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February 26 2015

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 Reply Memorandum of Law Regarding the Admissibility of Pattern and Practice Evidence 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

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

RESPONDENT BLUE PILOT ENERGY, LLC'S REPLY MEMORANDUM OF LAW REGARDING THE ADMISSIBILITY OF PATTERN AND PRACTICE EVIDENCE

Respondent Blue Pilot Energy, LLC ("BPE"), hereby responds to the Joint Memorandum of Law Regarding the Admission of Pattern of Practice Evidence ("PoP Mot.") submitted by the Commonwealth of Pennsylvania, by Attorney General Kathleen Kane ("OAG") and Acting Consumer Advocate Tanya J. McCloskey ("OCA") on BPE on February 9, 2015.

INTRODUCTION AND BACKGROUND

Complainants initiated this action by filing a Joint Complaint on June 20, 2014, in which they alleged that BPE committed violations of certain Public Utility Code and regulations of the Pennsylvania Public Utility Commission (the "Commission"). The Joint Complaint (the "Complaint") does not allege a specific violation tied to any particular BPE customer in Pennsylvania. Instead, the Complaint references alleged complaints that Complainants claim they received about Electric Generation Suppliers ("EGSs") in general. The Complaint does not even contain the words "pattern" of "practice,"[1] nor does it contain any allegations that BPE

[1] So-called "pattern and practice" evidence is used primarily in actions brought under Title VII of the Civil Rights Act of 1964 and relies almost exclusively on statistical evidence. It has dubious application to the present proceeding.

engaged in a "pattern of practice" of misconduct, or anything similar. Instead, the Complaint merely alleges, in a general manner that, "upon information and belief," BPE committed an unspecified number of violations of the Commission's regulations.

Instead of alleging specific incidents of alleged violations against specific individual customers, Complainants adopted a convention whereby they merely cite numbers of complaints allegedly made by customers against various EGSs. In adopting this convention, Complainants appear to rely on what is now, after the United States Supreme Court's decision in *Dukes v. Walmart*, 131 S.Ct. 2541 (2011), considered to be a disfavored manner of attempting to rely upon so-called "pattern and practice" evidence of a statutory violation through statistical analysis. The reality is that BPE received only a handful of complaints from its Pennsylvania customers (2 in 2012 and 12 in 2013) prior to 2014. If numbers matter, those numbers speak volumes.

Complainants allege that the customer complaints that they received related to increases in the customers' variable rate services with the EGSs during the extreme weather conditions that fell on Pennsylvania in 2013-2014, during which unprecedented increases in wholesale electricity prices caused variable-rate retail electricity prices to sharply spike. Only a small number of the overall complaints specifically alleged in the Complaint related to BPE. Because of the extreme weather that was experienced in Pennsylvania during the winter of 2013-2014, Pennsylvania customers who had variable rate plans encountered an increase in the prices.

In an attempt to meet their burden of proof, Complainants have solicited information from customers who allegedly filed complaints regarding several EGSs' prices, including BPE's prices, and have attempted to craft those complaints into testimony relating to BPE's marketing practices. Despite falling short of that goal by compiling a disparate assortment of generalized

complaints, all of which voice their general dissatisfaction with increased electric bills, Complainants now argue that the Commission should conclude that BPE engaged in a "pattern of practice" of wrongdoing. In their Motion, Complainants request that the Commission make this sweeping conclusion based on customer statements that have not been, and cannot be, admitted into evidence. Moreover, the customer statements that purport to constitute the corpus of this so-called evidence amounts to a very small percentage of BPE's customers.

In reality, the complaints, which come in the form of responses to a questionnaire drafted by Complainants and apparently sent out to the EGSs' customers are nothing more than unverified statements, many of which are streams of consciousness that are not even responsive to the leading questions posed in the questionnaire. In addition, the majority of the statements are handwritten responses to the questionnaire mailed to BPE's customers. Some of the statements are not even decipherable. To the extent that any of the customers attached documents to their statements, those documents have not been authenticated. There are many reasons why the customer statements should not be admitted into evidence. BPE intends to file a motion to strike many, if not all of the customer statements pursuant to Procedural Order #4 entered in this proceeding on February 4, 2015.

SUMMARY OF ARGUMENT

It is difficult to characterize Complainants' February 9, 2015 filing. At base, what Complainants appear to suggest is that the Commission can find that BPE violated the Commission's regulations as to all of its customers in Pennsylvania based on a "misleading or deceptive pattern of practice" of conduct. (PoP Mot. at 1.) In any event, the reality is that Complainants are moving for the admission of the customer statements to show a "pattern of practice" of conduct by BPE. Taken to its extreme, the Motion can also be read to suggest the

extraordinary and unprecedented request that based on nothing more than the infirm customer statements compiled by Complainants, which constitutes a small percentage of BPE's historical customer base in Pennsylvania, the Commission can find that BPE violated the Commission's regulations as to all of its customers in Pennsylvania. As such, BPE respectfully argues that this unprecedented application should be denied.

Complainants' Motion regarding the admission of so-called "pattern of practice" evidence raises several evidentiary issues regarding the written customer statements upon which Complainants seek to rely upon to prove their case. Complainants' Motion requires the Commission to determine whether it will accept as evidence the customer statements despite the fact that they are not properly authenticated and fail to meet procedural safe-guards. As set forth below, it is absolutely clear that there is no legal basis for admitting the statements into evidence without proper authentication, and that basing findings of law or fact on these unauthenticated statements would constitute reversible error. Moreover, BPE understands that the Commission has never granted such a request.

Next, the Commission must determine whether it need only consider 97 customer statements to arrive at a finding that BPE violated the Commission's regulations as to all of BPE's historical customers in Pennsylvania and find a "pattern of practice," beyond any of violations specifically alleged by the statements themselves. That issue goes directly to Complainants' burden of proof and the amount and type of evidence upon which the Commission must rely in order to find that a violation has occurred and to arrive at a finding of "pattern of practice." No such "pattern of practice" evidence can be derived from the few customer statements served by Complainants. As set forth below, it is clear that allegations made by customers regarding their specific transactions at the time that they entered into a

contract with BPE cannot form the basis for a finding of violations related to every customer of BPE and their specific dealings with BPE. Each customer's complaint must be fully considered before granting any relief.

In addition, Complainants' Motion raises concerns regarding BPE's constitutional rights in this proceeding. At base, Complainants suggest that because they have accumulated 97 statements constituting a small percentage of BPE's customers in Pennsylvania, many of which do not even recount their specific transaction with BPE, but rather generally complain about the fact that their energy bill went up, the Commission should use those 97 statements as some type of evidence that BPE engaged in a "pattern of practice" of conduct that violated the Commission's regulations. That type of argument is often made in Title VII employment discrimination actions and has been cast into grave doubt by the Supreme Court following *Dukes*.

In *Dukes*, Justice Scalia made clear that the type of anecdotal statistical evidence suggested by Complainants in their Motion will not stand as proof about a company's hiring or employment decisions and practices. Yet, without even offering a statistician's opinion, Complainants argue that 97 of BPE's customers in Pennsylvania should speak for all of BPE's customers in Pennsylvania and that the Commission can find a "pattern of practice" of violations of the Commission's regulations. If that type of argument does not persuade the Supreme Court of the United States in the context of a case alleging rights guaranteed by the Constitution of the United States regarding fair employment practices, it should not be considered in the context of any dispute or claims arising out of a private contract.

Nothing speaks better to this point than Complainants' own responses to BPE's discovery requests. BPE asked Complainants to identify by name the customers referenced in Count III

and Count IV of the Complaint. In response, Complainants identified 3 customers that would support the allegations cited in each of those counts. As it turns out, Complainants could only identify one customer for each count who submitted a written statement in response to the Complainants' questionnaire. Based on one customer's statement, Complainants are asking the Commission to come to the extraordinary conclusion that BPE engaged in a "pattern of practice" of behavior that would somehow justify a finding of a violation as sought in Counts III and IV.

As set forth above, it is questionable whether the customer statements even speak to the violations alleged in the Complaint. Complainants sent the questionnaire to an unknown number of BPE's Pennsylvania customers and received only 97 responses. The customer responses to the questionnaires do not conform to the technical requirements for testimony set forth in 52 Pa. Code § 5.412, and in most cases they lack actual responses to many of the questions posed in the questionnaire. Many of the statements vaguely recount conversations which allegedly took place years ago with unidentified individuals. In addition, it is arguable whether many of the contents of the statements are even relevant to the claims pending in this proceeding against BPE.

Despite admitting that there is no precedent for their novel "pattern of practice" argument that they make in this Motion, Complainants argue that the Commission is free to disregard the Public Utility Code, the Commission's own regulations, and decades of relevant precedent and instead substitute them with rules that apply to specific cases by courts considering consumer-protection actions and/or Common Pleas Courts adjudicating class action suits. In addition, Complainants' argue that the statements, which consist of hearsay evidence, should be accepted must be rejected because the Pennsylvania Supreme Court has not adopted the residual exception to hearsay and has been rejected by many courts.

As argued below, Complainants' Motion that the Commission consider these unauthenticated witness statements to be admitted into the record in an attempt to support an argument that BPE engaged in a "pattern of practice" of violations directly conflicts with the Commission's long-standing principles relating to authentication of witness statements, cross-examination of witnesses, and the burden of proving violations by substantial record evidence. Indeed, permitting infirm statements of just a few disgruntled customers would violate bedrock principles of due process and fairness.

I. ARGUMENT

A. Complainants Bear the Burden of Proof

Complainants claim that their Motion was made to "set forth the legal framework for the acceptance of evidence from a large group of customers to establish a misleading or deceptive pattern or practice into this record." (PoP Mot. at 1.) In fact, the Motion does not set forth a coherent framework for the acceptance of these infirm statements, whether on behalf of the person who submitted them or on behalf of people who submitted no statement at all. Complainants further advise the Commission in their Motion that they intend to use the 97 consumer statements that they solicited (*Id.* at 2), but not how they intend to use them. Instead, Complainants argue that the Commission has "wide discretion to determine how much consumer testimony is necessary to establish a misleading or deceptive pattern of practice." (*Id.* at 10.) There is no precedent for the type of "me too" testimony that Complainants suggest for use in a proceeding like this one. (*Id.* at 8.) At a minimum, Complainants have the burden of proving, through admissible evidence, each and every violation that they claim.

Complainants bear the burden of proof on this issue. 66 Pa.C.S. § 332(a). This means that Complainants must prove every fact by a preponderance of the evidence, and that evidence

must be more convincing than the evidence presented by BPE. *Se-Ling Hoisery v. Margulies*, 364 Pa. 54, 70 A.2d 854 (1950). Any fact, therefore, must be proved by admissible evidence. Pa.R.E. 104(a). To the extent that Complainants intend to rely on the statements of the 97 customers to prove their theory that BPE engaged in a "pattern and practice" of conduct in violation of the Commission's regulations, those statements are not admissible to prove such across-the-board because at best, each of those statements recounts that particular customer's experience with BPE. They do not prove that every one of BPE's customers had the same experience with BPE.[2]

Besides being admissible, the party that proffers the evidence must show that the proposed evidence is relevant. Pa.R.E. 401.

That evidence must be "substantial" and must support the conclusion that proposed by the party that proffers the evidence. *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. Of Review*, 194 Pa. Superior Ct. 278, 166 A.2d 96 (1961); and *Murphy v. Comm., Dept. of Public Welfare, White Haven Center*, 85 Pa. Cmwlth Ct. 23, 480 A.2d 382 (1984). That includes any evidence that Complainants would proffer to support their request that the Commission consider their "pattern and practice" theory.

Therefore, any fact that Complainants intend to use to prove their theory of so-called "pattern of practice" evidence must consist of evidence that is admitted in this proceeding. This would include the customer statements that they appear to rely upon. If the customer statements are not admitted into evidence, as they should not be, then Complainants have failed to meet their burden of proof.

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[2] This point is made clear by reviewing the 97 statements. Each of them recount a particular customer's idiosyncratic experience with BPE and hardly give rise to an argument that there was any "pattern and practice" because no such pattern or practice can be deciphered from a comparison of the 97 statements.

B. The Commission Lacks Jurisdiction To Hear The Type of Case Complainants Suggest in their Motion

The Complaint in this proceeding does not contain the words "pattern" or "practice." The Commission must be guided by Public Utility Code, 66 Pa.C.S. §§ 101 *et seq*. That code, which guides the Commission, does not even consider "pattern of practice" evidence. Nor does it treat the matters before it as if they were class actions. That is clear because Complainants have not even cited any Commission authority for the extraordinary "framework" that they suggest the Commission should adopt here.

The Commission was created by the General Assembly. As such, it 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).

Code Section 701 authorizes the Commission to hear complaints regarding acts alleged to have been done, or omitted to have been done, by a regulated entity in violation of any law which the Commission has jurisdiction to administer, or any regulation or order of the Commission. 66 Pa.C.S. § 701. Neither Code Section 701 nor any other provision of the Code authorizes the Commission to hear pattern of practice or class action type proceedings.

Complainants cannot present the substantial evidence required to move forward in this proceeding by relying on the infirm customer statements contained in the document entitled "Consumer Written Testimony" for the individuals who actually submitted a statement, much less than on behalf of individuals who never complained. Complainants have pointed to no provision in the Code or in Pennsylvania case law that would permit the Commission to conclude that a regulated entity has committed a violation without proof that such a violation actually occurred, based on admissible and substantial evidence.

Instead, Complainants refer to Pennsylvania Rules of Civil Procedure as support for their argument that Commission can use a representative sampling of some customer's experience with BPE to obtain relief for an entire class of customers who never complained as if this were a class action. Pa.C.R.P. 1702. This most certainly is not a class action, nor is BPE provided with the types of due process guarantees that a defendant in a class action has under the applicable rules.

The Commission has rejected prior attempts to be used as a forum for a class action lawsuit. See *Painter v. Aqua PA, Inc.*, Docket No. C-2011-2239557 (Opinion and Order entered May 22, 2014); *Pettko v. Pennsylvania American Water Company*, Docket No. C-2011-2226096 (Administrative Law Judge Order dated October 5, 2011 and adopted by Commission Order on February 18, 2013). Therefore, the civil rules relating to class actions do not apply to this proceeding.[3]

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[3] Complainants do not even have standing to pursue a class action in a proceeding before a Commission. While the Attorney General's enabling statute (73 P.S. § 201-4) authorizes the initiation of civil actions to address violations of the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.*, the Commission has already determined that it is not the appropriate forum to hear such claims in this proceeding. *Commonwealth of Pennsylvania, et al. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655 (Order entered December 11, 2014). Further, Code Section 701 expressly provides that the Commonwealth through the Attorney General may be a complainant before the Commission only as an advocate for the Commonwealth as a consumer of public utility services. 66 Pa.C.S. § 701. The Consumer Advocate's enabling statute authorizes it to represent the general interests of consumers as a party. 71 P.S. § 309-4(a). *See Suprick v. Commonwealth Telephone Co.*, Docket No. C-

This is not the appropriate forum for a "pattern of practice" approach because each customer's individual experience with BPE turns on a unique set of facts and circumstances relating to each individual sales transaction. The customer statements constitute each individual's idiosyncratic interpretation of their transaction with BPE. There is no across-the-board approach available here. For instance, while some of the customer statements contain vague and generalized allegations (some of which are simply incoherent) that they were promised savings, others are specific that they were advised that they would be charged a certain rate for a limited period of time. Also, some statements describe a consumer's understanding of a rate that they would receive based on nothing that they actually heard from BPE. It is precisely for this reason that federal courts in Pennsylvania have found that claims involving deceptive business practices are not suitable for class action treatment. *See Kostur v. Goodman Global, Inc.*, 2014 WL 6388432 (E.D. Pa) (claims of deceptive business practices involve varying levels of reliance, causation and damages between each individual). Complainants cannot prove any violations unless they present substantial evidence of each and every specific violation alleged as to each specific customer. Anything else would be pure speculation. Any finding made by the Commission must be based on something more than the mere trace of evidence or just a suspicion. *Norfolk, supra.*

The Commission has never found violations or assessed penalties based on assumptions about how customers might have been affected by a utility's actions, without any evidence of a specific violation against specific customers. Rather than employing a "pattern of practice" approach to situations involving multiple customers, the Commission has considered the number

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00903161, 1995 LEXIS 15. While its enabling statute also references its ability to name a consumer or group of consumers in an action brought in the name of the Commonwealth, it does not specify any ability to initiate a class action lawsuit, and in any event, the Joint Complaint in this case did not name a consumer or group of consumers. 71 P.S. § 309-4(d).

of customers affected by a violation in determining appropriate penalties. *See* 52 Pa. Code § 69.1201; s*ee also Rosi v. Bell Atlantic-Pa., Inc. and Sprint Communications Company*, Docket No. C-00992409 (Order entered February 10, 2000) ("*Rosi*"). Section 69.1201(c)(5) specifically provides for the Commission to consider the number of customers affected by a violation in making this determination. Indeed, the Commission has expressly refrained from speculating about the number of possibly affected customers if there is no evidence in the record to demonstrate how many customers were in fact affected by a violation. *See, e.g., Eckroth v. Verizon Pa. Inc.,* Docket No. C-2011-2279168 (Order entered April 28, 2013). *See also, Pa. Public Utility Commission, Bureau of Investigation and Enforcement v. UGI*, Docket No. M-2013-2338981, 308 PUR 4th 301, 2013 Pa. PUC LEXIS 782 (2013).

C. The United States Supreme Court Has Held That This Type of Anecdotal Evidence Is Not Admissible to Prove "Pattern and Practice" Claims

Complainants appear to argue that they "are not bound by the technical rules of evidence" and thus may submit "all relevant evidence of reasonably probative value" and with a broad stroke state that "[t]his type of case involve[es] [a] pattern of [ ] deceptive and misleading conduct and large volumes of consumer complaints." (PoP Mot. at 3.) To support this novel argument, Complainants appear to rely on 97 customer statements, ostensibly to prove their theory of "pattern of practice."[4] Broken down to its essence, Complainants ask the Commission to find that BPE violated the Commission's rules and regulations based on 97 disparate, and in some cases, incoherent statements. As an initial matter, 97 customer statements that consist of stream of consciousness responses to leading questions contained in a questionnaire authored by Complainants does not constitute "large volumes of consumer complaints." Moreover, as will be

[4] This so-called theory of "pattern of practice" evidence is never actually argued in Complainants Motion, much less put into a workable framework. Instead, there is merely a suggestion of this purported evidence.

argued in BPE's motion to strike the consumer statements, it does not even rise to the level of admissible evidence.

While they never fully make this point explicitly, Complainants suggest that the Commission can find a "pattern of practice" of violations by BPE as to every Pennsylvania customer based on the contents of the 97 customer statements. Complainants are wrong. In fact, what Complainants are actually suggesting, but fail to address or offer any proof of, is that because 97 consumers responded to a questionnaire based on objectionable and leading questions, the Commission can find a "pattern of practice." Regardless of what those particular 97 statements stand for, they are not proof that BPE violated the Commission's rules with respect to every single BPE customer in Pennsylvania. The United States Supreme Court has held that such attempts at proving company-wide violations of law with such across-the-board type evidence is not permissible. Even the lesser standard that Complainants offer the Commission cannot trump the holding relating to "pattern of practice" evidence decided in *Dukes*.

In *Dukes*, the Court considered whether allegations of alleged "pattern and practice" of discrimination in violation of Title VII of the Civil Rights Act of 1964[5] could be proved as to an entire company based on the type of evidence that Complainants offer the Commission here. The Supreme Court held that it could not. *Dukes*, 131 S.Ct. at 2552.

Title VII cases are often litigated on a class basis. Accordingly, the proof required to prove a violation must be proven as to the entire class. This is where the "pattern and practice" evidence was originally used.[6] In *Dukes*, the Court made clear that only, "significant proof" can be used to make a showing of pattern and practice. *Id.* at 2553. The plaintiffs in *Dukes* relied on an expert's anecdotal "social framework analysis" and statistical evidence in attempt to show

[5] 42 U.S.C. §§ 2000e to 2000e-17.

[6] The EEOC uses "pattern and practice" evidence when attempting to prove that a pattern or practice of discrimination exists. *Teamsters v. United States*, 431 U.S. 324 (1977). It is not widely used outside of that context.

"significant proof."[7] *Dukes* makes clear that at a minimum some type of statistical analysis is required if a plaintiff desires to prove a "pattern and practice" of anything. In this case, Complainants have not even offered any statistical analysis. Instead, they merely rely on the fact that they obtained 97 hearsay statements from a small number of BPE's customers. The Supreme Court found the plaintiffs' attempt to use statistical pattern and practice evidence to be insufficient and rejected it finding that "after considering [the] data. . . these studies are insufficient to infer that 'discriminatory treatment is typical of [the employer's employment] practices.'" *Id.* at 2554-55. If one were to substitute "employment practices" for the type of violative conduct that Complainants allege here, the outcome would be the same—Complainants' 97 customer statements constitute nothing more than anecdotal statistical evidence that proves nothing, much less "significant proof" of any violation.[8] Because the crux of Complainants' "pattern of practice" argument necessarily implicates statistical analysis, and because this type of evidence has been prohibited for the reasons articulated by the Supreme Court in *Dukes*, it cannot be used here. Especially given the fact that a constitutionally protected right such as the right to employment in a discrimination-free environment is afforded a heightened level of protection over the rights of parties to a private contract.

There is another analysis to consider when entertaining arguments similar to Complainants' "pattern of practice" argument. Some courts in the Third Circuit have considered consumer fraud claims in the context of a Rule 23 analysis under the rubric of complaints made about the alleged conduct at issue. *Mahtani v. Wyeth*, 2011 WL 2609857 (D.N.J. June 30, 2011);

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[7] Complainants have not even offered any evidence of the statistical significance of the 97 consumer statements vis a vis the total number of BPE's customers in Pennsylvania. As such, they are in no position to argue for a "pattern of practice" of any violations because they have no statistical body to measure that data against. Any such statistical information would be complicated by the fact that for the calendar years 2012 and 2013, BPE received only 14 complaints. Nevertheless, Complainants provide no analysis at all.

[8] The Court in *Dukes* held that such paucity of evidence could not be used to prove any violations on a "classwide basis." *Dukes*, 131 S.Ct. at 2555.

Laney v. Am. Standard Cos., 2010 WL 3810637 (D.N.J. Sept.23, 2010); *Payne v. FujiFilm*, 2010 WL 2342388 (D.N.J. May 28, 2010); *Chin v. Chrysler Corp.*, 182 F.R.D. 448 (D.N.J. 1998). Each of these courts noted that the very low number of consumers who complained about the alleged conduct at issue constituted evidence that common factual issues did not predominate so as to justify class treatment, which is what Complainants suggest happen here.[9]

D. Written Customer Statements Cannot Be Admitted Into The Record Without Authentication And Cross-Examination

Complainants argue that the written customer statements should be admitted into the record without authentication and without cross-examination. Complainants' legal rationale for this position is fatally flawed and without precedent in Pennsylvania, and therefore must be rejected.

1. Unauthenticated written statements are hearsay

It is beyond dispute that out of court statements that are intended to prove the truth of the matter asserted constitute hearsay. Pennsylvania Rule of Evidence 802 generally prohibits the admission of hearsay into evidence. It has long been recognized in Pennsylvania that hearsay rules are not mere "technical rules of evidence," but instead are fundamental rules of law that should be followed by agencies when facts crucial to the issue are sought to be placed on the record. *See, e.g., Loudon v. Viridian Energy,* PA PUC Docket No. C-2011-2244309 (Initial Decision dated February 2, 2012, Final Order entered March 29, 2012), *Gibson v. W.C.A.B.,* 861 A.2d 938 (Pa. 2004); and *Anthony v. PECO Energy Co.,* PA PUC No. C-2014-2408057 (Order entered July 30, 2014). A finding based solely on hearsay cannot support a legal conclusion by an administrative agency. *Walker v. Unemployment Compensation Board of Review,* 367 A.2d. 366 (Pa. Cmwlth 1976).

[9] Complainants suggestion that this proceeding be treated like a class action is discussed below.

Unauthenticated written statements such as those being proffered by Complainants constitute inadmissible hearsay because these statements are not made by a declarant while testifying at trial. Instead, they were made many months prior to the hearing, yet, they are being offered into evidence to prove the truth of the matters asserted in the statements. As such, they constitute hearsay under Pennsylvania Rule of Evidence 801. To the extent that Complainants argue that the unauthenticated written statements that they proffer constitute the proxy testimony of individuals who never complained to either Complainants or BPE, such an argument must be rejected out of hand.

Rule 901 of the Pennsylvania Rules of Evidence provides for the necessity of authentication of documentary evidence. Under the Commission's regulations, written testimony is subject to the same rules of admissibility and cross-examination of the sponsoring witness as if it were presented orally in the usual manner. 52 Pa. Code § 5.412. In Commission hearings, the author of the prepared testimony is called to authenticate the testimony as a witness with knowledge of the authenticity of the document pursuant to P.R.E. 901(b)(1). Without such authentication, the witness statements such as the ones proffered by Complainants here are inadmissible as hearsay.

2. Pennsylvania does not recognize the residual exception to hearsay

Complainants recognize that the written customer statements constitute hearsay because they launch into an argument that the "residual exception" to the hearsay rule should apply. (PoP Mot. at 5.)[10] Despite the fact that the "residual exception" to the hearsay rule has no application here, Complainants devote much of their argument to it and it appears as the basis for

[10] Complainants proviso that "[b]y this statement [they] do not intend to imply that the consumer testimonies are hearsay" is not convincing. (PoP Mot. at 7, fn. 5.) They are hearsay and nothing Complainants can do to argue that they are not can save them.

their argument for the admission of the customer statements without authentication or cross-examination. In support of this argument, Complainants point to a number of federal appellate cases involving prosecutions by the Federal Trade Commission in which the courts allowed the admission of consumer affidavits into the record without cross-examination. In all of those cases, the courts permitted admission of the affidavits pursuant to Federal Rule of Evidence 807 (formerly F.R.E. 803(24)), which codifies the "residual exception" to the hearsay rule. Complainants' argument, however, suffers from a fatal defect because Complainants fail to recognize that the Pennsylvania Supreme Court has expressly chosen not to adopt F.R.E. 807 and its "residual exception" to hearsay. *See* P.R.E. 804(b)(5) and 807 and *Commonwealth v. Stallworth,* 566 Pa. 349, 781 A.2d 110, 128, n.2 (2001) ("Pennsylvania has not adopted...the residual exception"). Indeed, *none* of the cases cited by Complainants involved application of the rules of evidence that apply in the Commonwealth of Pennsylvania, and *the fact is that no court or administrative agency in Pennsylvania has ever held that the residual exception applies in Pennsylvania,* even in informal administrative hearings.[11]

Complainants attempt to argue that the statements are not hearsay because the Commission is not bound by the technical rules of evidence. Accordingly, they ask the Commission to ignore the Pennsylvania Supreme Court's certain rejection of the residual exception. The Commission has rejected such a suggestion, stating that "[a]lthough the Pennsylvania Rules of Evidence are relaxed in an administrative proceeding, crucial findings of fact may not be established solely by hearsay evidence." *Pa. P.UC., Bureau of Investigation & Enforcement v. Yellow Cab Co. of Pittsburgh,* No. 20122249031, 2013 WL 5912555 (Pa. P.U.C. Oct. 8, 2013).

[11] The Pennsylvania Rules of Evidence contain other enumerated exceptions to the prohibition on hearsay, but none of those exceptions apply to the written customer statements that the Joint Complainants seek to admit in this case, and the Joint Complainants do not assert that any other exceptions would apply.

3. The circumstances permitting use of the residual exception are not present

When the exception is permitted, it is applied in very limited circumstances:

> Rule 807 is to be utilized only rarely, and is not to be taken as a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in Rules 803 and 804(6). In order to be admitted under Rule 807, there must be a 'clear basis of trustworthiness' to support the out-of-court statement. The burden is on the party seeking to invoke the residual exception to clearly demonstrate the existence of the requisite guarantees of trustworthiness. *Reassure Am. Life Ins. Co. v. Warner,* 2010 WL 4782776, *2 (S.D.Fla.2010) (Martinez, J.) (quoting *NLRB v. United Sanitation Serv. .,* 737 F.2d 936, 941 (11th Cir.1984); *United States v. Mathis,* 559 F.2d 294, 299 (5th Cir.1977); and *In re Terazosin Hydrochloride Antitrust Litigation,* No. 99—MDL-1317, 2005 WL 5955699, at *5 (S.D.Fla.2005).

Such a clear basis of trustworthiness is lacking with respect to the 97 customer statements. Complainants point to several federal cases in which the courts admitted customer affidavits pursuant to the residual exception, but the circumstances underlying those rulings were far different than the ones present in this case. Complainants argue that the *Figgie* case from the U.S. Court of Appeals for the Ninth Circuit. *FTC v. Figgie International, Inc.,* 994 F. 2d 595 (9th Cir. 1993) is dispostive.

In *Figgie,* the Ninth Circuit admitted letters that individuals provided at the time they purchased the product at issue. The letters were admitted not to prove liability or wrongdoing, but instead were admitted only in the remedy phase of that action in order to consider the price paid by customers. In contrast to the statements here, the letters used in *Figgie* were sent by the customers without solicitation by the FTC. Here, Complainants affirmatively solicited customer statements using template questionnaires, which were specifically framed to elicit responses sought by Complainants in support of their theory of the case. The fact that the statements were solicited using leading questions about events that took place many months or

even years prior to the relevant time frame distinguishes these statements from those used in *Figgie,* and calls into question the trustworthiness of the statements. Complainants offer nothing to guarantee the trustworthiness of the hearsay statements that they proffer, except by pointing to other similarly elicited hearsay statements as "corroboration." This argument (and the circumstances relevant to the customer statements proffered by Complainants) do not ensure the "guarantee of trustworthiness" required by the *Figgie* court. There is no guarantee of trustworthiness to justify admitting the statements into evidence without authentication or cross-examination. More important, because the customer statements themselves lack the hallmarks of trustworthiness, they cannot stand for the proxy statements of unidentified and unknown individuals who have never complained about BPE.

FTC v. Amy Travel Service, Inc., 875 F.2d 564, 576 (7th Cir. 1989) and *FTC v. Kisco of Nevada, Inc.,* 612 1282, 1294 (D. Minnesota 1985) are distinguishable from this case. *Amy Travel* involved the admission of consumer complaint letters to demonstrate the requisite customer harm for restitution, not defendant liability, and a key factor relied upon by the court to admit the letters was the fact that the customer-affiants were located throughout the country, unlike in this case. *Kitco* also involved the admissibility of customer affidavits to establish the total amount of customer injury, not liability, and the court ruled that it would be too expensive and time consuming to call witnesses from all parts of the United States merely to establish total consumer injury. In the present case, the individuals who submitted statements reside in Pennsylvania. No unreasonable efforts need to be taken to ensure that they appear at the hearing. Moreover, courts have rejected attempts by the FTC to seek admission of letters received from customers of a company on the grounds that the residual exception to the hearsay rule does not apply. *See FTC v. Washington Data Resources,* 2011 WL 2669661 (M.D Fla. July 7, 2011).

State courts have also rejected attempts by an Attorney General to introduce customer affidavits under the residual exception in consumer protection proceedings because of circumstances that are nearly identical to those present in the case at bar. *People v. Shifi-in*, -- P.3d --, 2014 WL 785220 (Colo. App. Feb. 27, 2014) (setting forth four factors that must be considered). In short, even if Pennsylvania actually recognized the "residual exception" (which it clearly does not), the narrow circumstances permitting admission of evidence pursuant to the residual exception are not present in this case. For all of the reasons set forth above, there is no legal basis to admit unauthenticated written customer statements into the record without cross-examination, and Complainants proposal to do so must be rejected.

E. Any Findings Of Violation Against BPE Must Be Based On Facts Which Appear In The Record

Complainants' Motion makes much of the use of customer affidavits in FTC "pattern and practice" consumer protection prosecutions in various federal district courts. Those cases are not relevant to the types of matters that come before the Commission. As an initial matter, any Complaint filed with the Commission must set forth an act or thing done or omitted by a regulated entity, in violation of a law which the Commission has jurisdiction to administer, or any regulation or order of the Commission. As set forth above, Complainants have the burden of proof. 66 Pa.C.S. § 332(a). In addition, any decision of the Commission must be supported by substantial evidence in the record. 2 Pa.C.S. § 704.

In accordance with these well-settled principles, for each violation that Complainants seek to prove against BPE, they must submit substantial evidence to support a finding that BPE committed that violation. Neither the Public Utility Code, the Commission's regulations, nor the Commission's Orders permit the Commission to conclude that a regulated entity has committed a violation without proof that such a violation occurred. Complainants'

"pattern of practice" theory constitutes nothing more than an attempt bypass their burden of proof in the hope of achieving a finding of violations beyond which they are able to prove with what they suggest in their Motion. Complainants admit that the there is no precedent for the Commission to find that a regulated entity engaged in a "pattern and practice" of violations by extrapolating the alleged "pattern of practice" from a discrete number of individual customer testimonies.[12] Indeed, Complainants cannot point to a single example of where Commission made such a finding of a "pattern of practice" of violations against a respondent as they suggest should be the "framework" here.

In support of their position that the Commission can base a determination of liability on evidence from "a representative sample of consumers," Complainants suggest that the Commission should unilaterally adopt the practices of Common Pleas Courts used in class action pursuant to Rules 1701-1717 of the Pennsylvania Rules of Civil Procedure. (PoP Mot. at 6, fn. 4.) Complainants fail to provide any legal authority to support this novel theory. It is debatable how "commonplace" the use of sampling evidence is to prove liability in any case in Pennsylvania. It clearly is no longer permissible in Title VII cases. *Dukes*, 131 S.Ct. at 2554-55.

Other than their suggestions, Complainants provide no authority for their bold suggestion that the Pennsylvania Public Utility Commission can adopt the processes and evidentiary procedures that have been established for class actions in Pennsylvania. The Pennsylvania Rules of Civil Procedure that apply to class actions do not apply to Commission proceedings, and cannot be used to change standards regarding the admissibility of evidence and the burden of proof in proceedings before the Commission.

[12] *See* PoP Mot. at 3 ("This type of case involving pattern of, inter alia, deceptive and misleading conduct and large volumes of consumer complaints and testimonies is of first impression to this Commission.").

The rules relating to class actions contained in Rules 1701-1714 of Pennsylvania Rules of Civil Procedure apply only to class actions, and set forth a detailed procedural process for pleadings, class certification, definition of the class, notice to potential class members, conduct of the hearings, and disbursement of monetary awards. Obviously, none of these processes have been followed to date in the present case because they are not applicable here.

One of the main focus points of any class action is the issue of predominance. In order to successfully move a court to certify a class, the plaintiff must prove that common questions of law and fact predominate over individual issues of fact. In other words, predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. at 623, 117 S.Ct. 2231 (1997) *aff'g Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996). The predominance standard is a "far more demanding" requirement than the commonality requirement of Rule 23(a). *Id.* at 623-24. Based on the allegations of the Complaint alone, there can be no doubt that common questions of fact do not predominate over the individual transactions of each of the 97 customers that responded to the questionnaire. Accordingly, this proceeding lacks the required cohesiveness that might "warrant adjudication by representation."

In short, to the extent that Complainants intend to prove multiple violations by BPE, they are required to submit substantial evidence in an admissible form as to each and every specific violation alleged. Complainants cannot expect to attempt to prove a small number of alleged violations and then ask that the Commission to take those small numbers and speculate about greater numbers. That approach violates the requirement that Commission findings may not be based only on the "mere trace of evidence or a suspicion of the existence of a fact sought to be established." *Norfolk & Western Ry. Co. p. Pa. Pub. Util. Comm'n,* 489 Pa. 109, 413 A.2d 1037

(1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review,* 194 Pa. Superior Ct. 278, 166 A.2d 96 (1961); and *Murphy v. Comm., Dept. of Public Welfare,* 85 Pa. Cmwlth Ct. 23, 480 A.2d 382 (1984).

The Commission has never found violations or assessed civil penalties based on assumptions about how customers might have been affected by a utility's actions, without any evidence of violation against specific customers. Section 69.1201 of the Commission's regulations outlines the specific factors and standards that the Commission is to use in evaluating cases involving violations of the Public Utility Code and the Commission's regulations. 52 Pa. Code § 69.1201(c)(5) authorizes the Commission to consider the number of customers affected by a violation in determining an appropriate sanction for the violation. The Commission cannot speculate about the number of possibly affected customers if there is no evidence in the record to demonstrate how many customers were in fact affected by an alleged violation. *See, e.g., Eckroth v. Verizon Pa. Inc.,* Docket No. C-2011-2279168 (Order entered April 18, 2013) ("In this case, the number of customers affected by [the respondent's] actions is unknown. Although the Complainant testified that his neighbors experienced similar problems and that they switched to RCN as a result, we find that this testimony is hearsay and may not be relied upon.")

In sum, the Complaint in this matter was based in large part "upon information and belief," because Complainants' allegations of wrongdoing by BPE were (and are) merely speculative. It is certainly permissible to make allegations "upon information and belief" in the filing of a Formal Complaint to the Commission. In order to meet their burden of proof, however, Complainants must produce substantial evidence to support a finding of each violation alleged against BPE. Complainants have not provided any legal basis for the Commission to modify this longstanding statutorily mandated principle.

F. Complainants' Vague "Public Policy" Arguments Do Not Trump BPE's Due Process Rights

BPE is guaranteed certain rights in this proceeding under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Complainants asks the Commission to consider revoking or suspending BPE's license in Pennsylvania and/or imposing civil penalties on BPE. It is apparent that Complainants wish to achieve that result based on their unprecedented "pattern of practice" theory, which is predicated on nothing more than their attempt to proffer hearsay evidence to prove the alleged violations. Complainants cite "solid public policy" reasons in an attempt to convince the Commission to find violations against BPE without eliciting individual proof of each violation. (PoP Mot. at p. 7.) Public policy cannot trump BPE's Constitutional rights.

Respectfully, Complainants' vague "public policy" argument for modifying the rules of evidence and attempting to side-step their burden of proof cannot be used as a basis to disregard BPE's due process rights. "[G]overnment licenses to engage in a business or occupation create an entitlement to partake of a profitable activity, and therefore, are property rights." *Philadelphia Entertainment and Development Partners, L.P. v. Pennsylvania Gaming Control Bd.*, 34 A.3d 261 (Pa.Cmwlth.2011), citing *City of Phila. Bd. of License & Inspection Review v. 2600 Lewis, Inc.*, 661 A.2d 20, 22 (Pa.Cmwlth.1995) and *Young J Lee, Inc. v. Dep't of Revenue, Bureau of State Lotteries,* 504 Pa. 367, 474 A.2d 266 (1983). The principle that due process is fully applicable to adjudicative hearings involving substantial property rights before administrative tribunals is well established. *See Soja v. Pennsylvania State Police,* 455 A.2d 613, 500 Pa. 188 (1982), citing *Conestoga Nat'l Bank of Lancaster v. Patterson,* 442 Pa. 289, 275 A.2d 6 (1971); *Wiley v. Woods,* 393 Pa. 341, 141 A.2d 844 (1958); *Commonwealth ex rel.*

Chidsey v. Mallen, 360 Pa. 606, 63 A.2d 49 (1949); *Pennsylvania State Athletic Comm. v. Bratton,* 177 Pa.Super.Ct. 598, 112 A.2d 422 (1955).

In *Sofa,* the Pennsylvania Supreme Court noted that the "essential elements" of due process have been frequently articulated as follows:

> notice and opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a tribunal having jurisdiction of the cause: 12 Amiur. § 573, pp. 267, 268; *Corn. ex rel. Chidsey v. Keystone Mut. Cas. Co.,* 373 Pa. 105, 109, 95 A.2d 664; *Carter v. Kubler,* 320 U.S. 243, 88 L.Ed. 26, 64 S.Ct. 1; *Ohio Bell Telephone v. Public Utilities Commission of Ohio,* 301 U.S. 292, 81 L.Ed. 1093, 57 S.Ct. 724; *Interstate Commerce Commission v. Louisville & Nashville Ry. Co.,* 227 U.S. 88, 57 L.Ed. 431, 33 S.Ct. 185; *Jordan v. American Eagle Fire Insurance Company* [83 U.S.App.D.C. 192], 169 F.2d 281, 288." Moreover, "[i]n almost every setting where important decisions turn on questions of fact, due process requires **an opportunity to confront and cross-examine adverse witnesses."** *Goldberg v. Kelly,* 397 U.S. 254, 269, 90 S.Ct. 1011, 1021, 25 L.Ed.2d 287 (1970).

Soja v. Pennsylvania State Police, 455 A.2d 613, 615, 500 Pa. 188, 194 (1982). The *Sofa* court when on to cite the United States Supreme Court's explanation of importance of cross-examination to due process:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictive-ness, intolerance, prejudice or jealousy. We had formalized these protections in the requirements of confrontation and cross examination. They have ancient roots. *Greene v. McElroy,* 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959).

The sanctions that Complainants seek against BPE are severe. BPE is entitled to full due process, including the right to confront each and every individual who Complainants believe support any of their claims against BPE. Complainants have simply not submitted any legal or public policy basis for altering the Commission's long-standing principles relating to authentication of witness statements, cross-examination of witnesses, and the burden of proving violations by substantial evidence of record. This is especially true if Complainants intend to argue that BPE has violated the Commission's regulations as to every one of BPE's historical customers in Pennsylvania when those customers have never been identified or heard from.

G. Complainants' "Pattern and Practice" Theory Violates BPE's Eighth Amendment Rights

Complainants' suggestion that the Commission should entertain their argument that the Commission can find a "pattern of practice" of violative conduct on a company-wide basis as to BPE's sales practices in Pennsylvania implicates BPE's rights under both the Eighth and Fourteenth Amendments the United States Constitution.

The Eighth Amendment prohibits the government from imposing excessive fines against individuals and companies. *See Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909) (excessive fines are fines are those which are "so grossly excessive as to amount to a deprivation of property without due process of law.").[13] The Eighth Amendment applies to the states insofar as they implicate the Due Process Clause of the Fourteenth Amendment. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (per curiam). As set forth above, because the purported evidence (the 97 customer statements) that Complainants seek to use and argue support their contention that the Commission can find that BPE engaged in a "pattern of practice" of violative conduct is infirm, BPE is deprived of its due process rights to defend

[13] This is commonly known as the Excessive Fines Clause.

against the novel "pattern of practice" espoused here. Essentially, Complainants are asking the Commission to find that BPE engaged in violative conduct on a company-wide basis as to every one of BPE's customers in Pennsylvania based on nothing more than the inadmissible statements of 97 individuals. Such a finding would be unprecedented. Accordingly, any civil penalty levied by the Commission against BPE would be constitutionally defective because such a penalty would be derived from infirm evidence which effectively would deprive BPE of its due process rights.

If the Commission were inclined to find that BPE engaged in a "pattern of practice" of violative conduct as to the Commission's regulations based on the infirm statements of a very small minority of BPE customers in Pennsylvania and imposed civil penalties based on the finding derived from those consumer statements, any civil penalty (which are clearly punitive in nature) would constitute an excessive fine in violation of the Eighth Amendment.[14] Without providing BPE with an opportunity to consider the evidence with respect to each Pennsylvania customer that Complainants forms the basis of their allegations (even though a small percentage even submitted a statement), and to permit BPE an opportunity to confront and cross-examine those individuals, violates BPE's due process rights. Complainants have the burden of proving the constitutionality of their actions. *Centerline Equipment Corp. v. Banner Personnel Svc., Inc.*, 545 F.Supp. 2d 768, 774 (N.D. Ill. 2008) (citing *Edenfield v. Fane*, 507 U.S. 761, 768–69, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993). They have failed to even attempt to do that here. Accordingly, the Commission should not consider any purported "pattern of practice" arguments made by Complainants.

[14] The Excessive Fines Clause of the Eighth Amendment applies in civil proceedings initiated by the government. *Austin v. United States*, 113 S.Ct. 2801 (1993). *See also United States v. Harper*, 490 U.S. 435 (1989) and *United States v. Bajakajian*, 524 U.S. 321 (1998).

II. CONCLUSION

BPE respectfully requests that the Commission reject Complainants' "framework" for accepting customer statements as a substitute for the type of substantial and admissible evidence that has been the long-standing principle upon which the Commission has decided complaints that a company operating under its jurisdiction has violated the Commission's regulations. The suggestion offered by Complainants that the Commission can accept the infirm statements of 97 of BPE's customers to establish a "pattern of practice" of violations is not only unprecedented, but it is also unconstitutional. The traditional obligation of the burden of proof through substantial evidence on the complaining party should be the only framework that the Commission follows in this proceeding.

February 26, 2015

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

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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