

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

UNIFIED ENERGY ALLIANCE, LLC,	:	
	:	
Complainant,	:	
	:	Docket No. C-2015-2492473
v.	:	
	:	
RODGER K. WALTER, ERNIE	:	
HORNING, J. NICK STORCH, DUANE	:	
ALBRIGHT, ANDY YOUNDT, DON	:	
SHIPP, FUTURE ENERGY	:	
SOLUTIONS, LLC and NAVIGATE	:	
POWER, LLC,	:	
	:	
Respondents.	:	

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**RESPONSE IN OPPOSITION TO NAVIGATE POWER, LLC’S  
MOTION TO STRIKE WRITTEN TESTIMONY**

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Unified Energy Alliance, LLC (“UEA”), by and through its counsel, hereby files its Response in Opposition to the Motion of Navigate Power, LLC (“Navigate”) to Strike Written Testimony in compliance with the Honorable Administrative Law Judge Elizabeth H. Barnes (“Presiding Officer”), email request of March 9, 2016, and states as follows:

**I. ANSWER TO INTRODUCTION**

UEA filed its formal complaint in this action in an effort to curtail the Respondents’ systematic and illegal marketing activities that are (a) confusing and deceiving customers, and (b) providing inaccurate and misleading information about services and products being marketed and brokered by the Respondents in violation of the Public Utility Code and the Regulations of the Pennsylvania Public Utility Commission. In support of its Complaint, UEA submitted written testimony from two representatives of UEA: Ricardo Hernandez II and Joseph Mazer.

Messrs. Hernandez and Mazer provide testimony that reveals first-hand knowledge of the deceptive marketing tactics being employed by Respondents, and of the impact that the Respondents' deceptive marketing has on UEA and its customers. Navigate's Motion to Strike is little more than a procedural joust and an effort to argue the impact and importance of the testimony before the hearing scheduled for next week. Similarly, Navigate's efforts to exclude Mr. Mazer altogether is fundamentally flawed because the statute simply does not apply to Mr. Mazer.

## **I. ANSWER TO ARGUMENT**

### **A. Legal Standards**

Navigate generally states the legal standards applicable to the admissibility of evidence, although omits from its recitation the additional principle that "under the relaxed evidentiary standards applicable to administrative proceedings, hearsay may be received and, in proper instances, may support a finding of fact." *Anderson v. Dept. of Pub. Welfare*, 468 A.2d 1167, 1169 (Pa. Cmwlth. 1983)

### **B. Mr. Hernandez's Testimony is Not Hearsay and Should not be Stricken.**

Navigate incorrectly asserts that a significant portion of Mr. Hernandez's testimony is hearsay. Hearsay, as defined by the Rules of Evidence, is an out of court statement offered to prove the truth of the matter asserted. Pa.R.E. 801(c). Thus, to be hearsay, the proffered testimony must be: (1) a statement; (2) made out of court; and (3) offered to prove the truth of the facts communicated in the statement. A statement is not hearsay, however, if it is offered as proof of a speaker's state of mind; to show the effect the statement had on the listener or reader; to explain the witness' course of conduct; because the statement is an operative fact or verbal act; or for any other purpose other than to prove that the facts communicated in the statement are

true. See, e.g., *Commonwealth v. Busanet*, 54 A.3d 35 (Pa. 2012); *Commonwealth v. Rega*, 933 A.2d 997 (Pa. 2007); *Commonwealth v. Carson* 913 A.2d 220 (Pa. 2006); *Commonwealth v. Stocker*, 622 A.2d 333 (Pa. 1993); *Zuk v. Zuk*, 55 A.3d 102 (Pa. Super. 2012); *Commonwealth v. Estep*, 17 A.3d 939 (Pa. Super 2011); *Alwine v. Sugar Creek Rest, Inc.*, 883 A.2d 605 (Pa. Super. 2005); *Am. Future Sys., Inc. v. Better Bus. Bureau*, 872 A.2d 1202 (Pa. Super 2005); *Jerry v. Dept. of Corrections*, 990 A.2d 112 (Pa. Commw. 2010); *Kierski v. Twp. Of Robinson*, 810 A.2d 196 (Pa. Commw. 2002); *Eagle v. Unemployment Comp. Bd. Of Review*, 659 A.2d 60 (Pa. Commw. 1995).

Here, each of the passages of Mr. Hernandez's testimony to which Navigate asserts an objection is either not hearsay, a recognized exception to the hearsay rule, or is corroborated by other evidence. For example, in each of the first four excerpts (UEA St. 1, p. 7:5-10, 7:13-17, 7:21-8:8; 9:12-18; 10:6-12) all describe a sequence of events that explain UEA's course of conduct in suspending and then terminated the individual respondents' contracts; undertaking an investigation into the individual respondents' actions with respect to UEA's customers, and taking action with respect to the letters that the respondents sent to UEA's customers. (UEA St. 1, 7:5-10:12). Indeed, Navigate even objects to UEA's testimony that it took recorded statements (9:12-18) despite the fact that UEA *does not testify* to the content of any such recorded statement – clearly not hearsay.

Secondly, Navigate even objects to UEA's own testimony about what it did and said. For example, on p. 10, Mr. Hernandez testifies, "we explained to the customers that the respondents no longer worked with UEA, and no longer worked with Liberty Power. Upon learning this, many of the customers expressed the desire to remain with UEA and Liberty Power. Those customers who expressed such a desire were asked [by UEA] to give a recorded statement

detailing what the Respondents had told them, and stating that they did not know that they were flipped, or did not wish to be flipped, and that they desired to continue working with UEA and Liberty Power. We submitted these recorded statements with our formal complaint.” (UEA St. 1, p. 10:19-11:3; 13:18-20). In other words, Navigate is claiming that UEA’s *direct testimony about its own conduct and statements* is hearsay! This testimony clearly is not hearsay, and cannot be excluded.

Although Navigate characterizes all of Mr. Hernandez’s statements as attempts to introduce hearsay testimony from non-testifying witnesses, what it really offers is a sequence of facts that were observed by UEA that are UEA’s direct testimony about its own statements and factual observations; that are *not* offered for the truth of the matter asserted, but are instead offered as operative facts, that demonstrate the reasons for UEA’s own course of conduct, that show the impact on the listener (UEA), and are otherwise the foundation for the allegations of the Formal Complaint.

**C. Mr. Hernandez, as the president of UEA, has sufficient foundation to offer testimony.**

Navigate moves to strike portions of Mr. Hernandez’s testimony on the purported basis that it lacks sufficient foundation. All of the passages to which Navigate objects are matters to which UEA can testify, and which on direct examination at the hearing can be established through foundational questions. Indeed, Navigate even objects to one passage (UEA St. 1, 9:4-12) for lack of foundation about a fact that the respondents actually admit in their own testimony. (Compare UEA St. 1, 9:4-7, with Horning St. at 3:66-4:69 and Storch St. at 6:128). The remaining allegations of foundation are issues that can be explored in cross-examination, but should not be summarily stricken before live testimony is presented.

**D. Mr. Hernandez’s Testimony is Relevant and Admissible.**

Navigate asserts that certain portions of Mr. Hernandez’s testimony is irrelevant and, therefore, inadmissible. All of the testimony to which Navigate objects as “irrelevant,” however, relates directly to UEA’s relationship with the individual respondents, which is directly relevant to the licensure questions presented in UEA’s Formal Complaint, specifically, the allegation that the Individual Respondents violated Section 2809 of the Public Utility Code by arranging for the sale of energy products or services to und users from more than one broker/marketer. (UEA Formal Compl. Paras 61-67).

**E. Mr. Mazer is Competent to Testify.**

Navigate incorrectly asserts that Mr. Mazer is not competent to testify pursuant to Section 5922 of the Judicial Code. Section 5922 provides that “in a civil matter, a person who has been convicted in a court of this Commonwealth of perjury, which term is hereby declared to include subornation of or solicitation to commit perjury, shall not be a competent witness for any purpose” unless the judgment has been set aside or the instant matter is one to redress or prevent injury to his person or property. 42 Pa.C.S.A. § 5922. Contrary to Navigate’s suggestion, however, Mr. Mazer never was convicted of perjury, subornation of perjury, or solicitation to commit perjury. Accordingly, Section 5922 does not apply, and Mr. Mazer remains competent to testify.<sup>1</sup>

The competence of a witness convicted of perjury to testify has been strictly construed by Pennsylvania courts. For example, an admission of perjury, *see Com. v. Levenson*, 422 A.2d 1355, 1358-59 (Pa. Super. 1980), or even a guilty plea, *see Com. v. Pearlman*, 191 A. 365, 371

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<sup>1</sup> In addition, even if Mr. Mazer’s conviction could be deemed to fall within the purview of Section 5922 (and it cannot), the statute is limited by its plain language to “civil matters.” Complainant is aware of no case applying Section 5922 to administrative proceedings.

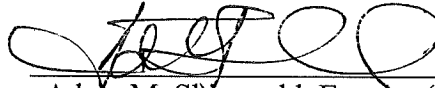
(Pa.Super. 1937), will not disqualify a witness unless and until the witness has been convicted and sentenced. *Com v. Myers*, 403 A.2d 85, 86 (Pa. 1979).

Importantly, Section 5922 is aimed at witnesses who have been convicted of “perjury,” and specifically deems “subornation of or solicitation to commit perjury” to be included in that definition, but *conspiracy* is not named in the statute and is not the same crime. A person is guilty of perjury, as defined in 18 Pa.C.S.A. § 4902(a), “if in any official proceeding he makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true.” The crime of subornation of perjury requires “proof of perjury by a witness plus proof that the accused induced, persuaded, and instigated witness to commit the crime of perjury.” *Com. v. Mervin*, 326 A.2d 602, 604 (Pa. Super. 1974). Solicitation, the last of the crimes named in Section 5922, is codified at 18 Pa.C.S.A. § 902. Conspiracy is defined separately at 18 Pa.C.S.A § 903. Significantly, commission of the underlying criminal act is not an element of criminal conspiracy, and a guilty plea for criminal conspiracy does not include any plea for commission of the underlying criminal act. If the General Assembly intended to include “conspirators” within the scope of Section 5922 of the Judicial Code, it certainly could have named conspiracy as an included offense, just as it included subornation and solicitation. Because Mr. Mazer has not been convicted of perjury, or any crime deemed to be the equivalent of perjury in Section 5922, he is not incompetent to testify as a matter of law and his testimony should not be stricken.

**II. ANSWER TO CONCLUSION**

Navigate's Motion should be denied in its entirety.

Respectfully submitted,



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Date: March 10, 2016

Counsel for Unified Energy Alliance, LLC

**CERTIFICATE OF SERVICE**

I certify that on this 10<sup>th</sup> day of March, 2016, I served a copy of the foregoing  
RESPONSE IN OPPOSITION TO NAVIGATE POWER, LLC'S MOTION TO STRIKE  
WRITTEN TESTIMONY via Electronic Mail addressed to:

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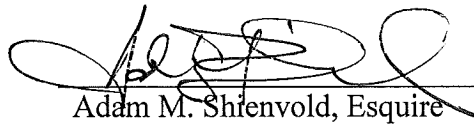
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