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August 18, 2014

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VIA E-FILE AND FIRST CLASS MAIL

Rosemary Chiavetta, Secretary
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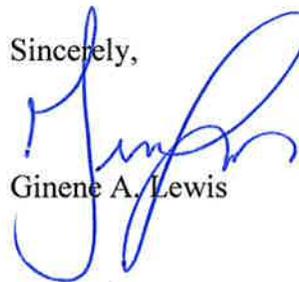
**Re: Commonwealth of Pennsylvania by Attorney General Kathleen G.
Kane, et al. v. HIKO Energy, LLC, Docket No. C-2014-2427652**

Dear Secretary Chiavetta:

Enclosed please find HIKO Energy, LLC's Motion to Compel Answer to HIKO's Set I Interrogatory No. 26(a) in the above-referenced proceeding. Copies have been served as shown on the Certificate of Service.

Please do not hesitate to contact us with any questions or concerns.

Sincerely,



Ginene A. Lewis

GAL

Enclosures

cc: Per Certificate of Service

COMMONWEALTH OF PENNSYLVANIA
BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Commonwealth of Pennsylvania, by
Attorney General KATHLEEN G. KANE,
Through the Bureau of Consumer
Protection,

And

TANYA J. McCLOSKEY, Acting
Consumer Advocate,
Complainants

Docket No. C-2014-2427652

v.

HIKO ENERGY, LLC.
Respondent

MOTION OF HIKO ENERGY, LLC TO COMPEL JOINT COMPLAINANTS'
RESPONSE TO INTERROGATORY 26(a)

Pursuant to 52 Pa. Code § 5.342(g), Respondent HIKO Energy, LLC (“HIKO”) hereby files this motion to compel an answer to HIKO’s Interrogatory 26(a) by the Commonwealth of Pennsylvania, by the Attorney General, and the Office of Consumer Advocate (collectively, “Joint Complainants” or “OCA/OAG”).

I. INTRODUCTION

Joint Complainants brought this proceeding against HIKO, alleging violations of various Commission statutes and regulations, the Unfair Trade Practices and Consumer Protection Law, and the Telemarketers Registration Act, all arising from HIKO's variable rate contracts with Pennsylvania consumers. Joint Complainants have brought similar actions against four other variable rate Electric Generation Suppliers ("EGSs"). Several of the allegations against HIKO relate to HIKO's use and oversight of third party marketers to enroll customers, and include allegations that HIKO "has failed to adequately train and monitor its agents, as required by the Commissions regulations." Joint Compl. ¶¶28, 49. The Joint Complaint also alleges that HIKO's "employees, agents and/or representatives have engaged and continue to engage in activities that are fraudulent, deceptive and/or in violation of the commission's regulations and orders" (*id.* ¶ 27), including "by switching customers to Respondent without the customers' consent," (*id.* ¶32). Complainants are seeking significant penalties against HIKO, including in connection with the alleged conduct of third-party marketers HIKO engaged. HIKO believes that it contracted with reputable and experienced marketers that were knowledgeable about the relevant laws and rules governing their marketing efforts in Pennsylvania. In response to Joint Complainants' effort to have penalties imposed on HIKO if they are able to prove misconduct on the part of HIKO's marketers, HIKO is entitled to show in mitigation of any such penalties that it acted properly in selecting marketers that were experienced in the industry and that were relied on by other EGS companies to market and sell variable rate products. The interrogatory at issue here is designed to elicit such information.

II. ARGUMENT

On July 31, 2014, HIKO served its First Set of Interrogatories and Requests of Production of Documents on the Joint Complainants. HIKO and Joint Complainants have

amicably resolved all potential objections with respect to this set of 33 interrogatories and 36 document requests — except for a single subset of a single discovery request: Interrogatory 26(a). Unfortunately, Joint Complainants’ refusal to produce readily available and relevant information in response to Interrogatory 26(a) has necessitated the filing of this motion.

Interrogatory 26(a) asked whether any of HIKO’s third party marketers were also used by any of the other four EGS companies that Joint Complainants have sued. Interrogatory 26(a) stated:

26. Identify the name of every company You believe provided third-party sales or marketing services to HIKO with respect to selling or marketing its services to consumers in Pennsylvania, and for each such third-party sales or marketing company, state the following:

- a. whether the company was used by any other EGS;

See Interrogatory 26(a) attached hereto as Exhibit A. HIKO has agreed that the term “any other EGS” would be limited to those four other EGS companies presently in litigation with the Joint Complainants.

Nevertheless, Joint Complainants have objected under 52 Pa. Code § 5.361(a) on the grounds that Interrogatory 26(a) seeks information that “would cause an unreasonable annoyance, burden or expense [to OCA/OAG]” and “would require the making of an unreasonable investigation by [OCA/OAG].” See Joint Objections of the Commonwealth of Pennsylvania and the Office of Consumer Advocate to HIKO Energy, LLC Interrogatories Set I, attached hereto as Exhibit B (“Joint Objections”), p. 2. As the objecting parties, OCA/OAG bear the burden of proving they meet these standards. 9A Goodrich-Amram 2d §4011(b) (2014 ed.) (“The key word, therefore, is ‘unreasonable,’ and the burden rests on the objecting party to show that the requested discovery will be unreasonably burdensome.”) (quoting Weber v. Campbell

Soup Co., 41 Pa. D. & C.3d 229 (Ct. Com. Pl. 1985)). Joint Complainants have failed to satisfy their burden.

Joint Complainants acknowledge that HIKO's response to Joint Complainants' discovery requests includes the names of the third party marketers that HIKO used in Pennsylvania. Thus, OCA/OAG already know which companies HIKO used — and it is a short list of companies. But OCA/OAG still refuse to say whether any of those six companies was also used by any of the other four EGS companies, contending that they “do not have this information *except* to the extent it may have been provided by Electric Generation Suppliers (EGSs) to discovery propounded by Joint Complainants in other complaint cases.” Joint Objections, p. 3. But, that is no basis to resist answering HIKO's interrogatory, especially when the OCA/OAG could easily find that information. Interrogatory 4 of Joint Complainants' Interrogatories and Requests for Production of Documents (attached hereto as Exhibit C) requested information regarding HIKO's “Sales and Marketing” personnel, which included information regarding third-party marketers. Joint Complainants have not denied that they asked each of the other four EGS companies to answer an interrogatory substantially similar to Interrogatory 4 propounded to HIKO. Thus, there is no basis for OCA/OAG's claim that it would be unreasonably burdensome and expensive or that it would “require an unreasonable investigation to probe the discovery responses provided by parties in various other cases in order to provide this information.” Joint Objections, p. 3 (emphasis added). See Chrysler v. Zigray, 7 Pa. D & C.4th 408, 410-11 (Ct. Com. Pl. Lackawanna Cnty. 1990) (“A party objecting to discovery has not sustained his burden with a showing of mere annoyance, oppression or expense as unreasonable.”); Weber v. Campbell Soup Co., 41 Pa. D & C.3d 229, 233 (Ct. Com. Pl. Clearfield Cnty. 1985) (“Merely showing that the production will occasion some investigative effort and expense, without some

evidence that the burden so imposed would be unreasonable, is not sufficient to prevail under Rule 4011.”).¹ Finding the response to a specifically identified interrogatory in each of four other cases would appear to be a relatively simple matter. Notably, there is no certification or affidavit to support Joint Complainants’ assertions about the nature or extent of the burdens involved in finding this information. See, e.g., Provident Nat’l Bank v. Soltoff, 1 Pa. D. & C.3d 600, 603 (Ct. Com. Pl. Philadelphia Cnty. 1977) (denying discovery motion where there was no record evidence to substantiate allegations that compliance with noticed deposition would prove oppressive and burdensome); 9A Goodrich-Amram 2d §4011(b): (“[A] general claim of unreasonable annoyance, embarrassment, oppression, burden, or expense, without substantiating evidence in the record, will not support an order barring discovery. Rather, only where the facts disclose that discovery will impose an unreasonable burden will discovery be denied.”).

Next, Joint Complainants argue that the information requested in Interrogatory 26(a) “is likely to be subject to confidentiality agreements and in that instance, Joint Complainants are not permitted to disclose the information to HIKO.” Id. As a preliminary matter, Interrogatory 26(a) is not seeking the disclosure of any particular EGS company; nor is it asking to associate a particular marketer with a particular EGS company, and therefore, does not even raise the confidentiality concerns upon which Joint Complainants rely. Moreover, as with Joint Complainants’ claims of burden and expense, there is nothing to support the claim of confidentiality. OCA/OAG has not even bothered to confirm whether or not the information was actually protected by any confidentiality agreement with each of the other four ESGs but, instead only assert that it is “likely” to be protected, and that one of the EGS companies has marked the

¹ Both the Commission’s Rules of Practice and Pennsylvania’s Rules of Civil Procedure prohibit discovery that “would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent, a person or party.” Compare 52 Pa. Code §5.361(a)(2) with Pa. R.C.P. 4011(b).

information “Highly Confidential.” Id. And, if the information were, in fact, covered under a confidentiality agreement or protective order, HIKO would need to know that in order to determine whether to seek to challenge that protection or to perhaps consider conditions under which the information nonetheless could be produced. Joint Complainants’ cavalier assertion of “likely” confidentiality does not allow for that.

Finally, OCA/OAG assert that HIKO is in a better position to obtain the answer to Interrogatory 26(a) directly from the third party marketing companies that HIKO has used. Id. That is not the case because, under HIKO’s agreements with those marketing companies, the identity of their other clients is confidential. OCA/OAG know this because HIKO has produced copies of those agreements in discovery. It plainly would be far less burdensome and more efficient for OAC/OAG to furnish information that it already has in its possession and that HIKO has requested in Interrogatory 26(a), rather than force HIKO to subpoena that information from third-parties. See generally Simon v. Simon, 6 Pa. D. & C.3d 196, 205 (Ct. Com. Pl. Philadelphia Cnty. 1977) (acknowledging that “a person should be compelled to undergo greater burdens relative to a lawsuit to which he is a party than a stranger should be asked to undertake.”).

III. CONCLUSION

For the foregoing reasons, HIKO respectfully requests that the Objection be denied and that Joint Complainants be ordered to answer Interrogatory 26(a).

Date: August 18, 2014

Respectfully submitted,

DRINKER BIDDLE & REATH LLP
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COMMONWEALTH OF PENNSYLVANIA
BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Commonwealth of Pennsylvania, by
Attorney General KATHLEEN G. KANE,
Through the Bureau of Consumer
Protection,

And

TANYA J. McCLOSKEY, Acting
Consumer Advocate,

Complainants

v.

HIKO ENERGY, LLC.
Respondent

Docket No. C-2014-2427652

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing documents have been served upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code §1.54 (relating to service by a participant).

VIA E-MAIL AND FIRST CLASS MAIL

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EXHIBIT A

26. Identify the name of every company You believe provided third-party sales or marketing services to HIKO with respect to selling or marketing its services to consumers in Pennsylvania, and for each such third-party sales or marketing company, state the following:

- a. whether the company was used by any other EGS;
- b. whether Plaintiffs were aware of any complaints concerning the third-party sales or marketing company prior to January 1, 2014;
- c. whether Plaintiffs conducted any investigation with respect to any complaints concerning the third-party sales or marketing company identified in response to Interrogatory No. 26, above, and the results of any such investigation.

RESPONSE:

EXHIBIT B

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Commonwealth of Pennsylvania, by
Attorney General KATHLEEN G. KANE,
Through the Bureau of Consumer Protection,

And

TANYA J. McCLOSKEY, Acting Consumer
Advocate,

Complainants

v.

HIKO ENERGY, LLC,

Respondent

Docket No. C-2014-2427652

**JOINT OBJECTIONS OF THE COMMONWEALTH OF PENNSYLVANIA AND THE
OFFICE OF CONSUMER ADVOCATE TO HIKO ENERGY, LLC
INTERROGATORIES SET I**

Pursuant to 52 Pa. Code § 5.342(e), the Commonwealth of Pennsylvania and the Office of Consumer Advocate (collectively Joint Complainants) hereby file these Objections to HIKO Energy, LLC's (HIKO or the Company) Interrogatories Set I Interrogatories to Joint Complainants.

I. INTRODUCTION

On July 31, 2014, HIKO served Interrogatories Set I on the Joint Complainants. HIKO's Interrogatories Set I consists of thirty-one questions directed to the Joint Complainants. Joint Complainants communicated their objections to HIKO on August 4, 2014, and Joint Complainants suggested resolutions that would have negated the need for these written

objections. HIKO, however, has rejected Joint Complainants' suggested resolution to HIKO Interrogatory Set I-26(a). As such, Joint Complainants submit this objection to HIKO Interrogatory Set I-26(a) pursuant to 52 Pa. Code § 5.342(e).

II. OBJECTION

In proceedings before the Public Utility Commission (Commission), a participant may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party or participant. 52 Pa. Code § 5.321(c). However, Section 5.361 of the Pennsylvania Code specifically limits the scope of discovery in proceedings before the Commission. In particular, Section 5.361 provides the following:

- (a) No discovery or deposition is permitted which:
 - (1) Is sought in bad faith.
 - (2) Would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent, a person or participant.
 - (3) Relates to a matter which is privileged.
 - (4) Would require the making of an unreasonable investigation by the deponent, a participant or witness.

52 Pa. Code § 5.361(a). Joint Complainants assert that HIKO Interrogatory Set I-26(a) seeks information that is not permitted because it would cause an unreasonable annoyance, burden or expense to Joint Complainants and would require the making of an unreasonable investigation by the Joint Complainants.

HIKO's Interrogatory Set I-26(a) states:

Identify the name of every company You believe provided third-party sales or marketing services to HIKO with respect to selling or marketing its services to consumers in Pennsylvania, and for each such third-party sales or marketing company, state the following:

- a. whether the company was used by any other EGS;

Joint Complainants object to this Interrogatory because answering it would cause them unreasonable annoyance, burden or expense and require an unreasonable investigation. See 52 Pa. Code §§ 5.361(a)(1) and (a)(4). Information regarding the third-party sales or marketing services companies used by HIKO as sought in HIKO Interrogatory Set I-26 is in HIKO's possession. Joint Complainants have requested this information from HIKO in discovery. To the extent that HIKO has provided responses to these requests, Joint Complainants would merely be reiterating HIKO's responses back to the Company. Further, specifically with regard to subpart (a) of HIKO Interrogatory Set I-26, Joint Complainants do not have this information *except* to the extent it may have been provided by Electric Generation Suppliers (EGSs) to discovery propounded by Joint Complainants in other complaint cases.¹ Also, to the extent such information was provided by EGSs in other cases, the information is likely to be subject to confidentiality agreements and in that instance, Joint Complainants are not permitted to disclose the information to HIKO. In fact, one EGS that has provided such information has marked it "HIGHLY CONFIDENTIAL." It would cause Joint Complainants unreasonable annoyance, burden and expense and require an unreasonable investigation to probe the discovery responses provided by parties in various other cases in order to provide this information to HIKO, which Joint Complainants may not be permitted to disclose after completing such investigation anyway.

Joint Complainants submit, however, that since HIKO already has the information requested in Interrogatory 26 in its possession, HIKO is in a better position to obtain the information sought in subpart (a) of Interrogatory 26 from the third-party sales and marketing services companies that HIKO utilizes. HIKO has ongoing, contractual relationships with its

¹ Joint Complainants filed complaints against the following EGSs in addition to HIKO on June 20, 2014: (1) IDT Energy, Inc. at Docket No. C-2014-2427657; (2) Blue Pilot Energy, LLC at Docket No. C-2014-2427655; (3) Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric at Docket No. C-2014-2427656; and (4) Respond Power, LLC at Docket No. C-2014-2427659.

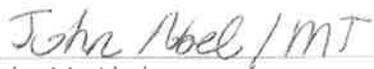
third-party sales and marketing services companies, and Joint Complainants do not. As such, HIKO can seek the information in its Interrogatory Set I-26(a) directly from the Company's third-party sales and marketing services companies.

Based on the foregoing, the information sought by HIKO in HIKO Interrogatory Set I-26(a) is discovery that is not permitted pursuant to 52 Pa. Code §§ 5.361(a)(1) and (4). Joint Complainants' objection thereto should be sustained.

III. CONCLUSION

WHEREFORE, the Joint Complainants respectfully request that these Objections be sustained.

Respectfully submitted,



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EXHIBIT C

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

COMMONWEALTH OF PENNSYLVANIA, by
Attorney General KATHLEEN G. KANE,
Through the Bureau of Consumer Protection

And

TANYA J. McCLOSKEY, Acting Consumer
Advocate

Complainants

v.

HIKO ENERGY, LLC

Respondent

Docket No. C-2014- 2427652

**INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS OF
JOINT COMPLAINANTS COMMONWEALTH OF PENNSYLVANIA AND THE
OFFICE OF CONSUMER ADVOCATE DIRECTED TO HIKO ENERGY, LLC**

The Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection (Attorney General) and the Acting Consumer Advocate Tanya J. McCloskey (OCA) (collectively referred to as Joint Complainants), pursuant to 52 Pa. Code §§ 5.341, 5.342 and 5.349, hereby propound the following interrogatories and requests for production of documents upon Hiko Energy, LLC (Respondent). In accordance with 52 Pa. Code §§ 5.342(d) and 5.349(d), the interrogatories are to be answered in writing under oath and documents are to be furnished and served in-hand upon the undersigned within the time period prescribed by the Commission for this docket.

cassettes, discs, records, and computer memories) now in the possession, custody or control of the Respondent, his agents, employees, attorneys and all other persons action on their behalf.

6. "Communication" means any transmission or exchange of information or meaning between two or more persons in any form.

7. "Commission" or "PUC" shall refer to the Pennsylvania Public Utility Commission.

8. "You" or "Your" shall refer to Hiko Energy, LLC, and all other names under which Hiko Energy, LLC does business or trades, any subsidiaries, agents, employees, representatives, attorneys and all other persons acting on their behalf.

INTERROGATORIES

1. Please provide a list all business names used by Respondent and the type of entity (i.e., corporation, partnership, sole proprietorship) through which Respondent has done business, from January 1, 2010, to present.
2. Please list the name(s), address(es), and telephone number(s) of any and all persons or entities having ownership or monetary interest in Respondent.
3. Please list the name(s), address(es), and telephone number(s) of any and all officers, directors and managers of Respondent at any time since January 1, 2013, including the dates of employment and position(s) held.
4. Please list the name(s), position(s) held, date(s) of separation, and length of employment for all of Respondent's employees in the Sales and Marketing and Customer Service Departments from January 1, 2013, to present.
5. Please identify the employees or other individuals (including names, titles, dates of separation, length of employment, business mailing addresses, and physical business