

COMMONWEALTH OF PENNSYLVANIA



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August 16, 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:

Enclosed please find the Answer of Joint Complainants Commonwealth of Pennsylvania Office of Attorney General, Bureau of Consumer Protection and Office of Consumer Advocate to the Petition to Intervene or, in the Alternative, Motion for Leave to Accept Exception of Retail Energy Supply Association, in the above-referenced proceeding.

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

Respectfully Submitted,

Handwritten signature of Kristine E. Marsilio in cursive.

Kristine E. Marsilio
Assistant Consumer Advocate
PA Attorney I.D. #316479

Enclosure

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

*185199

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	:	

**ANSWER OF JOINT COMPLAINANTS COMMONWEALTH OF PENNSYLVANIA,
OFFICE OF ATTORNEY GENERAL, BUREAU OF CONSUMER PROTECTION
AND OFFICE OF CONSUMER ADVOCATE
TO THE PETITION TO INTERVENE OR, IN THE ALTERNATIVE,
MOTION FOR LEAVE TO ACCEPT EXCEPTION
OF RETAIL ENERGY SUPPLY ASSOCIATION**

On July 27, 2016, Retail Energy Supply Association (RESA) filed a Petition to Intervene (Petition) or, in the alternative, a Motion for Leave to Accept Exception (Motion) and an Exception with the Pennsylvania Public Utility Commission (Commission) in the above-captioned proceeding. Pursuant to 52 Pa. Code §§ 5.66 and 5.103(c), the Office of Attorney General Bureau of Consumer Protection (OAG) and the Acting Consumer Advocate Tanya J. McCloskey (OCA) (collectively Joint Complainants) provide the following Answer to the

Petition or, in the alternative, Motion (Answer).¹ For the reasons set forth below, Joint Complainants submit that RESA's Petition/Motion should be denied.

I. INTRODUCTION

On June 20, 2014, the OAG and the OCA filed a Joint Complaint against Blue Pilot Energy, LLC (Blue Pilot or the Company) with the Commission pursuant to, *inter alia*, the Public Utility Code, 66 Pa. C.S. Ch. 28 and the Commission's regulations, 52 Pa. Code Ch. 54, 56 and 111. The Joint Complaint included five separate counts and alleged that Blue Pilot violated Pennsylvania law and Commission orders and regulations. Specifically, the five counts in the Joint Complaint were: I) failing to provide accurate pricing information; II) prices nonconforming to disclosure statement; III) misleading and deceptive promises of savings; IV) lack of good faith handling of complaints; and V) failure to comply with the Telemarketer Registration Act (TRA), 73 P.S. § 2241, *et seq.* With respect to relief, the Joint Complainants requested that the Commission find, *inter alia*, that Blue Pilot violated the Public Utility Code and the Commission's regulations and orders; provide restitution to Blue Pilot's customers; impose a civil penalty; and order Blue Pilot to make various modifications to its practices and procedures; and revoke or suspend the Company's Electric Generation Supplier (EGS) license, if warranted. The Bureau of Investigation and Enforcement (I&E) and the Office of Small Business Advocate (OSBA) intervened in the proceeding on July 31, 2014 and July 10, 2014, respectively.

On July 10, 2014, Blue Pilot filed Preliminary Objections to the Joint Complaint and an Answer to the Joint Complaint generally denying the alleged violations. On July 21, 2014, the Joint Complainants filed an Answer to Blue Pilot's Preliminary Objections. By Order dated

¹ Joint Complainants filed Reply Exceptions in this proceeding on August 8, 2016, in which they requested, *inter alia*, that to the extent the Commission considers RESA's Exception, RESA's Exception should be denied.

August 20, 2014, Administrative Law Judges Joel H. Cheskis and Elizabeth Barnes (ALJs) granted, in part, and denied, in part, Blue Pilot's Preliminary Objections. The ALJs found, *inter alia*, that the Commission lacked jurisdiction to hear complaints under the TRA even though compliance with the Act is required by the Commission regulations.

On September 8, 2014, Joint Complaints filed a Petition for Interlocutory Review and Answer to Material Questions with the Commission. Of relevance to this Answer, Joint Complaints sought for the Commission to answer the following question, *inter alia*: Does the Commission have authority and jurisdiction to determine whether a violation of the TRA has occurred when considering whether the Commission's regulations - which require compliance with the law - has been violated? On September 18, 2014, the Joint Complainants filed a Brief in Support of their Material Questions, and Blue Pilot filed a Brief in Opposition. On December 11, 2014, the Commission issued an Order in which it determined, *inter alia*, that while it does not have the authority or jurisdiction to determine whether a violation of the TRA has occurred, the Commission can hear claims alleging improper verification of enrollment of residential customers brought against Blue Pilot under the Commission's telemarketing regulations.

On October 17, 2014, Joint Complainants served consumer direct testimony from 97 consumer witnesses. On March 30, 2015 through April 1, 2015, Joint Complainants presented consumers for cross-examination. At these hearings, the direct testimonies and exhibits of 83² consumer witnesses were moved into the record by Joint Complainants. Additionally, Joint Complainants moved various redirect exhibits into the record. See gen'ly OAG/OCA M.B. at App. A (Record Evidence).

² Of these, by stipulation of the parties, the direct testimonies and exhibits of 36 consumer witnesses were moved into the record without cross-examination. The remaining 47 consumer direct testimonies and exhibits were moved into the record subject to cross-examination by Blue Pilot.

On October 20, 2015, Joint Complainants served the Direct Testimonies of their experts Barbara R. Alexander (OAG/OCA St. 1), Steven L. Estomin (OAG/OCA St. 2), Ashley E. Everette (OAG/OCA St. 3) and the non-consumer Direct Testimony of Gregory M. Strupp (OAG/OCA St. 4). On December 8, 2015, Blue Pilot served the Rebuttal Testimony of Raymond Perea (Blue Pilot Energy, LLC St. 1). On January 20, 2016, Joint Complainants served the Surrebuttal Testimony of Barbara R. Alexander (OAG/OCA St. 1-SR). Thereafter, on February 1, 2016, Joint Complainants served the Supplemental Surrebuttal Testimony of Barbara R. Alexander (OAG/OCA St. 1-SR (Suppl)). Ms. Alexander provided testimony in support of, *inter alia*, Count V of the Joint Complaint (Failure to Comply with the TRA). See OAG/OCA St. 1 at 48-51.

The ALJs commenced an evidentiary hearing on February 3, 2016, wherein Joint Complainants presented their witnesses for cross-examination and moved OAG/OCA Statement Nos. 1, 1-SR (Suppl), 2, 3 and 4³ into the record along with the accompanying exhibits. Blue Pilot conducted cross-examination of Joint Complainants' witnesses but did not present any witnesses and moved no testimony or exhibits into the record.

Joint Complainants and Blue Pilot filed Main Briefs on March 2, 2016 and Reply Briefs on March 23, 2016. In their Briefs, Joint Complainants pursued, *inter alia*, Count V of the Joint Complaint. See OAG/OCA M.B. at 76-83; see also OAG/OCA R.B. at 54-56. On July 7, 2016, the ALJs issued an Initial Decision, in which they sustained, in part, and denied, in part, the Joint Complaint. Of significance to this Answer, the ALJs found that when Blue Pilot enrolled customers via telemarketing, Blue Pilot failed to obtain customers' signatures agreeing to

³ Nicholas F. Basehore adopted the testimony of Gregory M. Strupp (OAG/OCA St. 4) at the hearing on February 3, 2016.

enrollment (wet signature) in violation of 52 Pa. Code § 111.10(a)(1) (Requiring compliance with the TRA). See I.D. at 157, ¶ 30. The ALJs also held:

The Company's business practices are not in accordance with the requirements of the TRA and thus, constitute violations of 52 Pa. Code §111.10(a). We are not enforcing the TRA per se, but the Commission has authority and jurisdiction to consider the standards in the TRA in determining whether a violation has occurred when considering the extent of an EGS's violations of Section 54.43(f), 111.10, and 111.12(d)(1) of the Commission's regulations. The Commission's regulations do not pre-empt or replace the requirements of the TRA, as Section 111.10(a) requires compliance with the TRA. See 52 Pa. Code § 111.10(a). The Commission has consistently stated that nothing in their regulations is intended to vacate or supersede any other existing federal, state or local requirement.

See Id. at 111-112. (Internal citation omitted.)

On July 27, 2016, RESA filed a Petition to Intervene or, in the alternative, a Motion for Leave to Accept Exception, in which RESA urged the Commission to reject the ALJs' conclusion that a wet signature is required for all telemarketing contracts. See Petition/Motion at 2.

Joint Complainants submit that the Commission should deny RESA's Petition to Intervene, as RESA does not have an interest in this proceeding that is required for intervention. See 52 Pa. Code § 5.72. Specifically, RESA is not bound by the action of the Commission in this proceeding, as required for intervention under 52 Pa. Code § 5.72(a)(2). In its Petition, RESA argues that it is bound by the Commission's decision in this proceeding in that the Commission's decision will "establish a standard of conduct to be followed by all EGSs." RESA Petition at ¶ 10. The Commission, however, has held that an interest based on the precedent that a Commission decision could establish is insufficient to meet the requirement that a party seeking to intervene must be bound by the Commission's action in that proceeding. See Verizon Pennsylvania Inc., et. al. v. Penn Telecom, Inc., Docket No. C-20066987, Opinion and Order at 8-9 (August 29, 2008) (Verizon). Additionally, RESA's late intervention in this proceeding is

not in the public interest, because Blue Pilot is already representing an interest similar to RESA's in this proceeding. See Corrina Lynn Scheffer v. Columbia Gas of Pennsylvania, Inc., Docket No. C-2010-2153353, Opinion and Order at 23 (Nov. 1, 2011) (Corrina). As such, RESA does not have an interest in this proceeding that is required for intervention.

Moreover, Joint Complainants submit that RESA did not file its Petition to Intervene in accordance with the time requirements provided in 52 Pa. Code Section 5.74(b), nor did RESA demonstrate "good cause" for its failure to do so or "extraordinary circumstances" for its failure to intervene prior to the evidentiary hearings. See 52 Pa. Code § 5.74(b), (c). As discussed in more detail in Section III, below, the TRA issue is not a new issue in this proceeding, and Joint Complainants have actively litigated this issue since filing the Joint Complaint over two years ago. As such, the Commission should not permit RESA to intervene at this stage in the proceeding. Joint Complainants, therefore, submit that the Commission should deny RESA's Petition to Intervene.

Finally, the Commission's regulations are clear that only parties may file exceptions. See 52 Pa. Code § 5.533(a). The Commission's regulations, however, permit the filing of amicus curiae briefs by a "person interested in the issues involved in a Commission proceeding." See 52 Pa. Code § 5.502(e). RESA provides no reason for failing to submit an amicus curiae brief in this matter, which would have been the appropriate path for a non-party's participation in this matter. As such, Joint Complainants submit that RESA's Motion for Leave to Accept Exception must be denied.

II. LEGAL STANDARD

A. PETITION TO INTERVENE

The Commission's procedural regulations, codified at 52 Pa. Code § 5.72, provide the requirements for a person to intervene in a Commission proceeding, as follows:

(a) *Persons.* A petition to intervene may be filed by a person claiming a right to intervene or an interest of such nature that intervention is necessary or appropriate to the administration of the statute under which the proceeding is brought. The right or interest may be one of the following:

- (1) A right conferred by statute of the United States or of the Commonwealth.
- (2) An interest which may be directly affected and which is not adequately represented by existing participants, and as to which the petitioner may be bound by the action of the Commission in the proceeding.
- (3) Another interest of such nature that participation of the petitioner may be in the public interest.

52 Pa. Code § 5.72. In order for a potential intervenor to present an "interest" in the proceeding, and therefore, confer standing, he must show that his interest is a "substantial, immediate and direct interest, as interpreted by Pennsylvania appellate courts." See e.g. PPL Electric Util. Corp. Universal Service and Energy Conservation Plan for 2011 through 2013, Docket No. M-2010-2179796, Order at 3 (May 5, 2011) (PPL USECP 2011-2013), citing William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975).

Additionally, the Commission's regulations provide the requirements for the filing of Petitions to Intervene at 52 Pa. Code Section 5.74, which provides, in pertinent part, as follows:

- (b) Petitions to intervene shall be filed:
- (1) No later than the date fixed for the filing of responsive pleadings in an order or notice with respect to the proceedings but not less than the notice and protest period established under §§ 5.14 and 5.53 (relating to applications requiring notice; and time of filing) absent good cause shown.

[...]

(c) Except with regard to statutory advocates [...] intervention will not be permitted once an evidentiary hearing has concluded absent extraordinary circumstances.

52 Pa. Code § 5.74.

It is well established that allowance of intervention is a matter within the discretion of the Commission. City of Pittsburgh v. Pa. PUC, 33 A.2d 641 (Pa. Super. 1943); NAACP, Inc. v. Pa. PUC, 290 A.2d 704 (Pa. Cmwlth. 1972). The Commission has held that late interventions will be granted only under the following circumstances: 1) the petitioner has a reasonable excuse for missing the intervention due date; 2) the proceeding is contested at the time of the filing of a petition for intervention; 3) the grant of intervention will not delay the orderly progress of the case; and 4) the grant of intervention will not broaden significantly the issues, or shift the burden of proof. See e.g. RE S.T.S. Motor Freight, Inc., Docket No. 97417, Order at 2-3 (June 19, 1980). The petitioner must establish that each of these standards is met for the Commission to permit a late intervention. See e.g. Application of Doughlasville Water Company, Opinion and Order, Docket No. A-210760 at 5 (Aug. 24, 1990); see also e.g. Application of Touch of Class Limo, Inc., Order, Docket No. A-00111898 at 6-8 (July 14, 1995).

Furthermore, the Commission has held that while the above standards may be sufficient to permit late intervention filed prior to evidentiary hearings, it is a “much taller task” to grant a petition for intervention after the Initial Decision has been issued. See Corrina at 20-21.⁴ The

⁴ Joint Complainants acknowledge that the Commission permitted late intervention in Corrina. Corrina, however, is distinguishable from the present case for several reasons. First, in Corrina, the Commission found that the intervenor stated a reasonable basis for missing the intervention due date, as there was no notice to the public of the case and Corrina was not the kind of “high-profile case that would otherwise become known in the regulatory community.” Corrina at 21. RESA raises no such argument here. Second, in Corrina, the affected Natural Gas Supplier (NGS) was not made a party to the proceeding, and as such, the Commission permitted the Suppliers to intervene, because “the NGS perspective was entirely absent from the case.” Corrina at 23. Here, Blue Pilot is a party to this proceeding, and Blue Pilot has filed an Exception to the TRA issue that RESA now seeks to address through its intervention. As such, Joint Complainants submit that the present circumstances are distinguishable from Corrina, and RESA has not justified late intervention in this matter.

Commission has also held that it “should only grant a petition to intervene after the issuance of an Initial Decision in the most extraordinary circumstances.” Verizon at 7.

B. MOTION FOR LEAVE TO ACCEPT EXCEPTION

In addition to regulations regarding specific motions, the Commission’s regulations provide for the general filing of motions. See 52 Pa. Code § 5.103(a). In relevant part, Section 5.103 of the Commission’s regulations states:

(a) *Scope and content.* A request may be made by motion for relief desired, except as may be otherwise expressly provided in this chapter and Chapters 1 and 3 (relating to rules of administrative practice and procedure; and special provisions). A motion must set forth the ruling or relief sought, and state the grounds therefor and the statutory or other authority upon which it relies.

52 Pa. Code § 5.103(a). The Commission has not definitively permitted the filing of exceptions by a non-party pursuant to Section 5.103(a) or any other provision of the Commission’s regulations.

III. ANSWER

As discussed in detail in paragraphs 1 through 25, below, Joint Complainants submit that the Commission should deny RESA’s Petition to Intervene, as RESA does not have an interest in this proceeding that is required for intervention. See 52 Pa. Code § 5.72. Moreover, Joint Complainants submit that RESA did not file its Petition to Intervene in accordance with the time requirements provided in 52 Pa. Code Section 5.74(b), nor did RESA demonstrate “good cause” for its failure to do so or “extraordinary circumstances” for its failure to intervene prior to the evidentiary hearings. See 52 Pa. Code § 5.74(b), (c). As such, Joint Complainants submit that the Commission should deny RESA’s Petition to Intervene.

Additionally, the Commission’s regulations are clear that only parties may file exceptions. See 52 Pa. Code § 5.533(a). The Commission’s regulations, however, permit the filing of

amicus curiae briefs by a “person interested in the issues involved in a Commission proceeding.” See 52 Pa. Code § 5.502(e). RESA provides no reason for failing to submit an amicus curiae brief in this matter, which would have been the appropriate path for a non-party’s participation in this matter. As such, Joint Complainants submit that RESA’s Motion for Leave to Accept Exception must be denied.

The Joint Complainants provide the following paragraph by paragraph response to RESA’s filing:

1. No response is required, as the Joint Complaint and referenced “similar complaints” are of record and speak for themselves.
2. No response is required, as the Initial Decision is of record and speaks for itself.
3. Denied. By way of further answer, Joint Complainants incorporate paragraphs 9, 11, and 13, below.
4. Denied. By way of further answer, Joint Complainants incorporate paragraph 12, below.
5. Denied. For the reasons set forth in paragraphs 6 through 25, below, Joint Complainants deny that the Commission should grant RESA’s Petition to Intervene or consider RESA’s Exceptions as a non-party.

A. PETITION TO INTERVENE

6. Denied. Joint Complainants are without information sufficient to form a belief regarding the veracity of the statements in paragraph 6 of RESA’s Petition relating to the “common vision” and license status of RESA’s members, as the information is solely within RESA’s possession. Joint Complainants, therefore, deny these statements.
7. Admitted upon information and belief based upon the signature line of RESA’s Petition.

8. This paragraph states conclusions of law to which no response is required. By way of further answer, the Joint Complainants incorporate Section II(A), above, herein.

9. This paragraph states conclusions of law to which no response is required. By way of further answer, the Joint Complainants incorporate Section II(A), above, herein. Additionally, Joint Complainants deny RESA's assertion that extraordinary circumstances warrant its intervention in this proceeding. Joint Complainants submit that RESA did not file its Petition to Intervene in accordance with the time requirements provided in 52 Pa. Code Section 5.74(b), nor did RESA demonstrate "good cause" for its failure to do so or "extraordinary circumstances" for its failure to intervene prior to the evidentiary hearings. See 52 Pa. Code § 5.74(b), (c). Pursuant to the Commission's regulations, RESA should have filed its Petition no later than the date fixed for the filing of responsive pleadings. See 52 Pa. Code § 5.74(b). In this case, that date was July 10, 2014. See 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, Secretarial Letter (June 20, 2014). RESA did not file its Petition until July 27, 2016, more than two years past the date required under the Commission's regulations.

Moreover, RESA has failed to demonstrate "good cause" for its failure to file its Petition on time or "extraordinary circumstances" for its failure to file prior to the evidentiary proceedings. See 52 Pa. Code § 5.74(b), (c). The TRA issue is not a new issue in this proceeding. Joint Complainants raised the TRA issue in their Joint Complaint, which was filed with the Commission and made available to the public on June 20, 2014. See Joint Complaint at Count V. By Order entered December 11, 2014 (Dec. 11 Order) in this proceeding, the Commission addressed whether it had the authority and jurisdiction to determine whether a

violation of the TRA has occurred when considering whether the Commission's regulations - which require compliance with these laws - have been violated. The Commission determined that while it does not have the authority or jurisdiction to determine whether a violation of the TRA has occurred, the Commission can hear claims alleging improper verification of enrollment of residential customers brought against Blue Pilot under the Commission's telemarketing regulations. Dec. 11 Order at 17-18. Accordingly, Joint Complainants pursued Count V in their litigation of the Joint Complaint, introducing evidence on the record to support a finding that Blue Pilot violated the Commission's regulations by, *inter alia*, enrolling customers via telemarketing and failing to obtain customers' signatures agreeing to enrollment in violation of 52 Pa. Code § 111.10(a)(1) (Requiring compliance with the TRA). See e.g. OAG/OCA St. 1 at 48-51. Joint Complainants also pursued Count V in their Main Brief and Reply Brief. See OAG/OCA M.B. at 76-83; see also OAG/OCA R.B. at 54-56. As such, Joint Complainants submit that RESA does not have good cause nor do extraordinary circumstances exist to justify RESA's late intervention.

10. Joint Complainants are without information sufficient to form a belief regarding the license status of all of RESA's members, as the information is solely within RESA's possession. By way of further answer, the Commission's regulations provide, in pertinent part, as follows:

The right or interest [necessary for intervention] may be one of the following:

[...]

(2) An interest which may be directly affected and which is not adequately represented by existing participants, and as to which the petitioner may be bound by the action of the Commission in the proceeding.

52 Pa. Code § 5.72. The Commission has held that an interest based on the precedent that a Commission decision could establish is insufficient to meet the requirement that a party seeking

to intervene must be bound by the Commission's action in that proceeding. See Verizon at 8-9.

Specifically, in Verizon, the Commission held:

CTSI claims that it will be directly affected by this proceeding because it could be adversely impacted by a decision adopting the Initial Decision. CTSI's claim, however, is based solely on the precedent that our decision could establish, which could affect CTSI in *Verizon v. CTSI*. This interest is insufficient to meet the requirement that a party seeking to intervene in this proceeding must be *bound* by the Commission's action *in this proceeding*. 52 Pa. Code § 5.72(a)(2) [...] Consequently, we will deny CTSI's Petition to Intervene.

Verizon at 8-9. Much like in Verizon, RESA is claiming that it is bound by the Commission's decision in this proceeding in that the Commission's decision will "establish a standard of conduct to be followed by all EGSs." As the Commission held in Verizon, RESA's interest in this proceeding based on the possible establishment of such precedent is insufficient to meet the requirement that a party seeking to intervene must be bound by the Commission's action in this proceeding.

11. Denied. RESA bases its assertion that a wet signature requirement would substantially impact the ability of EGSs to provide competitive generation service to retail customers on mere postulations. For instance, RESA's concerns are centered on the assumption that consumers will not provide the wet signatures timely, if at all. RESA, however, provides no support for its assertion that consumers would not send a required signature to complete an enrollment for which they have, supposedly, opted. If customers choose not to send their written consent or choose not to do so timely when the offered price is still available, the customer is, in essence, choosing not to enroll. The customer is entitled to make that decision, and the Commission has been strict in enforcing its regulations that ensure that EGSs will not switch customers without proper authorization. See e.g. Pennsylvania Public Utility Commission, Law Bureau

Prosecutory Staff v. MXenergy Electric Inc., Docket No. M-2012-2201861, Order at 9 (May 3, 2012). Joint Complainants, therefore, deny these statements.

Further, RESA asserts that “this never-before-required burdensome obligation to obtain wet signatures will likely result in EGSs electing not to use this sales channel.” Joint Complainants note that the Initial Decision did not establish new requirements for EGSs, but rather found that Blue Pilot violated the Commission’s already-existing regulations at 52 Pa. Code § 111.10(a)(1). As such, RESA’s Petition should be denied.

12. Denied. Joint Complainants deny that unusual circumstances exist that warrant RESA’s intervention at this stage in the proceeding. In support of its conclusion that unusual circumstances warrant its involvement at this stage of the proceeding, RESA argues that its interests in this proceeding, on behalf of a broad group of electric generation suppliers in general, are unique from and not adequately represented by other parties. The fact that RESA may have an interest unique from other parties is not a unique circumstance and it certainly does not warrant RESA’s late intervention. In Verizon, the Commission held as follows:

With regard to the timeliness of CTSI’s Petition to Intervene, our regulations provide “Except with regard to statutory advocates . . . intervention will not be permitted once an evidentiary hearing has concluded absent extraordinary circumstances.” 52 Pa. Code § 5.74. No extraordinary circumstances are present in this case. The crux of CTSI’s argument for intervention is that CTSI should be permitted to intervene because it could be adversely impacted by the precedent set in this case. It is not unusual for a non-party to be so affected by a decision of this Commission. CTSI has failed to show that its circumstances are in any way “extraordinary.” We therefore find CTSI’s argument unpersuasive.

We do not rule out the possibility that, in an appropriate future case, a petitioner might demonstrate extraordinary circumstances warranting intervention after the issuance of an Initial Decision. This case, however, demonstrates that we should be very cautious in granting such a petition. [...] We should only grant a petition to intervene after the issuance of an Initial Decision in the most extraordinary circumstances.

Verizon at 7.

As discussed in Paragraph 9, above, the circumstances here are not extraordinary. The TRA issue is not a new issue in this proceeding, and Joint Complainants have actively pursued this issue in litigation for over two years. Moreover, the fact that Blue Pilot is no longer operating as a licensed EGS in Pennsylvania is also not an “extraordinary circumstance” that warrants RESA’s late intervention. Joint Complainants requested license revocation in their Joint Complaint, and they have actively sought this remedy throughout the course of the proceeding. See e.g. OAG/OCA St. 1 at 58; see also OAG/OCA M.B at 83-89; see also OAG/OCA R.B. at 56-58. Additionally, on May 4, 2015, Blue Pilot filed a letter with the Commission at Docket No. A-2011-2223888 providing notice pursuant to 52 Pa. Code § 54.41(b) of the Company’s intent to abandon its Pennsylvania customers. Also of relevance, on December 17, 2015, the Commission issued a Tentative Order at Docket No. M-2015-2490383, in which the Commission tentatively cancelled Blue Pilot’s EGS license, *inter alia*, for the failure to provide proof to the Commission that it has a bond or other approved security currently in effect. The Tentative Order was published in the Pennsylvania Bulletin on January 2, 2016. As such, RESA should have expected that Blue Pilot would cease operations as a licensed EGS in Pennsylvania, either through Commission-ordered license revocation or cancellation or through voluntary abandonment of its customers.

Accordingly, RESA’s concern that Blue Pilot may not adequately defend the TRA issue is also not an “extraordinary circumstance.” In fact, Blue Pilot has filed an Exception on this issue, which is now before the Commission. As such, Joint Complainants submit that these circumstances do not justify RESA’s late intervention.

13. Denied. The Joint Complainants contend that RESA’s intervention at this juncture is not in the public interest. RESA asserts that its intervention in this proceeding will bring a new

perspective that will “enable the Commission to have a broader view of this matter to ensure that its final decision serves the public interest.” RESA’s perspective on the TRA issue in this proceeding, however, is not absent from the case. See Corrina at 23 (The Commission permitted the Suppliers late intervention *because* the affected natural gas supplier was not a party to the proceeding, and as such, the natural gas supplier perspective was entirely absent from the case.) Here, Blue Pilot is a party to this proceeding, and Blue Pilot has filed an Exception to the TRA issue that RESA now seeks to address through its intervention. As such, RESA’s perspective in this proceeding is not absent from the case, and its intervention at this stage in the proceeding is not in the public interest. Furthermore, as discussed in paragraphs 9 and 12, above, RESA has not demonstrated “good cause” or “extraordinary circumstances” to justify its late intervention in this proceeding, and Joint Complainants incorporate those paragraphs herein.

Joint Complainants also specifically deny RESA’s claim that “imposing a new wet signature requirement on telemarketing will make this sales channel no longer viable” and will “negatively impact the ability of customers to have access to a variety of avenues to enter the competitive market.” Again, Joint Complainants note that the Initial Decision did not establish new requirements for EGSs or eliminate the use of telemarketing for EGSs, but rather found that Blue Pilot violated the Commission’s already-existing regulations at 52 Pa. Code § 111.10(a)(1). Requiring EGSs to comply with Commission regulations does not negatively impact the ability of customers to have access to a variety of avenues to enter the competitive market, as suggested by RESA. As such, Joint Complainants submit that RESA has failed to demonstrate that its intervention is in the public interest.

14. Denied. This proceeding is a complaint proceeding initiated against a particular EGS. As stated, the Initial Decision did not establish new requirements for EGSs, but rather found that

Blue Pilot violated the Commission's already-existing regulations at 52 Pa. Code § 111.10(a)(1) by failing to obtain customers' signatures agreeing to enrollment when customers enrolled via telemarketing. Now, as RESA acknowledges, RESA is not taking any position regarding the specific allegations against Blue Pilot involving its marketing practices. Thus, RESA's attempt to intervene would broaden the issues in this case. Furthermore, as discussed in Paragraphs 9, 10, and 12, above, RESA has failed to justify its late intervention. As such, RESA's Petition should be denied.

15. Denied. By way of further answer, Joint Complainants incorporate paragraph 10 herein.

16. Denied. By way of further answer, Joint Complainants incorporate paragraphs 9 and 12 herein.

17. Denied. By way of further answer, Joint Complainants specifically deny that RESA had no reason to anticipate that a requirement for a wet signature would be presented to the Commission. As discussed in paragraph 9, above, the Joint Complainants have actively litigated the TRA issue in this proceeding for over two years, and Joint Complainants incorporate paragraph 9 herein.

The Joint Complainants also specifically deny that the recommendation of the Initial Decision is not consistent with the law. In support of its position, RESA relies on 73 P.S. § 2245(d)(1). An EGS doing telemarketing in Pennsylvania cannot avail itself of what has been fashioned as a safe-harbor exception under 73 P.S. § 2245(d)(1). This exception to the wet signature requirement would theoretically apply only if the contractual "sale" is regulated under "other laws" of the Commonwealth. This exception, however, does not apply here, as the "other laws" in the form of Commission regulations, do not address the process by which a consumer agrees to enter into a contract, in other words, a "sale" with an EGS. Those regulations merely

specify the requirements that EGSs must complete after a consumer has already agreed to enter into a sale. See 52 Pa. Code § 111.7.

Additionally, on February 8, 2010, the Commission sought an opinion by the Attorney General “regarding the applicability of the [TRA] to electric generation suppliers as defined in the Electricity Generation Customer Choice and Competition Act.” See Request for Opinion, 2010 Pa. AG LEXIS 1 (Feb. 8, 2010) (AG Opinion). In response to Chairman Cawley’s question regarding whether EGSs are excluded from the definition of “telemarketer” in the TRA, Attorney General Corbett replied as follows:

[E]lectric generation suppliers engaged in telemarketing are telemarketers for **all** purposes of the [Telemarketer Registration] Act except the requirement of Section 3(a), 73 P.S. § 2243(a), that telemarketers register with this Office, from which electric generation suppliers are excluded because they are licensed by the PUC under the Competition Act, 66 Pa. C.S. § 2809(a). Agents of suppliers, such as individuals and businesses initiating or receiving calls pursuant to contracts with suppliers, are not excluded from the definition of "telemarketer" and therefore must register.

AG Opinion at *4-5. (Emphasis added.)

Moreover, RESA’s argument that the Commission’s regulations do not require a wet signature ignores Section 111.10 of the Commission’s regulations, 52 Pa. Code § 111.10, which requires compliance with the TRA. As discussed above, the TRA requires a wet signature. As such, Joint Complainants submit that RESA’s argument is unfounded, and its Petition to Intervene should be denied.

18. Denied. By way of further answer, the Initial Decision did not change the status of this proceeding as a complaint proceeding initiated against a specific EGS. As such, the status of this proceeding does not justify RESA’s late intervention. Joint Complainants incorporate paragraphs 9 and 12 herein.

19. Denied. RESA asserts that its late intervention in this proceeding is “reasonable” because the settlements in the other EGS cases did not include a requirement that the Commission interpret the wet signature requirements consistent with the recommendation of the Initial Decision in this case. First, all five Joint Complaints filed on June 20, 2014 included a claim that the respective companies violated the Commission’s regulations by failing to comply with the TRA. Specifically, Joint Complainants asserted, “[w]hen respondent sells its goods or services through the use of a telemarketing call, the [TRA] requires the Respondent to reduce any sale of goods or services made during such call to a written contract and obtain the customer’s signature on the written contract.” See e.g. Joint Complaint at ¶ 52. As such, RESA should have been aware since June 20, 2014 that Joint Complainants were seeking full compliance with the Commission’s regulations requiring compliance with the TRA, including the requirement to obtain a wet signature. Moreover, as stated, the Joint Complainants have actively litigated the TRA issue in this proceeding for over two years, and Joint Complainants incorporate paragraph 9, above, herein. Finally, Joint Complainants note that the other settlements did include provisions wherein the respective EGSs agreed to comply with all Pennsylvania laws, including the TRA. 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. IDT Energy, Inc., Docket No. C-2014-2427657, Tentative Opinion and Order at 18 (June 30, 2016) (deemed final via Secretarial Letter dated July 14, 2016). As such, Joint Complainants submit that RESA’s late intervention in this proceeding is not justified and should be denied.

20. Denied. By way of further answer, Joint Complainants incorporate paragraphs 9 and 12 herein.

B. MOTION FOR LEAVE TO ACCEPT EXCEPTION

21. Denied as stated. For the reasons set forth below, Joint Complainants submit that RESA's Motion for Leave to Accept Exception should be denied.

22. The paragraph contains conclusions of law to which no response is required. It is specifically denied that because the Commission may have considered the exceptions of a non-party in Application of Sprint Communications Company, L.P. For Approval of the Right to Offer, Render, Furnish or Supply Telecommunications Services as a Competitive Local Exchange Carrier to the Public in the Service Territories of Alltel Pennsylvania, Inc. Commonwealth Telephone Company and Palmerton Telephone Company, Docket No. A-310183F0002AMA et al., Opinion and Order (Dec. 1, 2006) (Sprint Application Order), such action establishes a binding precedent. The Commission's regulation regarding exceptions is clear that only parties may file exceptions. See 52 Pa. Code § 5.533(a). Further, the fact that the Commission did not formally grant the Broadband Cable Association of Pennsylvania's (BCAP) Petition to Intervene in its Order in the Sprint Application Order, does not necessarily mean that BCAP's Petition was not granted. Rather, Joint Complainants submit that an appropriate reading of the Sprint Application Order indicates that BCAP's Petition to Intervene was granted by implication *because* the Commission considered BCAP's exceptions. Id. RESA did not identify any other instances where the Commission may have or, in fact, did entertain the exceptions of a non-party, and therefore, Joint Complainants submit that the Commission does not intend to alter or expand 52 Pa. Code § 5.533(a). Further, even if the Commission had addressed the exceptions of a non-party in the Sprint Application Order, the Commission thereafter passed a regulation allowing for the filing of amicus curiae briefs by a "person interested in the issues involved in a Commission proceeding." See 52 Pa. Code § 5.502(e). The amicus curiae

regulation does not include a provision for the purposes of filing exceptions or reply exceptions. Joint Complainants submit that Section 5.502(e) provides the appropriate path for non-parties to address an issue in a matter before the Commission.

23. Denied. It is denied that 52 Pa. Code § 5.502(e), which permits the filing of amicus curiae briefs by non-parties, should be expanded to permit the filing and consideration of exceptions by a non-party. It is denied that RESA “had no reasonable reason to anticipate the need to participate in this proceeding” prior to the issuance of the Initial Decision. As explained above in paragraphs 9 through 12, the issue has been a part of this case since the filing of the Joint Complaint on June 20, 2014, and Joint Complainants have pursued the issue since that time.

24. Denied. It is denied that considering RESA’s exception would not prejudice the parties in this proceeding. The Commission’s regulations provide the rules regarding proceedings on formal complaints, and the regulations do not permit the filing of exceptions by a non-party. Joint Complainants would be prejudiced by allowing a new party in this action at this time against whom Joint Complainants must prosecute their complaint. As explained in Section I above, RESA was aware of this action and the publicly available documents related Joint Complainants’ continued prosecution of Count V of the Joint Complaint for approximately two years before RESA filed a Petition to Intervene. It is not then an “extraordinary circumstance” when the ALJs make a determination regarding Count V.

25. Denied. It is denied that the Commission should grant RESA’s alternative request for leave to accept an exception to the Initial Decision. As explained above in paragraphs 22 and 23, the Commission’s regulations provide for the appropriate requirements to participate in a proceeding before the Commission. RESA does not meet these requirements and does not meet

the standards necessary for any exemption to these requirements. As such, RESA's Petition and Motion should be denied.

III. CONCLUSION

WHEREFORE, Joint Complainants respectfully request that the Commission deny RESA's Petition to Intervene or, in the alternative, Motion for Leave to Accept Exception.

Respectfully submitted,



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Date: August 16, 2016
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CERTIFICATE OF SERVICE

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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 :

I hereby certify that I have this day served a true copy of the foregoing document, the Answer of Joint Complainants Commonwealth of Pennsylvania and the Office of Consumer Advocate to the Petition to Intervene or, in the Alternative, Motion for Leave to Accept Exception of Retail Energy Supply Association, in the manner and upon the persons listed below:

Dated this 16th day of August 2016.

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