

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

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September 23, 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 Prehearing Memorandum of Joint Complainants Commonwealth of Pennsylvania and the Office of Consumer Advocate, in the above-referenced proceeding.

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

Respectfully Submitted,

*Candis A. Tunilo*

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

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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 :

Docket No. C-2014-2427652

TANYA J. McCLOSKEY, Acting Consumer :  
Advocate, :

Complainants

v.

HIKO ENERGY, LLC,

Respondent

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PREHEARING MEMORANDUM  
OF JOINT COMPLAINANTS COMMONWEALTH  
OF PENNSYLVANIA AND THE OFFICE OF CONSUMER ADVOCATE

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Pursuant to Section 333 of the Public Utility Code, 66 Pa. C.S. § 333, and the August 22, 2014 Prehearing Conference Order, 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 information in accordance with the Prehearing Conference Order in this matter:

**I. INTRODUCTION**

On June 20, 2014, the Joint Complainants filed a Joint Complaint with the Public Utility Commission (Commission) pursuant to the Public Utility Code, 66 Pa. C.S. Ch. 28, the Commission's regulations, 52 Pa. Code Ch. 54, 56 and 111, the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.* (Consumer Protection Law), and the Telemarketer Registration Act, 73 P.S. § 2241, *et seq.* (TRA). The Joint Complaint includes

eight separate counts and alleges that HIKO Energy, LLC (Respondent or HIKO) violated Pennsylvania law and Commission Orders and regulations. Specifically, the eight Counts in the Joint Complaint are: (1) misleading and deceptive promises of savings; (2) slamming; (3) lack of good faith handling of complaints; (4) failing to provide rate information; (5) failing to provide accurate pricing information; (6) prices nonconforming to disclosure statement; (7) failing to follow POR program parameters; and (8) failure to comply with the Telemarketer Registration Act.

With respect to relief, the Joint Complainants request that the Commission find that Respondent violated the Public Utility Code, the Consumer Protection Law, the TRA, and the Commission's regulations and Orders; provide restitution to Respondent's customers; impose a civil penalty; order Respondent to make various modifications to its practices and procedures; and revoke or suspend Respondent's Electric Generation Supplier (EGS) license, if warranted.

## II. ISSUES

### A. Misleading and Deceptive Promises of Savings

One of the issues raised in the Joint Complaint is whether HIKO engaged in misleading and deceptive conduct in violation of the Commission's regulations at 52 Pa. Code §§ 54.43(f), 111.4, 111.5 and 111.12(d)(1) and the Consumer Protection Law, 73 P.S. §§ 201-2(4)(v), (xi) and (xxi). See Joint Complaint at Count I. The Commission's regulations themselves incorporate the 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 Harrisburg Taxicab & Baggage Co. v. Pa. PUC, 786 A.2d 288, 292-93 (Pa. Commw. Ct. 2001). Specifically, Joint Complainants aver that Respondent led consumers to believe their rate

with HIKO would always save them money over the Price to Compare as inducement for consumers to switch to HIKO for electric generation. See Joint Complaint at Count I.

In support of their allegations, Joint Complainants will call customers of Respondent that have filed complaints with the BCP or the Commission and consumers that have provided information regarding Respondent to the OCA. Additionally, Joint Complainants will submit expert testimony and written testimony of other witnesses and cross examine Respondent's witnesses.

By way of remedies for Respondent's misleading and deceptive promises of savings, Joint Complainants seek restitution, civil penalties and if warranted, suspension or revocation of Respondent's license. Further, Joint Complainants request that the Commission order HIKO to (1) prohibit its salespeople from making pricing promises to consumers that are deceptive and inaccurate and (2) discontinue and permanently enjoin all other practices that violate the Public Utility Code, the Commission's regulations or Orders, and the Consumer Protection Law.

B. Slamming

One of the issues raised in the Joint Complaint is whether HIKO engaged in slamming in violation of the Public Utility Code, 66 Pa. C.S. § 2807(d)(1), and the Commission's regulations, 52 Pa. Code § 54.42(a)(9). See Joint Complaint at Count II. In support of their allegations, Joint Complainants will call customers of Respondent that have filed complaints with the BCP or the Commission and consumers that have provided information regarding Respondent to the OCA. Additionally, Joint Complainants will cross examine Respondent's witnesses and may submit written testimony of other witnesses.

By way of remedies for slamming, Joint Complainants seek restitution, civil penalties and if warranted, suspension or revocation of Respondent's license. Further, Joint Complainants

request that the Commission order HIKO to (1) cease and desist switching consumers to its generation service without their explicit consent and (2) discontinue and permanently enjoin all other practices that violate the Public Utility Code and the Commission's regulations or Orders.

C. Handling of Customer Complaints

One of the issues raised in the Joint Complaint is that Respondent failed to adequately handle customer complaints and use good faith, honesty and fair dealing with Respondent's residential customers with complaints in violation of the Commission's regulations at 52 Pa. Code Ch. 56 and HIKO's Licensing Order, 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, Order (June 7, 2012). Specifically, Joint Complainants aver that Respondent's customers could not reach HIKO with their billing complaints and questions and that HIKO did not return messages left by its customers and refused to address the customers' complaints and disputes about their rates. Further, Joint Complainants aver that Respondent did not utilize the procedure for handling of customer disputes set forth in the Commission's regulations at 52 Pa. Code Ch. 56. See Joint Complaint at Count III.

In support of their allegations, Joint Complainants will call customers of Respondent that have filed complaints with the BCP or the Commission and consumers that have provided information regarding Respondent to the OCA. Additionally, Joint Complainants will submit expert testimony and written testimony of other witnesses and cross examine Respondent's witnesses.

By way of remedies for Respondent's improper handling of customer complaints, Joint Complainants seek restitution, civil penalties and if warranted, suspension or revocation of

Respondent's license. Further, Joint Complainants request that the Commission order HIKO to (1) implement proper customer dispute procedures and adequately staff, train and monitor all employees and agents in such procedures and (2) discontinue and permanently enjoin all other practices that violate the Public Utility Code and the Commission's regulations or Orders.

D. Pricing Information and Disclosure Statement

One of the issues raised in the Joint Complaint is whether Respondent's Disclosure Statement complies with the Commission's regulations at 52 Pa. Code §§ 54.5(c), 54.43(1), 54.43(f) and 111.12(d)(1) and the Consumer Protection Law, 73 P.S. § 201-2(4)(xxi). See Joint Complaint at Count V and App. A. Specifically, Joint Complainants aver that HIKO failed to provide to customers the conditions of variability and the limits on variability and also failed to provide information in plain language using common terms and in a format that enables consumers to compare prices. See Joint Complaint at Count V and App. A. Another issue is whether Respondent's prices charged in early 2014 conformed to HIKO's variable rate pricing provision in its Disclosure Statement. See Joint Complaint at Count VI and App. B. Additionally, Joint Complainants raise an issue regarding HIKO's failure to provide rate information to its customers, including the failure to inform customers that they were on a variable rate and failure to inform customers of their first month's rate with Respondent. See Joint Complaint at Count IV.

In support of their allegations, Joint Complainants will call customers of Respondent that have filed complaints with the BCP or the Commission and consumers that have provided information regarding Respondent to the OCA. Additionally, Joint Complainants will submit expert testimony and written testimony of other witnesses and cross examine Respondent's witnesses.

By way of remedies for Respondent's conduct regarding its pricing, Joint Complainants seek restitution, civil penalties and if warranted, suspension or revocation of Respondent's license. Further, Joint Complainants request that the Commission order HIKO to (1) provide appropriate restitution, including without limitation, refunding all charges to its customers that were over and above the Price To Compare in the customers' respective service territories from January 1, 2014 through the date of resolution of this matter, as well as any late, cancellation and/or termination fees and/or other such penalties charged to customers as a result of the Respondent's charges and customers leaving Respondent to obtain generation service elsewhere and (2) discontinue and permanently enjoin all other practices that violate the Public Utility Code, the Commission's regulations or Orders, and the Consumer Protection Law.

E. Failure to Follow POR Program Parameters

One of the issues raised in the Joint Complaint is whether HIKO is complying with Purchase of Receivables (POR) program requirements in the service territories where Respondent participates in such programs. See Joint Complaint at Count VII. Specifically, HIKO's Disclosure Statement requires customers to allow Respondent to obtain and review information about the customer's credit. See Joint Complaint at Count VII and App. A. POR program parameters prohibit denying supplier services based on a customer's creditworthiness.

By way of remedies for Respondent's conduct regarding its pricing, Joint Complainants seek findings of violations of the Public Utility Code, the Commission's regulations and Orders and other state and federal laws and an order directing compliance with these laws and Orders and POR program requirements. Joint Complainants also seek an order directing restitution, civil penalties and if warranted, suspension or revocation of Respondent's license.

F. Failure to Comply with the Telemarketer Registration Act

One of the issues raised in the Joint Complaint is whether Respondent violated and continues to violate the Telemarketer Registration Act (TRA), 73 P.S. §§ 2245(a)(7) and 2245(c), and the Commission's regulations at 52 Pa. Code §§ 54.43(f) and 111.10(a), which require compliance with the TRA. See Request for Opinion, 2010 Pa. AG LEXIS 1 (Feb. 8, 2010). See also Joint Complaint at Count VIII. Specifically, Joint Complainants aver that in transactions initiated by a telemarketing call, the TRA requires HIKO to reduce the sale to a written contract and obtain the consumer's signature and provide a contract to consumers that contains: (1) a detailed description of the consumer goods and services purchased which shall match the oral description given in the telemarketing solicitation; (2) any oral or written representations made during the telemarketing solicitation; and (3) a statement that reads: "You are not obligated to pay any money unless you sign this contract and return it to the seller." See Joint Complaint at Count VIII.

In support of their allegations, Joint Complainants will call customers of Respondent that have filed complaints with the BCP or the Commission and consumers that have provided information regarding Respondent to the OCA. Additionally, Joint Complainants may submit expert testimony and written testimony of other witnesses and cross examine Respondent's witnesses.

By way of remedies for Respondent's violations of the TRA, Joint Complainants seek restitution, civil penalties and if warranted, suspension or revocation of Respondent's license. Further, Joint Complainants request that the Commission order HIKO to discontinue and permanently enjoin all other practices that violate the Public Utility Code, the Commission's regulations or Orders, and the Consumer Protection Law and the TRA.

### III. SERVICE ON JOINT COMPLAINANTS

The OCA will be represented in this case by Candis A. Tunilo and Kristine E. Robinson, Assistant Consumer Advocates. Copies of all documents should be served on the OCA as follows:

Candis A. Tunilo  
Kristine E. Robinson  
Assistant Consumer Advocates  
Office of Consumer Advocate  
5<sup>th</sup> Floor, Forum Place  
555 Walnut Street  
Harrisburg, PA 17101-1923  
Telephone: (717) 783-5048  
Facsimile: (717) 783-7152  
E-mail: ctunilo@paoca.org  
krobinson@paoca.org

The BCP will be represented in this case by John M. Abel and Nicole R. Beck, Deputy Attorneys General. Copies of all documents should be served on the BCP as follows:

John M. Abel  
Senior Deputy Attorney General  
Nicole R. Beck  
Deputy Attorney General  
Office of Attorney General  
Bureau of Consumer Protection  
15<sup>th</sup> Floor, Strawberry Square  
Harrisburg, PA 17120  
Telephone: (717) 787-9707  
Facsimile: (717) 787-1190  
E-mail: jabel@attorneygeneral.gov  
nbeck@attorneygeneral.gov

### IV. DISCOVERY MODIFICATIONS

Joint Complainants do not propose any discovery modifications in this matter.

## **V. SETTLEMENT**

Settlement discussions have already begun in this matter. Joint Complainants are willing to engage in further settlement discussions.

## **VI. PROPOSED SCHEDULE**

The Joint Complainants will work with Administrative Law Judges Barnes and Cheskis (ALJs) and the parties to develop a mutually agreeable procedural schedule. At this time discovery is ongoing between the parties. The parties have served various interrogatories and requests for production of documents, and they are working to provide adequate responses. As these responses are received and reviewed, parties may seek to obtain depositions and serve additional written discovery. It is not clear at this time how much additional discovery is contemplated by the parties.

Joint Complainants submit that hearings may be scheduled for consumer fact witnesses before written testimony of experts and other non-consumer witnesses is due. Joint Complainants recommend that consumer witness hearings be targeted for late January 2015 so long as consumers would be permitted to testify by telephone. As stated in Section VII below, Joint Complainants have identified approximately 270 potential consumer fact witnesses to present testimony in person, by affidavit, and telephonically. Joint Complainants are prepared to call a sufficient number of consumer fact witnesses in order to enable the ALJs to make determinations regarding Joint Complainants' allegations and will work with the ALJs and the parties to present evidence from a sufficient number of consumer witnesses from which the ALJs seek to receive testimony. Joint Complainants will work with the ALJs, the Commission scheduling office and the parties to determine the dates and locations (if in-person hearings are scheduled) for hearings for the customer fact witnesses.

## VII. WITNESSES

The Joint Complainants intend to present the direct, rebuttal, and surrebuttal testimonies, as may be necessary, of Dr. Steven L. Estomin and Ms. Barbara R. Alexander. These witnesses will present testimony in written form and may also attach various exhibits, documents, and explanatory information which will assist in the presentation of the Joint Complainants' case.

Steven L. Estomin, Ph.D.  
Exeter Associates, Inc.  
10480 Little Patuxent Parkway  
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Columbia, Maryland 21044  
E-mail: [sestomin@exeterassociates.com](mailto:sestomin@exeterassociates.com)

Barbara R. Alexander  
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Winthrop, ME 04364  
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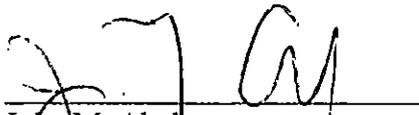
Joint Complainants request that copies of all discovery requests, testimony, and answers to discovery be mailed directly to the expert witnesses identified above, as well as mailing copies to counsel for the Joint Complainants.

Joint Complainants also intend to call:

Heather M. Weaver  
Consumer Protection Agent  
15<sup>th</sup> Floor, Strawberry Square  
Harrisburg, PA 17120  
E-mail: [hweaver@attorneygeneral.gov](mailto:hweaver@attorneygeneral.gov)

Additionally, Joint Complainants have identified approximately 270 consumer fact witnesses. Joint Complainants will identify the consumer fact witnesses they intend to call for the ALJs and parties as soon as possible. Joint Complainants specifically reserve the right to call additional witnesses, as necessary. As soon as Joint Complainants have determined any additional witness or witnesses will be necessary for any portion of their case, Joint Complainants will notify the ALJs and all parties of record.

Respectfully Submitted,

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

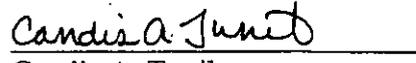
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DATE: September 23, 2014  
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Counsel for:

Tanya J. McCloskey  
Acting Consumer Advocate

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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, the Prehearing Memorandum of Joint Complainants Commonwealth of Pennsylvania and the Office of Consumer Advocate, in the manner and upon the persons listed below:

Dated this 23rd day of September 2014.

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