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September 9, 2015

VIA E-FILING

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

Re: Debbie Gruelle c/o Toll Diversified Properties, Inc. v. PPL Electric Utilities Corporation and Blue Pilot Energy, LLC, Docket No. C-2015-2463573

Dear Secretary Chiavetta:

On behalf of Blue Pilot Energy, LLC, I have enclosed for electronic filing the Brief on Behalf of Blue Pilot Energy, LLC 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

DEBBIE GRUELLE C/O :
TOLL DIVERSIFIED PROPERTIES, INC. :
Complainant :
v. : Docket No. C-2015-2463573
BLUE PILOT ENERGY, LLC, :
Respondent :

BRIEF
ON BEHALF OF
BLUE PILOT ENERGY, LLC

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Dated: September 9, 2015

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I. STATEMENT OF THE CASE

Blue Pilot Energy, LLC (“BPE”) is an electric generation supplier (“EGS”) licensed by the Commission since June 10, 2011 to supply electricity or electric generation services to the public within the Commonwealth of Pennsylvania.¹ N.T. 53-54. Debbie Gruelle c/o Toll Diversified Properties, Inc. (“Complainant”) enrolled in a variable rate plan with BPE for electric generation services on May 17, 2012 and was served by BPE from June 28, 2012 through May 30, 2014. N.T. 54; BPE Exhibit No. 2 and BPE Exhibit No. 3.

Under the Complainant’s agreement with BPE, the rate of 6.5 cents per kwh would be charged for the first 180 days and thereafter the rate would vary on the basis of several factors including PJM wholesale market conditions. BPE Exhibit No. 1; N.T. 54-55. Evidence offered by BPE at the hearing demonstrates that BPE charged the Complainant 6.5 cents per kwh for the first nine months, or three months longer than required by the contract. BPE Exhibit No. 2 and BPE Exhibit No. 3; N.T. 56-57.

On January 9, 2015, the Complainant filed a Formal Complaint (“Complaint”) with the Commission alleging that she was “grossly over-charged” by BPE from December 30, 2013 through May 30, 2014. Complaint ¶ 4. The Complainant claimed that she was guaranteed a flat rate for a certain amount of time and that at the end of this time period, she would either renegotiate a new contract with BPE or would automatically revert back to PPL Electric Utilities, Inc. (“PPL”). Complaint ¶ 4. By way of relief, the Complaint seeks a reduction in the prices charged by BPE. Complaint ¶ 5.

On February 9, 2015, BPE filed an Answer to the Complaint generally denying any wrongdoing and asserting numerous affirmative defenses, including: 1) the Complaint fails to

¹ *License Application of Blue Pilot Energy, LLC*, Docket No. A-2014-2223888 (June 10, 2011).

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 BPE charged the Complainant were lawful. The Answer with New Matter requests the Commission to dismiss the Complaint with prejudice. No response was filed to the New Matter.

Administrative Law Judge (“ALJ”) Colwell convened a hearing on July 22, 2015. BPE presented the testimony of Mr. Raymond Perea, General Counsel and Manager of BPE, and offered three exhibits, which were admitted into the record. These exhibits consist of BPE Exhibit No. 1, which is a Service Agreement signed by Ms. Gruelle; BPE Exhibit No. 2, which is comprised of Meter Information and Invoices for one of the Complainant’s two accounts served by BPE; and BPE Exhibit No. 3, which is comprised of Meter Information and Invoices for the other of the Complainant’s two accounts served by BPE.

II. SUMMARY OF ARGUMENT

The Commission lacks subject matter jurisdiction over EGS prices and may not award the relief requested by the Complainant - namely a reduction of the price charged by BPE. As an EGS, BPE is not a public utility except in very limited circumstances related to licensing and the payment of state taxes, neither of which is applicable here. Since the Commission does not regulate EGS prices, it may not determine that the price charged by BPE was excessive and may not direct the issuance of a refund or credit.

Simply stated, the Complainant entered into a private variable rate contract with BPE which the Commission may not interpret or consider whether a breach thereof has occurred. In any event, the clear terms and conditions of the contract allowed BPE, after the initial 180-day period, to vary the prices for electric generation service on a monthly basis to reflect various

factors, including changes in the wholesale market. Furthermore, the Service Agreement provided to the Complainant clearly disclosed the variable nature of the contract following that initial period. Even under the flawed rationale recently employed by the Commission in decisions that have been issued while this Complaint was pending, no basis exists for directing the issuance of a refund or credit in any amount to the Complainant. Indeed, the Commission would exceed its statutory authority if it directs the issuance of a refund or credit to the Complainant.

At the heart of the Complaint is the Complainant's displeasure with amount by which BPE increased its variable rates and her desire to avoid paying those charges. Since the Commission does not have jurisdiction over EGS pricing, to interpret provisions or address disputes regarding private contracts between EGSs and their customers, or to direct BPE to issue a refund or credit, the Complainant's request for relief should be denied and the Complaint should be dismissed.

III. ARGUMENT

A. The Commission Does Not Have Jurisdiction To Regulate The Prices Charged By Electric Generation Suppliers.

The Complaint essentially alleges that the prices charged by BPE were too high in the early part of 2014. Since the Commission does not have jurisdiction to regulate the prices charged by EGSs, the Complaint should be dismissed outright.

As a creation of the General Assembly, the Commission has only the powers and authority granted to it by the General Assembly and contained in the Public Utility Code, 66 Pa. C.S. §§ 101 *et seq.* ("Code"). *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937 (Order entered May 28, 2008); *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa.

1977). The Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. Pa. Pub. Util. Comm'n*, 43 A.2d 348 (Pa. Super. 1945). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967). Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992), alloc. denied, 637 A.2d 293 (Pa. 1993).

Nothing in the Code authorizes the Commission to regulate the prices of EGSs. To the contrary, Code Section 2806(a) provides that “the generation of electricity shall no longer be regulated as a public utility service or function except as otherwise provided for in this chapter.” 66 Pa. C.S. § 2806(a). The Pennsylvania Supreme Court has found that the definition of “public utility” in Code Section 102 does not include EGSs except for the limited purposes set forth in Code Sections 2809 and 2810, 66 Pa. C.S. §§ 2809 and 2810. *Delmarva Power & Light Co. v. Pa. Pub. Util. Comm'n*, 870 A.2d 901 (Pa. 2005). Those sections have no bearing on prices charged by EGSs. Code Section 2809 establishes the requirement for EGSs to be licensed, and Code Section 2810 requires EGSs to pay state taxes so as to ensure revenue neutrality to the Commonwealth of Pennsylvania. 66 Pa. C.S. §§ 2809-2810.

Indeed, the Commission has recognized its lack of jurisdiction to regulate prices charged by EGSs. In *Commonwealth of Pennsylvania, et al. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655 (Order entered December 11, 2014), the Commission concluded that it “does not have traditional ratemaking authority over competitive suppliers and does not regulate competitive supply rates.” *Id.* at 18. See also *Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Order entered December 18, 2014) (“*IDT Order*”). Additionally, in *Nadav v. Respond Power LLC*, Docket No. C-2014-2429159 (Order entered

December 19, 2014), the Commission dismissed a complaint claiming excessive variable rates due to its lack of jurisdiction over EGS prices. Moreover, the Commission's lack of statutory authority to regulate rates that EGSs charge their customers has been recently reinforced by the Commonwealth Court. *CAUSE-PA v. Pa. Pub. Util. Comm'n.*, 445 C.D. 2014 and *McCloskey v. Pa. Pub. Util. Comm'n.*, 596 C.D. 2014 (Slip Opinion issued July 14, 2015).

These rulings are consistent with the conclusions previously set forth by the Commission in an Order seeking comments from interested parties regarding significant variable price increases in the retail market. *Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, Docket No. M-2014-2406134 (February 20, 2014) ("*Variable Price Order*"). In the *Variable Price Order*, the Commission noted that the rates consumers pay in the retail electric market are governed by the terms of their contract with their EGS and that some variable price contracts have no ceiling on the rate that could be charged. The Commission further observed that while a variable rate may offer substantial savings when wholesale market prices are low, customers may experience very high bills during periods of market volatility. For that reason, the Commission emphasized the importance of consumers on variable rates "to carefully review the terms and conditions of their contracts to determine if they are at risk for large rate increases at any given time." *Variable Price Order* at 3.

B. The Commission Lacks Jurisdiction To Interpret Contract Between An Electric Generation Supplier And Its Customer.

In claiming that BPE charged the Complainant a rate that was too high, the Complaint essentially seeks to have the Commission interpret the terms and conditions of a private contract. The Commission has concluded, however, that its jurisdiction over EGSs "does not extend to interpreting the terms and conditions of a contract between an EGS and a customer to determine

whether a breach has occurred or setting the rates an EGS can charge.” *Office of Small Business Advocate v. First Energy Solutions Corporation*, Docket No. P-2014-2421556 (Order entered January 26, 2015 at 18). *See also Allport Water Auth. v. Winburne Water Co.*, 393 A.2d 673 (Pa. 1978) (Commission lacks jurisdiction to address disputes involving private contracts).

In any event, the terms of the Complainant’s contract were clear and the Complainant was charged in accordance with those terms. After the initial 180-day period, the rate could vary each month to reflect various factors, including wholesale energy prices, and had no ceiling on the extent to which prices could increase. BPE Exhibit No. 1; N.T. 54-55. Even if the Commission reviews this contract, it is clear that BPE’s obligation to charge the initial price of 6.5 cents per kwh for an initial 180-day period was fulfilled. In fact, BPE charged the initial price for three months longer than required by the contract. BPE Exhibit No. 2 and BPE Exhibit No. 3; N.T. 56-57.

As the Commission has recognized, consumers bear some responsibility to make choices that are appropriate for their individual circumstances. *William Towne v. Great American Power, LLC*, Docket No. C-2012-2307991 (Opinion and Order entered October 18, 2013 at 22). “A person of age is presumed to know the meaning of words in a contract, and if, relying upon his own ability, he enters into an agreement not to his best interests he cannot later be heard to complain that he was not acquainted with its contents and did not understand the meaning of the words used in the instrument which he signed.” *Design & Development, Inc. v. Vibromatic Mfg, Inc.*, 58 F.R.D. 71, 73 (E.D. Pa. 1973).

C. The Commission Lacks The Statutory Authority To Direct The Issuance Of A Refund by BPE.

1. Without the ability to regulate rates, it logically follows that the Commission may not require EGSs to issue refunds.

The Complainant seeks relief in the form of a refund or credit so that the prices charged by BPE after the initial 180 days are reduced. Without the ability to regulate EGS prices or to determine whether they are excessive, or unjust or unreasonable, it logically follows that the Commission may not require EGSs to issue refunds to consumers. In an Initial Decision issued on June 24, 2014, ALJ Salapa succinctly described this logical nexus, as follows:

The Commission may not regulate the rates that the Respondent charged the Complainant for electric generation service since it is not a public utility except for the limited purposes of 66 Pa. C.S. §§ 2809 and 2810. Therefore, the Commission has no jurisdiction over the Respondent to the extent that the Complainant contends that the Respondent has charged it an unreasonable, unjust or illegal rate for electric generation service. Since the Commission lacks the authority to regulate rates charged for electric generation service, it lacks the authority to order a refund or credit to the Complainant.

Yaglidereliler Corp. v. Blue Pilot Energy, LLC, Docket No. C-2014-2413732 (Initial Decision issued June 24, 2014) at 9.²

2. Code Section 1312 authorizes the Commission to direct the issuance of refunds only by public utilities.

Moreover, the Commission has expressly concluded that Code Section 1312, the only provision in the Code addressing refunds, does not authorize it to direct an EGS to issue refunds. Code Section 1312 provides the Commission with statutory authority to direct the issuance of

² While BPE recognizes that this Initial Decision was later remanded to the ALJ and the matter was settled by the parties, BPE notes that the Commission remanded this matter for a different purpose and made no comment about this language in its remand order entered on January 16, 2015. BPE is offering this quote to support its argument regarding the logical nexus between a lack of statutory authority to regulate EGS rates and the lack of statutory authority to direct EGSs to issue refunds to consumers. Further, BPE notes that other ALJs have acknowledged this logical nexus and employed similar reasoning in cases that were later settled by the parties. *See, e.g., Tustin v. Respond Power LLC*, Docket No. C-2014-2417552 (Interim Order issued by ALJ Barnes on June 26, 2014); *Russell v. Respond Power LLC*, Docket No. C-2014-2417551 (Interim Order issued by ALJ Colwell on July 3, 2014).

refunds only by a public utility if the rates are determined to be “unjust or unreasonable.” 66 Pa. C.S. § 1312. Since EGSs are not public utilities for the purposes of pricing, these provisions authorizing the Commission to direct the issuance of refunds by public utilities are not applicable to the charges EGSs impose on their customers. *IDT Order* at 16-17.

Notwithstanding its lack of statutory authority pursuant to Code Section 1312, the Commission has found that it has “plenary authority” under Code Section 501 to direct an EGS to issue a credit or refund for an over bill under limited circumstances. *IDT Order* at 17-18. In relying on Code Section 501 for authority to direct an EGS to issue a refund, the Commission has disregarded the Statutory Construction Act of 1972, 1 Pa. C.S. §§ 1501 *et seq.*, as well as long-standing case law.

It is well-settled under Pennsylvania law that specific provisions in a statute prevail over general provisions. 1 Pa. C.S. § 1933. *See Robinson Township Washington County v. Commonwealth of Pennsylvania*, 83 A.3d 901 (Pa. 2013). Here, Code Section 1312 specifically addresses refunds and expressly limits the Commission’s authority to directing public utilities to issue refunds, while Code Section 501 generally authorizes the Commission to “supervise and regulate all public utilities doing business with this Commonwealth.” 66 Pa. C.S. § 501(b) (emphasis added).³ Additionally, although the Commission has specific jurisdiction over the activities of EGSs as outlined in Code Section 2809, 66 Pa. C.S. § 2809, nothing in that provision or any other section of the Code authorizes the Commission to direct an EGS to issue refunds. Therefore, under the Statutory Construction Act of 1972, the lack of express authority under Code Section 1312 to direct an EGS to issue a refund prevails over any general authority the Commission has over EGSs under Code Section 501.

³ In addition to relying on general statutory authority while ignoring the specific statutory authority regarding refunds, the Commission has improperly relied on language in Section 501 that relates only to public utilities.

Moreover, well-settled case law limits the ability of the Commission to expand its authority beyond the parameters of the Code. As discussed above, subject matter jurisdiction is a threshold inquiry in every proceeding. *Hughes*. The Commission may only exercise powers and authority granted to it by the General Assembly. *Shedlosky*. The Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh*. Jurisdiction may not be conferred by the parties where none exists. *Roberts*.

In *Popowsky v. Pa. Public Utility Commission*, 869 A.2d 1144 (Pa.Cmwlth. 2005), the Commonwealth Court rejected an attempt by the Commission to broaden its authority under Code Section 1307(a), 66 Pa. C.S. § 1307(a), to permit a public utility to establish a surcharge for its wastewater collection service. In reversing the Commission decision's in *Popowsky*, the Commonwealth Court's rationale relied heavily on the fact that another provision in the Public Utility Code expressly addressed surcharges and did not permit the approval of a wastewater surcharge. Noting that Code Section 1307(g), 66 Pa. C.S. § 1307(g), specifically permitted water utilities to recover certain infrastructure improvement costs through a surcharge, the Commonwealth Court found that the general language of Code Section 1307(a), 66 Pa. C.S. § 1307(a), relating to surcharges did not authorize the Commission to permit wastewater utilities to recover such costs through a surcharge. *Popowsky* at 1158. The Court concluded that "[t]he PUC's belief that there is no limit on its authority to approve the use of a surcharge as the means for any utility to recover its costs for any facility addition is contrary to precedent and to sound principles of statutory construction." *Popowsky* at 1160.

The rationale relied upon by the courts in concluding that the Commission lacks statutory authority to award damages is particularly compelling here. In *Feingold*, the Supreme Court found that the remedial and enforcement powers vested in the Commission by the Code were

designed to allow the Commission to enforce its orders and regulations, but not to empower the Commission to award damages or to litigate a private action for damages on behalf of a complainant. Under the *Feingold* holding, the Commission is authorized by the Code to determine whether an EGS has violated its orders or regulations, but it must leave any determination regarding restitution or refunds to the courts.⁴ For purposes of enforcing the Code, its orders and regulations, the Commission has authority under Code Section 3301 to impose civil penalties. 66 Pa. C.S. § 3301. *See also Elkin v. Bell Tel. Co. of Pa.*, 420 A.2d 371 (Pa. 1980); *Poorbaugh v. Pa. Public Utility Commission*, 666 A.2d 744 (Pa. Cmwlth. 1995). The Commission may also revoke or suspend an EGS's license for violations of the Code, its orders and regulations. 52 Pa. Code § 54.42.

3. Even under the exceptions that the Commission has carved out to the no refund rule, the Complainant is not eligible for a refund.

Despite its lack of statutory authority to direct EGSs to issue refunds, the Commission carved out two exceptions to the no refund rule in the unappealable interlocutory *IDT Order* in December 2014, which have been succinctly summarized as follows:

First, the Commission noted that, pursuant to 52 Pa. Code § 57.177(b), it could direct an EGS to refund charges when a customer has been switched to an EGS without the customer's consent. Second, the Commission stated that it had the authority, pursuant to 66 Pa. C.S. § 501, to order a credit or refund where the EGS overbills a customer by failing to bill a customer in accordance with its disclosure statement, in violation of 52 Pa. Code §§ 54.4(a) and 54.5(a) and 6 Pa. C.S. § 2809(b).

Friz v. Respond Power LLC and PPL Electric Utilities Corporation, Docket No. F-2014-2453884 (Initial Decision issued February 11, 2015 at 10; Final Order entered March 9, 2015) ("*Friz Initial Decision*"). While BPE contends that the Commission lacks the requisite statutory

⁴ The Commission has acknowledged its lack of statutory authority to award equitable remedies including restitution. *IDT Order* at 25-26.

authority to direct an EGS to issue a refund,⁵ BPE also notes that neither of the exceptions carved out by the *IDT Order* apply to this case. Specifically, the Complainant has not alleged an unauthorized switch to BPE or a failure of BPE to charge prices that conform to its disclosure statement.

Since the hearing on the pending Complaint, the Commission has again exceeded its statutory authority by carving out yet a third exception to the no refund rule. *Kiback v. IDT Energy, Inc.*, Docket No. C-2014-2409676 (Order entered August 20, 2015) (“*Kiback Order*”). Specifically, in the *Kiback Order*, the Commission directed an EGS to issue a refund to a customer who had allegedly been promised by an EGS sales representative that his price would always be below the price to compare charged by the electric distribution company (“EDC”). In the *Kiback Order*, the Commission emphasized the credibility of the witness.

Whereas the Commission’s prior adoption of the *Friz Initial Decision* on March 9, 2015 provided the regulated industry with clear direction on the Commission’s interpretation of the *IDT Order* and the limited circumstances under which it believes it may direct an EGS to issue a refund to a customer, the *Kiback Order* has introduced a level of uncertainty into the electric retail market that leaves EGSs in the dark on their ability to charge prices to customers that are consistent with the contract. Through the *Kiback Order*, the Commission has announced that it will rewrite a contract between an EGS and its customers, on the basis of uncorroborated and self-serving hearsay evidence introduced by consumers years or months after a sales transaction. As a result, EGSs have no certainty that their private contracts or the prices charged in conformance with those contracts will be honored by the Commission. Any further extension of

⁵ BPE notes that the regulation cited by the Commission in the *IDT Order*, 52 Pa. Code § 57.177(b), which purports to authorize the Commission to require EGSs to provide full refunds to customers of all generation charges resulting from an unauthorized switch, has not undergone appellate review.

the no refund rule beyond the very specific circumstances underlying the *Kiback Order* will completely undermine the ability of EGSs to price their products in the competitive retail market. Additionally, rulings like the *Kiback Order* will encourage customers to devise any theory they can at a later date to get out of paying an increase in their electric charges that is lawfully based on the terms of their private contract with the EGS – a contract that the Commission has said it has no jurisdiction to interpret or determine a breach thereof.

D. Substantial Evidence Does Not Support A Finding That BPE Violated the Commission’s Marketing Or Billing Regulations.

It is well-established that any finding of fact necessary to support the Commission’s adjudication must be based on substantial evidence. *Edan Transportation Corp. v. Pa. Public Utility Commission*, 154 Pa. Commw. 21, 623 A.2d 6 (1993); *Mill v. Pa. Public Utility Commission*, 67 Pa. Commw. 597, 447 A.2d 1100 (1982); 2 Pa. C.S. § 704. Here, the only evidence in the record to support a finding of a violation of the Commission’s marketing or billing regulations is uncorroborated hearsay.

1. Uncorroborated hearsay may not support a finding.

As a threshold matter, “hearsay” is defined as an out-of-court statement offered to prove the truth of the matter asserted. *Commonwealth v. Harvey*, 666 A.2d 1108 (Pa. Super. 1995); Pennsylvania Rule of Evidence 801. In this case, the Complainant testified that the BPE sales representative told her that she was locking into a flat rate for a period of six months, and that after six months, she would revert back to PPL’s current rate or they would renegotiate a new rate. This testimony was offered to prove that her price should not have increased after the initial 180-day period. N.T. 10. As such, it is an out-of-court statement that was offered to prove the truth of the matter asserted and constitutes hearsay. Under Pennsylvania law, the hearsay rule is not a technical rule of evidence but a fundamental rule of law which must be followed by

administrative agencies in hearings when a party seeks to place facts crucial to an issue into the record. *London v. Viridian Energy*, Docket No. C-2011-2244309 (Order entered March 29, 2012); *C.S. Warthman Funeral Home v. GTE North, Inc.*, Docket No. C-00924416 (Order entered June 4, 1992); *Bleilevens v. Commonwealth of Pa. State Civil Service Commission*, 312 A.2d 109 (Pa. Cmwlth. 1973).

Although this hearsay testimony was admitted over BPE's objection, its inclusion in the record does not mean it can form the basis for a finding. To the contrary, even when hearsay is admissible pursuant to an exception, it is well-settled that a finding based wholly on hearsay cannot support a legal conclusion by an administrative agency. *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366 (Pa. Cmwlth. 1976). The Commission has held that "[a]lthough the Pennsylvania Rules of Evidence are relaxed in an administrative proceeding, crucial findings of fact may not be established solely by hearsay evidence." *Pa. P.U.C. Bureau of Investigation and Enforcement v. Yellow Cab of Pittsburgh*, Docket No. 2012-2249031, 2013 WL 5912555 (Pa. P.U.C. October 8, 2013). In fact, the Commission has expressly refused to make findings of fact on the basis of hearsay without separate evidence corroborating it. *See, e.g., Jackson v. PECO Energy Co.*, Docket No. F-2013-2351046 (July 5, 2013); *Davis v. Equitable Gas, LLC*, Docket No. C-2011-2252493, 2012 WL 3838095 (April 27, 2012).

2. Complainant's hearsay was not corroborated and was expressly refuted by other evidence of record.

In this case, the Complainant's hearsay testimony was not corroborated by any other evidence admitted in the record. The Complainant had the burden of proof to show that BPE is responsible or accountable for the problem described in the Complaint. *Patterson v. Bell Telephone Co. of Pa.*, 72 Pa. PUC 196 (1990); *Feinstein v. Philadelphia Suburban Water Co.*, 50 Pa. PUC 300 (1976). The Complainant must establish its case by a preponderance of the evidence. *Samuel J.*

Lansberry, Inc. v. Pa. Pub. Util. Comm'n, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. den.*, 602 A.2d 863 (Pa. 1992). To meet its burden of proof, the Complainant was required to present evidence more convincing, by even the smallest amount, than that presented by BPE. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950). Specifically, it was incumbent upon the Complainant to produce evidence, such as through the testimony of the sales representative or a recording of the sales calls, which corroborated this hearsay testimony. No such efforts were made.

Not only is Complainant's hearsay testimony uncorroborated by any evidence in the record, it is directly refuted by the Service Agreement, which was signed by Ms. Gruelle. BPE Exhibit No. 1. In the section of the Service Agreement explaining the terms of service, it clearly states, in pertinent part, as follows:

You will pay a variable rate with the starting price of 6.5 cents per kWh. This initial rate will be effective for at least the first one hundred and eighty (180) days of service. Thereafter, your price may vary on a month-to-month basis.

BPE Exhibit No. 1, Page 3 of 5. The Service Agreement also provided that the Complainant could cancel the agreement, without a termination fee, at any time.

Moreover, Ms. Gruelle's allegations and testimony were confusing, inconsistent and unclear in several regards, casting serious doubts on her credibility regarding a sales pitch that was made over three years ago. For instance, in the Complaint, Ms. Gruelle alleged that she "was guaranteed a flat rate for a certain amount of time." Complaint ¶ 4. Apparently, in January 2015 when she filed the Complaint, she did not recall the length of time during which the price would remain the same. Having subsequently reviewed BPE Exhibit No. 1 or other documents in preparation for the hearing, she testified that the initial price was for six months. N.T. 10. So, while she did not remember in January 2015 how long she was guaranteed a flat rate, she claims to recall today other details of the sales transaction.

Also, in the Complaint, Ms. Gruelle alleged that at the end of this time period for the flat rate, according to the BPE sales representative, she would “either renegotiate a new contract with Blue Pilot or....automatically revert back to PPL” as her supplier. Complaint ¶ 4. However, at the hearing, she testified that at the end of six months, according to the BPE sales representative, she would either renegotiate a new price or “revert back to PPL’s current rate,” apparently remaining with BPE for electric generation service. N.T. 10. Again, Ms. Gruelle’s memory of what the sales representative told her is vague, at best.

Regarding her review of the Service Agreement, she testified at one point during the hearing that she had not reviewed it carefully enough (N.T. 12) and at other times that she had not reviewed it all. N.T. 35. So, even a question about whether she reviewed the Service Agreement at the time she signed it did not produce a consistent response. This inconsistency suggests that she does not recall the details of the transaction.

Ms. Gruelle also was not aware that she was a customer of Liberty Power Holdings immediately before enrolling with BPE, which further undermines her ability to remember any specifics about the conversations with a BPE sales representative in that same timeframe. N.T. 30-32. If she did not remember being with Liberty Power Holdings, how does she remember what the BPE sales representative told her? It is not even clear that she is able to distinguish between what different EGSs, including BPE, may have told her since she testified that she began receiving calls from EGSs every day since electric choice started, although she inexplicably recanted that testimony a few questions later. N.T. 33-34.

Another issue affecting Ms. Gruelle’s credibility relates to the allegations in the Complaint. In one portion of the Complaint, Ms. Gruelle alleged that during the sales transaction, there was no mention of a “variable rate.” Complaint ¶ 4; N.T. 43. At another place

in the Complaint, she alleged that she was given numerous guarantees that she would never go on a “variable rate.” Complaint ¶ 4; N.T. 43. Indeed, when Ms. Gruelle was asked about these inconsistencies regarding variable rate references during cross-examination, she testified that she likewise wondered what she had meant and reminded counsel for BPE that “remember, I wrote this back in December.” N.T. 43. Thus, she admittedly did not remember what she was thinking when she wrote these allegations in December 2014, but she claims to remember what she was told by a BPE sales representative in May 2012.

It is also clear from Ms. Gruelle’s testimony that she does not attend to the finer details of running a business, which suggests that she overlooked or misunderstood some of the information provided to her by the BPE sales representative. For instance, Ms. Gruelle testified that as a business owner, she sometimes signs contracts without reading them. N.T. 35-36. In fact, she did not review the BPE contract despite being “suspicious.” N.T. 43-44. She also indicated that she did not review her bills, testifying as follows:

Yes, if I had looked at my bill, I certainly would have canceled the second I noticed the higher rate. And I did not look at the bill, and that was definitely my mistake. But you know, we have --- when you run a business, you have many, many bills coming in, and you don’t always look closely at every one.”

N.T. 44-45. However, had she reviewed any of her bills following the initial six months, she would have known that her price was not flat, long before the price increases she is complaining about that started in December 2013. Following the nine months of charges at 6.5 cents per kWh, she received another nine months’ worth of bills with BPE charges varying from 7.9 cents per kWh to 8.5 cents per kWh and to 10.5 cents per kWh. BPE Exhibit No. 2 and BPE Exhibit No. 3. At no point did she explain why she did not reach out to BPE after this supposed “six

month flat rate” expired so that she could renegotiate a new rate. She took no notice and took no steps to change the situation. A business owner would not need to look closely at every bill to notice these charges and cancel the contract, if the terms and conditions were not as expected.

Regardless of any impression that the Complainant may have been under based on her conversations with the BPE sales representative, the Service Agreement left no doubt as to the variable nature of the contract. In making this argument, BPE does not dispute the importance of the oral statements of its sales representatives. *See Kiback Order at 24-25*. What BPE disputes is the Commission’s ability to rely on a consumer’s hearsay testimony of those oral statements when that is the only evidence in the record to support the claims of what was said, especially when those self-serving claims are directly refuted by other evidence in the record.

As Mr. Perea testified, BPE trained its sales representatives to explain that after the initial rate, the variable price can change on the basis of several factors, including unknown and volatile wholesale market conditions. N.T. 57. Therefore, it is clear that BPE did not authorize or encourage its sales representatives to promise any opportunity for customers to renegotiate the rate after the initial period or return to the PPL rate. Of course, given the cancellation language in the Service Agreement, the Complainant was free at any time to return to PPL for default service. BPE Exhibit No. 1.

BPE is also not claiming that any violations of the Commission’s regulations based on inappropriate oral representations that may have been made by a sales representative are somehow negated by a written contract. However, BPE is arguing that the private contract between it and the Complainant is reflected in the Service Agreement, which established the applicable terms and conditions of service. Given that the written contract contradicts what the

Complainant claims the sales representative told her, it is the terms and conditions of service clearly explained in BPE Exhibit No. 1 that are controlling.

Verbal discussions between a sales agent and a prospective customer inherently have the potential for a misunderstanding, especially with the amount of information that must be shared during a sales pitch for electric generation supply. For that reason, under Pennsylvania law, particularly since these conversations inevitably lead to a “he said, she said” debate when disputes later arise, the written documentation must be what is relied upon rather than general statements made during a sales pitch. *See Steuart v. McChesney*, 498 Pa. 45, 48, 444 A.2d 659, 661 (Pa. 1982). (In Pennsylvania, “the intent of the parties to a written contract is to be regarded as being embodied in the writing itself”). *See also Union Storage Co. v. Speck*, 194 Pa. 126, 133, 45 A. 48, 49 (Pa. 1899). (“All preliminary negotiations, conversations and verbal agreements are merged in and superseded by the subsequent written contract...”). To award a complainant relief on the basis of alleged oral representations is contrary to Pennsylvania law and would render the Service Agreement meaningless.

Even if the Commission determines, on the basis of uncorroborated hearsay, that BPE engaged in unlawful marketing through oral representations of its sales representative, the appropriate remedy is a civil penalty or a suspension or revocation of its license. The Complainant is then free to seek a refund from an appropriate forum.

- E. Any Civil Penalty Imposed On BPE Should Be Significantly Lower Than \$1,000 Per Violation.

Code Section 3301 authorizes the Commission to impose a civil penalty not exceeding \$1,000 for a violation of the Code or regulations. BPE contends that it would be improper for the Commission to conclude that it violated the Code or regulations when the only evidence in the record is uncorroborated hearsay. However, in the event that the Commission concludes that

BPE violated its marketing or billing regulations, an application of the factors set forth in the Commission's policy statement at 52 Pa. Code § 69.1201, warrants the imposition of no civil penalty or a civil penalty that is significantly lower than \$1,000 per violation. The policy statement sets forth several factors that the Commission considers in evaluating litigated and settled proceedings and determining whether a fine for violating the Code, regulations or orders should be imposed, as well as the amount of any civil penalty.

The first factor is whether the conduct at issue was of a serious nature. Clearly, the Service Agreement provides accurate information and BPE did not train its agents to make promises about the price following the initial 180-day period. N.T. 57. Moreover, Mr. Perea explained that BPE's sales representatives are trained to explain the variable nature of the price after the initial period. N.T. 57. This was not a situation where an EGS made a business decision to increase variable prices and ignore its written contract guaranteeing savings to thousands of customers. *See Pa. Public Utility Commission, Bureau of Investigation and Enforcement v. Hiko Energy, LLC*, Docket No. C-2014-2431410 (Initial Decision issued August 21, 2015). Therefore, this factor weighs in favor of no penalty or a lower penalty.

The second factor is whether the consequences of the conduct at issue were of a serious nature. Since no personal injury or property damage was alleged, this factor supports the imposition of no penalty or a lower penalty.

The third factor considers whether the conduct was deemed intentional or negligent. Since BPE did not instruct its sales representatives to promise anything following the initial period, and in fact trained them to describe the variable nature of the contract, this factor weighs in favor of no penalty or a lower penalty.

As to whether BPE made efforts to modify internal practices and procedures to address the conduct at issue, BPE submits that the fourth factor is irrelevant. BPE has notified the Commission that it is no longer marketing in Pennsylvania and is in the process of exiting the Pennsylvania market and returning customer to the electric distribution companies (“EDCs”). *License Application of Blue Pilot Energy, LLC*, Docket No. A-2014-2223888 (Letter dated May 4, 2015).⁶

Regarding the fifth factor, one customer was affected. Therefore, this factor warrants the imposition of no penalty or a lower civil penalty.

The sixth factor is the compliance history of the regulated entity. The lack of a prior compliance history, which may be determined by a review of public documents searchable through the Commission’s website, supports the imposition of no penalty or a lower civil penalty.⁷

The seventh factor, regarding whether the regulated entity cooperated with the Commission’s investigation, is not applicable here. Since this proceeding was initiated by the filing of a formal complaint, this is a litigated proceeding with a private complainant rather than by a Commission investigation.

The eighth factor concerns the amount of civil penalty that is necessary to deter future violations. Since BPE is not actively marketing in Pennsylvania and has informed the

⁶ Although BPE’s letter is not published on the Commission’s website at its application docket, an entry for it appears on the daily actions at that docket with a date of May 5, 2015. Additionally, the letter is attached as Exhibit A to a Motion to Dismiss filed on May 14, 2015 by BPE at *Commonwealth of Pennsylvania et al. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655. In the letter dated May 4, 2015, BPE informed the Commission of its plan to abandon service to customers in Pennsylvania and to return its 218 remaining customers to the EDCs. BPE also requested cancellation of its license.

⁷ This press release explains the process available for searching the Commission’s website for complaints against regulated entities: http://www.puc.pa.gov/about_puc/press_releases.aspx?ShowPR=3579.

Commission that it is exiting the market, no civil penalty is necessary. Also, this factor can consider the size of the company; as of May 4, 2015, BPE was serving only 218 customers.

The ninth factor considers past Commission decisions in similar situations. Complaints about variable price increases are very fact-specific and the Commission's decisions have generally not been focused on the civil penalty phase. For some guidance, the ALJs' Initial Decision in *Hiko* found that \$125 per violation was appropriate. Since that case involved an executive management decision to increase variable prices and ignore a written contract that guaranteed savings for a period of time, any civil penalty imposed on BPE should be lower.

Therefore, while BPE submits that no civil penalty is warranted in this proceeding, to the extent the Commission disagrees, the record warrants the imposition of a minimal penalty per violation, far less than the \$125 per violation recommended by the ALJs in *Hiko*.

IV. CONCLUSION

Blue Pilot Energy, LLC respectfully requests the Formal Complaint of Debbie Gruelle c/o Toll Diversified Properties, Inc. be dismissed with prejudice and that the Commission grant any other such relief that may be just and appropriate.

Respectfully submitted,



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Dated: September 9, 2015

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**DEBBIE GRUELLE c/o TOLL
DIVERSIFIED PROPERTIES, INC.**

v.

**PPL ELECTRIC UTILITIES CORPORATION :
and BLUE PILOT ENERGY, LLC :**

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Docket No. C-2015-2463573

CERTIFICATE OF SERVICE

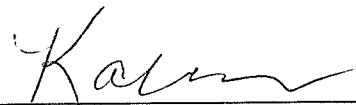
I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

Via E-Mail and First-Class Mail

Administrative Law Judge Susan D. Colwell
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Dated this 9th day of September, 2015.



Karen O. Moury, Esq.