

COMMONWEALTH OF PENNSYLVANIA



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March 2, 2016

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 Joint Complainants' Main Brief, in the above-referenced proceeding.

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

Respectfully Submitted,

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

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

Enclosure

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

\*185199

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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	:	

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MAIN BRIEF OF JOINT COMPLAINANTS

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**PUBLIC VERSION**

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## I. INTRODUCTION

On June 20, 2014, the Attorney General's Bureau of Consumer Protection (OAG) and the Office of Consumer Advocate (OCA) (hereinafter Joint Complainants) filed a Joint Complaint against Blue Pilot Energy, LLC (Blue Pilot or Company) to address multiple violations of Pennsylvania law and the Pennsylvania Public Utility Commission (Commission) regulations and Orders. As the OAG and OCA alleged in their Joint Complaint, Blue Pilot misled and deceived by consumers as to the price they would pay for their electricity, to their detriment. Joint Complaint at Count III. The Joint Complaint includes five separate counts as follows: I) failing to provide accurate pricing information; II) prices nonconforming to disclosure statement; III) misleading and deceptive promises of savings; IV) lack of good faith handling of complaints; and V) failing to comply with the Telemarketer Registration Act (TRA).<sup>1</sup>

The Joint Complaint arose from the significant number of consumer contacts and complaints received by the OAG and the OCA regarding Blue Pilot beginning in February of 2014. Joint Complaint at ¶¶ 14-17; OAG/OCA St. 4 at 1. These calls concerned the extraordinarily high level of electric generation charges that were being experienced by customers on variable rate plans during the winter of 2014, now known as the Polar Vortex. See Joint Complaint at ¶¶ 14, 17. Of the contacts, calls and complaints received and reviewed by the OAG and OCA, approximately 3.1% to 3.4% were from customers of Blue Pilot. Joint Complaint at ¶¶ 16-17.

The prices that Blue Pilot charged to its variable rate customers during this time period were far higher than the customers expected when they signed up for service with Blue Pilot, and far higher than Blue Pilot promised to customers in the promotional materials and sales pitches that induced the customers to switch. The series of extremely high prices charged by Blue Pilot

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<sup>1</sup> A full and complete procedural history of this proceeding is in Appendix B, attached hereto.

during the period of the Polar Vortex was not merely a reflection of short-term wholesale market prices, but served as a catalyst for customer complaints. These complaints revealed in the starkest of terms, that Blue Pilot was relying on unfair, misleading and deceptive marketing and sales practices to persuade customers to switch to Blue Pilot. Unlike the Polar Vortex itself, Blue Pilot's marketing and sales approach was not a short-term phenomenon, but was a widespread practice embedded in the Company's written promotional materials, the sales agent training, and the oral representations of the sales agents in contacts with customers.<sup>2</sup> The record clearly establishes that Blue Pilot explicitly promised savings and failed to deliver on the promised savings.

The Joint Complainants presented the testimony and exhibits of approximately 97 consumer witnesses who came forward with written testimony about their experiences with Blue Pilot. Of these, 83 testimonies and exhibits were placed on the record, with 47 consumers withstanding cross-examination and 36 testimonies stipulated into the record. The Joint Complainants also provided the expert testimony of three witnesses regarding Blue Pilot's promotional sales materials, its Disclosure Statements, its business operations, its pricing practices, its overcharges to customers, and its handling of customer complaints, *inter alia*. The Joint Complainants also presented the testimony of an OAG investigator who provided testimony relating to the complaints received by OAG against Blue Pilot. Specifically, the OAG/OCA presented the Direct and Supplemental Surrebuttal Testimonies of Barbara R. Alexander<sup>3</sup>

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<sup>2</sup> Blue Pilot's "sales agents" are employees of Blue Pilot.

<sup>3</sup> Ms. Alexander is a Consumer Affairs Consultant who works on consumer protection and customer service issues associated with utility regulation. Ms. Alexander is an attorney and a graduate of the University of Michigan (1968) and the University of Maine Law School (1976). Prior to opening her consulting practice in 1996, she spent nearly ten years as the Director of the Consumer Assistance Division of the Maine Public Utilities Commission. Her current consulting practice is directed to consumer protection, customer service and low-income issues associated with both regulated and retail competition markets. Ms. Alexander's qualifications are detailed in OAG/OCA St. 1 at 1-2, Exh. BRA-1.

(OAG/OCA St. 1 and 1-SR (Suppl)) and the Direct Testimonies of Dr. Steven L. Estomin<sup>4</sup> (OAG/OCA St. 2), Ashley E. Everette<sup>5</sup> (OAG/OCA St. 3), and Nicholas Basehore<sup>6</sup> (OAG/OCA St. 4).<sup>7</sup>

This case is not about the Polar Vortex or a few months of high prices. This case is about what the Polar Vortex brought to light about Blue Pilot's operations and sales and marketing activities in Pennsylvania. The investigation undertaken in this proceeding has documented far more than the high prices that exceeded customer expectations in the winter of 2014. The testimony of record from consumers and from the expert and non-consumer witnesses establishes

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<sup>4</sup> Dr. Estomin is a principal at Exeter Associates, Inc. He is a senior economist whose academic training and professional experience are in the areas of microeconomic applications, industry analysis, econometric modeling and environmental economics. Dr. Estomin received his Ph.D. in Economics from the University of Maryland (1986). Dr. Estomin specializes in power supply procurement, utility load forecasting, regulatory policy, options analysis, utility contract negotiation, and issues of competition, antitrust, and damages estimation. His qualifications are detailed in OAG/OCA St. 2 at 1-4, App. A and OAG/OCA St. 2-SR at 7-9.

<sup>5</sup> Ms. Everette is a Regulatory Analyst employed by the OCA since 2012. She received a Masters degree in Business Administration and a Bachelor's degree in Economics both from the University of Illinois. She has testified in numerous proceedings before the Commission with a primary specialty in accounting and finance issues. Ms. Everette's qualifications are attached as Appendix A to OAG/OCA St. 3.

<sup>6</sup> Joint Complainants note that OAG/OCA St. 4 is labeled, "Direct Testimony of Gregory M. Strupp." Mr. Gregory M. Strupp was the OAG investigator assigned to the Blue Pilot complaints at the OAG, and Mr. Strupp prepared the written, direct testimony referenced above that was served by Joint Complainants in this proceeding. Mr. Strupp, however, left his employment with the OAG prior to the hearing for cross-examination of the non-consumer witnesses that occurred on February 3, 2016 in this proceeding. As such, OAG investigator Nicholas Basehore adopted Mr. Strupp's testimony at the February 3 hearing and was presented for cross-examination by Blue Pilot counsel.

Mr. Basehore is a Consumer Protection Agent in the Pennsylvania Office of Attorney General's Bureau of Consumer Protection. Tr. at 769. Mr. Basehore has been employed with the Office of Attorney General since April 2015 with responsibility for mediating consumer complaints, assisting in investigations, and engaging in public outreach as needed. Tr. at 769, 773.

<sup>7</sup> Joint Complainants note that there is no Surrebuttal Testimony for Ms. Alexander on record in this proceeding. The reason for this occurrence is that Blue Pilot had served Rebuttal Testimony in this proceeding on December 8, 2015, pursuant to the litigation schedule. In response to the Rebuttal Testimony served by Blue Pilot, Joint Complainants served Surrebuttal Testimony of Ms. Alexander on January 20, 2016, also pursuant to the litigation schedule. Joint Complainants subsequently served Ms. Alexander's Supplemental Surrebuttal Testimony on February 1, 2016 to address new information that they had received from Blue Pilot in discovery. At the hearing for cross-examination of the non-consumer witnesses in this proceeding that occurred on February 3, 2016, Blue Pilot did not introduce its Rebuttal Testimony into the record. As such, Joint Complainants agreed that they would not move Ms. Alexander's Surrebuttal Testimony into the record that responded to Blue Pilot's Rebuttal Testimony. As Ms. Alexander's Supplemental Surrebuttal Testimony, however, was not responsive to Blue Pilot's Rebuttal Testimony, said testimony was admitted into the record.

a pattern of unfair and deceptive practices that constitute significant violations of the Public Utility Code and the Commission regulations and Orders. As OAG investigator Mr. Basehore testified, the consumer complaints received by the OAG were located in different geographic sections of Pennsylvania. OAG/OCA St. 4 at 2; see also OAG/OCA St. 4 at Exh. A. Many consumers provided substantially similar information regarding their experiences with Blue Pilot. See gen'ly Consumer Testimonies Volumes 1 and 2. The unfair and deceptive conduct was pervasive.

Joint Complainants' expert witness Barbara R. Alexander testified as to the systemic failings of the Company that resulted in such widespread conduct. After reviewing the Company's own sales scripts, promotional materials, and recorded sales calls, Ms. Alexander testified that the emphasis in the marketing of Blue Pilot's variable rate product for electric generation service is on the introductory fixed price and the potential for savings and lower bills. See OAG/OCA St. 1 at 5, 9. In addition, the promotional materials used by Blue Pilot in Pennsylvania emphasized promotional prizes and a high level of customer service by enrolling with Blue Pilot. OAG/OCA St. 1 at 10. Some of the materials also indicated that customers with default service might face dramatic rate increases. OAG/OCA St. 1 at 10. Blue Pilot's promotional materials, sales calls, verifications, and Disclosure Statements did not fully or even adequately explain the variable rate feature or inform the customer that they are being placed on a variable rate. See e.g. OAG/OCA St. 1 at 9-10, 12-13, 28.

When Joint Complainants' expert witness Ashley E. Everette analyzed the billing data provided by the Company from December 2013 through March 2014, she determined that, overall, Blue Pilot's customers paid significantly more than the Price to Compare in December

2013, January 2014, February 2014, and March 2014.<sup>8</sup> See OAG/OCA St. 3 at 4-7. Ms. Everette further noted that, overall, Blue Pilot charged its customers more than the Price to Compare in November 2013, and Blue Pilot continued to charge prices of at least 24.9 cents per kWh through at least August 2014. Id. at 8. 22. Thus, overall, Blue Pilot’s customers, who Blue Pilot promised would see “savings” and “lower bills,” paid more than the Price to Compare even before and after the period of extreme cold that began in early 2014.

Joint Complainants’ expert witness Dr. Steven L. Estomin also conducted a review of the prices charged by Blue Pilot. Dr. Estomin’s analysis revealed that the prices charged to Blue Pilot’s customers were largely unrelated to PJM wholesale market conditions identified in the Company’s Disclosure Statement for that time period. OAG/OCA St. 2 at 6-18. The Company, in fact, was unable to provide a formula or equation by which its prices were calculated. Id. at 16. Dr. Estomin further testified that while it is normal for an EGS to include a profit component in its overall price, Blue Pilot failed to identify or allude to a profit component in the Company’s Disclosure Statement. Id. at 10. Nevertheless, Blue Pilot admitted that an **BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL** was added to a cost basis in its determination of a variable price in a given month in a given EDC service area. Id. at 17. Despite Blue Pilot’s characterization of the gross margin as **BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL**, however, OCA witness Dr. Estomin

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<sup>8</sup> Specifically, Ms. Everette determined that, overall, residential customers paid **BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL** more than their applicable PTC in December 2013, **BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL** more than their applicable PTC in January 2014, **BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL** more than their applicable PTC in February 2014, and **BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL** more than their applicable PTC in March 2014 as a result of switching to Blue Pilot. OAG/OCA St. 3 at 4-7. Moreover, Ms. Everette determined that, overall, commercial customers paid **BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL** more than their applicable PTC in December 2013, **BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL** more than their applicable PTC in January 2014, **BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL** more than their applicable PTC in February 2014, and **BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL** more than their applicable PTC in March 2014 as a result of switching to Blue Pilot. OAG/OCA St. 3 at 8-11.

testified that the gross margin added by Blue Pilot in a sample calculation equates to approximately **BEGIN CONFIDENTIAL** ■ **END CONFIDENTIAL** percent of the Company's per-kWh costs in the month. *Id.* at 18. As such, it appears that the Company believed that it could simply charge a profit margin at its whim, regardless of its Disclosure Statement, and in essence use the profit margin to charge whatever price seemed to be a good idea at the time.

The unfair and deceptive practices identified in this case are exacerbated by the Company's lack of proper training, oversight and discipline of its sales agents. As Ms. Alexander aptly notes, the Company's training materials are not Pennsylvania-specific with regard to its marketing and sales activities in Pennsylvania. OAG/OCA St. 1 at 21. As the record shows, Blue Pilot has failed to properly supervise, train and oversee its telemarketing sales agents. The Company also failed to provide adequate customer service, or to treat customers fairly and in good faith as required by the Commission's Chapter 56 regulations during the Polar Vortex period when customers were trying to reach Blue Pilot to obtain some relief, although superior customer service was a promise used to induce customers to enroll.

After a review of the discovery, listening to sales calls and third party verification calls, and reviewing the consumer testimony and exhibits, Joint Complainants' expert witness Alexander summarized the extensive failings of Blue Pilot as follows:

I find that Blue Pilot's marketing practices, its oversight and training of marketing agents, its Disclosure Statement, as well as the Company's pricing and customer service practices are unfair, deceptive and inadequate and that these practices constitute significant defects in Blue Pilot's compliance with the Public Utility Code and the Commission's regulations and orders that govern the retail energy market. These unfair and deceptive practices have adversely impacted Pennsylvania consumers. Blue Pilot enticed Pennsylvania consumers to enter into variable price plans on the promises of savings and failed to deliver on the promises. Blue Pilot's marketing and sales activities failed to properly describe its Disclosure Statement, and Blue Pilot's pricing methodology failed to conform

to its Disclosure Statement. Blue Pilot also enrolled customers in plans by means of telemarketing sales calls without obtaining an actual customer signature or complying with the disclosures and terms required by the Commission's regulations that require compliance with the TRA. There is a pattern and practice revealed in Blue Pilot's sales calls, verification calls, and its handling of customer complaints of making false, deceptive, and misleading statements about the structure and operation of the Pennsylvania retail market, how default service or the Price to Compare is procured and implemented, and how Blue Pilot's products would provide benefits to consumers. Finally, Blue Pilot's responses to its customers' complaints and contacts regarding Blue Pilot's high variable prices charged in 2014 were insufficient and discriminatory with respect to rebates and credits issued to affected customers and did not comply with the customer complaint handling regulations applicable to EGSs.

OAG/OCA St. 1 at 56-57.

These significant failings harmed Pennsylvania consumers and the Pennsylvania retail market. The consumer testimony in this case was compelling as to the similarity of the customers' experiences with Blue Pilot's sales agents and customer service representatives. The consumer testimony was also compelling as to the hardship experienced by many Blue Pilot customers as a result of the high electricity charges experienced by these customers for several months. By way of example, consumers testified as follows or provided exhibits demonstrating the hardships that they experienced as a result of Blue Pilot's business operations:

- Robert W. Bishop attached letters to his testimony, in which he stated, "No one should ever have such a hardship placed on them." Exh. RWB-1. In a separate letter also attached to his testimony, Mr. Bishop explained, "PPL offered to again let me have time to pay [my electric bill] off. I could be paying the bill off by Christmas. I don't want to have that hanging over me. I have to pay it and will borrow the money to pay to get rid of the aggravation." Exh. RWB-2.
- Stephanie N. Repp, who testified on behalf of Distinctive Detail, attached a letter to her testimony, in which she stated, "We know this has affected a lot of people. It is hard times for business in this economy. The drastic jump and cost of these electric bills are unaffordable (sic), and enough to put a small business like us out of business." Exh. DD-1.
- Betty Ellis testified that she had to make payment arrangements with Met-Ed to pay her "high bills." Consumer Testimony of Charles & Betty Ellis at 98.

- Tammy M. Giles testified that she received termination notices, but was “saved” from termination because she has a child with disabilities. Consumer Testimony of Tammy M. Giles at 513.
- Termaine Gorham testified that PPL offered him a payment plan to “alleviate some of the financial burden,” and that he was still paying Blue Pilot’s invoices from March 2014. Consumer Testimony of Termaine Gorham at 338.
- William C. Evans attached an exhibit to his testimony, in which he stated, “Being retired and on a fixed income (Social Security) I cannot afford such price gouging and always made every effort to find the best provider for my electric service. [...] This billing has caused much anxiety and mental anguish as to how I am going to pay this cost gouging billing on Social Security income!” Exh. WCE-1.
- Tracey L. Frable testified, “I [am] still pay[ing] on this [and] winter [is] around [the] corner again- HELP[.]” Consumer Testimony of Tracy L. Frable at 402 (Emphasis in original).

In the remainder of this Main Brief, the Joint Complainants will detail the pattern of unfair and deceptive practices engaged in by Blue Pilot through its written materials and the oral representations of its sales agents. The Joint Complainants will also detail the many failings in Blue Pilot’s training and oversight of its sales agents.

As the record shows, the violations of Blue Pilot are significant and widespread. These widespread violations must be remedied and relief must be provided to all of Blue Pilot’s customers who were exposed to the unfair and deceptive practices.

## **II. LEGAL STANDARDS**

### **A. Burden of Proof.**

A complainant has the burden to prove his or her allegations by a “preponderance of the evidence.” 66 Pa. C.S. § 332(a). See also North American Coal Corp. v. Commonwealth of Pa., 2 Pa. Commw. 469, 279 A.2d 356 (1971). Proving an allegation by a “preponderance of the evidence” means that one party has presented evidence, which is more convincing, by even the

smallest amount, than the evidence presented by the other party. Se-Ling Hosiery v. Margulies, 364 Pa. 45, 70 A.2d 854 (1950) (Se-Ling). The Pennsylvania Supreme Court stated further:

. . . The burden of proof must be by a preponderance of the evidence, which means when it is weighed there will be a perceptibly greater weight in favor of the plaintiff's proof and more than a mere scintilla. . . . If we visualize evidence as something weighed in an ordinary balance scales and if the evidence plaintiff offers in support of his claim is so much more weighty in probative value than the evidence offered in opposition to it that it tips the scales on the side of the plaintiff, the latter has proved his claim by the fair weight of the evidence. . . .

Se-Ling, 364 Pa. at 48, 70 A.2d at 855-56.

The Commission has held that a complainant, to establish a sufficient case against a utility and satisfy the burden of proof, must show that the utility should be held responsible or accountable for the problem described in the complaint. Kiback v. IDT Energy, Inc., Docket No. C-2014-2409676, Opinion and Order at 6 (Aug. 20, 2015), citing Patterson v. The Bell Telephone Co. of PA, 72 Pa. P.U.C. 196 (1990); see also Herp v. Respond Power, LLC, Docket No. C-2014-2413756, Opinion and Order at 3 (Jan. 28, 2016). A complainant's evidence must be slightly more convincing than evidence presented by the utility but also must be substantial, and not just a trace of evidence or suspicion. Kiback at 6; Herp at 3-4. The ultimate burden of proof always remains with the complainant, even though the burden may shift to the utility periodically to rebut evidence offered by the complainant. Kiback at 7; Herp at 4.

B. Public Utility Code.

It is without question that the Commission has the "full power and authority" to carry out the intentions of and enforce the Public Utility Code. See 66 Pa. C.S. § 501(a). In fact, the Code provides that "it shall be [the Commission's] duty to enforce, execute and carry out, by its regulations, orders, or otherwise, all and singular, the provisions of this part, and the full intent thereof . . ." 66 Pa. C.S. § 501(a). As explained by Pennsylvania's Supreme Court:

This broad power must be read in light of the enumerated powers set forth in the Public Utility Code and in conjunction with the intended purpose of the commission, i.e. the regulation and control of public utilities in determining the cost and service to the public. Thus it is clear that Section 501 was intended to give the commission full powers in regulating services . . . .

Fairview Water Co. v. Pa. PUC, 509 Pa. 384, 392, 502 A.2d 162, 166 (1985).

In enacting the Electricity Generation Customer Choice and Competition Act, 66

Pa. C.S. Ch. 28 (Choice Act), the General Assembly declared, *inter alia*:

(9) Electric service is essential to the health and well-being of residents, to public safety and to orderly economic development, and electric service should be available to all customers on reasonable terms and conditions.

\* \* \*

(14) ... Electric generation suppliers will be required to obtain licenses, demonstrate financial responsibility and comply with such other requirements concerning service as the commission deems necessary for the protection of the public.

66 Pa. C.S. § 2802. Further, the General Assembly directed that:

(d) **Consumer protections and customer service.** . . .

\* \* \*

(2) The commission shall establish regulations to require each electric distribution company, electricity supplier, marketer, aggregator and broker to provide adequate and accurate customer information to enable customers to make informed choices regarding the purchase of all electricity services offered by that provider. Information shall be provided to consumers in an understandable format that enables consumers to compare prices and services on a uniform basis.

66 Pa. C.S. § 2807(d)(2). (Emphasis in original).

Electric Generation Suppliers (EGSs) are considered public utilities for the purposes described in Section 2809 of the Public Utility Code (relating to requirements for EGSs). See 66 Pa. C.S. § 102. See also Delmarva Power & Light Co. v. Pa. PUC, 870 A.2d 901, 909-10 (Pa. 2005). While the Commission may forbear from applying the requirements of the Public Utility

Code “which it determines are unnecessary due to competition” among EGSs, the Commission must, however, “impose requirements necessary to ensure that the present quality of service provided by electric utilities does not deteriorate, including assuring ... that 52 Pa. Code Ch. 56 (relating to standards and billing practices for residential utility service) are maintained.” 66 Pa. C.S. § 2809(e).

Since the enactment of the Choice Act, the Commission has been clear and unwavering in its authority and jurisdiction over EGSs and the interaction of the Choice Act with the Commission’s powers and duties enumerated in Section 501. As explained by the Commission:

[I]t is indisputably clear that the Commission has the legal authority and administrative discretion to require, to the extent deemed necessary given competition among electric generation suppliers, EGS compliance with the Public Utility Code, Commission's orders and the Commission regulations ... .

The Commission thus has the authority to impose any sanction on an EGS that it can legally impose on an EDC, or any other public utility to enforce compliance with the law, including, but not limited to, the levying of fines, the payment of restitution to customers, and the suspension or revocation of a license. As licensees, all EGSs must comply with Commission orders, regulations and provisions of the Public Utility Code that the Commission deems are applicable[.]

See Electric Distribution Company Procedures for Processing Pilot Customer Supplier Selections, 1998 Pa. PUC LEXIS 49, \*13-14 (Jan. 15, 1998) (also found at Docket No. M-00960890, Opinion and Order).

C. Commission’s Regulations and Orders.

1. Chapter 54.

Pursuant to its statutory authority in 66 Pa. C.S. §§ 501, 504, 505, 506, 1301, 1501, and 2807, the Commission promulgated regulations establishing customer information disclosure requirements for EGSs. See Customer Information Disclosure for Electricity Providers, 28 Pa. B. 3780 (Aug. 8, 1998) (also found at Docket No. L-970126, Final Rulemaking Order) (Chapter

54 Final Rulemaking Order). Regarding its authority to promulgate these regulations, the Commission stated:

Section 2807(d)(2) of the act clearly and explicitly directs the Commission to establish regulations requiring electricity providers to furnish adequate and accurate information in a format that is understandable to consumers. That provision also specifically requires that customers be provided with information that allows them to compare prices and services on a uniform basis. Through our adoption of this final rulemaking order, we simply seek to fulfill the statutory objectives of ensuring that consumers receive accurate and adequate information and are sufficiently equipped to make informed decisions about alternative generation sources.

In determining the proper scope of these final regulations, the Commission is primarily guided by use of the term "adequate" in § 2807(d)(2). While it is equally important for the Commission to ensure that accurate information is furnished, the statutory requirement for the Commission to warrant the provision of adequate information necessarily entails the development of detailed regulations. In order to fulfill that legislative mandate, the Commission has determined what is adequate and has prescribed the necessary bill format and bill content, disclosure statement requirements and pricing practices for electricity providers to follow to assure the adequacy of the information that is conveyed to consumers.

The scope of these regulations is further defined by the statutory language requiring that information must "enable customers to make informed choices" and be "in an understandable format that enables consumers to compare prices and services on a uniform basis." See 66 Pa. C.S. § 2807(d)(2). We believe that in order to satisfy our responsibility under the act, it is necessary to prescribe standard procedures governing the distribution of [] information to consumers. Through requiring all electricity providers to adhere to certain uniform rules applicable to communications with consumers, our final regulations seek to enable customers to meaningfully compare prices and services offered by a diverse group of electricity providers.

Chapter 54 Final Rulemaking Order at \*5.

In a recent consumer complaint case, the Commission explained:

Our customer choice Regulations are devoted to establishing a regulatory framework that ensures full and fair implementation of a competitive market for all stakeholders, including competitive providers, their representatives, and their customers. Chapter 54, subchapter A, addressing customer information, is intended "to require that electricity providers enable customers to make informed choices . . . by providing adequate and accurate customer information." 52 Pa. Code § 54.1. Customer information includes written, oral, and electronic

communications used by providers to communicate prices and terms to consumers under the definition of customer information. 52 Pa. Code § 54.2. Prices billed must reflect the prices marketed and agreed to in the disclosure statement. 52 Pa. Code § 54.4(a). Advertised prices must reflect prices billed and in disclosure statements. 52 Pa. Code § 54.7. All of this information is subject to our review for compliance purposes. 52 Pa. Code § 54.9.

Subchapter B addresses EGS licensing and standards, with Section 54.43 governing EGS standards and billing practices. 52 Pa. Code § 54.43. These Regulations require that consumers be provided accurate information about their services. 52 Pa. Code § 54.43(1). The Regulations also hold EGSs responsible for any fraudulent, deceptive, or other unlawful marketing or billing acts by employees, agents, or representatives. 52 Pa. Code § 54.43(f).

See Kiback v. IDT Energy, Inc., Docket No. C-2014-2409676, Opinion and Order at 21-22 (Aug. 20, 2015). The Commission further stated:

Our customer choice standards are high, specific, and unequivocal. They are intended to ensure fairness and integrity in the competitive market by requiring all marketer behavior – oral, written, or electronic – to be straightforward and clear. Only in this way may consumers make informed choices and the market flourish.

Id. at 24. Additionally, “the development of a robust and reliable competitive market is dependent upon an EGS’[s] strict adherence to clear and truthful marketing practices as outlined in our Regulations.” Id. at 25.

## 2. Chapter 111.

Contained in Chapter 111 of the Commission’s regulations are the Standards for Marketing and Sales Practices for the Retail Energy Market. See gen’ly 52 Pa. Code Ch. 111. See also Rulemaking Re: Marketing and Sales Practices for the Retail Residential Energy Market, Docket No. L-2010-2208332, Corrected Final Rulemaking Order (Oct. 24, 2012) (Corrected Chapter 111 Rulemaking Order). Chapter 111 was implemented pursuant to Sections 501, 504, 1501, 2206(b), 2208(b), 2208(e), 2807(d)(1), 2809(b) and 2809(e) of the Public Utility Code, 66 Pa. C.S. §§ 501, 504, 1501, 2206(b), 2208(b), 2208(e), 2807(d)(1), 2809(b) and 2809(e). See Corrected Chapter 111 Rulemaking Order at 55.

In 2010, the Commission sought to develop interim guidelines on marketing and sales activities after receiving contacts from concerned consumers regarding door-to-door marketing. See Corrected Chapter 111 Rulemaking Order at 2. These interim guidelines were issued on November 5, 2010. See Interim Guidelines on Marketing and Sales Practices for Electric Generation Suppliers and Natural Gas Suppliers, Docket No. M-2010-2185981, Order (Nov. 5, 2010) (2010 Interim Guidelines). The Commission then issued a Proposed Rulemaking Order in February 2011. Corrected Chapter 111 Rulemaking Order at 3. The Proposed Rulemaking Order culminated in the Corrected Chapter 111 Rulemaking Order on October 24, 2012, which established “standards and practices for marketing and sales activities for EGSs and [Natural Gas Suppliers] and their agents to ensure the fairness and the integrity of the competitive residential energy market.” Id.; 52 Pa. Code § 111.1. The Commission was clear in its intent in promulgating Chapter 111:

All market participants are put on notice that the Commission will use these resources to aggressively enforce these new regulations in the public interest – to safeguard public safety and ensure fairness for all.

Corrected Chapter 111 Rulemaking Order at 8.

Prior to the Implementation of Chapter 111, suppliers were required to comply with the 2010 Interim Guidelines. As the Commission recently explained:

Prior to the June 2013 effective date of these Chapter 111 marketing and sales practices Regulations, the activities of participants in our competitive market was regulated by a code of conduct prescribed in our *Interim Guidelines on Marketing and Sales Practices for Electric Generation Suppliers and Natural Gas Suppliers*, Docket No. M-2010-2185981 (Order entered November 5, 2010) (*2010 Interim Guidelines*). The standards established under our Final Order in *2010 Interim Guidelines* are the same as those the ALJ found IDT’s agent to have violated, specifically the Telemarketing and Consumer Fraud and Abuse Prevention Act and applicable federal regulations, *supra* at 8. So, too, was our concern for the development of a fair and robust market. As we stated then:

These guidelines are intended to facilitate the effective operation of a vigorous, dynamic, yet fair, competitive residential energy market, to the benefit of consumers, [suppliers, and distribution companies] alike. A competitive energy market can provide a positive experience for all consumers. Suppliers are expected to conduct themselves with these expectations in mind so that their sales and marketing activities do not call into question the fairness and integrity of the competitive market. Anything that damages the reputation of the competitive market harms not only consumers, but also all suppliers participating in the market.

*2010 Interim Guidelines* at 1.

Kiback at 23. (Internal footnote omitted).

3. Chapter 56.

Contained in Chapter 56 of the Commission's regulations are the standards and billing practices for Electric Distribution Companies (EDCs) and EGSs and include, *inter alia*, dispute resolution procedures that EGSs must use when contacted by a complaining customer. See gen'ly 52 Pa. Code Ch. 56. Chapter 56 regulations were promulgated pursuant to, *inter alia*, 66 Pa. C.S. Ch. 14 and §§ 331, 501, 504-506, 1301, 1305, 1501 and 1504. Id. These standards require, *inter alia*, good faith, honesty and fair dealing; that utilities attempt to directly resolve complaints with customers; investigate customer complaints, provide information to customers necessary for them to make informed judgments, and prepare a report meeting certain enumerated requirements. See 52 Pa. Code §§ 56.1(a), 56.141, 56.151 and 56.152.

As stated above, the Commission may forbear from applying the requirements of the Public Utility Code "which it determines are unnecessary due to competition" among EGSs. See 66 Pa. C.S. § 2809(e). See also Delmarva Power & Light Co. v. Pa. PUC, 870 A.2d 901, 909-10 (Pa. 2005). The Commission must, however, "impose requirements necessary to ensure that the present quality of service provided by electric utilities does not deteriorate, including assuring ... that 52 Pa. Code Ch. 56 (relating to standards and billing practices for residential utility

service) are maintained.” 66 Pa. C.S. § 2809(e). As such, since the enactment of the Choice Act, the Commission has directed that EGSs comply with the dispute resolution requirements in Chapter 56. See e.g. Electric Distribution Company Procedures for Processing Pilot Customer Supplier Selections, 1998 Pa. PUC LEXIS 49, \*11-14 (Jan. 15, 1998) (also found at Docket No. M-00960890, Opinion and Order). Furthermore, the Commission specifically directed Blue Pilot to comply with Chapter 56 requirements in the Company’s Licensing Order. See License Application of Blue Pilot Energy, LLC for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as an Aggregator and Broker/Marketer of Retail Electric Power, Docket No. A-2011-2223888, Order at 3 (June 10, 2011) (Licensing Order).

4. Enforcement.

The Commission has already confirmed its authority to hear and decide Joint Complainants’ allegations of Blue Pilot’s violations of the Commission’s regulations. Specifically, the Commission held:

[W]e agree with the conclusion of the presiding ALJs in the August 20 Order that the Commission has jurisdiction over alleged violations of its own Regulations. This jurisdiction includes determining whether the Commission’s Regulations prohibiting deceptive, and/or misleading conduct and/or the Commission’s telemarketing regulations have been violated by an EGS. Therefore, we also conclude that the Commission can hear claims alleging fraudulent, deceptive, and/or misleading conduct brought against Blue Pilot under the Commission’s Regulations. We also conclude that the Commission can hear claims alleging improper verification of enrollment of residential customers brought against Blue Pilot under the Commission’s telemarketing Regulations.

Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. Blue Pilot Energy, LLC, Docket No. C-2014-2427655, Opinion and Order on Joint Petition for Interlocutory Review and Answer to Material Questions at 17-18 (Dec. 11, 2014) (Interlocutory Review Order). (Internal footnotes omitted). With regard to the Commission’s authority and jurisdiction

to determine whether an EGS's prices charged conformed to the company's disclosure statement, the Commission expressly concluded that it "has jurisdiction and authority over this issue [of whether the prices charged to consumers conformed to the variable rate pricing provisions in the Company's Disclosure Statement] under Section 54.4(a) and 54.5(a) of our Regulations, 52 Pa. Code §§ 54.4(a), 54.5(a)." Interlocutory Review Order at 19-20.

With regard to remedies it may impose on EGSs for violations of the Public Utility Code, Commission regulations or orders, the Commission has stated:

The Commission thus has the authority to impose any sanction on an EGS that it can legally impose on an EDC, or any other public utility to enforce compliance with the law, including, but not limited to, the levying of fines, the payment of restitution to customers, and the suspension or revocation of a license. As licensees, all EGSs must comply with Commission orders, regulations and provisions of the Public Utility Code that the Commission deems are applicable[.]

See Electric Distribution Company Procedures for Processing Pilot Customer Supplier Selections, 1998 Pa. PUC LEXIS 49, \*14 (Jan. 15, 1998) (also found at Docket No. M-00960890, Opinion and Order); see also Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. Respond Power, LLC, Opinion and Order on Joint Petition for Interlocutory Review and Answer to Material Questions at 27 (Apr. 9, 2015) (Commission recognized its plenary authority "to direct a billing adjustment for an EGS overbill of supply charges"); see also Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. IDT Energy, Inc., Docket No. C-2014-2427657, Initial Decision at 38 (Nov. 19, 2015) (Commission has noted that its powers have been interpreted broadly and that ordering EGS billing adjustments for an over bill is fully consistent with the policy objectives of the Choice Act); see also Kiback at 33 (Commission held that the "[f]ailure to abide by our

Regulations and applicable regulatory standards governing telemarketing and the information to be provided to customers – oral or written – also constitute appropriate circumstances that justify ordering of a credit or refund.”); see also Herp at 39 (Commission held that “the ALJ correctly concluded that Respond’s agent’s marketing did not conform with Respond’s subsequent billing, resulting in violations of our Regulations and constituting appropriate circumstances warranting a refund.”); see also Durante v. Blue Pilot Energy, LLC, Docket No. F-2015-2487082, Joint Motion of Chairman Gladys M. Brown & Commissioner John F. Coleman, Jr. at 2 (Feb. 11, 2016) (A refund is appropriate for Blue Pilot’s failure to bill at the rate offered and accepted by the consumer complainant as required by the Commission’s regulations).

### **III. SUMMARY OF ARGUMENT**

This case involves patterns of unfair, deceptive and misleading practices and conduct that violate the Commission’s regulations and Orders and the Pennsylvania Public Utility Code. These violations are a result of Blue Pilot’s widespread use of false and misleading statements in the Company’s written advertising materials, Disclosure Statements, and in oral statements made by the Company’s agents. These practices also reflect Blue Pilot’s deficient training, oversight, and discipline procedures of its agents in violation of the Commission’s regulations at 52 Pa. Code § 111.5(a) and its inadequate enrollment and verification process. Through the testimony of their expert witnesses, the consumer witnesses, and the non-consumer witness, the Joint Complainants have shown that Blue Pilot’s sales and marketing activities are widespread, have significantly harmed Pennsylvania Blue Pilot customers and the retail market, and have resulted in violations of the Public Utility Code and the Commission’s regulations and Orders.

Specifically, the record establishes that Blue Pilot engaged in the following five counts of misconduct in violation of the Public Utility Code and the Commission’s regulations and Orders:

- **Count I – Failing to Provide Accurate Pricing Information**

The record establishes that Blue Pilot failed to provide accurate pricing information. Blue Pilot violated 52 Pa. Code §§ 54.5(c) (requiring that variable pricing terms include the conditions of variability and the limits on price variability), 54.43(1) (requiring that suppliers “provide accurate information about their electric generation services using plain language and common terms in communications with consumers” and “in a format that enables customers to compare the various electric generation services offered and the prices charged for each type of service”), 111.12(d)(5) (EGSs must ensure their offerings “contain information, verbally and written, in plain language designed to be understood by the customer), and Sections 54.43(f) and 111.12(d)(1) (requiring compliance with consumer protection laws), 52 Pa. Code §§ 54.5(c), 54.43(1), 111.12(d)(5), 54.43(f), and 111.12(d)(1).

- **Count II – Prices Nonconforming to Disclosure Statement**

The record establishes that Blue Pilot charged prices that did not conform to its Disclosure Statement. As such, Blue Pilot violated 52 Pa. Code §§ 54.4(a) and 54.5(a) (regarding billed prices, marketed prices and prices agreed upon in the disclosure statement all being the same), 52 Pa. Code §§ 54.4(a) and 54.5(a).

- **Count III – Misleading and Deceptive Promises of Savings**

The record establishes that Blue Pilot’s sales agents promised savings that were not delivered. Blue Pilot has violated 52 Pa. Code §§ 54.4(a) and 54.5(a) (regarding billed prices, marketed prices and prices agreed upon in the disclosure statement all being the same), 54.43(f) (relating to EGS responsibility for fraudulent, deceptive or other unlawful marketing acts by employees, agents and representatives); 111.4 (relating to supplier responsibility develop standards and qualifications for individuals it hires as agents); 111.5 (relating to supplier

responsibility to adequately train and monitor its agents); and 111.12(d)(1) (relating to compliance with the Consumer Protection Law), 52 Pa. Code §§ 54.4(a), 54.5(a), 54.43(f), 111.4, 111.5, and 111.12(d)(1).

- Count IV – Lack of Good Faith Handling of Complaints

The record establishes that Blue Pilot failed to adequately staff its call center, failed to provide reasonable access to Company representatives for purposes of submitting complaints, failed to properly investigate customer disputes, failed to properly notify customers of the results of the Company’s investigation into a dispute when such investigation was conducted, and failed to utilize good faith, honesty and fair dealing in its dealings with customers. As such, Blue Pilot violated 52 Pa. Code §§ 56.1(a), 56.141(a), 56.151, 56.152 and 111.13, all relating to proper handling of customer complaints, and the Company’s Licensing Order.

- Count V – Failure to Comply with the TRA

The record establishes that Blue Pilot failed to comply with the TRA. As such, Blue Pilot violated 52 Pa. Code §§ 111.10 (requiring compliance with the TRA with the exception of the registration requirement in the Act); 54.43(f) (relating to EGS responsibility for the fraudulent, deceptive or other unlawful behavior of its employees, agents or representatives); and 111.12(d)(1) (prohibiting misleading or deceptive conduct as defined by State or Federal law or by Commission rule, regulation or order), 52 Pa. Code §§ 54.43(f), 111.10 and 111.12(d)(1).

By way of relief for the Company’s violations of the Public Utility Code and the Commission’s regulations and Orders, Joint Complainants request that the ALJs order Blue Pilot to refund all charges to consumers that were over and above the Price to Compare in the customers’ respective service territories for usage from January 2014 through March 2014, impose a civil penalty on Blue Pilot, and direct the Company to make sizeable contributions to

the EDCs' hardship funds. Additionally, Joint Complainants submit that the evidence in this proceeding clearly shows that Blue Pilot lacks the managerial and technical expertise to retain its EGS license, and therefore, Joint Complainants request permanent license revocation and an order prohibiting Blue Pilot's owners, directors and managers from any type of participation in the competitive market in Pennsylvania. Should the Commission determine to not revoke Blue Pilot's EGS license or determine to allow a possible reinstatement of the license, and should Blue Pilot determine to resume business operations in Pennsylvania if allowed, conditions should be placed on the Company's EGS license based on the Joint Complainants' proven violations and the ALJs' and Commission's specific findings of wrongdoing by the Company.

#### **IV. ARGUMENT**

##### **A. Establishment of Pattern and Practice.**

This case involves patterns of unfair, deceptive and misleading practices and conduct that violate the Commission's regulations and Orders and the Pennsylvania Public Utility Code. These violations are a result of Blue Pilot's widespread use of false and misleading statements in the Company's written advertising materials, Disclosure Statement, and in statements made by the Company's agents, its deficient training, oversight, and discipline procedures of its marketing agents, and its inadequate enrollment and verification processes. Through the testimony of their expert witnesses, the consumer witnesses, and the non-consumer witness, the Joint Complainants have shown that Blue Pilot's sales and marketing activities are widespread and have significantly harmed Pennsylvania Blue Pilot customers and the retail market.

While perhaps not using the precise phrase "pattern and practice" in the past, the Commission has regularly had to consider documentary, statistical and testimonial evidence throughout its history to evaluate whether actions of utilities, their employees and their

contractors comply with the Public Utility Code and pertinent regulations promulgated thereunder. For example, in Mid-Atlantic Power Supply Ass'n v. PECO Energy Co., 92 PA PUC 414 (May 19, 1999), aff'd (this portion of Commission Order not appealed) Mid-Atlantic Power Supply Ass'n v. Pa. PUC, 746 A.2d 1196 (2000) (MAPSA), the Commission considered, *inter alia*, whether the widespread marketing activities of PECO through a direct mail campaign and mass media campaign were unfair, deceptive, false, and misleading. The Commission has also routinely conducted investigations of overall utility practices for compliance with the Public Utility Code and Commission regulations in its oversight of public utilities and licensees. For example, the Commission examines utility practices in quality of service cases and in cases considering the technical and managerial fitness of a utility to continue operation. See e.g. Investigation of W.P. Water Co., Inc. and W.P. Sanitary Co., Inc. Pursuant to Section 529 of the Pa. Public Utility Code; W.P. Water Co., Inc. and W.P. Sanitary Co., Inc.; Application of W.P. Sanitary Co., Inc. For Approval of Abandonment of Service, Docket Nos. I-00070114 *et al.*, Order (Mar. 31, 2009); Investigation Instituted into Whether the Commission Should Order a Capable Public Utility to Acquire Clean Treatment Sewage Company Pursuant to 66 Pa. C.S. § 529, Docket No. I-2009-2109324, Opinion and Order (July 16, 2013); Joint Petition Of the DEP and the OCA for Issuance of an Emergency Order Against Emlenton Water Co., Docket No. P-2008-2070480, Emergency Order (Nov. 20, 2008).<sup>9</sup> As discussed above in the Legal Standards section, the Commission has full authority to ensure that a company subject to its jurisdiction is in full compliance with all applicable statutes, regulations and Orders. When the Commission acts in this regard, it is protecting the interests of all consumers of the entity and the general public interest.

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<sup>9</sup> These cases stemmed from consumer complaint cases, wherein the evidence presented showed a lack of technical and managerial fitness of the company owners.

In a recent Order issued by the State of New York Public Service Commission (Public Service Commission), the Public Service Commission defined the term “material pattern of consumer complaints” in the context of revising the Public Service Commission’s authority to impose consequences on energy service companies (ESCOs) where there is a “material pattern of consumer complaints” regarding matters under the ESCOs control, such as marketing practices. In the Matter of Eligibility Criteria for Energy Service Companies, et. al., Case No. 15-N-0127, *et. al.*, Order Resetting Retail Energy Markets and Establishing Further Process at 19 (Feb. 23, 2016). Specifically, the Public Service Commission held:

As used in this context, a material pattern of complaints means a contributing volume of the same category of complaints, such as slamming or deceptive marketing. The Commission has broad discretion to determine when the volume and pattern of complaints requires action, and that the [Uniform Business Practices] specifies that in determining the consequences for non-compliance with the [Uniform Business Practices], the nature, circumstances and gravity of the non-compliance, as well as the ESCO’s history of previous violations, may be considered.

Id. (Internal footnote omitted).

Further, when considering a pattern and practice of unfair and deceptive sales and marketing practices, it is useful to turn to the courts for guidance. The federal courts have often considered such cases brought by the Federal Trade Commission (FTC) that involve large volumes of customers to determine whether there has been a pattern of unfair and deceptive practices. See e.g. FTC v. Kitco of Nevada, Inc., 612 F.Supp. 1282, 1294 (D. Minn. 1985) (Kitco). In such cases, the Courts consider a representative sampling of consumer testimony, as well as other evidence, to determine whether there is a widespread pattern and practice of deception.<sup>10</sup> Id.

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<sup>10</sup> In Kitco, the FTC brought suit seeking to enjoin defendants from misrepresenting facts concerning business opportunities, rescission of contracts and consumer restitution. 612 F.Supp. at 1286. By way of evidence in the matter, the FTC presented eight consumers who testified about their dealings with Kitco and 20 additional affidavits.

The federal courts have also recognized that the mailing of deceptive information in and of itself on a widespread basis can establish the foundation for liability. See United States v. Nat'l Fin. Servs., 98 F.3d 131,140 (4th Cir. 1996) (The Court recognized the difficulty in finding a quantifiable consumer loss in a debt collection case and concluded that sending millions of deceptive collection notices alone demonstrated “significant injury to the public”); United States v. Reader’s Digest Ass’n, Inc., 662 F.2d 955,969 (3d Cir. 1981) cert. denied, 455 U.S. 908 (1982) (Once the Court determines “that the travel checks and cash convertible bonds possessed the capacity to deceive, the Government was not obligated to adduce evidence of specific injuries to consumers”). Where the documents themselves have a capacity to deceive and are widely distributed, an unfair and deceptive practice can be established. Double Eagle Lubricants, Inc. v. FTC, 360 F.2d 268, 270 (10th Cir. 1965).

In an analogous area involving public protection, where the courts had confronted the phrase “pattern or practice” in the context of discrimination claims, the courts have recognized that these words were not intended to be words of art. United States v. Iron Workers Local 86, 443 F.2d 544, 552 (9th Cir. 1971). As the United States Supreme Court has explained, pattern or practice claims are not to be used on sporadic acts but rather must be based on conduct that is widespread throughout a company or that is a routine or regular part of the workplace. See Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977). To make out a case of pattern or practice discrimination, the plaintiff must show that the discrimination was “the company’s standard operating procedure – the regular rather than the unusual practice.” Cooper v. Fed.

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Id. at 1287-90, 1294, 1295. The Court found that the cumulative consumer testimony and other evidence presented at trial demonstrated that defendants engaged in a widespread pattern and practice of deception, and the consumer affidavits set forth facts relating to defendants’ misrepresentations that were consistent with the testimony and other evidence presented at trial. Id.

Reserve Bank of Richmond, 467 U.S. 867, 876 (1984), citing Teamsters v. United States, 431 U.S. 324, 336 (1977).

As will be discussed in more detail below and specifically in the Joint Complaint Counts Sections, Joint Complainants have shown that Blue Pilot has engaged in a pattern of unfair and deceptive sales and marketing practices that were in violation of the Commission regulations and Orders. The evidence here demonstrates that there is a pattern and practice revealed in Blue Pilot's sales contacts, sales calls, verification calls and handling of customer complaints about agents making false, deceptive and misleading statements about the structure and operation of the Pennsylvania retail market, default service and Price to Compare. Blue Pilot has no training, oversight, discipline or compliance monitoring that is sufficient to address these widespread violations or to prevent such widespread patterns and practices. Indeed, the deceptive and misleading conduct was Blue Pilot's standard operating procedure. Further, the Company's written materials are deceptive on their face and form the basis of all of the Company's marketing activities.

Joint Complainants' expert witnesses summarized the many failings identified in this case. Joint Complainants' expert witness Ms. Alexander summarized the unfair and deceptive practices and violations of Pennsylvania law and regulations that she identified as follows:

- Blue Pilot's advertisements and marketing materials used in 2013 and early 2014 (as well as those relied on earlier based on the consumer testimony and exhibits in the record and information provided in the OAG Complaints) were deceptive and misleading because they falsely suggest that selecting Blue Pilot would result in savings and lower bills;
- Blue Pilot's pricing disclosures are vague, insufficient and deceptive. Further, the Company charges prices that do not conform to its Disclosure Statement. In addition, Blue Pilot has charged prices to Pennsylvania consumers that do not comply with the promotional statements and sales scripts that induced customers to enroll;

- Blue Pilot has engaged in a pattern and practice of deceptive and misleading statements in its interactions with Pennsylvania consumers in both its sales and verification calls and in its responses to the many customers who attempted to contact Blue Pilot about the extremely high prices charged by Blue Pilot starting in January 2014;
- Blue Pilot's actions in response to its high variable prices in 2014 were unreasonable, particularly in light of the Company's poor customer service and its inconsistent and insufficient policies related to credits and refunds; and
- Blue Pilot has not had sufficient managerial and technical abilities to conduct energy sales in Pennsylvania. Blue Pilot has failed to properly supervise and train its sales agents and customer service personnel. In addition, Blue Pilot's compliance functions are insufficient. These failures have contributed to deceptive sales presentations and improper customer service and other actions, as described in more detail in my testimony.

OAG/OCA St. 1 at 57-58. Additionally, Joint Complainants' expert witness Steven L. Estomin concluded:

The Company's Disclosure Statement explains to customers that the prices charged by Blue Pilot over any given billing cycle would be based on PJM wholesale market conditions, but the Company notes that the PJM wholesale market conditions are one of several factors on which the variable price is based. The Company does not specify what these other factors might be. From examination and analysis of Blue Pilot's prices, it is clear that the Company's Pennsylvania customers served under the variable price plans were charged prices that were not clearly and consistently determined by PJM wholesale market conditions. Additionally, the available evidence suggests that Blue Pilot does not determine prices that are based on its costs in any meaningful way and the Company's variable prices charged appear to be largely unrelated to PJM wholesale market conditions.

OAG/OCA St. 2 at 6-7.

Blue Pilot's practices are not sporadic acts but constitute widespread practices that have resulted in significant harm to consumers and to the retail market in Pennsylvania. The extensive consumer testimonies, showing substantially similar experiences across the Commonwealth further demonstrate the widespread nature of the unfair and deceptive practices. Simply put,

Blue Pilot engaged in widespread violations of the Public Utility Code and the Commission's regulations.

B. Company Operations.

1. Introduction.

Blue Pilot is a retail supplier of electric generation located in Las Vegas, Nevada. OAG/OCA St. 1 at 7. Blue Pilot marketed electric generation supply to residential and commercial customers in all Pennsylvania Electric Distribution Company (EDC) service territories starting in 2012. *Id.* at 7. Blue Pilot has only offered variable price plans in Pennsylvania. OAG/OCA St. 1 at 7. Most of Blue Pilot's variable price plan offers included an introductory fixed price for 60-90 days. *Id.* at 7-8. Blue Pilot billed and collected for its electric generation supply charges pursuant to an approved Purchase of Receivables (POR) program, in which the respective EDC paid Blue Pilot for its electric generation supply charges regardless of whether or not the customers actually paid the EDC for Blue Pilot's charges. *Id.* at 8-9.

In December 2013, Blue Pilot billed **BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL** customers in Pennsylvania, of which **BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL** were residential and **BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL** were commercial. OAG/OCA St. 3 at 2-3. As of the end of March 2014, Blue Pilot billed **BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL** customers, of which **BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL** were residential and **BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL** were commercial. *Id.* at 3. Blue Pilot halted its retail sales marketing activity in Pennsylvania starting in March 2014. OAG/OCA St. 1 at 7.

As discussed in detail in Section IV.D.2 below, regarding civil penalties, the Joint Complaint is not the first, or only, instance where the marketing activities of Blue Pilot or its

affiliates, who have the same owners and many of the same officers and managers as Blue Pilot, have been investigated or the subject of a complaint. For example, Blue Pilot has been subject to investigation through complaints brought by individual consumers. See e.g. Loni Durante v. Blue Pilot Energy, LLC, & PPL Electric Utilities Corporation, Docket No. F-2015-2487082; see also e.g. Enrico Partners L.P. v. Blue Pilot Energy, LLC, Docket No. C-2014-2432979. Additionally, on April 1, 2014, the Maryland Public Service Commission instituted an investigation into “allegations of supplier misrepresentations resulting in unexpected and drastic increases of customers’ electric and natural gas prices” by Blue Pilot’s Maryland affiliate. See In the Matter of the Investigation into the Marketing, Advertising, and Trade Practices of American Power Partners, LLC; Blue Pilot Energy, LLC; Major Energy Electric Services, LLC and Major Energy Services, LLC; and Xoom Energy Maryland, LLC, Case No. 9346, Order at 1 (Apr. 1, 2014).<sup>11</sup>

As part of her investigation, Joint Complainants’ expert witness Alexander examined the Blue Pilot’s operations, particularly the training and oversight of the Company’s sales agents and its verification and enrollment processes. As Ms. Alexander explained, the oral representations of the sales agents and the promotional materials are most often relied upon by consumers in deciding whether to enroll with a supplier. OAG/OCA St. 1 at 13-14. The proper training, oversight and compensation of these sales agents, as well as proper verification and enrollment procedures, are critical to avoiding the types of widespread deceptive practices that are present

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<sup>11</sup> Additionally, Blue Pilot’s telecommunications affiliates, who have the same owners and many of the same officers and managers as Blue Pilot, have been investigated multiple times by the Federal Communications Commission. See OAG/OCA Cross Exh. 1 at Exh. 4 (Corporate Structure and List of Affiliates) and Exh. 9 (Kopyy resume) and FN 22 *infra*; see also In the Matter of NOS Communications, Inc. and Affinity Network Incorporated, 16 FCC Rcd 8133, 2001 FCC LEXIS 1762 (Mar. 28, 2001); see also In the Matter of NOS Communications, Inc. and Affinity Network Incorporated and NOSVA Limited Partnership, 18 FCC Rcd 6952, 2003 LEXIS 1900 (Apr. 7, 2003); In the Matter of NOS Communications, Inc., 22 FCC Rcd 19396, 2007 FCC LEXIS 8446 (Nov. 9, 2007). These cases were resolved through Consent Decrees with no admissions of wrongdoing.

here. As detailed below, Blue Pilot's business practices are wholly insufficient and inadequate, leading to the widespread deceptive practices documented in this case.

As an initial matter, and as detailed specifically below in the Sections on Counts I - III of the Joint Complaint, Joint Complainants submit that Blue Pilot's marketing and promotional materials are deceptive and misleading. In addition, Blue Pilot's Disclosure Statement and Welcome Letter are insufficient and deceptive. Where the documents themselves have the capacity to deceive, the tribunal may decide for itself whether the practices at issue are unfair and deceptive. See e.g. Double Eagle Lubricants, Inc. v. Federal Trade Commission, 360 F.2d 268, 270 (10th Cir. 1965). The record clearly establishes that such a practice existed at Blue Pilot and that such practice violates numerous Commission regulations and Orders and the Public Utility Code.

Equally important, however, to mitigate the potential for unfair and deceptive practices, either on a sporadic or system-wide basis, a supplier must engage in adequate training and oversight of its sales agents. The Commission recognized this critical point when it established its sales and marketing regulations. See gen'ly Corrected Chapter 111 Rulemaking Order. The Commission specifically required that an EGS ensure that its agents are trained to comply with such things as state and federal law and regulations and ethical sales practices, and that agents are fully trained on the Company's products, rates, fees, and disclosure statements. 52 Pa. Code § 111.5(a). See OAG/OCA St. 1 at 18-19. In addition, a supplier must document the training of an agent and monitor sales activity to ensure compliance with the applicable rules and regulations. 52 Pa. Code §§ 111.5(b) and (e). The Commission's regulations also provide for enrollment processes and separate verification processes to ensure that a customer is fully informed and that the enrollment is proper. 52 Pa. Code § 111.7.

As detailed by Joint Complainants' expert witness Ms. Alexander, the Company's business operations have failed to comply with these regulatory requirements. These inadequate business operations have resulted in the widespread practice of unfair, deceptive, and misleading sales practices and violations of the Commission regulations and Orders.

2. Blue Pilot's Training And Oversight Of Its Marketing Agents Are Deficient And Have Resulted In Unfair And Deceptive Practices.

Blue Pilot primarily enrolled Pennsylvania customers by means of telemarketing sales calls by its employees or sales agents, who were based in Las Vegas, Nevada. OAG/OCA St. 1 at 7. Pursuant to the Commission's regulations, Blue Pilot is required to adequately train and oversee these agents. See 52 Pa. Code § 111.5. As Ms. Alexander testified, however, Blue Pilot failed to train and exercise appropriate oversight of its marketing agents. OAG/OCA St. at 21. Ms. Alexander testified that Blue Pilot does not take any proactive steps to train and monitor its sales representatives to ensure compliance with Pennsylvania regulations and consumer protection policies. Id. at 21- 22. Ms. Alexander explained that when Blue Pilot was asked in discovery to identify training programs, training events, the number of attendees, and the location of training events, the Company directed Joint Complainants to its telemarketing scripts. Id. at 19.

Ms. Alexander also identified significant deficiencies with the training materials that Blue Pilot provided to its salespeople, most notably that Blue Pilot failed to utilize any Pennsylvania-specific training materials or provide its sales representatives with any information on Pennsylvania's consumer protection requirements. OAG/OCA St. 1 at 20-21. Additionally, Blue Pilot's training materials failed to include any information on identifying and avoiding misrepresentations, fraud, or deceptive sales statements or conduct. OAG/OCA St. 1 at 20. Indeed, the training materials repeat the deceptive and misleading statements that are the

foundation of the written promotional materials and emphasize the intent to offer **BEGIN**  
**CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL.**

OAG/OCA St. 1 at 20.

Blue Pilot also lacks oversight of its marketing agents. Ms. Alexander testified that when Blue Pilot was asked to identify and provide any internal compliance programs and policies, Pilot failed to provide such information. *Id.* at 19. Furthermore, Blue Pilot has not documented any audits or other investigations to ensure compliance with Pennsylvania statutes or the Commission's regulations. *Id.* at 19, 21. Moreover, the lack of oversight is evidenced in this proceeding by the overwhelming evidence on non-compliance by Blue Pilot representatives. Ms. Alexander testified:

There is no evidence Blue Pilot investigated any of the allegations in [the] customer complaints or the identification of unfair and deceptive marketing and sales conduct even when some customers demanded to speak to a manager or the legal department. As such, I can only conclude that if Blue Pilot conducted any actual monitoring and audits of its marketing and sales activities directed to Pennsylvania customers, the Company views the conduct of its sales agents in promoting savings and failing to properly and fully disclose the variable price feature of the Disclosure Statement as proper.

OAG/OCA St. 1 at 23-24. (Internal footnote omitted).

Ms. Alexander summarized her key findings with regard to Blue Pilot's training and oversight practices as follows:

I found through my analysis that Blue Pilot lacks any internal policies and programs that the Company can actually document to detect violations of Pennsylvania regulations and requirements, investigate potential violations, and take proactive steps to prevent future violations. Blue Pilot lacks appropriate and reasonable training and oversight programs for its sales representatives and their sales activities with regard to unfair trade practices, misleading disclosures, the requirement to fully explain the Disclosure Statement to prospective customers, or the requirement to ensure that any oral representations conform to the Disclosure Statement and vice versa. Blue Pilot has not documented any audits, or Pennsylvania-specific training materials with regard to its marketing and sales activities in Pennsylvania. As a result, Blue Pilot has not taken any proactive

steps to properly train, monitor, or assure compliance with Pennsylvania regulations and consumer protection policies.

OAG/OCA St. 1 at 21-22.

Ms. Alexander's testimony also demonstrates that Blue Pilot did not have adequate disciplinary procedures and measures in place to address and deter unfair and deceptive practices. Ms. Alexander testified:

While Blue Pilot claims that it had previously counseled or terminated three sales agents for failure to abide by corporate policies since it began to market retail generation supply to Pennsylvania consumers, these episodes do not reflect any investigations of Pennsylvania-based complaints or allegations or any routine internal audits and compliance related activities. In fact, of the three disciplinary actions cited by Blue Pilot, **BEGIN CONFIDENTIAL** [REDACTED]

[REDACTED]

**END CONFIDENTIAL** Blue Pilot received **BEGIN CONFIDENTIAL** [REDACTED]

[REDACTED]

**END CONFIDENTIAL.**

Id. at 19-20. (Internal footnotes omitted).

Blue Pilot's training, oversight and disciplinary procedures fail to comply with the Commission's regulations and Orders and are wholly inadequate. While individual statutory and regulatory violations will be discussed below in the Joint Complaint Sections, Ms. Alexander summarized her overarching concern as follows:

[T]he lack of sufficient training and oversight for marketing agents active in Pennsylvania on behalf of Blue Pilot, the inadequate compliance department, and the Company's claims that its actions reflect adequate training, oversight, and disclosures forms a pattern that suggests that Blue Pilot lacks the sufficient managerial and technical expertise to conduct business in Pennsylvania.

OAG/OCA St. 1 at 24.

### 3. Conclusion.

As will be detailed in the Joint Complaint Sections discussed below, there were additional failings in the Company's overall operations that resulted in the the unfair and deceptive practices. As explained in more detail below, the Company's enrollment processes are wholly inadequate in that they are not designed to comply with the TRA, and the customer is not adequately informed of the of the variable rate feature during the enrollment and verification processes. Blue Pilot's customer service was also wholly inadequate in addressing the large volume of calls and complaints in early 2014. See Section IV.C.4, *infra* (Count IV). These inadequate, unfair and deceptive practices must be remedied as they have brought significant harm to Pennsylvania consumers and the Pennsylvania retail market.

#### C. Joint Complaint.

As discussed below in Section IV.D.2, Blue Pilot served residential and commercial customers. Specifically, Blue Pilot issued **BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL** total bills in January through March 2014, of which **BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL** were residential and **BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL** were commercial. In the Joint Complaint, Joint Complainants alleged violations of Chapters 54, 56 and 111 of the Commission's regulations, 52 Pa. Code Ch. 54, 56 and 111. See gen'ly Joint Complaint at Counts I-V. The Commission's Chapter 56 and Chapter 111 regulations, however, apply only to residential customers, but many of the Chapter 54 regulations, specifically Sections 54.4 through 54.9 and 54.43, apply to residential and small commercial customers.<sup>12</sup> See 52 Pa. Code §§ 56.1(a),

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<sup>12</sup> Additionally, Sections 54.121 through 54.123 of the Commission's regulations, 52 Pa. Code §§ 54.121-54.123, apply to all customers. Joint Complainants did not, however, allege violations of these sections in the Joint Complaint. Cf. Herp v. Respond Power, LLC, Docket No. C-2014-2413756, Opinion and Order at 58 (Jan. 28, 2016) (Commission declined to find that an EGS had violated various sections of 52 Pa. Code Ch. 54 and 111

111.1, 54.1(b), 54.43. As discussed in Section IV.D.2 below regarding the civil penalty, Blue Pilot’s commercial customers meet the definition of small commercial customer in the Commission’s regulations. Joint Complainants specifically identify which regulations they assert that Blue Pilot violated apply to residential, commercial or both in the individual sections on the Joint Complaint Counts below.

1. Count I - Failing to Provide Accurate Pricing Information.

Joint Complainants averred that with regard to the pricing provisions in the Company’s Disclosure Statement, consumers could not determine the price that they would or could be charged by Blue Pilot or how the price would be calculated by the Company in violation of the Commission’s regulations at Sections 54.5(c) (requiring that variable pricing terms include the conditions of variability and the limits on price variability), 54.43(1) (requiring that suppliers “provide accurate information about their electric generation services using plain language and common terms in communications with consumers” and “in a format that enables customers to compare the various electric generation services offered and the prices charged for each type of service”), and Sections 54.43(f) and 111.12(d)(1) (requiring compliance with consumer protection laws), 52 Pa. Code §§ 54.5(c), 54.43(1), 54.43(f) and 111.12(d)(1).<sup>13</sup> See gen’ly Joint Complaint at Count I. Additionally, Joint Complainants averred that Blue Pilot failed to provide accurate pricing information in plain language and using common terms that consumers understand. See Joint Complaint at ¶ 25. Joint Complainants note that the Commission’s regulations require that suppliers “ensure that product or service offerings made by a supplier

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(applying to residential customers) in a case involving a commercial customer but found, *sua sponte*, that the EGS had violated Section 54.122(3), 52 Pa. Code § 54.122(3), which regulation applies to all customers).

<sup>13</sup> Section 111.12(d)(1), 52 Pa. Code § 111.12(d)(1), applies to residential customers only. The remaining regulations alleged to have been violated apply to both residential and small commercial customers.

contain information, verbally or written, in plain language designed to be understood by the customer.” 52 Pa. Code § 111.12(d)(5).

As the Commission recently stated:

Our customer choice standards are high, specific, and unequivocal. They are intended to ensure fairness and integrity in the competitive market by requiring all marketer behavior – oral, written, or electronic – to be straightforward and clear. Only in this way may consumers make informed choices and the market flourish.

See Kiback v. IDT Energy, Inc., Docket No. C-2014-2409676, Opinion and Order at 24 (Aug. 20, 2015). Additionally, as summarized by the ALJ in Enrico Partners LP:

[T]he term “plain” is generally defined as “clear or distinct to the eye or ear; clear to the mind, evident, manifest, obvious; conveying the meaning clearly and simply; easily understood; free from ambiguity or evasion.” Webster’s Encyclopedic Unabridged Dictionary of the English Language, Portland House, New York, 1983, at 1110. Furthermore, language is “ambiguous” when it conveys two or more reasonable meanings; or when it is otherwise vague, uncertain or indefinite. Barasch v. Pa.P.U.C., 516 Pa. 142, 156 (Pa. 1987). The Commission has held that all disclosures must be clear and unequivocal. Yaglidereliler Corporation v. Blue Pilot Energy, LLC, Docket No. C-2014-2413732, Opinion and Order (entered Jan. 16, 2015) (Yaglidereliler).

See Enrico Partners LP v. Blue Pilot Energy, LLP, Docket No. C-2014-2432979, Initial Decision at 11 (Feb. 12, 2015).

Specifically, Blue Pilot’s variable pricing provision in its Disclosure Statement states:

**Price per Kilowatt Hour.** You have a variable rate plan. Your price may vary on a month-to-month basis. This price includes Transmission Charges, but excludes applicable state and local Sales Taxes and the Distribution Charges from your local EDC. At any time, but not more frequently than monthly, Blue Pilot may increase or decrease your rate based on several factors, including changes in wholesale energy market prices in the PJM Markets. Your variable rate will be based upon PJM wholesale market conditions. Sudden, atypical fluctuations in climate conditions, including but not limited to, extraordinary changes in weather patterns may be detrimental to Blue Pilot’s electricity customer relationships. Such fluctuations or conditions may result in Blue Pilot incurring unusual costs when supplying electricity service, which may be passed through as a temporary assessment on your bill. Please log on to [www.bluepilotenergy.com](http://www.bluepilotenergy.com) or call Customer Service at 877-513-0246 for additional information about our current pricing.

See Joint Complaint at ¶ 20 and App. A.

Joint Complainants' expert witnesses Dr. Steven L. Estomin and Ms. Barbara R. Alexander reviewed and analyzed Blue Pilot's Disclosure Statement. Dr. Estomin testified regarding his interpretation of the Company's Disclosure Statement as it related to the variable prices that customers would be charged:

The Company's Disclosure Statement as it relates to the establishment of prices by Blue Pilot is clear only with regard to the introductory price provided by the Company, which is applicable for a defined term of typically 60 to 90 days following the customer's enrollment. The Disclosure Statement provides virtually no information regarding the establishment of prices following the expiration of the initial fixed-price period.

OAG/OCA St. 2 at 8-9.

Ms. Alexander identified several concerns with Blue Pilot's Disclosure Statement.

Specifically, Ms. Alexander testified:

First, the variable pricing disclosure included in the Disclosure Statement is vague and does not contain any substantive information about the variable price feature that allows any reasonable consumer to understand the basis for how the price will be calculated or may change. The fine, and very small, print Disclosure Statement contains what Blue Pilot asserts are the legally binding pricing and other provisions applicable to its plans. ...

Second, the actual language of the pricing term in the Disclosure Statement fails to provide any useful information to any consumer about how variable prices will be calculated and charged by Blue Pilot. The pricing description is meaningless to most consumers and fails to provide any means by which consumers could determine how their actual monthly price will be calculated or question the Company about the potential for miscalculation. ...

Last, it is clear that consumers, particularly residential and small business consumers who are generally not knowledgeable about the structure of the retail and wholesale electric markets, would not be able to determine what price Blue Pilot might charge based on publicly available information. Further, the Disclosure Statement provides no basis for any customer to determine whether or not Blue Pilot has complied with its pricing obligations by providing the information necessary for the customer to examine or question the basis for the monthly price charged in light of the language in this document.

OAG/OCA St. 1 at 28-29. As is discussed in the Section regarding Count II (prices nonconforming to Disclosure Statement), no relationship can be found between the Company's Disclosure Statement and the actual prices charged by Blue Pilot.

An ALJ has already found that the variable pricing provision in Blue Pilot's Disclosure Statement is "unclear or contains inconsistencies and, therefore, does not use plain language."

See Enrico Partners LP v. Blue Pilot Energy, LLP, Docket No. C-2014-2432979, Initial Decision at 10 (Feb. 12, 2015). Specifically, the ALJ found:

In particular, the fifth and sixth sentences are unclear, not easily understood and ambiguous when read together. For example, the fifth sentence states that Blue Pilot "*may* increase or decrease your rate" and the sixth sentence states that "Your variable rate *will* be...". Additionally, the fifth sentence references "changes in wholesale energy market *prices* in the PJM Markets" and the sixth sentence references "PJM wholesale market *conditions*." The fifth sentence indicates that the rate is based on "several factors" and the sixth sentence indicates that the rate is based on "PJM wholesale market conditions." It is unclear whether the sixth sentence clarifies, or elaborates upon, the fifth sentence or if the sixth sentence replaces the fifth sentence. It is unclear if the paragraph provides two separate ways that rates may be changed – one where the "PJM wholesale market conditions" are one of the factors that may cause the rate to increase or decrease and one where the "PJM wholesale market conditions" are part of the "changes in wholesale energy market prices in the PJM Markets." If the later, the sixth sentence is superfluous.

As a result, the fifth and sixth sentences in paragraph 3 are poorly written and it is not unreasonable that a consumer would be confused when reading the Disclosure Statement. This is particularly true when read in the context of shopping for the competitive provision of electric generation services and not simply because the parties disagree to the meaning. The sentence "Your rate will be based upon PJM wholesale market conditions" is not clear and unequivocal when read in conjunction with the preceding sentence. The rate charged to Enrico was not based upon PJM wholesale market conditions as the sixth sentence states it would be. Therefore, Blue Pilot has failed to provide "accurate information about [its] electric generation services using plain language and common terms in communications with consumers" and, thus, violates Sections 54.43(a) and 111.12(d)(5) of the Commission's regulations.

Id. (Emphasis in original).

The ALJ's finding in Enrico Partners LP can be distinguished from two other recent consumer complaint cases involving Blue Pilot, as those cases turned on the complainants not adequately meeting their burdens of proof. In Durante v. Blue Pilot Energy, the consumer complained that Blue Pilot's charges in early 2014 were excessive, and the ALJ recommended the complaint be dismissed because the complainant knew that she had enrolled in a variable rate with Blue Pilot that could change and because complainant had not met her burden of proof that the Company had engaged in deceptive marketing.<sup>14</sup> Durante, Docket No. F-2015-2487082, Initial Decision at 8 (Dec. 2, 2015). The Commission, while agreeing with the ALJ that the complainant had not met her burden of proof that the Company engaged in fraudulent or deceptive marketing at the time she enrolled, also rejected the ALJ's finding that Blue Pilot billed in accordance with the rate marketed in March 2014 and directed that Blue Pilot refund the complainant for charges over the amount agreed to for March 2014 and anytime thereafter. Durante, Docket No. F-2015-2487082, Joint Motion of Chairman Gladys M. Brown & Commissioner John F. Coleman, Jr. at 1-3 (Feb. 11, 2016).

In another recent Initial Decision involving Blue Pilot, the ALJ recommended that a commercial consumer's complaint that he had entered into a fixed price contract with Blue Pilot and was not billed a fixed price be denied. See Dubois Manor Motel c/o Nisha Patel v. Blue Pilot Energy, LLC, Docket No. C-2014-2433817, Initial Decision at 11 (Nov. 23, 2015). This case can be distinguished from the instant matter, as the ALJ found that the complainant's testimony regarding the marketing and enrollment with Blue Pilot was not credible, and

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<sup>14</sup> The ALJ made additional findings, including that the Commission lacks the authority to direct refunds for over-charges by an EGS and that the Commission lacks jurisdiction to review whether an EGS's prices were billed as marketed and disclosed. Durante, Docket No. F-2015-2487082, Initial Decision at 5-6 (Dec. 2, 2015). The Commission, however, voted to order complainant a refund for overcharges. Durante, Docket No. F-2015-2487082, Joint Motion of Chairman Gladys M. Brown & Commissioner John F. Coleman, Jr. (Feb. 11, 2016). Joint Complainants submit that the ALJ's analyses and findings are inconsistent with recent Commission decisions. See Section IV.D.3 below regarding refunds.

therefore, complainant did not meet the burden of proving a violation. Id. at 8. The focus of the ALJ's analysis was whether the complainant knew he had entered into a variable rate plan, and the ALJ found that the evidence, which included the Third Party Verification recording and the Disclosure Statement received by the complainant, was substantial that this commercial complainant knew he had entered into a variable rate plan. Id. at 8-10.

Joint Complainants submit that Durante and Dubois Manor Motel should not be persuasive in this matter, as the recommended findings were based solely on the consumer complainants' abilities to prove their allegations in a manner that conformed to the supplier marketing and billing requirements in the Commission's regulations. Further, neither case involved scrutiny of Blue Pilot's Disclosure Statement regarding the identification of how the variable price would be calculated, which scrutiny was performed in Enrico Partners, LP.

On January 22, 2014, Blue Pilot added the following language to the pricing provision of its Disclosure Statement:

Sudden atypical fluctuations in climate conditions, including but not limited to, extraordinary changes in weather patterns may be detrimental to Blue Pilot's electricity customer relationships. Such fluctuations and conditions may result in Blue Pilot incurring unusual costs when supplying electricity service, which may be passed through as a temporary assessment on your bill.

See OAG/OCA St. 1 at 26. Blue Pilot began sending a revised Disclosure Statement to its existing customers in January 2014, but many customers did not receive it until March 2014.

See OAG/OCA St. 1 at FN 40. As Joint Complainants' expert Barbara R. Alexander testified:

This revised Disclosure Statement was issued at the same time that customers were receiving EDC bills with significant increases in the Blue Pilot variable price and there was insufficient time to make any change in the customer's supplier or return to default service prior to receiving those bills and being required to make payments to avoid late fees and termination of service. In the issuance of the revised disclosure document the Company did not explain to its customers what authority it was relying upon to make such a unilateral change or explain the nature of the pricing disclosure change that was the purpose of the

revised agreement. I do not agree that this revised pricing disclosure “cured” any misrepresentations or lack of disclosure concerning its variable price terms prior to January 2014.

OAG/OCA St. 1 at 27.

Blue Pilot offered no evidence to dispute Joint Complainants’ experts’ analyses and conclusions regarding the allegations in Count I. There is no evidence that Blue Pilot’s Disclosure Statement was approved by the Commission or Commission staff. It is well-settled at the Commission that contacts with Commission staff about a supplier’s proposed disclosure statement are not binding on the Commission. See e.g. Herp v. Respond Power, LLC, Docket No. C-2014-2413756, Opinion and Order at 14, 16, 19 (Jan. 28, 2016); see also Customer Information Disclosure Requirements for Natural Gas Suppliers Providing Natural Gas Supply to Residential and Small Business Customers, Docket No. L-2015-2465942, Proposed Rulemaking Order at 22 (Mar. 26, 2015); 45 Pa.B. 2705.

Joint Complainants have shown that the Company’s Disclosure Statement with regard to the pricing provisions does not provide accurate information in that consumers could not determine the price that they would or could be charged by the Company or how the price would be calculated. As such, the Company is in violation of the Commission’s regulations at Sections 54.5(c) (requiring that variable pricing terms include the conditions of variability and the limits on price variability), 54.43(1) (requiring that suppliers “provide accurate information about their electric generation services using plain language and common terms in communications with consumers” and “in a format that enables customers to compare the various electric generation services offered and the prices charged for each type of service”), and 111.12(d)(5) (requiring that suppliers “ensure that product or service offerings made by a supplier contain information, verbally and written, in plain language designed to be understood by the customer”), and

Sections 54.43(f) and 111.12(d)(1) (requiring compliance with consumer protection laws), 52 Pa. Code §§ 54.5(c), 54.43(1), 54.43(f), 111.12(d)(5) and 111.12(d)(1).

2. Count II – Prices Nonconforming to Disclosure Statement.

In the Joint Complaint, Joint Complainants averred that Blue Pilot “charged its variable rate customers prices at least as high at \$0.50 per kWh for electricity” in early 2014. Joint Complaint at ¶ 29. Further, Joint Complainants averred that the prices charged by Blue Pilot “do not conform to the variable rate pricing provision” of the Company’s Disclosure Statement. Joint Complaint at ¶ 32. The Commission’s regulations require that Blue Pilot’s “prices billed must reflect the marketed prices and the agreed upon prices in the disclosure statement” as well as “agreed upon prices in the disclosure statement must reflect the marketed prices and the billed prices.” 52 Pa. Code §§ 54.4(a), 54.5(a).<sup>15</sup>

As noted above in Section IV.C.1 relating to the Failure to Provide Accurate Pricing Information, Blue Pilot’s Disclosure Statement provides as follows regarding its variable rate pricing:

**Price per Kilowatt Hour.** You have a variable rate plan. Your price may vary on a month-to-month basis. This price includes Transmission Charges, but excludes applicable state and local Sales Taxes and the Distribution Charges from your local EDC. At any time, but not more frequently than monthly, Blue Pilot may increase or decrease your rate based on several factors, including changes in wholesale energy market prices in the PJM Markets. Your variable rate will be based upon PJM wholesale market conditions. Sudden, atypical fluctuations in climate conditions, including but not limited to, extraordinary changes in weather patterns may be detrimental to Blue Pilot’s electricity customer relationships. Such fluctuations or conditions may result in Blue Pilot incurring unusual costs when supplying electricity service, which may be passed through as a temporary assessment on your bill. Please log on to [www.bluepilotenergy.com](http://www.bluepilotenergy.com) or call Customer Service at 877-513-0246 for additional information about our current pricing.

See Joint Complaint at ¶ 20 and App. A.

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<sup>15</sup> These sections of the Commission’s regulations apply to both residential and commercial customers.

In her Direct Testimony on behalf of Joint Complainants, Ms. Alexander testified that she “attempted to explore how Blue Pilot has implemented the language of its Disclosure Statement concerning the methodology or formula it used to establish its prices for customers on variable price plans.” OAG/OCA St. 1 at 30. Ms. Alexander testified:

My first observation is that the information provided to customers in Blue Pilot’s Disclosure Statement does not provide any basis for a customer to understand how the variable price will be calculated. Second, based on the information Blue Pilot has provided to date in responses to discovery, Blue Pilot’s methodology to establish its retail prices has no correlation to the vague language of its Disclosure Statement.

Id. Further, Ms. Alexander concluded that Blue Pilot “charged prices to Pennsylvania customers that do not conform to any reasonable interpretation of its Disclosure Statement.” Id. at 31-32.

As Ms. Alexander explained:

Blue Pilot’s actual practices in establishing prices cannot be rationally documented or explained and the Company cannot provide any calculations that were used to determine its retail prices or how its prices actually reflected any specific wholesale market prices, factors, or other identifiable costs. Rather, Blue Pilot used **BEGIN CONFIDENTIAL** [REDACTED]

**END CONFIDENTIAL** Blue Pilot admits that, **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL**

Furthermore, as set forth in the testimony of Dr. Steven Estomin on behalf of the Joint Complainants, Blue Pilot’s prices cannot be explained by any reference to actual PJM market costs, but appears to reflect factors that were manipulated in an undisclosed manner, some of which were not identified in its Disclosure Statement. Furthermore, when asked to recreate the calculation or formulation of prices it actually charged customers, Blue Pilot could not do so.

OAG/OCA St. 1 at 31.

Joint Complainants’ expert witness Steven L. Estomin also reviewed Blue Pilot’s power supply prices as those prices relate to the Company’s Disclosure Statement and representations

made in the Company's agreements with its variable rate customers. See gen'ly OAG/OCA St.

2. Dr. Estomin concluded:

The Company's Disclosure Statement explains to customers that the prices charged by Blue Pilot over any given billing cycle would be based on PJM wholesale market conditions, but the Company notes that the PJM wholesale market conditions are one of several factors on which the variable price is based. The Company does not specify what these other factors might be. From examination and analysis of Blue Pilot's prices, it is clear that the Company's Pennsylvania customers served under the variable price plans were charged prices that were not clearly and consistently determined by PJM wholesale market conditions. Additionally, the available evidence suggests that Blue Pilot does not determine prices that are based on its costs in any meaningful way and the Company's variable prices charged appear to be largely unrelated to PJM wholesale market conditions.

OAG/OCA St. 2 at 6-7.

Dr. Estomin testified that he interpreted from Blue Pilot's Disclosure Statement that the Company's "prices are determined by the costs that the Company incurs to secure and deliver electricity to the EDC service area in which the customer is located," specifically PJM wholesale market conditions including wholesale energy market prices in the PJM Markets. Id. at 9. According to Blue Pilot, the Company's prices during January 2014 through March 2014 were based on the **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL**, and Dr. Estomin notes that "nowhere in its Disclosure Statement and Agreement does Blue Pilot indicate that its prices are based on **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL** or, in fact, what possible relevance **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL** would have on prices." See OAG/OCA St. 2 at 9-10, FN 5.

Dr. Estomin testified that because Blue Pilot represented in its Disclosure Statement that prices would be based on PJM wholesale market conditions, Dr. Estomin expected different prices charged for (1) each billing cycle in a month, of which there are approximately 20 billing

cycles in a month based on the number of weekdays; (2) customers that terminate service during the course of the month; and (3) customers on introductory prices. OAG/OCA St. 2 at 10-11. Dr. Estomin, however, after reviewing Blue Pilot's actual billing information, observed "that there is one price in a given month for a particular EDC service area that accounts for the vast majority of billings for the applicable customer segment, that is, for each of the EDC service areas, there are months over which the bulk of customers were charged under a single, predominant price." Id. at 11. See also OAG/OCA St. 2 at Tables 1-3. As to the implications of this pricing analysis, Dr. Estomin testified:

The overriding implication is that the prices charged by Blue Pilot could not possibly be tied to the PJM wholesale markets. Rates tied to the PJM wholesale power markets would not be nearly as uniform as suggested by the data shown in Table 1 through Table 3. This conclusion is additionally supported by the data shown as graphs in Exhibit SLE-2 (confidential), which depict the number of customers served under all of the Blue Pilot variable prices disaggregated by EDC area. What is shown in Exhibit SLE-2 (confidential) is that the lack of variability in the Blue Pilot prices is, in fact, understated in Table 1 through Table 3.

OAG/OCA St. 2 at 14-15. (Emphasis in original).

Dr. Estomin identified additional reasons underlying his conclusion that Blue Pilot's prices could not possibly be tied to PJM market prices. See OAG/OCA St. 2 at 15-18. First, Dr. Estomin testified that **BEGIN CONFIDENTIAL** [REDACTED]

**END CONFIDENTIAL**, yet PJM costs over these months were not constant. Id. at 15. See also OAG/OCA St. 2 at Tables 2-3. Dr. Estomin provided the following example:

In the Penelec service area, for example, the relevant average PJM day-ahead prices were 7.9 cents per kWh (average of December 2013 and January 2014); 9.5 cents per kWh (average of January 2014 and February 2014); and 7.0 cents per kWh (February and March 2014). This suggests that the prices charged by Blue Pilot to its customers in January, February, and March 2014 in the Penelec service area **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL** were not based on PJM energy market conditions.

OAG/OCA St. 2 at 15. Dr. Estomin testified further regarding the lack of relationship between PJM market prices and Blue Pilot's prices:

The average PJM market prices increased from the first month (December/January average) to the second month (January/February average), then declined from the second month to the third month (February/March average). The Blue Pilot prices, in contrast, **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL**. This same relationship between the relevant PJM day-ahead energy market prices and Blue Pilot's prices exists for the **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL**. These relationships are graphically presented in Exhibit SLE-3 (Confidential). These graphs demonstrate that while the Blue Pilot prices **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL**. Those relationships, clearly shown in the graphs contained in Exhibit SLE-3 (Confidential), provide further support to the lack of any meaningful relationship between Blue Pilot's variable prices and PJM's market prices, regardless of what is represented in the Company's Disclosure Statement.

Id. at 16. See also OAG/OCA St. 2 at Exh. SLE-3.

Next, Dr. Estomin testified that the Company did not provide a formula or equation by which its prices are calculated given the Company's costs. OAG/OCA St. 2 at 16. Instead, the Company stated its prices were "based on **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL**," but Dr. Estomin found that the actual prices charged by Blue Pilot do not correspond with the Company's claim.

Id. at 16-17. See also OAG/OCA St. 2 at Exh. SLE-4. Dr. Estomin explained:

No indication is provided that indicates that other factors (including the cost of ancillaries, capacity, transmission, alternative energy portfolio compliance, management and administration, and profit) affect price. Although the Company's response to these interrogatories does not provide the basis on which to determine how Blue Pilot's prices were developed, the Company indicated in other discovery responses, however, that prices would change based on **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL**. I fully agree that prices should differ among billing cycles,

but note that the actual prices charged by Blue Pilot do not correspond with the Company's response. As shown in Table 1 through Table 3, and as graphically presented in Exhibit SLE-2 (Confidential), **BEGIN CONFIDENTIAL** **END CONFIDENTIAL** typically accounted for the bulk of Blue Pilot charges to its Pennsylvania variable price customers, particularly during the months of February and March 2014, and this was the case across EDC service territories.

OAG/OCA St. 2 at 17. (Emphasis in original). (Internal footnote omitted). See also OAG/OCA St. 2 at Tables 1-3 and Exh. SLE-2.

Joint Complainants' expert witness Ashley E. Everette also analyzed the prices charged by Blue Pilot over various billing cycles. Ms. Everette testified:

I reviewed the billing cycle data provided in the Company's response to OAG/OCA Set XI, and found that even within the same billing cycle, for customers of the same EDC, the price charged by Blue Pilot fluctuated. For example, in the billing cycle 12/31/13 through 1/29/14, West Penn Power commercial customers were charged **BEGIN CONFIDENTIAL** **END CONFIDENTIAL** per kWh.

In the billing cycle 12/27/13 through 1/27/14, **BEGIN CONFIDENTIAL** **END CONFIDENTIAL** West Penn Power commercial customers were charged **BEGIN CONFIDENTIAL** **END CONFIDENTIAL** cents per kWh and **BEGIN CONFIDENTIAL** **END CONFIDENTIAL** West Penn Power commercial customers were charged **BEGIN CONFIDENTIAL** **END CONFIDENTIAL** cents per kWh.

The same variation in prices can be seen in other months. In the billing cycle 3/19/14 through 4/21/14, 4 PPL residential customers were charged **BEGIN CONFIDENTIAL** **END CONFIDENTIAL** cents per kWh, **BEGIN CONFIDENTIAL** **END CONFIDENTIAL** PPL residential customer was charged **BEGIN CONFIDENTIAL** **END CONFIDENTIAL** cents per kWh, **BEGIN CONFIDENTIAL** **END CONFIDENTIAL** PPL residential customers were charged **BEGIN CONFIDENTIAL** **END CONFIDENTIAL** cents per kWh, and **BEGIN CONFIDENTIAL** **END CONFIDENTIAL** PPL residential customers were charged **BEGIN CONFIDENTIAL** **END CONFIDENTIAL** cents per kWh. Thus, Blue Pilot's contention that prices varied **BEGIN CONFIDENTIAL** **END CONFIDENTIAL** appears to be incorrect.

OAG/OCA St. 3 at 13-14. Last, Dr. Estomin identified issues with the gross margin that Blue Pilot added to its prices as additional evidence supporting his conclusion that Blue Pilot's prices

were not consistent with the Company's Disclosure Statement. See OAG/OCA St. 2 at 17-18.

As Dr. Estomin testified:

The Company stated that an **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL** was added to a cost basis in its determination of the variable price in a given month in a given EDC service area. In a sample calculation provided by Blue Pilot, in January 2014, the Company added a gross margin of **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL** for supply in the PECO area. This gross margin equates to approximately **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL** percent of the Company's per-kWh costs in the month. To put this **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL** in context, the simple average total price charged to all of Blue Pilot's customers in December 2013 was approximately **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL** cents per kWh. That price, which includes not only the gross margin but also Blue Pilot's costs, is slightly more than **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL** of the Company's January 2014 sample gross margin. The sample demonstrates that the price developed by Blue Pilot is not based on PJM market costs, as the Company states in its Disclosure Statement, but rather is a price that is essentially fabricated by Blue Pilot and unrelated to PJM market costs in any meaningful or consistent way.

Id.

Based on his analysis and for the foregoing reasons, Dr. Estomin concluded that "the prices charged by Blue Pilot to its Pennsylvania variable price customers during the first quarter of 2014 did not correspond to the representations made by the Company in its Disclosure Statement." Id. at 18.

Blue Pilot introduced no evidence to oppose Joint Complainants' expert witnesses' analyses and conclusions. As such, based on the foregoing, Joint Complainants submit that Blue Pilot's prices charged to customers in the first quarter of 2014 did not conform to the Company's Disclosure Statement in violation of 52 Pa. Code §§ 54.4(a) and 54.5(a). As such, Joint Complainants request a finding that Blue Pilot's prices charged to its variable rate customers in the first quarter of 2014 did not conform to the Company's Disclosure Statement in violation of the Commission's regulations at 52 Pa. Code §§ 54.4(a) and 54.5(a).

3. Count III – Misleading and Deceptive Promises of Savings.

a. Introduction.

Joint Complainants averred that Blue Pilot’s salespeople made misleading and deceptive promises of savings to consumers in order to induce the consumers to switch to Blue Pilot. See Joint Complaint at Count III. Specifically, Joint Complainants averred that Blue Pilot’s salespeople made the following types of misleading and deceptive promises of savings to consumers: (1) that Blue Pilot’s rates would always save customers money over the PTC; (2) Blue Pilot’s rates would be competitive with the PTC; and (3) that Blue Pilot’s rates would always be lower than or equal to the PTC. Id. Further, Joint Complainants averred that Blue Pilot did not deliver on these promises, as customers received bills for the Company’s generation supply that were at least two or three times more than the PTC and, in some cases, over six times more than the PTC. Id. Based on these actions and omissions of Blue Pilot and its salespeople, Joint Complainants averred that the Company violated the following Sections of the Commission’s regulations: (1) 54.43(f) (relating to EGS responsibility for fraudulent, deceptive or other unlawful marketing acts by employees, agents and representatives); (2) 111.4 (relating to supplier responsibility develop standards and qualifications for individuals it hires as agents); (3) 111.5 (relating to supplier responsibility to adequately train and monitor its agents); and (4) 111.12(d)(1) (relating to compliance with the Consumer Protection Law), 52 Pa. Code §§ 54.43(f), 111.4, 111.5, and 111.12(d)(1). See gen’ly Joint Complaint at Count III. Moreover, Joint Complainants submit that Blue Pilot has violated Sections 54.4(a) and 54.5(a), 52 Pa. Code §§ 54.4(a) and 54.5(a), because the Company failed to bill customers in accordance with its marketing statements.<sup>16</sup>

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<sup>16</sup> As discussed above, the Commission’s Chapter 111 regulations apply only to residential customers. Sections 54.4 and 54.5, 52 Pa. Code §§ 54.4 and 54.5, however, apply to both residential and small commercial

b. Blue Pilot and its Salespeople Promised Savings in Marketing Materials and Sales Presentations.

Joint Complainants' expert witness Barbara Alexander testified:

Blue Pilot's advertisements and marketing materials used in 2013 and early 2014 (as well as those relied on earlier based on the consumer testimony and exhibits in the record) were deceptive and misleading because they falsely suggest that selecting Blue Pilot would result in savings, lower bills, and a high level of customer service[.]

OAG/OCA St. 1 at 5. Joint Complainants submit that Blue Pilot's written marketing materials used in the Commonwealth plainly indicate that customers will save money by switching to Blue Pilot. See OAG/OCA St. 1 at 10; see also Exh. BRA-2 at 5-9 (CONFIDENTIAL); see also Exh. BRA-3 (CONFIDENTIAL). Moreover, Blue Pilot utilized written marketing materials in Pennsylvania that state that customers will experience dramatic rate increases in their PTCs. Id. Ms. Alexander described Blue Pilot's promotional materials used to market its variable price plans in Pennsylvania as follows:

Blue Pilot promoted its variable price plans for generation supply to Pennsylvania consumers by emphasizing the introductory fixed price, the potential for savings with variable price agreements compared to the consumer's current energy bills, and failing to accurately disclose its pricing terms for variable prices as stated in its Disclosure Statement. Blue Pilot's written promotional materials used in Pennsylvania emphasized promotional prizes and savings by enrolling with Blue Pilot. None of the written marketing and promotional materials provided by Blue Pilot explains variable rates or how prices would be calculated under its variable price plans. A typical example of Blue Pilot's promotional material is a one page document that appears to be from the Company's website and states, "Blue Pilot Energy was created to provide residential and commercial customers significant savings over their existing provider, along with outstanding customer service." The document went on to state: "Switch and start saving now!" Another 3-page promotional document was entitled, "You have the ability to choose your provider" and included statements such as, "When they [referring to EDC "rate stabilization plans,"] expire, customers may face dramatic rate increases, as their 'price to compare' is transitioned to more closely align with current market conditions." Further, Blue Pilot stated, "Blue Pilot Energy is an independent energy marketer whose main focus is helping our business and residential

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customers.

customers navigate the competitive energy marketplace and make sense of its complex pricing structures so the customer can maximize the value of their dollar with electricity plans designed to help lower their energy costs.

OAG/OCA St. 1 at 10. (Internal footnotes omitted). These marketing materials clearly state that Blue Pilot is offering savings in comparison to the EDC's PTC or to the customer's existing supplier.

Additionally, Blue Pilot's Welcome Letter to customers provided: "Our objective is to provide you with competitive pricing along with the highest level of customer service available." The customer is referred to the Disclosure Statement "for your review." See Id. at 27-28; see also Exh. BRA-2 at 33.

The Commission has determined whether information disseminated to customers was false or misleading. See Mid-Atlantic Power Supply Ass'n v. PECO Energy Co., 92 PA PUC 414 (May 19, 1999), aff'd (this portion of Commission Order not appealed) Mid-Atlantic Power Supply Ass'n v. Pa. PUC, 746 A.2d 1196 (2000) (MAPSA). In MAPSA, the Commission determined that PECO's marketing practices, which promoted its Provider of Last Resort service over competitive electric generation supply, were deceptive and inaccurate. MAPSA at 430. In the Recommended Decision in MAPSA, the ALJ identified examples from the Commission of what it would consider misleading or anti-competitive, which included, *inter alia*, disparaging statements that inferior generation service might be received from other competitive suppliers and marketing that disparages the electric service of competing EGSs using false facts or misleading statements. MAPSA, 92 PA PUC at 459. In the Recommended Decision, the ALJ also utilized the FTC standard<sup>17</sup> for determining if deception had occurred in PECO's marketing

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<sup>17</sup> The ALJ recognized that the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1 *et seq.*, is modeled after the Federal Trade Commission Act, and Pennsylvania appellate courts have used the courts' interpretation of the FTC Act in applying the state law. MAPSA, 92 PA PUC at 459-60, citing Commw. v. Hush-Tone Industries, Inc., 4 Pa. Commw. 1, 20 (Pa. Commw. 1971).

practices, which consists of three key elements: (1) the advertisement/communication/practice has to be likely to mislead; (2) the communication must be evaluated from the perspective of consumers acting reasonably in the circumstances; and (3) the challenged claim has to be material in that it would be likely to affect the consumer's choice of product or how they might use the product or service. *Id.* at 459-60, citing *Commw. v. Hush-Tone Industries, Inc.*, 4 Pa. Commw. 1, 20 (Pa. Commw. 1971) and *DiLucido v. Terminix Int'l, Inc.*, 676 A.2d 1237, 1240 (Pa. Super. Ct. 1996), alloc. denied, 684 A.2d 557. The Commonwealth Court similarly has ruled that an act or a practice is deceptive or unfair if it has the capacity or tendency to deceive; it need only be shown that the acts or practices in question are capable of being interpreted in a misleading way. *Commw. v. Peoples Benefit Services, Inc.*, 932 S.2d 1230, 1236 (Pa. Commw. Ct. 2007), citing *Commw. v. Nickel*, 26 Pa. D. & C.3d 115, 120 (C.P. Mercer 1983).

Joint Complainants submit that Blue Pilot's written marketing materials were deceptive and misleading, as per the examples in MAPSA, because they included disparaging statements about the PTC (*i.e.* "When they [referring to EDC "rate stabilization plans,"] expire, customers may face dramatic rate increases, as their 'price to compare' is transitioned to more closely align with current market conditions."). See OAG/OCA St. 1 at 10. Additionally, the materials meet the FTC's standard because when evaluated from the consumer's perspective, or by any reasonable perspective, the materials were likely to mislead consumers into believing they would save by switching to Blue Pilot. See OAG/OCA St. 1 at 5; see also FOF 92. Further, the claims in the Company's marketing materials affected consumers' choices to switch to Blue Pilot rather than staying with their EDCs or choosing another supplier. See OAG/OCA St. 1 at 13-14; see also *Hush-Tone Industries, Inc.*, 4 Pa. Commw. At 25; and *DiLucido*, 676 A.2d at 1241.

These very same representations were made to customers during the sales pitch. As detailed below, consumers testified that the Blue Pilot salesperson promised savings, and Blue Pilot did not present any of its salespeople to rebut this testimony. Further, as Joint Complainants' expert witness Ms. Alexander testified in this matter and is discussed above in Section IV.B regarding Company Operations, Blue Pilot did not train its salespeople to refrain from making misleading or deceptive statements in sales presentations or monitor the Company's salespeople to be sure they were not making misleading or deceptive statements to consumers. As the record in this matter shows, Blue Pilot did not regularly deliver savings to customers. OAG/OCA St. 1 at 24; see also gen'ly OAG/OCA St. 3. Overall, Blue Pilot charged its customers more than the applicable PTCs in effect for each EDC during the months December 2013 through March 2014. See gen'ly OAG/OCA St. 3.

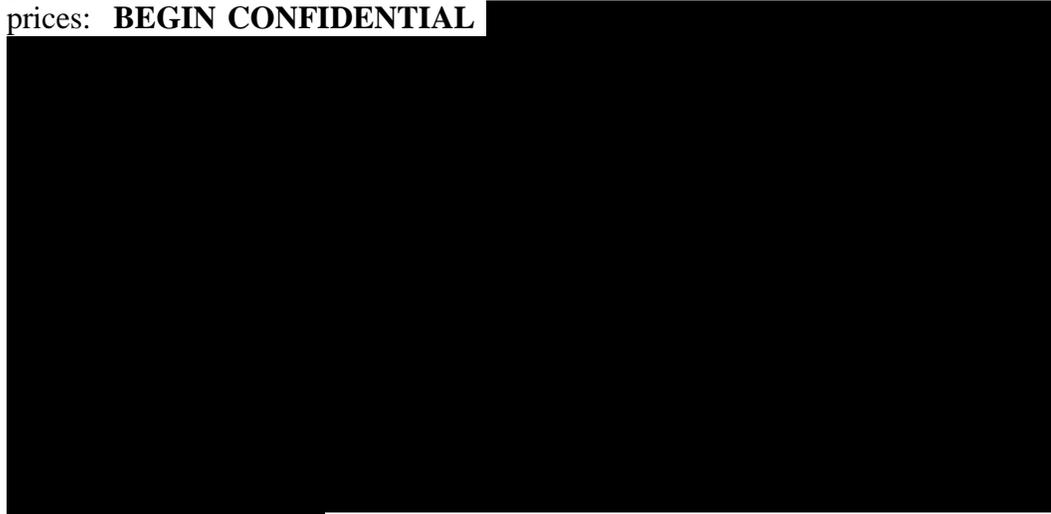
In her Direct Testimony, Joint Complainants' witness Ms. Alexander testified regarding the importance that oral sales representations made to consumers be accurate, as it is these representations that consumers rely upon in determining whether to enroll with an EGS. Specifically, Ms. Alexander testified:

Whether a sales presentation occurs with written marketing materials or oral representations by an agent over the phone, at the door, or over a cup of coffee, consumers typically form their opinion about whether to enroll based on the salesperson's representations. Consumers often view the "formal" enrollment process with its fine print terms and conditions as ancillary to the entire decision making process, especially here where the Disclosure Statement is provided after the enrollment. This requirement that the oral statements by the sales agent conform to the written terms and conditions is particularly important where, as here, the enrollment is submitted pursuant to an unsolicited telephone sales call and the consumer does not have any written materials to review prior to enrollment other than the promotional materials that I have identified, if readily available to the consumer. As a result, the oral representations and written marketing materials must be evaluated to determine if they conflict with the fine print in the Disclosure Statement to further determine whether the prospective customer has been unfairly misled about the nature of the transaction.

OAG/OCA St. 1 at 14. (Internal footnote omitted).

Ms. Alexander further testified to the misleading and deceptive promises of savings made by Blue Pilot's sales agents. Specifically, Ms. Alexander testified that the sales scripts utilized by Blue Pilot to market its variable price products to Pennsylvania consumers emphasize the potential for "lower rates." Ms. Alexander testified:

Blue Pilot's sales script used in Pennsylvania during 2013 emphasized the potential for "lower rates" and used the term "better rate" to refer to Blue Pilot's prices: **BEGIN CONFIDENTIAL**



**END CONFIDENTIAL** The reference to "month to month rates" is only given after the sales agent has emphasized savings and reducing the amount spent on the electric bill. The term "variable rate" is not stated in this sales script. The term "market" is not explained, and there is no explanation of the pricing term of the plan in this sales script.

OAG/OCA St. 1 at 11-12. (Internal footnote omitted); see also Exh. BRA-2 at 20-29 (CONFIDENTIAL). Additionally, after reviewing several of Blue Pilot's sales agents' calls with customers and the consumer testimonies submitted into the record in this matter, Ms. Alexander concluded:

In none of these calls does Blue Pilot fully or correctly describe the variable price terms and conditions that are actually included in Blue Pilot's Disclosure Statement. Rather, the Blue Pilot sales representatives emphasize the potential savings with an introductory rate and downplay any potential for significant rate increases after that period. Furthermore, the emphasis throughout these calls on "no contract" is misleading because the customers were led to believe they could

immediately leave Blue Pilot if they were not happy or if the price increased, but that was not the case since customers who cancelled were required to wait anywhere from 1-2 billing periods due to switching times in effect during this period.

OAG/OCA St. 1 at 40-41. Ms. Alexander also identifies a specific theme in Blue Pilot's sales agents' pitches that is especially troubling, and that is the agents' promises to be a consumer's "personal account representative" that will review the consumer's account every 60-90 days to determine if Blue Pilot has a better rate to offer the consumer. See OAG/OCA St. 1 at 33-41. Ms. Alexander explains that these promises are deceptive and misleading as follows:

The refrain that permeates Blue Pilot's sales script and sales calls that consumers should call back (or, that Blue Pilot would call them directly) to get a "better rate" proved to be a mirage when the extremely high prices charged by Blue Pilot began to appear on customer bills in early 2014. A theme throughout these calls is that the Blue Pilot agent creates the impression that Blue Pilot will initiate action to respond to changes in prices after 60-90 days or that contact with Blue Pilot after that period will result in being "taken care of," a phrase and intent designed to suggest that customers need not worry about the potential for higher prices.

OAG/OCA St. 1 at 41. (Internal footnote omitted). According to the evidence in the record in this matter, customers were not "taken care of" as promised. In fact, as Ms. Alexander testified, there is no evidence that Blue Pilot's "proactive department" actually initiated any calls or offers to Pennsylvania customers when their introductory rates expired. See OAG/OCA St. 1 at 22-23.

Ms. Alexander identifies the following additional deceptive and misleading statements from Blue Pilot's sales calls with consumers:

Finally, several of these calls promise notification prior to changes in prices, a statement that was not correct since Blue Pilot's prices were not known to the customer until the bill for the prior month's usage was issued by the EDC. Other calls clearly misrepresent the impact of "competition" in keeping rates low under the variable price term of these plans since Blue Pilot's prices in its Disclosure Statement and Agreement were disclosed as reflecting Blue Pilot's costs incurred in the wholesale market and not the retail prices charged by other suppliers in the Pennsylvania market.

Id. at 41.

As the Commission recently held in a consumer complaint case regarding oral promises of savings by EGS salespeople:

The propriety of an EGS' marketing does not end with the review of its written disclosure statement and bills as IDT argues. As the ALJ concluded, "[t]he conversation with the sales agent is a separate and distinct conversation from the conversation during the third party verification and is subject specifically to Section 111.10 of the Commission's regulations governing telemarketing." I.D. at 11. This is particularly the case if oral information provided by an EGS' representative had a bearing on the Complainant's informed decision to enroll with the EGS.

The ALJ correctly concluded that the development of a robust and reliable competitive market is dependent upon an EGS' strict adherence to clear and truthful marketing practices as outlined in our Regulations.

The conversation between the customer and the sales agent is critical in the development of a proper market for the competitive provision of electric generation service. Yet, in this case, un rebutted record evidence demonstrates that the total cost to purchase, receive or use electric generation service was not truthfully disclosed in a clear and conspicuous manner or that all material restrictions, limitations or conditions were disclosed. The fact that Mr. Kiback subsequently received a disclosure statement and had a right to rescind the contract does not negate the underlying violation of the Commission's telemarketing regulation by the sales agent [during the sales pitch].

Kiback v. IDT Energy, Inc., Docket No. C-2014-2409676, Opinion and Order at 25-26 (Aug. 20, 2015). The Commission further held that IDT's testimony from a company executive, with no specific knowledge of the oral marketing to the consumer, that sales agents are trained not to guarantee savings was insufficient to rebut the consumer's clear and concise testimony that the IDT sales agent promised savings over PPL's PTC. Id. at 27-31. As the Commission noted, the company did not present a recording of the sales call, the testimony of the salesperson or the script that the salesperson was directed to use. Id. at 31. The Commission also rejected IDT's argument that the disclosure statement it provided to the consumer after enrollment controlled

over salesperson’s marketing statements, holding that “[e]vidence of the subsequent disclosure statement, which did not contain the rate promised to Mr. Kiback, and right to rescind, did not negate an underlying marketing violation.” Id.

Joint Complainants submit that they have shown that Blue Pilot promised savings in its written marketing materials and through the Company’s salespeople, and these promises induced consumers to switch. As discussed in the next sub-section, these promises of savings were not delivered, and as such, there is nothing to support the Company’s promises of savings. As such, the promises were misleading and deceptive in violation of the Commission’s regulations at 52 Pa. Code §§ 54.43(f) and 111.12(d)(1). Joint Complainants further submit that, like in Kiback, Company failed to rebut the Joint Complainants’ evidence. As such, Joint Complainants submit that Blue Pilot should be found in violation of the Commission’s regulations at Sections 54.43(f) (relating to EGS responsibility for fraudulent, deceptive or other unlawful marketing acts by employees, agents and representatives); 111.4 (relating to supplier responsibility develop standards and qualifications for individuals it hires as agents); 111.5 (relating to supplier responsibility to adequately train and monitor its agents); and 111.12(d)(1) (relating to compliance with the Consumer Protection Law), 52 Pa. Code §§ 54.43(f), 111.4, 111.5, and 111.12(d)(1).

c. Specific Customer Experiences.

Customers also presented compelling testimony demonstrating that Blue Pilot engaged in misleading and deceptive promises of savings. Specifically, of the consumer witnesses whose testimonies were admitted into the record, approximately 63 provided testimony demonstrating that Blue Pilot sales representatives led them to believe that they would save on their electric bill, and/or failed to provide accurate pricing information, and/or failed to explain that the price

would be variable after the expiration of the 60-90 day introductory fixed price, and/or led them to believe that the price would be fixed for a longer period of time, and/or led them to believe that they would be notified of a price change. See OAG/OCA St. 1 at 33; see also FOF 87-90. For example, consumer testimonies provided the following evidence of Blue Pilot’s misleading and deceptive promises of savings, *inter alia*:

- “[Blue Pilot’s sales agent] told me that I would save a[t] least 2 cents a [k]W[h] and that would amount to a substantial saving[s] for me ...” Mr. Bishop was charged 44.9 cents/kWh. See Consumer Testimony of Robert W. Bishop at 100 and Exh. RWB-1.
- “I was told by Blue Pilot that I would ... save alot (sic) going with them. I ended up paying 46.9 cents per kWh.” See Consumer Testimony of Betty Ellis at 96.
- “The [Blue Pilot] sales person said the new rate after 60 days would be [a] competitive rate. That never happened!” See Consumer Testimony of Dennis Frey at 391.
- “[T]he price would save me money ...” See Consumer Testimony of Tammy M. Giles at 512.
- Mr. Bekele testified that Blue Pilot “promised a very low rate” and that he understood that Blue Pilot[‘s [rate] would never exceed the rate of PPL.” See Consumer Testimony of Tamrat Bekele at 85.
- Mr. VanHorn understood that Blue Pilot’s rate would be fixed at a price lower than West Penn Power and Blue Pilot would charge that rate indefinitely. See Consumer Testimony of Jeffrey VanHorn at 387.
- Mr. Estvanik believed that Blue Pilot would charge a rate “lower than West Penn [Power] ... Forever as long as I was signed up with them.” See Consumer Testimony of Dennis M. Estvanik at 508.
- Mr. Wranitz understood that his rates would change “but never by much” and his rate would “always be less than PPL.” See Consumer Testimony of William Wranitz at 291.
- Ms. Kennedy testified that a Blue Pilot sales agent locked her into 7.5 cents per kWh and “[the agent] would call to re-evaluate” the price “to keep me happy” and “so that she always could save me money.” See Consumer Testimony of Sherri Kennedy at 2 and Tr. 547.

- Mr. Cassel testified that he signed up with Blue Pilot in June 2012 at a fixed rate of 6.75 cents per kWh “and then the price would fluctuate according to market rates.” See Consumer Testimony of John J. Cassel at 574.
- The Quinns understood that the rates would remain competitive with other suppliers. See Consumer Testimony of Tom & Amy Quinn at 299 and Tr. 304-6.
- Mr. Smith testified that he received a notice from Superior that it had sold its interest to Blue Pilot but his terms of service would remain the same and rates would be kept “reasonable to market conditions.” See Consumer Testimony of William C. Smith at 568. and Tr. 338.
- Mr. Brontzman was told he “would save [approximately] 2 cents per kWh from [his] current supplier” See Consumer Testimony of David Brontzman at 165-66.
- Mr. Duke testified that he was “quoted [a] rate for a period of 90 days and then that rate could vary slightly each month.” See Consumer Testimony of David A. Duke at 504.
- Mr. Zablonksy testified that he was “led to believe a slight change may happen if I go with a variable rate.” See Consumer Testimony of Daniel Zablonksy at 271 and Tr. 477. (Emphasis in original).
- Ms. Nentwig testified that she believed her rate with Blue Pilot was fixed for 12 months and then variable “but competitive.” See Consumer Testimony of Rachel and Charles Nentwig at 466.
- Ms. Wesley was told by the Blue Pilot sales agent that the “rates would never be higher than [M]et-[E]d.” See Consumer Testimony of Tracy Wesley at 213.

Blue Pilot failed to present evidence to rebut the consumer testimonies establishing Blue Pilot’s misleading and deceptive promises of savings.

d. Blue Pilot Did Not Provide Savings to its Customers as Promised.

As discussed above, Blue Pilot represented in its marketing materials and the Company’s salespeople stated in their sales pitches that customers will experience savings by switching to Blue Pilot. In her Direct Testimony, Joint Complainants’ expert witness Ashley E. Everette evaluated these claims by reviewing billing data provided by the Company for December 2013 through March 2014 and applicable EDC PTCs. See gen’ly OAG/OCA St 3.

Ms. Everette provides a detailed analysis of Blue Pilot’s charges to customers by month, customer class and price. See gen’ly OAG/OCA St. 3. Ms. Everette’s testimony demonstrates that overall, Blue Pilot’s customers paid significantly more than the Price to Compare in December 2013, January 2014, February 2014, and March 2014. See OAG/OCA St. 3 at 4-7. Specifically, Ms. Everette determined that, overall, residential customers paid **BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL** more than their applicable PTC in December 2013, **BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL** more than their applicable PTC in January 2014, **BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL** more than their applicable PTC in February 2014, and **BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL** more than their applicable PTC in March 2014 as a result of switching to Blue Pilot. OAG/OCA St. 3 at 4-7. Moreover, Ms. Everette determined that, overall, commercial customers paid **BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL** more than their applicable PTC in December 2013, **BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL** more than their applicable PTC in January 2014, **BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL** more than their applicable PTC in February 2014, and **BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL** more than their applicable PTC in March 2014 as a result of switching to Blue Pilot. OAG/OCA St. 3 at 8-11.

Ms. Everette further noted that, overall, Blue Pilot charged its customers more than the Price to Compare in November 2013, and Blue Pilot continued to charge prices of at least 24.9 cents per kWh through at least August 2014. Id. at 8, 22. Thus, overall, Blue Pilot’s customers, who Blue Pilot told would see “savings” and “lower bills,” paid more than the Price to Compare even before and after the period of extreme cold that began in early 2014.

In light of the foregoing, Joint Complainants submit that Blue Pilot marketed its electric generation plans with deceptive promises of savings to customers, which were not regularly delivered. Further, these promises were misleading and deceptive in violation of the Commission's regulations at 52 Pa. Code §§ 54.43(f) and 111.12(d)(1), as there was absolutely no basis to support such promises of savings. Joint Complainants further submit that the Company failed to rebut the Joint Complainants' evidence supporting findings of violations.

e. Conclusion.

As such, Joint Complainants submit that Blue Pilot should be found in violation of the Commission's regulations at Sections 54.43(f) (relating to EGS responsibility for fraudulent, deceptive or other unlawful marketing acts by employees, agents and representatives); 111.4 (relating to supplier responsibility develop standards and qualifications for individuals it hires as agents); 111.5 (relating to supplier responsibility to adequately train and monitor its agents); and 111.12(d)(1) (relating to compliance with the Consumer Protection Law), 52 Pa. Code §§ 54.43(f), 111.4, 111.5, and 111.12(d)(1). Additionally, Blue Pilot should be found in violation of the Commission's regulations at Sections 54.4(a) and 54.5(a), 52 Pa. Code §§ 54.4(a) and 54.5(a), because the Company failed to bill customers in accordance with its marketing statements.

4. Count IV– Lack of Good Faith Handling of Complaints.

a. Introduction.

Joint Complainants averred that Blue Pilot failed to adequately staff its call center, failed to provide reasonable access to Company representatives for purposes of submitting complaints, failed to properly investigate customer disputes, failed to properly notify customers of the results of the Company's investigation into a dispute when such investigation was conducted, and failed

to utilize good faith, honesty and fair dealing in its dealings with customers in violation of the Commission's regulations, 52 Pa. Code §§ 56.1(a), 56.141(a), 56.151 and 56.152, and the Company's Licensing Order.<sup>18</sup>

In the Company's Licensing Order, the Commission held, "[s]ince Blue Pilot proposes to provide electric generation supplier services to residential customers it is required to comply with, and be governed by, applicable Chapter 56 residential service regulations [...]." See Licensing Order at 3. Section 56.1(a) of the Commission's regulations imposes a requirement to utilize "good faith, honesty and fair dealing" with residential customers. See 52 Pa. Code § 56.1(a). Additionally, Section 56.141 of the Commission's regulations provides, in pertinent part:

A notice of dispute, including termination disputes, must proceed, according to this section:

(1) *Attempted resolution.* If, at any time prior to the actual termination of service, a customer advises the public utility that the customer disputes any matter covered by this chapter, including, but not limited to, credit determinations, deposit requirements, the accuracy of public utility metering or billing or the proper party to be charged, the public utility shall attempt to resolve the dispute in accordance with § 56.151 (relating to general rule).

52 Pa. Code § 56.141. Section 56.151 of the Commission's regulations provides in part:

Upon initiation of a dispute covered by this section, the public utility shall:

- (1) Not issue a termination notice based on the disputed subject matter.
- (2) Investigate the matter using methods reasonable under the circumstances, which may include telephone or personal conferences, or both, with the customer or occupant.
- (4) Provide the customer or occupant with the information necessary for an informed judgment, including, but not limited to, relevant portions of tariffs, statements of account and results of meter tests.

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<sup>18</sup> As discussed above, the Commission's Chapter 56 regulations apply only to residential customers.

(5) Within 30 days of the initiation of the dispute, issue its report to the complaining party. The public utility shall inform the complaining party that the report is available upon request.

(i) If the complainant is not satisfied with the dispute resolution, the utility company report must be in writing and conform to § 56.152 (relating to contents of the public utility company report). Further, in these instances, the written report shall be sent to the complaining party if requested or if the public utility deems it necessary.

52 Pa. Code § 56.151. Section 56.152 of the Commission's regulations provide in part:

A utility company report must include the following:

(1) A statement of the claim or dispute of the customer and a copy thereof if the claim or notice of dispute was made in writing.

(2) The position of the public utility regarding that claim.

(4) A statement that if the complaining party does not agree with the utility company report, an informal complaint shall be filed with the Commission to ensure the preservation of all of the complaining party's rights.

(6) A full and complete explanation of procedures for filing an informal complaint with the Commission (see § 56.162 (relating to informal complaint filing procedures)). If a written report is not requested by the complaining party or is not deemed necessary by the public utility, the public utility shall provide the information in § 56.162(1), (2) and (5). In addition, the public utility shall always provide the telephone number and address of the office of the Commission where an informal complaint may be filed.

52 Pa. Code § 56.152.

Additionally, the Commission promulgated similar requirements for suppliers in handling customer complaints. See 52 Pa. Code § 111.13. Specifically, Section 111.13 provides that:

(a) A supplier shall investigate customer inquiries, disputes and complaints concerning marketing or sales practices. The supplier shall cooperate with the Commission and other government agencies that are investigating complaints about marketing or sales practices prohibited by State and Federal laws and with local law enforcement officials that are investigating complaints about violations of local municipal law.

(b) A supplier shall implement an internal process for responding to and resolving customer inquiries, disputes and complaints. The process shall

document as a record the customer inquiry, dispute or complaint, subsequent communications between the supplier and the customer, and the resolution of the inquiry, dispute or complaint. A supplier shall retain the record for a time period equivalent to six billing cycles in a system capable of retrieving that record by customer name and account number or by other effective means to obtain access to the information.

52 Pa. Code § 111.13(a), (b).

Joint Complainants submit that the record establishes that during the time period from February 2014 through May 2014, Blue Pilot failed to adequately staff its call center, failed to provide reasonable access to Company representatives for purposes of submitting complaints, failed to properly investigate customer disputes, failed to properly notify customers of the results of the Company's investigation into a dispute when such investigation was conducted, and failed to utilize good faith, honesty and fair dealing in its dealings with customers in violation of the Commission's regulations, 52 Pa. Code §§ 56.1(a), 56.141(a), 56.151, 56.152, 111.13(a) and (b) and the Company's Licensing Order.

- b. Blue Pilot failed to adequately staff its call center and provide reasonable access to Company representatives for purposes of submitting complaints.

The Commission's regulations require EGSs to implement a process for responding to and resolving customer inquiries, disputes and complaints. See 52 Pa. Code §§ 56.141(a), 56.151, 56.152, and 111.13(a), (b); see also Licensing Order at 3. EGSs are further required to document, *inter alia*, the customer inquiry, dispute or complaint, subsequent communications between the supplier and the customer, and the resolution of the inquiry, dispute or complaint. See 52 Pa. Code §§ 56.152, and 111.13(b). Joint Complainants submit that there is ample evidence on the record to support a finding that Blue Pilot failed to adequately staff its call center and provide reasonable access to Company representatives for purposes of submitting complaints.

As Joint Complainants' expert witness Ms. Alexander testified, Blue Pilot's sales agents, marketing materials, and Welcome Letter emphasized Blue Pilot's quality customer service. OAG/OCA St. 1 at 5, 28. In her Direct Testimony, Ms. Alexander further explained that Blue Pilot's sales agents emphasized that there was "no contract" involved in enrolling with Blue Pilot, which led customers to believe that they could immediately leave Blue Pilot if they were not happy or if their price increased.<sup>19</sup> See OAG/OCA St. 1 at 33-41.

The consumer testimonies in this proceeding, however, demonstrate that Blue Pilot failed to adequately staff its call center and to provide reasonable access to company representatives for purposes of submitting complaints (or cancelling service Blue Pilot). For example, consumer witnesses testified to the following instances, *inter alia*, in which they had trouble contacting Blue Pilot regarding their complaints or were unsuccessful in speaking with a supervisor:

- "[I] called numerous times until I could talk to someone and they acted like it was nothing to steal from me ... I was told a rate increase ... is unavoidable. They didn't let me speak with anyone else and hung up on me." See Consumer Testimony of Jeffery Hamilton at 108.
- "I contacted Corrine Plattner [a Blue Pilot representative] multiple times via phone and e-mail. She eventually turned me over to Nazario Jureidini, who is [in] their legal department. I sent multiple e-mails and left messages, but this individual never responded." See Consumer Testimony of Karen Kraft, Exh. KK-1 at 52.
- "[Blue Pilot] would not answer calls." See Consumer Testimony of Herbert Lyle Evans at 39.
- Alexandra Moratelli testified that she called Blue Pilot "quite a few times, and, no response." See Tr. 517.
- "I could not reach a live person" at Blue Pilot to discuss the bill. See Consumer Testimony of Jacqueline M. Epler at 90, Tr. 634.

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<sup>19</sup> Joint Complainants note that Blue Pilot's emphasis on "no contract" was misleading regardless of its customer service practices, as customers who cancelled with Blue Pilot were required to wait anywhere from one to two billing cycles to switch suppliers due to switching regulations that were in effect during this time period. OAG/OCA St. 1 at 41.

- Greg Payson testified that he called Blue Pilot “four or five different times before I finally did get connected with somebody.” See Tr. 423.
- Joann LeTersky testified, “I called them several times after the first time. And then, you know, I got through, but I still didn’t get any answers from them because they said they could not do anything with my bill at that time, and that they were referring it to their legal team, and they would call within two weeks. And no one ever called.” See Tr. 70.
- “I contacted Blue Pilot 2 or 3 times after the increase. I asked for a supervisor and was never called back.” See Consumer Testimony of Linda Wintersteen at 43.
- “When I asked to talk to the sales person (sic) at Blue Pilot who sold me this bad plan, I was told he is no longer with the Company and there is no way that I could speak to him. I had no success asking to talk to a supervisor or boss higher up the chain.” See Consumer Testimony of Dennis Frey at 394.

Joint Complainants also note that Blue Pilot sent extraordinary bills to customers, so the Company should have expected to receive calls from customers with inquiries, disputes, or complaints. As stated above, EGSs are required to implement a process for responding to and resolving customer inquiries, disputes and complaints and to provide documentation of, *inter alia*, said inquiry, dispute, or complaint and the resolution of the matter. See 52 Pa. Code §§ 56.141(a), 56.151, 56.152, and 111.13(a), (b). Thus, Blue Pilot’s inability to answer calls from customers with inquiries, disputes, or complaints and execute the Company’s process for responding to and resolving customer complaints is a violation of the Commission’s rules and regulations.

Blue Pilot failed to provide any evidence to dispute the evidence that demonstrates that Blue Pilot failed to adequately staff its call center and provide reasonable access to Company representatives for purposes of submitting complaints.

For the reasons expressed above, Joint Complainants submit that they have met their burden of proving that Blue Pilot failed to adequately staff its call center and provide reasonable

access to Company representatives in violation of the Commission's regulations at 52 Pa. Code §§ 56.141(a), 56.151, 56.152, and 111.13(a), (b), and the Company's Licensing Order.

- c. Blue Pilot failed to properly investigate customer disputes and to properly notify customers of the results of the Company's investigation into a dispute when such investigation was conducted.

The Commission's regulations require a supplier to investigate customer inquiries, disputes and complaints concerning marketing or sales practices and implement an internal process for responding to and resolving customer inquiries, disputes and complaints. 52 Pa. Code §§ 56.141(a), 56.151, and 111.13(a) and (b). Joint Complainants submit that there is ample evidence on the record to support a finding that Blue Pilot failed to properly investigate customer inquiries, disputes and complaints. Joint Complainants' expert witness Ms. Alexander reviewed Blue Pilot's complaint handling policies and testified as follows:

Blue Pilot is required to provide reasonable customer service and conform to the requirements in Chapter 56 of the Commission's regulations in handling customer inquiries and complaints. This duty is reflected in the Commission's licensing regulations for EGSs and specifically stated in Blue Pilot's licensing order. Contrary to its obligations to handle customer inquiries and complaints pursuant to the Commission's Chapter 56 requirements, Blue Pilot failed to properly investigate complaints that alleged misrepresentation and potentially fraudulent conduct by the Company's sales agents. Instead, Blue Pilot treated customer contacts as merely objections to the extremely high variable prices and sought to excuse those prices based on outside forces over which the Company had no control.

OAG/OCA St. 1 at 53-54. Furthermore, when specifically asked whether Blue Pilot investigated allegations of deceptive marketing and misleading sales disclosures as a response to the increase in customer complaints that occurred in early 2014, Ms. Alexander testified:

No. Rather, Blue Pilot's response to most of the complaints that the Company received from the OAG was to defend their conduct by relying on the written disclosures concerning variable and month-to-month prices after the end of the introductory fixed prices and their ability to pass through high wholesale market prices. [...] There is no evidence Blue Pilot investigated any of the allegations in

these customer complaints or the identification of unfair and deceptive marketing and sales conduct even when some customers demanded to speak to a manager or the legal department. As such, I can only conclude that if Blue Pilot conducted any actual monitoring and audits of its marketing and sales activities directed to Pennsylvania customers, the Company views the conduct of its sales agents in promoting savings and failing to properly and fully disclose the variable price feature of the Disclosure Statement as proper.

OAG/OCA St. 1 at 23-24. (Internal footnotes omitted).

The consumer testimonies on record in this proceeding support Ms. Alexander's testimony that Blue Pilot failed to properly investigate customer disputes or complaints. Numerous consumers testified that when they contacted the Company about their high variable prices, Blue Pilot's customer service representatives did nothing. See FOF 96-97. For example, un rebutted consumer testimony provides the following evidence:

- “Upon receiving a bill in March for \$514.95 and at a rate of .4490[,] we immediately called Blue Pilot and asked for an explanation. The response was ‘SORRY’. (sic) No conciliation was offered, only a comment that maybe next month it will come down.” See Consumer Testimony of George M. Dingler at 405. (Emphasis in original).
- “I called Blue Pilot at least 2 times about my rates going up [and] they told me there was nothing they could do ...” See Consumer Testimony of Charles & Betty Ellis at 98.
- “On June 11, 2014, I called Blue Pilot and talked to Kim... Kim said she could do nothing about my high bill.” See Consumer Testimony of Dennis Frey at 393. (Emphasis in original).
- “Blue Pilot did nothing to remedy the situation.” See Consumer Testimony of Tremaine Gorham at 338.
- “[A Blue Pilot representative] told me there was nothing he can do ... After talking to [him], I called [two] days later and asked to talk to [a] supervisor. They put Connie on the phone and she said ... [there is] nothing she could do.” See Consumer Testimony of Robert Kieffer at 21, 23.
- “After I made the [first] call to [Blue Pilot] concerning my problem, they told me there was nothing they could do. I asked them to be able to please talk to a manger or supervisor[,] [i]n which they told me they would have a manger call me back. They never called me back. I then believe ... after a day or two[,] I ...

contacted them [and] talked to ...the manger/supervisor ...in which she informed me there was nothing they could or would do ...” See Consumer Testimony of Michael Foster at 351-52.

- Ms. Miller contacted Blue Pilot three times regarding her problem with the Company. Blue Pilot did not give Ms. Miller any explanation as to why she was being charged 46.9 cents/kWh and told her there was no money available for relief. See Consumer Testimony of Kim F. Miller at 239.
- “I called [Blue Pilot] and asked about the bill and was told there was nothing they could do [and] to pay it or they would shut off my power.” See Consumer Testimony of William Wranitz at 292.
- Mehmet Isik provided testimonies on behalf of himself, his son (Ifan Isik), and Yaglidereliler Corp. and in all testimonies, Mr. Isik stated that he called Blue Pilot to complain about his 500% rate increase. Blue Pilot informed him that he had to pay it. See Consumer Testimony of Mehmet Isik at 356; see also Consumer Testimony of Ifan Isik at 360; see also Consumer Testimony of Yaglidereliler Corp. at 364.

Moreover, additional evidence provided by consumers includes the following:

- Ms. Moratelli testified that she received “[n]o relief” from Blue Pilot and that it was a hardship for her to pay the bill. See Consumer Testimony of Alexandra Moratelli at 210.
- William H. Otto, on behalf of Titusville Moose Lodge #84, testified that when he contacted Blue Pilot about the high bill, Blue Pilot offered no relief. See Consumer Testimony of William H. Otto at 583 and Tr. 659.
- A Blue Pilot representative told Luan Battersby that “nothing else could or was being done to resolve [the] complaint.” See Consumer Testimony of Luann and Matthew Battersby at 477.
- Blue Pilot did not offer the Quinns any options to resolve their complaint about Blue Pilot’s 48 cents per kWh charges. See Consumer Testimony of Tom & Amy Quinn at 300 and Tr. 306-7.
- Mr. Smith testified that when he called Blue Pilot about the high charges, the Company did not offer any relief and “they told me they are out of business.” See Consumer Testimony of William C. Smith at 569 and Tr. 339.
- Blue Pilot “offered no relief.” See Consumer Testimony of Gary Euler at 161.
- Mr. Brotzman testified that Blue Pilot offered “no relief.” See Consumer Testimony of David Brotzman at 166.

- Mr. Duke testified that he called Blue Pilot about his bill priced at 44.9 cents per kWh on March 5th, and the Company representative said there was nothing that could be done. See Consumer Testimony of David A. Duke at 505.
- Mr. Payson testified that when he did speak with a representative at Blue Pilot about his high bill, he said there was nothing he could do. See Consumer Testimony of Greg Payson at 553 and Tr. 425.
- Blue Pilot sent a letter to the PUC, dated August 21, 2014, stating that “no adjustments are warranted.” See Consumer Testimony of Daniel Zablonsky at 272.
- Ms. Williams testified that when she contacted Blue Pilot about her problem, “I was told: ‘we’ve been receiving lots of calls regarding this, but we can’t help you.’” See Consumer Testimony of Katherine Williams at 372.
- Karen Mauro called Blue Pilot after getting the first bill and was told that “it was a variable rate and nothing they could do.” See Consumer Testimony of Karen Mauro at 397.
- Walt Wensel testified that after he called Blue Pilot about his problem, he was told that “the rates have increased because [Blue Pilot] had to pay higher costs for [their] energy. Now you have to pay higher costs. And that was the end of the discussion.” See Consumer Testimony of Walt Wensel at 227 and Tr. at 274.

Blue Pilot failed to provide any evidence to rebut the consumer testimony demonstrating that the Company regularly “did nothing” in response to consumer complaints.

Additionally, if Blue Pilot ever investigated customer disputes, Blue Pilot failed to properly notify customers of the results of said dispute. Under Chapter 56 of the Commission’s regulations and upon initiation of a dispute, Blue Pilot is also required to “[p]rovide the customer or occupant with the information necessary for an informed judgment, including, but not limited to, relevant portions of tariffs, statements of account and results of meter tests.” 52 Pa. Code § 56.151(4). The evidence on record in this proceeding establishes that Blue Pilot failed to provide customers with information necessary for an informed judgment. For example, Mr. Dan Ellingsen testified that he did not sign up with Blue Pilot. See Consumer Testimony of Dan

Ellingsen at 242-244, Tr. 466-67. During the Company's re-cross-examination of Dan Ellingsen following re-direct, the following exchange took place:

Q. Mr. Ellingsen, can you tell me, or, to the best of your recollection, the first time, like date and month, that you saw a reference to Blue Pilot Energy on your bill?

A. I can remember late 2012. That's – I'm sorry; I don't remember anything specific.

Q. And if I understand your testimony correctly, at that time you did not believe that you signed up with Blue Pilot Energy; is that correct?

A. Yes.

Q. And you called Blue Pilot Energy and told Blue Pilot Energy that; is that correct?

A. I'm sorry; can you repeat that?

Q. Well, that's fair; it was not a good question.

When you first – the first time that you saw the reference to Blue Pilot Energy on your bill and you called Blue Pilot Energy to inquire as to why that reference was on your bill, did you cancel your service with Blue Pilot Energy?

A. At that time, the first time that I contacted them?

Q. Yes?

A. Well, obviously, not.

Q. Why not?

A. Well, they were giving me the run around as to – that we signed up for it. I asked for proof that we signed up for it.

This was a West Penn Power matter.

Then I pushed around to the Public Utility, or, Pennsylvania Utility Commission, who referred me back to West Penn Power, who referred me back to Blue Pilot Energy. So, you could tell by the next year and a half that I got the run around, mostly from Blue Pilot Energy.

Tr. 466-67. Blue Pilot failed to provide any evidence to rebut Mr. Ellingsen's testimony demonstrating that the Company failed to provide proof to Mr. Ellingsen of his enrollment the first time he contacted Blue Pilot with his complaint.

Thus, Joint Complainants submit that the record establishes that Blue Pilot failed to properly investigate customer inquiries, disputes and complaints and, if said investigation was conducted, Blue Pilot failed to notify customers of the results of the investigation. Blue Pilot failed to present any evidence to rebut Joint Complainants' evidence demonstrating said violations. As such, Joint Complainants submit that they have met their burden and request a finding that Blue Pilot failed to properly investigate customer inquiries, disputes and complaints in violation of the Commission's regulations, 52 Pa. Code §§ 56.141(a), 56.151, and 111.13(a) and (b).

d. Blue Pilot failed to utilize good faith, honesty and fair dealing in its dealings with customers.

The Commission's regulations require EGSs to utilize good faith, honesty and fair dealing with residential customers. See 52 Pa. Code § 56.1(a); see also Licensing Order at 3. Joint Complainants submit that there is ample evidence on the record to support a finding that Blue Pilot engaged in the following practices, *inter alia*, in which Blue Pilot failed to utilize good faith, honesty, and fair dealing in its dealings with consumers: 1) Blue Pilot failed to investigate consumer complaints as discussed in Section IV.C.4.c., above; 2) Blue Pilot utilized a customer service script that guided Blue Pilot representatives to take no responsibility for the prices charged and provided misleading and deceptive statements to consumers; 3) Blue Pilot failed to implement a fair and consistent policy for evaluating refunds; and 4) Blue Pilot failed to issue adequate refunds.

As discussed in Section IV.C.4.c., above, Joint Complainants submit that Ms. Alexander and the consumer witnesses provide ample evidence on the record to support a finding that Blue Pilot failed to investigate consumer complaints. See OAG/OCA St. 1 at 23-24; see also FOF 94. There is also ample evidence to support a finding that instead of initiating an investigation into complaints regarding variable rates or higher-than-normal prices, Blue Pilot’s Customer Service Department relied on a “Customer Care Script” to guide the representatives in responding to those complaints, wherein the representatives were directed to blame the high prices on extreme weather and wholesale market prices without assuming any responsibility for the high prices. OAG/OCA St. 1 at 51-52. Ms. Alexander further testified that this communication by Blue Pilot, which was the “sole communication provided by Blue Pilot on its explanations to its customers about the high prices charged in early 2014,” was misleading. Id. at 51. Specifically, Ms. Alexander explains:

First, “retail costs” did not skyrocket. The Price to Compare (PTC) charged by Pennsylvania EDCs did not reflect these short-term wholesale market prices in the manner suggested by Blue Pilot. Furthermore, this statement offered no information about how Blue Pilot’s prices were calculated pursuant to its Disclosure Statement or how the “weather” and the “record demand” impacted Blue Pilot’s pricing calculations.

Id. at 51-52. Additionally, Ms. Alexander pointed out that Customer Care Script does not provide any information to customers about their right to cancel their service with Blue Pilot and return to default service or choose another supplier. Id. at 53.

Additionally, regarding Blue Pilot’s policy for issuing credits or refunds to customers,

Ms. Alexander testified:

While Blue Pilot offered credits and rebates to some customers, particularly those that pursued complaints to the Commission and legislators, this policy did not treat all customers who were similarly situated fairly. Blue Pilot’s refund or credit policy changed repeatedly in early 2014. **BEGIN CONFIDENTIAL**

[REDACTED]

**END CONFIDENTIAL** It is not clear how this “re-rate” process was implemented, such as through a customer credit on the future bill, or a formal “cancel and re-bill” process conducted through the EDC. **BEGIN CONFIDENTIAL** [REDACTED]

**END CONFIDENTIAL** The “specific circumstances” referenced throughout these policy changes were not identified. Blue Pilot provided a credit or rebate to only a small number of customers overall: 21 received a credit and 101 customers received a refund of some amount between January 2014 and September 2014. The dollar amount of “credits” --\$49,710-- and “refunds” --\$173,744-- pale in comparison to the extremely high prices charged by Blue Pilot to Pennsylvania customers in 2014.

...

Blue Pilot adopted changes to its rebate or customer credit policy that appear to treat those customers who filed complaints with the Commission and/or legislators differently than customers who called the Company directly. Furthermore, as documented in their testimonies, most customers were not offered any rebate or credit under any circumstances. As a result, the Company’s policy is highly discretionary and potentially discriminatory. Second, the amount of such rebates or credits is small when compared to the number of customers affected by Blue Pilot’s unfair and deceptive marketing, disclosure and billing practices that I have outlined in my testimony. The number of residential consumers who actually received a rebate or credit represents only **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL** of the customers served by Blue Pilot in Pennsylvania pursuant to variable price plans in January 2014.

OAG/OCA St. 1 at 54-56 (Internal footnotes omitted).

The consumer testimonies on record in this proceeding also support Ms. Alexander's testimony relating to Blue Pilot's refund or credit policy. For example, the unrebutted consumer testimonies include the following evidence:

- “After I received my bill from Blue Pilot [of \$2,367.36], I called Blue Pilot[.] [The] sales woman (sic) in [a] very abrupt way said they could not adjust [my] bill. I would have to pay [the] rate of .4690 [per] kWh. Call ended.” See Consumer Testimony of William C. Evans at 188.
- Mr. George did not receive a refund from Blue Pilot until he contacted the Office of Attorney General to file a complaint. He was not satisfied with his refund amount. See Consumer Testimony of Edward S. George at 265 and Tr. 593;
- “With several contacts in February and March, they offered no compromise. After reporting the issue to [the Better Business Bureau] and the PA Attorney General and state PUC, they called back and, after an hour-long call in which they repeatedly expressed that they were well within their rights and I had no leg to stand on, eventually they agreed to send a check ...” See Consumer Testimony of Charles Wentzel at 490-91 and Tr. 679;
- Mr. Perry did not receive any refund from Blue Pilot until he filed a complaint with the Commission. See Consumer Testimony of Richard P. Perry, Jr. at 284-86 and Tr. 445-46.

As such, Joint Complainants submit that the record contains ample evidence to support a finding that Blue Pilot failed to implement a fair and consistent policy for evaluating refunds and failed to issue adequate refunds.

Blue Pilot provided no evidence rebutting Ms. Alexander's critique of the customer service script. Furthermore, Blue Pilot provided no evidence to rebut the testimony submitted on behalf of Joint Complainants regarding the Company's failure to implement a fair and consistent policy for evaluating refunds.

Additionally, consumer witnesses provided testimony demonstrating other instances of Blue Pilot's failure to utilize good faith, honesty and fair dealings, as follows:

- “[In] March 2014[,] [I] talked to Dave [a Blue Pilot representative] who laughed when I called to report the rate appeared wrong on my bill.” See Consumer Testimony of Robert Kieffer at 21.
- On February 12, 2014, we did contact Blue Pilot and complained about our extreme high bills and that no notice was sent to us. On March 7, 2014, we called Blue Pilot again and spoke to Lavonya. She said she couldn’t speak with us because we filed a complaint and it was with their legal department.” See Consumer Testimony of Distinctive Details and Exh. DD-1 at 306.
- Ms. Kraft summarizes approximately 40 contacts between herself and Blue Pilot in which she attempts to address her complaint to no avail. See Consumer Testimony of Karen Kraft, Exh. KK-1.
- “[Blue Pilot] did not wish to discuss the problem ... they said their lawyer could speak to us.” See Consumer Testimony of Norma Kreider at 138.
- “I called [Blue Pilot] and they wouldn’t talk to me and said my account was transferred to the legal [department]. I asked to be transferred to that [department] and they said they couldn’t do it.” See Consumer Testimony of Martha J. Vetter at 445.
- Mehmet Isik provided testimonies on behalf of himself, his son (Ifan Isik), and Yaglidereliler Corp. and in all testimonies, Mr. Isik stated that he called Blue Pilot to complain about his 500% rate increase. “[I] [a]sked to speak with my salesperson and was told I can’t.” See Consumer Testimony of Mehmet Isik at 356; see also Consumer Testimony of Ifan Isik at 360; see also Consumer Testimony of Yaglidereliler Corp. at 364.
- Alexandra Moratelli was told that an attorney would call her, and she never received such call. See Tr. 519-20.
- Ms. Kennedy testified that when she mentioned a letter she had received from Blue Pilot, “nobody knew what I was talking about” and “they can’t help rates went up.” See Consumer Testimony of Sherri Kennedy at 3.
- Blue Pilot did not cancel its contract with Titusville Moose Lodge #84, despite the Lodge’s repeated attempts to cancel the contract. See Tr. 654-55.
- Lynn Ober testified that when she called Blue Pilot about her high bill, the Blue Pilot representative “was indignant and obnoxious stating that I had to pay for the polar vortex and I was lucky that it was only 44.9 cents.” See Consumer Testimony of Lynn & Dale Ober at 202 and Tr. 401-2. (Emphasis in original).
- Rachel Nentwig testified that she called Blue Pilot three times about her high bill, and the third time told the Blue Pilot representative that she was contacting the

Attorney General and PUC and “was told lawyers would contact me, but never heard anything.” See Consumer Testimony of Rachel and Charles Nentwig at 467.

- Mr. Payson testified that when he did speak with a representative at Blue Pilot about his high bill, he “spoke to a gentleman named Jeff. He was arrogant [and] rude [and] said there was nothing he could do. He also refused to give his last name.” See Consumer Testimony of Greg Payson at 553 and Tr. 425.
- Mr. Dan Ellingsen testified that he tried to cancel his service with Blue Pilot in late 2012 and he was not permitted to do so. Tr. at 467.

Blue Pilot did not introduce any evidence to rebut the evidence demonstrating that the Company failed to utilize good faith, honesty and fair dealings. As such, Joint Complainants submit that they have met their burden and request a finding that Blue Pilot failed to utilize good faith, honesty and fair dealing with residential customers in violation of 52 Pa. Code § 56.1(a) and the Company’s Licensing Order.

e. Conclusion.

Accordingly, Joint Complainants submit that they have met their burden and request a finding that Blue Pilot failed to adequately staff its call center, failed to provide reasonable access to Company representatives for purposes of submitting complaints, failed to properly investigate customer disputes, failed to properly notify customers of the results of the Company’s investigation into a dispute when such investigation was conducted, and failed to utilize good faith, honesty and fair dealing in its dealings with customers in violation of the Commission’s regulations, 52 Pa. Code §§ 56.1(a), 56.141(a), 56.151, 56.152, and 111.13(a), (b) and the Company’s Licensing Order.

5. Failure to Comply with the TRA.

a. Introduction.

In their Joint Complaint, OAG and OCA averred that Blue Pilot violated the Commission's regulations requiring compliance with the Telemarketer Registration Act (TRA) and the Consumer Protection Law because when the Company consummated sales of its generation supply plans through telemarketing calls to consumers, Blue Pilot failed to reduce the sales to written contracts and failed to obtain the consumers' signatures on the contracts. See gen'ly Joint Complaint at Count V. Further, Joint Complainants averred that Blue Pilot failed to provide to its customers, gained through telemarketing calls, contracts that contain, *inter alia*, the following: (1) a detailed description of the consumer goods and services purchased that matched the oral description given in the telemarketing solicitation; (2) any oral or written representations made during the telemarketing solicitation; and (3) a statement that reads: "You are not obligated to pay any money unless you sign this contract and return it to the seller." Id. Joint Complainants averred that these omissions violated the Commission's regulations at Sections 111.10(a) (requiring compliance with the TRA with the exception of the registration requirement in the Act); 54.43(f) (relating to EGS responsibility for the fraudulent, deceptive or other unlawful behavior of its employees, agents or representatives); and 111.12(d)(1) (prohibiting misleading or deceptive conduct as defined by State or Federal law or by Commission rule, regulation or order), 52 Pa. Code §§ 54.43(f), 111.10(a) and 111.12(d)(1). Id.

In its Preliminary Objections, the Company argued that the TRA's requirement for a written contract is not applicable to Blue Pilot's telephonic enrollments because the Commission's regulations set forth the requirements applicable to electricity sales and, thus, Blue Pilot is exempt under Section 2245(d) of the TRA. Blue Pilot POs at ¶ 39. The Company also argued that its disclosure statement provides customers with all of the material terms of their contracts that were given during the telemarketing sales call and the third-party verification

(TPV) call. Blue Pilot POs ¶ 44. Blue Pilot concludes by stating that no formal written and executed contract is required following a telemarketing enrollment where the EGS utilizes a TPV provider to record consent and the consumer is sent a hard-copy disclosure statement. Blue Pilot POs ¶ 47.

The ALJs issued an Order Granting in Part and Denying in Part Preliminary Objections in this matter on August 20, 2014. See gen'ly Commonwealth of Pennsylvania by Attorney General Kathleen G. Kane, through the Bureau of Consumer Protection and Acting Consumer Advocate Tanya J. McCloskey v. Blue Pilot Energy, LLC, Docket No. C-2014-2427655, Order Granting/Denying Preliminary Objections (Aug. 20, 2014) (August 20 Order). While the ALJs stated that enforcement of EGS compliance with the TRA would be appropriate in a forum with jurisdiction over the TRA, that does not prevent the review and disposition of Count V to the extent that there are violations of Section 54.43(f) and 111.10 of the Commission's regulations. August 20 Order at 14-15. The Commission upheld the ALJs' August 20 Order in this regard in its Order of December 11, 2014. See Interlocutory Review Order at 16-18. Joint Complainants submit that, as detailed herein, the Company's business practices are not in accordance with the requirements of the TRA, and are therefore, misleading and deceptive. Thus, the Company's business practices constitute violations of 52 Pa. Code §§ 111.10(a), 54.43(f) and 111.12(d)(1).

The TRA applies to the sale of any goods or services used for personal, family or household purposes, by use of a telephone solicitation call. 73 P.S. § 2242. Blue Pilot sells electric supply through, *inter alia*, the use of telemarketing calls. Section 2245 of the TRA, 73 P.S. § 2245, requires Blue Pilot to provide consumers with a written contract that contains the following information: a detailed description of the consumer goods and services purchased which shall match the oral description given in the telemarketing solicitation; any oral or written

representations made during the telemarketing solicitation; and a statement that reads “You are not obligated to pay any money unless you sign this contract and return it to the seller.” 73 P.S. § 2245(a)(7) and (c). The Commission’s regulations require suppliers to comply with the TRA except the registration requirement. 52 Pa. Code § 111.10(a).

The exception within the TRA that Blue Pilot relies on, Section 2245(d)(1), states that a written contract is not needed if the sale of the good or service is regulated under other laws of the Commonwealth. 73 P.S. § 2245(d)(1). EGSs are subject to all requirements of the TRA, except the requirement that they register with the OAG. See 52 Pa. Code § 111.10(a)(1) and Corrected Chapter 111 Rulemaking Order at 8 (“We also take this opportunity to remind suppliers of their obligation to respect all federal, state and local laws related to sales and marketing and to note that nothing in these regulations is intended to vacate or supersede any other existing federal, state or local requirement”).

On February 8, 2010, Attorney General Thomas W. Corbett issued an advisory opinion in response to then Commission Chairman James H. Cawley’s request for an “opinion regarding the applicability of the [TRA] to electric generation suppliers as defined in the Electricity Generation Customer Choice and Competition Act.” See Request for Opinion, 2010 Pa. AG LEXIS 1 (Feb. 8, 2010) (AG Opinion). In response to Chairman Cawley’s question whether the EGSs are excluded from the definition of “telemarketer” in the TRA, AG Corbett replied:

[E]lectric generation suppliers engaged in telemarketing are telemarketers for all purposes of the [Telemarketer Registration] Act except the requirement of Section 3(a), 73 P.S. § 2243(a), that telemarketers register with this Office, from which electric generation suppliers are excluded because they are licensed by the PUC under the Competition Act, 66 Pa. C.S. § 2809(a). Agents of suppliers, such as individuals and businesses initiating or receiving calls pursuant to contracts with suppliers, are not excluded from the definition of "telemarketer" and therefore must register.

AG Opinion at \*4-5.

b. Blue Pilot Failed To Obtain Signed Contracts from Customers Obtained through Telemarketing.

In her Direct Testimony on behalf of the Joint Complainants, Ms. Alexander testified that Blue Pilot contacted Pennsylvania consumers over the telephone through unsolicited calls. OAG/OCA St. 1 at 7, 48. At the conclusion of the call, customers were supposed to be mailed a Disclosure Statement. Id. at 48. Blue Pilot, either during the telemarketing sales call or after, did not routinely obtain or seek a customer's actual signature on any document to confirm enrollment as required by Sections 2245(a)(7) and 2245(c) of the TRA and therefore required by 52 Pa. Code § 111.10(a). See OAG/OCA St. 1 at 49. In fact, Ms. Alexander testified that although Blue Pilot's sales scripts instruct the sales representative to ask if the customer has a FAX machine and to obtain a customer's signature under those circumstances, she did not hear Blue Pilot's sales representatives ask this question or follow this instruction in the sales calls she reviewed. Id. Additionally, Ms. Alexander testified, based on the consumer witness testimony she reviewed, in numerous instances, Blue Pilot did not in fact mail the required terms of service or disclosure documents after enrollment, nor could Blue Pilot provide any evidentiary proof of such mailing. Id. at 50. Ms. Alexander also notes that some consumers testified they did not receive the Disclosure Statement until long after their enrollment, including those who testified that they did not receive any Disclosure Statement until the revised version was issued in early 2014. Id.

In her Testimony, Ms. Alexander also expanded on the consumer protection purpose behind a law like the TRA by explaining that these laws are intended to avoid situations in which the customer was enticed into agreeing to a contract based solely on oral representations over the phone. Id. The Joint Complainants submit that the Commission's regulations require compliance with the TRA as a consumer protection policy. Consumers should not assume the

burden of reviewing and interpreting the terms presented in writing after the enrollment has been completed over the phone, to determine whether they conform to the sales call inducements. Id.

As described above regarding Counts I, II, and III, Blue Pilot promoted its product with repeated references to savings, emphasized in its initial price, without explaining the potential impact of variable prices and omitted material disclosures about its terms in sales scripts, oral presentations and verification scripts. This conduct misled and continues to mislead consumers when accompanied by a written disclosure statement that does not reflect any of the oral statements used to sell the product.

Section 111.10(c) of the Commission's regulations and Section 2245(a)(7) of the TRA require Blue Pilot to reduce any sale of goods or services made during a telemarketing call to a written contract and send that document to the consumer and obtain his or her signature. 52 Pa. Code § 111.10(c); 73 P.S. § 2245(a)(7). Blue Pilot, during the telemarketing sales call or after, did not routinely obtain or seek the customer's actual signature on any document to confirm enrollment for approximately 34 consumers whose testimonies were admitted into the record in this proceeding. Blue Pilot also failed to provide a Disclosure Statement to 17 consumers whose testimonies were admitted into the record in this proceeding. Moreover, Blue Pilot provided a Disclosure Statement long after the telemarketing sales call and enrollment to approximately 9 consumers whose testimonies were admitted into the record in this proceeding. The record establishes that Blue Pilot can provide no evidence that it routinely provided these documents to consumers who enrolled through a telemarketing call in a timely manner. This is a direct violation of Section 111.10(c) of the Commission's regulations and Section 2245(a)(7) of the TRA.

- c. The Commission's Regulations Do Not Preempt the TRA.

The Company's business practices are not in accordance with the requirements of the TRA and thus, constitute violations of 52 Pa. Code § 111.10(a). Joint Complainants are not seeking to have the Commission enforce the TRA, but the Commission has authority and jurisdiction to determine whether a violation of the TRA has occurred when considering the extent of an EGS's violations of Section 54.43(f), 111.10, and 111.12(d)(1) of the Commission's regulations.<sup>20</sup>

The Commission's regulations do not pre-empt or replace the requirements of the TRA, as Section 111.10(a) requires compliance with the TRA. See 52 Pa. Code § 111.10(a). The Commission has consistently stated that nothing in their regulations is intended to vacate or supersede any other existing federal, state or local requirement. See [Corrected Chapter 111 Rulemaking Order](#) at 8.

Additionally, the Joint Complainants submit that Blue Pilot failed to mail the required terms of service or disclosure documents as required by Section 111.10(c) of the Commission's regulations and Sections 2245(a)(7) and 2245(c) of the TRA. 52 Pa. Code § 111.10(c); 73 P.S. § 2245(a)(7) and (c). As detailed in Ms. Alexander's testimony and the testimony of the consumer witnesses, numerous consumers who testified did not receive the required terms of service or disclosure documents after their telemarketing enrollment or received it long after their enrollment. By requiring Blue Pilot to comply with Section 2245(a)(7) and (c) of the TRA, specifically, to send a written contract that details all oral representations made to a consumer and require that consumer to sign and return the contract to complete enrollment will ease the burden placed on consumers.

Joint Complainants have shown that Blue Pilot has violated the Commission's regulation at 52 Pa. Code § 111.10 by failing to comply with the TRA and failing to provide Disclosure

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<sup>20</sup> A violation of the TRA is also a violation of the Consumer Protection Law. 73 P.S. § 2246(a).

Statements to customers. With these failings, Joint Complainants submit that Blue Pilot has also violated the Commission's regulations at Sections 54.43(f) and 111.12(d)(1), 52 Pa. Code §§ 54.43(f) and 111.12(d)(1), which prohibit misleading and deceptive conduct.

D. Relief Requested

1. License Revocation.

Joint Complainants requested that the Commission find that Blue Pilot violated the Public Utility Code and the Commission's regulations and Orders and suspend or revoke Blue Pilot's EGS license. Joint Complaint at 12-13, ¶ 62.A. Joint Complainants note that Blue Pilot sought to surrender its EGS license with the Commission on May 4, 2015. OAG/OCA St. 1-SR at 2; see also Docket No. A-2011-2223888. Joint Complainants submit that the record in this matter clearly shows that permanent revocation of Blue Pilot's EGS license is warranted, and the Commission should issue an Order prohibiting Blue Pilot's owners and managers, Samuel Delug, Raymond Perea, and Joseph Kopyy, from any type of participation in the competitive market in Pennsylvania.

The Public Utility Code requires that EGSs be licensed by the Commission. 66 Pa. C.S. § 2809(a). With regard to EGS license revocations, the Commission's regulations provide, in pertinent part:

(a) A licensee shall comply with the applicable requirements of the code and Commission regulations and orders. Consistent with due process, a license may be suspended or revoked, and fines may be imposed against the licensee for:

\* \* \*

(6) The failure to follow the principles in § 54.43 (relating to standards of conduct and disclosure for licensees).

(7) A violation of applicable provisions of the code, this title and lawful Commission orders. See section 2809(b) of the code.

(8) A violation of Pennsylvania consumer protection law.

52 Pa. Code § 54.42(a)(6) – (9). In promulgating Section 54.42(a)(8), the Commission stated:

We believe the OCA's proposal to place applicants on notice that they may be penalized by this Commission for violating Pennsylvania consumer protection laws is appropriate. We have become aware of allegations of abusive practice in other jurisdictions. We are concerned about the impact the abuses may have on the full development of the competitive marketplace. If consumers are reluctant to participate in a competitive market because of the possibility of becoming the victim of fraud or other consumer abuses, the benefits of a fully competitive marketplace will be reduced.

See Licensing Requirements for Electric Generation Suppliers, 28 Pa. B. 3760, \*19 (Aug. 8, 1998) (also found at Docket No. L-970129, Final Rulemaking Order).

Joint Complainants submit that the evidence of record here, much of it showing similar experiences amongst Blue Pilot customers throughout the Commonwealth, shows that Blue Pilot systematically violated the Public Utility Code and the Commission's regulations and Orders, as specifically detailed above in this Main Brief. Notably:

- Blue Pilot's advertisements and marketing materials used in 2013 and early 2014 (as well as those relied on earlier based on the consumer testimony and exhibits in the record and information provided in the OAG Complaints) were deceptive and misleading because they falsely suggest that selecting Blue Pilot would result in savings and lower bills;
- Blue Pilot's pricing disclosures are vague, insufficient and deceptive. Further, the Company charges prices that do not conform to its Disclosure Statement. In addition, Blue Pilot has charged prices to Pennsylvania consumers that do not comply with the promotional statements and sales scripts that induced customers to enroll;
- Blue Pilot has engaged in a pattern and practice of deceptive and misleading statements in its interactions with Pennsylvania consumers in both its sales and verification calls and in its responses to the many customers who attempted to contact Blue Pilot about the extremely high prices charged by Blue Pilot starting in January 2014;
- Blue Pilot's actions in response to its high variable prices in 2014 were unreasonable, particularly in light of the Company's poor customer service and its inconsistent and insufficient policies related to credits and refunds; and

- Blue Pilot has not had sufficient managerial and technical abilities to conduct energy sales in Pennsylvania. Blue Pilot has failed to properly supervise and train its sales agents and customer service personnel. In addition, Blue Pilot's compliance functions are insufficient. These failures have contributed to deceptive sales presentations and improper customer service and other actions, as described in more detail in my testimony.

OAG/OCA St. 1 at 57-58. Moreover, there is no evidence presented in this matter that the Company conducted an internal investigation or audit or instituted compliance or disciplinary measures after receiving the Joint Complaint. See OAG/OCA St. 1 at 19, 21. Joint Complainants further submit that these actions by Blue Pilot have adversely impacted the development of the competitive market in Pennsylvania, and if the Company is permitted to retain its EGS license, such adverse impacts could continue.

As noted, on May 4, 2015, Blue Pilot filed a letter with the Commission seeking to surrender its EGS license. OAG/OCA St. 1-SR at 2; see also Docket No. A-2011-2223888. Furthermore, on August 27, 2015, the Commission notified Blue Pilot that it must file evidence of a bond or other approved security based on its gross receipts. See OAG/OCA St. 1-SR at 2. On December 17, 2015, the Commission issued a Tentative Order at Docket No. M-2015-2490383, in which the Commission tentatively approved the cancellation of Blue Pilot's EGS license, *inter alia*, for the failure to provide proof to the Commission that it has a bond or other approved security currently in effect. Electric Generation Supplier License Cancellations of Companies with an Expired Financial Security, Docket No. M-2015-2490383, Tentative Order, (Jan. 28, 2016). Joint Complainants filed an Answer to Blue Pilot's letter on May 18, 2015 and Comments to the Commission's Tentative Order on February 1, 2016, requesting, *inter alia*, the Commission to reserve action on Blue Pilot's EGS license for the Joint Complaint proceeding. Joint Complainants submit that permanent license revocation, as well as prohibition of Blue

Pilot's owners and managers from participating in the competitive market in Pennsylvania, rather than license cancellation or a voluntary withdrawal of Blue Pilot's EGS license, is appropriate. Blue Pilot's attempt to cancel its EGS license is purely voluntary, does not constitute a license revocation and is without the necessary conditions for such violations. Moreover, a cancellation of Blue Pilot's EGS license for failure to secure a bond or other approved security does not prevent Blue Pilot from attempting to get re-licensed at the Commission to serve electric generation supply to Pennsylvania customers at a later date. Joint Complainants submit that permanent revocation of Blue Pilot's EGS license, as well as an order prohibiting Blue Pilot's owners and managers, Samuel Delug, Raymond Perea, and Joseph Koppy, from participating in the competitive market in Pennsylvania, is appropriate in light of Blue Pilot's blatant disregard for the Public Utility Code and the Commission's regulations and Orders. Joint Complainants further submit that permanently revoking Blue Pilot's EGS license would send a signal that these types of overt violations and disregard for the Commission's authority and jurisdiction are not acceptable.

Joint Complainants also note that, as recognized by the ALJs in this proceeding, "a lapse in bond or other approved security is a violation of the Public Utility Code, 66 Pa. C.S. § 2809(c)(1)(i), and the Commission's regulations, and is therefore relevant to whether Blue Pilot should maintain its EGS license."<sup>21</sup> Commonwealth of Pennsylvania, by Attorney General

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<sup>21</sup> The Public Utility Code provides, in pertinent part, as follows regarding the requirement of an EGS to furnish a bond or other security:

(c) Financial responsibility.—

(1) In order to ensure the safety and reliability of the generation of electricity in this Commonwealth, no energy supplier license shall be issued or remain in force unless the holder complies with all of the following:

(i) Furnishes a bond or other security approved by the commission in form and amount to ensure the financial responsibility of the electric generation supplier and the supply of electricity at retail in accordance with contracts, agreements or arrangements.

Kathleen G. Kane, through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. Blue Pilot Energy, LLC, Docket No. C-2014-2427655, Order Granting Motion to Compel Responses to Joint Complainants' Interrogatories Set XII at 4 (Jan. 14, 2016); see also 52 Pa. Code § 54.40(a); see also OAG/OCA St. 1-SR at 3. Joint Complainants' expert witness Ms. Alexander testified as follows regarding Blue Pilot's failure to post bond or other security with the Commission:

This failure to post bond or other security with the Commission violates the requirements of the Public Utility Code and the Company's EGS license. Further, the lack of bond or other security could jeopardize the Commission's access to any security interest to enforce Blue Pilot's obligations to the Commonwealth or Blue Pilot's customers. Furthermore, this series of events is evidence of Blue Pilot's continuing and ongoing failures to comply with the Commission's consumer protection and retail market requirements as documented in the testimony of Joint Complainants' expert witnesses and consumers and should be taken into account when considering the Company's evidence in support of its positions and the need to order remedies as promptly as possible.

OAG/OCA St. 1-SR at 3. Thus, the very fact that Blue Pilot has allowed its bond or other security to lapse and disregarded requests by the Commission to cure this failure supports Joint Complainants' position that Blue Pilot's license should be permanently revoked, as the Company lacks the technical and financial fitness to maintain its EGS license. As such, Joint Complainants submit that permanent revocation of Blue Pilot's EGS license is not only appropriate but necessary to ensure the integrity of the Commonwealth's competitive retail electricity market.

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66 Pa. C.S. § 2809(c)(1)(i). Additionally, Section 54.40(a) of the Commission's regulations provides as follows:

- (a) A license will not be issued or remain in force until the licensee furnishes a bond or other security approved by the Commission. See section 2809(c) of the code (relating to requirements for electric generation suppliers).

52 Pa. Code § 54.40(a).

Further, as noted, Joint Complainants request the Commission issue an Order that Blue Pilot's owners and managers, Samuel Delug, Raymond Perea, and Joseph Kopyy, are prohibited from any type of participation in the competitive market in Pennsylvania.<sup>22</sup> As Ms. Alexander stated in her Direct Testimony:

I understand that Blue Pilot has requested that its license be terminated and stated that it is no longer marketing or seeking to market energy supply services to Pennsylvania consumers. However, while I would support the revocation of Blue Pilot's license based on violations of Pennsylvania law and regulations, this is an insufficient remedy in light of my findings. The Commission should also make clear that it would not approve any future license application for any retail gas or electric supply or telephone service in which the owners, officers, directors, or managers of Blue Pilot are involved.

OAG/OCA St. 1 at 6. As such, Joint Complainants respectfully request the Commission order permanent revocation of Blue Pilot's EGS license and prohibit Blue Pilot's owners and managers, Samuel Delug, Raymond Perea, and Joseph Kopyy, from any type of participation in the competitive market in Pennsylvania.

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<sup>22</sup> Samuel P. Delug, majority owner of Blue Pilot, is also an owner of Blue Pilot's telecommunications affiliates, NOS Communications, Inc. (NOS), Affinity Network Incorporated (ANI), and NOVSA Limited Partnership (NOVSA). See OAG/OCA Cross Exh. 1 at Exh. 4 (Corporate Structure and List of Affiliates). Additionally, Joseph T. Kopyy, who is the CEO/Manager of Blue Pilot, is also the Chief Executive Officer and Chief Financial Officer of NOVSA. See OAG/OCA Cross Exh. 1 at Exh. 9 (Kopyy resume). Furthermore, Raymond Perea, in-house General counsel for Blue Pilot, is also in-house General Counsel for NOVSA. See OAG/OCA Cross Exh. 1 at Exh. 9 (Perea resume). These telecommunications affiliates have been investigated multiple times by the Federal Communications Commission (FCC). See e.g. In the Matter of NOS Communications, Inc. and Affinity Network Incorporated, 16 FCC Rcd 8133, 2001 FCC LEXIS 1762 (Mar. 28, 2001); see also In the Matter of NOS Communications, Inc. and Affinity Network Incorporated and NOSVA Limited Partnership, 18 FCC Rcd 6952, 2003 LEXIS 1900 (Apr. 7, 2003); see also In the Matter of NOS Communications, Inc.; Compliance with the Commission's Rules and Regulations Governing the National Do-Not-Call Registry, 22 FCC Rcd 19396, 2007 FCC Lexis 8446 (Nov. 9, 2007).

Joint Complainants submit that although these actions were resolved by Consent Decrees and without admissions of wrongdoing, the actions involve allegations of deceptive and misleading marketing and billing practices. Further, regulators' resources were utilized to investigate these multiple complaints regarding the operations of the Companies under the direction of these same owners, officers and managers.

As in other instances of a supplier leaving Pennsylvania and to the extent Blue Pilot has any remaining customers in Pennsylvania and such notice has not already been provided, Blue Pilot's remaining Pennsylvania customers should be provided written notice as required in 52 Pa. Code § 54.41(b) that Blue Pilot is withdrawing from the market and advised that they may choose another supplier or return to default service.

Should the Commission determine to not revoke Blue Pilot's EGS license or determine to allow a possible reinstatement of the license, and should Blue Pilot determine to resume business operations in Pennsylvania if allowed, conditions should be placed on the Company's EGS license based on the Joint Complainants' proven violations and the ALJs' and Commission's specific findings of wrongdoing by the Company.

2. Civil Penalty and Contributions.

In the Joint Complaint, Joint Complainants requested that the Commission impose a civil penalty for the Company's violations of the Public Utility Code and the Commission's regulations and Orders. See Joint Complaint at 13, ¶ B.

In pertinent part, Section 3301 of the Public Utility Code provides:

(a) **General rule.** --

If any public utility, or any other person or corporation subject to this part, shall violate any of the provisions of this part, or shall do any matter or thing herein prohibited; or shall fail, omit, neglect, or refuse to perform any duty enjoined upon it by this part; or shall fail, omit, neglect or refuse to obey, observe, and comply with any regulation or final direction, requirement, determination or order made by the commission, or any order of the commission prescribing temporary rates in any rate proceeding, or to comply with any final judgment, order or decree made by any court, such public utility, person or corporation for such violation, omission, failure, neglect, or refusal, shall forfeit and pay to the Commonwealth a sum not exceeding \$ 1,000, to be recovered by an action of assumpsit instituted in the name of the Commonwealth. In construing and enforcing the provisions of this section, the violation, omission, failure, neglect, or refusal of any officer, agent, or employee acting for, or employed by, any such public utility, person or corporation shall, in every case be deemed to be the

violation, omission, failure, neglect, or refusal of such public utility, person or corporation.

66 Pa. C.S. § 3301(a). (Emphasis in original). The Public Utility Code provides that the term “public utility” does not include EGSs “except for the limited purposes as described in sections 2809 (relating to requirements for electric generation suppliers) and 2810 (relating to revenue-neutral reconciliation).” See 66 Pa. C.S. §§ 2809 and 2810. While the Commission may forbear from applying the requirements of the Public Utility Code “which it determines are unnecessary due to competition” among EGSs, the Commission must, however, “impose requirements necessary to ensure that the present quality of service provided by electric utilities does not deteriorate, including assuring ... that 52 Pa. Code Ch. 56 (relating to standards and billing practices for residential utility service) are maintained.” 66 Pa. C.S. § 2809(e).

The Commission’s regulations, promulgated pursuant to, *inter alia*, Section 2809 of the Public Utility Code, 66 Pa. C.S. § 2809, provide:

(a) A licensee shall comply with the applicable requirements of the code and Commission regulations and orders. Consistent with due process, a license may be suspended or revoked, and fines may be imposed against the licensee for:

\* \* \*

(6) The failure to follow the principles in § 54.43 (relating to standards of conduct and disclosure for licensees).

(7) A violation of applicable provisions of the code, this title and lawful Commission orders. See section 2809(b) of the code.

(8) A violation of Pennsylvania consumer protection law.

(9) The transfer of a customer without the customer’s consent. See section 2807(d)(1) of the code (relating to duties of electric distribution companies).

52 Pa. Code § 54.42(a)(6) – (9).

In a recent Initial Decision involving the imposition of a civil penalty for an EGS's violations of the Public Utility Code and the Commission's regulations and Orders, the ALJs summarized the Commission's authority to do so as follows:

[T]he Commission has clearly held that in order for vigorous retail competition to occur, customers must be protected and EGSs must be held to certain standards and regulated conduct. In fact, the Commission was charged by the General Assembly under Section 2807(d) to establish regulations requiring EGSs to provide adequate and accurate information to enable customers to make informed choices regarding the purchase of electricity. 66 Pa. C.S. § 2807(d)(2). The Commission was directed to ensure EGSs comply with Chapters 54 and 56 of the *Pennsylvania Code*. 66 Pa.C.S. §§ 2809(f) and (e). Further, the Commission has the authority to ensure EGSs "comply with such other requirements concerning service as the Commission deems necessary for the protection of the public." 66 Pa. C.S. § 280[2](12). The Commission's general powers pursuant to 66 Pa. C.S. § 501 include regulatory authority over public utilities and "every other person or corporation" subject to the Public Utility Code. 66 Pa. C.S. § 501(a)(b) and (c). HIKO certainly falls under the catch-all definition of "every other . . . corporation" if not first a "public utility." Therefore, the Commission has the authority to direct HIKO to pay civil penalties for violations of Commission regulations.

I&E v. HIKO Energy, LLC, Docket No. C-2014-2431410, Initial Decision at 37-38 (Aug. 21, 2015) (adopted by Opinion and Order of Dec. 3, 2015). See also e.g. Kiback v. IDT Energy, Inc., Docket No. C-2014-2409676, Opinion and Order at 35 (Aug. 20, 2015) (The Commission directed IDT Energy, Inc. to pay a civil penalty of \$2,000.00 for the violation of the Commission's regulation at 52 Pa. Code § 54.4(a) and the 2010 Interim Guidelines at Section H.2.); Herp v. Respond Power, LLC, Docket No. C-2014-2413756, Opinion and Order at 63 (Jan. 28, 2016) (The Commission directed Respond Power, LLC to pay a civil penalty of \$4,000.00 for the violation of the Commission's regulations at 52 Pa. Code §§ 54.4(a), 54.7(a), 54.43(f) and 54.122(3)).

Further, the Commission has held that it is appropriate to assess a civil penalty for each regulation violated by an EGS regardless of whether all the violations occurred during the

marketing to and billing of one customer. See Herp at 62. Specifically, the Commission held that “ ‘a violation of our marketing regulatory standards is separate and distinct from a finding of a violation of our billing [r]egulations’ and a finding of one violation does not work to the exclusion of others even if based upon the same set of circumstances.” Id., citing Kiback at 34.

The Commission has promulgated a Policy Statement at 52 Pa. Code § 69.1201 that sets forth ten factors (Rosi Factors) that the Commission will consider in evaluating, *inter alia*, litigated proceedings and determining whether a fine for violating a Commission order, regulation or statute is appropriate. The factors and standards that will be considered by the Commission include the following:

(1) Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.

(2) Whether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.

(3) Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated cases. When conduct has been deemed intentional, the conduct may result in a higher penalty.

(4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.

(5) The number of customers affected and the duration of the violation.

(6) The compliance history of the regulated entity which committed the violation. An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.

(7) Whether the regulated entity cooperated with the Commission's investigation. Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty.

(8) The amount of the civil penalty or fine necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount.

(9) Past Commission decisions in similar situations.

(10) Other relevant factors.

See 52 Pa. Code § 69.1201(b).

Joint Complainants have established that Blue Pilot has violated and continues to violate numerous Commission regulations, as well as the Public Utility Code and the Licensing Order.

Specifically the following violations have been identified:

- As shown in Section IV.C.1 above regarding Count I – Failing to Provide Accurate Pricing Information, Blue Pilot violated and continues to violate 52 Pa. Code §§ 54.5(c) (requiring that variable pricing terms include the conditions of variability and the limits on price variability), 54.43(1) (requiring that suppliers “provide accurate information about their electric generation services using plain language and common terms in communications with consumers” and “in a format that enables customers to compare the various electric generation services offered and the prices charged for each type of service”), 111.12(d)(5) (EGSs must ensure their offerings “contain information, verbally and written, in plain language designed to be understood by the customer), and Sections 54.43(f) and 111.12(d)(1) (requiring compliance with consumer protection laws), 52 Pa. Code §§ 54.5(c), 54.43(1), 111.12(d)(5), 54.43(f), and 111.12(d)(1).

- As shown in Section IV.C.2 above regarding Count II – Prices Nonconforming to Disclosure Statement, Blue Pilot violated and continues to violate 52 Pa. Code §§ 54.4(a) and 54.5(a) (regarding billed prices, marketed prices and prices agreed upon in the disclosure statement all being the same), 52 Pa. Code §§ 54.4(a) and 54.5(a).
- As shown in Section IV.C.3 above regarding Count III – Misleading and Deceptive Promises of Savings, Blue Pilot has violated and continues to violate 52 Pa. Code §§ 54.4(a) and 54.5(a) (regarding billed prices, marketed prices and prices agreed upon in the disclosure statement all being the same), 54.43(f) (relating to EGS responsibility for fraudulent, deceptive or other unlawful marketing acts by employees, agents and representatives); 111.4 (relating to supplier responsibility develop standards and qualifications for individuals it hires as agents); 111.5 (relating to supplier responsibility to adequately train and monitor its agents); and 111.12(d)(1) (relating to compliance with the Consumer Protection Law), 52 Pa. Code §§ 54.4(a), 54.5(a), 54.43(f), 111.4, 111.5, and 111.12(d)(1).
- As shown in Section IV.C.4 above regarding Count IV – Lack of Good Faith Handling of Complaints, Blue Pilot violated and continues to violate 52 Pa. Code §§ 56.1(a), 56.141(a), 56.151, 56.152 and 111.13, all relating to proper handling of customer complaints, and the Company’s Licensing Order.
- As shown in Section IV.C.5 above regarding Count V – Failure to Comply with the TRA, Blue Pilot violated and continues to violate 52 Pa. Code §§ 111.10 (requiring compliance with the TRA with the exception of the

registration requirement in the Act); 54.43(f) (relating to EGS responsibility for the fraudulent, deceptive or other unlawful behavior of its employees, agents or representatives); and 111.12(d)(1) (prohibiting misleading or deceptive conduct as defined by State or Federal law or by Commission rule, regulation or order), 52 Pa. Code §§ 54.43(f), 111.10 and 111.12(d)(1).

Additionally, Ms. Alexander testified that Blue Pilot's failure to post a bond or other approved security with the Commission violates the EGS licensing requirements in the Public Utility Code and the Company's EGS license. OAG/OCA St. 1-SR (Suppl) at 3.

As has been shown, Blue Pilot's conduct impacted all of its contacts with its customers. As such, Joint Complainants submit that a significant civil penalty is warranted in this proceeding. Additionally, a significant civil penalty is supported by the Rosi Factors.

With regard to the first three and fifth Rosi Factors, Joint Complainants submit that Blue Pilot's conduct was of a very serious nature, as it included intentional and willful deceptive misrepresentations, and the consequences of the Company's conduct were also very serious. See 52 Pa. Code §§ 69.1201(b)(1) – (3), (5). Additionally, the Company's conduct of deceptive and misleading marketing, disclosures and billing has impacted all of the Company's customers, as each customer was (1) subjected to the Company's deceptive marketing techniques via the Company's telemarketers and receipt of marketing materials and a welcome letter; (2) received, or would have received had one been provided, the same Disclosure Statement; and (3) received bills with prices that did not conform to the marketing materials or Disclosure Statement. See Sections IV.B and IV.C.1-4, above.

The duration of the Company's deceptive and misleading conduct in marketing and disclosures has been since the Company received its EGS license on June 10, 2011; the

Company's deceptive and misleading billing practices have also been ongoing since the Company received its EGS license, but the effects were felt by consumers more seriously in the first quarter of 2014. See Sections IV.B and IV.C.1-4, above. Further, as evidenced by the consumer testimonies, a large number of the Company's customers were impacted by the Company's failure to adhere to the Commission's regulations in handling customer complaints during this period. See Sections IV.B and IV.C.4, above. As such, a higher civil penalty is warranted in this matter. See 52 Pa. Code §§ 69.1201(b)(1) – (3).

With regard to the fourth Rosi Factor, the Company did not make any efforts to modify its internal practices to address its violations of the Public Utility Code and the Commission's regulations and Orders. See 52 Pa. Code § 69.1201(b)(4). Instead, by letter dated May 4, 2015 at Docket No. A-2011-2223888, Blue Pilot advised the Commission of its "plans to abandon service to customers in Pennsylvania" and requested that the Commission cancel the Company's EGS license. See Blue Pilot Motion to Dismiss Joint Complaint at Exh. A. Further, approximately two weeks later on May 19, 2015, Blue Pilot submitted a bond instrument that was about one-half the amount of the Company's previous bond instrument. See OAG/OCA St. 1-SR (Suppl) at 2 and Exh. BRA-1-SR. By August 27, 2015, however, Blue Pilot had no bond or other approved security on file with the Commission and has not provided a bond or other approved security to the Commission even though requested to do so. See OAG/OCA St. 1-SR (Suppl) at 2.

With regard to the sixth Rosi Factor, Joint Complainants submit that although the Company's compliance history prior to January 2014 seemed adequate in that few complaints were filed with the Commission, the misleading and deceptive conduct and pervasive violations of the Commission's regulations and orders that Joint Complainants have shown in this

proceeding and detailed at length in Section IV.A-C above, is indicative of frequent, recurrent violations. See 52 Pa. Code § 69.1201(b)(6). In a 2014 complaint case, wherein the complainant asserted, *inter alia*, over-billing by Blue Pilot and defects in the Company's Disclosure Statement, the ALJ found that the Disclosure Statement's pricing provision does not use the required "plain language," is ambiguous, and therefore, violates the Commission's regulations at 52 Pa. Code §§ 54.43(a) and 111.12(d)(5). See Enrico Partners L.P. v. Blue Pilot Energy, LLC, Docket No. C-2014-2432979, Initial Decision at 2, 9, 13 (Feb. 12, 2015). The ALJ recommended that Blue Pilot be assessed a civil penalty in the amount of \$1,000 for each of the two regulations violated, thereby totaling \$2,000. Id. at 21. Further, the ALJ recommended that Blue Pilot be directed to provide a refund to the complainant in the amount of \$27,168.48, which represents the amount the complainant believed it was over-billed by Blue Pilot. Id. at 22.

Further, the Commission stated its intention to reject an ALJ's recommendation that a complaint of over-billing by Blue Pilot be dismissed for the complainant's failure to meet her burden of proof. See Durante v. Blue Pilot Energy, LLC, Docket No. F-2015-2487082, Joint Motion of Chairman Gladys M. Brown & Commissioner John F. Coleman, Jr. at 2-3 (Feb. 11, 2016) (Opinion and Order pending). In the Joint Motion, the Commissioners stated that Blue Pilot did not bill complainant in March 2014 at a rate that matched the rate marketed and accepted by complainant. Id. at 2. The Commissioners also stated their intention to direct that Blue Pilot refund the over-charges for March 2014 and that Blue Pilot refund the complainant for any subsequent billing periods in which the Company did not bill the agreed-upon price while complainant remained a customer of Blue Pilot. Id. at 2-3.

Additionally, other state utility commissions have investigated Blue Pilot and its affiliates. For instance, recently, the Maryland Public Service Commission issued a Show Cause

Order against Blue Pilot’s Maryland affiliate, also called Blue Pilot Energy, LLC, on April 1, 2014, wherein the Maryland Commission instituted an investigation into “allegations of supplier misrepresentations resulting in unexpected and drastic increases of customers’ electric and natural gas prices.” See In the Matter of the Investigation into the Marketing, Advertising, and Trade Practices of American Power Partners, LLC; Blue Pilot Energy, LLC; Major Energy Electric Services, LLC and Major Energy Services, LLC; and Xoom Energy Maryland, LLC, Case No. 9346, Order at 1 (Apr. 1, 2014) (Maryland Show Cause Order). The allegations included, but were not limited to, “providing false and misleading information about the expected range and nature of variable prices; ... advertising to customers that the supplier’s variable rate would not exceed the Standard Offer Service (electric) or Sales Service (natural gas) price for the relevant utility; and providing inadequate information to allow a customer to make an informed choice regarding the purchase of electricity and natural gas services.” Maryland Show Cause Order at 2. Blue Pilot’s Maryland affiliate was ordered to, *inter alia*, show cause why the commission should not find the company in violation of Maryland law and the commission’s regulations and orders in its marketing, advertising or trade practices, revoke or suspend its supplier licenses, impose civil penalties, order refunds or credits to customers, or impose a moratorium on the addition or solicitation of additional customers. Id. at 3-4. This litigation of this matter continues. The parties filed reply briefs on January 27, 2016. Based on the foregoing, Joint Complainants submit that the maximum penalty is warranted and should be imposed in this matter.

With regard to the seventh Rosi Factor, Joint Complainants submit that the Company did not cooperate in the investigation during this proceeding. See 52 Pa. Code § 69.1201(b)(7). For example, in this action, Blue Pilot submitted objections to seven of Joint Complainants’ thirteen

sets of discovery requests (specifically Sets VI, VIII, IX, X, XI, XII and XIII), including follow up discovery to the Company's responses to prior discovery requests,<sup>23</sup> and often making the same arguments against responding to the requests even though the arguments had already been repeatedly rejected by the ALJs.<sup>24</sup> Blue Pilot did not attempt to resolve its objections directly with Joint Complainants, thereby requiring Joint Complainants to utilize their resources to file Motions to Compel and requiring the ALJs to utilize their resources to rule on Motions. Joint Complainants submit that the Company's actions delayed the proceedings and had the effect of wasting judicial resources. Additionally, on May 14, 2015, Blue Pilot filed a Motion to Dismiss Joint Complaint, asserting, *inter alia*, that the Company "can no longer defend itself in this proceeding,"<sup>25</sup> yet thereafter, the Company specifically defended itself when Joint Complainants took action to reduce the matter to judgment based on the Company's representation that it would not defend itself. The case proceeded to full litigation and the expenditure of considerable resources by the Commission and the parties. Ultimately, the Company did not present any witnesses in this matter. Tr. at 774.

With regard to the eighth and ninth Rosi Factors, Joint Complainants submit that a significant civil penalty is necessary to deter future violations. See 52 Pa. Code §§ 69.1201(b)(8) and (9). As the ALJ explained in Enrico Partners, LP:

With regard to the eighth factor, the amount of the civil penalty necessary to deter future violations, this factor supports imposing a higher penalty. The Commission has emphasized the importance of ensuring the development of a robust market for electric generation service through informative and reliable marketing practices and avoiding conduct that may be potentially detrimental to

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<sup>23</sup> See Joint Complainants' Motion to Compel Responses to Set VI-1 and VI-7 at 3, 13-14.

<sup>24</sup> See e.g. Joint Complainants' Motion to Compel Responses to Set XIII at FN 9 (Blue Pilot continued to object to answering discovery requests because the information sought was "commercially sensitive, confidential and proprietary" even though the ALJs had previously rejected such ground for objection in three prior discovery Orders because of the existence of a Protective Order in this matter).

<sup>25</sup> See Blue Pilot Motion to Dismiss Joint Complaint at ¶¶ 3, 5.

the development of a successful retail electric market. As a result, a higher civil penalty is appropriate to deter future violations by Blue Pilot and other EGSs.

Enrico Partners, LP v. Blue Pilot Energy, LLC, Docket No. C-2014-2432979, Initial Decision at 21 (Feb. 12, 2015). (Internal citations omitted).

In a case against an EGS with similar types of allegations of widespread patterns of violations, the Commission assessed a civil penalty of \$1,836,125, which amounted to \$125 per violation for 14,689 total violations. See I&E v. HIKO Energy, LLC, Docket No. C-2014-2431410, Opinion and Order at 54 (Dec. 3, 2015). The Commission found that HIKO's misconduct was intentional and involved false and deceptive marketing and sales activities. Id. at 44.

With regard to the tenth Rosi Factor, which permits consideration of "other relevant factors," Joint Complainants refer to ALJ Barnes' discussion of this factor in Herp that the "importance of compliance with the Commission's regulations, guidelines and code of conduct for suppliers in our burgeoning retail market cannot be over emphasized." Herp, Docket No. C-2014-2413756, Initial Decision at 48 (Dec. 19, 2014), as adopted Opinion and Order at 54 (Jan 26, 2016). Joint Complainants submit that another relevant factor for consideration in assessing an appropriate civil penalty in this matter is the Company's lack of bond or other approved security posted with the Commission, which violates Blue Pilot's Licensing Order, the Public Utility Code, 66 Pa. C.S. § 2809(e), and the Commission's regulations, 52 Pa. Code §§ 54.40(b), (e), (f)(1)-(3). The Public Utility Code provides, in pertinent part, as follows regarding the requirement of an EGS to furnish a bond or other security:

(c) Financial responsibility.—

(1) In order to ensure the safety and reliability of the generation of electricity in this Commonwealth, no energy supplier license shall be issued or remain in force unless the holder complies with all of the following:

- (i) Furnishes a bond or other security approved by the commission in form and amount to ensure the financial responsibility of the electric generation supplier and the supply of electricity at retail in accordance with contracts, agreements or arrangements.

66 Pa. C.S. § 2809(c). Furthermore, the bond requirement was established by the Commission to, *inter alia*, ensure the licensee’s financial responsibility and its obligations to the Commonwealth and Pennsylvania customers. See 52 Pa. Code §§ 54.40(b), (e), (f)(1)-(3). Blue Pilot has failed and refused to submit a bond or other approved security, although specifically requested to do so by the Commission. See OAG/OCA St. 1-SR (Suppl) at 2.

In this matter, Joint Complainants submit that, for the violations of the Company’s Licensing Order, the Public Utility Code and the Commission’s regulations regarding consumer protections, disclosures, training and compliance monitoring of agents, billing in accordance with the marketing and disclosure statements, and addressing customer complaints, Blue Pilot should be directed to pay a significant civil penalty. In addition to the Rosi Factor discussion above, Joint Complainants provide the following information relevant to the calculation of a civil penalty. As Joint Complainants’ expert witness Ashley E. Everette testified:

In January 2014, Blue Pilot billed **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL** customers. Of these, **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL** were residential and **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL** were commercial.

In February 2014, Blue Pilot billed **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL** customers. Of these, **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL** were residential and **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL** were commercial.

In March 2014, Blue Pilot billed **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL** customers. Of these, **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL** were residential and **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL** were commercial.

OAG/OCA St. 3 at 3. As such, Blue Pilot issued **BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL** total bills in January through March 2014, of which **BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL** were residential and **BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL** were commercial.

In this proceeding, Joint Complainants have established that Blue Pilot has violated at least 15 of the Commission’s regulations. See gen’ly Section IV.C above. The Commission’s Chapter 56 and Chapter 111 regulations, however, apply only to residential customers, but many of the Chapter 54 regulations, specifically Sections 54.4 through 54.9 and 54.43, apply to residential and small commercial customers.<sup>26</sup> See 52 Pa. Code §§ 56.1(a), 111.1, 54.1(b), 54.43.

A “small business customer” is defined in Chapter 54 as follows:

*Small business customer*—The term refers to a person, sole proprietorship, partnership, corporation, association or other business entity that receives electric service under a small commercial, small industrial or small business rate classification, and whose maximum registered peak load was less than 25 kW within the last 12 months.

52 Pa. Code § 54.2. Joint Complainants’ expert witness Ms. Everette testified as follows regarding Blue Pilot’s commercial customer usage:

The average monthly usage of Blue Pilot’s commercial customers from December 2013 through March 2014 was as follows:

December 2013	<b>BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL</b>
January 2014	<b>BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL</b>
February 2014	<b>BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL</b>
March 2014	<b>BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL</b>

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<sup>26</sup> Joint Complainants note that in a case where a customer was enrolled as a residential customer but billed as a commercial customer, as the customer was in fact commercial, and the ALJ recommended finding the EGS in violation of the Commission’s regulations pertaining to residential customers, the Commission declined to find that the residential regulations had been violated but, *sua sponte*, found that the EGS had violated Section 54.122(3), 52 Pa. Code § 54.122(3) (pertaining to the prohibition on EGSs engaging in false or deceptive advertising to customers with respect to the retail supply of electricity in this Commonwealth). See Herp v. Respond Power, LLC, Docket No. C-2014-2413756, Opinion and Order at 58 (Jan. 28, 2016).

OAG/OCA St. 3 at 22. (Internal footnote omitted). Joint Complainants submit that the average usage for Blue Pilot's commercial customers indicates that they are small business customers, and therefore, are subject to the protections in 52 Pa. Code §§ 54.4 through 54.9.

Joint Complainants submit that there is more than one way that a civil penalty could be calculated in this matter. First, Joint Complainants submit that each of Blue Pilot's customers in January 2014, when the violations first became apparent to customers after receiving bills with prices much higher than promised, was affected by at least one of the 15 total specific violations of the Commission's regulations that Joint Complainants have established. As such, and based on the Rosi Factors discussion above, Joint Complainants submit that the civil penalty could be calculated by assessing Blue Pilot \$1,000 for each of the Company's customers in January 2014. Blue Pilot billed **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL** customers in January 2014. See OAG/OCA St. 3 at 3. Using this method, the civil penalty would equal **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL**.

Second, Joint Complainants submit that the civil penalty could be calculated similar to the civil penalty assessed against HIKO Energy, LLC of \$125 for each bill rendered in violation of the Commission's regulation. See I&E v. HIKO, Docket No. C-2014-2431410, Opinion and Order at 54 (Dec. 3, 2015). As stated above, Blue Pilot issued **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL** total bills in January through March 2014. See OAG/OCA St. 3 at 3. Joint Complainants submit that each of these bills was subject to at least one of the 15 regulations violated by Blue Pilot. Using this method, the civil penalty would, at a minimum, be **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL**.

Regarding this method, Joint Complainants submit that a higher penalty per bill rendered would also be appropriate. In I&E v. HIKO, HIKO's deliberate conduct in failing to honor the

guaranteed discounted rate was executed in order to stay in business and continue to serve its customers. See I&E v. HIKO, Docket No. C-2014-2431410, Initial Decision at 32, 40 (Aug. 21, 2015). In this matter, Joint Complainants have established that Blue Pilot deceptively marketed to consumers by, *inter alia*, emphasizing savings and promising to maintain watch over prices so that the consumer did not need to do so in order to provide a false sense of security to consumers and induce them to switch to the Company. Blue Pilot did not deliver savings to customers, did not provide the promised price oversight, and customers endured hardship therefrom. As such, Joint Complainants maintain that Blue Pilot's actions and omissions, as established in this proceeding, warrant a higher penalty per bill rendered than the \$125 per bill assessed in I&E v. HIKO.

Based on all of the foregoing (*i.e.* number of violations, number of variable rate customers from January through March 2014), the total refunds due to customers for January through March 2014 discussed in Section IV.D.3 below, and in recognition of the size of the Company's Pennsylvania operations,<sup>27</sup> Joint Complainants assert that Blue Pilot should be assessed a civil penalty at the higher amount of **BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL** based on a \$1,000 per customer penalty for the Company's January 2014 level of customers. Joint Complainants further submit that such civil penalty will deter the types of conduct shown to have occurred in this proceeding, which negatively impacts other market participants and the success of the retail market as a whole, and as such, is appropriate and necessary in this proceeding.

Additionally, Joint Complainants submit that it would be appropriate, given the amount and seriousness of the violations shown in this proceeding, to direct Blue Pilot to make sizeable

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<sup>27</sup> Joint Complainants submit that although Blue Pilot may not have many customers in Pennsylvania, the Company has operations in several states and has many affiliates. As such, the apparent size of the Company in Pennsylvania is not a barrier to a substantial civil penalty in this matter.

contributions to the EDCs' hardship funds of at least \$150,000. Joint Complainants submit that, as evidenced in the consumer testimonies, Blue Pilot's customers experienced great hardship and financial difficulties because of Blue Pilot's violations of its Licensing Order and the Commission's regulations. Joint Complainants submit that customers continue to struggle to afford their electric bills in the Commonwealth. Joint Complainants note that Blue Pilot would not receive hardship fund contributions back, as these would go to the utility to support customers retaining service. Further, contributions to EDCs' hardship funds will assist consumers who have experienced difficulties as a result of high electric bills. As such, Joint Complainants submit that contributions to EDCs' hardship funds should be part of the comprehensive relief directed in this matter.

3. Refunds.

a. Introduction.

In this proceeding Joint Complainants requested that the Commission direct Blue Pilot to, *inter alia*, refund all charges to its customers that were over and above the Price to Compare in the customers' respective service territories from January 1, 2014 through the date of resolution of this matter. See Joint Complaint at 13, ¶ C. Joint Complainants submit that refunds are an appropriate remedy for the violations shown in this proceeding that Blue Pilot did not bill its variable rate customers in accordance with its Disclosure Statement in January, February and March 2014 in violation of the Public Utility Code and the Commission's regulations and orders. For the reasons discussed below, Joint Complainants submit that the Commission has jurisdiction to order across-the-board refunds in this proceeding.

b. Commission Authority and Jurisdiction To Order Refunds.

The Commission may order across-the-board refunds in this proceeding to an entire group of customers, regardless of whether they have submitted testimony in this proceeding or filed formal or informal complaints at the Commission. Section 501 of the Public Utility Code gives the Commission broad authority to address and remedy violations of the Public Utility Code and protect the rights of the public. See 66 Pa. C.S. § 501; see also Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. IDT Energy, Inc., Docket No. C-2014-2427657, Opinion and Order (Dec. 18, 2014) (IDT Order). In the IDT Order, the Commission specifically held that, in addition to having the authority to direct EGS refunds for slamming violations or when a customer has, otherwise, been switched to an EGS without his or her consent pursuant to 52 Pa. Code § 57.177(b), the Commission has plenary authority under Section 501 to direct an EGS to issue a credit or refund for an over bill. IDT Order at 17. The Commission stated:

Directing a billing adjustment for an EGS over bill of supply charges is within the Commission's Section 501 powers to carry out the consumer protections in the Electric Competition Act that are applicable to competitive electricity generation supply service. These consumer protections include the Section 2809(b) requirement that EGSs comply with the Commission's Regulations, including the Chapter 54 billing and disclosure regulations. Having the authority to order EGS credits and/or refunds carries out these statutorily-prescribed consumer protections by ensuring that electric generation supply bills are adjusted accordingly when an EGS, for example, fails to bill a customer in accordance with its disclosure statement, in violation of the Commission's Chapter 54 Regulations and, in turn, Code Section 2809(b). Thus, having the authority to order EGS billing adjustments, including refunds, under the appropriate circumstances, helps ensure that EGSs comply with the Commission's Regulations and bill customers in accordance with their disclosure statement - a fundamental consumer protection under the Electric Competition Act. *See* 66 Pa. C.S. § 2802(14) (" . . . Electric generation suppliers will be required to obtain licenses, demonstrate financial responsibility and comply with such other

requirements concerning service as the commission deems necessary for the protection of the public.”).

IDT Order at 17-18. (Internal footnote omitted.) Additionally, the Commission recently clarified that its authority to direct refunds is not limited to instances when an EGS fails to bill a customer in accordance with the disclosure statement but also extends to circumstances when an EGS:

Fail[s] to abide by our Regulations and applicable regulatory standards governing telemarketing and the information to be provided to customers – oral or written – also constitute[s] appropriate circumstances that justify ordering of a credit or refund.

Kiback at 33. (Internal footnote omitted). See also Herp v. Respond Power, LLC, Docket No. C-2014-2413756, Opinion and Order at 39, 43 (A refund is appropriate when an EGS agent’s marketing did not conform with the EGS’s subsequent billing).

The Commission re-affirmed its jurisdiction on this issue when it explicitly overruled a portion of an ALJ’s Initial Decision finding that the Commission lacked jurisdiction to order a refund or credit by an EGS in a recent Respond Power case. See Werle v. Respond Power, LLC, Docket No. C-2014-2429158, Opinion and Order at 8-9 (Feb. 23, 2015). Specifically, the Commission explained:

However, we do not agree with the ALJ’s statement that because we lack the authority to regulate EGS rates, we also lack the authority to order a refund or credit to the Complainant.

...

Moreover, in *Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Order entered December 18, 2014) (*IDT Order*), we found that the Commission has plenary authority under Section 501 of the Code, 66 Pa. C.S. § 501, to carry out the consumer protections in the Electric Competition Act, and direct an EGS to issue a credit or refund for an over bill in appropriate circumstances. As noted in the *IDT Order*, the appropriate circumstances include situations wherein an EGS fails to bill a customer in

accordance with its disclosure statement, in violation of the Commission's Chapter 54 Regulations and the Electric Competition Act.

Accordingly, while we find that we lack the authority to regulate EGS rates, we conclude that we may require EGSs to provide refunds to retail customers in appropriate circumstances.

Id. at 8. See also Werle, Docket No. C-2014-2429158, Motion of Vice Chairman John F. Coleman, Jr. (Jan. 15, 2015) (The Commission has plenary authority pursuant to 66 Pa. C.S. § 501 to direct an EGS to issue a credit or refund for an over bill when the EGS fails to bill a customer in accordance with its disclosure statement in violation of 52 Pa. Code §§ 54.4(a) and 54.5(a)); Werle, Docket No. C-2014-2429158, Motion of Commissioner Gladys M. Brown (Jan. 15, 2015) (Monetary remedies may be appropriately determined by the Commission with regard to EGS rates as they relate to, *inter alia*, marketing, disclosure and enrollments). See also Nadav v. Respond Power, LLC, Docket No. C-2014-2429159, Opinion and Order at 7 (Dec. 19, 2014) (Commission has authority and jurisdiction to require EGSs to provide refunds to retail customers in appropriate circumstances).

The Commission's authority is not limited to individual complainants or to only those consumers who submitted testimony in this proceeding. The Joint Complaint describes a pattern and practice of actions by Blue Pilot that violated Commission regulations and impacted all of Blue Pilot's Pennsylvania customers. See gen'ly Joint Complaint. The ALJs have consistently recognized that in the Joint Complaints filed by OCA and OAG against EGSs, the OCA and OAG are acting in their representative capacities as government agencies on behalf of the consumer interest and public interest as a whole, not on behalf of the specific individual consumers who filed complaints. See e.g. Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric,

Docket No. C-2014-2427656, Order Denying Motion In Limine (December 1, 2014). The OCA is authorized to represent the interests of consumers before the Commission in any matter properly before the Commission. 71 P.S. § 309-4(a). The Consumer Advocate “may exercise discretion in determining the interests of consumers which will be advocated in any particular proceeding and in determining whether or not to participate in or initiate any particular proceeding and, in so determining, shall consider the public interest, the resources available and the substantiality of the effect of the proceeding on the interest of consumers.” 71 P.S. § 309-4(b).

Additionally, this is an action being brought by the Attorney General “in the name of the Commonwealth,” as authorized by the Consumer Protection Law, when the Attorney General has reason to believe that any person is using or is about to use any “unlawful method, act or practice” and further determines the proceedings would be in the “public interest.” 73 P.S. § 201-4. The Attorney General is not acting on behalf on any one single claimant, but pursuant to the *parens patriae*<sup>28</sup> powers. See e.g. Commonwealth v. Foster, 57 Pa. D. & C.2d 203 (C.P. Allegheny 1972) (Characterizes the Commonwealth’s action by the Attorney General under the Consumer Protection Law as *parens patriae*).

The Attorney General does not act as the private attorney for any given customer but instead is authorized to bring a proceeding on behalf of the public “to protect the citizenry,” by among other things, seeking injunctive relief, restitution and civil penalties. Valley Forge Towers South Condominium v. Ron-Ike Foam Insulators, Inc., 393 Pa. Super. 339, 346, 574 A.2d 641,

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<sup>28</sup> By definition, when the Attorney General acts in the role of “*parens patriae*,” literally “parent of the country,” she is acting in her capacity as “the provider of protection to those unable to care for themselves.” BLACK’S LAW DICTIONARY, 9<sup>TH</sup> EDITION, at 1221. Clearly, non-complainants fall within the category of those on whose behalf the Joint Complaint was filed.

644 (1990), aff'd 529 Pa. 512, 605 A. 2d 798 (1990).<sup>29</sup> Proceedings brought by the Attorney General focus on unfair and deceptive methods, acts and practices. 73 P.S. §§ 201-3, 201-4.

Joint Complainants have alleged that Blue Pilot engaged in a pattern and practice of behavior that impacted all Pennsylvania Blue Pilot customers and are acting on behalf of all Pennsylvania customers of Blue Pilot.<sup>30</sup> See gen'ly Joint Complaint. The Commission has the authority to order relief pursuant to its plenary authority under Section 501, 66 Pa. C.S. § 501, and has ordered such relief to all customers. In 1997, the Commission ordered across-the-board relief to groups of customers where not all of them had complained or testified. See e.g. Richard Sanderman v. LP Water and Sewer Company, 87 Pa. PUC 734 (1997) (Sanderman). In Sanderman, the Commission adopted the ALJ's determination that Mr. Sanderman, in proving that he had been overcharged, not only supported his request for a refund but also supported a show cause proceeding initiated by the Commission to order refunds to all customers. Id. at 747, 750. On appeal, the Commonwealth Court affirmed the Commission's order and rejected LP's argument that the Commission should limit its refund order to Mr. Sanderman alone. LP Water & Sewer Co. v. Pennsylvania PUC, 722 A.2d 733, 740 (Pa. Commw. Ct. 1998).

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<sup>29</sup> Likewise, the Consumer Advocate does not represent individual consumers. See gen'ly 71 P.S. § 309-4.

<sup>30</sup> This action was brought by the Attorney General and the Acting Consumer Advocate pursuant to their statutory authorities and should not be confused with a class action lawsuit. Commission ALJs have held that class actions are not permitted under the Public Utility Code, and, as such, individual complainants do not have standing to represent the interests of others "similarly situated" before the Commission. See C Leslie Pettko v. Pennsylvania Water Company, Docket No. C-2011-2226096, Order Granting in Part and Denying in Part Motion for Judgment on the Pleadings at 6 (Oct. 5, 2011) (Pettko); see also Commonwealth of Pennsylvania, et. al. v. IDT Energy, Inc., Docket No. C-2014-2427657, Order Granting Petition to Intervene at 5 (May 1, 2015); see also Commonwealth of Pennsylvania, et. al. v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric, Docket No. C-2014-2427656, Order Granting Petition to Intervene at 6 (April 23, 2015) (PaG&E). This case, however, was brought by the Attorney General and the Acting Consumer Advocate pursuant to their statutory authorities. As such, the holdings from the Pettko, IDT, and PaG&E proceedings are not applicable to this proceeding.

In Office of Consumer Advocate, et al. v. Utility.com, Inc., 212 PUR4th 255 (2001), the OCA and seven individual customers filed complaints when Utility.com, Inc., suddenly withdrew from the Pennsylvania electric generation supplier market, resulting in lost prepayments and lost savings<sup>31</sup> for electric generation supply. Utility.com, 212 PUR4th at 257. The Commission sustained the OCA's complaint for refunds and lost savings on behalf of all of Utility.com's former customers and encouraged OCA to pursue "alternative means of collection" after it became apparent that the utility's bond would be consumed by gross receipts taxes. Id. at 262. The Commission noted that the complaint "shall not be considered to be satisfied in full, nor shall it be closed until receipt of a report that shows that all refunds and lost savings claimed on behalf of former customers have been paid by Utility.com, Inc." Id. at 264. (Emphasis added).

The following year, in David B. Lytle v. T.W. Phillips Gas and Oil Co., 97 Pa. PUC 476 (2002), the Commission approved an across-the-board refund to customers after the utility charged customers a credit card "convenience fee" that was not included in the utility's tariff. Lytle, 97 Pa. PUC at 478. Although only one customer filed a complaint, the Commission found that the surcharge constituted an "illegal, untariffed fee" and ordered the utility to stop including the fee and to refund, with interest, the amount of "convenience fees" paid by all customers. Id.

The Commission also approved broader refunds in Re Acquire Clean Treatment Sewage Company, Docket No. I-2009-2109324, Order (May 24, 2012), to availability customers in connection with the acquisition of the Clean Treatment Sewage Company (CTSC). Acquire Clean Treatment, at \*47. This investigative proceeding was prompted by an earlier complaint proceeding in which 56 customers of CTSC filed formal complaints about being charged

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<sup>31</sup> The Commission describes "lost savings" as "the amount of money that a customer could have been able to save either staying with Utility.com or transferring to a comparable supplier had Utility.com given the 90-days written notice prior to its departure from the Pennsylvania generation market as required by Commission regulations at 52 Pa. Code § 54.41(b) (relating to transfer or abandonment of license)." Utility.com, 212 PUR4th at 262.

availability service fees during a time when CTSC was prevented from providing service because of a local moratorium. See Stephen Sutter, et al. v. Clean Treatment Sewage Company, 104 Pa. PUC 146, 150 (2009). In the 2009 case, the Commission deferred the question of ordering refunds until it could investigate the appropriateness of an acquisition of CTSC by another company. In the acquisition case, the Commission found that CTSC's failure to provide reasonably continuous and uninterrupted service to its availability customers did not justify an availability fee. Id. at \*48. The Commission ordered CTSC to provide a list of all customers who paid an availability fee, not just those who complained, to determine a total refund amount, which was to be taken from the proceeds of acquisition. Id. at \*49-50.

Most recently, the Commission recognized that its analysis and determination in an investigation and complaint proceeding by I&E relating to an EGS that had not provided promised savings to customers should be akin to the analyses and determinations of the Commission had all of the affected customers pursued individual complaints. See I&E v. HIKO Energy, LLC, Docket No. C-2014-2431410, Opinion and Order at 46 (Dec. 3, 2015). Specifically, the Commission stated:

[W]e are particularly compelled by one observation of the ALJs. As the ALJs described it, HIKO was obliged "to make good on its promise" to save consumers at least 1% over the effective PTC of their EDC, and had each of the 5,708 individual customers affected by HIKO's breach of that promise individually pursued his or her individual complaint, the Company could have faced this same analysis over 5,700 times, with a penalty, which is separate and distinct from restitution, of up to \$1,000 for each of those individual complaints.

Id. See also I&E v. HIKO Energy, LLC, Docket No. C-2014-2431410, Initial Decision at 35 (Aug. 21, 2015) (The fact that the violations are being raised in one complaint does not minimize the EGS's liability). Joint Complainants submit that while these statements were made in relation to the determination of an appropriate civil penalty, they are equally applicable to the

determination of appropriate refunds to the consumers. The Joint Complaint was brought in the OCA's and OAG's capacities as representing Pennsylvania's consumers as a whole, and more specifically in this matter all Pennsylvania consumers served by Blue Pilot. As such, the determination of refunds for these consumers should be made as if each consumer had pursued his or her own complaint.

Also of note, The Federal Trade Commission (FTC) frequently initiates cases similar to this matter. See e.g. FTC v. Figgie Int'l, Inc., 994 F.2d 595, 605 (9<sup>th</sup> Cir. 1993); FTC v. Security Rare Coin & Bullion Corp., 931 F.2d 1312, 1316 (8th Cir. 1991). Much like Joint Complainants' role in this proceeding, the courts have recognized that the FTC does not file private actions on behalf of individuals, but instead seeks to deter unfair and deceptive trade practices and obtain relief on behalf of large classes of injured consumers. See Id. Courts have held that the FTC need not show individual consumer reliance on misleading and deceptive statements in order for all the affected consumers to be entitled to remedies. See Id. The reason a governmental party, such as the FTC, is not required to prove individualized harm is axiomatic:

It would be virtually impossible for the FTC to offer such proof, and to require it would thwart and frustrate the public purposes of FTC action. ***This is not a private fraud action***, but a government action brought to deter unfair and deceptive trade practices and to obtain restitution on behalf of a large class of defrauded investors. It would be ***inconsistent with the statutory purpose*** for the court to require proof of subjective reliance ***by each individual consumer***.

FTC v. Nat'l Bus. Consultants, Inc., 781 F. Supp. 1136, 1142 (E.D. La. 1991) quoting FTC v. Security Rare Coin & Bullion Corp., 931 F.2d 1312, 1316 (8th Cir. 1991). (Emphasis added).

In Figgie, the FTC issued a cease and desist order that the company stop its unfair and deceptive practices of marketing the company's heat detectors as more effective than smoke detectors, the accuracy of which was refuted in a series of tests by fire-prevention experts and recommendations by the National Fire Prevention Association. 994 F.2d at 598-600, 603. The

FTC then brought suit for consumer redress. Id. at 601. Summary judgment on the issue of liability was granted in favor of the FTC based on the record established in the cease and desist case, and the court directed that Figgie pay \$7.59 million, which represented the company's gross revenues from the sale of the heat detectors, into a fund to provide refunds to customers. Id. Further, the court required Figgie to add to the fund, if customers' claims totaled more than \$7.59 million, up to a ceiling of \$49.95 million, which represented the total amount consumers paid for the heat detectors. Id.

Figgie argued on appeal that only those consumers that proved reliance on the company's sales statements should be entitled to redress. 994 F.2d at 605. The court rejected Figgie's argument. Id. at 605-606; see also FTC v. Security Rare Coin & Bullion Corp., 931 F.2d 1312, 1316 (8th Cir. 1991) (FTC met the burden of showing consumer reliance by showing that defendant's misrepresentations concerning low coin prices, high profit potential, and low risk were the type of representations that consumers in the market would generally rely upon in deciding whether to make a purchase; showing of reliance by each consumer to be reimbursed was not necessary).

Joint Complainants submit that here, much like in Figgie, the Joint Complaint describes a pattern and practice of actions by Respond Power that impacted all of Blue Pilot's Pennsylvania customers, particularly with respect to Blue Pilot's promotional literature, marketing sales scripts, lack of training and compliance oversight of telemarketing sales agents, and Blue Pilot's pricing methodologies in comparison to its Disclosure Statement. As Joint Complainants' expert witness Ms. Alexander testified, Blue Pilot's Pennsylvania customers relied on the statements made during the sales presentations that they would experience savings if they signed up with Blue Pilot. See OAG/OCA St. 1 at 33. Despite these promises of savings, however, Joint

Complainants provided expert testimony demonstrating that from January through March 2014, Blue Pilot charged its customers a significant amount more than these customers would have paid had they been purchasing their power from their EDCs. OAG/OCA St. 3 at 21-22.

Furthermore, the consumer testimony in the record in this proceeding confirms the conclusion that Blue Pilot's pattern and practice of behavior affected customers on a widespread basis. As this action is not a private action, but an action brought by the OAG and the OCA to deter unfair and deceptive practices and to obtain relief for all customers of Blue Pilot, it would be inconsistent for the Commission to limit refunds or require proof of subjective reliance by each individual consumer.

As stated above, the OCA, as the statutory advocate for utility customers, and the OAG, on behalf of the public interest, comprehensively represent the interests of *all* Blue Pilot customers in Pennsylvania, whether or not they submitted testimony in this proceeding or filed a formal or informal complaint or contacted Joint Complainants about the problem. Joint Complainants submit that Commission precedent supports relief to all customers where substantial evidence supports a finding that a company's unlawful practices or charges have had a broader effect.

As such, Joint Complainants submit that the Commission has the authority to direct Blue Pilot to issue refunds to all customers in this proceeding. The Joint Complainants have appropriately requested in the Joint Complaint that the Commission "[o]rder Respondent to provide appropriate restitution including without limitation to refunding all charges to its customers that were over and above the Price to Compare in the customers' respective service territories..." Joint Complaint at 13, ¶ C. (Emphasis added).

c. Appropriate Refunds to Blue Pilot Customers in this Matter.

Joint Complainants submit that they have shown that, as required by 52 Pa. Code §§ 54.4(a) and 54.5(a) (requiring consistency among the marketed, disclosed and billed prices), Blue Pilot did not bill its variable rate customers in accordance with the terms identified in its Disclosure Statement in January, February and March 2014 in violation of the Public Utility Code and Commission regulations. See e.g. Sections IV.C.3 (regarding failure to deliver promises of savings) and IV.C.2 (regarding prices not conforming to Disclosure Statement), above. In addition, Blue Pilot did not deliver the advertised savings or prices when it billed customers. As such, refunds are appropriate for the Company's customers.

In order to address the over-billings by Blue Pilot, Joint Complainants respectfully request that Blue Pilot be directed to provide refunds to its residential and commercial customers that were billed a price in excess of their applicable PTC in January 2014, February 2014 or March 2014 and that Blue Pilot be directed to provide full and complete accountings of the refunds as part of a compliance filing. Based on the billing data for the Company's residential and commercial customers made available, Joint Complainants calculated that the aggregate amount due to Blue Pilot's customers for this period is approximately **BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL**. See OAG/OCA St. 3 at 21-22.

Joint Complainants recognize that mitigation principles would normally require that Blue Pilot be given credit towards this total refund amount for any refunds or bill credits already provided to customers for usage during the relevant time period. Joint Complainants submit, however, that in this matter, it is difficult to determine with accuracy the mitigation credit due to Blue Pilot. As Joint Complainants' expert Ms. Alexander testified:

Blue Pilot provided a credit or rebate to only a small number of customers overall: 21 received a credit and 101 customers received a refund of some amount

between January 2014 and September 2014. The dollar amount of “credits” -- \$49,710-- and “refunds” --\$173,744-- pale in comparison to the extremely high prices charged by Blue Pilot to Pennsylvania customers in 2014.

OAG/OCA St. 1 at 55. (Internal footnotes omitted). While the total refunds and bill credits are known, the billing period for which the refunds and bill credits correspond is not known. As Joint Complainants’ witness Ms. Everette’s Exhibit AEE-1 shows, Blue Pilot continued to charge customers a rate of 24.9 cents per kWh from March 31, 2014 through at least August 5, 2014. As Joint Complainants are seeking refunds for the period January through March 2014, the mitigation credit to Blue Pilot for refunds and bill credits already provided to customers should be for the same corresponding period. As such, Blue Pilot should be directed to provide a full accounting of refunds and bill credits provided to its Pennsylvania customers, including a detailed explanation of to which billing a refund or bill credit applies, so that an appropriate mitigation credit may be determined in this proceeding.

d. Conclusion.

Joint Complainants submit that, as explained above and earlier in this Main Brief, the Commission has the authority and jurisdiction to consider systematic and widespread business practices that violate the Public Utility Code and its regulations and orders. The Commission has full authority to direct appropriate remedies for such violations. In this proceeding, Joint Complainants have shown that the Company engaged in a systematic deceptive and misleading practice of charging prices to its variable rate customers that did not conform to the Disclosure Statement and did not provide promised savings in violation of 66 Pa. C.S. § 2807(d)(2) and the Commission’s regulations at 52 Pa. Code §§ 54.4(a), 54.5(a), 54.5(c), 54.43(1), 54.43(f) and 111.12(d)(1) and the Licensing Order.

As such, Blue Pilot should be directed to provide refunds to its customers for overcharges in January through March 2014.<sup>32</sup> The aggregate amount due to Blue Pilot's customers for this period is approximately **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL**. Blue Pilot should be directed to provide a full accounting of refunds and bill credits provided to its Pennsylvania customers, including a detailed explanation of to which billing a refund or bill credit applies, so that an appropriate mitigation credit may be determined in this proceeding. Further, Blue Pilot should be directed to provide a full and complete accounting the amounts billed over the applicable PTCs and refunds due for its customers as part of a compliance filing.

## **VI. CONCLUSION**

WHEREFORE, for the reasons set forth above, Joint Complainants respectfully request that the ALJs find that Blue Pilot violated the Public Utility Code at 66 Pa. C.S. § 2807(d)(2) and the Commission's regulations at 52 Pa. Code §§ 54.4, 54.5, 54.43, 56.1, 56.141, 56.151, 56.152, 111.4, 111.5, 111.10, 111.12 and 111.13, the Commission's Orders, specifically the Company's Licensing Order and the 2010 Interim Guidelines, and the Public Utility Code.

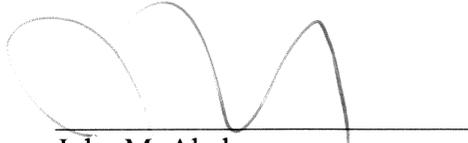
By way of relief for the Company's violations of the Public Utility Code and the Commission's regulations and Orders, Joint Complainants request that the ALJs order Blue Pilot to refund all charges to consumers that were over and above the Price to Compare in the customers' respective service territories from January 1, 2014 through the date of the resolution of this matter, impose a civil penalty on Blue Pilot, and direct the Company to make sizeable contributions to the EDCs' hardship funds. Additionally, Joint Complainants submit that the

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<sup>32</sup> Joint Complainants recognize that disbursement of such a large refund amount to a large group of customers is a major undertaking. Joint Complainants are willing to offer assistance in the coordination and disbursement of refund amounts using the administrator that stands ready to coordinate and disburse refund amounts to customers pursuant to the settlements in the PaG&E (Docket No. C-2014-2427656), IDT (Docket No. C-2014-2427657) and HIKO (Docket No. C-2014-2427652) cases. Furthermore, Joint Complainants submit that the administrator process would be appropriate if the Commission revokes Blue Pilot's EGS license, as discussed in Section IV.D.1, above. While the use of the administrator process is efficient, it is not without cost. Therefore, in the event this process is used, the Company should be directed to pay the costs thereof.

evidence in this proceeding clearly shows that Blue Pilot lacks the managerial and technical expertise to retain its EGS license, and therefore, Joint Complainants request permanent license revocation.

Respectfully submitted,



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

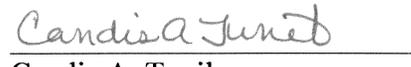
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Date: March 2, 2016  
216865



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Appendix A  
Record Evidence

1. Consumer Direct Testimony of Robert Bishop
  - Exh. RWB-1
  - Exh. RWB-2
2. Consumer Direct Testimony of Robert D'Adamo
3. Consumer Direct Testimony of George Dingler
  - Exh. GMD-1
  - Exh. GMD-2
4. Consumer Direct Testimony of Distinctive Detail
  - Exh. DD-1
5. Consumer Direct Testimony of Charles & Betty Ellis
6. Consumer Direct Testimony of Dennis Frey
7. Consumer Direct Testimony of Tammy Gilles
8. Consumer Direct Testimony of Gorham Holdings (Tremaine Gorham)
9. Consumer Direct Testimony of Jeffrey Hamilton
10. Consumer Direct Testimony of Robert Keiffer
  - Exh. RK-1
  - Exh. RK-2
11. Consumer Direct Testimony of Karen Kraft
  - Exh. KK-1
  - Exh. KK-2
  - Exh. KK-3
12. Consumer Direct Testimony of Mary Nye
13. Consumer Direct Testimony of Norma Kreider
14. Consumer Direct Testimony of Tamrat Bekele
15. Consumer Direct Testimony of Jeffrey VanHorn
16. Consumer Direct Testimony of Martha J. Vetter
  - Exh. MJV-1
  - Exh. MJV-2

17. Consumer Direct Testimony of Village Service Center
  - Exh. VSC-1
  - Exh. VSC-2
18. Consumer Direct Testimony of Dennis M. Estvanik
19. Consumer Direct Testimony of William C. Evans
  - Exh. WCE-1
20. Consumer Direct Testimony of Dean Faust
21. Consumer Direct Testimony of Patricia Fickess
  - Exh. PF-1
  - Exh. PF-2
  - Exh. PF-3
  - Exh. PF-4
22. Consumer Direct Testimony of Michael Foster
23. Consumer Direct Testimony of Tracey L. Frable
24. Consumer Direct Testimony of Fort Boone Campground
25. Consumer Direct Testimony of David J. Lynch/ Cambria Hardware & Equip.
  - Exh. DJL/CHE-1
26. Consumer Direct Testimony of Kim F. Miller
  - Exh. KFM-1
27. Consumer Direct Testimony of Mother's Nature, Inc.
28. Consumer Direct Testimony of Neil Weaver
29. Consumer Direct Testimony of Michael Weidner
30. Consumer Direct Testimony of Grace M. Witmer
  - Exh. GMW-1
  - Exh. GMW-2
  - Exh. GMW-3
31. Consumer Direct Testimony of William Wranitz
32. Consumer Direct Testimony of Ivan Zimmerman
33. Consumer Direct Testimony of Mehmet Isik

34. Consumer Direct Testimony of Ifran Isik
35. Consumer Direct Testimony of Yaglidereliler Corp.
36. Consumer Direct Testimony of Erie Animal Hospital/Bree Burlingame
  - Erie Animal Hospital Redirect Exh. 1 (BPE Service Agreement)
37. Consumer Direct Testimony of Edmund & Jo Ann LeTersky
38. Consumer Direct Testimony of Kenneth R. Brown
  - Brown Redirect Exh. 1 (Transcript of Sales Call)
39. Consumer Direct Testimony of Age Craft Manufacturing, Inc./Ben Policastro
  - Exh. ACM-1
  - Exh. BPE-ACM-1 (BPE Service Agreement)
40. Consumer Direct Testimony of Katherine L. Williams
  - Exh. BPE-KW-1 (BPE Service Agreement)
41. Consumer Direct Testimony of Darrell Bacorn
  - Exh. DB-1
42. Consumer Direct Testimony of Martha Campanella
43. Consumer Direct Testimony of Loni Durante
44. Consumer Direct Testimony of Flowers By Regina/Rose M. Livingstone
  - Exh. RML-1
  - Exh. RML-2
  - Exh. RML-3
  - Exh. RML-4
45. Consumer Direct Testimony of Robert E. Burkholder
46. Consumer Direct Testimony of Howard Johnsons Motor Lodge/Jayanti Shah
  - Exh. JKS/BH-1
  - Exh. BPE-HJML-1 (BPE Service Agreement)
47. Consumer Direct Testimony of James G. Seton
48. Consumer Direct Testimony of James A. Reed, Jr.
  - Reed Redirect Exh. 1 (Transcript of Sales Call)
49. Consumer Direct Testimony of Carol & Herbert Lyle Evans
50. Consumer Direct Testimony of Marcy Weyant

51. Consumer Direct Testimony of Tracy Wesley
  - Wesley Redirect Exh. 1 (Transcript Sales Call)
  - Wesley Redirect Exh. 2 (Transcript of TPV)
52. Consumer Direct Testimony of Karen Mauro
53. Consumer Direct Testimony of Tami Chicarielli/Geo Structures, Inc.
  - Chicarielli Redirect Exh. 1 (Transcript of Sales Call)
54. Consumer Direct Testimony of Joan Miller
  - Exh. JIM-1
55. Consumer Direct Testimony of Scott A. Hornberger
56. Consumer Direct Testimony of Walt Wensel
  - Exh. WW-1
  - Exh. WW-2
  - Exh. WW-3
57. Consumer Direct Testimony of Nancy Whisker
58. Consumer Direct Testimony of Tom & Amy Quinn
59. Consumer Direct Testimony of Mutual Aid Ambulance Service, Inc./Dennis Todaro
  - Exh. MAAS-1
  - Exh. MAAS-2
  - Exh. MAAS-3
  - MAASI Redirect Exh. 1 (Transcript of Sales Call)
60. Consumer Direct Testimony of William C. Smith
61. Consumer Direct Testimony of United Transmission & Service Center, Inc./Anthony Fatzinger & Martha Torbey
  - Exh. UTSCI-1
62. Consumer Direct Testimony of Gary Euler
  - Exh. GE-1
63. Consumer Direct Testimony of David Brotzman
64. Consumer Direct Testimony of David A. Duke
65. Consumer Direct Testimony of Dale & Lynne Ober
  - Exh. L/DO-1

66. Consumer Direct Testimony of Rachel Nentwig
67. Consumer Direct Testimony of Greg Payson/Indiana Auto Supply
  - Exh. GP-1
68. Consumer Direct Testimony of Richard P. Perry, Jr.
  - Exh. RPP-1
  - Exh. BPE-RP-1 (BPE Service Agreement)
69. Consumer Direct Testimony of Dan Ellingsen
70. Consumer Direct Testimony of Daniel Zablosky
71. Consumer Direct Testimony of Sherri Kennedy
  - Exh. SK-1
  - Exh. SK-2
  - Exh. BPE-SK-1 (Transcript of TVP)
  - Kennedy Redirect Exh. 1 (Transcript of Sales Call)
72. Consumer Direct Testimony of Edward George
  - George Redirect Exh. 1 (Transcript of Sales Call)
73. Consumer Direct Testimony of Allen Fitch
74. Consumer Direct Testimony of Jacqueline M. Epler
75. Consumer Direct Testimony of John J. Cassel
76. Consumer Direct Testimony of Alexandra Moratelli
  - Moratelli Redirect Exh. 1 (Transcript of Sales Call)
77. Consumer Direct Testimony of Charles Wentzel
78. Consumer Direct Testimony of William H. Otto
79. Consumer Direct Testimony of Luann & Matthew Battersby
80. Consumer Direct Testimony of Linda Wintersteen
  - Exh. LW-1
  - Exh. LW-2
81. Consumer Direct Testimony of Russell Mowl/North Bethlehem Township
82. Consumer Direct Testimony of Russell Mowl/Store Route 40
83. Consumer Direct Testimony of Russell Mowl

84. OAG/OCA St. 1 – Direct Testimony of Barbara R. Alexander

- Exh. BRA-1
- Exh. BRA-2
- Exh. BRA-3
- Exh. BRA-4

85. OAG/OCA St. 2 –Direct Testimony of Steven L. Estomin

- Appendix
- Exh. SLE-1
- Exh. SLE-2
- Exh. SLE-3
- Exh. SLE-4

86. OAG/OCA St. 3 –Direct Testimony of Ashley E. Everette

- Appendix A
- Exh. AEE-1

87. OAG/OCA St. 4 –Direct Testimony of Gregory M. Strupp, as adopted by Nicholas F. Basehore

88. OAG/OCA St. 1-SR(Suppl.) – Supplemental Surrebuttal Testimony of Barbara R. Alexander

- Exh. BRA-1-SR (Suppl)

89. OAG/OCA Cross. Exh. 1 (EGS License Application)

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Appendix B  
Procedural History

On June 20, 2014, the Office of Attorney General Bureau of Consumer Protection (BCP) and the Office of Consumer Advocate (OCA) filed a Joint Complaint against Blue Pilot Energy, LLC (Blue Pilot or the Company) with the Public Utility Commission (Commission) pursuant to, *inter alia*, the Public Utility Code, 66 Pa. C.S. Ch. 28 and the Commission's regulations, 52 Pa. Code Ch. 54, 56 and 111. The Joint Complaint includes five separate counts and alleges that Blue Pilot violated Pennsylvania law and Commission orders and regulations. Specifically, the five counts in the Joint Complaint are: I) failing to provide accurate pricing information; II) prices nonconforming to disclosure statement; III) misleading and deceptive promises of savings; IV) lack of good faith handling of complaints; and V) failure to comply with the Telemarketer Registration Act (TRA). With respect to relief, the Joint Complainants request that the Commission find, *inter alia*, that Blue Pilot violated the Public Utility Code and the Commission's regulations and orders; provide restitution to Blue Pilot's customers; impose a civil penalty; and order Blue Pilot to make various modifications to its practices and procedures; and revoke or suspend the Company's Electric Generation Supplier (EGS) license, if warranted. The Bureau of Investigation and Enforcement (I&E) and the Office of Small Business Advocate (OSBA) intervened in the proceeding.

On July 10, 2014, Blue Pilot filed Preliminary Objections to the Joint Complaint and an Answer to the Joint Complaint generally denying the alleged violations. On July 21, 2014, the Joint Complainants filed an Answer to Preliminary Objections. By Order dated August 20, 2014, Administrative Law Judges Joel H. Cheskis and Elizabeth Barnes (ALJs) granted in part and denied in part Blue Pilot's Preliminary Objections. Specifically, the ALJs found: 1) that the Commission lacks jurisdiction to hear complaints under the Unfair Trade Practices and Consumer Protection Law (CPL) and the TRA even though compliance with these Acts is

required by the Commission regulations, and 2) that the Commission lacks jurisdiction to determine if the prices charged to customers conformed to the disclosure statement provided to the customer.

On September 8, 2014, Joint Complaints filed a Petition for Interlocutory Review and Answer to Material Questions with the Commission. Specifically, Joint Complaints sought for the Commission to answer the following questions: (1) Does the Commission have authority and jurisdiction to determine whether a violation of the CPL and TRA has occurred when considering whether the Commission's regulations—which require compliance with these laws—have been violated and (2) Does the Commission have the authority and jurisdiction to determine whether the prices charged to customers by an EGS conform to the EGS disclosure statement regarding pricing. On September 18, 2014, the Joint Complainants filed a Brief in Support of their Material Questions, and Blue Pilot filed a Brief in Opposition.

On December 11, 2014, the Commission issued an Order in which it determined that while it does not have the authority or jurisdiction to determine whether a violation of the CPL or TRA has occurred, the Commission can hear claims alleging fraudulent, deceptive, and/or misleading conduct brought against Blue Pilot under the Commission's regulations and can also hear claims alleging improper verification of enrollment of residential customers brought against Blue Pilot under the Commission's telemarketing regulations. Further, the Commission determined that it has the authority and jurisdiction to determine whether the prices charged to customers by an EGS conform to the EGS's disclosure statement regarding pricing.

On August 25, 2014, a Prehearing Conference was convened and a litigation schedule was adopted for the submission of consumer testimony. Pursuant to the litigation schedule, on

October 17, 2014, Joint Complainants served consumer direct testimony from 97 consumer witnesses.

Hearings for cross examination of the consumer witnesses were initially scheduled for November 13-14, 2014, and a Further Prehearing Conference to determine the remainder of the litigation schedule was scheduled for November 25, 2014. On October 22, 2014, Blue Pilot filed a Motion for Continuance seeking to have continued the evidentiary hearings scheduled for November 13-14, 2014. On October 28, 2014, the ALJs issued an Order granting Blue Pilot's Motion for Continuance; rescheduling the hearings for February 2-6, 2014; and rescheduling the Further Prehearing Conference for February 20, 2015. On December 31, 2014, Blue Pilot filed a second Motion for Continuance, which was granted by Order dated January 7, 2015. In the January 7<sup>th</sup> Order, the ALJs rescheduled the evidentiary hearings for March 30 - April 3, 2015 and rescheduled the Further Prehearing Conference to February 2, 2015. By request of Blue Pilot, the Further Prehearing Conference was rescheduled for February 4, 2015.

At the February 4, 2015 Further Prehearing Conference, the remainder of the litigation schedule was adopted. The schedule included service of: (1) Joint Complainants' expert testimony and testimony of other non-customer witnesses; (2) the Company's rebuttal testimony; (3) Joint Complainants' surrebuttal testimony of their experts and other non-consumer witnesses; and (4) hearings for cross-examination. See Procedural Order #4 at 5 (Feb. 4, 2015). Pursuant to the ALJs' directive at the Further Prehearing Conference, on February 9, 2015, Joint Complainants submitted their Joint Memorandum of Law Regarding the Admission of Pattern of Practice Evidence. See Procedural Order #4 at 3 (Feb. 4, 2015). On February 26, 2015, Blue Pilot filed its Reply Memorandum of Law Regarding the Admissibility of Pattern and Practice Evidence. The ALJs did not rule on the Joint Complainants' Memorandum of Law but instead,

directed that as many consumers as possible be scheduled for cross-examination on the available hearing dates. Id.

By letter dated March 6, 2015, Blue Pilot notified the ALJs and parties that the Company intended to cross examine all of Joint Complainants' consumer witnesses. On March 18, 2015, Blue Pilot filed a Motion to Strike Direct Testimony of Various Consumers, and on March 26, 2015, Joint Complainants filed their Answer. By Order entered March 27, 2015, the ALJs denied Blue Pilot's Motion to Strike.

Pursuant to the Commission's well-established rule of encouraging settlements, Joint Complainants attempted to engage in settlement negotiations with the Company by providing a term sheet to the Company in December 2014. During an off-the-record status conference with the ALJs and parties on March 20, 2015, counsel for Blue Pilot stated that Blue Pilot was not an active participant in settlement negotiations and that the Company intends to move forward with litigation of the case.

Thereafter, on March 30, 2015 through April 1, 2015, Joint Complainants presented consumers for cross-examination. At these hearings, the direct testimonies and exhibits of 83<sup>1</sup> consumer witnesses were moved into the record by Joint Complainants. Additionally, Joint Complainants moved various redirect exhibits into the record. See gen'ly App. A (Record Evidence).

On May 14, 2015, Blue Pilot filed a Motion to Dismiss Joint Complaint pursuant to 52 Pa. Code § 5.103, asserting, *inter alia*, that the Company "can no longer defend itself in this

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<sup>1</sup> Of these, by stipulation of the parties, the direct testimonies and exhibits of 36 consumer witnesses were moved into the record without cross-examination. The remaining 47 consumer direct testimonies and exhibits were moved into the record subject to cross-examination by Blue Pilot.

proceeding,”<sup>2</sup> and Blue Pilot had filed a letter with the Commission on May 4, 2015<sup>3</sup> seeking to surrender its EGS license. By letter dated May 29, 2015, Joint Complainants requested that the ALJs hold the litigation schedule in abeyance until the Company’s Motion to Dismiss and any forthcoming motions or actions by Joint Complainants are resolved. The ALJs granted Joint Complainants’ request to hold the litigation schedule in abeyance by Order dated June 1, 2015. See Procedural Order #6 at 3 (June 1, 2015). On June 5, 2015, Joint Complainants filed their Answer to Blue Pilot’s Motion to Dismiss. By Order dated June 11, 2015, the ALJs denied Blue Pilot’s Motion to Dismiss and directed the parties to provide the ALJs with a proposed procedural schedule within ten days.

On June 22, 2015, Joint Complainants filed a Joint Motion for Entry of Judgment Against Blue Pilot Energy, LLC, with a Notice to Plead, based on Blue Pilot’s averments in its Motion to Dismiss Joint Complaint that it could no longer defend itself in this proceeding. Further, Joint Complainants requested that the ALJs dispose of the Joint Motion for Entry of Judgment prior to re-initiating the litigation schedule, which the ALJs granted via email dated June 23, 2015. On July 2, 2015, Blue Pilot requested a seven-day extension until July 20, 2015, in which to answer the Joint Motion for Entry of Judgment, which request was granted by the ALJs via email also on July 2, 2015. On July 20, 2015, Blue Pilot filed its Opposition to Joint Complainants’ Motion for Entry of Judgment. By Order entered August 4, 2015, the ALJs denied Joint Complainants’ Motion for Entry of Judgment was denied insofar as entry of judgment against Blue Pilot but granted in regards to Joint Complainants’ identification of incomplete responses to discovery to Sets VIII and IX. See gen’ly Order Granting in Part and Denying in Part Motion for Entry of

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<sup>2</sup> See Blue Pilot Motion at ¶ 3. See also Blue Pilot Motion at ¶ 5.

<sup>3</sup> See Docket No. A-2011-2223888.

Judgment (Aug. 4, 2015). Further, the parties were directed to submit a revised procedural schedule within ten days. Id. at 13.

On August 14, 2015, the parties submitted a revised procedural schedule to the ALJs as follows: 1) Joint Complainants' expert and other non-consumer testimony due October 20, 2015; 2) Blue Pilot's rebuttal testimony due on December 8, 2015; 3) Joint Complainants' surrebuttal testimony due on January 20, 2016; and 4) evidentiary hearings scheduled on February 3-5, 2016. The revised procedural schedule was adopted by the ALJs. See gen'ly Procedural Order #7 (Aug. 14, 2015).

Pursuant to the revised procedural schedule, Joint Complainants served the Direct Testimonies of Barbara R. Alexander (OAG/OCA St. 1), Steven L. Estomin (OAG/OCA St. 2), Ashley E. Everette (OAG/OCA St. 3) and Gregory M. Strupp (OAG/OCA St. 4) on October 20, 2015. On December 8, 2015, Blue Pilot served the Rebuttal Testimony of Raymond Perea (Blue Pilot Energy, LLC St. 1). On January 20, 2016, Joint Complainants served the Surrebuttal Testimony of Barbara R. Alexander (OAG/OCA St. 1-SR). Thereafter, on February 1, 2016, Joint Complainants served the Supplemental Surrebuttal Testimony of Barbara R. Alexander (OAG/OCA St. 1-SR (Suppl)).

An evidentiary hearing commenced on February 3, 2016, wherein Joint Complainants presented their witnesses for cross-examination and moved OAG/OCA Statement Nos. 1, 1-SR (Suppl), 2, 3 and 4<sup>4</sup> into the record along with the accompanying exhibits. Blue Pilot conducted cross-examination of Joint Complainants' witnesses but did not present any witnesses and moved no testimony or exhibits in to the record.

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<sup>4</sup> Nicholas F. Basehore adopted the testimony of Gregory M. Strupp (OAG/OCA St. 4) at the hearing on February 3, 2016.

By Order entered February 4, 2016, the ALJs directed the parties to file Main Briefs on March 2, 2016, and file Reply Briefs on March 23, 2016. See Briefing Order at 2 (Feb. 4, 2016).

Appendix C  
Proposed Findings of Fact  
Proposed Conclusions of Law  
Proposed Ordering Paragraphs

**I. Blue Pilot's Business Operations and General Findings of Fact**

1. Blue Pilot Energy, LLC (Blue Pilot or the Company) is a retail supplier of electric generation located in Las Vegas, NV. OAG/OCA St. 1 at 7.
2. Blue Pilot marketed electric generation supply to residential and commercial customers in Pennsylvania Electric Distribution Company (EDC) service territories starting in 2012. OAG/OCA St. 1 at 7.
3. Blue Pilot halted its retail sales marketing activity in Pennsylvania starting in March 2014. OAG/OCA St. 1 at 7.
4. On May 4, 2015, Blue Pilot filed a request to cancel its EGS license at Docket No. A-2011-2223888. OAG/OCA St. 1-SR at 2.
5. Blue Pilot does not currently have a bond or other approved security posted with the Commission. OAG/OCA St. 1-SR at 2.
6. Blue Pilot billed and collected for its electric generation supply charges pursuant to an approved Purchase of Receivables (POR) program, in which the respective Electric Distribution Company (EDC) paid Blue Pilot for its electric generation supply charges regardless of whether or not the customers actually paid the EDC for Blue Pilot's charges. OAG/OCA St. 1 at 8-9.
7. Blue Pilot has only offered variable price plans in Pennsylvania. OAG/OCA St. 1 at 7.
8. Most of Blue Pilot's variable price plan offers included an introductory fixed price for 60-90 days. OAG/OCA St. 1 at 7-8.
9. Blue Pilot promoted its variable price plans for generation supply to Pennsylvania customers by emphasizing the introductory fixed price and the potential for savings with variable price agreements compared to the customer's current energy bills. OAG/OCA St. 1 at 9.
10. Blue Pilot's advertising and marketing materials used in 2013 and early 2014 falsely suggested that selecting Blue Pilot would result in savings, lower bills, and a high level of customer service. OAG/OCA St. 1 at 5.
11. Blue Pilot's written promotional materials used in Pennsylvania emphasized promotional prizes by enrolling with Blue Pilot. OAG/OCA St. 1 at 10.
12. Blue Pilot's promotional and marketing materials included statements indicating that customers may see "dramatic rate increases" with the Price to Compare (PTC). OAG/OCA St. 1 at 10.

13. In promoting its variable price plans for generation supply to Pennsylvania customers, Blue Pilot failed to accurately disclose its pricing terms as stated in the Company's Disclosure Statement. OAG/OCA St. 1 at 9-10.

14. None of the written marketing and promotional materials used by Blue Pilot explain variable rates. OAG/OCA St. 1 at 10.

15. None of the written marketing and promotional materials used by Blue Pilot explain how prices would be calculated under its variable price plans. OAG/OCA St. 1 at 10.

16. Blue Pilot primarily enrolled Pennsylvania customers by means of telemarketing sales calls by its employees or sales agents, who were based in Las Vegas, Nevada. OAG/OCA St. 1 at 7.

17. Blue Pilot did not take any proactive steps to properly train or monitor its sales representatives to ensure compliance with Pennsylvania regulations and consumer protection policies. OAG/OCA St. 1 at 21-22.

18. Blue Pilot did not utilize any Pennsylvania-specific training materials with regard to its marketing and sales activities in Pennsylvania. OAG/OCA St. 1 at 21.

19. Blue Pilot's training materials provided to its sales representatives failed to include any information on Pennsylvania's consumer protection requirements. OAG/OCA St. 1 at 20.

20. Blue Pilot's training materials provided to its sales representatives failed to include any information on identifying and avoiding misrepresentations, fraud, or deceptive sales statements or conduct. OAG/OCA St. 1 at 20.

21. Blue Pilot's training materials emphasize **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL**. OAG/OCA St. 1 at 20.

22. Blue Pilot has not documented any internal compliance programs and policies to ensure compliance with the Commission's regulations. OAG/OCA St. 1 at 19.

23. Blue Pilot has not documented any audits or other investigations to ensure compliance with the Commission's regulations with regard to its marketing and sales practices in Pennsylvania. OAG/OCA St. 1 at 19, 21.

24. Many customers who enrolled with Blue Pilot never understood the variable price feature of the agreement, or were never informed of the variable price feature of the agreement, or were led to believe that the price would not change dramatically from month to month, or were led to believe that the price would move in concert with the EDC's PTC. OAG/OCA St. 1 at 33.

25. Blue Pilot's sales scripts used in Pennsylvania in 2013 do not include the term "variable." OAG/OCA St. 1 at 12.

26. Blue Pilot's sales scripts used in Pennsylvania in 2013 contain no explanation of the pricing term of the plan. OAG/OCA St. 1 at 12.

27. The sales scripts used by Blue Pilot's sales representatives in Pennsylvania in 2013 used the term "market" in describing the month-to-month variation in Blue Pilot's charges, but failed to explain the term. OAG/OCA St. 1 at 12.

28. Blue Pilot's sales scripts used in Pennsylvania in 2013 emphasized the potential for "lower rates" and used the term "better rate" to refer to Blue Pilot's prices. OAG/OCA St. 1 at 11.

29. Blue Pilot's sales scripts used in Pennsylvania in 2013 reference "month-to-month rates" after the sales agent has emphasized savings and reducing the amount the customer spends on his or her electric bill. OAG/OCA St. 1 at 12.

30. Blue Pilot's sales agents emphasized quality customer service in their sales presentations. OAG/OCA St. 1 at 28.

31. Blue Pilot's sales agents routinely promised to call customers following their initial 60-90 day fixed, introductory price to update them on their rates or prices or offer them a more competitive price. OAG/OCA St. 1 at 22.

32. Blue Pilot did not make any proactive calls to customers to update them on their rates or prices or offer a more competitive price. OAG/OCA St. 1 at 22-23.

33. On at least several occasions, Blue Pilot's sales agents falsely promised to notify customers prior to changes in prices. OAG/OCA St. 1 at 41.

34. Blue Pilot's sales agents routinely failed to mention the term "variable price" when enrolling customers with Blue Pilot. OAG/OCA St. 1 at 42.

35. Blue Pilot's sales agents made statements that were inconsistent with the Company's Disclosure Statement. See OAG/OCA St. 1 at 40.

36. Blue Pilot's sales agents emphasized that there was "no contract" involved in enrolling with Blue Pilot, which led customers to believe that they could immediately leave Blue Pilot if they were not happy or if their price increased. See OAG/OCA St. 1 at 33-41; see also Exh. BRA-4 (Confidential).

37. Customers who cancelled with Blue Pilot were required to wait anywhere from one to two billing cycles to switch suppliers due to switching regulations that were in effect during this period. OAG/OCA St. 1 at 41.

38. Blue Pilot's sales agents do not review or refer to the Company's Disclosure Statement in the sales presentation. OAG/OCA St. 1 at 8.

39. Blue Pilot's sales agents are not required to have a customer review the Company's Disclosure Statement prior to obtaining a customer's oral agreement to enroll. OAG/OCA St. 1 at 8.

40. Blue Pilot enrolled most customers by means of telemarketing sales calls without obtaining the customers' signatures agreeing to enroll. OAG/OCA St. 1 at 5, 8, 48.

41. Blue Pilot's verification call script does not explain the variable price feature identified in its Disclosure Statement. OAG/OCA St. 1 at 12-13, 42.

42. Blue Pilot mailed Welcome Letters to new customers who enrolled via telemarketing, which did not contain any information about the introductory prices or how the variable price feature of the plan would operate. OAG/OCA St. 1 at 13, 27.

43. Blue Pilot's Welcome Letter referenced its "competitive pricing." OAG/OCA St. 1 at 27.

44. Blue Pilot's Welcome Letter emphasized the potential for savings and a high level of customer service. OAG/OCA St. 1 at 28.

45. Blue Pilot's Disclosure Statement is in very fine print. OAG/OCA St. 1 at 45.

46. Blue Pilot's Disclosure Statement and other documents use terms that are not approved or applicable to Pennsylvania. OAG/OCA St. 1 at 47.

47. None of the formal documents provided to Blue Pilot's customers at the time of sale reflect any of the promotional statements contained in the Company's sales literature or sales scripts relating to savings, historical savings, or competitive pricing. OAG/OCA St. 1 at 47.

48. Blue Pilot's Disclosure Statement contains a provision that requires the customer to agree to a mandatory arbitration process to respond to his or her complaints. OAG/OCA St. 1 at 47.

49. Blue Pilot's Disclosure Statement provides that the Company's variable rate will be based on "several factors, including changes in wholesale energy market prices in the PJM markets." OAG/OCA St. 1 at 25-26.

50. Blue Pilot's Disclosure Statement fails to identify the "several factors" by which Blue Pilot establishes its prices. OAG/OCA St. 1 at 28; OAG/OCA St. 2 at 6.

51. Blue Pilot's variable pricing disclosure included in the Company's Disclosure Statement does not indicate that Blue Pilot will charge a profit margin. OAG/OCA St. 1 at 29.

52. Blue Pilot's Disclosure Statement does not contain any substantive information about the variable price feature. OAG/OCA St. 1 at 28.

53. Blue Pilot charged prices that did not conform to its own Disclosure Statement. OAG/OCA St. 1 at 4-5; See gen'ly OAG/OCA St. 2.

54. Blue Pilot was unable to provide any calculation that was used to determine its retail prices or document how its retail prices conformed to its Disclosure Statement. OAG/OCA St. 1 at 31-32.

55. In January 2014, Blue Pilot added language to its Disclosure Statement, indicating that "sudden atypical fluctuations in climate conditions" may result in Blue Pilot incurring unusual costs, which may be passed through as a "temporary assessment" on a customer's bill. OAG/OCA St. 1 at 26.

56. Blue Pilot issued its revised Disclosure Statement to then-current customers, with the assumption that the revised Disclosure Statement would be applicable to customers who had enrolled under the prior pricing disclosures. OAG/OCA St. 1 at 26-27.

57. In the issuance of the revised Disclosure Statement, Blue Pilot did not explain to its customers the authority it was relying upon to make such unilateral change or the nature of the change that was the purpose of the revised disclosure. OAG/OCA St. 1 at 27.

58. Blue Pilot's Pennsylvania customers relied on the promotional materials and the statements made during sales presentations that they would experience savings if they signed up with Blue Pilot. OAG/OCA St. 1 at 13-14.

59. Blue Pilot charged prices to Pennsylvania customers that did not comply with the promotional statements and sales scripts that induced customers to enroll. OAG/OCA St. 1 at 5.

60. Claims of savings must be evaluated against the applicable PTC, as that price is the amount a consumer will pay if he or she purchases electricity from the EDC as the default provider of electricity. OAG/OCA St. 4 at 22.

61. Overall, Blue Pilot charged its customers more than the applicable PTCs in effect for each EDC during the months December 2013 through March 2014. See gen'ly OAG/OCA St. 4.

62. Blue Pilot did not regularly deliver savings to its customers. OAG/OCA St. 1 at 24; see also gen'ly OAG/OCA St. 4.

63. Blue Pilot did not investigate allegations of deceptive marketing and misleading sales disclosures in response to the increase in customer complaints that occurred in early 2014. OAG/OCA St. 1 at 23, 42.

64. When customers called Blue Pilot to dispute or complain about a price charged, Blue Pilot did not provide the customer with any information necessary for the customer to examine the basis for the monthly price charged in light of the Company's Disclosure Statement. OAG/OCA St. 1 at 29-30, 51-52.

65. In response to customer complaints that Blue Pilot received in early 2014, Blue Pilot routinely defended its conduct by relying on the written disclosures concerning variable and month-to-month prices and its ability to pass through high wholesale market prices and blamed the high prices on extreme weather. OAG/OCA St. 1 at 23, 42, 52.

66. In response to customer complaints that Blue Pilot received in early 2014, Blue Pilot issued a "Customer Care Script" that provided false information about retail costs and information that conflicted with its Disclosure Statement. OAG/OCA St. 1 at 51-52.

67. Blue Pilot's Customer Care Script did not provide any information to customers about their right to cancel their service with Blue Pilot and return to default service or choose another supplier. OAG/OCA St. 1 at 53.

68. In early 2014, Blue Pilot's customer service representatives routinely told customers who contacted the Company about their high variable prices that there was nothing that could be done. OAG/OCA St. 1 at 22.

69. Blue Pilot routinely refused any relief or refund to customers who called for an explanation of or to complain about the high variable rates charged by Blue Pilot in early 2014. OAG/OCA St. 1 at 23.

70. Only 21 Blue Pilot customers received a credit and 101 Blue Pilot customers received a refund from Blue Pilot between January 2014 and September 2014. OAG/OCA St. 1 at 55.

71. When Blue Pilot did offer credits or rebates to customers who called about the high variable rates charged by Blue Pilot in early 2014, Blue Pilot's policy did not treat customers who were similarly situated fairly. OAG/OCA St. 1 at 54.

72. Blue Pilot's refund or credit policy changed repeatedly in early 2014. OAG/OCA St. 1 at 54.

73. Blue Pilot adopted changes to its rebate and customer credit policy that treated customers who filed complaints with the Commission and/or legislators differently than customers who called the Company directly. OAG/OCA St. 1 at 55.

## **II. Findings of Fact by Count**

### **Count I – Failing to Provide Accurate Pricing Information**

74. In promoting its variable price plans for generation supply to Pennsylvania customers, Blue Pilot failed to accurately disclose its pricing terms as stated in the Company's Disclosure Statement. OAG/OCA St. 1 at 9-10.

75. Blue Pilot's Disclosure Statement is in very fine print. OAG/OCA St. 1 at 45.

76. Blue Pilot's Disclosure Statement and other documents use terms that are not approved or applicable to Pennsylvania. OAG/OCA St. 1 at 47.

77. Blue Pilot's Disclosure Statement contains a provision that requires the customer to agree to a mandatory arbitration process to respond to his or her complaints. OAG/OCA St. 1 at 47.

78. Blue Pilot's Disclosure Statement provides that the Company's variable rate will be based on "several factors, including changes in wholesale energy market prices in the PJM markets." See e.g. OAG/OCA St. 1 at 25-26.

79. Blue Pilot's Disclosure Statement fails to identify the "several factors" by which Blue Pilot establishes its prices. OAG/OCA St. 1 at 28.

80. Blue Pilot's variable pricing disclosure included in the Company's Disclosure Statement does not indicate that Blue Pilot will charge a profit margin. OAG/OCA St. 1 at 29.

81. Blue Pilot's Disclosure Statement does not contain any substantive information about the variable price feature. OAG/OCA St. 1 at 28.

82. In January 2014, Blue Pilot added language to its Disclosure Statement, indicating that "sudden atypical fluctuations in climate conditions" may result in Blue pilot incurring unusual costs, which may be passed through as a "temporary assessment" on a customer's bill. OAG/OCA St. 1 at 26.

83. Blue Pilot issued its revised Disclosure Statement to then-current customers, with the assumption that the revised Disclosure Statement would be applicable to customers who had enrolled under the prior pricing disclosures. OAG/OCA St. 1 at 26-27.

84. In the issuance of the revised Disclosure Statement, Blue Pilot did not explain to its customers the authority it was relying upon to make such unilateral change or the nature of the change that was the purpose of the revised disclosure. OAG/OCA St. 1 at 27. See OAG/OCA Consumer Testimony of Nancy Whisker at 524 and Tr. 281-82.

### **Count II – Prices Nonconforming to Disclosure Statement**

85. Blue Pilot's pricing methodology failed to conform to its own Disclosure Statement. OAG/OCA St. 1 at 4-5.

86. Blue Pilot was unable to provide any calculation that was used to determine its retail prices or document how its retail prices conformed to its Disclosure Statement. OAG/OCA St. 1 at 31-32.

### **Count III – Misleading and Deceptive Promises of Savings**

87. Many customers who enrolled with Blue Pilot never understood the variable price feature of the agreement, or were led to believe that the price would not change dramatically from month to month, or were led to believe that the price would move in concert with the EDC's PTC. OAG/OCA St. 1 at 33; see also OAG/OCA Consumer Testimony of Alexandra Moratelli at 209 and Tr. 502 and Moratelli Redirect Exh. 1 at 2; see also OAG/OCA Consumer Testimony of Sherri Kennedy at 2 and Tr. 529, 546-47; see also OAG/OCA Consumer Testimony of Tom & Amy Quinn at 299 and Tr. 304-06; see also OAG/OCA Consumer Testimony of Dennis Todaro/Mutual Aid Ambulance Service at 309, 310, 318; see also OAG/OCA Consumer Testimony of David Brotzman at 164-65 and Tr. 365; see also OAG/OCA Consumer Testimony of Lynn Ober at 203; see also OAG/OCA Consumer Testimony of Gary Euler at 160; see also OAG/OCA Consumer Testimony of United Transmission & Service Center, Inc./Anthony Fatzinger at 438; see also OAG/OCA Consumer Testimony of Daniel Zablonksy at 271 and Tr. 477; see also OAG/OCA Consumer Testimony of Jaqueline M. Epler at 88-89; see also OAG/OCA Consumer Testimony of William H. Otto/Titusville Moose Lodge #84 at 581-82; see also OAG/OCA Consumer Testimony of Linda Wintersteen at 41-42; see also OAG/OCA Consumer Testimonies of Russell Mowl at 469 and Russell Mowl/Store Route 40 at 543; see also OAG/OCA Consumer Testimony of Erie Animal Hospital/Breeana Burlingame at 155-56, Tr. 57, 59-61; see also OAG/OCA Consumer Testimony of Kenneth Brown at 77, 80-82 and Kenneth Brown Redirect Exh. 1; see also OAG/OCA Consumer Testimony of Tracey Wesley at 212-13; see also OAG/OCA Consumer Testimony of Walt Wensel at 226 and Tr. at 272; see also OAG/OCA Consumer Testimony of Tami Chicarielli at 450; see also OAG/OCA Consumer Testimony of Nancy Whisker at 522; see also OAG/OCA Consumer Testimony of Darrell Bacorn at 150-151 and Tr. at 119 and Darrell Bacorn Exhibit DB-1; see also OAG/OCA Consumer Testimony of Lori Durante at 80-81 and Tr. at 136-38; see also OAG/OCA Consumer Testimony of Robert E. Burkholder at 279; see also OAG/OCA Consumer Testimony of Jayanti K. Shah/Bahubali Hospitality/Howard Johnsons at 516 and Tr. at 160; see also OAG/OCA Consumer Testimony of Tray Wesley at 212-213; see also OAG/OCA Consumer Testimony of Karen Mauro at 395-96 and Tr. at 225-226; see also OAG/OCA Consumer Testimony of Robert D'Adamo at 323-325; see also OAG/OCA Consumer Testimony of George Dingler at 404; see also OAG/OCA Consumer Testimony of Betty Ellis at 96-98; see also OAG/OCA Consumer Testimony of Denis Frey at 394; see also OAG/OCA Consumer Testimony of Tammy M. Giles at 511-512; see also OAG/OCA Consumer Testimony of Termaine Gorham at 336-337; see also OAG/OCA Consumer Testimony of Jeffrey Hamilton at 106-107; see also OAG/OCA Consumer Testimony of Robert Kieffer at 21-22; see also OAG/OCA Consumer Testimony of Mary Nye at 233-34; see also OAG/OCA Consumer Testimony of Norma Kreider at 136-37; see also OAG/OCA Consumer Testimony of Tamrat Bekele at 84-85; see also OAG/OCA Consumer Testimony of Jeffrey VanHorn at 388-87; see also OAG/OCA Consumer Testimony of Martha J. Vetter at 443-444; see also OAG/OCA Consumer Testimony of Village Service Center at 453-54; see also OAG/OCA Consumer Testimony of Martha J. Vetter at 443-444; see also OAG/OCA Consumer Testimony of Dennis M. Estvanik at 507-08; see also OAG/OCA

Consumer Testimony of Dean Faust at 294-295; see also OAG/OCA Consumer Testimony of Patricia Fickess at 60-61; see also OAG/OCA Consumer Testimony of Tracey L. Frable at 399, 401. See also OAG/OCA Consumer Testimony of Tracey L. Frable at 399, 401; see also OAG/OCA Consumer Testimony of Forte Boone Campground at 383-84; see also OAG/OCA Consumer Testimony of David J. Lynch/Cambria Hardware & Equip. at 216-17; see also OAG/OCA Consumer Testimony of Mother's Nature, Inc. at 332; see also OAG/OCA Consumer Testimony of Michael Weidner at 366-67; see also OAG/OCA Consumer Testimony of Grace M. Witmer at 420-21; see also OAG/OCA Consumer Testimony of William Wranitz at 290-291; see also OAG/OCA Consumer Testimony of Ivan Zimmerman at 497; see also OAG/OCA Consumer Testimony of Herbert Lyle Evans at 37-38; and see also OAG/OCA Consumer Testimonies of Mehmet Isik at 352 and Ifran Isik at 358 and Yaglidereliler Corp. at 362.

88. Blue Pilot's sales agents routinely falsely promised to call customers following their initial 60-90 day fixed, introductory price to update them on their rates or prices or offer them a more competitive price. OAG/OCA St. 1 at 22-23; see also OAG/OCA Consumer Testimony of Alexandra Moratelli at 209 and Tr. 504-5 and Moratelli Redirect Exh. 1 at 3; see also OAG/OCA Consumer Testimony of Sherri Kennedy at 2 and Tr. 547, 529; see also OAG/OCA Consumer Testimony of Edward S. George at 265-66 and Tr. 610-11, 622 and Edward George Redirect Exh. 1 at 4; see also OAG/OCA Consumer Testimony of Charles Wentzel at 488-89; see also OAG/OCA Consumer Testimony of Dennis Todaro/Mutual Aid Ambulance Service at 324 and Tr. 324 and Dennis Todaro/Mutual Aid Ambulance Service Redirect Exh. 1 at 1-2; see also OAG/OCA Consumer Testimony of Kenneth Brown at 82, 91, 94 and Kenneth Brown Redirect Exh. 1; see also OAG/OCA Consumer Testimony of James A. Reed Jr. at 558-59 and Tr. 181 and James A. Reed Jr. Redirect Exh. 1; see also OAG/OCA Consumer Testimony of Tami Chicarielli at 449 and Tr. at 232-34, 237-38 and Tami Chicarielli Redirect Exh. 1; and see also OAG/OCA Consumer Testimony of Robert W. Bishop at 100-101 and Robert W. Bishop Exhibit RWB-1 at 104.

89. On at least several occasions, Blue Pilot's sales agents falsely promised to notify customers prior to changes in prices. OAG/OCA St. 1 at 41; see also OAG/OCA Consumer Testimony of Alexandra Moratelli at 209; see also OAG/OCA Consumer Testimony of Sherri Kennedy at 2 and Tr. 547, 529; see also OAG/OCA Consumer Testimony of Edward S. George at 265-66 and Tr. 610-11, 622 and Edward George Redirect Exh. 1 at 4; see also OAG/OCA Consumer Testimony of Charles Wentzel at 488-89; see also OAG/OCA Consumer Testimony of Dennis Todaro/Mutual Aid Ambulance Service at 324 and Tr. 324; see also OAG/OCA Consumer Testimony of James A. Reed Jr. at 558-59 and Tr. 181 and James A. Reed Jr. Redirect Exh. 1; see also Tr. of Tracey Wesley at 199, 201; see also OAG/OCA Consumer Testimony of Tami Chicarielli at 449 and Tr. at 232-234, 237-38 and Tami Chicarielli Redirect Exh. 1; see also OAG/OCA Consumer Testimony of Robert D'adamo at 323, 325; see also OAG/OCA Consumer Testimony of Robert Kieffer at 21; see also OAG/OCA Consumer Testimony of Martha J. Vetter at 443-444; see also OAG/OCA Consumer Testimony of Martha J. Vetter at 443-444; see also OAG/OCA Consumer Testimony of Village Service Center at 453-54; and see also OAG/OCA Consumer Testimony of Dean Faust at 294-295;

90. Blue Pilot's sales agents routinely failed to mention the term "variable price" when enrolling customers with Blue Pilot. OAG/OCA St. 1 at 42; see also OAG/OCA

Consumer Testimony of Allen Fitch at 344-45 and Tr. 626; see also OAG/OCA Consumer Testimony of Dennis Todaro/Mutual Aid Ambulance Service at 324 and Tr. 324; see also OAG/OCA Consumer Testimony of Age Craft Manufacturing/Ben J. Policastro at 328 and Tr. 102; see also OAG/OCA Consumer Testimony of Tammy M. Giles at 511-512; see also OAG/OCA Consumer Testimony of Termaine Gorham at 336-337; see also OAG/OCA Consumer Testimony of Robert Keiffer at 21; see also OAG/OCA Consumer Testimony of Jeffrey VanHorn at 388-87; see also OAG/OCA Consumer Testimony of Martha J. Vetter at 443-444; see also OAG/OCA Consumer Testimony of Patricia Fickess at 60-61; see also OAG/OCA Consumer Testimony of Tracey L. Frable at 399, 401; and see also OAG/OCA Consumer Testimony of Ivan Zimmerman at 497.

91. Blue Pilot's sales agents emphasized that there was "no contract" involved in enrolling with Blue Pilot, which led customers to believe that they could immediately leave Blue Pilot if they were not happy or if their price increased. See OAG/OCA St. 1 at 33-41; see also Exh. BRA-4 (Confidential). See Sherri Kennedy Redirect Exh. 1 at 5 and Tr. 557-58, 577; and see also OAG/OCA Consumer Testimony of Charles Wentzel at 488.

92. Blue Pilot charged prices to Pennsylvania customers that did not comply with the promotional statements and sales scripts that induced customers to enroll. OAG/OCA St. 1 at 5; see also OAG/OCA Consumer Testimony of Alexandra Moratelli at 208; see also OAG/OCA Consumer Testimony of Linda Wintersteen at 41-42; see also OAG/OCA Consumer Testimony of Erie Animal Hospital/Breeana Burlingame at 155-56, Tr. 57; see also OAG/OCA Consumer Testimony of James A. Reed Jr. at 558-59 and Tr. 181 and James A. Reed Jr. Redirect Exh. 1; see also OAG/OCA Consumer Testimony of Robert W. Bishop at 100-101 and Robert W. Bishop Exhibit RWB-1 at 104; see also OAG/OCA Consumer Testimony of George Dingler at 403-404; see also OAG/OCA Consumer Testimony of Betty Ellis at 96-97; see also OAG/OCA Consumer Testimony of Jeffrey Hamilton at 106-107; see also OAG/OCA Consumer Testimony of Robert Kieffer at 21-22; see also OAG/OCA Consumer Testimony of Norma Kreider at 136-37; see also OAG/OCA Consumer Testimony of Tamrat Bekele at 84-85; see also OAG/OCA Consumer Testimony of Jeffrey VanHorn at 388-87; see also OAG/OCA Consumer Testimony of Martha J. Vetter at 443-444; see also OAG/OCA Consumer Testimony of Martha J. Vetter at 443-444; see also OAG/OCA Consumer Testimony of Village Service Center at 453-54; see also OAG/OCA Consumer Testimony of Dennis M. Estvanik at 507-08; see also OAG/OCA Consumer Testimony of Dean Faust at 294-295; see also OAG/OCA Consumer Testimony of Patricia Fickess at 60-61; see also OAG/OCA Consumer Testimony of Tracey L. Frable at 399, 401; see also OAG/OCA Consumer Testimony of Forte Boone Campground at 383-84; see also OAG/OCA Consumer Testimony of David J. Lynch/Cambria Hardware & Equip. at 216-17; see also OAG/OCA Consumer Testimony of Mother's Nature, Inc. at 332; see also OAG/OCA Consumer Testimony of Grace M. Witmer at 420-21; see also OAG/OCA Consumer Testimony of William Wranitz at 290-291; see also OAG/OCA Consumer Testimony of Ivan Zimmerman at 497; see also OAG/OCA Consumer Testimony of Herbert Lyle Evans at 37-38; and see also OAG/OCA Consumer Testimonies of Mehmet Isik at 352 and Ifran Isik at 358 and Yaglidereliler Corp. at 362.

**Count IV – Lack of Good Faith Handling of Complaints**

93. Numerous consumers testified they had trouble contacting Blue Pilot regarding their problem. See OAG/OCA Consumer Testimony of Robert W. Bishop at 102; see also OAG/OCA Consumer Testimony of Consumer Testimony of Jeffery Hamilton at 108; see also OAG/OCA Consumer Testimony of Karen Kraft, Exh. KK-1 at 52; see also OAG/OCA Consumer Testimony of Herbert Lyle Evans at 39; see also OAG/OCA Consumer Testimony of Michael Foster at 351-52; see also Alexandra Moratelli Tr. at 517, 519-20; see also OAG/OCA Consumer Testimony of Jacqueline M. Epler at 90 and Tr. 634; see also OAG/OCA Consumer Testimony of Linda Wintersteen at 43 and Exhibit LW-1; see also OAG/OCA Consumer Testimony of David A. Duke at 505 and Tr. at 376, 387-89; see also OAG/OCA Consumer Testimony of Rachel Nentwig at 467; see also OAG/OCA Consumer Testimony of Greg Payson at 553 and Tr. 423; see also Dan Ellingsen Tr. at 466-67; and see also OAG/OCA Consumer Testimony of Edmund and Joann LeTersky at 380 and Tr. 70-71.

94. When customers called Blue Pilot to dispute or complain about a price charged, Blue Pilot did not provide the customer with any information necessary for the customer to examine the basis for the monthly price charged. OAG/OCA St. 1 at 29-30, 51-52; see also OAG/OCA Consumer Testimony of George M. Dingler at 405; see also OAG/OCA Consumer Testimony of Dennis Frey 393-94; see also OAG/OCA Consumer Testimony of Jeffrey Hamilton at 108; see also OAG/OCA Consumer Testimony of Robert Kieffer at 21,23; see also OAG/OCA Consumer Testimony of Norma Kreider at 138; see also OAG/OCA Consumer Testimony of Martha J. Vetter at 445; see also OAG/OCA Consumer Testimony of Kim F. Miller at 239; see also OAG/OCA Consumer Testimony of Linda Wintersteen at 43 and Exhibit LW-1; see also OAG/OCA Consumer Testimony of Greg Payson at 553 and Tr. at 423-24; see also OAG/OCA Consumer Testimony of Edmund and Joann LeTersky at 380 and Tr. 70-71; see also OAG/OCA Consumer Testimony of Loni Durante at 82; see also OAG/OCA Consumer Testimony of Karen Mauro 397; and see also OAG/OCA Consumer Testimony of Walt Wensel at 227 and Tr. at 274.

95. In response to customer complaints that Blue Pilot received in early 2014, Blue Pilot routinely defended its conduct by relying on its ability to pass through high wholesale market prices and blamed the high prices on extreme weather. OAG/OCA St. 1 at 23, 42, 52; see also Exhibit RWB-1 of Robert W. Bishop at 100; see also OAG/OCA Consumer Testimony of Charles & Betty Ellis at 98; see also OAG/OCA Consumer Testimony of Termaine Gorham at 338; see also OAG/OCA Consumer Testimonies of Mehmet Isik at 356; see also OAG/OCA Consumer Testimony of Ifran Isik at 360; see also Alexandra Moratelli Tr. at 517; see also OAG/OCA Consumer Testimony of Sherri Kennedy at 3; see also OAG/OCA Consumer Testimony of Edward S. George at 267-68 and Tr. at 599; see also OAG/OCA Consumer Testimony of Tom & Amy Quinn at 300; see also OAG/OCA Consumer Testimony of Lynn Ober at 202 and Tr. 401-402; see also OAG/OCA Consumer Testimony of Greg Payson at 553 and Tr. 424; see also OAG/OCA Consumer Testimony of Daniel Zablonsky at 272 and Tr. at 481; see also OAG/OCA Consumer Testimony of Katherine Williams at 372 and Tr. at 113; and see also OAG/OCA Consumer Testimony of Walt Wensel at 227 and Tr. at 274.

96. In early 2014, Blue Pilot's customer service representatives routinely told customers who contacted the Company about their high variable prices that there was nothing that could be done. OAG/OCA St. 1 at 22; see also OAG/OCA Consumer Testimony of George M. Dingler at 405; see also OAG/OCA Consumer Testimony of Charles & Betty Ellis at 98; see also OAG/OCA Consumer Testimony of Dennis Frey 393-94; see also OAG/OCA Consumer Testimony of Jeffrey Hamilton at 108; see also OAG/OCA Consumer Testimony of Robert Kieffer at 21,23; see also OAG/OCA Consumer Testimony of William C. Evans at 188; see also OAG/OCA Consumer Testimony of Michael Foster at 351-52; see also OAG/OCA Consumer Testimony of William Wranitz at 292; see also OAG/OCA Consumer Testimony of Consumer Testimonies of Mehmet Isik at 356; see also OAG/OCA Consumer Testimony of Ifran Isik at 360; see also OAG/OCA Consumer Testimony of Russell Mowl at 470; see also OAG/OCA Consumer Testimony of David A. Duke at 505 and Tr. at 376, 387-89; see also OAG/OCA Consumer Testimony of Greg Payson at 553; see also OAG/OCA Consumer Testimony of Richard P. Perry, Jr. at 284-86 and Tr. 445; see also OAG/OCA Consumer Testimony of Katherine Williams at 372 and Tr. at 113; see also OAG/OCA Consumer Testimony of Loni Durante at 82; see also Rose Livingstone Tr. at 147; and see also OAG/OCA Consumer Testimony of Karen Mauro 397.

97. Blue Pilot routinely refused any relief or refund to customers who called for an explanation of or to complain about the high variable rates charged by Blue Pilot in early 2014. OAG/OCA St. 1 at 23; see also Exhibit RWB-1 of Robert W. Bishop at 100; see also OAG/OCA Consumer Testimony of George M. Dingler at 405; see also OAG/OCA Consumer Testimony of Charles & Betty Ellis at 98; see also OAG/OCA Consumer Testimony of Termaine Gorham at 338; see also OAG/OCA Consumer Testimony of Karen Kraft at 50; see also OAG/OCA Consumer Testimony of Norma Kreider at 138; see also OAG/OCA Consumer Testimony of William C. Evans at 188; see also OAG/OCA Consumer Testimony of Kim F. Miller at 239; see also OAG/OCA Consumer Testimony of Alexandra Moratelli at 210; see also OAG/OCA Consumer Testimony of Sherri Kennedy at 3; see also OAG/OCA Consumer Testimony of John J. Cassel at 573; see also OAG/OCA Consumer Testimonies of Russell Mowl at 470; see also OAG/OCA Consumer Testimony of Tom & Amy Quinn at 300 and Tr. at 306-307; see also OAG/OCA Consumer Testimony of William C. Smith at 569 and Tr. at 339; see also OAG/OCA Consumer Testimony of Gary Euler at 159, 169; see also OAG/OCA Consumer Testimony of David Brotzman at 166 and Tr. at 368; see also OAG/OCA Consumer Testimony of Rachel Nentwig at 467; see also OAG/OCA Consumer Testimony of Greg Payson at 553 and Tr. 425; see also OAG/OCA Consumer Testimony of Loni Durante at 82; and see also OAG/OCA Consumer Testimony of Karen Mauro 397.

### **Count V – Failure to Comply with the Telemarketer Registration Act**

98. Blue Pilot primarily enrolled Pennsylvania customers by means of telemarketing sales calls by its employees or sales agents, who were based in Las Vegas, Nevada. OAG/OCA St. 1 at 7, 48.

99. Blue Pilot did not routinely obtain or seek a customer's actual signature during or after the telemarketing sales call on any document to confirm enrollment. OAG/OCA St. 1 at 49.

100. Thirty-four consumer witnesses testified that they did not sign any written document to consummate the sale. See OAG/OCA Consumer Testimony of Robert D’Adamo at 325; see also OAG/OCA Consumer Testimony of George M. Dingler at 405; see also OAG/OCA Consumer Testimony of Dennis Frey at 393; see also OAG/OCA Consumer Testimony of Tammy M. Giles at 513; see also OAG/OCA Consumer Testimony of Jeffery Hamilton at 108; see also OAG/OCA Consumer Testimony of Karen Kraft at 50; see also OAG/OCA Consumer Testimony of Martha J. Vetter at 445; see also OAG/OCA Consumer Testimony of Dennis M. Estvanik at 509; see also OAG/OCA Consumer Testimony of William C. Evans at 188; see also OAG/OCA Consumer Testimony of Patricia Fickess at 62; see also OAG/OCA Consumer Testimony of Michael Foster at 351; see also OAG/OCA Consumer Testimony of Tracey L. Frable at 400; see also OAG/OCA Consumer Testimony of Fort Boone Campground/Russel F. Krout at 385; see also OAG/OCA Consumer Testimony of Michael Weidner at 368; see also OAG/OCA Consumer Testimony of Grace M. Witmer at 422; see also OAG/OCA Consumer Testimony of William Wrantz at 292; see also OAG/OCA Consumer Testimony of Ivan Zimmerman at 499; see also OAG/OCA Consumer Testimony of Herbert Lyle Evans at 39; see also OAG/OCA Consumer Testimony of Alexandra Moratelli at 210 and Tr. at 517; see also OAG/OCA Consumer Testimony of Sherri Kennedy at 3; see also OAG/OCA Consumer Testimony of Edward S. George at 267; see also OAG/OCA Consumer Testimony of Allen Fitch at 346; see also OAG/OCA Consumer Testimony of United Transmission & Service Center, Inc./Martha Torbey at 439; see also OAG/OCA Consumer Testimony of Lynn & Dale Ober at 202; see also OAG/OCA Consumer Testimony of Greg Payson at 553; see also OAG/OCA Consumer Testimony of Rose Livingstone at 142; see also OAG/OCA Consumer Testimony of Scott Hornberger at 254; see also OAG/OCA Consumer Testimony of Nancy Whisker at 524; see also OAG/OCA Consumer Testimony of Kenneth Brown at 528; see also OAG/OCA Consumer Testimony of James A. Reed, Jr. at 561; see also OAG/OCA Consumer Testimony of Tracy Wesley at 214 and Tr. at 198; see also OAG/OCA Consumer Testimony of Tami Chicarielli at 451; and see also OAG/OCA Consumer Testimony of Martha Campanella at 376; see also OAG/OCA Consumer Testimony of Dan Ellingsen at 244 and Tr. at 457.

101. Blue Pilot did not mail the required Disclosure Statement or terms of service document to all customers after enrollment. OAG/OCA St. 1 at 50.

102. Seventeen consumer witnesses testified that they did not receive a disclosure statement. See OAG/OCA Consumer Testimony of Tammy M. Giles at 512; see also OAG/OCA Consumer Testimony of Jeffery Hamilton at 107; see also OAG/OCA Consumer Testimony of Karen Kraft at 49; see also OAG/OCA Consumer Testimony of Martha J. Vetter at 444; see also OAG/OCA Consumer Testimony of Dennis M. Estvanik at 508; see also OAG/OCA Consumer Testimony of William C. Evans at 187; see also OAG/OCA Consumer Testimony of Patricia Fickess at 61; see also OAG/OCA Consumer Testimony of Tracey L. Frable at 401; see also OAG/OCA Consumer Testimony of Fort Boone Campground at 384; see also OAG/OCA Consumer Testimony of Michael Weidner at 367; see also OAG/OCA Consumer Testimony of William Wrantz at 291; see also OAG/OCA Consumer Testimony of Scott Hornberger at 255; see also OAG/OCA Consumer Testimony of Herbert Lyle Evans at 38; see also OAG/OCA Consumer Testimony of Lynn & Dale Ober at 203; see also OAG/OCA Consumer Testimony of Rose Livingstone at 141; see also OAG/OCA Consumer Testimony of

Martha Campanella at 375 and Tr. at 131; see also OAG/OCA Consumer Testimony of Dan Ellingsen at 243.

103. In some instances Blue Pilot did not mail the Disclosure Statement until long after their enrollment, including those who testified that they did not receive any Disclosure Statement until the revised version was issued in early 2014. OAG/OCA St. 1 at 50.

104. Moreover, nine consumer witnesses testified that they did not receive a Disclosure Statement until long after the telemarketing sales call and enrollment. See OAG/OCA Consumer Testimony of George M. Dinger at 404; see also OAG/OCA Consumer Testimony of Alexandra Moratelli at 209; see also OAG/OCA Consumer Testimony of Sherri Kennedy at 2 and Tr. at 572-73; see also OAG/OCA Consumer Testimony of United Transmission & Service Center, Inc./Martha Torbey at 438; see also OAG/OCA Consumer Testimony of Allen Fitch at 345; see also OAG/OCA Consumer Testimony of Scott Hornberger at 253; see also OAG/OCA Consumer Testimony of Jacqueline M. Epler at 89; see also OAG/OCA Consumer Testimony of Nancy Whisker at 523 and Tr. at 237; and see also OAG/OCA Consumer Testimony of Lori Durante at 81.

105. Consumer protection laws such as the TRA are intended to avoid situations in which the customer is enticed into agreeing to a contract based solely on oral representations over the phone. OAG/OCA St. 1 at 50.

## **PROPOSED CONCLUSIONS OF LAW**

### **Commission Jurisdiction and Burden of Proof**

1. The Commission has jurisdiction over this matter and over Blue Pilot. 66 Pa. C.S. §§ 501 and 2809.
2. EGSs are considered public utilities for the purposes described in Section 2809 of the Public Utility Code (relating to requirements for EGSs). See 66 Pa. C.S. § 102. See also Delmarva Power & Light Co. v. Pa. PUC, 870 A.2d 901, 909-10 (Pa. 2005).
3. The Commission has the “full power and authority” to carry out the intentions of and enforce the Public Utility Code. See 66 Pa. C.S. § 501(a).
4. A complainant has the burden to prove his or her allegations by a “preponderance of the evidence.” 66 Pa. C.S. §332(a). See also North American Coal Corp. v. Commonwealth of Pa., 2 Pa. Commw. 469, 279 A.2d 356 (1971).
5. Proving an allegation by a “preponderance of the evidence” means that one party has presented evidence, which is more convincing, by even the smallest amount, than the evidence presented by the other party. Se-Ling Hosiery v. Margulies, 364 Pa. 45, 70 A.2d 854 (1950) (Se-Ling).
6. The Commission has held that a complainant, to establish a sufficient case against a utility and satisfy the burden of proof, must show that the utility should be held responsible or accountable for the problem described in the complaint. Kiback v. IDT Energy, Inc., Docket No. C-2014-2409676, Opinion and Order at 6 (Aug. 20, 2015), citing Patterson v. The Bell Telephone Co. of PA, 72 Pa. P.U.C. 196 (1990).

### **Blue Pilot’s Business Operations & Establishment of Pattern and Practice**

7. The Commission’s regulations state that a licensed EGS is responsible for any fraudulent, deceptive or other unlawful marketing acts by its employees, agents and representatives. See 52 Pa. Code § 54.43(f).
8. The Commission’s regulations require EGSs to train its agents on, *inter alia*: responsible and ethical sales practices; the supplier’s product offering; the proper completion of transaction documents; and the EGS’s disclosure statement. See 52 Pa. Code § 111.5(a).
9. The Commission’s regulations require EGSs to monitor marketing activities to ensure that their agents are providing accurate and complete information and complying with applicable rules and regulations. See 52 Pa. Code § 111.5(e).
10. Blue Pilot has failed to properly supervise and train its marketing agents in violation of 52 Pa. Code § 111.5(a) to (f).

11. Blue Pilot has not had sufficient managerial and technical abilities to conduct energy sales in Pennsylvania in violation of 52 Pa. Code § 111.5(a) to (f).

### **Count I – Failing to Provide Accurate Pricing Information**

10. The Commission’s regulations require that variable pricing terms include the conditions of variability and the limits on price variability. See 52 Pa. Code § 54.5(c).

12. The Commission’s regulations require that EGSs “provide accurate information about their electric generation services using plain language and common terms in communications with consumers.” See 52 Pa. Code § 54.43(1).

13. EGSs must provide information to consumers “in a format that enables customers to compare the various electric generation services offered and the prices charged for each type of service.” See 52 Pa. Code § 54.43(1).

14. The Commission’s regulations require compliance with the Consumer Protection Law. See 52 Pa. Code § 54.43(f) and 111.12(d)(1).

15. Blue Pilot’s variable pricing terms fail to adequately state the conditions of variability and the limits on price variability in violation of 52 Pa. Code § 54.5(c).

16. Blue Pilot failed to provide information to customers in a format using plain language and common terms and, instead, provided consumers with misleading and deceptive pricing information in violation of 52 Pa. Code § 54.43(1), 54.43(f) and 111.12(d)(1).

### **Count II – Prices Nonconforming to Disclosure Statement**

17. EGSs’ prices billed must reflect the marketed prices and the agreed upon prices in the disclosure statement just as the agreed upon prices in the disclosure statement must reflect the marketed prices and the billed prices. 52 Pa. Code §§ 54.4(a) and 54.5(a).

18. Blue Pilot charged its customer prices that did not conform to its Disclosure Statement in violation of 52 Pa. Code §§ 54.4(a) and 54.5(a).

### **Count III – Misleading and Deceptive Promises of Savings**

19. The Commission’s regulations state that a licensed EGS is responsible for any fraudulent, deceptive or other unlawful marketing acts by its employees, agents and representatives. See 52 Pa. Code § 54.43(f).

20. The Commission’s regulations require compliance with the Consumer Protection Law. See 52 Pa. Code §§ 54.43(f) and 111.12(d)(1).

21. Blue Pilot's advertisements and marketing materials used in 2013 and early 2014 are deceptive and misleading in violation of 52 Pa. Code §§ 54.43(f) and 111.12(d)(1), because they falsely suggest that selecting Blue Pilot would result in savings and lower bills.

22. Blue Pilot has engaged in a pattern and practice of deceptive and misleading statements in its written materials and in interactions with Pennsylvania consumers in its sales and verification calls in violation of 52 Pa. Code §§ 54.43(f) and 111.12(d)(1).

23. Blue Pilot routinely failed to bill its customers in accordance with its written marketing materials and oral representations in violation of 52 Pa. Code §§ 54.4(a) and 54.5(a).

#### **Count IV – Lack of Good Faith Handling of Complaints**

24. The Commission's regulations require EGSs to utilize good faith, honesty and fair dealing with residential customers. See 52 Pa. Code § 56.1(a). See also Licensing Order at 3.

25. The Commission's regulations set forth the procedure for EGSs to use when they receive notice of a dispute, including a billing dispute, from a residential customer. Upon notice of such dispute, EGSs are required to investigate the matter, provide the customer with information necessary to make an informed judgment and issue a report to the customer within 30 days. See 52 Pa. Code §§ 56.141(a), 56.151 and 56.152.

26. Blue Pilot has violated the Commission's regulations in its interactions with Pennsylvania consumers in its responses to the many customers who attempted to contact Blue Pilot about the extremely high prices charged by Blue Pilot starting in January 2014. See 52 Pa. Code § 56.1(a) and the Company's Licensing Order at 3.

27. Blue Pilot's actions in response to its high variable prices in early 2014 were unreasonable, particularly the Company's poor customer service and its inconsistent policies related to credits and refunds in violation of 52 Pa. Code § 56.1(a), 56.141(a), 56.151 and 56.152 and the Company's Licensing Order at 3.

#### **Count V – Failure to Comply with the Telemarketer Registration Act**

28. The Commission's regulations require EGSs to comply with the Telemarketer Registration Act, 73 P.S. § 2241, *et seq.* See 52 Pa. Code § 111.10(a)(1).

29. When Blue Pilot enrolled customers via telemarketing, Blue Pilot routinely failed to obtain customers' signatures agreeing to enrollment in violation of 52 Pa. Code § 111.10(a)(1).

30. When Blue Pilot enrolled customers via telemarketing, Blue Pilot failed to provide said customers with a contract detailing the terms of the agreement which matched the oral description in violation of 52 Pa. Code § 111.10(a)(1).

**PROPOSED ORDERING PARAGRAPHS**

THEREFORE, IT IS ORDERED:

1. That all Counts of the Joint Complaint of the Office of Attorney General and the Office of Consumer Advocate at Docket No. C-2014-2427655, against Blue Pilot Energy, LLC are sustained.

2. That the Electric Generation Service License of Blue Pilot Energy, LLC, in light of the violations of the Public Utility Code and the Commission's regulations and orders, as discussed above, is hereby permanently revoked;

3. That the owners and managers of Blue Pilot Energy, LLC, Samuel Delug, Raymond Perea, and Joseph Kopy, are prohibited from any type of participation in the competitive market in Pennsylvania.

4. That civil penalties for Blue Pilot's violations of the Public Utility Code and the Commission's regulations and Orders, as discussed above, are assessed and imposed as calculated herein;

5. That Blue Pilot Energy, LLC shall pay the civil penalty set forth herein by certified check or money order as provided in section 3301(a) of the Public Utility Code, 66 Pa. C.S. § 3301(a), within twenty days after the final Commission Order in this proceeding to:

Pennsylvania Public Utility Commission  
P.O.Box 3265  
Harrisburg PA 17105-3265

6. That Blue Pilot Energy, LLC shall provide appropriate restitution, including without limitation to, refunds of all charges to its consumers that were over and above the Price To Compare in the customers' respective service territories for amounts charged from December 2013 through March 2014, as well as any late, cancellation and termination fees and other such

penalties charged to customers as a result of ending service with Blue Pilot to obtain generation service from another supplier, as calculated herein;

7. That Blue Pilot Energy, LLC shall pay a contribution to the Electric Distribution Companies' Hardship Funds as set forth herein.

BY THE COMMISSION

(SEAL)

ORDER ADOPTED:

ORDER ENTERED:

Date: \_\_\_\_\_

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,  
Joint Complainants' Main Brief, in the manner and upon the persons listed below:

Dated this 2nd day of March 2016.

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\*Receiving Proprietary Information