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March 23, 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 Reply Brief on Behalf of Blue Pilot Energy, LLC, in the above-captioned matter.

Copies have been served on all parties as indicated in the attached Certificate of Service.

Very truly yours,

Karen O. Moury

KOM/bb
Enclosure
cc: Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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.	:	

REPLY BRIEF
ON BEHALF OF
BLUE PILOT ENERGY, LLC

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Dated: March 23, 2016

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I. INTRODUCTION

Within the last week, the United States District Court for the Eastern District of Pennsylvania has issued two decisions dismissing class action complaints filed by consumers against electric generation suppliers ("EGSs") regarding increases in variable prices. In those decisions, the Eastern District Court correctly determined that retail prices charged by EGSs may fluctuate with the wholesale market and may vary based on other factors, without being tied to any particular formula or methodology. A review of this compelling legal precedent interpreting and applying Pennsylvania law demonstrates that:

- The question of whether BPE's prices conformed to the Disclosure Statement is a classic issue of contract interpretation, which is properly addressed by Courts;
- Under Pennsylvania law, Courts may not add a term, such as "competitive rate," into a contract based on extrinsic evidence;
- A contractual provision stating that the rate may vary dependent upon fluctuations in energy and capacity markets is unambiguous;
- In interpreting language in contracts, Court may not read words into the contract that changes its unambiguous meaning; and
- A Disclosure Statement informing the customer that the variable rate may change in response to market conditions is clear and sufficiently describes the conditions of variability

In *Silvis v. Ambit Energy L.P.*, 2016 WL 1086703 (E.D. Pa. March 21, 2016), Judge Robreno dismissed a class action complaint filed in connection with variable price increases due to the Polar Vortex in early 2014.[1] In *Silvis*, the plaintiff alleged that Ambit Northeast, LLC ("Ambit") had enticed her to switch from the EDC with its marketing materials promising savings over other EGSs and competitive variable rates. The Court explained that after a "teaser" rate for the first month, the consumer quickly became disappointed with her decision to

[1] The Slip Opinion is attached as Appendix A to the Reply Brief.

choose a variable rate plan because she was not saving money and her electric bill was increasing.

Ambit used two documents to enroll the consumer, including a Disclosure Statement and a Service Agreement. A provision in the Disclosure Statement provided that the rate may vary dependent upon price fluctuations in the energy and capacity markets. The Service Agreement further provided that the initial rate would be shown at the time of enrollment and that thereafter rates are subject to change at the discretion of Ambit. The consumer contended that the two provisions, when read together, stood for the proposition that Ambit has discretion to change the rate but only if its decision is based upon price fluctuations in the energy and capacity markets. However, the Court agreed with Ambit's interpretation of the contract, which was that Ambit had discretion in setting the rate it charges for electricity, limited only by the good faith requirement read into contracts. *See Bethlehem Steel Corp. v. Litton Indus., Inc.*, 488 A.2d 581, 600 (Pa. 1985).

Interpreting the private contract between the plaintiff and Ambit, the Court in *Silvis* found that "[t]he provision in the Disclosure Statement merely informs the customer that her rate may vary dependent upon price fluctuations in the energy and capacity market, but does not otherwise limit Ambit's discretion in setting the rate based on other legitimate factors." *Id.* at *3. Although the consumer sought to insert the word "only" after "may" in the contract so that the provision read that the rate "may only vary dependent upon price fluctuations in the energy and capacity markets," the Court noted that the word "only" does not appear in the provision, and the Court may not read it into the unambiguous language thereof. The Court added: "If a baseball team posts a sign reading that 'the game may be cancelled dependent on rain,' that is not a promise that it will not be cancelled for some other legitimate reason, such as the other team not

showing up or the lights being out. *Id.* Finding that the two provisions in the contract are unambiguous and not internally inconsistent, the Court concluded that it would "not look beyond the four corners of the contract to extrinsic evidence" or " incorporate new terms to change the contract's plain meaning" *Id.*

In addressing the consumer's claim that Ambit had breached the contract, *i.e.* charged prices nonconforming to the Disclosure Statement, by charging a rate that was not competitive or based on market factors, the Court observed that there was no express provision in the contract requiring Ambit to provide a competitive rate. Therefore, the Court found that it could not add into the contract a term regarding competitive rates based on extrinsic evidence.

As to Ambit's obligation to adjust rates in good faith under Pennsylvania contract law, the Court in *Silvis* recognized that the increased rates were due to the Polar Vortex in 2014. Noting that the comparison of Ambit's prices to the EDC rate did not evidence bad faith pricing, the Court referred to the differences in the way EGSs and EDCs price their products and recover their costs. The Court further found that the consumers' expectations are irrelevant when viewing the contract within its four corners.

In *Orange v. Starion Energy PA, Inc.*, 2016 WL 1043618 (E.D. Pa. March 16, 2016), Judge Jones dismissed a class action suit in which the plaintiff alleged that Starion Energy PA, Inc. ("Starion") breached a contract by increasing variable prices.[2] As explained by the Court, the contractual relationship between the parties consisted of a Welcome Letter and a Sales Agreement. The Welcome Letter set forth the initial rate and identified the rate as variable. The Sales Agreement explained that the variable rate would be calculated monthly and may change in response to market conditions. Although the initial price was lower than the rate charged by the

[2] The Slip Opinion is attached as Appendix B to the Reply Brief.

EDC, Starion's price eventually rose to an amount that was higher than the EDC's rate. The plaintiff contended the contract was breached because Starion did not consider market price-related factors in determining the variable rate.

In addressing the plaintiff's argument that Starion had arbitrarily set prices, the Court in *Orange* specifically reviewed the Commission's regulations governing the variable pricing statement in Disclosure Statements, which require an EGS to detail the conditions of variability. Observing that the contractual language stated that the variable rate may change in response to market conditions, the Court found that this provision set forth how the variable rate would be determined and described the conditions of variability as "clear. *Id.* at *4.

As with the contractual documents reviewed by the Eastern District Court for Pennsylvania in *Silvis* and *Orange*, BPE's Disclosure Statement clearly informed consumers that their variable rates could vary based on several factors, including PJM wholesale market conditions. As with the EGSs whose price increases were reviewed by the Courts in *Silvis* and *Orange*, BPE charged prices that were consistent with those conditions of variability. Although consumers were disappointed with their decision to choose a variable rate plan once they no longer realized savings, as observed about the plaintiff by the Court in *Silvis*, they are not entitled to have new terms -- like competitive rates -- added into their contracts now.

Two years ago, amidst the Polar Vortex recognized by the Court in *Silvis*, and prior to the filing of the Joint Complaint, Blue Pilot Energy, LLC ("BPE") completely ceased retail marketing in Pennsylvania. Nearly one year ago, BPE fully exited the Pennsylvania retail market, voluntarily surrendering its electric generation supplier EGS license. BPE currently serves no retail customers in Pennsylvania. Yet, this litigation persists, with the Joint Complainants wholly relying on a nonexistent legal theory of "pattern and practice" in urging the

Commission to find that BPE violated regulations in its interactions with all customers it served in early 2014. Regardless of how they characterize this proceeding, the Joint Complainants are treating it as a class action lawsuit, by seeking remedies on behalf of a class of individuals who are not parties to this proceeding, which it is well-settled the Commission has no jurisdiction to entertain.

Advancing this legal theory that has never been recognized by the Commission, the Joint Complainants -- in broad brush manner -- contend that the Commission may consider the testimony of an extremely small group of select individual customers to conclude that BPE was engaged in a pattern and practice of violating Commission regulations. Specifically, they are asking the Commission to conclude that every BPE customer had identical experiences and suffered the same alleged harms, when the consumer testimony they presented often directly contradicts the allegations of the Joint Complaint, as well as the generalities extrapolated from that testimony by the Joint Complainants' expert witnesses.

Further, based on an absolute dearth of credible and persuasive evidence to support their claims, the Joint Complainants would have the Commission take extreme measures that are simply not necessary or justified when an EGS has voluntarily stopped marketing, exited the Pennsylvania market, surrendered its EGS license and expressed a willingness to accept a permanent revocation of its license. Specifically, civil penalties serve no purpose under these circumstances. As to refunds for charges billed consistent with BPE's Disclosure Statement, the Joint Complainants are not authorized to request such remedies on behalf of individual customers.

The Joint Complainants claim that this proceeding is not about the Polar Vortex. However, it is completely about the Polar Vortex. The Commission itself has expressly

acknowledged that the variable price increases experienced by retail customers were the direct result of wholesale energy market volatility resulting from the frigid weather endured by this region in early 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*").

Since 2011, BPE has served thousands of customers on variable price plans. Through their sales and marketing activities, BPE did not guarantee savings to customers. Customers enjoyed savings for months or years, while others saw rate increases over the period of their contracts that they did not question. Prior to February 2014, not a single customer served by BPE filed a formal complaint with the Commission. However, when wholesale market prices skyrocketed to record levels as a result of the Polar Vortex and BPE adjusted its prices to reflect these new realities, the landscape changed. Consumers complained, and suddenly, according to the Joint Complainants, BPE's marketing and sales practices in the years of operation in Pennsylvania leading up to February 2014 were misleading and deceptive. However, the level of variable prices was the only factor that changed from 2011 until February 2014. Consumers complained in February 2014 because the prices increased above prior levels and they were not able to quickly terminate service with BPE due to the switching rules that were in place under Pennsylvania's electric choice program at that time.

Through this proceeding, it became clear that consumers misunderstood the way that the competitive retail market operates. For instance, when BPE sales agents told consumers that they could cancel at any time without penalty, that information was entirely accurate. However, it was unknown at that time the extent to which wholesale market prices would spike, the effect such volatility would have on retail prices and the desire that consumers would have to literally switch immediately. Therefore, the sales agents were not misleading the consumers about the length of the switching process when they told them they could cancel at any time without penalty. Rather, they were simply not forecasting future wholesale price volatility that would eventually result in the Commission forcing electric distribution companies ("EDCs") to change their systems to allow switching within three days. The Commission implemented that change almost immediately, after years of discussions during which EDCs claimed it was not feasible. Similarly, when sales agents spoke of savings opportunities that may be possible with BPE, they did so in the context of their experience with BPE's historical pricing trends and again did not forecast the skyrocketing and record-setting wholesale prices that would occur in early 2014.

Quite simply, the Joint Complainants have failed to carry their burden of proving that BPE's increases in its variable retail prices caused by the skyrocketing and record-setting wholesale prices in early 2014 violated any Commission regulations. To the extent that the Commission finds that any departures from the requirements of its regulations, BPE has exited the Pennsylvania market and requested the cancellation of its EGS license. Nothing further is warranted or necessary.

II. SUMMARY OF ARGUMENT

The Joint Complainants rely on an unprecedented "pattern and practice" theory to request that the Commission conclude, on the basis of the testimony of an extremely small group of

select individual customers, that BPE violated the Commission's regulations in its dealings with all of the customers it served in early 2014. Because the testimony of individual consumer witnesses does not support the broad-sweeping factual allegations set forth in the Joint Complaint or the relief requested by the Joint Complainants, they heavily depend in their Main Brief on the testimony of their expert witnesses. However, a review of the biased and self-serving testimony of those witnesses reveals that it is grounded in neither the consumer testimony nor the Commission's regulations. Rather, it consists of personal opinions and observations, as well as meaningless references to EDC prices to compare ("PTC") and the costs of serving customers in 2014. As to whether BPE's sales, marketing and business practices violated the Commission's regulations, the expert witness testimony proves nothing.

As the party with the burden of proof, the Joint Complainants have presented flimsy evidence in support of their averments and have failed to prove by a preponderance of the evidence that BPE violated the Commission's regulations. To the extent that the Commission finds that any of their allegations have been substantiated with respect to a handful of customers served by BPE, the permanent revocation of BPE's license more than adequately addresses those concerns. To BPE's knowledge, the Commission has yet to revoke an EGS license, except for instances when the EGS has failed to maintain a bond or other approved security. Since license revocation is the ultimate penalty available to the Commission, no further remedies are necessary or warranted.

As to Count I of the Joint Complaint (providing accurate pricing information), BPE's Disclosure Statement was approved by the Commission during the licensing process and has recently been reviewed and endorsed by the Commission. Moreover, it fully complies with the Commission's regulations by clearly and conspicuously: i) stating that the customer has a

variable price plan; (ii) giving the customer's specific initial price; (iii) providing the customer's specific initial price guarantee period; and (iv) noting that after the initial period, BPE may increase the customer's price based on several factors, including changes in wholesale energy market prices in the PJM markets. Nothing further is required by the Commission's regulations, and the terminology used in BPE's Disclosure Statement wholly adheres to the Electric Competition Dictionary. The standard that the Joint Complainants seek to impose on BPE's Disclosure Statement, of providing information that would essentially enable a consumer (and BPE's competitors) to calculate the price, is simply not the mandate that the Commission has established for EGS Disclosure Statements in a competitive retail market.

Regarding Count II (prices conforming to disclosure statement), the Joint Complainants propose to have the Commission exceed its statutory authority by interpreting a private contract. As this interpretation would require the Commission to undertake a cost of service analysis to determine the price that BPE "should" have charged retail customers in a deregulated environment in early 2014, including how much profit it should have been permitted to earn. Such an exercise is reserved for public utility ratemaking and has no place in an industry that the Commission has restructured, pursuant to the directives of the General Assembly, so that price-setting is left to the market.

While the Commission should dismiss Count II without any consideration of the merits, a review of the Joint Complainants' evidence demonstrates that they have failed to show that BPE's variable prices in early 2014 departed from the Disclosure Statement, which clearly provided that prices would vary monthly based on several factors, including PJM wholesale market conditions. Moreover, since the Joint Complainants did not present evidence of prices

paid by individual consumers, no basis exists for making a determination that those prices failed to conform to the Disclosure Statement.

With respect to Count III (promises of savings), the Joint Complainants have failed to prove that BPE's sales agents promised savings that were not realized. Many of the consumers who testified in this proceeding understood that their prices would vary monthly and indicated that BPE did not guarantee savings. Numerous customers also testified that the initial prices promised by BPE were honored and that they saved money for many months or even years. A glaring omission from the record in this proceeding is evidence of individual customer billing data. Without such data and without knowing the contract terms for each customer, it is impossible to determine that any specific promises made to individual consumers were not honored. Therefore, ordering across-the-board refunds would not only exceed the Commission's statutory authority but would also be contrary to the record in some instances and wholly unsupported with respect to the vast majority of customers. Moreover, Count III alleges violations of the Unfair Trade Practices and Consumer Protection Law ("Consumer Protection Law"),[3] which the Commission does not have jurisdiction to enforce. Therefore, Count III should also be dismissed.

As to Count IV (complaint handling), the evidence in this proceeding demonstrates that most consumers 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 from BPE, they acknowledged receiving an explanation for the price increase. Also, BPE issued refunds to many customers. The Joint Complainants have failed to show that

[3] 73 P.S. §§ 201-1 *et seq.*

BPE's complaint handling in early 2014 violated any Commission regulations, warranting dismissal of Count IV.

Count V alleges violations of the Telemarketer Registration Act,[4] which the Commission does not have jurisdiction to enforce. Moreover, the Telemarketer Registration Act expressly exempts transactions regulated by another administrative agency from compliance with the written contract requirements. As BPE fully complied with the Commission's regulations governing enrollments, Count V should be dismissed outright.

Because the evidence and legal arguments presented by the Joint Complainants fail to demonstrate that BPE violated the Public Utility Code,[5] Commission regulations or Commission orders, the Joint Complaint should be dismissed. 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, the revocation of BPE's EGS license more than adequately addresses such findings.

III. ARGUMENT

A. Pattern and Practice

Through their Main Brief, the Joint Complainants seek to rely on select individual consumer witness hearsay testimony laden with credibility issues, and the broad-sweeping unsubstantiated conclusions of their biased expert witnesses, to support Commission findings that BPE has violated various Commission regulations in connection with serving each of its customers during the January 2014 through March 2014 timeframe. In its Main Brief, BPE has fully addressed the inability of the Commission to use pattern and practice evidence to reach findings of fact and conclusions of law, or to order across-the-board remedies.[6] For the reasons

[4] 73 P.S. §§ 2242 *et seq.*
[5] 66 Pa.C.S. §§ 101 *et seq.*
[6] BPE M.B. at 39-59.

set forth therein and those discussed below, the Commission must reject the Joint Complainants' attempts to pursue class action type remedies and relief in this administrative proceeding.

BPE's position is based on the following key principles: (i) the Commission does not have jurisdiction to rely on pattern and practice evidence or to grant relief of a nature that occurs in class action lawsuits; (ii) the Joint Complainants do not have authority to pursue a class action lawsuit at the Commission because neither has standing to represent individual consumers or to seek relief on their behalf; (iii) a party in a Commission proceeding has the burden to prove each element of its case by a preponderance of evidence; (iv) Commission decisions must be supported by substantial evidence in the record, which is defined as such relevant evidence that a reasonable mind might accept as adequate to support a conclusion; (v) BPE has a fundamental right of due process that affords it the opportunity to confront and cross examine any witness who has offered testimony against it (or will receive relief from it); and (vi) a pattern and practice approach is not appropriate in this proceeding due to the unique facts and circumstances of each individual sales transaction and customer experience.

The Joint Complainants have not identified any statutory provision or case law that would suggest that the Commission may evaluate an EGS's conduct using a "pattern and practice" approach. Notably, even a cursory review of the Rules of Civil Procedure governing class action lawsuits[7] illustrates that such an action is appropriate only before a proper judicial authority, rather than a quasi-judicial administrative agency. For instance, Rule 1703 requires that a class action be commenced by filing a complaint with the prothonotary. Also, Rule 1704 requires the complaint to have a caption designating "class action" with a separate heading in the body of the complaint averring facts in support of the perquisites of Rules 1702, 1708 and 1709.

[7] Pa.R.C.P. 1701-1717.

Therefore, by the civil rules that govern class action proceedings, this matter is not properly before the Commission, even if it had jurisdiction over such actions.

Code Section 701 authorizes the Commission to hear complaints about acts done or omitted by a regulated entity in violation of any statute, regulation or order that the Commission has jurisdiction to administer. 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.

In support of their theory, the Joint Complainants refer to *Mid-Atlantic Power Supply Assoc. v. PECO Energy Co.*, Docket No. P-00981615, 92 PA PUC 414 (Order entered May 19, 1999), *aff'd,* 746 A.2d 1196 (2000).[8] However, the *MAPSA* decision offers absolutely no support for the Joint Complainants' position.

In *MAPSA*, a trade association of EGSs filed a complaint against PECO Energy Company ("PECO") alleging that PECO was engaged in marketing activities that were causing Pennsylvania consumers to remain with PECO and not participate in the competitive market. The trade association was not seeking remedies on behalf of consumers who may have foregone opportunities for savings; was not seeking the imposition of a civil penalty on PECO; and was not seeking to have PECO removed from its role of default service provider. Rather, the trade association simply wanted PECO to stop promoting default service and to refrain from making disparaging statements about EGSs. PECO's rights that were at issue in that proceeding were not of a property nature but of a constitutional nature -- could the Commission lawfully restrain its commercial speech?

[8] Joint Complainants' M.B. at 22.

Additionally, the trade association produced specific examples of written communications sent from PECO to its default service customers. The fact that these materials were widely distributed to all customers and contained statements promoting default service was not in dispute. Although the Commission found that PECO had created confusion regarding customer choice through its advertising campaign, it recognized the limits on its remedial authority and referred the matter to the Office of Attorney General ("OAG") as contemplated by Code Section 2811[9] and the Memorandum of Understanding between the OAG and the Commission. The Commission expressly rejected the ALJ's recommendation to impose a civil penalty on PECO.

Accordingly, *MAPSA* is nothing like this proceeding where the Joint Complainants are seeking to rely on the select testimony of individual consumers to have the Commission conclude that BPE has violated numerous Commission regulations in connection with every customer with whom they have interacted; impose a multi-million civil penalty; direct contributions to EDCs' hardship funds; permanently revoke BPE's license; and seek to have BPE's officers and directors forever barred from participation in Pennsylvania's competitive market. As the Joint Complainants conceded, the Commission has not used the "precise phrase 'pattern and practice' in the past."[10] Indeed, the Commission has not even come close to using any remotely similar phrase in the context of adjudicating a complaint or enforcement proceeding.

The Joint Complainants also refer to Commission decisions involving investigations of overall utility practices for compliance with the Code and Commission regulations. At no time in any of these proceeding, however, did the Commission even consider the imposition of

[9] 66 Pa. C.S. § 2811.
[10] Joint Complainants' M.B. at 21.

penalties on a regulated entity on the basis of the experiences of a select group of customers. As the cases cited by the Joint Complainants involved widespread issues affecting the adequacy of the utility's service to all customers in exactly the same way, and the Commission has express statutory authority to address such issues in that manner, they are not applicable here. Specifically, in *Investigation of W.P. Water Co., Inc. and W.P. Sanitary Co., Inc. Pursuant to Section 529 of the Pa. Public Utility Code, et al.*, Docket No. I-00070114 *et al.*, (Order entered March 31, 2009) ("*WP Order*"), the Commission initiated an investigation into whether it should order a capable public utility to acquire W.P. Water Co. Inc. ("WP") pursuant to Code Section 529,[11] which expressly confers this authority on the Commission. Relevant factors in such a proceeding are whether the existing utility has the financial, technical and managerial ability to make necessary improvements to provide adequate service to customers as required by Code Section 1501.[12] Notably, WP had no objection to the initiation of a take-over proceeding and viewed that result as both viable and practicable. *WP Order* at 3-4.

Similarly, in *Investigation into Whether the Commission Should Order a Capable Public Utility to Acquire Clean Treatment Sewage Company Pursuant to 66 Pa. C.S. § 529*, Docket No. I-2009-2109324 (Order entered July 16, 2013), the Commission initiated an investigation that resulted in the wastewater utility being acquired and no civil penalty was imposed. The other proceeding referenced by the Joint Complainants involved the issuance of an emergency order, due to public health and safety concerns, to ensure a reasonably continuous supply of potable water that is suitable for all household purposes. No civil penalties or remedies for individual consumers were sought in that proceeding. *Joint Petition of the DEP and the OCA for Issuance*

[11] 66 Pa. C.S. § 529.
[12] 66 Pa. C.S. § 1501.

of an Emergency Order Against Emlenton Water Co., Docket No. P-2008-2070480 (Order entered November 18, 2008).

Nothing in these orders suggest that the Commission may consider the unique experiences of an extremely small percentage of an EGS's customers and conclude that the EGS has engaged in a pattern and practice of violating Commission regulations across its entire customer base. Nor do these orders relieve the Commission of its obligation to base its decisions on substantial evidence, which must support each and every factual finding. Quite simply, the Commission may not infer wrongdoing or harm to 2,600 customers based on the testimony of 80 select consumers who described varying experiences in their interactions with BPE -- many of whom do not even support or even are directly contrary to the Joint Complainants' allegations.

In a further effort to find support for their misguided pattern and practice theory, the Joint Complainants rely on a recent order issued by the State of New York Public Service Commission ("NYPSC") in *In the Matter of Eligibility Criteria for Energy Service Companies, et al.*, Case No. 15-M-0127 (Order Resetting Retail Energy Markets and Establishing Further Process issued on February 23, 2016) ("*New York Order*"). However, the *New York Order* provides no basis upon which the Commission may adopt the Joint Complainants' proposed pattern and practice approach. Further, it is noteworthy that the Supreme Court of the State of New York issued a temporary restraining order at Index No. 870-16 on March 4, 2016, blocking the NYPSC from implementing or enforcing the *New York Order*.

As explained by the NYPSC, its staff had proposed changes to the Uniform Business Practices ("UBP") in August 2015 to address recent market developments and policy initiatives. Through the *New York Order*, the NYPSC reviewed the comments filed to the staff's proposal and made several changes to the UBP. One staff proposal was for the UBP to be revised to

explicitly detail the NYPSC's authority to impose consequences on energy service companies ("ESCOs") where there is a "material pattern of consumer complaints regarding matters under the ESCO's control, such as marketing practices, even when those complaints do not reveal any violations of the UBP." *New York Order* at 19. The Retail Energy Supply Association, as well as individual ESCOs, supported that proposal, but suggested that the NYPSC define "material pattern of consumer complaints." *Id.* The NYPSC agreed, and noted that the phrase means "a continuing volume of the same category of complaints, such as slamming or deceptive marketing." *Id.* In making this modification to the UBP, the NYPSC explained that it would "enable prompt action against ESCOs which, as demonstrated by the volume of complaints...do not meet customer expectations." *Id.*

Clearly, the NYPSC provided advance notice to ESCOs that it would looking at a material pattern of complaints -- meaning a *continuing* volume of the same category of complaints (*i.e.* not an onslaught of complaints stemming from one wholesale market-related incident) -- so that it could take prompt action. By contrast, the Commission has not revised its rules to provide advance notice of any intent to take action on the basis of a "material pattern of complaints." In any event, it is unknown what statutory authority the NYPSC may have to react to a material pattern of complaints and how its enabling law compares to the Code.

The reliance by the Joint Complainants on federal cases brought by the Federal Trade Commission ("FTC") involving large volumes of customers is likewise misplaced.[13] Specifically, they refer to *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1294 (D. Minn.

[13] Federal courts have broader powers, including equity powers, which the Commission simply does not have as a matter of law. It bears repeating that "[a]s 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). The Joint Complainants choose simply to ignore this bedrock principle of Pennsylvania public utility law throughout their advocacy for the expansion of the Commission's authority.

1985),[14] where the FTC had initiated an action against the manufacturing company seeking to enjoin the company from engaging in unfair and deceptive practices. The relevant issue in that proceeding was whether to admit twenty consumer affidavits, pursuant to the residual exception to the hearsay rule, to supplement the testimony provided by eight witnesses. The Court admitted fifteen of the proffered affidavits "to prove total consumer injury and establish the amount of the monetary" relief. *Kitco* at 1295. In doing so, the Court noted that it would be too expensive and time consuming to call witnesses from all parts of the United States merely to establish total consumer injury. *Id.* Notably, in the absence of specific harm shown for any other consumers, the Court only awarded monetary relief to the witnesses and the affiants.

The Joint Complainants cite *U.S. v. Nat'l Fin. Servs.*, 98 F.3d 131,140 (4th Cir. 1996), for the proposition that the mailing of deceptive information on a widespread basis can establish the foundation for liability. In that case, debt collectors repeatedly mailed computer-generated dunning notices to millions of magazine subscribers' accounts with relatively small balances, falsely threatening the initiation of legal proceedings. In finding that it was not necessary for the government to prove actual harm in order to assess penalties, the Court observed that threats of legal action are likely to be intimidating to consumers and that stress resulting from false threats of suit has been recognized as a compensable injury in private suits under the Fair Debt Collection Practices Act ("FDCPA").[15] On that basis, the Court found that the notices caused significant injury to the public, warranting the imposition of a civil penalty on the debt collectors.

The instant proceeding is distinguishable from *Nat'l Fin. Servs.* in that it involves subjective issues about a very small group of select individual consumers' understanding of their

[14] Joint Complainants' M.B. at 23.
[15] 15 U.S.C.A. § 169.

contractual rights resulting from promotional materials, sales calls and BPE's Disclosure Statement, as opposed to millions of customers receiving identical collection notices falsely threatening litigation. Therefore, that decision has no applicability to the present case. Moreover, even though millions of collection letters threatening legal action were sent, violating two separate statutory provisions, and the applicable law authorizes a civil penalty for up to $10,000 for each violation of the FDCPA, the Court assessed a civil penalty of $550,000. No relief, however, was awarded to consumers by the Court's decision in *Nat'l Fin. Servs.*

The United States Supreme Court's decision in *U.S. v. Reader's Digest Ass'n, Inc.*, 662 F.2d 955, 969 (3rd Cir. 1981), *cert. denied*, 455 U.S. 908 (1982), which is cited by the Joint Complainants for the proposition that the government is not obligated to adduce evidence of specific injuries to consumers, also does not provide any support for the Joint Complainants' approach in this proceeding.[16] That case involved the widespread dissemination of several million simulated checks through bulk mailings. As with *Nat'l Fin Servs.*, the factual scenario in that case was far different and of a completely different magnitude than the instant proceeding to the point of being of no persuasive value to any of the pending issues.

Regarding the Joint Complainant's reference to *Double Eagle Lubricants, Inc. v. FTC*, 360 F.2d 268, 270 (10th Cir. 1965), they rely on that case to argue that where documents have a capacity to deceive and are widely distributed, an unfair and deceptive practice can be established.[17] However, a review of *Double Eagle* demonstrates that the Circuit Court relied upon statutory language of the Federal Trade Communications Act ("FTC Act")[18] authorizing the FTC to seek redress on behalf of injured consumers without proving subjective reliance by

[16] Joint Complainants' M.B. at 24.
[17] Joint Complainants' M.B. at 24.
[18] 15 U.S.C. §§ 41 *et seq.*

each individual customer. Since the language of the FTC Act is not controlling in this proceeding, the case law decided under it is irrelevant.

The court decisions cited by the Joint Complainants, which address discrimination claims by employers, likewise do not support their theory in this proceeding.[19] In *United States v. Iron Workers Local 86*, 443 F.2d 544, 552 (9th Cir. 1971), the Court considered whether the employers' policies constituted a "pattern or practice" of resistance to full employment by minorities. In *Iron Workers*, the Court noted that its findings of repeated and routine discriminatory behavior were well-documented by statistical evidence showing a distinct absence of minority representation in special programs. Likewise in the other cases cited by the Joint Complainants, the Courts concluded that to prove a pattern or practice of discrimination in the workplace, the plaintiff must show that discrimination was the company's standard operating procedure. *See Cooper v. Fed. Reserve Bank of Richmond,* 467 U.S, 867, 104 S.Ct. 2794, 81 L. Ed. 2d 718 (1984). Yet, no statistical evidence was presented by the Joint Complainants to establish BPE's standard operating procedures.

Indeed, the use of "pattern or practice" evidence in the employment arena is now considered to be in disfavor as a result of the United States Supreme Court's decision in *Dukes v. Walmart*, 131 S.Ct. 2541 (2011). In *Dukes*, the Court made it clear that the type of anecdotal evidence suggested by the Joint Complainants in their Main Brief will not stand as proof about a company's hiring or employment decisions and practices. 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

[19] Joint Complainants' M.B. at 24-25.

certainly should not be considered in the context of any dispute or claims arising out of a private contract.

The primary problem with the Joint Complainants' reliance on these employment discrimination cases is that they have nothing to do with whether the Commission has jurisdiction to consider whether the evidence in the record even establishes a "pattern or practice" of unlawful conduct. Moreover, the Joint Complainants have not presented any evidence to show that BPE's standard operating procedure was to guarantee savings that would not be realized. To the contrary, even their own evidence shows that many consumers were not promised savings by BPE's sales agents. Also, BPE made no savings guarantees in its written materials. The mere fact that the Joint Complainants are relying on irrelevant cases involving millions of blatantly misleading mailings and patterns of discriminatory conduct in the workplace demonstrates the absurdity of considering a pattern and practice approach in this proceeding. Obviously, they have offered no applicable case law to support their theory of using this concept in a Commission proceeding because it does not exist.

In fact, the Joint Complainants' nonexistent legal theory runs afoul of the fundamental principle governing the Commission that parties with the burden of proof must prove each element of their case by a preponderance of evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n.*, 578 A.2d 600 (Pa. Cmwlth. 1990). Further, it is 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 and Western Railway Co. v. Pa. Pub. Util. Comm'n.*, 489 Pa. 109, 413 A.2d 1037 (1980). Each count must be supported by substantial evidence to

support the factual allegations and claims of violations of the Code, Commission regulations or Commission orders.

In requesting that the Commission find that BPE committed multiple violations in their dealings with every consumer served by the Company over a three-month period, and asking the Commission to impose civil penalties, grant restitution and revoke BPE's license as a result of those alleged violations, the Joint Complainants cannot carry their burden of proof by pointing to the testimony and experiences of a select and extremely small group of individual consumers. Likewise, the testimony of Ms. Alexander, who has only testified on behalf of consumers,[20] is based on her biased description of the consumer testimony, contains her own personal views of the rules that should govern the retail market and includes many flawed interpretations of the Commission's regulations. Her testimony does not prove any violations of Commission regulations and may certainly not support findings of widespread violations warranting the relief requested by the Joint Complainants. Similarly, Dr. Estomin's testimony that seeks to have BPE's unregulated prices dissected in a way that is reserved for public utility ratemaking, offers no support for finding violations of the Commission's regulations. Comparing a few months of BPE's prices to EDC's prices, Ms. Everette's testimony offers no support for the Joint Complaint's allegations.

In order to prove violations by BPE, it was incumbent upon the Joint Complainants to present substantial evidence in support of each and every specific alleged violation. 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. For the Commission to do so would directly violate the bedrock principle that Commission findings cannot be based on a

[20] Tr. 729.

"mere trace of evidence or a suspicion of the existence of a fact sought to be established." *Norfolk.*

To the extent that the Joint Complainants needed to look beyond the Code and court decisions involving Commission proceedings, the only relevant case law relates to class action lawsuits. It is well-established that for a pattern and practice approach to be used in deciding a lawsuit, the party initiating the litigation must demonstrate at the outset that a number of criteria are met, including questions of law or fact that are common to the class. *Dunn v. Allegheny County Property Assessment Appeals and Review*, 794 A.2d 416 (2002). It has been determined that claims involving alleged deceptive business practices are not suitable for class action treatment because of each customer's unique experience that the varying levels of reliance, causation and damages among individuals. *See Kostur v. Goodman Global, Inc.*, 2014 WL 6388432 (E.D. Pa. 2014).

The record in this consolidated proceeding contains countless instances of how those customer interactions varied. Specifically with respect to the allegations in Count III that BPE promised savings that did not materialize, several examples shown below demonstrate why it is not possible or appropriate in this case to take the testimony of a very small number of BPE customers and make broad-sweeping conclusions about what may have occurred across the rest of its customer base, including customers who did complain:

- 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.[21]

- 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.[22]

[21] 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).

- 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.[23]

- Scott Hornberger testified that no one from BPE guaranteed him savings.[24]

- Bree Burlingame, testifying on behalf of Erie Animal Hospital, noted that the guaranteed initial rates were honored.[25]

- 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.[26]

- 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.[27]

- William Smith had no interaction with BPE sales agents and merely assumed the rates would be reasonable for a couple of years.[28]

- 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.[29]

These examples of consumer testimony presented by the Joint Complainants demonstrate why class action treatment is not suitable for the allegations raised by the Joint Complaint. Indeed, the fact that the Commission has dismissed formal complaints against BPE containing the same allegations that are involved this proceeding further establishes why it would be inappropriate to make findings of a pattern and practice of violating Commission regulations.[30]

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[22] OAG/OCA Consumer Testimony at 501-503; Tr. 375.
[23] OAG/OCA Consumer Testimony at 106-108.
[24] Tr. 263. *See also* Tr. 192 (Marcy Weyant).
[25] OAG/OCA Consumer Testimony at 155-157; Tr. 59.
[26] OAG/OCA Consumer Testimony at 225-227, 231; Exh. WW-1.
[27] OAG/OCA Consumer Testimony at 563-565.
[28] OAG/OCA Consumer Testimony at 567-569.
[29] OAG/OCA Consumer Testimony at 465-467; Tr. 409-412.
[30] BPE M.B. at 48.

Further, as discussed in more detail in the section addressing Count III, even as to customers who claimed to have been promised savings, an expected time period for any promised savings is completely omitted from the Joint Complainants' analysis and requests for relief, despite the fact that many testified that they had no expectations for a specific timeframe. Another glaring omission from the Joint Complainants' presentation of their case regarding Count III is specific individual billing data for the customers who they claim were promised savings, as well as a comparison of the customers' savings expectations with the savings that were delivered over the course of months or years. The Commission's inability to apply a simple mathematical formula to determine whether any promises of savings were realized by individual consumers demonstrates the absurdity of evaluating this case upon the basis of pattern and practice approach or a class action lawsuit.

Given the Commission's lack of statutory authority to entertain class action proceedings, and the requirement for the Commission to base its decisions on substantial evidence, adoption of the pattern and practice approach proposed by the Joint Complainants would be unlawful. Rather, the Commission must hold the Joint Complainants to the same standard as every other complainant coming before the Commission and consider whether they have proven every element of their alleged violations with respect to the Company's dealings with each individual consumer.[31]

[31] What this means is that the Commission must review the record to determine whether the Joint Complainants have proven that the Company violated specific regulations it is dealings with 80 of its former customers. *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) ("*HIKO*") at 46. Specifically, this requires findings as to whether each of those 80 consumers was misled by BPE's sales representatives regarding prices they would be charged; whether each of them was unable to reach BPE's call center; and whether each of them was misled by BPE's Commission-approved Disclosure Statement. The remaining issues alleged by the Joint Complaint are not within the purview of the Commission to consider.

B. Company Operations

In describing the Company's operations, the Joint Complainants claim that this is not the only instance in which BPE's marketing activities have been investigated or the subject of a complaint.[32] As they have referred to various proceedings stemming from the same Polar Vortex-induced variable price increases, the Joint Complainants have inappropriately characterized BPE's past operations.

They specifically refer to *Durante v. Blue Pilot Energy, LLC and PPL Electric Utilities Corporation*, Docket No. F-2015-2487082 (Order entered March 14, 2016) in support of this claim. The formal complaint underlying *Durante* relates to a price increase in February 2014, the same time period that is involved in this proceeding. Notably, the complainant in that proceeding did not allege or testify that she was misled about her rate when she enrolled with BPE. Therefore, the Commission adopted the Initial Decision of the Administrative Law Judge dismissing the part of the complaint addressing electric supply charges for February 2014. The only concern raised by the Commission in *Durante* related to an allegation raised for the first time at the hearing that BPE had offered to reduce her March 2014 charges when she called into the call center to complain about her February 2014 bill. Although she claimed to have accepted the offer, a review of the transcript shows that she gave the call center representative a flippant response -- clearly not the acceptance of an offer. Moreover, in this proceeding, she testified that no relief was offered when she called BPE.[33] Undoubtedly, BPE's sales and marketing practices were clearly not at issue in that proceeding.

[32] Joint Complainants' M.B. at 27-28.

[33] Joint Complainants' Consumer Testimony at 82. Ms. Durante appears to be the classic example of a witness who changes her story in an effort to achieve her ultimate goal of obtaining a refund from BPE.

The Joint Complainants also refer to *Enrico Partners L.P. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2432979 (Initial Decision served March 13, 2015).[34] Besides the fact that the *Enrico* Initial Decision is still pending before the Commission on Exceptions, it is noteworthy that the formal complaint was filed on July 21, 2014 (after the filing of the Joint Complaint) relating to the same topics concerning BPE's pricing in early 2014. Also, the formal complaint that resulted in the issuance of the *Enrico* Initial Decision alleged that incorrect charges were on the bill and sought an interpretation of BPE's contract with the commercial customer as to whether the charges were correct. No allegations were raised regarding BPE's sales and marketing practices.

As to the Joint Complainants' references to a proceeding in Maryland in which BPE is involved, that proceeding likewise involves the same timeframe and variable price increases caused the Polar Vortex and accompanying wholesale market price volatility.[35] Moreover, that matter is still pending before the Maryland Public Service Commission and has no bearing on this proceeding. Similarly, the Joint Complainants' citations to Federal Communications Commission investigations from a decade or more ago involving telecommunications affiliates of BPE, which were resolved through Consent Decrees with no admissions of wrongdoing, are completely irrelevant here.

What is relevant to this proceeding is that no customers had filed formal complaints against BPE prior to February 2014.[36] Also, the Commission dismissed a formal complaint against BPE 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,

[34] Joint Complainants' M.B. at 28.
[35] Joint Complainants' M.B. at 28.
[36] BPE M.B. at 114-115.

2015; Final Order entered December 22, 2015), which raised allegations about BPE's sales and marketing practices during the same time period that is the subject of the Joint Complaint. In addition, an ALJ dismissed a formal complaint that made allegations about BPE's sales and marketing practices 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 December 2, 2015), which is pending review by the Commission. Even the *Durante* Order cited by the Joint Complainants absolved BPE of any violations concerning its sales and marketing practices.

C. Training and Monitoring Program

As to the Joint Complainants' assertions regarding BPE training and oversight of its marketing agents, they have failed to demonstrate that the Company violated the Commission's regulations in Section 111.4 (agent qualifications and standards) or Section 111.5 (agent training).[37] Rather, they have described the concerns of Ms. Alexander about BPE's training and oversight of agents and have summarily alleged that due to her criticisms, the Company has not complied with these regulatory requirements.

Section 111.4 of the Commission's regulations requires EGSs to develop standards and qualifications for its agents, conduct criminal background checks, disqualify certain individuals from being hired as agent and confirm that its vendors perform criminal background checks. No allegations have been raised, no testimony has been offered and nothing in the Joint Complainants' Main Brief suggests that BPE did not develop agent standards, conduct criminal background investigations, disqualify certain individuals from being hired as agents or confirm that its vendors perform criminal background checks. Additionally, BPE has not engaged in

[37] 52 Pa. Code §§ 111.4-111.5.

door-to-door marketing to which these requirements are applicable. Therefore, the record is devoid of any basis upon which to conclude that BPE violated Section 111.4.

Section 111.5 of the Commission's regulations, which went into effect on June 29, 2013, governs the training and monitoring of EGS agents.[38] Subsection 111.5(a) requires EGSs to ensure the training of their agents on the applicable regulatory requirements and consumer protections; responsible and ethical sales practices; the EGS's products and pricing structures; the customer's right to rescind and cancel contracts; the applicability of an early termination fee; the need to adhere to and understand the script if one is used; the proper completion of transaction documents; the EGS's disclosure statement; the terms and definitions related to energy supply, transmission and distribution service; information on how customers may contact the EGS; and the confidentiality of customer information. Under Subsection 111.5(b), EGSs are required to document agent training and maintain those records for three years. Subsection 111.5(c) requires EGSs to make training materials and training records available to the Commission upon request. Subsection 111.5(d) obligates EGSs, when they contract with vendors, to confirm that they have provided EGS-approved training to their agents. Under Subsection 111.5(e), EGSs are required to monitor telephonic and door-to-door marketing and sales to evaluate the training program and ensure that agents are providing accurate and complete information.

The Joint Complainants allege that BPE violated Section 111.5 in connection with Count III (promises of savings).[39] However, in the Joint Complaint, no factual allegations are raised

[38] Prior to the promulgation of Chapter 111, the Commission had Interim Guidelines in place addressing many of the same issues. However, the Pennsylvania Supreme Court has equated agency guidelines to general statements of policy which 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 interim guidelines, which do not have the force and effect of law. *See also Woods Services, Inc. v. Dep't of Public Welfare*, 803 A.2d 260, 265 (Pa. Cmwlth. 2002).

[39] Joint Complaint ¶ 42.

that are specific to the requirements of Section 111.5. For instance, the Joint Complaint contains no allegations that BPE failed to document training of an agent or maintain a record of the training. Similarly, it does not allege that BPE did not train its agents on its products and services, the Disclosure Statement or the applicability of early termination fees. Nor does it allege any failure by BPE to make training materials and training records available to the Commission.[40]

Notably, even their Main Brief does not offer any detail as to how the training and monitoring of BPE's agents departed from the requirements of Section 111.5. As they have done throughout this proceeding, the Joint Complainants simply rely on unsubstantiated generalities regarding BPE's sales and marketing practices, and the personal opinions of Ms. Alexander about how she believes that BPE should have trained and monitored their agents, to summarily allege that BPE has violated the Commission's regulations.[41]

Ms. Alexander's criticisms of BPE's training program are that the materials provided did not include Pennsylvania-specific requirements or contain information "to identify or avoid misrepresentation."[42] She did not, however, specify any particular Pennsylvania requirement that BPE's training program omitted. Also, she offered no explanation as to the information that would be necessary, in her mind, to ensure that sales agents could identify or avoid misrepresentation. Moreover, the Commission's regulations do not require that such information be included in training programs. Making sales agents aware of the need to avoid misrepresentation adequately fulfills the duties imposed by the Commission's regulations; any

[40] Joint Complaint ¶¶ 33-42.
[41] Joint Complainants' M.B. at 30-33.
[42] OCA St. 1 at 20.

further details about how that might be achieved are enhancements that Ms. Alexander prefers but are not required by the Commission.

The Joint Complainants' other concern about BPE's training and monitoring program is the lack of documentation produced by BPE concerning these activities.[43] BPE explained, however, that it continually trained sales agents throughout their employment, and the Commission's regulations do not require EGSs to use written training materials.[44] Further, BPE provided information to show that it took disciplinary actions to address instances when sales agents did not comply with BPE's polices; again no specific documentation is required by the Commission's regulations.[45] Although the Commission's regulations require EGSs to maintain records of agent training, that requirement did not go into effect until June 29, 2013 and the Joint Complainants have presented no evidence to show that any new agents were hired or trained after that date, just months before BPE terminated all marketing in Pennsylvania.

To the extent that the Commission has concerns about the Company's agent training and monitoring, BPE is not aware of any prior instances in which the Commission has imposed civil penalties on a regulated entity on that basis, particularly when the regulations do not set forth any specific requirements that the Company failed to fulfill.[46] Rather, it would be customary for the Commission to direct a regulated entity to address any shortcomings in their training of personnel. *See, e.g., Implementation Plan of the Focused Management Audit of Metropolitan Edison Company, et al.*, Docket No. D-2013-2365991 (Order entered March 30, 2015, Ordering

[43] Joint Complainants' M.B. at 30-33.
[44] OAG/OCA St. 1 at 19.
[45] OAG/OCA St. 1 at 19.
[46] Indeed, the imposition of civil penalties on BPE for violating a vague regulation would violate its due process rights, since it could have not reasonably been on notice as to the specific conduct that was required. *See Baggett et al. v. Bullitt et al.*, 377 U.S. 360 (1964).

Paragraph 7). In this instance, such directives are unnecessary due to BPE's exit from the Pennsylvania retail market.

D. Count I – Allegation of Failure to Provide Accurate Pricing Information

In Count I, the Joint Complaint alleges that the variable pricing terms of BPE's Disclosure Statement do not adequately state the conditions of variability and the limits on price variability.[47] Further, the Joint Complaint avers 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.[48]

In their Main Brief, the Joint Complaint alleges that BPE violated Section 54.5(c) of the Commission's regulations,[49] which require that variable pricing terms include the conditions of variability and the limits on price variability. They further allege 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."[50]

The Joint Complainants have failed to demonstrate that BPE's Disclosure Statement departed from the requirements 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 clearly and conspicuously: i) stating the customer has a variable price plan; (ii) setting forth the customer's specific initial price; (iii) providing the customer's initial price guarantee period; and (iv) noting that after the initial rate period, "[BPE] may increase [the customer's] rate based on

[47] Joint Complaint ¶ 21.
[48] Joint Complaint ¶ 26.
[49] 52 Pa. Code § 54.5(c).
[50] 52 Pa. Code § 54.43(1).

several factors, including changes in wholesale energy market prices in the PJM markets."[51] 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 full sentence, without any extraneous language, to emphasizing those points by stating simply, "Your variable rate will be based upon PJM wholesale market conditions."[52] As BPE did not offer limits on price variability, no limits were included. This language wholly satisfies the conditions of variability and the limits on price variability required by the Commission's regulations. Indeed, in *Silvis* and *Orange*, the Eastern District Court for Pennsylvania reviewed similar contracts and concluded that the EGSs had adequately disclosed the conditions of variability through clear and ambiguous language.

The factual allegations set forth in Count I, and carried over to the Joint Complainants' testimony and Main Brief, do not accurately reflect the Commission's requirements applicable to Disclosure Statements. Specifically, it is not incumbent upon an EGS to provide information that allows the consumer to determine from the Disclosure Statement the price that they would or could be charged by BPE or how the price would be calculated. A general reference to the conditions of variability is all that is required by the Commission's regulations. Even after the Polar Vortex, the Commission rejected proposals that would have required EGSs to include formulas or specific pricing methodologies, despite having such a requirement in its regulations applicable to disclosure statements used by natural gas suppliers.[53] *Rulemaking to Amend the Provisions of 52 Pa. Code, Section 54.5 Regulations Regarding Disclosure Statement for*

[51] OAG/OCA Exh. BRA-2 at 15; BPE M.B. at 60-77.
[52] *Id.*
[53] 52 Pa. Code § 62.75(c)(2)(i).

Residential and Small Business Customers, Docket No. L-2014-2409385 (Order entered April 3, 2014).

In their Main Brief, the Joint Complainants do not cite to a single piece of consumer testimony in support of their claims that BPE's Disclosure Statement failed to use plain language or common terms. Rather, they rely wholly on the testimony of Dr. Estomin and Ms. Alexander, who offered their own personal opinions of BPE's Disclosure Statement, which are not based on consumer testimony, consumer surveys or any particular expertise with respect to the review of consumer contracts.[54] Moreover, as to the Joint Complainants' contention that BPE offered no evidence to dispute the analyses and conclusions of Dr. Estomin and Ms. Alexander, it was unnecessary to do so since their testimony was not based on any requirements of the Commission's regulations. *See Jackson v. PECO Energy Company*, Docket No. F-2013-2351046 (Initial Decision served July 12, 2013; Final Order entered August 15, 2013) (a party with the burden of proof must also bear the burden of persuasion; even unrebutted evidence may be rejected). *See also Suber v. Comm'n on Crime and Delinquency*, 885 A.2d 678 (Pa. Cmwlth. 2005), *app. denied*, 586 Pa. 776, 895 A.2d 1264 (2006).

As to the Joint Complainants' reliance on the *Enrico* Initial Decision in support of their arguments that BPE's Disclosure Statement does not use plain language, BPE notes that the Initial Decision is pending review by the Commission. Moreover, as BPE argued in its Main Brief, the Commission's plain language guidelines do not establish any enforceable standards, and the Joint Complainants have failed to identify any departures by BPE from the terminology set forth in the Commission's "Consumer's Dictionary for Electric Competition.[55] *See Guidelines for Use of Fixed Price Labels for Products With a Pass-Through Clause*, Docket No.

[54] Joint Complainants' M.B. at 36-41.
[55] BPE M.B. at 67-72.

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). Additionally, another ALJ has concluded that BPE's Disclosure Statement "provided accurate, plain language to explain the variable rate product." *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) at 9. Also, the Commission itself has approved, or at least endorsed, the adequacy of BPE's Disclosure Statement. *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). Again, the Eastern District Court for Pennsylvania in *Silvis* and *Orange* -- a court that routinely engages in the interpretation of contracts -- found similar language to be clear and unambiguous.

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 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.[56] Therefore, Count I should be dismissed in its entirety.

E. Count II – Allegation of Prices Nonconforming to Disclosure Statement

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."[57] 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.[58] Therefore, the Joint Complaint alleges that the prices charged by BPE did not conform to the variable rate pricing provision of BPE Disclosure Statement.[59] However, the Joint Complaint identifies no regulations that BPE was alleged to have violated.

In their Main Brief, the Joint Complainants allege that BPE violated Section 54.4(a), which requires billed prices to reflected marketed prices and prices in an EGS's disclosure statement, and Section 54.5(a), which requires prices in disclosure statements to reflect marketed and billed prices.[60] As the Joint Complainants did not allege these violations in the Joint Complaint and did not amend the Joint Complaint during this proceeding to allege violations of these regulations, BPE was not placed on notice of their intent to pursue these legal arguments. *Commonwealth v. Thompson*, 444 Pa. 312, 316, 281 A.2d 856, 858 (1971). Accordingly, Count II should be dismissed on that basis.

Alternatively, as discussed in BPE's Main Brief, Count II should be dismissed because the Commission does not regulate the prices of EGSs and may not interpret a private contract.

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[56] BPE M.B. at 59-76.
[57] Joint Complaint ¶ 30.
[58] Joint Complaint ¶ 31, Appendix B.
[59] Joint Complaint ¶ 32.
[60] Joint Complainants' M.B. at 41-47.

Where a variable-priced contract is not based on a specific, prescribed methodology, formula or index and does not contain a ceiling price, none of which are required by the Commission's regulations, the Commission would have to interpret the contract to make a determination about whether it was breached by the EGS. This interpretation would necessarily entail performing a cost of service analysis that considers the various factors, including wholesale market conditions, which affect retail prices and imputes a "just and reasonable" profit margin. Such an exercise would not only constitute an interpretation of a private contract, which the Commission may not do, but would also improperly tread into the regulation of rates charged by EGSs.[61] When faced with claims of the breach of such contracts, the Eastern District Court in *Silvis* and *Orange* was clearly willing to defer to the competitive market to establish retail prices in a deregulated environment.

In any event, the Joint Complainants have not carried their burden of proof by establishing through a preponderance of the evidence that BPE charged prices that did not conform to the variable pricing language in the Disclosure Statement. In an effort to support these claims, the Joint Complainants rely on the testimony of Ms. Alexander and Dr. Estomin, which fails to support Count III.

As to Ms. Alexander's testimony, it is internally inconsistent and unpersuasive. In particular, she testified that information in the Disclosure Statement is vague and does not provide a basis for understanding how a variable price will be calculated.[62] She then relied on the testimony of Dr. Estomin, to conclude that BPE "has charged prices to Pennsylvania customers that do not conform to any reasonable interpretation of its Disclosure Statement."[63] It

[61] BPE M.B. at 79-86.
[62] OAG/OCA at St. 1 at 30.
[63] OAG/OCA St. 1 at 31-32.

is nonsensical for Ms. Alexander to testify on one hand that she cannot determine how the variable price would be calculated and to testify on the other hand that the prices charged by BPE did not conform to the Disclosure Statement. The Joint Complainants have provided no explanation for her inherently inconsistent conclusion or offered any reasonable rationale for relying at all on Ms. Alexander's testimony regarding BPE's pricing.

Moreover, Ms. Alexander's testimony appears to expect that BPE had a burden of establishing that its prices did conform to the Disclosure Statement. For instance, she testified that BPE "has failed to document how its prices are or were established."[64] She further testified that "[t]o the extent that Blue Pilot cannot provide a specific pricing methodology that reflects the criteria that is [sic] provided in its Disclosure Statement, I would conclude that Blue Pilot failed to conform to its own Disclosure Statement provided to Pennsylvania consumers."[65]

Contrary to Ms. Alexander's expectations, it is well-settled that in Commission proceedings, the complainants bear the burden of proof and may not shift that burden to the respondent.[66] It was not incumbent upon BPE to prove that its prices conformed to the Disclosure Statement. Additionally, BPE was not required by the Commission's regulations to provide a specific pricing methodology in its Disclosure Statement and cannot be expected now to produce a precise formula reflecting the factors in the Disclosure Statement.

Despite having no burden of proof or obligation to prove that its prices conformed to the Disclosure Statement, BPE provided various factors that affected retail prices in early 2014. Specifically, BPE explained that, consistent with its Disclosure Statement, it used several factors to set retail prices, including a desired rate of return, projected electricity costs, day-head market

[64] OAG/OCA St. 1 at 32.
[65] OAG/OCA St. 1 at 29.
[66] BPE M.B. at 35-36.

costs, projected weather, fluctuations in generators' pricing into the PJM grid, and the spot prices of natural gas. BPE also explained that it included a profit margin and identified other ancillary expenses that are used in developing retail generation prices.[67]

With respect to Dr. Estomin's testimony relied upon by the Joint Complainants in their Main Brief, it likewise does not establish that BPE charged prices that did not conform to its Disclosure Statement.[68] At the outset, BPE notes that Dr. Estomin mischaracterized its Disclosure Statement in two material respects. First, he testified that "[t]he Company's Disclosure Statement explains to customers that the prices charged by Blue Pilot over any given billing cycle would be based on PJM wholesale market conditions."[69] Second, he described BPE's Disclosure Statement as stating that "its prices are determined by the costs that the Company incurs to secure and deliver electricity to the EDC service area in which the customer is located."[70] However, the variable pricing language in the Disclosure Statement provides no such specificity as to billing cycles or EDC service areas. To the contrary, it provides that "Blue Pilot may increase or decrease your rate based on several factors, including changes in wholesale energy market prices in the PJM Markets."[71]

As to Dr. Estomin's expectation that BPE would charge different prices for each of the billing cycles in the month, it is clearly not based on the variable pricing language of BPE's Disclosure Statement. Moreover, as Dr. Estomin has never operated an EGS or priced electric supply for sale at the retail level, his presumptions for how that should or would be expected to

[67] OAG/OCA St. 1 at 31; OAG/OCA St. 2 at 8-9; Exh. SLE-4 at 1, 9-12.
[68] Joint Complainants' M.B. at 44-46.
[69] OAG/OCA St. 2 at 6.
[70] OAG/OCA St. 2 at 9.
[71] OAG/OCA St. 2 at 7.

occur are without any basis.[72] Therefore, his suggestion "that the prices charged by Blue Pilot could not possibly be tied to the PJM wholesale markets" because they are too uniform and many customers were charged the same price[73] establishes nothing -- and certainly does not support any findings that BPE's prices did not conform to its Disclosure Statement.

The Joint Complainants also challenge the gross margin that BPE included in its retail prices.[74] Yet, Dr. Estomin agreed during the hearing that a variety of factors affect retail pricing, including profit margins.[75] As the Commission does not regulate EGS rates, it also has no standards or requirements specifically applicable to the disclosure of profit margins or their levels. Indeed, it is the function of the competitive market to determine what acceptable profit margins are, and Dr. Estomin has no basis upon which to conclude that BPE's were too high.

With respect to Dr. Estomin's observations that "the predominant price" charged by BPE did not change from February to March 2014, despite declines in PJM wholesale market conditions, they are meaningless. BPE's Disclosure Statement does not indicate that prices would always adjust proportionally to the PJM Markets or that prices would be based exclusively on the PJM day-ahead market. As noted above and in BPE's Main Brief, several factors affect retail pricing.[76] Moreover, Dr. Estomin only compares the so-called "predominant price" charged by BPE, which is not representative of all prices billed to consumers or even an average price, to wholesale market conditions. Therefore, even to the extent that the predominant price is considered at all, it would not be a basis for making any across-the-board determinations concerning the conformance of BPE's prices to its Disclosure Statement. This entire discussion

[72] Tr. 754.
[73] OAG/OCA St. 2 at 13-14.
[74] Joint Complainants' M.B. at 46-47.
[75] Tr. 757-759.
[76] BPE M.B. at 86-88.

shows the slippery slope the Commission will be on if it engages in a cost of service analysis in an effort to determine what BPE's prices in early 2014 "should" have been.

F. Count III – Allegation of Misleading and Deceptive Promises of Savings

In Count III of the Joint Complaint, the Joint Complainants alleged that BPE promised savings that did not materialize, in violation of the Consumer Protection Law.[77] The Joint Complainants' evidence is flawed in several material respects, and importantly, the Commission does not have jurisdiction to enforce the Consumer Protection Law. Therefore, Count III should be dismissed.[78]

In their Main Brief, the Joint Complainants contend that BPE also violated Section 54.4(a), which requires prices billed to reflect marketed prices,[79] and Section 54.5(a), which requires disclosure statements to reflect marketed and billed prices.[80] As these allegations were not set forth in the Joint Complaint and the Joint Complaint was not amended to include these averments, BPE was not placed on notice that it would be charged with these additional alleged violations. *See Pa. Pub. Util Comm'n, Bureau of Investigation and Enforcement v. Yellow Cab of Pittsburgh*, Docket No. C-2012-2249031 (Order entered February 6, 2014) (Bureau of Investigation and Enforcement filed Amended Complaint, which afforded the respondent the necessary due process). *See also Pocono Water Co. v. Pa. PUC*, 630 A.2d 971, 973 (Pa. Cmwlth. 1993).

Moreover, the Joint Complainants did not carry their burden of proof as to the factual allegations of Count III. In an effort to prove that BPE's sales representatives promised savings that did not materialize, it was incumbent upon the Joint Complainants to prove both sides of the

[77] Joint Complaint ¶ ¶ 39-41.
[78] BPE M.B. at 88-103.
[79] 52 Pa. Code § 54.4(a).
[80] 52 Pa. Code § 54.5(a).

equation. First, they had to prove that savings for a certain period were promised to specific customers. Second, they were required to prove that any savings that were promised for a specified period were not realized by those individual consumers. In support of their allegations, the Joint Complainants rely on: (i) promotional marketing materials that contained no guarantees of savings and were not relied upon by consumers to enroll with BPE; (ii) consumer hearsay testimony that is laden with credibility issues; (iii) comparisons of BPE's charges to the EDCs' prices to compare ("PTC") for periods of time that bore no relationship to the consumer testimony regarding any discussions of savings.[81] In comparing BPE's charges to EDCs' PTC, the Joint Complainants ignore the fact that consumers frequently testified that either savings were not guaranteed or that long-term savings were not promised and that those consumers did save money during the initial periods and beyond. Due to the many shortcomings on both sides of the equation, the Joint Complainants have failed to carry their burden of proof. They have simply not set forth a preponderance of evidence to demonstrate that savings were guaranteed by BPE sales representatives and that any promised savings did not materialize. Moreover, as the contracts entered into with BPE clearly disclosed the variability of the prices and did not guarantee savings, it is inappropriate for the Commission to consider extrinsic evidence and thereby alter the terms of those contracts. *See Silva.*

1. Written Marketing Materials

In their Main Brief, the Joint Complainants submit that BPE's "written marketing materials used in the Commonwealth plainly indicate that customers will save money by switching to Blue Pilot."[82] Yet, the examples they provide from those marketing materials clearly do not guarantee savings, particularly over the long-term. To the contrary, even as

[81] Joint Complainants' M.B. at 48-60.
[82] Joint Complainants' M.B. at 49.

observed by Ms. Alexander, the materials emphasize the "potential for savings" through the initial price that remained in effect for a set period of time.[83] The materials also contain general language indicating that the BPE will help customers find a plan designed to help lower their energy costs. However, nothing in those promotional materials contained a percentage savings or specific dollar amounts or promised long-term savings. Notably, the Joint Complainants point to no consumer testimony indicating reliance on these materials in enrolling with BPE.[84]

The Joint Complainants cite case law for the proposition that materials can be found to be misleading even without any reliance on them by consumers.[85] However, all of the cases they refer to in support of this concept involve application of the Consumer Protection Law, which the Commission does not have jurisdiction to enforce or interpret. Specifically, in *Cmwlth. v. Hush-Tone Industries, Inc.*, 4 Pa.Cmwlth. 1 (1971), the Office of Attorney General ("OAG") had brought an action against two corporations in civil court pursuant to the Consumer Protection Law alleging deceptive advertising regarding hearing devices that were represented to have various features that do not actually exist. A review of the Commonwealth Court's order shows that the advertising materials contained numerous specific claims about the hearing device, which were proven to be false through extensive, thorough and detailed expert witness testimony of audiologists about each feature described in the materials. In finding that the representations had a tendency to deceive consumers and likely make a difference in the purchasing decision, the Commonwealth Court expressly relied on the language in Section 201-4(v) of the Consumer Protection Law. *Hush-Tone Industries* at 11-12.

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[83] OAG/OCA St. 1 at 10.
[84] BPE M.B. at 93.
[85] Joint Complainants' M.B. at 50-51.

Such language, however, does not exist in the Code or the Commission's regulations, and this proceeding was not initiated under -- and could not have been initiated under -- the Consumer Protection Law. Moreover, it is noteworthy that the Commonwealth Court in *Hush-Tone Industries* merely enjoined the respondents from using the advertising materials and did not award restitution to the purchasers of the devices. Rather, the Commonwealth Court noted that the purchasers were free to seek such relief through the fully adequate remedies at their disposal. *See Fountain Hills Mills v. Amalgamated Clothing Workers' Union of America*, 393 Pa. 385, 143 A.2d 354 (1958).

In the case of *DiLucido v. Terminix International, Inc.*, 450 Pa.Super. 393, 676 A.2d 1237 (1996), which is also referred to by the Joint Complainants, the Superior Court reviewed the issue of whether the class certification was properly denied by the court below. Noting that class actions were established to provide a means by which the claims of many individuals could be resolved at one time, the Superior Court considered whether the trial court had applied the correct standard concerning the need for commonality of issues. The Superior Court determined that the trial court had erred because it had reviewed the elements of common law fraud, whereas the proceeding involved the Consumer Protection Law, which creates a "statutory fraud" for which they need not prove reliance as is required for common law fraud. As the Superior Court's decision in *DiLucido* likewise turned on the express language of the Consumer Protection Law, it is of no persuasive value here.

Similarly, in *Cmwlth. v. Peoples Benefit Services, Inc.*, 923 A.2d 1230, 1236 (Pa.Cmwlth. 2007), the Commonwealth Court ruled on cross motions for summary judgment that arose from action filed in civil court by the OAG pursuant the Consumer Protection Law, alleging unfair and deceptive trade practices targeting Pennsylvania senior citizens in connection with the purchase

of prescription drugs. Again, in reviewing the advertisements in question, the Commonwealth Court relied on the express language set forth in the Consumer Protection Law and declined to find that the solicitations displayed a capacity to deceive as a matter of law. The Commonwealth Court also found that even the several complaints from consumers indicating that they found the solicitations quite misleading provided no assistance.

In *Cmwlth. v. Nickel*, 26 Pa. D. & C.3d 115, 120 (C.P. Mercer 1983), the Common Pleas Court also considered the express language of the Consumer Protection Law, as well as the case law under the corresponding FTC Act, in determining whether the Commonwealth had set forth a cause of action against the defendants in connection with their business of selling memberships in their recreational campground. While finding that the Commonwealth had established a cause of action against the defendants with respect to one count of the complaint involving the unlawful sale of campground lots and memberships, the Common Pleas Court found that mailing a letter of enticement or offering free prizes as promotions are not a violation of the Consumer Protection Law. The Common Pleas Court also concluded that high pressure salesmanship is not prohibited by the Consumer Protection Law, even noting that all advertising and sales techniques are designed to overcome and wear down sales resistance. *See also Commonwealth ex rel Packel v. Tolleson*, 14 Pa.Cmwlth. 72, 321 A.2d 664, 694 (1974).

The use of the FTC Act standard by the ALJ's recommended decision in *MAPSA* likewise offers no support for the Joint Complainants' position. In *MAPSA*, a trade association of EGSs filed a complaint alleging that PECO was engaged in marketing activities that were causing Pennsylvania consumers to remain with PECO and not participate in the competitive market. The trade association was not seeking remedies on behalf of consumers who may have foregone opportunities for savings; was not seeking the imposition of a civil penalty on PECO;

and was not seeking to have PECO removed from its role of default service provider. Rather, the trade association simply wanted PECO to stop promoting default service and to refrain from making disparaging statements about EGSs. Although the Commission found that PECO had created confusion regarding customer choice through its advertising campaign, it recognized the limits on the Commission's remedial authority and referred the matter to the OAG as contemplated by Code Section 2811[86] and the Memorandum of Understanding between the OAG and the Commission. In light of that referral, the Commission declined to address the applicability of the FTC standards.

Therefore, the cases cited by the Joint Complainants do not support their theory that the Commission may find that promotional materials were misleading and deceptive, absent detrimental reliance on them by consumers. Moreover, the promotional materials contained only general and vague statements about potential savings or helping customers navigate the marketplace, which are nothing more than sales techniques that the courts have accepted as customary. The Joint Complainants have not proven that any consumer witnesses relied on any them in switching to BPE. Even the consumer witnesses they have referred to as examples did not mention, let alone describe any reliance upon, the materials in question in their testimony.

2. Sales Scripts

In their Main Brief, the Joint Complainants also rely on the sales scripts in an effort to show that BPE promised savings to consumers.[87] However, a review of the sales scripts actually demonstrates the opposite. Nothing in the sales scripts offered consumers a specific percentage of savings, certain dollar savings or any long-term savings. The phrases used in the sales scripts emphasize the "potential" for lower rates and note that "lower rates may be available." Also,

[86] 66 Pa. C.S. § 2811.
[87] Joint Complainants' M.B. at 53-54.

while the sales scripts also emphasized the ability to get a better rate that is locked in for a period of 60-90 days, the review of specific customers' experiences below shows that each and every one of these commitments was fulfilled. As to the Joint Complainants' discussion of a "theme" identified by Ms. Alexander in the sales agents' pitches concerning a periodic review of customers' accounts, BPE notes that the sales script requires agents to tell customers to call them back in 80 days.[88] Indeed, that message was conveyed numerous times in calls admitted into evidentiary record and is discussed below with respect to the claims of certain customers that the BPE agent promised to initiate the call. Reviews of the sales recordings showed that time and time again, even when consumers testified to the contrary, the BPE sales agents encouraged the consumers to call them back.[89]

3. Consumer Testimony

The Joint Complainants' case for seeking to prove that BPE promised savings to consumers, as they have alleged, rests wholly on the hearsay testimony of the consumer witnesses. As argued in BPE's Main Brief, the testimony offered by consumer witnesses of promised savings that were not realized constitutes uncorroborated hearsay and lacks credibility due to numerous factors, including the use of leading questions by the Joint Complainants to solicit responses from consumers that BPE's sales representatives had guaranteed savings, the active solicitation of complaints for purposes of litigation, the promotion of electric choice in Pennsylvania as savings opportunity, faulty memories of consumers due to lengthy lapses of time since sales transactions occurred and inconsistencies or confusion included with the testimony.[90]

[88] OAG/OCA St. 1 at 11-12.
[89] *See, e.g.*, Joint Complainants' Consumer Testimony at 1-20; Tr. 529-584; Kennedy Redirect Exhibit No. 1.
[90] BPE M.B. at 92-97.

In *Kiback v. IDT Energy, Inc.*, Docket No. C-2014-2409676 (Order entered August 20, 2015) ("*Kiback*"), the Commission relied on a consumer's testimony of what the sales agent told him to conclude that the EGS had violated the Commission's regulations. In reaching that decision, the Commission emphasized that the consumer "repeatedly held steadfast" in his claims of promised savings during multiple interactions with the same EGS, described the consumer as "adamant" about his recollection and characterized his testimony as "clear and convincing." *Kiback* at 26-27. By contrast, in *Dubois Manor Motel v. Blue Pilot Energy, LLC*, Docket No. C-2014-2433817 (Initial Decision served December 2, 2015), ALJ Hoyer dismissed a complaint because the consumer's testimony as to what he was told by the EGS sales agent was not credible and was directly contrary to the disclosure statement. *See also Gruelle* (ALJ found that testimony of business owner regarding discussions with sales agent were not credible). Although BPE's position is that the Commission may not rely wholly on uncorroborated hearsay testimony to make findings,[91] it is important to keep these holdings in mind -- and the importance of clear and convincing credible testimony -- in reviewing the testimony relied upon by the Joint Complainants.

In support of their claims that BPE sales representatives promised savings and did not honor them, the Joint Complainants highlight the experiences of specific individual customers and reference several other pieces of witness testimony without any discussion.[92] Every single piece of consumer testimony is fraught with more than one of the shortcomings identified above -- with every single witness suffering from faulty memories due to lapses of time and the unimportance of the transaction to them at the time. BPE's discussion below of the testimony that is relied upon by the Joint Complainants in support of Count III underscores some of the

[91] BPE M.B. at 36-38.
[92] Joint Complainants' M.B. at 56-58, Appendix C, Proposed FOF 87-90.

deficiencies associated with specific witness statements and establishes why the Joint Complainants have not carried their burden of proof.

The Joint Complainants contend that approximately 63 consumer witnesses testified that BPE sales representatives "led them to believe that they would save on their electric bill, and/or failed to provide accurate pricing information, and/or failed to explain that the price would be variable after the expiration of the 60-90 day introductory fixed price, and/or led them to believe that the price would be fixed for a longer period of time, and/or led them to believe that they would be notified of a price change."[93] In support of this contention, the Joint Complainants refer to several snippets of consumer testimony.

Upon closer review of that testimony, it is clear that either it has been mischaracterized by the Joint Complainants or it is not credible. For instance, Robert Bishop testified that he signed up "sometime around 2010" and that he signed up "over the phone or by mail." As to whether he received a disclosure statement or welcome letter, signed an enrollment form, or received a verification call, he testified that he does not know. He further indicated that he was busy when the BPE sales representative called and experienced some personal tragedies around that time, explaining why he does not clearly recall the transaction.[94]

Dennis Frey testified that the BPE sales representative did not guarantee savings. Rather, the agent, according to Mr. Frey, simply told him to compare BPE's initial price with the rate that he was paying his current provider.[95]

Regarding his 2012 enrollment, Jeffrey VanHorn testified that he enrolled with BPE because his employer advised its employees that they could get the same rate as the company had

[93] Joint Complainants' M.B. at 56-57.
[94] Joint Complainants' Consumer Testimony at 100-104.
[95] Joint Complainants' Consumer Testimony at 392.

obtained. When he called BPE, the representative confirmed the rate. Mr. VanHorn was not guaranteed savings and he reviewed his disclosure statement when he received it immediately after enrollment.[96]

Testifying about his 2011 enrollment, Dennis Estvanik did not offer any explanation as to why he thought the rate would be the same forever. In describing the sales transaction, he indicated that he negotiated a deal with a club that he frequented and that the price sounded good at the time.[97]

William Wranitz testified that when he enrolled "sometime in 2012," he thought it was a fixed rate and that he would receive notice of any changes. However, he saw increases in May 2013, which he did not contest, suggesting that he was aware that he had signed up for a variable rate plan.[98] He simply did not like the increases that were assessed in early 2014.

Testifying for Recycle Logistics, Sherri Kennedy originally claimed that she locked in to an initial price and that the sale representative was supposed to call her back to reevaluate.[99] She also testified that the sales representative did not lock the price in for a particular time period.[100] However, during cross-examination, it was demonstrated through the recording of the sales call that the sales representative told Ms. Kennedy that BPE guaranteed rates 90 days at a time and also told her on two occasions that she should call BPE, which she did not do until after the price increase in March 2014.[101] Further, the third party verification recording disclosed that she had a variable rate for 90 days.[102] Ms. Kennedy explained the discrepancies between her testimony

[96] Joint Complainants' Consumer Testimony at 387-388.
[97] Joint Complainants' Consumer Testimony at 507-508.
[98] Joint Complainants' Consumer Testimony at 290-291.
[99] Joint Complainants' Consumer Testimony at 2.
[100] Tr. 529.
[101] Tr. 529, 530, 560, 568-569, 582, 584; Kennedy Redirect Exhibit No. 1.
[102] Tr. 541-542; BPE SK-1.

and the recordings as the result of her distraction due to the fact that she was conducting business while speaking with the BPE sales representative.

John Cassel acknowledged that after the initial price of 6.75 cents per kWh he was offered in June 2012, his price would thereafter fluctuate according to market conditions.[103] When wholesale market prices spiked in early 2014, so did Mr. Cassel's prices. Mr. Cassel testified that his initial price was honored and that no one at BPE guaranteed him savings. Indeed, Mr. Cassell found BPE on the Internet and the only conversation he had with a BPE representative was to make the switch.[104]

Tom and Amy Quinn testified that they signed up in 2012 through www.papowerswitch.com and understood that the price would remain competitive with other EGSs.[105] They also testified that they do not recall any contact with a BPE's sales representative, but then referred to a phone call and mentioned discussions about a variable rate after a certain time period.[106] Their testimony is far from clear and convincing in that they did not even explain the basis for their understanding that the price would remain competitive. In any event, even if a reference was made to the price remaining competitive, no evidence was introduced in this proceeding to show that the prices charged by BPE were not "competitive" with other EGSs, particularly those charging variable prices with no cancellation fees. To the contrary, the mere fact that the Joint Complainants and the Commission received an influx of consumer calls complaining about variable prices charged by several EGSs suggests that the prices charged by BPE were competitive, when compared to what was occurring in the

[103] Joint Complainants' Consumer Testimony at 574; Tr. 642.
[104] Tr. 643-644.
[105] Joint Complainants' Consumer Testimony at 298-299.
[106] *Id.*

wholesale market and with other similar EGSs.[107] As to any guarantee of savings, Mr. and Mrs. Quinn clearly testified that savings were linked only to the initial price.[108] Further, they called BPE on two subsequent occasions and received 6-month prices, which BPE honored.[109]

William Smith never had an interaction with BPE until he complained about the price increase in early 2014. His testimony was that his prior EGS sold their customers to BPE and that it was his prior EGS who told him that everything would remain the same.[110] He did not even indicate what his terms and conditions were with his other EGS.

David Brotzman learned about BPE through www.papowerswitch.com and testified that he signed up online.[111] During redirect examination, he testified that he thought he would save money because BPE offered lower rates, but he offered no time period for the expected savings. Indeed, he said that he did not "remember everything." Even when pressed by counsel for the Joint Complainants to recall a guarantee of savings, Mr. Brotzman testified: "Well, I don't remember right now; it's been a while."[112]

Testifying about his 2012 enrollment, David Duke explained that he found BPE prices on a website that listed other EGSs and understood they were variable. He did not suggest that any long-term savings were promised or that his initial rate was not honored.[113]

After comparing prices online, Daniel Zablonsky enrolled with BPE in 2012 and knew that the rate would be variable after a locked in period of time. He made no claims of guaranteed savings or that BPE did not honor his initial rate.[114]

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[107] *See Variable Price Order.*
[108] Joint Complainants' Consumer Testimony at 299.
[109] Tr. 301-305.
[110] Joint Complainants' Consumer Testimony at 567-569; Tr. 338.
[111] Joint Complainants' Consumer Testimony at 164.
[112] Tr. 365.
[113] Joint Complainants' Consumer Testimony at 501-503; Tr. 373-375.
[114] Joint Complainants' Consumer Testimony at 270-272; Tr. 473-480.

Rachel and Charles Nentwig signed up with BPE online in 2012 and had no interaction with a BPE sales representative. They assumed the rate would be fixed for one year and then variable thereafter. They understood the rate would be competitive but explained no basis for that understanding. In short, BPE made no guarantees.[115]

While Tracy Wesley testified that a BPE sales agent told her that the rates would never be higher than her EDC, a recording of the sales call that was admitted into the record during this proceeding establishes otherwise. At no point during the sales call did the BPE sales agent tell Ms. Wesley that her price would never exceed the EDC's rate.[116]

In her testimony, Alexandra Moratelli claimed that BPE was supposed to call her with a new price following the initial 3-month price.[117] However, a review of the sales call demonstrates that the sales agent repeatedly told Ms. Moratelli that her rate would vary after 60 days depending on market conditions and that she would have to call BPE about future rates. On one occasion, Ms. Moratelli specifically asked whether the agent would call her or whether she would have to call. In response, the agent told her that it would be impossible for him to call every single customer and advised her that she should look at her bill every 30 days and give him a call.[118] At the conclusion of the call, Ms. Moratelli simply stated, "well, just sign me up for the 60 days."[119]

Testifying for Mutual Aid Ambulance Service, Dennis Todaro signed a service agreement to enroll twelve accounts and routinely viewed BPE's charges on the EDC's bills. As controller for Mutual Aid for 29 years, he has read many contracts and was satisfied that the

[115] Joint Complainants' Consumer Testimony at 465-466; Tr. 409-412.
[116] Joint Complainants' Consumer Testimony at 213; Tr. 199-208.
[117] Joint Complainants' Consumer Testimony at 209.
[118] Tr. 500-505.
[119] Tr. 509.

agreement captured everything represented to him during the sales call.[120] Indeed, a review of the sales call demonstrates that despite Mr. Todaro's claims that the agent repeatedly told him the price would always be less than the EDC, no such promises were made.[121]

While Lynn and Dale Ober testified that BPE made no mention of variable rates, a review of the third party verification recording established that the variable nature of the price plan was disclosed. If they had not previously understood or intended to sign up for a variable price plan, they were free to rescind the selection but took no such steps. They also did not suggest that anyone at BPE promised savings that were not realized.[122]

Gary Euler originally testified that he thought that his business would save on electricity for one year; however, he later acknowledged that the sales representatives referred to a three-month rate lock "[b]ut, somewhere in the conversation, they talked about one year."[123] Mr. Euler was clearly confused about the sales transaction since he said that the particular agents with whom he recalls discussing these terms came to his office, while the evidence in the record shows that BPE conducted only telemarketing in Pennsylvania and did not engage in door-to-door sales.[124] Mr. Euler is not even certain that the sales representatives who were part of the discussion he recalled were from BPE.[125]

Testifying on behalf of United Transmission & Service Center, Inc. regarding the 2012 enrollment, Martha Torbey indicated that she understood the rate would be fixed for six months

[120] Joint Complainants' Consumer Testimony at 313; Tr. 314-316, 330-332.
[121] *Id.*
[122] Joint Complainants' Consumer Testimony at 201-203; Tr. 396-397.
[123] Joint Complainants' Consumer Testimony 159-160; Tr. 356.
[124] Tr. 352; OAG/OCA St. 1 at 7.
[125] Tr. 353-353.

and would vary thereafter. She further testified that the initial rate of 6.5 cents was honored for six months. The savings discussed by the sales agent were relative to the initial price.[126]

Jacqueline Epler signed up for a one year initial price in July 2012, which was fulfilled by BPE. She continued to see the BPE charges on her EDC bills and had no complaints until the price increases in 2014.[127]

Testifying for the Titusville Moose Lodge Number 84, William Otto offered no basis for his understanding that the price would always be below the EDC. Although he claimed to have attempted to cancel the contract prior to 2014, he did not have a copy of the letter he said that he sent, the name of the BPE representative with whom he supposedly spoke or a copy of the email that he alleged to have sent to BPE requesting cancellation.[128]

Russell Mowl testified about three different business accounts he switched to BPE in June 2012. As the Secretary/Treasurer of North Bethlehem Township and a business man, he frequently reads contracts and understood that an initial rate of 6 cents per kWh would be in effect for 90 days and that the rate would vary thereafter. He monitored BPE's charges on the bills and agreed that the three accounts enjoyed low rates from 2012 until early 2014. He recalls no savings being guaranteed.[129]

Testifying on behalf of Erie Animal Hospital, Bree Burlingame knew that the rates were variable after the initial lock-in period. She testified that the initial rate was honored for 90 days consistent with the service agreement.[130]

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[126] Joint Complainants' Consumer Testimony at 438; Tr. 345-346.
[127] Joint Complainants' Consumer Testimony at 88-89; Tr. 630-631.
[128] Joint Complainants' Consumer Testimony at 581-582; Tr. 661-662.
[129] Joint Complainants' Consumer Testimony at 469-470, 543-544, 547-548; Tr. 697-698, 703-704.
[130] Joint Complainants' Consumer Testimony at 155-156; Tr. 59; Redirect Exhibit No. 1.

Kenneth Brown understood that savings were guaranteed only for the first 90 days and testified that the initial rate was honored. He also knew that the price would be variable thereafter.[131]

Walt Wensel knew that the rate was variable, would be based on PJM wholesale market conditions, and had no ceiling. Indeed, he testified that he did not "feel there is anything fraudulent" about BPE's price increases.[132]

Testifying on behalf of GeoStructures Inc., Tami Chicarelli claimed that she would be contacted before the price was increased. However, the sales call shows that the BPE sales representative made it clear that the initial price was in effect for 60 days and advised Ms. Chicarelli to call him back to reevaluate, which she did not do.[133]

In 2012, Nancy Whisker learned about BPE through www.papowerswitch.com, understood that the rate would vary after the first 90 days and testified that it remained at the initial level for more than a year after the initial 90 day period. She was not guaranteed savings by BPE.[134]

Darrell Bacorn thought the price for electric service for his business would be lower for one year. However, he gave no basis for that understanding and offered no timeframe for when he enrolled. He also does not recall what the initial price was supposed to be.[135]

Loni Durante enrolled in 2012 at the recommendation of her landlord and understood that the rate was variable. She testified that the rate was lower than the EDC's rate when she enrolled

[131] Joint Complainants' Consumer Testimony at 526-527; Tr. 75, 79; Brown Redirect Exhibit No. 1.
[132] Joint Complainants' Consumer Testimony at 225-226; Exh. WW-1; 267-268, 271.
[133] Joint Complainants' Consumer Testimony at 449-450; 244-245. 248-249; Chicarelli Redirect Exhibit No. 1.
[134] Joint Complainants' Consumer Testimony 522-523; Tr. 278, 284.
[135] Joint Complainants' Consumer Testimony at 150-151; Tr. 117, 118-121.

and that she had no complaints during 2012 and 2013.[136] Moreover, the Commission dismissed Ms. Durante's formal complaint as it related to a price increase in February 2014, noting that she had not alleged that she was misled about her rate when she enrolled with BPE. *Durante.*

Regarding his 2012 enrollment, Robert Burkholder testified that no time period was given for the lower rate offered to his business. He further indicated that he did not speak with the BPE sales agent, and he left most of the questions blank on the pre-printed questionnaire.[137]

Testifying for the Howard Johnson Motor Lodge, Jayard Shah noted that the initial rate of 5.99 cents for 90 days was honored. He further acknowledged signing the service agreement which provided for a variable rate thereafter and testified that he paid no attention to his bills. Mr. Shah also indicated that he received a credit on his account after calling BPE.[138]

Karen Mauro found BPE on www.papowerswitch.com and understood that the rate would be variable. She saw BPE charges on her bills and testified that no one at BPE guaranteed her any savings.[139]

Testifying about his 2012 enrollment, George Dingler understood that the initial price was in effect for 180 days and would thereafter be variable. He had no complaints about his price until March 2014. While he believed the rate would always remain "competitive," he made that assumption based on the Commission's oversight of EGSs.[140]

Jeffrey Hamilton enrolled in 2012, with an initial price that remained in effect for 180 days. Mr. Hamilton understood that the rate could increase after that and made assumptions

[136] Joint Complainants' Consumer Testimony at 80-81; Tr. 135, 137-138).
[137] Joint Complainants' Consumer Testimony at 278-279; Tr. 150-151.
[138] Joint Complainants' Consumer Testimony at 515-516; Tr. 160-164.
[139] Joint Complainants' Consumer Testimony at 395-396; Tr. 221-222.
[140] Joint Complainants' Consumer Testimony at 403-405.

about the level of such increases, without explaining any basis for them. He merely noted that the initial rate was lower than that charged by other EGSs.[141]

Regarding his 2012 enrollment, Robert Kieffer testified that he found BPE through his EDC's website and that the initial rate was guaranteed for six months. The savings discussed by the BPE's sales agent were linked to that initial rate.[142]

A review of Mary Nye's testimony demonstrates that she has no recollection of the sales transaction. Indeed, she testified that all she remembered is that she was upset when she got a bill for over $500 without any notice. She did not provide any dates for enrollment and left almost the entire pre-printed questionnaire blank.[143]

Testifying on behalf of Cambria Hardware and Equipment, David Lynch indicated that he knew the rates would be variable after the initial lock-in period expired. He also testified that BPE did not guarantee savings.[144]

The testimony presented on behalf of Mother's Nature, Inc. claimed to recall specifics about the pricing discussions. However, when asked about the Disclosure Statement, the customer testified to having no recollection due to the lapse of time, noting that it was two years ago.[145]

Regarding her 2012 enrollment, Grace Witmer knew that the rate would be variable. She also testified that the promises of savings related only to the initial price.[146]

Herbert Evans enrolled in January 2013 and thought his rate was fixed for one year. He had no complaint about BPE's price until March 2014, over one year later. Mr. Evans also

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[141] Joint Complainants' Consumer Testimony at 106-107.
[142] Joint Complainants' Consumer Testimony at 21-22.
[143] Joint Complainants' Consumer Testimony at 233-236.
[144] Joint Complainants' Consumer Testimony at 216-217.
[145] Joint Complainants' Consumer Testimony at 332-334.
[146] Joint Complainants' Consumer Testimony at 420-421.

testified that he made an assumption -- without explaining the basis -- that BPE's price would stay below that charged by the EDC, or that if it increased, he could return to the EDC. His testimony does not support a finding of promised savings that were not realized.[147]

Regarding the identical testimony presented by Mehmet Isik, Irfan Isik and Yaglidereliler Corporation, these customers knew the rate would be variable after the initial 90-day period.[148] Moreover, they filed formal complaints against BPE and a certificate of satisfaction was filed on May 19, 2015. *Yaglidereliler Corp.*

Edward George understood that the term of his initial rate was in effect for three months and the TPV disclosed the variable rate thereafter. Moreover, the sales call reveals that the sales agent advised Mr. George to call him after 80 days to reevaluate the price, and Mr. George testified that he does not recall making that call.[149]

Charles Wentzel testified that he signed a one-year contract with BPE in January 2013 and understood that he would be variable after that initial period. He further noted that BPE did not guarantee him savings.[150]

According to James Reed's testimony, he knew that his rate would be variable after the two-month initial price. He also indicated that the savings discussed by the agent related to that initial rate. Mr. Reed further noted that he could cancel without penalty at any time.[151]

Testifying for Age Craft Manufacturing, Inc., Ben Policastro indicated that he signed the service agreement providing for an initial rate for 90 days, which would vary thereafter. As a

[147] Joint Complainants' Consumer Testimony at 37-38.
[148] Joint Complainants' Consumer Testimony at 354, 358, 362.
[149] Joint Complainants' Consumer Testimony at 264-266; Tr. 591, 608, 620-621.
[150] Joint Complainants' Consumer Testimony at 487-488; Tr. 673-674, 679.
[151] Joint Complainants' Consumer Testimony at 558-559; Tr. 185.

business man who signs contracts, it is not reasonable to accept his assertion that he thought the contract was fixed for one year.[152]

Clearly, a great deal of the consumer testimony that has been relied upon by the Joint Complainants to support their claim that BPE's sales representatives promised savings that were not realized or made other misleading statements is not concise or adamant -- the standard by which the Commission views consumer testimony on such claims. To the contrary, it is filled with generalities, vague recollections and inconsistencies. For consumers seeking refunds, it is self-serving. As this testimony was actively solicited by the Joint Complainants for purposes of litigation, it does not have the trustworthiness that is needed for the Commission to rely on in the context of determining whether BPE has violated its regulations.

4. Aggregate Billing Data

As to their allegation that BPE did not provide savings that they claim were promised, the Joint Complainants rely on Ms. Ashley Everette's review of BPE's aggregate billing data from December 2013 through March 2014 and applicable EDC PTCs for that timeframe.[153] However, this comparison proves nothing with respect to the bills that were issued to individual customers. Also, the Joint Complainant's argument ignores the testimony of many of the consumers in this proceeding who said that savings were not promised or that any guaranteed savings were relative to the initial price, which was honored by BPE. For customers who enrolled in 2012 and enjoyed years of prices that were below rates charged by EDCs or other EGSs, and had no expectations of long-term guarantees of savings, a review of billing data over the four-month period used by Ms. Everette is meaningless.

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[152] Joint Complainants' Consumer Testimony at 327-328; Tr. 100-102; Exh. BPE-ACM-1.
[153] Joint Complainants' M.B. at 58-60.

Without an examination of each individual customer's contract and actual billing data, it is impossible to conclude that BPE failed -- across the board and for its entire customer base -- to provide any promised savings. Yet, the Joint Complainants have made no effort to consider these actual experiences of any of the individual customers upon whose testimony they rely. In order to carry their burden of proof in Count III, it was incumbent upon them to prove each element of their allegation. They had the obligation to examine the granular details of each consumer's testimony and the relevant billing data to demonstrate that any promised savings did not materialize. Because they failed to fulfill that obligation, the Joint Complainants have not proven by a preponderance of the evidence that BPE committed the violations alleged in Count III.

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

In Count VI of the Joint Complaint, the Joint Complainants alleged 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.[154] The Joint Complainants contend that this alleged conduct violates various provisions in Chapter 56, including Sections 56.1(a), 56.141(a), 56.151 and 56.152.[155]

In their Main Brief, they expanded the list of regulations to also include Section 111.13,[156] which requires EGSs to investigate customer inquiries, disputes and complaints and to implement an internal process for responding to and resolving customer inquiries, disputes and

[154]Joint Complaint ¶ 48.
[155]52 Pa. Code §§ 56.1(a), 56.141(a), 56.151 and 56.152.
[156]52 Pa. Code § 111.3.

complaints. As this regulation was not identified in the Joint Complaint, it would be inappropriate for the Commission to find that BPE has violated this regulation. *Thompson* (consistent with due process, a respondent is entitled to notice and an opportunity to be heard).

The Joint Complaints argue that "there is ample evidence on the record to support a finding that Blue Pilot failed to adequately staff its call center and provide reasonable access to Company representatives for purposes of submitting complaints."[157] In support of this argument, the Joint Complainants refer to the testimony of 9 consumers. According to the Joint Complainants, the testimony of 9 consumers is "ample evidence" to prove that BPE "failed to adequately staff its call center." Even some of those consumers merely indicated that they had to make a few attempts before reaching BPE's call center.[158]

It is well-known that the Commission, the Joint Complainants and EGSs received an onslaught of consumer calls during the Polar Vortex. An EGS that is accustomed to a low volume of consumer complaints would obviously not be prepared for the volume of calls that were received. Despite those realities, the vast majority of the consumer witnesses who testified in this proceeding indicated that they were able to reach BPE's call center.[159] Therefore, the Joint Complainants' own evidence demonstrates that BPE adequately staffed its call center and provided reasonable access to Company representatives.

The Joint Complainants further contend that BPE failed to properly investigate customer disputes and notify the customers of the results of the Company's investigation. In support of this contention, the Joint Complainants refer to Ms. Alexander's personal observations regarding

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[157] Joint Complainants' M.B. at 63.
[158] *See, e.g.,* Joint Complainants' Consumer Testimony at 108 (Jeffery Hamilton) (called "numerous times" before he spoke with a BPE representative, with no indication of whether these attempts occurred over the course of a day or more).
[159] BPE M.B. at 103-105.

BPE's responses to consumer complaints and the testimony of consumers about receiving no relief.[160] However, neither Ms. Alexander's testimony nor the consumer testimony identifies any departures from the Commission's regulations. While Ms. Alexander criticized BPE for referring to the written disclosures, the extreme weather and the high wholesale market prices,[161] the Joint Complainants have not identified what investigation should have been performed by BPE. Obviously, BPE already knew the source of the consumers' complaints when they called and had a response ready to provide.[162] Complaints about price increases[163] did not call for any further investigation or report back to consumers. As to the consumers who testified that they were offered no relief, BPE was not obligated to offer lower prices or refunds to customers in a deregulated environment where EGSs prices are not regulated and the prices charged conformed to the Disclosure Statement.[164]

Referring to testimony of Dan Ellingsen, the Joint Complainants claim that this is an example of a consumer whose complaint was not investigated by BPE at the time of his original enrollment in 2012.[165] In Mr. Ellingsen's written testimony, he claimed that he did not sign up with BPE.[166] However, during cross-examination, he acknowledged that his wife had enrolled the account and he testified that he saw BPE charges on his EDC bills shortly after the

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[160] JC MB at 66-68.
[161] She also referred to a statement made by BPE's call center representatives regarding other retail prices, claiming that it was misleading since EDC's default service prices did not "skyrocket." However, it is well known that other EGSs offering variable prices, without cancellation fees, did significantly increase; those are more appropriate comparisons since their prices are not regulated in the way that EDC default prices must comply with various standards in the Code and Commission regulations. *See* 52 Pa. Code §§ 54.181-54.190.
[162] OAG/OCA St. 1 at 51.
[163] OAG/OCA St. 1 at 20 (complaints were about price, pricing methodology and price increases).
[164] BPE notes that the customers listed by the Joint Complainants on pages 67-69 of the M.B. all reached the call center to complain.
[165] Joint Complainants' M.B. at 69-71.
[166] Joint Complainants' Consumer Testimony at 242-244.

enrollment.[167] A review of the subsequent full colloquy (as opposed to excerpts) among Mr. Ellingsen, counsel for BPE and counsel for the Joint Complainants establishes nothing other than that Mr. Ellingsen's story continued changing and that he truly had no credible recollection about his contacts with BPE.[168]

As to the Joint Complainants' criticisms of BPE's refund policy, nothing in the Commission's regulations requires an EGS to follow any specific criteria when consumers complain about price increases. Indeed, the Commission's regulations do not impose any particular standards on EGSs for handling calls from consumers. Customer service in a deregulated environment is a function that should be left to the market to control. If consumers are not satisfied with the responsiveness of the EGS in handling complaints, they can choose to purchase their electric generation services elsewhere. 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. To the extent that the Commission believes that any of these allegations have been substantiated, BPE's exit from the Pennsylvania alleviates the need for any remedial measures, such as the Commission would typically implement when a regulated entity's complaint handling performance is deficient. *See Metropolitan Edison Company* at Ordering Paragraph 11.

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

By Count V, the Joint Complainants alleged that BPE violated the Telemarketer Registration Act because the Company did not provide consumers who were enrolled through a telemarketing call with a contract containing information required by Sections 2245(a)(7) and

[167] Tr. 457-458.
[168] Tr. 456-469.

2245(c) of the Telemarketer Registration Act, 73 P.S. §§ 2245(a)(7) and 2245(c), and obtain the consumers' signatures on such contracts.

BPE's Main Brief contains a thorough discussion of the Commission's lack of statutory authority to enforce the Telemarketer Registration Act.[169] In short, the Commission does not have jurisdiction to hear claims of alleged Telemarketer Registration Act violations. On interlocutory review, the Commission agreed with this conclusion, noting that it can only review alleged violations of its own regulations. Even if the Commission had jurisdiction to enforce the Telemarketer Registration Act, EGSs are exempt from the written contract requirements of the Telemarketer Registration Act because the contractual sale is regulated by the Commission.[170] Therefore, the Commission should dismiss Count V outright without any consideration of the merits.

Moreover, BPE fully complied with the Commission's regulations regarding the enrollment of customers. Specifically, 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."[171] The Commission's regulations further obligate EGSs to send disclosure statements to customers, regardless of the enrollment method and dictate the necessary components of disclosure statements.[172] As nothing in the Commission's regulations requires EGSs to secure consumers' signatures on written contracts, BPE's practice of sending disclosure statements to customers enrolled through telemarketing satisfies the requirements of the applicable regulations.[173]

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[169] BPE M.B. at 105-108.
[170] 73 P.S. § 2245(d)(1).
[171] 52 Pa. Code § 111.7(a).
[172] 52 Pa. Code § 54.5(b).
[173] OAG/OCA St. 1 at 8.

The Joint Complainants also argue that compliance with the Telemarketer Registration Act's requirements for a written contract signed by the customer is "a consumer protection policy."[174] Regardless of the views of the Joint Complainants about what would make good consumer protection policy, they are not the regulators and do not have the prerogative of ultimately deciding which consumer protections are appropriate for the electric retail market and need to be included in the Commission's regulations. While advocating for a written contract signed by the customer to avoid situations in which the customer agreed to a contract "based solely on oral representations over the phone," the Joint Complainants also suggest that "[c]onsumers should not assume the burden of reviewing and interpreting the terms presented in writing after the enrollment has been completed over the phone."[175] This nonsensical argument begs the question -- do the Joint Complainants want the consumers to receive a written contract after telemarketing sales or not? Regardless of the answer, the only requirements applicable to BPE are those imposed by the Commission, not those that the Joint Complainants would prefer to have in place.

In a last ditch attempt to salvage Count V, the Joint Complainants contend that BPE failed to provide a Disclosure Statement to 17 consumers in this proceeding and that "[t]he record establishes that Blue Pilot can provide no evidence that it routinely provided these documents to consumers who enrolled through a telemarketing call in a timely manner."[176] The Joint Complainants therefore allege that BPE violated Section 111.10(c) of the Commission's regulations.[177]

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[174] Joint Complainants' M.B. at 80-81.
[175] Joint Complainants' M.B. at 128.
[176] Joint Complainants' M.B. at 81; Appendix C, Proposed FOF 102.
[177] 52 Pa. Code § 111.10(c).

As a threshold matter, the Joint Complaint contains no factual allegations regarding BPE providing a Disclosure Statement and does not allege that BPE violated Section 111.10(c) of the Commission's regulations. Moreover, the Joint Complainants did not amend the Joint Complaint to include these averments. *See Order Granting in Part and Denying in Part Motion for Entry of Judgment* dated August 4, 2015 at p. 10 (Joint Complainants were not permitted to amend Joint Complaint by the Motion for Entry of Judgment and instead were afforded the opportunity to do so by a separate pleading pursuant to 52 Pa. Code § 5.91(a), to which BPE would be given an opportunity to respond). As BPE has not been afforded notice and an opportunity to be heard on this allegation, and finding a violation of Section 111.10(c) would violate BPE fundamental rights to due process, this allegation should be dismissed outright. *Thompson.*

In any event, the testimony relied upon by the Joint Complainants in support of these claims does not establish that BPE failed to routinely send Disclosure Statements to customers following their enrollment. One of the 17 consumer witnesses relied upon by the Joint Complainants in support of this allegation testified that she did receive a Disclosure Statement from BPE.[178] The testimony of other consumer witnesses relating to whether they received Disclosure Statements on connection with transactions that occurred several months or years earlier is not credible. For instance, the Joint Complainants point to the testimony of Jeffrey Hamilton and Patricia Fickess who each claimed that they did not receive a Disclosure Statement but both acknowledged receiving a welcome letter from BPE, which was accompanied by the Disclosure Statement.[179] Similarly, testimony presented by Fort Boone Campground suggested

[178] *See, e.g.*, Joint Complainants' Consumer Testimony at 49 (Karen Kraft).
[179] Joint Complainants' Consumer Testimony at 107-108; Joint Complainants' Consumer Testimony at 61-62. *See also* Joint Complainants' Consumer Testimony at 187-188 (William Evans); Joint Complainants' Consumer Testimony at 141-142 (Rose Livingstone/Flowers by Regina). In addition, Martha Campanella testified that she

that it received no Disclosure Statement, but referenced a welcome letter informing it of its initial rate of $.09 per kWh.[180] Also, regarding his 2011 enrollment, Dennis Estvanik only testified that he did not believe he received a Disclosure Statement.[181] Michael Weidner had a sketchy recollection of his early 2013 enrollment, evidenced by the lack of detail or responses he provided on the pre-printed questionnaire.[182] Lynn and Dale Ober testified only that they had no recollection of receiving a Disclosure Statement from BPE.[183] Although Dan Ellingsen testified that he did not receive a Disclosure Statement, he also claimed in his original testimony that he did not sign up with BPE or agree to be transferred to BPE for service.[184] Yet, on cross-examination, he testified that he agreed to accept service from BPE and saw BPE charges on his EDC bills.[185] Therefore, his testimony about whether he received a Disclosure Statement is not credible.

The Joint Complainants also refer to 9 consumer witnesses who testified that they did not receive a disclosure statement until "long" after their enrollments.[186] One of these consumers, United Transmission Service Center, Inc. provided testimony indicating that it received the Disclosure Statement in 2012 upon enrollment.[187] Also, the testimony of Nancy Whisker does not support the Joint Complainants' claim, in that she testified only that she received an *updated*

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may have received a welcome letter from BPE, but does not remember, casting doubt regarding her recollection of whether she received a Disclosure Statement. Joint Complainants' Consumer Testimony at 375-376.

[180] Joint Complainants' Consumer Testimony 384-385.

[181] Joint Complainants' Consumer Testimony at 508.

[182] Joint Complainants' Consumer Testimony at 366-368.

[183] Joint Complainants' Consumer Testimony at 203.

[184] Joint Complainants' Consumer Testimony at 242-243.

[185] Tr. 457-458.

[186] Joint Complainants' M.B. at 81; Appendix C, Proposed FOF 104. BPE notes that Scott Hornberger is listed in FOF 102 (as supporting the claim that no disclosure statement was received) and FOF 104 (as supporting the claim that it was received "long" after enrollment). In fact, his testimony regarding his 2012 enrollment was that he did not receive a disclosure statement until after he terminated service in 2014. BPE submits that perhaps, Mr. Hornberger simply does not recall the disclosure statement he received in 2012, while the more recent mailing was more memorable.

[187] Joint Complainants' Consumer Testimony at 438.

Disclosure Statement in early February 2014 relative to her 2012 enrollment.[188] In addition, Alexandra Moratelli, Allen Fitch, Jacqueline Epler and Loni Durante all testified that they received a Disclosure Statement within about a month after enrolling.[189] Section 111.10(c) cited by the Joint Complainants does not impose a specific timeframe for mailing the Disclosure Statement, and certainly these four customers received their Disclosure Statements shortly after enrolling, as opposed to not receiving them until after prices increased, as the Joint Complainants have suggested.

BPE's normal practice was to send Disclosure Statements to customers following telemarketing enrollments.[190] Indeed, many consumers testified that they received Disclosure Statements.[191] In any event, the burden was not on BPE to prove that it had sent the Disclosure Statement, but rather it was on the Joint Complainants to establish that the Company did not. The Joint Complainants simply failed to carry this burden. Clearly, the testimony of a handful of customers who claimed to have not received a Disclosure Statement or having not received one until early 2014 in no way suggests, let alone proves, that BPE failed to routinely provide Disclosure Statements after customers enrolled. Therefore, Count V should be dismissed in its entirety.

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[188] Joint Complainants' Consumer Testimony at 522-523

[189] Joint Complainants' Consumer Testimony at 209; Joint Complainants' Consumer Testimony at 345; Joint Complainants' Consumer Testimony at 89; Joint Complainants' Consumer Testimony 80-81.

[190] OAG/OCA St. 1 at 8.

[191] *See, e.g.,* Joint Complainant Consumer Testimony at 151, Exh. DB-1 (Darrell Bacorn); Joint Complainant Consumer Testimony at 279 (Robert Burkholder); Joint Complainant Consumer Testimony at 450 (GeoStructures, Inc.); Joint Complainant Consumer Testimony at 156 (Erie Animal Hospital); Joint Complainant Consumer Testimony at 295 (Dean Faust); Joint Complainant Consumer Testimony at 265 (Edward George); Joint Complainant Consumer Testimony at 337 (Gorham Holding); Joint Complainant Consumer Testimony at 379 (JoAnn LeTersky); Joint Complainant Consumer Testimony at 257 (I&J Miller, Inc. d/b/a Miller's Sunoco); Joint Complainant Consumer Testimony at 470 (Russell Mowl); Joint Complainant Consumer Testimony at 552 (Indiana Auto Supply); Joint Complainant Consumer Testimony at 299 (Tom and Amy Quinn); Joint Complainant Consumer Testimony at 388 (Jeffrey VanHorn); Joint Complainant Consumer Testimony at 454 (Village Service Center).

I. Relief Requested

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 an 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 an 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.[193] As discussed below, however, BPE strongly opposes the granting of any further relief as being unwarranted and unlawful.

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

[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

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.

5. License Revocation

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. Therefore, the Commission's statutory authority to suspend or revoke a license for reasons other than those noted in Code Section 2809(c) is not clear, or is nonexistent.[194]

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

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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.

[194] BPE MB at 109-110.

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

in Pennsylvania, it does not object to revocation of its license, without an opportunity for reinstatement, as part of this proceeding.

In addition to seeking revocation of BPE's EGS license, the Joint Complainants request in their Main Brief that the Commission issue an Order prohibiting BPE's owners and managers from any type of participation in the competitive market in Pennsylvania.[196] In their Motion for Entry of Judgment filed on June 22, 2015, the Joint Complainants characterized this request as seeking to bar BPE's owners and managers "from affiliations with suppliers licensed in Pennsylvania or from seeking approval for a supplier license in Pennsylvania."[197] Their request for relief in their Main Brief appears to go beyond that request and to adopt Ms. Alexander's recommendation that the Commission "make clear that it would not approve any future license application for any retail gas or electric supply or telephone service in which the owners, officers, directors or managers of Blue Pilot are involved."[198]

By requesting these additional remedies in the briefing stage, the Joint Complainants have wholly eradicated BPE's fundamental rights of due process. At the outset, by not amending the Joint Complaint to include these requests for relief, the Joint Complainants deprived BPE of notice and an opportunity to be heard. Moreover, forever barring BPE's owners, officers, directors, managers and shareholders from being affiliated with an EGS or applying for an EGS license would far exceed any statutory authority of the Commission and would violate those individuals or entities' due process rights. While the Commission may consider the involvement of certain individuals in adjudicating any future applications, and either disapprove or conditionally approve an application based on that information, it would be inappropriate for the

[196] Joint Complainants' M.B. at 83.
[197] Motion at 61.
[198] OAG/OCA St. 1 at. 6.

Commission to prejudge or foreclose the filing of such an application. In order to fairly adjudicate an application, it is incumbent upon the Commission to consider the information presented by the filing and determine whether the applicant meets the requirements of the law warranting approval.[199] Indeed, the Commonwealth Court has found that only an applicant's own compliance history may be considered, cautioning "that the Commission and courts may not disregard the independent entity of the corporate applicant." *Rosemont Taxicab Co., Inc. v. Philadelphia Parking Authority*, 68 A.3d 29, 37 (Pa. Cmwlth. 2013).

Any discussion of precluding BPE's owners and managers from participating in other competitive markets overseen by the Commission is so far-reaching as to be absurd. Not only would such relief make a mockery of due process principles and exceed the Commission's statutory authority, the record in this proceeding contains absolutely no justification for extreme measures that go well beyond the requested relief, as well as any relief previously discussed by the Commission in the context of similar EGS proceedings. Simply by advancing these proposals, which bear no resemblance to the violations they have alleged, albeit not proven, the Joint Complainants have demonstrated a complete disregard for the Commission's duty to balance the interests of consumers and private businesses.

Relying on snippets of testimony from various subsets of 80 consumer witnesses, which actually prove very little and are wholly inadequate upon which sustain the Complaint, the Joint Complainants are attempting to place all of the woes of Pennsylvania's retail market in early 2014 on the back of BPE. What the Joint Complainants were unable to show through the consumer witnesses, they have sought to do so through the purchased testimony of Dr. Estomin

[199] 66 Pa. C.S. § 2809. The Commission's regulations specifically provide that a license will be issued if the applicant is fit, willing and able to properly perform the proposed service and the proposed service is consistent with the public interest and the policy declared in Chapter 28. They further permit the filing of protests by interested parties, which would give the applicant notice of and an opportunity to respond to any issues that are raised.

and Ms. Alexander. Yet, these witnesses set forth their own personal standards for how an EGS should conduct business and criticize BPE for not meeting their standards. In short, nothing in this record supports the extreme relief requested by the Joint Complainants.

The Commission has not revoked the licenses of any of the other EGSs who were the targets of formal complaints arising from the variable price increases that occurred during the Polar Vortex. *See, e.g., Commonwealth of Pennsylvania, et al. v. Energy Services Providers, Inc., d/b/a Pennsylvania Gas and Electric*, Docket No. C-2014-2427656 (Tentative Order entered March 9, 2016; Secretarial Letter issued March 18, 2016). Even in the fully litigated case of *Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. HIKO Energy, LLC*, Docket No. C-2014-2431410 (Order entered December 3, 2015), where the EGS made an intentional executive level decision to increase prices for over 5,700 Pennsylvania customers who were on a guaranteed price plan, the Commission declined to revoke the EGS's license. When those circumstances are compared to the evidentiary record in this proceeding where an extremely small percentage of BPE's 2,600 former customers testified that sales agents promised savings that were not realized, the revocation of BPE's EGS license is more than adequate to address any alleged violations that the Commission finds to have been proven by the Joint Complainants.

6. Civil Penalties/Contributions to EDC Hardship Funds

In the Joint Complaint, the Joint Complainants requested the imposition of a civil penalty on BPE of an unidentified amount.[200] By their Motion for Entry of Default Judgment filed on June 22, 2015, the Joint Complainants requested that BPE be assessed a civil penalty in the

[200] Joint Complaint at pp. 12-13 (Relief).

amount of "any funds Blue Pilot has available."[201] In testimony presented by the Joint Complainants, no specific civil penalty amount was identified or supported.[202]

Even in their Main Brief, the Joint Complainants fail to precisely quantify the civil penalties they request, arguing that "Blue Pilot should be directed to pay a significant civil penalty." and "submit that there is more than one way that a civil penalty could be calculated in this matter."[203] Summarily suggesting that each of the 2,607 customers billed by BPE in January 2014 was affected by at least one of the 15 alleged violations they have identified, and proposing that BPE be assessed $1,000 for of those customers, the Joint Complainants recommend a civil penalty in the amount of $2,607,000.[204]

Alternatively, the Joint Complainants propose that the Commission could calculate the penalty on the basis of the number of bills issued to customers from January through March 2014. Again, they ask the Commission to surmise that each of those 7,582 bills was subject to at least one of the 15 regulations that the Joint Complainants allege BPE violated. Using the $125 per violation assessed by the Commission in *HIKO*, they indicate that a civil penalty of at least $947,750 should be imposed. However, they also advocate for a higher penalty per bill than was assessed in *HIKO*.[205]

At the outset, BPE notes that when an action seeks to impose civil penalties, a respondent is entitled to full due process rights. *Northview Motors, Inc. v. Commonwealth, Attorney Gen.*,

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[201] Motion at 2.
[202] By contrast, in the consolidated proceeding involving Respond Power, LLC, the formal complaint filed by the Bureau of Investigation and Enforcement ("I&E") requested a specific civil penalty amount and the I&E witness provided testimony in support of that proposal. *Pa. Pub. Util. Commn, Bureau of Investigation and Enforcement v. Respond Power, LLC*, Docket No. C-2014-2438640 and *Commonwealth of Pennsylvania, et al. v. Respond Power, LLC*, Docket No. C-2014-2427659 (Complaints filed August 21, 2014 and June 20, 2014, respectively). *See also HIKO* (I&E complaint specified a proposed civil penalty amount and testimony was offered to support it).
[203] Joint Complainants' M.B. at 101 and 103.
[204] Joint Complainants' M.B. at 103.
[205] Joint Complainants' M.B. at 103-104.

562 A.2d 977, 980 (Pa. Cmwlth. 1989). That is, the respondent must be informed with reasonable certainty of the nature of the accusation lodged against him and be afforded timely notice and opportunity to answer the charges and to defend against attempted proof of such accusation. *See also, Pocono Water Co. v. Pa. Public Util. Comm'n*, 630 A. 2d 971 (Pa. Cmwlth. 1993) (reversing a penalty imposed by the Commission for failure to comply with a prior order on due process grounds because the Commission failed to notice that compliance with the prior order would be an issue before the ALJ). As the Joint Complainants' proposed methodologies for calculating a civil penalty in this proceeding were not disclosed until their Main Brief, the imposition of a penalty on the basis of those proposals would violate BPE's fundamental rights of due process. Even now at the briefing stage, BPE is left to respond to moving targets and alternative methodologies advanced by the Joint Complainants.

Moreover, application of either formula by the Joint Complainants would result in a Commission order that is not based on substantial evidence. *See Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n.*, 489 Pa. 109, 413 A.2d 1037 (1980). Both of their suggested approaches assume facts that are not in the evidentiary record. In particular, the Commission may not merely assume that every customer billed by BPE in January 2014 was subjected to at least one violation of the Commission's regulations. Nor may the Commission merely assume that every bill issued by BPE from January through March 2014 was subjected to at least one violation of the Commission's regulations. To the contrary, it was incumbent upon the Joint Complainants to establish through a preponderance of the evidence that BPE violated a specific regulation in its dealings with each of those 2,607 billed customers in January 2014 or in issuing 7,582 bills from January through March 2014. In *HIKO*, I&E presented this evidence, which is wholly lacking in this proceeding.

In addition, imposing civil penalties on BPE on the basis of total customers in January 2014 or total bills issued from January through March 2014, when the evidence in this proceeding was limited to the specific experiences of 80 individual customers, would require the Commission to depart from its obligation to base its decision on substantial evidence. As discussed above, the Commission may not extrapolate (as the Joint Complainants' expert witnesses have attempted to do) from the testimony of an extremely small percentage of BPE's former customers that BPE violated the Commission's regulations across its entire customer base or in issuing every bill over a three-month period. Indeed, the Joint Complainants have not provided any rationale for penalizing BPE for every bill issued from January through March 2014 and have not presented any billing data to show what individual customers were billed and how their charges compared to the factors in BPE's Disclosure Statement, or even what they were allegedly told by the sales agents. *See HIKO.*

The Joint Complainants' proposals also fail to properly consider the actual number of customers served by BPE or the actual number of bills issued by BPE to small business customers who are afforded certain protections under the Commission's regulations that are not extended to other commercial customers.[206] They note that of the 7,582 bills issued by BPE from January through March 2014, 3,258 were sent to commercial customers.[207] Although they recognize that many of the regulations apply to residential customers and others apply only to residential and small business customers, they fail to present competent evidence showing how many of the 3,258 commercial customers fall within the Commission's definition of small business customers.

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[206] *See, e.g.*, 52 Pa. Code §§ 54.4-54.9.
[207] Joint Complainants' M.B. at 102.

Section 54.2 of the Commission's regulations defines a "small business customer" as a "person, sole proprietorship, partnership, corporation, association or other business entity that receives electric service under a small commercial, small industrial or small business rate classification, and whose maximum registered peak load was less than 25 kW within the last 12 months." [208] The only evidence presented by the Joint Complainants concerning BPE's commercial customers is their *average* monthly usage from December 2013 through March 2014, which ranged from 3,651 to 3,833 kWh.[209] Despite producing no evidence of whether these customers were on a small commercial rate classification or of their maximum registered peak load within the last 12 months, the Joint Complainants proclaim that "the average usage for Blue Pilot's commercial customers indicates that they are small business customers, and therefore, are subject to the protections of 52 Pa. Code §§ 54.4 through 54.9."[210]

Average monthly usage over a four month period bears no relationship to a customer's demand or maximum registered peak load within the last 12 months, as required by the Commission's regulations to qualify as a small business customer and be afforded those protections. Moreover, the average monthly usage of all BPE commercial customers provides no indication of the individual monthly usage or demands of those customers. Notably, the Commission's electric shopping website, www.papowerswitch.com, uses 1,200 kWh as the default monthly usage for small business customers, which is less than one-third of the average monthly usage of BPE's commercial customers from December 2013 through March 2014.[211] Absent evidence showing that BPE's commercial customers fall within the definition of a small business customer, the Joint Complainants have failed to demonstrate that the Commission's

[208] 52 Pa. Code § 54.2.
[209] Joint Complainants' M.B. at 102-103.
[210] Joint Complainants' M.B. at 103.
[211] *See* http://www.papowerswitch.com/shop-for-electricity/shop-for-your-smallbusiness/by-distributor/ppl/gs-1/ .

regulations affording protections to small business customers are applicable in this proceeding. *See Pramukh Swami Maharaj, LLC v. Liberty Power Holdings, LLC*, Docket No. C-2014-2419263 (Order entered October 6, 2015).

Further, by proposing $1,000 per customer or at least $125 per bill, the Joint Complainants' suggested methodologies fail to consider the seriousness of any particular violation of the Commission's regulations. Rather, they are content to have the Commission treat all alleged violations equally, without regard to the factors set forth in the Policy Statement which clearly seek to have penalties developed that reflect the unlawful conduct engaged in by a regulated entity.[212] Also, they fail to offer any basis in their Main Brief as to why any civil penalty at all is warranted when BPE has fully exited the Pennsylvania retail market and deterrence is not a factor, particularly if its EGS license is revoked.

BPE fully addresses in its Main Brief the standards and factors in the Commission's Policy Statement, which are considered when evaluating whether and to what extent a civil penalty is warranted for violations of the Code, Commission regulations or Commission orders.[213] Although that discussion will not be repeated here, BPE takes issue with some of the claims made by the Joint Complainants in their analysis of the factors set forth in the Policy Statement.

In particular, in their discussion of a civil penalty, the Joint Complainants inappropriately rely on issues related to BPE's bond.[214] As a fundamental matter of due process, BPE has a right to notice and opportunity to be heard on any allegations that the Joint Complainants seek to pursue against it. *Thompson.* It is well-settled that issues that are not raised in a complaint may

[212] 52 Pa. Code § 69.1201.
[213] BPE M.B. at 110-117.
[214] Joint Complainants' M.B. at 95, 100-101.

not be raised at hearing. *O'Toole v. Metropolitan Edison Company*, Docket No. C-2008-2045487 (Initial Decision served February 10, 2009 and Final Order entered April 20, 2009). As explained in *O'Toole*, the Commission is obligated to provide due process to parties appearing before it. *Schneider v. Pa. P.U.C.*, 479 A.2d 10 (Pa. Cmwlth. 1984). In *O'Toole*, the Commission appropriately recognized that if an issue is not raised in a party's complaint, the responding party receives no notice that the issue will be litigated at hearing, and if this occurs, the responding party is denied due process of law. *O'Toole* at 13. *See also Angelo Rodriguez v. Philadelphia Gas Works*, Docket No. F-2009-2110772 (Initial Decision served November 24, 2009; Final Order entered January 5, 2010) (respondent is entitled to have information specific enough to allow it to understand the allegations against it in order to conduct a meaningful investigation and to prepare coherent response). *See also* Code Section 701 and Section 5.22(a)(4) of the Commission's regulations, 66 Pa. C.S. § 701; 52 Pa. Code § 5.22(a)(4) (complaints must set forth "the act or thing done or omitted to be done" by a public utility "in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission")

Despite Code Section 701, the Commission's regulations and the Commission's prior rulings precluding parties from raising issues at hearing that were not alleged in the complaint, and over BPE's objection, the Joint Complainants were permitted to admit testimony of Ms. Alexander concerning BPE's bond. However, for the same reasons that the testimony should not have been admitted, it likewise should not be relied upon by the Commission in reaching a determination here. The Joint Complainants were free to amend their Joint Complaint at any time, and failed to do so; therefore, issues regarding BPE's bond are not properly before the Commission as part of this proceeding. *See also Order Denying in Part and Granting in Part*

Motion for Summary Judgment (August 4, 2015). Because they did not amend the Joint Complaint, BPE was not afforded any opportunity to present testimony about whether any customers were being served or about the efforts of BPE to obtain a bond or other approved security. Those are mitigating factors that would be relevant and should be considered in any discussion about BPE's bond.

Moreover, civil penalties are not the remedy that is established by the Code for lapses of bonds or other approved security. Code Section 2809(c)(1)(i) specifically provides that no EGS license shall "remain in force" if the EGS does not maintain a bond or other security. 66 Pa. C.S. § 2809(c)(1)(i). In suspending BPE's license,[215] the Commission has addressed any concerns about the lapse of its bond and this factor is irrelevant to the outcome of the present proceeding.

As to the Joint Complainants' discussion of BPE's compliance history, they have inappropriately relied on pending matters involving the same time period and issues concerning the variable price increases during the Polar Vortex. As such, these matters do not equate to a "compliance history."

They specifically refer to *Durante v. Blue Pilot Energy, LLC and PPL Electric Utilities Corporation*, Docket No. F-2015-2487082 (Order entered March 14, 2016) in support of this claim. The formal complaint underlying *Durante* relates to a price increase in February 2014, the same time period that is involved in this proceeding. Notably, the complainant in that proceeding did not allege or testify that she was misled about her rate when she enrolled with BPE. Therefore, the Commission adopted the Initial Decision of the Administrative Law Judge dismissing the part of the complaint addressing electric supply charges for February 2014. The only concern raised by the Commission in *Durante* related to an allegation raised for the first

[215] *Electric Generation Supplier License Cancellations of Companies with an Expired Financial Security*, Docket No. M-2015-2490383 (Final Order entered March 14, 2016).

time at the hearing that BPE had offered to reduce her March 2014 charges when she called into the call center to complain about her February 2014 bill. Although she claimed to have accepted the offer, a review of the transcript shows that she gave the call center representative a flippant response -- clearly not the acceptance of an offer. Moreover, in this proceeding, she testified that no relief was offered when she called BPE.[216] Undoubtedly, BPE's sales and marketing practices were clearly not at issue in that proceeding.

The Joint Complainants also refer to *Enrico*, which is still pending before the Commission on Exceptions in a matter involving a formal complaint filed after the Joint Complaint relating to the same topics concerning BPE's pricing in early 2014. In addition, the formal complaint alleged that incorrect charges on the bill and sought an interpretation of BPE's contract with the commercial customer as to whether the charges were correct. No allegations were raised regarding BPE's sales and marketing practices.

As to the Joint Complainants' references to a proceeding in Maryland in which BPE is involved, that proceeding likewise involves the same timeframe and the variable price increases caused the Polar Vortex and accompanying wholesale market price volatility.[217] Moreover, that matter is still pending before the Maryland Public Service Commission and has no bearing on this proceeding.

What is relevant to this proceeding is that no customers had filed formal complaints against BPE prior to February 2014.[218] Also, the Commission dismissed a formal complaint against BPE in *Gruelle*, rejecting allegations of deceptive sales and marketing practices during the same time period that is the subject of the Joint Complaint. In addition, an ALJ dismissed a

[216] Joint Complainants' Consumer Testimony at 82.
[217] Joint Complainants' M.B. at 28.
[218] BPE M.B. at 114-115.

formal complaint raising allegations about BPE's sales and marketing practices in *Dubois Manor Motel*, which is pending review by the Commission.

The Joint Complainants also propose that BPE be required to make contributions to EDCs' hardship funds in an amount of at least $150,000.[219] They cite to no statutory authority that the Commission has for directing an entity to make such contributions. While the Commission has approved settlement agreements providing for EGSs to make contributions to EDC hardship funds, it is well-settled that the Commission may approve measures that it would not have jurisdiction to award. *See, e.g., Pa. Pub. Util. Comm'n., Law Bureau Prosecutory Staff v. PPL Electric Utilities Corporation*, Docket No. M-2009-2058182 (Order entered November 23, 2009). Clearly, Code Section 3301, which empowers the Commission to impose civil penalties for violations of the Code, Commission regulations or Commission orders, does not authorize the Commission to require payments to EDCs' hardship funds. This request should therefore be rejected.

7. Refunds/Payment of Third Party Administrator Costs

The Joint Complaint seeks relief in the form of a refund or credit to all customers who were served by BPE in early 2014. In their Main Brief, the Joint Complainants argue that the Commission has jurisdiction to order across-the-board refunds in this proceeding and they request that the Commission direct BPE to issue refunds in the amount of $2,408,449.[220]

BPE has thoroughly addressed the lack of the Commission's jurisdiction to order refunds, particularly to individuals who are not complainants in this proceeding, in its Main Brief.[221]

[219] Joint Complainants' M.B. at 104-105.
[220] Joint Complainants' M.B. at 105, 116. In their Motion for Entry of Judgment filed on June 22, 2015, the request for refunds was $1,387,569.85.
[221] BPE M.B. at 38-58; 117-134.

Although those arguments will not be repeated here, BPE addresses in this Reply Brief specific case law relied upon by the Joint Complainants in their Main Brief.[222]

Specifically, the Joint Complainants refer to *Valley Forge Towers South Condominium v. Ron-Ike Foam Insulators, Inc.*, 393 Pa. Super. 339, 346, 574 A.2d 641, 644 (1990), *aff'd*, 529 Pa. 512, 605 A.2d 798 (1990) in support of the OAG's authority to bring a proceeding on behalf of the public and seek injunctive relief, restitution and civil penalties. All that is established by *Valley Forge Towers* is that the OAG may file a lawsuit in a court of competent jurisdiction pursuant to the Consumer Protection Law. Nothing about the Superior Court's decision supports the concept of the OAG seeking such relief from the Commission. Indeed, the Commission has held that it does not have jurisdiction to enforce the Consumer Protection Law. *MAPSA*. Moreover, the OAG is specifically precluded by Code Section 701 from filing a complaint with the Commission except as an advocate for the Commonwealth as a consumer of public utility services.[223] In any event, the OAG's authority to file or not file lawsuits has no bearing on the Commission's statutory authority to grant relief that may be requested by the OAG in this proceeding. Nothing in the Joint Complainants' Main Brief supports their argument that the Commission may treat this proceeding as a class action lawsuit and order across-the-board refunds.

They also cite to the case of *Richard Sanderman v. LP Water and Sewer Company*, 87 Pa. PUC 734 (1997) as an instance when the Commission ordered across-the-board relief to customers who had not complained. In *Sanderman*, the issue was whether a regulated public utility should be required to refund monies that were collected for water and sewerage tariffs but

[222] As to the Joint Complainants' request that BPE be directed to pay the costs of a third-party administrator to administer a refund pool, BPE notes that nothing in the Code authorizes the Commission to issue such a directive. *See* BPE MB at 34-35.
[223] 66 Pa. C.S. § 701.

not tariffed or approved by the Commission. As that case involved a public utility, which may be subjected to a refund directive by the Commission pursuant to Code Section 1312,[224] it is not applicable to this proceeding. Also, it involved known charges paid by consumers that were not properly tariffed at the Commission. In the present case, the record is wholly lacking information about the charges that individual customers were billed as compared to their expectations. Also, EGS prices are not regulated, and the decision in *Sanderman* does not give authority to the Commission that only the General Assembly may bestow.

Similarly, on the appeal of *Sanderman*, the Commonwealth Court expressly relied upon the language in Code Section 1312, which provides that upon making the findings required by provision, "[a]ny order of the commission awarding a refund shall be made for and on behalf of all patrons subject to the same rate of the public utility." *LP Water & Sewer Co. v. Pennsylvania PUC*, 722 A.2d 733, 740 (Pa. Cmwlth. 1988) Notably, Code Section 1312 goes on to provide that in such refund order, the "[t]he commission shall state...the exact amount to be paid...and shall make findings upon pertinent questions of fact." *Id.* Therefore, *LP Water* provides no support for the Joint Complainants' legal theory that the Commission may order across-the-board refunds to customers of EGSs, whose rates are not subject to Commission regulation, and where the exact amounts of any alleged overcharges cannot be identified based on the record created in this proceeding.

The case of *Lytle v. T.W. Phillips Gas and Oil Co.*, 97 Pa. PUC 476 (2002) is likewise inapplicable here. The complainant in *Lytle* had challenged a fee that the utility charged to customers who pay their gas bills by credit card. Because the fee was not in the tariff, the utility had no authority to levy the fee. Therefore, the Commission ordered refunds of the convenience

[224] 66 Pa. C.S. § 1312.

fees pursuant to Code Section 1312 on the basis that they were untariffed and therefore illegal. Notably, those fees were easily identified and calculated, with all customers being affected in exactly the same way.

The Joint Complainants also rely on the Commission's decision in *Office of Consumer Advocate et al. v. Utility.com, Inc.*, 212 PUR 4th 255 (2001). However, that case is distinguishable from the present case in that it did not involve a situation where an EGS would be directed to issue refunds of its charges to customers in the context of a contractual pricing dispute. Rather, the case addressed the proper use of an EGS's bond after it had filed for bankruptcy. A question was raised as to whether the bond could be used to satisfy consumer claims of "lost savings," meaning savings that consumers had expected to realize by being served by Utility.com or a comparable EGS but lost due to Utility.com's abrupt departure from the market. Although the Commission, in dictum, suggested that it had such jurisdiction to direct the use of the bond for this purpose, it did not order use of the bond to satisfy customer claims due to all available funds being directed to payment of the company's unpaid gross receipts tax. Regardless of the dictum in the *Utility.com Order* finding the ALJ's rationale relating to lost savings as persuasive, the Commission could not confer jurisdiction on itself; nor can other parties confer jurisdiction where none exists.

The Joint Complainants' reliance on the Commission's decisions in *Re Acquire Clean Treatment Sewage Company*, Docket No. I-2009-2109324 (Order entered May 25, 2012) and *Stephen Sutter, et al. v. Clean Treatment Sewage Company*, 104 Pa. PUC 146, 150 (2009), is similarly misplaced. In *Sutter*, the Commission had directed that an investigation be instituted pursuant to its statutory authority under Code Section 529 to determine whether the Commission should order a capable public utility to acquire Clean Treatment Sewer Company. Within the

context of the Code Section 529 investigation culminating in the issuance of the Order in *Clean Treatment Sewage* in 2012, the Commission reviewed availability fees that the utility had charged to customers. In *Sutter*, the utility had been directed to stop charging these fees because the company had failed to provide reasonably continuous and uninterrupted service to its availability customers. Pursuant to its statutory authority under Code Section 1312, the Commission ordered the utility to refund the availability fees. In reaching this determination, the Commission made one decision -- the utility failed to provide reasonably continuous and uninterrupted service to its availability customers -- and ordered refunds on that basis, with all customers being affected in exactly the same way.

Citing *HIKO*, the Joint Complainants further argue that "recently, the Commission recognized that its analysis and determination in an investigation and complaint proceeding by I&E relating to an EGS that had not provided promised savings to customers should be akin to the analyses and determinations of the Commission had all of the affected customers pursued individual complaints."[225] Contrary to the Joint Complainants' claims, the Commission's discussion in *HIKO* does not support an award of across-the-board refunds here. Rather, in determining an appropriate civil penalty, the Commission in *HIKO* merely recognized that had the 5,708 individual customers whose written guaranteed savings plans were not honored could have each filed a formal complaint with a penalty of up to $1,000 for each of those individual complaints. *Id.* at 35. The evidentiary record in that proceeding demonstrated that each of the 5,708 individual customers identified by I&E had received the same written promise of a 1% to 7% savings off their EDCs' PTCs, which the EGS did not fulfill. By contrast, in this matter, the Joint Complainants are requesting that the Commission treat all of BPE's customers as having

[225] Joint Complainants' M.B. at 112.

filed individual complaints when there is no evidence in the record of each customer's experience. Importantly, in *HIKO*, the Commission only considered the experiences of the customers who were on the guaranteed savings plan and for whom individual billing data was reviewed. Through that discussion, the Commission did not say that additional penalties could be imposed (or that refunds could be ordered) on the basis of an assumption that every other customer of the EGS had been similarly affected.

The Joint Complainants also rely on FTC cases in an effort to support their request for across-the-board refunds. Noting that the FTC seeks relief on behalf of large classes of injured customers, the Joint Complainants claim that these federal decisions establish that the Commission has authority to grant the same type of relief that is granted by federal courts.[226] A review of the cases cited by the Joint Complainants demonstrates that they are based on the FTC Act, and as such, do not and cannot confer authority on the Commission

In *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595 (9th Cir. 1993), the respondent sold heat detectors with the message that they could be relied upon as a life-saving fire warning device; every promotional material clearly conveyed the claim that the heat detectors provided the necessary warning to allow safe escape from a residential fire. Pursuant to authority expressly granted by the FTC Act,[227] the FTC brought a civil suit for redress in district court, which is empowered by the same law to order equitable relief even in the absence of proof of subjective reliance by each individual consumer. In ordering the respondent to pay refunds into an escrow count for consumers who purchased heat detectors and can make a valid claim for such redress, the Ninth Circuit Court explicitly grounded its ruling in the language of the FTC Act. *See also FTC v. Nat'l Bus. Consultants, Inc.*, 781 F. Supp. 1136 (E.D. La. 1991); *FTC v. Security Rare*

[226] Joint Complainants' M.B. at 113-115.
[227] 15 U.S.C. § 57b.

Coin & Bullion Corp., 931 F.2d 1312 (8th Cir. 1991) (federal court decisions were based on the specific language of the FTC Act, which is not similar in any way to the Code's grant of authority to the Commission or the Code's language governing Commission decisions).[228] Since these cases are founded in the express language of the FTC Act, they neither support the ordering of across-the-board refunds by the Commission nor forego the need for the Joint Complainants to establish detrimental reliance by consumers on BPE's promotional literature or the alleged statements of its sales agents in enrolling with BPE.

Again in this section of the Main Brief, the Joint Complainants seek to rely on the testimony of Ms. Alexander to prove what their consumer testimony does not. It is simply not appropriate for the Joint Complainants to make up for their shortcomings in producing evidence to prove their allegations by referring to the generalized and unsubstantiated testimony offered by Ms. Alexander. For instance, they refer to Ms. Alexander's testimony that "Blue Pilot's Pennsylvania customers relied on the statements made during the sales presentations that they would experience savings if they signed up with Blue Pilot."[229] Yet, as demonstrated above, much of the testimony offered in this proceeding by consumers suggested no such reliance. Several customers testified that no savings were promised or were guaranteed only for the period of the initial price, which promises were honored by BPE. Many customers offered no explanation for their understanding of expected savings, while others indicated that they relied on what their neighbor or employer told them in signing up with BPE. Still other customers

[228] Notably, the FTC Act does resemble the Consumer Protection Law, which allows the OAG to bring an action in civil court in the name of the Commonwealth to retrain by temporary or permanent injunction any unfair trade practices and gives the court issuing an injunction the discretion to direct the respondent to order restitution.
[229] Joint Complainants' M.B. at 114; OAG/OCA St. 1 at 33.

testified that they knew the rate would vary after the initial period and that they experienced savings for months or even years before the increases that occurred during the Polar Vortex.[230]

As to the specific amount of the refunds that the Joint Complainants seek to have BPE ordered to issue to consumers, which they quantify as $2,408,449 in their Main Brief, they use the difference between what the customers were billed and what the applicable PTC was for their EDC in January, February or March 2014.[231] As an initial matter, BPE notes that in the Motion for Entry of Default Judgment filed on June 22, 2015, the Joint Complainants sought to have BPE ordered to issue refunds in the amount of $1,387,570, which they described as representing the difference between what the customers were billed and what the applicable PTC was for their EDC from November 1, 2013 through March 31, 2014.[232] It appears that the Joint Complainants, either in June 2015, or in their Main Brief, have erred in calculating a proposed refund amount. Why the refund amount would increase when fewer months are used is unclear. Moreover, they fail to explain this discrepancy.

In any event, and aside from the legal issues concerning the ability of the Commission to direct an EGS to issue refunds, particularly to consumers who did not file complaints, the Joint Complainants have failed to provide a rationale for ordering the issuance of refunds for the difference between the applicable PTC and the BPE charges. While some consumers claimed that they were told that their price would not exceed the EDCs' PTC, this was certainly not the experience of all of the customers served by BPE during the relevant timeframe. Therefore, in the event that the Commission would determine to award refunds to consumers who have not

[230] BPE R.B. at 43-56.
[231] Joint Complainants' M.B. at 116.
[232] Motion at 61.

filed complaints or for whom no specific contract or billing information exists, there is no valid basis for using this benchmark.

As the Commission knows, the EDCs' PTCs are developed through a process that is consistent with the Commission's regulations and, at any given time, bear no resemblance to the wholesale market conditions that were driving BPE's retail prices in early 2014. *See Investigation of Pennsylvania's Retail Electricity Market: End State of Default Service*, Docket No. I-2011-2237952 (Order entered February 15, 2013). Indeed, EDCs have the opportunity to reconcile their prices so that they can recover their costs through later adjustments to their PTCs. Moreover, even the affidavit supplied by Dr. Estomin in support of the Joint Complaint indicated that looking only at real-time energy prices and day-ahead energy prices, which assumes no other costs and no profit margin, the "cost to serve residential customers" in four billing cycles in January 2014 and February 2014 would not be more than 23.0 cents per kWh.[233] Therefore, it makes no sense to require BPE to reduce its variable prices to the levels charged by the EDCs during that timeframe.

The inability of the Joint Complainants to develop a legitimate basis for calculating across-the-board refunds highlights the shortcomings of their proposal. It also reflects the fact that the retail prices charged by EGSs are not regulated by the Commission and demonstrates the slippery slope that the Commission will be on if it attempts to determine the prices that "should" have been charged by BPE.

While the Joint Complainants have not referred to any Commission precedent for finding that a regulated entity is engaged in "systematic and widespread business practices that violate the Public Utility Code," they argue that the Commission has the authority and jurisdiction to do

[233] Joint Complaint, Appendix B.

so. Even to the extent that the Commission can review the overall business practices of a regulated entity and make a determination that it has systematically violated its regulations, the legal question then evolves to what the Commission's authority and jurisdiction is in terms of providing relief. While the Commission may be able to take certain remedial measures designed to ensure future compliance by the regulated entity, the Code does not authorize the Commission to impose civil penalties or award restitution on the basis of a finding of systematic and widespread business practices. Rather, Code Section 3301 limits the Commission's authority to assessing civil penalties for violations of the Code, Commission regulations and Commission orders and to assessing penalties for continuing offenses. Since BPE has consented to a permanent license revocation as part of this proceeding, that outcome far exceeds -- in terms of severity -- any relief that the Commission is otherwise be authorized to award. The ultimate penalty for an EGS is to have its license revoked, which more than adequately addresses any "systematic and widespread business practices" found by the Commission as part of this proceeding.

IV. 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 23, 2016

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APPENDIX A

2016 WL 1086703
Only the Westlaw citation is currently available.
United States District Court,
E.D. Pennsylvania.

AMY SILVIS, on behalf of herself and all others similarly situated
v.
AMBIT ENERGY L.P, et al.

CIVIL ACTION NO. 14-5005
|
03/21/2016

MEMORANDUM

EDUARDO C. ROBRENO, J. MARCH 18, 2016

*1 Presently before the Court is the motion for summary judgment filed by Defendant, Ambit Northeast, LLC ("Ambit"), regarding Counts IX, XI, and XII of the amended complaint filed by Plaintiff, Amy Silvis ("Silvis"). In these counts, Silvis alleges breach of contract, unjust enrichment, and entitlement to declaratory relief. For the reasons that follow, the Court will grant Ambit's motion.

I. FACTS AND PROCEDURAL HISTORY

Silvis contracted with Ambit to supply her with electricity based on a variable rate plan under which she paid a "teaser" rate for the first month and thereafter the rate fluctuated. Silvis asserts that Ambit enticed her to switch her electricity supplier from Penelec with its marketing materials promising savings over other energy suppliers and competitive variable rates. Silvis quickly became disappointed with her decision when it became apparent that Ambit's variable rate plan was not saving her money, but was in fact causing her electricity bill to swell, at times, to nearly double what she would have paid under Penelec. Specifically, she alleges that: (1) in April and May 2014, Ambit charged her $.1369 per kilowatt hour ("kWh") while Penelec charged $.0771/kWh; (2) in June 2014, Ambit charged her $.1489/kWh while Penelec charged $.0823/kWh; (3) in July and August 2014, Ambit charged her $.1489/kWh while Penelec charged $.0925/kWh; (4) in September 2014, Ambit charged her $.1489/kWh while Penelec charged $.0849/kWh; and (5) in October 2014, Ambit charged her $.1489/kWh while Penelec charged $.0703/kWh.

In response, Silvis filed a class action complaint on August 27, 2014 alleging, inter alia, breach of contract. She asserted that Ambit "breached its agreements with Plaintiff and the Proposed Class Members by charging rates that did not meet the contractual obligation to provide a competitive rate based on market factors." Am. Compl., ¶ 105 (ECF No. 16). On December 23, 2014, Ambit filed a motion to dismiss and, on January 6, 2015, filed a motion to transfer venue. (ECF Nos. 19 & 21). On March 13, 2015, after a March 6, 2015 hearing on the motions, see (ECF No. 38), the Court denied the motion to transfer venue, (ECF Nos. 30 & 31), and granted in part and denied in part Ambit's motion to dismiss. (ECF No. 32). Specifically, the Court dismissed all defendants except for Ambit and dismissed all counts except for Count IX for breach of contract, Count XI for unjust enrichment[1] , and Count XII seeking declaratory relief regarding future services.

*2 On May 6, 2015, the Court entered a scheduling order setting a briefing schedule for Ambit's motion for summary judgment and for attendant discovery. (ECF No. 43).[2] On May 13, 2015, Ambit filed the pending motion for summary judgment regarding the remaining claims. (ECF No. 45). On October 9, 2015, Silvis responded to the motion after having conducted four months of discovery on the issues relevant to the motion. (ECF Nos. 51 & 52). Ambit filed its reply on October 26, 2015. (ECF Nos. 54 & 55).[3]

II. STANDARD

Summary judgment is appropriate if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A motion for summary judgment will not be defeated by 'the mere existence' of some disputed facts, but will be denied when there is a genuine issue of material fact." Am. Eagle Outfitters v. Lyle & Scott Ltd., 584 F.3d 575, 581 (3d Cir. 2009) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986)). A fact is "material" if proof of its existence or nonexistence might affect the outcome of the litigation, and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Liberty Lobby, 477 U.S. at 248.

The Court will view the facts in the light most favorable

to the nonmoving party. "After making all reasonable inferences in the nonmoving party's favor, there is a genuine issue of material fact if a reasonable jury could find for the nonmoving party." Pignataro v. Port Auth., 593 F.3d 265, 268 (3d Cir. 2010). While the moving party bears the initial burden of showing the absence of a genuine issue of material fact, meeting this obligation shifts the burden to the nonmoving party who must "set forth specific facts showing that there is a genuine issue for trial." Liberty Lobby, 477 U.S. at 250 (quoting First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 288 (1968)) (internal quotation marks omitted).

III. DISCUSSION

A. Contractual Ambiguity

"The court can grant summary judgment on an issue of contract interpretation if the contractual language being interpreted 'is subject to only one reasonable interpretation.' " Atkinson v. LaFayette Coll., 460 F.3d 447, 452 (3d Cir. 2006) (quoting Arnold M. Diamond, Inc. v. Gulf Coast Trailing Co., 180 F.3d 518, 521 (3d Cir. 1999)). "Where the language is clear and unambiguous, the express terms of the contract will control" and there is no need to consult extrinsic evidence to interpret the contract. Id.; Bohler-Uddeholm Am., Inc. v. Ellwood Grp., Inc., 247 F.3d 79, 92 (3d Cir. 2001). However, when the contractual language at issue is ambiguous in that "it is reasonably or fairly susceptible of different constructions and is capable of being understood in more senses than one and is obscure in meaning through indefiniteness of expression or has a double meaning," "a court may look to extrinsic evidence to resolve the ambiguity and determine the intent of the parties." In re Diet Drugs(Phentermine/Fenfluramine/Dexfenfluramine) Prod. Liab. Litig., 706 F.3d 217, 223 (3d Cir. 2013) (internal quotation marks omitted).

*3 Although the parties previously disagreed regarding which documents made up the contract, they are now in agreement. Both parties assert that the contract consists of two documents: (1) the Ambit Northeast, LLC Pennsylvania Penelec Service Area Residential Disclosure Statement ("Disclosure Statement"); and (2) the Ambit Pennsylvania Northeast, LLC Service Area Sales Agreement and Terms of Service ("Terms of Service"). Two provisions, one in each document, form the heart of the dispute. The Disclosure Statement provides that: "[y]our rate for the Initial Term and subsequent Renewal Terms may vary dependent upon price fluctuations in the energy and capacity markets, plus all applicable taxes." Am. Compl. Ex. C (ECF No. 16-3, p.2). The Terms of Service provides that: "[i]f you selected a variable rate plan, your initial rate will be shown at the time of your enrollment and thereafter rates are subject to change at the discretion of Ambit Energy." Am. Compl. Ex. B (ECF No. 16-2, p.3).

Silvis contends that these two provisions, when read together, stand for the proposition that Ambit has discretion to change the rate, but only if its decision is based upon price fluctuations in the energy and capacity markets. Silvis asserts that Ambit exercised its discretion to raise her rate as a result of other unnamed factors.

Ambit argues that the two provisions are clear and do not conflict with each other. It asserts that the provisions provide that Ambit has complete discretion to change the rate, and that one of the reasons it may change the rate is in response to price fluctuations in the energy and capacity markets. Silvis replies that, at a minimum, the provisions are ambiguous and summary judgment is inappropriate.

The Court agrees with Ambit's interpretation. The provision in the Terms of Service reflects that Ambit has discretion in setting the rate it charges for electricity, limited only by the good faith requirement read into contracts. See Bethlehem Steel Corp. v. Litton Indus., Inc., 488 A.2d 581, 600 (Pa. 1985)(providing that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement") (internal quotation marks omitted). The provision in the Disclosure Statement merely informs the customer that her rate may vary dependent upon price fluctuations in the energy and capacity markets, but does not otherwise limit Ambit's discretion in setting the rate based on other legitimate factors.

Silvis arrives at her interpretation by inserting the word "only" after "may" in the contract so that the provision reads that the rate "may [only] vary dependent upon price fluctuations in the energy and capacity markets." The word "only" does not appear in the provision, and the Court may not read it into the unambiguous language thereof. See e.g. Bohler-Uddeholm Am., 247 F.3d at 92. If a baseball team posts a sign reading that "the game may be cancelled dependent on rain," that sign is not a promise that it will not be cancelled for some other legitimate reason, such as the other team not showing up or the lights being out.

In that: (1) the parties now agree that the Terms of Service and Disclosure Statement make up the whole of their contract; (2) the contract includes an integration clause indicating that the contract expresses "the entire

agreement between the parties," (ECF No. 16-2, p. 4); and (3) the two provisions in the contract are unambiguous and not internally inconsistent, the Court will not look beyond the four corners of the contract to extrinsic evidence, nor will it incorporate new terms to change the contract's plain meaning.[4] See e.g. Atkinson, 460 F.3d at 452 (providing that the express contract terms control where the language is unambiguous); Rearick v. Pa. State Univ., 416 F. App'x 223, 225 (3d Cir. 2011) (providing that when presented with an unambiguous contract the "court should neither consider extrinsic evidence nor 'read into the contract a term . ..which clearly it does not contain' ") (alteration in original) (quoting Seven Springs Farm, Inc. v. Croker, 748 A.2d 740, 744 (Pa. Super. 2000)(en banc)). Having established the clear meaning of the relevant contractual provisions, the Court concludes that unless Ambit breached those provisions, its motion for summary judgment should be granted.

B. Breach of Contract and the Implied Covenant of Good Faith and Fair Dealing

*4 Under Pennsylvania law, a breach of contract claim includes the following elements: " '(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract[,] and (3) resultant damages.' " Ware v. Rodale Press, Inc., 322 F.3d 218, 225 (3d Cir. 2003) (alteration in original) (quoting CoreStates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa. Super. 1999)). Silvis contends in her amended complaint that Ambit "breached its agreements with Plaintiff and the Proposed Class Members by charging rates that did not meet the contractual obligation to provide a competitive rate based on market factors." Am. Compl., ¶ 105 (ECF No. 16).

There is no express provision in the contract requiring Ambit to provide a competitive rate. Moreover, as described above, the contract between Silvis and Ambit is an unambiguous, fully integrated document made up of the Terms of Service and the Disclosure Statement. See McGuire v. Schneider, Inc., 534 A.2d 115, 118 (Pa. Super. 1987), aff'd, 548 A.2d 1223 (Pa. 1988) (holding that a contract was fully integrated where it stated that it contained the parties' entire understanding, was not ambiguous, covered the disputed subject matter, and "convey[ed] no suggestion that anything beyond the four corners of the writing [was] necessary in order to ascertain the intent of the parties"). Thus, the Court may not add into the contract a term regarding competitive rates based on extrinsic evidence. See Bohler-Uddeholm Am., 247 F.3d at 92; Atkinson, 460 F.3d at 452; Rearick, 416 F. App'x at 225. As a result, Silvis has not alleged a breach of an express contractual provision.

Silvis also contends that Ambit breached the implied covenant of good faith and fair dealing by exercising its rate-adjusting discretion in bad faith. While every contract under Pennsylvania law includes a duty of good faith in performance, there is no separate cause of action for breach of the implied covenant of good faith and fair dealing. Bethlehem Steel Corp., 488 A.2d at 600; Burton v. Teleflex Inc., 707 F.3d 417, 432 (3d Cir. 2013). Instead, courts "utilize[ ] the good faith duty as an interpretive tool to determine the parties' justifiable expectations in the context of a breach of contract action." Northview Motors, Inc. v. Chrysler Motors Corp., 227 F.3d 78, 91 (3d Cir. 2000). That duty, however, "is not divorced from the specific clauses of the contract and cannot be used to override an express contractual term." Id.

Ambit recognizes that if Silvis is to succeed, because "the contract gives Ambit discretion to set rates, Plaintiff must establish that Ambit exercised this discretion in bad faith in order to prevail on her breach-of-contract claim." Def.'s Reply (ECF No. 54, p.15). Ambit asserts that Silvis has not provided any evidence to establish bad faith and that, in fact, the evidence shows that its rate adjustments were in good faith.

Ambit argues that its increased rates were due to a polar vortex in early 2014 which produced record cold temperatures. Ambit contends that Penelec, to which Silvis compared Ambit's rates, is a highly regulated entity which cannot immediately change its prices in accordance with the market, unlike Ambit. It also asserts that Penelec has multiple sources of income that help it absorb negative fluctuations in the energy market. Thus, Ambit contends, a side by side comparison of its rates and those of Penelec do not evidence bad faith pricing and Penelec does not represent the energy market as a whole. It also notes that Penelec did eventually raise its rate when it was authorized to do so, presumably in light of the polar vortex.

*5 Ambit further supports its assertion of good faith by citing to the partially sealed testimony of Michael Chambless, a co-founder of Ambit and its corporate representative. Chambless provided multiple reasonable factors that he asserted Ambit considered when setting its energy rates. He also divulged Ambit's profit margins to show the lack of price gouging. As noted by Chambless, Ambit is a for-profit company, but would not survive if it abused its discretion in setting rates, as Ambit's variable rate customers are under no contract and may switch providers at the end of any given monthly period. See Am. Compl. Ex. B (ECF No. 16-2, p.2).

Silvis does not proffer any legitimate evidence of bad faith. She argues that summary judgment is inappropriate because a jury must still decide whether Ambit violated the spirit of the agreement by unreasonably exercising its discretion in setting those higher rates. Silvis' argument ignores the fact that she has the burden at this stage to "set forth specific facts showing that there is a genuine issue for trial." Liberty Lobby, 477 U.S. at 250 (internal quotation marks omitted).

In its motion for summary judgment, Ambit has shown that there is no genuine dispute as to any material fact regarding its lack of bad faith. After four months of discovery, Silvis has provided no more than her bills from Ambit showing higher rates than those offered by Penelec and her declaration regarding her personal expectations.[5] The bills showing a higher price for energy than one other provider do not evidence bad faith and Silvis' expectations are irrelevant when viewing the contract within its four corners. Bohler-Uddeholm Am., 247 F.3d at 92; Atkinson, 460 F.3d at 452; cf Hassler v. Sovereign Bank, 374 F. App'x 341, 345 (3d Cir. 2010) (providing that, under New Jersey law, "[w]ithout bad motive or intention, discretionary decisions that happen to result in economic disadvantage to the other party are of no legal significance") (internal quotation marks omitted).[6] As such, Silvis has failed to rebut Ambit's showing that there is no genuine dispute as to any material fact. Therefore, summary judgment will be awarded in favor of Ambit and against Silvis.

IV. CONCLUSION

*6 For the reasons set forth above, the Court will grant Ambit's motion for summary judgment, entering judgment in its favor, and against Silvis.

An appropriate order follows.

All Citations

Slip Copy, 2016 WL 1086703

Footnotes

1 Pennsylvania law precludes a plaintiff from claiming unjust enrichment if she also pleads the existence of a valid, express contract. Wilson Area Sch. Dist. v. Skepton, 895 A.2d 1250, 1254 (Pa. 2006). When the Court entered its order on the motion to dismiss, the parties disputed which documents were included in the contract. Concluding that the contract's validity was at issue, and recognizing that a plaintiff may plead unjust enrichment as an alternative to an invalid contract, the Court refused to dismiss this claim. (ECF No. 32, p.4 n.5). As discussed below, the parties now agree on which documents formed the valid contract. Thus, Silvis may no longer maintain her claim for unjust enrichment and the claim will be dismissed.

2 At the parties' request, the time for discovery related to the motion was extended on August 24, 2015. (ECF No. 50).

3 The response and reply were filed partially under seal to protect allegedly confidential personal and business information. See August 11, 2015 Protective Order (ECF No. 49). The Court finds that direct discussion of the sealed information is unnecessary to decide the motion and consequently, there will be no need to file this memorandum under seal.

4 In addition to attempting to read the word "only" into this provision, Silvis appears to rely on several items of extrinsic evidence such as: her understanding of the contract as contained in her declaration; Ambit's marketing materials; and the impact of 52 Pa. Code § 54.5(c)(2), which requires energy providers to include in their variable pricing statements the "[c]onditions of variability (state on what basis prices will vary)." Whether Ambit's variable pricing statement violated this provision is not at issue here, and whether Silvis relied on this provision when signing the contract is immaterial given the prohibition on extrinsic evidence. The Court also notes that there is no evidence that Silvis was aware of the Code provision when entering into the agreement. The effect of the Code provision is also not the type of extrinsic evidence that could establish latent ambiguity in the contract. See Bohler-UddeholmAm., 247 F.3d at 94 n.3 (providing that "a party offers the right type of extrinsic evidence for establishing latent ambiguity if the evidence can be used to support a reasonable alternative semantic reference for specific terms contained in the contract," for example, whether "dollars" referenced in the contract are Canadian or U.S.). (internal quotation marks omitted).

5 As stated, Silvis has not provided any legitimate evidence of bad faith in response to the motion for summary judgment. However, in her brief, Silvis contends that "additional facts and discovery regarding the process by which Ambit determined the prices that it charged Ms. Silvis" are necessary, apparently indicating her belief that discovery of

the issues relevant to the summary judgment motion was not completed. (ECF No. 51, pp.11-12). She contends that "[a]s this Court is aware, discovery has been limited just to the issue of whether Ambit had unfettered discretion under the contract." (Id. n.6).

To the contrary, while the parties set aside discovery regarding class certification, the Court provided four months for discovery after Ambit filed its motion for summary judgment to investigate the claims raised in that motion. See (ECF Nos. 43 & 50). Silvis' counsel's own assertion supports this conclusion. Before questioning Chambless at his deposition, Silvis' counsel specifically stated, "before we get started, [defense counsel], it's my understanding that the purpose of this deposition, or the scope, rather, is limited to the topics raised in the amended motion for summary judgment." Pl. Resp., Ex. B, p.5 (ECF No. 51-2 filed partially under seal). Certainly, whether Ambit engaged in bad faith in setting Silvis' rate is an issue directly related to the summary judgment proceedings and should have been fully investigated during those four months. Silvis may not now legitimately claim that she was not afforded adequate time for discovery on this issue.

6 It is of little consequence that Hassler was decided under New Jersey law rather than Pennsylvania law, as "New Jersey provides a broader scope for breach of implied covenant of good faith and fair dealing claims than Pennsylvania." Akshayraj, Inc. v. Getty Petroleum Mktg., Inc., No. 06-cv-2002, 2009 WL 961442, at *1 n.1 (D.N.J. Apr. 8, 2009).

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APPENDIX B

2016 WL 1043618
Only the Westlaw citation is currently available.
United States District Court,
E.D. Pennsylvania.

John D. Orange, on behalf of himself and all others similarly situated, Plaintiff,
v.
Starion Energy PA, Inc; Starion Energy PA, Inc i/t/d/b/a Starion Energy; Starion Energy PA; Starion Energy PA, i/t/d/b/a Starion Energy; Starion Energy Inc; Starion Energy Inc, i/t/d/b/a Starion Energy, Defendants.

CIVIL ACTION NO. 15-773
|
Signed 03/16/2016

MEMORANDUM

Jones, II, J.

I. INTRODUCTION

***1** In accordance with an Order issued by this Court on September 18, 2015, Plaintiff filed an Amended Complaint in the above-captioned matter. Currently before the court is Defendant's[1] Motion to Dismiss said Complaint for failure to state a claim. For the reasons set forth below, Defendant's Motion shall be granted.

II. FACTUAL AND PROCEDURAL HISTORY

The within matter involves a class action suit in which Plaintiff alleges Defendant breached a contract to supply Plaintiff with energy. On or about September 4, 2013, Defendant agreed to supply Plaintiff's home with electricity. (Am. Compl. ¶ 25, ECF No. 26 at 7.) Plaintiff alleges that his decision to contract with Defendant was driven by his desire to save money. (Am. Compl. ¶ 15, ECF No. 26 at 5.)

The parties' contractual relationship was detailed in two documents: (1) a letter welcoming Plaintiff to the company, and (2) the sales agreement. (Am. Compl. Ex. A, ECF No. 26-1.) Defendant's letter set forth Plaintiff's initial rate and identified that rate as variable. (Am. Compl. Ex. A, ECF No. 26-1 at 2.) The sales agreement included a Terms of Service provision that set forth Defendant's variable pricing policy. (Am. Compl. Ex. A, ECF No. 26-1 at 3.) Under its terms:

> The Variable Rate will be calculated monthly based on the following Starion variable price methodology. The Variable Rate may change in response to market conditions, in any or all of the PJM, NEISO, NYISO, and MISO territories, including such factors as electricity market pricing, applicable taxes, transmission costs, utility charges, and other market price related factors, as determined by Starion's discretion.

(Am. Compl. Ex. A, ECF No. 26-1 at 3.)

Initially, the rate Plaintiff was charged was lower than that of the local supplier, Penelec. (Am. Compl. ¶ 25, ECF No. 26 at 7.) Eventually however, the rate rose to an amount that was higher than Penelec's rate. (Am. Compl. ¶¶ 25-26, ECF No. 26 at 7-8.)

In Plaintiff's originally-filed Complaint, he alleged breach of contract, breach of the covenant of good faith and fair dealing, and he sought declaratory relief. (Compl., ECF No. 1.) However, the parties subsequently stipulated to dismissal of Plaintiff's claims for breach of the covenant of good faith and fair dealing and declaratory relief. (Pl.'s Partial Stip. Dismissal, ECF No. 22.) Upon its own review of Plaintiff's Complaint, this Court recognized fatal deficiencies that would prevent the remaining breach of contract claim from going forward. Accordingly, Plaintiff was directed to show cause as to why the matter should not be dismissed for failure to state a claim. (ECF No. 23.) Plaintiff responded, claiming the Complaint demonstrated a breach of contract under the theory of good faith and fair dealing. (Pl.'s Resp. RSC, 6, ECF No. 24.) This Court dismissed Plaintiff's Complaint without prejudice and granted leave to amend. (ECF No. 25.)

***2** Plaintiff subsequently filed the instant Amended Complaint, again alleging one count of breach of contract. (Am. Compl., ECF No. 26.) Defendant now seeks dismissal of same, claiming: (1) no duty was breached under the contract; (2) any purported claim of breach of the covenant of good faith and fair dealing based upon

arbitrary pricing is without merit; and (3) 52 Pa. Code § 54.5 (c)(2)(i) was satisfied. (Def.'s Mot. Dismiss 9-11, ECF No. 28-2 at 8-11.) In response to the motion, Plaintiff maintains the contract was breached because Defendant did not consider market price-related factors in determining the variable rate. (Pl.'s Reply Def.'s Mot. Dismiss, ECF No. 29.)

III. STANDARD OF REVIEW

In deciding a motion to dismiss pursuant to Rule 12(b)(6), courts must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008) (internal quotation and citation omitted). After the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A claim has factual plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678 (citing *Twombly*, 550 U.S. at 556). This standard, which applies to all civil cases, "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 678; *accord Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) ("[A]ll civil complaints must contain more than an unadorned, the-defendant-unlawfully-harmed-me accusation.") (internal quotation marks omitted).

IV. DISCUSSION

a. Plaintiff's Amended Complaint Does Not Present a Plausible Claim for Breach of Contract Based Upon Breach of a Duty Imposed Therein

To establish a breach of contract under Pennsylvania law, Plaintiff must demonstrate: "(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract[,] and (3) resultant damages." *Ware v. Rodale Press, Inc.*, 322 F.3d 218, 225 (3d Cir. 2003) (citing *CoreStates Bank, N.A. v. Cutillo*, 723 A.2d 1053, 1058 (Pa. Super. Ct. 1999)).

Although there is no binding authority regarding contracts such as the one at issue, case law from the Northern District of Illinois provides a relevant assessment of a factual scenario similar to that involved herein. *See Zahn v. N. Am. Power & Gas, LLC*, Civ. No. 14 C 8370, 2015 U.S. Dist. LEXIS 67199, at *14 (N.D. Ill. May 22, 2015). In *Zahn*, a plaintiff alleged that an electricity supplier breached its contract because it did not charge rates based on the factors in the contract. *Id.* Upon review of the Complaint, the court found that the factual allegations contained therein only indicated that the defendant charged more for its energy than its local competitors. *Id.* The court further observed that the contract expressly stated that the rate could vary based on factors aside from market price, such as transportation, storage and other fees. *Id.* at *15. Because the Complaint only showed that the defendant charged a price higher than the local supplier, the court could not plausibly infer that the defendant did not charge rates based on the factors mentioned in the contract. *Id.*

As in *Zahn*, the factual allegations presented by Plaintiff herein do not support a claim that Defendant did not charge a rate based on the factors stated within the contract. Plaintiff asserts that Defendant breached the contract by not fulfilling its obligation to keep the variable rate tied to market conditions. (Am. Compl. ¶ 46, ECF No. 26.) Support for this assertion stems from the fact that the rate he was charged from December 2013 (approximately three months after Defendant began supplying Plaintiff's electricity) until April 2014 was substantially higher than the price charged by his local utility, Penelec. (Am. Compl. ¶ 25, ECF No. 26.) The contract makes clear, however, that the rate could change based on conditions in several other territories; namely, NEISO, NYISO and MISO. (Am. Compl. Ex. A, ECF No. 26-1 at 3.) Additionally, the contract states that items other than market pricing, such as transmission costs, taxes, utility charges and other market price-related factors would be used to determine the rate. (Am. Compl. Ex. A, ECF No. 26-1 at 3.) Because the contract provided that pricing and market conditions in other specific territories—as well as additional factors listed in the contract— could potentially play a part in pricing, it is not possible to draw a reasonable inference that Defendant breached same just by looking at how Defendant's price varied from the local supplier during a particular period of time when Starion's rates were lower at other times.

b. Plaintiff's Amended Complaint Does Not Appear to "Resurrect" a Claim of Breach of the Implied Covenant of Good Faith and Fair Dealing

*3 Defendant further argues that Plaintiff is improperly attempting to "resurrect" a claim a breach of implied

covenant of good faith and fair dealing via his Amended Complaint. (Def.'s Mot. Dismiss 10, ECF No. 28-2 at 11.) This Court does not necessarily agree with Defendant's assessment of Plaintiff's pleadings but will nevertheless address the claim on the merits.

Under the covenant of good faith and fair dealing, where discretion is given under a contract, the discretion must be exercised reasonably. *Haywood v. Univ. of Pittsburgh*, 976 F. Supp. 2d 606, 628 (W.D. Pa. 2013). District courts in this Circuit, however, do not agree on what is required to demonstrate a breach of the covenant. Some courts hold:

> A plaintiff must allege facts to establish that a contract exists or existed, including its essential terms, that defendant failed to comply with the covenant of good faith and fair dealing by breaching a specific duty imposed by the contract other than the covenant of good faith and fair dealing, and that resultant damages were incurred by plaintiff.

CRS Auto Parts, Inc. v. Nat'l Grange Mut. Ins. Co., 645 F. Supp. 2d 354, 369 (E.D. Pa. 2009) (citing *Sheinman Provisions, Inc. v. Nat'l Deli LLC*, Civ. No. 08-CV-453, 2008 U.S. Dist. LEXIS 54357, at *3 (E.D. Pa. July 15, 2008)).

Other courts do not require that a duty aside from the covenant of good faith and fair dealing be breached. *See Gallo v. PHH Mortgage Corp.*, 916 F. Supp. 2d 537, 550-53 (D.N.J. 2012) (finding that because no Pennsylvania state court has required any other duty be breached, plaintiffs only must demonstrate that the implied covenant was breached).

As was the situation presented to this Court prior to its first ruling, Plaintiff has failed to sufficiently plead a covenant was breached under either formulation. A breach cannot be sustained under *CRS* because Plaintiff cannot show that a duty under the contract, other than that of the covenant of good faith and fair dealing, was breached. Additionally, *Gallo* is not met because these facts do not show that Defendant acted unreasonably. Plaintiff's allegations simply indicate that Defendant's prices are higher than those of the local competitor. (Am. Compl. ¶¶ 25-26, ECF No. 26 at 7-8.) Because the contract stated that the price could be related to various market conditions in several territories, the difference in price alleged by Plaintiff does not permit the court to conclude that the price was set unreasonably. Inasmuch as neither formulation is met, an action for breach of contract under the theory of good faith and fair dealing cannot be sustained.[2]

c. Plaintiff's Amended Complaint Does Not State a Plausible Violation of 52 Pa. Code § 54.5(c)(2)(i)-(ii) in Support of a Breach of Contract Claim

*4 The Pennsylvania Code requires in part that a variable pricing statement detailing the conditions of variability, must be included in an energy supplier's contract. 52 Pa. Code § 54.5 (c)(2)(i)-(ii).[3]Plaintiff alleges that Defendant breached this particular aspect of the regulation by arbitrarily setting its prices. (Am. Compl. ¶ 45, ECF No. 26 at 12.) However, this allegation by Plaintiff constitutes a conclusory statement from which a reasonable inference of a breach cannot be drawn.

First, as previously discussed, the Amended Complaint does not contain non-conclusory averments that the rate was set without complying with the requirements of the contract. Second, the contract clearly states the conditions on which the rate could vary:

> The Variable Rate will be calculated monthly based on the following Starion variable price methodology. ***The Variable Rate may change in response to market conditions*** in any or all of the PJM, NEISO, NYISO, and MISO territories, including such factors as electricity market pricing, applicable taxes, transmission costs, utility charges, and other market price related factors, as determined by Starion's discretion.

(Am. Compl. Ex. A, ECF No. 26-1 at 3) (emphasis added).

In support of his new allegation that the contract at issue violated 52 Pa. Code § 54.5 (c)(2)(i)-(ii), Plaintiff continues to argue that Defendant's rates were not "based on" or "related to" market conditions, as described in the Disclosure Statement and Terms of Service. (Am. Compl. ¶¶ 44-47, ECF No. 26 at 12-13.) However, Plaintiff omits any reference to the contractual language directly applicable to changes in the rate: "***The Variable Rate may change in response to market conditions***[.]" (Am. Compl. Ex. A, ECF No. 26-1 at 3) (emphasis added). The

conditions of variability are clear, therefore this Court finds Plaintiff's breach of contract claim fails on this basis.

V. CONCLUSION

Plaintiff's Amended Complaint fails to plead a plausible breach of contract claim. The contract was not breached simply because the rate charged by Plaintiff's local supplier was less than Defendant's rate during a particular period of time. Further, Defendant has not breached the implied covenant of good faith and fair dealing because no other duty under the contract was breached and the facts do not show that rate was set unreasonably. Lastly, no breach occurred under 52 Pa. Code § 54.5(c)(2) because the applicable Terms of Service provision set forth how the variable rate would be determined.[4]

An appropriate Order follows.

All Citations

Slip Copy, 2016 WL 1043618

Footnotes

1 Movant Starion Energy PA, Inc. ("Starion") notes that Plaintiff has incorrectly identified it as "Starion Energy PA Inc. i/t/d/b/a Starion Energy, Starion Energy Pa [sic], Starion Energy PA, i/t/d/b/a Starion Energy, Starion Energy Inc., and Starion Energy Inc., i/t/d/b/a Starion Energy[.]" (Def.'s Mot. Dismiss 1, ECF No. 28-2 at 2.) Although this is not exactly how the matter is currently captioned, the court shall refer to the moving party as "Defendant" or "Starion" for purposes of this discussion.

2 In support of his argument, Plaintiff continues to allege that Defendant breached the contract by failing to consider market factors. In doing so, Plaintiff again refers to the rates charged by a local electric supplier, Penelec. First, Plaintiff's allegation is a conclusory statement which must be disregarded for purposes of assessing sufficiency of the pleadings. Secondly, nothing in the contract obligated Defendant to consider the rates of this one specific local provider. Instead, the contract specifically states in pertinent part that "The Variable Rate may change in response to market conditions in any or all of the PJM, NEISO, NYISO and MISO territories." (Am. Compl. Ex. A at 2, ECF No. 26-1 at 3.)

This Court further notes Plaintiff's contention that "[o]ther courts in this District have refused to dismiss on the pleadings breach of contract claims with substantially the same contracts." (Pl.'s Reply 10, ECF No. 29 at 10.) This Court has reviewed the Complaints in the two cases cited by Plaintiff, both of which were prepared by the same attorney involved herein. The contracts at issue in those cases are in no way "substantially the same." *See Silva v. Ambit Energy, L.P., et al.*, Civ. No. 14-5005, ECF No. 16 Ex. B; *Sobiech v. U.S. Gas & Electric, Inc.*, Civ. No. 14-4464, ECF No. 17-1 at 2-5.

3 The version of Section 54.1(c)(2)(i)-(ii) in effect at the time the contract at issue was executed, provided as follows:

> The contract's terms of service shall be disclosed, including the following terms and conditions, if applicable:
>
> * * * *
>
> (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.

52 Pa. Code § 54.5(c)(2)(i)-(ii) (2007) (amended 2014).

In this case, Plaintiff chose the Starion Simple plan, which did not include a price cap/limit on variability. The cap only applied to the Starion Smart plan.

4 Plaintiff has not sought leave to amend again. However, any such request would be denied, as the express terms of the contract are clear and any additional amendment would be futile.

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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Dated this 23rd day of March, 2016.

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