



Eckert Seamans Cherin & Mellott, LLC
213 Market Street
8th Floor
Harrisburg, PA 17101

TEL 717 237 6000
FAX 717 237 6019
www.eckertseamans.com

Karen O. Moury
717.237.6036
kmoury@eckertseamans.com

October 31, 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 Reply Brief with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,

A handwritten signature in black ink, appearing to be 'K. Moury'.

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 Reply Brief upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

Via First Class Mail

Brenda Smith
159 Alva Drive
Harrisburg, PA 17112


Via First Class Mail and Electronic Mail

Graig M. Schultz, Esq.
Gross McGinley LLP
33 South Seventh St.
PO Box 4060
Allentown, PA 18105-4060
gschultz@grossmcginley.com

Kristine E. Marsilio, Esq.
Office of Consumer Advocate
555 Walnut Street
Fifth Floor, Forum Place
Harrisburg, PA 17101-1923
KMarsilio@paoca.org

Hon Dennis J. Buckley
Administrative Law Judge
PA Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265
debuckley@pa.gov

Date: October 31, 2017



Karen O. Moury, Esq.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

BRENDA SMITH

v.

BLUE PILOT ENERGY, LLC

:
:
:
:
:

Docket No. F-2015-2472890

REPLY BRIEF OF BLUE PILOT ENERGY, LLC

Karen O. Moury
Attorney ID #36579
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101
(717) 237-6000 (phone)
(717) 237-6019 (fax)
kmoury@eckertseamans.com

Dated: October 31, 2017

Counsel for Blue Pilot Energy, LLC

I. STATEMENT OF THE CASE

In accordance with the briefing schedule established for this proceeding by Administrative Law Judge Buckley, Blue Pilot Energy, LLC (“BPE”) and the Office of Consumer Advocate (“OCA”) filed Main Briefs on October 17, 2017. BPE is filing this Reply Brief to respond to three specific issues in OCA’s Main Brief. BPE incorporates by reference its Main Brief.

II. SUMMARY OF ARGUMENT

First, OCA’s reliance on the Commission’s order in *Herp v. Respond Power, LLC*,¹ to argue that the Commission may base a finding on uncorroborated hearsay evidence ignores decades of precedent from both the Commission and the appellate courts in Pennsylvania. While hearsay evidence may be admitted into the record, it is well-established that it may not support a finding of an administrative agency unless it is corroborated by other evidence. Merely because the Commission departed from prior case law in the *Herp* order, which was not appealed, that departure does not justify the adoption of further orders that are contrary to well-settled precedent. Also, in *Herp*, the Commission found that the hearsay evidence was indeed corroborated by other evidence in the record, which is a factor that is not present here.

Second, prior to the filing of OCA’s Main Brief, BPE had no notice of any allegations concerning the proper handling of Complainant’s Complaint and had no opportunity to review its records for the purpose of presenting evidence of contacts that Complainant may have had with BPE. Therefore, to make any findings that BPE violated the Commission’s regulations governing the handling of complaints would violate its due process rights. Further, the only evidence about the Complainant’s attempt to reach BPE was that she made a telephone call and did not get a response.² Since according to the Complainant, she did not speak to anyone at BPE, the record

¹ Docket No. C-2014-2413756 (Order entered January 28, 2016).

² Tr. at 13.

does not support a finding that BPE violated Commission regulations that establish complaint handling standards. Importantly, nothing in those regulations imposes a requirement on regulated entities to answer a telephone call within a certain amount of time.

Third, contrary to the arguments in OCA's Main Brief, the record in this proceeding certainly does not establish that BPE failed to provide the Complainant with a disclosure statement after her enrollment. Notably, the Complainant also did not raise this issue in her Complaint, which was focused on the prices charged by BPE and alleged statements made by BPE's sales agent. Therefore, BPE was not on notice about any allegations that it had violated the Commission's disclosure statement regulations and did not have an opportunity to review its records for the purpose of presenting evidence to the contrary. Further, the Complainant only testified that she did not recall receiving a disclosure statement; this testimony is far from "proof" that BPE violated any regulation.³ Accordingly, it would be inappropriate for the Commission to find that BPE violated the regulations that require electric generation suppliers ("EGSs") to provide disclosure statements.

III. ARGUMENT

A. Uncorroborated Hearsay Testimony May Not Support Findings.

In its Main Brief, BPE set forth the well-established case law that the hearsay rule must be followed by administrative agencies when facts crucial to an issue are sought to be placed on the record. The general rule is that hearsay evidence is not competent to support a finding by an administrative agency. Even when it is admitted, 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. A finding of fact based solely on hearsay will not stand.⁴ In *Gruelle c/o Toll Diversified*

³ Tr. at 16.

⁴ BPE Main Brief at 4.

Properties, Inc. v. PPL Electric Utilities Corporation and Blue Pilot Energy, LLC,⁵ the Commission followed this long-standing precedent and dismissed a customer complaint on the basis that the only evidence presented at the hearing was the complainant's own hearsay account of statements of the EGS's sales agent.⁶

OCA relies almost exclusively on the Commission's *Herp* order to argue that decades of well-established case law should now be ignored so that the Commission may make findings on the basis of uncorroborated hearsay evidence. Notably, the case law that OCA would have the Commission ignore includes Pennsylvania Supreme Court and Commonwealth Court decisions.⁷ During the argument on BPE's hearsay objection at the hearing, OCA contended that because the *Herp* order was entered after the *Gruelle* order, it somehow takes precedence. Tr. at 9-15. To the extent that OCA's Reply Brief reiterates this argument, it should be soundly rejected since the Commission may not overturn decades of Pennsylvania precedent, including that of appellate courts. Simply stated, in the *Gruelle* order, the Commission correctly interpreted and applied the long-standing Pennsylvania law correctly, and, respectfully, got it wrong in the *Herp* order, which was not appealed.

Further, the discussion in OCA's Main Brief about the admissibility of hearsay that constitutes an opposing party's statement or is made by an agent acting within the scope of his authority⁸ has no bearing on whether the Commission may make a finding on the basis of that

⁵ Docket No. C-2015-2463573 (Initial Decision served November 18, 2015 adopted by Final Order entered December 22, 2015), Initial Decision at 17.

⁶ BPE Main Brief at 4-5.

⁷ See *Bleilevens v. Pa. State Civil Service Comm'n*, 11 Pa. Commw. Ct. 1, 312 A.2f 109 (1973); *Gibson v. W.C.A.B.*, 861 A.2d 938 (Pa. 2004); *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366 (Pa. Cmwlth. 1976).

⁸ OCA Main Brief at 14-15.

evidence. The questions of admissibility and reliance on hearsay are two different matters. BPE does not dispute that hearsay evidence is often admitted in Commission proceedings either due to relaxed rules or because of an applicable exception to the hearsay rule. However, even when hearsay is admitted or admissible, the case law cited by BPE is clear that absent any corroboration, the hearsay evidence may not be relied upon by the Commission to make a finding. Notably, in making its findings in the *Herp* order, the Commission relied heavily on other evidence in the record as corroborating the complainant's hearsay testimony.⁹ No such evidence exists here. Therefore, the Complainant's hearsay testimony may not lawfully support a finding that BPE violated the Commission's regulations, and the Complaint in its entirety must be dismissed.

B. The Record Does Not Support a Finding that BPE Violated the Commission's Regulations Governing Complaint Handling.

In its Main Brief, OCA contends that BPE failed to properly handle the Complainant's Complaint and argues that the Commission should find that BPE violated a series of regulations in Chapter 56 of the Commission's regulations, as well as Section 111.3 of the Commission's regulations and the Commission's order granting BPE's license application.¹⁰ This argument is based on the Complainant's uncorroborated hearsay testimony that she attempted call BPE one time and that no one picked up her call. OCA's Main Brief makes no effort to link the requirements of the Chapter 56 regulations with an EGS's failure, assuming it is true, to pick up one call from a customer. Rather, OCA provides a string of citations and submits that the Complainant has met her burden of proving that BPE did not provide reasonable access to Company representatives for

⁹ *Herp* order at 20-22, 27-30.

¹⁰ OCA Main Brief at 11-12.

purposes of submitting a complaint and failed to utilize good faith, honesty, and fair dealing with Complainant in violation of those regulations.¹¹

At the outset, BPE notes that Complainant did not even allege in her Complaint that BPE failed to provide reasonable access to Company representatives or failed to utilize good faith, honesty and fair dealing with her. Nor was the Complaint amended at any time, including at the hearing to conform to the evidence.¹² Therefore, BPE was not on notice that its complaint handling procedures were under review and had no opportunity to review its records for purposes of presenting evidence to the contrary. For the Commission to conclude that BPE violated a series of regulations relating to complaint handling would result in BPE being deprived of fundamental due process rights.¹³

Moreover, the only shred of evidence in the record to support OCA's argument is the Complainant's hearsay testimony that she called BPE one time and no one picked up the telephone. She did not even indicate how long she waited for someone to answer the call.¹⁴ OCA has not explained how the failure of an EGS to answer one telephone call from a customer translates into failing to provide reasonable access to Company representatives or a failure to utilize good faith, honesty and fair dealing with the customer.¹⁵

¹¹ OCA Main Brief at 13.

¹² See 52 Pa. Code § 5.92(b). Even though BPE did not object to the Complainant's testimony about calling BPE, it did not consent to having this issue treated as if it had been raised in the pleadings. BPE was not aware until the OCA's Main Brief was filed that it intended to rely on this testimony to allege a violation of Commission regulations.

¹³ See *Pa. P.U.C. v. Yellow Cab of Pittsburgh*, Docket No. C-2012-2249031 (Order entered February 6, 2014); *Pocono Water Co. v. Pa. PUC*, 630 A.2d 971, 973 (Pa. Cmwlth. 1993).

¹⁴ Tr. at 16-18.

¹⁵ OCA Main Brief at 11-13.

A review of the regulations cited by OCA shows that none of them support a finding that a failure by a regulated entity to pick up the telephone one time constitutes a violation of any requirement therein. Section 111.13(a) and (b) of the Commission's regulations requires EGSs to investigate customer inquiries, disputes and complaints and to implement an internal process for responding to and resolving customer inquiries, disputes and complaints.¹⁶ Even if BPE failed to pick up one call from the Complainant, that is not evidence of a failure to investigate customer complaints or to implement an internal process for responding to and resolving customer complaints. Similarly, Section 56.1(a) of the Commission's regulations merely describes the purpose of Chapter 56 as establishing and enforcing uniform, fair and equitable residential service and billing standards. It does not require regulated entities to promptly answer telephone calls. Indeed, none of the provisions relied upon by OCA impose such a requirement. Section 56.141(1) only requires entities to attempt to resolve disputes;¹⁷ Section 56.151 governs the process that must follow once a customer initiates a dispute;¹⁸ and Section 56.152 establishes the contents of the company's report following an investigation.¹⁹

As nothing in the Commission's regulations establishes a standard that must be followed in answering a customer's only telephone call, the record in this proceeding does not support a finding that BPE violated any of the regulations cited by OCA governing complaint handling. OCA's arguments should be rejected.

¹⁶ 52 Pa. Code § 111.13(a) and (b).

¹⁷ 52 Pa. Code § 56.141(1).

¹⁸ 52 Pa. Code § 56.151.

¹⁹ 52 Pa. Code § 56.152.

C. The Record Does Not Support a Finding that BPE Violated the Commission's Disclosure Statement Regulations.

Contrary to the arguments in OCA's Main Brief, the record in this proceeding does not establish that BPE failed to provide the Complainant with a disclosure statement after her enrollment.²⁰ Again, the Complainant did not even raise that issue in her Complaint, which was focused on the prices charged by BPE. Nor was the Complaint amended at hearing to conform to the evidence.²¹ Therefore, BPE was not on notice about any allegations that it had violated the Commission's disclosure statement regulations and did not have an opportunity to review its records for the purpose of presenting evidence to the contrary. For the Commission to conclude that BPE violated these regulations would deprive of its due process rights.²²

Moreover, the Complainant only testified that she did not recall receiving a disclosure statement; this testimony is far from "proof" that BPE violated any regulation. Tr. at 16. To satisfy a burden of proof, a complaining party must prove the facts alleged in the Complaint.²³ Also, the Commission's adjudication must be based on substantial evidence.²⁴ More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.²⁵ Absent any allegation in the Complaint suggesting that no disclosure statement was received, coupled with the Complainant's testimony indicating only that she does not recall receiving one, the Commission lacks substantial evidence upon which to conclude that BPE violated the disclosure statement regulations.

²⁰ OCA Main Brief at 8-9.

²¹ See BPE Reply Brief at 5, footnote 12.

²² See BPE Reply Brief at 5, footnote 10.

²³ *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990).

²⁴ *Mill v. Cmwlth., Pa. Pub. Util. Comm'n*, 447 A.2d 1100 (Pa. Cmwlth. 1982).

²⁵ *Norfolk and Western Railway Co. v Pa. Pub. Util. Commn*, 489 Pa. 109, 413 A.2d 1037 (1980).

III. CONCLUSION

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

Respectfully submitted,



Karen O. Moury
I.D. No. 36879
Eckert Seamans Cherin & Mellott, LLC
213 Market St., 8th Floor
Harrisburg, PA 17101
717.237.6036
kmoury@eckertseamans.com

Dated: October 31, 2017

Counsel for Blue Pilot Energy, LLC