

Karen O. Moury

717 237 4820  
Karen.moury@bipc.com

409 North Second Street, Suite 500  
Harrisburg, PA 17101

T 717 237 4800  
F 717 233 0852

[www.buchananingersoll.com](http://www.buchananingersoll.com)

December 3, 2014

**VIA E-FILING**

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

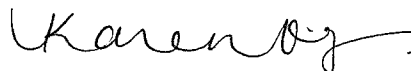
Re: Enrico Partners v. Blue Pilot Energy, LLC  
Docket Nos. C-2014-2432979

Dear Secretary Chiavetta:

On behalf of Blue Pilot Energy, LLC, I have enclosed for electronic filing the Brief of Blue Pilot Energy, LLC in the above-captioned matter.

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

Very truly yours,



Karen O. Moury

KOM/tg

Enclosure

cc: Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

<b>ENRICO PARTNERS</b>	:	
<b>Complainant</b>	:	
	:	
<b>v.</b>	:	<b>Docket No. C-2014-2432979</b>
	:	
<b>BLUE PILOT ENERGY, LLC,</b>	:	
<b>Respondent</b>	:	

---

**BRIEF  
ON BEHALF OF  
BLUE PILOT ENERGY, LLC**

**BUCHANAN INGERSOLL & ROONEY, P.C.**

**Karen O. Moury, PA ID No. 36879**

**409 North Second Street, Suite 500**

**Harrisburg, PA 17101-1503**

**Telephone: (717) 237-4820**

**Facsimile: (717) 233-0852**

**[karen.moury@bipc.com](mailto:karen.moury@bipc.com)**

**Attorneys for Blue Pilot Energy, LLC**

**Dated: December 3, 2014**

## TABLE OF CONTENTS

<b>I. STATEMENT OF THE CASE</b> .....	1
<b>II. SUMMARY OF ARGUMENT</b> .....	2
<b>III. ARGUMENT</b> .....	3
A. The Commission Does Not Have Jurisdiction To Regulate The Prices Charged By Electric Generation Suppliers.....	3
B. The Commission Lacks Jurisdiction To Interpret Contract Between An Electric Generation Supplier And Its Customer. ....	6
C. The Commission May Not Direct The Issuance Of A Refund by BPE.....	8
<b>IV. CONCLUSION</b> .....	11

## TABLE OF AUTHORITIES

### Cases

<i>Allport Water Auth. v. Winburne Water Co.</i> , 393 A.2d 673 (Pa. 1978) .....	6
<i>CAUSE-PA v. Pa. Pub. Util. Comm’n.</i> , 445 C.D. 2014.....	5
<i>City of Pittsburgh v. Pa. Pub. Util. Comm’n.</i> , 43 A.2d 348 (Pa. Super. 1945) .....	4
<i>Commonwealth of Pennsylvania, et al. v. Blue Pilot Energy, LLC</i> , Docket No. C-2014-2427655	4
<i>Delmarva Power &amp; Light Co. v. Pa. Pub. Util. Comm’n.</i> , 870 A.2d 901 (Pa. 2005).....	4
<i>Design &amp; Development, Inc. v. Vibromatic Mfg, Inc.</i> , 58 F.R.D. 71, 73 (E.D. Pa. 1973).....	7
<i>Feingold v. Bell Tel. Co. of Pa.</i> , 383 A.2d 791 (Pa. 1977).....	4
<i>Hughes v. Pennsylvania State Police</i> , 619 A.2d 390 (Pa. Cmwlth. 1992), alloc. denied, 637 A.2d 293 (Pa. 1993).....	4
<i>License Application of Respond Power LLC for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as a Supplier of Retail Electric Power</i> , Docket No. A-2014-2163898 (August 19, 2010).....	1
<i>MacLuckie v. Palmco Energy PA, LLC</i> , Docket No. C-2014-2402558 (Initial Decision dated June 16, 2014 at 13).....	6
<i>McCloskey v. Pa. Pub. Util. Comm’n.</i> , 596 C.D. 2014.....	5
<i>Nadav v. Respond Power LLC (“Nadav”)</i> , Docket No. C-2014-2429159.....	4
<i>Office of Small Business Advocate v. First Energy Solutions Corporation</i> , Docket No. P-2014- 2421556.....	6
<i>Petition of PECO Energy Company for Approval of its Default Service Plan</i> , Docket No. P- 2012-2283641 (March 6, 2014) .....	5
<i>PPL Energyplus, LLC. v. Maryland Public Service Commission</i> , 974 F.Supp. 2d 790 (D.Md. 2013) .....	7
<i>Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products</i> , Docket No. M-2014-2406134 (February 20, 2014).....	5
<i>Roberts v. Martorano</i> , 235 A.2d 602 (Pa. 1967) .....	4
<i>Russell v. Respond Power LLC</i> , Docket No. C-2014-2417551 (Initial Decision dated July 3, 2014) .....	9
<i>Tod and Lisa Shedlosky v. Pennsylvania Electric Co.</i> , Docket No. C-20066937 (Order entered May 28, 2008).....	4
<i>Tustin v. Respond Power LLC</i> , Docket No. C-2014-2417552 (Initial Decision dated June 26, 2014) .....	9
<i>William Towne v. Great American Power, LLC</i> , Docket No. C-2012-2307991 (Opinion and Order entered October 18, 2013 at 22) .....	6
<i>Yaglidereliler Corp. v. Blue Pilot Energy, LLC</i> , Docket No. C-2014-2413732 (Initial Decision dated June 18, 2014) .....	8

### Statutes

52 Pa. Code § 57.177 .....	10
66 Pa. C.S. § 2806(a).....	4
66 Pa. C.S. §§ 101.....	4
66 Pa. C.S. §§ 2809 and 2810.....	4, 9
66 Pa.C.S. § 1301.....	7
66 Pa.C.S. § 1312.....	8
66 Pa.C.S. §§ 2809-2810 .....	4

## I. STATEMENT OF THE CASE

Blue Pilot Energy, LLC (“BPE”) is an electric generation supplier (“EGS”) licensed by the Commission since June 10, 2011 to supply electricity or electric generation services to the public within the Commonwealth of Pennsylvania.<sup>1</sup> Enrico Partners (“Complainant”) enrolled in a variable rate plan with BPE for electric generation services on January 7, 2014, and began receiving these services on March 7, 2014.<sup>2</sup> At the time of enrollment, the Complainant signed a Service Agreement for the Purchase of Electric Power and Enrollment Form (“Service Agreement”), which provided that it would pay a variable rate with the starting price set at 7.9 cents per kWh.<sup>3</sup> Under the Service Agreement, the initial rate was effective for the first sixty days of service and thereafter “may vary on a month-to-month basis.”<sup>4</sup> The Service Agreement further provided: “At any time after 60 days of service, but not more frequently than monthly, we may increase or decrease your rate based on several factors, including changes in wholesale energy market prices in the PJM Markets.”<sup>5</sup>

After 90 days at the initial price of 7.9 cents per kWh, the price increased to 24.9 cents per kWh.<sup>6</sup> BPE provided service at this price for a second month, until the Complainant was returned to PECO Energy Company for default service.<sup>7</sup>

On July 18, 2014, the Complainant filed a Formal Complaint (“Complaint”) with the Commission alleging that BPE billed it a rate “in excess of our contractual agreement” and claiming that the agreement it had with BPE did not provide for an “arbitrary rate determined”

---

<sup>1</sup> *License Application of Blue Pilot Energy, LLC*, Docket No. A-2014-2223888 (June 10, 2011).

<sup>2</sup> Complaint ¶ 4.

<sup>3</sup> Plaintiff Exhibit No. 5, ¶ 3, Terms of Service.

<sup>4</sup> Plaintiff Exhibit No. 5, ¶ 3, Terms of Service.

<sup>5</sup> Plaintiff Exhibit No. 5, ¶ 3, Terms of Service.

<sup>6</sup> N.T. 14.

<sup>7</sup> N.T. 16.

by BPE.<sup>8</sup> By way of requested relief, the Complainant seeks to have its price for the entire period it was served by BPE adjusted to 7.9 cents per kWh, which was the initial price under the contract.<sup>9</sup>

On August 8, 2014, BPE filed an Answer to the Complaint generally denying any wrongdoing and asserting numerous affirmative defenses, including: 1) the Complaint fails to state a claim upon which relief can be granted; 2) BPE has fulfilled its contractual and legal obligations to the Complainant; 3) the Complainant is not entitled to any relief since the Complainant has breached its agreement with BPE; and 4) the variable rates that the Respondent charged the Complainant were lawful. The Answer with New Matter requests the Commission to dismiss the Complaint with prejudice. No response was filed to the New Matter.

Administrative Law Judge (“ALJ”) Cheskis convened a hearing on October 6, 2014. BPE did not present any witnesses, but was represented by counsel and participated in the hearing through the cross-examination of the Complainant’s witness, Mr. Gerald Holtz. Also, at the conclusion of the Complainant’s case, BPE moved for summary dismissal of the Complaint on the basis that the Commission has no jurisdiction to review or establish EGS prices and further lacks statutory authority to direct the issuance of a refund by EGSs. BPE’s motion is pending. By this Main Brief, BPE renews its motion to dismiss the complaint as there are no genuine issues of fact in dispute and it is entitled to relief as a matter of law.

## **II. SUMMARY OF ARGUMENT**

The Commission lacks subject matter jurisdiction over EGS prices and may not award the relief requested by the Complainant - namely a roll back to its initial price under a variable rate contract. As an EGS, BPE is not a public utility except in very limited circumstances related

---

<sup>8</sup> Complaint ¶ 4.

<sup>9</sup> Complaint ¶ 5.

to licensing and the payment of state taxes, neither of which is applicable here. As the Commission does not regulate EGS prices, it may not determine that the price charged by BPE was excessive.

Simply stated, the Complainant entered into a private variable rate contract with BPE which the Commission may not interpret or consider whether a breach thereof has occurred. In any event, the clear terms and conditions of the contract allowed BPE to vary the prices for electric generation service on a monthly basis to reflect various factors, including changes in the wholesale market. In seeking relief from the Commission, the Complainant essentially argues that its price should have been linked directly to a day-ahead wholesale price and asks the Commission to establish what would have been a reasonable price for BPE to charge. However, as EGS prices are not regulated by the Commission, it is beyond the Commission's statutory authority to review the wholesale market conditions or to establish what a "just and reasonable" price would have been based on those conditions.

At the heart of the Complaint is the Complainant's displeasure with amount by which BPE increased his variable rates and its desire to avoid paying those charges. Since the Commission does not have jurisdiction over EGS pricing, to interpret provisions or address disputes regarding private contracts between EGSs and their customers, or to direct BPE to issue a refund or credit, the Complainant's request for relief should be denied and the Complaint should be dismissed.

### **III. ARGUMENT**

#### **A. The Commission Does Not Have Jurisdiction To Regulate The Prices Charged By Electric Generation Suppliers.**

As a creation of the General Assembly, the Commission has only the powers and authority granted to it by the General Assembly and contained in the Public Utility Code, 66 Pa.

C.S. §§ 101 *et seq* (“Code”). *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937 (Order entered May 28, 2008); *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977). The Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. Pa. Pub. Util. Comm’n*, 43 A.2d 348 (Pa. Super. 1945). 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 power to decide a controversy. *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992), alloc. denied, 637 A.2d 293 (Pa. 1993).

Nothing in the Code authorizes the Commission to regulate the prices of EGSs. To the contrary, Code Section 2806(a) provides that the generation of electricity shall no longer be regulated as a public utility service or function except as otherwise provided for in this chapter.” 66 Pa. C.S. § 2806(a). The Pennsylvania Supreme Court has found that the definition of “public utility” in Code Section 102 does not include EGSs except for the limited purposes set forth in Code Sections 2809 and 2810, 66 Pa. C.S. §§ 2809 and 2810. *Delmarva Power & Light Co. v. Pa. Pub. Util. Comm’n*, 870 A.2d 901 (Pa. 2005). Those sections have no bearing on prices charged by EGSs. Code Section 2809 establishes the requirement for EGSs to be licensed, and Code Section 2810 requires EGSs to pay state taxes so as to ensure revenue neutrality to the Commonwealth of Pennsylvania. 66 Pa.C.S. §§ 2809-2810.

Indeed, the Commission has recognized its lack of jurisdiction to regulate prices charged by EGSs. In *Commonwealth of Pennsylvania, et al. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655, the Commission adopted a Motion on November 13, 2014 concluding that it “does not have traditional ratemaking authority over competitive suppliers and does not regulate competitive supply rates.” (Motion at 2). Additionally, in *Nadav v. Respond Power LLC* (“*Nadav*”), Docket No. C-2014-2429159, the Commission adopted a Motion on November 13,

2014 dismissing a complaint claiming excessive variable rates due to its lack of jurisdiction over EGS prices. *See also Petition of PECO Energy Company for Approval of its Default Service Plan*, Docket No. P-2012-2283641 (March 6, 2014) (“*PECO Default Service Plan Order*”).<sup>10</sup> In the *PECO Default Service Plan Order*, the Commission considered the views of numerous parties with competing interests on this issue, in the context of whether the Commission may cap the prices that low-income customers pay to EGSs, and concluded that “we have not found any arguments that convince us that we have statutory authority to limit prices charged by EGSs.” *Id.* at 11.

In an Order adopted on February 20, 2014, the Commission sought comments from interested parties regarding significant variable price increases in the retail market, *See Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, Docket No. M-2014-2406134 (February 20, 2014) (“*Variable Rate Order*”). In the *Variable Rate Order*, the Commission noted that the rates consumers pay in the retail electric market are governed by the terms of their contract with their EGS and that some variable price contracts have no ceiling on the rate that could be charged. The Commission further observed that while a variable rate may offer substantial savings when wholesale market prices are low, customers may experience very high bills during periods of market volatility. For that reason, the Commission emphasized the importance of consumers on variable rates “to carefully review the terms and conditions of their contracts to determine if they are at risk for large rate increases at any given time.” *Variable Rate Order* at 3.

---

<sup>10</sup> Order is currently on appeal to the Commonwealth Court of Pennsylvania, *CAUSE-PA v. Pa. Pub. Util. Comm’n*, 445 C.D. 2014 and *McCloskey v. Pa. Pub. Util. Comm’n*, 596 C.D. 2014.

**B. The Commission Lacks Jurisdiction To Interpret Contract Between An Electric Generation Supplier And Its Customer.**

In claiming that BPE charged the Complainant a rate that was in excess of the contractual agreement and that its agreement did not provide for an “arbitrary rate determined” by BPE, the Complaint seeks to have the Commission interpret the terms and conditions of a private contract. Specifically, the Complainant is asking the Commission to review a narrow subset of wholesale market conditions that were in effect at the time its prices were increased and further to determine whether increases imposed by BPE were consistent with the terms and conditions of its contract. The Commission has concluded, however, that its jurisdiction over EGSs “does not extend to interpreting the terms and conditions of a contract between an EGS and a customer to determine whether a breach has occurred or setting the rates an EGS can charge.” *Office of Small Business Advocate v. First Energy Solutions Corporation*, Docket No. P-2014-2421556 (Joint Motion of Chairman Robert F. Powelson and Vice Chairman John F. Coleman, Jr. adopted on November 13, 2014). *See also Allport Water Auth. v. Winburne Water Co.*, 393 A.2d 673 (Pa. 1978) (Commission lacks jurisdiction to address disputes involving private contracts).

In any event, the terms of the Complainant’s contract were clear. The rate could vary each month to reflect various factors, including wholesale energy prices, and had no ceiling on the extent to which prices could increase. As the Commission has recognized, consumers bear some responsibility to make choices that are appropriate for their individual circumstances. *William Towne v. Great American Power, LLC*, Docket No. C-2012-2307991 (Opinion and Order entered October 18, 2013 at 22). Consumers must be aware of the terms of service they agree to when entering into a contract with an EGS, just as they would for any other contract. *See MacLuckie v. Palmco Energy PA, LLC*, Docket No. C-2014-2402558 (Initial Decision dated June 16, 2014 at 13). “A person of age is presumed to know the meaning of words in a contract,

and if, relying upon his own ability, he enters into an agreement not to his best interests he cannot later be heard to complain that he was not acquainted with its contents and did not understand the meaning of the words used in the instrument which he signed.” *Design & Development, Inc. v. Vibromatic Mfg, Inc.*, 58 F.R.D. 71, 73 (E.D. Pa. 1973).

The Complainant has presented evidence of day ahead or spot market energy prices in PJM.<sup>11</sup> However, even if the Commission had the ability to interpret the contract, it is clear that it does not peg retail prices to a particular wholesale market index and certainly does not indicate that the rate will reflect day ahead or spot market energy prices. As the Commission is aware, day-ahead prices are not the only component of the wholesale market and are not necessarily indicative of what particular EGSs may be paying for electricity. Variable prices, by their very nature, are subject to wholesale market volatility. *See Variable Rate Order*. Indeed, wholesale market pricing is a complex topic that requires the analysis of a variety of factors that have not been examined here. *See PPL Energyplus, LLC. v. Maryland Public Service Commission*, 974 F.Supp. 2d 790 (D.Md. 2013).

By asking the Commission to review a narrow subset of wholesale market prices and determine what a just and reasonable price should have been during the time period in question, the Complainant asks the Commission to go through an exercise that is well beyond its jurisdiction. The concept of just and reasonable rates is solely within the realm of public utility ratemaking, and the Commission’s statutory authority to determine what is a just and reasonable rate is limited to the review of a rate charged by a public utility. Specifically, Section 1301 of the Public Utility Code provides that “[e]very rate made, demanded, or received by any public utility...shall be just and reasonable.” 66 Pa.C.S. § 1301 (emphasis added). Clearly, as the

---

<sup>11</sup> Plaintiff Exhibit No. 7.

Commission has recognized, it does not regulate the prices charged by EGSs and it may not substitute its own judgment for that of the EGS as to the appropriate price to charge to consumers in a competitive market.

**C. The Commission May Not Direct The Issuance Of A Refund by BPE.**

The Complainant seeks relief in the form of a refund or credit so that its price is rolled back to the amount that BPE charged during the initial ninety days. However, in order to direct the issuance of a refund, the Commission would need the ability to interpret the terms and conditions of the contract and conduct an analysis of wholesale market prices and other factors to determine the proper amount of the refund. The Commission simply lacks the necessary jurisdiction to perform this review and analysis.

Code Section 1312 provides the Commission's only statutory authority to direct the issuance of refunds. Under the express terms of Code Section 1312, the Commission may direct a public utility to refund rates that are determined to be "unjust or unreasonable." 66 Pa.C.S. § 1312. Since EGSs are not public utilities for the purposes of pricing, these provisions are not applicable to the charges they impose on their customers. Moreover, because the Commission does not have jurisdiction to review, set or regulate EGS prices, it cannot determine whether the prices charged were "unjust or unreasonable."

BPE's position is consistent with the findings of several Commission administrative law judges. For instance, in *Yaglidereliler Corp. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2413732 (Initial Decision dated June 18, 2014) ("*Yaglidereliler Initial Decision*"), ALJ Salapa dismissed a complaint that sought a refund of "excessive rates," finding that "the Commission lacks the authority to order the Respondent to provide either a refund or credit to the Complainant." *Id.* at 9. ALJ Salapa reasoned as follows:

The Commission may not regulate the rates that the Respondent charged the Complainant for electric generation service since it is not a public utility except for the limited purposes of 66 Pa. C.S. §§ 2809 and 2810. Therefore, the Commission has no jurisdiction over the Respondent to the extent that the Complainant contends that the Respondent has charged it an unreasonable, unjust or illegal rate for electric generation service. Since the Commission lacks the authority to regulate rates charged for electric generation service, it lacks the authority to order a refund or credit to the Complainant.

*Id.* at 9. In dismissing the complaint, ALJ Salapa referred to the Commission’s regulations governing disclosure statements and marketing practices, noting that violations of those rules subject EGSs to penalties imposed by the Commission. The ALJ further noted that the variable price increases were consistent with BPE’s sales agreement with the customer. *Id.* at 10-11.

In *Tustin v. Respond Power LLC*, Docket No. C-2014-2417552 (Initial Decision dated June 26, 2014), ALJ Barnes issued an Interim Order denying the Respondent’s preliminary objections due to the Commission’s jurisdiction over complaints involving the marketing and sales activities of EGSs. However, on the issue of a refund, ALJ Barnes concluded that “Respondent is correct that the Commission lacks authority to order a refund to Complainant” and noted that violations of regulations may result in civil penalties against EGSs. *Id.* at 4-5. In reaching that conclusion, ALJ Barnes relied on a similar rationale as explained by ALJ Salapa in the *Yaglidereliler Initial Decision*.

In *Russell v. Respond Power LLC*, Docket No. C-2014-2417551 (Initial Decision dated July 3, 2014), ALJ Colwell issued an Interim Order granting in part and denying in part the Respondent’s preliminary objections, finding as follows:

The Commission can impose a civil penalty, payable to the Commonwealth’s General Fund, but cannot award monetary damages or direct the refund or credit to Complainant’s account, as the Commission has no ability to regulate the rates of an EGS.

*Id.* at. 4.

In the Motion adopted in *Nadav*, the Commission suggested that it may direct the issuance of a refund to retail customers “in appropriate circumstances.” (*Nadav* Motion at 1). The only scenario endorsed by the Commission in the *Nadav* Motion was that in which an EGS may be required to provide a full refund to customers of all generation charges resulting from an unauthorized switch, pursuant to Section 57.177 of the Commission’s regulations, 52 Pa. Code § 57.177. Noting that this regulation was approved by the Independent Regulatory Review Commission, the Commission concluded that it “enjoys the presumption of reasonableness.” BPE reminds the Commission, however, that subject matter jurisdiction may not be conferred by any entity other than the General Assembly. *Roberts, supra*. Therefore, in the absence of express statutory authority for Section 57.177, which has not been challenged to BPE’s knowledge, it would likely not withstand appellate review.

In any event, the refund provisions contained in Section 57.177 of the Commission’s regulations are inapplicable here because the Complainant does not claim to have been switched to BPE without authorization. Moreover, the Complainant was served by BPE for three months before it filed the pending Complaint and therefore would not qualify for a refund under Section 57.177(b). Even to the extent that the Section 57.177(b) would be upheld on appellate review, it provides for a full refund of all EGS charges and does not presume any ability of the Commission to review the prices that were charged to determine whether they were “unjust and unreasonable.”

In seeking a roll back to the initial price that BPE charged the Complainant under its variable rate contract, the Complainant essentially seeks a revision of the terms and conditions of a contract that the Commission may not review or alter. As the Commission does not have jurisdiction over prices charged by EGSs or to address disputes regarding private contracts between EGSs and their customers, it lacks the authority to determine what a “just and

reasonable price” would have been or to require BPE to issue the Complainant a refund or credit for the difference between that amount and its price. *See, e.g., Allport Water Auth. supra.*

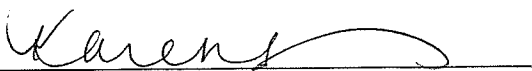
In view of the Commission’s lack of statutory authority to regulate or limit the prices charged by EGSs or to direct the issuance of refunds by EGSs, the Complainant’s request for relief should be denied. As a creation of the General Assembly, the Commission cannot confer this authority on itself, and in fact, the Commission has already found that it does not regulate the prices charged by EGSs. Several ALJs have taken that finding to its logical conclusion in determining that the Commission may not order the issuance of refunds. From a practical standpoint, without the ability to regulate prices, or to review whether the prices charged are just and reasonable, there is no basis upon which to award a refund.

#### **IV. CONCLUSION**

Blue Pilot Energy, LLC respectfully requests the Formal Complaint of Enrico Partners be dismissed with prejudice and that the Commission grant any other such relief that may be just and appropriate.

Respectfully submitted,

Dated: December 3, 2014

  
Karen O. Moury  
BUCHANAN INGERSOLL & ROONEY PC  
409 North Second Street, Suite 500  
Harrisburg, PA 17101-1357  
(717) 237-4820

*Attorneys for Blue Pilot Energy, LLC*

## Appendix A: Proposed Findings of Fact

1. Blue Pilot Energy, LLC (“BPE”) is an electric generation supplier (“EGS”) licensed by the Commission since June 10, 2011 to supply electricity or electric generation services to the public within the Commonwealth of Pennsylvania. *License Application of Blue Pilot Energy, LLC*, Docket No. A-2014-2223888 (June 10, 2011).
2. Enrico Partners (“Complainant”) enrolled in a variable rate plan with BPE for electric generation services on January 7, 2014, and began receiving these services on March 7, 2014. Complaint ¶ 4.
3. At the time of enrollment, the Complainant signed a Service Agreement for the Purchase of Electric Power and Enrollment Form (“Service Agreement”), which provided that it would pay a variable rate with the starting price set at 7.9 cents per kWh. Plaintiff Exhibit No. 5, ¶ 3, Terms of Service.
4. Under the Service Agreement, the initial rate was effective for the first sixty days of service and thereafter “may vary on a month-to-month basis.” Plaintiff Exhibit No. 5, ¶ 3, Terms of Service.
5. The Service Agreement further provided: “At any time after 60 days of service, but not more frequently than monthly, we may increase or decrease your rate based on several factors, including changes in wholesale energy market prices in the PJM Markets.” Plaintiff Exhibit No. 5, ¶ 3, Terms of Service.
6. After 90 days at the initial price of 7.9 cents per kWh, the price increased to 24.9 cents per kWh. N.T. 14
7. BPE provided service at this price for a second month, until the Complainant was returned to PECO Energy Company for default service. N.T. 16.

## **Appendix B: Proposed Conclusions of Law**

1. As a creation of the General Assembly, the Commission has only the powers and authority granted to it by the General Assembly and contained in the Public Utility Code, 66 Pa. C.S. §§ 101 *et seq* (“Code”). *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937 (Order entered May 28, 2008); *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977).
2. The Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. Pa. Pub. Util. Comm’n*, 43 A.2d 348 (Pa. Super. 1945).
3. Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967)
4. Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992), alloc. denied, 637 A.2d 293 (Pa. 1993).
5. Nothing in the Code authorizes the Commission to regulate the prices of EGSs. To the contrary, Code Section 2806(a) provides that the generation of electricity shall no longer be regulated as a public utility service or function except as otherwise provided for in this chapter.” 66 Pa. C.S. § 2806(a).
6. The Pennsylvania Supreme Court has found that the definition of “public utility” in Code Section 102 does not include EGSs except for the limited purposes set forth in Code Sections 2809 and 2810, 66 Pa. C.S. §§ 2809 and 2810. *Delmarva Power & Light Co. v. Pa. Pub. Util. Comm’n*, 870 A.2d 901 (Pa. 2005). Those sections have no bearing on prices charged by EGSs. Code Section 2809 establishes the requirement for EGSs to be licensed, and Code Section 2810 requires EGSs to pay state taxes so as to ensure revenue neutrality to the Commonwealth of Pennsylvania. 66 Pa.C.S. §§ 2809-2810.
7. The Commission does not have traditional ratemaking authority over competitive suppliers and does not regulate competitive supply rates. *Commonwealth of Pennsylvania, et al. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655 (Motion adopted November 13, 2014).
8. The Commission does not have jurisdiction to interpret a contract between an EGS and its customer to determine whether a breach has occurred or to set the rates an EGS can charge. *Office of Small Business Advocate v. First Energy Solutions Corporation*, Docket No. P-2014-2421556 (Joint Motion adopted November 13, 2014).
9. The Commission does not have statutory authority to direct the issuance of a refund or credit by BPE to the Complainant. 66 Pa.C.S. § 1312; *Yaglidereliler Corp. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2413732 (Initial Decision dated June 18, 2014).

**Appendix C: Proposed Ordering Paragraph**

The Formal Complaint filed by Enrico Partners is dismissed with prejudice.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**ENRICO PARTNERS**

v.

**BLUE PILOT ENERGY, LLC**

:  
:  
:  
:  
:

**Docket No. C-2014-2432979**

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).

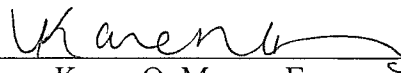
**Via Email and First-Class Mail**

Administrative Law Judge Joel H. Cheskis  
Pennsylvania Public Utility Commission  
PO Box 3265  
Harrisburg, PA 17105-3265

Enrico Partners, L.P.  
795 E. Lancaster Avenue  
Villanova, PA 19085

W. Kent Silvers, Jr.  
795 East Lancaster Avenue, Suite 200  
Villanova, PA 19085  
[ksilvers@provogroup.com](mailto:ksilvers@provogroup.com)

Dated this 3<sup>rd</sup> day of December, 2014.

  
\_\_\_\_\_  
Karen O. Moury, Esq.