

COMMONWEALTH OF PENNSYLVANIA



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August 13, 2018

Rosemary Chiavetta, Secretary
PA Public Utility Commission
Commonwealth Keystone Bldg.
400 North Street
Harrisburg, PA 17120

Re: Commonwealth of Pennsylvania, by the
Attorney General Josh Shapiro
Through the Bureau of Consumer Protection
AND
Tanya J. McCloskey, Acting Consumer Advocate,
Complainants
v.
Blue Pilot Energy, LLC, Respondents
Docket No. C-2014-2427655

Dear Secretary Chiavetta:

Attached for electronic filing please find the Joint Complainants' Answer to Blue Pilot Energy Petition for Reconsideration in the above-referenced proceeding. The undersigned certifies that this filing contains no averments or denials of fact subject to verification and penalties under 52 Pa. Code Section 1.36.

Copies have been served per the attached Certificate of Service.

Respectfully submitted,

/s/Christy M. Appleby
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Assistant Consumer Advocate
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Attachment

cc: Honorable Elizabeth H. Barnes, ALJ
Honorable Joel H. Cheskis, ALJ
Office of Special Assistants (email only: ra-OSA@pa.gov)
Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Commonwealth of Pennsylvania, by the	:	
Attorney General Josh Shapiro	:	
Through the Bureau of Consumer Protection	:	
	:	
AND	:	Docket No. C-2014-2427655
	:	
Tanya J. McCloskey, Acting Consumer	:	
Advocate,	:	
Complainants,	:	
	:	
v.	:	
	:	
Blue Pilot Energy, LLC,	:	
Respondent.	:	

**ANSWER OF
THE JOINT COMPLAINANTS
TO PETITION FOR CONSIDERATION**

August 13, 2018

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I. INTRODUCTION

On August 3, 2018, Blue Pilot Energy, LLC (Blue Pilot or Company) filed its Petition for Reconsideration of the Pennsylvania Public Utility Commission's (Commission) July 19, 2018 Order (Petition). In its July 19 Order, the Commission affirmed, in part, and denied in part, the Administrative Law Judges' Initial Decision regarding the Formal Complaint filed by the Office of Consumer Advocate and the Office of Attorney General (hereinafter Joint Complainants). July 19 Order at 97-100.¹ The Commission determined that Blue Pilot violated the Commission's regulations regarding the Company's failure to provide accurate pricing information to consumers; failure to conform prices to the disclosure statement; the misleading and deceptive promises of savings; and the Company's lack of good faith in the handling of consumer complaints. July 19 Order at 34-37, 41-46, 61-67, 71-74, 97-101.

As a result of the violations of the Commission's regulations and the Public Utility Code, the Commission ordered that Blue Pilot's license to operate in Pennsylvania be revoked. July 19 Order at 91-92.² The Commission also ordered, *inter alia*, refunds to impacted consumers for the months of December 2013 through March 2014 and civil penalties for the Company's violations of the Public Utility Code and the Commission's regulations. July 19 Order at 89-91, 95-98.

¹ The Joint Complainants included five separate counts in their Formal Complaint against Blue Pilot as follows: 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 in the handling of complaints; and V) failing to comply with the Telemarketer Registration Act. For a complete history of the proceeding, see, July 19 Order at 8-18; OAG/OCA M.B. at 1-8.

² The Joint Complainants note that the Commission had already suspended Blue Pilot's license in a Final Order at Docket No. M-2015-2490383 "until the Commission is assured that all of Blue Pilot's obligations to Pennsylvania consumers and the Commonwealth have been properly met." July 19 Order at 7. As the July 19 Order identifies, Blue Pilot also does not currently have a bond or other approved security on file at the Commission. July 19 Order at 7.

In its Petition, Blue Pilot requests that the Commission reconsider its July 19 Order. Blue Pilot Petition at ¶¶ 4-41. The Joint Complainants submit that Blue Pilot's Petition for Reconsideration should be denied. Blue Pilot's Petition raises three arguments. First, Blue Pilot argues that the Commission violated the Excessive Fines Clause of the Pennsylvania and United States Constitutions by imposing a civil penalty of \$1,066,900. Blue Pilot Petition at ¶¶ 4-14. Second, Blue Pilot argues that the Commission unlawfully 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. Blue Pilot Petition at ¶¶ 15-25. Finally, Blue Pilot argues that the Commission 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 to consumers. Blue Pilot Petition at ¶¶ 26-41.

For the reasons discussed below, the Joint Complainants submit that the Commission should deny Blue Pilot's Petition. Blue Pilot reargues the same issues that have already been decided by the ALJs and by the Commission's July 19 Order. Blue Pilot presents no new or novel argument or evidence. Instead, as discussed below, Blue Pilot reiterates evidence and legal arguments that the Commission has already considered, maintaining that the evidence or argument was not sufficiently addressed. The Commission and the ALJs thoroughly considered and rejected the Company's legal arguments and fully considered the evidence of record. Accordingly, the Joint Complainants submit that the Petition fails to meet the well-established standard for reconsideration, and the Commission's Order was legally and factually grounded in the substantial evidence presented.

II. LEGAL STANDARD

Pursuant to Section 703 of the Public Utility Code, “[a]fter an order has made by the [C]ommission, any party to the proceedings may, within 15 days after the service of the order, apply for a rehearing in respect of any matters determined in such proceedings and specified in the application for rehearing...” 66 Pa. C.S. § 703(f); 52 Pa. Code § 5.572(c) (“Petitions for reconsideration...shall be filed within 15 days after the Commission order involved is entered or otherwise becomes final”). Section 703 also provides that the Commission may “rescind or amend any order made by it.” 66 Pa. C.S. § 703(g).

The Commission set forth the standard applied to petitions for reconsideration in Duick v. Pennsylvania Gas and Water Co., 1982 Pa. PUC LEXIS 4, *12-13, where it stated:

A petition for reconsideration, under the provisions of 66 Pa. C.S. 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or part. In this regard we agree...that “[p]arties...cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them...” What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission. Absent such matters being presented, we consider it unlikely that a party will succeed in persuading us that our initial decision on a matter or issue was either unwise or in error.

In further delineating the standard for petitions for reconsideration, in Pa. PUC v. PECO Energy Co., 1999 Pa. PUC LEXIS 24, *10-11 (PECO Energy Co.), the Commission provided:

[B]ecause a grant of relief on such petitions may result in the disturbance of final orders, it should be granted judiciously and only under the appropriate circumstance.

...

We have held that such petitions must make new or novel arguments not previously considered or raise matters which are designed to convince us to exercise our discretion to rescind or amend the Order under consideration.

As detailed below, Blue Pilot’s Petition for Reconsideration does not meet the standard.

III. ARGUMENT

A. Blue Pilot's Petition For Reconsideration Does Not Meet The Legal Standard For Reconsideration And Should Be Denied.

The Joint Complainants submit that Blue Pilot's Petition for Reconsideration does not meet the legal standard for reconsideration and therefore, should be denied. As discussed in the Duick and PECO Energy Company cases, a Petition for Reconsideration must present new or novel arguments or arguments that have been overlooked. As discussed below, Blue Pilot's Petition fails to raise any new or novel arguments or identify any issues that the Commission has overlooked. See, Duick at *12-13; PECO Energy Co. at *10-11. In its Petition, Blue Pilot raises three arguments that have already been raised in the Company's pleadings below and that the ALJs' Initial Decision and the Commission's July 19 Order directly addresses. First, Blue Pilot argues that the Commission violated the Excessive Fines Clause of the Pennsylvania and United States Constitutions by imposing a civil penalty of \$1,066,900. Blue Pilot Petition at ¶¶ 4-14. Second, the Company argues that the Commission lacks the subject matter jurisdiction to grant the across-the-board relief to all impacted customers because the relief requested by the Joint Complaint is in the nature of a class action lawsuit. Blue Pilot Petition at ¶¶ 15-25. Finally, Blue Pilot argues that the Commission 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 to consumers. Blue Pilot Petition at ¶¶ 26-41.

As to the claim regarding the Excessive Fines Clause of Pennsylvania and United States Constitutions, Blue Pilot raised the same issue in its Exceptions to the Administrative Law Judges' Initial Decision. See, Blue Pilot Exc. at 31-38; see also, OAG/OCA Reply Exc. at 21-22; July 19 Order at 87. The July 19 Order specifically responds to Blue Pilot's Exceptions and orders a

reduction to the amount of the civil penalty recommended by the ALJs in their Initial Decision in response. July 19 Order at 89-91.

Blue Pilot also argues that the Commission lacks the subject matter jurisdiction to grant the across-the-board relief to all impacted customers because the relief requested by the Joint Complaint is in the nature of a class action lawsuit. Blue Pilot Petition at ¶¶ 15-25. Blue Pilot's arguments do not meet the Duick standard because the Company's arguments are nearly identical to the arguments that the Company raised in its pleadings below in this matter. Moreover, the July 19 Order directly addresses Blue Pilot's Exceptions regarding the Commission's subject matter jurisdiction and denies the Exceptions. See, July 19 Order at 95-97; see also, Blue Pilot Exc. at 27, 39; OAG/OCA Reply Exc. at 17-18. The July 19 Order holds that:

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 prosecuted the matter in their representative capacities on behalf of consumers and the public interest.

July 19 Order at 96.

Finally, Blue Pilot argues that the Commission 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. Blue Pilot Petition at ¶¶ 26-41. Blue Pilot raises the same issue regarding whether the Commission exceeded its statutory authority in its Exceptions. See, Blue Pilot M.B. at 77-86; Blue Pilot Exc. at 11-15, 15-39; I.D. at 69-78; July 19 Order at 42-46, 62. The Commission has affirmed its statutory authority to award damages and clarified that it has full jurisdiction regarding whether the Company has complied with the Public Utility Commission's regulations regarding the Company's disclosure of its billed/marketed price to customers. See, July 19 Order at 48-49, 62.

Regarding the issue of the Commission regulating its prices, the Commission specifically found that “substantial, credible record evidence shows that Blue Pilot’s prices charged to customers did not conform to the Company’s disclosure statement in violation of the Commission’s regulations.” July 19 Order at 42. The July 19 Order concludes that:

However, as we found in the *Blue Pilot Interlocutory Order* entered at this docket, the Commission's attempt to discern whether Blue Pilot billed customers in accordance with its disclosure statement as required by our Regulations is an issue that is squarely within our jurisdiction. We note that the Commonwealth Court of Pennsylvania in *HIKO v. Pa. Pub. Util. Comm’n, supra*, has confirmed the Commission’s authority to regulate certain aspects of the services provided by EGSs, including whether an EGS billed price matches the disclosure statement.

The essential argument of Blue Pilot is that the Commission does not have the authority to set prices in a competitive environment. This is true. *See* Finding of Fact No. 55. What is at issue is not a concern over the variability of rates in a competitive market, but the adequacy of the representations of fact presented by Blue Pilot to its customers. We find that the Joint Complainants have proved that the disclosures did not apprise customers of any objective facts or objective bases in order for them to make informed purchasing decisions. *See Kiback*. Rather, the statements of Blue Pilot suggesting that there would be a nexus between the PJM wholesale market conditions and “other” factors, to determine the contours of variability, was so ambiguous as to be illusory.

July 19 Order at 45-46.

Blue Pilot also raises the contract interpretation argument in its Petition. The July 19 Order directly responds to and denies this argument:

As noted, Blue Pilot first argues that in reaching its conclusion, the Initial Decision impermissibly goes beyond the “four corners” of the supply contract and impermissibly relies on extrinsic evidence in the form of oral representations of Blue Pilot’s sales agents. As noted by the Joint Complainants, however, the Commission is not using this evidence to engage in an interpretation of the supply contract between Blue Pilot and its customers here. Rather, the Commission is using this evidence, including the oral representations of Blue Pilot’s sales/marketing agents, to determine whether Blue Pilot’s billed price matched the disclosed and marketed price as required by Sections 54.4(a), 54.5(a), and 54.7(a) of our Regulations. 52 Pa. Code §§ 54.4(a); 54.5(a) and 54.7(a).

July 19 Order at 62.

As discussed in more detail below, Blue Pilot’s arguments do not meet the Quick standard for reconsideration because they have been thoroughly addressed in the Commission’s July 19 Order and throughout the proceeding. Moreover, as discussed below, the Commission correctly decided these issues in its July 19 Order.

B. The Commission’s July 19 Order Does Not Violate The Excessive Fines Clause of the Pennsylvania Constitution or the United States Constitution.

Blue Pilot argues that the civil penalty assessed by the July 19 Order “constitutes an excessive fine in contravention of Article I, Section 13 of the Pennsylvania Constitution, and the Eighth Amendment of the United States Constitution.” Blue Pilot Petition at ¶¶ 4-5. The Commission directed the Company to pay \$1,066,900 civil penalty for its numerous violations of the Commission’s regulations and the Public Utility Code. July 19 Order at 98.³ The July 19 Order concludes:

As such, Blue Pilot’s disclosure violated numerous Commission Regulations, most notable, Sections 54.5(c)(requiring that variable pricing terms include the conditions of variability and the limits on price variability); Section 54.43(1) (requiring that suppliers “provide accurate information about their electric generation services using plain language and common terms in communications with consumers” and “in a format that enable consumers to compare the various electric generation services offered and the prices charged for each type of service”); and Section 111.12(d)(5) (requiring that suppliers “ensure that product or service offerings made by a supplier contain information, verbally and written, in plain language designed to be understood by the customer”).

July 19 Order at 35. The civil penalty awarded by the Commission’s July 19 Order is warranted, not excessive, and does not violate the Pennsylvania or United States Constitutions. Moreover, the Petition for Reconsideration should be denied because Blue Pilot has not raised any new or novel issues or issues that were overlooked as required by the Quick standards. As discussed below,

³ The Commission reduced the amount of the civil penalty recommended by the Administrative Law Judge’s Initial Decision. The Administrative Law Judges recommended a civil penalty of \$2,554,000 in their Initial Decision. July 19 Order at 98.

each of Blue Pilot's arguments regarding the civil penalty have already been raised in the pleadings below and have been correctly addressed by the Commission.

The July 19 Order directly addresses the Blue Pilot's arguments regarding whether the civil penalty is excessive in violation of the Constitution. July 19 Order at 89-91; see also, discussion of Blue Pilot Exceptions at July 19 Order at 87-89. The exact same arguments and legal authority were raised by Blue Pilot in its Exceptions to the Initial Decision. Blue Pilot Petition at ¶¶ 5-8; Blue Pilot Exc. at 31-33. The Commission, in fact, granted the Company's Exceptions, in part, by reducing the amount of the civil penalty. July 19 Order at 89-91; see also, discussion of Blue Pilot Exceptions at July 19 Order at 87-89. The Joint Complainants submit that Blue Pilot's arguments do not merit reconsideration.

In its Petition, Blue Pilot argues that the July 19 Order inappropriately compares its actions to those in Pa. PUC v. HIKO Energy, LLC proceeding. Blue Pilot Petition at ¶ 11; HIKO Energy, LLC v. Pa. PUC, 163 A.3d 1079 (Pa. Cmwlth. Dec. 14, 2016), *appeal granted*, 176 A.3d (Pa. 2017)(HIKO). Blue Pilot argues that “under the July 19 Order, the Commission imposed the same civil penalty per ‘violation’ as it assessed in the Hiko proceeding” for overbilling customers, and “without any discussion of its rationale, imposed a higher civil penalty per ‘violation’ for its finding” regarding small business customers. Blue Pilot Petition at ¶ 11. Blue Pilot's Petition for Reconsideration ignores the fact that the Commission's July 19 Order did provide a rationale; weighed the ten Rosi standards and factors to be considered; and compared the factual reasons underpinning the decision here and in the HIKO case. See OAG/OCA M.B. at 89-105 for complete legal and factual analysis of the application of Rosi factors; 59 Pa. Code § 69.1201; Joseph A. Rosi v. Bell-Atlantic Pennsylvania, Inc. and Sprint Communications Co., L.P., Docket No. C-00992409 (Order entered March 16, 2000) (Rosi).

Instead of the civil penalty assessed by the Commission, Blue Pilot argues that a proportionality test must be applied for a “comparison of the amount of the fine to the gravity of the offense.” Blue Pilot Petition at ¶ 9. The Joint Complainants submit that the Commission has appropriately applied the Rosi factors and the mitigating and aggravating factors to determine the civil penalty that should be assessed.

The Commission assesses Blue Pilot the same fine for residential customers per violation as HIKO and reduces the ALJs’ recommended civil penalty from \$2,554,000 to \$1,066,900 in response to Blue Pilot’s Exceptions. July 19 Order at 89-90. The Commission directly compares the aggravating factors from the Rosi test that applied in each case. The Commission states:

In this Joint Complaint, the civil penalty recommended under the Initial Decision is \$195 per-violation for the 4,490 occurrences of residential overbilling and \$498 per-violation for the 3,371 occurrences of overbilling of small customers. Consistent with our decision in *HIKO*, we shall modify the recommendation and assess a civil penalty of \$1,066,900 for Blue Pilot’s intentional overbilling of customers for the period from December 2013 through March 2014, in violation of Section 54.4(a) of our Regulations. This civil penalty amount constitutes \$125 per-violation for 4,490 occurrences of overbilling of residential customers (\$561,250) and \$150 per-violation for the 3,371 occurrences of overbilling of small business customers (\$505,650) during the time-period in question.

On consideration of the *Rosi* factors, as applied to the conduct of HIKO and Blue Pilot, we acknowledge that HIKO committed twice as many overbilling violations as Blue Pilot. We also acknowledge that HIKO’s top management decisions regarding misconduct were found to be intentional, while no such intent has been found with Blue Pilot. **However, we find that there are aggravating factors in Blue Pilot’s case that support the civil penalty determined here. These factors include, *inter alia*, Blue Pilot instituting over a 500% increase in price as compared to the PTC during March 2014 and Blue Pilot attempting to leave the Pennsylvania market without providing sufficient refunds or financial security in compliance with our Regulations so as protect its customers for improper overbillings. In comparison, HIKO agreed to issue approximately \$2 million in refunds to affected customers. We also note that the Joint Complaint with Blue Pilot involves 3,371 occurrences of commercial overbillings that, typically, involve larger overbilling amounts than with residential customers, while HIKO’s overbillings were limited to residential customers only.**

July 19 Order at 90-91 (emphasis added). The Commission’s decision is also based upon the thorough analysis by the Administrative Law Judges of the mitigating factors for both the HIKO civil penalty and this case. July 19 Order at 84-87; I.D. at 138-140. Moreover, the Commonwealth Court’s decision in the HIKO proceeding affirmed the Commission’s authority and application of the Rosi factors in the HIKO case. HIKO Energy, LLC v. Pa. PUC, 163 A.3d 1079 (Pa. Cmwlth. Dec. 14, 2016), *appeal granted*, 176 A.3d (Pa. 2017)(HIKO).

Blue Pilot further argues that the penalties assessed Blue Pilot are not consistent with the civil penalties assessed to other Electric Generation Suppliers (EGSs). Blue Pilot Petition at ¶ 10. The Joint Complainants submit that Blue Pilot’s comparison to other cases where civil penalties were imposed was rejected by the Commission. The Commission considered the civil penalty assessed in the fully litigated HIKO proceeding when the Commission found:

we find that the recommended civil penalty is unduly disproportionate to the civil penalty imposed in HIKO, which is the only other Polar Vortex-related complaint filed by either the OAG\OCA or the Commission’s Bureau of Investigation & Enforcement that was a litigated outcome.

July 19 Order at 89-90 (emphasis added); see also, I.D. at 141-142 (discussion of civil penalties assessed in *pro se* fully litigated proceedings, Herp v. Respond Power, LLC, Docket No. C-2014-2413756, (Opinion and Order entered January 28, 2016)(Herp), Kiback v. IDT Energy, Inc., Docket No. C-2014-2402409676, (Opinion and Order entered August 20, 2015)(Kiback)). Moreover, as the Commonwealth Court stated in HIKO, “the stringency in application of the factors and standards the PUC utilizes in evaluating cases involving violations of the Public Utility Code and its regulations differ in settled and litigated cases.” HIKO at 1096. As can be seen, the ALJs and the Commission undertook a thorough evaluation of the Rosi factors and how they individually applied to Blue Pilot.

In its Petition, Blue Pilot again makes the argument that its due process rights were violated because it was not made aware of a specific civil penalty amount and did not have the opportunity to be heard on such a request. See, Petition at ¶ 12-13; see also, Blue Pilot M.B. at 111; OAG/OCA R.B. at 69-61. As discussed in the Joint Complainant's Reply Brief, the case cited by Blue Pilot in its Main Brief and again in its Petition here supports a finding that Blue Pilot's due process rights were maintained in this proceeding. OAG/OCA R.B. at 60-61; see Northview Motors, Inc. v. Commw., Attorney General, 128 Pa. Commw. 54, 562 A.2d 977 (Pa. Commw. Ct. 1989). In Northview Motors, the company asserted, *inter alia*, that the trial court's imposition of a \$10,000 civil penalty for violations of the Consumer Protection Law violated the company's due process rights. 128 Pa. Commw. 54, 61, 562 A.2d 977, 980. The Court identified the elements afforded to any person against whom civil penalties are sought as follows: (1) the accused be informed with reasonable certainty of the nature of the accusation lodged against him; (2) he has timely notice and opportunity to answer the charges and defend against attempted proof of the accusation; and (3) the proceedings be conducted in a fair and impartial manner. Id. The Court then rejected the company's due process violation argument for the following reasons:

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

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

The Joint Complainants submit that the same reasoning applies in this proceeding. See, OAG/OCA R.B. at 60-61. As detailed in the Main Brief, Joint Complainants have established that Blue Pilot has violated at least 15 of the Commission's regulations. See OAG/OCA M.B. at

Sections IV.C and IV.D.2; see also, OAG/OCA M.B. at 61. The Joint Complainants provided Blue Pilot with notice of its claims of these violations against the Company. Blue Pilot made no objection regarding the lack of specificity regarding the Joint Complainants' prayer for the imposition of a civil penalty. Joint Complainants' testimony and exhibits were pre-served, providing Blue Pilot with ample opportunity to conduct discovery regarding the testimony and exhibits and prepare a defense. See e.g. OAG/OCA St. 1 at 58 (Ms. Alexander recommended, based on her investigation, that the Commission seek, *inter alia*, substantial civil penalties in this matter). Blue Pilot was afforded the opportunity to cross-examine Joint Complainants' witnesses. Blue Pilot chose not to present any witnesses in defense of Joint Complainants' proof in this matter. As such, Joint Complainants submit that Blue Pilot's due process rights were properly maintained throughout this proceeding, and the Company's contention in its Petition for Reconsideration should be rejected.

Finally, in its Petition, Blue Pilot repeats its arguments made in the Company's Exceptions regarding the size of Blue Pilot and that the civil penalty is out of proportion with the size of the Company. Blue Pilot Petition at ¶ 14; Blue Pilot Exc. at 35-36. Blue Pilot's assertion that the Commission's and the ALJs' analysis did not address the Company's size is incorrect. The ALJs in their Initial Decision carefully addressed each Rosi factor separately, and the Commission discussed the ALJs' analysis in its July 19 Order. One of those Rosi factors analyzed is the size of the utility. I.D. at 136-137. The Joint Complainants also addressed the size of the Company in their Main Brief at page 104, FN 27 and asserted that the evidence in the record established that Blue Pilot has operations in several states and has many affiliates. See also, OAG/OCA Reply Exc. at 22. The Company's size was not a barrier to a substantial civil penalty in this matter. Blue Pilot offered no evidence in this matter regarding the Company's size. Further, the Commission's

July 19 Order addressed other factors, such as the seriousness of Blue Pilot's conduct, failure to modify the Company's business practices, the impact of the Company's actions on the its customers, and Blue Pilot's compliance history, based upon the evidence in the record, which was un rebutted by Blue Pilot. See July 19 Order at 83-87.

The Commission's July 19 Order thoroughly considered Blue Pilot's Exceptions and reduced the civil penalty awarded in response to Blue Pilot's arguments. The civil penalties are appropriate and based upon substantial evidence. As such, the Joint Complainants submit that the Commission's July 19 Order should be maintained.

C. Blue Pilot's Argument that the Commission Lacks Subject Matter Jurisdiction Is Without Merit.

Blue Pilot's argument in its Petition for Reconsideration that the Commission lacks subject matter jurisdiction over this proceeding does not meet the Duick standard for reconsideration. See, Blue Pilot Petition at ¶¶ 15-25. Blue Pilot continues to argue that this case is a class action lawsuit and that the Joint Complainants should have been dismissed on this basis. Blue Pilot Petition at ¶ 15-18. Blue Pilot further argues that the OCA and OAG are not permitted to represent a class of customers. Blue Pilot Petition at ¶¶ 18-19. Lastly, Blue Pilot argues that the Commission violated Sections 316 and 703(a) of the Public Utility Code by ignoring the fact that Blue Pilot reached settlements with customers, and filed certificates of satisfaction with the Commission, as well as the fact that the Commission has dismissed complaints filed by individual customers. Blue Pilot Petition at ¶¶ 23-24. Blue Pilot previously raised these issues which were thoroughly addressed in the July 19 Order. July 19 Order at 21-27.

In Petition paragraphs 17 and 18 Blue Pilot repeats its arguments from its Exceptions that the Commission does not have the statutory authority to address the issues raised by the OAG and OCA. See, Blue Pilot Exc. at 27-28; Blue Pilot Petition at ¶¶ 17-18. In its July 19 Order, the

Commission noted that “Blue Pilot’s essential contention in this regard is its objections that the Joint Complainants lack the requisite authority to seek relief on behalf of individual consumers as though this proceeding ‘were a class action lawsuit’ proceeding under the Rules of Civil Procedure applicable to a court of law.” July 19 Order at 22. The Commission adopted the ALJ’s rejection of Blue Pilot’s argument. See, July 19 Order at 22-24. Specifically, the ALJs ruled as follows:

Act 161 of the Pennsylvania General Assembly, 71 Pa.C.S. § 309-2, as enacted July 9, 1976, authorizes the Office of Consumer Advocate (OCA) to represent the interests of residential customers in rate proceedings before the Commission. Similarly, the OSBA, pursuant to 73 Pa.C.S. §§399.41, *et seq.* is authorized to represent small business customers’ interests in utility matters before the Commission. The Bureau of Investigation and Enforcement (I&E) serves as the prosecutory bureau for purposes of representing the public interest in ratemaking and service matters before the Commission. These “statutory advocates” participate in various types of investigations and complaint proceedings before the Commission.

The Attorney General is not acting on behalf of any one single claimant, but pursuant to its *parens patriae* powers. See e.g. Commonwealth v. Foster, 57 Pa. D. & C.2d 203 (C.P. Allegheny 1972) (Characterizes the Commonwealth’s action by the Attorney General under the Consumer Protection Law (CPL) as *parens patriae*). The Attorney General does not act as the private attorney for any given customer but instead is authorized to bring a proceeding on behalf of the public “to protect the citizenry,” by among other things, seeking injunctive relief, restitution and civil penalties. Valley Forge Towers South Condominium v. Ron-Ike Foam Insulators, Inc., 393 Pa. Super. 339, 346, 574 A.2d 641, 644 (1990), aff’d 529 Pa. 512, 605 A. 2d 798 (1990).

We recognize that proceedings brought by the Attorney General generally focus on unfair and deceptive methods, acts and practices. 73 P.S. §§ 201-3, 201-4. However, this Commission cannot entertain an action under the CPL and the relief available under our jurisdiction is not exactly the same as the relief available in a court of law’s jurisdiction in that the Commission cannot award compensatory or punitive damages to a consumer for the fraudulent activities of a company. Feingold v. Bell of PA., 282 A.2d 1191 (Pa. 1977). Nevertheless, although the relief available at this administrative agency level may not make Pennsylvania’s consumers whole, the Commission’s regulations hold licensees “responsible for any fraudulent deceptive or other unlawful

marketing or billing acts performed by the licensee, its employees, agents or representatives” and “a license may be suspended or revoked and fines may be imposed against the licensee for the failure to follow the principles in § 54.43 (relating to standards of conduct and disclosure for licensees).” 52 Pa.C.S. §§ 54.42(a)(6) and 54.43(f).

Some Commission regulations governing EGS conduct require compliance with the CPL and TRA. 52 Pa.C.S. §§ 54.42(a)(6); 54.43(f); and 111.12(d)(1). Thus, it is appropriate to hear a joint complaint filed by OAG/OCA alleging fraudulent and deceptive marketing practices against Respondent because many customers of Blue Pilot complained to OAG/OCA seeking relief and the Commission has the authority to grant, condition, suspend, and revoke licenses as well as assess civil penalties and direct refunds to consumers for violations of regulations and the Public Utility Code. For all of these aforementioned reasons, we believe Joint Complainants have authority to participate in a proceeding such as the instant one seeking to terminate alleged ongoing consumer fraud.

I.D. at 46-48.

In accordance with the ALJs’ decision, as to the OCA’s and OAG’s statutory authority, the Commission concluded that the OCA and the OAG had the necessary statutory authority to represent the interests of consumers in this matter. As to the OAG, the Commission found that the reasoning and holding in Commonwealth v. TAP Pharm. Prods., 885 A.2d 1127, 1143 (Pa Cmwlth. 2005) adequately rebutted Blue Pilot’s concerns. July 19 Order at 24. In discussing Commonwealth v. TAP Pharm Prods., the Commission noted that the Commonwealth Court considered a challenge to the legal authority of the Pennsylvania Office of Attorney General to prosecute a lawsuit on behalf of some of its Pennsylvania citizens who paid inflated prices for certain pharmaceuticals and that the Commonwealth Court was building upon the concept that OAG could be granted representational standing on behalf of the Commonwealth as a “person.” See, July 19 Order at 24. The Commission cited to the Commonwealth Court’s reasoning:

In pertinent part, the Court reasoned:

Here, the Commonwealth contends that the Amended Complaint pleads its interest in the economic well-being of its populace as its source for its claim of *parens patriae* standing. According to the Commonwealth's reasoning, the fact that individuals could have pursued their own actions is not determinative of the question. Even in such cases, the Commonwealth may assert such claims if it has stated facts supporting its own interest in the economic well-being of the Commonwealth and its citizens.

However, as noted above, even if an individual could assert his or her own claim, thus rendering the Commonwealth in one sense a nominal party, if the Commonwealth has asserted its own quasi-sovereign interest, then the fact that individuals could pursue their own claims is irrelevant.

885 A.2d at 1143 (emphasis supplied).

July 19 Order at 24-25. Applying the Commonwealth Court's reasoning in Commonwealth v.

TAP Pharm. Prods., the Commission determined as follows:

We find the ALJ's conclusions to be entirely consistent with the instruction provided by the Courts: "The key to resolving this question [representational standing of the OAG as *parens patriae*] is determining whether the Commonwealth has pleaded a quasi-sovereign interest rather than simply representing the interests of individuals who could have pursued their own claims." 885 A.2d at 1143. We find that the OAG/OCA have well-pled their interest in the overall, economic well-being of the citizens of the Commonwealth in obtaining the benefits of access to electric generation based on compliance with a code of conduct set forth in the Commission Regulations that have been promulgated pursuant to the Act.

July 19 Order at 25.

The Commission also noted Blue Pilot's contention that the Commission improperly attributed characteristics of a class action lawsuit in this proceeding and determined that the Commonwealth Court's decision in HIKO v. Pa. PUC, 163 A.3d 1079 (Pa. Cmwlth. 2017), *appeal granted* 176 A.3d 235 (Pa. 2017) ("HIKO") implicitly refuted most, if not all, of Blue Pilot's legal contentions regarding the jurisdiction of the Commission. July 19 Order at 25-27. As to Blue Pilot's argument that the Commission has already concluded in certain cases that individual consumers who filed complaints

cannot garner relief for other customers, the Commission properly distinguished that argument. See, OAG/OCA R.B. at 10-11. As noted, *supra*, the Commission adopted the ALJs' reasoning 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. 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 prosecuted the matter in their representative capacities on behalf of consumers and the public interest.

July 19 Order at 95-96. Moreover, the Commission noted as follows:

Finally, review and use of aggregate data is consistent with the role of the OAG and OCA as *parens patriae* in this Complaint. The Joint Complainants have emphasized that their proper statutory role is not to advocate for the vindication of the interests of individual complainants. Rather, the Joint Complainants seek to vindicate the larger interests of the citizens of the Commonwealth in this dispute.

July 19 Order at 65. As such, the Commission correctly addressed and did not overlook Blue Pilot's argument regarding subject matter jurisdiction and its class action argument.

Additionally, Blue Pilot's argument that the Commission did not address dismissed complaints and settlements entered into by individual complainants is not accurate. Blue Pilot Petition at ¶¶ 23-24. This issue was previously addressed by the Commission in ruling on Blue Pilot's May 14, 2015 Motion to Dismiss.

In the June 11, 2015 Order on the Motion to Dismiss, the Commission denied Blue Pilot's Motion to Dismiss. The Commission described the arguments in the Motion as follows:

In its Motion, Blue Pilot makes three primary arguments including: 1) Blue Pilot no longer has the resources to continue litigating this proceeding, and it has notified its remaining Pennsylvania customers that it will cease business operations in

Pennsylvania ; 2) Blue Pilot has resolved nearly every customer complaint; and 3) Blue Pilot has attempted to resolve this proceeding through settlement discussions.

Kathleen Kane and Tanya McCloskey v. Blue Pilot Energy, LLC., Docket No. C-2014, 2427655, Order Denying Motion to Dismiss at 3 (entered June 11, 2015) (“June 11 Order”).

In denying Blue Pilot’s Motion to Dismiss, the Commission stated as follows:

Blue Pilot claims that its motion should be granted because it has resolved nearly every customer complaint independent of this proceeding. A cursory review of assignments pending in OALJ shows the following other outstanding active formal complaints pending against Blue Pilot: Yagliderililer Corp. v. Blue Pilot Energy LLC (Docket No. C-2014-2415275); Irfan Isik and Mehmet Isik v. Blue Pilot Energy, LLC (Docket Nos. C-2014-2415275 and C-2014-2415276). Enrico Partners v. Blue Pilot (Docket No. C-2014-2432979); Smith v. Blue Pilot and PPL Electric Utilities (Docket No. F-2015-2472890); and Gruelle v. PPL Electric Utilities and Blue Pilot Energy LLC, (Docket No. C-2015-2463573). The complainants in these cases have not yet exhausted their administrative remedies. The cases have neither been fully resolved nor closed. Further, we do not know the number of informal complaints pending at the Commission’s Bureau of Consumer Services or elsewhere.

June 11 Order at 5.

The Commission has considered its subject matter jurisdiction and correctly found that these matters are squarely within the Commission’s jurisdiction⁴. Blue Pilot’s arguments are incorrect and do not meet the standards for reconsideration.

D. Blue Pilot’s Argument that the Commission Lacks Statutory Authority to Interpret Contracts and to Direct EGSs to Issue Refunds is Without Merit

Blue Pilot’s argument in its Petition for Reconsideration that the Commission lacks statutory authority to issue refunds is not new or novel and has been addressed in the Commission’s June 19 Order. Blue Pilot Petition at ¶¶ 26-41. Blue Pilot argues that the Commission may not exceed its statutory jurisdiction to issue refunds and that HIKO does not address Blue Pilot’s legal

⁴ This decision is consistent with other case law in Pennsylvania on the scope of *parens patriae* authority. For example, in a case brought by the Attorney General in his *parens patriae* capacity challenging alleged price fixing conspiracy, the Court observed that such an action is superior to a class action as a means of adjudication of collective claims. Commonwealth of Pennsylvania v. Budget Fuel Co., Inc., 122 F.R.D. 184, 185 (E.D. Pa 1988).

arguments. Blue Pilot Petition at ¶¶ 26-27. Blue Pilot argues that the Public Utility Code does not authorize the Commission to interpret the terms and conditions of a private contract between an EGS and its customer. Blue Pilot Petition at ¶ 28. Furthermore, Blue Pilot states that under Code Section 1312, Code Section 2809, Code Section 3301, and applicable case law⁵, the Commission is only authorized to determine whether an EGS violated its orders or regulations, but must leave any determination regarding restitutions or refunds to the courts. Blue Pilot Petition at ¶¶ 29, 31-34, 39-40. Moreover, Blue Pilot argues that nothing in the Code confers jurisdiction on the Commission to regulate EGS prices. Blue Pilot Petition at ¶ 30. Additionally, Blue Pilot argues that the Commission disregarded Code Section 501 in issuing refunds. Blue Pilot Petition at ¶¶ 36-37. Finally, Blue Pilot argues that in contrast to ARIPPA v. Pa. Pub. Util. Comm'n, Section 2809(e) does not confer implicit authority upon the Commission to direct EGSs to issue refunds. Blue Pilot Petition at ¶¶ 38-39. Blue Pilot's arguments are not new or novel and have not been overlooked. Moreover, Blue Pilot's arguments are without substantive merit and were properly rejected by the July 19 Order.

First, Blue Pilot discussed HIKO in regard to refunds in its Main Brief, Reply Brief, and Exceptions. Blue Pilot M. B. at 112, 116; Blue Pilot R.B. at 74-77, 87-88; Blue Pilot Exc. at 29, 32, 35-36. In its July 19 Order, the Commission addresses HIKO as follows:

At the time of litigating the instant Complaint, the Parties did not have the benefit of the Commonwealth Court's decision in *HIKO v. Pa. PUC*, 163 A.3d 1079 (Pa. Cmwlth. 2017), appeal granted 176 A.3d 235 (Pa. 2017) (*HIKO*). We read the holding in this case to implicitly refute most, if not all, of the legal contentions of Blue Pilot in this Complaint regarding the jurisdiction and authority of the Commission to investigate and adjudicate claims alleging a violation of the Commission Regulations and the Code applicable to an EGS, and to impose a civil penalty upon the establishment of a record of violations of the Code and Commission Regulations.

⁵ Blue Pilot cites to Feingold v. Bell Tel. Co. of Pa., 383 A.2d 791, 795 (Pa. 1977) and Elkin v. Bell Tel. Co. of Pa., 420 A.2d 371 (Pa. 1980).

HIKO v. Pa. PUC is authority for the proposition that the Courts acknowledge the authority of the Commission to make determinations regarding EGS compliance with the Code and Commission Regulations concerning adequate disclosures of their variable rate generation service offerings. See I.D. at 53-54, citing I&E v. HIKO Energy, LLC, Docket No. C-2014-2431410 (Initial Decision issued August 21, 2015) at 35 (The fact that the violations are being raised in one complaint does not minimize the EGS's liability).

July 19 Order at 26-27.

Blue Pilot's Petition further alleges that the Commission engaged in extensive contract analysis despite the Court in HIKO noting that no contract interpretation was necessary because the EGS admitted to overcharging customers. Blue Pilot Petition at ¶ 27. In HIKO the Commission determined as follows:

Consequently, we deny HIKO's Exception No. 1 and adopt the ALJs' conclusion that HIKO violated Section 54.4(a) of our Regulations each time it issued an invoice that billed a price that did not match its customer information. We also dismiss out of hand HIKO's bald assertion that doing so requires us to engage in an *ultra vires* contract interpretation. We do not need to interpret a contract in order to count the number of overbilled invoices HIKO issued, invoices we point out that were provided by HIKO.

Pa PUC v. HIKO Energy, LLC, Docket No. C-2014-2431410, at 27 (Opinion and Order entered Dec. 3, 2015)(HIKO). As in HIKO, the Commission properly finds here that the issue is not an interpretation of a contract terms but an issue of Blue Pilot's violation of the Commission's regulations and Orders by failing to bill prices that matched the Company's disclosure statement. In order to determine whether Blue Pilot violated the Commission's regulations, a review of Blue Pilot's disclosure statement must be made in order to determine the price agreed upon by Blue Pilot and its customers. Such review in the present case, however, does not amount to improper contract interpretation by the Commission. Moreover, the Commission fully considered and discussed this issue in the July 19 Order as follows:

According to Blue Pilot's Exceptions, the Initial Decision errs in concluding that it made deceptive promises of savings. As noted, Blue Pilot first argues that in

reaching its conclusion, the Initial Decision impermissibly goes beyond the “four corners” of the supply contract and impermissibly relies on extrinsic evidence in the form of oral representations of Blue Pilot’s sales agents. As noted by the Joint Complainants, however, the Commission is not using this evidence to engage in an interpretation of the supply contract between Blue Pilot and its customers here. Rather, the Commission is using this evidence, including the oral representations of Blue Pilot’s sales/marketing agents, to determine whether Blue Pilot’s billed price matched the disclosed and marketed price as required by Sections 54.4(a), 54.5(a), and 54.7(a) of our Regulations. 52 Pa. Code §§ 54.4(a); 54.5(a) and 54.7(a).

July 19 Order at 62.

Next, Blue Pilot argues that Section 1312 limits the Commission’s authority to issue refunds. The ALJs previously discussed Blue Pilot’s argument regarding Public Utility Code Section 1312 as follows:

Blue Pilot further argues that since there is no express statutory authority to direct a refund, and the Commission has ruled Section 1312 refund authority does not apply to EGSs, then the broad plenary authority under 66 Pa.C.S. 501 is insufficient to confer express authority upon the Commission to direct refunds. Blue Pilot cites as authority, *ARIPPA v. Pa. Pub. Util. Comm'n*, 966 A.2d 1204 (2009) (*ARIPPA*). Blue Pilot argues the lack of statutory authority to award damages is akin to the lack of authority to direct EGSs to issue refunds.

I.D. at 146. In rejecting this argument, the ALJs determined as follows:

The Commission has jurisdiction and authority under Section 54.4(a) and 54.5(a) of our Regulations, 52 Pa.Code §§ 54.4(a), 54.5(a), which require an EGS's billed price reflect its disclosure statement. Also, the Commission has been directing EGS's to refund or rebill customers when 54.4(a) is found to have been violated. We find that based upon Blue Pilot's offers of promised savings and deceptive omissions regarding material factors upon which variable rates would be charged, the variable rate customers in existence during December, 2013 - March, 2014 who were charged above their EDCs' PTCs during those months were billed not in accordance with 52 Pa. Code § 54.4(a). Thus, the 2,516 customers are entitled to refund relief, because in part we have found at least one violation of Section 54.4(a) concerning each customer's account.

I.D. at 147. The Commission adopted the reasoning in the ALJs’ initial decision in reaching its conclusion that the Commission has statutory authority to issue refunds. See, July 19 Order at 54-57; 61-62.

Further, in regard to its statutory authority to issue refunds or other civil remedies, the Commission determined as follows:

The Initial Decision directs Blue Pilot to issue refunds to affected customers for overbilling in violation of Section 54.4(a) of our Regulations. As noted in the Initial Decision, the record evidence is that there was at least one violation of Section 54.4(a) concerning each affected customer's account.

Upon review, we conclude that we have the authority to order across-the-board relief to all affected customers pursuant to our plenary authority under Section 501 of the Code, 66 Pa. C.S. § 501. This Commission has, on numerous occasions, stated that it may require EGSs to provide refunds to retail customers in appropriate circumstances. *See, e.g., Joseph Nadav v. Respond Power, LLC*, C-2014-2429159 (Opinion and Order entered December 19, 2014). These circumstances include, *inter alia*, when an EGS has billed customers in violation of the Commission's Chapter 54 marketing and billing Regulations. Specifically, the Commission in the *IDT* Order determined that it has plenary authority under Section 501 of the Code to enforce the consumer protection provisions of the Electric Competition Act and direct an EGS to issue a credit or refund for an overbill that violates our Chapter 54 Regulations.

July 19 Order at 96. In reaching this conclusion, the Commission addressed Blue Pilot's analysis of the Feingold and Elkin cases found in its Petition and Blue Pilot's analysis of these cases in its Main Brief. See, Blue Pilot M.B. at 126; Blue Pilot Petition at ¶ 29. As noted, *supra*, the Commission stated:

We recognize that proceedings brought by the Attorney General generally focus on unfair and deceptive methods, acts and practices. 73 P.S. §§ 201-3, 201-4. However, this Commission cannot entertain an action under the CPL and the relief available under our jurisdiction is not exactly the same as the relief available in a court of law's jurisdiction in that the Commission cannot award compensatory or punitive damages to a consumer for the fraudulent activities of a company. Feingold v. Bell of PA., 282 A.2d 1191 (Pa. 1977). Nevertheless, although the relief available at this administrative agency level may not make Pennsylvania's consumers whole, the Commission's regulations hold licensees "responsible for any fraudulent deceptive or other unlawful marketing or billing acts performed by the licensee, its employees, agents or representatives" and "a license may be suspended or revoked and fines may be imposed against the licensee for the failure to follow the principles in § 54.43 (relating to standards of conduct and disclosure for licensees)." 52 Pa.C.S. §§ 54.42(a)(6) and 54.43(f).

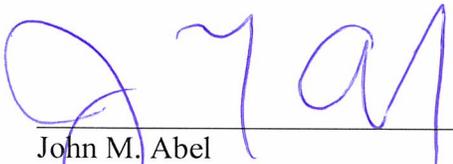
July 19 Order at 23. As such, the Commission addressed and did not overlook this argument.

Blue Pilot's Petition does not introduce any new or novel arguments. The Joint Complainants submit that the Commission should deny Blue Pilot's request for reconsideration.

IV. CONCLUSION

Blue Pilot Energy, LLC's Petition for Reconsideration of the Pennsylvania Public Utility Commission's July 19, 2018 Order should be denied consistent with the Office of Consumer Advocate/Office of Attorney General's Answer. For the reasons set forth above, the Company has not met the standard for reconsideration and, further, the Company's arguments have already been considered and properly denied by the Commission.

Respectfully submitted,



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