



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

IN REPLY PLEASE
REFER TO OUR FILE

C-2014-2431410

December 3, 2014

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 filing is the Objection of the Bureau of Consumer Services to HIKO Energy, LLC's (HIKO) Application For Subpoena Duces Tecum 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,

Steven K. Bainbridge
Assistant Counsel

Enclosure

cc: As per certificate of service

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

Pennsylvania Public Utility Commission, :
Bureau of Investigation and Enforcement, :
Complainant :

v. :

HIKO ENERGY, LLC, :
Respondent :

C-2014-2431410

**OBJECTION OF
THE BUREAU OF CONSUMER SERVICES
TO
HIKO ENERGY, LLC'S APPLICATION FOR SUBPOENA DUCES TECUM**

I. Introduction.

AND NOW, comes the **Bureau of Consumer Services (BCS)** of the Pennsylvania Public Utility Commission (PUC), by and through its counsel the Law Bureau of the Pennsylvania Public Utility Commission (Law Bureau), to object to **HIKO ENERGY, LLC's (HIKO)** Application for Subpoena Duces Tecum (Application), and in support thereof hereby avers as follows:

1. On November 12, 2014, HIKO filed an application for subpoena duces tecum addressed to the Pennsylvania Public Utility Commission's Bureau of Consumer Services.

2. Attached as Exhibit A to the Application was a draft Subpoena Duces Tecum (Subpoena) which if issued would compel BCS to produce the following:

1. Any and all documentation relating to the rates charged by electric generation suppliers ("EGS") companies in Pennsylvania from December 2013 to April 2014.

2. Any and all documentation relating to any analysis, summary, compilation, or review of any complaints made during the period of

December 2013 through April 2014 against any EGS operating within Pennsylvania, including but not limited to the internal weekly reports provided by or to the Commission's Bureau of Consumer Services ("BCS").

Application, Exhibit A.

3. Upon initial investigation, on information and belief BCS avers that it has six groups of documents that fit within the ambit of the Subpoena:

A. Approximately 9500 Informal Complaints filed by residential customers with BCS during the December 2013 through April 2014 time period. A large majority, but not all, of these informal complaints relate to rates charged by EGSs. These informal complaints also have attached documentation filed by the EGSs in response to the complaints. The attached filings vary greatly amongst the complaints, ranging from just a letter from the EGS to more complete statements of the customer charges, the contracts, and the customer consent documentation.

B. Weekly email summaries of BCS call volume (informal complaints) to the Commissioner Offices, primarily related to calls regarding EGS variable rate issues.

C. Memorandums from BCS to the Bureau of Investigation and Enforcement (I&E) regarding potential violations of the Public Utility Code relating to EGS charges for electricity to residential customers.

D. EGS variable rate disclosure statements for the winter 2013-14. In the Spring of 2014, the Commission required EGSs who offered variable rate products to submit their customer disclosure statements, to gather information in the wake of the large number of residential customer informal complaints. There are approximately 550 pages of such disclosure statements in total.

E. Material already disclosed to Mr. Gentile as part of the Commission's response to Mr. Gentile's July 10, 2014 Right-to-Know Law request. (Mr. Gentile is counsel for HIKO and filed the instant Application.) These materials related to various Commission Orders and PJM Interconnection reports regarding variable rate price increases by EGSs during the winter of 2013-14.

F. A six-page memorandum entitled "Recommendations for addressing EGS winter-time price increases" dated February 12, 2014 from the Commission's Office of Competitive Market Oversight (OCMO) to the Commissioners and Commissioner Staffs. BCS staff served as part of OCMO staff.

4. BCS notes that there may be formal complaints against other EGSs brought by I&E before the Office of Administrative Law Judge (OALJ) that fit within the ambit of the

subpoena, and the documents relating to these formal complaints may be obtained from the Commission's Secretary's Bureau or the Commission's website.

5. Physically printing out and/or electronically downloading the 9500 informal complaints, and the related documentation, would require substantial BCS staff time and printing costs.

6. The documentation relating to the 9500 informal complaints would require redaction to protect individual customer personal information. Such redaction would require substantial BCS staff time to complete.

II. Objections to the Application.

7. BCS objects to the Application for the requested subpoena duces tecum on the following grounds:

a. The Application fails to comply with 52 Pa.Code § 5.421(b)(1) in that it fails to describe the materiality and scope of the documents sought.

i. The Application fails to state how the rates of EGSs other than Respondent are relevant to the Complaint against Respondent. The determination of whether HIKO's rates were charged in breach of HIKO's agreements with its customers is based upon facts established under the terms of those agreements and the facts associated with HIKO's practices. HIKO's conduct in *comparison* to that of any other EGS is irrelevant for purposes of determining whether such a breach occurred.

- ii. The application contains only conclusory statements as to the materiality of the documents sought. For examples, see paragraphs seven and nine of the Application.
 - b. The Application fails to comply with 52 Pa.Code § 5.421(b)(2) in that it does not identify any facts to be proved by the documents in sufficient detail to indicate the necessity of the documents.
 - c. The Application requests BCS to compile HIKO-specific aggregate data. *See* Application at paragraph seven (seeking data on EGS rates in relationship to HIKO rates).
8. BCS additionally objects to the proposed subpoena duces tecum on the following grounds:
- a. The subpoena seeks records which are subject to the Deliberative Process Privilege.
 - b. The subpoena seeks records which are subject to the Attorney/Client Privilege and Attorney Work Product Doctrine.
 - c. The production of more than 10,000 records, each of which must be reviewed for redaction of confidential customer information is unduly burdensome in light of the minimal relevance, if any.
 - d. The subpoena seeks records which are exempt from disclosure under Pennsylvania's Right-to-Know Law, 65 P.S. §§ 67.101. *et seq.* (RTK Law).
 - e. The subpoena seeks records which contain confidential, proprietary and market sensitive information.
 - f. The subpoena seeks records which contain confidential consumer information.

9. Hiko's Motion to Compel is the appropriate forum for the issues raised by Respondent insofar as Hiko seeks to discover information from I&E regarding I&E's decision making, the exercise of I&E's prosecutorial discretion and Hiko's inferences that I&E engaged in selective enforcement. Respondent's stated rationale for the subpoena is simply an ad hoc attempt to create an open ended investigation into the I&E's decision to file a complaint against it, rather than (or in addition to) other EGSs. However, the rates charged by other EGSs are immaterial to I&E's prosecution of HIKO. HIKO's stated purpose for seeking the information is an attempt to show "the Commission [I&E sic] has not sought comparable penalties and sanctions against those other EGS companies". However, it is not a defense to a speeding ticket that other drivers were speeding too.

10. In the alternative, if the Application is granted, the BCS requests the issued subpoena to be limited to exclude documents subject to any privilege, including the Attorney-Client privilege and work product doctrine, the deliberative process privilege and matters pertaining to prosecutorial discretion.

11. In addition to the foregoing, and regardless of whether the Application is granted or denied, in full or in part, the Bureau of Consumer Services asserts that the appropriate forum for the Respondent's request for public records held by the Commission, including any available aggregate data on EGS rates during the applicable period, is under Pennsylvania's Right-to-Know Law, 65 P.S. §§ 67.101. *et seq.* (RTK Law). BCS hereby advises Respondent that it will treat the Application as a Request for public records under Pennsylvania's Right-to-Know Law, 65 P.S. §§ 67.101. *et seq.* (RTK Law). Pursuant to the RTK Law, all records responsive to Respondent's Subpoena Duces Tecum, excepting those records previously provided to Respondent's counsel as described in Paragraph 3(F) above, will be provided to the Respondent

within the statutorily prescribed period of thirty (30) days, or by January 2, 2015, together with the Commission's Right-to-Know Officer's final response to the request, which shall assert any basis for the exemption of records from disclosure.

III. Costs in Complying with the Subpoena Duces Tecum.

12. Section 5.421(e) of the Commission's Regulations (52 Pa.Code § 5.421(e)) provides for fees to be paid to subpoenaed witnesses as paid for like services in the courts of common pleas.

13. The courts of common pleas in the Commonwealth of Pennsylvania have substantial power to regulate discovery requests, which includes payment of reasonable fees to compensate subpoenaed witnesses. Section 5.421(e) of the Commission's regulations provides by implication similar power to Administrative Law Judges to provide reasonable fees to compensate subpoenaed witnesses for their efforts to comply with the subpoena.

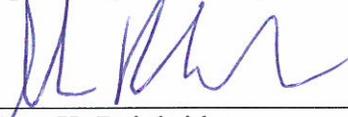
14. BCS respectfully requests that any subpoena commanding the production of documents by BCS provide that HIKO compensate BCS \$0.25 per page for any pages beyond the first 1000 pages, as a reasonable fee for printing out and redacting these documents, particularly the 9500 informal complaints and their attached documentation.

15. BCS also respectfully requests that it be provided with at least thirty days to comply with any such subpoena, to allow for printing and redacting of the 9500 informal complaints by BCS staff.

IV. Conclusion.

WHEREFORE, for the reasons stated above, the Bureau of Consumer Services of the Pennsylvania Public Utility Commission respectfully requests (1) that HIKO ENERGY, LLC's Application for Subpoena Duces Tecum be denied, and alternatively (2) that any subpoena issued to the Bureau of Consumer Services be limited to exclude documents subject to any privilege, including the Attorney-Client privilege and work product doctrine, the deliberative process privilege and matters pertaining to prosecutorial discretion and include provision that it may charge \$0.25 per page for any pages beyond the first 1000 pages and that it have at least thirty days to comply with the subpoena, to reasonably compensate it for the actual costs of complying with the subpoena, as well as to provide reasonable time for it to do so.

Respectfully submitted,



Steven K. Bainbridge
Assistant Counsel
Pa. Attorney ID # 91018

Robert F. Young
Deputy Chief Counsel

Counsel for the
Bureau of Consumer Services of the
Pennsylvania Public Utility Commission

P.O. Box 3265
Harrisburg PA 17105-3265
Ph.: (717) 787-5000

Dated: December 3, 2014

CERTIFICATE OF SERVICE

I, Steven K. Bainbridge, hereby certify that on this day I caused a true and correct copy of the foregoing document to be served upon the parties of record in this proceeding in accordance with the requirements of 52 Pa.Code § 1.54 (relating to service by a participant).

Via Electronic and First Class Mail

Hon. Elizabeth H. Barnes
Hon. Joel Cheskis
Pa. Public Utility Commission
P.O. Box 3265
Harrisburg PA 17105-3265
ebarnes@pa.gov
jcheskis@pa.gov

Wayne T. Scott
Michael L. Swindler
Stephanie M. Wimer
Pa. Public Utility Commission
Bureau of Investigation & Enforcement
P.O. Box 3265
Harrisburg PA 17105-3265
wascott@pa.gov
mwindler@pa.gov
stwimer@pa.gov

Candis A. Tunilo
Kristine E. Robinson
Office of Consumer Advocate
5th Fl., Forum Place
555 Walnut St.
Harrisburg PA 17101-1923
ctunilo@paoca.org
krobinson@paoca.org

John M. Abel
Nicole R. Beck
Bureau of Consumer Protection
Office of Attorney General
15th Fl., Strawberry Sq.
Harrisburg PA 17120
jabel@attorneygeneral.gov
nbeck@attorneygeneral.gov

Sharon E. Webb
Office of Small Business Advocate
300 N. Second St., Suite 202
Harrisburg PA 17101
swebb@pa.gov

Vincent E. Gentile
Ginene A. Lewis
Drinker, Biddle & Reath, LLP
One Logan Square, Suite 2000
Philadelphia, PA 19103
vincent.gentile@dbr.com
ginene.lewis@dbr.com

Motty Shulman
William Marsillo
Andrew Dressel
Boies, Schiller & Flexner, LLP
333 Main Street
Armonk, NY 10504
mshulman@bsflp.com
wmarsillo@bsflp.com
adressed@bsflp.com



Steven K. Bainbridge
Assistant Counsel
Pa. Attorney ID # 91018
Counsel for the
Bureau of Consumer Services of the
Pennsylvania Public Utility Commission

P.O. Box 3265
Harrisburg PA 17105-3265
Ph: (717) 787-5000

Dated: December 3, 2014