



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE
C-2014-2427655

August 13, 2018

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. 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 the Bureau of Investigation and Enforcement's Answer to the Petition for Reconsideration of Blue Pilot Energy, LLC in the above-referenced proceeding. Copies have been served on the parties of record in accordance with the Certificate of Service.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

Stephanie M. Wimer
PA Attorney ID No. 207522
Senior Prosecutor

Michael L. Swindler
PA Attorney ID No. 43319
Deputy Chief Prosecutor

Enclosure

cc: Honorable Joel H. Cheskis
Honorable Elizabeth H. Barnes
As per Certificate of Service
ra-OSA@pa.gov

determine the price they would be charged for electric generation supply, failed to bill prices in accordance with its disclosure statement, misled consumers with deceptive promises of savings and failed to meet regulatory obligations when handling consumer complaints. The Commission, *inter alia*, imposed a civil penalty of \$1,066,900 and directed Blue Pilot to issue refunds to customers.

On August 3, 2018, Blue Pilot filed the instant Petition for Reconsideration (“Petition”) of the Commission’s final Order in the above-captioned proceeding, arguing that reconsideration is necessary for the following three matters: (1) The Commission’s imposition of a \$1,066,900 civil penalty related to record evidence demonstrating 4,490 occurrences of overbilling residential customers and 3,371 occurrences of overbilling small business customers for the period from December 2013 through March 2014; (2) the Commission’s alleged treatment of this proceeding as a class action lawsuit when the Commission used aggregate data to support the finding of violations across Blue Pilot’s entire customer base; and (3) the Commission’s supposed lack of authority to direct Blue Pilot, as an EGS, to issue refunds to customers when the Commission found that Blue Pilot failed to bill customers in accordance with its disclosure statements.

Blue Pilot’s arguments are a mere repackaging of its July 27, 2016 Exceptions to the Initial Decision of the presiding Administrative Law Judges (“ALJs”). The Commission fully addressed these arguments in its Order and rejected Blue Pilot’s position. As such, Blue Pilot has not met the standards for reconsideration and its Petition should be denied.

II. LEGAL STANDARD

Section 703(g) of the Public Utility Code, 66 Pa.C.S. § 703(g), authorizes the Commission to rescind or amend any order made by it after the parties are provided with notice and an opportunity to be heard. Section 5.572(c) of the Commission's regulations, 52 Pa. Code § 5.572(c), permits a party to petition for reconsideration within fifteen (15) days after entry of a Commission order.

In enunciating the standard for reopening a final order for reconsideration, Commonwealth Court has stated as follows: "The PUC has the discretion whether to act on a petition for rescission or amendment, and because the relief of rescission or amendment under Section 703(g) may result in the disturbance of final orders, it should be granted judiciously and only under appropriate circumstances." *West Penn Power Co. v. Pa. Pub. Util. Comm'n*, 659 A.2d 1055, 1065 (Pa. Cmwlth. 1995); citing *City of Pittsburgh v. Pa. Dep't of Transp.*, 416 A.2d 461, 465 (Pa. 1980).¹

Reconsideration requires that a petition identify "new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission." *Duick v. Pa. Gas and Water Co.*, 56 Pa. PUC 553, 559 (1982). Reconsideration is not "a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them." *Id.* (quoting *Pa. R.R. Co. v. Pa. Pub. Serv. Comm'n*, 179 A. 850, 854 (Pa. Super. 1935)). Absent a new and novel argument or consideration that appears to have been overlooked

¹ A petition for rescission or amendment under Section 703(g) of the Public Utility Code, 66 Pa.C.S. § 703(g), may be characterized as a petition for reconsideration. *West Penn Power Co.*, 659 A.2d at 1065. See also *AT&T Communications v. Pa. Pub. Util. Comm'n*, 568 A.2d 1362 (Pa. Cmwlth. 1990).

by the Commission, the Commission has stated that it is “unlikely that a party will succeed in persuading us that our initial decision on a matter or issue was either unwise or in error.” *Duick*, 56 Pa. PUC at 559. Indeed, Commonwealth Court recently affirmed the Commission’s decision to deny reconsideration requesting a second review of questions that were definitively decided against a party. *Executive Transp. Co., Inc. v. Pa. Pub. Util. Comm’n*, 138 A.3d 145, (Pa. Cmwlth. 2016) (holding that the PUC did not err or abuse its discretion in denying a Petition for Reconsideration that reiterated the same arguments that had been previously advanced).

Blue Pilot’s arguments in the instant Petition do not meet the Commission’s standards for granting relief in the form of reconsideration of the Commission’s Order as the Commission fully and completely addressed Blue Pilot’s arguments, which were made below. The Commission should not entertain Blue Pilot’s obvious attempt to coax the Commission into granting a second bite at the apple.

III. ANSWER

As illustrated in greater detail herein, each of the three matters raised by Blue Pilot in its Petition have been previously considered and rejected by the Commission.

A. The Commission’s July 19 Order Considered and Rejected Arguments that were Advanced by Blue Pilot Concerning the Amount of the Civil Penalty

Blue Pilot reiterates the same argument made in its Exceptions that a civil penalty in excess of one million dollars violates the Excessive Fines Clause of the Pennsylvania Constitution. Blue Pilot Exceptions at 31; Petition at 3. In determining whether a fine is excessive, a proportionality analysis is employed, which compares the amount of the

fine to the gravity of the offense. *Commonwealth of Pa. v. Eisenberg*, 98 A.3d 1268 (Pa. 2014). Blue Pilot complains that the civil penalty must be proportional as compared to other civil penalties imposed for similar violations. Petition at 4. Yet, in its Order, the Commission engaged in such an analysis and lowered the civil penalty that had been imposed by the presiding ALJs to an amount more proportionate to the civil penalty in *I&E v. HIKO Energy, LLC*, Docket No. C-2014-2431410 (Order entered December 3, 2015) (“*HIKO*”). Order at 89-90.²

Blue Pilot also claims that the Commission overlooked civil penalties in other EGS complaint proceedings regarding violations that occurred during the “polar vortex” of 2014. Petition at 4-5. However, the Commission correctly noted that *HIKO* is the only other polar vortex related complaint that resulted in a litigated outcome. Order at 90. The Commission has held that it is inappropriate to consider a settlement, which is intended to be an amicable resolution of disputed claims, as precedent in any subsequent proceeding. *See Pa. Pub. Util. Comm’n v. Bell Telephone Co. of Pa.*, 68 Pa. P.U.C. 430 (1988). Thus, the Commission properly compared the civil penalty in the instant proceeding with *HIKO*.

Lastly, Blue Pilot’s argument that the size of the company was not considered with respect to the imposition of the civil penalty was previously raised by Blue Pilot and not adopted by the Commission. Exceptions at 35; Petition at 6. Similarly, Blue Pilot’s claim

² The civil penalty levied on HIKO by the Commission was upheld on appeal by Commonwealth Court. *HIKO Energy, LLC v. Pa. Pub. Util. Comm’n*, 163 A.3d 1079 (Pa. Cmwlth. 2017) (petition for allowance of appeal granted at 176 A.3d 235 (Pa. 2017)). The matter is currently under review by the Pennsylvania Supreme Court. 39 EAP 2017.

that its due process rights were violated regarding the imposition of the civil penalty was also argued below and not adopted. Exceptions at 34-35; Petition at 6. The Commission noted in its Order that any issue not specifically addressed is deemed to have been considered and rejected without further discussion. Order at 19. Accordingly, the Commission recognized Blue Pilot's arguments in relation to the civil penalty and thus, this issue does not meet the standard for reconsideration.

B. The Commission's July 19 Order Considered and Rejected Blue Pilot's Claim that this Proceeding was Treated like a Class Action Lawsuit

Blue Pilot continues to assert that the Commission impermissibly treated this proceeding as a class action lawsuit in its determination that Blue Pilot violated multiple Commission regulations across its entire customer base without hearing testimony from all affected consumers. Petition at 7. Blue Pilot also argues that the Commission erred by allowing the OCA and OAG to represent and seek relief on behalf of a class of individual consumers. Petition at 8.

Again, the Commission has duly considered and rejected Blue Pilot's arguments. The Commission cogently stated as follows:

Moreover, the Initial Decision at page 54 is clear that this proceeding is not a class action lawsuit under the rules of civil procedure. The cases that Blue Pilot relies on to support its position that a complaint may not be brought on behalf of other similarly-situated customers are not applicable here. [footnote omitted]. The cases cited by Blue Pilot involved individual complainants who do not have standing to represent the interests of other "similarly situated" customers before the Commission. This is not the situation here. Rather, the Joint Complainants brought this case pursuant to their statutory authority and in [sic] prosecuted the matter in their representative capacities on behalf of consumers and the public interest.

Order at 95-96.

Moreover, the Commission's findings of regulatory violations committed by Blue Pilot across its customer base are based on substantial record evidence. The Joint Complainants' presented expert testimony that used aggregate billing and usage data of residential and small commercial customers to support their allegations that Blue Pilot engaged in a pattern and practice of deceptive sales practices and overbilling. The Commission has found that aggregate data can be properly considered as competent evidence to support a finding that a company committed a violation. Order at 65. *See also Lyft v. Pa. Pub. Util. Comm'n*, 145 A.3d 1235 (holding that aggregate trip data, which was used in a complaint proceeding brought before the Commission to support violations, was not proprietary). Thus, the Commission's Order shows that it fully evaluated the record and Blue Pilot has not met its burden for reconsideration on this issue.

C. The Commission's July 19 Order Considered and Rejected Blue Pilot's Claim that the Commission is Not Authorized to Direct an EGS to Issue Refunds to Customers

It is well settled that the Commission is authorized to direct an EGS licensed in Pennsylvania to issue refunds to customers in appropriate circumstances. Blue Pilot's argument that the Commission lacks statutory authority to direct EGSs to issue refunds to customers was squarely addressed and rejected. Order at 95-97. In the July 19 Order, the Commission pointed to its order in *Commonwealth of Pa., et al., v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Order entered December 18, 2014) (hereinafter referred to as "*IDT Order*"), in which it concluded that Section 501 of the Public Utility Code, 66 Pa.C.S. § 501, provides the Commission with plenary authority to direct an EGS to issue a credit or refund for overbilling. *IDT Order* at 17. Section 501 of the Code empowers

the Commission to carry out the consumer protection measures set forth in the Electricity Generation Customer Choice and Competition Act, 66 Pa.C.S. § 2801, *et seq.*, which, *inter alia*, includes a requirement that EGSs comply with the Commission's regulations. 66 Pa.C.S. § 2809(b). The Commission's regulations require an EGS to bill in accordance with its disclosure statement. 52 Pa. Code §§ 54.4(a) and 54.5(a). In the *IDT Order*, the Commission stated that:

having the authority to order EGS billing adjustments, including refunds, under the appropriate circumstances, helps ensure that EGSs comply with the Commission's Regulations and bill customers in accordance with their disclosure statement - a fundamental consumer protection under the Electric Competition Act. *See* 66 Pa. C.S. § 2802(14)

IDT Order at 18.

Indeed, in the July 19 Order, the Commission concluded that its "decision in *IDT* substantially forecloses any attack on our authority to direct an EGS rebilling" when an EGS fails to bill customers in accordance with its disclosure statements. *Order* at 95. Apparently dissatisfied with the Commission's firm and clear ruling, Blue Pilot reiterates the same argument again. However, no new or novel concern was raised that warrants reconsideration of the Commission's decision to direct Blue Pilot to issue refunds to affected customers.

IV. CONCLUSION

For the reasons set forth above, I&E respectfully submits that Blue Pilot's Petition for Reconsideration of the Commission's July 19 Order should be denied. Blue Pilot has not met the standard required for reconsideration as its positions have already been considered and properly denied by the Commission.

Respectfully submitted,



Stephanie M. Wimer
Senior Prosecutor
PA Attorney ID No. 207522

Michael L. Swindler
Deputy Chief Prosecutor
PA Attorney ID No. 43319

Bureau of Investigation & Enforcement
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 772-8839
stwimer@pa.gov

Dated: August 13, 2018

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

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 52 Pa. Code § 1.54 (relating to service by a party).

Service by First Class Mail and Electronic Mail:

Karen O. Moury, Esq.
Eckert Seamans Cherin & Mellott, LLC
213 Market Street
8th Floor
Harrisburg, PA 17101
kmoury@eckertseamans.com
Counsel for Blue Pilot Energy, LLC

John M. Abel, Esq.
Senior Deputy Attorney General
Bureau of Consumer Protection
Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
jable@attorneygeneral.gov

Christy M. Appleby, Esq.
Harrison W. Breitman, Esq.
Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923
cappleby@paoca.org
hbreitman@paoca.org

Sharron Webb, Esq.
Office of Small Business Advocate
300 North Second Street
Harrisburg, PA 17101
swebb@pa.gov



Stephanie M. Wimer
Senior Prosecutor
PA Attorney ID No. 207522

Bureau of Investigation and Enforcement
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265
Phone: (717) 772-8839
Email: stwimer@pa.gov

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