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September 18, 2014

VIA E-FILING

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

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

Dear Secretary Chiavetta:

On behalf of Blue Pilot Energy, LLC, I have enclosed for electronic filing the Brief of Blue Pilot Energy, LLC in Opposition to Joint Petition of Office of Attorney General and Office of Consumer Advocate for Interlocutory Review and Answer to Material Questions in the above-captioned matter.

Copies have been served on all parties as indicated in the attached certificate of service.

Very truly yours,

Karen

Karen O. Moury

KOM/tlg
Enclosure
cc: Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

RESPONDENT BLUE PILOT ENERGY, LLC'S BRIEF IN OPPOSITION TO COMPLAINANTS' JOINT PETITION FOR INTERLOCUTORY REVIEW AND ANSWER TO MATERIAL QUESTIONS

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Pursuant to 52 Pa. Code § 5.302(b), Respondent Blue Pilot Energy, LLC ("BPE") respectfully submits this Brief in Opposition to Complaints' Joint Petition for Interlocutory Review and Answer to Material Questions ("Joint Petition"). For the reasons set forth below, Complainants' Joint Petition should be denied. If the Commission determines that interlocutory review is proper, it should answer the material questions in the negative.

I. INTRODUCTION AND PROCEDURAL BACKGROUND

On June 20, 2014, Complainants filed a Joint Complaint against BPE, an electric generation supplier ("EGS"). The Joint Complaint asserts five causes of action against BPE, three of which are implicated by the Joint Petition: (1) Count I – Failing to Provide Accurate Pricing Information; (2) Count II – Prices Nonconforming to Disclosure Statement; and (3) Count V – Failure to Comply With the Telemarketer Registration Act.

In Count I, Complainants allege that BPE's disclosure statement failed to provide consumers with accurate pricing information in plain language and using common terms that consumers understand in violation of various Commission regulations and the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. §§ 201-1, *et seq.* ("UTPCPL"). Jt. Compl. ¶¶ 25-27.

Despite their repackaging of Count II ("Prices Nonconforming to Disclosure Statement") in the Joint Petition, the cornerstone and only allegation in that Count is simply that BPE's rates during the periods of extreme weather and polar vortices were higher than they should have been:

> Upon information and belief, [BPE] charged its variable rate customers prices that were at least as high as $0.50 per kWh for electricity.

> It is averred, upon information and belief, that [BPE's] prices charged to customers in early 2014 were not reflective of the cost to serve residential customers.
>
> By way of example, the cost to serve the average residential heating customer in January 2014 should not have exceeded approximately $0.23 per kWh.
>
> It is averred, upon information and belief, that the aforementioned prices do not conform to the variable rate pricing provision of [BPE's] Disclosure statement.

Jt. Compl. at ¶¶ 29-32 (internal citation omitted).

In Count V, Complainants allege that BPE violated the Telemarketer Registration Act, 73 Pa. Stat. §§ 2241, *et seq.* ("TRA") because BPE purportedly failed to provide a written contract to customer following the customers' telephonic enrollment through a recorded, third-party verification ("TPV") process.[1]

On July 10, 2014, BPE filed Preliminary Objections, seeking dismissal of Counts I, II, and V. BPE argued that Count I should be dismissed because: (i) the Commission lacks jurisdiction over UTPCPL claims; (ii) BPE sought and received approval by the Commission's Bureau of Consumer Services to use the disclosure statement asserted by Complainants to be inadequate and, thus, as a matter of law under *Hoke v. Ambit NE, LLC*, No. C-2013-2357863, 2013 WL 6681516 (Pa. P.U.C. Nov. 21, 2013), BPE's disclosure statement satisfies Commission regulations; and, (iii) consistent with the Commission's recent recognition that the regulations alleged in Count I are subject to "potential misinterpretation" and that "more specific direction

[1] It is uncontroverted that any customer who opts not to enroll telephonically receives a written contract containing all material terms of the variable rate agreement, which he or she must sign and return to BPE. It is further uncontroverted that, following telephonic or paper enrollment, BPE provides all customers with individualized written disclosure statements, which contain all the material terms of their respective variable rate agreements, including the initial rate; initial rate period; an explanation that, following the initial rate period, the rate may fluctuate based on a number of factors such as wholesale energy prices and atypical weather; that the customer may cancel at any time and for any reason (without penalty); and the customer's right of rescission.

should be provided to EGSs regarding the level of detail the Commission expects regarding the variability in retail generating supply," enforcement of the regulations against BPE in the manner proposed by Complainants would violate BPE's Due Process rights. BPE's Prel. Objections, at 6-11.[2]

BPE moved to dismiss Count II on grounds that that Count was nothing more than a challenge to the rates that BPE charged its customers pursuant to their variable rate contracts – *i.e.*, that BPE's rate was higher than they should have been – masquerading under Complainants' characterization that the claim is one based on "Prices Nonconforming to Disclosure Statement." BPE argued that, because the Commission lacks jurisdiction to regulate BPE's rates, Count II should be dismissed. *Id.* at 11-14.

Finally, in support of dismissal of Count V, BPE argued that the Commission does not have jurisdiction to enforce the TRA because the Commission only has the authority expressly granted to it by the legislature (or which arises by necessary implication) under the Public Utility Code. BPE also argued that the TRA's purported written contract requirement is inapplicable where consumers agree to each of the material contract terms orally via the telephonic TPV process (and such agreements are recorded) and subsequently are provided with a written disclosure statement. *Id.* at 14-19.

Complainants filed an Answer to BPE's Preliminary Objections on July 21, 2014. On August 20, ALJs Cheskis and Barnes issued a well-reasoned, thorough 18-page decision granting in part and denying in part BPE's Preliminary Objections (the "August 20 Order").[3] The ALJs agreed with all of BPE's jurisdictional arguments. In particular, the ALJs held that the

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2 For the Commission's convenience, a copy of BPE's Preliminary Objections is attached hereto as Exhibit "1."

3 For the Commission's convenience, a copy of the August 20 Order is attached hereto as Exhibit "2."

Commission lacked authority to hear claims based on the UTPCPL, specifically rejecting the decision upon which Complainants principally relied in their Answer – *Harrisburg Taxicab & Baggage Co. v. Pa. PUC*, 786 A.2d 288 (Pa. Commw. 2001). Aug. 20 Order, at 6-7. The ALJs concluded, however, that, although the Commission could not hear Complainants' UTPCPL claims, it could decide whether the conduct alleged violated the Commission's own regulations. *Id.* at 10. For similar reasons, the ALJs held that the Commission lacks jurisdiction to hear complaints brought under the TRA, but has authority to hear claims brought under its own telemarketing regulations.[4] *Id.* at 13-17. Thus, Counts I and V were dismissed in part.

With respect to Count II, the ALJs agreed with BPE that "[t]he gravamen of Count II is clearly the rate at which [BPE] charged its variable rate customers, not conformance of those rates with the variable rate pricing provisions in the Disclosure Statement." *Id.* at 11. The ALJs held that the Commission lacks jurisdiction to hear the arguments raised in Count II because it lacks authority to regulate BPE's rates. *Id.* at 2. Count II, thus, was dismissed in its entirety.

Complainants filed their Joint Petition on September 8, 2014, posing the following two material questions:

> (1) Does the Commission have the authority and jurisdiction to determine whether a violation of the UTPCPL and TRA has occurred when considering whether the Commission's regulations – which require compliance with these laws – have been violated?
>
> (2) Does the Commission have the authority and jurisdiction to determine whether the prices charged to customers by an EGS conform to the EGS disclosure statement regarding pricing?[5]

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4 Complainants do not cite any independent Commission telemarketing regulation that BPE may have violated in their Joint Complaint.

5 As explained above and by the ALJs in their August 20 Order, despite the gloss applied by Complainants to Count II, the Joint Complaint does not, in fact, plead that BPE's rates failed to conform to any provision of its disclosure statement. Accordingly, the second material question asserted is inapplicable to the claims raised by Complainants, mischaracterizes the August 20 Order, and any answer would be an advisory decision. Try as they may, Complainants cannot transform their allegations through the Joint Petition into something that

BPE opposes the Joint Petition. As detailed below, Complainants have not met their heavy burden under 52 Pa. Code § 5.302(a), as they have failed to present a compelling reason why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding. Should the Commission, however, determine that interlocutory review is appropriate, BPE respectfully requests that the Commission answer Complainants' material questions in the negative – that the Commission lacks authority and jurisdiction to hear UTPCPL or TRA claims. Moreover, the Commission should find that it does not regulate EGSs' rates and, therefore, is unable to determine what an appropriate rate would be for an EGS to charge a customer under a variable rate contract, particularly one that has no caps on the amount that may be charged.

II. ARGUMENT

A. Legal Standard

"Generally, petitions for interlocutory review are not favored, as the preferred approach is to permit proceedings to move forward in the normal course . . ." *In re Application of Lyft, Inc.*, No. P-2014-2433420, 2014 WL 4162532, at *3 (Pa. P.U.C. Aug. 18, 2014); *Pa. PUC, Bureau of Investigation and Enforcement v. Snyder Bros., Inc.*, No. C-2014-2402746, 2014 WL 3763971, at *3 (Pa. P.U.C. July 24, 2014). The standards for interlocutory review are clear and well established: the petition must "state . . . the compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding." 52 Pa. Code § 5.302(a). The standard for the Commission to allow interlocutory review is high.

"The pertinent consideration is whether interlocutory review is necessary in order to prevent substantial prejudice – that is, the error and any prejudice flowing therefrom could not be

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they are not. The second material question would properly be whether the Commission has jurisdiction to regulate an EGS's rates.

satisfactorily cured during the normal Commission review process." *Snyder Bros.*, 2014 WL 3763971, at *2. Indeed, the Commission has explained that "it does not routinely grant interlocutory review except upon a showing by the petitioner of extraordinary circumstances or compelling reasons," and "such a showing may be accomplished by a petitioner by its proving that, without such interlocutory review, some harm would result which would not be reparable through normal avenues, that the relief sought should be granted now, rather than later, and that granting interlocutory review would prevent substantial prejudice or expedite the proceeding." *Id.* at *3 (citations omitted).

In conclusory fashion, Complainants offer two reasons why review is needed here. First, Complainants assert that, absent such review, "significant," but unspecified, "prejudice and harm to the Petitioners and to the interests of the consumers that they represent will result. It is in the public interest and consumer interest to allow the development of an accurate and complete factual record for Commission review."[6] Jt. Pet. at 2. Second, Complainants claim that resolving the issues raised in their Joint Petition will expedite this proceeding because of the possibility that the "ALJs' Order may create confusion as to the permissible scope of the proceeding" and "may result" in Complainants having to pursue the normal Commission review process later and, then, a potential appeal to the Commonwealth Court thereafter. *Id.* at 2-3. At bottom, Complainants take issue with the normal Commission review process, alleging that

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6 The "public interest" and "consumer interest" noted by Complainants are one and the same as Complainants' respective enabling statutes confirm that they represent the interests of Pennsylvania residents generally, which include consumers. *See* 71 Pa. Stat. §§ 309-2, 732-204. Notably, Section 701 of the Public Utility Code provides that "[t]he Commonwealth through the Attorney General may be a complainant before the commission in any matter ***solely as an advocate for the Commonwealth as a consumer of public utility services.***" 66 Pa. Stat. § 701. In short, the OAG does not have standing or statutory authority to pursue this litigation or seek remedies on behalf of Pennsylvania electricity consumers. However, BPE does not object to OAG's involvement in this action at this moment.

"[s]uch a process does not promote judicial economy, especially in this instance where the Commission's regulations and case law do not support the ruling of the ALJs." *Id.* at 3.

As described more fully below, Complainants merely seek to do an end-run around the normal Commission review process in order to re-litigate issues already considered by the ALJs; they seek to short-circuit the normal Commission review process. The Joint Petition should be denied because Complainants have not presented any extraordinary circumstances or compelling reasons in support thereof.

B. Complainants Fail to Present Compelling Reasons for Interlocutory Review and the ALJs' Holdings Do Not Result in Substantial Prejudice to Complainants

The burden on the Complainants to justify interlocutory review is heavy – they must provide "***compelling reasons*** why interlocutory review will prevent ***substantial prejudice*** or expedite the conduct of the proceeding." 52 Pa. Code § 5.302(a) (emphasis added). Complainants have failed to meet that burden.

As an initial matter, it bears noting that conspicuously absent from the Joint Petition is any argument or assertion that Complainants will suffer ***irreparable*** harm should interlocutory review be denied. That reason alone justifies denial of their Joint Petition. *See Lyft*, 2014 WL 4162532, at *8 (declining to answer material question and noting that "Lyft does not allege that interlocutory review will help to prevent some irreparable harm or substantial prejudice."); *Snyder Bros.*, 2014 WL 3763971, at *3 (among other things, petitioner seeking interlocutory review has the burden of demonstrating irreparable harm absent immediate Commission review).

The only specific justification offered by Complainants in support of their argument that substantial prejudice will result absent interlocutory review is their claim that the August 20 Order has the effect of "restrict[ing] the development of the evidentiary record." Jt. Pet. at 2. Of course, the dismissal of a claim in any litigation necessarily has some restrictive effect on the development of the record as those dismissed claims are no longer part of the initial proceeding. That minimal concern is even less acute in this case, which is based almost entirely on questions of law (rather than fact). In *Berkery v. PECO Energy Co.*, the Commission acknowledged that "an evidentiary record has not been built in the case," but, regardless, refused to grant interlocutory review and answer the material question. No. C-2010-2170223, 2011 WL 765620 (Pa. P.U.C. Jan. 14, 2011) ("Simply put, this matter must be left to run its course."). Complainants' speculation as to the potential for a restricted evidentiary record should not stand in the way of letting this litigation "run its course."

Further, while the ALJs granted BPE's Preliminary Objections regarding the Commission's jurisdiction to hear claims brought under the UTPCPL or TRA, they held that Complainants could pursue the same allegations under the Commission's own regulations. Aug. 20 Order, at 10, 17 ("Blue Pilot has demonstrated that the Commission has no jurisdiction to hear claims regarding the UTP/CPL and TRA," but "[t]he Commission can hear claims regarding its own consumer protection and telemarketing regulations."). Thus, the same evidentiary record that would support UTPCPL or TRA claims already is being developed as part of Complainants' pursuit of the same claims under the Commission's regulations. The potential effect on the development of an evidentiary record – if there even is one – is not a compelling reason sufficient to justify interlocutory review.

Complainants, thus, have failed their heavy burden of demonstrating compelling reasons why interlocutory review will prevent substantial prejudice and their Joint Petition should be denied.

C. Interlocutory Review Will Not Expedite the Conduct of this Litigation

Although Section 5.302(a) allows the Commission to grant interlocutory review to expedite the conduct of the proceeding, the OCA itself has argued before the Commission that,

> [T]he regulation is ***not*** . . . designed to afford interlocutory review to any party based solely on their desire to speed up the process . . . ***The OCA submits that as a matter of policy, litigants should not be able to satisfy the second element of the regulation by requesting an accelerated proceeding.***

In re Petition of West Penn Power Co., No. M-2009-2123951, Br. of the OCA in Opp'n to Pet. for Interlocutory Rev. and Answer to a Material Question, at 8 n.5 (Pa. P.U.C. Oct. 13, 2009) (emphasis added); *In re Equitable Resources, Inc.*, No. 122250F5000, 2006 WL 2850141 (Pa. P.U.C. July 21, 2006) ("The OCA states that Section 5.302 is not designed to afford interlocutory review to any party based solely on their desire to speed up the process.").

Complainants offer nothing but conjecture to support their argument for interlocutory review – *i.e.*, that the August 20 Order "***may*** create confusion" and "***may*** result" in the need to re-litigate matters before the Commission during the ordinary review process or require Complainants to file an appeal with the Commonwealth Court. Jt. Pet. at 2-3 (emphasis added). Complainants assert that "[s]uch a process does not promote judicial economy, especially in this instance where the Commission's regulations and case law do not support the ruling of the ALJs." *Id.* at 3. As described below, each of Complainants' arguments, however, have been considered and rejected by the Commission previously.

First, the Commission has "emphasize[d] that the correctness of the Presiding Officer's ruling is not an issue when the Commission sets out to determine whether a petitioner has fulfilled the regulatory requirements for the Commission to take interlocutory review and answer a material question." *Berkery*, 2011 WL 765620. Thus, Complainants' attempt to bait the Commission into granting interlocutory review to evaluate the merits of legal issues that were fully briefed and decided by Judges Cheskis and Barnes should be rejected. They will have ample opportunity to seek Commission review later through the normal review process.

Even if they were relevant to the determination of whether to grant interlocutory review, the ALJs' jurisdictional decisions in this case were not extraordinary or reaching. They were thorough and well-reasoned, and do not depart from the legion of cases and other authority holding that the Commission – a venue of limited jurisdiction – lacks authority to hear UTPCPL and TRA claims,[7] or to regulate a supplier's rates.[8] *See also infra* Section II(D). Interlocutory review would serve only to unnecessarily stall this litigation and result in the unnecessary

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[7] *See, e.g.*, *MacLuckie v. Palmco Energy PA, LLC*, No. C-2014-2402558, 2014 WL 3011753, at *7 (Pa. P.U.C. June 16, 2014) ("It is well settled, however, that the Commission does not have jurisdiction to enforce the UTP/CPL. The Commission cannot find that an entity has violated the UTP/CPL.") (citing *Mid-Atl. Power Supply Ass'n v. PECO Energy Co.*, No. P-00981615, 1999 Pa. PUC LEXIS 30 (Pa. P.U.C. May 19, 1999), and *Pa. PUC v. Bell Tele. Co. of Pa.*, 71 Pa. PUC 338 (1989)); *Painter v. Aqua Pennsylvania, Inc.*, No. C-2011-2239556, 2014 WL 2427094, at *1 n.1 (Pa. P.U.C. May 22, 2014) (denying complainants' exceptions and noting that initial decision dismissed complainants' claims based on the UTPCPL for lack of subject matter jurisdiction); *Torakeo v. Pa. Am. Water. Co.*, No. C-2013-2359123, 2014 WL 1390784, at *6 (Pa. P.U.C. Apr. 3, 2014) (denying complainants' exceptions to ALJ's decision that the Commission lacks jurisdiction to hear UTPCPL claims; "to the extent that the Complainant is challenging the ALJ's finding regarding our jurisdiction over the allegations that PAWC's actions violated the UTPCPL, this Exception is also denied. As the ALJ determined, it is clear under Pennsylvania law that the Commission does not have jurisdiction over such claims."); *See In re Mktg. and Sales Practices for the Retail Residential Energy Market*, 300 P.U.R. 4th 353, No. L-2010-2208332, at *4-5 (Order adopted Oct. 24, 2012) (noting that Commission refers TRA and UTPCPL issues that fall under the Attorney General's jurisdiction to the OAG for enforcement and/or resolution in a proper venue).

[8] *See, e.g.*, 66 Pa. Code § 2806(a); *In re Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, No. M-2014-2406134 (Order entered March 4, 2014) (the rates consumers pay in the retail electric market are governed by the terms of the contract with their EGS); *Nadav v. Respond Power LLC*, No. 2014-2429159, 2014 WL 4374216, at *8 (Pa. P.U.C. Aug. 14, 2014) ("the Commission . . . does not have jurisdiction to regulate the rates charged by an EGS, such as the Respondent, or order a refund of unreasonable rates. Rather, these rates are governed by private contract between the EGS and the customer"); *Yaglidereliler Corp. v. Blue Pilot Energy, LLC*, No. C-2014-2413732, 2014 WL 3011778, at *6 (Pa. PUC June 18, 2014) ("The Commission may not regulate the rates that [BPE] charged the Complainant for electric generation service since it is not a public utility . . ."); *In re Pet. of PECO Energy Co. for Approval of Its Default Serv. Plan*, No. P-2012-2283641 (Pa. P.U.C. Mar. 12, 2014) (rejecting OCA's argument that the Commission has the authority and responsibility to ensure that supplier rates are just and reasonable, and holding that "we [the Commission] have not found any arguments that convince us that we have the statutory authority to limit prices charged by EGSs").

expenditure of the Commission's and parties' resources and time debating well-settled legal principles. In fact, the OCA has argued, under similar circumstances, that interlocutory review is improper where "prior Commission decisions and the law are in accord with" the ALJ's underlying decision *See In re Petition of West Penn Power Co.*, No. P-2010-2158084, 2010 WL 4687833 (Pa. P.U.C. Nov. 8, 2010) (declining to answer material question).

Second, as the OCA has argued previously, and the Commission has agreed, "the possibility of expending substantial resources in litigation" "is present in many cases and does not constitute the extraordinary circumstances or compelling reasons that would justify granting interlocutory review." *Id.* (citation omitted). Thus, Complainants' argument that interlocutory review would promote judicial economy is a red herring and contradicts its own position previously staked before the Commission.

Finally, Complainants' suppositions that, absent interlocutory review, there may be confusion as to the permissible scope of the proceeding or that they might have to proceed through the normal Commission review and subsequent Commonwealth Court appeal processes do not rise to the level of extraordinary circumstances or compelling reasons necessary to support interlocutory review. Interlocutory review cannot be justified based upon a party's desire to simply speed up the normal-course process for review of administrative orders. *Equitable Resources*, 2006 WL 2850141. Moreover, there is no evidence that any party or judicial confusion will result if the litigation continues without interlocutory review. Accordingly, Complainants have not satisfied their burden of demonstrating compelling reasons why interlocutory review will prevent some irreparable harm or substantial prejudice. Their Joint Petition should be denied.

D. Should the Commission Grant Complainants' Joint Petition, It Should Be Determined That the Commission Lacks Jurisdiction to Hear UTPCPL and TRA Claims, or Regulate BPE's Rates

In their Joint Petition, Complainants present two purported "material questions" for the Commission to answer regarding the scope of its authority and jurisdiction to hear UTPCPL or TRA claims, and, at bottom, the Commission's jurisdiction to regulate EGSs' rates. Complainants recommend that the Commission answer both questions in the affirmative – *i.e.*, that it has such authority and jurisdiction. If the Commission grants interlocutory review, BPE avers that the Commission should answer Complainants two questions in the negative and find – as ALJs Cheskis and Barnes found in the August 20 Order – that the Commission does not have authority and jurisdiction to hear UTPCPL or TRA claims, or to regulate BPE's rates.

The Commission, as a creature of statute, only has the authority expressly granted to it by the legislature (or which arises by necessary implication) – *i.e.*, that which is contained in the Public Utility Code. *Shedlosky v. Pa. Elec. Co.*, No. C-20066937, 2008 WL 8014593 (Pa. P.U.C. May 22, 2008); *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791, 794 (Pa. 1977); *W. Pa. Rys. Co. v. Pa. PUC*, 4 A.2d 545, 549-50 (Pa. Super. Ct. 1939). Further, it is well settled that the Commission may not exceed its jurisdiction but, rather, must act within its limits. *City of Pittsburgh v. Pa. PUC*, 43 A.2d 348, 350 (Pa. Super. Ct. 1945). Jurisdiction may not be conferred by the parties where none exists. *Yaglidereliler*, 2014 WL 3011778, at *5 (citing *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967)); *City of Pittsburgh*, 43 A.2d at 350 ("Notwithstanding there may be a strong desire to extend all considerations and courtesies possible to members of our armed forces, commissions and courts must act within, and cannot exceed, their jurisdiction."). Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. *Hughes v. Pa. State Police*, 619 A.2d 390, 393 (Pa. Commw. 1993).

As noted above, *see supra* n.7, there is a wealth of Commission and ALJ precedent concluding that the Commission lacks jurisdiction to enforce the UTPCPL. Moreover, the case upon which Complainants principally rely, *Harrisburg Taxicab*, 786 A.2d 288, is inapplicable here. Although the *Harrisburg Taxicab* court supports "overlapping jurisdiction" and the Commission's ability to incorporate other laws, it also recognized that the Commission's authority to incorporate other laws must rest on statutory authority clearly granted to the Commission: "A regulatory agency, such as the PUC, is a creature of the legislative body which created it. ***It has only those powers, duties, responsibilities, and jurisdiction given to it by the Legislature.***" *Id.*, (quoting *W. Pa. Water Co. v. Pa. PUC*, 311 A.2d 370, 373 (Pa. Commw. 1973) (emphasis added). Here, however, the ALJs correctly found that unlike in *Harrisburg Taxicab*:

> [T]he Joint Complainants rely on the Commission's own regulations – not statutory authority – in support of their position that the Commission has jurisdiction to hear cases regarding the UTP/CPL. Reliance on its own regulations is not comparable to the Commission's express authority to regulate the safety of taxicabs explicitly granted by the General Assembly under Section 1501.

August 20 Order, at 7. Moreover, as the ALJs further recognized, the Joint Complaint references only Commission regulations incorporating two UTPCPL sections regarding certain definitions and rescission of contracts, neither of which confer upon the Commission jurisdiction to hear the UTPCPL claims regarding BPE's pricing information asserted in this case. *Id.* at 6. *Harrisburg Taxicab* does not support Complainants' UTPCPL and TRA claims.[9]

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[9] Notably, *Harrisburg Taxicab* has never been extended beyond the unique factual context in which it arose – the enforcement of certain safety provisions of the Pennsylvania Vehicle Code against taxicab companies. In fact, the case has been cited only once in the 13 years since it was decided. *See Keystone Cab Serv., Inc. v. Pa. PUC*, 54 A.3d 126 (Pa. Commw. 2011).

As with the UTPCPL, there is no Code provision authorizing the Commission to enforce the TRA. In fact, the Commission has acknowledged that it lacks jurisdiction to enforce the TRA. *See Mktg. and Sales Practices for the Retail Residential Energy Market*, 300 P.U.R. 4th 353, at *4-5. In that final rulemaking, a commenter noted that the OAG administers and regulates the TRA, as well as the UTPCPL, and inquired how the Commission would enforce its regulations that require compliance with those laws. The Commission responded by referring to its 1998 Memorandum of Understanding with the OAG, pursuant to which the Commission can refer TRA and UTPCPL issues that fall under the OAG's jurisdiction to that Office for enforcement and/or resolution.

As explained above, it is Black Letter law that the Commission's jurisdiction is limited specifically to that which it is granted by the General Assembly. Nothing in the Public Utility Code authorizes the Commission to enforce the provisions of the UTPCPL or TRA. Inclusion of a requirement in its regulations requiring compliance with these laws does not confer subject matter jurisdiction on the Commission to determine whether violations have occurred.

Finally, the second question Complainants pose in the Joint Petition is wholly removed from both the allegations made in the Joint Complaint that BPE's prices were too high and, indeed, the question presented in BPE's Preliminary Objections and answered in the August 20 Order. BPE contested whether the Commission has the jurisdiction to regulate the prices BPE charges; the ALJs directly answered this question with a conclusion that "the Commission does not have [such] authority." August 20 Order, at 12. Therefore, as posed, the second question seeks review of an issue not directly presented to the ALJs or implicated in this litigation. In fact, in the August 20 Opinion, the ALJs clearly point out that Count II of the Complaint makes no averments related to BPE's disclosure statement. Thus, as posited in their Joint Petition, the second question presented mischaracterizes the ALJs' decision in an apparent attempt to bait the Commission to issue an inappropriate advisory decision on an allegation not asserted in Count II of the Joint Complaint.

In any event, it is firmly established that the Commission does not and cannot regulate an EGS's rates. *See supra* n.8. The rates that BPE charged its customers pursuant to their variable rate contracts are a matter of private contract between the parties, and Pennsylvania appellate courts have long recognized that the Commission does not have authority to settle disputes arising under private contracts. *See, e.g., Allport Water Auth. v. Winburne Water Co.*, 393 A.2d 673, 675 (Pa. 1978). Count II of the Joint Complaint fails as a matter of law, and the ALJs' well-supported decision dismissing that claim should not be disturbed.

III. CONCLUSION

For the reasons discussed above, BPE respectfully requests that the Commission deny Complainants' Joint Petition. If the Commission determines to answer the material questions, however, BPE respectfully requests that they be answered in the negative – that is that the Commission lacks the authority or jurisdiction to hear claims brought to enforce the UTPCPL or TRA, and that it lacks jurisdiction to regulate BPE's rates.

Respectfully submitted,

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EXHIBIT 1

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

RESPONDENT BLUE PILOT ENERGY, LLC'S PRELIMINARY OBJECTIONS

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

Blue Pilot Energy, LLC ("BPE"), by and through its undersigned counsel, files these Preliminary Objections seeking dismissal with prejudice of Counts I, II, and V of the Complainants' Joint Complaint, pursuant to Section 5.101(a) of the Pennsylvania Public Utility Commission's ("Commission" or "PUC") regulations, 52 Pa. Code § 5.101(a)(4), and in support thereof, avers as follows:

I. BACKGROUND

1. BPE is an electric generation supplier ("EGS"), licensed by the Commission since June 10, 2011, Docket No. A-2011-2223888, to supply electricity or electric generation services to residential, small commercial, large commercial, and industrial customers in electric distribution company service territories throughout Pennsylvania. Jt. Compl. ¶ 6.

2. As part of the licensure application process, BPE submitted, among other things, a copy of its Disclosure Statement and Agreement for Electric Service ("Disclosure Statement") to the Commission for review and approval. Answer ¶ 6.

3. The Commission's Bureau of Consumer Services approved BPE's Disclosure Statement on May 26, 2011. *Id.* & Exh. 1.

4. BPE has only offered variable rate contracts to Pennsylvania residential consumers. *Id.* at ¶ 8(a).[1] Under those contracts, customers receive an initial rate, which is guaranteed for a specific period (typically 30, 60, or 90 days). After the rate-guarantee period expires, pursuant to the terms of their variable rate contracts, customers' rates may increase or decrease based on a number of factors, such as changes in wholesale energy market prices and "[s]udden, atypical fluctuations in climate conditions, including but not limited to, extraordinary changes in weather patterns." *See* Jt. Compl. ¶ 20 & App. A.

5. All material terms of a customer's contract are clearly and conspicuously disclosed to the customer prior to and during enrollment. These terms also are contained in BPE's Commission-approved Disclosure Statement, a copy of which is mailed to each customer following his or her enrollment. Answer ¶¶ 20, 54. The Disclosure Statement contains no cap on the amount by which a customer's rate may increase or decrease. *See* Jt. Compl. ¶ 20 & App. A; Answer ¶ 26 & Exh. 3.

6. BPE's customers may cancel their service at any time and for any reason, without incurring a termination fee. Jt. Compl., App. A.

7. When BPE began selling energy in Pennsylvania in or about December 2011, its retail rate was based upon BPE's projections of cost per kilowatt hour (kWh). In a number of instances before 2014, BPE lowered its customers' rates after their rate-guarantee periods ended.

8. Severe and unanticipated weather events, such as winter storms and polar vortices, plagued Pennsylvania and many other Eastern states during December 2013 and the

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1 In 2013, BPE implemented a trial program pursuant to which it sold 19 Pennsylvania business customers a two-year term plan with a fixed rate of $0.069 per kWh. Pursuant to the terms of those customers' contracts, that guaranteed rate has not changed and remains in effect until 2015. *Id.*

first quarter of 2014. Recognizing such unprecedented weather, the PUC explained to consumers that "[t]he extreme cold has significantly increased the demand for electricity" and "remind[ed] consumers [that] the frosty temperatures and increased use of heating systems will translate into higher energy bills in the coming months." Pa. PUC, Press Release, *PUC Urges Consumers to Conserve Energy During Frigid Temps*, Jan. 27, 2014.[2] PUC Chairman Robert Powelson specifically warned that consumers likely would be receiving "higher bills that will be associated with heating their homes during the winters' extended cold." *Id.*

9. In late January 2014, the PUC advised Pennsylvania consumers using a competitive supplier (such as BPE):

> [T]o review their contract[s] as cold temperatures and high demand have driven the wholesale price of electricity higher. ***Customers with variable contracts or those with fixed contracts that have expired and were moved to a variable rate may see their prices increase.*** Consumers are urged to check their contracts . . . The PUC is seeing higher prices in the wholesale electric markets, which could translate into higher prices for some customers who have contracts with competitive suppliers that allow for prices to change. Consumers should check the terms and conditions they received when they enrolled with the competitive supplier or call the supplier to check the status of their prices. Some prices for those on variable rates may have already increased.

Pa. PUC, Press Release, *PUC Urges Shopping Consumers to Review Contracts, Cold Temps Could Mean Higher Prices for Those on Variable Rates*, Jan. 31, 2014 (emphasis added).[3] The Commission again informed consumers that "cold temperatures and increased use of heating systems will translate into higher energy bills." *Id.*

10. The Federal Energy Regulatory Commission ("FERC") has noted that, during one of the polar vortices that hit Pennsylvania in January 2014 in particular, electricity prices surged

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[2] *Available at* http://www.puc.pa.gov/about_puc/press_releases.aspx?ShowPR=3297 (last accessed July 3, 2014).

[3] *Available at* http://www.puc.state.pa.us/about_puc/press_releases.aspx?ShowPR=3298) (last accessed July 3, 2014).

with the location marginal prices ("LMPs") being near or above $2,000/Mwh for a number of hours in PJM. FERC Staff Report, *Winter 2013-2014 Operations and Market Performance in RTOs and ISOs*, AD14-8-000, at 10 (Apr. 1, 2014).[4] Similarly, the PUC identified the "historic demand" for electricity in the Commonwealth, and confirmed that "PJM reached an all-time winter peak" in early January. Pa. PUC, Press Release, *PUC Urges Consumers to Conserve Energy During Frigid Temps*, Jan. 7, 2014.[5]

11. As a result of these extreme weather events, BPE was forced to increase its rates to recover its costs for wholesale power that, in certain markets, increased 400% or more over the course of a month.

12. In January 2014, BPE submitted to the Commission a slightly revised version of its previously approved May 2011 Disclosure Statement, which, in relevant part, added verbiage to the "Price per Kilowatt Hour" section to address extreme weather events. The Commission's Bureau of Consumer Services again reviewed and approved the revised Disclosure Statement on January 22, 2014. Answer ¶ 20 & Exhs. 2, 3.

13. In late March 2014, BPE suspended bringing on new customers in Pennsylvania until it could be sure that the cost per kWh to consumers would be stable. Answer ¶ 11. BPE has not lifted that self-imposed suspension. *Id.*

14. On June 20, 2014, Complainants Pennsylvania Attorney General Kathleen G. Kane and Tanya J. McCloskey, Acting Consumer Advocate for the Office of Consumer

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[4] *Available at* https://www.ferc.gov/legal/staff-reports/2014/04-01-14.pdf (last accessed July 3, 2014).

[5] *Available at* http://www.puc.pa.gov/about_puc/press_releases.aspx?ShowPR=3283) (last accessed July 3, 2014).

Advocate ("OCA"), filed their Joint Complaint in this case.[6] Complainants assert five causes of action against BPE: (1) Count I – Failing to Provide Accurate Pricing Information; (2) Count II – Prices Nonconforming to Disclosure Statement; (3) Misleading and Deceptive Promises of Savings; (4) Count IV – Lack of Good Faith Handling of Complaints; and (5) Count V – Failure to Comply With the Telemarketer Registration Act. Jt. Compl. ¶¶ 19-58.

15. For the reasons detailed below, Counts, I, II, and V fail to state a claim upon which the Commission can grant relief and/or the Commission lacks jurisdiction to grant relief. Those Counts should be dismissed as a matter of law.

II. ARGUMENT

A. Preliminary Objection Standard

16. The Commission's Rules of Administrative Practice and Procedure permit a respondent to file a preliminary objection in response to a regulatory complaint, such as the Joint Complaint here. 52 Pa. Code § 5.101(a). A complaint may be dismissed on, among other grounds, the Commission's lack of jurisdiction or the legal insufficiency of the complaint. *Id.* at § 5.101(a)(1), (4).

17. The preliminary objection standard under the Commission's Rules is similar to that which governs preliminary objections under the Pennsylvania Rules of Civil Procedure. *Cermak v. W. Penn Power Co.*, No. C-2014-2413754, 2014 WL 2528243, at *2 (Pa. P.U.C. May 19, 2014).

[6] On the same day, Complainants filed complaints against four other EGSs - Hiko Energy; IDT Energy; Respond Power; and Energy Services Providers d/b/a Pennsylvania Gas & Electric. All five complaints have an assembly-line quality in that the factual allegations are identical in all material respects and, in many cases, verbatim. However, Complainants assert a variety of additional causes of action against each of the other EGSs that are not asserted against BPE.

18. When considering a preliminary objection, the Commission generally accepts as true all well-pled, material facts of the non-movant, as well as all reasonable inferences deducible from those facts. *Id.*at *3. Further, the factual allegations in the Joint Complaint are to be viewed in the light most favorable to the Complainants. *Id.* The Commission, however, is not required to accept as true legal conclusions, unwarranted factual inferences, argumentative allegations, or expressions of opinion. *Armstrong Cty. Mem. Hosp. v. Dep't of Pub. Welfare*, 67 A.3d 160, 170 (Pa. Cmwlth. 2013).

19. Dismissal is appropriate where it appears that the Complainants "would not be entitled to relief under any circumstances as a matter of law." *Cermak*, 2014 WL 2528243, at *3; *see also Ricks v. PECO Energy Co.*, No. C-2012-2325257, 2012 WL 6763612 (preliminary objections will be granted where the law is "certain[] . . . that no recovery or relief is possible") (quoting *P.J.S. v. Pa. State Ethics Comm'n*, 669 A.2d 1105 (Pa. Cmwlth. 1996)).

B. BPE Provided Accurate Information About Its Prices (Count I)

20. Count I alleges that BPE violated Sections 54.43(1) and 54.5(c) of the Commission's regulations. Jt. Compl. ¶¶ 19-27.[7] More specifically, Complainants claim that BPE's Disclosure Statement fails to provide consumers with "accurate pricing information in

[7] Although the Joint Complaint is not the model of clarity, it appears that Complainants allege that BPE also violated the Pennsylvania Unfair Trade Practices and Consumer Protection Law's ("UTPCPL") "catch-all" provision, 73 Pa. Cons. Stat. § 201-2(4)(xxi). *See* Jt. Compl. ¶¶ 23-24 ("The Commission's regulations require compliance with the [UTPCPL]. The [UTPCPL] prohibits fraudulent and deceptive conduct which creates a likelihood of confusion or misunderstanding."); *see also id.* at ¶¶ 40, 57, 61 (alleging violations of and seeking relief under the UTPCPL). However, it is well-established and "clear under Pennsylvania law that the Commission does not have jurisdiction over [UTPCPL] claims." *Torakeo v. Pa. Am. Water Co.*, No. C-2013-2359123, 2014 WL 1390784, at *6 (Pa. PUC Apr. 3, 2014) (citing *Mid-Atl. Power Supply Ass'n v. Pa. PUC*, 755 A.2d 723, 725 (Pa. Cmwlth. 2000), and *Pa. PUC v. Bell Tel. Co. of Pa.*, 71 Pa. P.U.C. 338, 341 (1989)); *MacLuckie v. Palmco Energy PA, LLC*, No. C-2014-2402558, 2014 WL 3011753, at *7 (Pa. PUC June 16, 2014) (Cheskis, J.) ("It is well settled . . . that the Commission does not have jurisdiction to enforce the UTP/CPL. The Commission cannot find that an entity has violated the UTP/CPL.") (citations omitted). Thus, to the extent Complainants seek to assert UTPCPL claims against BPE, such claims necessarily must be dismissed.

plain language and using common terms that consumers understand," in particular "the price that they would or could be charged . . . or how the price would be calculated . . ." *Id.* at ¶¶ 25-26. Complainants also claim that BPE's Disclosure Statement "fail[s] to provide information to [BPE's] customers in a manner that would allow them to compare offers." *Id.* at ¶ 27. As detailed below, these allegations fail as a matter of law.

1. There Is No Violation of Commission Regulation or Order Because the Commission Approved the Very BPE Disclosure Statement That Complainants Challenge

21. First, as Complainants acknowledge, the Commission approved BPE's energy generation supplier license in June 2011. *Id.* at ¶ 6. As part of that application process, BPE provided the Commission with a copy of its Disclosure Statement, which the Commission approved. *See* Answer ¶ 6 & Exh. 1. The Commission also approved the slightly revised version that is excerpted in and appended to the Joint Complaint. *See infra* at n.15. Such Commission review and approval is fatal to Complainants' allegations of fraudulent or deceptive advertising and marketing conduct.

22. Recently, in *Hoke v. Ambit NE, LLC*, the Commission analyzed Sections 54.43(1) and 54.5(c), and found that, because the variable rate disclosure statement used by the EGS in that case had been approved by the PUC, there was no violation of any regulations or Commission orders. No. C-2013-2357863, 2013 WL 6681516, at *5-6 (Pa. PUC Nov. 21, 2013).

23. More specifically, in *Hoke*, after enrollment, the supplier mailed the complainant a disclosure statement, which contained language that previously had been approved by the Commission's Bureau of Consumer Services. *Id.* at *2. The disclosure statement explained that "rates for the initial term and subsequent renewal terms [one-month periods] may vary dependent

upon price fluctuations in the entry and capacity markets, plus all applicable taxes." *Id.* at *3. The supplier advertised that, under its variable rate plans, rates may vary month-to-month based upon commodity costs and market conditions, and that the introductory rate applied to the first billing cycle only. *Id.* The complainant, nonetheless, believed that the rates would remain stable and constant over a long period of time. *Id.* The complainant "was confused by language preapproved by the commission's Bureau of Consumer Services in the disclosed terms of agreement," which were contained in the disclosure statement, and filed a complaint alleging that the supplier's variable rate advertising and marketing was false and deceptive. *Id.* at *1.

24. In its decision dismissing the complaint, the Commission found that the supplier did not violate either Section 54.43(1) (*i.e.*, the supplier, in fact, provided accurate information to the complainant about his electric generation service using plain language and common terms) or 54.5(c) (*i.e.*, the supplier, in fact, adequately disclosed to the complainant all variable pricing terms, including the conditions of variability and the limits on price variability), or any other regulations or Commission orders, because, "[a]s part of [the supplier's] licensing process, it submitted a customer disclosure statement for review and approval by the Commission's Bureau of Consumer Services. [The supplier] is still using the same disclosure statement approved by Commission Staff." *Id.* at *5. At bottom, the Commission concluded that the supplier's advertising and marketing was not "deceptive" or "fraudulent." *Id.* at *6. The Commission also held that the disclosure statement that the complainant received from the supplier provided him "adequate notice" that he had a variable rate that could increase on a month-to-month basis. *Id.*

25. Similarly, just three weeks ago in *Yaglidereliler Corp. v. Blue Pilot Energy, LLC*, Judge Salapa found that the very same BPE Disclosure Statement challenged by Complainants here, in fact, "properly disclosed the terms and conditions of the electric generation supply

agreement with the customer and [BPE] billed the customer in accordance with those terms and conditions." No. C-2014-2413732, 2014 WL 3011778, at *1 (Pa. PUC June 18, 2014) (Salapa, J.).

26. Complainants take issue with BPE's Commission-reviewed and -approved Disclosure Statement, which clearly and conspicuously advises consumers of the nature and terms of their variable rate contracts.[8] As in *Hoke*, such review and approval necessarily are fatal to Complainant's claims for violation of Sections 54.43(1) and 54.5(c). For that reason alone, Count I should be dismissed.

2. Enforcement of Sections 54.43(1) and 54.5(c) Would Violate BPE's Due Process Rights

27. The U.S. Supreme Court has explained that, in order to satisfy the Fifth Amendment's Due Process Clause – made applicable to the states through the Fourteenth Amendment – laws must not fail to "give [a] person of ordinary intelligence a reasonable opportunity to know what is prohibited . . ." *Vill. of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982); *Com. v. Parker White Metal Co.*, 515 A.2d 1358, 1367 (Pa. 1986) (due process requires that the proscribed conduct and range of penalties be unambiguously identified). Due process demands that a statute not be vague. *Com. v. Mayfield*, 832 A.2d 418, 422 (Pa. 2003); *Com. v. Barud*, 681 A.2d 162, 165 (Pa. 1996). A statute is vague if it fails to provide fair notice as to what conduct is forbidden or if it prevents the gauging of future, contemplated conduct, or if it encourages arbitrary or discriminatory enforcement. *Com. v. McCoy*, 895 A.2d 18, 30 (Pa. Super. Ct. 2006). A vague law is one whose terms necessarily

[8] It bears noting that BPE's Disclosure Statement includes a "Definitions" section and otherwise incorporates terminology set forth in the Commission's "Consumer's Dictionary for Electric Competition," which "provide[s] a common language for consumers." *Compare* 1997 Customer Information Order, 180 P.U.R. 4th 61 ("staff developed a 'Dictionary' of terms for electric competition to assist EDCs and suppliers in meeting our requirement concerning the use of common and consistent terminology") & App. D, *with* Jt. Compl., App. A.

require people to guess at its meaning. *Mayfield*, 832 A.2d at 422. If a law is deficient (*i.e.*, vague) in any of these ways, then it violates due process and is constitutionally void. *Id.*

28. Section 54.43(1) requires a supplier like BPE to provide "accurate information" about its electric generation services "using plain language and common terms in communications with consumers." 52 Pa. Code § 54.43(1). Section 54.5(c) provides that, "if applicable," a disclosure statements' variable pricing provision must include "[c]onditions of variability (state on what basis prices will vary)" and any "[l]imits on price variability." *Id.* at § 54.5(c)(2). None of these terms are defined within the relevant Code sections.

29. BPE's Disclosure Statement clearly and conspicuously states (1) that the customer had a variable rate plan; (2) the customer's specific initial rate; (3) the customer's specific rate-guarantee period; (4) that, after that period, "[BPE] may increase [the customer's] rate based on several factors, including changes in wholesale energy market prices in the PJM Markets," and that "[the customer's] variable rate will be based upon PJM wholesale market conditions," which could be affected by "[s]udden, atypical fluctuations in climate conditions, including but not limited to, extraordinary changes in weather patterns." Answer at Exh. 3. Yet, Complainants allege that BPE violated Sections 54.43(1) and 54.5(c) because consumers purportedly could not determine from that Disclosure Statement "the price they would or could be charged by [BPE] or how the price would be calculated." Jt. Compl. ¶ 26.

30. To the extent that Sections 54.43(1) and 54.5(c) could be construed in the manner requested by Complainants, the regulations are unconstitutionally vague because they do not give BPE fair notice that the failure to provide information above and beyond that which BPE already discloses (and which was reviewed and approved by the Commission) violates those Commission regulations. In fact, in its recent June 14, 2014 Final-Omitted Rulemaking Order

amending Section 54.5, the Commission agreed with a commenter's statement that Section 54.5(c)(2)'s "conditions of variability" and "limits on price variability" disclosure requirements were vague and ambiguous and need to be "clarif[ied]"; the Commission further noted that the regulatory language was subject to "potential misinterpretation." 2014 Reg. Text. 358473 (NS) (June 14, 2014) ("[the Commission] believes that more specific direction should be provided to EGSs regarding the level of detail the Commission expects regarding the variability in retail generating supply pricing").

31. Thus, enforcement of Sections 54.43(1) and 54.5(c) against BPE in the manner that Complainants seek would violate BPE's due process rights. Accordingly, Count I fails for this reason as well.

C. The Commission Lacks Jurisdiction to Regulate The Rates BPE Charged Its Customers (Count II)

32. In Count II, Complainants allege that the rates that BPE charged customers during the extreme weather events of early 2014 were too high because "the cost to serve the average residential heating customer in January 2014 should not have exceeded approximately $0.23 per kWh." Jt. Compl. ¶¶ 28-31. Complainants further claim that BPE's rates "do not conform to the variable rate pricing provision of the Company's [Commission-reviewed and -approved] Disclosure Statement." *Id.* at ¶ 32. Neither allegation, however, is sufficient to survive dismissal.

33. Under Code Section 2806(a), the Commission does not regulate the rate charged by generation suppliers. 66 Pa. Code § 2806(a); *Yaglidereliler*, 2014 WL 3011778, at *6 ("The Commission may not regulate the rates that [BPE] charged the Complainant for electric generation service since it is not a public utility . . ."). Rather, "the rates consumers pay in the retail electric market are governed by the terms of their contract with the supplier." *Review of*

Rules, Policies and Consumer Educ. Measures Regarding Variable Rate Retail Elec. Prods., Order, No. M-2014-2406134, at 3 (PUC Order adopted Feb. 20, 2014).[9] In addition, the Commission recently acknowledged that it has no statutory authority to limit the prices charged by EGSs. *Petition of PECO Energy Co. for Approval of its Default Serv. Plan*, Order, No. P-2012-2283641, at 11 (PUC Order adopted Mar. 6, 2014). The Commission also has held that, where a respondent's rate-determination estimation processes were not challenged and/or not unreasonable, and the complainant seeks a refund based upon a hindsight analysis of what the rate should have been, dismissal is appropriate. *See C&D Techs., Inc. v. Pennsylvania Power and Light Co.*, 100 Pa. P.U.C. 1, No. 00992119, 2005 WL 389208, at *19 (Pa. PUC Feb. 4, 2005).[10]

34. Just a few weeks ago in *Yaglidereliler*, the Administrative Law Judge ("ALJ") made clear that "[the Commission] has no jurisdiction over [BPE] to the extent that the Complainant contends that the Respondent has charged it an unreasonable, unjust or illegal rate for energy generation service." 2014 WL 3011778, at *5. In that case, the complainant enrolled

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[9] The Commission has observed that it is incumbent on "consumers on variable rates to carefully review the terms and conditions of their contracts to determine whether they are at risk for large rate increases at any given time." *Id.*

[10] In *C&D Techs.*, the Commission explained:

> Complainants seek refunds based on a comparison of the actual PJM rate to respondent's estimate of the PJM rate used in calculating the buy-through charge. . . . Complainants have not taken issue with any aspect of respondent's process for developing its estimates nor have they disputed the validity that respondent used in preparing those estimates. Instead, their case consists entirely of comparing actual PJM rates, knowable only after-the-fact, to respondent's estimates, which had to be made before-the-fact. ***Complainants rely on an improper hindsight analysis, which is not a valid basis for questioning the reasonableness of a utility's actions or decisions.*** . . . Complainants seem to believe that respondent was obligated to make perfect predictions rather than mere good faith best estimates of what ***the next day's*** PJM rates were going to be. ***Perfection is not a standard the Commission has ever imposed . . . Perfection in predicting a future event requires clairvoyance, and this is not the Commission's standard.***

Id. (underlined emphasis added).

with BPE in October 2013, and agreed to a variable rate for electric generation supply with an initial rate fixed at $0.0790 per kWh for 90 days. *Id.* at *1-2. After enrollment, BPE mailed the complainant a copy of its Disclosure Statement, which confirmed both the complainant's initial price and that that price was fixed for 90 days. *Id.* at *2. The Disclosure Statement also stated that, after 90 days, the complainant's rate could vary on a month-to-month basis due to several factors, including wholesale electric prices. *Id.* As the ALJ noted, the Disclosure Statement contained no cap on the amount by which the variable rate could increase. *Id.*

35. After the complainant's 90-day rate-guarantee period expired, its rate increased to $0.3999 per kWh due to the extreme weather events that hit Pennsylvania in January 2014. *Id.* at *1, *3. The complainant stated that a competing EGS offered the complainant a rate of $0.09 per kWh and requested that the PUC direct BPE to charge the complainant that rate.

36. Construing the complainant's requested relief as seeking a refund (*i.e.*, restitution) or credit, the ALJ explained that the Commission "lacks the authority to order [BPE] to provide either a refund or credit to the Complainant." *Id.* at *5. In a straight-forward analysis, the ALJ acknowledged that the Commission did not have authority to regulate the rates charged by BPE – even to the extent that they might be "unreasonable, unjust or illegal" – and, thus, it lacked authority to order a refund or credit. *Id.; see also Tustin v. Respond Power LLC*, No. C-2014-2417552, at 4 (Pa. PUC June 26, 2014) ("Regarding the issue of a refund, Respondent is correct that the Commission lacks authority to order a refund to Complainant. The Commission may not regulate the rates that the Respondent charged the Complainant for electric generation services . .

. Therefore, the Commission has no jurisdiction over the issue of whether Respondent charged Complainant an unreasonable, unjust or illegal rate for electric generation services.").[11]

37. The Complainants' allegations here are no different than those raised by the complainant and rejected in *Yaglidereliler*. More specifically, based on a facially flawed economic analysis,[12] Complainants here claim that BPE's rates "were not reflective of the cost to serve residential customers" and should not have exceeded $0.23 per kWh – in other words, that BPE's rates were "unreasonable" or "unjust." Jt. Compl. ¶¶ 31-32. In turn, Complainants request that the PUC order BPE "to provide appropriate restitution including without limitation refunding all charges to its customers that were over and above the Price to Compare . . ." *Id.* at ¶ 62(B). Because the Commission lacks jurisdiction to regulate BPE's rates to order such relief, Count II should be dismissed with prejudice.[13]

D. BPE Complied With the Telemarketer Registration Act (Count V)

38. In Count V, Complainants allege that BPE violated the Pennsylvania Telemarketer Registration Act, 73 Pa. Cons. Stat. §§ 2241, *et seq.*, by failing to provide consumers with a written contract following their telephonic enrollment, which contains, among

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[11] *Cf. McCall v. Pennsylvania Elec. Co.*, No. C-2009-2105240, 2010 WL 2911727 (Pa. PUC June 7, 2010) ("The Complainant seeks a remedy in the nature of restitution, but this Commission lacks authority to impose such a remedy on an unwilling public utility.").

[12] Complainants rely exclusively upon an economic analysis performed by a paid expert who regularly works with the OCA, Dr. Steven Estomin. *See* Jt. Compl. ¶ 31 & App. B. Dr. Estomin's remarkably terse and conclusory statement of what he believes should have been the maximum amount charged by BPE to its customers in January 2014 fails, among other deficiencies, to account for any of the fixed costs, overhead, advertising expenses, and other variable inputs that factor into BPE's (and other EGSs') rates. In any event, the Commission does not regulate EGS prices, nor does the Commission have in place any rules that require EGSs to base their rates on costs of service, which is a ratemaking principle applicable to regulated utility rates.

[13] Complainants also are barred from seeking restitution on behalf of any individual BPE customers to whom BPE already has provided a refund. 66 Pa. Cons. Stat. § 703(a) ("If any party complained against . . . shall satisfy the complaint, the commission shall dismiss the complaint.").

other things, a description of the services purchased and restatement of the material representations made during the telemarketing call. Jt. Compl. ¶¶ 49-58.

39. As a preliminary point, the Telemarketer Registration Act's requirement for a written contract does not apply where "[t]he contractual sale is regulated under other laws of this Commonwealth." 73 Pa. Cons. Stat. § 2245(d). Electricity sales are governed by the PUC's laws and regulations and, thus, the Telemarketer Registration Act's written contract requirement is not applicable to BPE's telephonic enrollments in the first instance. For that reason alone, Complainants fail to state a claim upon which relief can be granted and Count V should be dismissed.[14]

40. Even if the Act's written contract requirement did apply to BPE in this case, Complainants conspicuously fail to mention in their Joint Complaint that many BPE customers, in fact, do sign and return written contracts to BPE following a telemarketing call when they opt

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[14] Further, although the Commission's regulations require suppliers to comply with the Telemarketer Registration Act, the Commission does not have jurisdiction to enforce that law. The Commission, as a creature of statute, only has the authority expressly granted to it by the legislature (or which arises by necessary implication) – *i.e.*, that which is contained in the Public Utility Code. *Shedlosky v. Pa. Elec. Co.*, No. C-20066937 (Pa. PUC May 22, 2008); *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791, 794 (Pa. 1977); *W. Pa. Rys. Co. v. Pa. PUC*, 4 A.2d 545, 549-50 (Pa. Super. Ct. 1939) (PUC's authority is not boundless because its powers are statutory). Accordingly, the Commission cannot exceed its jurisdiction, and jurisdiction may not be conferred by the parties where none exists. *Yaglidereliler*, 2014 WL 3011778, at *5 (citing *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967); *City of Pittsburgh v. Pa. PUC*, 43 A.2d 348, 350 (Pa. Super. Ct. 1945) ("Notwithstanding there may be a strong desire to extend all considerations and courtesies possible to members of our armed forces, commissions and courts must act within, and cannot exceed, their jurisdiction.").

In fact, the Commission has noted that it does not enforce the Telemarketer Registration Act. *See In re Mktg. and Sales Practices for the Retail Residential Energy Market*, 300 P.U.R. 4th 353, No. L-2010-2208332, at *4-5 (Order adopted Oct. 24, 2012). In that final rulemaking, a commenter noted that the Pennsylvania Attorney General administers and regulates the Telemarketer Registration Act, as well as the UTPCPL, and inquired how the Commission would enforce its regulations that require compliance with those laws. The Commission responded by referring to its 1998 Memorandum of Understanding with the Attorney General, pursuant to which the Commission can refer Telemarketer Registration Act and UTPCPL issues that fall under the Attorney General's jurisdiction to that Office for enforcement and/or resolution.

not to enroll telephonically. Answer ¶ 54. Regardless, the Commission has held that no written agreement following a telemarketing call is required where there is a recorded third-party verification ("TPV") call followed by the provision of a written disclosure statement. *See, e.g.*, *Dawes v. Pa. Gas & Elec.*, No. F-2013-2361655, 2014 WL 466614, at *12-14 (Pa. PUC Jan. 14, 2014) (holding that a valid, binding variable rate contract existed where respondent used Trusted TPV to verify complainant's enrollment and terms thereof, and followed-up with a disclosure statement stating that rate was variable and setting forth initial rate); *Pa. PUC v. PECO Energy Co.*, 88 Pa. P.U.C. 402, No. R-00984298, 1998 WL 442683, at *10-11 (Pa. PUC May 28, 1998).

41. Indeed, in considering whether a consumer must sign and return an EGS's disclosure statement, the PUC has "emphasize[d] that written contracts are not required but both oral and written sales agreements are 'contracts.' . . . [W]e offer that 'terms of service' best describes an agreement between a customer and a supplier." *In re Elec. Generation Customer Choice and Competition Act – Customer Information*, 180 Pa. P.U.R. 4th 61 (Pa. PUC 1997) (hereinafter, "1997 Customer Information Order"); *see also Mackey v. Mackey*, 984 A.2d 529, 534 (Pa. Super. Ct. 2009) ("it is axiomatic that Pennsylvania courts recognize oral agreement as valid and enforceable contracts"). The Commission concluded that "***we will not require a customer to sign a written disclosure statement, as doing so would essentially require all contracts to be in writing. The required disclosure statement becomes the agreement of the parties unless the customer cancels the agreement by invoking the right of rescission prior to the starting date.***" 1997 Customer Information Order (emphasis added).

42. In *PECO Energy*, the Commission was called upon to decide the issue of whether suppliers should be able to enroll customers without obtaining such agreement in writing. 1998 WL 442683, at *10. The respondent argued that a conversation between an EGS and a customer

followed by a written confirmation was sufficient; OCA disagreed, arguing that an EGS must provide a written contract following telephonic enrollment. *Id.* Both the Administrative Law Judge and Commission expressly rejected OCA's argument. *Id.* at *10-11.

43. BPE's telephonic enrollment process followed by the provision of its "Disclosure Statement ***and Agreement for Electric Service***," *see* Jt. Compl., App. A (emphasis added), to consumers is identical to the practice utilized by the respondent and endorsed by the PUC in *Dawes*, *supra*. In fact, BPE uses the exact third-party verification service – Trusted TPV – as the respondent in *Dawes*. Answer ¶ 54.

44. BPE's comprehensive Disclosure Statement, which is mailed to each customer shortly after telephonic enrollment, provides customers with all of the material terms of their contracts that were given during the telemarketing sales call and the separate TPV call. *See id.* For example, BPE's Disclosure Statement re-confirms, among other things, (1) that the customer is purchasing electric services from BPE and provides a detailed description of that service; (2) the customer's right of rescission; (3) that "You [the customer] have a variable rate plan"; (4) the customer's initial guaranteed rate and the specific rate guarantee period;[15] (5) how a customer may cancel service and that he or she may do so "at any time and for any reason without penalty"; and (6) how the customer will be billed for service. *See id.*

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[15] It bears noting that the version of the Disclosure Statement attached to the Joint Complaint was an updated, generic, template version of the document – which, in relevant part, added verbiage to the "Price per Kilowatt Hour" section to address extreme weather events – submitted by BPE and approved by the Commission in January 2014. *See* Answer ¶ 20 & Exh. 2. The actual Disclosure Statement that each BPE customer received after enrollment included that specific customer's initial rate and rate-guarantee period – "You have a variable rate plan ***with a starting price set at RATE cents per kWh. This initial rate will be effective for at least the first [rate-guarantee period] days of service.*** Thereafter, your price may vary on a month-to-month basis. . . . At any time ***after [rate-guarantee period] of service***, but not more frequently than monthly, Blue Pilot may increase or decrease your rate based on several factors . . ." Answer, Exh. 3, at ¶ 2 ("Price per Kilowatt Hour" section) (underlined emphasis added)

45. In short, each customer receives a written explanation from BPE that contains all the material terms of the parties' contract for service being provided, including all relevant variable rate disclosures in a clear and conspicuous manner. Further, each BPE customer is made aware of his or her right to rescind the contract and cancel at any time for any reason without incurring a penalty.

46. There is no allegation of consumer harm, or that consumers were unaware that they had enrolled and contracted with BPE under a variable rate agreement for electricity supply services.[16] At most, Complainants assert a technical violation of the Telemarketer Registration Act and, under such circumstances, "no practical benefits inure nor is the public interest advanced by any further prosecution of [BPE]." *Pa. PUC Law Bureau Prosecutory Staff v. Worldxchange, Inc.*, Nos. C-20031989 & A-311038, 2004 WL 1773389 (Pa. PUC June 2, 2004) (holding that there were no "numbering compliance issues . . . notwithstanding numerous technical violations of the Public Utility Code and our regulations"); *Schneider v. Pa. PUC*, 479 A.2d 10, 16 (Pa. Cmwlth. 1984) (absolving Commission administrative law judge of "technical violation" of PUC regulation where petitioners were not prejudiced). To hold otherwise would significantly and unnecessarily elevate form over substance.

47. In short, no formal written and executed contract is required following a telemarketing enrollment where the EGS utilizes a TPV provider to record consent and the consumer is sent a hard-copy disclosure statement containing the material terms of service. *Dawes*, 2014 WL 466614, at *12-14. Given that this component of the Telemarketer

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[16] Nor could Complainants argue that no contract existed because a customer's acceptance of electricity and BPE's furnishing of invoices for the same establish the existence of a legally binding contract. *Scranton Elec. Co. v. Sch. Dist. of Borough of Avoca*, 37 A.2d 725, 728 (Pa. Super. Ct. 1944) ("Defendant admittedly received monthly bills during the entire period involved in this suit. It accepted and used the electric current during those years without any complaint whatsoever as to the rates charged or the amount alleged to be due for such services. It is immaterial whether there was or was not a formal contract between plaintiff and defendant.").

Registration Act has never been addressed dispositively by the Commission or Commonwealth courts, and that the Commission itself has stated that written contracts with EGS providers are not required, there is no violation of the Telemarketer Registration Act. Dismissal of Count V is appropriate.

III. CONCLUSION

48. For the foregoing reasons, BPE respectfully requests that the Commission grant its Preliminary Objection and dismiss with prejudice Counts I, II, and V of the Joint Complaint because the Commission lacks jurisdiction and/or Complainants do not and cannot state a claim upon which relief may be granted. Further, the Commission should award BPE such other relief as may be just and reasonable under the circumstances.

July 10, 2014

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EXHIBIT 2

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Commonwealth of Pennsylvania, *et al.*	:	
	:	
v.	:	C-2014-2427655
	:	
Blue Pilot Energy, LLC	:	

ORDER
GRANTING IN PART AND DENYING IN PART PRELIMINARY OBJECTIONS

Procedural History

On June 20, 2014, the Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, through the Bureau of Consumer Protection (OAG), and Tanya J. McCloskey, Acting Consumer Advocate (OCA) (collectively referred to as "the Joint Complainants") filed with the Pennsylvania Public Utility Commission (Commission) a formal Complaint against Blue Pilot Energy, LLC (Blue Pilot or "the Company"), Docket Number C-2014-2427655. In their Complaint, the Joint Complainants averred that they had received numerous contacts and complaints from consumers related to variable rates charged by Blue Pilot, including eleven formal complaints filed by consumers at the Commission. The Joint Complainants further averred that Blue Pilot used a variety of marketing and advertising mediums to solicit residential customers for its variable rate plan. As a result, the Joint Complainants averred five separate counts against Blue Pilot, including, but not limited to, failing to provide accurate pricing information, making misleading and deceptive promises of savings and lack of good faith handling of complaints. The Joint Complainants made several requests for relief, including providing restitution and prohibiting deceptive practices in the future. The Joint Complainants provided several attachments to their Complaint.

On July 10, 2014, Blue Pilot filed an Answer in response to the Complaint. In its Answer, Blue Pilot admitted or denied the various averments made by the Joint Complainants. In particular, Blue Pilot specifically denied that any consumers were charged high variable rates by Blue Pilot and denied that it failed to state the conditions of variability and the limits on price variability adequately. Blue Pilot averred that it has complied with all Commission regulations and orders and has clearly, conspicuously and accurately disclosed to consumers all the material terms of their rate plans, including pricing information, in plain language and through the use of common terms. Blue Pilot further admitted or denied the various averments made by the Joint Complainants in the Complaint and requested that the Complaint be dismissed with prejudice. Blue Pilot attached multiple documents to its Answer in support of its position.

Also on July 10, 2014, Blue Pilot filed Preliminary Objections in response to the Complaint. In its Preliminary Objections, which was accompanied by a Notice to Plead, Blue Pilot averred that three of the five counts in the Complaint should be dismissed for lack of Commission jurisdiction or for failure to state a claim upon which relief may be granted.

On July 21, 2014, the Joint Complainants filed an Answer to Blue Pilot's Preliminary Objections. In their Answer, the Joint Complainants asserted that Blue Pilot's Preliminary Objections are unsupported. The Joint Complainants argued that it is clear and free from doubt that the Complaint is legally sufficient and seeks that the Commission make determinations pursuant to the Commission's powers and jurisdiction. The Joint Complainants requested that Blue Pilot's Preliminary Objections be overruled.

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

Blue Pilot's Preliminary Objections are ready for disposition. For the reasons discussed further below, Blue Pilot's Preliminary Objections will be granted in part and denied in part.

Legal Standard

Section 5.101 of the Commission's Rules of Administrative Practice and Procedure provides for the filing of Preliminary Objections. 52 Pa.Code § 5.101. Commission Preliminary Objection practice is comparable to Pennsylvania civil practice respecting the filing of Preliminary Objections. Equitable Small Transportation Intervenors v. Equitable Gas Company, 1994 Pa PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994) (Equitable). Section 5.101(a) provides:

> (a) *Grounds.* Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections. Preliminary objections must be accompanied by a notice to plead, must state specifically the legal and factual grounds relied upon and be 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 a proceeding.

52 Pa.Code § 5.101(a)(1)-(7).

For purposes of disposing of Preliminary Objections, the Commission must accept as true all well pleaded, material facts of the nonmoving party, as well as every reasonable inference from those facts. County of Allegheny v. Commonwealth of Pennsylvania, 490 A.2d 402 (Pa. 1985); Commonwealth of Pennsylvania v. Bell Telephone Co. of Pa., 551 A.2d 602 (Pa. Cmwlth. 1988). The Commission must view the Complaint in this case in the light most favorable to the Joint Complainants and should dismiss the Complaint only if it appears that the Joint Complainants would not be entitled to relief under any circumstances as a matter of law. Equitable, *supra*; *see also*, Interstate Traveler Services, Inc. v. Commonwealth, Department of Environmental Resources, 406 A.2d 1020 (Pa. 1979).

In its Preliminary Objections, Blue Pilot seeks dismissal with prejudice of Count I (Failing to Provide Accurate Pricing Information), Count II (Prices Nonconforming to Disclosure Statement) and Count V (Failing to Comply with the Telemarketer Registration Act). Each of these Counts will be addressed in turn below.

Count I – The Commission Lacks Jurisdiction To Determine Whether Blue Pilot's Actions Violate The Unfair Trade Practices/Consumer Protection Law But Can Determine Whether Those Actions Violate Commission Regulations

In their Complaint, the Joint Complainants averred that Blue Pilot supplied some consumer complainants with Terms and Conditions of Service that did not provide accurate pricing information in plain language and using common terms that consumers understand. The Joint Complainants averred that such actions violate the Unfair Trade Practices/Consumer Protection Law (UTP/CPL) and various Commission orders and regulations. In its Preliminary Objection, Blue Pilot argued that Count I should be dismissed because the Commission approved the very Disclosure Statement that the Joint Complainants challenge and because enforcement of the regulations raised by the Joint Complainants would violate Blue Pilot's due process rights because the regulations alleged to be violated are unconstitutionally vague. In their Answer to the Preliminary Objection, the Joint Complainants argued that Count I is legally sufficient because the Commission has jurisdiction to hear claims brought under the UTP/CPL and any prior Commission review of the Disclosure Statement is not relevant to whether the statement is misleading or deceptive. The Joint Complainants also argued that any argument that the regulation at issue is unconstitutionally vague is premature and such argument is not an appropriate Preliminary Objection. For the reasons discussed below, Blue Pilot's Preliminary Objection will be granted in part and denied in part.

To begin, it is well settled that the Commission may not exceed its jurisdiction and must act within it. City of Pittsburgh v. Pa. Pub. Util. Comm'n., 43 A.2d 348 (Pa. Super 1945) (Pittsburgh). Jurisdiction may not be conferred by the parties where none exists. Roberts v. Martorano, 235 A.2d 602 (Pa. 1967) (Roberts). Subject matter jurisdiction is a prerequisite to the exercise of the power to decide a controversy. Hughes v. Pa. State Police, 619 A.2d 390 (Pa. Cmwlth 1992) (Hughes). As a creation of the legislature, the Commission possesses only the authority that the state legislature has specifically granted to it in the Public Utility Code. 66 Pa.C.S. §§ 101, *et seq.* Its jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. Feingold v. Bell, 383 A.2d 791 (Pa. 1977) (Feingold).

With specific regard to the UTP/CPL, the Commission has stated that it does not have jurisdiction to enforce the UTP/CPL. *See*, Mid-Atlantic Power Supply Assoc. v. PECO Energy Co., Docket No. P-00981615, 1999 Pa PUC LEXIS 30 (entered May 19, 1999) (MAPSA); *see also*, David P. Torakeo v. Pennsylvania American Water Co., Docket No. C-2013-2359123, Opinion and Order (entered April 3, 2014) ("to the extent that the Complainant is challenging the ALJ's finding regarding our jurisdiction over the allegations that PAWC's actions violated the UTPCPL, this Exception is also denied. As the ALJ determined, it is clear under Pennsylvania law that the Commission does not have jurisdiction over such claims.").

In this case, the Joint Complainants rely in part on the UTP/CPL as the basis for their position in Count I that Blue Pilot failed to provide accurate pricing information. The Complaint also references various Commission regulations that prohibit Electric Generation Suppliers (EGS) from engaging in fraudulent deceptive or other unlawful marketing. *See e.g.*, 52 Pa.Code §§ 54.43(f) and 111.12(d)(1). The Joint Complainants contend that these regulations give the Commission jurisdiction over the UTP/CPL by reference. These regulations, however, do not equate to providing the Commission with jurisdiction to hear claims brought pursuant to UTP/CPL. The Commission, however, does have jurisdiction to determine whether its own regulations prohibiting deceptive or misleading conduct have been violated. The Commission can therefore hear claims regarding misleading and deceptive practices under Title 52 but not under UTP/CPL.

The Joint Complainants argued in their Answer to Blue Pilot's Preliminary Objection that the Commission is within its jurisdiction to hear Count I because it is allowed to incorporate other laws, including the Consumer Protection Law, into its decisions. *Citing,* Harrisburg Taxicab & Baggage Co. v. Pa. Pub. Util. Comm'n., 786 A.2d 288, 292-93 (Pa. Commw. 2001) (Harrisburg Taxi). In this instance, however, the Complaint references Section 54.43(f) of the Commission's regulations, which incorporates Section 7 of the UTP/CPL regarding rescission of contracts, and Section 111.12(d)(1) of the Commission's regulations, which incorporates the definition section of the UTP/CPL. Neither of these sections allow the Commission jurisdiction to hear the Joint Complainants claims in this case regarding Blue Pilot's failing to provide accuracte pricing information.

In Harrisburg Taxi, the Commonwealth Court determined that the Commission had authority to enforce provisions of the Pennsylvania Vehicle Code pursuant its authority under Section 1501 of the Public Utility Code that requires the Commission to ensure the safety of utility facilities, such as a taxicab. Id. at 293. The Court saw such overlapping jurisdiction as "exactly the type of sensible cooperation and mutual adjustment between the agencies." Id. In this case, however, the Joint Complainants rely on the Commission's own regulations – not statutory authority – in support of their position that the Commission has jurisdiction to hear cases regarding the UTP/CPL. Reliance on its own regulations is not comparable to the Commission's express authority to regulate the safety of taxicabs explicitly granted by the General Assembly under Section 1501.

In addition, in MAPSA, *supra*, the Commission found that the electric distribution company (EDC) created confusion regarding customer choice through its advertising campaign but noted that Section 2811 limits the Commission's remedial authority in this area. In particular, Section 2811(d) requires the Commission to refer findings of anticompetitive or discriminatory conduct to the Attorney General. 66 Pa.C.S. § 2811(d)(1). The Commission noted that "there is an administrative agency having more extensive expertise in this area to which this matter is referred." Although the Commission subsequently added Sections 54.43(f) and 111.12(d) to the Public Utility Code referencing provisions of the UTP/CPL, this does not mean that the Commission has jurisdiction to hear claims brought under UTP/CPL.

As noted above, the Commission is a creation of the legislature and possesses only the authority that the state legislature has specifically granted to it and its jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. Feingold. Neither such express or strong and necessary implication is present here. In contrast, for example, authority conferred by the General Assembly through Section 1501 of the Public Utility Code to regulate taxi facilities, as was the case in Harrisburg Taxi, does give the Commission such jurisdiction. *Cf.*, MAPSA (noting that the Attorney General has more extensive expertise in this area) and Harrisburg Taxi (noting that two agencies possess overlapping authority). Overlapping jurisdiction is not present here where, for example, the remedies for findings of deceptive trade practices vary. C. Leslie Pettko, *et al.* v. Pennsylvania American Water Co., 39 A.3d 473, 484 (Pa. Cmwlth 2012) (the Commission does not have the authority to award civil penalties up to $5,000, as is allowed under the UTP/CPL); *see also*, 73 Pa.C.S. § 201-8. Blue Pilot's Preliminary Objection will be granted in part.

With regard to Blue Pilot's argument that Count I should be dismissed because there is no violation of a Commission regulation or order because the Commission approved the very Blue Pilot Disclosure Statement that the Joint Complainants challenge, this argument will be rejected. As the Joint Complainants noted in their Answer to the Preliminary Objection, the Complaint does not aver that the Disclosure Statement itself violates Commission regulations or order. Rather, by incorporating the introductory paragraphs of the Complaint into Count I, the Joint Complainants argue that the Disclosure Statement as applied to the prices charged in early 2014 did not conform to the Disclosure Statement and, therefore violates the Commission's regulations. In particular, the Joint Complainants averred that the Commission's regulations require EGSs to provide information about their electric service using plain language and common terms in communications with customers. The Joint Complainants aver that Blue Pilot failed to do so. The Joint Complainants are entitled to a hearing on their averment that Blue Pilot's actions violate the Commission's consumer protection regulations, as well as any reasonable inference from that averment, and not have such claims dismissed on a preliminary basis.

When accepting as true all well pleaded material facts contained in the Complaint, as well as every reasonable inference from those facts, and viewing the Complaint in the light most favorable to the Joint Complainants, it is not clear that the Joint Complainants would not be entitled to relief under any circumstances as a matter of law with regard to the requirements of its Disclosure Statement. Blue Pilot's Preliminary Objection that Count I should be dismissed because the Commission previously approved the Disclosure Statement will therefore be denied in part.

Similarly, Blue Pilot's argument that Count I should be dismissed because the Commission's regulations are vague and enforcement of those regulations would violate Blue Pilot's due process rights, will also be rejected. Blue Pilot is correct that due process demands that a statute not be vague and that a statute is vague if it fails to provide fair notice as to what conduct is forbidden or if it encourages arbitrary or discriminatory enforcement. Yet, the Joint Complainants are also correct that being "void for vagueness" in violation of due process is considered on a case by case basis and not at this preliminary juncture – it is unclear on the facts alleged whether the enforcement of the regulations cited by the Joint Complainants would give rise to a constitutional violation because the regulations are vague.

In fact, a plain reading of the regulations in question, Section 54.5(c) and Section 54.43(1), reveals that the regulations are clear and unambiguous. Blue Pilot's argument that none of the terms contained in those regulations are defined in the relevant Code sections supports the fact that those terms are clear and unambiguous. That is, had those terms not been clear and unambiguous, definitions would have been provided. In this case, definitions are not necessary because the regulations are not vague. Furthermore, to the extent that Blue Pilot questioned the meaning of any regulations it is required to comply with it should have asked for clarification prior to having a formal complaint filed against it. Or, to the extent that Blue Pilot questioned the application of those regulations to the specifics of the Complaint, the Company can avail itself of the Commission's discovery process or informal information gathering to more clearly ascertain the application of the regulations to the facts raised in the Complaint. Blue Pilot should not be heard now to complain that the regulations are void for vagueness when it has not previously inquired about the meaning of the regulations it is required to comply with or as applied to the averments made by the Joint Complainants in the Complaint.

As a result, when accepting as true all well pleaded material facts contained in the Complaint, as well as every reasonable inference from those facts, and viewing the Complaint in the light most favorable to the Joint Complainants, it is not clear that the Joint Complainants would not be entitled to relief under any circumstances as a matter of law with regard to the application of the Commission's regulations to Blue Pilot's Disclosure Statement. Blue Pilot's Preliminary Objection must therefore be denied in part on this issue as well.

As such, Blue Pilot's Preliminary Objection that Count I of the Complaint must be dismissed because the Company provided accurate information about its prices will be granted in part because the Commission does not have jurisdiction to hear claims regarding the UTP/CPL and denied in part because the Commission can determine in this case whether Blue Pilot's actions violated the Commission's own regulations.

Count II – The Commission Lacks Jurisdiction To Regulate Blue Pilot's Prices

In their Complaint, the Joint Complainants averred in Count II that Blue Pilot charged its variable rate customers prices at least as high as $0.50 per kilowatt hour (kwh) for electricity and that such prices in 2014 were not reflective of the cost to serve residential customers. The Joint Complainants attached an Affidavit to the Complaint in support of this position. The Joint Complainants further averred that such prices do not conform to the variable rate pricing provision of the Company's Disclosure Statement. In its Preliminary Objection, Blue Pilot argued that Count II should be dismissed because the Commission lacks jurisdiction to regulate the rates charged by Blue Pilot. Blue Pilot cited to Section 2806 of the Public Utility Code and various Commission decisions in support of its position. In their Answer to the Preliminary Objection, the Joint Complainants argued that the Commission has the authority to regulate Blue Pilot's marketing and billing practices and, therefore, Count II is legally sufficient. The Joint Complainants further averred that the cases relied upon by Blue Pilot are neither relevant nor binding. For the reasons discussed below, Respond's Preliminary Objection will be granted and Count II of the Complaint will be dismissed.

To begin, as noted above, it is well settled that the Commission may not exceed its jurisdiction and must act within it. Pittsburgh. Jurisdiction may not be conferred by the parties where none exists. Roberts. Subject matter jurisdiction is a prerequisite to the exercise of the power to decide a controversy. Hughes. As a creation of the legislature, the Commission possesses only the authority that the state legislature has specifically granted to it in the Public Utility Code. 66 Pa.C.S. §§ 101, *et seq.* Its jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. Feingold.

Section 2806 of the Public Utility Code provides that "the generation of electricity shall no longer be regulated as a public utility service or function, accept as otherwise provided for in this chapter." 66 Pa.C.S. § 2806. Count II of the Complaint avers that Blue Pilot charged its variable rate customers prices at least as high as $0.50 per kwh for electricity and that such prices were not reflective of the cost to serve residential customers. The Joint Complainants then provide an example of the cost to serve the average residential heating customer in January 2014 and claim, based on an Affidavit attached to the Complaint, that such cost should not have exceeded approximately $0.23 per kwh. The Joint Complainants conclude that the aforementioned prices do not conform to the variable rate pricing provision of Blue Pilot's Disclosure Statement. The gravamen of Count II is clearly the rate at which Blue Pilot charged its variable rate customers, not conformance of those rates with the variable rate pricing provisions in the Disclosure Statement. There is no other averment in Count II regarding the Disclosure Statement. Yet, multiple other Counts in the Complaint make averments regarding the Disclosure Statement.

Nor does the attached Affidavit provided in support of Count II mention the Disclosure Statement. Rather the Affidavit provides details regarding analyses "addressing residential variable rate pricing in Pennsylvania during the winter of 2014. Specifically, I conducted an analysis regarding day-ahead and real-time market prices for electric energy during the winter of 2014." Nothing in the Affidavit correlates the prices charged by Blue Pilot to the Disclosure Statement. Rather, the Affidavit concludes: "the results obtained from this analysis suggest that the cost to serve residential consumers covering any of the four billing cycles examined would not be more than $0.23 per kwh in any of the six EDC zones examined, even under the assumption that all supply were procured on the PJM spot markets."

In addition to the express intention of the General Assembly in Section 2806, the Commission does not have authority to regulate an EGSs rates, such as Blue Pilot's rates, because EGSs are not included in the definition of public utilities subject to Commission regulation as defined by the Public Utility Code, except in limited purposes as described in Sections 2809 and 2810. 66 Pa.C.S. §§ 102, 2809 (requirements for electric generation suppliers), 2810 (revenue-neutral reconciliation); *see also*, Delmarva Power & Light Co. v. Pa. Pub. Util. Comm'n, 870 A.2d 901 (Pa. 2005) (noting that the Commission could forbear from regulating EGSs pursuant to Section 2809(e) of the Public Utility Code if it were determined that the requirements of Section 2809 were unnecessary due to competition among EGSs).

A plain reading of Sections 102, 2806, 2809 and 2810 of the Public Utility Code reveal that the Commission lacks jurisdiction to hear arguments raised by the Joint Complainants in Count II. The concept of "cost to serve," for example, as addressed in the Affidavit attached to the Complaint, is irrelevant to EGS pricing. Even when accepting as true all well-pleaded material facts contained in the Complaint, as well as every reasonable inference from those facts, and viewing the Complaint in the light most favorable to the Joint Complainants, it is clear that the Joint Complainants would not be entitled to relief under any circumstances as a matter of law with regard to Count II.

Blue Pilot's argument regarding refunds, and the Joint Complainants' response to it, is moot and will not be considered here because of the preliminary determination that the Commission lacks jurisdiction to hear claims made in Count II.

As such, Blue Pilot's Preliminary Objection that Count II of the Complaint must be dismissed on the basis of lack of jurisdiction will be granted and Count II of the Complaint will be stricken.

Count V – The Commission Lacks Jurisdiction To Hear Complaints Brought Under The Telemarketing Registration Act But Has Jurisdiction To Hear Complaints Brought Under Its Own Telemarketing Regulations

In their Complaint, the Joint Complainants averred that approximately 16% of the complaints received by the OAG against Blue Pilot averred that they received a telemarketing call that initiated the switch to Blue Pilot. The Joint Complainants further averred that the Telemarketer Registration Act (TRA) requires any sale of goods or services through the use of a telemarketing call be reduced to a written contract signed by the customer. The Joint Complainants averred that Blue Pilot failed to comply with the TRA. In its Preliminary Objection, Blue Pilot argued that the Company complies with the TRA and, therefore, Count V should be dismissed. Blue Pilot also argued that the Commission does not have jurisdiction to enforce the TRA and that Count V is, therefore, legally insufficient because it fails to state a claim on which relief can be granted. In their Answer to the Preliminary Objection, the Joint Complainants argued that its jurisdiction to enforce the TRA arises from an advisory opinion issued by then-Attorney General Tom Corbett in response to an inquiry from the Commission. The Joint Complainants also argued that Blue Pilot's allegations that it complies with the TRA is an evidentiary matter and is more appropriately brought in the evidentiary portion of this case. For the reasons discussed below, Blue Pilot's Preliminary Objection will be granted in part and denied in part.

To begin, as noted above, it is well settled that the Commission may not exceed its jurisdiction and must act within it. Pittsburgh. Jurisdiction may not be conferred by the parties where none exists. Roberts. Subject matter jurisdiction is a prerequisite to the exercise of the power to decide a controversy. Hughes. As a creation of the legislature, the Commission possesses only the authority that the state legislature has specifically granted to it in the Public Utility Code. 66 Pa.C.S. §§ 101, *et seq*. Its jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. Feingold.

The Joint Complainants argued in their Answer to Blue Pilot's Preliminary Objection that the Attorney General previously issued an advisory opinion regarding the "applicability of the TRA to electric generation suppliers." A review of the Advisory Opinion, however, reveals that, while the EGSs must comply with the TRA, except for the registration requirement, nothing in the Advisory Opinion grants the Commission jurisdiction to determine whether EGSs have been compliant. The Advisory Opinion responds to four specific questions:

> 1) is electric generation supply a "consumer good or service" as defined by the Telemarketer Act?
>
> 2) Is an electric generation supplier excluded from the definition of "telemarketer" in the 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?
>
> 3) Is customer consent to 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?
>
> 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?

None of these questions, however, nor the answers to them, grant the Commission authority to hear claims brought under the TRA. Rather, these questions, and the answers to them, require EGS compliance with the TRA, except for the registration requirement. Enforcement of EGS compliance with the TRA would appropriately be done in a forum with jurisdiction over the TRA.

As with issues regarding the Commission's jurisdiction over the UTP/CPL, *supra,* Count V of the Complaint references various Commission regulations that governing telemarketing. *See e.g.*, 52 Pa.Code § 111.10. Section 111.10 requires

EGSs to "comply with other provisions of [the TRA]" but also establishes other requirements regarding telemarketing. This provision, however, similar to the UTP/CPL, does not equate to providing the Commission with jurisdiction to hear claims brought pursuant to the TRA. The Commission is a creation of the legislature and possesses only the authority that the legislature has granted to it. With regard to the TRA, it is the Commission that has given itself the authority to enforce the provisions of the TRA, not the General Assembly. The Joint Complainants have not demonstrated any statutory implication that the Commission has jurisdiction over the TRA.

Similarly, the Joint Complainants' reliance in their Answer on Harrisburg Taxi, *supra*, where the express statutory authority to regulate the safety of taxicabs is specifically found in Section 1501 of the Public Utility Code, also is without merit for the same reasons. In Count V, the Joint Complainants rely on the Commission's own regulations in support of its position that the Commission has jurisdiction hear cases regarding the TRA. As with the claims regarding the UTP/CPL, neither such express or strong and necessary implication is present here with regard to the TRA. Blue Pilot's Preliminary Objection will be granted in part as it relates to the Commission's authority to enforce the provisions of the TRA.

Blue Pilot's Preliminary Objection regarding Count V, however, will be denied in part to the extent Count V references violations of Section 54.43(f) and 111.10 of the Commission's regulations. The Commission clearly has jurisdiction to hear allegations of violations of its own regulations. When accepting as true all well pleaded material averments made in the Complaint, as well as every reasonable inference from those averments, and viewing the Complaint in the light most favorable to the Joint Complainants, it does not appear that the Joint Complainants would not be entitled to relief under any circumstances as a matter of law with regard to Blue Pilot's compliance with the Commission's telemarketing regulations.

To the extent that Blue Pilot's Preliminary Objection also avers that Count V should be dismissed because the Company already complies with the TRA, this argument will also be rejected. Blue Pilot argued that the Complaint fails to state a claim upon which relief can be granted and that Count V should be dismissed. Blue Pilot added "even if the Act's written contract requirement did apply to BPE in this case," Blue Pilot is already in compliance with the statutory requirements. Blue Pilot's argument is one of legal insufficiency.

In civil practice, a Preliminary Objection based on legal insufficiency is referred to as a demurrer. Preliminary Objections in the form of a demurrer will be sustained only in cases which are free and clear of doubt and where dismissal is clearly warranted by the record. Community Life Support Systems, Inc., *et al.* v. Commonwealth of Pennsylvania, 689 A.2d 1014, 1017 (Pa. Cmwlth. 1997). Any doubt must be resolved in favor of overruling a demurrer. Id.; *see also*, Hoffman v. Misericordia Hospital of Philadelphia, 439 Pa. 501, 267 A.2d 867 (1970) ("the question presented by the demurrer is whether on the facts averred, the law states with certainty that no recovery is possible").

In this case, the Joint Complainants have averred that Blue Pilot failed to provide consumers with a written contract and obtain the consumer's signature on the written contract. The Commission's telemarketing regulations require that the telemarketing agent explain the supplier's verification process to the customer and state that the supplier will send a copy of the disclosure statement and other material about the service to the consumer after the transaction has been verified. When accepting as true the Joint Complainants' averments that Blue Pilot failed to provide consumers with a written contract, and accepting every reasonable inference from that averment, it does not appear that the Joint Complainants would not be entitled to relief under any circumstances as a matter of law. The Joint Complainants have averred claims upon which relief may be granted regarding whether Blue Pilot violated the Commission's telemarketing regulations. It is not free and clear of doubt that dismissal is clearly warranted by the record. Dismissal of Count V at this preliminary stage, therefore, is not warranted.

As such, Blue Pilot's Preliminary Objection that Count V of the Complaint must be dismissed because the Company has complied with the TRA will be granted in part because the Commission lacks the authority over the TRA and denied in part because the Commission has authority to hear cases brought pursuant to its own telemarketing regulations and because the Complaint is legally sufficient.

Conclusion

The standard for granting a Preliminary Objection is high. All well pleaded material facts, as well as every reasonable inference from those facts, must be accepted as true and the Complaint must be viewed in the light most favorable to the Joint Complainants. Even then, a Complaint will only be dismissed if it appears that the Joint Complainants would not be entitled to relief under any circumstances as a matter of law. Blue Pilot has satisfied this high standard with regard to Count II which pertains to the specific prices charged by Blue Pilot. Furthermore, Blue Pilot has demonstrated that the Commission has no jurisdiction to hear claims regarding the UTP/CPL and TRA. Blue Pilot has failed to satisfy this high standard with regard to claims brought by the Joint Complainants pursuant to the Commission's own regulations. The Commission can hear claims regarding its own consumer protection and telemarketing regulations. Blue Pilot's Preliminary Objections will, therefore, be granted in part and denied in part.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Preliminary Objections filed by Blue Pilot Energy LLC against Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, through

the Bureau of Consumer Protection, and Tanya J. McCloskey, Acting Consumer Advocate, at Docket Number C-2014-2427655 on July 10, 2014 are hereby granted in part and denied in part.

2. That Count II raised in the Complaint is hereby stricken in its entirety.

3. That Count I and V raised in the Complaint are hereby stricken in part consistent with the above discussion.

4. That all other Counts raised in the Complaint shall proceed to a Hearing.

Date: August 20, 2014

____
Elizabeth Barnes
Administrative Law Judge

____
Joel H. Cheskis
Administrative Law Judge

C-2014-2427655 - ATTORNEY GENERAL PA & OFFICE OF CONSUMER ADVOCATE v. BLUE PILOT ENERGY LLC

REVISED 8/19/14

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

COMMONWEALTH OF PENNSYLVANIA, ET AL.	:	
Complainants,	:	**Docket Nos. C-2014-2427655**
v.	:	
BLUE PILOT ENERGY, LLC	:	
Respondent.	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

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Dated this 18th day of September, 2014.

Karen
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