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January 22, 2016

VIA E-FILING

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

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

Dear Secretary Chiavetta:

On behalf of Blue Pilot Energy, LLC (“Blue Pilot Energy”), enclosed for electronic filing is a Brief on Behalf of Blue Pilot Energy, LLC in Support of Petition for Certification, in the above-captioned matter.

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

Very truly yours,



Karen O. Moury

KOM/bb
Enclosure
cc: Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**BRIEF ON BEHALF OF BLUE PILOT ENERGY, LLC
IN SUPPORT OF PETITION FOR CERTIFICATION**

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Counsel for Blue Pilot Energy, LLC

Dated: January 22, 2016

I. INTRODUCTION

Blue Pilot Energy, LLC (“BPE”) files this brief, pursuant to Section 5.304(d) of the Commission’s regulations,¹ in support of its Petition for Certification filed on January 19, 2016, seeking interlocutory review of the Order Granting Motion to Compel Responses to Joint Complainants’ Interrogatories Set XIII (“*Interim Order*”) issued by Administrative Law Judges (“ALJs”) Elizabeth Barnes and Joel H. Cheskis on January 14, 2016. By its Petition, BPE seeks certification and interlocutory review of the following important question of law:

Would BPE’s fundamental due process rights be violated if the evidentiary hearings in this proceeding address BPE’s bond, the status of its participation in the PJM wholesale market and the payment of gross receipts taxes when these issues are beyond the scope of the allegations raised by the Joint Complaint?

The suggested answer: Yes.

The Joint Complaint’s allegations arise from variable price increases during the Polar Vortex in early 2014 and relate to whether BPE: (i) provided accurate pricing information to consumers; (ii) charged prices that conform to BPE’s disclosure statement; (iii) honored any promises of savings that were made by BPE; (iv) properly handled consumer complaints; and (v) complied with the Telemarketer Registration Act.² Through the Joint Complainants’ Interrogatories and Requests for Production – Set XIII (“*Discovery Requests*”), they seek information that goes well beyond the scope of those allegations, including BPE’s current bond or other security; its present status to participate in the PJM wholesale market and unpaid or overdue billings incurred by BPE over the past year; and the payment of gross receipts taxes.

¹ 52 Pa. Code § 5.304(d). Although Section 5.304(d) permits parties to file responsive briefs within 7 days of a request for certification either supporting or opposing certification, the presiding officers have asked the parties, due to the procedural status of this proceeding, to submit briefs by January 22, 2016.

² 73 P.S. §§ 2242 *et seq.*

The Commission's regulations limit discovery to only what is relevant to the subject matter involved in the proceeding and is reasonably calculated to lead to the discovery of admissible evidence. Fundamental principles of due process require that respondents are given notice and opportunity to be heard as to any claims pursued against them. As it would be a violation of BPE's due process rights to admit any evidence into the record regarding its bond; its status to participate in the wholesale market; and the payment of gross receipts taxes, which far exceed the allegations raised by the Joint Complaint, the *Interim Order* inappropriately compelled BPE to produce this information. Moreover, both Surrebuttal Testimony and cross-examination of BPE's witness on his Rebuttal Testimony are limited to the scope of that Rebuttal Testimony, which addressed only one issue – the adequacy of BPE's disclosure statement.³ Therefore, any information produced in response to the Discovery Requests would be outside the proper scope of Surrebuttal Testimony, as well as the cross-examination of BPE's witness on his Rebuttal Testimony.

The Joint Complainants are engaged in an impermissible fishing expedition to gather information about BPE's business that is entirely unrelated to the allegations of the Joint Complaint. If they desire to bring issues about BPE's bond and other related matters covered by the Discovery Requests into this proceeding, it is incumbent upon them to file an Amended Complaint, which would afford BPE the requisite notice and opportunity to be heard. It is wholly improper to permit the Joint Complainants to use this proceeding, which concerns allegations about BPE's sales, marketing and business practices prior to and during the Polar Vortex in early 2014, to gather various pieces of information about financial aspects of BPE's current business operations that are irrelevant to those claims. By requiring discovery to be

³ BPE Statement No. 1.

relevant and reasonably calculated to lead to the discovery of admissible evidence, the Commission's regulations are designed to safeguard against the very type of conduct in which the Joint Complainants are engaged and which the *Interim Order* condoned.

For these reasons, BPE respectfully requests that the ALJs certify the question for interlocutory review so that the Commission may answer these important questions of law affecting BPE's fundamental rights of due process and avoid substantial prejudice to BPE.

II. ARGUMENT

The Commission's regulations provide that "a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." 52 Pa. Code § 5.321(c). The regulations further state that the information sought must be "reasonably calculated to lead to the discovery of admissible evidence." *Id.* The Joint Complainants' Discovery Requests, which seek information that is irrelevant to the proceeding and could not possibly lead to the discovery of admissible evidence, are the classic fishing expedition that is prohibited by these regulations. The Commission has emphasized that the standard for discovery is relevance, not curiosity. *See Pa. Pub. Util. Comm'n., et al. v. Pennsylvania American Water Company*, Docket No. R-2011-2232243 (Order on Motion to Compel dated July 21, 2011 at 21-22).

The Joint Complaint's allegations relate to various matters arising from variable price increases during the Polar Vortex in 2014 concerning: (i) the provision of accurate pricing information to consumers; (ii) charging prices that conform to BPE's disclosure statement; (iii) honoring any promises of savings that were made by BPE; (iv) the handling of consumer complaints; and (v) compliance with the Telemarketer Registration Act. The information sought

through the Discovery Requests pertains to whether BPE currently maintains a bond or other approved security; the present status of its participation in the PJM wholesale market and unpaid or overdue billings incurred by BPE over the past year; and the payment of gross receipts taxes. As this information about the status of BPE's current business operations is wholly unrelated to the allegations in the Joint Complaint relating to its sales, marketing and business practices during and before the Polar Vortex in 2014, BPE should not be required to produce responses.

Moreover, as a fundamental matter of due process, BPE has a right to notice and opportunity to be heard on any allegations that the Joint Complainants seek to pursue against it. *See Commonwealth v. Thompson*, 444 Pa. 312, 316, 281 A.2d 856, 858 (1971). It is well-settled that issues that are not raised in a complaint may not be raised at hearing. *O'Toole v. Metropolitan Edison Company*, Docket No. C-2008-2045487 (Initial Decision served February 10, 2009 and Final Order entered April 20, 2009) ("*O'Toole*"). As explained in *O'Toole*, the Commission is obligated to provide due process to parties appearing before it. *Schneider v. Pa. P.U.C.*, 479 A.2d 10 (Pa. Cmwlth. 1984). In *O'Toole*, the Commission appropriately recognized that if an issue is not raised in a party's complaint, the responding party receives no notice that the issue will be litigated at hearing, and if this occurs, the responding party is denied due process of law. *O'Toole* at 13. Since basic principles of due process preclude the Joint Complainants from raising allegations through testimony or at the hearing that were not included in the Joint Complaint, the information sought by the Discovery Requests is not reasonably calculated to lead to the discovery of admissible evidence.

In addition, given the procedural stage of this proceeding, evidence about BPE's bond and related matters are not properly the subject of Surrebuttal Testimony or cross-examination of BPE's witness on his Rebuttal Testimony. It is well-accepted that the scope of Surrebuttal

Testimony is limited to the topics that are addressed in Rebuttal Testimony. *See Downey v. Weston*, 451 Pa. 259, 268-69, 301 A.2d 635, 641 (1973) (parties may not introduce evidence in rebuttal which is properly part of their case in chief). Likewise, cross-examination of BPE's witness on his Rebuttal Testimony and the introduction of any cross-examination exhibits, are limited to the scope of the Rebuttal Testimony. Here, the Rebuttal Testimony addresses only one issue - BPE's disclosure statement.⁴ Therefore, any information produced in response to the Discovery Requests may not be addressed in either the Surrebuttal Testimony or the cross-examination of BPE's witness related to his Rebuttal Testimony. As a result, compelling BPE to produce information at this stage of the proceeding does nothing but facilitate the Joint Complainants' curiosity, which is not permissible under the Commission's discovery rules.

In the *Interim Order*, the ALJs found that the Commission's entry of a Tentative Order on December 17, 2015⁵ proposing to cancel BPE's EGS license for failure to maintain a bond or other approved security justifies the Discovery Requests at this phase of the proceeding. *Interim Order* at 6. Respectfully, BPE strongly disagrees. The Commission's independent actions in a different proceeding addressing bond issues related to BPE's EGS license are separate and apart from this proceeding. Indeed, any interested party is free to file comments with the Commission in response to the *License Cancellation Tentative Order*. Simply stated, absent an amendment of the Joint Complaint in this proceeding to raise issues concerning BPE's bond, the issuance of the *License Cancellation Tentative Order* by the Commission in a separate proceeding does not change the permissible scope of Discovery Requests or the admissibility of evidence in this proceeding.

⁴ BPE Statement No. 1.

⁵ *In re: Electric Generation Supplier License Cancellations of Companies with Expired Financial Security*, Docket No. M-2015-2490383 (Tentative Order entered December 17, 2015) ("*License Cancellation Tentative Order*").

The Joint Complainants were aware of issues concerning BPE's bond well before entry of the Commission's *License Cancellation Tentative Order* on December 17, 2015. Much of the information sought by the Discovery Requests relates to communications in the Summer of 2015 between the Commission and BPE in connection with its license and bond as referenced on BPE's application docket.⁶ After BPE filed a letter at that docket surrendering its EGS license on May 4, 2015, the Office of Consumer Advocate filed a Notice of Intervention on May 18, 2015 and the Office of Attorney General filed a Petition to Intervene on May 21, 2015. Thereafter, as entries appeared on that docket regarding bond cancellations which are referenced in the Discovery Requests, the Joint Complainants were free to amend the Joint Complaint at any time in this proceeding to add allegations relating to BPE's bond. Particularly as of the issuance of the Commission's August 27, 2015 letter referenced in the Discovery Requests, which informed BPE of the need to file a bond or other approved security, the Joint Complainants were on notice of a possible lapse in the bond.⁷ Yet, rather than amending the Joint Complaint at that time to afford BPE notice and an opportunity to respond to any allegations regarding the bond as part of this proceeding, the Joint Complainants waited until months later and after the service of BPE's Rebuttal Testimony to serve the Discovery Requests.

Had the Joint Complainants followed the proper process and amended the Joint Complaint, BPE would have had an opportunity to respond to such allegations and proffer evidence in defense of them. For example, BPE could have offered evidence demonstrating that no customers were being served or solicited during the relevant time period. BPE could have also offered evidence regarding its efforts to obtain a bond or other approved security. However,

⁶ http://www.puc.pa.gov/about_puc/consolidated_case_view.aspx?Docket=A-2011-2223888.

⁷ In fact, BPE's counsel was contacted by counsel for the Joint Complainants in September 2015 about filings at the application docket, as evidenced by the electronic email dated September 28, 2015, which is attached as Appendix A.

because the Joint Complainants did not amend the Joint Complaint, BPE has not had notice and opportunity to be heard on these allegations.

The *Interim Order* also suggested that a higher civil penalty may be warranted if BPE allowed its bond or other approved security to lapse. *Interim Order* at 6. Respectfully, again, BPE strongly disagrees. Because the Joint Complaint has not been amended to allege a lapse in BPE's bond, it would be a violation of BPE's fundamental due process rights to impose a civil penalty on the basis of allegations made in a separate proceeding and pursued in this proceeding for the first time in Surrebuttal Testimony.⁸ See *Northview Motors, Inc. v. Cmwlt. Attorney Gen.*, 562 A.2d 977, 980 (Pa. Cmwlt. 1989) (when an action seeks to impose civil penalties, a respondent is entitled to due process rights). See also *Pocono Water Co. v. Pa. Pub. Util. Comm'n.*, 630 A.2d 971 (Pa. Cmwlt. 1993) (reversing a penalty imposed by the Commission for failure to adhere to due process principles). Notably, by contrast, the Commission has afforded BPE the requisite due process in the *License Cancellation Tentative Order* by providing notice and an opportunity to either respond to the allegations or file approved security by February 1, 2015 before cancelling the EGS license.⁹

A scenario that is set up by the *Interim Order* is that if BPE would provide responses to the Discovery Requests indicating lapses in the bond, the Joint Complainants would supplement the Surrebuttal Testimony of Ms. Alexander to claim that these lapses should in some way affect the outcome of this proceeding. They have already improperly proffered Surrebuttal Testimony about the *License Cancellation Tentative Order*, which not only exceeds the scope of Rebuttal

⁸ The Surrebuttal Testimony served by the Joint Complainants on January 20, 2016 improperly exceeds the scope of the Rebuttal Testimony by addressing issues that are not remotely related to BPE's Rebuttal Testimony.

⁹ The *License Cancellation Tentative Order* does not contain any mention of the imposition of civil penalties. Moreover, the imposition of civil penalties in this proceeding stemming from the same violation of the Code would violate the double jeopardy protections of the Fifth Amendment. See *Gavieres v. United States*, 220 U.S. 338 (1911).

Testimony but also mischaracterizes the *License Cancellation Tentative Order* and reaches unfounded conclusions from it, regarding all of which BPE has no opportunity to respond.¹⁰ The same would be true with any supplemental Surrebuttal Testimony, which Ms. Alexander has reserved the right to submit upon the receipt of responses to the pending Discovery Requests.¹¹ BPE's only avenue for providing a response to such testimony would be through legal arguments set forth in a brief. However, facts about whether any customers were served after such lapse would not be in the record. Moreover, facts about the efforts of BPE to obtain a bond or other approved security would not be in the record. Yet, those are mitigating factors that would be relevant and should be considered.

Moreover, civil penalties are not the remedy that is established by the Public Utility Code ("Code")¹² for lapses of bonds or other approved security. Code Section 2809 is very clear in providing a remedy for the lapse of a bond – and that remedy is exactly what the Commission is now seeking through the issuance of the *License Cancellation Tentative Order* in a separate proceeding. Code Section 2809(c)(1)(i) specifically provides that no EGS license shall "remain in force" if the EGS does not maintain a bond or other security. 66 Pa. C.S. § 2809(c)(1)(i).

The *Interim Order* also asserts that the information sought by the Discovery Requests is relevant to whether BPE can pay any refunds that might be directed as part of this proceeding.¹³ *Interim Order* at 6. However, that information has absolutely no bearing on whether BPE

¹⁰ OAG/OCA Statement No. 1-SR at 6. Based on the Commission's *License Cancellation Tentative Order* in another proceeding, to which comments are not even yet due, Ms. Alexander claims that "Blue Pilot lacks sufficient security as required by the Public Utility Code, and this failure should be taken into account as well in this proceeding." *Id.* Even the Commission's *License Cancellation Tentative Order* has not suggested this conclusion; rather, the Commission has merely stated that evidence of a bond or other approved security has not been submitted. And the Commission is providing an opportunity for BPE to file comments or evidence of a bond or other security before proceeding to cancellation of the license.

¹¹ OAG/OCA Statement No. 1-SR at 10.

¹² 66 Pa. C.S. §§ 101 *et seq.*

¹³ In view of concerns that have been expressed about whether BPE has a financial ability to pay refunds to consumers, it is puzzling why a civil penalty for the lapse of a bond is even being discussed.

violated the Code, Commission regulations or orders, as alleged in the Joint Complaint. Specifically, even if BPE would produce responses indicating that its bond has lapsed, this information would not be relevant to whether BPE provided accurate pricing information to consumers; charged consumer prices that conformed to its disclosure statements; honored any promises of savings that were made; properly handled customer complaints; and complied with the Telemarketer Registration Act. In addition, the bond was certainly never a guaranteed source for payment in view of the prioritization given to the Commonwealth of Pennsylvania. 52 Pa. Code § 54.40 (f)(3); *Public Utility Commission Bonding/Security Requirements for Electric Generation Suppliers*, Docket No. M-2013-2393141 (Order entered July 24, 2014) (payment of gross receipts tax is the first priority). Therefore, introducing such information into the record of this proceeding adds nothing of relevance to the Joint Complaint's allegations.

Moreover, no case law has been cited by the Joint Complainants or the *Interim Order* in support of the proposition that the government has any entitlement to information about a respondent's ability to pay any relief that is requested or may be awarded. To the contrary, this issue normally arises in the context of considering the financial ability of a respondent to pay a proposed penalty in determining the amount of penalty that is imposed. *See In the Matter of Barnsley Square LP and Selvaggio Enterprises, Inc.*, Docket No. CAA-03-2008-0363, 2009 WL 1010409 (E.P.A.); *U.S. Papercraft Corp.* 540 F. 2d 131 (3rd Cir. 1976); *U.S. v. Swingline, Inc.*, 371 F. Supp. 37 (E.D. NY. 1974).

What the Joint Complainants are truly seeking to accomplish through the Discovery Requests is to have BPE forced to continue maintaining a bond or other security. That is not an option and it is not a remedy that the Commission has at its disposal. As the old saying goes, "You can't get blood from a stone." If BPE fails to provide evidence of a bond or other

approved security, for whatever reason and regardless of the circumstances, the Commission is required by Code Section 2809(c) to cancel the license. No other relief is appropriate or warranted, and issues that have arisen in a separate proceeding relating to this matter may not simply be rolled into this proceeding through Surrebuttal Testimony when the Joint Complaint has not been amended. To permit the Joint Complainants' fishing expedition into areas that are well beyond the scope of the Joint Complaint and then allow them to use the information obtained through such Discovery Requests, the Commission would be obliterating BPE's fundamental due process rights.

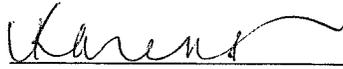
Section 5.304(d)(3) of the Commission's regulations requires responsive briefs to address whether a stay of the proceedings is required to protect the substantial rights of a party. BPE is requesting a stay of the proceedings in order to protect its fundamental rights of due process, as explained in this brief. Absent a stay, the Joint Complainants will be permitted to present evidence and legal arguments and seek the imposition of civil penalties on the basis of allegations on which BPE has not had notice and an opportunity to be heard.

III. CONCLUSION

Blue Pilot Energy, LLC respectfully requests the Petition for Certification be granted, that the Interim Order be vacated and that the Motion to Compel filed by the Joint Complainants on January 7, 2016 relating to the Joint Complainants' Interrogatories and Requests for Production – Set XIII be denied.

Respectfully submitted,

Dated: January 22, 2016



Karen O. Moury
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(717) 237-4820

Counsel for Blue Pilot Energy, LLC

APPENDIX A

Subject: FW: Blue Pilot A-docket

From: Moury, Karen O.
Sent: Monday, September 28, 2015 2:52 PM
To: 'Tunilo, Candis'
Cc: Dusman, Dianne E.
Subject: RE: Blue Pilot A-docket

Candis,

I have talked with Blue Pilot, and the company hasn't authorized you to contact Jessica Renneker directly. But I do have some information that I can share with you. If you'd like to call, I'm available this afternoon. Thanks.

Karen
237-4820

From: Tunilo, Candis [<mailto:CTunilo@paoca.org>]
Sent: Monday, September 28, 2015 2:13 PM
To: Moury, Karen O.
Cc: Dusman, Dianne E.
Subject: Blue Pilot A-docket

Karen: just to follow up, have you talked to Blue Pilot about us contacting Jessica Renneker directly about her filings in the A-docket?

Thanks, 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

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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 22nd day of January, 2016.



Karen O. Moury, Esq.