

COMMONWEALTH OF PENNSYLVANIA



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October 17, 2017

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

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

Dear Secretary Chiavetta:

Attached for electronic filing please find the Office of Consumer Advocate's Main Brief in the above-referenced proceeding.

Copies have been served per the attached Certificate of Service.

Respectfully submitted,

/s/ Kristine E. Marsilio
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Attachment

cc: Honorable Dennis J. Buckley
Certificate of Service

*240760

CERTIFICATE OF SERVICE

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

I hereby certify that I have this day served a true copy of the following document, the Office of Consumer Advocate's Main Brief, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 17th day of October 2017.

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Brenda Smith

v.

Blue Pilot Energy, LLC & PPL Electric
Utilities Corporation

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Docket No. F-2015-2472890

MAIN BRIEF
OF THE OFFICE OF CONSUMER ADVOCATE

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 2

 a. Burden of Proof..... 2

 b. Legal Standards..... 3

 c. Blue Pilot made misleading and deceptive promises of savings to Ms. Smith and failed to provide her with accurate pricing and terms of service information. 8

 d. Blue Pilot failed to properly handle Ms. Smith’s complaint. 11

 e. Ms. Smith’s testimony regarding statements made by Blue Pilot’s sales agent is admissible and capable of supporting findings of fact..... 13

 f. Relief Requested 15

III. CONCLUSION 19

TABLE OF AUTHORITIES

Cases	Page(s)
<u>North American Coal Corp. v. Commonwealth of Pa.</u> , 2 Pa. Commw. 469, 279 A.2d 356 (1971)	2
<u>Se-Ling Hosiery v. Margulies</u> , 364 Pa. 45, 70 A.2d 854 (1950) (<u>Se-Ling</u>)	2, 3
Administrative Decisions	
<u>Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. IDT Energy, Inc.</u> , Docket No. C-2014-2427657, Opinion and Order (Dec. 18, 2014) (<u>IDT Order</u>).....	16, 17
<u>Electric Distribution Company Procedures for Processing Pilot Customer Supplier Selections</u> , 1998 Pa. PUC LEXIS 49 (Jan. 15, 1998) (also found at Docket No. M- 00960890, Opinion and Order).....	5
<u>Enrico Partners LP v. Blue Pilot Energy, LLP</u> , Docket No. C-2014-2432979, Initial Decision (Feb. 12, 2015)	4
<u>Herp v. Respond Power, LLC</u> , Docket No. C-2014-2413756, Opinion and Order (Jan. 28, 2016) (<u>Herp</u>).....	3, 13, 14, 17
<u>Kiback v. IDT Energy, Inc.</u> , Docket No. C-2014-2409676, Opinion and Order (Aug. 20, 2015) (<u>Kiback</u>).....	3, 5, 17
<u>License Application of Blue Pilot Energy, LLC for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as an Aggregator and Broker/Marketer of Retail Electric Power</u> , Docket No. A-2011-2223888, Order (June 10, 2011) (<u>Licensing Order</u>)	5, 12, 13, 19

<u>Nadav v. Respond Power, LLC,</u> Docket No. C-2014-2429159, Opinion and Order (Dec. 19, 2014)	18
<u>Werle v. Respond Power,</u> Docket No. C-2014-2429158, Motion of Commissioner Gladys M. Brown (Jan. 15, 2015)	18
<u>Werle v. Respond Power,</u> Docket No. C-2014-2429158, Motion of Vice Chairman John F. Coleman, Jr. (Jan. 15, 2015)	18
<u>Werle v. Respond Power, LLC,</u> Docket No. C-2014-2429158, Opinion and Order (Feb. 23, 2015).....	17, 18

Statutes

66 Pa. C.S. § 332(a)	2
66 Pa. C.S. § 501.....	16
66 Pa. C.S. § 2809.....	3

Regulations

2 Pa. Code § 505	15
52 Pa. Code §§ 54.4(a), 54.5, 54.43(1), 54.43(f), 111.3(b), 111.5, 111.12(d)(2), 111.12(d)(4), and 111.12(d)(5)	8, 11
52 Pa. Code §§ 54.4(a), 54.5(a)	5
52 Pa. Code §§ 54.4(a), 54.43(1), 54.43(f), 54.5, 56.1(a), 56.141(a), 56.151, 56.152, 111.3(b), 111.5, 111.12(d)(2), 11.12(d)(4), 111.12(d)(5), and 111.13(a), (b)	19
52 Pa. Code § 54.5(b)	5
52 Pa. Code § 54.43(1)	5
52 Pa. Code § 56.1(a).....	5
52 Pa. Code §§ 56.1(a) 56.141(a), 56.151, 56.152, and 111.13(a), (b)	12, 13
52 Pa. Code § 56.141	6
52 Pa. Code § 56.151	6
52 Pa. Code § 56.152	7

52 Pa. Code § 57.177(b)	16
52 Pa. Code §§ 111.3(b), 54.43(f)	4
52 Pa. Code §§ 111.5(a)(1), (2), (3).....	4
52 Pa. Code § 111.12(d)(2).....	4
52 Pa. Code §§ 111.12(d)(4), (5)	4
52 Pa. Code § 111.13	6
52 Pa. Code §§ 111.13(a), (b).....	7

I. INTRODUCTION

On March 16, 2015, consumer Complainant Brenda Smith filed a Formal Complaint at the Pennsylvania Public Utility Commission (Commission) against Blue Pilot Energy, LLC (Blue Pilot) and PPL Electric Utilities Corporation (PPL), appealing a Bureau of Consumer Services decision. In her Formal Complaint, Ms. Smith asserted that Blue Pilot promised to shop around for the lowest rate possible, yet Blue Pilot charged her \$0.4490/kWh for three months in early 2014 even though PPL’s price was much lower.

On April 9, 2015, PPL filed Preliminary Objections, requesting that the Commission dismiss, without prejudice, Ms. Smith’s Complaint as to PPL. The matter was assigned to Dennis J. Buckley (ALJ Buckley).

On August 22, 2017, the OCA determined to intervene in Ms. Smith’s Formal Complaint to assist in addressing the allegations of wrongdoing by Blue Pilot and to ensure that Blue Pilot followed applicable Commission regulations and requirements when it engages in electric generation marketing and sales in Pennsylvania.¹

The OCA engaged in a number of settlement discussions with Ms. Smith and PPL.² As a result, PPL filed a Certificate of Satisfaction on September 5, 2017, resolving Ms. Smith’s allegations against PPL. In the Certificate of Satisfaction, PPL has agreed to apply a credit to Ms. Smith in the amount of \$112.10 and to put Ms. Smith on a new, more affordable payment arrangement to pay off the undisputed portion of her balance. Additionally, PPL agreed that, within 45 days of a Commission decision on the issues remaining for litigation against Blue

¹ Early in 2014, the OCA and the Office of Attorney General, Bureau of Consumer Protection joined in the filing of a Complaint against, *inter alia*, Blue Pilot to address multiple identified violations of the Commission’s regulations and Pennsylvania law and to seek protections for consumers. The Joint Complaint remains pending at the Commission.

² Ms. Smith had asserted that PPL charged late fees while she was on a payment plan, which made it difficult for her to pay down her back balance.

Pilot, the OCA, PPL, and Ms. Smith will discuss the establishment of a 36-month payment arrangement for Ms. Smith's arrearages.

A telephonic evidentiary hearing was held on August 31, 2017. Ms. Smith presented testimony during the evidentiary hearing.

As discussed in more detail below, the OCA submits that the evidence and testimony presented by Complainant Brenda Smith in this proceeding demonstrates that Blue Pilot violated the Commission's regulations and Orders by promising Ms. Smith savings that were not delivered, failing to provide accurate pricing information, and failing to properly handle her complaint. By way of relief for the Blue Pilot's violations of the Commission's regulations and Orders, the OCA requests that ALJ Buckley order Blue Pilot to refund Ms. Smith an amount of \$5,207.61, which represents the difference between the amount that Blue Pilot charged Ms. Smith and the amount that Ms. Smith would have been charged had she remained with PPL during the time period from November 21, 2013 through April 28, 2014.

II. ARGUMENT

a. Burden of Proof

A complainant has the burden to prove his or her allegations by a "preponderance of the evidence." 66 Pa. C.S. § 332(a); see also North American Coal Corp. v. Commonwealth of Pa., 2 Pa. Commw. 469, 279 A.2d 356 (1971). Proving an allegation by a "preponderance of the evidence" means that one party has presented evidence, which is more convincing, by even the smallest amount, than the evidence presented by the other party. Se-Ling Hosiery v. Margulies, 364 Pa. 45, 70 A.2d 854 (1950) (Se-Ling). The Pennsylvania Supreme Court stated further:

The burden of proof must be by a preponderance of the evidence, which means when it is weighed there will be a perceptibly greater weight in favor of the plaintiff's proof and more than a mere scintilla. [...] If we visualize evidence as something weighed in an ordinary balance scales and if the evidence plaintiff

offers in support of his claim is so much more weighty in probative value than the evidence offered in opposition to it that it tips the scales on the side of the plaintiff, the latter has proved his claim by the fair weight of the evidence.

Se-Ling, 364 Pa. at 48, 70 A.2d at 855-56.

The Commission has held that a complainant, to establish a sufficient case against an EGS and satisfy the burden of proof, must show that the EGS should be held responsible or accountable for the problem described in the complaint. Kiback v. IDT Energy, Inc., Docket No. C-2014-2409676, Opinion and Order at 6 (Aug. 20, 2015) (Kiback), citing Patterson v. The Bell Telephone Co. of PA, 72 Pa. P.U.C. 196 (1990); see also Herp v. Respond Power, LLC, Docket No. C-2014-2413756, Opinion and Order at 3 (Jan. 28, 2016) (Herp). A complainant's evidence must be slightly more convincing than evidence presented by the EGS but also must be substantial, and not just a trace of evidence or suspicion. Kiback at 6; Herp at 3-4. The ultimate burden of proof always remains with the complainant, even though the burden may shift to the EGS periodically to rebut evidence offered by the complainant. Kiback at 7; Herp at 4.

b. Legal Standards

The OCA submits that the Commission has the authority to require Blue Pilot to comply with all applicable law and Commission regulations as a condition of Blue Pilot's license as an EGS in Pennsylvania. See 66 Pa. C.S. § 2809. The Commission's Chapters 54, 56, and 111 regulations apply to EGSs and are designed to protect consumers and assure that they have accurate and adequate information to make informed decisions when choosing between offers for electric supply service. When a sales agent for a licensed EGS makes misrepresentations, unsupported claims, or material omissions that lead a consumer to enroll with the EGS, the consumer has been denied those protections.

Pursuant to the Commission's regulations, Blue Pilot may not "make false or misleading representations including misrepresenting rates or savings offered by the supplier." 52 Pa. Code § 111.12(d)(2). Blue Pilot is also required to "provide accurate and timely information" and shall ensure that its products or service offerings "contain information, verbally and written, in plain language designed to be understood by the customer." 52 Pa. Code §§ 111.12(d)(4), (5).

As summarized by the presiding Administrative Law Judge in Enrico Partners LP:

[T]he term "plain" is generally defined as "clear or distinct to the eye or ear; clear to the mind, evident, manifest, obvious; conveying the meaning clearly and simply; easily understood; free from ambiguity or evasion." Webster's Encyclopedic Unabridged Dictionary of the English Language, Portland House, New York, 1983, at 1110. Furthermore, language is "ambiguous" when it conveys two or more reasonable meanings; or when it is otherwise vague, uncertain or indefinite. Barasch v. Pa.P.U.C., 516 Pa. 142, 156 (Pa. 1987). The Commission has held that all disclosures must be clear and unequivocal. Yaglidereliler Corporation v. Blue Pilot Energy, LLC, Docket No. C-2014-2413732, Opinion and Order (entered Jan. 16, 2015) (Yaglidereliler).

See Enrico Partners LP v. Blue Pilot Energy, LLP, Docket No. C-2014-2432979, Initial Decision at 11 (Feb. 12, 2015).

Blue Pilot is also "responsible for any fraudulent deceptive or other unlawful marketing or billing acts performed by the licensee, its employees, agents or representatives." 52 Pa. Code §§ 111.3(b); 54.43(f). Chapter 111 dictates that Blue Pilot ensure the training of its agents on a variety of subjects including Pennsylvania and federal consumer protection laws, ethical sales practices, and Blue Pilot's services and products. 52 Pa. Code §§ 111.5(a)(1), (2), (3). As such, Blue Pilot had the responsibility to ensure that its sales representatives provided Ms. Smith with adequate and accurate information about the price that Blue Pilot would charge her.

Under Chapter 54, Blue Pilot is also required to "provide accurate information about its electric generation services using plain language and common terms in communications with consumers" and "in a format that enables customers to compare the various electric generation

services offered and the prices charged for each type of service.” 52 Pa. Code § 54.43(1). Chapter 54 also requires that Blue Pilot provide a customer written disclosure of the terms of the service at no charge whenever the customer requests that an EGS initiate service. 52 Pa. Code § 54.5(b). Under Chapter 54, there must be continuity and consistency between the marketed or advertised price for Blue Pilot’s service, the agreed upon price in the disclosure statement, and the billed price. 52 Pa. Code §§ 54.4(a), 54.5(a). If there is inconsistency between the marketing message communicated by Blue Pilot’s sales agent and the price charged by Blue Pilot, the OCA submits that the responsibility lies with Blue Pilot. The Commission recently stated:

Our customer choice standards are high, specific, and unequivocal. They are intended to ensure fairness and integrity in the competitive market by requiring all marketer behavior – oral, written, or electronic – to be straightforward and clear. Only in this way may consumers make informed choices and the market flourish.

See Kiback at 24.

In Blue Pilot’s Licensing Order, the Commission also specifically ordered Blue Pilot to comply with applicable Chapter 56 residential service regulations.³ License Application of Blue Pilot Energy, LLC for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as an Aggregator and Broker/Marketer of Retail Electric Power, Docket No. A-2011-2223888, Order at 3 (June 10, 2011) (Licensing Order). Section 56.1(a) of the Commission’s regulations imposes a requirement to utilize “good faith, honesty and fair dealing” with residential customers. See 52 Pa. Code § 56.1(a). Additionally, Chapter 56 of the Commission’s regulations provides extensive requirements related to handling customer

³ In addition to the Company’s Licensing Order, it is worth noting that on other occasions, the Commission has directed that EGSs comply with the dispute resolution requirements in Chapter 56. See e.g. Electric Distribution Company Procedures for Processing Pilot Customer Supplier Selections, 1998 Pa. PUC LEXIS 49, *11-14 (Jan. 15, 1998) (also found at Docket No. M-00960890, Opinion and Order).

complaints.⁴ Additionally, the Commission promulgated similar requirements for suppliers in handling customer complaints. See 52 Pa. Code § 111.13. Specifically, Section 111.13 provides that:

⁴ Specifically, Section 56.141 of the Commission’s regulations provides, in pertinent part:

A notice of dispute, including termination disputes, must proceed, according to this section:

(1) *Attempted resolution.* If, at any time prior to the actual termination of service, a customer advises the public utility that the customer disputes any matter covered by this chapter, including, but not limited to, credit determinations, deposit requirements, the accuracy of public utility metering or billing or the proper party to be charged, the public utility shall attempt to resolve the dispute in accordance with § 56.151 (relating to general rule).

52 Pa. Code § 56.141. Section 56.151 of the Commission’s regulations provides, in pertinent part:

Upon initiation of a dispute covered by this section, the public utility shall:

[...]

(2) Investigate the matter using methods reasonable under the circumstances, which may include telephone or personal conferences, or both, with the customer or occupant.

(4) Provide the customer or occupant with the information necessary for an informed judgment, including, but not limited to, relevant portions of tariffs, statements of account and results of meter tests.

(5) Within 30 days of the initiation of the dispute, issue its report to the complaining party. The public utility shall inform the complaining party that the report is available upon request.

(i) If the complainant is not satisfied with the dispute resolution, the utility company report must be in writing and conform to § 56.152 (relating to contents of the public utility company report). Further, in these instances, the written report shall be sent to the complaining party if requested or if the public utility deems it necessary.

52 Pa. Code § 56.151. Section 56.152 of the Commission’s regulations provide in part:

A utility company report must include the following:

(1) A statement of the claim or dispute of the customer and a copy thereof if the claim or notice of dispute was made in writing.

(2) The position of the public utility regarding that claim.

(4) A statement that if the complaining party does not agree with the utility company report, an informal complaint shall be filed with the Commission to ensure the preservation of all of the complaining party’s rights.

(a) A supplier shall investigate customer inquiries, disputes and complaints concerning marketing or sales practices. The supplier shall cooperate with the Commission and other government agencies that are investigating complaints about marketing or sales practices prohibited by State and Federal laws and with local law enforcement officials that are investigating complaints about violations of local municipal law.

(b) A supplier shall implement an internal process for responding to and resolving customer inquiries, disputes and complaints. The process shall document as a record the customer inquiry, dispute or complaint, subsequent communications between the supplier and the customer, and the resolution of the inquiry, dispute or complaint. A supplier shall retain the record for a time period equivalent to six billing cycles in a system capable of retrieving that record by customer name and account number or by other effective means to obtain access to the information.

52 Pa. Code §§ 111.13(a), (b). Thus, under the Commission's regulations, Blue Pilot was required to implement a process for responding to and resolving customer inquiries, disputes and complaints and to provide documentation of, *inter alia*, said inquiry, dispute, or complaint and the resolution of the matter.

The evidence on record in this proceeding shows that Blue Pilot violated these Commission regulations and Orders by making misleading and deceptive promises of savings to Ms. Smith, failing to provide Ms. Smith with accurate pricing and terms of service information, and failing to properly handle her complaint.

(6) A full and complete explanation of procedures for filing an informal complaint with the Commission (see § 56.162 (relating to informal complaint filing procedures)). If a written report is not requested by the complaining party or is not deemed necessary by the public utility, the public utility shall provide the information in § 56.162(1), (2) and (5). In addition, the public utility shall always provide the telephone number and address of the office of the Commission where an informal complaint may be filed.

52 Pa. Code § 56.152.

c. **Blue Pilot made misleading and deceptive promises of savings to Ms. Smith and failed to provide her with accurate pricing and terms of service information.**

The evidence on record in this proceeding demonstrates that Blue Pilot's sales representative made misleading and deceptive promises of savings to Ms. Smith to induce her to switch to Blue Pilot and failed to provide her with accurate pricing information at the time of enrollment. See Tr. at 9, 15-16, 30. The record further establishes that Blue Pilot failed to provide Ms. Smith with a Disclosure Statement after her enrollment. Tr. at 16. As such, Blue Pilot has violated the Commission's regulations at 52 Pa. Code §§ 54.4(a), 54.5, 54.43(1), 54.43(f), 111.3(b), 111.5, 111.12(d)(2), 111.12(d)(4), and 111.12(d)(5).

During the evidentiary hearing in this proceeding on August 31, 2017, Ms. Smith provided substantial evidence demonstrating that Blue Pilot's sales agent promised Ms. Smith savings if she switched to Blue Pilot. See Tr. at 9, 15-16. Specifically, during Ms. Smith's Direct Testimony, the following exchange took place:

Q. Can you please describe the sales contact that you had with Blue Pilot's representative when you signed up for the service?

A. The phone rang and I answered the phone, and they told me that they were Blue Pilot Energy and that they could save me money on my electric bill, and, of course, with my electric being my highest payment through my bills, it got my attention. We'll guarantee to save you money.

I listened to what they had to say, and --

[...]

Blue Pilot got my attention by telling me how they can save me money by lowering my electric bill and they guaranteed me to have the lowest rate; that their job was to shop around to give me the lowest rate that is out there. **Every month I would have a lower electric bill based on what they shopped for and that is how they would save me money, guaranteed to have the lowest rate out there.**

So, actually this did get my attention and I signed up for Blue Pilot.

Tr. at 9, 15-16 (emphasis added).

The record also demonstrates that Blue Pilot's sales representative did not provide Ms. Smith with adequate or accurate pricing information at the time of her enrollment and that Blue Pilot did not provide Ms. Smith with a Disclosure Statement following enrollment. During the evidentiary hearing in this proceeding, Complainant Brenda Smith testified that she did not understand the price that she would or could be charged by Blue Pilot or how the price would be calculated by the Company. Tr. at 16. Specifically, during Ms. Smith's Direct Testimony, the following exchange took place regarding Ms. Smith's understanding of how Blue Pilot would set its price:

Q. Did you understand how Blue Pilot set its price?

A. No, actually. I didn't understand anything like I do now. I just knew that what I was told, guaranteed to have the lowest rate.

Q. What was your understanding of how long Blue Pilot would charge the lowest rate to you?

A. As long as I kept them as my electric company.

Q. Did Blue Pilot ever mention that you were signing up for a variable rate?

A. Never.

Q. Did you ever receive any documents or paperwork from Blue Pilot in the mail such as a disclosure statement or a welcome letter?

A. No, not that I recall.

Tr. at 16. Later in her testimony, Ms. Smith reiterated, "Never once was a variable rate mentioned." Tr. at 30.

The evidence on record in this proceeding establishes that Blue Pilot apparently charged Ms. Smith a variable rate and did not, in fact, provide Ms. Smith the savings that she had been promised. Ms. Smith testified that she became concerned with the price Blue Pilot was charging

her when she “looked at [her] electric bills” which just “blew [her] out of the water [...]” Exh. BS-1 includes a copy of five electric bills that Ms. Smith received during the time that she was a Blue Pilot customer for billing periods (1) November 21, 2013 through December 23, 2013; (2) December 23, 2013 through January 23, 2014; (3) January 23, 2014 through February 24, 2014; (4) February 24, 2014 through March 24, 2014; and (5) March 24, 2014 through April 28, 2014.

These bills show that Blue Pilot was not charging Ms. Smith a fixed rate, as her bills varied three months in a row, from 0.1050 per kWh to 0.1090 per kWh to 0.4490 per kWh, and then remained at 0.4490 per kWh for two more months. See Exh. BS-1; see also Tr. at 19-26. These electric bills also show that Blue Pilot charged Ms. Smith an amount that exceeded her Price to Compare (PTC) **each month**. Exh. BS-1; see also Tr. at 18-27. The record demonstrates that the aggregate amount Ms. Smith was charged above her PTC by Blue Pilot during the months for which Ms. Smith provided bills was \$5,207.61. Exh. BS-1; see also Tr. at 27. Since Ms. Smith did not receive savings for at least five months while she was with Blue Pilot, the promises of savings made by Blue Pilot’s sales representatives to induce Ms. Smith to switch to Blue Pilot were deceptive and misleading.

Blue Pilot failed to provide any evidence or witnesses to rebut Ms. Smith’s testimony that Blue Pilot promised to save her money every month if she switched suppliers or to rebut the evidence demonstrating that Blue Pilot charged her an aggregate of \$5,207.61 above her PTC. Blue Pilot also offered no evidence or witnesses to dispute Ms. Smith’s testimony that Blue Pilot’s sales representatives failed to provide her with accurate information regarding the price Blue Pilot would charge and how long Blue Pilot would charge that price. Additionally,

Blue Pilot did not offer any evidence or witnesses to challenge Ms. Smith's testimony that she does not recall receiving a Disclosure Statement after her enrollment with Blue Pilot.⁵

As such, the OCA submits that Blue Pilot has violated 52 Pa. Code §§ 54.4(a) (requiring that billed prices must reflect marketed prices); 54.5 (requiring an EGS to provide a customer written disclosure of the terms of service when the customer initiates service); 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 enables customers to compare the various electric generation services offered and the prices charged for each type of service"); 54.43(f) and 111.3(b) (relating to EGS responsibility for fraudulent, deceptive or other unlawful marketing acts by employees, agents and representatives); 111.5 (requiring that suppliers adequately train their agents on responsible and ethical sales practices and the supplier's products and services, *inter alia*); 111.12(d)(1) (prohibiting suppliers from making false or misleading representations); 111.12(d)(4) (requiring that EGSs "provide accurate and timely information"); and 111.12(d)(5) (requiring that EGSs ensure their offerings "contain information, verbally and written, in plain language designed to be understood by the customer"), 52 Pa. Code §§ 54.4(a), 54.5, 54.43(1), 54.43(f), 111.3(b), 111.5, 111.12(d)(2), 111.12(d)(4), and 111.12(d)(5).

d. Blue Pilot failed to properly handle Ms. Smith's complaint.

The record also establishes that Blue Pilot failed to properly handle Ms. Smith's complaint. Specifically, Blue Pilot failed to provide Ms. Smith with reasonable access to Company representatives for purposes of submitting her complaint regarding Blue Pilot's

⁵ Blue Pilot's defense consisted of four cross-examination questions regarding the bills Blue Pilot may have charged Ms. Smith prior to the ones on record in this proceeding, the year Ms. Smith enrolled with Blue Pilot, and the name of the Blue Pilot sales representative. See Tr. at 32-33. Additionally, Blue Pilot challenged the admissibility of Ms. Smith's testimony relating to statements made by Blue Pilot's sales representatives, which the OCA will address in Section II(5), below. See Tr. at 9-15.

charges. See Tr. at 16-18. Since Ms. Smith was unable to contact Blue Pilot regarding her complaint, Blue Pilot never properly investigated her dispute and failed to utilize good faith, honesty and fair dealing with Ms. Smith in violation of the Commission's regulations at 52 Pa. Code §§ 56.1(a) 56.141(a), 56.151, 56.152, and 111.13(a), (b), and the Company's Licensing Order.

Specifically, the record establishes that Ms. Smith was unable to contact Blue Pilot regarding her complaint. Ms. Smith testified as follows:

Q. Did you have any concerns about the price Blue Pilot was charging you?

A. When I did have concerns about the price was when I looked at my electric bill – and understand, I didn't micromanage my bills. My bills would come in and I would pay the bills, and I looked at my electric bill, and it showed the charge, and it just blew me out of the water and I didn't understand how it got like this. I didn't get why it was so high.

That's when I called, because my bill is PP&L. So I called the number there to find out why my electric bill was so high.

Q. Do you recall when you noticed that your electric bill was so high?

A. As far as the year, I'm thinking it would have been either January or February of 2014.

Q. You said that you called PPL first; is that correct?

A. Yes.

[...]

Q. What did the woman that you spoke with at PPL tell you?

A. She told me that I needed to call Blue Pilot, and I did call Blue Pilot and I did not get any response. No one picked up. I called back, because I knew that I couldn't afford this. I knew that I could not afford this. I called back to PP&L. PP&L told me that they would switch me back, but it had to go with the billing cycle.

Q. And did you ever speak with -- you said you tried to call Blue Pilot back again. To your recollection, did you ever speak with anybody at Blue Pilot?

A. No, I did not. As far as I can remember, I did not speak with anyone from Blue Pilot.

Tr. at 16-18. Thus, Blue Pilot's failure to answer Ms. Smith's calls regarding her high bill complaint and to execute the Company's process for responding to and resolving customer complaints is a violation of the Commission's rules and regulations.

Blue Pilot failed to provide any evidence to dispute the evidence that demonstrates that Blue Pilot failed to provide reasonable access to Company representatives for purposes of submitting complaints.

For the reasons expressed above, the OCA submits that Ms. Smith has met her burden of proving that Blue Pilot failed to provide reasonable access to Company representatives for purposes of submitting a complaint and failed to utilize good faith, honesty, and fair dealing with Ms. Smith in violation of the Commission's regulations at 52 Pa. Code §§ 56.1(a) 56.141(a), 56.151, 56.152, and 111.13(a), (b), and the Company's Licensing Order.

e. Ms. Smith's testimony regarding statements made by Blue Pilot's sales agent is admissible and capable of supporting findings of fact.

As noted, Blue Pilot failed to introduce any testimony or evidence to challenge Ms. Smith's assertions. Blue Pilot, however, challenged the admissibility of Ms. Smith's testimony regarding the statements made by Blue Pilot's sales representative at the evidentiary hearing, arguing that those statements constitute hearsay. See Tr. at 9-15.

To the extent Blue Pilot intends to raise a similar argument in its Main Brief, the OCA submits that Blue Pilot's argument is without merit. First, the Commission addressed the exact issue of whether statements made by a representative or agent of an EGS constitute hearsay in a 2016 Order. See Herp at 27-30. Specifically, in Herp, the Commission held: "The contents of

an agent's oral sales representations constitute an opposing party's statement, previously referred to in Pennsylvania case law as a party admission, which is an exception to the hearsay rule regardless of the availability of the agent as a witness." Herp at 29, citing Pa. R.E. 803(25). The Commission also held that such statements are capable of supporting a finding of fact. See Herp at 27-28. The Commission held:

We find that Mr. Herp has supported his complaint with credible testimony, based on his first-hand contact with Respond's agents.

[...]

Mr. Herp's testimony was the only evidence in the record of the actual events that occurred in this proceeding with respect to Mr. Herp's transactions. As the ALJ noted, Respond chose not to present the testimony of the actual third-party marketer, its agents under our regulations, to refute the nature of the oral representations made. Further, as the ALJ found, Respond did not attempt to audit or investigate the actions of that agent nor did the Company even know whether that agent was still employed as a third-party marketer.

Herp at 28.

The OCA submits that the Commission's reasoning and holding in Herp regarding the weight and admissibility of statements made by an EGS agent are controlling in this proceeding. Here, much like in Herp, Ms. Smith provided testimony based on her first-hand contact with Blue Pilot's sales agents. Ms. Smith's testimony is the only evidence on record in this proceeding related to Ms. Smith's experience with Blue Pilot's sales agent. Blue Pilot chose not to present the testimony of Blue Pilot's sales representative, the call recording when Ms. Smith initiated service, or any evidence indicating any attempt by Blue Pilot to investigate the actions of the Blue Pilot agent when Ms. Smith filed her informal complaint prior to March 2015. As such, Ms. Smith's testimony regarding statements made by Blue Pilot's sales agent are not hearsay and are capable of supporting findings of fact in this proceeding.

Additionally, even if it was determined that statements made by Blue Pilot's sales agents are hearsay, it is common knowledge within Commission practice that Presiding Officers are not bound by the technical rules of evidence in administrative hearings under the Pennsylvania Administrative Procedure Act. 2 Pa. Code § 505. It is also common knowledge that Commission ALJs generally accept statements that meet the definition of hearsay into the record and accord such evidence the appropriate weight. As noted by ALJ Buckley during the evidentiary hearing, specifically related to the declarations or acts of an agent acting within the scope of his or her authority, the Commission has held that such statements are admissible even if they are hearsay. Tr. at 14, citing C.S. Warthman Funeral Home, et. al., v. GTE North, Incorporated, Docket No. C-00924416, Order (June 4, 1993).

Thus, Ms. Smith's testimony related to statements made by Blue Pilot sales representatives is clearly admissible and capable of supporting findings of fact in this proceeding.

f. Relief Requested

The OCA requests that the Commission direct Blue Pilot to refund Ms. Smith an amount of \$5,207.61, which represents the difference between the amount that Blue Pilot charged Ms. Smith and the amount that Ms. Smith would have been charged had she remained with PPL during the time period from November 21, 2013 through April 28, 2014. See Exh. BS-1; see also Tr. at 27; see also Section III(1), above. The OCA submits that refunds are an appropriate remedy for the violations shown in this proceeding: Blue Pilot made misleading and deceptive promises of savings to induce Ms. Smith to switch suppliers, failed to provide her with accurate pricing and terms of service information, and failed to properly handle her complaint.

The Commission has the authority to order Blue Pilot to refund this amount to Ms. Smith in this proceeding. Section 501 of the Public Utility Code gives the Commission broad authority to address and remedy violations of the Public Utility Code and protect the rights of the public. See 66 Pa. C.S. § 501; see also Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. IDT Energy, Inc., Docket No. C-2014-2427657, Opinion and Order (Dec. 18, 2014) (IDT Order). In the IDT Order, the Commission specifically held that, in addition to having the authority to direct EGS refunds for slamming violations or when a customer has, otherwise, been switched to an EGS without his or her consent pursuant to 52 Pa. Code § 57.177(b), the Commission has plenary authority under Section 501 to direct an EGS to issue a credit or refund for an over bill. IDT Order at 17. The Commission stated:

Directing a billing adjustment for an EGS over bill of supply charges is within the Commission's Section 501 powers to carry out the consumer protections in the Electric Competition Act that are applicable to competitive electricity generation supply service. These consumer protections include the Section 2809(b) requirement that EGSs comply with the Commission's Regulations, including the Chapter 54 billing and disclosure regulations. Having the authority to order EGS credits and/or refunds carries out these statutorily-prescribed consumer protections by ensuring that electric generation supply bills are adjusted accordingly when an EGS, for example, fails to bill a customer in accordance with its disclosure statement, in violation of the Commission's Chapter 54 Regulations and, in turn, Code Section 2809(b). Thus, having the authority to order EGS billing adjustments, including refunds, under the appropriate circumstances, helps ensure that EGSs comply with the Commission's Regulations and bill customers in accordance with their disclosure statement - a fundamental consumer protection under the Electric Competition Act. *See* 66 Pa. C.S. § 2802(14) (" . . . Electric generation suppliers will be required to obtain licenses, demonstrate financial responsibility and comply with such other requirements concerning service as the commission deems necessary for the protection of the public.").

IDT Order at 17-18 (internal footnote omitted). Additionally, the Commission recently clarified that its authority to direct refunds is not limited to instances when an EGS fails to bill a customer in accordance with the disclosure statement but also extends to circumstances when an EGS:

Fail[s] to abide by our Regulations and applicable regulatory standards governing telemarketing and the information to be provided to customers – oral or written – also constitute[s] appropriate circumstances that justify ordering of a credit or refund.

Kiback at 33 (internal footnote omitted); see also Herp at 39, 43 (A refund is appropriate when an EGS agent’s marketing did not conform with the EGS’s subsequent billing).

The Commission re-affirmed its jurisdiction on this issue when it explicitly overruled a portion of an ALJ’s Initial Decision finding that the Commission lacked jurisdiction to order a refund or credit by an EGS in a recent Respond Power case. See Werle v. Respond Power, LLC, Docket No. C-2014-2429158, Opinion and Order at 8-9 (Feb. 23, 2015). Specifically, the Commission explained:

However, we do not agree with the ALJ’s statement that because we lack the authority to regulate EGS rates, we also lack the authority to order a refund or credit to the Complainant.

[...]

Moreover, in *Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Order entered December 18, 2014) (*IDT Order*), we found that the Commission has plenary authority under Section 501 of the Code, 66 Pa. C.S. § 501, to carry out the consumer protections in the Electric Competition Act, and direct an EGS to issue a credit or refund for an over bill in appropriate circumstances. As noted in the *IDT Order*, the appropriate circumstances include situations wherein an EGS fails to bill a customer in accordance with its disclosure statement, in violation of the Commission’s Chapter 54 Regulations and the Electric Competition Act.

Accordingly, while we find that we lack the authority to regulate EGS rates, we conclude that we may require EGSs to provide refunds to retail customers in appropriate circumstances.

Id. at 8; see also Werle v. Respond Power, Docket No. C-2014-2429158, Motion of Vice Chairman John F. Coleman, Jr. (Jan. 15, 2015) (The Commission has plenary authority pursuant to 66 Pa. C.S. § 501 to direct an EGS to issue a credit or refund for an over bill when the EGS fails to bill a customer in accordance with its disclosure statement in violation of 52 Pa. Code §§ 54.4(a) and 54.5(a)); Werle v. Respond Power, Docket No. C-2014-2429158, Motion of Commissioner Gladys M. Brown (Jan. 15, 2015) (Monetary remedies may be appropriately determined by the Commission with regard to EGS rates as they relate to, *inter alia*, marketing, disclosure and enrollments); see also Nadav v. Respond Power, LLC, Docket No. C-2014-2429159, Opinion and Order at 7 (Dec. 19, 2014) (Commission has authority and jurisdiction to require EGSs to provide refunds to retail customers in appropriate circumstances).

As such, the submits that the Commission has the authority to direct Blue Pilot to issue a refund to Complainant Brenda Smith in this proceeding and that such a remedy is appropriate in this case.

III. CONCLUSION

WHEREFORE, for the reasons set forth above, the OCA respectfully requests that the ALJ Buckley find that Blue Pilot violated the Commission's regulations at 52 Pa. Code §§ 54.4(a), 54.43(1), 54.43(f), 54.5, 56.1(a), 56.141(a), 56.151, 56.152, 111.3(b), 111.5, 111.12(d)(2), 11.12(d)(4), 111.12(d)(5), and 111.13(a), (b) and the Commission's Orders, specifically the Company's Licensing Order.

By way of relief, the OCA requests that the ALJ Buckley order Blue Pilot to refund Ms. Smith an amount of \$5,207.61, which represents the difference between the amount that Blue Pilot charged Ms. Smith and the amount that Ms. Smith would have been charged had she remained with PPL during the time period from November 21, 2013 through April 28, 2014.

Respectfully Submitted,

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