

COMMONWEALTH OF PENNSYLVANIA



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August 19, 2014

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

RE: 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

Secretary Chiavetta:

Enclosed please find the Joint Reply of the Commonwealth of Pennsylvania and the Office of Consumer Advocate to the New Matter of HIKO Energy, LLC, in the above-referenced proceeding.

Copies have been served as indicated on the enclosed Certificate of Service.

Respectfully Submitted,

Handwritten signature of Candis A. Tunilo in cursive.

Candis A. Tunilo
Assistant Consumer Advocate
PA Attorney I.D. #89891

Enclosures

cc: Honorable Elizabeth Barnes, ALJ
Honorable Joel Cheskis, ALJ
Certificate of Service

*185197

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Commonwealth of Pennsylvania, by Attorney	:	
General KATHLEEN G. KANE, Through the	:	
Bureau of Consumer Protection,	:	
	:	
And	:	Docket No. C-2014-2427652
	:	
TANYA J. McCLOSKEY, Acting Consumer	:	
Advocate,	:	
	:	
Complainants	:	
	:	
v.	:	
	:	
HIKO Energy, LLC	:	
	:	
Respondent	:	

JOINT REPLY OF THE COMMONWEALTH OF PENNSYLVANIA
AND THE OFFICE OF CONSUMER ADVOCATE
TO THE NEW MATTER OF
HIKO ENERGY, LLC

Pursuant to Section 5.63 of the Pennsylvania Public Utility Commission’s (Commission) regulations regarding Replies to New Matter, 52 Pa. Code § 5.63, the Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection (BCP) and the Acting Consumer Advocate Tanya J. McCloskey (OCA) (collectively referred to as Joint Complainants), provide the following Reply to the New Matter of HIKO Energy, LLC (Respondent or HIKO), in the above-captioned proceeding. The Joint Complainants incorporate herein all paragraphs and allegations in their Joint Complaint filed in this action and aver the following:

1. Denied as stated. Joint Complainants do not enforce regulations. The regulations that Joint Complainants assert that HIKO violated were promulgated by and are enforced by the Commission pursuant to the authority granted to the Commission by the General Assembly. See 66 Pa. C.S. § 501. It is denied that the regulations that Joint Complainants assert that HIKO violated are inherently vague, ambiguous and susceptible to multiple interpretations.

2. Denied. It is specifically denied that the Commission approved HIKO's Disclosure Statement.

3. Denied as stated. This paragraph states conclusions of law to which no response is required. The Commission has those powers granted to it by the General Assembly, one power of which is to enforce the Public Utility Code and the Commission's regulations and Orders. See 66 Pa. C.S. § 501. The Commission has the authority under the Public Utility Code to regulate EGS standards and billing practices. 66 Pa. C.S. § 2809(e). Section 2809(e) allows the Commission to forbear from applying the Public Utility Code but does not limit the Commission in this instance. As alleged in the Joint Complaint, Respondent's prices billed did not reflect its marketed prices and the agreed upon prices in its Disclosure Statement. See Joint Complaint at Counts I, IV, V, and VI and App. A and B.

4. Denied. It is specifically denied that Respondent accurately disclosed rate and pricing information to its customers. See Joint Complaint at Counts I, IV, V, and VI and App. A and B. Specific proof thereof is demanded at hearings in this matter.

5. Denied. It is specifically denied that Respondent charged prices during early 2014, which conformed to HIKO's Disclosure Statement. See Joint Complaint at Counts I, IV, V, and VI and App. A and B. Strict proof thereof is demanded at hearings in this matter. It is

specifically denied that “unforeseen and anomalous causes” is a viable defense to charging prices that did not conform to HIKO’s Disclosure Statement.

6. Denied. Respondent’s allegations constitute conclusions of law, which require no response and are, therefore, denied. By way of further response, the Commission’s regulations themselves incorporate the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.* (Consumer Protection Law), and therefore, the Commission is required to make determinations pursuant to the Consumer Protection Law in order to determine if the Respondent violated the Commission’s regulations. See 52 Pa. Code §§ 54.122(3) and 111.12(d)(1). See also 52 Pa. Code § 111.1 (EGSs shall comply with the standards set forth in the regulations). In determining whether Respondent violated its regulations, the Commission must determine whether the conduct alleged constitutes a violation of State or Federal law, including the Consumer Protection Law, or Commission regulation or order. 52 Pa. Code §§ 54.43(f) and 111.12(d)(1). See also Elkin v. Bell Telephone Co. of Pennsylvania, 491 Pa. 123, 133, 420 A.2d 371, 376 (1980).

As a preliminary inquiry, the Commission must invoke the statute and case law under the Consumer Protection Law, interpret it, and apply it harmoniously where appropriate. See Duquesne Light Co. v. Borough of Monroeville, 449 Pa. 573, 298 A.2d 252 (1972); Pettko v. Pennsylvania American Water Co., 39 A.3d 473, 484 (Pa. Commw. Ct. 2012). In Harrisburg Taxicab & Baggage Co. v. Pa. PUC, the Commonwealth Court held that the Commission’s decision to incorporate another agency’s regulations into the Commission’s own regulations is in no way inappropriate and such overlap does not divest the Commission of its statutory authority or duty. Harrisburg Taxicab & Baggage Co. v. Pa. PUC, 786 A.2d 288, 292-93 (Pa. Commw. Ct. 2001) (Harrisburg Taxicab). See also City of Philadelphia v. Pa. PUC, 702 A.2d 1139 (Pa.

Commw. Ct. 1997). By allowing the Commission to adjudicate these disputes in the first instance, all rights of the parties will be preserved, as well as providing any subsequent reviewing court the benefit of the Commission's opinion. See e.g. County of Erie v. Verizon North, Inc., 879 A.2d 357 (Pa. Commw. Ct. 2005).

In the same spirit, the Commission's regulations also incorporate the Telemarketer Registration Act, 73 P.S. § 2241, *et seq.* (TRA), and therefore, the Commission has the authority to make determinations pursuant to the TRA in order to determine if Respondent violated the Commission's regulations. See 52 Pa. Code § 111.10(a)(1); Harrisburg Taxicab, 786 A.2d at 292-93.

Additionally, on February 8, 2010, Attorney General Thomas W. Corbett issued an advisory opinion in response to then Commission Chairman James H. Cawley's request for an "opinion regarding the applicability of the [TRA] to electric generation suppliers as defined in the Electricity Generation Customer Choice and Competition Act." See Request for Opinion, 2010 Pa. AG LEXIS 1 (Feb. 8, 2010) (AG Opinion). In response to Chairman Cawley's question whether the Electric Generation Suppliers (EGSs) are excluded from the definition of "telemarketer" in the TRA, AG Corbett replied:

[E]lectric generation suppliers engaged in telemarketing are telemarketers for all purposes of the [Telemarketer Registration] Act except the requirement of Section 3(a), 73 P.S. § 2243(a), that telemarketers register with this Office, from which electric generation suppliers are excluded because they are licensed by the PUC under the Competition Act, 66 Pa. C.S. § 2809(a). Agents of suppliers, such as individuals and businesses initiating or receiving calls pursuant to contracts with suppliers, are not excluded from the definition of "telemarketer" and therefore must register.

AG Opinion at *4-5. Clearly, it is intended that all provisions of the TRA, except the registration requirement, apply to EGSs.

As such, the Commission does have jurisdiction to determine if Respondent violated the Consumer Protection Law and the TRA as part of determining whether Respondent violated the Commission's regulations requiring compliance with the Consumer Protection Law and the TRA.

7. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. To the extent that an answer may be required, as explained in Paragraph 6 above, EGSs are subject to all requirements of the TRA, except the requirement that they register with the Pennsylvania Office of Attorney General. See AG Opinion.

8. Denied. Strict proof thereof is demanded at hearings in this matter.

9. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. Strict proof thereof is demanded at hearings in this matter.

10. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. To the extent that an answer may be required, HIKO is liable for violations by its employees, representatives and agents. See 52 Pa. Code § 54.43(f). HIKO is also responsible to adequately train and monitor its agents. See 52 Pa. Code §§ 111.4 and 111.5. As such, pointing to the actions or omissions of a third party engaged by Respondent is not a viable defense to the allegations of slamming in the Joint Complaint.

11. Denied. Strict proof thereof is demanded at hearings in this matter.

12. Denied. Strict proof thereof is demanded at hearings in this matter. Further, it is specifically denied that "unforeseen and anomalous causes" is a viable defense to Joint Complainants' assertions in the Joint Complaint that HIKO violated Chapter 56 of the

Commission's regulations. See License Application of Hiko Energy LLC for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as a Supplier of Retail Electric Power, Docket No. A-2012-2289944, Tentative Order at 2 (June 7, 2012), as adopted by Final Order at 1 (July 2, 2012) (As a licensed EGS, HIKO must comply with Chapter 56 of the Commission's regulations).

13. Denied. Strict proof thereof is demanded at hearings in this matter.

14. Denied. It is specifically denied that HIKO is entitled to a reduction of liabilities if it has settled Formal Complaints with customers who may have been part of the basis of any allegation in the Joint Complaint. Joint Complainants are not bringing this action on behalf of individual consumers. Rather, Joint Complainants formed their allegations and the remedies requested herein based on information provided by individual consumers and gathered from allegations in Formal Complaints. In this action, Joint Complainants seek to represent the interests of consumers and the public interest, as they have been authorized to do pursuant to Pennsylvania Law, 71 P.S. § 309-1, *et seq.*; the Consumer Protection Law, 73 P.S. § 201-4; Article IV § 4.1 of the Pennsylvania Constitution; and the Commonwealth Attorneys Act, 71 P.S. § 732-204.

15. Denied as stated. This paragraph states conclusions of law to which no response is required. By way of further answer, Joint Complainants seek Commission review of Respondent's deceptive marketing practices of promising, *inter alia*, savings over the Price to Compare (PTC) and then billing customers at prices greatly in excess of the PTC. See Joint Complaint at Counts I, IV, V and VI and App. A and B. The Commission has those powers granted to it by the General Assembly, one power of which is to enforce the Public Utility Code and the Commission's regulations and Orders. See 66 Pa. C.S. § 501. EGSs are considered

public utilities for the purposes described in Section 2809 of the Public Utility Code (relating to requirements for EGSs). See 66 Pa. C.S. § 102. See also Delmarva Power & Light Co. v. Pa. PUC, 870 A.2d 901, 909-10 (Pa. 2005).

The Commission has the authority to order equitable relief and has done so in other instances. See 66 Pa. C.S. § 103(c); OCA v. Utility.com, Inc., 212 P.U.R.4th 255 (2001) (Utility.com Final Order). In the Utility.com case, the OCA sought refunds of overpayments for service not received and for "lost savings" on behalf of customers. Utility.com Final Order at 262. In the Recommended Decision, ALJ Turner opined:

The ALJ opined that lost savings could be viewed as damages for breach of contract, and noted that the Commission does not exercise its jurisdiction over matters of damages. However, the ALJ notes that "the provisions of [the Public Utility Code] are cumulative and in addition to [the] rights of action and remedies" that exist under other statutory or common law. 66 Pa. C.S. § 103. Therefore, based on OCA's arguments, the ALJ recommends that the Commission find that it does have jurisdiction over lost savings.

See OCA v. Utility.com, Inc., 2001 Pa PUC LEXIS 32, *23 (June 4, 2001). The Commission sustained the OCA's claims for refunds and lost savings.¹ Utility.com Final Order at 262. The Commission has ordered equitable relief in other cases as well. See e.g. Pa. PUC v. Reed, 1972 Pa. PUC LEXIS 40; 46 Pa. PUC 19 (1972) (Commission directed Respondent, who was authorized to transport as a class D carrier, to refund overcharges to his customers); Ely v. Pennsylvania Water, Docket No. C-20055616, Order at 1 (July 10, 2006) (Commission determined this was a classic case for the application of equitable estoppel when Respondent damaged Complainants' asphalt driveway while replacing a water line on the neighboring property and made countless verbal assurances that the driveway would be restored); C.S. Warthman Funeral Home, et. al. v. GTE North, Inc., Docket No. C-00924416 (June 4, 1993)

¹ The Commission noted that there were no funds remaining from Utility.com's bond to pay refunds and lost savings and encouraged the OCA to seek alternative means of collection of these funds. Utility.com Final Order at 262.

(Complainants were permitted to introduce into evidence the letter and promise of Respondent that it would provide toll free calling to support a claim of equitable estoppel).

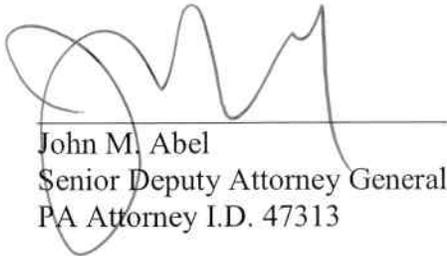
16. Denied as stated. Joint Complainants do not seek restitution for HIKO's customers who have fully and satisfactorily settled their claims against HIKO. It is specifically denied that HIKO is entitled to a reduction in civil penalties or other relief sought in the Joint Complaint due to settled claims.

17. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. To the extent that an answer may be required, the relief requested in the Joint Complaint is permitted by the Public Utility Code and the Commission's regulations and Orders. See e.g. 66 Pa. C.S. §§ 103(c), 501 and Ch. 28; 52 Pa. Code § 54.42. By way of further response, Joint Complainants incorporate Paragraph 15 above herein.

18. Denied. The allegations in the Joint Complaint are based on information obtained from HIKO's own customers. Joint Complainants submit that Respondent may utilize discovery processes in order to prepare a defense.

WHEREFORE, Joint Complainants respectfully request that judgment be entered against the Respondent, in favor of the Joint Complainants, and that the Commission grant the Joint Complainants the relief requested in the Joint Complaint.

Respectfully submitted,



John M. Abel
Senior Deputy Attorney General
PA Attorney I.D. 47313

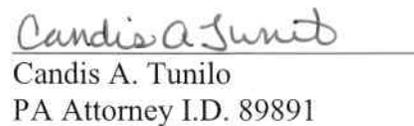
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CERTIFICATE OF SERVICE

Commonwealth of Pennsylvania, by	:	
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Through the Bureau of Consumer Protection,	:	
	:	
And	:	
	:	
TANYA J. McCLOSKEY, Acting Consumer	:	
Advocate,	:	
Complainants	:	
	:	Docket No. C-2014-2427652
v.	:	
	:	
HIKO ENERGY, LLC,	:	
Respondent	:	

I hereby certify that I have this day served a true copy of the foregoing, Joint Reply of the Commonwealth of Pennsylvania and the Office of Consumer Advocate to the New Matter of HIKO Energy, LLC, in the manner and upon the persons listed below:

Dated this 8th day of August 2014.

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