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

April 2, 2015

VIA E-FILING

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

Re: Enrico Partners v. Blue Pilot Energy, LLC
Docket No. C-2014-2432979

Dear Secretary Chiavetta:

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

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

Very truly yours,

Karen O. Moury

KOM/ bb
Enclosure
cc: Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

EXCEPTIONS
ON BEHALF OF
BLUE PILOT ENERGY, LLC

BUCHANAN INGERSOLL & ROONEY, P.C.

Karen O. Moury, PA ID No. 36879

409 North Second Street, Suite 500
Harrisburg, PA 17101-1503
Telephone: (717) 237-4820
Facsimile: (717) 233-0852
karen.moury@bipc.com

Attorneys for Blue Pilot Energy, LLC

Dated: April 2, 2015

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I. INTRODUCTION

The Initial Decision (I.D.) issued on March 13, 2015 by Administrative Law Judge ("ALJ") Joel Cheskis in this proceeding contains numerous errors warranting its reversal, as well as dismissal of the Complaint filed by Enrico Partners ("Complainant") against Blue Pilot Energy, LLC ("BPE"), a licensed electric generation supplier ("EGS"). At the outset, the I.D. inappropriately interpreted a private contract between an EGS and its commercial customer when the Commission has clearly concluded that such an exercise exceeds the bounds of its statutory authority. The I.D. further went beyond the jurisdiction of the Commission by establishing or limiting the prices that BPE should have charged the Complainant under a variable price contract that by its own terms varied monthly on the basis of several factors, including PJM wholesale market conditions, and contained no ceilings or price caps.

In addition, the I.D. erroneously considered an issue not raised by the Complainant of whether the contract of Blue Pilot Energy, LLC ("BPE") complies with the plain language requirements in the Commission's regulations. As this issue was not raised by the Complaint, it was a violation of BPE's substantive due process rights to make factual findings or legal conclusions about the compliance of its contract with those requirements. Even if this had been a valid inquiry as part of this proceeding, neither the Public Utility Code nor the Commission's regulations establish any standards to explain what is meant by plain language. As the contract contains terms and phrases that are commonly used by the Commission and the language is consistent with disclosure statements approved through the Commission's licensing process, no v valid basis exists for concluding that the contract failed to comply with plain language requirements.

Moreover, relying solely on its conclusion that BPE's contract did not fulfill the Commission's plain language requirements, the I.D. unlawfully placed a limit on the charges that BPE may impose on the Complainant and inappropriately determined that BPE should be required to refund or credit the Complainant a portion of the prices charged pursuant to the variable rate contract. The Commission has acknowledged its lack of jurisdiction over EGS rates and explicitly concluded that it may not limit those prices. Although the Commission also lacks statutory authority to direct the issuance of refunds by EGSs to consumers, BPE is aware of a recent unappealable interlocutory ruling of the Commission that carved out limited circumstances under which refunds may be directed. Even the application of that ruling to this case precludes the Commission from directing BPE to issue a refund to the Complainant since the limited circumstances set forth in those rulings are not applicable here.

Further, the civil penalty recommended by the I.D. is in error because the Complainant has not established that any violations of the Public Utility Code, 66 Pa.C.S. §§ 101 *et seq.* ("Code") or Commission regulations occurred. Even if the Commission finds that with perfect hindsight, BPE's contract could be more artfully worded, a penalty is inappropriate given the Commission's prior blessing of the same language as part of a disclosure statement implicitly improved through the licensing process. The only appropriate outcome is to direct BPE to revise the contract and accompanying disclosure statement, as necessary, to reflect the Commission's current thinking as to the plain language requirements of its regulations. Moreover, the I.D. inappropriately applied the relevant factors in determining a civil penalty and imposed two $1,000 civil penalties for one violation of the Commission's regulations.

II. BACKGROUND AND PROCEDURAL HISTORY

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

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

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

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[1] *License Application of Blue Pilot Energy, LLC*, Docket No. A-2014-2223888 (June 10, 2011).
[2] Complaint ¶ 4.
[3] Complainant Exhibit No. 5, ¶ 3, Terms of Service.
[4] Complainant Exhibit No. 5, ¶ 3, Terms of Service.
[5] Complainant Exhibit No. 5, ¶ 3, Terms of Service.
[6] N.T. 14.
[7] N.T. 16.

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

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

ALJ Cheskis convened a hearing on October 6, 2014. BPE did not present any witnesses, but was represented by counsel and participated in the hearing through the cross-examination of the Complainant's witness, Mr. Gerald Holtz. At the conclusion of the Complainant's case, BPE moved for summary dismissal of the Complaint on the basis that the Commission has no jurisdiction to regulate, establish or limit EGS prices and further lacks statutory authority to direct the issuance of a refund by EGSs. Rather than ruling on BPE's motion to dismiss the Complaint, the ALJ afforded the parties an opportunity to file Main Briefs and Reply Briefs.

BPE filed a Main Brief on December 3, 2014 and a Reply Brief on December 12, 2014. By these Exceptions, BPE fully incorporates its Main and Reply Briefs by reference.

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[8] Complaint ¶ 4.
[9] Complaint ¶ 5.

III. SUMMARY OF ARGUMENT

The Commission lacks subject matter jurisdiction over EGS prices and may not award the relief requested by the Complainant - namely a roll back to its initial price under a variable rate contract. As an EGS, BPE is not a public utility except in very limited circumstances related to licensing and the payment of state taxes, neither of which is applicable here. As the Commission does not regulate EGS prices, it may not determine that the price charged by BPE was excessive.

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

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

IV. EXCEPTIONS

A. Exception No. 1: In erroneously finding that BPE overcharged or overbilled the Complainant, the I.D. ignored the Commission's lack of jurisdiction to interpret the terms of a private contract between an electric generation supplier and its commercial customer.

Despite clear Commission precedent regarding a lack of jurisdiction to interpret the terms of a private contract between an EGS and its customer, the I.D. launched into a microscopic review of the contract, interpreted its terms and concluded that BPE overcharged or overbilled the Complainant.[10] As the exercise by the ALJ of interpreting a private contract exceeds the Commission's jurisdiction, the I.D. should be reversed on that basis alone and the Complaint should be dismissed outright.

The Complaint alleged that BPE billed a rate "in excess of our contractual agreement" and contended that the rate "should be contractually calculated based on changes in the PJM rate." Complaint, ¶ 4. The Complainant seeks a Commission interpretation of the language in the contract, which clearly allows for prices to vary on the basis of several factors, including PJM wholesale market conditions that would require BPE to impose prices that mirrored a narrow subset of PJM wholesale market conditions (*i.e.*, average daily hourly prices) that were in effect at the time. As the Complainant seeks to have the Commission interpret the terms and conditions of its private contract with BPE, the Complaint is outside of the Commission's jurisdiction.

The Commission has unequivocally concluded that it lacks statutory authority to interpret the terms and conditions of a contract between an EGS and its customer or to set the rates that may be charged by an EGS. *Office of Small Business Advocate v. First Energy Solutions*

[10] Initial Decision at pages 9-10, Finding of Fact Nos. 14, 23.

Corporation, Docket No. P-2014-2421556 (Order entered January 26, 2015) ("*FES Order*"). *See also Allport Water Auth. v. Winburne Water Co.*, 393 A.2d 673 (Pa. 1978) (Commission lacks jurisdiction to address disputes involving private contracts). In the declaratory order proceeding leading to the issuance of the *FES Order*, the Commission was asked to review the terms of a fixed price contract that FirstEnergy Solutions Corporation ("FES") had with its customers and to determine whether certain costs billed by PJM could be recovered from customers through a pass-through clause in the contract.

Refusing to interpret the terms of the contract between FES and its customers, the Commission acknowledged that jurisdiction is a threshold question, subject to plenary review. *See Borough of Olyphant v. Pa. PUC*, 861 A.2d 377 (Pa. Cmwlth. 2004), *appeal denied*, 585 Pa. 690, 887 A.2d 1242 (2005), citing *Bethlehem Steel Corp. v. Pa. PUC*, 680 A.2d 1203 (Pa. Cmwlth. 1996), *reversed on other grounds*, 552 Pa .134, 713 A.2d 1110 (1998). As the Commission recognized, it is a basic tenet of public utility law that the Commission only has those powers that are enumerated to it. *Feingold v. Bell Tel. Co. of Pa.*, 477 Pa. 1, 383 A.2d 791 (1977). The Commission's jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. *Id.*

In the *FES Order*, the Commission reviewed its statutory authority over EGSs and concluded that it is "clear that Commission jurisdiction does not extend to interpreting the terms and conditions of a contract between an EGS and a customer to determine whether a breach has occurred, or setting the rates an EGS can charge." *Id.* at 18. *See, generally, Morrow v. The Bell Tel. Co. of Pa.*, 479 A.2d 548 (Pa. Super Ct. 1984); *Virgilli v. Southwestern Pennsylvania Water Authority*, 427 A.2d 1251, 1254 (Pa. Cmwlth. Ct. 1981) (courts have jurisdiction over breach of contract issues). While the Commission noted in the *FES Order* that it has jurisdiction over the

marketing activities of EGSs, the pending Complaint did not raise any allegations about BPE's marketing activities. Rather, it was focused solely on the Complainant's interpretation of the contract it entered into with BPE which the Complainant believed provided for a "specifically definable, monthly variable rate."[11].

In finding that BPE had overbilled the Complainant, the ALJ interpreted the contract as requiring BPE's rates to directly track average daily hourly prices in the PJM wholesale market, without regard for other language in the contract, including but not limited to "several factors" and general "PJM wholesale market conditions." As the Commission has left no doubt regarding its lack of statutory authority to interpret a private contract between an EGS and its customer, the inquiry should cease here and the Complaint should be dismissed.

B. Exception No. 2: In erroneously finding that BPE overcharged or overbilled the Complainant, the I.D. ignored the Commission's lack of jurisdiction to regulate, establish or limit prices charged by an electric generation supplier.

The I.D. should also be reversed because it improperly seeks to regulate, establish or limit prices charged by an EGS, which the Commission has also clearly found is beyond its jurisdiction to do. *See FES Order* at 18. In finding that BPE overcharged or overbilled the Complainant, the I.D. erroneously suggests that the Commission may step into the shoes of an EGS and establish prices pursuant to a private contract.[12]

As a creation of the General Assembly, the Commission has only the powers and authority granted to it by the General Assembly and contained in the Public Utility Code, 66 Pa. C.S. §§ 101 *et seq.* ("Code"). *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937 (Order entered May 28, 2008); *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa.

[11] Complainant Main Brief at page 4.
[12] I.D. at page 10, Finding of Fact Nos. 14, 23.

1977). The Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. Pa. Pub. Util. Comm'n,* 43 A.2d 348 (Pa. Super. 1945). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967) ("*Roberts*"). Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992), alloc. denied, 637 A.2d 293 (Pa. 1993).

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

Indeed, the Commission has consistently recognized its lack of jurisdiction to regulate prices charged by EGSs. In *Commonwealth of Pennsylvania, et al. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655 (Order entered December 11, 2014), the Commission determined that it "does not have traditional ratemaking authority over competitive suppliers and does not regulate competitive supply rates." *Id.* at 18-19. *See also CRH Catering Company, Inc. v. Blue Pilot Energy, LLC,* Docket No. P-2014-2451865 (Order entered February 24, 2015) ("*CRH Catering Order*"); *Nadav v. Respond Power LLC,* Docket No. C-2014-2429159 (Order entered

December 12, 2014) ("*Nadav Order*") (complaints challenging EGS prices as too high were dismissed as beyond the Commission's subject matter jurisdiction).

The Commission's recent rulings regarding its lack of jurisdiction to regulate, establish or limit prices charged by EGSs are consistent with prior Commission decisions. For instance, in *Petition of PECO Energy Company for Approval of its Default Service Plan*, Docket No. P-2012-2283641 (March 6, 2014) ("*PECO Default Service Plan Order*"),[13] the Commission considered the views of numerous parties with competing interests on this issue, in the context of whether the Commission may cap the prices that low-income customers pay to EGSs. After a thorough analysis, the Commission concluded that "we have not found any arguments that convince us that we have statutory authority to limit prices charged by EGSs." *Id.* at 11.

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

[13] Order is currently on appeal to the Commonwealth Court of Pennsylvania, *CAUSE-PA v. Pa. Pub. Util. Comm'n.*, 445 C.D. 2014 and *McCloskey v. Pa. Pub. Util. Comm'n*, 596 C.D. 2014.

contracts to determine if they are at risk for large rate increases at any given time." *Variable Rate Order* at 3. Further, the Commission's long-standing regulations require bills of customers purchasing electric generation services from EGSs to include a statement noting that generation prices and charges are set by the EGS chosen by the consumer. 52 Pa. Code §54.5(b)(10).

Ignoring well-established Commission precedent about the inability to regulate, establish or limit prices charged by an EGS, the I.D. inappropriately established or limited the prices that BPE could charge the Complainant and concluded that BPE therefore overcharged or over-billed the Complainant. Specifically, the I.D. would require BPE's prices to mirror average daily hourly prices in the PJM market that were in effect at that time.[14]

Even if the Commission had the statutory authority to interpret a private contract and limit an EGS's prices, the contract that is the subject of the Complaint does not peg retail prices to a particular wholesale market index and certainly does not indicate that the rate will mirror average daily hourly prices. As the Commission is aware, average daily hourly prices are not the only component of PJM wholesale market conditions and are not necessarily indicative of what an EGS may be paying for electricity. Variable prices, by their very nature, are subject to wholesale market volatility. *See Variable Rate Order*. Indeed, wholesale market pricing is a complex topic that requires the analysis of a variety of factors that have not been examined here and should not be examined here since EGS pricing exceeds the scope of the Commission's jurisdiction. *See PPL Energyplus, LLC. v. Maryland Public Service Commission*, 974 F.Supp. 2d 790 (D.Md. 2013).

By reviewing a narrow subset of wholesale market prices and determining what a just and reasonable price should have been during the time period in question, the I.D. engaged in an

[14] Complainant Exhibit No. 7.

exercise that is well beyond the Commission's jurisdiction. The concept of just and reasonable rates exists solely within the realm of public utility ratemaking, and the Commission's statutory authority to determine what is a just and reasonable rate is limited to the review of a rate charged by a public utility. Specifically, Section 1301 of the Public Utility Code provides that "[e]very rate made, demanded, or received by any public utility...shall be just and reasonable." 66 Pa.C.S. § 1301 (emphasis added). Clearly, as the Commission has recognized, it does not regulate the prices charged by EGSs since they are not public utilities, and it may not substitute its own judgment for that of the EGS as to the appropriate price to charge to consumers in a competitive market.

C. Exception 3: The I.D. inappropriately engaged in a plain language review of the contract and unlawfully and improperly concluded that the contract fails to comply with the Commission's plain language requirements.

1. The ALJ improperly raised the plain language requirements for the first time in the I.D., depriving BPE of notice and an opportunity to be heard.

In a constrained effort to somehow bring the Complaint under the Commission's jurisdiction, despite the specific allegations of the Complaint seeking an interpretation of the private contract and the Complainant's efforts in the proceeding to have the Commission limit BPE's price, the I.D. inappropriately interjected an issue into the proceeding about whether BPE's contract fails to comply with the Commission's plain language requirements for communications with consumers about EGS products. Further, the I.D. unlawfully and improperly concluded that the contract fails to comply with the Commission's plain language requirements.[15]

[15] I.D. at pages 8-13, and Conclusion of Law No. 19.

At the outset, BPE notes that the Complainant did not allege any violations of the Commission's regulations requiring EGS communications to contain plain language, which are codified at 52 Pa. Code §§ 54.43 and 111.12(d)(5). Rather, the Complainant was focused on its interpretation of the contract and its view that prices charged by BPE should have mirrored average daily hourly prices in PJM's wholesale market. It was the ALJ who unilaterally, after the close of the record and the filing of briefs in this proceeding, took it upon himself to consider whether BPE's contract complied with the plain language requirements in Sections 54.43 and 111.12(d)(5) of the Commission's regulations. 52 Pa. Code §§ 54.43 and 111.12(d)(5). The Commission recently concluded in the *CRH Catering Orde*r that it is inappropriate for an ALJ to manufacture a dispute that was not raised by the complainant in the proceeding. *CRH Catering Order* at 15.

Addressing issues in the I.D. that were not raised by the Complainant in its Complaint or even in its Main Brief further deprived BPE of notice and opportunity to be heard and therefore violated its fundamental principles of due process. *See Angelo Rodriguez v. Philadelphia Gas Works*, Docket No. F-2009-2110772 (Initial Decision issued November 24, 2009; Final Order entered January 5, 2010) (respondent is entitled to have information specific enough to allow it to understand the allegations against it in order to conduct a meaningful investigation and to prepare coherent response). *See also* Code Section 701 and Section 5.22(a)(4) of the Commission's regulations, 66 Pa.C.S. § 701; 52 Pa. Code § 5.22(a)(4) (complaints must set forth "the act or thing done or omitted to be done" by a public utility "in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission"); *Payne v. Philadelphia Gas Works*, Docket No. C-2011-2247124, 2012 Pa. PUC LEXIS 271 (2012) (issues may not be raised for the first time on exceptions);

O'Toole v. Metropolitan Edison Company, Docket No. C-2008-2045487, 2009 Pa. PUC LEXIS 907 (2009) (issues not raised in complaint may not be raised at hearing).

The I.D. unfairly criticizes BPE for not presenting evidence to demonstrate that the contract complied with the plain language requirements of the Commission's regulations.[16] Absent an allegation, however, regarding the Commission's plain language requirements in the Complaint, BPE had no reason to do so. Moreover, BPE properly viewed the Complaint as seeking the Commission to exercise subject matter jurisdiction over rates charged under a variable price contract in a deregulated competitive electric market, which the Commission has stated consistently it lacks the authority to do so. Therefore, it was a violation of BPE's due process rights for the I.D. to reach factual findings and legal conclusions on the basis of an issue raised for the first time in the I.D. Notably, in the *FES Order*, the Commission did not unilaterally interject a plain language requirements issue into that proceeding, and the ALJ erred in doing so here.

2. The ALJ incorrectly referred to BPE's Service Agreement as its Disclosure Statement.

Throughout the I.D., the ALJ referred to BPE's Service Agreement as its Disclosure Statement.[17] While this is not a fatal flaw in the I.D., due to the similarities in the relevant language contained in these two documents used by BPE,[18] it creates some confusion. As such, a clarification of this issue is warranted. Also, the Commission taking official notice in this proceeding of public documents and facts may be helpful, particularly if it determines that it is appropriate to review the contract from the perspective of plain language compliance.

[16] I.D. at page 12.
[17] I.D. at page 9.
[18] BPE Reply Brief at page 8.

The Service Agreement (referred to interchangeably as the "contract" through these Exceptions) was introduced into the record by the Complainant.[19] Since the Complaint centered on the Complainant's interpretation of that Service Agreement, and no issue was raised about BPE's Disclosure Statement until the Complainant filed its Main Brief, BPE had no reason to offer the Disclosure Statement into the evidentiary record in this proceeding.[20] When the Complainant argued for the first time in its Main Brief that it had never received a Disclosure Statement, BPE pointed out in its Reply Brief that this issue had not been previously raised and therefore should not be considered by the ALJ. BPE noted that if the issue had been previously raised, it could have introduced evidence showing that the Disclosure Statement was mailed to the Complainant on at least two occasions, if the requirement is even applicable to this particular commercial customer. BPE further argued that in any event, the Service Agreement contained all of the key terms and conditions required by the Commission's disclosure statement regulations which were in effect at that time.[21] *See* 52 Pa. Code § 54.5 (prior to July 2014 revisions). The ALJ properly declined to consider this issue.[22]

While BPE's Disclosure Statement is not evidence in the record of this proceeding, the Commission may take official notice of public documents on file with the Commission, pursuant to Section 5.406(a)(1) of the Commission's regulations, 52 Pa. Code § 5.406(a)(1). To that end, BPE's Disclosure Statement is attached as Appendix A to the Joint Complaint filed by the Office of Attorney General and the Office of Consumer Advocate against BPE on June 20, 2014 at Docket No. C-2014-2427655.

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[19] Complainant Exhibit No. 5.
[20] N.T. 28.
[21] BPE R.B.at pages 6-8.
[22] I.D. at page 17.

The ALJ correctly noted the Disclosure Statement filed with BPE's EGS licensing application differs from the Service Agreement presented as Complainant Exhibit No. 5 in this proceeding,[23] as well as with the Disclosure Statement attached to the Joint Complaint referenced above. The reason for the differences between what was filed with the application and the Disclosure Statement in use by BPE is well-known to the Commission and is a fact of which the Commission may take official and judicial notice, consistent with Section 5.408 of the Commission's regulations, 52 Pa. Code § 5.408, upon disclosure to the parties. Specifically, as the Commission is aware, staff in the Bureau of Consumer Services ("BCS") engages in a review of disclosure statements before the Commission approves license applications. This review and revision process is fully explained in BPE's Answer and Preliminary Objections filed to the Joint Complaint referenced above, which are public documents available for review by the Commission.

3. Relevant to an inquiry concerning the contract's compliance with the plain language requirements is a consideration of language previously approved or endorsed by the Commission.

Therefore, relevant to any inquiry concerning the plain language compliance of the Service Agreement is a consideration of BPE's Disclosure Statement that was internally reviewed and approved during the licensing application process. To the extent that identical language has been approved by the Commission's plain language experts as part of that process, that information is persuasive in demonstrating compliance with plain language requirements. Again because BPE was not aware that the ALJ would engage in a microscopic review of the contract from the standpoint of plain language compliance, no evidence was introduced on prior

[23] I.D. at page 12, footnote 1. Although the Disclosure Statement submitted with BPE's EGS licensing application was not introduced as evidence in this proceeding, it appears that the ALJ has reviewed it and taken official notice of it as a public document on file with the Commission.

approvals. BPE submits, however, that the Commission is able through taking official notice of public documents and facts to confirm the prior approval process.

If the Commission is unable to accomplish this review through taking official notice of public documents and facts, and finds information about the prior approval process to be a necessary component of this proceeding, this matter should be remanded to the ALJ. In that manner, BPE would have an opportunity to develop a record showing that the language in this contract mirrors language contained in its disclosure statement, which was reviewed and approved by the Bureau of Consumer Services during the licensing process and in conjunction with future revisions. While BPE understands that BCS approval is not binding on the Commission,[24] such approval would demonstrate BPE's good faith reliance on its ability to use this language in its contract with the Complainant. Moreover, given BCS approval, it would be a violation of BPE's due process rights to be penalized for a determination at this point that the language violated the Commission's regulations.

In *Hoke v. Ambit NE, LLC*, Docket No. C-2013-2357863 (Initial Decision issued December 4, 2013; Final Order entered January 16, 2014), the Commission analyzed Section 54.43(1) of its regulations and found that because the variable rate disclosure statement used by the EGS in that case had been approved by the Commission's BCS, there was no violation of any regulations or Commission orders. The disclosure statement in question in *Hoke* explained that rates may vary dependent upon price fluctuations in the energy and capacity markets. The complainant was confused by the language in the disclosure statement approved by the Commission's BCS and alleged that the supplier's variable rate advertising and marketing were false and deceptive. In the decision dismissing the complaint, the Commission found that the

[24] 52 Pa. Code § 1.96.

supplier did not violate Section 53.43(a) because "[a]s part of [the supplier's] licensing process, it submitted a customer disclosure statement for review and approval by the Commission's Bureau of Consumer Services. [The supplier] is still using the same disclosure statement approved by Commission Staff." *Hoke* Initial Decision at 9.

Even without taking into consideration in this proceeding the BCS approval process for BPE's Disclosure Statement, which mirrors in all material ways the Service Agreement provided to the Complainant, the Commission should rely on the review of BPE's Disclosure Statement that has already occurred in *Yaglidereliler Corp. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2413732 (Initial Decision issued June 24, 2014 and Order on Remand entered January 16, 2015) ("*Yaglidereliler Corp. Order*"). As the Disclosure Statement was attached to BPE's Motion for Summary Judgment, it was reviewed by both the ALJ and the Commission. A review of that Disclosure Statement shows identical language to what is presented in Paragraph 3 of the Service Agreement. In the Initial Decision, the ALJ found that BPE had properly disclosed the terms and conditions of the variable price contract and took no issue with whether the Disclosure Statement complied with the Commission's plain language requirements. Notably, on review of Exceptions to the Initial Decision, the Commission likewise flagged no concerns about the Disclosure Statement. Although the Commission remanded the matter for further hearings, it expressly did so, on the basis that a review of the Disclosure Statement does not end the inquiry when the complainant has raised allegations about statements made by the sales representative during the enrollment process. Therefore, in the *Yaglidereliler Corp. Order,* the Commission has at least endorsed, if not approved, the contract language that the ALJ had made an issue of in this proceeding.

It further bears noting that the language used in BPE's contract incorporates terminology from the Commission's "Consumer's Dictionary for Electric Competition," which provides a common language for consumers. See *Guidelines for Sue of Fixed Price Labels for Products With a Pass-Through Clause,* Docket No. M-2013-2362961 (Order entered November 14, 2013) (now referred to as the "Electric Competition Dictionary" and available on www.papowerswitch.com under the "Glossary" section). As no departures from the Electric Competition Dictionary have been identified, any challenges to the plain language of BPE's contract must fail.

4. Without any clear legal standards governing plain language requirements, it is a violation of fundamental principles of due process for the Commission to find that BPE's contract violates any regulations.

Moreover, by the ALJ's own admission, the term "plain language" is not defined in the Code, the Commission's regulations or the Commission's Policy Statement on Plain Language Guidelines.[25] 52 Pa. Code § 69.251. Without any legal standards to guide BPE, it is inappropriate to retroactively review language in its contract with the Complainant, conclude that it somehow fails to comply with "plain language" requirements and then determine that BPE should be required to pay a civil penalty and refund charges to the Complainant on that basis.

The United States Supreme Court has explained that, in order to satisfy the Fifth Amendment's Due Process Clause – made applicable to the states through the Fourteenth Amendment – laws must not fail to "give [a] person of ordinary intelligence a reasonable opportunity to know what is prohibited..." *Vill. of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982); *Com v. Parker White Metal Co.*, 515 A.2d 1358, 1367 (Pa. 1986) (due process requires that the proscribed conduct and range of penalties be

[25] I.D. at pages 10-11.

unambiguously identified). Due process demands that legal standards not be vague. *Com. v. Mayfield*, 832 A.2d 418, 422 (Pa. 2003); *Com. v. Barud*, 681 A.2d 162, 165 (Pa. 1996). A statute or regulation is vague if it fails to provide fair notice as to what conduct is forbidden or if it prevents the gauging of future, contemplated conduct, or if it encourages arbitrary or discriminatory enforcement. *Com. v. McCoy*, 895 A.2d 18, 30 (Pa. Super. Ct. 2006). A vague law is one whose terms necessarily require people to guess at its meaning. *Mayfield,* 832 A.2d at 422. If a law is deficient (*i.e.,* vague) in any of these ways, then it violates due process and is constitutionally void. *Id.*

Section 54.43(1) of the Commission's regulations requires EGSs to "provide accurate information about their electric generation services using plain language and common terms in communications with consumers." 52 Pa. Code § 54.43(1). Similarly, Section 111.12(d)(5) requires EGSs to "ensure that product or service offerings made by a supplier contain information, verbally or written, in plain language designed to be understood by the customer." 52 Pa. Code § 111.12(d)(5). None of these phrases or terms, most notably "plain language," is defined.

Yet, despite recognizing the lack of Commission standards defining plain language, the ALJ undertook a microscopic review of the Service Agreement, finding that it is "unclear or contains inconsistencies and, therefore, does not use plain language."[26] The ALJ unnecessarily dissected the fifth and sixth sentences of Paragraph 3 of the Service Agreement, in an exercise that is nothing short of unlawfully interpreting the contract. As a result of this analysis, he ultimately concluded that "the rate charged to Enrico was not based upon PJM wholesale market

[26] I.D. at page 10.

conditions as the sixth sentence states it would be."[27] This conclusion is in error because it fails to give meaning to all of the language in Paragraph 3, taken together, and wrongfully assumes that PJM wholesale market conditions consist solely of average hourly daily prices.

5. BPE's contract complies with the plain language requirements of the regulations by clearly and conspicuously disclosing all key terms and conditions.

In any event, BPE's contract complies with the plain language requirements of the Commission's regulations by clearly and conspicuously disclosing all key terms and conditions. In particular, the contract provided to the Complainant unequivocally disclosed: (1) that the Complainant was on a variable rate plan; (2) that the starting price would be set at 7.9 cents per kWh; (3) that the initial rate would be effective for at least the first 60 days of service; (4) thereafter the price may vary on a month-to-month basis; and (5) that the rate may increase or decrease based on several factors, including changes in wholesale energy market prices in the PJM Markets. It should be further noted that BPE's contract contained no ceiling or cap. Notably, it did not set forth a formulaic price or tie the variable price to a particular index.

As the Commission has recognized, consumers bear some responsibility to make choices that are appropriate for their individual circumstances. *William Towne v. Great American Power, LLC*, Docket No. C-2012-2307991 (Opinion and Order entered October 18, 2013 at 22). Further, it is well-settled in Pennsylvania that "[a] person of age is presumed to know the meaning of words in a contract, and if, relying upon his own ability, he enters into an agreement not to his best interests he cannot later be heard to complain that he was not acquainted with its contents and did not understand the meaning of the words used in the instrument which he signed." *Design & Development, Inc. v. Vibromatic Mfg, Inc.*, 58 F.R.D. 71, 73 (E.D. Pa. 1973).

[27] I.D. at page 10.

D. Exception 4: The I.D. erred in concluding that the Commission may direct the issuance of refund or credit by BPE to the Complainant.

Finding that BPE's contract violated the Commission's plain language requirements, and concluding that BPE's rates should have mirrored PJM's average daily hourly prices, the I.D. unlawfully directs BPE to issue a refund or credit to the Complainant.[28] In order to direct the issuance of a refund by BPE, the Commission requires the statutory authority to (a) interpret the terms and conditions of the contract; (b) conduct an analysis of wholesale market prices and other factors to determine or limit the price that BPE may charge based on that review; and (c) to direct the issuance of a refund by an EGS. The Commission simply lacks the necessary jurisdiction to perform this review and analysis or to direct an EGS to issue a refund of charges imposed pursuant to a variable price contract.

As discussed above, the Commission's subject matter jurisdiction is limited by the powers granted to the Commission by the General Assembly. The Commission is not permitted to exceed its statutory authority. *Feingold, supra.*

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

[28] I.D. at pages 21-22, Conclusion of Law Nos. 17 and 20.

Despite the Commission's lack of statutory authority to regulate EGS prices or direct an EGS to issue a refund to customers, the Commission has carved out two narrow exceptions in an unappealable interlocutory ruling where refunds by EGSs may be directed. While BPE does not agree that the Commission may rely on its general powers in Code Section 501, 66 Pa.C.S. § 501, in the absence of specific refund authority similar to that set forth in Code Section 1312, as a basis for ordering EGS credits and/or refunds, neither of the limited circumstances recognized by the Commission is applicable here.

In *Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Order entered December 18, 2014) ("*IDT Energy Order*"), relying on general authority under Code Section 501, the Commission suggested that a billing adjustment may be directed if a customer has been switched to an EGS without consent or if an EGS fails to bill a customer in accordance with its disclosure statement. *See Tracey D. Friz v. Respond Power LLC and PPL Electric Utilities Corporation*, Docket No. F-2014-2453884 (Initial Decision issued February 11, 2015; Final Order entered March 19, 2015) (Commission has not defined any other circumstances under which a refund may be directed).

In the pending case, the Complainant clearly authorized the switch to BPE and knowingly enrolled in a variable rate plan. It is not disputed that the contract established an initial price of 7.9 cents per kWh for the first 60 days and that BPE's price conformed to the initial price set forth in the contract for the first 90 days. The only dispute centers on the charges following the initial 90 day period when the rates could vary.

In the *IDT Energy Order*, the Commission found that it may determine whether prices charged by an EGS conformed to the disclosure statement and direct the issuance of refunds when those prices did not conform. While that unappealable interlocutory ruling may

conceivably lay the foundation for refunds being directed if the initial prices that were charged did not match any initial prices included in the disclosure statement, the Commission is clearly limited by statute to determinations that do not require it to engage in ratemaking or place limitations on prices charged by EGSs.

Importantly, in the *IDT Energy Order*, the Commission did not conclude, and could not have lawfully concluded, that it has the statutory authority and jurisdiction to determine what a "just and reasonable" price would have been under a variable price contract that is based on a variety of factors including PJM wholesale market conditions. Such a conclusion would have been at odds with the Commission's statutory authority and its past pronouncements regarding its lack of jurisdiction to establish or limit EGS prices. Simply stated, cost of service ratemaking is a principle that applies to regulated utility rates. *See Lloyd v. Pa. Pub. Util. Comm'n*, 904 A.2d 1010, 2006 Pa. Commw. LEXIS 438 (2006). In short, the Commission's statutory authority clearly does not extend to reviewing wholesale market conditions, considering expenses incurred by an EGS to purchase electricity, determining a reasonable profit margin for the EGS to recover or performing any of the other traditional ratemaking functions that are applicable to rates charged by public utilities.

Although the present case does not involve slamming, which is the other scenario in which the Commission has indicated that it has authority to direct the issuance of a refund by an EGS, a discussion of the Commission's power in that regard is instructive here. In the *Nadav Order*, the Commission suggested that it may direct the issuance of a refund to retail customers "in appropriate circumstances." *Nadav Order* at 7. The only scenario endorsed by the Commission in the *Nadav Order* was that in which an EGS may be required to provide a full refund to customers of all generation charges resulting from an unauthorized switch, pursuant to

Section 57.177 of the Commission's regulations, 52 Pa. Code § 57.177. Noting that this regulation was approved by the Independent Regulatory Review Commission, the Commission concluded that it enjoys the presumption of reasonableness. To BPE's knowledge, these regulations have not undergone appellate review, and in the absence of express statutory authority for the Commission to direct the issuance of refunds by EGS, it is far from clear whether they would withstand such scrutiny. Notably, even to the extent that Section 57.177(b) would be upheld on appellate review, it provides for a full refund of all EGS charges when unauthorized switching occurs and does not presume any ability of the Commission to review the prices that were charged to determine whether they were "unjust and unreasonable."

Finally, BPE notes that although the *IDT Energy Order* was issued after the record closed in this proceeding, BPE does not interpret the *IDT Energy Order* as the Commission signaling any ability to determine or limit EGS prices in a deregulated competitive electric market. Given the Commission's consistent prior approach regarding its lack of statutory authority to regulate, establish or limit EGS rates, BPE justifiably relied upon those holdings and the Commission's expressly-stated lack of jurisdiction over EGS prices to refrain from producing evidence to support its prices in a deregulated competitive electric market.

E. Exception No. 5: The I.D. erred in imposing a civil penalty on BPE when no violation of the Commission's regulations was proven and inappropriately applied the factors that are relevant to the determination of a civil penalty.

The ALJ recommended the imposition of a penalty of $2,000 on the basis of his conclusion that BPE violated two provisions of the Commission's regulations.[29] Section 54.43(1) of the Commission's regulations requires EGSs to "provide accurate information about their electric generation services using plain language and common terms in communications

[29] I.D. at pages 18-21.

with consumers." 52 Pa. Code § 54.43(1). Similarly, Section 111.12(d)(5) requires EGSs to "ensure that product or service offerings made by a supplier contain information, verbally or written, in plain language designed to be understood by the customer." 52 Pa. Code § 111.12(d)(5). The recommended civil penalty is unwarranted and without support in the record or the Commission's regulations and well-established precedent.

For the reasons explained above, it is inappropriate to conclude that BPE's contract failed to comply with the plain language requirements of these Commission regulations. As BPE noted, the Complainant did not allege a violation of plain language requirements; the ALJ improperly interjected that issue into this proceeding as part of the I.D.; no enforceable standards exist for determining what constitutes plain language; and BPE's contract contains language that is consistent with common terminology used and previously approved by the Commission. Moreover, as BPE's contract fully and clearly discloses its terms and conditions, it is compliant with the plain language requirements in the Commission's regulations. If the Commission believes that with perfect hindsight the contract could be more artfully drafted, the appropriate remedy is not to impose a civil penalty on BPE but rather to direct BPE to revise the contract and submit it for review by the Commission's BCS and/or Office of Competitive Market Oversight.

Additionally, the I.D. failed to appropriately apply the factors that have been set forth in determining an appropriate civil penalty when a violation has occurred. *See* 52 Pa. Code § 69.1201; *Rosi v. Bell Atlantic-Pa., Inc. and Sprint Communications Company*, Docket No. C-00992409 (Order entered February 10, 2000) ("*Rosi*"). Specifically, the I.D. characterized non-compliance with plain language requirements as conduct of a "serious nature," supporting a

higher penalty.[30] In *Rosi*, the Commission describes conduct of a serious nature as constituting willful fraud or misrepresentation. Given the lack of Commission standards defining "plain language" and the fact that BPE's contract contained terminology commonly referenced and approved by the Commission, any determination now that it is on the level of willful fraud or misrepresentation is without basis.

The I.D. further suggested that because the language in the contract was provided intentionally, a higher penalty is warranted.[31] Yet, the I.D. recognized that there may not have been any intent to provide language that was ambiguous or unclear. Absent any intent to provide ambiguous or unclear language, it was inappropriate to find support for a higher penalty.

The I.D. also found that the amount of civil penalty necessary to deter future violations supports imposing a higher penalty. Again, this is in error given BPE's efforts to ensure compliance of its Disclosure Statement with the applicable Commission regulations and its willingness to make revisions in the future if the Commission determines that changes would be beneficial.

Moreover, the I.D. wrongfully relied on one sentence from a recent decision of the Commission in *Yaglidereliler Corp. Order* regarding the need for all disclosures to be clear and unequivocal as supporting a higher civil penalty. In the *Yaglidereliler Corp. Order*, the Commission merely emphasized the need for verbal disclosures to be considered in the context of that particular complaint proceeding. It did not impose a new or higher standard on disclosure statements or contracts. Moreover, as the ALJ noted, it is a recent decision which was issued well after the Complainant signed a contract with BPE. Recent pronouncements regarding the

[30] I.D. at page 19.
[31] I.D. at page 19.

need for all disclosures to be clear and unequivocal are not a valid basis for imposing a higher civil penalty on BPE relative to a contract entered into over a year ago.

In addition to incorrectly applying the factors that are relevant to a determination of a civil penalty, the ALJ erroneously imposed two $1,000 civil penalties for the same violation. Although the ALJ cited two different provisions in the regulations, both contain the same requirement for plain language in communications to consumers. When two different regulations contain the same requirement, it is inappropriate to impose a civil penalty for a violation of both provisions.

V. CONCLUSION

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

Respectfully submitted,

Dated: April 2, 2015

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

Attorneys for Blue Pilot Energy, LLC

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

ENRICO PARTNERS	:	
	:	
v.	:	**Docket No. C-2014-2432979**
	:	
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

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

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

W. Kent Silvers, Jr.
795 East Lancaster Avenue, Suite 200
Villanova, PA 19085
ksilvers@provogroup.com

Dated this 2nd day of April, 2015.

Karen O. Moury, Esq.