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October 17, 2017

Via Electronic Filing

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

Re: Brenda Smith v. Blue Pilot Energy, LLC and PPL Electric Utilities Corporation
Docket No. F-2015-2472890

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Blue Pilot Energy, LLC's Main Brief 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: Cert. of Service w/enc.
Hon. Dennis J. Buckley, w/enc.

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of Blue Pilot Energy's Main Brief 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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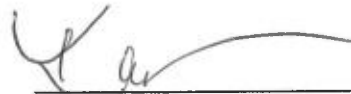
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Date: October 17, 2017



Karen O. Moury, Esq.

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

BRENDA SMITH

v.

BLUE PILOT ENERGY, LLC

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Docket No. F-2015-2472890

MAIN BRIEF OF BLUE PILOT ENERGY, LLC

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Dated: October 17, 2017

Counsel for Blue Pilot Energy, LLC

I. STATEMENT OF THE CASE

On March 16, 2015, Brenda Smith (“Complainant”) filed a Formal Complaint (“Complaint”) against Blue Pilot Energy, LLC (“BPE”), complaining about BPE’s prices for electric generation services in January to March 2014 and alleging that the prices were not consistent with oral representations made by BPE’s sales agent.¹ Based on these allegations, Complainant seeks a credit or refund in an unspecified amount from BPE.² At the relevant time, BPE was operating as a licensed electric generation supplier (“EGS”) in Pennsylvania but has since exited the market and is no longer serving customers.³

BPE filed an Answer and New Matter to the Complaint on April 3, 2015. In the Answer and New Matter, BPE denied the Complainant’s allegations and set forth several affirmative defenses, including: 1) the Complaint fails to state a claim upon which relief can be granted; 2) BPE has fulfilled its contractual and legal obligations to the Complainant; 3) BPE complied with the Commission’s disclosure requirements; and 4) the variable rates that BPE charged the Complainant were consistent with the contract. The Complainant filed no Reply to the New Matter.

On August 22, 2017, the Office of Consumer Advocate (“OCA”) filed a Notice of Intervention in this proceeding. An evidentiary hearing was held on August 31, 2017 before Administrative Law Judge (“ALJ”) Buckley. The Complainant, OCA and BPE participated in the

¹ Complaint, ¶ 4 (and attachment).

² Complaint, ¶ 5.

³ *License Application of Blue Pilot Energy, LLC*, Docket No. A-2014-2223888 (Orders entered June 10, 2011 and March 14, 2016).

hearing.⁴ At the conclusion of the hearing, ALJ Buckley established a briefing schedule. This Main Brief is filed in accordance with that schedule.

II. SUMMARY OF ARGUMENT

The Complainant has failed to carry her burden of proof that BPE has violated any Commission regulations. The only evidence presented at the hearing to support the allegations in the Complaint about BPE's prices being too high was the Complainant's own hearsay account of a conversation with BPE's sales agent. It is well-established that the Commission may not rely on uncorroborated hearsay to reach findings. Therefore, no basis exists upon which the Commission may determine that BPE violated any regulations.

Moreover, the Commission does not have the statutory authority to order BPE to issue a refund or credit to the Complainant. As a creation of the General Assembly, the Commission's subject matter jurisdiction must arise from express statutory authority or strongly implied authority. The Commission and the courts have long recognized that the Commission may not award monetary damages, and that it is necessary for consumers to seek such relief from the courts. It is also well-settled that the Commission does not regulate EGS prices; from that premise, it logically follows that the Commission may not direct EGSs to issue refunds. Section 1312 of the Public Utility Code is the only provision that authorizes the Commission to direct the issuance of refunds and its application is limited to public utilities in situations where the Commission has determined that they have charged unjust and unreasonable rates. Given the lack of statutory authority to direct BPE to order a refund or credit to the Complainant, the Complaint fails to seek relief that may lawfully be granted. The Complaint should be dismissed.

⁴ Although the Complaint was originally also docketed against PPL Electric Utilities Corporation ("PPL"), PPL filed a certificate of satisfaction on September 5, 2017.

III. ARGUMENT

A. Burden of Proof

Section 332(a) of the Public Utility Code (“Code”) provides that the party seeking a rule or order from the Commission has the burden of proof in that proceeding.⁵ It is axiomatic that “[a] litigant’s burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible.”⁶ Preponderance of the evidence means evidence which is more convincing, by even the smallest amount, than that presented by the other party.⁷ Additionally, any finding of fact necessary to support the Commission’s adjudication must be based upon substantial evidence.⁸ More information is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.⁹

As the moving party, the Complainant has the burden of proving that BPE overbilled her in violation of Commission’s regulations. In order to satisfy this burden, Complainant was required to establish that BPE breached some duty owed to her under the Public Utility Code, or a regulation or order of the Commission.¹⁰

⁵ 66 Pa. C.S. § 332(a).

⁶ *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Commw. Ct. 1990).

⁷ *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

⁸ *Mill v. Pa. PUC*, 447 A.2d 1100 (Pa. Commw. Ct. 1982); *Edan Transportation Corp. v. Pa. PUC*, 623 A.2d 6 (Pa. Commw. Ct. 1993).

⁹ *Norfolk and Western Ry. v. Pa. PUC*, 413 A.2d 1037 (Pa. 1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Review*, 166 A.2d 96 (Pa. Super. Ct. 1960); *Murphy v. Commonwealth, Dep’t. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Commw. Ct. 1984).

¹⁰ *Waldron v. Philadelphia Electric Company*, 54 Pa. PUC 98; 66 Pa.C.S. § 701.

B. Uncorroborated Hearsay Testimony May Not Support Findings

Hearsay is defined in Pennsylvania as “an out-of-court statement offered to prove the truth of the matter asserted.”¹¹ It is well-settled that the Commission may not rely on uncorroborated hearsay statements in making findings. The Complainant did not carry her burden of proof because the only evidence she presented to support her allegation of overbilling and her claim for a refund is her own hearsay account of the conversation with the BPE sales agent.

It has long been recognized that Pennsylvania courts do not regard the hearsay rule as a technical rule of evidence but rather as a basic, vital and fundamental rule of law, which must be followed by administrative agencies when facts crucial to an issue are sought to be placed upon the record.¹² The general rule is that hearsay evidence, properly objected to, is not competent to support a finding by an administrative agency.¹³ Even when it is not excluded, hearsay evidence is given its natural probative effect and may support a finding of the agency only if it corroborated by competent evidence in the record.¹⁴ A finding of fact based solely on hearsay will not stand.¹⁵

The Commission has specifically addressed the issue of hearsay in the context of statements allegedly made by an EGS sales representative to a prospective customer in *Gruelle c/o*

¹¹ *Commonwealth v. Cassidy*, 315 Pa. Super. 429, 462 A.2d 270 (1983). See also P.R.E. 801.

¹² *Bleilevens v. Pa. State Civil Service Comm'n*, 11 Pa. Commw. Ct. 1, 312 A.2d 109 (1973); *Loudon v. Viridian Energy*, Docket No. C-2011-2244309 (Initial Decision served February 2, 2012, adopted by Final Order entered March 29, 2012); *Gibson v. W.C.A.B.*, 861 A.2d 938 (Pa. 2004); *Anthony v. PECO Energy Co.*, Docket No. C-2014-2408057 (Order entered July 30, 2014)

¹³ *Anderson v. Pa. Department of Public Welfare*, 79 Pa. Commw. Ct. 182, 468 A.2d 1167 (1983).

¹⁴ *Pa. Pub. Util. Comm'n., Bureau of Investigation & Enforcement v. Yellow Cab Co. of Pittsburgh*, Docket No. 2012-2249031, 2013 WL 5912555 (Initial Decision served October 24, 2013 at 3; adopted in relevant part by Commission Order entered February 6, 2014).

¹⁵ *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366, 370 (Pa. Cmwlth. 1976). See also *Anderson v. Pa. Dep't. of Pub. Welfare*, 79 Pa. Cmwlth. Ct. 182, 468 A.2d 1167 (1983); *Jackson v. PECO Energy Co.*, Docket No. F-2013-2351046 (July 5, 2013).

*Toll Diversified Properties, Inc. v. PPL Electric Utilities Corporation and Blue Pilot Energy, LLC.*¹⁶ In *Gruelle*, the Commission dismissed a consumer complaint on the basis that the only evidence presented at the hearing was the complainant's own hearsay account of statements and assurances of the sales agent. In dismissing the complaint, the Commission noted that "[t]he conversation occurred outside the hearing room, the declarant is not available for cross examination, and the content is the sole evidence relied upon by Complainant to support its case for a claim of overbilling and refund."¹⁷ The Commission added that the complainant could have but elected not to subpoena the sales agent.

As in *Gruelle*, the Complainant's hearsay account in this proceeding was offered to prove the truth of the matter asserted – that BPE's sales agents made representations that were not consistent with the prices that were charged by BPE in January to March 2014. Those alleged statements were made outside the hearing room, the declarant's testimony was not presented and their content was the sole evidence relied upon by Complainant to support her case for a claim of overbilling and refund. In addition to not subpoenaing the sales agent, the Complainant produced no written documents (such as marketing materials or the disclosure statement) to support her claims of overbilling. Indeed, the Complainant did not even offer a timeframe for the enrollment, identify the sales agent or provide any other information to establish any credible foundation for her allegations as to the sales agent's representations.¹⁸

¹⁶ Docket No. C-2015-2463573 (Initial Decision served November 18, 2015 adopted by Final Order entered December 22, 2015), Initial Decision at 17.

¹⁷ *Id.*

¹⁸ The unreliability of witness testimony and the self-serving nature of testimony that supports requests for refunds are the reasons that Pennsylvania does not allow verbal testimony to modify terms of written contracts. *See Steuart v. McChesney*, 498 Pa. 45, 48, 444 A.2d 659, 661 (Pa. 1982). Also, general statements about saving money are non-actionable puffery since they are not susceptible to quantification. *Mirkin v. Viridian Energy, Inc.*, 2016 WL 3661106 (July 5, 2016).

It is also noteworthy that the Complainant did not file a Reply to BPE's New Matter. Under Section 5.63 of the Commission's regulations, the failure to file a Reply may be deemed in default and relevant facts stated in the New Matter may be deemed to be admitted.¹⁹ Therefore, the Commission may rely upon BPE's affirmative defenses averred in the New Matter to conclude that BPE's prices were consistent with the Complainant's contract and that BPE provided all required disclosures to the Complainant.

C. The Commission Lacks Jurisdiction to Direct BPE to Issue a Refund

The Complainant seeks monetary damages in the form of a refund or credit. Even if the Commission would find that the Complainant carried her burden that BPE's prices were inconsistent with statements made by its sales agent, the Commission does not have statutory authority to direct BPE to issue a refund or credit to the Complainant.

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.²⁰ It is well-settled that the Commission must act within, and cannot exceed, its jurisdiction.²¹ Jurisdiction may not be conferred by the parties where none exists.²² Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy.²³

¹⁹ 52 Pa. Code § 5.63.

²⁰ 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).

²¹ *City of Pittsburgh v. Pa. PUC*, 43 A.2d 348 (Pa. Super. 1945).

²² *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967).

²³ *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992), *alloc. denied*, 637 A.2d 293 (Pa. 1993).

As recognized by the ALJ in an Interim Order dated December 30, 2016 in another proceeding, the Commission does not have jurisdiction to award money damages.²⁴ In *Feingold*, which the ALJ relied upon in that Interim Order, the Pennsylvania Supreme Court found that the remedial and enforcement powers vested in the Commission by the Code were designed to allow the Commission to enforce its orders and regulations, but not to empower the Commission to award damages or to litigate a private action for damages on behalf of a complainant. 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.*,²⁵ 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."²⁶

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 more effective than economic regulation in controlling the cost of generating electricity."²⁷ Indeed, the

²⁴ *Alan Haulman d/b/a AJH Pizza, Inc. v. PPL Electric Utilities Corporation/Blue Pilot Energy, LLC*, Docket No. C-2014-2415273 (Interim Order dated December 30, 2016) at 4-5. See also *Poorbaugh v. Pa. PUC*, 666 A.2d 744 (Pa. Cmwlth. 1995) (Court stressed the importance of administrative agencies and courts applying their respective expertise in resolving legal issues).

²⁵ 420 A.2d 371 (Pa. 1980)

²⁶ *Id.* at 375.

²⁷ 66 Pa. C.S. § 2802(5).

Commission and the Commonwealth Court have recognized the Commission's lack of jurisdiction to regulate prices charged by EGSs.²⁸ It logically follows that since the Commission does not regulate EGS prices, it does not have authority to direct the issuance of refunds.²⁹

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.³⁰ 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.³¹ 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 expressly determined that the rates are unjust and unreasonable.³² Since EGSs are not public utilities for the purposes of pricing, it is not within

²⁸ See *Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657, 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).

²⁹ See *Yaglidereliler Corp. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2413732 (Initial Decision served June 24, 2014), at 9. Although the *Yaglidereliler Corp.* Initial Decision was later remanded for a different purpose and the parties ultimately settled the matter, it is offered for its persuasive value to support the argument regarding the logical nexus between a lack of statutory authority to regulate rates and a lack of statutory authority to direct the issuance of refunds. Other Administrative Law Judges have also endorsed this logical nexus and employed similar reasoning in cases that were later settled by the parties. See, e.g., *Tustin v. Respond Power LLC*, Docket No. C-2014-2417552 (Interim Order dated June 26, 2014); *Russell v. Respond Power LLC*, Docket No. C-2014-2417551 (Interim Order dated July 3, 2014). See also 66 Pa.C.S. § 1312 (Commission's authority to award refunds is limited to situations where public utilities' rates are found to be unjust or unreasonable).

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

³¹ *IDT Interlocutory Order* at 16.

³² *National Fuel Gas Distribution Corporation v. Pennsylvania Public Utility Commission*, 76 Pa. Cmwlth. 102, 464 A.2d 546 (1983).

the purview of the Commission to determine whether the prices are unjust and unreasonable pursuant to Code Section 1301.³³ Therefore, no Code Section 1312 refund authority exists.

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 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.³⁴

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.³⁵

³³ 66 Pa. C.S. § 1301.

³⁴ The Commission has acknowledged its lack of statutory authority to award equitable remedies including restitution. *IDT Interlocutory Order* at 25-26.

³⁵ 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.

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 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.

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 501³⁶ to direct an EGS to issue a credit or refund under limited circumstances.³⁷ In relying on Code Section 501³⁸ 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.

Code Section 501 confers on the Commission “general administrative power and authority to supervise and regulate all public utilities doing business within the Commonwealth.”³⁹ As EGSs are not public utilities except for limited purposes specified in the Competition Act, EGSs are

³⁶ 66 Pa. C.S. § 501.

³⁷ *See IDT Interlocutory Order; Kiback v. IDT Energy, Inc.*, Docket No. C-2014-2409676 (Order entered August 20, 2015).

³⁸ *Id.*

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

clearly not public utilities for purposes of Code Section 501.⁴⁰ Therefore, any reliance on Code Section 501 for authority to require EGSs to issue refunds to customers must fail.

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.⁴¹ 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 purpose of the Commission to regulate and control public utilities in determining cost and service to the public.⁴²

In *ARIPPA v. Pa. Pub. Util. Comm'n*,⁴³ 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.”⁴⁴ 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,

⁴⁰ See *Delmarva Power & Light Co. Pa. P.U.C.*, 582 Pa. 338, 870 A.2d 901 (Pa. 2005), at 352-353.

⁴¹ *PECO Energy Co. v. Pa. Pub. Util. Comm'n*, 568 Pa. 39, 791 A.2d 1155, 1159-1160 (2002).

⁴² *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).

⁴³ 966 A.2d 1204 (2009).

⁴⁴ 73 P.S. § 1648.3(e)(1).

accounted for, transferred and retired.⁴⁵ 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.”⁴⁶

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.⁴⁷ 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 (relating to standards and billing practices for residential utility service) are maintained.”⁴⁸ 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.

⁴⁵ 73 P.S. § 1648.3(e)(2)-(2)(i).

⁴⁶ *ARIPPA* at 1212.

⁴⁷ *IDT Interlocutory Order*.

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

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.⁴⁹ 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.


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 situation in which the Code authorizes the Commission to direct the issuance of refunds to customers, any order directing BPE to issue a refund or credit to the Complainant would exceed the Commission’s express and strongly implied statutory authority.

⁴⁹ 66 Pa. C.S. § 2809(e).

III. CONCLUSION

Based on the foregoing, Blue Pilot Energy, LLC respectfully requests that the Complaint be dismissed.

Respectfully submitted,



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Dated: October 17, 2017

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