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October 16, 2015

**VIA HAND DELIVERY**

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

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

Dear Secretary Chiavetta:

On behalf of Blue Pilot Energy, LLC, enclosed for filing is the Motion to Compel Joint Complainants' to Supplement Responses to Blue Pilot Energy, LLC's Discovery Requests Set I, in the above-captioned matter.

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

Very truly yours,



Karen O. Moury

KOM/tlg  
Enclosure  
cc: Certificate of Service

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*Joint Complaint.*<sup>1</sup> *Joint Complainants responded to Set I, and have since partially supplemented their initial responses.*<sup>2</sup> *Joint Complainants did not file objections to Set I. In general, Joint Complainants' responses simply reference the written consumer statements and future expert testimony. While Joint Complainants may have believed that their earlier responses were sufficient at the early procedural posture when Joint Complainants first responded to Set I, Joint Complainants are now long overdue for supplementing their responses to Blue Pilot's Set I and providing each and every factual basis that supports their claims in this proceeding. To date, Joint Complainants have failed to identify any actual facts that would support the claims made against Blue Pilot.*

On September 28, 2015, Blue Pilot sent a letter to each of the Joint Complainants requesting that they supplement their responses to Set I.<sup>3</sup> On October 1, 2015, counsel for OAG, OCA, and Blue Pilot held a conference call to discuss Blue Pilot's request for supplementation in an attempt to avoid filing this Motion to Compel. As Blue Pilot understands Joint Complainants' position, Joint Complainants object to further supplementing their responses to Set I on the basis that: (1) OCA and OAG have fully supplemented their responses; (2) OCA and OAG are not

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<sup>1</sup> See Blue Pilot's First Set of Interrogatories to OCA ("Set I Interrogatories to OCA"), attached as Exhibit 1; Blue Pilot's First Request for Production of Documents to OCA ("Set I RFPs to OCA"), attached as Exhibit 2; Blue Pilot's First Set of Interrogatories to OAG ("Set I Interrogatories to OAG"), attached as Exhibit 3; and Blue Pilot's First Request for Production of Documents to OAG ("Set I RFPs to OAG"), attached as Exhibit 4.

<sup>2</sup> See OAG's Responses to Set I Interrogatories and RFPs to OAG, dated August 20, 2014, attached as Exhibit 5; OCA's Responses to Set I Interrogatory Nos. 1-28 and 34-38 to OCA, dated August 22, 2014, attached as Exhibit 6; OCA's Responses to Set I RFPs to OCA, dated August 22, 2014, attached as Exhibit 7; OCA's Responses to Set I Interrogatory Nos. 29-33 to OCA, dated August 28, 2014, attached as Exhibit 8; Joint Complainants' Supplemental Response to Set I Interrogatory No. 2 and RFP No. 2 to Joint Complainants, dated October 8, 2014, attached as Exhibit 9; OCA's Supplemental Response to Set I Interrogatory No. 2 to OCA, dated October 10, 2014, attached as Exhibit 10; OCA's Supplemental Responses to Set I Interrogatory Nos. 6, 9, 34, and 37 and RFP Nos. 4, 11, and 17 to OCA, dated November 17, 2014, attached as Exhibit 11; OCA's Supplemental Responses to Set I Interrogatory No. 7 and RFP No. 17 to OCA, dated February 23, 2015, attached as Exhibit 12; OAG Supplemental Responses to Set I RFP Nos. 2 and 22, dated March 10, 2015, attached as Exhibit 13; OAG's Supplemental Response to Set I Interrogatory No. 2 to OAG, dated August 18, 2015, attached as Exhibit 14; and OCA's Supplemental Response to Set I Interrogatory No. 2 to OCA, dated August 19, 2015, attached as Exhibit 15.

<sup>3</sup> See Letter to OCA, dated September 28, 2015, attached as Exhibit 16; Letter to OAG, dated September 28, 2015, attached as Exhibit 17.

required to supplement with information that will later be covered in their expert reports; (3) the requests seek legal analysis beyond legal disclosure requirements; and (4) an oral agreement was reached a year ago with Dan Blynn regarding the sufficiency of OCA and OAG's responses.<sup>4</sup> Blue Pilot does not agree with any of Joint Complainants' contentions with respect to their discovery obligations in this proceeding. On October 5, 2015, Blue Pilot sent Joint Complainants a letter reciting Blue Pilot's understanding of Joint Complainants' position, Blue Pilot's response to that position, and requested Joint Complainants to inform Blue Pilot if they believed further discussion would be of any assistance.<sup>5</sup> The only response Blue Pilot has received to that letter regarding Blue Pilot's request to supplement is an email from Ms. Tunilo stating that Joint Complainants are not refusing to provide a summary of the alleged oral agreement, but that "it would take some time to compile it from our notes, and we are very busy with the objections and responses to BP Set IV."<sup>6</sup> That response is not sufficient, nor is it compelling.

In the October 5, 2015 letter, Blue Pilot explained that: (1) Joint Complainants have failed to fully supplement their responses because those responses generally defer to the consumer statements and future expert testimony, rather than stating the factual basis that supports the allegations made against Blue Pilot; (2) Joint Complainants cannot defer their discovery obligations by simply referring to later testimony of unspecified experts (none of whom can provide the factual basis for the allegations contained in the Joint Complaint); (3)

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<sup>4</sup> Following the call, Blue Pilot informed Joint Complainants that neither Dan Blynn nor Mark Robeck believe that any such agreement was made. See Email from Travis Cushman, dated October 1, 2015, attached as Exhibit 18. Given the fact that the alleged agreement was oral and a significant amount of time had passed, Blue Pilot requested that Joint Complainants summarize their recollection of the agreement. *Id.* On October 2, 2015. Ms. Tunilo informed Blue Pilot that Joint Complainants "do not currently have a written summary, only notes." See Email from Candis Tunilo, dated October 2, 2015, attached as Exhibit 19.

<sup>5</sup> See Letter to Joint Complainants, dated October 5, 2015, attached as Exhibit 20.

<sup>6</sup> See Email from Candis Tunilo, dated October 7, 2015, attached as Exhibit 21.

Joint Complainants cannot take cover behind a claim of “legal analysis” to avoid providing Blue Pilot with the *facts* upon which they base their claims; and (4) that neither Dan Blynn nor Mark Robeck believe that any such agreement was made, and even if there had been an agreement that the Joint Complainants’ responses were sufficient at that time, those responses are now overdue to be supplemented. For these reasons, Blue Pilot requests that Your Honors enter an order compelling Joint Complainants to fully supplement their responses to Set I within five days.

## ARGUMENT

### **I. Legal Standard**

Joint Complainants have availed themselves of the privilege of filing a lawsuit and taking discovery from Blue Pilot, but, as the Commission has made clear, having such “full participation rights also carry obligations such as . . . the obligation to respond to discovery requests . . .” *Interpretation of Procedural Rules Regarding Party Status, Rights and Obligations*, No. M-00061975, 2007 WL 7232877 (Pa. PUC Apr. 18, 2007). “[T]he scope of discovery is very broad.” *In re Pa. Tel. Co.*, No. M-00031772 (Pa. PUC Dec. 6, 2005). 52 Pa. Code § 5.321(c) outlines the discovery parameters:

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

*See also Application of Walter J. Jackson III t/a Jacksons Moving*, A-2014-2401884, 2014 WL 3011765, at \*3 (June 17, 2014) (“Commission regulations provide for the propounding of written interrogatories to a party regarding any matter, not privileged, which is relevant to the subject

matter involved in the pending action.”) (citing 52 Pa.Code §§ 5.321(c), 5.341). “Discovery itself is designed to promote free sharing of information so as to narrow the issues and limit unfair surprise. It is a tool which serves each litigant and promotes judicial economy.” *Pittsburgh Bd. of Public Educ. v. M.J.N.*, 524 A.2d 1385, 1388 (Pa. Cmwlth. Ct. 1987). The party resisting discovery “bears the burden of showing that the information requested is not discoverable.” *SmithKline Beecham Corp. v. Apotex Corp.*, 2004 U.S. Dist. LEXIS 8990, \*3 (E.D. Pa. Mar. 23, 2004) (citing *Josephs v. Harris Corp.*, 677 F.2d 985, 992 (3d Cir. 1982)).

Despite the breadth of discovery that is permissible, Blue Pilot seeks very narrow, and very specific discovery – *i.e.*, the facts supporting the Joint Complaints’ allegations against Blue Pilot and the identities of the customers that support Joint Complainants’ claims. As described below, Blue Pilot should be entitled to such basic discovery.

## **II. Joint Complainants Must Provide the Factual Basis that Allegedly Supports Their Allegations**

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

Joint Complainants cannot take cover behind a claim of “legal analysis” to avoid providing Blue Pilot with the *facts* upon which they base their claims. “Due process requires that parties be permitted to discover the basis for an opposing party's case so that parties can adequately prepare for litigation.” *Application of Walter J. Jackson III t/a Jacksons Moving*, A-2014-2401884, 2014 WL 3011765, at \*3 (June 17, 2014) (citing *Gaudenzia, Inc. v. Zoning Board of Adjustment of City of Philadelphia*, 4 Pa. Commw. 355, 287 A.2d 698 (1972)). To this end, Blue Pilot propounded Set I upon Joint Complainants in order to discover the factual basis behind Joint Complainants’ allegations. Blue Pilot is entitled to this information so it can adequately prepare its defense in this proceeding. To be clear, Blue Pilot does not seek

information relating to any purported privileged information. Rather, it seeks only the alleged facts that would support Joint Complainants' allegations.

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

Just as a plaintiff may not shield the facts that support the allegations of a complaint from discovery, it may not hide the identities of persons described only generally in its complaint. Those identities are properly discoverable. *In re Aetna Inc. Sec. Litig.*, No. CIV. A. MDL 1219, 1999 WL 354527, at \*1-5 (E.D. Pa. May 26, 1999) (granting defendant's motion to compel

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

Several of the interrogatories that are subject to this Motion to Compel might be classified as "contention" interrogatories. Compare, e.g., *R. Braun Medical, Inc. v. Abbott Laboratories*, 155 F.R.D. 525, 527 (E.D.Pa.1994) (defining contention discovery as, *inter alia*, that which asks a party to "state all the facts upon which it bases a contention"), and *Leotta v. Firestone Tire and Rubber*, 1989 WL 51797, at \*2-3 (E.D.Pa. May 12, 1989) (explaining "contention interrogatories" embrace questions asking whether a party makes some specified contention, or asking a party to state all the facts or evidence on which it bases some specified contention), with *In re Domestic Drywall Antitrust Litig.*, 300 F.R.D. 228, 230 (E.D. Pa. 2014) ("These interrogatories are not truly 'contention' interrogatories.... Interrogatories can ask contentions of facts, or law, or constitute mixed fact and law interrogatories. In this case, the interrogatories seek facts on which Plaintiffs base their claims, such as the names of the alleged conspirators, dates of communications, and the products subject to price fixing.") and *U.S. ex rel.*

*Hunt v. Merck-Medco Managed Care, LLC*, No. 00 CV 737, 2005 WL 1971885, at \*2 (E.D. Pa. Aug. 15, 2005) (“Medco's ‘Contention Interrogatories’ are not, in fact, contention interrogatories. ... [A]ll of the interrogatories seek information that formed the basis for the allegations made in Plaintiffs’ Complaint or Amended Complaint. Because Medco's ‘Contention Interrogatories’ do not seek Plaintiffs’ contentions, but rather the factual basis of Plaintiffs’ allegations and/or the identification of documents that bear on the allegations, the Court finds that they do not constitute contention interrogatories.”). Either way, Blue Pilot is entitled to discovery from Joint Complainants to learn the purported factual basis that Joint Complainants allege support their claims against Blue Pilot in this proceeding. See *Susquehanna Commercial Fin., Inc. v. Vascular Res., Inc.*, No. 1:09-CV-2012, 2010 WL 4973317, at \*10 (M.D. Pa. Dec. 1, 2010) (“An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.”); *Leotta v. Firestone Tire & Rubber*, No. CIV. A. 88-3989, 1989 WL 51797, at \*2 (E.D. Pa. May 12, 1989) (“An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact. Furthermore, Professor Moore states: ‘[i]nterrogatories requesting mere factual opinions or contentions may be elicited under Rule 33(b).’ Moreover, ‘[m]ixed questions of fact and law and questions which seek to discover a party's legal theory based on the facts elicited from other interrogatories are permissible under Rule 33(b).’”) (quoting 4A J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 33.17[2] at 33–91 (2d ed.1987)); *In re Domestic Drywall Antitrust Litig.*, 300 F.R.D. 228, 231 (E.D. Pa. 2014)

(“Accordingly, Plaintiffs should provide the facts currently available, from the information that has already been exchanged and from their own investigation.”).

Joint Complainants have previously contended that the work product doctrine shields them from providing the factual basis behind their allegations.<sup>7</sup> In support of that contention, Joint Complainants have relied upon *Sedat, Inc. v. Dep’t of Env’tl. Res.*, 163 Pa. Commw. 29, 641 A.2d 1243 (Pa. Commw. Ct. 1994). That case is readily distinguishable, as the subject of discovery sought there was a legal memorandum created by a state attorney. *Id.* In contrast, Blue Pilot here merely seeks the factual basis for the allegations made in the Joint Complaint – which is discoverable and not protected by the work product doctrine. *See Ford Motor Co. v. Edgewood Props.*, 257 F.R.D. 418, 422, 2009 U.S. Dist. LEXIS 42001, \*5 (D.N.J. 2009) (“Underlying facts are not protected by the work product doctrine.”).

At this late stage of the proceeding, Joint Complainants have only produced the written statements of the consumers who submitted statements to the Joint Complainants. Some of those consumers appeared at the hearing held on March 30 through April 1, 2015. Joint Complainants have further served on Blue Pilot and received responses to 146 discovery requests spanning twelve separate sets. They also filed a Motion for Entry of Judgment against Blue Pilot representing to Your Honors that sufficient evidence existed at that time to enter judgment against Blue Pilot. Joint Complainants relied on the sworn testimony of their experts when they filed that Motion. Yet, Joint Complainants have failed to allege any specific facts that would support their allegation that any Pennsylvania law or any of the Commission’s regulations were violated. Blue Pilot is entitled to know the factual basis that supports any alleged violation so that it may prepare its defense.

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<sup>7</sup> *See, e.g.*, Objections of Joint Complainants to Blue Pilot Energy, LLC Interrogatories and Requests for Production of Documents Set IV.

**B. Joint Complainants Cannot Avoid Their Discovery Obligations by Simply Referring to Unspecified Expert Testimony**

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

**C. Joint Complainants Cannot Defer to the Entire Record as Support for Each Individual Allegation against Blue Pilot**

A party may not produce records in lieu of answering an interrogatory when the burden of extracting the requested information is unequal. "If the answering party gives a vague description of the record sought, the burden of discovery imposed upon the interrogating party would be heavier than that upon the answering party due to the latter's familiarity with said records." *Northampton Borough Med. Auth. v. Remsco Assocs. Inc.*, 22 Pa. D & C. 3d 541, 544 (Pa. C.P. 1981) (interrogatory answer referring requesting party to "various letters of transmittal

of Remsco and the engineer” held incomplete for lack of specificity); *see also Gerffert Co., Inc. v. Dean*, No. 09 CV 266, 2012 WL 2054243, at \*3 (E.D.N.Y. June 6, 2012) (“Although referencing responsive documents is permitted . . ., to simply state ‘see documents produced herewith’ without a reference to Bates numbers or other description identifying the documents responsive to each request is insufficient”). By simply referring to all of the consumer statements produced in this proceeding and unnamed expert witnesses, Joint Complainants have failed to provide the level of specificity required under Pennsylvania law. Instead, they are forcing Blue Pilot to find the proverbial needle in a haystack of documents that they control. Moreover, it is unclear from Joint Complainants’ responses which of the documents support the various allegations set forth in the individual paragraphs of the Joint Complaint. Accordingly, Blue Pilot requests that Your Honors order Joint Complainants to supplement their responses with the specific facts that support each of their allegations.

#### **D. Joint Complainants Must Supplement Their Responses**

Pursuant to 52 Pa. Code 5.332(3) “A duty to supplement responses may be imposed by order of the presiding officer, agreement of the parties, or at a time prior to hearing through new requests to supplement prior responses.” *See also Sbg Mgmt. Servs., Inc. / Fairmount Manor Realty Co., L.P.*, C-2012-2304167, 2014 WL 4374219, at \*16 (Aug. 21, 2014) (“[P]ursuant to Commission regulation [a party] is under a continuing duty to amend a prior response upon discovering that the response is incorrect or incomplete.”).

Joint Complainants have alleged that counsel for Blue Pilot and counsel for Joint Complainants entered an oral agreement over a year ago as to the sufficiency of Joint Complainants’ responses to Set I.<sup>8</sup> Counsel for Blue Pilot has no recollection of any such

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<sup>8</sup> *See, e.g.*, Email from Ms. Tunilo, dated October 2, 2015, Ex 19; Letter to Joint Complainants, dated October 5, 2015, Ex. 20; and Email from Ms. Tunilo, dated May 7, 2015, Ex. 21.

agreement and denies that Blue Pilot would ever waive its right to learn the factual basis of the claims made against it.<sup>9</sup> More to the point, even if the parties agreed a year ago that Joint Complainants' responses were sufficient at that time – which Blue Pilot denies – those responses must now be supplemented. In most of their initial responses, Joint Complainants deferred to unnamed expert testimony, testimony of consumers, and Blue Pilot's own discovery responses. Since that time, certain consumer testimony has been entered into the record and Joint Complainants have submitted three affidavits of their purported experts in an attempt to prove their claims in this proceeding. In addition, Blue Pilot has responded to twelve sets of discovery requests, and Joint Complainants have filed a Motion for Entry of Judgment representing to the ALJs that they had amassed sufficient evidence as of June 2015 to enter judgment against Blue Pilot. To the extent that Joint Complainants will now attempt to argue that the purported support for their Motion for Entry of Judgment no longer supports their allegations in this proceeding, that argument should not be accepted. In short, while the factual basis that Joint Complainants' contend supports their claims in this proceeding should have been disclosed long ago, at this point in the proceeding, Joint Complaints must be compelled to put all of their cards on the table and disclose each and every fact that they allege supports their claims against Blue Pilot.

### **III. Specific Discovery Responses that Should Be Supplemented**

#### **A. Interrogatories 15 through 19**

Interrogatories 15 through 19 request “all facts in full and complete detail that support your allegation, and the manner in which you intend to prove” each of the claims alleged against Blue Pilot.<sup>10</sup> In response, OCA referred to the written consumer statements, the affidavit of

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<sup>9</sup> See Email from Mr. Cushman, dated October 1, 2015, Ex. 18; Letter to Joint Complainants, dated October 5, 2015, Ex. 20.

<sup>10</sup> See Set I Interrogatories to OCA, Ex. 1; Set I Interrogatories to OAG, Ex. 3.

Steve L. Estomin, PhD, dated June 3, 2014, and further stated that it intends to present consumer fact witnesses and expert witnesses and intends to cross examine representatives of Blue Pilot.<sup>11</sup> Similarly, OAG simply referred to the written consumer statements, the future testimony of Dr. Estomin and other unnamed experts, and stated that it is relying on OCA to fully respond.<sup>12</sup>

Joint Complainants' responses fail to answer the Interrogatories. Blue Pilot seeks to know *all facts* in detail that support each of the allegations made against Blue Pilot, which is necessary for Blue Pilot to form a defense. At this stage in the proceeding, Joint Complainants must be in possession of this information. Since the time that Joint Complainants responded to

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<sup>11</sup> See OCA's Responses to Set I Interrogatory Nos. 1-28 and 34-38 to OCA, dated August 22, 2014, Ex. 6.

<sup>12</sup> See OAG's Responses to Set I Interrogatories and RFPs to OAG, dated August 20, 2014, Ex. 5. OAG (not OCA) did provide a more generalized response to Interrogatory No. 19, which requests "all facts in full and complete detail that support your allegation, and the manner in which you intend to prove that BPE violated the Telemarketer Registration Act as alleged in Count V of the Joint Complaint." *Id.* In its response, OAG provides:

The Commonwealth submits that Section 111.10(a)(1) of the Commission's regulations require electric generation suppliers to comply with the Telemarketer Registration Act, 73 P.S. § 2241, *et seq.*

Blue Pilot failed to provide written contracts to consumers as required by Section 2245(a)(7) of the Telemarketer Registration Act. In the event that Blue Pilot's Disclosure Statement and Agreement is considered a written contract, the Commonwealth submits that the Disclosure Statement and Agreement fails [sic] to include:

- The name, address, and telephone number of the telemarketer or telemarketing business, as required by Section 2245(c)(1) of the Telemarketer Registration Act;
- The total price of the consumer goods or services purchased, as required by Section 2245(c)(2) of the Telemarketer Registration Act;
- A detailed description of the consumer goods and services purchased, which shall match the oral description given in the telemarketing solicitation, as required by Section 2245(c)(3) of the Telemarketer Registration Act;
- Any oral or written representations made during the telemarketing solicitation, as required by Section 2245(c)(4) of the Telemarketer Registration Act; and
- A statement that reads "You are not obligated to pay any money unless you sign this contract and return it to the seller," as required by Section 2245(c)(5) of the Telemarketer Registration Act.

*Id.* Blue Pilot submits that OAG's response is still incomplete and fails to provide the factual basis which would support its allegations. Further, in support of the allegation that Blue Pilot made misleading and deceptive promises of savings, as alleged in Count III of the Joint Complaint, OAG states that five (5) consumer complaints support this allegation. *Id.* If OAG relies exclusively on the five unnamed consumer statements referred to in its response to 17, OAG should state as such, provide the identify of these consumers, and state all facts that support OAG's allegation that these consumer complaints are evidence that Blue Pilot allegedly made misleading and deceptive promises of savings.

these Interrogatories, they have filed a Motion for Entry of Judgment against Blue Pilot, wherein they represented to Your Honors that they possessed sufficient facts to support each of the claims they have made against Blue Pilot. To that end, they submitted three affidavits of their purported experts in an attempt to prove their claims. Those affidavits contained a purported expert's opinion. They did not contain facts. In addition, Blue Pilot has responded to twelve sets of discovery requests and certain consumer testimony has been entered into the record. Blue Pilot requests that Your Honors order Joint Complainants to supplement these Interrogatories with "all facts in full and complete detail that support [Joint Complainants'] allegation, and the manner in which [Joint Complainants] intend to prove" each of the claims alleged against Blue Pilot.

**B. Interrogatory No. 20 and Request for Production Nos. 25-28**

Interrogatory No. 20 and Request for Production Nos. 25-28 seek the factual basis for many of the allegations Joint Complainants have made against Blue Pilot.<sup>13</sup> Specifically, the discovery requests seek the facts and documents that support the allegations made 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 its response, OCA referred to the written consumer statements and stated that it intends to present consumer fact and expert witnesses and intends to cross examine representatives of Blue Pilot.<sup>14</sup> OAG similarly referred to the written consumer statements, deferred to OCA, and further stated that it intends to offer expert testimony.<sup>15</sup> That response does not provide the facts sought in this Interrogatory and Requests for Production.

Blue Pilot seeks to know all facts in detail that support the allegations made by Joint Complainants against Blue Pilot, which is necessary for Blue Pilot to form a defense. At this

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<sup>13</sup> See Set I Interrogatories to OCA, Ex. 1; Set I Interrogatories to OAG, Ex. 3.

<sup>14</sup> See OCA's Responses to Set I Interrogatory Nos. 1-28 and 34-38 to OCA, dated August 22, 2014, Ex. 6; OCA's Responses to Set I RFPs to OCA, dated August 22, 2014, Ex. 7.

<sup>15</sup> See OAG's Responses to Set I Interrogatories and RFPs to OAG, dated August 20, 2014, Ex. 5.

stage in the proceeding, Joint Complainants must be in possession of this information. Since the time that Joint Complainants responded to these Interrogatories, they have filed a Motion for Entry of Judgment against Blue Pilot, wherein they represented to Your Honors that they possessed sufficient facts to support each of the claims they have made against Blue Pilot. To that end, they submitted three affidavits of their purported experts in an attempt to prove their claims. Those affidavits contained a purported expert's opinion. They did not contain facts. In addition, Blue Pilot has responded to twelve sets of discovery requests and certain consumer testimony has been entered into the record. Blue Pilot requests Your Honors order Joint Complainants to supplement these discovery requests with the facts and documents that support Joint Complainants allegations in the Paragraphs 13, 21, 25, 26, 27, 29, 30, 32, 34, 35, 36, 37, 41, 42, 48, 50, 54, and 58.

**C. Interrogatories Nos. 21 through 27**

Count IV of the Joint Complaint alleges that Blue Pilot lacked good faith in the manner that it handled consumer complaints about the variable rates charged on their bills – *i.e.*, that Blue Pilot's complaint handling processes failed to satisfy the standards set by Commission regulations and orders in a number of respects. Blue Pilot seeks the factual basis regarding what standard Joint Complainants allege Blue Pilot should have followed. To that end, Interrogatory Nos. 21-27 requested that Joint Complainants provide “in full and complete detail, and without resort to legal conclusions, what constitutes what you believe” 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).<sup>16</sup>

Another allegation that appears to be a cornerstone of the Joint Complaint is that the disclosure statement for Blue Pilot's variable rate plans allegedly does not comply with Commission regulations or orders, or Pennsylvania law. Blue Pilot simply seeks to discover from Joint Complainants what, in fact, Joint Complainants believe constitutes a compliant and adequate disclosure statement. Such a disclosure statement must exist or have existed, otherwise Joint Complainants would have no legal basis to assert that Blue Pilot's disclosure statement does not pass muster in the first instance. Thus, Interrogatory Nos. 26 and 27 request Joint Complainants 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," 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. . . ."<sup>17</sup>

Joint Complainants' rote answer to each of the above-referenced interrogatories is that responsive information will be presented by way of Barbara Alexander, Steven L. Estomin, or some other unspecified expert at a later.<sup>18</sup> Those answers are wholly unresponsive to the interrogatories posed. Blue Pilot is not seeking to know what an expert's opinion might be regarding what he or she believes constitutes proper complaint handling or a sufficient disclosure statement; rather, it seeks to learn the *factual* basis that supports Joint Complainants' allegations. Blue Pilot also seeks to discover what Joint Complainants understand would comply with

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<sup>16</sup> See Set I Interrogatories to OCA, Ex. 1; Set I Interrogatories to OAG, Ex. 3.

<sup>17</sup> *Id.*

<sup>18</sup> See OAG's Responses to Set I Interrogatories and RFPs to OAG, dated August 20, 2014, Ex. 5; OCA's Responses to Set I Interrogatory Nos. 1-28 and 34-38 to OCA, dated August 22, 2014, Ex. 6.

Commission regulations or orders, and Pennsylvania law, and whether Joint Complainants have, within their possession, custody, or control any examples of what does comply. Clearly they will have to argue that a factual basis exists to hold Blue Pilot to this alleged standard. If Joint Complainants have no support for their claims, cannot explain what they believe constitutes proper, good faith complaint handling, and/or cannot identify what they understand to constitute a legally sufficient disclosure statement, they should so state. Accordingly, Blue Pilot requests Your Honors order Joint Complainants to provide detailed responses to Interrogatory Nos. 21 through 27.

**D. Interrogatory Nos. 30-31 to OAG and 35-36 to OCA**

Interrogatory Nos. 30-31 to OAG and 35-36 to OCA seek the “elements of costs 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.”<sup>19</sup> In response, Joint Complainants have deferred to the future testimony of Dr. Estomin.<sup>20</sup> These answers are not responsive to the interrogatories. Further, Dr. Estomin has already signed a sworn affidavit to Your Honors stating his opinions regarding certain issues raised in this proceeding. Blue Pilot requests Your Honors order Joint Complainants to supplement these discovery requests.

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<sup>19</sup> See Set I Interrogatories to OCA, Ex. 1; Set I Interrogatories to OAG, Ex. 3.

<sup>20</sup> See OAG’s Responses to Set I Interrogatories and RFPs to OAG, dated August 20, 2014, Ex. 5; OCA’s Responses to Set I Interrogatory Nos. 1-28 and 34-38 to OCA, dated August 22, 2014, Ex. 6.

**E. Interrogatory No. 29 to OAG and 34 to OCA and Request for Production Nos. 4, 51, and 53**

Interrogatory No. 29 to OAG and Interrogatory No. 34 to OCA requests the following:

Identify in detail each and every document and item of tangible property that You may use at the time of trial or in any evidentiary hearing or proceeding to establish or prove any and all parts of Your case or that You may introduce into evidence for any purpose whatsoever at the time of trial or during any evidentiary hearing. With respect to each such document or item of tangible property, identify any person who has custody of the items and the present location where the items may be inspected. Identify all steps You have taken to preserve documents relevant to the Subject Matter of this Action.<sup>21</sup>

Request for Production No. 4 to both Joint Complainants similarly request “all documents, correspondence, and/or tangible items that you may utilize at trial, any evidentiary hearing, or for any purpose in this Action.”<sup>22</sup>

Request for Production No. 51 to OAG and 53 to OCA requests “[a]ny and all documents that you intend to use for any purpose in this Action to prove any of the claims made in the Joint Complaint.”<sup>23</sup> 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.<sup>24</sup> No party should be permitted to conduct a trial by ambush. Blue Pilot requests Your Honors order Joint Complainants to supplement these discovery requests.

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<sup>21</sup> See Set I Interrogatories to OCA, Ex. 1; Set I Interrogatories to OAG, Ex. 3.

<sup>22</sup> See Set I RFPs to OCA, Ex. 2; Set I RFPs to OAG, Ex. 4.

<sup>23</sup> *Id.*

<sup>24</sup> See OAG’s Responses to Set I Interrogatories and RFPs to OAG, dated August 20, 2014, Ex. 5; OCA’s Responses to Set I Interrogatory Nos. 1-28 and 34-38 to OCA, dated August 22, 2014, Ex. 6; OCA’s Responses to Set I RFPs to OCA, dated August 22, 2014, Ex. 7; OCA’s Supplemental Responses to Set I Interrogatory Nos. 6, 9, 34, and 37 and RFP Nos. 3, 11, and 17 to OCA, dated November 17, 2014, Ex. 11.

**F. Interrogatory No. 2**

Interrogatory No. 2 requests that Joint Complainants “[i]dentify each person that you intend to call as a witness at the time of trial or any evidentiary hearing,” and to provide, among other things, “the subject or subjects of the testimony that you believe they will give,” “the nature of the person’s involvement with any component of the Subject Matter of this Action,” and address and telephone number for each such individual.<sup>25</sup>

In its response to Interrogatory No. 2, OAG has identified certain consumer witnesses as well as Heather M. Weaver, Ashley E. Everette, Gregory Strupp, and “Blue Pilot employees, agents, or representatives.”<sup>26</sup> However, it does not appear that these are the only persons that OAG believes it will call as a witness. This is clear because OAG appeared to rely on Dr. Steven L. Estomin, Ph.D. and Barbara R. Alexander in connection with its Motion for Entry of Judgment against Blue Pilot.<sup>27</sup> OAG has also provided only a cursory explanation of the subject matter upon which these individuals will testify.

In response to Interrogatory No. 2, OCA has identified certain consumer witnesses as well as Heather M. Weaver, Asheley E. Everette, Gregory Strupp, Steven L. Estimon, Ph.D, Barbara Alexander, and “employees, agents, and/or representatives of Blue Pilot.”<sup>28</sup> OCA has provided only a cursory explanation of the subject matter upon which these individuals will testify. Blue Pilot is entitled to know the identity of each individual that Joint Complainants

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<sup>25</sup> See Set I Interrogatories to OCA, Ex. 1; Set I Interrogatories to OAG, Ex. 3.

<sup>26</sup> See OAG’s Responses to Set I Interrogatories and RFPs to OAG, dated August 20, 2014, Ex. 5; Joint Complainants’ Supplemental Response to Set I Interrogatory No. 2 and RFP No. 2 to Joint Complainants, dated October 8, 2014, Ex. 9; OAG’s Supplemental Response to Set I Interrogatory No. 2 to OAG, dated August 18, 2015, Ex. 14.

<sup>27</sup> See Joint Complainants Motion for Entry of Judgment against Blue Pilot.

<sup>28</sup> See OCA’s Responses to Set I Interrogatory Nos. 1-28 and 34-38 to OCA, dated August 22, 2014, Ex. 6; Joint Complainants’ Supplemental Response to Set I Interrogatory No. 2 and RFP No. 2 to Joint Complainants, dated October 8, 2014, Ex. 9; OCA’s Supplemental Response to Set I Interrogatory No. 2 to OCA, dated October 10, 2014, Ex. 10; OCA’s Supplemental Response to Set I Interrogatory No. 2 to OCA, dated August 19, 2015, Ex. 15.

intend to rely on at the hearing in this proceeding and requests that Your Honors order Joint Complainants to identify those individuals and state the specific information requested – i.e., the name, title, address, telephone number, subject matter of information she or he possesses, and involvement with any component of the Subject Matter of this Action.

**G. Interrogatory No. 37**

Interrogatory No. 37 requests “any admissions [you claim] were made by Blue Pilot.”<sup>29</sup> In response, Joint Complainants referred to the written consumer statements.<sup>30</sup> Blue Pilot requests Your Honors order Joint Complainants to specifically state which customer statement contains an alleged admission and whether this consists of every admission Joint Complainants claim was made by Blue Pilot or otherwise supplement their response.

**CONCLUSION**

Based on the foregoing, Blue Pilot requests Your Honors enter an order requiring OCA to fully supplement and respond to Set I, including Interrogatory Nos. 2, 15-27, and 34-37, and Request for Production Nos. 4, 25-28, and 53. Blue Pilot further requests Your Honors enter an order requiring OAG to fully supplement and respond to Interrogatories Nos. 2, 15-27, 29-31, and 37, and Request for Production Nos. 4-5, 25-28, and 51.

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<sup>29</sup> See Set I Interrogatories to OCA, Ex. 1; Set I Interrogatories to OAG, Ex. 3.

<sup>30</sup> See OAG’s Responses to Set I Interrogatories and RFPs to OAG, dated August 20, 2014, Ex. 5; OCA’s Responses to Set I Interrogatory Nos. 1-28 and 34-38 to OCA, dated August 22, 2014, Ex. 6; OCA’s Supplemental Responses to Set I Interrogatory Nos. 6, 9, 34, and 37 and RFP Nos. 3, 11, and 17 to OCA, dated November 17, 2014, Ex. 11.

October 16, 2015

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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**COMMONWEALTH OF  
PENNSYLVANIA, ET AL.**

**v.**

**BLUE PILOT ENERGY, LLC**

**Docket Nos. C-2014-2427655**

**CERTIFICATE OF SERVICE**

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

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Dated this 16<sup>th</sup> day of October, 2015.

  
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Karen O. Moury, Esq.