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August 25, 2015

VIA E-FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
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Harrisburg, PA 17120

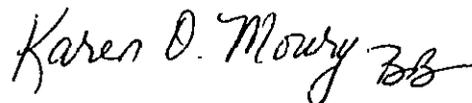
Re: Commonwealth of Pennsylvania, et al. v. Blue Pilot Energy, LLC
Docket Nos. C-2014-2427655

Dear Secretary Chiavetta:

On behalf of Blue Pilot Energy, LLC, enclosed for electronic filing is the Answer of Blue Pilot Energy, LLC to Motion to Compel of Joint Complainants Relating to Set X-1 and X-2, 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

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

COMMONWEALTH OF
PENNSYLVANIA, ET AL.,

Complainants,

v.

BLUE PILOT ENERGY, LLC,

Respondent.

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: Docket No. C-2014-2427655

**ANSWER OF BLUE PILOT ENERGY, LLC, TO MOTION TO COMPEL OF JOINT
COMPLAINANTS RELATING TO SET X-1 AND X-2**

TO: ADMINISTRATIVE LAW JUDGES BARNES AND CHESKIS

Pursuant to 52 Pa. Code § 5.342(g)(1), Blue Pilot Energy, LLC (“BPE”), by and through its counsel, files this Answer to the Motion to Compel filed by the Joint Complainants (the “Motion”), Commonwealth of Pennsylvania and the Office of Consumer Advocate, relating to the Interrogatories and Requests for Production of Documents – Set X-1 and X-2 (“Requests”), and in support hereof, avers as follows:

INTRODUCTION

The first Request at issue in the Motion seeks BPE’s confidential financial information related to “all generation prices charged by Blue Pilot’s Pennsylvania customers in December 2013, January 2014, February 2014, and March 2014.” *See* Set X-1. On August 14, 2015, BPE objected to these Requests on several bases, including that they seek privileged material, call for information that is not relevant to the subject matter of this action, and would cause unreasonable annoyance and burden to BPE. *See* BPE’s Objections to Complainants’ Interrogatories and Requests for Production (Set X), attached as Exhibit A to Joint Complainants’ Motion to

Compel. The second Request seeks the “monthly usage for Blue Pilot’s Pennsylvania residential [and commercial] customers for each EDC’s territory” for the months December 2013 through March 2014. BPE also objected to that request on a number of grounds. *Id.*

BPE agreed to produce the information sought in the Requests as it relates to the 97 individuals who submitted statements in this proceeding. The information sought in the Requests as it relates to every other Pennsylvania customer of BPE from December 2013 through March 2014 is only relevant if the Commission grants Joint Complainants’ unprecedented request to extrapolate the complaints of the 97 individuals into a finding that BPE engaged in a “pattern and practice” of conduct in violation of the Commission’s regulations. Because such a finding has not been made (and should not be made) and because the burden on BPE to collect and produce this information far outweighs its probative value, the Motion should be denied.

ARGUMENT AND AUTHORITY

I. Legal Standards

The Commission’s regulations provide that “a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.” 52 Pa. Code § 5.321(c). The regulations further state that while the inadmissibility of evidence at a hearing may not be a ground for objection, the information sought must be “reasonably calculated to lead to the discovery of admissible evidence.” *Id.* Further, discovery is not permitted which is sought in bad faith; would cause unreasonable annoyance, embarrassment, oppression, burden, or expense to the party; relates to a matter which is privileged; or would require the making of an unreasonable investigation by the party. 52 Pa. Code § 5.361(a).

II. The Information Sought in the Motion Is Not Relevant

Joint Complainants argue that information relating to all of BPE's customers in Pennsylvania is relevant because "[t]he allegations in the Joint Complaint are not specific to individual customers." (Mot. at 7.) Joint Complainants' Complaint, however, does not even contain the words "pattern" or "practice,"¹ nor does it contain any allegations that BPE engaged in a "pattern of practice" of misconduct, or anything similar. This so-called "pattern of practice" was unveiled by Joint Complainants far into the life of this proceeding. Joint Complainants only presented the written statements of less than 100 of BPE's Pennsylvania customers in this proceeding and an even smaller number at the hearing conducted from March 30, 2015 through April 1, 2015.

Joint Complainants fail to acknowledge that if there is a finding of liability in this proceeding, such a finding can only be based on the statements of those consumers who came forward. Accordingly, there is no relevance to the claims alleged in the Complaint regarding the generation prices charged by Blue Pilot to its Pennsylvania customers or the usage relating to those customers from December 2013 through March 2014. This information certainly is not relevant to whether BPE charged prices that conformed to its Disclosure Statement as Joint Complainants argue. (Mot. at 8.) In fact, Joint Complainants offer no argument as to why this information is relevant at this stage of the proceeding. Instead, they simply conclude that it is so. (Mot. at 9.)

Joint Complainants argue that BPE's opposition to Joint Complainants' Motion for Entry of Judgment, and specifically BPE's response to Ashley Everette's damages calculation, makes

¹ So-called "pattern and practice" evidence is used primarily in actions brought under Title VII of the Civil Rights Act of 1964 and relies almost exclusively on statistical evidence. Joint Complainants have provided no such evidence in this proceeding. Joint Complainants' "pattern of practice" motion has dubious application to the present proceeding.

the information sought in the Requests relevant. (Mot. at 9-10.) As explained in Blue Pilot's opposition, the entirety of Ms. Everette's affidavit was based on nothing more than the infirm assumptions contained in Joint Complainants' Pattern of Practice Motion. Only a very small percentage of Blue Pilot customers ever complained; yet, the affidavit assumed that Joint Complainants proved some unspecified claim against Blue Pilot as to every single Blue Pilot customer. Even if Blue Pilot violated a regulation as to a certain customer, the Commission cannot extrapolate from that one instance that Blue Pilot violated any regulation with respect to the majority of consumers that never complained about Blue Pilot's services. Further, the consumer witnesses' statements were idiosyncratic and in no way reflective of each other, much less every other Blue Pilot customer that never took issue with Blue Pilot's services or the rates that they were charged.²

Among the numerous other deficiencies in Ms. Everette's analysis, she not only assumed that every single Blue Pilot customer suffered damages regardless of whether there was evidence of such damages, but she then fabricated usage information for those customers. Joint Complainants brazenly assert that, because Blue Pilot alerted the Commission to the deficiencies of Joint Complainants' arguments, the usage information for customers for whom there is no evidence of damages is now relevant to this proceeding. This is nonsensical. If Joint Complainants were to allege that Blue Pilot should pay damages for customers in other states, and in their damages calculation fabricate usage numbers for those customers in different states, the fact that Blue Pilot might object to the fact that the Commission lacks jurisdiction over other territories and the fact that Joint Complainants fabricated data would not make that fabricated

² The flip side of Joint Complainants' Pattern of Practice Motion is that because 98% of Blue Pilot's customers never complained about their rates or the matter in which they purchased Blue Pilot's services, there was no pattern of practice of violative behavior.

data relevant. The same argument pertains here. Joint Complainants cannot overcome their own evidentiary failures by alleging a litany of unsupported claims, and then allege that because Blue Pilot refuted those claims, those claims are now relevant.

The information sought in the Requests goes directly to Joint Complainants' motion that the Commission make the unprecedented finding that because 97 individuals submitted a statement complaining about BPE, the Commission should conclude that BPE engaged in a "pattern of practice" of wrongdoing. *See* BPE's Reply Memorandum of Law Regarding Admissibility of Pattern of Practice Evidence dated February 26, 2015. Joint Complainants' pattern of practice motion suggests that the Commission can find that BPE violated the Commission's regulations as to all of its customers in Pennsylvania based on a "misleading or deceptive pattern of practice" of conduct. (PoP Mot. at 1.) Regardless of what Joint Complainants ultimately seek in this proceeding, they were only able to muster 97 customer complaints and can now only rely on a subset of the original 97 because some of the 97 declined to attend the hearing or were withdrawn. As BPE argued in its reply to the pattern of practice motion, such a small percentage of BPE's historical customer base in Pennsylvania does not support a finding of a pattern of practice of conduct.

In their Motion, Joint Complainants blithely argue that objections relating to admissibility are not proper at the discovery stage. (Mot. at 7.) The information sought in the Request, however, is extremely expansive because it seeks this information for every Pennsylvania customer for a four month period. Assuming that the Commission does not grant Joint Complainants' unprecedented request to find a pattern of practice of violative conduct for every one of BPE's Pennsylvania customers based on a statistically insignificant percentage of customers who did complain, then the burden placed on BPE to respond to this Request makes

no sense. Joint Complainants offer no reason, because there is none, why any information relating to more than the 97 individuals that they have identified is required at this stage of the proceeding. The burden on BPE far outweighs any probative value that this information has at this stage in the proceeding. 52 Pa. Code § 5.361(a).

III. The Information Sought Would Be Overly Burdensome to Produce

As set forth above, Blue Pilot agreed to provide the information sought for the 97 Pennsylvania customers that provided a statement to Joint Complainants in this proceeding. It took Blue Pilot approximately one week to gather the information sought for those 97 consumers. It will be a burden to Blue Pilot to compile the data sought for the remaining Pennsylvania customers, especially in light of the fact that this information is not relevant to this proceeding.

CONCLUSION

Based on the foregoing, BPE respectfully requests that the Commission deny Joint Complainants' Motion to Compel.

August 25, 2015

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

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