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August 20, 2015

VIA E-FILING

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

Re: Alan Haulman c/o AJH Pizza, Inc v. Blue Pilot Energy, LLC
Docket Nos. C-2014-2415273

Dear Secretary Chiavetta:

On behalf of Blue Pilot Energy, LLC, I have enclosed for electronic filing the Answer of Blue Pilot Energy, LLC Opposing Complainant's Motion for Summary Judgment, in the above 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**

ALAN HAULMAN C/O AJH PIZZA, INC.	:	
	:	Docket No. C-2014-2415273
v.	:	
	:	
BLUE PILOT ENERGY, LLC	:	

**ANSWER OF BLUE PILOT ENERGY, LLC
OPPOSING COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT**

To Administrative Law Judge Buckley:

Blue Pilot Energy, LLC (“BPE”), by and through its counsel, Karen O. Moury, and Buchanan Ingersoll & Rooney PC, files this Answer Opposing the Motion for Summary Judgment filed by Alan Haulman c/o AJH Pizza, Inc. (“Complainant”) pursuant to Section 5.102(b) of the Pennsylvania Public Utility Commission’s (“Commission”) regulations, 52 Pa. Code § 5.102(b), and in connection therewith avers as follows:

I. Introduction and Background

1. BPE is an electric generation supplier (“EGS”) licensed by the Commission since June 10, 2011 at Docket No. A-2011-2223888 to supply electricity or electric generation services to residential, small commercial, large commercial and industrial customers in electric distribution company service territories throughout the Commonwealth of Pennsylvania.

2. On April 2, 2014, the Complainant filed a Formal Complaint (“Complaint”) alleging that it was not billed correctly in February and March 2014, that it did not authorize a switch to BPE and that it has no written contract with BPE. By way of requested relief, the Complainant sought a refund/credit for the difference between what it would have paid PPL Electric Utilities Corporation (“PPL”) and what it was billed by BPE. The Complaint also named PPL as a respondent.

3. On April 28, 2014, BPE filed an Answer to the Formal 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.

4. On May 7, 2014, the Complainant filed a Reply to New Matter.

5. On June 7, 2014, the Commission issued a Notice scheduling an initial telephonic hearing on August 27, 2014 at 1:30 p.m. before Administrative Law Judge (“ALJ”) Dennis J. Buckley.

6. On August 27, 2014, the Commission issued a Notice cancelling the initial telephonic hearing scheduled for August 27, 2014 and rescheduling the hearing to November 4, 2014 at 1:30 p.m.

7. On September 26, 2014, PPL filed a Request for Relief, seeking the issuance of an order directing the parties to file written testimony or alternatively to extend the procedural schedule. BPE supported PPL’s Request for Relief.

8. On October 13, 2014, BPE filed a Motion for Summary Judgment seeking dismissal of the Complaint on the basis that it alleged no violations of the Public Utility Code (“Code”), 66 Pa.C.S. §§101 *et. seq.* or Commission regulations. Specifically, BPE noted that it was not required to have a written contract with the Complainant and further pointed out that a third party verification (“TPV”) recording clearly established that the switch to BPE was authorized. Moreover, BPE explained that it was permitted to increase the Complainant’s

variable rates pursuant to the written Disclosure Statement that it provided, and that the Commission has no jurisdiction to establish or review prices charged by EGSs or to order EGSs to issue refunds. Because the pleadings, as well as the Affidavit of Raymond Perea (“Perea Affidavit”), General Counsel/Manager for BPE, which was attached to BPE’s Motion for Summary Judgment, demonstrated that there was no genuine issue of fact and that BPE properly followed the terms of its contract with the Complainant, BPE contended that it was is entitled to relief as a matter of law. Accordingly, BPE requested that its Motion for Summary Judgment be granted and that the Complaint be dismissed. BPE’s Motion for Summary Judgment is incorporated herein by reference so as to avoid excessive repetition of facts and legal citations.

9. On July 31, 2015, the Complainant filed a Motion for Summary Judgment contending that the record “reflects that the Complainant never entered into an agreement” with BPE. Complainant’s Motion for Summary Judgment, ¶ 14. As this assertion is directly contrary to the undisputed TPV recording that was referenced in BPE’s Motion for Summary Judgment and is at odds with the unrefuted statements set forth in the Perea Affidavit, it is nothing more than an unsubstantiated and baseless allegation.¹

10. In its Motion for Summary Judgment, the Complainant also claims that BPE is “effectively defunct” and refers to a Motion to Dismiss Joint Complaint filed by BPE in a separate proceeding, which is not part of the record in this case.² The averments in that Motion to Dismiss Joint Complaint pertain only to that proceeding and have no bearing on the facts or legal issues that are pending here. Also, it is noteworthy that BPE is continuing to actively participate in that proceeding, as evidenced by the filing of an Answer Opposing Motion for

¹ BPE has provided this TPV recording to the Complainant through discovery. At no time has the Complainant disputed that Ms. Ashley Killinger authorized the switch to BPE or that she told BPE that as the manager of the business, she was authorized to make the switch. The real dispute is between the Complainant and Ms. Killinger, who Complainant claims did not have that authority.

² See *Commonwealth of Pennsylvania, et al. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655.

Entry of Judgment on July 22, 2015. Further, on August 4, 2015, the Administrative Law Judges (“ALJs”) Barnes and Cheskis issued an Order Granting In Part and Denying the Motion for Entry of Judgment. The only portions that were granted related to discovery responses; the remainder was treated as a Motion for Summary Judgment, which was denied. Moreover, the actions taken by BPE on May 4, 2015 to abandon its license and return customers to their electric distribution companies for default service are irrelevant to the contractual agreement that the Complainant entered into for electric generation service in November 2012.³

11. For all of these reasons and as further explained below, the Complainant’s Motion for Summary Judgment should be denied, BPE’s Motion for Summary Judgment should be granted, and the Complaint should be dismissed.

II. Argument

A. Summary Judgment Standard

12. The Commission’s Rules of Administrative Practice and Procedure permit parties to file preliminary motions. 52 Pa. Code §§ 5.101-103. Specifically, the Commission’s regulations at 52 Pa. Code § 5.102(a) permit any party to move for summary judgment after the pleadings are closed, but within such time as not to delay a hearing. A motion for summary judgment must be based on the pleadings, depositions, answers to interrogatories, admissions and supporting affidavits. 52 Pa. Code § 5.102(c). The presiding officer must grant a motion for summary judgment if the pleadings, depositions, answers to interrogatories, admissions and affidavits show that there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law. 52 Pa. Code § 5.102(d)(1).

13. Summary judgment is properly granted where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is

³ *Application of Blue Pilot Energy, LLC*, Docket No. A-2011-2223888.

no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Pennsylvania State Univ. v. County Of Centre*, 532 Pa. 142, 144 - 145, 615 A.2d 303, 304 (1992).

14. In the case of a motion for summary judgment, the moving party bears the burden of showing that no genuine issue of material fact exists and that it is entitled to a judgment as a matter of law. The Commission must view the record in the light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences. *First Mortgage Co. of Pennsylvania v. McCall*, 459 A.2d 406 (Pa. Super. 1983); *Mertz v. Lakatos*, 381 A.2d 497 (Pa. Cmwlth. 1978). All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Thomson Coal Company v. Pike Coal Company*, 412 A.2d 466 (Pa. 1979). Summary judgment will be granted only where the right is clear and free from doubt.

15. The provision at 52 Pa. Code § 5.102(c) serves judicial economy by avoiding a hearing where no factual dispute exists. If no factual issue pertinent to the resolution of a case exists, a hearing is unnecessary. 66 Pa. C.S. § 703(a); *Lehigh Valley Power Committee v. Pa. P.U.C.*, 563 A.2d 557 (Pa. Cmwlth. 1989); *S.M.E. Bessemer Cement, Inc. v. Pa. P.U.C.*, 540 A.2d 1006 (Pa. Cmwlth. 1988); *White Oak Borough Authority v. Pa. P.U.C.*, 103 A.2d 502 (Pa. Super. 1954).

B. BPE's notice of abandonment of its EGS license in Pennsylvania has no bearing on the pending Complaint.

16. On May 4, 2015, BPE provided notice to the Commission of its intent to abandon service to customers in Pennsylvania and requested a cancellation of its EGS license. Noting that from a financial perspective it was no longer able to serve customers, BPE indicated that

customers would be returned to their electric distribution companies for default service.⁴ BPE's abandonment of EGS service in Pennsylvania does not affect the Complainant and has no bearing on the pending Complaint.

17. The pending Complaint relates to a contract for electric generation service that was in effect for the time period from January 1, 2013 through May 5, 2014.⁵ It is undisputed that the Complainant was no longer being served by BPE as of May 4, 2015, the date of its abandonment notice. BPE's contractual right to charge the Complainant variable prices that reflected wholesale market conditions during the time when the Complainant was served by BPE is unaffected by the recent filing of BPE's abandonment notice. In short, the cessation of EGS services in Pennsylvania by BPE is immaterial to the pending Complaint.

18. In alleging that BPE is no longer capable of maintaining a defense in this proceeding, the Complainant bases these claims on assertions made by BPE in a different, unrelated proceeding initiated by the Office of Attorney General and the Office of Consumer Advocate, which involves a much broader scope of allegations and legal issues.⁶ Averments made by BPE in that proceeding are irrelevant to its intention or ability to maintain a defense here. Indeed, no such assertions have been made in this case, and to the contrary, BPE has moved for dismissal of this Complaint since it fails to assert any allegations over which the Commission has jurisdiction or to seek relief that the Commission may grant. In any event, BPE is actively participating in the proceeding initiated by the OAG and the OCA, as evidenced by the filing of an Answer Opposing Motion for Entry of Judgment on July 22, 2015.⁷

⁴ *Blue Pilot Energy, LLC*, Docket No. A-2011-2223888.

⁵ Perea Affidavit ¶¶ 8 and 11.

⁶ *Commonwealth of Pennsylvania, et al. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655.

⁷ *Id.*

19. Notably, the ALJs in that proceeding issued an Order on August 4, 2015 denying the portion of the Motion for Entry of Judgment that was treated as a Motion for Summary Judgment. Therefore, even in the proceeding where BPE previously asserted that it was no longer maintaining a defense, the entry of a judgment was not warranted.

20. In seeking an entry of judgment against BPE in this proceeding, the Complainant is asking the Commission to sustain a Complaint that alleges no factual or legal issues over which the Commission has jurisdiction on the basis of a litigation position taken by BPE in a separate and unrelated proceeding, where the ALJs declined to enter a judgment against BPE. No basis exists for the entry of a judgment against BPE here.

C. The Perea Affidavit and TPV recording demonstrate, without question, that the Complainant authorized a switch to BPE.

21. Through references to various documents and events pertaining to the ownership and operation of the Complainant's business, the Complainant lays the foundation for a private legal dispute between or among various individuals relating to which party had responsibility for paying its utility bills. However, that dispute has no bearing on the pending Complaint which involves Ms. Killinger's voluntary enrollment of the Complainant's account with BPE.

22. A review of the Perea Affidavit and the TPV recording accompanying BPE's Motion for Summary Judgment demonstrates that, without question, Ms. Killinger enrolled the Complainant's account with BPE and that she told BPE that as the manager of the business, she had the authority to make this change.⁸ Having reviewed the TPV recording through discovery, the Complainant has not disputed that Ms. Killinger authorized the switch or that she told BPE that she was authorized to make the switch. The real dispute here is between Ms. Killinger and the Complainant, who claims she did not have authority to switch to BPE. Upon Ms. Killinger's

⁸ Perea Affidavit ¶ 6.

representation to BPE that she had authority to switch the account to an EGS, BPE had no further obligation to inquire as to the basis for that authority, and the resulting switch to BPE was authorized and was not a violation of the Commission's slamming regulations. *See Tran v. Major Energy, LLC/Respond Power, LLC*, Docket No. C-2014-2417540 (Order adopted July 30, 2015).

D. The Commission has no jurisdiction to grant the requested relief of a refund.

23. The Commission has found that it does not have jurisdiction over EGS prices or statutory authority to direct EGSs to issue refunds to customers except in very limited circumstances which are not applicable here. *See Tracey D. Friz v. Respond Power LLC and PPL Electric Utilities Corporation*, Docket No. F-2014-2453884 (Initial Decision issued February 11, 2015); *Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Order entered December 18, 2014) (refunds may be awarded only when a customer has been switched to an EGS without consent or when the EGS fails to bill a customer in accordance with its disclosure statement).⁹ Here, no claim has been made by the Complainant that BPE charged prices that did not conform to the Disclosure Statement, and the undisputed evidence presented by BPE demonstrates that the switch was authorized.

24. Moreover, even when slamming occurs, in order to avoid responsibility for EGS bills, a switch needs to be disputed within the first two billing cycles, when the customer should have reasonably known of a change of the EGS. *See* 52 Pa. Code §57.177 (b). Here, the Complainant did not claim an unauthorized switch until sixteen months after enrollment. The Complainant contends that it timely raised a dispute because the Complaint was filed two months after looking at its bills. This argument ignores the clear directive of the Commission's

⁹ The Commonwealth Court recently reinforced the Commission's conclusions that it does not have statutory authority to regulate EGS prices. *CAUSE-PA v. Pa. Pub. Util. Comm'n.*, 445 C.D. 2014 and *McCloskey v. Pa. Pub. Util. Comm'n.*, 596 C.D. 2014 (Opinion issued July 14, 2015).

regulation which requires a dispute to be raised within two months of receiving a bill showing EGS charges. The Complainant had been receiving bills including BPE charges for well over a year before the Complaint was filed. When the Complainant reviewed those bills is irrelevant.


25. Additionally, the Complainant received a Welcome Letter and Disclosure Statement from BPE on December 19, 2012¹⁰ and would have also received a confirmation letter from PPL consistent with the Commission's regulations. See 52 Pa. Code § 57.173(2). Therefore, even if the Complainant was not reviewing its bills, it had other opportunities to be aware of the switch to EGS and of the variable nature of its contract with BPE.

III. Conclusion

WHEREFORE, for the foregoing reasons, Blue Pilot Energy LLC respectfully requests that the Commission deny the Motion for Summary Judgment filed by Alan Haulman c/o AJH Pizza, Inc., grant the Motion for Summary Judgment filed by BPE, dismiss the Complaint and grant BPE such other relief as may be just and reasonable under the circumstances.

Respectfully submitted,

Dated: August 20, 2015



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¹⁰ Perea Exhibit ¶ 7.

