



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

December 2, 2014

Via E-Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Pennsylvania Public Utility Commission, Bureau of Investigation
and Enforcement v. HIKO Energy, LLC
Docket No. C-2014-2431410

Dear Secretary Chiavetta:

Enclosed for electronic filing is the Answer of the Bureau of Investigation and Enforcement to HIKO Energy, LLC's (HIKO) Motion to Compel Further Responses to HIKO's First Set of Interrogatories in the above-referenced proceeding.

Copies have been served on the parties of record in accordance with the attached Certificate of Service.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink that reads "Stephanie M. Wimer".

Stephanie M. Wimer
Prosecutor
PA Attorney I.D. No. 207522

Enclosure

cc: Honorable Joel Cheskis
Honorable Elizabeth Barnes
As per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,	:	
Bureau of Investigation and Enforcement,	:	
Complainant,	:	
	:	
v.	:	C-2014-2431410
	:	
HIKO Energy, LLC,	:	
Respondent	:	

**ANSWER OF THE BUREAU OF INVESTIGATION AND ENFORCEMENT
TO THE MOTION TO COMPEL FURTHER RESPONSES
OF HIKO ENERGY, LLC**

NOW COMES, the Bureau of Investigation and Enforcement (I&E) of the Pennsylvania Public Utility Commission (Commission), Complainant in the above-docketed matter, by and through its prosecuting attorneys, and files this Answer to HIKO Energy, LLC's (HIKO, Company or Respondent) Motion to Compel Further Responses to HIKO's First Set of Interrogatories, pursuant to 52 Pa. Code § 5.103(c).¹ In support thereof, I&E avers as follows:

I. INTRODUCTION

I&E initiated an informal investigation of HIKO on March 31, 2014, as a result of customer complaints received by the Commission's Bureau of Consumer Services (BCS) related to allegations that HIKO billed rates that were higher than the rates promised by

¹ HIKO brings its Motion to Compel Further Responses pursuant to 52 Pa. Code § 5.103, which provides a twenty (20) day period of time to respond. Accordingly, I&E files its answer within this 20-day time frame and not the five (5) day responsive time period for a motion to compel filed pursuant to 52 Pa. Code § 5.342. It should also be noted that HIKO's written Motion failed to contain a Notice to Plead, as required by 52 Pa. Code 5.103(b).

the Company. The investigation focused on one particular HIKO variable rate price offering to residential electric customers in Pennsylvania, which provided that a customer enrolled in this offering would experience a guaranteed rate for “the first six monthly billing cycles” (the introductory period) that would be “1-7% less” than the local EDC’s price to compare (PTC) (referred to hereafter as the “price offering”).

HIKO enrolled customers in its price offering in the service territories of Duquesne Light Company (Duquesne Light), Metropolitan Edison Company (Met-Ed), PECO Energy Company (PECO), Pennsylvania Electric Company (Penelec), PPL Electric Utilities (PPL) and West Penn Power (West Penn). As such, for each enrolled customer’s first six billing cycles, HIKO guaranteed that the customer’s price for electric supply from HIKO would be one to seven percent less than the EDC’s PTC.

I&E determined that HIKO failed to bill prices to reflect the marketed prices and the agreed upon prices in the Disclosure Statement. HIKO guaranteed in its Disclosure Statement and Welcome Letter to customers enrolled in its 1-7% discount rate plan that the customer would experience a guaranteed rate for “the first six monthly billing cycles” (the introductory period) that would be “1-7% less” than the local EDC’s price to compare but, instead, charged its residential customers a rate per kilowatt hour (kWh) that far exceeded the guaranteed discounted rate.

On July 11, 2014, I&E filed a Formal Complaint (Complaint) against Respondent at Docket No. C-2014-2431410, alleging that Respondent violated the Commission’s regulations at 52 Pa. Code § 54.4(a), which reads:

- (a) EGS prices billed must reflect the marketed prices and the agreed upon prices in the disclosure statement.

I&E's Complaint focuses on a single and narrow subject matter – the repeated violation of HIKO's failure to honor the agreed-upon price set forth in the disclosure statement.

As a result, I&E seeks appropriate relief, including that the Commission: (1) find Respondent to be in violation of 52 Pa. Code § 54.4(a) for each of the 14,780 counts set forth in the Formal Complaint; (2) impose a cumulative civil penalty upon Respondent in the amount of Fourteen Million Seven Hundred Eighty Thousand Dollars (\$14,780,000.00);² (3) rescind the authority of Respondent to do business as an EGS in Pennsylvania; (4) direct Respondent to provide a refund to each customer consisting of the difference between the amount the customer was billed and the guaranteed discounted rate the customer was entitled to receive; and (5) order such other remedy as the Commission may deem to be appropriate.

On July 31, 2014, Respondent, through counsel, filed an Answer and New Matter to I&E's Complaint. Also on July 31, 2014, Respondent filed Preliminary Objections.

On August 8, 2014, the Pennsylvania Office of Consumer Advocate (OCA) filed a Notice of Intervention and Public Statement formally intervening into this matter.

On August 11, 2014, I&E answered HIKO's Preliminary Objections and on August 18, 2014, I&E replied to HIKO's New Matter.

² This proposed civil penalty was calculated by multiplying the number of violations (14,780 counts) by \$1,000 per violation, the maximum sum permitted to be assessed per violation pursuant to 66 Pa. C.S. § 3301.

The Pennsylvania Office of Attorney General (OAG) filed a Notice of Intervention on August 18, 2014.

On September 2, 2014, the presiding Administrative Law Judges (ALJs) denied HIKO's Preliminary Objections.

A Prehearing Conference was held on September 29, 2014 wherein various procedural matters were discussed. Evidentiary hearings are scheduled for April 20-22, 2015.

Of significance to the instant Motion, on August 15, 2014, HIKO propounded its First Set of Interrogatories and Requests for Production of Documents upon I&E. I&E timely responded on September 4, 2014. During a "meet and confer" session on September 9, 2014, I&E and HIKO discussed HIKO's dissatisfaction with I&E's responses. Specifically, HIKO expected I&E to produce information beyond its knowledge and possession. During that conversation, I&E explained that it is an independent prosecutory arm of the Commission and does not have in its possession information and documents maintained by other bureaus of the Commission, especially those that are advisory materials. In a demonstration of good faith and to avoid judicial resolution of a discovery dispute, I&E agreed to supplement its responses, to the extent that it was able as an independent prosecutory bureau of the Commission. I&E served its supplemental responses upon HIKO on September 19, 2014.

HIKO waited almost two months, until November 12, 2014, to file the instant Motion to Compel Further Responses. Despite I&E's good faith efforts, HIKO continues to assert that I&E should disclose all information and documents that HIKO believes to

be pertinent to the instant Complaint, but that are advisory materials that are beyond I&E's possession, custody or control.

II. ANSWER TO MOTION TO COMPEL FURTHER RESPONSES

HIKO Impermissibly Seeks Advisory Materials From I&E That Are Beyond I&E's Possession, Custody or Control

I&E answered HIKO's First Set of Interrogatories and Requests for Production of Documents to the extent that the requested information and documents are in the possession, custody or control of I&E.

The Commission created I&E to serve as the prosecutory bureau for the purposes of enforcing compliance with the Public Utility Code and Commission regulations and delegated all prosecutory functions to I&E. *Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Order entered August 11, 2011). As the prosecutory bureau of the Commission, I&E may not interact with bureaus advising the Commission due to the prohibition on commingling of functions. Section 308.2(b) provides the following:

(b) Prohibition on commingling of functions. – A commission employee engaged in a prosecutory function may not, in that matter or a factually related matter, provide advice or assistance to a commission employee performing an advisory function as to that matter.

66 Pa.C.S. § 308.2(b). *See also Lyness v. State Board of Medicine*, 605 A.2d 1204 (Pa. 1992), which held that the commingling of prosecutory and adjudicatory functions by Commonwealth agency decision makers violates due process. However, *Lyness* recognized that many state agencies fulfill both prosecutory and adjudicatory functions

and noted that due process is preserved if such functions are handled separately. *Lyness*, 605 at 1209.

I&E, as a separate prosecutory bureau of the Commission, has no professional interaction with advisory bureaus or the Commissioner's offices and does not perform any advisory function. In fact, advisory materials are not in I&E's possession, custody or control. Moreover, it would be a violation of the commingling prohibition established in *Lyness* and codified at Section 308.2(b) of the Public Utility Code, 66 Pa.C.S. § 308.2(b), for I&E to have possession, custody or control over any advisory materials. This is the very reason that I&E was created.

The Pennsylvania Rules of Civil Procedure limit discovery requests of documents and tangible items to those "which are in the possession, custody or control of the party or person upon whom the request or subpoena is served" Pa. R. C. P. No. 4009.1(a). Any advisory materials are simply not in the custody and control of I&E and therefore are beyond the scope of discovery.

Further, to the extent that discovery requests pertain to Commission staff serving in an adjudicatory or advisory function, that information is also beyond the scope of discovery pursuant to Section 5.321(d) of the Commission's regulations, 52 Pa. Code § 5.321(d). I&E knows no more about who specifically advised the Commission on these matters than does HIKO.

The precise issues raised by HIKO here have been considered and rejected before. In *Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. Snyder Brothers, Inc.*, the presiding ALJ denied the Motion to Compel of Snyder Brothers, Inc., which

requested that I&E produce information regarding communications between I&E and the Commission with members or staff of the Pennsylvania General Assembly. *Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. Snyder Brothers, Inc.*, Docket No. C-2014-2402746 (Order Denying Motion to Compel entered April 28, 2014). The ALJ concluded that Snyder Brothers, Inc. was not entitled to the information it sought because communications between the Commission and members or staff of the Pennsylvania General Assembly are not in the possession or control of I&E due to the prohibition against the commingling of prosecutory and adjudicatory functions. The ALJ also found that the Commission's discovery regulations at 52 Pa. Code §§ 5.321-5.372 do not apply to discovery sought of Commissioners or staff serving in an advisory or adjudicatory capacity, pursuant to 52 Pa. Code § 5.321(d). Therefore, the information requested by Snyder Brothers, Inc. was beyond the scope of discovery and its Motion to Compel was denied.

Similarly, in the present Motion to Compel, HIKO seeks further answers from I&E regarding information beyond I&E's possession, custody or control. HIKO generally mischaracterizes the function of I&E and asserts that I&E acts "on behalf of the Commission." Motion at 3. I&E has repeatedly attempted to correct HIKO's misunderstanding of the purpose and function of I&E within the Commission – to no avail. I&E, as an independent, prosecutory bureau of the Commission, can only share with HIKO the information that it possesses.

HIKO's Interrogatories Nos. 6 through 26

HIKO's Interrogatories Nos. 6 through 26 ask whether I&E is "**aware**" of whether other Electric Generation Suppliers (EGSs) charged a particular rate in certain Electric Distribution Company (EDC) service territories during specified months. In its first set of answers to HIKO Interrogatories Nos. 6 through 26, I&E truthfully stated that it is "not aware" of the rates charged by other EGSs. I&E, whose primary purpose is to investigate and enforce potential violations of the Public Utility Code and Commission regulations, does not maintain a database pertaining to EGS rates because EGS rates are not established or controlled by the Commission.

I&E's supplemental set of answers to HIKO Interrogatories Nos. 6 through 26 further elaborated that I&E, as an independent, prosecutory bureau of the Commission, is not aware of rates charged by EGSs. I&E then explained its belief that even the Commission does not maintain data regarding EGS rates because the Commission does not regulate the rates charged by EGSs. Even if the Commission maintained such a database, I&E would not have knowledge of or access to it.

I&E's independent "awareness" of rates charged by other EGSs during the time periods identified by HIKO could only be derived from discovery that is currently being exchanged in on-going litigated proceedings to which HIKO is not a party. All of these proceedings have Protective Orders in place that preclude I&E from using or disclosing the confidential or proprietary information therein for purposes outside of each

proceeding.³ I&E is obligated to maintain the confidentiality of such information and therefore, HIKO is not entitled to the information and I&E would violate the Protective Orders if it shares the information with HIKO.⁴

HIKO's Interrogatory No. 27

HIKO next takes issue with I&E's response to its Interrogatory No. 27, which requests I&E to state all of the factors "[y]ou believe contributed to the increase in electricity supply prices in Pennsylvania during the period from November 1, 2013 through April 30, 2014" HIKO states in its Motion that it "believes that the Commission itself has determined that causes well beyond HIKO's control contributed to the spike in electric supply prices during the polar vortex." Motion at 8.

I&E, as an independent, prosecutory bureau of the Commission, did not analyze or examine any factor that may have contributed to the increase in electricity supply in Pennsylvania. Such information was not pertinent to I&E's investigation and was not considered in I&E's Complaint, which is based on HIKO billing customers a rate not

³ *Pennsylvania, et al. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655 (Protective Order entered September 3, 2014); *Pennsylvania, et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Protective Order entered September 3, 2014); *Pennsylvania, et al. v. Energy Serv. Providers, Inc.*, Docket No. C-2014-2427656 (Protective Order entered September 3, 2014); *Pennsylvania, et al. v. Respond Power, LLC*, Docket No. C-2014-2427659 (Protective Order entered September 3, 2014).

⁴ Moreover, information about other EGSs not named in a Formal Complaint, including rates charged by other EGSs and customer complaints filed against other EGSs, has been determined to be irrelevant. See *Pennsylvania, et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Order Denying IDT Energy, Inc. Motion to Compel entered on September 8, 2014). The presiding ALJs found that "the names of other EGSs and the number of contacts and complaints filed against EGSs other than IDT is not relevant to whether IDT's Disclosure Statement is misleading or deceptive in anyway and, therefore, in violation of a Commission Order or regulation prohibiting such activities." *Id.* at 5. Similarly, HIKO discovery that seeks information regarding rates charged by other EGSs and the number of customer complaints filed against other EGSs in comparison to HIKO would not lead to relevant information or admissible evidence regarding the narrow and focused allegations against HIKO in I&E's Complaint – specifically, whether HIKO billed prices that reflect the agreed upon prices in the Welcome Letter and Disclosure Statement.

agreed upon in the Disclosure Statement. Accordingly, I&E's initial response accurately indicates that it does not have a position regarding the factors that contributed to the increase in electricity supply prices.

In its supplemental answer, I&E further states that it is uncertain as to whether the Commission studied factors that contributed to the increase in electricity supply prices in Pennsylvania during the period of time last winter known as the polar vortex. If such a study or analysis took place, I&E, as an independent, prosecutory bureau, would have no more ability to access this information from the Commission than HIKO.

HIKO's Document Requests Nos. 5 and 7

Finally, HIKO continues to seek advisory material in its Document Requests Nos. 5 and 7, which demand an analysis, summary, compilation or review of complaints made during the polar vortex months against any EGS operating in Pennsylvania, and documents relating to any analysis, summary, compilation or review that show how the nature, gravity or frequency of complaints against HIKO compares to complaints against any other EGS operating in Pennsylvania. In its initial response, I&E accurately states that no such documents are in the Bureau's possession. In its supplemental response, I&E sought to appease HIKO's dissatisfaction by indicating that a confidential, internal report of EGS complaints exists, but which is beyond the custody or control of I&E. Mr. Mumford, who serves as the Bureau of Consumer Services (BCS) prosecutorial liaison to I&E in this proceeding, prepared the confidential, internal weekly report to the Commissioners and their staff members in Mr. Mumford's advisory capacity. The weekly report was not provided to I&E by BCS in the materials that I&E used to

formulate a Complaint in this matter. To the contrary, non-privileged materials provided to I&E by Mr. Mumford in his capacity as prosecutorial liaison have been disclosed to HIKO.

I&E's initial and supplemental responses to HIKO's discovery requests are entirely appropriate and it is not incumbent upon I&E, as an independent, prosecutory bureau, to conduct a Commission-wide search for advisory materials outside of its possession, custody or control. Discovery in litigated proceedings does not apply to Commission staff serving in an adjudicatory or advisory function, pursuant to 52 Pa. Code § 5.321(d), and HIKO is not entitled to obtain the advisory materials it seeks in discovery.

WHEREFORE, the Bureau of Investigation and Enforcement respectfully requests that the presiding Administrative Law Judges and Commission deny the Motion to Compel Further Answers to HIKO Energy, LLC's First Set of Interrogatories.

Respectfully submitted,



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Dated: December 2, 2014

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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Date: December 2, 2014