Buchanan Ingersoll & Rooney PC

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

March 18, 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 Motion to Strike Direct Testimony of Various Consumers 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 MOTION TO STRIKE DIRECT TESTIMONY OF VARIOUS CONSUMERS

TO ADMINISTRATIVE LAW JUDGES BARNES AND CHESKIS:

Respondent Blue Pilot Energy, LLC ("BPE"), by and through its undersigned counsel, files this Motion to Strike Direct Testimony of Various Consumers (the "Motion"), pursuant to Section 5.103 of the Commission's regulations, 52 Pa. Code § 5.103, and the Prehearing Conference on February 4, 2015. Through this Motion, BPE respectfully requests an order striking and ruling inadmissible all or certain customer witness statements and exhibits pre-served by the Attorney General and the Office of Consumer Advocate (the "Complainants"), and in support hereof, states as follows.

INTRODUCTION

1. On or about October 17, 2014, Complainants served BPE with 97 statements from various consumers. These statements were obtained in response to a solicitation letter that the OAG sent to hundreds of BPE's Pennsylvania customers in or about September 2014. *See* PAOAG-BP-0003950; and 3879 to 82.[1] More specifically, the OAG sent letters and

[1] A copy of the OAG's solicitation letter and questionnaire are attached hereto as Exhibit A.

questionnaires to all of the BPE customers who filed a complaint with the OAG or contacted OCA about BPE. *See* PAOAG-BP-0003950 ("We are contacting you because you filed a complaint with the [OAG's] BCP [Bureau of Consumer Protection] or contacted the OCA about your problems with [BPE]."). [*See* Recent Discovery Response.] The OAG appealed to consumers to help it, OCA, and other consumers by completing the questionnaires:

> We now need your written testimony to submit in that case. You can help us – and other consumers – by providing your story in writing in a way that we may use it as evidence. . . . [W]e greatly appreciate concerned citizens such as you for making the effort to help us and other affected Pennsylvania customers.

Id.[2]

2. The statements that Complainants seek to have admitted for use in this proceeding constitute generalized inadmissible complaints. The majority of the statements are handwritten. The most benign statements are indecipherable, vague and non-responsive. The more troublesome statements, however, come in the form of inadmissible responses to leading questions, questions that are not relevant to the claims pending against BPE in this proceeding, questions eliciting responses based on hearsay statements that are filled with vitriol against BPE because it raised its prices due to forces outside of its control.

3. In many instances, the consumers did not answer the specific questions posed, and, in other instances, the consumers simply failed to answer the questions at all. Many of the consumers attached documents, such as utility invoices, undated and/or unsigned letters, emails, chronologies, advertisements, and a variety of other types of documents to their questionnaires, none of which have been authenticated or sworn. At least one consumer attached the disclosure

---

[2] The OAG requested that BPE's customers complete the questionnaire "even if you have already provided us with the information." Indeed, the OAG solicitation letter was preceded by the OCA's collection of BPE customer complaint information in April and May 2014 on a form notifying the consumers their statements were being solicited for use in this proceeding.

statement for another EGS (Direct Energy Service, LLC). CS[3] at 262-63. Some of the questionnaires were signed by multiple individuals.

4. In some cases, BPE is not able to determine if the consumer was ever one of its customers in Pennsylvania.

5. For the reasons set forth below, BPE moves to strike the 97 consumer statements in their entirety, or at least, in part.

ARGUMENT

I. LEGAL STANDARD FOR A MOTION TO STRIKE

A. Applicable Legal Standards

6. Section 5.403(a)(1) of the Commission's regulations authorizes the presiding officer to control the receipt of evidence, including ruling on the admissibility of evidence. 52 Pa. Code § 5.403(a)(1).

7. Section 5.403(b) of the Commission's regulations requires the presiding officers to "actively employ these powers to direct and focus the proceedings consistent with due process." 52 Pa. Code § 5.403(b).

8. Section 5.412(c) of the Commission's regulations provides that "[w]ritten 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(c).

9. While the Commission, as an administrative agency having quasi-judicial functions is not limited by the strict rules relating to the admissibility of evidence, essential legal principles must be observed. *Pittsburgh and Lake Erie Railroad Company, v. Pennsylvania*

---

[3] "CS" cites are to the consumer statements submitted by Complainants on October 17, 2014

Public Utility Commission, 85 A.2d 646, 653 (Pa. Super Ct. 1952); *Bleilevens v. State Civil Service Commission*, 312 A.2d 109, 111 (Pa. Commw. 1973).

II. TO THE EXTENT THAT COMPLAINANTS ARE RELYING ON THE CONSUMER STATEMENTS TO PROVE ANY OF THEIR CAUSES OF ACTION, THEY HAVE FAILED

10. Complainants bear the burden of proving each and every element of their causes of action. 66 Pa.C.S. § 332(a). This means that Complainants must prove every fact by a preponderance of the evidence. 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).

11. Any purported evidence that Complainants seek to rely upon in this proceeding, must be in admissible form. Pa.R.E. 104(a). In addition, such evidence must also be "substantial" and must support the conclusion 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).

12. Accordingly, "[i]t is an elementary proposition that the plaintiff must prove during his case in chief all essential elements of his action as to which he has the burden of proof, and that he may not as a matter of right introduce evidence in rebuttal which is properly part of his case in chief. The trial court has discretion in excluding as rebuttal evidence that which is properly part of the case in chief." *Downey v. Weston*, 451 Pa. 259, 268-69, 301 A.2d 635, 641 (1973).

13. Therefore, to the extent that Complainants intend to use the consumer statements in support of their case-in-chief, those statements must stand or fall as they were presented to BPE in October 2014. Complainants cannot wait until rebuttal to attempt to rehabilitate or make

their case in a different manner. *Clark v. Hoerner*, 362 Pa. Super. 588, 599, 525 A.2d 377, 382-83 (1987) ("[a] party cannot, as a matter of right, offer in rebuttal evidence which is properly part of his case in chief, but will be confined to matters requiring explanation and to answering new matter introduced by his opponent.").

14. Simply put, to the extent that the consumer statements are infirm, Complainants are bound to them in their current form.

III. THE VAST MAJORITY OF THE CONSUMER STATEMENTS FAIL TO COMPLY WITH THE WRITTEN TESTIMONY REQUIREMENTS OF THE COMMISSION'S REGULATIONS

15. Section 5.412(e) of the Commission's regulations governing written testimony requires that the proposed testimony be prepared in question and answer form and have line numbers in the left-hand margin on each page. 52 Pa. Code § 5.412(e). Section 1.32 of the Commission's regulations require that pleadings, submittals or other documents filed in proceedings be typewritten and that they follow other specifications regarding margins and legibility. 52 Pa. Code § 1.32(a). That is not the case with these statements.

16. While BPE understands that the consumer witnesses are not necessarily aware of these requirements, this proceeding is not akin to a situation in which *pro se* complainants seek relief before the Commission. Here, Complainants are governmental entities accustomed to engaging in litigation before the Commission and other tribunals in Pennsylvania.

17. Particularly given the relief sought by Complainants against BPE in this proceeding, it was incumbent upon Complainants to ensure that the consumer statements submitted in support of their claims complied with the Commission's regulations. Complainants are seeking license revocation and suspension, civil penalties and the issuance of refunds, and it is not reasonable to expect, and foist upon BPE, the obligation to make a case for Complainants based on these infirm statements to decipher hand-written (often in cursive) statements with no

line numbers, along with meandering narratives that are not in question and answer format, in some cases or terse and incomplete responses in others.

18. Every statement that fails fully to comply with the Commission's regulations should be stricken in their entirety.

IV. THE UNAUTHENTICATED CONSUMER STATEMENTS ARE NOT ADMISSIBLE

A. The Consumer Statements Constitute Uncorroborated Hearsay and Cannot Support a Factual Finding

19. Pennsylvania Rule of Evidence 801 defines "hearsay" as an out-of-court statement offered to prove the truth of the matter asserted. P.R.E. 801. In many situations, the consumer statements contain allegations that certain oral representations were made to them by BPE's sales representatives and those out-of-court verbal statements are offered to prove the matters asserted. In many instances, the consumer never identifies the name of the BPE representative that he or she allegedly spoke with at the time that the consumer accepted service from BPE. Such a lack of detail casts great doubt on the truth of the consumer's statement because it lacks fundamental indicia of trustworthiness. Other more egregious situations involve references to alleged statements made by BPE's representatives to other individuals. Further, many statements contain comments allegedly made by third parties including representatives of public utilities and governmental entities to the consumer and such constitute clear hearsay. In each situation, these statements are offered to prove the truth of the matter asserted. As such, the statements contain inadmissible hearsay under Pennsylvania Rule of Evidence of 801 and should be stricken.

20. Hearsay is not admissible as evidence under Pennsylvania Rule of Evidence 802, except as specifically provided by the rules, a statute or the Pennsylvania Supreme Court. P.R.E.

802.[4] 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).

21. Even in situations where a hearsay statement might be admissible pursuant to an exception, it is well-settled that a finding based wholly 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). The Commission has held 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.U.C., Bureau of Investigation & Enforcement v. Yellow Cab Co. of Pittsburgh*, Docket No. 2012-2249031, 2013 WL 5912555 (Pa. P.U.C. Oct. 8, 2013). The Commission has expressly refused to make findings of fact on the basis of hearsay without separate evidence corroborating it. *See, e.g., Jackson v. PECO Energy Co.*, Docket No. F-2013-2351046 (July 5, 2013); *Davis v. Equitable Gas., LLC*, Docket No. C-2011-2252493, 2012 WL 3838095 (April 27, 2012)

22. Although Commonwealth agencies might not be bound by "technical rules of evidence at agency hearings," 2 Pa. Code §505, the Pennsylvania Supreme Court has not completely rejected application of Pennsylvania's Rules of Evidence in administrative proceedings and, in any event, has held that "the hearsay rule is not a mere technical rule of evidence, but a fundamental rule of law which ought to be followed by agencies when facts

---

[4] While various exceptions set forth in Pennsylvania Rule of Evidence 803 permit hearsay to be admitted into a legal proceeding, those exceptions are not applicable here.

crucial to the issue are sought to be placed on the record and an objection is made thereto." *Gibson v. W.C.A.B.*, 861 A.2d 938, 947 (Pa. 2004) (emphasis in original); *Anthony v. PECO Energy Co.*, No. C-2014-2408057, at *4 (Pa. P.U.C. July 30, 2014) (quoting *Gibson* and sustaining respondent's hearsay objection to admission of invoice for contractor's electrical wiring work because complainant failed to present testimony from contractor who could "provide sufficient information relating to the preparation and maintenance' of the invoice in any way" and authenticate the document);[5] *Bennett v. UGI Cen. Penn Gas, Inc.*, No. F-2013-2396611, 2014 WL 1747713, at *8 (Pa. P.U.C. Apr. 10, 2014) ("The hearsay rule is not a technical rule of evidence but a fundamental rule of law which must be followed by administrative agencies in hearings when a party seeks to place facts crucial to an issue into the record.") (citations omitted). Pennsylvania Rule of Evidence 802 generally prohibits the admission of hearsay – an out-of-court statement offered to prove the truth of the matter asserted in the statement. Pa. R. Evid. 801(c)(2), 802; *Bennett v. UGI Cen. Penn Gas, Inc.*, No. F-2013-2396611, 2014 WL 1747713, at *8 (Pa. P.U.C. Apr. 10, 2014).

23. While Rules 803, 803.1, and 804 list exceptions to the rule against hearsay, none of those exceptions is relevant to the consumer statements submitted by Complainants here.[6]

---

[5] In *Ditsious v. Pa. Elec. Co.*, Nos. F-2011-2274306, F-2011-2274313, F-2011-2274318, F-2011-22743, 2013 WL 1180374 (Pa. P.U.C. Mar. 14, 2013), the Commission sustained the respondent's objection to the introduction into evidence a list of reconnection charges and utility rates on hearsay grounds.

[6] More specifically, the exceptions to the rule against hearsay are as follows: present sense impression (Rule 803(1)); excited utterance (Rule 803(2)); then-existing mental, emotional, or physical condition (Rule 803(3)); statement made for a medical diagnosis or treatment (Rule 803(4)); records of regularly conducted activity (Rule 803(6)); records of religious organizations concerning personal or family history (Rule 803(11)); certificates of marriage, baptism, and similar ceremonies (Rule 803(12)); family records (Rule 803(13)); records of documents that affect an interest in property (Rule 803(14)); statements in documents that affect an interest in property (Rule 803(15)); statements in ancient documents (Rule 803(16)); market reports and similar commercial publications

24. A number of the pre-served consumer statements, either in the statements themselves or in the attached exhibits, refer to statements supposedly made by persons other than the witness or a BPE representative as support for the witness's claims. As statements that (i) were not made while testifying at the hearing in this matter, and (ii) are being offered to prove the truth of the matters asserted, these statements are plainly hearsay. Pa. R.E. 801(c). Since these statements do not fall within any of the exceptions to the rule against hearsay, they are inadmissible and must be stricken from the customer witnesses' testimonies. *See* Pa. R.E. 802.

25. In *Walker v. Unemployment Compensation Bd. of Rev.*, 367 A.2d 366 (Pa. Cmwlth. 1976), the court established the following two rules governing the use of hearsay in administrative proceedings such as this one:

> (1) Hearsay evidence, properly objected to, is not competent evidence to support the findings of the [agency]; [and] (2) Hearsay evidence, admitted without objection, will be given its natural probative effect and may support a finding of the [agency], if it is corroborated by any competent evidence in the record, but a finding of fact based solely on hearsay will not stand.

Id. at 370 (citations omitted); *Goldson v. Metropolitan Edison Co.*, No. C-2013-2387326, 2014 WL 3555462, at *4 n.5 (Pa. P.U.C. June 30, 2014) (same); *Bennett*, 2014 WL 1747713, at *9

(Rule 803(17)); reputation concerning personal or family history (Rule 803(19)); reputation concerning boundaries or general history (Rule 803(20)); reputation concerning character (Rule 803(21)); statements made by an opposing party and offered against that party (also referred to as "party admissions") (Rule 803(25); cmt. to Rule 803(25)); prior inconsistent statement of declarant-witness (Rule 803.1(1)); prior statement of identification (Rule 803.1(2)); recorded recollection of declarant-witness (Rule 803.1(3)); and when the declarant is "unavailable" (Rule 804). Notably, unlike their federal counterparts, the Pennsylvania Rules of Evidence do not recognize the "residual" hearsay exception (Fed. R. Evid. 807), which allows the admission of hearsay on the rare occasion when there is sufficient indicia of trustworthiness. *Com. v. Stallworth*, 781 A.2d 110, 128 n.2 (Pa. 2001) ("Notably, . . . Pennsylvania has not adopted . . . the residual hearsay exception" even for "verified" documents); *see also* cmt. to Pa. R. Evid. 803(24) ("Pennsylvania has not adopted F.R.E. 803(24) (now F.R.E. 807).").

(same). *See also Eckroth v. Verizon Pa. Inc.*, No. C-2011-2279168, 2012 WL 6763607 (Pa. P.U.C. Dec. 10, 2012) (Barnes, J.) ("It is unknown the number of customers affected by Verizon's actions. Although Complainant testified that his neighbors experienced the same problems and that they also switched to RCN as a result, this testimony is hearsay and was uncorroborated by any witnesses."). In short, "[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.U.C., Bureau of Investigation & Enforcement v. Yellow Cab Co. of Pittsburgh*, No. 2012-2249031, 2013 WL 5912555 (Pa. P.U.C. Oct. 8, 2013).

26. Recently, in *Bennett*, the complainant sought to support his allegations that the respondent utility improperly failed to restore electric services to him in light of his heart condition, which required use of a nebulizer, by testifying about what his doctor's nurse told him during a telephone conversation. 2014 WL 1747713, at *8. Specifically, complainant claimed that the nurse told him that the respondent gave the doctor an incorrect number to which the doctor could fax a medical certification regarding the complainant's condition. *Id.* ("the only evidence that the Complainant presented in support of his allegations the Respondent gave his doctor the wrong fax number was based on what he alleges his doctor's nurse told him in a telephone conversation."). Administrative Law Judge Salapa noted that that "evidence," however, constituted inadmissible hearsay. *Id.* at *8-9. Further, even though the respondent did not object to the complainant's hearsay testimony that his doctor's nurse told him that the respondent had given the doctor an incorrect fax number, because there was no "corroborating, non-hearsay evidence" Judge Salapa held that he could not make a finding of fact that the respondent provided the doctor with an incorrect fax number. *Id.* at *9 (discussing *Walker*).

27. Judge Salapa's decision in *Bennett* is the rule, not the exception. The Commission regularly excludes as hearsay (or refuses to make findings of fact without separate evidence corroborating the hearsay) testimony about what others have told the witness or complainant. *See, e.g., Jackson v. PECO Energy Co.*, No. F-2013-2351046, at *5 (Pa. P.U.C. July 5, 2013) ("I note here that the Company's evidence is faulty. . . . PECO offered Mr. Begley's recitation of the content of the call, which is uncorroborated hearsay."); *Davis v. Equitable Gas Co., LLC*, No. C-2011-2252493, 2012 WL 3838095 (Pa. P.U.C. Apr. 27, 2012) (because complainant's testimony relating conversations he had with Pennsylvania LIHEAP employees constituted uncorroborated hearsay, Commission held that it "cannot use this testimony in deciding the Complainant's case"); *Hoffsis v. Verizon Pa. Inc.*, No. C20043904, 2005 WL 2276854 (Pa. P.U.C. Sept. 13, 2005) (complainant's reports of conversations with respondent's service representative was hearsay, "and the Commission cannot base a finding of fact on uncorroborated hearsay"); *Pickford v. Pennsylvania-American Water Co.*, Nos. C-20078029 to -31, C-20078034 to -39, C-20078041 to -46, C-20078051, C-20078052, C-20078061, C-2008-2044004, 2009 WL 1514962 (Pa. P.U.C. May 14, 2009) ("we find that the ALJ correctly limited the scope of the testimony . . . at the evidentiary hearings . . . Some testimony that was offered was based on what others have said and done, which was inadmissible hearsay").[7]

---

[7] *See also Carlson v. Equitable Gas Co.*, No. C-20078025, 2008 WL 8014610, at n.4 (Pa. P.U.C. June 10, 2008) (Opinion and Order) ("The Complainant testified concerning statements subsequently made by a third party to the effect that the water well should not have been plugged with cement. The Respondent timely and properly objected to the testimony as hearsay. We will not consider that testimony in issuing this Opinion and Order."); *Rahman v. Verizon Pa., Inc.*, No. F-2009165, 2007 WL 2492046 (Pa. P.U.C. Sept. 4, 2007) (Opinion and Order) (respondent's employee's testimony regarding the substance of other respondent representatives' letters and calls to complainant concerning the impending termination of her telephone service was inadmissible hearsay).

28. In fact, the only case BPE has been able to identify where the Commission admitted hearsay testimony under an exception to the general prohibition is *Munro v. PECO Energy Co.*, No. C-2010-2214718, 2012 WL 2454212 (Pa. P.U.C. June 21, 2012). However, that case appears to be an outlier and distinguishable from the instant action. *Munro* involved a *pro se* complainant. Under 52 Pa. Code § 1.2(d), the procedural and evidentiary rules applied in Commission proceedings are relaxed and construed particularly "liberally" for *pro se* complaints. *Roberts v. Nat'l Fuel Gas Distrib. Corp.*, No. C-2014-2408721, 2014 WL 5712841, at *3 n.1 (Pa. P.U.C. Oct. 2, 2014); *Robinson v. PECO Energy Co.*, No. C-2012-2300615, 2013 WL 1771129 ("the Commission construes its procedural rules liberally in proceedings involving *pro se* litigants"). In a one-sentence analysis, the Commission granted the complainant's exception to the ALJ's decision disallowing the complainant to testify about what a PECO employee told him about a bill increase: "We find merit in the Complainant's second Exception as we believe that the Complainant's testimony likely falls within an exception to the hearsay rule pertaining to an admission by a party opponent." However, in the very next sentence, the Commission noted that the testimony "does not present any new information and is not dispositive to the outcome in this case. While we will grant this Exception, it is not necessary to modify any portion of the Initial Decision as a result." In other words, in order to provide the *pro se* complainant with every opportunity to present his case and because the hearsay testimony was merely duplicative of other record evidence – *i.e.*, corroborating evidence existed in any event – the Commission "liberally" applied the evidentiary rules and allowed the hearsay testimony into evidence.

29. Complainants are not *pro se* litigants, rather, they are seasoned government attorneys and the PUC procedural and evidentiary rules should not be relaxed for them as they were for the complainant in *Munro*. Further, unlike in *Munro*, the consumer witness hearsay

testimony proffered by Complainants to establish the truth of the factual assertions is not duplicative of any other record evidence. To admit it here would not amount to harmless error as it might have been in *Munro* given the additional corroborating evidence in that case. Rather, because there is no corroborating evidence being offered here, it might greatly prejudice BPE and put it at an evidentiary disadvantage as it would be forced to respond to each consumer's often exaggerated and non-responsive testimony of what was said or not said by BPE's various employees, the majority of whom the consumers fail to identify. That is why hearsay testimony is generally excluded in the first instance.

B. Pennsylvania does not recognize the residual exception to hearsay

30. The "residual exception" to the hearsay rule has no application here. Instead, it applies to 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 those cases, the courts permit 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. The Pennsylvania Supreme Court, however, 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.[8]

---

[8] 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.

31. The Commission has rejected the application of the residual hearsay exception 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. 2012-2249031, 2013 WL 5912555 (Pa. P.U.C. Oct. 8, 2013).

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

32. In any event, 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).

33. 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 of no help to Complainants.

34. 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.

35. *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 also 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).

36. 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. In this case, the consumer statements lack the required trustworthiness because they expect Complainants to seek money on their behalf. Thus, they have a financial incentive to make the statement, which obliterates any degree of trustworthiness that a consumer statement might otherwise have.

37. Accordingly, all of the statements recounting what any particular consumer allegedly told BPE, Complainants or the Commission, whether such statements were made orally or through all letters, other documents and chronologies attached to testimonies constitutes inadmissible hearsay and should be stricken.

38. The failure by many of the consumers to identify the BPE representative that they allegedly spoke with is especially troubling because such unattributed statements lack any level of trustworthiness.

39. Question 7 asks: "[P]lease describe the sales contacts that you had with the EGS's representative when you signed up for the service."

40. Many consumers failed to even identify the gender of the representative of BPE that they allegedly spoke to and instead resort to a response such as "they said. . ."

41. The following consumers failed to identify the particular representative of BPE that they allegedly spoke to when they signed up with BPE:

(a) Lewis & Majorie Townsend (CS30-35);

(b) Herbert Lyle Evans (CS37-40);

(c) Linda Wintersteen (CS41-44);

(d) Karen Kraft (CS48-51);

(e) Patricia Fickess (CS60-63);

(f) Loni Durante (CS80-83);[9]

(g) Laurie Huckstein (CS92-95);

(h) Charles & Betty Ellis (CS96-99);

(i) Robert W. Bishop (CS100-103);

(j) Jeffery Hamilton (CS106-109);

(k) Norma Kreider (CS136-139);

(l) Rose M. Livingstone/Flowers by Regina (CS140-143);

(m) Darrell Bacorn (CS150-153);

(n) Erie Animal Hospital (CS155-158);

(o) Gary Euler (CS159-162);

(p) David Brotzman (CS164-167);

(q) William C. Evans (CS186-189);

(r) Jyotsna A. Jivani (CS197-200);[10]

(s) Alexandra Moratelli (CS208-211);

(t) Tracy Wesley (CS212-215);

(u) David J. Lynch/Cambria Hardware & Equip. (CS216-219);

(v) Elaine Rock (CS221-224);

(w) Mary Nye (CS233-236);[11]

---

9 Ms. Durante states that her "previous landlord . . . recommended" BPE. (CS80.) When Ms. Durante goes on to answer the following question, it is in no way clear whether she is still talking about a conversation with her previous landlord.

10 When asked to describe the contact that he had with BPE's representative, Mr. Jivani responded "[n]o idea." (CS197.)

(x) Kim F. Miller (CS237-240);

(y) Rebecca & Timothy Kennedy (CS246-250);[12]

(z) Scott A. Hornberger (CS252-256);

(aa) Joan I. Miller (CS257-260);[13]

(bb) Daniel Zablosky (CS270-273);

(cc) Marcy Weyant (CS274-277);[14]

(dd) Robert E. Burkholder (CS278-281);[15]

(ee) Richard P. Perry, Jr. (CS282-288);

(ff) William Wrantz (CS290-293);

(gg) Tom & Amy Quinn (CS298-301);

(hh) Robert D'Adamo (CS323-326);

---

11 When asked to describe the contact that he had with BPE's representative, Ms. Nye elected not to respond. (CS233.) Other consumer statements suffer from the same infirmity.

12 When asked to describe the contact that she had with BPE's representative, Ms. Kennedy responded "[s[ee question #6," which stated "[t]elemarketing call." (CS197.)

13 When asked to describe the contact that she had with BPE's representative, Ms. Miller responded "Small Commercial Enrollment Consent Form (Pennsylvania)" (CS257.) That document is attached to Ms. Miller's statement. (CS262-263.) The EGS listed on that document is "Direct Energy Service, LLC." The record evidence will demonstrate that that entity that is not affiliated in any way with BPE. Furthermore, in response to a question regarding how she signed up with BPE, Ms. Miller states that "person came in." (CS257.) This clearly implies that Ms. Miller most likely spoke with a door-to-door marketing representative for Direct Energy Service, LLC, not BPE. The record evidence will demonstrate that BPE did not conduct door-to-door marketing in Pennsylvania. This statement, one of which Complainants intend to use in support of their claims against BPE in this proceeding clearly show that these infirm statements lack the trustworthiness upon which any finding of violations by BPE could be found.

14 Ms. Weyant claims to have signed up online. She does not attach, or even describe her online experience with BPE. When asked to describe the contact that he had with BPE's representative, Ms. Weyant responded "I don't recall any contact with a representative." (CS274.)

15 Mr. Burkholder freely admits that he never spoke with a BPE representative. Instead, he states that "[c]alled my wife at a business we owned." (CS278.)

(ii) Age Craft Manufacturing/Ben J. Policastro (CS327-330);

(jj) Mother's Nature, Inc. (CS332-335);

(kk) Tremaine Gorham (CS336-339);

(ll) Rainbow S. Brubaker-Gass (CS340-343);

(mm) Allen Fitch (CS344-347);

(nn) Michael Foster (CS348-353);

(oo) Mehmet Isik (CS354-357);

(pp) Ifran Isik (CS358-361);[16]

(qq) Yaglidereliler Corp. (CS362-365);

(rr) Michael Weidner (CS366-369);

(ss) Katherine L. William (CS370-373);

(tt) Martha Campanaella (CS374-377);

(uu) Jo Ann Letersky (CS378-382);

(vv) Fort Boone Campground (CS383-386);

(ww) Jeffrey VanHorn (CS387-390);

(xx) Dennis Frey (CS391-394);

(yy) Karen Mauro (CS395-398);

(zz) Tracey L. Frable (CS399-402);[17]

(aaa) George M. Dingler (CS403-406);

---

16 Based on the responses to this particular questionnaire, it is not at all clear who is answering the questions, or in what capacity. It appears that "Mehmet Isik" signed this statement as Ifran Isik's "agent," (CS361) without any evidence of a grant of authority to do so. If that is the case, this particular statement cannot be used on behalf of Ifran Isik.

17 Ms. Frable is another example of the untrustworthiness of statements that fail to identify the BPE representative that the consumer allegedly spoke with when they first signed up. In response to question no. 7, Ms. Frable responded "over phone—that[]s all." (CS399.) That statement is all the more noteworthy when later in her statement, Ms. Frable states that she was quoted a rate of ".5 cent kwh" and that rate would be "locked in forever--." (CS401.)

(bbb) Grace M. Witmer (CS420-423);

(ccc) James G. Seton (CS433-436);

(ddd) United Transmission & Service Center, Inc. (CS437-441);

(eee) Martha J. Vetter (CS443-446);

(fff) Tami Chicarielli/GeoStructures, Inc. (CS449-452);

(ggg) Village Service Center (CS453-456);

(hhh) Rachel and Charles Wentwig (CS465-468);[18]

(iii) Billie Hockenberry (CS473-476);

(jjj) Luann & Matthew Battersby (CS478-482);[19]

(kkk) Karen A. Giran (CS483-486);

(lll) Charles Wentzel (CS487-492);

(mmm)Robert Hartman (CS493-496);

(nnn) Ivan Zimmerman (CS497-500);

(ooo) David Duke (CS501-506);

(ppp) Dennis M. Estvanik (CS507-510);[20]

(qqq) Tammy M. Gilles (CS511-514);

(rrr) Jayard K. Shah/Bahubali Hospitality dba Howard Johnson (CS515-518);

(sss) Nancy Whisker (CS522-525);

(ttt) Earl F. kreitz, Jr. (CS530-533);[21]

---

18 Ms. Wentwig, who signed the statement, claims to have signed up online. (CS465). She does not attach, or even describe her online experience with BPE. When asked to describe the contact that he had with BPE's representative, Ms. Weyant responded "[n]o sales contact." (CS465.)

19 Ms. Battersby, who signed the statement, states that she had no contact with BPE at the time that she signed up. (CS478.)

20 Mr. Estvanik is another consumer who provides almost no details of his contact with an unidentified representative of BPE, but nevertheless remembers that he was provided with a fixed rate "forever." (CS508.)

(uuu) Greg Payson (CS551-554);

(vvv) Neil Weaver (CS563);

(www) William C. Smith (CS567-570);[22]

(xxx) John J. Cassel (CS571-576);

(yyy) Gary & Betty Leitzel (CS577-580); and

(zzz) William H. Otto (CS581-584).[23]

42. Accordingly, based on each consumer's statement alone and their failure to identify particular representative of BPE, their statement lacks the required indicia of trustworthiness to permit their statement to constitute testimony in support of Complainants' case-in-chief.

43. Question no. 19 states: "[p]lease describe any contacts that you had with EGS agents concerning your problem?" To the extent that any consumer who offers a response to this question fails to identify the BPE representative that he or she spoke to and which forms the basis for the response to that question, that testimony should be stricken because it constitutes inadmissible hearsay.

C. The Consumer Statements Are Not Based on Personal Knowledge As Required and the Attachments Thereto are Not Authenticated

44. Each of the questionnaires signed by Complainants' customer witnesses states:

---

21 Mr. Kreitz's statement was complete and signed by his daughter, who claims to have his power of attorney. (CS534-538.) While Ms. Ober may have her father's power of attorney, that power of attorney does not constitute an exception to the hearsay rule.

22 Mr. Smith states that he never signed up with BPE. Instead he claims that his "old supplier" sold their business to BPE. (CS567.) When asked to describe the contact that he had with BPE's representative, Mr. Smith flatly responded "[n]one." (CS567.) Accordingly, any representations that he attempts to attribute to BPE could only be hearsay.

23 Mr. Otto freely admits that he did not speak to any representative of BPE. Rather, his "prior administrator signed with [BPE]." (CS581.)

> [Y]ou verify, subject to the penalties of Section 4904 of the Criminal Code, 18 Pa. C.S. § 4904, relating to unsworn falsification to authorities, that the facts set forth above are true and correct ***to the best of your knowledge, information, and belief.***

PAOAG-BP-0003882 (emphasis added).

45. Under Pennsylvania law, this language is insufficient to support sworn testimony because it does not demonstrate that the declarant had the requisite "personal knowledge" to provide that testimony in the first instance. *See Phaff v. Gerner*, 303 A.2d 826, 829-30 (Pa. 1973); *Muller v. Midstate Equipment Serv., Inc.*, 11 Pa. D. & C.3d 115, 117 n.1 (Pa. Com. Pl. 1979). For example, *in Muller*, the Court of Common Pleas held that an affidavit stating that the facts set forth therein that were "within [the affiant's] personal knowledge and the facts set forth which are within the knowledge of others are true to the best of [the affiant's] knowledge, information, and belief" was "defective." 11 Pa. D. & C.3d at 117 n.1. The court explained that, because the affidavit was not made "***only***" on the affiant's "personal knowledge," it could not be entertained by the court. *Id.* (emphasis in original and citing *Phaff*). In *Phaff*, the Pennsylvania Supreme Court distinguished the "very strict requirement[]" that sworn testimony be based solely on personal knowledge from the much more relaxed standard that controls a pleading:

> [A]llegations contained in a pleading are made according to the '. . . knowledge, information and belief' . . . of the person signing the complaint. A pleading may be signed by a person who does not have personal knowledge of the facts, and who would not be competent to testify concerning the facts in the pleading.

303 A.2d at 829.

46. In other words, because a complaint contains only allegations and not facts, it may be based upon "knowledge, information, and belief." However, where a party seeks to establish facts by way of sworn written testimony – such as Complainants attempt to do here – such facts must be based only on the witness's personal knowledge, and the sworn testimony must affirm as much. *Id.* at 829-30. *See also Howley v. Town of Stratford*, 217 F.3d 141, 155

(2d Cir. 2000) ("We agree that assertions made by [plaintiff] only on information and belief, for example, would not be admissible through her at trial, for testimony as to facts must generally be based on the witness's personal knowledge."); *Williams v. Mucci Pac, U.S.A., Ltd.*, 961 F. Supp. 2d 835, 839 (E.D. Mich. 2013) (holding that entirety of sworn testimony suffered from "fatal defect" and was inadmissible because, "at least some portion of the testimony is based 'on information and belief,' rather than personal knowledge"). None of the written testimony was based purely on the respective witnesses' personal knowledge as is required. Rather, as each witness makes clear in his or her testimony, the testimony was based merely on "knowledge, information, and belief." This "fatal defect" renders all of the consumer statements inadmissible. Accordingly, it should be struck in omnibus fashion.

47. In addition to not being based on the personal knowledge, a number of the consumers attached unauthenticated documents to their statements. 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).

48. 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.

49. 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.

50. The following consumers attached documents to their statements that have not been authenticated and therefore should be stricken:

(a) Sherri Kennedy (CS10-20);

(b) Robert Kieffer (CS25-29);

(c) Linda Wintersteen (CS45-47);

(d) Karen Kraft (CS52-54);

(e) Patricia Fickess (CS67-74);

(f) Loni Durante (CS80-83);

(g) Robert W. Bishop (CS104-105);

(h) Merlin Barboza/RK Enterprise, Inc. (CS115-123);

(i) Merlin Barboza/RK Enterprise, Inc. (CS130-135);

(j) Rose M. Livingstone/Flowers by Regina (CS144; 146-148);

(k) Darrell Bacorn (CS150-153);

(l) Myrtis Podejko/Myrtis's PreSchool & CLC (CS172-185);

(m) William C. Evans (CS190; 192-196);

(n) Lynn & Dale Ober (CS205-207);

(o) David J. Lynch/Cambria Hardware & Equip. (CS220);

(p) Walt Wensel (CS229; 231-232);

(q) Kim F. Miller (CS241);

(r) Rebecca & Timothy Kennedy (CS251);

(s) Scott A. Hornberger (CS255);

(t) Joan I. Miller (CS262-263);

(u) Richard P. Perry, Jr. (CS285-287);

(v) Distinctive Detail (CS306-307);

(w) Age Craft Manufacturing/Ben J. Policastro (CS331);

(x) George M. Dingler (CS407-413);

(y) Grace M. Witmer (CS424-427);

(z) United Transmission & Service Center, Inc. (CS442);

(aa) Martha J. Vetter (CS448);

(bb) Village Service Center (CS457-459);

(cc) Jayard K. Shah/Bahubali Hospitality dba Howard Johnson (CS519-521);

(dd) Earl F. kreitz, Jr. (CS534-542)

(ee) Greg Payson (CS555-557); and

(ff) John J. Cassel (CS574-575).

D. Some of the Questions Are Leading and/or Assume Facts Not In Evidence

51. Some of the questions contained in each of the questionnaires constitute leading questions, which are questions that are designed to obtain a certain result. They are completely disfavored. Rather, questions that permit an open-ended response, without the desired answer embedded in the question are the types of questions that should be asked in a party's case-in-chief.

52. Question No. 3 is a leading question. Question No. 3 asks: "a. Which electric generation supplier (EGS) did you have a problem with, if any? b. Please describe the problem." In the first instance, this question improperly assumes that there is a problem and leads the witness whom Complainants call in their case-in-chief to respond to the leading question as posed. Any response to this question elicits testimony from the consumer affirming that there was a problem, regardless of the consumer's view on the matter. In addition, question No. 3 assumes facts not in evidence—that there was a "problem." Question No. 3 should be stricken.

53. Question No. 6 is a leading question. Question No. 6 asks: "How did you sign up with the EGS? For example, was it a telemarketing call, a door-to-door marketer, through a website or mailing, or some other method?" One non-objectionable way to ask this question might be: "Please describe how you first heard about [the particular EGS]. . ." As posed, Question No. 6 should be stricken

54. Question No. 7 is a leading question. Question No. 7 asks: "Please describe the sales contacts that you had with the EGS's representative when you signed up for the service." This question is leading because it assumes facts not in evidence (that the consumer made contact with a representative.) Several of the consumers made statements that their entire experience with BPE was done through the internet. Question No. 7 improperly assumed a fact that was not in evidence, and was asked in a leading manner. It should be stricken.

55. Question No. 12 is a leading question. Question No. 12 asks: "a. Did the EGS salesperson guarantee savings? b. If yes, please explain." Question No. 12 assumes facts that are not yet in evidence (that the salesperson actually guaranteed savings), and from that assumption, the question leads the witness to a response that would elicit an answer that savings were guaranteed. Because Question No. 12 is directed toward a witness with whom Complainants are calling in their case-in-chief, it should be stricken.

56. Question No. 14 is a leading question. Question No. 14 asks: "When, if at all, did you receive a disclosure statement (sometimes called the terms and conditions)?" One non-objectionable way to ask this question might be: "Did you receive a disclosure statement?" As posed, Question No. 12 is leading and should be stricken.

57. Question No. 19 is a leading question. Question No. 19 asks: "Please describe any contacts that you had with the EGS agents concerning your problem?" Question No. 19 assumes facts that are not yet in evidence (that there was a problem), and from that assumption, the question leads the witness to a response that would elicit an answer that there was a problem. One non-objectionable way to ask this question might be: "Did you speak with the EGS regarding your service at any time?" Instead, Complainants' question improperly suggests that there was a problem. Because Question No. 19 is directed toward a witness with whom Complainants are calling in their case-in-chief, it should be stricken.

58. Question No. 20 is a leading question. Question No. 20 asks: "If you were able to contact your EGS, please describe the relief, if any, the EGS offered you." Question No. 20 assumes facts that are not yet in evidence (that somehow the EGS blocked itself from access and that it was required to provide relief), and from that assumption, the question leads the witness to a response that would elicit an answer that perhaps the EGS made itself unavailable or

unresponsive to the consumer's request. Because Question No. 20 is directed toward a witness with whom Complainants are calling in their case-in-chief, it should be stricken.

59. Question No. 21 is a leading question. Question No. 21 asks: "Please provide any additional important information about your experience, including payment arrangements or termination notices." Question No. 21 is leading because it characterizes information as "important." To whom is the information important? The leading suggestion to the consumer is that anything that the consumer brings forward, whether in terms of a statement regarding his or her experience is "important" and that payment arrangements and/or termination notices are "important." Because Question No. 21 is directed toward a witness with whom Complainants are calling in their case-in-chief, it should be stricken.

60. It is well-settled that a party may not lead its own witness with suggestive questions. *See In Re Rogan Estate*, 404 Pa. 205, 214, 171 A.2d 177, 181 (1961); *Pascone v. Thomas Jefferson Univ.*, 516 A.2d 384, 388 (Pa. Super. Ct. 1986); *see also* Pa.R.E. 611(c). The prohibition against the use of leading questions on direct examination equally applies to administrative proceedings. *See Harbison v. W.C.A.B. (Donnelley)*, 496 A.2d 1306, 1309 (Pa. Commw. Ct. 1985) (impermissible for counsel to literally place the sought-after answers into the witnesses' mouths). Moreover, answers to inappropriate leading questions are not admissible and may not be used to support the examining parties' case. *Wilson v. A.P. Green Indus., Inc.*, 2002 Pa. Super. 294, 807 A.2d 922, 926 (Pa. Super. Ct. 2002).

61. A leading question has been defined as one that puts the desired answer in the mouth of the witness. *Com. v. Dreibelbis*, 493 Pa. 466, 476, 426 A.2d 1111, 1116 (1981). The guaranteed savings question does exactly that, especially by following up with a second part to explain if the answer was yes. While other questions are more general, asking the consumer to

describe the problem or their interactions with the sales representative, the guaranteed savings question makes it clear to the consumer witness that he or she is expected to answer yes. Despite many consumers suggesting nothing about promised savings in response to the prior more general questions, most of them responded yes to the guaranteed savings question, including consumers who did not even switch or claimed that they did not switch to BPE.

62. In this context, each consumer witness knows that Complainants are attempting to recover money for them from BPE based on allegedly misleading statements by BPE regarding pricing and savings. Asking the consumers, "Did the EGS salesperson guarantee savings?" clearly suggests that an affirmative answer is both desired and the one most likely to produce a refund for the witness. Had the question been phrased appropriately, consumers would not have been encouraged to answer in the affirmative, but rather would have provided their actual, unprompted recollection of the facts.

63. Complainants could have easily elicited relevant testimony without signaling the desired answer. For instance, they could have asked what they discussed with the EGS's salesperson. That is no longer possible since the desired answer that the EGS sales person "guaranteed savings" has already been suggested to each witness.

64. A party may not lead his own witness with suggestive questions. The rule against the use of leading questions on direct examination applies in administrative hearings. It also applies with full force to pre-recorded testimony presented in written form. Furthermore, answers to inappropriate leading questions are not admissible and may not be used to support the examining party's case.

E. Question Nos. 9, 10, 11 and 21 Are Not Relevant

65. Some of the questions contained in the questionnaires are not relevant to the claims in this proceeding. For instance, Question Nos. 9. 10 and 11 ask for the consumer's

"understanding" of the price, how the price would be set and how the price would be charged. ("9. If you signed up, what was your understanding of the EGS's price?; 10. a. Did you understand how the EGS's price would be set? b. If yes, please explain your understanding. 11. What was your understanding of how long the EGS would charge that price?."). There are no claims alleging fraud in this proceeding. Accordingly, any given consumer's "understanding"[24] regarding the price, how the price would be set and how the price would be charged is not relevant to any claim pending. In this proceeding, a relevant inquiry might relate to what the EGS's representative objectively said to the consumer, not what the consumer's subjective (and perhaps self-serving) "understanding" consisted of. Accordingly, any question seeking the consumer's "understanding" should be stricken.

66. In addition, Question No. 21 is not relevant to any claim pending in this proceeding. Question No. 21 asks: "Please provide any additional important information about your experience, including payment arrangements or termination notices." A consumer's "experience," "payment arrangements" or "termination notices" are not relevant to any claim pending in this proceeding.

F. Many of The Answers Are Non-Responsive

67. A quick review of the questions and responses to the questionnaire would lead one to arrive at the conclusion that they constitute little more than streams of consciousness about a general topic. In addition, some of the responses are incomplete and leave BPE left to

---

[24] A consumer's "understanding" might be relevant to a claim brought under the Unfair Trade Practices/Consumer Protection Law (UTP/CPL) in the proper forum. The claims alleged in Count I of the Joint Complaint brought under the UTP/CPL were dismissed. Order Granting In Part and Denying In Part Preliminary Objections dated August 20, 2014.

interpret what the consumer may have said in response to a question. To the extent that any question is incomplete or indecipherable, it should be stricken.

G. Any Consumer Who Received a Refund Should Be Stricken

68. In order to obtain relief from a court or tribunal, a complainant must have been injured. Accordingly, injury in fact is a requirement for standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Several of the consumers who responded to Complainants questionnaire and who Complainants appear to rely upon in this proceeding obtained a refund from BPE. As such, they no longer have standing to complain about BPE because they sought and received relief. Therefore, any claim made against BPE is now moot.

H. Consumers Who Are Pursuing Sepratate Actions Should Be Stricken

69. Complainants should not be permitted to offer the statement of any consumer in this proceeding if that consumer has filed a separate action before this Commission to the extent that both Complainants and such consumers are seeking the same relief against BPE.

70. Consumers Mehmet Isik (CS354-357), Ifran Isik (CS358-361) and Yaglidereliler Corp. (CS362-365) have each filed separate complaints before the Commission in a proceeding entitled *Yaglidereliler Corp. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2413732.

CONCLUSION

WHEREFORE, on the basis of the foregoing, BPE LLC respectfully requests that the Administrative Law Judges grant this Motion to Strike Pre-Served Consumer Direct Testimony.

Respectfully submitted,

Dated: March 18, 2015

BUCHANAN INGERSOLL & ROONEY PC

By: _____

Karen O. Moury
409 North Second Street, Suite 500
Harrisburg, PA 17101
Telephone: (717) 237-4820
Facsimile: (717) 233-0852

Mark R. Robeck (admitted *Pro Hac Vice*)
Catherine M. Wilmarth (admitted *Pro Hac Vice*)
Travis Cushman (*Pro Hac Vice* admission pending)
KELLEY DRYE & WARREN LLP
3050 K Street, NW, Suite 400
Washington, DC 20007
Telephone: (202) 342-8400
Facsimile: (202) 342-8451

Geoffrey W. Castello (admitted *Pro Hac Vice*)
KELLEY DRYE & WARREN LLP
One Jefferson Road
Parsippany, NJ 07054
Telephone: (973) 503-5900
Facsimile: (973) 503-5950

Attorneys for Blue Pilot Energy, LLC

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).

Via Email and First Class Mail

Elizabeth Barnes
Joel Cheskis
Administrative Law Judges
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

John M. Abel
Margarita Tulman
Office of Attorney General
Bureau of Consumer Protection
15th Floor, Strawberry Square
Harrisburg, PA 17120

Sharon E. Webb
Office of Small Business Advocate
300 N. Second Street, Suite 202
Harrisburg, PA 17101

Steve Estomin
Exeter Associates, Inc.
10480 Little Patuxent Parkway
Suite 300
Columbia, Maryland 21044

Candis A. Tunilo
Christy M. Appleby
Kristine E. Robinson
Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101

Michael L. Swindler
Wayne T. Scott
Stephanie Wimer
Pennsylvania Public Utility Commission
Bureau of Investigation & Enforcement
PO Box 3265
Harrisburg, PA 17105-3265

Barbara R. Alexander
83 Wedgewood Drive
Winthrop, Maine 04364

Dated this 18th day of March, 2015.

Karen O. Moury, Esq.