

COMMONWEALTH OF PENNSYLVANIA



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August 25, 2014

Honorable Elizabeth Barnes
Honorable Joel Cheskis
Office of Administrative Law Judge
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

Dear Judge Barnes and Judge Cheskis:

Enclosed please find the Answer of the Commonwealth of Pennsylvania and the Office of Consumer Advocate to the Motion of HIKO Energy, LLC to Compel Joint Complainants' Response to HIKO Interrogatory Set I-26(a), in the above-referenced proceeding.

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

Respectfully Submitted,

A handwritten signature in cursive script that reads "Candis A. Tunilo".

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

Enclosures

cc: Rosemary Chiavetta, Secretary
Certificate of Service

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**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	:	

ANSWER OF THE COMMONWEALTH OF PENNSYLVANIA
AND THE OFFICE OF CONSUMER ADVOCATE
TO THE MOTION OF HIKO ENERGY, LLC
TO COMPEL JOINT COMPLAINANTS' RESPONSE
TO HIKO INTERROGATORY SET I-26(a)

Pursuant to 52 Pa. Code § 5.342, 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 Joint Complainants) provide the following Answer to the Motion of HIKO Energy, LLC (HIKO or the Company) to compel Joint Complainants' response to HIKO Interrogatory Set I-26(a). For the reasons set forth below, the Company's Motion should be denied.

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 written objections. HIKO, however, rejected Joint Complainants' suggested resolution to HIKO Interrogatory Set I-26(a). As such, on August 8, 2014, Joint Complainants submitted a written objection to HIKO Interrogatory Set I-26(a) pursuant to 52 Pa. Code § 5.342(e). On August 18, 2014, HIKO filed a Motion to Compel Joint Complainants' Response to HIKO Interrogatory Set I-26(a) pursuant to 52 Pa. Code § 5.342(g). Joint Complainants submit this Answer to HIKO's Motion to Compel.

II. ANSWER

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). Section 5.321 outlines the scope of discovery as follows:

- (c) *Scope.* Subject to this subchapter, a party 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, including the existence, description, nature, content, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

52 Pa. Code § 5.321(c).

Further, 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).

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;¹

As discussed below, Joint Complainants assert that HIKO Interrogatory Set I-26(a) seeks information that is not permitted because it will not lead to relevant information or admissible evidence regarding the allegations against HIKO; would cause an unreasonable annoyance, burden or expense to Joint Complainants; and would require the making of an unreasonable investigation by the Joint Complainants.

First, the information regarding HIKO's third party sales or marketing services is information within HIKO's custody and control. It is unreasonably annoying and burdensome to require the Joint Complainants to provide information to HIKO about the identity of HIKO's

¹ HIKO has agreed that the term "any other EGS" is limited to the four other EGS companies presently in litigation with the Joint Complainants. Motion at 3. In addition to HIKO, the following companies are presently in litigation with the Joint Complainants: (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.

own third party sales or marketing services. Second, the requested information about other EGS third party sales or marketing services will not lead to relevant information or admissible evidence regarding the allegations against HIKO in the Joint Complaint. The allegations of violations in the Joint Complaint are specific to HIKO's billing and marketing practices in Pennsylvania. The Commission's regulations state that a licensed EGS is responsible for any fraudulent, deceptive or other unlawful marketing acts by its employees, agents and representatives. See e.g. 52 Pa. Code § 54.43(f) (emphasis added). As such, information about the third-party sales or marketing companies of other EGSs will not lead to relevant information or admissible evidence regarding the specific allegations of violations in the Joint Complaint against HIKO. HIKO seeks to obtain information that is outside the scope of discovery. See 52 Pa. Code § 5.321(c).

While discovery is broad in Pennsylvania, parties are not entitled to engage in "fishing expeditions." Land v. State Farm Mut. Ins. Co., 410 Pa. Super. 579, 585, 600 A.2d 605, 608 (1991). Whether or not the third party sales marketing company used by HIKO was used by any other EGS is in no way germane to the issues posed in this case.

In its Motion to Compel, HIKO first argues that there is no basis for Joint Complainants' claim that responding to HIKO Interrogatory Set I-26(a) would be unreasonably burdensome and expensive or that it would require an unreasonable investigation. Motion at 4. In support of this argument, HIKO admits that it provided the names of HIKO's third party marketers to Joint Complainants. Id. Thus, HIKO asserts that Joint Complainants have that information. Id.

HIKO's argument merely supports Joint Complainants position that Interrogatory Set I-26(a), insofar as it requests information regarding the third-party sales or marketing services companies used by HIKO, would cause an unreasonable annoyance and burden, because HIKO

has that information in its possession. To require Joint Complainants to reiterate that information back to HIKO would be unreasonably burdensome.

As for subpart (a) of HIKO Interrogatory Set I-26, HIKO asserts that “the [Joint Complainants] could easily find that information.” Motion at 4. HIKO states that Joint Complainants have not denied asking the four other EGS companies who are presently in litigation with Joint Complainants an interrogatory regarding the third-party sales or marketing services companies used by those EGSs. *Id.* Thus, HIKO concludes there is no basis for Joint Complainants’ claim that HIKO Interrogatory Set I-26(a) is unreasonably burdensome or would require an unreasonable investigation. *Id.* To the extent that Joint Complainants have the information, it was provided in response to interrogatories which, as discussed below, have been marked confidential. Moreover, Joint Complainant’s discovery is on-going, and it would create an unreasonable burden on Joint Complainants to cease efforts in the other cases to discover the information sought by HIKO, particularly when it will not lead to relevant or admissible evidence.

Moreover, citing Provident Nat’l Bank v. Soltoff, 1 Pa. D. & C.3d 600 (Ct. Com. Pl. Philadelphia Cnty. 1977) and 9A Goodrich-Amram 2d § 4011(b), HIKO relies on the fact that Joint Complainants have not filed a certification or affidavit to support its claim. Motion at 5. HIKO’s reliance, however, is misplaced. In Provident Nat’l Bank, the Common Pleas Court of Philadelphia County held:

In the present case, there is no evidence of the effect upon the deponent in the event of compliance. There is merely an unsubstantiated allegation that compliance with the noticed deposition would prove oppressive and burdensome ... This court is of the opinion that since there is no evidence to corroborate defendants’ allegation of unreasonableness, defendants’ motion to quash the subpoena duces tecum is denied.

1 Pa. D. & C.3d at 603. The holding in Provident Nat'l Bank does not require a certification or affidavit in proceedings before the Commission. According to 9A Goodrich-Amram 2d § 4011(b), discovery will be denied where the facts disclose that discovery will impose an unreasonable burden. This provision is similar to Section 5.361(a)(2) which prohibits discovery that would cause an unreasonable burden. 52 Pa. Code § 5.361(a)(2). Here, Joint Complainants have asserted that the effect would be to require Joint Complainants to conduct an extensive review of various discovery responses provided by other parties in multiple cases that, as discussed infra, is easily available to HIKO, as it already has a relationship with the marketing companies. These facts establish an unreasonable investigation pursuant to 52 Pa. Code § 5.361(a).

Further, the Commission has sustained interrogatory objections when the interrogatories are relevant to other proceedings and create an undue burden in the present proceeding. See Application of Newtown Artesian Water Company and Indian Rock Water Company, Order Granting Motion to Limit Issues, 1990 Pa. PUC LEXIS 83 (June 20, 1990). In Newtown, Applicants objected to interrogatories filed by the Protestant, arguing that the Protestant was seeking extensive discovery outside the scope of the instant proceeding and was also pursuing discovery related to a matter which was at issue in a separate proceeding. Acknowledging that these interrogatories would be relevant in the separate proceeding, the Court determined that the effect in the proceeding before it would be to create an unreasonable burden and, accordingly, the court sustained these objections. Id. The Commonwealth Court has also recognized the Commission's right to limit discovery pursuant to 52 Pa. Code § 5.361. See Pittsburgh v. Pa. PUC, 106 Pa. Commw. 437 (1986) (The Commission's rejection of the city's discovery request regarding per-district and per-customer class costs did not violate discovery rules.).

HIKO's second argument in its Motion to Compel is that there is nothing to support Joint Complainants' claim of confidentiality. Motion at 5. First, HIKO states that it is neither seeking disclosure of any particular EGS company, nor asking Joint Complainants to associate a particular marketer with a particular EGS company and, therefore, it does not raise confidentiality concerns. Motion at 5. As HIKO noted in its Motion to Compel, Interrogatory Set I-26(a) is limited to four specific EGS companies. Motion at 3. For each marketer specifically, Joint Complainants are asked to confirm whether any of those four specific companies used that marketer. Thus, providing such information greatly narrows the association of a particular marketer with a particular EGS company, certainly raising confidentiality concerns.

In support of HIKO's second argument, HIKO next claims that Joint Complainants have not confirmed whether or not the information is actually protected by confidentiality agreements. First, it should be noted that Joint Complainants did confirm in the written objections that one EGS has provided that information and marked it "HIGHLY CONFIDENTIAL." Joint Complainants assert that upon a preliminary review, the other EGSs have either marked this information as "CONFIDENTIAL" or Joint Complainants do not have access to this information at this time. Joint Complainants further assert that if they are provided with additional information, it will likely be subject to similar confidentiality requirements. As such, pursuant to the Stipulated Protective Agreements between Joint Complainants and the EGSs, Joint Complainants may not disclose the information to HIKO, a third-party unrelated to the proceedings. Furthermore, HIKO acknowledges that its own agreements with these marketing companies are confidential. Motion at 6.

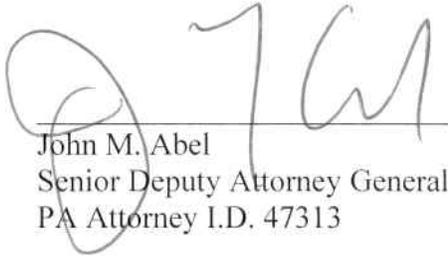
Finally, HIKO asserts that it would be far less burdensome and more efficient for Joint Complainants to furnish that information rather than have HIKO subpoena the information from third parties. In support of this argument, HIKO cites to Simon v. Simon, 6 Pa. D. & C.3d 196 (Ct. Com. Pl. Philadelphia Cnty. 1977). Simon v. Simon is not relevant to this matter. Id. In Simon, the Petitioner witness was a resident in the state of Florida. Id. He was ordered to travel to Philadelphia, PA for a deposition examination in an action in which he was not a party. Id. He filed a petition to quash subpoena duces tecum. Id. The court found that requiring him to travel from Florida to Philadelphia would constitute an unreasonable burden on him. Id.

The Commission has stated that “[t]he law is ... clear that the Commission has the right to limit discovery that would place an unreasonable burden upon a participant in litigation.” Application of Newtown Artesian Water Company and Indian Rock Water Company, Order Granting Motion to Limit Issues, 1990 Pa. PUC LEXIS 83 (June 20, 1990) (emphasis added). As discussed above, HIKO Interrogatory Set I-26(a) places an unreasonable burden upon Joint Complainants. The third-party sales and marketing services companies, however, have the requested information readily available and HIKO already has an ongoing relationship with these entities, while Joint Complainants do not. Accordingly, HIKO can seek the information directly from the Company’s third-party sales and marketing services companies.

III. CONCLUSION

WHEREFORE, for the reasons set forth above, Joint Complainants respectfully request that HIKO's Motion to Compel Joint Complainants' Response to HIKO Interrogatory Set I-26(a) be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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	:	

I hereby certify that I have this day served a true copy of the foregoing document, Answer of the Commonwealth of Pennsylvania and the Office of Consumer Advocate to the Motion of HIKO Energy, LLC to Compel Joint Complainants' Response to HIKO Interrogatory Set I-26(a), in the manner and upon the persons listed below:

Dated this 25th day of August 2014.

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