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December 12, 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 Reply Brief On Behalf 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/ bb

Enclosure

cc: Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**ENRICO PARTNERS
Complainant**

v.

**BLUE PILOT ENERGY, LLC,
Respondent**

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Docket No. C-2014-2432979

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

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Dated: December 12, 2014

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I. STATEMENT OF THE CASE

Blue Pilot Energy, LLC (“BPE”) files this Reply Brief in response to the Main Brief of Enrico Partners (“Complainant”). As BPE’s Main Brief contained a comprehensive discussion of the evidence, legal principles and its position on the issues, BPE will only address those matters raised by the Complainant that were not previously addressed or that require clarification. By this Reply Brief, BPE addresses four issues: 1) the Complainant’s flawed argument of being switched without authorization; 2) the Complainant’s unsubstantiated and irrelevant claim that BPE failed to provide a disclosure statement; 3) the Complainant’s inappropriate allegations regarding generic pricing statements made by BPE sales agent during the enrollment process; and 4) the Complainant’s faulty assertion that the Commission may interpret the terms of a contract between an EGS and its customer and determine the price that BPE supposedly “should” have charged on the basis of hourly raw data that does not equate to wholesale market conditions or reflect other factors that affect prices.

The 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, 2014.¹ 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.² 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.”³ The Service Agreement further provided: “At any time after 60 days of service, but not

¹ Complaint ¶ 4.

² Complainant Exhibit No. 5, ¶ 3, Terms of Service.

³ Complainant Exhibit No. 5, ¶ 3, Terms of Service.

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.”⁴

After 90 days at the initial price of 7.9 cents per kWh, the price increased to 24.9 cents per kWh.⁵ BPE provided service at this price for two months, until the Complainant was returned to PECO Energy Company for default service.⁶

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 contract it had with BPE did not provide for an “arbitrary rate determined” by BPE.⁷ As requested relief, the Complainant sought 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.⁸

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

⁴ Plaintiff Exhibit No. 5, ¶ 3, Terms of Service.

⁵ N.T. 14.

⁶ N.T. 16.

⁷ Complaint ¶ 4.

⁸ Complaint ¶ 5.

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.

The Complainant and BPE filed Main Briefs (M.B.) on December 3, 2014. In this Reply Brief, BPE incorporates by reference its arguments and analysis contained in its Main Brief, and contends that there are no genuine issues of fact in dispute and that it is entitled to relief as a matter of law.

II. SUMMARY OF ARGUMENT

Having become aware of recent pronouncements regarding the Commission's lack of statutory authority over EGS prices and to interpret the terms of contracts between and an EGS and its customer, the Complainant has shifted gears at (and beyond) the eleventh hour to concoct claims of deception that must be disregarded by the Commission. Despite a complete lack of any such factual averments in the Complaint and its admission during the hearing that it understood it was enrolling in a variable rate plan, the Complainant now contends that it was somehow deceived or misled during the enrollment process. The Complainant also claims for the first time in its Main Brief, without any record support, that it did not receive a disclosure statement from BPE, despite the fact that the Complainant itself produced into the record the Service Agreement, which fully disclosed the key relevant terms and conditions of the contract. In addition, the Complainant has manufactured a flawed legal theory that it was switched without authorization to a new contract, thereby ignoring the clear terms of its contract which provided that its price could vary monthly on the basis of several factors, including wholesale market conditions. This constrained interpretation of the slamming regulations is nothing more than an attempt to get a credit or refund that would clearly not otherwise be authorized.

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 several 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 hourly energy prices and asks the Commission to establish under that scenario 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 for the purpose of determining 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 its 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 under these circumstances, the Complainant's request for relief should be denied and the Complaint should be dismissed.

III. ARGUMENT

A. As The Complainant Was Not Switched To BPE Without Authorization, It Has No Claim For A Refund.

As thoroughly explained in BPE's Main Brief,⁹ the Commission does not have statutory authority to direct the issuance of a refund in this proceeding since Section 1312 of the Public Utility Code only authorizes the Commission to direct a public utility to refund rates that are determined to be "unjust or unreasonable." 66 Pa.C.S. § 1312. The sole scenario endorsed by

⁹ BPE M.B. at 8-11.

the Commission in which an EGS may be required to provide a refund to customers is when generation charges resulted from an unauthorized switch, pursuant to Section 57.177 of the Commission's regulations, 52 Pa. Code § 57.177. *See Nadav v. Respond Power LLC*, Docket No. C-2014-2429159 (Order entered December 12, 2014).

In its Main Brief, the Complainant argues that because BPE increased its rates, it was switched to a new contract without authorization and it is entitled to a full refund.¹⁰ This contrasts with the relief sought by the Complaint and testimony produced at the hearing, which was a rollback to the amount that BPE charged the Complainant during the initial ninety days.¹¹

Particularly given the tenuous, if any, link to the Commission's statutory authority, the refund provisions contained in Section 57.177(b) of the Commission's regulations are simply inapplicable here. They are expressly designed to make a customer whole whose EGS was changed without consent. Section 57.177(b) states as follows:

“When the customer's dispute has been filed within the first two billing periods since the customer should have reasonably known of a change of the EGS and the dispute investigation establishes that the change occurred without the customer's consent, the customer is not responsible for EGS bills rendered during that period. If the customer has made payments during this period, the company responsible for initiating the change of supplier shall issue a complete refund within 30 days of the close of the dispute.

52 Pa. Code § 57.177(b). *See Final Rulemaking: Ensuring Customer Consent to a Change of Electric Supplier (Antislamming)*, Docket No. L-970121, 28 Pa. B. 5770 (Order Adopted May 31, 1998) (entire focus of rulemaking was to address slamming). The refund provision in the Commission's regulations is aimed wholly at addressing unauthorized switches and may not be relied upon to direct the issuance of a refund to a customer that willingly and knowingly entered into a variable rate contract with an EGS and now has a contractual dispute.

¹⁰ Complainant M.B. at 6-7.

¹¹ Complaint ¶ 5; N.T. 16.

The Complainant has not alleged an unauthorized switch. Rather, the Complainant has alleged that BPE charged too much for electricity. Under the clear terms and conditions of the Service Agreement, which the Complainant executed with BPE, the initial price was locked in for 60 days and thereafter could vary on a monthly basis to reflect several factors, including PJM wholesale market conditions. It is undisputed that the initial price remained in effect for 90 days before BPE exercised its discretion to vary the price.¹² It is further undisputed that the Complainant was aware the price could vary.¹³ Simply stated, the Complainant knowingly enrolled in a variable rate plan, without any ceiling, and cannot now claim an unauthorized the switch merely because the price increased to a level that it did not anticipate.

B. The Complainant Improperly Claims For The First Time In Its Main Brief That BPE Failed To Provide A Disclosure Statement.

In its Main Brief, for the first time, the Complainant contends that BPE failed to provide a disclosure statement in violation of Section 54.5 of the Commission’s regulations, 52 Pa. Code § 54.5.¹⁴ As this issue was not raised in the Formal Complaint and is being raised for the first time in the Complainant’s Main Brief, this issue is not properly before the Commission and the argument should be disregarded. *See Payne v. Philadelphia Gas Works*, Docket No. C-2011-2247124, 2012 Pa. PUC LEXIS 271 (2012) (issues may not be raised for the first time on exceptions). In fact, it would have been improper for the Complainant to first raise the issue at the hearing. *O’Toole v. Metropolitan Edison Company*, Docket No. C-2008-2045487, 2009 Pa. PUC LEXIS 907 (2009) (issues not raised in complaint may not be raised at hearing.)

In any event, no evidence has been produced in support of the allegation that is now being raised that the Complainant did not receive the disclosure statement. In its Main Brief, the

¹² N.T. 14.

¹³ N.T. 13.

¹⁴ Complainant M.B. at 8.

Complainant refers to pages 11-13 of the transcript and Complainant Exhibit No. 1 as supporting this claim. A review of the transcript and exhibit, however, reveals that no testimony or evidence was offered to allege that that BPE did not produce a disclosure statement to the Complainant. Therefore, BPE has had no opportunity to respond to such an allegation on the record, and it is inappropriate for the Commission to consider this argument.

The Complainant further claims that it was unaware of the disclosure statement until it received it from BPE as a hearing exhibit about a week before the scheduled hearing.¹⁵ Again, no testimony or evidence was offered in the record to support this averment. Even assuming the averment is true – which BPE does not concede, it was incumbent upon the Complainant to file an amended Complaint if it wanted to raise an issue regarding receipt of the disclosure statement, and provide notice to BPE so that it could defend that allegation. Had BPE been aware that the Complainant would claim not to have received the disclosure statement, it would have perhaps proceeded differently in deciding whether to offer testimony in defense of the Complaint. For instance, BPE would have had the opportunity to produce evidence showing that the disclosure statement was mailed to the Complainant on at least two occasions.

Moreover, BPE would have considered whether the Commission's disclosure statement requirement is even applicable to the Complainant. Section 54.5 of the Commission's regulations requires EGSs to provide disclosure statements to residential and small business customers. 52 Pa. Code § 54.5. No evidence was offered by the Complainant to demonstrate that it is a small business customer, which is defined by Section 54.1 of the Commission's regulations as a business that receives service under a small business rate classification and

¹⁵ Complainant M.B. at 8.

whose maximum registered peak load was less than 25kW within the last 12 months. 52 Pa. Code § 54.1.

In any event, the record clearly demonstrates that BPE provided the Complainant with a copy of the Service Agreement, which was introduced and admitted as Complainant Exhibit No. 5. The key terms and conditions concerning the variable nature of the rate plan are set forth in the Service Agreement, as described above. As the purpose of the disclosure statement is to set forth the contract's applicable terms of service, including prices and the nature of the contract, the length of the agreement, and cancellation provisions, the Sales Agreement met the overall requirements of the Commission's regulations. No doubt exists that the Complainant was aware of the relevant terms and conditions of the Service Agreement, which would have simply been repeated in the disclosure statement.

C. Neither The Complaint Nor The Record Contains Allegations Of Misleading or Deceptive Conduct By BPE And These Claims Should Be Dismissed.

While the Complainant makes bald assertions in its Main Brief about “misleading and deceptive” conduct,¹⁶ neither the Complaint nor the record contains any information to substantiate those claims. The Complaint contains absolutely no factual averments about statements made by the sales agent during the enrollment process. While it vaguely alleges “fraudulent activity,”¹⁷ the Complaint offers no facts to support that allegation. It also avers “bait and switch” marketing practices, but these allegations are consistent with the nature of a variable contract which offered an initial flat rate subject to change after the first 60 days. Specifically under the express language of the contract, BPE could charge the Complainant 7.9 cents per kWh for a period of sixty days and thereafter could charge the Complainant a price

¹⁶ Complainant M.B. at 8.

¹⁷ Complaint ¶ 4.

based on several factors, including wholesale market conditions. Even if this is characterized as “bait and switch” tactic, it was expressly permitted by the contract the Complainant signed. The fact that BPE did not increase the price after the initial 60 days runs contrary to the Complainant’s claim that BPE changed the price at the first available opportunity.

At the hearing, the Complainant’s witness, Mr. Holtz, offered testimony regarding his conversations with the sales agent. BPE’s counsel objected to this testimony, because it went beyond the scope of the allegations in the Complaint.¹⁸ See *O’Toole, supra*. The ALJ permitted the testimony as “laying the background and foundation for the complaint.”¹⁹ Since no allegations about any statements regarding price savings were set forth in the Complaint, it is improper to consider that testimony in adjudicating the Complaint.

In any event, none of the statements described by Mr. Holtz constituted promises of savings but rather amounted to general comments about expected savings.²⁰ Clearly, during the hearing, Mr. Holtz’s testimony was focused on his understanding of the Service Agreement and his view that the price should not have increased based on his analysis of PJM hourly data.²¹ Upon becoming aware of the Commission’s lack of jurisdiction over EGS prices, the Complainant has shifted gears to argue deceptive or misleading marketing practices. The problem is that it is too late in the proceeding for the Complainant to revise its litigation strategy since BPE has been deprived of the opportunity to respond to these factual averments. Complainant’s claims of deception that were lodged well after the eleventh hour should be disregarded.

¹⁸ N.T. 8.

¹⁹ N.T. 9.

²⁰ N.T. 9.

²¹ N.T. 14-17.

Moreover, the express terms of the Service Agreement contained no promises of savings and had no caps on the prices that could be charged. Particularly since conversations during a sales pitch inevitably lead to “he said, she said” debates when disputes later arise, the written documentation is must what be relied upon rather than general statements leading to execution of the contract. *See Stuart v. McChesney*, 498 Pa. 45, 48, 444 A.2d 659, 661 (Pa. 1982). Additionally, courts have found that general statements about cost-effective or low prices are mere puffery and do not constitute actionable claims. *See Gordon & Breach Science Publishers SA v. Am. Inst. of Physics*, 905 F. Supp. 169, 182 (S.D.N.Y. 1985).

D. The Commission May Not Review The Contract And Determine What Price BPE Should Have Charged On The Basis of Raw Hourly Data That Does Not Equate To Wholesale Market Conditions Or Reflect Other Factors That Affect Prices.

The Complainant, in its Main Brief, argues that the contract it entered into with BPE “provided for a specifically definable, monthly variable rate.”²² Claiming that price variations were to be linked specifically to wholesale market conditions, the Complainant conveniently quotes only one sentence from the Service Agreement, ignoring the immediately preceding sentence which states, “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.”²³

Arguing that BPE did not adhere to this contract when it increased the price in the fourth month of the contract despite “hourly raw data disseminated by” PJM,²⁴ the Complainant seeks to have the Commission interpret the terms and conditions of a private contract. The Commission, however, has concluded that its jurisdiction over EGSs “does not extend to

²² Complainant M.B. at 4.

²³ Complainant Exhibit No. 5, ¶ 3, Terms of Service.

²⁴ Complainant M.B. at 5.

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 adopted on November 13, 2014 at p. 1). *See also Allport Water Auth. v. Winburne Water Co.*, 393 A.2d 673 (Pa. 1978) (Commission lacks jurisdiction to address disputes involving private contracts).

Although it claims that it is not asking the Commission to interpret the terms and conditions of its contract with BPE, the Complainant makes numerous references to doing just that by arguing that BPE did not abide by the contract or did not honor the contract.²⁵ Throughout this argument, the Complainant urges 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 that the increases imposed by BPE were inconsistent with the contract.

This entire argument is based on the Complainant’s own legal interpretation of the contract, which is that its prices would precisely move in step with hourly energy prices. Moreover, the Complainant wishes to have the Commission endorse this interpretation and put itself in the shoes of BPE to determine a price that would reflect wholesale market conditions, while ignoring the contract’s reference to “several factors” affecting the price.

Even if the Commission had the ability to interpret a contract between an EGS and its customer, it is clear that the contract between BPE and the Complainant does not peg retail prices to a particular wholesale market index and certainly does not indicate that the rate will mirror hourly energy prices. As the Commission is aware, hourly prices are not the only component of wholesale market conditions and are not indicative of what a particular EGS may

²⁵ Complainant M.B. at 6.

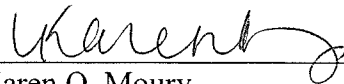
be paying for electricity depending on the procurement methods and hedging practices that are followed. Indeed, wholesale market pricing is a complex topic that requires the analysis of a variety of factors that have not been examined here. *See PPL Energyplus, LLC v. Maryland Public Service Commission*, 974 F.Supp. 2d 790 (D.Md. 2013); *DC Energy, LLC v. PJM Interconnection*, Docket No. EL12-8-001 (Order Denying Rehearing issued July 12, 2013).

IV. CONCLUSION

Blue Pilot Energy, LLC respectfully requests that 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 12, 2014



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Appendix A: Proposed Findings of Fact

1. The Complainant neither alleged in the Complaint nor testified at the hearing that it did not receive a disclosure statement. Complaint ¶ 4.; N.T. 11-13; Complainant Exhibit No. 1.
2. The Complainant did not offer testimony to support the claim that it did not receive the disclosure statement until about a week before the hearing. N.T. 11-13.
3. The Complainant received a copy of the Service Agreement, which contained the key terms and conditions concerning the variable nature of the rate plan. Complainant Exhibit No. 5.
4. The Service Agreement required BPE to charge the Complainant the initial price for a period of 60 days and thereafter allowed BPE to charge the Complainant a price based on several factors, including wholesale market conditions. Complainant Exhibit No. 5.
5. The Service Agreement contained no promises of savings and had no caps on the prices that could be charged. Complainant Exhibit No. 5.
6. The Service Agreement did not link prices to a specific market index or provide that those prices would mirror hourly wholesale market prices. Complainant Exhibit No. 5.
7. The initial price remained in effect for 90 days. N.T. 14.
8. The Complainant knew it was enrolling in a variable rate plan. N.T. 13.
9. The Complainant was not switched to BPE without authorization. Complainant Exhibit No. 5.
10. The Complaint contains no factual averments regarding statements made by the sales agent during the enrollment process. Complaint ¶ 4.
11. The alleged general statements that the sales agent made during the enrollment process did not amount to any promises of savings. N.T. 9.

Appendix B: Proposed Conclusions of Law

1. The sole scenario in which an EGS may be required to provide a refund to customers is when generation charges resulted from an unauthorized switch, pursuant to Section 57.177 of the Commission's regulations, 52 Pa. Code § 57.177. *See Nadav v. Respond Power LLC*, Docket No. C-2014-2429159 (Order entered December 12, 2014).
2. BPE did not violate the Commission's regulations prohibiting an EGS from switching a customer without authorization. 52 Pa.Code § 57.177.
3. A party may not raise issues at hearing that were not raised in the complaint. *O'Toole v. Metropolitan Edison Company*, Docket No. C-2008-2045487, 2009 Pa. PUC LEXIS 907 (2009)
4. No evidence was presented to show that BPE violated the Commission's regulations requiring an EGS to furnish residential and small business customers with disclosure statements. 52 Pa. Code § 54.5.
5. The Service Agreement provided by BPE fulfilled the requirements of the Commission's regulations requiring an EGS to disclose key terms and conditions of the contract, and fully disclosed the variable nature of the rate plan in a manner that was consistent with the Commission's regulations. 52 Pa. Code § 54.5.
6. The evidence of record does not demonstrate that BPE violated the Commission's regulations prohibiting misleading or deceptive marketing practices. 52 Pa. Code § 54.43.
7. Since the Commission does not have jurisdiction over EGS prices and may not interpret the terms of a contract between an EGS and its customer, the Commission may not review wholesale market conditions for the purpose of determining a price that it believes BPE should have charged the Complainant pursuant to their contract. *Commonwealth of Pennsylvania, et al. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655 (Order entered December 5, 2014); *Nadav v. Respond Power LLC*, Docket No. C-2014-2429159 (Order entered December 12, 2014); *Office of Small Business Advocate v. First Energy Solutions Corporation*, Docket No. P-2014-2421556 (Joint Motion adopted November 13, 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

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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).

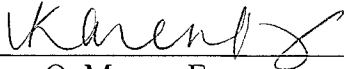
Via Email and First-Class Mail

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Dated this 12th day of December, 2014.



Karen O. Moury, Esq.