

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

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July 21, 2014

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 the Answer of the Commonwealth of Pennsylvania and the Office of Consumer Advocate to the Preliminary Objections of Blue Pilot Energy, LLC, 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

Enclosures

cc: Office of Administrative Law Judge  
Certificate of Service

\*185199

CERTIFICATE OF SERVICE

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

I hereby certify that I have this day served a true copy of the foregoing Answer of the Commonwealth of Pennsylvania and the Office of Consumer Advocate to the Preliminary Objections of Blue Pilot Energy, LLC, in the manner and upon the persons listed below:

Dated this 21st day of July 2014.

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185179

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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ANSWER OF THE COMMONWEALTH OF PENNSYLVANIA AND THE OFFICE OF  
CONSUMER ADVOCATE TO THE PRELIMINARY OBJECTIONS OF  
BLUE PILOT ENERGY, LLC

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Pursuant to Sections 5.61 and 5.101 of the Pennsylvania Public Utility Commission's (Commission) regulations regarding Answers to Preliminary Objections, 52 Pa. Code §§ 5.61 and 5.101, the Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection (BCP) and the Acting Consumer Advocate Tanya J. McCloskey (OCA) (collectively referred to as Joint Complainants), provide the following Answer to the Preliminary Objections of Blue Pilot Energy, LLC (Answer), in the above-captioned proceeding.

## I. INTRODUCTION

On June 20, 2014, the Joint Complainants filed a Joint Complaint with the Commission, pursuant to the Public Utility Code, 66 Pa. C.S. Ch. 28, the Commission's regulations, 52 Pa. Code Ch. 54, 56 and 111, the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.* (Consumer Protection Law) and the Telemarketer Registration Act, 73 P.S. § 2241, *et seq.* (TRA). The Joint Complaint includes five separate counts and alleges that Blue Pilot Energy, LLC. (Respondent or Blue Pilot) violated Pennsylvania law and Commission orders and regulations.<sup>1</sup> With respect to relief, the Joint Complainants request that the Commission find that Respondent violated the Public Utility Code, the Consumer Protection Law, the Telemarketer Registration Act, and the Commission's regulations and orders; provide restitution to Respondent's customers; impose a civil penalty; and order Respondent to make various modifications to its practices and procedures; and revoke or suspend Respondent's Electric Generation Supplier (EGS) license, if warranted.

On July 10, 2014, Blue Pilot filed Preliminary Objections to the Joint Complaint. In its Preliminary Objections, Blue Pilot asserts that Count I of the Joint Complaint is legally insufficient because the Commission approved of Respondent's disclosure statement, and therefore, there is no violation of Commission regulation or order. As discussed in detail in Paragraphs 20 through 26 in Section III below, Commission review of Respondent's Disclosure Statement is irrelevant to Joint Complainants' claims for violations of the Public Utility Code and the Commission's regulations. Further, the Commission has the jurisdiction to incorporate other laws and agency regulations into its decisions insofar as the other laws and agency

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<sup>1</sup> The five separate counts in the Joint Complaint are as follows: I) failing to provide accurate pricing information; II) prices nonconforming to disclosure statement; III) misleading and deceptive promises of saving; IV) lack of good faith handling of complaints; and V) failure to comply with the Telemarketer Registration Act.

regulations are incorporated into the Commission's regulations. See Harrisburg Taxicab & Baggage Co. v. Pa. PUC, 786 A.2d 288, 292-93 (Pa. Commw. Ct. 2001). As such, Blue Pilot's Preliminary Objection to Count I should be overruled

Blue Pilot also asserts in its Preliminary Objections that the enforcement of Sections 54.43(1) and 54.5(c) would violate Respondent's due process rights. As discussed in detail in Paragraphs 27 through 31 in Section III below, Blue Pilot's Preliminary Objection to Count I on Constitutional grounds is improper and must be overruled.

In reference to Count II of the Joint Complaint, Respondent asserts in its Preliminary Objections that the Commission lacks jurisdiction to regulate the rates that Respondent charges its customers. In Count II, the Joint Complainants assert that Blue Pilot charged its variable rate customers prices at least as high as \$0.50 per kWh for electricity. See Joint Complaint at ¶ 29. Joint Complainants further assert the cost to serve residential heating customers in January 2014 in the PJM market should not have exceeded approximately \$0.23 per kWh. See Joint Complaint at ¶¶ 20, 31 and App. B. Joint Complainants thus assert that Respondent's prices were nonconforming to its disclosure statement. See Joint Complaint at ¶ 32. As discussed in detail in Paragraphs 32 through 37 in Section III below, Respondent is not in compliance with the Public Utility Code, the Commission's regulations and Orders and the Consumer Protection Law because Blue Pilot charged customers prices in early 2014 that did not conform to the Disclosure Statement. Further, the Commission has the authority to order restitution in this matter. As such, Blue Pilot's Preliminary Objection to Count II must be overruled.

Finally, referencing Count V of the Joint Complaint, Respondent asserts in its Preliminary Objections that a failure to provide written contracts in connection with telephone sales and obtain customer signatures would not be a violation of the TRA. In Count V, the Joint

Complainants allege that the Commission's regulations require that EGSs comply with the TRA and the Consumer Protection Law. See Joint Complaint at ¶ 56. Joint Complainants assert that the TRA requires Respondent to, *inter alia*, reduce any sale of goods or services made during a telemarketing call to a written contract and obtain the customer's signature on the written contract, but Respondent does not do so. See Joint Complaint at ¶¶ 52, 54. As discussed in detail in Paragraphs 38 through 47 in Section III below, EGSs are subject to all of the requirements of the TRA, and the Commission has the authority to determine whether the conduct alleged constitutes a violation of the TRA. See Request for Opinion, 2010 Pa. AG LEXIS 1, \*4-5 (Feb. 8, 2010) (AG Opinion); 52 Pa. Code § 111.10(a)(1); Harrisburg Taxicab, 786 A.2d at 292-93.

The Joint Complainants submit that Blue Pilot's Preliminary Objections are unsupported, as set forth in more detail below. It is clear and free from doubt that the Joint Complaint is legally sufficient and seeks that the Commission make determinations pursuant to the Commission's powers and jurisdiction. As such, Blue Pilot's Preliminary Objections to the Joint Complaint must be overruled.

## **II. LEGAL STANDARD**

The Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary objections. 52 Pa. Code §§ 5.101 (a)(1)-(7). The grounds for preliminary objections are limited to the following:

- (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
- (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
- (3) Insufficient specificity of a pleading.

- (4) Legal insufficiency of a pleading.
- (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
- (6) Pendency of a prior proceeding or agreement for alternative dispute resolution.
- (7) Standing of a party to participate in the proceeding.

52 Pa. Code § 5.101(a).

In deciding whether to grant or deny a preliminary objection, the truth of all facts averred in the complaint must be assumed, and it must be determined whether, based on well-pleaded factual averments of the complainant, recovery or relief is possible. See Feingold v. Bell of Pa., 383 A.2d 791 (Pa. 1977); See also Equitable Small Transp. Interveners v. Equitable Gas Co., 1994 Pa PUC LEXIS 69, \*3. Further, any inferences fairly deducible from the facts must be accepted for purposes of the disposition of the preliminary objections. See Commonwealth v. Bell Telephone Co., 551 A.2d 602 (Pa. Commw. Ct. 1988). The Commission shall deny a preliminary objection, in favor of the non-moving party, if there are any doubts that must be resolved. Boyd v. Ward, 802 A.2d 705, 707 (Pa. Commw. Ct. 2002); Weber v. PPL Electric Utilities Corp., Docket No. C-2008-2052894, Order at 4 (March 23, 2009). Also, preliminary objections must be denied, where factual or legal issues remain to be examined. See P. J. S. v. PA State Ethics Comm'n, 669 A.2d 1105 (Pa. Commw. Ct. 1996).

With regard to preliminary objections related to the Commission's lack of jurisdiction, it is well settled that the Commission has the powers and authority granted to it by the General Assembly contained in the Public Utility Code. Lasko v. Windstream Pennsylvania, LLC, 2011 Pa. PUC LEXIS 696, \*9. One can file a formal complaint with the Commission, however, alleging violation of a statute that the Commission has jurisdiction to administer. Id. at \*7.

Preliminary objections alleging “legal insufficiency of pleading” serve judicial economy by avoiding a hearing where no factual dispute exists. Drake v. Pennsylvania Electric Co., Docket No. C-2014-2413771, Order at 5 (May 7, 2014). The Commission will find a complaint legally sufficient if it provides the following:

...an act or thing done or omitted to be done or about to be done or omitted to be done by the respondent in violation, or claimed violation, of a statute which the Commission has jurisdiction to administer, or of a regulation or order of the Commission.

Drake, Order at 6; 52 Pa. Code § 5.22(a)(5).

### III. ANSWER

1-13. These paragraphs are introductory in nature. Respondent provides purported facts in these paragraphs that are based on information in the possession of Respondent and are therefore, denied. Strict proof thereof is demanded at hearings in this matter. Joint Complainants incorporate their responses detailed below to the extent they are responsive to Respondent’s assertions in these paragraphs, herein. It is denied that the Commission Press Releases or FERC Staff Report cited by Respondent is authoritative precedent to the resolution of this matter. It is denied that the Commission approved Blue Pilot’s Disclosure Statement, and even if it was approved, Respondent’s prices charged to customers in early 2014 did not conform to the Disclosure Statement.

14. No response is required, as the Joint Complaint is of record and speaks for itself.

15. Denied as stated. This paragraph states conclusions of law to which no response is required and is deemed denied.

16-19. Denied as stated. These paragraphs state conclusions of law to which no response is required. By way of further response, Joint Complainants incorporate Section II above herein.

Count I Is Legally Sufficient.

20. Denied as stated. Respondent's allegations constitute conclusions of law to which no response is required. By way of further answer, the Joint Complaint is of record and speaks for itself. With regard to Footnote 7, the Commission's regulations themselves authorize the Commission to make determinations pursuant to the provisions of the Consumer Protection Law. See 52 Pa. Code §§ 54.122(3) and 111.12(d)(1). In determining whether Respondent violated its regulations, the Commission must determine whether the conduct alleged constitutes a violation of State or Federal law, including the Consumer Protection Law, or Commission regulation or order. 52 Pa. Code §§ 54.43(f) and 111.12(d)(1). See also Elkin v. Bell Telephone Co. of Pennsylvania, 491 Pa. 123, 133, 420 A.2d 371, 376 (1980). As a preliminary inquiry, the Commission must invoke the statute and case law under the Consumer Protection Law, interpret it, and apply it harmoniously where appropriate. See Duquesne Light Co. v. Borough of Monroeville, 449 Pa. 573, 298 A.2d 252 (1972); Pettko v. Pennsylvania American Water Company, 39 A.3d 473, 484 (Pa. Commw. Ct. 2012). Moreover, since the adjudication of Pa. PUC v. The Bell Telephone Co. of Pa., 71 Pa. PUC 338, in 1989 and MAPSA v. PECO Energy Co., Docket No. P-00981615, in 1999, the Commission added to its regulations the requirement that EGSs comply with the Consumer Protection Law. Furthermore, the Commonwealth Court decided Harrisburg Taxicab & Baggage Co. v. Pa. PUC, wherein the Court held that the Commission's decision to incorporate another agency's regulations into the Commission's own regulations is in no way inappropriate and such overlap does not divest the Commission of its statutory authority or duty. Harrisburg Taxicab & Baggage Co. v. Pa. PUC, 786 A.2d 288, 292-93 (Pa. Commw. Ct. 2001) (Harrisburg Taxicab). See also City of Philadelphia v. Pa. PUC, 702 A.2d 1139 (Pa. Commw. Ct. 1997). By allowing the Commission to adjudicate these disputes in

the first instance, all rights of the parties will be preserved, as well as providing any subsequent reviewing court the benefit of the Commission's opinion. County of Erie v. Verizon North, Inc., 879 A.2d 357 (Pa. Commw. Ct. 2005). Joint Complainants note that Respondent's reliance on the Initial Decision in MacLuckie v. Palmco Energy PA, Docket No. C-2014-2402558, is misplaced, as the OCA timely filed Exceptions to the Initial Decision, and the Commission has not yet disposed of the Exceptions.

21-24. Denied as stated. Respondent's allegations constitute conclusions of law to which no response is required. By way of further answer, the Joint Complaint is of record in this matter and speaks for itself. Joint Complainants deny the allegation that the Commission approved Blue Pilot's Disclosure Statement. Even if the Commission reviewed Respondent's Disclosure Statement, Joint Complainants deny that such Commission review constitutes approval and further submit that such review is not relevant to Joint Complainants' allegations of misleading and deceptive advertising. Respondent's assertion is irrelevant, in that the Joint Complainants are not alleging that the Disclosure Statement on its face violates Commission regulations or orders. Rather, Joint Complainants allege that Respondent's prices in early 2014 did not conform to its Disclosure Statement.

Specifically, the Joint Complainants assert that Respondent charged its variable rate customers prices that were as high as \$.50 per kWh for electricity. See Joint Complaint at ¶ 29. The affidavit of Dr. Steven L. Estomin is attached to the Joint Complaint as Appendix B. Dr. Estomin analyzed the day-ahead and real-time market prices for electric energy during the winter of 2014 for electric and non-electric space heating residential customers and for several Electric Distribution Company (EDC) territories in Pennsylvania. See Joint Complaint at App. B, page 1. Dr. Estomin included several categories of PJM generation costs and EGS-specific costs, such as

profit, in his analysis. Joint Complaint at App. B, pages 1-2. These categories analyzed by Dr. Estomin are comparable to the categories in Blue Pilot's pricing disclosure term. Based on his analysis, Dr. Estomin concluded that the cost to serve the average residential heating customer in January 2014 should not have exceeded approximately \$0.23 per kWh. See Joint Complaint at ¶ 31; App. B, page 2. As such, the Joint Complainants have provided sufficient allegations that Respondent's prices charged to customers in early 2014 did not conform to its price disclosure, and indeed, the Joint Complainants have also provided an expert's affidavit stating as much based on his own analysis of the issue. See gen'ly Joint Complaint at ¶¶ 20, 28-32 and App. B. The finding in Hoke v. Ambit NE, LLC, Docket No. C-2013-2357863, I.D. (Nov. 21, 2013), discussed in Respondent's Preliminary Objections, is irrelevant to this proceeding, as Joint Complainants' allegation that Respondent's prices do not conform to its Disclosure Statement are specific to the facts of this case. It is worth noting, however, that in Hoke the ALJ found that it was the PaPowerSwitch website that led to the complainant's confusion regarding Ambit's price that would be charged after the first month, but the ALJ also referred Ambit's disclosure statement to the Commission's Bureau of Consumer Services for additional review. See Hoke, Docket No. C-2013-2357863, I.D. at 6.

25. Denied as stated. Respondent's allegations constitute conclusions of law to which no response is required. By way of further answer, complainant in Yaglidereliler Corp. v. Blue Pilot Energy, LLC, Docket No. C-2014-2413732, filed exceptions to the Initial Decision, and the Commission has not yet ruled on the exceptions. Therefore, Respondent's reliance is on the Initial Decision is misplaced, as the Commission has not yet disposed of the Exceptions. Regardless, the facts and evidence in Yaglidereliler Corp. are specific to that case.

In the present proceeding, Joint Complainants have sufficiently pleaded facts that support a finding that Respondents billed its customers in a manner inconsistent with the terms and conditions in Respondent's Disclosure Statement. Joint Complainants herein incorporate Paragraphs 21 through 24 above. The facts alleged in the Joint Complaint support a finding that Respondent acted in violation of the Commission's regulations and orders and the Consumer Protection Law.

26. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and are deemed denied. It is specifically denied that the "Definitions" section in Respondent's Disclosure Statement relieves Blue Pilot from Joint Complainants' allegations that Blue Pilot did not charge prices in early 2014 that conform to the Disclosure Statement. As stated in paragraphs 21 through 24, Joint Complainants deny that the Commission review of Respondent's Disclosure Statement is fatal to Joint Complainants' claims for violations of Section 54.43(1) and 54.5(c) of the Commission's regulations. For the reasons explained in Paragraphs 21 through 25 above, Joint Complainants submit that Respondent's request that Count I be dismissed must be overruled.

Commission Enforcement Of Its Regulations Would Not Violate Respondent's Constitutional Rights.

27. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and are deemed denied. By way of further answer, an alleged violation of Constitutional rights is not a proper ground for preliminary objections. See 52 Pa. Code § 5.101(a)(1)-(7).

28. It is admitted only that Section 54.43(1) of the Commission's regulations speaks for itself. Joint Complainants deny any characterization of the provisions of the Commission's regulations.

29. Admitted only that the Respondent has accurately quoted portions of the Disclosure Statement. Joint Complainants specifically deny the legal import the Respondent attaches to the language used in the Disclosure Statement, as well as the Respondent's characterization of the Joint Complaint as that document speaks for itself.

30. Denied as stated. Respondent's allegations constitute conclusions of law, which require no response and are deemed denied. Joint Complainants deny Blue Pilot's assertions that the Commission approved the Disclosure Statement. Further, even if the Commission had approved Respondent's Disclosure Statement, such Commission review and approval is irrelevant to the facts alleged in this matter that Respondent's prices charged in early 2014 did not conform to the Disclosure Statement. The Joint Complainants further deny any characterization of the June 14, 2014 Final-Omitted Rulemaking Order or the legal import thereof. To the extent that an answer may be required, the Joint Complainants specifically deny that the "void for vagueness" doctrine is a bar to the instant action. Whether a statute is "void for vagueness," in violation of due process, is considered "as applied to the particular facts at issue." Holder v. Humanitarian Law Project, 561 U.S. 1, 18 (2010). A statute is not deemed unconstitutionally vague merely because it is strict and harsh. See Barsky v. Bd. of Regents of Univ. of State of New York, 347 U.S. 442, 448 (1954). Perfect clarity and precise guidance has never been required of a regulation to pass constitutional muster. Holder, 561 U.S. at 19.

The United States Supreme Court has stated that to succeed in a void-for-vagueness challenge, the complainant must demonstrate that the law "is impermissibly vague in all of its applications." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494-495 (1982). The Court also noted that the level of vagueness that the Constitution tolerates is related in part to the nature of the enactment. Id. at 498. For example, economic regulation is

subject to a less strict vagueness test than criminal regulation, because of the narrower subject matter and because business will consult legislation in advance of action. Id. Moreover, the Court should examine the complainant's conduct before analyzing other hypothetical applications of the law. Id. at 495.

At this juncture of the proceedings, the void for vagueness doctrine has no application as the Respondent was under an obligation to ensure its conduct was compliant with the law and the regulations put it on sufficient notice. Respondent demands a level of precision regarding prohibited conduct, which is simply not required as a matter of law. The Commonwealth Court has upheld the Consumer Protection Law's ban on unfair and deceptive practices in the face of a void for vagueness challenge. See Commonwealth v. Nat'l Apartment Leasing, Co., 108 Pa. Commw. 300, 308, 529 A.2d 1157, 1161 (1987).

31. Denied as stated. Respondent's allegations constitute conclusion of law which requires no response and are deemed denied. By way of further answer, Joint Complainants incorporate Paragraphs 27 and 30 above herein. Blue Pilot's Preliminary Objection to Count I on Constitutional grounds is improper and must be overruled.

The Commission Has Jurisdiction To Regulate Blue Pilot's Marketing And Billing Practices.

32. Denied as stated. By way of further response, Joint Complainants submit that the Joint Complaint is of record in this matter and speaks for itself. It is denied that Count II of the Joint Complaint is legally insufficient.

33. Denied. These paragraphs states conclusions of law to which no response is required and are deemed denied. It is explicitly denied that any statements made by the Commission in Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products, Docket No. M-2014-2406134, Order (adopted Feb. 20, 2014/entered March 4,

2014) (March 4 Order Seeking Comments)<sup>2</sup> have any binding effect on the instant proceeding, as the facts alleged in the Joint Complaint are specific to the conduct of Blue Pilot. It is, therefore, not appropriate to rely on Commission statements in the March 4 Order Seeking Comments as authority that Respondent is in compliance with the Public Utility Code, the Commission's regulations and Orders and the Consumer Protection Law or that Blue Pilot charged customers prices in early 2014 that conformed to the Disclosure Statement. The case cited by Respondent in support of the conclusion of law that the Commission has no authority to limit EGS prices is currently before the Commonwealth Court, and therefore, it is not appropriate to cite as binding precedent. See McCloskey v. Pa. PUC, 569 C.D. 2014 (Advanced Form Brief submitted on July 10, 2014). Additionally, C&D Techs, Inc. v. Pa. Power and Light Co, 100 Pa. P.U.C. 1 (2005), is not binding in this matter, as the holding is limited to the facts and evidence presented in that proceeding. In this matter, Joint Complainants attached the affidavit of Dr. Steven L. Estomin to the Joint Complaint as Appendix B in support of the averments in the Joint Complaint that Respondent's billed prices did not conform to its marketed prices or its Disclosure Statement. Dr. Estomin analyzed the day-ahead and real-time market prices for electric energy during the winter of 2014 for electric and non-electric space heating residential customers and for several Electric Distribution Company (EDC) territories in Pennsylvania. See Joint Complaint at App. B, page 1. Dr. Estomin included several categories of PJM generation costs and EGS-specific costs in his analysis. See Joint Complaint at App. B, page 1. These categories analyzed by Dr. Estomin are comparable to the categories in Respondent's pricing disclosure term. Based on his analysis, Dr. Estomin concluded that the cost to serve the average residential heating customer in

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<sup>2</sup> Of note, the Commission sought Comments from interested parties in its March 4 Order Seeking Comments. On April 3, 2014, the OCA submitted Comments jointly with AARP, the Pennsylvania Utility Law Project and Community Legal Services, Inc. to the March 4 Order Seeking Comments. The Commission has not acted on the Comments submitted by interested parties to the March 4 Order Seeking Comments.

January 2014 should not have exceeded approximately \$0.23 per kWh. See Joint Complaint at ¶ 31 and App. B, page 2.

34-36. Denied as stated. Respondent's allegations constitute conclusions of law to which no response is required. By way of further answer, these paragraphs contain a discussion of Yaglidereliler Corp. v. Blue Pilot Energy, LLC, Docket No. C-2014-2413732, Initial Decision (June 18, 2014). As Joint Complainants explain above in Paragraph 25, complainant in Yaglidereliler Corp. filed exceptions to the Initial Decision. Therefore, Respondent's reliance is on the Initial Decision is misplaced, as the Commission has not yet disposed of the Exceptions. Additionally, Tustin v. Respond Power, LLC, Docket No. C-2014-2417552 (June 26, 2014), is irrelevant to the claims in the Joint Complaint because Joint Complainants do not seek for the Commission to regulate Respondent's rates.

37. Denied as stated. Respondent's allegations constitute conclusions of law to which no response is required. As Joint Complainants explain above in Paragraph 25, complainant in Yaglidereliler Corp. v. Blue Pilot Energy, LLC, Docket No. C-2014-2413732, filed exceptions to the Initial Decision. Therefore, Respondent's reliance is on the Initial Decision is misplaced, as the Commission has not yet disposed of the Exceptions.

It is denied that the affidavit of Dr. Estomin attached to the Joint Complaint as Appendix B contains a "facially flawed economic analysis." Additionally, Joint Complainants find it interesting that Blue Pilot can make such conclusions about Dr. Estomin's analysis without reviewing Dr. Estomin's underlying analysis.

By way of further answer, the Commission has the authority to order equitable relief and has done so in other instances. See 66 Pa. C.S. § 103(c); OCA v. Utility.com, Inc., 212 P.U.R.4<sup>th</sup> 255 (2001) (Utility.com Final Order). In the Utility.com case, the OCA sought refunds of

overpayments for service not received and for "lost savings" on behalf of customers. Utility.com Final Order at 262. In the Recommended Decision, ALJ Turner opined:

The ALJ opined that lost savings could be viewed as damages for breach of contract, and noted that the Commission does not exercise its jurisdiction over matters of damages. However, the ALJ notes that "the provisions of [the Public Utility Code] are cumulative and in addition to [the] rights of action and remedies" that exist under other statutory or common law. 66 Pa. C.S. § 103. Therefore, based on OCA's arguments, the ALJ recommends that the Commission find that it does have jurisdiction over lost savings.

See OCA v. Utility.com, Inc., 2001 Pa PUC LEXIS 32, \*23 (June 4, 2001). The Commission sustained the OCA's claims for refunds and lost savings.<sup>3</sup> Utility.com Final Order at 262. The Commission has ordered equitable relief in other cases as well. See e.g. Pa. PUC v. Reed, 1972 Pa. PUC LEXIS 40; 46 Pa. PUC 19 (1972) (Commission directed Respondent, who was authorized to transport as a class D carrier, to refund overcharges to his customers); Ely v. Pennsylvania Water, Docket No. C-20055616, Order at 1 (July 10, 2006) (Commission determined this was a classic case for the application of equitable estoppel when Respondent damaged Complainants' asphalt driveway while replacing a water line on the neighboring property and made countless verbal assurances that the driveway would be restored); C.S. Warthman Funeral Home, et. al. v. GTE North, Inc., Docket No. C-00924416 (June 4, 1993) (Complainants were permitted to introduce into evidence the letter and promise of Respondent that it would provide toll free calling to support a claim of equitable estoppel).

Based on the foregoing, Blue Pilot's Preliminary Objection to Count II must be overruled.

Blue Pilot Is In Violation Of The Commission's Regulations Because It Is Not In Compliance With The Telemarketer Registration Act.

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<sup>3</sup> The Commission noted that there were no funds remaining from Utility.com's bond to pay refunds and lost savings and encouraged the OCA to seek alternative means of collection of these funds. Utility.com Final Order at 262.

38. The Joint Complaint is of record and speaks for itself.

39. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and which are deemed denied. To the extent that an answer may be required, the exception that the Respondent alludes to in Section 2245(d)(1) of the TRA 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, however, are subject to all requirements of the TRA, except the requirement that they register with the OAG. On February 8, 2010, Attorney General Tom Corbett issued an advisory opinion in response to then Commission Chairman James H. Cawley's request for an "opinion regarding the applicability of the [TRA] to electric generation suppliers as defined in the Electricity Generation Customer Choice and Competition Act." See Request for Opinion, 2010 Pa. AG LEXIS 1 (Feb. 8, 2010) (AG Opinion), attached hereto as Appendix A. In response to Chairman Cawley's question whether the EGSs are excluded from the definition of "telemarketer" in the TRA, Attorney General Thomas W. 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. Clearly, it is intended that all provisions of the TRA, except the registration requirement, apply to EGSs. To the extent that an answer may be required to respond to Footnote 14, the Commission incorporated the TRA into its regulations, and it, therefore, has the authority to make determinations pursuant to the TRA in order to determine if Respondent has violated the Commission's regulations. See 52 Pa. Code § 111.10(a)(1); Harrisburg Taxicab,

786 A.2d at 292-92. By way of further answer, Joint Complainants incorporate Paragraph 20 above herein.

40. Denied. Respondent's allegations constitute conclusions of law which require no response and which are deemed denied. By way of further answer, Joint Complainants incorporate Paragraph 39 above herein. See AG Opinion at \*4-5.

41. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and which are deemed denied. To the extent that an answer may be required, EGSs are subject to all requirements of the TRA, except the requirement that they register with the OAG. See AG Opinion at \*4-5. Joint Complainants note that the 1997 Customer Information Order relied upon by Blue Pilot was entered over ten years before the AG Opinion was sought by Chairman Cawley and is therefore, irrelevant.

42. Denied as stated. EGSs are subject to all requirements of the TRA, except the requirement that they register with the OAG. See AG Opinion at \*4-5. The PECO Energy case cited by Blue Pilot was entered over ten years before the AG Opinion was sought by Chairman Cawley and is therefore, irrelevant.

43-45. Denied. Blue Pilot provides information in these paragraphs that is evidentiary in nature and is more properly brought in the evidentiary portion of this matter.

46. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. As stated in the Joint Complaint, the OCA is the agency authorized by law to represent the interests of utility consumers before the Commission, as provided in 71 P.S. § 309-1, *et seq.*

The Attorney General is authorized by the Consumer Protection Law to bring an action in the name of the Commonwealth of Pennsylvania where a business is believed to be engaged in

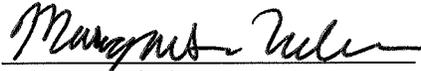
unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce as provided in 73 P.S. § 201-4. The Consumer Protection Law further authorizes the Attorney General to take such action when she has reason to believe that any person is using or is about to use a method, act, or practice unlawful under the Consumer Protection Law and when she determines that proceedings would be in the public interest as provided in 73 P.S. § 201-4. The Attorney General, as the chief law officer of the Commonwealth of Pennsylvania pursuant to Article IV § 4.1 of the Pennsylvania Constitution, is further authorized to initiate and maintain this action, and does so, pursuant to the Commonwealth Attorneys Act, 71 Pa. Stat. § 732-204. Even a “technical violation” of the provisions of the Consumer Protection Law or the TRA is actionable, although it is specifically denied that the allegations in the Joint Complaint amount to “technical violations.” The Consumer Protection Law and the TRA exist to protect consumers. The Commission determined that these consumer protection provisions were important and therefore, incorporated these consumer protection statutes into its regulations. As such, seeking a determination of violations of the Consumer Protection Law and the TRA and an order of enforcement of the Commission’s regulations is by no means unnecessarily elevating form over substance.

47. Denied. Respondent’s allegations constitute conclusions of law which require no response and which are deemed denied. To the extent that an answer may be required, Joint Complainants incorporate Paragraphs 39 and 46 above herein. Count V should not be dismissed, as EGSs are subject to all of the requirements of the TRA, and the Commission has the authority to determine whether the conduct alleged constitutes a violation of the TRA.

**IV. CONCLUSION**

WHEREFORE, Joint Complainants respectfully request that Respondent's Preliminary Objections to the Joint Complaint be overruled.

Respectfully submitted,



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

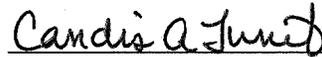
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# APPENDIX A



OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

[NO NUMBER IN ORIGINAL]

2010 Pa. AG LEXIS 1

February 8, 2010

**SYLLABUS:**

[\*1]

Request for Opinion regarding the Telemarketer Registration Act and the Electricity Generation Customer Choice and Competition Act

**REQUESTBY:**

James H. Cawley, Chairman  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17120

**OPINIONBY:**

TOM CORBETT, Attorney General

**OPINION:**

On behalf of the Public Utility Commission ("PUC"), you have requested my opinion regarding the applicability of the Telemarketer Registration Act ("Telemarketer Act"), 73 P.S. §§ 2241-2249, to electric generation suppliers as defined in the Electricity Generation Customer Choice and Competition Act ("Competition Act"), 66 Pa. C.S. §§ 2801-2815.

As a threshold matter under Section 204(a)(1) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(a)(1), we must establish that the PUC's request for legal advice concerns "a matter or issue arising in connection with the exercise of the official powers or the performance of the official duties of the [PUC]."

The Competition Act requires electric utilities "to unbundle their rates and services and to provide open access over their transmission and distribution systems to allow competitive suppliers to generate and sell electricity directly [\*2] to consumers," 66 Pa. C.S. § 2802(14). The Act directs the PUC, by regulation, to require electricity providers to provide adequate and accurate customer information to enable customers to make informed choices regarding the purchase of electricity services. 66 Pa. C.S. § 2807(d)(2). PUC regulations require providers to notify consumers that information is available upon request, 52 Pa. Code § 54.6(h), and prohibit providers from releasing customer information to third parties without customer consent. 52 Pa. Code § 54.8.

Telephone communication is among the means by which electricity providers may seek to discharge their obligation under the Competition Act and regulations to inform customers of choices regarding the purchase of electricity. Section 3(b) of the Telemarketer Act, 73 P.S. § 2243(b), prohibits telemarketers from communicating with consumers by telephone in connection with the purchase of consumer goods or services "unless the telemarketer or the telemarketing business [\*3] which employs the telemarketer is registered with the Office of Attorney General" and otherwise circumscribes telemarketer activities.

This interplay between the communication requirements of the Competition Act and the communication restrictions of the Telemarketer Act provides ample basis for concluding that the applicability of the Telemarketer Act to electric generation suppliers is an issue "arising in connection with" the PUC's powers and duties. Accordingly, we proceed to address the questions presented in your opinion request.

**1. Is electric generation supply a "consumer good or service" as defined in the Telemarketer Act?**

Section 2 of the Telemarketer Act, 73 P.S. § 2242, defines "consumer goods and services" as "real or personal property or services used for personal, family or household purposes." Electricity is used in countless aspects and activities of daily life; thus electric generation supply is plainly a "service used for personal, family and household purposes" and therefore a "consumer service" within the meaning of the Act.

**2. Is an electric generation supplier excluded from the definition of "telemarketer" in the [\*4] Telemarketer Act? If so, what is the scope of the exclusion under the Act, does it extend to an agent of a supplier, and does it matter that the source of customer information used for telephone solicitation by a supplier or its agent is an electric distribution company?**

Section 2 of the Telemarketer Act, 73 P.S. § 2242, defines "telemarketer" as follows:

Any person or business which, in connection with telemarketing, initiates or receives telephone calls to or from a consumer in this Commonwealth, or when the person or business acting in connection with telemarketing is located within this Commonwealth when such calls are initiated or received. *For purposes of registration under section 3(a)*, "telemarketer" does not include any of the following...

(5) A person or business engaged in a business or occupation which is licensed by, certificated by or registered with a Federal or Commonwealth agency while acting within the scope of the business for which licensure, certification or registration is required.

(Emphasis added).

Under this definition, electric generation suppliers engaged in telemarketing are telemarketers for all purposes [\*5] of the 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. It is immaterial to the definition or the exclusion that the source of customer information used for telephone solicitation by suppliers or their agents is an electric distribution company.

**3. Is customer consent to the release of information given to an electric distribution company to enable competitive solicitations "an express request" to receive telephone solicitations from electric generation suppliers or their agents within the meaning of the Telemarketer Act?**

Section 2 of the Telemarketer Act, 73 P.S. § 2242, excludes from the definition of a "telephone solicitation call" a call to a residential [\*6] or wireless consumer "(1) in response to an express request of the residential or wireless consumer." You explain that customers of electric distribution companies may indicate to the company their general consent to the release of information about them to enable competitive solicitations by electric generation suppliers and that such consent may be given by an "opt-in" process in which the customer affirmatively agrees to the release of information or an "opt-out" process in which the customer does not object to (opt-out of) the release of information.

Regardless of process, customer consent to the release of customer information by an electric distribution company to enable competitive solicitations by electric generation suppliers does not constitute "an express request" to receive telephone solicitation calls. The "do-not-call list" defined in section 2 of the Telemarketer Act, 73 P.S. § 2242, protects consumers from unwanted telephone solicitation calls. See sections 5-9, 73 P.S. §§ 2245-2249. The protection of the do-not-call list is defeated if general consent to the release of information given by a consumer to one individual or business [\*7] operates as general consent to receive telephone solicitations from any number of other individuals or businesses.

**4. Is an electric generation supplier using customer information supplied by an electric distribution company for telephone solicitations shielded from liability under the "error" provision of the Telemarketer Act?**

Section 5(a) of the Telemarketer Act, 73 P.S. § 2245(a), shields a telemarketer who has complied with the four requirements (i)-(iv) of the provision from liability for a telephone solicitation call to a consumer who has previously indicated that he or she does not wish to receive such calls. It is immaterial to this "error" provision of the Act that an electric generation supplier or its agent uses customer information supplied by an electric distribution company in making telephone solicitation calls.

In summary, it is my opinion, and you are so advised, that electric generation suppliers are subject to all the requirements of the Telemarketer Act, as detailed herein, except the requirement that they register with this Office.

Finally, you are advised that, in accordance with Section 204(a)(1) of the Commonwealth [\*8] Attorneys Act, 71 P.S. § 732-204(a)(1), you are required to follow the advice set forth in this Opinion and shall not in any way be liable for doing so.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Consumer Protection Telemarketing Communications Law Privacy Telemarketing & Consumer Fraud & Abuse Prevention Act Energy & Utilities Law Transportation & Pipelines Electricity Transmission