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September 23, 2014

VIA E-FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

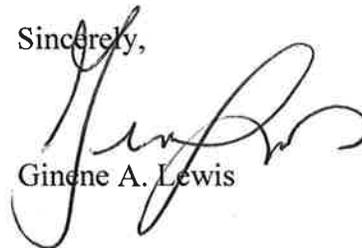
**Re: Commonwealth of Pennsylvania by Attorney General Kathleen G.
Kane, et al. v. HIKO Energy, LLC, Docket No. C-2014-2427652**

Dear Secretary Chiavetta:

On behalf of HIKO Energy, LLC, I have enclosed for electronic filing the Prehearing Conference Memorandum of HIKO Energy, LLC in the above-captioned matter. Copies have been served on all parties as indicated in the attached certificate of service.

Please feel free to contact me if you have any questions or concerns.

Sincerely,



Ginene A. Lewis

GAL

Enclosures

cc: Certificate of Service
Administrative Law Judge Elizabeth Barnes (via email and First Class U.S. Mail)
Administrative Law Judge Joel Cheskis (via email and First Class U.S. Mail)

**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

PREHEARING CONFERENCE MEMORANDUM OF HIKO ENERGY, LLC

In accordance with 52 Pa. Code § 5.222 and the August 25, 2014 Prehearing Conference Order issued by Administrative Law Judges Joel Cheskis and Elizabeth Barnes, Respondent HIKO Energy, LLC (“HIKO”), respectfully submits its Prehearing Conference Memorandum in the above-captioned matter.

I. BACKGROUND AND OVERVIEW OF ISSUES FOR RESOLUTION

HIKO is an electric generation supplier (“EGS”) that began serving Pennsylvania customers in January 2013. HIKO, like all other EGSs, provides an alternative to the monopoly in energy supply otherwise held by regulated utility companies.

On June 20, 2014, the Office of Consumer Advocate (“OCA”) and Office of the Attorney General (“OAG”) filed their Joint Complaint (“OCA/OAG Complaint”) against HIKO. The OCA/OAG Complaint purports to be founded on Formal Complaints filed against HIKO with the Pennsylvania Public Utility Commission (“Commission”), customer complaints filed against HIKO with the OAG, and customer contacts to the OCA regarding HIKO’s variable rate offers during this past winter. *See* OCA/OAG Complaint ¶¶ 17-19. The complaints against HIKO only represent approximately 3-4% of the total complaints received by the OCA and OAG regarding EGS rates in this time period. *Id.*

The OCA and OAG made eight separate claims against HIKO solely based on customer complaints, many of which already had been resolved by HIKO at the time the OCA/OAG Complaint was filed. Among other things, the OCA and OAG alleged that HIKO failed to satisfy certain price guarantees. Based solely on these customer complaints, OCA and OAG seek restitution payments, changes to HIKO’s marketing practices, and penalties.

On July 11, 2014, the Commission’s Bureau of Investigation and Enforcement (“I&E”) filed a separate complaint against HIKO (“I&E Complaint”) that — like the Complaint filed by the OCA and OAG — alleges that HIKO had failed to satisfy certain price guarantees found in its marketing materials. The I&E Complaint seeks a substantial civil penalty, the revocation of HIKO’s license and restitution payments that would bring HIKO’s rates for certain customers to below the rates charged by public utilities. HIKO answered the OCA/OAG Complaint on July 30, 2014 and the I&E Complaint on July 31, 2014.

During this past winter, extreme climate conditions and insufficient regional natural gas transportation infrastructure created unprecedented price spikes in the short-term energy markets. While HIKO’s practice of purchasing energy on the spot market had generated

consistent savings for Pennsylvania customers for months, the anomalous prices seen this past winter did not allow HIKO to continue to pass on its traditional low rates. Unsurprisingly, dissatisfied customers complained, which in turn led to HIKO's customer service response team being overwhelmed by complaints. This turn of events, which seems to have affected the entire EGS industry, was not the result of a scheme hatched by HIKO to deceive customers, but was instead the result of a unique set of circumstances outside HIKO's control. Indeed, when HIKO became aware that it would be experiencing sustained high prices on the spot energy markets it ceased all marketing in Pennsylvania, as it knew it could not meet its usual low rates in the short term. Moreover, HIKO has continued to refund to its customers for these unprecedented market events, including by issuing refunds to customers who are not entitled to any refund under their agreement with HIKO. In addition, HIKO customers who have been enrolled with HIKO for a full year also have the opportunity to receive one free month of service. Customers who take advantage of this offer would receive complete reimbursement for their highest monthly bill.

HIKO has exchanged discovery with OCA, OAG and I&E. It is clear from a review of the OCA and OAG responses that the OCA/OAG Complaint is based primarily on the complaints of dissatisfied customers who experienced rate increases during the "polar vortex" event this past winter. OCA and OAG's alleged instances of slamming are, in fact, unfounded, many customers were claiming discounts for introductory rates they no longer qualified for, and a significant portion of the customers already had received refunds from HIKO, including courtesy refunds extended by HIKO to customers not entitled to a refund. OCA/OAG also assert, *based solely on language in HIKO's Disclosure Statement*, that HIKO impermissibly has conducted credit checks before offering electric service to customers. That language is a vestige

from a “form” document; HIKO has never used credit checks to screen potential Pennsylvania customers, and it has taken steps to remove such language.

HIKO now seeks a resolution to the OCA/OAG Complaint and the I&E Complaint that will allow it to continue to do business in Pennsylvania and to continue its historical practice of passing on savings to Pennsylvania customers.

II. REPRESENTATION AND SERVICE LIST

HIKO is represented in this matter by Vincent E. Gentile of Drinker Biddle & Reath LLP. Boies, Schiller & Flexner LLP also is counsel to HIKO and is assisting in this matter.

Copies of all documents should be served on HIKO as follows:

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III. SPECIFIC ISSUES FOR RESOLUTION AND HIKO’S POSITIONS ON EACH

A. What is the Proper Scope of this Proceeding

HIKO’s Position: The OCA and OAG have not clearly outlined the scope of this proceeding. HIKO objects to any attempt to use the discovery process as a “fishing expedition” designed to allow the OCA and OAG to supplement or amend their allegations. HIKO needs to know the scope of the proceeding in order to properly prepare defenses and in order to object to further discovery requests that may be used to investigate HIKO’s practices, as opposed to supporting the claims asserted in the OCA/OAG Complaint. To date, HIKO has cooperated with OAG’s and OCA’s requests, both prior to the OCA/OAG Complaint being filed, and thus far during discovery. HIKO believes, now that it has reviewed the OCA’s and OAG’s document productions, that the proceeding must be limited to those customer complaints that the OCA and OAG have identified as forming the basis of the allegations in the OCA/OAG Complaint, and whether the facts underlying those customer complaints support the allegations contained

in the OAG/OCA Complaint. Further, in light of the ALJ's decision, dated August 20, 2014, in the matter concerning *Pennsylvania, et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657, the only allegations concerning HIKO's rates that can be at issue here concern only those customers who were eligible for a rate guarantee.

B. Whether the Commission Has Jurisdiction Over the Unfair Trade Practices and Consumer Protection Law ("UTPCPL")

HIKO's Position: The Administrative Law Judges already have recognized in similar proceedings that the Commission lacks the authority to hear claims under the UTPCPL. As such, any allegations regarding potential violations of the UTPCPL and requests for relief under the UTPCPL are beyond the scope of this proceeding and any claims based on such allegations should be dismissed. *See Pennsylvania, et al. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655, Order at 4 (Aug. 20, 2014); *Pennsylvania, et al. v. Energy Serv. Providers, Inc.*, Docket No. C-2014-2427656, Order at 10 (Aug. 20, 2014); *Pennsylvania, et al. v. Respond Power LLC*, Docket No. C-2014-2427659, Order at 8 (Aug. 20, 2014)

C. Whether the OCA and OAG are Barred from Re-litigating Consumer Complaints Filed Against HIKO that Have Already Been Resolved and/or Satisfied

HIKO's Position: The OCA/OAG Complaint makes reference to a number of customer complaints filed against HIKO with the Commission and the OAG's office, and relies on allegations from those complaints for the Complaint's factual foundation. A review of the documents reveals that HIKO had, prior to the filing of the OCA/OAG Complaint, resolved a significant number of these complaints. To the extent that HIKO demonstrates that a customer complaint filed in any forum has been satisfied or resolved, the OCA and OAG should be precluded from relying on such customer complaints to prosecute the present Complaint. Furthermore, the OCA and OAG should be precluded from seeking restitution on behalf of any customer to whom HIKO already has provided a refund.

D. Whether Count I of the Complaint (Misleading and Deceptive Promises of Savings) Can Be Sustained

HIKO's Position: Count I of the OCA/OAG Complaint should be dismissed insofar as it seeks to recover on behalf of customers who were enrolled in HIKO's standard variable rate program. HIKO's disclosure statement, which is provided to all newly enrolled customers, clearly indicates that the customer will be charged a variable rate and does not include any reference to a rate cap. HIKO's disclosure statement also clearly states that the customer could have terminated his or her enrollment with HIKO at any time, with no penalty, and that customers would be enrolled in the standard variable rate program (i.e., no guarantee) once the 6-month enrollment period concerning guaranteed rates expired.

E. Whether Count II of the Complaint (Slamming) Can Be Sustained

HIKO's Position: In order to establish their allegations of slamming, OCA and OAG are limited to the customer complaints that formed the basis of the OCA/OAG Complaint. If OCA and OAG are unable to establish that any of those customers were slammed, then Count II of the OCA/OAG Complaint should be dismissed. HIKO took reasonable and pro-active measures to prevent any slamming by its third-party marketers. HIKO also verifies its enrollment through a third-party verification process in accordance with the Commission's regulations. HIKO believes that OCA/OAG cannot sustain their allegations of slamming as all customer complaints that form the basis of the slamming allegations were made by customers who will be shown to have been validly enrolled with HIKO.

F. Whether Count III of the Complaint (Lack of Good Faith Handling of Complaints) Can Be Sustained

HIKO's Position: HIKO believes that the allegation that it did not handle customer complaints in good faith cannot be supported. HIKO, like many other EGSs, the Commission, the OCA, and the OAG, experienced unprecedented call volumes in early 2014 as a result of the unforeseen price spikes caused by the polar vortex. HIKO added telephone lines and new customer service personnel in response and increased the hours worked by its pre-existing personnel. HIKO has also continued to work to respond to customer complaints and provide refunds to customers.

G. Whether Count IV (Failing to Provide Rate Information) Can Be Sustained

HIKO's Position: Count IV of the OCA/OAG Complaint should be dismissed. HIKO's disclosure statement, which was received by all customers, clearly disclosed that it provided an uncapped variable rate. Moreover, the disclosure statement was approved by the Commission; the OCA and OAG cannot now contend that the language in this disclosure statement was unclear or misleading.

H. Whether Count V (Failing to Provide Accurate Pricing Information) Can Be Sustained

HIKO's Position: Count V of the OCA/OAG Complaint should be dismissed insofar as it alleges a violation of the UTPCPL, as the Administrative Law Judges lack the authority to hear claims under the Act. *See Pennsylvania, et al. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655, Order at 4 (Aug. 20, 2014); *Pennsylvania, et al. v. Energy Serv. Providers, Inc.*, Docket No. C-2014-2427656, Order at 10 (Aug. 20, 2014); *Pennsylvania, et al. v. Respond Power LLC*, Docket No. C-2014-2427659, Order at 8 (Aug. 20, 2014). Moreover, Count V should be dismissed insofar as it seeks to recover on behalf of customers who were not covered by any guarantee. HIKO's disclosure statement, which is provided to all newly enrolled customers, clearly indicates that the customer will be charged an uncapped variable rate based on a variety of factors,

including HIKO's margins and expenses. This language was approved by the Commission. HIKO has fully complied with the Commission's regulations regarding disclosure statements, and there is no basis for the claim that HIKO failed to accurately describe its variable rates.

I. Whether Count VI (Prices Nonconforming to Disclosure Statement) Can Be Sustained

HIKO's Position: Count VI of the OCA/OAG Complaint should be dismissed insofar as it seeks to recover on behalf of customers who were not covered by any guarantee. The Administrative Law Judges lack the authority to determine a proper "cost to serve" by an EGS, *See Pennsylvania, et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657, Order at 7 (Aug. 20, 2014); *Pennsylvania, et al. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655, Order at 12 (Aug. 20, 2014); *Pennsylvania, et al. v. Respond Power LLC*, Docket No. C-2014-2427659, Order at 16 (Aug. 20, 2014). HIKO's disclosure statement clearly states that HIKO charges an uncapped variable rate, in language that was approved by the Commission. HIKO has fully complied with the Commission's regulations regarding disclosure statements, and there is no basis for the claim that HIKO failed to accurately describe its variable rates.

J. Whether Count VII of the Complaint (Failure to Follow POR Program Parameters) Can Be Sustained

HIKO's Position: Count VII of the OCA/OAG Complaint cannot be supported. As noted earlier, this Count rests entirely on certain language in HIKO's Disclosure Statement. The OCA and OAG have no evidence that HIKO ever investigated the credit of a potential customer, and HIKO did not investigate the credit of any Pennsylvania consumers. There is simply no merit to this claim and the claim should therefore be dismissed.

K. Whether Count VIII of the Complaint (Failure to Comply with the Telemarketing Registration Act) Can Be Sustained

HIKO's Position: Count VIII of the OCA/OAG Complaint should be dismissed. As an initial matter, the Administrative Law Judges lack the authority to enforce the Act. *See Pennsylvania, et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657, Order at 12 (Aug. 20, 2014); *Pennsylvania, et al. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655, Order at 17 (Aug. 20, 2014); *Pennsylvania, et al. v. Energy Serv. Providers, Inc.*, Docket No. C-2014-2427656, Order at 21 (Aug. 20, 2014); *Pennsylvania, et al. v. Respond Power LLC*, Docket No. C-2014-2427659, Order at 21 (Aug. 20, 2014). Moreover, the Act contains an express exclusion from the signed contract requirement for sales that are regulated under other laws of the Commonwealth, as EGS sales are by the Commission pursuant to the Electricity Generation Customer Choice and Competition Act. The Commission permits EGSs, such as HIKO, to use third-party verification recordings in place of signed agreements, which has been HIKO's practice. There simply

is no requirement for HIKO to procure signed written contracts pursuant to its telemarketing sales and therefore OCA/OAG cannot prevail on Count VIII.

L. Whether the Commission Has the Authority to Order a Licensed Electricity Generation Supplier to Pay Restitution to Customers

HIKO's Position: The Administrative Law Judges lack the authority to order restitution as requested by the Complaint. *See Pa. P.U.C., Bureau of Investigation & Enforcement v. HIKO Energy, LLC*, Docket No. C-2014-2431410, Order at 10 (Sept. 2, 2014); *Pennsylvania, et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657, Order at 13-14 (Aug. 20, 2014); *Pennsylvania, et al. v. Energy Serv. Providers, Inc.*, Docket No. C-2014-2427656, Order at 12-13 (Aug. 20, 2014).

M. Whether the OCA/OAG Complaint Should Be Consolidated with the I&E Complaint

HIKO's Position: HIKO believes that the OCA/OAG Complaint and the I&E Complaint should be consolidated, as all parties are now (as a result of intervention) parties to both actions and the claims that I&E has made regarding HIKO's 1-7% guarantee are also brought in the OCA/OAG Complaint. Consolidating both actions would lead to greater efficiencies, allow for a single coordinated schedule, and reduce unnecessary costs on the part of all parties. Moreover, deciding the claims on a consolidated basis would be more conducive to achieving a global resolution to the allegations in the Complaints.

IV. WITNESSES

The witnesses that HIKO will call will largely depend on the issues that remain to be litigated after any ruling on HIKO's anticipated motion for summary judgment. HIKO reserves its right to supplement this list, including based on discovery, motion practice, and further development of the case. At this time HIKO anticipates providing testimony from the following witness: Harvey Klein.

V. PROPOSED LITIGATION SCHEDULE

HIKO proposes that all witnesses submit written testimony followed by in-person cross-examination at the evidentiary hearing in Harrisburg. HIKO opposes the OCA and OAG's proposal to hold a number of "mini hearings" to allow for customers to provide oral testimony without attending the evidentiary hearing. HIKO also proposes that sufficient time be allotted

between rounds of testimony to allow for discovery to be served and responded to between each round.

Public input hearings are not warranted for this matter. With respect to the remainder of the litigation schedule, it is likely that HIKO will file a Motion for Summary Judgment seeking dismissal of some, if not all, Counts of the Complaint. Even if HIKO's Motion is not granted in full, HIKO's Motion for Summary Judgment is likely to substantially narrow the issues in this proceeding. To the extent the Commission will not rule immediately on the issue of consolidating the OCA/OAG Complaint with the I&E Complaint, and that further input from the parties would be helpful, the schedule should be modified to accommodate briefing on the consolidation issue. Accordingly, HIKO proposes the following litigation schedule (subject to change after further discussions with the parties or the Commission):

September 29, 2014	Prehearing Conference
November 18, 2014	HIKO Motion for Summary Judgment
December 15, 2014	OCA/OAG Reply to Motion for Summary Judgment
January 12, 2015 (approx.)	Ruling on HIKO Motion for Summary Judgment
<i>If Necessary</i>	
February 12, 2015	OCA/OAG/Intervenor Direct Testimony Served
March 24, 2015	HIKO Rebuttal Testimony Served
April 27, 2015	OCA/OAG/Intervenor Surrebuttal Testimony Served
June 9-11, 2015	Evidentiary Hearings in Harrisburg
July 15, 2015 (approx.)	Main Briefs
August 18, 2015 (approx.)	Reply Briefs

VI. DISCOVERY

HIKO does not propose any modifications to the Commission's discovery regulations, but is amenable to considering any reasonable modifications proposed by other parties.

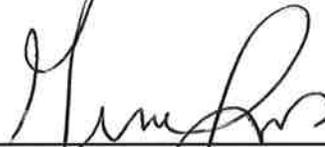
The parties have agreed upon a proposed Protective Order to govern the exchange and use of confidential materials in this proceeding. A Motion for Protective Order has been filed.

VII. SETTLEMENT

The parties have initiated a dialogue about resolving both the OCA/OAG Complaint and the I&E Complaint and eliminating the need for protracted litigation. The parties will be meeting the day of the prehearing conference to further discuss the possibility of reaching a just and reasonable settlement in these matters.

Respectfully Submitted,

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Dated: September 23, 2014

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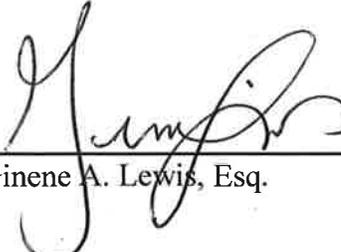
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Dated: September 23, 2014



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