

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Commonwealth of Pennsylvania, <i>et al.</i>	:	
	:	
v.	:	C-2014-2427655
	:	
Blue Pilot Energy, LLC	:	

INITIAL DECISION – NON-PROPRIETARY VERSION

Before
Elizabeth H. Barnes
Administrative Law Judge

Joel H. Cheskis
Administrative Law Judge

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I. INTRODUCTION

This Decision finds that the Attorney General, through the Bureau of Consumer Protection (OAG) and the Acting Consumer Advocate (OCA) (collectively referred to as “the Joint Complainants”) have satisfied their burden of proving that Blue Pilot Energy, LLC (“Blue Pilot” or “the Company”), an electric generation supplier (EGS)¹: 1) failed to provide accurate pricing information; 2) failed to bill prices in conformity with its disclosure statement and marketed prices regarding its variable rate plan; 3) misled consumers with deceptive promises of savings; 4) lacked good faith in the handling of complaints; and 5) failed to comply with Commission regulations requiring compliance with the Telemarketer Registration Act (TRA). The EGS violated numerous provisions of the Public Utility Code, Chapters 54, 56, and 111 of Title 52, Pa.Code, as well as Pennsylvania consumer protection laws.

Accordingly, the Complaint shall be sustained in part and denied in part as follows. The Company shall be directed to pay civil penalties in the amount of \$2,554,000 and a refund pool amount of \$2,408,449. Blue Pilot’s variable rate customers in existence during the time period of December, 2013 – March 2014 are eligible for refunds in the amount of the difference in prices for electric generation supply between what Blue Pilot charged them versus what their respective electric distribution companies (EDCs) would have charged them during the same months given the EDCs’ respective price to compare (PTC) rates during that time period.

Joint Complainants’ request for restitution in the form of cancellation, termination fees and other financial late fees/penalties charged to customers as a result of overbilling by Blue Pilot or switching from Blue Pilot is denied. Joint Complainants’ request for restitution in the form of directed contributions to EDCs’ hardship funds is denied. Joint Complainant’s request that officers and owners of the Company be enjoined from participating in the competitive telecommunications market is denied.

¹ An EGS is a person or corporation, generator, broker, marketer, aggregator or any other entity licensed by the Commission that sells electricity to retail customers, using the transmission or distribution facilities of an electric distribution company (EDC). Consumer Dictionary for Electric Competition a/k/a Electric Competition Dictionary. <http://www.papowerswitch.com/glossary>.

The Company's license shall be permanently revoked. No future license application for any electric supply service filed by the owners, officers, directors or managers of Blue Pilot shall be considered by this Commission. Commission staff may take action upon any viable security instrument such that appropriate claims may be made against it. To the extent there are any customers remaining with Blue Pilot, who have not elected an alternative electric generation supplier within 90 days after receiving notice of cancellation of service from Blue Pilot, said customers shall be switched back to their default service providers (DSPs) with no cancellation fees.

II. HISTORY OF THE PROCEEDING

On February 1, 2011, Blue Pilot filed an Application to render, furnish or supply electricity or electric generation. Blue Pilot applied to be licensed as a Retail Electric Aggregator and Broker/Marketer engaged in the business of supplying electricity in all territories within Pennsylvania serving residential, small commercial (25 kw and under demand), large commercial (over 25 kw demand) and industrial customers. On June 10, 2011, the Commission entered an Order directing the company to inform its independent consultants, which arrange for the sale of Blue Pilot's energy to end-users, that they are required to obtain an EGS license before marketing the products of more than one EGS. The order reiterated certain Orders and regulations the Commission expected the Company to comply with as a condition of granting the license to Blue Pilot. These laws included all applicable federal, state laws, regulations, procedures and orders including emergency orders, which may be issued verbally or in writing during any emergency situations that may unexpectedly develop from time to time in the course of doing business in Pennsylvania. In re: License Application of Blue Pilot, LLC for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as an Aggregator and Broker/Marketer of Retail Electric Power. A-2011-2223888, (Order entered June 10, 2011) (Licensing Order).

On June 20, 2014, the Joint Complainants filed with the Commission a formal complaint against Blue Pilot at Docket Number C-2014-2427655. The Joint Complainants averred that they had received numerous contacts and complaints from consumers related to variable rates charged by Blue Pilot, including approximately eleven formal complaints filed by

consumers at the Commission. The Joint Complainants further averred that Blue Pilot used a variety of marketing and advertising mediums to solicit residential customers for its variable rate plan. As a result, Joint Complainants averred five separate counts against Blue Pilot, including: 1) failing to provide accurate pricing information; 2) pricing that did not conform to disclosure statement; 3) making misleading and deceptive promises of savings; 4) lacking good faith in the handling of complaints; and 5) failing to comply with the TRA.

The Joint Complainants made several requests for relief, including but not limited to: 1) suspension or revocation of Blue Pilot's EGS license; 2) civil penalties; 3) an injunction preventing violations of Consumer Protection Law; 4) restitution to the consumers²; and 5) any such relief that the Commission deems appropriate. The Joint Complainants attached as Appendix A to the Joint Complaint, a document entitled, "Blue Pilot Energy, LLC Disclosure Statement and Agreement for Electric Service."

The Joint Complaint was served upon Respondent on June 20, 2014. On July 10, 2014, Blue Pilot filed an Answer in response to the Complaint. In its Answer, Blue Pilot admitted or denied the various averments made by the Joint Complainants. In particular, Blue Pilot specifically denied that the disclosure statement attached to the Complaint accurately sets forth the contents of Blue Pilot's disclosure statement. Blue Pilot averred the disclosure statement was an updated version of a previously Commission-reviewed and approved May 2011 disclosure statement. Blue Pilot denied violating any Commission regulations or orders and averred consumers could determine from the disclosure statement the price to be charged and how it was calculated. Blue Pilot averred that consumers knowingly entered into agreements to purchase electric generation service through variable rate plans under which prices would vary month to month on the basis of wholesale market conditions. The Company denied its variable rates reached as high as \$0.50 per kWh for electricity.

² The restitution was described as refunds for 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, as well as any late, cancellation and/or termination fees and/or other such penalties charged to consumers as a result of the Respondent's charges and consumers leaving Respondent to obtain generation service elsewhere.

Also on July 10, 2014, Blue Pilot filed Preliminary Objections in response to the Complaint. In its Preliminary Objections, which was also accompanied by a Notice to Plead, Blue Pilot averred that three of the five counts in the Complaint should be dismissed for lack of Commission jurisdiction, insufficient specificity of a pleading and/or legal insufficiency of a pleading.

Also on July 10, 2014, the Office of Small Business Advocate (OSBA) filed a Notice of Intervention and Public Statement formally intervening into this proceeding.

On July 21, 2014, the Joint Complainants filed an Answer to Blue Pilot's Preliminary Objections. Specifically, the Joint Complainants averred that the Commission has jurisdiction to hear cases brought pursuant to the Unfair Trade Practices and Consumer Protection Law (UTCPL or CPL) and the Telemarketer Registration Act (TRA).

On July 22, 2014, a Motion for Admission of Mark R. Robeck and Daniel S. Blynn Pro Hac Vice was filed by Blue Pilot.

On July 30, 2014 the Commission issued a Prehearing Conference Notice establishing an Initial Prehearing Conference for this matter for Monday, August 25, 2014 at 10:30 a.m. in Hearing Room 1 of the Commonwealth Keystone Building in Harrisburg and assigning us as Presiding Officers.

On July 31, 2014, the Commission's Bureau of Investigation and Enforcement (I&E) filed a Notice of Intervention formally intervening in this proceeding.

On August 8, 2014, a Prehearing Conference Order was issued setting forth various procedural rules that would govern the Initial Prehearing Conference set for August 25, 2014.

On August 20, 2014, an Order Granting in Part and Denying in Part Preliminary Objections was issued. In the Order, Count II (prices nonconforming to disclosure statement) was stricken. Additionally, two other Counts in the Complaint, Counts I (failure to provide accurate

pricing information) and V (failing to comply with the TRA) were stricken in part. All other Counts raised in the Complaint were allowed to proceed to a hearing.

On August 25, 2014, an Initial Prehearing Conference was held as scheduled for the proceeding involving the Complaint filed by the Joint Complainants. Various procedural issues were discussed during the Initial Prehearing Conference. Those issues were memorialized by two Procedural Orders dated August 25, 2014 and September 3, 2014, respectively.

In the August 25, 2014 Procedural Order, Mark Robeck and Daniel Blynn were granted leave to participate pro hac vice. Procedural Order #2 established a process for the submission of written direct testimony from consumer witnesses subject to cross-examination and timely motions on October 17, 2014. Procedural Order #2 adopted the parties' proposed litigation schedule and scheduled an evidentiary hearing for November 13-14, 2014, for purposes of admitting consumer witnesses' testimonies subject to cross examination. A further prehearing conference was scheduled for November 25, 2014.

Also on September 3, 2014, Blue Pilot filed a Motion for a Protective Order to govern the proceeding involving the Complaint filed by the Joint Complainants. That Motion was not opposed and was granted via Order dated September 3, 2014.

On September 8, 2014, the Joint Complainants filed a Petition for Interlocutory Review and Answer to Material Questions in response to the Order dated August 20, 2014 Granting in Part and Denying in Part Preliminary Objections filed by Blue Pilot. The Joint Complainants specifically sought review of the decision regarding the Commission's jurisdiction to hear claims brought under the CPL and TRA, as well as whether the Commission has jurisdiction to determine whether the prices charged by an EGS conform to the EGS's disclosure statement. On September 18, 2014, the Joint Complainants filed a Brief in support of their Petition.³ Also, on September 18, 2014, Blue Pilot filed a Brief in Opposition to the Joint Petition for Interlocutory Review.

³ The Commission issued a Secretarial Letter waiving the 30-day period for review pursuant to 52 Pa.Code § 5.303 and extended its deadline for consideration beyond thirty days.

On October 10, 2014, a Motion for Admission of Catherine M. Wilmarth Pro Hac Vice was filed by Blue Pilot. On October 14, 2014, the Joint Complainants provided Blue Pilot and the ALJs the names of the consumers whose written testimony the Joint Complainants intended to present at hearing. On October 17, 2014, pursuant to Procedural Order #2, the Joint Complainants pre-served the written direct testimony of 97 consumer witnesses and their exhibits in two volumes.

On October 22, 2014, Blue Pilot requested a continuance of the November 13-14 hearing dates claiming it needed more time to prepare for cross-examination. The unopposed motion for continuance was granted by Order Granting Motion For Continuance dated October 28, 2014.

On December 11, 2014, the Commission issued an Opinion and Order disposing of the Petition for Interlocutory Review and Answer to Material Questions filed by the Joint Complainants on September 8, 2014. In its Order, the Commission determined that the Commission does not have the authority to enforce the CPL and TRA but does have authority to enforce its own consumer protection and telemarketing regulations, which reference the CPL and TRA. Additionally, the Commission determined that it has the authority to determine whether an EGS charges customers prices that conform to the EGS's disclosure statement. Count II was reinstated into the Complaint and those claims remained part of the action going forward.

Thus, the Commission determined it can hear claims alleging fraudulent, deceptive, and/or misleading conduct as well as improper verification and enrollment of customers brought against Blue Pilot under the Commission's regulations. The Commission answered the Joint Petition in the negative as to whether the Commission has the authority and jurisdiction to find violations of the CPL and TRA and order legal remedies under the CPL or TRA. The Commission did acknowledge its authority to consider whether its regulations, which reference compliance with the CPL and TRA, have been violated.⁴ The Commission further determined it can hear claims alleging improper verification of enrollment of residential customers under telemarketing

⁴ Although OAG/OCA filed a Petition for Review of the Commission's December 11, 2014, Order, the Commonwealth court quashed the petition for review as the Commission's order was interlocutory and not immediately appealable pursuant to Pa. R.A.P. 311(f). *Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, through the Bureau of Consumer Protection v. Pennsylvania Pub. Util. Comm'n* No. 18 C.D. 2015, Order entered January 21, 2015.

regulations. Further, the Commission determined 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.

By Cancellation/Reschedule Notice dated December 24, 2014, the hearing was rescheduled to February 2-6, 2015 and the further prehearing conference was rescheduled to February 20, 2015. On December 29, 2014, Blue Pilot submitted a letter indicating it intended to cross-examine all of the consumer witnesses.

On December 31, 2014, Blue Pilot filed a second motion for continuance. On January 7, 2015, an Order Granting Second Motion For Continuance was entered and the hearing was rescheduled to begin on March 30, 2015.

On January 9, 2015, a Further Prehearing Conference Order was issued. On January 30, 2015, a Motion for Admission of Geoffrey W. Castello Pro Hac Vice was filed by Blue Pilot. On February 4, 2015, a second Prehearing Conference was held and Procedural Order #4 was issued granting the Motion for Admission of Geoffrey Castello, Esquire Pro Hac Vice on behalf of Blue Pilot and establishing a litigation schedule with expert and other witnesses hearings scheduled for September 16-18, 2015.

On March 18, 2015, Blue Pilot moved to strike direct testimony of various consumers. On March 26, 2015, Joint Complainants filed a Joint Answer to Blue Pilot's Motion to Strike Consumer Direct Testimony. On March 27, 2015, an Order Denying Motion to Strike was issued. On March 30, 31, and April 1, 2015 the evidentiary hearings were held for the purpose of admitting into the record the pre-served written direct testimony of consumer witnesses, subject to cross examination. At the hearings, the direct testimonies and accompanying exhibits of

approximately 83⁵ consumer witnesses were admitted into the record. Forty-seven (47) consumer witnesses appeared and testified at the hearings. Thirty-six (36) witnesses did not appear in person because their pre-served written testimony was admitted into the record via stipulation of the parties and with cross-examination waived. Re-direct and cross-examination exhibits were also admitted into the record.

On or about May 4, 2015, Blue Pilot notified the Commission pursuant to 52 Pa.Code § 54.41(b) of its intention to abandon service to its customers in Pennsylvania. The letter requested waiver of the 90-day notice requirement and requested a shortening of the period to 45 days notice to approximately EDCs and the 218 customers affected by the EGS's actions. This letter was docketed at A-2011-2223888.⁶ A copy of this letter was attached to a Motion to Dismiss Joint Complaint filed in the instant case on May 14, 2015.

On May 29, 2015, Joint Complainants filed a letter request to suspend the litigation procedural schedule pending a decision on the Motion to Dismiss and "any forthcoming motion(s) or actions from Joint Complainants in light of the fact that Blue Pilot had notified the Commission of its intent to abandon service." On June 1, 2015, Procedural Order #6 was issued keeping the scheduled hearing dates of September 16-18, 2015, but suspending the deadlines for testimony until a ruling on the Motion to Dismiss.

On June 5, 2015, a Joint Answer to the Motion to Dismiss was filed by Joint Complainants. On June 11, 2015, an Order Denying Motion to Dismiss was issued directing the

⁵ Blue Pilot argues that there were approximately 80 witnesses given that Irfan Isik, Mehmet Isik and Yaglidereliler Corporation (OAG/OCA Consumer Testimony at 358, 354 and 362) pertain to related accounts and Russell Mowl enrolled three (3) accounts with Blue Pilot (OAG/OCA Consumer Testimony at 469, 543 and 547). Blue Pilot M.B. at 16. It is noted that a few of the statements may involve either the same customer with multiple accounts or more than one person testifying regarding the same account, as they were entered as separately marked statements and exhibits, for the sake of clarity in referencing testimony, we agree with Joint Complainants' representation that approximately 83 direct testimonies from consumer witnesses were entered into the record.

⁶ On May 18, 2015, Joint Complainants filed a Joint Answer to Blue Pilot's Letter Notice to Abandon at A-2011-2223888. Joint Complainants requested the Commission immediately act to secure the proceeds of the Blue Pilot bond or letter of credit on file with the Commission because of pending formal complaints at the Commission including but not limited to the instant Joint Complaint. On May 19, 2015, I&E filed a notice of intervention regarding Blue Pilot's Letter of Abandonment at A-2011-2223888. I&E sought to ensure all of Blue Pilot's obligations to Pennsylvania consumers were met prior to cancellation of their EGS license, especially as they pertain to the instant proceeding.

parties to provide a new procedural schedule for the remainder of the proceeding concluding with the September 16-18, 2015 hearing dates.

On June 22, 2015, Joint Complainants filed a Joint Motion for Entry of Judgment against Blue Pilot. On July 20, 2015, Blue Pilot filed an Opposition to Joint Complainants' Motion for Entry of Judgment. On August 4, 2015, an Order Granting in Part and Denying in Part Motion for Entry of Judgment was entered. The ALJs found genuine issues of material fact warranting a hearing pursuant to 66 Pa. C.S. §703. Blue Pilot was given 10 days to provide responses to outstanding discovery requests. The parties were directed to provide the ALJs with a revised procedural schedule.

On August 14, 2015, Procedural Order #7 was issued cancelling evidentiary hearings scheduled for September 16-18, 2015, and rescheduling them to February 3-5, 2016. On August 28, 2015, a Notice of Hearing Cancellation/Reschedule was issued scheduling the hearings for February 3-5, 2016.

On October 20, 2015, Joint Complainants served expert and non-consumer direct testimony of Barbara Alexander (OAG/OCA St. 1), Steven Estomin (OAG/OCA St. 2), Ashley Everette (OAG/OCA St. 3), and Gregory Strupp (OAG/OCA St. 4).

On December 8, 2015, Blue Pilot served the Rebuttal Testimony of Raymond Perea (Blue Pilot Energy, LLC St. 1). By letter dated December 16, 2015, Joint Complainants served notice that Nicholas F. Basehore would be a witness who would be adopting the testimony of Gregory M. Strupp at the hearing.

On December 17, 2015, the Commission entered a Tentative Order, In re: Electric Generation Supplier License Cancellations of Companies with an Expired Financial Security at Docket No. M-2015-249083, which stated in pertinent part that as of December 8, 2015, Blue Pilot had not provided proof to the Commission that it had a bond or other approved security in the amount directed by the Commission to replace its expired bond. The Commission tentatively concluded that Blue Pilot was not in compliance with 52 Pa.Code § 54.40(a) and (d); therefore, it was appropriate to initiate the cancellation process for its EGS license. The Commission tentatively

approved cancellation of Blue Pilot's license as being in the public interest. This Tentative Order was published in the Pennsylvania Bulletin, 46 Pa. B. 112 on Saturday, January 2, 2016. A thirty-day comment period expired on February 2, 2016.

On January 6, 2016, Geoffrey Castello, Esquire, admitted pro hac vice, withdrew his appearance for Blue Pilot. On January 20, 2016, Joint Complainants served Surrebuttal Testimony of Barbara Alexander, (OAG/OCA Statement No. 1-SR). On February 1, 2016, Joint Complainants served the Supplemental Surrebuttal Testimony of Barbara Alexander, (OAG/OCA Statement No. 1-SR (Supl.)).

On February 3, 2016, an evidentiary hearing was held. At the hearing, Blue Pilot indicated it would not be moving for admission the Rebuttal Testimony of Mr. Perea. Therefore, OAG/OCA withdrew its motion to admit the Surrebuttal Testimony of Barbara Alexander, although it had been marked for evidence at the hearing. N.T. 720-721. Over the objection of Blue Pilot, Ms. Alexander's Supplemental Surrebuttal Testimony, OAG/OCA St. 1-SR Supplemental was moved and accepted into evidence. N.T. 720-728. Although Blue Pilot cross examined Joint Complainants' witnesses, it did not present any witnesses, and only presented 5 cross-examination exhibits.

On February 4, 2016, a Briefing Order was issued. A transcript of the hearing was filed on February 10, 2016, consisting of 69 pages. On March 2, 2016, Main Briefs were filed by Blue Pilot and Joint Complainants. On March 14, 2016, the EGS's license was suspended by the Commission. In re: Electric Generation Supplier License Cancellations of Companies with an Expired Financial Security M-2015-2490383, (Final Order entered March 14, 2016). On March 23, 2016, Reply Briefs were filed by Blue Pilot and Joint Complainants. I&E and OSBA did not submit any briefs. By Interim Order, the record in this case closed on March 24, 2016. On May 3, 2016, Blue Pilot filed a letter stating it agrees to waive confidential treatment of certain material contained in the written testimonies and briefs previously submitted by Joint Complainants. On May 9, 2016, Joint Complainants filed revised Main and Reply Briefs, which have certain confidential designations removed. On May 13, 2016, Joint Complainants filed updated Direct Testimonies of Barbara R. Alexander, Steven I. Estomin and Ashley E. Everette (OAG/OCA St. 1, St. 2 and St. 3 with accompanying exhibits). This matter is ripe for a decision.

III. FINDINGS OF FACT

1. Joint Complainant Kathleen G. Kane, Attorney General, is the chief law officer of the Commonwealth of Pennsylvania and is authorized to initiate and maintain this action pursuant to Article IV § 4.1 of the Pennsylvania Constitution and the Commonwealth Attorneys Act, 71 P.S. § 732-204.

2. Joint Complainant Tanya J. McCloskey, is the Acting Consumer Advocate who is authorized by law to represent the interests of utility consumers before the Commission pursuant to 71 P.S. § 309-1, *et seq.*

3. Intervenor Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement (I&E) is authorized under 66 Pa.C.S. §§ 308 and 701 as well as 52 Pa.Code §§ 1.8 and 5.72 to intervene in the instant complaint against Respondent.

4. Intervenor Office of Small Business Advocate (OSBA) represents the interests of small business consumers of utility services in Pennsylvania under the provisions of the Small Business Advocate Act, Act 181 of 1988, 73 P.S. §399.41-399.50.

5. Respondent is Blue Pilot Energy, LLC, a foreign limited liability company established in the State of Nevada on December 9, 2010, and registered in Pennsylvania as of December 14, 2010. At all relevant times, Blue Pilot has maintained a principal place of business at 250 Pilot Road, Suite 300, Las Vegas, Nevada 89119. OAG/OCA Cross. Exh. 1 (License Application) at Exhibits 2 and 3.

6. Blue Pilot Energy, LLC is licensed to operate in Nevada, Pennsylvania, and Maryland. OAG/OCA Cross. Exh. 1 (License Application).

7. On June 10, 2011, Blue Pilot was licensed by the Commission at Docket No. A-2011-2223888 to be an electric generation supplier (EGS) that supplies electric generation service to residential, small commercial (25 kw and under demand), large commercial (over 25 kw

demand), and industrial consumers in the service territories of all electric distribution companies (EDCs) operating in Pennsylvania. Licensing Order.

8. Beginning in 2012, and at all relevant times, Blue Pilot advertised, marketed, offered for sale, and sold electric generation service to retail customers in Pennsylvania under only variable rate plans, typically with a 60-90 day introductory fixed rate followed by a variable rate that could vary from month to month. OAG/OCA St. 2 at 5. OAG/OCA St. 1 at 7-9.

9. After a customer enrolled, Blue Pilot acted as a Load Serving Entity (LSE) for that customer and became responsible for the supply of electric power to be delivered through the local utilities (a/k/a electric distribution companies (EDCs) or default service providers (DSP)). OAG/OCA St. 2 at 6.

10. Blue Pilot billed and collected for its electric generation supply charges pursuant to a Purchase of Receivables (POR) program. OAG/OCA St. 1 at 8-9.

11. During the first several months of 2014, high levels of electric power demand resulted from periods of below-normal temperatures in the Eastern United States, which caused higher-than-normal spot electricity prices in a large portion of PJM Interconnection, LLC, (PJM)⁷ including Pennsylvania. OAG/OCA St. 2 at 4-5.

12. From February 27, 2014 until June 4, 2014, the OAG received and reviewed 229 consumer complaints against Blue Pilot. OAG/OCA St. No. 4 at 1.

13. The 229 consumers mainly resided in the following counties: Allegheny, Lackawanna, Luzerne, Washington, Westmoreland and York. OAG/OCA St. No. 4 at 2. Direct Testimony of Gregory M. Strupp as adopted by Nicholas F. Basehore on February 3, 2016, N.T. 769-772.

⁷ PJM was founded in 1927 as a power pool of three utilities serving customers in Pennsylvania and New Jersey. In 1956, with the addition of two Maryland utilities, it became the Pennsylvania-New Jersey-Maryland Interconnection, or PJM. PJM became a fully functioning Independent System Operator (ISO) in 1996 and, in 1997, it introduced markets with bid-based pricing and locational market pricing (LMP). PJM was designated a Regional Transmission Organization (RTO) in 2001.

14. Blue Pilot halted its retail sales marketing activity in Pennsylvania starting in March, 2014. OAG/OCA St. 1 at 7.

15. On May 4, 2015, Blue Pilot filed a notice to cancel its EGS license at Docket No. A-2011-2223888. OAG/OCA St. 1-SR at 2.

16. Blue Pilot does not currently have a bond or other approved security at the Commission. OAG/OCA St. 1-SR at 2.

17. Ashley E. Everette, Regulatory Analyst, holds a Masters in Business Administration and a Bachelor's degree in Economics from the University of Illinois and has extensive background in analyzing utility companies' financial filings. OAG/OCA Statement No. 3, Appendix A.

18. Steven L. Estomin is a Senior Economist and principal with Exeter Associates, Inc. holding a B.A., M.A. and Ph.D. degrees in economics from the University of Maryland, with extensive experience analyzing electric utility integrated planning, load forecasting, power supply procurement issues. OAG/OCA Statement No. 2 at 1-2, Appendix.

19. Barbara R. Alexander, Consumer Affairs Consultant, is a consultant from Maine with extensive experience as Director of Consumer Assistance Division of Maine PUC. She is a non-practicing "inactive" lawyer with a B.A. from University of Michigan and a J.D. from Maine Law School. OAG/OCA St. 1 at 1-2, Exhibit BRA-1.

20. Nicholas F. Basehore is a Consumer Protection Agent for OAG, Bureau of Consumer Protection who reviewed the written testimony of Gregory M. Strupp and adopted it as his own, testifying as to its veracity and accuracy at the February 3, 2016 hearing. N.T. 769-774. Exhibit OAG/OCA St. 4.

21. Samuel P. Delug and Rosette Delug are the joint owners of Blue Pilot Energy, LLC and its affiliates: NOS Communications, Inc.; Affinity Network Inc.; and NOSVA

Limited Partnership, which hold certificates of public convenience to operate as competitive telecommunications carriers in Pennsylvania. Licensing Order, OAG/OCA Cross Exh. 1 (License Application) at Exhibit 4. In Re: Joint Application of NOS Communications, Inc., Affinity Network, Inc. and NOSVA A Limited Partnership for Approval of a Direct Transfer of Control, Docket Nos. A-310043F0003, A-310024F0003, and A-310197F0004, (Commission Order entered August 24, 2006).

22. Samuel P. Delug owns 75% membership shares and Rosette Delug owns 25% membership shares of Blue Pilot Energy, LLC. Licensing Order June 10, 2011, OAG/OCA Cross Exh. 1 (License Application) at Exhibit 4.

23. Joseph Kopyy, Chief Executive Officer and Chief Financial Officer (CEO/CFO) of Blue Pilot since October, 2010, signed Blue Pilot's Application, acknowledging Blue Pilot has a statutory obligation to conform with 66 Pa.C.S. §2807(d)(2) and the standards and billing practices of 52 Pa.Code Chapter 56. OAG/OCA Cross Exh. 1 (License Application) at 17.

24. Raymond A. Perea, Esquire has been General Counsel for Blue Pilot since October 2010. OAG/OCA Cross Exh. 1 (License Application) at Exhibit 9.

25. The following individuals are officers, managers, and/or in-house counsel at Blue Pilot: Sandra M. Morton, Executive Vice President since 2006; Darrell Overturf, Vice President Billing Services since 1998; Jessica Renneker, Esquire, and Nazario Jureidini, Esquire. OAG/OCA Cross Exh. 1 (License Application) at Exhibit 9.

26. As of August 27, 2015, Blue Pilot failed to keep proper levels of security at the Commission. OAG/OCA St. 1-SR Supplemental.

A. Count I – Failure to Provide Accurate Pricing Information

27. Nearly all, approximately **BEGIN PROPRIETARY** **END PROPRIETARY** of the marketing to Pennsylvania customers occurred through telemarketing calls initiated by Blue Pilot's sales agents or employees based in Las Vegas, Nevada. OAG/OCA St. 1 at 7, 48.

28. Blue Pilot's sales agents engaged in conversations with potential customers, completed paperwork and submitted an enrollment with Blue Pilot, and each sale was accompanied by a recorded third-party verification call (TPV) in which the customer was asked questions. OAG/OCA St. 1 at 8.

29. Blue Pilot's sales agents did not review the terms of or refer to the disclosure statement with the prospective customers during their sales presentations and they did not require the customer to review the disclosure statement prior to agreeing to enroll. OAG/OCA St. 1 at 8.

30. Although Blue Pilot obtained some faxed signatures on Service Agreements for some small business customers, most of the time Blue Pilot did not obtain consumers' written (a/k/a wet) signatures when they verbally agreed to enrollment either during or after the telemarketing sales call on either the sales agreement or disclosure statement. Cross Exhibit BPE-ACM-1. OAG/OCA St. 1 at 8. Consumer Direct Testimony Vol. 1 at 12, 23, 33, 39, 50, 62, 94, 98, 108, 112, 113, 127, 137, 142, 152, 166, 170, 202, 210, 223, 239, 243, 248, 254, 267, 276, 284, 292, and 304. Consumer Direct Testimony Vol. 2 at 325, 334, 338, 351, 368, 376, 380, 385, 389, 393, 400, 405, 422, 439, 445, 451, 455, 467, 471, 474, 499, 504, 509, 513, 524, 526, 528, 532, 561, 569, 573, and 579.

31. After an initial fixed rate introductory period for 60-90 days, Blue Pilot's price per kilowatt hour varied on a monthly basis. OAG/OCA St. 2 at 6.

32. Blue Pilot's original (prior to January 22, 2014) disclosure statement and Agreement for Electric Service are clear only regarding the introductory rate, but provide no

information upon which PJM energy market is being relied upon or any other cost elements the company would account for in the development of a variable rate as they state in pertinent part:

You have a variable rate plan with a starting price set at **RATE** cents per kWh. This initial rate will be effective for at least the first ninety (90) days of service. Thereafter, 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 after ninety (90) days of service, 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. Please log on to www.bluepilotenergy.com or call Customer Service at 877-513-0246 for additional information and updates.

OAG/OCA St. 2 at 7-8; Exhibit SLE-1.

33. No ceiling price or price-cap on the variable rate is mentioned in the disclosure statement provided to Blue Pilot's customers. OAG/OCA St. 2 at 6.

34. There is no information contained in Blue Pilot's disclosure statement that would allow a customer to calculate what an appropriate price should be based on available cost data or supporting data that could have been provided by Blue Pilot. OAG/OCA St. 2 at 6.

35. Blue Pilot's disclosure statement states that the prices charged over any given billing cycle will be based on PJM wholesale market conditions; however, this is one of several factors upon which the variable price is based and the other factors are not revealed. OAG/OCA St. 2 at 6.

36. Blue Pilot's customers were not charged prices that were either clearly or consistently determined by PJM market conditions. OAG/OCA St. 2 at 6-7.

37. Blue Pilot's customers were billed at variable rates that were largely unrelated to PJM wholesale market conditions and largely unrelated to its costs. OAG/OCA St. 2 at 7.

38. Although the disclosure statement states: “At any time after ninety (90) days of service, but not more frequently than monthly, Blue Pilot may increase or decrease your rate based on several factors . . .,” it does not expressly disclose or reveal the risk that the variable rate may exceed the utility’s rate in any given month after the introductory period. Exhibits SLE-1 and BRA-2.

39. There is no disclosure that the “starting price set at RATE” term under the “Price per Kilowatt Hour” heading in the disclosure statement should not be taken as guarantee of future rates or any express or implied warranty regarding future savings. Exhibits SLE-1 and BRA-2.

40. Nowhere in Blue Pilot’s disclosure statement, Welcome Letter, telemarketing sales script, verification script, or other marketing materials provided in Exhibits BRA-2 is there any disclosure to the customer that Blue Pilot’s rates may be higher than the DSP’s price to compare rate in any given month; rather, these documents show Blue Pilot emphasized that its initial current rate for a 60-90 day introductory period would be lower than the DSP’s PTC rate in order to demonstrate possible cost savings. Exhibit BRA-2.

41. Although an introductory rate for 60-90 days would be given to the customer, it was not the practice of Blue Pilot to provide the then current variable rate, average or historical variable rates to the customer at the time of the telemarketing sales call. Exhibit BRA-2 at 20-29.

42. Blue Pilot’s prices per kilowatt hour that were developed for its variable rate customers in Pennsylvania from January –March 2014, were based upon the PJM day-ahead market price as well as anticipated weather patterns and nowhere in its disclosure statement or Sales Agreement did Blue Pilot indicate that the variable rate/price would be based upon anticipated weather patterns or what relevance/weight such a factor would have on a variable rate. OAG/OCA St. 2 at 10; Exhibit SLE-4.

43. Joseph Koppy and Raymond Perea determined all kWh prices for residential and commercial customers and they used the PJM Day Ahead Market price, as well as

anticipated weather patterns as a basis for determining the rates charged to residential and commercial customers. Exhibit SLE-4.

44. Although Blue Pilot did incur costs in the PJM wholesale energy markets, it also incurred costs for ancillary services, transmission, transmission losses and other PJM charges not disclosed in the disclosure statement. OAG/OCA St. 2 at 10.

45. Blue Pilot's disclosure statement does not reveal whether there is a profit or gross margin used in the calculation of its variable rate/price or whether overhead costs of running the company are included. OAG/OCA at 10.

46. Blue Pilot's prices billed were not meaningfully related to PJM wholesale market conditions. OAG/OCA St. 2 at 10-12, Tables 1 and 2; Exhibit SLE-2.

47. In Penelec's service territory, 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 cents per kWh (February and March 2014). This suggests the prices charged by Blue Pilot to its customers in January – March 2014, in Penelec's service territory (7.5, 39.9 and 39.9 cents per kWh, respectively) were not based on PJM energy market conditions. OAG/OCA St. 2 at 16.

48. 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); however, Blue Pilot's prices increased then stayed constant between the second and third months. The same relationship between the relevant PJM day-ahead energy market prices and Blue Pilot's prices exists for the Duquesne, Metropolitan Edison Company, PPL Electric Utilities, Inc., and West Penn Power Company service territories. OAG/OCA St. 2 at 16.

49. While Blue Pilot's prices increased with the average PJM day-ahead prices between month one and month two, they did not decrease with the decline in average PJM day-ahead prices between months two and three. OAG/OCA St. 2 at 16; Exhibit SLE-3.

50. Blue Pilot added an “acceptable gross margin percentage” to its cost basis in determining its variable prices, and did not reveal this pricing factor as part of the financial risk its customers were agreeing to in its Sales Agreement or disclosure statement. OAG/OCA St. 2 at 17.

51. In January, 2014, Blue Pilot added **BEGIN PROPRIETARY**
END PROPRIETARY, **BEGIN**
PROPRIETARY **END PROPRIETARY** of the Company’s per- kWh costs for January.
OAG/OCA St. 2 at 18.

52. PECO customers were paying Blue Pilot a gross margin as part of their variable rates in January, 2014. OAG/OCA St. 2 at 18.

53. Blue Pilot’s gross margin in January, 2014 was a greater percentage than its gross margin in December, 2013. OAG/OCA St. 2 at 18.

54. Blue Pilot used an amalgam of factors, including a desired rate of return, projected electricity costs, day-ahead market costs, projected weather, fluctuations in generators’ pricing into the PJM grid, and the spot prices of natural gas in calculating its variable rates. However, it admits that specific “calculations for determining rates do not exist.” Blue Pilot Resp. to Jt. Com. Set XII-1; OAG/OCA St. 1 at 31.

55. The prices Blue Pilot charged could not be recalculated by the Company, and did not conform to any reasonable interpretation of the language regarding pricing in the disclosure statement. OAG/OCA St. 1 at 32.

56. Blue Pilot’s disclosure statement, Welcome Letter, sales script, verification script, and marketing materials misled customers giving them a false assurance of the efforts the Company was undertaking to keep rates low and only described the variable rate product in terms of savings and cost reductions without any disclosure of the possibility of a

variable rate exceeding the EDC's PTC, and increasing the customer's overall costs for electricity. Exhibit BRA-2.

57. Blue Pilot provided insufficient information in its written "Service Agreement for the Purchase of Electric Power and Enrollment Form," Sales Script, Welcome Letter and disclosure statement by which a reasonable and prudent customer could conduct its own independent research of all relevant material pricing factors. Exhibit BRA-2; Cross Exhibit BPE-ACM-1; N.T. 586.

58. Blue Pilot's variable rate plan customers in existence in December, 2013 – March, 2014, could reasonably have relied upon the misleading representations of cost savings to conclude the expected range of the variable rate would not exceed the utility's PTC rate in any given month. Exhibit BRA-2. Cross Exhibit BPE-ACM-1; N.T. 586.

59. The omission of the risks of the variable rate products misled customers as to the range of expected variable rates. Exhibit BRA-2.

60. Blue Pilot misrepresented cost savings and the material factors upon which its variable rate was based in its disclosure statement. Exhibit BRA-2; N.T. 586.

B. Count II – Prices Nonconforming to Disclosure Statements

61. Prices charged by Blue Pilot to its Pennsylvania variable price customers during January – March 2014 did not correspond to the representations made by Blue Pilot in its disclosure statement. OAG/OCA St. 2 at 18.

62. Blue Pilot does not identify the "several factors" that may cause Blue Pilot's rate to increase or decrease other than one – "changes in wholesale energy market prices in the PJM Markets" and this is insufficient for a reasonable customer to be able to understand its rate. OAG/OCA St. 1 at 29-30.

63. On or about January 22, 2014, Blue Pilot added the following language to its pricing paragraph:

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.

OAG/OCA St. 1 at 26.

64. Blue Pilot did not have the January language in its disclosure statement or sales agreement or marketing literature given to customers enrolling prior to January, 2014; however, the company did mail out the revised disclosure statement to all existing customers in 2014, concurrent to the time the customers were receiving the spikes in their electric bills.

OAG/OCA St. 1 at 26.

65. The revised language added to the company's disclosure statement does not introduce a new term of agreement and it does not cure any misrepresentations made or lack of proper disclosure in the original disclosure statements sent to the customers affected by rate increases in December 2013 – March 2014.

66. The disclosure statement is in very fine print (a font size smaller than 10) and is difficult for an average customer to read. OAG/OCA St. 1 at 14.

67. 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.

C. Count III – Misleading and Deceptive Promises of Savings

68. Blue Pilot did not properly train or monitor its sales agents to ensure compliance with Pennsylvania statutes, regulations and Commission orders. OAG/OCA St. 1 at 22.

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

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

71. Blue Pilot's training materials emphasize "price protection" and "competitive rates." OAG/OCA St. 1 at 19-20.

72. 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.

73. Many customers who enrolled with Blue Pilot did not understand the variable price feature of the agreement, and were not adequately informed of the risks of the variable price as many believed the price would not vary dramatically from month to month and would move in concert with the EDC's PTC. OAG/OCA St. 1 at 33; OAG/OCA Consumer Testimony of Alexandra Moratelli at 209 and N.T. 502 and Moratelli Redirect Exh. 1 at 2; OAG/OCA Consumer Testimony of Sherri Kennedy at 2 and N.T. 529, 546-47; OAG/OCA Consumer Testimony of Tom & Amy Quinn at 299 and N.T. 304-06; OAG/OCA Consumer Testimony of Dennis Todaro/Mutual Aid Ambulance Service at 309, 310, 318; OAG/OCA Consumer Testimony of David Brotzman at 164-65 and N.T. 365; OAG/OCA Consumer Testimony of Lynn Ober at 203; OAG/OCA Consumer Testimony of Gary Euler at 160; OAG/OCA Consumer Testimony of United Transmission & Service Center, Inc./Anthony Fatzinger at 438; OAG/OCA Consumer Testimony of Daniel Zablonksy at 271 and N.T. 477; OAG/OCA Consumer Testimony of Jaqueline M. Epler at 88-89; OAG/OCA Consumer Testimony of William H. Otto/Titusville Moose Lodge #84 at 581-82; OAG/OCA Consumer Testimony of Linda Wintersteen at 41-42; OAG/OCA Consumer Testimonies of Russell Mowl at 469 and Russell Mowl/Store Route 40 at 543; OAG/OCA Consumer Testimony of Erie Animal Hospital/Breeana Burlingame at 155-56, N.T. 57, 59-61; OAG/OCA Consumer Testimony of Kenneth Brown at 77, 80-82 and Kenneth Brown Redirect Exh. 1; OAG/OCA Consumer Testimony of Tracey Wesley at

212-13; OAG/OCA Consumer Testimony of Walt Wensel at 226 and N.T. at 272; 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 N.T. at 119 and Darrell Bacorn Exhibit DB-1; see also OAG/OCA Consumer Testimony of Lori Durante at 80-81 and N.T. 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 N.T. 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 N.T. 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.

74. Blue Pilot's sales scripts used in Pennsylvania in 2013 did not include the term "variable" and yet, all of the contracts were for a variable rate. OAG/OCA St. 1 at 12.

75. 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.

76. Blue Pilot's sales scripts in 2013 referenced a "market" but failed to explain the term. OAG/OCA St. 1 at 12.

77. 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.

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

79. 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; however, 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, 41; see also OAG/OCA Consumer Testimony of Alexandra Moratelli at 209 and N.T. 504-5 and Moratelli Redirect Exh. 1 at 3; see also OAG/OCA Consumer Testimony of Sherri Kennedy at 2 and N.T. 547, 529; see also OAG/OCA Consumer Testimony of Edward S. George at 265-66 and N.T. 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 N.T. 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 N.T. 181 and James A. Reed Jr. Redirect Exh. 1; see also OAG/OCA Consumer Testimony of Tami Chicarielli at 449 and N.T. 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.

80. 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 N.T. 547, 529; see also OAG/OCA Consumer Testimony of Edward S. George at 265-66 and N.T. 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 N.T. 324; see also OAG/OCA Consumer Testimony of James A. Reed Jr. at 558-59 and N.T. 181 and James A. Reed Jr. Redirect Exh. 1; see also N.T. of Tracey Wesley at 199, 201; see also OAG/OCA Consumer Testimony of Tami Chicarielli at 449 and N.T. 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.

81. 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 N.T. 626; see also OAG/OCA Consumer Testimony of Dennis Todaro/Mutual Aid Ambulance Service at 324 and N.T. 324; see also OAG/OCA Consumer Testimony of Age Craft Manufacturing/Ben J. Policastro at 328 and N.T. 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.

82. Blue Pilot’s sales agents made statements that were inconsistent with the Company’s disclosure statement. See OAG/OCA St. 1 at 40.

83. 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. OAG/OCA St. 1 at 33-41; Exh. BRA-4 .

84. 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.

85. Blue Pilot's sales agents did not review or refer to the Company's disclosure statement in the sales presentation. OAG/OCA St. 1 at 8.

86. Blue Pilot's sales agents were 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.

87. 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.

88. 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.

89. Blue Pilot mailed Welcome Letters to some but not all 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.

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

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

92. Blue Pilot’s disclosure statement and other documents use terms that are not approved or applicable to Pennsylvania. OAG/OCA St. 1 at 47.

93. 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.

94. 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.

95. 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.

96. 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.

97. Blue Pilot’s disclosure statement does not contain any substantive information about the variable price feature. OAG/OCA St. 1 at 28.

98. Blue Pilot charged prices that did not conform to its own disclosure statement. OAG/OCA St. 1 at 4-5; OAG/OCA St. 2.

99. 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.

100. 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.

101. 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.

102. 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.

103. 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.

104. 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.

105. 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.

106. Blue Pilot charged its customers more than the applicable PTCs in effect for each EDC during the months December 2013 through March 2014. OAG/OCA St. 4.

107. Blue Pilot did not regularly deliver savings to its customers. OAG/OCA St. 1 at 24; OAG/OCA St. 4.

108. 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.

109. 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.

110. 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.

111. 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.

112. 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.

113. 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.

114. 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.

115. 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.

116. 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.

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

118. 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.

119. The average number of customers affected by the overbilling pursuant to variable rate plans during the months of December, 2013 through March, 2014 was **BEGIN PROPRIETARY** **END PROPRIETARY** which when added together, total an average number of residential and small business customers of 2,516. OAG/OCA St. 3 at 2-3; Exh. VSC-1 (indicating the Village Service Center's peak demand was 15.10 kW in January, 2014; 15.5 kW in February, 2014; and 11.90 kW in March, 2014); Exhibit AEE-1.

120. There were **BEGIN PROPRIETARY** **END PROPRIETARY** occurrences of residential overbillings not in accordance with marketed prices over and above the customers' respective EDCs' price to compare (PTC) during the period of December, 2013 through March, 2014. OAG/OCA St. 3 at 4-7.

121. There were **BEGIN PROPRIETARY** **END PROPRIETARY** occurrences of small business commercial overbillings over the PTCs not in accordance with promised marketed prices during the period of December, 2013 through March, 2014. OAG/OCA St. 3 at 8-12.

122. The total number of overbilling occurrences to residential and small business customers totaled 7,861⁸ for the time period of December, 2013 through March, 2014. OAG/OCA St. 3 at 2-12.

123. The total dollar amount overcharged (over the DSP's PTC) to residential customers on variable rate plans during the time period of December, 2013 through March, 2014 is **BEGIN PROPRIETARY** **END PROPRIETARY** OAG/OCA St. 3 at 4-8.

124. The total dollar amount overcharged (over the DSP's PTC) to small business customers on variable rate plans during the time period of December, 2013 through March, 2014 is **BEGIN PROPRIETARY** **END PROPRIETARY** OAG/OCA St. 3 at 8-12.

125. The total overcharge to both residential and small business customers during December, 2013 through March, 2014 is \$2,459,517.⁹ OAG/OCA St. 3 at 4-12, 21-22.

126. The total refund requested by OAG/OCA is \$2,408,449, is described as total overcharges for the months January – March, 2014, which is less than the total overbilled amount from December, 2013 – March, 2014 of \$2,459,517. OAG/OCA M.B. at 116; OAG/OCA St. 3 at 4-12, 21-22.

127. The total refund Blue Pilot provided its customers who complained included one re-bill in April, 2014 which lowered the price from 46.9 cents to 29.9 cents per kWh and another re-bill took place in May, 2014; however, the total credits of \$49,710 and refunds of \$173,744 are much less than the total overcharged amount of \$2,408,449. OAG/OCA St. 1 at 54-56.

⁸ Disaggregated, **BEGIN PROPRIETARY**
END PROPRIETARY

⁹ Disaggregated, **BEGIN PROPRIETARY**,
END PROPRIETARY

128. The average overcharge per occurrence for residential customers from December, 2013 – March, 2014 was **BEGIN PROPRIETARY** ¹⁰ **END PROPRIETARY** OAG/OCA St. 3 at 21.

129. The average overcharge per occurrence for small business customers from December, 2013 – March, 2014 was **BEGIN PROPRIETARY** ¹¹ **END PROPRIETARY** OAG/OCA St. 3 at 22.

130. The total overcharge for residential customers over the period of December 1, 2013 through and including March 31, 2014 is **BEGIN PROPRIETARY** . **END PROPRIETARY** OAG/OCA St. 3 at 20-22.

131. The total overcharge for small business customers over the period of December 1, 2013 through and including March 31, 2014, is **BEGIN PROPRIETARY** . **END PROPRIETARY** OAG/OCA St. 3 at 20-22.

132. The duration of the occurrences of overbilling lasted over 4 consecutive months, December, 2013 through March, 2014. OAG/OCA St. 3 at 20-22.

133. The overbillings occurred in EDC territories including but not limited to: West Penn Power, PPL Electric Utilities, Pennsylvania Electric Company, PECO Energy Company, Metropolitan Edison Company, and Duquesne Light. OAG/OCA St. 3 at 4-22.

134. The average residential customer on Blue Pilot’s variable rate plan paid **BEGIN PROPRIETARY** . **END PROPRIETARY** OAG/OCA St. 3.

¹⁰ **BEGIN PROPRIETARY**
 . **END PROPRIETARY**

¹¹ **BEGIN PROPRIETARY**
 . **END PROPRIETARY**

135. The average residential consumer on Blue Pilot's variable rate plan paid a price **BEGIN PROPRIETARY. END PROPRIETARY** OAG/OCA St. 3.

136. The average residential consumer on Blue Pilot's variable rate plan paid a price **BEGIN PROPRIETARY**
. END PROPRIETARY OAG/OCA
St. 3.

137. The average residential consumer on Blue Pilot's variable rate plan paid a price **BEGIN PROPRIETARY**
END PROPRIETARY
OAG/OCA St. 3

138. The average residential consumer on Blue Pilot's variable rate plan paid a price **BEGIN PROPRIETARY**
END PROPRIETARY OAG/OCA St. 3.

139. The average residential consumer on Blue Pilot's variable rate plan paid a price **BEGIN PROPRIETARY**
END
PROPRIETARY OAG/OCA St. 3.

140. The average monthly usage of Blue Pilot's small business customers from December 2013 through March 2014 was **BEGIN PROPRIETARY. END PROPRIETARY** OAG/OCA St. 3 at 21, Exhibit AEE-1.

141. Blue Pilot does not currently enroll new customers in Pennsylvania and no longer advertises or markets in Pennsylvania. Exhibit BRA-2.

142. Blue Pilot promoted its variable price plans for generation supply to Pennsylvania consumers by emphasizing the introductory fixed price and the potential for savings

with variable price agreements compared to the consumer's current energy bills. OAG/OCA St. 1 at 9-10.

143. Blue Pilot's written promotional materials used in Pennsylvania emphasized promotional prizes and savings by enrolling with Blue Pilot and none of these materials explained "variable rates" or how prices would be calculated under its variable rate plan. OAG/OCA St. 1 at 10.

144. A one-page marketing material from Blue Pilot's website stated, "Blue Pilot Energy was created to provide residential and commercial customers significant savings over their existing provider, along with outstanding customer service. Switch and start saving now!" OAG/OCA St. 1 at 10.

145. Another three-page marketing material stated, "You have the ability to choose your provider" and included the statements: 1) "When they expire, customers may face dramatic increases, as their 'price to compare' is transitioned to more closely align with current market conditions;" and "Blue Pilot Energy is an independent energy marketer whose main focus is helping our business and residential 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; Exhibit BRA-2.

146. Blue Pilot provided customers with marketing materials promising savings compared to customers' local utility's rates. OAG/OCA St. 1 at 11, N.T. 683-707; Exhibit BRA-3.

147. Blue Pilot's sales script used in Pennsylvania in 2013 emphasized the potential for "lower rates" and stated, **BEGIN PROPRIETARY**

END PROPRIETARY. Exhibit BRA-2 at 19-20.

148. Blue Pilot's telemarketer sales agents refer to a variable month-to-month rate after they have emphasized savings and a fixed introductory rate. The terms "variable rate" is not defined in the script. Neither the term "market" nor any other pricing term listed in the disclosure statement is defined in the sales script. OAG/OCA St. 1 at 12; Exhibit BRA-2.

149. Blue Pilot's verification scripts/recordings do not explain the variable rate term to the customer or any other pricing feature in the disclosure statement. OAG/OCA St. 1 at 12; Exhibit BRA-2; Cross Exhibit BPE-SK-1 (Sherri Kennedy TPV); N.T. 586.

150. Some commercial customers may have faxed a signed sales contract or disclosure statement to Blue Pilot as part of their enrollment over the phone; however most customers' sales were completed through a third-party verification recording. OAG/OCA St. 1 at 48.

151. The Welcome Letter Blue Pilot mails out after a verbal enrollment does not contain any information about introductory prices or how the variable price feature of the plan will work. OAG/OCA St. 1 at 13, 27; Exhibit BRA-2.

152. The Welcome Letter merely refers to the finely printed disclosure statement for review but does not thoroughly explain what the disclosure statement is or its legal significance. OAG/OCA St. 1 at 13; Exhibit BRA-2.

153. The Welcome Letter states, "Our objective is to provide you with competitive pricing along with the highest level of customer service available." OAG/OCA St. 1 at 28.

154. All customers of Blue Pilot were either sent a Welcome Letter and disclosure statement after enrolling through a telemarketing call, or they were not sent any written welcome letter or disclosure statement at all until approximately January 22, 2014, when an updated disclosure statement was mailed to all customers. OAG/OCA St. 1 at 14, footnote 13.

155. When asked to produce sales training programs, Blue Pilot only produced telemarketing scripts and offered no evidence of any internal audits or other investigations regarding its sales agents even though Blue Pilot claims it previously counseled or terminated three sales agents for failure to abide by corporate policies. OAG/OCA St. 1 at 20.

156. Blue Pilot lacks appropriate training for its sales agents to state the terms of the contract in accordance with Pennsylvania consumer law regarding unfair trade practices, misleading disclosures, the requirement to go over the terms of service with the customer prior to enrollment and to make sure oral representations conform with written disclosures and the prices billed. OAG/OCA St. 1 at 21.

157. 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. OAG/OCA St. 1 at 33-41; Exh. BRA-4 (Confidential); Sherri Kennedy Redirect Exh. 1 at 5 and N.T. 557-58, 577; OAG/OCA Consumer Testimony of Charles Wentzel at 488.

158. 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; OAG/OCA Consumer Testimony of Alexandra Moratelli at 208; OAG/OCA Consumer Testimony of Linda Wintersteen at 41-42; OAG/OCA Consumer Testimony of Erie Animal Hospital/Breeana Burlingame at 155-56, N.T. 57; see also OAG/OCA Consumer Testimony of James A. Reed Jr. at 558-59; N.T. 181; James A. Reed Jr. Redirect Exh. 1; 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.

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

159. Blue Pilot’s call center was overwhelmed with calls in early 2014.
OAG/OCA St. 1.

160. Blue Pilot’s customer service representatives were instructed to read from “Customer Care Scripts” that **BEGIN PROPRIETARY**

END PROPRIETARY. OAG/OCA St. 1 at 51.

161. The explanation of the charges Blue Pilot gave its complaining customers was misleading. OAG/OCA St. 1 at 51.

162. Blue Pilot did not fairly and evenly refund its customers, giving preferential treatment to only those customers complaining to the Commission, OAG, or State Legislators. OAG/OCA St. 1 at 54-55.

163. Only those customers complaining to OAG/OCA were given a rebill in April from 46.9 cents per kWh to 29.9 cents per kWh. OAG/OCA St. 1 at 54.

164. The number of residential customers who actually received a rebill or credit represents only 4.7% of the customers served by Blue Pilot on variable price plans in January 2014. OAG/OCA St. 1 at 56.

165. Blue Pilot's script used for calls during early 2014 did not contain any language about investigating the consumer's complaint, about the right to cancel service, or about the right to return to default service or choose another supplier. OAG/OCA St. 1 at 51-57.

166. Many consumers 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 N.T. at 517, 519-20; see also OAG/OCA Consumer Testimony of Jacqueline M. Epler at 90 and N.T. 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 N.T. 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 N.T. 423; see also Dan Ellingsen N.T. at 466-67; and see also OAG/OCA Consumer Testimony of Edmund and Joann LeTersky at 380 and N.T. 70-71.

167. 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 N.T. at 423-24; see also OAG/OCA Consumer Testimony of Edmund and Joann LeTersky at 380 and N.T. 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 N.T. at 274.

168. 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 N.T. 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 N.T. 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 N.T. 401-402; see also OAG/OCA Consumer Testimony of Greg Payson at 553 and N.T. 424; see also OAG/OCA Consumer Testimony of Daniel Zablonky at 272 and N.T. at 481; see also OAG/OCA Consumer Testimony of Katherine Williams at 372 and N.T. at 113; and see also OAG/OCA Consumer Testimony of Walt Wensel at 227 and N.T. at 274.

169. 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 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 N.T. 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 N.T. 445; see also OAG/OCA Consumer Testimony of Katherine Williams at 372 and N.T. at 113; see also OAG/OCA Consumer Testimony of Loni Durante at 82; see also Rose Livingstone N.T. at 147; and see also OAG/OCA Consumer Testimony of Karen Mauro 397.

170. 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 N.T. at 306-307; see also OAG/OCA Consumer Testimony of William C. Smith at 569 and N.T. 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 N.T. 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 N.T. 425; see also OAG/OCA Consumer Testimony of Loni Durante at 82; and see also OAG/OCA Consumer Testimony of Karen Mauro 397.

E. Count V – Telemarketer Registration Act

171. Some commercial customers may have faxed a signed sales contract or disclosure statement to Blue Pilot as part of their enrollment over the phone; however, most customers' sales were completed through a third-party verification recording and the contract was never reduced to writing or executed by a handwritten signature. OAG/OCA St. 1 at 48. Cross Exhibit BPE-ACM-1.

172. 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. 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 N.T. 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 N.T. 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 N.T. at 457.

173. 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. 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 N.T. at 131; see also OAG/OCA Consumer Testimony of Dan Ellingsen at 243.

174. 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 January, 2014. OAG/OCA St. 1 at 50. See OAG/OCA Consumer Testimony of George M. Dingler 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 N.T. 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 N.T. at 237; and see also OAG/OCA Consumer Testimony of Lori Durante at 81.

IV. DISCUSSION

A. Legal Standard

Section 332(a) of the Public Utility Code provides that the party seeking relief from the Commission has the burden of proof. 66 Pa.C.S. § 332(a). As a matter of law, a complainant must show that the named utility is responsible or accountable for the problem described in the complaint in order to prevail. Patterson v. Bell Tel. Co. of Pa., 72 Pa. PUC 196 (1990). “Burden of proof” means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. Se-Ling Hosiery v. Margulies, 364 Pa. 54, 70 A.2d 854 (1950). The offense must be a violation of the Public Utility Code, the Commission’s regulations or an outstanding order of the Commission. 66 Pa.C.S. § 701.

If a complainant establishes a *prima facie* case, the burden of going forward with the evidence shifts to the utility. If a utility does not rebut that evidence, the complainant will prevail. If the utility rebuts the complainant's evidence, the burden of going forward with the evidence shifts back to the complainant, who must rebut the utility's evidence by a preponderance of the evidence. The burden of going forward with the evidence may shift from one party to another, but the burden of proof never shifts; it always remains on a complainant. Milkie v. Pa. Pub. Util. Comm’n, 768 A.2d 1217 (Pa.Cmwlt 2001); *see also*, Burleson v. Pa. Pub. Util. Comm’n, 443 A.2d 1373 (Pa.Cmwlt 1982).

Decisions of the Commission must be supported by substantial evidence. 2 Pa.C.S. § 704. "Substantial evidence" is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm’n, 413 A.2d 1037 (Pa. 1980); Erie Resistor Corp. v. Unemployment Comp. Bd. of Review, 166 A.2d 96 (Pa.Super. 1961); and Murphy v. Comm., Dept. of Public Welfare, White Haven Center, 480 A.2d 382 (Pa.Cmwlt. 1984).

B. Subject Matter Jurisdiction

Blue Pilot challenges the Commission's subject matter jurisdiction. Blue Pilot M.B. at 32-35. The Commission has recently held it has subject matter jurisdiction to regulate certain aspects of the services provided by EGSs, specifically concerning issues involving Sections 54.4(a) and 54.5(a) of Title 52, Pennsylvania Code. In the case of Commonwealth of Pennsylvania, et al. v. Blue Pilot Energy, LLC, C-2014-2427655, (Opinion and Order entered December 11, 2014), the Commission addressed an interlocutory question by stating it has the authority and jurisdiction to determine whether the prices charged to customers by an EGS conform to the EGS disclosure statement regarding pricing. Id. at 18-20.

The Commission's subject matter jurisdiction over EGSs is set forth in Sections 2807 and 2809 of the Public Utility Code, 66 Pa.C.S.A. §§ 2807, 2809. Under Section 2809, 66 Pa. C. S. § 2809, EGSs are required to abide by the Commission's Regulations. For EGSs serving residential customers, this includes abiding by the Commission's Chapter 54 Regulations on bill format,¹² disclosure statements,¹³ marketing and sales activities,¹⁴ and contract expiration notices.¹⁵ In addition, EGSs serving residential customers also are required to comply with the standards and billing practices in Chapter 56 of the Commission's Regulations.

The Electric Generation Customer Choice and Competition Act, 1966, Dec. 3, P.L. 802, No. 138, § 4, effective Jan. 1, 1997, (Choice Act) restructured the industry, but did not deregulate it entirely. The Choice Act envisions Commission regulation of EGS companies for the protection of the public as stated in Section 2802(14), which provides in pertinent part:

(14) . . . The generation of electricity will no longer be regulated as a public utility function except as otherwise provided for in this chapter. Electric generation suppliers will be required to obtain

¹² 52 Pa.Code § 54.4.

¹³ 52 Pa.Code § 54.5.

¹⁴ 52 Pa.Code §§ 54.3, 54.6, and 54.7; 52 Pa.Code §§ 54.43(1) and 54.43(f); 52 Pa.Code §§ 54.122(3). The Commission also has marketing and sales rules at 52 Pa.Code §§ 111.1-111.14 applicable to residential customers only.

¹⁵ 52 Pa.Code § 54.10 (effective June 2014).

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(14).

Section 2809(f) provides the Commission shall ensure that brokers, marketers and aggregators comply with 52 Pa.Code Chapter 56. 66 Pa.C.S. § 2809(f).

The Commission's authority is also derived from Section 501 of the Public Utility Code, which sets forth the general powers of the Commission.

(a) Enforcement of provisions of part. – In addition to any powers expressly enumerated in this part, the commission shall have full power and authority, and it shall be its 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, and shall have the power to rescind or modify any such regulations or orders.

* * * *

(c) Compliance. – Every public utility, its officers, agents, and employees, and every other person or corporation subject to the provisions of this part, affected by or subject to any regulations or orders of the commission or of any court, made, issued, or entered under the provisions of this part, shall observe, obey and comply with such regulations or orders, and the terms and conditions thereof.

66 Pa.C.S. §§ 501(a) and (c).

Section 501 grants the Commission authority to enforce the Public Utility Code and the Commission's regulations and Orders. 66 Pa.C.S. § 501. EGSs are considered public utilities for the purposes described in Section 2809 of the Public Utility Code. 66 Pa.C.S. §§ 102, 2809; see also Delmarva Power & Light Co. v. Pa. Pub. Util. Comm'n, 870 A.2d 901, 909-10 (Pa. 2005).

Section 2809(e) of the Public Utility Code provides:

Form of regulation of electric generation suppliers. – The commission may forbear from applying requirements of this part which it determines are unnecessary due to competition among electric generation suppliers. In regulating the service of electric generation suppliers, the commission shall impose requirements necessary to ... 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). Section 2809(e) allows the Commission to forbear from applying the Public Utility Code but does not limit the Commission in this instance. In addition to imposing requirements to assure that EGSs maintain standards and billing practices consistent with Chapter 56, Chapter 54 of the Commission's regulations also relate to EGSs' billing practices. See 52 Pa.Code Chps. 54, 56.

C. Authority/Role of OAG/OCA at Joint Complainants

Blue Pilot contends the Joint Complainants have no authority to seek relief on behalf of individual consumers as though this “were a class action lawsuit.” Blue Pilot M.B. at 40-45.

We believe “a class action lawsuit” is a misrepresentation of the instant proceeding. 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 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). Act 161 of the Pennsylvania General Assembly, 71 Pa.C.S. § 309-2, as enacted July 9, 1976, authorizes the Office of Consumer Advocate (OCA) to represent the interests of residential customers in rate proceedings before the Commission. Similarly, the OSBA, pursuant to 73 Pa.C.S. §§399.41, *et seq.* is authorized to represent small business customers' interests in utility matters before the Commission. The Bureau of Investigation and Enforcement (I&E) serves as the prosecutory bureau for purposes of representing the public interest in

ratemaking and service matters before the Commission. These “statutory advocates” participate in various types of investigations and complaint proceedings before the Commission.

The Attorney General is not acting on behalf of any one single claimant, but pursuant to its *parens patriae*¹⁶ 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 (CPL) 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, 644 (1990), aff’d 529 Pa. 512, 605 A. 2d 798 (1990).

We recognize that proceedings brought by the Attorney General generally focus on unfair and deceptive methods, acts and practices. 73 P.S. §§ 201-3, 201-4. However, this Commission cannot entertain an action under the CPL and the relief available under our jurisdiction is not exactly the same as the relief available in a court of law’s jurisdiction in that the Commission cannot award compensatory or punitive damages to a consumer for the fraudulent activities of a company. Feingold v. Bell of PA., 282 A.2d 1191 (Pa. 1977). Nevertheless, although the relief available at this administrative agency level may not make Pennsylvania’s consumers whole, the Commission’s regulations hold licensees “responsible for any fraudulent deceptive or other unlawful marketing or billing acts performed by the licensee, its employees, agents or representatives” and “a license may be suspended or revoked and fines may be imposed against the licensee for the failure to follow the principles in § 54.43 (relating to standards of conduct and disclosure for licensees).” 52 Pa.C.S. §§ 54.42(a)(6) and 54.43(f).

Some Commission regulations governing EGS conduct require compliance with the CPL and TRA. 52 Pa.C.S. §§ 54.42(a)(6); 54.43(f); and 111.12(d)(1). Thus, it is appropriate to hear a joint complaint filed by OAG/OCA alleging fraudulent and deceptive marketing practices against

¹⁶ 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, 9TH EDITION, at 1221.

Respondent because many customers of Blue Pilot complained to OAG/OCA seeking relief and the Commission has the authority to grant, condition, suspend, and revoke licenses as well as assess civil penalties and direct refunds to consumers for violations of regulations and the Public Utility Code. For all of these aforementioned reasons, we believe Joint Complainants have authority to participate in a proceeding such as the instant one seeking to terminate alleged ongoing consumer fraud.

D. Pattern and Practice

Throughout this proceeding, the Joint Complainants have argued that Blue Pilot has engaged in a pattern of unfair and deceptive sales and marketing practices that were in violation of the Choice Act and the Commission regulations and orders. At the Initial Prehearing Conference on August 25, 2014, the OAG/OCA envisioned a proceeding similar to a class action law suit in a federal or State civil trial court, whereby the ALJs would hear from consumer witnesses first through evidentiary hearings, and then determine at what time they had heard enough evidence in order for OAG/OCA to establish Blue Pilot's pattern and practice of fraudulent and deceptive marketing practices. N.T. 11. At the prehearing conference, OAG/OCA had identified 40 consumer witnesses, but this number grew to 97 as the litigation schedule proceeded. Counsel for Blue Pilot stated that "pre-filed testimony and telephone cross is probably – would be fine." N.T. at 9.

At the hearings on March 30, 31, and April 1, 2015, we heard from approximately 83 consumer witnesses, leaving 14 pre-served testimonies not admitted into the record. At no time did we say that we had not heard from enough witnesses in order to make certain widespread findings regarding deceptive practices or overbilling. Conversely, we did not certify any particular class of consumers as might have been done in a class action lawsuit in a court of law. Rather, we reserved judgment on this "pattern and practice" issue until after expert and non-consumer testimony were presented for our consideration.¹⁷

¹⁷ When the Commission does not preside at the reception of evidence, the presiding officers initially decide the case. 66 Pa.C.S.A. § 335.

The parties submitted memorandum of law regarding whether or not the Commission could make a “pattern of practice” determination on February 9 and February 26, 2015, respectively. Joint Complainants argued the Commission could accept evidence from a large group of customers to find Blue Pilot conducted a misleading or deceptive pattern of practice widespread throughout the Commonwealth to its variable rate customers and that this was an ongoing concern causing violations beyond the time period of December 1, 2013 through March 31, 2014.

Conversely, Blue Pilot argued in adjudicating this proceeding, the Commission must be guided by the Code, which does not contain the words “pattern” or “practice.” Blue Pilot contends the Public Utility Code (Code) does not recognize any ability of the Commission to treat matters before it as if they were class actions.¹⁸ Blue Pilot admits that Section 701 authorizes the Commission to hear complaints about acts done or omitted by a regulated entity in violation of any law which the Commission has jurisdiction to administer; however, it argues that no provision of the Code authorizes the Commission to rely on pattern of practice evidence or to entertain class action types of proceedings in determining whether a violation of the Code, Commission regulations or Commission orders has occurred and, if so, what penalty or relief may be awarded.

Blue Pilot argues there is no precedent for applying Pennsylvania Rules of Civil Procedure 42 Pa.C.S. §1701, to find that the Commission can use a representative sampling of some customer’s experience with Blue Pilot to obtain relief for an entire class of customers who never complained as if this were a class action.

As authority for its position, Blue Pilot cites to the following decisions: Painter v. Aqua PA, Inc., Docket No. C-2011-2239557 (Opinion and Order entered May 22, 2014); and Pettko v. Pennsylvania American Water Company, Docket No. C-2011-2226096 (Administrative Law Judge Order dated October 5, 2011 adopted by Commission Order on February 18, 2013).

¹⁸ A class action is a lawsuit in which litigation is conducted on behalf of a class of individuals who are not individually named in the proceeding. See, e.g., *Braun v. Wal-Mart Stores, Inc.*, 24 A.3d 875, 2011 Pa.Super. 121 (Pa.Super. 2011) (plaintiffs alleged claims of breach of contract on behalf of themselves and other similarly situated hourly employees).

Blue Pilot argues those decisions held that only complainants who filed complaints with the Commission have any recourse to request or receive relief.

Blue Pilot further argues: 1) that Joint Complainants have no authority to seek relief on behalf of individual consumers; 2) no class certification occurred in the proceeding; 3) the unique facts regarding individual consumers renders a class action approach inappropriate; 4) there is insufficient evidence to support a “pattern of practice” as required by federal courts; and 5) reliance on the residual exception to the hearsay rule is misplaced.

Examining the authority upon which Blue Pilot relies, on February 28, 2013, upon motion for summary judgment, the Commission dismissed C. Leslie Pettko’s complaint, on behalf of himself and all other similarly situated, against Pennsylvania American Water Company (PAWC) at Docket No. C-2011-2226096. Mr. Pettko had argued PAWC was prohibited from billing its DSIC on a bills rendered basis and he sought refund relief for himself and others similarly situated (overbilled). The Commission analyzed whether PAWC’s implementation of its Distribution System Improvement Charge (DSIC) or State Tax Adjustment Surcharge (STAS) violated CPL laws, and whether its customers were entitled to a refund. The Commission determined PAWC was in compliance with a Commission directive to bill its customers for DSIC on a bills rendered basis. *Id.* at 18 citing Implementation of Act 11 of 2012, Docket No. M-2012-2293611 (Order entered August 2, 2012).

The Commission entered summary judgment in favor of PAWC finding no genuine issue as to material facts in dispute. Although the Commission was silent as to whether it would have issued a refund to a class of consumers in similar situation to Mr. Pettko, if his complaint had ultimately been sustained, and the Commission had found an overbilling not in accord with a tariffed rate, then the Commission had the authority to ultimately direct PAWC to issue refunds not only to Mr. Pettko, but to others in his rate class pursuant to Section 1312 of the Public Utility Code. Although a pro se Complainant cannot represent a class per se as in a class action lawsuit before the Commission, the Commission could have sustained Mr. Pettko’s complaint, giving him refund relief, and then it could have initiated a show cause proceeding to give refund relief to the entire group of customers similarly situated like him (those consumers being billed on a “bills rendered basis”).

In 1997, the Commission exercised such an authority ordering across-the-board relief to groups of customers where not all of them had complained or testified. See 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. Cmwlth. 1998).

In Pettko, on behalf of himself and all others similarly situated, v. Pa. American Water Co., 39 A.3d 473 (Pa. Cmwlth. 2012), (Pettko), the Commonwealth Court issued an Opinion on January 13, 2012, which held in pertinent part:

[t]he relief potentially available to Pettko under the UTPCPL is substantially distinct from the relief available under the Public Utility Code. As Pettko contends, the General Assembly's objectives in enacting the UTPCPL are reflected in the remedies providing for potential exemplary and treble damages for successful plaintiffs.

Id.

Under Section 103(c) of the Public Utility Code, a consumer complainant is entitled to pursue a claim under the CPL a/k/a UTPCPL after the Commission completes its initial review of their claims. A private cause of action serves as an important cumulative law enforcement weapon where there is a simultaneous government action. Id. at 484-85. Thus, the Public Utility Code provides that unless otherwise specified, remedies from the Commission are cumulative and in addition to common law and statutory remedies. 66 Pa.C.S.A. § 103(c) (relating to remedies cumulative).

In Pettko, the Commonwealth Court held that the Commission does not have exclusive jurisdiction "unless it has the power to award relief that will make a successful litigant whole." 39 A. 3d at 484, citing Feingold v. Bell of Pa., 383 A.2d 791 (Pa. 1977). The Court

concluded that some of Mr. Pettko's claims, if proven, would result in relief that the Commission did not have the power to grant. Although Mr. Pettko's claims of conversion and breach of contract sought redress for overcharging, and the Commission could award refund relief for the overcharging, the Commission could not provide complete relief involving additional restitution, (compensatory or punitive damages) available to a Plaintiff under the CPL. Thus, the Court concluded that "the relief potentially available to Pettko under the CPL is substantially distinct from the relief available under the Public Utility Code." *Id.* The Court agreed with Mr. Pettko that under Section 103(c), he may pursue claims under the CPL independent of the Commission claims. *Id.* at 484-85.

The United States District Court for the Eastern District of Pennsylvania cited to the Pettko decision, in denying HIKO Energy, LLC's preemptive motion to strike or alternatively stay in lieu of the Commission's proceedings, a class action law suit filed against the company. Michael Kantor, on behalf of himself and all others similarly situated v. HIKO Energy, LLC, Civil Action No. 14-5585, Memorandum Opinion entered April 14, 2015.

Specifically, the Court opined:

This potential class action and the pending settlement recovery stemming from the PUC action are not alternatives. They are complementary. They share the goal of protecting consumers and deterring unlawful conduct by companies that provide essential services to the public. Yet, there are different remedies available under each. Thus, as in Pettko, those remedies are cumulative within the meaning of the Public Utility Code.

Id.

The CPL and TRA offer cumulative remedies for aggrieved customers, and provide potential remedies that are different from or greater than the remedy provided through the Public Utility Code's refund and civil penalties provision. For example, under the CPL, a consumer may receive compensatory damages or \$100, whichever is greater, for every fraudulent violation of the law. Pettko.

We do not agree with Blue Pilot that either the Pettko case or the decision in Walter and Donna Painter, on behalf of themselves and all others similarly situated v. Pa. Pub. Util.

Comm'n, 1010 C.D. 2014 (Opinion and Order entered May 18, 2015), forebears OAG/OCA from representing the public in the instant case. Mr. and Mrs. Painter did not, but had they proven Aqua incorrectly assessed the DSIC surcharge amount by not prorating its application only to utility services rendered after its effective date and by applying it to the entire billed amount, including the portion pre-dating its effective date was incorrect billing, then the PUC would have had authority to refund not only the Painters but ultimately through a show cause proceeding, others similar to them under 66 Pa.C.S. §§501, 1301, and 1312.

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 savings¹⁹ 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).

Most recently, in I&E v. HIKO, 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.

¹⁹ 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.

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).

The Painters and Pettko decisions pertain to tariffed rates and can be distinguished on that ground. However, I&E v. HIKO involved alleged overbilling conduct of an EGS and the case was fully litigated regarding similar facts and law as the instant case. Thus, it is more controlling.

While perhaps not using the precise phrase "pattern and practice" or "pattern of 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.

The Commission's regulations vest us with authority to limit the number of witnesses to be heard, limit the time and scope of direct and cross examinations and other reasonably necessary limitations. 52 Pa.Code § 5.403. We recognize this proceeding is not a class action under the rules of civil procedure and that I&E, OSBA, and OAG/OCA are not the same entities as the Federal Trade Commission; nor, is the Commission the same as either a court of common pleas or federal district court. We do not have the same jurisdiction. Also, we cannot award the same relief to consumers as a court of law; however, we work with these other jurisdictions to bring about necessary justice to aggrieved consumers. The Commission has no authority to award customers compensatory, punitive, or treble damages; however, it has authority under 66 Pa.C.S. § 501 to award refunds to EGS customers that were not billed in accordance with a regulatory compliant disclosure statement or marketed prices. See 52 Pa.C.S. § 54.4(a); OAG/OCA v. HIKO. The Commission may not be able to make a consumer entirely whole for all compensatory damages resulting from an overbilling by a regulated entity; however, under Section 103(a) of the Public Utility Code, the Commission's remedies are considered to be cumulative with those of other jurisdictions. 66 Pa.C.S. § 103(a). The Commission is in a position to investigate and is interested in preventing deceptive marketing practices, which can lead to unauthorized switching.

Additionally, the Commission has the authority to revoke licenses and to assess civil penalties for violation of the Public Utility Code and Commission Regulations.

E. Count I - Failing to Provide Accurate Pricing Information

1. Joint Complainants

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 Commissions regulations at Section 54.5(c) (requiring that variable pricing terms include the conditions of variability and the limits on price variability), Section 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).²⁰ 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. Joint Complainants contend that the Commission’s regulations require suppliers “ensure that product or service offerings made by a supplier contain information, verbally or written, in plain language designed to be understood by the customer.” 52 Pa.Code §111.12(d)(5). Joint Complainants argue that Blue Pilot’s practice of failing to provide accurate pricing information in either its disclosure statement or sales agreement violates 66 Pa.C.S. §2807(d)(2). Section 2807(d)(2) provides in pertinent part:

Information shall be provided to consumers in an understandable format that enables consumers to compare prices and services on a uniform basis.

²⁰ 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.

66 Pa.C.S.A. § 2807(d)(2).

2. Blue Pilot

Blue Pilot contends its disclosure statement was approved implicitly by the Commission in its Licensing Order of June 10, 2011, and it relied upon that approval in distributing it to its customers believing it was regulatory compliant with 52 Pa.Code § 54.5. As further support, Blue Pilot cites to an Initial Decision, Dubois Manor Motel c/o Nisha Patel v. Blue Pilot Energy, LLC, Direct Energy, LLC and Pennsylvania Electric Company, Docket No. C-2014-2433817 (Initial Decision issued December 2, 2015)(DuBois Manor), wherein the ALJ found Blue Pilot's disclosure statement provided accurate, plain language to explain the variable rate product.

Although Blue Pilot acknowledges that in a different case, the ALJ found its disclosure statement to be non-compliant with the plain language requirements, Blue Pilot argues there is no such requirement under 52 Pa.Code §69.251; accordingly, no violation of Section 111.12(d)(1). Enrico Partners LP v. Blue Pilot Energy, LLC, Docket No. C-2014-2432979 (Initial Decision February 12, 2015)(Enrico Partners).

3. Disposition

Whether or not the disclosure statement language is sufficiently compliant within the meaning of 66 Pa.C.S.A. § 2807(d)(2); 52 Pa.Code §§ 54.5(c); § 54.43(1) and (f); and §111.12(d)(1) is at issue.

The License Application shows that Joseph Kopy, Chief Executive Officer and Chief Financial Officer (CEO/CFO) of Blue Pilot since October, 2010, signed Blue Pilot's Application, acknowledging Blue Pilot has a statutory obligation to conform to 66 Pa.C.S. §2807(d)(2) (regarding plain language) and the standards and billing practices of 52 Pa.Code Chapter 56. OAG/OCA Cross Exh. 1 (License Application) at 17.

At the time Blue Pilot's customers enrolled (prior to June, 2014), Section 54.5(c) provided in pertinent part as follows:

§ 54.5. Disclosure statement for residential and small business customers.

- (c) The contract's terms of service shall be disclosed, including the following terms and conditions, if applicable:
 - (1) Generation charges shall be disclosed according to the actual prices.
 - (2) The variable pricing statement, if applicable, must include:
 - (i) Conditions of variability (state on what basis prices will vary).
 - (ii) Limits on price variability.

52 Pa.Code § 54.5(c) (prior to June, 2014).

Section 54.5(c) directed EGSs to provide residential and small business customers with a disclosure statement containing written terms and conditions including, but not limited to: pricing information, length of agreement, cancellation provisions, penalties, and an explanation of any bonuses or incentives. At all times relevant, Blue Pilot was required to reveal in its disclosure statement the basis upon which the variable prices would vary as well as limits on price variability. 52 Pa.Code §§ 54.5(c)(2)(i) and 54.5(c)(2)(ii).

On June 14, 2014, the Amendment to §54.5 took effect, adding a requirement that if there is a limit on price variability, the disclosure shall reveal it, and if not a limit on price variability, the EGS shall state there is not a limit on how much the price may change from one billing cycle to the next. 52 Pa.Code §54.5(c)(2)(i) and (ii).

Section 54.43(1) and (f) provide as follows.

§ 54.43. Standards of conduct and disclosure for licensees.

To protect consumers of this Commonwealth, licensees shall adhere to the following principles in the provision of electric generation service:

- (1) A licensee shall provide accurate information about their electric generation services using plain language and common terms in communications

with consumers. When new terms are used, the terms shall be defined again using plain language. Information shall be provided in a format that enables customers to compare the various electric generation services offered and the prices charged for each type of service.

* * *

(f) A licensee is responsible for any fraudulent deceptive or other unlawful marketing or billing acts performed by the licensee, its employees, agents or representatives. Licensee shall inform consumers of state consumer protection laws that govern the cancellation or rescission of electric generation supply contracts. See section 7 of the Unfair Trade Practices and Consumer Protection Law (73 P. S. § 201-7).

52 Pa.Code §§54.43(1) and (f).

Sections 111.12(d)(1)-(5) provide as follows.

§ 111.12. Consumer protection.

(d) A supplier:

(1) May not engage in misleading or deceptive conduct as defined by State or Federal law, or by Commission rule, regulation or order.

(2) May not make false or misleading representations including misrepresenting rates or savings offered by the supplier.

(3) Shall provide the customer with written information about the products and services being offered, or with instructions for where the information can be obtained.

(4) Shall provide accurate and timely information about services and products being offered. Information includes rates being offered, contract terms, early termination fees and right of cancellation and rescission.

(5) Shall ensure that product or service offerings made by a supplier contain information, verbally or written, in plain language designed to be understood by the customer. This includes providing written information to the customer in a language which the supplier's representative has had substantive discussions with the customer or in which a contract is negotiated.

52 Pa.Code 111.12(1) – (5).

We are unpersuaded by Blue Pilot's argument that its disclosure statement was implicitly pre-approved by the Commission in its Licensing Order and later found to be

compliant in the DuBois Manor case. The Enrico Partners case is currently pending and the Commission has yet to make a final decision in that case. The Commission recently issued an Opinion and Order in the DuBois Manor case on June 9, 2016. The Commission was silent with regard to whether the disclosure statement was clear or not. Dubois Manor Motel c/o Nisha Patel v. Blue Pilot Energy, LLC, Direct Energy, LLC and Pennsylvania Electric Company, Docket No. C-2014-2433817 (Opinion and Order at 20 entered June 9, 2016).

Additionally, there is no express language in the Commission's Licensing Order either approving any proposed disclosure statement or indemnifying the company from any later claims against it involving the disclosure statement. Thus, there is no presumption that Blue Pilot's disclosure statement is "Commission-approved" or "regulatory-compliant." Blue Pilot submitted no evidence of any written staff determinations to support its claim. This is a bald assertion, which does not constitute evidence. Pennsylvania Bureau of Corrections v. City of Pittsburgh, 532 A.2d. 12 (Pa. 1987).

To the extent that any statements may have been made by Commission staff to representatives from Blue Pilot during the time period between the date the Application was filed and the date that the Licensing Order was entered, said statements could be considered as aids, but are nonbinding upon the Commission and do not preclude the Commission from later finding that certain pertinent pricing factors were omitted from a disclosure, or that the statement is misleading in violation of any regulation at a later date. Specifically, Section 1.96 of the Commission's regulations provides that statements containing informal opinions of Commission staff whether oral or written given to the public are considered "aids" but are not binding upon the Commission. They do not have the full force and effect of the law. 52 Pa.Code § 1.96.

The Company's argument that it relied upon a belief that the Commission had implicitly approved its proposed disclosure statement before its dissemination to the public and therefore, was compliant with all regulations pertaining to a disclosure statement thereafter is without merit.

During its marketing/sales activities, Blue Pilot knew or should have known whether its disclosure statement clearly revealed material pricing terms and financial risk, or whether it was

deceptively misleading and noncompliant with Commission regulations. A reasonable person would know it is deceptive to the consumer when he/she decided to base variable rates on not only the disclosed factor of PJM wholesale market conditions, but also upon undisclosed and undefined factors, including but not limited to, “anticipated weather patterns” and an “acceptable gross margin.”

The Company has knowledge at the time it offers its products regarding the material pricing factors it is basing its variable rate upon and the extent to which it is limiting the variability of its rate. Blue Pilot is not entitled to indemnity (an exemption from civil penalty or refund) from violating numerous Commission regulations merely because the Commission granted it an EGS license through a Licensing Order.

As the Commission held in Herp v. Respond Power, C-2014-2413756 (Opinion and Order entered January 28, 2016) (Herp), the disclosure statement may be scrutinized if it is at issue in a Complaint proceeding, and the pricing factors disclosed are relevant to the issue of whether prices charged were in accordance with prices agreed upon in a disclosure statement and marketed prices. Id. 52 Pa.Code §§ 54.4(a) and 54.5(a). Such an issue is before us in the instant case; therefore, the disclosure may be scrutinized.

Specifically, Blue Pilot’s variable pricing provision in its original 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.

See OAG/OCA St. 1 at 26. Then, on or about January 22, 2014, an updated disclosure statement was mailed out to existing customers which added the following language to this “Price per Kilowatt Hour” provision.

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 or call Customer Service at 877-513-0246 for additional information about our current pricing.

See Joint Complaint at ¶ 20 and App. A. 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 Footnote 40.

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 those 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.

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 entered August 20, 2015). Additionally, as summarized in Enrico Partners:

[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 at 11.

There is an insufficient relationship between the Company’s disclosure statement and the actual prices charged by Blue Pilot. 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).

Enrico Partners can be distinguished from the two cases Blue Pilot cites as authority for its position that the disclosure statement has already been found to be regulatory-compliant by the Commission. 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. Durante, Docket No. F-2015-2487082, (Initial Decision at 8 entered December 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, conversely 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. Specifically, the Commission held in pertinent part:

We disagree with the ALJ's legal conclusion that there is no remedy here. Consistent with our decision in Herp v. Respond Power, C-2014-2413756 (Order entered January 28, 2016) (Herp), we conclude that the Company's failure to bill the Complainant at the rate offered and accepted constitutes a violation of Sections 54.4(a) and 54.7(a) of our Regulations, 52 Pa.Code §§ 54.4(a) and 54.7(a). As we noted in Herp, these provisions are companion consumer protections that, together with Section 54.5(a) of our Regulations, mandate consistency among the prices an EGS markets, discloses, and bills.

To address this violation, we direct the Company to refund the Complainant the net difference between the rate charged for the March 2014 bill (44.9 cents per kWh) and the rate offered and agreed upon (24.0 cents per kWh). This remedy is consistent with our plenary authority under Section 501 of the Code, 66 Pa.C.S. § 501, to order EGS refunds. Specifically, for the March 2014 bill, we direct the Company to calculate what the Complainant's bill would have been under a \$0.24/kWh rate and subtract this amount from the actual billed amount to determine the net difference.

Further, we direct this refund methodology for any subsequent billing periods in which the Company did not bill the Complainant in accordance with its marketed and agreed upon prices to the extent the Complainant's EGS of record remained Blue Pilot. Blue Pilot shall provide this refund within sixty days of the entry date of this Opinion and Order and shall notify the Commission when this refund has been paid.

Durante, (Opinion and Order at 9-10, entered March 14, 2016). The Commission made no specific finding that Blue Pilot's disclosure statement was either compliant or non-compliant in Durante.

We acknowledge in another recent Initial Decision involving Blue Pilot that the ALJ recommended a commercial consumer's complaint be denied and the Commission affirmed the ALJ's decision as modified finding the Complainant had failed to meet its burden of proof. See Dubois Manor, Initial Decision at 11 Dubois Manor Order at 23. However, we distinguish the instant case from DuBois Manor, as there was no expert testimony in the DuBois Manor case, there was no recording of the sales call in evidence, and the ALJ found the complainant's testimony that he was promised a one-year fixed rate product when he enrolled with Blue Pilot in October, 2013, to be incredible. Id. at 8. The ALJ found that the evidence, which included a third-party

verification (TPV) recording and a disclosure statement, showed this commercial complainant had entered into a variable rate plan with a 90-day introductory rate of 7.5 cents per kilowatt hour instead of a one-year fixed rate contract. Id. at 8-10.

The Durante and Dubois Manor decisions are not controlling in this matter, as the recommended findings of those ALJs were based upon the evidence specific to those proceedings and primarily upon 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. Additionally, neither case scrutinized Blue Pilot's disclosure statement regarding the identification of how the variable price would be calculated, which scrutiny was performed in Enrico Partners.

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.

With regard to the language added to the disclosure statement by Blue Pilot in January, 2014, 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 expressly approved by the Commission. Communications with Commission staff about a supplier's proposed disclosure statement are not binding on the Commission. 52 Pa.Code Section 1.96. See Herp, (Opinion and Order at 14, 16, 19, entered Jan. 28, 2016). Thus, there is no presumption that the disclosure statement offered as evidence in the instant case is regulatory-compliant or "Commission approved" as Blue Pilot asserts.

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"), 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).

We are unpersuaded to find ongoing continuing violations to date as there is evidence that the Company no longer has customers in Pennsylvania. OAG/OCA St. 1-SR Supplemental, Exhibit BRA-1-SR Supplemental, N.T. 750-751. However, there is substantial evidence to show all small business and residential customers in existence during the time period of December, 2013 through and including March, 2014, either did not receive an original disclosure statement at the time they enrolled, or they received a disclosure statement that failed to reveal all substantial factors upon which the pricing would be based such that a reasonable consumer could determine his/her variable rate. OAG/OCA St. 1, OAG/OCA St. 2, N.T. 745-746, 758-764. Findings of Fact Nos. 172 and 173.

For example, Ben Policastro, President of Age Craft Manufacturing testified he signed up two business accounts with Blue Pilot on February 13, 2014 with a one-year rate of \$.06/

kWh. From February - April, the bill was at \$.06/kWh on both accounts; however, in May, the rate increased to \$.299/kWh on one account and in June, the rates were \$.299/kWh and \$.199 respectively. He believes the rates increased for these two accounts before the one-year rate expired. He claims to have never received a disclosure statement. Vol. 2 Consumer Direct Testimony at 328-329, Exh. ACM-1.

Although Sherri Kennedy recalled enrolling in November/December 2013, she testified she received a disclosure statement in March, 2014. Volume 1 of Consumer Direct Testimony at 1-2. Lewis and Marjorie Townsend testified they enrolled in June or July, 2012, but received the disclosure statement on October 22, 2012. Id. at 30-33. Herbert Evans enrolled in January 2013, but never received a disclosure statement. Id. at 37-40. Patricia Fickess enrolled in October, 2012 but never received a disclosure statement. Id. at 60-64. Jeff Hamilton enrolled in July, 2012, but never received a disclosure statement. Merlin Barboza enrolled in October 2012 but never received a disclosure statement. Id. at 110-116. OAG/OCA St. 1 at 14, footnote 13.

The disclosure statement's purpose is to reveal important pricing factors upon which a reasonable customer may rely in understanding and predicting his/her variable rate. Also, it informs the customer of his/her right to rescind the agreement within 3 business days, an important consumer protection. It provides the customer with dispute procedures, and contact information. Without this information, the customer may not know how to terminate its agreement. Blue Pilot's considerable delay from enrollment to the issuance of disclosure statements or issuing none at all is of concern.

Even the updated version issued in January, 2014 is insufficient in this regard. There was never a disclosure that the prices during the first quarter of 2014 would be dependent upon "anticipated weather patterns" and "an acceptable gross margin." These two terms are vague, variable, and not well-defined.

Mr. Estomin's testimony is credible that the PJM wholesale market rate was not the main basis for the rate, despite this being the only factor disclosed. The Company is unwilling or cannot provide calculations used to determine its retail prices or show how its prices actually reflected any specific wholesale market prices, factors, or other identifiable costs. Rather, the

company based its rates upon an amalgam of factors, including a desired rate of return, projected electricity costs, day-ahead market costs, projected weather, fluctuations in generators' pricing into the PJM grid, and the spot prices of natural gas. Furthermore, Blue Pilot's prices are not explained through any reference to actual PJM market costs, but appear to reflect factors that were manipulated in an undisclosed manner, some of which were not identified in its disclosure statement. 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.

Even though the evidence suggests all of these customers received an updated disclosure statement in late January, 2014, after consumer usage during the polar vortex winter had already partially taken place and high bills were being delivered, the updated disclosure statement issued on or about January 22, 2014, does not cure the defect in the original disclosure statement and is also noncompliant.

We accept as true Ms. Everette's testimony based upon discovery responses from Blue Pilot, that 2,607 customers were billed in January, 2014. However, the average number of customers during the time period (December 2013 – March 2014) in question of 2,516 will be used in calculating the number of violations of 52 Pa.Code § 54.5(c) for failing to provide accurate pricing information to each and every one of those customers, a distinct violation per customer. Chapter 54 protects both small business and residential customers.

Chapter 111 was not in existence until July 1, 2013. Thus, it is difficult to determine the specific number of violations of regulations in Chapter 111, as many of the consumers testifying enrolled prior to that date. However, the 2010 Interim Guidelines were in effect at the time most of Blue Pilot's residential customers enrolled in the variable rate plans. Thus, as there were an average number of customers totaling 2,516²¹ for the time period of December, 2013 through March, 2014, there are similarly 2,516 violations of Section 54.5 regarding the defective disclosure statements. Additionally, for the same time period, there were an average number of **BEGIN PROPRIETARY** **END PROPRIETARY** residential customers; consequently, **BEGIN PROPRIETARY**

²¹ See Finding of Fact No. 115. OAG/OCA St. 3 at 2-3.

END PROPRIETARY violations of either Section 111.12(d) (which became effective July 1, 2013) or the 2010 Interim Guidelines Order. OAG/OCA St. 3 at 2-3.

F. Count II - Prices Nonconforming to Disclosure Statement

1. Joint Complainants

Joint Complainants contend that Blue Pilot “charged its variable rate customers prices at least as high as \$0.50 per kWh for electricity” in early 2014. 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 Complainants argue Blue Pilot violated the Commissions regulations because “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).²²

2. Blue Pilot

Blue Pilot contends that the Commission may not regulate EGS prices or interpret contracts between EGSs and their customers. Only Section 1301 of the Public Utility Code provides the Commission statutory authority to determine a “just and reasonable” rate. Blue Pilot argues it is not a “public utility” under Section 1301, and therefore, the Commission has no authority to regulate its rates or to determine whether an overbilling occurred not in accordance with a disclosure statement or marketed prices. This argument essentially is that Section 54.4 is invalid as it conflicts with Chapter 28 of the Public Utility Code. Blue Pilot cites to the Commonwealth Court decision in Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania; the Tenant Union Representative Network and Action Alliance of Senior Citizens of Greater Philadelphia and Tanya J. McCloskey, Acting Consumer Advocate v. Pa. Pub. Util. Comm’n, 120 A.3d 1087; (Pa.Cmwth. 2015)(CAUSE-PA). Blue Pilot admits the Commonwealth Court stated the Commission could “bend” competition such that it need not be unbridled especially where low-income consumers are concerned; however, Blue Pilot argues the CAUSE-PA decision should be

²² These sections of the Commission’s regulations apply to both residential and commercial customers.

very narrowly interpreted to carve out just one exception to the overall general rule that the Commission cannot determine the reasonableness of a rate, or direct the issuance a refund as it is tied to the rate. Additionally, Blue Pilot argues the Joint Complainants have failed to show its variable prices in early 2014 departed from a Commission-approved disclosure statement. Thus, Blue Pilot argues that there is no violation of Section 54.4, 52 Pa.Code.

Blue Pilot argues in its Reply Brief:

Although they [Joint Complainants] recognize that many of the regulations apply to residential customers and others apply only to residential and small business customers, they fail to present competent evidence showing how many of the 3,258 commercial customers fall within the Commission’s definition of small business customers.

Blue Pilot R.B. at 79.

3. Disposition

Section 54.4(a) provides that EGS prices billed must reflect the marketed prices and the agreed upon prices in the disclosure statement. 52 Pa.Code § 54.4(a).

The Electric Generation Customer Choice and Competition Act, 1966, Dec. 3, P.L. 802, No. 138, § 4, effective Jan. 1, 1997, (Choice Act) restructured the industry, but did not deregulate it entirely. Recently, on July 14, 2015, the Commonwealth Court reiterated that this Commission has authority to “bend” competition for good reason under the Choice Act²³ in order to protect the public, and especially low-income residential consumers during this transition to a more competitive retail market place. CAUSE-PA.

Specifically, the Commonwealth Court held, “[t]he General Assembly has reserved with the PUC the authority to ‘bend’ competition to further other important aspects of the Code, including the Choice Act, where it provides substantial reasons why the restriction on competition is necessary (i.e. there are no reasonable alternatives.)” Id. Notably, the Commonwealth Court stated

²³ 66 Pa.C.S. §§ 101-3316.

that the Choice Act may have had an “overarching goal” of competition through deregulation of the energy supply industry, which was generally thought would lead to reduced electricity costs for consumers. However, the Court also held that this “scheme does not demand absolute and unbridled competition.” Id.

We find credible Ms. Alexander’s testimony as follows:

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.

OAG/OCA St. 1 at 30. 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 an amalgam of factors, including a desired rate of return, projected electricity costs, day-ahead market costs, projected weather, fluctuations in generators’ pricing into the PJM grid, and the spot prices of natural gas. Blue Pilot admits that, “Calculations for determining rates do not exist.” 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. 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 PJM day-ahead market price as well as anticipated weather patterns, and Dr. Estomin notes that "nowhere in its Disclosure Statement and Agreement does Blue Pilot indicate that its prices are based on anticipated weather patterns or, in fact, what possible relevance anticipated weather patterns 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. 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 PROPRIETARY**
END PROPRIETARY, 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 (7.5, 39.9, and 39.9 cents per kWh, respectively) 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, stayed constant between the second and third months. This same relationship between the relevant PJM day-ahead energy market prices and Blue Pilot's prices exists for the Duquesne, Metropolitan Edison, PPL, and West Penn Power service areas. These relationships are graphically presented in Exhibit SLE-3 (Confidential). These graphs demonstrate that while the Blue Pilot prices increase with the increase in average PJM day-ahead prices between month one and month two, they do not decline with the decline in average PJM day-ahead prices between months two and three. 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 PJM day-ahead energy prices and projections of weather conditions," 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 differences in billing cycles, among other things. 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), one single price 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 PROPRIETARY END PROPRIETARY** per kWh.

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

Penn Power commercial customers were charged **BEGIN PROPRIETARY** **END PROPRIETARY** 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 PROPRIETARY 7.9 END PROPRIETARY** cents per kWh, **BEGIN PROPRIETARY END PROPRIETARY** PPL residential customer was charged **BEGIN PROPRIETARY END PROPRIETARY** cents per kWh, **BEGIN PROPRIETARY END PROPRIETARY** PPL residential customers were charged **BEGIN PROPRIETARY END PROPRIETARY** cents per kWh, and **BEGIN PROPRIETARY END PROPRIETARY** PPL residential customers were charged **BEGIN PROPRIETARY END PROPRIETARY** cents per kWh. Thus, Blue Pilot's contention that prices varied **BEGIN PROPRIETARY** **END PROPRIETARY** appears to be incorrect.

OAG/OCA St. 3 at 13-14. 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 "acceptable gross margin percentage" 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 PROPRIETARY**

END PROPRIETARY for supply in the PECO area. This gross margin equates to approximately **BEGIN PROPRIETARY END PROPRIETARY** percent of the Company's per-kWh costs in the month. To put this "acceptable gross margin" in context, the simple average total price charged to all of Blue Pilot's customers in December 2013 was approximately **BEGIN PROPRIETARY END PROPRIETARY** cents per kWh. That price, which includes not only the gross margin but also Blue Pilot's costs, is slightly more than **BEGIN PROPRIETARY** **END PROPRIETARY** 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.

OAG/OCA St. 3 at 17-18.

Blue Pilot offered no evidence to refute Joint Complainants' expert witnesses' analyses and conclusions.

We agree with the expert opinions of Ms. Alexander and Mr. Estomin and also conclude 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 statements. *Id.* at 18. Although the exact pricing calculation need not be disclosed on the disclosure statement, the pertinent factors upon which the EGS's variable rate will depend must be revealed in plain language.

Blue Pilot's disclosure statement, Welcome Letter, sales script, verification script, and marketing materials are misleading and give customers a false assurance of the efforts the Company was undertaking to keep rates low and only described the variable rate product in terms of savings and cost reductions without any disclosure of the possibility of a variable rate exceeding the EDC's PTC; thus, increasing the customer's overall costs for electricity. Exhibit BRA-2.

Blue Pilot presented no evidence that any variable rate customer in Pennsylvania achieved an overall savings or a range of savings. As Blue Pilot provided insufficient information in its written "Service Agreement for the Purchase of Electric Power and Enrollment Form," sales script, Welcome Letter and disclosure statement by which a reasonable customer could conduct its own independent research of all relevant material pricing factors, the variable rate plan customers in existence in December, 2013 – March, 2014, could reasonably have relied upon the misleading representations of cost savings to conclude the expected range of the variable rate would not exceed the utility's PTC rate in any given month. Exhibit BRA-2. Cross Exhibit BPE-ACM-1. N.T. 586. The omission of the risks of the variable rate product can mislead customers as to the range of expected variable rates. Exhibit BRA-2.

Disclosures should not serve to increase consumer confusion or undermine their confidence in the new retail electricity market. Under Chapter 54, there are mandatory uniform pricing disclosure requirements in Pennsylvania, and Blue Pilot has not substantiated its defense that it did not omit material pricing factors, but rather charged in conformity with those factors revealed in its disclosure statement.

Further, by not disclosing that its variable rate could go above the PTC, and by emphasizing an introductory rate only, a reasonable consumer could have believed the variable rate would vary from the initial rate, but not exceed the PTC. Additionally, as there was no express “no guarantee” regarding the introductory rate beyond the 60-90 days, the language could imply that these rates would probably continue or stay close to the rate beyond the 60-90 days. This finding is supported by numerous consumers who believed they were on a longer fixed rate product. For example, Mr. Quinn believed he was purchasing electric generation supply priced in six-month intervals. N.T. 305. Sales Agent King stated to consumer witness Todaro, “So, in 90 days, once we do the evaluation, just like a I promised you, that’s on a recorded line. If I can’t give you a better rate, it’s gonna stay that way. That’s gonna keep you current for six months, before we even have to speak about anything else.” N.T. 324.

Upon hearing such a statement, and with no express disclosure in the disclosure statement that there was no guarantee the initial rate would last beyond the initial 90 days or that rates may exceed the PTC, a prudent customer could reasonably believe that if there was no call-back in 90 days, then his/her initial rate would remain the same for another 90 days. David Duke also testified he believed he was in a fixed rate contract for 180 days. N.T. 379-381. Thus, it is reasonable these consumers believed they would be charged at the initial rate for six-months. Thus, the disclosure statement and the marketed prices were misleading and a reasonable consumer could not have understood their variable rate could exceed the PTC on a month-to-month basis immediately following the introductory 60-90 day period of the agreement. This financial risk was not revealed to the consumer.

As we found under Count I, there are 2,516 violations of Section 54.5(a). However, regarding Section 54.4(a), each separate monthly billing is an occurrence of overbilling in violation of 54.4(a). See Pa. Pub. Util. Comm’n., Bureau of Investigation and Enforcement v. HIKO Energy, LLC, Docket No. C-2014-2431410, Opinion and Order at 46 (Dec. 3, 2015 (I&E v. HIKO)). The imposition of a civil penalty for each overcharge is lawful and appropriate because each overbilling can be feasibly segregated into a discrete violation. See Newcomer Trucking, Inc. v. Pa. Pub. Util. Comm’n, 531 A.2d 85 (Pa.Cmwlth. 1987) (holding that Section 3301 of the Code authorizes the Commission to impose a civil penalty of up to \$1,000 for each and every discrete violation, regardless of the number of violations occurred). Thus, there were a total number of occurrences of

overbilling higher than the PTCs of EDCs during this time period of 7,861, **BEGIN**

PROPRIETARY

END PROPRIETARY. Thus, in aggregate, there were at least 7,861 occurrences of violations of 54.4(a).

G. Count III – Misleading and Deceptive Promises of Savings

1. Joint Complainants

Joint Complainants argue 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. Specifically, Joint Complainants contend 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.

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. 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 to 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 marketed prices.²⁴

²⁴ 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 customers.

2. Blue Pilot

Blue Pilot contends that the consumer testimony does not prove Blue Pilot's promised savings were not realized because the evidence shows many consumers testified that savings were not guaranteed by sales representatives. Further, the testimony regarding what sales agents told customers is uncorroborated hearsay testimony and should not be given any weight. Blue Pilot argues the customers who testified are not credible and their testimony was refuted by the disclosure statement. Blue Pilot contends Section 54.43(f) does not establish any standards to which an EGS is required to adhere. Further, Sections 111.4 and 111.5 of the Commission's regulations were not violated and there is insufficient evidence to show Blue Pilot failed to adequately train and monitor its agents. Specifically, Blue Pilot contends at least Section 111.5 (relating to agent training requirements), is vague. Blue Pilot argues, "Indeed, the imposition of civil penalties on BPE for violating a vague regulation would violate its due process rights, since it could have not reasonably been on notice as to the specific conduct that was required. See Baggett et al. v. Bullitt et al., 377 U.S. 360 (1964)." Blue Pilot R.B. at 31, footnote 46.

3. Disposition

Regarding Blue Pilot's argument that consumer testimony regarding statements made to them by Blue Pilot's sales agents should be given no weight as it is uncorroborated hearsay testimony, we disagree. The contents of an agent's oral sales representations constitute an opposing party's statement, referred to in Pennsylvania case law as a party admission, which is an exception to the hearsay rule regardless of the availability of the agent as a witness. *See Pa. R.E. 803(25)*.²⁵ Additionally, some of the sales agents' out-of-court statements were recorded and these recordings and transcripts of recordings were admitted into evidence as exhibits at the hearing.

The Commission opined in Herp:

²⁵ Pennsylvania Rule of Evidence 803(25) provides that a statement of an opposing party, offered against the opposing party, and made by the party in an individual or representative capacity, may be considered as an exception to the hearsay rule. Moreover, the EGSs' responsibility for the actions of their agents, including independent contractors, is an obligation codified in our Regulations. *See* 52 Pa.Code §§ 54.43(f), 111.2.

[i]f there is an inconsistency between the oral marketing message communicated by Respond's sales agent and the content of Respond's written disclosure statement regarding Respond's pricing, the responsibility for that inconsistency lies with the EGS, the party responsible for the representations of its agents. Contrary to Respond's suggestion, we find it unacceptable to expect customers to produce recordings of the oral sales representations made by marketers in order to carry their burden of proving misrepresentation.

Customers must be able to rely on all representations made in the sales process. While written disclosure statements are one source of information upon which customers may rely, they are equally entitled to rely on the oral marketing of an EGS' agents. For purposes of our review for compliance with our Regulations, the subsequently provided terms in a written statement do not override the oral misrepresentations that may be made in the inducement of the sale. Respond is correct that marketing involves a volume of information that may have the potential for misunderstanding. This is all the more reason, however, why Respond's agents must be held to our regulatory standards regarding accuracy in those disclosures when describing their product in their oral presentations. Respond's decision to rely on general testimony describing the training it provides its agents was, as the ALJ found, insufficient to refute the Complainant's evidence of misleading statements by its agents. And contrary to Respond's suggestion, it is not impossible to produce recordings of sales agents' pitches.

Id.

Blue Pilot argues the customers who testified are not credible and their testimony was refuted by the disclosure statement. We disagree. Although the disclosure statement states: "At any time after ninety (90) days of service, but not more frequently than monthly, Blue Pilot may increase or decrease your rate based on several factors . . .," it does not expressly disclose or reveal the risk that the variable rate may exceed the utility's rate in any given month after the introductory period. Exhibits SLE-1 and BRA-2. There is no disclosure that the "starting price set at RATE" term under the "Price per Kilowatt Hour" heading in the disclosure statement should not be taken as guarantee of future rates or any express or implied warranty regarding future savings or that the price may be lower or higher than the customer's local EDC's price. Exhibits SLE-1 and BRA-2.

Nowhere in Blue Pilot's disclosure statement, Welcome Letter, telemarketing sales script, third-party verification transcript, or other marketing materials provided in Exhibits BRA-2 is there any disclosure to the customer that Blue Pilot's rates may be higher than the

EDC's price to compare rate in any given month; rather, these documents show Blue Pilot emphasized that its initial current rate for a 60-90 day introductory period would be lower than the EDC's PTC rate in order to demonstrate possible cost savings. Exhibit BRA-2. Although an introductory rate for 60-90 days would be given to the customer, it was not the practice of Blue Pilot to provide the then current variable rate, average or historical variable rates to the customer at the time of the telemarketing sales call. Exhibit BRA-2 at 20-29.

For example, consumer witness Katherine Williams' testified that although she understood her rate was not fixed beyond the first three months in 2012 when she signed a Service Agreement (BPE-KW-1), and she understood that thereafter the price may vary month to month. However, based on the mailings she received, she was under the impression that even though the rate would be variable, it would still be better than what PP&L could provide. N.T. 109-114.

We agree with the expert opinion of Ms. Alexander who 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. 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; Exhibit BRA-2 at 5-9; Exhibit BRA-3. Moreover, Blue Pilot used written marketing materials in Pennsylvania that state the customers will experience dramatic rate increases in their PTCs. Exhibit BRA-2 at 5-9. 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 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). A review of these marketing materials leads us to conclude that Blue Pilot is offering savings in comparison to the EDC's PTC or to the customer's existing supplier. Exhibits BRA-2 and BRA-3. 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." Exhibit BRA-2 at 27-28, 33.

Blue Pilot's written marketing materials were deceptive and misleading because they included inaccurate 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 when evaluated from the testifying consumers' perspectives, or by any reasonable perspective, were likely to mislead consumers into believing they would save by switching to Blue Pilot. See OAG/OCA St. 1 at 5. 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. These statements may be injurious to Blue Pilot's competitors. Advertising intended to injure competitors by directing business to the advertiser through means of deceptive practices injures both the competitors and consumers because consumers who preferred the competitor's product are wrongly diverted. FTC v. Colgate-Palmolive Co., 380 US at 388 (1965).

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 refute this testimony. A review of one sales recording transcript shows that a 74 year old customer, Kenneth Brown, asked the sales agent, “Okay and then this is what effective for what 90 days and then what do you do, reevaluate that and recalculate the new kilowatt per hour then?” Sales Agent Cliff King responded as follows:

Alright so Mr. Brown you kind of hit on exactly what we like to do. This is in lieu of you having to do a contract, now do keep in mind we want to keep you long term so we’re not saying that you can only have 7.5 for 90 days. We’re saying we’ll guarantee that rate for a minimum of 90 days. We invite you . . . to give us a call within first the 80 to 85 days before your 90 is up.

Brown Redirect – Exhibit 1. N.T. 73 – 94.

Mr. King then represented he would call Mr. Brown back in 85 days as follows.

I’ll give you a call and we’ll set that up that way we you know I can set the expectation so you know what to expect and of course if we keep in conversation like that there will be less chance you leave you know. If I show you that I’m willing to do the things that I say I’m gonna do, and check my work.

Brown Redirect – Exhibit 1. N.T. 73 – 94.

Another sales recording transcript (George Redirect – Exhibit 1) shows a sales agent named “Rodger” told Edward George the following,

“I’m gonna be your personal account rep from this point and on I’m gonna be the one taking care of your bill so like I mentioned to you within about 80 days we have what is called a provisioning team. They actually try to get ahold of you so we can go over your bill one more time before the 90 days are up. So we can actually offer you a lower rate. If not if we have the same rate we’ll be able to keep you there for another 90 days.”

George Redirect Exhibit-1 at 4.

The sales transcript regarding Alexandra Moratelli shows the agent offered a 60-day locked in rate, but then represented that she had the “ability to call us back in a couple of months and we’ll do a free evaluation on your account. If we have a lower rate at that point, we’ll pass the savings down to you. Not like those other companies where they sign you up and forget about

you.” Moratelli Redirect Exhibit 1 at 2. When Ms. Moratelli asked who the third party verifiers were, the agent replied, “Ah, they are they’re from the government.” Id. at 8. This is not correct and shows a lack of proper training and control over sales agents.

A small business representative testified she enrolled Erie Animal Hospital into a 90-day fixed price variable rate plan on July 3, 2013. Statement of Bree Burlingame, Bookkeeper of Erie Animal Hospital, Consumer Testimony Vol. 1 at 155, N.T. 56-60. Ms. Burlingame testified she understood after the first 90 days of a rate of 7.9 cents per kWh, the rate may vary, but the sales agent said “it would remain comparable. And it always did until the couple of months when it didn’t.” N.T. 59-60. Ms. Burlingame testified Erie Animal Hospital received a 400% increase in its rate, and a \$3,000 bill. Vol 1 at 157. N.T. 60. See Erie Animal Hospital Redirect Exhibit No. 1, N.T. 63.

Mr. Euler was in his office in a business park, when two sales agents were canvassing the business park, and they approached him in his office. N.T. 353-357. The sales agents told Mr. Euler that Blue Pilot was working on smaller profit margins and passing the savings on to their valued customers. The agents assured Mr. Euler they could beat the kilowatt rate on Mr. Euler’s utility bill, and they put Mr. Euler on the phone with Blue Pilot Energy, which took almost an hour, while the agents sat in front of Mr. Euler. N.T. 355. Mr. Euler’s understanding was that his personal account and his business account would be charged a certain price for one year, with a three-month rate lock. N.T. 356.

Mr. Dennis “Dan” Todoro testified he was the controller for Mutual Aid Ambulance Service, Inc. who enrolled the company with Blue Pilot’s plan. He understood at the time of enrollment, in July, 2013, that the rate offered was 5.9 cents per kilowatt hour for at least a 90 day period, and he signed a faxed service agreement with that term in it. N.T. 311-318. Mr. Todoro was promised a rate that would always be lower than West Penn Power’s rate. N.T. 318. The sales agent, James LeMay, also promised, “So, in 90 days, once we do the evaluation, just like I promised you, that’s on a recorded line. If I can’t give you a better rate [than 5.9 cents pkWh], it’s gonna stay that way. That’s gonna keep you current for six months, before we even have to speak about anything else.” N.T. 324. Redirect Exhibit MAASI-1. Mr. Todoro is educated, with a Bachelor of Science degree in Accounting, and had been a controller for 29 years. Based upon the oral

representations made by Mr. LeMay on behalf of Blue Pilot, it was reasonable for Mr. Todoro to believe that not only was there a fixed rate of 5.9 cents per kWh for at least 90 days, but also a six month guarantee that Mutual Ambulance would not be charged higher than 5.9 cents per kWh. Mr. LeMay also guaranteed Mr. Todoro that the rates would always be lower than West Penn Power's rates. N.T. 318, 324-326. Redirect Exhibit MAAI-1. Mr. LeMay's scripted representations are similar to other sales agents.

Further, we find credible Ms. Alexander's testimony that 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. Her testimony is unrefuted. Blue Pilot presented no witnesses and never moved for admission of the pre-served written Rebuttal Testimony of Raymond Perea, Esquire at the hearing. The record shows that Blue Pilot did not regularly deliver savings to customers. OAG/OCA St. 1 at 24; 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.

We find credible Ms. Alexander's expert testimony regarding the importance of oral sales representations made to consumers, 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: "you don't have to keep paying the rates you have been paying for so long and lower rates may be available to you." The sales agent was instructed to state, "[w]e actually specialize in reducing the amount of money you are spending every month on your electricity bill." In addition, the agent was instructed to state, "[so] there are going to be a few benefits to you. You will take advantage of a better rate which is also going to reduce your bill." After emphasizing the bill reduction that the Company will provide and stating that the rate that is locked in for 60-90 days, the agent is instructed to state in closing that the rate "could vary month to month based on the market, so it could go up or down." This is immediately followed by, "[t]he way we separate ourselves from the competition is I tell all my customers to call me back in 80 days. We will do a free evaluation on your account and if we have a better rate at that point we'll pass the savings down to you." Also, "I will assist you with any problems you may have or put you right back where you are at if need be." 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. 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. Blue Pilot’s sales agents frequently promised 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. This representation appears to be deceptive since consumers testified that despite these representations, no one called them back. Ms. Alexander testified:

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 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 at 25-26. The Commission further held that IDT’s testimony from a company executive 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.

In the instant case, 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. We also consider the following consumer testimonies that are consistent with the expert opinion of Ms. Alexander regarding the issue of misleading and deceptive promises of savings:

- “[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 N.T. 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 N.T. 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 N.T. 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. Zablonsky testified that he was “led to believe a slight change may happen if I go with a variable rate.” See Consumer Testimony of Daniel Zablonsky at 271 and N.T. 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. Other than five cross-examination exhibits (BPE-ACM-1 (Age Craft Manufacturing Sales Agreement; BPE-KW-1, BPE-HJML-1 (Jayanti Shah/Howard Johnsons; BPE-SKI-1; and BPE – RT-1)), Blue Pilot admitted no evidence into the record. No sales agents appeared to refute any testimony regarding their oral promises/guarantees.

Blue Pilot does not argue that the amounts charged over the local utilities’ PTC as testified to by Ms. Everette are inaccurate. Rather, the Company bases its defense on the theory that the terms of the disclosure statement are controlling, it is irrelevant what the sales agents said, and that the Commission has no authority to require EGSs adhere to Commission regulations. Blue Pilot M.B. at 31-36.

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 PROPRIETARY** **END PROPRIETARY** more than their applicable PTC in December 2013, **BEGIN PROPRIETARY** **END PROPRIETARY** more than their applicable PTC in January 2014, **BEGIN PROPRIETARY** **END PROPRIETARY** more than their applicable PTC in February 2014, and **BEGIN PROPRIETARY** **END PROPRIETARY** 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, small business customers paid **BEGIN PROPRIETARY** **END PROPRIETARY** more than their applicable PTC in December 2013, **BEGIN PROPRIETARY** **END PROPRIETARY** more than their applicable PTC in January 2014, **BEGIN PROPRIETARY** **END PROPRIETARY** more than their applicable PTC in February 2014, and **BEGIN PROPRIETARY** **END PROPRIETARY** 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. Ms. Everette’s testimony is consistent with the testimony of Tom Darlington, a pro se complainant in a separate case, who testified he was charged a variable rate of up to 25 cents per kWh during the months of June – August, 2014, over and above what he had been promised. Tom Darlington v. Blue Pilot, F-2015-2500535, (Opinion and Order entered June 30, 2016), (Darlington).

In light of the foregoing, Joint Complainants have met their burden of proving 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 no basis to support such promises of savings.

The Company failed to rebut the Joint Complainants' evidence supporting findings of violations as it offered no witness testimony or other marketing materials or disclosure statements to refute the evidence. The Company relies almost entirely upon legal argument that the Commission has no authority to direct an issuance of refunds, to determine whether an agreement has been breached, to find a pattern or practice of misleading and deceptive marketing, or to assess a civil penalty regarding violations to a wider group of customers beyond those violations that may have occurred to the 83 people testifying before the Commission or the 350 consumers who complained to OAG/OCA to win its case. The Company essentially argues "substantial evidence" requires consumer testimony in order to find many of the alleged violations because what is misleading to one may not be misleading to all.

Accordingly, Blue Pilot has violated the Commission's regulations at Section 54.43(f) (relating to EGS responsibility for fraudulent, deceptive or other unlawful marketing acts by employees, agents and representatives). This conduct also violates Section 111.4 (relating to supplier responsibility develop standards and qualifications for individuals it hires as agents); Section 111.5 (relating to supplier responsibility to adequately train and monitor its agents); and Section 111.12(d)(1) (relating to compliance with the Consumer Protection Law), regarding the residential customers enrolled after July 1, 2013. 52 Pa.Code §§ 54.43(f), 111.4, 111.5, and 111.12(d)(1).

Additionally, this evidence supports our prior finding of violations of Sections 54.4(a) and 54.5(a), because the prices billed to an average number of 2,516 customers over a four month period were not in accordance with Blue Pilot's marketed prices and agreed upon prices in the disclosure statement. 52 Pa.Code §§ 54.4(a) and 54.5(a). It violated Section 54.4(a) each time it overbilled the residential and small business customers (approximately 7,861 times) and violated Section 54.5(a), approximately 2,516 times by either giving a misleading disclosure statement to its customers, or no disclosure statement at all; therefore, concealing material pricing terms either way. Many consumers testified they did not receive the disclosure statement when they enrolled with Blue Pilot. OAG/OCA St. 1 at 14, footnote 13. This practice is in violation of Section 54.5(b), which requires the EGS to provide the customer written disclosure of the terms of service at no charge whenever the customer enrolls. 52 Pa.Code § 54.5(b). The disclosure statement is important

to the consumer and informs him/her of cancellation provisions, pricing factors, contact information, and other important information.

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

1. Joint Complainants

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.

2. Blue Pilot

Blue Pilot contends there is no regulatory requirement to staff a call center to handle consumer complaints. Blue Pilot argues Chapter 56 establishes no specific standards that must be followed by EGSs.

3. Disposition

The Commission’s Chapter 56 regulations pertain only to residential accounts. 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.

(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 residential customer complaints. 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).

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 contend 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; 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.

We are persuaded to find 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.

A review of the exhibits attached to Ms. Alexander's written testimony shows Blue Pilot's sales scripts, marketing materials, and Welcome Letter emphasized Blue Pilot's quality customer service. OAG/OCA St. 1 at 5, 28. 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.

The consumer testimonies in this proceeding show 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). Consumer witnesses testified to the following instances, 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 N.T. 517.
- “I could not reach a live person” at Blue Pilot to discuss the bill. See Consumer Testimony of Jacqueline M. Epler at 90, N.T. 634.
- Greg Payson testified that he called Blue Pilot “four or five different times before I finally did get connected with somebody.” See N.T. 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 N.T. 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.

See also, Findings of Fact 105-115.

As the company charged unusually high variable rates to its customers in the first quarter of 2014, the Company should have expected to receive calls from customers with inquiries, disputes, or complaints. 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. Further, Blue Pilot did not refute the evidence. The Company simply argues that Chapter 56 does not apply to EGSs, even though there is an express directive in its Licensing Order directing it to comply with Chapter 56. Blue Pilot failed to adequately staff its call center and provide reasonable access to Company representatives for purposes of submitting complaints. Thus, Blue Pilot violated the following numerous times: 52 Pa.Code §§ 56.141(a), 56.151, 56.152, and 111.13(a), (b), and the Company’s Licensing Order.

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). Blue Pilot failed to properly investigate customer inquiries, disputes and complaints. 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. The following consumer testimony supports findings of violations concerning 52 Pa.Code §§ 56.141(a), 56.151, 56.152, and 111.13(a), (b).

- “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.

- 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 N.T. 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 N.T. 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 N.T. 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 N.T. 425.
- Blue Pilot sent a letter to the PUC, dated August 21, 2014, stating that “no adjustments are warranted.” See Consumer Testimony of Daniel Zablonisky 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 N.T. 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. See Findings of Fact Nos. 164 and 165.

Additionally, the record shows that even if Blue Pilot investigated customer disputes, Blue Pilot failed to properly notify customers of the results of said dispute. Findings of Fact Nos. 164 and 165. 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, N.T. 466-67. Mr. Ellingsen testified that when he telephoned Blue Pilot and requested proof that he had signed up for their product, they “gave him the run around.” N.T. 466-467. Mr. Payson testified, “They were giving me – like putting me on hold, giving me the run around, waiting for somebody, you know, back on hold, and I really – you know, I don’t know how many – I mean I had to probably re-call four or five different times before I finally did get connected with somebody.” N.T. 423.

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.

Accordingly, 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 have met their burden of proving 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).

Given the credible testimony of Ms. Alexander and the consumer witnesses, there is substantial evidence on the record to support a finding that Blue Pilot failed to investigate consumer complaints. See OAG/OCA St. 1 at 23-24; Findings of Fact 105-115. 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 PROPRIETARY**

END PROPRIETARY 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 PROPRIETARY**

END PROPRIETARY 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 appears 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 4.7% 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 un rebutted 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 N.T. 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 N.T. 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 N.T. 445-46.

We accept as credible the above testimonies and find they 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, in making this finding we are considering the following consumer witnesses’ testimonies:

- “[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 a call. See N.T. 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 N.T. 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 N.T. 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 N.T. 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. N.T. 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, Blue Pilot failed to

utilize good faith, honesty and fair dealing with these above-referenced residential customers in violation of 52 Pa.Code § 56.1(a) and the Company's Licensing Order.

Accordingly, we find 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. The number of violations is not as many as the number of residential customers in existence during the time period in question, **BEGIN PROPRIETARY** , **END PROPRIETARY** for it is unknown if everyone in the group called to complain.

I. Count V - Failure to Comply with the Telemarketer Registration Act (TRA)

1. Joint Complainants

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 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.

2. Blue Pilot

Blue Pilot argues this count should be dismissed because the Commission has no authority to hear claims brought under the TRA consistent with the Blue Pilot Interlocutory Order. Even if the Commission has jurisdiction to find violations of its regulations which consider violations of the act, the evidence is insufficient to show a violation of the Act. Blue Pilot contends that allowing the process of switching to be written, oral, or electronic, under Section 111.7, implies the Commission does not require a written contract and has not imposed any regulatory obligation upon the EGS to reduce verbal commitments to written agreements, signed and executed by the customers. 52 Pa.C.S. § 111.7. Thus, Blue Pilot violated no regulation by not reducing verbal agreements to written agreements.

3. Disposition

Section 111.10 (a) provides in pertinent part:

§ 111.10. Telemarketing.

(a) A supplier and its agents shall comply with regulations that govern marketing, consumer protection and telemarketing sales including consumer protection regulations in Chapters 54 and 62 (relating to electricity generation customer choice; and natural gas supply customer choice) and applicable provisions in Chapters 56, 57 and 59 (relating to standards and billing practices for residential utility service; electric service; and gas service).

(1) A supplier that is licensed by the Commission and engages in telemarketing is not required to register as a telemarketer under section 3(a) of the act (73 P. S. § 2243(a)), regarding registration requirement, but shall comply with other provisions of the act.

(2) An agent that contracts with a supplier to conduct telemarketing and sales activities on behalf of the supplier shall register as a telemarketer and comply with the act.

52 Pa.C.S.A. §§ 111.10(a)(1) and (2). Thus, Blue Pilot and its agents must comply with regulations that govern marketing, consumer protection and telemarketing sales including consumer protection regulations. Section 111.10(a)(1) provides that an EGS need not register with the TRA; however, under 111.10(a)(2), an EGS's independent contractor sales agents do have to register. The evidence in this case shows Blue Pilot used its own call center (employees) to market sales over the phone. OAG/OCA St. 1 at 7, 48. Finding of Fact No. 27. Although there is evidence some canvassing of small businesses through door-to-door marketers took place, the enrollments and verification recordings in evidence only pertain to recorded phone calls. Section 111.10(c) provides:

When an agent completes a transaction with a customer, the agent shall explain the supplier's verification process to the customer and state that the supplier will send a copy of the disclosure statement and other material about the service to the customer after the transaction has been verified. At the end of the telephone contact, the agent shall state that the customer may rescind the transaction within 3 business days after receiving the disclosure statement.

52 Pa.Code § 111.10(c).

Section 2245 of the TRA prohibits the act of failing to reduce any sale of goods or services made during a telemarketing call to a written contract and obtaining the consumer's signature on the written contract. 73 P.S. Section 2245(a)(7).

On August 20, 2014, an Order Granting in Part and Denying in Part Preliminary Objections in this matter was issued. 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). The Order stated that while enforcement of EGS compliance with the TRA would be appropriate in a forum with jurisdiction over the TRA, this 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 August 20 Order in this regard in its Order of December 11, 2014. See Interlocutory Review Order at 16-18.

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. Nearly all, **BEGIN PROPRIETARY END PROPRIETARY** of the 2,516 customers enrolled through a telemarketing sales call initiated by a Blue Pilot employee, which ended with a verification recording. Blue Pilot Resp. to Jt. Complaint IR Set 1-10. See also Resp. to Jt. Complaint Set III-4. Resp. to Jt. Complaint RPD Set I-22 at BPE-PALIT-000288-293. OAG/OCA St. 1 at 7. A very small percentage initiated telephonic enrollment after noticing the Company's name and introductory price on either PaPowerswitch.com or another website (i.e. Duquesne Light's webpage) as a potential supplier. See Consumer Testimony Vol 1. at 21, 41, 92, 164.

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. 52 Pa.Code § 111.10(a)(1)

The former Attorney General Thomas W. Corbett issued an advisory opinion on February 8, 2010, in response to the Commission's former 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.

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). OAG/OCA St. 1 at 49. 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.

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 consumers when accompanied by a written disclosure statement that does not reflect any of the oral statements used to sell the product.

Although several small business consumers did sign a fax, the majority of consumers overall did not sign anything. Finding of Fact No. 30. Cross Exhibit BPE-ACM-1. OAG/OCA St. 1 at 8. Consumer Direct Testimony Vol. 1 at 12, 23, 33, 39, 50, 62, 94, 98, 108, 112, 113, 127, 137, 142, 152, 166, 170, 202, 210, 223, 239, 243, 248, 254, 267, 276, 284, 292, and 304. Consumer Direct Testimony Vol. 2 at 325, 334, 338, 351, 368, 376, 380, 385, 389, 393, 400, 405, 422, 439, 445, 451, 455, 467, 471, 474, 499, 504, 509, 513, 524, 526, 528, 532, 561, 569, 573, and 79.

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 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 9 consumers whose testimonies were admitted into the record in this proceeding. The record establishes that Blue Pilot can provide no evidence that it 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.

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). We are not enforcing the TRA per se, but the Commission has authority and jurisdiction to consider the standards in the TRA in determining whether a violation 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.²⁶ 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 Towne v. Great American Power, C-2012-2307991, (Opinion and Order entered October 18, 2013) (Towne). In the Towne case, the Commission assessed a \$10,000 civil penalty and placed conditions on Great American Power's EGS license after making certain findings including: 1) failure to properly identify itself as an independent energy supplier; 2) failure to promptly place Mr. Towne on a do-not-call list; and 3) failure to provide a caller ID which permitted Mr. Towne to request placement on a do-not-call list. Thus, the Commission has already issued civil penalties in a case involving failures to comply with provisions in the TRA.

Additionally, there is substantial evidence showing that Blue Pilot failed to mail the required terms of service or disclosure documents to every residential customer 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). 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. For example, Rainbow S. Brubaker-Gass testified she did not receive a disclosure statement. Vol. 2 Consumer Direct Testimony at 340. See also Findings of Fact Nos. 172 and 173.

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 statements or written agreements to residential customers. With these failings, 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.

²⁶ A violation of the TRA is also a violation of the Consumer Protection Law. 73 P.S. § 2246(a).

J. Relief Requested

1. License Revocation

a. Joint Complainants

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. Blue Pilot sought to surrender its EGS license with the Commission on May 4, 2015. Joint Complainants request permanent revocation of Blue Pilot's EGS license, and a directive prohibiting Blue Pilot's owners and managers, Samuel Delug, Raymond Perea, and Joseph Kopyy, from any type of participation in the competitive markets in Pennsylvania. OAG/OCA St. 1-SR at 2; see also Docket No. A-2011-2223888.

b. Blue Pilot

Blue Pilot contends there is no need for revocation as it has surrendered its license as of May 4, 2015, and its cancellation is pending at A-2011-2223888. Further, Blue Pilot has no plans in the foreseeable future to operate as an EGS in Pennsylvania and does not object to revocation of its license without an opportunity for reinstatement. Blue Pilot M.B. at 110. In its Reply Brief, Blue Pilot argues that the owners/managers should not be precluded from operating through Blue Pilot's affiliates certificated to provide competitive telecommunications services in Pennsylvania. Blue Pilot R.P. at 72-73. Blue Pilot claims this relief was first raised in Joint Complainants' Motion for Entry of Judgment filed on June 22, 2015, as modified in Joint Complainants' Main Brief. However, this request is more than what Ms. Alexander recommended and by requesting these additional remedies in the briefing stage, Blue Pilot argues its due process rights have been violated.

c. Disposition

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:

* * *

(2) The failure to furnish and maintain a bond or other security approved by the Commission in the amount directed by the Commission.

* * *

(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)(2);() – (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).

OCA's witness Barbara Alexander testified 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 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.

We agree with Ms. Alexander's expert opinion. Moreover, we find no evidence to show 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. Where evidence which would properly be part of a case is within the control of the party whose interest it would be to produce it, and without satisfactory explanation fails to do so, an inference may be drawn that would be unfavorable to him. Wisler v. Manor Care of Lancaster PA, LLC, 124 A.3d317, (Pa.Super 2015). (Wisler). Thus, we draw an inference that Blue Pilot conducted no internal investigations or audits or instituted any compliance or disciplinary measures after June, 2014. These actions by Blue Pilot have adversely impacted not only the consumers but also other

licensed EGSs. Through false and misleading claims of savings the company never intended to honor, Blue Pilot drew customers away from other suppliers and the DSPs.

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).

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. 52 Pa.Code § 54.40(a). 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, one reason to permanently revoke the license is because Blue Pilot has allowed its bond or other security to lapse and disregarded requests by the Commission to cure this failure showing a lack of technical and financial fitness to maintain its EGS license. Such a revocation rather than cancellation is necessary also to ensure the integrity of the Commonwealth's competitive retail electricity market.

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 markets in Pennsylvania.²⁷ 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. Under the plenary authority of 66 Pa. C.S. §§ 501, 502 and 2802, the Commission has broad authority to regulate electric generation suppliers. Permanent license revocation, as well as prohibition of Blue Pilot's owners, managers and in-house counsel from participating in the retail electricity competitive market in Pennsylvania, rather than mere license cancellation, is appropriate. Revocation would also act as a deterrence for other alternative suppliers to overbill Pennsylvania's consumers then "surrender their license" in an attempt to avoid civil penalties and refunds.

The evidence shows that Blue Pilot's officers set the variable rates and knew or should have known the pricing factors they were using in setting rates were material and not revealed to the variable rate consumers. OAG/OCA Cross Exh. 1, FOF 24 and 43. Additionally, before engaging in such a practice, Blue Pilot's officer had signed an affidavit in Blue Pilot's Application, acknowledging Blue Pilot has a statutory obligation to conform with 66 Pa.C.S. §2807(d)(2) and the standards and billing practices of 52 Pa.Code Chapter 56. OAG/OCA Cross Exh. 1 (License Application) at 17. The owners and officers were involved in managerial decisions

²⁷ 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).

regarding deceptive marketing/sales activities as well as the mishandling of consumer complaints in violation of the Pennsylvania Public Utility Code and numerous Commission Regulations and Orders.

Section 502 of the Public Utility Code provides in pertinent part as follows.

Whenever the commission shall be of opinion that any person or corporation, . . . is violating, or is about to violate, any provision of this part; or has done, or is about to do, any act, matter, or thing herein prohibited or declared to be unlawful; or has failed, omitted, neglected, or refused, or is about to fail, omit, neglect, or refuse to obey any lawful requirement, regulation or order made by the commission; or any final judgment, order, or decree made by any court, then and in every such case the commission may institute injunction, mandamus or other appropriate legal proceedings, to restrain such violations of the provisions of this part, or of the regulations, or orders of the commission, and to enforce obedience thereto.

66 Pa. C.S. § 502. (Emphasis added.) The Commission is vested with the authority to issue injunctions against violations of Public Utility Law, 66 Pa. C.S. § 1101, *et seq.* and has issued injunctive relief in other cases involving respondents operating without certificates of public convenience in violation of law. An injunction is designed to protect the public and prevent irreparable injury through the utility's operations. Pa. Pub. Util. Comm'n v. Israel, 52 A.2d 317, (Pa. 1947); Pa. Pub. Util. Comm'n Bureau of Investigation and Enforcement v. Uber Technologies, Inc., et al., C-2014-2422723 (Opinion and Order entered May 10, 2016); Cease and Desist Order issued July 1, 2014 at Docket Nos. C-2014-2422723 and P-2014-2426846.

Thus, it is in the public interest to restrain said officers and owners from further violations of the Public Utility Code, Commission Regulations and Orders. Precluding those individuals from reapplying for an EGS license in Pennsylvania is just and reasonable given the fact that the company's management did willfully and intentionally allow its security to lapse during an attempt to exit the Pennsylvania retail electric market without providing its customers sufficient refunds for overbillings.

Therefore, permanent revocation of Blue Pilot's EGS license together with civil penalties and refunds shall be directed. However, given none of the affiliate competitive telecommunications carriers were parties to the instant action and due process requirements, we will

not at this time enjoin the officers and owners from competing in the telecommunications market. In the event that Blue Pilot does not pay the ordered civil penalties and refund amounts in the ordering paragraphs below, an action may be brought by a party in the future seeking suspension or revocation of certificates for public convenience held by affiliated competitive telecommunications providers as well as enjoining the owners/officers of the affiliate companies from operating in Pennsylvania. Thus, Blue Pilot has an opportunity to pay the refund and civil penalty before any authority to operate of a certificated affiliate would be suspended or revoked.

K. Civil Penalty and Contributions

1. Joint Complainants

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 in the amount of \$1,000 multiplied by 2,607, the number of residential and commercial customers the company had in January 2014, for a total civil penalty of \$2,607,000. In the alternative, and at minimum, Joint Complainants request a civil penalty at least as high as \$125 multiplied by the number of occurrences of overbilling that occurred over December, 2013 through March, 2014 in violation of Section 54.4(a). 52 Pa.Code § 54.4(a). Joint Complainants ask the per-occurrence penalty be higher than the \$125 assessed in I&E v. HIKO because the aggravating circumstances are greater and the mitigating factors are lower in the instant case.

2. Blue Pilot

Blue Pilot advocates no civil penalty or a very minimal civil penalty is warranted. Blue Pilot M.B. 110. Blue Pilot argues it has exited the market, has a pending cancellation of license, and is amenable to license revocation. Blue Pilot does not dispute that it lapsed in its security bond requirement in August, 2015. Blue Pilot argues a civil penalty should be much lower than \$1,000 per occurrence of violation and also cited to I&E v. HIKO as authority for this position. Blue Pilot M.B. 111-112, 116. Blue Pilot argues its managers' decisions were less egregious than HIKO's managers' decisions to overbill customers on an introductory 1-7% guaranteed savings

plan; thus, Blue Pilot’s civil penalty per occurrence of overbilling should be less than \$125, the figure used in I&E v. HIKO.

3. Disposition

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).

Other than a \$1,000 civil penalty per violation per day of occurrence cap, there is no statutory maximum civil penalty in the instant case. 66 Pa.C.S. §§ 3301(a) and (b). 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).

a. Civil Penalty

We find credible Ms. Everette's testimony as follows:

In January 2014, Blue Pilot billed 2,607 customers. Of these, 1,485 were residential and 1,122 were commercial.

In February 2014, Blue Pilot billed 2,511 customers. Of these, 1,432 were residential and 1,079 were commercial.

In March 2014, Blue Pilot billed 2,464 customers. Of these, 1,407 were residential and 1,057 were commercial.

OAG/OCA St. 3 at 3. Thus, Joint Complainants argue we should use the figure of 7,582²⁸ in calculating a civil penalty because Blue Pilot issued that many total bills in January

²⁸ Total billings for January – March, 2014 totaled 2,607 billings + 2,511 billings + 2,464 billings = 7,582 billings.

through March 2014, of which 4,324 were residential and 3,258 were commercial. As with other evidence provided by the Joint Complainants in this case, Blue Pilot did not rebut these numbers.

Rather than relying on the number of customers billed in January 2014 of 2,607, since that figure includes bills reflecting Blue Pilot rates below the PTC and some above, it is more accurate to base a finding of violations of Section 54.4(a) upon the number of overbilled customers or the number of occurrences of when the customer was billed a rate in excess of the PTC (overbilling during the period of December, 2013 – March, 2014). Based upon Ms. Everette’s testimony, Blue Pilot had an average number of residential and small business customers of approximately 2,516 during the time period of December, 2013 – March, 2014. OAG/OCA St. 3 at 2-3. Exh. VSC-1 (indicating the Village Service Center’s peak demand was 15.10 kW in January, 2014; 15.5 kW in February, 2014; and 11.90 kW in March, 2014). Exhibit AEE-1.

Further, there were a total number of occurrences of overbilling higher than the PTCs of EDCs during this time period of 7,861, **BEGIN PROPRIETARY**

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Thus, it more accurately supports the violations of Section 54.4(a). The total overcharge to residential and small business customers combined is \$2,459,517.²⁹ This figure takes into consideration Blue Pilot’s re-bill in April and May 2014 to those customers that complained and includes total credits of \$49,710 and refunds of \$173,744. The average overcharge per occurrence is **BEGIN PROPRIETARY**

. **END PROPRIETARY** Accordingly, there were 7,861 occurrences of overbilling in violation of 54.4(a) and these above facts further support our prior finding of 2,516 occurrences of violations of 54.5(a) under Count I of the Joint Complaint.

²⁹ It is noted that the \$2,459,517 finding is higher than the refund requested by Joint Complainants of \$2,408,449 based upon billings in January – March, 2014. Thus, we will adopt the lower figure for purposes of establishing a refund pool.

Applying the same process of developing a civil penalty as the Commission did in I&E v. HIKO based on the occurrence of overbilling establishes a civil penalty in this case of a

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END PROPRIETARY for a total civil penalty of approximately \$2,554,000.

In this proceeding, Joint Complainants have established that Blue Pilot has violated at least 15 of the Commission’s regulations. 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. 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	3,651 kWh
January 2014	3,798 kWh
February 2014	3,833 kWh
March 2014	3,700 kWh

OAG/OCA St. 3 at 22. (Internal footnote omitted). Joint Complainants argue 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. We agree having also

considered some of the exhibits attached to consumer testimony for small businesses. For example, Exh. VSC-1 indicates the Village Service Center's peak demand was 15.10 kW in January, 2014; 15.5 kW in February, 2014; and 11.90 kW in March, 2014. The customer had a GS-1 rate classification. Although we did find one testifying customer's bill indicating peak demand at 30.72 kW which is slightly over 25 kW - Merlin Barboza/RK Enterprise, Inc., Exh. RKE 6th-1, the fact that Blue Pilot did not break down its responses to discovery by commercial customer classification, leads us to find in favor of adopting Witness Everette's methodology for calculating the number of small business customers affected by overbilling and deceptive marketing practices. Blue Pilot offered no evidence to refute Ms. Everette's testimony that **BEGIN PROPRIETARY END PROPRIETARY** are small business customers with peak loads all less than 25 kW.

Additionally, the figure was given by Blue Pilot in response to interrogatories requesting information regarding commercial accounts. Blue Pilot did not explicitly provide the class or sub-class of the commercial customers. However, Ms. Everette's testimony (N.T. 768; OAG/OCA St. 3 at 21) regarding the usage patterns of the commercial accounts as well as the exhibits showing GS-1 rates on several different bills, (i.e. OAG/OCA St. 3 Exh. AEE-1, and Consumer Testimony Exh. VSC-1) are persuasive. Where evidence which would properly be part of a case is within the control of the party whose interest it would be to produce it, and without satisfactory explanation fails to do so, an inference may be drawn that would be unfavorable to him. Wisler supra. In the Consumer Testimony, Exh. VSC-1 indicates the Village Service Center's peak demand was 15.10 kW in January, 2014; 15.5 kW in February, 2014; and 11.90 kW in March, 2014. The company had an opportunity to put on its own witness to refute Ms. Everette's testimony but did not.

Under 66 Pa.C.S. 3301, the Commission may assess civil penalties of up to \$1,000 per occurrence of a violation of a Commission regulation. Therefore, applying 66 Pa.C.S.A. § 3301, a \$1,000 fine per 2,516 customers³⁰ yields a similar total civil penalty to one calculated by multiplying average overcharges per 7,861 occurrences of overbilling. So, although civil penalties need not be reduced to mathematical calculations, it is helpful to show logic in following prior

³⁰ 2,516 average number of residential and small business customers from December 2013 – March 2014 multiplied by \$1,000 civil penalty = \$2,516,000.

precedents instead of being arbitrary or capricious given these calculations. Either way, the total civil penalty of \$2.55 million seems reasonable and within the guidelines of prior precedent given the multitude of other regulations violated during the same time period concerning the same group of customers (those in existence from December, 2013 through March, 2014).

b. Rosi Factors

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).

1) First Factor – Blue Pilot's Conduct

The first factor for consideration is whether the conduct at issue was of a serious nature. Section 69.1201(c)(1) states:

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.

52 Pa.Code § 69.1201(c)(1).

Blue Pilot contends its conduct was not serious because it did not train its sales agents to make any pricing or savings guarantees other than initial price guarantees that were honored for their specified time periods. We disagree. Blue Pilot's misconduct was serious, which results in a higher civil penalty. Blue Pilot's conduct involved willful misrepresentations as evidenced by its disclosure statement, welcome letter, telemarketing sales scripts, and marketing materials hiding the potential financial risk and the pertinent pricing factors it actually used in determining prices. Exhibit BRA-2. Nearly all of the sales were conducted through telemarketing enrollments over phone calls initiated by Blue Pilot's employees located at its call center in an intentional rather than negligent manner and it was neither a mere administrative filing nor a technical error. OAG/OCA St. 1 at 7, footnote 1. Sales agents were instructed to emphasize an introductory rate good for 60-90 days, and savings in comparison to the customers' EDCs' PTC, but were not instructed to adequately explain the pricing terms of the variable rate product or the risk

involved in the agreement. Most of these phone-call enrollments had verification calls included at the end, but these recordings indicate the variable rate term was not explained and this is an insufficient way to enroll the customer given the Telemarketer Registration Act requirement that verbal agreements over the phone be reduced to written contracts. OAG/OCA St. 1 at 13-25.

Although there were some faxed and signed sales agreements during the telephonic enrollments, the variable rate product was not more clearly described as it was in the company's disclosure statement. As evidenced by its disclosure statement, sales scripts, welcome letters, marketing materials, and verification recordings, Blue Pilot did not tailor its telemarketing campaign to the requirements of Pennsylvania's regulations, and its sales scripts, verification call script, welcome letter, and disclosure statement did not reveal enough information about the "competitive" variable rate price feature for a reasonable customer to understand the financial risk involved with the transaction as a reasonable consumer would be unable to determine the prices. During all times relevant, the terms "competitive," "variable" and "market" are not defined in these aforementioned documents. OAG/OCA St. 1 at 12-13. This shows an intentional disregard for Pennsylvania consumer protection law as well as the Commission's regulations.

It shows a lack of proper control over sales agents as well. Blue Pilot lacks internal policies and programs that can document and detect violations of Pennsylvania regulations, investigate potential violations and take proactive steps to prevent future violations. We are particularly concerned with statements indicating the government is verifying the consent of the customers. Moratelli Redirect Exhibit 1 at 8. The practice of claiming to be "proactive" with customer care is a promised benefit that was not delivered upon as evidenced by some of the consumers' unrefuted testimonies and some sales call transcripts. Brown Redirect – Exhibit 1. N.T. 73 – 94. OAG/OCA St. 1 at 23. The practice of promising that an introductory rate would remain in effect after the initial 90 days of the agreement if the sales agent could not give the customer a better rate is deceptive. Redirect Exhibit MAASI-1. Blue Pilot did not offer any sales agents as witnesses to testify they followed-up with any customers after 80-85 days of enrollment to offer a better or the same introductory price if they could as promised on the sales calls. This is serious conduct that warrants a higher civil penalty.

2) Second Factor - Consequences of Blue Pilot's Conduct

The second factor is whether the resulting consequences of Blue Pilot's conduct at issue were of a serious nature. Section 69.1201(c)(2) states:

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.

52 Pa.Code § 69.1201(c)(2).

Blue Pilot contends that since no allegations were raised about personal injury or property damage, there were no serious consequences. Although there was no property damage or personal injury alleged by the consumer witnesses, many of those who testified, indicated they and/or their small businesses experienced financial hardship as a result of the overbilling over December 2013 through March, 2014.

For example, Rainbow S. Brubaker-Gass testified "I had to get outside help from PCAP so I could keep electric for my 3 young children." OAG/OCA Consumer Direct Testimony Vol. 2 at 342. As Patti Fikess of Fickess Pumps, Inc. stated, "How can small people and small companies that are trying to scratch out a living in PA – who has very high taxes and does little for small people and companies pay these high bills?" Exhibit PF-1. A day care owner wrote that her child care center could not afford a \$900 bill. Exhibit MP/CLC-1. Sherri Kennedy testified a rate jump of 7.5 cents to 46 cents and two consecutive electric bills totaling \$10,000 forced Recycle Logistics to close for three months in 2014 and almost put it out of business. N.T. 578. Ms. Kennedy not only enrolled her small company, but also enrolled two residential accounts at the same time and at the same introductory rate of 7.5 cents offered by Blue Pilot. N.T. 336-387. Cross Exhibit BPE-SK-1.

Some customers sustained cancellation fees or other financial fees in order to pay their bills. 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. Some faced termination shut-off notices from their EDCs because of failure to timely pay their electric bills. The customers had a difficult time terminating their agreements because they experienced

difficulty in reaching the call center. Consumer testimony reveals some customers faced termination notices and had to enter into payment arrangements with their EDCs in order to continue to receive electricity. Consumer Testimony Vol. 1 at 50 and 202. The Commission cannot order restitution in the form of EDC charges, bank overdraft charges or personal loan charges as a result of the overcharge in order to make the customers whole; however, the fact that many were financially distressed can weigh into the consideration of a higher penalty. Additionally, these actions caused a strain on EDCs' hardship funds in 2014, misguided customers from Blue Pilot's competitors, and generally jeopardized the success of the retail electric market in Pennsylvania. These are also serious consequences.

3) Third Factor – Whether Blue Pilot's Conduct Was Intentional

The third factor is whether the conduct at issue was deemed intentional or negligent. Section 69.1201(c)(3) provides:

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.

52 Pa.Code § 69.1201(c)(3). "Intentional" is defined as "done by intention or design." *Merriam-Webster's Collegiate Dictionary* 609 (10th ed. 1999).

In its Tentative Order, which became final by operation of law on or about June 30, 2002, the Commission stated as follows.

Based upon our review of the Rosi factors, we believe that the civil penalty is appropriate. The total amount to be paid by ACN Energy in the instant settlement is \$45,000. In reviewing the appropriateness of a civil penalty, we consider a number of factors including the nature of the alleged violations. For unintentional or negligent alleged conduct, the Commission starts with the presumption that the civil penalty will be in the range of zero dollars to \$500 per day; whereas, for intentional actions, the Commission starts with the presumption that the civil penalty will be between \$500 and \$1,000 per day.

Pa. Pub. Util. Comm'n v. ACN Energy, M-00021618, (Tentative Order entered June 14, 2002 became final by operation of law, on or about June 30, 2002) at 4 citing Joseph A. Rosi v. Bell-

Atlantic-Pennsylvania, Inc. and Sprint Communications Company, L.P., C-00992409 (Order entered March 16, 2000).

Blue Pilot contends no evidence has been offered to suggest Blue Pilot intentionally promised savings and then ignored those promises by increasing variable prices. Conversely, the Joint Complainants contend 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.

These were not the actions a few rogue agents. Rather, the materials in Exhibit BRA-2 show management directed its telemarketers to target offers to small business and residential customers and emphasized savings with an introductory rate, but enrolled all customers into a variable rate product without sufficient information for the customers to understand the pricing terms. Many consumers believed they were in a fixed rate product for at least six months or a year, and that the company's sales agent would call them back to negotiate a new rate within a few months before the rate would change. Some customers reasonably believed if they did not receive a phone call back from Blue Pilot within the 60-90 day period, that their introductory rate would continue. There was no evidence that the company called back the customers. We believe Blue Pilot's actions were intentional and this supports a higher civil penalty.

4) Fourth Factor – Blue Pilot's Modifications of Internal Practices and Procedures

The fourth factor considers whether Blue Pilot made any effort to modify internal practices and procedures to address the conduct at issue. Section 69.1201(c)(4) states:

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.

52 Pa.Code § 69.1201(c)(4).

Blue Pilot contends it voluntarily ceased marketing to Pennsylvania customers in March 2014 and in May 2015 exited the Pennsylvania market; thus, the penalty should be lower. This is not a modification of internal procedures or corrective actions within the company. Other than updating its disclosure statement on January 22, 2014, we see no evidence that the Company made any effort to modify its internal practices to address its violations of the Public Utility Code and the Commission's regulations and Orders prior to the Complaint having been filed on June 14, 2014. In fact, Tom Darlington, a pro se complainant, testified he was charged a variable rate of up to 25 cents per kWh during the months of June – August, 2014, over and above what he had been promised. Darlington, supra.

In the Darlington case, the ALJ directed a civil penalty in the amount of \$2,500 for three violations of Section 54.4(a) (overbilling) at \$500 per violation and one violation of 54.5(a) (for never providing a disclosure statement) at \$1,000. Mr. Darlington's unrefuted testimony that he was overbilled not in accordance with prices marketed to him over the phone, and that he did not receive a disclosure statement, was sufficient to find violations of Sections 54.4(a) and 54.5(a). 52 Pa.Code §§ 54.4(a) and 54.5(a). The Commission sustained Mr. Darlington's complaint and adopted the ALJs Initial Decision on June 30, 2016. The facts in the Darlington case are consistent with Ms. Everette's testimony that the Company continued to charge a 24.5 cent price per kilowatt hour rate through August, 2014. This indicates an unwillingness to modify internal procedures, and shows continued non-compliance after March, 2014.

5) Fifth Factor - The Impact of Blue Pilot's Conduct

The fifth factor involves the number of customers affected and the duration of the violation. 52 Pa.Code § 69.1201(c)(5). Blue Pilot contends only 315 customers who contacted OCA or complained to OAG, representing 3% of the total number of variable price customers, were adversely affected. Blue Pilot claims this number is *de minimus*. Blue Pilot M.B. at 114. We disagree, as we find substantial evidence supports a finding that at least 2,516 residential and small business customers were affected by the conduct over a period of at least 4 months. Finding of Fact No. 115. Further, by Blue Pilot's own argument, it contends we should consider violations to consumers who did not testify at the hearing, as only 83 consumers testified as opposed to 315. Blue Pilot M.B. at 114. This argument contradicts Blue Pilot's "uncorroborated hearsay" argument.

The duration of the Company's deceptive and misleading conduct in marketing and disclosures has been since the Company began marketing in 2012, but the effects were felt by consumers more seriously in the first quarter of 2014; thus, we are basing a civil penalty considering the specific number of residential and small business customers Blue Pilot had during December 2013 through March 2014 and the overbillings in reference to the local utility's PTC during that time period. Some of the customers testified they were over the age of 60, and thus, senior citizens were affected by the misconduct.

The fact that a \$2.55 million civil penalty is warranted is not because the fines per occurrence are harsh; rather, the number of the occurrences of violations is very high. The Commission does not cap the number of customers an EGS may have (other than restricting authority to certain service territories). The penalty is high because Blue Pilot had customers in service territories across Pennsylvania, and continued overbilling above the PTCs of EDCs over a four month period regarding a high number of customers – 2,516, not in conformity with a regulatory-compliant disclosure statement or marketed prices. This case is not unlike I&E v. HIKO in that it involves thousands of customers and a high number of violations. See also, Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. Uber Technologies, Inc., C-2014-2422723, (Opinion and Order entered May 10, 2016).

We agree with Joint Complainants that the Company's conduct of deceptive and misleading marketing, disclosures and billing has impacted all of the Company's customers during the December 2013 – March, 2014 time period, 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.

6) Sixth Factor – Blue Pilot's Compliance History

The sixth factor addresses the compliance history of Blue Pilot. 52 Pa.Code § 69.1201(c)(6). Section 69.1201(c)(6) provides:

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.

52 Pa.Code § 69.1201(c)(6).

Blue Pilot contends it has an unblemished prior compliance record with the commission before February, 2014, as no formal complaints had been filed prior to that time. Although one complaint has been sustained since then, this adjudication does not constitute a prior compliance history since the allegations revolve around the same time period. Blue Pilot M.B. at 114 citing Durante.

Although the Company's compliance history prior to January 2014 seemed adequate in that few if any 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, is indicative of frequent, recurrent violations. See 52 Pa.Code §69.1201(b)(6).

In Enrico Partners, supra, wherein the complainant asserted 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 at 2, 9, 13. 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. The Commission has not yet rendered a final decision in this case.

In Durante v. Blue Pilot Energy, LLC, Docket No. F-2015-2487082, (Opinion and Order entered March 14, 2016) (Durante), the Commission directed Blue Pilot to refund a pro se complainant for an overbill in March 2014. Id. at 2. The Commissioners also directed 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.

In Darlington, the ALJ directed Blue Pilot to pay a \$2,500 civil penalty after the company failed to appear for a scheduled hearing, and the pro se Complainant testified as to an overbilling above the PTC over a three month period in June-August 2014. Currently, in addition to the instant proceeding and Enrico Partners, only two other active cases are pending against Blue Pilot. See Brenda Smith v. Blue Pilot Energy LLC and PPL Electric Utilities Corp., F-2015-2472890. See also, Alan Haulman d/b/a AJH Pizza, Inc. v. PPL Electric Utilities Corp. and Blue Pilot Energy, LLC, C-2014-2415273.

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. 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. These facts show non-compliance even after Joint Complainants filed their Complaint.

We also view the Company was non-compliant when it failed to maintain a proper 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.—

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 re: Electric Generation Supplier License Cancellations of Companies with an Expired Financial Security M-2015-2490383, (Final Order entered March 14, 2016).

Under 52 Pa.Code § 54.42(a)(2), the failure to furnish and maintain a bond or other security approved by the Commission in the amount directed by the Commission is one reason a license may be suspended or revoked. Thus, it appears from the evidence in Ms. Alexander's Supplemental Surrebuttal Testimony that the Company was noncompliant with the Commission's regulations requiring maintenance of a bond or other security at the Commission as of August 27, 2015, and same true today. N.T. 727. OAG/OCA St. 2-SR Supplemental. This non-compliance weighs in favor of a higher civil penalty.

7) Seventh Factor – Blue Pilot's Cooperation With Investigation

The seventh factor addresses whether Blue Pilot cooperated with I&E's investigation. 52 Pa.Code § 69.1201(c)(7). There was no Commission investigation in this case. Therefore, this factor does not apply.

8) Eighth Factor – Amount of Civil Penalty Necessary to Deter Future Violations

The eighth factor is consideration of the amount of the fine or civil penalty necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount. 52 Pa.Code § 69.1201(c)(8).

The Commission has stated, “Though we may more often craft penalties specific to the individual case and circumstances at hand, we have leeway to consider the impact of our actions as deterrence to the industry as a whole. Doing so is an effective means of assuring the industry understands the importance of compliance with our Regulations to the development of a fair and reliable competitive market.” See I&E v. HIKO Energy, LLC, Docket No. C-2014-2431410, Opinion and Order at 54 (Dec. 3, 2015) at 44, footnote 13. 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, Supra.

As explained in Enrico Partners:

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 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).

We disagree with Blue Pilot’s contention that no civil penalty is required. Allowing an EGS to overcharge a substantial number of customers at rates up to 500% of the PTC not in accordance with a regulatory-compliant disclosure statement or marketed prices, and to then leave the market with no substantial refund to those customers or civil penalty is tantamount to inviting the company to reorganize or reapply under a different name and repeat the process. Once a company is found to have overbilled its customers not in accordance with their marketed prices and their disclosure statement together with deceptive marketing practices, it is an appropriate deterrent

to require the company to give back what it overcharged and additionally assess a civil penalty in order to deter future misconduct. Requiring only a refund with no civil penalty would leave the company in no worse position than if it had billed correctly to begin with. There would further be no incentive to settle and provide customers with quicker refund relief. We believe a \$2.55 million civil penalty is sufficient to prevent Blue Pilot from engaging in similar misconduct in the future. Such a penalty will further act not only as deterrence to Blue Pilot, but also to the industry as a whole from such misconduct in the future.

A \$2.55 million civil penalty is reasonable and not excessive as it is somewhat reflective of the overbilling/refund amount and there is no evidence to show the company is financially distressed, other than its bald assertion in a motion to dismiss. Such a bald assertion is not considered evidence. Pennsylvania Bureau of Corrections v. City of Pittsburgh, 532 A.2d. 12 (Pa. 1987). There is no evidence of a pending bankruptcy petition or that Blue Pilot is shutting down operations in either Maryland or Nevada due to financial distress.

Thus, a \$2.55 million civil penalty in addition to a \$2.4 million refund is appropriate given the numerous widespread violations and the fact that the Company is large, operating in multiple States. It is appropriate to deter this type of misleading and deceptive pricing/marketing conduct, especially during prolonged periods of extreme temperatures, when customers may be relying upon electricity the most and health and safety issues are heightened.

9) Ninth Factor - Past Commission Decisions in Similar Situations

The ninth factor calls for a consideration of past Commission decisions in similar situations. 52 Pa.Code § 69.1201(c)(9).

The primary positions of the parties are that Joint Complainants request a \$1,000 per customer billed in January 2014 (2,607) civil penalty totaling \$2,607,000; conversely, Blue Pilot argues for no civil penalty. Because both parties cite to I&E v. HIKO as authority for their positions, we look to that caselaw for guidance. Blue Pilot M.B. at 112-116. OAG/OCA M.B. at 103-104. In the instant case, Joint Complainants alternatively propose calculating a civil penalty based upon 7,582 billings from January – March, 2014 instead of overbilling occurrences of 7,861

from December, 2013 – March, 2014. OAG/OCA M.B. at 103. It appears that while Joint Complainants alternatively argue for a minimum civil penalty of \$947,750 (\$125 civil penalty multiplied by 7,582 occurrences of billing during January – March, 2014), they also argue for a greater fine than \$125 per occurrence due to more egregious conduct. OAG/OCA M.B. at 103. Blue Pilot seems to argue for no or a very minimal civil penalty because its managers’ conduct was less egregious than HIKO’s managers’ conduct. Blue Pilot M.B. at 116-117. Specifically, Blue Pilot argues:

Since the HIKO Energy case involved an executive management decision to increase variable prices, intentionally ignoring a written contract that guaranteed savings for a period of time, and the Commission did not revoke the EGS’s license, no civil penalty is warranted here. No allegation has been made that BPE did guaranteed savings through its written contracts. Moreover, BPE honored the initial prices that were included in those written contracts at all times, including during the Polar Vortex.

Blue Pilot M.B. at 116

We compare the instant case to the I&E v. HIKO case. In I&E v. HIKO, the Commission issued an order directing HIKO pay a \$125 civil penalty per occurrence of overbilling regarding a group of residential customers (5,700) who were overbilled during the first quarter of 2014, while they were on HIKO’s “guaranteed savings plan.” Because the number of occurrences of overbilling was so high, 14,689, the total civil penalty was \$1.8 million ($\$125 \times 14,689 = \1.8 million). Another way to look at the civil penalty, is that it closely represented the amount overcharged of \$316 per customer ($\$316 \times 5,700 = \1.8 million). Each of the customers was overcharged on average \$124 per occurrence, or \$316 over a four month period, December, 2013 – March, 2014. The Commission found that HIKO’s misconduct was intentional and involved false and deceptive marketing and sales activities. Id. at 44.

In comparing the two cases, HIKO’s mitigating factors were that it: 1) agreed to injunctive relief and change of business practices in a companion complaint case; 2) agreed to \$2 million in refunds; 3) some overbillings were less than \$1; 4) there was less evidence regarding customer financial hardship; 5) no slamming violations; and 6) HIKO already provided \$159,320 in refunds voluntarily. Factors increasing HIKO’s civil penalties included: 1) serious misconduct; 2) duration of overbilling over four months; and 3) the top management decisions were intentional.

In comparison, Blue Pilot's mitigating factors are that it paid \$173,744 in refunds voluntarily, and it may have paid its gross receipts taxes and PJM charges prior to voluntarily surrendering its license. Factors increasing Blue Pilot's penalty include: 1) serious misconduct; 2) over 500% increase in price compared to PTC during March, 2014; 3) duration of violations of overbilling over 4 consecutive months; 4) widespread deceptive marketing activities; 5) disclosure statement terms for pricing not disclosed; 6) customers testified to financial hardship; 7) Bond expired August 27, 2015, with no proof of replacement security at the Commission; and 8) an attempt to leave Pennsylvania market without refunding customers the overbilled amount. Unlike Blue Pilot, HIKO intended to continue its operations in Pennsylvania and agreed to pay a \$2 million refund, and correct its business practices. Both cases involved egregious overbilling of thousands of customers over a 4-month period in the same time period.

The Commission determined there had been 14,689 violations of Section 54.4(a) based upon the testimony of I&E witness Daniel Mumford, HIKO's witnesses Harvey Klein and Charles J. Cicchetti, as well as circumstantial evidence of numerous data entries showing prices billed versus the EDCs' PTC in different EDC territories. The Commission only denied refund relief as moot in the I&E v. HIKO decision because in a separate but concurrent decision issued the same date, it approved by Final Order a settlement between OAG/OCA and HIKO which provided for refunds of 3.5% savings for the same customer group of approximately 5,700. OAG/OCA v. HIKO Energy, LLC, C-2014-2427652, (Commission Order entered December 3, 2015). The Commission made concurrent but separate rulings because the two cases had not been formally consolidated for hearing; however, the group of consumers affected were present in both cases, and the time period of when violations occurred overlapped between the cases. Thus, while there was no civil penalty issued in the OAG/OCA v. HIKO case, there was a \$2 million refund pool established to give the same group of customers in I&E v. HIKO refund relief. Conversely, while there was no refund relief in the I&E v. HIKO case, there was a \$1.8 million civil penalty for overbilling 14,689 times in violation of Section 54.4(a), 52 Pa.Code § 54.4(a). Thus, neither decision was made in a vacuum; rather, the Commission considered the facts and legal arguments as presented in both cases in rendering compatible decisions. The end result was that HIKO could keep its license on the condition that: 1) it placed a moratorium on offering variable rate plans while

correcting its business practices; 2) paid a \$1.8 million civil penalty; and 3) paid approximately \$2 million into a refund pool.

The Commission denied revocation relief in the I&E v. HIKO case because HIKO agreed as part of the settlement with OAG/OCA to have a moratorium on offering a variable rate product and to correct its business practices. See I&E v. HIKO Energy, LLC, Docket No. C-2014-2431410, Opinion and Order at 46 (Dec. 3, 2015). 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). More recently, on January 28, 2016, the Commission stated in an Opinion and Order regarding HIKO's request for supersedeas stay the following:

HIKO's challenge to the \$1.8 million penalty evidences a lack of understanding of our authority to impose penalties. Based on the Company's deliberate overbilling of 5,708 customers, we could have imposed a penalty of \$5,708,000, a result with clear precedent, had we simply applied the maximum penalty allowed for each individual customer violation. Indeed, that was the result in a settled case on which HIKO relies, Pa. PUC Bureau of Investigation and Enforcement v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas and Electric and U.S. Gas and Electric d/b/a Pennsylvania Gas and Electric, Docket No. M-2013-2325122 (Order entered October 2, 2014) (PaG&E 2014 Settlement).

Id.

The Commission noted that there was no consumer testimony in the record at C-2014-2431410; however, the concurrent but separate case, OAG/OCA v. HIKO at Docket No. C-2014-2427652, did have consumer testimony regarding hardship in its record; and, accordingly, that testimony regarding the same time period supported a finding of financial hardship in the I&E v. HIKO case at Docket No. C-2014-2431410.

Specifically, the Commission held:

The \$125 per violation determined by the ALJs approximates the Company's average overbilling of \$124. It is thus comparable to the overbillings notwithstanding any number above or below that average. While comparability in and of itself does not justify the \$125 as an appropriate amount for a penalty for each violation, we find the correlation between the two to temper HIKO's claim that

the determination is too high. Also, although we find the support for the ALJs' conclusion that customers suffered financial hardship lacking on this record, consumer testimony admitted into the record to support the parties' agreement in OAG/OCA-HIKO Settlement addresses that issue. Placing little or no weight on this particular finding by the ALJs, however, does not disturb our conclusion that the civil penalty recommended by the ALJs on the whole is appropriate.

Id. (Emphasis added.) (Internal footnote omitted).

The Commission's December 3, 2015, Opinion and Order, which in large-part adopted our reasoning regarding I&E v. HIKO, is currently on appeal at Commonwealth Court of Pennsylvania at Case No. 5 C.D. 2016; however, it serves as precedent.

Other recent Commission decisions are also similar to this case. In Herp and Kiback v. IDT Energy, Inc., C-2014-2409676, (Opinion and Order August 20, 2015)(Kiback), both pro se complainant cases, the Commission directed the EGS to pay a \$1,000 penalty for violating 54.4(a) regarding one customer over a 3-5 month period of time. In Kiback, the Commission directed IDT Energy, Inc. to pay a civil penalty of \$2,000 for the violation of the Commission's regulation at 52 Pa.Code § 54.4(a) and the 2010 Interim Guidelines at Section H.2.). Id. at 35. In Herp, the Commission directed Respond Power, LLC to pay a civil penalty of \$4,000 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). Id. at 63.

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.

In this matter, 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 shall be directed to pay a significant civil penalty.

Because the Commission held in I&E v. HIKO, a civil penalty per occurrence of overbilling was warranted, we will do the same. Many factors in the instant case are comparable to I&E v. HIKO regarding numerous instances of overbilling an average amount less than \$500 per occurrence. Both cases involved intentional directives from top management regarding pricing decisions. Both cases involved a similar duration of overbilling during roughly the same time period. Blue Pilot had 2,516 customers versus HIKO's 5,700 customers. Both cases involved some financial harm sustained by customers as a result of the overbillings. Both companies could have attempted to exit the market and transfer their customers rather than overbilling them.

A total civil penalty of \$2,554,000 is similarly calculated as in I&E v. HIKO as it also reflects the amount of the total overcharge to a finite group of customers. This amount is \$53,000 less than Joint Complainant's requested civil penalty of \$2,607,000 and \$38,000 greater than \$2,516,000, (a \$1,000 per average number of customers affected during the time period civil penalty). Similar to I&E v. HIKO, a civil penalty calculated per occurrence is reasonable taking into consideration an additional directed refund amount of \$2,408,449.

10) Tenth Factor - Other Relevant Factors

Blue Pilot requests consideration of the increased cost to purchase supply during the "polar vortex" winter. Blue Pilot claims that the Commission already excused its price increases in its "Variable Rate Order," Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products, Docket No. M-2014-2406134 (Order entered March 4, 2014) (Variable Rate Order). We disagree. Many EGSs endured cost increases during the winter of 2013-2014 but many also absorbed these costs instead of profiting by taking advantage of the higher than normal usage caused by frigid temperatures in Pennsylvania to increase their variable rates as high as 500%.

Blue Pilot does not have a good excuse when it blames its pricing increases on the "polar vortex" winter given the evidence before us regarding the actual pricing methodology used

versus the pricing factors listed in the disclosure statement. Thus, a reasonable way in keeping with precedent is that the Commission could fine the company \$1,000 per average number of residential and small business customers for multiple violations per customer. ($\$1,000 \times 2,516 = \$2,516,000$). This amount would be in addition to a refund and revocation of license. The Commission has fined other EGSs \$1,000 per customer for violating Section 54.4(a) in some fully-litigated pro se cases. See Herp, Kibak. 52 Pa.Code § 54.4(a).

The evidence shows the CEO/CFO signed Blue Pilot's Application agreeing to follow the directives of 66 Pa.C.S.A. § 2807(d)(2), which require information be provided to consumers in an understandable format enabling them to compare prices and services on a uniform basis. This provision was not followed. Although the Company is seeking to leave the market, it is doing so leaving no security behind and without refunding its customers except for \$173,744 compared to the over \$2.4 million in overcharges. A substantial gross margin as well as other undisclosed material pricing factors were part of the variable price charged; thus, a \$2,554,000 civil penalty is reasonable as it falls well within the statutory cap of \$1,000 per occurrence per violation and is generally reflective of the total amount overbilled. 66 Pa.C.S.A. § 1301.

We note that some of the regulations have similar elements. For instance Section 54.43(1) is similar to 66 Pa.C.S.A. § 2807(d)(2) (relating to plain language) and Sections 54.43(f) and 111.12(d)(2) both prohibit an EGS from making false or misleading representations regarding rates or savings offered by the supplier or its agents. Although Section 111.12 applies only to residential customers, 54.43 applies to small business and residential customers. Thus, although we can acknowledge violations of both Chp. 54 and 111, for purposes of assessing civil penalties, the Commission could merge the penalties for similar violations.

The customers enrolled with Blue Pilot in order to reduce their electric bills. Many of these witnesses did not understand the meaning of the variable price feature and were led to believe it would not change dramatically from month to month, or that it would be competitively low or move in concert with the EDC's price to compare rate.

Of the 83 witnesses, 63 testified that Blue Pilot's sales agents led them to believe they would save on their electric bill, failed to give them accurate pricing information, did not

explain that the price would be variable after the 60-90 day introductory period, and led them to believe the price would be fixed for a longer period of time or that they would be notified of a price change before it became variable. At least 26 consumer witnesses testified they never received any disclosure statement or terms of service from Blue Pilot. Of those testifying they had received a disclosure statement, 20 stated it was received long after their enrollment and 15 stated they received the revised disclosure statement in January, 2014, after their enrollments took place the year before.

Blue Pilot engaged in widespread deceptive marketing by emphasizing initial introductory savings that would “reset every 60 days” in contrast to the disclosure statement pricing term that would establish variable prices each month. In none of the disclosure statements, sales contracts, verification recordings, or advertised materials are the price terms fully disclosed in a fair and meaningful manner. Instead, the sales scripts encourage the customers to call their agents back in 80 days to see what other savings they can receive.

L. EDC Hardship Fund Contributions

Blue Pilot objects to any directive to pay either a civil penalty or any amount to EDC Hardship Funds in their pro rata share. It contends that since its license will be revoked, no purpose would be served by imposing a civil penalty or payments to EDC Hardship Funds of any amount. Joint Complainants argue that it would be appropriate, given the amount and seriousness of the violations shown in this proceeding, to direct Blue Pilot to make sizeable 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. However, Joint Complainants offer no authority to support this request.

Therefore, while the Commission has approved terms of prior settlements involving EGSs which included the EGS’s agreement to contribute to EDC hardship funds, in other settled cases, the Commission has declined modifying settlements as such. See LBPS v. MXenergy, Inc. , M-2012-2201861, (Opinion and Order entered December 5, 2013), wherein the Commission

directed a civil penalty of \$22,000 but rejected comments to a settlement proposing an EDC Hardship Fund contribution as part of the settlement involving 22 customers and 22 violations of 52 Pa.Code § 57.173 (relating to unauthorized switching). The Commission held that no contributions to EDC hardship funds would be directed pursuant to 66 Pa.C.S. § 3315 and prior Commission caselaw. *Id.* at 8.

As such, we decline to adopt the Joint Complainants' argument that Blue Pilot should be required to contribute to EDC's Hardship Funds.

M. Refunds

1. Joint Complainants

Joint Complainants requested that the Commission direct Blue Pilot to 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. Joint Complainants request refunds as 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 December, 2013, January, February and March 2014 in violation of the Public Utility Code and the Commission's regulations and orders. OAG/OCA M.B. at 105-117.

2. Blue Pilot

Blue Pilot contends the Commission lacks statutory authority to direct a refund, re-bill or credit to customers who were served by the EGS. Because the refund is tied to the rate, and the Commission has ruled that it lacks jurisdiction to regulate the rates of EGSs, by similar logic, the Commission has no authority to direct a refund. As authority, Blue Pilot cites an ALJ decision that was reversed and remanded by the Commission. Yaglidereliler Corp. v. Blue Pilot Energy, LLC, Docket No. C-2014-2413732 (Initial Decision issued June 24, 2014). The ALJ's Initial Decision which had dismissed the complaint on preliminary objections was reversed and remanded for a hearing. The Commission held that oral representations by a sales agent to the company's owners may have had a bearing on the Complainant's informed decision to agree to a variable rate. A bill

going from \$2,000 to \$9,000 in one month raised questions as to whether its rates were competitive and reasonable within the meaning of Blue Pilot's disclosure statement. Ultimately this case resolved through settlement and a certificate of satisfaction on or about May 19, 2015.

Blue Pilot further argues that since there is no express statutory authority to direct a refund, and the Commission has ruled Section 1312 refund authority does not apply to EGSs, then the broad plenary authority under 66 Pa.C.S. 501 is insufficient to confer express authority upon the Commission to direct refunds. Blue Pilot cites as authority, ARIPPA v. Pa. Pub. Util. Comm'n, 966 A.2d 1204 (2009) (ARIPPA). Blue Pilot argues the lack of statutory authority to award damages is akin to the lack of authority to direct EGSs to issue refunds.

Although Blue Pilot acknowledges the Commission has found plenary authority under Section 501 in IDT Order and has issued refunds in several cases including Kiback and Herp, Blue Pilot requests we disregard those decisions based upon its argument. Blue Pilot M.B. at 131. Finally, Blue Pilot contends that Joint Complainants have not proven the prices in question were not in conformance with Blue Pilot's marketed prices and disclosure statement. Accordingly, no refunds should be issued for any of the customers, or at least for those that did not testify. Blue Pilot M.B. 133.

3. Disposition

The Commission has reiterated its position that it does have authority to issue refunds when Sections 54.4(a) or 57.177 have been violated in the following pro se complainant cases. Werle v. Respond Power, LLC, Docket No. C-2014-2429158, (Opinion and Order at 8-9 entered February 23, 2015) (Werle); Nadav v. Respond Power, LLC, Docket No. C-2014-2429159, (Opinion and Order at 7 entered December 19, 2014) (Nadav); Yaglidereliler Corporation v. Blue Pilot Energy, LLC, Docket No. C-2014-2413732, (Opinion and Order entered Jan. 16, 2015) (Yaglidereliler); and Fritz v. Respond Power and PPL Electric Corporation, F-2014-2453884, (Opinion and Order entered March 19, 2015)

The refund requested of \$2.4 million represents the amount charged by Blue Pilot over and above what the EDC would have charged for the same usage during the same 4 months –

Dec. 2013 –March 2014 regarding approximately 2,516 customers. The amount was determined by Witness Everette when she analyzed Blue Pilot’s responses to discovery requests, and compared its variable rates and the usage of its customers to the PTC rates that the EDCs provided her with regarding small business and residential customers. Blue Pilot waived cross examination of Ms. Everette’s direct testimony and it was unrefuted. Blue Pilot put on no witnesses.

The Commission has jurisdiction and authority under Section 54.4(a) and 54.5(a) of our Regulations, 52 Pa.Code §§ 54.4(a), 54.5(a), which require an EGS’s billed price reflect its disclosure statement. Also, the Commission has been directing EGS’s to refund or rebill customers when 54.4(a) is found to have been violated. We find that based upon Blue Pilot’s offers of promised savings and deceptive omissions regarding material factors upon which variable rates would be charged, the variable rate customers in existence during December, 2013 – March, 2014 who were charged above their EDCs’ PTCs during those months were billed not in accordance with 52 Pa.Code § 54.4(a). Thus, the 2,516 customers are entitled to refund relief, because in part we have found at least one violation of Section 54.4(a) concerning each customer’s account.

In these types of cases, the Commission may not be able to make a consumer entirely whole for such additional costs sustained due to increased generation supply charges: i.e. EDC charges due to late payment fees, personal loan fees, cancellation or early termination fees, lost business revenues due to temporary closures, etc.; however, under Section 103(a) of the Public Utility Code, the Commission’s remedies are considered to be cumulative with those of other jurisdictions. 66 Pa.C.S. §103(a). The Commission is in a position to investigate and is interested in preventing deceptive marketing practices, which can lead to unauthorized switching.

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 66 Pa.C.S.A. § 501 in conjunction with 52 Pa.Code § 54.4(a) 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.)³¹ 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 verbal marketed prices (guarantees of savings) did not conform with the EGS's subsequent billing); see also Kiback.

In Werle 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

³¹ The Commission recently entered a Tentative Opinion and Order tentatively adopting with modifications the Initial Decision of the ALJs, which had approved a joint settlement involving refunds, contributions to EDC hardship funds, corrective action, and civil penalties in Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc., Docket No. C-2014-2427657, (Tentative Order entered June 30, 2016).

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.

We believe finding 7,196 violations of Section 54.4(a) not only supports a civil penalty of \$2,554,000, but also supports the finding of a \$2.4 million refund remedy as these instances of overbilling pertain to all customers on the variable rate plan during the time period in question (an average number of 2,516).

The evidence in the instant case supports wider findings of overbillings pertaining to approximately 2,516 customers as opposed to just those overbillings pertaining to the 83 consumers testifying, due in large part to the expert witnesses' testimonies. See generally, OAG/OCA St. 1. OAG/OCA St. 2. OAG/OCA St. 3 at 2-22. The Commission has never directed an EGS to refund or rebill for having violated any Section other than Section 54.4(a), except for Sections 57.171-177, pertaining to unauthorized switches. There are no slamming allegations in the instant complaint, so Chapter 57 does not apply to this case. We recognize that in Kiback, the Commission declared it was not limiting its authority to issue refunds in only two carve-out situations involving violations of Chapters 54 or 57. Although the Commission has identified these two instances where it believes it has the authority to order an EGS to provide a refund, the Commission has specifically rejected the notion that its authority to issue refunds or credits is limited to those two situations. Mickie Schreiber v. Respond Power, LLC, Docket Number C-2014-2446282 (Order entered February 11, 2016) at n.8 (noting that the Commission has the authority to order an EGS to issue a refund under "appropriate circumstances."). The Commission has consistently directed issuance of refunds when it found violations of Section 54.4(a) in Herp, Kiback, Durante, and I&E v. HIKO, all fully litigated cases. (In I&E v. HIKO, the refund relief was actually awarded in the companion case of OAG/OCA v. HIKO, issued on the same date.)

Because there are 7,861 occurrences of overbilling in violation of 52 Pa.Code §54.4(a), similarly we find a refund is due for every overbilling to protect the public. Specifically, those customers in existence from December 2013 – March, 2014 shall receive a refund from a refund pool in the amount of the difference between the price charged by Blue Pilot and what they would have been charged had they been with their EDC during the same time period. Consistent with refund pools established in other similar cases, Blue Pilot shall additionally pay \$100,000 towards the costs of administering the refund pool. Any fees over and above \$100,000 shall be taken from the refund pool.

As such, Blue Pilot shall be directed to provide refunds to its customers for overcharges in December, 2013 through March 2014, through a third-party Administrator as retained by Joint Complainants. The aggregate amount due to Blue Pilot's customers for this period is approximately \$2,459,517.³² However, as OAG/OCA request a lesser amount of \$2,408,449 in their briefs, we are willing to direct the latter amount. Blue Pilot is 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 of the amounts billed over the applicable PTCs and refunds due for its customers as part of a compliance filing.

Joint Complainants offered the current Administrator already retained to disburse funds regarding settlements reached with Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric (C-2014-2427656); IDT Energy, Inc. (C-2014-2427657); and HIKO Energy, LLC (C-2014-2427652) in order to process the disbursement of such a large refund pool to a large number of customers. This appears to be a “consumer-friendly” and efficient way to administer the refund amount. Joint Complainants have the legal authority to issue requests for proposals (RFP) or request for qualifications (RFQ) and hire independent third-party Administrators, which then collect and distribute fund monies. This concept is not new to the Commission. Similar to the OCA and OAG, the Commission, as a governmental agency, has issued RFPs and RFQs to hire third-party

³² By our calculations, the refund should be \$2,459,517 disaggregated as follows: **BEGIN PROPRIETARY**

END PROPRIETARY

administrators pursuant to various regulatory provisions in the past. See Implementation of the Alternative Energy Portfolio Standards Act of 2004, Docket No. M-00051865, Request for Qualifications For Alternative Energy Credit Program Administrator, April 12, 2006. Alternative Energy Portfolio Standards Act of 2004, 73 P.S. §§ 1648.1-1648.8. See also, Establishment of a Pennsylvania Universal Service Fund, M-00001337, Order, entered April 18, 2000. 52 Pa.Code §§ 63.161 *et seq.* Thus, in the interest of assisting the OAG/OCA to obtain relief on behalf of consumers who have been violated by state consumer protection law and Commission regulations incorporating same, we find in favor of Joint Complainants on this issue as it appears to facilitate refund relief to customers in Pennsylvania.

The EGS will be directed to pay the refund amount plus an additional \$100,000 in order to cover anticipated Administrator fees into the Refund Pool. In the event the Administrator's fees exceed \$100,000, any remaining fees shall be paid from the refund pool fund monies. OAG/OCA M.B. at 118, footnote 32. Additionally, the monthly reports regarding fund distribution should be submitted to designated Commission staff.

V. CONCLUSION

For all of these aforementioned reasons, we conclude that substantial record evidence demonstrates that Blue Pilot deceptively and misleadingly charged prices to its variable rate customers that neither conformed to the Disclosure Statement nor reflected marketed prices promising savings in violation of 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. The Company's mass telemarketing campaign in Pennsylvania disregarded the Commission's regulations and resulted in widespread deceptive and misleading claims of savings as evidenced by the Company's own telemarketer scripts, customer care scripts, verification scripts, marketing materials, and disclosure statement upon which the consumers relied in enrolling in Blue Pilot's variable rate product. Substantial evidence shows at least 2,516 residential and small business customers were overbilled above their local EDCs' PTC at least 7,861 times not in accordance with a disclosure statement or

marketed prices, during a specific period of December, 2013 through March, 2014. Blue Pilot has not refuted this evidence

Additionally, at least 2,516 consumers were billed prices not substantially based upon the factors revealed in the disclosure statement. These same consumers either received a misleading disclosure statement, or none at all, (either being a violation of Commission regulations). The preponderance of evidence shows Blue Pilot had deceptive marketing practices inadequate control over its agents, and a poor handling of residential consumer complaints.

The mitigating factor that the Company voluntarily gave \$173,744 in refunds to those customers pales in comparison to the overall overbilling, and the fact that Blue Pilot is voluntarily attempting to exit the market does not adequately protect the consumers as they have not yet received a sufficient refund.

However, in light of the fact that Joint Complainants request the refund pool be based on a lesser figure of \$2,408,449 based upon billings in January – March, 2014, in their Main Brief, we will adopt the lower figure and grant that request. Therefore, Blue Pilot shall be directed to pay into a refund pool \$2,408,449, plus \$100,000 in administrative fees, and shall pay a civil penalty of \$2,554,000. This civil penalty amount is similar to the sum reached using Joint Complainant's proposed alternative method of calculating civil penalties, involving a civil penalty greater than \$125 used in I&E v. HIKO for each bill rendered in violation of the Commission's regulation 52 Pa.Code § 54.4(a). OAG/OCA M.B. at 103. Finally, Blue Pilot lacks the managerial and technical expertise to retain its EGS license; therefore, it shall be permanently revoked.

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.

VI. CONCLUSIONS OF LAW

A. 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. 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).

7. Decisions of the Commission must be supported by substantial evidence, which is such evidence that a reasonable mind might accept as adequate to support a conclusion. 2 Pa.C.S.A. § 702.

8. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n, 413 A.2d 1037 (Pa. 1980); Erie Resistor Corp. v. Unemployment Comp. Bd. of Review, 166 A.2d 96 (Pa.Super. 1961); and Murphy v. Comm., Dept. of Public Welfare, White Haven Center, 480 A.2d 382 (Pa.Cmwlth. 1984).

B. Lack of Control and Training of Agents

9. 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).

10. EGSs are required to train sales 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. 52 Pa.Code § 111.5(a).

11. 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. 52 Pa.Code § 111.5(e).

12. Blue Pilot has failed to properly supervise and train its marketing agents in violation of 52 Pa.Code § 111.5(a) to (f).

13. 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).

C. Count I – Failing to Provide Accurate Pricing Information

14. 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).

15. 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).

16. 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).

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

18. 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).

19. 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).

D. Count II – Prices Nonconforming to Disclosure Statement

20. 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).

21. 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).

E. Count III – Misleading and Deceptive Promises of Savings

22. 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.

23. Blue Pilot has made 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).

24. Blue Pilot 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).

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

25. 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.

26. 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.

27. 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.

28. 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.

G. Count V – Failure to Comply with the Telemarketer Registration Act

29. Except for registration, the Commission’s regulations generally require EGSs to comply with the Telemarketer Registration Act, 73 P.S. § 2241, *et seq.* See 52 Pa.Code § 111.10(a)(1). Exhibit (Attorney General Opinion).

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

31. 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).

VII. ORDER

THEREFORE,

IT IS ORDERED:

1. That the Complaint filed by the Office of Attorney General and Office of Consumer Advocate against Blue Pilot Energy, LLC at Docket No. C-2014-2427655 is hereby sustained in part and denied in part consistent with the above discussion.

2. That Blue Pilot Energy, LLC is directed to pay the Commonwealth of Pennsylvania a civil penalty in the amount of \$2,554,000, due within thirty (30) days from the date of entry of the Commission’s Final Order, made payable to “The Commonwealth of Pennsylvania” and addressed to:

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

3. That Blue Pilot Energy, LLC is directed to pay the sum of \$2,508,449, which includes a \$100,000 third-party Administrator's fee, into a refund pool intended to provide at least 2,516 consumers refunds of all charges that were over and above the Price To Compare of their respective electric distribution companies' service territories for amounts charged from December 2013 through March 2014.

4. That the Office of Attorney General and Office of Consumer Advocate's request for restitution of cancellation fees, termination fees, and other financial fees charged to customers as a result of overbilling by Blue Pilot or switching from Blue Pilot are denied.

5. That one half of the refund pool amount in Ordering Paragraph No. 3 shall be paid within 30 days after the Office of Attorney General and Office of Consumer Advocate identify to Blue Pilot Energy, LLC the Administrator retained, and Blue Pilot shall deposit the remaining one-half within 60 days thereafter.

6. That Blue Pilot shall fully and timely cooperate with Office of Attorney General, Office of Consumer Advocate and the Administrator by providing all customer information necessary to calculate each customer's refund amount including billing rates, usage and addresses, as well as a full accounting of all refunds and bill credits provided to Pennsylvania customers so that an appropriate mitigation credit may be determined.

7. That the Administrator shall use best efforts to distribute the funds from the refund pool within 180 days of receiving the funds from Blue Pilot, and shall provide monthly reports to Office of Consumer Advocate, Office of Attorney General, Blue Pilot Energy, LLC and designated Commission staff of funds distributed.

8. That if any funds remain in the refund pool after issuance of the calculated refunds, they shall be forwarded to the Pennsylvania Department of Treasury pursuant to unclaimed property requirements for the customers entitled to the refund.

9. That the Electric Generation Supply License held by Blue Pilot Energy, LLC at Docket No. A-2011-2223888 shall be permanently revoked, and the operating rights, powers and privileges previously granted shall forthwith cease and terminate.

10. That no future electric generation supply license application from the owners, officers, directors or managers of Blue Pilot shall be considered by this Commission.

11. That the Law Bureau and Office of Technical Utility Services take such appropriate action upon any viable security instrument pertaining to Blue Pilot Energy, LLC such that appropriate claims may be made against it.

12. That if there are any active customers remaining with Blue Pilot, who have not elected an alternative electric generation supplier within ninety days after receiving Blue Pilot Energy, LLC's notice of cancellation, said customers shall be switched back to their respective default service providers by their default service providers with no cancellation fees charged to the customers.

13. That Complainant's request for Electric Distribution Company hardship fund contributions is denied.

14. That a copy of this Order shall be served upon the Secretary's Bureau, Office of Administrative Services, Bureau of Technical Utility Services, the Office of Competitive Market Oversight, Law Bureau, and the Bureau of Consumer Services.

15. That after Blue Pilot Energy, LLC remits \$2,554,000 as required by Ordering Paragraph No. 2, and files an affidavit reporting that all refunds have been paid in full, the Secretary's Bureau shall mark Docket No. C-2014-2427655 closed.

16. That Blue Pilot Energy, LLC shall cease and desist from further violations of the Pennsylvania Public Utility Code, Commission Regulations, and Commission Orders regarding retail electricity markets.

17. That upon revocation, the Commission's Secretary is directed to strike Blue Pilot Energy, LLC's name from all active utility lists maintained by the Annual Report Section of the Secretary's Bureau and the Assessment Section of the Bureau of Administrative Services.

18. That upon entry of a Final Order revoking its license, Blue Pilot Energy, LLC shall be removed from the Commission's website, and notifications shall be sent to all electric distribution companies in which Blue Pilot Energy, LLC is licensed to do business.

Date: July 7, 2016

/s/
Elizabeth H. Barnes
Administrative Law Judge

/s/
Joel H. Cheskis
Administrative Law Judge