovery responses and any cross-examination of representatives, agents and employees of Blue Pilot.

We anticipate that the facts that support the allegations in paragraph 29 will be provided through consumer fact witness testimony and any documents provided by the consumers. Additionally, we anticipate that the facts that support this allegation will be provided through documents provided by Blue Pilot through discovery responses and any cross-examination of representatives, agents and employees of Blue Pilot..

We anticipate that the facts that support the allegations in paragraph 30 will be provided through the expert testimony of Barbara R. Alexander and Steve L. Estomin pursuant to 52 Pa. Code § 5.324(a)(2) and the litigation schedule adopted in this proceeding. We anticipate that they will testify regarding Blue Pilot's prices to customers in early 2014 as not being reflective of the cost to serve residential customers. We anticipate that the facts that support this allegation will also be provided through consumer fact witness testimony and any documents provided by the consumers. Additionally, we anticipate that the facts that support this allegation will be provided through documents provided by Blue Pilot through discovery responses and any cross-examination of representatives, agents and employees of Blue Pilot.

We anticipate that the facts that support the allegations in paragraph 32 will be provided through the expert testimony of Barbara R. Alexander and Steve L. Estomin pursuant to 52 Pa. Code § 5.324(a)(2) and the litigation schedule adopted in this proceeding. We anticipate that they will testify regarding Blue Pilot's prices not conforming to the variable rate provision of the Company's Disclosure Statement. We anticipate that the facts that support this allegation will also be provided through consumer fact witness testimony and any documents provided by the consumers. Additionally, we anticipate that the facts that support this allegation will be provided through documents provided by Blue Pilot through discovery responses and any cross-examination of representatives, agents and employees of Blue Pilot.

The facts that support the allegations in paragraphs 34 and 35 are the persons listed in the attached document to OAG's response to Request for Production Nos. – 32 – 33 and 35- 37 and

their respective consumer complaints provided in the response to Request for Production No. 2. We anticipate that the facts that support this allegation will also be provided through consumer fact witness testimony and any documents provided by the consumers and Blue Pilot through discovery responses. Additionally, We anticipate that the facts that support this allegation will be provided through testimony of Heather M. Weaver, consumer protection agent, and any cross-examination of representatives, agents and employees of Blue Pilot.

The facts that support the allegations in paragraphs 36 and 37 are not in the possession of the OAG and OCA would have provided an answer responsive to this request in their discovery responses.

We anticipate that the facts that support the allegations in paragraphs 41 and 42 will be provided through the expert testimony of Barbara R. Alexander and Steve L. Estomin pursuant to 52 Pa. Code § 5.324(a)(2) and the litigation schedule adopted in this proceeding. We anticipate that they will testify regarding Blue Pilot's employees, agents and/or representatives promising of savings that may not, and for many customers did not, materialize. We anticipate that they will also testify regarding Blue Pilot's failure to adequately train and monitor its agents. We anticipate that the facts that support this allegation will also be provided through consumer fact witness testimony and any documents provided by the consumers. Additionally, We anticipate that the facts that support this allegation will be provided through documents provided by Blue Pilot through discovery responses and any cross-examination of representatives, agents and employees of Blue Pilot.

We anticipate that the facts that support the allegations in paragraph 48 will be provided through the expert testimony of Barbara R. Alexander and Steve L. Estomin pursuant to 52 Pa. Code § 5.324(a)(2) and the litigation schedule adopted in this proceeding. We anticipate that they will testify regarding Blue Pilot's failure to adequately staff its call center, failure provide reasonable access to Company representatives for purposes of submitting complaints, failing to properly investigate customer disputes, failing to properly notify customers of the results of the Company's investigation into a dispute when such investigation was conducted, and failing to utilize good faith, honesty and fair dealing in its dealings with customers. We anticipate that the facts that support this allegation will also be provided through consumer fact witness testimony and any documents provided by the consumers. Additionally, we anticipate that the facts that support this allegation will be provided through documents provided by Blue Pilot through discovery responses and any cross-examination of representatives, agents and employees of Blue Pilot.

The facts that support the allegations in paragraphs 50, 54, and 58 are the persons listed in the attached document to OAG's response to request for production – 48 and their respective consumer complaints provided in the response to Request for Production No. 2. We anticipate that the facts that support this allegation will also be provided through consumer fact witness testimony and any documents provided by the consumers and Blue Pilot through discovery responses. Additionally, we anticipate that the facts that support this allegation will be provided through testimony of Heather M. Weaver, consumer protection agent, and any cross-examination of representatives, agents and employees of Blue Pilot.

The following is a more detailed response to Requests for Production Nos. 26-31:

We anticipate that the documents that support the allegations in paragraphs 26 through 31 will be provided through the expert written testimony of Barbara R. Alexander and Steve L. Estomin pursuant to 52 Pa. Code § 5.324(a)(2) and the litigation schedule adopted in this proceeding. The documents that support these allegations is provided by the consumers in their consumer complaints, provided in response to Request for Production No. 2. We anticipate that the documents that support these allegations will also be provided through consumer fact witness testimony and any documents provided by those consumers along with documents provided by Blue Pilot through discovery responses.

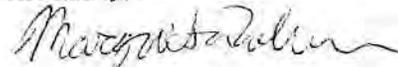
The following is a more detailed response to the following Request for Production No. 47:

We anticipate that the documents that are responsive to this question will be provided through the expert written testimony of Barbara R. Alexander pursuant to 52 Pa. Code § 5.324(a)(2) and the litigation schedule adopted in this proceeding. We anticipate that the documents that are responsive to this question will also be provided through consumer fact witness testimony and any documents provided by those consumers along with documents provided by Blue Pilot through discovery responses.

The following is a more detailed response to the following Request for Production No. 51:

We anticipate that the documents that are responsive to this question will be provided through the expert written of Barbara R. Alexander and Steve L. Estomin pursuant to 52 Pa. Code § 5.324(a)(2) and the litigation schedule adopted in this proceeding.

Sincerely,



Margarita Tulman  
Deputy Attorney General

Enclosures – CD-ROM  
Cc:

Karen O. Moury, Esq.  
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Mark R. Robeck, Esq.  
Kelley Drye & Warren LLP

Daniel S. Blynn, Esq.  
September 5, 2014  
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3050 K Street, NW, Suite 400  
Washington, DC 20007

# EXHIBIT I

## Tunilo, Candis

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**From:** Tunilo, Candis  
**Sent:** Friday, October 2, 2015 2:52 PM  
**To:** 'Cushman, Travis'; [mtulman@attorneygeneral.gov](mailto:mtulman@attorneygeneral.gov); Robinson, Kristine E.; [jabel@attorneygeneral.gov](mailto:jabel@attorneygeneral.gov)  
**Cc:** Castello, Geoffrey; Moury, Karen  
**Subject:** RE: BPE - OAG/OCA Responses to BPE Discovery Requests

**Categories:** Discovery-related follow up

Travis: we do not currently have a written summary, only notes. It would take some time to adapt those notes into a written summary. It seems that, as participants in the conference call at issue, Mr. Blynn and Mr. Robeck would also have their own notes of the call. Further, neither Mr. Blynn nor Mr. Robeck have contacted us since August 28, 2014 to assert that Joint Complainants were not in compliance with the agreement reached. While we maintain our willingness to work through discovery issues that come up, we are currently very busy working on responses and objections to BP Set IV and direct testimony in this matter. We will do our best to provide a summary of the agreement reached on August 28, 2014 as soon as we can. We maintain, however, that Joint Complainants have provided discovery responses and timely supplemented the responses in this matter.

Candis

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**From:** Cushman, Travis [<mailto:TCushman@KelleyDrye.com>]  
**Sent:** Thursday, October 1, 2015 3:19 PM  
**To:** Tunilo, Candis; [mtulman@attorneygeneral.gov](mailto:mtulman@attorneygeneral.gov); Robinson, Kristine E.; [jabel@attorneygeneral.gov](mailto:jabel@attorneygeneral.gov)  
**Cc:** Castello, Geoffrey; Moury, Karen  
**Subject:** BPE - OAG/OCA Responses to BPE Discovery Requests

Candis and Rita,

During our call earlier today, you all referenced a previous "oral agreement" with Dan Blynn and Mark Robeck regarding the sufficiency of OCA and OAG's responses to the discovery requests from late August/early September 2014. I spoke with both of them and they do not believe any such agreement was made. Given the fact that the alleged agreement was oral and a significant amount of time has since passed, could you summarize what you recall this agreement to have been? Thanks.

Best,

Travis

**KELLEY**  

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**DRYE**

Travis Cushman

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