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July 27, 2016

VIA E-FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Commonwealth of Pennsylvania, et al. v. Blue Pilot Energy, LLC
Docket No. C-2014-2427655

Dear Secretary Chiavetta:

On behalf of Blue Pilot Energy, LLC, enclosed for filing are the Exceptions of Blue Pilot Energy, LLC, in the above-captioned matter.

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

Very truly yours,

Karen O. Moury

KOM/bb
Enclosure
cc: Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

EXCEPTIONS OF
BLUE PILOT ENERGY, LLC

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Counsel for Blue Pilot Energy, LLC

Dated: July 27, 2016

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Adoption of the Initial Decision ("ID") issued on July 7, 2016 in this proceeding would result in the Commission: (i) exceeding its statutory authority in numerous ways; (ii) violating constitutional protections afforded to Blue Pilot Energy, LLC ("BPE"); (iii) obliterating due process protections to which BPE is entitled; and (iv) ignoring the well-established legal requirement for substantial evidence to support the Commission's findings of fact. Moreover, if the Commission adopts the ID's analysis of whether BPE's prices conformed to its disclosure statement, it will run afoul of recent compelling federal court rulings which demonstrate that under Pennsylvania law:[1]

- The question of whether BPE's prices conformed to the disclosure statement is a classic issue of contract interpretation, which is properly addressed by the courts;
- In interpreting contractual language, courts may not read words into the contract that change its unambiguous meaning based on extrinsic evidence such as consumer testimony or expectations; and
- A contractual provision stating that a price will vary dependent upon fluctuations in the wholesale market is clear and unambiguous.

Besides containing several legal and factual errors, which are addressed below, the ID disregards the vast majority of BPE's legal arguments and ignores BPE's references to the consumer testimony offered by the Office of Attorney General ("OAG") and the Office of Consumer Advocate ("OCA") (collectively referred to as the "Joint Complainants"), which are contrary to and inconsistent with factual findings in the ID. Because the ID summarily adopts the claims of the Joint Complainants in all material respects, it is necessary for the Commission to step in as a quasi-judicial and neutral body to fairly weigh the evidence, correctly apply the applicable legal principles, and find an appropriate balance that is in the

[1] *Silvis, et al. v. Ambit Energy LP, et al.*, 2016 WL 1086703 (March 21, 2016); *Orange, et al. v. Starion Energy PA, Inc.* 2016 WL 1043618 (March 16, 2016). Both decisions are attached to BPE's Reply Brief as Appendices.

public interest. Section 335(a) of the Public Utility Code ("Code") provides that "[o]n review of the initial decision, the commission has all the powers which it would have in making the initial decision."[2] Under well-established Pennsylvania law, the Commission is always free to wholly disregard and supersede an initial decision. *See, e.g., City of Philadelphia v. Pa. Pub. Util. Comm'n*, 73 Pa. Cmwlth. 355, 361, 458 A.2d 1026 (1983) (a "broader grant of power to the Commission in the disposition of initial decisions…can scarcely be imagined").

Perhaps the most compelling example of the ID's resolve to sustain the Joint Complaint in its entirety is the handling of the Joint Complainants' allegations concerning the Telemarketer Registration Act.[3] Despite the Commission's unequivocal conclusion during interlocutory review in *this proceeding* that it does not have jurisdiction to enforce the requirements of the TRA,[4] the ID concludes that BPE violated Section 111.10(a)(1) of the Commission's regulations[5] by not complying with a provision of the TRA that requires a wet signature on written contracts following telemarketing sales. Since the Commission's regulations do not require a wet signature on a written contract for an EGS to enroll a customer, the Commission is compelled to reject the ID's conclusions.

The ID also contains glaring errors in addressing the Joint Complainants' claims regarding the adequacy of BPE's disclosure statement. Rather than imposing the standards set forth in the Commission's regulations, the ID devises new requirements based on the expressed preferences of the Joint Complainants and retroactively applies them to BPE's disclosure statement to find that the language is inadequate. Had the ID focused on the Commission's

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[2] 66 Pa. C.S. § 335(a).
[3] 73 P.S. §§ 2242 *et seq.*
[4] *See Cmwlth. of PA, et al. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655 (Order entered December 11, 2014) ("*BPE Interlocutory Review Order*") at 16-18.
[5] 52 Pa. Code § 111.10(a)(1).

regulations governing EGS disclosure statements, it would have properly concluded that BPE's disclosure statement contained the necessary elements and fully complied with those regulations.

Another blatant error is the ID's disregard of the Commission's lack of jurisdiction to entertain class action lawsuits. Relying on snippets of testimony of a small sampling of consumers, the ID leaps to unsubstantiated conclusions about the experiences of all 2,516 BPE customers served in December 2013 through March 2014. Not only does the ID find that BPE violated the Commission's regulations in its dealings with all of its customers, it also concludes that the Commission may grant relief in the form of refunds to customers who did not file complaints or even testify in this proceeding. While the ID suggests that it is not approaching this proceeding as a "class action lawsuit," the recommendation for across-the-board relief to all customers based on the alleged experiences of some customers demonstrates otherwise. Following this class action approach, the ID relies upon uncorroborated hearsay testimony, ignores testimony that is inconsistent with its desired outcome, finds testimony as credible that was directly contradicted by other evidence in the record and makes findings that are not supported by the evidentiary record.

The ID further commits fundamental error by discounting the Commission's lack of statutory authority to regulate EGS rates, interpret private contracts and direct refunds to all BPE customers. Under the guise of considering whether BPE's prices conformed to its disclosure statement, the ID adopts the Joint Complainants' flawed legal theories that: (i) the Commission may interpret a private contract between an EGS and a customer and determine whether it has been breached; (ii) the Commission may insert words into a contract based on extrinsic evidence; (iii) the Commission conduct a cost of service analysis to determine whether an EGS's prices are just and reasonable; (iv) the Commission may require an EGS's prices to mirror specific

wholesale market conditions without containing a profit margin or reflecting other factors; and (v) the Commission may award damages in the form of refunds to all customers served by BPE from December 2013 through March 2014. In reality, the Commission has none of these powers.

The overall package of relief recommended by the ID is over-reaching and excessive. If adopted by the Commission, the ID would result in the unprecedented permanent revocation of BPE's EGS license; the inability of the owners and directors of BPE to ever again even *apply* for an EGS license in Pennsylvania; the payment of an excessive civil penalty in the amount of $2,554,000; *and* the refund of $2,508,449 to all of the customers served by BPE from December 2013 through March 2014, including the vast majority of BPE customers who did not complain and even some customers whose complaints against BPE have been dismissed by the Commission. Particularly given the small number of customers served by BPE and the even smaller subset of customers who provided testimony in this proceeding, this package of relief far exceeds prior directives of the Commission in cases involving variable price increases.[6]

Adding a massive civil penalty -- the highest ever imposed by the Commission in the energy industry -- on top of license revocation is unlawful and inappropriate. Notably, the fine recommended by the ID exceeds by one-half million dollars the amount of civil penalty that the Commission is authorized to impose on public utilities that engage in a series of violations of gas pipeline safety standards in the transportation of natural gas, flammable gas, or gas which is toxic or corrosive.[7] Clearly, the goal of the ID is to financially obliterate BPE for variable price increases that mirrored those imposed by many other EGSs during the Polar Vortex of 2014.[8]

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[6] *See, e.g., Cmwlth. of PA, et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Order entered June 30, 2016); *Cmwlth. of PA, et al. v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric*, Docket No. C-2014-2427656 (Order entered March 9, 2016).

[7] 66 Pa. C.S. § 3301(c).

[8] Joint Complaint ¶ 17.

Conducting a *de novo* review, the Commission should: (i) follow the recent federal court decisions demonstrating that under Pennsylvania law, the question of whether BPE's prices conformed to the disclosure statement is a classic issue of contract interpretation, which is properly addressed by courts of competent jurisdiction; (ii) find that a disclosure statement informing the customer that the variable rate may change in response to wholesale market conditions and other factors sufficiently describes the conditions of variability as required by the Commission's applicable regulations; (iii) confirm that the Commission must base its findings on substantial evidence rather than speculating about the experiences of customers who did not file complaints or even testify in this proceeding; (iv) reject the notion that testimony purchased by the Joint Complainants qualifies as substantial evidence when it merely sets forth the witnesses' own personal standards and extrapolates the testimony of a small number of customers to make unsubstantiated and broad-sweeping conclusions about the experiences of all customers; and (v) determine that the evidentiary record is insufficient to establish "widespread" misleading or deceptive marketing practices since each customer had his or her own unique experience, with many customers testifying that BPE did *not* guarantee savings or indicating that BPE delivered any savings that were promised during (and even beyond) the introductory period.

The Commission should appropriately balance all relevant factors and arrive at an outcome that is consistent with its statutory authority, reflects the evidentiary record in this proceeding and grants only that relief that the Commission is empowered to award under the Code. Each of BPE's Exceptions to the ID is briefly described below, with appropriate references to the record and the ID. These Exceptions fully incorporate by reference BPE's Main Brief ("MB") filed on March 2, 2016 and its Reply Brief ("RB") filed on March 23, 2016.

II. EXCEPTIONS

A. The ID Errs in Concluding that BPE Failed to Provide Accurate Pricing Information.[9]

For the reasons set forth in BPE's Main Brief and Reply Brief and as further explained below, the Commission should reverse the ID's conclusion that BPE failed to provide accurate pricing information and dismiss Count I of the Joint Complaint.[10] The pertinent provisions of the Commission's regulations governing disclosure statements, which were in effect during the relevant time period, required as follows:

> (c) The contract's terms of service shall be disclosed, including the following terms, if applicable:
>
> (1) Generation charges shall be disclosed according to the actual prices.
>
> (2) The variable pricing statement, if applicable, must include:
>
> (i) Conditions of variability (state on what basis prices will vary).
>
> (ii) Limits on price variability.[11]

The variable pricing language in BPE's disclosure statement that is the subject of this proceeding clearly and conspicuously states: (i) that the customer has a variable rate plan; (ii) the customer's specific initial rate; (iii) the customer's specific initial rate guarantee period; and (iv) that after the initial rate period, "[BPE] may increase [the customer's] rate based on *several factors*, including changes in wholesale energy market prices in the PJM markets."[12] Emphasizing the variable nature of the price and that it will be dependent upon wholesale market prices, BPE's disclosure statement repeats this information by stating simply: "Your variable rate will be based upon PJM wholesale market conditions."[13] As BPE did not offer caps on variable prices, no limits were included.

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[9] ID at 154-155, Conclusion of Law ("CL") 14, 15, 16, 17, 18, 19.
[10] BPE MB at 59-77; BPE RB at 32-36.
[11] 52 Pa. Code § 54.5(c)(1) and (2), as published at 37 Pa. B. 4996 (September 15, 2007).
[12] OAG/OCA Exh. BRA-2 at 15 (emphasis added).
[13] *Id.*

This language wholly satisfies the requirements of the Commission's applicable regulations shown above. Indeed, the ID fails to point to any provision of these regulations from which BPE's disclosure statement supposedly departs. Rather than evaluating BPE's disclosure statement within the context of the Commission's requirements, the ID inappropriately reviews BPE's disclosure statement from the perspective of the Joint Complainants' expert witnesses, who would impose several additional requirements that do not appear in the Commission's regulations.[14] Therefore, in concluding that BPE's disclosure statement violated the Commission's regulations, the ID imposes standards on BPE that are not required by the Commission's regulations that were in effect prior to June 2014 or even under the Commission's current regulations. To the extent that the Commission would hold BPE's disclosure statement to these higher standards, it would violate BPE's due process rights.[15]

For instance, the ID finds that no information is "contained in Blue Pilot's disclosure statement that would allow a customer to calculate what an appropriate price should be based on available cost data."[16] This finding suggests that BPE's disclosure statement should have set forth a specific pricing methodology or formula, which is not required by the Commission's regulations. Indeed, both the Commission and the Joint Complainants have previously acknowledged the reality that EGS variable pricing disclosures do not contain this level of detail.[17] In short, the Commission's regulations do not require EGSs to include information in

[14] ID at 61-66. By contrast, a federal court reviewing a contract between a customer and an EGS correctly observed that even if more detailed information would assist consumers in making an informed decision, it is inappropriate to read requirements into the rules for greater details in explaining variable pricing terms. *Mirkin v. Viridian Energy, Inc.*, 2016 WL 3661106 (July 5, 2016).

[15] BPE MB at 66-67.

[16] ID at 16, Finding of Fact ("FF") 34; ID at A similar finding criticizes BPE for not providing information "by which a reasonable and prudent customer could conduct its own independent research of all relevant material pricing factors" – a standard not required by the Commission's regulations. ID at 20, FF 57. *See also* ID at 61-62.

[17] *See Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, Docket No. M-2014-2406134 (Order entered March 4, 2014) ("*Variable Price Order*"); OCA Comments filed April 3, 2014 to the *Variable Price Order*.

their disclosure statement that enable a customer to calculate its price. To the contrary, EGSs are obligated to provide the conditions of variability, which BPE satisfied by noting that prices will vary on the basis of several factors, including PJM wholesale energy market conditions.[18]

The ID also finds that no "ceiling price or price-cap on the variable rate is mentioned in the disclosure statement provided to Blue Pilot's customers."[19] The regulations that were in effect at that time only required an EGS to disclose the ceiling price, if applicable.[20] BPE had no ceiling price, and therefore none was disclosed. In addition, the ID finds that BPE's disclosure statement did not reveal the "other factors" that are taken into consideration in setting prices besides PJM wholesale market conditions."[21] Again, nothing in the Commission's regulations requires EGSs to specify in the disclosure statement each specific factor that will affect their unregulated retail prices.

The ID further concludes that BPE's disclosure statement did not reveal the risk that the variable rate may exceed the utility's rate in any given month after the introductory period.[22] This finding suggests that BPE committed a violation of the regulations through an omission of information that is not required by the regulations. Warning consumers of the risks of variable price increases, in a highly competitive retail market, is more appropriate for consumer education materials than sales documents. Even when enhancing the information provided to consumers after the Polar Vortex, the Commission merely required EGSs to prominently disclose the fact,

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[18] Similarly, the ID concludes that BPE's disclosure statement provides no information about which PJM energy market is used to determine prices. ID at 15-16, FF 32. Again, such specificity is not the standard that is not required by the Commission's regulations.

[19] ID at 16, FF 33.

[20] Even the current regulations do not require EGSs to disclose a ceiling price; rather, they require EGSs to make it clear that there is no ceiling price, if applicable. 52 Pa. Code § 54.5(c)(2)(ii)(B).

[21] ID at 16, FF 37.

[22] ID at 16, FF 38. In a similar finding, the ID observes that "the omission of the risk of the variable rate products misled customers as to the range of expected variable rates." ID at 20, FF 59.

when the contract contains no ceiling price, that there is no limit to the extent to which variable prices may increase.[23] No further explanation of risks is required by the Commission's rules.

Another finding in the ID is that the disclosure statement does not disclose that "the starting price set at RATE" term "should not be taken as guarantee of future rates or any express or implied warranty regarding future savings."[24] This finding suggests that an EGS offering a variable price contract is obligated to indicate in the disclosure statement that the "starting price" has no connection to future rates or future savings. Such a disclosure is clearly not required by the Commission's regulations and the term "starting price" sufficiently reveals to the customer that it is not a "future price."

The ID further finds that BPE did not provide "the then current variable rate, average or historical variable rates to the customer at the time of the telemarketing sales call."[25] Again, no regulatory requirement existed for BPE to provide such information to the customer. This was not a requirement until June 2014 when the Commission revised its regulations and added a requirement for EGSs to make historical variable rate information available to customers.[26]

Also, the ID states that "Blue Pilot's sales agents did not review the terms of or refer to the disclosure statement with the prospective customers during their sales presentations and they did not require the customer to review the disclosure statement prior to agreeing to enroll."[27] Nothing in the Commission's regulations imposes a requirement on EGSs to reference the disclosure statement during their sales presentations. Rather, the disclosure statement is required to be sent to customers *after* they have enrolled with an EGS.[28]

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[23] 52 Pa. Code § 54.5(c)(2)(ii)(B).
[24] ID at 17, FF 39.
[25] ID at 17, FF 41.
[26] 52 Pa. Code § 54.5(c)(14). *See Rulemaking to Amend the Provisions of 52 Pa. Code, Section 54.5*, Docket No. L-2014-2409385 (Final-Omitted Rulemaking Order entered April 3, 2014).
[27] ID at 15, FF 29.
[28] 52 Pa. Code § 111.11.

The ID further concludes that BPE's various marketing materials emphasize that its initial price for a 60-90 day introductory period would be lower than the utility's price to compare in order to demonstrate possible cost savings.[29] However, the ID does not explain why it is unlawful for an EGS, as part of its marketing, to focus on the cost savings that may be possible during the introductory period. Common sense dictates that an "introductory" price is intended to persuade a consumer to purchase a service or product for the first time and that an introductory price will not remain in effect after its expiration. Also, by its very nature, marketing is designed to emphasize the aspects of the product that most appeal to a consumer.

Many of the remaining findings of fact in support of Count I are simply irrelevant to the allegation that BPE failed to provide accurate pricing information to consumers. Rather, they address electric distribution company ("EDC") pricing; the factors that were used by BPE to compute prices; BPE's pricing trends during the Polar Vortex; and the inclusion of profit margins in BPE's prices.[30] As such, they offer no basis for sustaining the allegations of Count I relating to the adequacy of BPE's disclosure statement.

In addition, the ID errs in its refusal to consider any prior Commission review and approval of the language that is under scrutiny in this proceeding.[31] Rather than acknowledging the Commission's long-standing practice of reviewing and approving disclosure statements during the license application process, the ID suggests that BPE "knew or should have known

[29] ID at 17, FF 40.
[30] ID at 17-20, FF 42, 43, 47, 48, 49, 50, 51, 52, 53, 54 and 58. *See also* ID at 61-68. The ID (at 68) further errors by finding violations of interim guidelines, which are general statements of policy that do not establish binding norms. Therefore, the Commission may not find violations of guidelines. *Pa. Human Relations Commission v. Norristown Area School Dist.*, 473 Pa. 334, 350; 374 A.2d 671, 679 (1977), *Woods Services, Inc. v. Dep't of Public Welfare*, 803 A.2d 260, 265 (Pa. Cmwlth. 2002).
[31] ID at 58-59; BPE MB at 64-65; BPE RB at 34-35.

whether its disclosure statement clearly revealed material pricing terms, or whether it was deceptively misleading and noncompliant with Commission regulations."[32]

In reaching this conclusion, for which it offers no support, the ID ignores the fact that the Administrative Law Judge ("ALJ") in *DuBois Manor Motel c/o Nisha Patel v. Blue Pilot Energy, LLC and Pennsylvania Electric Company*, Docket No. C-2014-2433817 (Initial Decision served December 2, 2015; Order entered June 9, 2016), found that BPE's disclosure statement "provided accurate, plain language to explain the variable rate product." *DuBois Manor* ID at 9.[33] The ALJ specifically found the disclosure statement to be "accurate and clear," observing that "[p]lain language is used to convey the terms of the contract, including most importantly the variable rate." *DuBois Manor* ID at 9-10.[34]

In addition, two recent federal court decisions dismissing class action complaints filed by consumers against EGSs regarding increases in variable prices reviewed very similar language. Both courts endorsed this language as adequately informing the customers that the variable rate may change in response to market conditions. *See Silvis v. Ambit Energy L.P.*, 2016 WL 1086703 (E.D. Pa. March 21, 2016); *Orange v. Starion Energy PA, Inc.*, 2016 WL 1043618 (E.D. Pa. March 16, 2016).[35] The ID addresses neither of these cases.

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[32] ID at 59.

[33] Although the Commission dismissed the complaint against BPE, it found that it was unnecessary to review BPE's disclosure statement. The ID does not view the *DuBois Manor* ID as being persuasive because it did not scrutinize how the variable price would be calculated. ID at 65. However, for Count I, the only question is whether the disclosure statement complied with the Commission's regulations, as opposed to whether BPE's prices conformed to the disclosure statement, which is addressed in Count II.

[34] *See also Yaglidereliler Corp. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2413732 (Initial Decision served June 24, 2014; Order on Remand entered January 16, 2015) (*Yaglidereliler Corp. Order)* (the ALJ confirmed the adequacy of BPE's disclosure statement and the Commission remanded the matter on other grounds).

[35] BPE RB at 1-7, Appendices A and B. While disregarding relevant Commission and federal court decisions, the ID (at 63-64) mistakenly discusses *Durante v. Blue Pilot Energy, LLC*, Docket No. F-2015-2487082 (Order entered March 14, 2016), which did not address BPE's disclosure statement, and was not cited by BPE in support of the adequacy of its disclosure statement. Rather, in that case, the Commission agreed that BPE did not make misleading representations and dismissed the bulk of the formal complaint, only finding that BPE should honor an offer that was allegedly made to the complainant when she called in to complain about a variable price increase in March 2014. Notably, her testimony in that proceeding was not consistent with her testimony here. BPE MB at 26.

BPE's disclosure statement was fully compliant with applicable Commission requirements. The ID's conclusions should be reversed and Count I should be dismissed.

B. The ID Errs in Concluding that BPE Charged Prices that Did Not Conform to its Disclosure Statement.[36]

In erroneously concluding that BPE charged prices that did not conform to its disclosure statement, the ID fails to address or even acknowledge the bulk of BPE's legal arguments.[37] Specifically, the ID does not offer any rationale for its presumption that the Commission has statutory authority to regulate EGS prices and interpret private contracts between EGSs and their customers. As argued by BPE in its Main Brief and Reply Brief, and further explained below, Count II of the Joint Complaint must be dismissed because it would require the Commission to exercise authority that has not been conferred upon it by the General Assembly.[38]

The Commission has expressly confirmed that it does not "have traditional ratemaking authority over competitive suppliers and does not regulate competitive supply rates." *Commonwealth et al. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655 (Order entered December 11, 2014) ("*Blue Pilot Interlocutory Order*") at 26. In addition, the Commission has ruled that it may not review private contracts between consumers and EGSs because its jurisdiction over EGSs "does not extend to interpreting the terms and conditions of a contract between an EGS and a customer to determine whether a breach has occurred or setting the rates an EGS can charge." *Office of Small Business Advocate v. FirstEnergy Solutions Corp.,* Docket No. P-2014-2421556 (Order entered January 26, 2015) at 18. Rather, these are matters for civil courts of common pleas of competent jurisdiction. *Adams et al. v. Pa. Pub. Util. Comm'n*, 819 A.2d 631 (Pa. Cmwlth. 2003).

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[36] ID at 155, CL 20, 21.
[37] ID at 69-78.
[38] BPE MB at 34-35, 77-88; BPE RB at 36-41. A review of the federal court decisions in *Silva*, *Orange* and *Mirkin* confirm that this exercise is a classic case of contract interpretation.

Despite this lack of jurisdiction, the ID adopts the Joint Complainants' public utility type of cost of service analysis and finds that the prices "charged by Blue Pilot to its Pennsylvania variable price customers during January – March 2014 did not correspond to the representations made by Blue Pilot in its disclosure statement."[39] No matter what terminology is used, this finding is the equivalent of concluding that BPE breached its private contracts with customers. The only methods by which the Commission can determine that BPE charged prices that did not conform to the disclosure statement are to: (i) interpret the terms of the contract; (ii) perform a cost-of-service analysis to evaluate the reasonableness of BPE's prices; and (iii) determine a reasonable rate of return – none of which the Commission may do. It is simply not possible to determine whether an EGS breached a contract in a situation where a variable-priced disclosure statement does not contain a specific index, formula, pricing methodology or ceiling. Yet, neither this form of rigid price formula for variable price agreements nor a ceiling on variable prices is required by Commission regulations. Nor was such a formula used by BPE in its contracts with customers. Notably, the federal court in *Mirkin* found a disclosure statement adequate even though it did not provide additional details about the pricing methodology.

On interlocutory review in this proceeding, the Commission merely found that Count II should survive Preliminary Objections because in theory, the Commission may be able to find that an EGS has charged prices that do not conform to its disclosure statement.[40] The Commission did not, however, suggest that it could step into the shoes of an EGS and determine what a "just and reasonable" variable price would have been under a contract where the price varies due to fluctuations in the wholesale market and includes a profit margin. Indeed, such a

[39] ID at 20, FF 61; ID at 71-76.

[40] BPE recognizes that in situations where a disclosure statement contains a formula, index or a ceiling, the Commission may be able to consider whether the prices conformed to the disclosure statement without interpreting the contract or performing a cost of service analysis. However, these are not the realities with BPE's disclosure statement.

conclusion would have been at odds with its statutory authority and its past pronouncements regarding its lack of jurisdiction to regulate EGS prices and interpret contracts.

Because BPE's variable price is based on a number of factors, including PJM's wholesale market conditions, the Commission cannot perform a simple comparison of BPE's prices with the elements of its disclosure statement. As was the case in *FirstEnergy Solutions,* the same is true here -- in order to determine whether BPE's prices conformed to its disclosure statement, the Commission would need to interpret the terms of the contract and review the wholesale market conditions and other factors that go into pricing an EGS product, including a profit margin. In other words, the Commission would need to perform a traditional cost of service analysis that is typically reserved for a review of public utility rates. *Lloyd v. Pa. PUC*, 904 A.2d 1010 (2006).

Moreover, in improperly engaging in contract interpretation and a cost of service analysis, despite the lack of Commission jurisdiction, the ID ignores the information provided by BPE about its prices.[41] Specifically, BPE explained that, consistent with its disclosure statement, it used several factors to set retail prices, including a desired rate of return, projected electricity costs, day-head market costs, projected weather, fluctuations in generators' pricing into the PJM grid, and the spot prices of natural gas. BPE also explained that it included a profit margin and identified other ancillary expenses that are used in developing retail generation prices.[42]

Perhaps the most compelling example of a factor that the Commission may not review or limit in the context of a deregulated energy market is the profit margin earned by competitive EGSs. The Commission has no requirements for an EGS's profit margin -- nothing requires that it be defined, flat, limited or disclosed. Therefore, even if the Commission attempted to perform a cost-of-service analysis and considered all of the different costs that it believes should have

[41] ID at 69-78.
[42] OAG/OCA St. 1 at 31; OAG/OCA St. 2 at 8-9; Exh. SLE-4 at 1, 9-12.

gone into the development of BPE's prices, it would still be unable to impute a "reasonable rate of return" to determine what BPE's variable prices "should" have been in early 2014.

The ID also includes findings that are irrelevant to Count II about the size of the font in BPE's disclosure statement and the inclusion of an arbitration process,[43] neither of which is a violation of any regulation and neither of which has any bearing on whether BPE's prices conformed to the disclosure statement. Similarly, the ID discusses BPE's sales scripts and marketing materials, finding that the omission of "the risks of the variable rate product can mislead customers as to the range of expected variable rates."[44] These observations are likewise irrelevant to the question of whether BPE's prices conformed to its disclosure statement.[45]

In the absence of any statutory authority to regulate EGS prices and interpret private contracts to determine whether a breach has occurred, the Commission must dismiss Count II. Even if the Commission engages in these functions that are beyond its jurisdiction, the evidence in the record shows that consistent with its disclosure statement, several factors were considered by BPE, including PJM wholesale market conditions and a profit margin, in setting variable prices in early 2014.

C. The ID Errs in Concluding that BPE made Deceptive Promises of Savings.[46]

Without statutory authority and in the absence of support in the evidentiary record, the ID finds that BPE made "deceptive promises of savings to customers, which were not regularly

[43] ID at 21, FF 66; ID at 21, FF 67.
[44] ID at 76-77.
[45] The ID's discussion contains several other comments that are not germane to whether BPE's prices conformed to its disclosure statement, including statements regarding the welcome letter, sales script, verification script, marketing materials, the omission of risk of the variable price product, and introductory prices. ID at 76-77. Within this discussion, the ID includes extraneous references to consumer testimony that does not support sustaining Count II. For instance, the ID relies on the testimony of Tom Quinn, who testified that savings were linked to the initial price, and that he called BPE on two occasions during which he received 6-month prices, which BPE honored. Tr. 301-305 (BPE RB at 52). Similarly, David Duke testified that he enrolled online in 2012 and knew his price was variable. Tr. 373-375 (BPE MB at 52).
[46] ID at 155-156, CL at 22-24. The conclusions that BPE, therefore, also failed to adequately train and monitor its agents are likewise in error. ID at 154, CL 9, 10, 11, 12, 13.

delivered."[47] In reaching this conclusion, the ID deviates from well-established contract law in Pennsylvania by looking beyond the express language of the contract and considering extrinsic evidence, including alleged oral representations of BPE's sales agents. In *Silvis*, the Eastern District Court of Pennsylvania concluded that it would "not look beyond the four corners of the contract to extrinsic evidence" or "incorporate new terms to change the contract's plain meaning."[48] The Court expressly refused to read words into the contract based on the consumer's expectations for a "competitive rate."[49] For the reasons set forth in BPE's Main Brief and Reply Brief and as further explained in these Exceptions, the ID should be reversed and Count III of the Joint Complaint should be dismissed.[50]

Improperly going beyond the four corners of the contract, the ID summarily concludes that all of BPE's 2,516 residential and small business customers in early 2014 were "over-billed," relying predominantly on the skewed and biased interpretation by the Joint Complainants' expert witness of the testimony of 63 consumer witnesses.[51] In reaching this conclusion, the ID performs no independent or detailed evaluation of the testimony of these consumer witnesses about whether savings were promised, whether a certain amount of savings were promised, whether savings were promised for a specified period and whether those promises were fulfilled. The ID also fails to determine whether the experiences of those witnesses were statistically significant in any way. In fact, the only common theme in the consumer testimony is that they were unhappy with their unregulated variable price increases

[47] ID at 91.
[48] *Id.* at 3.
[49] *Id. See also Orange.* Similarly, in *Mirkin v. Viridian Energy, Inc.*, 2016 WL 3661106 (July 5, 2016), a different federal court recognized that statements of an EGS offering to "save money" or "competitive rates" are non-actionable puffery since they are not susceptible to quantification.
[50] BPE MB at 88-103; BPE RB at 41-60.
[51] ID at 30, FF 119.

during the Polar Vortex of 2014, an event which the Commission has recognized as being responsible for record-breaking wholesale price spikes.[52]

To the extent that the Commission determines that it may under Pennsylvania law consider extrinsic evidence in adding new terms to a contract, it is noteworthy that many consumers testified in this proceeding that BPE did *not* guarantee savings during their sales transactions. Other witnesses testified that BPE only guaranteed savings during the introductory period. No consumer testified that BPE failed to honor this initial price. Several witnesses testified that they knew their prices would vary on a monthly basis, after the expiration of the initial price, to reflect several factors including wholesale market conditions. Many consumers understood that their variable prices had no ceilings. Consumers also testified that they had enjoyed savings for many months or years prior to the Polar Vortex. While some witnesses indicated that they expected longer-term savings, they either did not attribute that expectation to BPE or expressly attributed it to a different source.[53]

The ID acknowledges *none* of this testimony. In addition, the ID uses snippets from the testimony of a small sampling of consumers to support its findings, without even addressing the situations in which BPE has shown that testimony to be unreliable or inconsistent. By way of example, the ID refers to the testimony of Sherri Kennedy who claimed that she locked into a price and that the sales representative would call her back to reevaluate.[54] However, the ID fails to note that during cross-examination, it was demonstrated through a recording of the sales call

[52] BPE MB at 1-9, 41-43, 50-52; *Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, Docket No. M-2014-2406134 (Order entered March 4, 2014) ("*Variable Price Order*").

[53] BPE MB at 47-48; BPE MB at 90-92; BPE RB at 42-43, 46-47, 49-60. Within those pages, BPE provided numerous examples of consumer testimony which were contrary to the Joint Complainants' allegations; however, the ID is silent regarding this testimony. By way of example, BPE pointed to the testimony of John Cassel, who acknowledged that his rate would vary after the initial price and that no one at BPE guaranteed him savings. BPE MB at 51.

[54] ID at 89.

that the sales representative told Ms. Kennedy that BPE only guaranteed rates 90 days at a time and that Ms. Kennedy would need to call back, which she did not do until March 2014. Further, the third party verification recording disclosed that she had a variable rate for 90 days.[55]

The ID also does not address BPE's contentions about the consumer testimony lacking credibility, particularly due to lapses of time and the emphasis on potential savings from so many different sources.[56] Instead of analyzing each consumer's testimony and determining its credibility, the ID wholly ignores the portions of the evidentiary record that are inconsistent with its findings and relies on scant testimony from a small number of witnesses to leap to unsubstantiated conclusions about all of BPE's customers relying on promotional materials and statements made during sales presentations that they would experience savings if they signed up with Blue Pilot.[57] A review of the evidence, however, shows that in fact, not a single customer testified that he or she had relied on promotional statements in enrolling with BPE.[58]

In addition to failing to evaluate each consumer's testimony regarding their sales transactions, the ID summarily dismisses BPE's argument about the Commission's inability to rely on uncorroborated hearsay testimony by referring to the Pennsylvania Rule of Evidence which permits statements of an opposing party to be considered as an exception to the hearsay rule.[59] However, that rule only goes to admissibility of the evidence, not to whether the evidence may be relied upon to support a finding, which it clearly may not. This principle was confirmed

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[55] BPE MB at 50-51.
[56] ID at 80. BPE MB at 94-97; BPE RB at 47-61. Within those pages of its briefs, BPE pointed to numerous examples of specific contradictions within individual consumer testimony, which were not addressed at all by the ID. For example, while Tracy Wesley testified that a BPE sales agent told her that her rate would never be higher than her EDC, a recording of the sales call that was admitted into the record establishes otherwise. BPE MB at 53.
[57] ID at 28, FF 103; ID at 34, FF 143, 144, 145, 146.
[58] *See* BPE MB at 42-43. Given the lack of reliance on promotional or marketing materials by the consumer witnesses to enroll with BPE, FF 143, 144, 145 and 146 provide no basis for sustaining Count III of the Joint Complaint. Moreover, these materials contained language emphasizing the possibility for savings without making any promises.
[59] ID at 79.

in *Gruelle c/o Toll Diversified Properties, Inc. v. PPL Electric Utilities Corporation and Blue Pilot Energy, LLC*, Docket No. C-2015-2463573 (Initial Decision served November 18, 2015; Final Order entered December 22, 2015), where the Commission found that statements allegedly made by a sales agent could not support a claim that BPE promised contractual terms other than those appearing in the signed contract.

The ID further disregards the fact that some consumers served by BPE have filed complaints that were dismissed by the Commission because they did not allege or establish that savings were promised but not delivered.[60] This fact alone demonstrates the inappropriateness of concluding in this proceeding that BPE routinely or always promised savings that were not delivered.

Further, the ID inappropriately concludes that all of BPE's 1,073 commercial customers qualify for the protections under the Commission's regulations that are extended only to small business customers. Without any evidence in the record of whether these customers meet the definition of having a "maximum registered peak load" of "less than 25 kW within the last 12 months," the ID relies on average monthly consumption and the peak demand of one commercial customer to apply these protections to all 1,073 of BPE's commercial customers.[61]

Without evaluating the experience of each individual customer and determining whether savings were promised and not delivered and in the absence of billing data for each consumer, and without any support in the evidentiary record, the ID summarily finds that BPE "overbilled" residential and small business customers on a total of 7,861 occurrences.[62] Again, without the necessary evaluation and analysis, the ID leaps to the unsubstantiated conclusion that BPE

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[60] *See, e.g., Gruelle*; *DuBois Manor*; *CRH Catering Company, Inc. v. Blue Pilot Energy, LLC*, Docket No. P-2014-2451865 (Order entered February 24, 2015).
[61] ID at 30, FF 119, 140; 52 Pa. Code § 54.2 (relating to definitions); BPE RB at 78-79; *Pramukh Swami Maharaj, LLC v. Liberty Power Holdings, LLC*, Docket No. C-2014-2419263 (Order entered October 6, 2015).
[62] ID at 30, FF 120, 121, 122.

overcharged these customers from December 2013 through March 2014 in the amount of $2,459,517.[63] In computing this amount, the ID uses the price to compare offered by each EDC during that time.[64] Yet, as the Commission knows, EGSs and EDCs set their prices in completely different ways, with EDCs charging quarterly prices that are later reconciled to reflect the actual costs incurred.[65] As the ID failed to engage in any analysis of the evidence and ignored all contrary evidence, these findings must be rejected by the Commission.

In the absence of a preponderance of evidence produced by the Joint Complainants proving that BPE violated Commission regulations by promising savings of specific amounts and durations that were not realized by customers, the ID was constrained to include irrelevant and redundant factual findings to support what appears to be a desired result of sustaining Count III. Examples are set forth below.

For instance, the ID criticizes BPE's sales scripts because they did not contain the term "variable" but instead referred to them as "month-to-month" prices.[66] However, nothing in the Commission's regulations requires use of the term "variable" instead of "month-to-month" prices; indeed, the Commission has interchangeably used these descriptions for prices that vary by the month.[67] Further, the evidence shows that sales agents did in fact refer to the price as variable. For instance, Walt Wensel knew the rate was variable, would be based on PJM wholesale market conditions, and had no ceiling. In fact, he testified that he did not "feel there is anything fraudulent" about BPE's price increases."[68] Other criticisms of the sales script are that

[63] ID at 31-32, FF 123, 124, 125, 126, 128, 129, 130, 131, 132.
[64] ID at 32-33, FF 133, 134, 135, 136, 137, 138, 139.
[65] *See Investigation of Pennsylvania's Retail Electricity Market*, Docket No. I-2011-2237952 (Order entered February 14, 2013), at 10-16.
[66] ID at 24, FF 74, 77; ID at 35, FF 148.
[67] *See Guidelines For Use of Fixed Price Labels*, Docket No. M-2013-2362961 (Order entered November 14, 2013) (refers to variable prices); 52 Pa. Code § 54.10(3) (refers to month-to-month contracts).
[68] BPE MB at 56. *See also, e.g.*, BPE MB at 52 (David Duke), 53 (Alexandra Moratelli), 54 (United Transmission & Service Center), 55 (Russell Mowl), and 55 (Erie Animal Hospital).

it does not thoroughly explain the variable pricing term and what is meant by the term "market."[69] Again, EGSs are not required by the Commission's regulations to include any particular information in sales scripts; these concepts are appropriate for consumer education.

The ID also refers to the testimony of some consumer witnesses who claimed that their sales agents promised to call them after the initial 60-90 day fixed, introductory price.[70] In reaching this finding, the ID ignores evidence in the record showing that this promise was not made by BPE sales agents and that, to the contrary, the agents often encouraged the customers to call back for pricing information prior to the expiration of the introductory period.[71] Indeed, the ID recognizes that the sales script contained language for the sales agent to have the customers call BPE back during the initial period.[72]

The ID further finds that customers believed they could leave BPE at any time due to the month-to-month contract but then had to wait one or two billing cycles before switching.[73] Although the ID acknowledges that the delays were due to the switching timeframes that were in effect during that time period, it suggests that somehow BPE is to blame for the inability of customers to "immediately" leave BPE. Moreover, this finding has nothing to do with whether BPE promised savings to customers that were not realized.

Another irrelevant finding is that the sales agents did not review the disclosure statement during the sales presentation or have the customer review the disclosure statement prior to obtaining the customer's oral agreement to enroll.[74] As the Commission's regulations impose

[69] ID at 24, FF 75, 76; ID at 35, FF 148.
[70] ID at 24, FF 79.
[71] *See, e.g.,* BPE MB at 50 -51 (Recycle Logistics), 53 (Alexandra Moratelli), 56 (GeoStructures, Inc.).
[72] ID at 34-34, FF 147.
[73] ID at 26, FF 83-84.
[74] ID at 26, FF 85-86.

requirements on EGSs to provide a disclosure statement following enrollment,[75] these findings have no bearing on whether BPE promised savings that were not delivered.

Additionally, the finding that BPE did not obtain customers' signatures following telemarketing sales calls[76] has nothing to do with any alleged promises of savings. Findings about BPE's welcome letter are likewise irrelevant since it was sent after the customer's enrollment and was not relied upon by any customers in selecting BPE.[77] Also, the welcome letter is not a mandatory communication and, therefore, is not required to contain any specific information. Importantly, nothing in the welcome letter promised savings.

Similarly, the ID fails to explain how several findings concerning the disclosure statement support a conclusion that BPE promised savings to customers that were not realized.[78] They are unnecessarily repetitive and offer no support for sustaining Count III of the Joint Complaint. As such, they appear to be an attempt to bolster an otherwise weak set of factual findings that are relevant to the allegations of Count III. Similarly, the ID includes findings relating to the conformance of BPE's prices to its disclosure statement,[79] which have no bearing on the issue of whether BPE failed to deliver any promised savings. Additionally, the ID offers numerous findings in support of Count III that relate to BPE's handling of consumer complaints after the prices were increased, which is irrelevant to any savings promised prior to enrollment.[80]

The ID also contains findings about the lack of an explanation during the verification process about the variable price feature.[81] Yet, the evidence in the record shows that the variable

[75] 52 Pa. Code § 111.11.
[76] ID at 26, FF 87. ID at 35, FF 150.
[77] ID at 26, FF 89-91; ID at 35-36, FF 151, 152, 153.
[78] ID at 27, FF 92, 94, 95, 96, 97, 100, 101, 102.
[79] ID at 27-28, FF 98, 99.
[80] ID at 28-29, FF 108,109, 110, 111, 112, 113, 114, 115, 116, 117, 118.
[81] ID at 26, FF 88; ID at 35, FF 149.

nature of the price was disclosed during verification calls.[82] In any event, the Commission's regulations specify the information that must be included in the verification process and the variable price feature of a contract is not one of those required components.[83]

In support of its findings that BPE did not properly train or monitor its sales agents, the ID references a lack of Pennsylvania-specific training, an absence of information on identifying and avoiding misrepresentations, an emphasis on "price protection" and "competitive rates," and a lack of documentation concerning audits or other investigations.[84] However, the ID fails to explain how any of these findings support a conclusion that BPE violated the Commission's regulations at Section 111.4 and 111.5.[85] Indeed, the record contains no evidence demonstrating any failure on the part of BPE to develop agent standards or to offer sufficient training to its agents.[86]

Because the evidentiary record fails to prove that BPE promised savings to customers that were not delivered, the ID's conclusions should be reversed and Count III should be dismissed. At most, if the Commission relies upon hearsay testimony and foregoes the need for specific billing, it may be able to conclude that that some sales agents made promises of savings that were not realized by particular individual customers. Certainly, the number of instances in which that may have occurred is minimal, especially when compared to the numbers reached in the ID. Further, to determine any such violations would require the Commission to analyze the record in a way that has not been done by the Joint Complainants or the ALJs.[87]

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[82] *See, e.g.*, BPE MB at 50 (Recycle Logistics); *see also DuBois Manor*.
[83] 52 Pa. Code § 111.7(b)(2)-(5).
[84] ID at 21, FF 68, 69, 70, 71, 72; ID at 36, FF 155, 156.
[85] 52 Pa. Code §§ 111.4-111.5.
[86] BPE RB at 28-32.
[87] BPE RB at 47-61.

D. The ID Errs in Concluding that BPE Violated any Commission Regulations in its Handling of Consumer Calls during the Polar Vortex.[88]

Although the vast majority of the consumer witnesses who testified in this proceeding indicated that they were able to reach BPE's call center,[89] the ID erroneously concludes that BPE violated various Commission regulations because of the information and relief that was provided to consumers during those calls, and as a result of some testimony indicating difficulty accessing the call center.[90] For the reasons set forth in BPE's Main Brief and Reply Brief, the ID should be reversed and Count IV should be dismissed.[91]

BPE notes that the Commission's regulations do not impose standards on EGSs for the staffing of its call centers or for handling calls from consumers. Indeed, the Commission's regulations do not even impose these requirements on public utilities, except that EDCs are required to report various statistics concerning telephone access, including the percent of calls answered within 30 seconds, the average busy-out rate and the call abandonment rate for each call center.[92]

Moreover, the provisions of Chapter 56 cited by the ID establish no specific standards that must be followed by EGSs. The only real complaint of the consumers testifying in this proceeding is that they did not like the answer they received about the increases in variable prices. The evidentiary record simply fails to establish that BPE violated any of the requirements imposed by the provisions of Chapter 56.

[88] ID at 156, CL 25, 26, 27, 28.
[89] BPE MB at 103-105.
[90] ID at 37-40, FF at 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170.
[91] BPE MB at 103-105; BPE RB at 61-64.
[92] 54 Pa. Code § 54.153.

E. The ID Errs in Concluding that BPE Violated Commission's Regulations by Violating the Telemarketer Registration Act.[93]

In finding that BPE violated the Commission's regulations that require compliance with the Telemarketer Registration Act, the ID ignores the Commission's ruling during the pendency of this proceeding that it lacks statutory authority to consider claims arising from alleged violations of the TRA.[94] For the reasons set forth in BPE's Main Brief and Reply Brief and as further explained set forth below, Count V of the Joint Complaint should be dismissed outright.[95]

The Commission has already acknowledged that the provision in its regulations requiring compliance with the TRA "does not equate to the General Assembly providing the Commission with jurisdiction to hear claims brought pursuant to the TRA."[96] As the Commission has only the powers and authority granted to it by the General Assembly, an advisory opinion of a former Attorney General cannot confer jurisdiction on the Commission to enforce the provisions of the TRA. *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791, 795 (Pa. 1977).

In addition, a review of the TRA demonstrates that its requirement for a telemarketing sale to be reduced to a written contract containing the customer's signature is inapplicable to EGSs. Specifically, Section 2245(a)(7) expressly exempts entities from this requirement if "[t]he contractual sale is regulated under other laws of this Commonwealth."[97] An advisory opinion of an Attorney General cannot alter this specific language of the TRA. Indeed, to the extent that the Attorney General found that all provisions of the TRA, except the registration requirement, apply

[93] ID at 157, CL 29, 30, 31.
[94] *Blue Pilot Interlocutory Order* at 16-18. *See also In Re Marketing and Sales Practices for the Retail Residential Energy Market*, Docket No. L-2010-2208332 (Order entered October 24, 2012) ("*Marketing Rulemaking Order*"). (Commission referred to its long-standing Memorandum of Understanding with the OAG, under which it refers matters that more appropriately fall under the OAG's purview for appropriate enforcement).
[95] BPE MB at 105-108; BPE RB at 64-69.
[96] *Blue Pilot Interlocutory Order* at 17.
[97] 73 P.S. § 2245(d)(1).

to EGSs, this exemption language for contractual sales regulated under other laws of the Commonwealth would likewise apply.

The Commission's regulations clearly establish the requirements for the enrollment of customers, set forth the elements that must be contained in disclosure statements and specify the verification measures that must be taken.[98] Notably, in adopting Chapter 111, the Commission clarified the rules governing enrollments by "simply requiring a supplier to establish a verbal, written or electronic transaction process for a customer to authorize the transfer of his or her account to the supplier." *Marketing Rulemaking Order* at 34.

Besides the indisputable legal reasons for dismissing Count V of the Joint Complaint, BPE also notes that inserting a requirement for a written contract containing a customer's signature into the enrollment process would require a rulemaking proceeding by the Commission, which has not occurred. Simply stated, BPE cannot be found to have violated regulations that do not contain this requirement, particularly when the Commission's regulations expressly provide for verbal enrollments and specify the disclosure and verification processes that must be followed. Moreover, the need for an EGS to obtain a wet signature in connection with a telemarketing sale would be contrary to the Commission's recent efforts to accelerate the switching process.[99]

As to the findings in the ID regarding the mailing of disclosure statements to all customers,[100] BPE notes that Count V does not even include any allegations about the mailing of disclosure statements. The Joint Complainants raised this issue in their Main Brief in a last ditch

[98] 52 Pa. Code §§53.4 and 111.7. The OCA, in its comments regarding the telemarketing provisions of Chapter 111, did not propose a requirement for a written contract to contain the customer's signature. See OCA Comments filed on December 21, 2011 at Docket No. L-2010-2208332 at pages 19-21.
[99] *See Final-Omitted Rulemaking Order to Amend 52 Pa. Code, Chapter 57*, Docket No. L-2014-2409383 (Order entered April 3, 2014) (reduced switching period from 11-40 days to 3 days); 52 Pa. Code § 57.180.
[100] ID at 42, FF 173, 174.

attempt to salvage Count V, claiming that 17 consumers in this proceeding did not receive a disclosure statement.[101] Consideration of this issue would violate BPE's due process protections. Moreover, the testimony relied upon by the ID does not establish that BPE failed to routinely send disclosure statements to customers following their enrollment, particularly in view of the extensive testimony from consumers indicating that they were received.[102]

F. The ID Errs by Treating this Proceeding as a Class Action Lawsuit.[103]

In direct contravention of prior Commission rulings which concluded that the Commission may not entertain class action lawsuits, the ID finds that BPE violated Commission regulations across its entire customer base and recommends granting relief to consumers who were not parties to this proceeding, the vast majority of whom did not even participate in this proceeding as witnesses. Relying on select individual consumer witness hearsay testimony laden with credibility issues, and the broad-sweeping unsubstantiated conclusions of the Joint Complainants' biased expert witnesses, the ID finds that BPE has violated various Commission regulations in connection with serving each of its customers during the January 2014 through March 2014 timeframe. The specific nature of the relief requested by the Joint Complainants and recommended by the ID -- refunds for all customers served by BPE based on the alleged experiences of a very small percentage of those customers -- makes this proceeding a class action lawsuit, which the Commission does not have the statutory authority to entertain. For the reasons set forth in BPE's Main Brief and Reply Brief, and as further explained below, the Commission should reverse the ID's conclusions granting class action types of remedies.[104]

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[101] JC MB at 81.
[102] BPE RB at 67-69.
[103] ID at 48-55, 120-124, 131-132, 145-152.
[104] BPE MB at 39-58; BPE RB at 11-25.

Indeed, the ALJs who authored the ID in this proceeding issued an Order on April 23, 2015 stating that "[n]othing in Section 701 or any other section of the Public Utility Code...allows for the filing of class action complaints. In the absence of such statutory authority, the Commission cannot entertain class action complaints." *Commonwealth of Pennsylvania, et al. v Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric, Docket No.* C-2014-2427656 (Order Granting Petition to Intervene dated April 23, 2015). Rather than acknowledging that this case is a text book class action lawsuit, the ID describes the Joint Complainants as acting in their representative capacities as government agencies on behalf of the consumer interest and public interest as a whole.[105] In describing the statutory functions of the OCA and the OAG, however, the ID provides no references to any provisions in their enabling statutes that permit the representation of individual consumers.[106] Moreover, this whole discussion overlooks the absence of any Commission jurisdiction to grant class action relief, regardless of the abilities that the OCA or OAG may have to pursue those remedies elsewhere.[107]

The ID discusses *Pettko v. Pennsylvania American Water Company*, Docket No. C-2011-2226096 (Administrative Law Judge Order dated October 5, 2011 and adopted by Commission Order on February 18, 2013), which was cited by BPE.[108] In that discussion, the ID seems to suggest that *Pettko* does not support BPE's position. However, the ALJ's Order which was adopted by the Commission, in pertinent part, expressly concluded that a complaint may not be brought on behalf of others similarly situated "as is possible in proceedings brought before a Court of Common Pleas." *Pettko* ALJ Order at 6. The ALJ went on to correctly explain:

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[105] ID at 46.
[106] Particularly with respect to the Attorney General's standing, Code Section 701 expressly provides that "the Commonwealth through the Attorney General may be a complainant before the Commission in any matter solely as an advocate for the Commonwealth as a consumer of public utility services." 66 Pa. C.S. § 701.
[107] BPE MB at 39-50, 57-59; BPE RB at 11-25.
[108] ID at 50-55.

> Section 701 of the Public Utility Code provides that any person may complain in writing to the Commission regarding the acts or omissions of a public utility. 66 Pa. C.S. § 701. Nothing in that Section 701 or any other section of the Public Utility Code, however, allows for the filing of class action complaints. In the absence of statutory authority, the Commission cannot entertain class action complaints.

Id. Therefore, in that case, the Commission did not even permit the complainant to pursue his class action claim beyond the pleadings.

That same conclusion was reached in *Painter v. Aqua PA, Inc.*, Docket No. C-2011-2239557 (Opinion and Order entered May 22, 2014). Notably, the *Pettko* and *Painter* proceedings involved challenges to a distribution system infrastructure charge, which is a formula-driven surcharge, and any refunds ordered through a separate proceeding would have been based on Code Section 1312, which authorizes the Commission to require public utilities to issue refunds when the rates charged are unjust and unreasonable.[109] Similarly, in *HIKO Energy*, relied upon by the ID, the overcharges were not in dispute and the amounts were determined through application of a formula using a written promise guarantee and actual billing data. Moreover, the discussion cited by the ID related only to the amount of the civil penalty, as the EGS voluntarily agreed to issue refunds as part of a companion settlement. Here, no formula is available by which to calculate refunds, particularly since all customers had different sales experiences, and the Commission has no express or implied statutory authority to direct the issuance of refunds by EGSs.[110]

The Commission does not have jurisdiction to entertain a class action lawsuit and to do so would require a departure from the Commission's obligations to base its decisions on substantial evidence. The unique circumstances involved in each electric sales transaction render such treatment inappropriate, and no comprehensive statistical analysis has been presented here,

[109] 66 Pa. C.S. § 1312.
[110] BPE MB at 117-132; BPE RB at 83-91.

which is typically required before reaching conclusions regarding a pattern and practice of certain conduct. Also, BPE would be deprived of its due process rights to confront witnesses.

G. The ID Errs in Finding that BPE's Owners and Managers May be Barred from Ever Applying for an EGS License in the Future.[111]

The ID recommends permanent revocation of BPE's EGS license. BPE is not aware of any prior action taken by the Commission to permanently revoke the license of an EGS. Although numerous licenses have been cancelled for failing to maintain evidence of appropriate security on file with the Commission, those licenses could presumably be reinstated upon request. Therefore, the permanent revocation of BPE's EGS license is the ultimate sanction and adequately addresses any violations found by the Commission as part of this proceeding.

The ID's additional recommendation to forever bar BPE's owners, managers and in-house counsel from ever applying for an EGS license in the future[112] would be in the nature of granting injunctive relief and thereby exceed the Commission's statutory authority. Under Code Section 502, the General Assembly specifically granted the Commission the ability to seek injunctive relief from courts of equity, rather than bestowing on it the ability to grant injunctions.[113] In the case cited by the ID, *Pa. PUC v. Israel*, 52 A.2d 317 (Pa. 1947), the Commission did not grant injunctive relief, but rather requested an injunction from the Supreme Court under a statutory provision substantially similar to Code Section 502.

Also, while the Commission is free to consider the involvement of certain individuals or entities in adjudicating future applications, and either approve or conditionally approve an application based on that information, it would be unlawful for the Commission to prejudge or foreclose the filing of such an application. In order to fairly adjudicate an application, it is

[111] ID at 117.
[112] ID at 117-118.
[113] 66 Pa. C.S. § 502.

incumbent upon the Commission to consider the information presented by the filing and determine whether the applicant meets the requirements of the law.[114] Indeed, the Commonwealth Court has found that only an applicant's own compliance history may be considered, cautioning "that the Commission and courts may not disregard the independent entity of the corporate applicant." *Rosemont Taxicab Co., Inc. v. Philadelphia Parking Authority*, 68 A.3d 29, 37 (Pa. Cmwlth. 2013).

H. The ID Errs in Recommending the Imposition of an Excessive Civil Penalty.[115]

In addition to permanent revocation of BPE's license, the ID recommends the imposition of an enormous $2.55 million civil penalty on BPE, which: (i) violates the Excessive Fines Clause in Article I, Section 13 of the Pennsylvania Constitution; (ii) violates BPE's due process protections; (iii) exceeds the Commission's statutory authority to impose civil penalties in the amount of $1,000 per violation, not to exceed $1,000 per day; and (iv) fails to appropriately weigh and apply the factors of the Commission's policy statement.[116] For reasons set forth in BPE's Main Brief and Reply Brief, and as further explained here, any civil penalty imposed on BPE should be far lower than the statutory cap of $120,000.[117]

The Excessive Fines Clause of the Pennsylvania Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." Pennsylvania Constitution, Article I, Section 13. The Eighth Amendment of the United States Constitution, made applicable to the Commonwealth by the Fourteenth Amendment, contains similar language. U.S. Const., Amend. VIII. *See Cmwlth. of Pa. v. Brunk,* Nos. 235 C.D. 2015

[114] 66 Pa. C.S. § 2809. The Commission's regulations specifically provide that a license will be issued if the applicant is fit, willing and able to properly perform the proposed service, and the proposed service is consistent with the public interest and the policies declared by Chapter 28. They further permit the filing of protests by interested parties, which would give the applicant notice of and an opportunity to respond to any issues that are raised.
[115] ID at 119-143.
[116] 52 Pa. Code § 69.1201.
[117] BPE MB at 110-117; RB at 74-82.

and 236 C.D. 2015, 2015 WL 7200937 (Pa. Cmwlth. Nov. 16, 2015). The prohibition against excessive fines applies to those levied against corporations, just as to individuals. *See Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 286, 109 S.Ct. 2909 (1989). Moreover, the proscription against excessive fines applies to a "civil penalty" if the penalty is designed, at least in part, to serve "either retributive or deterrent purposes." *Austin v. United States,* 509 U.S. 602, 610 (1993). The "dispositive inquiry in determining whether a mandatory fine is violative of Article I, Section 13 of the Pennsylvania Constitution revolves solely around the question of whether, under the circumstances, the fine is 'irrational or unreasonable.'" *Cmwlth. v. Gipple,* 418 Pa.Super. 119, 123, 613 A.2d 600 (1992). Similarly, under the Eighth Amendment, a fine "violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *United States v. Bajakajian,* 524 U.S. 321, 337 (1998).

Several factors demonstrate that the $2.55 million civil penalty is grossly disproportionate to the severity or gravity of the offense and fails any proportionality test. The highest civil penalty imposed upon an EGS is $1.8 million in *Pa. PUC v. HIKO Energy, LLC*, Docket No. C-2014-2431410 (Initial Decision served August 21, 2015; Order entered December 3, 2015). There, the Commission found that EGS had committed egregious violations of the law when it made an executive level decision to not honor a written savings guarantee and to intentionally overcharge 5,708 customers for a total of 14,689 instances. By contrast, the allegations here revolve around the expectations and understandings of a small percentage of BPE's 2,516 customers as to the extent to which their variable prices would increase, based on alleged conversations with sales agents.

Another compelling factor showing the grossly disproportionate nature of the civil penalty is how the fine imposed by the ID compares to the Commission's statutory authority

under Code Section 3301(c) for violations of gas pipeline safety standards relating to the transportation of natural gas, flammable gas or toxic gas. While the Commission is empowered by Code Section 3301(c) to impose civil penalties not to exceed $200,000 for each day that a violation exists, the maximum civil penalty may not exceed $2 million for any related series of violations.[118] In other words, the Commission is expressly capped at $2 million in penalizing conduct that departs from gas pipeline safety standards -- conduct that has the potential to cause severe, or even disastrous, consequences for a large number of people as the result of a single incident. Yet, here, the ID would impose a civil penalty that exceeds that cap by more than half a million dollars to address private contractual disputes between BPE and its customers, when the written contract leaves no doubt that prices will vary on the basis of several factors, including PJM wholesale market conditions.

Further showing the disproportionate nature of the civil penalty imposed on Respondents are several examples of fines that the Commission has assessed on electric and natural gas companies based on allegations of unsafe business practices that had resulted in fatalities, serious bodily injury and significant property damage. For instance, in three separate proceedings against electric and natural gas companies for violations involving eight fatalities, the Commission imposed a total civil penalty of $1.3 million on the three companies. *Pa. PUC v. PPL Electric Utilities Corp.*, Docket No. M-2008-2057562 (Order entered March 31, 2009); *Pa. PUC v. UGI Utilities, Inc.-Gas Division*, Docket No. C-2012-2308997 (Order entered February 19, 2013); *Pa. PUC v. Philadelphia Gas Works*, Docket No. C-2011-2278312 (Order entered July 26, 2013). Although those cases were settled, the civil penalty amounts were found to be in the public interest and therefore they are relevant to the civil penalty inquiry here.

[118] 66 Pa.C.S. § 3301(c).

The imposition of a $2.55 million civil penalty would also violate BPE's fundamental due process rights. The United States Supreme Court has held that state-ordered monetary penalties violate the due process clause's guarantee against unlawful deprivation of property when the penalties are "wholly disproportioned to the offense and obviously unreasonable." *See St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919). Here, for all of the same reasons that the civil penalty is grossly disproportionate for Eighth Amendment purposes, it is also wholly disproportioned to the offense and unreasonable for due process purposes.

Moreover, when an action seeks to impose civil penalties, a respondent is entitled to full due process rights. *Northview Motors, Inc. v. Commonwealth, Attorney Gen.*, 562 A.2d 977, 980 (Pa. Cmwlth. 1989). Yet, neither the Joint Complaint nor the Joint Complainants' witnesses offered a proposed amount of civil penalty or any rationale for imposing a certain amount, if any at all, particularly if BPE's license is permanently revoked. As the Joint Complainants' proposed methodologies for calculating a civil penalty in this proceeding were not disclosed until their Main Brief, after which BPE had no opportunity to provide testimony, the imposition of a penalty on the basis of those proposals would violate BPE's fundamental rights of due process.[119]

In addition to violating BPE's constitutional and due process rights, the civil penalty proposed by the ID exceeds the Commission's statutory authority. Under Code Section 3301, the Commission may assess a penalty of up to $1,000 per offense, for "each and every ***day's*** continuance of the violation constituting a separate and distinct offense." 66 Pa. C.S. § 3301(b) (emphasis added). In other words, the maximum penalty is $1,000 *for each day* of a continuing offense. Clearly, the alleged violations here were of a continuing nature over either a 90-day or 120-day period (depending on whether December 2013 or January 2014 through March 2014 timeframes are used). Even in the case of *Newcomer Trucking, Inc. v. Pa. PUC.*, 109 Pa.

[119] BPE RB at 75-76.

Cmwlth. 341 (1987), where the Court permitted the Commission to impose fines for each separate violation, when more than one violation occurred on any given day under an entirely different set of factual circumstances, the Court did not interpret Code Section 3301 as permitting the imposition of more than $1,000 per day for continuing offenses.

Indeed, consistent with the statutory language, the Commission has previously found that its authority to impose a civil penalty is capped by Code Section 3301(a) and (b) at $1,000 per day for violations of the statute, regulations and orders. *See Rosi v. Bell-Atlantic- Pennsylvania, Inc., and Sprint Communications, L.P.*, Docket No. C-00992409 ("Since §3301 states clearly that this is a maximum amount, presumably a penalty of $1,000.00 per day should be imposed only for the most egregious violations."), at 10. *See also Pa. PUC, Bureau of Investigation and Enforcement v. Daniel and Darlene Applegate t/a Independent Security Cab*, 2016 WL 1559265 (Pa. PUC), Docket No. C-2015-2451749 (Order entered on May 23, 2016) (Code Section 3301 authorizes the Commission to impose a sum not exceeding $1,000 per day on an entity providing unauthorized transportation services). Even if BPE is found to have violated the Commission's regulations each day over the course of December 2013 through March 2014, the total civil penalty would be $120,000.

Finally, the ID's proposed civil penalty analysis unfairly weighs and applies the factors set forth in the Commission's policy statement at 52 Pa. Code § 69.1201. The most notable error in the ID's analysis concerns the size of BPE. Despite the absence of any information in the evidentiary record regarding BPE's size, the ID concludes that "the Company is large."[120] In staying the payment of a $1.8 million civil penalty imposed on HIKO Energy by the Commission, the Commonwealth Court found that HIKO Energy had shown a substantial case on the merits regarding the issue of whether the Commission failed to follow its factors and

[120] ID at 137.

standards for determining the appropriateness of a penalty. The Court was particularly troubled by the Commission's failure to consider the penalty relative to revenues or profits and whether the company had sufficient assets on hand to pay the penalty, finding this shortcoming significant "in light of the sheer magnitude of the penalty here." *HIKO Energy, LLC v. Pa. PUC,* No. 5 C.D. 2016 (Memorandum Opinion by Senior Judge Colins dated February 12, 2016).

Another error in the penalty guideline analysis is that in finding that BPE's conduct was "serious," the ID relies on several practices of BPE that did not depart from the Commission's regulations.[121] For instance, in this discussion, the ID focuses on the sale scripts emphasizing the savings during the introductory period. Yet, no allegations were raised during this proceeding to suggest that those savings were not realized by customers. Also, an EGS is not prohibited by any Commission regulations from emphasizing the portions of its product that consumers may find the most attractive. The ID also refers to verification calls that do not include explanation about how variable price term is calculated and insufficient information being provided for customers to understand the financial risks involved. As these observations do not translate to violations of the Commission's regulations, they cannot support the conclusion that BPE's conduct was serious – particularly serious enough to warrant permanent revocation of its license and the imposition of an excessive civil penalty. These infirmities also extend to the discussion of the consequences of the conduct and whether it was intentional.[122]

In addition, the ID errs in analyzing BPE's modifications to internal practices.[123] BPE voluntarily ceased marketing to Pennsylvania customers in March 2014, three months prior to

[121] ID at 126-127.
[122] ID at 128-130.
[123] ID at 130-131.

the filing of the Joint Complaint. That modification was monumental since it meant that BPE's customer count began to decline until a year later when it exited the retail market.[124]

As to the impact of BPE's conduct on customers, the ID repeats the same errors that are made elsewhere. By summarily finding that 2,516 customers were affected by the variable price increases over a four-month period, the ID disregards the fact that the evidence in the record reflects the experiences of a very small percentage of those customers and that much of that testimony is inconsistent with the ID's findings of fact.[125] Notably, the ID makes no comparison to the number of customers affected in the *HIKO Energy* case, which was approximately twice the number, and fails to consider the number of complaints received by the OAG and OCA about BPE, as compared to the number of complaints received by them regarding other EGSs.[126]

Another area of the penalty analysis that is flawed relates to BPE's compliance history.[127] The operative word in the policy statement is "history." Yet, none of the proceedings referenced in the ID stemmed from conduct or practices that arose prior to January 2014. They all relate to the same issue that is the focus of this proceeding -- the variable price increases passed through to retail customers as a result of wholesale market conditions in early 2014. Therefore, they do not constitute "compliance history" and the fact remains that no formal complaints were filed against BPE prior February 2014. Also, the references to BPE's failure to maintain security with the Commission are inappropriate since that situation occurred over a year after the Joint Complaint was filed and has been addressed by the Commission through a separate proceeding.

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[124] BPE MB at 10.
[125] In addition, the ID offers no explanation for finding violations over a 4-month period, despite the Joint Complaint's allegations spanning a three-month period beginning in January 2014. Joint Complaint ¶ 30, Appendix B. Going beyond the allegations of the Joint Complaint for purposes of finding violations and recommending relief, the ID violates BPE's due process rights.
[126] Joint Complaint ¶ 17.
[127] ID at 132-134.

Finally, in *Durante*, the Commission explicitly found that BPE did not engage in misleading representations, but rather accepted the testimony offered by the complainant about a price that was offered to her during a call to complain about the price increase.

I. The ID Errs in Concluding that the Commission May Direct BPE to Issue Refunds to All Customers.[128]

In recommending that the Commission direct BPE to issue refunds to all of the customers it served from December 2013 through March 2014 in the amount of $2.4 million, the ID does not address BPE's arguments regarding the need for the Commission's either express statutory authority or a "strong and necessary implication" authorizing to order refunds under the broad general powers granted by Code Section 501. *See PECO Energy Co. v. Pa. PUC*, 568 Pa. 39, 791 A.2d 1155, 1159-1160 (2002). For these reasons fully set forth in BPE's Main and Reply Briefs, and as further explained below, the Commission should reject the ID's recommendation for the issuance of refunds to all customers.[129]

Since the Commission has already concluded that it does not regulate EGS prices, it logically follows that the Commission lacks statutory authority to order a refund or credit to a customer. This logical conclusion is bolstered by the fact that the Commission's only statutory authority relating to directing refunds is in Code Section 1312, which is limited to situations when the Commission has determined that public utilities charged rates that were unjust and unreasonable. *National Fuel Gas Distribution Corporation v. Pennsylvania Public Utility Commission*, 76 Pa. Cmwlth. 102, 464 A.2d 546 (1983).

Because the Commission has correctly found that Code Section 1312 does not authorize it to order refunds by EGSs, it has sought to use Code Section 2809(e) as providing the "strong

[128] ID at 146-149.
[129] BPE MB at 117-133; BPE RB at 83-91.

and necessary implication" to exercise plenary authority under Code Section 501.[130] However, Code Section 2809(e) does not provide the requisite strong and necessary implication to support such directives.

A review of Code Section 2809(e) reveals that it was not intended to provide any oversight of EDC or EGS rates but rather to ensure that the introduction of retail choice did not cause a deterioration in the quality of electric service provided by electric utilities with respect to electric reliability and the Chapter 56 standards (*i.e.* payment periods). In its analysis of this issue in *Darlington v. Blue Pilot Energy, LLC,* Docket No. F-2015-2500535 (Order entered June 30, 2016), the Commission appears to have overlooked the focus of Code Section 2809(e), which is on service, rather than rates. Neither reliability concerns nor Chapter 56 has anything to do with the Commission's regulation of rates. To the contrary, the Commission has acknowledged that it does not regulate EGS rates,[131] and the Commission oversees EDC distribution rates through Chapter 13 of the Code and EDC supply rates through Code Section 2807.[132] Therefore, Code Section 2809(e) has no bearing on the rates charged by either EGSs or EDCs, and may not be relied upon as implicit authority to direct refunds.

As no statutory authority, express or implied, exists under which the Commission may direct EGSs to issue refunds to customers, the Commission should reverse the ID's findings. Further, the evidentiary record does not support any directives for across-the-board refunds.

III. CONCLUSION

On the basis of the foregoing, Blue Pilot Energy, LLC respectfully requests that the Pennsylvania Public Utility Commission: (i) grant its Exceptions, (ii) reverse the Initial Decisions; (iii) dismiss the Joint Complaint filed by the Commonwealth of Pennsylvania by

[130] *See Cmwlth. of PA, et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Order entered December 18, 2014).
[131] BPE MB at 78-80.
[132] 66 Pa. C.S. § 2807.

Attorney General Kathleen Kane, through the Bureau of Consumer Protection, and Tanya J. McCloskey, Acting Pennsylvania Consumer Advocate; and (iv) grant any such other relief as may be deemed appropriate.

Respectfully submitted,

Dated: July 27, 2016

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

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