

COMMONWEALTH OF PENNSYLVANIA



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October 31, 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 Reply Brief in the above-referenced proceeding.

Copies have been served per the attached Certificate of Service.

Respectfully submitted,

A handwritten signature in cursive script that reads "Kristine E. Marsilio".

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Attachment

cc: Honorable Dennis J. Buckley
Certificate of Service

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 Reply 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 31st 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

REPLY BRIEF
OF THE OFFICE OF CONSUMER ADVOCATE

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TABLE OF CONTENTS

I. INTRODUCTION1

II. REPLY ARGUMENT2

 A. Burden of Proof..... 2

 B. Ms. Smith’s testimony regarding statements made by Blue Pilot’s sales agent is
admissible and capable of supporting findings of fact. 2

 1. Blue Pilot’s responsive pleading filed on April 3, 2015 provides no basis to make
any conclusions regarding Ms. Smith’s allegations against Blue Pilot..... 5

 C. The Commission has jurisdiction to order Blue Pilot to issue a refund to Ms. Smith in
this proceeding. 7

V. CONCLUSION10

TABLE OF AUTHORITIES

	Page(s)
Cases	
<u>Delmarva Power & Light Co. v. Pa. PUC,</u> 870 A.2d 901 (Pa. 2005).....	8
 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 Interlocutory Order</u>).....	8
<u>Commonwealth of Pennsylvania by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. Respond Power, LLC,</u> Docket No. C-2014-2427659, Order (Apr. 9, 2015).....	8
<u>Durante v. Blue Pilot Energy, LLC,</u> Docket No. F-2015-2487082, Order (March 14, 2016).....	9
<u>Herp v. Respond Power, LLC,</u> Docket No. C-2014-2413756, Opinion and Order (Jan. 28, 2016) (<u>Herp</u>).....	<i>passim</i>
<u>Kiback v. IDT Energy, Inc.,</u> Docket No. C-2014-2409676, Order (Aug. 20, 2015).....	9
<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)	10
<u>Nadav v. Respond Power, LLC,</u> Docket No. C-2014-2429159, Order (Dec. 19, 2014)	9
<u>Gruelle c/o Toll Diversified Properties, Inc. v. Blue Pilot Energy, LLC,</u> Docket No. C-2015-2463573, Opinion and Order (Dec. 22, 2015) (<u>Gruelle</u>).....	2, 3, 4
<u>Werle v. Respond Power, LLC,</u> Docket No. C-2014-2429158, Order (Feb. 23, 2015).....	9

Statutes

Pa. R.E. 8033
Pa. R.E. 803(25).....2, 3
66 Pa. C.S. § 501.....7, 8
66 Pa. C.S. §§ 501 and 2809(e)9
66 Pa. C.S. § 2809.....7, 8
66 Pa. C.S. § 3301.....7
66 Pa. C.S. Ch. 28.....7

Regulations

52 Pa. Code § 5.625
52 Pa. Code § 5.635
52 Pa. Code § 5.63(b)6
52 Pa. Code § 5.536(a).....3
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)10
52 Pa. Code § 57.177(b)8

I. INTRODUCTION

The Office of Consumer Advocate (OCA) files this Reply Brief in response to the Main Brief filed by Blue Pilot Energy, LLC (Blue Pilot or the Company) in the above-captioned proceeding.

On October 17, 2017, the OCA filed a Main Brief in support of the Formal Complaint filed by consumer Complainant Brenda Smith against Blue Pilot. In its Main Brief, the OCA argued that the evidence on record 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 her with 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 requested 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. The OCA also addressed the Commission's jurisdiction to issue refunds in this proceeding. The OCA Main Brief also addressed Blue Pilot's argument that Ms. Smith's testimony regarding statements made by Blue Pilot's sales agents is inadmissible hearsay.

Blue Pilot also filed a Main Brief on October 17, 2017. In its Main Brief, Blue Pilot argued that the Commission may not rely on the testimony of Ms. Smith regarding statements made by Blue Pilot representatives, as these statements constitute uncorroborated hearsay and that the Commission does not have the statutory authority to order Blue Pilot to issue refunds in this proceeding. The OCA files this Reply Brief to address the errors in Blue Pilot's arguments.

II. REPLY ARGUMENT

A. Burden of Proof

In its Main Brief, Blue Pilot addressed the burden of proof. Blue Pilot M.B. at 3. The OCA also discussed the burden of proof in its Main Brief. See OCA M.B. at 2-3. That discussion is incorporated herein.

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

In its Main Brief, Blue Pilot argues that that Ms. Smith did not meet her burden of proof, because the only evidence she presented to support her allegations is her own account of the conversation with Blue Pilot's sales agents, which constitutes uncorroborated hearsay. Blue Pilot M.B. at 4-5. In support of its argument, Blue Pilot relies on Gruelle c/o Toll Diversified Properties, Inc. v. Blue Pilot Energy, LLC, Docket No. C-2015-2463573, Opinion and Order (Dec. 22, 2015) (Gruelle).

Blue Pilot's argument is without merit. Blue Pilot incorrectly characterizes Ms. Smith's testimony as hearsay. As the OCA discussed in its Main Brief, Ms. Smith's testimony regarding statements made by Blue Pilot's sales agents are not hearsay, as they constitute opposing party's statements, which are an exception to the hearsay rule. OCA M.B. at 13-15; Herp v. Respond Power, LLC, Docket No. C-2014-2413756, Opinion and Order at 29 (Jan. 28, 2016) (Herp); Pa. R.E. 803(25). The Pennsylvania Rules of Evidence defines an opposing party's statement, as follows:

(25) *An Opposing Party's Statement.* The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) **was made by the party's agent or employee on a matter within the scope of that relationship and while it existed;** or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

Pa. R.E. 803(25) (emphasis added). Opposing party's statements are "not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness." Pa. R.E. 803.

In Herp, the Commission specifically held that the contents of an EGS agent's oral representations constitute an opposing party's statement, are not uncorroborated hearsay, and are capable, even without corroborating evidence, of supporting findings of fact. See Herp at 27-29; see also OCA M.B. at 14. The Herp decision succeeded the Gruelle decision. Additionally, it is worth noting that, unlike Herp, the Initial Decision in Gruelle was adopted without Commission action pursuant to the Commission's procedural rules. See Gruelle at 1; see also 52 Pa. Code § 5.536(a) (If no exceptions are filed, the decision of the administrative law judge will become final without further Commission action).

Further, even without the more-recent and contradictory Herp decision, Blue Pilot's reliance on Gruelle is without merit. Although the presiding Administrative Law Judge (ALJ) in Gruelle found that the commercial consumer complainant's testimony regarding sales contact was hearsay, the ALJ also found that the complainant's testimony about the sales contact was not credible. Gruelle at 16-18 (Oct. 27, 2015). The ALJ specifically linked her finding of hearsay to her credibility determination, even suggesting that the testimony regarding sales contacts may qualify as a hearsay exception, but for the lack of credibility of the testimony. See Gruelle at 16-

17. Specifically, the ALJ held: “While the Complainant may refer to the hearsay as an admission against interest here, the inconsistencies in Ms. Gruelle’s testimony results in a finding that Ms. Gruelle’s claims [about the promises made by the EGSs’ representative are] not credible.” Gruelle at 16-17. The ALJ’s credibility determination in Gruelle was based on inconsistencies with the complainant’s testimony that were demonstrated through evidence presented by Blue Pilot and cross-examination. In other words, in Gruelle, the supplier presented contrary evidence to challenge the evidence provided by the complainant.

Here, unlike in Gruelle, Blue Pilot did not present any testimony or evidence to challenge Ms. Smith’s credibility or to otherwise challenge her allegations.¹ Also unlike in Gruelle, Blue Pilot did not suggest or demonstrate any inconsistencies with Ms. Smith’s testimony. In fact, Blue Pilot did not specifically deny any of Ms. Smith’s factual allegations. Blue Pilot could have presented the testimony of Blue Pilot’s sales representative, the call recording when Ms. Smith initiated service, or any evidence related to Blue Pilot’s marketing practices or attempts by Blue Pilot to investigate Ms. Smith’s allegations. Blue Pilot chose not to do so.

Additionally, as noted by the OCA in its Main Brief and by Judge Buckley during the evidentiary hearing in this proceeding, the Commission has held that declarations or acts of an agent acting within the scope of his or her authority are admissible even if they are hearsay. See OCA M.B. at 15; see also Tr. at 14, citing C.S. Warthman Funeral Home, et. al., v. GTE North, Incorporated, Docket No. C-00924416, Order (June 4, 1993). As such, the OCA submits that the testimony of Ms. Smith regarding statements made by Blue Pilot’s sales agents is admissible and

¹ In fact, Blue Pilot’s only apparent challenge to Ms. Smith’s credibility is its assertion in its Main Brief that Ms. Smith did not provide certain additional evidence or information to support her allegations, including written materials to support her claims of overbilling. See Blue Pilot M.B. at 5. It is worth noting again that such information is not required to support a finding of fact. See Herp at 28. Further, Ms. Smith testified that she did not receive any documents or paperwork from Blue Pilot, such as a Disclosure Statement or Welcome Letter. Tr. at 16.

capable of supporting findings of fact. The OCA further submits that Ms. Smith has met her burden of proof, and Blue Pilot has failed to provide any valid defense to rebut the evidence offered by Ms. Smith.

1. **Blue Pilot's responsive pleading filed on April 3, 2015 provides no basis to make any conclusions regarding Ms. Smith's allegations against Blue Pilot.**

In its Main Brief, Blue Pilot also asserts that Ms. Smith did not file a Reply to Blue Pilot's New Matter. Blue Pilot M.B. at 6. As such, Blue Pilot concludes that the Commission may rely on Blue Pilot's affirmative defenses averred in the New Matter to conclude that Blue Pilot's prices were consistent with Ms. Smith's contract and that Blue Pilot provided all required disclosures to the Complainant. Blue Pilot M.B. at 6. In support of its position, Blue Pilot relies on 52 Pa. Code § 5.63.

The OCA submits that Blue Pilot's reliance on 52 Pa. Code § 5.63 is without merit. First, the Commission's regulations require that Answers raising New Matter "shall be pleaded in an answer or other responsive pleading under the heading of "New Matter." 52 Pa. Code § 5.62. Blue Pilot's Answer does not properly label its affirmative defenses as "New Matter," as required by the Commission's regulations. See Blue Pilot Answer.² As such, Ms. Smith was not required to provide a response. The OCA submits that, as Ms. Smith is a pro se complainant, any failure on the part of Blue Pilot to precisely follow the Commission's regulations is especially critical.

Second, Section 5.63 of the Commission's regulations provides, in pertinent part, as follows: "Failure to file a timely reply to new matter may be deemed in default, and relevant

² The OCA has not included pinpoint citations to Blue Pilot's Answer, because the pages are not numbered, and the "Affirmative Defenses" portion of the Answer does not include numbering paragraphs.

facts stated in the new matter may be deemed to be admitted.” 52 Pa. Code § 5.63(b) (emphasis added). Even if Blue Pilot had appropriately labeled its New Matter as such, none of Blue Pilot’s affirmative defenses contain any **facts** which may be deemed admitted. Rather, Blue Pilot merely makes legal conclusions, without providing any supporting factual information. For example, Blue Pilot asserts in its Fourth Affirmative Defense, “The Respondent has fulfilled all their contractual and legal obligations due to the Complainant, and thus does not owe the Complainant anything.” To the contrary, factual allegations could include statements regarding the nature of Blue Pilot’s legal obligations to Ms. Smith and the measures that Blue Pilot took to fulfill those obligations. Similarly, all of Blue Pilot’s Affirmative Defenses are legal conclusions that do not contain supporting factual information. As such, even if Blue Pilot had raised “New Matter,” 52 Pa. Code § 5.63(b) would not apply.

Third, it is worth noting that Blue Pilot filed its Answer raising its affirmative defenses on April 3, 2015. If Blue Pilot had properly asserted “New Matter,” Ms. Smith’s Answer would have been due on April 23, 2015. Blue Pilot never asserted, until now, that Blue Pilot’s affirmative defenses could be relied upon “to conclude that [Blue Pilot’s] prices were consistent with the Complainant’s contract and that [Blue Pilot] provided all required disclosures to the Complainant.” Blue Pilot never argued to Judge Buckley that a hearing was unnecessary, because there were no factual allegations still in dispute in this proceeding. Accordingly, an evidentiary hearing was held in this proceeding. It is untimely for Blue Pilot to now assert that the affirmative defenses raised in its responsive pleading on April 3, 2015 are sufficient to support conclusions of law. As such, the OCA submits that Blue Pilot’s responsive pleading filed on April 3, 2015 provides no basis to make any conclusions regarding Ms. Smith’s allegations against Blue Pilot.

C. **The Commission has jurisdiction to order Blue Pilot to issue a refund to Ms. Smith in this proceeding.**

In its Main Brief, Blue Pilot argues that the Commission lacks jurisdiction to order Blue Pilot to issue a refund. See Blue Pilot M.B. at 6-13. Blue Pilot makes several arguments in support of its position that the Commission lacks jurisdiction to order an EGS to issue refunds, including the following: 1) the Commission lacks statutory authority to award money damages. 2) since the Commission lacks the authority to regulate EGS prices, it follows that the Commission lacks the authority to issue refunds to customers; 3) there is no express statutory authority granting the Commission the authority to direct EGSs to issue refunds; and 4) the broad authority given to the Commission under Section 501 of the Public Utility Code, 66 Pa. C.S. § 501, does not confer implicit authority on the Commission to direct EGSs to issue refunds. See Blue Pilot M.B. at 6-13.

Blue Pilot's arguments that the Commission lacks jurisdiction to issue refunds lack merit. If Blue Pilot's arguments were valid, the Commission would essentially be left only with the options of imposing civil penalties pursuant to Section 3301 of the Public Utility Code, 66 Pa. C.S. § 3301, or revocation of the EGS's license pursuant to Section 2809 of the Public Utility Code, 66 Pa. C.S. § 2809. This would be an untenable result for both the retail market and consumer protection. Specifically, acceptance of these arguments would hamstring the Commission in EGS cases and would run directly contrary to the grant of broad powers by the General Assembly through Section 501 of the Public Utility Code, 66 Pa. C.S. § 501; it would also undermine the Commission's ability to enforce the Choice Act, 66 Pa. C.S. Ch. 28, as the General Assembly intended. Acceptance of Blue Pilot's arguments would also be inconsistent with the Commission's obligation to effectively monitor and enforce retail energy

market regulations and protect consumers in accordance with 66 Pa. C.S. § 2809. The Commission should reject these contentions relative to issuance of refunds.

Moreover, the OCA has fully supported its position that the Commission has jurisdiction to order Blue Pilot to refund Ms. Smith in this case. OCA M.B. at 15-18. The Commission has both affirmed and invoked its power to order an EGS to issue refunds. See e.g. Commonwealth of Pennsylvania by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. Respond Power, LLC, Docket No. C-2014-2427659, Order at 27-28 (Apr. 9, 2015); 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 at 17-18 (Dec. 18, 2014) (IDT Interlocutory Order). In the IDT Interlocutory 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 of the Public Utility Code, 66 Pa. C.S. § 501, to direct an EGS to issue a credit or refund for an over bill. IDT Interlocutory Order at 17-18. Further, the Pennsylvania Supreme Court in Delmarva Power & Light Co. v. Pa. PUC, 870 A.2d 901 (Pa. 2005) confirmed that in regulating the service of EGSs, the Commission shall impose the requirements “necessary to ensure that the present quality of service ... does not deteriorate, including ... assuring that” standards and billing practices for residential utility service are maintained. Delmarva at 254-55, 911, citing 66 Pa. C.S. § 2809(e).

The Commission recently clarified that its authority to direct refunds includes instances when an EGS fails to abide by regulatory standards governing telemarketing or in any “appropriate circumstances.” Kiback v. IDT Energy, Inc., Docket No. C-2014-2409676, Order at 31-33 (Aug. 20, 2015); see also Werle v. Respond Power, LLC, Docket No. C-2014-2429158, Order at 8-9 (Feb. 23, 2015) (Commission explicitly overruled the portion of the ALJ’s Initial Decision concluding that the Commission lacked jurisdiction to order a refund or credit); see also Nadav v. Respond Power, LLC, Docket No. C-2014-2429159, Order at 7 (Dec. 19, 2014); see also Durante v. Blue Pilot Energy, LLC, Docket No. F-2015-2487082, Order at 9 (March 14, 2016) (“We disagree with the ALJ’s legal conclusion that there is no remedy here. [...] we conclude that the Company’s failure to bill the Complainant at the rate offered and accepted constitutes a violation of Sections 54.4(a) and 54.7(a) of our Regulations, 52 Pa. Code §§ 54.4(a) and 54.7(a). [...] To address this violation, we direct the Company to refund the Complainant the net difference between the rate charged for the March 2014 bill [...] and the rate offered and agreed upon [...].”); see also Herp at 39 (“[W]e find the ALJ correctly concluded that Respond’s agent’s marketing did not conform with Respond’s subsequent billing, resulting in violations of our Regulations and constituting appropriate circumstances warranting a refund.”). In light of these recent decisions, it is clear that the Commission has jurisdiction to order EGSs to issue refunds, as such remedies are essential to preserving the quality of electric service in this Commonwealth. See 66 Pa. C.S. §§ 501 and 2809(e).

Here, Ms. Smith has demonstrated that Blue Pilot’s prices charged did not match the promises of savings made by Blue Pilot representatives, in violation of the Commission’s regulations and Orders. The Commission has already determined that refunds are appropriate in


these circumstances. See e.g. Herp v. Respond Power at 39. As such, the Company's assertions that the Commission lacks authority or jurisdiction to direct refunds in this matter must be rejected.

V. 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, 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).

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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