



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

August 11, 2014

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Pennsylvania Public Utility Commission, Bureau of Investigation
and Enforcement v. HIKO Energy, LLC
Docket No. C-2014-2431410

Dear Secretary Chiavetta:

Enclosed for filing is the Answer to Preliminary Objections on behalf of the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission in the above-referenced matter. Copies have been served on the parties of record in accordance with the Certificate of Service.

Should you have any questions, please feel free to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "M. Swindler".

Michael L. Swindler
Prosecutor
PA Attorney ID No. 43319

Enclosure

cc: As per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,	:	
Bureau of Investigation and Enforcement,	:	
Complainant,	:	
	:	
v.	:	C-2014-2431410
	:	
HIKO Energy, LLC,	:	
Respondent	:	

**ANSWER OF THE BUREAU OF INVESTIGATION AND ENFORCEMENT
TO THE PRELIMINARY OBJECTIONS OF HIKO ENERGY, LLC**

NOW COMES, the Bureau of Investigation and Enforcement (I&E) of the Pennsylvania Public Utility Commission (Commission), Complainant in the above-docketed matter, by and through its prosecuting attorneys, and files this Answer to the Preliminary Objections of HIKO Energy, LLC (HIKO, Company or Respondent), pursuant to 52 Pa. Code § 5.101(f). In support thereof, I&E avers as follows:

I. INTRODUCTION

On July 11, 2014, I&E filed a Formal Complaint against Respondent at Docket No. C-2014-2431410, alleging that Respondent violated the Commission's regulations at 52 Pa. Code § 54.4(a), which reads:

- (a) EGS prices billed must reflect the marketed prices and the agreed upon prices in the disclosure statement.

As a result, I&E seeks appropriate relief, including that the Commission: (1) find Respondent to be in violation of 52 Pa. Code § 54.4(a) for each of the 14,780 counts set

forth in the Formal Complaint; (2) impose a cumulative civil penalty upon Respondent in the amount of Fourteen Million Seven Hundred Eighty Thousand Dollars (\$14,780,000.00)¹; (3) rescind the authority of Respondent to do business as an electric generation supplier (EGS) in Pennsylvania; (4) direct Respondent to provide a refund to each customer consisting of the difference between the amount the customer was billed and the guaranteed discounted rate the customer was entitled to receive; and (5) order such other remedy as the Commission may deem to be appropriate.

On July 31, 2014, Respondent, through counsel, filed Respondent HIKO Energy, LLC's Preliminary Objections, at the above docket.² In its Preliminary Objections, HIKO argues that the doctrine of *lis pendens* mandates the dismissal of I&E's Formal Complaint or, in the alternative, the stay or consolidation of the Complaint and that the Complaint's request for restitution (i.e., refunds) should be dismissed on the basis, as alleged by HIKO, that the Commission has no authority to demand refunds from an EGS.

As set forth in detail below, the Joint Complaint brought by the Office of Attorney General (OAG) and Office of Consumer Advocate (OCA) (Complaint of OAG and OCA) is *not* the same as I&E's Complaint, does not involve the same parties and does not request the same relief. Moreover, HIKO's claim that the Commission does not have the authority to direct refunds to customers where the EGS contractually guarantees a capped introductory rate and then bills the customer up to 400% of that guaranteed rate is dubious at best and must be summarily dismissed.

¹ This proposed civil penalty was calculated by multiplying the number of violations (14,780 counts) by \$1,000 per violation, the maximum sum permitted to be assessed per violation pursuant to 66 Pa.C.S. § 3301.

² On July 31, 2014, Respondent, through counsel, also separately filed its Answer and New Matter to I&E's Formal Complaint, to which I&E shall separately respond.

II. BACKGROUND

1. Admitted.

2. Admitted.

3. Admitted.

4. Admitted in part. Denied in part. It is admitted that the sustained period of cold weather experienced by Pennsylvania consumers and resulting in an increase in electricity usage during the winter months beginning January 2014 has been referred to as the “polar vortex.” I&E’s Complaint states:

According to HIKO, the winter season of 2013-2014 brought unprecedented costs related to what has been generally referred to as the “polar vortex” and, as a result, there was a period of time where HIKO’s rates did not reflect the offer guaranteed in its price offering.

I&E Complaint at Paragraph 19. By way of further Answer, it is denied that the Commission Order in *Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, M-2014-2406134 (Order entered March 4, 2014) (March 4, 2014 Order) made any explicit reference to HIKO. As to the remainder of this Paragraph, I&E is without knowledge sufficient to form a belief as to the truth of the matters asserted and the same are therefore denied and proof thereof demanded.

5. Admitted. By way of further Answer, the Commission Order in *Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, M-2014-2406134 (Order entered March 4, 2014) speaks for itself.

I&E avers that any Commission investigation of underlying wholesale cost spikes has no bearing on the 14,780 specific violations set forth in the I&E Complaint regarding HIKO's flagrant disregard for the terms of its price offering to customers that guaranteed HIKO EGS customers a rate for "the first six monthly billing cycles" (the introductory period) that would be "1-7% less" than the local EDC's price to compare.³ By way of further Answer, the March 4, 2014 Order referenced in HIKO's Preliminary Objections also states, in pertinent part:

In many cases, EGSs voluntarily absorbed loses during this period in order to maintain long term contractual relationships with customers. However, not all EGSs acted to mitigate the financial hardship experienced by their customers. In particular, retail rates under some variable priced contracts appear to have passed the full impact of record wholesale costs on to Pennsylvania retail customers.

March 4, 2014 Order at 2.

6. Admitted. By way of further Answer, the Commission Order in *Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, M-2014-2406134 (Order entered March 4, 2014) speaks for itself.

I&E avers that any reference to the number of complaints received by the Commission has no bearing on the 14,780 specific violations set forth in the I&E Complaint regarding HIKO's flagrant disregard for the terms of its price offering to customers that guaranteed HIKO EGS customers a rate for "the first six monthly billing cycles" (the introductory period) that would be "1-7% less" than the local EDC's price to compare. As to the

³ This price offering was designated by HIKO in each applicable EDC service territory as follows: HK001 (Duquesne), METE-SAV1-7 (Met-Ed), PECE-SAV1-7 (PECO), PENE-SAV1-7 (PENELEC), PPLE-SAV1-7 (PPL) and WPPE-SAV1-7 (West Penn).

remainder of this Paragraph, I&E is without knowledge sufficient to form a belief as to the truth of the matters asserted and the same are therefore denied and proof thereof demanded.

7. Admitted in part. Denied in part. While it is admitted that such statements were made in the Commission Order in *Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, M-2014-2406134 (Order entered March 4, 2014) this Order speaks for itself. Moreover, I&E avers that the reference in the March 4, 2014 Order warning customers of market volatility was specifically related to the scenario where “some customer contracts had no ceiling on the variable rate that could be charged by the EGS.” March 4, 2014 Order at 3. In any event, it is denied that this scenario has any bearing on the 14,780 specific violations set forth in the I&E Complaint regarding HIKO’s flagrant disregard for the terms of its price offering to customers that guaranteed HIKO EGS customers a rate for “the first six monthly billing cycles” (the introductory period) that would be “1-7% less” than the local EDC’s price to compare.

8. Denied. It is denied that the Commission’s press releases have any bearing on the 14,780 specific violations set forth in the I&E Complaint regarding HIKO’s flagrant disregard for the terms of its price offering to customers that guaranteed HIKO EGS customers a rate for “the first six monthly billing cycles” (the introductory period) that would be “1-7% less” than the local EDC’s price to compare. This averment is, therefore, irrelevant and immaterial to this proceeding and is, therefore, denied.

9. Denied. This Paragraph does not contain a preliminary objection but is only introductory in nature and therefore no Answer is required. I&E is without knowledge sufficient to form a belief as to the truth of the matters asserted and the same are therefore denied and proof thereof demanded.

10. Admitted in part. Denied in part. While it is admitted that the Complaint of OAG and OCA substantially contains the information presented, I&E is without sufficient knowledge to form a belief as to the truth of the matters asserted. In any event, it is denied that this information has any relevance to the I&E Complaint which charges HIKO with 14,780 specific violations of flagrant disregard for the terms of its price offering to customers that guaranteed HIKO EGS customers a rate for “the first six monthly billing cycles” (the introductory period) that would be “1-7% less” than the local EDC’s price to compare. This averment is, therefore, irrelevant and immaterial to this proceeding and is, therefore, denied.

11. Denied. I&E is without sufficient knowledge to form a belief as to the truth of the matters asserted. In any event, it is denied that this information has any relevance to the I&E Complaint which charges HIKO with 14,780 violations of flagrant disregard for the terms of its price offering to customers that guaranteed HIKO EGS customers a rate for “the first six monthly billing cycles” (the introductory period) that would be “1-7% less” than the local EDC’s price to compare. This averment is, therefore, irrelevant and immaterial to this proceeding and is, therefore, denied.

12. Admitted in part. Denied in part. It is admitted that the Complaint of OAG and OCA substantially contains the information presented. By way of further answer, the

Commission's Bureau of Investigation and Enforcement is charged with enforcing the Public Utility Code and the Commission's regulations as well as protecting the public interest. It is denied that this information has any relevance to the Complaint filed by I&E which charges HIKO with 14,780 specific violations of flagrant disregard for the terms of its price offering to customers that guaranteed HIKO EGS customers a rate for "the first six monthly billing cycles" (the introductory period) that would be "1-7% less" than the local EDC's price to compare. This averment is, therefore, irrelevant and immaterial to this proceeding and is, therefore, denied.

13. Admitted in part. Denied in part. It is admitted that the Complaint of OAG and OCA substantially contains the information presented. By way of further answer, the Commission's Bureau of Investigation and Enforcement is charged with enforcing the Public Utility Code and the Commission's regulations as well as protecting the public interest. It is denied that this information has any relevance to the Complaint filed by I&E which charges HIKO with 14,780 specific violations of flagrant disregard for the terms of its price offering to customers that guaranteed HIKO EGS customers a rate for "the first six monthly billing cycles" (the introductory period) that would be "1-7% less" than the local EDC's price to compare. This averment is, therefore, irrelevant and immaterial to this proceeding and is, therefore, denied.

14. Admitted in part. Denied in part. While it is admitted that the Complaint of OAG and OCA substantially contains the information presented, it is denied that this information has any relevance to the Complaint filed by I&E which charges HIKO with 14,780 specific violations of flagrant disregard for the terms of its price offering to

customers that guaranteed HIKO EGS customers a rate for “the first six monthly billing cycles” (the introductory period) that would be “1-7% less” than the local EDC’s price to compare. This averment is, therefore, irrelevant and immaterial to this proceeding and is, therefore, denied.

15. Admitted in part. Denied in part. While it is admitted that the Complaint of OAG and OCA substantially contains the information presented, it is denied that this information has any relevance to the Complaint filed by I&E which charges HIKO with 14,780 specific violations of flagrant disregard for the terms of its price offering to customers that guaranteed HIKO EGS customers a rate for “the first six monthly billing cycles” (the introductory period) that would be “1-7% less” than the local EDC’s price to compare. This averment is, therefore, irrelevant and immaterial to this proceeding and is, therefore, denied.

16. Admitted in part. Denied in part. While it is admitted that the Complaint of OAG and OCA substantially contains the information presented, it is denied that this information has any relevance to the Complaint filed by I&E which charges HIKO with 14,780 specific violations of flagrant disregard for the terms of its price offering to customers that guaranteed HIKO EGS customers a rate for “the first six monthly billing cycles” (the introductory period) that would be “1-7% less” than the local EDC’s price to compare. This averment is, therefore, irrelevant and immaterial to this proceeding and is, therefore, denied.

17. Admitted in part. Denied in part. While it is admitted that the Complaint of OAG and OCA substantially contains the information presented, it is denied that this

information has any relevance to the Complaint filed by I&E which charges HIKO with 14,780 specific violations of flagrant disregard for the terms of its price offering to customers that guaranteed HIKO EGS customers a rate for “the first six monthly billing cycles” (the introductory period) that would be “1-7% less” than the local EDC’s price to compare. This averment is, therefore, irrelevant and immaterial to this proceeding and is, therefore, denied.

18. Admitted. By way of further Answer, while it is admitted that I&E filed the above-docketed Formal Complaint on July 11, 2014, I&E initiated an informal investigation of HIKO by letter to the Company dated April 2, 2014, at the request of the Commission’s Bureau of Consumer Services. After serving three sets of data requests to HIKO or its counsel and reviewing the responses to those data requests as provided by the Company, I&E determined that the specific violations uncovered from its investigation warranted the initiation of a formal proceeding.

19. Denied. The violations set forth in the I&E Complaint are comprised of 14,780 individual counts regarding HIKO’s flagrant disregard for the terms of its price offering to customers that guaranteed HIKO EGS customers a rate for “the first six monthly billing cycles” (the introductory period) that would be “1-7% less” than the local EDC’s price to compare. These counts, both in number and regarding specific customers, are different from the Complaint of OAG and OCA.

20. Admitted. By way of further Answer, I&E’s request for relief is based on the 14,780 specific violations set forth in the I&E Complaint regarding HIKO’s flagrant disregard for the terms of its price offering to customers that guaranteed HIKO EGS

customers a rate for “the first six monthly billing cycles” (the introductory period) that would be “1-7% less” than the local EDC’s price to compare.

21. Admitted. By way of further answer, as admitted in the Preliminary Objections, it is specifically noted that, unlike the Complaint of OAG and OCA, the I&E Complaint does not allege any of the other violations of 52 Pa. Code Section 54 that are specified in this Paragraph.

22. Admitted. This Paragraph does not contain a preliminary objection but is only introductory in nature and therefore no Answer is required. By way of further Answer, as admitted in the Preliminary Objections, it is specifically noted that unlike the Complaint of OAG and OCA, the I&E Complaint does not allege any of the other violations of 52 Pa. Code Section 54 that are specified in this Paragraph.

23. Admitted in part. Denied in part. While it is admitted that the recitation of the relief sought is generally accurate, it is denied that this relief should be characterized as “expansive.” Moreover, it is denied that this information has any relevance to the I&E Complaint which charges HIKO with 14,780 specific violations of flagrant disregard for the terms of its price offering to customers that guaranteed HIKO EGS customers a rate for “the first six monthly billing cycles” (the introductory period) that would be “1-7% less” than the local EDC’s price to compare. This averment is, therefore, irrelevant and immaterial to this proceeding and is, therefore, denied.

24. Denied. It is denied that the relief sought by the I&E Complaint is “identical” to the relief sought in the Complaint filed by OAG and OCA. I&E specifically requests, *inter alia*, that HIKO pay a civil penalty for each violation of 52 Pa.

Code § 54.4(a) uncovered by I&E's investigation and review of HIKO's data request responses. I&E's investigation found 14,780 overcharged invoices under HIKO's price offering that guaranteed HIKO EGS customers a rate for "the first six monthly billing cycles" (the introductory period) that would be "1-7% less" than the local EDC's price to compare for the period January through April, 2014.⁴

25. Admitted.

26. Denied. It is denied that the parties to I&E's Complaint and relief sought by I&E's Complaint are "identical" to the relief sought in the Complaint filed by OAG and OCA. First, the OAG and Office of Small Business Advocate (OSBA) are not parties to I&E's Complaint. Second, I&E specifically requests, *inter alia*, that HIKO pay a civil penalty for each violation of 52 Pa. Code § 54.4(a) uncovered by I&E's investigation and review of HIKO's data request responses. I&E's investigation found 14,780 overcharged invoices under HIKO's price offering that guaranteed HIKO EGS customers a rate for "the first six monthly billing cycles" (the introductory period) that would be "1-7% less" than the local EDC's price to compare for the period January through April, 2014.⁵ There is no such specificity in the Complaint filed by OAG and OCA. The reference to restitution states a conclusion of law to which no response is required and is deemed denied.

⁴ See Attachment A to I&E's Formal Complaint.

⁵ See Attachment A to the I&E Complaint.

III. PRELIMINARY OBJECTIONS STANDARD

27. Denied. This Paragraph states a conclusion of law to which no response is required and is deemed denied. By way of further Answer, 52 Pa. Code § 5.101(a) speaks for itself.

28. Denied. This Paragraph states a conclusion of law to which no response is required and is deemed denied.

29. Denied. This Paragraph states a conclusion of law to which no response is required and is deemed denied.

30. Denied. This Paragraph does not contain a preliminary objection but is only introductory in nature and therefore no Answer is required. By way of further Answer, the caselaw cited by HIKO in this Paragraph does not apply in this case since I&E's request for relief is clearly warranted due to HIKO's flagrant disregard for the terms of its price offering to customers that guaranteed HIKO EGS customers a rate for "the first six monthly billing cycles" (the introductory period) that would be "1-7% less" than the local EDC's price to compare. As to the remainder of this Paragraph, I&E is without knowledge sufficient to form a belief as to the truth of the matters asserted and the same are therefore denied and proof thereof demanded.

IV. ARGUMENT

A. The Doctrine of *Lis Pendens* is Not Applicable

31. Denied. This Paragraph states a conclusion of law to which no response is required and is deemed denied. By way of further Answer, 52 Pa. Code § 5.101(a)(6) speaks for itself.

32. Denied. It is denied that the doctrine of *lis pendens* applies as set forth by the Court in *Crutchfield* because in the case of the I&E Complaint and the Complaint of OAG and OCA, the cases are not the same, the parties are not the same and the rights asserted and relief prayed for are not the same. *Crutchfield* directs that this “three-pronged identity test must be applied **strictly** when a party is seeking dismissal under the doctrine of *lis pendens*. *Crutchfield v. Eaton Corp.*, 806 A.2d at 1259, 1262 (Pa. Super. Ct. 2002) (emphasis added). Strict construction is an interpretation that considers only the literal words of a writing. *Black’s Law Dictionary*, 308 (7th ed., 1999). Here, the cases are not the same. The scope of the I&E Complaint is limited to HIKO’s violation of 52 Pa. Code § 54.4(a) related to *a single* HIKO price offering wherein enrolled customers were guaranteed a rate for “the first six monthly billing cycles” (the introductory period) that would be “1-7% less” than the local EDC’s price to compare and limited to the timeframe of January through April 2014. By contrast, the Complaint of OAG and OCA spans *at least seven* different regulatory violations. Further, the parties are not the same. The OAG and OSBA are not parties to the I&E Complaint. Lastly, the relief requested is not the same. The I&E Complaint specifically demands, *inter alia*, that HIKO be charged with 14,780 counts of violating 52 Pa. Code § 54.4(a). I&E’s investigation and review of HIKO’s data request responses discovered 14,780 specific overcharged invoices under HIKO’s price offering that guaranteed HIKO EGS customers a rate for “the first six monthly billing cycles” (the introductory period) that would be “1-7% less” than the local EDC’s price to compare for the period January through April,

2014.⁶ There is no such specificity in the Complaint filed by OAG and OCA. The I&E Complaint specifically demands, *inter alia*, that HIKO pay a civil penalty of \$14,780,000.00, or \$1,000 for each violation of 52 Pa. Code § 54.4(a) uncovered by I&E's investigation and review of HIKO's data request responses. There is no such specificity in the Complaint filed by OAG and OCA. Accordingly, strict application of the *lis pendens* three-prong test as mandated by the Court in *Crutchfield* results in a finding that the claim of *lis pendens* must be rejected. As to the remainder of this Paragraph, I&E is without knowledge sufficient to form a belief as to the truth of the matters asserted and the same are therefore denied and proof thereof demanded.

33. Denied. This Paragraph sets forth a conclusion of law to which no Answer is required and is deemed denied.

34. Denied. The Superior Court's opinions in *Norristown Auto Co.* and *Davis Cookie Co.* speak for themselves. By way of further Answer, this Paragraph sets forth a conclusion of law to which no Answer is required and is deemed denied.

35. Denied. The Superior Court's opinion in *Penox Technologies, Inc.* speaks for itself. By way of further Answer, this Paragraph sets forth a conclusion of law to which no Answer is required and is deemed denied.

36. Denied. The Superior Court's opinion in *Crutchfield* speaks for itself. By way of further Answer, this Paragraph sets forth a conclusion of law to which no Answer is required and is deemed denied.

⁶ See Attachment A to I&E's Formal Complaint.

37. Denied. It is denied that “the very same issue” in the I&E Complaint is “specifically raised” in the OAG and OCA Complaint. Here, the scope of the I&E Complaint is limited solely to HIKO’s violation of 52 Pa. Code § 54.4(a). Section 54.4(a) mandates that EGS prices billed reflect the marketed prices and the agreed upon prices in the disclosure statement. HIKO’s violation of 52 Pa. Code § 54.4(a), as alleged by I&E, relates to *a single* HIKO price offering wherein enrolled customers were guaranteed a rate for “the first six monthly billing cycles” (the introductory period) that would be “1-7% less” than the local EDC’s price to compare and limited to the timeframe of January through April 2014 and the I&E Complaint identifies 14,780 specific violations from 14,780 overcharged invoices. By contrast, the Complaint of OAG and OCA spans *at least seven* different regulatory violations and provides no quantification of the customers or customer invoices impacted by any violation of 52 Pa. Code § 54.4(a).

38. Denied. It is denied that the relief sought in the I&E Complaint is “identical” to the relief sought in the Complaint of OAG and OCA. In *Penox*, the Superior Court held that *lis pendens* has no application where the relief requested in the separate actions is different. *Penox Technologies, Inc. v. Foster Med. Corp.*, 546 A.2d 114, 115 (Pa. Super. Ct. 1988). First, the I&E Complaint specifically demands, *inter alia*, that HIKO be charged with 14,780 counts of violating 52 Pa. Code § 54.4(a). I&E’s investigation and review of HIKO’s data request responses discovered 14,780 specific overcharged invoices under HIKO’s price offering that guaranteed HIKO EGS customers a rate for “the first six monthly billing cycles” (the introductory period) that would be “1-7% less” than the local EDC’s price to compare for the period January through April,

2014.⁷ There is no such specificity in the Complaint filed by OAG and OCA. Second, the I&E Complaint specifically demands, *inter alia*, that HIKO pay a civil penalty of \$14,780,000.00, or \$1,000 for each violation of 52 Pa. Code § 54.4(a) uncovered by I&E's investigation and review of HIKO's data request responses. There is no such specificity in the Complaint filed by OAG and OCA.

39. Denied. It is denied that the role of I&E is "identical" to the role being served by OAG and OCA. I&E is not a "regulatory arm" of the Commission, but rather an enforcement bureau. As such, only I&E is charged specifically with enforcing the Public Utility Code and the Commission's regulations. Neither the OAG nor OCA are charged with this specific responsibility. I&E is also charged with protecting the public interest. This is much more expansive than the OAG's and OCA's charge to represent residential customers and guard against consumer fraud. The role of I&E when compared to that of the OAG and OCA is not mutually exclusive. In fact, I&E and OCA routinely represent separate interests in the same proceedings before the Commission. OCA represents Pennsylvania residential consumers in matters involving their utility service. *See*, 71 Pa.C.S. §§ 309-2 and 309-4. In contrast, I&E acts as the Commission's prosecutorial arm and is charged with representing the public interest, which is a broader interest, in prosecutions before the Commission. The Commission has delegated its authority to initiate proceedings that are prosecutory in nature to I&E. *Delegation of Prosecutory Authority to Bureaus with Enforcement Responsibilities*, Docket No.

⁷ See Attachment A to I&E's Formal Complaint.

M-00940593 (Order entered September 2, 1994), as amended by Act 129 of 2008, 66 Pa.C.S.A. § 308.2(a)(11).

40. Denied. It is denied that the I&E Complaint and the Complaint of OAG and OCA involve the same parties. The OAG and OSBA are not parties to the I&E Complaint. I&E intervened in the Complaint of OAG and OCA solely to determine whether HIKO violated provisions of the Public Utility Code, Commission regulations and orders that were not alleged in the I&E Complaint against HIKO.

41. Denied. It is denied that the doctrine of *lis pendens* applies as set forth by the Court in *Crutchfield* because in the case of the I&E Complaint and the Complaint of OAG and OCA, the cases are not the same, the parties are not the same and the rights asserted and relief prayed for are not the same. *Crutchfield* directs that this “three-pronged identity test must be applied **strictly** when a party is seeking dismissal under the doctrine of *lis pendens*. 806 A.2d at 1262 (emphasis added). Strict construction is an interpretation that considers only the literal words of a writing. *Black’s Law Dictionary*, 308 (7th ed., 1999). Here, the cases are not the same. The scope of the I&E Complaint is limited to HIKO’s violation of 52 Pa. Code § 54.4(a) related to *a single* HIKO price offering wherein enrolled customers were guaranteed a rate for “the first six monthly billing cycles” (the introductory period) that would be “1-7% less” than the local EDC’s price to compare and limited to the timeframe of January through April 2014. By contrast, the Complaint of OAG and OCA spans *at least seven* different regulatory violations. Further, the parties are not the same. The OAG and OSBA are not parties to the I&E Complaint. Lastly, the relief requested is not the same. The I&E Complaint

specifically demands, *inter alia*, that HIKO be charged with 14,780 counts of violating 52 Pa. Code § 54.4(a). I&E's investigation and review of HIKO's data request responses discovered 14,780 specific overcharged invoices under HIKO's price offering that guaranteed a HIKO EGS customer a rate for "the first six monthly billing cycles" (the introductory period) that would be "1-7% less" than the local EDC's price to compare for the period January through April, 2014.⁸ There is no such specificity in the Complaint filed by OAG and OCA. The I&E Complaint specifically demands, *inter alia*, that HIKO pay a civil penalty of \$14,780,000.00, or \$1,000 for each violation of 52 Pa. Code § 54.4(a) uncovered by I&E's investigation and review of HIKO's data request responses. There is no such specificity in the Complaint filed by OAG and OCA. Accordingly, strict application of the *lis pendens* three-prong test as mandated by the Court in *Crutchfield* results in a finding that the claim of *lis pendens* must be rejected here. By way of further Answer, it is denied that allowing the I&E proceeding to proceed separately from the OAG and OCA proceeding would create duplication of effort or waste resources. As explained, *supra*, the narrow scope of the I&E Complaint is separate and distinct from the numerous issues raised by OAG and OCA. Commingling the I&E Complaint with the numerous OAG and OCA issues would not prove administratively beneficial to the various parties or to the presiding officers in conducting the evidentiary hearings, evaluating the pleadings or reviewing the transcript.

⁸ See Attachment A to I&E's Formal Complaint.

42. Denied. This Paragraph states a conclusion of law to which no response is required and is deemed denied. Moreover, for the reasons stated above, the I&E Complaint should not be dismissed or stayed.

43. Denied. It is denied that consolidation is appropriate. At the outset, it should be recognized that Preliminary Objections are not the proper forum to request consolidation. By way of further answer, HIKO cites to *AT&T*, in which a claim of *lis pendens* was rejected because the three elements- cases, parties and rights asserted and relief prayed to – were not precisely the same. *AT&T Communications of Pennsylvania, LLC, et al. v. Armstrong Tel. Co. – Pennsylvania, et al.*, C-2009-2098380, 2009 WL 2475086 (Pa. P.U.C. July 29, 2009). Unlike *AT&T*, there is no considerable overlap of issues between the I&E Complaint and the Complaint of OAG and OCA. As explained, *supra*, the narrow scope of the I&E Complaint is separate and distinct from the numerous issues raised by OAG and OCA. Consolidation of the I&E Complaint with the numerous OAG and OCA issues would not prove administratively beneficial to the various parties or to the presiding officers in conducting the evidentiary hearings, evaluating the pleadings or reviewing the transcript. As to the remainder of this Paragraph, I&E is without knowledge sufficient to form a belief as to the truth of the matters asserted and the same are therefore denied and proof thereof demanded.

44. Denied. For the reasons stated above, it is denied that consolidation of the I&E Complaint with the Complaint of OAG and OCA is appropriate.

B. The I&E Complaint's Request for Restitution is Proper

45. Admitted.

46. Denied. It is denied that the Commission has no authority to provide restitution to customers. At the outset, HIKO's reliance on *Yaglidereliler* is misplaced and premature since no final Commission Order has yet been entered in that matter. By way of further answer, the facts in *Yaglidereliler* are clearly distinguishable from the I&E Complaint. In *Yaglidereliler*, the complainant agreed that upon the expiration of an introductory three-month term at a fixed rate, the customer would be charged a variable rate that could fluctuate from month to month. Upon the expiration of the introductory three-month term, the complainant was apparently dissatisfied with the subsequent variable rate billed pursuant to the price offering the customer had agreed to. Unlike the present matter, the complainant in *Yaglidereliler* was properly charged pursuant to the terms of the contract. By contrast, HIKO violated the terms of its disclosure statement by failing to honor the guaranteed, fixed price during the introductory three-month term.

47. Denied. This Paragraph states a conclusion of law to which no response is required and is deemed denied. By way of further Answer, pursuant to the provisions of the applicable Commonwealth statutes and regulations, the Commission has jurisdiction over the subject matter and the actions of HIKO in its capacity as an EGS serving consumers in Pennsylvania. Section 2809(b) of the Code, 66 Pa.C.S. § 2809(b), provides that the Commission will issue a license to an EGS if it finds that the EGS is fit, willing and able to comply with the Commission's regulations regarding standards and billing practices. The Commission's regulation at 52 Pa. Code § 54.4(a) requires licensed EGSs to bill prices that reflect the marketed prices and the agreed upon prices in the disclosure statement. Implicit in this authority is the ability to make customers "whole" when they

have been overcharged. In addition, the Commission is authorized and obligated to execute and enforce provisions of the Code, pursuant to 66 Pa.C.S. § 501(a). The Commission is also authorized to impose civil penalties on any public utility or on any other person or corporation subject to the Commission's authority for violations of the Code or Commission regulations or both, pursuant to 66 Pa.C.S. § 3301.

48. Denied. This Paragraph states a conclusion of law to which no response is required and is deemed denied. By way of further Answer, pursuant to the provisions of the applicable Commonwealth statutes and regulations, the Commission has jurisdiction over the subject matter and the actions of HIKO in its capacity as an EGS serving consumers in Pennsylvania. Section 2809(b) of the Code, 66 Pa.C.S. § 2809(b), provides that the Commission will issue a license to an EGS if it finds that the EGS is fit, willing and able to comply with the Commission's regulations regarding standards and billing practices. The Commission's regulation at 52 Pa. Code § 54.4(a) requires licensed EGSs to bill prices that reflect the marketed prices and the agreed upon prices in the disclosure statement. In addition, the Commission is authorized and obligated to execute and enforce provisions of the Code, pursuant to 66 Pa.C.S. § 501(a). The Commission is also authorized to impose civil penalties on any public utility or on any other person or corporation subject to the Commission's authority for violations of the Code or Commission regulations or both, pursuant to 66 Pa.C.S. § 3301.

49. Denied. HIKO, as an EGS in Pennsylvania, is a public utility as defined by Section 102 of the Public Utility Code, 66 Pa.C.S. § 102, for the limited purposes as described in Sections 2809 and 2810 of the Competition Act, 66 Pa.C.S. §§ 2809-10.

HIKO, as a provider of electric generation service for compensation, is subject to the power and authority of the Commission and must observe, obey and comply with the Commission's regulations and orders pursuant to Section 501(c) of the Public Utility Code, 66 Pa.C.S. § 501(c). As to the remainder of this Paragraph, I&E is without knowledge sufficient to form a belief as to the truth of the matters asserted and the same are therefore denied and proof thereof demanded.

50. Denied. Section 2806(a) of the Public Utility Code, 66 Pa.C.S. § 2806(a) speaks for itself. By way of further Answer, the I&E Complaint does not challenge the price offerings of HIKO such as to regulate electricity generation prices, but rather the subject of the I&E Complaint is HIKO's flagrant disregard for the terms of its price offering to customers that guaranteed HIKO EGS customers a rate for "the first six monthly billing cycles" (the introductory period) that would be "1-7% less" than the local EDC's price to compare.

51. Denied. The mandate in Section 2806(a) of the Public Utility Code, 66 Pa.C.S. § 2806(a) speaks for itself. By way of further Answer, the I&E Complaint does not challenge the price offerings of HIKO such as to regulate electricity generation prices, but rather the subject of the I&E Complaint is HIKO's flagrant disregard for the terms of its price offering to customers that guaranteed HIKO EGS customers a rate for "the first six monthly billing cycles" (the introductory period) that would be "1-7% less" than the local EDC's price to compare.

52. Denied. By way of further Answer, the I&E Complaint does not challenge the price offerings of HIKO such as to regulate electricity generation prices, but rather

the subject of the I&E Complaint is HIKO's flagrant disregard for the terms of its price offering to customers that guaranteed HIKO EGS customers a rate for "the first six monthly billing cycles" (the introductory period) that would be "1-7% less" than the local EDC's price to compare.

53. Denied. By way of further Answer, the I&E Complaint does not challenge the price offerings of HIKO such as to regulate electricity generation prices, but rather the subject of the I&E Complaint is HIKO's flagrant disregard for the terms of its price offering to customers that guaranteed HIKO EGS customers a rate for "the first six monthly billing cycles" (the introductory period) that would be "1-7% less" than the local EDC's price to compare.

54. Denied. This Paragraph states a conclusion of law to which no response is required and is deemed denied. By way of further Answer, HIKO's reliance on *Yaglidereliler* is misplaced and premature since no final Commission Order has yet been entered in that matter. In any event, the facts in *Yaglidereliler* are clearly distinguishable from the I&E Complaint. In *Yaglidereliler*, the complainant agreed that upon the expiration of an introductory three-month term at a fixed rate, the customer would be charged a variable rate that could fluctuate from month to month. Upon the expiration of the introductory three-month term, the complainant was apparently dissatisfied with the subsequent variable rate billed pursuant to the price offering the customer had agreed to. Unlike the present matter, the complainant in *Yaglidereliler* was properly charged pursuant to the terms agreed to. By contrast, HIKO violated the terms of its disclosure

statement by failing to honor the guaranteed, fixed price during the introductory three-month term.

55. Denied. This Paragraph states a conclusion of law to which no response is required and is deemed denied. By way of further Answer, HIKO's reliance on *Yaglidereliler* and *Tustin* is misplaced and premature since no final Commission Order has yet been entered in these matters. Moreover, the facts in *Yaglidereliler* and *Tustin* are clearly distinguishable from I&E's Complaint. In *Yaglidereliler*, the complainant agreed that upon the expiration of an introductory three-month term at a fixed rate, the customer would be charged a variable rate that could fluctuate from month to month. Upon the expiration of the introductory three-month term, the complainant was apparently dissatisfied with the subsequent variable rate billed pursuant to the price offering the customer had agreed to. Similarly, in *Tustin*, the complainant requested a refund of rate increases imposed by the EGS under a variable rate plan. Under those circumstances, the administrative law judge noted that the Commission could not order a refund to complainant. There was no allegation in *Tustin* that the prices billed did not conform to the disclosure statement.

56. Denied. This Paragraph states a conclusion of law to which no response is required and is deemed denied. Moreover, this issue is one of fact that should be presented on the record for Commission determination.

V. CONCLUSION

57. Denied. This Paragraph states a conclusion of law to which no response is required and is deemed denied.

WHEREFORE, the reasons stated above, the Bureau of Investigation and Enforcement respectfully requests that the Commission dismiss Respondent's Preliminary Objections and sustain I&E's Complaint.

Respectfully submitted,



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Dated: August 11, 2014

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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