

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**RESPONSE OF ENRICO PARTNERS, L.P. TO THE EXCEPTIONS OF BLUE PILOT
ENERGY, LLC**

ENRICO PARTNERS, L.P

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I. INTRODUCTION-STATEMENT OF CASE

On July 18, 2014, Enrico Partners, L.P. (“Enrico”) filed a complaint against Blue Pilot Energy (“Blue Pilot”) with the Pennsylvania Public Utility Commission (the “Commission”). On August 8, 2014, Blue Pilot filed an Answer to the Complaint. On August 18, 2014 the Commission scheduled a hearing (“Hearing”) in front of Administrative Law Judge Joel H. Cheskis (the “ALJ”) to be held on October 6, 2014. On October 6, 2014, the Hearing was held in which Enrico through its one witness Gerald Holtz, introduced undisputed testimony and offered exhibits that set forth violations by Blue Pilot of 52 Pa. Code § 54.43, and their unsubstantiated or unauthorized changes under their agreement thereby creating unconscionable and fraudulent electric generation rates. None of the facts were denied or opposed by Blue Pilot or any witness at the hearing. At the conclusion of the Hearing, the ALJ determined that briefs should be filed. Blue Pilot and Enrico each filed Post Hearing Briefs on December 3, 2014 and Reply Briefs on December 12, 2014. On March 12, 2015, the ALJ rendered an Initial Decision (“Initial Decision”) on this matter granting among other things a refund to Enrico in the amount of \$27,168.48. Thereafter, on April 2, 2015, Blue Pilot filed Exceptions to the Initial Decision.

II. SUMMARY OF ARGUMENT

The Initial Decision rendered by the ALJ is consistent with the facts of this case and the law and should be sustained. Despite repeated attempts by Blue Pilot to argue to the contrary in their Brief, their Reply Brief and now in the Exceptions to the Initial Decision, the Commission has the jurisdiction and authority to act upon fraudulent practices of an electric generation supplier. Moreover, the Commission has the authority to provide a refund to Enrico

and can impose civil penalties on Blue Pilot for its failure to adhere to the standards of conduct in violation of 52 Pa. Code § 54.

III. Response To Blue Pilot's Exception #1 and #2

It has been established that the Commission does have subject matter jurisdiction to regulate its own regulations and certain aspects of the services provided by EGSs. The Electricity Generation Customer Choice and Competition Act clearly vests the Commission with unquestionable, albeit limited jurisdiction, over EGSs and certain EGS activities to protect the public interest and realize the Commonwealth's policy objectives. *See PECO Energy Co. v. Pa. Public Utility Commission*, 791 A.2d 1155 (Pa. 2002). The Competition Act (66 §2801 et. al) and more specifically §2807(d), and the associated regulations of Chapter 54 provide the Commission the jurisdiction over this specific matter. As Enrico points out in both its Brief (p.3) and its Reply Brief (p.2), these provisions are designed to ensure that the Commission monitors the billing practices of an EGS and that the authorized service of the EGS is consistent with the public interest, the clear terms of the Service Agreement and stated policies within the Act. 66 Pa. C.S. §2807. The Competition Act establishes licensing and other such requirements deemed necessary for the protection of the public and it requires an EGS "to provide adequate and accurate customer information to enable customers to make informed choices regarding the purchase of all electricity services offered by the provider. Information shall be provided to consumers in an understandable format that enables consumers to compare prices and services based on a uniform basis". 66 Pa.C.S § 2807 (d)(2). As the Initial Decision correctly determined, Blue Pilot did not provide such an understandable format with adequate and accurate

customer information. Throughout the course of this proceeding it has been Enrico's contention that it did not receive a disclosure statement. The ALJ in the Initial Decision determined that the "Service Agreement for the Purchase of Electric Power and Enrollment Form" (the "Service Agreement") was in fact Blue Pilot's Disclosure Statement. Blue Pilot concedes in its Exceptions that the similarities with regard to the relevant language in this document and its actual Disclosure Statement are similar and not a "fatal flaw" to the Initial Decision (Blue Pilot Exceptions p.14). Disclosures need to be clear, well organized and in plain language so that consumers have the information they need to make informed decision. See *Guidelines for Use of Fixed Price Labels for Products With a Pass-Through Clause*. Docket No. M-2013-2362961 (November 14, 2013). The language set forth in this Service Agreement clearly falls within 52 Pa. C.S. §54.43 and as such under the jurisdiction of the Commission. EGSs are required to abide by the Commission's regulations, including its Chapter 54 regulations on bill format, disclosure statements, marketing and sales activity....*Commonwealth of Pennsylvania v. Blue Pilot*, No. C-2014-2427655, Motion of Vice Chairman John F. Coleman, Jr., Public Meeting November 13, 2014.

Blue Pilot argues that by undertaking a reasonable and comprehensive review into the specific language of the Service Agreement, the Commission is interpreting a private contract. On the contrary, the Commission is simply conducting its statutory function. The Commission is not regulating or establishing prices. It is simply overseeing that appropriate and unambiguous language is being used so as to protect the public interest and ensure safe and reliable utility service at reasonable rates readily determinable by the public consumer.

Blue Pilot sets forth the complexities of the "wholesale energy market prices in the PJM Markets" that require the analysis of a multitude of factors. However, Blue Pilot has never

offered one shred of evidence as to any of the “factors” that may go into their “variable price”. They just cite the Commission’s comments in *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 which variable prices, by their very nature are subject to market volatility” (Blue Pilot Exceptions p. 11). As mentioned in Enrico’s reply brief, this Variable Rate Order was promulgated by a spike in wholesale energy prices during the sustained cold weather of January of 2014 (commonly referred to as the “Polar Vortex”) and the accompanying rise in the variable rate contracts of consumers due to the higher energy costs. *See pp. 1 and 2 of Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, Docket No. M-2014-2406134 (February 20, 2014). In our situation, the change in Enrico’s variable rate occurred in June and July of 2014. It had nothing to do with “market volatility” which would cause a spike in energy prices. In fact, the geographic area was undergoing a very mild summer season with cool nights. During this period, prices declined in the energy market as clearly evidenced by Plaintiff’s Exhibit #7. Blue Pilot is simply perpetrating fraud to line their corporate pockets. They believe their ability to alter the variable rate means charging whatever they want based on their own arbitrary desire for additional profit. Blue Pilot has never provided a shred of evidence of their 215% rate increase calculation.

Moreover, if the variable rate price determination is so complex then how could anyone expect the public at large to determine or calculate what the rate could be under a variable rate Service Agreement without a specifically definable index or metric? As the Service Agreement stated, that was the PJM market index. No one can determine future energy prices, but people should be able to rely on a fixed set of unambiguous parameters that will enable the price to be

ascertained and not subject to the whim of an unscrupulous the EGS. Furthermore, it should be noted that Blue Pilot later on in its Exceptions argues that its Service Agreement complies with the plain language requirement of the Regulations (Blue Pilot Exceptions p. 21). Well which is it? Is the variable rate so complex that it is beyond the purview of laymen and legal experts or is it so simple that anyone can understand and calculate it based on the plain language that Blue Pilot purports that exists in the Service Agreement.

Instead, as Enrico has argued throughout this matter, this action has nothing to do with the terms within the Service Agreement. Blue Pilot is attempting to use amorphous language and an arbitrary determination to perpetrate a fraud, then arguing that the Commission has no jurisdiction to curtail its abuses. Enrico has never asked this Commission to interpret the rate under the Service Agreement. Enrico has always argued that the only interpretation of the Service Agreement is that any rate increase or decrease will be based upon changes in the “PJM Wholesale Market Conditions” and have supplied unrebutted evidence that those market rates during the term of the Service Agreement declined rather than increased. Blue Pilot ‘s incorrect reading of the contract sets forth no fixed set of rate criteria, just an arbitrarily exorbitant rate in an attempt to maximize its profit from Enrico and others.

IV. Response To Blue Pilot’s Exception #3

In the Initial Decision, the ALJ properly reviewed the contract to ensure that it met the criteria set forth in the Regulations. In such a review, it rightfully determined that at a minimum paragraph 3 “is unclear or contains inconsistencies, and therefore, does not use plain language” (Initial Decision p.10) and as such is in violation of 52 Pa. C.S. §54.43. Blue Pilot raises the

issue that “plain language” was never brought up in the hearing. This is absolutely false. The language in the Service Agreement has been the basis for the claim from the beginning. It is inaccurate and disingenuous for Blue Pilot to argue that this case was always about the actual rate Enrico was charged. The case has never been about Enrico asking the Commission to set the contractual rate in the Service Agreement . It has been about the unsubstantiated, arbitrary and fraudulent determination that an increase or “change” in the rate had occurred as a result of a change in the PJM market conditions under the Service Agreement. Enrico’s assertion throughout is that the Service Agreement between the parties states that Enrico’s (Your) “variable rate will be based upon PJM wholesale market conditions” (Enrico Testimony, Record p. 14, Enrico Exhibit #5). Blue Pilot’s attorney has focused on the immediate preceding sentence in the Service Agreement which provides supplemental or descriptive information. It states, “At any time after 60 days of service, but not more frequently than monthly, we may increase or decrease your rate based on several factors, including changes in wholesale market prices in the PJM Markets”. Enrico argued that Blue Pilot’s attorney mistakenly uses the first sentence as a defense against her client’s behavior by using that language as the basis of the uncertainty of a variable rate. However, in reality the first sentence describes and establishes “several factors” that go into determining the PJM rate. It doesn’t alter or create less objectivity as to the rate. The second sentence then actually clarifies how Enrico’s rate will be specifically determined. Although the ALJ disagreed with Enrico’s interpretation of the Service Agreement language, they did concur that at the very least the 2 sentences side by side were “poorly written and not unreasonable that a consumer be confused” (Initial Decision p.10). The Commission has held that all disclosures must be clear and unequivocal. *Yaglidereliler Corporation v. Blue Pilot Energy, LLC*, Docket No. C-2014-2413732, Opinion and Order (entered Jan. 16, 2015).

Language is ambiguous when it conveys two or more reasonable meanings; or when it is otherwise vague, uncertain or indefinite, *Barasch v. Pa.P.U.C.*, 516 Pa. 142, 156 (Pa. 1987). Moreover, since the Service Agreement was “not clear, obvious or easily understood” but ambiguous (Initial Decision p. 13) it violated standards set forth in the 52 Pa. C.S. §54.43 and 111.12(d)(5) of the regulations.

Blue Pilot also claims that they were deprived their due process rights. Blue Pilot had an opportunity to build a record and refute these claims by Enrico and elected not to do so. Blue Pilot presented no testimony or conflicting information to the results provided by Enrico, nor did Blue Pilot object to the validity, completeness or information source of Enrico’s Exhibit #7. No one appeared at the hearing, nor have any documents or evidence been presented which explain any “factors” or changes in the wholesale energy market that precipitated a change in Blue Pilot’s variable rate. The reason for this is that there is no explanation for the large rate increase. Blue Pilot’s definition of “variable rate” means charging whatever they want based on their own arbitrary and greedy desires. Blue Pilot’s increase rate was not determined by any of the market “factors” other than their desire to maximize profits or recoup past losses from the previous polar vortex. It was an imaginary calculation unsupported by any PJM wholesale market data whatsoever. Blue Pilot elected to forgo introducing any testimony at the hearing and instead relied upon their belief that the Commission had no jurisdiction. They were mistaken on that argument and now are creating new defenses to attempt to rescue them from this faulty strategy.

V. Response To Blue Pilot’s Exception #4

Once again the Commission ruled properly in allowing Enrico's request for a refund. In 66 Pa. C.S. §501(a), "In addition to any powers expressly enumerated in this part, the commission shall have full power and authority, and it shall be its duty to enforce, execute and carry out, by its regulations, orders, or otherwise, all and singular, the provisions of this part, and the full intent thereof." Although the Commission rejected Enrico's claim that they were "slammed" by Blue Pilot, it did authorize a refund based upon the recently decided case of *Commonwealth of PA, et. al. v. IDT Energy, Inc.* Docket No. C-2014-2427657, Opinion and Order (entered December 18, 2014). In that case the Commission found that it has the "plenary authority under Section 501, 66 Pa. C.S§501 to direct an EGS to issue a credit or refund for an over bill". Directing a billing adjustment is consistent with the Commissions Section 501 powers to carry out consumer protection in the Electric Competition Act including Chapter 54 (*Id.*, p. 17) , "is fully consistent with the policy objectives of the Electric Competition Act..." *Id.* at 18, and "furthers the objective by ensuring the customers receive accurate bills and hence, receive service under reasonable terms and conditions". *Id.*

Enrico has set forth substantial evidence that showed it was overbilled by Blue Pilot and consistent with the Commissions finding of the shortcoming in the Service Agreement should be entitled to a refund. As Enrico demonstrated and without rebuttal from Blue Pilot, the PJM Market conditions actually improved following its 60 day Fixed Rate Period and yet Blue Pilot charged Enrico at a 215% increased rate. Blue Pilot once again argues that because the Commission cannot establish whether prices are "unjust or unreasonable" and cannot establish or limit EGS prices (Exceptions P. 24), they cannot grant this refund. However, once again this argument is flawed. It is unnecessary for the Commission to establish pricing. Enrico's provided ample evidence and testimony at the hearing establishing the pricing and Blue Pilot's over

billing. Blue Pilot failed to refute any of the testimony or evidence presented by Enrico. As the Commission found, Enrico established a prima facie case, the burden of going forward with the evidence then shifted to Blue Pilot (Initial Decision p.22). Since Blue Pilot failed to rebut this evidence, Enrico must prevail. *Repogle v. Pennsylvania Electric Company*, 54 Pa. PUC 528 (1980).

VI. CONCLUSION

The Commission had the jurisdiction, to determine whether the Service Agreement is in compliance with 66 §2807(d), and the associated regulations of Chapter 54. At a minimum the Paragraph 3 of the Service Agreement was ambiguous and failed to set forth definitively its terms, more likely as Enrico contends it was for a more nefarious purpose. Moreover, it has been decided that the Commission can issue a refund for an overbill based upon the its plenary authority under 66 Pa. C.S§ Section 501.

WHEREFORE, Enrico, L.P. hereby requests the Commission deny Blue Pilot's Exceptions and uphold its Initial Decision

Respectfully Submitted,



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