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August 3, 2018

Via Electronic Filing

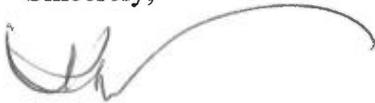
Rosemary Chiavetta, Secretary
PA Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

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

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Blue Pilot Energy, LLC's ("Blue Pilot") Petition for Reconsideration of the Commission's July 19, 2018 Order with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,



Karen O. Moury

KOM/lww
Enclosure

cc: Hon. Elizabeth Barnes w/enc.
Hon. Joel Cheskis w/enc.
Cert. of Service w/enc.

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I. INTRODUCTION

Pursuant to Sections 703(f) and 703(g) of the Public Utility Code,¹ and Section 5.572 of the regulations of the Pennsylvania Public Utility Commission (“Commission”),² Blue Pilot Energy, LLC (“Blue Pilot”) files this Petition for Reconsideration (“Petition”) of the Commission’s Order entered on July 19, 2018 (“July 19 Order”). By the July 19 Order, the Commission has: (i) violated the Excessive Fines Clause of the Pennsylvania and United States Constitutions by imposing a civil penalty of \$1,066,900 as a result of variable prices charged by Blue Pilot to a small group of electric consumers during the Polar Vortex of 2014;³ (ii) unlawfully sustained, in part, the Joint Complaint filed by the Office of Attorney General (“OAG”) and the Office of Consumer Advocate (“OCA”) (collectively referred to as the “Joint Complainants”) and directed across-the-board relief to all affected customers, in the nature of a class action lawsuit over which the Commission lacks subject matter jurisdiction; and (iii) exceeded its statutory authority by engaging in contract interpretation and by directing Blue Pilot, an electric generation supplier whose prices are not regulated by the Commission, to issue refunds in the amount of \$2,508,449 to consumers.⁴

¹ 66 Pa. Code § 703(f)-(g).

² 52 Pa. Code § 5.572.

³ Notably, the constitutionality of a \$1.8 million civil penalty imposed on an electric generation supplier (“EGS”) stemming from prices charged during the Polar Vortex is currently under review by the Pennsylvania Supreme Court and is scheduled for oral argument in September 2018. *Hiko Energy, LLC v. Pa. P.U.C.*, 163 A.3d 1079 (Pa. Cmwlth. 2017); petition for allowance of appeal granted at 176 A.3d 235 (Pa. 2017), and appeal pending at 39 EAP 2017. The Supreme Court’s resolution of *Hiko* is likely to affect the outcome of issues raised here by Blue Pilot concerning the constitutionality of the civil penalty.

⁴ In addition to these three issues that Blue Pilot is focusing on in this Petition, the July 19 Order contains several other errors, which include: (i) holding Blue Pilot’s disclosure statement to a standard that is not established by the regulations (July 19 Order at 34-37); (ii) considering extrinsic evidence beyond the four corners of the contract to conclude that Blue Pilot overbilled customers (July 19 Order at 62-63); (iii) ignoring significant consumer testimony that showed the lack of reliance on verbal statements of sales agents and varying experiences (July 19 Order at 50-52); (iv) reliance on uncorroborated hearsay testimony to reach factual findings (July 19 Order at 60-63); (v) reaching factual determinations about overbilling without having substantial evidence showing individualized usage and billing statements (July 19 Order at 63-64); (vi) relying on the Commonwealth Court’s decision in *Lyft, Inc. v. Pa. P.U.C.*, 145 A.3d 1235 (Pa. Cmwlth. 2016) for the proposition that aggregate data may support its findings when the *Lyft* decision

In further support of this Petition, Blue Pilot states as follows:

II. LEGAL STANDARDS FOR RECONSIDERATION

1. The Public Utility Code establishes a party's right to seek relief following the issuance of a final decision.⁵ Such requests for relief must be consistent with Section 5.572 of the Commission's regulations.⁶

2. It is well settled that petitions made pursuant to Section 703(g) may properly raise any matters designed to convince the Commission that it should exercise its discretion under the Public Utility Code to rescind or amend a prior order in whole or in part.⁷ Parties are not permitted by a second motion to review and reconsider, to raise the same questions which were specifically decided against them. What the Commission expects in petitions for reconsideration are new and novel arguments, not previously heard or considerations which appear to have been overlooked by the Commission. Additionally, a petition for reconsideration is properly before the Commission where it pleads newly discovered evidence, alleges errors of law, or a change in circumstances.⁸

involved the release of aggregate data (July 19 Order at 65); (vii) lacking substantial evidence that the affected commercial customers fall within the definition of "small business customer" (July 19 Order at 67). Therefore, Blue Pilot wholly incorporates this Petition its Main Brief filed on March 2, 2016, its Reply Brief filed on March 23, 2016 and its Exceptions filed on July 27, 2016 in this proceeding. Moreover, Blue Pilot does not waive these additional issues raised in these pleadings and expressly reserves its ability to raise them on appeal. Blue Pilot's reason for its narrow advocacy here is limited access to financial resources due to exiting the Pennsylvania market in 2014 and going out of business in 2015. Yet, the devastating impact on Blue Pilot and the compelling legal errors identified above warrant reconsideration by the Commission of the July 19 Order.

⁵ 66 Pa.C.S. § 703(f) relating to rehearings and § 703(g), relating to the rescission, clarification and amendment of orders.

⁶ 52 Pa. Code § 5.572, relating to petitions for relief following the issuance of a final decision.

⁷ *Duick v. Pennsylvania Gas and Water Co.*, Docket No. C-R0597001 et al., Order entered December 17, 1982; 56 Pa. P.U.C. 553 (1982).

⁸ *Id.*

3. In addition, the Commission is required to render consistent opinions that must follow, distinguish or overrule its own precedent.⁹ An agency abuses its discretion if it fails to interpret statutes, regulations or orders consistent with their clear and plain meaning or when an agency fails to follow its own regulations and procedures.¹⁰

III. RECONSIDERATION IS WARRANTED

A. The One Million Dollar Civil Penalty Is Unconstitutionally Excessive

4. The civil penalty imposed the July 19 Order of \$1,066,900 constitutes an excessive fine in contravention of Article I, Section 13 of the Pennsylvania Constitution, and the Eighth Amendment of the United States Constitution.¹¹

5. 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.¹²

6. The prohibition against excessive fines applies to those levied against corporations, just as to individuals.¹³

7. 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."¹⁴

8. 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

⁹ *Standard Fire Insurance v. Insurance Department*, 611 A.2d 356, 359 (Pa.Cmwlth. 1992).

¹⁰ *See Peoples Natural Gas Company v. Pennsylvania Public Utility Commission*, 542 A.2d 606, 608 (Pa.Cmwlth. 1988), *affirmed*, 567 A.2d 642 (Pa. 1989).

¹¹ July 19 Order at 89-91), Ordering Paragraph 6.

¹² *See Cmwlth. of Pa. v. Brunk*, Nos. 235 C.D. 2015 and 236 C.D. 2015, 2015 WL 7200937 (Pa. Cmwlth. 2015).

¹³ *See Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 286, 109 S.Ct. 2909 (1989).

¹⁴ *Austin v. United States*, 509 U.S. 602 (1993).

whether, under the circumstances, the fine is 'irrational or unreasonable.'"¹⁵ 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."¹⁶

9. To determine whether a penalty is excessive, it is necessary to employ a proportionality analysis, *i.e.* a comparison of the amount of the fine to the gravity of the offense.¹⁷ In applying the proportionality test, the Pennsylvania Supreme Court has pointed to *Solem v. Helm*,¹⁸ which requires a comparison of the magnitude of the fine to the treatment of other offenders in the same jurisdiction, and to the treatment of the same offense in other jurisdictions.¹⁹ The Supreme Court has further noted the special need for "intra-Pennsylvania" proportionality and explained that "comparative and proportional justice is imperative within Pennsylvania's own borders."²⁰

10. Despite this clear legal precedent for ensuring the proportionality of the civil penalty, as compared to other civil penalties imposed for similar violations, the July 19 Order imposed a \$1.1 million civil penalty without considering the significantly lower civil penalties that were imposed on other EGSs as a result of similar pricing activities during the Polar Vortex of 2014. Failing to make this comparison, the Commission imposed a civil penalty on Blue Pilot that is more than \$1 million, or over 40 times, the amount that two other EGSs paid,²¹ and nearly \$1 million, or over 8 times, the amount that another EGS paid.²² Given the extreme differences

¹⁵ *Cmwlth. v. Gipple*, 418 Pa.Super. 119, 123, 612 A.2d 600 (1992).

¹⁶ *United States v. Bajakajian*, 524 U.S. 321, 337 (1998).

¹⁷ *Commonwealth v. Eisenberg*, 626 Pa. 512, 98 A.3d 1268 (Pa. 2014).

¹⁸ 463 U.S. 277, 103 S.Ct. 3001 (1983).

¹⁹ *Eisenberg*, 98 A.3d at 1282.

²⁰ *Eisenberg*, 98 A.3d at 1283.

²¹ *Commonwealth of PA v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric*, Docket No. C-2014-2427656 (Order entered March 9, 2016) (civil penalty of \$25,000); *Commonwealth of PA v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Order entered June 30, 2016) (civil penalty of \$25,000).

²² *Commonwealth of PA v. Respond Power LLC*, Docket No. C-2014-2427659, and *Pa. P.U.C. v. Respond Power LLC*, Docket No. C-2014-2438640 (Order entered August 11, 2016) (civil penalty of \$125,000).

between these civil penalty amounts, reconsideration of the Blue Pilot civil penalty is warranted. Through that process, the Commission should reduce the civil penalty to a level commensurate with the results in those cases, keeping in mind the relatively low number of customers that were served by Blue Pilot, as compared to other EGSs.

11. For purposes of comparison, the July 19 Order only considered the civil penalty imposed on the EGS in *Pa. P.U.C. Hiko Energy, LLC*.²³ 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, and the findings were based on hearsay testimony regarding alleged conversations with sales agents despite contract language indicating that the prices would vary based on wholesale market conditions. Yet, under the July 19 Order, the Commission imposed the same civil penalty per "violation" as it assessed in the *Hiko* proceeding for the purported "overbilling" of residential customers, and without any discussion of its rationale, imposed a higher civil penalty per "violation" for its finding of "overbilling" of small business customers.²⁴ In comparison to the *Hiko* civil penalty, the fine imposed on Blue Pilot is grossly disproportionate and unconstitutionally excessive.

12. The July 19 Order also wholly disregards Blue Pilot's argument that the imposition of a civil penalty of the magnitude that was assessed would violate Blue Pilot's fundamental due

²³ Docket No. C-2014-2431410 (Order entered December 3, 2015). Blue Pilot notes that the Commission's *Hiko* order is currently pending review by the Pennsylvania Supreme Court; it is likely that the outcome of that proceeding will have a bearing on the civil penalty analysis here.

²⁴ Notably, the Joint Complainants did not prove that the commercial customers qualify as "small business" customers for purposes of the protections of the regulations in question, a reality that is glossed over by the July 19 Order. Therefore, any penalty imposed for violations of regulations in connection with serving commercial customers is not based on substantial evidence. See Reply Brief at 77-79.

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."²⁵ 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.

13. Moreover, when an action seeks to impose civil penalties, a respondent is entitled to full due process rights.²⁶ 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. As the Joint Complainants' proposed methodologies for calculating a civil penalty in this proceeding were not disclosed until their Main Brief, after which Blue Pilot had no opportunity to provide testimony, the imposition of a penalty on the basis of those proposals violates Blue Pilot's fundamental rights of due process.

14. Finally, the July 19 Order did not consider the ability of Blue Pilot to pay a civil penalty of the magnitude that was imposed, and in fact, recognized that Blue Pilot has not actively participated in Pennsylvania's retail market since 2014. By contrast, in *Hiko*, staying the payment of a \$1.8 million civil penalty previously imposed by the Commission, the Commonwealth 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."²⁷

²⁵ See *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919).

²⁶ *Northview Motors, Inc. v. Commonwealth, Attorney Gen.*, 562 A.2d 977, 980 (Pa. Cmwlth. 1989).

²⁷ *Hiko Energy, LLC v. Pa. P.U.C.*, No. 5 C.D. 2016 (Memorandum Opinion by Senior Judge Colins dated February 12, 2016). See also *Hiko*, 163 A.3d at 1100 (the Commission considered the fact that the EGS was licensed in eight states).

B. The Commission Lacks Subject Matter Jurisdiction Over Class Action Lawsuits

15. In direct contravention of prior Commission rulings which concluded that the Commission may not entertain class action lawsuits,²⁸ the July 19 Order determines that Blue Pilot violated Commission regulations across its entire customer base based on a small sampling of consumer testimony and grants across-the-board relief to all affected customers.²⁹

16. 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 July 19 Order finds that Blue Pilot has violated certain Commission regulations in connection with serving each of its electric supply customers during the December 2013 through March 2014 timeframe.³⁰

17. Indeed, the specific nature of the relief requested by the Joint Complainants and granted by the July 19 Order – refunds for all customers served by Blue Pilot based on the alleged experiences of a small percentage of those customers – makes this proceeding a class action lawsuit, which the Commission does not have the statutory authority to entertain.

18. Rather than acknowledging that this case is a text book class action lawsuit and dismissing the Joint Complaint on this basis, the July 19 Order 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. However, in describing the statutory functions of the OCA and OAG, the July 19 Order provides no references to any provisions in their enabling statues that permit the representation of a class of individual consumers in proceedings at the Commission or

²⁸ See *Painter v. Aqua PA, Inc.*, Docket No. C-2011-2239557 (Opinion and Order entered May 22, 2014); *Pettko v. Pennsylvania American Water Company*, Docket No. C-2011-2226096 (Administrative Law Judge Order dated October 5, 2011 adopted by Commission Order on February 18, 2013).

²⁹ July 19 Order at 25-27, 41-46, Ordering Paragraph 8.

³⁰ July 19 Order at 61-66.

that authorize them to seek relief from the Commission on behalf of a class of individual customers.³¹

19. In fact, neither OCA nor OAG is permitted to represent a class of individual consumers in proceedings at the Commission or to seek relief on behalf of a class of individual customers. OCA's enabling statute authorizes it to represent the general interests of consumers as a party, as opposed to the interests of a class of individual utility consumers.³² As to OAG, Section 701 of the Public Utility Code 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."³³ Therefore, it was unlawful for the Commission to grant relief to a class individual customers as requested by the Joint Complaint when neither OCA nor OAG was authorized to seek such relief and OAG is expressly prohibited by the Public Utility Code from doing so.

20. Further, the July 19 Order is wrong in relying on the Commonwealth Court decision in *Commonwealth v. TAP Pharmaceutical Products, Inc.*,³⁴ for the proposition that OAG may prosecute the Joint Complaint at the Commission on behalf of Pennsylvania consumers.³⁵ As a threshold matter, as noted above, OAG is precluded by the Public Utility Code from prosecuting the Joint Complaint at the Commission, as it may be a complainant only on behalf of the Commonwealth as a public utility consumer. Therefore, the holding in *TAP Pharmaceutical Products* regarding the ability of OAG to prosecute a lawsuit in court is inapplicable.

³¹ July 19 Order at 22-24.

³² 71 P.S. § 309-4(a). *See also Suprick v. Commonwealth Telephone Co.*, Docket No. 00903161, 1995 WL 945164.

³³ 66 Pa.C.S. § 701 (emphasis added).

³⁴ 885 A.2d 1127, 1143 (Pa. Cmwlth. 2005).

³⁵ July 19 Order at 24-25.

21. Moreover, the ability of OAG to prosecute a lawsuit in its *parens patriae* capacity on behalf of Pennsylvania consumers in a court is dependent on whether it has pleaded “a quasi-sovereign interest rather than simply representing the interests of individuals who could have pursued their own claims.”³⁶ Quasi-sovereign interests “consist of a set of interests that the State has in the well-being of its populace.”³⁷ A key determinant is whether OAG has alleged more than injury to an identifiable group of individual residents, such as an alleged injury to a sufficiently substantial segment of the population.³⁸

22. Here, relief was sought by OAG on behalf of a class of 2,516 customers, which is .043% of the total electric customers in Pennsylvania.³⁹ Given this scant identifiable group of individual residents who were the subject of the Joint Complaint, the Commission erred in viewing the Joint Complaint as having the objective of the “overall, economic well-being of the citizens of the Commonwealth in obtaining the benefits of access to electric generation.” Rather, the purpose of the Joint Complaint was to obtain refunds for all individual consumers served by Blue Pilot during the relevant time period on the basis of testimony provided by a handful of those consumers. Clearly, those individual consumers could have, and many in fact did, pursued their own claims. Therefore, it was reversible error for the Commission to rely on the *TAP Pharmaceutical Products* holding to entertain the Joint Complaint.

23. Additionally, through entertaining this class action lawsuit and granting relief to all individuals served by Blue Pilot from December 2013 through March 2014, the Commission ignored the fact that it has already considered and dismissed formal complaints filed by some of

³⁶ 885 A.2d at 1143.

³⁷ *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601-602.

³⁸ 885 A.2d at 1143.

³⁹ <http://www.papowerswitch.com/sites/default/files/PAPowerSwitch-Stats.pdf> (5,821,164 total electric customers as of June 1, 2018).

those customers raising the same issues as are alleged by the Joint Complaint.⁴⁰ Therefore, Code Section 316 precludes the granting of relief to those customers whose complaints have been dismissed.⁴¹

24. Also, by entertaining this class action lawsuit and granting relief to all individuals served by Blue Pilot in the first quarter of 2014, the Commission has ignored the fact that Blue Pilot reached settlements with many of those customers and filed certificates of satisfaction with the Commission.⁴² Under Code Section 703(a), those complaints have been dismissed and cannot be resurrected by this proceeding.⁴³

25. In summary, while recognizing its lack of subject matter jurisdiction to hear class action lawsuits, the Commission has done just that through the July 19 Order by concluding that it may rely on the hearsay testimony of a small sampling of customers to modify the terms of written contracts and on that basis direct across-the-board relief in the form of refunds to all affected customers. This result warrants reconsideration of the July 19 Order.

⁴⁰ See, e.g., *Dubois Manor Motel c/o Nisha Patel v. Blue Pilot Energy, LLC*, Docket No. C-2014-2433817, Docket No. C-2014-2433817 (Order entered June 9, 2016); *Debbie Gruelle c/o Toll Diversified Properties, Inc. v. Blue Pilot Energy, LLC*, Docket No. C-2015-2463573 (Order entered December 22, 2105); *Alan Haulman c/o AJH Pizza, Inc. v Blue Pilot Energy, LLC*, Docket No. C-2014-2415273 (Order entered July 31, 2017).

⁴¹ 66 Pa.C.S. § 316. See *Tillman v. Philadelphia Gas Works*, Docket No. C-2014-2445229, (Initial Decision served November 19, 2015; Order entered March 8, 2016); (Initial Decision on Remand served January 26, 2017; Final Order entered March 16, 2017).

⁴² See, e.g., *Wranitz v. Blue Pilot Energy, LLC*, Docket No. C-2014-2447892 (Certificate of Satisfaction filed January 9, 2015); *Clientlink Inc. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2439832 (Certificate of Satisfaction filed December 12, 2014); *Logan v. Blue Pilot Energy, LLC*, Docket No. C-2014-2423414 (Certificate of Satisfaction filed June 23, 2014); *Corba Beverage v. Blue Pilot Energy, LLC*, Docket No. C-2014-2411101 (Certificate of Satisfaction filed April 8, 2014).

⁴³ 66 Pa.C.S. § 703(a).

C. The Commission Lacks Statutory Authority to Interpret Contracts and to Direct EGSs to Issue Refunds

26. As a creation of the General Assembly, the Commission has only the powers and authority granted to it by the General Assembly and contained in the Public Utility Code.⁴⁴ It is well-settled that the Commission must act within, and cannot exceed, its jurisdiction.⁴⁵ Jurisdiction may not be conferred by the parties where none exists.⁴⁶ Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy.⁴⁷

27. Rather than addressing the legal arguments set forth by Blue Pilot concerning the Commission's lack of statutory authority to interpret contracts or to direct EGSs to issue refunds to customers, the July 19 Order refers to the Commonwealth Court's *Hiko* decision as resolving these issues.⁴⁸ However, the Court in *Hiko* noted that no contract interpretation was necessary because the EGS admitted to overcharging customers.⁴⁹ By contrast, in this proceeding, the Commission engaged in extensive contract analysis that should have been left to a competent court of law.⁵⁰ Likewise, statutory authority to require EGSs to issue refunds was not an issue in *Hiko* because the EGS had agreed as part of a Commission-approved settlement to voluntarily issue refunds. In short, the Commonwealth Court's *Hiko* opinion, which is currently under review by the Pennsylvania Supreme Court, does not address Blue Pilot's legal arguments regarding the

⁴⁴ See *City of Phila. v. Phila. Elec. Co.*, 473 A.2d 997, 999-1000 (Pa. 1984) ("We begin our inquiry by recognizing that the authority of the Commission must arise from the express words of the pertinent statutes or by strong and necessary implication therefrom...It is axiomatic that the Commission's power is statutory; and the legislative grant of power in any particular case must be clear."); see also *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791, 795 (Pa. 1977); *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937 (Order entered May 28, 2008).

⁴⁵ *City of Pittsburgh v. Pa. PUC*, 43 A.2d 348 (Pa. Super. 1945).

⁴⁶ *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967).

⁴⁷ *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992), *alloc. denied*, 637 A.2d 293 (Pa. 1993).

⁴⁸ July 19 Order at 26-27.

⁴⁹ 163 A.3d at 1100.

⁵⁰ July 19 Order at 41-46.

Commission's lack of statutory authority to interpret contracts or to direct EGSs to issue refunds to customers.

28. Nothing in the Code authorizes the Commission to interpret the terms and conditions of a private contract between an EGS and its customers. Indeed, the Commission has concluded that 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."⁵¹ Rather, these are matters for civil courts of common pleas of competent jurisdiction.⁵²

29. Under the *Feingold* holding, the Commission is authorized by the Code to determine whether an EGS has violated its orders or regulations and to impose remedies prescribed by the Code, but it must leave any determination regarding restitution or refunds to the courts. Also, in *Elkin v. Bell Tel. Co. of Pa.*,⁵³ the Pennsylvania Supreme Court referred to the Commission's "rather extensive statutory responsibility for ensuring the adequacy, efficiency, safety and reasonableness of public utility services" before concluding that the General Assembly has "withheld from the PUC the power to award damages."⁵⁴

30. In addition to the lack of statutory power to award monetary relief, nothing in the Code confers jurisdiction on the Commission to regulate EGS prices. To the contrary, in amending the Code to add Chapter 28 or the Competition Act, the General Assembly made it clear that the price of generation supply is exempt from regulation, noting that "[c]ompetitive market forces are

⁵¹ *Office of Small Business Advocate v. FirstEnergy Solutions Corp*, Docket No. P-2014-2421556 (Order entered January 26, 2015) at 18.

⁵² *See Allport Water Auth. v. Winburne Water Co.*, 258 Pa. Super. 555, 393 A.2d 673 (Pa. Super. 1978) (Commission lacks jurisdiction to address disputes involving private contracts); *Adams et al. v. Pa. Pub. Util. Comm'n*, 819 A.2d 631 (Pa. Cmwlt. 2003).

⁵³ 420 A.2d 371 (Pa. 1980).

⁵⁴ *Id.* at 375.

more effective than economic regulation in controlling the cost of generating electricity.”⁵⁵ Indeed, the Commission and the Commonwealth Court have recognized the Commission’s lack of jurisdiction to regulate prices charged by EGSs.⁵⁶ It logically follows that since the Commission does not regulate EGS prices, it does not have authority to direct the issuance of refunds.⁵⁷

31. Code Section 1312 is the only statutory provision authorizing the issuance of refunds by the Commission and it provides the Commission with authority to direct the issuance of refunds only by a public utility.⁵⁸ In the *IDT Interlocutory Order*, the Commission correctly concluded that Code Section 1312 does not empower it to direct EGSs to issue refunds to customers because EGSs are not “public utilities” under the Code except for the limited purposes of Code Sections 2809 and 2810, neither of which are applicable.⁵⁹ Moreover, as the Commonwealth Court has found, this statutory authority to direct the issuance of refunds by a public utility is expressly limited to situations in which the Commission has determined that the rates are unjust and unreasonable.⁶⁰ Since EGSs are not public utilities for the purposes of pricing, it is not within the purview of the Commission to determine whether the prices are unjust and unreasonable pursuant to Code Section 1301.⁶¹ Therefore, no Code Section 1312 refund authority exists.

32. A review of other provisions of the Code likewise uncovers no express authority for the Commission to direct the issuance of refunds by EGSs. Code Section 3301 sets forth the

⁵⁵ 66 Pa.C.S. § 2802(5).

⁵⁶ See *Commonwealth of PA v. IDT Energy, Inc.*, Docket No. C-2014-2427657, (Order entered December 18, 2014) (“*IDT Interlocutory Order*”); *CRH Catering Company, Inc. v. Blue Pilot Energy, LLC*, Docket No. P-2014-2451865 (Order entered February 24, 2015), at 16 (it is “well-settled that the Commission does not have traditional ratemaking authority over competitive supplies and cannot regulate competitive supply rates”). See also *Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania v. Pa. P.U.C.*, 120 A.3d 1087, 1094 (Pa. Commw. Ct. 2015), appeals denied, 136 A.3d 982 and 136 A.3d 983 (Pa. 2016), at 1102; *HIKO Energy, LLC v. Pa. P.U.C.*, 163 A.3d 1079, 1082, n.1 (Pa. Commw. Ct. 2017).

⁵⁷ Likewise, nothing in the Code permits the Commission to require an EGS to pay for a third party administrator for a refund pool, as the July 19 Order erroneously did.

⁵⁸ 66 Pa. C.S. § 1312 (emphasis added).

⁵⁹ *IDT Interlocutory Order* at 16.

⁶⁰ *National Fuel Gas Distribution Corporation v. Pennsylvania Public Utility Commission*, 76 Pa. Cmwlth. 102, 464 A.2d 546 (1983).

⁶¹ 66 Pa. C.S. § 1301.

remedies that the Commission may impose for violations of the Code, Commission regulations or Commission orders by public utilities or any other person or corporation subject to the Code. In authorizing the Commission to impose civil penalties in an amount not to exceed \$1,000 per violation, Code Section 3301 provides for no other civil remedies, including restitution, refunds or damages.⁶²

33. In addition, Code Section 2809(c) authorizes the Commission to suspend or revoke an EGS's license under specified circumstances, including the failure to maintain a bond or other security to ensure its financial responsibility and the failure to pay state taxes. Nowhere in Chapter 28, however, is the Commission authorized to direct an EGS to issue refunds as a result of a violation of the Code, Commission regulations or Commission orders. Also, the civil penalties authorized by Code Section 3301 and the license suspension or revocation remedies authorized by Code Section 2809(c) are reiterated in Section 54.42 of the Commission's regulations, without any mention of refunds.⁶³

34. Clearly, if the General Assembly had desired to empower the Commission to direct EGSs to issue refunds, it would have amended Code Section 1312 or Code Section 3301 or included express authority in Chapter 28. It would have also set forth a basis for deciding when refunds should be awarded, such as following a determination that the prices charged by the EGS were not "just and reasonable," did not conform to the disclosure statement or departed from statements made by sales agents. It would have also set forth a basis for the calculation of refunds and established a process through which the Commission would make these determinations when it

⁶² The Commission has acknowledged its lack of statutory authority to award equitable remedies including restitution. *IDT Interlocutory Order* at 25-26.

⁶³ 52 Pa. Code § 54.42. Indeed, the only mention in the Commission's regulations about a refund by an EGS appears in Section 57.177(b), which provides that a customer who has been switched to an EGS without consent and files a dispute within the first two billing periods is not responsible for EGS bills rendered during that period. While the Commission's statutory authority to promulgate that regulation is unclear (or nonexistent) and the application of that provision to an EGS has not been challenged through the appellate review process, it is irrelevant in this proceeding.

does not regulate EGS prices. Further, it would have indicated whether prior lower prices should offset such refunds. Yet, the General Assembly did none of these things.

35. Notwithstanding the Commission's lack of jurisdiction over EGS prices and its lack of express statutory authority to award damages, the Commission has found that it has "plenary authority" under Code Section 501⁶⁴ to direct an EGS to issue a credit or refund under limited circumstances.⁶⁵ In relying on Code Section 501⁶⁶ for implicit authority to direct an EGS to issue a refund, the Commission has disregarded the express language of Code Section 501, as well as long-standing case law.

36. Code Section 501 confers on the Commission "general administrative power and authority to supervise and regulate all public utilities doing business within the Commonwealth."⁶⁷ EGSs are clearly not public utilities for purposes of Code Section 501.⁶⁸ Therefore, any reliance on Code Section 501 for authority to require EGSs to issue refunds to customers must fail.

37. Even if the authority in Code Section 501 applied to EGSs, it does not empower the Commission to direct EGSs to issue refunds. The Pennsylvania Supreme Court has held that if the text of the Code not does provide the Commission with specific authority, a strong and necessary implication from those words is required to provide such authority.⁶⁹ Similarly, the Commonwealth Court has emphasized that the broad general powers granted to the Commission by Code Section 501 must be read in light of the enumerated powers set forth in the Code and in conjunction with the

⁶⁴ 66 Pa. C.S. § 501.

⁶⁵ See *IDT Interlocutory Order; Kiback v. IDT Energy, Inc.*, Docket No. C-2014-2409676 (Order entered August 20, 2015).

⁶⁶ *Id.*

⁶⁷ 66 Pa. C.S. § 501 (emphasis added).

⁶⁸ See *Delmarva Power & Light Co. Pa. P.U.C.*, 582 Pa. 338, 870 A.2d 901 (Pa. 2005), at 352-353.

⁶⁹ *PECO Energy Co. v. Pa. Pub. Util. Comm'n*, 568 Pa. 39, 791 A.2d 1155, 1159-1160 (2002).

purpose of the Commission to regulate and control public utilities in determining cost and service to the public.⁷⁰

38. In *ARIPPA v. Pa. Pub. Util. Comm'n*,⁷¹ the Commonwealth Court reviewed a Commission decision to determine whether the text of the Code provided the requisite “strong and necessary implication” authorizing the Commission to determine ownership of alternative energy credits. The underlying statute, the Alternative Energy Portfolio Standards Act (“AEPS”), empowered the Commission “to establish an alternative energy credits program as needed to implement this act.”⁷² These duties expressly included the creation and administration of a an alternative energy credits certification, tracking and reporting program, and entailed establishment of a process for qualifying alternative energy systems and determining the manner credits can be created, accounted for, transferred and retired.⁷³ The Court concluded that the Commission had jurisdiction to determine ownership because of “the unique nature of alternative energy credits and the provision in AEPS for the Commission’s extensive oversight of them,” as well as a “process that implicates the particular expertise of the Commission.”⁷⁴

39. By contrast, on the issue of directing EGSs to issue refunds to customers, the Commission has pointed to Code Section 2809(e), and the reference therein to the Chapter 56 standards and billing practices as supporting its exercise of jurisdiction.⁷⁵ Code Section 2809(e), however, only authorizes the Commission to “impose requirements necessary to ensure that the present quality of service provided by electric utilities does not deteriorate, including assuring that adequate reserve margins of electric supply are maintained and assuring that 52 Pa. Code Ch. 56

⁷⁰ *United Telephone Co. of Pennsylvania v. Pennsylvania Pub. Util. Comm'n*, 676 A.2d 1244 (Pa. Cmwlth. 1999); *Fairview Water Co. v. Pa. Pub. Util. Comm'n*, 502 A.2d 162, 509 Pa. 384 (1985).

⁷¹ 966 A.2d 1204 (2009).

⁷² 73 P.S. § 1648.3(e)(1).

⁷³ 73 P.S. § 1648.3(e)(2)-(2)(i).

⁷⁴ *ARIPPA* at 1212.

⁷⁵ *IDT Interlocutory Order*.

(relating to standards and billing practices for residential utility service) are maintained.”⁷⁶ By obligating the Commission to assure that the standards and billing practices for residential utility service are maintained by electric utilities, the General Assembly did not confer implicit authority upon the Commission to direct EGSs to issue refunds to consumers. Indeed, this provision was not intended to provide any oversight of rates but rather to ensure that the introduction of retail choice did not cause a deterioration in the quality of service. The focus of Section 2809(e) is clearly on service, not rates. Neither reliability concerns nor Chapter 56 has anything to do with the Commission’s regulation of rates. Moreover, nothing in Chapter 56 addresses refunds by either electric distribution companies or EGSs.

40. Indeed, the other language contained in Code Section 2809(e) is more relevant to this inquiry, in that it permits the Commission to “forbear from applying requirements of this part which it determines are unnecessary due to competition among” EGSs.⁷⁷ Specifically, the Commission should forbear from applying any provisions of the Code that would result in a determination that an EGS’s prices were unreasonable or improper, thereby supporting a directive for the issuance of a refund, since such a determination is unnecessary due to competition among EGSs. Rate regulation of EGSs is unnecessary because of competitive alternatives.

41. Notably, the Commission’s decisions directing the issuance of refunds have not yet been appealed; and the lack of subject matter jurisdiction is an issue that may be raised at any time. Based on the long-standing case law precluding the Commission from awarding monetary damages, the lack of Commission regulation over EGS prices, and the very limited parameters under which the Code authorizes the Commission to direct the issuance of refunds to customers by public

⁷⁶ 66 Pa. C.S. § 2809(e) (emphasis added).

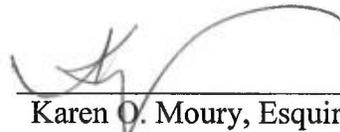
⁷⁷ 66 Pa. C.S. § 2809(e).

utilities, any order directing BPE to issue a refund or credit to the Complainant would exceed the Commission's express and strongly implied statutory authority.

IV. CONCLUSION

WHEREFORE, Blue Pilot Energy, LLC respectfully requests that the Commission: (1) grant this Petition for Reconsideration; (2) modify the July 19 Order to deny the Joint Complaint; and (3) grant any other relief in favor of Blue Pilot as may be just and proper under the circumstances.

Respectfully submitted,



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From: Karen O. Moury <kmoury@eckertseamans.com>
Sent: Friday, August 03, 2018 11:53 AM
To: Leonard, Allyson
Subject: Blue Pilot Petition for Reconsideration

Allison,

This is to confirm that the Petition for Reconsideration filed by Blue Pilot Energy, LLC today at Docket No. C-2014-2427655 contains no factual averments. If you need anything further, please let me know.

Thank you.

Karen

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CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of a Blue Pilot Energy's Petition for Reconsideration upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

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