

COMMONWEALTH OF PENNSYLVANIA



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August 8, 2016

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

RE: Commonwealth of Pennsylvania, by Attorney General  
KATHLEEN G. KANE, Through the Bureau of Consumer  
Protection,  
And  
TANYA J. McCLOSKEY, Acting Consumer Advocate,  
Complainants

v.

Blue Pilot Energy, LLC

Respondent

Docket No. C-2014-2427655

Secretary Chiavetta:

Enclosed please find Joint Complainants' Reply Exceptions, in the above-referenced proceeding.

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

Respectfully Submitted,

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

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

Enclosure

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

\*185199

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

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REPLY EXCEPTIONS OF JOINT COMPLAINANTS

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DATE: August 8, 2016

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## I. INTRODUCTION

In its Exceptions to the Initial Decision, Blue Pilot Energy, LLC (Blue Pilot or the Company) took issue with the Administrative Law Judges' (ALJs) findings of violations of the Public Utility Commission's (Commission) regulations and orders relative to each Count of the Joint Complaint and the remedies recommended by the ALJs. Further, Blue Pilot challenged the Commission's authority and jurisdiction in this matter. The Office of Attorney General Bureau of Consumer Protection (OAG) and the Office of Consumer Advocate (OCA) (collectively, Joint Complainants) submit that the ALJs acted fully within the Commission's authority in this matter. Further, Joint Complainants submit that the ALJs' findings in the Initial Decision are based upon substantial evidence submitted into the record by Joint Complainants, which included expert testimony regarding Blue Pilot's marketing and billing practices and consumer testimony of individual experiences with the Company. Blue Pilot submitted no evidence to rebut Joint Complainants' evidence. As such, Blue Pilot's exceptions the Initial Decision are without merit and should be rejected. Joint Complainants submit that they have met their burden of proof in this matter, and the Initial Decision is well reasoned, based upon substantial evidence of record, and should be adopted.

## II. REPLY EXCEPTIONS

**OAG/OCA Reply to Blue Pilot Exception 1: The ALJs Were Correct in Determining that Blue Pilot Failed to Provide Accurate Pricing Information to its Customers. (Blue Pilot Exceptions at 6-12; OAG/OCA M.B. at 34-41; OAG/OCA R.B. at 13-28).**

In its Exceptions, Blue Pilot argued that the ALJs erred in concluding that Blue Pilot violated Section 54.5(c) of the Commission's regulations, 52 Pa. Code § 54.5(c), by failing to

provide accurate pricing information in the Company's disclosure statement.<sup>1</sup> Blue Pilot Exc. at 6-12. Blue Pilot argued that the pricing information in its disclosure statement is clear and conspicuous and that the ALJs erred in relying on Joint Complainants' expert witnesses' testimonies. Id. at 6-10. Blue Pilot further argued that the ALJs erred in not considering any evidence of prior Commission review and approval of the language in Blue Pilot's disclosure statement. Id. at 10-12.

In the Initial Decision, the ALJs correctly determined that Blue Pilot's disclosure statement violated 52 Pa. Code § 54.5(c),<sup>2</sup> as well as other provisions of the Commission's regulations. Joint Complainants' expert witnesses reviewed and analyzed Blue Pilot's disclosure statement and testified that "[t]he Disclosure Statement provides virtually no information regarding the establishment of prices following the expiration of the initial fixed-price period" and "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." See OCA St. 2 at 8-9; OCA St. 1 at 28. Blue Pilot did not present any evidence to rebut or otherwise contradict this expert testimony.

In addition, the ALJs relied on the consumer testimony in this proceeding and correctly found that there was substantial evidence to show that:

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<sup>1</sup> Blue Pilot did not except to the ALJs' other findings with regard to Count I that the Company also violated Sections 54.43(1) (requiring that suppliers "provide accurate information about their electric generation services using plain language and common terms in communications with consumers" and "in a format that enables customers to compare the various electric generation services offered and the prices charged for each type of service"), and 111.12(d)(5) (requiring that suppliers "ensure that product or service offerings made by a supplier contain information, verbally and written, in plain language designed to be understood by the customer"), and Sections 54.43(f) and 111.12(d)(1) (requiring compliance with consumer protection laws), 52 Pa. Code §§ 54.5(c), 54.43(1), 54.43(f), 111.12(d)(5) and 111.12(d)(1). See I.D. at 66.

<sup>2</sup> Section 54.5(c), 52 Pa. Code § 54.5(c), is based upon the requirements in 66 Pa. C.S. § 2807(d)(2) that the Commission shall establish regulations to require Electric Generation Suppliers (EGSs) to "provide adequate and accurate customer information to enable customers to make informed choices regarding the purchase of all electricity services offered by that provider" and that information provided to customers shall be "in an understandable format that enables consumers to compare prices and services on a uniform basis."

[A]ll 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 customer could determine his/her variable rate.

I.D. at 66. As such, the ALJs correctly found that “[t]here is an insufficient relationship between the Company’s disclosure statement and the actual prices charged by Blue Pilot.” I.D. at 62.

Further, the ALJs correctly rejected Blue Pilot’s assertions regarding the Commission’s prior approval of the Company’s disclosure statement.<sup>3</sup> As determined by the ALJs, there was no evidence in the record regarding such approval, and to the extent that statements about the disclosure statement were made by Commission staff such statements are not binding on the Commission. See I.D. at 59, citing 52 Pa. Code § 1.96.<sup>4</sup>

The ALJs accurately concluded that, based on all of the evidence of record, Blue Pilot violated the Commission’s regulation at Sections 54.5(c) (requiring that variable pricing terms include the conditions of variability and the limits on price variability, if applicable), as well as other Commission regulations at 52 Pa. Code §§ 54.5(c), 54.43(1), 54.43(f), 111.12(d)(5) and 111.12(d)(1). As such, Joint Complainants submit that the ALJs’ Initial Decision regarding Count I should be approved.

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<sup>3</sup> Additionally, contrary to Blue Pilot’s assertion, the ALJs did consider another ALJ’s determination in Dubois Manor Motel c/o Nisha Patel v. Blue Pilot Energy, LLC, Docket No. C-2014-2433817, Initial Decision (Dec. 2, 2015), that Blue Pilot’s disclosure statement was “accurate and clear” and correctly found this matter distinguishable. See I.D. at 64-65. The ALJs correctly determined that an ALJ’s analysis of Blue Pilot’s disclosure statement in Enrico Partners LP v. Blue Pilot Energy, LLP, Docket No. C-2014-2432979, I.D. at 10 (Feb. 12, 2015), is applicable to this matter. See I.D. at 62-63.

<sup>4</sup> Further, with regard to Blue Pilot’s assertion that the ALJs erred in not considering two recent federal court decisions dismissing class action complaints filed by consumers against EGSs regarding increases in variable prices, Blue Pilot refers to Silvis v. Ambit Energy L.P., 2016 WL 1086703 (E.D. Pa.) (March 21, 2016), and Orange v. Starion Energy PA, Inc., 2016 WL 1043618 (E.D. Pa.) (March 16, 2016). Blue Pilot Exc. at 11. These cases are irrelevant to this matter, as they involve class actions pursuant to other EGSs’ disclosure statements and prices charged pursuant to the disclosure statements. As such, these cases provide nothing helpful to the determination by this Commission whether Blue Pilot’s marketing and billing practices violated this Commission’s regulations.

**OAG/OCA Reply to Blue Pilot Exception 2: The ALJs Were Correct in Determining that Blue Pilot Charged Prices that Did Not Conform to its Disclosure Statement. (Blue Pilot Exceptions at 12-15; OAG/OCA M.B. at 41-47; OAG/OCA R.B. at 28-32).**

In its Exceptions, Blue Pilot argued that the ALJs erred in finding that the Company's prices did not conform to its disclosure statement, as making such a finding amounts to interpretation of a private contract and regulation of EGS prices, which is beyond the Commission's statutory authority. Blue Pilot Exc. at 12-15. Blue Pilot's arguments are wholly without merit and have already been properly rejected by the Commission.

The ALJs relied upon Joint Complainants' experts' testimonies in finding that the prices charged did not conform to the disclosure statement. See I.D. at 71-75. Joint Complainants' expert witness Ms. Alexander testified, *inter alia*, that "Blue Pilot's methodology to establish its retail prices has no correlation to the vague language of its Disclosure Statement" and Blue Pilot "charged prices to Pennsylvania customers that do not conform to any reasonable interpretation of its Disclosure Statement." See I.D. at 71, citing OAG/OCA St. 1 at 30, 31-32. Further, Joint Complainants' expert witness Dr. Estomin testified that Blue Pilot represented in its disclosure statement that prices would be based on PJM wholesale market conditions and testified that, based upon his analysis, "the overriding implication is that the prices charged by Blue Pilot could not possibly be tied to the PJM wholesale markets." See I.D. at 72, 73, citing OAG/OCA St. 2 at 9, 14.

Blue Pilot's assertion that reaching this conclusion is beyond the Commission's statutory authority is a red herring that must be rejected. Blue Pilot relies on Office of Small Business Advocate v. FirstEnergy Solutions Corp., Docket No. P-2014-2421556, Opinion and Order (Jan. 26, 2015) (OSBA v. FES), for its assertion that the Commission would improperly engage in the interpretation of a private contract if it accepts the ALJs' finding. In OSBA v. FES, the OSBA

sought for the Commission to issue a declaratory order determining, after review and interpretation of FES's fixed price contracts with small commercial customers, "at what point does the amount of PJM ancillary services fees rise to the level necessary to trigger the pass-through clause?" *Id.* at 4. OSBA's claim was not a challenge to FES's marketing or billing practices and did not allege violations of the Commission's regulations. *Id.* at 10-11. The Commission concluded not to use its discretion to issue a declaratory order and address the underlying merits of the claim, as OSBA confirmed that it was seeking for the Commission to interpret the meaning of a contract. *Id.* at 2, 19. The Commission described its jurisdiction over EGSs, *inter alia*, as follows:

[T]he Commission can only ensure that an EGS is abiding by the standards of conduct and disclosure, the marketing and sales Regulations, and the contract expiration/change-of-terms notice requirements; and that the rate billed by an EGS was calculated in accordance with those materials.

OSBA v. FES at 18-19. (Internal footnotes omitted).

In this case, the issue is not an interpretation of a contract terms but an issue of Blue Pilot's violation of the Commission's regulations and Orders by failing to bill prices that matched the Company's disclosure statement. In order to determine whether Blue Pilot violated the Commission's regulations, a review of Blue Pilot's disclosure statement must be made in order to determine the price agreed upon by Blue Pilot and its customers. Such review in the present case, however, does not amount to improper contract interpretation by the Commission.

Additionally, a finding that Blue Pilot did not charge prices that conformed to its disclosure statement would not amount to improper regulation of an EGS's prices, as asserted by Blue Pilot. The Commission has already addressed and rejected this argument in the

Interlocutory Review Order at this docket. See Interlocutory Review Order at 18-19. See also OAG/OCA R.B. at 29-30.

The ALJs correctly found that Blue Pilot's prices charged to customers in the first quarter of 2014 did not conform to the Company's Disclosure Statement in violation of 52 Pa. Code §§ 54.4(a) and 54.5(a). As such, Joint Complainants submit that the ALJs' Initial Decision regarding Count II should be approved.

**OAG/OCA Reply to Blue Pilot Exception 3: The ALJs Did Not Err in Concluding in Their Initial Decision that Blue Pilot Made Deceptive Promises of Savings. (Blue Pilot Exceptions at 15-23; OAG/OCA M.B. at 48-60; OAG/OCA R.B. at 32-50)**

A. Introduction.

In its Exceptions, Blue Pilot asserted that the evidentiary record lacked support for the ALJs' conclusion that Blue Pilot made deceptive promises of savings.<sup>5</sup> Blue Pilot Exc. at 15. Blue Pilot made several arguments in support of this position, all which lack merit, as discussed in more detail in Sections B through F, below.<sup>6</sup>

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<sup>5</sup> Blue Pilot also asserted that the ALJs were "without statutory authority" to conclude that Blue Pilot made deceptive promises of savings. Blue Pilot, however, fails to make any argument to justify that assertion. To the extent, however, that Blue Pilot is challenging the Commission's jurisdiction in this proceeding, Joint Complainants have addressed the Commission's jurisdiction at length in their Main Brief and Reply Brief. See OAG/OCA M.B. at 8-18, 21-27, 105-115; see also OAG/OCA R.B. at 8-12, 61-69.

<sup>6</sup> In addition to the arguments posed by Blue Pilot in Sections B through F, below, Blue Pilot also asserted that the ALJs inappropriately dismissed Blue Pilot's argument that the consumer testimony is uncorroborated hearsay. Blue Pilot Exc. at 18. Joint Complainants addressed Blue Pilot's uncorroborated hearsay argument in detail in their Reply Brief. See OAG/OCA R.B. at 6-7. As indicated in Joint Complainants' Reply Brief and as recognized by the ALJs in their Initial Decision, statements made by Blue Pilot's sales agents constitute a party-opponent admission, which is an exception to the hearsay rule regardless of the availability of the agent as a witness. See I.D. at 79; see also OAG/OCA R.B. at 7; see also Herp v. Respond Power, LLC, Docket No. C-2014-2413756, Opinion and Order at 28-29 (Jan. 28, 2016). Joint Complainants further submit that a determination that statements made by Blue Pilot's sales agents are an exception to hearsay quashes Blue Pilot's argument that these statements may not be relied upon to support a finding.

Joint Complainants submit that the ALJs correctly concluded that Blue Pilot made deceptive promises of savings, as the record contains sufficient, corroborated evidence to support the ALJs' conclusion that Blue Pilot and its sales and marketing agents engaged in misleading and deceptive promises of savings in violation of the Commission's regulations. The Initial Decision contains a detailed explanation of the record evidence that supports the ALJs' conclusion regarding deceptive promises of savings. See I.D. at 78-93. As acknowledged by the ALJs in their Initial Decision, the expert testimonies of Joint Complainants' witnesses Ms. Barbara Alexander and Ms. Ashley Everette, consumer testimonies, and exhibits of Blue Pilot's marketing materials, Welcome Letter, and sales recording transcripts on record in this proceeding all support a finding that Blue Pilot made misleading and deceptive promises. See I.D. at 78-93; see also gen'ly OAG/OCA St 1; see also gen'ly OAG/OCA St 3; see also Exh. BRA-2 at 20-29 (CONFIDENTIAL); see also OAG/OCA M.B. at App. C at FOF 87-90. In their Initial Decision, the ALJs identified specific consumer testimonies that support their conclusion that Blue Pilot made deceptive promises. See I.D. at 81, 83-85, 88-90.

Blue Pilot did not present any witnesses to rebut this evidence demonstrating that Blue Pilot and its sales and marketing agents have engaged in misleading and deceptive promises of savings through marketing materials and sales presentations. See I.D. at 92. Thus, Joint Complainants submit that the ALJs correctly concluded that Blue Pilot made deceptive promises of savings, as the record contains ample evidence to support this conclusion.

B. The ALJs Did Not Err in Considering the Oral Representations of Blue Pilot's Sales Agents.

In support of its position, Blue Pilot first asserted that the ALJs erred in considering the oral representations of Blue Pilot's sales agents, because such consideration "deviates from well-

established contract law.” Blue Pilot Exc. at 16. Blue Pilot’s argument is misplaced and must be rejected.

Joint Complainants are not seeking for the Commission to interpret a contract in this case; instead, Joint Complainants are seeking a finding, *inter alia*, that Blue Pilot violated the Commission’s regulations and Orders by making misleading and deceptive promises of savings to customers through its marketing materials and oral representations. The Company’s argument that Pennsylvania law requires that written documentations be given precedence over oral sales statements is misplaced in this proceeding and ignores the Commission’s regulations that require that the prices billed equal the prices disclosed *and the prices marketed*.<sup>7</sup> See 52 Pa. Code §§ 54.4(a) and 54.5(a); see also Herp v. Respond Power at 53-54.

The Company mistakenly assumes that its agents and employees can “say anything, do anything,” during their sales pitches, even if the pitch is deceptive or confusing, and then avoid any liability whatsoever by relying on a subsequently delivered disclosure statement that is confusing in and of itself. The Commission’s regulations flatly reject such an approach, and the Commission has confirmed it in Herp v. Respond Power. See 52 Pa. Code §§ 54.4(a) and 54.5(a); see also Herp v. Respond Power at 53-54. Blue Pilot, as a licensed EGS, must comply with the Public Utility Code and the Commission’s regulations and Orders, and therefore, the Company’s reliance on un-related contract case law must be rejected.

C. The Consumer Testimonies are Credible and Support a Finding that Blue Pilot Routinely Made Deceptive Promises.

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<sup>7</sup> Joint Complainants’ expert witness Ms. Alexander provided extensive testimony on the emphasis of savings provided in Blue Pilot’s written promotional materials and oral representations. See e.g. OAG/OCA St. 1 at 5, 10-12; see also Exh. BRA-2 at 20-29 (CONFIDENTIAL). Additionally, Joint Complainants’ expert witness Ms. Everette provided ample testimony to support a finding that Blue Pilot did not provide savings to its customers as promised. See gen’ly OAG/OCA St. 3.

Next, Blue Pilot asserted that in concluding that Blue Pilot made deceptive promises in their Initial Decision, the ALJs failed to consider the consumer testimony that is contrary to Joint Complainants' allegations. Blue Pilot Exc. at 17. Blue Pilot further asserted that the ALJs failed to address Blue Pilot's contentions that the consumer testimony lacks credibility. Blue Pilot Exc. at 17- 18 and FNs 53, 56. In support of these assertions, Blue Pilot alleged that its Main Brief identifies "numerous examples of consumer testimony which are contrary to the Joint Complainants' allegations." Blue Pilot Exc. at 17, FN 53.

First, the fact that the ALJs did not reach Blue Pilot's desired conclusion does not support Blue Pilot's allegation that the ALJs did not appropriately consider and weigh the evidence on record. Second, Joint Complainants submit that the Company does not appropriately characterize any of the testimonies that it relies upon in its Exceptions. See OAG/OCA R.B. at 36-39. Those testimonies, when viewed in their entirety as the ALJs did, actually support Joint Complainants' position that Blue Pilot's sales agents routinely engaged in misleading and deceptive practices. Id.

Further, the Company did not present evidence that rebutted the consumers' testimonies, such as testimony from the sales agents, sales call recordings<sup>8</sup> or agent training and compliance records. As such, Joint Complainants submit that the consumer testimony supports a finding that Blue Pilot made deceptive promises in its oral representations and written marketing materials.

D. The Dismissal of Individual Consumer Complaints Does Not Relieve Blue Pilot from Liability Under the Joint Complaint.

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<sup>8</sup> In fact, the sales call recordings reviewed by Joint Complainants' expert witness Ms. Alexander corroborate the testimony of the consumer witnesses. See OAG/OCA St. 1 at 34-42; see also Exh. BRA-4 (CONFIDENTIAL).

Next, Blue Pilot asserted that the ALJs' finding of deceptive promises is inappropriate based on the fact that some consumers served by Blue Pilot filed formal complaints that were dismissed by the Commission because they did not allege or establish that Blue Pilot promised savings that it did not deliver. Blue Pilot Exc. at 19. The dismissal of individual consumer complaints does not relieve Blue Pilot from liability under the Joint Complaint, which contains different allegations and record evidence than the individual consumer complaint proceedings.

The allegations in the Joint Complaint are not specific to individual customers. Rather, Joint Complainants have alleged, *inter alia*, that Blue Pilot's pattern and practice of behavior was misleading and deceptive. See gen'ly Joint Complaint at Counts I-III. Additionally, the ALJs have consistently recognized that in the Joint Complaint actions brought by the OAG and the OCA against EGSS, Joint Complainants 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. I.D. at 46.<sup>9</sup>

As discussed by Joint Complainants in their Main Brief and Reply Brief, the evidence on record in this proceeding supports a finding that Blue Pilot engaged in a pattern and practice of misleading and deceptive behavior in violation of the Commission's regulations. As such, Joint Complainants submit that the ALJs did not err in concluding that Blue Pilot made deceptive promises.

- E. The ALJs did not Err in Concluding that Blue Pilot's Small Commercial Customers Qualify for Protection or in Their Evaluation of Overbilling Occurrences.

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<sup>9</sup> 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. Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric, Docket No. C-2014-2427656, Order at 6 (December 1, 2014).

In its Exceptions, Blue Pilot asserted that the ALJs inappropriately conclude that all of Blue Pilot's commercial customers qualify for the protections under the Commission's regulations, as there is no evidence in the record of whether these customers meet the definition of "small business consumer" under 52 Pa. Code ¶ 54.2. Blue Pilot Exc. at 19. Blue Pilot also asserted that the ALJs did not perform the necessary analysis to determine the total monetary amount and number of overbilling occurrences, because the ALJs did not evaluate the experience of each individual consumer. Blue Pilot Exc. at 19-20.

The ALJs, however, did consider the expert testimony of Ms. Everette in reaching their conclusions. See I.D. at 123- 125; see also OCA St. 3 at 22. Ms. Everette's testimony that the ALJs relied upon to determine the number of commercial customers was based on the information that Blue Pilot provided in discovery. See I.D. at 124. Furthermore, the ALJs' relied upon Ms. Everette's thorough analysis of the prices charged by Blue Pilot to determine the monetary amount and number of overbilling occurrences. See gen'ly OCA St. 3. Blue Pilot failed to provide any evidence to rebut the evidence provided by Joint Complainants. As such, the ALJs did not err in finding that Blue Pilot's commercial customers were "small commercial customers" or in their determinations of overbilling occurrences and the monetary amount of overcharges.

F. The ALJs Findings of Fact Support Their Conclusions of Law.

Finally, Blue Pilot asserted that the ALJs included "irrelevant and redundant factual findings to support what appears to be a desired result of sustaining Count III [Misleading and Deceptive Promises of Savings]." Blue Pilot Exc. at 20-23. Blue Pilot then listed several examples of what it considers to be "irrelevant and redundant factual findings." Joint Complainants submit that the ALJs' findings related to Blue Pilot's deceptive promises are

consistent with the record evidence and support the conclusion that Blue Pilot engaged in and made deceptive promises. See Section A, supra; see also OAG/OCA M.B. at App. C at FOF 87-92.

**OAG/OCA Reply to Blue Pilot Exception 4: The ALJs Did Not Err in Concluding in Their Initial Decision that Blue Pilot Violated Commission Regulations in its Handling of Consumer Complaints. (Blue Pilot Exceptions at 24; OAG/OCA M.B. at 60-76; OAG/OCA R.B. at 50-54)**

In their Initial Decision, the ALJs concluded, *inter alia*, 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 interactions with customers in violation of the Commission’s regulations at 52 Pa. Code §§ 56.1(a), 56.141(a), 56.151 and 56.152, and 111.13(a), (b) and the Company’s Licensing Order. I.D. at 106. In its Exceptions, Blue Pilot asserted that “the [Initial Decision] erroneously concludes that [Blue Pilot] violated various Commission regulations because of the information and relief that was provided to consumers during [calls to Blue Pilot’s call center], and as a result of some testimony indicating difficulty accessing the call center.” Blue Pilot Exc. at 24. Blue Pilot further asserted that, “the Commission’s regulations do not impose standards on EGSs for the staffing of its call center or for handling calls from consumers.” Blue Pilot Exc. at 24. Joint Complainants submit that the record contains sufficient, corroborated evidence to support the ALJs’ findings regarding Blue Pilot’s handling of consumer complaints.

The Initial Decision contained a detailed explanation of the record evidence that supports the ALJs’ conclusion regarding Blue Pilot’s handling of consumer complaints. See I.D. at 96-

106. As acknowledged by the ALJs in their Initial Decision, the expert testimony of Ms. Alexander and the consumer testimonies on record in this proceeding demonstrate that numerous consumers had trouble contacting Blue Pilot regarding their complaints or were unsuccessful in speaking with a supervisor. See I.D. at 96-97; see also OAG/OCA M.B. at 63-66 and FOF 93. In fact, Blue Pilot has even acknowledged that several consumers had trouble reaching the call center “amidst and following the Polar Vortex.” See Blue Pilot M.B. at 104. Additionally, the testimonies on record in this proceeding demonstrate that Blue Pilot failed to properly investigate customer disputes, and when such investigation was conducted, Blue Pilot failed to notify customers of the results of the Company’s investigation. See I.D. at 98-102; see also OAG/OCA M.B. at 66-71. Joint Complainants also submit that the testimonies support a finding that Blue Pilot failed to utilize good faith, honesty and fair dealing in its dealings with customers in violation of 52 Pa. Code § 56.1(a) and the Company’s Licensing Order. See I.D. at 98-106; see also OAG/OCA M.B. at 71-76.

In response, Blue Pilot merely asserted in its Exceptions that “[t]he only real complaint of the consumers testifying in this proceeding is that they did not like the answer they received about variable prices.” Blue Pilot Exc. at 24. Blue Pilot’s argument does not rebut the evidence supporting the ALJs’ conclusions relating to Blue Pilot’s handling of consumer complaints or properly reflect the substance of the testimony provided.

As for Blue Pilot’s assertion that the Commission’s regulations do not impose standards on EGSs for the staffing of their call centers and the handling of customer complaints, Joint Complainants note that Section 111.13 of the Commission’s regulations requires EGSs to implement a process for investigating, responding to and resolving customer inquiries, disputes and complaints and to provide documentation of, *inter alia*, said inquiry, dispute, or complaint

and the resolution of the matter. See 52 Pa. Code §§ 111.13(a), (b). Additionally, Section 111.13 specifically references Sections 56.141, 56.151 and 56.152.<sup>10</sup> See 52 Pa. Code §§ 56.141, 56.151, and 56.152. Thus, contrary to Blue Pilot’s assertion in its Exceptions, the Commission’s regulations do impose standards on EGSs for the handling of customer complainants, and an 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.<sup>11</sup> As such, Joint Complainants submit that the ALJs did not err in concluding that Blue Pilot violated the Commission’s regulations and its Licensing Order in its handling of consumer complaints.

**OAG/OCA Reply to Blue Pilot Exception 5: The ALJs Were Correct in Determining that Blue Pilot Violated the Commission’s Regulations by Violating the Telemarketer Registration Act. (Blue Pilot Exceptions at 25-27; OAG/OCA M.B. at 76-83; OAG/OCA R.B. at 54-56).**

In its Exceptions, Blue Pilot argued that the ALJs erred in finding that the Company violated the Commission’s regulations that require compliance with the Telemarketer Registration Act, because the Commission lacks statutory authority to consider claims of alleged violations of the Telemarketer Registration Act (TRA). Blue Pilot Exc. at 25. Blue Pilot also asserted that the requirement for a telemarketing sale to be reduced to a written contract is inapplicable to EGSs, because Section 2245(d)(1) of the TRA, 73 P.S. § 2245(d)(1), provides that a written contract is not needed if the sale of the good or service is regulated under other

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<sup>10</sup> Section 2809(e) of the Public Utility Code requires that the Commission impose requirements necessary to maintain 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. See 66 Pa. C.S. § 2809(e).

<sup>11</sup> Furthermore, Joint Complainants note that Blue Pilot created an expectation of “quality customer service” through its sales agents, marketing materials, and Welcome Letter. See I.D. at 96; see also OAG/OCA St. 1 at 5, 28.

laws of the Commonwealth, and the Commission's regulations clearly establish the requirements for the enrollment of customers. Blue Pilot Exc. at 26.

By Order entered December 11, 2014 in this proceeding (Dec. 11 Order), the Commission determined that it has jurisdiction over alleged violations of its own regulations, including the Commission's telemarketing regulations. Dec. 11 Order at 17-18. The Commission's regulations require compliance with the TRA. See 52 Pa. Code § 111.10; see also OAG/OCA M.B. at 76-83; OAG/OCA R.B. at 54-56). As such, Joint Complainants submit that the Commission has the authority to determine whether Blue Pilot violated its regulations by failing to comply with the TRA.

As for Blue Pilot's argument that this TRA provision is inapplicable to EGSs, such argument is misplaced. Blue Pilot cited Section 111.7 of the Commission's regulations (relating to customer authorization to transfer account; transaction; verification; and documentation), 52 Pa. Code §111.7, in support of its argument.<sup>12</sup> Such argument, however, completely ignores Section 111.10 of the Commission's regulations, 52 Pa. Code § 111.10, which governs the telemarketing activities of EGSs and, as noted above, requires compliance with the TRA. If the Commission were to rely on Blue Pilot's argument, then Section 111.7 would nullify any additional requirements set forth in Chapter 111. As noted by Joint Complainants in their Main Brief, the Commission issued a Corrected Chapter 111 Rulemaking Order, which stated, "[w]e also take this opportunity to remind suppliers of their obligation to respect all federal, state and local laws related to sales and marketing and to note that nothing in these regulations is intended

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<sup>12</sup> Blue Pilot also cited Section 53.4 (relating to bond form), 52 Pa. Code § 53.4, but Joint Complainants believe this citation to be a mistake. See Blue Pilot Exc. at 26, FN 98.

to vacate or supersede any other existing federal, state or local requirement.” OAG/OCA M.B. at 79.

The Retail Energy Supply Association (RESA) also filed an Exception with the Commission, asserting that the ALJs erred in the Initial Decision in concluding that EGSs are required to obtain a wet signature to complete a telemarketing enrollment.<sup>13</sup> See gen’ly RESA Exc. at 4-14. RESA makes two separate arguments in support of its position: 1) the TRA does not require EGSs to acquire wet signatures; and 2) the Commission’s regulations do not require wet signatures. See gen’ly RESA Exc. at 4-14.

As for RESA’s argument that the TRA does not require EGSs to acquire wet signatures, an EGS doing telemarketing in Pennsylvania cannot avail itself of what has been fashioned as a safe-harbor exception under 73 P.S. § 2245(d)(1). This exception to the wet signature requirement would theoretically apply only if the contractual “sale” is regulated under “other laws” of the Commonwealth. This exception, however, does not apply here, as the “other laws” in the form of Commission regulations, do not address the process by which a consumer agrees to enter into a contract, in other words, a “sale” with an EGS. Those regulations merely specify the requirements that EGSs must complete after a consumer has already agreed to enter into a sale. 52 Pa. Code § 111.7.

RESA’s argument that the Commission’s regulations do not require a wet signature is similar to the argument raised by Blue Pilot that the Commission’s regulations establish the requirements for customer enrollments, which do not require a telemarketing sale to be reduced to a written contract. As was the case with Blue Pilot’s argument, RESA’s argument ignores

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<sup>13</sup> Joint Complainants note that they oppose RESA’s Petition to Intervene and intend to file an Answer to that effect. Nevertheless, Joint Complainants will address RESA’s Exception.

Section 111.10 of the Commission's regulations, 52 Pa. Code § 111.10, which requires compliance with the TRA. As discussed above, the TRA requires a wet signature.

As such, Joint Complainants submit that the ALJs correctly found that Blue Pilot's violated the Commission's regulations at Sections 54.42(f), 111.10, and 111.12(d)(1) by failing to comply with the TRA and failing to provide disclosures statements or written agreements to residential customers.<sup>14</sup> See I.D. at 112, citing 52 Pa. Code §§ 54.42(f), 111.10, and 111.12(d)(1).

**OAG/OCA Reply to Blue Pilot Exception 6: The Commission has the Authority to Order Across the Board Refunds to an Entire Group of Customers. (Blue Pilot Exceptions at 27-30; OAG/OCA M.B. at 21-27, 105-118; OAG/OCA R.B. at 7-12, 61-69)**

In its Exceptions, Blue Pilot asserted that the ALJs erred by treating this proceeding as a class action lawsuit. Blue Pilot Exc. at 27-30. Blue Pilot's conclusion that this proceeding is a class action lawsuit is not supported by the ALJs' consideration of this matter or the law. Furthermore, the Commission has the authority to order across-the-board relief in this proceeding.

The ALJs acknowledged that this proceeding is not a class action lawsuit under the rules of civil procedure. I.D. at 54. Blue Pilot's contrary conclusion is not supported by the law. First, Blue Pilot asserted that "[t]he specific nature of the relief [...] – refunds for all customers served by [Blue Pilot] based on the alleged experiences of a small percentage of those customers

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<sup>14</sup> In the alternative, Joint Complainants submit that the Commission could determine to refer this issue to the Office of Attorney General for enforcement pursuant to the Memorandum of Understanding between the OAG and the Commission dated February 5, 1998. See Rulemaking Re: Marketing and Sales Practices for the Retail Residential Energy Market, Docket No. L-2010-2208332, Corrected Final Rulemaking Order at 8, Attach. 1 (Oct. 24, 2012) (The Commission can refer matters that more appropriately fall under the jurisdiction of the OAG, including "matters that fall under the [TRA]").

– makes this proceeding a class action lawsuit [...].” Blue Pilot Exc. at 27. Blue Pilot, however, offered no citation to support that statement. As recognized by the ALJs in their Initial Decision, in this case, Joint Complainants 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.<sup>15</sup> See I.D. at 46-47. The ALJs have also recognized that these cases initiated by Joint Complainants against EGSs are different than cases initiated by the individual consumers and that the relief sought by individual consumers is likely different than the relief sought by the Joint Complainants. See e.g. PaG&E Order at 6. As such, this proceeding is not appropriately classified as a class action lawsuit.

In its Exceptions, Blue Pilot relied on Pettko v. Pennsylvania Water Company, Docket No. C-2011-2226096, Order Granting in Part and Denying in Part Motion for Judgment on the Pleadings (Oct. 5, 2011) (Pettko) and Painter v. Aqua PA, Inc., Docket No. C-2011-2239556, Opinion and Order (May 22, 2014) (Painter), in support of its position that a complaint may not be brought on behalf of others similarly situated. Blue Pilot Exc. at 28-29. In Pettko, the presiding ALJ held that class actions are not permitted under the Public Utility Code, and, as such, individual complainants do not have standing to represent the interests of others “similarly situated” before the Commission. Pettko at 6. In Painter, the Commission noted that the Initial Decision dismissed the individual complainants’ class action status, and the complainants did not

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<sup>15</sup> Further, Blue Pilot asserted that the Initial Decision failed to cite any provisions in the enabling statutes of the OCA and the OAG which “permit the representation of individual consumers.” Blue Pilot Exc. at 28. The Joint Complainants note that the ALJs did not determine that Joint Complainants are permitted to represent individual customers, but rather determined that the OAG and OCA are acting on behalf of the public interest and consumer interest, respectively, as a whole. See I.D. at 46-47. In support of this determination, the ALJs cited 71 P.S. § 309-4(b) and Act 161 of the Pennsylvania General Assembly, 71 Pa.C.S. § 309-2, and the Attorney General’s *parens patriae* powers in support of the OCA’s and the OAG’s authorities, respectively, to seek relief on behalf of Blue Pilot’s customers. I.D. at 46-47. Joint Complainants also discussed the roles of the OCA and the OAG in this issue in detail in their Main Brief and Reply Brief. See OAG/OCA M.B. at 108-110; see also OAG/OCA R.B. at 9-12.

except to that portion of the Initial Decision. Painter at 2, FN 1. Again, this proceeding was not initiated by individual complainants seeking to represent the interest of others, but was brought by the Attorney General and the Acting Consumer Advocate pursuant to their statutory authorities. As such, this proceeding is not a class action, and the holdings from the Pettko and Painter proceedings are not applicable to this proceeding.

Rather, the Commission has the authority to order across-the-board relief pursuant to its plenary authority under Section 501, 66 Pa. C.S. § 501, and has ordered such relief in other proceedings. See e.g. Sanderman v. LP Water and Sewer Company, 87 Pa. PUC 734 (1997) (Sanderman).<sup>16</sup> This case involves patterns of unfair, deceptive and misleading practices and conduct that violate the Commission's regulations and Orders and the Pennsylvania Public Utility Code. See OAG/OCA M.B. at 21-27; 105-118; see also OAG/OCA R.B. at 7-12, 61-69. The record evidence demonstrates that Blue Pilot's sales and marketing activities were widespread and significantly harmed Pennsylvania Blue Pilot customers and the retail market. As such, Joint Complainants submit that the Commission has the authority to order across the board refunds in this proceeding.

**OAG/OCA Reply to Blue Pilot Exception 7: The ALJs Did Not Err in Finding that Blue Pilot's Owners and Managers May Be Barred from Ever Applying for an EGS**

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<sup>16</sup> In Sanderman, the Commission adopted the ALJ's determination that Mr. Sanderman, in proving that he had been overcharged, not only supported his request for a refund but also supported a show cause proceeding initiated by the Commission to order refunds to all customers. Id. at 747, 750. On appeal, the Commonwealth Court affirmed the Commission's order and rejected LP's argument that the Commission should limit its refund order to Mr. Sanderman alone. LP Water & Sewer Co. v. Pennsylvania PUC, 722 A.2d 733, 740 (Pa. Commw. Ct. 1998); see also Office of Consumer Advocate, et al. v. Utility.com, Inc., 212 PUR4th 255 (2001); see also David B. Lytle v. T.W. Phillips Gas and Oil Co., 97 Pa. PUC 476 (2002); see also Re Acquire Clean Treatment Sewage Company, Docket No. I-2009-2109324, Order (May 24, 2012); see also I&E v. HIKO Energy, LLC, Docket No. C-2014-2431410, Opinion and Order at 46 (Dec. 3, 2015). Also of note, The Federal Trade Commission (FTC) frequently initiates cases similar to this matter. See e.g. FTC v. Figgie Int'l, Inc., 994 F.2d 595, 605 (9th Cir. 1993).

**License in the Future. (Blue Pilot Exceptions at 30-31; OAG/OCA at 83-89; OAG/OCA R.B. at 56-58)**

In its Exceptions, Blue Pilot argued that the ALJs erred in ordering that no future electric generation supply license application from the owners, officers, directors or managers of Blue Pilot shall be considered, because the Commission lacks the statutory authority to order such relief. Blue Pilot Exc. at 30-31. Contrary to Blue Pilot’s assertion, however, the Commission has such authority. See OAG/OCA M.B. at 83- 89; see also OAG/OCA R.B. at 56-58. Joint Complainants submit that the Company’s assertion ignores 66 Pa. C.S. § 2809(b) that a license would be issued **only if**, *inter alia*, “it is found that the applicant is fit, willing and able to perform properly the service proposed and to conform to the provisions of this title and the lawful orders and regulations of the [C]ommission under this title, including the [C]ommission’s regulations regarding standards and billing practices [...] .” See 66 Pa. C.S. § 2809(b) (Emphasis added). It is axiomatic that the Commission may make determinations that certain individuals are not fit to perform properly the service proposed. As discussed in Joint Complainants’ Main and Reply Briefs and throughout this Reply Exception, evidence on record in this proceeding demonstrates that Blue Pilot’s owners, officers, directors, and managers are not fit to perform electric generation services in the Commonwealth.

**OAG/OCA Reply to Blue Pilot Exception 8: The ALJs Recommended an Appropriate Civil Penalty Be Imposed. (Blue Pilot Exceptions at 31-38; OAG/OCA M.B. at 89-104; OAG/OCA R.B. at 58-61).**

In its Exceptions Blue Pilot argued that the civil penalty recommended by the ALJs is excessive in violation of Article I, Section 13 of the Pennsylvania Constitution, violates Blue Pilot’s due process, exceeds the Commission’s statutory authority, and fails to appropriately weigh and apply the Rosi Factors at 52 Pa. Code § 69.1201. Blue Pilot Exc. at 31-38. The ALJs

correctly determined that a civil penalty of \$2.554 million is warranted in this proceeding given the large volume of Commission regulations that Blue Pilot violated and the number of customers affected by the violations. See I.D. at 120-44.

Blue Pilot's assertion that the civil penalty is excessive in violation of the Pennsylvania Constitution is not supported. The ALJs' correctly rejected Blue Pilot's comparison to the civil penalty levied in Pa. PUC, Bureau of Investigation and Enforcement v. HIKO Energy, LLC, Docket No. C-2014-2431410, Order (Dec. 3, 2015) (I&E v. HIKO), as I&E v. HIKO involved the violation of *one* Commission regulation, and HIKO agreed to provide refunds to affected customers and implement corrections to the company's business practices in a separate case. See I.D. at 137-41. In this matter, Blue Pilot, *inter alia*, was found to have violated numerous Commission regulations and attempted to leave the Pennsylvania market without refunding customers. I.D. at 139. Joint Complainants submit that Blue Pilot's comparison to other cases where civil penalties were imposed should be similarly rejected as irrelevant due to the egregiousness of Blue Pilot's conduct and lack of willingness by the Company to mitigate the effects thereof.<sup>17</sup>

Blue Pilot's assertion that the civil penalty recommended in this action would exceed the Commission's statutory authority should also be rejected, as the ALJs correctly identified the bases of the Commission's authority to levy civil penalties and found that there is no statutory maximum civil penalty in this matter. See I.D. at 120-21. Further, the ALJs correctly determined the number of violations as the number of overbillings during the period January through March 2014 and correctly applied the same process used by the Commission in I&E v.

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<sup>17</sup> Further, as discussed on pages 59-61 of Joint Complainants' Reply Brief, Blue Pilot's assertions that its due process rights were violated because neither the Joint Complainants' Complaint nor their witnesses proposed an amount of civil penalty or rationale for imposing a certain amount should be rejected, as Blue Pilot's due process rights were maintained throughout this proceeding.

HIKO of multiplying a flat civil penalty figure by the number of overbillings ( $\$195 * 4,490$  residential overbillings =  $\$875,500$ ;  $\$498 * 3,371$  small business overbillings =  $\$1,678,758$ ;  $\$875,500 + \$1,678,758 = \$2,554,000$ ). See I.D. at 122-23.

Finally, Blue Pilot's assertion that the ALJs' Rosi Factor analysis was unfair, especially regarding the analysis of Blue Pilot's size, should be rejected. The ALJs carefully and meticulously addressed each Rosi Factor. See I.D. at 125-44. Joint Complainants addressed the Company's size in its Main Brief at page 104, FN 27 and asserted that the evidence in the record established that Blue Pilot has operations in several states and has many affiliates. The Company's size was not a barrier to a substantial civil penalty in this matter. Blue Pilot offered no evidence in this matter regarding the Company's size. The ALJs correctly addressed other factors, such as the seriousness of Blue Pilot's conduct, failure to modify the Company's business practices, the impact of the Company's actions on its customers, and Blue Pilot's compliance history, based upon the evidence in the record, which was un rebutted by Blue Pilot. See I.D. at 125-44.

The ALJs' recommendation of a \$2.554 million civil penalty be levied against Blue Pilot is appropriate and based upon substantial evidence. As such, Joint Complainants submit that the ALJs' Initial Decision regarding the imposition of civil penalty of \$2.554 million should be approved.

**OAG/OCA Reply to Blue Pilot Exception 9: The ALJs Correctly Recommended that Blue Pilot Refund Customers for Overcharges. (Blue Pilot Exceptions at 38-39; OAG/OCA M.B. at 105-118; OAG/OCA R.B. at 61-69).**

In its Exceptions, Blue Pilot asserts that the ALJs failed to address the Company's arguments that the Commission lacks express statutory authority or a "strong and necessary

implication” authorizing the Commission to order refunds. Blue Pilot Exc. at 38. The ALJs, however, discussed at length the Commission’s jurisdiction and authority pursuant to 66 Pa. C.S. § 501 to direct an EGS to make refunds for violations of the Commission’s regulations. See I.D. at 146-49. As the ALJs recognized, the Commission has already decided this issue. See I.D. at 147-48, citing 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 at 17-18 (Dec. 18, 2014) (IDT Interlocutory Order). In the IDT Interlocutory Order, the Commission specifically held that, in addition to having the authority to direct EGS refunds for slamming violations or when a customer has, otherwise, been switched to an EGS without his or her consent pursuant to 52 Pa. Code § 57.177(b), the Commission has plenary authority under Section 501 of the Public Utility Code, 66 Pa. C.S. § 501, to direct an EGS to issue a credit or refund for an over bill. IDT Interlocutory Order at 17-18.

The Commission clarified that its authority to direct refunds includes instances when an EGS fails to abide by regulatory standards governing telemarketing or in any “appropriate circumstances.” Kiback v. IDT Energy, Inc., Docket No. C-2014-2409676, Order at 31-33 (Aug. 20, 2015) (Kiback v. IDT), 2015 Pa. PUC LEXIS 53, \*29-30; see also Werle v. Respond Power, LLC, Docket No. C-2014-2429158, Order at 8-9 (Feb. 23, 2015), 2014 WL 6807071 (Commission explicitly overruled the portion of the ALJ’s Initial Decision concluding that the Commission lacked jurisdiction to order a refund or credit); Nadav v. Respond Power, LLC, Docket No. C-2014-2429159, Order at 7 (Dec. 19, 2014), 2014 WL 4374216; see also Durante v. Blue Pilot Energy, LLC, Docket No. F-2015-2487082, Order at 9 (March 14, 2016) (“We disagree with the ALJ’s legal conclusion that there is no remedy here”); see also Herp v.

Respond Power, Docket No. C-2014-2413756, Opinion and Order (Jan. 28, 2016) (“[W]e find the ALJ correctly concluded that Respond’s agent’s marketing did not conform with Respond’s subsequent billing, resulting in violations of our Regulations and constituting appropriate circumstances warranting a refund).<sup>18</sup>

Joint Complainants submit that the Commission has the authority and jurisdiction to direct Blue Pilot to make across-the-board refunds to customers for over-billings in this proceeding. As such, Blue Pilot’s assertions to the contrary should be rejected.

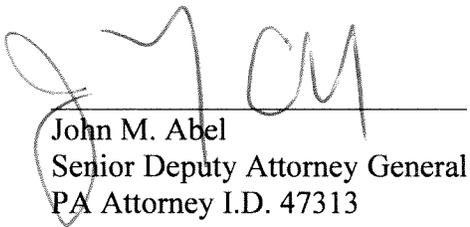
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<sup>18</sup> Further, the Pennsylvania Supreme Court in Delmarva Power & Light Co. v. Pa. PUC, 870 A.2d 901 (Pa. 2005) confirmed that in regulating the service of EGSs, the Commission shall impose the requirements “necessary to ensure that the present quality of service ... does not deteriorate, including ... assuring that” standards and billing practices for residential utility service are maintained. Delmarva at 254-55, 911 citing 66 Pa. C.S. § 2809(e).

### III. CONCLUSION

For the reasons set forth above, and for the reasons set forth in Joint Complainants' Briefs, Joint Complainants submit that the ALJs' Initial Decision should be adopted and Blue Pilot's Exceptions should be rejected in their entirety.

Respectfully submitted,



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Date: August 8, 2016

CERTIFICATE OF SERVICE

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Through the Bureau of Consumer Protection,	:	
	:	
And	:	
	:	
TANYA J. McCLOSKEY, Acting Consumer	:	
Advocate,	:	
Complainants	:	Docket No. C-2014-2427655
	:	
v.	:	
	:	
BLUE PILOT ENERGY, LLC	:	
Respondent	:	

I hereby certify that I have this day served a true copy of the foregoing document, the Joint Complainants Commonwealth of Pennsylvania and the Office of Consumer Advocate's Reply Exceptions, in the manner and upon the persons listed below:

Dated this 8th day of August 2016.

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