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September 21, 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 Reply 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 :

REPLY BRIEF
ON BEHALF OF
BLUE PILOT ENERGY, LLC

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Attorneys for Blue Pilot Energy, LLC

Dated: September 21, 2015

I. STATEMENT OF THE CASE

Blue Pilot Energy, LLC (“BPE”) files this Reply Brief in response to the Main Brief of Debbie Gruelle c/o Toll Diversified Properties, Inc. (“Complainant”) filed on September 9, 2015. Consistent with the Briefing Order issued by the Administrative Law Judge (“ALJ”) on July 23, 2015, this Reply Brief discusses only those matters raised by the Complainant’s Brief that were not previously addressed. As BPE’s Main Brief filed on September 9, 2015 contained a comprehensive discussion of the evidence, legal principles and its positions on the issues before the Commission in this proceeding, it is fully incorporated herein by reference.

By this Reply Brief, BPE addresses only one issue: the Complainant’s flawed legal analysis of the hearsay rule.¹ In her Main Brief, the Complainant argues that the Commission should rewrite her contract with BPE on the basis of her uncorroborated self-serving testimony of what a BPE sales representative allegedly told her during the sales transaction that occurred over three years ago. Since the testimony regarding conversations with the BPE sales representative was offered to prove that the Complainant was promised certain contract terms and that the price therefore should not have increased after the initial period, it constitutes hearsay evidence. Further, it was not corroborated by any other evidence in the record and, in fact, it was directly refuted by the written contract. As the argument in the Complainant’s Main Brief is based on a flawed legal analysis of the hearsay rule, it should be rejected.

¹ As an aside, BPE also notes that the Complainant’s Main Brief improperly relies on Section 1312 of the Public Utility Code, 66 Pa.C.S. § 1312, and an Initial Decision of an Administrative Law Judge, which is still pending review by the Commission, to support her request for a refund. Complainant’s M.B. at 4. Since BPE fully discussed the Commission’s statutory authority to direct an electric generation supplier to issue a refund to a customer and cited the Commission’s most recent pronouncements on this issue in its Main Brief, BPE will not reiterate those arguments here. BPE M.B. at 7-12.

II. SUMMARY OF ARGUMENT

The Complainant advances a faulty legal analysis of the hearsay rule to suggest that uncorroborated out-of-court statements of a BPE sales representative do not constitute hearsay and therefore may be relied upon by the Commission to support findings of fact and reach legal conclusions. Complainant's M.B. at 2-4. Citing to comments in the evidentiary rules and to federal case law, the Complainant refers to the statements of BPE sales representatives as being "verbal acts" that do not equate to hearsay. In making this argument, the Complainant overlooks specific language in the comments and the federal case law explaining that out-of-court statements may sometimes be relied upon if they have other legal significance and are not being offered for the truth of the matter asserted. As the Complainant's testimony was clearly offered to prove that certain promises were made by the BPE sales representative and that her price should therefore not have increased after the initial six-month period, it constitutes hearsay.

Even if the hearsay is admissible, the Complainant introduced no evidence to corroborate this testimony and therefore it may not be used by the Commission to support a finding of fact or legal conclusion. In fact, the written contract admitted into the record directly refutes the Complainant's claims. Furthermore, the Complainant's testimony was riddled with inconsistencies, casting serious doubts on her credibility about the sales transaction that occurred more than three years ago. Therefore, it would be improper and unlawful for the Commission to essentially rewrite the contract between BPE and Ms. Gruelle on the basis of Ms. Gruelle's self-serving and uncorroborated hearsay testimony, which was directly refuted by the written documentation.

III. ARGUMENT

In her Main Brief, the Complainant advances a flawed legal analysis of the hearsay rule and suggests that out-of-court and uncorroborated statements of a BPE sales representative do not constitute hearsay and therefore may be relied upon by the Commission to support findings of fact and reach legal conclusions. Complainant's M.B. at 2-4. Citing to comments accompanying Pennsylvania Rule of Evidence 801 and to federal case law, the Complainant refers to the statements of BPE sales representatives as constituting "verbal acts" that do not equate to hearsay. In making this argument, the Complainant overlooks language in the comments and the federal case law, which explains that out-of-court statements may sometimes be relied upon if they have other legal significance and are not being offered for the truth of the matter asserted.

Here, 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 either revert back to the default service rate or renegotiate a new rate. N.T. 10. It is beyond dispute that this testimony was offered to prove that certain promises were made to the Complainant during the sales transaction, and that as a result, her price should not have increased after the initial six-month period. As such, it is an out-of-court statement that was offered to prove the truth of the matter asserted and constitutes hearsay.

The comment to Pennsylvania Rule of Evidence 801 referenced by the Complainant explains that sometimes an out-of-court statement has direct legal significance and therefore is not considered hearsay. However, the comment also emphasizes that in these situations when statements are considered "verbal acts" rather than hearsay, the evidence of the statement is

“offered for a purpose other than to prove the truth of the matter asserted.” 52 Pa. Code, Title 225, Article VIII, Rule 801 (emphasis added).

The federal case law likewise underscores this point. For instance, in the case cited by the Complainant, *Cloverland-Green Spring Dairies, Inc. v. Pennsylvania Milk Marketing Board*, 298 F.3d 201 (3d Cir. 2002), the federal court found that certain out-of-court statements were of legal significance for reasons other than proving the truth of the matter asserted. The primary issue in that case was whether Pennsylvania may impose wholesale price floors for milk that shield in-state businesses from more efficient out-of-state competitors. In finding that the testimony about offers made by Pennsylvania milk dealers in other states was not hearsay, the court concluded that under the circumstances of that case, the statement offering to sell a product at a particular price was a “verbal act,” not hearsay. Notably, the statement in that case was not offered to prove the truth of the matter asserted but had legal significance in the analysis of whether Pennsylvania’s policies violated the Commerce Clause.

The cases cited by the *Cloverland* court also highlight this important distinction between statements offered to prove the truth of the matter asserted and statements offered for other legal reasons. In *United States v. Montana*, 199 F.3d 947 (7th Cir. 1999), the court emphasized that “verbal acts” are statements that do not make claims about the truth. The court clearly explained that a statement is hearsay if its value as evidence “would have depended on its being truthful, that is, on such a promise having actually been made.” *Montana* at 950. *See also Trepel v. Roadway Express, Inc.*, 194 F.3d 708, 717 (6th Cir. 1999).

Here, the value of the Complainant’s statement as evidence is completely dependent on it being truthful as to whether a promise was actually made that after the initial six-month period, the Complainant would renegotiate the rate or return to the default service rate. Therefore, it is

clearly hearsay. Even if it is admissible hearsay, the out-of-court statements were not substantiated by any other evidence in the record and therefore cannot support a legal conclusion by the Commission. *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366 (Pa. Cmwlth. 1976).²

In fact, the Complainant's uncorroborated hearsay was directly refuted by the written contract that she signed. Specifically, her contract provided that after the initial six-month 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. In the section of the contract 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. It is not in dispute that BPE's obligation to charge the initial price of 6.5 cents per kwh for an initial six-month 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.

Moreover, Ms. Gruelle's allegations and testimony were confusing, inconsistent and unclear in several regards, casting serious doubts on her credibility regarding a sales transaction that was completed over three years ago. Although specific examples are set forth in BPE's Main Brief and will not be repeated here,³ BPE notes that these discrepancies include numerous important details about the sales transaction concerning the amount of time during which her

² A comprehensive discussion of the Commission's inability to rely on hearsay to support findings of fact or legal conclusions is set forth in BPE's M.B. at 12-13.

³ BPE M.B. at 13-17.

initial rate was guaranteed; what would occur at the conclusion of the initial time period; whether she reviewed the contract prior to signing it; whether she was a customer of a different electric generation supplier (“EGS”) before enrolling with BPE; how frequently she was solicited by other EGSs; and discussions with the BPE sales representative about variable rates.

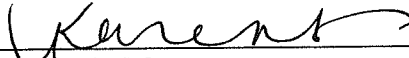
In summary, Pennsylvania law precludes the Commission from relying on uncorroborated hearsay evidence to support findings of fact and reach conclusions of law. *See Walker, supra*. Moreover, under Pennsylvania law, the written documentation is what is relied upon rather than general statements made during a sales pitch. *See Steuart v. McChesney*, 498 Pa. 45, 48, 444 A.2d 659, 661 (Pa. 1982). Further, all preliminary negotiations, conversations and verbal agreements are merged in and superseded by the subsequent written contract. *See Union Storage Co. v. Speck*, 194 Pa. 126, 133, 45 A. 48, 49 (Pa. 1899). Therefore, it would be improper and unlawful for the Commission to essentially rewrite the contract between BPE and Ms. Gruelle on the basis of Ms. Gruelle’s uncorroborated hearsay testimony, especially in view of the serious questions raised about her credibility and when those self-serving claims were directly refuted by other written documentation that was admitted into the record of this proceeding.

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,

Dated: September 21, 2015



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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

DEBBIE GRUELLE c/o TOLL	:	
DIVERSIFIED PROPERTIES, INC.	:	
	:	
v.	:	Docket No. C-2015-2463573
	:	
PPL ELECTRIC UTILITIES CORPORATION	:	
and 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).

Via E-Mail and First-Class Mail

Administrative Law Judge Susan D. Colwell
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Dated this 21st day of September, 2015.



Karen O. Moury, Esq.