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September 8, 2015

VIA HAND DELIVERY

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

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

Dear Secretary Chiavetta:

On behalf of Blue Pilot Energy, LLC, enclosed for filing is the Answer of Blue Pilot Energy, LLC, to Motion for Sanctions of Joint Complainants Relating to Joint Complainants' Interrogatories and Requests for Production of Documents - Set VIII And IX, in the above-captioned matter.

Copies have been served on all parties as indicated in the attached Certificate of Service.

Very truly yours,



Karen O. Moury

KOM/bb
Enclosure
cc: Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**COMMONWEALTH OF
PENNSYLVANIA, ET AL.,**

Complainants,

v.

BLUE PILOT ENERGY, LLC,

Respondent.

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Docket No. C-2014-2427655

**ANSWER OF BLUE PILOT ENERGY, LLC, TO MOTION FOR SANCTIONS
OF JOINT COMPLAINANTS RELATING TO JOINT COMPLAINANTS'
INTERROGATORIES AND REQUESTS FOR
PRODUCTION OF DOCUMENTS SET VIII AND IX**

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 for Sanctions 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 VIII and IX (the “Requests”), and in support hereof, avers as follows:

INTRODUCTION

Rather than contact counsel for BPE in an effort to resolve any dispute relating to BPE’s responses to the Requests, Joint Complainants filed this Motion just two business days before a National and Commonwealth holiday, leaving BPE little time to respond. Notwithstanding the timing of the Motion, BPE fully responded to the Requests at issue in the Motion. Joint Complainants merely take issue with the responses and now request the imposition of extreme sanctions that would be inappropriate even if BPE did not respond to the Requests – which it did.

While the Motion is lengthy, the actual substance is relatively short and can be broken down as follows:

1. Joint Complainants allege that BPE failed to respond to Request VIII-I regarding its desired “rate of return.” To the contrary, BPE provided a full and complete response to this request as set forth below.

2. Joint Complainants allege that BPE failed to provide certain EDI documents. To the contrary, BPE provided the documents.

3. Joint Complainants allege that BPE improperly filed objections in addition to its complete responses to Set IX. To the contrary, BPE’s objections were proper. More importantly, however, BPE has fully responded to Set IX.

Joint Complainants argue that “[t]hroughout the proceeding, [they] have attempted to engage in discovery.” (Motion at 4.) The reality is that Joint Complainants failed to engage in discovery in a manner that was productive. This Motion clearly shows that rather than meet-and-confer with Blue Pilot in an attempt to resolve their perceived discovery disputes, Joint Complainants would prefer to gain tactical advantages by filing sanctions motions designed to provide them with shortcuts when none are warranted. This Motion should be denied because BPE fully responded to the Requests and properly interposed objections given the procedural posture of this proceeding.

ARGUMENT AND AUTHORITY

I. Sanctions Are Not Warranted Because BPE Fully Responded to the Requests

A. BPE Responded to Request VIII-1 (Rate of Return)

On May 4, 2015, BPE surrendered its License to the Commission and requested that the Commission immediately cancel its License.¹ On May 14, 2015, BPE filed a Motion to Dismiss on the grounds that (1) BPE notified its remaining customer that it was ceasing its business in Pennsylvania and that they should begin taking steps to fill their electric service needs through other sources, (2) BPE resolved nearly every customer complaint, and (3) BPE had attempted to resolve this present proceeding. On June 1, 2015, the Commission suspended the Procedural Order in light of Blue Pilot's pending Motion to Dismiss. After filing the Motion to Dismiss, BPE informed OCA that BPE did not intend to respond to OCA's discovery in light of the pending Motion to Dismiss. Counsel for BPE never represented that it would never respond to OCA's discovery. The Commission denied BPE's Motion to Dismiss on June 11, 2015, and directed the parties to provide a procedural schedule for the remainder of the proceeding within ten (10) days. Rather than provide a procedural schedule – or confer with BPE regarding any outstanding discovery – on June 22, 2015, Joint Complainants filed a Motion for Entry of Judgment against BPE, thus signaling that in their view, no further discovery was needed to seek judgment in this proceeding.

On August 4, 2015, the ALJ's entered an Order Granting in Part and Denying in Part Motion for Entry of Judgment (the "August 4 Order"). In the August 4 Order, BPE was provided ten days to respond to Joint Complainants' outstanding discovery, which was suspended up through the entry of the August 4 Order. Thus, BPE's time to respond (and object)

¹ At that time, BPE had only 218 remaining customers in Pennsylvania.

to that outstanding discovery did not expire until August 14, 2015, when BPE served its Objections and Responses to Complainants' Interrogatories and Requests for Production (Set VIII). (Motion, Ex. C.)

As an initial matter, Joint Complainants take issue with BPE's objections to Request VIII-1, which requested that BPE "describe in detail the 'desired rate of return' Blue Pilot used in calculating rates for Pennsylvania customers on variable rate plans from March 31, 2012 until December 31, 2014." (Request VIII-1.)

BPE fully responded to Request VIII-1 and provided all of the information sought in that request. There is no other information that BPE could provide in response to Request VIII-1 because none exists. So that there will be no confusion, BPE will serve separate objections in one document and separate responses in another. Indeed, had Joint Complainants sought to meet-and-confer with BPE regarding this dispute, BPE would have supplied separate objections and responses and this Motion could have been avoided.

BPE responded in full to Request VIII-1, which clearly states:

Discovery Request No. 1: Regarding Blue Pilot's response to Joint Complainants Interrogatories Set I No. 9, describe in detail the "desired rate of return" Blue Pilot used in calculating rates for Pennsylvania customers on variable rate plans from **March 31, 2012 until December 31, 2014**. Please provide the rate of return obtained by Blue Pilot from its Pennsylvania sales to customers on variable rate plans for **March 31, 2012 until December 31, 2014**.

(Emphasis added) (Request VIII-1, Motion, Ex. C.)

BPE's August 14, 2015, response to Request VIII-1 stated as follows:

Supplemental Objection and Response: Without waiving BPE's previous objections to Discovery Request No. 1, **BPE reiterates that the phrase "desired rate of return" referenced in BPE's response to Joint Complainants Interrogatory Set I No. 9 refers to the profit that BPE sought to realize from the business that it conducted in Pennsylvania. BPE has never**

developed a specific formula or calculation that it used in connection with the profits that it sought. In its Order Granting In Part and Denying In Part Motion to Compel Responses to Joint Complainant Interrogatories VI-1 and VI-7 dated March 3, 2015 (the “March Order”) the Commission, through Administrative Law Judge Elizabeth Barnes and Administrative Law Judge Cheskis held that “[w]ith regard to Blue Pilot’s argument that interrogatories VI-1 and VI-7 are irrelevant, this argument will be granted in part and denied in part. Blue Pilot’s costs, expenses and billing are relevant to this proceeding but its profits, losses and revenues are not” (Order at 5); and “[i]n contrast, however, the Joint Complainants’ request for Blue Pilot’s profits, losses and revenues are not likely to lead to the discovery of admissible evidence because profits, losses and revenue are not referenced in the Disclosure Statement or otherwise relevant to an issue raised in the Joint Complaint. Nowhere in Blue Pilot’s Disclosure Statement, for example, is there a reference to the Company’s profits, losses and revenues being used to determine the variable rate and, therefore, Blue Pilot’s profits, losses and revenues are not relevant to ensure that the billed prices conform to the Disclosure Statement” (Order at 6); see also Order at 8, 10. To the extent that Order Granting In Part and Denying In Part Motion to Compel Responses to Joint Complainants’ Interrogatories VIII-1 and VIII-2 May 1, 2015 (the “May 1 Order”) reverses the holding in the Order, **BPE states that its rate of return based on its sales to customers on variable rate plans in Pennsylvania from March 31, 2012 until December 31, 2014 was -6.3%.**

(Emphasis added.) (Request VIII-1, Motion, Ex. C.)

Joint Complainants allege that “Blue Pilot fails to ‘describe in detail the ‘desired rate of return’ Blue Pilot used in calculating rates for Pennsylvania customers on variable rate plans from March 31, 2012 until December 31, 2014,’ which is requested in Set VIII-1.” (Motion at 11.) To the contrary, Blue Pilot clearly stated that “BPE reiterates that the phrase ‘desired rate of return’ referenced in BPE’s response to Joint Complainants Interrogatory Set I No. 9 refers to the profit that BPE sought to realize from the business that it conducted in Pennsylvania. BPE has never developed a specific formula or calculation that it used in connection with the profits that it sought.” (Request VIII-1, Motion, Ex. C.) Joint Complainants claim that this answer “relates to

profits only, not the desired rate of return that Blue Pilot actually used in calculating rates from March 31, 2012 until December 31, 2014.” (Motion at 11). Joint Complainants assertion is strictly argument. Again, as BPE stated in its verified response, ***BPE did not have a specific “desired rate of return that Blue Pilot actually used in calculating rates from March 31, 2012 until December 31, 2014.”*** (Request VIII-1, Motion, Ex. C.) Joint Complainants lament that Blue Pilot has not furnished something that does not exist. Because BPE did not have a “desired rate of return that Blue Pilot actually used in calculating rates from March 31, 2012 until December 31, 2014” Joint Complainants requested sanctions are inappropriate and unfounded.

B. BPE Responded to Request VIII-2

Request VIII-2 clearly requested the following:

Discovery Request No. 2: Please provide all documents and/or correspondence that are identified or referred to in Blue Pilot’s response to Joint Complainants Discovery Request Set VI No. 7 for January 1, 2013 until December 31, 2014.

(Request VIII-2, Motion, Ex. C.)

On April 7, 2015, Joint Complainants filed VIII-2. On April 23, 2015 – *prior to the twenty (20) day time period BPE had to respond to Set VIII-2* – Joint Complainants filed a Motion to Compel production of that set. On April 27, 2015, BPE timely served its response to VIII-2. (Request VIII-2, Motion, Ex. C.) Thus, by the time the Commission ordered production of VIII-2 on May 1, 2015, BPE had already timely responded to VIII-2.

To reiterate the position that Joint Complainants have taken, Joint Complainants filed a motion to compel production of Set VIII-2 before BPE had time to respond to the initial request. Over four months after BPE responded, Joint Complainants now file this Motion for Sanctions based on an alleged deficiency in that initial response. In the interim, Joint Complainants have never discussed with BPE directly why they believe the production was deficient. As with Set

VIII-1, BPE is forced to guess what it is that Joint Complainants believes is deficient in its response to Set VIII-2, which was served on April 27, 2015—four days before BPE was directed to provide a response. Rather than meet and confer with BPE over any perceived deficiency, Joint Complainants file this Motion for Sanctions because BPE failed to guess what Joint Complainants sought.

All of this aside, Blue Pilot has fully responded to this request and therefore fully complied with the direction to respond to this request. The EDI documents identified by Joint Complainants were produced by BPE as BPE-PALIT-002953-57, which was produced to Joint Complainants on April 27, 2015. These five files contain EDI records for categories 867, 810, 824, and 820. BPE fully complied with its obligations under the May 1, 2015 and August 4, 2015 Orders and provided all of the documents sought in Request VIII-2. There is no basis to impose a sanction to the effect that “Blue Pilot’s prices charged to Pennsylvania consumers do not match the pricing description in the Company’s Disclosure Statement and that Blue Pilot shall not be permitted to rebut this finding at hearings or in briefs” because there are no more documents responsive to Request VIII-2 that Blue Pilot has not already produced. BPE has verified this in its response to this request. Indeed, in light of BPE’s full response to this request, such a sanction would be without basis and therefore unjust.

C. BPE’s Objections and Responses to Request IX-1 through 8 Were Proper

Joint Complainants argue that BPE’s objections to Requests IX-1 through 8 are improper insofar as they were not contained in a separate document. (Motion at 17.) For this, Joint Complainants seek a sanction of \$100 per day.² Joint Complainants infer a motive by BPE to

² In support, Joint Complainants cite to Pa PUC v. Pennsylvania American Water Co., Docket No. R-2011-2232243, Order at 12 (July 21, 2011). That Order does not even contain the word “sanction” and in no way supports the relief Joint Complainants seek in the Motion.

confuse both the ALJs and parties. No such confusion was intended. BPE fully responded to Requests IX-1 through 8³ and provided all of the information sought in those requests. Nevertheless, BPE will serve separate responses in a separate document. As set forth above, had Joint Complainants sought to meet-and-confer with BPE regarding this dispute, BPE would have supplied separate objections and responses and this Motion could have been avoided.

Moreover, the objections were timely. In the August 4 Order, the Commission held that “we are willing to give the Company the benefit of doubt that it inferred by our subsequent Procedural Order # 6, that discovery deadlines were also suspended until further notice.” (August 4 Order at 9.) The Commission then directed Blue Pilot to “serve answers to Set IX.” (*Id.*) BPE’s objections to Request IX-1 through 8 were timely. More importantly, to the extent that Joint Complainants take issue with the fact that BPE included objections in its response to Set IX, BPE would note that, despite its objections, BPE *has fully responded* to Set IX.

No sanction is warranted.

CONCLUSION

Based on the foregoing, BPE respectfully requests that the Commission deny Joint Complainants’ Motion for Sanctions. The sanctions requested by Joint Complainants are extreme, especially in light of the fact that BPE provided full and complete responses to all of the Requests referenced in the Motion and did not intend to cause any confusion in this proceeding.

³ BPE provided Gregory Rosebeck’s employment file to counsel on August 13, 2015 and intended to produce that file along with the other files that it produced on August 14, 2015. That particular file was inadvertently left out of the production and BPE has since produced that file to Joint Complainants as BPE-PALIT-003203-08. Had Joint Complainants simply followed up with counsel for BPE, the issue could have been resolved much more expediently and without waste of judicial resources.

September 8, 2015

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**COMMONWEALTH OF
PENNSYLVANIA, ET AL.**

v.

BLUE PILOT ENERGY, LLC

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Docket Nos. C-2014-2427655

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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Dated this 8th day of September, 2015.



Karen O. Moury, Esq.