

COMMONWEALTH OF PENNSYLVANIA



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May 9, 2016

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

RE: Commonwealth of Pennsylvania, by Attorney General
KATHLEEN G. KANE, Through the Bureau of Consumer
Protection,
And
TANYA J. McCLOSKEY, Acting Consumer Advocate,
Complainants

v.
Blue Pilot Energy, LLC

Respondent

Docket No. C-2014-2427655

Secretary Chiavetta:

Pursuant to the request of ALJs Barnes and Cheskis to limit the amount of confidential material referenced in briefs and in follow-up to the May 3, 2016, letter filed by counsel for Blue Pilot, enclosed please find the updated Main and Reply Briefs of Joint Complainants Commonwealth of Pennsylvania, Bureau of Consumer Protection and the Office of Consumer Advocate in the above matter. The briefs have been updated to remove some confidential designations pursuant to the agreement of Blue Pilot, OAG and OCA.

Copies have been served as indicated on the enclosed Certificates of Service.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Candis A. Tunilo".

Candis A. Tunilo
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Enclosure

cc: Honorable Elizabeth Barnes, ALJ
Honorable Joel Cheskis, ALJ
Certificates of Service

*220771

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Commonwealth of Pennsylvania, by	:	
Attorney General KATHLEEN G. KANE,	:	
Through the Bureau of Consumer Protection,	:	
	:	
And	:	
	:	
TANYA J. McCLOSKEY, Acting Consumer	:	
Advocate,	:	
Complainants	:	
	:	Docket No. C-2014-2427655
v.	:	
	:	
BLUE PILOT ENERGY, LLC,	:	
Respondent	:	

REPLY BRIEF OF JOINT COMPLAINANTS

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UPDATED TO REMOVE CONFIDENTIAL DESIGNATIONS

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I. INTRODUCTION

The Office of Consumer Advocate (OCA) and the Office of Attorney General (OAG) (collectively Joint Complainants) submit this Reply Brief in response to the arguments raised in the Main Brief of Blue Pilot Energy, LLC (Blue Pilot or the Company). The Company's arguments in its Main Brief were thoroughly addressed in the Joint Complainants' Main Brief, or were rejected in prior Orders of the Administrative Law Judges (ALJs) and the Public Utility Commission (Commission) in this case. The Joint Complainants will not repeat here the extensive discussion contained in the Joint Complainants' Main Brief but will highlight the key failings and flaws in the positions of the Company.

Suffice it to say that nothing contained in the Company's Main Brief alters the Joint Complainants' position that Blue Pilot violated the Public Utility Code and multiple Commission regulations and Orders, using unfair, misleading and deceptive marketing and sales practices to persuade customers to switch to Blue Pilot, and then charging the customers any price that Blue Pilot saw fit to charge, regardless of its Disclosure Statement or promises in its advertising and marketing. The Joint Complainants have established by the testimony of their expert witnesses, non-consumer witness, and the testimony of 83 consumers who provided their own personal, first-hand experiences with Blue Pilot, a pattern and practice of noncompliance with the Public Utility Code and the Commission's regulations and Orders, including the regulations that incorporate the standards of the consumer protection laws of this Commonwealth.

Blue Pilot failed in its Main Brief, as well as throughout this proceeding, to respond in any meaningful way to the substantial evidence adduced by the Joint Complainants. Moreover, Blue Pilot's Main Brief rests on thinly constructed legal arguments that try to limit the Commission's jurisdiction and authority to enforce the Public Utility Code and its regulations, or

a shifting of blame approach that attempts to blame the weather,¹ blame the consumer victims, or blame the Commission and its website, PaPowerSwitch.com, or Electric Distribution Companies (EDCs) or blame the OCA and OAG for pursuing this case.

Blue Pilot devotes the bulk of its Main Brief to addressing issues that have already been decided by the ALJs or Commission, such as the Commission's authority over various issues in this case or the admission of consumer testimony into the record. Blue Pilot simply ignores the overwhelming evidence that consumers from all across the Commonwealth consistently identified the same illegal business practices, attacking this testimony as lacking in credibility. While the ALJs will make the ultimate determination on the credibility of all of the sworn witnesses in this proceeding, Blue Pilot's bald assertions are nothing more than a further attempt to divert attention from the Company's many failings demonstrated by the testimony of consumers and the expert and non-consumer witnesses presented by Joint Complainants. Indeed, Blue Pilot did not present a single witness to rebut the first hand experiences of the consumers that testified in this proceeding. In fact, Blue Pilot's bare assertions in its Main Brief have no basis in fact or in the record, as the testimony of the consumer witnesses demonstrated.

¹ In support of its argument that price increases experienced by retail consumers were the "direct result of wholesale energy market volatility resulting from the very cold weather that the region endured in January and February 2014," Blue Pilot points to the testimonies of Commissioner Witmer before the Consumer Affairs Committee of the Pennsylvania House of Representatives on April 10, 2014 and Acting Consumer Advocate Tanya J. McCloskey before the Pennsylvania Senate Consumer Protection and Professional Licensure Committee on April 1, 2014. See Blue Pilot M.B. at 4-7. Joint Complainants submit that Blue Pilot's reliance on these testimonies is entirely misplaced, as these testimonies do not serve as a defense to Blue Pilot's violations of the Public Utility Code and the Commission's regulations and Orders. As Joint Complainants stated in their Main Brief, this case is not about the Polar Vortex or a few months of high prices. This case is about what the Polar Vortex brought to light about Blue Pilot's operations and sales and marketing activities in Pennsylvania. Consistently, in her testimony on April 1, 2014, Acting Consumer Advocate Tanya J. McCloskey did not suggest that the problems identified by consumers following the Polar Vortex were a result of the Polar Vortex or increases in the wholesale market prices. Rather, Ms. McCloskey discussed several problems with the practices and operations of some supplier companies that the OCA identified as a result of the Polar Vortex. See gen'lly Testimony of Tanya J. McCloskey Acting Consumer Advocate Before the Pennsylvania Senate Consumer Protection and Professional Licensure Committee, http://www.oa.state.pa.us/Testimony/2014/Testimony%20of%20Tanya%20McCloskey%20Re.%20Variable%20Rate%20Plans_04-01-2014.pdf at 5- 10 (April 1, 2014). There was no moratorium or other hiatus imposed on the applicability or enforcement of the Public Utility Code or the Commission's regulations or Orders during early 2014.

The Company's response to the facts and evidence adduced by Joint Complainants' expert witnesses is equally lacking. Blue Pilot has mounted no substantive defense to the facts and evidence reflected in the testimonies of Joint Complainants' expert witnesses, and indeed, one is not possible. The Joint Complainants provided detailed expert testimony based on Blue Pilot's own business documents and call recordings that Blue Pilot's marketing and sales practices, its oversight and training of its sales agents, and its disclosures and pricing practices are not in compliance with the Public Utility Code or the Commission's regulations and Orders governing the retail electric market. This evidence included the Company's own documents and scripts, which were shown to be false and deceptive on their faces, and a detailed review of sales and third party verification call recordings that fully demonstrated the systemic failings of the Company that resulted in this pattern and practice of unfair and deceptive conduct.

The Company does not rebut that evidence but instead, simply tries to rely on the conclusory statements made by the Company's counsel in its Main Brief that are not supported by any testimony, documentation or evidence in this proceeding. Although the Company's Main Brief is replete with conclusory statements about how Blue Pilot conducts its business, the Company did not provide any testimony, documents or evidence to support these vague claims and provided no facts or evidence to contradict the Joint Complainants' expert testimony. This stands in stark contrast to the detailed evidence provided by Joint Complainants' expert witnesses and the pervasive and extensive consumer witness testimony.

The Joint Complainants provided detailed Findings of Fact in Appendix C of their Main Brief regarding the evidence adduced in this proceeding. Among the salient points shown are the following:

- Blue Pilot's promotional materials, including its Welcome Letter, contained deceptive and misleading statements about savings, lower bills, and a high

level of customer service and other benefits that were not provided by the Company. OAG/OCA M.B. at App. C at ¶¶ 10-11, 43-44.

- Blue Pilot’s sales scripts used in Pennsylvania in 2013 emphasized the potential for “lower rates” and used the term “better rate” to refer to Blue Pilot’s prices. OAG/OCA M.B. at App. C at ¶¶ 28.
- Blue Pilot did not regularly deliver savings to its customers, and overall, Blue Pilot charged its customers more than the applicable [Prices to Compare (PTCs)] in effect for each EDC during the months December 2013 through March 2014. OAG/OCA M.B. at App. C at ¶¶ 61-62.
- The Company’s disclosure statement is in very fine print and does not contain any substantive information about the variable price feature. OAG/OCA M.B. at App. C at ¶¶ 45, 52.
- Blue Pilot was unable to provide any calculation that was used to determine its retail prices or document how its retail prices conformed to its Disclosure Statement. OAG/OCA M.B. at App. C at ¶¶ 54.

These unfair and deceptive practices, along with Blue Pilot’s lack of proper training, oversight and discipline of its sales agents, have significantly harmed Pennsylvania consumers and the retail market. These harms were compounded by Blue Pilot’s failure to provide adequate and reasonable customer service or to treat customers fairly and in good faith when customers attempted to reach Blue Pilot to obtain some relief.

Blue Pilot appears to rely on the voluntary surrender of its EGS license and exit from the retail market in Pennsylvania as a resolution to the Joint Complainants’ allegations. See e.g. Blue Pilot M.B. at 3 (“Nearly one year ago, [Blue Pilot] fully exited the Pennsylvania retail market, voluntarily surrendering its EGS license. Yet, this litigation persists [...]”). The attempt to voluntarily surrender its EGS license and exit from the Pennsylvania retail market provides no basis to dismiss the Joint Complaint or forego appropriate remedies for the many violations demonstrated by the Joint Complainants. The Commission has made clear its intent to foster a robust retail energy market in Pennsylvania and to meet its responsibility to monitor and enforce

the market rules. In two recent cases concerning complaints against an Electric Generation Supplier (EGS), Chairman Gladys M. Brown issued a Statement declaring that:

The Commission has and will continue to work diligently to foster a robust energy market in Pennsylvania. This mission requires the PUC not only to properly design the market, but also to effectively monitor and enforce the market. It is unfortunate that the PUC has come to this juncture with these two Complaints. However, these proceedings serve as an example of the Commission's responsibility to be a retail energy market watchdog. This outcome today serves as a reminder to the retail supply industry that the Commission will not hesitate to take action against bad actors. More importantly, I hope these proceedings provide some consolation to all utility customers that the Commission will always work tirelessly for their protection.

Statement of Chairman Gladys M. Brown, December 3, 2015, at 2.² This case requires that the Commission enforce its regulations designed to inform, educate and protect consumers as required by the Electricity Generation Customer Choice and Competition Act, 66 Pa. C.S. Ch. 28 (Choice Act), and provide appropriate remedies for the many violations of the Commission's regulations, the unfair and deceptive marketing practices that induced customers to switch to Blue Pilot and the failure to charge prices that were in any way meaningfully tied to the Company's Disclosure Statement.

Joint Complainants respectfully submit that Blue Pilot's significant failings have harmed Pennsylvania consumers and the Pennsylvania retail market. The demonstrated violations are significant and widespread and must be remedied. Joint Complainants have provided a comprehensive set of remedies, including appropriate refunds to consumers, civil penalty and permanent license revocation that will address the Company's violations and provide some relief to Blue Pilot's customers. Joint Complainants urge the ALJs and the Commission to adopt the

² See Pa. PUC Bureau of Investigation and Enforcement v. HIKO Energy, LLC, Docket No. C-2014-2431410, Order (Dec. 3, 2015) (Rejected the exceptions of HIKO and affirmed civil penalty of approximately \$1.8 million) and Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. HIKO Energy, LLC, Docket No. C-2014-2427652, Order (Dec. 3, 2015) (Adopted the Initial Decision of Aug. 21, 2015 that recommended approval of the Joint Petition for Settlement in its entirety without modification, requiring over \$2 million in refunds, \$25,000 in hardship fund contributions, and various modifications to business practices).

comprehensive remedies supported in the Joint Complainants' Main Brief and in this Reply Brief.

II. LEGAL STANDARDS

In its Main Brief, Blue Pilot identifies and discusses several legal standards including subject matter jurisdiction, burden of proof and substantial evidence, and due process. See Blue Pilot M.B. at 34-36, 38-39. Joint Complainants extensively discuss applicable legal standards in their Main Brief at, *inter alia*, Sections II (Legal Standards), IV.A (Establishment of Pattern and Practice), and IV.D.3.b (Commission Authority and Jurisdiction to Order Refunds), and will not repeat these discussions herein. Further, Joint Complainants address Blue Pilot's assertions regarding due process, as applicable, *infra*.

Blue Pilot, however, also identifies Uncorroborated Hearsay Evidence as a legal standard in this matter and asserts that the statements by Blue Pilot's sales agents referred to by the consumer witnesses in their testimonies are hearsay and cannot support a legal conclusion by the Commission. See Blue Pilot Main Brief at 36-38, citing Gruelle c/o Toll Diversified Properties, Inc. v. Blue Pilot Energy, LLC, Docket No. C-2015-2463573, Opinion and Order (Dec. 22, 2015). Joint Complainants submit that Blue Pilot's reliance on Gruelle is misplaced. The Initial Decision in Gruelle was adopted without Commission action pursuant to the Commission's procedural rules. See Id. at 1. See also 52 Pa. Code § 5.536(a) (If no exceptions are filed, the decision of the administrative law judge will become final without further Commission action). Further, although the ALJ found that the commercial consumer complainant's testimony regarding sales contact was hearsay, the ALJ also found that the complainant's testimony about the sales contact was not credible. Gruelle c/o Toll Diversified Properties, Inc. v. Blue Pilot Energy, LLC, Docket No. C-2015-2463573, Initial Decision at 17-18 (Oct. 27, 2015).

In a more recent decision, however, the Commission specifically addressed this issue and held that consumer testimony about an EGS's sales contact that is based upon first-hand contact with the EGS's sales agent is not uncorroborated hearsay. See Herp v. Respond Power, LLC, Docket No. C-2014-2413756, Opinion and Order at 28 (Jan. 28, 2016). The Commission also held that in addition to constituting first-hand knowledge of the contents of the oral sales presentation, the EGS sales agent's oral sales representations constitute a party-opponent admission, which is an exception to the hearsay rule regardless of the availability of the agent as a witness. Id. at 29, citing Pa. R.E. 803(25).

Joint Complainants submit that the Commission's reasoning and holding in Herp controls, and as such, the consumer witnesses' testimonies regarding their sales contacts with Blue Pilot's sales agents are not uncorroborated hearsay.

III. SUMMARY OF ARGUMENT

Joint Complainants fully articulated their Summary of Argument in their Main Brief. Nothing in the Company's Main Brief alters the relief that Joint Complainants submit is necessary and appropriate in this proceeding. As such, Joint Complainants incorporate herein Section III-Summary of Argument of their Main Brief.

IV. REPLY ARGUMENT

A. Establishment of Pattern and Practice.

1. Introduction.

Joint Complainants have extensively briefed the issues surrounding the establishment of pattern and practice in their Main Brief and incorporate the discussion herein. OCA/OAG M.B. at 21-27, 106-115. In summary, adjudications based upon a sampling of customers' experiences with a particular company are more the rule than the exception before this Commission.

Moreover, a rule against such consideration would undercut both the Attorney General's and the OCA's abilities to bring cases in their representative capacities under their respective statutes. OAG/OCA M.B. at 106-115. Nonetheless, the Joint Complainants will briefly address each of Blue Pilot's points relating to the establishment pattern and practice. In summary, Blue Pilot's arguments relating to the establishment of pattern and practice can be categorized as follows: (1) the Commission lacks jurisdiction to entertain pattern of practice claims and cannot entertain class actions; (2) Joint Complainants cannot seek relief on behalf of individual consumers; (3) it is not appropriate to utilize the residual rule to the hearsay exception to admit pattern and practice evidence into the record; and (4) Joint Complainants have not presented adequate pattern of practice evidence for a finding thereof. Blue Pilot M.B. at 39-59.

2. The Commission May Base its Decision on the Patterns of Practices Demonstrated through the Expert and the Customer Testimonies and Exhibits.

Blue Pilot asserts that the Commission does not have jurisdiction to use pattern and practice evidence. Blue Pilot M.B. at 43-45, 46-50. Joint Complainants would note that the type of evidence and the amount of evidence that the Commission may use is really not a jurisdictional issue at all. Further, Blue Pilot's suggestion that a particular provision of the Public Utility Code would have to support the use of this type of evidence is a false premise. Blue Pilot M.B. at 43-44. The Commission clearly has the power to apply the law pertaining to the various statutes and regulations governing the EGS retail marketing and sales practices that Joint Complainants have invoked in the Joint Complaint. See e.g. Choice Act. The Commission also clearly has the authority to accept all types of relevant evidence into the record and to make determinations based on that evidence. 66 Pa. C.S. § 332. Blue Pilot's suggestion that some additional statutory authority is required to allow the Commission to consider a particular type of

evidence is erroneous. See e.g. Blue Pilot M.B. at 43. The Commission has the discretion to decide what type and what quantum of evidence is necessary to support claims alleging regulatory violations and whether the phrase “pattern and practice” is used or not, that discretion does not change.

The Company’s suggestions that Joint Complainants should have used this phrase in the Joint Complaint or that they should have moved any testimony into the record through the proposed pattern and practice approach in order to rely on it for disposition in this matter are also plainly incorrect. See Blue Pilot M.B. at 43. In addition to the extensive consumer testimony admitted into the record in this matter, the expert testimony of Barbara Alexander addresses virtually *nothing but* Blue Pilot’s marketing, billing and customer service practices from an overall company operations perspective and incorporates information from the sworn testimony of the consumer witnesses as well as a review of the Company’s sales and verification call recordings. See OAG/OCA St. 1. Further, Joint Complainants’ expert witnesses Dr. Steven L. Estomin and Ashley E. Everette address virtually *nothing but* the Company’s Disclosure Statement, calculations of pricing for *all* customers and whether *any* customers saved money. See gen’ly OAG/OCA St. 2; OAG/OCA St. 3. For the Company to suggest, after this expert testimony and the testimony of 83 customers,³ that it did not understand that the Joint Complainants were challenging the Company’s overall practices as violating the Public Utility Code and the Commission’s regulations and orders is wholly without merit and must be rejected.

3. Joint Complainants Are Acting in Their Representative Capacities as Government Agencies.

³ It is well established that the Commission may draw inferences from the specific probative factual evidence before it in order to reach the legal conclusion that Blue Pilot engaged in certain practices generally. See e.g. MKP Enters. v. Underground Storage Tank Indemnification Bd., 39 A.3rd 570, 580-582, 2012 Pa. Commw. LEXIS 62 at **21-25 (Pa. Commw. Ct. 2012). Indeed, it is the job of a decision maker to determine the nature and extent of company actions and decide whether and to what extent Commission regulations were violated, based upon the evidence before it, even if not every single affected customer has testified.

Blue Pilot asserts that Joint Complainants do not have standing to represent individual consumers or seek relief on their behalf. Blue Pilot M.B. at 45-46. Blue Pilot further asserts that this action is akin to a class action, although the Commission does not have the jurisdiction to certify the class or hear such an action, if it did, the requirements for class certification could not be met. Id. at 46-50. Also, Blue Pilot asserts that the Commission may not rely on evidence from some consumers to determine that an EGS committed a violation of the Public Utility Code or the Commission's regulations in its dealings with all consumers, but instead, the Commission must consider the number of customers affected in determining appropriate penalties. Id. at 57-59.

As discussed in detail in Joint Complainants' Main Brief, Joint Complainants bring this action appropriately within their statutory authority. See OAG/OCA M.B. at 108-110. The ALJs have consistently recognized that in filing the Joint Complaints against EGSs, the OCA and OAG are acting in their representative capacities as government agencies on behalf of the consumer interest and public interest as a whole, not on behalf of the specific individual consumers who filed complaints. See e.g. Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric, Docket No. C-2014-2427656, Order Denying Motion In Limine (December 1, 2014). Further, the Commission most recently addressed the OCA's authority to represent consumers who have not filed complaints with the Commission and held that any attack on the statutory authority of the OCA to bring an action on behalf of an EGS's customers is "sufficiently foreclosed." See Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. Energy Services Providers,

Inc. d/b/a Pennsylvania Gas & Electric, Docket No. C-2014-2427656, Tentative Form Opinion and Order at 64 (Mar. 9, 2016). As such, Joint Complainants submit that Blue Pilot's assertions regarding Joint Complainants' standing should be rejected.

Additionally, Joint Complainants submit that Blue Pilot's assertions and comparisons of this action to a class action are misplaced and not appropriate. Joint Complainants discussed in detail the Commission's authority and jurisdiction to decide this matter and incorporate the discussions herein. See OAG/OCA M.B. at 8-18, 21-27, and 106-115. Further, Joint Complainants note that as discussed in their Main Brief, the mailing of documents to an entire customer group or using a specific sales script is part and parcel of showing that a pattern and practice of violations has occurred. See OAG/OCA M.B. at 30-32. While perhaps not using the phrase "pattern and practice," the Commission regularly has had to consider documentary, statistical and testimonial evidence throughout its history to determine whether the actions of utilities, their employees and their contractors comply with the Public Utility Code and regulations promulgated thereunder and Commission orders – without hearing from every single customer individually. See OAG/OCA M.B. at 21-22.

Embodied in the Joint Complainants' expert testimonies are the conclusions that support overall findings relative to Blue Pilot's widespread unfair and deceptive business practices. See OAG/OCA St. 1; OAG/OCA St. 2; and OAG/OCA St. 3. The Commission does not have to rely solely on individual customer testimony of a subgroup of Blue Pilot customers. It is clear that the individual variations in the customers' understanding of written materials or experience with Blue Pilot sales agents did *not* interfere with Joint Complainants' experts' abilities to draw conclusions about the Company's practices and the effects upon customers' quality of electric

service across-the-board throughout Pennsylvania.⁴ With regard to the Commission's determination of an appropriate penalty for Blue Pilot's violations of the Public Utility Code and the Commission's regulations and Orders, Joint Complainants discuss these factors extensively in their Main Brief at pages 89-104 and incorporate the discussion herein.

In conclusion, Joint Complainants' experts provided extensive testimony regarding Blue Pilot's patterns and practices, which were misleading and deceptive and violated the Commission's regulations and Orders. Joint Complainants' experts' testimonies were corroborated by the customers' testimonies.

4. Issues Regarding the Admission of Pattern of Practice Evidence Are Moot.

Blue Pilot asserts that it is not appropriate for the Joint Complainants or the ALJs to rely on the residual exception to the hearsay rule, F.R.E. 807, in this proceeding. Blue Pilot M.B. at 52-56. Joint Complainants submit that Blue Pilot's assertions in this regard are now moot, as the evidentiary record in this matter is closed. Joint Complainants rely exclusively on evidence in the record in this matter in meeting their burden of proving the allegations in the Joint Complaint. See gen'ly OAG/OCA M.B.

Joint Complainants presented as many consumer witnesses as possible over the allotted hearing days. Joint Complainants note that there is a difference between the *admission of evidence* of pattern of practice (*i.e.* some unauthenticated or hearsay evidence may be permitted

⁴ Joint Complainants submit that Blue Pilot's reliance on Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 131 S.Ct. 2541(2011), is misplaced. In Wal-Mart Stores, Inc., Plaintiffs, current and former female employees of Wal-Mart, brought a discrimination class action, and the District Court certified the class, which was then affirmed by the Court of Appeals. 564 U.S. 338, 346, 131 S.Ct. 2541, 2549. The United States Supreme Court reversed the class certification, holding that plaintiffs had not shown sufficient commonality in employment decisions by various Wal-Mart supervisors nationwide when the decisions were wholly discretionary by the supervisors and not based upon company policy. 564 U.S. 338, 352-56, 131 S.Ct. 2541, 2552-55. Joint Complainants submit that, as a class action brought pursuant to Federal law, Wal-Mart Stores, Inc. carries moderate persuasiveness in this matter. As described in Joint Complainants' Main Brief, however, the violations of the Commission's regulations and Orders was "company-wide policy" at Blue Pilot in that the sales agents' marketing scripts and the Company's promotional materials, Disclosure Statement and billing practices were not discretionary but instead, applied and utilized across the board pursuant to Company policy. See e.g. OAG/OCA M.B. at Sections IV.B (Company Operations) and IV.C (Joint Complaint).

into the record if adequately corroborated by other authenticated, non-hearsay evidence) and the *finding of a pattern of practice in the operation of a business* (i.e. that the pattern of practice in the company's daily operations affects all of its customers). In this case, the *admission* of pattern of practice evidence is moot, as all the evidence in this matter was authenticated and overcame hearsay or other evidentiary challenges. What is not moot at this point is Joint Complainants' request for the Commission to find that Blue Pilot *engaged in a pattern of practice* in its operations as an EGS in the Commonwealth of, *inter alia*, misleading and deceiving consumers and failing to charge prices that conformed to the Company's Disclosure Statement.

B. Company Operations.

Joint Complainants fully discussed this topic in Section IV.B of their Main Brief and incorporate the discussion herein. To the extent Blue Pilot raised issues regarding the Company's operations generally, the issues are addressed in other sections of this Reply Brief and will not be repeated here.

C. Joint Complaint.

1. Count I – Failing to Provide Accurate Pricing Information.

In its Main Brief, Blue Pilot asserts that its Disclosure Statement complies with the Commission's regulations. Blue Pilot M.B. at 60, 61-72. Blue Pilot further asserts that the Commission's regulations do not require that variable pricing disclosure statements contain information that would allow customers to determine how much they would or could be charged or precisely how the price would be calculated by the Company. *Id.* Also, Blue Pilot asserts that if such level of information is required in variable pricing disclosure statements, Blue Pilot's due process rights would be violated because "it could not have known that this is the standard that was expected." *Id.* Finally, Blue Pilot asserts that it cannot be found to have violated Sections

111.12(d)(1) or 54.43(f) of the Commission's regulations, 52 Pa. Code §§ 111.12(d)(1) and 54.43(f), for lack of Commission jurisdiction and vagueness. Blue Pilot M.B. at 61, 73-76.

a. Blue Pilot's Disclosure Statement Does Not Comply with the Commission's Regulations.

Blue Pilot asserts that its Disclosure Statement complies with 52 Pa. Code § 53.5(c) because the variable pricing language states, *inter alia*, (1) it is a variable rate plan; (2) the customer's initial rate and initial rate guarantee period; and (3) after the initial rate guarantee period, Blue Pilot "may increase or decrease your rate based on several factors, including changes in wholesale energy market prices in the PJM markets." Blue Pilot M.B. at 61-62. Blue Pilot asserts that because it did not offer limits on price variability, none were included, which complies with the regulation. *Id.* at 62. Also, Blue Pilot relies on the ALJ's findings regarding the Company's Disclosure Statement in Dubois Manor Motel c/o Nisha Patel v. Blue Pilot Energy, LLC, Docket No. C-2014-2433817, Initial Decision (Dec. 2, 2015). *Id.* Further, Blue Pilot asserts that its level of disclosure of the conditions of variability "is similar to countless EGS disclosure statements approved by the Commission and in use in Pennsylvania." Blue Pilot M.B. at 62-63.

As Joint Complainants discussed in their Main Brief, the Commission's customer choice standards "are high, specific, and unequivocal" and "are intended to ensure fairness and integrity in the competitive market" so that "consumers [may] make informed choices and the market flourish." See Kiback v. IDT Energy, Inc., Docket No. C-2014-2409676, Opinion and Order at 24 (Aug. 20, 2015). As the Commission explained in promulgating its regulations:

Section 2807(d)(2) of the act clearly and explicitly directs the Commission to establish regulations requiring electricity providers to furnish adequate and accurate information in a format that is understandable to consumers. That provision also specifically requires that customers be provided with information that allows them to compare prices and services on a uniform basis. Through our

adoption of this final rulemaking order, we simply seek to fulfill the statutory objectives of ensuring that consumers receive accurate and adequate information and are sufficiently equipped to make informed decisions about alternative generation sources.

See Customer Information Disclosure for Electricity Providers, 28 Pa. B. 3780, *5 (Aug. 8, 1998) (also found at Docket No. L-970126, Final Rulemaking Order) (Chapter 54 Final Rulemaking Order).

Joint Complainants submit that they have not taken the position that an explicit formula for the calculation of the variable price is required by the Commission's regulations for EGSs; however, the regulations specifically require that a certain level of information and format be provided about the variable rate in the disclosure statement, namely the conditions of variability, limits on price variability and the use of plain language and common terms in a format that enables customers to compare the various electric generation services offered and the prices charged for each type of service. See e.g. 52 Pa. Code §§ 54.5(c), 53.43(1) and 111.12(d)(5). Joint Complainants' expert witnesses Dr. Estomin and Ms. Alexander analyzed Blue Pilot's Disclosure Statement and testified that there is no useful information for consumers to determine how Blue Pilot will calculate and charge prices or determine if Blue Pilot has complied with its pricing obligations. See OAG/OCA M.B. at 36-37, citing OAG/OCA St. 2 at 8-9 and OAG/OCA St. 1 at 28-29. As Ms. Alexander testified:

[T]he variable pricing disclosure included in the Disclosure Statement is vague and does not contain any substantive information about the variable price feature that allows any reasonable consumer to understand the basis for how the price will be calculated or may change.

OAG/OCA St. 1 at 28. Blue Pilot offered no evidence to dispute Joint Complainants' experts' analyses and conclusions regarding the allegations in Count I.

Further, Joint Complainants submit that Blue Pilot's reliance on Dubois Manor Motel is misplaced. As Joint Complainants explained in their Main Brief at 38-39, the ALJ found that the complainant's testimony regarding the marketing and enrollment with Blue Pilot was not credible, and therefore, complainant did not meet the burden of proving a violation. See Dubois Manor Motel c/o Nisha Patel v. Blue Pilot Energy, LLC, Docket No. C-2014-2433817, Initial Decision at 8 (Dec. 2, 2015). The focus of the ALJ's analysis was whether the complainant knew he had entered into a variable rate plan, and the ALJ found that the evidence, which included the Third Party Verification recording and the Disclosure Statement received by the complainant, was substantial that this commercial complainant knew he had entered into a variable rate plan. Id. at 8-10. Joint Complainants submit that the ALJ's findings in Dubois Manor Motel should not be persuasive in this matter, as the recommended findings were based solely on the commercial consumer complainant's ability to prove his allegations in a manner that conformed to the supplier marketing and billing requirements in the Commission's regulations. Further, the case did not involve scrutiny of Blue Pilot's Disclosure Statement regarding the identification of how the variable price would be calculated.

Such scrutiny of Blue Pilot's Disclosure Statement, however, occurred in another recent Initial Decision, wherein the ALJ found that the variable pricing provision in Blue Pilot's Disclosure Statement is "unclear or contains inconsistencies and, therefore, does not use plain language." See Enrico Partners LP v. Blue Pilot Energy, LLP, Docket No. C-2014-2432979, Initial Decision at 10 (Feb. 12, 2015). Specifically, the ALJ found:

In particular, the fifth and sixth sentences are unclear, not easily understood and ambiguous when read together. For example, the fifth sentence states that Blue Pilot "**may** increase or decrease your rate" and the sixth sentence states that "Your variable rate **will** be...". Additionally, the fifth sentence references "changes in wholesale energy market **prices** in the PJM Markets" and the sixth sentence references "PJM wholesale market **conditions**." The fifth

sentence indicates that the rate is based on “several factors” and the sixth sentence indicates that the rate is based on “PJM wholesale market conditions.” It is unclear whether the sixth sentence clarifies, or elaborates upon, the fifth sentence or if the sixth sentence replaces the fifth sentence. It is unclear if the paragraph provides two separate ways that rates may be changed – one where the “PJM wholesale market conditions” are one of the factors that may cause the rate to increase or decrease and one where the “PJM wholesale market conditions” are part of the “changes in wholesale energy market prices in the PJM Markets.” If the later, the sixth sentence is superfluous.

As a result, the fifth and sixth sentences in paragraph 3 are poorly written and it is not unreasonable that a consumer would be confused when reading the Disclosure Statement. This is particularly true when read in the context of shopping for the competitive provision of electric generation services and not simply because the parties disagree to the meaning. The sentence “Your rate will be based upon PJM wholesale market conditions” is not clear and unequivocal when read in conjunction with the preceding sentence. The rate charged to Enrico was not based upon PJM wholesale market conditions as the sixth sentence states it would be. Therefore, Blue Pilot has failed to provide “accurate information about [its] electric generation services using plain language and common terms in communications with consumers” and, thus, violates Sections 54.43(a) and 111.12(d)(5) of the Commission’s regulations.

Id. (Emphasis in original).

Joint Complainants submit that they have shown that the Company has violated 52 Pa. Code §§ 54.5(c), 54.43(1), 54.43(f), 111.12(d)(1) and 111.12(d)(5), and the Company’s arguments in its Main Brief do not rebut Joint Complainants’ evidence and should be rejected.

b. Blue Pilot’s Disclosure Statement Has Not Been Approved by the Commission.

In its Main Brief, Blue Pilot asserts that its Disclosure Statement was approved by the Commission’s Bureau of Consumer Services (BCS) during the license application process. Blue Pilot M.B. at 64.⁵ The Company also relied on Hoke v. Ambit Northeast, LLC d/b/a Ambit

⁵ Blue Pilot refers to Exhibit 1 to its Answer to the Joint Complaint in support of its assertion that BCS approved its Disclosure Statement. Blue Pilot M.B. at 64 and FN 106. Joint Complainants submit that Blue Pilot’s reliance on Exhibit 1 to its Answer is not appropriate because the Company did not move its Answer and accompanying exhibits into the record. As such, these documents may not be considered as evidence of a fact in this matter. See 52 Pa. Code § 5.405(b). Section 5.405(b) states: “a pleading, or any part thereof may not be considered as evidence of a fact other than that of filing thereof unless offered and received into evidence.” Id. Further, Blue Pilot did not present a witness or other evidence regarding such claims of approval of its Disclosure

Energy, Docket No. C-2013-2357863, Order (Jan. 16, 2014) and Yaglidereliler Corp. v. Blue Pilot Energy, LLC, Docket No. C-2014-2413732, Initial Decision (June 24, 2014) and Opinion and Order (Jan. 16, 2015). Id. at 64-65.

Joint Complainants submit that even if there was evidence in the record in this matter regarding BCS's approval of Blue Pilot's Disclosure Statement, which there is not, it is well settled that informal approvals from BCS are not binding on the Commission and are subject to withdrawal or change at any time. As the Commission recently held:

As for the NGS Parties' request that the Commission allow suppliers to ask for reviews of their disclosure statements by Commission staff, we note that informal reviews and opinions are always available upon request. Pursuant to 52 Pa. Code § 1.96, informal opinions are provided solely as an aid to the requester and are not binding upon the Commonwealth or the Commission. Informal opinions are also subject to withdrawal or change at any time to conform with new or different interpretations of the law. Suppliers interested in informal opinions should contact the Bureau of Consumer Services and/or OCMO. However, we remind suppliers of their duty to develop and maintain expertise in these regulations in order to ensure effective compliance. See 66 Pa. C.S. § 2208.

See Customer Information Disclosure Requirements for Natural Gas Suppliers Providing Natural Gas Supply to Residential and Small Business Customers, Docket No. L-2015-2465942, Proposed Rulemaking Order at 22 (Mar. 26, 2015); 45 Pa.B. 2705. (Some internal citations omitted).

Joint Complainants further submit that Blue Pilot's reliance on Hoke is misplaced. The dispute in Hoke involved, *inter alia*, the issue of whether Ambit's terms and conditions and disclosure statement properly identified the plan as variable with a one-month introductory rate, which the ALJ found they did. See Hoke, Docket No. C-2013-2357863, Initial Decision at 9 (Nov. 21, 2013). Also, Joint Complainants note that no exceptions were filed by the *pro se*

Statement or that the so-called "approved" Disclosure Statement was actually in use by the Company in Pennsylvania during the relevant time period.

consumer to the Hoke Initial Decision, and it was therefore, adopted by the Commission per procedure and without analysis pursuant to 52 Pa. Code § 5.536(a). Id. at Order (Jan. 16, 2014). Regardless, the issue here is whether Blue Pilot's Disclosure Statement adequately discloses the material terms of its electric supply plans, and as such, findings related to another EGS's disclosure statement are irrelevant.

Additionally, Joint Complainants submit that Blue Pilot's reliance on Yaglidereliler Corp. is misplaced. In its Main Brief, Blue Pilot asserted that the Commission identified no concerns with the language in Blue Pilot's Disclosure Statement in Yaglidereliler Corp. and therefore, "approved, or at the very least endorsed, BPE's Disclosure Statement." Blue Pilot M.B. at 65. In Yaglidereliler Corp., a commercial complainant averred that he "was assured that this company [Blue Pilot] was the most reasonably priced. ... I never would have expected to go from .0779 to .3999 Kwh (5 x more)." Yaglidereliler Corp. v. Blue Pilot Energy, LLC, Docket No. C-2014-2413732, Opinion and Order at 19 (Jan. 16, 2015). The Commission, in reversing the ALJ's Order Granting Summary Judgment, explained:

The reasonable inferences drawn from the Complainant's averments is that when speaking with a representative of Blue Pilot to assess the relative risk of a variable rate, he was assured that "the company was the most reasonably priced" and he would never expect a reasonable price to increase "5 x or more" in the span of one month. In denying "each and every allegation contained" in each of these paragraphs in its Answer (Answer at ¶¶ 5, 7), Blue Pilot placed these material facts in dispute. Moreover, if, as reasonably inferred from the Complainant's averments, Blue Pilot's oral representations undermine the clarity of its written communications, Blue Pilot's disclosure and marketing could be unclear, misleading, or deceptive in contravention of our Regulations. As Blue Pilot recognizes, our Regulations require that the billed prices reflect marketed prices and prices agreed to in the disclosure statement (52 Pa. Code § 54.4(a)) and that advertised prices reflect prices in disclosure statements and billed prices (52 Pa. Code § 54.7).

Id. Joint Complainants submit that the Commission did not engage in an analysis of Blue Pilot's Disclosure Statement in Yaglidereliler Corp., but instead, the Commission identified Blue Pilot's

oral marketing as the issue in dispute. As such, Blue Pilot's assertion that its Disclosure Statement has been endorsed or approved or otherwise embraced by the Commission should be rejected.

c. The Commission's Regulations Are Not Unconstitutionally Vague.

Blue Pilot asserts that Joint Complainants aver that the Commission's regulations require the Company to provide a formula or methodology by which the consumer could compute the price or know what price may be charged. Blue Pilot M.B. at 66. Additionally, Blue Pilot asserts that it is not appropriate to hold Blue Pilot's Disclosure Statement to the requirements of 52 Pa. Code § 54.43(1), as it is the "other information" that the Company provides to the consumers that must meet the "broader objectives" of receiving information in an understandable format that allows consumers to compare offers on a uniform basis if the Company has not violated 52 Pa. Code § 54.5(c). *Id.* at 67-70. Blue Pilot further asserts that should the Commission interpret its regulations to require more than what Blue Pilot did, the regulations are unconstitutionally vague. *Id.* at 66, 70-71.

Joint Complainants submit that Blue Pilot's interpretation of Joint Complainants' allegations is not correct; Joint Complainants have not taken the position that Blue Pilot must provide a specific pricing formula or methodology in its Disclosure Statement. Rather, Joint Complainants asserted that Blue Pilot does not provide accurate pricing information in its Disclosure Statement. The Commission's regulations in effect at the time specifically required that EGSs provide in variable pricing provisions, *inter alia*, the conditions of variability and the limits on price variability, if applicable, and also to "provide accurate information about their electric generation services using plain language and common terms in communications with

consumers” and “in a format that enables customers to compare the various electric generation services offered and the prices charged for each type of service.” See 52 Pa. Code §§ 54.5(c) and 54.43(1). Joint Complainants asserted that Blue Pilot did not meet these requirements, as customers could not determine what they could or would be charged and therefore, could not compare the services and prices offered by Blue Pilot with other EGSs’ offers.⁶

Joint Complainants submit that there is no merit to Blue Pilot’s assertion that as long as the Disclosure Statement complies with 52 Pa. Code § 54.5(c) (provide the conditions of variability and the limits on price variability, if applicable), the Company’s Disclosure Statement need not *also* comply with 52 Pa. Code § 54.43(1) (provide accurate information about the Company’s electric generation services using plain language and common terms in communications with consumers and “in a format that enables customers to compare the various electric generation services offered and the prices charged for each type of service”). See Blue Pilot M.B. at 67-69. Joint Complainants further submit that there is no merit to Blue Pilot’s argument that it cannot be found to have violated 52 Pa. Code § 54.43(f) because the provision does not establish standards for conduct. See Blue Pilot M.B. at 76. The Commission, at no point in promulgating Sections 54.1 – 54.9 of its regulations, announced that these sections superseded, replaced or otherwise repealed any other Commission regulations. See gen’ly Chapter 54 Final Rulemaking Order. See also OAG/OCA M.B. at 11-13. As such, Blue Pilot’s assertion that it cannot be found to have violated 52 Pa. Code § 54.43(1) if the Company is found to have complied with 52 Pa. Code § 54.5(c) is not supported.

⁶ Further, as discussed in Section IV.C.2 of Joint Complainants’ Main Brief, Blue Pilot did not calculate prices in conformity with its Disclosure Statement.

Furthermore, the Commission has already expressly rejected this argument in a consumer complaint case involving another EGS. See Herp v. Respond Power, LLC, Docket No. C-2014-2413756, Opinion and Order at 54 (Jan. 28, 2016). In Herp, Respond Power argued that the ALJ's finding that it had violated 52 Pa. Code § 54.43(1)(f) was in error because the provision merely established the responsibility of the EGS but did not set standards that an EGS can be found to have violated. Id. at 50. The EGS further asserted that it was more appropriate to focus on the particular regulations that an EGS has violated. Id. at 50-51. The Commission rejected the company's arguments, holding:

We also agree with the ALJ's finding a violation of Section 54.43(1)(f) of our Regulations. Citing the code of conduct set forth in Section 54.43, the ALJ noted the importance we have placed on "fair and honest sales and marketing practices in safeguarding consumers and preserving the integrity of the electric generation market" and found, *inter alia*, that Respond's deceptive marketing violated this section. I.D. at 38. We agree with the ALJ and the OCA that the deceptive and misleading actions of Respond's sales agent directed to Mr. Herp violated 52 Pa. Code § 54.43(1)(f).

Herp, at 54.

Regarding Blue Pilot's claims that Joint Complainants did not present evidence to support allegations regarding Blue Pilot's violation of 52 Pa. Code § 54.43(1), Joint Complainants submit that as discussed in Joint Complainants' Main Brief, Joint Complainants presented their experts Ms. Barbara R. Alexander and Dr. Steven L. Estomin, who analyzed the variable pricing provision of Blue Pilot's Disclosure Statement. See OAG/OCA M.B. at 36-37, 39-41. Specifically, Dr. Estomin concluded that, with regard to the establishment of prices, Blue Pilot's Disclosure Statement "is clear only with regard to the introductory price provided by the Company, which is applicable for a defined term of typically 60 to 90 days following the customer's enrollment." See OAG/OCA St. 2 at 8. Dr. Estomin also testified that Blue Pilot's Disclosure Statement "provides virtually no information regarding the establishment of prices

following the expiration of the initial fixed-price period.” Id. at 9; see also OAG/OCA St. 1 at 28- 29 (Ms. Alexander testified to similar conclusions regarding Blue Pilot’s Disclosure Statement).

Additionally, with regard to Blue Pilot’s due process violation assertions, Joint Complainants submit that the Commission’s regulations at 52 Pa. Code §§ 54.5(c) and 54.43(1) are not unconstitutionally vague, and it would not violate Blue Pilot’s due process rights if a finding is made that Blue Pilot violated 52 Pa. Code §§ 54.5(c) and 54.43(1).⁷ See Blue Pilot M.B. at 66-67, 70-72. The cases cited by the Company do not support the Company’s claim of constitutional violations.

In Village of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489 (1982),⁸ relied upon by the Company, the United States Supreme Court identified the test for deciding a facial challenge to the overbreadth and vagueness of a law, pursuant to the United States Constitution, as first determining whether the law reaches a substantial amount of constitutionally protected conduct (*i.e.* free speech), and if not the overbreadth challenge fails.⁹ Village of Hoffman Estates, 455 U.S. 489, 494. The facial vagueness challenge is then examined and may only be upheld if the law is impermissibly vague in all of its applications.¹⁰ Id. at 494-95. The Court

⁷ Joint Complainants note that Blue Pilot does not identify in Section IV.C.2.iii of its Main Brief exactly which of the “Commission’s regulations” the Company asserts are unconstitutionally vague. See Blue Pilot M.B. at 65-67.

⁸ In this challenge pursuant to the Fourteenth Amendment of the United States Constitution, the Court held that a village’s ordinance, which required businesses that sell any items “designed or marketed for use with illegal cannabis or drugs” to be licensed, was not facially overbroad because it did not reach constitutionally protected conduct and was not facially vague because the ordinance was reasonably clear in its application to the complainant. Village of Hoffman Estates, 455 U.S. at 491, 505.

⁹ In its Main Brief, Blue Pilot does not make a challenge as to the “overbreadth” of the Commission’s regulations at 52 Pa. Code §§ 54.5(c) and 54.43(1). See Blue Pilot M.B. at 66-67.

¹⁰ In its Main Brief, Blue Pilot does not make a challenge regarding “discriminatory enforcement” of the Commission’s regulations at 52 Pa. Code §§ 54.5(c) and 54.43(1), which is a form of objection to a regulation for vagueness. See Blue Pilot M.B. at 66-67.

held that the complainant's conduct should be examined before analyzing any other hypothetical applications of the law. *Id.* at 495. The Court also found that economic regulation is subject to a less strict vagueness test because of the more narrow subject matter and because businesses are expected to consult relevant legislation in advance of action and may have the ability to inquire for a clarification of a regulation's meaning. *Id.* at 498. As such, the Court concluded that the principal inquiry is whether the law affords fair warning of what is proscribed. *Id.* at 503. In its Main Brief, Blue Pilot fails to articulate its vagueness challenge with particularity, *i.e.* exactly what constitutionally protected conduct by Blue Pilot the regulations violate or whether the regulations are not reasonably clearly applicable to Blue Pilot. *See* Blue Pilot M.B. at 66-67, 70-72. As such, it is not clear what test the Company asserts that the Commission should use to analyze the issue.

In Commonwealth v. Parker White Metal Co., 512 Pa. 74, 515 A.2d 1358 (Pa. 1986), another case relied upon by Blue Pilot, the Pennsylvania Supreme Court, in a challenge to two provisions involving criminal penalties of the Solid Waste Management Act based on due process and vagueness,¹¹ stated that the guidelines a court must use in due process/void for vagueness challenges to *penal* laws included a determination of whether the law defined the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

¹¹ This case also involved challenges to the two provisions pursuant to the Fourteenth Amendment of the United States Constitution and Article I, Section 26 of the Pennsylvania Constitution. 512 Pa. 74, 82-90. The Court identified the applicable test as first requiring a determination of whether the law created a classification of the unequal distribution of benefits or imposition of burdens. 512 Pa. 74, 84. Finding that the sections of the law in question did not create such classifications, the Court stated that an equal protection problem could, therefore, only arise upon enforcement of the law, which is an issue of selective enforcement by a prosecutor or agency. *Id.* at 86. Ultimately, the Court found that there is no equal protection violation in a law merely because it allows the prosecutor or agency to choose from two different penalty provisions for similar unlawful conduct and that the mere possibility that the law might be selectively enforced does not invalidate the law. *Id.* at 86-87. In its Main Brief, Blue Pilot does not assert that the Commission's regulations at 52 Pa. Code §§ 54.5(c) and 54.43(1) violate equal protection considerations. *See* Blue Pilot M.B. at 66-67.

512 Pa. 74, 91. In Parker White Metal Co., the Court found no due process violation because the two provisions, although referring to the same conduct but proscribing different penalties, identified the prohibited conduct and courts have consistently upheld the authority of a prosecutor to choose between procedures and sentencing alternatives. 512 Pa. 74, 93-94. Similarly, Commonwealth v. Mayfield, 574 Pa. 460, 464, 832 A.2d 418, 420 (Pa. 2003) and Commonwealth v. McCoy, 2006 Pa. Super. 33, 895 A.2d 18 (Pa. Super. 2006), which are also relied upon by Blue Pilot, involved due process and vagueness challenges to a penal laws, and the Courts determined the laws were constitutional. Commonwealth v. Barud, 545 Pa. 297, 681 A.2d 162 (Pa. 1996), relied upon by Blue Pilot, also involved a challenge to a penal law, wherein the Pennsylvania Supreme Court found various constitutional due process and vagueness problems with the Driving Under the Influence Statute, finding that the law swept unnecessarily broadly into activities that are lawful, such as driving with a blood alcohol content below the amount prescribed in the law to be unlawful. 545 Pa. 297, 305-308. Blue Pilot relies upon these cases to support its due process/void for vagueness violation argument, but the Company fails to fully articulate its claims of violations or how these cases should be applied by the Commission. Further, these cases involve the standards for finding of due process or void for vagueness of *penal* laws, which are not at issue here.

In summary, Joint Complainants submit that Blue Pilot made a short argument in its Main Brief that a finding that the Company violated the Commission's regulations would violate the Company's due process rights and cited several cases, but the exact nature of the Company's constitutional challenge or the test that the Company asserts should be used to determine if the regulation passed constitutional muster and application thereof in this proceeding are unclear.¹²

¹² Blue Pilot also claims that finding that the Company violated both 52 Pa. Code § 54.5(c) and § 54.43(1) would violate the double jeopardy protections of the Fifth Amendment. Blue Pilot M.B. at 72. Joint Complainants

Furthermore, Joint Complainants submit that the cases cited by Blue Pilot, while identifying the tests to determine if an ordinance requiring licensure for certain conduct or penal laws are unconstitutionally vague, do not support the Company's constitutional challenge to Sections 54.5(c) and 54.43(1).¹³

It appears that Blue Pilot demands a level of precision regarding prohibited conduct, which is simply not required as a matter of law. As the United States Supreme Court re-affirmed in Village of Hoffman Estates, economic regulation is subject to a less strict vagueness test because of the more narrow subject matter and because businesses are expected to consult relevant legislation in advance of action and may have the ability to inquire for a clarification of a regulation's meaning. 455 U.S. 489, 498. Blue Pilot had the ability, and the obligation, to review the Commission's applicable tentative and final rulemaking orders and subsequent orders involving all regulations applicable to the Company upon receiving its EGS license. As such, Joint Complainants submit that the Company's constitutional arguments should be rejected.

note that such Constitutional protections apply to individuals accused of crimes, not companies accused of regulatory violations. Blue Pilot failed to cite any authority for its premise that the Fifth Amendment protects the Company from findings of multiple regulatory violations. As discussed above, the Commission has already rejected the argument that an EGS cannot be found to have violated both a more specific and a more general regulation for the same conduct. See Herp v. Respond Power, LLC, Docket No. C-2014-2413756, Opinion and Order at 54 (Jan. 28, 2016).

¹³ Blue Pilot also claims that the Commission agreed that 52 Pa. Code § 54.5(c) is vague and ambiguous in the Final-Omitted Rulemaking Tentative Order at Docket No. L-2014-2409385. See Blue Pilot M.B. at 67. The Commission made no such statement. See Rulemaking to Amend the Provisions of 52 Pa. Code, Section 54.5 Regulations Regarding Disclosure Statement for Residential and Small Business Customers and to Add Section 54.10 Regulations Regarding the Provision of Notices of Contract Expiration or Changes in Terms for Residential and Small Business Customers, Docket No. L-2014-2409385, Final-Omitted Rulemaking Order at 11 (Apr. 3, 2014) (Chapter 54 Final-Omitted Rulemaking Order). Rather, in comments to the Chapter 54 Final-Omitted Rulemaking Order, a commenter asserted that the "if applicable" language in Section 54.5(c) was "ambiguous and can be misinterpreted." Id. The Commission agreed with the commenter *only* "regarding the potential [for] misinterpretation." Id. In a 2000 case, however, the Commission specifically directed that in order to comply with Section 54.5(c), a floor and ceiling price had to be conveyed. See Petition of Shell Energy Services Co., L.L.C. For Declaratory Order and in the Alternative, Waiver of 52 Pa. Code § 54.5(c)(2), Docket No. P-00001848, Order (Dec. 20, 2000). Pursuant to the License Application of Blue Pilot Energy, LLC for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as an Aggregator and Broker/Marketer of Retail Electric Power, Docket No. A-2011-2223888, Order (June 10, 2011) (Licensing Order). Blue Pilot must educate itself regarding the Public Utility Code and the Commission's regulations *and orders* and comply therewith.

d. Joint Complainants Do Not Seek Commission Enforcement of the Consumer Protection Law.

In its Main Brief, Blue Pilot asserts that the Commission cannot conclude that the Company violated 52 Pa. Code § 111.12(d)(1), which prohibits “misleading or deceptive conduct as defined by State or Federal law, or by Commission rule, regulation or order, because the Commission cannot enforce the Consumer Protection Law. Blue Pilot M.B. at 73-76. Joint Complainants address this assertion *infra* in Section IV.C.3.f and incorporate that discussion herein. By way of a brief response, the Commission has already addressed this issue and held that it may consider the Unfair Trade Practices and Consumer Protection Law, 71 P.S. § 201-1 *et seq.* (Consumer Protection Law), in enforcing its own regulations, which incorporate the Consumer Protection Law’s statutory standards. See e.g. Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. Blue Pilot Energy, LLC, Docket No. C-2014-2427655, Opinion and Order on Joint Petition for Interlocutory Review and Answer to Material Questions at 17-18 (Dec. 11, 2014) (Interlocutory Review Order); Towne v. Great American Power, LLC, Docket No. C-2012-2307991, Opinion and Order (Oct. 18, 2013). As such, Blue Pilot’s assertions to the contrary should be rejected.

e. Conclusion.

Joint Complainants have shown that the Company’s Disclosure Statement with regard to the pricing provisions does not provide accurate information in that consumers could not determine the price that they would or could be charged by the Company or how the price would be calculated. Further, the Company failed to provide accurate information about its services in plain language and common terms so that customers could compare Blue Pilot’s services with other offers. See OAG/OCA M.B. at 34-41. The Company failed to present any evidence in

opposition to Joint Complainants' expert analyses and conclusions. As such, the Company is in violation of the Commission's regulations at Sections 54.5(c) (requiring that variable pricing terms include the conditions of variability and the limits on price variability, if applicable), 54.43(1) (requiring that suppliers "provide accurate information about their electric generation services using plain language and common terms in communications with consumers" and "in a format that enables customers to compare the various electric generation services offered and the prices charged for each type of service"), and 111.12(d)(5) (requiring that suppliers "ensure that product or service offerings made by a supplier contain information, verbally and written, in plain language designed to be understood by the customer"), and Sections 54.43(f) and 111.12(d)(1) (requiring compliance with consumer protection laws), 52 Pa. Code §§ 54.5(c), 54.43(1), 54.43(f), 111.12(d)(5) and 111.12(d)(1).

2. Count II – Prices Nonconforming to Disclosure Statement.

In its Main Brief, Blue Pilot asserts that the Commission lacks jurisdiction to regulate EGS prices, interpret the terms of a contract or engage in a cost of service analysis. Blue Pilot M.B. at 77-86. Further, Blue Pilot asserts that Joint Complainants failed to prove that the Company's variable rate prices in early 2014 departed from the Disclosure Statement. *Id.* at 86-88. Joint Complainants do not seek for the Commission to determine if Blue Pilot's variable prices charged in early 2014 were just and reasonable or require the Commission to engage in a cost of service analysis to determine if the regulations were violated. See gen'ly Joint Complaint at Count II. Likewise, Joint Complainants do not seek a contract interpretation in this matter. Rather, Joint Complainants allege that the Company did not charge variable prices in early 2014 that conformed to the variable pricing provision in Blue Pilot's Disclosure Statement. *Id.*

Joint Complainants submit that Blue Pilot's assertion that the Commission lacks jurisdiction to interpret the terms of private contracts between EGSs and their customers is misplaced. Blue Pilot relies on Office of Small Business Advocate v. FirstEnergy Solutions Corp., Docket No. P-2014-2421556, Opinion and Order (Jan. 26, 2015) (OSBA v. FES). In OSBA v. FES, OSBA sought for the Commission to issue a declaratory order determining, after review and interpretation of FES's fixed price contracts with small commercial customers, "at what point does the amount of PJM ancillary services fees rise to the level necessary to trigger the pass-through clause?". Id. at 4. FES asserted that OSBA's claim is merely a request for the Commission to interpret the pass-through provision in FES's contracts and determine which party's interpretation is correct; OSBA's claim is not a challenge to FES's marketing or billing practices. Id. at 10-11. The Commission concluded not to use its discretion to issue a declaratory order and address the underlying merits of the claim, as OSBA confirmed that it was seeking for the Commission to interpret the meaning of a contract. Id. at 2, 19. The Commission described its jurisdiction over EGSs, *inter alia*, as follows:

[T]he Commission can only ensure that an EGS is abiding by the standards of conduct and disclosure, the marketing and sales Regulations, and the contract expiration/change-of-terms notice requirements; and that the rate billed by an EGS was calculated in accordance with those materials.

OSBA v. FES at 18-19. (Internal footnotes omitted). The Commission stated that an inquiry into FES's marketing of the contracts at issue would be fact-intensive and therefore, not appropriately raised in a petition for declaratory order. Id. at 20.

Joint Complainants submit that OSBA v. FES is distinguishable because Joint Complainants are not seeking for the Commission to interpret a contract; instead, Joint Complainants are seeking a finding, in a fully litigated complaint case with an extensive evidentiary record, that Blue Pilot violated the Commission's regulations and Orders by failing

to bill prices that matched the Company's Disclosure Statement. Further, the Commission has already determined that it "has jurisdiction and authority over this issue [of whether the prices charged to consumers conformed to the variable rate pricing provisions in the Company's Disclosure Statement] under Section 54.4(a) and 54.5(a) of our Regulations, 52 Pa. Code §§ 54.4(a), 54.5(a)." See Interlocutory Review Order at 19-20. The Commission also rejected Blue Pilot's assertion that adjudicating Count II of the Joint Complaint would amount to the Commission regulating EGS prices. Interlocutory Review Order at 18-19.

With regard to Blue Pilot's assertion that the allegations in Count II and Dr. Estomin's affidavit attached to the Joint Complaint seek for the Commission to improperly engage in a cost of service analysis, Joint Complainants submit that Blue Pilot has misstated Joint Complainants' claim in Count II and erroneously applied the affidavit attached the Joint Complaint.¹⁴ In Count II, Joint Complainants refer to and incorporate Blue Pilot's variable rate pricing provision, which states the Blue Pilot rate would include Transmission Charges and "may increase or decrease your rate based on several factors, including changes in wholesale energy market prices in the PJM Markets." See Joint Complaint at ¶ 20. As the variable rate pricing provision appears, *on its face*, to state that Blue Pilot will determine its prices based on its costs to serve, and having had an expert determine that the costs to serve in early 2014 would have been approximately 23¢ per kWh, Joint Complainants had sufficient basis *to allege* that Blue Pilot's variable rate plan prices in early 2014 did not conform to the variable rate pricing disclosure in the Company's Disclosure Statement. As such, the affidavit attached to the Joint Complaint provided the basis for the allegations in Count II.

¹⁴ The Joint Complaint and exhibits thereto were not moved into the record in this matter, and therefore, Dr. Estomin's affidavit is not evidence that may be considered or relied upon in adjudication of this matter. See 52 Pa. Code § 5.405(b).

During this proceeding, Joint Complainants' expert witnesses Barbara R. Alexander and Steven L. Estomin reviewed and analyzed Blue Pilot's Disclosure Statement and marketing materials concerning the methodology or formula Blue Pilot used to establish its prices for customers on variable price plans and to determine whether the variable rate prices the Company charged in early 2014 were calculated by the Company pursuant to the list of price-affecting items identified in the Company's Disclosure Statement. See gen'ly OAG/OCA St. 1 and OAG/OCA St. 2. Ms. Alexander concluded that: "Blue Pilot's methodology to establish its retail prices has no correlation to the vague language of its Disclosure Statement." See OAG/OCA St. 1 at 30. Dr. Estomin concluded:

The 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, but the Company notes that the PJM wholesale market conditions are one of several factors on which the variable price is based. The Company does not specify what these other factors might be. From examination and analysis of Blue Pilot's prices, it is clear that the Company's Pennsylvania customers served under the variable price plans were charged prices that were not clearly and consistently determined by PJM wholesale market conditions. Additionally, the available evidence suggests that Blue Pilot does not determine prices that are based on its costs in any meaningful way and the Company's variable prices charged appear to be largely unrelated to PJM wholesale market conditions.

OAG/OCA St. 2 at 6-7. See also OAG/OCA St. 2 at Exh. SLE-4 (Company could not recreate how prices charged were calculated.)

Finally, with regard to Blue Pilot's assertion that Joint Complainants have not proven their allegations in Count II, Joint Complainants submit that, as discussed in this Section and in their Main Brief at pages 41-47, they have provided substantial evidence to support their allegations in Count II of the Joint Complaint that Blue Pilot charged prices in early 2014 that did not conform to the Company's variable pricing provision in the Disclosure Statement. Blue Pilot presented no evidence to rebut Joint Complainants' evidence on this issue. Instead Blue

Pilot seeks in its Main Brief to defend itself on this issue by asserting that Dr. Estomin's analyses and conclusions are conjecture because Blue Pilot's variable pricing provision is so vague as to how prices will be established. See Blue Pilot M.B. at 87 ("BPE's Disclosure Statement does not indicate that rates would always adjust proportionally to the PJM Markets or that rates would be based exclusively on the PJM day-ahead market").

Joint Complainants submit that they have shown that Blue Pilot's prices charged to customers in the first quarter of 2014 did not conform to the Company's Disclosure Statement in violation of 52 Pa. Code §§ 54.4(a) and 54.5(a). Consequently, Joint Complainants request a finding that Blue Pilot's prices charged to its variable rate customers in the first quarter of 2014 did not conform to the Company's Disclosure Statement in violation of the Commission's regulations at 52 Pa. Code §§ 54.4(a) and 54.5(a).

3. Count III – Misleading and Deceptive Promises of Savings.

a. Introduction.

In its Main Brief, Blue Pilot asserts that Joint Complainants' evidence in support of the allegations in Count III is flawed. Blue Pilot M.B. at 88. Specifically, the Company asserts that many consumers testified that Blue Pilot's sales representatives did not guarantee savings. Blue Pilot M.B. at 90-92. Blue Pilot also asserts that the consumer testimony is uncorroborated hearsay¹⁵ and that, regardless, many of the consumer witnesses' testimonies are not credible. Id. at 92-98. Additionally, the Company asserts that the consumer testimony is refuted by Blue Pilot's Disclosure Statement. Id. at 98-100. Further, Blue Pilot asserts that Count III should be dismissed, because the Commission lacks jurisdiction to enforce the Consumer Protection Law, and Section 54.43(f) of the Commission's regulations (relating to EGS responsibility for fraudulent, deceptive or other unlawful marketing acts by employees, agents and

¹⁵ Joint Complainants address Blue Pilot's uncorroborated hearsay argument in Section II, *supra*.

representatives), 52 Pa. Code § 54.43(f), does not establish “clear and enforceable standards to which an EGS is required to adhere.” Id. at 100-101. Finally, Blue Pilot asserts that Joint Complainants have not presented evidence to prove any violation of the Commission’s regulations concerning training and monitoring of its sales agents. Id. at 101-102.

Joint Complainants submit that the record contains sufficient, corroborated evidence to support a finding that Blue Pilot and its sales and marketing agents engaged in misleading and deceptive promises of savings in violation of the Commission’s regulations at Sections 54.4(a) and 54.5(a) (relating to EGS requirement that prices billed must reflect prices marketed and prices in the disclosure statement); 54.43(f) (relating to EGS responsibility for fraudulent, deceptive or other unlawful marketing acts by employees, agents and representatives); 111.4 (relating to supplier responsibility to develop standards and qualifications for individuals it hires as agents); 111.5 (relating to supplier responsibility to adequately train and monitor its agents); and 111.12(d)(1) (relating to compliance with the Consumer Protection Law), 52 Pa. Code §§ 54.4(a), 54.5(a), 54.43(f), 111.4, 111.5, and 111.12(d)(1). For example, Joint Complainants’ expert witness Ms. Alexander testified as follows regarding the Company’s promises of savings:

Blue Pilot promoted its variable price plans for generation supply to Pennsylvania consumers by emphasizing the introductory fixed price, the potential for savings with variable price agreements compared to the consumer’s current energy bills, and failing to accurately disclose its pricing terms for variable prices as stated in its Disclosure Statement. Blue Pilot’s written promotional materials used in Pennsylvania emphasized promotional prizes and savings by enrolling with Blue Pilot. None of the written marketing and promotional materials provided by Blue Pilot explains variable rates or how prices would be calculated under its variable price plans.

OAG/OCA St. 1 at 10. (Internal footnotes omitted). Ms. Alexander also testified that Blue Pilot’s sales representatives made these same representations to customers during the sales pitch pursuant to the sales script developed for use by Blue Pilot’s sales agents. See OAG/OCA St. 1

at 11-12; see also Exh. BRA-2 at 20-29 (CONFIDENTIAL). Ms. Alexander's testimony regarding Blue Pilot's misleading and deceptive promises of savings was supported by the testimonies and exhibits provided by consumer witnesses. See Id. at 11, 33; see also OAG/OCA M.B. at App. C at FOF 87-90.

Further, despite Blue Pilot's claims to the contrary and as discussed in more detail in Section IV.B.2. of Joint Complainants' Main Brief, the record contains ample evidence to support a finding that Blue Pilot failed to adequately train and monitor its sales agents in violation of the Commission's regulations at 52 Pa. Code §§ 111.4 and 111.5. For example, Ms. Alexander testified as follows regarding Blue Pilot's training and monitoring practices:

While Blue Pilot was asked to identify training programs, training events, the number of attendees, and location of training events, the Company directed Joint Complainants to the Company's telemarketing scripts. Blue Pilot's response claimed that its sales agents were trained "continuously throughout their employment as applicable." When asked to identify and provide its internal compliance programs and policies, Blue Pilot failed to provide any internal compliance program documents or policies. When asked to provide any evidence of internal audits or other investigations, Blue Pilot did not produce any documents or evidence.

...

The training materials that Blue Pilot did provide to its sales people failed to include any information on Pennsylvania's consumer protection requirements. Rather, these materials were primarily designed to train sales representatives how to use the sales scripts or how to conform to the "do not call" requirements when conducting telemarketing. There is no information in these materials to identify or avoid misrepresentation, fraud, or deceptive sales statements or conduct. In fact, the sales script used as part of Blue Pilot's training program emphasizes the "price protection" of the initial fixed rate, followed by "the most competitive rates for each month of service based on market conditions."

...

I found through my analysis that Blue Pilot lacks any internal policies and programs that the Company can actually document to detect violations of Pennsylvania regulations and requirements, investigate potential violations, and take proactive steps to prevent future violations. Blue Pilot lacks appropriate and reasonable training and oversight programs for its sales representatives and their

sales activities with regard to unfair trade practices, misleading disclosures, the requirement to fully explain the Disclosure Statement to prospective customers, or the requirement to ensure that any oral representations conform to the Disclosure Statement and vice versa. Blue Pilot has not documented any audits, or Pennsylvania-specific training materials with regard to its marketing and sales activities in Pennsylvania. As a result, Blue Pilot has not taken any proactive steps to properly train, monitor, or assure compliance with Pennsylvania regulations and consumer protection policies.

OAG/OCA St. 1 at 19-22. (Internal footnotes omitted).

Blue Pilot did not present any witnesses to rebut this evidence demonstrating that Blue Pilot and its sales and marketing agents have engaged in misleading and deceptive promises of savings through marketing materials and sales presentations, and Blue Pilot's training and oversight of its agents is deficient.

b. The Consumer Testimony Supports a Finding that Blue Pilot's Sales Representatives Routinely Made Misleading and Deceptive Promises of Savings.

First, Blue Pilot asserts that the consumer testimony does not provide a basis for finding that Blue Pilot promised savings, because many consumers testified that savings were not guaranteed by Blue Pilot's sales representatives. Blue Pilot M.B. at 90. Contrary to Blue Pilot's assertion, however, Joint Complainants' expert witness Ms. Alexander testified that the consumer testimony in this proceeding shows that Blue Pilot salespeople routinely promised savings. OAG/OCA St. 1 at 33. Specifically, Ms. Alexander testified:

There is a clear pattern in the testimony of these consumers that the Blue Pilot sales representatives promised savings, that customer witnesses signed up with Blue Pilot to get lower bills, and that many of these consumers either never understood or were told about the variable price feature after the introductory price or, if told, were led to believe that this feature would not change dramatically from month to month or that it would move in concert with the EDC's Price to Compare. Of the testimony of 84 consumer witnesses whose testimony was submitted into the record, including the 49 consumers who appeared at the hearings on March 30 through April 1, 2015, approximately 63 testified that the Blue Pilot sales representatives led them to believe that they would save on their electric bill, failed to provide accurate pricing information,

provided evidence that Blue Pilot did not explain that the price would be variable after the expiration of the 60-90 day introductory fixed price or led them to believe that the price would be fixed for a longer period of time or that they would be notified of a price change.

Id.

Despite the Company's subsequent arguments that the consumer testimonies constitute uncorroborated hearsay and are not credible in its Main Brief, the Company first relies on a few examples of these consumer testimonies to support its position that the consumer testimony does not provide a basis for finding that Blue Pilot promised savings, because "many consumers" testified that savings were not guaranteed by Blue Pilot's sales representatives. See Blue Pilot M.B. at 90-92. Joint Complainants submit that, as demonstrated by the evidence on record in this proceeding, Blue Pilot's sales agents engaged in a pattern and practice of misleading and deceptive behavior, which led consumers to believe that switching to Blue Pilot would save them money or lower their electric bills. Moreover, Joint Complainants submit that the Company does not appropriately characterize any of the testimonies to which it cites, and those testimonies, when viewed in their entirety, actually support Joint Complainants' position that Blue Pilot's sales agents routinely engaged in misleading and deceptive practices. For instance, Blue Pilot mischaracterizes the following consumer testimonies, which actually demonstrate that Blue Pilot engaged in misleading and deceptive practices:

- Blue Pilot asserts, "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 [Blue Pilot] guaranteed him any savings." Blue Pilot M.B. at 91. Joint Complainants submit that Mr. Cassel, however, also specifically testified, "Although I knew that the rate I was charged could vary, I had no expectation that [Blue Pilot] would increase the rate to over four times what PP&L charged without advanced notice and an ability to switch companies prior to the unreasonable rate increase." Consumer Testimony of John J. Cassel at 575. Thus, Joint Complainants submit that Mr. Cassel's testimony supports a finding that Blue Pilot's sales

representatives engaged in misleading and deceptive promises that switching to Blue Pilot was risk free.

- Blue Pilot asserts, “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.” Blue Pilot M.B. at 91. Joint Complainants submit that when asked in his Direct Testimony the EGS salesperson guaranteed savings, Mr. Duke responds, “yes.” Consumer Testimony of David A. Duke at 503. Mr. Duke does not provide any testimony that this guarantee was limited to the initial fixed price period, as Blue Pilot asserts. Further, Mr. Duke testified that Blue Pilot informed him that his rate could vary “slightly” following the introductory fixed price periods and that he understood that the variable rate would be “comparable to other companies.” See Consumer Testimony of David A. Duke at 503; see also Tr. at 381. Thus, Joint Complainants submit that David A. Duke’s testimony supports a finding that Blue Pilot’s sales representatives engaged in misleading and deceptive promises of savings.
- Blue Pilot asserts, “Jeffrey Hamilton, who enrolled in July 2012, knew that the rate could increase after 18 months and did not suggest that anyone at [Blue Pilot] promised savings.” Blue Pilot M.B. at 91. Contrary to Blue Pilot’s assertion, however, when asked whether the EGS salesperson guaranteed savings, Mr. Hamilton testified, “yes.” Consumer Testimony of Jeffery Hamilton at 107. Mr. Hamilton further explained that he understood from Blue Pilot’s sales representative that “compared to othe[r] EGS suppliers[,] [Blue Pilot] had the best rate[.]” Id. Thus, Joint Complainants submit that Jeffrey Hamilton’s testimony supports a finding that Blue Pilot’s sales representatives engaged in misleading and deceptive promises of savings.
- Blue Pilot asserts, “Scott Hornberger testified that no one from [Blue Pilot] guaranteed him savings.” Blue Pilot M.B. at 91. Mr. Hornberger, however, also testified as follows:

I changed by electricity provider to Blue Pilot in 2012 with a six-month fixed rate of .075 per kwh. At the end of this period Blue Pilot contacted me to let me know that my fixed rate had expired, and we negotiated another fixed rate of .079 per kwh. I believed this rate to also be for six months, although Blue Pilot is now telling me that it was for only three months. I received no contract or paperwork of any kind for these rates. Apparently my new fixed rate expired in January of 2014, but I was not contacted this time and did not realize that it had expired. In March of 2014 I received my electric bill for the period of February 4 – March 5. Shocked by the total of \$492.54 for 939 kwh, I contacted both PP&L and Blue Pilot and learned that my rate had been raised to .4490 per kwh.

Consumer Testimony of Scott A. Hornberger at 255. Thus, Joint Complainants submit that Scott Hornberger's testimony supports a finding that Blue Pilot's sales representatives engaged in misleading and deceptive behavior by failing to disclose the length of Mr. Hornberger's fixed rate.

- Blue Pilot asserts, "Bree Burlingame, testifying on behalf of Erie Animal Hospital, noted that the guaranteed initial rates were honored." Blue Pilot M.B. at 91. Ms. Burlingame, however, also testified that Blue Pilot's salesperson said that following the "lock in period," Erie Animal Hospital would receive "comparable rates thereafter." Consumer Testimony of Erie Animal Hospital at 156; Tr. at 57, 60. Thus, Joint Complainants submit that Bree Burlingame's testimony on behalf of Erie Animal Hospital supports a finding that Blue Pilot's sales representatives engaged in misleading and deceptive promises of pricing comparable to the introductory rate.
- Blue Pilot asserts, "Testifying about his August 2012 enrollment when he was offered an initial rate for 180 days, George Dingler assumed that [Blue Pilot's] pricing would be consistently competitive with all other Pennsylvania rates 'regulated' by the Commission." Blue Pilot M.B. at 91. Despite Blue Pilot's claim, however, Mr. Dingler never uses the word "assume" to describe his understanding of Blue Pilot's rates. See Consumer Testimony of George M. Dingler at 403-406. In fact, Mr. Dingler specifically testifies that Blue Pilot's salesperson guaranteed savings. Id. at 404. Mr. Dingler further explains, "It was understood that Blue Pilot would continue to offer a competitive rate [...]." Id. Thus, George Dingler's testimony supports a finding that Blue Pilot's sales representatives engaged in misleading and deceptive promises of savings.
- Blue Pilot asserts, "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 [Blue Pilot]." Blue Pilot M.B. at 91. First, Joint Complainants note that Mr. Wensel did not testify that he knew that his variable rate did not have any caps, as Blue Pilot asserts. In fact, Mr. Wensel specifically testified as follows regarding his variable rate, "And I was aware that it was adjustable. But quite honestly, I didn't realize that it was unlimited adjustable. You know, every expense I'd had in the past [...] could be ratcheted up, but over an extended period of time." Tr. at 271. Further, Mr. Wensel also testified that the Blue Pilot salesperson "encouraged [him] to change because [he] could save money." Id.; see also Consumer Testimony of Walt Wensel at 226. Finally, Blue Pilot's reliance on Mr. Wensel's testimony that Mr. Wensel does not feel that there was "anything fraudulent" done by Blue Pilot is inappropriate. Mr. Wensel testified that he is not an attorney. Tr. at 275. As such, Mr. Wensel does not have the legal expertise to provide an opinion as to the legality of Blue Pilot's actions. As such, Joint Complainants submit that Walt Wensel's testimony supports a finding that Blue Pilot's sales representatives engaged in misleading and deceptive promises of savings.

- Blue Pilot asserts, “Neil Weaver compared prices on the internet and called [Blue Pilot] 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.” Blue Pilot M.B. at 91. Contrary to Blue Pilot’s assertion, however, Mr. Weaver did not testify that he understood his rate was variable. See Consumer Testimony of Neil Weaver at 563-66. In fact, when asked for his understanding of the EGS’s price, Mr. Weaver testified that Blue Pilot “did not specify.” Id. at 564. Moreover, it appears from Mr. Weaver’s testimony that Mr. Weaver understood that his rate with Blue Pilot would be “fixed cause [he] knew variable could go up or down [...],” and Mr. Weaver switched in an attempt to avoid “rate caps coming off.” Id. at 563-64. Further, despite enrolling via telephone, Mr. Weaver testified that he did not understand how Blue Pilot’s rate would be set, Blue Pilot did not explain how long it would charge its price, and Mr. Weaver never received a disclosure statement. Id. at 564. Mr. Weaver further testified that he was given “no notice in any way that rates would increase.” Id. at 565. As such, Joint Complainants submit that Neil Weaver’s testimony supports a finding that Blue Pilot’s sales representatives engaged in misleading and deceptive conduct by failing to adequately explain the Company’s products and services on its website or through its sales agent and failing to provide a Disclosure Statement.
- Blue Pilot asserts, “William Smith had no interaction with [Blue Pilot] sales agents and merely assumed the rates would be reasonable for a couple of years.” Blue Pilot M.B. at 91. First, Joint Complainants’ note that the basis of Mr. Smith’s understanding of Blue Pilot’s rate is not clear from Mr. Smith’s testimony. Specifically, Mr. Smith testifies that he understood that Blue Pilot would “keep rates reasonable to market conditions.” Id. Blue Pilot “merely assumed” that Mr. Smith’s understanding of Blue Pilot’s rate was based on an assumption. Further, as Mr. Smith had no sales contacts with any Blue Pilot representatives, his testimony is not relevant to the specific issue of whether Blue Pilot’s sales representatives guaranteed savings.
- Blue Pilot asserts, “Rachel and Charles Nentwig signed up 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 guarantee of savings.” Blue Pilot M.B. at 92. As Rachel and Charles Nentwig had no sales contacts with any Blue Pilot representatives, their testimony is not relevant to the issue of whether Blue Pilot’s sales representatives guaranteed savings. See Consumer Testimony of Rachel and Charles Nentwig at 465.¹⁶

¹⁶ Via Footnotes 146 and 149 in Blue Pilot’s Main Brief, the Company also cites to the Consumer Testimonies of Michael Foster, Dennis Frey, and Marcy Weyant in support of its position that Blue Pilot sales representatives did not engage in misleading and deceptive promises of savings. Blue Pilot M.B. at 91, FNs 146, 149. Blue Pilot’s reliance on these testimonies is also misplaced. For example, Michael Foster provided the following testimony demonstrating Blue Pilot’s misleading and deceptive behavior:

[Blue Pilot representatives] told me they would give me a competitive rate at .0079 for 3 months [and] then they would contact me after 3 months. [T]hey did contact me but informed me they would then call back on a [Monday] night at 7:00 PM [...] so I could have my wife present to

Further, the Company did not present evidence that rebutted the consumers' testimonies, such as testimony from the sales agents, sales call recordings or agent training and compliance records. In fact, Ms. Alexander testified that the Company's sales calls confirm that Blue Pilot's sales representatives emphasized potential savings with an introductory rate and downplay any potential for significant rate increase. See OAG/OCA St. 1 at 40-41. Joint Complainants submit that the lack of rebuttal evidence from Blue Pilot in this matter is similar to the lack thereof by the EGS in Kiback v. IDT Energy, Inc., Docket No. C-2014-2409676, Order at 31-32 (Aug. 20, 2015), which led the Commission to find that IDT had failed to refute Mr. Kiback's credible evidence, and in Herp v. Respond Power, LLC, Docket No. C-2014-2413756, Opinion and Order (Jan. 28, 2016) (Herp v. Respond Power). Specifically, in Herp, the Commission held:

We find that [complainant] Mr. Herp has supported his Complaint with credible testimony, based on his first-hand contact with Respond's agent. [...] In contrast, the testimony presented by Respond's witness Mr. Small was generalized with respect to the Company's policies and lacking any first-hand knowledge of the conversation between Mr. Herp and the sales agent.

As pointed out by the OCA, this result is consistent with our decision in *Rahman* because Mr. Herp's testimony was the only evidence in the record of the actual events that occurred in this proceeding with respect to Mr. Herp's transaction. As the ALJ noted, Respond chose not to present the testimony of the actual third-party marketer, its agent under our Regulations, to refute the nature of the oral representations made. Further, as the ALJ found, Respond did not attempt to audit or investigate the actions of that agent nor did the Company even know whether that agent was still employed as a third-party marketer.

discuss [the] new charges. [...] [T]hey never contacted me back [and] proceeded to charge me an outrageous new rate[.]

Consumer Testimony of Michael Foster at 350. Mr. Foster also testified that Blue Pilot's sales representative guaranteed a "competitive" rate and made it seem like Mr. Foster would "want to stay with [Blue Pilot], because the Company wanted to keep him as a customer "for years." *Id.* at 350. Similarly, Dennis Frey testified that Blue Pilot's sales representative offered him a fixed rate for 60 days, followed by a "competitive" rate. Consumer Testimony of Dennis Frey at 391. Mr. Frey testified that he never received a competitive rate from Blue Pilot, as promised. *Id.* Finally, Marcy Weyant's testimony is not relevant to whether Blue Pilot's sales agents engaged in misleading and deceptive promises of savings, as Ms. Weyant signed up online. See Consumer Testimony of Marcy Weyant at 274.

Herp v. Respond Power at 28. (Internal Footnote omitted). As such, Joint Complainants submit that the consumer testimony supports a finding that Blue Pilot's sales representatives routinely made misleading and deceptive promises of savings in violation of the Commission's regulations, as well as a finding that Blue Pilot's marketing and promotional materials were misleading and deceptive.

c. The Consumer Testimonies are Clear, Credible, and Consistent.

Next, Blue Pilot asserts that many of the consumer testimonies claiming promised savings are "confusing, inconsistent and unclear in several regards," casting doubt on the witnesses' credibility. Blue Pilot M.B. at 94. Blue Pilot further asserts that some "complaints" are "not credible or verifiable" because the topic of energy pricing is not commonplace and some consumers may be confused. Id. Blue Pilot also argues that competing offers or information received from a consumer's EDC "made it difficult for customers to recall specific details about their sales experiences with [Blue Pilot]." Id. at 94-95. Joint Complainants submit that Blue Pilot's arguments are red herrings and do not provide a valid defense for Blue Pilot's misleading and deceptive practices.

Blue Pilot has failed to present any witnesses to rebut the overwhelming evidence demonstrating that Blue Pilot and its sales and marketing agents have engaged in misleading and deceptive promises of savings through marketing materials and sales presentations. Consumer witnesses have consistently testified to the misleading and deceptive practices of Blue Pilot and its sales agents. See OAG/OCA M.B. at FOF 87-92. As stated above, such evidence has been corroborated through the testimony of Joint Complainants' expert witness Ms. Alexander and through exhibits of Blue Pilot's sales scripts, marketing materials, and recordings of sales calls. See e.g. OAG/OCA St. 1 at 40-42; see also Exh. BRA-2 at 5-9, 20-29 (CONFIDENTIAL); see

also Exh. BRA-4 (CONFIDENTIAL). While Blue Pilot claims customer confusion about energy pricing, Blue Pilot fails to cite any authority or consumer testimony in support of this claim. Furthermore, even if true, Blue Pilot's argument that consumers may have been confused about electricity pricing does not rebut the overwhelming evidence proving that Blue Pilot promised savings. Similarly, Blue Pilot's argument that the consumer witnesses may have received promises of savings from other sources does not rebut the evidence proving that Blue Pilot and its sales agents made misleading and deceptive promises of savings about its own service. Moreover, Joint Complainants note that educational materials provided by EDCs explaining shopping are not the same as explicit promises of savings made by EGSs. Blue Pilot cannot be permitted to shift the blame, but must take responsibility for its own actions and omissions.

Next, Blue Pilot argues that Questions 12.a and 12.b in the Consumer Testimonies, which provide as follows, are leading: 12.a. "Did the EGS salesperson guarantee savings?" and 12.b. "If yes, please explain." Blue Pilot M.B. at 96. As discussed in Section II above, the Company was required to submit any motion to strike consumer testimony in writing by January 26, 2015. See Order Granting Continuance at 6. Pursuant to the ALJs' Order Granting Continuance, Blue Pilot filed a Motion to Strike Direct Testimony of Various Consumers on March 18, 2015, in which the Company argued, *inter alia*, that Questions 12.a. and 12.b. in the Consumer Testimonies are leading. On March 27, 2015, The ALJs made a ruling on that Motion. See Motion to Strike Order. In their Motion to Strike Order, the ALJs rejected Blue Pilot's argument that Questions 12.a and 12.b are leading. Motion to Strike Order at 5. Specifically, the ALJs held:

We are unpersuaded by Blue Pilot's argument to strike responses to 12.a and 12.b. Blue Pilot is correct that a party may not generally lead its own witness with suggestive questions and that answers to such questions are generally not admissible. Pa. R. Evid. 611(c). However, we find the question "Did the EGS

salesperson guarantee savings? If yes, please explain” is essentially an open-ended question calling for an explanation and it implies a yes or no response may be made. The use of the word “if” conveys to consumers that it is possible that the salesperson may not have guaranteed savings. It is further noted that each of the statements of pre-served written testimony is accompanied by a verification that requires the consumer to verify that the answers are true and correct. Blue Pilot could have inquired further regarding answers to this question in discovery and will be given an opportunity to cross-examine these witnesses at hearing regarding their responses to this question.

Motion to Strike Order at 5.

As acknowledged by the ALJs, Blue Pilot had the opportunity to cross-examine consumer witnesses regarding their responses to Questions 12.a and 12.b at the hearings in this proceeding. Blue Pilot’s counsel either waived cross-examination or conducted cross-examination of all consumers whose testimony was admitted into the record. See gen’ly Tr. at 39-708. Prior to being subjected to cross-examination by Blue Pilot’s counsel, each consumer swore to his or her written testimony under oath. See e.g., Tr. at 53-54. Thus, to the extent Blue Pilot is now arguing that the consumer testimony is not credible because Questions 12.a. and 12.b are leading, such argument is inappropriate and should again be rejected.

d. The Disclosure Statement Does Not Refute Statements of Savings by the Company’s Sales Agents.

In its Main Brief, the Company also asserts that the consumers’ testimony regarding the sales agents’ promises of savings is refuted by Blue Pilot’s Disclosure Statement, which “left no doubt as to the variable nature of the contract and the fact that the price would vary on the basis of market conditions and would have no ceiling.” Blue Pilot M.B. at 98. Blue Pilot also asserts that under Pennsylvania law, the written documentation must be what is relied upon rather than general statements made during a sales pitch. Id. at 98. Joint Complainants submit that these arguments must be rejected. Ms. Alexander testified that Blue Pilot’s sales agents do not review or refer to the Company’s Disclosure Statement during sales presentations. OAG/OCA St. 1 at

8. Ms. Alexander further testified that, in reviewing the Disclosure Statement, the explanation of the variable rate feature is in very fine print and vague as to the description of how the Company will calculate a customer's price. Specifically, Ms. Alexander testified:

I have several significant concerns. First, the variable pricing disclosure included in the Disclosure Statement is vague and does not contain any substantive information about the variable price feature that allows any reasonable consumer to understand the basis for how the price will be calculated or may change. The fine, and very small, print Disclosure Statement contains what Blue Pilot asserts are the legally binding pricing and other provisions applicable to its plans. However, the consumer is not presented with any information about these material terms [...].

OAG/OCA St. 1 at 28. Furthermore, the Company's argument that Pennsylvania law requires that written documentations be given precedence over oral sales statements is an inaccurate statement of Pennsylvania law and ignores the Commission's regulations that require that the prices billed equal the prices disclosed *and the prices marketed*. See 52 Pa. Code §§ 54.4(a) and 54.5(a); see also Herp v. Respond Power at 53-54. The cases relied upon by Blue Pilot in support of this proposition involved the interpretation of written contracts that resulted from the oral negotiation of terms and not oral sales contacts, as is the case here.¹⁷ The Company

¹⁷ Blue Pilot cites Steuart v. McChesney, 498 Pa. 45, 47, 444 A.2d 659 (Pa. 1982) (Steuart v. McChesney) and Union Storage Co. v. Speck, 194 Pa. 126, 133, 45 A. 48, 49 (Pa. 1899) (Union Storage) in support of the proposition that the terms in the Disclosure Statement trump any statements made by the Company's salespeople. Blue Pilot M.B. at 98-99. Steuart v. McChesney involved the interpretation of a first right of refusal clause in a contract. Joint Complainants note that in Steuart v. McChesney, the Court recognized, "We are not unmindful of the dangers of focusing only upon the words of the writing in interpreting an agreement" and "[s]ome of the surrounding circumstances always must be known before the meaning of the words can be plain and clear; and proof of the circumstances may make a meaning plain and clear when in the absence of such proof some other meaning may also have seemed plain and clear." 498 Pa. 45, 49-50, 444 A.2d 659, 661-62. Similarly, in Union Storage Co. v. Speck, 194 Pa. 126, 133, 45 A. 48, 49 (Pa. 1899), which involved the time for payment for the storage of whiskey, the Court explained the parol evidence rule as follows: "[t]he general rule undoubtedly is, that parol evidence is not admissible to contradict or alter the terms or provisions of a written instrument ... Oral evidence for any such purpose is generally inadmissible *unless a foundation for its introduction is previously laid by competent proof of fraud, accident or mistake*." (Emphasis added). Moreover, as stated above, these cases cited by Blue Pilot involved the interpretation of written contracts that resulted from the oral negotiation of terms and not an oral sales contact. Contract interpretation is not the issue here, but rather the issue falls on whether Blue Pilot charged prices that conformed with the promises and representations made by Blue Pilot's sales agents, *inter alia*.

Additionally, in this section of Blue Pilot's Main Brief, the Company cites Towne v. Great American Power, LLC, Docket No. C-2012-2307991, Order (Oct. 18, 2013) (Towne). Blue Pilot M.B. at 99 and Design and Development,

mistakenly assumes that its agents and employees can “say anything, do anything,” during their sales pitches, even if the pitch is deceptive or confusing, and then avoid any liability whatsoever by relying on a subsequently delivered Disclosure Statement that is confusing in and of itself. The Commission’s regulations flatly reject such an approach, and the Commission confirmed it in Herp v. Respond Power. Specifically, in Herp v. Respond Power, the Commission held:

With respect to the ALJ’s findings of violations of Sections 54.4(a) and 54.7(a), we agree with the ALJ and the OCA and find that in billing Mr. Herp a rate that did not match what was marketed by its agent, Respond violated Sections 54.4(a) and 54.7(a) of our Regulations. These provisions are companion consumer protections that, together with Section 54.5(a), where applicable, mandate consistency among the prices the EGS markets, discloses, and bills. Each of these regulatory standards is necessary, and together they work in tandem to ensure that the terms of the sale agreed to by the EGS and the customer, including conditions related to pricing, are clear and unequivocal.

Herp v. Respond Power at 53. Blue Pilot, as a licensed EGS, must comply with the Public Utility Code and the Commission’s regulations and Orders, and therefore, the Company’s reliance on un-related contract case law must be rejected.

e. The Commission Has Jurisdiction to Enforce Its Own Regulations Which May Incorporate Standards Set Forth In Other Laws.

Blue Pilot next argues that the Commission does not have jurisdiction to enforce the Consumer Protection Law. Blue Pilot M.B. at 100. Therefore, Blue Pilot concludes that Joint

Inc. v. Vibromatic Manufacturing, Inc., 58 F.R.D. 71, 73 (E.D. Pa. 1973) (Design and Development). Blue Pilot M.B. at 99-100. Towne is not relevant to the Company’s argument but is certainly supportive of Joint Complainants claims in this proceeding. In Towne, the consumer complainant complained about the EGS’s overly zealous telemarketing campaign, which included, *inter alia*, misleading and deceptive statements about the EGS’s affiliation with Duquesne Light Company, but he was not switched to the EGS. Id. at 18. In Towne, the Commission found “the conduct by [the EGS] to be potentially detrimental to the ongoing enhancements and the ultimate success of Pennsylvania’s retail electric market” and that “this Commission must continue to send a clear message to EGSs that the egregious and deliberate behavior utilized in this case, including the use of potentially misleading statements that could result in slamming, will not be tolerated.” Id. at 22. Design and Development, Inc. v. Vibromatic Manufacturing, Inc., 58 F.R.D. 71, 73 (E.D. Pa. 1973), involved relief sought from a default judgment to enforce a settlement agreement, which agreement was entered into with the counsel and advice of an attorney. Joint Complainants submit that these cases do not support Blue Pilot’s argument that evidence of oral representations are refuted by the Company’s Disclosure Statement.

Complainants' allegation that Blue Pilot violated Section 111.12(d)(1) of the Commission's regulations, 52 Pa. Code § 111.12(d)(1), should be dismissed, as said violation is based wholly on the claim that Blue Pilot violated the Consumer Protection Law. Id.

The Commission has already addressed this jurisdictional argument earlier in this case. Interlocutory Review Order at 17-18. While the Commission held, *inter alia*, that it does not have the authority to *enforce* the Consumer Protection Law, the Commission may consider the Consumer Protection Law in enforcing its own regulations which incorporate the Consumer Protection Law's statutory standards. See Id.

The fact that the Commission does not specifically enforce the Consumer Protection Law does not mean that the Commission may not *interpret* the provisions of that law where they are incorporated into its own regulatory standards. See Harrisburg Taxicab & Baggage Co., v. Pa. PUC, 786 A.2d 288, 2001 Pa. Commw. LEXIS 778 (Pa. Commw. Ct. 2001) (Commission was able to determine whether vehicles complied with DOT regulations at 67 Pa. Code Chapter 175 where those provisions were incorporated into its own regulatory code at 52 Pa. Code § 29.402(1)). The Court noted in that case that the Commission's decision to incorporate DOT regulations in an area where two agencies possess overlapping authority was in no way inappropriate; in fact, the Court found it "salutary." Id., citing Baltimore and Ohio Railroad Co. v. Occupational Safety and Health Review Commission, 179 U.S. App. D.C. 97, 548 F.2d 1052, 1055 (D.C. Cir. 1976).

Blue Pilot relies upon the Commission's decision in Mid-Atlantic Power Supply Ass'n v. PECO Energy Co., 92 PA PUC 414 (May 19, 1999) (MAPSA), for its position that the Commission has no jurisdiction over Consumer Protection Law issues. Blue Pilot M.B. at 100. While Blue Pilot correctly states that the Commission cannot *enforce* the Consumer Protection

Law, the Company erroneously suggests that this is tantamount to the Commission lacking jurisdiction to consider Consumer Protection Law issues at all even though incorporated into the Commission's regulations. MAPSA does not stand for this proposition. In MAPSA, the Commission specifically found that the letters at issue were deceptive and inaccurate. MAPSA, 92 PA PUC 414, 430. The Commission then referred the finding to the OAG under its Memorandum of Understanding with the Commission for consideration of further enforcement. Id.

In a more recent Commission decision, the interplay of the Consumer Protection Law as it is incorporated into the Commission's regulations is addressed. See Towne v. Great American Power, LLC, Docket No. C-2012-2307991, Opinion and Order (Oct. 18, 2013). In Towne, the Commission found that the EGS's telemarketers used potentially misleading statements that created a substantial risk of confusion for consumers, which conduct is prohibited by the Consumer Protection Law and the Commission's regulations in Chapter 111, 52 Pa. Code Ch. 111 (Section 111.12(d)(1) prohibits misleading or deceptive conduct as defined by, *inter alia*, State or Federal law). See Towne at 7-8, 21-22.

This approach is consistent with jurisdictional determinations of the courts in public utility matters. See e.g. Elkin v. Bell Tel. Co., 420 A.2d 371, 376 (Pa. 1980) (Use of the agency's special experience and expertise in complex areas promotes consistency and uniformity in the area of administrative policy); Weston v. Reading Co., 282 A.2d 714, 714 (Pa. 1977) (Protection of the integrity of the regulatory scheme dictates that the parties preliminarily resort to the agency that administers the scheme for the resolution of disputes); County of Erie v.

Verizon North, Inc., 879 A.2d 357, 357 (Pa. Commw. Ct. 2005) (Allowing the Commission to adjudicate a dispute in the first instance would preserve all right of the parties, while allowing them and any subsequent reviewing court, to benefit from the Commission’s opinions).

Joint Complainants submit that this jurisdictional issue has been fully considered and decided. As such, Blue Pilot’s assertions should be rejected.

f. Blue Pilot Is Responsible for the Fraudulent and Deceptive Marketing and Billing Practices of its Employees, Agents, and Representatives, Pursuant to Section 54.43(f) of the Commission’s Regulations.

Next, Blue Pilot asserts that Section 54.43(f) of the Commission’s regulations establishes “no clear and enforceable standards to which an EGS is required to adhere,” and as such, it would be a violation of Blue Pilot’s due process rights to find a violation of Section 54.43(f), 52 Pa. Code § 54.43(f). Blue Pilot M.B. at 100-101. Joint Complainants address these assertions in detail in Section IV.C.1.c., *supra*, and incorporate the discussion herein.

g. The Company’s Training Is Deficient and Has Resulted in Misleading and Deceptive Practices.

In its Main Brief, the Company asserts that the Joint Complainants failed to prove that Blue Pilot’s training program violated the Commission’s regulations. Blue Pilot M.B. at 101-102. Joint Complainants submit that, as discussed in their Main Brief in Section IV.B.2., Joint Complainants presented substantial evidence demonstrating that Blue Pilot failed to adequately train and monitor its marketing agents, resulting in misleading and deceptive practices in violation of 52 Pa. Code §§ 54.43(f), 111.4, 111.5, 111.12(d)(1), 54.4(a) and 54.5(a). Blue Pilot failed to present any witnesses to rebut the evidence demonstrating Blue Pilot’s inadequate training and oversight policies. Instead, in its Main Brief, Blue Pilot merely asserts that it “trained its sales agents continuously throughout their employment and took disciplinary actions

to address instances when sales agents did not comply with [Blue Pilot's] policies," and cites the Direct Testimony of Joint Complainants' expert witness Ms. Alexander in support of this assertion. Id. at 102.

Joint Complainants submit that Blue Pilot mischaracterizes Ms. Alexander's testimony, as her testimony does not support Blue Pilot's position. In fact, Ms. Alexander provided significant evidence demonstrating Blue Pilot's inadequate training, oversight, and disciplinary policies. See OAG/OCA St. 1 at 19-24. For example, Ms. Alexander testified that when Blue Pilot was asked in discovery to identify training programs, training events, the number of attendees, and the location of training events, the Company directed Joint Complainants to its telemarketing scripts. Id. at 19. Additionally, upon Ms. Alexander's review of the Company's training materials, Ms. Alexander identified significant deficiencies, most notably that Blue Pilot failed to utilize any Pennsylvania-specific training materials or provide its sales representatives with any information on Pennsylvania's consumer protection requirements. Id. at 20-21. Additionally, Ms. Alexander confirmed that the training scripts make misleading and deceptive promises of savings. Id. at 20. Furthermore, Ms. Alexander testified that Blue Pilot was unable to provide any internal compliance programs and policies and has not documented any audits or other investigations to ensure compliance with Pennsylvania law or the Commission's regulations. Id. at 19, 21. Ms. Alexander also presented evidence demonstrating that Blue Pilot did not have adequate disciplinary procedures and measures in place to address and deter unfair and deceptive practices. Id. at 19-20.

As such, Joint Complainants submit that they have presented substantial evidence demonstrating that Blue Pilot failed to adequately train and monitor its marketing agents in violation of 52 Pa. Code §§ 54.43(f), 111.4, 111.5, 111.12(d)(1), 54.4(a) and 54.5(a).

h. Conclusion.

As Joint Complainants asserted in their Main Brief at pages 48-60, Blue Pilot made misleading and deceptive promises of savings in its marketing and promotional materials and through its sales agents in order to induce consumers to enroll and did not deliver the promised savings. As such, Joint Complainants submit that Blue Pilot should be found in violation of the Commission's regulations at Sections 54.43(f) (relating to EGS responsibility for fraudulent, deceptive or other unlawful marketing acts by employees, agents and representatives); 111.4 (relating to supplier responsibility to develop standards and qualifications for individuals it hires as agents); 111.5 (relating to supplier responsibility to adequately train and monitor its agents); 111.12(d)(1) (relating to compliance with the Consumer Protection Law); and 54.4(a) and 54.5(a) (relating to the failure to bill prices that matched the marketed and disclosed prices), 52 Pa. Code §§ 54.43(f), 111.4, 111.5, 111.12(d)(1), 54.4(a) and 54.5(a).

4. Count IV– Lack of Good Faith Handling of Complaints.

Joint Complainants averred that Blue Pilot failed to adequately staff its call center, failed to provide reasonable access to Company representatives for purposes of submitting complaints, failed to properly investigate customer disputes, failed to properly notify customers of the results of the Company's investigation into a dispute when such investigation was conducted, and failed to utilize good faith, honesty and fair dealing in its interactions with customers in violation of the Commission's regulations at 52 Pa. Code §§ 56.1(a), 56.141(a), 56.151 and 56.152 and the Company's Licensing Order. See OCA/OAG M.B. at Section 60-76; see also gen'ly Joint Complaint at Count IV.

As a general response to Joint Complainants' allegation that Blue Pilot engaged in a lack of good faith handling of customer complaints, Blue Pilot asserts in its Main Brief that "the

Commission's regulations do not impose standards on EGSs for the staffing of its call center or for handling calls from consumers." Blue Pilot M.B. at 103. Blue Pilot further asserts:

[C]ustomer service in a deregulated environment is a function that should be left to the market to control. [...] If a customer is not satisfied with the responsiveness of the EGS in answering telephone calls or other inquiries, or with the way complaints are resolved, he or she can choose to purchase electric generation services elsewhere.

Id. at 104. Finally, Blue Pilot argues that Sections 56.1, 56.141(a), 56.151, and 56.152 of the Commission's regulations, 52 Pa. Code §§ 56.1, 56.141(a), 56.151 and 56.152, do not establish specific standards that must be followed by EGSs. Id. at 104-105.

Blue Pilot's argument that customer service should be left to the market to control is not supported by the Public Utility Code or the Commission's regulations. As Joint Complainants stated in their Main Brief, Section 2809 makes it a condition of receiving a license that an EGS conform to the Commission's regulations regarding standards and billing practices (*i.e.* Chapter 56). 66 Pa. C.S. § 2809(a). Section 111.13 of the Commission's regulations requires EGSs to implement a process for investigating, responding to and resolving customer inquiries, disputes and complaints and to provide documentation of, *inter alia*, said inquiry, dispute, or complaint and the resolution of the matter. See 52 Pa. Code §§ 111.13(a), (b). Additionally, Section 111.13 specifically references Sections 56.141, 56.151 and 56.152. See 52 Pa. Code §§ 56.141, 56.151, and 56.152. Thus, contrary to Blue Pilot's assertion in its Main Brief, the Public Utility Code and the Commission's regulations do impose standards on EGSs for the handling of customer complainants, and an inability to answer calls from customers with inquiries, disputes, or complaints and execute the Company's process for responding to and resolving customer complaints is a violation of the Commission's rules and regulations.¹⁸

¹⁸ Furthermore, Joint Complainants note that Blue Pilot created an expectation of "quality customer service" through its sales agents, marketing materials, and Welcome Letter. OAG/OCA St. 1 at 5, 28.

As discussed in their Main Brief, Joint Complainants have demonstrated through the expert testimony of Ms. Alexander and through consumer testimonies that numerous consumers had trouble contacting Blue Pilot regarding their complaints or were unsuccessful in speaking with a supervisor. See OAG/OCA M.B. at 63-66 and FOF 93. Blue Pilot has failed to present any witnesses to rebut the evidence demonstrating that Blue Pilot failed to adequately staff its call center and provide reasonable access to Company representatives for purposes of submitting complaints. In fact, Blue Pilot even acknowledges that several consumers had trouble reaching the call center “amidst and following the Polar Vortex.” See Blue Pilot M.B. at 104. To the extent that Blue Pilot is asserting the Polar Vortex as a defense to its failure to adequately staff its call center, such defense is inappropriate, as there are no exceptions noted in the regulations identifying when adequate customer service may be unnecessary.

Thus, Joint Complainants submit that they have met their burden of proving that Blue Pilot failed to adequately staff its call center and provide reasonable access to Company representatives in violation of the Commission’s regulations and the Company’s Licensing Order.

Additionally, Joint Complainants alleged that Blue Pilot failed to properly investigate customer disputes, and when such investigation was conducted, Blue Pilot failed to notify customers of the results of the Company’s investigation. OAG/OCA M.B. at 66-71; see also Joint Complaint at Count IV. Specifically, Joint Complainants have shown, *inter alia*:

- Blue Pilot failed to properly investigate complaints that alleged misrepresentation and potentially fraudulent conduct by the Company’s sales agents. OAG/OCA M.B. at 66-69; see also FOF 96.
- Instead of initiating an investigation into complaints regarding variable rates or higher-than-normal bills, Blue Pilot routinely defended its conduct by relying on its ability to pass through high wholesale market prices and blamed the high

prices on extreme weather. OAG/OCA M.B. at 66-67; see also OAG/OCA St. 1 at 23, 42, 52; see also FOF 95.

- When customers called Blue Pilot to dispute or complain about a price charged, Blue Pilot did not notify the customer of the results of the dispute or provide the customer with any information necessary for the customer to examine the basis for the monthly price charged. OAG/OCA M.B. at 69-71; see also OAG/OCA St. 1 at 29-30, 51-52; see also FOF 95.

Blue Pilot did not present any witnesses to rebut the evidence demonstrating that Blue Pilot failed to properly investigate customer disputes. Instead, Blue Pilot merely asserts that some customers who were able to reach Blue Pilot regarding their complaints “simply did not like the answer they were given.” Blue Pilot M.B. at 104. Blue Pilot’s argument does not rebut the evidence demonstrating that Blue Pilot failed to investigate customer disputes. In fact, in light of the evidence demonstrating Blue Pilot’s failure to investigate customer disputes, it is no surprise that customers were not satisfied with the Company’s response, as Blue Pilot asserts. As such, Joint Complainants request a finding that Blue Pilot failed to properly investigate customer disputes, and when such investigation was conducted, Blue Pilot failed to notify customers of the results of the Company’s investigation in violation of the Commission’s regulations, 52 Pa. Code §§ 56.141(a), 56.151, and 111.13(a) and (b).

Joint Complainants also alleged that Blue Pilot failed to utilize good faith, honesty and fair dealing in its dealings with customers in violation of 52 Pa. Code § 56.1(a) and the Company’s Licensing Order. OAG/OCA M.B. at 71-76; see also gen’ly Joint Complaint at Count IV. Specifically, Joint Complainants have shown, *inter alia*:

- Blue Pilot failed to investigate consumer complaints. OAG/OCA M.B. at 66-69; see also FOF 96.
- Blue Pilot utilized a customer service script that guided Blue Pilot representatives to take no responsibility for the prices charged and provided misleading and deceptive statements to consumers. OAG/OCA M.B. at 72.

- Blue Pilot failed to implement a fair and consistent policy for evaluating refunds. OAG/OCA M.B. at 72-73; see also OAG/OCA St. 1 at 54-56.
- Blue Pilot failed to issue adequate refunds. OAG/OCA M.B. at 72-74; see also OAG/OCA St. 1 at 54-56.

Blue Pilot did not present any witnesses to rebut the evidence demonstrating that Blue Pilot failed to utilize good faith, honesty and fair dealing with customers. Thus, Joint Complainants submit that they have met their burden of proving that Blue Pilot failed to utilize good faith, honesty and fair dealing with customers in violation of the Commission's regulations and the Company's Licensing Order.

Joint Complainants request a finding that Blue Pilot failed to adequately staff its call center, failed to provide reasonable access to Company representatives for purposes of submitting complaints, failed to properly investigate customer disputes, failed to properly notify customers of the results of the Company's investigation into a dispute when such investigation was conducted, and failed to utilize good faith, honesty and fair dealing in its dealings with customers in violation of the Commission's regulations, 52 Pa. Code §§ 56.1(a), 56.141(a), 56.151, 56.152, and 111.13, and the Company's Licensing Order.

5. Count V – Failure to Comply with the TRA.

Blue Pilot argues in its Main Brief that the Commission does not have jurisdiction to enforce the provisions of the TRA, and even if the Commission had such jurisdiction, the Joint Complainants have not established any violations. Blue Pilot M.B. at 106. As detailed above in Section II of Joint Complainants' Main Brief (relating to Legal Standards), the Joint Complainants are properly before the Commission. The Commission has incorporated the TRA into its own regulations and therefore, has authority to address this issue.

Furthermore, the Joint Complainants have met their burden of proof and have submitted evidence to prove:

- Blue Pilot failed to provide a written contract that complied with the requirements of the TRA, thereby violating Section 111.10(a)(1)-(2) of the Commission's regulations, 52 Pa. Code § 111.10(a)(1)-(2), that require a supplier, or its agent who conducts telemarketing and sales activities on its behalf, to comply with the TRA; and
- Blue Pilot failed to mail the required terms of services or disclosure documents violating Section 111.10(c) of the Commission's regulations, 52 Pa. Code § 111.10(c).

Blue Pilot, in its Main Brief, relied on an exception in Section 2245(d) of the TRA, 73 P.S. § 2245(d), to claim that the Company was exempt from providing a written contract pursuant to the TRA because Blue Pilot's sale of electric supply was regulated by other laws of the Commonwealth, specifically in 52 Pa. Code § 111.7.¹⁹ Blue Pilot M.B. at 107. Blue Pilot also asserts that Section 54.5 of the Commission's regulations, 52 Pa. Code § 54.5, dictates the terms of an EGS's disclosure statement. Blue Pilot argues that the disclosure statement is the contractual sale of electric generation supply, and thus, Blue Pilot is exempt from providing a written contract pursuant to the TRA. The Joint Complainants submit, however, that EGSs are subject to all requirements of the TRA, except the requirement that the EGS register with the OAG. See 52 Pa. Code § 111.10(a)(1).

The Joint Complainants thoroughly responded to these two assertions in their Main Brief. See OAG/OCA M.B. at 77-83. Neither Section 54.5 nor Section 111.7 of the Commission's regulations, 52 Pa. Code §§ 54.5 and 111.7, negate or supersede Blue Pilot's requirement to

¹⁹ Ironically, the Joint Complainants would note that Blue Pilot argues elsewhere in its Brief that the Commission does not regulate Blue Pilot's sale of electricity or the prices it can charge. Blue Pilot M.B. at 79-81. Blue Pilot also argues that the Commission has no jurisdiction over its "contracts." Blue Pilot M.B. at 81-83.

provide a written contract that provides the disclosures required by Section 2245(c) of the TRA, 73 P.S. § 2245(c), and to obtain a customer's signature to confirm enrollment as required by Section 2245(a)(7) of the TRA, 73 P.S. § 2245(a)(7). EGSs are subject to all requirements of the TRA, except the requirement that they register with the OAG. See 52 Pa. Code § 111.10(a)(1) and Rulemaking Re: Marketing and Sales Practices for the Residential Energy Market, Docket No. L-2010-2208332, Corrected Final Rulemaking Order at 8 (Oct. 24, 2012) ("We also take this opportunity to remind suppliers of their obligation to respect all federal, state and local laws related to sales and marketing and to note that nothing in these regulations is intended to vacate or supersede any other existing federal, state or local requirement.").

Joint Complainants submit that the Company's legal arguments regarding jurisdiction and the meaning of the Commission's regulations at 52 Pa. Code §§ 54.5 and 111.7 must be rejected. Joint Complainants have shown that Blue Pilot has violated the Commission's regulation at 52 Pa. Code § 111.10 by failing to comply with the TRA and failing to provide Disclosure Statements to customers. With these failings, Joint Complainants submit that Blue Pilot has also violated the Commission's regulations at Sections 54.43(f) and 111.12(d)(1), 52 Pa. Code §§ 54.43(f) and 111.12(d)(1), which prohibit misleading and deceptive conduct.

D. Relief Requested.

1. License Revocation.

Joint Complainants requested that the Commission find that Blue Pilot violated the Public Utility Code and the Commission's regulations and Orders, permanently revoke Blue Pilot's EGS license, and prohibit Blue Pilot's owners and managers, Samuel Delug, Raymond Perea, and Joseph Koppy, from participating in the competitive market in Pennsylvania. OAG/OCA M.B. at 83-89. In its Main Brief, the Company asserts that the Commission's authority to suspend or revoke an EGS's license is limited to instances where the EGS fails to fulfill its

financial responsibility requirements of maintaining a bond or other security and state tax obligations, which are the only specific instances identified for license suspension or revocation under 66 Pa. C.S. § 2809(c).²⁰ Blue Pilot M.B. at 109. Although Blue Pilot acknowledges that the Commission’s regulation at 52 Pa. Code § 54.42 also provides that an EGS’s license may be suspended or revoked for the violations listed therein, the Company asserts that the Commission’s authority to direct license suspension or revocation pursuant to 52 Pa. Code § 54.42 “is unclear, or nonexistent.” Blue Pilot M.B. at 110.

Joint Complainants submit that the Company’s assertion ignores 66 Pa. C.S. § 2809(b) that a license would be issued only if, *inter alia*, “it is found that the applicant is fit, willing and able to perform properly the service proposed and to conform to the provisions of this title and the lawful orders and regulations of the [C]ommission under this title, including the [C]ommission’s regulations regarding standards and billing practices” See 66 Pa. C.S. § 2809(b). It is axiomatic that if the Commission has the power to grant the license, it also has the power to take it away.

Moreover, Joint Complainants submit that the Company’s assertion must be rejected, as it ignores the Commission’s duties pursuant to 66 Pa. C.S. § 2809(e). Section 2809(e) requires that the Commission impose requirements necessary to maintain the present quality of service provided by electric utilities does not deteriorate, including assuring that 52 Pa. Code Ch. 56 (relating to standards and billing practices for residential utility service) are maintained. See 66 Pa. C.S. § 2809(e). The Commission promulgated Section 54.42 of its regulations pursuant to,

²⁰ Joint Complainants note that the Commission suspended Blue Pilot’s EGS license for failure to maintain a bond or other security approved by the Commission until final resolution of the Joint Complaint. See Electric Generation Supplier Cancellations of Companies with an Expired Financial Security, Docket No. M-2015-2490383, Final Order at 2-3 (March 14, 2016).

inter alia, 66 Pa. C.S. § 2809. See 52 Pa. Code Ch. 54. As such, Joint Complainants submit that the Commission's authority to revoke Blue Pilot's EGS license in this proceeding is clear.

As discussed by Joint Complainants and Blue Pilot in their Main Briefs, Blue Pilot has agreed to voluntarily surrender its EGS license, and the cancellation of Blue Pilot's EGS license is the subject of a separate proceeding initiated by the Commission at Docket No. M-2015-2490383. OAG/OCA M.B. at 85; Blue Pilot M.B. at 110; see FN 21, *supra*. As Joint Complainants pointed out in their Main Brief, however, permanent license revocation, as well as an order prohibiting Blue Pilot's owners and managers, Samuel Delug, Raymond Perea, and Joseph Koppy, from participating in the competitive market in Pennsylvania, is appropriate in this proceeding in light of Blue Pilot's blatant disregard for the Public Utility Code and the Commission's regulations and Orders and necessary to ensure the integrity of the Commonwealth's competitive retail electricity market. See OAG/OCA M.B. at 83-89.

As such, Joint Complainants respectfully request the Commission order permanent revocation of Blue Pilot's EGS license and prohibit Blue Pilot's owners and managers, Samuel Delug, Raymond Perea, and Joseph Koppy, from any type of participation in the competitive market in Pennsylvania.²¹

2. Civil Penalty and Contributions.

In its Main Brief, Blue Pilot asserts that, based on the Company's discussion of the Rosi Factors, a civil penalty would serve no purpose in this proceeding because Blue Pilot has exited

²¹ Further, as in other instances of a supplier leaving Pennsylvania and to the extent Blue Pilot has any remaining customers in Pennsylvania and such notice has not already been provided, Blue Pilot's customers should be provided written notice as required in 52 Pa. Code § 54.41(b) that Blue Pilot is withdrawing from the market and advised that they may choose another supplier or return to default service.

Should the Commission determine to not revoke Blue Pilot's EGS license or determine to allow a possible reinstatement of the license, and should Blue Pilot determine to resume business operations in Pennsylvania if allowed, conditions should be placed on the Company's EGS license based on the Joint Complainants' proven violations and the ALJs' and Commission's specific findings of wrongdoing by the Company.

the Pennsylvania market and will not oppose or appeal license revocation in this matter. Blue Pilot M.B. at 110-17. Joint Complainants submit that Blue Pilot's Rosi Factor analysis is not supported by the evidence in this matter and should be rejected. For the sake of brevity, Joint Complainants incorporate their detailed Rosi Factor analysis herein, which fully supports a substantial civil penalty. See OAG/OCA M.B. at 89-105. Joint Complainants, however, address a few specific details from Blue Pilot's Main Brief as follows.

At the outset, Joint Complainants submit that Blue Pilot's assertion that a civil penalty will serve no deterrence purpose in this proceeding because the Company has left the Pennsylvania market and is willing to give up its EGS license is flawed. Foregoing the imposition of a civil penalty for multiple proven violations of the Commission's regulations and Orders for the reasons cited by Blue Pilot could actually encourage suppliers to obtain an EGS license in Pennsylvania and then market and bill in violation of, or without regard to, the Commission's regulations and Orders with the plan of merely leaving the market should the EGS be "caught" and brought to task before the Commission. Joint Complainants further submit that they have established that Blue Pilot has violated and continues to violate numerous Commission regulations, as well as the Public Utility Code and the Licensing Order and that a significant civil penalty is warranted in this proceeding. See OAG/OCA M.B. at 89-105.

Further, Blue Pilot's assertion that its fundamental due process rights were violated because it was not made aware of a specific civil penalty request and did not have the opportunity to be heard on such request should be rejected. See Blue Pilot M.B. at 111. Further, the case cited by Blue Pilot supports a finding that Blue Pilot's due process rights were maintained in this proceeding. See Northview Motors, Inc. v. Commw., Attorney General, 128 Pa. Commw. 54, 562 A.2d 977 (Pa. Commw. Ct. 1989). In Northview Motors, the company

asserted, *inter alia*, that the trial court's imposition of a \$10,000 civil penalty for violations of the Consumer Protection Law violated the company's due process rights. 128 Pa. Commw. 54, 61, 562 A.2d 977, 980. The Court identified the elements afforded to any person against whom civil penalties are sought as follows: (1) the accused be informed with reasonable certainty of the nature of the accusation lodged against him; (2) he has timely notice and opportunity to answer the charges and defend against attempted proof of the accusation; and (3) the proceedings be conducted in a fair and impartial manner. Id. The Court then rejected the company's due process violation argument for the following reasons:

Northview was informed with reasonable certainty of the nature of the Commonwealth's accusations. No objections were filed as to their specificity. Northview made no contention that it did not have sufficient timely notice and certainly had the opportunity to defend against the Commonwealth's proof, evidenced by the fact that Northview appeared and presented witnesses at trial. The proceedings were conducted in a fair and impartial manner, and the burden was placed upon the Commonwealth to prove its accusations against Northview.

128 Pa. Commw. 54, 61-62, 562 A.2d 977, 980.

Joint Complainants submit that the same reasoning applies in this proceeding. The Joint Complaint provided Blue Pilot with notice of the claims of violations against the Company. Blue Pilot made no objection regarding a lack of specificity regarding Joint Complainants' prayer for the imposition of a civil penalty. Joint Complainants' testimony and exhibits were pre-served, providing Blue Pilot with ample opportunity to conduct discovery regarding the testimony and exhibits and prepare a defense. See e.g. OAG/OCA St. 1 at 58 (Ms. Alexander recommended, based on her investigation, that the Commission seek, *inter alia*, substantial civil penalties in this matter). Blue Pilot was afforded the opportunity to cross-examine Joint Complainants' witnesses. Blue Pilot chose not to present any witnesses in defense of Joint Complainants' proof in this matter. As such, Joint Complainants submit that Blue Pilot's due

process rights were properly maintained throughout this proceeding, and the Company's contention to the contrary should be rejected.

As detailed in their Main Brief, Joint Complainants have established that Blue Pilot has violated at least 15 of the Commission's regulations. See OAG/OCA M.B. at Sections IV.C and IV.D.2. Further, Joint Complainants detailed two ways in which a civil penalty could be calculated based on the evidence in this matter and recommend that Blue Pilot be assessed a civil penalty in the higher amount of \$2,607,000

based on a \$1,000 per customer penalty for the Company's January 2014 level of customers. See OAG/OCA M.B. at 103-104. Additionally, Joint Complainants asserted that it would be appropriate, given the amount and seriousness of the violations shown in this proceeding, to direct Blue Pilot to make sizeable contributions to the EDCs' hardship funds of at least \$150,000. Id. at 104-105. Blue Pilot's assertions in its Main Brief do not alter or otherwise amend Joint Complainants' assertions regarding an appropriate civil penalty and contributions to EDCs' hardship funds in this proceeding.

3. Refunds.

In their Main Brief, Joint Complainants requested that the Commission direct Blue Pilot to, *inter alia*, refund all charges to its customers that were over and above the Price to Compare in the customers' respective service territories from January 2014 through March 2014. OAG/OCA M.B. at 105-117. In its Main Brief, Blue Pilot asserts that the Commission lacks jurisdiction to order refunds in this matter. Blue Pilot M.B. at 117-129. Blue Pilot makes several arguments in support of its position that the Commission lacks jurisdiction to order an EGS to issue refunds, including the following: 1) since the Commission lacks the authority to regulate EGS prices, it follows that the Commission lacks the authority to issue refunds to customers; 2) there is no express statutory authority granting the Commission the authority to

direct EGSs to issue refunds; 3) the broad authority given to the Commission under Section 501 of the Public Utility Code, 66 Pa. C.S. § 501, does not confer implicit authority on the Commission to direct EGSs to issue refunds; and 4) the lack of statutory authority to award damages is akin to the lack of authority to direct EGSs to issue refunds, and as such, the same reasoning must apply. See Blue Pilot M.B. at 117-129.

Blue Pilot's arguments that the Commission lacks jurisdiction to issue refunds lack merit. If Blue Pilot's arguments were valid, the Commission would essentially be left only with the options of imposing civil penalties pursuant to Section 3301 of the Public Utility Code, 66 Pa. C.S. § 3301, or revocation of the EGS's license pursuant to Section 2809 of the Public Utility Code, 66 Pa. C.S. § 2809. This would be an untenable result for both the retail market and consumer protection. Specifically, acceptance of these arguments would hamstring the Commission in EGS cases and would run directly contrary to the grant of broad powers by the General Assembly through Section 501 of the Public Utility Code, 66 Pa. C.S. Section 501; it would also undermine the Commission's ability to enforce the Choice Act, 66 Pa. C.S. Ch. 28, as the General Assembly intended. Acceptance of Blue Pilot's arguments would also be inconsistent with the Commission's obligation to effectively monitor and enforce retail energy market regulations and protect consumers in accordance with 66 Pa. C.S. § 2809. The Commission should reject these contentions relative to issuance of refunds.

Moreover, Joint Complainants have fully supported their position that the Commission has jurisdiction, pursuant to Sections 501 and 2809(e) of the Public Utility Code, 66 Pa. C.S. §§ 501 and 2809(e), to order across-the-board refunds in this case. OAG/OCA M.B. at 105-115. Joint Complainants incorporate the discussion from pages 105 through 115 of their Main Brief herein. In summary, the Commission has both affirmed and invoked its power to order an EGS

to issue refunds. See Commonwealth of Pennsylvania by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. Respond Power, LLC, Docket No. C-2014-2427659, Order at 27-28 (Apr. 9, 2015) (Respond Power Interlocutory Order); see also Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. IDT Energy, Inc., Docket No. C-2014-2427657, Opinion and Order at 17-18 (Dec. 18, 2014) (IDT Interlocutory Order). In the IDT Interlocutory Order, the Commission specifically held that, in addition to having the authority to direct EGS refunds for slamming violations or when a customer has, otherwise, been switched to an EGS without his or her consent pursuant to 52 Pa. Code § 57.177(b), the Commission has plenary authority under Section 501 of the Public Utility Code, 66 Pa. C.S. § 501, to direct an EGS to issue a credit or refund for an over bill.²² IDT Interlocutory Order at 17-18. Further, the Pennsylvania Supreme Court in Delmarva Power & Light Co. v. Pa. PUC, 870 A.2d 901 (Pa. 2005) confirmed that in regulating the service of EGSs, the Commission shall impose the requirements “necessary to ensure that the present quality of service ... does not deteriorate,

²² In its Main Brief, Blue Pilot also argues that the Statutory Construction Act of 1972, 1 Pa. C.S. § 1933 (Statutory Construction Act), mandates that specific provisions prevail over general provisions. Blue Pilot M.B. at 129-130. As such, Blue Pilot asserts that the lack of express authority to direct an EGS to issue a refund prevails over any general authority under Section 501 of the Public Utility Code, 66 Pa. C.S. § 501. Blue Pilot, however, mischaracterizes the Statutory Construction Act, which provides, in pertinent part, as follows:

Whenever a general provision in a statute shall be in conflict with a special provision in the same or another statute, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions is irreconcilable, the special provisions shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted later and it shall be the manifest intention of the General Assembly that such general provision shall prevail.

1 Pa. C.S. § 1933. While Blue Pilot points to certain provisions of the Public Utility Code that expressly authorize the Commission to order certain remedies, these provisions do not limit the Commission’s authority to order other remedies, as Blue Pilot suggests. See 66 Pa. C.S. §§ 2809 and 3301. As such, no conflict exists between Section 501 and Sections 2809 and 3301 of the Public Utility Code. Even to the extent a conflict did exist, the Statutory Construction Act provides that the provisions shall be construed, if possible, so that effect may be given to both provisions in conflict. As such, Joint Complainants submit that Blue Pilot’s statutory construction argument is without merit.

including ... assuring that” standards and billing practices for residential utility service are maintained. Delmarva at 254-55, 911 citing 66 Pa. C.S. § 2809(e).

The Commission recently clarified that its authority to direct refunds includes instances when an EGS fails to abide by regulatory standards governing telemarketing or in any “appropriate circumstances.” Kiback v. IDT Energy, Inc., Docket No. C-2014-2409676, Order at 31-33 (Aug. 20, 2015) (Kiback v. IDT), 2015 Pa. PUC LEXIS 53, *29-30; see also Werle v. Respond Power, LLC, Docket No. C-2014-2429158, Order at 8-9 (Feb. 23, 2015), 2014 WL 6807071 (Commission explicitly overruled the portion of the ALJ’s Initial Decision concluding that the Commission lacked jurisdiction to order a refund or credit); Nadav v. Respond Power, LLC, Docket No. C-2014-2429159, Order at 7 (Dec. 19, 2014), 2014 WL 4374216; see also Durante v. Blue Pilot Energy, LLC, Docket No. F-2015-2487082, Order at 9 (March 14, 2016) (“We disagree with the ALJ’s legal conclusion that there is no remedy here. [...] we conclude that the Company’s failure to bill the Complainant at the rate offered and accepted constitutes a violation of Sections 54.4(a) and 54.7(a) of our Regulations, 52 Pa. Code §§ 54.4(a) and 54.7(a). [...] To address this violation, we direct the Company to refund the Complainant the net difference between the rate charged for the March 2014 bill [...] and the rate offered and agreed upon [...].”); see also Herp v. Respond Power (“[W]e find the ALJ correctly concluded that Respond’s agent’s marketing did not conform with Respond’s subsequent billing, resulting in violations of our Regulations and constituting appropriate circumstances warranting a refund.”). In light of these recent decisions, it is clear that the Commission has jurisdiction to order EGSs to issue refunds, as such remedies are essential to preserving the quality of electric service in this Commonwealth. 66 Pa. C.S. §§ 501 and 2809(e).

Here, Joint Complainants have shown, *inter alia*, that Blue Pilot's prices charged did not match the Company's salespeople's promises of savings or the Disclosure Statement, in violation of, *inter alia*, 52 Pa. Code §§ 54.4(a) and 54.5(a). The Commission has already determined that refunds are appropriate for violations of these regulations. See e.g. *Herp v. Respond Power* at 39. As such, the Company's assertions that the Commission lacks authority or jurisdiction to direct refunds in this matter must be rejected.

In its Main Brief, Blue Pilot argues that the Commission should disregard its decisions in *Kiback v. IDT* and *Herp v. Respond Power*, in which the Commission directed EGSs to issue refunds to customers. Blue Pilot M.B. at 130-32. Blue Pilot asserts:

[T]he decisions in *Kiback* and *Herp* have introduced a level of uncertainty into the electric retail market that leaves EGSs in the dark on their ability to charge prices to customers that are consistent with the contract. Through the *Kiback* and *Herp* decisions, the Commission has announced that it will rewrite a private contract between an EGS and its customers, on the basis of uncorroborated and self-serving hearsay evidence introduced by consumers years or months after a sales transaction.

Id. at 131. Joint Complainants submit that the Commission's decisions in *Kiback v. IDT* and *Herp v. Respond Power* set a clear standard that prices charged by an EGS must conform to the marketing of information to customers and to the EGS' disclosure statement. See *Kiback v. IDT* at 21-22 ("Prices billed must reflect the prices marketed and agreed to in the disclosure statement. 52 Pa. Code § 54.4(a). Advertised prices must reflect prices billed and in disclosure statements. 52 Pa. Code § 54.7. All of this information is subject to our review for compliance purposes. 52 Pa. Code § 54.9."); see also *Herp v. Respond Power* at 39 ("[F]ailure to abide by our Regulations with respect to the marketing of information to customers – oral or written – constitutes appropriate circumstances that justify the order of a credit or refund."). The Commission did not create a new standard in *Kiback v. IDT* and *Herp v. Respond Power*, as

Blue Pilot suggests. Rather, the Commission found that the EGSs in Kiback v. IDT and Herp v. Respond Power acted in violation of Commission regulations. Along those same lines, Blue Pilot completely mischaracterizes the Commission's decisions in Kiback v. IDT and Herp v. Respond Power by characterizing those decisions as an announcement by the Commission "that it will rewrite a private contract between an EGS and its customers." See Blue Pilot M.B. at 131. Again, Kiback v. IDT and Herp v. Respond Power were about clear violations of the Commission's regulations, not an attempt by the Commission to adjudicate private contractual disputes.²³

Next, Blue Pilot argues that should the Commission determine that it may order refunds, none are warranted here. Blue Pilot M.B. at 132-33. Blue Pilot asserts that since the consumer witnesses are not formal complainants in this proceeding, they may not be awarded refunds by the Commission. Id. at 133. Blue Pilot further asserts that the Commission should also not award refunds to consumers who did not submit testimony in this proceeding, as no basis exists to direct such a remedy. Id. at 133-34. Blue Pilot also argues that Joint Complainants have not carried their burden of proof in this proceeding. Id.

As discussed by Joint Complainants in their Main Brief, the Commission's authority is not limited to individual complainants or to only those consumers who submitted testimony in this proceeding. See OAG/OCA M.B. at 108-115. The ALJs have repeatedly acknowledged Joint Complainants' role in this and other similar proceedings to act on behalf of consumers and the public interest as a whole. See Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, Through the Bureau of Consumer Protection, And Tanya J. McCloskey,

²³ Joint Complainants note that in Herp v. Respond Power, the Commission declined to make any findings related to the written "contract." See Herp v. Respond Power at 16. The decision was related entirely to the Company's agent's marketing and the Company's billing. Additionally, in Kiback v. IDT, the complainant did not raise an issue with the Company's contract or disclosure statement. See Kiback v. IDT at 2-6.

Acting Consumer Advocate v. Blue Pilot Energy, LLC, Docket No. C-2014-2427655, Order at 7 (Sept. 3, 2015) (Sept. 3 Order); see also Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, Through the Bureau of Consumer Protection, And Tanya J. McCloskey, Acting Consumer Advocate v. Blue Pilot Energy, LLC., Docket No. C-2014-2427655, Order at 5 (Sept. 11, 2015) (Sept. 11 Order); see also Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, Through the Bureau of Consumer Protection, And Tanya J. McCloskey, Acting Consumer Advocate v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric, Docket No. C-2014-2427656, Order at 6 (Dec. 1, 2014) (PaG&E Order). Specifically, in the PaG&E Order, the ALJs held:

... in this case, the OCA and OAG are acting in their representative capacities as government agencies on behalf of the public interest as a whole, not on behalf of the specific individual consumers[...]. As we noted in the August 20, 2014 Order Granting In Part And Denying In Part Preliminary Objections, and as the Joint Complainants argued in their Answer to [PaG&E's] Motion, both the OCA and the OAG are authorized to represent consumer interests before the Commission. *See*, 71 P.S. § 309-4(a) and (b); 73 P.S. § 201-4. Neither the OCA nor the OAG act as a private attorney for any given customer and are not seeking to do that in this case. Rather, the Joint Complainants are proceeding in this matter on behalf of the public interest ... The Joint Complainants are able to bring complaints based on the public interest that an individual consumer alone would not be able to bring. This is the opportunity to do that.

PaG&E Order at 6; see also Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, Through the Bureau of Consumer Protection, And Tanya J. McCloskey, Acting Consumer Advocate v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric, Docket No. C-2014-2427656, Tentative Form Opinion and Order at 64 (March 9, 2016) (The Commission rejected the argument that the OCA does not have the authority to represent consumers who have not filed complaints). Moreover, in both the Sept. 3 Order and the Sept. 11 Order, the ALJs rejected Blue Pilot's argument that the Joint Complaint is limited to the consumers whose testimony was submitted into the record:

[W]e reject Blue Pilot's argument that the Joint Complaint in this proceeding pertains solely to the 97 customers whose testimony was submitted into the record of this proceeding. This reading is too narrow. Rather, the Joint Complainants are entitled in their statutory capacity to represent Blue Pilot's Pennsylvania consumers as a whole and are doing so in this proceeding. The information sought is likely to lead to admissible evidence and that Joint Complainants represent the public interest, not only the 97 consumers that complained to Joint Complainants.

Sept. 3 Order at 7; Sept. 11 Order at 5.

Moreover, Joint Complainants have demonstrated that Blue Pilot engaged in a pattern and practice of misleading and deceptive behavior in violation of the Public Utility Code and the Commission's regulations and Orders that affected all of Blue Pilot's Pennsylvania customers. For example, Joint Complainants' expert witness Ms. Alexander reviewed the Company's marketing materials and sales script provided in discovery as well as all of the testimony and other documents provided by consumers and reached conclusions relevant to Blue Pilot's overall business practices. See gen'ly OAG/OCA St. 1. Additionally, Joint Complainants' expert witness Ms. Everette analyzed the overall prices charged by Blue Pilot to its customers from December 2013 through March 2014. See gen'ly OAG/OCA St. 3. Ms. Everette determined that Blue Pilot's customers overall paid more than their applicable PTCs in December 2013 through March 2014. Id. Moreover, Joint Complainants' expert witness Dr. Estomin provided testimony relating to Blue Pilot's Disclosure Statement and the Company's calculation of prices in relation to its Disclosure Statement, as related to all Pennsylvania customers. See gen'ly OAG/OCA St. 2. Further, it must be emphasized that the testimonies of these consumers, from different parts of the Commonwealth and lacking meaningful personal connection to one another, demonstrate a remarkable overlap and similarity in their experiences with Blue Pilot. Indeed, Joint Complainants submit that the only conclusion that can be drawn from these testimonies, along with the expert witness testimonies, is that the modus operandi of Blue Pilot –

its way of doing business – was replete with deception in violation of the Public Utility Code and Commission regulations and Orders. A requirement that every customer file a formal complaint or testify in order to receive a refund in this proceeding, in which Blue Pilot engaged in widespread violations of the Public Utility Code and the Commission’s regulations and Orders, would present an impossible hurdle and one that the courts have never imposed. Thus, refunds to all Pennsylvania customers are appropriate in this case.

Furthermore, as discussed in Section IV.C. of their Main Brief, substantial evidence supports the allegations in the Joint Complaint in this case. The consumer witness testimonies, the Company’s documents, and the expert testimonies of Ms. Alexander, Dr. Estomin and Ms. Everette as to the Company’s overall general marketing, sales, billing and customer service practices establish that Blue Pilot engaged in a pattern and practice of misleading and deceptive behavior in violation of the Public Utility Code and the Commission’s regulations and Orders that affected all of Blue Pilot’s Pennsylvania customers. As such, Joint Complainants submit that refunds to all customers for usage from January 2014 through March 2014 in an aggregate amount of approximately \$2,408,449 should be ordered in this proceeding. See OAG/OCA M.B. at 116.

V. CONCLUSION

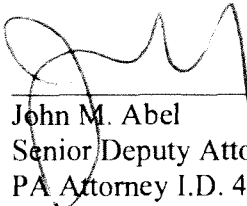
WHEREFORE, for the reasons set forth above, Joint Complainants respectfully request that the ALJs find that Blue Pilot violated the Public Utility Code at 66 Pa. C.S. § 2807(d)(2) and the Commission’s regulations at 52 Pa. Code §§ 54.4, 54.5, 54.43, 56.1, 56.141, 56.151, 56.152, 111.4, 111.5, 111.10, 111.12 and 111.13, and the Commission’s Orders, specifically the Company’s Licensing Order and the 2010 Interim Guidelines²⁴.

²⁴ See Interim Guidelines on Marketing and Sales Practices for Electric Generation Suppliers and Natural Gas Suppliers, Docket No. M-2010-2185981, Order (Nov. 5, 2010).

By way of relief for the Company's violations of the Public Utility Code and the Commission's regulations and Orders, Joint Complainants request that the ALJs order Blue Pilot to refund all charges to consumers that were over and above the Price to Compare in the customers' respective service territories for usage from January 1, 2014 through the date of the resolution of this matter, impose a civil penalty on Blue Pilot, and direct the Company to make sizeable contributions to the EDCs' hardship funds. Additionally, Joint Complainants submit that the evidence in this proceeding clearly shows that Blue Pilot lacks the managerial and technical expertise to retain its EGS license, and therefore, Joint Complainants request

permanent license revocation and an order prohibiting Blue Pilot's owners and managers, Samuel Delug, Raymond Perea, and Joseph Koppy, from participating in the competitive market in Pennsylvania.

Respectfully submitted,



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	:	
And	:	
	:	
TANYA J. McCLOSKEY, Acting Consumer	:	
Advocate,	:	
Complainants	:	
	:	Docket No. C-2014-2427655
v.	:	
	:	
BLUE PILOT ENERGY, LLC	:	
Respondent	:	

I hereby certify that I have this day served a true copy of the foregoing document,
Joint Complainants' Reply Brief, in the manner and upon the persons listed below:

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And	:	
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TANYA J. McCLOSKEY, Acting Consumer	:	
Advocate,	:	
Complainants	:	
	:	Docket No. C-2014-2427655
v.	:	
	:	
BLUE PILOT ENERGY, LLC	:	
Respondent	:	

I hereby certify that I have this day served a true copy of the foregoing document,
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