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March 2, 2016

VIA E-FILING

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 No. C-2014-2427655

Dear Secretary Chiavetta:

On behalf of Blue Pilot Energy, LLC ("Blue Pilot Energy"), enclosed for filing is a 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

Administrative Law Judges
Elizabeth H. Barnes and Joel H. Cheskis

COMMONWEALTH OF PENNSYLVANIA, ET AL.,	:	
Complainants,	:	
v.	:	**Docket No. C-2014-2427655**
BLUE PILOT ENERGY, LLC,	:	
Respondent.	:	

BRIEF
ON BEHALF OF
BLUE PILOT ENERGY, LLC

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Dated: March 2, 2016

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I. INTRODUCTION

Blue Pilot Energy, LLC ("BPE") was licensed by the Commission in 2011 to provide electric generation services to retail customers throughout Pennsylvania pursuant to the Electricity Generation Customer Choice and Competition Act ("Competition Act" or "Chapter 28").[1] Under the Competition Act, retail customers may choose the company from whom they purchase electric generation services, while their electric distribution companies ("EDCs") continue to deliver the electricity to their homes and businesses. When passing the Competition Act in 1996, the General Assembly declared that "[c]ompetitive market forces are more effective than economic regulation in controlling the cost of generating electricity,"[2] and that "the generation of electricity will no longer be regulated as a public utility."[3]

As a licensed electric generation supplier ("EGS"), BPE has served thousands of retail electric customers in Pennsylvania since 2011 on variable price contracts. Prior to February 2014, no formal complaints were filed against BPE. In January 2014, Pennsylvania -- along with other portions of Northeast United States -- experienced a phenomenon that became known as the "Polar Vortex." A "perfect storm" occurred during the Polar Vortex, in which temperatures were frigid over a prolonged period, resulting in new records for winter electricity use through the service area of PJM Interconnection, LLC ("PJM"). Extremely high demand combined with particularly high forced generator outage rates to produce record high costs in the PJM-

[1] 66 Pa. C.S. §§ 2801-2815.
[2] 66 Pa. C.S. § 2802(5).
[3] 66 Pa. C.S. § 2802(14).

administered energy markets.[4] As a result, many EGSs serving Pennsylvania customers on variable price retail supply contracts increased their retail prices to recover these record-breaking wholesale energy costs. BPE was one of those EGSs that made a business decision to increase variable prices in accordance with the terms and conditions of the contracts entered into by consumers. The Company's complaint volume at the Commission immediately spiked, due to customers' frustration with price increases and the length of time it took to switch to another EGS or back to the EDC.

On June 20, 2014, the Commonwealth of Pennsylvania by Attorney General Kathleen Kane through the Bureau of Consumer Protection ("OAG"), and Tanya J. McCloskey, Acting Pennsylvania Consumer Advocate ("OCA") (collectively referred to as the "Joint Complainants") responded to the Polar Vortex and accompanying variable price increases of EGSs through the filing of a Joint Complaint against BPE, as well as four very similar complaints filed against other EGSs.[5] In filing the Joint Complaint, the OAG and OCA recited the high volume of consumer contacts and complaints that they had received about EGSs' variable prices in early 2014, of which BPE was accountable for an extremely small percentage.

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[4]The Federal Energy Regulatory Commission ("FERC") noted that during one of the polar vortices that hit Pennsylvania in January 2014 in particular, electricity prices surged with the locational marginal prices being near or above $2,000 per Mwh for a number of hours in PJM. *FERC Staff Report, Winter 2013-2014 Operations and Market Performance in RTOs and ISOs*, AD14-8-000, at 10 (April 1, 2014).

[5] *See Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Complaint filed June 20, 2014; *Commonwealth of Pennsylvania, et al. v. HIKO Energy, LLC*, Docket No. C-2014-2427652 (Complaint filed June 20, 2014); *Commonwealth of Pennsylvania, et al. v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric*, Docket No. C-2014-2427656 (Complaint filed June 20, 2014); and *Commonwealth of Pennsylvania, et al. v. Respond Power, LLC*, Docket No. C-2014-2427659 (Complaint filed June 20, 2014). These complaints basically followed a cookie cutter approach, except that some allegations were lodged against other EGSs that were not raised in the Joint Complaint filed against BPE. Please note that, pursuant to 66 Pa. C.S. §§ 331(g) and 332(e), the Commission has taken official notice of the filing of these other similar complaints. *Blue Pilot Interlocutory Order* at 5-6.

The Joint Complainants alleged violations of the Public Utility Code[6] ("Code") and Commission regulations regarding BPE's sales, marketing and business practices prior to, during and following the Polar Vortex. As a result of those alleged violations, the Joint Complainants sought various remedies including refunds to consumers, a civil penalty and revocation of BPE's EGS license.

Two years ago, amidst the Polar Vortex and prior to the filing of the Joint Complaint, BPE completely ceased retail marketing in Pennsylvania. Nearly one year ago, BPE fully exited the Pennsylvania retail market, voluntarily surrendering its EGS license. Yet, this litigation persists, with the Joint Complainants using this forum to make BPE the scapegoat for all the woes of PJM's wholesale market and Pennsylvania's retail market in early 2014.

In pursuing this litigation, the Joint Complainants seek to have the Commission rely on a nonexistent "pattern of practice" legal theory under which if they prove that BPE violated Commission regulations or orders with respect to some individual consumers, the Commission can find that BPE violated these regulations or orders in its dealings with all of the customers it was serving in Pennsylvania at that time. They further rely on flawed legal interpretations of the Commission's regulations advanced by their expert witnesses, who invent standards to apply to BPE that simply do not exist. They also urge the Commission to enforce provisions of state consumer protection laws, which the Commission has already said it lacks the statutory authority to do. Notably, they would also have the Commission direct BPE to issue refunds to every customer served during that time, using the irrelevant price to compare ("PTC") charged by

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[6] 66 Pa. C.S. §§ 101 *et seq.*

electric distribution companies ("EDCs"), regardless of what an individual customer's own experience may have been. In fact, this proposal ignores the testimony of consumers in this proceeding who indicated that BPE sales representatives did not guarantee them savings and that they understood their prices would vary to reflect wholesale market conditions.

The Commission has expressly acknowledged that the variable price increases experienced by retail consumers were the direct result of wholesale energy market volatility resulting from the very cold weather that the region endured in January and February of 2014, which contributed to increased and record-breaking use of natural gas and electricity. Specifically, the Commission explained that "[a]s a result of these high PJM energy market prices, many electric generation suppliers (EGSs) serving Pennsylvania customers with variable-priced retail supply contracts needed to increase their retail prices to customers in order to recover the higher wholesale electric energy costs they incurred in January 2014." *Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, Docket No. M-2014-2406134 (Order entered March 4, 2014) ("*Variable Price Order*") at 2. The Commission further observed that "[d]ue to the foregoing events as well as higher than usual energy use due to prolonged cold weather, some Pennsylvania retail electric customers received very high electric bills in amounts two to three times (and even higher) than what they would normally be billed during this time of year." *Id.*

Testifying before the Consumer Affairs Committee of the Pennsylvania House of Representatives on April 10, 2014, Commission Witmer noted that "as consumer usage spiked…so did wholesale market prices for gas and electricity. It appears that these wholesale price increases, in whole or in part, were passed on by EGSs to retail electric customers receiving service at a variable rate. This resulted in a doubling, tripling or even larger increases of the per-

kilowatt hour rate that these customers were charged for their electric usage. Variable rate customers are particularly vulnerable to these price spikes because their rates change monthly to reflect market conditions."[7]

Due to the unprecedented wholesale prices that led to significant increases in variable rates for thousands of retail customers, the Commission committed in the *Variable Price Order* to investigate "the causes of these underlying wholesale cost spikes and pursue all appropriate FERC complaints, and PJM tariff and operating manual modifications necessary to improve the efficient functioning of wholesale PJM markets." *Id.* at 2, footnote 2. The Commission further noted that it would participate in all PJM stakeholder processes and OPSI working groups to help implement modifications to energy and capacity market rules necessary to achieve these objectives. *Id.*

Similarly, in offering testimony before the Pennsylvania Senate Consumer Protection and Professional Licensure Committee on April 1, 2014, Acting Consumer Advocate McCloskey indicated that the OCA would be working at PJM and at the FERC to address these wholesale market events and ensure that solutions are developed expeditiously.[8] Indeed, the FERC has taken actions, including the initiation of a price formation proceeding to specifically examine the use of uplift payments, offer price mitigation, scarcity and shortage pricing and operator actions

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[7] Testimony is available at: http://www.puc.pa.gov/General/pdf/Testimony/Witmer_Variable_Rates_Testimony-House04-10-14.pdf (last accessed on February 19, 2016). *See also* Commissioner Powelson's testimony before the Consumer Protection and Professional License Committee of the Pennsylvania Senate on April 29, 2014: http://www.puc.state.pa.us/General/pdf/Testimony/Powelson-Senate_Variable_Rates_042914.pdf (last accessed on February 28, 2016).

[8] Testimony is available at: http://www.oca.state.pa.us/Testimony/2014/Testimony%20of%20Tanya%20McCloskey%20Re.%20Variable%20Rate%20Plans_04-01-2014.pdf (last accessed February 28, 2016).

that affect prices. Also, PJM has actively participated in that proceeding, as well as others, and made compliance filings to implement changes required by the FERC.

No one could have predicted the wholesale market volatility and extreme price spikes that occurred in early 2014. The Commission certainly did not predict these events. Indeed, as the Polar Vortex was occurring, Chairman Brown testified on January 23, 2014 before the Pennsylvania House Democratic Policy Committee about electric competition, describing the Commission's efforts to educate consumers with the message: "Shop. Switch. Save." and referring to www.PAPowerSwitch.com as "an impartial information source for consumers to shop for their electricity."[9] She further noted that "PAPowerSwitch.com puts tools at consumers' fingertips to make informed decisions about shopping for electricity."[10]

The Joint Complainants certainly did not predict these events either. In her April 1, 2014 testimony, Acting Consumer Advocate McCloskey described the winter as being one of the coldest in decades, resulting in record winter electricity demand as well as record winter wholesale market prices.[11] Referring to volatility in wholesale day ahead and real time energy market prices as not being unusual, Acting Consumer Advocate McCloskey testified that what was unusual was the extraordinary level of the wholesale price increases and the extreme impact on many Pennsylvania residential customers who were directly exposed to these price spikes through their monthly electric bill. While Acting Consumer Advocate McCloskey was quick to

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[9] Testimony is available at: http://www.puc.pa.gov/general/pdf/testimony/Brown-House_Policy-PAPS_012314.pdf (last accessed February 19, 2016).
[10] *Id.*
[11] Testimony is available at: http://www.oca.state.pa.us/Testimony/2014/Testimony%20of%20Tanya%20McCloskey%20Re.%20Variable%20Rate%20Plans_04-01-2014.pdf (last accessed February 28, 2016).

blame EGS disclosure statements, which she described as vague and meaningless, she did not explain how complex electric pricing terms could be better explained to consumers but rather centered her proposals on more drastic measures designed to significantly limit, if not eliminate, the ability of EGSs to offer variable prices to consumers. She also did not indicate any efforts of the OCA to address concerns with disclosure statements prior to the Polar Vortex.

In the same way that the Commission, PJM, the FERC and the Joint Complainants did not predict the extreme volatility in the wholesale market that would occur in early 2014, BPE and its sales agents were likewise unprepared for the frigid weather conditions, record-setting demands, forced generator outage rates and the resulting wholesale prices. No evidence has been introduced in this proceeding to suggest that BPE and its sales representatives set out to induce retail customers to enter into variable price contracts with the expectation of imposing significant increases in response to a future and unprecedented energy crisis affecting Pennsylvania's wholesale and retail market. Rather, customers voluntarily opted to enter into variable price contracts that offered immediate savings, without regard for the fact that the terms and conditions included no price ceilings, no price formulae or methodologies, and knowing that prices were completely at the whim of the PJM wholesale market. Indeed, the record shows time and time again that consumers enjoyed prices below the PTC for many months or even years prior to the Polar Vortex.

However, when the Polar Vortex occurred, demand for electricity reached new records, generators failed to produce, wholesale prices increased to unprecedented levels and retail variable prices increased accordingly, consumers complained. A frequent source of their complaints was that they were required to wait as much as two months to switch to another EGS or return to the EDC, over which an EGS had no control and was a function of the Commission's

switching rules in place at that time.[12] Besides the lengthy switching process, the Polar Vortex and accompanying variable price increases uncovered several other shortcomings in the electric retail market that contributed to consumer frustration, including:

- Customers incorrectly believed that the only reason for switching to an EGS was to save money "forever" or to always pay less than they would have paid the EDC;[13]

- Customers seldom reviewed disclosure statements that were provided to them or were not even aware that they had received them;[14]

- Even customers who reviewed their disclosure statements or understood that their rates would vary in accordance with several factors including wholesale market conditions did not take note that the contract contained no price ceilings;[15]

- Many customers did not review their monthly electric bills or pay attention to the supplier charges on those bills.[16]

To make BPE the scapegoat for everything that went wrong in the wholesale and retail market in Pennsylvania in early 2014 is wholly inappropriate and unfair. There is universal agreement that the wholesale market did not operate as it should have during the Polar Vortex. As a result, both the Commission and the OCA vowed to get more involved, the FERC initiated proceedings to remedy the deficiencies and PJM made filings complying with the FERC

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[12] *See, e.g.*, OAG/OCA Consumer Testimony at 403 (George Dingler); OAG/OCA Consumer Testimony at 505 (David Duke); OAG/OCA Consumer Testimony at 255 (Scott Hornberger); OAG/OCA Consumer Testiomny at 397 (Karen Mauro); OAG/OCA Consumer Testimony at 472 (Russell Mowl); OAG/OCA Consumer Testimony at 298 (Tom and Amy Quinn); OAG/OCA Consumer Testimony at 461 (James Reed.); OAG/OCA Consumer Testimony at 443 (Martha Vetter); OAG/OCA Consumer Testimony at 488 (Charles Wentzel); Tr. 479-480 (Daniel Zablosky).

[13] *See, e.g.*, OAG/OCA Consumer Testimony at 371-372 (Katherine Williams); OAG/OCA Consumer Testimony at 564 (Neil Weaver); OAG/OCA Consumer Testimony at 404 (George Dingler).

[14] *See, e.g.*, Tr. 705 (Russell Mowl); OAG/OCA Consumer Testimony at 258 (Joan Miller); OAG/OCA Consumer Testimony at 283 (Richard Perry).

[15] *See, e.g.*, OAG/OCA Consumer Testimony at 503 (David Duke); OAG/OCA Consumer Testimony at 155 (Erie Animal Hospital); OAG/OCA Consumer Testimony at 216 (Cambria Hardware & Equipment).

[16] *See, e.g.*, Tr. 378 (David Duke); Tr. 442 (Richard Perry); Tr. 164 (Howard Johnson Motor Lodge); Tr. 688 (Linda Wintersteen); Tr. 461-463 (Dan Ellingsen).

directives. To penalize BPE in the form of license revocation, civil penalties and refunds to all customers as a result of variable price increases -- which the Commission has acknowledged directly reflected the wholesale market volatility -- improperly shifts blame from the malfunctioning of the wholesale market to BPE.

BPE exited the Pennsylvania retail market two years ago and asked nearly one year ago that its license be cancelled, effective immediately. By this Main Brief, BPE agrees to a revocation of its EGS license, such that it cannot be reinstated.[17] It has also issued refunds to many customers since early 2014. BPE has done its part to address any of its own shortcomings that may have contributed to the Polar Vortex-induced variable price crisis. No further remedies are warranted against BPE as part of this proceeding.

II. STATEMENT OF THE CASE

A. Procedural Background

1. Licensing Order

On June 9, 2011, the Commission approved BPE's EGS license application, authorizing the Company to supply electricity or electric generation services to the public within the Commonwealth of Pennsylvania. *License Application of Blue Pilot Energy, LLC*, Docket No. A-2011-2223888 (June 9, 2011) ("*Licensing Order*"). This license was issued pursuant to the

[17] BPE is unaware of any distinction the Commission has made between cancellation and revocation of an EGS license. In the event that a cancellation due to failure to maintain a bond or other approved security enables an EGS to seek reinstatement of the license upon obtaining such bond or other security (such as in the transportation industry where a certificate can be reinstated upon obtaining insurance), whereas the revocation of a license does not allow the possibility of reinstatement, BPE is willing to accept revocation of its license as part of this proceeding.

Commission's authority under Section 2809 of the Code.[18] Since receiving its license to operate as an EGS in 2011, BPE has supplied electric generation services under variable rate plans to thousands of residential and commercial customers throughout Pennsylvania.[19] Prior to the Polar Vortex, in December 2013, BPE was serving about 2,500 customers in Pennsylvania.[20] As of March 2014, BPE was no longer engaged in retail marketing in Pennsylvania, and as of May 4, 2015, BPE announced its exit from the Pennsylvania retail market.[21] BPE is currently serving no customers in Pennsylvania.[22]

2. Joint Complaint

By the Joint Complaint, the Joint Complainants alleged that they had received numerous contacts and complaints from consumers related to variable rates charged by electric generation suppliers EGSs, including BPE. Of the 2,434 contacts received by the OCA, only 83 or 3.4% of them were from BPE's former or current customers.[23] Similarly, of the 7,503 consumer complaints received by the OAG from variable rate customers, only 232 or 3.1% concerned BPE.[24] Based on these consumer complaints, the Joint Complainants averred five separate counts against BPE, as follows:

Count I – Alleged Failing to Provide Accurate Pricing Information

Count II – Alleged Prices Nonconforming to Disclosure Statement

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[18] 66 Pa. C.S. § 2809. Throughout this Main Brief, BPE will include a full citation to the statutory provision or regulation the first time it is mentioned and thereafter refer to it by its abbreviated name.
[19] OAG/OCA St. 1 at 7-8.
[20] OAG/OCA St. 1 at 9.
[21] OAG/OCA St. 1 at 7.
[22] OAG/OCA St. 1-SR (Suppl.), Exhibit BRA-1-SR (Suppl.) at page 4 (Discovery Request No. 3).
[23] Joint Complaint ¶ 16. For completeness of the record in this proceeding, BPE requests that the Commission take official notice or judicial notice of the Joint Complaint filed by the Joint Complainants and the Answer filed by BPE, pursuant to Section 5.408 of the Commission's regulations, 52 Pa. Code § 5.408.
[24] Joint Complaint ¶ 17.

Count III – Alleged Misleading and Deceptive Promises of Savings

Count IV – Alleged Lack of Good Faith Handling of Complaints

Count V – Alleged Failure to Comply with the Telemarketer Registration Act

The Joint Complaint made several requests for relief, including restitution in the form of refunds to consumers, a civil penalty in an unidentified amount, license suspension or revocation and injunctive measures. The Office of Small Business Advocate ("OSBA") and the Bureau of Investigation and Enforcement ("I&E") intervened on July 10, 2014 and July 31, 2014, respectively.

On July 10, 2014, BPE filed an Answer in response to the Joint Complaint, in which it admitted or denied the various averments made by the Joint Complainants and specifically denied that any of its actions violated Pennsylvania law or the orders and regulations of the Commission. Further, BPE denied that consumers were misled or deceived as to the price they would pay for electricity. To the contrary, BPE averred that consumers were provided with clear and conspicuous advertising, marketing, and other materials informing them of the nature and rate terms of their contracts for the provision of electricity.

Also, on July 10, 2014, BPE filed Preliminary Objections to the Joint Complaint seeking dismissal of Counts I (providing accurate pricing information), II (prices conforming to disclosure statement) and V (Telemarketer Registration Act). In these Preliminary Objections, BPE contended that: (i) its disclosure statement was approved by the Commission through the licensing process and provided the information required by the Commission's regulations; (ii) the Commission lacks jurisdiction to regulate the rates charged by EGSs; and (iii) the Commission does not have statutory authority to enforce the Unfair Trade Practices and

Consumer Protection Law ("Consumer Protection Law" or "CPL")[25] or the Telemarketer Registration Act ("TRA").[26]

On August 20, 2014, the Administrative Law Judges ("ALJs") issued an Interim Order Granting in Part and Denying in Part Preliminary Objections ("*Interim Order on Preliminary Objections*"). By the *Interim Order on Preliminary Objections*, the ALJs ruled that the Commission lacks jurisdiction to determine whether BPE violated the Consumer Protection Law, but did not dismiss Count I (accurate pricing information) of the Joint Complaint because the Commission has jurisdiction to determine whether BPE violated the Commission's own consumer protection regulations. *Id.* at 10. The *Interim Order on Preliminary Objections* struck Count II (prices conforming to disclosure statement) on the basis of lack of jurisdiction since cost of service principles are irrelevant to EGS pricing. *Id.* at 12. As to Count V (Telemarketer Registration Act), the *Interim Order on Preliminary Objections* found that although the Commission lacks jurisdiction to hear complaints brought under the TRA, it may consider whether BPE violated the Commission's own telemarketing regulations. *Id.* at. 17.

An Initial Prehearing Conference convened on August 25, 2014. The ALJs issued their first Procedural Order on August 25, 2014 affording the parties an opportunity to submit a joint proposed procedural schedule on or before August 29, 2014 regarding the following dates: (i) a deadline date for the OCA/OAG to serve written direct testimony or affidavits of consumer witnesses; (ii) proposed date(s) for a telephonic evidentiary hearing wherein written direct testimony or affidavits of the consumer witnesses will be admitted into the record subject to

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[25] 73 P.S. §§ 201-1 *et seq.*
[26] 73 P.S. §§ 2242 *et seq.*

cross examination and/or objections; and (iii) a date for a further prehearing conference to schedule the remaining deadlines and evidentiary hearings. The parties collaborated and made this submission August 29, 2014. On September 3, 2014, the ALJs issued Procedural Order #2, establishing that: (i) the Joint Complainants would submit written direct testimony of consumer witnesses by October 17, 2014; (ii) evidentiary hearings for purposes of admitting the written direct testimony of the consumer witnesses subject to cross examination and timely objections would be held on November 13-14, 2014; and (iii) that a further prehearing conference would be held on November 25, 2014.

On September 3, 2014, BPE filed an unopposed Motion for Protective Order. On the same date, the ALJs issued a Protective Order for this proceeding.

On September 8, 2014, the Joint Complainants filed a Joint Petition for Interlocutory Review and Answer to Material Questions ("Interlocutory Petition"), in response to the ALJs' *Interim Order on Preliminary Objections* issued on August 20, 2014. The parties filed briefs on September 18, 2014 in support of or opposing the Interlocutory Petition. By Secretarial Letter dated October 3, 2014, the Commission waived the 30-day period for consideration of the Interlocutory Petition that is set forth in Section 5.303 of the Commission's regulations,[27] in order to afford the Commission adequate time to address the questions raised.

On October 22, 2014, BPE filed an unopposed Motion for Continuance of the evidentiary hearings scheduled for November 13-14, 2014. The primary justification for the requested continuance was to provide BPE sufficient time to fully respond to the Joint

[27] 52 Pa. Code § 5.303.

Complainants' discovery requests relating to 100 consumer witnesses and prepare for hearings, when previously they had identified approximately 40 consumer witnesses.

On October 28, 2014, the ALJs issued an Order Granting Motion for Continuance. By that Order, the ALJs cancelled the hearings scheduled for November 13-14, 2014 and rescheduled them for February 2-6, 2015. The Order also directed the parties to coordinate the most efficient means for admitting the pre-served consumer testimony into the record and established dates by when BPE must circulate exhibits that it intended to use during the hearing and file any Motions to Strike pre-served consumer testimony.

On December 11, 2014, the Commission entered an Order addressing the Interlocutory Petition ("*BPE Interlocutory Order*"). The Commission's *BPE Interlocutory Order*: (i) granted interlocutory review; (ii) agreed with the *Interim Order on Preliminary Objections* that the Commission does not have jurisdiction to enforce the Consumer Protection Law or TRA, but that it may find violations of its own regulations; and (iii) declined to dismiss Count II (prices conforming to disclosure statement) on the basis that it may determine whether an EGS's prices conform to the disclosure statement. *Id.* at 16-20.

On December 31, 2014, BPE filed a second unopposed Motion for Continuance, requesting a continuance of the evidentiary hearings scheduled for February 2-6, 2015 until March 2015. In that Motion, BPE cited the unanticipated and extended absence from the office of BPE's lead day-to-day counsel due to a death in his family, which hampered his ability to engage in the necessary hearing preparations. The ALJs granted a continuance and rescheduled the hearings for March 30-April 3, 2015.

On January 9, 2015, the ALJs issued a Further Prehearing Conference Order establishing a Further Prehearing Conference for February 2, 2015 and advising the parties that the remaining

schedule for this proceeding would be developed during the Further Prehearing Conference, including the dates for the submission of pre-served written testimony, and hearings for the admission of that pre-served expert testimony, subject to cross-examination and any timely motions. Additionally, the ALJs informed the parties that a discussion would be held regarding the most efficient means for admitting the pre-served consumer testimony into the record, including entering into any stipulations or waiving the need to cross-examine any witnesses and engaging in any other activity that will help expedite the evidentiary hearings. At the Further Prehearing Conference on February 2, 2015, the ALJs directed the Joint Complainants and BPE to submit Memoranda of Law regarding reliance by the Commission on "pattern and practice" evidence by February 9, 2015 and February 26, 2015.

On February 4, 2015, the ALJs issued Procedural Order #4, establishing a schedule for the remainder of the proceeding, including the service of the Joint Complainant Direct Testimony by June 12, 2015; BPE Rebuttal Testimony by August 3, 2015; Surrebuttal Testimony by September 10, 2015; and evidentiary hearings on September 16-18, 2015.

On February 9, 2015, the Joint Complainants filed a Joint Memorandum of Law Regarding the Admission of Pattern of Practice Evidence. On February 26, 2015, BPE filed a Reply Memorandum of Law Regarding the Admissibility of Pattern and Practice Evidence. The ALJs have not issued an Order addressing these memoranda of law.

On March 18, 2015, BPE filed a Motion to Strike the direct testimony of the 97 consumer witnesses, in their entirety or in part, on the basis that the statements contained hearsay and responses to leading questions. BPE also noted that many of the statements were indecipherable, vague and non-responsive to the questions. The Joint Complainants filed an Answer to the

Motion to Strike on March 26, 2015. The ALJs issued an Order Denying Motion to Strike on March 27, 2015.

On March 30-April 3, 2015, evidentiary hearings were convened for the purpose of admitting consumer witness testimony of the Joint Complainants, subject to cross-examination. Over the course of the hearings, the written testimony of approximately 80 consumer witnesses was admitted into the record.[28] During cross-examination, BPE used several exhibits, which were admitted into the record.

On May 14, 2015, BPE filed a Motion to Dismiss Joint Complaint. BPE contended that the record in this proceeding cannot support a finding that any of BPE's marketing, advertising or trade practices violated any Pennsylvania law, Commission regulations or Commission orders. It also noted that it abandoned its license on May 4, 2015 and that the expenses incurred by BPE in defending the Joint Complaint had forced it to shut down its business. BPE further explained that independent of this proceeding, it has resolved nearly every complaint that it received from a Pennsylvania customer, except for a few formal complaints that are still pending before the Commission.

On May 29, 2015, the Joint Complainants filed a letter requesting that the schedule for serving testimony in the proceeding be placed on hold pending a resolution of the Motion to

[28] Although a reference has been made in the Joint Complainants' testimony about 83 consumer witnesses, BPE has not been able to precisely replicate that number. Further, BPE notes that Russell Mowl (OAG/OCA Consumer Testimony at 469, 543 and 547) provided three identical pieces of testimony relating to three accounts he enrolled with BPE. Also, the statements of Irfan Isik, Mehmet Isik and Yaglidereliler Corporation (OAG/OCA Consumer Testimony at 358, 354 and 362) are three identical pieces of testimony regarding related accounts. Therefore, BPE is referring throughout this Main Brief to the admitted testimony of approximately 80 consumer witnesses.

Dismiss and any other forthcoming motions or actions from the Joint Complainants. By Procedural Order #6, the ALJs suspended the deadlines for testimony until further notice.

The Joint Complainants filed an Answer to the Motion to Dismiss on June 5, 2015. The ALJs issued an Order Denying Motion to Dismiss on June 11, 2015.

The Joint Complainants filed a Motion for Entry of Judgment on June 22, 2015. BPE filed an Answer to the Motion for Entry of Judgment on July 22, 2015. By Order dated August 4, 2015, the ALJs issued an Order Granting in Part and Denying in Part Motion for Entry of Judgment. Although the Motion was denied in all important respects concerning the substantive issues, the ALJs granted a small portion of the Motion regarding a procedural issue involving a discovery dispute. The Order directed the parties to submit a revised procedural schedule within ten days.

By Procedural Order #7 issued on August 14, 2015, the ALJs adopted the unopposed revised procedural schedule submitted by the parties. Under this schedule, the Joint Complainants' Direct Testimony was due on October 20, 2015; BPE's Rebuttal Testimony was due on December 8, 2015; the Joint Complainants' Surrebuttal Testimony was due on January 20, 2016; and evidentiary hearings on this pre-served testimony of expert witnesses were rescheduled for February 3-5, 2016.

On December 17, 2015, the Joint Complainants served discovery requests on BPE seeking information about its bond or other approved security. BPE objected to this discovery on the basis that the Joint Complaint contained no allegations regarding its bond. The Joint Complainants filed a Motion to Compel on January 7, 2016, to which BPE filed an Answer on January 12, 2016.

On January 14, 2016, the ALJs issued an Order Granting Motion to Compel, directing BPE to respond to the discovery requests within five days. BPE filed a Petition for Certification on January 19, 2016, raising fundamental issues of due process regarding the Joint Complainants' requests for information that far exceeded the scope of the allegations in the Joint Complaint. Briefs opposing and supporting the Petition were filed by the Joint Complainants and BPE, respectively, on January 22, 2016. On January 27, 2016, the ALJs issued Order Denying Petition for Certification and directed BPE to provide the information within two days. On February 1, 2016, the Joint Complainants served Supplemental Surrebuttal Testimony of Barbara R. Alexander, OAG/OCA Statement No. 1-SR (Suppl), incorporating the information provided by BPE in response to the discovery requests.

Evidentiary hearings were held on February 3, 2016. BPE had previously served Rebuttal Testimony, BPE Statement No. 1, in accordance with the procedural schedule, but elected not to offer it into the record during those hearings. Likewise, the Joint Complainants did not move OAG/OCA Statement No. 1-SR into the record. Although BPE objected to the admission of OAG/OCA Statement No. 1-SR (Suppl) on the basis that it addressed issues that were not raised in the Joint Complaint, the testimony was admitted. BPE conducted cross-examination of Ms. Alexander regarding her Direct Testimony, OAG/OCA Statement No. 1; of Dr. Steven Estomin regarding his Direct Testimony, OAG/OCA Statement No. 2; and of Mr. Nicholas Basehore regarding his Direct Testimony, OAG/OCA Statement No. 4. BPE waived cross-examination of Ms. Ashley Everette regarding her Direct Testimony, OAG/OCA Statement No. 3.

By Briefing Order dated February 4, 2016, the ALJs established a briefing schedule for the parties to file Main Briefs on March 2, 2016 and Reply Briefs on March 23, 2016. This Main Brief is filed in accordance with the Briefing Order.

B. Factual Background

BPE has been licensed as an EGS since 2011, supplying electric generation services to thousands of residential and commercial customers throughout Pennsylvania.[29] Although BPE began marketing in all EDC service territories in 2012, it halted all retail sales activities in Pennsylvania in March 2014.[30] On May 4, 2015, BPE notified the Commission that it was exiting the Pennsylvania market and returning customers to default service. By that letter, BPE asked the Commission to cancel its license, effective immediately.[31] BPE is currently serving no retail customers in Pennsylvania.[32]

From 2011 until early 2014, BPE marketed electric generation services to residential and commercial customers throughout Pennsylvania primarily by means of telemarketing sales calls by its employees or sales agents.[33] The Company only offered variable price plans in Pennsylvania, and most of these plans included an initial price that remained in effect for a 60 or 90 day (or longer) period.[34] Thereafter, the prices could vary monthly based on several factors,

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[29] OAG/OCA St. 1 at 9.
[30] OAG/OCA St. 1 at 7.
[31] *See* http://www.puc.pa.gov/about_puc/consolidated_case_view.aspx?Docket=A-2011-2223888. S*ee also Electric Generation Supplier License Cancellations of Companies with an Expired Financial Security*, Docket No. M-2015-2490383 (Tentative Order entered December 17, 2015) (Commission proposed to cancel BPE's license, alleging that it had failed to maintain a bond or other approved security).
[32] OAG/OCA St. 1-SR (Suppl.), Exhibit BRA-1-SR (Suppl.) at page 4 (Discovery Request No. 3).
[33] OAG/OCA St. 1 at 7.
[34] *Id.* OAG/OCA Consumer Testimony at 501 (David Dukes) (180 days). Although the record does not contain this information, BPE notes that in 2013, BPE implemented a trial program pursuant to which it sold a two-year term plan with a fixed rate of $0.069 per kWh to 11 Pennsylvania business customer accounts. Pursuant to the terms of

including changes in wholesale energy market and PJM wholesale market conditions.[35] BPE imposed no cancellation fee on consumers to terminate their contracts.[36]

From 2011 until February 2014, no customers had filed formal complaints with the Commission against BPE.[37] During the month of January 2014, wholesale prices for hourly energy supply in the day ahead and particularly the real time markets increased exponentially in response to sustained cold weather that is commonly referred to as the Polar Vortex. New records were set for winter electricity use in Pennsylvania and throughout PJM region. High demand combined with particularly high forced outage rates for a number of generators to produce record high costs in the PJM-administered energy markets. For instance, average wholesale day-ahead LMP prices for Pennsylvania in January 2014 were estimated at $148/MWh compared to $44/MWh in December 2013. Similarly, estimated energy uplift charges, which are energy charges billed to EGSs in addition to LMP costs, were estimated at $631 million in the month of January 2014, which is equivalent to a full year of uplift charges for the period 2010-2012. *See Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, Docket No. M-2014-2406134 (Order entered March 4, 2014) ("*Variable Price Order*"). Further, the Federal Energy Regulatory Commission ("FERC") noted that during one of the polar vortices that hit Pennsylvania in January 2014 in particular, electricity prices surged with the locational marginal prices being near or above

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those customers' contracts, that guaranteed rate never changed and remained in effect until service was terminated. This caveat is provided in the interest of full disclosure even though it does not affect the merits of this proceeding.

[35] OAG/OCA Exh. BRA-2 at 15.

[36] *Id.*

[37] See authority information at: http://www.puc.pa.gov/about_puc/search_results/utility/authority_search/utility_detail_view.aspx?Utility=1113179.

$2,000 per Mwh for a number of hours in PJM. *FERC Staff Report, Winter 2013-2014 Operations and Market Performance in RTOs and ISOs*, AD14-8-000, at 10 (April 1, 2014).[38]

In the *Variable Price Order*, the Commission expressly recognized that "[a]s a result of these high PJM energy market prices, many electric generation suppliers (EGSs) serving Pennsylvania customers with variable-priced retail supply contracts needed to increase their retail prices to customers in order to recover the higher wholesale electric energy costs they incurred in January 2014." *Id.* at 2. The Commission further observed that "[d]ue to the foregoing events as well as higher than usual energy use due to prolonged cold weather, some Pennsylvania retail electric customers received very high electric bills in amounts two to three times (and even higher) than what they would normally be billed during this time of year." *Id.*

Like many other EGSs, BPE exercised its discretion under its variable-priced contracts and made a business decision to increase retail customers' rates to recover at least a portion of those wholesale price spikes. That business decision, which BPE was permitted to make in a deregulated environment in a manner that was consistent with its Disclosure Statement, resulted in the filing of a significant number of formal complaints with the Commission. Although the number of formal complaints spiked in early 2014, BPE has successfully resolved the vast

[38] Staff report is available at http://www.ferc.gov/legal/staff-reports/2014/04-01-14.pdf (last accessed February 19, 2016).

majority of them through settlements.[39] BPE has also issued refunds or credits to consumers who did not file formal complaints with the Commission.[40]

In the *Variable Price Order*, the Commission referred to "a record number of inquiries and informal complaints related to high bills over the last several weeks." *Id.* at 2. Testifying before the Consumer Protection and Professional License Committee on April 29, 2014, Commissioner Powelson indicated that 17,000 customers had contacted the Commission with concerns about EGSs.[41] The experiences of the OCA and the OAG were very similar. In early 2014, the OCA received 2,434 contacts from consumers regarding EGS variable prices, while 7,503 consumers filed complaints with the OAG.[42] These figures demonstrate that the onslaught of consumer complaints due to variable prices stemming from the Polar Vortex reflected an industry-wide occurrence. Notably, a relatively small percentage (about 3%) of the consumers who contacted the OCA and OAG about EGSs' variable prices were served by BPE.

C. Regulatory and Legal Background

1. Passage of Competition Act

On December 3, 1996, the Competition Act was enacted into law in Pennsylvania.[43] The Competition Act establishes a framework that provides retail customers direct access to a competitive market for the generation and sale or purchase of electricity, while ensuring that

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[39] *See, e.g.*, *Yaglidereliler Corp. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2413732 (Certificate of Satisfaction filed May 19, 2015); *Clientlink, Inc. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2439832 (Certificate of Satisfaction filed December 12, 2014); *Barboza, Merlin t/a RK Ent. Inc.*, Docket No. C-2014-2445639 (Certificate of Satisfaction filed March 10, 2015).
[40] OAG/OCA St. 1 at 54-55.
[41] Testimony is available at:
http://www.puc.pa.gov/General/pdf/Testimony/Powelson-Senate_Variable_Rates_042914.pdf
(last accessed February 28, 2016).
[42] Joint Complaint ¶¶ 16-17.
[43] 66 Pa. C.S. §§ 2801-2815.

safe, affordable and reliable transmission and distribution services are available.[44] In passing the Competition Act to allow retail customers to choose the entity that supplies their generation service, the General Assembly proclaimed that "[c]ompetitive market forces are more effective than economic regulation in controlling the cost of generating electricity."[45]

The General Assembly further declared that "[t]his Commonwealth must begin the transition from regulation to greater competition in the electricity generation market to benefit all classes of customers and to protect this Commonwealth's ability to compete in the national and international marketplace for industry and jobs."[46] Notably, the General Assembly emphasized that "[t]he generation of electricity will no longer be regulated as a public utility function except as otherwise provided for in this chapter. Electric generation suppliers will be required to obtain licenses, demonstrate financial responsibility and comply with such other requirements concerning service as the commission deems necessary for the protection of the public."[47]

By the Competition Act, the General Assembly authorized the Commission to implement the electric choice program through the promulgation of regulations and orders giving retail customers direct access to a competitive generation market, while ensuring that customers continue to receive "safe and affordable transmission and distribution service...at levels of reliability" to which they had become accustomed prior to passage of the Competition Act.[48] The Commission has implemented the Competition Act through a series of regulations and orders that establish standards for EDCs and EGSs and offer protections to consumers.

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[44] 66 Pa. C.S. § 2802(3)
[45] 66 Pa. C.S. § 2802(5).
[46] 66 Pa. C.S. § 2802(7).
[47] 66 Pa. C.S. § 2802(14) (emphasis added).
[48] 66 Pa. C.S. § 2802(3).

A review of Chapter 28 demonstrates that the Commission's regulatory oversight of EGSs is indeed very limited. Specifically, the statutory requirements applicable to EGSs are primarily set forth in Code Section 2809, which focuses on licensing and financial responsibility. In addition, Code Section 2809(e) allows the Commission to forbear from applying the Code's requirements to EGSs "which it determines are unnecessary due to competition among" EGSs.[49] Code Section 2809(e) further requires the Commission to impose requirements on EGSs that are "necessary to ensure that the present quality of service provided by electric utilities does not deteriorate, including assuring that adequate reserve margins of electric supply are maintained and assuring that 52 Pa. Code Ch. 56 (relating to standards and billing practices for residential service) are maintained." *Id.* Code Section 2810 also provides that EGSs must pay the Commonwealth's gross receipts tax.[50]

In *Delmarva Power & Light Co. v. Pa. Pub. Util. Comm'n*, 582 Pa. 338, 870 A.2d 901 (Pa. 2005) ("*Delmarva*"), the Pennsylvania Supreme Court held that the definition of "public utility" in Code Section 102[51] does not include EGSs except for the limited purposes set forth in Code Sections 2809 and 2810 (relating to licensing and gross receipts tax). The *Delmarva* Court specifically concluded that the Commission was not permitted to impose annual assessments on EGSs because the clear language of Code Section 510[52] authorized the Commission to assess

[49] 66 Pa. C.S. § 2809(e).
[50] 66 Pa. C.S. § 2810.
[51] 66 Pa. C.S. § 102.
[52] 66 Pa. C.S. § 510.

only "public utilities," which term does not include EGSs except for the limited purposes noted above.[53] *Id.* at 352-353.

2. Implementation of Competition Act

In implementing the Competition Act, the Commission has steadfastly adhered to the fundamental principles underlying a competitive retail market and has not interfered with the pricing activities, day-to-day operations or management decisions of EGSs. The Commission has repeatedly recognized that it does not regulate EGS prices. For instance, the Commission's regulations adopted early in the implementation of the Competition Act require bills for customers who have chosen electric generation services from an EGS to include a statement noting that "[g]eneration prices and charges are set by the electric generation supplier you have chosen."[54] The Commission's regulations also require EGS disclosure statements to contain this language.[55]

More recently, in the *Variable Price Order*, the Commission declared that "[t]he rates consumers pay in the retail electric market are governed by the terms of their contract with their supplier." *Id.* at 3. Noting that some customer contracts "had no ceiling on the variable rate that could be charged by the EGS," the Commission concluded that "[w]hile a variable rate may offer substantial savings when wholesale market prices are low, customers may experience very high bills during periods of market volatility such as occurred with the recent cold weather." *Id.* The Commission emphasized that "[i]t is important for consumers on variable rates to carefully

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[53] On December 22, 2014, the Code was amended by Act 155 of 2014 to permit the Commission to impose annual fees on EGSs to fund the oversight of EGS activities. 66 Pa.C.S. §2809(g).
[54] 52 Pa. Code § 54.4(b)(10)(i).
[55] 52 Pa. Code § 54.5(f)(1).

review the terms and conditions of their contracts to determine if they are at risk for large rate increases at any given time." *Id.*

Since that time, the Commission has continued to hold that it does not regulate EGS prices. *See Blue Pilot Interlocutory Order* at 18 (the Commission "does not have traditional ratemaking authority over competitive suppliers and does not regulate competitive supply rates"). *See also Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Order entered December 18, 2014) (*IDT Interlocutory Order*) at 24. Additionally, in *Nadav v. Respond Power LLC*, Docket No. C-2014-2429159 (Order entered December 19, 2014), the Commission dismissed a consumer complaint claiming excessive variable rates due to its lack of jurisdiction over EGS prices. The Commission's lack of statutory authority to regulate EGS prices has also 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) at 24-25.

In its regulatory oversight of EGSs, rather than attempting to limit product offerings or regulate EGS prices, the Commission has consistently focused on consumer education and efforts designed to ensure that consumers receive information they need from EGSs to compare offers and make informed decisions in selecting an EGS. A key example of an initiative that was intended to fulfill both objectives is www.PaPowerSwitch.com, the shopping website developed by the Commission to share extensive information about the electric choice program, the opportunity for consumers to save on their electric bill and the various prices and products offered by EGSs.

3. Regulatory Response to Polar Vortex

In response to the high volume of bill inquiries and informal complaints arising from the Polar Vortex, the Commission immediately took several steps that are outlined in the *Variable Price Order* as follows:

- Issued a press release on January 31, 2014 advising consumers receiving electricity from EGSs to carefully review the terms of their contracts;
- Posted a "consumer alert" on February 14, 2014 as a slider on the PUC's website that consumers on variable contracts may see their prices increase; and that such consumers should check their contracts; evaluate competitive offers at www.PaPowerSwitch.com; contact their EDC to sign up for budget billing; and to discuss a payment arrangement or assistance program; and to conserve energy;
- Re-issued its January 31, 2014 press release on February 14, 2014;
- Posted an abridged version of the above-referenced slider message on February 18, 2014 on the home page of www.PaPowerSwitch.com;
- Developed a separate page on www.PaPowerSwitch.com devoted to information on fixed vs. variable products;
- Developed a fact sheet specifically on "fixed" vs. "variable" rates;
- Added a fixed vs. variable Q&A to the existing "Shopping for Electricity" fact sheet and enhanced the Q&A under "Frequently Asked Questions" on www.papowerswitch.com to help ensure that consumers are better educated about variable rates.

Id. at 5.[56] The Commission also posed a series of questions to stakeholders soliciting comments about possible enhanced disclosure requirements for variable price contracts. *Id.* at 7.

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[56] After issuance of the *Variable Price Order*, the Commission took additional measures to better inform consumers about variable price contracts, including:

- Releasing a video on fixed and variable prices on March 20, 2014 (http://www.puc.pa.gov/about_puc/press_releases.aspx?ShowPR=3322); and

By regulations adopted on April 3, 2014,[57] the Commission revised the customer information disclosure regulations for variable price contracts to provide for various enhancements including: (i) more details on conditions of liability, including whether there are limits on variability; (ii) a statement of the initial price; (iii) customer access to historical pricing information; and (iv) a separate contract summary that highlights key terms and conditions in a uniform and consistent manner. *Rulemaking to Amend the Provisions of 52 Pa. Code, Section 54.5 Regulations Regarding Disclosure Statement for Residential and Small Business Customers and to Add Section 54.10 Regulations Regarding the Provision of Notices of Contract Expiration or Changes in Terms for Residential and Small Business Customers*, Docket No. L-2014-2409385 (Order entered April 3, 2014) ("*New Disclosure Requirements Order*"). These regulations also require EGSs to provide more timely information on notices that inform consumers about contract renewals and changes in terms.

Adopting these regulations, the Commission expressly recognized the need for greater transparency in the information that is provided to consumers so that they are adequately

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- Issuing a press release on May 27, 2014 announcing website updates to educate about variable rates and encourage consumers to keep shopping (http://www.puc.pa.gov/about_puc/press_releases.aspx?ShowPR=3361).

In addition, the Commission took steps to ensure that customers were aware of their ability to choose an EGS by:

- Releasing a video on April 10, 2014 teaching electricity shoppers what to do at the end of a contract (http://www.puc.pa.gov/about_puc/press_releases.aspx?ShowPR=3337);
- Issuing a press release on May 13, 2014 reminding consumers that papowerswitch.com can help them find stability and savings (http://www.puc.pa.gov/about_puc/press_releases.aspx?ShowPR=3350); and
- Releasing a video on May 30, 2014 on how to shop for an EGS (http://www.puc.pa.gov/about_puc/press_releases.aspx?ShowPR=3363).

[57] Due to the Polar Vortex crisis, the Commission used a rarely-utilized tool of adopting final-omitted regulations without first promulgating a proposed rulemaking. 45 P.S. § 1204(3). However, the Commission afforded interested parties an opportunity to submit comments prior to adoption of the final-omitted regulations, which were approved by the Independent Regulatory Review Commission ("IRRC") on May 22, 2014, and published in the *Pennsylvania Bulletin* on June 14, 2014 at 44 Pa.B. 3522.

informed about the scope and limits of price variability. The Commission rejected proposals, however, that would have required EGSs to place price ceilings in their variable price contracts and instead required EGSs to prominently disclose that there is no ceiling if that is the case. *New Disclosure Requirements Order* at 12-13. The Commission also declined to require EGSs to provide advance notice of a variable price change, instead opting for enhanced disclosure in EGS communications to customers as to when they can expect to see price changes and when they will learn about them. *Id.* at 21.

In requiring the inclusion of an EGS Contract Summary, the Commission noted that it would provide "in an easy-to-read, one-page document, the most important terms of the disclosure statement," observing that "[m]any customers either do not read the 'fine print' of their disclosure statements or are confused by the 'legalese' included therein." *New Disclosure Requirements Order* at 26. The Commission observed that "more education is needed regarding the terms of a contract," referencing its recent actions such as clarifying the presentation of information available on www.PaPowerSwitch.com and updating the definitions of "variable" and "fixed price" contracts. *Id.* at 25.

Also in the *Variable Price Order*, the Commission noted that "the large fluctuations in wholesale and retail prices again magnified an often frustrating aspect of shopping for electricity – the length of time it takes to switch to an alternative electricity supplier." *Id.* at 4. Responding to those frustrations expressed by consumers and enhancing their ability to participate in the retail electric market, the Commission also adopted final-omitted regulations on April 3, 2014 allowing switches to occur in as little as three business days. *Rulemaking to Amend the Provisions of 52 Pa. Code, Chapter 57 Regulations Regarding Standards for Changing a Customer's Electricity Generation Supplier*, Docket No. L-2014-2409383 (Order entered April

3, 2014).[58] In addition, the Commission issued a Secretarial Letter on September 8, 2014 informing EGSs of their role in accelerating the timeframe for customers to switch EGSs by promptly notifying the EDC of the customer's selection.

The Commission further committed in the *Variable Price Order* to investigate "the causes of these underlying wholesale cost spikes and pursue all appropriate FERC complaints, and PJM tariff and operating manual modifications necessary to improve the efficient functioning of wholesale PJM markets." *Id.* at 2, footnote 2. The Commission also noted that it would participate in all PJM stakeholder processes and OPSI working groups to help implement modifications to energy and capacity market rules necessary to achieve these objectives. *Id.*

Other entities have similarly responded to problems that came under the spotlight during the Polar Vortex. Specifically, the Federal Energy Regulatory Commission ("FERC") has taken numerous steps in response to the unprecedented energy crisis that occurred in early 2014. Citing concerns about wholesale market performance during the 2013-2014 Winter, FERC initiated a proceeding on price formation at Docket No. AD14-14. As part of the price formation proceeding, FERC staff specifically examined use of uplift payments, offer price mitigation, scarcity and shortage pricing and operator actions that affect prices. In addition, FERC issued a notice of proposed rulemaking at Docket No. RM15-24-000 to address practices that may fail to compensate resources at prices that reflect the value of service and signal future action on offer price caps, mitigation, uplift transparency and uplift drivers. Also, in the wake of the gas supply issues during January 2014, FERC issued a notice of proposed rulemaking at Docket No. RM14-

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[58] These final-omitted regulations were also approved by IRRC on May 22, 2014 and were published in the *Pennsylvania Bulletin* on June 14, 2014 at 44 Pa.B. 3522.

2, addressing gas and electric coordination and specifically proposing to modify gas scheduling timelines to be consistent with gas industry timelines. A final rule was issued in April 2015 and PJM made a compliance filing on July 23, 2015 at Docket No. ER15-2260, in which it proposed to modify the timing of its Day Ahead energy market to be more consistent with the new gas timeframes.

III. SUMMARY OF ARGUMENT

Amidst the Polar Vortex, BPE responded to the malfunctioning of the wholesale market in the PJM region by halting all retail marketing in Pennsylvania in March 2014. Just over a year later, in May 2015, BPE exited the Pennsylvania retail market and asked the Commission to cancel its license, effective immediately. BPE currently has no retail customers in Pennsylvania.

Prior to the Polar Vortex, BPE served about 2,500 Pennsylvania retail customers. Of the over 10,000 customers who contacted or complained to the OCA and OAG in early 2014 about variable price increases, BPE customers accounted for only about 3%. Roughly 3% the customers served by BPE in December 2013 presented testimony in this proceeding. As most of those consumers merely expressed frustration with price increases and switching delays, a much smaller percentage of BPE's customer base submitted testimony raising allegations that could potentially result in a finding that BPE violated any Commission regulations. All but a couple of BPE's formal complaints have been resolved, with refunds having been issued to many consumers. Despite all of these facts, the Joint Complainants have persisted in their litigation of the Joint Complaint.

In pursuing this litigation, the Joint Complainants rely on an unprecedented and unrecognized "pattern and practice" or "pattern of practice" theory to request that the Commission find that BPE violated the Commission's regulations in its dealings with all of its

customers served during the relevant time period. They advance this non-existent legal theory in an effort to avoid their obligation to prove their allegations by a preponderance of the evidence. However, the Commission has duty to base its decision on substantial evidence and does not have the luxury of ignoring that legal requirement. Moreover, the Joint Complainants' "pattern of practice" claims fail to acknowledge the testimony of many consumers who indicated that BPE did not promise savings and that they knew they were being served on variable rate plans.

As to Count I of the Joint Complaint (providing accurate pricing information), the Joint Complainants allege that the variable pricing terms of BPE's Disclosure Statement do not adequately state the conditions of variability and the limits on price variability. However, a review of BPE's Disclosure Statement, which was approved by the Commission during the licensing process, demonstrates that it fully complies with the Commission's regulations that were in effect at that time. By disclosing that that the consumer is on a variable rate, providing the initial price, explaining that the price will thereafter vary monthly based on several factors including PJM wholesale market conditions, BPE's Disclosure Statement clearly and conspicuously informed consumers of the terms and conditions applicable to their service.

Regarding Count II of the Joint Complaint (prices conforming to disclosure statement), the Joint Complainants are asking the Commission to exceed its jurisdiction and interpret a private contract. This interpretation would essentially require the Commission to conduct a cost of service analysis of BPE's prices by reviewing the wholesale costs and other costs incurred by BPE and imputing a just and reasonable profit margin to determine the price that BPE "should" have charged in a price-deregulated electric retail market. As the Commission does not have statutory authority to interpret private contracts, regulate EGS prices or determine whether an EGS's prices or profit margins are just and reasonable, the Commission should not even consider

the merits of Count II. In any event, the Joint Complainants have failed to show that BPE's variable prices in early 2014 departed from its Disclosure Statement, which clearly provided that prices would vary monthly based on several factors, including PJM wholesale market conditions.

With respect to Count III (promises of savings) of the Joint Complaint, the Joint Complainants failed to prove by a preponderance of the evidence that BPE promised savings to consumers that were not realized. Many of the consumers who testified in this proceeding understood that their prices would vary monthly to reflect PJM wholesale market conditions and that no savings were guaranteed. Numerous customers also testified that the initial prices promised by BPE were honored and that they did realize savings for many months or even years. The uncorroborated hearsay testimony, laden with credibility issues, of a few disgruntled customers seeking refunds as part of this proceeding may not be relied upon by the Commission to make any crucial findings or to conclude that BPE promised savings that were not realized. Additionally, in claiming that this alleged conduct violated the Consumer Protection Law, the Joint Complainants have sought a conclusion that the Commission does not have the jurisdiction to reach.

Count IV (complaint handling) of the Joint Complaint alleges violations of the Commission's regulations governing disputes filed by consumers. The evidence in this proceeding demonstrates that most customers were able to reach BPE's call center when their variable prices increased during the Polar Vortex. Moreover, while some of those customers were not happy with the response they received, they acknowledged receiving an explanation about the price increase. Also, BPE issued refunds to many consumers.

In Count V (Telemarketer Registration Act), the Joint Complaint alleges violations of the TRA, under which the Commission has said it does not have statutory authority to entertain

claims. Moreover, the TRA expressly exempts from compliance with its requirements any transactions that are regulated by another administrative agency. As BPE fully complied with the Commission's regulations governing enrollments, the Joint Complainants have not carried their burden of proving any violations in connection with Count V.

The Joint Complaint should be dismissed in its entirety. The evidence that has been presented as part of this proceeding in support of the allegations of the Joint Complaint simply fails to demonstrate that BPE has violated any Commission regulations or orders. To the extent that the Commission finds that the Joint Complainants have carried their burden of proof as to any of the allegations in the Joint Complaint, a revocation of BPE's license more than adequately addresses such findings.

IV. ARGUMENT

A. Legal Standards

Although specific legal standards are set forth throughout this Main Brief, some fundamental legal principles are applicable to various counts of the Joint Complaint. These issues, which are addressed below, include subject matter jurisdiction; burden of proof and substantial evidence; uncorroborated hearsay evidence; and due process requirements.

1. Subject Matter Jurisdiction

Subject matter jurisdiction is a threshold inquiry underlying many of the issues raised in this proceeding, including the alleged violation of state consumer protection laws and various requests for relief contained the Joint Complaint. The legal principles upon which BPE challenges the Commission's subject matter jurisdiction are set forth in the paragraph immediately below, and in the interest of brevity, will not be repeated each time that issues are raised by BPE throughout this Main Brief concerning the Commission's statutory authority.

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 Code. *See City of Phila. v. Phila. Elec. Co.*, 473 A.2d 997, 999-1000 (Pa. 1984) ("We begin our inquiry by recognizing that the authority of the Commission must arise from the express words of the pertinent statutes or by strong and necessary implication therefrom...It is axiomatic that the Commission's power is statutory; and the legislative grant of power in any particular case must be clear."); *see also Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791, 795 (Pa. 1977); *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937 (Order entered May 28, 2008). It is well-settled that 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).

2. Burden of Proof and Substantial Evidence

As the proponent of a rule or order, the Joint Complainants in this proceeding bear the burden of proof pursuant to Section 332(a) of the Code.[59] To establish a sufficient case and satisfy the burden of proof, the Joint Complainants must prove the facts alleged in the Joint Complaint and demonstrate that BPE violated the Public Utility Code or the orders or regulations

[59] 66 Pa. C.S. § 332(a).

of the Commission.[60] *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pennsylvania Public Utility Commission*, 578 A.2d 600 (Pa. Cmwlth. 1990). Additionally, any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. *Mill v. Cmwlth., Pa. Pub. Util. Comm'n*, 447 A.2d 1100 (Pa. Cmwlth. 1982); *Edan Transportation Corp. v. Pa. Pub. Util. Comm'n*, 623 A.2d 6 (Pa. Cmwlth. 1993), 2 Pa.C.S. § 704. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and Western Railway Co. v Pa. Pub. Util. Commn,* 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Review*, 166 A.2d 96 (Pa. Super. 1960); *Murphy v. Commonwealth, Dep't. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

3. Uncorroborated Hearsay Evidence

It is well-settled that the Commission may not rely on uncorroborated hearsay statements in making factual findings. Pennsylvania Rule of Evidence 801 defines "hearsay" as a statement that the declarant makes outside a current trial or hearing and that a party offers in evidence to prove the truth of the matter asserted in the statement.[61] The statements referred to by the consumers in their "testimonies" -- particularly as to claims of promised savings -- were not made during a hearing and are offered to provide the truth of the matters asserted. As such, they constitute hearsay under the evidentiary rules.

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[60] 66 Pa. C.S. § 701.
[61] P.R.E. 801.

Hearsay is not admissible as evidence under Pennsylvania Rule of Evidence 802, except as specifically provided by the rules, a statute or the Pennsylvania Supreme Court.[62] It has long been recognized in Pennsylvania that hearsay rules are not mere "technical rules of evidence" but instead are fundamental rules of law that should be followed by agencies when facts crucial to the issue are sought to be placed on the record. *See, e.g., Loudon v. Viridian Energy*, Docket No. C-2011-2244309 (Initial Decision dated February 2, 2012, Final Order entered March 29, 2012); *Gibson v. W.C.A.B.*, 861 A.2d 938 (Pa. 2004); and *Anthony v. PECO Energy Co.*, Docket No. C-2014-2408057 (Order entered July 30, 2014) .

Pennsylvania and Commission case law make it clear that a finding based wholly on hearsay cannot support a legal conclusion by an administrative agency. *Walker v. Unemployment Compensation Board of Review*, 27 Pa. Cmwlth. 523, 367 A.2d 366 (Pa. Cmwlth. 1976). As explained in *Walker*, hearsay is not competent evidence and may support a finding only if it is corroborated by competent evidence. The Commonwealth Court expressly concluded that "a finding of fact based solely on hearsay will not stand." *Id.* at 527. *See also Anderson v. Pa. Dep't. of Pub. Welfare*, 79 Pa. Cmwlth. Ct. 182, 468 A.2d 1167 (1983).

Likewise, 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. Pub. Util. Comm'n., Bureau of Investigation & Enforcement v. Yellow Cab Co. of Pittsburgh*, Docket No. 2012-2249031, 2013 WL 5912555 (Initial Decision served October 24, 2013 at 3; adopted in relevant part by Commission Order entered February 6, 2014).

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[62] P.R.E. 802.

Even when hearsay is not excluded, the Commission has refused to make findings of fact 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).

The Commission has specifically addressed the issue of hearsay in the context of statements allegedly made by an EGS sales representative to a prospective customer in *Gruelle c/o Toll Diversified Properties, Inc. v. PPL Electric Utilities Corporation and Blue Pilot Energy, LLC*, Docket No. C-2015-2463573 (Initial Decision served November 18, 2015; Final Order entered December 22, 2015). In *Gruelle*, the Commission found that statements made by an EGS sales agent constituted hearsay since they were made outside the hearing room, the declarant was not available for cross examination, and the content was the sole evidence relied upon by the complainant to claim overbilling and seek a refund. *Gruelle* at 17. The Commission explained that the complainant could have but elected not to subpoena the sales agent. *Id.* Concluding that consequently, "there is no reliable evidence to support a claim that Respondent promised contractual terms other than those which appear in the signed contract," the Commission properly found that the complainant failed to carry its burden of proof. *Id.* at 18.

4. Due Process Requirements

Fundamental rights of due process require that BPE be given the full opportunity to confront and cross examine the witnesses who have offered "testimony" against it or would benefit from this litigation. "[G]overnment licenses to engage in a business or occupation create an entitlement to partake of profitable activity, and therefore, are property rights." *Philadelphia Entertainment and Development Partners, L.P. v. Pennsylvania Gaming Control Bd.*, 34 A.3d 261 (Pa. Cmwlth. 2011). The principle that due process is fully applicable to adjudicative

hearings involving substantial property rights is well established. *See Soja v. Pennsylvania State Police*, 45 A.2d 613, 500 Pa. 188 (1982). In *Soja*, the Pennsylvania Supreme Court observed that where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. *See also Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S.Ct. 1011, 1021, 25 L Ed. 2d 287 (1970).

B. Nonexistent Pattern of Practice Theory

1. Introduction

Regardless of how they characterize the legal theory on which they are basing their requests for factual findings, legal conclusions and relief, the Joint Complainants seek to have the Commission treat this proceeding as a class action lawsuit, which the Commission has said that it lacks the requisite jurisdiction to entertain. Specifically, the Joint Complainants contend that any violations alleged in the Joint Complaint that are found by the Commission to have been proven with respect to some consumers should be assumed to have occurred in exactly the same manner across BPE's entire Pennsylvania customer base. On the basis of those assumptions, the Joint Complainants seek the revocation of BPE's EGS license, the issuance of refunds to all customers served during the relevant time period and the imposition of a civil penalty.

With no mention of the terms "pattern" or "practice" in the Joint Complaint, and without any basis in the Code or legal precedent applicable to the Commission, the Joint Complainants launched into a proposal midway through this proceeding under which they purported to set forth "the legal framework for the acceptance of evidence from a large group of customers to establish

a misleading or deceptive *pattern of practice* into the record."[63] Under their initial proposal, the Joint Complainants sought "to present a sample of consumer witnesses and permit the remaining consumers to submit sworn affidavits in lieu of testifying."[64] In support of that approach, the Joint Complainants cited federal decisions involving proceedings initiated by the Federal Trade Commission ("FTC") involving large volumes of consumers.

Opposing this proposal, BPE cited various fundamental flaws including: (i) the Commission's lack of statutory authority to implement a "pattern of practice" concept or hear a class action lawsuit; (ii) reliance on such a theory would require a departure from the Commission's obligation to base its decisions on substantial evidence; (iii) the unique circumstances involved in each electricity supply sales transaction render such treatment inappropriate; (iv) BPE's due process rights to confront witnesses who testify against it or who would benefit from this proceeding; and (iv) pattern of practice findings are typically made in the employment discrimination arena and require a comprehensive statistical analysis, which has not been introduced here.[65]

The ALJs did not rule on the pattern of practice proposal advanced by the Joint Complainants prior to the evidentiary hearings that were held on March 30-April 2, 2015, and at that time, the testimonies of about 80 consumer witnesses were admitted. Since then, the Joint Complainants' "pattern of practice" theory has evolved to the point where they would have the Commission rely on the infirm testimony of those 80 consumer witnesses, which constitutes an

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[63] Joint Memorandum of Law Regarding the Admission of Pattern of Practice Evidence ("Joint Memo) at 2 (emphasis supplied).
[64] Joint Memo at 4.
[65] Reply Memorandum of Law Regarding Admissibility of Pattern and Practice Evidence at 3-7.

extremely small percentage of BPE's historical customer base in Pennsylvania, to conclude that BPE violated the Commission's regulations in serving all of its customers in Pennsylvania.[66] The Joint Complainants seek this outcome despite the fact that that have not even shown that BPE violated any regulations with respect to those 80 consumers. Moreover, they have certainly not demonstrated that BPE violated all of the Commission regulations referenced in the five counts of the Joint Complaint in their interactions with all of those 80 consumers.

Simply stated, no "pattern of practice" conclusions can be derived from this small number of customer statements admitted into the record. Many of the statements suffer from credibility issues in that they contain inconsistencies or vaguely recount conversations which allegedly took place years ago with unidentified individuals. In addition, the testimony of the 80 consumers who testified in this proceeding demonstrated varying experiences in their interactions with BPE. Allegations made by customers regarding their specific transactions at the time that they entered into a contract with BPE cannot form the basis findings related to every customer of BPE and their specific dealings with BPE.

Through their pattern of practice theory, the Joint Complainants seek to rely on the biased and self-serving testimony of their expert witnesses to avoid their burden of presenting competent evidence in support of their allegations. While BPE does not dispute that these witnesses have specific areas of expertise, none of the witnesses qualifies as an expert witness in identifying a pattern of practice of conduct and their testimony falls far short of the legal standards required by the United States Supreme Court. Specifically, these witnesses have

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[66] Tr. 777. *See also* Motion for Entry of Judgment filed on June 22, 2015.

presented no statistical evidence or analysis and the anecdotal evidence to which they refer is too weak to raise any inference that BPE engaged in specific conduct in its dealings with every customer and which had the exact same effect on every single customer. Yet, that is the standard that is relied upon by the courts in determining whether class action lawsuits should move forward. From this very small group of BPE customers whose testimony was admitted, it is impossible to extrapolate any consistent theme other than that they were unhappy with the variable price increases during the Polar Vortex of 2014. This testimony certainly cannot be relied upon to prove or to find that every one of BPE's customers had the same experience, or that BPE violated the Commission's regulations in their dealings with each of those consumers.

The Joint Complainants' pattern of practice theory also disregards the Commission's obligation to base its decisions, including factual findings, legal conclusions and grants of relief, on substantial evidence in the record. Notably, their proposal to rely on unprecedented and unrecognized legal theories for their requests for findings of violations of Commission regulations and their requests for relief erroneously ignores much of their own evidence which is directly contrary to the allegations in the Joint Complaint.

Despite admitting that there is no precedent for their novel "pattern of practice" argument, the Joint Complainants argue that the Commission is free to disregard the Public Utility Code, the Commission's own regulations, and decades of relevant precedent and instead substitute them with rules that apply to specific cases by courts considering consumer-protection actions and/or Common Pleas Courts adjudicating class action suits. For the reasons explained below, it would be unlawful and inappropriate for the Commission to rely on the consumer testimony that has been admitted in to the record, and as extrapolated by the Joint Complainants'

expert witnesses, to find that BPE has committed any violations in their interactions with other consumers or to conclude that any other consumers are entitled to any relief.

2. Discussion

a. The Commission has no jurisdiction to entertain pattern and/of practice claims or class action type proceedings.

The Joint Complaint does not contain the words "pattern" or "practice." Nor does it allege that BPE engaged in a pattern of practice of conduct that violated the Commission's regulations. In adjudicating this proceeding, the Commission must be guided by the Code, which likewise does not contain the words "pattern" or "practice." Nor does the Code recognize any ability of the Commission to treat matters before it as if they were class actions.[67] Indeed, the Joint Complainants have not cited to any Commission authority for the extraordinary "framework" that they suggest the Commission should adopt here.

Code Section 701 authorizes the Commission to hear complaints about acts done or omitted by a regulated entity in violation of any law which the Commission has jurisdiction to administer, or any regulation or order of the Commission. Neither Code Section 701 nor any other provision of the Code authorizes the Commission to rely on pattern of practice evidence or to entertain class action types of proceedings in determining whether a violation of the Code, Commission regulations or Commission orders has occurred and, if so, what penalty or relief

[67] A class action is a lawsuit in which litigation is conducted litigation is conducted on behalf a class of individuals who are not individually named in the proceeding. *See, e.g., Braun v. Wal-Mart Stores, Inc.*, 24 A.3d 875, 2011 Pa. Super. 121 (Pa. Super. 2011) (plaintiffs alleged claims of breach of contract on behalf of themselves and other similarly situated hourly employees). As the Joint Complainants are seeking remedies on behalf of individual consumers who were not named in this proceeding, and did not even participate in this proceeding through the submission of testimony, they are seeking to have this matter handled as a class action.

may be awarded. Therefore, the Commission does not have jurisdiction over class action lawsuits or to hear pattern of practice claims.

Indeed, the ALJs have observed that "[n]othing in Section 701 or any other section of the Public Utility Code...allows for the filing of class action complaints. In the absence of such statutory authority, the Commission cannot entertain class action complaints." *Commonwealth of Pennsylvania, et al. v Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric, Docket No.* C-2014-2427656 (Order Granting Petition to Intervene dated April 23, 2015). *See also Painter v. Aqua PA, Inc.*, Docket No. C-2011-2239557 (Opinion and Order entered May 22, 2014); *Pettko v. Pennsylvania American Water Company*, Docket No. C-2011-2226096 (Administrative Law Judge Order dated October 5, 2011 adopted by Commission Order on February 18, 2013). As a result, only complainants who have filed complaints with the Commission have any recourse to request or receive relief.

The Joint Complainants have pointed to no provision in the Code or in Pennsylvania case law that would permit the Commission to conclude that a regulated entity has committed a violation of the Code, Commission regulations or Commission orders without proof -- based on substantial evidence -- that such a violation actually occurred. Further, they have referred to nothing in the Code or in Pennsylvania case law that would permit the Commission to order relief in the form of revocation, civil penalties and refunds absent substantial and competent evidence supporting findings of violations.

Instead, the Joint Complainants refer to Pennsylvania Rules of Civil Procedure as support for their argument that Commission can use a representative sampling of some customer's

experience with BPE to obtain relief for an entire class of customers who never complained as if this were a class action.[68] As the Commission has rejected prior attempts to be used as a forum for a class action lawsuit, the civil rules relating to class actions do not apply to this proceeding. *See Painter v. Aqua PA, Inc*, Docket No. C-2011-2239557 (Opinion and Order entered May 22, 2014); *Pettko v. Pennsylvania American Water Company*, Docket No. C-2011-2226096 (Administrative Law Judge Order dated October 5, 2011 and adopted by Commission Order on February 18, 2013).

b. The Joint Complainants have no authority to seek relief on behalf of individual consumers.

Moreover, as neither party has standing to represent individual consumers or seek relief on their behalf, the Joint Complainants do not have authority to pursue what is effectively a class action lawsuit at the Commission. While the OAG's enabling statute[69] authorizes the initiation of civil actions to address violations of the Consumer Protection Law, the Commission has already determined that it is not the appropriate forum to hear those claims. *BPE Interlocutory Order* at 16-18. Further, Code Section 701 expressly provides that the "Commonwealth through the Attorney General may be a complainant before the Commission in any matter solely as an advocate for the Commonwealth as a consumer of public utility services."[70] Similarly, the OCA's enabling statute authorizes it to represent the general interests of consumers as a party, as opposed to the interests of individual utility consumers.[71] While its enabling statute also references its ability to name a consumer or group of consumers in an action brought in the name

[68] Pa.C.R.P. 1702.
[69] 73 P.S. § 201-4.
[70] Emphasis added.
[71] 71 P.S. § 309-4(a). *See also Suprick v. Commonwealth Telephone Co.*, Docket No. 00903161, 1995 WL 945164.

of the Commonwealth, it does not specify an ability to initiate a class action lawsuit; in any event, the Joint Complaint in this case did not name a consumer or group of consumers.[72]

c. No class certification has been conducted.

Even aside from the Commission's lack of jurisdiction to entertain class action lawsuits, and the inability of the Joint Complainants to initiate such a proceeding at the Commission on behalf of individual consumers, it is incumbent upon plaintiffs in putative class action proceedings to obtain a ruling from the trial court certifying the class. No such efforts have been made here; nor would the Commission have the authority to certify a class.

It is well-established black-letter law that a class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700-701, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). In order to justify a departure from that rule, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974)). Federal Rule of Civil Procedure 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate. The Rule's four requirements - numerosity, commonality, typicality, and adequate representation - "effectively 'limit the class claims to those fairly encompassed by the named plaintiff's claims.'" *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982) (*quoting*

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[72] 71 P.S. § 309-4(d).

General Telephone Co. of Northwest v. EEOC, 446 U.S. 318, 330, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980)). Similarly, in *Dunn v. Allegheny County Property Assessment Appeals and Review*, 794 A.2d 416 (2002), the Pennsylvania Commonwealth Court set forth the five criteria that must be met for a suit to proceed as a class action, as follows: (i) the class is so numerous that joinder of all members is impracticable; (ii) there are questions of law or fact common to the class; (iii) the claims and defenses of the representative parties are typical of the claims or defenses of the class; (iv) the representative parties will fairly and adequately assert and protect the interests of the class; and (iv) a class action provides a fair and efficient method for adjudication of the controversy. *Id.* at 423. Commonality requires a showing that the class members "have suffered the same injury." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157, 102 S.Ct. 2364 (1982).

d. The unique facts and circumstances of each individual sales transaction render any class action approach inappropriate.

Although the Commission does not have the requisite authority to evaluate whether a class should be certified, even a layperson's review of the record in this proceeding demonstrates that the unique facts and circumstances of each individual sales transaction render any class action approach inappropriate. Specifically, a review of the consumer statements shows that each consumer described a unique interaction with BPE and that each interaction involved many nuances that warrant a more in-depth review. Many consumers testified that savings were not

guaranteed by BPE,[73] while others indicated that savings were only expected for the period of the initial rate and that those expectations were fulfilled.[74]

While some of the consumer statements contain vague and generalized allegations that they were promised savings for an undefined time period,[75] others are specific about a savings or particular price for a defined time period.[76] Also, some statements describe a consumer's understanding of savings, without any explanation or even indicating that the source was other than BPE.[77] Still others testified that they knew their prices would vary but that they did not realize the extent to which that might occur.[78] Some customers had been served by BPE (and saving money) for several years before the prices increased as a result of the Polar Vortex.[79] Indeed, the fact that the Commission has dismissed some complaints filed against BPE in connection with the variable price increases demonstrates that no pattern of practice of conduct can be found to have occurred.[80]

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[73] *See, e.g.*, OAG/OCA Consumer Testimony at 391-393 (Dennis Frey); OAG/OCA Consumer Testimony at 395-397 (Karen Mauro); OAG/OCA Consumer Testimony at 433-435 (James Seton).
[74] *See, e.g.*, OAG/OCA Consumer Testimony at 526-528 (Kenneth Brown); OAG/OCA Consumer Testimony at 374-376, Tr. 127-128 (Martha Campanella); OAG/OCA Consumer Testimony at 571-573, Tr. 642-643 (John Cassel).
[75] *See, e.g.*, OAG/OCA Consumer Testimony at 278-280 (Robert Burkholder); OAG/OCA Consumer Testimony at 257-259 (I&J Miller, Inc. d/b/a Miller's Sunoco); OAG/OCA Consumer Testimony at 282-284 (Richard Perry).
[76] *See, e.g.*, OAG/OCA Consumer Testimony at 164-166 (David Brotzman); OAG/OCA Consumer Testimony at 323-325 (Robert D'Adamo); OAG/OCA Consumer Testimony at 332-334 (Mother's Nature, Inc.).
[77] *See, e.g.*, OAG/OCA Consumer Testimony at 567-569 (William Smith); OAG/OCA Consumer Testimony at 370-372 (Katherine Williams); OAG/OCA Consumer Testimony at 522-524 (Nancy Whisker).
[78] *See, e.g.*, OAG/OCA Consumer Testimony at 298-300 (Tom and Amy Quinn); OAG/OCA Consumer Testimony at 225-227 (Walt Wensel); OAG/OCA Consumer Testimony at 487-489 (Charles Wentzel).
[79] *See, e.g.*, OAG/OCA Consumer Testimony at 100 (Robert Bishop); OAG/OCA Consumer Testimony at 278 (Robert Burkholder); OAG/OCA Consumer Testimony at 571 (John Cassel); OAG/OCA Consumer Testimony at 403 (George Dingler); OAG/OCA Consumer Testimony at 80 (Lori Durante); OAG/OCA Consumer Testimony at 507 (Dennis Estvanik).
[80] *CRH Catering Company, Inc. v. Blue Pilot Energy, LLC*, Docket No. P-2014-2451865 (Order entered February 24, 2015); *Gruelle v. Blue Pilot Energy, LLC*, Docket No. C-2015-2463573 (Initial Decision served November 18,

Each customer's unique experience is precisely the reason that federal courts in Pennsylvania have found that claims involving deceptive business practices are not suitable for class action treatment. *See Kostur v. Goodman Global, Inc.*, 2014 WL 6388432 (E.D. Pa. 2014) (claims of deceptive business practices involve varying levels of reliance, causation and damages between each individual). In fact, the United States District Court for the Eastern District recently denied the plaintiffs' motion for class certification in a putative class action lawsuit filed against an EGS regarding marketing and sales activities related to variable price contracts for the very reasons explained above. Since the variable rate customers could not be expected to share the same understanding of their contractual rights, the Court found that the commonality requirement of class certification was not fulfilled. *Barbara A. Gillis, Thomas Gillis, Scott R. McClelland, and Kimberly A. McClelland, individually and on behalf of all others similarly situated v. Respond Power, LLC*, Docket No. 14-38576 (Order dated August 31, 2015). (The Court's Order is attached as Appendix B).

Even if the Commission would have the statutory authority to entertain pattern of practice claims or class action lawsuits and to require EGSs to issue refunds to consumers, it would have no basis for calculating refunds in this proceeding for most consumers served by BPE. This case does not present a situation of an alleged billing error or intentional overbilling that affected all consumers in exactly the same way. For instance, the allegations in this proceeding do not involve a scenario where BPE allegedly overcharged customers by a specific amount over a price that was guaranteed by the written contract. Moreover, the circumstances presented in this case

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2015; Final Order entered December 22, 2015); *Durante v. Blue Pilot Energy, LLC*, Docket No. F-2015-2487082 (Joint Motion adopted February 11, 2016, dismissing complaint in part).

are very different from a simple billing error by a public utility that may be uncovered during an audit and result in the issuance of refunds to all customers.

Even if the Commission would determine that refunds should be issued to some consumers who testified in this proceeding, it would be necessary for the Commission to customize each refund to reflect the individual customer's uncorroborated hearsay testimony that was actively solicited by the Joint Complainants. For all other customers served by BPE, the Commission would have no way of knowing what their experiences were or have any barometer for determining what an appropriate refund amount might be. The inability of the Commission to require the application of a simple mathematical formula by BPE upon which to base the calculation of refunds to its entire customer base demonstrates both the logistical and legal shortcomings of the Joint Complainants' proposed refund relief.

e. The Joint Complainants have not presented evidence of a "pattern of practice" of conduct that has been demanded by federal courts, including the Supreme Court of the United States.

In *Wal-Mart Stores, Inc. v. Dukes et al.*, 131 S.Ct. 2541 (June 20, 2011), the United States Supreme Court considered whether allegations of a pattern and practice of discrimination in violation of Title VII of the Civil Rights Act of 1964[81] could be proven as to an entire company based on the type of evidence that Complainants offer the Commission here. The Supreme Court held that it could not. *Id.* at 2552.

Title VII cases are often litigated on a class basis. Accordingly, the proof required to prove a violation must be applicable as to the entire class. This is where the "pattern and

[81] 42 U.S.C. §§ 2000e to 2000e-17.

practice" evidence was originally used.[82] In *Dukes*, the Supreme Court made clear that, even in the early phase of determining whether to certify a class, only "significant proof" can be used to make a showing of pattern and practice. *Id.* at 2553. The plaintiffs in *Dukes* relied on an expert's anecdotal "social framework analysis" and statistical evidence in attempt to show "significant proof."[83] Declining to certify the class, the Supreme Court rejected this showing by the plaintiffs and emphasized that, at a minimum, some type of statistical analysis is required if a plaintiff desires to prove a "pattern and practice" of anything.

In this case, the Joint Complainants have not offered any statistical analysis.[84] Instead, they merely rely on snippets of testimony from 80 consumer statements and the biased expert testimony of Ms. Alexander, who seeks to extrapolate from the consumer statements and make broad-sweeping conclusions of her own that have no basis in the record and are contrary to the requirements set forth in the Commission's regulations. Much of Ms. Alexander's testimony consists of her own personal opinions; and in formulating her opinions, she has not interviewed consumers or BPE representatives or conducted any consumer surveys.[85] In many instances, she offers her own conjecture as to what some hypothetical consumer might perceive or how the consumer might be misled. However, a plaintiff alleging that a representation is misleading is required to "produce extrinsic evidence of actual consumer confusion – it is not enough for a court to determine after the fact that a representation could have mislead hypothetical

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[82] The EEOC uses "pattern and practice" evidence when attempting to prove that a pattern or practice of discrimination exists. *Teamsters v. United States*, 431 U.S. 324 (1977). It is not widely used outside of that context.
[83] Complainants have not even offered any evidence of the statistical significance of the 80 consumer statements vis a vis the total number of BPE's customers in Pennsylvania. As such, they are in no position to argue for a "pattern of practice" of any violations because they have no statistical body against which to measure that data.
[84] Tr. 742.
[85] Tr. 741-742.

consumers." *In re GNC Corp.*, No. 14-1724, 2015 WL 3798174 (4th Cir., June 19, 2015) (dismissing false advertising claim based on several states consumer protection laws, including Pennsylvania's Consumer Protection Law).

In *Dukes,* the Supreme Court emphasized the need for significant statistical evidence and analysis to establish a common contention that is capable of class-wide resolution, meaning that its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. If one were to substitute the type of violations alleged by the Joint Complainants for "employment practices" for in the *Dukes* decision, the outcome would be the same – their testimony constitutes nothing more than anecdotal evidence that proves nothing, much less "significant proof" of any violation.[86] If that type of argument does not persuade the Supreme Court of the United States in the context of a case alleging rights guaranteed by the Constitution of the United States regarding fair employment practices, it certainly should not be considered in the context of any dispute or claims arising out of a private contract.

f. Reliance on the residual exception to the hearsay rule is misplaced.

In support of their pattern of practice theory, the Joint Complainants seek to rely on the residual exception to the hearsay rule in Federal Rule of Evidence 807[87] by referring to cases in which the Federal Trade Commission ("FTC") has awarded relief to consumers who did not offer testimony. However, the Pennsylvania Supreme Court has expressly rejected the residual exception to the hearsay rule, and the federal courts rarely rely on this tool because of the need

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[86] The Court in *Dukes* held that such paucity of evidence could not be used to prove any violations on a "classwide basis." *Dukes*, 131 S.Ct. at 2555.
[87] F.R.E. 807.

for a clear basis of trustworthiness supporting out-of-court statements. The rationale employed by the federal courts in determining whether to award relief to consumers who did not provide testimony does not support such awards in this proceeding.

i. The residual exception to the hearsay rule is not recognized in Pennsylvania.

Pennsylvania Rule of Evidence 802 expressly notes that exceptions to the hearsay rule are limited to those set forth in the Pennsylvania Rules of Evidence or prescribed by the Pennsylvania Supreme Court or a statute.[88] Particularly since the residual exception to the hearsay rule has been expressly rejected by the Pennsylvania Supreme Court, it may not be relied upon here. *See Commonwealth v. Stallworth*, 566 Pa. 349, 781 A.2d 110, 128, n.2 (2001).

ii. Federal courts rarely rely on the residual exception because there must be a clear basis of trustworthiness to support the out-of-court statements, which is not present here.

Even if relevant Pennsylvania legal precedent existed for applying the residual exception in a Commission proceeding, federal courts have expressed significant skepticism about its use and have stressed that it be applied only in very limited circumstances. The courts' rationale for using it rarely is that there must be a "clear basis of trustworthiness" to support the out-of-court statements, and the burden is on the party seeking to invoke the residual exception to clearly demonstrate the existence of those requisite guarantees of trustworthiness. *See Reassure Am. Life Ins. Co. v. Warner*, 2010 WL 4782776, (S.D. Fla. 2010). The Joint Complainants have made no effort to establish this clear basis of trustworthiness. To the contrary, particularly given the solicitation of the consumer statements by the Joint Complainants for purposes of litigation

[88] P.R.E. 802.

and the clear expectation on the part of many consumers for restitution, these guarantees could not be made.

iii. Cases cited by the Joint Complainants are distinguishable.

In addition, the cases cited by the Joint Complainants in support of the residual exception to the hearsay rule are distinguishable from the present case. For instance, the Joint Complainants heavily rely on the decision in *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 608-609 (9th Cir. 1993). However, the circumstances are very different. In *Figgie*, the Ninth Circuit Court admitted letters that consumers provided at the time they purchased the product at issue – heat detectors. Notably, they were not admitted to prove liability or wrongdoing but only to establish the prices that customers paid for the heat detectors during the remedy phase of the case. Moreover, the letters were sent by the consumers without solicitation by the FTC. By contrast, the Joint Complainants in the present case actively solicited the customer statements using template questionnaires that were specifically framed to elicit responses that would advance the Joint Complainants' theory of the case. The use of leading questions to elicit details of transactions that occurred many months or years before distinguishes the statements submitted in this proceeding from those used in *Figgie*.

The other FTC cases cited by the Joint Complainants are likewise distinguishable. Specifically, *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564 (7th Cir. 1989), involved the admission of consumer complaint letters to prove only that the defendant was on notice of potentially fraudulent activity. Again, they were not admitted to prove liability. Also, a key factor relied upon by the Seventh Circuit Court in *Amy Travel* to admit the letters was that the customer-affiants were located throughout the country, unlike this case. Similarly, the other case relied upon by the Joint Complainants, *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1294

(D. Minn. 1985), involved the admissibility of customer affidavits to establish the total amount of customer injury, not liability. In *Kitco*, the District Court in Minnesota also ruled it would be too expensive and time consuming to call witnesses from all parts of the country for that purpose.

Not only are all of the potentially affected consumers in the present case located in Pennsylvania, but a process was established to allow the witnesses to provide written testimony and be subjected to cross-examination by telephone. The ability of witnesses to testify in this manner weighs heavily in favor of rejecting any notion advanced by the Joint Complainants to make any assumptions or speculate about the experiences of other consumers. The circumstances were already less than ideal for BPE since consumers were not required to provide in-person testimony or withstand cross examination from a witness stand in a crowded hearing room. It was very simple and far less intimidating for the consumers to provide written and telephonic testimony, which most certainly resulted in greater customer participation than if in-person testimony had been required.

iv. Federal and state courts have rejected efforts to admit customer letters under the residual exception in circumstances that are very similar to those present here.

Notably, several federal courts have rejected the FTC's attempts to admit customer letters under the residual exception in circumstances that are very similar to those present here. For instance, in *FTC v. Washington Data Resources*, 2011 WL 2669661 (M.D. Fla. July 7, 2011), the Middle District Court in Florida did not permit the FTC to introduce letters that were obtained through outreach by the FTC to certain consumers to procure a declaration for the purpose of litigation. Because the FTC offered them as substantive evidence of alleged deceptive

statements and misleading marketing material, the federal court in *Washington Data Resources* noted that the statements were *not* trustworthy.

State courts have likewise rejected attempts by an Attorney General to introduce affidavits under the residual exception in consumer protection proceedings that bear strikingly similar circumstances as are present here. For instance, in *People v. Shifrin*, 2014 WL 785220 (Feb. 27, 2014), the Colorado Court of Appeals ruled that customer affidavits were not admissible because the: (i) affiants knew that litigation was pending; (ii) the affiants stood to receive substantial restitution based on their affidavits; (iii) the affidavits were not written spontaneously or independently, but were obtained by representatives of the Attorney General's office; and (iv) the Attorney General's office had procured the affidavits to further its position in the litigation.

All four of the above-referenced factors are present here. The consumer witnesses who presented written statements were obviously aware that the litigation was pending. While BPE contends that the Commission may not award any relief to individual consumer witnesses as part of this proceeding, it is clear from reading the "testimonies" that the affiants believe otherwise and are seeking refunds as part of this proceeding.[89] Moreover, the Joint Complainants heavily promoted the litigation through the media, urging consumers to come forward, and thereafter actively soliciting customers to testify.[90]

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[89] *See, e.g.*, OAG/OCA Consumer Testimony at 302, Exh. DD-1 (Distinctive Detail); OAG/OCA Consumer Testimony at 190 (William Evans); OAG/OCA Consumer Testimony at 255 (Scott Hornberger).

[90] *See, e.g.*, https://www.attorneygeneral.gov/Media_and_Resources/Press_Releases/Press_Release/?pid=353 (last accessed March 1, 2016); OAG/OCA Consumer Testimony at 420, Exh. GMW-1 (Grace Witmer).

g. The Commission may not rely on admitted consumer testimony to make any findings as to what may have occurred during other consumers' sales transactions.

Given the well-established case law discussed above precluding any reliance on unadmitted consumer statements or affidavits as part of this proceeding, the rationale and principles underlying those decisions apply with even greater force to "silent consumers." Clearly, the Joint Complainants went to great lengths to encourage customers on variable price contracts to come forward to complain and further solicited those who did complain to submit written testimony. To the extent that consumers elected not to complain or decided not to submit testimony, their experiences cannot be considered by the Commission since no factual allegations are available to review or challenge.

As discussed above, complainants at the Commission have the burden of proving each element of their case by a preponderance of the evidence. A preponderance of evidence is established by presenting evidence that is more convincing, by even the smallest amount, than that presented by the other parties to the case. *Se Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950) ("*Margulies*"). Additionally, it well-settled that the Commission's decision must be supported by substantial evidence in the record. Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk.*

In accordance with these well-established principles, Joint Complainants are obligated to present substantial evidence to support their factual allegations and claims of violations of the Code and Commission regulations. The Joint Complainants have pointed to nothing in the Code or Pennsylvania case law that would permit the Commission to conclude, on the basis of evidence related to some consumers, that a regulated entity has committed a violation of the

Code or Commission regulations in their dealings with all consumers. To BPE's knowledge, the Commission has never found violations or assessed penalties based upon assumptions about how a customer may have been affected by a utility's actions, without any customer-specific evidence. Further, due to the requirement that Commission decisions be based on substantial evidence, it would be unable to do so.

To the extent that the Joint Complainants intend to prove multiple violations by BPE, it is incumbent upon them to present substantial evidence of each and every specific violation alleged. The Joint Complainants cannot expect to prove a discrete number of violations and then ask the Commission to speculate that more violations must have occurred. Such a request would directly violate the bedrock principle that Commission findings cannot be based on a "mere trace of evidence or a suspicion of the existence of a fact sought to be established." *Norfolk.* Indeed, the Commission has expressly refrained from speculating about the number of possibly affected customers if there is no evidence in the record to demonstrate how many customers were in fact affected by a violation. *See, e.g., Eckroth v. Verizon Pa. Inc.,* Docket No. C-2011-2279168 (Order entered April 28, 2013).

Furthermore, reliance on pattern and practice evidence to find violations or award relief would violate BPE's fundamental rights to due process. To find that BPE violated the Commission's regulations in its interactions with consumers who did not offer testimony in this proceeding would run afoul of BPE's rights to confront and cross examine witnesses. *Soja.*

h. <u>The Commission's approach in handling situations involving multiple customers is to consider the number of customers affected by a violation in determining appropriate penalties.</u>

Rather than employing a pattern and practice approach in situations involving multiple customers, the Commission has considered the number of customers affected by a violation in

determining appropriate penalties.[91] The Commission's Policy Statement specifically provides for the Commission to consider the number of customers affected by a violation in making this determination.[92] Further, the Commission's only consideration of any pattern of allegations has occurred in the context of a public utility's prior compliance history, over the course of adjudicated proceedings, in establishing an appropriate civil penalty. *See Pa. Public Utility Commission, Bureau of Investigation and Enforcement v. UGI*, Docket No. M-2013-2338981, 308 PUR 4th 301, 2013 Pa. PUC LEXIS 782 (2013) (for purposes of determining civil penalty, prior compliance history over the course of several proceedings was indicative of a pattern of allegations regarding gas safety violations, as well as a failure on the part of management to adequately focus on gas safety issues).

C. Count I – Alleged Failure to Provide Accurate Pricing Information

1. Introduction

In Count I of the Joint Complaint, the Joint Complainants allege that the variable pricing terms of BPE's Disclosure Statement do not adequately state the conditions of variability and the limits on price variability.[93] Further, the Joint Complainants contend that consumers could not determine from the Disclosure Statement the price that they would or could be charged by BPE or how the price would be calculated by BPE.[94]

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[91] *See* 52 Pa. Code § 69.1201; s*ee also Rosi v. Bell Atlantic-Pa., Inc. and Sprint Communications Company*, Docket No. C-00992409 (Order entered February 10, 2000).
[92] 52 Pa. Code § 69.1201(c)(5).
[93] Joint Complaint ¶ 21.
[94] Joint Complaint ¶ 26.

Based upon these factual allegations, the Joint Complaint alleges that BPE violated Section 54.5(c) of the Commission's regulations,[95] which require that variable pricing terms include the conditions of variability and the limits on price variability. The Joint Complaint further alleges that BPE violated Section 54.43(1) of the Commission's regulations, which requires EGSs to "provide accurate information about their electric generation services using plain language and common terms in communications with consumers."[96] The Joint Complaint also alleges a violation of the Consumer Protection Law.

The Joint Complainants have failed to demonstrate that BPE's Disclosure Statement did not comply with the provisions of the Commission's regulations governing variable pricing statements. To the contrary, BPE's Disclosure Statement, which has been approved by the Commission, contained all of the elements required by the Commission's regulations by explaining that the price would vary on a monthly basis based on several factors including PJM wholesale market conditions. Simply stated, the Commission's regulations do not require EGS disclosure statements to contain information that would allow consumers to determine how much they would or could be charged or precisely how the price would be calculated by BPE. Rather, that is a standard devised by the Joint Complainants during this proceeding, which they inappropriately seek to impose on BPE. To the extent that the Commission would interpret its regulations as requiring this level of information, it would constitute a violation of BPE's due process rights since it could not have known that this was the standard that was expected.

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[95] 52 Pa. Code § 54.5(c).
[96] 52 Pa. Code § 54.43(1).

Further, the Commission does not have statutory authority to enforce the provisions of the Consumer Protection Law, those allegations of the Joint Complaint must fail, along with the claims that BPE in turn violated 111.12(d)(1),[97] which mandates compliance with the Consumer Protection Law.

Finally, Section 54.43(f)[98] merely makes an EGS responsible for acts of its representatives; as such, it imposes no standards to which an EGS adhere or of which it may be found to have violated. In short, Count I must be dismissed in its entirety.

2. Discussion

a. BPE's Disclosure Statement Complies with 52 Pa. Code § 53.5.

The pertinent provisions of the Commission's regulations governing disclosure statements, which were in effect during the relevant time period, required as follows:

> (c) The contract's terms of service shall be disclosed, including the following terms, if applicable:
> (1) Generation charges shall be disclosed according to the actual prices.
> (2) The variable pricing statement, if applicable, must include:
> (i) Conditions of variability (state on what basis prices will vary).
> (ii) Limits on price variability.[99]

The variable pricing language in BPE's Disclosure Statement that has undergone scrutiny in this proceeding clearly and conspicuously states that: (i) the customer has a variable rate plan; (ii) the customer's specific initial rate; (iii) the customer's specific initial rate guarantee period; (iv) after the initial rate period, "[BPE] may increase [the customer's] rate based on several

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[97] 52 Pa. Code § 111.12(d)(1).
[98] 52 Pa. Code § 54.43(f).
[99] 52 Pa. Code § 54.5(c)(1) and (2), as published at 37 Pa. B. 4996 (September 15, 2007).

factors, including changes in wholesale energy market prices in the PJM markets."[100] Just in case a customer did not notice the reference to "variable" or to "wholesale energy market prices in the PJM markets," BPE's Disclosure Statement devotes another sentence to emphasizing those points by stating simply, "Your variable rate will be based upon PJM wholesale market conditions."[101] As BPE did not offer limits on price variability, no limits were included. This language wholly satisfies the requirements of the Commission's regulations shown above, which were in effect at the time. Therefore, the Joint Complainants have not shown that BPE violated Section 53.5 of the Commission's regulations.

Indeed, Deputy Chief Administrative Law Judge Mark Hoyer reviewed BPE's Disclosure Statement in *Dubois Manor Motel c/o Nisha Patel v. Blue Pilot Energy, LLC, Direct Energy, LLC, and Pennsylvania Electric Company*, Docket No. C-2014-2433817 (Initial Decision served on December 2, 2015) and found that it "provided accurate, plain language to explain the variable rate product." I.D. at 9. He specifically found BPE's Disclosure Statement to be "accurate and clear," and further observed that "[p]lain language is used to convey the terms of the contract, including most importantly the variable rate." I.D. at 9-10.[102]

i. Required Conditions of Variability.

As to the requirement in the regulations for EGSs to provide the conditions of variability, or the basis on which prices will vary, BPE's Disclosure Statement informs consumers that the

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[100] OAG/OCA Exh. BRA-2 at 15.
[101] *Id.*
[102] BPE acknowledges that a different ALJ has found that BPE's Disclosure Statement does not comply with the Commission's plain language requirements. *Enrico Partners v. Blue Pilot Energy, LLC*, Docket No. C-2014-2432979 (Initial Decision served March 13, 2015). As noted below, the Commission's unenforceable plain language guidelines are set forth in a policy statement at 52 Pa. Code § 69.251, and do not define plain language or establish any specific standards that must be followed.

price will vary on the basis of several factors, including PJM wholesale market conditions. This level of disclosure complies with the requirement in the regulations and is similar to countless EGS disclosure statements approved by the Commission and in use in Pennsylvania.[103] In fact, in Comments filed to the Commission's *Variable Price Order*, the OCA acknowledged that it had "not yet seen an EGS terms and conditions containing explicit formulaic pricing parameters for variable-priced products. Variable price disclosures state that price will vary based on, inter alia, market conditions, wholesale energy costs, retail competition, and other non-specific terms. This could be a result of the complex PJM wholesale markets that may not lend themselves to such an approach."[104]

Indeed, in the *Variable Price Order*, the Commission acknowledged that "it is unlikely that many market-priced, variable contracts have very explicit formulaic rates that establish how the retail rate is calculated from transparent wholesale price components. Thus, many current disclosure statements may not precisely describe how contract prices change as a function of the underlying wholesale costs or other price indices." *Id.* at 3. Even after changing the regulations through the *New Disclosure Requirements Order* in response to the Polar Vortex, the Commission does not require the inclusion of a specific methodology or explicit formulaic pricing parameters for variable priced-products.[105]

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[103] *See, e.g.* Joint Complaint, Appendix A in *Commonwealth et al. v Respond Power, LLC*, Docket No. C-2014-2427659 (Joint Complaint filed June 20, 2014). See also the testimony of Acting Consumer Advocate McLoskey: http://www.oca.state.pa.us/Testimony/2014/Testimony%20of%20Tanya%20McCloskey%20Re.%20Variable%20Rate%20Plans_04-01-2014.pdf (last accessed February 28, 2016).

[104] OCA Comments filed April 3, 2014 at 39 (http://www.puc.pa.gov/pcdocs/1277994.pdf).

[105] 52 Pa. Code § 54.5(c). By contrast, the Commission's regulations applicable to natural gas suppliers ("NGSs") require the inclusion of the "NGS's specific prescribed variable pricing methodology." 52 Pa. Code § 62.75(c)(2)(i).

ii. Commission Approval of Disclosure Statement.

Moreover, it is important to note that BPE's Disclosure Statement was reviewed and approved by the Commission's Bureau of Consumer Services ("BCS") during the license application process.[106] Therefore, by issuing the *Licensing Order* approving BPE's application to operate as an EGS in Pennsylvania, the Commission implicitly approved that language.

In *Hoke v. Ambit Northeast, LLC d/b/a Ambit Energy*, Docket No. C-2013-2357863 (Initial Decision issued December 4, 2013) (Final Order entered January 16, 2014), the Commission relied upon the prior approval of the language contained in an EGS's disclosure statement in finding that the EGS had not violated any Commission regulations or orders. It is essential that EGSs be able to rely on Commission approval of disclosure statements with certainty that they will not later be called upon to defend certain provisions as being inconsistent with the Commission's regulations.[107] It is also noteworthy that the disclosure statement approved by the Commission in *Hoke* referred to prices fluctuating on the basis of capacity markets and market conditions, which is less descriptive than BPE's variable pricing terms. In dismissing the complaint, the Commission found that the supplier had provided accurate information using plain language and common terms and had not violated either Section 54.5(c) or Section 54.53(1) of the Commission's regulations. The Commission also concluded that the disclosure statement provided the customer adequate notice that the variable rate could increase on a month-to-month basis.

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[106] BPE Answer, Exhibit 1.

[107] To the extent that the Commission later determines that more information or details are needed in the disclosure statement, BPE recognizes the ability of the Commission to direct an EGS to make changes to its disclosure statement. However, an EGS should not be penalized for providing customers language in its disclosure statement that was submitted with its application and approved by the Commission.

Additionally, BPE's Disclosure Statement was reviewed and approved by the Commission in *Yaglidereliler Corp. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2413732 (Initial Decision served June 24, 2014; Order on Remand entered January 16, 2015) (*Yaglidereliler Corp. Order).* In the Initial Decision, the ALJ found that BPE's Disclosure Statement properly disclosed the terms and conditions of the variable price contract. During a review of the Initial Decision, the Commission discussed the language of the Disclosure Statement, identified no concerns about that language and did not alter that portion of the ALJ's Initial Decision. Rather, the Commission remanded the matter for further hearings on the basis that a review of the Disclosure Statement does not end the inquiry and that it was necessary to consider allegations about statements made by the sales representative during the enrollment process. *Id.* at 8-9, 11, 15, 18-19. Therefore, the Commission approved, or at the very least endorsed, BPE's Disclosure Statement through the *Yaglidereliler Corp. Order.*

iii. Requirements Demanded by Joint Complainants Do Not Exist in Commission's Regulations.

The real gist of the Joint Complainants' allegations regarding BPE's Disclosure Statement is that "consumers could not determine from the Disclosure Statement the price that they would or could be charged by the Respondent or how the price would be calculated."[108] Similarly, Ms. Alexander criticized the Disclosure Statement because it "did not contain any substantive information about the variable price feature that allows any reasonable consumer to understand the basis for how the price will be calculated or may change."[109] Similarly, Dr.

[108] Joint Complaint ¶ 26.
[109] OAG/OCA St. 1 at 28-30.

Estomin testified that "there is no information contained in Blue Pilot's Disclosure Statement that would allow a customer to calculate when an appropriate price should be."[110]

However, Ms. Alexander and Dr. Estomin have failed to accurately set forth the standard required by the Commission's regulations. Nothing in the regulations required BPE to provide a formula or methodology by which the consumer could compute the price or know what price may be charged. In fact, to the extent that the Commission would interpret the regulations in the manner suggested by the Joint Complainants, they are unconstitutionally vague because they do not give BPE fair notice that additional information is required in the Disclosure Statement. Therefore, any finding of a violation by BPE in connection with the content of its Disclosure Statement would run afoul of its due process rights.

The United States Supreme Court has explained that, in order to satisfy the Fifth Amendment's Due Process Clause -- made applicable to the states through the Fourteenth Amendment -- laws must not fail to "give [a] person of ordinary intelligence a reasonable opportunity to know what is prohibited..." *Hoffman* at 497; *Cmwlth. v. Parker White Metal Co.*, 515 A.2d 1358, 1367 (Pa. 1986) (due process requires that the proscribed conduct and range of penalties be unambiguously identified). Due process demands that a law not be vague. *Cmwlth. v. Mayfield*, 832 A.2d 418, 422 (Pa. 2003); *Cmwlth. v. Barud*, 681 A.2d 162, 165 (Pa. 1996). A law is vague if it fails to provide fair notice as to what conduct is forbidden or if it prevents the gauging of the future, contemplated conduct, or if it encourages arbitrary or discriminatory enforcement. *Cmwlth. v. McCoy*, 895 A.2d 18, 30 (Pa. Super. Ct. 2006). A vague law is one

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[110] OAG/OCA St. 2 at 6.

whose terms necessarily require people to guess at its meaning. *Mayfield*, 832 A.2d at 422. If a law is deficient (*i.e.*, vague) in any of these ways, then it violates due process and is constitutionally void. *Id.*

Indeed, in its *New Customer Disclosure Requirements Order*, the Commission agreed with a commenter's statement that requirements for "conditions of variability" and "limits on price variability" were vague and ambiguous and needed to be clarified as they were subject to "potential misinterpretation." *Id.* at 11. The Commission further stated its belief that "more specific direction should be provided to EGSs regarding the level of detail the Commission expects regarding the variability in retail generation supply pricing." *Id.* at 12.

b. Compliance with 52 Pa. Code § 54.5 establishes compliance with requirements of 52 Pa. Code § 54.43(1).

Section 54.43(1) of the Commission's regulations sets forth standards of conduct and requires EGSs to adhere to various general principles in the provision of electric generation service including the need to "provide accurate information about their electric generation services using plain language and common terms in communications with consumers, and to provide information "in a format that enables customers to compare the various electric generation services offered and the prices charged for each type of service."[111] The general policies of Section 54.43(1) do not establish any specific mandates applicable to BPE's Disclosure Statement beyond those standards already contained in Section 54.5. Therefore, BPE's compliance with Section 54.5 necessarily establishes compliance with the requirements of Section 54.43(1).

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[111] 52 Pa. Code § 54.43(1).

In developing these general standards of conduct in Section 54.43(1), prior to promulgating the specific customer information and disclosure regulations, the Commission merely echoed the language in Code Section 2807(d)(2) and its existing plain language statement of policy[112] in order to institute the licensing process and set forth basic rules.[113] In the rulemaking order promulgating Section 54.43, the Commission expressly recognized that future rules involving customer information and disclosure, as well as other consumer protection rules, would overlap with, or substitute for, these general policies at the time of their adoption.[114]

Thereafter, the Commission adopted various consumer protection regulations, including Section 53.5 governing the content of disclosure statements.[115] In promulgating the series of customer information and disclosure regulations,[116] the Commission expressly noted that they were intended to comply with Code Section 2807(d)(2) relating to the provision of adequate and accurate information in an understandable format that enables consumers to make informed choices and compare prices and services on a uniform basis. Therefore, through the customer information and disclosure regulations, the Commission was setting forth the specific requirements necessary to ensure that general mandates of the Competition Act and Section 54.43(1) were achieved.

An EGS's disclosure statement is not required, by the customer information and disclosure regulations, to fulfill all of those statutory objectives. Rather, it was the entire series of customer information and disclosure regulations that the Commission viewed as fulfilling its

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[112] 52 Pa. Code § 69.251 (policy statement on plain language guidelines).
[113] 28 Pa.B. 3760.
[114] *Id.*
[115] 28 Pa.B. 3780.
[116] 52 Pa. Code §§ 54.1-54.9.

mandate of ensuring that customers receive accurate and adequate information and are sufficiently equipped to make informed decisions. For instance, the Commission found that standard pricing terminology and units of measure proposed by Section 54.3 of the regulations[117] were necessary to provide consumers information in a clear and understandable format that enables them to compare prices and services on a uniform basis. Likewise, the Commission viewed the bill format prescribed by Section 54.4 of the regulations[118] as another means of providing customers with adequate and accurate information. In its discussion of Section 54.5 of the regulations, the Commission focused on the disclosure of actual prices, as opposed to percentage savings due to customer confusion during the pilot programs as to whether the percentage would be off only the generation charges or the entire EDC bill.[119]

Specifically with respect to the role of the disclosure statement in achieving the objectives of Code Section 2807(d)(2) and Section 54.43(1) of the regulations, Section 54.5 establishes the standards that EGSs must follow. Since the Commission clearly did not expect the disclosure statement itself to fulfill all of the objectives of the statutory mandates for accurate and adequate information in an understandable format that allows comparisons of prices and services on a uniform basis, it is inappropriate to hold BPE's Disclosure Statement to the broader requirements of Section 54.43(1). Whereas the purpose of the disclosure statement itself is to convey the terms and conditions of the proposed service, other information provided to the

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[117] 52 Pa. Code § 54.3.
[118] 52 Pa. Code § 54.4.
[119] 28 Pa.B. 3780.

consumers meets the broader objectives of receiving information in an understandable format that allows consumers to compare offers on a uniform basis.

Further, the Joint Complainants have failed to explain how BPE's Disclosure Statement departed from any specific requirements of Section 54.43(1), particularly as it pertains to disclosure statements. Indeed, it would be a violation of BPE's due process rights to find that its Disclosure Statement violated some provision of Section 54.43(1), when no specific requirement is clearly set forth therein. It is well-settled that the Commission may not enforce vague or general standards that do not provide fair notice as to what is required of EGSs or of what is prohibited. *See Vill. of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982) ("*Hoffman*") (the United States Supreme Court has explained that, in order to satisfy the Fifth Amendment's Due Process Clause – made applicable to the states through the Fourteenth Amendment – laws must not fail to "give [a] person of ordinary intelligence a reasonable opportunity to know what is prohibited…").

As to the plain language reference in Section 54.43(1), the Commission has adopted a policy statement recommending that public utilities adopt guidelines for written material provided to residential customers.[120] While the policy statement does not define "plain language," it provides guidance such as using short sentences, using active rather than passive voice and providing clear section headings. Again, the Joint Complainants have failed to identify any specific plain language guidelines from which BPE has allegedly departed. It further bears noting that the language used in BPE's Disclosure Statement incorporates

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[120] 52 Pa. Code § 69.251(a).

terminology from the Commission's "Consumer's Dictionary for Electric Competition," which provides a common language for consumers. See *Guidelines for Sue of Fixed Price Labels for Products With a Pass-Through Clause,* Docket No. M-2013-2362961 (Order entered November 14, 2013) (now referred to as the "Electric Competition Dictionary" and available on www.papowerswitch.com under the "Glossary" section).

Moreover, as noted above, absent clear standards, it would be a violation of BPE's due process rights to conclude that these guidelines were violated. *Hoffman.* Due process demands that legal standards not be vague. *Com. v. Mayfield*, 832 A.2d 418, 422 (Pa. 2003); *Com. v. Barud*, 681 A.2d 162, 165 (Pa. 1996). A statute or regulation is vague if it fails to provide fair notice as to what conduct is forbidden or if it prevents the gauging of future, contemplated conduct, or if it encourages arbitrary or discriminatory enforcement. *Com. v. McCoy*, 895 A.2d 18, 30 (Pa. Super. Ct. 2006). A vague law is one whose terms necessarily require people to guess at its meaning. *Mayfield,* 832 A.2d at 422. If a law is deficient (*i.e.,* vague) in any of these ways, then it violates due process and is constitutionally void. *Id.*

Additionally, the Pennsylvania Supreme Court has found that agency guidelines and general statements of policy do not establish a "binding norm." *Pa. Human Relations C'mmn. v. Norristown Area School Dist.*, 473 Pa. 334, 350, 374 A.2d 671, 679 (1977). Accordingly, the Commission may not find violations of policy statements or guidelines, which do not have the force and effect of law. *See Woods Services, Inc. v. Dep't. of Public Welfare*, 803 A.2d 260, 265 (Pa. Cmwlth. 2002).

As no departures from the Electric Competition Dictionary have been identified, any challenges to the plain language of BPE's Disclosure Statement must fail. Moreover, the Commission has not established any clear standards for how compliance with this requirement

may be achieved, and the Joint Complainants have not identified any departure by BPE from these guidelines in the context of its Disclosure Statement. In short, as BPE's Commission-approved Disclosure Statement complies with the specific provisions of Section 54.5 governing the content of disclosure statements, which was promulgated to make sure that customers receive adequate and accurate information, it necessarily complies with the requirements of 54.43(1) containing the same mandate.

To the extent that the Commission somehow concludes that BPE's Disclosure Statement does not comply with Section 54.5, no additional violations would be warranted given the fact that the general policies set forth in 54.43(1) of the regulations impose no further standards or requirements on EGSs with respect to their disclosure statements. Moreover, it is long-established black-letter law that prosecution for the same offense twice violates the double jeopardy protections of the Fifth Amendment. This protection extends to the prosecution for identical offenses. *Gavieres v. United States*, 220 U.S. 338 (1911). While the same act may give rise to the violation of multiple regulations, if the elements for each violation are the same, then prosecution of both violations would place a respondent in double jeopardy. In determining if the offenses are identical, and in application constitute one offense, "the test to be applied...is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299 (1932). *See also Brown v. Ohio*, 432 U.S. 161 (1977). To find otherwise could have an absurd result. For instance, an administrative agency could elect to have 100 regulations that impose the same standard and determine that a regulated entity that has committed one act that violates the standard has committed 100 violations.

c. As the Commission does not have statutory authority to enforce the Consumer Protection Law, it is not lawful for the Commission to conclude that BPE violated 52 Pa. Code § 111.12(d)(1).

Regarding the Joint Complainants' contentions in Count I that BPE's Disclosure Statement violates the Consumer Protection Law and thereby violates the Commission's regulations requiring compliance with the Consumer Protection Law, they must be dismissed because the Commission does not have jurisdiction (or expertise) to enforce the Consumer Protection Law.[121] As the Joint Complaint's alleged violations of Section 111.12(d)(1) are based wholly on the claim that BPE violated the Consumer Protection Law, it would be unlawful the Commission to conclude that BPE has violated the specified Commission regulations.

In ruling on BPE's Preliminary Objections, the ALJs properly concluded that the Commission does not have statutory authority to consider claims arising from alleged violations of the Consumer Protection Law and dismissed Count I to the extent it they seeks relief based on the CPL. *Interim Order on Preliminary Objections* at 5-8. On interlocutory review of the *Interim Order on Preliminary Objections*, the Commission agreed with the ALJs, concluding that it lacks statutory authority to hear complaints under the Consumer Protection Law. *Blue Pilot Interlocutory Order* at 16-17.

These rulings are consistent with prior Commission pronouncements. In *Mid-Atlantic Power Supply Assoc. v. PECO Energy Co.*, Docket No. P-00981615, 1999 Pa. PUC LEXIS 30 (Order entered May 19, 1999) , the Commission ruled that it has no statutory authority to enforce the Consumer Protection Law. In *MAPSA*, the Commission found that the EDC had created

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[121] Notably, the Joint Complainants also fail to identify any specific departures from the Consumer Protection Law in BPE's Disclosure Statement.

confusion regarding customer choice through its advertising campaign but noted that Code Section 2811 limits the Commission's remedial authority in this area.[122] In particular, Code Section 2811(d)(1) requires the Commission to refer findings of anticompetitive or discriminatory conduct to the Attorney General. Therefore, in *MAPSA,* the Commission deferred the issues to OAG, as an administrative agency with more extensive expertise in this area. *See also David P. Torakeo v. Pennsylvania American Water Co.*, Docket No. C-2013-2359123 (Opinion and Order entered April 3, 2014) ("to the extent that the Complainant is challenging the ALJ's finding regarding our jurisdiction over the allegations that PAWC's actions violated the UTPCPL, this Exception is also denied. As the ALJ determined it is clear under Pennsylvania law that the Commission does not have jurisdiction over such claims").

The Commission also recognized its lack of jurisdiction to enforce the Consumer Protection Law in *In Re Marketing and Sales Practices for the Retail Residential Energy Market*, Docket No. L-2010-2208332 (Order entered October 24, 2012) ("*Marketing Rulemaking Order*"). In that rulemaking proceeding, the Independent Regulatory Review Commission ("IRRC") had commented that the OAG administers the Consumer Protection Law and questioned how the Commission would administer or enforce its regulations requiring compliance with that law. In explaining how it would handle allegations about violations of the Consumer Protection Law, the Commission noted that it has a long-standing Memorandum of Understanding with the OAG, under which it refers matters that more appropriately fall under the OAG's purview for appropriate enforcement. *Id.* at 5-8.

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[122] 66 Pa. C.S. § 2811(d).

The Joint Complainants have relied on *Harrisburg Taxicab & Baggage Co. v. Pa. Pub. Util. Comm'n.*, 786 A.2d 288, 292-93 (Pa. Commw. 2001) ("*Harrisburg Taxicab*") for the concept that the Commission is permitted to incorporate another agency's regulations into its own and then enforce them. In *Harrisburg Taxicab*, the Commonwealth Court determined that the Commission has authority to enforce provisions of the Pennsylvania Vehicle Code pursuant to its authority under Code Section 1501,[123] which requires the Commission to ensure the safety of utility facilities, such as a taxicab. *Id.* at 293. The Court saw such overlapping jurisdiction as "exactly the type of sensible cooperation and mutual adjustment between the agencies." *Id.*

However, in this case, the Joint Complainants rely on the Commission's own regulations -- not statutory authority -- in support of their position that the Commission has jurisdiction to hear cases regarding the Consumer Protection Law. As the ALJs have properly determined, "[r]eliance on its own regulations is not comparable to the Commission's express authority to regulate the safety of taxicabs explicitly granted by the General Assembly in Section 1501." *Interim Order on Preliminary Objections* at 7. The ALJs further correctly noted that overlapping jurisdiction is not present here, where, for example, the remedies for findings of deceptive trade practices vary. *C. Leslie Pettko, et al. v. Pennsylvania American Water Co.*, 39 A.3d 473, 484 (Pa. Cmwlth. 2012) (the Commission does not have the authority to award civil penalties up to $5,000, as is allowed under the Consumer Protection Law). Consistent with the ALJs' conclusion, any issues regarding BPE's compliance with the Consumer Protection Law must be

[123] 66 Pa. C.S. § 1501.

brought in a forum that has jurisdiction to hear such claims. The Commission upheld these findings in the *Blue Pilot Interlocutory Order*.

d. Section 54.43(f) does not establish any standards to which an EGS is required to adhere.

As to the Joint Complaint's allegation that BPE has violated Section 54.43(f) of the Commission's regulations, this provision establishes no clear and enforceable standards to which an EGS is required to adhere. Rather, Section 54.43(f) simply provides that an EGS is responsible for the conduct of its employees, agents or representatives. As this provision does not establish standards for conduct, it would be a violation of BPE's due process to find a violation of Section 54.43(f). *See Hoffman*. Moreover, the Joint Complainants have failed to explain what aspect of Section 54.43(f) they believe BPE failed to adhere, and in fact have referred to this regulation only in the context of compliance with the Consumer Protection Law, which the Commission does not have the statutory authority to enforce.[124] In any event, since the Joint Complainants have not demonstrated any departure from the Commission's regulations governing disclosure statements, no violation can be found of Section 54.43(f).

3. Conclusion

The variable pricing language in BPE's Disclosure Statement, which has been approved by the Commission, fully complies with the requirements of Section 54.5 of the Commission's regulations, by setting forth the variable rate nature of the plan, the initial price and the conditions of variability through reference to several factors, including PJM wholesale market conditions. The Disclosure Statement is not required by the Commission's regulations to contain

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[124] Joint Complaint ¶ 23.

a specific pricing methodology or formula as the Joint Complainants would prefer, despite their acknowledgement that it may not be feasible to do so and that they have seen no disclosure statements that contain such details. Additionally, BPE's compliance with Section 54.5 of the Commission's regulations demonstrates that the Disclosure Statement also adheres to the general policies set forth in Section 54.43(1) of the regulations as they pertain to disclosure statements. Finally, the Commission lacks jurisdiction to consider claims arising from the Consumer Protection Law and may not find violations of regulations that establish no clear and enforceable standards to which an EGS must adhere. Therefore, Count I should be dismissed in its entirety.

D. Count II - Allegation of Prices Nonconforming to Disclosure Statement

1. Introduction

In Count II, the Joint Complaint alleges that BPE's prices charged to variable rate customers in early 2014 "were not reflective of the cost to serve residential customers."[125] Attached to the Joint Complaint is an Affidavit of Dr. Estomin, which claims that the average residential heating customer in January 2014 should not have exceeded approximately $0.23 per kWh.[126] Therefore, the Joint Complaint alleges that the prices charged by BPE did not conform to the variable rate pricing provision of BPE Disclosure Statement.[127]

Notably, the Joint Complaint cites no regulation, Code section or Commission order in Count II of the Joint Complaint that BPE is alleged to have violated. The reason for that omission is clear -- the Commission does not regulate the prices of EGSs and may not interpret

[125] Joint Complaint ¶ 30.
[126] Joint Complaint ¶ 31, Appendix B.
[127] Joint Complaint ¶ 32.

the contract or conduct a cost of service analysis to determine whether those prices are just and reasonable.

In the *Blue Pilot Interlocutory Order*, the Commission confirmed that it does not "have traditional ratemaking authority over competitive suppliers and does not regulate competitive supply rates." *Id.* at 26. As to whether BPE's prices conformed to its Disclosure Statement, the Commission found that a sufficient nexus existed between allegations of EGS pricing in the Joint Complaint and the required disclosures under the Commission's regulations to "withstand preliminary objection." *Id.* at 27.

Now that the evidentiary record has been developed in this proceeding, it is clear that any determination as to whether BPE's prices conformed to its Disclosure Statement would require the Commission to interpret the terms of the contract and engage in a cost of service analysis by reviewing various cost elements in the wholesale market and imputing a "just and reasonable" profit margin. The Commission has correctly determined that it does not have jurisdiction to interpret the terms of a contract between an EGS and its customer. Without interpreting the contract, it is not possible to determine that BPE's prices failed to conform to its Disclosure Statement in the absence of a specific index, formula pricing methodology or ceiling – none of which are required by the Commission's regulations.

As EGS rates are not regulated by the Commission and may not be subjected to a "just and reasonable" review, and a determination as to whether BPE's prices conformed to the Disclosure Statement would require the contract to contain terms that are not mandated by the Commission's regulations, Count II should be dismissed outright. Moreover, the Joint Complainants have failed to carry their burden of proving that the prices charged by BPE to its

variable rate customers in early 2014 departed in any way from the variable pricing statement contained in the Disclosure Statement.

2. Discussion

a. The Commission may not regulate EGS prices or interpret contracts between EGSs and their customers.

i. The Code does not authorize the Commission to determine whether EGS rates are "just and reasonable."

Nothing in the Code authorizes the Commission to regulate the prices of EGSs. Code Section 1301 is the only provision that gives the Commission statutory authority to determine "just and reasonable" rates.[128] This provision clearly applies only to rates demanded or received by a "public utility," which does not include EGSs for this purpose. Specifically, 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."[129] Also, 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. *Delmarva.* 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. Moreover, in enacting the Competition Act, the General Assembly made it clear that the price of

[128] 66 Pa. C.S. § 1301.
[129] 66 Pa. C.S. § 2806(a).

generation supply is exempt from regulation, noting that "[c]ompetitive market forces are more effective than economic regulation in controlling the cost of generating electricity."[130]

Indeed, the Commission has recognized its lack of jurisdiction to regulate prices charged by EGSs. *Blue Pilot Interlocutory Order* at 18. *See also CRH Catering Company, Inc. v. Blue Pilot Energy, LLC*, Docket No. P-2014-2451865 (Order entered February 24, 2015) (noting that it is well-settled that the Commission's jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom, the Commission concluded that "it is equally well-settled that the Commission does not have traditional ratemaking authority over competitive suppliers and cannot regulate competitive supply rates.") *Id.* at 16. These rulings are consistent with the conclusions previously set forth by the Commission in the *Variable Price Order*, where 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. *Variable Price Order* at 3.

Moreover, the Commission's lack of statutory authority to regulate prices that EGSs charge their customers has been recently reinforced by the Commonwealth Court in *CAUSE-PA*. While the *CAUSE-PA* decision has already been cited as supporting the ability of the

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[130] 66 Pa. C.S. § 2802(5).

Commission to "bend competition,"[131] it is noteworthy that the Court's language was entirely premised on policy concerns affecting low-income customers on assistance programs and other utility customers who subsidize those programs. While clearly recognizing that the Commission does not have jurisdiction to regulate EGS prices, the Court in *CAUSE-PA* found that the Commission could, under very limited and specific circumstances, adopt certain parameters regarding EGS services that would only be applicable to EGSs who voluntarily opt to participate in *future* Commission-authorized programs that are designed to enable low-income customers to shop for electricity. *CAUSE-PA* at 29. Nothing in the *CAUSE-PA* decision supports the concept that the Commission may step in months or years later to review, regulate or in any way limit prices charged to customers by EGSs under private contracts.

ii. The Code does not authorize the Commission to interpret private contracts.

Moreover, nothing in the Code authorizes the Commission to interpret the terms and conditions of a private contract between an EGS and its customers. Indeed, the Commission has concluded 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. FirstEnergy Solutions Corp. ("FES")*, Docket No. P-2014-2421556 (Order entered January 26, 2015) at 18. Rather, these are matters for civil courts of common pleas of competent jurisdiction. *See Allport Water Auth. v. Winburne Water Co.*, 258 Pa. Super. 555, 393 A.2d 673

[131] *See Herp v. Respond Power LLC,* Docket No. C-2014-2413756 (Order entered January 28, 2016).

(Pa. Super. 1978) (Commission lacks jurisdiction to address disputes involving private contracts); *Adams et al. v. Pa. Pub. Util. Comm'n*, 819 A.2d 631 (Pa. Cmwlth. 2003).

As the case law envisions, Pennsylvania county courts of common pleas have resolved contractual disputes between EGSs and their customers. *See, e.g., Tech Met, Inc. et al. v. Strategic Energy, LLC* (Court of Common Pleas of Allegheny County – Civil Division, Docket No. GD-05-030407, Memorandum and Order of Court (Wettick, J.) entered June 4, 2014) (A copy of Judge Wettick's Order granting summary judgment in favor of the EGS is attached hereto as Appendix A). Moreover, in prior cases involving disputes between EGSs and their customers, the Commission has limited its inquiry to whether the EGSs have violated the Code or Commission regulations. *See, e.g., Bracken v. Champion Energy Services, LLC*, Docket No. C-2011-2256514 (Opinion and Order entered June 12, 2012); *Bosche v. Direct Energy Services, LLC*, Docket No. C-2013-2361740 (Initial Decision issued December 3, 2013 and Final Order entered December 12, 2014).

In *FES*, when the OSBA raised questions about the prices that were being charged by the EGS, the Commission appropriately observed that the case required an interpretation of a private contract. *FES* at 20. The Commission properly found that to provide OSBA the requested relief -- of declaring that FES may not recover ancillary service costs as a pass-through event -- it would need to interpret the language in the FES contract. *See, generally, Morrow v. The Bell Tel. Co. of Pa.*, 479 A.2d 548 (Pa. Super. 1984) (the courts retain jurisdiction of a suit for damages based on negligence or breach of contract wherein a utility's performance of its legally imposed and contractually adopted obligations are examined and applied to a given set of facts); *see also Virgilli v. Southwestern Pennsylvania Water Authority*, 427 A.2d 1251, 1254 (Pa. Cmwlth. 1981) ("[w]hile Southwestern's claim may ultimately affect Mather's rates, such a

result does not divest a common pleas court of its jurisdiction to resolve a private contract dispute"). The Commission should recognize the same reality in this proceeding.

b. In order to sustain Count II of the Joint Complaint, the Commission would need to improperly engage in a cost of service analysis of unregulated rates and interpret the terms of a private contract.

Regardless of how Count II is titled, the only factual allegations contained therein are that BPE's prices did not reflect of serving residential customers in early 2014. Indeed, the Affidavit attached to the Joint Complaint analyzes cost of service, which is a ratemaking principle applicable to regulated utility rates and not a requirement that applies to EGS prices. *See e.g., Lloyd v. Pa. Pub. Util. Comm'n*, 904 A.2d 1010, 2006 Pa. Commw. LEXIS 438 (2006) ("*Lloyd*"). In the *Interim Order on Preliminary Objections*, the ALJs correctly observed that the "[n]othing in the Affidavit correlates the prices charged by BPE to the Disclosure Statement," and that rather, it discusses concepts of the cost to serve which is irrelevant to EGS pricing. *Id.* at 12. Since EGS pricing is divorced from the cost incurred to serve residential customers, the factual allegations of the Joint Complaint, on their face, must fail.

On interlocutory review, the Commission merely found that Count II should survive Preliminary Objections because in theory, the Commission may be able to find that an EGS has charged prices that do not conform to its disclosure statement. The Commission did not, however, suggest that it could step into the shoes of an EGS and determine what a "just and reasonable" variable price would have been under a contract where the price varies due to fluctuations in the wholesale market and includes a profit margin. Such a conclusion would have been at odds with its statutory authority and its past pronouncements regarding its lack of jurisdiction to regulate EGS prices. Rather, it considered the narrow question posed by the Joint

Complainants in a vacuum and simply found that theoretically it may be able to determine whether a price conforms to a disclosure statement.

However, as the record has developed in this proceeding, it has become clear that BPE's variable price is based on a number of factors, including PJM's wholesale market conditions, such that the Commission cannot perform a simple comparison of BPE's prices with the elements of its Disclosure Statement. As was the case in *FES,* the same is true here -- in order to determine whether BPE's prices conformed to its Disclosure Statement, the Commission would need to interpret the terms of the contract and review the wholesale market conditions and other factors that go into pricing an EGS product, including a profit margin. In other words, the Commission would essentially need to perform a traditional cost of service analysis that is typically reserved for a review of public utilities' rates. *Lloyd.*

Perhaps most compelling of all of the Commission's limitations on reviewing EGS prices is the profit margin component. The Commission has no requirements for an EGS's profit margin -- nothing requires that it be defined, flat, limited or disclosed. Therefore, even if the Commission attempted to perform a cost-of-service analysis and considered all of the different costs that it believes should have gone into the development of BPE's price, it would still be unable to impute a "reasonable rate of return" to determine what BPE's variable price should have been in early 2014.

While Dr. Estomin attempts to frame the issue as one of whether BPE's variable prices in early 2014 conformed to the Disclosure Statement, he unavoidably interchanges the principles of cost of service with the various elements contained in the Disclosure Statement. For instance, he

testified that BPE "does not determine prices that are based on its costs." [132] This testimony illustrates the slippery slope that the Commission will be on if it engages in a review to determine what it believes BPE's prices should have been; it will unavoidably be drawn into a traditional cost of service analysis that is reserved for determinations of whether public utilities' rates are just and reasonable.

Therefore, while the Commission was concerned that it was premature at the preliminary objection phase of the proceeding to dismiss Count II (prices conforming to disclosure statement), such dismissal is now warranted. It is simply not possible to determine whether an EGS's prices conform to their disclosure statements in a situation where a variable-priced disclosure statement does not contain a specific index, formula, pricing methodology or ceiling. Yet, neither this form of rigid price formula for variable price agreements nor a ceiling on variable prices is required by Commission regulations. Nor was such a formula used by BPE in its contracts with customers. [133]

Not only would the adjudication of an EGS-customer private contract dispute exceed the Commission's statutory authority, it would also run afoul of the Commonwealth's electric competition policies, deterring EGS participation and stifling product innovation in Pennsylvania's retail market. The policy of the Commonwealth, as expressed in the Competition

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[132] OAG/OCA St. 2 at 7.

[133] BPE recognizes that in situations where a disclosure statement contains a formula or a ceiling, the Commission may be able to consider whether the prices conformed to the disclosure statement without interpreting the contract or performing a cost of service analysis. For instance, if an EGS has a fixed price contract with a customer to provide electricity at 9 cents per kWh for a period of six months, and the EGS charges the customer 10 cents per kWh after a period of only five months, the Commission may be able to determine that the EGS's price in the sixth month did not conform to the disclosure statement. Similarly, if an EGS has a variable price contract with a customer that contains a 15 cent/kWh ceiling, and the EGS charges the customer 20 cents/kWh, the Commission may be able to determine that the EGS's price did not conform to the disclosure statement. However, these are not the realities with BPE's Disclosure Statement.

Act, is that the generation of electricity be deregulated in order to control prices and encourage product innovation.[134] If the Commission begins interpreting words and phrases in EGS contracts as they relate to market conditions or other costs, or to determine "just and reasonable" profit margins for EGSs, it will completely undermine the express and fundamental principles upon which the Competition Act is based.

The Commission does not regulate the prices charged by EGSs and may not conduct cost of service analyses to determine if those prices are just and reasonable. Likewise, the Commission may not interpret the terms of a private contract. Therefore, Count II should be dismissed outright.

c. The Joint Complainants have failed to demonstrate that BPE's variable prices in early 2014 departed from the Disclosure Statement.

In any event, the evidence offered by the Joint Complainants does not show that BPE's variable prices in early 2014 departed from the factors described in the Disclosure Statement. Their attempts to do so through the testimony of Dr. Estomin failed. Despite never having operated an EGS or priced an energy product for sale to retail customers,[135] Dr. Estomin referenced various costs that BPE may have incurred and summarily concluded that BPE did not price its product in a manner that is consistent with its Disclosure Statement or in a way that reflected its costs of service.[136] This testimony, along with his affidavit attached to the Joint Complaint, demonstrates that Dr. Estomin is frozen in regulated utility mode. In short, this is not a regulated rate case and BPE's Disclosure Statement is not the basis for a cost of service study.

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[134] *See, e.g.*, 66 Pa. C.S. §§ 2802(14), 2806(a), 2809.
[135] Tr. 754.
[136] OAG/OCA St. 2 at 18.

Dr. Estomin also testified that the prices charged to customers in February should have reflected the energy costs that BPE incurred in January and February, and that the prices charged to customers in March should reflect energy costs that BPE incurred in February and March. He noted, however, that PJM costs over these months were not constant.[137] Significantly, BPE's Disclosure Statement does not indicate that rates would always adjust proportionally to the PJM Markets or that rates would be based exclusively on the PJM day-ahead market.[138] Dr. Estomin's conjecture regarding how BPE should have calculated its rates based on PJM wholesale market conditions is outside the jurisdiction of the Commission, as the Commission lacks ratemaking authority, and is peculiar to his own way of thinking. It certainly is not supported by any facts in the record and does not prove that BPE's prices failed to conform to its Disclosure Statement.

Further, Dr. Estomin acknowledged that many other costs could fall in to the "several factors" category of the Disclosure Statement, including hedging costs, transmission costs, ancillary costs, scheduling costs, supplier fees, PJM monthly fees, imbalance charges, purchase of receivables, processing fees, EDI expenses, renewable energy costs, overhead costs and management fees.[139] Also despite his own personal preference for consumers to be able to calculate whether a price charged by an EGS is reasonable, he conceded that many of the elements of EGS prices would not be readily available to consumers.[140] Therefore, he seeks to hold BPE to a standard that is neither practical nor required by the Commission's regulations.

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[137] OAG/OCA St. 2 at 15.
[138] Tr. 761.
[139] OAG/OCA St. 2 at 8; Tr. 757-759.
[140] Tr. 759.

The Joint Complainants have failed to carry their burden of proof that BPE departed from the variable pricing language of its Disclosure Statement in establishing variable prices in early 2014. They have likewise failed to demonstrate that BPE's prices during that time did not conform to its Disclosure Statement. Any further inquiry by the Commission is inappropriate.

3. Conclusion

The Commission does not regulate EGS prices or consider whether the prices charged by EGSs are just and reasonable. Likewise, the Commission does not interpret private contracts. Since a consideration of the allegations set forth in Count II would require the Commission to review wholesale market conditions, consider expenses incurred by an EGS to purchase electricity, determine a reasonable profit margin for BPE to recover and perform other traditional ratemaking functions that are applicable to rates charged by public utilities, Count II should be dismissed in its entirety.

E. Count III - Allegation of Misleading and Deceptive Promises of Savings

1. Introduction

In Count III of the Joint Complaint, the Joint Complainants allege that BPE promised savings that did not materialize, in violation of the Consumer Protection Law.[141] They also claim that BPE failed to adequately train and monitor its agents, in violation of Sections 111.4 and 111.5 of the Commission's regulations.[142] The Joint Complainants' evidence in support of Count III is flawed in several material respects, and importantly, the Commission does not have

[141] Joint Complaint ¶ 41.
[142] 52 Pa. Code §§ 111.4-111.5; Joint Complaint ¶ 42.

jurisdiction to enforce the Consumer Protection Law. As they have failed to carry their burden of proof, Count III should be dismissed.

Notably, even before the evidence in this proceeding is reviewed, the numbers of consumers who complained to the OAG, the OCA and the Commission about BPE's alleged "promises of savings" that were not realized are remarkably low. For example, the Joint Complaint alleges that five consumers indicated their belief to the OAG that BPE would save them money over the PTC;[143] that three consumers told OCA that they were promised savings over the PTC;[144] and that three consumers made the same claim in formal complaints filed with the Commission.[145] Without even identifying these eleven consumers or alleging that they are eleven different consumers, the Joint Complaint offers the broad-sweeping allegation that BPE engaged in fraudulent and deceptive activities by promising savings that "for many customers" did not materialize and failed to adequately train and monitor its agents. Anchoring this type of allegation on the factual claims of possibly eleven consumers demonstrates the lack of any legitimate basis from the outset for the Joint Complainants to even pursue these matters against BPE.

In addition, the consumer witness testimony about alleged "promised savings" is uncorroborated hearsay evidence, which may not be relied upon by the Commission to support any findings. Further, many of the consumer witnesses indicated their expectation that the Pennsylvania electric choice program inherently guarantees savings, while others offered vague

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[143] Joint Complaint ¶ 34.
[144] Joint Complaint ¶ 36.
[145] Joint Complaint ¶ 37.

and inconsistent accounts of their experiences, casting serious doubts on their credibility. Moreover, this uncorroborated hearsay testimony was elicited through an aggressive media campaign and a pre-printed series of questions that led consumers who were in search of refunds to answer the questions a certain way. Further, not only is the hearsay testimony of the consumer witnesses uncorroborated by any evidence in the record, but it is directly refuted by BPE's Disclosure Statement which contains no promises of savings or price ceilings and explains that prices will vary on the basis of several factors including PJM wholesale market conditions.

2. Discussion

a. The consumer testimony provides no basis for finding that BPE promised savings that were not realized.

i. Many consumers testified that savings were not guaranteed by BPE sales representatives.

At the outset, it is noteworthy that many consumers testified in this proceeding that BPE did not guarantee savings during their sales transactions. Others testified that they knew their prices would vary on a monthly basis, after the expiration of the initial price, to reflect factors including wholesale market conditions. Consumers also testified that their initial prices had been honored and that they had enjoyed savings prior to the Polar Vortex. Others indicated that they expected savings but either did not attribute that expectation to BPE or attributed to a different source. Examples of this testimony include the following:

- John Cassel, who enrolled in June 2012, testified that he understood his initial price would be 6.75 cents per kWh and would thereafter fluctuate according to the market. He also testified that no one at BPE guaranteed him any savings.[146]

- David Duke, who enrolled in October 2012, referred only to savings that were guaranteed during the initial period and testified that he understood he was on a variable rate.[147]

- Jeffery Hamilton, who enrolled in July 2012, knew that the rate could increase after 18 months and did not suggest that anyone at BPE promised savings.[148]

- Scott Hornberger testified that no one from BPE guaranteed him savings.[149]

- Bree Burlingame, testifying on behalf of Erie Animal Hospital, noted that the guaranteed initial rates were honored.[150]

- Testifying about his August 2012 enrollment when he was offered an initial rate for 180 days, George Dingler assumed that BPE's pricing would be consistently competitive with all other Pennsylvania rates "regulated" by the Commission.[151]

- Walt Wensel testified that he knew the rate was variable and did not have any caps; he further indicated that he did not feel that there was "anything fraudulent" done by BPE.[152]

- Neil Weaver compared prices on the internet and called BPE because he thought he had to switch based on a newspaper article he read; he understood the rate was variable and no savings were guaranteed.[153]

- William Smith had no interaction with BPE sales agents and merely assumed the rates would be reasonable for a couple of years.[154]

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[146] OAG/OCA Consumer Testimony at 574; Tr. 642, 644; *see also* OAG/OCA Consumer Testimony at 348-350 (no guaranteed savings); OAG/OCA Consumer Testimony at 391-393 (no guaranteed savings);
[147] OAG/OCA Consumer Testimony at 501-503; Tr. 375.
[148] OAG/OCA Consumer Testimony at 106-108.
[149] Tr. 263. *See also* Tr. 192 (Marcy Weyant);
[150] OAG/OCA Consumer Testimony at 155-157; Tr. 59.
[151] OAG/OCA Consumer Testimony at 403-406.
[152] OAG/OCA Consumer Testimony at 225-227, 231; Exh. WW-1.
[153] OAG/OCA Consumer Testimony at 563-565.
[154] OAG/OCA Consumer Testimony at 567-569.

- Rachel and Charles Nentwig signed upon online in 2012 and thought the rate would be fixed for one year; they knew it would vary after the first year and received no guarantees of savings.[155]

ii. The consumer testimony offered by the Joint Complainants regarding statements made by BPE sales representatives constitutes uncorroborated hearsay testimony.

The consumer testimony offered by the Joint Complainants, which claims that BPE sales representatives made promises of savings, is uncorroborated hearsay. 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). In this case, some consumer witnesses testified that the BPE sales representative told them that they would save money by switching to BPE, as compared to the EDC's PTC. This testimony was offered to prove that their prices later exceeded the PTC contrary to the representations of BPE sales representatives and to support the issuance of a refund to consumers. As such, they are out-of-court statements that are offered to prove the truth of the matter asserted and constitute hearsay. *Gruelle.*

As discussed above, it is well-settled that even when hearsay is included in the record, it cannot support findings by an administrative agency. *Walker.* The hearsay testimony of the consumer witnesses was not corroborated by any other evidence admitted in the record. As the parties with the burden of proof and the obligation to establish their case by a preponderance of the evidence, it was incumbent upon the Joint Complainant to produce evidence, such as through the testimony of the sales representatives. No such efforts were made. *Gruelle.*

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[155] OAG/OCA Consumer Testimony at 465-467; Tr. 409-412.

Moreover, since the promotional materials described by Ms. Alexander's testimony did not guarantee savings, they do not corroborate the hearsay testimony of consumer witnesses.[156] Specifically, none of these materials contained any prices or comparisons to EDC's PTCs or time periods for any savings. Rather, they generally referred to possible savings and are nothing more than non-actionable puffery. *See Gordon & Breach Science Publishers SA v. Am. Inst. of Physics*, 905 F. Supp. 169, 182 (S.D.N.Y. 1985). Further, the consumer witnesses mentioned by Ms. Alexander in conjunction with the promotional materials did not testify that they relied on this information to enroll with BPE. Linda Wintersteen provided materials to the Joint Complainants that she had downloaded on August 1, 2014, three years after her enrollment, and offered no testimony to indicate that she had viewed this information when she decided to enroll with BPE.[157] Similarly, Russell Mowl's testimony made no reference to promotional materials that he had received from BPE and, in fact, he testified that he does not recall any savings being guaranteed.[158]

The sales scripts described by Ms. Alexander likewise fail to corroborate the hearsay testimony of consumer witnesses, and in reality, demonstrate the opposite. While she testified that the sales scripts used during 2013 emphasized the potential for "lower rates" and used the term "better rate" to refer to BPE's prices, these phrases do not suggest that any savings were being promised. Indeed, one example she relied upon specifically says that lower rates "may" be available.[159] Also, although the scripts referred to a rate that would reduce the bill, they did not contain commitments of any long-term reductions and expressly indicated that the price could go up

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[156] OAG/OCA St. 1 at 10-11.
[157] OAG/OCA St. 1 at 11; OAG/OCA Consumer Testimony at 41-43.
[158] OAG/OCA St. 1 at 11; OAG/OCA Consumer Testimony at 469-472.
[159] OAG/OCA St. 1 at 11.

or down.[160] Clearly, BPE's sales scripts were designed to ensure that long-term savings were not promised, and as such, they fail to give any credence to the consumers who claimed otherwise.

iii. Many of the consumer witnesses' testimonies are not credible.

In addition, many of the consumer witnesses' testimonies claiming promised savings were confusing, inconsistent and unclear in several regards, casting serious doubts on their credibility regarding a sales pitch that was made several months or several years prior to submission of the testimony.[161] Some complaints are simply not credible or verifiable because the topic of energy pricing is not commonplace, especially when compared to discussion about a local sports team, or national news, or the latest electronic gadget. Consumers may be confused and as time passes, people tend to forget facts, especially if they were not particularly interesting to them initially. Also, it is noteworthy that at the same time that BPE sales representatives were engaged in sales and marketing activities, customers were also being contacted by other EGSs with sales pitches.[162] Receiving competing offers naturally made it difficult for consumers to recall specific details about their sales experience with BPE.

In addition, consumers were hearing from their EDCs about their ability to choose and EGS and potentially save money. Pursuant to Commission directives set forth in a December 15,

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[160] OAG/OCA St. 1 at 12.

[161] *See, e.g.,* OAG/OCA Consumer Testimony at 150-152, Tr. 117-121 (Darrell Bacorn) (thought the rate for his business would be lower for one year but has no recollection of when he signed up or what the price would be); OAG/OCA Consumer Testimony at 100-102 (Robert Bishop) (does not recall if he signed up over the telephone or by mail and conceded that he does not clearly recall the sales transaction); OAG/OCA Consumer Testimony at 159-161, 352-353) (Gary Euler) (thought that sales agents solicited him at his office and residence and is not certain they were from BPE).

[162] *See, e.g.,* OAG/OCA Consumer Testimony at 88-90 (Jacqueline Epler); Tr. 146 (Flowers by Regina); OAG/OCA Consumer Testimony at 257-259, Exh. JIM-1 (I&J Miller, Inc. d/b/a Miller's Sunoco) (referring to disclosure statement sent by a different EGS).

2011 Secretarial Letter, the EDCs sent all residential and small business customers a postcard signed by all five Commissioners (by February 29, 2012) containing the simple message: "Shop, Switch, Save."[163] Also, starting in November 2012, the EDCs mailed to all residential and small business customers a Commission-endorsed tri-fold flyer emphasizing the possibility of saving by choosing an EGS, offering specific examples of savings.[164] Consumers recounted instances of being encouraged by the Commission or their EDCs to shop for electric generation supply.[165] Further, every EDC website contains an educational section that reviews the electric choice program and provides instructions on how to shop and compare, generally explaining that the selection of an EGS may result in savings."[166] Additionally, the Commission's shopping website, www.PaPowerSwitch.com, contains messages about potential savings.[167]

As a result of these sales and educational efforts, customers were constantly hearing about the opportunity to save money if they switched to an EGS. Therefore, rather than BPE sales representatives creating any expectations of savings, consumers entered the conversation with BPE sales representatives with the mindset that this was a money-saving opportunity. Customers heard what they wanted to hear or what they expected to hear based on their prior exposure to consumer education campaigns and other sales pitches.

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[163] *See Investigation of Pennsylvania's Retail Electricity Market*, Docket No. I-2011-2237952 (Secretarial Letter dated December 15, 2011).
[164] *See Investigation of Pennsylvania's Retail Electricity Market*, Docket No. I-2011-2237952 (Order entered March 1, 2012, at pp. 7-12) and (Order entered June 21, 2012).
[165] *See, e.g.*, OAG/OCA Consumer Testimony at 477-479 (Luann and Matthew Battersby); OAG/OCA Consumer Testimony at 64 (Fickess Pumps, Inc.); OAG/OCA Consumer Testimony at 270-272 (Daniel Zablosky).
[166] *See, e.g.*, https://www.pplelectric.com/at-your-service/choose-your-supplier.aspx. ("You may save money.")
[167] http://www.papowerswitch.com/. ("Depending on where you live, you may be able to save money by switching your electric supplier).

Further damaging the credibility of the consumer witness testimony, the Joint Complainants sent forms containing a leading question aimed at eliciting a response that BPE sales representatives had guaranteed savings. In the statements submitted by the Joint Complainants, Question No. 12.a. asks: "Did the EGS salesperson guarantee savings?" and Question No. 12.b. asks each witness: "If yes, please explain."

It is well-settled that a party may not lead its own witness with suggestive questions. *See In Re Rogan Estate*, 404 Pa. 205, 214, 171 A.2d 177, 181 (1961); *Pascone v. Thomas Jefferson Univ.*, 516 A.2d 384, 388 (Pa. Super. 1986).[168] The prohibition against the use of leading questions on direct examination equally applies to administrative proceedings. *See Harbison v. W.C.A.B. (Donnelley)*, 496 A.2d 1306, 1309 (Pa. Cmwlth. 1985) (impermissible for counsel to literally place the sought-after answers into the witnesses' mouths). Moreover, answers to inappropriate leading questions are not admissible and may not be used to support the examining parties' case. *Wilson v. A.P. Green Indus., Inc.*, 2002 Pa. Super. 294, 807 A.2d 922, 926 (Pa. Super. 2002).

A leading question has been defined as one that puts the desired answer in the mouth of the witness. *Cmwlth. v. Dreibelbis*, 493 Pa. 466, 476, 426 A.2d 1111, 1116 (1981). The guaranteed savings question does exactly that, especially by following up with a second part to explain if the answer was yes. While other questions are more general, asking the consumer to describe the problem or their interactions with the sales representative, the guaranteed savings question makes it clear to the consumer witness that he or she is expected to answer "yes."

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[168] *See also* P.R.E. 611(c).

Many consumers who suggested nothing about promised savings in response to the prior more general questions responded "yes" (without any explanation) to the guaranteed savings question.[169] Even those who mentioned promises of savings earlier in their testimony had access to the full set of written questions prior to responding to any of them.

The consumer witnesses were generally aware that the Joint Complainants are trying to recover money on their behalf based on allegedly misleading statements by BPE regarding pricing and savings. Asking the consumers, "Did the EGS salesperson guarantee savings?" clearly suggests that an affirmative answer is both desired and the one most likely to produce a refund for the witness. Had the question been phrased appropriately, consumers would not have been encouraged to answer in the affirmative, but rather would have provided their actual, unprompted recollection of the facts.

The Joint Complainants could have easily elicited relevant testimony without signaling the desired answer. For instance, they could have asked if the EGS salesperson talked about savings. As of the time when the consumer testimony was served on BPE, it was no longer possible to re-word the question since the desired answer that the EGS salesperson guaranteed savings had already been suggested to each witness. In essence, the Joint Complainants -- as they have throughout this proceeding -- manipulated the consumer testimony to match the worst-case allegations of the Joint Complaint and suggested that the tainted evidence is applicable to an

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[169] *See, e.g.*, OAG/OCA Consumer Testimony at 403-405 (George Dingler); OAG/OCA Consumer Testimony at 88-90 (Jacqueline Epler); OAG Consumer Testimony at 294-296 (Dean Faust); OAG/OCA Consumer Testimony at 383-385 (Fort Boone Campground); OAG/OCA Consumer Testimony at 208-210 (Alexandra Moratelli).

entire class of customers, rather than allowing the evidence to simply speak for itself on a consumer-by-consumer basis.

iv. The uncorroborated hearsay was directly refuted by the Disclosure Statement.

Not only is the hearsay testimony of the consumer witnesses uncorroborated by any evidence in the record, it is directly refuted by the Disclosure Statement. Regardless of any impression that the consumer witnesses may have been under based on EDC and Commission educational materials and their conversations with BPE and other EGS sales representatives, the Disclosure Statement left no doubt as to the variable nature of the contract and about the fact that the price would vary on the basis of market conditions and would have no ceiling.

The only competent evidence in the record directly refutes the self-serving hearsay offered by the Joint Complainants through the consumer witnesses. Given that the written contract contradicts what some consumer witnesses claim the sales representatives told them, it is the terms and conditions of service clearly explained in the Disclosure Statement that are controlling. The written words of the Disclosure Statement must prevail over memories of what consumers believed that a sales agent told them, particularly due to the many terms that are important to a transaction involving the selection of an EGS.

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 contract meaningless.

Ms. Alexander's testimony suggesting that consumers rely on oral statements of agents and promotional materials in deciding whether to enroll should be disregarded.[170] Besides this suggestion having no basis in Pennsylvania law, which relies on the written documentation, Ms. Alexander's experience on these matters is entirely rooted in her consulting practice. She has no experience developing marketing materials or interacting with consumers as part of a sales transaction.[171] Moreover, she does not claim to have any expertise in linguistic or psychological analyses of how consumers perceive sales transactions or any background relating to consumer marketing and perceptions.[172] Significantly, she conducted no consumer surveys to arrive at her conclusions and does not rely on any data relating to any such consumer survey.[173]

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

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[170] OAG/OCA St. 1 at 14.
[171] Tr. 732.
[172] OAG/OCA St. 1, Exhibit BRA-1.
[173] Tr. 734-735.

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).

b. The Commission does not have jurisdiction to enforce the Consumer Protection Law.

Regarding the Joint Complainants' contentions in Count III that BPE violated the Consumer Protection Law during sales transactions with customers, BPE reiterates the argument set forth above regarding the Commission's lack of statutory authority to enforce the Consumer Protection Law.[174] Therefore, as the Joint Complaint's alleged violations of Section 111.12(d)(1) are based wholly on the claim that BPE violated the Consumer Protection Law, it would be unlawful the Commission to conclude that BPE has violated the specified Commission regulation.[175] Dismissal of this allegation of Count III would be consistent with the ALJ's *Interim Order on Preliminary Objections* and the Commission's *Blue Pilot Interlocutory Order*. *See also MAPSA; Marketing Rulemaking Order*.

c. Section 54.43(f) does not establish any standards to which an EGS is required to adhere.

As to the Joint Complaint's allegation in Count III that BPE violated Section 54.43(f) of the Commission's regulations, this provision establishes no clear and enforceable standards to which an EGS is required to adhere. Rather, Section 54.43(f) simply provides that an EGS is responsible for the conduct of its employees, agents or representatives. As this provision does

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[174] *See* BPE M.B. at 72-75.
[175] Joint Complaint ¶ 39.

not establish standards for that conduct, it would be a violation of BPE's due process to find a violation of Section 54.43(f). *See Hoffman.* Moreover, the Joint Complainants have failed to explain what aspect of Section 54.43(f) they believe BPE failed to adhere, and in fact have referred to this regulation only in the context of compliance with the Consumer Protection Law, which the Commission does not have the statutory authority to enforce.[176] In any event, since the Joint Complainants have not demonstrated any departure from the Commission's regulations governing disclosure statements, no violation can be found of Section 54.43(f).

d. The Joint Complainants have not presented evidence to prove any violation of the Commission's regulations concerning training and monitoring of its sales agents.

Without offering any factual averments or identifying specific alleged departures from the Commission's regulations, the Joint Complaint simply alleges that BPE has failed to adequately train and monitor its agents, as required by Section 111.4 and 111.5 of the Commission's regulations. Section 111.4 requires EGSs to develop agent standards and to conduct a criminal background investigation of agents. Nothing in the Joint Complaint or in the testimony offered by the Joint Complainants suggests that BPE did not develop agent standards or conduct criminal background investigations. Therefore, the record is devoid of any evidence upon which to base a finding that BPE violated Section 111.4.

Section 111.5 requires EGSs to ensure the training of agents on a variety of topics, including applicable laws and regulations, the EGS's products and rates, the proper completion of transaction documents and the EGS's disclosure statement. Again, the Joint Complaint is

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[176] Joint Complaint ¶ 23.

silent as to any specific shortcomings concerning BPE's agent training program. To the contrary, BPE trained its sales agents continuously throughout their employment and took disciplinary actions to address instances when sales agents did not comply with BPE's policies.[177] The Joint Complainants have failed to prove by a preponderance of the evidence that BPE's training program violated the Commission's regulations.

3. Conclusion

Count III of the Joint Complaint should be dismissed. In alleging that BPE promised savings that did not materialize in violation of the Consumer Protection Law, Count III fails to state a claim over which the Commission has jurisdiction. Moreover, the evidence offered by the Joint Complainants in support of Count III does not prove that BPE promised savings that did not materialize. To the contrary, many consumers testified that savings were not guaranteed, particularly beyond the period in which the initial price was effective, and no consumer testified that BPE failed to honor the initial price. The only evidence of any promised savings that were not realized constituted hearsay, which was not corroborated by competent evidence in the record, and was not credible, due to the use of leading questions, vague recounts and inconsistencies. Additionally, the Joint Complaint's allegation that BPE violated Section 54.43(f) of the Commission's regulations must fail since that provision only establishes BPE's responsibility for the conduct of its sales agents but does not impose a standard to which EGS's must adhere. With respect to the claims that BPE violated Sections 111.4 and 111.5 of the Commission's regulations, the Joint Complainants have failed to identify or substantiate any

[177] OAG/OCA St. 1 at 19.

specific departures from the provisions imposing duties on EGSs to develop agent standards and train their agents.

F. Count IV – Allegation of Lack of Good Faith Handling of Complaints

1. Introduction

In Count IV of the Joint Complaint, the Joint Complainants allege that BPE did not utilize good faith, honesty and fair dealings with residential customers and failed to: (i) adequately staff its call center; (ii) provide reasonable access to Company representatives for purposes of submitting complaints; (iii) properly investigate customer disputes; and (iv) properly notify customers of the results of the Company's investigation into a dispute.[178] The Joint Complainants contend that this conduct violates various provisions in Chapter 56, including Sections 56.1(a), 56.141(a), 56.151 and 56.152,[179] as well as the *Licensing Order* at 3.

The evidence presented by the Joint Complainants in this proceeding shows that BPE's customers were generally able to reach the call center when their variable prices increased during the Polar Vortex. Moreover, while some of those customers were not happy with the result, they acknowledged receiving an explanation about the price increase. As the Commission's regulations do not impose any further requirements on BPE, Count IV should be dismissed.

2. Discussion

As a threshold matter, BPE notes that the Commission's regulations do not impose standards on EGSs for the staffing of its call centers or for handling calls from consumers. Indeed, the Commission's regulations do not even impose these requirements on public utilities,

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[178] Joint Complaint ¶ 48.
[179] 52 Pa. Code §§ 56.1(a), 56.141(a), 56.151 and 56.152.

except that EDCs are required to report various statistics concerning telephone access, including the percent of calls answered within 30 seconds, the average busy-out rate and the call abandonment rate for each call center.[180]

Although a few consumers indicated that they had difficulty reaching BPE's call center amidst and immediately following the Polar Vortex, most of the consumer witnesses were able to talk with a BPE representative;[181] some simply did not like the answer they were given. Additionally, it is important to note that customer service in a deregulated environment is a function that should be left to the market to control. Providing good customer service can set an EGS apart from others who may be offering consumers similar or even higher prices. If a customer is not satisfied with the responsiveness of the EGS in answering telephone calls or other inquiries, or with the way complaints are resolved, he or she can choose to purchase electric generation services elsewhere.

Moreover, the provisions of Chapter 56 cited by the Joint Complainants establish no specific standards that must be followed by EGSs. Section 56.1 is a "[s]tatement of purpose and policy" and explains that every privilege or duty required under Chapter 56 "imposes an obligation of good faith, honesty and fair dealing in its performance and enforcement."[182] Section 56.141(a) requires regulated companies to "attempt to resolve the dispute" with the customer prior to the actual termination of service.[183] Section 56.151, in pertinent part, requires an investigation of customer disputes "using methods reasonable under the circumstances" and

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[180] 54 Pa. Code § 54.153.
[181] *See, e.g.*, OAG/OCA Consumer Testimony at 152 (Darrell Bacorn); OAG/OCA Consumer Testimony at 102 (Robert Bishop); OAG/OCA Consumer Testimony at 451 (GeoStructures, Inc.).
[182] 52 Pa. Code § 56.1.
[183] 52 Pa. Code § 56.141(a).

notification to the customer of the outcome of the investigation.[184] Section 56.152 sets forth the contents of what must be included in the company's report when responding to an informal complaint filed with BCS.[185] The evidence presented by the Joint Complainants fails to establish that BPE violated any of the requirements imposed by the provisions of Chapter 56.

3. Conclusion

The language of Chapter 56 is vague in that it requires EGSs to attempt to resolve disputes and to investigate customer disputes using methods that are reasonable under the circumstances. As the Joint Complainants have failed to carry their burden of proving that BPE's complaint handling during the Polar Vortex departed in any way from the Commission's regulations, Count IV should be dismissed in its entirety.

G. Count V – Allegation of Failure to Comply with the Telemarketer Registration Act

1. Introduction

In Count V, the Joint Complainants allege that BPE violated the TRA because the Company did not provide consumers who were enrolled through a telemarketing call with a contract that complied with and contained information required by Sections 2245(a)(7) and 2245(c) of the Telemarketer Registration Act, 73 P.S. §§ 2245(a)(7) and 2245(c). They also claim that a violation of the TRA constitutes a violation of the Consumer Protection Law.

The Commission has already determined that it does not have jurisdiction to enforce the requirements of the TRA. Moreover, the TRA expressly exempts transactions regulated under

[184] 52 Pa. Code § 56.151(2) and (5).
[185] 52 Pa. Code § 56.152.

other laws of the Commonwealth. As BPE's enrollment procedures fully comply with the Commission's regulations, Count V should be dismissed in its entirety.

2. Discussion

In ruling on BPE's Preliminary Objections, the ALJs concluded that the Commission does not have statutory authority to consider claims arising from alleged violations of the TRA, and dismissed Count V to the extent that it sought relief based on the TRA. *Interim Order on Preliminary Objections* at 17. On interlocutory review of the *Interim Order on Preliminary Objections*, the Commission agreed with the ALJs, concluding that it lacks statutory authority to hear complaints under the TRA. *Blue Pilot Interlocutory Order* at 16-18. *See also Marketing Rulemaking Order* (Commission referred to its long-standing Memorandum of Understanding with the OAG, under which it refers matters that more appropriately fall under the OAG's purview for appropriate enforcement). Also, in the *Blue Pilot Interlocutory Order*, the Commission found that including a provision in its regulations requiring EGSs to comply with provisions of the TRA "does not equate to the General Assembly providing the Commission with jurisdiction to hear claims brought pursuant to the TRA." *Id.* at 17. Since Count V only alleges violations of the TRA, it should be dismissed in its entirety consistent with the *Blue Pilot Interlocutory Order*.

Even if the Commission had jurisdiction to enforce the provisions of the TRA, the Joint Complainants have not established that BPE violated any of those provisions. The Joint Complainants correctly note that Section 2245(a)(7) of the TRA requires entities that sell goods or services made during a telemarketing call to reduce the sale to a written contract and obtain

the customer's signature on the written contract.[186] They fail to mention, however, that Section 2245(a)(7) expressly exempts entities from this requirement if "[t]he contractual sale is regulated under other laws of this Commonwealth."[187] As the sale of electric generation services is regulated by the Commission under the Code and its regulations, the requirement to reduce the requirement to a written contract that is signed by the customer is inapplicable.

Indeed, Section 111.7 of the Commission's regulations require EGSs to "establish a written, oral or electronic transaction process for a customer to authorize the transfer of the customer's account to the supplier."[188] Allowing the process to be oral or electronic, the Commission has steered clear of a written contract requirement and has likewise not imposed any obligation on EGSs to obtain a signature from the customer. Similarly, Section 2245(c) of the TRA[189] specifies the elements that must be contained in a contract, unless the sale is regulated under other laws of the Commonwealth, Section 54.5 of the Commission's regulations establishes the necessary components of disclosure statements, or contracts.[190] Since BPE sent a written contract, in the form of a Disclosure Statement, to each customer enrolled through telemarketing, it fully complied with the Commission's regulations.[191]

3. Conclusion

Count V should be dismissed in its entirety since the Commission has no statutory authority to enforce the provisions of the TRA. Further, under the clear terms of the TRA,

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[186] 73 P.S. § 2245(a)(7).
[187] 73 P.S. § 2245(d)(1).
[188] 52 Pa. Code § 111.7(a).
[189] 73 P.S. § 2245(c).
[190] 52 Pa. Code § 54.5.
[191] OAG/OCA St. 1 at 8.

transactions that are subject to regulation under another state law are not required to comply with its terms. Moreover, BPE complied with the Commission's regulations by sending a Disclosure Statement to each customer setting forth the terms and conditions of the contract.

H. Relief Requested

1. Introduction

The Joint Complaint requests various forms of relief, including the revocation or suspension of BPE's license; imposition of a civil penalty of an unspecified amount; provision of restitution including refunding all charges to its customers that were over and above the PTC from January 1, 2014 through the date of resolution of this matter; prohibition on BPE's salespeople from making pricing promises to consumers that are deceptive and inaccurate; implementation of proper customer dispute procedures, adequate staffing and training and monitoring of all employees and agents; and injunction against practices that violate the Consumer Protection Law, the Telemarketer Registration Act, the Public Utility Code, and Commission regulations or orders.[192]

To BPE's knowledge, the Commission has not yet cancelled or revoked any EGS's license for any reason other than a failure to maintain a bond or other approved security. Indeed, the Commission's statutory authority to revoke an EGS license for matters other than those related to financial issues as set forth in Section 2809 is not clear. Moreover, the Commission has not established specific criteria to consider in determining whether the revocation of an EGS license is warranted. Nonetheless, if the Commission finds that the Joint

[192] Joint Complaint at pp. 12-14 (Relief).

Complainants have carried their burden of proving that BPE violated Commission regulations or orders, BPE will not appeal a decision revoking its license, as BPE has no plans for the foreseeable future to engage in EGS activities in Pennsylvania.[193] As discussed below, however, BPE vehemently opposes the granting of any further relief as being unwarranted and unlawful.

If BPE desired to retain its EGS license and was not willing to accept a revocation of its license, the record in this proceeding would, at most, support a very minimal civil penalty. Imposing civil penalties in addition to license revocation would be clearly excessive under the circumstances of this case. The remaining remedies proposed by the Joint Complainants are beyond the Commission's jurisdiction to award.

2. Discussion

a. License Revocation

By the Joint Complaint, the Joint Complainants seek revocation of BPE's license. Code Section 2809(c) authorizes the Commission to suspend or revoke an EGS's license only under specified circumstances, which have not been alleged by the Joint Complaint. Specifically, Code Section 2809(c) provides that no EGS license shall "remain in force" unless the EGS fulfills its financial responsibility requirements of maintaining a bond or other security in a form and amount approved by the Commission remains current on its state tax obligations. No other provision in the Code addresses the suspension or revocation of an EGS license. Although

[193] BPE is unaware of any distinction the Commission has made between cancellation and revocation of an EGS license. In the event that a cancellation due to failure to maintain a bond or other approved security enables an EGS to seek reinstatement of the license upon obtaining such bond or other security (such as in the transportation industry where a certificate can be reinstated upon obtaining insurance), whereas the revocation of a license does not allow the possibility of reinstatement, BPE is willing to accept revocation of its license as part of this proceeding.

Section 54.42 of the Commission's regulations[194] provides that a license may be suspended or revoked and civil penalties may be imposed against an EGS for a variety of violations of the Code and Commission regulations, the Commission's statutory authority to suspend or revoke a license for reasons other than those noted in Code Section 2809(c) is unclear, or nonexistent.

Nonetheless, BPE voluntarily surrendered its EGS license nearly a year ago. Moreover, as the Commission is aware, the cancellation of BPE's license is the subject of a separate proceeding initiated by the Commission stemming from an alleged failure to maintain a bond or other approved security.[195] As BPE has no plans in the foreseeable future to operate as an EGS in Pennsylvania, it does not object to revocation of its license, without an opportunity for reinstatement, as part of this proceeding.

b. Civil Penalties

The Joint Complainants seek the imposition of civil penalties in an unidentified amount. Neither the Joint Complaint nor the Joint Complainants' witnesses offered a proposed amount of civil penalty or any rationale for imposing a certain amount, if any at all, particularly if BPE's license is revoked. Absent a license revocation, the record in this proceeding would support nothing more than a very minimal civil penalty. Given that BPE has exited Pennsylvania's market, its EGS license is pending cancellation in a separate proceeding relating to issues regarding its bond or other approved security and it is amenable to license revocation as part of

[194] 52 Pa. Code § 54.42.
[195] *Electric Generation Supplier License Cancellations of Companies with an Expired Financial Security*, Docket No. M-2015-2490383 (Tentative Order entered December 17, 2015).

this proceeding, no purpose would be served by the imposition of any civil penalty. Deterrence, which is the primary goal of a civil penalty, is simply unnecessary here.

Code Section 3301[196] authorizes the Commission to impose a civil penalty not exceeding $1,000 for a violation of the Code or regulations. At the outset, as a matter of fundamental due process, BPE was entitled to have an opportunity to be made aware of a specific civil penalty that has been requested and to be heard on that proposal during the proceeding while the evidentiary record was undergoing development. *Northview Motors, Inc. v. Commonwealth, Attorney Gen.*, 562 A.2d 977, 980 (Pa. Cmwlth. 1989).

To the extent that the Commission believes that a civil penalty is necessary, any amount should be significantly lower than $1,000 per violation. The Commission's policy statement at 52 Pa. Code § 69.1201 sets forth specific standards and factors that are to be considered when evaluating whether and to what extent a civil penalty for violations of the Code, Commission regulations or Commission orders is warranted. These factors were initially developed in the *Rosi v. Bell-Atlantic – Pennsylvania, Inc., and Sprint Communications, L.P.*, Docket No. C-00992409 (Order entered March 16, 2006) and in *Pa. Public Utility Commission v. NCIC Operator Serv.*, Docket No. M-00001440 (Order entered December 21, 2000), where the Commission held that violations would be subject to the same standards. The Commission's policy statement is essentially a codification of those guidelines. A review of these factors demonstrates that no civil penalty is warranted.

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[196] 66 Pa. C.S. § 3301.

i. Whether conduct was of a serious nature.

The first factor that is considered under the Policy Statement is whether the allegations were of a serious nature, such as willful fraud or misrepresentation, as opposed to administrative or technical errors.[197] No allegations have been made and no evidence has been introduced to suggest that BPE directed or trained its sales representatives to make any pricing or savings guarantees other than offering initial prices that were honored for specified time periods. Importantly, this is also not a situation where an executive level decision was made to increase prices despite a written guarantee to the contrary. *See Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. HIKO Energy, LLC*, Docket No. C-2014-2431410 (Order entered December 3, 2015).

ii. Whether resulting consequences of conduct were of a serious nature.

The second factor that is evaluated under the Policy Statement is whether the resulting consequences of the actions were of a serious nature, such as whether personal injury or property damage were involved.[198] Here, no allegations have been raised about personal injury or property damage. The variable price increases charged to customers were consistent with contracts into which they entered. Also many customers experienced savings, particularly during the periods when their initial prices were effective.

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[197] 52 Pa. Code § 69.1201(c)(1).
[198] 52 Pa. Code § 69.1201(c)(2).

iii. Whether conduct was deemed intentional or negligent.

The third factor identified by the Policy Statement is whether the conduct at issue was deemed intentional or negligent.[199] Again, no evidence has been offered to suggest that BPE made an intentional decision to promise savings and then ignore promises of savings by increasing variable prices.

iv. Whether Company has made efforts to modify internal practices and procedures.

The fourth factor that is considered under the Policy Statement is whether BPE has made efforts to modify internal practices and procedures to address the allegations at issue and prevent similar conduct in the future. BPE voluntarily stopped marketing to retail customers in Pennsylvania in March 2014, while still in the midst of the Polar Vortex crisis. Further, in May 2015, BPE exited the Pennsylvania market. These efforts fully eliminated the need to even consider any modifications to internal practices and procedures. The ALJs have previously recognized temporary moratoriums on the sale of variable rate products as mitigating the need for other relief. *See Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Initial Decision served November 19, 2015) at 54. A complete self-imposed moratorium on all marketing efforts is significantly more severe than such temporary measures banning one type of product.

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[199] 52 Pa. Code § 69.1201(c)(3).

v. Number of affected customers and duration of alleged violations.

The fifth factor that is evaluated under the Policy Statement is the number of customers who were affected and the duration of the alleged violations.[200] The Joint Complaint identified 315 BPE customers who contacted the OCA or complained to the OAG, which represents only about 3% of the total number of variable price customers who reached out to the Joint Complainants in early 2014 about EGSs. The 80 BPE customers who provided testimony during this proceeding constitute only about 3% of the total customers being served by BPE during the Polar Vortex. Even many of those customers only complained about price increases and switching delays and did not raise any allegations that would result in findings that BPE violated Commission regulations. Without doubt, the number of affected consumers is *de minimis*, particularly when contrasted with the 17,000 customers who contacted the Commission in early 2014.

vi. Compliance history.

The sixth factor is BPE's compliance history.[201] BPE has an unblemished prior compliance record with the Commission.[202] Before February 2014, no formal complaints had been filed with the Commission against BPE. Although one formal complaint filed against BPE stemming from the Polar Vortex has since been sustained in part by the Commission[203] and a few

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[200] 52 Pa. Code § 69.1201(c)(5).
[201] 52 Pa. Code § 69.1201(c)(6).
[202] See authority information at: http://www.puc.pa.gov/about_puc/search_results/utility/authority_search/utility_detail_view.aspx?Utility=1113179.
[203] *Durante v. Blue Pilot Energy, LLC,* Docket No. F-2015-2487082 (Joint Motion adopted February 11, 2016). It is noteworthy that the Commission adopted the Initial Decision to the extent that the complainant alleged a variable price increase during the Polar Vortex.

formal complaints are currently pending before the Commission, these adjudications do not or will not constitute a prior "compliance history" since those cases involve similar allegations and the same time period at issue here. Given the lack of any prior compliance history, the ultimate penalty of license revocation more than adequately addresses any violations of the Commission's regulations that are substantiated as part of this proceeding.

Indeed, formal complaints filed with the Commission involving the same allegations and time period at issue here have been dismissed during the pendency of this proceeding.[204] The mere fact that formal complaints arising from price increases during the Polar Vortex were fully litigated and adjudicated in BPE's favor demonstrates that there is no "pattern and practice" of unlawful activity.

vii. Whether BPE cooperated with Commission's investigation.

The seventh factor that is considered under the Policy Statement is whether BPE cooperated with the Commission's investigation.[205] As this matter involved litigation, rather than a Commission investigation, this factor is not relevant to the disposition of this proceeding.

viii. Whether the amount of the civil penalty is sufficient to deter future violations.

The eighth factor that is evaluated under the Policy Statement is the amount of civil penalty that is necessary to deter future violations.[206] Since BPE has not been marketing in Pennsylvania for two years; exited the retail market nearly one year ago; is not currently serving any customers; and will not oppose or appeal a revocation of its license, no civil penalty is

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[204] *See, e.g., CRH Catering, Gruelle.*
[205] 52 Pa. Code § 69.1201(c)(7).
[206] 52 Pa. Code § 69.1201(c)(8).

necessary to deter future violations. Indeed, the imposition of any civil penalty in this proceeding would serve no purpose and would utilize funds that may otherwise be available to enter into settlements with customers who continue to seek full or partial refunds related to service they received in early 2014.

ix. Past Commission decisions in similar situations.

The ninth factor that is considered under the Policy Statement relates to past Commission decisions in similar situations.[207] In *HIKO Energy*, the Commission assessed a civil penalty of $125 per violation in a proceeding that involved an egregious situation that far exceeds any allegations in the present matter. Beginning in August 2013, HIKO Energy, LLC ("HIKO Energy) offered a variable rate product that included a six-month introductory price guarantee to be at least 1-7% less than the PTC of the customer's local utility. Following the Polar Vortex, HIKO Energy's chief executive officer ("CEO") decided not to honor the 1% less price to compare introductory rate guarantee and the CEO and HIKO Energy management made the business decision to intentionally overbill approximately 5,700 customers enrolled in the guaranteed savings plan during the months of January – April 2014. *Id.*

Since the *HIKO Energy* case involved an executive management decision to increase variable prices, intentionally ignoring a written contract that guaranteed savings for a period of time, and the Commission did not revoke the EGS's license, no civil penalty is warranted here. No allegation has been made that BPE did guaranteed savings through its written contracts.

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[207] 52 Pa. Code § 69.1201(c)(9).

Moreover, BPE honored the initial prices that were included in those written contracts at all times, including during the Polar Vortex.[208]

x. Other relevant factors.

The tenth factor to consider is "other relevant factors."[209] The ultimate penalty – license revocation – more than adequately addresses any allegations of the Joint Complaint that have been substantiated. No purpose would be served by imposing a civil penalty of any amount.

c. Refunds

The Joint Complaint seeks relief in the form of a refund or credit to all customers who were served by BPE in early 2014. This request for relief raises numerous questions about the Commission's jurisdiction, all of which must be resolved in BPE's favor. As a threshold matter, for the reasons fully discussed below, the Commission lacks statutory authority to direct an EGS to issue refunds to customers.[210] While this fundamental lack of subject matter jurisdiction is the focus of this section, other flaws in the Joint Complainants' request for refunds are discussed in the pattern and practice section of this Main Brief.[211] Even if the Commission continues to find that it may require EGS to issue refunds to customers, the circumstances under which it has

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[208] *See, e.g.,* Tr. 642-643 (John Cassel); Tr. 59 (Erie Animal Hospital); Tr. 345-346 (United Transmission & Service Center, Inc.)

[209] 52 Pa. Code § 69.1201(c)(10).

[210] BPE recognizes that the Commission has directed EGSs to issue refunds to customers. However, the Commission may not confer subject matter jurisdiction upon itself by ordering relief that it lacks the statutory authority to award. BPE notes that these decisions have not yet been reviewed on appeal and respectfully urges the Commission to revisit its conclusions based on the arguments contained herein.

[211] On pages 38-58 of this Main Brief, BPE notes that even if the Commission would have any authority to direct an EGS to issue refunds, it may award such relief only to customers who file informal or formal complaints. It may not direct an EGS to issue refunds to customers who provided testimony as part of this proceeding, since they are not complainants and the Joint Complainants are not authorized to represent individual consumers or seek relief on behalf of individual consumers in Commission proceedings. And it certainly may not direct an EGS to issue refunds to customers who were not involved in any way in a Commission proceeding.

ordered such relief or under which it has suggested that such relief may be awarded are not present here.

i. A logical nexus exists between the lack of statutory authority to regulate EGS prices and the lack of statutory authority to require EGSs to issue refunds.

The Commission has unequivocally concluded that it lacks jurisdiction to regulate the prices charged by EGSs.[212] Without the statutory authority 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 rate 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.[213]

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[212] *See* BPE Main Brief at 78-80.

[213] 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 for its persuasive value 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 endorsed 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).

ii. Express statutory authority to direct the issuance of refunds by EGSs is nonexistent.

Code Section 1312 is the only statutory provision authorizing the issuance of refunds by the Commission and it provides the Commission with statutory authority to direct the issuance of refunds only by a public utility if the rates are determined to be "unjust or unreasonable."[214] In the *IDT Interlocutory Order*, the Commission correctly concluded that Code Section 1312 does not empower it to direct EGSs to issue refunds to customers because EGSs are not "public utilities" under the Code except for the limited purposes of Code Sections 2809 and 2810, neither of which applied in that proceeding nor apply here. *Id.* at 16. Moreover, as the Pennsylvania Commonwealth Court has found, this statutory authority to direct the issuance of refunds by a public utility is expressly limited to situations in which the Commission has expressly determined that the rates are unjust and unreasonable. *National Fuel Gas Distribution Corporation v. Pennsylvania Public Utility Commission*, 76 Pa. Cmwlth. 102, 464 A.2d 546 (1983). Since EGSs are not public utilities for the purposes of pricing, it is not within the purview of the Commission to determine whether the prices are unjust and unreasonable pursuant to Code Section 1301.[215] Therefore, no Code Section 1312 refund authority exists.

The conclusions in the *IDT Interlocutory Order* regarding the Commission's lack of statutory authority to direct EGSs to issue refunds are consistent with a recent federal court decision interpreting FERC's refund authority. The authority of FERC to award refunds by entities that are not public utilities was challenged after the California energy crisis of 2000 and

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[214] 66 Pa. C.S. § 1312 (emphasis added).
[215] 66 Pa. C.S. § 1301.

2001. In *Bonneville Power Admin. v. F.E.R.C. ("Bonneville Power")*, 422 F.3d 908 (2005), the United States Court of Appeals for the Ninth Circuit considered whether FERC's statutory authority to direct public utilities to issue refunds extended to other entities. The issue arose when prices soared several years after moves to deregulate and restructure the California market. In an effort to remedy what it termed a "dysfunctional" and "seriously flawed" market, FERC ordered both public utilities and non-public utilities to make refunds. Entities that did not qualify as public utilities challenged the refund orders. As the federal agency charged with regulation of all facilities for transmission and sale of electric energy for resale in interstate commerce, FERC acknowledged that it did not have regulatory rate authority over power sales by non-public utilities, but found that it had authority to order them to abide by market rules and therefore to direct them to issue refunds. FERC based its decision on its broad regulatory authority over the sale of electric energy for resale in interstate commerce.

In reversing FERC's refund orders, the Ninth Circuit Court resolved this question based on a straightforward analysis of FERC's enabling statute, finding that "[t]he text is clear and unambiguous." *Bonneville Power* at 911. The Court emphasized that it was "not unmindful of the impact our decision may have on the overall refunds claimed by California ratepayers. But it is not our task to second guess Congress's judgment as to the breadth of FERC's refund authority. Our role is a limited one – interpreting the statute as Congress wrote it." *Id.*

A review of other provisions of the Code likewise uncovers no express authority for the Commission to direct the issuance of refunds by EGSs. Code Section 3301expressly sets forth the remedies that the Commission may impose for violations of the Code, Commission regulations or Commission orders by public utilities or any other person or corporation subject to the Code. In authorizing the Commission to impose civil penalties in an amount not to exceed

$1,000 per violation, Code Section 3301 provides for no other civil remedies, including restitution, refunds or damages.[216]

In addition, Code Section 2809(c) authorizes the Commission to suspend or revoke an EGS's license under specified circumstances, including the failure to maintain a bond or other security to ensure its financial responsibility and the failure to pay state taxes. Nowhere in Chapter 28, however, is the Commission authorized to direct an EGS to issue refunds as a result of a violation of the Code, Commission regulations or Commission orders. Also, the civil penalties authorized by Code Section 3301 and the license suspension or revocation remedies authorized by Code Section 2809(c) are reiterated in Section 54.42 of the Commission's regulations, without any mention of refunds.[217]

Clearly, if the General Assembly had desired to empower the Commission to direct EGSs to issue refunds, it would have amended Code Section 1312 or Code Section 3301 or included express authority in the Competition Act. It would have also set forth a basis for deciding when refunds should be awarded, such as following a determination that the prices charged by the EGS were not "just and reasonable" or did not conform to the disclosure statement. It would have also set forth a basis for the calculation of refunds and established a process through which the Commission would make these determinations when it does not regulate EGS prices. It would

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[216] Throughout Chapter 33, however, the Code provides other remedies that may be available to the Commission for certain violations, including criminal penalties, none of which are applicable here. *See, e.g.*, 66 Pa.C.S. § 3304 (relating to unlawful issuance and assumption of securities).

[217] 52 Pa. Code § 54.42. Indeed, the only mention in the Commission's regulations about a refund by an EGS appears in Section 57.177(b), which provides that a customer who has been switched to an EGS without consent and files a dispute within the first two billing periods is not responsible for EGS bills rendered during that period. While the Commission's statutory authority to promulgate that regulation is unclear (or nonexistent) and the application of that provision to an EGS has not been challenged through the appellate review process, it is irrelevant to the vast majority of consumer complaints identified in this proceeding.

have also indicated whether prior lower prices should offset such refunds. Yet, the General Assembly did none of these things.

iii. The broad authority given to the Commission under Code Section 501 does confer implicit authority to direct EGSs to issue refunds.

Notwithstanding a recognition of its lack of express statutory authority under Code Section 1312, and the absence of any enabling language in Code Section 3301 or the Competition Act, the Commission has found that it has "plenary authority" under Code Section 501[218] to direct an EGS to issue a credit or refund for an over bill under limited circumstances. *IDT Interlocutory Order* at 17-18. In relying on Code Section 501[219] for implicit authority to direct an EGS to issue a refund, the Commission has disregarded the express language of Code Section 501[220] and the Statutory Construction Act of 1972,[221] as well as long-standing case law.

Code Section 501 confers on the Commission "general administrative power and authority to supervise and regulate all public utilities doing business within the Commonwealth."[222] As EGSs are not public utilities except for limited purposes specified in the Competition Act and further explained in *DelMarva*, EGSs are clearly not public utilities for purposes of Code Section 501. Therefore, any reliance on Code Section 501 for authority to require EGSs to issue refunds to customers must fail.

Even if Code Section 501 authority applied to EGSs, it does not empower the Commission to direct EGSs to issue refunds. The Pennsylvania Supreme Court has held that if

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[218] 66 Pa. C.S. § 501.
[219] *Id.*
[220] *Id.*
[221] 1 Pa. C.S. §§ 1501 *et seq.*
[222] Emphasis added.

the text of the Code not does provide the Commission with specific authority, a strong and necessary implication from those words is required to provide such authority. *PECO Energy Co. v. Pa. Pub. Util. Comm'n*, 568 Pa. 39, 791 A.2d 1155, 1159-1160 (2002). Similarly, the Commonwealth Court has emphasized that the broad general powers granted to the Commission by Code Section 501 must be read in light of the enumerated powers set forth in the Code and in conjunction with the purpose of the Commission to regulate and control public utilities in determining cost and service to the public. *United Telephone Co. of Pennsylvania v. Pennsylvania Pub. Util. Comm'n*, 676 A.2d 1244 (Pa. Cmwlth. 1996); *Fairview Water Co. v. Pa. Pub. Util. Comm'n.*, 502 A.2d 162, 509 Pa. 384 (1985).

In *ARIPPA v. Pa. Pub. Util. Comm'n*, 966 A.2d 1204 (2009) ("*ARIPPA*"), the Commonwealth Court reviewed a Commission decision to determine whether the text of the Code provided the requisite "strong and necessary implication" authorizing the Commission to determine ownership of alternative energy credits. The enabling statute, the Alternative Energy Portfolio Standards Act ("AEPS"), empowered the Commission "to establish an alternative energy credits program as needed to implement this act."[223] These duties expressly included the creation and administration of a an alternative energy credits certification, tracking and reporting program, and entailed establishment of a process for qualifying alternative energy systems and determining the manner credits can be created, accounted for, transferred and retired.[224] In 2007, the General Assembly amended the AEPS to specifically address ownership of alternative energy credits. The Court concluded that the Commission had jurisdiction over this issue because of

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[223] 73 P.S. § 1648.3(e)(1).
[224] 73 P.S. § 1648.3(e)(2)-(2)(i).

"the unique nature of alternative energy credits and the provision in AEPS for the Commission's extensive oversight of them," as well as a "process that implicates the particular expertise of the Commission." *ARIPPA* at 1212.

By contrast, on the issue of directing EGSs to issue refunds to customers, the Commission has pointed to Code Section 2809(e) as supporting its exercise of jurisdiction. Code Section 2809(e), however, only authorizes the Commission to "impose requirements necessary to ensure that the present quality of service provided by electric utilities does not deteriorate, including assuring that adequate reserve margins of electric supply are maintained and assuring that 52 Pa. Code Ch. 56 (relating to standards and billing practices for residential utility service) are maintained."[225] In the *IDT Interlocutory Order*, the Commission specifically relied on the Code Section 2809(e) reference to the Chapter 56 standards and billing practices as giving it implicit statutory authority to direct EGSs to issue refunds.

A careful review of Code Section 2809(e) demonstrates the error in that conclusion. By obligating the Commission to assure that the standards and billing practices for residential utility service are maintained by electric utilities, the General Assembly did not confer implicit authority upon the Commission to direct EGSs to issue refunds to consumers. Moreover, nothing in Chapter 56 addresses refunds by either EDCs or EGSs. Rather, Chapter 56 establishes the rules for billing and payment standards, such as billing frequency; estimated billing; billing for previously unbilled public utility; billing information; payment due dates; accrual of late payment charges; application of partial payments; and electronic payments.

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[225] *Id.* (emphasis added).

Chapter 56 also sets forth the rules applicable to termination of service, restoration of service and the disposition of informal and formal complaints. Therefore, the reference in Code Section 2809(e) to billing standards and billing practices contained in Chapter 56 provides no support for the Commission's exercise of Section 501 authority to direct the issuance of refunds by EGSs.

Indeed, the other language contained in Code Section 2809(e) is more relevant to this inquiry, in that it permits the Commission to "forbear from applying requirements of this part which it determines are unnecessary due to competition among" EGSs.[226] Specifically, the Commission should forbear from applying any provisions of the Code that would result in a determination that an EGS's prices were unreasonable or improper, thereby supporting a directive for the issuance of a refund, since such a determination is unnecessary due to competition among EGSs. Rate regulation of EGSs is unnecessary because of competitive alternatives.

Such forbearance would be consistent with other provisions in the Code making it clear that EGSs prices are not regulated the Commission. Enactment of the Competition Act was largely based upon the principle that "it is now in the public interest to permit retail customers to obtain direct access to a competitive generation market as long as safe and affordable transmission and distribution service is available at levels of reliability that are currently enjoyed by the citizens and businesses of this Commonwealth."[227] Code Section 2802(5) declared that "[c]ompetitive market forces are more effective than economic regulation in controlling the cost

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[226] 66 Pa. C.S. § 2809(e).
[227] 66 Pa. C.S. § 2802(3).

of generating electricity."[228] Without the ability to regulate EGS prices -- a premise with which the Commission agrees[229] -- it logically follows that it likewise has no ability to direct the issuance of refunds.

iv. The lack of statutory authority to award damages is akin to the lack of authority to direct EGSs to issue refunds.

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 Pennsylvania 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 and to impose remedies prescribed by the Code, but it must leave any determination regarding restitution or refunds to the courts.[230]

Also, in the matter of *Elkin v. Bell Tel. Co. of Pa.*, 420 A.2d 371 (Pa. 1980), the Pennsylvania Supreme Court referred to the Commission's "rather extensive statutory responsibility for ensuring the adequacy, efficiency, safety and reasonableness of public utility services" before concluding that the General Assembly has "withheld from the PUC the power to award damages." *Id.* at 375. See also *Behrend v. Bell Telephone*, 363 A.2d 1152, 1158 (Pa.

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[228] 66 Pa. C.S. § 2802(5).
[229] *Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Order entered December 18, 2014) (*IDT Interlocutory Order)* at 18.
[230] The Commission has acknowledged its lack of statutory authority to award equitable remedies including restitution. *IDT Interlocutory Order* at 25-26.

Super. 1976), *vacated and remanded on other grounds*, 374 A.2d 536 (Pa. 1977) ("The courts retain jurisdiction of a suit for damages based on negligence or breach of contract wherein a utility's performance of its legally imposed and contractually adopted obligations are examined and applied to a given set of facts.") (citation and footnote omitted). *Adams et al. v. Pa. Pub. Util. Comm'n*, 819 A.2d 631 (Pa. Cmwlth. 2003); *see also Leveto v. Nat'l Fuel Gas Dist. Corp.*, 366 A.2d 270 (Pa. Super. 1976); *Litman v. Peoples Natural Gas Co.*, 449 A.2d 720 (Pa. 1982). *See, generally, Morrow* (the courts retain jurisdiction of a suit for damages based on negligence or breach of contract wherein a utility's performance of its legally imposed and contractually adopted obligations are examined and applied to a given set of facts).

In *Poorbaugh v. Pa. Public Utility Commission*, 666 A.2d 744 (Pa. Cmwlth. 1995), the Commonwealth Court followed this well-established precedent and specifically discussed the importance of administrative agencies and courts applying their respective expertise in resolving legal issues. Here, while the Commission has administrative expertise to determine whether an EGS has committed violations of the Code, Commission regulations or Commission orders, it is obligated to leave questions of contract interpretation and the determination of appropriate remedies for any breaches of contract to the courts that have the necessary legal expertise. For instance, in resolving contractual disputes, courts have found that the written documentations must be relied upon rather than general statements allegedly 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....").

As the appellate courts have made clear in extensive case law, the Commission's jurisdiction to decide whether public utilities have provided adequate service as required by Code Section 1501[231] does not include the ability to determine any damages that should be awarded to the consumer if the public utility failed to provide adequate service. The issue of refunds raised by this proceeding is akin to damages, and the same reasoning must apply. Merely because the Commission has jurisdiction over the sales, marketing and billing practices of EGSs in connection with providing electric generation services does not empower the Commission to regulate rates or require EGSs to refund money to consumers. The fact that BPE is an EGS, not a public utility, provides even greater support for its argument that the Commission's jurisdiction is limited and does not include the ability to effectively award damages to consumers.[232]

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[231] 66 Pa. C.S. § 1501.

[232] The issuance of a refund must either be based upon a statutory authorization or an exercise of equity. *Pennsylvania Life Ins. Co. v. Pennsylvania National Life Ins. Co.,* 417 Pa. 168, 173, 208 A.2d 780, 783 (1965) ("Equity will afford relief if the statutory remedy is inadequate or its pursuit would work irreparable harm"). While the PUC has statutory authority to issue refunds under 66 Pa. C.S. § 1312(a) in proceedings involving rates charged by public utilities, it does not have statutory authority to order refunds as a form of damages for alleged marketing violations. *See Pettko at* 484-86 (holding that the PUC has no power to award relief based upon alleged fraudulent conduct claims sounding under the Unfair Trade Practices and Consumer Protection Law). *See also Feingold* at 795 (holding that that the General Assembly preserved traditional judicial remedies, such as the award of damages, in the hands of the courts.) Accordingly, any order directing refunds in the instant case could only be based upon the exercise of equity powers which, as a traditional judicial basis for the award of damages, is beyond the jurisdiction of the Commission. Pennsylvania Courts of Common Pleas have routinely awarded refunds as a form of equitable relief. *See, e.g., Belin v. Bundy*, 27 Pa. D. &C. 3d 760 (Pa. C.P. 1983) (Court of Common Pleas exercising its equitable powers to order the refund of illegally collected tax proceeds); *Evans Equipment Corp v. Borough of Sharpsville*, 37 Pa. D. & C. 489 (Pa. C.P. 1965) (Court of Common Pleas exercising its equitable powers to order the refund of a contractor's forfeited deposit paid in connection with an unsuccessful bid for constructing and paving certain streets).

v. Statutory construction rules require that specific provisions prevail over general provisions in a statute.

The Statutory Construction Act of 1972 mandates that specific provisions in a statute prevail over general provisions.[233] *See Robinson Township Washington County v. Commonwealth of Pennsylvania*, 83 A.3d 901 (Pa. 2013). Here, the specific provisions include: (i) Code Section 1312, which specifically addresses refunds and expressly limits the Commission's authority to direct public utilities to issue refunds following a determination that the rate charged was unjust or unreasonable; (ii) Code Section 3301, which sets forth civil penalties as the permitted remedies that are available when EGSs violate the Code, Commission regulations or Commission orders; and (iii) Code Section 2809, which is part of the Competition Act and provides for suspension or revocation of EGS licenses under specified circumstances. Neither together nor separately do these specific provisions authorize the Commission to direct the issuance of refunds by EGSs.

Under the Statutory Construction Act of 1972, the lack of express authority under Code Section 1312, Code Section 3301or the Competition Act to direct an EGS to issue a refund prevails over any general authority the Commission has over EGSs under Code Section 501. Therefore, in ignoring specific statutory authority regarding refunds, civil penalties and license suspension and revocation, and instead attempting to find general authority to grant such relief, the Commission has inappropriately interpreted the Code.

In addition, in *Popowsky v. Pa. Public Utility Commission*, 869 A.2d 1144 (Pa. Cmwlth. 2005), the Commonwealth Court expressly rejected an unlawful attempt by the Commission to

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[233] 1 Pa. C.S. § 1933.

broaden its authority under Code Section 1307(a)[234] to permit a public utility to establish a surcharge for its wastewater collection service. In reversing the Commission decision in *Popowsky*, the Commonwealth Court 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)[235] specifically permits water utilities to recover certain infrastructure improvement costs through a surcharge, the Commonwealth Court found that the general language of Code Section 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.

vi. The Commission should disregard the decisions in which it has found that it has statutory authority to direct EGSs to issue refunds.

In its unappealable *IDT Interlocutory Order,* the Commission specified two situations in which it believes it may direct the issuance of refunds by EGSs, 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

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[234] 66 Pa. C.S. § 1307(a).
[235] 66 Pa. C.S. § 1307(g).

statement, in violation of 52 Pa. Code §§ 54.4(a) and 54.5(a) and 66 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*"). Since the issuance of the *IDT Interlocutory 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 EDC. *See Kiback v. IDT Energy, Inc.,* Docket No. C-2014-2409676 (Order entered August 20, 2015); *Herp.* Since neither case involved substantial enough refunds to warrant appellate review, those findings have not been challenged. The Commission should disregard those decisions based upon its lack of statutory authority to direct EGSs to issue refunds.

The Commission's adoption of the *Friz Initial Decision* on March 9, 2015 interpreting the *IDT Interlocutory Order* provided the regulated industry with clear direction on the Commission's view of the limited circumstances under which it believes it may direct an EGS to issue a refund to a customer. However, the decisions in *Kiback* and *Herp* have 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* and *Herp* decisions, the Commission has announced that it will rewrite a private 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. Moreover, both the *Kiback* and *Herp* decisions are legally flawed in that they rely on uncorroborated hearsay

testimony to make factual findings. Additional rulings like *Kiback* and *Herp* 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.

The Commission is not required to follow its own precedent, absent a situation involving the doctrine of *res judicata*. In *Philboro Coach Corp. v. Pa. Public Utility Commission*, 67 Pa. Cmwlth. 176, 179, 446 A.2d 725 (1982), the Commonwealth Court found that any failure of the Commission to follow its prior rulings is not an error of law that is subject to review. Similarly, in *Duquesne Light Co. v. Pa. Public Utility Commission*, 176 Pa. Super. 568, 577, 107 A.2d 745 (1954), the Superior Court concluded that the Commission was not bound by its prior decision since the matter did not involve the doctrine of *res judicata*.

In order for the doctrine of *res judicata* to apply, there must be a concurrence of four elements: (i) identity in the thing sued for; (ii) identity of the cause of action; (iii) identity of persons and parties to the action; and (iv) identity in the quality of the persons for or against whom the claim is made. *See Namcorp, Inc. v. Zoning Hearing Board of Horsham Township*, 558 A.2d 898 (Pa. Cmwlth. 1989). As the *Kiback* and *Herp* decisions involved different parties and was based on the very specific circumstances and factual scenarios that were present in that case, their conclusions should have no bearing on the outcome in this proceeding.

vii. Even under the circumstances in which the Commission has found that it may order refunds, none are warranted here.

As a threshold matter, this proceeding does not involve the filing of formal complaints by consumers. Some of the consumers who testified in this proceeding filed formal complaints,

many of which have already been adjudicated by the Commission. Even if consumer testimony is relied upon in this proceeding to find violations of the Commission's regulations and determine whether BPE should be subjected to a civil penalty or license revocation, they are not formal complainants in this proceeding and may not be awarded refunds by the Commission. If individual consumers desired to seek refunds from the Commission, it was incumbent upon them to file their own formal complaints, particularly since the Joint Complainants have no authority to represent individual consumers in Commission proceedings and request refunds on their behalf.

Moreover, even if the Commission somehow determines that it may direct the issuance of refunds to consumer witnesses, the record developed in this proceeding does not support such awards under any of the circumstances previously endorsed by the Commission. As argued above, the Joint Complainants have not carried their burden of proving by a preponderance of the evidence that BPE's prices did not conform to the Disclosure Statement or that BPE's sales representatives promised savings that were not realized.[236] Certainly, the witness credibility that the Commission has demanded before directing EGSs to issue refunds is absent from much of the testimony. *See Kiback* at 26-27 (consumer "repeatedly held steadfast" in his claims of promised savings during multiple interactions with the same EGS; the consumer was "adamant" about his recollection and his testimony was "clear and convincing").

In any event, no refunds should be ordered for any consumer who has not submitted testimony in this proceeding. Without a sworn statement as to what the BPE sales representative

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[236] *See* BPE Main Brief at 76-87.

supposedly told the consumer, no basis would exist upon which to direct the issuance of a refund. For instance, in *Kiback*, the Commission ordered a refund based on the difference between the EDC's price to compare and the price that the company charged the complainant, because that remedy reflected what the complainant had allegedly been told. Some consumer witnesses in this proceeding testified that the sales representatives used the EDC's price to compare as a point of reference, while others testified vaguely about possible savings. It would be wholly improper to view testimony offered by a *de minimis* percentage of BPE's total customers and conclude that all (or any others than possibly those who testified) had a particular experience, warranting the issuance of a refund for which no formula exists to calculate.

3. Conclusion

To BPE's knowledge, the Commission has not yet cancelled or revoked any EGS's license for any reason other than a failure to maintain a bond or other approved security. Indeed, the Commission's statutory authority to revoke an EGS license for matters other than those related to financial issues as set forth in Section 2809 is not clear. Moreover, the Commission has not established specific criteria to consider in determining whether the revocation of an EGS license is warranted. Nonetheless, if the Commission finds that the Joint Complainants have carried their burden of proving that BPE violated Commission regulations or orders, BPE will not appeal a decision revoking its license, as BPE has no plans for the foreseeable future to engage in EGS activities in Pennsylvania. BPE strongly opposes, however, the granting of any further relief as being unwarranted and unlawful.

If BPE was not willing to accept a revocation of its license, the record in this proceeding would, at most, support a very minimal civil penalty. Imposing civil penalties in addition to license revocation would be clearly excessive under the circumstances of this case and would

serve no purpose since deterrence is not a factor in this proceeding. The remaining remedies proposed by the Joint Complainants are beyond the Commission's jurisdiction to award.

V. CONCLUSION

On the basis of the foregoing, Blue Pilot Energy, LLC respectfully requests that the Pennsylvania Public Utility Commission: (i) dismiss the Joint Complaint filed by the Commonwealth of Pennsylvania by Attorney General Kathleen Kane, through the Bureau of Consumer Protection, and Tanya J. McCloskey, Acting Pennsylvania Consumer Advocate; or (ii) conclude that any allegations in the Joint Complaint that have been substantiated are fully addressed by the revocation of BPE's license.

Respectfully submitted,

Dated: March 2, 2016

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APPENDIX A

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

TECH MET, INC., ALFRED POZZUTO, G. MONEY, INC. d/b/a NORTH PARK CLUBHOUSE, MR. MAGIC CAR WASH, INC., and JOHN TIANO, on their own behalf and on behalf of all others similarly situated,

Plaintiffs

vs.

STRATEGIC ENERGY, LLC,

Defendant

CIVIL DIVISION

NO. GD-05-030407

MEMORANDUM AND ORDER OF COURT

HONORABLE R. STANTON WETTICK, JR.

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Appendix A

MEMORANDUM AND ORDER OF COURT

WETTICK, J.

This is a breach of contract class action brought against defendant, Strategic Energy, LLC ("Strategic") on behalf of all Pennsylvania commercial/business customers who entered into a Power Supply Coordination Service Agreement ("Service Agreement") with Strategic.[1] Plaintiffs contend that they have been overcharged.

Strategic is an electricity supplier. Strategic purchases electricity in large blocks from Duquesne Light or other sources which it resells to customers pursuant to the terms and conditions of its Service Agreement with the customer. With limited exceptions, through the Service Agreement, Strategic guarantees its customers that the price for electricity will not exceed a specified amount (the price set forth on its Pricing Attachment) for five years.[2]

Plaintiffs contend that Strategic has charged them amounts in excess of the amounts permitted by the Service Agreement. They seek to recover the difference between the amount paid for the electricity and the lesser amount permitted by the Service Agreement.

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[1]Attachment 1 is the Service Agreement between Strategic and Tech-Met Services, Inc. The other named plaintiffs executed similar writings; but see p. 5.

[2]Strategic contends that when electricity was undergoing deregulation in 2000, there was much uncertainty regarding electricity costs. The benefit of buying from Strategic, as opposed to buying directly from Duquesne Light, was to achieve price certainty in an uncertain market. (12/9/13 Argument T. 23.)

Strategic contends that its prices have never exceeded the amounts permitted by the Service Agreement.

The subject of this Memorandum and Order of Court is Strategic's motion for summary judgment seeking dismissal of plaintiffs' Complaint on the ground that plaintiffs were never overcharged.

Relevant discovery has been completed. Thus, the issue is whether the evidence, construed in plaintiffs' favor, will support a verdict in plaintiffs' favor.

The prices that Strategic may charge its customers are governed by the following provisions of the Service Agreement:

> **4. PSC Services Fee:**
>
> The PSC Services Fee is 0.3 cents per kilowatt-hour for each kilowatt-hour of Electricity provided under this Agreement. The PSC Services Fee is included in the price paid by the Buyer.
>
> . . .
>
> **7. Price:**
>
> The Price to be paid by Buyer for the Electricity and BSC Services provided hereunder during the Term of this Agreement shall not exceed that set forth on the Pricing Attachment below. All pricing terms are inclusive of applicable costs for Energy, Capacity, Transmission, Ancillary Services, Delivery Services, applicable taxes up to the Point of Delivery, overhead expenses as defined by Strategic Energy, and the PSC Services Fee.

STRATEGIC'S INTERPRETATION

Strategic contends that under the Service Agreement (Attachment 1), the price it may charge shall not exceed the price set forth "on the Pricing Attachment" (Attachment 2). Plaintiffs do not challenge the evidence showing that Strategic has never charged a

price that exceeded that set forth on the Pricing Attachment. Thus, according to Strategic, summary judgment should be entered dismissing plaintiffs' Complaint.

PLAINTIFFS' INTERPRETATION

According to plaintiffs, the price set forth in the Pricing Attachment is only a ceiling. The actual price, if it does not exceed the ceiling, consists of the sum of Duquesne Light's costs for energy, capacity, transmission, ancillary services, delivery services, applicable taxes up to the point of delivery, overhead expenses as defined by Strategic Energy and PSC Services Fee. Under this interpretation of ¶ 7, the maximum price that Strategic may charge is the amount of Duquesne Light's actual costs plus 0.3 cents per kilowatt-hour.

COURT'S INTERPRETATION

I find that the only reasonable reading of ¶ 7 is that offered by Strategic.

The first sentence of ¶ 7 permits Strategic to charge the amount set forth in the Pricing Attachment. The second sentence protects the buyer by explaining that the price set forth in the Pricing Attachment includes costs which Strategic incurs for energy, capacity, transmission, ancillary services, delivery services, applicable taxes up to the point of delivery, overhead expenses as defined by Strategic, and the PSC Services Fee.

Paragraph 4 describes the PSC Services Fee and reiterates that it is included in the price paid by the buyer.

Plaintiffs contend that the first sentence of ¶ 7 only establishes a maximum price that may be charged because ¶ 7 states that the price "shall not exceed that set forth in

the Pricing Attachment below." (Emphasis added.) According to plaintiffs, a contract uses the phrase "shall not exceed" only when there is another method for calculating price that may be less than the price set forth in the Pricing Attachment.

However, the Service Agreement cannot be read in the manner which plaintiffs propose unless the Service Agreement also provides for a lesser price under certain circumstances. In other words, it could not have been the intention of the parties for the first sentence of ¶ 7 to be construed as only setting a maximum price if the Agreement does not also include a lesser price that shall be charged under some circumstances.

Plaintiffs apparently propose that the second sentence of ¶ 7 be read as follows: "The price to be paid by the Buyer for the electricity and PSC services provided under the Service Agreement shall be the sum of the costs Strategic incurs for energy, capacity, transmission, ancillary services, delivery services, applicable taxes up to the point of delivery, overhead expenses as defined by Strategic Energy, and the PSC Services Fee."

However, this is not a reasonable construction of the second sentence of ¶ 7. There is nothing in the language of ¶ 7 that in any way suggests that the price shall be based on Strategic's costs. Thus, I am left with a single method governing the price that may be charged.

If ¶ 7 consisted of only the first sentence, the only reasonable construction of the Agreement would be that Strategic is permitted to charge the amount set forth in the Pricing Attachment. This is so because pricing is governed by ¶ 7, and this is the only provision governing the price to be paid. Where a second sentence is added that does

not refer to the price to be paid, there is no difference between the two-sentence paragraph and the one-sentence paragraph.

A contract shall be construed to give meaning to each sentence in ¶ 7. This is accomplished only if the second sentence is construed as describing costs that are included in the price to be paid by the buyer as set forth in the Pricing Attachment. The language of the second sentence does not support any other construction that gives meaning to both sentences.

At least one of the Service Agreements between plaintiffs and Strategic, at ¶ 7, included a second paragraph which reads as follows:

> If, during the term of this Agreement, regulatory changes create additional charges, not currently included in the Price, which Buyer would be subject to regardless of whether Buyer was receiving service from Strategic Energy, the Host Utility or any other provider of electric service ("Incremental Charge"), and Strategic Energy is unable to mitigate such incremental Charge, then Strategic Energy shall pass through such incremental Charge to be paid by Buyer above the Price.

Plaintiffs contend that the inclusion of this second paragraph supports plaintiffs' position that the price to be paid consists of the sum of the costs. However, this additional paragraph is equally consistent with an interpretation that the price to be paid shall not exceed that set forth in the Pricing Attachment, but Strategic may pass on an incremental charge to be paid by the buyer "above the Price."

While I base my ruling on the language of the Agreement, I agree with Strategic that parol evidence also supports its construction of ¶ 7.

Strategic buys electricity at different times and at different prices. None of the purchases can be traced to specific customers. Thus, there is no way to calculate the costs of energy for individual customers.

The Service Agreements between Strategic and plaintiffs do not require Strategic to purchase only from Duquesne Light. Furthermore, it appears that Strategic does not purchase exclusively from Duquesne Light. These purchases from other sellers are not segregated from Strategic's purchases from Duquesne Light. (12/9/13 Argument T. 12.) Plaintiffs never explain how costs of energy will be calculated in these circumstances.

There is testimony in the record that where Strategic successfully managed down the price (see definition of *Power Supply Coordination (PSC) Services* at ¶ 5 of the Service Agreement), Strategic did not charge the full amount provided for in the first sentence of ¶ 7. (Wilson Dep. T. 124-28.) This is consistent with the use of the phrase *shall not exceed* in the first sentence of ¶ 7.

Finally, common sense dictates that Strategic would not have agreed to provide price certainty over a five-year period for a nominal payment of .3 cents per kilowatt-hour per month. See Deposition of Vogel at 148-49 and Exhibit G of Vogel Deposition—.3% of monthly charge for 6200 kilowatts is $18.60.

CONCLUSION

In this case, there are only two interpretations offered by the parties. The language of the Service Agreement offers no support for calculating a price based on the sum of Strategic's costs for energy, capacity, transmission, ancillary services, delivery services, applicable taxes up to the point of delivery, overhead expenses as defined by Strategic Energy, and the PSC Services Fee. This leaves a construction supported by the language of ¶ 7, namely "the Price to be paid by the Buyer for the

Electricity and PSC Services provided hereunder during the Term of this Agreement shall not exceed that set forth in the Pricing Attachments below."

For these reasons, I grant defendant's motion for summary judgment and dismiss plaintiffs' Complaint with prejudice.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

TECH MET, INC., ALFRED POZZUTO, G. MONEY, INC. d/b/a NORTH PARK CLUBHOUSE, MR. MAGIC CAR WASH, INC., and JOHN TIANO, on their own behalf and on behalf of all others similarly situated, Plaintiffs vs. STRATEGIC ENERGY, LLC, Defendant	NO. GD-05-030407

ORDER OF COURT

On this 4 day of June, 2014, it is hereby ORDERED that defendant's motion for summary judgment is granted, and plaintiffs' Complaint is dismissed with prejudice.

BY THE COURT:

WETTICK, J.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARBARA GILLIS, THOMAS GILLIS, SCOTT R. McCLELLAND, and KIMBERLY A. McCLELLAND, individually and on behalf of all others similarly situated	CIVIL ACTION
v.	No. 14-3856
RESPOND POWER, LLC	

MEMORANDUM

NORMA L. SHAPIRO, J. **AUGUST 31, 2015**

This is a class action against Respond Power, LLC ("Respond"), an electric generation supplier in Pennsylvania. Between November 2010 and June 2014, Respond entered into variable rate contracts with Pennsylvania customers for residential electrical service. The class representatives allege that every variable rate contract promised customers a rate cap and that Respond breached those contracts and violated the implied covenant of good faith and fair dealing. Plaintiffs move to certify the putative class as to their contract and implied covenant claims. Because the requirements of Federal Rule of Civil Procedure 23(a) are not met, class certification will be denied.

I. BACKGROUND

The putative class consists of all Pennsylvania residents who entered into variable rate contracts with Respond between November 2010 and June 2014. Am. Compl. ¶ 59. Approximately 50,000 Respond customers entered into variable rate contracts during the proposed class period. Am. Compl. ¶ 11.

This action turns on the meaning of an allegedly uniform Disclosure Statement ("Disclosure Statement") included in all of Respond's variable rate contracts. Am. Compl. ¶ 2; Ex.

A. Respond does not deny that the Disclosure Statement was uniform and included in every one of its variable rate contracts during the proposed class period. Tr. at 9(22)-10(4). In relevant part, the Disclosure Statement reads: "Respond Power's goal each and every month is to deliver your power at a price that is less than what you would have paid had your [sic] purchased your power from your local utility company, however, due to market fluctuations and conditions, Respond Power cannot always guarantee that every month you will see savings." Ex. A.[1]

Plaintiffs argue that the Disclosure Statement promised customers a variable monthly rate capped at the rate charged by their local utility. Am. Compl. ¶ 72. They allege that Respond breached its variable rate contracts by failing to adhere to the alleged rate cap. *Id.* Plaintiffs further allege that Respond breached the implied covenant of good faith and fair dealing by failing to disclose that its rates could exceed local utility rates. Am. Compl. ¶ 86. Plaintiffs move to certify the proposed class as to those two claims.

Class representatives

The representatives of the putative class are Barbara Gillis, her son Thomas Gillis, Scott McClelland, and his wife Kimberly McClelland.

On April 25, 2013, one of Respond's door-to-door salespeople encouraged the Gillises to leave their local utility PECO for Respond and gave them a copy of the Disclosure Statement. Am. Compl. ¶ 8. The Gillises switched to Respond. Am. Compl. ¶ 9. Respond charged the Gillises a monthly rate higher than the PECO rate from July 2013 through February 2014. Am. Compl. ¶ 9. Thomas Gillis has stated that he did not believe Respond was bound by a rate cap or that an

[1] Respond's Disclosure Statement provides that it "shall be construed under and . . . governed by the laws of the State of Pennsylvania without regard to the application of its conflicts of law principles." Ex. A at ¶ 13.

increase in Respond's variable rate was in violation of any contractual term; rather, in his view, "it was not good business practice." King Cert. ¶ 5 at 55(3-9). He also stated that, at the time he entered into Respond's variable rate agreement, he was not guaranteed a rate cap by Respond's sales representative. King Cert. ¶ 5 at 33(4-22). Barbara Gillis has stated she did not know if Respond was bound by a rate cap. King Cert. ¶ 4 at 55(9-22).

The McClellands left their local utility Penelec for Respond after, on May 7, 2013, one of Respond's door-to-door salespeople encouraged them to make the switch and gave them a copy of the Disclosure Statement. Am. Compl. ¶ 10. Respond charged the McClellands a rate higher than the Penelec rate from July 2013 through April 2014. Am. Compl. ¶ 11. Kimberly McClelland has stated that she was not assured a rate cap by her sales representative, just a "surplus of energy." King Cert. ¶ 6 at 17(2-13). She also stated that she did not know if the Disclosure Statement promised a rate cap. *Id.* at 51(20-25). Scott McClelland was not present when the McClellands' variable rate contract was signed; his understanding of the contract's terms was based on conversation with his wife and his grasp of energy deregulation in Pennsylvania. King Cert. ¶ 7 at 86(2-13).

II. DISCUSSION

To be certified, a "putative class must satisfy the four requirements of Rule 23(a) and the requirements of either Rule 23(b)(1), (2), or (3)." *Marcus v. BMW of N. Am.*, 687 F.3d 583, 591 (3d Cir. 2012); FED. R. CIV. P. 23.

Rule 23(a) requires that a class be "so numerous that joinder of all members is impracticable" (numerosity); "there are questions of law or fact common to the class" (commonality); "the claims or defenses of the representative parties" must be "typical of the claims

or defenses of the class" (typicality); and the class representatives must "fairly and adequately protect the interests of the class" (adequacy). FED. R. CIV. P. 23.

Numerosity

Because joinder would be impracticable for the approximately 50,000 Respond customers who entered into variable rate contracts with Respond between November 2010 and June 2014, the numerosity requirement is satisfied.

Typicality and Adequacy

The Third Circuit has held that "[t]he proper consideration in assessing typicality . . . include[s] three distinct, though related, concerns: (1) the claims of the class representative must be generally the same as those of the class in terms of both (a) the legal theory advanced and (b) the factual circumstances underlying that theory; (2) the class representative must not be subject to a defense that is both inapplicable to many members of the class and likely to become a major focus of the litigation; and (3) the interests and incentives of the representative must be sufficiently aligned with those of the class." *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 599 (3d Cir. 2009).

Although the class representatives rely on the same legal theory and underlying facts as the rest of the putative class, namely that Respond broke a contractual promise to adhere to a rate cap and breached the implied covenant of good faith and fair dealing by failing to disclose that its rates could exceed those of local utilities, the class representatives are vulnerable to certain defenses that may be inapplicable to the rest of the putative class. Three of the four class representatives either believed Respond was not contractually bound by a rate cap (Thomas Gillis) or did not know if it was (Barbara Gillis and Kimberly McClelland). King Cert. ¶ 4 at 55(9-22); ¶ 5 at 55(3-9); ¶ 6 at

51(20-25). The fourth (Scott McClelland) believed the contract provided for a cap, but his understanding of the contract was based not on its terms, but rather conversation with his wife and a general understanding of energy deregulation. King Cert. ¶ 7 at 86(2-13). The class representatives have also said they were not guaranteed rate caps by Respond's sales representatives. King Cert. ¶ 5 at 33(4-22); ¶ 6 at 17(2-13).

If Respond's Disclosure Statement expressly provided for a rate cap, the sales experiences and contractual intent of the class representatives would not be material. But it does not. It states that Respond's "goal" is to beat the price charged by local utilities and adds the caveat that Respond "cannot always guarantee" monthly savings. Ex. A. Plaintiffs construe the word "goal" to mean "promise." That is an implausible reading of the contract. *See, e.g.*, *Kripp v. Kripp*, 849 A.2d 1159, 1163 (Pa. 2004) ("If left undefined, the words of a contract are to be given their ordinary meaning."). But even if the contract were treated as ambiguous, "it is parol evidence that reveals the parties' intent." *Id.* at 1165. Parol and extrinsic evidence may not support plaintiffs' preferred reading of the contract: at the time they entered into a variable rate agreement with Respond, three of the four class representatives either did not believe or did not know if Respond was contractually bound by a rate cap. Nor do they claim they were guaranteed a rate cap by Respond's sales representatives. These factual circumstances make the class representatives vulnerable in ways other members of the putative class may not be. Typicality is not satisfied.[2]

The class representatives are not adequate for the same reason they are not typical. The adequacy inquiry has two parts: the first "tests the qualifications of the counsel to represent the class. . . . The second component of the adequacy inquiry seeks to uncover conflicts of interest

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[2] All the class representatives entered into contracts with Respond in 2013. Yet the proposed class covers customers from as far back as 2010. This disparity raises typicality concerns.

between named parties and the class they seek to represent. There are clear similarities between the components of the typicality inquiry relating to the absence of unique defenses and the alignment of interests, and this second part of the adequacy inquiry." *In re Schering Plough*, 589 F.3d 585, 602 (3d Cir. 2009). The class representatives are subject to defenses that may not apply to other members of the putative class and, for that reason, may not "fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). Adequacy is not satisfied.

Commonality

In *Wal-Mart Stores, Inc. v. Dukes*, the United States Supreme Court clarified the stringency of the commonality requirement. 131 S.Ct. 2541 (2011). "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury," *Id.* at 2551. The putative class claims "must depend upon a common contention" and "[t]hat common contention . . . must be of such a nature that it is capable of classwide resolution-which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* "What matters to class certification . . . is not the raising of common questions-even in droves-but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.*

Plaintiffs argue that two questions are common to the putative class: (1) whether Respond's uniform Disclosure Statement promised a rate cap; and (2) whether Respond breached the implied covenant of good faith and fair dealing by failing to disclose that its rates could exceed those charged by local utilities.

Those questions will not yield common answers. The Disclosure Statement does not expressly provide for a rate cap; if deemed ambiguous, parol and other extrinsic evidence would

need to be considered to resolve its meaning. That evidence would vary by customer, especially since Respond hired numerous third-party vendors for door-to-door solicitation and used at least five different companies for telephone solicitation in Pennsylvania. Small Dep. at 17(20-24), 60(9-20). The class representatives themselves do not share the same understanding of their contractual rights. Respond's 50,000 variable rate customers could not be expected to either. Commonality is not satisfied.[3]

III. CONCLUSION

Because the putative class does not comply with the typicality, adequacy, and commonality requirements of Federal Rule of Civil Procedure 23(a), class certification will be denied. Plaintiffs may proceed with this action in their individual capacities. An appropriate Order follows.

[3] For the same reasons, individual questions would predominate over questions common to the class. The putative class would not be certifiable under Rule 23(b)(3). Because the Disclosure Statement is not susceptible to interpretation on a classwide basis, certification under Rule 23(b)(2) would also be denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARBARA GILLIS, THOMAS GILLIS, SCOTT R. McCLELLAND, and KIMBERLY A. McCLELLAND, individually and on behalf of all others similarly situated	:	CIVIL ACTION
v.	:	No. 14-3856
RESPOND POWER, LLC	:	

ORDER

AND NOW, this 31st day of August, 2015, upon consideration of plaintiffs' motion for class certification (paper no. 34), defendant's response in opposition (paper no. 36), plaintiffs' reply in further support of the motion for class certification (paper no. 37), and oral argument on plaintiffs' motion for class certification, it is **ORDERED** that:

1. Plaintiffs' motion for class certification (paper no. 34) is **DENIED**.

2. Plaintiffs' motion for leave to file under seal (paper no. 33) is **DENIED AS MOOT**.

/s/ Norma L. Shapiro
J.

APPENDIX C

(Proposed Findings of Fact)

Proposed Findings of Fact

1. Blue Pilot Energy, LLC ("BPE") is an electric generation supplier ("EGS") licensed by the Commission since June 9, 2011 to supply electricity or electric generation services to the public within the Commonwealth of Pennsylvania. *License Application of Blue Pilot Energy, LLC*, Docket No. A-2011-2223888 (June 9, 2011) ("*Licensing Order*").

2. As a licensed EGS, BPE has supplied electric generation services under variable rate plans to thousands of residential and commercial customers throughout Pennsylvania. OAG/OCA St. 1 at 7-8.

3. As of March 2014, BPE halted retail marketing in Pennsylvania. OAG/OCA St. 1 at 7.

4. As of May 4, 2015, BPE announced its exit from the Pennsylvania retail market, and asked the Commission to cancel its EGS license, effective immediately. OAG/OCA St. 1 at 7-8.

5. BPE is currently serving no customers in Pennsylvania. OAG/OCA St. 1-SR (Suppl.), Exhibit BRA-1-SR (Suppl.) at page 4 (Discovery Request No. 3).

6. Of the 2,434 contacts received by the OCA regarding variable price increases, only 83 or 3.4% of them were from BPE's former or current customers. Joint Complaint ¶ 16.

7. Of the 7,503 consumer complaints received by the OAG regarding variable price increases, only 232 or 3.1% concerned BPE. Joint Complaint ¶ 17.

8. During the month of January 2014, wholesale prices for hourly energy supply in the day ahead and particularly the real time markets increased exponentially in response to sustained cold weather that is commonly referred to as the Polar Vortex. New records were set for winter electricity use in Pennsylvania and throughout PJM region. High demand combined with particularly high forced outage rates for a number of generators to produce record high costs in the PJM-administered energy markets. For instance, average wholesale day-ahead LMP prices for Pennsylvania in January 2014 were estimated at $148/MWh compared to $44/MWh in December 2013. Similarly, estimated energy uplift charges, which are energy charges billed to EGSs in addition to LMP costs, were estimated at $631 million in the month of January 2014, which is equivalent to a full year of uplift charges for the period 2010-2012. *Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, Docket No. M-2014-2406134 (Order entered March 4, 2014) ("*Variable Price Order*").

9. The Federal Energy Regulatory Commission noted that during one of the polar vortices that hit Pennsylvania in January 2014 in particular, electricity prices surged with the locational marginal prices being near or above $2,000 per Mwh for a number of hours in PJM. *FERC Staff Report, Winter 2013-2014 Operations and Market Performance in RTOs and ISOs*, AD14-8-000, at 10 (April 1, 2014).

10. As a result of these high PJM energy market prices, many EGSs serving Pennsylvania customers with variable-priced retail supply contracts needed to increase their retail prices to customers in order to recover the higher wholesale electric energy costs they incurred in January 2014. *Variable Price Order.*

11. Prior to February 2014, no formal complaints were filed against BPE. http://www.puc.pa.gov/about_puc/search_results/utility/authority_search/utility_detail_view.aspx?Utility=1113179.

12. Due to BPE's business decision to increase variable prices in a manner that was consistent with its Disclosure Statement, the volume of formal complaints spiked early in 2014.

13. In response to the high volume of bill inquiries and informal complaints arising from the Polar Vortex, the Commission immediately took several steps to enhance consumer education, including the issuance of press releases; the posting of a consumer alert on the Commission's website about variable prices; and the development of a separate page on www.papowerswitch.com devoted to information on fixed vs. variable products. *Variable Price Order* at 5.

14. From 2011 until early 2014, BPE marketed electric generation services to residential and commercial customers throughout Pennsylvania primarily by means of telemarketing sales calls by its employees or sales agents. OAG/OCA St. 1 at 7.

15. BPE sent a Disclosure Statement to all customers following enrollment. OAG/OCA St. 1 at 8.

16. The Commission approved BPE's Disclosure Statement. *Licensing Order*; *Yaglidereliler Corp. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2413732 (Initial Decision served June 24, 2014; Order on Remand entered January 16, 2015).

17. The variable pricing language in BPE's Disclosure Statement clearly and conspicuously states that: (i) the customer has a variable rate plan; (ii) the customer's specific initial rate; (iii) the customer's specific initial rate guarantee period; (iv) after the initial rate period, "[BPE] may increase [the customer's] rate based on several factors, including changes in wholesale energy market prices in the PJM markets." It also contains no price limits and permits customers to cancel without paying early termination fees. OAG/OCA Exh. BRA-2 at 15.

18. Prior to the Polar Vortex, BPE served about 2,500 Pennsylvania retail customers. The approximately 80 consumers who testified in this proceeding comprise about 3% of that customer base. OAG/OCA St. 1 at 9.

APPENDIX D

(Proposed Conclusions of Law)

Proposed Conclusions of Law

1. 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 ("Code"), 66 Pa. C.S. §§ 101 *et seq.* *See City of Phila. v. Phila. Elec. Co.*, 473 A.2d 997, 999-1000 (Pa. 1984).

2. 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).

3. Nothing in the Code authorizes the Commission to interpret the terms and conditions of a private contract between an EGS and its customers. Indeed, the Commission has concluded 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. FirstEnergy Solutions Corp.*, Docket No. P-2014-2421556 (Order entered January 26, 2015).

4. Interpretations of private contracts these are matters for civil courts of common pleas of competent jurisdiction. *See Allport Water Auth. v. Winburne Water Co.*, 258 Pa. Super. 555, 393 A.2d 673 (Pa. Super. 1978).

5. The generation of electricity is no longer regulated as a public utility service function except for the limited purposes set forth in Code Section 2809 (licensing) and Code Section 2810 (taxes). 66 Pa. C.S. § 2806(a); *Delmarva Power & Light Co. v. Pa. Pub. Util. Comm'n*, 582 Pa. 338, 870 A.2d 901 (Pa. 2005).

6. The Commission does not regulate the prices of EGSs. 66 Pa. C.S. § 1301 ("just and reasonable" rates analysis only applies to public utilities).

7. Code Section 1312 only authorizes the Commission to direct public utilities to issue refunds when a determination has been made that their rates are not just and reasonable. 66 Pa. C.S. § 1312.

8. Code Section 3301 sets forth the remedies that are available to the Commission when regulated entities violate the Code, Commission regulations or Commission orders, including civil penalties, and does not authorize directives for the issuance of refunds. 66 Pa. C.S. § 3301.

9. Code Section 2809(c) authorizes the Commission to suspend or revoke an EGS's license under specified circumstances, including the failure to maintain a bond or other security to ensure financial responsibility and the failure to pay taxes, and does not authorize directives for the issuance of refunds. 66 Pa. C.S. § 2809(c).

10. Code Section 501 confers on the Commission "general administrative power and authority to supervise and regulate all public utilities, which does not include EGSs for these purposes. 66 Pa. C.S. § 501; *Delmarva.*

11. As nothing in the text of the Code provides a strong and necessary implication authorizing the Commission to direct EGSs to issue refunds, Code Section 501 may not be relied upon to infer that authority. *PECO Energy Co. v. Pa. Pub. Util. Comm'n*, 568 Pa. 39, 791 A.2d 1155, 1159-1160 (2002).

12. The Commission is not permitted to award damages to complainants. *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791, 795 (Pa. 1977); *Elkin v. Bell Tel. Co. of Pa.*, 420 A.2d 371 (Pa. 1980).

13. The Statutory Construction Act of 1972 mandates 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).

14. The Commission does not have jurisdiction to enforce the provisions of the Consumer Protection Law or the Telemarketer Registration Act. *Mid-Atlantic Power Supply Assoc. v. PECO Energy Co.*, Docket No. P-00981615, 1999 Pa. PUC LEXIS 30 (Order entered May 19, 1999); *David P. Torakeo v. Pennsylvania American Water Co.*, Docket No. C-2013-2359123 (Opinion and Order entered April 3, 2014); *In Re Marketing and Sales Practices for the Retail Residential Energy Market*, Docket No. L-2010-2208332 (Order entered October 24, 2012).

15. The Commission may not enforce vague or general standards that do not provide fair notice as to what is required of EGSs or of what is prohibited. *See Vill. of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982).

16. Code Section 701 authorizes the Commission to hear complaints about acts done or omitted by a regulated entity in violation of any law which the Commission has jurisdiction to administer, or any regulation or order of the Commission. Neither Code Section 701 nor any other provision of the Code authorizes the Commission to rely on pattern and practice evidence or to entertain class action types of proceedings in determining whether a violation of the Code, Commission regulations or Commission orders has occurred and, if so, what penalty or relief may be awarded. Therefore, the Commission does not have jurisdiction over class action lawsuits or to hear pattern and practice claims. 66 Pa. C.S. § 701; *see also Painter v. Aqua PA, Inc.*, Docket No. C-2011-2239557 (Opinion and Order entered May 22, 2014); *Pettko v. Pennsylvania American Water Company*, Docket No. C-2011-2226096 (Administrative Law Judge Order dated October 5, 2011 adopted by Commission Order on February 18, 2013).

17. The Attorney General may be a complainant before the Commission in any matter solely as an advocate for the Commonwealth as a consumer of public utility services. 66 Pa. C.S. § 701.

18. The Office of Consumer Advocate is authorized to represent the general interests of consumers as a party, not the interests of individual utility consumers. 71 P.S. § 309-4(a); *see also Suprick v. Commonwealth Telephone Co.,* Docket No. 00903161, 1995 WL 945164.

19. A finding based wholly on hearsay cannot support a legal conclusion of an administrative agency. *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366 (Pa. Cmwlth. 1976). Uncorroborated hearsay may not be the basis for a finding of fact. *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).

20. The residual exception to the hearsay rule has been expressly rejected by the Pennsylvania Supreme Court. *See Commonwealth v. Stallworth*, 566 Pa. 349, 781 A.2d 110, 128, n.2 (2001).

21. Federal courts rarely apply the residual exception because there must be a clear basis of trustworthiness to support the out-of-court statements. *See Reassure Am. Life Ins. Co. v. Warner*, 2010 WL 4782776 (S.D. Fla. 2010).

22. Code Section 332(a) places the burden of proof for an order on the proponent of the order. 66 Pa. C.S. § 332(a). *Samuel J. Lansberry, Inc. v. Pennsylvania Public Utility Commission*, 578 A.2d 600 (Pa. Cmwlth. 1990).

23. A preponderance of evidence is established by presenting evidence that is more convincing, by even the smallest amount, than that presented by the other parties to the case. *Se Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950)

24. Commission decisions must be supported by substantial evidence in the record. 2 Pa. C.S. § 704. Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and Western Railway Co. v. Pennsylvania Public Utility Commission*, 489 Pa. 109, 413 A.2d 1037 (1980).

25. A pattern and practice approach is not appropriate in this proceeding due to the unique facts and circumstances of each individual sales transaction. *Barbara A. Gillis, Thomas Gillis, Scott R. McClelland, and Kimberly A. McClelland, individually and on behalf of all others similarly situated v. Respond Power, LLC*, Docket No. 14-38576 (Order dated August 31, 2015).

26. In Pennsylvania, written contracts supersede all preliminary negotiations, conversations and verbal agreements. *See Steuart v. McChesney*, 498 Pa. 45, 48, 444 A.2d 659, 661 (Pa. 1982).

27. BPE's Disclosure Statement complied with the Commission's regulations that were in effect during the relevant time period. 52 Pa. Code § 54.5(c)(1) and (2), as published at 37 Pa. B. 4996 (September 15, 2007).

28. The Joint Complainants failed to carry their burden of proof with respect to Counts I (Alleged Failure to Provide Accurate Pricing Information), III (Alleged Misleading and Deceptive Promises of Savings), and IV (Alleged Lack of Good Faith Handling of Complaints).

29. The Commission does not have jurisdiction to address Counts II (Alleged Prices Nonconforming to Disclosure Statement) and V (Alleged Failure to Comply with the Telemarketer Registration Act).

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

COMMONWEALTH OF PENNSYLVANIA, ET AL.,	:	
Complainants,	:	
v.	:	**Docket No. C-2014-2427655**
BLUE PILOT ENERGY, LLC,	:	
Respondent.	:	

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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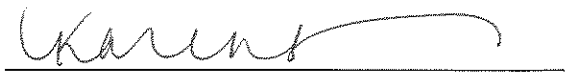

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