

**FLAMM WALTON PC**

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**BEFORE THE PENNSYLVANIA UTILITY COMMISSION**

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<b>Toll Diversified Properties, Inc.</b>	:	
	:	
Complainant,	:	
	:	
v.	:	Complaint Docket
	:	No.: C-2015-2463573
<b>PPL Electric Utilities Corp., and</b>	:	
	:	
<b>Blue Pilot Energy, LLC,</b>	:	
	:	
Respondent.	:	

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Complainant Toll Diversified submits this brief in support of its claim against Respondent Blue Pilot Energy.

**I. Introduction**

When it was selling its services, Blue Pilot told Toll Diversified Properties, Inc. that Blue Pilot would either provide Toll Diversified with a new fixed rate at the expiration of the original fixed rate agreement or would change Toll Diversified back to the default energy provider PPL Electric Utilities Corp. But Blue Pilot did not honor its commitment upon which Toll Diversified relied when it selected Blue Pilot as its energy provider. As a result, Blue Pilot overbilled Toll Diversified by \$13,644.09, which Blue Pilot should now have to refund.

## **II. Blue Pilot Agent's Statement Is Not Hearsay**

Toll Diversified's owner Deborah Gruelle testified at the hearing that Blue Pilot's agent told her that she would not have to worry about a variable rate because Blue Pilot would either negotiate a new fixed rate or the rate would revert back to the PPL's current rate. Respondent objected to this evidence, arguing that the evidence was hearsay.<sup>1</sup> Pennsylvania Rule of Evidence 801 states that "Hearsay" means a statement that (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." As the comment to this rule notes, not all statements are hearsay: "[a] statement is hearsay only if it is offered to prove the truth of the matter asserted in the statement. There are many situations in which evidence of a statement is offered for a purpose other than to prove the truth of the matter asserted."

The comment adds that "[s]ometimes a statement has direct legal significance, whether or not it is true. For example, one or more statements may constitute an offer, an acceptance, a promise, a guarantee, a notice, a representation, a misrepresentation, defamation, perjury, compliance with a contractual or statutory obligation, etc."

Here, Ms. Gruelle testified that Blue Pilot's agent made a guarantee that Toll Diversified would not be subject to a variable rate if she selected Blue Pilot as Toll Diversified's energy supplier. This guarantee turned out to be a misrepresentation. When Ms. Gruelle testified about this misrepresentation, she recounted a legally significant statement but was not offering

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<sup>1</sup> Transcript of July 22, 2015 Hearing ("Tr."), p. 8, ll. 14-18.

the statement for the truth of the matter. As a result, Blue Pilot should not be able to bar Ms. Gruelle's testimony by mischaracterizing it as hearsay.

The Third Circuit made this point when it applied the federal version of Rule 801 in *Cloverland-Green Spring Dairies, Inc. v. Pennsylvania Milk Marketing Board*, 298 F.3d 201, 218 n.20 (3d Cir. 2002). There the district court had refused to consider testimony from plaintiff's employees about sale offers that the defendant's agents had made to the plaintiff's employees because the district court deemed those statements to be hearsay. The Third Circuit corrected the district court, stating that "a statement offering to sell a product at a particular price is a 'verbal act,' not hearsay, because the statement itself has legal effect." *Id.* Here, Blue Pilot's agent made a statement, or verbal act, in that he made a guarantee to induce Toll Diversified to sign a contract with Blue Pilot. As a result, this statement is not a hearsay statement offered for its truth, but is instead a verbal act about which Ms. Gruelle can properly testify.

Moreover, even if the statement were hearsay, Ms. Gruelle's testimony would still be admissible under the exception for statements by opposing parties. Pennsylvania Rule of Evidence 803(25) provides that "[t]he following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: . . . (25) An Opposing Party's Statement. The statement is offered against an opposing party and: . . . (C) was made by the party's agent or employee on a matter within the scope of that relationship while it existed . . . ." The Pennsylvania Superior Court has held that for an admission of a party opponent to be admissible under this rule, the proponent of the statement must establish three elements: (1) the declarant was an agent or employee of a party opponent; (2) the declarant made the statement while employed by the party opponent; and (3) the statement concerned a matter

within the scope of agency or employment. *Harris v. Toys “R” Us—Penn, Inc.*, 880 A.2d 1270, 1275 (Pa. Super. Ct. 2005). Raymond Perea, Blue Pilot’s General Counsel, testified that Blue Pilot’s sales analyst was authorized to make statements on the subject of variable rates.<sup>2</sup> Here a sales analyst for Blue Pilot made the statement at issue while inducing Ms. Gruelle to contract with Blue Pilot. As a result, Ms. Gruelle’s testimony is admissible even if it constitutes hearsay.

### **III. Blue Pilot Should Refund the Amount of Overpayment**

The Commission has clarified its authority to issue refunds to customers. In *Enrico Partners L.P. v. Blue Pilot Energy, LLC*, the administrative law judge held that the Commission has authority under § 1312 of the Public Utility Code to order [electric generation suppliers] to issue refunds to customers. *Enrico Partners L.P. v. Blue Pilot Energy, LLC*, Docket No. C-2104-2432979 (Feb. 12, 2015), Opinion and Order dated February 12, 2015. Here, Blue Pilot’s agent told Ms. Gruelle that Toll Diversified would “have a locked-in lower rate, and that [Toll Diversified] never had to worry about it going any higher than the locked-in rate because it would expire in six months. And when it did, [Blue Pilot’s agent, would call me and tell me when the new rate was.”<sup>3</sup> The agent added that “when the contract expired, it would either revert back to PPL’s current rate, or we would renegotiate a new rate on whatever their new flat rate was.”<sup>4</sup> Ms. Gruelle would not have executed the contract absent the agent’s representations regarding the rate.<sup>5</sup>

The contract does not contain a merger clause limiting the parties agreement to the language of the contract. As a result, Blue Pilot should be held to its agreement with Toll Diversified in which it

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<sup>2</sup> Transcript, p. 59 ll:7-14.

<sup>3</sup> Tr. p. 10 ll: 2-6.

<sup>4</sup> Tr. p. 10, ll:14-17.

<sup>5</sup> Tr. p. 12, ll: 10-13.

agreed to provide Ms. Gruelle with either a new flat rate or to have Ms. Gruelle revert back to PPL as the default energy provider. Blue Pilot never did either of these things, although it agreed to do so in exchange for Toll Diversified executing the agreement. As a result, Toll Diversified was overbilled by \$13,644.09.<sup>6</sup>

#### **IV. Blue Pilot Mislead Toll Diversified into Agreeing to Contract**

In the alternative, if Blue Pilot never intended to honor the above agreement that it reached with Toll Diversified, then Blue Pilot made a misrepresentation to Toll Diversified. The Commission's regulations prohibit electric generation suppliers from making false and misleading statements. 52 Pa. Code § 111.10(a)(3). As a result, Blue Pilot should at least have to pay the statutory fine of \$1,000.00 for misleading Toll Diversified into executing the contract.<sup>7</sup>

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September 9, 2015

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<sup>6</sup> Tr. pp. 13-24. A summary of Ms. Gruelle's calculations is attached.

<sup>7</sup> 66 Pa. C.S. § 3301(a).

**SUMMARY OF MS. GRUELLE'S CALCULATIONS  
(2 PAGES)**

ACCOUNT #88012 (200913)

Period	Exhibit	Provider	Kilowatts Used	Generation Charge Rate	Generation Charge	Price Difference
2/3	C10	Blue Pilot PPL	7,753 kw 7,753 kw	*.4490 per KWH = *.0925 per KWH	\$3,481.10 \$717.15	\$2,763.95
3/28	C11	Blue Pilot PPL	7326 kw 7326 kw	*.4490 per KWH = *.0925 per KWH =	\$3,289.77 \$677.66	\$2,611.21
4/1	C12	Blue Pilot PPL	7961 kw 7961 kw	*.2490 per KWH = *.10391 per KWH =	\$1,982.29 \$827.23	\$1,125.06
5/2	C13	Blue Pilot PPL	8528 kw 8528 kw	*.2490 per KWH = *.10391 per KWH	\$2,123.47 \$886.14	\$1,237.33
6/2	C14	Blue Pilot PPL	7307 kw 7307 kw	*.2490 per KWH = *.09585 per KWH	\$1,819.44 \$700.38	\$1,119.06
<b>Total</b>						<b>\$8,857.11</b>

**ACCOUNT #20013 (200917)**

Period	Exhibit	Provider	Kilowatts Used	Generation Charge Rate	Generation Charge	Price Difference
1/30	C5	Blue Pilot PPL	3,825 kw 3,825 kw	* .4490 per KWH = * .0925 per KWH	\$1,717.43 \$353.81	\$1,363.62
2/28	C6	Blue Pilot PPL	3,541 kw 3,541 kw	* .4490 per KWH = * .0925 per KWH =	\$1,589.91 \$327.54	\$1,262.37
4/1	C7	Blue Pilot PPL	4,221 kw 4,221 kw	* .2490 per KWH = * .10391 per KWH =	\$1,051.03 \$438.60	\$612.43
5/2	C8	Blue Pilot PPL	4,941 kw 4,941 kw	* .2490 per KWH = * .10391 per KWH	\$1,230.31 \$513.42	\$716.89
6/2	C9	Blue Pilot PPL	5,424 kw 5,424 kw	* .2490 per KWH = * .09585 per KWH	\$1,351.57 \$519.90	\$831.67
<b>Total</b>						<b>\$4,786.98</b>