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October 17, 2019

**Via Electronic Filing**

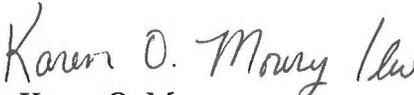
Rosemary Chiavetta, Secretary  
PA Public Utility Commission  
PO Box 3265  
Harrisburg, PA 17105-3265

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 Stay Pending Judicial Review 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.

**CERTIFICATE OF SERVICE**

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

**Via Email and First Class Mail**

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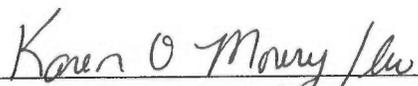
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Dated: October 17, 2019

  
\_\_\_\_\_  
Karen O. Moury, Esq.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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**PETITION FOR STAY  
PENDING JUDICIAL REVIEW**

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Blue Pilot Energy, LLC (“BPE”) respectfully files this Petition for Stay Pending Judicial Review (“Petition”), pursuant to Pa. R.A.P. 1781(a) and 52 Pa. Code § 5.572, requesting that the Commission grant BPE a stay pending the disposition of the appeal by BPE of the Opinion and Orders issued July 11, 2018 and the related Order denying reconsideration that was issued on July 18, 2019 (collectively, the “Orders”) in the above-captioned matter.

By the Orders, the Commission has directed BPE, *inter alia*, to refund monies to all customers it was serving during the early months of 2014 and to pay a civil penalty in excess of \$1 million. The Orders have been appealed by BPE. This Petition seeks to preserve the *status quo*, i.e., to stay any application or enforcement of the Orders pending the ultimate disposition of the BPE’s appeal from said Orders and any further proceedings relating

In support of this Petition, BPE avers as follows:

## Background

1. BPE was licensed by the Commission in 2011 to operate in Pennsylvania as an electric generation supplier (“EGS”), supplying electric generation services to retail customers.

2. The proceedings below were initiated by the filing of a Complaint against BPE on June 20, 2014 by the Commonwealth of Pennsylvania by Attorney General Kathleen Kane through the Bureau of Consumer Protection of the Office of Attorney General (“OAG”) and Tanya J. McCloskey, Acting Pennsylvania Consumer Advocate of the Office of Consumer Advocate (“OCA”). The Complaint alleged various violations of Commission regulations in connection with BPE’s variable prices during the Polar Vortex, which occurred in early 2014 when a high demand for electricity combined with particularly high forced outage rates for a number of generators to produce record high costs in the wholesale energy market. *See Review of Rules, Policies, and Consumer Education Measures Regarding Variable Rate Electric Products*, Docket No. M-2014-2406134 (Order entered March 4, 2014).

3. By the Orders, the Commission interpreted BPE’s contracts with retail customers, determined that BPE had breached those contracts and awarded damages to all affected customers of BPE during the relevant time period in the form of monetary refunds of over \$2.5 million. The Commission further directed BPE to pay a civil penalty in excess of \$1 million.

4. BPE has filed a Petition for Review (in the nature of an appeal) from the Final Orders (“appeal”) that was docketed by the Commonwealth Court at No. 1054 C.D. 2019.

## Legal Standard

5. The Commission has authority to entertain this Petition pursuant to Pa.R.A.P. 1781(a), which states that: “Application for a stay or supersedeas of an order or other determination of any government unit pending review in an appellate court on petition for review

shall ordinarily be made in the first instance to the government unit.” *See also* Pa.R.A.P. 1701(b)(1).

6. A stay is appropriate and necessary when a party demonstrates that (1) it is likely to prevail on the merits; (2) it will suffer irreparable injury without the requested relief; (3) issuance of a stay will not substantially harm interested parties in the proceedings; and (4) issuance of the stay will not adversely affect the public interest. *See PUC v. Process Gas Consumers Group*, 467 A.2d 805 (Pa. 1983).

### **Request for Stay Pending Appeal**

#### **BPE is likely to succeed on the merits**

7. In *Process Gas*, the Pennsylvania Supreme Court noted that the tribunal which had just rendered an adverse decision could nonetheless determine that an applicant for stay had presented a substantial case on the merits even though that tribunal disagreed that its own order would likely be reversed. *See Process Gas*, 467 A.2d at 809, n8 (“[T]here are ample instances where the lower tribunal could find that the applicant has presented a substantial case on the merits even though it disagrees.”).

8. The Commission has said that the *Process Gas* criteria “require the balancing of all interests, including the public, where applicable.” *PUC v. HIKO Energy, LLC*, Docket Nos. P-2015-2519419 and C-2014-2431410, Opinion and Order entered January 28, 2016 at page 11. Further, the Commission has observed that: “[I]n deciding whether to stay one of our orders pending appeal, this Commission should not indulge in a further review of the case. Rather, this Commission should concentrate solely on the effect our Order will have pending appeal.” *PUC v. Makovsky Brothers, Inc.*, 53 Pa. PUC 510, 511 (1979).

9. Here, as in *Process Gas*, significant questions exist regarding the Commission's legal authority so that a substantial case on the merits has been made by BPE.<sup>1</sup> Given the likelihood that the Commonwealth Court would find these challenges as significant and substantial, BPE urges the Commission to stay any compliance, application or enforcement of the Orders.

### **BPE will suffer irreparable injury without a stay**

10. The Orders inflict immediate, substantial, and irreparable harm on BPE by directing the payment of significant amounts of refunds and civil penalties by a company that terminated retail marketing in Pennsylvania in March 2014 and exited the Pennsylvania retail market one year later.

11. Forcing BPE to comply with the requirements in the Orders is irreparable harm *per se*. As explained in BPE's Petition for Review, the Commission has exceeded its statutory authority by interpreting contracts, determining a breach of those contracts, awarding damages and granting across-the-board relief to all affected customers. Such violations of the Public Utility Code result in *per se* irreparable harm. *See, e.g., PUC v. Israel*, 356 Pa. 400, 406, 52 A.2d 317, 321 (1947).

12. Compliance with the Orders pending the ultimate disposition of BPE's appeal from the Orders constitutes irreparable harm in that BPE would be required to remit over \$2.5 million to a designated agent of OAG and OCA for distribution to 2,500 retail customers and pay a civil penalty of over \$1.0 million. Unless a stay pending appeal is granted, the Orders will deprive BPE of meaningful access to judicial process. The refunds to customers, once made, are

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<sup>1</sup> BPE incorporates by reference the issues raised in its Petition for Review with the Commonwealth Court.

not readily, or likely ever, recouped if BPE prevails on appeal. Therefore, there is irreparable injury to BPE.

**Other interested parties will not be substantially harmed by a stay**

13. The issuance of a stay pending appeal will not substantially harm OAG or OCA, whose interests on behalf of BPE’s former customers are strictly monetary. If BPE loses its appeal, the delay due to a stay will merely lead to refunds being payable at a later time, so there is no substantial harm to OAG or OCA or the affected customers in granting a stay pending the ultimate disposition of the BPE’s appeal from the Orders.

**A stay will not adversely affect the public interest**

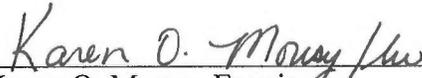
14. The issuance of a stay pending appeal will not adversely affect the public interest. The stay is related to refunds and the payment of a civil penalty. As BPE’s position is that the Commission exceeded its statutory authority in directing the issuance of refunds and imposed a civil penalty that is unconstitutionally excessive, the Orders are flawed and should not be enforced pending judicial review. If BPE loses its appeal, the delay due to a stay will merely lead to refunds and/or a civil penalty being owed in the future, so there is no substantial harm to the public interest or the Commission in granting a stay pending the ultimate disposition of the BPE’s appeal from the Orders.

## Conclusion

WHEREFORE, BPE respectfully requests that the Commission issue an Order:

- A. granting this Petition for Stay;
- B. entering an Order staying the compliance, application or enforcement of the Final Order pending the ultimate disposition of BPE's appeal from the Orders;
- C. granting such further relief in favor of BPE as may be just and reasonable under the circumstances.

Respectfully submitted,



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Karen O. Moury, Esquire  
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(717) 237-6000 (phone)  
(717) 237-6019 (fax)

Date: October 17, 2019

Counsel for Blue Pilot Energy, LLC

**VERIFICATION**

I, Raymond Perea, hereby state that the facts above set forth in the foregoing document are true and correct (or are true and correct to the best of my knowledge, information and belief).

I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).



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Raymond Perea  
General Counsel  
Blue Pilot Energy, LLC